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Salaried Or Hourly: Do Your Exempt Employees Meet the "Salary Test" Under the FLSA?

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Introduction

Many employers have policies which require deductions from exempt employees' accrued leave time for absences of less than a day, or from their pay if the employees do not have any accrued leave. Generally these policies reflect employers' attempts to be flexible with their exempt employees, allowing them to take an hour or two off for such things as a medical or dental appointment. While such policies appear to be reasonable, some courts have found them to be inconsistent with being paid on a salary basis, a requirement of exempt status under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. Section 201 *et seq.* As a result, an employee who is otherwise exempt (meets the "duties test"), may fail the salary test, and be entitled to back overtime compensation and liquidated damages. Such a finding could expose those employers to substantial liability.

1. Applicable Law

The FLSA exempts from its coverage "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. Section 213(a)(1) (1988). The regulations promulgated by the Department of Labor ("DOL") pursuant to the FLSA ("Regulations") established a "duties test" and a "salary test" for determining whether an employee is exempt. 29 C.F.R. Section 541.1. An employer must prove that an employee meets both the duties and salary tests to establish the exemption. *Abshire v. County of Kern*, 908 F.2d 483, 484 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991) ("*Abshire*"). Since the *Abshire* decision, the salary test has received conflicting interpretations from the courts. The Department of Labor and Congress have also refused to provide relief to private employers regarding the confusion which has resulted from the different applications of the salary test by the courts.

The Regulations provide that an employee will be considered paid "on a salary basis" if he or she regularly receives a pre-

determined amount which is not subject to reduction because of variations in the quality or quantity of work performed. 29 C.F.R. Section 541.118(a). Subject to a few exceptions, an employee must receive a full salary for any week in which work is performed without regard to the number of days or hours worked. A relevant exception provides that salary status is not affected

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BOOK REVIEW: INDUSTRIAL DYSTOPIA

Richard Vigilante, *Strike; The Daily News War and the Future of American Labor*
(New York: Simon & Schuster, 1994)

Steven J. Kaplan*

Among our nation's oldest labor unions are the newspaper crafts; the typographers, the printing pressmen, the stereotypers and the linotypers. Now operating under the umbrella of the Allied Printing Trades Council, membership in these craft unions has dwindled markedly over the last decades. But as the November 1994 strike at the San Francisco Chronicle and Examiner demonstrates, the printing trades still have the ability to garner considerable public attention and inspire the labor movement as a whole.

Perhaps because of what happened recently in San Francisco, the publication of Richard Vigilante's *Strike; The Daily News War and the Future of American Labor* (N.Y., Simon & Schuster, 1994) seems particularly opportune. This account of the 1990 strike at New York's *Daily News*, which threatened the survival of what was then the largest urban daily in the United States, contains all the dramatic features of a classic union-management showdown, featuring prolonged and fractious negotiations, permanent replacement of workers, wildcat activity, and violence on both sides of the picket line.

Most recent journalistic accounts of major labor struggles have been written from the labor vantage point; for example, *Rank-and-File Rebellion*,¹ about the Teamsters for a Democratic Union, and *Hard-pressed in the Heartland*,² about the UFCW Local P-9 strike against Hormel. What distinguishes *Strike* is Vigilante's unabashed conservative perspective. Indeed, the comments of no less a luminary of the Reagan-right than George Gilder decorate the jacket cover.

Strike should be of particular interest to members of the Labor and Employment Law Section. As strike activity declines, this book may be as close as most labor and employment lawyers get to involve-

ment in a major labor dispute. But more seriously, the book is useful for the careful attention it pays to the role of the *Daily News*' lawyers during the pre-negotiation planning, the negotiations themselves, and the strike. Lawyers usually play an important part in planning negotiation strategy, but rarely are they given the kind of unfettered responsibility that the *Daily News* gave to Nashville's Robert Ballow, "possibly the most loathed and admired, respected and hated labor lawyer in the United States."³ Vigilante presents an admiring description of Ballow's approach to labor negotiations:

Wherever Ballow goes now he is preceded by the myth of his own ruthlessness and invincibility ... [W]hat Ballow does, according to the myth, is make unions destroy themselves.

* * *

He'll never give an inch, he'll let negotiations run on and on for months or years after the contract expires. He'll stop company contributions to the union health and welfare funds ... He'll stop the union dues check-off. He'll launch innumerable 'unfair labor practice' actions against the union before the National Labor Relations Board ... He'll make sure management disciplines workers for the slightest infringement of the rules, with firings whenever possible.

