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## Are Supervisory Law Enforcement Officers Entitled to Overtime Under the Fair Labor Standards Act?

by Jay E. Grenig

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Under the Fair Labor Standards Act (the "FLSA" or the "Act"), an employer does not have to pay overtime compensation to an employee working in "a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1) (1994). Such employees are paid on a salaried, not hourly basis.

Regulations of the Department of Labor ("DOL"), which administers the FLSA, provide that an employee is not salaried if the employee may have deductions made from his or her salary "because of variations in the quality or quantity of the work performed," 29 C.F.R. § 541.118(a) (1954), although a one-time deduction does not automatically convert a salaried employee into a nonsalaried, hourly employee covered by the overtime provisions of the Act. DOL regulations also provide for a window of correction that allows an employer to treat employees as salaried, regardless of the employer's one-time or unintentional failure to adhere to the requirements of Section 541.118(a).

This case is about whether police sergeants who are subject to short-term disciplinary suspensions with an attendant loss of pay lose their status as salaried employees and, thus, become entitled to overtime, either in the form of pay or compensatory time. Complicating the case is the fact that only one of the 288 sergeants involved in this case ever received a short-term disciplinary suspension, and the further fact, noted by the respondents in their brief to the Supreme Court, that a post-lawsuit DOL regulation provides that a public-sector employee does not lose his or her status as a salaried employee solely by virtue of being subject to short-term suspensions without pay.

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*FRANCIS BERNARD AUER ET AL. V.  
DAVID A. ROBBINS, IN HIS OFFICIAL  
CAPACITY AS A MEMBER OF THE  
ST. LOUIS BOARD OF  
POLICE COMMISSIONERS, ET AL.  
DOCKET NO. 95-897*

ARGUMENT DATE:  
DECEMBER 10, 1996  
FROM: THE EIGHTH CIRCUIT

# Case at a Glance

Under federal regulations, employees paid on a salaried basis are exempt from the overtime provisions of the Fair Labor Standards Act if the salary cannot be reduced because of variations in the quality or quantity of the work performed. This case asks whether police sergeants are salaried employees under the Act when they can be suspended without pay for less than one week for disciplinary reasons, even though only one sergeant has been given such a suspension.

## ISSUES

1. Does the Eleventh Amendment preclude private individuals from bringing a federal lawsuit against a state, or political subdivision of a state, to enforce provisions of the Fair Labor Standards Act?
2. Do employees lose their status as salaried employees and become subject to the overtime provisions of the Act because their pay is subject to reduction under a written manual that permits disciplinary suspensions of less than one week?

## FACTS

This case asks whether sergeants and lieutenants in the St. Louis police department are entitled to overtime compensation under the FLSA. According to a Missouri statute, no St. Louis police officer with the rank of sergeant or higher is allowed overtime pay.

In 1988, 288 police sergeants and one police lieutenant in the St. Louis police department filed suit against the St. Louis Board of Police Commissioners (the "Commissioners") in federal district court, alleging that the department had violated the FLSA by failing to pay them overtime wage benefits. In an unreported opinion, the district court held that the lieutenant performed primarily managerial duties and, accordingly, was a salaried employee. The court also ruled that 20 categories of sergeants were exempt from the Act's overtime provisions and that two categories were partially exempt from the provisions.

The sergeants appealed to the Eighth Circuit which affirmed in part and reversed in part, holding that all categories of sergeants were executive employees exempt from the Act's overtime provisions. 65 F.3d 702 (8th Cir. 1995). In a

portion of its decision that the sergeants do not challenge, the court of appeals held that all sergeants performed primarily administrative or managerial duties, thereby satisfying the "duties" component of the Act's test for salaried status.

The Eighth Circuit also rejected the sergeants' argument that they were not salaried employees because they could be disciplined by suspension without pay for periods of less than one week under the employer's disciplinary policy for violations of minor rules, i.e., rules that do not have a major impact on safety. The court of appeals held that the mere possibility of an improper pay deduction does not defeat an employee's status as salaried under DOL regulations.

