

Tempers Flare Over Whether Tool Pushers May Receive Overtime

Things became testy between two Fifth Circuit judges over the seemingly mundane question whether a “tool pusher” is entitled to overtime pay under the Fair Labor Standards Act (FLSA). The court faced this question in *Hewitt v. Helix Energy Sols. Grp.*, No. 19-20023, 2020 WL 7488207 (5th Cir. Dec. 21, 2020). Although the term “tool pusher” may not sound like a very important or skilled position, the title is a bit of a misnomer. Tool pushers manage other employees and are often very highly compensated. Judge Weiner, one of the judges who heard this case, describes tool pushers as “the equivalent of first or second lieutenants” that oversee and maintain direct contact with the common laborers on oil and gas rigs.

Under the FLSA, employers must pay a 50% overtime premium for any time worked over 40 hours per week. However, certain employees are exempt from the overtime provisions of the FLSA, such as “bona fide executive, administrative, [and] professional” employees.

In this case, Helix Energy paid Michael Hewitt a daily rate to serve as a tool pusher. Although daily rate employees are typically covered by the FLSA’s overtime provisions, under certain regulations it is possible for them to be exempt. Here, Helix, the employer, would have had to show that despite being paid a daily rate, Hewitt nevertheless was paid on a “salary basis” as defined in the relevant regulations.

In essence, to satisfy the “salary basis” test and be exempt from overtime pay, an employee must “receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.” Joining the Sixth and Eighth Circuits, the panel majority decided that under current regulations an exempt employee paid on a daily basis can remain exempt from overtime pay so long as two conditions are met: (1) “the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked”; and (2) “a reasonable relationship exists between the guaranteed amount and the amount actually earned.” Judge Ho, writing for the majority, explained:

This two-prong test protects employees in two ways. First, the “minimum weekly” guarantee ensures that a daily rate employee still receives a guaranteed amount

each week “regardless of the number of hours, days or shifts worked.” In other words, it sets a floor for how much the employee can expect to earn, “regardless” of how many hours, days, or shifts the employee works. Second, the reasonable relationship test ensures that the minimum weekly guarantee is not a charade—it sets a ceiling on how much the employee can expect to work in exchange for his normal paycheck, by preventing the employer from purporting to pay a stable weekly amount without regard to hours worked, while in reality routinely overworking the employee far in excess of the time the weekly guarantee contemplates.

Applying this test to Hewitt’s situation, the majority found that his pay structure did not exempt him from the overtime pay required under the FLSA.

In dissent, Judge Weiner first noted that being “born, bred, and educated in the ‘oil patch,’” informs his decision here. In Judge Weiner’s view, Hewitt’s compensation of more than \$200,000 per year clearly demonstrates that he is a “highly compensated employee” exempt from overtime pay. Judge Weiner further noted that other regulations provide that employees earning more than \$107,432 are deemed exempt if they regularly perform executive, administrative, or professional responsibilities, such as a tool pusher. Judge Weiner pleaded for this case to be heard before the entire Fifth Circuit, fearing that, if left to stand, it could have “devastating effects on all employers, especially in the oil and gas arena.”

In addition to authoring the majority opinion, Judge Ho wrote a concurring opinion responding to the arguments made by Judge Weiner in dissent. Judge Wiener’s only response to Judge Ho’s concurrence is a partial quote of Macbeth: “full of sound and fury, signifying nothing.” The full quote is a bit harsher: “Told by an idiot, full of sound and fury, / Signifying nothing.” The entire quote was not lost on Judge Ho. Not to be outdone, Judge Ho responds by quoting the 2006 Will Ferrell comedy, *Talladega Nights: The Ballad of Ricky Bobby* and also stating that “[m]ore often than not, any writing’s persuasive value is inversely proportional to its use of hyperbole and invective.” These types of jabs—while not unheard of—are departures from the usual decorum federal judges show one another.

It is difficult to know the extent to which this decision will impact the financial viability of oil and gas operations in the Gulf. Although Judge Weiner appears worried that it will have far-reaching economic repercussions, it is important to note that the majority’s opinion does not state that highly compensated employees like tool pushers are per se entitled to overtime pay. Instead, it will be a case-by-case basis that looks to whether there is a guaranteed minimum payment per week. Any employer could simply structure such a worker’s pay to include such a minimum

weekly payment and avoid the risk of having to pay any overtime. In any event, it will be interesting to see if Judge Weiner's pleas persuade the full Fifth Circuit to rehear the case. Stay tuned.