



CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
100 HIGH ST NE, RM 1272 • SALEM, OR 97301-3640
Mailing Address:
PO BOX 12869 • SALEM, OR 97309-0869

ALBIN W. NORBLAD
Circuit Court Judge

503.588.5028
fax **503.588.5027**

February 21, 2008

Kevin Lafky
Attorney at Law
429 Court St. NE
Salem, OR 97301

Loren W. Collins
Senior Asst. Attorney General
Department of Justice
1162 Court St. NE
Salem, OR 97301-4096

James S. Coon
Attorney at Law
820 S.W. 2nd Avenue
Portland, OR 97204

**RE: DINICOLA v. STATE OF OREGON, DEPARTMENT OF REVENUE
v. SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 503
Circuit Court Case No. 07C14758**

Dear Counsel:

On May 8, 2007, Plaintiff filed a complaint against the Defendants, alleging violations of the Fair Labor Standards Act (FLSA), Oregon state wage and hour laws, and Oregon contract law. Plaintiff seeks to recover overtime pay, liquidated damages, penalty wages, and attorney fees under federal and state law. In response, the State filed a Third-Party Complaint against Defendant Service Employees' International Union, Local 503 (SEIU).

Plaintiff was hired by Oregon Department of Revenue (DOR) in 1987 as a tax auditor. Plaintiff has been a DOR Corporation Tax Auditor since about 1991. In November 2004, Plaintiff was elected SEIU President and pursuant to the terms of his DOR employment, he was granted release time to serve as Union President.

Under the terms of the Collective Bargaining Agreement between SEIU and the DOR, SEIU agreed to reimburse the DOR for payment of Plaintiff's salary, benefits, paid leave time, pension and all other employer-related costs. Moreover, SEIU agreed to indemnify the DOR and both the Union and Plaintiff expressly agreed to "hold the State harmless against any and all claims, damages, suits, or other forms of liability which may arise out of any action taken or not taken by the State . . ."

From November 2004 through January 2007, Plaintiff submitted time sheets to his DOR supervisor, with each time sheet indicating that Plaintiff worked forty hours per week. However, in March 2007, after three and a half years of serving as SEIU President, Plaintiff submitted revised time sheets to his DOR supervisor claiming that he worked between 18 and 174 hours of overtime each month. He also submitted a time sheet for February 2007 which indicated that Plaintiff worked 96 hours of overtime for that month.

SEIU has a collective bargaining agreement with its own union staff, which is represented by the Public Employees Representative Union Communications Workers of America, Local 7901 (PERU). Overtime under the PERU agreement must be authorized by the Executive Director of the Union or his or her designee.

In April 2007, Plaintiff sent a Tort Claim Notice and Notice of Wage Claim to the Department of Administrative Services (DAS) and the DOR, claiming that he worked 2,596 hours of overtime and was owed over \$109,000.00 in compensation. The DOR refused to compensate Plaintiff for his overtime. Additionally, the Board of Directors for SEIU Local 503 voted to disapprove payment for any overtime. Accordingly, SEIU advised the DOR that it would not reimburse it in the event that any hours in excess of forty hours per week were paid or credited to Plaintiff.

Plaintiff then filed his complaint seeking overtime compensation under the FLSA and Oregon state wage and hour laws. Plaintiff and Defendants have filed Motions for Summary Judgment.

Plaintiff contends that he is owed overtime compensation pursuant to the terms of the release agreement (Agreement 1281) between Plaintiff and DOR and the CBA between the SEIU and the DOR. Plaintiff claims that such terms provide that Plaintiff is entitled to be paid overtime wages of one and a half times his regular rate of pay for all overtime hours. Moreover, the Plaintiff is defined as a "non-exempt employee" of the DOR and therefore, he is entitled to receive overtime pay. Thus, Agreement 1281 and the CBA bind the DOR to pay Plaintiff overtime wages.

