No. 05-40370

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JUNE BELT, ET AL.,

Plaintiffs-Appellees,

v.

EMCARE, INC. AND TEXAS EM-I MEDICAL SERVICES, P.A.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Texas, Tyler Division

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF THE PLAINTIFFS-APPELLEES

HOWARD M. RADZELY
Solicitor of Labor

STEVEN J. MANDEL
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate
Litigation

ANNE PAYNE FUGETT
Senior Attorney

U.S. Department of Labor
200 Constitution Ave., N.W.
Room N-2716
Washington, D.C. 20210
202-693-5555

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STATEMENT OF INTEREST

The Department of Labor ("Department") is responsible for the administration and enforcement of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 201 et seq. Pursuant to an express delegation of rulemaking authority, the Secretary of Labor ("Secretary") has promulgated regulations that define and delimit the term "employed in a bona fide . . . professional capacity" for purposes of the Act's exemption from its minimum wage and overtime provisions at 29 U.S.C. 206 and 207. 29 U.S.C. 213(a)(1). In addition to certain "duties" requirements,

section 541.3 of the Secretary's regulations required that a professional employee be "compensated for services on a salary or fee basis,"[1] except in the case of those employees who are licensed and engaged in the practice of law or medicine, and in the case of teachers. 29 C.F.R. 541.3(e).[2]

The Secretary has a significant interest in ensuring that her interpretation of this regulation is upheld by this Court, as it was by the district court. Specifically, the Secretary believes the exception to the "salary basis" requirement should not be applied to physician assistants and nurse practitioners, because the relevant interpretive regulation clearly stated that the exception applies only to the traditional profession of medicine, not to those who merely serve that profession, see 29 C.F.R. 541.314(a), and a Wage and Hour Administrator opinion letter and a section of the Wage and Hour Division's Field Operations Handbook provide that physician assistants must be

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[1] "An employee will be considered to be paid 'on a salary basis' within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. 541.118(a).

[2] New regulations implementing the FLSA's minimum wage and overtime exemptions for executive, administrative, and professional employees became effective on August 23, 2004. See 69 Fed. Reg. 22122, 22126 (2004). This case was decided under the previous rule and all references to the regulations are to that rule, unless otherwise indicated.

compensated on a salary basis in order to qualify for the professional exemption. Finally, the Secretary has an interest in confirming that the new rule does not substantively change section 541.314 of the old interpretive regulations.

STATEMENT OF THE ISSUE

Whether the district court correctly held that hourly paid employees working as physician assistants and nurse practitioners must be paid on a "salary basis" in order to be exempt learned professionals under 29 C.F.R. 541.3(e).

STATEMENT OF THE CASE

A. Nature Of The Case, Course Of Proceedings, And Disposition Below

On February 25, 2003, physician assistants and nurse practitioners employed by EmCare, Inc. and Texas EM-I Medical Services, P.A. (collectively "EmCare") brought suit for back wages, and an equal amount in liquidated damages, under section 16(b) of the FLSA, 29 U.S.C. 216(b), in the District Court for the Eastern District of Texas (1R. at 30-37).[3] The complaint alleged that EmCare had willfully violated the FLSA by failing to pay one and one-half times the regular rate of pay for hours

[3] References to the district court record are indicated by the abbreviation "R.," preceded by the volume number, and followed by the appropriate page number(s), and paragraph (¶) number(s), where applicable. References to EmCare's appellate brief are indicated by the abbreviation "App. Br.," followed by the pertinent page number(s).

worked over 40 in a workweek, as required by section 7 of the Act, 29 U.S.C. 207. EmCare answered that physician assistants and nurse practitioners, although not paid on a salary basis, were learned professionals exempt from the FLSA's overtime requirements pursuant to 29 C.F.R. 541.314 (exception for physicians, lawyers, and teachers) (3R. at 1042).

On August 2, 2004, the physician assistants and nurse practitioners filed a motion for partial summary judgment on the issue of the applicability of the salary basis exception (3R. at 1280-1314). On September 22, 2004, EmCare also moved for summary judgment on this issue (6R. at 2549-72). On January 13, 2005, the district court granted plaintiffs' motion for summary judgment and denied defendants' cross-motion (id. at 2704-19).[4]

The district court certified the decision for interlocutory appeal under 28 U.S.C. 1292(b), stating that it involved a controlling question of law, the resolution of which may advance the termination of the litigation (6R. at 2719). This Court granted EmCare's petition for permission to appeal on March 16, 2005 (6R. at 2871-72).

