

HOLDING 3 C.M.C. § 4434 (f)

FILED
Clerk
District Court

MAR 31 1992

For The Northern Mariana Islands
By [Signature]
(Deputy Clerk)

FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

7	YANG BI KEI, et al.,)	Civil No. 91-0025 ✓
8	Plaintiffs,)	Civil No. 91-0026
9	v.)	
10	AMERICAN INTERNATIONAL)	DECISION AND ORDER
11	KNITTERS CORPORATION, et al.,)	DENYING ALTERNATIVE
12	Defendants.)	MOTION TO DISMISS
<hr/>			
13	HUANG YU CYI, et al.,)	
14	Plaintiffs,)	
15	v.)	
16	AMERICAN INVESTMENT)	
17	CORPORATION, et al.,)	
18	Defendants.)	

THIS MATTER came before the Court for consideration of Defendants' alternative motion to dismiss the pendent claims under Commonwealth of the Northern Mariana Islands (CNMI) law for failure to exhaust administrative remedies. The administrative remedies at issue provide reduced judicial access to nonimmigrant alien workers alleging wage and labor violations. Plaintiffs Yang and Huang et al. (collectively

1 "Yang") were represented by Mr. Joe Hill of Hill & Sawhney.
2 Defendants American International Knitters Corporation, et al.
3 and American Investment Corporation, et al. (collectively
4 "AIKC") were represented by Mr. Robert O'Connor. Amicus curiae
5 CNMI Attorney General Robert C. Naraja ("CNMI AG") was
6 represented by CNMI Assistant Attorney General James B. Parsons.

7 AIKC's original motion to dismiss this case, heard on
8 Saturday, September 7, 1991, was denied on September 10, 1991
9 because the written "consent to sue" requirement of the Fair
10 Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. applies
11 only to plaintiffs who are acting in a representative capacity.¹
12 However, as to AIKC's concurrent alternative motion to dismiss
13 the CNMI pendent claims, the Court ordered additional written
14 briefing by October 1991 concerning the constitutionality of the
15 CNMI statute establishing the administrative remedies that Yang
16 failed to exhaust.

17 Because the statute unconstitutionally denies equal
18 protection to nonimmigrant alien workers by restricting their
19 access to the courts, AIKC's alternative motion to dismiss
20 pendent claims for failure to exhaust administrative remedies on
21 the basis of that statute is DENIED.

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25 ¹The pertinent portion of the Decision and Order is attached
26 as an appendix. Yang v. American Int'l Knitters Corp., Civil No.
91-0025, Order at 2-5 (D. N. Mar. I. Sept. 10, 1991).

1 I. EXHAUSTION OF REMEDIES STATUTE

2 The Commonwealth Code, at 3 CMC § 4434(f) (Supp. 1990),
3 expressly requires so called "nonresident" nonimmigrant alien
4 workers to exhaust administrative remedies before bringing suit
5 in the CNMI Superior Court for violations of the CNMI Minimum
6 Wage and Hour Act, 4 CMC § 9211 et seq. (1984) or CNMI
7 Nonresident Workers Act, 3 CMC § 4411 et seq. (Supp. 1988), such
8 as the pendent claims in this case. 3 CMC § 4434(f) provides:

9 Notwithstanding 1 CMC § 9112 [(1984) providing
10 judicial review of contested administrative cases], no
11 civil action may be brought by a nonresident worker after
12 the effective date of this Act against an employer for
13 violation of the Minimum Wage and Hour Act (4 CMC § 9211
14 et seq.) and/or the Nonresident Workers Act (3 CMC § 4411
15 et seq.) unless the nonresident worker has first filed a
16 written complaint concerning those violations with the
17 Chief of Labor no later than 30 days after the violation
18 is alleged to have occurred. Said civil action, if any,
19 shall be commenced in any court only after the Director or
20 his designee, after a hearing, has issued a decision on
21 the complaint favorable to the nonresident worker and the
22 employer fails or refuses to pay any assessment made by
23 the Director within ten days after receiving notification
24 of the Director's decision, the entire sum of money that
25 the decision says is owed by the employer to the employee.
26 Such payment shall be made through the Director.

