Case 19.2 Michael Shane Christopher v. SmithKline Beecham Corporation

635 F.3d 383; 2011 U.S. App. LEXIS 2834 (9th Circuit)

The issue is whether pharmaceutical sales representatives are exempt from overtime pay.

SMITH, CIRCUIT JUDGE.

Plaintiffs-Appellants Michael Christopher and Frank Buchanan appeal the judgment of the district court that they are not entitled to overtime pay under the Fair Labor Standards Act of 1938 (FLSA). Plaintiffs were employed as Pharmaceutical Sales Representatives (PSRs) for Defendant-Appellee *SmithKline Beecham Corporation* d/b/a *GlaxoSmithKline* (*Glaxo*). *Glaxo* classified Plaintiffs as "outside salesmen"—a legal designation that exempts an employee from the FLSA's overtime-pay requirement. Plaintiffs' suit challenges *Glaxo's* classification and seeks back pay.

The district court granted summary judgment to *Glaxo*. We affirm.

regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

The Secretary's outside sales regulation references provides that "'[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." The Secretary's regulations provide:

Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

In the regulations, the Secretary draws a distinction between sales work and promoting:

Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

To illustrate the concept of promoting sales, as opposed to selling, the Secretary's regulations provides two examples—a manufacturer's representative and a company representative who visits chain stores:

(b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. . . . Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work. . . .

(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.

In a FLSA overtime-wage case, the question of how an employee spends his or her workday is one of fact, while the question of whether his or her activities exclude him or her from the overtime-pay requirement is one of law.

The employer always has the burden of showing the exemption applies to its employee.

Absent an agency-determined result, it is the province of the court to construe the relevant statutes and regulations. As noted supra, Plaintiffs argue that by not transferring any product to physicians, they are not selling pharmaceuticals, but only "promoting" them. Plaintiffs say this distinction is warranted in light of the rule that the FLSA be "narrowly construed against . . . employers." For its part, *Glaxo* urges us to view "sale" in *Section 3(k)* in a commonsensical fashion, while contending that the meaning of "sale" is permissive. *Glaxo* urges us to adopt the rationale that the phrase "other disposition" in *Section 3(k)*'s definition of "sale" is a broad catch-all category.

Plaintiffs' contention that they do not "sell" to doctors ignores the structure and realities of the heavily regulated pharmaceutical industry. It is undisputed that federal law prohibits pharmaceutical manufacturers from directly selling prescription medications to patients. Plaintiffs suggest that despite being hired for their sales experience, being trained in sales methods, encouraging physicians to prescribe their products, and receiving commission-based compensation tied to sales, their job cannot "in some sense" be called selling. This view ignores the reality of the nature of the work of detailers, as it has been carried out for decades. Plaintiffs' argument also fails to account for the fact that the relevant "purchasers" in the pharmaceutical industry, and the appropriate foci of our inquiry, are not the end-users of the drug but, rather, the prescribing physicians whom they importune frequently.

Unlike conventional retail sales, the patient is not at liberty to choose personally which prescription pharmaceutical he desires. As such, he cannot be fairly characterized as the "buyer." Instead, it is patient's physician, who is vested with both a moral and legal duty to prescribe medication appropriately, who selects the medication and is the appropriate focus of our "sell/buy" inquiry. In this industry, the "sale" is the exchange of non-binding commitments between the PSR and physician at the end of a successful call. Through such commitments, the manufacturer

I. Pharmaceutical Sales Representatives

Glaxo is in the business of developing, producing, marketing, and selling pharmaceutical products. Christopher and Buchanan began working as PSRs for *Glaxo* in 2003. *Glaxo* terminated Christopher in May 2007. Buchanan's career at *Glaxo* ended when he accepted a PSR position at another pharmaceutical company.

PSRs usually work outside of a *Glaxo* office and spend much of their time traveling to the offices of, and working with, physicians within their assigned geographic territories. Plaintiffs visited between eight and ten physicians each day, usually between the hours of 8:30 a.m. and 5:00 p.m. Plaintiffs claim that they worked between ten and twenty hours each week outside of normal business hours, for which they received no overtime wages. When not making calls on physicians, Plaintiffs studied *Glaxo* products and relevant disease states, prepared new presentation modules, answered phone calls, checked email, generated reports, and attended events on evenings and weekends.

