

The FLSA's Executive Exemption: A Circuit-By-Circuit Survey

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Introduction

There is no objective test for determining what an employee's "primary duty" is for purposes of the Fair Labor Standards Act of 1938's ("FLSA") executive exemption. The lack of an objective standard places a huge emphasis on case law when litigating a primary-duty case. Below are some cases that should be considered when handling a primary-duty case. The majority of the cases over the years have resulted in employer-friendly opinions. But those representing employees should not be discouraged, as more and more cases are being decided in the employees' favor—an apparent trend that continues to spread.

But before discussing those cases, a brief word on the burden of proof in these type of cases is appropriate. While all acknowledge that the employer must prove that an employee is an exempt executive, there is a disagreement over how heavy that burden is.

The Sixth and Seventh Circuits have concluded that employers must prove the applicability of an exemption by a preponderance of the evidence.¹ But the Fourth Circuit requires employers to prove the applicability of an exemption by clear and

¹ See *Renfro v. Ind. Mich. Power Co.*, 497 F.3d 573, 576 (6th Cir. 2007) ("And because establishing the applicability of an FLSA exemption is an affirmative defense, AEP has the burden to establish the following elements by a preponderance of the evidence"); *Jackson v. Go-Tane Servs., Inc.*, 56 Fed.Appx. 267, 270 (7th Cir. 2003) ("After considering the evidence presented during the trial, the court found that Go-Tane had failed to prove that Jackson was a 'bona fide executive' under the FLSA, because it had not demonstrated by a preponderance of the evidence that Jackson's 'primary duties' also consisted of the management of the Car Wash.").

convincing evidence.² The confusion apparently comes from the Tenth Circuit stating that an employer must prove by “clear and affirmative evidence” that an exemption is proper.³ Many courts have not commented on how heavy the burden is, but those who litigate the applicability of FLSA exemptions should be aware of this confusion.

There are four elements an employer must satisfy in order to take advantage of the executive exemption:

- The employer must pay the worker a salary of at least \$455 per week.
- The employee’s primary duty must be the performance of management duties.
- The employee must customarily and regularly direct the work of two or more employees.
- The employee must have the authority to hire or fire employees, or at least have the ability to offer suggestions and recommendations as to hiring, firing, advancement, promotion, or other status changes for employees, with the employer giving particular weight to those suggestions.⁴

These elements are what remained after the U.S. Department of Labor got rid of what was known as the “long test”⁵ and the “short test”⁶ and adopted a single

² See *Jones v. Va. Oil Co., Inc.*, 69 Fed.Appx. 633, 636 (4th Cir. 2003)(“An employer bears the burden of establishing by clear and convincing evidence that an employee qualifies for an exemption from FLSA’s requirements.”).

³ *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984)(citing *Walling v. Gen. Indus. Co.*, 330 U.S. 545, 547-48 (1947)).

⁴ 29 C.F.R. § 541.100.

⁵ The long test required the following: (1) the employee had to earn at least \$155 per week; (2) must have had a primary duty of management; (3) must have regularly directed the work of two or more other employees; (4) must have had the authority to hire and fire or have their personnel recommendations accorded particular weight; (5) must have regularly exercised discretionary

standard in 2004. The focus of this article is the primary-duty factor, which is fact intensive and the source of much litigation.

First Circuit

You cannot litigate a wage-and-hour case in any circuit—let alone the First Circuit—without being aware of *Donovan v. Burger King Corp.*⁷ (“*Burger King I*”). The case involved Burger King assistant managers who performed duties such as scheduling employees, assigning work, overseeing product quality, training employees, determining the quantity of food to be produced, and performing various recordkeeping, inventory, and cash reconciliation duties. But the assistant managers spent the majority of their time performing the same tasks as hourly employees—tasks such as taking orders, preparing food, and filling orders to hand to customers.

Following a bench trial in the lower court—which resulted in a finding that the assistant managers were nonexempt employees—the First Circuit had to determine the primary duty of a Burger King assistant manager. The court ultimately held that the district court erred in finding the employees to be nonexempt.

First, the court acknowledged that assistant managers were expected to follow well-defined policies created by Burger King. Tasks to be performed by assistant

powers; and (6) must not have devoted more than 40% of their workweek to activities not directly and closely related to management. 29 C.F.R. § 541.1 (2003).

⁶ The short test required the following: (1) the employee had to earn at least \$250 per week; (2) must have had a primary duty of management; and (3) must have regularly directed the work of two or more other employees. 29 C.F.R. § 541.1 (2003).

⁷ 672 F.2d 221 (1st Cir. 1982).

managers were spelled out in great detail in policy manuals. But the court found this fact insufficient because the assistant managers were expected to ensure these policies were followed. And ensuring that company policies are followed, the court found, is the very essence of supervisory work.

