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Journalists as Professionals: Rethinking the Professional Exemption under the Fair Labor Standards Act

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ARTICLES

JOURNALISTS AS PROFESSIONALS: RETHINKING THE PROFESSIONAL EXEMPTION UNDER THE FAIR LABOR STANDARDS ACT

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I. INTRODUCTION

This Article examines the question of whether journalists in the print or electronic media are professionals and hence exempt from coverage under the Fair Labor Standards Act of 1938[1] ("FLSA") or whether they are wage earners and therefore covered by the FLSA. Department of Labor regulations[2] are unclear as to the status of journalists under the FLSA; they recognize that journalists may qualify as professionals but appear to state that most journalists are covered by the FLSA.[3] Those regulations, however, are seriously outdated and out of touch with the modern world of journalism. Promulgated when television was in its infancy and before the era of television news, the regulations are geared to apply almost exclusively to print media and only incidentally to radio and television. Even with respect to print journalists, the regulations are clearly out of step with the times. The current regulations have not been significantly revised

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1. 29 U.S.C. § 201 (1989).

2. 29 C.F.R. § 541 (1994).

3. 29 C.F.R. § 541.302 (b), (d), (f)(1) (1994); 29 C.F.R. § 541.303 (b), (d), (f)(1) (1992) (reporters and newspaper writers are not normally exempt but "editorial writers, columnists, critics, and 'top-flight writers' of analytical and interpretative articles" are exempt).

On October 9, 1992, 29 C.F.R. §§ 541.301, 541.302 and 541.303 were redesignated without change as 29 C.F.R. §§ 541.300, 541.301 and 541.302 respectively. 57 Fed. Reg. 46,744 (1992). This Article will refer to both the current and the earlier codification in order to be consistent with the discussions in the relevant cases.

in nearly a half-century, and accordingly do not take into account revolutionary changes in communications technology, news gathering, and the packaging of the news for public consumption. Not only do the present regulations ignore technological advances in the field of journalism, they also fail to take into account other important changes, including the emphasis on education as opposed to experience as a hiring criterion, the public perception of journalists as professionals and the self-perception of journalists as professionals.

In November 1985, the Department of Labor ("DOL") published an advanced notice of proposed rulemaking in the Federal Register, inviting views of the public as to whether the DOL should reconsider the status of various professions under the FLSA and its regulations.[4] To date, the DOL has chosen not to act, effectively deflecting the issue to the judicial arena where the question has recently been addressed by five different courts.[5] This litigation is unnecessary, for the DOL could easily clarify standards for statutory coverage of journalists. The litigation is also wasteful because the courts in these suits are asked to apply ancient criteria to the modern-day journalist. Worse, it is the DOL which, in two recent suits, has sought to have these outmoded standards applied. The time has come for the Department of Labor to revisit the status of journalists under the professional exemption and to take into account developments in the field. Today's print and electronic journalists are professionals under any commonly understood definition of that term and therefore are not within the purview of the FLSA. Attempts by highly paid journalists to invoke the protections of the FLSA constitute a perversion of the statute and are clearly contrary to Congressional intent.[6] Hence, these efforts ought not to be aided by the federal courts.

This Article is divided into four parts: (1) an analysis of the professional exemption under the FLSA and its regulations; (2) a detailed review of the job functions of recent cases analyzing the modern day print and electronic journalists; (3) proposed guidelines for the courts in deciding

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4. 50 Fed. Reg. 47,696 (1985).

5. Reich v. Newspapers of New England, Inc., 44 F.3d 1060 (1st Cir. 1995), *aff'd*, 834 F. Supp. 530 (D.N.H. 1993); Reich v. Gateway Press, Inc., 13 F.3d 685 (3d Cir. 1994); Dalheim v. KDFW-TV, 706 F. Supp. 493 (N.D. Tex. 1988), *aff'd*, 918 F.2d 1220 (5th Cir. 1990); Sherwood v. Washington Post, 677 F. Supp. 9 (D.D.C. 1988), *rev'd and remanded on other grounds*, 871 F.2d 1144 (D.C. Cir. 1989); Freeman v. National Broadcasting Co., 846 F. Supp. 1109 (S.D.N.Y. 1993). These cases typically arise in the context of journalists seeking time-and-a-half pay for any time worked in excess of 40 hours in a work week.

6. *See* 29 U.S.C. § 202 (1988).

the exemption issue; and (4) a discussion of the thorny procedural issues that arise in litigating the question of FLSA coverage.

II. THE FAIR LABOR STANDARDS ACT

A. Legislative History

The FLSA is a Depression-era statute designed to protect the lowest paid classes of workers and to provide a social safety net that guarantees all workers a certain minimum level of earnings.[7] It was passed in response to President Roosevelt's poignant call for Congressional action to aid the unemployed and underpaid.[8] In enacting the FLSA, Congress intended to eliminate substandard working conditions, including the payment of extremely low wages and the maintenance of an unduly long work week.[9] The bill sought to protect those workers who have so little to spare and save over the necessities of life that they are not economically strong enough to protect their own interest in a struggle with their own employers.[10] In particular, the FLSA was designed primarily to help the unprotected, the unorganized and the lowest-paid workers who were not unionized—"those employees who lack sufficient bargaining power to secure for themselves a minimum subsistence wage."[11] While the statute was designed to have broad coverage, Congress, at the same time, determined that minimum wage protection was neither necessary nor appropriate for *all* classes of workers. Specifically, Congress did not intend to extend FLSA coverage to white collar workers and, therefore, provided the so-called white collar exemptions, general exclusions for executive, professional and administrative employers, as well as specific exemptions for jobs in certain identified industries.[12]

The legislative history of the FLSA as it pertains to journalists is sparse and generally unilluminating. Indeed, there is only one specific reference to journalists in the Congressional hearings which was made

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7. S. REP. NO. 884, 75th Cong., 1st Sess. 2 (1937) ("[A] fair day's pay for a fair day's work."). *See* Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981).

8. S. REP. NO. 884, 75th Cong., 1st Sess. 1 (1937).

9. *Id.* at 3.

10. Olearchick v. American Steel Foundries, 73 F. Supp. 273, 277 (W.D. Pa. 1947).

11. *Id.*; *see also Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor*, 75th Cong., 1st Sess. 81-82 (1937) [hereinafter *Hearings*] (statement of Robert H. Jackson, Assistant Attorney General).

12. Freeman v. National Broadcasting Co., 846 F. Supp. 1109, 1112 (S.D.N.Y. 1993).

during a colloquy between Congressman Connery and the Roosevelt administration's chief proponent of the bill on Capitol Hill—then Assistant Attorney General, and later Justice, Robert Jackson.[13] That reference points in the direction of exemption. When specifically asked his view of the status of newspaper journalists under the FLSA, Jackson responded that they would be considered professionals.[14]

Congress, with some exceptions, made no effort to categorize each occupation as exempt or covered; rather this task was delegated to the Department of Labor.[15] The statute itself simply sets a tone—the legislation should be read broadly to protect those at the lower end of the economic scale who are powerless to protect themselves.

B. The Regulations and Interpretations

1. Background

Rather than provide detailed definitions of the exempt classes in the law itself, Congress opted to delegate that task to the Secretary of Labor.[16] The Department of Labor did indeed promulgate regulations defining exempt categories under the FLSA nearly a half-century ago.[17] Those regulations have been modified from time to time but have remained essentially unchanged for the last forty years. To comprehend fully this regulatory scheme, it is necessary to understand three pervasive principles.

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13. The colloquy in full reads as follows:

> Representative CONNERY: *How about the reporters*?
> Mr. JACKSON: *They can come under the group of professionals.* It does not affect employees who are engaged in a private capacity. I don't know whether the newspapermen consider that they are engaged in a professional capacity or if they are engaged at such low wages as not to come within the bill.
> Rep. CONNERY: Suppose they went into a labor organization, or suppose they have a guild, all of the reporters, and suppose just for the sake of argument, that their wages are down pretty low, would they come under it then? Could you set a definite minimum wage, in other words, for your newspaper reporters? I don't mean these 'big shot' fellows, but I mean the small-town fellows.
> Mr. JACKSON: It would be a matter of interpretation, and different minds might disagree on it. *I would not think that the newspapermen would be included, because I would regard them as a profession.*"

Hearings, *supra* note 11, at 81-82 (emphasis added). *But see* Reich v. Gateway Press, 13 F.3d 685, 698 n.15 (3d Cir. 1994) (finding statements "not significant indicators of legislative intent").

14. *Hearings*, *supra* note 11, at 81-82 (statement of Robert H. Jackson, Assistant Attorney General.).

15. 29 U.S.C. §§ 201-19 (1989).

16. Sherwood v. Washington Post, 677 F. Supp. 9, 13 (D.D.C. 1988), *rev'd and remanded on other grounds*, 871 F.2d 1144 (D.C. Cir. 1989).

17. *See* 29 C.F.R. § 541 (1994).

First, the regulatory scheme is divided into two parts: regulations and interpretations.[18] Interpretations are merely the views of the Department of Labor regarding various occupations.[19] While the courts are free to take into account interpretations when construing the FLSA and regulations, they are not bound to do so and indeed are free to ignore them, especially where the court finds them inconsistent with the statutory scheme.[20]

Regulations, on the other hand, generally do have the force of law, but even regulations can be disregarded by a court if they are inconsistent with the statute pursuant to which they were promulgated.[21] Regulations under the FLSA tend to be more general than interpretations, which may be quite specific, as in the case of newspaper reporters.[22] Unfortunately, some courts tend to cite the regulations and interpretations interchangeably

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18. 29 C.F.R. § 541(A) (1994) (regulations); 29 C.F.R. § 541(B) (1994) (interpretations).

19. Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944); *Sherwood*, 677 F. Supp. at 9.

20. Daughters of Miriam Ctr. for the Aged v. Mathews, 590 F.2d 1250, 1258 (3d Cir. 1978) (citing *Skidmore*, 323 U.S. at 140.). According to one judge, a court is not bound by interpretations.

> It must be recognized that these 30-year-old regulations themselves do not, however, in any respect purport to be categorical and, indeed, given the wide variety of journalism jobs and their ever-changing characteristics, cannot be decisive in the context of present day journalism. They are useful guides, nothing more. There are too many uncertainties. Similarly, occasional interpretations by the Department of Labor are also useful but not controlling upon the courts.

Sherwood, 677 F. Supp. at 14. *See Skidmore*, 323 U.S. at 140.

Thus, in each instance a court must fashion an interpretation of the FLSA which comports with congressional purpose, guided primarily by the general regulations, the overall direction taken in individual rulings and by the special facts of each situation.

> Each situation must be judged on its merits. It is not a question of making an exception for all reporters at this or any other newspaper but rather of determining whether or not these 13 individuals while working for *The Washington Post* fall within or without the expanding concept accepted for identifying professional work that has evolved through individual administrative actions and the general regulations themselves.

Sherwood, 677 F. Supp. at 14; NLRB v. Lion Oil Co., 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part) (footnotes omitted). *See* Reich v. Gateway Press, Inc., 13 F.3d 685, 699 n.17 (3d Cir. 1994) ("The DOL interpretations do not have the force of law"); *see also* Freeman v. National Broadcasting Co., 846 F. Supp. 1109, 1113 n.7 (S.D.N.Y. 1983) (interpretations are "promulgated absent legislatively delegated power to make rules having the force of law.").

21. *See Sherwood*, 677 F. Supp. at 14 (regulations must be viewed in light of modern realities and in a manner consistent with Congressional intent); *Freeman*, 846 F. Supp. at 1113 n.7 ("[L]egislative rules are promulgated pursuant to an explicit or implicit grant of authority by Congress.").

22. *See* 29 C.F.R. § 541.302 (1994); 29 C.F.R. § 541.303 (1992).

and feel equally bound by both.[23] That approach is neither sound nor mandated by law.

Second, the classifications of various occupations as covered or exempt under the regulations are not cast in stone and may be changed as the nature of the job changes.[24] The Department of Labor has specifically recognized that the category of learned professions is not limited to those traditionally viewed as learned, such as medicine and law.[25] Thus, as advanced technology is applied to the workplace, the category of exempt occupations may expand. Moreover, the exempt category may expand as new occupations that were not even contemplated fifty years ago come into existence. In short, the Department of Labor recognizes the fluid nature of the workplace.

Third, in determining exempt status, the court must focus on the "primary duty" of the worker.[26] The DOL has recognized that all jobs, including those unquestionably recognized as professional, may involve menial aspects.[27] For example, a certain amount of a lawyer's workday may be devoted to such non-legal tasks as proofreading legal documents, billing clients and interviewing job applicants. Yet, no one would contest the professional status of lawyers. Similarly, a doctor is likely to spend a portion of each work day completing routine paperwork. The Department of Labor maintains that "as a good rule of thumb," primary duty means "the major part, or over 50%, of the employee's time."[28] Thus, where a major portion of the employee's workday is devoted to professional tasks, that person will still qualify for exemption, even though the job involves a significant portion of non-exempt tasks. Even the fifty percent figure is not ironclad. The DOL recognizes that time alone is not the sole test.[29] An employee may be exempt even if less than fifty percent of his or her activities are of an exempt nature; for example, where the employee has

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23. *See Freeman*, 846 F. Supp. at 1113 n.7 ("While 29 C.F.R. § 541 draws a distinction between regulations and interpretations, these terms are often used interchangeably in the relevant case law.").