3 CMC § 4434(f) (Supp. 1990). Yang has raised an equal
protection challenge to this statute under the federal and CNMI
constitutions, among other grounds.² The Fourteenth Amendment
applies to the CNMI. Covenant to Establish a Commonwealth of

²In view of this court's holding that denying judicial access and imposing different statutes of limitations on nonimmigrant workers for wage and hour claims violates equal protection, it is unnecessary to consider whether such denial, and the thirty day limitation period for filing claims, also violates due process.

1 the Northern Mariana Islands in Political Union with the United
2 States of America (Covenant) § 501, Act of Mar. 24, 1976,
3 Pub. L. 94-241, 90 Stat. 263, as amended by Pub. L. 98-213, §9,
4 97 Stat. 1461, Pub. L. 99-396, §10, 100 Stat. 840, reprinted in
5 48 U.S.C. § 1681 (1988) statutory note at 209, 211 and CMC at B-
6 101, B-107. Unlike nonimmigrant workers, U.S. citizens and
7 permanent residents are not subject to the above-quoted
8 administrative scheme, and may bring suit for minimum wage and
9 hour violations directly, 4 CMC § 9244(a) (1984), for up to six
10 years after the violations. 7 CMC § 2505 (1984).

11 AIKC (along with the CNMI AG) argues that this distinction
12 between nonimmigrant workers versus U.S. citizens and permanent
13 resident aliens is constitutionally valid as part of an
14 elaborate plan dealing with immigration and the protection of
15 nonimmigrant alien workers. Yang's counsel submitted as an
16 exhibit to an earlier opposition to a motion several letters to
17 the CNMI Department of Labor ("Labor") listing cases
18 experiencing long delays and backlogs in the administrative
19 process, in excess of the statutory thirty days for Labor to
20 make a written determination after a worker files a complaint
21 for breach of employment contract, 3 CMC § 4447(b) (Supp. 1988),
22 or ten days after concluding a hearing following a Notice of
23 Violation, 3 CMC § 4444(d) (Supp. 1988). Nevertheless, AIKC and
24 the CNMI AG argue that the exhaustion of remedies statute serves
25 to expedite claims and is actually a benefit, not a harm, to
26 nonimmigrant alien workers. Under this theory the aliens, whose

1 labor contracts are typically for a one year period, receive
2 "prompt" resolution of their claims, assuming the aliens file
3 claims within thirty days, rather than having to try to litigate
4 their claims after having been forced to leave the island upon
5 expiration of their contracts. In that regard, 3 CMC § 4434(g)
6 (Supp. 1990) provides:

7 A nonresident worker who has left his or her
8 employment[,] whose contract of employment has expired, or
9 who is no longer employed by the employer approved by the
10 Chief, shall not be permitted to remain in the
11 Commonwealth. Except that, a nonresident worker shall be
12 allowed to remain in the Commonwealth for a period not to
13 exceed 20 days in order to pursue a civil action against
14 his or her employer for a breach of their [sic] employment
15 contract, other civil or criminal claims, or to pursue
16 violations of any Commonwealth or federal labor law.
17 Provided, however, for a claim made against an employer
18 for failure to pay the contract wages, a nonresident
19 worker shall only be allowed to remain in the Commonwealth
20 for a period of 30 days in order to pursue such action
21 where a timely claim is made for failure to pay the
22 contract wages and where the employer fails or refuses to
23 pay the full sum of money as ordered by the Director
24 within the ten day period provided by this section. A
25 nonresident worker who has left the Commonwealth shall be
26 allowed to return no sooner than five days before their
[sic] scheduled trial date in the Commonwealth Superior
Court or federal court. Such person will be required to
exit the Commonwealth within three days after the
termination of the trial, or any continuances thereof.

20 Id. Because a challenge to this subsection is not yet ripe in
21 this case and has not been made, the Court expresses no opinion
22 as to its constitutionality. Cf. Office of the Attorney General
23 and the Office of Immigration and Naturalization of the
24 Commonwealth of the Northern Mariana Islands v. Jimenez,
25 3 Comm.Rptr. 828, 831-32 (D. N. Mar. I. App. Div. 1989) (no
26 standing to challenge if no lawsuit filed).

