SUPREME COURT OF THE UNITED STATES

No. 98–1167

EDWARD CHRISTENSEN, ET AL., PETITIONERS *v.* HARRIS COUNTY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May 1, 2000]

JUSTICE THOMAS delivered the opinion of the Court.

Under the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, as amended, 29 U. S. C. §201 *et seq.* (1994 ed. and Supp. III), States and their political subdivisions may compensate their employees for overtime by granting them compensatory time or "comp time," which entitles them to take time off work with full pay. §207(*o*). If the employees do not use their accumulated compensatory time, the employer is obligated to pay cash compensation under certain circumstances. §§207(*o*)(3)–(4). Fearing the fiscal consequences of having to pay for accrued compensatory time, Harris County adopted a policy requiring its employees to schedule time off in order to reduce the amount of accrued compensatory time. Employees of the Harris County Sheriff's Department sued, claiming that the FLSA prohibits such a policy. The Court of Appeals rejected their claim. Finding that nothing in the FLSA or its implementing regulations prohibits an employer from compelling the use of compensatory time, we affirm.

I

A

The FLSA generally provides that hourly employees who work in excess of 40 hours per week must be compensated for the excess hours at a rate not less than 1½ times their regular hourly wage. §207(a)(1). Although this requirement did not initially apply to public-sector employers, Congress amended the FLSA to subject States and their political subdivisions to its constraints, at first on a limited basis, see Fair Labor Standards Amendments of 1966, Pub. L. 89–601, §102(b), 80 Stat. 831 (extending the FLSA to certain categories of state and local employees), and then more broadly, see Fair Labor Standards Amendments of 1974, Pub. L. 93–259, §§6(a)(1)–(2), 88 Stat. 58–59 (extending the FLSA to all state and local employees, save elected officials and their staffs). States and their political subdivisions, however, did not feel the full force of this latter extension until our decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985), which overruled our holding in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), that the FLSA could not constitutionally restrain traditional governmental functions.

In the months following *Garcia*, Congress acted to mitigate the effects of applying the FLSA to States and their political subdivisions, passing the Fair Labor Standards Amendments of 1985, Pub. L. 99–150, 99 Stat. 787. See generally *Moreau* v. *Klevenhagen*, 508 U. S. 22, 26 (1993). Those amendments permit States and their political subdivisions to compensate employees for overtime by granting them compensatory time at a rate of 1½ hours for every hour worked. See 29 U. S. C. §207(*o*)(1). To provide this form of compensation, the employer must arrive at an agreement or understanding with employees that compen-

satory time will be granted instead of cash compensation.[1] §207(*o*)(2); 29 CFR §553.23 (1999).

The FLSA expressly regulates some aspects of accrual and preservation of compensatory time. For example, the FLSA provides that an employer must honor an employee's request to use compensatory time within a "reasonable period" of time following the request, so long as the use of the compensatory time would not "unduly disrupt" the employer's operations. §207(*o*)(5); 29 CFR §553.25 (1999). The FLSA also caps the number of compensatory time hours that an employee may accrue. After an employee reaches that maximum, the employer must pay cash compensation for additional overtime hours worked. §207(*o*)(3)(A). In addition, the FLSA permits the employer at any time to cancel or "cash out" accrued compensatory time hours by paying the employee cash compensation for unused compensatory time. §207(*o*)(3)(B); 29 CFR §553.26(a) (1999). And the FLSA entitles the employee to cash payment for any accrued compensatory time remaining upon the termination of employment. §207(*o*)(4).

B

Petitioners are 127 deputy sheriffs employed by respondents Harris County, Texas, and its sheriff, Tommy B. Thomas (collectively, Harris County). It is undisputed that each of the petitioners individually agreed to accept compensatory time, in lieu of cash, as compensation for overtime.

As petitioners accumulated compensatory time, Harris

---

[1] Such an agreement or understanding need not be formally reached and memorialized in writing, but instead can be arrived at informally, such as when an employee works overtime knowing that the employer rewards overtime with compensatory time. See 29 CFR §553.23(c)(1) (1999).