B. Statement Of Facts

1. The plaintiffs-appellees are 59 physician assistants and 20 nurse practitioners who provided health care services for

[4] The district court's decision is published at 351 F. Supp.2d 625.

EmCare in hospital emergency rooms in 20 states (3R. at 1284). The physician assistants and nurse practitioners were paid on an hourly basis and were paid straight-time hourly rates for all hours worked, including overtime hours, i.e., those over 40 in a workweek (1R. at 31, ¶3b; 3R. at 1323, ¶¶ 20, 21). The physician assistants and nurse practitioners performed the same job duties (3R. at 1322, ¶ 15). They obtained medical histories, discussed with patients the reasons for the emergency room visit and the patients' symptoms, examined patients, made a preliminary diagnosis and a determination of the treatment indicated to give to the physician, consulted with the physician to determine the final diagnosis and treatment plan, ordered lab work or x-rays and discussed the results with the physician, and prescribed medication within their limited prescriptive authority or obtained prescriptions from the physician (3R. at 1322, ¶ 16) They sutured cuts and put dislocated shoulders back in place (id.). In minor cases (e.g., a sprained ankle or wrist), the patient might see only the nurse practitioner or the physician assistant (id. at 1323, ¶ 17). In more serious cases, a physician would examine the patient after the physician assistant's or nurse practitioner's initial examination (id.).

The nurse practitioners' and physician assistants' work was performed under the direct or indirect supervision of a physician (3R. at 1323, ¶ 18). Generally, physicians made the

decision concerning whether they would see a patient (id. at 1323 n.3). In those cases where the patient did not see a physician, a physician reviewed and signed the patient's chart before the patient left the emergency room (id. at 1323, n.2).

2. According to the Department's Bureau of Labor Statistics' Occupational Outlook Handbook (2004-05) ("Occupational Outlook Handbook"), all states require physician assistants to complete an accredited physician assistant program, which may be an Associate, Bachelor, or Masters Degree program. See Occupational Outlook Handbook, http://www.bls.gov/oco/ocos081.htm. Most graduates of physician assistant programs have earned at least a bachelor's degree. Id. All states and the District of Columbia require physician assistants to pass a national certification examination administered by the National Commission on Certification of Physician Assistants. Id. Also, physician assistants must complete 100 hours of continuing medical education every two years to maintain their certification. Id. Every six years, they must pass a recertification examination or complete an alternative program involving a combination of learning experiences and a take-home examination. Id.

The Occupational Outlook Handbook indicates that the nurse practitioner occupation consists of registered nurses who have completed advanced education and training. See Occupational

Outlook Handbook, http:www.bls.gov/oco/ocos083.htm. To be certified or licensed in the state where they practice, nurse practitioners must complete an accredited post-graduate program, typically a Masters Degree program. Id. The parties do not dispute that EmCare's physician assistants and nurse practitioners were properly licensed.

C. The District Court's Decision

The district court concluded that section 541.3(e) of the regulations is ambiguous on the question whether the exception to the salary basis requirement for learned professionals engaged in the practice of medicine applies to physician assistants and nurse practitioners. Therefore, the court deferred to the Department's interpretation of the regulation at 29 C.F.R. 541.314 -- "This exception [to the salary basis requirement] applies only to the traditional professions of law, medicine, and teaching and not to employees in related professions which merely serve these professions" -- and to an opinion letter (Acting Administrator's Opinion Letter, WH-266 (Wage and Hour Division, Dep't. of Labor, May 10, 1974)) and a section of Wage and Hour's Field Operations Handbook (§ 22d23), both of which provide that physician assistants must be paid on a salary basis in order to qualify for the exemption. The court, applying the standard for granting deference to an agency's interpretation of its own regulations articulated in

Auer v. Robbins, 519 U.S. 452, 461 (1997), determined that these interpretations were not clearly erroneous or inconsistent with the regulation, and were therefore controlling. The district court concluded: "Like the Court in Auer, this Court has 'no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question'" (6R. at 2717, quoting Auer, 519 U.S. at 462).

Also, based on its review of the regulatory history, the district court recognized that the Department had considered, but rejected, extending the exception to the salary basis test to other professionals, like architects and engineers. The court also reasoned that since the physician assistant and nurse practitioner occupations did not develop until the 1960s, they could not have been within the traditional practice of medicine when the salary basis exception was created in 1940; nor was it likely that they were so considered when the old regulations were last substantively amended in 1967, or when they were last issued in 1973.

