No. 98-1167

IN THE
Supreme Court of the United States

EDWARD CHRISTENSEN, *et al.*,
Petitioners,

v.

HARRIS COUNTY, TEXAS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

This brief *amicus curiae* is filed by the International Association of Fire Fighters, AFL-CIO, C.L.C. ("IAFF"), an unincorporated association comprised of municipal, state, federal and private sector fire fighters and emergency

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

medical services employees located throughout the United States and Canada, in support of the petitioners, Edward Christensen, *et al.* The parties to this case have consented to the filing of this brief *amicus curiae,* as provided for in the Rules of this Court. The parties' signed consent forms have been filed with the Clerk of this Court in accordance with these Rules.

The IAFF has over 225,000 state and municipal members. The IAFF's mission includes protecting the safety and improving the working conditions for fire fighters and emergency medical services personnel, as well as advancing the general health and welfare of those employees through collective bargaining, court action, grass roots lobbying and other appropriate means.

As public sector employees, many IAFF members are subject to comp time arrangements in their workplaces. Indeed, IAFF members who have earned time off by working long overtime hours have found that, with careful planning, comp time can be a useful benefit. For instance, IAFF members have used comp time to spend additional time with their families on planned family vacations, or to tend to the medical or child care needs of their families. This benefit is severely undermined, if not eliminated, by a policy which would allow their employers to force them to use their hard-earned comp time at their employer's convenience. Moreover, IAFF members who are covered by comp time policies believe that it is only fair that they be allowed control over the use of their comp time in the same manner that IAFF members not subject to such policies are allowed to spend their cash overtime on whatever they wish.

The IAFF has worked hard to ensure that the comp time arrangements covering its members are implemented

and administered fairly and in a manner consistent with the law. Nevertheless, the employers of some IAFF members have attempted to subject IAFF members to forced usage policies. While the IAFF has successfully defeated such attempts, *see, e.g., Rogers v. City of Virginia Beach,* No. 98-2253, 1999 WL 498707 (4th Cir. July 15, 1999), its ability to continue to protect its members' rights in this respect is obviously dependent upon the outcome in this case. Accordingly, the IAFF and its members have a direct and substantial interest in the case before this Court.

SUMMARY OF ARGUMENT

The Fair Labor Standards Act (FLSA) requires all employers to whom it applies to compensate employees for all overtime hours worked, at a rate not less than one and one-half times their regular rate. Congress imposed this requirement upon employers to protect workers from substandard wages and oppressive working conditions, and to spread employment by placing financial pressure on the employer who would otherwise schedule massive overtime hours.

In 1985, Congress provided a narrow exception from the Act's overtime requirement that allows employees of a public agency to receive compensatory time in lieu of cash overtime compensation, subject to the conditions set forth in 29 U.S.C. § 207(o). Because § 207(o) is a limited exception to the requirement that employees must be paid cash overtime, it must be narrowly construed against the employer who seeks to take advantage of this exception. An employer whose comp time policy does not fit within this narrow exception must provide cash overtime to its employees.

In § 207(o)(3), Congress allows employees to create comp time banks, but limits the amount of comp time

that may be accrued in these banks. Any overtime worked by an employee who has accrued the maximum amount of comp time hours allowed by this statutory cap must be paid in cash for additional overtime hours. The FLSA provides only three mechanisms by which an employer may reduce the accrued comp time balance of an employee: by paying the employee cash for these hours; by cashing out the comp time upon the employee's termination; or by granting an employee's request to use comp time. The FLSA does not allow an employer to reduce an employee's comp time balance by forcing the employee to take time off from work.