County became concerned that it lacked the resources to pay monetary compensation to employees who worked overtime after reaching the statutory cap on compensatory time accrual and to employees who left their jobs with sizable reserves of accrued time. As a result, the county began looking for a way to reduce accumulated compensatory time. It wrote to the United States Department of Labor's Wage and Hour Division, asking "whether the Sheriff may schedule non-exempt employees to use or take compensatory time." Brief for Petitioners 18–19. The Acting Administrator of the Division replied:

> "[I]t is our position that a public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed if the prior agreement specifically provides such a provision . . . .
>
> "Absent such an agreement, it is our position that neither the statute nor the regulations permit an employer to require an employee to use accrued compensatory time." Opinion Letter from Dept. of Labor, Wage and Hour Div. (Sept. 14, 1992), 1992 WL 845100 (Opinion Letter).

After receiving the letter, Harris County implemented a policy under which the employees' supervisor sets a maximum number of compensatory hours that may be accumulated. When an employee's stock of hours approaches that maximum, the employee is advised of the maximum and is asked to take steps to reduce accumulated compensatory time. If the employee does not do so voluntarily, a supervisor may order the employee to use his compensatory time at specified times.

Petitioners sued, claiming that the county's policy violates the FLSA because §207(*o*)(5)– which requires that an employer reasonably accommodate employee requests to use compensatory time– provides the exclusive means of utilizing accrued time in the absence of an agreement or

understanding permitting some other method. The District Court agreed, granting summary judgment for petitioners and entering a declaratory judgment that the county's policy violated the FLSA. *Moreau* v. *Harris County*, 945 F. Supp. 1067 (SD Tex. 1996). The Court of Appeals for the Fifth Circuit reversed, holding that the FLSA did not speak to the issue and thus did not prohibit the county from implementing its compensatory time policy. *Moreau* v. *Harris County*, 158 F. 3d 241 (1998). Judge Dennis concurred in part and dissented in part, concluding that the employer could not compel the employee to use compensatory time unless the employee agreed to such an arrangement in advance. *Id.*, at 247–251. We granted certiorari because the Courts of Appeals are divided on the issue.[2] 528 U. S. __ (1999).

II

Both parties, and the United States as *amicus curiae*, concede that nothing in the FLSA expressly prohibits a State or subdivision thereof from compelling employees to utilize accrued compensatory time. Petitioners and the United States, however, contend that the FLSA implicitly prohibits such a practice in the absence of an agreement or understanding authorizing compelled use.[3] Title 29

– – – – – –

[2]Compare, *e.g.*, *Collins* v. *Lobdell*, 188 F. 3d 1124, 1129–1130 (CA9 1999) (upholding employer's policy compelling compensatory time use), with *Heaton* v. *Moore*, 43 F. 3d 1176, 1180–1181 (CA8 1994) (striking down policy compelling compensatory time use), cert. denied *sub nom*. *Schriro* v. *Heaton*, 515 U. S. 1104 (1995).

[3]We granted certiorari on the question "[w]hether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act of 1938, 29 U. S. C. §207(*o*), may, absent a preexisting agreement, require its employees to use accrued compensatory time." 528 U. S. ___ (1999). As such, we decide this case on the assumption that no agreement or understanding exists between the employer and employees on the issue of compelled use of compensatory time.

U. S. C. §207(*o*)(5) provides:

> "An employee . . .
> "(A) who has accrued compensatory time off . . . , and
> "(B) who has requested the use of such compensatory time,
> "shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency."

Petitioners and the United States rely upon the canon *expressio unius est exclusio alterius*, contending that the express grant of control to employees to use compensatory time, subject to the limitation regarding undue disruptions of workplace operations, implies that all other methods of spending compensatory time are precluded.[4]

We find this reading unpersuasive. We accept the proposition that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Raleigh & Gaston R. Co.* v. *Reid*, 13 Wall. 269, 270 (1872). But that canon does not resolve this case in petitioners' favor. The "thing to be done" as defined by

---

[4] JUSTICE STEVENS asserts that the parties never make this argument. See *post*, at 2, n. 1. (dissenting opinion). Although the United States and petitioners fail to make their arguments in Latin, we believe a fair reading of the briefs reveals reliance upon the *expressio unius* canon. See Brief for United States as *Amicus Curiae* 16 ("Congress . . . identified only one circumstance in which an employer may exercise some measure of control: when an employee requests the use of compensatory time, the employer must allow such use within a reasonable period of time except where the use would 'unduly disrupt' the employer's operations. 29 U. S. C. §207(*o*)(5). If Congress intended for employers to exercise unilateral control over the use of compensatory time in other respects as well, it presumably would have so provided"); Reply Brief for Petitioners 4–6 (contending that the FLSA explicitly provides methods for reducing compensatory time and thus other means may not be used).

