No. 99-

IN THE

Supreme Court of the United States

GARY COLLINS, *et al.*,

Petitioners,

v.

SPOKANE VALLEY FIRE PROTECTION DISTRICT NO. 1, a public employer and political subdivision of the State of Washington,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that a public employer covered by the overtime and compensatory time provisions of the Fair Labor Standards Act may compel public employees to use their accrued compensatory time against their will?

PARTIES TO THE PROCEEDINGS BELOW

The plaintiffs-appellants below, and petitioners in this court, are:

Gary Collins;

Dennis Doyle;

Gary Ghirarduzzi;

Bruce Hamner;

Don Matthews;

Jeff McLaughlin; and

Dave Phay.

The defendant-appellant below, and respondent in this Court, is:

Spokane Valley Fire Protection District No. 1, a public employer and political subdivision of the State of Washington.

In the district court there was an additional defendant, David Lobdell, personally and in his official capacity as Assistant Fire Chief. Mr. Lobdell was dismissed from the case after it was agreed that all of his actions were taken within the scope of his official position.

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SPOKANE VALLEY FIRE PROTECTION DISTRICT NO. 1, a public employer and political subdivision of the State of Washington,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Collins, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's opinion and order granting defendants summary judgment is unpublished and is reproduced as Appendix B (pages B1-B12), attached hereto. The Ninth Circuit's decision affirming the district court, *Collins* v. *Lobdell*, -- F.3d --, 1999 WL 639131 (CA9 1999), will be, but is not

yet, published and is reproduced as Appendix A (pages A1-A11), attached hereto. Petitioners did not seek rehearing or rehearing *en banc*.

JURISDICTION

The Ninth Circuit entered its judgment on August 24, 1999. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case presents a question involving § 7 of the Fair Labor Standards Act ("FLSA"), as amended, 29 U.S.C. § 207, and the Department of Labor regulations related thereto, 29 C.F.R. part 553. The relevant portions of the statute and the regulations are reproduced as Appendix C (pages C1-C4) and Appendix D (pages D1-D7), respectively, attached hereto.

STATEMENT OF THE CASE[1]

Petitioners are all firefighters employed by respondent Spokane Valley Fire Protection District No. 1 (the "Fire District"). The Fire District is a public employer subject to the FLSA, 29 U.S.C. § 201, *et seq.*, and in particular to the overtime requirements contained in 29 U.S.C. § 207. The FLSA requires employers to pay time-and-a-half wages for hours worked over the relevant statutory maximum. In the wake of this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985), Congress adopted amendments giving public employers a limited option, upon

[1] Unless otherwise noted, the facts are taken from the Ninth Circuit and district court opinions, attached as Appendices A & B.

agreement with their employees, to provide compensatory time off ("comp time") instead of cash to satisfy FLSA overtime obligations. 29 U.S.C. § 207(*o*) . This case raises the question of who controls the decision whether to use accrued comp time when the employer wants the time used, but the employee does not yet wish to use the time.

The employment relationship between petitioner firefighters and the Fire District is governed by a collective bargaining agreement ("CBA"). Under certain limited circumstances, the CBA allows the substitution of comp time for overtime pay. Article 25 of the CBA provides, in relevant part:

> **Section 9.** Shift employees who are required to perform tasks, attend meetings or perform other duties outside their regular shift hours shall receive one and one half hours of comp time off for each hour worked. If such employees have a total accumulation of more than 144 net hours of comp time at the end of any month, that is comp time for 96 hours called back, they will be paid their hourly wage rate for each comp hour in excess of 144 hours on the first pay day of the following month.
>
> * * *
>
> **Section 11.** Requesting of Comp Time Hours: Employees shall request in writing from the District, at least 64 hours in advance, the number of hours and the date that they want comp time off. The District may deny the request if it deems it necessary. If, on the third request to take comp time hours, the District should deny the request, the District shall pay the employee his/her hour [sic] hourly wage rate for the comp hours requested, unless the denial is because more than two employees have asked to be off at the same time. If a request is made less than 64 hours in advance and denied, it will not count as a denial of a request.

Pursuant to these provisions, petitioner firefighters accrued comp time that began to approach the 144 hour cap after

which the Fire District would be required to pay cash time-and-a-half for any additional overtime hours.

Because the Fire District desired to schedule additional overtime, but did not want to pay cash for any hours above the 144-hour cap, the Fire District ordered the firefighters to use some of their accrued comp time. The firefighters neither needed nor wanted to use their accrued hours at that time, and complied with the order only under protest.

Following the compelled use of their accrued comp time, the union representative for the firefighters brought a grievance under the CBA. That grievance eventually was abandoned when the firefighters brought suit in the United States District Court for the Eastern District of Washington alleging a violation of their statutory rights under the comp time provision of the FLSA, 29 U.S.C. § 207(*o*). Jurisdiction in the district court was based upon 28 U.S.C. § 1331 and 29 U.S.C. § 216(b).

As the district court recognized, the "principal issue in this action is whether a local government may require FLSA covered employees to use some of the compensatory time they have accrued." App. B1.[2] Reviewing the various subsections of 29 U.S.C. § 207(*o*), the legislative history behind the 1985 amendments that added § 207(*o*), and a related Department of Labor regulation, 29 C.F.R. § 553.23, the court recounted the basic legal framework surrounding comp time and decided that "local governments and their employees have substantial latitude in negotiating comp time agreements." App. B8.

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[2] A secondary issue in the case was the Fire District's argument that the plaintiff firefighters had failed to exhaust their remedies under the CBA. The district court rejected this argument, quoting *Barrentine* v. *Arkansas-Best Freight System*, 450 U. S. 728, 745 (1981) for the proposition that "the FLSA rights petitioners seek to assert in this action are independent of the collective-bargaining process." App. B4-B5.

The district court reviewed and rejected the Eighth Circuit decision in *Heaton* v. *Moore*, 43 F.3d 1176, 1180-81 (CA8 1994), *cert. denied*, 515 U. S. 1104 (1995), which held that the "forced-use" of comp time violated the FLSA. Instead, the district court held that while "comp time is subject to certain parameters," local governments and unions may negotiate concerning the "retention of comp time." App. B10. From this the court concluded that the firefighters were "incorrect" that "the District violated the FLSA simply by requesting them to use some of their accumulated comp time. … The District may have breached the collective bargaining agreement, but it did not violate the FLSA." App. B11. The court thus entered summary judgment against the firefighters.

The firefighters appealed the final decision of the district court to the Ninth Circuit, pursuant to 28 U.S.C. § 1291. The Ninth Circuit affirmed.

