



## Using The Duck Test For Professional Employees

By Chris Mills and Jason Storipan (New Jersey)

When classifying their employees for overtime purposes under federal and state wage-hour laws, employers often rely on the equivalent of the “Duck Test”: the job’s title sounds professional and its duties require expertise and a high degree of skill – it sounds and looks like a professional job, and so it must qualify for the professional exemption even if most of its occupants lack advanced degrees. In other words, they assume that when a high degree of skill and years of experience are needed to perform the position’s essential tasks, and the position requires either advanced education or long years of experience, the occupants can be treated as exempt professionals under the Fair Labor Standards Act (FLSA).

But a recent decision by a federal appeals court should serve as a warning that relying on mere assumptions in classifying employees as exempt professionals, without analyzing the position under *all* the FLSA criteria for the professional exemption, is a prescription for trouble. *Young v. Cooper Cameron Corp.*

### Background

Under the FLSA, employers must pay their non-exempt employees at least the federal minimum wage and overtime for all hours worked over 40 in any workweek. But the FLSA’s overtime provisions do not apply to employees who fit within one of the enumerated exceptions, including those who qualify for the “professional exemption.”

The FLSA itself does not define what a professional is, but the U.S. Department of Labor (DOL) has issued detailed regulations on the subject.

To qualify for the professional exemption, an employee’s position must first require advanced knowledge. The advanced knowledge must be in a field of science or learning, and “customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education or from an apprenticeship, and from training in the performance of routine mental, manual or physical processes.” The *Young* case re-emphasizes that courts interpreting these DOL regulations narrowly construe the exemption and are likely to consider that the “prolonged course of specialized intellectual instruction” means that a degree or license from such a “course” is an implied requirement of the regulation.

### Young Plaintiff, Old Problem

Andrew Young worked as a Product Design Specialist II (PDS II) for Cooper Cameron Corp., designing hydraulic power units for oil rigs. The work involved a high level of complexity and required significant technical expertise. However, neither Young nor any of the other PDS II employees had a college degree, though he did have almost 20 years of experience in the engineering field and was a member of the American Society of Mechanical Engineers.



Small factual details in a case often tip the balance, and here, the court noted that Young was first offered a job with Cooper Cameron as a Mechanical Designer – a non-exempt position that was lower-rated (and lower-paid) than PDS II. He declined the offer of that position because he considered its compensation inadequate; the company then offered him the PDS II position, which it paid on a salary basis and classified as exempt. Compensation for PDS IIs, translated into an hourly wage, was \$3 per hour higher than for the Mechanical Designer. The requirements for the PDS II job were articulated as at least 12 years of relevant experience, with no requirement for any particular type or amount of education, or for a degree, and none of the current occupants of the job had a college degree. Significantly, both the trial and appellate courts concluded that despite holding the PDS II title, Young performed the same duties that he would have as a Mechanical Designer.

Young apparently held the PDS II job title happily enough for three years, never complaining about not receiving overtime. But as with much FLSA misclassification litigation, an intervening event led Young to sue: he was involuntarily terminated in a 2004 RIF. His federal court suit alleged that he had been misclassified as an exempt professional and was due overtime for his years with the company.

The district court granted summary judgment for Young on the exemption issue, holding that the work of a PDS II did not satisfy the FLSA professional exemption, since it was “not of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.” The court also held that Cooper Cameron’s misclassification was a willful violation of the FLSA because even though it had engaged in detailed studies of the PDS II position before concluding that it should be classified as exempt, what mattered was the nature of the duties that *Young* was performing, and Cooper Cameron knew that he was performing the same duties as its

Continued on page 4

# Policies And Procedures Pay Off For Car Manufacturer In USERRA Case

By Timothy Weatherholt (Louisville)

Earlier this year, a federal appeals court ruled in favor of Hyundai Motor Manufacturing Alabama, LLC (HMMA) in a case brought under the Uniformed Services Employment and Re-Employment Rights Act of 1994 (USERRA). In his complaint, ex-employee Jerry Leon Dees alleged that he was discriminated against and harassed based on his National Guard membership, and that he was ultimately fired because of his National Guard obligations. One of the key issues was whether Dees had standing to bring a USERRA harassment claim since he did not suffer lost wages or loss of other employee benefits.

