Hon. Ronald B. Leighton

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,

vs.

CITY OF VANCOUVER, a municipality,

Defendant.

No. 3:17-cv-05414-RBL

DEFENDANT CITY OF VANCOUVER'S TRIAL BRIEF

TRIAL DATE: January 7, 2019

CITY ATTORNEY'S OFFICE
PO BOX 1995
VANCOUVER, WA 98668
Tel: (360) 487-8500 * Fax: (360) 487-8501

I. INTRODUCTION

This Court stated in plain terms: "the BCs' exempt status depends on their primary duties." (Dkt. 90 at 4.) If the BCs' primary duty is determined by the jury to be management, they should be deemed exempt under 29 C.F.R. § 541.601 ("highly compensated employee" or "HCE"). The City will argue at trial that the BCs are HCEs, which excuses the City from additionally proving the fourth element of 29 C.F.R. § 541.100, namely that the BCs' "suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight." Nevertheless, the City proposes instructions on both tests consistent with Department of Labor ("DOL") regulations.

II. AUTHORITY

A. The parties agree that the City should present its case first because the City holds the burden of proof on all remaining issues.

Every issue on which the Plaintiffs would have held the burden of proof has been resolved either by stipulation or by the Court's summary judgment order. The only issues remaining for the jury's consideration are whether the Plaintiffs are exempt and whether the City acted in good faith[1] as to deny liquidated damages if an FLSA violation is found. Consequently, the City holds "the affirmative of [every] issue" remaining to be decided, which means it should "open the cause." LCR 43(h)(1). Plaintiffs have advised that they agree the City should present its case first. This is reflected in Joint Instruction #8.

B. The Court should instruct the jury that preponderance of the evidence is the appropriate burden of proof for FLSA exemptions.

The Ninth Circuit explicitly adopted preponderance of the evidence as the test to determine whether an employer proves an employee is exempt under the FLSA. *Dickenson v. United States*, 353 F.2d 389, 392 (9th Cir. 1965). ("[O]nce [FLSA] coverage is proved, the

[1] Defendant submits that this issue should be submitted to the jury as Judge Lasnik did in an approach approved by the Ninth Circuit last year. *Acosta v. Zhao Zeng Hong*, No. 2:13-cv-00877-RSL (W.D. Wash.) (Dkt. 147 at 22), *aff'd*, 704 Fed. Appx. 661, 665 (9th Cir. 2017). There is authority suggesting the Court may decide this issue unilaterally or, as was done in *Acosta*, tender it to the jury.

CITY ATTORNEY'S OFFICE
PO BOX 1995
VANCOUVER, WA 98668
Tel: (360) 487-8500 * Fax: (360) 487-8501

defendant employer must prove *by a preponderance of the evidence* that he was a retailer under the Act, meeting the percentage tests for exemption.") (emphasis added). The City's proposed instruction adheres to this standard.

Plaintiffs instead propose a "clear and convincing" standard, pointing to Fourth Circuit cases and one Ninth Circuit unpublished decision. The Fourth Circuit stands alone embracing a standard other than preponderance.[2] In fact, the Tenth Circuit overturned a jury verdict when a "district court … instructed the jury that [the employer] bore a heightened burden of proof in establishing its entitlement to an FLSA exemption." *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1153, 1158 (10th Cir. 2012). *Lederman* made clear that "an employer need prove such an exemption by [nothing] more than a preponderance of the evidence." *Id.* at 1158. As stated above, the Ninth Circuit is in accord with *Lederman*. *Dickenson*, 353 F.2d at 392.

Given that the Fourth Circuit stands contrary to what the Ninth Circuit adopted, this Court should reject Plaintiffs' proposal. To be sure, the lone unpublished Ninth Circuit decision cited by Plaintiffs discussed the clear and convincing standard because an Arizona statute[3] required the heightened burden to determine whether the plaintiff there was an independent contractor or employee under state law. *See Iontchev v. AAA Cab Service, Inc.*, 685 Fed. Appx. 548 (9th Cir. 2017). *Iontchev* affirmed the denial of recovery "under the FLSA *and Arizona law*" because the employer established "by clear and convincing evidence" that the plaintiffs were independent contractors. *Id.* at 549-50 (emphasis added). In other words, the employer

[2] *See Meza v. Intelligent Mexican Mktg., Inc.*, 720 F.3d 577, 581 (5th Cir. 2013); *Foster v. Nationwide Mut. Ins. Co.*, 710 F.3d 640, 646 (6th Cir. 2013); *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1158 (10th Cir. 2012); *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 507 (7th Cir. 2007); *Dybach v. Fla. Dep't of Corr.*, 942 F.2d 1562, 1566 n.5 (11th Cir. 1991); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 614 (2d Cir. 1991).