Addressing "whether the FLSA prohibits an employer from compelling an employee to use comp time," the Ninth Circuit held that the "plain language of the FLSA does not specifically prohibit public employers from requiring employees to use comp time." App. A7-A8. The court also examined the legislative history and drew therefrom the notion that "allowing employees to stockpile comp time would impede the purpose of the comp time provision." App. A10. Although recognizing that the "legislative history suggests that employers and employees are required to negotiate and reach agreements over the use and preservation of comp time" the Ninth Circuit nonetheless held that absent a contrary agreement concerning the use and preservation of comp time, "the FLSA does not prohibit public employers from requiring employees to use comp time." App. A10-A11.[3]

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[3] The Ninth Circuit did not reach the Fire District's argument that the CBA authorized the Fire District to compel use of comp time. Rather, the court recognized that the CBA "does not specifically address the issue of whether the Fire District may compel Appellants to use comp time," noted some evidentiary issues related to the intent of the CBA's comp time pro-

This petition for certiorari followed, and is filed on an expedited basis so that the Court has the option of considering it in relation to the pending petition in No. 98-1167, *Christensen* v. *Harris County*.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Ninth Circuit's decision conflicts with a decision of the Eighth Circuit and conflicts with the Department of Labor's authoritative construction of the FLSA comp time provisions. The question presented raises an important national issue adversely affecting public employees in two of the largest circuits in the country and creating uncertainty in circuits yet to reach the issue. This case presents a favorable vehicle for resolving the current controversy and for establishing framework for avoiding future controversies involving the scope and effect of agreements concerning comp time.

I. THE QUESTION PRESENTED RAISES AN IMPORTANT NATIONAL ISSUE SUBJECT TO A CONFLICT AMONG THE CIRCUITS.

As the Ninth Circuit recognized, the Fifth and Eighth Circuits have already split over whether the FLSA prohibits a public employer from compelling an employee to use compensatory time accrued in lieu of overtime pay. App. A7 ("whether the FLSA prohibits an employer from compelling an employee to use comp time . . . has been addressed by the Fifth and Eighth Circuits – with conflicting results. *Compare*

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visions, but then noted that the firefighters made no claim that the CBA precludes such compelled use. App. A11 n. 4. Depending on this Court's interpretation of the FLSA, arguments concerning the unexpressed "intent" of the CBA are either irrelevant or are subjects to be taken up on remand after the proper legal standard is established.

Moreau v. *Harris County*, 158 F.3d 241, 246 (5th Cir.1998), *with Heaton* v. *Moore*, 43 F.3d 1176, 1180 (8th Cir.1994).”). The Ninth Circuit expressly rejected the approach of the Eighth Circuit and joined the Fifth Circuit in allowing public employers to force employees to use accrued comp time. App. A8 (“After reviewing the decisions of the Eight[h] and Fifth Circuits, we agree with the Fifth Circuit’s decision in” *Harris County*)

Currently pending before this Court is a petition for certiorari from the Fifth Circuit’s *Harris County* case, recaptioned as *Christensen* v. *Harris County*, No. 98-1167. The Court called for the views of the Solicitor General regarding that petition, and the Solicitor General responded by stating:

> The petition for a writ of certiorari should be granted. The decision of the court of appeals is incorrect. This Court’s review is warranted because the decision conflicts with *Heaton* v. *Moore*, 43 F.3d 1176 (8th Cir. 1994), cert. denied, 515 U.S. 1104 (1995), and the question presented is an important one.

Brief for the United States as Amicus Curiae, *Christensen* v. *Harris County*, No. 98-1167, at 9. The Solicitor General went on to recognize that the conflict now included the “recent decision of the Ninth Circuit” in this case, which was “to the same effect” as the Fifth Circuit decision in *Harris County* and contrary to the Eighth Circuit decision in *Heaton*. Brief for the United States as Amicus Curiae, *Christensen* v. *Harris County*, No. 98-1167, at 16.

The Ninth Circuit’s decision in this case, like the Fifth Circuit’s decision in *Harris County*, is incorrect and should be reviewed by this Court. Without belaboring the arguments presented at length in the parallel petition, the Ninth Circuit erred in finding that fulfilling the purpose of the comp time provision required a presumptive right in the employer to compel the use of accrued comp time. Rather, when properly viewed as a conditional exception to the otherwise mandatory

overtime provisions, the comp time provision actually requires, at a minimum, a presumption favoring employee control over use of accrued comp time.

Such a minimum presumption is in accord with the statutory burden placed upon the public employer to secure agreement from its employees for the substitution of comp time for cash in the first place. 29 U.S.C. § 207(*o*)(2)(A). Absent agreement, comp time may not be used at all, and the employer is obligated to pay for overtime in cash. The statutory presumption against the use of comp time recognizes that in many instances it is an inferior form of overtime compensation, and thus the statute maintains the baseline cash overtime requirement in cases where no agreement is reached.

Where a comp time agreement does exist, however, but fails to resolve an unprovided-for situation such as the compelled use of comp time, the presumption should be that the employees – having had no obligation to agree to comp time at all – did not grant such a right to the employer. Indeed, where the only consequence of non-use of comp time is the potential triggering of the baseline requirement of overtime payments that would apply in the absence of an agreement, the burden of securing an agreement allowing compelled use should rest with the employer just as the burden of securing the original agreement rests with the employer.

A minimum presumption favoring employee control of accrued comp time also is in accord with the considered and authoritative position of the Department of Labor. *See* Brief for the United States as Amicus Curiae, *Christensen* v. *Harris County*, No. 98-1167, at 11-12 (discussing the Department's interpretation of § 207(*o*)). Where the FLSA does not expressly address an issue, the Department's reasonable construction of the statute is entitled to deference. *Auer* v. *Robbins*, 519 U. S. 452, 457, 462 (1997).

In addition to being wrong, the *Collins* decision affects a tremendous number employees. The Ninth Circuit is one of

the most populous and contains many large public employers. The direct effect of this decision alone thus constitutes a problem of national significance. For those employees operating under comp time agreements that do not address compulsory use, the "compensation" they thought they would receive in lieu of cash has just been devalued and converted into the employer's right to manipulate time off to its own whim or convenience. For those employees considering whether to accept comp time under new agreements, the Collins decision, conferring new default rights on the employer, alters the bargaining dynamic to the employees' detriment. Finally, for employees in all circuits, the existing split creates uncertainty that will not be diminished until this Court resolves the split. Such uncertainty generates greater negotiating costs, particularly in the collective bargaining context.

II. THIS CASE PRESENTS A FAVORABLE VEHICLE FOR RESOLVING THE CONFLICT.

Petitioner firefighters fully support the petition in *Christensen* v. *Harris County*, No. 98-1167. Because the Ninth Circuit in *Collins* expressly relied upon *Harris County*, it thus would be forced to reconsider its views should the petition in *Harris County* be granted and the Fifth Circuit decision reversed.

Insofar as this Court may have concerns with finality or other potential vehicle problems in *Harris County*, however, petitioners note that this case – *Collins* – presents an appropriate vehicle for reaching the issue either in lieu of or consolidated with *Harris County*.

