| **Bergmann v State of New York** |
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| 2000 NY Slip Op 30012(U) |
| March 27, 2000 |
| Court of Claims |
| Docket Number: Claim No. 97565 |
| Judge: Thomas J. McNamara |
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# BERGMANN v. New York, #2000-011-101, Claim No. 97565

## Synopsis

The claim raises issues of whether under the Fair Labor Standards Act of 1938 (29 USC Section 201 *et seq.*) claimants are entitled to be compensated at one and one-half times their regular rate for hours worked in excess of forty hours per week and if so, whether they are entitled to liquidated damages under the Act. There also exists an issue as to which of two FLSA statues of limitations applies.

## Case Information

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| UID: | 2000-011-101 |
| **Claimant(s):** | H. KENNEDY BERGMANN, KEVIN B. KRAUS and RANDALL S. DAVIS |
| **Claimant short name:** | BERGMANN |
| **Footnote (claimant name) :** | |
| **Defendant(s):** | THE STATE OF NEW YORK |
| **Footnote (defendant name) :** | |
| **Third-party claimant(s):** | |
| **Third-party defendant(s):** | |
| **Claim number(s):** | 97565 |
| **Motion number(s):** | |
| **Cross-motion number(s):** | |
| **Judge:** | Thomas J. McNamara |
| **Claimant's attorney:** | CSEA Local 1000, AFSCME, AFL-CIO(Timothy Connick, Esq., Senior Associate Counsel) |
| **Defendant's attorney:** | Hon. Eliot Spitzer, Attorney General(Kevan J. Acton, Esq,. Assistant Attorney General) |
| **Third-party defendant's attorney:** | |
| **Signature date:** | March 27, 2000 |
| **City:** | Saratoga Springs |
| **Comments:** | |
| **Official citation:** | |
| **Appellate results:** | |
| **See also (multicaptioned case)** | |

Decision

The claim raises issues of whether under the Fair Labor Standards Act of 1938 (29 USC §201

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*et seq.),* claimants are entitled to be compensated at one and one-half times their regular rate of pay for hours worked in excess of forty hours per week and if so, whether they are entitled to liquidated damages under the Act. There also exists an issue as to which of two FLSA statutes of limitations applies.
For more than twelve years, claimants H. Kennedy Bergmann and Kevin B. Kraus have held the title of Associate Planner in the State Emergency Management Office (SEMO).[1]
The positions carry a salary grade of SG-23. Claimants maintain that during portions of the calendar years 1996 and 1997, they each regularly worked in excess of forty hours per week and under provisions of the FLSA should be paid time and a half for those hours. The State, however, has determined that all employees in positions allocated or equivalent to SG-23 or above are exempt from the requirements of the FLSA and therefore, ineligible to receive overtime compensation. The State takes the position that based upon their duties as Associate Planners Claimants fall within the administrative exemption of the FLSA.
EXEMPTION
Under the FLSA, employers are generally required to pay employees at least one and one-half times their regular rate of pay for hours worked in excess of forty hours per week (29 USC §207[a][1]). There exists, however, an exemption for those workers employed in a bona fide executive, administrative or professional capacity as those terms are defined by regulations promulgated by the Secretary of Labor (29 USC §213[a][1]). The regulations contain what have been termed a long test and a short test to determine whether a worker is employed in an administrative capacity. If, as is the case here, an employee earns more than $250.00 per week, the short test applies (29 CFR §541.2[e][2]). The short test defines an administrative employee as one whose primary duty consists of office or non-manual work that is directly related to management policies or general business operations of the employer or the employer's customers and requires the exercise of discretion and independent judgment (29 CFR §§541.2[a][1] & [e][2]). The employer has the burden of establishing that the employee falls within the exemption and the exemption is narrowly construed against the employer and will be used only where the employee fits plainly and unmistakably within its terms (
Wetzel Servs. v New York State Bd. of Indus. Appeals, 252 AD2d 212).
Guidance as to whether associate planners perform work that is "directly related to management policies or general business operations" is found in interpretative regulations issued by the Secretary. According to these regulations, the phrase describes those types of activities relating to the administrative operations of an organization as distinguished from production work (29 CFR §541.205[a]). The first step in applying this production/administrative dichotomy is to identify the nature of the employer's business i.e. the products or services the organization offers to the public (
Wetzel Servs. v New York State Bd. of Indus. Appeals, *supra).*
SEMO is an office within the office of military and naval affairs whose function is to assist the disaster preparedness commission in carrying out its functions (Executive Law §29-e[1][e]). The commission is responsible for preventing, preparing for and responding to natural and man-made disasters (Executive Law §21[3]).

