THOMPSON V. REGIONS SECURITY SERVICES, INC.: THE ELEVENTH CIRCUIT PERSUADED BY THE DEPARTMENT OF LABOR'S INTERPRETATION OF "REGULAR RATE" UNDER THE FAIR LABOR STANDARDS ACT

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In *Thompson v. Regions Security Services, Inc.*, the Eleventh Circuit Court of Appeals addressed an employee's claims that Regional Security Services Inc. ("Regional Security") reduced his hourly rate to circumvent paying the overtime rate.[1] Specifically, security guard David Thompson alleged that Regional Security reduced his hourly rate from $13.00 to $11.15, an "artificially low rate," to avoid the Fair Labor Standards Act's ("FLSA") overtime compensation requirement.[2] Regional Security moved for judgment on the pleadings, and the district court granted the motion.[3] Consequently, Thompson appealed the district court's decision.[4] The Eleventh Circuit Court of Appeals vacated the district court's judgment and remanded the case, finding that Thompson's allegations plausibly supported the claim that Regional Security reduced his pay to avoid paying overtime compensation.[5]

Initially, Thompson typically worked forty hours per week with an hourly rate of $13.00 at Regional Security.[6] In January 2019, however, Regional Security began scheduling Thompson to work overtime, raising his weekly total to about sixty hours.[7] Thompson retained his hourly rate of $13.00 and earned an overtime rate of $19.50, or "time-and-a-half."[8] Then in July 2019, Thompson's hourly rate was reduced to $11.15.[9] Thompson's overtime rate thus decreased to $16.73 per hour, a reduction from his typical overtime pay but still

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1 67 F.4th 1301, 1303–04 (11th Cir. 2023).

2 *Id.* at 1304.

3 *Id.* at 1305.

4 *Id.*

5 *Id.* at 1304.

6 *Id.*

7 *Thompson*, 67 F.4th at 1304.

8 *Id.*

9 *Id.*

"time-and-a-half" under the FLSA.[10] He worked between fifty-five and seventy-five hours per week at the reduced rates.[11]

Nearly a year after Regional Security began scheduling Thompson to work overtime with reduced pay, Regional Security cut Thompson's work week back to forty hours and restored his regular hourly rate to $13.00.[12] Following this "abrupt" change, Thompson sued, asserting that Regional Security decreased his hourly rate so that it could schedule him for considerable overtime hours without having to pay him $19.50 for those overtime hours.[13] Regional Security moved for judgment on the pleadings.[14] The district court granted the motion, and Thompson appealed.[15] The Eleventh Circuit reviewed the district court's order *de novo*, which requires the appellate court to view the facts "in the light most favorable" to Thompson, the non-movant.[16]

On appeal, Thompson argued that his "regular rate" during his employment was $13.00.[17] The court explained that under the FLSA, an employer is required to pay an employee overtime compensation if the employee's workweek exceeds forty hours.[18] And the rate at which overtime compensation is provided cannot be ''less than one-and-one-half times the *regular rate* at which [the employee] is employed."[19] The court thus recognized the importance of an employee's "regular rate" in determining overtime compensation, and explained that Thompson's appeal revolved around the definition of "regular rate."[20]

To define "regular rate," the court first relied on statutory interpretation by looking at the FLSA's definition of the term.[21] Under the FLSA, "regular rate" generally "include[s] all remuneration for employment paid to . . . the employee," and excludes an employee's compensation for overtime hours worked.[22] Correspondingly, "'regular rate' refers to the hourly rate actually paid to the employee for the normal, non-overtime workweek for which he is employed."[23] Since Thompson had two different non-overtime hourly rates, the court

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Thompson*, 67 F.4th at 1304–05.
[14] *Id.* at 1305.
[15] *Id.*
[16] *Id*.
[17] *Id.* at 1306.
[18] *Id.* at 1305 (citing 29 U.S.C. § 207(a)(1)).
[19] *Thompson*, 67 F.4th at 1305 (emphasis added) (quoting 29 U.S.C. § 207(a)(1)).
[20] *Id.*
[21] *Id.*
[22] 29 U.S.C. § 207(e).
[23] *Thompson*, 67 F.4th at 1305.

determined that the statutory definition provided by the FLSA alone did not resolve whether Thompson's regular rate was $11.15 or $13.00.[24]

As a result, the court turned to the ordinary public meaning of "regular rate" by looking into the dictionary definitions in use at the time Congress enacted the FLSA.[25] In doing so, the court determined that "regular rate" means a "rate that is 'selected . . . in conformity with established or prescribed usages, rules,' or principles."[26] While the court noted this definition did not resolve Thompson's regular rate, it recognized that the rate of $13.00 could fairly be considered as Thompson's "established or prescribed" rate, since it was the rate he started with and the rate he reverted back to after his eleven-month period of overtime work.[27] Regional Security rebutted this allegation by contending that it reduced Thompson's pay to accommodate his requested scheduling modifications, which would qualify as a lawful reduction of an employee's non-overtime hourly rate under the FLSA.[28] The court could not determine from the pleadings if Regional Security and Thompson had agreed to modify his hourly pay to $11.15.[29] The court therefore decided that the ordinary public meaning of "regular rate" did not resolve whether Thompson's "regular rate" was $13.00 or $11.15.[30]

After determining that both the statutory definition and the ordinary public meaning of "regular rate" failed to resolve the controlling question, the court turned to the Department of Labor's interpretation of the FLSA's overtime provisions in 29 C.F.R. § 778.[31] The court considered the historical context of the Department of Labor's interpretation of the FLSA as it applied *Skidmore* deference to the agency's interpretative rules in Part 778.[32] Additionally, the court noted that Thompson cited to 29 C.F.R. § 778.500 to support his contention that his regular rate was $13.00.[33] "Under that rule, an

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[24] *Id.* at 1306.

