Washington and Lee Law Review

Volume 50 | Issue 1 Article 24

1-1-1993

Case Comments M. Labor Relations Wilson V. City Of Charlotte

when it is clear that the partners have agreed to create specific rights and obligations as among or between themselves, and when the extent of such rights and obligations is readily ascertainable without an accounting, recourse pursuant to the partnership agreement is proper even absent a dissolution, winding up, and settlement of partnership accounts.[544]

M. LABOR RELATIONS

Wilson v. City of Charlotte

964 F.2d 1391 (4th Cir. 1992) (en banc)

Prior to 1985, the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA)[545] were not applicable to state and local public employers. Consequently, a public employer could legally provide compensatory leave in lieu of monetary compensation for overtime hours. State and local public employer immunity from the FLSA overtime requirements evaporated, however, with the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*.[546]

In amending the FLSA to bring the Act in line with the *Garcia* decision, Congress attempted to ease the financial burden that providing cash overtime compensation would place on public employers by enabling them to imple-

---

ognizing that although partnership has not undergone final accounting, partner may maintain action at law against partnership when doing so requires no complex accounting); Warren v. Warren, 784 S.W.2d 247, 252 (Mo. Ct. App. 1989) (recognizing that final accounting is not prerequisite to action at law between partners where items sued on are few and simple of solution); Hanes v. Giambrone, 471 N.E.2d 801, 807 (Ohio Ct. App. 1984) (stating that prior final accounting is unnecessary for maintenance of action at law between partners based on partnership transactions where facts are such that no complex accounting is necessary); Pilch v. Milikin, 19 Cal. Rptr. 334, 340 (Ct. App. 1962) (holding that where no complex accounting involving variety of partnership transactions is necessary, an action at law may be maintained though winding up and final accounting have not taken place).

544. Gilbert v. Fontaine, 22 F.2d 657, 662 (8th Cir. 1927); *see also* Giblin v. Anesthesiology Assocs., 567 N.Y.S.2d 775, 776 (App. Div. 1991) (recognizing that although partnership has not undergone final accounting, partner may maintain action at law against partnership when doing so requires no complex accounting); Warren v. Warren, 784 S.W.2d 247, 252 (Mo. Ct. App. 1989) (recognizing that final accounting is not prerequisite to action at law between partners where items sued on are few and simple of solution); Hanes v. Giambrone, 471 N.E.2d 801, 807 (Ohio Ct. App. 1984) (stating that prior final accounting is unnecessary for maintenance of action at law between partners based on partnership transactions where facts are such that no complex accounting is necessary); Pilch v. Milikin, 19 Cal. Rptr. 334, 340 (Ct. App. 1962) (holding that where no complex accounting involving variety of partnership transactions is necessary, an action at law may be maintained though winding up and final accounting have not taken place).

545. Fair Labor Standards Act of 1938, 29 U.S.C.A. §§ 201-19 (West Supp. 1991).

546. 469 U.S. 528 (1985). In *Garcia*, the Supreme Court overruled its decision in National League of Cities v. Usery, 426 U.S. 833 (1976) (holding that public employees, where traditional governmental functions are involved, are immune from requirements of FLSA), holding that Congress could require public employers to comply with the FLSA regardless of the nature of the work. *Garcia*, 469 U.S. at 547.

ment compensatory leave policies in lieu of monetary payments for overtime.[547] Section 207(o) of the Fair Labor Standards Amendments of 1985[548] permits employers to compensate employees with compensatory leave but only pursuant to an agreement with the employee or the employee's representative[549] as defined in subsections (2)(A)(i) and (ii) of section 207(o).[550] If no agreement is reached, the Act mandates monetary compensation for overtime work.[551]

The United States Court of Appeals for the Fourth Circuit first construed section 207(o) in *Abbott v. City of Virginia Beach*.[552] In *Abbott*, the Fourth Circuit held that section 207(o) permits public employers to enter into individual agreements with its employees when state law has prohibited the employer from entering into agreements with the employees' representative.[553] In *Wilson v. City of Charlotte*,[554] the Fourth Circuit reexamined the *Abbott* interpretation of section 207(o).

In December 1985, the City of Charlotte, North Carolina was in the practice of awarding its fire fighters with compensatory leave for overtime in lieu of monetary compensation. Disgruntled by this practice, 156 members of the Charlotte Fire Fighters Association Local 660 notified the City that Charlotte's policy violated section 207(o) of the FLSA because the City had not reached an agreement with the fire fighters' representative regarding the

---

547. Wilson v. City of Charlotte, 964 F.2d 1391, 1393 (4th Cir. 1992) (en banc).

548. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2(a), 99 Stat. 787 (1985) (added 29 U.S.C.A. § 207(o)). Section 207(o) provides in relevant part:

> (1) Employees of a public agency which is a state, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
>
> (2) A public agency may provide compensatory time under paragraph (1) only—
>
> (A) pursuant to—
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause(i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and
>
> (B) . . .
>
> In the case of employees described in clause (A)(ii) hired before April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

Id.

549. *Wilson*, 964 F.2d at 1394.

550. *Id.*

551. *Id.*

552. 879 F.2d 132 (4th Cir. 1989).