And he'll do all this for one reason: like the outlaw gunfighter played by Jack Palance in *Shane*, he wants to manipulate the unions into 'drawing' on him, so he can shoot 'em down dead. The way the union 'draws' is to strike . . . That's right, says the myth, Ballow is doing all this because he wants unions to strike. Once they do, he can bring in 'permanent replacements' to do their jobs, run the newspaper without

them, and decertify the union.

And there is some truth to this scenario...⁴

We learn from Vigilante that the genesis of the 1990 strike can be found in rapidly changing newspaper industry technology. While the *Daily News* had an antiquated production system, its owner, Chicago's Tribune Company, was elsewhere one of the industry's most technologically advanced companies. Freedom Center, its Chicago plant, is an industrial mammoth where computerization is state of the art. Computers measure black and color ink flows with precision, monitor newsprint tears that shut down production, and enable the publication of thirteen different editions targeted for different zones of the paper's market. At Freedom Center, drivers never have to enter the plant to pick up paper bundles; they back up their trucks, punch individual route codes into a keypad at the loading bay, and the computer delivers to them just those bundles targeted for their delivery areas.

Freedom Center, it seems, means freedom from the craft unions. Computerization eliminated the need for the separate craft lines that had predominated in the newspaper industry. A pressman now needed to become familiar with mechanical, electrical, paperhandling and mailing functions. Opines Vigilante, craft skills were replaced with "moral skills." Hierarchical management structures were replaced with team work and collaborative efforts. Vigilante, a cheerleader for the so-called "new workplace," employs all the slogans of post-industrial management to describe utopia at Freedom Center: flexibility, self-managed teams, flattened organization, Total Quality Management, and "constant vigilance rather than gossip."

The computer allows the pressman to raise his sights, to become not just an artist but a renaissance artist, part of the current rebirth of American industry.

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difficult to see how "hostile environment" harassment claims based on speech would survive.

4) Conclusion

In this author's opinion, Title VII "hostile environment" claims based on speech in the workplace may not survive constitutional scrutiny if and when analyzed by the Supreme Court. Although there is no question that harassment in any form is abominable, the right to free speech may allow such to take place.

When arguing the First Amendment defense to "hostile environment" harassment claims based on speech, defendants' should argue that Title VII is "overbroad" when being applied to such claims. When a statute is "substantially overbroad" it may be stricken entirely.²⁹ When a statute is just "overbroad" it will in most cases not be stricken completely, but instead will just be limited in application. Because of the im-

portance of Title VII, it is unlikely that a court would hold it to be "substantially overbroad." Instead, the correct approach courts should take, based on the importance of Free Speech, would be to hold that interpreting Title VII claims to cover "hostile environment" harassment based on discriminatory speech is overbroad. Limiting Title VII in this respect would verify the importance of free speech, while preserving the importance of Title VII.

1. 42 U.S.C. 2000 (e).
2. *Merritor Savings Bank, FSB v. Vinson* 477 U.S. 57, 67 (1986).
3. *Rogers v. EEOC* 454 F. 2d. 234 (5th Cir. 1971), *cert denied*, 406 U.S. 957 (1972).
4. Because Title VII does not universally cover all employers, states have created laws, patterned after Title VII, to prohibit discrimination in the workplace. Therefore, the issues discussed in this paper may be applicable under state law also.
5. *Davis v. Monsanto Chemical Co.* 858 F. 2d 345, 350 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 3166 (1989).
6. *Walker v. Ford Motor Co.*, 684 F. 2d 1355 (11th Cir. 1982).
7. *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991).

8. *Ellison v. Brady* 924 F. 2d. 872, 880 (9th. Cir. 1991).
9. *Merritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 71 (1986).
10. *Id.*
11. *Elison v. Brady*, 924 F. 2d. 872, 881 (9th. Cir. 1991).
12. U.S. Const. Amend. 1 (1787) (emphasis added).
13. *Gitlow v. New York*, 268 U.S. 652 (1925).
14. *Thomas v. Collins*, 323 U.S. 516 (1945); *Citizen Publishing v. U.S.*, 394 U.S. 131 (1969).
15. *Abrahms v. U.S.*, 250 U.S. 616, 630 (1919-Holmes, J., dissenting).
16. *Miller v. California*, 413 U.S. 15 (1973).
17. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
18. *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991).
19. *Id.*, at 1534.
20. *United States v. O'Brien*, 391 U.S. 367 (1968).
21. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).
22. *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991).
23. *Id.*
24. *United States v. Grace*, 461 U.S. 171, 178 (1983).
25. *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991).
26. Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 Ohio St. L. J. 481, 520 (1991).
27. *Frisby v. Shultz*, 487 U.S. 474, 484 (1988).
28. *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991).
29. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

