No. 129526

IN THE
SUPREME COURT OF ILLINOIS

CARMEN MERCADO and JORGE LOPEZ, on behalf of themselves and all others similarly situated,	)	On Appeal from the Illinois Appellate Court, First Judicial District, No. 1-22-0020
Plaintiffs-Appellants,	)	
v.	)	Circuit Court of Cook County, Chancery Division,
S&C ELECTRIC COMPANY,	)	No. 2020 CH 7439
Defendant-Appellee.	)	The Honorable Allen P. Walker, Judge Presiding.

BRIEF OF *AMICI CURIAE* ILLINOIS CHAMBER OF COMMERCE, CHICAGOLAND CHAMBER OF COMMERCE, AND ILLINOIS MANUFACTURERS' ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE

Gretchen Harris Sperry
Benjamin D. Rowley
GORDON REES SCULLY MANSUKHANI LLP
One North Franklin Street
Chicago, Illinois 60606
312-565-1400
gsperry@grsm.com
browley@grsm.com

Counsel for Amici Curiae Illinois Chamber of Commerce, Chicagoland Chamber of Commerce, and Illinois Manufacturers' Association

E-FILED
3/11/2024 1:01 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

STATEMENT OF INTEREST 1

820 ILCS 105/4a 4

29 U.S.C. § 207(e) 4

BACKGROUND 5

820 ILCS 105/4a 5

56 Ill. Admin. Code § 210.410(a) 6

ARGUMENT 7

56 Ill. Admin. Code § 210.410(a) 7

I. Under § 210.410(a), payments to employees that are "not measured by or dependent on hours worked" are excluded from the regular rate used to calculate overtime wages. 8

56 Ill. Admin. Code § 210.410(a) 8

56 Ill. Admin. Code § 210.430 8

820 ILCS 105/4a 8

II. Recent amendments to FLSA regulations support the conclusion that any remuneration that is not measured by or dependent on hours worked is excluded from the "regular rate" for calculating overtime under the IMWL. 9

56 Ill. Admin. Code § 210.410(a) 9, 10, 12

Lewis v. Giordano's Enterprises,
397 Ill. App. 3d 581 (2009) 9

29 U.S.C. § 207(e) 9, 10, 11

Mirizza v.. Stone Container Store,
842 F.3d 1456 (3d Cir. 1988) 9, 10

Regular Rate Under Fair Labor Standards Act,
84 F.R. 67836-01 (Dec. 26, 2019) 10, 11

29 C.F.R. § 778.224 ..... 10, 11

III. The construction of § 210.410(a) has implications for Illinois employers beyond the incentive payments at issue in this case. 12

56 Ill. Admin. Code § 210.410(a) 12

Regular Rate Under Fair Labor Standards Act, 84 F.R. 67836-01 (Dec. 26, 2019) 10, 12

CONCLUSION 16

STATEMENT OF INTEREST

The Illinois Chamber of Commerce is a non-profit organization that represents the voice of the Illinois business community. It is comprised of businesses representing a broad spectrum of industry throughout the state, including mining, manufacturing, construction, transportation, utilities, finance and banking, insurance, gambling, real estate, professional services, local chambers of commerce, and other trade groups and membership organizations. Its members range in size from small companies to middle market businesses to large international companies headquartered in Illinois.

The Illinois Chamber works collaboratively with trade organizations on specific policy issues or in specific areas of activity. It is dedicated to strengthening business climate and economy for employers throughout Illinois. Its mission focuses on representing the business community at the state level by working with state representatives, senators, and the Governor's Office to advocate for Illinois businesses. Accordingly, the Chamber provides these businesses with a voice as it works with state lawmakers to make business-related policy decisions.

In addition to its work with state legislators, the Chamber also operates an Amicus Briefs Program to bring attention to specific cases and provide additional information for the Illinois reviewing courts to consider. Over the last few years, the Chamber has submitted *amicus* briefs in matters of significant importance to its members, including the proper scope

of actions brought under the Illinois Biometric Information Privacy Act, the appropriate role and compensation of relators in Illinois false claims actions, limitations on a municipality's authority to tax, and an employee's fiduciary duty of loyalty to the employer, to name a few.