The case was dismissed by a federal district court. On appeal the U.S. Court of Appeals for the 11<sup>th</sup> Circuit upheld the lower court's action. *Dees v. Hyundai Motor Mfg.*

## Background

USERRA provides that a member of the Armed Services "shall not be denied initial employment, re-employment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership." To establish a *prima facie* case under USERRA, an employee must show by a preponderance of the evidence that his protected status was "a motivating factor," in an adverse employment decision, but that status need not be the sole cause as long as "it is one of the factors that a truthful employer would list if asked for the reasons for the decision."

Here, the court found that Dees failed to establish that HMMA took into account his military service in its decision to terminate him. Dees testified that he believed he was fired due to his Guard obligations because it "seem[ed]" that way and because "everything stemmed around [his] drill weekends," but such unsupported conclusory statements are insufficient, and the federal district court threw the case out. The court relied on the fact that the evidence established that HMMA was aware of Dees' military obligations when he was hired in 2005, and that he was never disciplined for missing work due to Guard training. Furthermore, HMMA's military policy provides for absences due to military obligations, and HMMA even pays the difference between military pay and regular wages up to a month.

The court also found that Dees lacked standing to bring a USERRA harassment claim. USERRA provides that a court may award three types of relief: 1) an injunction requiring an employer to comply with USERRA's provisions; 2) compensation for lost wages or benefits suffered by reason of the employer's failure to comply with USERRA; and 3) liquidated damages in an amount equal to lost wages or benefits if the employer's failure to comply with USERRA was willful.

The court assumed without deciding, that a USERRA harassment claim is cognizable, but it found that Dees lacked standing to bring such a claim because he admitted that he had not suffered any lost wages or employment benefits from the alleged harassment. Further, an injunction requiring HMMA to comply with USERRA could not benefit Dees, as he was no longer an HMMA employee. Although Dees' attorney argued that he should be granted "equitable relief," he only specifically sought attorney's fees. The statute provides for three specific remedies for USERRA violations and does not provide for other "equitable relief or attorney's fees." As such, the court rejected that case law and found Dees lacked standing to bring his USERRA harassment claim.

## The Take-Home Lesson

Although the automobile manufacturer was awarded summary judgment, the case raises some interesting issues. First, the court assumed, without deciding the question, that an employee could bring a harassment claim under USERRA. Thus, employers should make sure that the anti-harassment provision in their handbooks (your handbook has one, doesn't it?) also include USERRA, and should conduct training in this regard along with the more common forms of training, such as sex harassment and race harassment.

Second, it's significant that HMMA was aware of Dees' military service at the time it hired him. Just as in age cases where an employer may hire an employee over the age of 40 and the court permits an inference that the employer did not engage in age discrimination, so too, the court here found that the employer was aware of Dees' military obligations at the hire date and that same type of inference was applicable.

The bottom line is, although an employee's military service – particularly extended military service – might cause headaches for employers, you should always be aware of the protections afforded to employees under USERRA, and corresponding state laws, and take the necessary steps to ensure compliance.

For more information contact the author at [tweatherholt@laborlawyers.com](mailto:tweatherholt@laborlawyers.com) or 502.561.3990.



"WHICH REMINDS ME, HAVE YOU FED THE LIVING TRUST LATELY?"



## Real World HR

# “The Thing That Wouldn’t Die”

## *Do Past Practices Last Forever?*

By John McLachlan (San Francisco)

In our last issue we took a look at how past practices get started, and what that can mean to a company in a unionized setting. This time we’ll take a look at keeping them from overwhelming you.

Assuming that there is a valid and enforceable past practice which meets the criteria above, such ways of doing things need not last forever. On the other hand, management usually cannot change them just because it has concluded that the practice is no longer useful or has found a better way to perform a task. Both arbitrators and the National Labor Relations Board discourage unilateral action by management. So the change or elimination of genuine past practices needs to be addressed thoughtfully and usually in the context of discussions with the union before taking any action to eliminate or change it/them.

