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EMPLOYMENT LAW—THE FAA’S EXEMPTION FROM THE FLSA-MANDATED OVERTIME-PAY PROVISION AFTER THE APPROPRIATIONS ACT OF 1996

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I. INTRODUCTION

In *Abbey v. United States*, the Court of Appeals for the Federal Circuit vacated the ruling of the Court of Federal Claims that the Federal Aviation Administration (FAA) violated the overtime-pay provision of the Fair Labor and Standards Act of 1938 (FLSA).¹ The Federal Circuit held instead that, even though no statute stated it, the FAA was still authorized to depart from the FLSA’s overtime-pay provision.² The court interpreted both the Department of Transportation and Related Agencies Appropriations Act of 1996 (Appropriations Act) and Federal Aviation Reauthorization Act of 1996 (Reauthorization Act) together and determined that Congress did not intend to discontinue the exemption under which the FAA had operated.³ However, as the dissent argued, this is too generous a reading of these statutes, and the plain, unambiguous language of the Appropriations Act does not allow for the interpretation given by the circuit court.⁴ Therefore, the Federal Circuit should have upheld the Court of Federal Claims’s ruling.

The plaintiffs in this case—a group of air traffic control specialists and traffic-management coordinators employed by the FAA (the controllers)—sued the United States alleging that the

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¹ *Abbey v. United States*, 745 F.3d 1363, 1365 (Fed. Cir. 2014), *reh’g en banc denied* (Aug. 22, 2014).

² *Id.* at 1375–76.

³ *Id.* at 1375.

⁴ *Id.* at 1379 (O’Malley, J., dissenting in part).

FAA violated the FLSA-mandated overtime-pay provision.⁵ The FLSA requires that an employee who works more than forty hours in a workweek must be paid at least one and one-half times the employee's regular rate of pay.⁶ Since 1974, the FLSA has applied to federal employees.⁷ Title 5 of the U.S. Code governs federal employment, and it lays out several exceptions to the FLSA's overtime-pay provision, including the exception for workers working irregular or occasional overtime.⁸ These workers, if they request, may be provided "compensatory time"—time off equal to the time spent in occasional overtime—instead of the time-and-a-half rate of pay.⁹ In addition, employees who work flexible schedules may be provided either compensatory time or "credit hours"—hours used to reduce the length of a workweek or workday.¹⁰

The FAA, relying on these Title 5 exemptions, compensated the controllers with compensatory time and credit hours instead of time-and-a-half pay for several years.¹¹ Congress then passed the Appropriations Act, which reformed the FAA's operations in order for the FAA to develop a new personnel management policy.¹² The proposed purpose of the new personnel management system was to ensure "greater flexibility in the hiring, training, compensation, and location of personnel."¹³ The Appropriations Act also stated that the provisions of Title 5 would not apply to the new personnel management system, except for a list of specific sections that did not include the overtime-pay provision.¹⁴ From this, the FAA implemented a new personnel management system that included maintaining the same overtime compensation as it used before—compensatory time and credit hours—having concluded that 49 U.S.C. § 40122(g) permitted this.¹⁵ Shortly after the implementation of the new personnel management system, Congress enacted the Reauthorization Act of 1996, which stated that in fixing compensation of employees,

⁵ *Id.* at 1365.

⁶ 29 U.S.C. § 207(a)(1) (2012).

⁷ *Id.* § 203(e)(2).

⁸ 5 U.S.C. § 5543(a)(1) (2012).

⁹ *Id.*

¹⁰ 5 U.S.C. §§ 6121(4), 6122(a)(1).

¹¹ *Abbey*, 745 F.3d at 1366.

¹² 49 U.S.C. § 40122(g) (2012).

¹³ *Id.* § 40122(g)(1).

¹⁴ *Id.* § 40122(g)(2)(A)-(I).

¹⁵ *Abbey*, 745 F.3d at 1366 (citing *Abbey v. United States (Abbey III)*, 106 Fed. Cl. 254, 260 (2012)).

the Administrator shall not “be bound by any requirement to establish such compensation or benefits at particular levels.”¹⁶ The FAA continued to provide, if an employee so requested, compensatory time and credit hours to its employees who worked overtime. These hours could accumulate with no expiration.¹⁷ However, in May 2007 the FAA changed its policy so that the compensatory time earned before that date would expire by May 14, 2010, and the government would discontinue its use of credit hours altogether.¹⁸