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Drawing on Christian, and in particular Puritan sources, he sees the post-industrial workplace in terms of "communal individualism," where self-centered workers are guided by high moral standards and are fiercely committed to the communal enterprise.⁵

Vigilante asks whether the new workplace is consistent with union representation. Postindustrialism "requires a commitment to the company . . . [i]t requires a sort of employee patriotism, even chauvinism."⁶ Even if the Tribune was willing to live with unions, it was "unwilling to live with union solidarity."⁷ Of course, there aren't many opportunities to become a Christian soldier in the future workplace; fewer workers were required to operate this computer driven system than were needed in pre-automated times, and often with fewer skills. The Chicago newspaper unions learned the hard way. They struck in 1985, and close to a thousand permanently lost their jobs when the paper busted its unions.

The Tribune Company wanted to do in New York what it had accomplished in Chicago, but without a Freedom Center. While it promised for years to invest in new printing technology at the *Daily News*, and had extracted millions of dollars in concessions ostensibly for that purpose,

the Tribune left things pretty much alone. As negotiations geared up in 1989, management committed to creating a post-industrial order in a rusting, industrial plant. It sought to eliminate manning minimums on the presses, lower jurisdictional and craft divisions, and eliminate entrenched but allegedly inefficient workplace practices. On the other side of the table, says a hostile Vigilante, were protective unions, seeking to maintain featherbedding practices, unrealistic manning levels, corruption, and laziness. Vigilante is particularly critical of the Newspaper and Mail Deliverers Union (NMDU), which he accuses of having ties to organized crime, and of stealing thousands of newspapers every night and bootlegging them on the market, with the company going along for the sake of labor peace. To him, the negotiations became a battleground for two competing visions of the workplace; post-industrial efficiency, TQM and the Protestant work ethic versus worker solidarity and the traditions of the union shop.

Against this backdrop, Vigilante describes the strategy and pace of contract negotiations that led inexorably to the strike.⁸ Ballow demanded an end to union security and dues checkoff. He wanted all supervisors to quit their union membership. This "apostle of quality" demanded the elimination of seniority and seniority-

based pay increases. Ballow threatened to replace a jointly managed defined benefit plan with an employer-sponsored individual account defined contribution plan. He demanded a reduced work-force, but instead of specific cutbacks, he insisted that contractual manning tables, including those for the presses, be eliminated in their entirety. Union priority lists would be abolished, as would union involvement in hiring. Ballow insisted on an expanded management rights clause. He even pressed for concessions from the drivers, for whom no major structural changes were required to implement his new work order. This, as much as anything, persuaded the unions that Ballow was serious about doing away with them.

The Tribune Company also spent tens of millions of dollars in recruiting, training, and housing strike replacements. Like San Francisco's newspapers, the *Daily News* pledged not to miss a single day of publication. In the event of a strike, strikers would be permanently replaced, and a new, non-union workforce would take over operation of the paper.

On whether the Tribune was prepared to cut a deal with the unions, or whether from the outset the Tribune was bent on busting them, Vigilante waffles, although he seems to think Ballow was bargaining

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hard but in good faith. He blames the slow pace of negotiations and the ultimate strike on the unions, and in particular their advisor, New York labor statesman Theodore Kheel, for misreading Ballow's signals.

According to Kheel, the Tribune wanted to sell the *Daily News*. To do this with the unions in place carried unacceptable financial burdens. The *Daily News* was in such bad shape that the Tribune would have to pay someone to take it over. A shutdown entailed financial obligations of about \$300 million to printers and stereotypers with lifetime job guarantees negotiated back in 1974. If the paper's death could be blamed on the unions, it would relieve the Tribune of this obligation, and increase the value of the paper for a potential sale.

Concluding that the Tribune wanted the *Daily News* to die of a strike, he (with the help of the AFL-CIO's organizing department) helped the unions devise a strategy of avoiding a strike at all costs. Drag out the negotiations; but keep things moving enough so that Ballow could not claim impasse and implement a last and final offer. Tolerate increased harassment. Accept harsh discipline meekly. No resolution was preferable to capitulation or a strike.

The strike itself came not by design, then, but as the result of pent up frustration engendered by the molasses-paced negotiations and the unions' passive strategy. Dissidents within the NMDU precipitated a confrontation and wildcat walkout over the discipline of a loading dock employee with a torn knee cartilage. Local management, trained to respond mechanically, brought in a team of scabs within minutes. After unsuccessful efforts by union leadership to quell the "Battle of Wounded Knee" by pleading with management to return the wildcatters to their jobs, the unions struck.

