UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RYAN C. HENRY, individually and on behalf of other similarly situated,

Plaintiffs,

v.

QUICKEN LOANS, INC., a Michigan corporation,

Defendant.
_____/

Case No. 04-cv-40346

HONORABLE STEPHEN J. MURPHY, III

ORDER REQUIRING THE CLERK OF THE COURT TO NOTIFY THE DEPARTMENT OF LABOR OF THIS ACTION AND REQUESTING THAT THE DEPARTMENT OF LABOR FILE AN AMICUS CURIAE BRIEF CLARIFYING THE IMPACT OF ADMINISTRATIVE INTERPRETATION 2010-1 ON THIS LITIGATION

This is a Fair Labor Standards Act (FLSA) class-action litigation brought by former "web mortgage brokers" for Quicken Loans, Inc. ("Quicken Loans"), seeking back payment of overtime wages allegedly owed them by Quicken Loans. One of the crucial legal issues in this case is the application of the so-called "administrative exception" that removes from the FLSA's overtime provisions "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213. Department of Labor regulations define with greater specificity the sorts of employees who qualify for the administrative exception. *See* 29 C.F.R. § 541.200 (setting out the basic, three-factor test for the administrative exception, which looks to the weekly salary of the employee and his or her "primary duty"); *Id.* § 541.203(b) (giving "examples" of the sorts of duties held by exempt financial services employees). If web mortgage brokers are found to qualify under the administrative exception, Quicken Loans cannot be held liable for back overtime wages.

For much of this litigation, the crucial document in the dispute over whether or not web mortgage brokers qualify under the administrative exemption has been FLSA2006-31, an opinion letter authored by the Department of Labor ("DOL") on September 8, 2006. That letter, based on a hypothetical set of duties for employees similar to web mortgage brokers, concluded that such employees do fit the administrative exemption because their "primary duties" are "administrative" in the sense required by 29 C.F.R. § 541.200. In his Report and Recommendation on Quicken Loans' Motion for Summary Judgment on the merits (docket no. 434), Judge Pepe concluded that the opinion letter was entitled to deference under Supreme Court and Sixth Circuit case law. Docket No. 556, at 38–40; *see also Auer v. Robbins*, 519 U.S. 452, 462–63 (1997) (giving deference to the DOL's informal interpretation of its own regulations in an amicus brief because of the soundness of its reasoning and the absence of any intent to "defend past agency action against attack"); *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (calling DOL opinion letters "a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); *Fazekas v. The Cleveland Clinic Found. Health Care Ventures, Inc.*, 204 F.3d 673, 677–78 (6th Cir. 2000) (giving *Auer* and *Skidmore* deference to a DOL opinion letter over earlier, internal DOL memoranda that took a contradictory position). That letter was deemed to be more persuasive than letters on the same topic issued in 1999 and 2001 which the plaintiff cited in support of its position, in part because the earlier letters were not signed by the Wage and Hour Administrator of DOL. Docket No. 556, at 39; *see also Fazekas*, 204 F.3d at 678 (making a similar distinction between a DOL Opinion Letter and internal DOL memoranda). Nonetheless, the Judge Pepe recommended denying summary judgment in favor of Quicken Loans because the plaintiffs created a triable issue on whether or not Quicken Loans' web mortgage brokers were sufficiently similar to the

employees described in FLSA2006-31. Docket No. 556, at 43. The Court adopted Judge Pepe's Report and Recommendation on September 30, 2009. Docket No. 571.

The soundness of the Court's legal conclusion has been brought into question by Administrative Interpretation 2010-1 ("AI 2010-1"), issued by DOL on March 24, 2010. The document is the first of its kind, reflecting a shift away from the "opinion letter" approach DOL took for decades toward clarifying the FLSA for parties attempting to comply with it, and a movement towards authoritative agency guidance for parties facing similar sets of issues. Wage and Hour Div., *Wage and Hour Highlights*, United States Dep't of Labor (March 24, 2010), http://www.dol.gov/whd/Hightlights/archived.htm (describing the AI as a "general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue," and claiming it will be "a much more efficient and productive use of resources" than opinion letters, which were often too influenced by specific sets of proposed facts to be of general utility). AI 2010-1 concluded, after a thorough analysis of case law and previous DOL opinion letters on the administrative exemption, that employees like the web mortgage brokers are *not* exempt, and explicitly withdrew FLSA 2006-31. U.S. Dep't of Labor Wage and Hour Div., Administrative Interpretation 2010-1, at 8 (March 24, 2010), *available at* http://www.dol.gov/whd/opinion/adminInterprtn/FLSA/2010/FLSAA2010_1.pdf. The plaintiffs argue that partial summary judgment on the liability issues in this case is now appropriate, on the basis of AI 2010-1's repudiation of FLSA2006-31. Quicken Loans insists that the Court should not revisit its previous legal rulings on the administrative exception, both because they find AI 2010-1 poorly reasoned and unworthy of deference, and because revisiting the law would constitute a violation of "law of the case" principles.

