

03-7666

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

EVELYN COKE

Plaintiff-Appellant,

v.

LONG ISLAND CARE AT HOME, LTD.,
and
Maryann Osborne,

Defendants-Appellees.

On Appeal from the Judgment of the United States District Court
for the Eastern District of New York, the Honorable Thomas C. Platt, District Judge

**BRIEF *AMICUS CURIAE* OF AARP
IN SUPPORT OF PLAINTIFF-APPELLANT**

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CORPORATE DISCLOSURE STATEMENTS OF *AMICUS CURIAE*

Pursuant to Fed. R. Civ. P. 26.1, *amicus curiae* AARP states the following:

AARP is a not-for-profit corporation with no parent companies, and which issues no stock. Therefore no publicly-held company has a 10% or greater interest in AARP. AARP provides information and resources, and advocates on legislative, consumer and legal issues. Through a wholly-owned subsidiary, AARP Services, Inc., AARP makes available products and services from third party providers to its members, including long-term care insurance.

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STATEMENT OF INTEREST

AARP is a nonpartisan nonprofit membership organization of more than thirty-six million persons aged fifty and older dedicated to addressing the needs and interests of older Americans. Approximately 2.6 million members live in the State of New York. Most older and disabled persons in need of long term care and/or supportive services prefer to receive these services in their own home. Mary Jo Gibson, *Beyond 50.03: A Report to the Nation on Independent Living and Disability*, AARP Public Policy Institute, at 146 (April 2003). AARP thus has a substantial interest in securing quality home care for its members and others. AARP filed an *amici curiae* brief in the case of *Olmstead v. L.C.*, 527 U.S. 581 (1999), urging the Supreme Court to reach the decision it ultimately adopted - that unnecessary institutionalization amounts to discrimination under the American with Disabilities Act (ADA) and that states must create and implement comprehensive, effective, working plans to serve persons in home and community-based settings rather than in institutions. AARP Foundation Litigation (AFL) attorneys have subsequently been involved in litigation aimed at implementing the *Olmstead* decision. See e.g., *Davis v. California*, C.A. C-00-2532 (N.D. Cal. filed July 13, 2000)(advocating for the expansion of home and community-based care HCBS.)

AARP is acutely aware of the shortage of home care workers who are essential to providing home care, and the need to improve the wages and benefits received by direct care workers to help ensure their availability and quality of care. To that end, AFL is co-counsel in *Ball v. Biedess*, Civ. 00-0067-TUC-EHC (U.S.D.C. Arizona)(elderly and disabled in Medicaid HCBS program forced to go without necessary care due to shortage of home health care workers caused in part by wages too low to recruit and retain sufficient numbers of home care workers.) AARP is authorized to file this brief under Fed. R. App. P. 29(a), as all parties have consented to its filing.

ARGUMENT

INTRODUCTION

The Supreme Court remanded this case to this Court for reconsideration in light of the Department of Labor Wage and Hour Advisory Memorandum.¹ AARP files this brief in order to address the suggestion in the Memorandum that the interests of consumers of home care services are served by application of the third party regulation. Based on extensive experience with federal and state programs that finance much of the provision of home care services through third party agencies, AARP believes that relieving such agencies of the minimum requirements of the FLSA will not serve, but rather will compromise the interests of both older and disabled consumers. We explain why by describing home care workers, the critical and growing need for such workers, and the current, and even greater projected, shortage of these workers.

¹Wage and Hour Advisory Memorandum No. 2005-1, from Alfred B. Robinson, Deputy Administrator, Dep't of Labor to Regional Administrators, District Directors (December 1, 2005) (hereinafter *DOL Memorandum*).

I. Home Care Workers, Who Are Predominantly Women Supporting Children, Perform Difficult Critically Needed Jobs For Low Pay and Limited or No Benefits.

