[MS-0368.040.013.005]

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DEPUTIES

August 17, 1992

Honorable Board of Supervisors
County of San Diego
335 County Administration Center
San Diego, California 92101

CONFIDENTIAL

Honorable Board:

Re: SEIU Local 102, et al. v. County of San Diego
U.S.D.C. No. 90-1211-GT(M)

As your Board is aware, the federal district court previously ruled that plaintiffs in this action were not "salaried" under the Fair Labor Standards Act (FLSA). On July 27, 1992 the Court ruled orally on damage issues, and advised that a written opinion would be provided. The Court recently issued its opinion, a copy of which is enclosed for your Board's review.

The Court awarded damages for three years prior to the filing of the lawsuit and awarded "liquidated" damages. This means that plaintiffs are entitled to actual damages and an amount equal to actual damages. Additionally, the Court ruled that nurses and park rangers assigned to standby duty at night are "working" and are entitled to be paid hourly. The Court again awarded damages for three years and liquidated damages.

Very truly yours,

LLOYD M. HARMON, JR., County Counsel

By Miriam E. Brewster
MIRIAM E. BREWSTER, Deputy

MEB:meb
90-90498
Enc.
cc: David E. Janssen (A6)
Chief Administrative Officer

County Counsel

FILED
DON HENDRIX, CLERK
AUG 17 1992
U.S. DISTRICT COURT
SOUTHERN DISTRICT
OF CALIFORNIA

United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

Service Employees International Union, Local 102, et al.,
Plaintiff
v.
County of San Diego,
Defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 90-1211-GT

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

(1) plaintiffs' motion that non-Assistant Deputy Probation Officers are entitled to use the three year statute of limitations is GRANTED.

(2) plaintiffs' motion that Non-Assistant Deputy Probation Officers be awarded liquidated damages is GRANTED.

(3) plaintiffs' motion that on-site stand-by nurses and on-site night duty rangers prevail under FLSA is GRANTED based on the County's inability to distinguish these plaintiffs from the Non-ADPOS. As a result, the three year statute of limitations governs, and these plaintiffs are entitled to liquidated damages.

August 7, 1992
Date

DON HENDRIX
Clerk

(By) Deputy Clerk

ENTERED ON

limitations for the non-Assistant Deputy Probation Officers (non-ADPOS); (2) are non-ADPOS entitled to liquidated damages or interest; (3) does the court's earlier holding apply to on-site stand-by nurses; and (4) does the court's earlier holding apply to on-site night duty rangers.

CONCLUSIONS OF LAW

(1) What is the statute of limitations for the non-Assistant Deputy Probation Officers (non-ADPOS)

An action under FLSA must be brought within two years except "a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. § 255(a). The issue here is whether the two year or the three year statute of limitations applies -- was this a willful violation.

A. The Court's Statements in ADAMS Regarding the Two Year Statute of Limitations is not Binding in this Litigation

In Adams, the Court ruled that plaintiffs would receive damages based on a two year statute of limitations. The County argues that this ruling is dispositive of how this issue should be resolved, reasoning that collateral estoppel principles were used against the County in Adams, and thus collateral estoppel principles should be used in this motion as well. The County's argument fails for two reasons: first, the plaintiffs in Adams did not request the three year statute of limitations -- they requested damages for two years, which was granted (the Court did not address the applicability of the three year statute in Adams,

and thus there is no holding which could have a preclusive effect); and second, even if the court had ruled on the issue, the County would not be entitled to use the ruling in Adams in an adverse manner against the plaintiffs in this litigation because the plaintiffs were not a party to the Adams litigation. The County is a party in both actions and can have matters decided against it in one proceeding decided against it in another -- non-party plaintiffs stand in an entirely different light. As a result, it is necessary to resolve this issue of whether these plaintiffs are entitled to use the three year statute of limitations.

