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**

## PETITIONER'S BRIEF

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PETITION FOR CERTIORARI FILED JANUARY 19, 1999
CERTIORARI GRANTED OCTOBER 12, 1999

## QUESTION PRESENTED

Whether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. §207(o), may, absent a preexisting agreement, require its employees to use accrued compensatory time?

## PARTIES TO THE PROCEEDING BELOW

## I.

## PLAINTIFFS/APPELLANTS/PETITIONERS

The following members of the Harris County Sheriff's Department are parties to the petition. For convenience, they are referred to as "the Deputies[1]".

1. Edward A. Christensen
2. Kenneth O. Adams
3. David W. Addison
4. Jose A. Alvarado
5. Robert Amboree
6. Bobby G. Andrews
7. Randy Anderwald
8. Gary R. Ashford
9. Craig L. Bailey
10. Richard Bailey
11. Ricardo E. Baldoras
12. Herbert V. Barnard
13. Gerald Barnett
14. Paulette M. Barnett
15. Bridgett Blackman
16. Aynl E. Blackwell
17. Gary F. Blahuta
18. Scott P. Blakenburg
19. Deborah Bliess
20. Bruce H. Breckenridge
21. J.T. Brooks
22. Brian Buchannan
23. Patricia M. Bui
24. Don E. Bynum
25. Clarence A. Callis
26. William M. Campbell
27. Heather Carr
28. Thomas J. Carr
29. Paul E. Carpenter
30. Robert Casey
31. Mark E. Cervel
32. Eladio C. Chavez
33. Roy Clark
34. Denny P. Coker
35. Alford A. Cook
36. Gregory P. Cox
37. Donald D. Crayton
38. Richard D. Crook
39. David D. Davis
40. Gary W. Davis
41. Christopher E. Denny
42. Russell Duckes

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[1] Lynwood Moreau, the initial lead Plaintiff, asserted individual claims which are not before this Court because he has withdrawn. *See*, Order granting Moreau's Motion to Withdraw Authorization of Counsel to Represent Him. (Docket #37-39) November 20, 1997.



43. Larry A. Eickhoff
44. Frank Fairly
45. David W. Finley
46. James P. Fitzgerald
47. Ernie R. Fowler
48. Michael R. Garcia
49. Thomas M. Gentry
50. John Goldejohn
51. Robert M. Goerlitz
52. David Gonzales
53. Raul Gonzales
54. Miguel A. Gonzales
55. Billy Gray
56. William L. Gray
57. Lawrence P. Gries
58. Thomas P. Gurrey
59. Preston R. Halfin
60. Sammy Head
61. Neal Hines
62. Larry A. Howell
63. Marshall P. Isom
64. James A. Johnson
65. Derry L. Jones
66. David E. Kaup
67. William C. Kinisell
68. Howard J. Kimile
69. Steve Kirls
70. Edgar Knighton
71. Freddy G. Lafurente
72. Michael G. Lagrove
73. Al Lanford
74. Vernon S. Lemons
75. Shemei B. Levi
76. Jeanne Long
77. Timothy Loyd
78. Joe S. Magallou
79. David B. Martin
80. Pedro Martinez
81. Russell L. Mayfield
82. Terry McGregor
83. Robert C. Meaux
84. Stephen Melinder
85. Marty M. Mirgo
86. D.D. Montgomery
87. Jose L. Merin
88. Richard O. Newby
89. Arthur W. Nolley
90. William R. Norwood
91. Richard C. Nummery
92. Karen D. O'Bannon
93. Raymond E. O'Bannon
94. Guadalupe Palafox
95. Wayne Parinella
96. Deborah Petruska
97. James A. Phillips
98. Simon C. Ramirez
99. Michael B. Rankin
100. James C. Reynolds
101. Willard G. Rogers
102. Gerald M. Robinson
103. Joe Ruffino
104. Lance J. Scott
105. Rob A. Self
106. Donald Shaver
107. James K. Shirley
108. James Smedick

109. Gina K. Spriggs-Graham[2]
110. Jeffrey M. Stauber
111. Larry L. Strickland
112. Billy J. Taylor
113. Kerry Townsend
114. Richard S. Trinski
115. Gordon Trott
116. Ed Trott
117. Richard P. Valdez
118. Dalton E. Van Slyke
119. Frank L. Vernagallo
120. Ruben Villarreal
121. Johnny F. Walling
122. Gerald R. Warren
123. James M. Watson
124. Thomas G. Welch
125. John A. Wheler
126. Joseph L. Williams
127. Rwanda Wiltz

[2] In an earlier pleading Deputy Gina K. Spriggs-Graham was identified twice as petitioner #109 and #110.



II.

**DEFENDANTS/APPELLEES/RESPONDENTS**

Harris County, Texas

Tommy B. Thomas, Sheriff, Harris County, Texas[3]

[3] Johnny Klevenhagen, former Sheriff of Harris County, was not a party to the appeal from the judgment of the Trial Court.

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SUPREME COURT OF THE UNITED STATES

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No. 98-1167

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

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# PETITIONERS' BRIEF

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Edward Christensen and 126 other individually named Harris County Deputy Sheriffs, Plaintiffs in the District Court and the Appellees in the Court of Appeals, request the Court to overturn the judgment of the United States Court of Appeals for the Fifth Circuit in *Lynwood Moreau, et al., v. Harris County, Texas, et al.*, Fifth Circuit No. 97-20796 (October 19, 1998), and remand the case for a decision consistent with the United States Department of Labor's interpretation of 29 U.S.C. § 207(o) that a public agency, absent a preexisting agreement, may not compel employees to use accrued compensatory time.

## OPINIONS BELOW

The Court of Appeals opinion is reported at 158 F.3d 241 (5th Cir. 1998) and is reproduced as Appendix A (Pet. App. 1a-23a) in the separately bound Appendix to the *certiorari* petition (hereafter "Pet. App.").

The District Court's opinion on Summary Judgment was issued on November 25, 1996, reported at 945 F.Supp. 1067 (S.D. Tex. 1996), and is reproduced as Appendix B. (Pet. App. 24a-27a). The District Court's final order is unreported and is reproduced as Appendix C. (Pet. App. 28a).

## JURISDICTIONAL STATEMENT

The Court of Appeal's Opinion and Judgment were entered on October 19, 1998. The judgment is reproduced as Appendix D. (Pet. App. 29a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). No petition for rehearing or hearing *en banc* was filed.

## STATUTES AND REGULATIONS INVOLVED

This case involves the construction of the 1985 Amendments to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* ("FLSA"), codified in 29 U.S.C. § 207(o) and the relevant implementing regulation thereto, codified in 29 C.F.R. §§ 553.20-553.28.

The 1985 FLSA Amendment Act's §207(o) provision is reproduced in Appendix E. (Pet. App. 32a-38a).



The implementing regulations to the FLSA, promulgated by the Secretary of Labor are reproduced in Appendix F. (Pet. App. 39a-59a).

The Department of Labor's interpretation of those regulations is set forth in DOL Letter Rulings of September 14, 1992, available in 1992 WL 845100; April 1, 1994, available in 1994 WL 1004765; and August 19, 1994, available in Thompson, Fair Labor Standards Handbook at 212; and in the Solicitor General's "Brief for the United States as *Amicus Curiae*" on petition for *certiorari* in this case.

