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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Joseph M. Ford - FLSA Overtime - Limitations Period

File: B-250051

Date: May 23, 1994

DIGEST

1. Fire inspection employee worked 8-1/2-hour day, including one-half hour meal period. The employee is not entitled to Fair Labor Standards Act overtime for scheduled meal period for those days he was on annual or sick leave since he was not charged leave for the meal period. Armitage v. United States, 23 Cl. Ct. 483 (1991), aff'd, 991 F.2d 746 (Fed. Cir. 1993).

2. Provisions of the Portal-to-Portal Act of 1947, as amended, 29 U.S.C. § 255(a), imposing a limitation period of 2 years (3 years for willful violations) on a "cause of action" under the Fair Labor Standards Act (FLSA) will be applied in the settlement of pending and future FLSA claims filed with GAO by federal employees. Section 255(a) constitutes an exception to 31 U.S.C. § 3702(b)(1), which establishes a 6-year limit on filing claims with GAO "except . . . as provided by . . . another law." Prior GAO decisions that allowed a 6-year period for filing FLSA claims, 57 Comp. Gen. 441 (1978), 67 Comp. Gen. 247 (1988), and 68 Comp. Gen. 681 (1989), will no longer be followed.

DECISION

Mr. Joseph M. Ford, a Fire Inspector formerly employed by the Department of the Air Force at Scott Air Force Base, Illinois, claims overtime pay under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq., for meal periods during his regularly scheduled daily tour of duty of 8-1/2 hours. The claim may be partially allowed to the extent stated below.

Mr. Ford was a Fire Inspector engaged in fire protection activities. His schedule called for him to work 5 days per week. His tour of duty consisted of 4 days of 8-1/2 hours and 1 day of 24 hours, for a total of 58 hours. Mr. Ford's agency paid him based on only 56 hours a week, since it considered the 1/2 hour on the four "short days" to be a duty-free meal break. He received 3 hours of FLSA

overtime because employees engaged in fire protection activities are entitled to FLSA overtime compensation for work more than 53 hours per week. FPM Letter 551-20 (Sept. 22, 1983).

Mr. Ford claims an additional 2 hours overtime per week since meal periods for those engaged in fire protection activities are compensable under the FLSA whether they are duty-free or not. Specifically, he requests such overtime pay from September 10, 1985, 6 years before the date the agency received his claim on September 10, 1991, to the date of his retirement, July 28, 1992, including periods of paid leave, and for his unused annual leave at the date of retirement.

The Department of the Air Force agrees that Mr. Ford performed "fire protection activities" under FLSA and should receive overtime pay for the meal periods that were part of his 8-1/2-hour work days. See Henry G. Tomkowiak, et al., 67 Comp. Gen. 247 (1988). However, the agency contends that payment is not due for periods when the claimant was in a paid leave status, including his leave pay at retirement. The agency also contends that payment of backpay is appropriate only for the period beginning 2 years before the claim was filed, rather than 6 years.

OPINION

Periods of Paid Leave

Mr. Ford claims that he should receive FLSA overtime pay for meal periods on days of paid leave under the rationale of Lanehart v. Horner, 818 F.2d 1574 (Fed. Cir. 1987). In Lanehart, the firefighters had an uncommon tour of duty of six 24-hour shifts for 144 hours per biweekly pay period. They were entitled to FLSA overtime pay for hours worked over 106 per pay period. They also earned and used leave at an accelerated rate of 144 hours per pay period. Thus, when they took a day of leave they were charged 24 hours of leave. The court of appeals held that the various leave with pay statutes (sick, annual, jury, and military leave in title 5, United States Code, prevented any reduction in their regular pay, including overtime pay under the FLSA, when they are on leave under the title 5 leave provisions.

The agency disagrees with the application of the Lanehart holding to this case and argues that the periods when Mr. Ford was in a paid leave status must be deducted because of the holding of the United States Claims Court in

Armitage v. United States, 23 Cl. Ct. 483 (1991), aff'd, 991 F.2d 746 (Fed. Cir. 1993). The plaintiffs in Armitage were police or law enforcement officers regularly scheduled to work 8 hours a day plus another period of regularly scheduled overtime each day. If they took annual or sick leave, like Mr. Ford, they were only charged 8 hours leave for those days. This distinguished them from the firefighters in Lanehart who earned and used leave at an accelerated rate of 24 hours per day because of their uncommon tour of duty. As stated above, when the firefighters took a day of leave, they were charged 24 hours of leave that included their FLSA overtime hours. In contrast, when the plaintiffs in Armitage took a day of leave, no annual or sick leave was charged for regularly scheduled overtime hours that were not worked. Because of this distinction, the Claims Court in Armitage held that, since the plaintiffs were not charged leave for hours of overtime not worked, they were not entitled to overtime pay for periods of leave under the Lanehart rationale or the leave with pay statutes.

