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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DREW TRACY, DUANE SCHUMAN, RICK STEELE, CHRIS LINES, DANIEL KEVIN GRIFFEE, RICHARD HUFFMAN, LEE HAZELTON and SCOTT WILLIS, individually,

Plaintiffs,

v.

THE CITY OF VANCOUVER, a municipality

Defendant.

Case No. 3:17-cv-5414-RBL

PLAINTIFFS' TRIAL BRIEF

I. INTRODUCTION

This case is being tried to a jury to determine whether Plaintiffs' primary duty is that of first responders, or that of exempt managers/office workers. Defendant City of Vancouver contends that the Plaintiffs are exempt under either the Highly Compensated Employee exemption or the Executive Employee Exemption. While it is possible that a jury could find Plaintiffs are not first responders and also do not meet either exemption based on other criteria, Plaintiffs believe the First Responder rule will likely be central to the jury's inquiry. Due to the infrequency with

which this particular type of case has been tried to a jury, many of the FLSA specific jury instructions have been crafted from the Department of Labor's own rules, its interpretation of those rules, and case law.

II. STATEMENT OF FACTS

The parties have expended significant time and effort in putting forth facts relating to their respective summary judgment motions. *See* Docket #28-77. The court denied the parties cross-motions for summary judgment finding that a factual dispute exists with respect to what the plaintiffs' primary duty is. See Docket #80.

A. Factual issues for trial.

Plaintiffs moved in limine to exclude evidence of "corrective counselings," which are not considered discipline; evidence of stale personnel decisions or recommendations that occurred more than five years before the operative time period of this case; evidence of personnel decisions or recommendations issued by Plaintiff Huffman or Plaintiff Tracy while acting as Division Chief of Training or Deputy Chief, and evidence relating to hiring and promotions as these particular personnel decisions are clearly driven by the civil service process. Excluding this evidence will reduce the potential for juror confusion and for prejudice to Plaintiffs. It will also streamline the trial and allow those facts that are actually in dispute to be heard. Plaintiffs are concerned about the amount of time that will be spent on stale and irrelevant personnel decisions and recommendations and therefore renews their motions in limine regarding these matters.

III. BURDEN OF PROOF AND LEGAL STANDARDS

Defendant bears the burden of proof on whether all or some of the Plaintiffs are exempt. If defendant fails to carry its burden of proof, Plaintiffs are deemed not exempt and owed wages for

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uncompensated overtime. Consequently, the parties have agreed that defendant should present its case first.

Plaintiffs contend the burden should be "clear and convincing" evidence. Defendant contends they need only prove an exemption by a preponderance of the evidence.

The first responder rule is one of the key issues in this case. *See Morrison v. County of Fairfax, VA*, 826 F.3d 758 (4th Cir. 2016). If Plaintiffs are "first responders" they cannot be found exempt under either the Executive Exemption or the Highly Compensated Employee exemption. In discussing the first responder regulation in the 2004 preamble, the Department of Labor ("DOL") noted that first responders, including fire fighters, who do not qualify for the Part 541 exemptions under the other tests, "also cannot qualify as exempt under the highly compensated test" because their primary duty—emergency response—is not office or non-manual work. DOL *Morrison amicus* brief at p. 26, citing to 69 Fed. Reg. at 22,129, Docket #73, Appendix. The DOL position is entitled to *Chevron* deference and provides significant guidance to the Court in how the duties of the Plaintiffs in this case should be evaluated by a factfinder. Plaintiffs have closely tracked the DOL's position in their jury instructions, modifying instructions to better track with that position as explained below in Part V. Jury Instructions.

IV. EVIDENTIARY ISSUES

A. Pending Motion in Limine relating to Tracy and Huffman's duties while working as Division and Deputy Chief.

Because the Court has now granted summary judgment to the defendant on the limited issue of whether Plaintiffs Tracy and Huffman were exempt while working in their roles as Division and Deputy Chief, Plaintiffs' motion in limine to exclude evidence of decisions made

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while acting in those positions for the purpose of proving what duties the Battalion Chiefs perform should be granted.

B. Expert witnesses and stipulation as to damages.

Plaintiffs are not submitting any expert witnesses. Plaintiff and defendant have stipulated to the accuracy of the unpaid overtime calculations performed by defendant's expert witness, Neal Beaton, for the relevant two-year period. *See* Plaintiff's Proposed Instruction No. 1 – Claims and Defenses. Mr. Beaton's calculations can be doubled unless defendant succeeds in asserting that it acted in "good faith."