Plaintiff controllers filed their four-count complaint on May 1, 2007, asserting, among other things not at issue on this appeal, that the United States violated the FLSA by paying the controllers in compensatory time and credit hours instead of time-and-a-half pay.¹⁹ The United States moved to dismiss the count for failure to state a claim (which the court treated as a motion for summary judgment), and the controllers moved for summary judgment.²⁰ On July 31, 2008, the Court of Federal Claims held that the FAA had no authority to depart from the FLSA’s overtime-pay provision and granted the controllers’ motion for summary judgment on this count (Count II), while denying summary judgment on the other three counts.²¹ On May 4, 2011, the Court of Federal Claims ruled on Counts I, III, and IV—granting partial summary judgment to plaintiffs on Count I, denying summary judgment on Count III, and granting summary judgment to plaintiffs on Count IV.²² Then, on June 12, 2012, the Federal Court of Claims held that the plaintiffs were entitled to compensation due to the government’s violation of FLSA’s overtime-pay requirement and awarded damages accordingly.²³

The government appealed the ruling to the Federal Circuit, at which time the government also changed its position on another issue.²⁴ Although the government had previously agreed that the Court of Federal Claims had jurisdiction under the Tucker Act, it argued on appeal that a recent Supreme Court

¹⁶ 49 U.S.C. § 106(l)(1).

¹⁷ *Abbey*, 745 F.3d at 1367.

¹⁸ *Id.*

¹⁹ *Id.* at 1367–68.

²⁰ *Id.* at 1368 (citing *Abbey v. United States (Abbey I)*, 82 Fed. Cl. 722, 728 (2008)).

²¹ *Id.* (citing *Abbey I*, 82 Fed. Cl. at 745).

²² *Abbey v. United States (Abbey II)*, 99 Fed. Cl. 430, 461 (2011).

²³ *Abbey III*, 106 Fed. Cl. 254, 287–88 (2012).

²⁴ *Abbey*, 745 F.3d at 1369.

decision (*United States v. Bormes*) overturned the longstanding interpretation that the Tucker Act gave the court jurisdiction over FLSA claims.²⁵ The court decisively ruled against the government's argument regarding the Tucker Act and upheld the Court of Federal Claims's jurisdiction.²⁶ The court focused most of its analysis on Count II—the FLSA overtime-pay provision question.

II. FEDERAL CIRCUIT'S RULING: FAA DOES NOT HAVE TO PAY

The Federal Circuit held that the FAA was indeed still authorized to depart from the FLSA-mandated overtime-pay provision when it created its new personnel management system.²⁷ The court took a two-step approach to analyzing the issue. First, the court determined that no other authority outside of the authority given under 5 U.S.C. §§ 5543 and 6120–6133 allows the FAA to depart from the FLSA provision.²⁸ Second, the court analyzed 49 U.S.C. § 40122(g)(1) “not in isolation, but in the context of the statutes of which it was and is a part” and determined that the provisions of 5 U.S.C. §§ 5543 and 6120–6133, which previously authorized the FAA to depart from the FLSA-mandated overtime provision, remained in place.²⁹ Therefore, the court vacated the decision of the Court of Federal Claims, vacated the damages award, and remanded the case for further proceedings.³⁰ In addition, the court held that the Court of Federal Claims did not resolve the question of whether the FAA's challenged overtime-pay policies were fully or partially within the FAA's exemption.³¹

The first step of the court's analysis focused on whether any statute other than 5 U.S.C. §§ 5543 and 6120–6133 afforded the FAA the authority to depart from the FLSA overtime-pay provision.³² Both the Court of Federal Claims and the Federal Circuit held that the FAA could not depart from the FLSA's overtime provision unless 5 U.S.C. §§ 5543 and 6120–6133 continued to

²⁵ *Id.* (citing *United States v. Bormes*, 133 S. Ct. 12 (2012)).

²⁶ *Id.* at 1369–70.

²⁷ *Id.* at 1375.

²⁸ *Id.* at 1372.

²⁹ *Id.* at 1374.

³⁰ *Id.* at 1376.

