

No. 18-8736

In the
Supreme Court of the United States

Juan Espinoza; Alberto Reyes; Antonio Naranjo; Roel Olivares,
Petitioners

v.

San Benito Consolidates¹ Independent School District,
Respondent

On Petition for a Writ of Certiorari
from the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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¹ The correct spelling for Respondent is San Benito Consolidated Independent School District; however, for this caption, Respondent is matching the incorrect spelling as used by Petitioners.

QUESTIONS PRESENTED

1. Whether the Petitioners failed to controvert the District's summary judgment evidence that Petitioners were properly paid overtime using the Fluctuating Workweek method for overtime calculations under 29 C.F.R. §778.114.
2. Whether the Court is required to sift through the record in search of evidence to support a party's opposition to summary judgment when the party failed to file the evidence with his summary judgment evidence.

LIST OF PARTIES

Petitioners are:

- (1) Juan Espinoza; Plaintiff - Appellant
- (2) Alberto Reyes; Plaintiff - Appellant
- (4) Antonio Naranjo; Plaintiff - Appellant
- (5) Roel Olivares, Plaintiff - Appellant

Respondent is:

- (1) San Benito Consolidated Independent School District

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STATUTORY PROVISIONS INVOLVED

29 C.F.R. §778.114(a):

An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount a straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because

such hours have already been compensated at the straight time regular rate, under the salary arrangement.

29 U.S.C. §207(k):

Employment by public agency engaged in fire protection or law enforcement activities.

No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if -

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT OF THE CASE

In this case, Petitioners challenge Respondent's calculation of their overtime pay using the Fluctuating Workweek method, instead of the §207(k) exemption, under the Fair Labor Standards Act ("FLSA") and the trial court's finding that Petitioners had not filed an expert report with their summary judgment evidence.

I. Procedural History

On July 7, 2014, Petitioners filed suit against the District, ("Respondent" or "District"), alleging that Respondent violated their rights under the Fair Labor Standards Act ("FLSA") for overtime pay issues and for violations of other statutory and constitutional provisions not at issue in this appeal.²

Respondent moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim.³ The district court denied in part and granted in part the Defendant's Motion to Dismiss.⁴ Respondent also filed a Motion for Summary Judgment on Petitioner's remaining claims, including their claims for overtime pay issues.⁵ The district court granted Defendant's Motion for Summary Judgment in favor of Respondent on Petitioner's FLSA Wage and Hour overtime claims.⁶

² R.24-51.

³ R.347-370.

⁴ R.1792 – 1804.

⁵ R.1057-1207.

⁶ R.1968-1989.

After a trial on the merits of the remaining claims, the Court granted Respondent's Motion for Judgment as a Matter of Law on Petitioners' FLSA retaliation claims and three of the officers' First Amendment claims. Two of the officers' First Amendment claims went to the jury, and the jury found in the District's favor.⁷

Petitioners appealed to the Fifth Circuit Court of Appeals, appealing the trial court's ruling on the Motion to Dismiss, Motion for Summary Judgment, Motion for Judgment as a Matter of Law, and the jury verdict; the Fifth Circuit affirmed the trial court's rulings in favor of the District. *See* App. A. Petitioners now petition this Court to reverse the portion of the Fifth Circuit's decision concerning only the summary judgment ruling on their FLSA overtime pay claims.

Respondent requests that this Court deny Petitioners' Petition for Writ of Certiorari as no compelling reasons exist for this Court to grant certiorari on the issues raised by Petitioners.

II. Factual Background

The Petitioners⁸ (the "Officers" or "Petitioners") are employed with San Benito Consolidated Independent School District as peace officers in the school district's police department.⁹

As employees of the school district, the Officers worked schedules similar to

⁷ R.2400-2407.

⁸ There were five plaintiffs in the courts below, but in the Petition before this Court only four remain, as it appears Plaintiff Omar Garza is no longer a party. *See* Pet. for Writ of Cert. at 1, 3.

⁹ R..2293-2294.

other employees of the District, having time off during school holidays and reduced summer work schedules; they had fluctuating work week schedules.¹⁰

San Benito CISD police officers are non-exempt salaried employees who were consistently compensated on a fixed salary with overtime compensation paid and calculated under the half-time fluctuating workweek methodology of 29 C.F.R. §778.114.¹¹

In March 2012, Officers Olivares and Reyes, on behalf of all the Petitioners, filed a complaint with the Department of Labor concerning their overtime calculations and pay.¹² In November 2012, the Department of Labor (“DOL”) completed its review of the Officers’ complaint regarding their wages and overtime calculations from 2010-2012 and found that the District had not violated FLSA and was in compliance with the FLSA provisions.¹³ The DOL concluded:

The allegations could not be substantiated. The employees were paid salary for all hours worked that provided compensation to the employees at a rate that was not less than the applicable minimum wage for all hours worked and where an employee worked over 40 hours the regular rate of pay of an employee was determined by dividing his total remuneration for employment in any workweek by the total number of hours actually worked in that workweek for which such compensation was paid....

The DOL compliance report found “Compliance (no violations found).”¹⁴

¹⁰ R.1167-1168.

