UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENISA CHASTEEN, individually and on behalf of similarly situated employees,

Plaintiffs,

v.

ROCK FINANCIAL and DANIEL B. GILBERT,

Defendants.
_____/

Case No. 07-cv-10558

HONORABLE STEPHEN J. MURPHY, III

ORDER DENYING MOTION FOR SUMMARY JUDGMENT BASED ON ONE-YEAR STATUTE OF LIMITATIONS (docket no. 209)

Typically, a two-year statute of limitations applies to violations of the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 255(a). In this case — one of three remaining cases before this Court addressing Quicken Loans, Inc.'s[1] ("Quicken") overtime compensation practices with respect to its “mortgage bankers” — the Plaintiffs signed employment agreements limiting the time in which they could file an action “relating to or arising out of [the] employment relationship” with Quicken, including any “labor” law claim, to one year from the date the employee knew or should have known of the claim’s accrual. Quicken has now moved for summary judgment on all of Plaintiffs' claims that accrued more than a year after they joined this collective action. Plaintiffs respond that these provisions are void as a matter of law.

[1] This complaint named as a defendant one of the brand names Quicken operates under, Rock Financial. But the parties do not dispute that Quicken is responsible for the policies at the core of this case, and that Rock Financial has no distinct corporate identity. Accordingly, this order will refer to Quicken for the sake of simplicity.

Neither the Sixth Circuit nor the Supreme Court has spoken to the issue this motion presents. But as a general rule, contractual waivers that purport to weaken the FLSA's substantive protections are invalid. The waivers in Quicken's employment agreements do exactly this, by limiting the financial penalty Quicken would have to pay for violating the FLSA, and upsetting the balance Congress struck in § 255(a) . Accordingly, the Court finds that the contractual waivers are unenforceable, and it will deny Quicken's motion for summary judgment.[2]

I. Background

A. The FLSA's Statute of Limitations

In response to the Supreme Court's expansive decisions interpreting the FLSA during the mid-1940s, Congress amended the statute in 1947 to control the exposure of companies to liability under the FLSA. Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (codified as amended in scattered sections of 29 U.S.C.). One reform addressed the time frame in which an employee could bring an FLSA claim. The initial version of the FLSA had no statute of limitations. Prior to 1947, courts would apply an analogous statute of limitations from the state in which the plaintiff brought the case to determine its timeliness. This led to an unpredictable patchwork of standards across the country. *See* 29 U.S.C. § 251(a) ("Congress . . . finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry."). The Portal-to-Portal Act resolved the issue by imposing a uniform statute of limitations on FLSA claims. It provides, in relevant part:

[2] Oral argument is not necessary to decide this motion. E.D. Mich. LR 7.1(f)(2).

> Any action . . . to enforce any cause of action for . . . unpaid overtime compensation . . . under the [FLSA] . . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.[3]

29 U.S.C. § 255(a).

B. The Presumption Against Waiver of FLSA Provisions

Contractual limitation or waiver of the FLSA's provisions is not discussed in the FLSA itself. Nonetheless, the Supreme Court has consistently held that a worker's remedies under the FLSA — such as back wages and liquidated damages — may not be waived by a contract. *See Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981) ("FLSA rights cannot be abridged by contract or otherwise waived because this would . . . thwart the legislative policies it was designed to effectuate."); *Brooklyn Savs. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) ("No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the [FLSA]."). Congress recognized that "due to the unequal bargaining power as between employer and employee," both groups had to be restrained from making certain agreements for labor. *O'Neil*, 324 U.S. at 706 (1945); *Wineman v. Durkee Lakes Hunting & Fishing Club, Inc.*, 352 F. Supp. 2d 815, 821 (E.D. Mich. 2005) ("[E]mployees cannot be allowed to preempt the market by waiving statutorily-enacted rights intended to benefit laborers as a class for the expedient of making their individual services more attractive to an employer."); *see also* E. Merrick Dodd, *The Supreme Court and Fair Labor Standards, 1941–1945*, 59 Harv. L. Rev. 321, 367 (1946)

[3] The original amendment had a two-year statute of limitations for all cases. Congress amended the statute again in 1966 to extend the statute of limitations to three years for "willful" violations. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830, 844 (codified as amended at 29 U.S.C. § 255(a)). The significance of this extension will be discussed below.

