

**IN THE SUPREME COURT
STATE OF ARIZONA**

MARCIE A. REDGRAVE,
individually and on behalf of all others
similarly situated,

Plaintiff/Appellant,

v.

DOUG DUCEY, Governor; THOMAS J.
BETLACH, in his official capacity as
Director of the Arizona Health Care Cost
Containment System; ARIZONA
SECURITY; ARIZONA DIVISION OF
DEVELOPMENTAL DISABILITIES,

Defendants/Appellees.

Arizona Supreme Court
No. CV-20-0082-CQ

United States Court of Appeals Ninth
Circuit No. 18-17150

United States District Court No.
2:18-cv-01247-DLR

**BRIEF OF AMICUS CURIAE
KIMBERLY SPITLER**

Dated: September 21, 2020

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INTRODUCTION

Kimberly Spitler is an employee of the State of Arizona Department of Economic Security (the “ADES”). Spitler, like Plaintiff/Appellee Marcie A. Redgrave, has filed suit against the State of Arizona for, among other things, failure to pay overtime compensation under 29 U.S.C. §§ 206-207, the Fair Labor Standards Act (the “FLSA”). Spitler files this brief as Amicus Curiae following the Arizona District Court’s decision in *Spitler v. State of Arizona*, No. CV-19-04859-PHX-DWL, 2020 WL 1536310 (D. Ariz., March 31, 2020), to await this Court’s answer to the question certified to it by the Ninth Circuit in this matter before deciding issues pending in *Spitler*. *Id.* at * 1.

According to Redgrave, the State has consented to private suits for damages under the FLSA because the Public Entities Act, A.R.S. § 12-820.01, does not create sovereign immunity from claims under the FLSA. Plaintiff-Appellant’s Supplemental Brief at pp. 5-7. (noting that references to “tort liability” were removed from the Public Entities Act and Arizona courts have allowed claims against the State beyond tort liability). The State counters that the Public Entity Act does not specifically address the FLSA, or any federal statute, and that alone should bar waiver of sovereign immunity. Supplemental Brief of State Appellees, p. 12. The State also argues that the Legislature “approves” sovereign immunity from FLSA claims. *Id.* at 17.

Spitler believes it is critical for this Court to determine whether the State has consented to damages liability for violation of the FLSA overtime provisions by the Legislature's enactment of A.R.S. §§ 23-350 *et seq.* and 23-391, an argument not addressed by the parties in the present case.

A.R.S. § 23-391 explicitly incorporates federal overtime law (the FLSA) into Arizona law and mandates overtime pay for State employees who are eligible; and that the director of the Arizona Department of Administration has the authority to determine, and has determined, that non-exempt State employees are eligible for overtime compensation as set forth in FLSA regulations. Further, A.R.S. § 23-350 *et seq.* creates a statutory cause of action for unpaid overtime wages when an employee has a reasonable expectation to be paid overtime, and ADES employees have such a reasonable expectation pursuant to the State's personnel regulations incorporating overtime provisions of the FLSA and ADES policies mandating payment of overtime in accordance with the FLSA.

ARGUMENT

A. The State has waived immunity from liability under the FLSA by Arizona statute

In Arizona, public entities are to be found liable in accordance with the statutes and the common law of the State for the acts and omissions of their employees; and immunity is the exception and not the rule. *Fidelity Sec. Life Ins. Co. v. State, Dept of Ins.*, 191 Ariz. 222, 224-25, 954 P.2d 580, 582-83 (1998).

Judicial construction of immunity provisions in statutes applicable to government entities should thus be restrained and narrow. *Id.*, 191 Ariz. at 225; 954 P.2d at 583.

The State argues that it has sovereign immunity in FLSA cases because it has not consented to suit under the FLSA or any federal statute (Supplemental Brief of State Appellees, pp. 12-13). The State advances this argument by going so far as to conclude that the Legislature has at least implicitly “approved” sovereign immunity under the FLSA. *Id.* at 17. In A.R.S. § 23-391(A)(1), however, the Legislature has established a waiver of sovereign immunity with regard to FLSA overtime claims by expressly requiring payment of overtime compensation to State employees determined by the director of the Arizona Department of Administration to be eligible for overtime compensation “if overtime compensation is mandated by federal law.” And indeed, the director of the Arizona Department of Administration, who is statutorily delegated rulemaking and policy making authority pursuant to A.R.S. § 41-703(3) and (4), has specifically incorporated by reference FLSA Regulations 29 CFR 553 (Application of the Fair Labor Standards Act to Employees of State and Local Governments) and 29 CFR 778 (Overtime Compensation) into Arizona personnel regulations regarding the payment of overtime; and has specifically provided for the payment of overtime compensation pursuant to the FLSA to non-exempt employees. *See* A.A.C. R2-5A-404(A) and (C).