The district court also examined the new regulations, which became effective on August 23, 2004, for guidance. First, the court noted that while the new rule eliminates the distinction

between regulations (Subpart A) and interpretations (Subpart B),[5] it does not change the "substantive content" of section 541.314 of the old interpretive regulations (6R. at 2714). Second, the court pointed out that section 541.301(e)(4) of the new rule specifically states that physician assistants who meet certain educational and certification requirements "'generally meet the duties requirements for the learned professional exemption'"; that the new regulations require learned professionals to be paid on a salary basis to qualify for the exemption; and that section 541.600(e) of the new rule specifically provides that the exception to the salary basis test is inapplicable to registered or certified medical technologists and nurses, two other occupations that section 541.301(e) specifically recognizes as learned professionals in terms of the duties performed (6R. at 2714-15). On this basis, the court reasoned that "like registered or certified medical technologists and nurses, physician assistants are not 'practitioners licensed and practicing in the field of medical science and healing' who are exempt from the salary-basis test" (id. at 2715, quoting 29 C.F.R. 541.304(b) of the new rule).

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[5] The new rule was promulgated in its entirety after notice and comment. See 68 Fed. Reg. 15560 (March 31, 2003); 69 Fed. Reg. 22122 (April 23, 2004).

With regard to the nurse practitioners, the district court noted that neither the new rule, its preamble, the 1974 opinion letter, nor Wage and Hour's Field Operations Handbook mentions this occupation. The court concluded, however, that the history of the salary basis exception did not support its application to nurse practitioners.

SUMMARY OF ARGUMENT

The district court correctly held, in reliance on the Secretary's reasonable interpretation, that physician assistants and nurse practitioners must be paid on a salary basis in order to be exempt learned professionals. The Secretary's interpretive regulation at section 541.314(a) clearly stated that the exception to the salary basis requirement applies only to employees engaged in the traditional profession of medicine, not those who merely serve that profession. The interpretive regulation explained further that the exception's application is limited to "medical doctors," including general practitioners and specialists, and osteopathic physicians, and to "other practitioners in the field of medical science," which may include podiatrists, dentists, and optometrists. 29 C.F.R. 541.314(b)(1).

As the district court held (6R. at 2718), this interpretation of an ambiguous legislative regulation is entitled to controlling deference under Auer v. Robbins, 519

U.S. 452, 461 (1997), which holds that deference is owed whenever an agency's interpretation of its own regulation is neither "plainly erroneous [n]or inconsistent with the regulation." (Internal quotation marks omitted.)

Physician assistants and nurse practitioners are not medical doctors or osteopathic physicians, nor are they "other practitioners" on a par with podiatrists, dentists, and optometrists -- independent medical specialists who have a longstanding status in the medical field and who have customarily been viewed as doctors. Rather, physician assistants and nurse practitioners "service the medical profession." 29 C.F.R. 541.314(c).

The regulatory history discloses that the exception, which was created in 1940, had its origins in the distinctive position that doctors and lawyers held in society at that time. It also reveals the Department's consistent view that the salary basis requirement is one of the most reliable indicia of an employee's exempt status and that the exception to its application should be strictly confined to the truly "traditional" professions. Further support for the Secretary's position is found in a 1974 Wage-Hour opinion letter that plainly states that physician assistants must be compensated on a salary basis to qualify for the exemption. The district court was correct (6R. at 2716) in

giving controlling deference to this letter in accordance with the principles set forth in Auer.

Finally, the new regulations -- while not controlling in this case -- disclose that physician assistants and nurse practitioners continue to be excluded from the salary basis exception.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT PHYSICIAN ASSISTANTS AND NURSE PRACTITIONERS MUST BE PAID ON A SALARY BASIS IN ORDER TO BE EXEMPT LEARNED PROFESSIONALS

A. Statutory And Regulatory Provisions

Section 7 of the FLSA provides that "no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. 207(a)(1).

Section 13(a)(1) of the FLSA provides an exemption from the Act's minimum wage and overtime requirements for employees "employed in a bona fide executive, administrative, or professional capacity, . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to

time by regulations of the Secretary . . .)." 29 U.S.C. 213(a)(1).[6]

The regulations defining executive, administrative, and professional employees, and outside salespersons are found at 29 C.F.R. Part 541. As noted supra, updated regulations became effective on August 23, 2004. See 69 Fed. Reg. 22122, 22126 (2004). While this case arose under the old regulations, because the district court examined both the old and the new regulations in reaching its decision, the Secretary discusses both.