Defendants DOR and SEIU counter by arguing that first, the DOR is not Plaintiff's employer under FLSA and Oregon state wage law provisions. In order for the Plaintiff to recover under the FLSA and Oregon state wage laws, the DOR must be "employers" under those statutes. Because the DOR does not qualify as Plaintiff's "employer", the Plaintiff cannot recover overtime wages. In the alternative, Defendant DOR and SEIU contend that Plaintiff is an "exempt employee" because he is considered an executive employee under the FLSA and Oregon state wage laws. As an executive employee, Plaintiff is exempt from overtime wages.

ORCP 47 requires the moving party to "show that there is not genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." No genuine issue as to a material fact exists if, based upon the record before the Court, viewed in a manner most favorable to the adverse party, "no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment." ORCP 47C. The Court's role on summary judgment is not to decide whether its credulity has been strained but to determine whether there is a genuine issue of material fact. *McPhail v. Milwaukie Lumber Co.*, 165 Or. App. 596, 607, 999 P.2d 1144 (2000). All parties have moved for summary judgment on the issue of whether Plaintiff

is entitled to overtime compensation under the FLSA and Oregon state wage and hour laws. All parties have stipulated that there is no question of fact remaining. This Court is basing its decision on its acceptance of the parties' representations that there are no issues of fact.

To determine whether the Plaintiff is entitled to overtime compensation, the Court must first address the issue of whether the DOR is an "employer" under the relevant statutes. If the court finds that the DOR is not Plaintiff's employer, either under Federal or State statute, Plaintiff cannot recover overtime compensation.

Under the FLSA, an "employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ." 29 U.S.C. §203(d). The definition of "employer" under the FLSA is not limited by the common law concept of "employer" and should be given an expansive interpretation in order to effectuate the FLSA's broad remedial measures. *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983). The determination of whether an employer-employee relationship exists does not depend on "isolated factors but rather upon the circumstances of the whole activity." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S. Ct. 1473, 1477 (1947). The touchstone is "economic reality." *Bonnette, supra.* at 1469, citing *Goldberg v. Whitaker House Cooperative Inc.*, 366 U.S. 28, 33, 81 S. Ct. 933 (1961).

Important factors that courts have relied on in determining whether an employment relationship exists include whether the alleged employer: 1) had the power to hire and fire the employees; 2) supervised and controlled employee work schedules or conditions of employment; 3) determined the rate and method of payment; and 4) maintained employment records. *Bonnette, supra.* at 1470. While these factors are a useful framework in analyzing whether an employer relationship exists, "[the factors] are not etched in stone and will not be blindly applied. The ultimate determination must be based 'upon the circumstances of the whole activity.'" *Id.*, citing *Rutherford, supra.* at 730.

The Court finds that the DOR does not qualify as an employer under the FLSA. The DOR played no role in Plaintiff's election as Union President. Rather, Union members elected him President in November 2004 and again in November 2006. Moreover, it is only the Union that can "fire" Plaintiff from his position as Union President. This power resides exclusively in the Union's Constitution and bylaws. The DOR can play no role in the removal of Plaintiff as Union President without engaging in a violation of state and federal law by interfering in the administration of the Union. See ORS §243.672(1)(b); 29 U.S.C. §158(a)(2). The DOR does not have the ability to hire or fire Plaintiff as Union President and therefore, the DOR does not meet the definition of "employer" under this factor.

Secondly, the DOR does not determine Plaintiff's salary. As a Tax Auditor, Plaintiff received salary and fringe benefits set forth in the CBA between the Union and the DAS, which includes the DOR. For the purpose of maintaining Plaintiff's PERS status and his right to return to his job as Tax Auditor, Plaintiff's regular salary check came from the DOR. However, the "economic reality" indicates that the Union actually paid the Plaintiff's salary. The Union reimbursed the DOR for Plaintiff's salary. That reimbursement, and additional salary and a fringe benefit package that Plaintiff receives as Union President was determined by the operation of the Agreement 1281, the Union's governing