The Eighth Circuit went on to rule that the sergeants were exempt employees notwithstanding that in one instance the department and one sergeant had agreed to the sergeant's two-day suspension without pay for violating the department's residency requirement. Because a residency requirement is not a safety rule of major significance, the court concluded that the sergeant's suspension without pay was inconsistent with the DOL's salary basis regulation and arguably required that the sergeant be treated as a nonsalaried employee. The court concluded, however, that such a one-time improper deduction did not mean that sergeants, as a category, should be considered nonsalaried under the Act.

The Supreme Court granted the sergeants' petition for a writ of certiorari to review the Eighth Circuit's decision. 116 S. Ct. 2545 (1996).

## CASE ANALYSIS

As a general rule, the FLSA requires employers to provide employees with overtime compensation, either overtime pay or compensatory time, to employees for hours worked in excess of a 40-hour work week. When Congress passed amendments to the FLSA in 1974 extending the Act to state and municipal employers, it recognized the unusual working conditions and long hours of firefighters and law enforcement employees. To alleviate the financial burdens that result for public employers, Congress enacted a special overtime provision for employees in those categories. 29 U.S.C. § 207(k). Instead of requiring overtime compensation after 40 hours of work in a seven-day period for firefighters and law enforcement employees, Congress set a higher threshold for these workers that is presently 171 hours in a 28-day work period. The FLSA also provides that an employer does not have to pay overtime compensation to an employee who works in "a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1) (1994).

The FLSA delegates the responsibility for defining these terms to the Secretary of Labor. 29 U.S.C. § 213(a)(1). Under DOL regulations, an employee is not salaried and, thus, is covered by the Act's overtime provisions if the employee is subject to salary deductions "because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a). However, DOL regulations provide an exception to this rule. "Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status." 29 C.F.R. § 541.118(a)(5).

DOL regulations also provide that a one-time deduction for a minor work-rule infraction does not automatically transform a salaried employee into a nonsalaried one. In this situation, DOL regulations provide for a window of correction and state that "the effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case." 29 C.F.R. § 541.118(a)(6). DOL regulations further state that if "a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." 29 C.F.R. § 541.118(a)(6). In other words, the window of correction allows an employer to treat otherwise eligible employees as salaried employees, regardless of the employer's one-time or unintentional failure to adhere to the requirements of Section 541.118(a).

The sergeants argue that the FLSA's goal of a broad national hours-of-work standard presumes coverage of all employees and is susceptible only to very limited and narrowly construed, exemptions. Contending that the Supreme Court has conservatively, consistently, and narrowly construed efforts to expand exemptions to the FLSA, the sergeants rely on *Phillips v. Walling*, 324 U.S. 490, 493 (1945), in which the Supreme Court ruled: "Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative

process and to frustrate the announced will of the people."

According to the sergeants, Congress has expanded FLSA coverage over the years but has been reluctant to broaden exemptions from its protections, such as the overtime provisions at issue here. The sergeants claim that the FLSA's test for determining exempt executive and administrative employees is reasonable and an effective enforcement component of the national hours-of-work standard.

With respect to the DOL rule generally defining nonsalaried employees as those who are subject to short-term disciplinary suspensions without pay, the sergeants argue that it is a reasonable standard and a true measure of nonsalaried status. In the sergeants' view, it is clear that employees subject to short-term loss of pay for disciplinary reasons are nonsalaried employees covered by the Act's overtime provisions. Such employees are distinguishable from executive and administrative employees who, when compared to salaried employees, are more independent, have greater control of their work, and earn compensation that is not conditioned on avoiding discipline.

The sergeants next argue that the department should not be able to take advantage of the window of correction to avoid the overtime provisions of the FLSA. They maintain that the window of correction is available solely to cure an impermissible pay reduction made in cases of actual mistake or inadvertence, and is premised on restoring the lost compensation and eliminating the impermissible rule that led to the pay reduction in the first place. Because none of these preconditions was met in this case, the sergeants conclude that the department

should not be able to take advantage of the corrective mechanism.