C. Other witnesses.

Plaintiffs have submitted a Witness List separately with the court. Some of the witnesses may not be called, however it is difficult to anticipate what the evidence will be in defendant's case due in part to the pending motions in limine.

D. Exhibits.

Plaintiffs and defendant jointly submitted an Exhibit List with the Court. Plaintiff reserves the right to withdraw any exhibits that are not utilized so as to avoid juror confusion and promote efficiency. Some of the exhibits will need to be discussed at the pretrial conference as admissibility and/or authenticity has not been stipulated to all exhibits.

1. Defendant's incomplete and misleading exhibits.

Plaintiffs are specifically concerned by the training exhibits, emergency call time exhibits, and "summary" exhibits defendant is likely to introduce because they are misleading and inaccurate. For example, A-29 and consequently A-30 does not include all of the trainings attended or performed by Plaintiffs. The Training Division does not track all hours that the Plaintiffs teach

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or receive instruction. For example, the Training Division would only track the first two hour training given by a Battalion Chief, not the subsequent three additional two hour trainings he provides to additional groups of employees on the same topic. There are other significant omissions, as well, including what appear to be missing EMS/medical training.

Finally, both A-30 and A-75 exclude sleeping and meal times completely. For the reasons articulated in Plaintiffs' summary judgment briefing, this exclusion is improper when determining the amount of time spent on managerial exempt duties, as discussed in *Morrison* at 770-71; *see also* Docket #59 at 13-14, 20-21.

> Second, the regulation directs attention not to the amount of time spent performing non-exempt work like fighting fires, but specifically to "the amount of time spent performing exempt work." Id. § 541.700(a) (emphasis added). And it will not do simply to assume, as the County seems to on occasion, that the two are inversely correlated—that any time a Captain is not on the scene of a fire, he or she is engaged in an exempt managerial task. On the contrary, some of the things firefighters do at the station while awaiting emergency calls, like sleeping and eating, are decidedly non-managerial. The burden is on the County to come forward with evidence that the Captains spend some significant portion of their time at the station—the regulations suggest that "employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement," id. § 541.700(b)—on managerial or management-related tasks.

Morrison at 770. In short, sleeping and eating are not exempt duties.

V. JURY INSTRUCTIONS

A. Burden of proof.

This type of FLSA case (addressing exemptions) is generally disposed of on summary judgment and is rarely tried to a jury. Consequently, there is little guidance as to the correct burden of proof to apply. Plaintiffs contend that the standard should be clear and convincing evidence, relying upon *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688 (4th Cir. 2009); *Shockley v. City of Newport News,* 997 F.2d 18, 21 (4th Cir.1993); *Iontchev v. AAA Cab Service,*

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Inc., 685 Fed. Appx. 548, 549-550 (9th Cir. 2017) (unpublished). Defendant contends the standard should be preponderance of the evidence. Defendant's Instructions No. 2 and 3 should be rejected if the court determines that clear and convincing evidence is the appropriate standard to apply.

B. Plaintiffs' proposed FLSA instructions 8-11 should be adopted because they closely track the most recent DOL interpretation of the First Responder Rule and it should be applied in assessing the primary duty of fire service employees.

Plaintiffs have slightly modified the DOL regulations for the jury instructions in this case to comport with the Department of Labor's *amicus* position in the *Morrison* case and with a close reading of the language contained in 69 Fed. Reg. at 22,130, the Preamble, which discusses the introduction of the First Responder Rule. Plaintiffs' proposed FLSA instructions 8-11 reflect these modifications and are supported by citations. These instructions correctly state the law, are not misleading and are fair. *SEIU v. Nat'l Union of Healthcare Workers*, 718 F.3d 1036, 1047 (9th Cir. 2013). A party is entitled to an instruction on its theory of the case only if it is supported by law and has foundation in the evidence. *Id.* "In evaluating jury instructions, prejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was [not] fairly and correctly covered." *Dang v. Cross*, 422 F.3d 800, *quoting Swinton v. Potomac Corp.,* 270 F.3d 794, 802 (9th Cir.2001).

Plaintiffs' instructions reflect the DOL's rules and its own interpretation of those rules as exhibited in its *amicus* brief to the Fourth Circuit on behalf of the Morrison plaintiffs. The DOL's *amicus* brief interpretation of its own ambiguous First Responder rule is entitled to *Chevron* deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); s*ee also Oregon Restaurant and Lodging Ass'n v. Perez*, 816 F.3d 1080, 1089-90 (9th Cir. 2016). Further, to the extent that the First

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Responder rule conflicts with any general definition – such as Primary Duty or Management – the more specific language of the First Responder rule should be given weight because it was drafted specifically to apply to fire service and other first responder employees as noted in the rule and in the Preamble.