B. The Evidence Warrants Imposition of the Three Year Statute of Limitations Because the County's Conduct was Willful

A violation is willful only where the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988). The County submitted evidence to demonstrate the efforts it undertook to determine whether its employees were salaried within the meaning of FLSA. The County met with Department of Labor Officials on various occasions, and received oral approval for some of the portions of their plan. Formal approval of all portions of the County's plan was never received. In the meantime, the Department of Labor adopted a non-enforcement policy concerning the salary test. After receiving word of this change in policy, the County stopped all plans to alter its employment plan. Importantly, however, the non-enforcement policy only applied to the Department of Labor's

actions, but did not affect any employees' rights in private actions. The County knew that the non-enforcement plan did not affect the application of this rule in private actions, but dropped its plans to review the plan anyway.

Then in 1990, the Ninth Circuit decided Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), which clearly set forth that the County's interpretation on this issue was incorrect. The County, however, took no action immediately following this ruling (which was binding immediately in this district), and did not begin to re-examine its plan until 45 days after the Supreme Court denied certiorari, almost a full year after the Ninth Circuit had ruled. It was only at this time that the County stopped docking for absences of less than a day. The County, however, continued to dock leave, but not pay, despite warnings in Abshire that such a policy also would violate FLSA. The County's unwillingness to accept what it was being told by the ninth circuit is best summarized in the following statement during the deposition of Patrick Mahler, the private consultant in charge of reviewing the plan: "So did I think it was a problem for the County? No. I thought it was a problem with the Court."

Despite the fact that it never actually received formal written approval of all aspects from the Department of Labor, the County dropped its review plans based on the non-enforcement policy, even though this policy had no affect on private suits. Then, the County continued to disregard indications from the Ninth Circuit that its plans were not in compliance. Although the County did make some initial efforts to review its plan, its conduct, especially in the latter stages, showed a reckless

disregard for the matter of whether it's conduct was prohibited by the statute. As a result, under McLaughlin, the violation is willful, and the plaintiffs are entitled to damages for a period a three-years prior to the filing of the lawsuit.

(2) Are non-ADPOS entitled to liquidated damages or interest

FLSA provides that an employer who violates the minimum wage or maximum hour provisions "shall be liable for ... the payment of wages lost and an equal amount as liquidated damages." 29 U.S.C. § 216(b). Liquidated damages are not penal in nature, but instead "constitute[] compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." Brooklyn Savings bank v. O'Neil, 324 U.S. 697, 707 (1945). Importantly, in a FLSA case, "Double damages are the norm, single damages the exception." Watson v. United Consumers Club, Inc., 786 F.2d 303, 310 (7th Cir. 1986).

Although FLSA makes the award of liquidated damages mandatory, it created an exception where the court had discretion not to award liquidated damages "if the employer shows ... that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act." 29 U.S.C. § 260. To benefit from this exception, the employer must pass both a subjective and an objective test. See 29 C.F.R. § 790.22(b) ("(1) The employers must show ... that the act or omission giving rise to such action was in good faith; and (2) he must show also ... that he had reasonable grounds for believing

that his act or omission was not a violation of the ... Act.")

As the facts and discussion in the preceding section indicate, the County's conduct does not pass the willful test. As a result, liquidated damages should be awarded. Moreover, even if the County could pass these tests, it would still be within the Court's discretion, given the normalcy of liquidated damages in FLSA actions, to award liquidated damages. Although the Court does not reach this issue, even if the County's conduct passed the objective and subjective tests, the County's conduct is not deserving of relief from the normal rule -- liquidated damages.

(3) Does the court's earlier holding apply to on-site stand-by nurses

As the County correctly acknowledges, the Court intends to follow its earlier rulings. Based on the prior rulings against the County by this Court, and based on the fact that the County has provided no evidentiary basis for distinguishing factually the nurses from the ADPOS, the Court's earlier holding must apply to on-site stand-by nurses.

