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Employment Law Session

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Decisions, Decisions: Using Mental Models to Improve Your Law Practice

Dan Petrov, Esq.

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FLSA Case law Update

Bob DeRose, Esq.

Precedential FLSA Opinions from the Sixth Circuit
Decided Between January 1, 2014 and February 28, 2018[1]

Compiled by Pete Winebrake
Winebrake & Santillo, LLC (Dresher, PA)

Barks v. Silver Bait, LLC, 802 F.3d 856 (6th Cir. Oct. 2, 2015)

Holding: Workers at worm farm covered by FLSA's agricultural exemption, 29 U.S.C. § 213(b)(12).

Comments: After substantial statutory and regulatory analysis, the court reasons that "[t]he raising and growing of bait worms – at least as practiced by Silver Bait – shares much in common with traditional farming." So now you know.

Craig v. Bridges Brothers Trucking LLC, 823 F.3d 382 (6th Cir. May 19, 2016)

Holding: District court erred in issuing summary judgment against employee who purportedly "waived" her right to overtime "by not immediately claiming is."

Comments: This is another good decision (see also Rosenfeld in Ninth Circuit section and Bailey in Eleventh Circuit section) in which a circuit rejects the notion that workers can waive or be estopped from asserting FLSA claims by failing to affirmatively seek additional pay or complain about the unpaid hours. The court observes that these notions of "waiver" or "estoppel" cannot be squared with the rule that workers cannot agree to FLSA violations. The relevant question is whether the company has actual or constructive knowledge of the unpaid work. In other words, did the company "know or have reason to believe" the work was being done? The company can be liable if it "should have discovered [the unpaid work] through the exercise of reasonable diligence."

Hughes v. Gulf Interstate Field Services, Inc., 878 F.3d 183 (6th Cir. Dec. 19, 2017)

Holding: District court erred in granting summary judgment against welding inspectors paid on a day-rate basis because a jury could find that their weekly salary was not "guaranteed."

Comments: This case addresses the salary basis regulations and the requirement that the salary

[1] This summary is limited to ***precedential*** opinions that (i) arise under the FLSA and (ii) have been or will be reported in the *Federal Reporter*. I did my best to capture every such decision, but I probably missed a few. Also, this summary does *not* include Circuit Court decisions (i) addressing wage/overtime issues arising under state or local laws and or (ii) focusing on the arbitrability of FLSA claims where the arbitrability decision does not address substantive FLSA provisions. Finally, as you will see, the case Comments generally are written from the perspective of a plaintiffs-side lawyer.

be "guarantee[d]." 29 C.F.R. § 541.604(b). In a split decision, the Court held that this requirement could be violated if the company's policy makes it *possible* that the employees can receive less than their guaranteed salary even if, in practice, the plaintiff employees always received their full salary.

Keller v. Miri Microsystems LLC, 781 F.3d 799 (6th Cir. March 26, 2015)

Holding: Under "economic realities" test, jury could reasonably find that satellite dish installers are employees rather than independent contractors. Also, where company fails to maintain time records, worker can prove his overtime hours through imprecise testimony.

Comments: This is a significant decision that demonstrates how judges are becoming very skeptical of the independent contractor business model. For example, outside of the FLSA context, we have seen many similar holdings from circuit courts considering whether FedEx delivery drivers are employees under state wage statutes. *See, e.g., In re. FedEx Ground Package System, Inc. Employment Practices Litig.*, 729 F.3d 818 (7th Cir. 2015) (drivers are employees under Kansas wage laws); *Slayman v. FedEx Ground Packaging System, Inc.*, 765 F.3d 1033 (9th Cir. 2014) (same under Oregon wage laws); *Alexander v. FedEx Ground Packaging System, Inc.*, 765 F.3d 981 (9th Cir. 2014) (same under California wage laws).

Killion v. Kehe Distributors, 761 F.3d 574 (6th Cir. July 30, 2014)

Holding: District court improperly entered summary judgment against salaried sales representatives under FLSA's outside sales exemption, where the sales representatives' responsibilities include, *inter alia*, delivering products to retail stores, stocking shelves, and facilitating the automatic re-ordering process.