In A.R.S. § 23-350, the Legislature has further established the waiver of immunity against the State for unpaid overtime under the FLSA for employees of the ADES, such as Spitler and Redgrave. A.R.S. § 23-351(C)(3) expressly requires that the State timely pay its employees overtime wages due, mandating that for purposes of an unpaid wage claim “**overtime** or exception pay shall be paid. . . .” (Emphasis added). A.R.S. § 23-350(3) provides that the “**Employer** also includes **this state** and any county, municipality, school district or other political subdivision of this state.” (Emphasis added). A.R.S. § 23-352 provides that an employer may not withhold wages except for under certain limited circumstances. And, A.R.S. § 23-355 provides that “if an employer, in violation of this chapter, fails to pay wages due an employee, the employee may recover **in a civil action against the employer or former employer** an amount that is treble the amount of unpaid wages.” (Emphasis added).

Furthermore, under the A.R.S. § 23-350, “wages” means nondiscretionary compensation due to an employee in return for labor or services rendered by an employee for which the employee **has a reasonable expectation to be paid**. A.R.S. § 23-350(7) (Emphasis added). The State’s personnel regulations, discussed above, and ADES written policies, create an expectation on the part of ADES employees that overtime compensation will be paid to them. Specifically, ADES policies establish that “[t]he Arizona Department of Economic Security...shall ensure that

all employees are properly compensated for overtime hours worked” pursuant to the FLSA. *See* ADES Policy Numbers DES 1-26-31 and DES 1-26-31-01, at Appendix, pp. 10-14.

In sum, the Arizona legislature has waived immunity from FLSA overtime claims against the State because A.R.S. § 23-391 and Arizona personnel regulations specifically incorporate the federal law (the FLSA) with respect to payment of overtime wages to non-exempt employees; and the Arizona Wage Statute, A.R.S. 23-350 *et seq.*, explicitly mandates the payment of overtime compensation for State employees, such as non-exempt ADES employees, who have a reasonable expectation to receive it.

B. Waiver of Sovereign Immunity is Not Limited to Tort Actions

This Court should reject the State’s position that the legislature limited the doctrine of sovereign immunity only with respect to tort claims when it adopted the Actions Against Public Entities or Public Employees Act, A.R.S. §§ 12-820–12-826. The State’s position ignores the fact that Arizona law has long recognized that the doctrine of sovereign immunity must be narrowly construed; and the fact that the Arizona Wage Statute expressly allows for an employee of the State to pursue a private cause of action against the State for unpaid overtime, as explained above.

The State’s position also ignores the fact that several Arizona cases have held that public entities can be held liable in matters other than those arising from tort.

See e.g., City of Phoenix v. Fields, 219 Ariz. 568, 571 (2009) (analyzing sovereign immunity law and allowing class constructive fraud, breach of contract and unpaid wage claims to proceed against the City of Phoenix); *Valencia Energy Co. v. Arizona Dept. of Revenue*, 191 Ariz. 565, 568-69, 576, 959 P.2d at 1259-60, 1267 (1998) (after analyzing whether a claim for equitable estoppel is impacted by the doctrine of sovereign immunity, this Court determined that equitable estoppel may be asserted against the Arizona Department of Revenue); *Andrew S. Arena, Inc., v. Superior Court*, 163 Ariz. 423, 25-26, 788 P.2d 1174, 1176-77 (1990) (noting that since the *Stone* decision, the rule is liability and sovereign immunity is the exception, discussing A.R.S. § 12-821, and allowing class claim for injunctive and monetary relief against County by plaintiffs alleging building permit fees to be excessive); *Kromko v. Arizona Bd. of Regents*, 213 Ariz. 607, 615, 146 P.3d 1016, 1024 (2006) (finding that statutory immunity provisions did not prevent students from suing the Arizona Board of Regents for declaratory and injunctive relief following the Board's decision to raise tuition); and *County of La Paz v. Yakima Compost Co., Inc.*, 224 Ariz. 590, 603, 233 P.3d 1169, 1182 (App. 2010), *review denied* (holding that absolute governmental immunity did not shield the county from liability for decisions amounting to breach of its contractual obligations). These cases indicate that Arizona's waiver of sovereign immunity is not limited only to tort claims.

