The Burger Court Opinion Writing Database

Falk v. Brennan

414 U.S. 190 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 29, 1973

Re: No. 72-844 - Falk v. Brennan

Dear Potter:

Please join me.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 5, 1973

Dear Potter:

Please join me in your opinion in 72-~~746~~ 844, Falk v. Brennan.

WILLIAM O. DOUGLAS

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 20, 1973

Dear Bill:

In 72-844, Falk v. Brennan, I had previously joined Potter. But after studying your concurring and dissenting opinion I have decided to ask you to join me.

William O. Douglas

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 6, 1973

MEMORANDUM TO THE CONFERENCE

RE: No. 72-844 - Falk v. Brennan

In due course I shall circulate a dissent in the above.

W.J.B.Jr.

Circulated
11-19-73

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-844

E. E. Falk, Individually and as Partner in Drucker & Falk, et al., Petitioners, *v.* Peter J. Brennan, Secretary of Labor, United States Department of Labor.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[November —, 1973]

MR. JUSTICE BRENNAN, concurring in part and dissenting in part.

I concur in the Court's holding that petitioners are "employers" of the maintenance workers who service the apartment buildings managed by D & F.

I dissent, however, from the holding that for the purposes of § 3 (s)(1), D & F's "annual sales made or business done" is to be measured solely by its commissions. The Court acknowledges that the typical commodity sale must be measured by the gross proceeds of the sale, rather than by the commission or profits the seller may receive, but does not apply that same standard to D & F's sale of rental space. Without discussing the statute or its attendant legislative history, the Court argues that its conclusion follows "inescapabl[y]" from what it perceives to be a "critical difference" between the two types of sales: "when a lease is negotiated by D & F, its remuneration is calculated not from the proceeds derived from that lease, but only from the rentals collected during its managerial tenure, during which period it renders significant and substantial management services beyond its earlier service in negotiating the lease." *Ante*, p. —.

Circulated
12-28-73

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-844

E. E. Falk, Individually and as Partner in Drucker & Falk, et al. Petitioners, v. Peter J. Brennan, Secretary of Labor, United States Department of Labor	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[November --, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

I concur in the Court's holding that petitioners are "employers" of the maintenance workers who service the apartment buildings managed by D & F.

I dissent, however, from the holding that, for the purposes of § 3 (s)(1), "the enterprise of D & F is limited to the sale of its professional management services," and that those services must be measured by D & F's commissions. The record in this case leaves no doubt whatever that D & F's enterprise activities resulted in both the sale of professional management services *and* rental space. While the Court acknowledges that sales of rental space are "sales made or business done" within the meaning of § 3 (s)(1), *ante*, p. --, it nevertheless decides that rental sales should not be attributed to D & F because, "when a lease is negotiated by D & F, its remuneration is calculated not from the proceeds derived from that lease, but only from the rentals collected during its managerial tenure, during which period it renders significant and substantial management services beyond its earlier service in negotiating the lease." *Ante*, p. ---.

2nd DRAFT

Circulated: NOV 1 1973

Recirculated:

SUPREME COURT OF THE UNITED STATES

No 72-844

E. E. Falk, Individually and as Partner in Drucker & Falk, et al., Petitioners, *v.* Peter J. Brennan, Secretary of Labor, United States Department of Labor.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[November —, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

The Secretary of Labor initiated this action against the petitioners, partners in a real estate management company, for an injunction against future violations of various provisions of the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*, and for back wages allegedly due to employees affected by past violations of the Act.[1] The petitioners' defense was that they are not "employers"[2] of the employees involved, and that their business is not a single "enterprise" that is subject to the Act's requirements.[3]

[1] The complaint alleged violations of the minimum wage (29 U. S. C. § 206 (b)), overtime (29 U. S. C. § 207 (a)(2)), and recordkeeping (29 U. S. C. § 211 (c)) provisions of the Act.

[2] Section 3 (d), 29 U. S. C. § 203 (d), states that an "'Employer' includes any person acting directly or indirectly in the interest of an employer with respect to an employee."

[3] This defense brought together two separate contentions. First, the petitioners contended that their combined activities do not constitute an "enterprise," as that term is defined in § 3 (r), 29 U. S. C.

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No 72-844

E. E. Falk, Individually and as Partner in Drucker & Falk, et al., Petitioners, *v.* Peter J. Brennan, Secretary of Labor, United States Department of Labor.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[November —, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

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[1] The complaint alleged violations of the minimum wage (29 U. S. C. § 206 (b)), overtime (29 U. S. C. § 207 (a) (2)), and recordkeeping (29 U. S. C. § 211 (c)) provisions of the Act.

[2] Section 3 (d), 29 U. S. C. § 203 (d), states that an "'Employer' includes any person acting directly or indirectly in the interest of an employer with respect to an employee."