[3] The statute in question provided:

> whether a person is an independent contractor or an employee shall be determined according to the standards of the federal fair labor standards act, *but* the burden of proof shall be upon the party for whom the work is performed to show independent contractor status by *clear and convincing evidence*.

ARIZ. REV. STAT. § 23-362 (emphasis added).

CITY ATTORNEY'S OFFICE
PO BOX 1995
VANCOUVER, WA 98668
Tel: (360) 487-8500 * Fax: (360) 487-8501

there satisfied a higher burden of proof mandated by state law, eliminating any need to determine whether the employer also met the lower FLSA standard. *Id.* at 550-51. Given the absence of any state law requiring the heightened burden of proof in this case, there is no reason to depart from the preponderance standard embraced by the Ninth Circuit for the FLSA.

Plaintiffs additionally propose an instruction stating that the FLSA exemptions must be narrowly construed. Giving that instruction would be reversible error. *United States v. Cortes*, 732 F.3d 1078, 1084-85 (9th Cir. 2013) (misstatements of the law grounds for reversal); *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (rejecting "narrowly construed" standard). Moreover, even when that statement was the law (it is no longer), it was used by courts to construe the statute, not to instruct a jury. *See Lederman*, 685 F.3d at 1158. None of the cases cited by Plaintiffs applied this rejected principle in the context of instructing the jury.

C. The Court should adopt the City's Proposed Instructions 4-7 on whether these Plaintiffs are exempt under the FLSA.

"Jury instructions must fairly and adequately cover the issues presented, must correctly state the law, and must not be misleading." *SEIU v. Nat'l Union of Healthcare Workers*, 718 F.3d 1036, 1047 (9th Cir. 2013); *Dang v. Cross*, 422 F.3d 800, 804 (9th Cir. 2005) (same). The adequacy of "instructions must be evaluated in the context of the whole trial." *United States v. Marabelles*, 724 F.2d 1374, 1382 (9th Cir. 1984). The City's proposed instructions ("DPJI") Nos. 4, 5, 6, and 7 accurately preserve the HCE, bona-fide executive, primary duty, and management tests while also presenting the elements and factors in a digestible fashion. Each instruction accurately reflects the language in the corresponding DOL regulations. *United States v. Fries*, 781 F.3d 1137, 1150 (9th Cir. 2015) (noting that adopting the language of the statute is appropriate where the plain meaning of the rule is unambiguous). Although DPJI 4 slightly modifies the regulatory structure—presenting as an element the requirement that the plaintiff's primary duty include non-manual or office work—this change accurately reflects 29 C.F.R. § 541.601's limitation of the HCE test to only those employees whose primary duty

CITY ATTORNEY'S OFFICE
PO BOX 1995
VANCOUVER, WA 98668
Tel: (360) 487-8500 * Fax: (360) 487-8501

includes office or non-manual work. *Id.* To be sure, there is precedent for articulating the HCE test in the form proposed by the City. *See* Jury Charge (Dkt. 65), *Escribano v. Travis County*, No. 1:15-CV-331-RP (W.D. Tex. Sept. 22, 2016), at 10-11; Jury Charge (Dkt. 112), *Benavides, et al. v. City of Austin*, No. A-11-CV-438-LY (W.D. Tex. Nov. 13, 2012) at 21-22.

Conversely, Plaintiffs' proposed instructions (PPJIs) either overcomplicate the contents of the regulation by adding superfluous and conflicting information, or misleadingly omit terminology to achieve a desired meaning. For example, one proposed instruction admits that Plaintiffs customarily and regularly direct the work of two or more people (PPJI 6), but then disputes in the very next proposed instruction whether any Plaintiff "customarily and regularly performs any one or more of the exempt duties or responsibilities described in the executive exemption" (PPJI 7). Conflicting instructions are misleading and should not be given. *United States v. Pazsint*, 703 F.2d 420, 424 (9th Cir. 1983). Further, PPJI 7 unnecessarily includes inapposite examples of what constitutes manual work for purposes of the HCE test. *See* PPJI 7 (referring to "carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, [and] laborers"). Conversely, the City's instruction adopts the regulation's definition of "manual" without the inapplicable and confusing example, which is preferred. *United States v. Chambers*, 918 F.2d 1455, 1460 (9th Cir. 1990) (court need not define "a common word which an average juror can understand and which the average juror could have applied to the facts of this case without difficulty").

