Old Navy Should Face NY Late Pay Suit, Judge Says

Law360 (November 16, 2022, 3:12 PM EST) -- Old Navy should not be able to dodge a former employee's lawsuit claiming she received late paychecks in violation of New York law, a federal magistrate judge said, finding the worker backed her claims that not receiving her paychecks weekly could have affected her finances.

A federal magistrate judge said Old Navy should face a suit brought by a former employee saying she received late paychecks in violation of New York law. (iStock)

U.S. Magistrate Judge Gabriel W. Gorenstein said in his **report and recommendation** Tuesday that Old Navy LLC's motion to dismiss Jonelle Harris' suit should not be granted because the former employee supported her claim under New York's paycheck frequency law.

Under the law, manual workers must be paid weekly and not later than

seven days after the end of the week in which the wages are earned.

"While the harm Harris suffered may be difficult to measure or approximate, the harm is real, not hypothetical," Judge Gorenstein said.

Harris sued in November 2021 in New York federal court, alleging in her proposed class action that she spent more than 25% of her time performing manual work during her employment at Old Navy from 2018 to 2021. However, Harris said that she "was denied the time value of her money" and was "unable to invest, save or purchase utilizing the wages she earned" because Old Navy paid her on a biweekly basis.

Litigation over weekly pay for manual workers **has become more contentious** in the past few years in the wake of 2019's Vega v. CM & Associates Construction Management LLC 🔴 decision by the First Judicial Department of New York's Appellate Division. In that decision, the appellate court determined that "the moment that an employer fails to pay wages" in accordance with the frequency of pay law, "the employer pays less than what is required."

Old Navy said in its April motion to dismiss that those allegations weren't enough to show that Harris was "concretely harmed" by the late payments.

Judge Gorenstein disagreed Tuesday, saying Harris said in her complaint that she suffered an injury because she could not use what she earned as a result of the late payments.

However, Judge Gorenstein also said that Harris supported her claims even though "the extent of [her] injury may ultimately be difficult to

prove."

Judge Gorenstein also turned down Old Navy's argument that Harris lacked standing because the class she seeks to represent would include workers the company employed starting in 2015 — when she was not yet working at Old Navy — saying that argument would be more suitable at the class certification stage.

Additionally, Judge Gorenstein rejected Old Navy's argument that Harris does not have a private right of action under New York Labor Law Section 191 because that section applies to employees working for insolvent or unstable employers.

"While the statute permits the Department of Labor to exempt solvent employers," Judge Gorenstein said, "the overarching purpose of the statute is to protect manual workers, not to give solvent employers an exemption from weekly payments."

"Plaintiff here alleges she was a manual worker and the complaint is devoid of allegations regarding the solvency of Old Navy," Judge Gorenstein said.

Representatives of Harris did not immediately respond to requests for comment.

Ira G. Rosenstein of [Morgan Lewis & Bockius LLP](), who is representing Old Navy, declined to comment.

Harris is represented by Brian S. Schaffer and Dana M. Cimera of [Fitapelli & Schaffer LLP]().

Old Navy is represented by Ira G. Rosenstein, Nicole M. Zito and Elisa C. Egonu of Morgan Lewis & Bockius LLP.

The case is Harris v. Old Navy LLC, case number 1:21-cv-09946, in the U.S. District Court for the Southern District of New York.

--Editing by Khalid Adad.