This case presents no issues that might preclude the Court from reaching and resolving the split. The only other question addressed below is the firefighters' supposed failure to exhaust remedies under the CBA. App. A4. The Ninth Circuit rejected this argument by defendant and ruled that exhaustion was inapplicable to claims of statutory violation under the

FLSA. App. A6. Furthermore, any supposed exhaustion requirement applicable to claims under the FLSA would at best be prudential, not jurisdictional. *See Barrentine*, 450 U. S. at 740 ("29 U.S.C. § 216(b) . . . permits an aggrieved employee to bring his statutory wage and hour claim 'in any Federal or State court of competent jurisdiction.' No exhaustion requirement or other procedural barriers are set up, and no other forum for enforcement of statutory rights is referred to or created by the statute"). Finally, the exhaustion issue in this case involves only the application of settled Ninth Circuit law, not a split among the circuits. *See* App. A4-A6 (citing no cases from other circuits). The Court thus would have neither need nor incentive to consider the exhaustion issue should it grant this petition, and no obligation to raise the issue on its own.[4]

The *Collins* case also presents a desirable vehicle because it involves comp time accrued pursuant to a single collective bargaining agreement, 29 U.S.C. § 207(*o*)(2)(A)(i), the operative provisions of which are discussed in the district court and Ninth Circuit decisions. It is plain from the provisions of the CBA that it does not expressly address the compelled use of comp time, and it thus allows the Court to consider, at a minimum, what the rule should be in the unprovided-for case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[4] The disposition of the Fire District's exhaustion argument also was correct. The firefighters based their claim entirely upon the FLSA, not the contract. That the FLSA requires an agreement allowing for comp time in the first place in order for the Fire District to avoid a violation means only that the terms of the CBA may be part of a potential affirmative *defense* to a violation, not that the violation is based upon the agreement.

Respectfully submitted,

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Dated: October 5, 1999.

APPENDICES

APPENDIX A

Gary COLLINS, Dennis Doyle; Gary Ghirarduzzi; Bruce Hamner; Don Matthews; Jeff McLaughlin; Dave Phay, Plaintiffs-Appellants,

v.

David LOBDELL, Personally and His Official Capacity as Assistant Fire Chief, Defendant,

and

Spokane Valley Fire Protection District No. 1, a Public Employer and Political Subdivision of the State of Washington, Defendant-Appellee.

No. 98-35655.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted July 14, 1999.

Decided Aug. 24, 1999.

Kambra Mellergaard, Ellensburg, Washington, for plaintiffs-appellants.

Jeffrey A. Hollingsworth, Perkins Coie, Seattle, Washington, for defendant- appellee.

Appeal from the United States District Court for the Eastern District of Washington; Fred Van Sickle, District Judge, Presiding. D.C. No. CV-97-00232- FVS.

Before: LEAVY, TROTT, and T.G. NELSON, Circuit Judges.

TROTT, Circuit Judge:

OVERVIEW

A group of firefighters ("Appellants") employed by Spokane Valley Fire Protection District No. 1 (the "Fire District"), appeal a district court decision denying their motion for summary judgment and granting the Fire District's motion for summary judgment on Appellants' claim under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. Appellants claim that the Fire District violated the FLSA by requiring them to use compensation time ("comp time") after they had accumulated a certain number of compensatory hours. We have jurisdiction pursuant to 28 U.S.C. § 1291. We hold that the FLSA does not prohibit employers from requiring use of comp time and therefore affirm.[1]

BACKGROUND

Appellants are members of the International Association of Fire Fighters, Local 876 (the "Union") and are employed by the Fire District as firefighters. The Union negotiated a collective bargaining agreement ("CBA") with the Fire District. Under the CBA, firefighters who perform special projects for the Fire District outside of their normal hours of employment receive comp time in lieu of overtime pay.[2] However, the CBA capped the amount of comp time that an employee could accumulate at 144 hours, after which the Fire District was required to pay the employee time and a half for each overtime hour. Employees are able to schedule paid time

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[1] Because we affirm the district court, we need not address Appellants' request for attorneys' fees and liquidated damages under 29 U.S.C. § 216.

[2] The CBA specifically provides that:

> Shift employees who are required to perform tasks, attend meetings or perform other duties outside their regular shift hours shall receive one and one half hours of comp time off for each hour worked. If such employees have a total accumulation of more than 144 net hours of comp time at the end of any month, that is comp time for 96 hours called back, they will be paid their hourly wage rate for each comp hour in excess of 144 hours on the first pay day of the following month.

off based on their comp hours by giving notice to the Fire District sixty-four hours in advance.

Appellants did not use their comp time, and their accumulated comp time began to approach the 144 hour cap. Because of budgetary restraints, rather than paying Appellants overtime, the Fire District told Appellants to use their comp time. Appellants did not need or want to use the comp time, but reluctantly complied with the order.

Pursuant to the "Grievance Procedure"[3] set out in the CBA, the Union filed a grievance with the Assistant Fire Chief, arguing that the Fire District lacked the authority to force Appellants to use comp time. The Assistant Fire Chief denied the grievance, stating that "the intent of [the CBA] was to ensure that employees were allowed an opportunity to use their earned comp time, and not to guarantee additional income." The Union then submitted its grievance to the Board of Fire Commissioners. However, the Union withdrew that grievance shortly thereafter when Appellants filed this cause

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[3] The Grievance Procedure provides:

> Grievances which may arise out of the application or interpretation of this agreement shall be settled in the following manner:
>
> (a) The Union Grievance Committee, upon receiving a written statement asserting a matter or situation claimed to constitute a grievance shall determine whether or not, in its opinion a grievance does exist. If, in the opinion of the committee, no grievance exists, no further action shall be taken. If, in the opinion of the committee, a grievance does exist, then the committee shall, with or without the employee or employees who asserted the grievance, present the grievance in writing to the Chief or Acting Chief for resolution. The claim of grievance shall specify the provision of this agreement or past practice, violation or application of which is claimed. If within ten days after being thus submitted, the grievance has not been resolved, the committee may submit the grievance to the Board of Fire Commissioners for resolution. If the grievance has not been resolved by the Fire Commissioners within twenty days of their receipt of the grievance, the committee may submit the grievance to arbitration within the next ten days or the grievance shall be waived.

of action because the Union believed that this lawsuit would supercede the grievance outcome.

Appellants claim that the Fire District violated the FLSA by requiring them to use accumulated comp time. The parties filed cross motions for summary judgment. The Fire District argued that the complaint should be dismissed because Appellants failed to exhausted their remedies under the CBA. The district court held that Appellants were not required to exhaust CBA remedies before bringing suit for violations of the FLSA, but held that the FLSA did not prohibit employers from requiring employees to use accumulated comp time. This appeal followed.

DISCUSSION

I. Exhaustion of Remedies

The Fire District argues that Appellants' claim is barred by their failure to exhaust remedies available under the CBA. Whether Appellants were required to exhaust remedies under the CBA prior to suing in federal court is a question of law reviewed *de novo*. *See General Dynamics Corp.* v. *United States*, 139 F.3d 1280, 1282 (9th Cir.1998).

