the proceedings were too preliminary to warrant federal deference given that there was no record of the purpose of the Board's pending, but indefinite, hearing. The Board countered that it was giving Mulholland the process he had requested on election day, but the Circuit Court found this cut against the Board's position because it indicated the purpose of the hearing was remedial – not coercive – meaning it was even further from a criminal proceeding than the Court initially proposed.

Completely independently, the Circuit found a second reason to deny *Younger* abstention: the Board was attempting to enforce a law already deemed, in a final judgment by a federal court, facially unconstitutional. This was important given that *Younger*, though itself an exception to the general rule that federal courts must hear cases and controversies within their jurisdictions, has exceptions of its own. The relevant exception here was that *Younger* does not apply when federal courts are enjoining enforcement actions involving "bad faith, harassment, or a patently invalid state statute." Here, the Board invoked *Younger* against the enforcement of a statute that was already deemed facially unconstitutional. The Board countered that *Younger* was appropriate because in 2003 the law was only deemed facially unconstitutional as to the plaintiffs in that case. This argument was rejected: as the court put it "[w]e have not encountered before the idea of facial unconstitutionality as applied only to a particular plaintiff. Facial unconstitutionality as to one means facial unconstitutionality as to all, regardless of the fact that the injunctive portion of the judgment directly adjudicated the dispute of only the parties before it."

http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D03-20/C:13-3027:J:Hamilton:aut:T:fnOp:N:1311081:S:0 (last accessed Apr. 3, 2014).

Employment: Workers Wrongly Classified as "Fire Protection Employees" Win Liquidated Damages Under FLSA

Haro v. City of Los Angeles, Nos. 12-55062, 55310 (9th Cir. Mar. 18, 2014)

In the latest episode of an ongoing battle between Los Angeles and City employees engaged in activities incidental to firefighting, the Ninth Circuit has ordered the City to pay liquidated damages to workers who were improperly classified as "fire protection employees" and deprived of overtime pay.

In 1999 dual-trained paramedics (both firefighters and medics) and quality improvement analysts for the city of Los Angeles sued the City under the Fair Labor Standards Act (FLSA), claiming the City had improperly categorized them under the FLSA as "fire protection employees," thereby limiting their overtime pay. Being classified as such, instead of receiving time and half for every hour worked over 40 in one week, they had to work over 212 hours in a twenty-eight day period before receiving time and a half.

The City lost that case and, more significantly, because the City had lost a similar case brought against it in 1997, the City had to pay liquidated damages because it was deemed to have acted in bad faith.

Last year Los Angeles again found itself in litigation over its classification of employees as fire protection employees. This time the plaintiffs were emergency dispatchers and aeromedical technicians. Dispatchers are those that receive calls and then dispatch firefighters and other emergency personnel to the scene of an emergency. They are based out of the city hall building, and do not go to the scene of accidents unless the accident scene is so big that liaisons are needed between incident commanders and operations. This has not happened in ten years and, even if it does occur, the dispatchers do not actually fight fires while on scene. The aeromedical technicians fly in air ambulances and must be certified as both firefighters and paramedics, but are at emergency scenes to administer medical care. They are required to wear fire-resistant Nomex in case the helicopter crashes, but these suits are not certified for firefighting. Such air ambulances are occasionally used in brush fires to drop water on fires, but if used the paramedics never fly with the helicopter to the scene, rather they stay at the water pick-up location while the water is deposited.

FLSA requires employers to pay all employees time and half for every hour over forty they work in a week period, excepting from this rule employees "engaged in fire protection." Plaintiffs claimed the city improperly classified them and that, in fact, they were similarly situated to the paramedics in the previous case, *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005), meaning they should be re-classified and given more overtime. They also asserted that under FLSA, 29 U.S.C. § 255(a), the statute of limitations should be extended from the standard two years to three years since the city's classification of them as "fire protection employees" was a willful violation of FLSA and, moreover, that they were entitled to liquidated damages based on the city's bad faith in complying with FLSA. The district court granted the plaintiffs' summary judgment motion by applying *Cleveland* and held the three-year statute of limitations and liquidated damages both applied.

Los Angeles appealed the district court ruling, arguing that 1) since dispatchers and aeromedical technicians contribute directly to firefighting they come within the FLSA definition of "fire protection employees," 2) without indicia that the plaintiffs were misclassified the City did not willfully violate FLSA and only the two-year statute of limitations should apply, and 3) without such indicia, the lower court erroneously deemed the City to have acted in bad faith in complying with FLSA, such that liquidated damages were inappropriate.

HELD: The Ninth Circuit affirmed the district court on all three issues, forcing the City to pay liquidated damages to all plaintiffs.

