Supreme Court of Ohio Clerk of Court - Filed March 25, 2016 - Case No. 2014-1241

IN THE SUPREME COURT OF OHIO

John Haight, et al.,	:	Supreme Court Case No. 2014-1241
	:	
Plaintiffs,	:	Appeal from the Montgomery County
v.	:	Court of Appeals, 2nd District
	:	
The Cheap Escape Company, et al.,	:	Appeal No. CA 25983
	:	
Defendants.	:	Trial No. 2012 CV 00946

PLAINTIFFS/APPELLEES' MOTION FOR RECONSIDERATION

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Plaintiffs/Appellees' Motion for Reconsideration

Pursuant to S.Ct.Prac.R. 18.02, Appellees ask the Court to reconsider its March 17, 2016 decision. In doing so, Appellees do not dispute the Court's interpretation of Ohio law. The Court's ultimate conclusion, however, is at odds with the U.S. Supreme Court's interpretation of the Fair Labor Standards Act.

Federal courts, including the U.S. Supreme Court, have uniformly held that "employee" under the Act means "any individual employed by an employer." No federal court has interpreted the Act to hold that the Act's Section 213 exemptions either modify this meaning or create a class of workers that fall outside of the meaning. Instead, federal courts have uniformly held exempt employees are within the Act's meaning of "employee."

Appellees ask the Court to reconsider its decision and apply federal law, as uniformly interpreted by federal courts. Upon doing so, the Court should affirm the Second District's decision.

A memorandum in support is attached hereto.

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Memorandum in Support of Plaintiffs/Appellees' Motion for Reconsideration

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> Proposition of law: Under the Ohio Fair Minimum Wage Amendment, the term "employee" has the *same* meaning as under the Fair Labor Standards Act. Federal courts, including the U.S. Supreme Court, have uniformly held that exempt employees are within the meaning of "employee" under the Act. No federal court has held the contrary. Exempt employees are within the Act's meaning of "employee," and, accordingly, within the Amendment's meaning of "employee."

1. The Court should reconsider its decision in order to apply the U.S. Supreme Court's interpretation of the Fair Labor Standards Act.

Appellees urge the Court to reconsider the majority opinion in order to align it with federal courts' uniform interpretation of the Fair Labor Standards Act. If the Court fails to do so, then this Court's decision will be at odds with the U.S. Supreme Court's interpretation of the Act.

Under the Ohio Fair Minimum Wage Amendment, "employee" has the *same* meaning as under the Fair Labor Standards Act.[1] Thus, this case rests on interpreting federal law.

In its decision, the Court focused on to what extent the Amendment draws the meaning of "employee" from the Act. The Court correctly held that, when considering the meaning of "employee" under the Amendment, "the entirety of the FLSA is to be considered…" *See Haight v. Minchak*, Slip Opinion No. 2016-Ohio-1053, ¶ 13 ("the Decision."). The Court did not, however, address the fundamental question of this case: Are Appellees, as exempt employees, within the meaning of "employee" under the Fair Labor Standards Act? It is a question that must be answered in this case.

Federal courts, including the U.S. Supreme Court, have uniformly held that exempt employees *are* within the Act's meaning of "employee." Because exempt employees are "employees" under the Act, they are also "employees" under the Amendment. That is the only way to give "employee" the *same* meaning under the Act and the Amendment.

Appellees ask the Court to reconsider and correct its March 17, 2016 decision to align it with established Fair Labor Standards Act jurisprudence.[2] Upon doing so, the Court should affirm the Second District's decision.

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[1] "As used in this section: 'employer,' 'employee,' 'employ,' 'person' and 'independent contractor' have the same meanings as under the federal Fair Labor Standards Act…" Ohio Constitution, Article II, Section 34a.

[2] The Court has used its reconsideration authority to "correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Shemo v. Mayfield Hts.*, 2002-Ohio-4905, 96 Ohio St. 3d 379, 775 N.E.2d 493, ¶ 5.

2. **Federal courts, including the U.S. Supreme Court, have uniformly held exempt employees are within the meaning of "employee" under the Fair Labor Standards Act.**

Federal courts have uniformly held that exempt employees are within the meaning of "employee" under the Act. Moreover, no federal court has held that exempt employees are *outside* of that meaning. This Court should follow the well-established Fair Labor Standards Act jurisprudence on this issue and hold that exempt employees are employees under the Act.