The rule for determining whether a plaintiff is required to exhaust remedies provided for in a collective bargaining agreement before bringing the claim in federal court is well established. If the claim is based on rights arising from the collective bargaining agreement, the plaintiff is required to exhaust remedies created by the agreement. *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 736-37, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981); *Wren* v. *Sletten Constr. Co.*, 654 F.2d 529, 535 (9th Cir.1981). However, if the claim arises from statutory rights, the plaintiff is not required to exhaust agreement remedies, *Barrentine*, 450 U.S. at 737; *Albertson's Inc.* v. *United Food and Commercial Workers Union*, 157 F.3d 758, 761 (9th Cir.1998), because statutory rights under the FLSA are "guarantees to individual workers that may not be waived through collective bargaining." *Local*

246 Util. Workers Union v. *Southern Cal. Edison Co.*, 83 F.3d 292, 297 (9th Cir.1996); *see also Wright* v. *Universal Maritime Serv. Corp.*, 525 U.S. 70, 119 S.Ct. 391, 394, 142 L.Ed.2d 361 (1998). "Moreover, ... congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement." *Barrentine*, 450 U.S. at 740-41. Consequently, exhaustion of remedies provided for in a collective bargaining agreement is not required even where a claim based on statutory rights also presents a claim under the agreement. *Doyle* v. *Raley's Inc.*, 158 F.3d 1012, 1015 (9th Cir.1998); *Albertson's*, 157 F.3d at 761. However, a claim couched as a statutory claim is still subject to exhaustion requirements if the claim is in reality "essentially on the contract." *Wren*, 654 F.2d at 535.

In this case, the district court correctly held that Appellants' claim is based on the FLSA and that Appellants are therefore not required to exhaust CBA remedies. The complaint clearly alleges violations of the FLSA. Indeed, Appellants do not even argue that the Fire District's actions violated the CBA. Instead, Appellants argue that, if the CBA allows the Fire District to compel use of comp time, then it violates the FLSA. Because Appellants' complaint is based on a violation of statutory rights provided by the FLSA, they were not required to exhaust CBA remedies prior to bringing their claim. *See Local 246*, 83 F.3d at 297 ("Because the employees' claim was confined to an interpretation of the Act and our decision rests on an interpretation of the Act, there is no requirement of exhaustion.").

We find unpersuasive the Fire District's argument that because comp time may only be paid in lieu of overtime pay pursuant to an agreement between the employer and the employees, *see* 29 U.S.C. § 207(o)(2) (1994), any dispute over comp time must necessarily be based on the CBA. Although employers and employees are free to negotiate and reach agreements concerning comp time, such agreements may not violate the FLSA. *See* 29 C.F.R. § 553.23(a)(2) (allowing

employers and employees to agree on guidelines governing the preservation and use of comp time as long as the agreement does not violate the FLSA). Where employers and employees reach an agreement that expressly violates the FLSA or is silent on an issue and the employer takes action, which violates the FLSA, employees may still bring actions to protect rights provided for in the FLSA without exhausting remedies established in the agreement. *See Barrentine*, 450 U.S. at 740 (holding that individual rights under the FLSA may not be waived through agreement). Clearly, in such a case, the complaint is based on the FLSA and not the agreement. In this case, if Appellants are correct and the FLSA prohibits employers from requiring employees to use comp time, the Fire District may not require Appellants to use comp time, even if the CBA expressly permitted such action. Appellants' claim is therefore clearly based on the FLSA and Appellants were not required to exhaust CBA remedies.

The Fire District argues also that the FLSA does not specifically state that employers cannot force employees to use comp time and therefore Appellants' claim must arise from the CBA. Although we ultimately agree that the FLSA does not prohibit employers from requiring employees to use comp time, that argument relates to the merits not to the basis of Appellants' claim. If, as the Fire District argues, the FLSA does not prohibit employers from forcing employees to use comp time, then Appellants' claim is without merit. That does not mean, however, that the claim arises under the CBA. As explained above, Appellants' complaint is based on the FLSA, and Appellants were therefore not required to exhaust CBA remedies.

II. Use of Comp Time

Appellants argue that the district court erred in holding that the Fire District did not violate the FLSA by forcing them to use their comp time. A district court's interpretation of the FLSA is reviewed *de novo*. *Berry* v. *County of Sonoma*, 30 F.3d 1174, 1180 (9th Cir.1994).

We have not previously addressed the issue of whether the FLSA prohibits an employer from compelling an employee to use comp time. This issue, however, has been addressed by the Fifth and Eighth Circuits – with conflicting results. *Compare Moreau* v. *Harris County*, 158 F.3d 241, 246 (5th Cir.1998), *with Heaton* v. *Moore*, 43 F.3d 1176, 1180 (8th Cir.1994).

In *Heaton*, the Missouri Department of Corrections required employees who accrued over 180 hours of comp time to schedule use of the comp time or have comp time scheduled for them by the MDOC. 43 F.3d at 1179. The Eighth Circuit held that employers could not compel employees to use comp time. *Id*. at 1180. The Eighth Circuit reasoned that comp time is the property of the employee and may be used solely at the discretion of the employee. *Id*. Relying on § 207(o)(5), the Eighth Circuit held that the only right expressly granted to the employer under the FLSA is that of denying the use of comp time when it would unduly disrupt the employer's business. Id. The court noted the "maxim of statutory construction *inclusio unius est exclusio alterius*" – "'when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode'" and held that employers could not compel use of comp time but could only restrict its use when it would unduly disrupt business. *Id.* (quoting *Longview Fibre Co.* v. *Rasmussen*, 980 F.2d 1307, 1312 (9th Cir.1992)).

In *Moreau*, the Harris County Sheriff's Department required employees to keep their amount of accrued comp time below predetermined levels. 158 F.3d at 243. An employee who reached or exceeded the predetermined level was asked to reduce the number of comp time hours or the employee's supervisor would order the level reduced. *Id*. The Fifth Circuit held that employees do not have a property right in accrued comp time. *Id*. at 246. The court specifically rejected the Eighth Circuit's reasoning that because § 207(o)(5) provided that employers could deny the use of comp time only if

it would unduly disrupt their business, the negative implication of the statutory grant was that employers had no control over employees' use of comp time. *Id*. at 246. Finally, the court noted that the statutory purpose of § 207(o) was to ease the burden on public employers of paying overtime wages. *Id*. at 245-46.

After reviewing the decisions of the Eight[h] and Fifth Circuits, we agree with the Fifth Circuit's decision in *Moreau*. When interpreting statutes, we first look to the plain language of the statute. *Jeffries* v. *Wood*, 114 F.3d 1484, 1494 (9th Cir.1997). The plain language of the FLSA does not specifically prohibit public employers from requiring employees to use comp time. Appellants point to § 207(o)(5), which provides that employees who have accrued comp time and request use of that time "shall be permitted by the employee's employer to use such time" and argue that the FLSA grants employees absolute discretion over the use of accrued comp time. We reject Plaintiff's argument that the positive implies the negative in this case. The fact that the FLSA allows employees to use comp time and requires the employer to allow use of comp time does not mean that employees have absolute discretion over the use of comp time. *See Moreau*, 158 F.3d at 246. There is no question that employees may choose to use comp time; the question is whether employers can require employees to use comp time absent the employees' choice, and the plain language of the FLSA does not address that issue.