The Fifth Circuit Court of Appeals erred by concluding that Harris County could unilaterally force its employees to use their comp time simply because the FLSA does not specifically prohibit this practice. Under similar circumstances, this Court has held that Congress' failure to specifically prohibit an employer practice under the FLSA does not preclude it from invalidating that practice, where the legislative policy of the FLSA would be thwarted by allowing the practice. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 713 (1945). The forced usage policy unilaterally imposed by Harris County is inconsistent with § 207(o) not only because it is not one of the three mechanisms by which Congress specifically allows employers to reduce the accrued comp time of their employees, but also because it allows an employer to evade, both intentionally and indefinitely, the requirement that it pay cash overtime to employees who have accrued more than the statutory cap set forth in § 207(o)(3). Moreover, Harris County's policy thwarts the FLSA's purpose by allowing employers to restrict the ability of employees to request use of their comp time, as provided in § 207(o)(5), and by allowing employers to control the way in which its employees spend their comp time. The exercise of such control over an employee's cash overtime is comparable to, and as impermissible as, the use of company scrip in the early Industrial Age.

Because forced usage policies are inconsistent with § 207(o), an employer should not be able to implement such policies pursuant to an "agreement" with its employees purporting to allow forced usage. An employee's right to cash overtime is mandatory under the FLSA, and is therefore generally not subject to agreements to waive this right. Where the FLSA provides for agreements between employers and employees, these provisions must be narrowly construed. While § 207(o)(2) requires employers to obtain agreements with their employees as a condition of instituting a comp time policy, nothing in this subsection contemplates an "agreement" by which an employer could force its employees to use their accrued comp time. Moreover, allowing for "agreements" to permit forced usage would thwart the legislative purposes of the FLSA by allowing employers to use their superior bargaining power to avoid having to compensate their employees in cash overtime. The considerable deference shown by the courts to employers in finding the existence of agreements in other contexts under the FLSA, such as under the sleep time exclusion, amply illustrates that an "agreement" requirement would be inadequate to protect public employees against their employers' superior bargaining power in this context.

ARGUMENT

I. THE CIRCUIT COURT'S DECISION MUST BE REVERSED BECAUSE IT IS INCONSISTENT WITH THE LANGUAGE AND LEGISLATIVE PURPOSE OF THE FAIR LABOR STANDARDS ACT.

The Fifth Circuit Court of Appeals concluded that, in the absence of an agreement prohibiting forced usage,

public employers enjoy absolute freedom to force their employees to use their accrued hours, simply because the Fair Labor Standards Act (FLSA) contains no provision specifically prohibiting such a practice. In reaching this conclusion, the Court applied a "default" rule that "the employer can set workplace rules in the absence of a negotiated agreement to the contrary." *Moreau v. Harris County*, 158 F.3d 241, 247 (5th Cir. 1998). The Circuit Court's interpretation of the FLSA, as well as its rationale in reaching its decision, are seriously flawed and must be reversed.

Permitting employers to dictate to employees the circumstances under which they may use their hard-earned overtime compensation violates certain well-established core principles under the FLSA. The FLSA is a remedial statute that requires all employers to whom it applies to compensate employees for all overtime hours worked "at a rate not less than one and one-half times the regular rate" at which they are employed. 29 U.S.C. § 207(a)(1); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 39 (1944). Congress imposed this requirement upon employers to protect workers from substandard wages and oppressive working hours, and to spread employment by placing financial pressure on the employer who would otherwise schedule massive overtime hours. *Walling*, 323 U.S. at 40; *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706 (1945). As shall be demonstrated, *infra*, employer devices and schemes designed to avoid these requirements have been consistently struck down by the courts.

Congress applied the overtime requirements of the FLSA to public employers in 1974. 29 U.S.C. § 203(d) and (x). Following this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which confirmed that the FLSA is properly

applied to public employers, Congress enacted a narrow exception from the FLSA's overtime requirement that allows employees of a public agency to receive compensatory time in lieu of cash overtime compensation. 29 U.S.C. § 207(o). This Court has specifically held, however, that § 207(o), as a limited exception to the requirement that employees must be paid cash overtime, must be " 'narrowly construed' " against the employer who seeks to take advantage of this exception. *Moreau v. Klevenhagen*, 508 U.S. 22, 33-34 & n.16 (1993) (quoting *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295-96 (1959)); *see also Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). Accordingly, public employers may "take advantage of the benefits [the comp time exception] offers only pursuant to certain conditions set forth by Congress." *Moreau*, 508 U.S. at 34 n.16. An employer who fails to satisfy these narrow conditions "remains in precisely the same position as any other employer subject to the overtime pay provisions of the FLSA." *Moreau*, 508 U.S. at 34 n.16.

