

Who's Minding the Store?

When Do Managers, Assistant Managers and Supervisors Qualify as Exempt

By C.R. Wright (Atlanta)

We wish there were an easy and certain answer to the above question, but the reality is that court decisions in this area differ in both analysis and results even given similar factual scenarios. For some time now we have been talking about the huge increase in overtime cases and other actions being filed under the Fair Labor Standards Act (FLSA) and similar state wage and hour laws. No area of employment litigation has been more active recently than wage and hour litigation. In 2007 the steep increase in FLSA lawsuits filed continued as did payouts, collectively totaling over a billion dollars.

Lawsuits being filed by retail managers who claim they should not be treated as exempt from overtime pay because they are not really "managing" has many asking just who is "minding the store." If these individuals are not managing, who is? For many years now we have seen retailers forced to pay as a result of such claims.

But a recent decision by the United States Court of Appeals for the Sixth Circuit is an example of how some courts are beginning to side with retailers on this issue, recognizing that someone indeed does have to manage the store even if they also have to perform non-managerial duties. *Thomas v. Speedway SuperAmerica*. As a result some plaintiffs' attorneys are saying they recognize the danger and that they are now reluctant to bring these cases on behalf of managers. First, some background.

Exempt Classification and the "Executive" Test

Individuals can be classified as exempt from overtime requirements based on their job duties if they meet the requirements of the administrative, professional, executive, outside sales or other tests under the FLSA. The executive test is the one that most likely determines whether supervisors and managers can be properly classified as exempt. In the past five years we have seen an increase in claims brought by managers, assistant managers and supervisors claiming that they do not meet the requirements of this exemption, that they are not "bona fide executives," and that they should therefore be entitled to overtime pay.

Retailers, particularly those who operate convenience stores, coffee shops or other stores having relatively few employees at each location have been particularly subject to such challenges. The court cases dealing with these claims show that there is a great deal of uncertainty when it comes to safe reliance on the executive test as a basis for classifying managers and assistant managers as exempt.

In order to qualify as exempt under the FLSA executive test, an individual's primary duty must be the management of the enterprise or of

a customarily recognized department or subdivision. The individual must customarily and regularly direct the work of two or more other employees, and must have the authority to hire and fire other employees or to make suggestions and recommendations which are given particular weight as to hiring, firing, advancement, promotion or other change of status of other employees.

As you will see, this test has been interpreted and applied in different ways by courts dealing with cases brought by "managers" challenging whether they were properly classified as exempt from overtime.

Past and Present Claims Against Retailers

In January of 2007 a federal court in Texas found that two Starbucks store managers were properly classified as executives exempt from overtime under the FLSA. Other similar cases against Starbucks proceeded, however, as other store managers claimed they were not managers, but were instead merely glorified baristas pouring coffee and performing other non-exempt duties the majority of the time.

Managers attempt to join their claims together while companies try to keep them as individual cases. In September of 2007 a federal court in Florida allowed such a case against Starbucks to proceed as a class nationwide. Just a few weeks ago, in mid-January of 2008, a federal judge in Texas allowed a class of up to 11,000 assistant store managers to proceed with a

lawsuit against Starbucks for its failure to pay them overtime. The judge noted that even though the individuals worked in different stores and had different supervision, they all had the same job title, the same job description and the same hierarchy of supervision.

Sometimes managers are not successful in their attempt to proceed as a class. Last November hundreds of Home Depot assistant merchandising store managers in California learned that they would have to proceed individually to bring their claims. Because circumstances varied greatly between stores, the court found that the claimants should not be joined as a class (which could have included from 1,400 to 2,700 individuals).

The managers claim that they spend more than half of their time doing the same duties as hourly workers, that they exercise no managerial discretion and that they have no hiring or firing authority. For each individual case going forward, Home Depot will still have to show that the managers qualify as exempt executives under California law.

In October, 2007, Duane Reade assistant managers asked to be certified as a class to bring overtime claims. The first claim was filed by a night manager who claimed the company improperly classified nighttime employees as exempt. Similar claims were later filed by daytime assistant



Continued on next page

Who's Minding the Store?

Continued from previous page

managers, saying that they should not be classified as exempt executives under New York or federal law.

In January of 2008 Family Dollar was sued by store managers seeking to proceed as a class. They claim that their managerial duties are nonexistent or minimal compared to the other duties they perform.

To Fight or not to Fight

With uncertain results and expensive legal battles some companies have chosen to resolve claims and move on. It has been more than five years since Radio Shack announced that it would pay up to \$29.9 million to settle claims by California store managers who said they should be paid

overtime. But the story did not end there. More suits were filed in other states including Illinois, Pennsylvania, Florida and New York.

In 2005 a court, applying the FLSA executive test, ruled that store managers who did not supervise at least 80 hours of subordinate time for at least 80% of their workweeks could not qualify as exempt under the executive test. That made it difficult for Radio Shack to defend against many of the claims. In 2007 Radio Shack agreed to a global settlement paying up to \$8.8 million. In November of 2007 a Radio Shack spokesperson said the Company was pleased with the settlement and happy to move on.

Also in November, 2007, three days before a trial was to begin, Staples announced that it would pay \$38 million to settle overtime claims of operations and sales managers in California who claimed they did not qualify as exempt as executives under California law. The "managers" claimed they spent more than 50% of their time stocking shelves, helping customers and doing other non-managerial duties. They also claimed that Staples controlled everything such that they had no managerial discretion.