¹¹ R.1194-1196; R.1522-1527.

¹² R.2296 at ¶19-20; R.2586; R.2423.

¹³ R.1194-1196

¹⁴ R.1194.

Respondent filed a Motion for Summary Judgment addressing Petitioners' FLSA overtime claim; its summary judgment evidence showed that the officers were properly paid half-time using the Fluctuating Work Week method under 29 C.F.R. §778.114 and the Department of Labor had found the District properly calculated the officers' overtime.¹⁵ Petitioners responded to the Motion for Summary Judgment, arguing Respondent should have used the §207(k) one and one-half times pay method to pay the officers, but failed to attach any expert report regarding overtime payments or calculations.¹⁶

The district court granted, and the Fifth Circuit affirmed, summary judgment in the District's favor.¹⁷ Both of the underlying courts noted that Petitioners failed to articulate their FLSA overtime claim, failed to produce their expert report with their summary judgment evidence, and failed to controvert the District's evidence.¹⁸ Both courts noted that although Petitioners referenced an expert report, they did not produce it with their Response to Motion for Summary Judgment, and the court was not required to scour the record for evidence supporting Petitioners' position.¹⁹ Petitioners now ask this Court to reverse the Fifth Circuit's decision and find that a fact question existed on what overtime calculation method was used and which one should have been used to pay Petitioners overtime and find that the underlying courts

¹⁵ R.1065-1067.

¹⁶ R.1262-1264; R.1979-1982; *see* App. A.

¹⁷ R.1979-1982; *see* App. A.

¹⁸ R.1979-1982; *see* App. A at 6-7.

¹⁹ R.1979-1982; *see* App. A at 6-7.

improperly refused to consider an expert report that was not included in the summary judgment evidentiary record.²⁰

REASONS FOR DENYING THE PETITION

I. Denial of the Petition for Writ of Certiorari is proper because no compelling reasons exist for the Supreme Court of the United States to grant review.

Pursuant to United States Supreme Court Rule 10, a review on writ of certiorari is not a matter of right, but of judicial discretion and will only be granted when there are compelling reasons.²¹ Petitioners have not articulated any compelling reason for the Court to exercise its discretion in this case. This case does not involve a conflict amongst the courts of appeal nor does it involve an important federal question that has not been but should be settled but this Court. Likewise, this case does not involve a decision that so far departed from the accepted and usual course of judicial proceedings to call for this Court to exercise its supervisory powers. Instead, this case involves case-specific facts and concerns questions of law that are settled and not in conflict.

The power to grant certiorari is a power that the Supreme Court sparingly exercises. *Camreta v. Greene*, 563 U.S. 692 (2011). In the case at hand, the issues raised by Petitioners specifically pertain to the parties themselves and have no public impact requiring the Court's review.

II. The Fifth Circuit correctly upheld summary judgment in the District's favor on Petitioners' FLSA overtime violation claims, as no material

²⁰ See Pet. for Writ of Cert. at 10-13.

²¹ U.S. Sup. Ct. R. 10.

fact issue existed concerning the application of the Fluctuating Workweek method of overtime pay.

Should the Court consider the question presented by Petitioner, Respondent contends that the Fifth Circuit and the trial court correctly applied the standards set forth in FED. R. CIV. P. 56(a) in granting Respondent's Motion for Summary Judgment on Petitioners FLSA wage and hour claims, finding no genuine dispute concerning any material fact.

A court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56 (a). The Fifth Circuit's review of a district court's grant of summary judgment is reviewed *de novo*. *Bridges v. Empire Scaffold, L.L.C.*, 875 F.3d 222, 225 (5th Cir. 2017).

Petitioners contend that the court erred when it found no genuine or material fact issue in dispute because they state that they attached excerpts from their expert witness' deposition testimony and a report by an employee of the school district, who both purportedly stated Petitioners were not paid correctly.²²

a. The Fluctuating Workweek Method was used for overtime pay calculations, and Petitioners did not carry their burden of proof to prove it should not have been used.

The FLSA provides that "no employer shall employ any of his employees...for a workweek longer than forty hours unless such employee receives compensation for

²² See Pet. for Writ of Cert. at 11.

his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he his employed.” 29 U.S.C. §207(a)(1).

The fluctuating workweek method (“FWW”) is a calculation method that can be used to comply with the overtime payment requirements of 29 U.S.C. § 207(a)(1). *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 636 (5th Cir.2001), *cert. denied*, 534 U.S. 825 (2001). The FWW is a method of calculation used to meet §207(a) overtime requirements; it is not an exception to the overtime pay requirement. Under the FWW, an employee employed on a salary basis who has hours that fluctuate from week to week may be paid a salary with the understanding with his employer that he will receive a fixed amount for straight time pay for whatever he is called upon to work in a workweek, whether few or many. 29 C.F.R. §778.114(a).

When there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek whatever their number, rather than for working 40 hours or some other fixed weekly work period, such salary arrangement is permitted.... Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate....

Id.

