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Employment Law - Interpreting the Fair Labor Standards Act: Dirty Deeds Done Dirt Cheap in McCune v. Oregon Senior Services

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EMPLOYMENT LAW

INTERPRETING THE FAIR LABOR STANDARDS ACT: DIRTY DEEDS DONE DIRT CHEAP IN *McCUNE v. OREGON SENIOR SERVICES*

I. INTRODUCTION

In *McCune v. Oregon Senior Services*,[1] the Ninth Circuit held that a group of domestic service employees were excluded from minimum wage coverage under the Fair Labor Standards Act of 1938 (FLSA) as they performed companionship services for the elderly and infirm.[2] The employees would have been entitled to minimum wage if the services they performed fell within an exception to the FLSA's companionship services exemption.[3] The Ninth Circuit based its decision on the Secretary of Labor's interpretation of the 1974 amendments to the FLSA.[4]

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1. McCune v. Oregon Senior Services, 894 F.2d 1107 (9th Cir. 1990) (per Trott, J., the other panel members were Rymer, J., and Pregerson, J., dissenting).

2. McCune v. Oregon Senior Services, 894 F.2d at 1108-11. *See* 29 U.S.C. §§ 201-19 (1988), for text of the FLSA.

The plaintiffs originally brought their claim when the federal minimum wage was $3.35 an hour. 29 C.F.R. § 552.100 (1989). Minimum wage was $3.35 an hour from January 1, 1981 to April 1, 1990. 29 U.S.C. § 206(a)(1) (1988 and Supp. 1990). It was raised to $4.25 an hour on April 1, 1991. 29 U.S.C. § 206(a)(1) (Supp. 1990).

3. *McCune*, 894 F.2d at 1108-09. If the court had found the attendants were "trained personnel" or performed "general household work" according to 29 C.F.R. § 552.6 (1989), the attendants would have been entitled to minimum wage under the FLSA. *Id.* at 1109-11. *See infra* note 54 for text of 29 C.F.R. § 552.6 (1989).

4. *McCune*, 894 F.2d at 1108. 29 U.S.C. § 206(f)(2) (1988 and Supp. 1990) provides:

> Any employee who in any workweek (A) is employed in domestic service in one or more households, and (B) is so employed for more than eight hours in the aggregate, shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under subsection (b) of this section.

The court found that these domestic service workers were not trained personnel and were merely employed in a companionship services capacity.[5] Therefore, they were not covered by minimum wage provisions as the FLSA does not guarantee minimum wage to employees who are domestic companions.[6]

II. FACTS

The plaintiffs worked as full-time, live-in attendants[7] for

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29 U.S.C. § 206(b) (1988) states, in part:

> Every employer shall pay to each of his employees . . . who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce . . . and who is such work-week is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977 not less than the minimum wage rate in effect under subsection (a)(1) of this section.

29 U.S.C. § 206(a)(1) (1988) states, in part:

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, wages at the following rates: (1) . . . [N]ot less than $2.65 an hour during the year beginning January 1, 1978, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980 . . . .

This statute was revised in 1988. *See supra* note 2.

Congress specifically determined that domestic service workers affect commerce, and are therefore entitled to minimum wage. 29 U.S.C. § 202(a) (1988). *See also*, H.R. REP. No. 913, 93rd Cong., 2d Sess. 120, *reprinted* in 1974 U.S. CODE CONG. & ADMIN. NEWS 2811, 2821, (hereinafter Legislative History).

5. *McCune*, 894 F.2d at 1109-10.

6. *Id.* at 1108. The FLSA does not extend minimum wage protection to " any employee employed on a casual basis in domestic service employment to provide babysitting or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves . . . ." 29 U.S.C. § 213(a)(15) (1988).

The court observed that the attendants would enjoy FLSA minimum wage coverage if they qualified as "trained personnel" or provided "general household work," the only two exceptions to the companionship services exemption. *McCune*, 894 F.2d at 1108-09.

7. McCune v. Oregon Senior Services, 894 F.2d 1107, 1108 (9th Cir. 1990). Many of the plaintiffs were Certified Nursing Assistants ("CNAs"). McCune v. Oregon Senior Services, 643 F. Supp. 1444, 1449 (D. Or. 1986). CNAs receive 60 hours of formal training in various areas such as nutrition, personal hygiene, body mechanics, and elimination. Brief for Appellants at 35, McCune v. Oregon Senior Services, 894 F.2d 1107 (9th Cir. 1990) (Nos. 88-3843 and 88-6332 PA) (citing OR. ADMIN. R. 851-20-113 (1985)). *See also infra* notes 24-35 and accompanying text for related background discussion.

The attendants contended that they were required to be present at their client's homes for 18 to 20 hours a day. McCune v. Oregon Senior Services, 643 F. Supp. 1444,

elderly and infirm people who were unable to care for themselves.[8] Two sub-agencies of the Oregon Department of Human Resources (DHR) administered the in-home care programs and funding.[9]

The attendants performed a variety of daily services for clients including cooking, cleaning, hygiene, and medical care.[10] There were three types of domestic service employment that were relevant to the attendants' claim.[11] The attendants' rate of pay was determined by the specific type of work performed.[12] Many of the hours that the attendants worked were paid at $1.50 to $1.55 per hour,[13] which was less than the federal minimum wage.[14]

The attendants brought suit against the defendants[15] in

1447 (D. Or. 1986).

8. *McCune*, 894 F.2d at 1108. The in-home care recipients had limited financial resources. Brief for Appellants at 6, McCune v. Oregon Senior Services, 894 F.2d 1107 (9th Cir. 1990) (Nos. 88-3843 and 83-6332-PA). The maximum monthly income was $326.70 for a disabled person to be a recipient of the live-in attendant program; income above that level had to be given to the State. *Id. See also* OR. ADMIN. R. 4610-05-922 and 461-06-105 (1985).

Plaintiffs worked under individual contracts with the State. *McCune*, 894 F.2d at 1111.

9. McCune v. Oregon Senior Services, 643 F. Supp. at 1445. The two subagencies of DHR were the Senior Services Division (SSD) and the Adult and Family Services Division (AFSD). *Id.*

10. *McCune*, 894 F.2d at 1108. Although the opinion of the Ninth Circuit did not list the attendants' duties, the opening brief filed on their behalf indicates that the attendants cleaned house, did laundry, shopped, prepared and cleaned up after meals, transported, and bathed and dressed clients. Brief for Appellants at 16.

Further, the opening brief states, "when plaintiffs perform household cleaning, it is not dusting a Waterford crystal collection; plaintiffs' household chores involve cleaning up feces, urine and vomit. Their so-called 'companionship services' include such job descriptions as bowel elimination." Brief for Appellants at 38.

11. McCune v. Oregon Senior Services, 643 F. Supp at 1446. The three types of domestic service employment at issue were companions, housekeepers/chore persons and personal care providers. *Id. See infra* notes 26-41 and accompanying text for discussion of SSD manual provisions.

12. Brief for Appellants at 11.

13. *Id.*

14. *McCune*, 894 F.2d at 1108. The minimum wage was $3.35 an hour. *Id.* In addition to the hourly wage, the attendants also received room and board in their respective client's home, which was often necessary to take proper care of the client. McCune v. Oregon Senior Services, 643 F. Supp. at 1449. The live-in attendants were not entitled to overtime hours because they received room and board. *See* 29 U.S.C. § 213(b)(21) (1988).

15. McCune v. Oregon Senior Services, 643 F. Supp. 1444 (D. Or. 1986). The defendants in this action were: the Oregon Senior Services Division (SSD); Richard Ladd and Dexter Henderson, Administrators of the SSD; the Oregon Adult and Family Services

United States District Court for the District of Oregon,[16] seeking minimum wage for all hours worked pursuant to the Fair Labor Standards Act of 1938.[17] The attendants claimed that they should have been paid the minimum wage as their domestic service work qualified them under a 1974 FLSA amendment.[18] This amendment guarantees minimum wage to any domestic service worker employed in one or more households, for more than eight hours per week.[19]

The district court granted the defendants' motion for summary judgment[20] based on its finding that the attendants performed companionship services, which were specifically exempted from FLSA minimum wage protection.[21] The district

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Division (AFSD); Keith Putnam, Administrator of the AFSD; the Oregon Department of Human Resources (DHR); and Leo Hegstrom, Administrator of the DHR. *McCune*, 894 F.2d at 1107.