## STATEMENT OF THE CASE

### A. The Fifth Circuit Decision and DOL's Rules.

This case presents the question of whether under the 1985 Amendments Act to the Fair Labor Standards Act, 29 U.S.C. § 207(o), its implementing regulations, 29 C.F.R. §§ 553.20 to 553.28, and the Secretary of Labor's reasonable and considered interpretations and rulings thereon, a local government which utilizes a system of accrued compensatory time in lieu of cash for overtime hours may, absent an agreement with the employees permitting mandatory time off, compel employees to burn off their accumulated compensatory time bank involuntarily, that is, when they do not request to do so.

The Fifth Circuit below answered this question in the affirmative, expressly disagreeing with the Eighth Circuit holding in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir.

1994) *cert. denied, Schriro v. Heaton*, 515 U.S. 1104 (1995), that FLSA compensatory time banks belong to employees and are not subject to unilateral employer compelled use.

The Fifth Circuit's decision is based on direct statutory analysis, without attention to the related regulations and Department of Labor interpretations. The Fifth Circuit majority created a "default rule" that the employer may set whatever workplace rules it wishes in the absence of a negotiated agreement to the contrary. (Pet. App. 13a). And so, the Fifth Circuit allowed employer compelled use of accrued compensatory time, thereby decreasing the real value of banked compensatory time, even in the face of the FLSA overtime standard and the statute's own default rule that, in the absence of free employee agreement, overtime must be paid in cash at premium rates. Judge Dennis dissented, objecting to the Fifth Circuit's lack of recognition of the relevant regulations, on grounds of this Court's rule in *Auer v. Robbins*, 519 U.S. 452 (1997) -- that is, it is the Secretary of Labor, and not the courts, that is charged with the issuance of regulations under the 1985 Amendment Act P.L. 99-150, 56 (1985). Because the rules controlling FLSA compensatory time are "a creature of the Secretary's own regulations", her interpretation of those rules "is, under our jurisprudence, controlling, unless plainly erroneous or inconsistent with the regulations." The DOL's rule follows the statute's guidance mandating



overtime in cash absent a bilateral agreement consistent with §207(o), and prohibits compelled use absent an express employee authorization by agreement which is both freely arrived at and consistent with the requirements of §207(o). (Pet. App. 14a-23a).

**B. The History of Comp Time and §207(o)'s Enactment.**

For forty-eight years compensatory time in lieu of cash payment for labor was anathema to the FLSA. For more than fifty years, timely cash payment for hours of work has been a fundamental premise of the Act. This is so because broadly used, liberally accessed, employer mandated compensatory time off in lieu of cash undermines the effectiveness of the national FLSA overtime standard. The core purpose of the Act's premium pay for overtime is not the provision of an employee benefit; instead, it is intended as a market disincentive to an employer so managing the work place to create fewer jobs with hours in excess of the forty hour per week standard rather than more jobs with hours within the standard. See *Overnight Motor Transport v. Missel*, 316 U.S. 572, 576 (1941). Compensation systems which provide for payment for hours of work other than in cash avoid this disincentive and undermine the effectiveness of the national hours of work standard. This is particularly so when an employer establishes a practice of moving compensation liability from one pay period to another through mandatory time off as a substitute for cash overtime. A mandatory time off system

strikes at the FLSA overtime standard forcefully three times. First, the employer adjusts work schedules to get the job with fewer workers working more than 40 hours per week; strike one. Then, the employer avoids contemporaneous premium pay cash liability; thus, strike two, defeating the cost of the time and one half incentive to spread the work among less expensive straight time workers. Finally, the employer compels the use of accrued comp time at his convenience, relieving the incentive to keep the standard work week at 40 hours; strike three.

In constructing the FLSA between 1936 and 1938, Senator Hugo Black, later Justice Black, and his New Deal colleagues, were insistent that pay be required in cash on the basis of a forty hour work week standard. The standard arose, in part, as a reform of the employment practices common in Senator Black's Alabama in the 1920's and 1930's, a period of job scarcity during which some of the Senator's constituents were often paid in script redeemable only at the employer's stores, rather than in cash, and were required to work very long work hours on days in which the company had extra work and go home on days in which work was slow. This employment system operated absent a national hours of work standard. It allowed industry to concentrate its work at low wages spread among fewer



workers than would be the case under a standard forty hour work week with overtime at time and one-half.[4]

The aim of the FLSA premium pay/hours of work standard was to create a market incentive to shorten the work week to the national standard and spread work. The use of employer mandated time off as overtime compensation in lieu of cash alleviates the market force of that incentive and, thereby, lessens its effectiveness. Thus, the Act outlawed mandatory time off as a substitute for cash pay at a time and one half premium for overtime.

As originally enacted in 1938, the FLSA applied only to private employers. Beginning in 1966, Congress expanded the coverage to protect state and local government employees which resulted in a now settled question of the authority of the Congress to do so. *See, e.g., Maryland v. Wirtz*, 392 U.S. 183 (1968); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v.*

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[4] *See* the history of enactment of the FLSA in Roediger and Foner, *Our Own Time: A History of American Labor and the Working Day* (Greenwood Press, 1989); Hunnicutt, *Work Without End: Abandoning Shorter Hours for the Right to Work* (Temple University Press, 1988); Rosensweig, *Eight Hours for What We Will: Workers and Leisure in an Industrial City 1870-1920* (Cambridge University Press, 1983); Steinberg, *Wages and Hours: Labor Reform in the Twentieth Century* (Rutgers University Press, 1982); Cahill, *Shorter Hours: A Study Since the Civil War* (Columbia University Press, 1932); Nodland, "A Brief History of the FLSA," 39 *Labor Law Journal* 715-28 (November 1988); Hunnicutt, "Monsignor Ryan and the Shorter Hours of Labor," 69 *Catholic Historical Review* 384-401 (July 1983); and Eggert, "Fight for the Eight Hour Day," *American History Illustrated*, 36-44 (May 1972).

*San Antonio Metropolitan Transit Auth.*, 469 U.S. 328 (1985). That dispute was resolved in 1985 by *Garcia* with a recognition that under the federalism of the 10th Amendment, Congress, and not the judiciary, is the proper institution to protect and give full consideration to federalism and the special attributes of state and local government, including particularly the special character of the public employer-public employee relationship.

