

Comments

RESCUE ME? SHOULD THE COURTS COME TO THE AID OF QUASI-FIREFIGHTERS: AN ANALYSIS OF THE CIRCUIT SPLIT REGARDING HOW BROADLY THE COURTS SHOULD READ § 203(Y) OF THE FAIR LABOR STANDARDS ACT

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I. INTRODUCTION

Firefighters, emergency medical technicians (EMTs), and paramedics are used to saving the public in moments of need. Recently, however, these individuals have asked the court system to come to their rescue. They want the courts to interpret the Fair Labor Standards Act (FLSA) to enable them to claim additional overtime benefits by concluding that they do not fall within a public employee exemption to the Act.¹

The FLSA states that an employer may not allow its employee to work for more than forty hours in a workweek unless the employer pays the employee “time-and-a-half” for the hours spent working over forty hours.² Section 207(k), however, exempts a “public agency” from subsection (a)'s overtime requirements with respect to various categories of employees, including individuals engaged in “fire protection activities.”³ Section 203(y) defines an employee engaged in fire protection activities as:

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1. This issue has arisen because of a change in the operations of fire departments around the country. This change resulted from cities recognizing that they had an increased need for emergency medical services and a decreased need for firefighting services. Thus, fire departments began deploying their employees to emergency medical calls. Benton J. Matthis Jr. & Dana Kristin Maine, *When are Firefighters Truly Firefighters*, 67 DEF. COUNSEL J. 260, 261 (2000).

2. 29 U.S.C. § 207(a) (2006).

3. 29 U.S.C. § 207(k) (2006).

an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who--

(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

(2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.⁴

This issue is important because it has a significant impact on city budgets, which are already constrained. In addition to future labor costs, municipalities face substantial costs in back pay, attorneys' fees, and court costs if they are deemed to have violated the FLSA. Currently, municipalities are in an especially difficult position because of a circuit split over how to interpret the FLSA. This split leaves cities both uncertain about how to structure their employees' working environment and potentially liable for substantial damages. It has been estimated that the Ninth Circuit's holding, which stated that quasi-firefighters⁵ were covered by the normal overtime rules rather than the fire protection exemption, if adopted nationally, could cost municipalities \$500 million per year in overtime, administrative, and litigation costs.⁶

This issue is also important because Congress had previously recognized that jurisdictions were interpreting the FLSA differently in this area and amended the Act to clarify the confusion. The amendment has been unsuccessful on this front and has led to a significant amount of litigation by paramedics and others claiming they should not be considered fire-protection employees under the amended act.

Part II of this Comment briefly discusses the FLSA, its background and purpose, its initial interpretation, and the 1999 amendment which is currently at issue. Part III provides an overview of the circuit split in this area. The Third and Ninth Circuits have adopted a narrow interpretation of the fire protection exemption and thus have ruled that many quasi-firefighters were entitled to greater overtime payments from their city employers. The Fifth and Eleventh Circuits have adopted a broad interpretation and have included these employees within the fire protection exemption, thus denying them the additional overtime benefits they were seeking. After delineating factual differences in these cases which could

4. 29 U.S.C. § 203(y) (2006).

5. I use this term to refer to the broad group of Emergency Medical Technicians, Paramedics, Ambulance Personnel, and Rescue Service Workers who assert that they engage in fire protection activities under the FLSA.

6. *Lawrence v. City of Phila.*, 527 F.3d 299, 325 (3d Cir. 2008).

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lead courts to different conclusions, this Comment will argue that the circuit courts have drawn fundamentally different legal conclusions as to how to interpret the FLSA. Part IV, utilizing the tools of statutory construction prescribed by the Supreme Court, asserts that the broader interpretation of the exemption is the proper interpretation of the Act. Part V provides a brief conclusion and recommends that the Supreme Court grant certiorari to clarify this issue or that Congress should more explicitly specify which city employees are entitled to payment under the normal overtime rules and thus do not fall under the fire protection exemption.

II. HISTORY OF THE FLSA

The FLSA was passed during the Great Depression to address the prevalent issues of low wages, high unemployment, and long working hours.⁷ Originally, the Act exempted states and their political subdivisions from its coverage.⁸ In 1966, Congress removed this exemption and amended the FLSA by extending its provisions to the states and their political subdivisions operating certain schools, hospitals, nursing homes, railroads, and carriers.⁹ In 1974, the Act was amended to cover virtually all state and local government employees.¹⁰ The constitutionality of this amendment was challenged in *National League of Cities v. Usery* and found to be unconstitutional.¹¹ Less than a decade later, the Supreme Court overruled *Usery* and the “traditional governmental functions’ test” in *Garcia v. San Antonio Metro. Transit Authority*, thus allowing FLSA’s terms to apply to state and local government employees.¹²

Congress exempted some state and local employees from the standard terms of the Act. For example, § 207(k) of the Act applies to public agencies that employ persons in fire protection or law enforcement activities and allows public agencies to calculate their employees’ hours for overtime purposes according to work periods ranging between seven and twenty-eight days rather than on a workweek basis.¹³ The Department of

7. Michael Jilka, *For Whom Does The Clock Tick: Public Employers’ Liability For Overtime Compensation Under Federal Law*, 63 J. KAN. B. ASS’N 34, 35 (1994).

