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Second Circuit Holds Employer Liable for Misclassifying Employee as Exempt Under the Administrative Exemption of the FLSA

The U.S. Court of Appeals for the Second Circuit recently held that yet another employer would be liable for back wages when it misclassified one of its employees as falling within the “administrative exemption” of the Fair Labor Standards Act (“FLSA”). The Court held that the employee, who was engaged in both sales and marketing, was non-exempt and was entitled to back wages for overtime compensation. *Reiseck v. Universal Communications of Miami, Inc.*, 591 F.3d 101 (2d Cir. 2010).

In *Reiseck*, the Plaintiff worked as the Regional Director of Sales at Universal Communications of Miami, Inc. (“Universal”). In this capacity, Plaintiff was responsible for generating advertising sales from the travel and finance sectors of the northeastern United States and Canada for the publication and distribution of Universal’s complimentary magazine, *Elite Traveler*. Because *Elite Traveler* was a free publication, advertising sales were the magazine’s primary source of revenue.

After Plaintiff was terminated, she brought a claim against her employer alleging, among other things, that she was entitled to overtime compensation under the FLSA. Universal moved for summary judgment, arguing that Plaintiff was exempt from the overtime pay requirements of the FLSA because she fell within the Act’s “administrative exemption.” Plaintiff cross-moved for summary judgment arguing that she was entitled to overtime pay. The District Court held that Universal properly classified Plaintiff as falling within the “administrative exemption” of the FLSA and that she was, therefore, not entitled to overtime.

On appeal, the Second Circuit considered the issue of whether an advertising salesperson is an administrative employee for purposes of the FLSA and, thus, exempt from the overtime provisions of the FLSA. Because there was no dispute that Plaintiff was paid more than the amount required for an exempt employee per week and that Plaintiff’s primary duty consisted of the performance of office or non-manual work, it honed in on whether such primary duty was “directly related to management policies or general business operations of h[er] employer,” *id.* § 541.2(a).

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The Court looked to and explained the seemingly contradictory interpretive regulations issued by the Department of Labor which define the phrase “directly related to management policies or general business operations.” The regulations state that the phrase “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” (29 C.F.R. § 541.205(a)) and that “the phrase limits the [administrative] exemption to persons who perform work of substantial importance to the management or operation of the business.” *Id.* Alternatively, the interpretive rules state that administrative operations include “advising the management, planning, negotiating, representing the company, purchasing, *promoting sales*, and business research and control.” *Id.* § 541.205(b)(emphasis added).

The Court explained that because Universal’s advertising sales were a critical source of its revenue, advertising space was Universal’s “product” and Plaintiff’s primary duty was the sale of that product. As a result, the Court held that Plaintiff reasonably would be considered a sales employee, rather than an administrative employee. Further, the Court adopted the Third Circuit’s reasoning in *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896, 905 (3d Cir. 1991), explaining that the regulation which includes “promoting sales” in the definition of administrative operations refers to sales promotions which “consists of marketing activity aimed at promoting (i.e., increasing, developing, facilitating, and/or maintaining) customer sales *generally*” among all customers. But, when an employee makes specific sales to individual customers, he or she is a salesperson for purposes of the FLSA and is not a non-exempt administrative employee.

The Court held that, although Plaintiff was responsible for developing new clients with a goal of increasing sales generally, her “primary duty” (i.e. the duty in which more than fifty percent of her time was spent) was selling specific advertising space to clients. As a result, she was a salesperson for purposes of the FLSA and not exempt from the overtime provisions of the FLSA. The Second Circuit reversed the District Court and held Universal liable for paying Plaintiff back wages in the form of overtime. This decision reflects the Court’s continued trend toward favoring employees when faced with the question of whether their employers misclassified them as exempt under the administrative exemption of the FLSA. ■

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