We agree with the agency that Armitage is controlling here because Mr. Ford, like the plaintiffs in Armitage, was not charged leave for the one-half hour overtime period when he took leave on any of his four 8-1/2-hour days.[1] Accordingly, he is not entitled to overtime pay during periods of paid leave on those days. Armitage, supra, 23 Cl. Ct. at 492.

Statute of Limitations

The authority of GAO to settle claims against the United States is contained in 31 U.S.C. § 3702(b)(1) (1988), which provides that a claim filed in this Office must be received within 6 years after the date the claim accrues, "except . . . as provided in this chapter or another law."[2] The issue is whether the Portal-to-Portal Pay Act of 1947, as amended, is such another law since it provides in 29 U.S.C.

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[1]Although Mr. Ford was engaged in fire protection activities, he was not a firefighter and did not work the same hours as the firefighters in Lanehart. The one 24-hour day he worked per week is not at issue here, and we express no opinion as to overtime pay requirements for that day when leave is taken.

[2]The quoted phrase was added to the statutory limitation provisions on GAO's claims settlement authority for clarity when title 31 of the United States Code was codified by Pub. L. No. 97-258, 96 Stat. 877, 970 (1982). See reviser's note following 31 U.S.C. § 3702; H R. Rep. No. 651, 97th Cong., 2d Sess. at 131 (1982).

§ 255(a) that a "cause of action" under the FLSA shall be forever barred unless commenced within 2 years (3 years for willful violations) after it accrues.[3]

We considered this issue in Transportation Systems Center, 57 Comp. Gen. 441 (1978), and concluded that section 255(a) did not constitute an exception to 31 U.S.C. § 3702. Thus, we held that the time limit for filing an FLSA claim with GAO was 6 years. We have followed Transportation Systems Center in subsequent decisions dealing with FLSA claims. See Federal Firefighters, 68 Comp. Gen. 681 (1989); Henry G. Tomkowiak, et al., supra.

In the current case, the Air Force asks us to reconsider our position and apply the limitations of 29 U.S.C. § 255(a) to FLSA claims filed with our Office. The Department of the Navy likewise advocates a change in our position, as does the Office of Personnel Management (OPM), which has statutory responsibility to administer the FLSA for federal employees. See 29 U.S.C. § 204(f).

OPM points out that the courts apply the FLSA time limitations to federal employee overtime pay claims arising under that law. See, e.g., Hickman v. United States, 10 Cl. Ct. 550, 552 (1986), observing that when the FLSA was extended to federal employees, "no congressional intent was manifested in the amending language or its underlying legislative history that federal employees would be accorded a more liberal limitations period than employees in the private sector."[4] OPM also points out that in the Federal Employees Pay Comparability Act (FEPCA) of 1990,[5] Congress recognized the distinct and separate overtime entitlements of those federal employees covered by FLSA and those FLSA exempt federal employees covered by various title 5 pay provisions whose claims remain subject to a 6-year statute of limitations.

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[3]Section 255(a) applies to actions arising under several statutes, including "[a]ny action commenced on or after May 14, 1947, to enforce any cause of action for . . . unpaid overtime compensation . . . under the Fair Labor Standards Act of 1938, as amended."

[4]The court in Hickman rejected the plaintiffs' argument that filing FLSA claims with GAO tolled the running of the limitations applicable to judicial actions on FLSA claims under 29 U.S.C. § 255(a), and thereby enlarged the period of recovery.

[5]Pub. L. No. 101-509, § 529, 104 Stat. 1427 (1990). See § 210 of FEPCA, 104 Stat. 1460, amending 5 U.S.C. § 5542.

On the other hand, representatives of federal employees have urged us to adhere to our current position, or, in the alternative, to apply any change only to claims which are filed after the date of a new decision.

For the reasons stated below, we agree with OPM and the other executive agencies that 29 U.S.C. § 255(a) constitutes an exception to the 6-year limitation period in 31 U.S.C. § 3702(b).

Our original decision in Transportation Systems Center, supra, holding that the FLSA limitation period did not supersede the general 6-year limitation period, adopted the position advanced at that time by OPM's predecessor agency, the Civil Service Commission. Both the Commission and our Office reasoned that since the FLSA time limitations in 29 U.S.C. § 255 referred to a "cause of action," they applied only to actions filed in court and not to administrative claims.