8. *Id.*

9. *Id.*

10. *Id.*

11. The Supreme Court held that extending the FLSA to state and local governments when they performed traditional governmental functions violated the Tenth Amendment and exceeded Congress’s commerce clause power. *Id.*

12. *Id.* (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985)). The Supreme Court held that the political process protected the states against excesses in congressional exercises of power under the Commerce Clause. *Id.*

13. *Id.* The full text of §207(k) (*Employment by public agency engaged in fire protection or law enforcement activities*) provides:

Labor (DOL) established regulations, pursuant to § 207(k), providing that employees of a public agency engaged in fire protection activities are entitled to overtime compensation at a rate of 1 1/2 times their regular wage rate to the extent they work more than fifty-three hours in a week (or an equivalent number in a work period longer than seven days).¹⁴

Plaintiffs who establish a violation of the minimum wage or overtime compensation provisions can recover their back wages and an equal amount in liquidated damages.¹⁵ Further, plaintiffs are entitled to costs and reasonable attorneys' fees.¹⁶ An employer's liability typically extends to back pay for the two years preceding the filing of the lawsuit, unless the violation is willful, in which case the period is extended to three years.¹⁷ Congress later gave courts the "discretion not to award liquidated damages if the employer can show 'to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not in violation of the [FLSA].'"¹⁸

In addition to clarifying when state and local governments would be liable to pay overtime to their public service employees, the DOL passed regulations interpreting the meaning of "fire protection activities." This

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if--

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

14. Andrew M. Campbell, Annotation, *Emergency Medical Technicians, Paramedics, Ambulance Personnel and Rescue Service Workers as Fire Protection or Law Enforcement Personnel for Purposes of § 7(k) of Fair Labor Standards Act (29 U.S.C.A. § 207(k)) Providing Limited Exemption from Overtime Protection for Employees Engaged in Fire Protection or Law Enforcement Activities*, 116 A.L.R. FED. 143 (2008).

15. Jilka, *supra* note 7, at 41.

16. *Id.*

17. *Id.*

18. *Id.* at 41-42 (quoting 29 U.S.C. § 260 (1988)).

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step was necessary since, prior to 1999, the FLSA did not define what this term meant. The first such regulation established a four-part test to determine if an employee was involved in a fire protection activity.¹⁹ The DOL regulation stated that, for the purposes of § 207(k), an employee engaged in fire protection activities would be anyone:

(1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards.²⁰

A separate Regulation provided that, even if employees satisfied the four part test of § 533.210(a), they might fall outside of the exemption if they participated in non-fire related activities that occupied more than twenty percent of their time.²¹

In 1999, Congress amended the FLSA by adding § 203(y) in order to “clarify the overtime exemption for employees engaged in fire protection activities.”²²

19. 29 C.F.R. § 553.210(a).

20. *Id.* This regulation also states that the term covers:

all such employees, regardless of their status as “trainee,” “probationary,” or “permanent,” or of their particular specialty or job title (e.g., firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, battalion chief, deputy chief, or chief). . . . The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities.

21. 29 C.F.R. § 553.212(a). This regulation states:

[e]mployees engaged in fire protection or law enforcement activities as described in §§ 553.210 and 553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat either the section 13(b)(20) or 7(k) exemptions unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.

22. Pub.L. No. 106-151, 113 Stat. 1731 (1999).

III. OVERVIEW OF THE CIRCUIT SPLIT

The circuit courts that have examined this issue have conducted thorough factual analyses of the plaintiff employees' fire protection (or lack thereof) activities. After exploring the factual similarities and differences between the employees in these cases, this Comment will lay out the different legal interpretations adopted by the circuits. Through this process it will become clear that, while there are important factual differences between these cases, the circuit split is the result of contrasting legal interpretations and cannot be distinguished on purely factual grounds.

A. *Fire Protection Activities of Personnel Involved in These Cases*

In *Lawrence v. City of Philadelphia*²³ and *Cleveland v. City of Los Angeles*,²⁴ the Third and Ninth Circuits, respectively, were confronted with how to interpret the FLSA's overtime provision relating to fire protection activities. Both courts adopted a narrow view of the fire protection exemption under somewhat similar factual circumstances. In *Lawrence*, fire service paramedics (FSPs) sued their employer, the City of Philadelphia, for violating the overtime provisions of the FLSA.²⁵ The City employed hundreds of FSPs who were assigned to forty different medic units and located in firehouses.²⁶ Philadelphia concluded in the early 1970s that it needed individuals with paramedic abilities to become part of the Fire Department's emergency response team.²⁷

"In 1980, the City created a specific job classification for 'fire paramedics.'"²⁸ These individuals were fully trained as firefighters and paramedics.²⁹ Because of the expense of sending firefighters to paramedic school, a cost which was increasing, the City started hiring trained paramedics in 1988.³⁰

The positions of firefighter and FSP are distinct within the Philadelphia Fire Department and differ in several respects. One such area is training. Whereas paramedic training takes about one year, firefighter training only takes sixteen weeks.³¹ While FSPs underwent instruction for fire suppression, this training only involved "basic-level instruction in some of the fundamentals of firefighting, hazardous materials incidents,

23. *Lawrence v. City of Phila.*, 527 F.3d 299 (3d Cir. 2008).

24. *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005).

25. *Lawrence*, 527 F. 3d at 303.

26. *Id.*

27. *Id.*

28. *Id.* (citation omitted).

29. *Id.*

30. *Id.*

31. *Id.* at 304.