The foregoing principles reflect the FLSA's presumption in favor of cash overtime for public employees. A public employer wishing to substitute comp time for cash overtime must overcome this presumption by demonstrating that its comp time policy fits within the narrow exception created by Section 207(o). Employers unable to meet this burden are required to reimburse their employees in cash overtime in an amount equivalent to their accrued comp time. *See, e.g., Nevada Employees Ass'n v. Bryan*, 916 F.2d 1384 (9th Cir. 1990).

The plain language of § 207(o) sets forth clear limits upon the manner in which employers may take advantage of the benefits of the comp time exception. As recognized by this Court in *Moreau*, § 207(o)(2) prohibits public

employers from instituting a comp time policy unless, and until, they obtain an agreement with their employees to provide comp time *prior* to the performance of overtime work. 29 U.S.C. § 207(o)(2)(A) and (B). The comp time amendments specifically allow employers and employees to create banks in which to store an employee's accrued comp time, but they limit the amount of comp time that may be accrued by a public safety employee to 480 hours. 29 U.S.C. § 207(o)(3)(A). Employers are required to pay cash, and only cash, for any overtime hours worked by employees who have accrued the maximum amount of comp time hours allowed by this statutory cap. 29 U.S.C. § 207(o)(3)(A).

It is particularly significant to the instant case that § 207(o) contains only *three* mechanisms by which an employer may reduce the accrued comp time balance of an employee. First, the statute requires that an employer wishing to reduce an employee's comp time balance "shall" do so by paying off the accrued balance in cash, "at the regular rate earned by the employee at the time the employee receives such payment." 29 U.S.C. § 207(o)(3)(B). Second, an employee is entitled to receive the cash value of any accrued comp time upon termination of employment. 29 U.S.C. § 207(o)(4). Third, an employer must allow an employee to use accrued comp time within a reasonable period after the employee's request, so long as use of the time does not unduly disrupt the operations of the public agency. 29 U.S.C. § 207(o)(5).

Significantly, the FLSA does *not* contain any *additional* mechanism to allow an employer to reduce its employees' accrued comp time balance by forcing its employees to take time off from work. The Circuit Court erroneously concluded that the statute's failure to *prohibit* such a policy compels the conclusion that Congress intended

that employers be free to impose such a condition. Indeed, the Circuit Court went so far as to apply a "default" rule by which the employer can set any workplace rules regarding overtime in the absence of a negotiated agreement to the contrary. 158 F.3d at 247. The Circuit Court's conclusion is fundamentally unsound for the simple reason that it ignores the principle, as clearly set forth by this Court in *Moreau*, that comp time is an exception to the FLSA's cash overtime requirements, and that Congress has specifically identified the only circumstances in which comp time may be used. As correctly recognized by the Eighth Circuit,

> An employee has the right to use the accrued time as the employee sees fit subject only to the employer's limited right to deny an employee's request if it would unduly disrupt the employer's operations. Congress has not provided the employer with any further right to unilaterally control or to force the employee's use of compensatory time.

Heaton v. Moore, 43 F.3d 1176, 1180 (8th Cir. 1994), *cert. denied*, 515 U.S. 1104 (1995). *See also Hellmers v. Town of Vestal*, 969 F. Supp. 837 (N.D.N.Y. 1997) (refusing to allow employer to force comp time usage on grounds that the court will not "expand an employer's power to condition use of comp time beyond that which Congress has provided").

The Circuit Court's ruling would produce a result that is inconsistent with the three mechanisms explicitly provided by Congress for the reduction of accrued comp time. Permitting employers to dictate when an employee will use his or her accrued comp time eviscerates the requirement under § 207(o)(5) that employee requests to use comp time be granted so long as the request does not unduly disrupt the operations of the agency. If the em-

ployer can tell the employee when to use accrued comp time, the employee's desire as to when to use this comp time is obviously compromised, if not eliminated.[2] Further, as illustrated by the facts of the instant case, the Circuit Court's interpretation will allow employers to evade, both intentionally and indefinitely, the statutory cap which Congress placed on the accrual of comp time—as well as the employers' obligation to compensate employees in cash for overtime hours worked in excess of this cap—by simply requiring employees to use their accrued comp time whenever their comp time balance approaches the statutory limit.