24. *See Sherwood*, 677 F. Supp. at 14 n.8 ("Each situation must be judged on its merits."). In *Sherwood*, Judge Gesell pointed out that the occupations now within the professional exemption are increasing, noting that the following occupations are not viewed as professional: business research workers, dieticians, dental hygienists, dormitory proctors, driving instructors, music instructors, helicopter pilots, physicians' assistants, therapists, radio announcers, and short story writers. *Id.* at n.8.

25. *Id.*; 29 C.F.R. § 541.3 (1994).

26. 29 C.F.R. § 541.3(a) (1994).

27. *Id.*

28. 29 C.F.R. § 541.103 (1994).

29. *Id.*

broad managerial responsibilities but spends more than half of his or her time on production or sales work, he or she still may qualify as exempt.[30] Hence, time spent in performance of exempt work is merely a guide for determining what constitutes an employee's primary duty. Other factors that may support a conclusion that exempt work is an employee's primary duty include:

> [1] the relative importance of the managerial duties as compared with other types of duties, [2] the frequency with which the employee exercises discretionary powers, [3] his or her relative freedom from supervision, and [4] the relationship between his [or her] salary and the wages paid other employees for the kind of non-exempt work performed by the supervisor.[31]

Thus, the determination of the "primary" nature of a job requires a modicum of common sense, not a mechanical quantification of hours. The chief executive officer of a major corporation travels to a meeting of the board of directors in a corporate jet, just as a migrant worker travels to the fields on a company bus. The distinction is not the means of travel or the length of the trip, but the purpose of the trip. Likewise, both the Nobel Prize winning medical researcher and the lowest paid laboratory assistant may spend countless hours with a microscope and laboratory equipment. For the laboratory assistant, the task ends when a dish is covered, or a slide stored; for the medical researcher, the routine tasks are merely means to an end.

2. Tests for the Professional Exemption

The Department of Labor recognizes at least two types of professionals: learned professionals and artistic professionals.[32] The regulations provide two alternative tests for determining whether a given occupation is exempt as either learned or artistic: the standard or long test and the abbreviated or short test.[33] Under the long test, employees are exempt if they meet the following five criteria: (1) the employee's primary duty

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30. *See, e.g.*, Guthrie v. Lady Jane Collieries, 722 F.2d 1141, 1148 (3d Cir. 1983) (foreman found to have spent only forty-three percent of his time on managerial duties still held to have been exempt).

31. 29 C.F.R. § 541.103 (1994).

32. 29 C.F.R. § 541.3(a)(1) (1994) (learned professionals); *Id.* § 541.3(a)(2) (artistic professionals). Teachers comprise a third category of professionals which will not be further discussed here. *See id.* § 541.3(a)(3).

33. Cobb v. Finest Foods, Inc., 582 F. Supp. 818, 822 (E.D. La. 1984), *aff'd*, 755 F.2d 1148 (5th Cir. 1985) (citing 29 C.F.R. §§ 541.1-541.3 (1994)).

consists of the performance of "work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study," rather than from a general academic education, an apprenticeship or from training in the performance of routine mental, manual or physical processes (learned professional); or the primary duty involves work that is original or creative in character in a recognized field of artistic endeavor and the result of that work depends primarily on the invention, imagination or talent of the employee (artistic professional); (2) the work requires the consistent exercise of judgment and discretion; (3) the character of the work is predominantly intellectual and varied as opposed to routine and the output produced cannot be standardized in relation to a given period of time; (4) not more than twenty percent of the work falls within a non-exempt category; and (5) the employee earns at least $170 per week.[34]

Under the short test, employees are exempt if: (1) their primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, rather than from a general academic education, an apprenticeship or from training in the performance of routine mental, manual or physical processes, or the work is original or creative in character in a recognized field of artistic endeavor; and (2) the work requires consistent exercise of judgment and discretion, and in addition, the employee earns in excess of $250 per week.[35]

Thus, where an employee's salary exceeds a certain threshold level, the task of proving exemption becomes easier. Indeed, the short test was added to the FLSA in 1949 "in large part because the DOL felt that salary level turned out to be a good proxy for determination of professional status."[36] Unquestionably, income plays an important role in separating exempt from non-exempt. Because the short test would apply to the vast

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34. 29 C.F.R. § 541.3 (1994).

35. *Id.* § 541.3(e).

36. Reich v. Gateway Press, Inc., 13 F.3d 685, 698 n.16 (3d Cir. 1994). The Third Circuit stated:

> The experience of the Divisions has shown that in the categories of employers under consideration the higher the salaries paid the more likely the employees are to meet all the requirements of the exemption, and the less productive are the hours of inspection time spent and analysis performed. At the higher salary levels in such classes of employment, the employees have almost invariably been found to meet all the other requirements of the regulations for the exemption.

Id. U.S. DEPARTMENT OF LABOR, REPORT AND RECOMMENDATIONS ON PROPOSED REVISIONS FOR REGULATIONS, part 541, at 22-23 (1949). *Accord* Reich v. Newspapers of New England, 44 F.3d 1060, 1071 n.4 (1st Cir. 1995).

majority of journalists in this country, only that criterion will be discussed herein.

a. Learned Professional

i. Learned

Certain occupations are universally recognized as professional callings. These include law, medicine, and the ministry. Nevertheless, as the DOL has acknowledged, the classification of professional for FLSA purposes is not limited to the traditional learned professions and may expand as academic degrees are offered in new and diverse fields.[37] The professional category also includes any calling requiring knowledge of an advanced type that has a recognized status and that involves the acquisition of knowledge through a prolonged course of specialized intellectual instruction or study at an institution of higher learning, as opposed to a general academic education or from training in routine functions.[38] To be a truly learned professional, skills must be those customarily acquired through a prolonged course of specialized intellectual training and study typically provided at the college or graduate school level and not simply those that can be learned through on the job training.[39] By using the term customarily, the DOL recognizes as professional the rare lawyer who is admitted to the bar without attending law school.[40] Trades learned through apprenticeship do not qualify as professional, even though they may require a great deal of skill or specialized knowledge.[41] For example, a plumber or an auto mechanic may be quite skillful and have specialized knowledge, but the necessary skills can be acquired on the job and do not have a high degree of intellectual content. For such "how-to" occupations where the employee develops primarily through experience, there is no exemption.

ii. Discretion and Independent Judgment

A learned professional must routinely exercise discretion and independent judgment.[42] This means that in performing their jobs, the

37. *See supra* note 24.
38. 29 C.F.R. § 541.3 (1994).
39. *Id.* § 541.301(a); 29 C.F.R. § 541.302(a) (1992).
40. 29 C.F.R. § 541.301(d) (1994); 29 C.F.R. § 541.302(d) (1992).
41. 29 C.F.R. § 541.301(a) (1994); 29 C.F.R. § 541.302(a) (1992).
42. 29 C.F.R. § 541.3(b) (1994).

employees must routinely face a range of options from which they must make choices in order to complete their tasks. The difference between covered and exempt employees in this respect can be best illustrated by example. The doctor—unquestionably a professional—clearly exercises discretion in the course of treating a patient by (1) initially asking questions to elicit the patient's symptoms; (2) asking appropriate follow-up questions; and (3) deciding on a course of treatment. Each patient is unique; symptoms of the same disease may vary from patient to patient. In making a diagnosis, therefore, a degree of professional judgment must be utilized. Similarly, in treating a malady, professional judgment is essential. The doctor must consider possible adverse side effects of any medication as well as the impact of any prescribed treatment for existing conditions.

On the other hand, the auto mechanic typically operates by rote rather than by exercising judgment and discretion. The range of options that must be exercised in the course of repairing cars is limited. Typically, similar problems call for similar solutions. Cars, unlike human beings, are massive collections of interchangeable parts. Consequently, the work of an auto mechanic, even though highly skilled, does not require judgment or discretion.

b. Artistic Professional

To qualify as an artistic professional, an employee must perform work that is "original and creative in character . . . the result of which depends primarily on the invention, imagination or talent of the employee."[43] The regulations utilize a number of adjectives to describe the attributes of an artistic professional—"original," "creative," "invention," "imagination" and "talent." None of these words is specifically defined in the regulations or in the interpretations. It must be presumed that these words are to be given their ordinary meaning rather than a definition solely for the purposes of this statute. It is apparent that in using these five adjectives to describe "artistic," the DOL was attempting to describe work that required special qualities and that could not be performed by individuals with ordinary intellectual or manual ability. Accordingly, the courts should use the concept of special qualities in construing the regulation rather than trying to formulate a definition for each of the individual adjectives used in the regulations.

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43. *Id.* § 541.3(a)(2).

Equally important, the employee must function within a "recognized field of artistic endeavor."[44] Writing, of course, is a recognized field of artistic endeavor.[45] Thus, the question that must be explored in the context of journalists is whether writing newspaper articles or electronic news reports are sufficiently original and creative to qualify as exempt.

C. *The Department of Labor's View*

The regulations do not specifically address the status of journalists under the FLSA. The interpretations do not address the status of television journalists but deal at length with print journalists.[46] This is not surprising in light of the fact that the regulations were drafted at a time when newspapers were a principal vehicle for disseminating news, television was in its infancy, and television news was virtually unknown. It is surprising that the DOL has not updated its regulations and interpretations to address the status of television journalists, given the revolutionary changes in electronic news gathering in the last decade. Indeed, it is somewhat baffling that in the mid-1980s, a time when the technological revolution in television news was in full flower, the DOL passed up a chance to consider the status of television journalists and revisit the status of print journalists.

From the interpretations, it is clear that the DOL does not consider newspaper journalism a learned profession.[47] The interpretations refer to newspaper journalism as a quasi-profession "in which the bulk of the employees have acquired their skill by experience rather than by any formal specialized training."[48] In the DOL's view, the only newspaper writers who may qualify as learned professionals are those writing in certain "highly technical fields" which are not further defined.[49] Presumably, science writers and business reporters—as opposed to general assignment reporters—would fall within this class. As discussed more fully below,[50] the Department of Labor's underlying premise, that the bulk of the employees in newspaper journalism have acquired their skills through experience rather than through formal training, does not accurately portray

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44. *Id.*
45. 29 C.F.R. § 541.302(b) (1994); 29 C.F.R. § 541.303(b) (1992).
46. 29 C.F.R. §§ 541.301-02 (1994); 29 C.F.R. §§ 541.302-03 (1992).
47. 29 C.F.R. §§ 541.301-02 (1994); 29 C.F.R. §§ 541.302-03 (1992).
48. 29 C.F.R. § 541.301(d) (1994); 29 C.F.R. § 541.302(d) (1992).
49. 29 C.F.R. § 541.301(d) (1994); 29 C.F.R. § 541.302(d) (1992).
50. *See, e.g.*, Rothstein v. Cannon & Sullivan Technical Productions, 32 Lab. Cas. (CCH) ¶ 70,822 (S.D. Cal. 1957).

newspaper journalism today and has not painted an accurate picture for some time.

On the other hand, the Department of Labor does recognize that newspaper journalists can be "artistic" professionals.[51] However, those falling within this category are limited to those whose writing is "predominantly original and creative in character," which, in the DOL's view, means writing which is "analytical, interpretative or highly individualized."[52] Within this category, the DOL includes editorial writers, columnists, critics and "top flight" writers of analytical and interpretative articles.[53] Other newspaper writers are specifically outside the exemption in the DOL's view:

> (2) The reporting of news, the rewriting of stories received from various sources, or the routine editorial work of a newspaper is not predominantly original and creative in character within the meaning of § 541.3 and must be considered as nonexempt work. Thus, a reporter or news writer ordinarily collects facts about news events by investigation, interview, or personal observation and writes stories reporting these events for publication, or submits the facts to a rewrite man or other editorial employees for story preparation. Such work is nonexempt work. The leg [person], the reporter covering a police beat, the reporter sent out under specific instructions to cover a murder, fire, accident, ship arrival, convention, sport event, etc., are normally performing duties which are not professional in nature within the meaning of the act and § 541.3.[54]

From the very wording of this interpretation one can readily discern that it is out of date. First, the leg person—the reporter who could observe events and then phone facts into a "rewrite person" who actually prepared the story for publication because the leg person could not write—disappeared from major metropolitan newspapers decades ago. Furthermore, it is doubtful whether any analogue to the leg person ever existed in television news. Writing is a key skill for today's journalist and one who cannot write simply will not be hired. Equally important, newspapers and television news organizations are looking for journalists with broad skills, not simply the ability to recite events in detail. Journalists today must be able to identify newsworthy stories, to select the

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51. 29 C.F.R. § 541.302(f)(1) (1994); 29 C.F.R. § 541.303(f)(1) (1992).
52. 29 C.F.R. § 541.302(f)(1) (1994); 29 C.F.R. § 541.303(f)(1) (1992).
53. 29 C.F.R. § 541.302(f)(1) (1994); 29 C.F.R. § 541.303(f)(1) (1992).
54. 29 C.F.R. § 541.302(f)(1-2) (1994); 29 C.F.R. § 541.303(f)(1-2) (1992).

pertinent facts to report, to synthesize those facts for the reader, to put events in context and to show how various news events interrelate. Journalism schools are churning out graduates capable of meeting these expectations. The era of the leg person is long passed.

