"FLSA Issues"

Trang Q. Tran
Tran Law Firm
2537 S. Gessner, Suite 104 ,Houston, Texas 77063
Tel: 713.223.8855 x 2002| Fax: 713.623.6399 | Ttran@tranlawllp.com

29th Annual
Labor and Employment Law Institute
Aug. 24 - 25, 2018
Marriott Marquis, Houston, Texas

No violation of § 541.602 if employer prospectively reduced salaries

Kitagawa v. Drilformance, LLC, No. H-17-726, 2018 U.S. Dist. LEXIS 72690 (S.D. Tex. 2018) In 2015 the oil field industries experienced a major down turn. As a result many energy companies laid off workers or reduced compensation to oil field workers. The way Drilformance reduce workers' pay resulted in an FLSA lawsuit accusing them of voiding the salary basis test needed for their exemption defenses.

The parties agree on the material facts and cross-moved for summary judgment on the effect of the salary reduction. The plaintiffs argue that the salary reduction removed them from the status of salaried professional employees, exempt from the Fair Labor Standards Act's overtime requirements.

The plaintiffs argued that the are hourly employees because their compensation declined based on "variations in the quality or quantity of the work performed" and on "absences occasioned by the employer or by the operating requirements of the business," 29 C.F.R. § 541.602(a).

Drilformance sought summary judgment the plaintiffs were exempt and the salary basis test was met. The employer argued that prospective salary reduction based on the economic downturn did not violate the Department of Labor's salary-basis regulation, § 541.602, and did not change the plaintiffs' exempt status.

The Fifth Circuit has never dealt with this issue.

The Department of Labor has issued three opinion letters addressing whether employers reducing salaries in response to economic slowdowns are subject to the Fair Labor Standards Act's overtime provisions. See *In re Wal–Mart Stores, Inc.,* 395 F.3d 1177, 1185 (10th Cir. 2005) (collecting authority). Department of Labor opinion letters interpreting ambiguous regulations receive *Auer* deference. That is, the Department's interpretation controls unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997); see also *In re Wal–Mart Stores, Inc.*, 395 F.3d at 1184–85 (applying *Auer* deference to the Department of Labor opinions addressing salary reductions based on economic slowdowns); *Bassiri v. Xerox Corp.*, 463 F.3d 927, 930–31 (9th Cir. 2006) (applying Auer deference to Department of Labor opinion letters); *Humanoids Grp. v. Rogan*, 375 F.3d 301, 306 (4th Cir. 2004) (same).

These opinion letters confirm that the salary -basis regulation requiring exempt employees to receive a "predetermined amount . . . not subject to reduction because of variations in the number of hours worked or the quantity and quality of the work performed" allows employers to prospectively reduce salaries in response to business needs, such as an industry slowdown, without affecting the employees' exempt status.

The court agreed with Tenth Circuit ruling that an employer does not violate § 541.602 by prospectively reducing salaries to accommodate business needs or a market downturn. Since the record showed that the salary reduction was prospective.

The June 11, 2015 email announcing the reduction stated that it would become effective for the pay period starting June 13, 2015. The plaintiffs' deposition testimony and pay records show that

the salary reduction was implemented only in the pay periods after the announcement. The evidence also shows that the reduction was based on the steep downturn in the oil market and drilling activity.

In an effort to maintain as many jobs as possible and prevent the type of mass layoffs that had become systemic in the industry, Drilformance announced, on June 11, 2015, a prospective reduction in salaries for an indefinite period of time."

The plaintiffs did not dispute that their salary reduction was based on the downturn in the oil market. Because the salary reduction was prospective and based on a downturn in the oil market and the company's finances, it did not violate § 541.602's salary-basis requirement.

First to File Rule Does Not Apply to Individual FLSA Claim *Shirey v. Helix Energy Sols. Grp.*, No. H-17-2741, 2018 U.S. Dist. LEXIS 55609 (S.D. Tex. Apr. 2, 2018)

This is an employment law case in which plaintiff Jason Shirey contends that Helix misclassified his job as a toolpusher as exempt from overtime. Helix filed a motion to dismiss or stay because Shirey's claims were duplicative and overlapped with an existing and earlier filed FLSA lawsuit. (Dkt. 6); see *Hewitt v. Helix Energy Solutions Grp., Inc.,* No. 4:17-cv-02545 (S.D. Tex., filed Aug. 8, 2017). Shirey thereafter amended his complaint and removed the claims on behalf of those similarly situated and proceeded on an individual FLSA case. The court has discretion whether to apply the first-to-file rule. The FLSA allows plaintiffs to proceed on an individual basis rather than joining a collective action. *Id*. The court finds that Shirey's right to have his case heard as an individual as opposed to joining a collective action weighs against the application of the first-to-file rule. Additionally, the court does not find it appropriate or necessary to stay Shirey's case until the collective action case is resolved. While there is a slight risk that this court and the court considering the collective action will reach different conclusions, the issues are not complex and the law is relatively well settled. Thus, the threat of conflicting rulings is minimal. The court denied the defendants motion to dismiss and to abate.