Appellants do not argue that the Fire District prevented them from using comp time. Nor do they argue that the Fire District was scheduling comp time in such a way that it precluded employees from taking any comp time when they wanted. Indeed, in this case the Fire District was not preventing Appellants from using comp time, but was encouraging and ultimately ordering employees to use comp time. Such action does not violate the plain language of the FLSA.

If the meaning of the statute is unclear from the plain language, this court looks at the legislative history. *Recording Indus. Ass'n* v. *Diamond Multimedia Sys. Inc.*, --- F.3d ----, No. 98-56727, 180 F.3d 1072, 1999 WL 387265, at *9 (9th Cir. June 15, 1999). There is nothing in the legislative history that suggests that comp time was a property right or that employers would not be allowed to require employees to use accumulated comp time. Indeed, the legislative history strongly suggests that employers may require employees to use comp time. As Fire District correctly points out, Congress intended to provide states and municipalities with an alternative to paying overtime wages. In *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), the Supreme Court held that states and municipalities are not exempt from the minimum wage and overtime pay requirements of the FLSA. In response to this holding, Congress amended the FLSA and added the comp time provisions to ease the financial burden of complying with the FLSA on state and municipalities. S.Rep. No. 159, 99th Cong., 7 (1985), *reprinted in* 1985 U.S.C.C.A.N. 651, 655-56; *See Austin* v. *City of Bisbee, Arizona*, 855 F.2d 1429, 1435 (9th Cir.1988) (noting Congress's concern over the financial hardship on states and localities from complying with the FLSA). Unlike private employers, public employers cannot pass the operating costs associated with overtime pay to consumers, and Congress therefore provided public employers with an alternative. If, as Appellants argue, employees could stockpile comp time and eventually force public employers to pay overtime, employees could remove that alternative and essentially nullify the amendment. *See Local 889, Am. Fed. of State, County, and Mun. Employees* v. *Louisiana*, 145 F.3d 280, 285 (5th Cir.1998) ("The purpose of the 1985 amendment to the FLSA would be greatly impeded if employees were allowed to 'bank' their compensatory time and force their public employers to pay cash overtime."). Because allowing employees to stockpile comp time would impede the purpose of the comp time provision, the district court correct-

ly held that the FLSA did not prohibit employers from compelling employees to use comp time.

Appellants correctly point out that Congress attempted to strike a balance between the "employee's right to make use of comp time that has been earned and the employer's need for flexibility." 1985 U.S.C.C.A.N. at 659. Clearly, Congress wanted to protect employees' rights to use comp time and therefore limited the employer's ability to prohibit use of comp time to situations when use of comp time would "unduly disrupt the operations of the public agency." § 207(o)(5)(B). However, Congress did not intend to allow employees to upset the balance by stockpiling comp time and eliminating the employer's flexibility. Although employees have a right to use comp time when it would not unduly disrupt the public employers business, the FLSA does not give employees the right of absolute control over the use of comp time. Rather, the legislative history suggests that employers and employees are required to negotiate and reach agreements over the use and preservation of comp time. *See* 1985 U.S.C.C.A.N. at 659 ("The agreement or understanding may include provisions governing the preservation, use, or cashing out of comp time so long as those provisions do not conflict with [the FLSA]."); *see also* 29 C.F.R. § 553.23(a)(2) ("The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act.").

We do not suggest that the FLSA requires that public employers be allowed to force employees to use comp time. As explained above, both the legislative history and the interpretive regulations suggest that employers and employees should reach agreements concerning the use and preservation of comp time. *See* 1985 U.S.C.C.A.N. at 659; 29 C.F.R. § 553.23(a). We encourage public employers and employees to negotiate and reach agreements concerning the use and

preservation of comp time.[4] We simply hold that the FLSA does not prohibit public employers from requiring employees to use comp time. Because the Fire District's actions did not violate the FLSA, the district court correctly granted the Fire District's motion for summary judgment on Appellants' claim.

AFFIRMED.

[4] We note that the agreement in this case does not specifically address the issue of whether the Fire District may compel Appellants to use comp time. There is evidence in the record that the comp time provision in the CBA was never intended to result in Appellants receiving overtime pay, and that it was assumed that Appellants would use comp time as they acquired it. Appellants have not argued that the Fire District's actions violated the CBA, and because Appellants failed to exhaust the remedies under the CBA, this court may not address that issue. *Wren*, 654 F.2d at 535.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GARY COLLINS, et al.,	
Plaintiffs,	NO. CS-97-232-FVS
vs.	ORDER
DAVID LOBDELL, et al.,	
Defendants.	

THIS MATTER comes before the Court based upon cross-motions for summary judgment. The plaintiffs are represented by Barry E. Ryan; the defendants by Jeffrey A. Hollingsworth.

I.

In 1985, Congress amended the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-229, to soften its impact upon state and local governments. Now, in certain circumstances, state and local governments may provide their employee with compensatory time off in lieu of overtime. The principal issue in this action is whether a local government may require FLSA covered employees to use some of the compensatory

time they have accrued. The Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 216(b).

II.

The plaintiffs arc employed by the Spokane Valley Fire Protection District No. 1 ("District") as fire fighters. They are members of the International Association of Fire Fighters, Local 876 ("Union"), which had negotiated a collective bargaining agreement ("CBA") on their behalf. One of the issues addressed by the CBA is compensatory time ("comp time"). Section 9 of Article 25 allows the District to substitute comp time for overtime in certain circumstances.[1] Section 11 of Article 25 establishes the procedure for using comp time.[2]

Fire fighters who perform special projects for the District receive comp time for their work. (Article 25, Section 10.) For example, the District relies heavily upon one of its fire fighters to maintain its computers. This arrangement has been mutually beneficial. The fire fighter has taken computer clas-

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[1] Section 9 provides:

> Shift employees who are required to perform tasks, attending meetings or perform other duties outside their regular shift hours shall receive one and one half hours of comp time off for each hour worked. If such employees have a total accumulation of more than 144 net hours of comp time at the and of any month, that is comp time for 96 hours called back, they will be paid their hourly wage rate for each comp hour in excess of 144 hours on the first pay day of the following month.

[2] Section 11 provides:

> Employees shall request in writing from the District, at least 64 hours in advance, the number of hours and the date that they want comp time off. The District may deny the request if it deems it necessary. If, on the third request to take comp time hours, the District should deny the request, the District shall pay the employee his/her hour hourly wage rate for the comp hours requested, unless the denial is because more than two employees have asked to be off at the same time. If a request is made less than 64 hours in advance and denied, it will not count as a denial of a request.

ses at the District's expense; in exchange, the District has an in-house computer specialist.