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

6th DRAFT

From: Stewart, J.

Circulated:

Recirculated: NOV 21 1973

SUPREME COURT OF THE UNITED STATES

No. 72-844

E. E. Falk, Individually and as Partner in Drucker & Falk, et al., Petitioners, v. Peter J. Brennan, Secretary of Labor, United States Department of Labor	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[November —, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

The Secretary of Labor initiated this action against the petitioners, partners in a real estate management company, for an injunction against future violations of various provisions of the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*, and for back wages allegedly due to employees affected by past violations of the Act.[1] The petitioners' defense was that they are not "employers"[2] of the employees involved, and that their business is not a single "enterprise" that is subject to the Act's requirements. This latter contention brought together two separate arguments. First, the petitioners contended that their com-

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[2] Section 3 (d), 29 U. S. C. § 203 (d), states that an "'Employer' includes any person acting directly or indirectly in the interest of an employer with respect to an employee."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 19, 1973

Re: No. 72-844 - Falk v. Brennan

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 8, 1973

Re: No. 72-844 -- Falk v. Brennan

Dear Potter:

I will await Bill Brennan's dissent.

Sincerely,

T. M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 26, 1973

Re: 72-844 -- Falk v. Brennan

Dear Bill:

Please join me in your opinion in this case.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 6, 1973

Re: No. 72-844 - Falk v. Brennan

Dear Potter:

You may join me in the proposed opinion you circulated on November 1. I have, however, the following comments which, although they may have no appeal, I pass on for your consideration:

1. The Solicitor General, on page 24, n. 13, of his brief, suggests that if the Court decides the dollar measurement issue contrary to his position (as, apparently, we shall), the case should be remanded for the District Court to determine whether other activities of the petitioners are "related," within the meaning of 29 U.S.C. § 203(r), and would make up any difference between the commissions and the designated statutory amount. I wonder, therefore, whether the case should be reversed and remanded rather than flatly reversed. I have not studied the record in detail as to this; your chambers will have done so, and I shall be guided by your conclusions.

2. I would feel happier if somewhere in the opinion, perhaps at the end of footnote 3, it could be stated that the applicable measure of annual gross volume since January 31, 1969, is $250,000. The opinion has application, of course, to years when the $500,000 measure was in force, and it implies, in footnote 10 and perhaps elsewhere, that that particular dollar limitation has not continued. Nonetheless, I would prefer to be specific.

3. This comment follows from the one immediately preceding. In footnote 12, it is stated that we do not reach the "employers" issue because of our resolution of the dollar volume issue. This is logical and follows customary appellate routine. On the other hand, our taking this path leaves the "employers" issue unresolved for the second time. I earnestly hope that we are not to be subjected to still a third full-fledged review, at great cost to the litigants, of the issue that is now

a comparatively minor one in a narrow area of the Fair Labor Standards Act. I, for one, would be willing to step out and violate appellate decorum by indulging in a dictum or an additional holding to the effect that D & F was an employer (even though the employees were also employees of the owners). Byron went this far in his dissent in Arnheim & Neely, 410 U. S., at 525, and I suspect a majority of the Court would reach that conclusion if the issue were not to be avoided. I am willing to telegraph my own feelings by a separate concurrence, if you feel constrained not to go that far in the opinion for the Court.

Sincerely,

Harry

Mr. Justice Stewart

cc: The Conference

November 9, 1973

Dear Potter:

Re: No. 72-844 - Falk v. Brennan

I very much appreciate the changes effectud with your fourth draft circulated yesterday. I am, of course, with you.

Sincerely,

HAB

Mr. Justice Stewart

November 5, 1973

No. 72-844 Falk v. Brennan

Dear Potter:

As I have indicated, I intend to join your opinion. But I do have some suggestions for your consideration.

1. I think the opinion would be strengthened by an emphasis on what might be called the business and economic realities. I start, as I know you do, from the premise that it is an unusual concept (almost a bizarre one) to measure gross sales or business done by the total dollar flow through a business. Such an approach is directly contrary to established tax and accounting principles. We can be sure that D&F's audited profit and loss statement will not report as gross sales of the partnership the gross rentals from all of the properties over which D&F has managerial responsibilities. I am confident that the SEC would not tolerate the selling of securities by a real estate corporation if the corporation treated gross rentals in its financials as though they were gross sales of the enterprise. Certainly, state and federal tax laws are in accord with accepted accounting principles in this regard, rather than with the unprecedented concept which the government now tries to read into the FLSA.

Another aspect of the "economic realities" argument that might be made in this case (and which has substantial appeal for me) focuses on the notion of a business' impact on interstate commerce. In its 1966 amendments to the Act, Congress apparently shifted emphasis from what a business can afford to a broader concept of measuring the economic impact that a business has on interstate commerce. It is fair to say, I think, that this is - or at least should be - the central issue of substance.