16. McCune v. Oregon Senior Services, 643 F. Supp. at 1444. The attendants brought suit under federal question jurisdiction pursuant to 28 U.S.C. § 1331 (1989), which provides: "The District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

17. McCune v. Oregon Senior Services, 643 F. Supp. at 1445. *See* 29 U.S.C. §§ 201-19 (1988).

18. *McCune*, 894 F.2d at 1109-11. *See* 29 U.S.C. § 206(f)(2) (1988) for text of applicable 1974 FLSA amendment.

19. Brief for Appellants at 16-24. The attendants also sought an order from the district court that would require the State to compensate them for all the hours they *actually worked*, rather than those hours *authorized* by a State agency. McCune v. Oregon Senior Services, 643 F. Supp. at 1451 (emphasis added). The district court noted that if the defendants knew the attendants were working more hours than were authorized and did not object, then the employees had to be compensated for all the hours they were allowed to work. *Id.*

20. *McCune*, 894 F.2d at 1108. A summary judgment is properly granted when a judge determines that a party has not alleged a genuine issue of fact, and that party is not entitled to prevail as a matter of law. BLACK'S LAW DICTIONARY 1287 (5th ed. 1979).

21. McCune v. Oregon Senior Services, 643 F. Supp. at 1449, 1454. The district court found that the attendants solely provided, "fellowship, care, and protection" for their clients, and therefore were exempt from minimum wage under the companionship services exclusion. *Id.* at 1448. The court did not discuss or examine the attendants' specific job functions before it concluded that the attendants performed companionship services. *Id.* at 1448-49. The court noted the attendants would "enjoy minimum wage coverage only if they fit within the trained personnel or general household exceptions." *Id.* at 1449.

The court determined that the attendants' CNA training did not qualify the attendants as "trained personnel" as the CNA course did not, "provide the depth of training required for RNs or LPNs." McCune v. Oregon Senior Services, 643 F. Supp. 1444, 1449 (D. Or. 1986). The "on-the-job" training that the attendants received did not qualify them for minimum wage. *Id.* at 1450. The court observed that the attendants might be performing tasks that they were forbidden from performing according to Oregon regulations. *Id.* at 1449-50. The court did not want to "reward" the attendants with minimum

court also determined that the attendants did not fall under either the trained personnel or the general household work exceptions to the companionship exclusion.[22] The attendants appealed the district court's decision.[23]

III. BACKGROUND

A. Oregon's In Home Service Program

The State of Oregon provides in-home service care for elderly, blind, and disabled people who qualify for public assistance.[24] This program allows the elderly and infirm to stay in their own home, receive personal care, and avoid hospitalization.[25]

The Oregon Senior Services Division (SSD) establishes and maintains policies for compensating in-home domestic service employees and the Adult and Family Services Division (AFSD) makes the actual payments.[26] The SSD establishes the pay scales and job descriptions for each type of domestic service.[27]

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wage if they were violating Oregon's regulations. *Id.* at 1450. The court noted that if the attendants' informal training qualified the attendants for minimum wage, the state would suffer from an "administrative nightmare." *Id.* Further, the court refused to estop the defendants from raising the general household work exemption. *Id.* at 1451.

22. McCune v. Oregon Senior Services, 643 F. Supp. 1444, 1451 (D. Or. 1986).

23. McCune v. Oregon Senior Services, 894 F.2d 1107 (9th Cir. 1990).

24. McCune v. Oregon Senior Services, 643 F. Supp. 1444, 1446 (D. Or. 1986). In-home care service for the elderly or infirm is not unique to Oregon. Nearly every state in America offers some type of government assisted home service care for aged and disabled people. Telephone interview with Ms. Francis Contreras, U.S. Department of Health and Human Services - Medicaid Division (December 5, 1990). For example, California offers low-cost, government assisted in-home care service for individuals who cannot afford formal medical institutionalization. *See* Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983).

There are only 12 states (including the District of Columbia) that do not provide federally assisted home care service programs for the aged and disabled. Letter from Ms. Francis Contreras to the author (December 6, 1990) (listing national home and community based health service programs).

25. *McCune*, 643 F. Supp. at 1446. Thus, the high costs of formal medical institutionalization are alleviated for the state and the recipient. McCune v. Oregon Senior Services, 894 F.2d 1107 (9th Cir. 1990).

26. McCune v. Oregon Senior Services, 643 F. Supp. at 1446.

27. *Id.* at 1447. "Companionship services were paid $1.50 per hour, to a maximum of $361.00 per month. Housekeeping services were paid $3.55 per hour, the current minimum wage, to a maximum of $140.00 per month. Personal care services were paid $3.55 per hour. Most live-in domestic employees could earn up to $646.00 per month." *Id.* The attendants received pay for a maximum of eight hours a day, and many of the hours

The SSD outlines its policies in a manual which the AFSD utilizes to calculate the state domestic workers' wage rates.[28]

Prior to 1985, the SSD manual provided for four types of in-home service employees: (1) homemaker; (2) companionship; (3) housekeeper/chore; and (4) personal care.[29] In April 1985, SSD changed its policies to include only two types of in-home employment services: Activities of Daily Living (ADL) and Self-Management Activities (SMA).[30]

According to the pre-1985 policies outlined in the SSD manual, a domestic worker performed companionship services by providing fellowship and protection for an aged or mentally infirm person who could not care for their own needs.[31] The major purpose of companionship service was to be there for the client; the job did not require specialized training or provide for specific duties.[32] Housekeeper/chore services included basic housekeeping tasks, such as housecleaning, food shopping, laundry and meal service.[33] Personal care service was designed to maintain, strengthen, or restore an individual's functioning.[34] Only Certified Nursing Assistants (CNAs) who passed a sixty-hour training course could provide personal care services, which included giving baths to the client, assisting with medication, and maintaining catheters and colostomy bags.[35]

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worked were only paid at the rate of $1.50 per hour. Brief for Appellants at 11, McCune v. Oregon Senior Services, 894 F.2d 1107 (9th Cir. 1990). (Nos 88-3843 and 83-6332-PA).

These rates "depended on the type of service, rather than the attendant's qualifications." *Id.*

28. Brief for Appellants at 11. *See also, id.* at 7.

29. McCune v. Oregon Senior Services, 643 F. Supp. at 1446.

30. *Id. See infra* notes 36-41 and accompanying text for discussion of amended policies. The new and old policies outlined in the SSD manual were relevant as the plaintiffs worked during a time period when both policies were in effect. McCune v. Oregon Senior Services, 643 F. Supp. at 1446.

31. McCune v. Oregon Senior Services, 643 F. Supp. at 1447 (citing Oregon SSD manual at 11).

32. *Id.*

33. *Id.* Housekeepers were required to have at least sixteen hours of training, including first aid, home safety and maintenance, and an orientation to working with the elderly. *Id.* at 1446 (citing Oregon SSD manual at 12-17).

34. *Id.* at 1447 (citing Oregon SSD manual at 23). These tasks were performed when the individual's condition was stabilized, but continued medical (RN) supervision was necessary. *Id.*

35. *Id.* Personal care service did not include skilled nursing services which were prescribed by a physician and supervised by a registered nurse. *Id.* (citing Oregon SSD manual at 23-30). The job classification "homemaker" was not relevant to the instant case.

After April 1, 1985,[36] in-home employment services were classified into two categories.[37] The first, ADL, included assistance with eating, dressing, personal hygiene, mobility, bowel and bladder care.[38] The second, SMA, included medication management, transportation, meal preparation, shopping and household maintenance.[39] ADL tasks were to be paid at $3.55 per hour,[40] and SMA tasks were to be paid either $3.55 per hour or $1.55 per hour, depending on whether the attendant was covered by an FLSA provision that required the attendant be paid the federal minimum wage.[41]

B. The Fair Labor Standards Act Of 1938

1. General Applicability

The Fair Labor Standards Act of 1938 (FLSA)[42] regulates various employer-employee areas such as minimum wage,[43] equal pay,[44] overtime pay,[45] and child labor.[46] The FLSA was

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Id. at 1446. *See supra* note 29 and accompanying text.

36. McCune v. Oregon Senior Services, 643 F. Supp. at 1446.

37. *Id.* These new rules also divide ADL and SMA into three levels, according to the client care needed for each activity. *Id.* at 1447.

38. *Id. See also* Or. Admin. R. 411-30-020(1) (1985).