When an employer claims it paid an employee using the Fluctuating Workweek method, the employee bears the burden of proving that the employer failed to properly administer the FWW method. *See Clark v. Williamson Cty.*, No. A-10-CA-869 LY, 2012 WL 1222950, at *3–4 (W.D. Tex. Apr. 11, 2012), *subsequently aff'd*, 538 Fed. Appx 579 (5th Cir. 2013); *Cash v. Conn Appliances, Inc.*, 2 F.Supp.2d 884, 896

(E.D.Tex.1997) (“The employee alleging an improper application of the fluctuating workweek method bears the burden of proof.”)

In *Samson v. Apollo Resources, Inc.*, the Fifth Circuit explained:

The Fair Labor Standards Act generally requires that employees be paid an overtime premium of “time-and-one-half ” for all hours worked in excess of forty hours in a week. 29 U.S.C. § 207(a). The Department of Labor provides to employers various methods for calculating overtime compensation to suit different employment needs while still complying with § 207(a). One such method is the Fluctuating Workweek method. 29 C.F.R. § 778.114 (stating the guidelines governing the use of the FWW method). Under the FWW method, the employee receives a fixed salary as compensation for all hours worked by the employee, whether above or below forty hours, as well as an additional overtime premium for each overtime hour. *Id.* § 778.114(a). The overtime premium is calculated by dividing the fixed weekly salary by the number of hours that the employee actually works in a particular week to yield the employee's “regular rate of pay.” *Id.* The employee is paid an overtime premium of one-half his regular rate of pay for each overtime hour. This premium is in addition to his fixed weekly salary.

Samson, 242 F.3d at 633.

Contrasted with the FWW overtime calculation method, Section 207(k) of the FLSA provides an exception to the §207(a)(1) overtime requirement for law enforcement officer and firefighters; Section 207(k) exempts public agencies’ employment of an employee in law enforcement activities from §207(a) if it compensates the employee at one and one-half times the regular rate at which he is employed if the “number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to 28.” 29 U.S.C. §207(k); 29 C.F.R. §553.230(b). The regulations state that 171 hours is the maximum number of hours a law enforcement officer may work in a period of 28 days

before the officer must be paid an overtime wage under the Section 207(k) exception. *See* 29 C.F.R. §553.230(b); *Arnold v. State of Ark.*, 910 F. Supp. 1385, 1392 (E.D. Ark. 1995). The number of hours at the regular and overtime wage rates for periods fewer than 28 days is calculated by applying the same proportion as explained in 29 C.F.R. §553.230. *See Lee v. Coahoma County*, 937 F.2d 220, 224 (5th Cir. 1991).

Here, the District presented summary judgment evidence and argument that the Officers were paid overtime using the half-time rate under the FWW method 29 C.F.R. §778.114; the District did not use the §207(k) exemption for overtime.²³ The Officers argued, without supporting authority, that even using the FWW, they should be paid time and one-half - instead of the FWW half-time method – because, according to Petitioners, the 29 C.F.R. §778.114 methodology does not apply to law enforcement.²⁴ They cited to the deposition testimony of their expert, Ms. Stefanos, to claim the §778.114 methodology does not apply to law enforcement; however, she did not testify that it did not apply but that the use of the FWW method for overtime calculation depends on the situation.²⁵ They also claim “an employee” of the District had stated the officers were not paid correctly;²⁶ however, the employee did not find that they were paid incorrectly, but referred the officers’ overtime claims to legal counsel to make a determination if additional pay was owed to them.²⁷ Petitioners

²³ R.1065-1067.

²⁴ R.1263.

²⁵ R.1423 at 72:9-18.

²⁶ *See* Pet. for Writ of Cert. at 11.

²⁷ R.1470.

cited to no legal authority to support their argument, and they did not include their expert's report with their summary judgment evidence.

The evidence Petitioners did include in the summary judgment record, however, supported the District's position that the officers' overtime pay was calculated using the FWW method. For example, the officers' pay sheets demonstrated they worked fluctuating hours but were paid a fixed salary; their overtime was calculated based on an hourly rate (their set salary divided by actual hours worked each week), which hourly rate was then divided by 2 for the overtime rate, and overtime pay was paid at the overtime rate multiplied by the hours worked over 40.²⁸ Petitioners knew they had set salary and knew they were paid using the half-time FWW method; they just disagreed with it and thought they should be paid at time and a half.²⁹ *See Bailey v. County of Georgetown*, 94 F.3d 152, 156–57 (4th Cir.1996) (rejecting as “contrary to the plain language of the FLSA” the notion that employees under a fluctuating pay plan must understand the manner in which overtime pay will be calculated; employee simply must understand that while his hours may vary, his base salary will not).

Petitioners presented no legal authority in the courts below or to this Court that the FWW method should not or cannot be applied to Petitioners or that only the §207(k) exemption can be used for law enforcement personnel. Indeed, several courts have applied the FWW method to law enforcement personnel, instead of the §207(k) exemption. *See, e.g., Robinson v. Webster Cty. Bd. of Supervisors*, No. 3:05CV15, 2007 WL

²⁸ R.1522-1527.

²⁹ R.1324 at 43:7-11; R.1326 at 54:4-12; R.1333; R.1334 at 60:4-15; R.1395.