What the 6th Circuit Said

The recent decision by the Sixth Circuit Court of Appeals in a case brought by Mabel Kay Thomas, a Speedway SuperAmerica convenience store manager, shows how courts do sometimes side with retailers in determining whether the FLSA executive test applies. The issue was whether or not Thomas's primary duty was management so as to establish an exemption from overtime requirements under the FLSA executive test.

The store manager was found to spend sixty percent of work time performing non-managerial duties. In the past other courts have used similar findings to conclude that the "primary duty" could not have been management, and that the executive exemption thus does not apply. But here the Court continued its analysis of other factors, considered applicable regulations and other court decisions and looked at the actual duties to determine whether the manager was "in charge" and thus exempt as a *bona fide* executive.

The Court found that the manager's managerial duties were more important than the non-managerial duties, reasoning that the station could not operate if the manager failed to hire, schedule and train other employees. Furthermore, the manager regularly used discretion and was relatively (even though not completely) free from supervision. Therefore, the store manager was properly classified as exempt from overtime under the FLSA executive test.

Lessons to be Learned

Given the uncertainty described above, the potential for enormous costs and liability, and the recent trend by courts to more carefully consider factors and perhaps side with retailers on the issue of whether managers should be exempt from overtime, what should retailers do to minimize the risk of being challenged?

First, remember that the *Speedway SuperAmerica* case could have had a different result in another court. While we are encouraged by the trend and results of this type, the risks are high and results are by no means guaranteed.

Our advice is that retailers continue to monitor store operations and circumstances carefully. If staffing is short such that meeting the exemption is a close call (either because of the number of people supervised or the percentage of time spent by supervisors performing non-managerial duties), reconsider what levels of supervision should be classified as exempt from overtime. You should also periodically document job duties for all levels of first-line store management and be certain that records are updated as conditions change.

Should you have questions about how the above principles might apply to your operations and whether your managers meet the executive test, or if you would like to discuss alternative compensation methods to avoid completely the risk of future challenges, please contact your Fisher & Phillips attorney.

The author may be contacted at crwright@laborlawyers.com or 404.231.1400.

The *Retail Update* is a periodic publication of Fisher & Phillips LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult counsel concerning your own situation and any specific legal questions you may have. Fisher & Phillips LLP lawyers are available for presentations on a wide variety of labor and employment topics.

Office Locations

Atlanta

1500 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, GA 30326
phone (404) 231-1400

Charlotte

Suite 2020
227 West Trade Street
Charlotte, NC 28202
phone (704) 334-4565

Chicago

1000 Marquette Building
140 South Dearborn Street
Chicago, IL 60603
phone (312) 346-8061

Columbia

Suite 1400
1901 Main Street
Columbia, SC 29201
phone (803) 255-0000

Dallas

Thanksgiving Tower
Suite 4343
1601 Elm Street
Dallas, TX 75201
phone (214) 220-9100

Denver

Suite 2800 South
600 17th Street
Denver, CO 80202
phone (303) 323-4200

Fort Lauderdale

Suite 800
450 East Las Olas Boulevard
Fort Lauderdale, FL 33301
phone (954) 525-4800

Houston

Two Allen Center
Suite 2220
1200 Smith Street
Houston, TX 77002
phone (713) 292-0150

Irvine

Suite 400
18400 Von Karman Avenue
Irvine, CA 92612
phone (949) 851-2424

Kansas City

Suite 400
104 West 9th Street
Kansas City, MO 64105
phone (816) 842-8770

Las Vegas

Suite 650
3993 Howard Hughes Parkway
Las Vegas, NV 89169
phone (702) 252-3131

New Jersey

430 Mountain Avenue
Murray Hill, NJ 07974
phone (908) 516-1050

New Orleans

Suite 3710
201 St. Charles Avenue
New Orleans, LA 70170
phone (504) 522-3303

Orlando

1250 Lincoln Plaza
300 South Orange Avenue
Orlando, FL 32801
phone (407) 541-0888

Philadelphia

Radnor Financial Center
Suite 650
201 King of Prussia Road
Radnor, PA 19087
phone (610) 230-2150

Portland

Suite 1250
111 SW Fifth Avenue
Portland, OR 97204
phone (503) 242-4262

San Diego

Suite 950
4225 Executive Square
La Jolla, CA 92037
phone (858) 597-9600

San Francisco

One Embarcadero Center
Suite 2340
San Francisco, CA 94111
phone (415) 490-9000

Tampa

SunTrust Financial Centre
Suite 2525
401 E. Jackson Street
Tampa, FL 33602
phone (813) 769-7500

We're interested in your opinion. If you have any suggestions about how we can improve the *Retail Update*, let us know by contacting your Fisher & Phillips attorney or email the editor at mmitchell@laborlawyers.com.

How to ensure continued receipt of this newsletter

If you would like to continue to receive our newsletters and other important information such as Legal Alerts and seminar information via email, then please take a moment right now to make sure your spam filters are set to allow transmissions from the following addresses: communications@laborlawyers.com or seminars@laborlawyers.com. If you currently receive communications from us by regular mail, and would like to begin receiving them by email, please send a request to communications@laborlawyers.com.