

FORMER PARKS DIRECTOR CLAIMS OVERTIME PAY UNDER FLSA

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The Fair Labor Standards Act (FLSA) requires employers to pay wage earner employees overtime pay to individuals who work more than forty hours in a workweek. *See* 29 U.S.C. §§ 206(a), 207(a). However, as illustrated by the case described herein, the FLSA may not require a governmental entity, like a public parks and recreation agency, to pay overtime wages to certain exempt salaried supervisory or administrative employees who serve on a policy making level at the pleasure and discretion of a public elected official.

SEE: Fair Labor Standards Act (FLSA) Coverage (Exempt vs Non-Exempt)

<http://www.flsa.com/coverage.html>

HOURLY OR SALARIED EMPLOYEE?

In the case of *Watts v. Carroll County Fiscal Court*, E.D. Ky. (8/25/2017), plaintiff Benjamin Watts brought a lawsuit in federal district court claiming overtime pay under the Fair Labor Standards Act (FLSA) after being fired from his position as Carroll County Director of Parks and Recreation.

On January 5, 2015, the Carroll County executive (Westrick) hired Watts as county parks and recreation director. At the time, Watts was not given a formal job description, but Westrick told Watts his role as director would be to "oversee the Park & Recs of the Carroll County Park, completely." Despite this articulation of Watts's role, Westrick also later informed Watts that he should not question or second-guess the ways Westrick handled issues regarding other park employees. When asked to personally describe his duties as director, Watts stated these duties included "supervising and training park employees, even though he never "technically supervised anyone."

Watts experienced confusion over his wages a number of times during his tenure as Carroll County Parks and Recreation Director. When Watts was initially hired at the start of January 2015, he was told the position was a \$30,000.00 per year salaried role. Nevertheless, Watts was required to submit a time sheet every week indicating how many hours he worked.

On January 4, 2016, Westrick approached Watts and asked him why he was reporting more than forty hours per week on his time sheets. Watts informed Westrick that he was merely documenting the hours he worked every week as originally instructed. According to Watts, Westrick then instructed him to keep track of any hours in excess of forty "in his head" and to use those hours as "comp time" rather than reporting it on a time sheet. This confused Watts, so he asked both Westrick and his personal lawyer to further explain the matter.

After Watts sought clarification, Westrick sent Watts a memorandum imposing new conditions of employment on his parks and recreation position. The memorandum informed Watts that "he had no supervisory authority and, thus, could no longer work over forty hours per week without Westrick's prior approval." The new conditions also confined Watts to his office between the hours of 8:30 a.m. and 4:30 p.m., to ensure he worked only forty hours per week.

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Watts was also classified as an hourly employee, rather than a salaried one, going forward. According to Westrick, these new conditions were imposed because of Watts's lackluster performance as parks and recreation director.

Not long after the new conditions were imposed, Watts was terminated from his employment with Carroll County. Carroll County Fiscal Court officers informed Watts that his position was no longer needed and that "several issues" led to his discharge.

Following his termination, Watts filed a civil action in federal district court, alleging various violations of the Fair Labor Standards. In particular, Watts claimed during his time as county parks and recreation director "he frequently worked in excess of forty hours per week but was never paid overtime compensation."

In response, defendant Carroll County Fiscal Court (CCFC) claimed Watts was not an "employee" for purposes of the Fair Labor Standards Act (FLSA) and, thus, not entitled to overtime compensation. Even if Watts was considered an "employee" under the FLSA, CCFC claimed Watts was "an exempt employee who still was not entitled to overtime compensation."

FLSA POLICYMAKING EXCEPTION

In particular, CCFC claimed Watts was not entitled to any overtime compensation because "Watts's position as Director of Parks and Recreation fell within the policymaking exception" of the FLSA.

As noted by the federal district court, the policy exception to the FLSA overtime requirement has been interpreted in a variety of ways by the federal courts to include "employees who merely implement policies or offer suggestions about policies" and limited to "employees who work closely with and are specifically held accountable to their appointers." Further, the court cited the following factors as relevant in determining the applicability of the FLSA policy exception:

- (1) whether the elected official has plenary powers of appointment and removal or, put another way, whether the appointee serves at the pleasure of the appointing authority;
- (2) whether the appointee is personally accountable to only that elected official;
- (3) whether the appointee represents the elected official in the eyes of the public—i.e., whether the appointee can speak on behalf of the policymaker;
- (4) whether the appointee has discretionary rather than administrative powers;
- (5) the level of the position within the organization's chain of command; and
- (6) the actual intimacy of the working relationship between the elected official and the appointee.