Class Certified even though the Plaintiffs and Class Members had different jobs and job duties*Song v. JFE Franchising Inc.*, No. 4:17-cv-1775, 2018 U.S. Dist. LEXIS 140979 (S.D. Tex. Aug. 20. 2018)

Judge Dena Palermo granted conditional certification. "Plaintiffs are generally required to have held similar jobs, because the nature of the work performed by each plaintiff will determine either (a) whether an FLSA violation occurred and (b) whether a relevant FLSA exemption applies." *Tamez v. BHP Billiton Petroleum (Americas), Inc.,* No. 5:15-CV-330-RP, 2015 WL 7075971, at *3 (W.D. Tex. Oct. 5, 2015) (citations omitted). The purpose of requiring class members to have similar job positions is to ensure judicial efficiency by "avoiding the need for individualized inquiries into whether a defendant's policy violates the FLSA as to some employees but not others." *Id*. (citations omitted). Defendants oppose conditional certification because the Plaintiffs had different job titles and responsibilities and their declarations contain no information about the job requirements of the putative class members. Defendants argue that the declarations are too vague to support finding that the other aggrieved employees were subject to the same pay practices. Plaintiffs acknowledge that the each of them and the other aggrieved employees have different job

titles, but allege they were all subject to the same pay policy as salaried employees who were required to perform additional tasks without payment for their overtime. The Plaintiffs argue that these dissimilarities are legally irrelevant because the alleged FLSA violations do not turn on the work performed under their regular job duties; instead, they were allegedly denied overtime for performing the same type of non-exempt work that caused them to work overtime for which they were not paid. The declarations show that the Defendant required the three Plaintiffs to work unpaid overtime while performing duties that were different from each other: cook, serve, and clean at stores or company hosted functions. One plaintiff was required to work unpaid overtime on the owner's house, lawn, and cars. The jobs were all different, but the affidavits are sufficient to show that the Plaintiffs were all required to work unpaid overtime and perform work that would otherwise entitle them to overtime pay. In granting the motion for conditional certification the court held that:

> "These allegations and evidence are sufficient to show that the class members were victims of a single decision, policy, or plan. The Tamez case is instructive. In *Tamez*, the plaintiff asked the court to conditionally certify a proposed class consisting of "all BHP Billiton employees who were paid a day rate, regardless of the nature of their responsibilities." *Tamez*, 2015 WL 7075971, at *2. This broad definition included employees with at least eight different job titles and job responsibilities. Id. BHP Billiton argued that due to the stark differences between the duties and responsibilities of each job title, the proposed "class members ... [were] not similarly situated." Id. The Tamez court rejected BHP Billiton's argument, finding that (1) Tamez's day rate allegation amounted to a per se FLSA violation that did not depend on the job title or responsibilities of each particular plaintiff; and (2) BHP Billiton had failed to demonstrate why any differences in job titles and responsibilities among class members would be relevant given the day rate allegation. Id. at *3-4. Based on these findings, the Tamez court conditionally certified the class, explaining: The class definition proposed by Plaintiffs is admittedly broad. But, the Court nonetheless finds that dissimilar job responsibilities among the class have not been shown to be relevant to the Plaintiffs' FLSA allegations and, thus, are not a barrier to conditional certification. Id. at *4. At least one court in this district has followed Tamez. *Wade*, 2018 WL 2088011, at *4. Like Tamez, Plaintiffs allege that they were paid a salary without regard for the number of hours worked—i.e., without regard for whether they worked in excess of 40 hours each work week. Moreover, Plaintiffs allege that they were required to work overtime to perform tasks that were non-exempt and not part of their regular duties as salaried employees. Defendants have failed to show why any differences in the job titles and responsibilities would be relevant to these allegations. If Plaintiffs' allegations are true, such a compensation scheme is a per se violation of the FLSA, and JFE would be in violation of the FLSA with regard to every putative plaintiff regardless of their particular job position. Because Plaintiffs allege that the compensation scheme is in of itself a violation of the FLSA, "liability can be determined collectively without limiting the class to a specific job position." 2015 WL 7075971, at *3; *Wade*, 2018 WL 2088011, at *4. "

What is necessary to prove that other People are Interested in joining this class.