In a direct response to these concerns, Congress amended the FLSA insofar as that Act applies to the public sector shortly after this Court's decision in *Garcia*. (P.L. 99-150; 99 Stat. 790). Congress enacted the 1985 Amendments Act after full consultation with both public employers and public employees in a process designed to ascertain and harmonize their basic interests and needs with a national hours of work standard which would include the public sector.[5]

After the *Garcia* decision, many public employers and their organizations sought Congressional relief from the costs of FLSA coverage, arguing that such costs would seriously injure their ability to function effectively. In hearings held by House and Senate committees, public employees made the contrary arguments that compliance with *Garcia* would not be excessively costly, that it was only fair for public employees to enjoy the same standards

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[5] *See, Hearings on the Fair Labor Standards Act*, H. Hrg. 99-67, 99th Cong. 1st Sess. (Sept. 24, 1985); and S. Hrg. 99-359, 99th Cong. 1st Sess. (July 25, August 28, and Sept. 10, 1985).



as virtually all private employees, and that with the expansion of public employment to a much larger portion of the work force national wage and hours standards would be diluted were such a significant portion of American workers exempted.[6]

At the invitation of Congressional leaders, the public-employer and public-employee groups met and proposed legislation which was the product of intense negotiation between all the affected parties and a resulting extensive compromise.[7] With board support, including organizational support representing both the Deputies and

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[6] In the end, public employers and public employee representatives agreed in their testimony before Congress that use of compensatory time in lieu of overtime pay, if pursuant to equitable arrangements, could be mutually beneficial. *See*, e.g., House Hearings, 99th Cong., 1st Sess. 155 (1985) (G. Brazgel, IUPA Reg. Dir., representing the union of Deputies in their case) ("Comp time is vital to policing. Not only is it an important benefit to on the job police officers, but it also is an important tool of sound police management.")

[7] *See, e.g.*, 131 Cong. Rec. S14047 (Sen. Nickles)(the final Senate bill is different from the bill I originally introduced and represents a compromise among the effective parties); 131 Cong. Rec. H9916 (Rep. Hawkins) ("bipartisan efforts" and "compromise" produced the 1985 Amendments). The compromise bill was supported by the National Association of Counties [of which Harris County is a member], the National Public Employer Labor Relations Association [in which Harris County participated], the U.S. Conference of Mayors, the National League of Cities, the National Conference of State Legislatures, the International Union of Police Association [of which the Deputies are members], the AFL-CIO [in which the Deputies are members], and other major public employer associations and public employees unions and associations.

the County in this litigation, the 1985 FLSA Amendments were quickly and unanimously enacted by Congress. (App. H, I, and J, Pet. App. 61a *et seq.*).

In reporting the 1985 Amendments Act, the Education and Labor Committee of the House of Representatives stated:

> The Committee is very concerned that public employees in office with regular year-round functions, short staff, and steady demands will be urged to accrue many hours of compensatory time and then encounter difficulty in being able to make beneficial use of the accumulated compensatory time. It is the committee's views that an employee should not be coerced to accept more compensatory time in lieu of overtime pay in a year than an employer realistically and in good faith expects to be able to grant to that employee if he or she requests it within a similar period. To do otherwise would permit public employers to enjoy the fruits of the overtime labor of employees without having to pay the overtime premium required by the Act. Clearly, compensatory time is not envisioned as a means to avoid overtime compensation. It is merely an alternative method of meeting that obligation.[8]

Among the provisions in the resulting statute, FLSA §207(o) compensatory authorization accommodates the

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[8] *See* House Report No. 99-331, 99th Cong. 1st Sess. 10 (1985).



preexisting practice among state and local employers and the need and expressed preference for work place flexibility among their employees. The new public sector compensatory rule provided that, pursuant to strict conditions, including employee agreement freely given, a public employer may pay FLSA premium compensation for overtime in compensatory time off in lieu of cash. The provision is an exception to the general requirement that all overtime must by paid in cash. Compensatory time under the Act may be used only by qualifying public employees and only under strict conditions designed to prevent employer manipulation of the employee's right to time and one half remuneration for overtime. A public employer is permitted to deviate from the basic rule that employers are required to pay their employees in cash for all overtime work only pursuant to a compensatory time system which meets the standards of §207(o). As an exception to the more general prohibition on the use of compensatory time off as compensation §207(o) was designed to be narrowly construed under strictly enforced conditions. *See Overnight Motor Transport v. Missel*, 316 U.S. 572, 576 (1941); *Phillips v. Wallace*, 324 U.S. 490, 493 (1945); *Powell v. United States Cartridge Co.*, 399 U.S. 497, 516 (1950); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1947). In addition as the Eighth Circuit wrote in *Heaton*, the maxim of statutory construction *inclusio unius est exclusio alteris* is particularly appropriate when the statutory language being interpreted is an exception to a general rule.

"When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Raleigh & Gaston Ry. v. Reid*, 80 U.S. 269, 270 (1871).

**C. The DOL's Final Comp Time Rules.**

Congress mandated the issuance of regulations necessary to implement the 1985 amendments after an open regulatory comment period. P.L. 99-150, § 6 (1985). The Department of Labor, in turn, conducted an extensive rule making and solicited and carefully considered the views of state and local governments and of public employees. *See* 52 Fed. Reg. 2012-15 (1987). Again public employers and employee representatives, including organizational representatives of Harris County and the Deputies in this case, contributed. *See*, 51 Fed. Reg. 25710 (July 16, 1986) and 52 Fed. Reg. 2012 (January 16, 1987). Appendix C (Pet. App. 61e et seq.)

The Department of Labor's final regulations and discussion of the major comments received during the related comment period were published in January 1987.[9] The final rule clarified the nature of accrued FLSA public sector compensatory time as a "bank" which is "preserved and used," and of which a record is kept. The DOL's response to comments emphasized employee flexibility; an accrued account to be administered with an element of employee choice and with the voluntary, knowing and

[9] *See* Exhibit 1 at the end of this brief for a section-by-section review of 29 C.F.R. §§553.20-28.



willing agreement of the employee, absent any element of employer coercion.[10] The employee's compensatory bank may not be used to avoid the cost of overtime at premium rates and its use may not be controlled by the scheduling convenience or inconvenience of the employer.[11] *See* App. G Pet. App. 61a.

[10] *See* Exhibit 2 at the end of this brief for a detailed review of the regulatory comments.

[11] In 1995, in its commentary on its final rule on the Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2206-07 (January 6, 1995), the Department of Labor referenced the interplay of comp time with the FMLA and revisited the special nature of FLSA comp time, as follows:

> The use of compensatory time off is severely restricted under the [FLSA] in ways that are incompatible with FMLA's substitution provisions. First, "comp" time is not a form of accrued paid leave mentioned in the FMLA or legislative history for purposes of substitution. It is also not a benefit provided by the employer. Rather, it is an alternative form for paying public employees (only) for overtime hours worked. **The public employee's "comp time bank" is not the property of the employer to control, but rather belongs to the employee.** If a public employee terminates employment, any unused comp time must be "cashed out." Thus, FMLA's provisions allowing an employer to unilaterally require substitution would conflict with FLSA's rule on public employees' use of comp time only pursuant to an agreement or understanding between the employer and the employee (or the employee's representative) reached before the performance of the work. ... 60 Fed. Reg. 2180, 2206-07 (January 6, 1995).