These consequences could not possibly have been intended by Congress when it enacted § 207(o). Indeed, as demonstrated by the foregoing, the Circuit Court's construction of § 207(o) effectively nullifies operation of the specific protections afforded to employees by Congress in §§ 207(o)(3)(A), (3)(B) and (5). It is, of course, a " 'cardinal principle of statutory construction' " to " 'give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section." *Bennett v. Spear*, 520 U.S. 154, ——, 137 L.Ed.2d 281, 302 (1997) (quoting *United States v. Menasche*, 348 U.S. 528, 538 (1955)). The Circuit Court's interpretation of § 207(o) violates this cardinal rule of construction in two important respects: first, it allows employers to intentionally evade the statutory cap placed on accrued comp time by § 207(o)(3); and, second, it allows employers to

[2] It is easy to illustrate how forced usage would nullify public employees' rights under § 207(o)(5). It is axiomatic that once an employer has forced an employee to use comp time, this time is no longer available to be used pursuant to an employee's request. For example, an employee who is hoping to use accrued comp time for a family vacation will no longer have the time available for this use if the employer dictates that the employee's comp time be used at an earlier date for the employer's convenience.

disregard employees' interests as to when to use accrued comp time in favor of the employer's interests, which contradicts the intent of § 207(o)(5). Permitting forced use of comp time effectively nullifies these statutory protections that are specifically afforded to employees under the FLSA.

The Circuit Court concluded that Harris County's forced usage policy is consistent with the FLSA, even if implemented for the specific purpose of evading the statutory cap set forth in § 207(o)(3), because Congress did not specifically prohibit this particular policy in the text of the statute. This approach is wrong because it broadly, rather than narrowly, construes the comp time exception for employers. Moreover, the Circuit Court's approach demands of Congress a clairvoyance that it simply cannot possess by requiring Congress to anticipate, and specifically prohibit, any policy by which employers might attempt to evade the conditions placed upon their use of comp time in § 207(o).

Indeed, this Court, under similar circumstances, has explicitly held that Congress' failure to specifically prohibit an employer practice under the FLSA does not preclude it from invalidating the practice, where the legislative policy of the FLSA would be thwarted by allowing the practice. In *Brooklyn Savings Bank*, 324 U.S. at 713, the employer, like Harris County in the instant case, argued that this Court could not prohibit employers from obtaining employee waivers of FLSA rights because the FLSA did not contain a provision which specifically prohibited this practice. While acknowledging that "[t]here is no indication why Congress did not embody [such a] provision" in the FLSA, this Court concluded that the "[a]bsence of such provisions, however, has not prevented the courts from invalidating waivers where the legislative pol-

icy would be thwarted by permitting such contracts." 324 U.S. at 713.

The instant case demands the identical approach. Only by interpreting the FLSA to prohibit forced usage policies can the FLSA's presumption in favor of cash overtime be preserved. Absent such a ruling, employers such as Harris County will be able to avoid ever having to pay cash overtime to their employees by simply requiring these employees to take time off whenever their accrued comp time balances approach the statutory limit. Further, employers such as Harris County will be able to force employees to use accrued comp time in circumstances that are most favorable to the employer with complete disregard to the interests of the employee, who, after all, actually earned the comp time through his or her labor.

In many respects, the Circuit Court's decision allows for a compensation system that is no better than the now-illegal "company scrip" compensation systems of the early Industrial Age. While employees were paid for every hour they worked under the company scrip system, this compensation method was deemed illegal because it allowed the employer to control how its employees spent their hard-earned compensation. The forced usage policy approved by the Circuit Court leads to the same result, allowing the employer to dictate how its employees' compensation shall be used.