Some District Court Judges require that the plaintiff demonstrate that others are interested in joining a class. The Plaintiffs stated in their declarations that they were aware of others "who would be interested to learn that they may recover unpaid overtime" from Defendants. This is sufficient to establish that others seek to join the lawsuit. *Kibodeux*, 2017 WL 1956738, at *3 (finding evidence of one potential claimant who wished to opt-in was sufficient); *Vaughn*, 250 F. Supp. 3d at 244 (same). *Song et al v. JFE Franchising, Inc. et al*, 4:17-cv-01775, No. 49 (S.D.Tex. Aug. 20, 2018)

Exception to an exception? Who has the burden of proof in a mixed-fleet case? *Carley v. Crest Pumping Techs., L.L.C.*, 890 F.3d 575 (5th Cir. 2018)

Normally, the employer bears the burden to prove that an exemption to the FLSA applies. The exception are overtime cases involving transportation. If an employer can prove that they are covered by the Motor Carrier's Act (MCA), then they are exempted from the FLSA statute. The Technical Corrections Act (TCA) created an exception to the MCA exemption. Under that exception, employers must comply with the FLSA's overtime requirements for employees who operate vehicles weighing 10,000 pounds or less (the "small vehicle exception"). A mixed-fleet case is an overtime case where the employees are subject to be called to work on, load or drive vehicles are 10,000 pounds or less and big trucks that are over 10,000 pounds. FLSA lawyers have debated two fundamental questions about the TCA regulations: (1) who bears the burden of proving that an employee operated a "small vehicle" subject to the exception, and, (2) how does one "weigh" a vehicle?

On appeal, Crest argues that the trial court erred in not granting it judgment as a matter of law ("JMOL") or a new trial, because it was exempt from FLSA's overtime payment requirements. Crest also argues that it should have received a new trial because, inter alia, the court improperly placed the burden on Crest to prove that the SAFETEA-LU Technical Corrections Act ("Corrections Act") did not except Plaintiffs from the Motor Carrier Act ("MCA") exemption.

The Fifth Circuit held that the employee now bears the burden.

"The dispute here is who bears the burden of proving the weight of vehicles under the Corrections Act. Plaintiffs argue that the Corrections Act, though codified separately from the MCA exemption, is analogous to exclusionary language contained within exemptions under 29 U.S.C. § 213, which the employer bears the burden of proving. See, e.g., 29 U.S.C. § 213(a) (6) (reading, in part, that wage requirements do not apply to "any employee employed in agriculture . . . if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor" (emphasis added)). But Plaintiffs' examples all fall within the group of "Exemptions" listed under 29 U.S.C. § 213.

On the other hand, the Corrections Act was codified under 29 U.S.C. § 207, which sets out FLSA standards that Plaintiffs bear the burden of proving lack of compliance by an employer. In other words, the Corrections Act defines a "covered employee" in a statute subsection under which the plaintiff has the burden of proof for FLSA. "

Our decision in *Samson v. Apollo Resources, Inc.,* 242 F.3d 629 (5th Cir. 2001) is instructive. In *Samson*, we determined whether the employee or employer bore the burden of proving compliance with an approved method of paying overtime under 29 U.S.C. § 207. 242 F.3d at 636. We held that, because the payment method "is one method of complying with the overtime payment requirements of 29 U.S.C. § 207(a)(1) [and] [i]t is not an exemption to it . . . the employee bears the burden of proving that the employer failed to properly administer the [overtime payment] method." Id. *Samson* considered whether the method of paying overtime was a way to meet 29 U.S.C. § 207(a) or a way to exempt oneself from § 207(a). See id. Here, the Corrections Act is similarly not an exemption from § 207(a); rather, it codifies conditions under which § 207(a) requires overtime pay notwithstanding the MCA exemption. *Sampson*'s logic thus indicates that the burden of proof is more appropriately placed on Plaintiffs here, as compliance with the Corrections Act is of a piece with compliance with § 207(a), rather than a way to exempt oneself from § 207(a) as per an exemption enumerated under 29 U.S.C. § 113. We hold that the burden of proof should have been placed on Plaintiffs. Therefore, the trial court erred in allocating the burden of proving the Corrections Act to Crest."

Interestingly, the court also held that GVWR was the appropriate measure of vehicle weight for the TCA small vehicle exception. In doing so, the court gave *Skidmore* deference to the U.S. Department of Labor guidance that determined the weight of vehicles should be determined by relying on the GVWR, and not the actual weight of the vehicle.

When wait time is not counted as work time. *Bridges v. Empire Scaffold, L.L.C.*, 875 F.3d 222 (5th Cir. 2017), *cert. den*., 138 S. Ct. 1552 (2018) The Fifth circuit affirmed summary judgement. Empire required its employees to take buses from the Port Arthur Road Parking Lot to the refinery on a first-come, first-serve basis between 5:00 a.m. and 6:15 a.m. Empire's policy was that an employee who missed the last bus at 6:15 a.m. would not be able to work until the next day. Empire did not allow the employees to access the refinery by any other means, such as riding in another contractor's van. The purpose of this policy was to prevent chaos and congestion of vehicles at the refinery, as well as to keep the refinery secure.