The 1985 Amendments and their regulations dramatically changed, for public agencies and no one else, the rules regarding compensatory time off. It created an exception to the Act's general prohibition of compensatory time in lieu of cash so long as the compensatory time system is in the public sector and so long as it is provided under a collective bargaining agreement, employment agreement, or a memorandum of understanding. (29 U.S.C. § 207(o), App. F, Pet. App. 33a-39a). Any such agreements in jurisdictions, like Harris County, Texas, without authorized collective bargaining, may be directly with the employees, see *Moreau v. Klevenhagen*, 508 U.S. 22 (1993), and must meet the following conditions set forth in House Report 99-331, 99th Cong. 1st Sess. 10 (1985) --

> The agreement or bilateral understanding to provide time off as compensation for overtime may take the form of an expressed condition of employment, so long as (1) **the employee knowingly agrees** to it as a condition of employment, and (2) the employee is informed that the compensatory time received may be **preserved**, used, or cashed out consistent with the provision of this new subsection [§ 207(o)]. The agreement or understanding may include other provisions governing the preservation, use or cashing out of compensatory time **so long as those provisions are consistent with this subsection of the Act.** (bracketed material supplied)(emphasis added).

Even if a condition of employment is involved the employee's decision to accept compensatory time must be made "freely and without coercion or pressure." 29 C.F.R.



§ 553.23(c); and *Moreau v. Klevenhagen*, 508 U.S. 22 (1993). The agreement with the employee must be arrived at before the work is done. 29 C.F.R. § 553.23(a).

FLSA compensatory time must be paid, like cash overtime, at premium rates of time and one half, that is 90 minutes for each 60 minutes worked. 29 U.S.C. § 207(o)(1); 29 C.F.R. §§ 533.20 and 553.22. Employees such as the Deputies in this case may accumulate up to 480 hours of compensatory time. 29 U.S.C. § 207(o)(3); and 29 C.F.R. § 553.25. However, in this case, Harris County has set the limit at 240 hours. Requests by an employee to use accrued compensatory time must be granted if made within a reasonable time and if granting the request does not "unduly disrupt" the operations of the agency. 29 U.S.C. § 207(o)(5) and 29 C.F.R. § 553.25. Undue disruption of operations, and not budgetary considerations, is the **only** allowable reason for denying compensatory time. Undue disruption is more than inconvenience to the employer and the fact that an employer must pay a substitute overtime at premium rates is not a legitimate reason for denying access. DOL Letter Ruling, August 19, 1994, available in Thompson, Fair Labor Standards Handbook at 212.

An employer may freely substitute cash payment, in whole or in part, for compensatory time off. 29 C.F.R. § 553.26. However, compensatory time is not to be used as a means of avoiding overtime compensation. Therefore, more compensatory time may not be used than an employer can realistically, and in good faith, expect to be able to grant to the employees. 29 C.F.R. § 553.25(b). **Public employers may, of course, choose not to enter non-coercive bilateral compensatory time agreements with their employees. However, if they choose that option,**

**the default rule is that they must pay their employees in cash for overtime or add employees to eliminate the need for overtime.**

### D. Compensatory Time Under §207(o) in Harris County.

And so, on November 13, 1985, the Fair Labor Standards Amendments Act of 1985, P.L. 99-150; 99 Stat. 790 was enacted containing §207(o) authorizing the substitution of compensatory time for cash overtime in the public sector. It became effective in April 1986. The final regulations were published in the Federal Register on January 16, 1987. (App. F, 40a-59; App. J 79a-97a).

Over the ensuing eighteen months, following the enactment of §207(o), the Harris County Sheriffs Department implemented unilaterally a compensatory time system over the expressed objection of the Deputies, led by the Harris County Deputies Union. After a series of these objections, both formal and informal, indicating refusal to freely accept compensatory time as unilaterally imposed, in April 1988, approximately 400 objecting Deputies filed suit against the County and the Sheriff insisting that the compensatory time system so imposed violated the requirement of §207(o)(2) that any compensatory time system must be the result of an agreement between the employees affected and their designated representative. The County responded that in jurisdictions in which collective bargaining agreements are not authorized by local law, the relevant comp time agreement may be a condition of employment imposed on individual employees through their acceptance of employment under the County's personnel regulations. Each Harris County Deputy had signed a brief, boiler-plate payroll compensation form that stated that the Deputy understood and accepted the



County's personnel regulations. Basic terms of the County's pay system were set forth in the personnel regulations, including a provision for compensatory time **but not including a provision allowing employer compelled use of accrued compensatory time banks.**[12]

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[12] Currently Harris County Personnel Regulation 8.02 provides:

8.02 OVERTIME FOR NON-EXEMPT EMPLOYEES

8.021 Based on available budgeted funds allocated for overtime compensation, non-exempt employees are compensated for hours of actual work or physical work in accordance with applicable federal and state statutes, rules and regulations regarding overtime compensation. In lieu of cash payment for overtime work, compensatory time may be allowed.

8.022 All compensatory time accrued by a non-exempt employee is calculated at the rate of one and one-half (1 ½) times per hour if the employee actually works more than 40 hours during the work week.

8.023 The compensatory time balance must not exceed a 240-hour maximum, is carried forward indefinitely, and may be used by the non-exempt employee at any time approved by the employee's supervisor.

8.024 Upon termination of employment, a non-exempt employee receives full pay for any compensatory time balance in accordance with applicable state and federal law.

8.025 No employee may "buy back" compensatory time after s/he receives cash payment or uses compensatory time.

Harris County Personnel Regulations, effective June 8, 1996, adopted and approved by the Commissioners' Court of Harris County, Texas, May 14, 1996. The provision re-adopted Rule 8.02 as it had appeared in the regulations at least since 1992. No where in the personnel regulation is there any mention of compelled use of compensatory time or other express provisions on the "preservation, use or cashing out" of compensatory time beyond the language set forth

(continued...)

On May 3, 1993, this Court ruled in *Moreau v. Klevenhagen*, 508 U.S. 22 (1993), in conformance with the controlling Department of Labor rule that where collective bargaining is not authorized by local laws, §207(o) agreements may indeed be with individual employees.

In the interim, the County and the Sheriffs Department continued to develop and implement compensatory time practices. By the summer of 1992, a number of Harris County Deputies had earned compensatory time banks of sufficient total hours to raise a concern within the County's administration. Then Assistant County Attorney Rosalinda Garcia wrote to the federal Wage and Hour Administrator that the County "must comply with certain legal requirements to have cash reserves available to pay outstanding obligations, such as compensatory time. Therefore, county officials are looking for ways to decrease this liability." Ltr. Harris County Attorney's Off. To DOL Wage and Hour Division, July 10, 1992. Accordingly, on July 10, 1992, the County requested a Letter Ruling from the Department of Labor, as follows:

> While it is clear that the Sheriff must authorize an employee to use compensatory time within a reasonable time after it is requested, neither the Federal Fair Labor Standards Act nor the regulations promulgated thereunder appear to expressly address whether the Sheriff may schedule non-exempt employees to use or take compensatory time. Would such scheduling violate the FLSA? Ltr. Harris County Att. to DOL, July 10, 1992.

The Department of Labor responded in a Letter Opinion of September 14, 1992, that --

> ...[I]t is our position that a public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed, **if** the prior agreement **specifically** provides such a provision, and the employees have knowingly and voluntarily agreed to such provision freely and without coercion or pressure. See §553.23(c). Absent such an agreement, it is our position that neither the statute nor the regulations permit an employer to **require** an employee to use accrued compensatory time. However, as indication in §553.27, accrued compensatory time may be paid in cash at any time. It appears that "cashing out" accrued compensatory time could achieve the objective of concern. (emphasis in original) DOL Letter Ruling, September 14,1992; 1992 WL 845100.