1. The Old Regulations

Section 541.3 of the regulations was a legislative rule promulgated by the Secretary that implemented the statutory overtime exception for professionals set out at 29 U.S.C. 213(a)(1). See 29 C.F.R. 541.3. It included a "duties" and "salary basis" test, but specifically excepted from the "salary basis" requirement licensed medical practitioners. See 29 C.F.R. 541.3(e). Section 541.314 of the regulations, in turn, was an interpretive regulation in which the Secretary explained that the exception to the "salary basis" test is limited to the

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[6] Exemptions from the FLSA are "narrowly construed against the employers seeking to assert them." Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960). See also Martin v. Bedell, 955 F.2d 1029, 1035 (5th Cir.) ("[T]he remedial goals of the Fair Labor Standards Act lead us to read narrowly its exemptions."), cert. denied, 506 U.S. 915 (1992).

traditional profession of medicine, as opposed to those who serve that profession. See 29 C.F.R. 541.314(a).

A detailed explanation of the old regulations follows. Under the "short" test for the learned professional exemption (which is the test that is pertinent here), the employee's primary duty was required to consist of the performance of "[w]ork requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes," 29 C.F.R. 541.3(a)(1), and was required to include "work requiring the consistent exercise of discretion and judgment[,]" 29 C.F.R. 541.3(e).

The "short" test also required that a learned professional employee be "compensated for services on a salary or fee basis" and "at a rate of not less than $250 per week[.]" 29 C.F.R. 541.3(e). The regulations, however, provided that the salary basis requirement does not apply "in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship

or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher[.]" Id.

The interpretive regulations stated that "[t]his exception applies only to the traditional professions of law, medicine, and teaching and not to employees in related professions which merely serve these professions." 29 C.F.R. 541.314(a) (emphasis added). The interpretations further explained:

> (b) In the case of medicine: (1) The exception applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term *physicians* means medical doctors including general practitioners and specialists, and osteopathic physicians (doctors of osteopathy). Other practitioners in the field of medical science and healing may include podiatrists (sometimes called chiropodists), dentists (doctors of dental medicine), optometrists (doctors of optometry or bachelors of science in optometry).
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> (c) In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dieticians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

29 C.F.R. 541.314(b)(1), (c) (emphasis added).[7]

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[7] With regard to the "duties" prong of the learned professional exemption, section 541.301(e)(1) of the interpretive regulations stated that "[r]egistered nurses have traditionally been recognized as professional employees by the Division in its enforcement of the act" and "nurses who are registered by the appropriate State examining board will continue to be recognized

2. The New Regulations

The new test for the learned professional exemption requires that the employee be "compensated on a salary or fee basis at a rate of not less than $455 per week" and have the primary duty of performing work "requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction[.]" 29 C.F.R. 541.300(a)(1),(2)(i) (2005). Section 541.304 of the new rule, using language from section 541.314 of the old interpretations, provides an exception from both the salary requirements and the general duties tests of the learned professional exemption for "any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof," and for medical interns and residents. 29 C.F.R. 541.304(a)(1),(2) (2005). Section 541.304(b) of the new rule states, in pertinent part:

> In the case of medicine, the [learned professional] exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term "physicians" includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentist (doctors of dental

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as having met the [learned professional duties] requirement[.]" 29 C.F.R. 541.301(e)(1). Neither the regulations nor the interpretations specifically mentioned physician assistants or nurse practitioners.

> medicine), and optometrists (doctors of optometry or bachelors of science in optometry).

29 C.F.R. 541.304(b) (2005). Section 541.304(d) expressly provides that "[t]he requirements of § 541.300 ["[g]eneral rule for professional employees"] and subpart G (salary requirements) of the part do not apply to the employees described in this section [i.e., to employees engaged in the practice of medicine]." 29 C.F.R. 541.304(d) (2005).

In section 541.600(e), the new rule reiterates that the salary basis requirements do not apply to the employees described in section 541.304 and also incorporates verbatim the language of section 541.314(c) of the old interpretive regulations. Section 541.600(e) states, in pertinent part:

> In the case of professional employees, the compensation requirements in this section shall not apply to employees . . . who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice thereof (*see* § 541.304). In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

29 C.F.R. 541.600(e) (2005) (emphases added).

The new rule also contains a new section that further explains the general duties test for the learned professional exemption and that includes illustrations of how that test applies to certain occupations, such as physician assistants.

See 29 C.F.R. 541.301 and 541.301(e)(4) (2005). Section 541.301 does not specifically mention nurse practitioners but, consistent with the old interpretive regulations (29 C.F.R. 541.301(e)(1)), provides that "registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption." 29 C.F.R. 541.301(e)(2) (2005).

