



U.S. Supreme Court Rules that Pharmaceutical Representatives are Not Entitled to Receive Overtime Pay



Linda Davis
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At first glance, the recent decision of the United States Supreme Court seems to be fairly obvious and straight-forward: Pharmaceutical representatives have been restored to their previous classification as “outside sales employees” under the Fair Labor Standards Act (FLSA), meaning they are exempt from the statute’s requirements regarding minimum wages and overtime pay.

However, this case is worth reviewing more closely because it was a 5 to 4 decision, split among partisan lines, with the Republicans favoring the exempt status for pharmaceutical representatives, and the Democrats favoring a non-exempt status that would have allowed the representatives to receive overtime compensation. The analysis presented in this decision could affect employee classifications in other industries.

The case is *Christopher et al v Smith Kline Beecham Corp. d/b/a GlaxoSmithKline*, which was decided on June 18, 2012. The Plaintiffs worked for GlaxoSmithKline as pharmaceutical representatives. They worked both during and after normal business hours, often in excess of 40 hours per week. They received bonuses based on the company’s pharmaceutical sales within their regions. The Plaintiffs sued to collect overtime pay under recently issued regulations by the U.S. Department of Labor. The pharmaceutical industry, facing the prospect of having to pay billions of dollars in overtime pay, argued that the new regulations issued by the Department of Labor conflicted with the FLSA.

Congress enacted the FLSA in 1938 to protect all covered workers from substandard wages and oppressive working hours. To that end, the FLSA imposes a minimum wage and sets a maximum number of hours an employee may be required to work on a weekly basis without additional compensation. For most workers, the minimum wage is currently \$7.25 per hour, and the maxi-

imum hours are 40 hours per week.

Generally, executive, administrative and professional employees, outside sales employees and certain skilled computer professionals are exempt from both the minimum wage and overtime pay requirements. Until 2009, the Department of Labor had classified pharmaceutical representatives as “outside sales employees.”

In his dissenting opinion, Justice Stephen J. Breyer agreed with the 2009 change by the Department of Labor stating that pharmaceutical representatives do not “sell” anything to the doctor. The Justice then quoted *Black’s Law Dictionary*, which defines “sale” as “the transfer of property or title for a price.” The Justice further noted that while doctors do write prescriptions for medications, the final “sale” is contingent upon the prescription being filled by the patient.

Writing for the majority, however, Justice Samuel J. Alito noted that one of the Plaintiffs received just over \$72,000 in annual gross pay, and the other Plaintiff received just over \$76,000. He stated these employees are “hardly the kind of employee that the FLSA was intended to protect,” and that the Department of Labor has made it clear in previous reports that exempt status should not “depend on technicalities,” such as “whether it is the sales employee or the customer who types the order into a computer system and hits the return button.” Because pharmaceuticals may only be dispensed to patients upon a physician’s prescription, the Justice reasoned, “pharmaceutical companies have long focused their direct marketing efforts, not on the retail pharmacies that dispense the prescription drugs, but rather on the medical practitioners who possess the authority to prescribe the drugs in the first place.”

The Court rejected the argument that pharmaceutical represen-

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CMDA Happenings

Attorney Joins Kansas City Office

We are pleased to announce that Tim Mudd has joined our Kansas City, Missouri office as a partner.

Mr. Mudd concentrates his practice on criminal defense, civil litigation representing the interests of local governments and school districts, insurance dispute litigation, personal injury and wrongful death litigation and defending servicemen and service women involved in court martial proceedings.

He received a Juris Doctor degree from Washburn University School of Law in Topeka, Kansas and a Bachelor of Arts de-

gree, cum laude, from Mount Marty College in Yankton, South Dakota.

Attorneys Attend Culinary Challenge Fundraiser

On June 5, 2012 Carla Testani and Lindsey Kaczmarek, both attorneys from our Livonia office, attended the fifth annual Bench Bar Culinary Challenge fundraiser. At the event, Judges and attorneys competed in a live grilling cookoff at the Grosse Pointe Park home of Court of Appeals Judge Kirsten Frank Kelly. All profits from the event benefited Alternatives for Girls, Crossroads for Youth and the Women Lawyers Association of Michigan Foundation Scholarship Fund.

U.S. Supreme Court Upholds the Health Care Act as a Tax and Places a Cap on the Commerce Clause

The United States Supreme Court has upheld the Patient Protection and Affordable Care Act, otherwise known as "Obamacare" as a tax, but not as a permissible federal power under the Commerce Clause of the Constitution. This means the federal government may use the Commerce Clause to regulate activity that affects interstate commerce, but not inactivity, or so-called "failures to act." Nevertheless, because the federal government is afforded the power to levy taxes under the Constitution, the Affordable Care Act is now the law of the land.

Beginning in 2014, companies with 50 or more employees must provide health insurance for their employees or pay

penalties starting at \$40,000. Individuals must also purchase insurance beginning in 2014 or pay a "phase-in" penalty of \$95 or 1% of income, whichever is higher. In 2015, the penalty for individuals increases to \$325 or 2% of income. After 2015, the penalty is 2.5% of income. These penalties will be assessed and managed by the Internal Revenue Service. Less expensive insurance is expected to be available through insurance exchanges created by the states. While many states are waiting until the November elections, Governor Snyder has stated his intent to begin creating an insurance exchange for the State of Michigan.