Despite the DOL Letter Ruling, during 1993 the Harris County Sheriffs Department unilaterally developed and implemented a practice of the compelled use of compensatory time. The Deputies strongly objected. On April 28, 1994, Petitioners ("Deputies"), consisting of 129 Deputy Sheriffs employed by Respondents ("County"), initiated this action in the United States District Court for

[12](...continued)
above. The Rule does contain provisions that compensatory time is "carried forward indefinitely," "may be used at any time approved by the employee's supervisor," and deference to "applicable federal and state statutes, rules and regulations."

the Southern District of Texas. In their action, the Deputies contended that the County engaged in two practices which contravened the provisions of §7(o) of the FLSA and the Secretary of Labor's implementing regulations to that statute. In particular, the County failed and refused to grant the Deputies the use of their accumulated compensatory time when they reasonably requested it absent "undue disruption." See, DOL Letter ruling August 19,1994 (declaring such a practice to be in violation of §207(o)). In addition, the County unilaterally forced them to use their accumulated compensatory time off when they did not request its use.

The Trial Court, after examining the Deputies claims required the parties to submit a stipulated set of facts addressing the County's practice of compelling Deputies to use their accumulated compensatory time when they did not request it. (Pet. App. 30a-32a). Correspondingly the Trial Court directed the parties to file cross motions for summary judgment based upon their stipulation of facts.

In response to the Trial Court's directive, the parties stipulated to the facts set forth in the following paragraph:

> Harris County personnel regulations provide for the payment of compensatory time off for its employees in accordance with the Fair Labor Standards Act. It is the policy of the Harris County Sheriff's Department that the compensatory time of employees, who, for purposes of the Fair Labor Standards Act are considered non-exempt will be maintained below predetermined maximum levels. Pursuant to this policy, each Bureau Commander



> determines the maximum number of compensatory hours that may be maintained by the employees in his or her bureau. Such determination is based upon an assessment of the personnel requirements of the particular bureau. Whenever it appears that the employee has accumulated compensatory hours which approach the maximum allowable number of compensatory hours authorized by the Fair Labor Standards Act, the employee is advised that he or she is nearing the maximum number and is requested to voluntarily take steps to reduce the accumulated compensatory hours. If the employee does not voluntarily take steps to reduce the accumulated hours within a reasonable time, the employee's supervisor is authorized to order the employee to reduce the accumulated compensatory time. While the Department attempts to arrange mutually agreeable times for the employee to utilize his or her accumulated compensatory time, an agreement cannot always be reached between the employer and supervisor. In that event, the supervisory personnel are authorized by the Department to issue an order directing the employee to utilize compensatory time at a time or times that will best serve the personnel requirements of the bureau. If the employee is dissatisfied with the supervisor's order, he or she may complain to higher levels of supervision with the department on an informal basis. (Pet. App. 30a-32a).

Based upon these stipulations, the parties filed their cross motions for summary judgment. On November 25, 1996, the Trial Court, addressing these motions, entered an opinion on summary judgment, holding that the County's

practice of forcing employees to use their accumulated compensatory time when they did not request it violated the provisions of §7(o) of the FLSA, 29 U.S.C. § 207(o). *Moreau v. Harris County*, 945 F. Supp. 1067 (S.D. Tex. 1996). (Pet. App. 24a-27a). Relying on the decision of the Eighth Circuit in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied, sub nom. Schriro v. Heaton*, 515 U.S. 1104 (1995), the Trial Court found thus:

> Public employers may pay their employees for overtime by awarding time off at the rate of one and one-half hours for each hour, 29 U.S.C. § 207(o)(1992). Governments are allowed to substitute time off for cash as compensation; but the time credits need to be as nearly equivalent to cash as possible; the time off must be consumable by the worker on the worker's terms. *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied sub nom. Schriro v. Heaton*, 515 U.S. 1104 (1995). Federal law limits maximum accrued time to 240 or 480 hours depending on the type of work an employee does. Employees must be paid cash for additional hours. The workers in this case have not yet accrued 240 hours. The function of the county limits is to force workers to take time off rather than to keep working and receive cash for overtime.

945 F.Supp. 1067. (Pet. B 25a).



On July 28, 1997, the Trial Court entered a final judgment proscribing the County's practice of unilaterally forcing petitioners to consume their accumulated compensatory time. (Pet. App. 28a).

The County appealed this judgment to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed. *Moreau v. Harris County*, 158 F.3d 241 (5th Cir. 1998). (Pet. App. A 1a-23a). The Fifth Circuit's Judgment was entered on October 19, 1998.

On January 19, 1999, the Deputies, complaining of this decision and judgment, requested that this Court issue a Writ of *Certiorari* to the United States Court of Appeals for the Fifth Circuit to review that Court's holding and resolve the issues surrounding the preservation of FLSA compensatory time consistently with the applicable rules and interpretations of the Department of Labor.

This Court invited the Solicitor General to express the view of the United States on the petition. In September, 1999, the Solicitor expressed the view that --

> The Department of Labor accordingly has construed Section 207(o) not to authorize a public employer, in the absence of an agreement, unilaterally to require an employee to use accrued compensatory time. The terms of Section 207 reflect the general principle that the employee controls the use of his or her accrued compensatory time, absent an agreement to the contrary. Section 207(o) identifies only one circumstance in which an employer may unilaterally control an employee's use of accrued compensatory time -- when the employee has

requested use of accrued time and that use would "unduly disrupt" the employer's operations. 29 U.S.C. §207(o)(5). If Congress had intended that the employer could impose other limitations on the use of compensatory time, it presumably would have so provided. See *Russello v. United States*, 464 U.S. 16, 23 (1983). Here, however, the court of appeals held that an employer not only may narrow the range of circumstances in which an employee may use accrued compensatory time, but also may affirmatively require the employee to use compensatory time even if the employee would prefer not to do so. Reading into Section 207(o) such additional employer rights unilaterally to control the preservation and use of compensatory time would be inconsistent with the function of compensatory time as substitute compensation and would impermissibly "enlarge[] by implication" the exception provided by Section 207(o). (Citations omitted). Brief of the United States as *Amicus Curiae* at 11-12 ( September 1999).

This Court granted *certiorari* on October 12, 1999.

## SUMMARY OF ARGUMENT

There is no §207(o) agreement in place in the Harris County Sheriffs Department which provides for the compelled use practice outlined in the record stipulation. Nor would there be; the Deputies in this case would not freely accept the practice of employer compelled



consumption of their compensatory time banks. It obviously devalues their accrued comp time.[13]

A public agency may not compel its employees to use accrued compensatory time under 29 U.S.C § 207 (o) of the Federal Fair Labor Standards Act, absent a freely accepted agreement with its employees permitting it to do so where the agreement complies with §207(o) in all other respects. At its core, this is so because under the statute accrued compensatory time "belongs to the employee" and is devalued by unilaterally compelled use. The statute establishes that the "default rule" is where no agreement exists cash overtime must be paid. The only reasonable application of that rule is that where an employer is allowed to substitute comp time for cash overtime pursuant to such an agreement, the employer may not then compel the use of accrued comp time without an employee's express authorization by bilateral agreement.