Second, the interpretations demonstrate a fundamental misconception about the nature of newspaper reporting. While it is true that newspapers report their share of routine stories involving fires, automobile accidents or the police blotter, few stories are so simple that they can be effectively reported by sending out an individual to tell the reader "just the facts." The journalist is constantly making judgments regarding which facts to include and which to omit, which facts to emphasize, and how the story should be slanted. Thus, the so-called routine reporting is the exception, not the rule. More significantly, even routine stories involve elements of artistry, creativity and originality in the way they are put together and presented by the journalist. In this respect, the facts themselves are irrelevant; the artistry and creativity lie in the process or the packaging, rather than in the package itself.

III. THE COURTS AND THE PROFESSIONAL EXEMPTION FOR JOURNALISTS

Surprisingly few cases have faced the issue of whether journalists are within the professional exemption under the FLSA. The early cases adopted the DOL view without question and held that newspaper journalists were covered by the FLSA and not exempt.[55] The editorial function, on the other hand, has been recognized as an exempt task.[56] The issue lay dormant until recently when the professional exemption for journalists was the subject of five separate and unrelated actions: (1) a suit by multiple reporters, editors and photographers of *The Washington Post* for overtime compensation;[57] (2) an action by producers, editors and on-air talent for KDFW, a CBS-TV affiliate in Dallas also seeking overtime pay;[58] (3) a claim by newswriters, show producers and field producers for NBC News and the news divisions of its owned and operated stations seeking monetary recovery based on NBC's wrongful exclusion of certain payments from

55. *See, e.g.*, Sun Publishing Co. v. Walling, 140 F.2d 445, 449 (6th Cir.), *cert. denied*, 322 U.S. 728 (1994).

56. *See, e.g.*, Reich v. Newspapers of New England, Inc., 44 F.3d 1060 (1st Cir. 1995).

57. *See* Sherwood v. Washington Post, 677 F. Supp. 9 (D.D.C. 1988), *rev'd and remanded on other grounds*, 871 F.2d 1144 (D.C. Cir. 1989).

58. Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990).

employees' overtime;[59] (4) an action by the Department of Labor claiming that newspaper reporters, editors and photographers for a New Hampshire newspaper, the *Concord Monitor* were within FLSA coverage;[60] and (5) an action by the Department of Labor against the publishers of nineteen local weekly newspapers serving the Pittsburgh suburbs, claiming violation of the FLSA minimum wage, overtime and recordkeeping requirements.[61]

A. Sherwood v. Washington Post

Sherwood involved a claim by ninety-nine editors, reporters and photographers employed by *The Washington Post* (*"Post"*) for overtime pay pursuant to the FLSA.[62] Defendant newspaper contended that plaintiffs were professionals under the FLSA, and therefore overtime pay at a rate of time-and-a-half was not mandatory.[63] The parties cross-moved for summary judgment and the *Post*'s motion was granted by the district court.[64] On appeal, the appellate court reversed on the procedural issue of the propriety of summary judgment but expressly declined to state any view on the merits.[65] The case was retried before Judge Norma Holloway Johnson.[66] The district court concluded that plaintiff Sherwood was exempt as an artistic professional, thereby affirming Judge Gesell's earlier conclusion on summary judgment.[67]

1. Judge Gesell's Opinion on Summary Judgment

Judge Gesell's opinion on summary judgment, although subsequently reversed on procedural grounds, is instructive on the issue at hand. Referring to the legislative history of the FLSA, Judge Gesell made several key findings regarding the scope of the statute.[68] First, the FLSA was enacted to protect workers at the bottom end of the economic scale, "those receiving the bare necessities of life whose health was injured by long

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59. Freeman v. National Broadcasting Co., 846 F. Supp. 1109 (S.D.N.Y. 1993).

60. Reich v. Newspapers of New England, 44 F.3d 1060 (1st Cir. 1995), *aff'd* 834 F. Supp. 530 (D.N.H. 1993).

61. Reich v. Gateway Press, Inc., 13 F.3d 685 (3d Cir. 1994).

62. Sherwood v. Washington Post, 677 F. Supp. 9 (D.D.C. 1988), *rev'd and remanded on other grounds*, 871 F.2d 1144 (D.C. Cir. 1989).

63. *Id.* at 10.

64. *Id.* at 15.

65. Sherwood v. Washington Post, 871 F.2d 1144 (D.C. Cir. 1989).

66. Sherwood v. Washington Post, 871 F. Supp. 1471 (D.D.C. 1994).

67. *Id.*

68. Sherwood v. Washington Post, 677 F. Supp. 9 (D.D.C. 1988), *rev'd and remanded on other grounds*, 871 F.2d 1144 (D.C. Cir. 1989).

hours of toil."[69] Given that plaintiffs' salaries ranged from $30,000 to $60,000 per annum and averaged $50,000 a year,[70] there was substantial doubt at the outset as to whether the FLSA was meant to cover these individuals.

Second, Department of Labor interpretations are not controlling on the court.[71] Nor is the court bound by the thirty-year-old FLSA regulations that specifically recognize that the category of exempt occupations may increase as the nature of the workplace changes and which, given the wide variety of journalism jobs and their ever-changing characteristics, cannot be decisive in any event.[72] The court's job is to fashion a ruling that comports with the congressional purpose behind the FLSA.[73] Thus, the regulations are "useful guides [and] nothing more."[74]

Third, the FLSA was not intended as a substitute for the collective bargaining process.[75] Efforts to invoke the FLSA to exact wage demands that cannot be won at the bargaining table constitute a perverse use of the statute. This appears to be precisely what the plaintiffs were doing.

Moreover, the undisputed factual record strongly supported the court's finding that these plaintiffs were professionals. The court did not distinguish between artistic and learned professionals, but the opinion would support a conclusion that plaintiffs qualified in either category. This is readily apparent from the court's own summary of its holding:

> The Court is wholly satisfied that *The Washington Post* has met its burden and is entitled on the undisputed facts summarized above to treat each of the 13 reporters/editors as professionals exempted from the overtime pay requirements of the FLSA. They produce original and creative writing of high quality within the meaning of the regulations; they have far more than general intelligence; they are thoroughly trained before employment; their performance as writers is individual, interpretative and analytical both in the writing itself and in the process by which the writing must be prepared; and their performance is measured and paid accordingly. A special talent is necessary to succeed.[76]

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69. *Id.* at 13.
70. *Id.* at 10.
71. *Id.* at 14.
72. *Id.*
73. *Sherwood*, 677 F. Supp. at 14.
74. *Id.*
75. *Id.* at 15.
76. *Id.* at 14.

In so holding, the court considered the following indicia of professionalism: (1) knowledge of an advanced type; (2) pay levels; (3) professional trust; (4) professional environment; (5) professional responsibility; (6) professional milieu; and (7) professional satisfaction.[77]

a. Knowledge of an Advanced Type

The positions held by the plaintiffs at the *Post* require far more than general intelligence.[78] The *Post* is a prestigious newspaper with an international reputation. Writing for the *Post* represents the pinnacle of many journalists' aspirations. *Post* writers are experienced and fully trained before joining the staff; none is entry level.[79] All are highly intelligent, and most are college graduates.[80] They are expected by the *Post* to be, and are generally perceived by the public as, specialists in discrete areas, such as foreign affairs, military procurement or local politics. Indeed, the undisputed record revealed that *Post* writers serve as adjunct professors, public speakers or guests on talk shows.[81] In short, the position as a writer for the *Post* is not one that could be filled by one with a general academic background. Moreover, the court specifically held that even though some of plaintiffs' reporting is "straight, quick, factual . . . and [hence] does not require the full range of talent that led to the reporters being hired in the first place," that fact does not alter the basic professional character of newswriting.[82]

b. Professional Pay

Post writers were paid between $30,000 and $60,000 per annum at the time of suit, and the average yearly salary was $50,000.[83] These salary levels far exceed those of the marginal and economically powerless wage earners that the FLSA was designed to protect.

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77. *See* Sherwood v. Washington Post, 677 F. Supp. 9 (D.D.C. 1988), *rev'd and remanded on other grounds*, 871 F.2d 1144 (D.C. Cir. 1989).

78. *Id.* at 11, 14.

79. *Id.*

80. *Id.* at 12 n.5.

81. *Id.* at 12.

82. *Sherwood*, 677 F. Supp. at 14.

83. *Id* at 10.

c. Professional Trust

The *Post* writers are expected to, and do, exercise independent judgment and discretion in performing their tasks.[84] In collaboration with their editors, they choose the topics on which they report.[85] They decide whom to interview, which leads to pursue, and whether or not a particular story should be killed. The writers are self-starters who must discern the significance of events, anticipate news developments, and report the news so as to "bring the scene alive" for readers.[86]

d. Professional Environment

The environment of the *Post* is professional. There is no standardized output per day.[87] Writers are judged by the quality, not the quantity of their work. Nor are *Post* writers expected to punch a time clock. They work irregular hours, often outside of the office, and are on call twenty-four hours per day. Moreover, the atmosphere is collegial. Writers frequently consult each other and share ideas, criticism, and praise.[88] Writers also collaborate with their editors. The court specifically noted that the professional nature of a writer's work is not altered by the fact that one has editors. Further, at the *Post*, writers remain ultimately responsible for their work product unless they fail to perform up to standards.[89]

In addition, writers are expected to tackle a variety of tasks in reporting the news. News by definition varies from day to day; there is no routine or mechanical procedure to follow.

e. Professional Responsibility

Post writers exercise professional responsibility. They adhere to recognized ethical standards in reporting the news.[90] They exercise professional standards of care by avoiding libel and partake in professional privilege by preserving the anonymity of confidential sources. Equally important, they recognize their responsibility to the public to seek the truth

84. *Id.* at 12.
85. *Id.* at 11.
86. *Sherwood*, 677 F. Supp. at 11.
87. *Id.* at 12.
88. *Id.*
89. *Id.* at 14.
90. *Id.* at 11.

and report the news fairly and accurately. The writers take personal responsibility for their stories, which are written under their byline.

f. Professional Commitment

Post writers are members of professional societies.[91] They are permitted leaves of absence to work on personal writing projects or to study in fields related to journalism.[92] Some are adjunct teachers. *Post* writers are fully committed to the field of journalism. They do not view their jobs as simply a means to a paycheck.

g. Professional Creativity

The writing of *Post* reporters is creative "in the sense that the type of writing coupled with [the] reporter's full understanding of the factors influencing events 'will bring the scene alive' and be interesting as well as informative."[93] Thus, it is irrelevant that the writers purport to report only the "facts." Their creativity lies "in the writing itself and in the process by which the writing must be prepared."[94] Nor is the basic artistry required of the writer's job diminished merely because some reporting is "straight, quick, factual news."[95] The court flatly rejected plaintiffs' attempts to deprecate the creative and responsible work performed at the *Post* as a vehicle for obtaining additional compensation under the FLSA.

2. Court of Appeals Decision

On appeal, the District of Columbia Circuit Court of Appeals, without addressing the merits of the claims, reversed the trial court's entry of summary judgment.[96] The court stated that the question of whether plaintiff Sherwood was within the professional exemption raised a genuine issue of material fact necessitating a full-scale trial.[97] The case was remanded to the district court for a new trial.[98]

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91. *Id.* at 12.
92. *Sherwood*, 677 F.Supp. at 11.
93. *Id.*
94. *Id.* at 14.
95. *Id.*
96. Sherwood v. Washington Post, 871 F.2d 1144 (D.C. Cir. 1989).
97. *Id.*
98. *Id.*

3. Judge Johnson's Opinion Following Trial

Judge Johnson, following trial on remand, agreed with Judge Gesell that plaintiff Sherwood was not covered by the FLSA.[99] The court concluded that Sherwood was an artistic professional whose work "required invention, imagination, and talent."[100] The court further found that Sherwood "was not a robot run by his editors."[101] Rather, "[h]is job required him to originate his own story ideas, maintain a wide network of sources, write engaging, imaginative prose, and produce stories containing thoughtful analysis of complex issues."[102]

Equally important, Judge Johnson rejected plaintiff's arguments that the DOL's interpretations have the force of law and are binding on the court.[103] The court found that the interpretations were entitled to some deference, but, in this case, the interpretations were unpersuasive.[104]

B. Dalheim v. KDFW-TV[105]

Dalheim, which was heard and decided after *Sherwood*, concerned claims by general assignment reporters, producers, directors and assignment editors at a CBS-TV affiliate in Dallas-Fort Worth, Texas, for overtime compensation under the FLSA. The station claimed that plaintiffs were

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99. Sherwood v. Washington Post, 871 F. Supp. 1471 (D.D.C. 1994).