[25] *Id.*

[26] *Id.* (alteration in original) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934)) (citing BLACK'S LAW DICTIONARY (3d ed. 1933)).

[27] *Id.*

[28] *Id.* at 1306–07. Wage negotiations between employer and employee are permitted under the FLSA as long as the statutory minimum is respected. Walling v. Helmerich & Payne, 323 U.S. 37, 42 (1944).

[29] *Thompson,* 67 F.4th at 1307.

[30] *Id.*

[31] *Id.*

[32] *Id*. at 1307–08.

[33] *Id.* at 1308.

employee's regular rate cannot 'vary from week to week inversely with the length of the workweek.'"[34]

The Ninth Circuit has interpreted this regulation as prohibiting a practice that lowers the hourly rate during overtime hours or weeks when overtime hours are worked.[35] This interpretation precludes employers from avoiding the FLSA's overtime requirements by preventing them from using "simple arithmetic" to circumvent these requirements.[36] The Eleventh Circuit found that the Ninth Circuit's interpretation embodied the congressional purpose behind the FLSA's overtime provisions.[37]

Additionally, the court recognized that the Department of Labor's interpretation of "regular rate" also embodied the congressional purpose by preventing employers from using "simple arithmetic" to guarantee that an employee will not earn more than his non-overtime hourly rate regardless of the amount of overtime hours worked.[38] The Department of Labor's interpretation "prevents employers from nullifying the FLSA's overtime provisions," and the court determined that this interpretation effectively defined "regular rate."[39] Using this interpretation, the court reasoned that Thompson had plausibly alleged that Regional Security used "simple arithmetic" to nullify the FLSA's overtime provisions.[40] After Thompson was scheduled sixty-hour work weeks with an hourly pay of $11.15, Thompson earned $780.50 for a sixty-hour workweek.[41] Those earnings were only $0.50 more than he would have grossed with his former hourly salary of $13.00 in a forty-hour workweek.[42] This "simple arithmetic," combined with Thompson's fluctuating salary rates, bolstered the inference that Regional Security attempted to "evade paying [Thompson] overtime."[43]

The court did, however, recognize the possibility that Regional Security reduced Thompson's hourly rate for a permissible reason

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[34] *Id.* (quoting 29 C.F.R. § 778.500).

[35] *Thompson,* 67 F.4th at 1308–09 (citing Brunozzi v. Cable Commc'ns, Inc., 851 F.3d 990, 997 (9th Cir. 2017)).

[36] *Id.* at 1309.

[37] *Id.* ("Congress enacted the FLSA's overtime provisions 'to spread employment by placing financial pressure on the employer through the overtime pay requirement' and 'to compensate employees for the burden of a workweek in excess of the hours fixed in the Act.'" (quoting Walling v. Helmerich & Payne, 323 U.S. 37, 40 (1944))).

[38] *Id.* at 1309–10.

[39] *Id.* at 1310.

[40] *Id.*

[41] *Thompson,* 67 F.4th at 1310.

[42] *Id.*

[43] *Id.*

under the FLSA.[44] The court stated that an impermissible reduction "comes down to whether the rate change 'is justified by no other factor other than the number of hours' an employee worked."[45]

Regional Security contended that Thompson failed to allege his hourly rate fluctuated week to week, and the court agreed, noting that the fluctuation occurred after a seven-month period.[46] As a result, the court noted that the change in rates from $13.00 to $11.50 after seven months could support competing interests: (1) that Regional Security reduced Thompson's hourly rate due to "legitimate 'factor[s] other than the number of hours' in his workweek," or (2) the reduction was an attempt to disguise its avoidance of the FLSA's overtime requirements.[47] The court noted that because the fluctuation in rates plausibly suggested that Regional Security was attempting to avoid adhering to the FLSA, the Eleventh Circuit vacated the district court's order granting Regional Security's motion for judgment on the pleadings and remanded the case.[48]

Although the Court's decision in *Thompson v. Regions Security Services, Inc.* did not establish new law, it reaffirms the FLSA's prohibition on employers circumventing the FLSA's overtime requirements.[49] Furthermore, this decision serves as a reminder that employers can lawfully reduce an employee's hourly rate, but employers must avoid using "simple arithmetic" or other devices that suggest noncompliance with the FLSA's overtime requirements. *Thompson* illustrates the importance of the FLSA's overtime requirements and how the courts will construe the actions of employers when determining compliance with the FLSA.

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[44] *Id.*

[45] *Id.* (quoting 29 C.F.R. § 778.327(b)).

[46] *Id.* at 1311.

[47] *Thompson,* 67 F.4th at 1311 (alteration in original) (quoting 29 C.F.R. § 778.327(b)).

[48] *Id.* at 1311–12.

[49] *See id.* at 1309, 1311.