The bus ride to the refinery took approximately 20 to 30 minutes. The bus dropped the employees off at Empire's lunch tents, which were about three-quarters of a mile inside the refinery and a few hundred yards away from the live units where the employees performed scaffolding. Empire required its employees to sign in at the lunch tents. Empire did not mandate anything else—such as work at the live units, safety meetings, or completing the job safety analysis paperwork—prior to 7:00 a.m. At 7:00 a.m., a horn sounded, commencing the shift time. Empire required its employees to wear personal protection equipment ("PPE") upon reporting to work at the live units.

The employer argued that the pre-shift wait time and the donning and doffing should not be compensable because. Portal-to-Portal Act in order to curb See *Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513, 516– 17 (2014). This Act exempts employers from liability for claims based on the following activities: (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2)

activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. 29 U.S.C. § 254 (a).

Additionally, unlike some of their coworkers, Bridges, Gonzalez, and Alanis have not claimed that they participated in principal activities prior to 7:00 a.m. Alanis testified that during the pre-shift wait time, he did "[n]othing" and would "chat with [his] colleagues." Bridges stated that he used his time to smoke. Gonzalez testified that he just sat down and waited for 7:00 a.m. The court held that the plaintiffs did not created a genuine dispute of material fact with respect to performing principal activities prior to 7:00 a.m. The court applied the integral and indispensable test is the relevant test for determining the compensability of the Appellants' pre-shift wait time. The court granted summary judgment on the preliminary wait time because it was not intrinsic to the plaintiff's principal activities and is not compensable under the Portal-to-Portal Act.

Arbitrability is a threshold question before class ruling *Edwards v. DoorDash, Inc.*, 888 F.3d 738 (5th Cir. 2018)

DoorDash requires Dashers to sign an Independent Contractor Agreement ("ICA"). The ICA that Edwards signed contains an arbitration clause.

Edwards filed suit against DoorDash in the United States District Court for the Southern District of Texas, alleging Fair Labor Standards Act ("FLSA") violations. He also moved for conditional certification of a class of similarly situated individuals nationwide on the same day. In response, DoorDash filed both an emergency motion to stay the conditional certification and a motion to compel individual arbitration and dismiss the suit. After an evidentiary hearing and supplemental briefing, the magistrate judge issued a report and recommendation that the motion to dismiss should be granted and Edwards should be compelled to arbitrate his claims. The district court agreed. Edwards appealed.

On appeal, Edwards argued the district court erred in ruling on DoorDash's motion to dismiss and compel arbitration before it ruled on Edwards 's motion to certify a class.

We continue to hold that arbitrability is a "threshold question" to be determined "at the outset," a holding consistent with the "national policy favoring arbitration." Id. at 377–78 (citations omitted).

Following *Buckeye* and *Rent-A-Center*, we must distinguish arguments regarding the validity of the arbitration agreement from arguments regarding the validity of a contract as a whole. *Lefoldt ex rel. Natchez Reg'l Med. Ctr. Liquidation Tr. v. Horne, L.L.P.*, 853 F.3d 804, 814 (5th Cir. 2017), as revised (Apr. 12, 2017). Once the court determines there is a valid arbitration agreement, any remaining arguments that target the validity of the contract as a whole are questions for the arbitrator. *Id*. at 815. Importantly, arguments attacking an agreement's validity are to be distinguished from arguments that a contract was never formed. Id. at 810. We are permitted to consider arguments about contract formation. *Id*.

When does the fluctuating work week apply? *Hills v. Entergy Operations, Inc.*, 866 F.3d 610 (5th Cir. 2017) The 5th Circuit dealt with a common issue in misclassification cases. Is the backpay calculated based on time and one half of the regular rate of pay or a fluctuating work week. The later usually results in a much lower recovery.

"The backpay owed to a successful misclassification plaintiff is the extra pay that she should have received for working overtime hours at 1.5 times her regular rate of pay. The court's preliminary task, therefore, is to determine the employee's regular rate of pay. "Calculation of the correct 'regular rate' is the linchpin of the FLSA overtime requirement", an often tricky calculation that the Supreme Court has called "perplexing." The Wage and Hour Division of the Department of Labor attempts to assist with its guidance and examples in the Code of Federal Regulations that this court and others often rely on. The conceptual complexity posed here lies in converting salaried employees' salaries into regular hourly rates of pay for the purpose of determining proper overtime pay. Overtime is computed in terms of an hourly rate, so when an employee is compensated by salary or other basis, the compensation must be converted to an hourly rate.