However, the statute is silent on the precise compelled use question raised here. In such circumstances,

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[13] Which is not to say that a compensatory time system similar to that described in the stipulation would not be permissible when incorporated in a bilateral compensatory time agreement containing (a) strong protection of the Deputies' right to use their accrued compensatory time liberally and on demand, or when such use would unduly disrupt operations (as "unduly disrupt" is defined in the Department of Labor's August 19, 1994 Letter Ruling) to cash comp time banks out on demand, and (b) a clear provision that any interpretation or application of the agreement which is inconsistent with the Department of Labor's interpretation of its regulations under §207(o) would be superseded.

the question is controlled by the interpretation of the federal Department of Labor of its own relevant regulations under 29 C.F.R. §§553.20-553.28, *Auer v. Robbins*, 519 U.S. 452 (1997) and *Moreau v. Klevenhagen*, 508 U.S. 22 (1993). The Department of Labor's reasonable interpretation of its own compensatory time regulations prohibits employer compelled use of accrued comp time absent an agreement. See, DOL Letter Rulings September 14, 1992, available in 1992 WL 845100; April 1, 1994, available in 1994 WL 1004765; August 19, 1994, available in Thomson, Fair Labor Standards Handbook at 212; and " Brief of the United States as *Amicus Curiae*"on petition for *certiorari* in this case.

## ARGUMENT

### I. THE EXPRESS STATUTORY PROHIBITION ON THE PAYMENT OF FLSA OVERTIME BY COMP TIME IN LIEU OF CASH DICTATES THE REASONABLENESS OF A RULE THAT THE USE OF ACCRUED COMP TIME ALSO MAY NOT BE COMPELLED BY THE EMPLOYER ABSENT AN EMPLOYEE AGREEMENT.

The Fifth Circuit erred when it found that the purpose of the FLSA statutory compensatory time provision in §207(o) established a presumptive -- "default rule" -- right in the employer to compel the use of accrued comp time. The Fifth Circuit erred in approving the compelled use practice reflected in the record stipulation. The



compensatory time rule in §207(o) is a conditional exception to the otherwise mandatory, soundly based, and longstanding provision that all FLSA overtime must be paid in cash at time and one-half the employee's regular rate of pay. As a conditional exception to the basic statutory rule requiring cash payment for overtime, §207(o) requires, at minimum, a presumption favoring employee control of the use of accrued comp time.

A presumption favoring employee over employer control of accrued comp time banks in the absence of express terms to the contrary reflects the statutory burden placed upon the employer to secure agreement from its employees for substituting comp time for cash overtime. 29 U.S.C. §207(o)(2)(A). Absent agreement, comp time may not be used at all and the employer must pay cash for overtime. The statutory presumption against the use of comp time recognizes that in many ways comp time is an inferior form of overtime compensation, not the least of which is that unlike "cash in the bank" accrued comp time remains subject to the possibility of devaluation through employer scheduling manipulation. Further, the authors of the national hours of work standard, particularly Senator Black, were keenly aware of the unequal bargaining power

between employers and employees in many work places.[15] Thus, the statute mandates cash overtime in all cases in which no express, freely arrived at, agreement with the employee exists, which otherwise reflects all of the Act's protection.[16]

When a comp time agreement does exist, however, but fails to expressly resolve an eventuality such as an employer claim of a right to compel use, the presumption must be that the employees -- having had no obligation to agree to comp time at all -- did not grant such a right to the employer. Where the only consequence of non-use of comp time is the potential triggering of the baseline requirement of cash overtime payment that would apply in the absence of an agreement, the burden of securing an agreement allowing compelled use should rest on the employer just as the burden of securing any comp time agreement rests on the employer.

No agreement of any kind ever existed which authorized Harris County to compel the Deputies to burn off their compensatory time. Absent such an agreement, freely accepted without coercion and containing all of the prerequisites of the §207(o) regulation, the Harris County compensatory time system outlined in the record stipulation here violates the Fair Labor Standards Act. Such a system

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[15] See, n.4.

[16] See, Argument IV on agreements.



is an inadequate and illegal substitute for the payment of cash overtime.

No doubt the availability of paying for necessary work time in any medium except cash is a great temptation to an employer. It is hardly surprising that any employer who views compensatory time as a means of avoiding the premium compensation costs of FLSA overtime will ultimately come to the "concern," reflected in the Harris County Attorneys' 1992 letter to the Department of Labor, that "cash reserves must ultimately be set aside to pay the accrued compensatory time." When that happens, employers, such as was the case in Harris County, will be "looking for ways to decrease that liability," such as compelled burn off at the employer's convenience. Congress foresaw that ultimate day of reckoning. The legislative history shows that Congress was "very concerned that public employees... will be urged to accrue many hours of compensatory time and then encounter difficulty in being able to make beneficial use of the accumulated compensatory time." Congress emphasized in this regard that "compensatory time is not envisioned as a means to avoid overtime compensation. It is merely an alternative method of meeting that obligation." See, House Report No. 99-331, 99th Cong., 1st Sess. at 10. Where an employer seeks to establish such a compensatory time system as a means of avoiding the cost of FLSA premium rate overtime compensation, as Harris County openly admits here, that system must be found to violate the Act,

for its very design is to undermine the central enforcement mechanism of the national hours of work standard. Such a system of compensatory time devalued by the unilateral manipulation of work schedules is inadequate under the Act to release the employer of the obligation to compensate employees for all of their overtime at time and one-half in cash.

While it must be said that in the express statutory language of §207(o) the Congress has not spoken to the precise question raised here, it also must be accepted that the most reasonable reading of the statutory language and its legislative history is that accrued compensatory time belongs to the employee and that absent a freely accepted mutual agreement to the contrary, which agreement otherwise fully complies with the requirements of §207(o), the employer does not have the right to compel employees to consume their accrued comp time. For those employees working under compensatory time agreements that do not address compulsory use, the "compensation" they thought they would receive in lieu of cash with equivalent value, would be devalued and converted into an employer's right to manipulate time off to the employer's convenience. Such a result not only damages the bargain struck between the employee and the employer, but it strikes a serious blow to the basic FLSA requirement that all FLSA overtime must be paid at premium rates.



## II. THE COURTS ARE CONTROLLED IN THEIR APPLICATION OF FLSA § 207(o) BY THE DOL'S CONSIDERED JUDGMENTS ON THE MATTER.

Since the enactment of the 1985 FLSA Amendments, provisions on public sector §207(o) compensatory time in lieu of cash overtime, and the promulgation of §207(o)'s implementing regulations, this Court has issued two major decisions concerning the application of the Act to public employees.[17] Each

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[17] There has been a ten year, two stage history of litigation concerning the application of the §207(o)'s compensatory time provisions of the FLSA Amendments Act of 1985. The first series of cases from 1988 through this Court's *Moreau v. Klevenhagen*, 508 U.S. 22 (1993), decision in 1993 dealt with the steps necessary to establish compensatory time system under the agreements required by the Act, especially in jurisdiction which did not allow collective bargaining representation.