162289, at *2 (N.D. Miss. Jan. 17, 2007); *Aiken v. County of Hampton SC*, 977 F. Supp 390, 392, 399 (D. S.C. 1997); *see also Anderson v. Cty. of Kershaw*, 172 F.3d 862 (4th Cir. 1999) (applying FWW method to law enforcement personnel in conjunction with the §207(k) exemption for hours worked over 171 hours in a work period).

b. Petitioners failed to controvert the Department of Labor findings in the District's favor

The District also submitted summary judgment evidence that the Department of Labor's ("DOL") investigation found that the District was in compliance with the overtime regulations and had been paying the Officers correctly.³⁰ The DOL concluded:

The allegations could not be substantiated. The employees were paid salary for all hours worked that provided compensation to the employees at a rate that was not less than the applicable minimum wage for all hours worked and where an employee worked over 40 hours the regular rate of pay of an employee was determined by dividing his total remuneration for employment in any workweek by the total number of hours actually worked in that workweek for which such compensation was paid....³¹

Petitioners did not dispute this evidence. Petitioners failed to produce any evidence that the District had violated the FLSA's overtime wage requirements and thus, could not make out their *prima facie* case.³²

Petitioners "fail[ed] to provide any *specific* facts showing that the School District violated the FLSA." *See* App. A at 6. Petitioners attempt to raise disputed issues, but, as expressed by the district court and affirmed by the Fifth Circuit, Petitioners failed and continue to fail to explain how the issue of overtime

³⁰ R.1067; R.1193-1196.

³¹ R.1196.

³² R.1066; *see* R.1247-1567.

methodology is material. *See* App. A at 6. Petitioners provided no competent evidence to contradict the District or show it had improperly used the Fluctuating Work Week method or otherwise violated the FLSA, either at summary judgment or on appeal. *See* App. A at 6-7. Accordingly, the lower courts properly found in the District's favor.

III. *Petitioners' expert report was not filed with the summary judgment evidence, and the lower courts were not required to scour the record for Petitioners*

Petitioners argue that the lower courts should have considered its expert report of Ms. Tomi Jo Stefanos.³³ However, their expert's report was not included in their Response to Motion for Summary Judgment.³⁴ Instead, the only summary judgment evidence exhibits related to their expert were excerpts of her deposition testimony, not her report.³⁵ Petitioners wholly failed to include Ms. Stefanos' report with their summary judgment evidence, and instead attached the report to their Response to Defendant's Motion to Exclude Expert.³⁶

"Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915–16 & n.7 (5th Cir.), *cert. denied*, 506 U.S. 832 (1992). Nevertheless, Petitioners argue that the court should have sifted through the record and located their exhibit attached to a different motion for them.³⁷ That is not what the law requires.

³³ *See* Pet. for Writ of Cert. at 12-13.

³⁴ R.1247-1567.

³⁵ R.1419-1424.

³⁶ *Compare* R.1247-1567 (Plaintiff's Response to Motion for Summary Judgment) *with* R.1751-1791 (Response to Defendant's Motion to Exclude Expert); *see* R.1981 (district court noted that they failed to include or rely on the expert report in their summary judgment evidence).

³⁷ *See* Pet. for Writ of Cert. at 12-13.

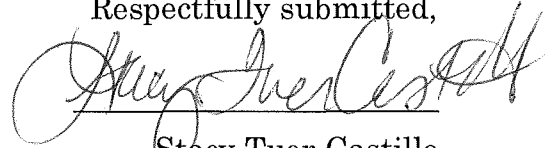
Moreover, Petitioners have failed to indicate how the expert report, if it had been included in the summary judgment record, would have changed the court's ruling. An expert's opinion on what law applies, such as whether the FWW method can be applied to law enforcement personnel, is a legal conclusion reserved for the court, not an expert. *See Highland Capital Mgmt., L.P. v. Bank of Am., N.A.*, 574 Fed. Appx 486, 491 (5th Cir. 2014) (legal conclusions are the province of the court, not an expert); *Goodman v. Harris Cnty.*, 571 F.3d 388, 399 (5th Cir. 2009) (“[A]n expert may never render conclusions of law.....”).

Accordingly, the lower courts did not err when refusing to consider the Petitioners' expert report when rendering summary judgment in favor of the District.

CONCLUSION

The trial court properly granted and the Fifth Circuit properly affirmed summary judgment on the Officers' FLSA wage and hour claims. Petitioners have not offered compelling reasons for the Court to grant Writ, as their claims pertain only to themselves personally and do not implicate matters of important jurisprudence affecting the greater public. The Court should deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Stacy Tuer Castillo", written over a horizontal line.

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APPENDIX

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A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

October 12, 2018

Lyle W. Cayce
Clerk

No. 17-40839

JUAN ESPINOZA; OMAR GARZA; ALBERTO REYES; ANTONIO
NARANJO; ROEL OLIVARES,

Plaintiffs - Appellants

v.

SAN BENITO CONSOLIDATED INDEPENDENT SCHOOL DISTRICT,

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:14-CV-115

Before SMITH, CLEMENT, and COSTA, Circuit Judges.

