Case No. 15-1199

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOSEPH LALLI,
Plaintiff-Appellant,

v.

GENERAL NUTRITION CENTERS, INC.
and GENERAL NUTRITION CORP.,

Defendants-Appellees.

On Appeal from the United States District Court
District of Massachusetts

Brief of National Retail Federation and National Federation of Independent Business Small Business Legal Center as *Amicus Curiae* in Support of Defendants/Appellees General Nutrition Centers, Inc. and General Nutrition Corp.

Filed in Support of Affirmance of the District Court's Order Granting Defendants' Motion to Dismiss

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CORPORATE DISCLOSURE

Pursuant to First Circuit Rule 26.1, the National Retail Federation and National Federation of Independent Business Small Business Legal Center make the following disclosure:

1. Are said parties a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

s/ Michelle W. Johnson

DATED: July 24, 2015

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INTEREST OF AMICUS CURIAE

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—42 million working Americans. Contributing $2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF's This is Retail campaign highlights the industry's opportunities for life-long careers, how retailers strengthen communities, and the critical role that retail plays in driving innovation. www.nrf.com

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 member businesses nationwide,

and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The NRF has an interest in this action because it concerns an issue of great significance to its membership and the retail industry as a whole, namely whether payment of commissions will disqualify an employer from calculating an employee's overtime pay using the fluctuating work week ("FWW") method. Retail's reason for being is to serve customers up to seven days a week, with hours that may vary depending on the volume of customers and their needs. Because the hours worked in retail depend on customer demand, work schedules are necessarily different than in many other workplaces. From a business perspective, it is beneficial to pay certain non-exempt employees a set salary upon which both parties can rely, regardless of the vagaries of the work schedule in any given week. At the same time, it is common in the industry to encourage extra sales efforts by paying commissions based on clearly articulated goals. Such commissions clearly benefit non-exempt retail employees.

For many years, the industry norm has been to pay commissions to non-exempt managers who are compensated using the FWW method. Prior to the May 5, 2011 effective date of the U.S. Department of Labor's ("DOL") Final Rule of

April 5, 2011, the DOL and courts uniformly held that the FWW method of calculating overtime was not incompatible with commission payments. The Final Rule did not alter the language of 29 C.F.R. §778.114, and Appellant agrees that the Final Rule also did not alter the DOL's interpretation of this regulation. Thus, the court decisions that have uniformly upheld the compensation practices at issue in this case remain good law.

The NRF submits that the district court correctly followed the wealth of authority decided both before and after the Final Rule was issued, and correctly dismissed Appellant's claims. Requiring that employees who are paid pursuant to the FWW forego the possibility of receiving commissions would fundamentally change long-standing compensation practices. The legislative history of the Final Rule further reinforces the case law.

The NRF and NFIB Legal Center submit this brief pursuant to NRF's motion for leave to file. Appellees have consented to the filing of this brief, but Appellant refused to consent. General Nutrition Centers, Inc. and General Nutrition Corp. (collectively "GNC") are not members of the NRF or NFIB and did not contribute to the authoring or preparation of this *amicus* brief. No person other than the NRF, the NFIB Legal Center, their members, and their counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The question presented in this appeal is whether the district court correctly held that a company may use the fluctuating work week ("FWW") method of compensation when it factors sales commissions into the regular weekly rate. The answer is "Yes."

GNC and other retailers around the country utilize the FWW method of compensating non-exempt managers, as authorized by 29 C.F.R. §778.114. Simply stated, the FWW method provides for non-exempt employees to be paid a fixed weekly salary as straight time compensation for all hours worked in a workweek. When employees paid pursuant to the FWW work more than 40 hours in a week, they earn an additional amount equal to half their regular hourly rate multiplied by the number of overtime hours. GNC's compensation plan also provides non-exempt managers with the opportunity to receive commissions based on eligible sales attributed to them while working each week. The commissions vary from week to week and are added to the fixed weekly salary when calculating the regular hourly rate for overtime .