An equally detrimental, if not as obvious, outcome of allowing employers to force employees to use their accrued comp time would be to allow employers such as Harris County to accomplish through judicial construction of the FLSA what cannot be accomplished pursuant to the plain language of the statute. This is no better illustrated than by the Eighth Circuit's decision in *Heaton v. Moore*, *supra*. In *Heaton*, the employer, like Harris

County in the instant case, unilaterally imposed a policy that forced its employees to use their accrued comp time before reaching the statutory cap. Significantly, the employer argued that its forced usage policy was necessary to avoid the "unduly disruptive" effect of having to pay cash overtime to employees who had accrued more than 480 hours of comp time in their accounts. The Eighth Circuit rejected this argument, correctly concluding that the eventual payment of cash overtime can *never* be held to be "unduly disruptive" within the meaning of § 207(o)(5) for the simple, and obvious, reason that employers are *explicitly required* to pay cash overtime to employees whose accrued comp time exceeds the statutory cap. As succinctly stated by the Eighth Circuit, if public employers want to control their employees' accrual of comp time, they can simply do what other employers are required to do under the FLSA: "schedule less overtime and/or hire more [employees] to reduce the need for compensatory time." *Heaton*, 43 F.3d at 1181. This outcome, and only this outcome, accomplishes the fundamental objectives of the overtime requirements of the FLSA.

Simply put, had Congress intended to provide employers with the "open-ended" authority to force employees to use their accrued comp time as a means of avoiding cash overtime payments, "it surely would have said so more simply" in the text of Section 207(o). *Moreau*, 508 U.S. at 33. Further, if Congress had wanted employers' interests to be equal to employees' interests in deciding when to use accrued comp time, Congress would surely have indicated this intention in § 207(o)(5).

II. BECAUSE FORCED COMP TIME USAGE IS INCONSISTENT WITH § 207(o), AN EMPLOYER MAY NEVER FORCE AN EMPLOYEE TO USE ACCRUED COMP TIME, WHETHER PURSUANT TO AN "AGREEMENT" WITH ITS EMPLOYEES PURPORTING TO ALLOW SUCH A CONDITION OR OTHERWISE.

The question on *certiorari* that was presented by petitioners asks whether a public employer may compel employees to utilize their accrued compensatory time involuntarily, "absent an agreement with the employer permitting such compulsion." *Amicus* respectfully submits that, under the FLSA, a public employer may *never* force its employees to utilize their accrued comp time, pursuant to an agreement purporting to allow such forced usage or otherwise.

The majority opinion below did not reach the particular question of whether employees can agree to let their employers dictate when their comp time will be used, nor did the Eighth Circuit in *Heaton*, 43 F.3d at 1180 n.4 (specifically refraining from deciding this question). Should this Court, however, decide to reach this question, *amicus* respectfully submits that any agreement which purports to allow a public employer to force its employees to use their accrued comp time violates the FLSA, and is therefore unenforceable as a matter of law.

Analysis of this question properly begins with the recognition that an individual employee's rights under the FLSA are mandatory, and are generally not subject to negotiation or bargaining between employers and employees. *Brooklyn Savings Bank*, 324 U.S. at 707-08; *Gaby v. Omaha Home for Boys*, 140 F.3d 1184, 1186 (8th Cir. 1998) (" 'employers and employees may not, in general, make agreements to pay and receive less pay than the statute provides' ") (quoting *Rudolph v. Metro-*

politan Airports Comm'n, 103 F.3d 677, 680 (8th Cir. 1996)). Indeed, this principle is so important that courts have barred agreements that are inconsistent with the FLSA even where employees have demonstrated "enthusiastic assent" to such agreements. *Calderon v. Witvoet*, 999 F.2d 1101, 1107 (7th Cir. 1993).

The reason for this principle is simple—in enacting the FLSA, Congress recognized that "there are often great inequalities in bargaining power between employers and employees." *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352 (11th Cir. 1982). *See also Braddock v. Madison County, Ind.*, 34 F. Supp. 2d 1098, 1106 (S.D.Ind. 1998) (noting Congress' recognition in enacting the FLSA that employers "often have much greater bargaining power than employees"). Accordingly, this Court has held that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate.' " *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 740 (1981) (quoting *Brooklyn Savings Bank*, 324 U.S. at 707).