Second, the court was not persuaded that the employees were nonexempt employees simply because they spent the majority of their time performing nonexempt work. The court found a strict time division to be misleading because a person can be managing even while doing something else. In other words, often times employees are performing both exempt and nonexempt work simultaneously. Thus, the 50% rule of the regulations—which at that time provided that it is a good rule of thumb that an employee’s primary duty is what they spend the majority of their time doing—was better left to situations where management and nonmanagement duties were clearly severable.

Third, the assistant managers were in charge of the restaurants during their shifts. The court found support in other cases for the proposition that a person in charge of a store has a primary duty of management, regardless of the fact that the employee may spend the majority of their time performing nonexempt work.

Second Circuit

Yet another case concerning Burger King assistant managers came out of the Second Circuit—*Donovan v. Burger King Corp.*⁸ (“*Burger King II*”). *Burger King*

⁸ 675 F.2d 516 (2d Cir. 1982).

II involved essentially the same facts and arguments as *Burger King I*, and the Second Circuit reached the same conclusion as the First Circuit.

The court found that a Burger King restaurant could not operate unless the exempt duties were performed—duties such as determining amounts of food to be prepared, scheduling employees, keeping track of inventory, and assigning employees to particular jobs. This led the court to conclude that the performance of managerial work was more important than the performance of nonmanagerial work.

The court, much like the First Circuit, rejected the argument that Burger King’s detailed policy manuals limited the discretion of assistant managers to the point that they were nonexempt employees. The court noted the economic genius in maintaining uniform products and services throughout the chain, and found that assistant managers still were expected to use their judgment. The court found that in the low-margin circumstances of Burger King’s business, mistakes regarding the wrong number of employees, too many or too few supplies, delays in service, or an undirected and unsupervised work force could mean the difference between success and failure.

Third Circuit

The case of *Guthrie v. Lady Jane Collieries, Inc.*⁹ involved individuals who worked at a coal mine and spent just 44% of their time performing managerial work. In finding that the employees were exempt, the court concluded that the

⁹ 722 F.2d 1141 (3d Cir. 1983).

employees were essentially on their own when working underground. The employees' safety and supervisory functions were essential to the operation of the mine, and so the fact that these employees may have also performed nonexempt duties simultaneously did not persuade the court that the exempt duties should be regarded as nonmanagerial.

Fourth Circuit

Perhaps the most important executive-exemption case to come out of the Fourth Circuit is *Jones v. Virginia Oil Co.*,¹⁰ which involved a manager of a convenience store and Dairy Queen combination store. The manager spent 75-80% of her time performing nonexempt duties, such as cooking burgers, serving ice cream, cleaning, operating the cash register, stocking, and sweeping the parking lot. The remainder of her time was spent performing duties such as completing paperwork, conducting inventory, and filling out the weekly schedule.

The Fourth Circuit found the manager to be an exempt employee not entitled to overtime pay. The manager was usually the senior-most person in the store, and exercised plenty of discretion over duties such as hiring, training, scheduling, disciplining, and firing employees. She was not constrained by her superiors in the day-to-day operations of the store. And, the court concluded, the Dairy Queen could not have functioned unless the manager performed the exempt duties.

¹⁰ 69 Fed.Appx. 633 (4th Cir. 2003).

Fifth Circuit

There is not a single Fifth Circuit decision that neatly sums up how the court analyzes the primary-duty factors. But the case of *Kastor v. Sam's Wholesale Club*¹¹ out of the Northern District of Texas is indicative of how the majority of courts within the circuit view primary-duty cases. It involved an employee that managed a bakery. He spent 90% of his time performing the same work as hourly employees—baking, packaging baked products, stocking baked items, refilling inventory, getting supplies from the freezer, cleaning, and taking and preparing food orders.

But the court noted that within the Fifth Circuit determining an employee's primary duty took more than applying a simple clock standard. Although the employee spent the vast majority of his time on nonexempt work, that was not the purpose of his employment, according to the court. The performance evaluation used by the company to evaluate the performance of managers in the bakery department indicated that the manager was only required to assist with production on an as necessary basis.

The court rejected the argument that the employee did not exercise discretion because he did not have the independent and sole authority to act over several managerial tasks. The court found that an employee need not have final say over managerial decisions—few managers do the court noted. So the court found that

¹¹ 131 F.Supp.2d 862 (N.D. Tex. 2001).

final decision-making authority was not necessary for an employee to qualify for the executive exemption.