In general, this "is computed by dividing the salary by the number of hours which the salary is intended to compensate" referred to as the "fixed" or "standard" method of calculating a salaried employee's regular hourly rate of pay. However, for many salary relationships, there is no fixed number of hours that the employee is expected to work each week. Many, if not most, salaries are intended to compensate however many hours the job demands in a particular week, with the salary not increasing just because a particular week is onerous. The theory is that employees agree to this arrangement because, in return, the employer cannot reduce the salary when a different week happens to be light. When an employee has agreed to this arrangement, her workweek is said to "fluctuate," so her regular rate of pay is determined by the "fluctuating workweek method." Under this method, the regular rate of pay is determined by examining each week individually and dividing the salary paid by the number of hours actually worked (because the salary was intended to compensate whatever number of hours that happened to be). The employee's regular hourly rate thus varies from week to week, so her proper overtime compensation similarly varies from week to week.

"The question of whether an employer and employee agreed to a fixed weekly wage for fluctuating hours is a question of fact." The parties' initial understanding of the employment arrangement as well as the parties' conduct during the period of employment must both be taken into account in determining whether the parties agreed that the employee would receive a fixed salary as compensation for all hours worked in a week, even though the number of hours may vary each week. In this circuit, the employees bear the burden of demonstrating that the fluctuating workweek method is inapplicable."

The workers must prove that the FWW does not apply. This is frequently done through deposition testimony on the understanding between the parties.

"The plaintiffs argue and have submitted evidence that they believed their schedules would be limited to the alternating 36- and 48-hour weeks. EOI argues and has submitted evidence that the plaintiffs knew they would be required to work more than that baseline. However, the district court

entered summary judgment against the plaintiffs, holding as a matter of law that the fluctuating workweek method would apply to compute their regular rate of pay— a method that would count against the plaintiffs all of the hours that they ended up working each week even though, if they are to be believed, they agreed to a limited schedule. While the district court acknowledged the disputed record, it focused on the plaintiffs' admission that their weekly schedule was to alternate between 36 hours and 48 hours. The district court thought this biweekly alternation to be 'fluctuating' within the meaning of the fluctuating workweek method, hence its grant of summary judgment that the method applied. We disagree, concluding that this is too literal a conception of 'fluctuating.' "

Not all deviations in the work week are the same.

"The fluctuating workweek method may be applied only where the employee "clearly understands" that her salary is intended to compensate any unlimited amount of hours she might be expected to work in any given week— as the CFR puts it, "whatever hours the job may demand in a particular workweek." It does not necessarily apply, as a matter of law, to any and all deviation from week to week. The plaintiffs here, if believed, agreed only to a weekly work schedule that alternated between two fixed amounts of hours. Though that schedule alternates from week to week, it is "fixed" in the sense that the parties agreed to it at the outset of their employment relationship (or so the plaintiffs testified; we make no evidentiary determinations). This biweekly alternating, but fixed, schedule is not necessarily "fluctuating" as that term of art is used in the fluctuating workweek method. The district court also emphasized the fact that most of the plaintiffs, including the instant appellants, testified that they knew they would not be receiving overtime compensation. In fact, the sole reason the district court denied summary judgment on the fluctuating-workweek-method issue as to four other plaintiffs not party to this appeal was because they all testified that they did believe they would receive additional overtime compensation. This emphasis is misplaced. Salaried, but misclassified, employees may well understand themselves not be to receiving overtime compensation. That does not alleviate liability under the FLSA, nor does it reduce the backpay they are owed if they are misclassified. That they understood they were not receiving overtime pay does not imply that they clearly understood their salary to compensate unlimited hours each week."

Technical meaning vs Lay Understanding:

"We depart from our Fourth Circuit colleagues because we conclude that the reading of "fluctuating" explained here more faithfully applies that term's "technical meaning" in the FLSA regulations instead of its "lay understanding." Of course, we do not foreclose the application of the fluctuating workweek method here. The eventual trier of fact is entitled to credit EOI's evidence over the plaintiffs' and find that they did indeed agree to have their salaries compensate an unlimited amount of hours each week, in which case the fluctuating workweek method would apply. But the district court's pretrial ruling as a matter of law was premature on this disputed record. The eventual trier of fact will also be entitled to credit the plaintiffs' evidence that they agreed only to an alternating fixed schedule, in which case their regular rate of pay must be computed with reference to that limited agreement. As EOI conceded at argument, reversal on this issue alone revives Hill's and Luke's claims, making them viable once more because their

base recoveries may be high enough to withstand the bonus offsets with a net-positive value . We thus need go no further to find that their dismissal from the case was error, so we do not reach the issue of bonus offsets. "

The Fifth Circuit reversed and remanded the district court's summary judgment that the fluctuating workweek method applies as a matter of law. The factual issue of what the employees clearly understood, would be decided at trial.