It seems to me the SG's principal point. * And, it is here that the SG's argument makes little sense, as he attempts to place full responsibility for the economic impact produced by the rental of units on petitioners and the personnel supervised by petitioners. The SG ignores the fact that, absent petitioners, the owners would continue to rent precisely the same units and probably would employ the same maintenance personnel (now paid, in an ultimate sense, by the owners, regardless of who may, technically speaking, be the "employer") to maintain them. Or putting it differently, the impact on interstate commerce of the 30 or more rental properties now being managed by petitioners would remain the same if D&F went out of business and simply turned the properties back to their owners for management or for the engaging, as is conceivable, of 30 different rental agents.

In my view, the legislative history of the 1966 amendments is ambiguous with regard to the appropriate measure of "gross sales or business done". (In this connection I have wondered whether your opinion might address this somewhat more fully.) In the absence of a clear Congressional declaration to the contrary, we should not presume that the Congressional purpose was to legislate a rule for the FLSA that is totally foreign to long accepted business, accounting and tax practices. Nor should we presume that Congress would have been blind to the economic realities with respect to incremental impact on interstate commerce. ** These, it seems to me, give us the strongest arguments not to follow the contrary view of the Circuits, which have not, I believe, given appropriate weight to these considerations.

It seems a certainty that the dissent in this case will come down hard on the legislative history of the 1966 amendments (see SG's brief, pp. 16, 17). The best answer, to my mind, is to address the "underlying concern of the Act" and to argue - as we can soundly - that the rental and management activities of D&F add little or nothing to the impact of these rental units upon interstate commerce. Indeed, I suppose it could be argued that the impact would be greater if each of

*For example, at p. 19 of his brief, the SG cites Wirtz v. Allen Green & Associates, Inc., 379 F. 2d 198, 200 (CA 6 1967) for the following proposition: "The underlying concern of the Act is the impact of the particular activity upon interstate commerce."

**Could Congress really have meant, for example, to apply the FLSA to a rental management company with gross rentals of $500,001 and gross commissions of, perhaps $30,000?

the owners managed his or its own rental unit, as there would then be fewer opportunities for the sharing of employees engaged in certain service activities. Certainly, supplies purchased, and the flow thereof in interstate commerce, would remain the same, and there is no reason to think that the number of employees involved would be less.

2. At the bottom of page 7 (last sentence), the opinion states "that the enterprise of D&F is limited to the sale of its professional management services. . . ." This is an accurate, as well as the most favorable, description of D&F's business. I prefer this description to the more detailed one on page 2 of the opinion, where it is said that "D&F assumes two primary obligations under its contracts with these apartment owners", one of them being the collection of rents and the representation of the owners "in leasing any apartments that become vacant."

Both statements, page 7 and page 2, are factually correct. I have a preference, as a matter of advocacy, for emphasizing that the rental agent performs a package of services which includes all of the things mentioned by the opinion, without singling out any particular service (such as renting vacant apartments) in a way that suggests that it is more important than keeping the apartments in attractive condition, providing quality service, supervising the employees, etc.

3. As the opinion states in footnote 12, there is no occasion for the Court at this time to pass upon the "employee" question. In view of this, I wonder whether the last sentence in the middle paragraph on page 3 should not be omitted. When I read it, before seeing footnote 12, I thought it "leaned" toward the view that D&F is not the employer.

4. At the bottom of page 8, the opinion states that D&F's remuneration is calculated, not from the proceeds derived from the leases negotiated by D&F, but from the rentals collected during its managerial term. I have not looked at the record or even reexamined the agreement between D&F and the apartment owners. Some lease agreements I have seen (and written) have clauses entitling the agent who procured the tenant and negotiated the lease to his commissions for the duration of the term - regardless of whether the agent is or remains the rental agent in charge of managing the leased property. This cuts both ways. It would mean, with respect to leases negotiated before D&F became the agent, that it would receive none of the rentals collected.

I merely raise a question about this sentence, suggesting that the facts be verified.

5. I send to you with this memorandum a copy of your opinion on which I have noted a few "fly-specking" changes for your consideration.

Sincerely,

Mr. Justice Stewart

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 9, 1973

No. 72-844 Falk v. Brennan

Dear Potter:

Please join me.

I may add a brief concurrence after seeing Bill Brennan's dissent.

Sincerely,

L.F.P.

Mr. Justice Stewart

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 26, 1973

No. 72-844 Falk v. Brennan

Dear Potter:

I am still with you.

Sincerely,

L. Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 6, 1973

Re: No. 72-844 - Falk v. Brennan

Dear Potter:

Please join me in your opinion for the Court.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 12, 1973

Re: No. 72-844 - Falk v. Brennan

Dear Potter:

Please join me.

Sincerely,

WHR

Mr. Justice Stewart

Copies to the Conference