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# Fair Labor Standards Act--Regular Rate of Pay--Existence Thereof Where Sole Wages Consist of Tips

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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.

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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*

*Co. v. Fleming,* 126 F.2d 537 (C. C. A. 8th 1942). Rather, the intent of Congress is to require extra pay for overtime work done by those covered by the Act, even though their hourly wages exceed the statutory minimum; the purpose is to compensate employees for wear and tear of overtime work and to spread employment by inducing employers to shorten hours. *Bay Ridge Operating Co. v. Aaron,* 334 U. S. 446 (1948). That case also held that every contract of employment, written or oral, explicitly or impliedly includes a "regular rate" of pay for the purposes of computing overtime payment. The fact that the total compensation exceeds the amount which would be payable on the basis of the minimum rate fixed in Section 6 of the FLSA does not preclude the employee from claiming overtime compensation at one and one-half times the "regular rate" at which he is employed. *Walling v. Helmerich & Payne,* 323 U. S. 37 (1944); *Walling v. Arctic Circle Exploration,* 56 F. Supp. 944 (W. D. Wash. 1944). No contract designation of a base rate as the "regular rate" can negative the fact, if it is a fact, that employees do receive a higher rate, and in determining the "regular rate" the courts will not look solely to contract nomenclature, but also to the actual payments regularly received during the work week. *Walling v. Harnischfeger Corp.,* 325 U. S. 427 (1945).

All payments, wages, piece-work earnings, bonuses, or anything of value forming part of an employee's normal weekly income must be included in determining his "regular rate." *Walling v. Alaska Pac. Consol. Mining Co.,* 152 F.2d 812 (C. C. A. 9th 1945). It is not important whether the employee receives compensation for his labor direct from the employer, or, with the employer's consent, from the employer's patrons. *Southern Ry. v. Black,* 127 F.2d 280 (C. C. A. 4th 1942). Tips paid by passengers to red caps at railway terminals, whether compensation or gratuities, have been construed as wages within the intent of the Act. *Williams v. Jacksonville Terminal Co.,* 315 U. S. 386 (1942).

The instant case relies heavily on *Southern Ry. v. Black, supra,* where the total tips received by the red caps working in a railway terminal *did not* equal the statutory minimum wage. Since no wage rate had been agreed upon, the wages, plus overtime due, were computed on the basis of the statutory rate, and the red caps were permitted to recover that amount less total tips received. It is true that when the computation of the "regular

rate" results in an hourly rate less than the minimum, the statutory rate is the "regular rate," for the purposes of computation of overtime payments. *Carleton Screw Products Co. v. Fleming, supra.* But the "regular rate" for overtime compensation under the FLSA is not an arbitrary figure, being rather the actual amount determined by dividing all payments, except true overtime premiums, received by an individual employee as compensation for work performed, by the number of hours worked by the employee during the work week; the "regular rate" may vary from week to week. *Bay Ridge Operating Co. v. Aaron, supra; Landreth v. Ford Bacon & Davis Co.,* 147 F.2d 446 (C. C. A. 8th 1945). The FLSA imposes upon the employer an absolute duty to pay currently each of its employees, within the coverage of the Act, for overtime at a rate not less than one and one-half times the "regular rate." *Bay Ridge Operating Co. v. Aaron, supra.*

From the above, the conclusion can be drawn that for the purposes of computing overtime pay: (1) Each employee covered by the Act has a "regular rate" of pay. (2) The "regular rate" is not the equivalent of the statutory minimum. (3) It is immaterial that the total wages exceed the statutory minimum. (4) Anything of value received by the employee for his labors, including tips, is creditable as wages. (5) The "regular rate" is determined by dividing the total wages received during the work week (excluding true overtime payments) by the number of hours worked. (6) Employees covered by the Act are entitled to overtime pay at one and one-half times the "regular rate." In the instant case, if these shoe-shine boys are considered "employees" and covered by the FLSA, it would seem that their "regular rate" should be computed by dividing their total wages for the week (all amounts received from tips and for shining shoes) by the total hours worked during the week, and that they would be entitled to overtime pay at one and one-half times the "regular rate" thus calculated.

R. L. T.

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TAXATION — GROSS INCOME — CANCELLATION OF INDEBTEDNESS AS CONSTITUTING TAXABLE INCOME. — Taypayer, a natural person, issued secured bonds evidencing his personal indebtedness to the holders thereof. After procuring an extension of the maturity date he, solvent though in "straitened financial circumstances,"