In reaching this conclusion, both the Commission and our Office relied on an earlier decision of our Office, 51 Comp. Gen. 20 (1971), which distinguished between limitations applicable to judicial actions and administrative claims. The 1971 decision held that a 1-year limitation period on the commencement of "actions at law" for the recovery of certain communications charges did not supersede the general limitation for filing claims with GAO, which then was 10 years. See 31 U.S.C. §§ 71a and 237 (1970).

The premise underlying our earlier decisions--that a limitation on claims expressed in terms of judicial actions should be distinguished from administrative proceedings to adjudicate the same claims--runs counter to general principles of law. When a statute creates a right that did not exist at common law and restricts the time to enforce it, expiration of the time limit not only bars the remedy but extinguishes the underlying rights and liabilities of the parties. See, e.g., William Danzer Co. v. Gulf R.R., 268 U.S. 633, 635-37 (1925); Kalmich v. Bruno, 553 F.2d 549, 553 (7th Cir. 1977).

Accordingly, a time limitation imposed on a statutorily created judicial cause of action will apply to administrative proceedings to adjudicate the same claims absent a specific provision to the contrary. Moreover, the policies and objectives underlying limitations on judicial actions ordinarily apply with equal force to administrative proceedings dealing with the same entitlements. See, Utah Consolidated Mining Co. v. Industrial Comm'n of Utah, 57 Utah 279, 194 P. 657, 16 ALR 458 (1920). Thus, legislative determinations to limit the extent of a party's exposure to liability or to discourage claims involving

stale facts or documentation problems are no less relevant to administrative than to judicial proceedings.

We believe that these general principles are just as valid in the context of GAO's claims settlements. Indeed, the General Accounting Office Act of 1974[6] reduced the limitation period in 31 U.S.C. § 3702 from 10 years to 6 years, thereby conforming it to the 6-year limitation period applicable to judicial actions on claims against the United States under 28 U.S.C. §§ 2401 and 2501. The legislative history noted that "[t]his will make the time limitation consistent with the Statute of Limitations now applicable to claims filed in administrative agencies and the courts." S. Rep. No. 1314, 93d Cong., 2d Sess. 5-6 (1974); see also, H.R. Rep. No. 1300, 93d Cong., 2d Sess. 18 (1974).

These principles also apply in the context of FLSA claims which involve rights created by statute. The language of the Portal-to-Portal Act expresses its limitations in comprehensive terms, applying to "any action . . . to enforce any cause of action for . . . unpaid overtime compensation" under the FLSA.[7] As noted in Hickman v. United States, supra, it appears that Congress intended to subject federal employees to the same limitation period applicable to other FLSA claimants. Preserving a 6-year period for FLSA claims filed with GAO would be inconsistent with this purpose, and would create disparate treatment not only between federal employees and private sector employees, but also between federal employees who file claims only in court and those who file administrative claims.

Upon reconsideration, therefore, we will follow the interpretation of OPM and the rationale of the courts and apply the statute of limitations in 29 U.S.C. § 255(a) to FLSA claims filed with our Office. Transportation Systems Center, Federal Firefighters, and Henry G. Tomkowiak, supra, are overruled.

Consistent with our usual practice, we will apply the 2-year statute of limitations (3 years for willful violations) in 29 U.S.C. § 255(a) (1938) to all FLSA claims that have not been settled prior to the date of today's decision. See, e.g., Turner-Caldwell, 61 Comp. Gen. 408, 410 (1982).[8] Settlements made before the date of this decision by our

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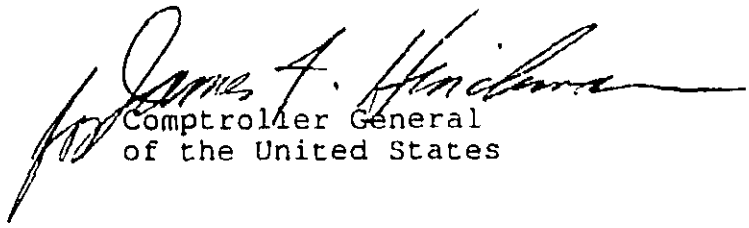
[6]Pub. L. No. 93-604, § 801, 88 Stat. 1965 (1975).

[7]See note 3, supra.

[8]Today's decision does not apply to claims that arise solely out of the title 5 overtime provisions; the 6-year limitation period still applies to title 5 claims.

Office or other federal agencies pursuant to our prior decisions will not be disturbed.

Accordingly, Mr. Ford may be reimbursed for the meal periods that were part of his 8-1/2-hour work days beginning 2 years before the date he filed his claim with his agency, but he may not receive overtime pay for periods when he was in a paid leave status.



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