IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 16, 2021
Lyle W. Cayce
Clerk

No. 19-10467

SERGIO LEAL, and all others similarly situated under 29 U.S.C. § 216(b),

Plaintiff–Appellant,

v.

MAGIC TOUCH UP, INCORPORATED; CHARLES R. WHITE, JR.; JAMES B. WHITE,

Defendants–Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CV-662

Before OWEN, Chief Judge, and SOUTHWICK and OLDHAM, Circuit Judges.

PRISCILLA R. OWEN, Chief Judge:*

This is a Fair Labor Standards Act case. Sergio Leal seeks unpaid overtime wages. A jury returned a verdict finding that Magic Touch Up, Inc. did not fail to pay Leal overtime wages, but it did not reach Magic Touch Up's affirmative defense. Post-trial, Leal moved for judgment as a matter of law

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

and for a new trial, and both motions were denied. We affirm the district court's judgment.

I

Magic Touch Up, Inc. employed Sergio Leal as a paint prepper at its automobile-painting business in Dallas, Texas from February 6, 2015, through March 4, 2016. For the first three months of Leal's employment, Magic Touch Up paid him $16 per hour for the first 40 hours and time and one-half for all hours worked over 40 in any workweek. Leal makes no claim for those three months.

Leal sued for unpaid overtime wages for the remainder of his employment with Magic Touch Up. During that time, Magic Touch Up paid Leal based on three different commission plans. Under each commission plan, Leal's compensation was determined by his accrual of "flag" hours. Flag hours are not a literal representation of the amount of time it takes an employee to complete a task; rather, they are a set number of hours charged to the customer for performance of a particular service. To distinguish flag hours from actual hours worked, we refer to a flag hour as a "point." Under each commission plan, Leal was paid every two weeks.

Under the First Commission Plan, used April 30, 2015, through January 20, 2016, Leal was paid $12.80 per point for the first 50 points he accrued in each week and $3.50 for each additional point. Under the Second Commission Plan, used January 21 through February 3, 2016, Magic Touch Up implemented a team system. A single team included three paint preppers and one painter. The team earned points together, and the painter received 40 percent of the team's commissions while each paint prepper received 20 percent. Under the Third Commission Plan, used February 4 until the termination of Leal's employment on March 4, 2016, a team system continued.

A team included a painter who was paid 60 percent of the team's commissions, a paint prepper who was paid 30 percent, and a buffer who was paid 10 percent.

Leal brought claims under the Fair Labor Standards Act (FLSA) for unpaid overtime wages under each commission plan. At trial, the issue was whether Magic Touch Up failed to pay Leal overtime wages as required by law. Magic Touch Up claimed it was exempt from the FLSA's overtime provisions under the Retail or Service Establishment Exemption. At the close of the evidence, Leal moved for judgment as a matter of law on both the liability element of his FLSA claim and Magic Touch Up's exemption defense. The district court denied his motion.

Magic Touch Up then moved for judgment as a matter of law on its exemption defense. The court deferred ruling on the motion and submitted the case to the jury. The jury returned a verdict finding that Magic Touch Up did not fail to pay Leal overtime wages required by law. It therefore did not reach the question of whether Magic Touch Up proved its exemption defense. Leal renewed his motion for judgment as a matter of law and moved for a new trial. The district court denied those motions as well. Leal appealed.

II

Leal contends that the district court erred in failing to disregard the jury's verdict and in failing to hold that, as a matter of law, Leal was entitled to overtime pay. We review a district court's ruling on a motion for judgment as a matter of law de novo.[1] "Although our review is de novo, . . . our standard of review with respect to a jury verdict is especially deferential."[2] Therefore, a party is not entitled to judgment as a matter of law, notwithstanding a jury's

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[1] *Evans v. Ford Motor Co.*, 484 F.3d 329, 334 (5th Cir. 2007) (quoting *Brown v. Bryan Cnty.*, 219 F.3d 450, 456 (5th Cir. 2000)).

[2] *Id.* (alteration in original) (emphasis omitted) (quoting *Flowers v. S. Reg'l Physician Servs. Inc.*, 247 F.3d 229, 235 (5th Cir. 2001)).

verdict, "unless the facts and inferences point 'so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion.'"[3]

The FLSA provides that "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate."[4] The district court followed this circuit's pattern jury instruction and instructed the jury that Leal was required to establish by a preponderance of the evidence that (1) he was an employee of Magic Touch Up during the relevant period, (2) Magic Touch Up had gross annual sales of at least $500,000 during the relevant time period, and (3) Magic Touch Up failed to pay Leal "overtime pay required by law."[5] The jury was also instructed that the parties stipulated to the first two elements and only the third element was in dispute.