Appellant Joseph Lalli ("Lalli") contends that he did not receive a "fixed amount as straight time pay" because the total of his commissions plus his fixed weekly salary varied from week to week. This argument lacks support in the federal regulations interpreting the FLSA and the relevant case law. And, as

discussed below, the history of the DOL's 2008 Notice of Proposed Rulemaking which culminated in the April 5, 2011 Final Rule further establishes that the payment of commissions in addition to a fixed salary is fully consistent with settled law.

ARGUMENT

I. FWW Compensation Plans that Include Non-Discretionary Performance-Based Commissions Comply With Settled Federal Law

It is common in the retail industry for an employer to pay non-exempt employees a fixed salary plus commissions. The DOL has long recognized this fact, and the regulations regarding the computation of overtime specifically address this scenario:

> Commissions (whether based on a percentage of total sales or of sales in excess of a specific amount, or on some other formula) are payments for hours worked and must be included in the regular rate. This is true regardless of whether the commission is the sole source of the employee's compensation *or is paid in addition to a guaranteed salary* or hourly rate, or on some other basis, and regardless of the method, frequency, or regularity of computing, allocating and paying the commission. . . .

29 C.F.R. § 778.117 (emphasis added).[1] An employee's guaranteed salary compensates him for all of the hours he works, and it does not change from week to week based on the number of hours. Performance-based commissions are paid

[1] As the district court below noted, "It is hard to see how a commission can be viewed as part of a salary when it is characterized as being paid 'in addition' to a salary." (Add. 13.)

in addition to the fixed salary, and provide an employee with the opportunity for additional compensation based on the attainment of goals that are unrelated to the number of hours logged in a week.

When computing overtime, an employee's commissions and "other earnings" (such as a fixed salary) are added together and divided by the number of hours worked that week to determine an employee's regular hourly rate. 29 C.F.R. § 778.118. "The employee must then be paid extra compensation at one-half of that rate for each hour worked in excess of the maximum hours standard." *Id.* The regulations thus specifically contemplate the compensation framework used for non-exempt salaried managers by GNC (and other retailers across the country).

This plain reading of the regulation regarding the calculation of overtime for non-exempt employees who are paid a fixed salary plus commissions has been accepted by the courts. Both commissions and bonuses that are based on performance-based metrics, regardless of hours worked, have historically been permitted in the context of FWW compensation plans under 29 C.F.R. §778.114. *See Lance v. Scotts Co*., 2005 U.S. Dist. LEXIS 14949 (N.D. Ill. Jul. 21, 2005) (inclusion of commissions in salary base did not violate FWW's requirement of fixed weekly salary); *Brantley v. Inspectorate Am. Corp*., 821 F. Supp. 2d 879, 889-90 (S.D. Tex. 2011) (distinguishing off-shore, holiday, and day-off premiums from "sales-based or production based bonuses and commissions" which are

permitted under FWW method); *Soderberg v. Naturescape, Inc*., 2011 U.S. Dist. LEXIS 156235 (D. Minn. Nov. 3, 2011) (payment of performance-based bonuses to branch managers and lawn specialists held consistent with using FWW to calculate overtime pay); *Switzer v. Wachovia Corp*., 2012 U.S. Dist. LEXIS 120582 (S.D. Tex. Aug. 24, 2012) (upholding FWW method despite performance-based bonus payments to financial specialists); *Perez v. Radioshack Corp*., 2005 U.S. Dist. LEXIS 33420 (N.D. Ill. Dec. 14, 2005) (approving retailer's FWW method which included payment of non-discretionary performance based bonuses); *Inniss v. Tandy Corp*., 7 P.3d 807, 815 (Wash. 2000) (same).