Plaintiffs' Proposed Instruction No. 8 is a modified version of the First Responder Rule. It has been modified to reflect the DOL's position that being required to dispatch to emergencies is strong evidence that the employee is a first responder and therefore not exempt. "[The preamble] further noted that '[a]nother important fact considered in at least one case is that exempt police and fire executives generally are not dispatched to calls, but rather have discretion to determine whether and where their assistance is needed.' *Id.* (citing *Anderson v. City of Cleveland, Tenn.*, 90 F. Supp. 2d 906, 909 (E.D. Tenn. 2000))." DOL *Morrison amicus* brief at 26, citing and quoting from 69 Fed. Reg. at 22,130.

Plaintiffs' Proposed Instruction No. 9 is a modified version of the Primary Duty definition contained in 29 C.F.R. § 541.700. Plaintiffs have retained the example portion of the definition because it will be helpful for the jury to think about what management activities look like in another employment context. Plaintiff further modified the definition to comport with the First Responder rule and the DOL's interpretation of that rule.

In Plaintiffs' Proposed Instruction No. 10, Plaintiffs carefully carve out "training" that is related to first responder duties in order to stay in line with *Morrison* and the DOL's position in its *amicus* brief to the Fourth Circuit in that case.

> Nor can the gap be filled with the approximately four hours per day the Captains devote to a combination of emergency response and physical fitness training. The Captains undergo the same training as all of the other firefighters at the station so that they, along with their crews, are able to fulfill their first responder obligations.

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> That so much time is devoted to this process only underscores the importance of those direct response duties. And like other efforts to "assur[e] a constant state of preparedness," such training "relate[s] directly to [a fire captain's] regular front line firefighting duties," and is therefore non-managerial and non-exempt under the first responder regulation. Barrows, 944 F.Supp.2d at 604 (citing Mullins and finding fire captains non-exempt under first responder regulation and primary duty standard).

Morrison at 772; *see also* DOL *Morrison amicus* brief at 37-38.

In Plaintiffs' Proposed Instruction No. 11, Plaintiffs have excluded "training" that relates to first responder duties from the general management duty definition because for fire fighter employees "training" to ensure first responder readiness is not a managerial activity. *Morrison* at 772; *see also* DOL *Morrison amicus* brief at 37-38. Instead, it is the "coordination of" and "implementation of" training that is a management activity. See 69 Fed. Reg. at 22,130. These activities are performed by the Training Division and the Training Captain, not by the Battalion Chiefs, as discussed in Plaintiffs' summary judgment briefing and as will be presented at trial. The case law and DOL's position is clear that, for fire service employees, training to be "response ready" is a first responder activity. Such training is not a management activity even if the employee is participating in the training in a lead role or is assisting in the training. *See e.g.* DOL *Morrison amicus* brief at 37-38.

C. Defendant's Proposed Instructions Misstate the Law , are Prejudicial and Will Confuse the Jury.

Defendant's Instruction No. 4 and No. 5 contain an unnecessary and potentially confusing paragraph at the end, particularly considering that there will be a verdict form that asks the jury to assess whether the defendant has proven the exemptions or not. This undue emphasis could be confusing to the jury and is unnecessary.

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Defendant's Instruction No. 6 should be rejected. Plaintiffs' Instruction No. 9 should be adopted, instead, because it clarifies that if the "primary duty" of Plaintiffs is determined to be that of first responders, they are not exempt.

Defendant's Instruction No. 7 should be rejected because it includes "training" in its list of management tasks. Plaintiffs' Instruction No. 11 should be adopted, instead, because it is consistent with the DOL's own interpretation of an ambiguous rule.

Defendant's Instruction No. 9 should be rejected in its entirety. There is already an express rule that is applicable to first responders who "respond" to emergencies. This rule is derived from a different part of the CFRs that is wholly inapplicable to this case and is, instead, the kind of provision that one would look at for a lumber mill, an auto plant, or another type of manufacturing operation. The inclusion of this instruction will be extremely confusing to jurors and is prejudicial to Plaintiffs.