By April of 1997, certain fire fighters had accumulated significant amounts of comp time. That created budgetary problems for the District. Consequently, Assistant Fire Chief David Lobdell asked the plaintiffs to use two shifts of comp time. "Here's what's going on," he explained

> I still have to find a way to deal with the fact that our budget for overtime and move-ups will run out of money by the end of May unless we change something. That is why we have the temporary moratorium on all overtime, including the program that you are involved in. My intent at this time is to have everybody who is close to the maximum allowable hours of comp time take some time off so that we can get important programs back in operation

(Memorandum of David Lobdell dated April 18, 1997.) The plaintiffs complied with Lobdell's request, but only under protest.

Mr. Wayne K. Howerton is chairman of the Union's grievance committee. On May 14, 1997, he filed a grievance with Lobdell. Howerton argued that the issue of comp time is governed by sections 9 and 11 of Article 25, and that the District lacks authority to require fire fighters to use their comp time. Lobdell denied the grievance in a letter dated May 21, 1997. "Since the contract is silent on the specific issue in question," he said, "we have to look at the intent of the existing language. As we agreed yesterday, the intent of this contract language was to ensure that employees were allowed an opportunity to use their earned comp time, and not to guarantee additional income."

Pursuant to the CBA, the Union submitted its grievance to the Board of Fire Commissioners. (Article 5, Section 2(a).) At about the same time, however, the plaintiffs filed this ac-

tion. Shortly thereafter, the Union withdrew its grievance, saying:

> Due to the lawsuit filed by the Union regarding the Comp. Time issue, the Grievance Committee sees no point in continuing with the Comp. Time grievance. The Committee feels the outcome of the lawsuit will supercede [sic] and/or absorb any outcome the grievance may accomplish. We are respectfully withdrawing the Comp. Time grievance and no further action on your part is required.

(Memorandum of Wayne Howerton dated June 23, 1997.)

III.

The District argues that the plaintiffs must exhaust their remedies under the collective bargaining agreement before commencing a federal action. Since the union abandoned its opportunity to arbitrate whether Lobdell's request was authorized by the CBA, the District concludes that the plaintiffs' action must be dismissed. Wren v. Sletten Const. Co., 654 F.2d 529, 535 (9th Cir. 1981) ("Where the employee's claim is essentially on the contract, . . . there is no reason to vary from the traditional exhaustion requirement."). The District is incorrect. The parties to a CBA cannot authorize the employer to order employees to use comp time unless the FLSA allows the employer to do so. Otherwise, the parties would be authorizing an unlawful act. That they cannot do. For that reasons the District's exhaustion argument begs the question. If the FLSA permits public employers to require their employees to use comp time they have accumulated, Lobdell's order did not violate the FLSA no matter what the CBA provides. Conversely, if the FLSA prohibits such behavior, Lobdell's order violated the FLSA no matter what the CBA provides. The parties to a CBA cannot bargain away protections created by federal law. See Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 745, 101 S.Ct. 1437, 1447, 67 L.Ed.2d 641 (1981) ("the FLSA rights petitioners seek to assert in this

action are independent of the collective-bargaining process"). Thus, the key to this case is whether the FLSA permits public employers to require their employees to use comp time they have accumulated.

IV.

In 1974, Congress expanded the FLSA's definition of the terms "employer," "employee," and "public agency" to include states and their political subdivisions. Fair Labor Standards Amendments of 1974, Pub.L. No. 93-259, § 6(a)(1), (2), (6), 88 Stat. 55, 58-60. That brought states, local governments, and their employees within the ambit of the FLSA. National League of Cities v. Usury, 426 U.S. 833, 838-39, 96 S.Ct. 2465, 2468, 49 L.Ed.2d 245 (1976). The Supreme Court first ruled that Congress could not regulate the compensation of state and local employees, id., at 852, 96 S.Ct. at 2474, but then changed its mind. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 530, 105 S.Ct. 1005, 1007, 83 L.Ed.2d 1016 (1985). After Garcia, both Houses of Congress held hearings to consider the FLSA's financial impact upon state and local governments. Moreau v. Klevenhagen, 508 U.S. 22, 26, 113 S.Ct. 1905, 1908, 123 L.Ed.2d 584 (1993). That led to the Fair Labor Standards Amendments of 1985, Pub.L. No. 99-150, 99 Stat. 787.

It is clear from the amendments' legislative history that Congress intended to ease the burdens imposed by the FLSA. The Report of the Senate Committee on Labor and Human Resources explains that while the committee was not retreating from the principles that had led Congress to amend the FLSA in 1974, the committee thought "it essential that the particular needs and circumstances of the states and their political subdivisions be carefully weighed and fairly accommodated." S.Rep. No. 159, 99th Cong., 7 (1985), reprinted in 1985 U.S.C.C.A.N. 651, 655. The committee recognized "that financial costs of coming into compliance with the FLSA -- particularly the overtime provisions of section 7 -- are a matter of grave concern to many states and localities."

Id. at 8, 1985 U.S.C.C.A.N. at 655-56. However, the committee was also aware that many state and local governments had addressed the FLSA's financial impact by working out "arrangements, providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements -- frequently the result of collective bargaining -- reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable, [the committee] wish[ed] to accommodate such arrangements." Id. at 8, 1985 U.S.C.C.A.N. at 656. Congress did that by permitting state and local governments to make some overtime payments in the form of comp time rather than cash. Pub.L. No. 99-150, 99 Stat. 787, codified at 29 U.S.C. § 207(o), (p) (1985).

The comp time option is subject to important limitations. At a minimum, "[t]he provision of comp time must be at the premium rate of not less than 1½ hours per hour of overtime work, and must be pursuant to an agreement reached prior to performance of the work." Moreau, 508 U.S. at 26, 113 S.Ct. at 1908 (citing Senate Committee Report). The latter requirement is codified at § 207(o)(2), which provides that a local government such as the District may provide comp time in lieu of cash only:

> (A) pursuant to --
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and
>
> (B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

29 U.S.C. § 207(o)(2)(A),(B).

Section 207(o)(2) contemplates two different kinds of Comp time agreements. The first type is described by subsection (A)(i). It is created when employees "designate a representative who lawfully may bargain collectively on their behalf . . . ." Moreau, 508 U.S. at 35, 113 S.Ct. at 1912. That is the type of agreement at issue here -- a collective bargaining agreement. The other type of agreement is described by subsection (A)(ii). It is created when an employer enters into comp time agreements with individual employees. That is not the type of agreement at issue here. The regulations adopted by the Secretary of Labor ("Secretary") distinguish between the types of agreements. Compare 29 C.F.R. § 553.23(b) ("Agreement or understanding between the public agency and a representative of the employees") with 29 C.F.R. § 553.23(c) ("Agreement or understanding between the public agency and individual employees").

