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## Judge Says Chipotle Must Hand Over Atty Docs In OT Suit

By **Aaron Vehling**

Law360, New York (December 19, 2014, 4:20 PM ET) -- Chipotle Mexican Grill Inc. must turn over attorney-client communications because it did not meet a "good-faith" compliance requirement under federal labor law, a New York federal magistrate judge ruled on Thursday in a collective action brought by employees who allege the chain misclassified them as overtime-exempt executives.

U.S. Magistrate Judge Sarah Netburn rejected Chipotle's request for a protective order on its communications with its attorneys, pointing to Chipotle's affirmative defenses to the suit: Chipotle had argued that it relied on administrative authority in classifying the plaintiffs as overtime-exempt and is therefore free from liability, and that it did not act willfully and thus should not be subjected to the Fair Labor Standards Act's liquidated damages provision.

Judge Netburn said that the parties have demonstrated that Chipotle had the advice of counsel on the issue, which proves fatal to its exertion of attorney-client privilege because the statutes the company relies on to argue for such privilege require showings that the employer acted in "good faith" to comply with the law.

"Where the defendant has clearly benefited from the advice of counsel on the very issue on which it asserts good faith, it puts its relevant attorney-client communications at issue and thereby waives its privilege," Judge Netburn's order says. "Therefore, the defendant's Motion for a Protective Order is denied."

She gave Chipotle three weeks to produce the documents the plaintiffs are seeking in their suit.

Maxcimo Scott, a former apprentice who now works as a Chipotle general manager, sued in November 2012, accusing the Mexican restaurant chain of illegally denying apprentices overtime, and classifying them as managerial workers even though they spent most of their time on tasks like filling orders and operating cash registers.

Scott and Jay Ensor — who was added in a February 2013 amended complaint — moved for conditional collective action certification in March 2013, arguing that they easily met the burden for notice-stage certification and taking aim at Chipotle's "uniform" policy of classifying workers like the plaintiffs as exempt from the FLSA's overtime requirements.

Chipotle has argued that its employees are part of management, enjoy the salaries and benefits they receive in their positions and meet the legal standards.

The court **certified the collective action** in June 2013, rejecting Chipotle's argument

that the plaintiffs couldn't identify an illegal policy or plan with classwide impact. There are six named opt-in plaintiffs and nearly 600 current and former apprentices who have joined the collective action as of December 2014.

In September, the plaintiffs and Chipotle **sparred over depositions**, with Chipotle accusing the plaintiffs of refusing to name certain opt-in plaintiffs.

Around that time, the parties also engaged in briefing related to Chipotle's motion for a protective order on its communications with its counsel.

Chipotle argued that the plaintiffs should not be allowed discovery of the communications in order to determine if Chipotle had communicated with its attorneys on classifying the apprentices, according to court filings. The company said allowing the plaintiffs access would undermine attorney-client privilege.

Chipotle has argued that although it did consult with counsel, it is entitled to narrowly define its affirmative defenses without waiving privilege.

"Numerous courts have held that good faith and willfulness defenses under the FLSA are not disproved by a failure to seek advice of counsel," the company said.

However, on Thursday Judge Netburn said Chipotle put its attorney-client communications "at issue" because two of its affirmative defenses rely on sections 259 and 260 of U.S. Labor Code, both of which carry a requirement that the employer acted in "good faith" to meet its obligations under labor law. Even if Chipotle does not explicitly mention "good faith" in its defenses, it relies on statutes that require it.

Representatives for the parties were not immediately available on Friday for comment.

The plaintiffs are represented by Gregg Shavitz and Keith Stern of the Shavitz Law Group PA, Joseph Fitapelli, Brian Schaffer and Frank Mazzafero of Fitapelli & Schaffer LLP and Justin Swartz, Ossai Miazad and Melissa L. Stewart of Outten & Golden LLP.

Chipotle is represented by Lisa Lewis, Richard Simmons and Brian Murphy of Sheppard Mullin Richter & Hampton LLP and Bruce Montoya, John Shunk and Andrew Smith of Messner & Reeves LLC.

The case is Scott v. Chipotle Mexican Grill Inc., case number 1:12-cv-08333, in the U.S. District Court for the Southern District of New York.

--Editing by Kelly Duncan.

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