The Court held that all meanings of "employee" under the Act apply to the Amendment. Decision at ¶ 13. Presumably, the Court means that it must apply to the Amendment all parts of the Act that apply to the Act's meaning of "employee."[3]

In considering the entirety of the Act, the U.S. Supreme Court has uniformly identified and used only one meaning of "employee" under the Act—that which is found in 29 U.S.C. § 203(e).[4] *See, e.g., Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 875, 187 L. Ed. 2d 729 (2014) ("The Act provides that 'employee' generally means 'any individual employed by an employer…").[5] Every Circuit Court has held the same.[6] This is consistent with the Act's legislative his-

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[3] As opposed to suggesting "employee" literally has multiple definitions under the Act. It would be highly unusual for a statute to have multiple meanings for the same term. If there *were* multiple meanings for "employee" under the Act, one would expect to find numerous cases discussing the meanings and determining which meaning applies to which situation. To Appellees' knowledge, there are no such cases.

[4] "*As used in this chapter*—Except as provided in paragraphs (2), (3), and (4), the term 'employee' means any individual employed by an employer." (Emphasis added.) 29 U.S.C. 203(e).

[5] *See also Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 300, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985) (The Act's definitions are "comprehensive." The Act "defines * * * 'employee' as (with certain exceptions not relevant here) 'any individual employed by an employer.'" *Id.* at n. 21, *citing* 20 U.S.C. 203(e)); *United States v. Rosenwasser*, 323 U.S. 360, 362, 65 S. Ct. 295, 89 L. Ed. 301 (1945) ("'employee' * * * is defined include 'any' employed individual…" Further, "broader or more compressive coverage of employees within the stated categories would be difficult to frame.")

tory: "the term 'employee' is defined to include all employees. * * * Senator Black said on the floor of the Senate that the term 'employee' had been given the broadest definition that has ever been included in any one act." *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3, 65 S. Ct. 295, 89 L. Ed. 301 (1945). It is notable that the U.S. Supreme Court has not used any alternative meaning for "employee" under the Act; *i.e.*, one that excluded exempt employees.

Individuals within the meaning of "employee," may be subject to some or all of the Act's provisions, which include minimum wage and overtime requirements, child labor protections, equal pay protections, recordkeeping requirements, nursing mother protections, and retaliation protections. *See* 29 U.S.C. 206, 207, 211, 212, and 218c. Under 29 U.S.C. § 213, some "employ-

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[6] *See, e.g., Donovan v. Agnew*, 712 F.2d 1509, 1513 (1st Cir. 1983) ("the FLSA defines 'employee' to 'mean[ ] any individual employed by an employer.'"); *Dejesus v. HF Mgmt. Servs., LLC*, 726 F.3d 85, 90 (2d Cir. 2013) ("Under the statute, an 'employee' is 'any individual employed by an employer…'"); *Safarian v. Am. DG Energy*, 622 F. App'x 149, 151 (3d Cir. 2015) (Same, and noting that "six factors [ ] determine whether a worker is an 'employee' under the FLSA…" None of the six factors include whether an employee is exempt.); *Schultz v. Capital Int'l Sec.*, 466 F.3d 298, 304 (4th Cir. 2006) ("employee is defined as 'any individual employed by an employer…'" Employee status is determined as a matter of economic reality. There is no mention of non-exempt status being relevant to this determination.); *Watson v. Graves*, 909 F.2d 1549, 1553 (5th Cir. 1990) ("Under the FLSA, an 'employee' is defined as 'any individual employed by an employer.'"); *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 806-07 (6th Cir. 2015) ("The FLSA defines an 'employee' as 'any individual employed by an employer.'"); *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1534 (7th Cir. 1987) (citing and quoting the same meaning of "employee" and holding, "For purposes of social welfare legislation, such as the FLSA, 'employees are those who as a matter of economic reality are dependent upon the business to which they render service.'"); *Lucas v. Jerusalem Café*, LLC, 721 F.3d 927, 934 (8th Cir. 2013) (Employee means "*any* individual employed by an *employer*." (Emphasis sic.) Further stating "Congress showed elsewhere in the statute that it 'knows how to' limit this broad definition 'when it means to…'" The only limits cited are those in 29 U.S.C. § 203(e), *not* exemptions from 29 U.S.C. § 213); *Rosenfield v. GlobalTranz Enterprises, Inc.*, 811 F.3d 282, 285 (9th Cir. 2015) ("Although a[n exempt employee], Plaintiff meets the broad statutory definition of 'employee.'"); *Henderson v. Inter-Chem Coal Co.*, 41 F.3d 567, 570 (10th Cir. 1994), *as modified on denial of reh'g* (Dec. 5, 1994) ("The FLSA defines an employee as 'any individual employed by an employer.'"); *Freeman v. Key Largo Volunteer Fire & Rescue Dep't, Inc.*, 494 F. App'x 940, 942 (11th Cir. 2012) ("Under the FLSA, an employee is 'any individual employed by an employer.'"); *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 10 (D.C. Cir. 2001).