Although Congress chose to require local governments to reach comp time agreements with their employees before exercising the option of substituting comp time for cash, Congress placed few limitations on the terms of such agreements. At least in the case of collective bargaining agreements, that appears to have been intentional. The Senate Committee Report states, "The [comp time] agreement or understanding may include other provisions concerning the preservation, use, or cashing out of comp time so long an those provisions do not conflict with this subsection or the remainder of the Act." S.Rep. No. 159 at 11, 1985 U.S.C.C.A.N. at 659. What was left implicit by Congress has been made explicit by the Secretary:

> Agreements or understandings may provide that compensatory time may be restricted to certain hours of work only. In addition, agreements or understandings may provide any combination of compensatory time off and overtime payment in cash (e.g., one hour compensatory time credit plus one half the employee's regular

> hourly rate of pay in cash for each hour of overtime worked) so long as the premium pay principal of at least "time and one-half" is maintained. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act.

52 Fed.Reg. 2012, 2034 (January 16, 1987) (codified at 29 C.F.R. § 553.23(a)(2) (1996)) (emphasis added). Thus, it is clear that local governments and their employees have substantial latitude in negotiating comp time agreements.

Having agreed to give local governments the authority to substitute comp time for overtime in certain circumstances, the Senate Committee on Labor and Human Resources sought to ensure that comp time would be a meaningful benefit. S.Rep. No. 159 at 11-12, 1985 U.S.C.C.A.N. at 659-60. Among other things, the committee said, "The employee . . . has the right to use some or all of his accrued comp time within a reasonable period after requesting such use, provided that this does not unduly disrupt the employer's operation." Id. at 12, 1985 U.S.C.C.A.N. at 660. Ultimately, Congress enacted § 207(o) (5), which provides:

> An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency --
>
> (A) who has accrued compensatory time off authorized to be provided under paragraph (1), and
>
> (B) who has requested to use such compensatory time,
>
> shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 U.S.C. § 207(o)(5).

V.

The plaintiffs argue that the District may not require them to use even some of the comp time they have accrued. As authority, they cite Heaton v. Moore, 43 F.3d 1176 (8th Cir.1994). In that case, the employer entered into individual comp time agreements with its employees pursuant to subsection (A)(ii). When an employee accumulated a certain amount of comp time, he had to use some of his comp time whether he wanted to or not. Id. at 1178-79. The Eight Circuit held that the "forced-use" policy violated the FLSA. Id. at 1180-81. That decision was based upon several assumptions: (1) comp time is the property of the employee; (2) the only authority an employer has over the use of comp time is to deny a request that would be unduly disruptive; and (3) in the absence of a request, an employer has no authority to regulate comp time. Id.

The District questions whether the Eighth Circuit's interpretation of § 207(o) is consistent with the purpose of the 1985 amendments, which was to ease the burden on state and local governments, not create new property rights for employees. Furthermore, according to the District, Heaton is distinguishable even if it was correctly decided. In that case, the employer had entered into individual comp time agreements with its employees. In this case, comp time is governed by a collective bargaining agreement. The Eight[h] Circuit took no position with respect to the latter. Heaton, 43 F.3d at 1180 n.4.

VI.

In the Ninth Circuit, it is well established that "'[p]roperty rights to public benefits are defined by the statutes or customs that create the benefits.'" Austin v. City of Bisbee, Arizona, 855 F.2d 1429, 1434 (9th Cir.1988) (quoting Jones v. Reagan, 748 F.2d 1331, 1338-39 (9th Cir.1984)). Thus, the first place to turn for guidance is the text of § 207(o). That section says a number of things about comp time. For example, it sets the

rate for comp time. 29 U.S.C. § 207(o)(1). It requires an agreement between employer and employee. 29 U S.C. § 207(o)(2)(A). It caps the a number of hours of comp time that may be substituted for overtime, 29 U.S.C. § 207(o)(3), and it protects an employee's right to use comp time. 29 U.S.C. § 207(o)(5). However, it says nothing about whether an employee has a right to continue accumulating comp time until he reaches the statutory cap.

The Secretary, by contrast, has promulgated a regulation that addresses the issue. The last sentence of § 553.23(a)(2), which is drawn almost verbatim from the Senate Committee Report, states that a collective bargaining agreement may regulate the "preservation" of comp time as long as the CBA is consistent with § 207(o). The word "preservation" has several definitions. It can mean "to keep . . . in existence," "to retain in one's possession," or to "maintain." Webster's Third New International Unabridged Dictionary 1794 (Philip B. Gove ed. 1966). If that is the sense intended by the Secretary, employers and union representatives are entitled to negotiate issues involving the retention of comp time.[3]

Given the Senate Committee Report, § 207(o), and § 553.23 (a)(2), it is clear that the comp time option is subject to certain parameters. Within those parameters, local governments and unions retain the discretion they traditionally have exercised in structuring collective bargaining agreements. One of the issues they may negotiate is the retention of comp time.

That view is supported by principles of federalism. Not long ago, the Supreme Court observed:

> When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evi-

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[3] The plaintiffs have not challenged the validity of § 553.23(a)(2) .

> dent scope. . . . We will interpret a statute to pre-empt the traditional state powers only if that result is the clear and manifest purpose of Congress.

Department of Revenue v. ACF Indus., Inc., 510 U.S. 332, 345, 114 S.Ct. 843, 850-51, 127 L.Ed.2d 165 (1994) (internal citations and punctuation omitted). By enacting the 1974 and l985 amendments to the FLSA, Congress has limited the authority of state and local governments to determine the wages of their employees. In doing so, however, Congress has left them with substantial latitude in negotiating comp time agreements.

Finally, it is worth noting that Congress created the comp time option in order to maintain financial balance in the workplace. Cf. S.Rep. No. 159 at 11, 1985 U.S.C.C.A.N. at 659 ("The committee has sought to balance the employee's right to make use of comp time that has been earned and the employer's need for flexibility in operations."). Where comp time is governed by a collective bargaining agreement, giving individual employees absolute control over the preservation of comp time would disrupt both the collective bargaining process and the balance Congress sought to achieve.

VII.

The, plaintiffs argue that the District violated the FLSA simply by requesting them to use some of their accumulated comp time. The plaintiffs are incorrect. The District may have breached the collective bargaining agreement, but it did not violate the FLSA.

IT IS HEREBY ORDERED:

1. The plaintiffs' motion for summary judgment (Ct. Rec. 28) is denied.

2. The defendants' motion for summary judgment is granted to the extent indicated above.

3. All other pending motions are denied as moot.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this Order and furnish copies to counsel.

DATED this 15th day of June 1998.

/s/ Fred Van Sickle
FRED VAN SICKLE
United States District judge

APPENDIX C

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 8--FAIR LABOR STANDARDS
[EXCERPTS]

§ 207. Maximum hours

* * *

(*o*) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only--

(A) pursuant to--

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April

15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than--

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee,

whichever is higher.

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency--

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) of this section if--

(A) such employee is paid at a per-page rate which is not less than--

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection--

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

* * * *

APPENDIX D

CODE OF FEDERAL REGULATIONS
TITLE 29--LABOR
CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

PART 553--APPLICATION OF THE FAIR LABOR STANDARDS ACT TO EMPLOYEES OF STATE AND LOCAL GOVERNMENTS

[EXCERPTS]

Sec. 553.20 Introduction.