39. Or. Admin. R. 411-30-020(31) (1985). Caseworkers assess the client's ADL and SMA needs for different activities. McCune v. Oregon Senior Services, 643 F. Supp. at 1447. There are maximum monthly hours that can be spent for ADL and SMA at the three care levels; a more dependent client would lead to more hours authorized for each activity. *Id. See also* Or. Admin R. 411-30-022 (1985). The new and old rules limited the domestic service employees' work to eight hours per day. McCune v. Oregon Senior Services, 643 F. Supp. at 1447.

40. McCune v. Oregon Senior Services, 643 F. Supp. at 1447. There was a slight increase in this rate when a client required the highest care level. Or. Admin. R. 411-30-022(2)(b)(A)(iii) (1985).

41. McCune v. Oregon Senior Services, 643 F. Supp. at 1447 (citing Or. Admin. R. 411-30-022(2)(b)(A)(iii) (1985)). The district court recognized that some employees may be covered by 29 U.S.C. § 206(f)(1) (1988) which states that any employee:

> who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under subsection (b) of this section unless such employee's compensation for such service does not . . . constitute minimum wages for the purposes . . . of such Act.

42. 29 U.S.C. §§ 201-19 (1988).

43. 29 U.S.C. § 206 (1988). *See supra* note 4.

44. 29 U.S.C. § 206(d) (1988) provides:

> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such estab-

designed to protect certain groups within the labor force being paid substandard wages and working excessive hours.[47] Workers the FLSA intended to aid included the unprotected, unorganized, and lowest paid members of the nation's population.[48] Initially, however, some of the nation's lowest paid employees were not afforded minimum wage protection under the FLSA.[49] FLSA amendments subsequently extended minimum wage coverage to many of those low-paying occupations.[50]

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lishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work . . . .

45. 29 U.S.C. § 207 (1988) provides:

> (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

46. 29 U.S.C. § 212 (1988) provides, "(a) No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed . . . ."

47. *See* H.R. REP. No. 913, 93rd Cong., 2d Sess. 120, *reprinted in* Legislative History at 2811-13. *See also*, *Fair Labor Standards Act*, [June] L.R.R.M. (BNA) No. 392 at 21-36 (June 6, 1987). Congress found that substandard wages and working excessive hours endangered the employees' mental and physical health and impeded the free flow of goods through interstate commerce. *Id.*

48. *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945) (night watchman for a business substantially devoted to production of interstate goods was entitled to FLSA protection), *reh'g denied*, 325 U.S. 893 (1945).

49. *See* H.R. REP. No. 913, 93rd Cong., 2d Sess. 120, *reprinted in* Legislative History at 2813-14. *See also*, *Fair Labor Standards Act*, [June] L.R.R.M. (BNA) No. 392 at 21 (June 6, 1987). The Wage and Hour Manual documented the evolution of the FLSA:

> The laws relating to employment standards which were enacted prior to 1933 were limited to (1) employees of the Government itself, (2) work performed for the Government by private contractors, and (3) private employment in a few specific industries. And, until the 1930's, the legislation put on the books dealt only with hours of work.

Congress intended the FLSA to extend minimum wage to workers engaged in or having an affect on interstate commerce in order to maintain "minimum standards of living necessary for health, efficiency, and well-being of workers . . . ." H.R. REP. No. 913, 93rd Cong., 2d Sess. 120, *reprinted in* Legislative History at 2811.

50. Fair Labor Standards Act Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 (codified as amended in scattered sections of 29 U.S.C).

2. FLSA Domestic Service Worker Amendment of 1974

In 1974, the FLSA was amended to extend minimum wage protection to domestic service workers.[51]

a. Amendment Exemptions

Congress enacted specific exemptions to the 1974 amendment which excluded certain domestic workers from minimum wage protection.[52] Domestic service workers employed as babysitters on a casual basis or companions for the aged and infirm were specifically exempted from FLSA minimum wage protection.[53]

Domestic employment on a "casual basis" and the scope of "babysitting services" and "companionship services for the aged or infirm" are defined in the Code of Federal Regulations (CFR).[54]

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51. *See* H.R. REP. No. 913, 93rd Cong., 2d Sess. 120, *reprinted in* Legislative History at 2813-14. *See* 29 U.S.C. § 206 (1982). This amendment was enacted as Congress determined that domestic service employees performed functions that affected interstate commerce. 29 U.S.C. § 202(a) (1988). Congress observed, "It is the intent of this committee to include within the coverage of the Act all employees whose vocation is domestic service." H.R. REP. No. 913, 93rd Cong., 2d Sess. 120, *reprinted in* Legislative History at 2845. Workers affected by the 1974 amendments were domestic service workers, federal, state, and public employees, telegraph agency employees, and hotel and restaurant workers in Puerto Rico and the Virgin Islands. *Id.* at 2820-21.

The enactment of the Fair Labor Standards Amendments of 1974 culminated a four-year effort to increase the minimum wage and expand coverage under the FLSA. *Fair Labor Standards Act*, [June] L.R.R.M. (BNA) No. 392 at 35 (June 6, 1987). Congress thereby included domestic service employees in the class of workers covered by the FLSA. Marshall v. Rose, 616 F.2d 102 (4th Cir. 1980) (night watchmen who performed domestic services in addition to patrolling were entitled to minimum wage under the FLSA).

52. 29 U.S.C. § 213 (1988).

53. 29 U.S.C. § 213(a)(15) (1988). Congress exempted these workers because they were not regular breadwinners or responsible for supporting a family. H.R. REP. No. 913, 93rd Cong., 2d Sess. 120, *reprinted in* Legislative History at 2845.

54. 29 C.F.R. §§ 552.1-.110 (1989). The three specific terms are defined and discussed at 29 C.F.R. §§ 552.3-.6 (1989). 29 C.F.R. § 552.3 defines domestic service employment as:

> [S]ervices of a household nature performed by an employee in or about a private home of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, and grooms and chauffeurs of automobiles for family use.

The Secretary of Labor determined that the "casual basis" limitation only applied to the babysitting exemption.[55] Therefore, a babysitter's employment that is intermittent or irregular is excluded from FLSA minimum wage protection.[56] However, if babysitting is the permanent vocation of the domestic worker, then the employee will be afforded minimum wage coverage under the FLSA.[57] A casual babysitter who performs limited household work *unrelated* to the children would not be entitled to FLSA minimum wage protection.[58]

This section "includes babysitters employed on other than a casual basis," and disclaims itself as "illustrative, not exhaustive." 29 C.F.R. § 552.3 (1989). 29 C.F.R. § 552.4 defines babysitting services as:

> [T]he custodial care and protection, during any part of the 24 hour day, of infants or children in or about the private home in which the infants or young children reside. The term babysitting services does not include services relating to the care and protection of infants or children which are performed by trained personnel, such as registered, vocational, or practical nurses.

This section does not remove these specially trained people from the category of a covered domestic servant, "when employed in or about a private household." 29 C.F.R. § 552.4 (1989). 29 C.F.R. § 552.5 defines the term casual basis when applied to babysitting services as:

> [E]mployment which is irregular or intermittent, and which is not performed by an individual whose vocation is babysitting. Casual babysitting services may include the performance of some household not related to caring for the children, provided, however, that such work is incidental and does not exceed 20 percent of the total hours worked on the particular babysitting assignment.

29 C.F.R. § 552.6 explains that the term 'companionship services' includes:

> [T]hose services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: provided however, that work does not exceed 20 percent of the total weekly hours worked. The term 'companionship services' does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse.

The CFR is the general body of regulations governing the practice and procedure of federal administrative agencies, including the Department of Labor. BLACK'S LAW DICTIONARY 233-34 (5th ed. 1979).

55. 29 C.F.R. § 552.5 (1989).

56. *Id.*

57. *Id.*

58. 29 C.F.R. § 552.6 (1989). *See supra note* 54 for full text of 29 C.F.R. § 552.6

The Secretary further interpreted the FLSA to exempt those workers who perform companionship services for the aged or infirm from minimum wage protection, unless the employees fit under a specific exception.[59] The Secretary found that a "companion" is a worker who provides fellowship, care, and protection for an individual because that person is either aged, or physically or mentally infirm.[60] Further, a companion does not change job status by performing limited general household work that is unrelated to the aged or infirm person.[61]

b. Amendment Exemption Exceptions

The Secretary of Labor determined that the FLSA provides two exceptions to the "casual basis" and "companionship services" exemptions.[62] First, there is a "trained personnel" exception to the companionship services exemption that will qualify a worker for minimum wage coverage under the FLSA.[63] The Secretary indicated that registered or practical nurses are examples of the types of workers that fall within the "trained personnel" exception.[64]

Second, a general household work exception, is applicable to both the casual babysitting and companionship services exemptions.[65] The Secretary of Labor determined that if a domestic worker performed general household work for over twenty percent of the total weekly hours worked, and this work was *unrelated* to the care of the baby or aged person, the FLSA required that those hours be paid at the minimum wage.[66]

(1989). Congress further stated: "The fact that persons performing casual services such as baby-sitters or services as companions do some incident of household work does not keep them from being casual baby-sitters or companions for purposes of this exclusion." H.R. REP. No. 913, 93rd Cong., 2d Sess. 120, *reprinted in* Legislative History at 2845.