Sixth Circuit

The case of *Thomas v. Speedway SuperAmerica, LLC*¹² involved a gas-station/convenience-store manager who spent 60% of her time performing nonexempt duties. These duties included stocking merchandise, sweeping floors, cleaning bathrooms, operating the register, and performing routine clerical duties.

Still, the court concluded that her primary duty was the performance of managerial duties. If the manager would not have performed her managerial duties, the court concluded, the gas station would not function at all. On the other hand, if she failed to perform her nonmanagerial duties, the gas station would operate less efficiently perhaps, but, in the court's view, it would still function.

The court also found the manager to be relatively free from supervision, and that she exercised discretion on a daily basis. While her discretion was not unfettered, she exercised discretion over important managerial functions frequently enough to support a finding that management was her primary duty. The fact that she had a district manager was of no consequence because the court concluded that a store manager's job is no less managerial simply because she has an active district manager.

¹² 506 F.3d 496 (6th Cir. 2007).

Seventh Circuit

In *Jackson v. Go-Tane Services, Inc.*,¹³ the Seventh Circuit affirmed a lower court's decision finding that a manager of a car wash was a nonexempt employee. The testimony showed that the employee spent 95% of his time performing the same duties as the car wash attendants—duties such as sweeping, window cleaning, gardening, emptying the garbage, cleaning the wash tunnels, and booth cleaning.

The lower court concluded that the employee was called a “manager,” but was far from it. The employee could not hire or fire any employee without approval, and did not have the authority to set rates of pay for employees. There was a wealth of evidence that demonstrated that very few managerial responsibilities were entrusted to the employee. And to the extent the employee did perform managerial duties, these duties were not near as important as the nonmanagerial duties. The employee had very little independent discretion concerning the operation of the car wash—leading the court to conclude that the employee was nothing more than a glorified car-wash attendant.

Eighth Circuit

The case of *Murray v. Stuckey's, Inc.*¹⁴ out of the Eighth Circuit involved managers of roadside convenience stores/gasoline stations/restaurants. Managers spent 65-90% of their time performing nonmanagement duties such as pumping gas,

¹³ 56 Fed.Appx. 267 (7th Cir. 2003).

¹⁴ 939 F.2d 614 (8th Cir. 1991).

mowing grass, waiting on customers, and stocking shelves. Still, the court—relying on *Burger King I* and *Burger King II*—found the managers to be exempt employees.

The court rejected the argument that standardized policies meant that the managers were nonexempt employees. It found that the managers still had primary duties of management despite the company's desire for standardization and uniformity. The court also rejected the argument that the regional managers were the actual managers of the store. While acknowledging that the regional managers actively supervised the store managers, this fact did not make the store managers' jobs any less managerial.

Ninth Circuit

In *Baldwin v. Trailer Inns, Inc.*,¹⁵ the Ninth Circuit found the managers of an RV park to be properly exempt under the executive exemption, despite the fact that they spent 90% of their time performing nonexempt duties. The court found that someone had to be managing the park, and that responsibility fell on the managers. And the fact that the assistant managers performed many of the managerial duties made no difference. It was the managers who were in charge of directing the day-to-day operations of the park, and that was their principal value to the company.

¹⁵ 266 F.3d 1104 (9th Cir. 2001).

Tenth Circuit

There is not one good opinion from the Tenth Circuit or from a court within the circuit that is indicative of the general attitude towards misclassification cases. Cases have gone both in favor of employees and employers, without much analysis.¹⁶

Eleventh Circuit

In *Morgan v. Family Dollar Stores, Inc.*,¹⁷ the Eleventh Circuit affirmed a jury's verdict finding that a group of store managers from Family Dollar were nonexempt employees. The store managers spent 80-90% of their time performing nonexempt duties. And while this fact was not dispositive, it did weigh in favor of a nonexempt finding.

The court rejected the argument that simply because an employee is in charge that employee must be exempt, and instead found that Family Dollar's business model required store managers to spend the vast majority of their time performing the same duties as hourly employees. The court found that the store-manager job description contemplated the performance of manual-labor duties, and so a

¹⁶ Compare *Ward v. Park Ave. Exploration Corp.*, No. 94-6157, 1994 U.S. Dist. LEXIS 36093 (10th Cir. 1994)(finding the case was inappropriate for summary judgment because the employee disputed that he had significant input into hiring and firing decisions, he disputed the level of discretion and decision-making ability he had, and he alleged that he spent 60% of his time performing nonexempt work), with *Johnson v. DG Retail LLC*, No. 1:08-CV-123 TS, 2010 U.S. Dist. LEXIS 47416 (D. Utah May 13, 2010)(finding a manager of a retail operation to be an exempt employee on summary judgment).

¹⁷ 551 F.3d 1233 (11th Cir. 2008).

reasonable jury could conclude that this was the most important duty of a store manager.