100. *Id.* at 1482.

101. *Id.*

102. *Id.*

103. *Id.* at 1481.

104. *Sherwood*, 871 F. Supp. at 1481.

> In deciding what weight to accord these nonbinding interpretations, the Court can consider "the thoroughness evident in [the DOL's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140, 65 S. Ct. at 164. After considering these factors, the Court concluded that the Labor Department interpretations should be accorded very little weight. The evidence submitted at trial demonstrated that in the 1940s, when the interpretations were drafted, newspapers were staffed primarily by "leg men" and "rewrite men" whose jobs consisted entirely of doing what they were told to do. Stories were simple, one-dimensional, and contained virtually no analysis. In the forty years since then, the era of the leg men and rewrite men has passed, and the average reporter at *The Washington Post* displays invention, imagination, and talent that only a few "top-flight" reporters could have demonstrated in 1949. The interpretations still refer to leg men and rewrite men, thus clearly relying upon an outdated conception of the news profession. Their "power to persuade" is meager indeed.

Id. (citations omitted).

105. Dalheim v. KDFW-TV, 706 F. Supp. 493 (N.D. Tex. 1988), *aff'd*, 918 F.2d 1220 (5th Cir. 1990).

exempt from coverage as professionals, administrators or executives.[106] Following a bench trial, the court concluded that the station had failed to sustain its burden of proving that plaintiffs were exempt, and hence plaintiffs were covered by the FLSA.[107]

Unlike the court in *Sherwood*, the court in *Dalheim* gave controlling effect to the DOL's regulations and interpretations.[108] Although it expressly acknowledged that the regulations were adopted "when television was in its relative infancy,"[109] the court presumed, without explanation, that the DOL's regulations and interpretations, which by their terms address only print reporters in the context of the 1940s, applied equally to television news reporters of the late 1980s.

In ruling for the plaintiffs, the court flatly rejected the station's argument that plaintiffs were learned professionals. It held that broadcast journalism does not require knowledge of an advanced type, since the bulk of the job skills are acquired by experience.[110] The court ruled that the requirement of an advanced degree is the sine qua non of standing as a learned professional.[111] While acknowledging the proliferation of graduate programs in journalism and mass communication, the trial judge found that such advanced degrees are not a condition of employment at the station and further noted that some of the plaintiffs had no college degree, while others had degrees in fields unrelated to journalism.[112] The court sought to buttress its holding by noting that the DOL's interpretations specifically exclude newspaper journalists from the ranks of professionals, and therefore disqualify broadcast journalists.[113] Although the court acknowledged that broadcast journalists, like professionals in other fields, adhere to ethical standards, it gave no apparent weight to this factor.[114]

The court found somewhat more complicated the station's contention that plaintiffs were artistic professionals. Significantly, the court found that on-air reporters *can* qualify as artistic professionals. It acknowledged important technological differences between print media and broadcast media that "have rendered unpersuasive any generalized notion that

106. *Id.*
107. *Id.*
108. *Id.* at 495-96.
109. *Id.* at 504.
110. *Dalheim*, 706 F. Supp. at 501-02.
111. *Id.*
112. *Id.* at 502.
113. *Id.*
114. *Id.*

broadcast journalists cannot be artistic professionals."[115] The court observed that broadcast journalists must do more than merely report the news; they must also "capture the viewer's attention, and enhance the viewer's understanding in a relatively short time frame by relating the news through the use of pictures, sound and words—words that are understandable to the ear."[116] The court further found that reporters did indeed exercise creativity in their daily work, especially in series and feature packages.[117] In the end, however, the court concluded that on-air reporters were not exempt because it was not persuaded that the reporters' artistic work represented their *primary duty*.[118] Rather, the court reasoned that the bulk of a reporter's work depends on "intelligence, diligence, and accuracy" because (1) reporters are told which stories to report and the focus of those stories; (2) they are told whom to interview for their stories; (3) they use standard formats of pictures and sound for their stories; (4) they present balanced pieces that reveal both sides of their stories; and (5) they work within an established format.[119]

In addition, the court rejected arguments that producers and directors are artistic professionals. The court ruled that the producers' work was not original or creative but analogous to that of a "rewrite [person],"[120] consisting largely of revisions of wire service stories, reports from earlier broadcasts or reporter copy.[121] The court also ruled that there was no artistry in formatting a newscast because "producers follow accepted conventions in selecting lead stories, grouping related stories, pacing the broadcast, [and] avoiding monotony in sequencing forms of stories . . . that can be added or dropped."[122]

Similarly, the work of news directors was found non-exempt.[123] The court reasoned that because the station management prescribed the look of a broadcast, directors had no artistic leeway and hence did not exercise invention, imagination or talent in performing their tasks.[124]

The Fifth Circuit affirmed the trial court's findings.[125] Its decision, however, was hardly a ringing endorsement of the district court's ruling

115. *Dalheim*, 706 F. Supp. at 505.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Dalheim*, 706 F. Supp. at 506.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990).

below. The Court of Appeals concluded that the determination of exemptions under the FLSA is "intensely factbound and case specific."[126] Because "[e]ach case must be judged on its own peculiar facts," the *Dalheim* court pointedly cautioned against reading its decision as determinative in other factual settings.[127] The holding in *Dalheim* is thus narrowly tailored to address specific factual issues raised on the record before it and is not dispositive of the issues raised in this case.

The key to the Fifth Circuit's holding is the recognition of the appellate court's limited role in reviewing a trial judge's findings of fact. Under the Federal Rules, findings of fact made by the court at a bench trial may be reversed only if they are "clearly erroneous."[128] Thus, even if it disagreed with the trial court's findings, the Fifth Circuit was not free to substitute its own judgment for that of the district court; rather, it had to defer to the district court's findings, absent proof of *clear* error. Because the Fifth Circuit determined that the trial court's findings could not be found clearly erroneous, it was compelled as a matter of law to affirm.[129]

A finding of no clear error, however, is a far cry from an unqualified adoption of the lower court's decision. The Fifth Circuit obviously viewed the exemption issue as a close call, and carefully and pointedly underscored its view that the "general-assignment reporters *may be exempt creative professionals*, and that KDFW's reporters did . . . do original and creative work," a position that plaintiffs have adamantly rejected throughout this litigation.[130] The Fifth Circuit also concluded that although there was evidence to support the inferences drawn by the trial court that the work of KDFW-TV news reporters was not exempt, these inferences were not in fact "*compelled by the evidence.*"[131] This language strongly suggests that the appellate court also would have found no clear error if the district court had concluded that the KDFW employees were exempt. This fact alone strongly militates against giving *Dalheim* a broad reading.

Equally important is *Dalheim*'s conclusion that exemption issues are intensely factbound and, consequently, that different factual records may call for different results. The Fifth Circuit concluded there was at least some record evidence before the district court that could support the

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126. *Id.* at 1226.

127. *Id.* at 1227. "We cannot say, therefore, whether the legal conclusions reached by the district court and affirmed by this court in this case have any relevance beyond the news department at KDFW." *Id.*

128. FED. R. CIV. P. 52(a).

129. *Dalheim*, 918 F.2d at 1229.

130. *Id.* (emphasis added).

131. *Id.* (emphasis added).

inference that KDFW-TV employees were not exempt, including the findings that KDFW-TV: (1) emphasized good reporting in the aggregate and did not emphasize "individual reporters with the 'presence' to draw an audience;" (2) required all news stories fit within prescribed preset formats determined by station management rather than by individual journalists; (3) discouraged variations within such formats and hence discouraged individualization in presenting the news; (4) decided which stories to cover, the general thrust of these stories, who should be interviewed, the angle or focus of these stories and the type of pictures that should accompany the story; and (5) employed news producers as mere rewrite persons whose jobs were essentially to ensure that news stories complied with the station's preset format.[132] Consequently, the court in *Dalheim* concluded that the work of the KDFW plaintiffs did not place a high premium on creativity, imagination or talent.[133]

1. An Analysis and Critique of *Dalheim*

The trial court decision in *Dalheim* is clearly at odds with the compelling opinions of both Judges Gesell and Johnson in *Sherwood* and stands as an unfortunate misconstruction of FLSA. Initially, the trial court ignored the legislative history of FLSA and the Congressional intent to assist workers at the lowest end of the economic scale. In addition, it gave undue weight to the DOL regulations and interpretations promulgated with respect to print journalists. More importantly, the decision portrays a fundamental misunderstanding of how broadcast journalists function and of the many complexities and nuances of television news.

a. Television Journalists as Learned Professionals

i. Specialized Knowledge

The court in *Dalheim* took an unduly restrictive approach as to what constitutes a learned professional under the regulations. The court correctly acknowledged that the category of learned professionals under the FLSA is not limited to the traditionally recognized professions of law, medicine and the ministry. However, the court appeared to ignore a host of rulings by courts and the DOL recognizing additional callings as within the learned

132. *Id.* at 1229.
133. *Id.*

professional exemption. These include accountants,[134] actuaries,[135] airplane pilots,[136] artists,[137] assistants to engineers,[138] biologists,[139] chemists,[140] computer programmers,[141] dentists,[142] dormitory proctors,[143] driving instructors,[144] editors (radio),[145] engineers,[146] filter designers,[147] flight instructors,[148] gas pipeline radio technicians,[149] machine designers,[150] medical technologists,[151] music instructors,[152] nurses,[153] pharmacists,[154] physicists,[155] research associates,[156] teachers,[157] and technical writers.[158]

The court also was correct in observing that journalism had taken on certain characteristics of recognized learned professions, including adherence to a code of ethics and undergraduate and graduate degree programs in broadcast journalism and the related field of mass com-

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134. 29 C.F.R. § 541.301(e)(1) (1994); 29 C.F.R. § 541.302(e)(1) (1992); Rausch v. Wolf, 72 F. Supp. 658, 659 (N.D. Ill. 1947).

135. 29 C.F.R. § 541.301(e)(1) (1994); 29 C.F.R. § 541.302(e)(1) (1992).

136. 29 C.F.R. § 541.301(g)(2) (1994); 29 C.F.R. § 541.302(g)(2) (1992); Paul v. Petroleum Equip. Tools Co., 708 F.2d 168 (5th Cir. 1983).

137. 29 C.F.R. § 541.302(a) (1994); 29 C.F.R. § 541.303(a) (1992).

138. Krill v. Arma Corp., 76 F. Supp. 14 (E.D.N.Y. 1948).

139. 29 C.F.R. § 541.301(e)(1) (1994); 29 C.F.R. § 541.302(e)(1) (1992).

140. 29 C.F.R. § 541.301(e)(1) (1994); 29 C.F.R. § 541.302(e)(1) (1992).

141. Zacek v. Automated Sys. Corp., 541 S.W.2d 516 (Tex. Civ. App. 1976).

142. 29 C.F.R. § 541.314(b)(1) (1994).

143. Donovan v. Fessenden Sch., 92 Lab. Cas. (CCH) ¶ 34,125 (D. Mass. 1981).

144. 29 C.F.R. § 541.301(g)(2) (1994); 29 C.F.R. § 541.302(g)(2) (1992).

145. Mitchell v. Kickapoo Prairie Broadcasting Co., 182 F. Supp. 578 (W.D. Mo. 1960), *aff'd*, 288 F.2d 778 (8th Cir. 1961).

146. 29 C.F.R. § 541.301(e)(1) (1994); 29 C.F.R. § 541.302(e)(1) (1992); Phillips v. Federal Cartridge Corp., 69 F. Supp. 522 (D. Minn. 1947).

147. McComb v. Eimco Corp., 83 F. Supp. 635 (D. Utah 1949).

148. 29 C.F.R. §§ 541.301(g)(2), 541.314(a) (1994); 29 C.F.R. § 541.302(g)(2) (1992).

149. Mitchell v. Transcontinental Gas Pipeline Corp., 47 Lab. Cas. (CCH) ¶ 31,457 (S.D. Tex. 1963).

150. Aulen v. Triumph Explosive, Inc., 58 F. Supp. 4 (D. Md. 1944).

151. 29 C.F.R. § 541.301(e)(1) (1994); 29 C.F.R. § 541.302(e)(1) (1992).

152. 29 C.F.R. § 541.301(g)(2) (1994); 29 C.F.R. § 541.302(g)(2) (1992).

153. 29 C.F.R. §§ 541.301(e)(1), 541.314(c) (1994); 29 C.F.R. § 541.302(e)(1) (1992); Hofer v. Federal Cartridge Corp., 71 F. Supp. 243 (D. Minn. 1947); Principe v. Lluberas, 6 Lab. Cas. (CCH) ¶ 61,501 (D.P.R. 1943).

154. 29 C.F.R. §§ 541.301(e)(1), 541.314(c) (1994); 29 C.F.R. § 541.302(e)(1) (1992).

155. 29 C.F.R. § 541.301(e)(1) (1994); 29 C.F.R. § 541.302(e)(1) (1992).