Linda Davis Friedland

U.S. Supreme Court Rules (cont.)

tatives were not "outside salesmen" because a "transfer of title to property" did not take place, stating that the Department of Labor's own regulations define "sales" as to "include the transfer of title to tangible property," and this inclusion in no way limited the definition of "sales" to that inclusion. The Court also found it was not bound by the Department of Labor's 2009 regulations regarding this novel definition of "sales," because the regulations had been issued upon the filing of briefs as opposed to a formal rule-making process.

The Court then included a finding that could serve as a test in future cases. It stated the Plaintiffs "bear all of the external indicia of salesmen." For example, "they were hired for their sales experience. They were trained to close each sales call by obtaining the maximum commitment possible from the

physician. They worked away from the office, with minimum supervision, and they were rewarded for their efforts with incentive compensation." It is now clear pharmaceutical representatives are deemed to be "outside sales employees" and therefore exempt from receiving overtime compensation. The question remains, however, whether this 5 to 4 decision would apply to employees who fall within more of a gray area, such as those who perform both outside sales and in-house customer service functions.

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Intellectual Property in the Academic Setting



Patrick R. Sturdy

Universities and colleges must be prepared to navigate the complicated world of intellectual property, including dealing with their own trademark. A trademark is a name or symbol which identifies a product, service or institution to the general public. Trademarks, while intangible, are considered property, and the rights associated with trademarks are protected by Federal, State and common law.

Generally, the first party to use a trademark in commerce is entitled to exclusive use of the trademark. That means the first party to use a trademark can prevent anyone else from using the trademark. This is important, because trademarks can have significant economic value as many consumers make purchasing decisions based upon a specific product or service's identification with a specific provider.

A university or college's name, logo and mascot are all trademarks subject to the same protections as any other trademark. University and colleges use their name, logo and mascot on a wide variety of promotional and marketing materials, including everything from letterhead to apparel to inter-collegiate athletic facilities. The most common trademark issues that university and college administrators must deal with involve preventing unrelated businesses or organizations from using its name, logo or mascot without permission. The failure to protect against the unauthorized use of a trademark can result in the loss of trademark rights. Universities and colleges have developed licensing program which provide for the use of its name, logo or mascot in exchange for payment of a royalty. Licensing programs allow the university or college to regulate commercial use of its name, logo or mascot, which includes allowing the university or college to police the quality of the products bearing its name, logo or mascot to ensure they reflect positively on the university and college. It has been reported that collegiate licensing annually tops 3 billion dollars in sales and resides only behind Major League Baseball and the National Football League in terms of major sports sales revenue.

Many universities and colleges have been forced to file infringement lawsuits against those businesses or organizations that have used the university or college's name, logo or mascot without permission. In *Board of Supervisors for Louisiana State University Agricultural & Mechanical College v. Smack Apparel Co.*, Louisiana State University, joined by three other major universities, filed suit to enforce their trademark rights against Smack, a t-shirt manufacturer, who was producing t-shirts using the schools' colors. The t-shirts also referenced the schools' sports success. Only one t-shirt actually used a registered trademark owned by Oklahoma. The Fifth Circuit Court of Appeals found Smack's use of the color scheme, along with reference to the school sports success

constituted infringement. In reach this holding the Fifth Circuit reasoned that each of the schools' long term use of the color scheme had acquired distinctiveness through secondary meaning. The Court also found the similarity between Smack's marks and the schools' marks, the intent to associate with the school and several of the other Polaroid factors demonstrated a likelihood of confusion.

Universities and colleges have also pursued trademark enforcement actions against other educational institutions who have adopted a trademark which might be considered so similar to their trademark that the newly adopted mark causes a likelihood of confusion as to the source of the trademark. Recently, the University of Iowa successfully prevented the University of Southern Mississippi from federally registering its newly adopted eagle head mascot, despite the common use by many other institutes of bird heads for mascots. Southern Mississippi tried to register its new trademark with the United States Patent and Trademark Office. Iowa objected, claiming Southern Mississippi's eagle head was confusingly similar to Iowa's Hawkeye trademark. In finding in Iowa's favor, the court explained:

Both parties' marks present the head of a bird of prey facing right, and basically oval in shape. Both contain identical colors. These images are very similar to each other in style and proportion. They both involve a bold profile image of the head of a large bird. That Southern Miss's eagle may be a bit more literal and fierce than Iowa's original Hawkeyes mark does not overcome the overall similarities.

Southern Mississippi attempted to argue that Iowa's mark was not entitled to protection because the field was flooded by a large number of colleges and universities whom had adopted a bird's head as a mascot. The court disagreed, finding that despite the popularity of using birds of prey, like eagles and hawks for collegiate and professional sports teams, Iowa's mark had developed sufficient recognition allowing Iowa to develop a zone of protection, which precluded Southern Mississippi's use of the mark. In reaching its holding, the court also noted that some collegiate logos containing bird heads, also contained literal elements (e.g., the university name, the team name or mascot, or even one or more letters), which arguable reduces the chances of confusion - even among the most uninitiated of sports fans.

The above discussion is not intended, nor does it constitute a comprehensive examination of the issues faced by universities and colleges in connection with either trademarks. Instead, this brief survey simply begins to highlight the significant legal complexities of intellectual property in academic setting. It does however highlight the need postsecondary institutions to take proactive approach in protecting their name, logo and mascot.

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