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LABOR LAW-FAIR LABOR STANDARDS ACT-DETERMINATION OF "REGULAR RATE" FOR COMPUTATION OF OVERTIME PAY

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LABOR LAW—FAIR LABOR STANDARDS ACT—DETERMINATION OF "REGULAR RATE" FOR COMPUTATION OF OVERTIME PAY—Two recent decisions interpret the overtime provisions of the Fair Labor Standards Act:[1] (1) Pre-

[1] 52 Stat. L. 1060 (1938), 29 U.S.C. (1940) §§ 201 et seq. Effective in October, 1938, the act provided (§ 6) for a minimum hourly wage fixed at $.25 the first

vious to the enactment of the act, defendant company paid employees at an hourly rate for an eight hour day, seven day week. In order to comply with section 7a requiring payment of time and a half the "regular rate" of pay for hours in excess of the weekly maximum set by the act, defendant contracted to pay employees for six straight time and two overtime hours each day but at a new, lower rate such that payment at the new rate for six straight time hours and time and a half the new rate for two overtime hours would equal the former daily wage.[2] *Held*, the new hourly rate cannot qualify as the "regular rate" for compensating overtime in compliance with the act. *Walling v. Alaska Pacific Consolidated Mining Company*, (C.C.A. 9th, 1945) 152 F. (2d) 812. (2) Defendant's employees were paid a monthly salary for varying hours of work. To comply with the overtime provisions of the act, defendant adopted new employment contracts guaranteeing a weekly wage corresponding to the former measure of compensation and fixing an hourly rate at such a figure that payment of the rate for straight time hours and time and a half the rate for overtime hours usually worked would not exceed the guaranteed sum.[3] *Held*, the contracts satisfy the overtime requirements of the act. *Walling v. Halliburton Oil Well Cementing Company*, (C.C.A. 9th, 1945) 152 F. (2d) 622.

The issue in the principal cases is whether an employer who pays a wage or salary amounting to more than would be the total required for straight time hours at the minimum wage established by the Fair Labor Standards Act and time and a half the minimum for overtime hours can retain his prestatutory labor costs and comply with the requirement that he compensate for overtime at time and a half the "regular rate" of compensation. The problem is one of redistributing the wage or salary over the hours worked so that overtime hours can appear to draw 50 per cent greater pay than straight time hours. The requirement of any plan to achieve this end is a reduction of the hourly wage, or average hourly wage in the case of salaried employees, so that the necessary relationship between compensation for straight time and compensation for overtime hours can be established without affecting the total payment to the employee.[4] The opposed results reached in the principal cases reflects an unsettled

year of its operation, $.30 for the next six years, and $.40 after the expiration of the seventh. Maximum weekly hours permitted without payment of overtime (§ 7) were fixed at 44 hours for the first year and reduced to 42 and 40 hours successively the two succeeding years.

[2] No example of a typical contract is given in the decision. The following illustration will suffice to indicate the principle of defendant's plan, however: at an hourly rate of $.90, a laborer working 8 hours a day would earn $7.20; under defendant's plan a new hourly rate would be fixed at $.80 to be paid for the six straight time and time and a half that rate for the two overtime hours: $(6 \times .80) + (1\frac{1}{2} \times 2 \times .80) = \$7.20$. Two other employment plans disallowed by the court are not noted.

[3] In the case of cementers, for example, defendant guaranteed a weekly salary of $63.46 and fixed the hourly rate at $.59. It was thus necessary to work 40 hours at this rate and 44 hours at time and a half this rate before more than the weekly guarantee would be earned. Walling v. Halliburton Oil Well Cementing Co., (C.C.A. 9th, 1945) 152 F. (2d) 622 at 623.

[4] A reduction in existing wages above the minimum is not prohibited by the act. It is considered that § 18 which states that nothing in the act shall justify such a reduction is simply declarative of Congressional policy in the absence of a provision

interpretation of section 7a resulting from two leading decisions of the Supreme Court. In *Overnight Motor Transportation Company, Incorporated v. Missel*,[5] a case of salaried employment, the court held that the salary could not be regarded as including overtime compensation and that the regular rate for computing additional payment for overtime was the average hourly rate. On the same day, however, the Court held in *Walling v. A. H. Belo Corporation*,[6] another case of salaried employment, that where the parties had purported to fix by contract an hourly rate below the average, such rate satisfied the requirements of "regular rate" for computing overtime compensation, notwithstanding the fact that the rate had been adjusted to result in the same total salary as before. Thus, while the *Missel* case interpreted the act as precluding an employer's retaining his prestatutory labor costs in ordinary circumstances, the *Belo* case seemed to afford an opportunity by the device of a contract rate.[7] Applied in the terms with which it was clothed, the *Belo* rule seemed to invite merely verbal compliance with section 7a except in those cases where rate of employment was at or near the minimum wage fixed in the act; [8] and the Congressional purpose to spread employment by penalizing overtime would have been frustrated.[9] This result was forestalled by decisions which have in effect limited the *Belo* rule to cases of salaried employment. Employers who paid on some other basis such as hourly wage, or piece rate, or who used incentive

for its enforcement. Walling v. A. H. Belo Corp., 316 U.S. 624 at 630, note 6, 62 S. Ct. 1223 (1942). In Anuchick v. Transamerican Freight Lines Inc., (D.C. Mich. 1942) 46 F. Supp. 861, however, defendant, which had arbitrarily reduced rates to avoid increased pay for overtime, was held liable for overtime compensation figured at the rate before the reduction.

