

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Lawrence, et al.,	:	
Plaintiffs,	:	
	:	
v.	:	No. 03-CV-4009
	:	
City of Philadelphia,	:	
Defendant.	:	

MEMORANDUM

GREEN, S.J.

September 29, 2006

Presently pending are the parties’ cross motions for partial summary judgment limited to the issue of liability. The parties filed memoranda in support of their motions and in response to opposing motions. After considering the parties’ oral and written arguments, I will deny Plaintiffs’ motion for partial summary judgment and will grant Defendant’s motion for summary judgment as it relates to liability.

I. Background

Plaintiff Lawrence, a Philadelphia Fire Service Paramedic (“FSP”), is employed by the City of Philadelphia in its Fire Department. He filed his Complaint on July 7, 2003 and claims therein a violation of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 et seq.. By Stipulation approved by the Court on May 31, 2006, fire service paramedics with similar claims were permitted to opt into this collective action by written consent, to be filed within 90 days of the date of the Stipulation. The enlarged opt-in period has now expired and this matter is ripe for decision.¹

¹ John Holstein filed a similar suit at 06-CV-00643 assigned to the Honorable Jan E. DuBois. On June 27, 2006 he consented in writing to become a plaintiff herein. (See Stipulation filed herein, docket number 140).

Donald Alston and several other fire service paramedics, represented by the same counsel

Plaintiffs complain that they are not being paid by Defendant, their employer, at a rate of at least 1.5 times their regular pay rate for hours worked in excess of 40 hours in a work week.

Plaintiffs assert that Defendant's failure to pay the Fire service paramedics at the time and a half overtime rate when they work in excess of 40 hours a week violates 29 U.S.C. §207(a)(1) which states, in pertinent part:

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Plaintiffs Lawrence and Alston also seek payment at the overtime rate for extra time accrued by their coming to work before their regular shifts to prepare for duty and for extra time served at the end of their tours of duty. This work is referred to as "off-clock" time.

It is not disputed that pursuant to the terms of the collective bargaining agreement fire service paramedics work rotating eight-day shifts at their assigned fire engine companies. The fire service paramedics work "platoon schedules" that consist of either: (1) two 10-hour shifts followed by two 14-hour shifts, followed by four days off (designated the A, B, C, or D platoons); or (2) four 12-hour shifts followed by four days off (designated the E or F platoons). Under the eight-day schedule rotation, a fire service paramedic may work as little as 34 hours in a workweek and as many as 48 hours in a workweek. In each two week pay period fire service paramedics receive pay for 42 hours of work per week regardless of whether they worked 34 or 48 hours in a week. For the 41st and 42nd hour of each week, fire service paramedics receive

as Mr. Lawrence, filed at similar suit in this court at Civil Action number 04-CV-2764. Counsel agree that the decision herein is applicable to the Alston suit.

pay for 2.4 hours at premium rates that are higher than the rate for their first 40 hours. Fire service paramedics only receive additional overtime pay if they work an extra shift or if they work 15 minutes or more after the end of their assigned shift. The undisputed evidence clearly establishes that Plaintiffs, in certain weeks, work in excess of 40 hours and the hours so worked would clearly qualify for payment at the overtime rate specified by the aforesaid section of the Fair Labor Standards Act unless other sections of the Act exempt the fire service paramedics from the 40 hour overtime provision. Thus, the heart of this matter involves whether the exemption provision of the Fair Labor Standard Act found at 29 U.S.C. § 207(k) provides an exemption from the 40 hour standard and substitutes a higher overtime standard with a higher threshold of at least 61 hours worked in an eight day work period for fire service paramedics employed in fire protection activities.² Plaintiffs do not claim that the City is in violation of the higher overtime standard.

²29 U.S.C. § 207(k) provides, in pertinent part:

Employment by public agency engaged in fire protection or law enforcement activities. No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if--

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) [29 USCS § 213 note] in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Counsel for the parties argue that there are no material facts in dispute and that the issues concerning liability are appropriate for decision on summary judgment.³ Plaintiffs claim that the fire service paramedic pay structure violates the FLSA and that the City is required to pay the them at a rate of at least 1.5 times their regular rate for all hours worked in excess of 40 per workweek. Defendants argue that Plaintiffs are subject to the higher threshold set by § 29 U.S.C. §207(k) and only qualify for overtime if they work over 61 hours in an eight day work period.