156. Molinari v. McNeil Pharmaceutical, 27 Wage & Hour Cas. (BNA) 1240 (E.D. Pa. 1986).

157. 29 C.F.R. §§ 541.301(e)(1), 541.314(a) (1994); 29 C.F.R. § 541.302(e)(1) (1992).

158. Rothstein v. Cannon & Sullivan Technical Publications, 32 Lab. Cas. (CCH) ¶ 70,822 (S.D. Cal. 1957).

munication.[159] Nevertheless, the court concluded that television journalists are not learned professionals because their work does not require knowledge of a field of science or learning and because their performance is enhanced by experience rather than professional training.[160] This conclusion is incorrect.

First, the work of broadcast journalists does require knowledge of a field of learning. In the last two decades, journalism has emerged as a field of learning. Programs in journalism abound at the nation's colleges and universities. Currently, 410 colleges and universities offer undergraduate majors or substantial academic studies in journalism and mass communication.[161] Of these, 95 are accredited by the Accrediting Council for Education in Journalism and Mass Communications ("ACEJMC")[162] and numerous programs offer specific sequences or programs in broadcast journalism.[163] In addition, 128 colleges and universities offer graduate programs in journalism and mass communication.[164] Of these, 75 are accredited by ACEJMC[165] and 98 offer sequences or programs in broadcast journalism.[166]

Second, the specialized skills needed to become a journalist cannot typically be acquired merely through on-the-job training. A college education is generally expected for entry into the field of broadcast journalism. Most news directors—local station managers who hire the people who eventually work their way up to larger market stations and network newswriting positions—state that most of the new staff members they hire have a college degree in broadcast news.[167] More than two-thirds of the news directors polled said that college training in broadcast journalism is a decided advantage for new employees.[168] In addition, eighty-four percent of news directors and two-thirds of all executives surveyed by the Roper Organization in 1987 stated that a degree in

159. Dalheim v. KDFW-TV, 706 F. Supp. 493, 502 (N.D. Tex. 1989).

160. *Id.*

161. ASSOCIATION FOR EDUCATION IN JOURNALISM AND MASS COMMUNICATION, 1995 DIRECTORY.

162. ACCREDITING COUNCIL ON JOURNALISM AND MASS COMMUNICATION, ACCREDITED JOURNALISM AND MASS COMMUNICATION EDUCATION: 1994-95 DIRECTORY.

163. *See Dalheim*, 706 F. Supp. at 502.

164. *Id.*

165. ASSOCIATION FOR EDUCATION IN JOURNALISM AND MASS COMMUNICATION, 1995 DIRECTORY.

166. *Dalheim*, 706 F. Supp. at 502.

167. V.A. Stone, *J-Grad Quality and Entry Level Hiring*, 43 RTNDA COMMUNICATOR 58-59 (Sept. 1989).

168. *Id.*

journalism or communications is a very important consideration in evaluating a prospective employee.[169]

Journalism programs teach specialized skills that are essential to success in the field. Among these skills, basic newswriting is still considered the fundamental professional qualification. The fact that there are at least twenty-eight textbooks on the fundamentals of broadcast newswriting is further evidence of the importance of newswriting in the curriculum of journalism schools and its specialized nature.[170] Some ninety-four percent of the news directors surveyed by the Roper Organization reported that writing skills are among the most important criteria.[171] Summarizing his findings, Professor Vernon Stone states:

> The findings reconfirm that writing is at the heart of broadcast journalism and should be central to education for careers in radio and TV news. Good writing and the clear thinking that relates to clear writing develop from a long process of individual practice and critique. News directors say writing courses are the ones that have helped them most, and they expect the newspeople they hire to bring writing ability to the job. *On the*

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169. THE ROPER ORGANIZATION, INC., ELECTRONIC MEDIA CAREER PREPARATION STUDY 18, 30 (Dec. 1987).

170. Broadcast Journalism newswriting textbooks include: JOHN R. BITTNER & DENISE A. BITTNER, RADIO JOURNALISM (1977); BLISS, ROBERT SILLER ET AL, TELEVISION AND RADIO NEWS (3d ed. 1960); MERVIN BLOCK, WRITING BROADCAST NEWS (1987); JOSEPH E. BROUSSARD & JACK F. HOLGATE, WRITING AND REPORTING BROADCAST NEWS (1982); DAVID K. CHOLER, BROADCAST JOURNALISM: A GUIDE FOR THE PRESENTATION OF RADIO AND TELEVISION NEWS (1985); DAVID K. CHOLER, BROADCAST NEWSWRITING (1990); IRVING FANG, TELEVISION NEWS, RADIO NEWS (4th ed. 1985); DANIEL E. GARVEY AND WILLIAM L. RIVERS, BROADCAST WRITING (1982); DANIEL E. GARVEY & WILLIAM L. RIVERS, NEWSWRITING FOR THE ELECTRONIC MEDIA (1982); ROY GIBSON, RADIO AND TELEVISION REPORTING (1991); CARL HAUSMAN, CRAFTING THE NEWS FOR ELECTRONIC MEDIA (1992); JAMES R. HOOD & BRAD KALBFELD, THE ASSOCIATED PRESS BROADCAST NEWS HANDBOOK (1982); EDWARD HOYT & JAMES L. HOYT, WRITING NEWS FOR BROADCAST (3d ed. 1994); JULIUS K. HUNTER & LUNNE S. GROSS, BROADCAST NEWS: THE INSIDE OUT (1980); RONALD H. MACDONALD, A BROADCAST NEWS MANUAL OF STYLE (1987); PETER MAYEUX, BROADCAST NEWS: WRITING AND REPORTING (1991); ROBERT A. PAPPER, BROADCAST NEWS WRITING STYLEBOOK OHIO (1987); FREDERICK SHOOK & DAN LATTIMORE, THE BROADCAST NEWS PROCESS (1987); FREDERICK SHOOK, TELEVISION NEWSWRITING CAPTIVATING THE AUDIENCE (1994); PAUL G. SMEYAK, BROADCAST NEWS WRITING (2d ed. 1983); MITCHELL STEPHENS, BROADCAST NEWS (3d ed. 1993); ROGER WALTERS, BROADCAST WRITING: PRINCIPLES AND PRACTICE (1994); CLARK J. WEAVER, BROADCAST NEWSWRITING AS A PROCESS (1984); TED WHITE, BROADCAST NEWSWRITING AND REPORTING (1993); ARTHUR WIMER & DALE BRIX, WORKBOOK FOR RADIO AND TV NEWS EDITING AND WRITING (1980); RICHARD D. YOAKAM & CHARLES F. CREMER, ENG: TELEVISION NEWS AND THE NEW TECHNOLOGY (2d ed. 1989); IVOR YORKE, THE TECHNIQUE OF TELEVISION NEWS (2d ed. 1987).

171. THE ROPER ORGANIZATION, *supra* note 169, at 19.

job, news directors and other supervisors can help writers add professional polish. But the basics need to be learned in school.[172]

In short, would-be journalists must bring proven writing skills to their positions; they cannot expect to learn through on-the-job training. If they lack writing skills, they will not be hired. Thus, skills are obtained through specialized training and not through experience.[173]

Third, the day-to-day work of television journalists—writing television news scripts—requires special skills. Newswriters simply cannot recount the facts surrounding an event; rather, they must sift through all available data, including wire service reports, newspapers, magazines and available news footage, and use judgment and discretion in selecting the most salient facts. This information must then be distilled to fit a limited time frame of perhaps fifteen, twenty, or thirty seconds. Some stories may need more explanation than others; the writer must have a feel for the situations where more facts are needed to inform the viewer.

In addition, the newswriter must develop the point of the story clearly, quickly and concisely. Unlike the print journalist who operates under different time and space constraints, the television newswriter risks losing the viewer if the point of the story is not made immediately. Where writers are called upon to provide an introduction to a report by an on-air correspondent, a poorly crafted beginning may cause the story to fail.

Moreover, newswriters prepare stories that will be viewed by an audience with diverse intelligence levels, educational achievement, sophistication, income and interests. Stations must present their news stories so as to meet the needs of this pluralistic audience. Some viewers are illiterate, some are geniuses, most fall somewhere in between.

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172. Vernon A. Stone, *News Directors Say Writing Helped Them Most*, 41 RTNDA COMMUNICATOR 9, 10-14 (Nov. 1987) (emphasis added).

173. Moreover, the court in *Dalheim* was wrong in stating that television journalists are not "learned" because their skills and talent may be gained by experience. Many of the plaintiffs in *Dalheim* had college degrees. Stations prefer to hire individuals with college degrees. *See* Dalheim v. KDFW-TV, 706 F. Supp. 493 (N.D. Tex. 1988). College graduates possess the intellectual ability to understand meaningful political, social, economic, and historic issues and are able to translate these issues into verbal and pictorial presentations for dissemination to the public. Undoubtedly, these traits are enhanced by experience; the mere fact that journalists improve with experience does not disqualify them from the ranks of the professional. All professionals—doctors, lawyers and others—become more adept with experience.

Colleges provide basic training in skills necessary to become a broadcast journalist. In the fast-paced world of television news, there is simply no time to teach new broadcast journalists the basics. This is not to say that stations provide no training; rather, the training is in the nature of fine-tuning. The fundamentals must be learned elsewhere.

Presenting a news story that appeals to this disparate audience requires communication skills of the highest order.

Most importantly, the story the anchor reads must complement whatever picture or tape is shown. As one network newswriter explained, "there are 'two tricks in writing voice-overs. The first trick is to say what you see. . . . The other principle is that the words have to end when the pictures end. It's a little bit like a newspaper caption.'"[174] Matching the script to the tape provides the essence of the story. "Writing to the picture" makes the story creative, clear, and memorable.[175] Matching words and pictures may not seem difficult in the abstract, but, in reality, it is a most demanding task. The writer must strike a delicate balance in deciding when to let the script speak and when to let the picture speak. Hence, news scripts are prepared in a way that is uniquely different from the way individuals normally write.

In writing to the picture, the newswriter must write under pressure in a very limited time frame. For example, writers for NBC Nightly News may have as little as one and one-half hours to prepare their scripts.[176] At times, breaking news stories may require stories to be written for immediate airing while the newscast is in progress. A writer may have to view multiple screens simultaneously under deadline pressure to determine which stories to pursue. To be productive in such a high-pressure environment, a writer must be professional.

Finally, newswriters also must accommodate the personal preferences and idiosyncrasies of the anchors or correspondents for whom they write. The newswriter must in a sense become the alter ego of the anchor. The ability of the newswriter to adapt to the varying preferences and quirks of different anchors is yet another indication of the special talent and skill required for news writing.

In sum, the process by which a television newswriter or producer selects the relevant facts of a story to be reported, determines the emphasis or slant of the story, distills such facts into a twenty- or thirty-second format, matches the words with accompanying pictures, videotape or graphics and requires considerable training and experience. Indeed, the work of a television newswriter is analogous to that of a computer systems analyst, an occupation now recognized as professional under the FLSA.

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174. Freeman v. National Broadcasting Co., 846 F. Supp. 1109, 1128 (S.D.N.Y. 1993) (quoting trial record at Tr. 232); *see also* Dalheim v. KDFW-TV, 706 F. Supp. 493, 505 (N.D. Tex. 1989) ("reporter may have to 'write to the video'").

175. *Freeman*, 846 F. Supp. at 1128.

176. *Id.* at 1126.

In establishing a computer system, analysts have numerous options. Their goal is to provide the system that best fits the needs of the firm. To accomplish this goal, analysts must consider any number of factors, including, but not limited to: (1) the numerous software packages available; (2) the firm's present computer capabilities and future needs; (3) budgeting constraints; (4) speed; and (5) training required. In short, there are any number of ways to program a system. In creating the system, the analyst must examine many options and, employing professional judgment, select the one that best fits the needs of the firm.

Television journalists operate in much the same way. There are many ways to convey the words and pictures that comprise a television news story. Time limitations preclude a mere recapitulation of all the facts. The story must be compressed, sometimes into as few as ten or fifteen seconds. Using their professional judgment, television journalists must select the most important facts from the many that may be reported and distill them into a presentation that is concise, clear, informative, and interesting.

The fact that journalists, unlike doctors or lawyers, are not licensed by the state in no way detracts from their professional status. Any attempt to license journalists would implicate the First Amendment. Therefore, there can be no formal entry requirements to enter the journalism field.

ii. Judgment and Discretion

It cannot be disputed that television journalists must exercise judgment and discretion. Interpreting professional exemption regulations, the DOL has stated that "the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered."[177] The plaintiffs in *Dalheim* fulfilled these functions. Their judgment and discretion was required to determine: (1) what is news; (2) which facts from the many available to select for a fifteen- or twenty-second piece; (3) the focus of the report; (4) whether a story should be rewritten or enlarged; (5) which portions of available videotape to use; (6) how to match the script with the tape; and (7) whether the story comports with appropriate journalistic standards.[178] Newswriting is neither routine nor repetitive and, thus, is distinguishable from other tasks, such as auto maintenance and repair, which may require a high degree of mechanical skill but little or no judgment and discretion.