B. Physician Assistants And Nurse Practitioners Are Not Licensed For Or Engaged In The Traditional Practice Of Medicine, And Thus Are Not Excepted From The Salary Basis Requirement.

1. While physician assistants and nurse practitioners might very well perform the requisite duties for the learned professional exemption, they must be paid on a salary basis in order to be exempt. Section 541.314 of the Secretary's interpretive regulations made plain that "[a] holder of a valid license or certificate permitting the practice of . . . medicine or any of [its] branches, who is actually engaged in practicing the profession," and thus need not be paid on a salary basis under 29 C.F.R. 541.3(e), means an employee engaged in the "traditional profession[] of . . . medicine . . ., and [does] not [apply] to employees in related professions which merely serve [the medical profession]." 29 C.F.R. 541.314(a). More specifically, section 541.314 explained:

> (b) In the case of medicine: (1) The exception applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the

> medical specialties practiced by physicians or practitioners. The term *physicians* means medical doctors including general practitioners and specialists, and osteopathic physicians (doctors of osteopathy). Other practitioners in the field of medical science and healing may include podiatrists (sometimes called chiropodists), dentists (doctors of dental medicine), optometrists (doctors of optometry or bachelors of science in optometry).
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> (c) In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dieticians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

29 C.F.R. 541.314 (b), (c) (italics in the original) (emphasis added).

2. Contrary to EmCare's arguments (App. Br. 16-21, 42-44), this interpretive regulation (29 C.F.R. 541.314) of an ambiguous legislative rule (29 C.F.R. 541.3(e)), as well as the Department's interpretations of this rule in other forms, see infra, is entitled to controlling deference if not clearly erroneous. See Auer v. Robbins, 519 U.S. 452, 461 (1997) (Secretary of Labor's interpretation of her own regulatory salary basis test (promulgated after notice and comment) is controlling unless clearly erroneous or inconsistent with the regulations). See also Christensen v. Harris County, 529 U.S. 576, 588 (2000) ("Auer deference [to an agency's interpretation] is warranted . . . when the language of the regulation is

ambiguous."); Wells Fargo v. James, 321 F.3d 488, 494 (5th Cir. 2003) (Auer-type deference applies to an agency's interpretation "where the regulation is ambiguous as to the precise issue in contest"); Galle v. Director, OWCP, 246 F.3d 440, 449-50 (5th Cir.) (Auer-type deference applies to Department's interpretation of Longshore and Harbor Workers Act regulations), cert. denied, 534 U.S. 1002 (2001). See generally Beck v. City of Cleveland, 390 F.3d 912, 919 (6th Cir. 2004), cert. denied, 125 S. Ct. 2930 (2005).

3. Physician assistants and nurse practitioners are not part of the "traditional" profession of medicine.[8] They are not medical doctors, nor are they "other practitioners in the field of medical science and healing," such as podiatrists, dentists, and optometrists, who are independent medical specialists who have a long-recognized status in the field of medicine, and who have been commonly regarded as doctors. See 29 C.F.R. 541.314(b)(1). Therefore, physician assistants and nurse practitioners do not hold a license to practice medicine, nor

[8] EmCare's argument (App. Br. 23-27) that physician assistants and nurse practitioners perform duties that physicians and doctors have "traditionally" performed and, for that reason, come within the salary basis exception is unavailing. Whether or not physician assistants and nurse practitioners perform some of the traditional duties of doctors is beside the point. Physician assistants and nurse practitioners are not part of the traditional profession of medicine, as they are required to be in order to qualify for the exception to the salary basis test under 29 C.F.R. 541.314(a).

are they engaged in the practice of medicine, within the meaning of section 541.3(e).[9]

4. The history of the section 541.3(e) exception to the salary basis requirement refutes its applicability to physician assistants and nurse practitioners. The regulatory history reflects that the exception was based on the unique status held by those licensed to practice law or medicine at the time the exception was created. It also discloses a Departmental intent to limit the exception to distinct "traditional" professions.

The salary basis test was added to the regulatory requirements for the learned professional exemption in 1940. See 5 Fed. Reg. 4077 (1940). Its stated purpose was "to avoid disputes, to assist in the effective enforcement of the act and to prevent abuse." "*Executive, Administrative, Professional . . . Outside Salesman" Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding*

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[9] EmCare relies on Clark v. United Emergency Animal Clinic, Inc., 390 F.3d 1124 (9th Cir. 2004) (App. Br. 28-31), to argue that section 541.314(b) "include[s] any person who is licensed or certified to practice within the field of medical science and healing within the Salary Basis Exception," and is not limited to doctors. This reliance is misplaced. The court in Clark held that veterinarians "plainly" are included within the salary basis exception because "section 541.3(e) on its face excepts those licensed to practice medicine *or any of its branches*" and "veterinary medicine is a 'branch' of medicine." 390 F.3d at 1127 (italics in original). Contrary to EmCare's suggestion that the court held that an employee's status as a doctor or physician is not relevant (App. Br. 29, 31), the court

Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct. 10, 1940) ("*Stein Report*") 36. At the same time, the limited exception from the test was included to apply "in the case of the traditional professions of law and medicine, where possession of a State certificate or license is regarded as an adequate equivalent of a salary test." Id. The rationale for the exception was explained as follows:

> The three traditional professions of law, medicine, and theology[10] occupy a distinctive position in the United States as well as elsewhere. Members of these professions acquire a special status and are recognized as quasipublic officials. Indeed until recently only the members of these professions would have been considered as persons employed "in a bona fide professional capacity." * * * [S]ome special consideration for members of these professions is reasonable. This special consideration is, of course, applicable only to those who have actually acquired the special status referred to -- in other words, to those who have received a State license or certificate to practice law or medicine. The action of the appropriate State authority in issuing the certificate or license may be taken as an adequate substitute for the salary test in the case of the professions of law and medicine.

Id. at 42.

In 1949, the Department reconsidered the salary basis exception. Representatives of organizations of architects, engineers, and librarians proposed that these professional

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emphasized that "veterinarians are doctors of medicine, they have advanced degrees, and they are licensed." Id. at 1128.

[10] The *Stein Report* explained that "the practice of the profession of theology is presumably only of academic interest so far as the application of the Fair Labor Standards Act is concerned[.]" Id. at 42 n.131.

occupations be included within the exception. Rejecting the proposal, the Department reiterated that the exception for the medical and legal professions was "based upon the traditional standing of these professions, the recognition of doctors and lawyers as quasi-public officials, and the universal requirement of licensing by the various jurisdictions." *Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor* (June 30, 1949) ("*Weiss Report*") 77. The Department also noted the "relatively simple problems of classification presented by these professions." Id. In addition, the Department emphasized the continued importance of the salary basis test as a reliable index of exempt status. In this regard, the *Weiss Report* stated:

> The Divisions in their enforcement have always recognized engineering, architecture and library science as professional fields of endeavor. However, the regulations contemplate, and the witnesses who testified at the hearing in favor of these proposals recognized, that there are within these professional fields many employees with titles such as architect, engineer, or librarian who are not employed in a bona fide professional capacity because they are performing work which utilizes little, if any, professional training. The inclusion of a salary test in the regulations is of great assistance in making a ready separation between such nonexempt employees and the bona fide professional employees whose professional status is recognized by the salary paid.

Id. at 78.[11]

In 1958, the Department rejected a proposal to expand the salary basis exception to include licensed engineers and certified public accountants.[12] The Department reasserted the basis for the exception for lawyers and doctors as follows: "the traditional standing of these professions, the recognition of doctors and lawyers as quasi-public officials, the universal requirement of licensing, and the relatively simple problems of classification in these professions." *Report and Recommendations on Proposed Revisions of Regulations, Part 541,*

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[11] The *Weiss Report* also explained the meaning of the regulatory phrase "or any of their branches[,]" as it relates to "the practice of law or medicine" in 29 C.F.R. 541.3(e):

> Questions have been raised as to the meaning of the phrase "or any of their branches." It is therefore advisable to restate the Divisions' position that this exception applies only to the traditional professions of law and medicine and not to employees in related professions which merely service the professions of law or medicine. For example, in the case of medicine, the exception applies to physicians and other practitioners in the field of medical science and healing, such as dentists, or any of the medical specialties, but it does not include pharmacists, nurses, or other professions which service the medical profession.

Id. Adopting this language, in 1949, the Department issued section 541.314 of the interpretive regulations. See 14 Fed. Reg. 7730, 7743 (1949); 29 C.F.R. 541.314 (1950).

[12] The Department noted that some engineers and accountants might not possess licenses and, therefore, if the proposal was accepted, the exception would extend to only a portion of those engaged in these professions.

under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (March 3, 1958) 4.

In sum, the regulatory history evinces the Department's consistent intent to maintain the general applicability of the salary basis requirement to purported professional employees and to strictly limit the salary basis exception to truly "traditional" professions.[13] It is undisputed that the physician assistant and nurse practitioner occupations have only developed since the 1960s. Thus, these occupations could not have been regarded as a part of the "traditional profession of medicine" at the time the salary basis exception originated, nor can they be considered a part of the "traditional profession of medicine" (29 C.F.R. 541.314(a)) as that phrase has been commonly understood over subsequent decades.