ees" are exempted from some of the Act's requirements. Section 213 does not, however, modify the meaning of "employee" or create a class of non-employees.[7] This is much like the different levels of membership at a country club (social, pool, golf, etc.); all people who join the club are "members," but some are entitled to more amenities. All employed individuals are "employees," but Section 213 restricts the "amenities" for some "employees."

Because the Act's exemptions do not influence whether someone is an "employee," federal courts have uniformly held that exempt employees are within the meaning of "employee" under the Act. *See, e.g., Auer v. Robbins*, 519 U.S. 452, 454-6, 117 S.Ct. 905, 137 L. Ed. 2d 79 (1997).[8] In *Auer*, Justice Scalia described exemptions as conferring a "status" on employees. *Id.* at 455. ("one requirement for exempt status under §213(a)(1) is that the *employee* earn a [salary]." (Emphasis added.) That status determines not whether the person is an "employee" under the Act but to what protections and requirements apply to him or her. *See, e.g., Rosenfield v. GlobalTranz Enterprises, Inc.*, 811 F.3d 282, 285 (9th Cir. 2015) ("Although a[n overtime and minimum wage exempt] manager, Plaintiff meets the broad statutory definition of 'employee.'") The Second District also recognized this critical point: "exemptions remove certain categories of employees from the minimum wage requirements set forth in other parts of the Fair Labor Stand-

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[7] In fact, in order for a person to be subject to a Section 213 exemption in the first place, he or she must be within the meaning of "employee." *See, e.g.*, 29 U.S.C. 213(a)(1). ("The provisions of section 206 * * * and section 207 of this title shall not apply with respect to—any *employee* employed in [certain capacities].") (Emphasis added.)

[8] *See also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204, 191 L. Ed. 2d 186 (2015) ("Certain classes of *employees*, however, are exempt from these [minimum wage and overtime] provisions. * * * The exemption for such *employees* is known as the 'administrative' exemption." (Emphasis added.)); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2162, 183 L. Ed. 2d 153 (2012) (Overtime requirements do not "apply with respect to all employees"; *i.e.*, someone can be an "employee," but exempt from overtime requirements. Further, "an [exempt] outside salesman is any *employee* [with certain duties]." (Emphasis added.)).

ards Act, but they do not remove persons in those categories from the definition of employee."[9] *Haight v. Cheap Escape Co.*, 2014-Ohio-2447, ¶17 (2nd Dist.).

Federal courts are uniform in their interpretation of the meaning of "employee" and that exempt employees are within that meaning. Still, it is notable what federal courts have *not* done in interpreting the Act. To Appellees' knowledge, no federal court has held that (1) "employee" under the Act means anything *other* than "any individual employed by an employer," (2) "employee" is subject to more than one meaning, (3) exempt employees are outside of the meaning of "employee" under the Act, or (4) exempt status under the Act affects whether someone falls within the meaning of "employee."

With the parameters of interpreting the Amendment set by this Court—the Amendment draws the meaning of "employee" from the entire Act—the next question should have been "Are exempt employees, like Appellees, within the Act's meaning of "employee?" The Court did not answer this question but should do so in order to resolve this case.

Federal courts, including the U.S. Supreme Court, uniformly answer this question in the affirmative—exempt employees *are* within the Act's meaning of "employee." There are no known cases to the contrary. The U.S. Supreme Court's interpretation of the Act, if not outright binding, is persuasive enough to warrant this Court's reconsideration so that it can address this key question. Even Appellants "admit that Plaintiffs and other Outside Commission Salespeople

[9] Appellants' central premise—exempt employees are not entitled to minimum wage under the Act—misses the point. Whether an employee is exempt from minimum wage requirements is irrelevant to whether the person is within the meaning of "employee" under the Act.

were 'employees' within the meaning of that term as used in the Fair Labor Standards Act, but maintain they were exempt employees."[10]

The Amendment uses the *same* meaning as the Act.[11] Because exempt employees are "employees" under the Act, exempt employees are "employees" under the Amendment. Accordingly, the Court should affirm the Second District's decision. To do otherwise would put Ohio's interpretation of the Act at odds with that of the U.S. Supreme Court, all lower federal courts, and the Act's plain language.