1 The CNMI AG contends without citing authority that the
2 quoted subsection (g) precludes an alien's deportation until
3 Labor has concluded an investigation and issued a report.
4 Amicus Memorandum at 14. Prior to expiration of their
5 contracts, the aliens are protected from summary deportation
6 upon termination of employment by the requirement of a hearing
7 prior to cancellation of their labor certificates. 3 CMC
8 § 4444(e) (Supp. 1988); Jimenez, 3 Comm.Rptr. at 835-38. No
9 case law has been cited interpreting subsection (g) to preclude
10 deportation until Labor has acted, subsequent to expiration of
11 aliens' contracts, but such a reading seems reasonable and may
12 well represent the policy of the CNMI AG. Nevertheless, as
13 analyzed in Part III below, this separate protection against
14 abrupt deportation does not save 3 CMC § 4434(f) nor provide a
15 rational basis for denying these aliens access to the courts on
16 their minimum wage and hour claims. By its terms the provisions
17 of the CNMI Nonresident Workers Act are severable, CNMI Pub. L.
18 3-66, § 21, and the Court will consider 3 CMC § 4434(f) singly
19 on its merits, albeit in the context of the entire Act.

20 Prior to discussing the immigration power of the CNMI and
21 the lack of a rational basis for the statute which would justify
22 the denial of equal protection, it is appropriate to consider a
23 term used unquestioningly by all the parties, and in the
24 exhaustion of remedies statute itself: "nonresident worker."
25 These aliens are indeed nonresidents before their first arrival
26 in the CNMI. They come here for a fixed contract term after

1 which they must return home. They are not immigrants, who by
2 definition would enter and "permanently settle" in the CNMI.
3 Black's Law Dictionary 676 (5th ed. 1979); Cf. 8 U.S.C.A.
4 § 1101(a)(15) (West 1970 & Supp. 1991) (federal categories of
5 nonimmigrants); 8 U.S.C.A. § 1101(a)(15)(H)(ii)(b) (West Supp.
6 1991) (nonimmigrants include aliens who "perform other temporary
7 service or labor if unemployed persons capable of performing
8 such service or labor cannot be found in this country"). But
9 once they arrive, although their domiciles remain in their
10 homelands, the alien laborers do physically reside in the CNMI
11 for the length of their contracts.³

12 For clarity, this decision refers to people such as the
13 non-domiciliary plaintiffs as "nonimmigrant workers,"
14 "nonimmigrant alien workers," or "resident aliens" rather than
15 "nonresident workers," notwithstanding the definition contained
16 in the Nonresident Workers Act:

17 "Nonresident worker" means any available individual who is
18 at least 18 years old and who is capable of performing
19 services or labor desired by an employer and who is not a
20 resident worker. Nonresident worker shall not include any
immediate relative, spouse or children including adopted
children of a U.S. citizen or any foreign investor.

21 3 CMC § 4412(i) (Supp. 1988). In turn, the definition of a
22 "resident worker" is:

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24 ³One year terms are sometimes extended repeatedly, and while
25 they live in the CNMI as "nonresidents," any of their children
26 born here are U.S. citizens. Covenant § 303. These nonimmigrants
must obey all local laws, share equal tax burdens, and make
substantial contributions to the community.

1 "Resident worker" means any available individual who is
2 capable of performing services or labor desired by an
3 employer, and who is a citizen or national of the United
4 States as defined in the Constitution of the Northern
5 Mariana Islands or who has been granted national or
6 citizenship status pursuant to Commonwealth law or who is
7 legally residing without restrictions as to employment in
8 the Commonwealth.

9 3 CMC § 4412(n) (Supp. 1988). In other words, the operative
10 difference in the definitions of "nonresident" and "resident"
11 workers lies not in where they reside, but in their citizenship
12 or alien's legal residence status for immigration purposes.

