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Can a Public Employer Require Employees to Use Their Comp Time?

by Jay E. Grenig

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Case at a Glance

The Supreme Court is asked to determine whether a Texas county's policy requiring employees to use accrued compensatory time when their balances approach a set level violates the Fair Labor Standards Act. Christensen and 126 other Harris County Deputy Sheriffs argue that under the Act, accrued comp time is devalued by unilaterally compelled use. The County responds that the 1985 Amendments to the FLSA were enacted to lessen the financial burdens imposed on local governments by the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*.

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Editor's Note: The respondent's brief in this case was not available by *PREVIEW*'s deadline.

ISSUE

The Court is asked to decide whether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. § 207(o), may, absent a preexisting agreement, require its employees to use accrued compensatory time.

FACTS

The FLSA, 29 U.S.C. § 201 et seq., requires employers to pay nonexempt employees time and one-half their hourly wage for work considered "overtime" under the Act. 28 U.S.C. § 207(o)(1) permits public employers to avoid paying cash overtime wages by paying compensatory time to such employees instead.

It is a policy of Harris County, Texas, that the accrued compensatory time off for employees in its Sheriff's Department who are covered by the Fair Labor Standards Act must be kept below a predetermined level. The bureau commanders set these levels based on each bureau's personnel requirements.

The County asks employees reaching the maximum allowable hours of compensatory time authorized by the FLSA to take steps to reduce the number of accrued hours. A supervisor may order an employee to reduce accumulated compensatory time at a time suitable to the bureau. An employee dissatisfied with the supervisor's order may informally complain to higher levels of supervisor authority within the department.

The employees in this case filed a class action against the County in federal district court. The district court entered summary judgment against the County. 945 F.Supp. 1067 (S.D. Tex. 1996). The district court held that accumulated compensatory time and salary must be treated the same way and that

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employees have a right to use compensatory time when they choose. According to the court, the County in this case involuntarily shortened an employee's workweek with pay in violation of 29 U.S.C. § 207(o)(5).

The County appealed the district court's summary judgment to the U.S. Court of Appeals for the Fifth Circuit, arguing that its policy was authorized by 1985 amendments to the FLSA. The court of appeals reversed the district court, holding that the 1985 amendments to the FLSA do not grant public employees a right to choose when they will use accrued compensatory time. *Moreau v. Harris County,* 158 F.3d 241 (5th Cir. 1998). The United States Supreme Court granted the employees' petition for certiorari.

Case Analysis

In 1985, the FLSA was amended to allow public employers to agree with employees or their representatives to award compensatory time in lieu of monetary payments at a rate not lower than one and one-half hours' pay for every overtime hour the employee works. 29 U.S.C. § 207(o). (With respect to employees not covered by a bargaining or representative's agreement, but hired before April 15, 1986, the regular practice in effect on that date constitutes an agreement satisfying the statute.) Employees working overtime would receive additional time off from the job with pay, but not cash at the higher overtime rates.

Section 207(o)(5) provides that an employee of a political subdivision of a state who has accrued compensatory time and who has requested the use of such compensatory time "shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operation of the public agency."

Section 207(o)(5) does not expressly address the issues raised by the County's policy. That section is triggered only when the employee first requests the use of his or her accrued compensatory time, and it does not address whether a public employer may control an employee's accrual of compensatory time.

The employees contend that the use of accrued compensatory time may not be compelled absent a freely arrived-at bilateral agreement between the employer and the employee. The employees assert that Congress vested the employee, rather than the employer, with the right to determine the use of accrued compensatory time off. They urge that 29 U.S.C. § 207(o)(5) imposed only one limitation on this right—that the use of the compensatory time must not unduly disrupt the operations of the public agency.

According to the employees, a mandatory time-off system is inconsistent with the FLSA overtime standard. They reason that the use of employer-mandated time off as overtime compensation in lieu of cash alleviates the market incentive to shorten the workweek to the national standard and to spread the work among employees.

Since no other limitation on this right was imposed by Congress, the employees assert that they can choose whether to use or to bank their compensatory time as they see fit. According to the employees, employers do not have the right to control employees' use of their accrued compensatory time so long as their use does not unduly disrupt agency operations.

They also claim that the regulations of the Department of Labor, the agency that administers and enforces the FLSA, do not allow an employer to require an employee to use accrued compensatory time off involuntarily in the absence of a lawful agreement providing such authorization. They assert that these regulations are reasonable and in harmony with the language of the FLSA.

The County, however, contends that the 1985 amendments to the FLSA were enacted to alleviate the economic burden upon state and local governments imposed by the Act's cash overtime requirements. It urges that Congress must have intended for public employers to control the accrual of compensatory time because Congress contemplated circumstances in which a public employer may elect to reduce or eliminate accrued compensatory time by making cash payments.

The County points to 29 U.S.C. § 207(o)(3)(B), which states that "if compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment." Since this section permits a public employer to reduce accrued compensatory time cash payments, the County asserts that reductions in compensatory time must be at the employer's option.

Significance

As originally enacted in 1938, the FLSA applied only to private employers. Beginning in 1966, however, Congress expanded the coverage to protect state and local government employees. *See Garcia v. San Antonio Metro. Transit Authority,* 469 U.S. 528 (1985) (holding that the Constitution per-

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mitted the FLSA to be applied to states and their political subdivisions).

In 1985, the FLSA was amended to permit public employers, under specified circumstances, to provide compensatory time rather than cash wages to employees who worked overtime. Under the FLSA, the compensatory time received by those public employees who work overtime may be preserved, used, or cashed out consistent with the provisions of Section 207(o)(5). The employer may discharge its obligation by paying for the compensatory time at the regular rate earned by the employee at the time the employee receives payment. Upon termination of employment, the employer must pay the employee for unused compensatory time at a rate of compensation not less than the average regular rate received by such employee during the last three years of the employee's employment, or the final regular rate received by the employee, whichever is higher.

The economic consequences of this case are clear. With tight budgets, public employers like the county wish to control the accrual of compensatory time in order to avoid paying cash overtime wages. On the other hand, the public employees want to accumulate accrued comp time up to the statutory maximum in order to begin receiving payments at an overtime rate of time and one-half, or at least retain the ability to "bank" their compensatory time for later use at their discretion.

In *Heaton v. Moore,* 43 F.3d 1176, 1181 (8th Cir. 1994), cert. denied sub nom *Schiro v. Heaton,* 515 U.S. 1104 (1995), the Eighth Circuit held that an employer could not require employees to use compensatory time before using their annual leave. The Eighth Circuit explained that when "a statute limits a thing to be done in a particular mode, it includes a negative of another mode." 43 F.3d at 1180. The Fifth Circuit has disagreed with this decision, finding that nothing in the FLSA limits an employer's power to require an employee to use accrued compensatory time. *See also Alford v. Louisiana,* 145 F.3d 280 (5th Cir. 1998), holding that an employer could require employees to use compensatory time before using annual leave.

This case gives the Supreme Court the opportunity to resolve the disagreement between the Fifth and Eighth Circuits. Of course, the final answer, however, may be provided by further congressional action.

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Amicus Briefs (as of Jan. 21)

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National Association of Police Organizations (Stephen R. McSpadden (202) 842-4420)

In Support of Harris County, Texas

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