³¹ *Id.*

³² *Id.* at 1372.

authorize it.³³ The government offered two other statutory provisions for the purpose of proving the continuing authority: 29 U.S.C. § 204(f) and 49 U.S.C. § 40122(g)(1).³⁴ The first provision, part of the FLSA itself, authorizes the Office of Personnel Management to administer the provisions of the FLSA to individuals employed by the United States.³⁵ The second provision authorized the FAA to create a “personnel management system that provides ‘greater flexibility in . . . compensation.’”³⁶ The court was clear that neither of these provisions, standing alone, overrode the FLSA provision.³⁷ In addition, the court analyzed 49 U.S.C. § 40122(g)(1) to determine if it met the high standards of an implied repeal of the FLSA’s overtime-pay provision and determined it did not.³⁸ The court concluded that the legislative history of § 40122(g)(1), if nothing else, was meant to continue the availability of 5 U.S.C. §§ 5543 and 6120–6133 as authority for the FAA.³⁹

Having concluded that 5 U.S.C. §§ 5543 and 6120–6133 were the only provisions that could give the FAA the authority to depart from the FLSA’s overtime-pay provision, the court, in its second step, analyzed whether §§ 5543 and 6120–6133 survived the Appropriations Act.⁴⁰ In order to make this determination, the court used one section of the Appropriations Act itself (49 U.S.C. § 40122(g)(1)) for guidance.⁴¹ Section 40122(g)(1) states that “notwithstanding the provisions of title 5 and other Federal personnel laws, the Administrator shall develop and implement” a personnel management system, and that “[s]uch a system shall, at a minimum, provide for greater flexibility in the . . . compensation . . . of personnel.”⁴² The court focused on the two phrases “notwithstanding the provisions of title 5” and “greater flexibility” in particular.⁴³ The court explained that “greater flexibility” must mean greater than the pre-Appropriations

³³ *Id.*

³⁴ *Id.* at 1373.

³⁵ 29 U.S.C. § 204(f) (2012).

³⁶ *Abbey*, 745 F.3d at 1373 (quoting 49 U.S.C. § 40122(g) (2012)).

³⁷ *Id.*

³⁸ *Id.* (citing *Hui v. Castaneda*, 559 U.S. 799, 809–10 (2010)) (explaining both that (1) an implied repeal is not favored and (2) will not be presumed unless the intentions of the legislature to repeal are clear and manifest).

³⁹ *Id.*

⁴⁰ *Id.* at 1373–74.

⁴¹ *Id.*

⁴² 49 U.S.C. § 40122(g)(1) (2012).

⁴³ *Abbey*, 745 F.3d at 1374.

tions Act authority of the FAA.⁴⁴ This greater flexibility language coupled with the “notwithstanding title 5” language justified the FAA’s interpretation of the provision, according to the court’s rationale.⁴⁵

III. CONCURRENCE AND DISSENT: COURT HAS JURISDICTION, BUT FAA VIOLATED FLSA

Circuit Judge O’Malley wrote an opinion concurring in the majority’s Tucker Act analysis and dissenting in its judgment on the FAA’s exemption from FLSA’s overtime-pay requirement.⁴⁶ Judge O’Malley concurred with several of the majority’s holdings, namely: that under the FLSA, the FAA is an employer and thereby bound by its provisions, that the FAA failed to offer an express provision that exempts it from the overtime-pay provision, and that the Appropriations Act allows the FAA to adopt and implement policies similar to those considered by Title 5, even when the specific Title 5 policy is not enumerated in the Appropriations Act.⁴⁷ The dissent’s main contention is that the FAA is not free to adopt a policy from a Title 5 provision that is an unenumerated section because this would violate the applicable federal law.⁴⁸

The dissent analyzed the statute from a strict interpretation standard, contending that when Congress wants to make an exemption from a statutory provision, it does so explicitly.⁴⁹ In fact, Judge O’Malley pointed out that the statute specifically did exempt the personnel management system from the provisions of Title 5, save the few exceptions laid out in 49 U.S.C. § 40122(g)(2); the overtime-pay provision was not one of these exceptions.⁵⁰ The dissent concluded that the language in § 40122(g)(2) is unambiguous, and therefore does not allow for the administrator to create a reasonable gap filler because doing so would be contrary to Congress’s will.⁵¹ The dissent bolstered its position by referencing the legislative history of the

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1376.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1377 (citing *Dodd v. United States*, 545 U.S. 353, 357 (2005)) (“[The] legislature says in a statute what it means and means in a statute what it says there.”).

⁵⁰ *Id.*

⁵¹ *Id.* (citing *United States v. Smith*, 499 U.S. 160, 167 (1992)).