Since 1993, compensatory time litigation has concentrated not on the steps necessary to establish a system of compensatory time but rather on issues surrounding the ownership and use of accrued compensatory time banks once established. Five years of such litigation have resulted in five major decision by Courts of Appeal concerning the use of accrued §207(o) compensatory time banks: (1) *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied*, *Schriro v. Heaton*, 515 U.S. 1104 (1995)(holding, on the basis of the statutory language in 29 U.S.C. §207(o)(5) and the related DOL regulations in 29 C.F.R. §§553.23(c)(1)(ii) and 553.25(b)), that banked compensatory time is the property of the employee the use of which may not be compelled by the employer; (2) *Local 889, AFSCME v. Louisiana*, 145 F.2d 280 (5th Cir. 1998)(holding that no FLSA violation occurs when an employer first deducts compensatory time when an employee request annual leave, distinguishing *Heaton* on the basis that in *Heaton* the court was faced with a situation where the employer would force employees to take compensatory time, but indicating that the Fifth Circuit did "not necessarily agree with *Heaton*"); (3) the Fifth Circuit decision in this

(continued...)

recognized the controlling weight afforded the considered judgment of the Secretary of Labor on FLSA issues which Congress has vested in the Secretary's regulatory authority. *First*, in *Moreau v. Klevenhagen*, 508 U.S. 22 (1989), writing for a unanimous Court, Justice Stevens emphasized the need for consistency with the DOL's interpretation of the 1985 Amendments Act, 508 U.S. at 23; and the

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[17](...continued)
case (holding that an employer even absent an agreement may compel the use of compensatory time on the basis of a "default rule" that an employer is free to control the work place absent an agreement preventing such control but containing a strong dissent calling for a remand of the case to allow an application of the relevant DOL regulations and interpretations, especially, those with regard to "agreements"); (4) *Collins v. Spokane Valley Fire Protection District No. 1*, 1999 U.S. App. LEXIS 20027 (9th Cir. August 12, 1999), *pet. for certiorari pending*, No. 99-788 (1999) (relying on the Fifth Circuits decision in this case and criticizing *Heaton* in holding that the FLSA does not prohibit employers from requiring the use of compensatory time while at the same time discussing the "agreement" requirements of the Act and an exhaustion issue raised on the facts since the Spokane Fire Protection District had a collective bargaining agreement relating to the use of comp time); and (5) *Aiken v. Memphis*, 5 Wage and Hour Cas. 2d (BNA) 961, 1999 W.L. 689468 (6th Cir., September 7, 1999) (holding that a practice of restricting access to accrued compensatory time not at the point of "undue disruption" but rather at the point at which the employer would begin having to pay replacement workers was legal on the basis on the freedom of the parties to define "reasonable period" through an agreement citing 29 C.F.R. §553.25**(c)** over a strong dissent that the holding was contrary to the interpretation of the Department of Labor of its own regulations, particularly the "undue disruption" rule in 29 C.F.R. §553.25**(d)** which contains no provision allowing modification by agreement).



"special deference" owed the Secretary in applying her own regulations, 508 U.S. at 24.

*Second*, in *Auer v. Robbins*, 519 U.S. 452 (1997) Justice Scalia, again for a united court, wrote that where, as here, and as the Fifth Circuit Court of Appeals below found, "Congress has not spoken clearly in the text of the statute or the legislative history," and where the Congress has clearly vested the Secretary of Labor with the authority to issue regulations under the statute and to apply, interpret, and enforce those regulations, the interpretation by the Secretary of Labor is the reference point which controls judicial application of the statute. *Auer v. Robbins*, 519 U.S. at 457 (1997). "Because Congress has not directly spoken to the precise question," Justice Scalia wrote, "we must sustain the Secretary's approach so long as it is based on a permissible construction of the statute." 519 U.S. at 457. The courts must defer to all of the Secretary's "fair and considered judgement on the matter in question," even those which are set forth in a brief or opinion letter and not expressly contained in the Department's "legislative" or "interpretative" regulations. *Auer* , 519 U.S. at 462.

## III. THE SECRETARY OF LABOR INTERPRETS FLSA § 207(o) TO PREVENT EMPLOYERS FROM COMPELLING THE USE OF COMPENSATORY TIME, ABSENT AN AGREEMENT WITH EMPLOYEES.

There can be no question that the Secretary of Labor's interpretation of § 207(o) is one which prevents employers from compelling the use of compensatory time, absent an agreement with employees. In 1992, when specifically asked by the Harris County attorney's office whether a practice of the compelled use of compensatory time was allowed, the Wage and Hour Division responded that such a practice was not allowed. See, DOL Letter Ruling, available in 1992 WL 845100 (September 14, 1992). The Solicitor General reemphasized that interpretation in their brief in support of the grant of *certiorari*. See, above at 17-19. The DOL position is a fully considered judgment on the precise issue. The interpretation is certainly a reasonable application of the statute.

## IV. A FREELY ARRIVED AT BILATERAL AGREEMENT CONSISTENT WITH §207(O) IS A MANDATORY PREREQUISITE TO EMPLOYER COMPELLED USE OF ACCRUED COMP TIME.

The national hours of work standard set by the Fair Labor Standards Act is a statutory guarantee the very purpose of which is to modify the common law concept that the employment relationship is entirely contractual and the "default rule," relied upon by the Fifth Circuit below, under which one view of the American employment at-will



system dictates that absent an agreement between employer and employee to the contrary the employer may unilaterally set all the terms of employment. The very purpose of the national wage and hour standards in the FLSA is to impose statutory requirements applicable to every covered job. The effectiveness of a national standard can be undermined as effectively by overly broad waiver theories as it can be by "actual" violations. For this reason, statutory rights under the FLSA cannot be abridged or waived by contract or through an agreement between an employer and a union or between employer and employee. *Barrantine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728, 720 (1981) and *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945). Further, as an exception to the more general statutory rule prohibiting the substitution of compensatory time for cash overtime, §207(o) is designed to be narrowly construed under strictly enforced conditions. See, *Klevenhagen*, 508 U.S. at 25; *Kentucky Finance Co.*, 359 U.S. 290, 295-296 (1959); and cases collected above at 11.