(acknowledging that while waiver of liquidated damages "would be a less lethal blow to effective implementation of the legislative purpose than freedom to waive payment of statutory wages," the difference is only "one of degree"). If these provisions could be waived, then workers willing to forfeit their right to a minimum wage or overtime would obtain an unfair advantage in the labor market, and nullify the policy goals of the statute. Dodd, *supra*, at 366 ("[A]ny minimum wage law is necessarily an assertion of a legislative policy against leaving wage determination to unregulated freedom of contract.").

II. Should the Statute of Limitations be Waivable Because It Is "Procedural"?

In its motion for summary judgment,[4] Quicken acknowledges this presumption against waiver, but argues that the statute of limitations in the FLSA is not a "substantive" right entitled to the presumption. Rather, defendant argues that the statute of limitations is a mere "procedural" right under the FLSA, and therefore waivable. So long as an agreement between employer and employee to shorten the statute of limitations is "reasonable" in duration and not prohibited by law, Quicken maintains, the agreed-upon period should be recognized just as any contractual limitation clause would. In this case, Quicken claims its motion should be granted because the six-month limitation period in the employment contracts is widely recognized as reasonable in the field of employment agreements.

But Quicken's classification of statutes of limitation as "procedural" cannot be taken for granted. Statutes of limitation do not fit neatly within the framework of "substance" and "procedure." *See Sun Oil Co. v. Wortman*, 486 U.S. 17, 727 (1988) ("[T]he words 'substantive' and 'procedural' themselves . . . do not have a precise content . . . ."); *Vernon*

[4] Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Because the material facts necessary to decide this motion are agreed upon by both sides, the Court need only resolve the legal issue presented in this motion.

v. Cassadaga Valley Cent. Sch. Dist., 49 F.3d 886, 892 (2d Cir. 1995) (Cabranes, J., concurring) ("Because statutes of limitations create important reliance interests, govern whether or not an individual can vindicate a right, and prevent a court from deciding stale claims, they lie on the cusp of the procedural/substantive distinction."). A particular statute of limitations could be procedural in some contexts, and substantive in others. *Wortman*, 486 U.S. at 722–29 (finding statutes of limitations are "procedural" for choice-of-law purposes, but not with respect to the *Erie* doctrine); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 557–58 (1974) (rejecting a rigid distinction between substance and procedure for determining whether a time limit could be tolled, in favor of analyzing "whether tolling the limitation in a given context is consonant with the legislative scheme").

Quicken relies upon *Hodgson v. Humphries*, 454 F.2d 1279 (10th Cir. 1972), and *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975), for the proposition that § 255(a) is "a conventional procedural statute of limitations," and therefore subject to waiver by the employee. But Quicken has taken that phrase out of context. Both of these cases involved employers that failed to raise the statute of limitations as a defense during litigation in the district court. The employers attempted, on appeal, to assert the statute of limitations by arguing that it was "a substantive condition precedent to the maintenance of an action under [the FLSA], rather than a conventional procedural statute of limitation which must be defensively pled." *Hodgson*, 454 F.2d at 1283. Both the Sixth and Tenth Circuits rejected this argument. *Id.*; *see also Ott*, 523 F.2d at 1370 (relying on *Hodgson* to find that § 255(a) is not "jurisdictional" and can be waived by a defendant if not raised in a timely manner). In the sense that § 255(a) "was intended as a limitation on the remedy available, not on the right to bring the action, and must be pleaded as an affirmative defense," the Court agrees with *Hodgson* and *Ott* that it should be treated like "a conventional procedural statute of

limitations." But these holdings, which subjected the employers to greater liability than would have been possible had they asserted the statute of limitations, and did not deny that § 255(a) had substantive features, do not answer the question presented in Quicken's motion.

As an example of the viability of its theory, Quicken points out that an FLSA right most consider "procedural" — the ability to bring suit in federal court — may be waived by an arbitration agreement.[5] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("[S]tatutory claims," like an FLSA claim, "may be the subject of an arbitration agreement, enforceable pursuant to the [Federal Arbitration Act]."); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 313 (6th Cir. 2000) (finding that employee could agree to submit FLSA claims to mandatory arbitration). But forum selection clauses do not live on "the cusp of the procedural / substantive distinction." Because they only effect where a claim is resolved, they sit comfortably on the "procedure" side of the divide.