MCA does not automatically apply. *Amaya v. Noypi Movers, L.L.C.*, No. 17-20635, 2018 U.S. App. LEXIS 18862 (5th Cir. Jul. 11, 2018). Nonprecedential Opinion Before DENNIS, CLEMENT, and ENGELHARDT, Circuit Judges.

Mr. Amaya and the class of employees for which he brings this action were hired for the purpose of installing office cubicles ordered by the defendants' clients. The employer's Vice President's declaration broadly asserted that "NOYPI employees, including Juan Amaya," were responsible for loading commercial trucks and were required "to exercise judgment and discretion" to ensure the safe transit of the load.

"Amaya testified that he was "hardly ever" involved in such activities. He could recall loading items only a "few times" during his years with the company. Moreover, he described his loading work as "help[ing] . . . carry the cubicles onto the trucks." At the very least, there remains a material issue of fact as to whether the loading activities of Amaya and other furniture-installing Panel Tech employees were too "casual or occasional" to qualify them as "loaders." 29 C.F.R. § 782.5. Furthermore, the record lacks a sufficient evidentiary basis to tie the loading work done by Panel Techs specifically to interstate commerce. The declaration merely states that NOYPI employees "loaded . . . commercial trucks on approximately 545 different jobs" between 2012 and 2014, and that "15 of those jobs in which . . . trucks were loaded by NOYPI employees, including Juan Amaya, required interstate travel." The record also includes certain work orders that required interstate deliveries listing Pioneer employees involved. Notably, only two list the involvement of NOYPI Panel Techs, and they provide no information regarding the nature of their involvement. This is an insufficient basis to establish that Amaya and his class "could reasonably have been expected" to load trucks engaged in interstate commerce. *Allen*, 755 F.3d at 284 (quoting *Songer*, 618 F.3d at 476)."

The record failed to establish how frequently these furniture-installing employees loaded any trucks or the fifteen trucks that crossed state borders. The evidence (namely, Amaya' s own deposition testimony) suggests Panel Tech employees were rarely involved in any loading activities. And Amaya's own work never caused him to travel interstate.

"Yet, we cannot merely rubber-stamp an employer's assertion that the MCA exemption applies. Notably, "where the continuing duties of the employee's job have no substantial direct effect on such safety of operation or where such safety-affecting activities are so trivial, casual, and insignificant as to be de minimis, the exemption will not apply to [the employee]." 29 C.F.R. § 782.2(b)(3); see *Allen,* 755 F.3d at 284; *Wirtz v. C & P Shoe Corp.,* 336 F.2d 21, 29– 30 (5th Cir. 1964) (no FLSA exemption for employees " who sporadically helped on the trucks or acted as drivers")."

The court noted that the connection between the workers and interstate commerce was quite thin. These cubicle installers were not directly responsible for transporting activities. The court held that the defendants have failed to provide sufficient evidence to prove that any of the workers in the plaintiff's class were involved as loaders with the 15 interstate shipments that crossed state line. The Fifth Circuit reversed and remanded the case.

Prior lawsuits can create fact question of willfulness *Snively v. Peak Pressure Control, LLC*, No. MO:15-CV-00134-DC, 2018 U.S. Dist. LEXIS 113034 (W.D. Tex. Jul. 9, 2018)

Plaintiffs also request the Court take judicial notice of twelve lawsuits filed against Defendant and answers filed in three lawsuits as part of their motion for summary judgement that the Defendant willfully violated the FLSA. While it is common for Defendants to file for summary judgement on the issue of willfulness, it is rare for the Plaintiff to do so.

Placing the Cart Before the Horse

In asking the Court to grant summary judgment in their favor finding that Defendants willfully violated the FLSA. The court held that Plaintiffs are putting the proverbial cart before the horse in asking the Court to make a willfulness determination before they have put on any evidence that Defendants actually violated the FLSA. The Court cannot grant summary judgment finding Defendants willfully violated the FLSA without first finding that Defendants violated the FLSA.

The Court cannot grant summary judgment for Plaintiffs, it can determine whether there is a genuine issue of material fact that would give rise to a willfulness question at trial.

Reviewing the parties' motions for summary judgment, motion to strike, motions for judicial notice, and the associated responses and replies, it is clear that there is a fact question on the issue of willfulness. Plaintiffs cite sixteen cases involving FLSA violations alleged against Defendant

Defendants claim the lawsuits are irrelevant because they involved different legal issues and the existence of a lawsuit does not equate or indicate an FLSA violation. (Doc. 164 at 7

The court noted that some district courts within the Fifth Circuit find that prior litigation can support a finding of willfulness. The existence of these previous suits raises a fact question regarding whether Defendants willfully violated the FLSA.