Employees on the administrative side of a business are those who perform work of substantial importance to the management or operation of a business (29 CFR §541.205[a]) and are engaged in work such as advising management, planning, negotiating, representing the company, purchasing, promoting sales and business research and control (29 CFR §541.205[b]).

Claimants and their supervisor, John Gibb, testified that all associate planners have the same general responsibilities and function and perform in four different roles: trainer, exerciser, planner and responder. As trainers they create training programs and present those programs to targeted audiences. In the role of exerciser, associate planners serve as either a player or an evaluator in disaster exercises. The planner function involves the creation and revision of plans and procedures for state and local government's response to natural and technological hazards. As a responder, the associate planner functions at the local emergency management center as liaison between the state and local authorities to facilitate or broker the use of state resources. In this role, associate planners act as the eyes and ears of the organization at the site of a disaster.

Clearly, the work performed by associate planners is of substantial importance to the functions for which SEMO is responsible. At times their work involves them in administrative side tasks such as advising management and representing the organization particularly when they act as the eyes and ears of SEMO at the site of a disaster. Other work such as training and acting as a player or evaluator in a disaster exercise involves delivery of the SEMO product (prevention, preparation and response with respect to disasters).

Although the job of associate planner involves functions which fall on either side of the production/administrative dichotomy, the issue here is whether Defendant has established that the primary duty of

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an associate planner fits within the administrative exemption. The only proof on the amount of time an associate planner devotes to each of the four areas of responsibility came from Claimant Kevin Kraus. He testified that as an associate planner he devotes about half of his time to work as a trainer and exerciser, approximately thirty-five percent of his time working as a planner and the remaining fifteen percent of his time is spent responding to disasters. Based upon the various roles of an associate planner and the amount of time devoted to each of those functions, it cannot be said that the primary function of an associate planner is in an administrative capacity. Consequently, the administrative exemption does not apply and Claimants are entitled to one and one half their regular rate of pay for hours worked in excess of forty hours per week.

STATUTE OF LIMITATIONS

In deciding prior motions by Claimants for permission to late file the claim and by Defendant for dismissal, the court determined, based on a change in the law, that the claim was subject to the six month filing requirement in Court of Claims Act §10(4) (
Bergmann v State of New York, M-60457 and M-60458, November 23, 1999, McNamara, J.). Because portions of the claim accrued more than six months before the claim was filed on December 26, 1997 that determination meant that a portion of the claim was not timely and could only be pursued if the court granted permission to late file the portion of the claim which accrued before June 26, 1997. However, the court's authority to grant such permission is constrained by Court of Claims Act §10(6) which limits consideration to motions made before the statute of limitations has expired on a claim. In FLSA actions the statute of limitations is two years extended to three years for willful violations of the statute (29 USC §255). The claim was filed on December 26, 1997 but the motion for permission to late file was not made until September 30, 1999; more than two years after any untimely portion of the claim accrued but within three years of some untimely portion of the claim i.e. September 30, 1996 to June 25, 1997. Therefore, in order to resolve the motion for permission to late file, it became necessary to determine which period of limitation applied. Because the question raised factual issues, the court deferred determination of the matter until trial and thus, the issue is addressed here.
To gain the benefit of the three year statute of limitations, Claimants must show that the employer knew its actions were illegal or acted recklessly in determining legality (
McLaughlin v Richland Shoe Co., 486 US 128; Truslow v Spotsylvania County Sheriff, 783 F Supp. 274). There is no proof that defendant knew that it was violating the FLSA by not paying overtime compensation to associate planners. To establish that Defendant acted with reckless disregard Claimants point to prior litigation involving the State in FLSA overtime issues, the determination by the State that most SG-23 positions are overtime ineligible and the fact that the issue of paying overtime compensation to associate planners arose on other occasions.
Claimants, citing
Harris v District of Columbia, 749 F Supp. 301, argue that an employer's involvement in similar litigation where it has been found that the employer's position was wrong can support a finding of reckless disregard. The case cited, however, does not stand for that proposition and no case supporting the argument was found by the court. Furthermore, while involvement in FLSA litigation obviously puts an employer on notice of the statute's mandates, such involvement does not, without more, show that the employer acted recklessly because it failed to inquire into whether its conduct was in compliance with the Act regarding all employee classifications. This is particularly true where, as here, the employer employed a large number of people in numerous capacities.
In addition, the fact that most SG-23 positions are classified as overtime ineligible does not establish reckless disregard. The argument assumes that the only common denominator for SG-23 and above positions is the salary level. It does not take into consideration possible similarities in the duties and responsibilities attendant to those positions. Because salary level is often tied to the types of duties and degree of responsibility required by a position, it would be speculative to conclude that the use of salary grade as a factor in determining overtime eligibility was done without regard to consideration of the employer's obligations under the FLSA (see
Freeman v National Broadcasting Co., 80 F 3d 78, 86-87)
Finally, the State's willingness to pay, or consider paying, overtime to an associate planner even though it had concluded the FLSA did not require it, is not proof of reckless disregard. U
nder Civil Service Law §134(6) employees ineligible for overtime compensation may be granted additional compensation if they are required to work beyond a normal workweek during a period deemed by the director of the budget to be an extreme emergency. The proof at trial suggest that it was under just such circumstances that the issue of overtime compensation for associate planners arose in the past. The fact that an employer is willing to pay overtime compensation is not an admission that it was required to do so under the FLSA as Claimants suggest (Freeman v National Broadcasting Co., *supra)*, writers entitled to overtime payments under a collective bargaining agreement were found to be exempt from FLSA overtime compensation requirements).

