Cincinnati Law Library News

A Monthly Newsletter from the Cincinnati Law Library Association October 2009

Juries and the Executive Exemption

By Allen S. Kinzer. Reprinted with permission.

There has been an explosion of litigation under the Fair Labor Standards Act (FLSA) in recent years. Many of these cases are brought as collective actions, seeking to involve all the employees in a particular job classification. With the high volume of FLSA cases, there have been many settlements, but very few jury trials.

Jury trials present particular challenges to employers that are not present when cases are settled or decided by a judge. This was reflected in two recent federal trials that addressed whether certain managers were exempt executive employees under the FLSA and, therefore, exempt from overtime pay. The results from these trials were not good news for employers.

In Morgan v. Family Dollar Stores, a jury awarded more than $35 million in overtime pay and liquidated damages to 1,424 plaintiffs. In Rodriguez v. Farm Stores Grocery, a jury awarded more than $290,000 in overtime pay to 26 plaintiffs. In both cases, the employer attempted to prove that the managers were exempt from the FLSA's overtime pay provisions because they were "executive" employees (29 C.F.R. §541.100; see ¶330 of the Guide).

From these jury verdicts, there are lessons to be learned for employers and lawyers who represent employers.

The Executive Exemption

The denotation (the black-letter definition under the law) of an "executive" is explained in the FLSA regulations. In both the Morgan and Rodriguez cases, the juries received the denotation. That is, the judge instructed the jury on the FLSA's definition of an executive employee for the overtime pay exemption. The instructions explained that to be an executive, all of the following must be met:

Management: The employee must have a primary duty that is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof.

Supervision: The employee must customarily and regularly direct the work of two or more other employees.

Authority: The employee must have the authority to hire or fire other employees. Alternatively, the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Compensation: The employee must be compensated on a salary basis at a rate of not less than $455 per week, exclusive

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of board, lodging or other facilities. (29 C.F.R. §541.100; see ¶331 of the Guide) In Morgan, the employer faced former store managers who testified that they spent about 80 percent of their time stocking shelves, running cash registers, unloading trucks and cleaning the store restrooms (see February 2009 newsletter, p. 1). In Rodriguez, the store managers testified that they spent about 30 percent of their time cleaning, 10 percent stocking the racks, but most of the time on customer sales (see May 2008 newsletter, p. 1). Under the FLSA regulations, how much time an employee spends on exempt duties is but one factor to consider in determining whether the employee's primary duty is management. Indeed, the regulations list several other factors, including the employee's freedom from direct supervision and the relationship between the employee's wages and the wages paid to other workers performing the same type of nonexempt duties.

Concurrent Exempt and Nonexempt Duties

The regulations even contemplate concurrent duties. For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management (29 C.F.R. §541.106(b)). An assistant manager may supervise employees and serve customers at the same time without losing the exemption. An exempt employee also may simultaneously direct the work of other employees and stock shelves.

In Morgan, the judge instructed the jury on concurrent duties: "An executive employee may sometimes perform nonexempt or nonmanagerial duties concurrent with his executive duties, so long as the nonexempt duties are not his primary duties." The court, however, also instructed the jury, "A working or supervising foreman [who] works alongside his or her subordinates performing the same kind of work as the subordinates, and carrying out supervisory functions" is "not [an] executive[] within the meaning of the law."

The Morgan Trial

The Morgan jury had to apply these concepts to a broad range of facts. The store managers testified that they spent 80 to 90 percent of their time on manual labor tasks and had little discretion on assigned management tasks such as reports, bank deposits and petty cash management because the store manual strictly prescribed what was to be done. For example, to show that they had little managerial authority, the store managers testified that the store manual specified that the trash must be emptied (after checking for cigarettes) the floors must be swept every day and mopped with clean water at least once a week; and the restrooms must be cleaned and mopped daily, and stocked with toilet tissue, paper towels and a trash container that is to be emptied daily. The store manager testified that Family Dollar forbade them from hiring janitorial help and that they had no authority to hire outside workers. With that background, the store managers testified that they routinely performed janitorial duties themselves.

The plaintiffs also presented evidence that a large amount of manual labor had to be performed by store managers, given the limited payroll budget of each store. Further, the plaintiffs argued that the store manuals effectively limited the store managers' discretion concerning any exempt managerial duties. Those manuals, for example, instructed store managers how to arrange clipboards, what items go in each of the four drawers of the single file cabinet and how to remove spots and chewing gum from store mats.

Family Dollar attempted to counter the plaintiffs' evidence with testimony about the store managers' authority, such as scheduling store workers and performing exempt managerial functions like making bank deposits and completing accident and payroll reports. With each of these functions, however, the plaintiffs countered with the limits on managerial authority, either in the store manuals, or by their boss (the district manager) or the corporate office. When Family Dollar appealed the jury verdict in favor of the store managers, the 11th U.S. Circuit Court of Appeals held that there was sufficient evidence for the jury to find as it did.

The Rodriguez Trial

In Rodriguez v. Farm Stores Grocery, the jury considered similar evidence. Farm Stores introduced evidence that the store managers interviewed, hired, trained, evaluated and disciplined employees; maintained store inventory; and were relatively free from daily supervision.

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The store managers, however, testified that their primary duties were sales-related, not managerial. They told the jury that they spent almost no time performing managerial tasks during most weeks, that they lacked real authority over their stores and employees, and that they were required to consult their district managers before making management decisions.

The managers also testified that their hourly rate of pay (salary divided by total hours worked) was essentially the same as the hourly rate of pay for the sales staff. When Farm Stores appealed the jury verdict, the 11th Circuit concluded:

We agree with Farm Stores that it presented abundant documentary evidence and testimony at trial indicating that the store managers' primary duty was management. We would affirm a jury verdict in that direction, but that is not what we have.

Thus, based on the evidence, the Rodriguez jury could have found either way. Most likely, that is true for the Morgan case as well. But why did both juries go against the employers?

Connotation of the Word 'Executive'

In these exemption cases, the employer must not only prove the denotation of the word "executive," but the employer must overcome the connotation of "executive." Let's briefly step back from the legal definition of executive and ask: What does the average person (or average juror) picture when someone says the word "executive"? Do they see someone who makes $500 per week? Or do they see someone who makes $1,000 per week or more? Do they see someone who supervises just two employees? Or do they see someone who can fire anyone out of a large group of employees? Do they see someone writing a weekly schedule of work hours for three employees? Or do they see someone sitting at a desk making major decisions affecting many people in the organization? Do they see someone who is told that they have little say in how much or how the budget can be spent? Or do they see someone managing the budget of the business?

Under the FLSA regulations, an executive can be stocking the shelves at the same time she is supervising the staff, but do juries really expect the "executive" to be stocking the shelves? If so, how often does the executive have to stock the shelves? Does the executive just stock shelves when training a new employee? Is the executive routinely stocking the shelves each week?

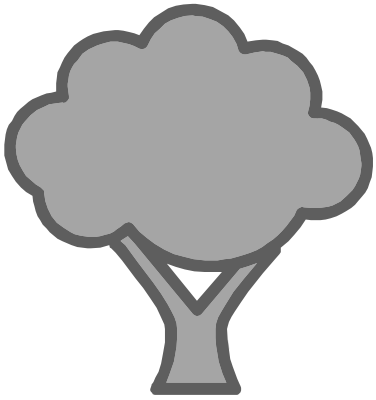
The *connotation* of "executive" is much different than the *denotation* under the FLSA. It is perhaps unfortunate for employers that the FLSA uses the term "executive" and then defines the term "supervisor." An employer not only has to prove that the plaintiffs satisfy the denotation of "executive," but also overcome the jurors' perceptions when they hear the term. These are two significant hurdles, and in front of juries, employers are tripping over them.

Allen S. Kinzer is a partner in the Columbus, Ohio, office of Vorys, Sater, Seymour and Pease LLP, where he practices labor and employment law. He has successfully represented employers before state and federal courts and the U.S. Department of Labor concerning compliance with the Fair Labor Standards Act. Mr. Kinzer is also a member of the editorial advisory boards for Thompson Publishing Group's Employer's Guide to the Fair Labor Standards Act and FLSA Employee Exemption Handbook.

Save a tree and get the news first!

Are you currently receiving the CLLA newsletter in print? Would you prefer an online version?

CLLA members who opt for the online version receive it before the print copy is mailed, plus the links for email and websites are active. We send out a summary via email each month with a link to the full text. To switch from print to online, just email reference@cms.hamilton-co.org with a request to switch formats.