Comments: It's nice to see a reversal of summary judgment in an FLSA misclassification case. The appellate court recognized that, based on the disputed evidence, a reasonable jury could find that the sales representatives' primary duty was not "making sales." The decision contains a good discussion of what types of activities are "incidental" to making sales.

Lutz v. Huntington Bancshares, Inc., 815 F.3d 988 (6th Cir. March 2, 2016)

Holding: District court did not err in entering summary judgment ruling that residential loan underwriters "were administrative employees within the meaning of 29 U.S.C. § 213(a)(1) and 29 C.F.R. § 541.200(a), and therefore exempt from the overtime-pay provisions because their job duties related to the general business operations of the Bank, and they exercised discretion and independent judgment when performing those duties."

Comments: This is a split decision. The majority surveys the various administrative exemption decisions involving loan underwriters, and that discussion is worth reading. The dissent convincingly argues that disputed facts regarding the administrative exemption requirements should preclude summary judgment. Administrative exemption cases are just very tough. The requirements described in 29 C.F.R. § 541.200, *et seq.*, are elusive and almost always can "go

either way." The more administrative exemption cases I read, the more I become convinced that the outcomes are almost always "results-oriented."

Michigan Corrections Organization v. Michigan Department of Corrections, 774 F.3d 895 (6th Cir. Dec. 17, 2014)

Holding: (1) State Department of Corrections is constitutionally immune from FLSA liability. (2) Neither FLSA nor any other theory provides a private right of action for plaintiffs to seek injunctive relief against the Department's Director in his individual capacity.

Comments: Judge Sutton's scholarly opinion contains a good discussion of the constitutional limits of the FLSA. Very heady stuff.

Misewicz v. City of Memphis, 771 F.3d 332 (6th Cir. Nov. 14, 2014)

Holding: Municipal paramedics' training time is not compensable under FLSA.

Comments: This decision contains a good discussion to the rules applicable to determining whether municipal employee training time is compensable. The Court explains that, in refusing to pay for training time, a municipality is only required to satisfy 29 C.F.R. § 553.226(b) and is not required to also satisfy 29 C.F.R. § 553.226(a) (which applies to private employers). Here, the paramedics were not entitled to be paid for their training time because, under § 553.226(b)(1), the training was required for their state certifications.

Monroe v. FTS USA, LLC, 815 F.3d 1000 (6th Cir. March 2, 2016) (Monroe I)

Holding: (1) District court properly refused to "decertify" the FLSA collective. (2) Use of "representative testimony" at trial for both damages and liability purposes was proper. (3) It is permissible for the judge – rather than the jury – to calculate damages based on the jury's findings regarding hours worked by the collective.

Comments: This is a must-read for any lawyer facing a decertification motion or going to trial in an FLSA collective action. The court's denial of decertification is thorough and has a great discussion of the efficiencies fostered by the collective action device and the fact that the FLSA's "similarly situated" analysis is less demanding than Rule 23(b)(3)'s commonality and predominance inquiries.

Monroe v. FTS USA, LLC, 860 F.3d 389 (6th Cir. June 21, 2017) (Monroe II)

Holding: The Supreme Court's decision in Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016), does not alter the outcome of Monroe I (discussed above).

Comments: This opinion is even better than Monroe I. It provides a great roadmap for defeating decertification motions and, as importantly, demonstrates how – contrary to the assertions of defense counsel in almost every class/collective action – the rights of large groups of employees

can be tried to a jury in a fair and efficient manner.

Moran v. Al Basit LLC, 788 F.3d 201 (6th Cir. June 1, 2015)

Holding: Where company allegedly failed to maintain accurate timekeeping records, plaintiff could rely entirely on his own testimony and recollection to prove the amount of his/her allegedly uncompensated time and precision is not required. Summary judgment in favor of company reversed.

Comments: This brief opinion applies and follows the Supreme Court's seminal decision in Anderson v. Mount Clemens Pottery Co., 328 U.S. 680 (1946). A very concise discussion of basic FLSA principles and another example of a district court getting slapped down for improvidently granting summary judgment.

NLRB v. Alternative Entertainment, Inc., 858 F.3d 393 (6th Cir. May 26, 2017)

Holding: Worker not prevented from pursuing an FLSA collective action even though he signed an arbitration agreement containing a class waiver because the class waiver violates the National Labor Relations Act.

