The Executive, Administrative and Professional Exemptions to the Overtime Requirement

By Robert L. Abell

Both the federal Fair Labor Standards Act and Kentucky law require that employees be paid at an overtime rate of time and a half for all hours worked in a workweek greater than forty. Exempted from the overtime requirements of both federal and Kentucky law are those persons employed in a "bona fide executive, administrative or professional capacity." These overtime exemptions are widely misapplied and, as a result, millions of Americans are denied overtime wages they have earned.[1] Three recent cases are instructive on these exemptions.

In *Morgan v. Family Dollar Stores, Inc.*,[2] a class of 1,424 present and former Dollar General store managers challenged the company's application of the "executive" exemption to them. The Eleventh Circuit upheld the district court's ruling that the store managers were not exempt based on the following:

- Store managers spent 80-90 percent of their time performing manual labor tasks such as stocking shelves, running the cash registers, unloading trucks, and cleaning the parking lots, floors and bathrooms.
- Performing manual labor was included in the job description as "Essential Job Functions" of the store managers.
- Store managers rarely exercised any discretion because the operations manuals or district managers controlled virtually every aspect of a store's day-to-day operations.
- Store managers were closely supervised by district managers, who exercised practical managerial authority over each store.
- The store managers' pay rate was only slightly higher than the hourly rate of their assistant store managers.[3]

These factors led the Eleventh Circuit to conclude, "Sweeping corporate micro-management, close district manager oversight and fixed payroll budgets left store managers little choice in how to manage their stores and with the primary duty of performing manual, not managerial, tasks."[4] As a result, the store managers were entitled to recover more than $35 million dollars, which included unpaid overtime and an equal amount of unliquidated damages based on the company's "willful" violation of the FLSA.

Whether loan underwriters tasked with approving loans, in accordance with detailed guidelines established by their employer, were exempt under the "administrative" exemption was at issue in *Davis v. JP Morgan Chase & Co.*[5] The Second Circuit reversed a district court's ruling emphasizing that "an administrative employee must *both* perform work directly related to management policies or general business operations *and* customarily and regularly exercise discretion and independent judgment."[6] The loan underwriters failed to meet this standard based on the following:

- Chase expected an underwriter to evaluate each loan application under its credit guide and approve the loan if it met the guide's standards.
- Exemptions from overtime requirements are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.
- The administrative exemption applies to an employee performing work directly related to management policies or general business operations and customarily and regularly exercises discretion and independent judgment.
- Production and sales work does not fall within the administrative exemption.
- Nonexempt production work does not require production of tangible goods.
- The loan underwriters did not advise customers; they determined, based on criteria established by the bank, whether the customers financially qualified for their loans.

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- The payment of production incentives supported the conclusion that the underwriter's job function was production rather than management related.

The Second Circuit in *Davis* essentially found the loan underwriters to be white-collar production workers—instead of widgets, their employer produced loans, and they followed the employer's detailed guidelines in the production process. The court also analyzed other decisions involving white-collar production jobs including criminal investigators,[7] telephone salespersons,[8] claims adjusters[9] and escrow loan closers.[10]

Application of the "professional" exemption to a product design specialist was at issue in *Young v. Cooper Cameron Corporation*.[11] The "professional" exemption applies to work in "a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study,"[12] and the product design specialist position involved complicated technical and engineering type expertise and experience.[13] The plaintiff, Young, had more than 20 years of relevant experience but neither he nor any of his colleagues had a college degree.

The Second Circuit found the absence of a degree requirement decisive: "where most or all employees in a particular job lack advanced education and instruction, the exemption is inapplicable."[14] The court further rejected the employer's argument that the position's duties made the "professional" exemption applicable: "if a job does *not* require knowledge customarily acquired by an advanced educational degree—as for example when many employees in the position have no more than a high school diploma—then, regardless of the duties performed, the employee is not an exempt professional under the FLSA."[15]

Violations of the overtime requirements established by the FLSA and Kentucky's wage and hour law are widespread and many arise from mislabeling employees as exempt, particularly those employed in white-collar occupations.

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News & Notes

DAVID T. ROYSE, a member in the Lexington office of Stoll Keenon Ogden PLLC, recently completed the Mediation Workshop at the Harvard Negotiation Institute in Cambridge, Massachusetts. This five-day intensive mediation training program involves lawyer and non-lawyer participants from around the world. Mr. Royse is a member of the firm's litigation department.

R. SEAN DESKINS has joined the Oldfather Law Firm as an Associate. Sean received his B.A., *summa cum laude,* from the University of Louisville and earned his J.D. from the Brandeis School of Law at the University of Louisville. His primary areas of practice are complex civil litigation, medical negligence, personal injury and employment disputes.

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1 Wage and hour and overtime violations are widespread and agency enforcement lax. *See* Greenhouse, "Low-Wage Workers Are Often Cheated, Study Says," *New York Times*, September 2, 2009 (available at http://www.nytimes.com/2009/09/02/us/02wage.html); Greenhouse, "Labor Agency Is Failing Workers, Report Says," *New York Times*, March 25, 2009 (available at http://www.nytimes.com/2009/03/25/washington/25wage.html).
2 551 F.3d 1233 (11th Cir. 2008), *cert. denied*, 130 S.Ct. 59 (2009).
3 551 F.3d at 1269-71.
4 *Id.* at 1271.
5 --- F.3d ----, 2009 WL 3922892 (2d Cir., November 20, 2009) (NO. 08-4092-CV).
6 2009 WL 3922892 *7.
7 *Reich v. State of New York*, 3 F.3d 581 (2d Cir. 1993).
8 *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896 (3d Cir. 1991).
9 *Neary v. Metro. Prop. & Cas. Ins. Co.*, 517 F.Supp.2d 606 (D. Conn. 2007).
10 *Reich v. Chi. Title Ins. Co.*, 853 F.Supp. 1325 (D. Kan. 1994).
11 --- F.3d ----, 2009 WL 3763848 (2d Cir., November 12, 2009) (NO. 08-5847-CV).
12 29 C.F.R. § 541.3(a)(1).
13 2009 WL 3763848 *2.
14 *Id.* *4.
15 *Id.*