The Chicagoland Chamber of Commerce advocates on behalf of Chicagoland businesses to help create and maintain a competitive business environment that encourages sustained economic growth, specifically developing employer-friendly policies for the greater Chicago area to enhance job creation and retention. The Chicagoland Chamber is a unifying voice for businesses across the region, and includes retailers of all sizes, in addition to other commercial entities. As the Chicagoland Chamber's members benefit from these policies, so too do the people of Chicagoland, by realizing increased job opportunities, increased wages and profits, and favorable tax collection practices that allow Chicagoland businesses and residents to thrive.

The Illinois Manufacturers' Association is an Illinois not-for-profit corporation founded in 1893 and is the oldest and largest state-wide manufacturing association in the United States. More than 4,000 Illinois manufacturing companies currently hold IMA membership. The IMA's members, which include businesses of all sizes, employ over seventy-five percent of Illinois' manufacturing workforce. The IMA's mission is to preserve and strengthen the Illinois manufacturing base by providing

information to and advocating on behalf of member companies on issues that relate to the Illinois business climate, such as industrial relations, federal and state regulations, insurance, public affairs, and environmental matters. The IMA works actively in the judicial and legislative arenas in furtherance of this objective and has filed *amicus* briefs in other important cases affecting manufacturers' interests in Illinois.

As representatives of thousands of Illinois employers, *amici* have a strong interest in the outcome of this case, which has implications well beyond the particular incentive payments that are the subject of this lawsuit. Over the past few decades, it has become industry standard for employers to create individualized compensation packages that include a variety of benefits, incentives, and perks to attract prospective employees. Whether or not the value of these benefits may be excluded from the "regular rate" used to calculate overtime payments could affect the types of offerings employers have made and employees have come to expect in hiring practices, which has particular importance in today's highly competitive labor market.

If the value of those benefits, incentives, and perks is included in calculating overtime rates, as Plaintiffs suggest, it will result in prohibitively high labor costs that will cause many employers to simply stop offering them, to the detriment of employees and employers alike. Employees would lose monetary and non-monetary benefits and quality of life accommodations that are as important to their employment decisions as

their wages, if not more so. For employers, not only would they see an exponential increase in overtime wages, they will also face endless costly class action lawsuits like this one to recover allegedly unpaid wages. The litigations costs alone could prove ruinous for many Illinois employers, to say nothing of the potential treble damages awards, penalties, and attorney fees allowed by statute, all of which compounds employers' hardships during this tenuous process of economic recovery.

Both lower courts rejected Plaintiffs' reading of the Illinois Minimum Wage Law ("IMWL"), 820 ILCS 105 *et seq*., in which they argued that benefit payments may only be excluded from overtime calculations if they are *both* unrelated to hours worked *and* given as a gift. The IMWL contains no such requirement. Indeed, in a sign of the times, the U. S. Department of Labor recently updated its regulations under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207, to acknowledge the prevalence of benefit- and incentive-based payments and perks in the 21st century workplace and exclude all of them from overtime calculations because they are unrelated to hours worked. While Illinois businesses remain optimistic, the stakes are high for those still recovering from global economic downturns.

Accordingly, *amici* have a substantial interest in the outcome of this case. They seek to provide this Court with their perspective on how acutely a change in overtime calculations can impact their members, their

workforce, and the overall economic climate in Illinois, positively or negatively.

BACKGROUND

Plaintiffs filed this class action lawsuit against S&C, alleging they were underpaid because S&C failed to include the value of certain incentive payments in the "regular rate" of pay when calculating their overtime wages. Plfs. Br. at 6. Notwithstanding S&C's subsequent payment of those adjusted wages, Plaintiffs sued S&C on behalf of a proposed class under the IMWL, seeking payment of unpaid wages, treble damages, penalties, and attorney fees. A.069; 820 ILCS 105/12(a).