59. 29 C.F.R. § 552.6 (1989). *See supra* note 54.

60. 29 C.F.R. § 552.6 (1989). *See supra note* 54.

61. 29 C.F.R. § 552.6 (1989). *See supra note* 54.

62. 29 C.F.R. § 552.5-6 (1989). *See supra* note 54.

63. 29 C.F.R. § 552.6 (1989). *See supra* note 54. "Trained personnel" perform services for aged and infirm clients which require performance by trained personnel. 29 C.F.R. § 552.6 (1989).

64. 29 C.F.R. § 552.6 (1989). *See supra* note 54.

65. 29 C.F.R. § 552.5-6 (1989). *See supra* note 54.

66. 29 C.F.R. § 552.6 (1989). *See supra* note 54.

C. JUDICIAL INTERPRETATION OF GENERAL FLSA PROVISIONS

The courts have liberally interpreted the FLSA to extend minimum wage protection to a large number of employees.[67] For example, in *Tony and Susan Alamo Foundation v. Secretary of Labor*,[68] the Court found that a religious foundation constituted a business enterprise,[69] that its members who contributed "services" were employees[70] and awarded minimum wage under the FLSA.[71] The Ninth Circuit has also liberally interpreted the employer-employee definition to find an employment relationship existed for a group of agricultural workers.[72] The Ninth Circuit noted that the determination of whether an employment relationship existed depended on all of the circumstances of the work activity rather than the presence of any one dispositive factor.[73]

In *A.H. Phillips, Inc. v. Walling*,[74] the Supreme Court observed that the FLSA is "humanitarian and remedial legislation."[75] Further, the Court determined that FLSA exemptions should be narrowly construed in order to meet the legislative

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67. *See* Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985). *See infra* notes 68-82 and accompanying text.

68. 471 U.S. 290 (1985). The Court observed that the FLSA should be interpreted and applied broadly to comport with congressional intent. *Id.* at 297 (citing Mitchell v. Lublin, McGaughy & Assoc., 358 U.S. 207, 211 (1959) (Court found that non-executive employees of an architectural firm affected interstate commerce and were entitled to minimum wage)).

69. *Id.* at 296-98.

70. *Id.* at 299-302.

71. *Id.* at 306.

72. Real v. Driscoll Strawberry Assoc. Inc., 603 F.2d 748 (9th Cir. 1979) (agricultural workers sought minimum wages under the FLSA). In *Driscoll Strawberry*, the court found an employer-employee relationship existed between strawberry growers and a berry contracting corporation under the FLSA despite individual employment agreements indicating the growers were "independent contractors." *Id.* at 756. The Ninth Circuit utilized an "expansive interpretation" of FLSA definitions, "in order to effectuate the broad remedial purposes of the FLSA and found that an employer-employee relationship existed." *Id.* at 754. The case was remanded to the district court to determine which of the workers were covered by the FLSA in light of the Ninth Circuit's finding that an employment relationship existed. *Id.*

73. *Id.* at 754.

74. 324 U.S. 490 (1945) (employees who worked in a warehouse and central office that serviced a chain of retail stores sought minimum wage under the FLSA even though not all their work affected interstate commerce).

75. *Phillips*, 324 U.S. at 493.

purposes of the FLSA.[76]

The Court observed that the specific nature of the employees' work must be examined on a case by case basis to determine if the employees were entitled to minimum wage.[77] The Court noted that the employees in *Phillips* were engaged in interstate commerce and were not exempt from minimum wage under the FLSA retail service exemption.[78]

The Ninth Circuit followed the rationale in *Phillips* in deciding *Worthington v. Icicle Seafoods, Inc.*.[79] The Ninth Circuit

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76. *Id.* The Supreme Court noted that the legislative intent behind the FLSA was to narrowly construe its exemptions in order to give full effect to the FLSA's purpose. *Id.* at 493. In *Phillips*, the Court relied on President Franklin D. Roosevelt's May 24, 1934 message to Congress regarding the purpose of the FLSA. *Id.* The President stated, "The Fair Labor Standards Act was designed to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." *Id.*

The Court determined that the employees were engaged in interstate commerce and that the nature of the employees' tasks did not "fall within either the terms or spirit of the exemption . . . ." *Id.* at 498. Justice Murphy, writing for the Court, observed:

> Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of the statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people.

Phillips, 324 U.S. at 498.

See also Powell v. United States Cartridge Co., 339 U.S. 497, 517 (1950) (exemptions to the FLSA minimum wage provisions construed to find that employees of a government munitions factory were not exempt from FLSA minimum wage under the government employee exemption). Justice Burton observed, "[E]mployees not thus exempted. . . remain within the Act." *Id.* at 517. The FLSA exempts employees under contract with the United States from its minimum wage protection. 29 U.S.C. § 206 (e)(1) (1988). However, the Court determined that the workers were independent contractors, not "employees of the United States," and awarded them minimum wage. *United States Cartridge*, 339 U.S. at 504-06. The Court also interpreted the FLSA to qualify the munitions produced as "goods," even though the munitions were only to be delivered to their "ultimate consumer," the United States. *Id.* at 512-15.

77. *Phillips*, 324 U.S. at 492-94, 498. *See also* Marshall v. Intraworld Commodities Corp., 89 Lab Cas. 49,269 (E.D.N.Y. 1980) (district court specifically examined the various tasks that the worker performed in order to determine if his work was exempt under the FLSA).

78. *Phillips*, 324 U.S. at 494-98. *See* 29 U.S.C. § 213(a)(2) (1988). This FLSA provision exempts any employee who works for a retail or service establishment if more than fifty percent of that establishment's annual dollar volume of sales of goods or services is made within the state where the establishment is located. *Id.*

79. 749 F.2d 1409 (9th Cir. 1979) (*Icicle I*) (maintenance employees aboard a fish processing barge sued to recover over 8000 overtime hours under the FLSA overtime

observed that labels or titles were not controlling in determining whether an employee was exempt from FLSA minimum wage provisions.[80] Rather, the Ninth Circuit found that the character of the work performed and the capacity in which one is principally employed are the standards for determining whether an employee is covered by the FLSA.[81] Therefore, an employer can rely on an FLSA exemption only if it can be shown that the employees fit "plainly and unmistakably" within the terms of the exemption.[82]

The circuit courts have also determined that FLSA mini-

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provision). In the *Icicle* cases, the employer argued that the employees were exempt from FLSA coverage according to 29 U.S.C § 213 (a)(5) (1978) (employee that catches, takes, propagates, harvests, cultivates, or farms fish, shellfish, crustacea, seaweeds and other aquatice life and is exempt from FLSA minimum wage provisions). *See* 29 U.S.C. § 213 (a)(5) (1978) which states that an employee is exempt from FLSA minimum wage if they are employed in, "Catching, . . . harvesting, cultivating or farming any kind of fish, shellfish . . . or other aquatic forms of animal and vegetable life, or in the first processing, canning, or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations . . . ." The Ninth Circuit noted that FLSA exemptions were to be narrowly construed in order to ensure workers maximum coverage. *Icicle II*, 774 F.2d at 352.

80. *Icicle II*, 774 F.2d at 352-53.

81. *Id.* at 352-53. In *Icicle II*, the court observed that, "One does not become a seaman under the FLSA [exemption] merely by performing services aboard a vessel on navigable waters." *Id.* at 353.