Moreover, the cases Quicken cites do not make the right to a federal forum absolutely waivable. *Gilmer* suggested, and *Floss* held, that an agreement to arbitrate will be thrown out if it does not "allow for the effective vindication of that claim." *Floss*, 211 F.3d at 313; *see also Gilmer*, 500 U.S. 20, 28 ("'[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'" (quoting *Mitsubishi Motors Corp. v. Soler Chyrsler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985))). Indeed, in *Floss*, the Sixth Circuit permitted a plaintiff to sue in federal court over the terms of an arbitration agreement, because it found that the agreed-upon arbitration panel would not vindicate the plaintiff's

[5] Other cases have determined that plaintiffs are free to waive collective action and class action mechanisms for vindication of FLSA claims, as well.

rights. *Floss*, 211 F.3d at 313; *see also Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 385–88 (6th Cir. 2005) (concluding, in a case similar to *Floss*, that employer's arbitration scheme did not provide for effective vindication of employee's FLSA claims and was therefore not enforceable under *Gilmer*).

Finally, drawing analogies between arbitration agreements and contractual limitation clauses is unwise. Agreements to arbitrate are governed by the Federal Arbitration Act, and the federal courts are steadfast in their support of the right of employers to submit disputes to arbitration. *See Gilmer*, 500 U.S. at 30 ("[I]n our recent arbitration cases we have already rejected [challenges to the adequacy of arbitration procedures] as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration . . . are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" (quoting *Rodriguez de Quijas v. Shearson / Am. Express, Inc.*, 490 U.S. 477, 481 (1989))); *see also 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1463 (2009) (extending *Gilmer* to arbitration clauses in collective-bargaining agreements). There is no parallel line of authority with regard to contractual limitation clauses counseling similar restraint. It would be unwise to infer from the Court's arbitration cases an all-encompassing framework for determining whether or not a particular provision of the FLSA can be waived by private contract, as Quicken asks this Court to do here.

III. The Contracts Unlawfully Relinquish FLSA Rights

The proper approach to ruling on this motion is to examine § 255(a) within the context of the FLSA as a whole, and determine whether waiving it is "consonant with the legislative scheme."[6] *Am. Pipe*, 414 U.S. at 558; *see also O'Neil*, 324 U.S. at 704 ("[A] right conferred

[6] The Court takes notice of the numerous cases cited by the parties arising from other federal statutes that utilize § 255(a) for their statute of limitations, such as the Family Medical Leave Act ("FMLA") and the Age Discrimination in Employment Act ("ADEA").

on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy."). In making this examination, two of the Plaintiffs' arguments seem particularly salient.

The first concerns the manner in which FLSA claims accrue. Each workweek in which an individual is denied overtime constitutes a separate claim under the FLSA. *Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169 (6th Cir. 2008) ("'A cause of action is deemed to accrue, as a general rule, at each regular payday immediately following the work period during which the services were rendered for which the wage or overtime compensation is claimed.'" (quoting *Archer v. Sullivant Cnty.*, Nos. 95-5214, 95-5215, 1997 WL 720406, at *2 (6th Cir. Nov. 14, 1997))). It is not unusual for a misclassified worker to stay in a particular job for many years. If she eventually decides to vindicate her rights in court, she may have dozens, if not hundreds, of "claims" for back wages. The statute of

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Ultimately, the Court does not find any of them persuasive. While these statutes share common enforcement mechanisms, the FLSA is radically different in its objectives than both the ADEA and the FMLA:

> The FLSA is a remedial statute setting the floor for minimum wage and overtime pay. It was intended to protect the most vulnerable workers, who lacked the bargaining power to negotiate a fair wage or reasonable work hours with their employers. . . . Like the ADEA, the FMLA is not primarily focused on pay, and protects all segments of the workforce, from low wage workers to highly paid professionals.

The Family Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 67,987 (Nov. 17, 2008). The underlying policies of these statutes may compel different answers to questions about waiver. *See id.* (rejecting application of FLSA's requirement of supervised settlement agreements to the FMLA).

