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Attention Employers: Be Careful How You Classify Your Litigation Support or E-Discovery Employees

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Kadden v. VisuaLex, LLC, No. 11-CV-4892 (S.D.N.Y. Sept. 24, 2012)

On September 24, 2012, United States District Judge Scheindlin, recognized and respected for her e-Discovery related opinions, ruled that a law school graduate who was hired as a $75,000-a-year litigation graphics consultant was not exempt from the overtime requirements of the Fair Labor and Standards Act ("FLSA").

In *Kadden v. VisuaLex, LLC*,***[1]*** the Plaintiff, a law school graduate, sued her former employer, VisuaLex, LLC, to recover unpaid overtime and liquidated damages under the Fair Labor Standards Act and New York Labor Law. The Plaintiff earned her Juris Doctor in 2001 and worked for VisuaLex from 2008 through 2011 as a Litigation Graphics Consultant. In 2009, VisuaLex suspended overtime pay in response to the financial crisis. VisuaLex did not anticipate any problems with the suspension, as it believed that graphic consultants were exempt from the overtime requirements of the FLSA.

Kadden then sued VisuaLex seeking compensation for any time she worked over forty hours. In response, VisuaLex argued that it did not have to pay her overtime because she was exempt under the creative professional exemption, learned professional exemption, administrative employee exemption, or a combination thereof.

In determining whether the Plaintiff was exempt from the overtime requirement, the Court looked at the employer's offer letter; offer letters to other employees in similar positions; and the Plaintiff's job title, duties, training, and education. According to the Court, the Plaintiff's job consisted of reading background material on each case, including depositions, expert material, and other documents related to the case, and then "com[ing] up with creative ways, strategic ways of not only how to depict the information in individual graphics, but also…creating a visual framework that … help[s] the trial team advance their case." When analyzing the Plaintiff's duties, the Court concluded that the duties actually performed by Plaintiff and those listed in the Offer Letter did not require specialized training, imagination or originality, and were not related to the administration of VisuaLex. Therefore, they were not sufficient to meet any of the exempt classifications and the Plaintiff was entitled to overtime pay even though she held an advanced degree. For a complete analysis of the employment issues visit our post on our Employment Litigation blog.

In making the decision, Judge Scheindlin emphasized that employers cannot rely solely on job titles or education to satisfy the exempt status of an employee, and instead, must engage in an analysis of the employee's job

duties. This case, consequently, brings forth an interesting issue as to how law firms and litigation support vendors classify their employees who perform e-discovery related tasks and hold a Juris Doctorate. On one hand, these e-discovery employees perform work that is very similar to the trial preparation work that a paralegal or IT person would perform, such as collecting electronically stored information and preparing it for trial. On the other hand, however, e-discovery employees are also often asked to perform tasks that first year associates often perform, such as reviewing documents, drafting discovery demands, and partaking in meet-and-confers.

With this in mind, it is important to make sure that when you hire an employee to join your e-discovery department, you clearly state what duties they will perform and ensure that they actually perform those duties before automatically classifying them as exempt employee under the FLSA.

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[1]*Kadden v. VisuaLex, LLC*, No. 11-CV-4892(SAS) (S.D.N.Y. Sept. 24, 2012, Sheindlin, J.).