82. *Icicle II*, 774 F.2d at 352. The Ninth Circuit determined that the employees in *Icicle II* primarily performed industrial duties and the occasional maritime duties they performed did not significantly aid navigation of the vessel. *Id.* at 353. The court found these employees performed non-exempt work. *Id.*

The Supreme Court observed that the determination of the specific nature of an employee's job is an issue of fact. Walling v. General Indus. Co., 330 U.S. 545, 546 (1947) (Wage-Hour administrator sought to enjoin an employer from violating FLSA overtime provisions; employees were engineers in a power plant). The Court noted that the district court properly viewed the evidentiary facts in determining that the employees were not entitled to minimum wage based on the executive exemption. *General Industries*, 330 U.S. at 550. The district court heard all of the evidence, made special findings of fact, and thereafter concluded that the employees were not covered by the FLSA according to the executive exemption. *Id.* at 546-47. The Ninth Circuit has followed this finding. *See* Hoyt v. General Ins. Co. of America, 249 F.2d 589 (1957) (employee worked as an insurance company inspector and sought unpaid overtime compensation).

The Ninth Circuit noted that the issue of whether an employee was exempt from any FLSA provision was ultimately a question of fact to be decided by the trier of fact. *Id.* at 590. The executive exemption excludes any bona fide administrative or professional employee. 29 U.S.C. § 213 (a)(1) (1988). In *Hoyt*, the employee's job duties included inspecting boilers and machinery that his employer insured. *Hoyt*, 249 F.2d at 590. The court found that the employee was an administrative employee and therefore exempt from the FLSA. *Id. See also* Wainscoat v. Reynolds Elec. & Eng. Co., Inc. 471 F.2d 1157 (9th Cir. 1973) (Operations and Drilling Rig Superintendents sought unpaid overtime wages under the FLSA).

mum wage exemptions do not apply to a worker who performs both exempt and non-exempt activities in the same work week.[83] In *Hodgson v. Wittenburg*,[84] the Fifth Circuit noted that performance of both exempt and non-exempt work during the same work week defeats any exemption that would otherwise apply.[85]

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83. Skipper v. Superior Dairies, Inc., 512 F.2d 409, 411 (5th Cir. 1975); Brennan v. Six Flags Over Georgia, 474 F.2d 18, 19 (5th Cir. 1973); Hodgson v. Wittenburg, 464 F.2d 1219, 1221 (5th Cir. 1972). *See infra* notes 84-89 and accompanying text for discussion of these cases. Generally, employees who work "in agriculture" are exempt from FLSA minimum wage coverage. 29 U.S.C. § 213(a)(6) (1988). *But see* Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 762-63 (Court extended the statutory definition of agriculture to embrace a primary and secondary concept of agriculture, one which was exempt from FLSA coverage and the other which was non-exempt), *reh'g denied*. 338 U.S. 839 (1949). The Court found that the employees performed agricultural activities under both concepts and awarded them minimum wage under the FLSA. *Id.* Various circuit courts have also awarded minimum wage in situations where an employer processed some of his sugar cane for agriculture (exempt under the FLSA), and the balance of his sugar cane for non-agricultural purposes (non-exempt under the FLSA). NLRB v. Tepper, 297 F.2d 280 (10th Cir. 1961); NLRB v. Olaa Sugar Co., 242 F.2d 714 (9th Cir. 1957); Calaf v. Gonzalez, 127 F.2d 934 (2nd Cir. 1942); and Bowie v. Gonzalez, 117 F.2d 11 (1st Cir. 1941) (sugar cane processing employees found not to be employed "in agriculture"; therefore covered by FLSA minimum wage provisions). *See also* NLRB v. Tovera Packing Co., 111 F.2d 626 (9th Cir. 1940) (minimum wage awarded where employees worked in feed pens of a meat packing plant which serviced both stock ranch animals, an exempt service, and animals ready for conditioning and fattening, a non-exempt service).

84. 464 F.2d 1219 (5th Cir. 1972) (Secretary of Labor sued an employer on behalf of some agricultural workers to recover unpaid minimum wages and to enjoin the employer from violating various FLSA provisions).

85. *Hodgson*, 464 F.2d at 1221. *See also* Brennan v. Six Flags Over Georgia. 474 F.2d 18, 19 (5th Cir. 1973) (amusement park workers sought minimum wage for all the hours they worked as maintenance workers and general park employees). In *Six Flags*, the court found that amusement park maintenance workers who did small, new construction jobs were entitled to be paid minimum wage, even though the FLSA exempts amusement and recreational establishment employees. *Id.* at 19. As the amusement park employees performed some exempt general amusement park work during the season and non-exempt maintenance work throughout the year, they were "covered fully" by the FLSA minimum wage provisions. *Id.* The court noted that, "The nature of the work is what gives rise to the need for an exemption; the exemption is not a subsidy accorded to an employer because of his principal activity." *Id.*

See also Skipper v. Superior Dairies, 512 F.2d 409 (5th Cir. 1975) (dairy delivery-route man sued his former employer under the FLSA to recover back overtime wages for the entire period of his employment). In *Superior Dairies*, the employer asserted that the employee was exempt from FLSA minimum wage coverage according to 29 U.S.C. § 213(b)(12) (1972), which exempts any employee in agriculture from the FLSA overtime provisions at 29 U.S.C. § 207 (1972). *Id.* at 411. The employee in *Superior Dairies* delivered various dairy products to grocery and convenience stores. *Id.* at 410-11. The employer did not own any cows, or produce any dairy products. *Id.* at 411. The Fifth Circuit determined that the employee did not perform activities that were related to "dairying" and agriculture. *Superior Dairies*, 512 F.2d at 411-12. The Fifth Circuit concluded that even if the deliveryman performed dairying or agricultural duties, he would not be ex-

In *Hodgson*, the employees were primarily engaged in the handling, care and feeding of livestock that were purchased at auction for immediate resale.[86] Such isolated activities fell within the FLSA agriculture exemption.[87] However, the court determined that the employees also performed non-agricultural work that was unrelated to operating a livestock auction.[88] Therefore, the Fifth Circuit found that the nonexempt activities of the employees made the agricultural exemption inapplicable and awarded minimum wage.[89]

D. Judicial Interpretation Of The 1974 Domestic Worker Amendments

The 1974 FLSA Domestic Service Worker Amendments[90] have been construed to extend minimum wage to various groups of laborers.[91] The District Court of Puerto Rico held that workers who provided services normally performed by family members were entitled to minimum wage coverage under the amendment.[92]

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empt from the FLSA as he also performed non-exempt work activities. *Id.* The court observed, "Nor does it make any difference that the employee is doing mixed work. In any week that any particular employee does some non-exempt work he is covered fully, not pro-rata." *Id.* at 411 (citing *Six Flags*, 474 F.2d at 19). *See also infra* notes 92-96 and accompanying text.

86. Hodgson v. Wittenburg, 464 F.2d 1219, 1222-23 (5th Cir. 1972). In 1961, Congress enacted a "specific and limited (FLSA) exemption" for employees who are also engaged in livestock auctions. *Id.* at 1221. *See* 29 U.S.C. § 213(b)(13) (1988).

87. 29 U.S.C. § 213(a)(6) (A) (1972). The court examined the language of 29 U.S.C. § 213(a)(6)(A) (1972). *Hodgson*, 464 F.2d at 1223. Any employee in agriculture is exempt from the FLSA if the employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor. *See* 29 U.S.C. § 213(a)(6)(A) (1972).

88. *Hodgson*, 464 F.2d at 1221.

89. *Id.* at 1223.

90. 29 U.S.C. § 213(a)(15) (1988).

91. Marshall v. Cordero, 508 F. Supp. 324 (D.C. Puerto Rico 1981) (minimum wage extended to domestic worker who performed babysitting services, cleaned the employer's house and raked the employer's yard). *See infra* notes 92-102.