Most importantly, Plaintiffs' proposed instructions repeatedly include an error of law. "Repetitious instructions which place undue emphasis on matters favorable to either side constitute reversible error." *Gill v. Manuel*, 488 F.2d 799, 802 (9th Cir. 1973). In contrast to this principle of law, Plaintiffs propose that jurors be instructed to find for the City only where "defendant has proven one or more of the plaintiffs meet all of the elements of the [a given] Exemption *and* that plaintiffs' primary duty is not that of First Responders." (Emphasis added). Charging the jury in this manner overemphasizes the role of 29 C.F.R. § 541.3(b), because

CITY ATTORNEY'S OFFICE
PO BOX 1995
VANCOUVER, WA 98668
Tel: (360) 487-8500 * Fax: (360) 487-8501

primary duty is a necessary element of both the executive and HCE tests. As such, the jury will, when answering the question of primary duty, refer to the appropriate primary duty instruction and make their determination. *Fields v. Brown*, 503 F.3d 755, 782 (9th Cir. 2007) (courts "presume that jurors follow the instructions"). If the jury concludes that the elements of the executive exemption are met under either the traditional test (§ 541.100) or HCE test (§ 541.601), they will have necessarily concluded that Plaintiffs' primary duty is management and therefore *not* extinguishing fires (i.e. "first response"). Plaintiffs' proposed instructions are unduly repetitive on this point, distorting the overall exemption inquiry and placing undue emphasis on Plaintiffs' most favorable point. Giving Plaintiffs' proposed instructions would therefore "constitute reversible error." *Gill*, 488 F.2d at 802.

The parties' proposed instructions for primary duty and management differ in only a few respects; however, only the City's are proper for use. Plaintiffs' proposed "primary duty" instruction begins with the first sentence of 29 C.F.R. § 541.700(a) ("[t]o qualify for exemption, defendant must prove for each plaintiff employee that his primary duty is the performance of exempt work"). But nowhere do Plaintiffs' instructions attempt to define "exempt work" versus "non-exempt work," which is a legal question reserved for the Court. Additionally, Plaintiffs provide an inapposite example of a manager at a retail store. The City's instruction, conversely, accurately defines primary duty as per 29 C.F.R. § 541.700, which read in conjunction with the HCE and traditional BFE tests, accurately sets forth the law and adequately enables the parties to argue their respective theories of the case. And as explained *infra*, Plaintiffs erroneously employ a proposed instruction on management that intentionally omits "training" from the list of management functions. *Contra* 29 C.F.R. § 541.102. It is error to presume that an agency can modify a regulation through a non-promulgated agency interpretation set forth in, for example, an amicus brief. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). In contrast to Plaintiffs' proposals, the City's instructions accurately track the regulations' text and are proper for use.

CITY ATTORNEY'S OFFICE
PO BOX 1995
VANCOUVER, WA 98668
Tel: (360) 487-8500 * Fax: (360) 487-8501

D. The Court should reject Plaintiffs' Proposed Instructions, particularly their effort to expand 29 C.F.R. § 541.3(b) beyond its scope.

Critical to the parties' ability to try this case will be how the Court determines which duties are exempt managerial functions versus which duties are nonexempt. However, the Court's earlier order does not so indicate. For example, it is unclear whether the Court views "ensuring operational readiness through supervision and inspection of personnel, equipment and quarters … and directing operations at crime, fire or accident scenes, including deciding whether additional personnel or equipment is needed" as "managerial tasks" and consequently exempt duties as DOL's regulatory comments explain, 69 Fed. Reg. at 22130, or whether the Court views such tasks as nonexempt duties synonymous with fighting a fire. The same can be said in regards to "training," which is defined as a management function in 29 C.F.R. § 541.102, but is claimed by the Plaintiffs to be nonexempt work because they work in a fire department. How the Court views the law on these points will greatly aid the parties in deciding how to present their cases, which will inevitably streamline the trial. As a result, the City intends to solicit clarification from the Court at the pretrial conference as to how it has interpreted the law on these points.