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safe operating procedures, driver training and departmental procedures.”³² The purpose of this instruction was “to familiarize [the FSPs] with the operations of the people that they are going to be working with in the engines and the ladders, and also it’s familiarization training for [the FSPs] when they have to utilize certain firefighting equipment.”³³ Upon completion of training, firefighters receive a “Firefighter I” certificate.³⁴ FSPs, on the other hand, receive a “Fire Service Paramedic Orientation” certificate.³⁵

Another area that distinguishes firefighters from FSPs is pay and status. “Paramedics receive higher pay than firefighters generally, and if a paramedic wanted to switch jobs and become a firefighter, s/he would be considered to be ‘demot[ing] down.’”³⁶

After distinguishing the positions of firefighter from FSP, the Third Circuit proceeded to delve more deeply into the work requirements associated with the FSP position. The FSP job description “states that the position involves ‘advanced life support and field paramedical work responding to emergency calls *from the public* to perform medical assistance with emphasis on the stabilization of patients to permit safe transport to a full-service medical facility’”.³⁷

The court relied heavily on this job description. It stated:

Every substantive aspect of the job description is medical in nature. . . . The job description does not mention any fire protection related examples of work to be performed, or fire suppression skills needed to perform the job of an FSP, except that it does state that FSPs should receive orientation in the use of fire equipment “*as applicable to paramedical work.*”³⁸

The court supports this qualitative distinction with a quantitative one. It noted that “FSP dispatches to fire scenes account for only about one tenth of one percent (i.e., .1%) of FSP ambulance dispatches in a year”³⁹

The City of Philadelphia attempted to counter these arguments by pointing to the possibility that FSPs would be called upon to engage in fire protection activities. Thus, the City emphasized the statement of a former

32. *Id.* at 308 (citation omitted).

33. *Id.* at 309 (citation omitted).

34. *Id.* at 304.

35. *Id.* at 308.

36. *Id.* at 304 (citation omitted).

37. *Id.* at 305 (citation omitted). The court goes on to detail other job requirements, such as the ability “to observe patients’ vital signs, clean wounds, treat burns, administer drugs, and prepare reports on each treatment given.” *Id.*

38. *Id.* (citation omitted).

39. *Id.* The lack of dispatches results from FSPs not always being dispatched to fire scenes. FSPs are only sent to fire scenes when the Fire Communications Center determines it is necessary. *Id.*

Fire Commissioner that “FSPs are trained in fire suppression so that they ‘can provide fire suppression if called upon to do so by their incident commander or by other circumstances.’”⁴⁰ The City also pointed to the FSP Code of Conduct, which FSPs are required to sign in order to graduate from the Fire Academy. In this Code, the cadet “recognize[s] [his or her] responsibility to render Fire Suppression.”⁴¹

The Third Circuit found the City’s arguments unpersuasive. Countering these arguments, the court noted that “the City could cite no instance in which an FSP was called upon to enter a burning building to put out a fire, or was expected to perform any fire suppression duty other than a few marginal instances involving nothing more than moving a hose line.”⁴² Moreover, the court, with one exception, found that FSPs had not been ordered by superior fire officials to use a hose to fight a fire or to engage in other fire suppression activities. The one exception was when a fire officer ordered a paramedic to move a hose over a fence.⁴³

In *Cleveland v. City of Los Angeles*, 119 employees of the City of Los Angeles sued over the application of the fire protection exemption.⁴⁴ These employees were fully trained and certified in both fire suppression skills and advanced life support and were referred to as “dual function paramedics.”⁴⁵ The City also employed single function paramedics who were not trained in fire suppression.⁴⁶

These dual function paramedics staffed ambulances and “were responsible for providing medical care, transporting patients to hospitals, maintaining the ambulances, and completing related paperwork.”⁴⁷ Distinguishing this group from firefighters, the Ninth Circuit noted that “[t]hey do not carry water, hoses, pumps, ladders, or fire suppression breathing equipment, nor do they carry any specialized extrication equipment, aside from a crow bar and a lock cutter.”⁴⁸

Additionally, paramedic ambulances usually were not dispatched to fire calls and only responded when there was a need for advanced medical services.⁴⁹ When called to fire scenes, there was no evidence that these

40. *Id.* (citation omitted).

41. *Id.* (citation omitted).

42. *Id.* The court also mentioned the testimony of a retired Fire Department Battalion Chief (a middle management safety officer) who stated that he “wouldn’t let [FSPs] anywhere near a fire building” and had “reprimanded a paramedic for going into a burning building to try to save . . . a kid.” *Id.* at 306-07 (citation omitted).

43. *Id.* at 307.

44. *Cleveland v. City of Los Angeles*, 420 F.3d 981, 983 (9th Cir. 2005).

45. *Id.*

46. *Id.*

47. *Id.* at 984.

48. *Id.*

49. *Id.* On average, plaintiffs responded to fire calls only once or twice a year. *Id.*

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dual function paramedics had ever been ordered to perform fire suppression when assigned to an ambulance.⁵⁰

The Fifth and Eleventh Circuits faced different factual circumstances. In *McGavock v. City of Water Valley*, five firefighters sued the City of Water Valley, Mississippi.⁵¹ These firefighters had graduated from the fire academy with training in fire suppression, had legal authority to engage in fire suppression and had been called to extinguish, control, and prevent fires, as well as respond to emergency situations where life, property, or the environment was at risk. These firefighters tried to argue that, even after the passage of § 203(y), because they spent more than twenty percent of their workweek engaged in dispatching duties (as opposed to fire protection activities), they should not fall under the fire protection exemption.⁵² The court did not find this argument persuasive and found that the Water Valley firefighters fell squarely within § 203(y)'s terms. It concluded:

The only purpose of Congress in amending the statute that is clear to us, is that it intended all emergency medical technicians (EMTs) trained as firefighters and attached to a fire department to be considered employees engaged in fire protection activities even though they may spend one hundred percent of their time responding to medical emergencies.⁵³

In *Huff v. DeKalb County*, the defendants employed dual-function Firefighters/Paramedics and Fire Medics.⁵⁴ They were fully trained and

50. *Id.* However, these paramedics could volunteer to assist firefighters. If they did not, no disciplinary action would be taken against them. *Id.* Summarizing the relevant facts, the court stated:

- (1) the paramedic ambulances do not carry firefighting equipment or breathing apparatuses;
- (2) a dispatcher does not know if he or she is sending single or dual function paramedics to a call;
- (3) paramedic ambulances are not regularly dispatched to fire scenes and are dispatched only when there appears to be a need for advanced life support medical services;
- (4) dual function paramedics are not expected to wear fire protective gear;
- (5) dual function paramedics are dispatched to a variety of incidents (e.g., vehicle accidents and crime scenes) at which they are expected to perform only medical services; and
- (6) there is no evidence that a dual function paramedic has ever been ordered to perform fire suppression.