Court will not strike similar declarations in support of certification *Davis v. Capital One Home Loans, LLC*, No. 3:17-CV-3236-G, 2018 U.S. Dist. LEXIS 130035 (N.D. Tex. Aug. 2, 2018)

The plaintiffs moved to certify a nationwide class of loan officers.

As for the differences in pay between different types of loan officers, while the Capital One defendants again point to differences in pay dependent on the individuals' credentials or their specific role in the sales process, Davis provides evidence suggesting that the members of the putative class are (or were) all paid in essentially the same way -- hourly pay plus commissions.

Davis also provides evidence that the Capital One defendants subjected the members of the putative class to a common policy or plan which misclassified loan officers as exempt and discouraged non-exempt loan officers from recording their overtime hours. See, e.g., Jeffrey Davis's Sworn Statement ¶¶ 8-14. After due consideration, the court concludes that Davis has met the lenient burden of establishing, at stage one, that he and the potential class members are similarly situated in terms of job requirements and compensation.

In doing so Court dealt with 2 issue: Cookie Cutter Declarations and Personal knowledge

1. Cookie Cutter Declarations - Defendants criticized the declarations used by the plaintiffs in their class motion because they contain cookie cutter statements. In response to the Capital One defendants' motion, Davis asserts that the alleged similarity of the sworn statements goes to their weight and credibility --determinations better left for a second stage analysis. The court agree and held that similarity alone is not fatal, at this stage, to the admissibility of the declarations or his motion for conditional certification. See id.; see, e.g., *Parker v. Silverleaf Resorts, Inc.,* No. 3:14-CV-2075-B, 2017 WL 1550522, at *7 n.9 (N.D. Tex. May 1, 2017) (*Boyle*, J.) ("The Court finds that similar declarations alone do not warrant the Court striking them from the record. While the weight of such declarations may be called into question during the Court's similarly situated analysis, it would be inappropriate to strike them from the record simply because they are similar."). In actuality, Davis urges, the similarity of the statements militates in favor of their admissibility at the notice stage and evinces the propriety of conditional certification. See Plaintiff's Response at 4; *Turner v. Nine Energy Service, LLC,* No. H-15-3670, 2016 WL 6638849, at *6 (S.D. Tex. Oct. 4, 2016) ("[W]ith regard to Defendant's argument that the declarations are too similar, this court finds-that the fact that the declarations are similar helps to support Plaintiff's position that Declarants were similarly situated."); see also *Beauperthuy v. 24 Hour Fitness USA, Inc*., No. 06-0715 SC, 2008 WL 793838, at *4 (N.D. Cal. Mar. 24, 2008) ("How are Plaintiffs to allege that they all suffered the same injury as a result of the same corporate policy if they cannot make the same factual allegations? The notion borders on the absurd."). The court recognizes the overt similarity between the submitted sworn statements, the court will not strike the sworn statements solely based on the similarity of their language

2. The defendant objected to the declarations used in plaintiff's motions for conditional certifications because they are not based on Personal knowledge. Plaintiff submitted eleven sworn statements from prospective members of the FLSA class. The majority of the declarants worked as loan officers for the Capital One defendants for at least one year. And a few of the submitted sworn statements are from declarants who worked for the Capital One defendants for less than one year.

"But all of the declarants demonstrated their personal knowledge by averring that they learned about the Capital One defendants' policies through their experiences and observations. See, e.g., id. ¶ 16. "District courts in Texas have held that this [foundation] is enough to establish that a declaration at this stage of the case is based on personal knowledge." *Turner*, 2016 WL 6638849, at *6 (citing, inter alia, *Lee*, 980 F. Supp. 2d at 762); *Zachary*, 2017 WL 1079374, at *4 ("At this

stage, it is reasonable to infer that opt-in Plaintiffs had personal knowledge of the employment conditions of other Processors based on their own observations and experiences during their employment."). "

Plaintiff's summary judgement granted on executive exemption *Livingston v. FTS International Services, LLC,* 4:16-cv-00817, No. 32 (N.D.Tex. Feb. 28, 2018)

Judge Terry Means granted Plaintiff's partial motion for summary judgement that the Executive Exemption did not apply to him.

The Court concludes, diverging from its holding in the class action, that FTSI has failed to present sufficient evidence demonstrating that Livingston's actual job duties satisfied the fourth prong of the executive exemption. The executive exemption applies to an employee who meets all of the following requirements: (1) Compensated on a salary basis at a rate of not less than $455 per week . . . ; (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (3) Who customarily and regularly directs the work of two or more other employees; and (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight. 29 C.F.R. § 541.100(a)(2016). Regarding the fourth factor, it is undisputed that Livingston did not have authority to hire and fire employees.

Thus, FTSI must demonstrate that his recommendations regarding hiring, firing, advancement, or promotion were given particular weight. This FTSI has failed to do. Factors to consider in making this determination are "whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon." 29 C.F.R. § 541.105 (2016). "[M]ore than informal input, solicited from all employees, is needed to prove applicability of the executive exemption." *Madden v. Lumber One Home Ctr., Inc.*, 745 F.3d 899, 904 (8th Cir. 2014). But "many different employee duties and levels of involvement can work to satisfy this fourth element," such as "the offering of personnel recommendations that were acted upon by managers, involvement in screening applicants for interviews, and participation in interviews." Id. FTSI's corporate representative testified that "as part of their normal course of work, service supervisors will either call or send emails to field coordinators and/or operations managers when a person needs to be removed from a crew" and that doing so is "part of their day-to-day responsibility." Livingston also admits having signed a written "position description" when he commenced employment that included in his "essential duties and responsibilities" that he would "perform[] a full range of supervisory responsibilities including assisting in and making recommendations regarding hiring . . . [and] for promotions, demotions, and termination of employment." (Id. 47, 65.)

"But FTSI has wholly failed to present any evidence tending to demonstrate that any of Livingston's recommendations regarding hiring or firing were given particular weight; indeed, no evidence has been presented demonstrating that during his service as a Frac Service Supervisor, Livingston made any such recommendations at all. Nor has FTSI presented any evidence

demonstrating that Livingston selected prospective employees to be interviewed, participated in interviewing them, or participated in evaluating them or subordinate employees for promotion, demotion, or termination. In this regard, it is important to remember that "FLSA exemptions are based on actual job functions, not intended responsibilities." *Madden*, 745 F.3d at 906 (emphasis added); see also 5 C.F.R. § 551.202(e) ("While established position descriptions and titles may assist in making initial FLSA exempt ion determinations, the designation of an employee as FLSA exempt or nonexempt must ultimately rest on the duties actually performed by the employee."). As a result, the Court concludes that Livingston's Motion for Partial Summary Judgment (doc. 22) should be and hereby is GRANTED. FTSI has failed to create a genuine factual dispute regarding application of the executive, administrative, or highly compensated employee FLSA exemptions to Livingston while he was employed as a Frac Service Supervisor."

When is a salary not a salary? *Patai v. Paton Eng'rs & Constructors (CA) LLC*, No. 4:17-CV-3104, 2018 U.S. Dist. LEXIS 109276 (S.D. Tex. Jun. 29, 2018)

The employers paid the plaintiffs "$65.50 per hour, $62.00 per hour, and $73.00 per hour, respective" but were still able to establish that they were salaried. While employed by Paton, each Plaintiff's compensation was stated as an hourly rate, and not as an annual salary.5 Plaintiffs were paid their respective standard hourly rate for every hour worked, irrespective of how many hours they worked in a given week. Said differently, Plaintiffs never were paid one-and-a-half times their hourly rate for any time worked in excess of forty hours in a week. Although Plaintiffs compensation was stated in terms of an hourly rate, Paton contends that during their employment "onboarding process," each Plaintiff was told that they would be guaranteed to receive at least forty hours of pay a week, even if they did not work for forty hours.

Prior DOL audit showed a violation. Before any of Plaintiffs were employed by Paton, Paton was the subject of an investigation by the U.S. Department of Labor's Wage and Hour Division (the "DOL"). The DOL concluded in its investigation that Paton had violated the FLSA by failing to pay its "non-exempt designers" an overtime rate for time worked in excess of forty hours per week.

The parties agree that a common criterion for the two FLSA exemptions that Defendant relies on here is that the purportedly exempt employee must be paid on a "salary basis." An employee is considered to be paid in a "salary basis" if "the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed."

However, the FLSA's regulations also provide that an "exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned."29 C.F.R. § 541.604(b). D

Defendant produced sworn declarations from several of its employees, including Lee Marshall, its Chief Financial Officer, Tabeth Deriso, its human resources manager, and Cameron Campbell, Plaintiffs' supervisor, each of whom aver that Deriso orally guaranteed Plaintiffs during their respective onboarding processes that Paton would always pay them for at least forty hours in a workweek, even if they worked less than that amount…… numerous outstanding fact issues as to how, and the circumstances under which, Plaintiffs actually used their PTO or "flex time" when employed by Paton. Therefore, notwithstanding the fact that Plaintiffs' compensation was stated as an hourly wage, there remains a material issue of fact whether Paton paid Plaintiffs on a "salary basis" within the meaning of the FLSA by guaranteeing them pay equivalent to at least forty hours per week.