Applying these factors to Watts's case, the federal district court found itself "unable to grant summary judgment in favor of Carroll County." According to the federal district court, the applicability of the FLSA policy exception should be "narrowly construed" because it typically involves questions of fact better left for a jury to consider at trial, as opposed to being resolved on a pretrial motion for summary judgment. While acknowledging "some factors weigh in support of the policymaking exception," based on the pretrial record, the federal district court found a reasonable jury could return a verdict" in favor of Watts's FLSA claim to overtime as a non-exempt employee.

POLICYMAKING AUTHORITY?

In making its case for the policy exception, Carroll County had relied on the pretrial testimony of county executive Westrick which claimed Watts was hired to "completely" oversee the parks and recreation department. Westrick had testified that Watts was "director of the whole park out there" and that Watts's duties involved "anything that pertains to the park." Carroll County claimed this testimony demonstrated Westrick "lacked the personal knowledge or experience to effectively determine County policy with regard to the Parks and Recreation Department."

Further, Carroll County argued the FLSA policy exception applied to Watts because county executive Westrick, the holder of a public elective office, did "personally appoint and subsequently remove Watts" from his service on a policy making level as county parks and recreation director.

The federal district court, however, found such evidence was "simply not enough" to conclude, "Watts was actively involved in shaping Carroll County Parks and Recreation policy."

While Watts had testified that it was "his responsibility to create and implement goals and strategies for the Parks and Recreation department," the court found Watts "also had to seek permission to implement those goals and strategies." Moreover, the court noted Watts had testified that he "thought" he was responsible for developing budget for the parks and recreation department. However, once the budget left Watts's hands, the court found the budget "was altered before final approval."

In support of its claim to the FLSA policy exception, Carroll County Fiscal Court had also pointed to "many emails Watts sent to other employees with policymaking suggestions." The federal district court, however, found these e mails were "insufficient evidence" to conclusively establish that "Watts was actually responsible for making those policy ideas come to life." On the contrary, the court noted Westrick had expressed frustration that Watts was "constantly" sending him "long emails" about different programs Watts wanted to pursue. In particular, the court found Westrick had communicated to Watts that "the County was not, in fact, going to pursue the suggested policy changes."

ADMINISTRATIVE EMPLOYEE EXCEPTION

If Watts was considered an "employee" for purposes of the FLSA, in the alternative, Carroll County had also argued Watts was "an exempt administrative employee pursuant to 29 U.S.C. § 213(a)(1)." As cited by the federal district court, the FLSA administrative employee exemption would apply where an employee is:

- (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week . . . exclusive of board, lodging and other facilities;
- (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

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(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200(a).

In this particular instance, the federal district court found the first requirement of the administrative exemption was satisfied during the time that he was a salary employee because Watts's testimony and personnel file indicated he was "making at least \$30,000.00 annually, or at least \$576.92 per week." The court, however, found the other two requirements related to Watts' "primary duty" as parks and recreation director "remain in dispute."

As was the case with the policymaking exemption, the federal district court would "construe this exemption narrowly" and "the employer bears the burden of proving each element of the exemption by a preponderance of the evidence." Once again, the court acknowledged, "the application of an FLSA exemption is generally considered a question of fact that "will be better addressed by a jury in the context of trial," as opposed to being resolved by the judge in a pretrial motion for summary judgment.

Based on the pretrial testimony and evidence in this case, the federal district court was "unable to conclude at this time that the administrative exemption applies to Watts's employment as Carroll County Parks and Recreation Director."

MANAGEMENT RELATED WORK

As cited by the court, "[t]he second prong of the administrative exemption test requires an employee's primary duty to involve office or non-manual work directly related to the management or general business operations of the employer." 29 C.F.R. § 541.200(a)(2).

In this particular instance, the court noted that the pretrial record did not contain a written job, but Watts's deposition testimony suggested, "his primary duty could be viewed as management-related." In describing his duties, in his deposition, Watts had testified as follows:

I would best describe them as it was my responsibility to create and manage recreational and sports programs for the community both for youth and adults. To manage and oversee the county park and the associates that were employed to work at the park. And that included the pool, the county pool that was - that was at the park as well.

And then we also had an after-school program that we had a few employees who worked with the school as part of a grant that was created before I was ever the director, and just to kind of manage and oversee that as well.

Watts had further testified that he "trained Parks and Recreation employees and directed them to perform certain tasks." Watts also stated that he "made recommendations about equipment or materials to be purchased, although he was not the one with final purchasing authority." Ultimately, Watts testified that he believed his primary duty was "to manage."

MANUAL WORK DUTIES

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That being said, Watts claimed the FLSA administrative employee exception did not apply to his particular position because "his primary duty did not involve 'office or non-manual work' as required under the regulation." On the contrary, Watts claimed his work duties included manual work. According to Watts, the county executive had told him it was "his responsibility to pick up trash around the park and to personally deliver checks to employees." Moreover, Watts said he "also helped other employees with various manual projects, such as putting wind screens around batting cages, pumping water out of the park fields, and transporting bags full of sports equipment."

The federal district court, however, noted that such manual labor activities engaged in by Watts "would not preclude a conclusion that his primary duty was management-related." On the contrary, the court acknowledged: "employees can perform some manual work without losing exempt status, particularly where manual tasks are merely incidental to a primary, non-manual duty such as managing the park and its employees on the whole."

In this particular instance, the court found "Watts's occasional labor-heavy tasks appear to be peripheral to his supervisory role as a manager of the Carroll County Parks and Recreation department." As described by the court, the county executive had "confined Watts to his office for a period of time" which suggested Westrick believed "Watts could carry out his duties as Parks and Recreation Director from behind a desk."

DISCRETION AND INDEPENDENT JUDGMENT

For the FLSA administrative employee exception to apply, the court would also require Carroll County Fiscal Court to prove Watts's primary duty as parks and recreation director included "the exercise of discretion and independent judgment with respect to matters of significance." Within the context of this FLSA exception, the court characterized discretion and independent judgment as follows:

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. This prong can be satisfied even if an employee is subject to "active supervision" or if his work is heavily regulated.

Once again, the court found pretrial "conflicting evidence" would preclude the granting of summary judgment in favor of Carroll County.

On one hand, the court found evidence that Watts could exercise discretion and independent judgment as parks and recreation director. As noted by the court, the county executive had originally told Watts his role as parks and recreation director would be to "oversee the Park & Recs of the Carroll County Park, completely." Watts testified that the county executive had told him that "he didn't know anything about Parks and Recreation and that he just needed somebody to come in and clean it up." Further, the court found "Watts was allegedly tasked with a number of decision-making responsibilities, such as developing a budget, creating a website, recommending certain personnel actions, and more." As characterized by the court, this pretrial evidence suggested, "Watts had sufficient authority to make decisions out of his own discretion and independent judgment."

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On the other hand, the federal district court cited the following pretrial evidence which suggested that the county executive, Westrick, was "really the party in control of Parks and Recreation decision-making":

Westrick complained during his deposition of "long emails" Watts used to send him suggesting new programs the Parks and Recreation department could pursue. According to Westrick, he told Watts "no, that we're not going to pursue different issues, different programs that goes on in the school at this county park. No." Westrick then complained of Watts's persistence in sending recommendations.

On one occasion, Westrick apparently gave Watts grief for ordering a storage building with a green roof, instead of the blue roof Westrick had requested. And Watts testified that at one point when he tried to recommend Westrick take certain personnel actions, Westrick responded that "he was the one who could fire me and that I was not to question his decisions."

Further, the court found Watts had testified as follows that "he did not know the extent of his discretion and independent judgment abilities":

The further into the position, the longer that I was in that position, the more muddied the waters were as far as what I was and was not able to do or what I did or did not have the authority to do. Did I make recommendations, absolutely. Did I have the authority to do so? Your guess is as good as mine."

In light of such conflicting pretrial evidence and testimony, as was the case with the FLSA policymaking exception, the federal district court found further trial proceedings were necessary for a jury to determine "how much independent decision-making capability" Watts had as parks and recreation director and whether "Watts was a non-exempt administrative employee entitled to overtime compensation." In reaching this determination, the federal district court noted, "active supervision from a supervisor does not totally preclude an employee from exempt status" under the FLSA discretion and independent judgment exception.

CONCLUSION

Having found that the pretrial evidence had failed to conclusively establish Carroll County's claim that Watts was an exempt employee under the FLSA, the federal district court denied Carroll County's motion for summary judgment. Rather than proceed to a jury trial, on October 20, 2017, the federal district court reported that Watts and Carroll County had reached a settlement on this claim for overtime pay under the FLSA.

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