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177. 29 C.F.R. § 541.207(a) (1994).
178. *Dalheim*, 706 F. Supp. at 505.

The work of newswriters is subject to review and editing by supervisors and ultimately by station management. This in no way vitiates the fact that newswriters exercise discretion and judgment. In hiring reporters and producers, stations look for experienced personnel who are capable of making news judgments. Given the large volume of news reported each day, it would be virtually impossible for a station to operate without respecting the judgment and discretion of its writers.

b. Artistic Professionals

Dalheim also erred in its holding that reporters, producers and directors are not artistic professionals within the meaning of the regulations.[179] Again, the court in *Dalheim* ignored a series of DOL interpretations and court rulings identifying artistic professionals whose logic suggests that journalists fall within the professional category. These professionals include: actors,[180] advertising writers,[181] artists,[182] authors,[183] cartoonists,[184] clothing designers,[185] columnists,[186] commercial poster artists,[187] composers,[188] critics,[189] editorial writers,[190] essayists,[191] motion picture cameramen,[192] musical conductors,[193] musicians,[194] novelists,[195] painters,[196] radio and television announcers,[197] scenario writers,[198] short story writers[199] and singers.[200] It would defy logic to rule that the foregoing occupations are exempt from the FLSA as artistic professionals but that journalists are neither artistic

179. *Id.* at 493.
180. 29 C.F.R. § 541.302(d) (1994); 29 C.F.R. § 541.303(d) (1992).
181. 29 C.F.R. § 541.302(c)(2) (1994); 29 C.F.R. § 541.303(c)(2) (1992).
182. 29 C.F.R. § 541.302(d) (1994); 29 C.F.R. § 541.303(d) (1992).
183. 29 C.F.R. § 541.302(c) (1994); 29 C.F.R. § 541.303(c) (1992).
184. 29 C.F.R. § 541.302(c)(1) (1994); 29 C.F.R. § 541.303(c)(1) (1992).
185. Abrams v. Genauer, 29 N.Y.S.2d 974 (N.Y. Sup. Ct. 1941).
186. 29 C.F.R. § 541.302(f)(1) (1994); 29 C.F.R. § 541.303(f)(1) (1992).
187. Goldberg v. Winn-Dixie Stores, Inc., 46 Lab. Cas. (CCH) ¶ 31,334 (S.D. Fla. 1962).
188. 29 C.F.R. § 541.302(c)(1) (1994); 29 C.F.R. § 541.303(c)(1) (1992).
189. 29 C.F.R. § 541.302(c)(1) (1994); 29 C.F.R. § 541.303(c)(1) (1992).
190. 29 C.F.R. § 541.302(c)(1) (1994); 29 C.F.R. § 541.303(c)(1) (1992).
191. 29 C.F.R. § 541.302(c)(2) (1994); 29 C.F.R. § 541.303(c)(2) (1992).
192. Ercole v. Pictorial Research, Inc., 15 Lab. Cas. (CCH) ¶ 64,651 (N.Y. Sup. Ct. 1948).
193. 29 C.F.R. § 541.302(c)(1) (1994); 29 C.F.R. § 541.303(c)(1) (1992).
194. 29 C.F.R. § 541.302(d) (1994); 29 C.F.R. § 541.303(d) (1992).
195. 29 C.F.R. § 541.302(c)(2) (1994); 29 C.F.R. § 541.303(c)(2) (1992).
196. 29 C.F.R. § 541.302(c)(1) (1994); 29 C.F.R. § 541.303(c)(1) (1992).
197. 29 C.F.R. § 541.302(e)(2) (1994); 29 C.F.R. § 541.303(e)(2) (1992).
198. 29 C.F.R. § 541.302(c)(2) (1994); 29 C.F.R. § 541.303(c)(2) (1992).
199. 29 C.F.R. § 541.302(d) (1994); 29 C.F.R. § 541.303(d) (1992).
200. 29 C.F.R. § 541.302(d) (1994); 29 C.F.R. § 541.303(d) (1992).

professionals nor exempt. The court properly recognized that the work of reporters, at least, involved elements of artistry, but incorrectly concluded that artistic work did not constitute their primary duty.[201] This conclusion was based on the court's observation that, when preparing stories, reporters: (1) are limited by the facts involved; (2) are told in advance which stories to cover; (3) are told the slant or angle of the story; (4) are frequently told whom to interview; (5) use a standard format of sound and picture; and (6) attempt to present both sides of an issue fairly and then choose the supporting audio and video.[202] Therefore, the court reasoned, the work of reporters did not depend on invention, imagination and talent but rather on intelligence, diligence and accuracy.[203]

In so ruling, the court totally misconceives the nature of the artistry involved in creating news stories. Since television journalists do not fabricate news stories, they do not utilize the same artistic imagination as the fiction writer, nor do they copy stories verbatim from wire services. The "invention, imagination or talent" they utilize is manifest in the process of developing the news story, rather than in the news story itself. Television journalists must decide: (1) which facts are newsworthy; (2) how to capture the essence of the story with limited time; (3) the proper focus or slant of the story; (4) whether the story is best told by words, pictures, or by words and pictures; and (5) where words and pictures are to be used, the best footage and graphics to accompany the written script. The end result is a unique package; it is a product of the journalist's invention, imagination or talent. The uniqueness of the end product is in no way diminished by the fact that a television newswriter or producer cannot create the facts of his or her story.

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201. Dalheim v. KDFW-TV, 706 F. Supp. 493, 505 (N.D. Tex. 1988). The court in *Dalheim* simply did not grasp the meaning of primary duty. It is clear in this context that "primary duty" means the "chief, principal or first of several functions," not necessarily the amount of time that the employee actually spends on non-exempt work. Marshall v. Burger King, 504 F. Supp. 404, 409 (E.D.N.Y. 1980); Stein v. J. C. Penney Co., 557 F. Supp. 398 (W.D. Tenn. 1983); *see also* Donovan v. Burger King, 672 F.2d 221, 226 (1st Cir. 1982). Indeed, the Regulations themselves make clear that the "primary duty" requirement must take into account "the relative importance" of the assigned duties, "the frequency with which the employee exercises discretionary powers, his or her relative freedom from supervision, and . . . the wages paid other employees for the kind of nonexempt work performed by the supervisor." 29 C.F.R. § 541.103 (1994). There can be no question that the "primary duty" of journalists is the creating, assembling, producing or editing of news stories to be seen or read by people on a daily basis—tasks which clearly require the use of "invention, imagination *or* talent" as their principal or chief function. 29 C.F.R. § 541.3(a)(2) (1994) (emphasis added).

202. *Dalheim*, 706 F. Supp. at 505.

203. *Id.*

Furthermore, the existence of conventions in newswriting transform this essentially creative endeavor into a rote or mechanical exercise. Newswriting definitely has conventions. Thus, the emphasis of the news story is typically at the beginning and not the end; the active voice is preferable to the passive voice; and newswriting typically is a conversational, not a formal, style. The existence of such conventions in newswriting, however, does not detract from its creative nature. All forms of creative expression, whether drama, poetry, fiction, nonfiction, sculpture or painting, have conventions. As two leading authorities on broadcast journalism observed:

> [n]o rule can take into account every conceivable circumstance of its application. What this means is that the writer must approach each rule, each story, each writing challenge, with an open mind and a good deal of caution. Each writing guideline must be applied thoughtfully, carefully, and purposefully, rather than blindly, rigidly, or by rote. Put another way, the very first requirement for a broadcast news writer is the ability to think.[204]

In addition, preparation of a news story is hardly a form of electronic cutting and pasting, as *Dalheim* suggests.[205] Stories do not write themselves, and the mere fact that there are opposing points of view in connection with a given event does not automatically dictate the content of the news coverage. Reporters must immerse themselves in the facts and constantly make judgments regarding which facts to include and which to omit, how much video to use and how to blend words and pictures. Setting forth competing viewpoints fairly in a fifteen or twenty second item is no small task and certainly not self-executing. Each story is unique and must be handled accordingly by the reporter.

Newswriting is unquestionably an artistic task. The artful use of language serves to achieve maximum impact on the viewer. The television newswriter must write in a style that lends visual imagery to the story. To achieve maximum impact on the audience, the newswriter cannot simply incorporate lengthy and cumbersome wire service reports, but rather must carefully craft all words and phrases.

Moreover, "writing to the picture" requires artistry as well as skill. Where videotape is available, the writer must decide how best to tell the story, the extent to which a script is needed or whether a tape itself tells the

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204. RICHARD D. YOAKAM & CHARLES F. CREMER, ENG: TELEVISION NEWS AND THE NEW TECHNOLOGY 176 (1985).

205. *Dalheim*, 706 F. Supp. at 505.

story. The synthesis of the on-screen pictures and words enables the newscast to entertain the audience. The court's efforts to equate news reporters with the newspapers' leg person of a bygone era is wholly inappropriate.

Equally inappropriate is the court's analogy of news producers to a newspaper rewrite person, described by the DOL interpretations as non-exempt work.[206] Producers perform a variety of functions in connection with a newscast. A show producer, for example, bears responsibility for the content and operation of a news show. The specific responsibilities include: (1) identifying which of the many topical news stories to cover; (2) selecting which feature stories should be aired; (3) preparing and executing the "run down" (the stories to be covered and the order in which they will be aired); (4) reviewing the scripts to ensure that they are accurate, interesting and in conformity with station standards; (5) editing scripts; and (6) preparing scripts.[207]

The process of selecting stories for a news program, determining their length, and deciding a format, requires the exercise of news judgment and discretion acquired from years of experience in the news business. The show's producer is the line employee responsible for the program. The job combines all the skills, talents and functions, including supervisory functions, that characterize an exempt employee. Therefore, the responsibilities of the show producer are clearly distinguishable from the newspaper rewrite person.

Similarly, the field producer, who covers a story on location, typically collaborating with an on-air reporter, performs a professional function. A field producer's many tasks may include supervising a camera crew, interviewing a subject, editing tape, preparing a script, or editing the final package.

Normally, field producers function with minimal supervision and are afforded broad discretion. In the field, the producer has overall responsibility for the shoot and control over the technicians that are assigned to assist the producer. The field producer's job, therefore, has two key aspects: (1) journalism, including pursuing and developing the story; and (2) production, including shooting, editing, and overseeing the preparation of the story for airing. Additionally, while preparing stories, field producers must be concerned with broader questions of company policy and

206. *Id.* at 506.

207. Dalheim v. KDFW-TV, 706 F. Supp. 493 (N.D. Tex. 1988), *aff'd*, 918 F.2d 1220, 1223-24 (5th Cir. 1990).

legal issues, such as fairness and defamation. They also must try to contain production costs.

Field producers, like show producers, are professionals. In performing their tasks, they must employ sound journalistic judgment and discretion. Moreover, they must understand the artistry involved in preparing a story for a visual medium.

2. Analogous Classifications by Other Government Agencies

The court in *Dalheim* also ignores the manner in which other governmental agencies, including the Federal Communications Commission ("FCC") and other divisions of the Department of Labor, have classified the work performed by journalists.

The FCC is directly empowered to regulate the broadcast industry and thus is charged with knowledge concerning the activities of that industry. One such form of regulation includes the prohibition of discriminatory employment practices by television station licensees and the encouragement of affirmative action goals by sublicensees.[208] As part of this regulatory process, the FCC requires television stations to report on the racial, ethnic, and gender labor statistics of all employees in certain job categories.[209] One such category is denoted as "professionals." Jobs included by the FCC in this category are "correspondents, producers, writers, [and] editors."[210]

Ironically, the DOL routinely classifies journalists as professionals in areas outside of the FLSA. For instance, in *Matter of Perez*,[211] the Secretary of Labor, acting pursuant to 8 U.S.C. § 1154 and 8 C.F.R. § 204.2(f), determined that an alien journalist qualified as a professional for immigration purposes.[212] The Employment and Training Administration, also administered by the Secretary of Labor, classifies reporters and editors, as well as lawyers, architects, and doctors, under the category "Professional, Technical and Managerial Occupations."[213] Moreover, the Census Bureau classifies editors and reporters as among the "professional specialty occupations."[214] Given this widespread recognition of the professional

208. 47 C.F.R. § 2080 (1994).
209. *Id.* § 73.3500.
210. *Id.*
211. 12 I. & N. Dec. 701 (1968).
212. *Id.*
213. U.S. DEP'T OF LABOR, DICTIONARY OF OCCUPATIONAL TITLES 77-79 (1977).
214. U.S. DEP'T OF COMMERCE, 1980 CENSUS OF POPULATION, OCCUPATION BY INDUSTRY (1980).

status of the plaintiffs' work generally under federal law, it would be inconsistent to treat such work differently for FLSA purposes.