PER CURIAM:*

The plaintiffs, police officers for the defendant, San Benito Consolidated Independent School District (the School District), sued the School District for various labor and retaliation claims. The district court eventually dismissed or granted the School District judgment on all but one claim. A jury found for the

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 17-40839

School District on the remaining claim. The officers appeal the district court's rulings, including some of its evidentiary rulings at trial. We affirm.

FACTS AND PROCEEDINGS

I. Budgetary woes and solutions

At the end of the 2011–2012 school year, the School District was experiencing budget problems stemming from legislative funding cuts and increased health insurance costs. The shortfall was substantial, in part because the legislature implemented a \$5 million cut. Meanwhile, in March 2012, five officers of the School District's police department—Juan Espinoza, Omar Garza, Antonio Naranjo, Roel Olivares, and Alberto Reyes—filed a complaint with the Department of Labor (DOL), alleging violations of the wage and overtime protections of the Fair Labor Standards Act (FLSA).

Prior to August 2012, in preparation for the 2012–2013 school year, the School District created and approved a new budget that made significant cuts to multiple programs. It cut funds to and reduced eligibility for the pre-kindergarten program. It dissolved twenty-three teaching positions. It left nine maintenance positions vacant. It cut the day care program. It eliminated employee convenience leave. And, while the officers' DOL complaint was pending, it reduced the work days for all the officers in its police department from 226 days to 187 days, essentially cutting the officers' summer hours.

In addition to its immediate budgetary concerns, the School District had reason to reduce the police officers' hours. There was less need for their presence during the summer months when students were out of school. The School District's security costs were higher than those of neighboring districts. The state had recommended that 65% of the School District's budget be allocated to costs directly associated with teaching, but it had not yet managed to meet this goal. Additionally, the School District's police department had been organized with funds from a federal grant, which were exhausted in 2012.

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In September 2012, after the cuts had been made, the School District realized that it would receive an additional two or three million dollars in funding because of an accounting error that was not discovered until after the new budget's approval. The School District was advised to save a portion of those funds because it was possible that they would have to be returned. These additional funds did not fully cover the shortfall.

After discovering the additional funds, the School District hired twenty-six security guards, but they were part-time employees without benefits and were significantly less expensive than the police officers. The School District also gave retention incentives and pay increases to all employees. But the School District never reinstated or increased the officers' hours; never revived the daycare program, employee convenience leave, or the dissolved teaching positions; and never filled the vacant maintenance positions.

In November 2012, the DOL completed its review of the officers' complaint and concluded that the School District had not violated the FLSA. In December 2012, the officers filed an internal grievance with the School District regarding their claim for overtime pay and the School District's decision to cut their work days, as well as some issues with their boss. Two officers, Garza and Reyes, also reached out to the local District Attorney to complain about police misconduct. In March 2013, an internal hearing officer issued an opinion that ruled against the officers on nearly all their issues. All their internal appeals to the School District's board were denied.

II. The officers' lawsuit and pretrial pleadings and rulings

The five officers sued the School District in July 2014. They alleged overtime pay violations and retaliation under the FLSA, violations of the Equal Pay Act (EPA), and retaliation in violation of their First Amendment rights under 42 U.S.C. § 1983, among other claims not relevant to this appeal.

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The School District moved to dismiss. The district court largely denied that motion, except that it dismissed the EPA claims of three of the officers after it determined they could not make out a prima facie case.

The School District then moved for summary judgment on the remaining claims. The district court granted judgment on all the officers' wage-and-hour FLSA claims and the remaining EPA claims, but denied summary judgment on the FLSA retaliation and First Amendment retaliation claims.

III. The jury trial

A jury was empaneled, but after the officers presented their case-in-chief, the School District moved for judgment as a matter of law. The district court granted this motion in part, dismissing the officers' FLSA retaliation claims and three of the officers' First Amendment retaliation claims. Ultimately, the jury was asked to decide only whether the School District retaliated against two officers (Garza and Reyes) for their protected First Amendment activities (their complaint to the District Attorney). The jury found in favor of the School District, concluding that no adverse employment action had been taken against the officers. The officers moved for a new trial, but the court denied their motion.

The officers timely appealed, raising multiple issues.

DISCUSSION

I. Dismissal of EPA Claims—Naranjo, Espinoza, Olivares

This court reviews de novo an order granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). A plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

To establish a prima facie case of discrimination under the Equal Pay Act, a plaintiff must show that he received less money but performed work in

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a position requiring equal skill, effort, and responsibility under similar working conditions as a coworker of the opposite sex who is similarly situated. *See* 29 U.S.C. § 206(d)(1); *Chance v. Rice Univ.*, 984 F.2d 151, 153 (5th Cir. 1993); *Jones v. Flagship Intern.*, 793 F.2d 714, 722–23 (5th Cir. 1986).

The district court dismissed the EPA claims of Officers Naranjo, Espinoza, and Olivares when it granted the School District’s motion. Those officers argue that they successfully articulated a plausible EPA claim because they alleged Officer Martinez, a woman, was promoted and received a raise even though she had less experience and fewer credentials. The district court determined that the officers had “not demonstrated that they performed work in a position requiring equal skill, effort, and responsibility as Martinez.”