[5] 316 U.S. 572, 62 S. Ct. 1216 (1942).

[6] 316 U.S. 624, 62 S. Ct. 1223 (1942). This case and the Missel case, note 5, supra, are noted in 41 MICH. L. REV. 543 (1942) and commented upon at length in 52 YALE L. J. 159 (1942).

[7] The following words of the Belo decision are quoted by nearly every court applying the rule of that case: "But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act." Walling v. A. H. Belo Corp., 316 U.S. 624 at 630, 62 S. Ct. 1223 (1942).

[8] Cases following the Belo rule are listed in 1944-1945 W. H. MAN. 203-204. See also Murray v. Noblesville Milling Co., (C.C.A. 7th, 1942) 131 F. (2d) 470; White v. Witwer Grocer Co., (C.C.A. 8th, 1942) 132 F. (2d) 108; Walling v. Emery Wholesale Corp., (D.C. Ga. 1943) 49 F. Supp. 192. Green Head Bit & Supply Co. v. Hendricks, (D.C. Okla. 1943) 49 F. Supp. 698, is an extreme holding under the Belo rule. In a suit for a declaratory judgment, the court there upheld employment contracts where the plaintiff company had agreed with its employees that a slightly increased hourly rate actually used in computing wages should include both time and overtime compensation and that another rate adjusted to comply with the act, according to varying hours worked and total earnings, should be determined each week.

[9] The extent to which courts have felt it was a Congressional purpose to spread employment by the overtime provisions of the act has influenced their treatment of § 7a. The matter is discussed in 52 YALE L. J. 159 (1942). The Supreme Court in the Missel case committed itself to that view of the Congressional purpose. Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 at 577-578, 62 S. Ct. 1216 (1942).

bonuses, were not allowed to assert a contract rate other than the average hourly rate for purposes of computing overtime pay.[10] The first of the principal cases was decided on the authority of a decision of the Supreme Court on similar facts.[11] In these cases, the Court has characterized the contract rate as "artificial" [12] and distinguished the *Belo* holding on the grounds that the contract rate in that case was the "actual rate" of compensation.[13] Certainly it is a more obvious case where an employer who formerly paid at a specified rate per hour asserts a lower contract rate for purposes of the act than where he paid a salary and determines a "regular rate" for the first time; but not all minds will agree that the Court states a distinction that goes to the merits of the fact situations,[14] and some of the language in the recent cases suggests that the *Belo* rule would not survive another decision on the same facts.[15] In the second of the principal cases, however, the *Belo* rule was regarded as controlling.[16]

John A. Huston

[10] Walling v. Helmerich & Payne Inc., 323 U.S. 37, 65 S. Ct. 11 (1944) (hourly wages with split pay plan similar to facts of first of principal cases); Walling v. Harnischfeger Corp., 325 U.S. 427, 65 S. Ct. 1346 (1945) (bonus plan); Walling v. Youngerman-Reynolds Hardwood Co., Inc., 325 U.S. 419, 65 S. Ct. 1242 (1945) (piecework).

[11] Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 65 S. Ct. 11 (1944).

[12] Id. at 42.

[13] Speaking of the Belo case the Court said in Walling v. Youngerman-Reynolds Hardwood Co., Inc., 325 U.S. 419 at 426, 65 S. Ct. 1242 (1945): "The particular wage agreements there involved were upheld because it was felt that in fixing a rate of 67 cents an hour the contracts did in fact set the actual rate at which workers were employed. The case is no authority, however, for the proposition that the regular rate may be fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees."

[14] The decision of Walling v. Harnischfeger Corp. was regarded by Chief Justice Stone, who dissented, as overruling Walling v. A. H. Belo Corp., 316 U.S. 624, 62 S. Ct. 1223 (1942). Walling v. Harnischfeger Corp., 325 U.S. 427 at 440, 65 S. Ct. 1346 (1945). In disallowing wage contracts fixing a rate for the compensation of overtime lower than the average hourly compensation, the court in Walling v. Uhlmann Grain Co., (C.C.A. 7th, 1945) 151 F. (2d) 381 at 383, stated: "If the Supreme Court has not repudiated its holding in the Belo case, it has come so close as to leave no room for its application except upon an identical state of facts."

[15] "Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts." Walling v. Youngerman-Reynolds Hardwood Co., Inc., 325 U.S. 419 at 424-425, 65 S. Ct. 1242 (1945). "To discover the rate . . . we look not to contract nomenclature but to the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each workweek." Walling v. Harnischfeger Corp., 325 U.S. 427 at 430, 65 S. Ct. 1346 (1945).

[16] Walling v. Halliburton Oil Well Cementing Co., (C.C.A. 9th, 1945) 152 F. (2d) 622 at 624.