

June 1949

Fair Labor Standards Act--Contingent Fee Agreement--Allowance of Reasonable Attorney's Fee Under FLSA Conditioned Upon Attorney's Surrender of Contingent Fee Agreement

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Recommended Citation

D. M. B., *Fair Labor Standards Act--Contingent Fee Agreement--Allowance of Reasonable Attorney's Fee Under FLSA Conditioned Upon Attorney's Surrender of Contingent Fee Agreement*, 51 W. Va. L. Rev. (1949).

Available at: <https://researchrepository.wvu.edu/wvlr/vol51/iss4/8>

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E.2d 649, 652 (1941) (verified plea). This latter case raises some doubt as to whether West Virginia will continue to follow the *Bartley* case. The better view favors the admissibility of a withdrawn plea. 4 WIGMORE, EVIDENCE §1067. Therefore, it would seem sounder and more logical to have admitted the evidence as a withdrawn plea and the indictment as a part thereof. As to the third reason, the fact that FED. R. CIV. P. 43 (a) applies, there seems to be a valid reason for assigning some importance to this. In cases of doubt as to the admissibility of evidence it should be admitted. *Pfotzer v. Aqua Systems*, 162 F.2d 779 (C. C. A. 2d 1947); *Neff v. Pennsylvania R. R.*, 7 F. R. D. 532 (1948). The intent of Rule 43 (a) is admissibility not exclusion. 3 MOORE, FEDERAL PROCEDURE 68 (Supp. 1947).

As a matter of policy it would seem that there are conflicting arguments: (1) the admission of this testimony would result in the defendants' being prejudiced because of prior wrongs; or (2) all evidence should be admitted if it will aid in reaching a true decision. Since the federal courts are bound by FED. R. CIV. P. 43 (a) favoring admissibility, the result in the instant case would seem correct. Even in state courts where this rule does not apply the sounder approach would be to admit such evidence as a withdrawn plea.

D. A. B.

FAIR LABOR STANDARDS ACT — CONTINGENT FEE AGREEMENT — ALLOWANCE OF REASONABLE ATTORNEY'S FEE UNDER FLSA CONDITIONED UPON ATTORNEY'S SURRENDER OF CONTINGENT FEE AGREEMENT. — In an action by an employee against his employer for overtime wages under the Fair Labor Standards Act, 52 STAT. 1060 (1938), as amended 29 U. S. C. §201 (Supp. 1948), the trial court awarded the plaintiff overtime wages, an equal amount as liquidated damages, costs, and a reasonable attorney's fee. Plaintiff had a contingent fee agreement with his counsel for compensation in addition to that which the court would allow. *Held*, on appeal, that this private agreement is invalid as being contrary to the purpose of the Act, and the judgment is modified so as to make the payment of the fee fixed by the court conditional upon the attorney's surrender of all rights to additional compensation under his agreement with the plaintiff. Affirmed as modified. *Harrington*

v. Empire Construction Co., 167 F.2d 389 (C. C. A. 4th 1948).

This holding construes Section 16 (b) of the Fair Labor Standards Act, which reads in part: "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." Under this section a contingent fee was likewise denied in a prior case, *Sykes v. Lochmann*, 156 Kan. 223, 132 P.2d 620 (1943), and in a subsequent case, *Burke v. Mesta Mach. Co.*, 79 F. Supp. 588 (W. D. Pa. 1948). But see *Aucoin v. Mystic Waste Co.*, 55 F. Supp. 672, 673 (D. C. Mass. 1944), and *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 297 (D. C. Mass. 1943).

In the absence of statute, it is well settled that an attorney may contract with his client for the rendition of professional services and in such contract may fix the amount of compensation to be paid for such services. *Thornley v. Jones*, 96 Cal. App. 219, 274 Pac. 93 (1929); *Hubbard v. George*, 81 W. Va. 538, 94 S. E. 974 (1918); *Clifford v. Braun*, 71 App. Div. 432, 75 N. Y. Supp. 856 (2d Dep't 1902). Contingent fee agreements, although closely scrutinized by the courts, are valid if fair and reasonable to the client. *In re Mason's Estate*, 174 Misc. 218, 20 N. Y. S.2d 501 (Surr. Ct. 1940); *Klauder v. Gregar*, 327 Pa. 1, 192 Atl. 667 (1937).

Similar provisions calling for the award by the court of a reasonable attorney's fee have appeared in other federal statutes. Interstate Commerce Act, 24 STAT. 384 (1887), as amended 49 U. S. C. §16 (2) (1946); Antitrust laws, 38 STAT. 731 (1914), as amended 15 U. S. C. §15 (1946); Railway Labor Act, 44 STAT. 578 (1926), as amended 45 U. S. C. §153 (p) (1946); Packers and Stockyards Act, 46 STAT. 534 (1930), as amended 7 U. S. C. §499g (b) (1946); Merchant Marine Act, 49 STAT. 2015 (1936), 46 U. S. C. §1227 (1946); Communications Act, 48 STAT. 1072 (1934), 47 U. S. C. §206 (1946).

These statutory provisions for the allowance of attorney's fees are not identical in their general purpose. It may be presumed that the provision in the Fair Labor Standards Act for the award of a reasonable attorney's fee was designed to enable the employee more easily to prosecute his claim against the employer and to protect the employee from economic oppression, and this may explain the restrictive construction placed upon Section 16 (b) of the Act by the instant case. Under the other federal

acts cited above, while many cases have dealt with the reasonableness of the fee so awarded, no case has been found pertaining to the validity of a private agreement, contingent or otherwise, between the plaintiff and his counsel for compensation other than that which the court would allow as a reasonable attorney's fee. The protective intent of the Fair Labor Standards Act may serve to distinguish the instant case and prevent the extension and application of its restrictive construction to other federal acts having similar provision for the allowance of a reasonable attorney's fee.

D. M. B.

FAIR LABOR STANDARDS ACT — REGULAR RATE OF PAY — EXISTENCE THEREOF WHERE SOLE WAGES CONSIST OF TIPS. — Plaintiffs were shoe-shine boys in the men's rest room of an interstate bus terminal. They were not paid by the defendant bus company, but were permitted to retain all amounts received by them from shining shoes, in consideration for which they were required to keep the rest room clean. Plaintiffs worked fifty-six hours per week in daily shifts of eight hours each, and their earnings and tips from shining shoes averaged \$8.00 to \$10.00 per day. Plaintiffs sought to recover overtime compensation under Section 16 (b) of the Fair Labor Standards Act, 52 STAT. 1069 (1938), 29 U. S. C. §216 (b) (1946). The claim was refused by the district court. *Held*, on appeal, on the supposition that plaintiffs were "employees" within the meaning of the FLSA, that as there was no regular rate of pay the right to recover overtime compensation must be determined under the minimum wage provisions of the Act. Since the amounts received from shining shoes were creditable as wages, and were in excess of the statutory minimum requirements, no recovery was allowed. Judgment affirmed. *Moyd v. Atlantic Greyhound Corp.*, 170 F.2d 302 (C. C. A. 4th 1948).

The computation of the "regular rate" and overtime goes to the fundamentals of the FLSA and is a basic part of the Congressional policy, and must be considered in the same category as an employee's right to the statutory minimum. *Robertson v. Alaska Juneau Gold Mining Co.*, 157 F.2d 876 (C. C. A. 9th 1946). The "regular rate" is not equivalent to the statutory minimum wage rate prescribed by Section 6 of the Act. *Carleton Screw Products*