The district court further instructed the jury as to what the FLSA required in order for Leal to meet his burden of proof, which included that Leal worked more than 40 hours in a given workweek and that he was not paid at a rate of at least one and one-half times the regular rate for those additional hours. The uncontroverted evidence shows that Leal regularly worked more than 40 hours in a workweek under all three commission plans. The evidence also shows that Leal did not receive overtime pay under those plans. Commission pay is not overtime pay.[6]

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[3] *Flowers*, 247 F.3d at 235 (quoting *Omnitech Int'l, Inc. v. Clorox Co.*, 11 F.3d 1316, 1323 (5th Cir. 1994)).

[4] 29 U.S.C. § 207(a)(1).

[5] *See* PATTERN CIV. JURY INSTR. 5TH CIR. 11.24(B) (2014) (brackets and emphasis omitted).

[6] *See* 29 C.F.R. §§ 778.109, 778.117 (2021).

Magic Touch Up argues that the phrase "required by law" subsumes the exemption that it claims, and contends that the jury properly concluded that Magic Touch Up did not fail to pay Leal overtime pay "required by law" because Leal was an exempt retail or service employee and therefore not entitled to overtime pay. This contention fails because whether an employee is exempt from overtime pay is an affirmative defense, and the employer has the burden of proof.[7]

The issue submitted to the jury required Leal to prove by a preponderance of the evidence that he did not receive "overtime pay required by law." The jury answered "No" on this issue as to each of the Commission Plans. Magic Touch Up's position that the jury found that Leal was exempt from overtime is not a correct interpretation of the jury's answer to the issues because it improperly shifts the burden of proof regarding the exemption defense to Leal. The jury's *failure to find* by a preponderance of the evidence that Magic Touch Up failed to pay Leal overtime pay "required by law" is not an affirmative finding, by a preponderance of the evidence, that Leal was an exempt employee. Moreover, such an interpretation is contrary to the instructions the jury received. The jury was separately and extensively instructed as to what it would have to find in order to conclude that Leal was exempt from the payment of overtime. The jury instructions comported with this court's precedent, which is that "the employer 'has the burden of proving that the employee falls within the claimed exempted category.'"[8] To establish his prima facie case for overtime pay, Leal needed to prove only that he worked

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[7] *F.T.C. v. Nat'l Bus. Consultants, Inc.*, 376 F.3d 317, 322 (5th Cir. 2004) (citing *United States v. Cent. Gulf Lines, Inc.*, 974 F.2d 621, 629 (5th Cir. 1992)); *see also Smith v. Ochsner Health Sys.*, 956 F.3d 681, 683 (5th Cir. 2020).

[8] *Johnson v. Heckmann Water Res. (CVR), Inc.*, 758 F.3d 627, 630 (5th Cir. 2014) (quoting *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 636 (5th Cir. 2001)).

more than 40 hours per week and was not paid one and one-half times the regular rate for those hours. Based on the evidence presented at trial, he made that showing. However, Leal was not entitled to judgment as a matter of law if Magic Touch Up's affirmative defense was established as a matter of law. We turn to that issue.

III

The jury issues inquiring whether Magic Touch Up established its affirmative defense were conditionally submitted. The jury was instructed to skip answering the question whether Leal was exempt from overtime pay as a retail or service establishment employee if it answered "No" to the question whether Leal had proven by a preponderance of the evidence that Magic Touch Up failed to pay Leal overtime pay as required by law. Since the jury answered "No" to the issues on which Leal had the burden of proof pertaining to each of the Commission Plans, the jury did not resolve whether Magic Touch Up established its affirmative defense by a preponderance of the evidence.

Both parties moved for judgment as a matter of law as to the Retail or Service Establishment Exemption. In reviewing the denial of judgment as a matter of law, we apply the same standards as the district court.[9] "The district court properly grants a motion for judgment as a matter of law only if the facts and inferences point so strongly in favor of one party that reasonable minds could not disagree."[10]

It is undisputed that Magic Touch Up is a retail or service establishment. The Retail or Service Establishment Exemption of 29 U.S.C. § 207(i) is met if (1) Leal's "regular rate of pay" is greater than one and one-half times the

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[9] *Adams v. Groesbeck Indep. Sch. Dist.*, 475 F.3d 688, 690 (5th Cir. 2007) (citing *Int'l Ins. Co. v. RSR Corp.*, 426 F.3d 281, 296 (5th Cir. 2005)).

