

Juries and the Executive Exemption

By Allen S. Kinzer, Esq.



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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:

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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 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

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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.

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' for Juries

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. 🏠

Classification Tips for Employers

The *Morgan* and *Rodriguez* jury verdicts provide some lessons to proactive employers on reducing the chances of a large verdict (see story, p. 3). Don't wait until there is a lawsuit; take these steps now:

1. Analyze the job classifications that currently are treated as exempt, and get the assistance of legal counsel in making that analysis (legal counsel's assistance will assist in establishing "good faith" compliance with the law and serve as a defense to the FLSA's liquidated damages (see February 2009 newsletter, p. 1));
2. Take a conservative approach in analyzing job duties; and
3. When analyzing managerial positions, think about whether the average person would label the job "executive." 🏠