More can be done with respect to the elimination or modification of past practices in the context of contract negotiations. Some employers use what is known as a “zipper clause” which basically says that the written contract contains the parties’ entire agreement and that nothing exists outside of the four corners of the document. Other employers include a list of past practices which the parties have

agreed exist with the statement that any practice not specifically listed is of no force or effect.

Lest any reader conclude that changing a past practice is easy, remember that any proposals to change a practice can work against management if it raises the subject and proposes a change and does not finally get a union’s agreement to that change across the bargaining table. In that situation, the practice can be found to be better entrenched than it was before because of management’s failure to obtain union agreement to its negotiations proposal to change or eliminate the practice.

Another way to deal with claims of past practice is take them seriously and research the allegations and challenge them whenever they are made where the facts do not indicate the existence of a true past practice. Just because something has been done a certain way sometimes does not necessarily translate to a binding past practice.

Keep in mind the criteria above necessary to a finding of past practice. If the action *does not* meet those criteria, it is our belief that management is better served by clearly addressing the claim and stating that there is no past practice with regard to that situation and explaining why this is so. Management’s opposition to claims of past practice may not eliminate the claims themselves, but careful observation and appropriate challenge to unfounded claims of past practice will keep new past practices from springing up and taking root because of management’s failure to address them.

Those are some thoughts about the frequently used but often misunderstood term “past practice.” It is not always used correctly and it doesn’t mean that management automatically loses. Now you know what it means and how to analyze claims of past practice and you know that saying it doesn’t necessarily make it so.

*For more information contact the author at [jmclachlan@laborlawyers.com](mailto:jmclachlan@laborlawyers.com) or 415.490.9000.*

### More Articles Available Online

For those wishing to read our newsletter articles online, they are all available on our website [www.laborlawyers.com](http://www.laborlawyers.com). Under the tab “publications,” then “newsletters,” you can find all the articles in the July issue of Labor Letter, plus these bonus articles:

“*Double Whammy For Employers*” by Gregg Salka. This article explores recent decisions by New York courts, which prevent employers from using affirmative defenses under the U.S. Supreme Court decisions of *Faragher* and *Ellerth*. Worse, this doctrine is

applicable even to companies that have no employees in New York, if employment decisions were made there.

“*Misclassifications Matter*,” by Melanie Zaharias. In this article you’ll learn about some of the many problems that befall employers who misclassify employees as independent contractors, and learn how to avoid liability.

## Using The Duck Test For Professional Employees

Continued from page 1

non-exempt Mechanical Designers. The employer appealed both aspects of the decision.

### The Appeals Court Ruling

Relying on the DOL regulations in effect at the time of the alleged violation, the U.S. Court of Appeals for the 2<sup>nd</sup> Circuit held that an employee cannot be considered an exempt professional unless the work performed requires knowledge that is customarily attained from intellectual study. The court parsed the regulation on the professional exemption into a three part test: 1) the employee's "knowledge must be of an advanced type"; 2) "the knowledge must be in a field of science or learning"; and 3) the knowledge "must be customarily acquired by a prolonged course of specialized intellectual instruction and study."

The issue in the case centered on the third prong and the term "customarily." Cooper Cameron argued that use of the term demonstrated that an academic degree was not always required. Under the employer's view, the lack of a degree requirement for the position did not matter, because the duties of the position required knowledge of an advanced type, and Young's prior experience was a satisfactory substitute for education or a degree. The court disagreed.

Focusing on the meaning of "customarily," the appeals court returned to the DOL regulations for guidance. The regulations provide that "the word 'customarily' implies that in the vast majority of cases the specific

academic training is a prerequisite for entrance into the profession." The court expressed the view that the use of "customarily" in the regulations means that a specialized degree is required in *almost all cases*.

