

REGIONAL NEWS

Health Aides Win OT Pay in Class Action Settlement

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Of the Legal Staff

A class of 2,600 home health care workers who allege they are owed overtime wages under the state's minimum wage laws struck a \$2.34 million settlement with a home health care and nursing company in Philadelphia Common Pleas Court.

Judge Idee C. Fox gave the final approval for the class action settlement in *Gallagher v. Bayada Nurses Inc.* last month. Fox also approved \$575,000 in plaintiff attorney fees and litigation costs, according to the judge's final approval order.

The plaintiff class will receive 48 percent of their unpaid overtime wages following the payout of the \$575,000 award of attorney fees and litigation expenses from the class' common fund, according to court papers.

Plaintiffs' counsel were awarded \$15,725.67 in litigation expenses and \$559,274.33 in counsel fees, or 23.9 percent of the class' common fund, according to court papers. Plaintiffs' counsel's fee was based on a \$287,993 lodestar for 651 attorney hours.

Plaintiffs' counsel were Peter Winebrake and R. Andrew Samitillo of the Winebrake Law Firm in Dresher, Pa. Defense counsel was Thomas G. Collins of Buchanan Ingersoll & Rooney in Harrisburg.

The *Gallagher* settlement rises against the

backdrop of litigation over whether home health aides are exempt from minimum wage and overtime provisions.

The U.S. Supreme Court ruled in June 2007 in *Long Island Care at Home Ltd. v. Coke* that home health workers who are paid by a third-party employer are exempt from the federal Fair Labor Standard Act's minimum wage and overtime provisions.

A Pennsylvania case, *Bayada Nurses Inc. v. Commonwealth, Department of Labor and Industry*, is pending in the appellate courts over a similar question: whether the Pennsylvania Minimum Wage Act, or PMWA, can give more expansive wage protection to home health care workers than the federal minimum wage law.

Bayada argues that its home health care worker employees are exempt from the state minimum wage law because they are domestic servants who do not have to be paid time-and-a-half because they are working for people in their private dwellings, according to Bayada's brief in the case on appeal.

The en banc Commonwealth Court ruled

in September 2008 that Bayada was not entitled to the domestic servant exemption. Bayada has petitioned for an allowance of appeal with the state Supreme Court.

The settlement in the Philadelphia case was a prudent maneuver by the class if the Supreme Court reverses the Commonwealth Court and finds that Bayada is entitled to the domestic services exemption for its home health aides, according to the memorandum of law

in support of a joint motion to approve the settlement.

"While class counsel believes plaintiffs have strong arguments to prevail on this particular point, a favorable ruling from the Supreme Court would significantly undermine plaintiffs' position in the instant litigation," the joint memorandum said. "This issue, and others, presented major risks for plaintiffs of recovering nothing and played a major role in the decision to reach a settlement."

Winebrake and Collins declined comment on the case saying that they had agreed to limit their comment to a joint press release.

Bayada did not admit violating the PMWA

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based upon Bayada's

existing payroll records.

or any other liability by agreeing to settle the case, Fox's order said.

Class representatives Jeanne Gallagher, Betty Brooks and Wendy Nickerson alleged they and other home health aides employed by Bayada did not receive time-and-a-half pay for hours worked in excess of 40 hours and for time spent traveling between client households, according to the joint motion for final approval of the settlement.

Bayada argues it jointly employs its home health aides with the people the aides take care of in their homes, so it is entitled to the domestic servant exception, according to the joint memorandum of law.

Bayada said its home health aide employees were exempt from minimum wage and overtime obligations because they are domestic servants, but Bayada said it pays them for all the time they spend with a client, even overnight hours spent with a client when the aide and the client might be sleeping, court papers said.

Class members will be paid overtime compensation for hours worked above 40 hours based upon Bayada's existing payroll records. Class members also will be paid overtime compensation if they worked more than 40 hours per week because of travel between clients' homes when there was a two-hour gap or less between the visits to clients' homes, the joint motion said. Class members will be

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the request, citing a section of FOIA that exempts the public disclosure of trade secrets.

L-3 Comm had appealed that ruling and lost, Dial said. Yet, witnesses associated with L-3 Comm acknowledged using those same

engineering reports in soliciting international business without Lockheed's prior approval.

Dial also said that L-3 Comm also argued that the U.S. government had been given much of the information Lockheed claimed was proprietary to L-3 Comm's predecessor firms between the 1960s and the 1990s without requiring a nondisclosure agreement. But Dial said that Lockheed lawyers convinced the jury that the trade secrets at issue had been protected

each such occasion.