§207(*o*)(5) is not the expenditure of compensatory time, as petitioners would have it. Instead, §207(*o*)(5) is more properly read as a minimal guarantee that an employee will be able to make some use of compensatory time when he requests to use it. As such, the proper *expressio unius* inference is that an employer may not, at least in the absence of an agreement, deny an employee's request to use compensatory time for a reason other than that provided in §207(*o*)(5). The canon's application simply does not prohibit an employer from telling an employee to take the benefits of compensatory time by scheduling time off work with full pay.

In other words, viewed in the context of the overall statutory scheme, §207(*o*)(5) is better read not as setting forth the exclusive method by which compensatory time can be used, but as setting up a safeguard to ensure that an employee will receive timely compensation for working overtime. Section 207(*o*)(5) guarantees that, at the very minimum, an employee will get to use his compensatory time (*i.e.*, take time off work with full pay) unless doing so would disrupt the employer's operations. And it is precisely this concern over ensuring that employees can timely "liquidate" compensatory time that the Secretary of Labor identified in her own regulations governing §207(*o*)(5):

> "Compensatory time cannot be used as a means to avoid statutory overtime compensation. An employee has the right to use compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of his or her making a request for use of such time." 29 CFR §553.25(b) (1999).

This reading is confirmed by nearby provisions of the FLSA that reflect a similar concern for ensuring that the

employee receive some timely benefit for overtime work. For example, §207(*o*)(3)(A) provides that workers may not accrue more than 240 or 480 hours of compensatory time, depending upon the nature of the job. See also §207(*o*)(2)(B) (conditioning the employer's ability to provide compensatory time upon the employee not accruing compensatory time in excess of the §207(*o*)(3)(A) limits). Section 207(*o*)(3)(A) helps guarantee that employees only accrue amounts of compensatory time that they can reasonably use. After all, an employer does not need §207(*o*)(3)(A)'s protection; it is free at any time to reduce the number of hours accrued by exchanging them for cash payment, §207(*o*)(3)(B), or by halting the accrual of compensatory time by paying cash compensation for overtime work, 29 CFR §553.26(a) (1999). Thus, §207(*o*)(3)(A), like §207(*o*)(5), reflects a concern that employees receive some timely benefit in exchange for overtime work. Moreover, on petitioners' view, the compensatory time exception enacted by Congress in the wake of *Garcia* would become a nullity when employees who refuse to use compensatory time reach the statutory maximums on accrual. Petitioners' position would convert §207(*o*)(3)(A)'s shield into a sword, forcing employers to pay cash compensation instead of providing compensatory time to employees who work overtime.

At bottom, we think the better reading of §207(*o*)(5) is that it imposes a restriction upon an employer's efforts to *prohibit* the use of compensatory time when employees request to do so; that provision says nothing about restricting an employer's efforts to *require* employees to use compensatory time. Because the statute is silent on this issue and because Harris County's policy is entirely compatible with §207(*o*)(5), petitioners cannot, as they are required to do by 29 U. S. C. §216(b), prove that Harris County has violated §207.

Our interpretation of §207(*o*)(5)– one that does not

prohibit employers from forcing employees to use compensatory time– finds support in two other features of the FLSA. First, employers remain free under the FLSA to decrease the number of hours that employees work. An employer may tell the employee to take off an afternoon, a day, or even an entire week. Cf. *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 739 (1981) ("[T]he FLSA was designed . . . to ensure that each employee covered by the Act . . . would be protected from the evil of overwork . . ." (internal quotation marks and emphasis omitted)). Second, the FLSA explicitly permits an employer to cash out accumulated compensatory time by paying the employee his regular hourly wage for each hour accrued. §207(*o*)(3)(B); 29 CFR §553.27(a) (1999). Thus, under the FLSA an employer is free to require an employee to take time off work, and an employer is also free to use the money it would have paid in wages to cash out accrued compensatory time. The compelled use of compensatory time challenged in this case merely involves doing both of these steps at once. It would make little sense to interpret §207(*o*)(5) to make the combination of the two steps unlawful when each independently is lawful.[5]