Direct care workers, including those who work in private homes, are the paraprofessionals who provide the bulk of paid long-term care. Bernadette Wright, *Direct Care Workers in Long Term Care*, AARP Public Policy Institute (May 2005) (hereinafter *Direct Care Workers*). They carry a variety of job titles are applied, including personal care assistants, home care aides, home health aides, and certified nursing assistants (CNAs). *Id.* They work in diverse settings, including private homes, adult day centers, assisted living residences and other residential care settings, and nursing homes. *Id.* More than a million direct care workers in the United States work in these various settings at jobs that may include: assisting with personal care activities; providing oversight for people with cognitive and mental impairments; observing and reporting changes in a client's condition; administering medications and measuring vital signs; preparing meals and housekeeping; and providing comfort and companionship. *Id.*

In comparison to the general workforce, home care workers are more likely women, non-white and unmarried with children. *Id.* Most choose direct care work because they want to help people and are interested in working in health care. *Id.* They are often low paid. For example, the national median hourly wage is \$8.05 for personal and home care aides, compared to \$13.75 for all other occupations. *Id.* Thus annual wages for full-time work range from \$16,750 to \$20,260. *Id.* One out of seven low-income workers in the New York City Region is a home or community-based direct care worker similar to the plaintiff.²

Beyond low pay, direct care workers often have no benefits, high workloads, unsafe working conditions, inadequate training, lack of respect from supervisors, lack of control over their jobs and few opportunities for advancement. *Direct Care Workers*. All these factors contribute to a very high turnover rate. *Id.* The Department of Labor notes that turnover among personal and homecare home care aides is high due to low pay and high emotional demands of the job. See Dep't of Labor, *Occupational Outlook Handbook*, Bulletin 2600 (2006-07), available at <http://www.bls.gov/oco/> (hereinafter *Occupational Outlook Handbook*).

II. The Country Faces A Severe and Increasing Shortage of Homecare Home Care Workers and Decent Wages Are Critical to Ensure Workers Will Be Available to Provide Care.

²Dorie Seavey, *Engaging the Public Workforce Development System: Strategies for Investing in the Direct Care Workforce*, Better Jobs, Better Care, Issue Brief (January, 2006), <http://www.cael.org/newsroom/BJBCIssueBriefWFI0106.pdf>.

The consequences of chronic low pay for home care and other direct care workers are well known. Most states across the country report shortages of direct care workers and, high turnover rates, lack of qualified staff, and difficulty retaining workers.³ The extremely high turn-over rates in home care agencies, averaging 40 to 50 percent on an annual basis,⁴ are a product of poor job quality. “Better Jobs Better Care: Retaining Long-Term Care Workers”, The Nat’l Conference of State Legislatures, *State Health Notes*, Vol. 25, #419 (Apr. 19, 2004); Erin Hattan and Laura Dresser, *Caring About Caregivers: Reducing Turnover of Frontline Health Care Workers in South Central Wisconsin*, The Center on Wisconsin Strategy, University of Wisconsin-Madison (Oct. 2003). Specifically, these jobs pay low wages, lack access to affordable benefits, offer minimal training, and often provide erratic, part-time work. Steve Dawson and Rick Surpin, *Direct-Care Health Workers: The Unnecessary Crisis in Long-Term Care*, The Aspen Institute, (May 2001); *A Preventable Labor Crisis in Long-Term Care*, Paraprofessional Healthcare Institute, <http://www.directcarealliance.org/sections/pubs/preventable2.htm> (last visited June 6, 2006).

Inadequate wages causes workforce instability which in turn can cause service delivery disruption or failures endangering older and disabled persons’ ability to remain in their homes. See, Order of August 13, 2004, *Ball v. Biedess*, Civ. 00-0067-TUC-EHC (U.S.D.C. AZ 2004) (failure of services to meet the needs of elderly and disabled Medicaid beneficiaries caused by inadequate wages of home care workers).