The officers’ complaint does not explain how their job duties were the same as Martinez’s. It alleges only that she received a pay raise “even though she had less experience than [the officers].” The officers failed to plausibly allege that they and Martinez performed equal work under equal conditions with equal skill. We affirm the district court’s dismissal of the three officers’ EPA claims.

II. Summary Judgment

We review a district court’s grant of summary judgment de novo. *Bridges v. Empire Scaffold, L.L.C.*, 875 F.3d 222, 225 (5th Cir. 2017). “Summary judgment is appropriate if ‘there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *Id.* (quoting FED. R. CIV. P. 56(a)).

A. FLSA wage-and-hour claims

All five officers contend that the district court erred when it granted summary judgment against them on their FLSA wage-and-hour claims. The FLSA requires employers to pay certain employees no less than time-and-one-half their usual rate for all hours worked above the standard 40-hour

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workweek. *See* 29 U.S.C. § 207(a)(1); *Black v. SettlePou, P.C.*, 732 F.3d 492, 496 (5th Cir. 2013). One method of complying with the overtime payment requirement is the “fluctuating work-week” method (FWW). “The FWW is an employment arrangement in which an employee receives a fixed weekly pay for a fluctuating work schedule with a varying number of hours worked each week.” *Black*, 732 F.3d at 496. Section 207(k)(1) provides a separate exception to § 207(a), requiring instead that a law enforcement officer who works more than 171 hours in a period of 28 days receive overtime. 29 U.S.C. § 207(k)(1); *see also* 29 C.F.R. § 553.230(b).

The district court concluded that the officers failed to provide any specific facts showing that the School District violated the FLSA. Although there was testimony that they were on call 24 hours a day, the district court found that they failed to demonstrate how many hours they actually worked each pay period. According to the district court, the only evidence the officers provided to support their FLSA-violation claim was the deposition testimony of an expert, Tomi Stefanos, “stating that the [officers] were never on a fluctuating workweek [as the School District contends], but rather were on a fluctuating time period” under section 207(k)(1). But the district court found that the officers failed to explain “why such a difference is material” and failed to offer evidence of how many hours the officers worked during the “fluctuating time periods.” The court also noted that it was undisputed that the DOL found no FLSA violations. Accordingly, it granted summary judgment in favor of the School District.

On appeal, the officers do not even attempt to explain their point about the FWW. Instead, they argue that their theory explaining the FLSA violation was in Stefanos’s report, which the district court did not consider. They do not dispute that they failed to enter the report into summary judgment evidence as required by Rule 56(c). They argue, however, that because they attached the

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report to a separate motion that the district court considered, the court should have looked at the report.

This court has held that “Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party’s opposition to summary judgment.” *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915 n.7 (5th Cir. 1992). Thus, the district court did not err when it declined to consider Stefanos’s report and determined there was no factual dispute regarding the officers’ FLSA wage-and-hour claims. The DOL ruled against the officers. The School District submitted evidence showing the officers were paid using the FWW method. The officers provided no competent evidence to contradict the School District or show it had improperly used the FWW or otherwise violated the FLSA, either at summary judgment or on appeal. Nor have they adequately explained on appeal how the School District violated the FLSA. We affirm the district court’s grant of summary judgment to the School District.

B. EPA claims—Garza and Reyes

Officers Garza and Reyes, whose EPA claims survived the motion to dismiss but not summary judgment, argue that the district court erred when granting summary judgment in favor of the School District because they submitted evidence that they make less money than Officer Martinez but do more work.

As discussed above, to make out a *prima facie* case of discrimination under the EPA, a plaintiff must show that he performed work in a position requiring equal skill, effort, and responsibility under similar working conditions as a coworker of the opposite sex who is similarly situated, but received less money. *See Chance*, 984 F.2d at 153.

It is undisputed that Officer Martinez has a Bachelor of Science degree in Criminal Justice and Garza and Reyes do not. Under 29 C.F.R. § 1620.13(c),

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level of education can be a sex-neutral basis for difference in pay. It is also undisputed that Officer Martinez performs duties that the two officers do not: she was frequently assigned to a school with a higher incident rate and greater student population than other campuses. So it does not appear that the male officers have equal job qualifications or duties. In other words, “the [officers’] job duties are not ‘nearly identical’ to those of their comparators; their positions do not ‘requir[e] equal skill, effort, and responsibility under similar working conditions.’” *Fields v. Stephen F. Austin State Univ.*, 611 F. App’x 830, 832 (5th Cir. 2015) (second alteration in original) (quoting *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 523 (5th Cir. 2008); *Chance*, 984 F.2d at 153). We affirm the district court’s grant of summary judgment to the School District.

III. Judgment as a matter of law

Under Rule 50, a district court can grant a motion for judgment as a matter of law when “a party has been fully heard on an issue” but there is no “legally sufficient evidentiary basis to find for the party on that issue.” FED. R. CIV. P. 50(a)(1). “We apply the same standard of review as the district court did in reviewing the court’s grant of judgment as a matter of law” *London v. MAC Corp. of Am.*, 44 F.3d 316, 318 (5th Cir. 1995). All reasonable inferences from the evidence presented must be drawn in favor of the non-movant. *Id.* A motion for judgment as a matter of law can be granted only if a rational jury could not find their way to a contrary verdict. *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 950–51 (5th Cir. 1994). “If there is substantial evidence—that is, evidence of such quality and weight that reasonable and fair-minded jurors might reach a different conclusion—then the motion should have been denied.” *Id.* at 951.

