

First Circuit Holds that Jury Can Decide Whether Store Managers Were Exempt from the Overtime Requirements of the FLSA

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Last week, the U.S. Court of Appeals for the First Circuit reversed summary judgment to the employer, an operator of Dunkin' Donuts stores, on claims by two former managers that they were improperly denied overtime under the federal Fair Labor Standards Act ("FLSA"). Under the FLSA, an employee can perform both exempt and non-exempt duties and still be considered exempt for overtime purposes, provided that the exempt tasks reflect the employee's primary duty. In *Marzuq v. Cadete Enterprises, Inc.*, the Court of Appeals believed that there were disputes of fact regarding the employees' primary duty.

In that case, two former Dunkin' Donuts store managers alleged that they were misclassified as exempt and denied overtime pay. They were responsible for training and supervising the employees in the store, interviewing candidates for hiring, and setting work schedules. The plaintiffs described themselves as being "in charge" and the "captains of the store." However, they also said that they worked more than 60 hours per week and spent a significant amount of time doing non-exempt work, such as serving customers, covering other employees' shifts and cleaning. According to one of the plaintiffs, he spent 90% of the time "on the floor" and thus did not have enough time to be a manager.

The employer moved for summary judgment, arguing that the managers were exempt under the executive exemption to the FLSA. Under the executive exemption, the employer must show that (1) the employee's salary is at least \$455 per week; (2) the employee's primary duty is management; (3) the employee directs the work of two or more other employees, and (4) the employee has the power to hire or fire other employees or make recommendations regarding those subjects. The plaintiffs did not dispute that the first, third and fourth prongs were met, but disputed that management was their primary duty. The district court granted summary judgment to the employer, holding that the facts were indistinguishable from a prior First Circuit decision, *Donovan v. Burger King Corp.*, 672 F.3d 221 (1st Cir. 1982), where the court had ruled that the employer properly classified its managers as exempt even though they spent up to 40% of their time doing non-exempt work. Plaintiffs appealed to the First Circuit.

The First Circuit reversed the grant of summary judgment, holding that there were disputes of fact regarding the plaintiffs' primary duty. The First Circuit acknowledged that the plaintiffs were in charge of the stores and that they could manage subordinates even when working side-by-side with them and performing non-exempt tasks. However, because the plaintiffs claimed to have spent 90% of their time on the floor and worked 60 hours per week, it believed that a jury could conclude that the plaintiffs performed two jobs – a full-time non-exempt job and a part-time manager job. The Court also relied on the fact that corporate management closely supervised their work and that they earned less than their non-exempt colleagues on an hourly basis. It thus remanded the case to the district court.

Although the FLSA is clear that the performance of non-managerial work will not disqualify an employee from the executive exemption and the amount of time spent performing those tasks is not the sole test, the decision in *Marzuq* highlights how these can be difficult issues for employers on summary judgment. The plaintiffs never stopped being "in charge" of their stores, yet were able to survive summary judgment based on their own testimony regarding how much time they spent performing work "on the floor." The Court acknowledged that this testimony, even if true, did not mean that they stopped being managers, but it nonetheless believed that the case should go to a jury. As **we previously reported**, the Department of Labor has proposed to increase the minimum salary required for the executive exemption, as well as for the administrative and professional exemptions. If finalized, this will require employers to reconsider employees' exempt status, particularly first-line managers. The decision in *Marzuq* is a reminder, however, that employers must also review the duties performed by exempt employees. It is not enough to pay them a salary.

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