

MEMORANDUM

To: Linda Crohn, ESQ

From: [George M Weinert V](#), Paralegal

Re: *Case of Ronald Smith – Overtime compensation and/or Damages*

Date: Monday, April 25, 2011

QUESTIONS PRESENTED

- 1.) Can Ronald Smith, a salaried Assistant Manager, employed by Gap, Inc. recover overtime wages for hours he was required to work?
- 2.) Can Smith recover additional monies?

BRIEF ANSWER

- 1.) Yes, Smith can recover overtime pay that is due to him. An employee in an “Assistant Manager” position is classified as a non-exempt, salaried worker and should be compensated for any hours worked over 40 per week at the rate of 1.5 times his normal

base hourly rate. All employees are entitled to overtime pay unless they fall into a specific exemption that excludes them. The three largest exemptions include employees in “executive,” “administrative,” and “professional” job positions. Smith does not fit into any of these classifications, though his supervisors may claim that he does.

- 2.) Yes, Smith may recover other funds. In addition to overtime wages due, Smith can recover interest, and attorney’s fees. He is also potentially entitled to an additional amount of “liquidated damages.”

FACTS

Ronald Smith works as an Assistant Manager for the Gap store in Old Orchard Shopping Center. Gap is a nation-wide chain owned by Gap, Inc. 2 Folsom Street, San Francisco, CA. 94105, (650) 942-4400. Smith supervises four employees, schedules their hours, and assigns job duties. Smith also trains new employees. He has no authority to discipline or discharge but must report any problems to his supervisor, Peter Cooper. Smith makes no buying decisions though he assists in maintaining the inventory reports.

Cooper has frequently required that Smith work more than 40 hours per week. Though Smith has worked an additional 10-15 hours every week, he has not been paid overtime.

CASE ANALYSIS

a.) Ronald Smith, a salaried Assistant Manager, employed by the Gap store in Old Orchard can recover overtime wages due him.

The overtime provision in Illinois's Minimum Wage Law provides that no employer shall employ any of his employees for a workweek of more than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one half times the regular rate at which he is employed. 820 Ill. Comp. Stat. 105/4a(1). In determining whether this overtime law has been violated, it is necessary to calculate the hours worked, which is defined as all the time an employee is required to be on duty, or on the employer's premises, or at other prescribed places of work, and any additional time he or she is required or permitted to work for the employer, Ill. Admin. Code tit. 56, § 210.110, as well as the regular rate of pay, the formula for which varies depending upon the manner in which the employee is compensated, Ill. Admin. Code tit. 56, § 210.430, and includes multiple exclusions. Ill. Admin. Code tit. 56, § 210.410. *Wis. Cent., Ltd. v. McDonald*, 539 F.3d 751, 2008 U.S. App. LEXIS 18331 (7th Cir., August 26, 2008, Decided) (Westlaw, As of: Oct 14, 2008).

Smith bears the burden of proving that he performed **overtime** work for which he was not properly compensated. [*Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87, 66 S.Ct. 1187, 90 L.Ed. 1515 \(1946\)](#), superseded by statute on other grounds as stated in [*IBP, Inc. v. Alvarez*, 546 U.S. 21, 41, 126 S.Ct. 514, 163 L.Ed.2d 288 \(2005\)](#). The district court held that “ ‘while this burden is not an insurmountable one, an employee who brings suit for unpaid **overtime** compensation must prove, with definite and certain evidence, the he performed work for which he was not properly compensated.’ ” Dist. Ct. op. at 5-6, *citing* [*Anderson*, 328 U.S. at](#)

[686-87, 66 S.Ct. 1187; *Reeves v. IT & T Corp.*, 616 F.2d 1342, 1351 \(5th Cir.1980\)](#), implicitly overruled on other grounds as recognized *595 in [Heidtman v. County of El Paso](#), 171 F.3d 1038, 1042 n. 4 (5th Cir.1999).

We next examine the Fair Labor Standards Act, which provides that employees who work more than 40 hours in a week must be paid for the excess hours at one and one-half times the regular rate of pay. 29 U.S.C.S. § 207(a)(1). Smith bears the burden of proving that he performed overtime work for which he was not properly compensated. *Brown v. Family Dollar Stores of Ind., LP*, 534 F.3d 593, 2008 U.S. App. LEXIS 14997 (7th Cir., July 15, 2008, Decided) (Westlaw, As of: Oct 14, 2008)

Furthermore, there is an imperceptible gradation in responsibility and authority up and down the line. Here, as in the other instances, the differentiation between the clerk and the person with true administrative responsibility is to be found, first, in the exercise of discretion and independent judgment, and, second, in the receipt of an appropriate salary.⁶ *Gorchakoff v. California Shipbuilding Corp.*, 63 F.Supp. 309. Smith can only advise Cooper regarding discipline and discharge of employees he supervises.

It is settled beyond dispute that before exemptions under Section 13(a)(1) of the (Fair Labor Standards) Act are invocable the status of a particular worker in question must conform to the terms of the statute and the effective and applicable regulations of the administrator. [Smith v. Porter](#), 8 Cir., 143 F.2d 292.

- b.) Additional compensation can be recovered. Smith is entitled to interest on past-due overtime wages plus reasonable attorney(’s) fees. Smith may also be entitled to an additional amount of “liquidated damages.” Smith will not be entitled to receive liquidated damages if Employer, the Gap, can prove that it acted in good faith.

In Jackson v. Go-Tane Servs., 56 Fed. Appx. 267, 2003 U.S. App. LEXIS 949 (7th Cir., January 21, 2003, Decided) (Westlaw, As of: Oct 14, 2008) an employer violated the Fair Labor Standards Act by failing to pay overtime to a car wash "manager" who spent 95 percent of his workday performing car wash attendant duties and had little managerial authority; a liquidated damages award was proper.

CONCLUSION

Ronald Smith can recover for unpaid overtime, interest and attorneys fees. He must be able to document his claims, but this is not overly burdensome. Smith can also recover liquidated damages. Gap can be expected to oppose but Smith appears to have a strong case and will be bolstered by the Land of Lincoln and 7th Circuit's strong support for labor. There is a Statute of Limitations. The FLSA contains a two-year limitations period. That means Smith can recover overtime for the two (2) year prior to the date he files a lawsuit. This limitations period can be extended to three (3) years if his employer's action of not paying overtime was "willful."