documents, and the practices and procedures applicable to the Union President's compensation.¹ The Union bylaws also provide that the Union shall compensate the Union President at the rate of \$400.00 per month. In addition, the Union affords the President: a car allowance in the amount of \$245.00 per month; mileage and expense reimbursement; and a flexible medical benefit that can be taken in cash of \$140.00 per month. Plaintiff has received these payments during his entire term as Union President. Thus, the court finds that the "economic reality" demonstrates that Plaintiff's salary is actually determined by the Union and not the DOR. Agreement 1281, the Union's governing documents, and the Union's practices and procedures relating to presidential compensation support such a finding.

While the DOR does maintain Plaintiff's time sheets, the Union also maintains records and files concerning the Plaintiff's activities as Union President. The DOR maintains relevant employment records in the instance that Plaintiff returns to work at the DOR. The maintenance of these records is merely a matter of convenience for both the DOR and Plaintiff if Plaintiff decides to return to work. However, the Union also maintains employment records. The Union reports to the Department of Labor concerning all payments made by the Union to the Plaintiff. The Union also maintains records of hours worked and miles traveled by the Plaintiff to be used for compensation and reimbursement payroll purposes. Thus, while the DOR does maintain basic employment records on the Plaintiff, such records are for the purpose of maintaining Plaintiff's right to return to work as a Tax Auditor at the DOR.

The Plaintiff contends that the DOR and the Union should be considered joint employers. In assessing whether a joint employment situation exists, the Court looks to "all the facts in the particular case." 29 C.F.R. §500.20(h)(4)(i). "If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a joint employment situation does not exist." *Id.* Since he was elected Union President in November 2004, Plaintiff has performed over 7,000 hours of work on behalf of the Union and its members. Plaintiff has performed approximately nine hours of work for the DOR. Pursuant to Agreement 1281, Plaintiff has been on release time from the DOR for the performance of Union duties as Union President. Plaintiff was bound by Union provisions and documents aimed at ensuring that his work and efforts were devoted to causes, interests, and benefits of the Union and its members. The DOR plays no role in the performance of Plaintiff's duties – DOR does not direct, oversee or supervise Plaintiff's duties. An attempt to do so would violate state and federal law. Thus, the facts indicate that Plaintiff's work as Union President is completely disassociated from any minor work that he performed for Plaintiff, and therefore, the DOR and Union are not joint employers.

The DOR does not constitute an "employer" under the FLSA. The DOR does not play a role in the hiring or firing of Plaintiff as Union President; Plaintiff's duties, with the exception of nine hours,

¹ Under Agreement 1281, the Union agreed to reimburse the DOR for "payment of appropriate salary, benefits, paid time leave, pension, and all other "Employer-related costs." The "appropriate salary" is defined by the Union's bylaws which state: "The President shall be paid a salary (through their respective employer if available) during his/her term of office. . . The Union will reimburse the employer through invoice for all salary expenditures."

were done for the benefit of the Union, without the supervision or oversight of the DOR; the DOR does not determine Plaintiff's salary; and the DOR only maintains Plaintiff's employment records in the case that Plaintiff returns to work at the DOR. Under the totality of all the circumstances of Plaintiff's activities, the DOR does not qualify as an "employer" under the FLSA.

Oregon wage statutes under which Plaintiff brings his claim define "employ" as "to suffer of permit to work." ORS §653.010(2). Where a plaintiff fails to prove that the work for which he was claiming wages was authorized, that is, required or controlled by the employer, the plaintiff is not in the employer's "employ." *Leonard v. Arrow-Tualatin, Inc.*, 76 Or. App. 120, 124, 708 P.2d 630 (1985). The *Leonard* court adopted the definition of "work" first expressed by the United States Supreme Court in *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944), which defined it as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

As stated above, Plaintiff's work and duties were done on behalf of the Union and its members. Moreover, the DOR is prohibited by state and federal law from controlling Plaintiff's work as Union President.