Id. at 990.

51. *McGavock v. City of Water Valley*, 452 F.3d 423, 424 (5th Cir. 2006).

52. *Id.*

53. *Id.* at 427.

54. *Huff v. DeKalb County*, 516 F.3d 1273, 1274 (11th Cir. 2008).

certified in fire suppression and advanced life support.⁵⁵ Beginning in 2003, the County classified the NPQI plaintiffs as “Firefighter/Paramedics” and the NPQII plaintiffs as “Fire Medics,” and gave both groups responsibility for fire suppression.⁵⁶ Furthermore, both groups could be assigned to fire apparatuses,⁵⁷ were required to wear fire protection gear, and both had the legal authority and responsibility to prevent, control, and extinguish fires.⁵⁸ If any of the plaintiffs refused to follow an order to fight a fire, they would be disciplined.⁵⁹

While the plaintiffs theoretically had these responsibilities, in actuality, at least for the NPQI-certified Firefighter/Paramedics, their fire suppression duties were minimal. For example, Firefighter/Paramedics were not authorized to suppress a house fire (although they could be authorized to extinguish small fires, such as brush fires and perhaps exterior structure fires).⁶⁰ These employees had “never engaged in or been ordered to extinguish, fight, or suppress a fire.”⁶¹ Fire Medics, on the other hand, “are required to perform firefighting and ‘to improve knowledge and skill in all areas related to fire fighting and life rescue.’”⁶² Their job description included performing fire control and suppression, and inspecting fire hydrants and fire station equipment.⁶³

The factual circumstances in *Lawrence* and *Cleveland* bear many similarities. Most importantly, both courts reached the same factual conclusion that the employees in question provide medical assistance and not fire suppression services. The Fifth and Eleventh Circuits, on the other hand, faced similar factual circumstances but ones that differed substantially from the Third and Ninth Circuits. One conclusion that could be drawn from this discussion is that the circuits share similar legal interpretations of the FLSA and were simply confronted by different factual scenarios, which led to their different holdings. Such a conclusion would be inaccurate, however. The circuit split is not the result of courts deciding the cases based on the facts before them. The split results from fundamentally different conceptions of how to interpret the FLSA.

55. *Id.* The plaintiffs received National Professional Qualification I (“NPQI”) certification, which requires additional training beyond what is normally required for a firefighter in Georgia. Some plaintiffs even received NPQII, an even higher level of certification. *Id.*

56. *Id.*

57. Such apparatuses include “[r]escues, [t]rucks, [s]quads, [l]adders, [t]echnical [r]escue [t]rucks, or [e]ngines.” *Id.* at 1275.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* (citation omitted).

63. *Id.* at 1276.

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Because the circuits are split on a matter of law, Supreme Court or congressional action is appropriate to resolve this issue.

B. Circuits' Legal Interpretations of the Statute

While there are four requirements in the FLSA for an employee to be engaged in fire protection activities, the circuit courts that have evaluated this issue have focused on two main issues. As the Third Circuit noted, the dispute about employees engaging in fire protection activities depends on “whether FSPs are trained in fire suppression and have legal authority and responsibility to engage in fire suppression.”⁶⁴ The circuit split in this area hinges on a fundamental disagreement on this topic, particularly what it means to have the responsibility to engage in fire suppression.

The Third Circuit drew heavily from the Ninth Circuit’s analysis to determine what it means to be responsible for fire protection activities. As the court noted, “[i]n order to be responsible for something, a person must be required to do it or be subject to penalty. In other words, a responsibility is something that is mandatory and expected to be completed as part of someone’s role or job.”⁶⁵ Applying that conception of responsibility to the facts of the case before the court, the court noted that FSPs are not hired, nor expected to fight fires based on their job description and experience on the job.⁶⁶ Thus, the court stated, “[t]here is no evidence of an FSP being disciplined for not engaging in fire suppression activities at a fire scene. There is no evidence that FSPs are ever dispatched to a fire scene for the purpose of fighting a fire, not even in situations when a firefighter is unavailable.”⁶⁷ Dismissing the time(s) when FSPs had been asked to move a fire hose, the court stated, “[s]uch minor assistance is not the ‘role’ or required duty of an FSP, and therefore does not fall within the plain meaning of the term ‘responsibility.’”⁶⁸ The court also dismissed the fact that FSPs had signed a statement declaring their responsibility for fire suppression.⁶⁹ The court concluded that this fact did “not mean that FSPs have legal authority and responsibility to engage in fire suppression activities; it simply means that the Fire Department required them to sign such a statement in order to retain their jobs.”⁷⁰

In *Cleveland*, the Ninth Circuit similarly narrowed its focus to what, if

64. *Lawrence v. City of Phila.*, 527 F.3d 299, 303 (3d Cir. 2008).