92. Marshall v. Cordero, 508 F. Supp. 324 (D.C. Puerto Rico 1981). In *Cordero*, the district court reasoned that the intent of Congress was to extend minimum wage to those people who performed home-related, noncommercial labor in private family homes that were normally and traditionally carried out by family members. *Id. See* Marshall v. Rose, 616 F.2d 102 (4th Cir. 1980). Night watchmen who performed extra domestic services such as answering the phone, checking for mechanical or electrical failures, walking the dogs and watching the grandchildren in addition to their patrolling duties were granted minimum wage for hours spent doing extra duties). The dispute in *Rose* developed when the employer did not want to pay the watchmen minimum wage for time

In *Marshall v. Intraworld Commodities Corp.*,[93] the New York Eastern District Court held that a part-time domestic worker was not exempt as a "casual" babysitter and awarded him minimum wage.[94] The court observed that the employee performed additional domestic service duties including cooking, cleaning, washing and ironing clothes, raking the yard, and caring for the employer's children.[95] The court determined that these non-exempt services entitled the worker to minimum wage for all the hours worked, including the time spent performing services which might otherwise fall under the "casual basis" babysitting exemption.[96]

The companionship services exemption to the 1974 FLSA Amendments was raised in *Bonnette v. California Health & Welfare Agency*.[97] In *Bonnette I*, a group of domestic service attendants who cared for elderly and infirm clients sought unpaid minimum wage payments from the California State Health and Welfare Department.[98] The district court found that whether the domestic service attendants provided mere "companionship services" to the disabled recipients of public assistance was an issue of fact.[99] Five years later, in *Bonnette v. California Health & Welfare (Bonnette II)*,[100] the district court found that the plaintiff "chore workers" were entitled to mini-

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spent doing additional domestic services. *Rose*, 616 F.2d at 103-04. After specifically examining the additional duties the watchmen performed and the intent of Congress, the district court noted that watchmen are specifically covered by the FLSA. *Id.* at 104. The court reasoned that the FLSA domestic service provision should be broadly construed so that the watchmen were entitled to minimum wage for the additional domestic services they provided. *Id.*

93. 89 Lab. Cas. 49,269 (E.D.N.Y. 1980).

94. *Id.* at 49,272-73.

95. *Id.* at 49,271.

96. *Id.* at 49,272. *See* Lopez v. Roderiguez, 668 F.2d 1376 (D.C. Cir. 1981) (full-time, live in domestic housekeeper and babysitter awarded unpaid minimum wages under the FLSA).

97. 414 F. Supp. 212 (N.D. Cal. 1976) (*Bonnette I*). *Bonnette I* involved various motions for summary judgment. *Id. See infra* notes 98-102 and accompanying text.

98. *Bonnette I*, 414 F. Supp. at 212. The State moved for summary judgment, asserting that the attendants were exempt from FLSA minimum wage provisions as they were companions to the aged and infirm. *Id.*

99. *Id.* at 214. The court determined that there was a triable issue of fact as to the amount of time the attendants devoted to general household work and it denied the motions for summary judgment. *Id.*

100. 525 F. Supp. 128 (N.D. Cal. 1981) (*Bonnette II*). The court observed, "Plaintiffs have filed several amended complaints and withstood a motion to dismiss . . . ." *Id.* at 134.

mum wage according to the FLSA domestic service provision.[101] The court determined that extending FLSA provisions to these "chore workers" provided them with a reasonable wage and ensured the continued viability of the in-home care program.[102]

IV. THE COURT'S ANALYSIS

A. THE MAJORITY OPINION

In *McCune v. Oregon Senior Services*,[103] the Ninth Circuit majority held that domestic service employees who provided in-home support services for elderly and infirm clients were not entitled to receive minimum wage.[104] The court determined that the attendants were mere companions, and did not possess the requisite training to warrant minimum wage protection.[105]

1. The Companionship Service Exemption

The Ninth Circuit first considered whether the companionship service exemption applied to the attendants.[106] The court

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101. *Bonnette II*, 525 F. Supp. at 139.

102. *Id.* at 138. The Ninth Circuit affirmed the district court's finding, however, the issue of whether the employees were exempt from FLSA minimum wage was not raised. Bonnette v. California Health and Welfare Agency, 704 F.2d 1465 (9th Cir. 1990).

103. McCune v. Oregon Senior Services, 894 F.2d 1107 (9th Cir. 1990).

104. *McCune*, 894 F.2d at 1109-10. The Ninth Circuit majority found that the attendants were domestic service employees, but were not entitled to minimum wage coverage as they performed work that was exempted. *McCune*, 894 F.2d at 1108-09.

105. *McCune*, 894 F.2d at 1111.

106. *Id.* at 1107-09. The Ninth Circuit was asked to decide whether the "not casual" limitation of the FLSA applied only to babysitters and not companions as the lower court had determined. *Id.* at 1109. Although this issue had not been raised in the district court, the attendants argued successfully that review of the issue was appropriate. Brief for Appellants at 12-13, McCune v Oregon Senior Services, 894 F.2d 1107 (9th Cir. 1990) (Nos. 88-3843 and 83-6332-PA). The attendants asserted four reasons why review of the "not casual" limitation was proper. *Id.* First, the "not casual" issue had been raised peripherally when the FLSA's legislative history relative to all minimum wage exemptions was argued and the district court partially based its ruling on it. *Id.* Second, the parties would not be required to develop new facts. *Id.* Third, the "not casual" issue involved a pure question of law. *Id.* Fourth, the constitutionality of the court's ruling and of the interpretive regulation posed a significant question of general impact. *Id.* Therefore, on appeal, the Ninth Circuit reviewed five issues to determine if the district court erred in granting the defendants' motion for summary judgment. *McCune*, 894 F.2d at 1107.

The Ninth Circuit reviewed the appeal *de novo*. *Id.* at 1109. *De novo* is defined as "trying a matter anew; the same as if it had not been heard before and as if no decision had previously been rendered." BLACK'S LAW DICTIONARY 392 (5th ed. 1979). Summary Judgments based on statutory construction, are reviewed *de novo* by the appellate court.

determined that the attendants provided companionship services according to the Secretary of Labor's definition.[107] The majority opined that public policy favored not applying the companionship exemption to the attendants as they were often required to work under unattractive conditions.[108] However, the majority noted that in-home care recipients might not receive critical care if the State was required to pay minimum wage.[109] The Ninth Circuit majority concluded that the attendants should seek to redress their claim through the legislative branch of the government; not through the judicial.[110] Accordingly, the attendants were exempt from federal minimum wage coverage unless they were found to be excepted from the exemption.[111]

2. The Casual Limitation Exemption

The majority then noted that the "casual limitation,"[112] exemption applied to babysitters,[113] but not to companionship services.[114] Therefore, the companionship exemption applied to the

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Turner v. McMahon, 830 F.2d 1003 (9th Cir. 1987) (appellate courts must review a grant of summary judgment that construes the Social Security Act to afford overtime payments to workers *de novo*), *cert denied*, 488 U.S. 818 (1988).

107. *McCune*, 894 F.2d at 1109-10. *See also*, 29 C.F.R. § 552.4-6 (1989), *see supra*, note 54. The court considered the statutory exemptions to the 1974 FLSA amendment which required domestic service workers be paid minimum wage. *McCune*, 894 F.2d at 1109-10. *See supra* note 6. The court then relied on the Secretary of Labor's interpretation of these exemptions. *McCune*, 894 F.2d at 1110-11.

108. *McCune*, 894 F.2d at 1109-10.

109. *Id.* at 1110. The court noted that, "Critical services [performed by the appellants] reach more elderly or infirm individuals . . . because the care-providers are exempt from the FLSA." *Id.*

110. *Id.* at 1110. The court observed, "Appellants must petition the Secretary [of Labor] or Congress for the remedy they seek." *Id.*

111. *Id.* at 1109-11. *See* 29 U.S.C. § 213(a)(15) (1988).

112. *McCune*, 894 F.2d at 1109-11. The court relied on 29 U.S.C. § 213(a)(15) (1988). *See supra* note 6. Further, the court relied on 29 C.F.R. § 552.106 (1989), which states in part: "The 'casual' limitation does not apply to companion services." *McCune*, 894 F.2d at 1110.

113. *McCune*, 894 F.2d at 1110. The court relied on the domestic service exemptions at 29 U.S.C. § 213(a)(15) (1988). *See supra* note 6 for the "casual limitation" language.

114. *McCune*, 894 F.2d at 1110. The Ninth Circuit noted that the Secretary of Labor's definition of "companionship services" was not "unreasonable in light of Congressional mandate." *Id.* at 1110. The court reasoned that when Congress delegates authority to an agency to explain a statute by regulation, such regulations are controlling, "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984) (Environmental Protection Agency's definition of "stationary source" found to be a permissible construction of language from the Clean Air Acts Amendments of 1977)). The Ninth

attendants even though they were employed on more than a casual basis.[115]

3. The Exceptions to the Exemptions

The majority found that the attendants did not qualify for minimum wage coverage under the "trained personnel" or "general household work" exceptions to the FLSA.[116] Relying on legislative history, the majority determined that Congress intended that only registered nurses and licensed practical nurses qualified under the "trained personnel" exception.[117] The majority concluded that because the attendants who were CNAs received only sixty hours of formal medical training they were not entitled to FLSA minimum wage protection under the "trained personnel" exception.[118]

The general household work exception was found to not ap-

Circuit also relied upon a Supreme Court decision that found, "As long as the agency's construction is reasonable, it must be upheld." *Id.* (citing Connecticut Dep't of Income Maintenance v. Heckler, 471 U.S. 524, 532 (1985) (Medicaid Act definitions of different medical facilities held not to be mutually exclusive)).