DISCUSSION: FLSA was passed in 1938 and initially exempted employees engaged in "fire protection activities" including "[A]ny employee . . . who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment

of fires, including *such incidental nonfirefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards.* . . . The term would *also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities*." (emphasis added).

But in 1999 Congress enacted §203(y) of the FLSA specifically defining "employee[s] in fire protection activities" and left out the emphasized language above. Instead, as the Ninth Circuit paraphrased, the term now includes only those employees who "1) [are] trained in fire suppression; (2) ha[ve] the legal authority and responsibility to engage in fire suppression; (3) [are] employed by a fire department; and (4) [are] engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk." Only the second requirement—responsibility to engage in fire suppression--was at issue in this case, and the Court looked to *Cleveland* to interpret the point. It noted that *Cleveland* had held that only those who have an actual job obligation to perform fire suppression fulfill the definition of "responsibility" to engage in fire suppression; aeromedical paramedics, like the ground paramedics involved in the previous case, are tasked with treating the injured and clearly are not obligated to fight fire. They do not carry firefighting equipment, for example, are not regularly dispatched to fire scenes, do not have protective gear for fighting fire, and not one has ever been ordered to fight a fire.

The Circuit Court found the same rule applied to dispatchers, which the court noted are even further removed from the scene of an active fire than the medics. They are tasked with dispatching necessary personnel to the scene of a fire and are not even required to be trained in firefighting.

The City countered, unsuccessfully, that the FLSA phrase "responsibility to engage in fire suppression" should be expanded to include all those employees who have a direct causal connection to fire suppression. The court rejected this argument, citing the amendments which had clearly narrowed the scope of the FLSA regarding firefighting.

The City also lost as to the statute of limitations because the court found it had willfully violated FLSA. The court had little difficulty finding that the City "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute" given the City's long history of litigation over the classification of employees in firefighting. (Perhaps more damning was the revelation that, prior to this litigation, the City had classified dispatchers as within the "Bureau of Support Services," which included the maintenance division, operations control, and fire facilities, but once the litigation began the City reassigned them to the "Bureau of Emergency Services," which included all "personnel normally engaged in fire fighting . . . ."

Based on the finding that the City had not acted in good faith, it also lost on the issue of liquidated damages. The question of how to calculate the liquidated damages was one of first impression for the Ninth Circuit. FLSA commands that if overtime has not been properly paid, an employer may credit overtime payments it has made to the

employee against overtime payments it owes the employee. However, how such credit is to be calculated is not clear.

The Sixth and Seventh Circuits have determined that the credit must be calculated on a week-to-week basis, while the Eleventh and Fifth Circuits have held that the payments can be calculated on a cumulative basis. The Ninth Circuit sided with the Sixth and Seventh on this issue for two reasons. First, it noted that § 207(a) sets out how overtime in general shall be paid, using a forty-hour, seven-day week and determined that any requirement in the act for a calculation of back pay must be "read" within this context. Second, it was persuaded by reasoning in the Seventh Circuit which held that if a city were able to use a cumulative calculation "the City would be the recipient of the windfall, and in fact would be placed in a substantially better position than if it had complied with the overtime requirements of the FLSA all along. . . ."

http://www.gpo.gov/fdsys/pkg/USCOURTS-ca9-12-55310/pdf/USCOURTS-ca9-12-55310-0.pdf (last accessed Apr. 3, 2014).

Guns: San Francisco Ordinance Requiring Guns to Be Locked Up and Prohibiting Sale of Hollow Point Bullets is Upheld

Jackson v. City and County of San Francisco, No. 12-17803 (9th Cir. Mar. 25, 2014)

In another decision construing *Heller*, the Ninth Circuit has upheld a San Francisco ordinance which prohibits the sale of hollow-nosed bullets and requires handguns to be locked up or disabled unless in the possession of an adult. The Circuit Court found that these restrictions do not unreasonably burden the core of the Second Amendment right and satisfy a significant governmental interest, sufficient to satisfy the appropriate standard of review—intermediate scrutiny.

The San Francisco Code has two ordinances with which Espanola Jackson and the National Rifle Association disagree. First, §4512 provides that handguns within homes must be either in a locked container or disabled with a trigger lock, unless a person over 18 years of age physically has the gun on their person. Second, §613.10(g) prohibits the sale (but not the possession) of "hollow point" bullets, e.g. those designed to expand or fragment upon impact.

Jackson brought suit in 2009 against the City claiming these sections were impermissible violations of the Second Amendment. In 2012 Jackson moved for a preliminary injunction, which the district court denied. Jackson appealed.

HELD: The Ninth Circuit affirmed the district court's denial of a preliminary injunction, holding the provisions at issue restrict but do not destroy the Second Amendment rights