Specifically, the four nurses (Irene Clayton, Nancy Reinhardt, Connie Sevilla, and Milton Thornton) work a normal shift from 6:30 a.m. to 8:30 p.m. One of them is then required to remain on-site stand-by duty from 8:30 p.m. to 6:00 a.m. While on stand-by duty, a nurse cannot leave the facility, must abide by all rules governing staff at the facility, must keep each dorm and the duty supervisor informed of his or her whereabouts at all times, and must remain ready to return to work at any time. The County pays the nurses for one-hour at their normal rate for the

entire nine and one-half hour stand-by shift unless they are called to active duty. These factors mirror the facts behind the court's April 1991 order and have not been distinguished. As a result, the nurses are entitled to coverage under FLSA, including the three year statute of limitations and the liquidated damages.

(4) Does the court's earlier holding apply to on-site night duty rangers

Unlike the situation with the nurses, the County does attempt to factually distinguish the on-sight night duty rangers. The County notes that the key factual distinction is that the rangers reside permanently at their work sites. In drawing this distinction, the County recognizes that the fact that employees are kept away from home is one of the reasons driving the FLSA coverage in cases such as these, and indeed this was a significant factor in this court's April 1991 order.

The Department of Labor regulations provide:

> An employee who resides on his employer's premises on a permanent basis or for any extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the plumber of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switch board in her own home. Skelly Oil v. Jackson, 194 Ok. 183 (Sup. Ct. 1944); Thompson v. Loring Oil Co., 50 F. Supp. 213 (W.D. La. 1943).

29 C.F.R. § 785.23. The County argues that pursuant to this regulation, night duty does not constitute "work" for which hourly

compensation is required. This regulation, however, is not necessarily applicable where, as is the case here, there are restrictions upon the individuals freedom. Specifically, while there are times when rangers have complete freedom from all duties, rangers do not have such freedom when they are on the night shift. Indeed, in reviewing the April 1991 order, the opinion was primarily based on the deprivations placed on the employees' freedoms. Obviously not being able to go home is a significant deprivation of freedom, but even if one is at home, there might still be a sufficient deprivation to qualify as work in some factual settings. Here, there were significant restrictions on the rangers when they were on the night shift. They work a normal shift of either eight or ten hours, after which they are often required to work an on-site night shift for the remainder of the 24 hour day. When the rangers work this "night shift," they cannot leave the camp, they must obey all rules governing employees on day duty in the camp (including the rule prohibiting the consumption of alcohol), they must remain accessible to members of the public using the camps, and they must remain ready at all times to respond to the public inquiries, enforce park rules and insure public safety in the camps. Importantly, several routine duties, such as assisting members of the public using the camps, enforcing camp rules, and maintaining public safety in the camps, are not considered active duty, but instead are merely considered normal night shift duties. Although rangers reside normally at the work sites, this does not overcome the other deprivations of their freedom that the "night shift" imposes upon them. Unlike the situation the County attempts to

rely on in Rural Fire Protection Co. v. Hepp, 366 F.2d 255, 361 (9th Cir. 1966), the rangers are not merely sleeping in their residences, but they additionally have duties and responsibilities as well. As a result, the rangers are entitled to coverage under FLSA, including the three year statute of limitations and the liquidated damages.

CONCLUSION

IT IS HEREBY ORDERED that:

(1) plaintiffs' motion that non-Assistant Deputy Probation Officers are entitled to use the three year statute of limitations is GRANTED.

(2) plaintiffs' motion that Non-Assistant Deputy Probation Officers be awarded liquidated damages is GRANTED.

(3) plaintiffs' motion that on-site stand-by nurses and on-site night duty rangers prevail under FLSA is GRANTED based on the County's inability to distinguish these plaintiffs from the Non-ADPOS. As a result, the three year statute of limitations governs, and these plaintiffs are entitled to liquidated damages.

IT IS SO ORDERED.

August 1, 1992
Date

GORDON THOMPSON, JR.
United States District Judge