This litigation commenced in August 2008, when Plaintiffs filed the Complaint challenging *Glaxo's* practice of requiring overtime work without paying additional compensation. The parties cross-moved for summary judgment, and Plaintiffs moved to certify a conditional class. *Glaxo* contended that Plaintiffs were exempt under the "outside salesman" provision in FLSA or, alternatively, under the "administrative" exemption.

In granting *Glaxo's* motion for summary judgment, the district court addressed only the outside sales exemption and held that PSRs "unmistakably fit within the terms and spirit of the exemption." The court observed that PSRs "are not hourly workers, but instead earn salaries well above minimum wage —up to $100,000 a year," and that they receive bonuses in lieu of overtime as "an incentive to increase their efforts." The district court continued, "A PSR's ultimate goal is to close an encounter with a physician by obtaining a non-binding commitment from the physician to prescribe the PSR's assigned product. In this highly regulated industry, that is the most a PSR can achieve."

To meet those goals and expand employment opportunities across the economy, the FLSA includes a baseline "overtime payment requirement" that employers must pay employees "a rate not less than one and one-half times the regular rate at which he is employed" for hours worked in excess of forty per week. There are numerous exceptions to this general rule. These exemptions to the overtime-pay requirement vary widely from "white-collar" executive, administrative, and professional exemptions to those for babysitters. Relevant here is one part of the "white-collar" exemption for persons employed "in the capacity of outside salesman." The white-collar exemption removes from the overtime pay requirement: any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]). . . .

As the statute indicates, a proper interpretation of the FLSA is necessarily guided by the regulations issued by the Secretary of Labor—"[t]he FLSA grants the Secretary broad authority to 'define and delimit' the scope of the exemption for executive, administrative, and professional employees." Congress did not define the term "outside salesman" or the other white-collar exemptions in the FLSA. Rather, "[p]ursuant to Congress's specific grant of rulemaking authority, the [DOL] has issued implementing regulations, at defining the scope of the section 13(a)(1) exemptions." In 2004, the DOL's Wage and Hour Division promulgated supplemental rules concerning the outside sales and administrative exemptions (the 2004 Rule). Among other things, the 2004 Rule explained that "the major substantive provisions of the Part 541 regulations have remained virtually unchanged for 50 years."

The Secretary defines an "outside salesman" as any employee:

1. Whose primary duty is: (i) making sales within the meaning of section 3(k) of the Act; or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
2. Who is primarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

An employee's "primary duty" is "the principal, main, major, or most important duty that the employee performs." The outside sales regulation provides: In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be

will provide an effective product and the doctor will appropriately prescribe; for all practical purposes, this is a sale. Because pharmaceutical manufacturers appreciate who the "real" buyer is, they have structured their 90,000-person sales force and their marketing tactics to accommodate this unique environment.

When a PSR visits a doctor, he or she attempts to obtain the absolute maximum commitment from his or her "buyer"—a non-binding commitment from the physician to prescribe the PSR's assigned product when medically appropriate. In most industries, there are no firm legal barriers that prohibit the actual physical exchange of the goods offered for sale. Because such barriers do exist in this industry, the fact that commitments are non-binding is irrelevant; the record reveals that binding or non-binding, a physician's commitment to a PSR is nevertheless a meaningful exchange because pharmaceutical manufacturers value these commitments enough to reward a PSR with increased commissions when a physician increases his or her use of a drug in the PSR's bag.

The Secretary's distinction between selling and promoting is only meaningful if the employee does not engage in any activities that constitute "selling" under the Act. This much is seen from the plain language of the regulations, which gives the example of promotional work as "a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases." PSRs do far more than collect general data or provide consultations; indeed they ask for, and sometimes obtain, a commitment by the doctor to prescribe Glaxo drugs, and whether the doctor keeps that commitment is verified and traced using aggregated pharmacy data Glaxo collects.

For the past seventy-plus years, selling in the pharmaceutical industry has followed this process. PSRs are driven by their own ambition and rewarded with commissions when their efforts generate new sales. They receive their commissions in lieu of overtime and enjoy a largely autonomous work-life outside of an office. The pharmaceutical industry's representatives—detail men and women—share many more similarities than differences with their colleagues in other sales fields, and we hold that they are exempt from the FLSA overtime-pay requirement.

For the foregoing reasons, we AFFIRM the district court's summary judgment for Defendant-Appellee *SmithKline Beecham Corporation*.