3. If the Court departs from established case law interpreting the Fair Labor Standards Act, then the expectations of Ohio voters will be upended.

Ohioans approved a constitutional amendment that incorporates the meanings of five terms from the Fair Labor Standards Act. In doing so, voters expected that Ohio courts would use the well-established interpretations of those terms. *See* Decision at ¶15. Because federal courts have uniformly interpreted "employee" to include exempt employees, this Court should do the same. If the Court departs from established Fair Labor Standards Act jurisprudence, then the Court will upend the voters' expectations.

The fact that exempt employees are "employees" under the Act (and, thus, under the Amendment) was widely known and discussed both before and after the Amendment's passage. For example, counsel for Appellants' amici published an "E-Alert" that noted the Act's exemptions do *not* apply to the Amendment: "However, many familiar exemptions to the minimum wage—including those for executives, administrative and professional employees and computer

[10] This is Appellants' response to Request for Admission 43. Incidentally, this answer should, under Civ. R. 36, "conclusively establish" this point for purposes of this case.

[11] The Amendment only incorporates the Act's meaning of "employee." The Amendment does *not* borrow the meaning of "employee entitled to minimum wage under the Act." To hold otherwise, the Court would have to add words to the Amendment.

employees—will no longer apply in Ohio." Vorys, Sater, Seymour and Pease LLP, *Ohio Passes Sweeping Changes to Minimum Wage and Record-Keeping Laws*, (© 2006) http://www.olc.org/pdf/VSSPOhioPassesSweepingChangesMinimumWage.pdf (accessed Aug. 4, 2015).[12]

Likewise, the Ohio Manufacturers' Association stated "[t]his Amendment, which does not incorporate exemptions found under the FLSA and current Ohio law, appears to apply to numerous employees previously exempt from minimum wage requirements."[13] The Ohio Manufacturers' Association, *More on the Proposed Ohio Fair Minimum Wage Amendment: A Closer Look at the Fine Print* (2006 Archive) http://www.ohiomfg.com/communities/human-

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[12] The articles referenced in this section were part of Appellees' supplemental materials for oral argument. The Vorys article was accessed via the Ohio Library Council's website because it is not currently available on Vorys, Sater, Seymour and Pease LLP's website.

[13] *See also* Gary S. Batke, Bailey Cavalieri, *Employment Consequences of Ohio Ballot Issues 2 and 5*, (© 2006) https://www.baileycavalieri.com/57-Ohio_Ballot_Issues_2&5.pdf (accessed Aug. 4, 2015) (The Amendment "applies to all Ohio employees [except those specifically listed in the Amendment itself]." Further, the recordkeeping provisions apply for "every employee." (Emphasis sic.)); Paul D. Dorger, Keating Muething & Klekamp PLL, *Legal Alert: Ohio Voters Pass New Minimum Wage Law and Smoke Free Workplace Law*, (Nov. 15, 2006) http://www.kmklaw.com/news-publications-31.html (accessed Aug. 4, 2015) (Employers must keep records for "salaried employees, including upper management, who are presently exempt from federal minimum wage and record-keeping requirements." The article lists "exceptions to minimum-wage requirement" and includes only those exemptions actually set forth in the Amendment.); Cathy Stickels, JDSupra Business Advisor, *Ohio Employers Face New Minimum Wage and Record Keeping Requirements*, (Aug. 9, 2007) http://www.jdsupra.com/legalnews/ohio-employers-face-new-minimum-wage-and-59163 (accessed Aug. 4, 2015) (Under the Amendment, "very few exceptions to [the minimum wage] requirement exist."); Thompson Hine, *Ohio's Minimum Wage Amendment Also Imposes Recordkeeping Requirements*, (Nov. 9, 2006) http://www.thompsonhine.com/publications/ohios-minimun-wage-amendment-also-imposes-recordkeeping-requirements (accessed Aug. 4, 2015) ("Since the amendment makes no distinction between exempt and non-exempt employees, it appears that Ohio employers * * * will be required to keep payroll records for both hourly and salaried employees."). Unsurprisingly, management-side commentators changed their interpretations following the passage of R.C. § 4111.14.