The City's proposed instructions parallel the DOL's interpretation as expressed in the official regulatory comments. Conversely, Plaintiffs' proposed "first responder" and "training" instructions further an unsupported version of the law and seek to expand the regulations beyond their intended scope. On this point of law, *United States v. Christensen*, 801 F.3d 970, 992 (9th Cir. 2015), is instructive. There, the defendants were convicted of aiding and abetting unauthorized access of a computer in violation of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030. *Id*. at 991. During trial, the jury was instructed consistent with the statute's language that a violation of the CFAA included situations where the defendant knowingly aided or induced a third party to violate the CFAA. *Id*. The Ninth Circuit, however, found reversible error, as the instructions ran counter to case law that held the CFAA applied only to those who "access" information rather than those who misused accessed information.

CITY ATTORNEY'S OFFICE
PO BOX 1995
VANCOUVER, WA 98668
Tel: (360) 487-8500 * Fax: (360) 487-8501

Id. (citing *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (en banc)). Because the defendants had paid a third party, who was a non-party to the suit, to *access* information and the defendants themselves had simply misused the information by selling it, defendant's action did not fit within the statute's scope. Finding the instruction "transform[ed] the CFAA from an anti-hacking statute into an expansive misappropriation statute," the Court reversed the convictions. *Id*. at 992 (quoting *Nosal*, 676 F.3d at 857 n.3).

Plaintiffs' proposed instructions parallel the errors found in the *Christensen* instructions. First, Plaintiffs' "First Responder" instruction (PPJI 8) states that no FLSA exemption applies to an employee "whose primary duty is determined to be that of a First Responder." But that is not what 29 C.F.R. § 541.3(b) says—the term "First Responder" is wholly absent from § 541.3(b)'s text. Rather, as both courts and the DOL have opined, § 541.3(b) protects from exemption all employees *whose primary duty* is to "control[] or extinguish[] fires" or "rescu[e] fire, crime or accident victims." *Id.* § 541.3(b). It is not the law, as Plaintiffs suggest, that any employee who is ever dispatched to an emergency is automatically nonexempt. Rather, as courts have found, "[t]he distinction appears to hinge on whether the supervisors engage in the same front-line activities as their subordinates on a daily basis." *Maestas v. Day & Zimmerman, LLC*, 664 F.3d 822, 829 (10th Cir. 2012); *accord Smith v. City of Jackson*, 954 F.2d 296, 299 (5th Cir. 1992) (battalion chiefs who respond to some calls but generally do not engage in front-line firefighting deemed exempt), *adopted and cited with approval in* 69 Fed. Reg. at 22130. Given the text of the rule, DOL clarification, as well as extra-circuit case law, Plaintiffs' proposed instruction must be rejected as improperly expanding the law beyond the DOL's intent in promulgating § 541.3(b). *Accord Smith*, 954 F.2d at 299; *see also Mullins v. City of N.Y.*, 653 F.3d 104, 115 (2d Cir. 2011) (noting that "high-level direction of operations by fire chiefs and fire captains who generally d[o] not engage in any *front-line* firefighting" are exempt) (quoting DOL *Amicus* brief, Dkt. 58-1, at 5) (emphasis added). *Christensen* makes clear that instructions must not be misleading and may

CITY ATTORNEY'S OFFICE
PO BOX 1995
VANCOUVER, WA 98668
Tel: (360) 487-8500 * Fax: (360) 487-8501

not highlight sections of regulations that misconstrue the law's reach. 801 F.3d at 2015; *see also Victor v. Nebraska*, 511 U.S. 1, 29 (1994) ("It is not sufficient for the jury instruction merely to be susceptible to an interpretation that is technically correct.").

In contrast, the City's proposed instruction not only quotes from § 541.3(b) accurately, it also draws the appropriate distinction embraced by courts and the DOL between "direct[ing] the work of other employees *in the conduct of fighting a fire*" which is nonexempt work, *id.* § 541.3(b) (emphasis added), "and directing operations at crime, fire or accident scenes," which is an exempt "managerial" duty, 69 Fed. Reg. at 22130 (citing and following *Smith*, 954 F.2d at 299). The City's instruction allows the Plaintiffs to argue their theory that the BCs engage in front-line activities synonymous with captains and firefighters, but also allows the City to argue its theory that BCs' primary role is to ensure operational readiness and direct operations apart from the front-lines. The City's proposed instruction parallels what other courts have done. *See* Jury Charge (Dkt. 112), *Benevides v. City of Austin*, A-11-cv-438-LY (W.D. Tex. Nov. 13, 2012) at 21-22.