S&C moved to dismiss, arguing that Plaintiffs failed to state a cause of action because according to IMWL regulations, the incentive payments "other amounts that are not measured by or dependent on hours worked" and were properly excluded. A.021-022; 56 Ill. Admin. Code § 210.410(a). S&C submitted the affidavit of its Chief Human Development and Strategy Officer attesting to that fact. A.023. S&C also argued that dismissal was proper because once it paid the wage adjustments to Plaintiffs, Plaintiffs could no longer prove they were damaged. A.024-25.

In response, Plaintiffs argued that payments unrelated to hours worked could only be excluded from the regular rate under § 210.410(a) if they were also gifts. A.022. They argued that "interpreting the exception to

exclude *any* compensation not based off hours is absurd." A.023 (emphasis added).

The trial court rejected Plaintiffs' reading of the regulation and found that under the plain language of § 210.410(a), any incentive payments that were "not measured by or dependent on hours worked" were excluded from the regular rate for overtime purposes. A.023. But there was a question of fact as to whether the specific incentive payments paid to Plaintiffs were based on hours worked or not. A.024. The court ultimately dismissed the complaint because once S&C paid the wage adjustments to Plaintiffs, Plaintiffs could no longer prove they were damaged. A.024.

The appellate court affirmed, holding that hourly workers' bonuses not measured by or derived from hours worked are properly excluded from the regular rate calculation used to determine overtime wages. A.012. It also affirmed dismissal on the ground that Plaintiffs have not sufficiently pled damages as to underpaid wages. A.017.

ARGUMENT

The Court's construction of § 210.410(a) has implications far beyond the particular incentive payments Plaintiffs received in this case. Employers use a variety of monetary and non-monetary benefits, incentives, and perks as part of compensation packages used to recruit, hire, and retain employees—indispensable tools in a competitive job market. These offerings include: training and advancement opportunities, tuition reimbursement, incentive payments, discounts on goods and services, wellness benefits and incentives, reimbursement for transportation costs, childcare, and other quality of life enhancements. Whether the value of these benefits must be included in the regular rate to calculate overtime payments depends on how § 210.410(a) is interpreted. If, as S&C contends, they are not "measured by or dependent on hours worked" and are awarded to employees simply by virtue of being employees, they should be excluded from overtime payment calculations.

That is the lens through which § 210.410(a) should be viewed. If the value of the benefits, incentives, and perks each employee received were converted to hourly wages and used to calculate overtime payments, employers' labor costs would be prohibitively expensive and they would likely stop providing those benefits altogether, to the employees' detriment. Of greater concern, however, is that reclassifying those benefits as wages would expose employers to endless class action lawsuits like this one for

unpaid wages, with claims for damages, penalties, and attorney fees that would be devastating.

I. Under § 210.410(a), payments to employees that are "not measured by or dependent on hours worked" are excluded from the regular rate used to calculate overtime wages.

The IMWL requires that employees who work more than 40 hours per week be paid overtime wages, compensated at one-and-one-half times the "regular rate" at which he is employed. 820 ILCS 105/4a. For those employed "solely on the basis of a single hourly rate," like Plaintiffs, the regulations state that "the hourly rate is the 'regular rate.'" 56 Ill. Admin. Code § 210.430(a). Certain payments made to employees are excluded from the "regular rate" calculation, specifically "sums paid as gifts such as those made at holidays or other amounts that are not measured by or dependent on hours worked." 56 Ill. Admin. Code § 210.410(a).

Plaintiffs contend that the regulation should be read as excluding *only* payments that were made as gifts: gifts made at the holidays or gifts made any other time of the year that are not based on hours worked. Plfs. Br. at 19. But that construction would require the Court to read an additional limitation into the second clause that does not exist, *i.e.*, that payments not based on hours worked must also qualify as gifts. The circuit court and the appellate court correctly rejected Plaintiffs' interpretation and concluded that the type of incentive payments at issue here are properly excluded from the regular rate calculation so long as they are "not measured

by or derived from hours worked." A.012, A.023. This Court should apply the same interpretation.

II. Recent amendments to FLSA regulations support the conclusion that any remuneration that is not measured by or dependent on hours worked is excluded from the "regular rate" for calculating overtime under the IMWL.