As the court noted, the use of the term "customarily" means that an employer cannot merely give lip service to the degree requirement, filling all or a substantial majority of the slots in a job title with non-degreed individuals. "[T]he term 'customarily' in this context makes the exemption applicable to the rare individual who, unlike the vast majority of others in the profession, lacks the formal educational training and degree." The court then went on to note that "[i]f a job does not require knowledge customarily acquired by an advanced educational degree . . . then, regardless of the duties performed, the employee is not an exempt professional under the FLSA."

Simply put, an employee might occasionally be deemed an exempt professional without having a degree, but only in a situation where a specialized degree is typically required for the position, the vast majority of the occupants have been required to have one, and an almost singular exception has been made for the individual at issue.

### What It Means To You

The lesson from *Young* for employers is clear: just because a position seems like a professional position does not render it exempt from overtime.

The fact that a position requires high levels of technical expertise and significant experience will not be enough to qualify it for the professional exemption. Rather, it must *both* require the use of knowledge of an advanced type in a field of science or learning *and* require an advanced degree in that specialized field. The exemption is not based merely on a duties test. Employers that impose an advanced degree requirement when hiring for a position, but still populate the job category mostly with workers who lack a degree but qualify based on a certain number of years of experience, are at fairly high risk of not satisfying the requirements for the professional exemption.

The decision in *Young* is from only one circuit court (though it cites two other similar decisions from other federal appeals courts). But the message to employers with positions being treated as exempt under the professional exemption is that it's worth taking another look at the educational requirements for the position and the academic credentials of the occupants.

If the job description states, as many will, that an advanced degree is required but that some number of years of experience can substitute for an advanced degree or license, and most of the occupants don't have an advanced degree, the odds of sustaining the exempt status of those employees, in the event of a challenge, will not be good. Conversely, if the job description mentions a degree requirement, and the vast majority of occupants do hold degrees, while only a small minority do not, the employer will be in a much better position to defend treating employees as exempt professionals.

In addition to reassessing the appropriateness of treating employees as exempt under the professional exemption, you should confirm that all employees you consider to be professional-exempt are recording their work time, and that such records are being safeguarded. Challenges to exempt status can be filed years after an employee terminates employment. If you have not required employees to record their time (since you considered the job classification to be exempt), you have not only violated FLSA recordkeeping requirements but also left your company all but defenseless in trying to dispute a litigant's self-proclaimed set of time records that can be counted on to show hours and hours of overtime worked in the three years prior to the suit. A good set of time records can be an FLSA-defendant's last line of defense.

For more information contact the authors at [cmills@laborlawyers.com](mailto:cmills@laborlawyers.com), [jstoripan@laborlawyers.com](mailto:jstoripan@laborlawyers.com), or call 908.516.1050.

The *Labor Letter* 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

<b>Atlanta</b> phone 404.231.1400	<b>Houston</b> phone 713.292.0150	<b>Orlando</b> phone 407.541.0888
<b>Charlotte</b> phone 704.334.4565	<b>Irvine</b> phone 949.851.2424	<b>Philadelphia</b> phone 610.230.2150
<b>Chicago</b> phone 312.346.8061	<b>Kansas City</b> phone 816.842.8770	<b>Phoenix</b> phone 602.281.3400
<b>Columbia</b> phone 803.255.0000	<b>Las Vegas</b> phone 702.252.3131	<b>Portland ME</b> phone 207.774.6001
<b>Dallas</b> phone 214.220.9100	<b>Louisville</b> phone 502.561.3990	<b>Portland OR</b> phone 503.242.4262
<b>Denver</b> phone 303.218.3650	<b>New Jersey</b> phone 908.516.1050	<b>San Diego</b> phone 858.597.9600
<b>Fort Lauderdale</b> phone 954.525.4800	<b>New Orleans</b> phone 504.522.3303	<b>San Francisco</b> phone 415.490.9000
		<b>Tampa</b> phone 813.769.7500

*Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters*

We're interested in your opinion. If you have any suggestions about how we can improve the *Labor Letter* or any of our other publications, let us know by contacting your Fisher & Phillips attorney or email the editor at [mmitchell@laborlawyers.com](mailto: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](mailto:communications@laborlawyers.com) or [seminars@laborlawyers.com](mailto: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](mailto:communications@laborlawyers.com).