[10] *Gomez v. St. Jude Med. Daig Div. Inc.*, 442 F.3d 919, 927 (5th Cir. 2006) (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 576 n.9 (5th Cir. 2001)).

federal minimum wage and (2) "more than half [of Leal's] compensation for a representative period (not less than one month) represents commissions on goods or services."[11] The FLSA specifies that "all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee."[12]

Leal argues that the district court erred in denying his motion for judgment as a matter of law on the exemption defense for three reasons. He alleges (1) all three commission plans fail under the first element, (2) the First Commission Plan also fails under the second element, and (3) the First Commission Plan is not bona fide.

A

Leal argues that Magic Touch Up cannot meet its burden on the first element because it did not keep the records necessary to prove that Leal's regular rate of pay was in excess of $10.88. He also argues that the First Commission Plan fails under this element because it is front-loaded.

To satisfy the first element of the exemption, the employee's "regular rate of pay" must exceed $10.88—one and one-half times the federal minimum wage.[13] When an employee is not paid on an hourly rate basis, the regular rate is determined by dividing the employee's total pay during one week by the number of hours he worked that week.[14] Leal contends that Magic Touch Up cannot show that it paid him over $10.88 per hour each week because it paid

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[11] 29 U.S.C. § 207(i).

[12] *Id.*

[13] *Id.*

[14] 29 C.F.R. § 778.109 (2021).

him on a two-week pay system and failed to keep records of the points he earned on a weekly basis.

This argument fails as to the First Commission Plan because the evidence conclusively establishes that Leal's regular rate of pay exceeded $10.88 per hour. Under the First Commission Plan, Leal was paid at a rate of $12.80 per point for the first 50 points he earned each week. His pay stubs show that each two-week pay period, Leal was paid the entire $1,280, meaning that he was earning at minimum $640 per week. With his weekly earnings at a minimum of $640 per week, Leal would have to work over 58 hours per week before his hourly rate of pay fell below $10.88. The undisputed evidence shows that Leal never worked over 58 hours in any week during the time he was being paid under the First Commission Plan. Thus, the evidence conclusively establishes that Leal's regular rate of pay was in excess of $10.88. For this reason, Leal's contention that his pay under the First Commission Plan was "front-loaded," and thus his regular rate of pay occasionally fell below $10.88, also fails.

The Second and Third Commission Plans employed a different pay structure. Although the regular rate of pay typically must be calculated on a weekly basis, there is an exception to the one-week computation rule if an employer establishes that "it is not possible or practicable" to calculate an employee's regular rate on a weekly basis.[15] In that case, the employer may "[a]ssume that the employee earned an equal amount of commission in each week of the commission computation period" and determine the regular rate by "divid[ing] the total amount of commission by the number of weeks for which

[15] *Id.* § 778.120.

it represents additional compensation to get the amount of commission allocable to each week."[16]

It was not practicable for Magic Touch Up to track Leal's points on a weekly basis. At trial, witnesses testified that calculating pay on the commission system took extensive work, taking as long as fifteen hours to complete, and it was not feasible to do that every week. The process of calculating pay involved verifying the points claimed by each employee and interviewing the employees when there were inconsistencies in the claimed points. Because of the amount of work involved and the quick turnaround required to get the payroll out on time, this process could take Leal's employer, Brodie White, until four in the morning the day before payroll was due. These facts establish that it was impracticable for Magic Touch Up to calculate pay on a weekly basis. Therefore, Leal's regular rate of pay can be calculated using the bi-weekly pay stubs and assuming that Leal earned an equal amount of compensation in each week of the pay period. Using this calculation method, Leal's regular rate of pay always substantially exceeded $10.88. All three commission plans meet the first element of the exemption.

B

Leal argues that Magic Touch Up has not established that more than half of his pay under the First Commission Plan was commissions. Leal points to his pay stubs which each list a $1,280 payment labeled as "salary" and a separate amount labeled "commission," which in all but two instances was less than $1,280. However, Magic Touch Up presented uncontroverted testimony that the $1,280 was the commissions paid to Leal at $12.80 for the first 50 points he earned each week. The amount labeled "commission" was for the points paid at the $3.50 rate. The testimony established that the $1,280 was

[16] *Id.* § 778.120(a).

only labeled "salary" because the payment system did not allow Magic Touch Up to designate two different commission rates. The $1,280 was not guaranteed—if Leal did not accrue at least 50 points each week, he would not earn it. Leal also admitted at trial that the "salary" Magic Touch Up paid him was conditioned on him earning 100 points every two weeks. The evidence thus shows that all of Leal's pay except for a small year-end bonus was commissions. The second element is easily met.

