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Appeals court revives attorneys' lawsuit for overtime compensation

This fall, many among the next bumper crop of litigation associates beginning their careers will bypass depositions and court hearings and proceed to the nearest conference room to pore through documents for discovery.

As their eyes glaze over thousands of documents, they perhaps take comfort in knowing they are just paying their dues as newly minted associates. But a recent decision might give them — and, in particular, temporary attorneys hired to staff document review projects — additional hope: the prospect of overtime compensation.

In July, the 2nd U.S. Circuit Court of Appeals reversed the dismissal of a Fair Labor Standards Act collective action brought by a temporary contract attorney against a law firm and a staffing agency. *Lola, et al. v. Skadden, Arps, Slate, Meagher & Flom LLP*, No. 14-3845 (2nd Cir., July 23).

Plaintiff David Lola claimed that he and a class of other contract attorneys hired to perform document review were unlawfully deprived of overtime premium compensation when they worked more than 40 hours per week.

The case turns on the FLSA's exemption from its overtime requirements for those "employed in a bona fide ... professional capacity." 29 U.S.C. Section 213(a)(1). Department of Labor regulations provide that this exemption applies to "[a]ny employee who is the holder of a valid license or certificate permitting the practice of law ... and is actually engaged in the practice thereof." 29 C.F.R. Section 541.304(a)(1).

The 2nd Circuit concluded that the plaintiff stated a claim that licensed attorneys performing document review

were not necessarily practicing law so as to qualify for this exemption. The decision paves the way potentially to classwide recovery of unpaid overtime compensation, up to double (liquidated) damages and attorney fees.

District court: Not glamorous, but practicing law

This case began in July 2013 with a lawsuit filed in New York federal court by a temporary contract attorney who allegedly spent 15 months reviewing documents in North Carolina for a multidistrict litigation. The plaintiff allegedly worked 45 to 55 hours per week without receiving any overtime premium.

According to the plaintiff, contract attorneys were closely supervised and simply looked at documents for certain search terms, marked documents into predetermined categories and occasionally drew "black boxes" to redact documents based on specific protocols.

This "mechanical" work, the plaintiff argued, could have been performed by a paralegal, did not constitute the practice of law under the labor regulations and therefore did not invoke the FLSA's professional exemption.

The defendants moved to dismiss on the ground that the plaintiff and other contract attorneys are exempt as licensed attorneys engaged in the practice of law.

The defendants argued that this work demanded they use their legal education and judgment in performing a "core," albeit non-glamorous, function in litigation.

In September 2014, the district court granted the defendants' motion to dismiss. (*Lola*, Doc. No. 35, 1:13-cv-05008-RJS (S.D. N.Y., Sept. 16, 2014)). Applying North Carolina state standards, rather than promul-

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gating a federal standard, the district court concluded that document review qualified as the "practice of law," regardless of whether it required legal judgment and discretion.

Consequently, the FLSA's professional exemption barred the plaintiff from recovering overtime compensation.

2nd Circuit revives overtime suit

The plaintiff appealed to the 2nd Circuit. In a unanimous decision, that court parted ways with the district court's conclusion that document review necessarily entailed the practice of law.

Instead, the 2nd Circuit found that "at least a modicum of independent legal judgment" is required for the FLSA's professional exemption. Accepting the plaintiff's allegations as true, the plaintiff "failed to exercise any legal judgment" and "provided services that a machine could have provided."

The 2nd Circuit accordingly vacated the dismissal and remanded for further proceedings.

Implications

The contract attorneys in *Lola* of course have a long way to go from surviving a motion to dismiss to securing any judgment in their favor. But the 2nd Circuit's decision offers some important lessons.

For one, employers should tread carefully in presuming that licensed attorneys, at least those

hired on a contract basis to perform document review, are automatically practicing law for purposes of the labor regulations.

The *Lola* court pointed to how many states — including Illinois — "consider the exercise of some legal judgment an essential element of the practice of law."

Consequently, the less independent judgment and discretion an attorney is called upon to apply, the less likely the attorney may be deemed to be practicing law to qualify for the professional exemption.

Staffing agencies that deploy contract attorneys to law firms for document review and other projects also should carefully evaluate the scope of work to be performed and the risk of not paying overtime compensation.

A potential claim may arise that an employee performed the services of a machine, not of a trained legal professional. (Notably, a similar lawsuit is pending against another staffing company and law firm: *Henig et al. v. Quinn, Emanuel, Urquhart & Sullivan LLP*, No. 13-cv-1432 (S.D. N.Y.).)

Further, law firms bringing temporary attorneys onboard should strive to manage projects in a way that would defeat a "joint employer" argument, and consider perhaps insurance or indemnification provisions with their vendors for this contingency.

Ultimately, it remains to be seen whether any court will deem a licensed attorney performing document review a nonexempt employee. But, at the very least, law firms and the staffing agencies that place temporary attorneys there may need to think twice before presuming only the non-lawyers in their offices can qualify for overtime compensation.