5. Indeed, the typical roles of physician assistants and nurse practitioners in the health care industry demonstrate that these occupations are "related professions which merely serve" the medical profession (29 C.F.R. 541.314(a)). According to the Department's Occupational Outlook Handbook, physician assistants "provide healthcare services under the supervision of

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[13] In 1967, teachers were included within the exception in response to the FLSA Amendments of 1966 (Pub. L. No. 89-601), which added schools to the Act's coverage. See 32 Fed. Reg. 7823, 7829 (1967).

physicians" and "are formally trained to provide diagnostic, therapeutic, and preventive healthcare services as delegated by a physician." www.bls.gov/oco/ocoso81.htm (emphases added). The Handbook states further that "[w]orking as part of the healthcare team, they take medical histories, examine and treat patients, order and interpret laboratory tests and x rays, make diagnoses, and prescribe medications. They also treat minor injuries . . . PAs [physician assistants] record progress notes, instruct and counsel patients, and order or carry out therapy." Id. (emphasis added).

The Handbook also indicates that nurse practitioners are a subcategory of nurses, an occupation expressly excluded from the salary basis exception under section 541.314(c). See www.bls.gov/oco/ocos083.htm. In this regard, the American College of Nurse Practitioners' website states that a nurse practitioner is "a registered nurse with advanced academic and clinical experience, which enables him or her to diagnose and manage most common and many chronic illnesses." www.nurse.org/acnp/facts/whatis.shtml. The website further states that nurse practitioners provide health care "[w]orking in collaboration with a physician," and that they "focus largely on health maintenance, disease prevention, counseling and patient education." Id. (emphasis added). Therefore, the occupations of physician assistant and nurse practitioner are

auxiliary to the practice of doctors; they serve and support the traditional profession of medicine. See Harrison v. Washington Hospital Center, 1979 WL 1923, at *3 (D. D.C. 1979) (rejecting argument that modern day registered nurses are engaged in the practice of medicine and therefore excepted from the salary basis test, the district court concluded that, despite the acquisition of "more skill, knowledge and expertise" and the assumption of "greater responsibilities," registered nurses' "primary function has remained unchanged; that is, to serve and provide support to the medical profession[;] physicians retain overall responsibility for directing the course of medical treatment").[14]

6. Additionally, in 1974, the Department's Wage and Hour Division issued an opinion letter (Acting Administrator's Opinion Letter, WH-266 (Wage and Hour Division, Dep't. of Labor May 10, 1974), 1974 WL 38705), which it subsequently incorporated into its Field Operations Handbook (Wage and Hour Division Field Operations Handbook § 22d23 (1994)), that provided the Department's interpretation of the learned professional exemption as applied to physician assistants. The

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[14] EmCare acknowledges that the role of its physician assistants and nurse practitioners was to provide assistance in the emergency rooms. See App. Br. at 10 ("EmCare paid its NPs and PAs ... to assist in the patient-care aspect of emergency room operations.") (emphasis added).

opinion letter enumerates the duties that a physician assistant must perform and the academic credentials that he or she must possess to satisfy the exemption's "duties" test (29 C.F.R. 541.3(a)(1), (e)). The opinion letter goes on to state unequivocally that a physician assistant must be "compensated on a salary basis of not less than $200 per week[.]"[15] As the district court held, citing to Auer, this interpretation of section 541.3(e) is controlling because it is neither clearly erroneous nor inconsistent with the language of the regulation. See Wells Fargo Bank of Texas, 321 F.3d at 491 n.2 and 494 (interpretation offered in interpretive letters directed to three banks accorded Auer-type deference); cf. Christensen, 529 U.S. at 588.

7. Finally, the new rule makes clear that, consistent with the Department's longstanding position, physician assistants and nurse practitioners (a subcategory of registered nurses) must be paid on a salary basis in order to be exempt. Thus, for example, section 541.600(e) of the new regulations uses the identical language as that contained in section 541.314(c) of the old regulations in stating that the exception does not apply to "professions which service the medical profession." The new

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[15] The Field Operations Handbook, issued subsequent to the opinion letter, requires payment on a salary basis "of not less than $250 a week." FOH § 22d23(a)(4) (1994) (emphasis in original).

regulations simply recodify the old regulations in regard to the exception to the salary basis requirement.

