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Community service not subject to FLSA

A criminal defendant ordered to perform community service in order to avoid conviction on minor charges is not an "employee" of the nonprofit or public agency for which the defendant works, and the labor is not covered by the wage and hour requirements of the Fair Labor Standards Act, a federal court in New York has ruled.

A claim by three defendants who performed community service in anticipation of an "adjournment in contemplation of dismissal" ("ACD") of the charges against them has been dismissed by the court. The crimes for which the defendants were facing prosecution were jumping a subway turnstile, speeding and possessing a "gravity knife," and resisting arrest after running a red light on a bicycle.

The court started its analysis by repeating, as courts usually do, that the statutory definitions in the FLSA are "unhelpful." An employee is defined as any individual employed by an employer and an employer includes any person acting in the interest of an employer in relation to an employee.

The City of New York, which had apparently received the benefit of the services, argued that the defendants were "volunteers" who are specifically excluded from the definition of employee. The Department of Labor has said a volunteer must (1) have a civic, charitable, or humanitarian purpose, (2) have not been promised or expect compensation, (3) perform the work freely and without pressure or coercion from the employer, and (4) not perform the same services as an employee for the same agency. Giving deference to the Department's regulations, the Court accepted the workers' claim that they were not in the least motivated by civic, charitable or humanitarian service and were therefore not volunteers.

But saying that they were not volunteers did not resolve the ultimate issue, the Court wrote. It applied an "economic reality" test based on all of the facts and circumstances of the situation. Those who perform community service, it said, do not do so for the pay. They do it to avoid the consequences of a criminal conviction.

The purpose of the FLSA, the court said, was to eliminate substandard labor conditions throughout the nation and to raise living standards without substantially curtailing employment or earning power. "Extending the FLSA to cover those whom a court orders to perform community service in lieu of criminal prosecution would do little to advance that purpose," it said. "At the same time, it would threaten to undermine the efficacy of programs like New York's ACD program, as judges and prosecutors might be less

inclined to agree to ACDs if doing so would require City agencies to pay for labor that they might not otherwise have even wanted. The Court assumes that Congress would not have intended such a result.” (*Doyle v. The City of New York*, S.D., NY, No. 14-CV-2831, 3/4/15.)