Other Relevant Cases

With employer-friendly cases in just about every circuit, the thought of filing a primary-duty lawsuit may not be appealing. But a recent flurry of cases—which is beginning to look more and more like a trend—has given hope to employees alleging they were wrongly classified.

It all really began with the Eleventh Circuit's decision in *Morgan v. Family Dollar Stores, Inc.*,¹⁸ which affirmed a jury's finding that a group of store managers were nonexempt employees entitled to overtime compensation. If at all possible, it's best to file a lawsuit alleging misclassification under the executive exemption within the Eleventh Circuit. But filing lawsuits elsewhere shouldn't be totally avoided because the Eleventh Circuit's reasoning has spread.

Employee-friendly cases have arisen within several circuits, such as the Second, Third, Fourth, and Eighth Circuits. The following is a list of cases that should be taken into account before and during a primary duty case:

- *Barreto v. Davie Marketplace, LLC*, 331 Fed.Appx. 672 (11th Cir. 2009).

Where an employee spends the majority of his time on nonexempt work and has admittedly few managerial-type obligations, there is at least a factual question as to

¹⁸ 551 F.3d 1233 (11th Cir. 2008).

whether the nonexempt duties are comparatively more important than the exempt duties.

- *Clougher v. Home Depot U.S.A., Inc.*, 696 F.Supp.2d 285 (E.D.N.Y. 2010).

Although the employer argued that the store could not have operated efficiently if the employee did not perform his managerial duties, a question of fact existed because the employee rarely performed managerial tasks and did so in strict accordance with company policies.

- *Davis v. Wal-Mart Stores, Inc.*, No. 3:10cv68-WHA (wo), 2010 U.S. Dist. LEXIS 95172 (M.D. Ala. Sept. 13, 2010).

The plaintiff was required to perform manual-labor duties because of the lack of employee hours to accomplish all necessary duties, and the job description contemplated the performance of manual-labor duties.

- *Hale v. Dolgencorp, Inc.*, No. 1:09CV00014, 2010 U.S. Dist. LEXIS 62584 (W.D. Va. June 23, 2010).

A reasonable jury could conclude that the employer valued the employee's ability to stock shelves, operate a cash register, and promptly notify her superior when problems within the store arose.

- *Johnson v. Big Lots Stores, Inc.*, 604 F.Supp.2d 903 (E.D. La. 2009).

The employee's completion of manual-labor duties was critical to the success of the store because of the employer's policy of avoiding overtime hours and not allowing stores to exceed labor budgets the employer provided to the store.

- *Kanatzer v. Dolgencorp, Inc.*, No. 4:09CV74 CDP, 2010 U.S. Dist. LEXIS 67798 (E.D. Mo. July 8, 2010).

Traditionally exempt duties should not be considered in the primary-duty analysis when those duties are reduced to simply applying well-established techniques described in manuals provided by the employer.

- *McKinney v. United Stor-All Centers LLC*, 656 F.Supp.2d 114 (D.D.C. 2009).

The employee stayed in touch with the district manager by phone and email, and was required to obtain approval prior to a number of managerial duties being performed, which undermined the employer's assertion that the employee was relatively free from supervision.

- *Myrick v. Dolgencorp, LLC*, No. 7:09-CV-5 (HL), 2010 U.S. Dist. LEXIS 1781 (M.D. Ga. Jan. 11, 2010).

The court refused to guess or assume that the employer valued the employee's performance of managerial duties more simply because she received a bonus and higher wages.

- *Plaunt v. Dolgencorp, Inc.*, No. 3:09cv079, No. 1:09cv084, 2010 U.S. Dist. LEXIS 132135 (M.D. Pa. Dec. 14, 2010).

It becomes difficult not to find a genuine issue of material fact as to what the employer truly values when considering the following: (1) the employee spends more than 50% of their time on nonmanagerial duties and, thus, as a rule of thumb has a primary duty of nonmanagment; (2) the employer bears the burden of proof; (3) exemptions are narrowly construed against employers; and (4) the evidence on summary judgment must be viewed in a light most favorable to the nonmovant.

Conclusion

With cases such as *Burger King I* and *Burger King II* dominating for the last three decades, employees face an up-hill battle when seeking overtime pay they allege to be entitled to. But the Eleventh Circuit's recent decision has provided hope for employees, and left a host of opinions sympathetic to employees in its wake.

Courts are now really beginning to understand how inherently fact intensive the primary-duty inquiry can be. Considering this fact and the fact that there is no objective test for determining what an employee's primary duty is, many courts are refusing to take the primary-duty inquiry out of the hands of the jury on summary judgment.