II. The Department of Labor's Proposed Rulemaking Further Indicates that Under the FWW Employees May Earn Salary and Commissions

The DOL's proposed rulemaking confirms that the payment of commissions to non-exempt employees using the FWW framework has never been controversial. In 2008, the DOL proposed to modify 29 C.F.R. §778.114 to expressly permit the use of the FWW method when *hours-based bonuses* were paid. *See* Notice of Proposed Rulemaking ("NPRM"), 73 Fed. Reg. 43654 ("Paying employees bonus or premium payments for certain activities such as working undesirable hours is a common and beneficial practice for employees. Moreover, the Department's proposed clarification is consistent with the Supreme Court's decision in *Overnight Motor Transp. Co*. v. *Missel*, 316 U.S. 572 (1942), on which the existing regulation is patterned."). The DOL's proposal had nothing

to do with commissions or performance-based bonuses, which had never been held to be improper. *See Wills v. RadioShack Corp.*, 2013 U.S. Dist. LEXIS at **38-39 ("viewed in context, the change that the DOL proposed was directed solely at establishing that payment of hours-based bonuses did not preclude use of the FWW. The DOL's proposal did not, in any way, implicate performance-based bonuses, which had not, up to that point, presented a significant issue, let alone ever been held to offend the FWW method's fixed weekly salary requirement").

The DOL ultimately decided not to implement the proposed rule, and left the text of §778.114 substantively unchanged. *See* 76 Fed. Reg. 18832. In its Final Rule the DOL cited to no public comment specifically addressing commissions or performance-based bonuses, and in fact did not mention commissions or performance-based bonuses at all. The DOL stated that it had decided not "to expand the use of [the FWW] method beyond the scope of the current regulation," but instead to "restore the current rule." 76 Fed. Reg. at 18850. The DOL further stated that "courts have not been unduly challenged in applying the current regulation to additional bonus and premium payments." *Id*. Accordingly, the law with respect to commissions and performance-based bonuses would remain unchanged. *See Wills*, 2013 U.S. Dist. LEXIS 159727 at **38-39, 46 ("Despite its admittedly sweeping language in points, the Final Ruling is not properly read to have moved the law in the opposite direction from that contemplated in the

proposed rule, so as to tacitly change §778.114 to preclude the FWW method in cases of performance-based bonuses.").

In his brief, Lalli concedes that the DOL's Final Rule left §778.114 unchanged. (*See* Appellant's Brief at p. 30 n.16.) On this point, Lalli agrees with the court's reasoning in *Wills v. RadioShack Corp.*, 981 F. Supp. 2d 245 (S.D.N.Y. 2013). In *Wills*, the court rejected the contrary holding of another district court in *Sisson v. RadioShack Corp.*, 2013 WL 945372 (N.D. Ohio Mar. 11, 2013), and went on to hold that performance-based bonuses were consistent with the FWW. Of relevance here is the *Sisson* court's conclusion that prior to the DOL's April 5, 2011 Final Rule, "the DOL's prior position [ ] held that the payment of bonuses and premiums did not invalidate the FWW method and was consistent with the United States Supreme Court decision in *Overnight Transportation Co. v. Missel*, 316 U.S. 572 (1942), which formed the basis of the regulation." The *Sisson* decision further supports the NRF and NFIB Legal Center's position that the payment of commissions in addition to a fixed salary has always been (and continues to be) permissible under the FWW framework.

CONCLUSION

For the reasons set forth above, the NRF and NFIB Legal Center respectfully request that this Court affirm the district court's order granting GNC's motion to dismiss Lalli's Complaint.

Respectfully submitted this 24th day of July, 2015.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the foregoing pleading has been prepared with 14 point Times New Roman font, and, based on the word count of the word processing system used to prepare the brief, is 2,742 words long.

s/ Michelle W. Johnson
Michelle W. Johnson
Georgia Bar No. 759611

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the within and foregoing **BRIEF OF THE NATIONAL RETAIL FEDERATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS/APPELLEES GENERAL NUTRITION CENTERS, INC. AND GENERAL NUTRITION CORP.** with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on July 24th , 2015.

Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

This 24th day of July, 2015.

s/Michelle W. Johnson
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