A. FLSA retaliation claims

To make out an FLSA retaliation claim, “a plaintiff must make a prima facie showing of (1) participation in protected activity under the FLSA; (2) an

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adverse employment action; and (3) a causal link between the activity and the adverse action.” *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 624 (5th Cir. 2008) (emphasis and quotation omitted). The plaintiff must also prove by a preponderance of the evidence that “the adverse employment action would not have occurred ‘but for’ plaintiff’s protected activity.” *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 580 (5th Cir. 2004).

Determining whether discrimination occurred requires application of the Supreme Court’s burden-shifting framework from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Hagan*, 529 F.3d at 624. Under that framework—as applied to FLSA retaliation claims—if a plaintiff makes out a prima facie case, then the defendant must articulate a legitimate, non-retaliatory reason for the adverse employment action. *Id.* The burden then shifts back to the plaintiff to offer evidence that this reason is pretextual. *Id.*

The district court found that the officers articulated a prima facie case when they showed that their yearly work days had been reduced from 226 to 187 after they filed a complaint with the DOL, followed by bonuses and the hiring of security guards. But the district court also found that the School District articulated a legitimate, non-retaliatory reason for the adverse actions—the budget shortfall. The School District cut numerous programs and reduced the number of hours for the whole police department, even for officers who did not file DOL complaints. The bonuses and hired security guards were attributable to the unforeseen windfall. Finally, the district court found no evidence of pretext.

On appeal, the officers urge that it is undisputed that the School District had options when deciding whether to cut their hours and this shows a factual issue about whether the cuts were pretextual. The officers also reject the notion that a budget crisis can count as a legitimate, non-discriminatory reason for taking adverse employment actions. The officers finally contend that, because

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there were differing accounts as to whether the School District was even suffering a budget crisis, judgment as a matter of law was inappropriate.

Although the School District cut the officers' time when it had other ways of meeting its budgetary constraints, this does not create a fact issue for a jury, negate the legitimacy of the proffered reason for cutting the days, or show pretext. The School District offered legitimate reasons for why it made cuts to the police department in particular. Importantly, it cut the hours of *all* the officers in the entire department, not just the ones who had engaged in FLSA protected activity. Without any other evidence of pretext, there was not enough evidence for a rational jury to rule in the officers' favor.

The district court was also right to conclude that the testimony of Yliana Gonzalez, a school district board member who testified that she did not believe that the School District was facing a budgetary crisis in 2012, was "without a sufficient personal knowledge predicate to be helpful to the jury." It was "undisputed that [Gonzalez] was not involved in the details of the [School District's] budget items." As such, there was no "legally sufficient evidentiary basis" for the jury to decide that the School District experienced only a budgetary surplus and no crisis. FED. R. CIV. P. 50.

We affirm the district court's grant of judgment as a matter of law to the School District on the officers' FLSA retaliation claims.

*B. First Amendment retaliation—Espinoza, Naranjo, and Olivarez*¹

¹ The School District urges that Federal Rule of Appellate Procedure 10(b)(2) bars consideration of this issue because the officers failed to file a trial transcript and so the three officers' testimony is not in the record. An appellant's failure "to provide a transcript is a proper ground for dismissal of the appeal." *Richardson v. Henry*, 902 F.2d 414, 416 (5th Cir. 1990) (citing *Coats v. Pierre*, 890 F.2d 728, 731 (5th Cir.1989)). However, dismissal is not mandatory. *Coats*, 890 F.2d at 731. When this court has declined to exercise its discretion to dismiss arguments on appeal when not all the relevant evidence was submitted, the court "necessarily limit[ed] the scope of [its] review to the available record." *Boze v. Branstetter*, 912 F.2d 801, 803 n.1 (5th Cir. 1990).

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To establish a First Amendment retaliation claim, the officers must show that (1) they suffered an adverse employment action; (2) they spoke as citizens on a matter of public concern; (3) their interest in speaking outweighed the School District's interest in promoting efficiency; and (4) their speech motivated the School District's adverse action against them. *See Harris v. Victoria Ind. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir. 1999). Only the second prong is at issue. “[W]hether a statement addresses a matter of public concern is a question of law that must be resolved by the court.” *Graziosi v. City of Greenville*, 775 F.3d 731, 736 (5th Cir. 2015).

The district court dismissed Officers Espinoza's, Naranjo's, and Olivarez's claims because their DOL complaint “only raised wage issues” and so was “solely personal, and not a matter of public concern.” As to their internal grievances, they primarily concerned “management policies” but also alleged sexual harassment and police misconduct and so presented “at most, a ‘mixed speech’ situation” that the court held was not protected under *Teague v. City of Flower Mound*, 179 F.3d 377, 380–81, 383 (5th Cir. 1999) (finding the “mixed speech” about police misconduct made in the context of an employer-employee dispute not to be a matter of public concern).