65. *Id.* at 317 (citing *Cleveland v. City of Los Angeles*, 420 F.3d 981, 989 (9th Cir. 2005)).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 318.

any, responsibility the plaintiffs bore for fire suppression. Here, the plaintiffs asserted that:

(1) they do not have the ‘responsibility’ to engage in fire suppression (citation omitted); (2) they do not, in fact, engage in fire suppression and are not regularly dispatched to fire scenes (citation omitted); and (3) the exemption is inapplicable because Plaintiffs spent more than twenty percent of their time engaged in nonexempt work (work that is not performed incident to or in conjunction with their fire protection) because they devote the vast majority of their time to providing medical services.⁷¹

Congress enacted § 203(y) three months after plaintiffs filed their suit.⁷² Because the court concluded that the twenty percent standard no longer applied since § 203(y) displaced the DOL’s regulations, the court focused on what the word “responsibility” meant in the FLSA.⁷³ To perform this analysis, it turned to dictionary definitions of responsibility. This analysis led it to conclude that responsibility meant “‘a duty, obligation or burden’” and to be responsible meant “‘expected or obliged to account (for something, to someone), answerable, accountable’ and ‘involving accountability, obligation or duties[;] [r]esponsible applies to one who has been delegated some duty or responsibility by one in authority and who is subject to penalty in case of default.’”⁷⁴

Applying this definitional analysis to the facts at hand, the court concluded that for plaintiffs to have responsibility for fire suppression “they must have some real obligation or duty to do so. If a fire occurs, it must be their job to deal with it.”⁷⁵ The Ninth Circuit found it unnecessary to consider legislative intent since it found the term “responsibility” to be clear in the statute. The court concluded that the plaintiffs did not have the responsibility to engage in fire suppression and thus did not fall under the FLSA exemption.⁷⁶

The Fifth and Eleventh Circuits, on the other hand, adopted a very different view on the meaning of responsibility in § 203(y). At first blush, the Eleventh Circuit appears to distinguish the facts of *Huff* from

71. *Cleveland v. City of Los Angeles*, 420 F.3d 981, 986-87 (9th Cir. 2005) (citation omitted).

72. *Id.* at 987.

73. The circuits that have examined § 203(y) have concluded that it displaces the DOL’s regulations. Thus, the 80/20 provision is no longer applicable in determining who is determined to be an employee engaged in fire protection activities. *See, e.g.*, *Huff v. DeKalb County*, 516 F.3d 1273, 1278 (11th Cir. 2008) (“The Plaintiffs argue that the regulatory definition of ‘employee in fire protection activities,’ particularly the 80/20 Rule, still applies. We disagree.”).

74. *Cleveland*, 420 F.3d at 989 (citations omitted).

75. *Id.* at 990.

76. *Id.* at 991.

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Cleveland. It points out that “[t]here is undisputed testimony that all Plaintiffs are qualified to engage in fire suppression and must do so if ordered, whereas the *Cleveland* plaintiffs had no such obligation.”⁷⁷ However, a closer examination of the opinion makes clear that the real distinction between the cases is how the courts define responsibility.

For the Eleventh Circuit, responsibility “does not imply any actual engagement in fire suppression, and employees may have a ‘responsibility to engage in fire suppression’ without ever actually engaging in fire suppression themselves. This ‘responsibility’ is a forward-looking, affirmative duty or obligation that an employee may have at some point in the future.”⁷⁸ The court reached this conclusion because of the disjunctive nature of the requirements in § 203(y). As the court stated, “[e]mployee in fire protection activities’ means an employee . . . [who] . . . is engaged in the prevention, control, and extinguishment of fires *or* response to emergency situations where life, property, or the environment is at risk.”⁷⁹ Since employees fall under the second prong of the exemption even if they only respond to emergency situations, the court concluded there is no statutory requirement that there be any level of actual engagement in fire suppression.⁸⁰

The court also pointed out the perverse incentive that the opposite interpretation provides because “if we read ‘responsibility’ to require actual engagement in fire suppression, DeKalb County could simply assign its paramedics (who already meet the other requirements of § 203(y)) to perform fire suppression activities occasionally, for the sole purpose of exempting them from the FLSA forty hour overtime standard.”⁸¹

The Fifth Circuit also reached the conclusion that responsibility implied no actual engagement with fighting fires. As the court noted,

The only purpose of Congress in amending the statute that is clear to us, is that it intended all emergency medical technicians (EMTs) trained as firefighters and attached to a fire department to be considered employees engaged in fire protection activities even though they may spend *one hundred percent of their time responding to medical emergencies*.⁸²

As the quote above indicates, the Fifth Circuit found Congress’s intent in amending the FLSA to be clear. The Eleventh, Third, and Ninth Circuits

77. *Huff*, 516 F.3d at 1279.

78. *Id.* at 1281.

79. *Id.* (quoting 29 U.S.C. § 203(y) (2006)) (emphasis added).

80. *Id.* The Eleventh Circuit reaffirmed this decision in *Gonzalez v. City of Deerfield Beach*, 549 F.3d 1331, 1336 (2008).

81. *Id.* at 1281.

82. *McGavock v. City of Water Valley*, 452 F.3d 423, 427 (5th Cir. 2006) (emphasis added).

also agreed that the statutory language was not ambiguous.⁸³ The Third Circuit, however, “in an abundance of caution,” consulted legislative intent to determine its meaning.⁸⁴ The fact that four circuit courts found the language to be clear, yet reached different conclusions as to what this “clear” language meant (and one of the circuit’s fractured by reaching different conclusions), should give pause to the assumption that the language is unambiguous. Thus, evaluating legislative intent is a worthwhile endeavor.