Comments: This decision (along with a similar decision from the Ninth Circuit and a contrary decision from the Fifth Circuit) is on appeal at the Supreme Court. Oral argument was conducted in October 2017, and the Supreme Court will be ruling soon!!!

Perez v. D. Howes, LLC, 790 F.3d 681 (6th Cir. June 22, 2015)

Holding: District court's properly held that cucumber pickers were employees rather than independent contractors under, *inter alia*, the FLSA.

Comments: This one-page opinion simply adopts the district court's analysis, which can be found at 7 F. Supp. 3d 715 (W.D. Mich. 2014).

Perry v. Ranstad Genral Partner (US) LLC, 876 F.3d 191 (6th Cir. 2017)

Holding: (1) District court correctly granted summary judgment in favor of staffing company that asserted that "Account Managers" were covered by the administrative exemption; (2) District court erred in granting summary judgment in favor of staffing company that asserted that "Staffing Consultants" were covered by the administrative exemption; (3) District court erred finding that company entitled to the FLSA's "good faith" defense.

Comments: The first half of this opinion delves into the administrative exemption's requirement that the covered employee's "primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 521.200(a)(3). The administrative exemption is especially boring, so cases analyzing the exemption are generally boring. This opinion fits the mold. The Court basically draws a distinction between the Account

Manager position (which purportedly required a lot of independent judgment) and the Staffing Consultant position (which purportedly was a sales job). As I have said many times, administrative exemption cases are very, very tough when the plaintiff holds an office job and gets paid a good salary. It's just really easy for the employer to make any office job seem more complicated and important than it really is. That brings us to the second half of the opinion, which has some very nice analysis if the "good faith" defense. This defense allows an employer to escape liability when its conduct was done "in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the [DOL]." 29 U.S.C. § 259. Adopting the reasoning of Judge Black in Swigart v. Fifth Third Bank, 870 F. Supp. 2d 500 (S.D. Ohio 2012), the Court explains that "[a]n employer cannot avail itself of the defense unless it relied on a DOL interpretation that ***specifically*** addresses its circumstances," and that "[t]he administrative interpretation relied upon ***must provide a clear answer to the particular situation*** in order for the employer to rely on it." (internal quotations and citations omitted; emphasis supplied). This is really important language because, in the absence of a specificity requirement, the good faith defense could swallow up many FLSA disputes.

Stein v. hhgregg, Inc., 873 F.3d 523 (6th Cir. Oct. 12, 2017)

Holding: District court improperly dismissed complaint against retail sales people under the FLSA's "retail or service" exemption.

Comments: This is another favorable opinion drafted by Judge Moore. This opinion deals with the FLSA's retail/service exemption codified at 29 U.S.C. § 207(i). First, the Court observes that the exemption only applies to overtime claims, not to minimum wage claims. Thus, the district court erred by relying on the exemption to dismiss the salespeoples' minimum wage claim. Next, the Court delves into the exemption's requirement that the salespeoples' "regular rate of pay [be] in excess of one and one-half the minimum hourly [wage]" and addresses the issue of whether the company's "draw against commission" policy violated this requirement. Under the policy, the salespeople took a weekly draw against commissions whenever their actual commissions were not sufficient to satisfy the minimum wage. The Court had no problem with this aspect of the policy. However, the policy also enabled the company to require the employee to pay back any outstanding draw payments at the time of termination. Even though this never actually happened, the Court held that the mere existence of such retroactive deductions could violate the well-established principle that minimum wage payments must be "free and clear" of deductions.

Vance v. Amazon.com, Inc., 852 F.3d 601 (6th Cir. March 31, 2017)

Holding: Uncompensated time that Amazon.com warehouse workers spend engaged on post-shift security screening activities is not compensable under the Kentucky Wage and Hours Act.

Comments: In 2014, the Supreme Court decided Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513, 190 L. Ed. 2d 41 (U.S. 2014), which held that uncompensated time that Amazon.com warehouse workers spend engaged on post-shift security screening activities is not compensable due to the Portal-to-Portal amendments to the FLSA. In Vance, the workers argued that such

Portal-to-Portal principles did not apply under Kentucky law. The Sixth Circuit disagreed, reasoning that the Kentucky state legislature never manifested any intention to deviate from the FLSA.