553. Abbott v. City of Virginia Beach, 879 F.2d 132, 135 (4th Cir. 1989).

554. 964 F.2d 1391 (4th Cir. 1992).

use of compensatory time off in lieu of monetary compensation. Because the fire fighters' had designated Local 660 of the International Association of Fire Fighters as their representative, and because North Carolina law prohibited state and local governmental units from contracting with labor unions, the City refused to bargain with Local 660. Consequently, the fire fighters brought an action against the City in the United States District Court for the Western District of North Carolina claiming that the City's failure to recognize and negotiate with Local 660 violated section 207(o) of the FLSA.

The district court entered summary judgment in favor of the fire fighters. The district court rejected the City's argument that it was permitted to award compensatory leave without the union's consent because the City was precluded by state law from entering into an agreement with Local 660. The district court declared that under FLSA, a public employer could only substitute compensatory leave for monetary compensation when the employer reached an agreement with the employees' designated representative. According to the district court, if the employer did not reach such an agreement or could not enter into an agreement with the employees' designated representative because of state law, the employer was statutorily bound to pay monetary compensation for overtime work. The City appealed arguing that the district court incorrectly interpreted the language of section 207(o). The Fourth Circuit reversed and remanded.

In *Wilson*, the Fourth Circuit noted that section 207(o) recognizes three types of agreements—two express and one statutorily imposed agreement. Subsection 207(o)(2)(A)(i) provides for an express agreement between the employer and the employees' representative. Subsection (A)(ii) provides for an express agreement between the employer and employees not covered by subsection (A)(i). Subsection 207(o)(2)(B) provides for a statutory imposed agreement under subsection (2)(ii). Pursuant to subsection (2)(B), if an employer had a regular practice of providing compensatory leave in lieu of monetary compensation for overtime work in effect on April 15, 1986, this practice constitutes an agreement between the employer and any employee described in subsection (A)(ii) hired before April 15, 1986.

The issue before the Fourth Circuit was whether the employees' designation of a representative or the employer's recognition of a representative triggered the application of subsection (A)(i). Turning to the regulations promulgated in implementing section 207(o), the Fourth Circuit concluded that the Secretary of Labor intended that state or local law would determine whether an employee had a representative for the purposes of subsection (A)(i). Accordingly, the Fourth Circuit found that the employees did not have a representative for purposes of subsection (A)(i) because North Carolina law prohibited the City from entering into an agreement with Local 660. Consequently, the Fourth Circuit determined that subsection (A)(i) did not cover the fire fighters.

There was no question that the City and fire fighters had not reached an agreement and that the City had hired the fire fighters prior to April 15, 1986. Because the City had a regular practice in effect as of April 15,

1986 of providing compensatory leave for overtime work, that practice constituted an agreement under subsection (A)(ii). The Fourth Circuit held that, by virtue of this statutorily imposed agreement, the City could continue to provide compensatory time for overtime work.

Judge Luttig, in a concurring opinion, disagreed with the majority's finding that the City was precluded from reaching an agreement with Local 660. Judge Luttig agreed with the dissent and the fire fighters that Local 660 was a representative within the meaning of the statute but disagreed with the majority's finding that the statute required the employer to reach an agreement with the representative. Although the City could have entered into an agreement with Local 660, the FLSA did not require the City to do so.

Judge Luttig also disagreed with the majority's interpretation of the language "not covered by subsection (A)(i)" found in subsection (A)(ii). According to the majority, subsection (A)(i) did not cover the fire fighters because they did not have a recognized representative. Judge Luttig, however, found that because no agreement had been reached between the City and Local 660, the fire fighters were not covered by subsection (A)(i). This distinction in interpretation was critical to Judge Luttig because under the majority's interpretation, if state law permitted the employer to enter into an agreement with the employees' representative, the City had to reach an agreement with the representative before it could award compensatory time off. However, under Judge Luttig's interpretation, the statute did not require the employer to reach an agreement with the representative. If the employer did not reach an agreement with the employees' representative, for whatever reason, the City was free to engage in negotiation with the employee individually.

Chief Judge Ervin, writing for the five member dissent, argued that merely by designating a representative, employees are "represented" for purposes of subsection (A)(i), and that the representative need not be recognized by the employer. Chief Judge Ervin, therefore, agreed with the district court's finding that the Act did not permit the City to take advantage of compensatory leave without entering into an agreement with Local 660.

The Fourth Circuit's interpretation of the term "representative" is consistent with the United States Courts of Appeals for the Fifth, Ninth, and Eleventh Circuits. These circuits have held that an employer is not required to pay its employees for overtime hours in the absence of a negotiated compensatory time agreement with the employees' designated representative when such an agreement is prohibited by state law.[555] The United States Court of Appeals for the Tenth Circuit, however, has ruled differently.[556] The Tenth Circuit has held, like the dissent in *Wilson*, that

555. Moreau V. Klevenhagen, 956 F.2d 516 (5th Cir.), *cert. granted*, 113 S. Ct. 51 (1992); Nevada Highway Patrol Ass'n v. Nevada, 899 F.2d 1549 (9th Cir. 1990); Dillard v. Harris, 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 210 (1990).

556. International Ass'n of Fire Fighters, Local 2203 v. West Adams County Fire Protection Dist., 877 F.2d 814 (10th Cir. 1989).