Plaintiffs argue that the appellate court "drastically expand[ed]" §210.410(a) to exclude "*all* remuneration not measured by or dependent on hours worked," even if it is not a gift, and that this "tortured interpretation" conflicts with the regulatory context. Plfs. Br. at 19-20. To the contrary, the appellate court's construction is consistent with the purpose of the statutory scheme as a whole.

Interpretations of the FLSA may provide guidance when interpreting the IMWL. *Lewis v. Giordano's Enterprises, Inc.*, 397 Ill. App. 3d 581, 587 (2009). As S&C correctly notes in its brief (Def. Br. at 21), the differences between the statutes are just as likely to provide interpretive guidance as the similarities. Here, the FLSA provides useful perspective on the statutes' guiding principles.

Section 207(e) of the FLSA begins with the premise that "all remuneration for employment" be included in the "regular rate" calculation for computing overtime. 29 U.S.C. § 207(e). But an employee's "remuneration" may, and often does, encompass more than just compensation for hours worked. *Minizza v. Stone Container Corp.*, 842 F.2d 1456, 1459-60 (3d Cir. 1988). And much of that remuneration is excluded

from overtime calculations. *Id*. As the U.S. Department of Labor recently explained, "in a sense, every benefit or payment that an employer gives an employee is 'remuneration for employment.'" But any benefits or payments made to employees for purposes other than compensation must be excluded from overtime calculations "because they have no relationship to the employee's hours worked or services rendered… even if those benefits are remuneration of a sort." *Regular Rate Under the Fair Labor Standards Act*, 84 F.R. 68736-01, 68745-46 (Dec. 16, 2019), 2019 WL 6828543, *68745-46 ("Final Rule"). These benefits and payments are "conditioned merely on one being an employee." *Id*. at 68747.

Many of these excluded benefits and payments fall under the "catch-all exception" of § 207(e)(2), which excludes from overtime calculations "payments which are not made as compensation for hours of employment." 29 U.S.C. § 207(e)(2); 29 C.F.R. § 778.224. While the meaning of "compensation" is much broader under the FLSA than under the IMWL,[1] the relative principle here is the same: contrary to Plaintiffs' contention, there is nothing "drastic" or "tortured" or otherwise controversial about excluding non-"compensation" payments, *i.e*., payments "not measured by or dependent on hours worked," from overtime calculations. In fact, as

[1] The IMWL "regular rate" calculation excludes payments that are not based on hours worked (§ 210.410(a)), whereas excluded payments under the FLSA cannot be based on "hours worked, services rendered, job performance, or other criteria that depend on the quality or quantity of the employee's work" (29 C.F.R. § 778.224(a)).

explained in the Final Rule, they *must* be excluded. *Id.* at 68746-47; *see* § 210.410(a).

The Final Rule was issued as a companion to updated FLSA regulations issued in 2019. According to the Department, it updated the regulations to "help employers understand their legal obligations by addressing some of the innovative changes in compensation practices and workplace environments that have occurred" since the last update in 1950. It acknowledged that employers rely on "a variety of creative benefits offerings" to attract and retain employees and issued updated regulations to "promote a clear yet flexible standard for employers and employees. *Id.* It also noted that these clarifications may encourage employers to extend these benefits to "wide groups of employees instead of reserving them only for FLSA-exempt employees" *Id.*

C.F.R. § 778.224 now explicitly excludes numerous monetary and non-monetary employee benefits, incentives, and perks from overtime calculations under 702(e)(2), including: fitness classes, gym memberships, wellness programs, onsite medical treatment, discounts on retail goods and services, tuition benefits/reimbursement, paid parking benefits, childcare services, adoption assistance, payments to employees in certain locations, and certain signing bonuses, among others. *Id.* at 68747-48, 68750-51.

These recent amendments to C.F.R. § 788.224 support the conclusion that any remuneration that is "not measured by or dependent on hours

worked" under § 210.410(a) is excluded from the "regular rate" for calculating overtime under the IMWL. This conclusion is particularly notable[2] given that the FLSA generally construes "compensation" more broadly and "regular rate" exclusions more narrowly than the IMWL, yet both arrive at the same unavoidable conclusion.