The majority opinion in *Lawrence v. Philadelphia* argued that congressional intent supported its interpretation of § 203(y) that the employees in question were exempt from the fire protection exemption. To this end, the court cited three congressmen’s views on the bill. Thus, they noted that the amendment’s sponsor, Representative Ehrlich, stated that it “‘seeks to clarify the definition of a fire protection employee,’ which had been rendered unclear due to recent inconsistent court interpretations.”⁸⁵ Rep. Boehner thought the purpose of the amendment was to ensure “‘that firefighters who are cross-trained as emergency medical technicians, HAZMAT responders and search and rescue specialists would be covered by the exemption even though they may not spend all of their time performing activities directly related to fire protection.’”⁸⁶ Finally, the court quoted Rep. Clay stating that:

[U]nder the 1985 amendments to the Fair Labor Standards Act, the [§ 207(k)] exemption was intended to apply to all firefighters who perform normal firefighting duties. [The amendment] provides that where firefighters are cross-trained and are expected to perform both firefighting and emergency medical services, they will be treated as firefighters for the purpose of overtime. However, where emergency medical technicians are not cross-trained as firefighters, they will remain outside the purview of [§ 207(k)] and [sic] will be entitled to overtime after 40 hours a week, even if the emergency medical services are placed within the fire department.⁸⁷

These statements led the majority to conclude that “Congress intended that true dual function paramedics, that is, individuals who were no doubt firefighters but also performed various other functions within a fire department, would fall within the exemption.”⁸⁸ These statements,

83. *Lawrence v. City of Phila.*, 527 F.3d 299, 318 (3d Cir. 2008); *Huff*, 516 F.3d at 1280; *Cleveland v. City of Los Angeles*, 420 F.3d 981, 990 (9th Cir. 2005).

84. *Lawrence*, 527 F.3d at 318.

85. *Id.* at 312 (quoting 145 Cong. Rec. 28, 521 (1999) (statement of Rep. Ehrlich)).

86. *Id.* (quoting 145 Cong. Rec. 28, 520 (1999) (statement of Rep. Boehner)).

87. *Id.* (quoting 145 Cong. Rec. 28, 520 (1999) (statement of Rep. Clay)).

88. *Id.* at 318.

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however, are relatively neutral as to whether quasi-firefighters of the sort before the Third Circuit should be exempt or not. As the statement of Rep. Clay demonstrates, assuming that these statements actually reflect Congress's intent in passing the amendment, it is unclear if Congress intended EMTs who have some of the same training as firefighters to be sufficiently cross-trained to fall within the amendment's exemption.

The dissent in *Lawrence* believed this was Congress's intent. Drawing on additional comments of the congressmen cited by the majority, the dissent found that the impetus behind the amendment was to lessen the financial liability faced by municipalities from quasi-firefighters successfully suing their employers. Thus, Rep. Ehrlich "noted that a municipality in his district had recently been found liable for \$3.5 million under the FLSA, and that the potential consequences of such cases were 'serious and far-reaching and could result in a dramatic increase in the local costs of fire protection to taxpayers nationwide.'"⁸⁹ Rep. Boehner noted that "the narrowing of the exemption by the courts had 'resulted in State and local governments being liable for millions of dollar [sic] in back pay, attorneys fees and court costs.'"⁹⁰

There is debate about the relevance of a few congressional members' statements about a bill in determining Congress's intent behind passing legislation. While it appears that the *Lawrence* dissent more accurately captures congressional sentiment behind the amendment to the FLSA, this sentiment is unclear and does not definitively determine how to interpret the FLSA. Given the current situation (no further congressional action and no certiorari), the best answer lies in applying the tools of statutory construction that the Supreme Court has provided to the FLSA. This analysis shows that the interpretation embraced by the Fifth and Eleventh Circuits, and the dissent from the Third Circuit, more faithfully honors the language of the FLSA.

IV. APPLYING TOOLS OF STATUTORY ANALYSIS

This Part describes the guidance provided by the Supreme Court for interpreting legislation and applies this guidance to the factual situation in *Lawrence*. *Lawrence* was selected as the test case because the FSPs there depart most from the standard firefighting employee. If, as I argue, these employees should rightly be exempted,⁹¹ these cases become easier to

89. *Id.* at 324 (quoting 145 Cong. Rec. H11,500 (daily ed. Nov. 4, 1999) (statement of Rep. Ehrlich)).

90. *Id.* (quoting 145 Cong. Rec. H11,500 (daily ed. Nov. 4, 1999) (statement of Rep. Boehner)).

91. This position is not a normative one (i.e., about whether quasi-firefighters should be entitled to greater overtime benefits). It is based on applying the tools of statutory analysis

decide and much of the confusion in this area dissipates.

The Supreme Court has been clear that the legislation in question is the starting point, and often the end point, for statutory analysis. In *Hughes Aircraft Co. v. Jacobson*, the Court stated that “as in any case of statutory construction, our analysis begins with ‘the language of the statute.’”⁹² The first step in the Court’s analysis is to determine if the language in question is plain and unambiguous.⁹³ If this question is answered in the affirmative and “the statutory scheme is coherent and consistent,” then the “inquiry must cease.”⁹⁴ In order to determine if the language is clear or ambiguous, the Court looks to “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”⁹⁵

The Supreme Court’s analysis does not focus on words in isolation but in the context of the words around it and the legislation as a whole.⁹⁶ Part of the Court’s concern with context is ensuring that the Court gives full meaning to all of the legislation and that its interpretation of one part of the legislation does not render another part contradictory or moot. Thus, the Court has stated that “[j]udges should hesitate . . . to treat [as surplusage] statutory terms in any setting.”⁹⁷ The Court has also expressed “deep reluctance . . . to render superfluous other provisions in the same enactment.”⁹⁸

The Supreme Court has been remarkably consistent in this area. As far back as 1883, the Court stated that it had a duty “to give effect, if possible, to every clause and word of a statute.”⁹⁹ Thus, the Court has been consistent and clear that, when performing statutory analysis, the key is to look at the words the legislature has chosen and their context so as not to render inconsequential any of the words in the act.

Apart from this general guidance on statutory interpretation, the Supreme Court has provided specific guidance on interpreting the FLSA. As the majority noted in *Lawrence*, “[t]here are additional considerations in an FLSA case because the FLSA must be construed liberally in favor of

elucidated by the Supreme Court to interpret the FLSA’s language.

92. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (quoting *Estate of Cowart v. Nickolas Drilling Co.*, 505 U.S. 469, 475 (1992)).

93. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (stating the above proposition).

94. *Id.* (quoting *U.S. v. Ron Pair Enter.*, 489 U.S. 235, 240 (1989)).

95. *Id.* at 341 (citations omitted).

96. *See Bailey v. U.S.*, 516 U.S. 137, 145 (1995) (“We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. ‘[T]he meaning of statutory language, plain or not, depends on context’”) (citation omitted).

97. *Id.* (quoting *Ratzalf v. U.S.*, 510 U.S. 135, 140-41 (1994)).

98. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990).

99. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883)).

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employees.”¹⁰⁰ In this area, the general rules of statutory interpretation and the precedent that FLSA exemptions are to be construed narrowly pull in opposite directions. Since the language that Congress chose to draft and pass broadens the exemption, this interpretation should control and leads to the conclusion that quasi-firefighters, like the FSPs in *Lawrence*, fall within the fire protection exemption.

Much of the disagreement among the circuits stems from their differing interpretations of “responsibility.” It is difficult to critique their interpretations of responsibility because the statute does not define the term and the circuits can rightly say that their interpretation is based on a common acceptance of the word’s meaning. However, the word responsibility does not have only one meaning and the circuits have chosen to emphasize different definitions in their analyses.

The Third and Ninth Circuits embrace the following definition of responsibility:

In order to be responsible for something, a person must be required to do it or be subject to penalty. . . . In other words, a responsibility is something that is mandatory and expected to be completed as part of someone’s role or job.¹⁰¹

For the Fifth and Eleventh Circuits, responsibility “does not imply any actual engagement in fire suppression, and employees may have a ‘responsibility to engage in fire suppression’ without ever actually engaging in fire suppression themselves. This ‘responsibility’ is a forward-looking, affirmative duty or obligation that an employee may have at some point in the future.”¹⁰²

It is difficult to distinguish which side of the circuit split has the proper interpretation of the FLSA based solely on its analysis of the meaning of responsibility. Both sides agree that the definition of responsibility is at the heart of this issue and can confidently assert that they have applied a proper definition for the term. While difficult, however, the conclusion still stands that, even embracing the narrower definition of responsibility, the Third Circuit reached the wrong legal conclusion by holding that FSPs did not fall within the fire protection exception.

100. *Lawrence v. City of Phila.*, 527 F.3d 299, 310 (3d Cir. 2008). For this proposition, the majority cited *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (“explaining that the purpose of the FLSA is to protect workers from substandard wages and oppressive working hours”) and *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (“emphasizing limited application to be given an exemption from the FLSA provisions”). The majority also stated that “[a]n employer seeking to apply an exemption to the FLSA must prove that the employee and/or employer comes ‘*plainly and unmistakably*’ within the exemption’s terms.” *Lawrence*, 527 F.3d at 310 (citations omitted).

101. *Lawrence*, 527 F.3d at 317 (citations omitted).

102. *Huff v. DeKalb County*, 516 F.3d 1273, 1281 (11th Cir. 2008).

Based on the Third and Ninth Circuits' definitions of responsibility, FSPs would only fall within the fire protection exemption if they could be held accountable for fire suppression activities or subjected to discipline if they failed to engage in such activities. While FSPs at no time directly engaged in fire suppression (apart from moving a hose), they were accountable, and potentially subject to discipline, for their actions related to fire suppression. FSPs are required to sign the FSP Code of Conduct in order to graduate from the Fire Academy. In this code, the cadet "recognize[s] [his or her] responsibility to render Fire Suppression."¹⁰³ In addition to acknowledging their responsibility to engage in fire suppression, eleven FSPs (ten of them plaintiffs) also stated that they had to obey the orders of their Incident Commander, which lawfully include engaging in fire suppression,¹⁰⁴ and would be disciplined if they did not do so.¹⁰⁵ Embracing the Third and Ninth Circuits' narrow definition of responsibility and applying that definition to personnel whose fire suppression duties differ greatly from the standard firefighter job description demonstrates that the proper interpretation of the FLSA will result in the vast majority of quasi-firefighters falling within the fire protection exemption.

While this conclusion seems like a close call given the multiple definitions of "responsibility" and the various ways that fire departments could choose to structure their operations (e.g., text of cadet oaths, powers and authority of the incident commander), an analysis of the term "responsibility" within the broader context of § 203(y) makes clear that the Fifth and Eleventh Circuits' interpretation of the FLSA is the proper one.

The flaw in the Third and Ninth Circuits' reasoning is that their interpretation renders key portions of § 203(y) superfluous and thus disregards Supreme Court guidance on statutory interpretation. As the dissent in *Lawrence* notes:

If employees must satisfy § 203(y)(1) by being 'hired to fight fires' and 'expected to fight fires as part of their job duties,' it necessarily follows that they are 'engaged in the prevention, control, and extinguishment of fires' and the first clause of §

103. *Lawrence*, 527 F.3d at 306 (citation omitted).

104. In *Lawrence*, the dissent noted that:

[B]oth current Commissioner Lloyd Ayers and former Commissioner Harold Hairston made clear that the Incident Commander possesses broad discretion to 'direct or redirect any fire service person, fire service paramedic, or firefighter, in any manner he or she believes will result in the safest environment for civilians and firefighters and efficient suppression of fire,' and that FSPs were accordingly authorized 'to engage in fire suppression on firegrounds if needed and as directed by an Incident Commander.' *Lawrence*, 527 F.3d at 326 (Hardiman, J., dissenting).