13 Defining something by another name does not make it so.
14 Yang is a resident alien living on Saipan. The confusion
15 generated by the misnomer "nonresident" is highlighted by the
16 cases permitting unequal treatment against true nonresidents
17 cited by AIKC and the CNMI AG, which are not apposite here.
18 Barclay & Co., Inc. v. Edwards, 267 U.S. 442, 449-50, 45 S.Ct.
19 348, 349, 67 L.Ed. 703, 705 (1925) (lower federal tax burden for
20 foreign corporations); Alexander Ranch, Inc. v. Central
21 Appraisal Dist., 733 S.W.2d 303 (Tex.App. 1987) (corporation
22 controlled by nonresident aliens ineligible for reappraisal of
23 land as open space); Lehndorff Geneva, Inc. v. Warren,
24 246 N.W.2d 815 (Wis. 1974) (land in excess of one square mile
25 optioned to West German owned corporation subject to state
26 forfeiture); United States v. Tsuda Maru, 479 F.Supp. 519 (D.
Alaska 1979) (federal government may prohibit foreign fishing
vessels).

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1 The attempt by AIKC and the CNMI AG to distinguish leading
2 Supreme Court cases, see Graham v. Richardson, 403 U.S. 365,
3 371, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534, 541 (1971) (states may
4 not refuse welfare benefits based upon alienage); Takahashi v.
5 Fish & Game Comm'n, 334 U.S. 410, 419-20, 68 S.Ct. 1138, 1142-
6 43, 92 L.Ed. 1478, 1487 (1948) (alien entitled to state
7 commercial fishing license), on the ground that those cases
8 refer to resident aliens rather than "nonresident aliens" is
9 incorrect. The nonimmigrant worker plaintiffs are resident
10 aliens.

11 12 **II. IMMIGRATION POWER OF THE CNMI**

13 Unlike any of the several States, Territories, or
14 Commonwealths, Congress has granted the CNMI authority over its
15 own immigration. Covenant § 503(a), reprinted in 48 U.S.C.
16 § 1681 (1988) statutory note at 209, 211 and CMC at B-101, B-
17 107. See Tran v. Northern Mariana Islands, 780 F.Supp. 709 (D.
18 N. Mar. I. 1991).

19 The federal government's exercise of its immigration
20 authority is subject only to "narrow judicial review."
21 Fiallo v. Bell, 430 U.S. 787, 792, 97 S.Ct. 1473, 1478,
22 52 L.Ed.2d 50, 56 (1977) (upheld exclusion of father-
23 illegitimate child relationship from immigration
24 preferences); Mathews v. Diaz, 426 U.S. 67, 81-82,
25 96 S.Ct. 1883, 1892, 48 L.Ed.2d 478, 490-91 (1976) (upheld
26 federal five year residency requirement for aliens'
Medicare eligibility). "[O]ver no conceivable subject is
the legislative power of Congress more complete than it is
over" the admission of aliens. Oceanic Steam Navigation
Co. v. Stranahan, 214 U.S. 320, 339, 29 S.Ct. 671, 1676,
53 L.Ed.2d 1013, 1022 (1909) (upheld civil fine for
transporting immigrants with contagious disease) quoted in
Fiallo, 430 U.S. at 792, 97 S.Ct. at 1478, 52 L.Ed.2d at
56.

1 Tran, 780 F.Supp. at 713.

2 The CNMI AG and AIKC urge application of the same
3 deferential rational basis scrutiny for equal protection
4 challenges to CNMI laws dealing with immigration as courts apply
5 to federal immigration laws. Yang argues that intermediate
6 scrutiny is required, citing Sirilan v. Castro, 1 Comm.Rptr.
7 1082, 1118-19, 1125, 1130 (D. N. Mar. I. App. Div. 1984).
8 Sirilan involved a due process and equal protection challenge to
9 the termination of the CNMI's permanent resident program. Like
10 this case, it involved distinctions between aliens,
11 specifically, whether they had lived in the CNMI for five years
12 and submitted their paperwork prior to the termination of the
13 program. In Sirilan the former Appellate Division of this
14 Court, acting as a local appellate court pursuant to 48 U.S.C.
15 §1694b (1982), imposed intermediate scrutiny under the CNMI
16 Constitution. Sirilan, 1 Comm.Rptr. at 1118-19, 1125, 1130.