resources/more-on-the-proposed-ohio-fair/ (accessed Aug. 3, 2015).[14] Even Ohioans to Protect Personal Privacy, the organization formed to oppose the Amendment's passage, and funded by four of Appellants' amici,[15] posted on their website, "Did you know... Employers would have to track daily hours worked for employees employed in executive, administrative or professional capacities and outside sales?" Ohioans to Protect Personal Privacy, *Issue 2 Fine Print Essential Facts*, https://web.archive.org/web/20061022053632/http://www.otppp.com/facts.php (accessed Aug. 21, 2015 via the Wayback Machine Internet archive).

Commentators and voters understood what this Court missed: FLSA-exempt employees are within the Act's meaning of "employee" and, thus, are within the Amendment's meaning of "employee." Either in spite of this understanding or because of it, the voters overwhelmingly approved the Amendment.

The Court's decision that exempt employees under the Act are not "employees" under the Amendment either (1) does not apply Fair Labor Standards Act jurisprudence that uniformly holds exempt employees are within the Act's meaning of "employee," or (2) does not apply the *same* meaning of "employee" under the Act to the Amendment. Either way, the decision is contrary to the expectations of all Ohio voters, regardless of the way they voted on the Amendment.

During oral argument in this case, Justice French asked,

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[14] *Citing* "For more information, please contact Betsy A. Swift at 614.227.8850 or bswift@bricker.com, Faith M. Williams at 614.227.2374 or fwilliams@bricker.com or Elizabeth C. Stock at 614.227.2323 or estock@bricker.com. Article provided by Bricker & Eckler LLP." The article also notes "[c]urrently, the [FLSA] and Ohio's minimum wage statute do not require employers to track the hours worked each day for employees employed in executive, administrative, or professional capacities or in outside sales. * * * The proposed amendment would add such a requirement…"

[15] *See, e.g.*, http://www.followthemoney.org/entity-details?eid=10239499 (accessed Mar. 22, 2016).

> I ask that kind of question all the time: don't tell me what the legislature intended, tell me what they actually enacted. How does that apply in this context where what we're talking about is an amendment that the voters passed. You can't just go back and quickly change it. How does that rule of strict construction apply here? Is it the same as if we were construing a statute?

The answer is that, while strict construction always applies, laws passed by referendum, like the Amendment, must be afforded the utmost deference to the voters' intent. A referendum is the "exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest." *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976). Where the voters' intent is to increase worker protections and use well-established interpretations of specific terms from the Act, the Court should defer to the voters. Like the U.S. Supreme Court precedent cited above, if the voters' intent and understanding is not outright binding on this Court, it is persuasive enough to warrant reconsideration so that the Court can apply well-established Fair Labor Standards Act jurisprudence. This requires affirming the Second District's decision.

4. Conclusion

This case rests on interpreting a federal statute: the Fair Labor Standards Act. Through decades of jurisprudence, federal courts, including the U.S. Supreme Court, have uniformly interpreted the Act to include exempt employees within the Act's meaning of "employee." Even Appellants admit that exempt employees are within the meaning of "employee" under the Act. Because the Amendment uses the *same* meaning of "employee," if an exempt employee is an "employee" under the Act, he or she is an "employee" under the Amendment. There is no other way to apply the *same* meaning.

This Court should reconsider its decision and answer the pertinent question: Are Appellees, as exempt employees, within the Act's meaning of "employee"? Because the answer is yes under the Act's plain language, the uniform case law interpreting the language, the voter's expectations, and Appellants' admission, Appellees are also within the Amendment's meaning of "employee." Appellees are not, however, within R.C. § 4111.14(B)(1)'s meaning of "employee." Accordingly, the Amendment and Revised Code conflict.

Appellees ask the Court to reconsider its March 17, 2016 decision and hold that exempt employees are within the meaning of "employee" under the Act and, therefore are "employees" under the Amendment. Accordingly, the Second District's decision should be affirmed.

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Certificate of Service

The undersigned hereby certifies that on the 25th day of March, 2016, a copy of the foregoing was served upon the following and by regular mail.

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