III. The construction of § 210.410(a) has implications for Illinois employers beyond the incentive payments at issue in this case.

A survey of the competitive job market and fragile state of economic recovery in Illinois may illustrate how changes to the "regular rate" analysis could impact *amici*'s constituents and their interests. As the economy continues to rebound after the global pandemic and the ensuing Great Resignation, employers of all sizes, in all industry sectors, continue to struggle with a persistent labor shortage.[3] In September 2022, 94% of business leaders reported challenges with hiring workers at all levels, from front-line workers to administrative staff.[4] While the economy added an

---

[2] The amended regulations are also notable for the additional benefits they are expected to provide: (1) the added clarity may encourage some employers to start offering benefits they refrained from offering for fear of potential overtime consequences; (2) offering new benefits may have a positive impact on workplace morale and retention, employee compensation, and wellness; (3) the added clarity will prevent many avoidable "regular rate" disputes and ultimately save a minimum of $28 million per year in litigation costs. Final Rule, 84 F.R. at 68767-68.

[2] "The Talent Gap Survey: 4 Key Takeaways and How to Capitalize on Them," RSM US (Sept. 12, 2022), https://rsmus.com/insights/services/managed-services/the-talent-gap-survey.html (last accessed Feb. 27, 2024).

[4] *Id.*

"unprecedented" 4.5 million jobs in 2022, nearly one-third of those jobs went unfilled because of a shortage of skilled workers.[5]

The difficulty in attracting, hiring, and retaining workers remains just as acute today. At the end of 2023, the labor force participation rate in Illinois was around 64.7%.[6] While wage increases remain part of the strategy to attract new workers, the promise of higher pay is often not enough.[7] At the same time, the need to retain existing talent is just as critical.[8] Worker shortages weigh most heavily on existing workers, who are left to fill those gaps in productivity.[9] This takes a different kind of toll on the existing workforce. A solid 40% of employees reportedly suffer from burnout, which in turn negatively impacts morale, decreases productivity,

---

[5] Ferguson, Stephanie, "Understanding America's Labor Shortage," U.S. Chamber of Commerce (Feb. 13, 2024), https://www.uschamber.com/workforce/understanding-americas-labor-shortage (last accessed Feb. 27, 2024).

[6] Employment Status of the civilian noninstitutional population, seasonally adjusted, U.S. Bureau of Labor Statistics, available at: bls.gov/web/laus/ststdsadata.txt (last accessed Feb. 27, 2024).

[7] Levanon, Gad, "US Labor Market Outlook, March 2023," The Burning Glass Institute, available at: https://static1.squarespace.com/static/6197797102be715f55c0e0a1/t/6407469ce25c5c0aa026e79d/1678198429229/Labor+Market+Outlook+March+2023+-+FINAL.pdf (last accessed Feb. 27, 2024)

[8] "The battle for retention: What do workers want?" RSM US (Jan. 10, 2023), available at: https://rsmus.com/insights/services/business-strategy-operations/the-battle-for-retention-what-do-workers-want.html (last accessed Feb. 27, 2024).

[9] *Supra*, n.2.

and sends many look for better jobs.[10] High turnover and low worker retention perpetuate this vicious cycle.[11]

To remain competitive in the marketplace, employers have relied on comprehensive compensation packages to attract prospective employees. These offerings can include any combination of flexible and remote work hours, training and advancement opportunities, tuition reimbursement, incentive payments, discounts, wellness benefits and incentives, childcare options, and other incentives to improve their quality of life.[12,13,14,15] At least half of the workers surveyed by RSM Consulting in 2022 said those benefits were as their salary, if not more so.[16]

These compensation packages have been mutually beneficial for employers and employees. Employees increasingly report that they value

---

[10] *Id.*; *supra*, n.8.