115. *McCune*, 894 F.2d at 1110. The court noted that the attendants "live with their clients at a near poverty level providing around-the-clock care." *Id.* The court also discussed the attendants' argument that the legislative history of the FLSA exempted casual babysitters and companions as these workers "are not regular breadwinners or responsible for their families' support." *Id. See also*, H.R. REP. No. 913, 93rd Cong., 2d Sess. 120, *reprinted in* Legislative History at 2845. The attendants argued unsuccessfully that Congress did not intend the provision to apply to them as they are breadwinners. *McCune*, 894 F.2d at 1110. However, the court did not find a breadwinner/nonbreadwinner distinction because Congress's statements about a breadwinner being excepted from the exemption "are merely policy justifications," and not a determining factor in assessing if minimum wage was due." *Id.* The court noted that, "The plain language of the statute does not make this breadwinner/nonbreadwinner distinction . . . ." *Id.*

Relying on Congressional intent, the attendant argued that the purpose of the FLSA was to provide coverage for "all employees whose vocation was domestic service . . . ." H.R. REP. No. 913, 93rd Cong., 2d Sess. 120, *reprinted in* Legislative History at 2845. Attendants argued unsuccessfully that if vocational babysitters (caretakers of the young) were covered, then vocational caretakers of the elderly or infirm should be covered also. *McCune*, 894 F.2d at 1110; *see also* Brief for Appellants at 12-13, 23-26, McCune v. Oregon Senior Services, 894 F.2d 1107 (9th Cir. 1990) (Nos. 88-3843 and 83-6332-PA).

116. *McCune*, 894 F.2d at 1110-11.

117. *Id.* The court relied on the following language: "The exemption reflects the intent of the committee to exclude from coverage. . . companions for individuals who are unable because of age and infirmity to care for themselves. But it is not intended that trained personnel, such as nurses, whether licensed or practical, shall be excluded." *McCune*, 894 F.2d at 1111, (citing H.R. REP. No 913, 93rd Cong., 2d Sess. 120, *reprinted in* Legislative History at 2845).

118. *Id.*

ply to the attendants as their "general household" duties were directly related to the care of the recipients.[119] The majority determined that such household work was not considered "general household" work under this exception.[120] Further, the majority noted that even if an otherwise exempt "companion" performed general household work, he would still be exempted from minimum wage coverage if the general household work was incidental to the recipient's care.[121] The Ninth Circuit majority determined that the attendants' household work was incidental.[122]

B. The Dissenting Opinion

Dissenting, Judge Pregerson asserted that the purpose of the FLSA was to extend minimum wage protection broadly to a large number of workers.[123] He noted that a logical extension of the Supreme Court's holding in *Phillips*[124] was that exceptions

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119. *Id. See supra* note 54 for the text of 29 C.F.R. § 552.6 (1989).

120. *McCune*, 894 F.2d at 1111 (citing H.R. Rep. No. 913, 93rd Cong., 2d Sess. 120, *reprinted in* Legislative History at 2845). *See also supra* note 6 and accompanying text.

121. *McCune*, 894 F.2d at 1111. The court relied on 29 C.F.R. § 552.6 (1989). *See supra* note 54 for the text of 29 C.F.R. § 552.6 (1989). The work is incidental work if it does not exceed twenty percent of the total weekly hours worked. *McCune*, 894 F.2d at 1111.

122. *McCune*, 894 F.2d at 1111. The court relied on the Congressional comment, "The fact that persons performing casual services as baby-sitters or services as companions do some incident of household work does not keep them from being casual baby-sitters or companions for purposes of this exclusion." *Id.* (citing H.R. Rep No. 913, 93rd Cong., 2d Sess. 120, *reprinted in* Legislative History at 2845).

Finally, the majority held that the attendants had to be compensated for all hours the State of Oregon permitted them to work. *McCune*, 894 F.2d at 1111. However, the court refused to impute the knowledge of hours worked from the individual recipients to the State, even though the State and care recipients were deemed joint employers. *Id.* at 1111-12. *See* Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1981) (State and in-home care recipients were joint employers). In *Bonnette*, the court did not determine whether the recipient's knowledge of hours worked should be imputed to the state. *Id.* The Ninth Circuit noted that knowledge of the total hours worked could be imputed under a general agency theory. *McCune*, 894 F.2d at 1111. However, the court observed that allowing the in-home care recipients to control the number of hours their attendants worked, and then forcing the State to pay for those hours was inappropriate, and would remove much of the control from the agencies in charge of administrating the in-home care program. *Id.* at 1111-12.

123. McCune v. Oregon Senior Services, 894 F.2d 1107, 1112-14 (9th Cir. 1990) (Pregerson, J., dissenting).

124. *Id.* at 1113. Judge Pregerson noted that Congress intended the FLSA to broaden, not narrow the number of workers eligible for minimum wage coverage. *Id. See supra* notes 74-78 and accompanying text for a discussion of *Phillips*.

to the FLSA exemptions should be broadly construed.[125]

Further, Judge Pregerson asserted that the majority misapplied definitions from the Code of Federal Regulations[126] to the employees.[127] He urged that if the employees provided substantial domestic service or received significant formal training in a domestic service area, they were entitled to receive minimum wage.[128]

Judge Pregerson reasoned that many of the attendants received the requisite formal training needed to qualify as trained personnel.[129] According to the dissent the majority erred in determining that the legislative examples of a "registered or practical nurse" were the only types of domestic service workers that Congress intended to qualify as "trained personnel" for FLSA minimum wage protection.[130] The majority completely disregarded the attendants' CNA training as it was not as extensive as that received by a registered nurse or licensed practical nurse.[131] Judge Pregerson contended that by ignoring the plaintiffs' training, the majority was overlooking the realities of a rapidly changing health care industry where many patients are forced to rely on practically trained medical personnel.[132]

Judge Pregerson also urged that the attendants' work was clearly neither casual nor strictly companionship in nature.[133] Relying on legislative history, he asserted that the attendants' duties went far beyond basic chores such as preparing meals or washing diapers.[134] He further urged that the labor regulations

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125. *McCune*, 894 F.2d at 1113. Judge Pregerson relied on President Franklin D. Roosevelt's May 24, 1934 message to Congress. *See supra* note 74.

126. *McCune*, 894 F.2d at 1113-14. Judge Pregerson further relied on 29 C.F.R. §§ 552.1-6 (1989). *See supra* note 54 for text of 29 C.F.R. §§ 552.1-6 (1989).

127. *McCune*, 894 F.2d at 1114.

128. *Id.* at 1112-14.

129. *Id.* at 1113. Judge Pregerson reasoned that the CNA attendants received sixty hours of formal medical training so they should not to be exempted as mere companions or babysitters. *Id.* at 1112-14.

130. *Id.*

131. *McCune*, 894 F.2d at 1112-14.

132. *Id.* Judge Pregerson observed, "The argument that CNA attendants are not trained for purposes of minimum wage coverage smacks of elitism. This conclusion is by no means dictated by the language of the regulation." *Id.*

133. *Id.* at 1112-14.

134. *Id.* at 1112-13. Judge Pregerson observed:

> The babysitter/companion exemption is meant to apply to

should not be read to exclude the attendants from minimum wage protection as some of their work fell into an exempted category.[135] Rather, employees who performed exempt and nonexempt work activities during the same work week are entitled to minimum wage for all of their work.[136]

Judge Pregerson further contended that the majority failed to look at the attendants' actual job functions.[137] He asserted that Congress intended that an employee's actual job function and not their job title should determine whether that employee was entitled to minimum wage.[138] Accordingly, Judge Pregerson urged that if the majority looked at the attendants' actual job functions, the attendants would not be disqualified from minimum wage protection under the "companionship services" exemption.[139] Therefore, Judge Pregerson would have remanded the case to determine whether the attendants' specific job functions and training entitled them to minimum wage.[140]

> part-time workers not involved in hard domestic labor who do not look to their work as a principle means of support. The regulation should not be read to exclude precisely those persons Congress meant to protect with the 1974 FLSA amendments. This is however, what the district court did when it categorized (the attendants) without looking to the actual nature of the work they perform. Though simple meal preparation might be "incidental," what of specially prepared nutritional diets . . . and the administration of medication? Though simple laundry work might be "incidental," what of bed-pan duty, catheterization, and soiled linens and garments for bed-ridden invalids? These duties are certainly related to the care of the attendant's client, but are by no means incidental. The work is hard and back-breaking, requiring patience and stamina, and is critical to adequate medical care of many elderly and disabled persons who live at home.