– – – – – –

[5] JUSTICE STEVENS does not dispute this argument. In fact, he expressly endorses half of it. See *post*, at 3, 5 (employer free to cash out compensatory time). Instead, JUSTICE STEVENS claims that we "stumbl[e]" by failing to identify "the relevant general rule" that employees have "a statutory right to compensation for overtime work payable in cash." *Post*, at 1. We fail to do so only because the general rule is not relevant to this case. Both parties to this case agreed that compensatory time would be provided in lieu of cash and thus §207(a)'s general requirement of cash compensation is supplanted. Petitioners and the United States do assert that the requirement of cash compensation is relevant by analogy. They claim that an employer cannot compel compensatory time use because compensatory time should be treated like employee cash in the bank– that is, under the exclusive control of the employee. But this analogy is wholly inapt under the very terms of the FLSA. The FLSA grants significant control to the

III

In an attempt to avoid the conclusion that the FLSA does not prohibit compelled use of compensatory time, petitioners and the United States contend that we should defer to the Department of Labor's opinion letter, which takes the position that an employer may compel the use of compensatory time only if the employee has agreed in advance to such a practice. Specifically, they argue that the agency opinion letter is entitled to deference under our decision in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). In *Chevron*, we held that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute. *Id.*, at 842–844.

Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters– like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law– do not warrant *Chevron*-style deference. See, *e.g.*, *Reno* v. *Koray*, 515 U. S. 50, 61 (1995) (internal agency guideline, which is not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment," entitled only to "some deference" (internal quotation marks omitted)); *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 256–258 (1991) (interpretative guidelines do not receive *Chevron* deference); *Martin* v.

– – – – – –

employer over accrued compensatory time. For example, the employer is free to buy out compensatory time at any time by providing cash compensation. §207(*o*)(3)(B); 29 CFR §553.27(a) (1999). Additionally, an employer is free to deny any request to use compensatory time when such use would unduly disrupt the employer's operations. §207(*o*)(5)(B); 29 CFR §553.25(d) (1999). The cash analogy is therefore directly undermined by unambiguous provisions of the statute.

Occupational Safety and Health Review Comm'n, 499 U. S. 144, 157 (1991) (interpretative rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers"). See generally 1 K. Davis & R. Pierce, Administrative Law Treatise §3.5 (3d ed. 1994). Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944), but only to the extent that those interpretations have the "power to persuade," *ibid*. See *Arabian American Oil Co.*, *supra*, at 256–258. As explained above, we find unpersuasive the agency's interpretation of the statute at issue in this case.

Of course, the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation. But in this case the Department of Labor's regulation does not address the issue of compelled compensatory time. The regulation provides only that "[t]he agreement or understanding [between the employer and employee] *may* include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with [§207(*o*)]." 29 CFR §553.23(a)(2) (1999) (emphasis added). Nothing in the regulation even arguably requires that an employer's compelled use policy *must* be included in an agreement. The text of the regulation itself indicates that its command is permissive, not mandatory.

Seeking to overcome the regulation's obvious meaning, the United States asserts that the agency's opinion letter interpreting the regulation should be given deference under our decision in *Auer* v. *Robbins*, 519 U. S. 452 (1997). In *Auer*, we held that an agency's interpretation of its own regulation is entitled to deference. *Id*., at 461. See also *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945). But *Auer* deference is warranted only when the

language of the regulation is ambiguous. The regulation in this case, however, is not ambiguous– it is plainly permissive. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation. Because the regulation is not ambiguous on the issue of compelled compensatory time, *Auer* deference is unwarranted.

* * *

As we have noted, no relevant statutory provision expressly or implicitly prohibits Harris County from pursuing its policy of forcing employees to utilize their compensatory time. In its opinion letter siding with the petitioners, the Department of Labor opined that "it is our position that neither the statute nor the regulations *permit* an employer to require an employee to use accrued compensatory time." Opinion Letter (emphasis added). But this view is exactly backwards. Unless the FLSA *prohibits* respondents from adopting its policy, petitioners cannot show that Harris County has violated the FLSA. And the FLSA contains no such prohibition. The judgment of the Court of Appeals is affirmed.

It is so ordered.