II. Discussion

Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c), Nebraska v. Wyoming, 507 U.S. 584, 590 (U.S. 1993). An issue is “material” if the dispute may affect the outcome of the suit under the governing law and is “genuine” if a reasonable jury could return a verdict for the non moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The evidence must be viewed in the light most favorable to the non-moving party. See American Flint Glass Workers Union, AFL-CIO v. Beaumont Glass Co., 62 F. 3d 574, 578 (3d Cir. 1995). Plaintiffs correctly argue that the FLSA is to be construed liberally in favor of employees and exemptions are to be narrowly construed against the employer claiming the benefit of the exemption. At oral argument and in their cross motions for summary judgment the parties assert that there are no genuine issues of material fact, and that this matter should be determined on summary judgment.

³See transcript of argument on cross motions for summary judgment.

To determine whether Plaintiffs must receive overtime for hours worked in excess of 40 hours, this court must determine whether the Plaintiffs are properly classified. The FLSA generally requires employers to pay employees compensation at a rate of at least 1.5 times the regular rate when they work in excess of 40 hours per week. See 29 U.S.C. § 207(a)(1). However, the higher qualifying threshold of work in excess of 61 hours applies to paramedics in fire protection activities.

- Employee in fire protection activities" means an employee, including a ... paramedic, ... who—
- (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and
 - (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

29 U.S.C. § 203(y).

Defendant argues that Plaintiffs are employees trained in fire protection activities, fully qualified under § 203(y), and need not be paid at 1.5 times their regular rate for working over 40 hours in a work week. Defendant further claims that Plaintiffs must work over 61 hours in an eight day work period to qualify for overtime. Plaintiffs concede that they are paramedics employed by a fire department of a fire district, as required under § 203(y)(1). However, they argue that they are not trained in fire suppression and do not have the legal authority and responsibility to engage in fire suppression, as required by statute.

a. Training:

To be employees engaged in fire protection activities, the fire service paramedics must be trained in fire suppression. Plaintiffs argue that they are not instructed in fire suppression as

extensively as firefighters, and that § 203(y)(1) requires identical or equivalent training. Plaintiffs have filed a statement of 520 uncontested facts that contains a general description of the training provided firefighters as contrasted to the training of fire service paramedics. To be sure, the training of firefighters is more rigorous, extensive, and intensive than the training required of fire service paramedics. However, the training of fire service paramedics requires several weeks of attendance at the fire academy and the satisfactory completion of relevant fire suppression instruction. This training cannot properly be characterized as merely orientation as Plaintiffs argue in their attempt to show noncompliance with the statutory requirement of training in fire suppression. Regarding the training requirement, Plaintiffs' reliance on Cleveland v. City of Los Angeles 420 F.3d 981 (9th Cir. 2005) is misplaced. In Cleveland, compliance with the training requirement was conceded and the court did not find the training inadequate. Indeed, the Court of Appeals for the Ninth observed that the Department of Labor Regulations merely required training to the extent required by state statute or local ordinance. The parties agree that Pennsylvania law does not require any specific period or type of training. Thus, in Pennsylvania it is left to the local government to prescribe the extent of training, and in Philadelphia the Fire Commissioner is authorized to determine the type and extent of training necessary. Plaintiffs have not cited to any other local government in Pennsylvania that requires training in excess of that required of a fire service paramedic in Philadelphia. A reasonable jury could only find, on the record before the court, that Philadelphia fire service paramedics are trained as required by § 203(y)(1). The statute and regulations do not require more.

b. Legal Authority and Responsibility:

The parties agree that the Fire Department and its Commissioner are authorized by City charter and ordinance. The evidence is undisputed that at every fire scene an Incident

Commander is charged with the responsibility of directing the activities of the firefighters and fire service paramedics. Thus, when directed to engage in fire suppression, fire service paramedics have the legal authority and responsibility to do so. The parties agree that paramedics have only been called upon infrequently to aid in fire suppression, however, it is beyond dispute that fire service paramedics have, on occasion, been directed to aid in fire suppression, and when directed have done so. There is no evidence that such a command has ever been questioned or refused. Plaintiffs rely on language found in Cleveland to argue that the responsibility requirement is not met. In Cleveland the Court stated “. . . for Plaintiffs to have the ‘responsibility’ to engage in fire suppression, they must have some real obligation or duty to do so. If a fire occurs, it must be their job to deal with it.” Id., 420 F.3d at 990. In Cleveland the Court also pointed out deficiencies in the evidence concerning responsibility such as:

- (1) the paramedic ambulances do not carry firefighting equipment or breathing apparatuses;
- (2) a dispatcher does not know if he or she is sending single or dual function paramedics to a call;
- (3) paramedic ambulances are not regularly dispatched to fire scenes and are dispatched only when there appears to be a need for advanced life support medical services;
- (4) dual function paramedics are not expected to wear fire protective gear;
- (5) dual function paramedics are dispatched to a variety of incidents (e.g., vehicle accidents and crime scenes) at which they are expected to perform only medical services; and
- (6) there is no evidence that a dual function paramedic has ever been ordered to perform fire suppression.

Id.

Factually the instant case is clearly distinguishable from Cleveland. Here, it is undisputed that fire service paramedics have been directed, on a number of occasions, to perform fire suppression activities and when ordered they have obeyed. It is also clear that paramedic ambulances in Philadelphia carry breathing apparatus, and paramedics in Philadelphia are

provided fire protective gear to wear. Moreover, it is undisputed that during the course of training at the fire academy, fire service paramedics are provided the “Fire Service Paramedic Cadet Code of Conduct” (“Code”) which they are required to acknowledge and sign before becoming Fire service paramedics. The Code states, in pertinent part, that a fire service paramedic recognizes his or her “. . .responsibility to render Fire Suppression . . .” upon graduation from the fire academy.

The evidence submitted on summary judgment clearly and convincingly establishes the City’s right to rely on the exemption that extends the threshold for overtime pay as it relates to employees engaged in fire protection activities. Of course, there must be some real obligation or duty on the part of the employee to engage in fire suppression. There is no evidence of record that would support a finding by a reasonable jury that the obligation and responsibility to engage in fire suppression on command is not genuine or real. Philadelphia fire service paramedics have in writing acknowledged, and by their performance, verified their responsibility to engage in fire suppression activity.

Plaintiffs argue that the statutory exemption requires equal or identical training and responsibility as is required of firefighters. It is undisputed that fire service paramedics and firefighters have different job descriptions and are called upon to concentrate their efforts according to their respective job descriptions. However, the evidence clearly establishes that paramedics are in fact expected to perform fire suppression activities when directed by the Incident Commander and the obligation to follow the command is real. Neither the statutory language nor the legislative history of the exemption requires identical job descriptions or performance. I agree with the conclusion of the court in McGavock v. City of Water Valley, Mississippi, 452 F.3d 423 (5th Cir. 2006), that the new definition in § 203(y)(1) supplants earlier

regulations and “[t]he only purpose of Congress in amending the statute that is clear to us, is that it intended all emergency medical technicians (EMTs) trained as firefighters and attached to a fire department to be considered employees engaged in fire protection activities even though they may spend one hundred percent of their time responding to medical emergencies.” Id., 452 F.3d at 427. Accordingly, Defendant is entitled to summary judgment as a matter of law.⁴

An appropriate order follows.

⁴ I have recently received from Plaintiff’s counsel an opinion in Diaz, et al., v. City of Plantation, Fla, Civil Action No. 05-60757 (S.D. FL, Sept. 15, 2006). I have considered the opinion and find it not to be persuasive or controlling in the context of the factual record herein.

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City of Philadelphia,	:	
Defendant.	:	

ORDER

Presently pending before the court are the parties' cross motions for summary judgment, and the responses thereto. **AND NOW**, this 29th day of September 2006 upon consideration of the parties' cross motions for summary judgment, the responses thereto, and oral arguments advanced, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' Motion for Summary Judgment on the issue of overtime payment at the rate of at least 1.5 times the hours worked over 40 is **DENIED**.
2. Defendant's Motion for Summary Judgment on the issue of overtime payment at the rate of at least 1.5 times the hours worked over 40 is **GRANTED**.

BY THE COURT:

s/Clifford Scott Green
CLIFFORD SCOTT GREEN, S.J.

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	:	
	:	
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	:	
Defendant.	:	

JUDGMENT

AND NOW, this 29th day of September 2006 it is **HEREBY ADJUDGED and DECREED** that **JUDGMENT** is entered in favor of Defendant and against Plaintiffs.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.