The Court is not aware of a case opining on the weight to be given an Administrative Interpretation on a DOL regulation, particularly in the context of an ongoing litigation where a withdrawn DOL Opinion Letter has already been used to frame the legal issues in the litigation.[1] Because AI 2010-1 marks a significant change of DOL's practices in providing guidance to regulated parties, the Court believes that this is the sort of case where the intervention of a government agency may prove helpful. *See* Fed. R. Civ. P. 24(b)(2)(A) ("Upon timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on a statute or executive order administered by the officer or agency."); *see also Mead Corp v. Tilley*, 490 U.S. 714, 726 (1989) (comparing an attempt to decide important issues of statutory interpretation "without

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[1] The Sixth Circuit recently addressed the issue of deference to an Administrative Interpretation when interpreting a federal *statute*. *Franklin v. Kellogg Co.*, No. 09-5880, 2010 WL 3396843, at *5–8 (6th Cir. Aug. 31, 2010). In that case, the court chose not to give *Skidmore* deference to an interpretation of a statute contained in an AI because the Department of Labor's multiple switches of opinion about the meaning of the statute in four opinion letters issued prior to the Administrative Interpretation indicated that no deference should be shown. *Id.* at *5–6. In addition, the court found the Administrative Interpretation unworthy of *Skidmore* deference because it believed its conclusion was "inconsistent with the language of the statute." *Id.* at *6.

Franklin would conceivably govern this case if it had dealt with interpretation of a regulation, rather than a federal statute. Deference to agency interpretations of statutes commended to them by Congress stems from the Supreme Court's seminal decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984). By contrast, deference to administrative interpretations of an agency's own regulations is governed by a separate line of cases, most notably *Auer* and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The Supreme Court acknowledged that DOL opinion letters are potentially subjects of *Auer* deference. *Christensen v. Harris County*, 529 U.S. 576, 587–88 (2000) (claiming that an agency interpretation of a regulation in a DOL opinion letter could be entitled to *Auer* deference, if "the language of the regulation is ambiguous"). Because there remains a live debate about whether *Auer* represents a higher level of deference than *Chevron*, borrowing haphazardly from a case governed by *Chevron* when ambiguous regulations are at issue is unwise. *See* Gary Lawson, *Federal Administrative Law* 452 (4th ed. 2007) ("Given the different origins of the *Chevron* and *Seminole Rock / Auer* doctrines . . . the correct approach is to keep them separate . . . .").

the vews of the agency] responsible . . . would be to 'embar[k] upon a voyage without a compass'" (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980))).

WHEREFORE, upon **REVIEW** of the record, and in **CONSIDERATION** of the issues of concern to the Department of Labor in this case, the Court hereby **NOTIFIES** the Department of Labor of this action and its possible interest herein, and **INVITES** the Department of Labor to file an amicus curiae brief on the issues raised by AI 2010-1's withdrawal of FLSA 2006-31, after FLSA 2006-31 already served as a basis for summary judgment. The Court refers the Department of Labor to the parties' supplemental briefing on this issue for further guidance on the issues to be addressed. Docket Nos. 584–88. The Court emphasizes that it is exclusively concerned with the issue of deference to the Department of Labor's interpretation of its own regulations in AI 2010-1 relative to FLSA 2006-31, rather than the substantive merits of their constructions and applications of the regulations to the facts of this case. The Court requests the Department of Labor to notify the Court on or before October 27, 2010 if it wishes to file an amicus curiae brief in this case. Further, if the United States Department of Labor wishes to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure, the Court will consider such a motion.

The Clerk of the Court is also directed to process this order for service by the United States Marshall Service upon: Ms. Barbara L. McQuade, United States Attorney for the Eastern District of Michigan, 211 W. Fort St. Suite 2001, Detroit, Michigan 48226; Ms. M Patricia Smith, Solicitor of Labor, 200 Constitution Ave., NW, Washington, DC 20210; Ms. Joan E. Gestrin, Regional Solicitor for the Department of Labor, 230 South Dearborn St., Room 84, Chicago, IL 60604-1502; and Mr. Eric Holder, Attorney General, United States, 950 Pennsylvania Ave. NW, Washington, DC 20530-0001.

SO ORDERED.

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

Dated: September 27, 2010

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on September 27, 2010, by electronic and/or ordinary mail.

Alissa Greer
Case Manager