Moreover, the structure of the new regulations is instructive. Section 541.300 of the new rule sets forth the general duties and salary requirements for the learned professional exemption. Section 541.301 further explicates the general duties test of section 541.300, and "contains examples . . . illustrating how the learned professional duties test applies to specific occupations." 69 Fed. Reg. at 22148. Among the occupations specifically included in section 541.301 are physician assistants (29 C.F.R. 541.301(e)(4)) and registered nurses (29 C.F.R. 541.301(e)(2)). All the occupations enumerated in section 541.301 are thus subject to the general duties and salary tests for the learned professional exemption. By contrast, the new rule expressly provides an exception from the general requirements for the learned professional exemption (both duties and salary basis) for doctors, lawyers, and teachers. Thus, separate sections govern the exempt status of teachers (29 C.F.R. 541.303) and those practicing law or medicine (29 C.F.R. 541.304), and state that "[t]he requirements of § 541.300 ["General rule for professional employees"] and subpart G (salary requirements) of this part do not apply to the [employees enumerated in these sections]." 29 C.F.R. 541.303(d); 541.304(d).

8. The preamble to the final rule discloses that the Department considered comments urging it to expand the salary basis exception to include pharmacists, registered nurses, and "others," but declined to do so. Thus, in response to the National Association of Chain Drug Stores' comment that the increase in the educational requirements and professional standards for pharmacists since the last revision of the regulations justified their inclusion in the salary basis exception, the Department stated as follows:

> In the Department's view, pharmacists can qualify, along with doctors, teachers, lawyers, etc., as professionals under the FLSA exemption. However, the fact that the standards for the profession are rising does not mean that the minimum salary requirement to be exempt should be removed. The Department also considered but rejected suggestions from commenters that we remove the salary requirements for registered nurses and others. The Department does not think it is appropriate to expand the original, limited number of professions that were not subject to the salary test.

69 Fed. Reg. at 22172 (emphasis added). Significantly, the American Academy of Physician Assistants submitted a comment on the proposed rule arguing that the Department should include physician assistants within new section 541.304 (lawyers and doctors), rather than within section 541.301 (learned professionals), and thereby except physician assistants from both the duties and the salary basis requirements (see 4R. at

1804-06).[16] The Department did not adopt this comment. Thus, the new regulations do not depart from the Department's historical view that the salary basis exception should be strictly limited.

8. In sum, as the Secretary's former interpretative regulation explained, section 541.3(e)'s salary basis exception "applies only to the traditional profession[ ] of . . . medicine . . . and not to employees in related professions which merely serve" the medical profession. 29 C.F.R. 541.314(a). Physician assistants and nurse practitioners are not within the "traditional" profession of medicine. Rather, they assist that profession. Thus, the district court correctly held that, under the Secretary's permissible interpretation of her own regulation, physician assistants and nurse practitioners must be paid on a salary basis in order to be exempt.

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[16] This comment is not discussed in the preamble, but is a part of the district court record.

CONCLUSION

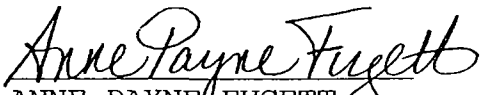
For the foregoing reasons, this Court should affirm the district court's decision.

Respectfully submitted,

HOWARD M. RADZELY
Solicitor of Labor

STEVEN J. MANDEL
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate
Litigation



ANNE PAYNE FUGETT
Senior Attorney

U.S. Department of Labor
200 Constitution Ave., N.W.
Room N-2716
Washington, D.C. 20210
202-693-5555

CERTIFICATE OF SERVICE

This is to certify that on this 12th day of August 2005, two paper copies and one electronic copy (on a 3.5 inch diskette) of the Secretary of Labor's brief as amicus curiae were served by Federal Express Overnight Delivery on the following counsel of record:

Ronald E. Manthey
Ann Marie Painter
Jay F. Utley
W. Barton Rankin
Baker & McKenzie, LLP
2300 Tramell Crow Center
2001 Ross Ave.
Dallas, Texas 75201

James A. Jones
Gillespie, Rozen, Watsky,
Motley & Jones, P.C.
3402 Oak Grove Ave.
Suite 200
Dallas, Texas 75204

Richard J. Burch
Bruckner Burch, P.L.L.C.
5847 San Felipe #3900
Houston, Texas 77057

This also certifies that on the 12th day of August 2005, the original, six paper copies, and one electronic copy of the Secretary of Labor's amicus brief were dispatched by Federal Express Overnight Delivery to the Clerk of the Court.

Anne Payne Fugett
ANNE PAYNE FUGETT
Senior Attorney

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Anne Payne Fugett

ANNE PAYNE FUGETT
Senior Attorney
U.S. Department of Labor

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