At the same time, the FLSA and its regulations contain provisions which make specific reference to the use of "agreements" between the parties as a guide to the resolution of questions arising under the statute and regulations.[18] Each of those provisions operates within the

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[18] There are at least nine primary examples of this within the statute:

(1) 29 U.S.C. §207(b) refers to employment "pursuant to a collective bargaining agreement under the NLRA" which limits hours of work as a basis for coverage under the Act's overtime requirements;
(2) 29 U.S.C. §207(e)(7) refers to "extra compensation provided by a premium rate paid an employee, in pursuance of an applicable employment

(continued...)

narrow constraints of its exact language, is narrowly applied and must be applied in recognition of the more general rule that basic FLSA statutory and regulatory overtime rights may not be waived by agreement or contract. The use of "agreements" as a tool within the regulations is always in the context in which the "agreements" are subordinate to the regulation. The specific provisions of §207(o) and the related regulations incorporating a requirement of employee "agreements" as one of the constraints on employer access to compensatory time requires specific and careful attention with an eye to the more general rules (a) that FLSA statutory rights may

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[18](...continued)
agreement or collective bargaining agreement" as a part of the definition of the FLSA "regular rate";
(3) 29 U.S. C. §207(f) refers to agreement in establishing the "irregular hours" exception to the standard 40 hour work week;
(4) 29 U.S.C. §207(g)(1),(2) and (3) refer to agreements in delineating the rule applicable to "piece work;"
(5) 29 U.S.C. §207(j) refers to agreements in setting alternative hours of work standards for certain hospital employees;
(6) 29 U.S.C. §207(n) refers to agreement in determining the FLSA rights of electric railway, trolley operators and motor carrier employees;
(7) 29 U.S.C. §207(o) on compensatory time refers to agreements as discussed in this case;
(8) 29 U.S.C. §207(p)(1)(3) references FLSA deference to agreements to aid in resolving a rule on one public safety employee substituting for another; and
(9) 29 U.S.C. §216(c) refers to agreements "to accept payment" as waivers in resolving FLSA enforcement disputes.



not be altered or waived by contract or agreement; (b) that exceptions to general rules must be narrowly construed; and (c) that overtime compensation must be paid in cash at time and one-half or compensatory time which is of equivalent value to the 150% premium cash requirement; and (d) that where the "agreement" conflicts with the statute or its regulations, the agreement is always superseded.

There is a single provision within statutory §207(o) referencing "agreements" and three major references to "agreements" in the related regulations. Statutory §207(o)(2) mandating that compensatory time itself may be used "only pursuant to (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the agency and representatives of such employees" with an alternative provision that where "(i)" does not apply the agreement may be with individual employees. After *Moreau v. Klevenhagen*, 508 U.S. 22 (1993) it is clear that in Harris County the agreement would be with individual employees. The only statutory provision relating to the **use** of accrued compensatory time, 29 U.S.C. § 207(o)(5) contains no reference to "agreements" and provides only that employee requests to use their compensatory time made within a "reasonable period" must be granted unless the use of the time off would "unduly disrupt" employer operations. There is no other mention of "agreements" in the statute's compensatory time provisions.

The applicable §207(o) regulations contain three major references to "agreements." *First*, the general provision reflecting the statutory scheme and its constraint on employer use of compensatory time in lieu of cash overtime absent an agreement with employees, 29 C.F.R. §553.23. *Second*, §553.23(a)(2) references agreements as a permissible means of "governing the preservation, use and

cash out of compensatory time **so long as these provisions are consistent with §207(o) of the Act. To the extent that any provision of an agreement or understanding is a violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o).**" And *third*, the rules on conditions for use of compensatory time ("reasonable period" "unduly disrupt") in §553.25(c)(2) indicate that the terms of such "agreement" or understanding [under §553.23] will "govern the meaning" of "reasonable period" (§553.25(c)(2)), but no similar agreement incorporation appears in the "undue disruption" rule (§553.25(d)).

The regulations expressly provide that FLSA compensatory time agreements may -- (1) restrict compensatory time payment to certain hours of the day disallowing it in others, §553.23(a)(2)(first sentence); (2) restrict comp time to certain jobs or employees and refuse it to others, §553.23(c)(i)(third sentence); (3) provide for a combination of time off and cash payment for overtime work so long as the total resulting compensation equals time and one half the employee's regular rate, §553.23(a)(2)(second sentence); (4) define the "reasonable period" in which requests to use compensatory time may be made, §553.25(c)(2); and (5) include provisions on the preservation, use and cash out of compensatory time **so long as those provisions are consistent with the other requirements of §207(o),** §553.25(a)(2)(third and fourth sentences).

The regulations are also clear that a compensatory time agreement may **not** provide for: (1) retroactivity, but must be arrived at before the work is performed, §553.23(a)(1); (2) less than time and one-half overtime compensation, §553.20(last sentence); (3) accruals of more than 480 hours, §553.22; (4) supersession of the "undue



disrupt rule," §553.25(d); (5) rejection of the employers authority to cash out compensatory time at any time, §553.26(a); (6) reduction below the regulatory standard of the rate at which compensatory time is paid out if an employer chooses to buy it out, §553.27(a); (7) reduction of the rate below the regulatory standard to which compensatory time is paid at termination, §553.27(b); (8) a "use it or lose it" provision, §553.25(b); (9) an override of protection of a degree of employee flexibility in the use of compensatory time, §553.20(second sentence); (10) the "payment in lieu of cash overtime of more compensatory time than an employer can realistically and in good faith expect to be able to grant on request of the employee," §553.25(b); or (11) reduction in the economic value of compensatory time below a level equivalent to premium rates of cash overtime at time and one-half, that is the value of compensatory time must be susceptible to calculation "just as the mandatory [cash] rate is calculated", §553.20.

Absent an "agreement" freely agreed to by the employee involved and arrived at without coercion, which is consistent with these §207(o) mandates, an employer may not compel the use of accrued compensatory time. As the Department of Labor informed Harris County in response to a formal request for a Letter Ruling:

> ... a public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed, **if** the prior agreement **specifically** provides such a provision, and the employees have knowingly and voluntarily agreed to such provision freely and without coercion or pressure. See §553.23(c). Absent such an agreement, it is our position that neither the statute nor the regulations permit an employer to **require** an employee to use accrued compensatory time.

As the Eighth Circuit emphasized in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied*, *Schriro v. Heaton*, 515 U.S. 1104 (1995) --

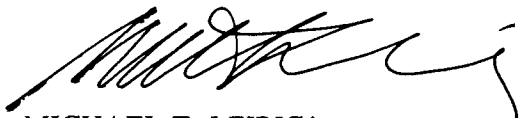
> Employees are allowed to "bank" compensatory time in what amounts to an employee-owned savings account of compensatory time. The banked compensatory time essentially is the property of the employee. [citing, 29 C.F.R. §553.23(c)(1)(ii) and §553.25(b).] We read section 207(o)(5), the only section addressing the method of using banked compensatory time, to be consistent with the understanding that banked time belongs to the employee. Section 207(o)(5) specifically gives the employee the right to access to and control of the use of that banked time subject only to the employer's right to deny requested uses by the employee that would unduly disrupt the employer's operation. As the employee would have the right to spend the employee's cash overtime pay when and as the employee chose, so the employee should be allowed to spend the banked compensatory time as the employee chooses, subject only that the employee may not "unduly disrupt" the public employer's operations in doing so. 43 F.3d at 1180.



## CONCLUSION

This Court should overturn the Court below and remand this case for a decision consistent with the United States Department of Labor's interpretation of 29 U.S.C. § 207(o) that a public agency, absent a preexisting agreement, may not compel employees to use accrued compensatory time.

Respectfully Submitted,



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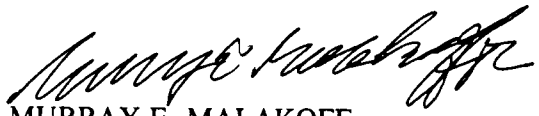

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