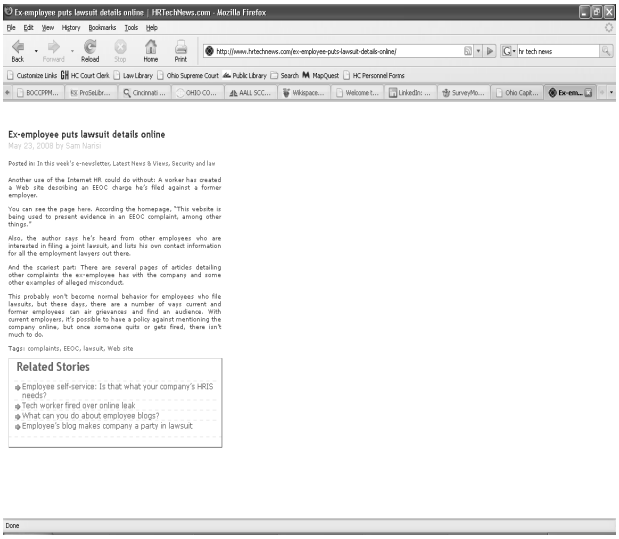
Tech Tip: Use Aarkvark to Customize Your Print-Outs from the Web

By Mary Jenkins, Law Librarian & Director

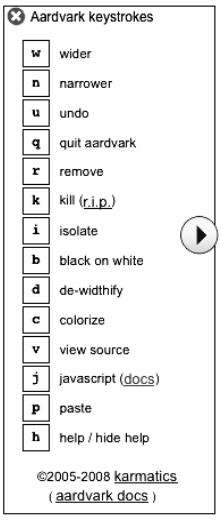
Don't you just hate it when you print out pages from the web containing all sorts of useless material like advertisements, sidebars, and so on? Wouldn't you rather strip out the material you don't want before printing? Well, you could do it with just a keystroke. If you use Mozilla Firefox as your internet browser, take a look at these "before" and "after" images and read on!

BEFORE: You want just the main article but you also get side bar information, navigation bars, banners, advertise-

AFTER: Here it is! Just the article you want with none of the fluff:



Just download Aarkvark at https://addons.mozilla.org/en-US/firefox/addon/4111 Once you've downloaded this little application, you'll simply right click when you're on a page you'd like to trim down and you'll select <Start Aardvark>. A red outline appears around various page elements so you will use the keystroke **i** to isolate just the text you want. There is additional functionality but that one will make a big difference, I promise. A demo is available at http://karmatics.com/aardvark/



New Ohio Juvenile Court "Youth Assessment System"

By Chuck Kallendorf, Public Services

Hamilton County's Juvenile Court is widely considered a model for others in the nation in delinquency and child abuse cases, with its Hillcrest Training School being recognized as one of the top three treatment facilities in the nation.

Even that being so, budget cuts forced court officials to close part of the detention center this week, meaning more youths than ever accused of committing crimes were being released to low-security programs or sent home all together. "The cuts come at a time when violent juvenile crime such as burglaries and robberies are up a whopping 20 percent in Hamilton County, with gun crimes at a historic high," according to recent news accounts. "Overall, though, juvenile crime is down five percent in 2008 on top of a five percent decline in 2007."

Hamilton County isn't alone in southwestern Ohio. Butler County budget cuts closed 12 of its 66 detention center beds, the *Enquirer* recently reported. Butler has also seen a decline in serious juvenile crime in recent years, and while Warren and Clermont county juvenile courts also face budget cuts, because those counties are smaller and the courts oversee probate matters as well, cuts have largely spared their juvenile divisions up to now. "The proposed budget will have a devastating effect on the Juvenile Court, its operations, and the ability to perform its constitutional and statutory obligations -- most importantly compromises public safety," Hamilton County Juvenile Court Judge Thomas Lipps told commissioners here. Butler County Juvenile Court Administrator Robert Clevenger told the *Enquirer* that in addition to reducing the number of beds at that county's detention center, budget cuts have resulted in fewer psychological evaluations, a decrease in the number of youths sent to residential drug and alcohol treatment, and the elimination of a family counseling program.

In the midst of all these issues, Ohio juvenile courts have the potential of a significant new tool at their disposal developed by the Ohio Department of Youth Services and U.C.'s *Center for Criminal Justice Research*.