Defendant has included language in its proposed Instruction No. 10 that is contrary to a plain reading of 29 C.F.R. 541.3(b) and to the DOL's own interpretation of that first responder rule in its *amicus* brief to the Fourth Circuit. For this reason alone, the court should reject it. Particularly offensive, is language contained in the last sentence of paragraph 1: "Whether a supervisor qualifies as a firefighter, paramedic, emergency medical technician, ambulance personnel, rescue worker, or similar employee under this instruction ***depends on whether the supervisor engages in the same front-line activities as his or her subordinate on a daily basis***." Def's Jury Instruction No. 10. The problem with this instruction is that it both (1) creates a new test for first responders that is not present in the original CFR – that is, that they must "engage in the same front-line activities as his or her subordinate" and (2) describes this condition as being

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required to occur on a "daily basis" in order for a jury to find that the employee is a first responder under the rule. This is a baldly incorrect rendering of the First Responder rule, which includes the caveat that an employee is not exempt and may be a first responder simply because he directs subordinates at the emergency scene. See 29 CFR 541.3(b). It is prejudicial to Plaintiffs by lowering the bar for the defendant to prove Plaintiffs are exempt. It also conflicts with the DOL's position regarding the First Responder rule and the case law applying it.

Finally, this misstatement of law conflates the First Responder rule with the immediately preceding rule at 541.3 (a) which relates to a different constituency of workers and is not applicable to those workers addressed by the First Responder rule in either a plain reading, or as interpreted by several cases and the DOL.

> Moreover, the district court's statement that "the First Responder Regulation ensures the Executive Exemption does not apply to 'blue collar' fire fighters, regardless of rank or pay level, regardless of the work they do at the fire scene," JA 4523, reflects a misguided focus on the reference in 29 C.F.R. 541.3(a) to "'blue collar' workers." That provision articulates the general principle that the Part 541 exemptions "do not apply to manual laborers or other 'blue collar' workers who perform work involving repetitive operations with their hands, physical skill and energy" because their skills are not the type that qualify under the professional exemption described in 29 C.F.R. 541.300…. Although the provision immediately precedes the first responder regulation, there is no basis for reading the provision as altering the plain and distinct meaning of 29 C.F.R. 541.3(b) or as otherwise detracting from the importance of the primary duty inquiry.

See e.g. DOL *Morrison* Amicus Brief at 28-30. The DOL's interpretation as articulated in its *amicus* brief is entitled to *Chevron* deference. *Auer v. Robbins*, at 461 (1997). This part of defendant's instruction must be rejected as an incorrect statement of the law, a misreading of the DOL's position on the First Responder rule's applicability to employees who direct subordinates to carry out manual tasks on a fire (such as breaking down a door or holding a hose) and is also a

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misreading of the cases from the early 1990s – some of which have been expressly or impliedly overruled by the 2004 DOL changes and subsequent case law. See Docket #73 at 9-12. Defendant's jury instruction is unacceptable because it is a bald misstatement of the First Responder rule and is unsupported by the case law, DOL position ,or plain reading of 29 CFR 541.3(b).

VI. VERDICT FORM

Because the issue of whether the Plaintiffs are first responders will likely be central to the jury's resolution of this case, Plaintiffs have included interrogatories for the jury that specifically track with that issue. Plaintiffs have also clearly articulated that the defendant must prove either that the HCE exemption applies, or that the Executive Exemption applies, so that the jury does not attempt to mix and match portions of those exemptions.

VII. DAMAGES

In the event defendant fails to carry its burden of proof and the Plaintiffs prevail at trial, damages have been agreed to by the parties, based on the calculations performed by Neal Beaton.

DATED this 26th day of December, 2018.

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s/Katelyn S. Oldham

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PLAINTIFF'S TRIAL BRIEF on:

Dan Lloyd and
Sara Baynard
City Attorney's Office
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[ ] by mailing to said attorney(s) a full and correct copy thereof, contained in a sealed envelope, with postage paid, addressed to said attorney(s) as stated above and deposited in the United States Post Office at Portland, Oregon on the date set forth below.

[X] by electronic means through the Court's Case Management/Electronic Case File system on the date set forth below.

[ ] by e-mailing to said attorney(s) a full and correct copy thereof, addressed to said attorney(s) as stated above on the date set forth below.

[ ] by hand delivering to said attorney(s) a true copy thereof on the date set forth below.

[ ] by faxing to said attorney (s) a true copy thereof on the date set forth below.

[ ] by concurrently electronically mailing this documents in Word format to each attorney's last-known e-mail address on the date set forth below.

DATED this 26th day of December, 2018.

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