Finally, Plaintiffs' proposed instructions on management and "Training Related to First Responder Duties" misstate the law and must be rejected. *Obsidian Fin. Group, LLC v. Cox*, 740 F.3d 1284, 1288, 1290-93 (9th Cir. 2014) (vacating jury verdict and remanding for new trial when jury instructions misstated the law). First, "training of employees" and "implementing compliance measures" are plainly set forth by DOL regulations as exempt management duties. 29 C.F.R. § 541.102. Contrary to what Plaintiffs suggest, the DOL could not "modify" the regulation through its amicus brief. *Harris County*, 529 U.S. at 588 (agency cannot interpret law in a way that is "inconsistent with the regulation"). Moreover, *Morrison v. County of Fairfax*, 826 F.3d 758 (4th Cir. 2016), did not adopt any conclusion that all fire department training sessions—whether being trained or actively training others—as *de facto* nonexempt duties in direct contradiction to § 541.102. Rather, *Morrison* narrowly identified the training in which the employee *participates* that "relates *directly* to a fire captain's *regular*

CITY ATTORNEY'S OFFICE
PO BOX 1995
VANCOUVER, WA 98668
Tel: (360) 487-8500 * Fax: (360) 487-8501

front line firefighting duties," as being non-exempt. *Id*. (emphasis added). The City does not dispute this proposition of law: any training the Plaintiffs receive that relate directly to "front line firefighting duties" is nonexempt work; conversely, training that relates to "directing operations" would be exempt work. Given that the DOL has explicitly concluded that high-level fire department personnel can be exempt if their primary duty is management, it would illogically render the regulations self-contradictory to have a categorical rule that conducting trainings is nonexempt work. Again, any claim that "training" subordinates in a fire department is always nonexempt work would be "inconsistent with the regulation" that is § 541.102, and therefore must be rejected. *Harris County*, 529 U.S. at 588. Conversely, DPJI #10 provides necessary context to inform the jury's decision under the FLSA, is supported by relevant case law, and DOL interpretation.

The Court should also give DPJI #8 (emergencies), which accurately reflects the language of 29 C.F.R. § 541.706. As with the City's other proposed instructions, there is precedent for this instruction under these circumstances. *See* Jury Charge (Dkt. 112), *Benevides*, *supra*, at 20. The City will present evidence at trial demonstrating that the only circumstances in which Plaintiffs engage in § 541.3(b) front-line firefighting activities are when an unexpected emergency has occurred and employee lives are in danger, which does not eliminate their exempt status. The City is therefore entitled to present this theory. *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002).

III. CONCLUSION

For all of the foregoing reasons, the Court should reject Plaintiffs' proposed instructions[4] and adopt those proposed by the City.

[4] Plaintiffs' instructions are also misleading because they suggest the City is obligated to prove that each Plaintiff is exempt for the jury to find one of them exempt. *E.g.*, PPJI 1, 6. There is already a joint jury instruction that tracks 9th Circuit's Model Instruction No. 1.8, which is universally accepted to advise the jury to apply the law individually to separate parties. This provides yet another reason to reject Plaintiffs' instructions.

CITY ATTORNEY'S OFFICE
PO BOX 1995
VANCOUVER, WA 98668
Tel: (360) 487-8500 * Fax: (360) 487-8501

DATED on December 26, 2018.

CITY ATTORNEY'S OFFICE
VANCOUVER, WASHINGTON

By: /s/ Daniel G. Lloyd
Daniel G. Lloyd, WSBA No. 34221
Sara E. Baynard-Cooke, WSBA No. 35697
Assistant City Attorneys
Attorneys for Defendant City of Vancouver
PO Box 1995
Vancouver, WA 98668-1995
Tel: 360.487.8500; **Fax:** 360.487.8501
dan.lloyd@cityofvancouver.us
sara.baynard-cooke@cityofvancouver.us

CERTIFICATE OF SERVICE

I hereby certify that on the date provided below, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following individual(s):

Katelyn S. Oldham
Tedesco Law Group
12780 SE Stark Street
Portland, OR 97233
Tel: (866) 697-6015; **Fax:** (503) 210-9847
katelyn@miketlaw.com

DATED on December 26, 2018.

CITY ATTORNEY'S OFFICE
VANCOUVER, WASHINGTON

By: /s/ Daniel G. Lloyd
Daniel G. Lloyd, WSBA No. 34221
Assistant City Attorney
Attorney for Defendant City of Vancouver
PO Box 1995
Vancouver, WA 98668-1995
Tel: 360.487.8500; **Fax:** 360.487.8501
dan.lloyd@cityofvancouver.us