The *Ohio Youth Assessment System* was recently described by the *Columbus Dispatch* as a "streamlined, web-based system for assessing young offenders in determining appropriate dispositions, treatment, and levels of supervision, designed, in part, to help judges decide whether they should send juveniles to more-costly state programs or less-expensive community projects,"

The roots of the *Assessment* lie in Ohio's "*RECLAIM*" program. In evaluating those programs back in 2005, ODYS found that their effectiveness was mitigated by the risk level of the youth being served in the program. Risk principles propose that the intensity of service be matched to the risk level of the offender -- in practice calling for the focusing of resources on the most serious cases, with high risk offenders benefiting most from intensive services and low risk youth left to less stringent options. Some research, in fact, suggests that providing intensive treatment to low risk cases can have a detrimental impact on low risk youth because it exposes them to higher risk offenders and disrupts their prosocial community networks. [Ohio's RECLAIM program was created by provisions in the 2003 biennial budget appropriations bill (HB 152), now codified at ORC §5139.41, 5139.43, and 5139.44. The "executive summary" of that study can be read @ http://www.dys.ohio.gov/DNN/LinkClick.aspx?fileticket=7a23A5o%2buK4%3d&tabid=143&mid=763]

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Those results in hand, ODYS next surveyed the courts to better understand the "state" of risk assessment across Ohio's 88 counties. Upon learning that there were some 77 different instruments being used, ODYS seized upon the opportunity to get back together with U.C. to develop a single, uniform, and statewide risk assessment platform available across- the- board to all of the counties. [That study's "Final Report" can be viewed @ http://www.dys.ohio.gov/DNN/LinkClick.aspx?fileticket=qs3kMUWdVQY%3d&tabid=161&mid=821 with copies of the assessment forms in appendix]

"To best meet its goal of providing juvenile justice professionals 'the most effective interventions for youth based on their likelihood to reoffend, their criminogenic needs, and their barriers to services, while using the least restrictive alternative,' five instruments were designed to assess youth at each stage of the juvenile justice system," the report summarized. "The first two, OYAS-Diversion and OYAS-Detention, are used pre-adjudication and are expected to help juvenile justice professionals determine what type of interventions are appropriate to address the youth's level of risk and need. The next three, OYAS-Disposition, OYAS-Residential, and OYAS-Reentry, were created to help best serve youth once they were adjudicated."

In order to have a major impact on the Ohio juvenile justice system, though, it is important to encourage as many counties as possible to adopt it, the Study's report says.

That's where problems may now lie. The Assessment has already been developed and is in place, but since Ohio is a home-rule state, local courts have the autonomy to choose their own local procedures including whether or not to use a validated risk/need instrument.

As noted above, the OYDS *Assessment* model was developed from input specific to the State of Ohio and each of the individual counties. It has a state-wide overview, but is also accessible only on an individual court/county basis with their own unique attributes & characteristics input into the system, and would be an on-going project which would be refined and updated the same way Court personnel now have to complete two, full-day training programs and pass a written & proficiency test to be certified to use the System. After that, certifications are good for three years.

Dr. Edward Latessa, principal investigator and head of the Criminal Justice Program at U.C., reported that about 300 people from the state's 12 pilot counties have already been trained in the System's use. Fifty-four of the state's counties, including all of the larger ones, are already onboard, either already having been, or scheduled to be, trained.

Free Lunch! Free Seminar on Social Networking!

According to the 2009 Networks for Counsel Survey, more than 70 percent of lawyers are members of an online social network. If you're not, or if you don't think you're using online social networks or social media to your advantage, come to this session. Mary Jenkins, Law Librarian & Director, will introduce attendees to social networking tools that can help attorneys and other professionals connect with colleagues and prospective clients. We will look at general sites including LinkedIn, Facebook, Plaxo, and Twitter, and law-specific sites like LawLink, Legal OnRamp, Lawyrs.net, and Martindale-Hubbell Connected, with a focus on free, easy-to-use resources. We'll consider potential benefits and risks, noting the difference between directories and more substantive, productive sites that offer real potential for collaboration, professional development, and effective marketing. And the session wouldn't be complete without a look at a few really stupid things that some lawyers have done with social media.

- Tuesday, October 27, 2009 at 12 noon
- CLLA's Judge Robert S. Kraft Board Room
- Free to members and county personnel. Non-members: $20.
- An RSVP is required for lunch. Please call 513.946.5300.

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