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MINIMUM WAGE REQUIREMENTS: SEVENTH CIRCUIT PERPETUATES EMPLOYER-FRIENDLY FLSA INTERPRETATION

ASHLEY JO ZACCAGNINI*

I. INTRODUCTION

THE ENACTMENT OF THE Fair Labor Standards Act (FLSA) in 1938 symbolized Congress's recognition that employees deserve protection from being overworked and underpaid.¹ In spite of this clear aspiration, heated litigation over the proper interpretation of the FLSA's minimum wage provision has ensued for decades.² While Congress has consistently and meticulously amended the FLSA to increase minimum wage compensation in accordance with prevailing socioeconomic indicators,³ the appropriate method for assessing compliance with the provision remains unclear. Confronted with lawsuits by employees claiming they were not paid the hourly wage prescribed by the FLSA, several circuit courts have adopted the view that employees are not necessarily entitled to any hourly wage, as long as their average weekly wages comply with the federal standard.⁴ The Seventh Circuit recently followed this trend in *Hirst*

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¹ See *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 491, 493 (1945) (citing President Franklin D. Roosevelt, Message to Congress on Establishing Minimum Wages and Maximum Hours (May 24, 1937)).

² See Anna P. Prakash & Brittany B. Skemp, *Beyond the Minimum Wage: How the Fair Labor Standards Act's Broad Social and Economic Protections Support Its Application to Workers Who Earn a Substantial Income*, 30 A.B.A. J. LAB. & EMP. L. 367, 375 (2015).

³ See U.S. DEP'T OF LABOR, HISTORY OF FEDERAL MINIMUM WAGE RATES UNDER THE FAIR LABOR STANDARDS ACT, 1938–2009, <https://www.dol.gov/whd/minwage/chart.htm> [<https://perma.cc/DV5N-U5WJ>] (last visited Feb. 23, 2020).

⁴ See, e.g., *Douglas v. Xerox Bus. Servs., LLC*, 875 F.3d 884, 888 (9th Cir. 2017) (“[T]he Second, Fourth, Eighth, and D.C. Circuits have embraced the per-work-week construction.”).

v. SkyWest, a class action suit in which flight attendants alleged they were not paid in accordance with FLSA requirements.⁵ Despite being the first to analyze minimum wage requirements in the unique context of airline wage schemes, the court dismissed the flight attendants' claim on grounds that the "per-workweek" FLSA interpretation applies to all industries.⁶ This Casenote argues that by adopting an absolute interpretation of the FLSA's minimum wage provision, the Seventh Circuit overlooked an opportunity to carve out a specific exception for airlines that would better serve public policy by providing a solution for complex wage and hour issues plaguing the industry.

II. FACTUAL BACKGROUND

The facts of *Hirst v. SkyWest* are relatively simple, despite the complex pay scheme at the center of the dispute. Eight flight attendants filed this case against their employer, SkyWest.⁷ The defendant airline is headquartered in St. George, Utah, while the company's flight attendants are based out of airports in ten different states.⁸ SkyWest flight attendants work long days, performing a variety of tasks both on board airplanes and in airports before and after flights.⁹ However, SkyWest only pays its flight attendants for their time spent in the air, or "block time" as it is known throughout the industry.¹⁰ New flight attendants earn \$17.50 per qualifying hour.¹¹ However, because the actual "duty day" is much longer than time spent in the air, SkyWest flight attendants are not compensated for a portion of their work each day.¹² Plaintiff employees brought their class action lawsuit based on this disparity.¹³

In March 2015, four of the plaintiffs filed suit in the Northern District of Illinois, claiming their employer's failure to pay them for time on the ground constituted a violation of the FLSA and the Illinois Minimum Wage Law.¹⁴ Several months later, a similar claim was filed by SkyWest flight attendants in the Northern

⁵ *Hirst v. SkyWest, Inc.*, 910 F.3d 961, 963 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 2759 (2019).

⁶ *Id.* at 965–66.

⁷ *Id.* at 964.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *See id.*

¹³ *Id.*

¹⁴ *Id.* & n.2.

District of California, also alleging violations of the FLSA and various state and local ordinances governing minimum wage.¹⁵ Ultimately, the two cases were consolidated and heard in the Northern District of Illinois.¹⁶

The court decided that “in assessing violations of the federal minimum wage, an employee’s wage is calculated as the average hourly wage across the workweek.”¹⁷ Therefore, the flight attendants failed to state a claim from the district court’s perspective because none of them were paid less than a *weekly* average of \$7.25 per hour.¹⁸ Consequently, the district court dismissed all of the flight attendants’ claims with prejudice, determining that none properly pleaded an FLSA violation.¹⁹ Additionally, the district court denied the state and local law claims as preempted by the Dormant Commerce Clause.²⁰

On appeal, the Seventh Circuit agreed with the district court’s interpretation of the FLSA provision.²¹ However, it reversed the district court’s holding with respect to the application of the Dormant Commerce Clause, thus reinstating the plaintiffs’ minimum wage claims under state and local laws.²² According to the Seventh Circuit, the Dormant Commerce Clause only serves to invalidate a state law “where there is a clear showing of discrimination against interstate commerce,” and SkyWest failed to allege any sort of discrimination aside from the burden of compliance costs associated with conflicting state minimum wage laws.²³ Without minimizing the significance of invalidating the application of the Dormant Commerce Clause in the context of the airline industry, this Casenote will concentrate on the court’s interpretation of the relevant FLSA minimum wage provision.

III. LEGAL CONTEXT

The provision at issue in *Hirst*, section 206 of the FLSA, provides that “[e]very employer shall pay to each of his employees who in any workweek is engaged in commerce . . . \$7.25 an

¹⁵ *Id.* at 964.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 964–65.

¹⁹ *Id.*

²⁰ *Id.* at 965.

²¹ *Id.* at 963.

²² *Id.*

²³ *Id.* at 967.

hour.”²⁴ While this provision “could be construed as requiring hour-by-hour compliance, both administrative and judicial decisions established the workweek as the measuring rod for compliance at a very early date.”²⁵ In fact, the Department of Labor issued a policy statement in 1940, just two years after the enactment of the FLSA, electing the workweek as “the standard period of time over which wages may be averaged to determine” compliance with minimum wage laws.²⁶ However, in issuing the statement, the General Counsel of the Wage and Hour Division of the Department of Labor remained mindful that the minimum wage was defined as an hourly rate, specifically clarifying that the Department’s interpretation was not binding on courts.²⁷

Four years after the Department of Labor’s policy statement was issued, the United States Supreme Court emphasized the judiciary’s freedom to deviate from agency interpretations of the FLSA in *Skidmore v. Swift & Co.*²⁸ While acknowledging that administrative interpretations “do constitute a body of experience and informed judgment,” the *Skidmore* Court squarely rejected the Wage and Hour Division’s general recommendation that “periods of inactivity are not properly counted as working time.”²⁹ The Court further advised that it refused to “lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time.”³⁰

In light of the *Skidmore* analysis, federal courts are clearly authorized to deviate from agency interpretations of the FLSA where the specific facts of a case so require.³¹ In fact, this landmark case gave rise to “*Skidmore* deference,” a principle of judicial review under which agency interpretations are only afforded consideration to the extent they exude “power to per-

²⁴ 29 U.S.C. § 206(a) (2018).

²⁵ *Dove v. Coupe*, 759 F.2d 167, 171 (D.C. Cir. 1985) (citation omitted).

²⁶ *Hirst*, 910 F.3d at 965 (citing U.S. Dep’t of Labor, Wage & Hour Div., Release No. R-609 (Feb. 5, 1940), as reprinted in [1942] Wage & Hour Man. (BNA) 185).

²⁷ *Dove*, 759 F.2d at 171–72.

²⁸ 323 U.S. 134, 139–40 (1944).

²⁹ *Id.* at 135, 138, 140 (adjudicating a dispute over firefighters’ pay schemes).

³⁰ *Id.* at 136.

³¹ See, e.g., *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37–38 (2005) (holding that time spent by meat processing plant employees walking between locker rooms to put on required protective clothing constitutes paid work time under the FLSA).

suade.”³² The Supreme Court subsequently established an elevated standard of review under which administrative rulemaking may be analyzed with greater deference, yet it specifically distinguished informal agency *interpretations* as deserving only the less deferential *Skidmore* standard.³³

In the half century following *Skidmore*, several federal appellate courts have examined the issue of whether the FLSA’s minimum wage provision should be measured on an hour-by-hour or average weekly basis.³⁴ In spite of the Supreme Court’s mandate to afford only minimal deference to agency interpretations, every circuit court confronted with this issue has adopted the Department of Labor’s per-workweek standard.³⁵ However, the Seventh Circuit became the first—and only—court to determine whether compliance with the Department’s interpretation is appropriate in the context of the airline industry.³⁶

IV. SEVENTH CIRCUIT’S ANALYSIS IN *HIRST*

In *Hirst v. SkyWest*, both the district court and the Seventh Circuit Court of Appeals held that under the FLSA, the average hourly wage across the workweek—not wages per hour—is the relevant unit for measurement.³⁷ In reaching its decision, the Seventh Circuit first examined the plain text of the FLSA, explicitly pointing out that “29 U.S.C. § 206 does not state what measure should be used to determine compliance with the minimum wage, nor do any of the surrounding provisions provide guidance.”³⁸

³² See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 228, 237–38 (2001) (quoting *Skidmore*, 323 U.S. at 140).

³³ *Christensen v. Harris Cty.*, 529 U.S. 576, 587–88 (2000) (explaining that agency policy statements are not owed the more deferential standards under *Chevron* and *Auer*).

³⁴ See *Douglas v. Xerox Bus. Servs., LLC*, 875 F.3d 884, 885 (9th Cir. 2017); *U.S. Dep’t of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 780 (6th Cir. 1995); *Hensley v. MacMillan Bloedel Containers, Inc.*, 786 F.2d 353, 357 (8th Cir. 1986); *Dove v. Coupe*, 759 F.2d 167, 169 (D.C. Cir. 1985); *Olson v. Superior Pontiac-GMC, Inc.*, 765 F.2d 1570, 1578–79 (11th Cir. 1985); *Blankenship v. Thurston Motor Lines, Inc.*, 415 F.2d 1193, 1198 (4th Cir. 1969); *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 490 (2d Cir. 1960).

³⁵ See *Douglas*, 875 F.3d at 887–88; *Cole Enters.*, 62 F.3d at 780; *Hensley*, 786 F.2d at 357; *Dove*, 759 F.2d at 171–72; *Olson*, 765 F.2d at 1578–79; *Blankenship*, 415 F.2d at 1198; *Klinghoffer Bros.*, 285 F.2d at 490.

³⁶ *Hirst v. SkyWest, Inc.*, 910 F.3d 961, 965–66 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 2759 (2019).

³⁷ *Id.* at 964–66.

³⁸ *Id.* at 965.

Given the statute's shortcomings, the Seventh Circuit immediately turned to the Department of Labor's 1940 policy statement to glean an interpretation.³⁹ Even recognizing that the policy statement was never codified, the court rationalized its per-workweek preference on grounds that Congress never amended the FLSA to alter the Department's understanding over the last eighty years.⁴⁰ Moreover, the court noted that every circuit to assess the FLSA's minimum wage provision has adopted the per-workweek measure.⁴¹ Finding "no reason to deviate from the Department's interpretation or the consensus of other federal appellate courts," the Seventh Circuit ultimately adopted the per-workweek measure as well, declining to establish or even consider any industry-specific exceptions.⁴² Applying its newly adopted workweek standard to the facts of the case, the Seventh Circuit affirmed the district court finding that none of the flight attendants properly stated an FLSA claim because their wages complied with the statutory minimum when averaged on a weekly basis.⁴³

V. ARGUMENT

In holding that the per-workweek standard applies to all industries governed by the FLSA minimum wage provision, the Seventh Circuit overlooked key considerations rooted in Supreme Court precedent and public policy, which tend to support the application of an hour-by-hour standard of measurement for wages in the airline industry. The Seventh Circuit's decision in *Hirst* undermines the Supreme Court's directive to analyze cases requiring FLSA interpretations on a fact-specific basis. FLSA litigants arguing for the position adopted in *Hirst* have appealed to courts by emphasizing the judiciary's "preference for national uniformity" in embracing interpretations of federal law.⁴⁴ However, the Seventh Circuit did not need to deviate from the per-workweek standard adopted by other circuit courts in order to reach an opposite holding in *Hirst*. Rather, the court still could have embraced the per-workweek standard to preserve uniformity, while making an exception for the airline industry instead of taking an absolute approach.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 966.

⁴³ *Id.*

⁴⁴ *See Douglas v. Xerox Bus. Servs., LLC*, 875 F.3d 884, 889 (9th Cir. 2017).

The Supreme Court made very clear in *Skidmore* that FLSA provisions are not intended to be absolute.⁴⁵ However, rather than analyzing the unique characteristics of employment as a flight attendant, the Seventh Circuit found “no reason to deviate from the Department’s interpretation” given the consensus among other federal appellate courts.⁴⁶ The Seventh Circuit’s reliance on the analyses of other circuit courts is problematic in the sense that the duties of a flight attendant are in no way comparable to those of employees in other industries to which the per-workweek measurement has been applied.

The Second Circuit was the first circuit court to adopt the per-workweek measurement in *United States v. Klinghoffer Bros. Realty Corp.*, a 1960 criminal case involving allegations by security guards who claimed they were never paid for overtime in addition to their hourly wages, though they were promised a delayed payment as compensation.⁴⁷ In perhaps a slightly more analogous case, *Dove v. Coupe*, the D.C. Circuit applied the per-workweek measurement in assessing the minimum wage claims of limousine drivers.⁴⁸ Ultimately, the drivers were unable to establish an FLSA minimum wage claim when they based their complaint on the unpaid time they spent waiting for assignments because they were not required to complete any work-related tasks during the period at issue and still received a “guarantee,” even if they were not assigned to a single route.⁴⁹

Unlike the security guards and drivers in *Klinghoffer* and *Dove*, the flight attendants in *Hirst* were not guaranteed pay in any sense because SkyWest only compensated them for time in the air.⁵⁰ As established, the flight attendants earned nothing for pre- and post-flight duties, including training, deplaning passengers, waiting during gate-checked baggage delays, passing through customs, handling mechanical issues after the final flight of the day, writing reports, and complying with drug tests.⁵¹ In general, accomplishing these tasks requires flight attendants to begin working at least one to two hours prior to

⁴⁵ See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“Each case must stand on its own facts.”).

⁴⁶ *Hirst*, 910 F.3d at 966.

⁴⁷ *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 489–90 (2d Cir. 1960).

⁴⁸ *Dove v. Coupe*, 759 F.2d 167, 169 (D.C. Cir. 1985).

⁴⁹ *Id.* at 172–75.

⁵⁰ See *Hirst*, 910 F.3d at 964.

⁵¹ See, e.g., *id.*; *Hirst v. SkyWest, Inc.*, No. 15 C 02036, 2016 WL 2986978, at *2 (N.D. Ill. May 24, 2016) (mem. op.).

scheduled departure, in addition to staying on duty for no less than fifteen minutes after arrival.⁵² Thus, a flight attendant may be scheduled to work thirteen hours, but must actually endure a duty time of fourteen and a half hours.⁵³ The Seventh Circuit recognized the disparity between the overall workday and “block time” in its analysis yet did not point out a key distinguishing factor in *Hirst*: SkyWest flight attendants are not compensated for their waiting time *even* when flights are delayed or cancelled.⁵⁴ Moreover, Federal Aviation Administration regulations restrict the number of consecutive hours flight attendants are allowed to work.⁵⁵ This means that if a flight is cancelled or delayed, on-duty flight attendants may be required to go off-duty without the opportunity to earn the pay they expected, even if they arrange to work a different flight.

Not only does the analysis in *Hirst* overlook the factual differences between wage schemes in other industries compared to airlines, but the court missed an opportunity to carve out an exception that would better suit the FLSA’s policy objectives in applying the per-workweek standard. It is true that none of the flight attendants in *Hirst* proved they earned less than an average of \$7.25 per hour over the course of a given workweek.⁵⁶ However, applying an hour-by-hour standard to the airline industry in particular would better support Congress’s endeavor “to guarantee a minimum livelihood to the employees covered by the Act.”⁵⁷ The per-workweek standard only incentivizes airline companies to avoid paying flight attendants whenever possible and to make no accommodations for flight attendants who lose an entire day’s worth of wages because their flight was delayed or cancelled. Regardless of how much flight attendants wind up earning on average—which for one SkyWest employee only amounted to about \$7.62 per hour⁵⁸—that incentive completely undermines the FLSA’s intention “to protect certain groups of the population from sub-standard wages . . . due to . . .

⁵² See OFFICE OF AEROSPACE MED., FED. AVIATION ADMIN., DOT/FAA/AM-07/21, FLIGHT ATTENDANT FATIGUE 13 (2007).

⁵³ See, e.g., *id.* at 14–15.

⁵⁴ *Hirst*, 2016 WL 2986978, at *2.

⁵⁵ See FLIGHT ATTENDANT FATIGUE, *supra* note 52, at 3.

⁵⁶ *Hirst*, 910 F.3d at 964.

⁵⁷ *Dove v. Coupe*, 759 F.2d 167, 171 (D.C. Cir. 1985) (citing *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 490 (2d Cir. 1960)).

⁵⁸ *Hirst*, 910 F.3d at 964.

unequal bargaining power.”⁵⁹ Rather, it encourages collective bargaining agreements among unions and the airline industry that aim to pay just enough to avoid a serious federal violation, while stripping flight attendants of any power to negotiate.⁶⁰

VI. CONCLUSION

The purpose of minimum wage laws is to protect employees, not to permit employers to adopt complex pay schemes that ultimately accomplish the opposite. Congress made its objectives clear in enacting the FLSA, but the Seventh Circuit’s decision in *Hirst* suggests that courts are not on the same page. It is true that under the per-workweek standard, the *Hirst* flight attendants failed to meet their burden. However, the Seventh Circuit’s statement that there is “no reason to deviate from the Department’s interpretation or the consensus of other federal appellate courts” flies in the face of both precedent and public policy.⁶¹

Carving out an exception for the airline industry such that flight attendants must be paid wages on an hourly instead of weekly basis would accomplish the FLSA’s ultimate objectives without overextending that standard to industries where average weekly wages are more predictable. In addition, such a pay scheme might actually alleviate the administrative burden SkyWest complains of in relation to the flight attendants’ surviving state and local claims.⁶² With flight attendants constantly crossing state lines, averaging weekly wages so as to comply with a number of contradictory regulations does seem confusing. However, paying flight attendants by the hour—by allowing them to earn at least the minimum wage required by a particular state while working on the ground in that state—simplifies the equation and guarantees compliance. Undoubtedly, the burden of compliance should be placed on airlines, but in refusing to impose an hour-by-hour wage scheme, the court missed an opportunity to fulfill the FLSA’s purpose of giving bargaining power back to employees.

⁵⁹ *Dove*, 759 F.2d at 171 (citing *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706 (1945)).

⁶⁰ *Cf. Hirst v. SkyWest, Inc.*, No. 15 C 02036, 2016 WL 2986978, at *3–4 (N.D. Ill. May 24, 2016) (mem. op.).

⁶¹ *See Hirst*, 910 F.3d at 966.

⁶² *See id.* at 967.