Reauthorization Act, which illustrated Congress's intention to deliberately remove the personnel management system from Title 5—and away from the overtime-pay exemption.⁵² Congress was concerned that the FAA, in choosing its policies, would ignore certain provisions of Title 5 that it deemed important. In these talks, the overtime-pay provision was never mentioned, while others were.⁵³

IV. ANALYSIS: CONGRESS DID NOT EXPECT THE FAA TO HAVE TO READ ALL STATUTES IN ORDER TO UNDERSTAND THE PROVISION

While it is reasonable that the court could read the several statutes in their entirety and determine that the legislature intended for the FAA to retain its exemption from the FLSA-mandated overtime provision, it is not, however, the clearest reading of the provisions. The driving force behind the court's decision is the reading of § 40122(g)(1)'s language—specifically “notwithstanding title 5” and “greater flexibility”—to mean that Congress intended to leave in place the FAA's exemption from the FLSA-mandated overtime pay provision. However, this rationale is incomplete. The court reasoned that § 40122(g)(1)'s reference to “greater flexibility” must mean greater flexibility than before the Appropriations Act, and eliminating the exemption would necessarily decrease flexibility; therefore, Congress could not have meant to take away the exemption.⁵⁴ Read in isolation, this conclusion could be understandable, but the court stops its analysis before reading the very next provision, wherein Congress enumerates the exact provisions of Title 5 that survive the creation of the personnel management system.⁵⁵

The court, citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* as its authority, read 49 U.S.C. § 40122(g)(2)'s directive that “[t]he provisions of title 5 shall not apply” to mean only the Title 5 provisions that *constrain* the new system, in contrast to those that *empower* the FAA.⁵⁶ This analysis is a bit of a stretch. *Chevron* says that if a statute explicitly leaves a gap for the agency to fill, the gap-filler chosen will stand so long as it is not

⁵² *Id.* at 1378.

⁵³ *Id.*

⁵⁴ *Id.* at 1374.

⁵⁵ *Id.* at 1378.

⁵⁶ *Id.* at 1374; *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

arbitrary, capricious, or manifestly contrary to the statute.⁵⁷ If Congress leaves an implicit gap, then a reasonable construction made by the administrator will stand.⁵⁸ The court clearly found this to be an implicit gap, with which the FAA would be permitted to adopt a reasonable interpretation of the statute.⁵⁹ The interpretation would be reasonable if one was only reading § 40122(g)(1); however, the language of § 40122(g)(2) is quite clear. There is no ambiguity in the list of exceptions in § 40122(g)(2). The overtime-pay provision is simply not listed as a Title 5 provision from which the personnel management system was exempted.⁶⁰ With § 40122(g)(2) being a clear list of exceptions to the Title 5 exemptions, the FAA should not be allowed to add a gap-filler under *Chevron* because there is no gap to fill.

The court's decision in *Abbey* could have widespread consequences for two reasons. First, the decision could affect the aviation industry by its effects on a key component in the industry—air traffic controllers. In a way, the aviation industry revolves around air traffic controllers: they ensure safety in the sky, which helps commercial travellers feel safer, which increases commercial travel, which bolsters the industry. Air traffic controllers have one of the most stressful jobs in the United States. The job requires total concentration at all times (and night, weekend, and rotating shifts are the norm), creating a stressful work environment that often leads to early retirement.⁶¹ Because the court felt that the statute was unclear and ambiguous, the effect on the air traffic controllers' morale could, and perhaps should, have been taken into consideration as a matter of policy.

Second, much of governmental administration is conducted via agency, and this decision will very likely make it easier for federal agencies to interpret statutes more liberally and sometimes, as here, concoct interpretations that directly violate federal law. This decreases predictability and clarity for employees, employers, administrators, and even courts. In *Abbey*, the statutes that eliminated the FAA's exemption were clearly written and

⁵⁷ *Chevron*, 467 U.S. at 843–44.

⁵⁸ *Id.* at 844.

⁵⁹ *Abbey*, 745 F.3d at 1374.

⁶⁰ 49 U.S.C. § 40122(g)(2) (2012).

⁶¹ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK (2014), available at <http://www.bls.gov/ooh/transportation-and-material-moving/air-traffic-controllers.htm>.

unambiguous; however, the court has illustrated that even the clearest of language will not bar agency gap-filling.

The Federal Circuit's decision, while understandable, is not the clearest reading of the statutory provisions that govern the FAA's ability to implement its new personnel management system. Instead, the court should have upheld the ruling of the Court of Federal Claims that the Appropriations Act removed the exemption under which the FAA had previously operated, and, consequently, the FAA was in violation of the FLSA overtime-pay provision.⁶² The plain language of the Act states that the "provisions of title 5 shall not apply" to the FAA—except for the enumerated sections listed—meaning that the FAA is no longer exempted from the FLSA-mandated overtime provision.⁶³ The court's decision will make it harder for administrators to interpret directives when setting up their agency's systems and may result in damages awards that may prove to be costly for the government, and thus the taxpayer.

⁶² See *Abbey*, 745 F.3d at 1365.

⁶³ 49 U.S.C. § 40122(g)(2).



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