As *amicus* demonstrated earlier, a forced usage policy does not fit within the narrow comp time exception from the FLSA's overtime requirements that was crafted by Congress in 29 U.S.C. § 207(o). It necessarily follows that any agreement purporting to allow an employer to force its employees to use accrued comp time would be invalid and unenforceable as a matter of law. *Brooklyn Savings Bank*, 324 U.S. at 713.

This conclusion is unaffected by 29 U.S.C. § 207(o)(2), which requires public employers to obtain agreements with their employees as a condition precedent to the implementation of a comp time policy. As exemplified by § 207(o)(2), the FLSA contains a limited number of

provisions that explicitly allow employers and employees to reach agreements with respect to certain compensation issues. For instance, the FLSA specifically allows employers engaged in the operation of a hospital to agree to a work period of fourteen consecutive days for purposes of determining entitlement to overtime compensation. 29 U.S.C. § 207(j). The Act also allows employees, under certain conditions, to agree to accept a payment of unpaid wages in settlement of an action brought to enforce the FLSA. 29 U.S.C. § 216(c).[3] Because these provisions represent exceptions to the rule that FLSA rights are not subject to waiver, each of these provisions must be narrowly construed, and strictly applied according to their literal terms, so as to prevent agreements that are the product of uneven bargaining power from usurping the statutory guarantees of the FLSA. *Brooklyn Savings Bank*, 324 U.S. at 705; *Lynn's Food Stores, Inc.*, 679 F.2d at 1354 (holding that approval of

[3] Other provisions in the FLSA which allow for deference to agreements between employers and employees include § 207(b) (allowing the parties to define hours of employment through collective bargaining agreements); § 207(e)(7) (allowing the parties to exclude from an employee's regular rate premium-rate compensation paid pursuant to an employment agreement); § 207(f) (allowing agreements to establish, under certain conditions, workweeks of irregular hours); § 207(g) (allowing agreements on piece-rate work); and § 207(n) (allowing agreements to exclude certain hours worked by electric railway, trolley or motor carrier operators). The Department of Labor has promulgated several regulations which also allow for modification of FLSA rights through agreements. For instance, 29 C.F.R. § 553.222(c) allows for the exclusion of sleep time from a fire fighter's compensable hours if there exists, *inter alia*, "an expressed or implied agreement between the employer and the employee to exclude such time." Under 29 C.F.R. § 778.114(a), an employer may apply a fluctuating workweek methodology to calculate an employee's overtime entitlement, but only "[w]here there is a clear mutual understanding of the parties that the fixed salary is compensation . . . for the hours worked each workweek, whatever their number."

an agreement to settle a wage dispute between an employer and an employee which did not comply with § 216(c) "would be in clear derogation of the letter and spirit of the FLSA").

The provision set forth in § 207(o)(2) pertaining to comp time agreements has only been interpreted, consistent with its plain language, to constitute a ***threshold*** prerequisite governing an employer's decision to ***provide for*** comp time. *See, e.g., Moreau*, 500 U.S. at 34 n.16, ***Nevada Employees' Association v. Bryan***, 916 F.2d 1384 (9th Cir. 1990); *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, 498 U.S. 878 (1990); ***Local*** *2203 v. West Adams*, 877 F.2d 814 (10th Cir. 1989); *Local 2961, IAFF v. City of Jacksonville*, 685 F. Supp. 513, 522 (E.D.N.C. 1988) ("an agreement is required in order for [an employer] to take advantage of the FLSA's compensatory time off feature as opposed to making monetary overtime payments"). Nothing in the plain language of Section 207(o)(2) references, or even contemplates, an "agreement" by which an employer could force its employees to use their accrued comp time. Construing the language of § 207(o)(2) narrowly, it necessarily follows that agreements purporting to allow forced usage of comp time are not allowed under § 207(o).