105. See *id.* at 326-27 (quoting plaintiffs' testimony in support of this assertion).

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203(y)(2) is redundant.¹⁰⁶

Looking beyond § 203(y)(1) shows that the narrow definition of responsibility embraced by the Third and Ninth Circuits is not the appropriate way to interpret the Act. If this narrow definition was the proper interpretation, there would have been no need for Congress to insert the first part of § 203(y)(2). That Congress did insert this language shows that it meant responsibility to convey a potential, if unrealized, obligation as the Fifth and Eleventh Circuits concluded.

The addition of § 203(y)(2) strongly indicates that Congress did not envision any requirement that quasi-firefighters actually engage in fire suppression to fall within the fire protection exemption. The first part of § 203(y)(2) conveys that “responsibility” in § 203(y)(1) does not mean that these employees are actually engaging in fire suppression. While the first part of § 203(y)(2) does establish a requirement that the employees engage in fire suppression activities, this requirement is not absolute, but merely part of a disjunctive test. For employees to be engaged in fire protection activities, they must satisfy the terms of § 203(y)(1) and be “engaged in the prevention, control, and extinguishment of fires *or* response to emergency situations where life, property, or the environment is at risk.”¹⁰⁷ Thus, the second part of the test in § 203(y)(2) establishes that there is no requirement that quasi-firefighters actually engage, or are hired to engage, in fire suppression.¹⁰⁸

This interpretation is supported by the introductory clause to § 203(y). This clause states that “[e]mployee in fire protection activities’ means an employee, including a firefighter, *paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker.*”¹⁰⁹ As the dissent in *Lawrence* notes, “Congress’s enumeration of various job titles, in addition to that of firefighter, undermines the majority’s conclusion that the exemption applies only to employees hired exclusively, primarily, or periodically ‘to fight fires.’”¹¹⁰

V. CONCLUSION

Under the interpretation of § 203(y) that is most faithful to Supreme Court precedent, all of the employees in the circuit cases discussed in this

106. *Id.* at 322-23.

107. 29 U.S.C. § 203(y)(2) (2006) (emphasis added).

108. *See Lawrence*, 527 F.3d at 323 (“[T]he use of the disjunctive in § 203(y)(2) demonstrates that ‘there is no statutory requirement that there be *any* level of actual engagement in fire suppression’”) (quoting *Huff v. DeKalb County*, 516 F.3d 1273, 1281 (11th Cir. 2008)).

109. 29 U.S.C. § 203(y) (2006) (emphasis added).

110. *Lawrence*, 527 F.3d at 324.

Comment would fall within the fire protection exemption.¹¹¹ The employees were trained in fire suppression; had the legal authority and responsibility (a forward-looking, potential responsibility) to respond to fires; were employed by a fire department of the relevant political entity; and, where not directly engaged in the prevention, control, and extinguishment of fires, responded to emergency situations where life, property, or the environment were at risk. Embracing this interpretation leads to the conclusion that the FSPs in *Lawrence*, even though they never did more than move a hose in response to a fire, fall within the fire protection exemption.

While this conclusion is in some tension with how the Supreme Court usually interprets the Act because it broadens an FLSA exemption, it is more faithful to the statutory language and other Supreme Court precedent going back more than a hundred years and reaffirmed repeatedly. If the circuits were to embrace this interpretation, much, if not all, of the confusion surrounding § 203(y) would disappear because it clarifies many of the terms that have caused the circuit split. While this Comment has asserted that there is a proper interpretation for § 203(y), the strong circuit divide on questions of law requires clarification from above. This clarification could take one of two forms: congressional or Supreme Court action.

While both of these institutions face many pressing issues, this one deserves attention for a variety of reasons. First, Congress felt strongly enough about confusion in this area to amend the FLSA in 1999, only to find that its amendment has engendered additional confusion. Second, given current economic conditions, from which municipalities are suffering greatly, it is critical for cities' ability to plan and budget that they know what actions will expose them to liability for FLSA violations.

For congressional action, the solution hinges on properly defining "responsibility." The definition embraced by the Fifth and Eleventh

111. Based on the descriptions of cases provided in this Comment, it may appear that the dual function paramedics in *Cleveland v. City of Los Angeles* would not meet the criteria of having the legal authority and responsibility for engaging in fire suppression. See *Cleveland v. City of Los Angeles*, 420 F.3d 981, 982 (9th Cir. 2005) (holding that while working as paramedics, dual function paramedics are not responsible for engaging in fire prevention). This view is incorrect. The dual function paramedics in Los Angeles may be assigned to fire trucks or paramedic ambulances. Appellant's Opening Brief at 4, *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005) (No. 03-55505), 2003 WL 22752490. The plaintiffs in that case were arguing that they should not fall within the fire protection exemption while assigned to ambulances, but conceded that they did fall within the exemption during their assignments to fire trucks. *Id.* at 4-5. However, these paramedics can be ordered to transfer between these vehicles during the course of a single shift. *Id.* at 5. Thus, these paramedics "have the legal authority to fight fires, and — because they may be ordered to fight fires within the course and scope of their employment — they have the responsibility to engage in fire suppression." *Id.* at 8.

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Circuits has two benefits: it appears consistent with the congressional intent behind the 1999 amendment of the FLSA, and it would eliminate disputes over how much time quasi-firefighters spend engaging in fire suppression activities (since this question would be irrelevant to the analysis). Similarly, the Supreme Court solution involves embracing the interpretations of the Fifth and Eleventh Circuits (or the dissent in the Third Circuit) and their definition of responsibility. While this interpretation would not provide many quasi-firefighters with the additional overtime they desire, it would alleviate confusion regarding their schedules and allow them and their employers to better structure their work environment. It would also rescue the circuits from a fundamental divide which leaves both employees and employers uncertain about their rights and responsibilities.