C

Finally, Leal argues that the First Commission Plan is not bona fide because the pay structure creates a disincentive to earn over 50 points each week. Challenging a commission plan as non-bona fide is an attack on the Retail or Service Establishment Exemption's second element, which requires the use of a "bona fide commission rate."[17] The FLSA does not define what makes a commission plan bona fide.[18] The Department of Labor issued a nonbinding regulation interpreting the term by providing two negative examples:

> A commission rate is not bona fide if [(1)] the formula for computing the commissions is such that the employee, in fact, always or almost always earns the same fixed amount of compensation for each workweek[,] . . . [or (2)] the employee receives a regular payment constituting nearly his entire earnings which is expressed in terms of a percentage of the sales which the establishment or department can always be expected to make with only a slight addition to his wages based upon a greatly reduced percentage applied to the sales above the expected quota.[19]

The First Commission Plan passes muster under both examples. As to the first example, the evidence shows that Leal's compensation varied from

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[17] 29 U.S.C. § 207(i).

[18] *See id.* § 207.

[19] 29 C.F.R. § 779.416(c) (2021).

week to week under the First Commission Plan. His bi-weekly pay ranged from as high as $3,646.75 to as low as $1,721. He therefore did not earn the same fixed amount of compensation for each workweek. As to the second example, even if the $1,280 Leal was paid for the first 50 points he earned each week could be considered a regular payment based on sales Magic Touch Up could always be expected to make, that payment did not constitute "nearly his entire earnings." In fact, the $1,280 never constituted more than 75 percent of Leal's total pay, and, in two instances, constituted less than 40 percent of his total pay. The $1,280 therefore cannot be said to have constituted nearly all of Leal's earnings.

These examples are not exhaustive, and we also look to our sister circuits for guidance as to the meaning of a bona fide commission plan. Both the Seventh and Eleventh Circuits have approved of commission systems operating on a point, or "flag hour," system.[20] The Seventh Circuit noted that the flag hour system at issue was a bona fide commission plan because the commissions were "decoupled from actual time worked."[21] The Third Circuit also remarked that decoupling compensation from actual time worked is a hallmark of a commission.[22] Here, the decoupling is present. Leal could increase his hourly rate by completing jobs faster. The system is not tied to hours worked but to efficiency.

However, the point system in the First Commission Plan differs from the systems the Seventh and Eleventh Circuits encountered because the First

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[20] *See Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 509 (7th Cir. 2007) (using the term "booked hours" rather than flag hours); *Klinedinst v. Swift Invs., Inc.*, 260 F.3d 1251, 1256 (11th Cir. 2001).

[21] *Yi*, 480 F.3d at 509, 511.

[22] *Parker v. NutriSystem, Inc.*, 620 F.3d 274, 284 (3d Cir. 2010) (first quoting *Yi*, 480 F.3d at 509; and then citing U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on Fair Labor Standards Act (FLSA) (Nov. 14, 2005)).

Commission Plan pays workers at a lower wage rate after the first 50 points earned each week. Leal contends that this demonstrates that the commission plan was not made in good faith and therefore is not bona fide. Black's Law Dictionary defines "bona fide" as "[m]ade in good faith; without fraud or deceit."[23] It makes sense, then, that a commission plan not made in good faith is not bona fide under the FLSA.

However, nothing indicates that the First Commission Plan was not made in good faith. The fact that points earned after the first 50 each week were less profitable than the first 50 earned does not demonstrate bad faith. The evidence shows that under the First Commission Plan, Leal always earned substantially more than 100 points every two weeks. The evidence also shows that Leal's hourly rate under the First Commission Plan was always higher than his hourly rate before the points system was implemented. Leal clearly still had an incentive to work after the first 50 points each week, even at this lower rate. Even if the pay structure did create a disincentive to earn in excess of 50 points per week, that fact alone does not establish that the plan was not made in good faith. Here, testimony establishes a good faith reason for implementing the commission system—encouraging employees to work more efficiently and make fewer mistakes. Leal's argument that the First Commission Plan was not bona fide fails.

Because reasonable minds could not differ as to whether Magic Touch Up established the elements of its affirmative defense, the jury's verdict in favor of Magic Touch Up was proper—regardless of the jury's finding that Magic Touch Up did not fail to pay overtime as required by law. Magic Touch Up was exempt from paying Leal overtime wages via the Retail or Service Establishment Exemption. Thus, Magic Touch Up was entitled to judgment

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[23] *Bona Fide*, BLACK'S LAW DICTIONARY (11th ed. 2019).

as a matter of law and, accordingly, judgment in favor of Magic Touch Up was proper. In light of this holding, the district court did not abuse its discretion in denying Leal's motion for a new trial.[24]

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The district court's judgment in favor of Magic Touch Up is AFFIRMED.

[24] *See Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1049 (5th Cir. 1998).