McCune, 894 F.2d at 1114.

135. *McCune*, 894 F.2d at 1113-14. *See supra* note 54 for text of 29 C.F.R. § 552.6 (1989), for discussion of relevant labor regulations.

136. *Id.* Judge Pregerson relied on Skipper v. Superior Dairies, 512 F.2d 409 (5th Cir. 1975), Hodgson v. Wittenburg, 464 F.2d 1219 (5th Cir. 1972), and Brennan v. Six Flags Over Georgia, 474 F.2d 18 (5th Cir. 1973). *See supra* notes 83-89 and accompanying text for a discussion of these cases.

137. *McCune*, 894 F.2d at 1113-14.

138. *Id.*

139. *Id.* at 1114.

140. *Id.* Judge Pregerson determined that the attendants' duties clearly lifted them from mere companion status and entitled them to minimum wage. *Id.*

V. CRITIQUE

In *McCune*,[141] the Ninth Circuit seemingly failed to adhere to Congress' intent to extend the FLSA to a broad range of workers[142] by denying a logical extension of minimum wage protection to the domestic service attendants in the instant case.

Historically, the courts have interpreted the FLSA and its amendments liberally. This led to a large number of employees qualifying for FLSA protection despite various potential exemptions.[143] In the instant case, the Ninth Circuit majority ignored the principles previously established and significantly limited FLSA minimum wage protection for domestic workers.

It has been observed that a factual determination of an employee's actual job function must be made in order to ascertain if that employee is entitled to FLSA protection.[144] The Ninth Circuit followed this reasoning in determining that the employees in *Icicle* were entitled to minimum wage.[145] However, in the instant case, the Ninth Circuit did not inquire into the attendants' actual job functions. Rather, the majority relied on labels provided by the district court and the defendants in finding that the attendants were companion workers. The Ninth Circuit failed to examine whether any factual determination had been made by the district court about the nature and quality of the attendants' jobs before exempting them from FLSA minimum wage protection.[146]

Factually, it would seem that the attendants' job duties were more than mere companionship services and thus the attendants should have been entitled to FLSA minimum wage

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141. McCune v. Oregon Senior Services, 894 F.2d 1107 (9th Cir. 1990).

142. *See supra* notes 67-102 and accompanying text for a discussion of the related FLSA wage cases. *See also supra* notes 42-66 and accompanying text for discussion of FLSA and the relevant 1974 amendments.

143. *See supra* notes 67-102 and accompanying text.

144. Walling v. General Indus. Co., 330 U.S. 545 (1947) (Wage-Hour Administrator sought to enjoin an employer from violating FLSA overtime provisions; employees were engineers in a power plant). *See supra* notes 71-82 and accompanying text.

145. Worthington v. Icicle Seafoods, Inc., 774. F.2d 349, 353 (9th Cir. 1984). (*Icicle II*) *See supra* notes 76-80 and accompanying text.

146. *See supra* notes 77-82 and accompanying text for discussion of the importance of determining an employee's job functions and duties in FLSA wage cases.

coverage.[147] However, the district court improperly granted the defendants' summary judgment without making a factual determination as to the nature and quality of the attendants' specific job functions.[148] The Ninth Circuit failed to recognize this error. It would have been more appropriate for the Ninth Circuit to remand *McCune* to the district court to specifically review the attendants' actual job functions.[149]

Further, the attendants performed both exempt and nonexempt work. Courts have construed the FLSA to hold that if an employee performed both exempt and nonexempt work during the same week, then that employee was entitled to minimum wage for all work performed.[150] However, the attendants lost the benefit of this FLSA construction because a factual determination was not made, and the Ninth Circuit majority erred by not requiring a determination be made.[151]

The majority properly recognized several categories of work that were covered by the FLSA. However, the trained personnel exception was narrowly construed. The majority accepted Congress' listed examples of trained personnel as exhaustive.[152] Prior court decisions suggest that the Ninth Circuit should have considered these examples as illustrative.[153] An expansive interpretation would have resulted in the CNA attendants qualifying as trained personnel. This outcome would have recognized the vital care the CNA attendants provide and the changes in the health care industry which have led to increased reliance on home-based care. Likewise, the underlying purpose of the FLSA, to protect a large group of workers, would better be served.

The second category of work, "general household work," was also narrowly construed. The Ninth Circuit found that the attendants' work was "too related to the care" of the recipients, and basically eliminated the entire exception. The majority de-

147. *See supra* note 10 and accompanying text.

148. *See supra* note 21 and accompanying text.

149. *See supra* notes 97-99 and accompanying text.

150. *See supra* notes 83-89 and accompanying text. In making such determinations, other courts have liberally interpreted what qualifies as nonexempt work. *Id.*

151. McCune v. Oregon Senior Services, 894 F.2d 1107, 1114 (9th Cir. 1990). *See supra* notes 83-89 and accompanying text.

152. *See supra* note 21 and accompanying text.

153. *See supra* notes 72-82 and accompanying text.

termined that the facts of this case were insufficient to establish that the employees were engaged in nonexempt general household work. Therefore, it appears that it will be impossible for a similarly situated employee to show that their household work was unrelated to the care of the recipient. Consequently, the Ninth Circuit denied minimum wage protection to a group of workers that Congress seemingly intended to protect.

Further, the holding in *McCune* appears to have been result-oriented as the majority focused its concern on whether the State of Oregon would be able to pay FLSA wages to the attendants.[154] However, it was incorrect to give primary importance to the potential costs that the attendants' employers might have to bear.[155] The companionship service exemption is present to prevent minimum wage from being unreasonably extended. For example, it would be unreasonable to require an elderly neighbor/employer to pay minimum wage to a neighborhood youth who visits weekly and helps organize the elderly person's affairs and accompanies them grocery shopping.

The primary focus should be to protect the employees' interests; not the employers' interests. In enacting the FLSA, Congress was concerned that the unorganized and lowest paid members of this nation's work force were suffering from unfair labor practices.[156] Therefore, it was inappropriate for the Ninth Circuit to give the FLSA's primary purpose secondary status by over-extending the companionship service exemption to protect an employer.

VI. CONCLUSION

The Ninth Circuit strictly relied upon the Secretary of Labor's definitions and the provisions of the FLSA to exempt the attendants from minimum wage protection.[157] Accordingly, after

154. *See supra* notes 110-11 and accompanying text.

155. The State of Oregon and the in-home care recipients were determined to be joint employers, but this was not at issue. McCune v. Oregon Senior Services, 894 F.2d 1107, 1111 (9th Cir. 1990).

156. *See supra* notes 42-66 and accompanying text. In light of the humanitarian and remedial purpose of the FLSA, the *McCune* decision appears to defeat Congress' intent to extend minimum wage to a broad range of workers.

157. The Ninth Circuit deferred to the Secretary of Labor's interpretation as to whether a domestic service worker was entitled to minimum wage under the FLSA. *Mc-*

McCune, domestic service employees who perform "companionship" job functions will probably be forced to seek amendments to the FLSA in order to receive the federal minimum wage. Unfortunately, most domestic service workers do not have the resources to seek such legislative changes because they are paid less than minimum wage.[158] Thus, the Ninth Circuit's strict adherence to the Secretary of Labor's interpretation of the FLSA and its unwillingness to order that a determination be made as to the attendants' job functions may be economically damaging to a valuable, humanitarian work force.[159]

*Stephen K. Lightfoot II**

Cune, 894 F.2d at 1110-11. Since many courts read the Secretary's definitions broadly, and the Ninth Circuit read the Secretary's definitions narrowly, there is likely a need for Congress to provide further legislation that will explicitly provide which domestic service workers qualify for minimum wage. Without a definite provision, courts and employers seemingly will be unguided in their decisions of whether the FLSA covers or excludes the employee.

158. Telephone interview with Gayle Troutwine, Attorney for the plaintiffs, Jay McCune, et al. (September 20, 1990).

159. The *McCune* decision will not be overturned by the United States Supreme Court because many of the original plaintiffs have moved from Oregon, or are no longer interested in pursuing their claim. Telephone interview with Gayle Troutwine, Attorney for the plaintiffs, Jay McCune, et al. (September 20, 1990).

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