Section 7 of the FLSA requires that covered, nonexempt employees receive not less than one and one-half times their regular rates of pay for hours worked in excess of the applicable maximum hours standards. However, section 7(o) of the Act provides an element of flexibility to State and local government employers and an element of choice to their employees or the representatives of their employees regarding compensation for statutory overtime hours. The exemption provided by this subsection authorizes a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, to provide compensatory time off (with certain limitations, as provided in Sec. 553.21) in lieu of monetary overtime compensation that would otherwise be required under section 7. Compensatory time received by an employee in lieu of cash must be at the rate of not less than one and one-half hours of compensatory time for each hour of overtime work, just as the monetary rate for overtime is calculated at the rate of not less than one and one-half times the regular rate of pay.

* * * * *

Sec. 553.22 "FLSA compensatory time" and "FLSA compensatory time off".

(a) Compensatory time and compensatory time off are interchangeable terms under the FLSA. Compensatory time off is paid time off the job which is earned and accrued by an employee in lieu of immediate cash payment for employment in excess of the statutory hours for which overtime compensation is required by section 7 of the FLSA.

(b) The Act requires that compensatory time under section 7(o) be earned at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by section 7 of the FLSA. Thus, the 480-hour limit on accrued compensatory time represents not more than 320 hours of actual overtime worked, and the 240-hour limit represents not more than 160 hours of actual overtime worked.

(c) The 480- and 240-hour limits on accrued compensatory time only apply to overtime hours worked after April 15, 1986. Compensatory time which an employee has accrued prior to April 15, 1986, is not subject to the overtime requirements of the FLSA and need not be aggregated with compensatory time accrued after that date.

Sec. 553.23 Agreement or understanding prior to performance of work.

(a) General. (1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7(o)(2)(A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. If the employees do not have a representative, compensatory time may be used in lieu of cash overtime compensation only if

such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. No agreement or understanding is required with respect to employees hired prior to April 15, 1986, who do not have a representative, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.

(2) Agreements or understandings may provide that compensatory time off in lieu of overtime payment in cash may be restricted to certain hours of work only. In addition, agreements or understandings may provide for any combination of compensatory time off and overtime payment in cash (e.g., one hour compensatory time credit plus one-half the employee's regular hourly rate of pay in cash for each hour of overtime worked) so long as the premium pay principle of at least "time and one-half" is maintained. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act. To the extent that any provision of an agreement or understanding is in violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o).

(b) Agreement or understanding between the public agency and a representative of the employees. (1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act.

(2) Section 2(b) of the 1985 Amendments provides that a collective bargaining agreement in effect on April 15, 1986, which permits compensatory time off in lieu of overtime

compensation, will remain in effect until the expiration date of the collective bargaining agreement unless otherwise modified. However, the terms and conditions of such agreement under which compensatory time off is provided after April 14, 1986, must not violate the requirements of section 7(o) of the Act and these regulations.

(c) Agreement or understanding between the public agency and individual employees. (1) Where employees of a public agency do not have a recognized or otherwise designated representative, the agreement or understanding concerning compensatory time off must be between the public agency and the individual employee and must be reached prior to the performance of work. This agreement or understanding with individual employees need not be in writing, but a record of its existence must be kept. (See Sec. 553.50.) An employer need not adopt the same agreement or understanding with different employees and need not provide compensatory time to all employees. The agreement or understanding to provide compensatory time off in lieu of cash overtime compensation may take the form of an express condition of employment, provided (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section 7(o) of the Act. An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay. In such a case, an agreement or understanding would be presumed to exist for purposes of section 7(o) with respect to any employee who fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay. However, the employee's decision to accept compensatory time off in lieu of cash overtime payments must be made freely and without coercion or pressure.

(2) Section 2(a) of the 1985 Amendments provides that in the case of employees who have no representative and were employed prior to April 15, 1986, a public agency that has

had a regular practice of awarding compensatory time off in lieu of overtime pay is deemed to have reached an agreement or understanding with these employees as of April 15, 1986. A public agency need not secure an agreement or understanding with each employee employed prior to that date. If, however, such a regular practice does not conform to the provisions of section 7(o) of the Act, it must be modified to do so with regard to practices after April 14, 1986. With respect to employees hired after April 14, 1986, the public employer who elects to use compensatory time must follow the guidelines on agreements discussed in paragraph (c)(1) of this section.

[52 FR 2032, Jan. 16, 1987; 52 FR 2648, Jan. 23, 1987]

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Sec. 553.25 Conditions for use of compensatory time ("reasonable period", "unduly disrupt").

(a) Section 7(o)(5) of the FLSA provides that any employee of a public agency who has accrued compensatory time and requested use of this compensatory time, shall be permitted to use such time off within a "reasonable period" after making the request, if such use does not "unduly disrupt" the operations of the agency. This provision, however, does not apply to "other compensatory time" (as defined below in Sec. 553.28), including compensatory time accrued for overtime worked prior to April 15, 1986.

(b) Compensatory time cannot be used as a means to avoid statutory overtime compensation. An employee has the right to use compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of his or her making a request for use of such time.

(c) Reasonable period. (1) Whether a request to use compensatory time has been granted within a "reasonable period"

will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff.

(2) The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employer and the employee (or the representative of the employee) reached prior to the performance of the work. (See Sec. 553.23.) To the extent that the (conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in Sec. 553.23, the terms of such agreement or understanding will govern the meaning of "reasonable period".

(d) Unduly disrupt. When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

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Sec. 553.26 Cash overtime payments.

(a) Overtime compensation due under section 7 may be paid in cash at the employer's option, in lieu of providing compensatory time off under section 7(o) of the Act in any workweek or work period. The FLSA does not prohibit an employer from freely substituting cash, in whole or part, for

compensatory time off; and overtime payment in cash would not affect subsequent granting of compensatory time off in future workweeks or work periods. (See Sec. 553.23(a)(2).)

(b) The principles for computing cash overtime pay are contained in 29 CFR part 778. Cash overtime compensation must be paid at a rate not less than one and one-half times the regular rate at which the employee is actually paid. (See 29 CFR 778.107.)

(c) In a workweek or work period during which an employee works hours which are overtime hours under FLSA and for which cash overtime payment will be made, and the employee also takes compensatory time off, the payment for such time off may be excluded from the regular rate of pay under section 7(e)(2) of the Act. Section 7(e)(2) provides that the regular rate shall not be deemed to include

> . . . payments made for occasional periods when no work is performed due to vacation, holiday, . . . or other similar cause.

As explained in 29 CFR 778.218(d), the term "other similar cause" refers to payments made for periods of absence due to factors like holidays, vacations, illness, and so forth. Payments made to an employee for periods of absence due to the use of accrued compensatory time are considered to be the type of payments in this "other similar cause" category.

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