In any event, the courts that have looked at this issue in the FMLA context have not reached a consensus. *Compare Lewis v. Harper Hosp.*, 241 F. Supp. 2d 769, 773 (E.D. Mich. 2002) (holding that a six-month contractual limitation clause in an employment contract was unenforceable as to FMLA claims) *with Badgett v. Fed. Express Corp.*, 378 F. Supp. 2d 613, 624–25 (M.D.N.C. 2005) (rejecting *Lewis* and upholding a six-month contractual limitation clause with respect to employee's emotional distress, 42 U.S.C. § 1981, and FMLA claims).

limitations caps the employer's liability for these continuing violations by limiting back wage claims for misclassification to two or three years, depending on the employer's culpability. Therefore, much like the contract provisions the Supreme Court struck down in *O'Neil* and similar cases, the limitation clauses in Plaintiffs' employment contracts reduce Quicken's potential exposure to liability for violating the FLSA to a level below that mandated by Congress. The only difference between these clauses and an agreement to waive the back pay remedy altogether, is one of "degree," and not of kind. Dodd, *supra* at 367.

The substantive function of § 255(a) is confirmed by the Plaintiffs' second argument. If an employee can prove the employer willfully violated the FLSA, he has three years from accrual to bring suit, rather than two. The Supreme Court has noted that § 255(a) sends a substantive message about Congress's perception of the seriousness of both willful *and* negligent violations of the statute.[7] *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132 (1988) ("The fact that Congress did not simply extend the limitations period to three years, but instead adopted a two-tiered statute of limitations, makes it obvious that Congress intended to draw a significant distinction between ordinary violations and willful violations."). The relationship between the statute of limitations and the culpability of the employer's conduct reaffirms that the time periods in § 255(a) not only serve the procedural function of providing repose for claims, but also reflect the substantive judgment of Congress about the exposure to liability employers should face in both ordinary and extraordinary cases.

[7] In *Henry*, the Court found that because Quicken made good-faith efforts to investigate the proper classification of its employees, it could not be held liable for a "willful" violation of the FLSA. *See Henry v. Quicken Loans*, No. 04-cv-40346, ECF No. 571, at 26–29 (E.D. Mich. Sept. 30, 2009). The Court does not understand Plaintiffs to be casting doubt on the correctness of that ruling. The argument, in the view of the Court, is merely being asserted to demonstrate the "substantive" nature of § 255(a).

This close reading of the statute allows the Court to place the two leading district court cases the parties discuss — *Boaz v. Federal Express Corp.*, 752 F. Supp. 2d 925 (W.D. Tenn. 2010), and *Wineman v. Durkee Lakes Hunting & Fishing Club, Inc.*, 352 F. Supp. 2d 815 (E.D. Mich. 2005) — in context. The Court agrees with much of what *Wineman* has to say about the economic theory underlying the FLSA. Nonetheless, as *Boaz* points out, *Wineman* went a step too far when it held that a party could not waive *any* rights under the FLSA. But *Boaz*, which found that *all* "procedural" rights under the FLSA are waivable and that § 255(a) was one such "procedural" right, is wrongly decided. It does not follow from *Gilmer*, *Penn Plaza*, and *Floss* that waiver of FLSA rights is governed by an inflexible distinction between substantive and procedural provisions. Even if it did,§ 255(a) has a significant substantive component that cannot be neglected.

The Court agrees with the result in *Wineman*, but for a slightly different rationale. The Court finds that the limitation clauses in Plaintiffs' employment agreements reduce Quicken's overall exposure to overtime wage claims. The policy behind the FLSA, as expressed by the courts, is that such agreements are impermissible overreaching as a matter of law, and must give way to the minimum requirements found in the statute. Because the contractual limitation provisions in Plaintiffs contracts "contravene[ ] the statutory policy" of the FLSA, the Court finds them unenforceable as a matter of law. *O'Neil*, 324 U.S. at 704. Therefore, Quicken's motion must be denied.

WHEREFORE, it is hereby **ORDERED** that Quicken's motion for summary judgment on Plaintiffs' one-year contractual limitations period (docket no. 209) is **DENIED**.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: January 31, 2012

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on January 31, 2012, by electronic and/or ordinary mail.

Carol Cohron
Case Manager