Inasmuch as Claimants have failed to establish willfulness on the part of Defendant the two year statute of limitations applies to the claim. Accordingly, the motion for permission to late file a portion of the claim must be denied and that portion of the claim alleged to have accrued before June 26, 1997 is dismissed.

LIQUIDATED DAMAGES

Under the FLSA, an employer who violates the minimum compensation provisions of the statute is liable for both past due wages and an equal amount of liquidated damages (29 USC §216[c]). Liquidated damages may be avoided only where the employer shows that it acted in subjective good faith and had objectively reasonable grounds for believing that the acts or omissions were not in violation of the statute (29 USC §260). The employer bears the burden of establishing, by plain and substantial evidence, subjective good faith and objective reasonableness (
Reich v Southern New England Telecomm. Corp., 121 F 3d 58, 70). No proof was offered to show how the determination was made that associate planners were exempt from the overtime payment requirements of the FLSA and therefore, Claimants are entitled to liquidated damages.
DAMAGES

Because the administrative exemption urged by the State does not apply to Claimants they are entitled to recover one and one half times their hourly rate of pay for any overtime hours worked during the six month period preceding filing of the claim as well as liquidated damages.

During the period from September 30, 1996 to October 1, 1997, Claimants earned an annual salary of $55,336. The annual salary for the period from October 2, 1997 to December 31, 1997 was $57,270. The hourly rate of pay is determined by dividing the annual salary by the required number of hours of work in a year which the parties agree is 1950 (37.5 x 52). Claimant Kevin B. Kraus worked 17.75 overtime hours (in excess of 40 hours in a week) during the period from July 24, 1997 to October 1, 1997 and 4.0 overtime hours during the period from October 2, 1997 to December 31, 1997. Claimant H. Kennedy Bergmann worked 24.75 overtime hours during the period from July 24, 1997 to October 1, 1997 and 1.5 overtime hours during the period from October 2, 1997 to December 31, 1997. The calculation of damages follows:

KEVIN B. KRAUS
July 24 - October 1, 1997
17.75 x $42.55 (1.5 x hourly rate) = $755.26 x 2 (liquidated damages) = $1,510.52

October 2 - December 31, 1997
4.0 x $44.04 (1.5 x hourly rate) = $176.16 x 2 (liquidated damages) = $352.32

TOTAL $1,862.84

H. KENNEDY BERGMANN
July 24 - October 1, 1997
24.75 x $42.55 (1.5 x hourly rate) = $1053.11 x 2 (liquidated damages) = $2,106.22

October 2 - December 31, 1997
1.5 x $44.04 (1.5 x hourly rate) = $66.06 x 2 (liquidated damages) = $132.12

TOTAL $2,238.34

Interest on the award to Kevin B. Kraus shall run from October 1, 1997 on the first $1,510.52 and from December 31, 1997 on the remaining $352.32.

Interest on the award to H. Kennedy Bergmann shall run from October 1, 1997 on the first $2,106.22 and from December 31, 1997 on the remaining $132.12.

LET JUDGMENT BE ENTERED ACCORDINGLY.

March 27, 2000
Saratoga Springs, New York

HON. THOMAS J. MCNAMARA
Judge of the Court of Claims

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1. [1]In a prior decision, the court determined that any portion of the claim which accrued prior to September 30, 1996 was untimely (Bergmann v State of New York, M-60457 and M-60458, November 23, 1999, McNamara, J.). As the entire claim by Randall S. Davis accrued before that date, the claim by him was dismissed at the start of the trial and no proof was offered with respect to his claim.

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