C. Freeman v. National Broadcasting Co.

Perhaps the most interesting of the five cases is *Freeman v. National Broadcasting Co.*[215] In that case, certain National Broadcasting Company ("NBC") newswriters claiming non-exempt status brought an action against the company under the FLSA seeking additional compensation for certain overtime work. Under the collective bargaining agreement between NBC and the National Association of Broadcast Employees and Technicians ("NABET"), members of the newswriters' union were entitled to: (1) a base rate of pay; (2) various fees paid on a weekly basis and determined by the specific job that each performs on a given day; and (3) overtime computed at a rate of one-and-a-half times the base pay for each hour worked over forty hours in any given week.[216] The fees were not included in the overtime base.[217] The plaintiffs contended that this practice was unlawful. They asserted that the FLSA required NBC to include their fees in the computation of any overtime received under the collective bargaining agreement.[218] NBC argued that newswriters were professionals and hence exempt from FLSA coverage.[219]

The plaintiffs appeared pro se and competently prosecuted their claims. Most striking, however, was their unusual trial strategy of demeaning themselves and denigrating their work as journalists and the work of journalists in general.

The courts have been wary of this self-deprecation strategy and also of the perverse use of the FLSA to attain benefits that could not be won on collective bargaining. As Judge Gesell observed in *Sherwood*:

> Unfortunately, this action appears to reflect a misconception of the thrust of the FLSA. The Act was never intended to be a substitute for collective bargaining. Some professional employees of *The Washington Post* may be underpaid in the light of their contribution to the enterprise and the level of compensation that professionals in some other fields apparently receive these days. However, this matter remains to be resolved

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215. 846 F. Supp. 1109 (S.D.N.Y. 1993).
216. *Id.* at 1111.
217. *Id.*
218. *Id.*
219. *Id.*

> at the bargaining table. Higher compensation may not be achieved by the plaintiffs' deprecation of the creative, responsible work they perform at the Post, so as to take advantage of [the FLSA].[220]

Similarly, Magistrate Judge Kathleen Roberts, presiding at the *Freeman* trial, pointed out that it was "remarkably ironic" that:

> [w]riters and producers at the pinnacle of accomplishment and prestige in broadcast journalism, in order to increase their remuneration, present themselves as simple writers, editors and reporters who are forced to fit the news into rigid molds imposed upon them by their employer: while NBC extols the plaintiffs as "the best and the brightest" in the most competitive media market in the country, but argues that they are too creative, talented and independent to merit increased pay.[221]

Nevertheless, Magistrate Judge Roberts, trying the case without a jury, reached a result opposite to that of *Sherwood*. Relying heavily, indeed almost exclusively on *Dalheim*, she concluded that Freeman and his co-plaintiffs were not exempt employees under the FLSA.[222] Noting that any inquiry into exempt status is "intensely fact-bound," Magistrate Judge Roberts concluded that the tasks performed by the plaintiffs in *Freeman* were "virtually indistinguishable" from those performed by plaintiffs in *Dalheim* and that NBC had failed to overcome the strong statutory presumption of coverage.[223] As in *Dalheim*, Magistrate Judge Roberts relied too heavily on outmoded DOL regulations and interpretations.

D. Gateway Press *and* Newspapers of New England

The remaining two cases, *Reich v. Gateway Press*[224] and *Reich v. Newspapers of New England*[225] involved print journalists in enforcement actions brought by the Department of Labor. In both cases, the DOL was successful in arguing that the journalists in question were covered by the FLSA. Factually, however, the cases are markedly different *Reich v. Newspapers of New England* involved a claim by the Department of Labor

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220. Sherwood v. Washington Post, 677 F. Supp. 9 (D.D.C. 1988), *rev'd and remanded on other grounds*, 871 F.2d 1144 (D.C. Cir. 1989), *on remand*, 871 F. Supp. 1471 (D.D.C. 1994).

221. Freeman v. National Broadcasting Co., 846 F. Supp. 1109, 1123 (S.D.N.Y. 1993).

222. *Id.* at 1152 ("In reaching this conclusion, I have been both aided and ultimately persuaded by the analysis of the district and circuit courts in *Dalheim*."). *Id.*

223. *Id.* at 1153.

224. 13 F.3d 685 (3d Cir. 1994).

225. 44 F.3d 1060 (1st Cir. 1995).

that the publisher of the *Concord Monitor* ("*Monitor*"), an award-winning small city newspaper with a circulation of 4000, had violated the FLSA by failing to pay its staff writers, editors and photographers time-and-a-half for overtime work.[226] The *Monitor* claimed that these employees were exempt professionals.[227] The Department of Labor argued that the interpretations should be given controlling weight, while the *Monitor* urged that the interpretations be declared obsolete and invalid.[228] The *Monitor* made no serious attempt to show that the employees in question fit within the standards set forth in the interpretations.[229] Rather, it urged, as the defendants in *Dalheim* had unsuccessfully argued, that the trial court had erred as a matter of law in giving controlling weight to the interpretations.[230] Relying on *Dalheim*, the First Circuit concluded that it must affirm in the absence of clear error.[231] Accordingly, the trial court was upheld and the *Monitor's* arguments rejected.

Gateway Press presented issues that differed from those raised in *Newspapers of New England* and *Dalheim*. *Gateway Press* involved claims by the publisher of nineteen local weekly newspapers in the Pittsburgh area that it was exempt from the FLSA under the small town newspaper proviso[232] and further that its reporters were exempt as professionals.[233] The reporters in *Gateway Press* were much different from the reporters in *Dalheim*, *Sherwood*, *Freeman* and *Newspapers of New England*. The court concluded that the function of the reporters was predominantly to fill pages by gathering facts about routine community events and reporting them in a standard format.[234] The Third Circuit agreed that the work of the

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226. *Id.* at 1065.

227. *Id.*

228. *Id.* at 1071. "The interpretations state that '[o]nly writing which is analytical, interpretive or highly individualized is considered to be creative in nature.'" *Id.*

229. *Newspapers of New England*, 44 F.3d at 1065.

230. *Id.* at 1072.

231. *Id.* at 1072-73.

232. 29 U.S.C. § 213(a)(8) (1988).

233. Reich v. Gateway Press, 13 F.3d 685, 690 (3d Cir. 1994).

234. *Id.* at 699. The Third Circuit thereafter detailed the findings of the District Court supporting its conclusion that the employees were not exempt:

> The district court found, and the record shows, that the reporters spent over 50% of their time rewriting press releases, attending municipal, school board and city council meetings, interviewing people, answering phones, and typing wedding announcements, school lunch menus, business reviews, real estate transactions, and church news. The court found that most articles were either recast press releases issued under headings such as "what's happening," "church news," "school lunch menus," and "military news" or information taken from the police blotter, obituaries, or real estate transaction reports. Based on these findings, the district court found that the Gateway reporter's job "was predominantly to fill pages by gathering facts about routine community events and reporting them in a

reporters required no special skill, imagination or invention and affirmed.[235] With the exception of *Sherwood*, this is the only case where the courts correctly construed the professional exemption.

IV. A FRAMEWORK FOR ANALYZING THE PROFESSIONAL EXEMPTION AS APPLIED TO JOURNALISTS

The issue of exemption from the FLSA is fact-sensitive but no one fact is necessarily controlling.[236] Given the fact-intensive standard, the vagueness of the ancient regulation, and dearth of case law, the following proposal addresses the professional exemption as applied generally and to journalists.

A. Learned Professional

1. Advanced Knowledge

In determining whether a given occupation is professional in nature, the courts should adopt the criteria used by social scientists in studying the work of various occupational groups. These criteria include: (1) a specialized academic course of study and specified professional and academic skills used for admission to the field; (2) scholarly study of the field; (3) professional organizations; (4) recognition of, and adherence to, professional standards; (5) professional environment; (6) professional compensation; and (7) public perception.[237]

a. Specialized Course of Study and Skills

A principal indicia of professional status is the existence of a specialized course of academic study, as distinguished from apprenticeship and routine mental and physical processes.[238] Relevant considerations include whether: (1) colleges and universities offer undergraduate and graduate programs in the field; (2) specialized knowledge and skills

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standard format." That finding is not clearly erroneous. *Id.*

235. *Id.* at 700.

236. Dalheim v. KDFW-TV, 706 F. Supp. 493 (N.D. Tex. 1988) *aff'd*, 918 F.2d 1220, 1226-27 (5th Cir. 1990) ("Each case must be judged on its own peculiar facts.").

237. *See generally* Dalheim v. KDFW-TV, 706 F. Supp. 493, 502 (N.D. Tex. 1988), *aff'd*, 918 F.2d 1220 (5th Cir. 1990).

238. *Id.* at 501.

essential to success in the field are taught within such programs; (3) they are monitored and accredited;[239] and (4) special training is necessary. To the extent the skills do not require specialized knowledge, the position is non-exempt. The professional status of the job is not compromised by training or job performance improvement over time.[240]

b. Scholarly Study of the Field

Relevant considerations of professional status should also include the existence of a body of academic research, work product of those in the field, the number of graduate and undergraduate programs at colleges and universities devoted to journalism and mass communication, and the number and quality of journals devoted to research and scholarly debate in the field.

c. Professional Organizations

The existence of professional organizations, such as the Society of Professional Journalists and the Radio-Television News Directors Association, which are dedicated to professional continuing education, is another indication of professionalism.[241]

d. Recognition of and Adherence to Professional Standards

The existence of a recognized group of principles or ethical standards to which those in the field adhere is a criterion for a learned profession.[242]

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239. *See* Jack M. McLeod & Searle E. Hawley Jr., *Professionalization Among Newsmen*, 41 JOURNALISM Q. 529 (1964); Randal A. Beam, *Journalism Professionalism as an Organizational Concept*, JOURNALISM MONOGRAPHS 12 (June 1990).

240. Unlike other recognized learned professions, such as law and medicine, the journalism field is neither licensed nor regulated by any governmental authority. This fact does not detract from the professional status of journalists, as the concept of regulating the news media is contrary to the First Amendment of the United States Constitution.

241. Society of Professional Journalists, P.O. Box 77 Greencastle, IN 46135; Radio-Television News Directors Association, 1000 Connecticut Ave., N.W., Washington, D.C. 20036.

242. Beam, *supra* note 239, at 12-13.

e. Professional Environment

A professional environment is typified by an emphasis on quality of output, rather than quantity, and by a collegial atmosphere where writers share ideas, criticism, and praise.[243]

f. Professional Compensation

The professional is normally compensated at rates that far exceed the minimum subsistence wage that the FLSA was designed to achieve.

g. Other Factors

Other factors that the court might consider when distinguishing a professional from a non-professional position include whether the job requires: (1) comprehension of a breadth of facts and topics; (2) the application of intelligence or knowledge to a given task; (3) analysis of facts; (4) selectivity; (5) synthesis; (6) distillation; and (7) style.[244]

2. Judgment and Discretion

Consistent exercise of judgment and discretion is a hallmark of professionalism.[245] Under the DOL's interpretations, the exercise of judgment and discretion "involves the comparison and evaluation of possible courses of conduct and acting or making decisions after the various possibilities have been considered."[246] The phrase "implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance."[247] The phrase does *not* necessarily imply that the employee's decision is final or that the decision is not subject to further review.[248] The key is whether the employee is responsible for specified work product in the first instance, not whether that work product is ultimately reviewed or revised by others.[249]

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243. *Id.*

244. Sherwood v. Washington Post, 677 F. Supp. 9 (D.D.C. 1988), *rev'd and remanded on other grounds*, 871 F.2d 1144 (D.C. Cir. 1989).

245. *Id.*

246. 29 C.F.R. § 541.207(a) (1994).

247. *Id.*

248. *Id.* § 541.207(e).

249. *Id.*; *see* Mulverhill v. New York, No. 87-CV-853, 1989 U.S. Dist. LEXIS 15480 (N.D.N.Y. Dec. 16, 1989) ("an employee may be exercising discretion even though his or her

B. *Artistic Professional*

Artistic work requires the application of imagination, inventiveness or talent in a recognized field of artistic endeavor.[250] The Department of Labor recognizes writing as an artistic field[251] and specifically identifies as artistic professionals newspaper journalists functioning as editorial writers, columnists, critics and writers of analytical and interpretive pieces.[252] Under the Labor Department interpretations, whether the function is exempt as professional turns on whether work is "analytical, interpretative, or highly individualized," as opposed to work that depends primarily on "intelligence, diligence, and accuracy."[253]

In determining whether the function of a journalist is "analytical, interpretative, or highly individualized" as opposed to work that depends primarily on "intelligence, diligence, and accuracy," the courts should use the following criteria.

1. Creativity

Newswriting is creative to the extent that "the type of writing coupled with a reporter's full understanding of the factors influencing events 'will bring the scene alive' and be interesting as well as informative."[254] Creativity in news reporting entails more than simply recapitulating facts; it also entails capturing the viewer's attention and enhancing the viewer's understanding of events by putting the facts in context.[255] The essence of creativity is the ability to comprehend the significance of events; to synthesize facts; and to express the story, whether fictional or not, in a way that is interesting and memorable. Creativity involves the *process* of reviewing and analyzing facts from many sources telling a story that is both

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determination or his [or her] chosen course of action is subject to review"); Gilstrap v. Synalloy Corp., 409 F. Supp. 621, 625-26 (M.D. La. 1976).