There is an ongoing shift occurring in long term care financing away from institutional care to home and community-based HCBS care. Congress sought such an end in passing the ADA, and the Supreme Court in *Olmstead* affirmed the illegality of unnecessary institutionalization. *Olmstead* and subsequent cases have moved state Medicaid programs away from the bias toward nursing home care and toward more home and community-based HCBS care.⁵ Consequently the need for home care workers has expanded. Between 2002 and 2012, the number of direct care jobs will increase at a much higher rate than employment in the overall labor market. *Direct Care Workers*.⁶ Demand is expected to be especially high for home care and community-based workers because of consumer preferences for and increased public

³Dorie Seavey and Vera Salter, Forthcoming Article, *How States are Assuring Quality Personal Care Services by Providing Adequate Wages to Direct Care Workers*, AARP Policy Institute, Draft 5-12-06 (2006) (citing the National Clearinghouse on Direct Care Workforce and The Direct Care Workers Association of North Carolina, *Results of the 2005 (sic) 2004 National Survey of State Initiatives on the Long-Term Care Direct Care Workforce*, September, 2005).

⁴New York State Register, *Revised Rulemaking, Department of Health, Criminal History Record Check of Certain Non-Licensed Nursing Home and Home Care Staff* (October 27, 2004), www.dos.state.ny.us/info/register/2004/oct27/pdfs/rules.pdf.

⁵Sara Rosenbaum and Joel Teitelbaum, *Olmstead at Five: Assessing the Impact*, Kaiser Family Foundation (2004), <http://www.kff.org/medicaid/upload/Olmstead-at-Five-Assessing-the-Impact.pdf>.

⁶See *Occupational Outlook Handbook*; D.E. Hecker, *Occupational Employment Projections to 2012*, Monthly Labor Review (Feb. 2004); Nat’l Clearinghouse on the Direct Care Workforce, *Who Are Direct Care Workers?*, Fact sheet (Sept. 2004).

funding. *Id.*⁷ Considering, all these factors, the demand for home care workers is projected to significantly rise. *Occupational Outlook Handbook*.

⁷See *Occupational Outlook Handbook*; Rosenbaum and Teitelbaum, *supra* note 5.

The gap between the supply of, and demand for, home care and other direct workers will likely increase as the population ages.⁸ Between 2000 and 2030, the U.S. population age 85 and older - those most likely to need personal care services - is projected to more than double, from 4.3 million to 8.9 million.⁹ Meanwhile, the traditional care giving population - women age 20-54 - is projected to increase by just nine percent during this time. *Id.* The situation in New York State illustrates the problems created by increased demand for home based care. The New York State Department of Labor estimates that by 2012, the number of personal and home care aides needed by the metropolitan New York area will increase by 31%, requiring a minimum of 16,300 additional personal and home care workers to meet expected demand.¹⁰

Given the dynamics of the workforce - high turnover, low wages and few, if any, benefits - as well as the waning numbers of individuals in the care-giving demographic, it is becoming harder for consumers to access care. This "Care Gap" will continue to grow until the quality of direct care jobs improve. Steve Dawson and Rick Surpin, *Direct-Care Health Workers: The Unnecessary Crisis in Long-Term Care*, The Aspen Institute (May 2001); *A Preventable Labor Crisis in Long-Term Care*, Paraprofessional Healthcare Institute. The lack of FLSA protection directly contributes to turnover, which affects both the ability of consumers to remain at home and the quality of care that consumers receive. See Robyn Stone, *The Direct Care Worker: A Key Dimension of Home Care Policy*, 16 Home Health Care Mgmt. and Practice 5, 339 (2004); *Caregivers Without Coverage: The Facts About a Critical Gap in Long-Term Care*, Health Care for Health Care Workers, Paraprofessional Healthcare Institute (Jan. 2006), available at <http://www.directcareclearinghouse.org/download/PHI-191%20PolicyBrief1Final.1.pdf>.

⁸Nora Super, *Who Will Be There to Care? The Growing Gap between Caregiver Supply and Demand*, The George Washington University (2002).

⁹*Nursing Workforce: Recruitment and Retention of Nurses and Nurse Aids Is a Growing Concern, Testimony Before the S. Comm. on Health, Education, Labor and Pensions*, 107th Cong. (2001) (statement of William J. Scanlon, Director, Health Care Issues, GAO).