The evidence clearly demonstrates that the DOR is not the Plaintiff's employer, under the FLSA or Oregon state wage laws. During his tenure as Union President, Plaintiff has performed duties on behalf of the Union and its members. Moreover, the DOR has not and cannot play a role in hiring or firing Plaintiff as Union President. Plaintiff's salary is not determined by the DOR. Rather, it is determined by the Union's governing documents, policies and procedures. Finally, while DOR may maintain the barest of employment records, such records are maintained to allow Plaintiff to return to work at the DOR. Accordingly, the court finds that the DOR is not Plaintiff's employer under the FLSA or Oregon state wage laws, and therefore, cannot recover overtime wages.

Even if the court found that the DOR was Plaintiff's "employer" under the FLSA and Oregon state wage laws, Plaintiff would still not be eligible for overtime wages as he is an exempt employee.

Under the FLSA, certain employers must pay their employees time and a half for work in excess of 40 hours per week. 29 U.S.C. §207(a)(1). Some employees are exempt from overtime pay; specifically, "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1).

"Whether employees are exempt from the requirements of the [FLSA] is primarily a question of fact." *Nigg v. U.S. Postal Service*, 501 F.3d 1071 (9th Cir. 2007) (internal citations omitted). The burden of proof rests with the agency that asserts the exemption. 5 C.F.R. §551.202©. "The criteria provided by the regulations are absolute and the employer must prove that any particular employee meets every requirements before the employee will be deprived of the protection of the Act." *Bratt v. Co. of Los Angeles*, 912 F.2d 1066, 1069 (9th Cir. 1990).

Three tests must be satisfied for an employee to be considered an exempt executive, professional or administrative employee: the duties test; see 29 C.F.R. §541.1; the salary level test;

see 29 C.F.R. §541.1(f); and the salary basis test; see 29 C.F.R. §541.118. However, it is important to note that “[t]he designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee.” 5 C.F.R. §551.202(l).

To determine whether an employee is exempt under the duties test, the employee’s “primary duty” must “(i) consist of “[t]he performance of office or nonmanual work directly related to management policies or general business operations of his employer,” and (ii) include the exercise of “discretion and independent judgment.” 29 C.F.R. §541.2 (2004).

The DOL has issued implemented regulations explaining the primary duties test:

The phrase “directly related to management policies or general business operations of his employer or his employer’s customers” describes those types of activities relating to the administrative operations of a business as distinguished from “production” or, in a retail or service establishment, “sales” work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer’s customers.

29 C.F.R. § 541.205

As Union President, Plaintiff’s primary duty is to serve as chief spokesperson of SEIU. The President also presides at all meetings of the General Council, Board and Executive Committee, appoints members of Standings and Special committees, represents the Union at all appropriate national or regional meetings, including coalitions for which the Union is participating, serves as the local SEIU delegate at the SEIU Convention, and represents that Union at the Legislature and in ballot measure campaigns.²

Plaintiff contends that he is simply a “spokesperson” and generally has no authority to direct employees, hire or fire employees, expend Union funds or establish Union policy. Plaintiff argues that this authority lies with the Union Executive Director. However, the duties test is only concerned with whether the employee performs “office or nonmanual work directly related to management policies or general business operations. . .” Plaintiff need not have the sole authority to direct employees, hire or fire employees, expend Union funds, or establish Union policy.

It is clear that Plaintiff’s duties are office and nonmanual work which are related to the management or general business operations of the Union. Plaintiff is not involved in production or sales activities. Rather, his duties include activities relating to the operation and benefit of the Union. There is no question that Plaintiff exercise his discretion and independent judgement with these matters. Thus, Plaintiff qualifies as an exempt employee under the duties test.

² Union President duties are described in the SEIU Local 503 Bylaws, Article IX, §1.

Plaintiff also meets the requirements as an exempt employee under the salary test. In order to be exempt from overtime, the employee must be compensated on a salary or fee basis of not less than \$455.00 per week. 29 C.F.R. §541.200(a)(1). Plaintiff is compensated approximately \$5,900.00 per month, which is about \$1,470.00 per week, which is well over the required compensation.