250. 29 C.F.R. § 541.3 (1994); Dalheim v. KDFW-TV, 706 F. Supp. 493, 503 (N.D. Tex. 1988).

251. 29 C.F.R. § 541.302(b) (1994); 29 C.F.R. § 541.303(b) (1992).

252. 29 C.F.R. § 541.302(f)(1) (1994); 29 C.F.R. § 541.303(f)(1) (1992).

253. 29 C.F.R. § 541.302(f)(1) (1994); 29 C.F.R. § 541.303(f)(1) (1992); *see* Sherwood v. Washington Post, 677 F. Supp. 9, 13 (D.D.C. 1988), *rev'd and remanded on other grounds*, 871 F.2d 1144 (D.C. Cir. 1989), *on remand*, 871 F. Supp. 1471 (D.D.C. 1994).

254. *Sherwood*, 677 F. Supp. at 11.

255. Dalheim v. KDFW-TV, 706 F. Supp. 493, 505 (N.D. Tex. 1988).

unique and informative. Consequently, factual reporting can be creative.[256]

a. Fact v. Fiction

Writing fiction is widely recognized as a creative endeavor of the artistic professional. Obviously, a fiction writer must exercise creativity in developing and describing scenes, themes and plots. It has been argued that newswriters are not artistic professionals because they deal in fact, not fiction; they simply report events and therefore, create nothing.

This view is both illogical and narrow, as demonstrated by the case of Janet Cooke, a former *Washington Post* reporter who won a Pulitzer Prize for reporting on the plight of a young boy in a drug-infested Washington, D.C. ghetto, but later admitted that her reporting was largely fabricated.[257] The fact/fiction dichotomy is exemplified by this situation. If Cooke were reporting fact, she is not an artistic professional; if she were writing fiction, she is an artistic professional. Identical writing would be classified as exempt or nonexempt depending on whether it is real or imagined. Moreover, the standard is overly restrictive; it would exclude nonfiction writers from the category of artistic professionals. The biographer uses many of the same skills as a fiction writer to tell the story of a person's life. The difference is that the biographer purports to recount facts.

b. Process v. End Product

The fact/fiction dichotomy is illogical. The inquiry should focus not on the end product but rather on the process of writing. The biographer starts with facts that must be organized into an informative story. No two biographers are likely to write a person's life story in the same way. Similarly, the television newswriter starts with data that must be developed into a coherent story lasting perhaps ten to fifteen seconds, and the viewpoint will vary with the newswriter.

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256. *Dalheim*, 706 F. Supp. at 505; *see also* International News Serv. v. Associated Press, 248 U.S. 215, 234 (1918) (distinguishing between the *substance* of a report and the particular form or collocation of words communicating the report).

257. *See* Eva Hoffman & Margot Slade, *Pulitzers Are Awarded and One Is Given Back*, N.Y. TIMES, Apr. 19, 1981, § 4, at 7.

2. Originality

"A work is original if it is the independent creation of its author."[258] The key is the unique perspective that a writer imparts; even fact-based works may be original.[259] The degree of originality is determined by the extent to which the journalist is expected to use a fresh or different approach in reporting the news, rather than relying on accepted conventions or formats dictated by the station.[260] At the same time, the mere existence of conventions or formats does not detract from the artistic nature of a particular writing. All forms of artistic expression—poetry, drama, fiction, painting, sculpture—have conventions. It is the truly original writer whose work transcends convention.

3. Choice

A third element of artistic professionalism is the extent to which the journalist has discretion in developing a story. Judgment and discretion imply that a person is empowered to compare and evaluate options and to make choices on matters of significance to the employer.[261] When management dictates the editorial content of the news story, the work is not exempt.[262] When the journalist is expected to exercise judgment and discretion in terms of: (1) what is news; (2) which facts to report; (3) what is the focus or slant of the story; (4) whether to rewrite or enlarge the story; (5) whether to use videotape; (6) how to match words and pictures; and (7) whether the story comports with recognized journalistic standards, that journalist is functioning as a professional.[263]

Whether persons empowered to make choices are supervised or subject to review is irrelevant in determining whether they exercise judgment or discretion. Thus, a writer's superiors may choose to edit his or her work, but this does not vitiate the judgment and discretion exercised by the writer. Nor is an employee's status diminished merely because some choices made during the work day are routine. Judge Gesell in *Sherwood* observed:

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258. Baltimore Orioles v. Major League Baseball Players Ass'n, 805 F.2d 663, 668 n.6 (7th Cir. 1986).

259. *International News Serv.*, 248 U.S. at 234.

260. *Cf. Dalheim*, 706 F. Supp. at 506.

261. 29 C.F.R. § 541.207(d) (1994).

262. *Dalheim*, 706 F. Supp. at 506.

263. Gilstrap v. Synalloy Corp., 409 F. Supp. 621, 624-25 (M.D. La. 1976).

> Plaintiffs insist that the work they do is far more routine than original and creative. They give great credit for the end result to a handful of editors, who are clearly professionals, and tend to deprecate the quality of their own written work. To be sure, some reporting of straight, quick, factual news is routine and does not require the full range of talent that led to the reporters being hired in the first place. All professionals, including the learned professionals, however, entail such more routine work and this is recognized by the Department of Labor. But this does not alter the primary, dominant, written work of these thirteen reporters/editors and the artistry expected to go into it. Moreover, the collaborative editor does not take the responsibility for writing from the reporter's hands unless he or she fails to perform up to standard on a specific, occasional assignment. Nor does the fact the process may involve an element of training affect the professional status of the reporter.[264]

All writers must work with editors, and their work is reviewed by management before it is disseminated.

4. Special Talent

To the extent that work requires special talent, such as significant investigative skills or understanding of the uses and capabilities of advanced technology, including electronic news gathering and satellite news gathering, it is professional.[265] Similarly, professional work requires more than beginner's skills. To the extent that the work can be done by a person of general intelligence, or at entry level, it is within the nonexempt category.

5. Initiative

Another indication of the professional is initiative—the extent to which the employee is expected: (1) to independently understand the tasks to be performed; (2) to suggest stories or perspectives; and (3) to use his or her own efforts to obtain the story, rather than relying solely on other sources, such as wire services.

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264. Sherwood v. Washington Post, 677 F. Supp. 9 (D.D.C. 1988), *rev'd and remanded on other grounds*, 871 F.2d 1144 (D.C. Cir. 1989).

265. *Dalheim*, 706 F. Supp. at 505.

6. Varied Nature of the Work

Professional work tends to be varied in nature and requires judgment and discretion. Nonexempt work tends to be routine and requires little judgment and discretion.

7. External Standards

Professional work typically conforms to generally accepted external ethical norms, usually denoted as professional standards or ethical standards. In the field of journalism, codes of ethics have been promulgated by both the Society of Professional Journalists,[266] formerly known as Sigma Delta Chi, and the Radio-Television News Directors Association.[267] These codes of ethics emphasize the personal and professional ethical responsibilities of all broadcast journalists—to report the news fairly and accurately and to avoid conflicts of interest.

8. Standard of Excellence

A professional is held by his or her employer to a standard of excellence and this is reflected in the extent to which: (1) the employee receives individualized credit for his or her work; (2) the employer promotes the employee's work in an effort to increase viewership; (3) the employee's work is recognized by his or her peers through awards or other plaudits; and (4) the employee and others recognize that the work is professional.[268]

9. Professional Environment

A professional environment is typified by an emphasis on quality of output, rather than quantity, and by a collegial atmosphere where writers share ideas, criticism and praise.[269]

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266. 81 QUILL, SOCIETY OF PROFESSIONAL JOURNALISTS CODE OF ETHICS 37 (Dec. 1993).

267. 49 RTNDA COMMUNICATOR, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION CODE OF ETHICS 18 (July 1995).

268. *See generally Sherwood*, 677 F. Supp. at 11-12.

269. Beam, *supra* note 239, at 12-13.

10. Professional Compensation

The professional is normally compensated at rates that far exceed the minimum subsistence wage that the FLSA was designed to achieve.[270]

The courts in both *Sherwood* and *Dalheim* recognize that the DOL has taken an overly restrictive approach to the artistic exemption as applied to journalists.[271] The court in *Sherwood* held that the work of by-line newspaper reporters is sufficiently analytical and interpretative to qualify within the artistic exemption.[272] The court in *Dalheim* held that the work of television news reporters, particularly on series packages and features, can qualify as artistic.[273]

Equally important, the court in *Dalheim* recognized that technological innovation brought about by electronic news gathering and satellite news gathering has made the function of the television reporter more demanding than that of the print journalist.[274] According to the court in *Dalheim*, "TV reporters must also capture the viewer's attention, and enhance the viewer's understanding in a relatively short time frame by relating news through the use of pictures, sound, and words."[275] Furthermore, technological advances in television news gathering "have rendered unpersuasive any generalized notion that broadcast journalists cannot be artistic professionals."[276]

V. PROCEDURAL HURDLES

The Fifth Circuit's observation in *Dalheim* that issues involving the professional exemption under the FLSA are "intensely factbound and case

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270. *Id.*

271. Judge Gesell in *Sherwood* stressed that the thirty-year-old regulations "given the wide variety of journalism jobs and their ever-changing characteristics, cannot be decisive in the context of present day journalism." *Sherwood*, 677 F. Supp. at 14. The court in *Dalheim* noted that the regulations "appear to be influenced substantially by concepts more appropriately associated with print journalism." Dalheim v. KDFW-TV, 706 F. Supp. 493, 505 (N.D. Tex. 1988).

272. *Sherwood*, 677 F. Supp. at 14.

273. "KDFW did persuade the court that its reporters from time to time use creativity, invention, imagination, and talent in portions of their work. This is especially true in series packages and feature pieces and is also reflected in some of their daily work." *Dalheim*, 706 F. Supp. at 505.

274. *Id.*

275. *Id.*

276. *Id.*

specific" suggests that a trial is inevitably necessary in exemption cases.[277] Indeed, the courts have demonstrated a reluctance to resolve FLSA exemption cases on summary judgment. However, the courts have been too cautious. It is both possible and appropriate to resolve most FLSA exemption disputes on summary judgment or through procedures short of a full-scale trial.

In the vast majority of exemption cases, there is no dispute as to what an employee actually does on a day-to-day basis. The real question is the legal significance of those activities. For example, do the skills needed on the job require prolonged study in a specialized field, or can they be acquired through on the job training?[278] Does the work require "invention, imagination or talent?"[279] Does the employee exercise discretion and judgment?[280] The answers to all of these questions are legal conclusions that can be derived from undisputed facts.[281] Hence, the issues can be resolved on summary judgment.

A court can most efficiently determine whether there are genuine issues of material fact by requiring the moving party to furnish a list of the material facts not in dispute and the opposing party to come forward with a statement of material facts genuinely disputed.[282] This process enables the court to focus quickly on whether any material facts are genuinely at issue. Once the court determines there are no genuine issues of fact, it can rule on the case as a matter of law.

Nevertheless, the courts remain wary of granting summary judgment in FLSA cases. In *Sherwood*, Judge Gesell, with the consent and cooperation of the parties, had "elaborately documented cross-motions for summary judgment" at the close of discovery.[283] Based on that record, Judge Gesell granted the defendant's motion.[284] The District of Columbia Court of Appeals, however, reversed on the grounds that the trial court erred by making findings of fact on issues that the appellate court found to have been genuinely disputed.[285] In *Freeman*, the trial court, faced with motions and cross motions for summary judgment, ruled that fact disputes

277. Dalheim v. KDFW-TV, 918 F.2d 1220, 1226 (5th Cir. 1990).

278. 29 C.F.R. § 541.3 (1994).

279. *Id.*

280. *Id.* § 541.302(f); 29 C.F.R. § 541.303(f) (1992).

281. *See Dalheim*, 918 F.2d at 1225 ("[t]he ultimate determination of employee status is a question of law.").

282. N.Y. CIV. PRAC. L. & R. 3(g) (1995).

283. Sherwood v. Washington Post, 677 F. Supp. 9 (D.D.C. 1988), *rev'd and remanded on other grounds*, 871 F.2d 1144 (D.C. Cir. 1989), *on remand*, 871 F. Supp. 1471 (D.D.C. 1994).

284. *Id.*

285. *Sherwood*, 871 F.2d at 1147-48.

precluded summary judgment.[286] In both cases, the courts appear to have been straining to assure the plaintiffs their day in court. A full-scale trial in *Freeman* shed little additional light on the case but added significant costs to all parties and much delay.

Summary judgment has been an underutilized vehicle in resolving professional exemption issues. Both litigants and courts would greatly benefit from its wider use in FLSA cases.

VI. CONCLUSION

Journalists are unquestionably professionals and should be exempt from FLSA coverage. The Department of Labor should revisit the status of journalists under the FLSA and revise both its regulations and interpretations to reflect modern-day realities of the workplace.

286. Freeman v. National Broadcasting Co., 846 F. Supp. 1109, 1112 (S.D.N.Y. 1993).