The Commissioners respond first by advancing a procedural argument. Relying on *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), 1 *ABA PREVIEW* 19 (Sept. 20, 1995), the Commissioners contend that they are an arm of the State of Missouri and, thus, are immune from suit in federal court under the Eleventh Amendment. In *Seminole Tribe*, the Supreme Court concluded that Congress' authority under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, did not authorize it to enforce provisions of the Indian Gaming Regulatory Act by subjecting a state to suit in federal court. In other words, the Court held that the Congress' Commerce Clause authority, broad though it may be, could not trump a state's Eleventh Amendment immunity.

The Commissioners agree that Congress had Commerce Clause authority to enact the FLSA. But the Commissioners strenuously argue that the Commerce Clause does not permit private persons such as the sergeants to sue an arm of the state in federal court, even if they are alleging a violation of federal law.

The Commissioners' then advance an argument on the merits in the event they do not prevail on their immunity argument. According to the Commissioners, the DOL's regulations defining nonsalaried employees as employees subject to short-term loss of pay for disciplinary reasons are irrational as applied to a public employer engaged in law enforcement activity. They contend that as a law enforcement agency, the St. Louis police department must set a tone of discipline and good order among

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its officers. According to the Commissioners, the department needs the flexibility provided by short-term disciplinary pay reductions without being forced to comply with the Act's overtime provisions if it avails itself of that disciplinary tool.

Even if the department is subject to the DOL regulations defining salaried and nonsalaried employees, the Commissioners contend that the department does not have a policy or practice of short-term disciplinary pay reductions with respect to its supervisory officers. They point out that only one of the 288 sergeants involved in this case ever received a short-term disciplinary pay reduction and that the reduction occurred only after the department and the sergeant negotiated a two-day suspension with loss of pay to settle the department's disciplinary charge that the officer violated the department's residency policy. According to the Commissioners, this one-time, short-term suspension did not jeopardize the salaried status of any other sergeant and that the department is entitled to correct the effects of the suspension, if it is determined that the suspension was inconsistent with the salaried status of supervisory officers.

## SIGNIFICANCE

The Supreme Court's decision in this case could be more important for what it says about a state's Eleventh Amendment immunity from suit by private persons in federal court than what it may say about the impact of short-term disciplinary pay reductions on an employee's status under the FLSA.

Several lower federal courts have relied on the Court's *Seminole Tribe* decision to hold that the FLSA does not abrogate a state's Eleventh Amendment immunity, meaning that any FLSA suit against a state or arm of the state would have to be brought in state court, if at all. See, e.g., *Adams v. Kansas*, 919 F. Supp. 1496 (D. Kan. 1996); *Mills v. Maine*, 3 Wage & Hour Cas. (BNA) 2d 767 (D. Me. 1996); *Close v. State of New York*, 3 Wage & Hour Cas. (BNA) 2d 856 (N.D.N.Y. 1996). Thus, this case gives the Court the opportunity to extend or restrict its *Seminole Tribe* holding, and, if it extends the *Seminole Tribe* holding, to further shift the balance of authority between the federal government and the states in the states' favor.

With respect to the whether short-term disciplinary pay reductions transform public salaried employees to nonsalaried employees, a decision for the sergeants would increase substantially the wage-compensation costs of state and local governments. In other words, a decision for the sergeants would cost state and local taxpayers. A decision for the Commissioners would remove one incentive for public employers to limit the hours exempt employees are required to work.

## ATTORNEYS OF THE PARTIES

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**For David A. Robbins et al.**  
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## AMICUS BRIEFS

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Joint brief of the National League of Cities, National Association of Counties, International City/County Management Association, United States Conference of Mayors, International Municipal Lawyers Association, Council of State Governments, National Conference of State Legislatures, National Governors' Association, Government Finance Officers Association, National Association of State Personnel Executives, National Public Employer Labor Relations Association, and the International Personnel Management Association  
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