Vigilante shows us how, once the strike began, management's careful plans backfired. Constitutionally unable to exercise the slightest bit of flexibility, Ballow insisted that his contingency plans go into effect; all with disastrous effects for the paper. We see, for example, former Board Member Bud Johansen, now one of Ballow's minions, standing paralyzed in the plant during Ballow's absence, unable to do anything but follow the script that Ballow had written for him, refusing even to

agree to a union suggestion that the company fire those of the wildcatters who had engaged in misconduct.

Did the *Daily News'* permanent replacement strategy succeed? Although the paper didn't miss a day of publication, it lost too much circulation to survive. Hundreds of newspaper stand owners canceled their orders of the paper. The accepted version of the strike is that union members intimidated newspaper stands, threatened them with violence, stole bundled papers, and otherwise made it impossible to distribute the paper. The debate focuses on whether this violence was due to an orchestrated campaign initiated by the unions themselves, or by individual union members terrorized by the prospect of permanent replacement. Vigilante himself claims that organized criminal elements within the pressmen's and drivers' unions bear the brunt of responsibility. Vigilante overplays his hand, though, and appears uncritically to join in the unfounded accusations made by the paper at the time of the strike. During the strike the *Daily News* accused the unions of organized criminality, yet failed to produce any evidence to support its charges when asked to do so by a state legislative committee holding hearings on the *Daily News'* use of professional strike breakers.⁹ Vigilante does no better than the paper in trying to prove his charges, or in rebutting the opinion of the N.Y. Police Department that organized crime was not involved.¹⁰

Ultimately, lack of circulation, combined with public support for the unions, forced the Tribune to give in. It sold the paper to Robert Maxwell, the disreputable and soon to be deceased British newspaper magnate. Mortimer Zuckerman ultimately bought it out of bankruptcy. By then, the paper was a shadow of its former self; the *Daily News* is no longer one of New York's great newspapers.

As Monday morning quarterback, Vigilante places most of the blame for the strike on the miscalculations of labor. The unions, he claims, preferred destruction of the paper to losing their cushy, featherbedded deal at the *Daily News*. Vigilante devotes no more than a paragraph to the fact that the NLRB, accepting Ballow's tactics at face value, issued an unfair labor practice complaint charging that the paper intentionally locked out employees for the purpose of replacing them with a non-union work force.¹¹

Another possible explanation of the strike emerges from Vigilante's own account. The strike may have become inevitable when the Tribune relinquished control over the negotiations to its lawyers, who in this case were so caught up in their union busting strategies and legal maneuvering, that they lost sight of their client's interests. Whatever the cause, however, by marching lockstep with management on this issue, and minimizing alternative views about the origins and causes of the strike and the violence, Vigilante undermined what is otherwise a credible and indeed compelling depiction of this tragic labor struggle.

Marrying union representation to the post-industrial workplace, if it is to happen at all, will be no easy task. If *Strike* teaches us any lesson, it is that this marriage cannot be accomplished with the 1980's style union busting tactics adopted by Ballow. The goal of team efforts, so-called TQM programs, and other forms of workplace collaboration cannot be reached by way of the hyper-adversarial approach adopted by Ballow. Following a rigid and inflexible strategy to defeat the unions, Ballow left himself no room to maneuver when push came to, shove. New representational processes, consensus-style "win-win" bargaining,¹² would be more appropriate to the post-industrial workplace than those selected by Ballow. If workers are expected to become more committed to the goals and health of the enterprise, it hardly makes sense to undermine the integrity of their own institutions which help set the parameters of their relationship. Ballow, perhaps more than the unions themselves, failed to understand the nature of the post-industrial workplace.

Strike prompts the question why, in this era of decreasing journalistic coverage of labor issues, a conservative like Vigilante wrote this compelling human interest story? The answer is that Vigilante sees himself as a guru of the new workplace. He has told this story in order to set forth his vision of future union-management relations, and justify his prescription for labor law reform in the United States.