Finally, the FLSA requires that an exempt employee be paid on a "salary basis". The FLSA defines "salary basis" as:

An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if, under his employment agreement, he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

29 C.F.R. §602(a).

In order to qualify for exempt status, "the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked," but "need not be paid for any workweek in which he performs no work." 29 C.F.R. §602(b)(1). The rule makes an exception for "penalties imposed in good faith for infractions of safety rules of major significance," but other reductions in pay for disciplinary violations are impermissible "reductions because of variations of the quality or quantity of the work performed" when imposed on exempt employees. *Auer v. Robbins*, 519 U.S. 452, 456 (1997).

Plaintiff claims that he is not paid on a salary basis because he is subject to reduction in his pay because of variations in the quality or quantity of his work. Plaintiff relies on *Moorhead v. City of Gresham*, 1197 U.S. Dist. Lexis 10672 (D. Or. 1997). However, *Moorhead* is an unpublished district court case decided under a different version of the federal regulations than are in place now. Current regulations now permit reductions in pay for violations of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. 29 C.F.R. 541.602(b)(5).

Therefore, even if Plaintiff is subject to a reduction in his pay, that fact alone does not exempt him from being paid on a salary basis. The Plaintiff's argument that he is subject to pay reductions is not enough to remove him from being paid on a salary basis: "[T]he mere theoretical possibility that exempt employees could be suspended improperly is not enough to render those employees 'subject to' improper deduction in pay in violation of the regulation. *Auer, supra.* at 461-62. That standard is only met "if there is either an actual practice of making such deductions or an employment policy that creates a significant likelihood of such deductions." *Id.* at 462.

In this case, the DOR does not monitor Plaintiff's quality or quantity of work performed. Plaintiff is paid his salary for the 40-hour work week he reports, irregardless of how much or what

work Plaintiff performs. Plaintiff cannot show that there is an "actual practice" or a policy that creates a "significant likelihood" of improper deductions. The Court finds that Plaintiff is paid on a salary basis. Any deductions in Plaintiff's pay are permitted by the FLSA.

Plaintiff meets all the requirements to be considered an exempt employee under the FLSA.

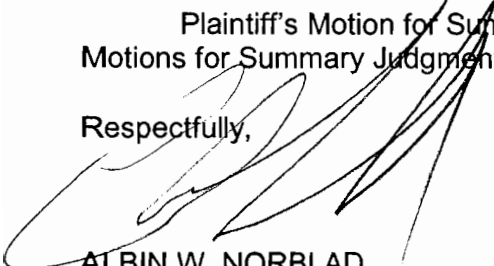
The state claims for overtime compensation closely follow the federal standards. ORS §652.020 provide that individuals who perform work in a bona fide executive, managerial, and/or administrative capacity within the meaning of these provisions are exempt and therefore, not entitled to overtime pay. See also OAR 839-020-0005 (office or nonmanual work directly related to management policies or general business operations).

Again, as discussed above, Plaintiff's work is directly related to the management or general business operations of the Union. Accordingly, Plaintiff's state wage claims must also fail.

Plaintiff is not entitled to overtime wages under the FLSA or Oregon state wage laws. The DOR is not the Plaintiff's "employer" as defined by the FLSA. Moreover, the DOR does not "employ" the Plaintiff as defined by the Oregon wage laws. This acts as the first bar to Plaintiff's recovery of overtime wages. The Plaintiff is additionally barred from recovery as he is an exempt employee because he qualifies as a bona fide executive, managerial, and/or administrative employee as defined by both the FLSA and Oregon wage laws.

Plaintiff's Motion for Summary Judgment is denied and Defendant and Third-Party Defendant's Motions for Summary Judgment are granted.

Respectfully,



ALBIN W. NORBLAD
Circuit Court Judge

AWN:knh