¹⁰New York State Dep't of Labor, Workforce and Industry Data, Occupational Projections, <http://www.labor.state.ny.us/workforceindustrydata/apps.asp?reg=nyc&app=fastest> (last visited June 6, 2006).

Numerous states, localities and advocates have employed various strategies to specifically improve the wages rates and benefits of direct care workers delivering services paid for by Medicaid.¹¹ These strategies include wage pass through legislation¹² and living wage ordinance,¹³ minimum wage improvements,¹⁴ and litigation against state Medicaid agencies. While some of these strategies have been helpful, the effort continues to sufficiently improve wages and benefits to attract and retain direct care workers. Congress's intent in enacting the Perpetuating the "Care Gap" is not what Congress desired when it enacted the FLSA and the 1974 amendments was to promote fair working conditions for workers and this salutary effect will not be felt by home care HCBS workers if they are deprived of the Act's protections. This and it will not serve the workers or the interests of older and disabled Americans.

III. The Denial of FLSA Protection to Homecare Home Care Workers Employed by Third Parties Would Impede Access to Home Care for Older and Disabled Persons.

The DOL Memorandum states that one of the purposes of the 1974 FLSA amendments was to ensure that working families could find home care for older and disabled person in their households. *DOL Memorandum*. (Cite) However, exclusion of direct care workers, employed by third parties, who are providing services to older and disabled persons in their homes will only help to perpetuate the already existing shortage of these workers.

When Congress enacted the companionship exemption professionalized home care was a very young industry, see Molly Biklen, Note, *Healthcare in the Home: Reexamining the Companionship Services Exemption to the Fair Labor Standards Act*, 35 Colum. Hum. Rts. L. Rev., Fall 2003, 113 at 123-125, and Congress intended to exempt only casual sitters, for the elderly or children. See 119 Cong. Rec. 24801 (daily ed. July 19, 1973) (statement of Sen. Williams) (describing a babysitter's job as "to watch the youngsters," and the companion's job as "the same role- to be there and to watch an older person."). As this Court notes in its July 2004 decision, when DOL proposed amendments in 2001 it recognized the changing nature of the industry and the services needed to maintain people in their homes and communities:

Due to significant changes in the home care industry over the last 25 years, workers who today provide in-home care to individuals needing assistance with activities of daily living are performing types of duties and working in situations that were

¹¹Dorie Seavey and Vera Salter, Forthcoming Article, *How States are Assuring Quality Personal Care Services by Providing Adequate Wages to Direct Care Workers*, AARP Policy Institute, Draft 5-12-06 (2006).

¹²Legislation that earmarks appropriations to go directly to specific groups of direct care workers. Seavey and Salter, *supra* note 11, at ii.

¹³Sets a wage floor for a specific group of workers; generally requiring wages needed to support a family at a level above the poverty line. Seavey and Salter, *supra* note 11, at iii.

¹⁴Establishes a wage floor for all businesses and workers in a given city, state, or country. Seavey and Salter, *supra* note 11, at iii.

not envisioned when the companionship services regulations were promulgated. (Application of Fair Labor Standards Act to Domestic Service, 66 Fed. Reg. 5481, 5482, proposed Jan. 19, 2001) *Coke v. Long Island Care at Home*, 376 F.3d 118, 124 (2d Cir. 2004).

Professional home care workers like Ms. Coke, employed by third party agencies like Long Island Care at Home, CHCA were not intended to be exempt from the basic FLSA protections and should not be.

CONCLUSION

This Court should reaffirm its decision that these workers are clearly part of the workforce entitled to coverage by the FLSA and recognize the rights of this critically needed workforce.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because brief contains 2616 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Pursuant to the Court's Order of April 7, 2006 requiring the supplemental briefs not exceed ten single-spaced pages, the *amicus* brief does not exceed five single-spaced pages.

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CORRECTED CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief *Amicus Curiae* in Support of Plaintiff-Appellant was served on June 9, 2006, via Federal Express, upon counsel listed below:

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