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 STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

Because the disagreement between the parties concerns the scope of an exception to a general rule, it is appropriate to begin with a correct identification of the relevant general rule. That rule gives all employees protected by the Fair Labor Standards Act a statutory right to compensation for overtime work payable in cash, whether they work in the private sector of the economy or the public sector. 29 U. S. C. §§206, 207 (1994 ed. and Supp. III). In 1985, Congress enacted an exception to that general rule that permits States and their political subdivisions to use compensatory time instead of cash as compensation for overtime. The exception, however, is not applicable unless the public employer first arrives at an agreement with its employees to substitute that type of compensation for cash. §207(*o*); 29 CFR §553.23 (1999). As I read the statute, the employer has no right to impose compensatory overtime payment upon its employees except in accordance with the terms of the agreement authorizing its use.

The Court stumbles because it treats §207's limited and conditional exception as though it were the relevant general rule. The Court begins its opinion by correctly asserting that public employers 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." *Ante*, at 1. It is not until it reaches the bottom of the second page, however, that the Court acknowledges that what appeared to be the relevant general rule is really an exception from the employees' basic right to be paid in cash.

In my judgment, the fact that no employer may lawfully make any use of "comp time" without a prior agreement with the affected employees is of critical importance in answering the question whether a particular method of using that form of noncash compensation may be imposed on those employees without their consent. Because their consent is a condition without which the employer cannot qualify for the exception from the general rule, it seems clear to me that their agreement must encompass the way in which the compensatory time may be used.

In an effort to avoid addressing this basic point, the Court mistakenly characterizes petitioners' central argument as turning upon the canon *expressio unius est exclusio alterius*.[1] According to the Court, petitioners and the United States as *amicus curiae* contend that because employees are granted the power under the Act to use their compensatory time subject solely to the employers' ability to make employees wait a "reasonable time" before using it, "all other methods of spending compensatory time are precluded." *Ante*, at 6. The Court concludes that *expressio unius* does not help petitioners because the

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[1]It must be noted that neither petitioners' brief nor the brief for the United States as *amicus curiae* actually relies upon this canon. Indeed, the sole mention of it in either brief is in petitioners' statement of the case, in which petitioners refer in a single sentence to an argument made by the Court of Appeals for the Eighth Circuit in *Heaton* v. *Moore*, 43 F. 3d 1176 (1994) (rejecting compelled-use policy absent agreement to that effect), cert. denied, *Schriro* v. *Heaton*, 515 U. S. 1104 (1995).

"thing to be done" as prescribed by the statute (and because of which all other "things" are excluded) is simply a guarantee that employees will be allowed to make some use of compensatory time upon request, rather than an open-ended promise that employees will be able to choose (subject only to the "reasonable time" limitation) how to spend it. *Ibid.*

This description of the debate misses the primary thrust of petitioners' position. They do not, as the Court implies, contend that employers generally must afford employees essentially unlimited use of accrued comp time under the statute; the point is rather that rules regarding both the availability and the use of comp time must be contained within an *agreement*. The "thing to be done" under the Act is for the parties to come to terms. It is because they have not done so with respect to the use of comp time here that the county may not unilaterally force its expenditure.

The Court is thus likewise mistaken in its insistence that under petitioners' reading, the comp time exception "would become a nullity" because employees could "forc[e] employers to pay cash compensation instead of providing compensatory time" for overtime work. *Ante*, at 8. Quite the contrary, employers can only be "forced" either to abide by the arrangements to which they have agreed, or to comply with the basic statutory requirement that overtime compensation is payable in cash.

Moreover, as the Court points out, *ante*, at 3, 7, even absent an agreement on the way in which comp time may be used, employers may at any time require employees to "cash out" of accumulated comp time, thereby readily avoiding any forced payment of comp time employees may accrue. §207(*o*)(3)(B); 29 CFR §553.26(a) (1999). Neither can it be said that Congress somehow assumed that the right to force employees to use accumulated comp time was to be an implied term in all comp time agreements. Congress specifically contemplated that employees might

well reach the statutory maximum of accrued comp time, by requiring, in §207(*o*)(3)(A), that once the statutory maximum is reached, employers must compensate employees in the preferred form– cash– for every hour over the limit.

Finally, it is not without significance in the present case that the Government department responsible for the statute's enforcement shares my understanding of its meaning. Indeed, the Department of Labor made its position clear to the county itself in response to a direct question posed by the county before it decided– agency advice notwithstanding– to implement its forced-use policy nonetheless. The Department of Labor explained:

> "[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, and the employees have knowingly and voluntarily agreed to such 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.

The Department, it should be emphasized, does not suggest that forced-use policies are *forbidden* by the statute or regulations. Rather, its judgment is simply that, in accordance with the basic rule governing compensatory time set down by the statutory and regulatory scheme, such policies may be pursued solely according to the parties' *agreement*. Because there is no reason to believe that the Department's opinion was anything but thoroughly considered and consistently observed, it unquestionably

merits our respect. See *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).[2]

In the end, I do not understand why it should be any more difficult for the parties to come to an agreement on this term of employment than on the antecedent question whether compensatory time may be used at all. State employers enjoy substantial bargaining power in negotiations with their employees; by regulation, agreements governing the availability and use of compensatory time can be essentially as informal as the parties wish. See 29 CFR §553.23(c) (1999). And, as we have said, employers retain the ability to "cash out" of accrued leave at any time. That simple step is, after all, the method that the Department of Labor years ago suggested the county should pursue here, and that would achieve precisely the outcome the county has all along claimed it wants.

I respectfully dissent.

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[2]I should add that I fully agree with JUSTICE BREYER's comments on *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). See *post*, at 1-2.