CONCLUSION

For all of the foregoing reasons, Amicus Curiae Kimberly Spitler respectfully requests that this Court find that the State has waived sovereign immunity with regard to claims under the Fair Labor Standards Act and consented to damages liability for State agency violations of the federal Fair Labor Standards Act.

RESPECTFULLY SUBMITTED this 21st day of September 2020.

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Declaration of Kimberly Spitler

I, Kimberly Spitler, declare as follows:

1. I have been an employee of the State of Arizona, Department of Economic Security (the "ADES") since August of 2015.
2. ADES Policies DES 1-26-31, Overtime Pay, attached hereto as Exhibit 1; and DES 1-26-31-01, Overtime Pay Procedures, attached hereto as Exhibit 2, are true and correct copies current ADES policies regarding overtime.

I declare, under penalty of perjury, that the facts set forth above are true to the best of my knowledge.

 _____ 9.21.2020
Kimberly Spitler Date

EXHIBIT 1



ARIZONA DEPARTMENT OF ECONOMIC SECURITY

CHAPTER		POLICY NUMBER	
1 Department of Economic Security		DES 1-26-31	
.SUBJECT		EFFECTIVE DATE	REVISION
31 Overtime Pay		September 29, 2012	4

**DES 1-26-31
Overtime Pay**

This policy does not create a contract for employment between any employee and the Department. Nothing in this policy changes the fact that all uncovered employees of the Department are at-will employees and serve at the pleasure of the appointing authority.

I. POLICY STATEMENT

The Arizona Department of Economic Security (DES), hereafter referred to as the Department, shall ensure that employees are properly compensated for overtime hours worked.

II. APPLICABILITY

According to the "Fair Labor Standards Act" (FLSA), specific criteria must be met in order for a position to be exempt from overtime payments. The two categories used to define an employee's eligibility for overtime are:

- Non-exempt.
- Exempt.

III. PROCEDURES

This policy is supported by a single departmental procedure, which identifies how action related to this policy will be conducted, including responsibilities, time frames, and required actions.

DES 1-26-31-01 Overtime Pay Procedures

IV. AUTHORITY

Fair Labor Standards Act (FLSA)

A.R.S. § 41-773 Causes for dismissal or discipline for employee in covered service

A.A.C. R2-5A-404 Arizona State Personnel System Rules (ASPS): Overtime

A.A.C. R2-5A-501 ASPS Rules: Standards of Conduct

V. DEFINITIONS

Exempt Employee: Exempt employees are not covered by the Fair Labor Standards Act (FLSA) and are not eligible for overtime compensation. Exempt employees do not receive any additional compensation for overtime hours worked, nor are they required to take leave for a partial day's absence, except in cases of Family and Medical Leave. FLSA determinations are made by the Arizona Department of Administration (ADOA), according to the provisions found in A.R.S. § 41-771.

Fair Labor Standards Act (FLSA): Federal wage and hour laws and regulations.

Flex Time: The time an employee takes leave during a workweek to offset extra hours worked during the same workweek.

Hourly Wage: An employee's base annual salary plus pay add-ons (i.e., stipends, shift differential, etc.) divided by 2,080 hours.

Non-exempt Employee: Non-exempt employees are covered by FLSA. Non-exempt employees receive overtime at the rate of one and one-half times their hourly wage for each hour of overtime worked. FLSA determinations are made by ADOA.

Overtime: All time worked by a non-exempt employee in excess of 40 hours in a workweek.

Pay Period: Bi-weekly pay cycle established by ADOA, General Accounting Office.

Workweek: 168 consecutive hours (7 days). The standard workweek for DES begins Saturday at 12:00 a.m. and ends Friday at 11:59 p.m.

VI. STANDARDS

- A. The Department shall compensate non-exempt employees who work more than 40 hours in a workweek in accordance with FLSA, ASPS Personnel Rules, and this policy.
- B. The Department has the authority to direct employees to flex out time to avoid exceeding 40 hours in a workweek.
- C. All overtime shall be approved in advance by the Director, Deputy Director, Deputy Assistant Director, Assistant Director, Program Administrator, or designee unless overtime is required for an emergency and such authorization is not feasible. Each Division is to issue a memorandum to Division staff, copying the DES Payroll Manager (site code 870A2), as to who is designated to approve overtime.
- D. Supervisors shall manage employee work schedules to ensure that an employee does not work overtime without prior approval. Supervisors must ensure that employees do not work varying shifts without prior approval, causing an unexpected overtime situation.
- E. The Department may require employees to work overtime. If the Department requires employees to work overtime, employees will be assigned overtime in the following order:
 1. Employees who volunteer for overtime will be assigned overtime first. If there are more qualified employees who volunteer to perform the duties than are required, they will be selected on a rotational basis, as determined by the supervisor.