Vigilante holds unions responsible for their own decline.¹³ They are, he says, unable to "make the post-industrial change." More importantly, workers believe that unions will not be able to make that

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change.¹⁴ Unionism connotes solidarity; it discourages the individuality required in the post-industrial economy, where, as one commentator recently put it, each employee must become virtually a separate business.¹⁵ "The ethic of unionism is incompatible with the post-industrial workplace."¹⁶

While Vigilante is skeptical about whether unions belong in the new workplace, curiously enough he sees an important future for labor. The logical conclusion to be drawn from his analysis is that unions should participate in the post-industrial economy as partners with management in designing and achieving common goals.¹⁷ But Vigilante shrinks from this conclusion, and instead develops a curious theory of crisis unionism. Unions are necessary, he says, not to work with management for the overall good of the enterprise, but to keep the worst of management in line. "[U]nions as an emergency measure, a tool we take down off the shelf when things go bad."¹⁸

Under his theory of crisis unionism, company unions would be legal. Section 8(a)(2)¹⁹ restrictions on employer assistance would be abolished. But company unions should be easily convertible into "real unions." The NLRB would periodically conduct elections at all workplaces; whether or not any election petition was filed. Vigilante would preclude employer interference with a union's selected bargaining unit, and would permit minority representation. He would increase penalties for section 8(a)(3)²⁰ discrimination.²¹ Vigilante also believes the strike is labor's only meaningful weapon. The corporate campaign, working to rule, and other labor tactics, he argues, are of little value. Although he thinks the law should make strikes easier to wage, he rejects legislation to overturn *NLRB v. Mackey Radio*,²² which permits employers to permanently replace economic strikers.

Vigilante's unusual vision for American labor relations, while containing much that organized labor could support, is, finally, no more persuasive than is his analysis of the strike. Vigilante has a rose-colored view of the post-industrial workplace. He sounds almost like a 1930's style Stalinist, believing that new forms of work organization will change human nature and turn workers into will-

ingly cooperative, hardworking, and happy soldiers. At Freedom Center, he claims, "morale runs amazingly high."²³ But elsewhere in his book, he admits that, without a union contract, workers there experience "terrifying insecurity."²⁴ Vigilante has failed to make a case that, in the future, workers no longer will need to look out for their collective interests as workers.

His specific proposals are also troubling for their lack of depth. With crisis unionism, for example, unions would be punished for their success. If they manage to effect improvements in the workplace, their just desserts is their removal. This would, ironically, give unions an incentive to fail; provided that their failure could be convincingly blamed on management. What organizational structure would support crisis unionism? Vigilante is silent. Vigilante's enthusiasm for Ballow's insistence that supervisors be required to drop their union membership is inconsistent with the new, collaborative workplace that he claims is in the best interests of U.S. industry.

Vigilante's proposals, provocative though they might be, are not thought through. But they do serve as a catalyst for further discussion about the need for and the parameters of labor law reform. They also suggest that there are, within the conservative camp of policy makers, those who can do more than merely be obstructionist. In this sense, *Strike* does more than tell a good story. It suggests that a meaningful dialogue might be possible on the issue of labor law reform.

1. Dan La Botz, *Rank-and-File Rebellion; Teamsters for a Democratic Union* (New York: Verso, 1990).
2. Peter Rachleff, *Hardpressed in the Heartland; The Hormel Strike and the Future of the Labor Movement* (Boston: South End Press, 1993).
3. *Strike*, p. 29-30.
4. *Id.* at 30-31.
5. *Id.* at 277.
6. *Id.* at 49.
7. *Id.* at 122.
8. With few exceptions—for example, he erroneously asserts that health and welfare contributions are not mandatory subjects of bargaining (*id.* at 31)—Vigilante does an admirable job in absorbing the nuances of federal labor law.
9. 222 BNA *Daily Labor Report*, A-8 (November 27, 1990).
10. *Id.*
11. 26 BNA *Daily Labor Report*, A-11 (February 7, 1991).
12. Dorothy Sue Cobble, "Making Postindustrial Unionism Possible," in Friedman, et. al., editors, *Restoring the Promise of American Labor Law* (Ithaca, N.Y.: Cornell University ILR Press, 1994).
13. *Id.* at 272-274.
14. *Id.* at 272-275.
15. William Bridges, "The End of the Job," *Fortune*, September 19, 1994, 62-74.
16. *Strike* at 276.
17. Among the best known advocates for this model of labor management relations are Barry Bluestone and Irving Bluestone, *Negotiating the Future: A Labor Perspective on American Business* (New York: Basic Books, 1992).
18. *Id.* at 291.
19. 29 U.S.C. § 158(a)(2).
20. 29 U.S.C. § 158(a)(3).
21. Some of these proposals are not unlike those discussed in Paul Weiler, *Governing the Workplace; The Future of Labor and Employment Law* (Cambridge Harvard University Press, 1990), Chapt. 6.
22. 304 U.S. 333 (1938).
23. *Id.* at 281.
24. *Id.* at 69.