[11] *Id.*

[12] *Supra*, n.8;

[13] "RSM Survey Highlights Multifaceted Approach to Overcoming Labor Challenges and Maximizing Productivity," RSM US (Jan. 25, 2024), available at: https://www.uschamber.com/workforce/rsm-survey-highlights-multifaceted-approach-to-overcoming-labor-challenges-and-maximizing-productivity (last accessed Feb. 27, 2024).

[14] "Persistent workforce cahllenges put premium on productivity," RSM US (Jan. 25, 2024), available at: https://rsmus.com/middle-market/workforce-mmbi/thank-you.html#people (last accessed Feb. 27, 2024).

[15] "Navigating workforce challenges: What drives employee satisfaction and retention?" RSM US (Nov. 28, 2022), available at: https://rsmus.com/insights/services/business-strategy-operations/navigating-workforce-challenges-employee-satisfaction-retention.html (last accessed Feb. 27, 2024).

[16] *Supra*, n.8.

work-life balance, professional development opportunities, and other quality of life benefits they have grown accustomed to from their employers. For employers, they can attract prospective employees and boost morale among existing employees by offering valuable benefit options without significantly increasing labor costs.

Plaintiffs argue that even if the benefits and incentives provided are "not measured by or dependent on hours worked," they must still be included in the regular rate for purposes of calculating overtime, unless they are provided as a "gift." Plfs. Br. at 19. Under Plaintiffs' reading of the regulations, that would mean the value of most benefits must be converted to an hourly wage and included in the calculation of time-and-a-half overtime payments, resulting in an overwhelming increase in labor costs. More importantly, it would lead to a landslide of class action litigation under the IMWL to recover allegedly unpaid wages, potentially going back years. The statutory treble damages, penalties, and attorney fees would subject employers to potentially ruinous liability. That cannot be the result contemplated by the legislature of the Illinois Department of Labor when crafting the overtime rules. The appellate court's decision should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the circuit and appellate court decisions.

Respectfully submitted,

Dated: February 29, 2024

/s/ Gretchen Harris Sperry

Gretchen Harris Sperry
Benjamin D. Rowley
GORDON REES SCULLY MANSUKHANI LLP
One North Franklin Street
Chicago, IL 60606
312-565-1400
gsperry@grsm.com
browley@grsm.com

Counsel for Amici Curiae
Illinois Chamber of Commerce,
Chicagoland Chamber of Commerce, and
Illinois Manufacturers' Association

CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 3293 words.

/s/ Gretchen Harris Sperry

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to § 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), I, Gretchen Harris Sperry, attorney for the proposed *amici curiae*, certify that the statements set forth in this instrument are true and correct. I further certify that the foregoing Brief of *Amici Curiae* Illinois Chamber of Commerce, Chicagoland Chamber of Commerce, and Illinois Manufacturers' Association in Support of Defendant-Appellee was electronically filed with the Clerk of the Illinois Supreme Court on February 29, 2024, by using the Odyssey electronic filing service and was served on counsel of record via Odyssey and by email to:

Christopher J. Wilmes
Margaret E. Truesdale
HUGHES SOCOL PIERS RESNICK & DYM, LTD.
70 W. Madison Street, Suite 4000
Chicago, Illinois 60602
312-604-2630
cwilmes@hsplegal.com
mtruesdale@hsplegal.com

Counsel for Plaintiffs-Appellants

Michael A. Scodro
Charles E. Harris, II
Brett E. Legner
Anastasiya Lobacheva
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, Illinois 60606
312-782-0600
mscodro@mayerbrown.com
charris@mayerbrown.com
blegner@mayerbrown.com
alobacheva@mayerbrown.com

Kwame Raoul
Jane Elinor Notz
Alex Hemmer
OFFICE OF THE ILLINOIS ATTORNEY GENERAL
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601
312-814-5526
alex.hemmer@ilag.gov

Counsel for Amici Curiae Illinois Attorney General and Illinois Department of Labor

John T. Roache
AKERMAN LLP
71 S. Wacker Drive
46th Floor
Chicago, Illinois 60606
john.roache@akerman.com

Counsel for Defendant-Appellee S&C Electric Company

/s/ Gretchen Harris Sperry