17 However, this Court on one occasion followed Sirilan and
18 applied intermediate scrutiny under the U.S. Constitution, not
19 the CNMI Constitution. Chun Nam Kin v. Northern Mariana
20 Islands, 3 Comm.Rptr. 608, 612 (D. N. Mar. I. 1989). Because of
21 the egregious facts in Chun, this Court did not find it
22 necessary to discuss its reasoning for selecting the standard of
23 review, as the statute would have been equally unconstitutional
24 under more deferential scrutiny. Tran, 780 F.Supp. at 713-14.
25 Here, as in Chun, the statute fails both standards of review,
26 including rational basis scrutiny as indicated below.

1 **III. LACK OF RATIONAL BASIS FOR STATUTE**

2 Yang challenges only a single subsection of the CNMI
3 Nonresident Workers Act, which denies the nonimmigrant alien
4 workers court access for their claims. 3 CMC § 4434(f). While
5 the Court will certainly evaluate the rationality of
6 subsection (f) in the context of the entire Act, if the
7 provision violates equal protection, the soundness of the
8 remainder of the Act will not save it. Thus, the determinative
9 issue is whether there is a rational basis for denying equal
10 access to the courts.

11 The CNMI AG argues that equal access to the courts has
12 never been a universal right of aliens. However, his two
13 examples fail to support such a sweeping statement. 28 U.S.C.
14 § 2502 (1988) provides that in the U.S. Claims Court, aliens may
15 sue the federal government only if the foreign government of
16 which they are citizens permits similar suits against it by U.S.
17 citizens. 28 U.S.C. § 1391(d) (1988) states that venue is
18 proper for suit against an alien in any of the 94 U.S. district
19 courts. Neither statute derogates aliens' equal access to the
20 courts.

21 In fact, although permissible distinctions may be made
22 between citizens and aliens or among aliens, Mathews, 426 U.S.
23 at 78 n.12, 96 S.Ct. at 1890 n.12, 48 L.Ed.2d at 489 n.12, equal
24 access to a court of law has been a part of our tradition since
25 the ratification of the Fourteenth Amendment. The Civil Rights
26 Act of 1866, Act of Apr. 9, 1866, c. 31, § 1, 14 Stat. 27, as

1 amended by The Voting Rights Act of 1870, Act of May. 31, 1870,
2 c. 114, § 16, 16 Stat. 144, provides:

3 All persons within the jurisdiction of the United States
4 shall have the same right in every State and Territory to
5 make and enforce contracts, to sue, be parties, give
6 evidence, and to the full and equal benefit of all laws
7 and proceedings for the security of persons and property
8 as is enjoyed by white citizens, and shall be subject to
9 like punishment, pains, penalties, taxes, licenses, and
10 exactions of every kind, and to no other.

11 42 U.S.C. § 1981 (1988) (emphasis added). This statute could
12 not be more clear, and formerly was codified in Title 8, United
13 States Code, Aliens and Nationality, at 8 U.S.C. § 41 (1946).

14 "All persons," within the meaning of section 1981, protects
15 aliens against discrimination by a state, Graham, 403 U.S. 365;
16 Takahashi, 334 U.S. 410, although not, perhaps, against private
17 discrimination. Bhandari v. First Nat'l Bank of Commerce,
18 829 F.2d 1343 (5th Cir. 1987) (en banc). A nonimmigrant alien
19 is undoubtedly a "person" within the meaning of the equal
20 protection clause. Yick Wo v. Hopkins, 118 U.S. 356, 369,
21 6 S.Ct. 1064, 1070, 30 L.Ed. 220, 226 (1886); Plyler, 457 U.S.
22 at 210, 102 S.Ct. at 2391, 72 L.Ed.2d at 791 (1982).

23 The CNMI has control over its own immigration and has
24 greater latitude than a state has in regulating aliens, as does
25 Congress. However, the asserted unimportance of the right to
26 sue or the equivalence of administrative measures are not
rational bases for dispensing with this right. Indeed, the
right to judicial access is so fundamental that in almost any

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1 circumstance other than immigration, its denial based on
2 alienage would evoke strict scrutiny.

3 The fact that there is an elaborate system pertaining to
4 alien laborers does not make this particular subsection
5 rational. If subsection (f) is struck down, the remainder of
6 the Act will continue in full force and effect. CNMI Pub. L. 3-
7 66, § 21. A review of the entire Act does not disclose that its
8 effectiveness rests upon barring the courthouse door to
9 nonimmigrant alien workers.

10 The strongest argument suggested by the CNMI and AIKC as a
11 rational basis for the provision is efficiency. Under this
12 reasoning, there is a rational relationship between the
13 administrative scheme and the CNMI's valid interest in prompt,
14 fair settlement of resident aliens' labor claims. However,
15 subsection (f) is both overbroad and under-inclusive in
16 attaining these goals, which do not logically flow from the
17 restriction in question. While claiming to protect the resident
18 aliens from the burden of having to prosecute litigation in
19 absentia, the CNMI shoots a fly with a cannon and denies their
20 day in court altogether. On the other hand, if the
21 administrative scheme as a substitute or prerequisite to filing
22 suit is as salutary as claimed, there is no legitimate reason to
23 exclude citizens from its scope.

24 Yet the number of complaints filed by alien laborers
25 apparently dwarfs those filed by citizens. Whether this
26 represents widespread abuse of and discrimination against

1 nonimmigrant alien workers by employers or the workers' cynical
2 attempts to prolong their stays in the CNMI, the wage claim
3 resolution system seems overloaded. Restricting lawsuits would
4 thus be a measure to conserve CNMI administrative and judicial
5 resources. The CNMI Superior Court, or the U.S. District Court
6 in diversity cases alleging over \$50,000 in controversy⁴ or
7 alleging a federal question in any amount,⁵ could be overwhelmed
8 by labor cases. However, the solution to injustice lies not in
9 abandoning the efforts to achieve right, but in devoting
10 adequate enforcement and judicial resources to accomplish the
11 job.

12 No rational basis has been advanced for abrogating the
13 right of access to the courts by nonimmigrant alien workers.

15 CONCLUSION

16 3 CMC § 4434(f) denies nonimmigrant workers their equal
17 protection right to sue for wage and hour violations. Because
18 the CNMI has almost plenary authority over immigration under
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20 ⁴28 U.S.C. § 1332(a) (1988); 48 U.S.C. § 1694a(a) (1988),
21 Act of Oct. 5, 1984, Pub. L. No. 98-454, § 902, 98 Stat. 1744;
22 See H. Rep. No. 784, 98th Cong., 2nd Sess., reprinted in 1984 U.S.
23 Code Cong. & Admin. News 2908 (excluding relevant pages).
24 Previously, there was no minimum amount in controversy required.
25 48 U.S.C. § 1694a(a) (1982), Act of Nov. 8, 1977, Pub. L. No. 95-
26 157, § 2(a), 91 Stat. 1266; See S. Rep. No. 475, 95th Cong., 1st
Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 3307. The
original version of 48 U.S.C. § 1694a(a) implemented Covenant
§ 402(a), which has been superseded by the 1984 statutory
amendment pursuant to Covenant § 105.

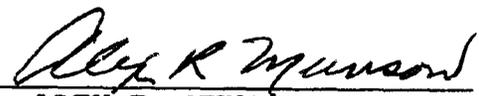
⁵28 U.S.C. § 1331 (1988)

1 Covenant § 503(a), it has broad powers to enact laws concerning
2 resident aliens. However, there is no rational basis between
3 denial of the aliens' judicial access and a valid CNMI interest.
4 Therefore, subsection (f) is unconstitutional. Accordingly, the
5 alternative motion of AIKC to dismiss the pendent claims for
6 failure to exhaust administrative remedies is DENIED.

7 IT IS SO ORDERED.

8 DATED this 31st day of March, 1992.

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ALEX R. MUNSON
Judge

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APPENDIX A

WRITTEN CONSENT TO SUE

29 U.S.C. § 216(b) provides in relevant part:

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and an additional equal amount as liquidated damages.... An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. (Emphasis added.)

The issue in the case at bar is whether "consent" is required when individually named plaintiffs sue on their own behalves, or only when they are being represented by another named plaintiff.

The Ninth Circuit has not analyzed and directly addressed this issue. However, both the Fifth and Sixth Circuits have held that there is no need to "consent" to one's own suit, that the requirement is solely apposite to representative actions.

Allen v. Atlantic Richfield Co., 724 F.2d 1131, 1134-35 (5th Cir. 1984); Morelock v. NCR Corp., 586 F.2d 1096, 1103 (6th Cir. 1978); see also Wallace v. Water Tank Service Co., 256 F.Supp. 689, 690 (W.D. Okl. 1966); Mitchell v. Mace Produce Co., 163 F.Supp. 342, 346-47 (D. Md. 1958); Deley v. Atlantic Box & Lumber Corp., 119 F.Supp. 727 (D.N.J. 1954).

1 Yet Defendants argue that the Ninth Circuit has ruled to
2 the contrary in a concluding footnote to the reversal of a
3 summary judgment which had dismissed a FLSA claim. Real v.
4 Driscoll Strawberry Associates, Inc., 608 F.2d 748, 756 n.19
5 (9th Cir. 1979). There, the defendants had urged partial
6 affirmance of the district court's dismissal with prejudice, on
7 the alternative ground of three plaintiffs' failure to file
8 written consents. However, the panel noted, "As we read this
9 statute, the FLSA claim of a plaintiff who has failed to file a
10 written consent is subject to dismissal without prejudice."
11 (Emphasis in original.) Id. On remand the three plaintiffs
12 were required to file written consents.

13 Therefore, in Real, the issue was whether a dismissal for
14 failure to file a written consent, when required, is with or
15 without prejudice, not whether and under what circumstances a
16 consent is required at all. No analysis of that issue was
17 undertaken. It is significant that Real was a representative
18 action. Unlike here, the Real plaintiffs sued individually and
19 on behalf of all others similarly situated. Id. 603 F.2d at
20 748.

21 Arrayed against the defendants' "plain meaning" of the
22 statutory language "No employee shall be a party plaintiff to
23 any such action unless he gives his consent in writing to become
24 such a party...." (emphasis added) is the definition of the word
25 "consent", "(1) Voluntary acceptance or allowance of what is
26 planned or done by another; permission. (2) Agreement as to

1 opinion or a course of action." The American Heritage
2 Dictionary 283 (1975). An individual need not and can not give
3 "consent" to himself for his own actions.

4 Moreover, the legislative history of the 1947 amendment,
5 requiring written consent, to the 1938 FLSA indicates that its
6 purpose was to apprise defendants of plaintiffs' identity in
7 representative actions. Allen, 724 F.2d at 1134-35; Deley,
8 119 F.Supp. at 728. Here, there is no doubt as to the identity
9 of the plaintiffs, who are all listed in the caption. Contrary
10 to defendants' assertion, plaintiffs' counsel is not their
11 "representative;" he is not a named plaintiff suing on their
12 behalf.

13 Defendants attempt to distinguish the foregoing cases
14 because in at least one of them, the plaintiffs are expressly
15 named in separate counts of the complaint, rather than solely in
16 the caption, as here. However, nothing would be gained by
17 multiplying the length of the complaint by the number of
18 plaintiffs. Plaintiffs' complaint states a cause of action for
19 each named plaintiff. Individual relief is sought for each of
20 the plaintiffs. Fed.R.Civ.P. 20(a) permits joinder "in one
21 action as plaintiffs if they assert any right to relief ...
22 arising out of the same transaction, occurrence, or series of
23 transactions or occurrences and if any question of law or fact
24 common to all these persons will arise in the action."

25 Finally, many or most of the plaintiffs now reside in the
26 People's Republic of China. The time, effort, and delay in

1 obtaining the written "consents" would be inimical to the prompt
2 and just resolution of this matter.

3 Accordingly, because Plaintiffs are not acting in a
4 representative capacity, Defendants' motion to dismiss this case
5 for failure to file a written "consent" is DENIED.

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