2. In the absence of employees who volunteer for overtime, if more than one employee is qualified to perform the duties required, employees will be assigned on a rotational basis, as determined by the supervisor.

F. Employees required to work overtime in an emergency situation shall make every attempt to notify their supervisor immediately upon the supervisor's availability, and the supervisor will immediately notify the Director, Deputy Director, Deputy Assistant Director, Assistant Director, Program Administrator, or designee, following the notification path established by the Division.

Examples of what constitutes an emergency include, but are not limited to, those instances when a DES customer's health, safety, or welfare is at risk, or the basic functionality of the Department is at risk.

G. Non-exempt employees shall ensure that all hours worked and any leave used are accurately reflected on his/her timesheet. All totals shall be added correctly, all leave time should be accurately and properly recorded, and any overtime hours should be accurately and properly recorded. Employees that fail to follow this policy may be subject to disciplinary action, up to and including dismissal from state service.

H. Supervisors shall ensure that each employee has accurately filled out the timesheet to reflect hours worked and any leave used. If the timesheet is not completed correctly, it is the supervisor's responsibility to ensure the timesheet is corrected before submitting it for entry. Failure to follow this policy may result in disciplinary action, up to and including dismissal from state service.

I. All overtime compensation shall be paid by the Department as monies to the employee in his/her normal paycheck. The Department does not offer compensatory leave in lieu of cash payment for overtime hours worked. Overtime compensation shall be added to the employee's normal paycheck for the pay period for which the overtime hours are recorded.

EXHIBIT 2

ARIZONA DEPARTMENT OF ECONOMIC SECURITY



PROCEDURE NUMBER	
DES 1-26 -31-01	
TITLE	POLICY
Overtime Pay Procedures	DES 1-26-31
PROCESS OWNER	EFFECTIVE DATE
Human Resources Administration	September 29, 2012
	REVISION
	4

**DES 1-26-31-01
Overtime Pay Procedures**

This procedure does not create a contract for employment between any employee and the Department. Nothing in this procedure changes the fact that all uncovered employees of the Department are at-will employees and serve at the pleasure of the appointing authority.

I. PURPOSE

The purpose of these procedures is to establish a process for non-exempt employees to be reimbursed for overtime hours worked.

II. PROCESS

- A. Non-exempt employees shall ensure that all hours worked and any leave used are accurately reflected on his/her timesheet.
 - 1. Indicate regular hours worked.
 - 2. Record any overtime hours.
 - 3. Ensure that all leave time is properly identified.
 - 4. Add all totals correctly.
- B. Supervisors shall ensure that each employee has accurately filled out the timesheet to reflect hours worked and any leave used. If there are errors in the timesheet, the supervisor shall ensure that the timesheet is corrected before submitting it for entry.
- C. All overtime compensation shall be paid to the employee as monies to the employee in his/her normal paycheck. Overtime compensation shall be added to the employee's normal paycheck for the pay period for which the overtime hours are recorded.

NOTE: The Department does not offer compensatory leave in lieu of cash payment for overtime hours worked.

- D. Overtime shall be calculated by workweek rather than pay period or by hours worked in one day. Non-exempt employees who actually work over 40 hours in one workweek shall receive overtime compensation at one and one-half hours of pay for each hour worked in excess of 40 hours in a week. Exempt employees are not eligible to receive overtime.
- E. Leave hours (i.e., Holiday, Sick, Annual, etc.) shall not be used when determining overtime compensation; calculations shall include *only* hours that the employee actually worked.

- F. If annual leave or sick leave are requested and approved during a week in which extra hours are worked, the leave hours shall be offset on an hour-for-hour basis (flexed out) to minimize the use of leave and avoid compensation of over 40 hours in the workweek.
- G. Overtime hours worked in one workweek shall not be flexed in another workweek even if the workweeks are in the same pay period. If overtime hours cannot be flexed in the same workweek that they are earned, the non-exempt employee must receive overtime compensation, as outlined in DES 1-26-31, and in accordance with the Fair Labor Standards Act (FLSA) and the Arizona State Personnel System (ASPS) Rules.