Bayada paid a straight-time hourly rate for 442,033.50 hours worked by class members that qualified for overtime, and Bayada would have paid \$3,620,524.60 to class members if it had paid them time-and-a-half for those hours,

Thierfelder, sued Irwin Wolfert, the couple's family physician, after Wolfert began an affair with Joanne Thierfelder while treating her for anxiety, depression and marital problems. Klein wrote that Wolfert issued Joanne Thierfelder prescriptions for anti-depression medications.

The married couple alleged the affair with Wolfert worsened Joanne Thierfelder's psychological condition and brought negligence, medical malpractice, loss of consortium and other claims against the doctor, according to Klein's opinion.

The trial court judge dismissed the case on preliminary objections, however, and based its decision on the Superior Court's 2004 decision, *Long v. Ostroff*. In *Long*, a panel of the court held that "a general practitioner's duty of care does not prohibit an extramarital affair with a patient's spouse."

Though the panel's ruling in *Long* prevents a spouse from bringing a medical malpractice claim against a doctor having an affair with the spouse's partner, it does not do the same for Joanne Thierfelder's claims, Klein wrote. The "critical distinction" between the cases is that there is a much greater risk of foreseeable harm

through contracts between the government and Lockheed and that legends on many of the drawings L-3 Comm appropriated for its own use clearly identified them as proprietary.

"Their argument that it was in the public domain was rejected," she said. "They were bound by restrictions on the documents themselves. The documents were marked with Lockheed Martin proprietary legends indicating Lockheed Martin's interest in the

the joint memorandum of law said.

Bayada employs 1,000 registered nurses, licensed practical nurses and home health aides in Pennsylvania that provide personal care and nursing care to clients in their homes, according to Bayada's brief in the to determine whether Wolfert as a GP owed Joanne Thierfelder a duty.

'A HIGH DEGREE OF TRUST'

"Because of a patient's often inferior knowledge about medicine and related conditions, a healthcare professional often has a position of superiority over his client," Klein wrote. "As such, it is very common that the patient is in a vulnerable position and as a result puts a high degree of trust in his or her doctor. In such relationships where the players are on unequal playing fields, it is even more incumbent upon our legal system to protect patients from the malfeasance of medical professionals when they become sexually involved with their trusting patients."

In her dissent, Lally-Green wrote that the majority's ruling contradicted precedent set forth in the state Supreme Court's 1999 decision, *Physicians Insurance Co. v. Pistone*. In that decision, Lally-Green wrote, the state Supreme Court rejected both the "substantial nexus" and "inseparable and intertwined" tests while ruling that a physician's sexual assault on a patient was not covered by his insurance policy because the assault did not

material." Drawings with those legends were found in L-3 Comm's possession, she said. "They were on notice of Lockheed Martin's rights with regard to that information."

The case, before U.S. District Judge Charles A. Pannell Jr., is *Lockheed Martin Corp. v. L-3 Communications Corp.*

This article originally appeared in the Fulton County Daily Report, a legal affiliate based in Atlanta. •

appellate case.

Russell M. Nigro, a former Supreme Court justice, mediated the settlement, according to court papers.

Six class members opted to exclude themselves from the settlement, court papers said. •

runs contrary to guiding Supreme Court precedent," Lally-Green wrote. "The high court is, of course, free to revisit its precedent and to expand the rule in its wisdom."

Lally-Green was joined in the dissent by Judges Joan Orié Melvin and Jacqueline O. Shogan.

Klein's majority opinion, however, was explicit to note that the ruling reached by the majority was of narrow scope. It applied only to the facts at hand and only to Joanne Thierfelder. David Thierfelder's claim of loss of consortium was not dismissed, but Klein wrote that his ruling did not extend to his cause of action.

"If wife had simply alleged that she had been treated by Dr. Wolfert for a non-eremotional condition such as arthritis, we might not find that wife would have a viable cause of action against him," Klein wrote. "It well could be that under those circumstances a subsequent, intervening sexual relationship would have had no effect on her arthritic condition — thus establishing no causal connection for malpractice."

(Copies of the 18-page opinion in Thierfelder v. Wolfert, PICS No. 09-0843, are available from The Legal Intelligencer

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credited for at least 30 minutes of overtime for

Doctor

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its role as an intermediate appellate court, "should be reluctant to expand tort liability" without guidance from the state Supreme Court or the General Assembly.

Bruce G. Cassidy, the plaintiffs' attorney in the case, said *Thierfelder* was the first time in Pennsylvania that a medical malpractice action was brought against a general practitioner who was prescribing psychiatric medicine and engaging in a sexual relationship with his patient.

Though there have been similar cases, they have dealt with psychiatrists, said Cassidy of Bruce G. Cassidy & Associates in Princeton, N.J.

"I'm not quite sure if [the ruling] expands torts or if it applies Pennsylvania's existent law to a larger class of people who practice the same type of medicine," he said. "You can't hide behind your title. Basically, a fish is a fish."

Defense attorneys Kevin Charles Cottone