This conclusion should not be affected by references to agreements governing the "preservation, use or cashing out of comp time" contained in the Department of Labor's regulations interpreting the comp time amendments. Specifically, 29 C.F.R. § 553.23(a)(2) provides that an agreement or understanding regarding comp time "may include other provisions governing the preservation, use, or cashing out of compensatory time *so long as these provisions are consistent with section 7(o) of the Act. To the extent that any provision of an agreement or under-*

standing is a violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o)" (emphasis added). The Secretary's regulations do not define the terms "preservation, use or cashing out." Nevertheless, the regulations set forth several examples of permissible agreements which would relate to the preservation, use and cashing out of comp time. *See, e.g.*, 29 C.F.R. § 553.23(a)(2) (agreements "may provide for any combination of compensatory time off and overtime payment in cash (*e.g.*, one hour compensatory time credit plus one-half the employee's regular hourly rate of pay in cash for each hour of overtime worked) so long as the premium pay principle of at least 'time and one-half' is maintained"); 29 C.F.R. § 553.23(a)(2) (parties may agree to provide comp time for "certain hours of work only"); 29 C.F.R. § 553.23(c) (the employer "need not adopt the same agreement or understanding with different employees and need not provide compensatory time to all employees"); 29 C.F.R. § 553.25(c)(2) (allowing agreement to "govern the meaning of 'reasonable period' "). Under the Secretary's regulations, the parties could also agree to a policy setting forth a cap for accrued comp time balances that is lower than the cap established by § 207(o)(3)(A). There is no suggestion in the Department of Labor regulations that a forced usage agreement would be allowed under the FLSA.

Moreover, as previously demonstrated, interpreting § 207(o) to allow for forced usage would thwart the legislative purposes of the FLSA by allowing employers to avoid their obligation to compensate their employees in cash overtime, and would eviscerate the requirement under § 207(o)(5) that employers grant employee requests to use comp time. This outcome would be no different simply because an employer is required to obtain an "agreement" with an employee to allow forced usage. This conclusion is based upon the considerable deference that courts have shown to employers in finding the existence of agreements under other provisions of the FLSA. For instance, some courts interpreting 29 C.F.R. § 553.222(c), which requires employers to establish the existence of an agreement as a condition of excluding its employees' sleep time, have concluded that such "agreements" exist based upon nothing more than the fact that these employees were aware of their salary and hours and did not quit their jobs. *See, e.g., Bodie v. City of Columbia, S.C.*, 934 F.2d 561, 564 (4th Cir. 1991) (agreement evidenced by employee's admission to continuation of employment with " 'at least some awareness of the [exclusion] policy' ") (quoting *Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1248 (5th Cir. 1986), *cert. denied*, 484 U.S. 827 (1987)); *Rotondo v. City of Georgetown, S.C.*, 869 F. Supp. 369, 376 (D.S.C. 1994) (mere acceptance of a paycheck by fire fighter manifests acceptance of the sleep time exclusion, "in spite of any pre-employment lack of knowledge of the exemptions and in spite of any post-hired expressed objections once becoming aware of the exemptions"); *Morehead v City of Pearl, Miss.*, 763 F. Supp. 175, 177 (S.D. Miss. 1990) (holding that city could lawfully "use[] as an example" and "treat[] unfairly" a firefighter who had initially refused to agree to sleep time exclusion by scheduling him to highly irregular shifts, "until he decided to either accept the [exclusion], or to go find employment elsewhere"); *Harrison v. City of Clarksville, Tenn.*, 732 F. Supp. 810, 814 (M.D. Tenn. 1990) (granting employer's motion for summary judgment because "[u]nder the FLSA, an employee's continued employment and acceptance of pay is evidence of the employee's implied agreement to certain practices, terms and conditions of employment").

The foregoing cases inspire little confidence that merely imposing a requirement that an employee "agree" to forced usage will ensure that the legislative purpose of the FLSA will not be undermined by allowing this practice. Courts might allow employers simply to announce a forced usage policy to establish an "agreement" with its employees to permit forced comp time usage. Indeed, these cases demonstrate that an "agreement" requirement does little to remedy the unequal bargaining power between employers and employees which necessitated passage of the FLSA. The only way to ensure that Congress' goals in enacting the FLSA continue to be realized in the public sector is to prohibit the forced usage of comp time, without respect to the existence of an "agreement" on this issue.

CONCLUSION

For the foregoing reasons, *amicus curiae*, the International Association of Fire Fighters, respectfully urges this Court to reverse the decision of the Court below.

Respectfully submitted,

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