On appeal, the officers contend that the district court erred when it held that they did not speak on a matter of public concern.² “Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community or when it is a

² The district court did not discuss or determine whether the officers spoke *as citizens* on a matter of public concern. The officers were speaking as citizens because they complained to the DOL. *See Gibson v. Kilpatrick*, 838 F.3d 476, 482 (5th Cir. 2016) (“If ‘a public employee takes his job concerns to persons outside the work place in addition to raising them up the chain of command at his workplace, then those external communications are ordinarily not made as an employee, but as a citizen.’” (quoting *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008))).

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subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” *Gibson v. Kilpatrick*, 838 F.3d 476, 482 (5th Cir. 2016) (internal quotation marks omitted) (quoting *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014)). “[P]ublic concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.” *Id.* (alteration in original) (quoting *Connick v. Myers*, 461 U.S. 138, 147–48 (1983)).

As to content, the DOL complaint dealt solely with the officers’ wage-and-hour dispute. “Speech that ‘is related only to [a] superior’s employment decisions’ and that affects a plaintiff ‘in a purely personal manner’ is not a matter” of public concern. *Id.* at 484 (quoting *Rathjen v. Litchfield*, 878 F.2d 836, 842 (5th Cir. 1989)). The district court properly held that the officers’ speech in the DOL complaint was not on a matter of public concern. Meanwhile, the officers’ internal grievances were primarily personal grievances about pay and management in the police department, although there was apparently some hearing testimony about sexual harassment and investigatory decisions that could arguably be considered public matters. The officers were also seeking primarily personal and employment-related relief, which weighs against finding the speech to be on matters of public concern. At most, the speech in the internal grievances was “mixed speech.”

The form of the officers’ speech also weighs against finding it to be on a matter of public concern. The officers are correct that their grievances are distinguishable from the private lawsuit in *Gibson*. However, they filed only internal grievances and did not choose “to inform someone outside” of the School District of their issues. *Modica v. Taylor*, 465 F.3d 174, 181 (5th Cir. 2006). Moreover, the primary focus of the grievances related to personal complaints. *Compare id.* (finding “the majority of [the plaintiff’s] concerns did not relate to her personal grievances”), *with Teague*, 179 F.3d at 383 (finding

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a grievance letter to be “undeniably private in form” because it sought personal redress).

Finally, the context of the officers’ speech suggests that it was not about a matter of public concern. In *Gibson*, this court held that speech “is not on a matter of public concern if it is made solely in ‘furtherance of a personal employer-employee dispute.’” 838 F.3d at 486 (quoting *Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178, 187 (5th Cir. 2005)). Another contextual consideration is whether the “speech occurred ‘against a backdrop of widespread debate in the community.’” *Id.* at 487 (quoting *Markos v. City of Atlanta*, 364 F.3d 567, 572 (5th Cir. 2004)). The officers made their internal grievances primarily in furtherance of a personal employer-employee dispute. And they have presented no evidence of a widespread public debate about the budget crisis or the management of the School District’s police force.

The officers have not demonstrated that their speech to the DOL or the School District implicates a public concern or deserves First Amendment protection. We affirm the district court’s judgment as a matter of law in favor of the School District on the First Amendment retaliation claims of Officers Espinoza, Naranjo, and Olivarez.

IV. Evidentiary Rulings

Finally, the officers contend the district court erred when it excluded some testimony at trial and instructed the jury to disregard “opinion and reputation testimony” showing that the School District allegedly has a history of improper retaliation.

“A district court’s evidentiary rulings are reviewed for abuse of discretion.” *United States v. Lowery*, 135 F.3d 957, 959 (5th Cir. 1998). “However, even if the district court erred in its evidentiary rulings, such error can be excused if it was harmless error.” *Id.*

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We need not reach the question of whether the district court erred in its evidentiary rulings, as any error was harmless. The jury ultimately found that neither Officer Reyes nor Officer Garza—the only officers whose retaliation claims went to the jury—had been subjected to an adverse employment action, a necessary condition to finding liability on a First Amendment retaliation claim. The officers do not challenge the jury’s finding on appeal.³ The excluded testimony goes to elements such as policy and custom, and thus, even if admitted, would not have changed the jury’s finding that the School District took no adverse employment action against the officers.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court’s rulings.

³ In their reply brief, the officers state that “Appellee’s belief that Appellant did not appeal the jury’s verdict is wholly inaccurate.” But merely stating this does not make it so. The officers did not argue that no rational jury could have found that the school district did not take an adverse employment action against them and so failed to challenge on appeal the jury’s finding.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

October 12, 2018

Lyle W. Cayce
Clerk

No. 17-40839

D.C. Docket No. 1:14-CV-115

JUAN ESPINOZA; OMAR GARZA; ALBERTO REYES; ANTONIO
NARANJO; ROEL OLIVARES,

Plaintiffs - Appellants

v.

SAN BENITO CONSOLIDATED INDEPENDENT SCHOOL DISTRICT,

Defendant - Appellee

Appeal from the United States District Court for the
Southern District of Texas

Before SMITH, CLEMENT, and COSTA, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by
counsel.

It is ordered and adjudged that the judgment of the District Court is
affirmed.



Certified as a true copy and issued
as the mandate on Nov 05, 2018

Attest:

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit