

14-3845

Lola v. Skadden, Arps, Slate, Meagher & Flom

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 _____
4
5 August Term, 2014

6
7 (Argued: May 29, 2015

Decided: July 23, 2015)

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9 Docket No. 14-3845-cv

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12
13 DAVID LOLA, on behalf of himself and all others similarly situated,

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15
16 *Plaintiff-Appellant,*

17
18 v.

19
20 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, TOWER LEGAL
21 STAFFING, INC.,

22
23 *Defendants-Appellees.*

24
25 _____
26
27 Before: POOLER, LOHIER, DRONEY, *Circuit Judges.*

28
29 David Lola, on behalf of himself and all others similarly situated, appeals
30 from the September 16, 2014 opinion and order of the United States District Court
31 for the Southern District of New York (Sullivan, J.) dismissing his putative

1 collective action seeking damages from Skadden, Arps, Slate, Meagher & Flom
2 LLP and Tower Legal Staffing, Inc. for violations of the overtime provision of the
3 Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (“FLSA”), arising out of Lola’s
4 work as a contract attorney in North Carolina. We agree with the district court
5 that: (1) state, not federal, law informs FLSA’s definition of “practice of law;” and
6 (2) North Carolina, as the place where Lola worked and lived, has the greatest
7 interest in this litigation, and thus we look to North Carolina law to determine if
8 Lola was practicing law within the meaning of FLSA. However, we disagree with
9 the district court’s conclusion, on a motion to dismiss, that by undertaking the
10 document review Lola allegedly was hired to conduct, Lola was necessarily
11 “practicing law” within the meaning of North Carolina law.

12 Vacated and remanded.

13 _____
14
15 D. MAIMON KIRSCHENBAUM, Joseph &
16 Kirschenbaum LLP (Denise A. Shulman, *on the*
17 *brief*), New York, NY, *for Plaintiff-Appellant David*
18 *Lola, on behalf of himself and all others similarly*
19 *situated.*

20
21 BRIAN J. GERSHENGORN, Ogletree, Deakins,
22 Nash, Smoak & Stewart, P.C. (Stephanie L.

1 complaint that his document review was devoid of legal judgment such that he
2 was not engaged in the practice of law, and remand for further proceedings.

3 **BACKGROUND**

4 Lola commenced this FLSA collective action against Skadden, Arps, Slate,
5 Meagher & Flom LLP and Tower Legal Staffing Inc. In his first amended
6 complaint, Lola alleged that Skadden, a Delaware limited liability partnership, is
7 based in New York City. He alleges that Tower is a New York corporation that
8 provides attorneys and paralegals on a contract basis to various law firms and
9 corporate law departments. Lola alleges that Skadden and Tower (together,
10 “Defendants”) were joint employers within the meaning of FLSA.

11 Lola, a North Carolina resident, alleges that beginning in April 2012, he
12 worked for Defendants for fifteen months in North Carolina. He conducted
13 document review for Skadden in connection with a multi-district litigation
14 pending in the United States District Court for the Northern District of Ohio.
15 Lola is an attorney licensed to practice law in California, but he is not admitted to
16 practice law in either North Carolina or the Northern District of Ohio.

17 Lola alleges that his work was closely supervised by the Defendants, and
18 his “entire responsibility . . . consisted of (a) looking at documents to see what

1 search terms, if any, appeared in the documents, (b) marking those documents
2 into the categories predetermined by Defendants, and (c) at times drawing black
3 boxes to redact portions of certain documents based on specific protocols that
4 Defendants provided.” App’x at 20 ¶ 28. Lola further alleges that Defendants
5 provided him with the documents he reviewed, the search terms he was to use in
6 connection with those documents, and the procedures he was to follow if the
7 search terms appeared. Lola was paid \$25 an hour for his work, and worked
8 roughly forty-five to fifty-five hours a week. He was paid at the same rate for any
9 hours he worked in excess of forty hours per week. Lola was told that he was an
10 employee of Tower, but he was also told that he needed to follow any procedures
11 set by Skadden attorneys, and he worked under the supervision of Skadden
12 attorneys. Other attorneys employed to work on the same project performed
13 similar work and were likewise paid hourly rates that remained the same for any
14 hours worked in excess of forty hours per week.

15 Defendants moved to dismiss the complaint, arguing that Lola was exempt
16 from FLSA’s overtime rules because he was a licensed attorney engaged in the
17 practice of law. The district court granted the motion, finding (1) state, not
18 federal, standards applied in determining whether an attorney was practicing

1 law under FLSA; (2) North Carolina had the greatest interest in the outcome of
2 the litigation, thus North Carolina's law should apply; and (3) Lola was engaged
3 in the practice of law as defined by North Carolina law, and was therefore an
4 exempt employee under FLSA. *Lola v. Skadden, Arps, Slate, Meagher & Flom, LLP*,
5 No. 13-cv-5008 (RJS), 2014 WL 4626228 (S.D.N.Y. Sept. 16, 2014). This appeal
6 followed.

7 DISCUSSION

8 "We review *de novo* a district court's dismissal of a complaint for failure to
9 state a claim, accepting all factual allegations in the complaint as true and
10 drawing all reasonable inferences in plaintiffs' favor." *Freidus v. Barclays Bank*
11 *PLC*, 734 F.3d 132, 137 (2d Cir. 2013).

12 Pursuant to FLSA, employers must generally pay employees working
13 overtime one and one-half times the regular rate of pay for any hours worked in
14 excess of forty a week. 29 U.S.C. § 207(a)(1). However, employees "employed in a
15 bona fide . . . professional capacity" are exempt from that requirement. *Id.* §
16 213(a)(1). The statute does not provide a definition of "professional capacity,"
17 instead delegating the authority to do so to the Secretary of the Department of
18 Labor ("DOL"), who defines "professional employees" to include those

1 employees who are:

2 (1) Compensated on a salary or fee basis at a rate of not
3 less than \$455 per week . . . ; and

4
5 (2) Whose primary duty is the performance of work:

6
7 (i) Requiring knowledge of an advanced type in a
8 field of science or learning customarily acquired by a
9 prolonged course of intellectual instruction; or

10
11 (ii) Requiring invention, imagination, originality
12 or talent in a recognized field of artistic or creative
13 endeavor.

14
15 29 C.F.R. § 541.300. These requirements, however, do not apply to attorneys
16 engaged in the practice of law. 29 C.F.R. § 541.304(d) (“The requirements of
17 § 541.300 and subpart G (salary requirements) of this part do not apply to the
18 employees described in this section.”). Instead, attorneys fall under 29 C.F.R. §
19 541.304, which exempts from the overtime requirement:

20 Any employee who is the holder of a valid license or
21 certificate permitting the practice of law or medicine or
22 any of their branches and is actually engaged in the
23 practice thereof[.]

24
25 *Id.* § 541.304(a)(1). While it is undisputed that Lola is an attorney licensed to
26 practice law in California, the parties dispute whether the document review he
27 allegedly performed constitutes “engaging in the practice of law.”

1 **I. “Practice of law.”**

2 Lola urges us to fashion a new federal standard defining the “practice of
3 law” within the meaning of Section 541.304. We decline to do so because we
4 agree with the district court that the definition of “practice of law” is “primarily a
5 matter of state concern.” *Lola*, 2014 WL 4626228, at *4 (citation omitted).

6 In *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991), the Supreme
7 Court examined whether, in an action based on a federal statute, federal common
8 law should incorporate state law. There, the issue was whether the contours of
9 the demand futility requirement of the Investment Company Act of 1940 must be
10 discerned by reference to state law or by reference to federal law. *Id.* at 97-98. The
11 *Kamen* Court explained “that a court should endeavor to fill the interstices of
12 federal remedial schemes with uniform federal rules only when the scheme in
13 question evidences a distinct need for nationwide legal standards, or when
14 express provisions in analogous statutory schemes embody congressional policy
15 choices readily applicable to the matter at hand.” *Id.* at 98 (citation omitted).

16 “Otherwise,” the Court continued:

17 we have indicated that federal courts should
18 incorporate state law as the federal rule of decision,
19 unless application of the particular state law in question

1 would frustrate specific objectives of the federal
2 programs. The presumption that state law should be
3 incorporated into federal common law is particularly
4 strong in areas in which private parties have entered
5 legal relationships with the expectation that their rights
6 and obligations would be governed by state-law
7 standards.

8
9 *Id.* (internal citation, quotation marks and alterations omitted).

10 Applying these principles, the Supreme Court explained that “where a gap
11 in the federal securities laws must be bridged by a rule that bears on the
12 allocation of governing powers within the corporation, federal courts should
13 incorporate state law into federal common law unless the particular state law in
14 question is inconsistent with the policies underlying the federal statute.” *Id.* at
15 108 (emphasis omitted). Thus, the *Kamen* court concluded that “the scope of the
16 demand requirement” must be determined by the law of the state of
17 incorporation. *Id.* at 108.

18 *De Sylva v. Ballentine*, 351 U.S. 570 (1956), is also instructive in determining
19 whether state or federal law should define the sweep of a federal right.. In *De*
20 *Sylva*, the Supreme Court examined the question of whether an illegitimate child
21 was a “child” within the meaning of the Copyright Act. Noting that “[t]he scope
22 of a federal right is, of course, a federal question, but that does not mean that its

1 content is not to be determined by state, rather than federal law,” *id.*, the court
2 also observed that “[t]his is especially true where a statute deals with a familial
3 relationship; there is no federal law of domestic relations, which is primarily a
4 matter of state concern.” *Id.* The Court then relied on state law to define “child”
5 within the meaning of the federal Copyright Act. *Id.* at 581.

6 Just as “there is no federal law of domestic relations,” here there is no
7 federal law governing lawyers. Regulating the “practice of law” is traditionally a
8 state endeavor. No federal scheme exists for issuing law licenses. As the district
9 court aptly observed, “[s]tates regulate almost every aspect of legal practice: they
10 set the eligibility criteria and oversee the admission process for would-be
11 lawyers, promulgate the rules of professional ethics, and discipline lawyers who
12 fail to follow those rules, among many other responsibilities.” *Lola*, 2014 WL
13 4626228, at *4. The exemption in FLSA specifically relies on the attorney
14 possessing “a valid license . . . permitting the practice of law.” 29 C.F.R. §
15 541.304(a)(1). The regulation’s history indicates that the DOL was well aware that
16 such licenses were issued by the states. *See Wage and Hour and Public Contracts*
17 *Divisions, U.S. Department of Labor, Report and Recommendations of the*
18 *Presiding Officer at Public Hearings on Proposed Revisions of Regulations, Part*

1 541, at 77 (1949) (noting that the exemption for attorneys was based in part on
2 “the universal requirement of licensing by the various jurisdictions”). In rejecting
3 a proposal to exempt librarians from the overtime rules, the DOL noted that
4 “states do not generally license the practice of library science, so that in this
5 respect . . . the profession is not comparable to that of law or medicine.” *Id.* A
6 similar distinction was drawn in a discussion of extending the exemption to
7 architects and engineers:

8 The practice of law and medicine has a long history of
9 state licensing and certification; the licensing of
10 engineers and architects is relatively recent. While it is
11 impossible for a doctor or lawyer legally to practice his
12 profession without a certificate or license, many
13 architects and engineers perform work in these fields
14 without possessing licenses, although failure to hold a
15 license may limit their permissible activities to those of
16 lesser responsibilities.

17
18 *Id.* We thus find no error with the district court’s conclusion that we should look
19 to state law in defining the “practice of law.”

20 **II. Choice of law.**

21 We turn to the question of which state’s law to apply. “Where jurisdiction
22 is based on the existence of a federal question . . . we have not hesitated to apply
23 a federal common law choice of law analysis.” *Barkanic v. Gen. Admin. of Civil*

1 *Aviation of the People's Republic of China*, 923 F.2d 957, 961 (2d Cir. 1991). “The
2 federal common law choice-of-law rule is to apply the law of the jurisdiction
3 having the greatest interest in the litigation.” *In re Koreag, Controle et Revision S.A.*,
4 961 F.2d 341, 350 (2d Cir. 1992). Here, there are four possible forum states: North
5 Carolina (where Lola worked and lived); Ohio (where the underlying litigation is
6 venued); California (where Lola is barred); and New York (where Skadden is
7 located).

8 “[W]hen conducting a federal common law choice-of-law analysis, absent
9 guidance from Congress, we may consult the Restatement (Second) of Conflict of
10 Laws.” *Eli Lilly Do Brasil, Ltda v. Fed. Express Corp.*, 502 F.3d 78, 81 (2d Cir. 2007).

11 The Restatement provides in relevant part that:

12 The validity of a contract for the rendition of
13 services and the rights created thereby are determined,
14 in the absence of an effective choice of law by the
15 parties, by the local law of the state where the contract
16 requires that the services, or a major portion of the
17 services, be rendered, unless, with respect to the
18 particular issue, some other state has a more significant
19 relationship under the principles stated in § 6 to the
20 transaction and the parties, in which [] event the local
21 law of the other state will be applied.

22
23 Restatement (Second) of Conflict of Laws § 196 (1971). Here, the services were

1 rendered in North Carolina. Moreover, as the state where Lola resides, North
2 Carolina possesses a strong interest in making sure Lola is fairly paid. We find no
3 error in the district court's decision to apply North Carolina law.

4 **III. Definition of "practice of law" under North Carolina law.**

5
6 North Carolina defines the "practice of law" in its General Statutes, Section
7 84-2.1, which provides that:

8 The phrase "practice law" as used in this Chapter
9 is defined to be performing any legal service for any
10 other person, firm or corporation, with or without
11 compensation, specifically including . . . the preparation
12 and filing of petitions for use in any court, including
13 administrative tribunals and other judicial or
14 quasi-judicial bodies, or assisting by advice, counsel, or
15 otherwise in any legal work; and to advise or give
16 opinion upon the legal rights of any person, firm or
17 corporation

18
19 N.C. Gen. Stat. § 84-2.1. North Carolina courts typically read Section 84-2.1 in
20 conjunction with Section 84-4, which defines the unauthorized practice of law as
21 follows:

22 Except as otherwise permitted by law, . . . it shall
23 be unlawful for any person or association of persons
24 except active members of the Bar, for or without a fee or
25 consideration, to give legal advice or counsel, [or]
26 perform for or furnish to another legal services
27

1 *Id.* § 84–4; see *N.C. State Bar v. Lienguard, Inc.*, No. 11–cvs–7288, 2014 WL 1365418,
2 at *6–7 (N.C. Super. Ct. Apr. 4, 2014).

3 The North Carolina General Statutes do not clarify whether “legal
4 services” includes the performance of document review. Nevertheless, the North
5 Carolina State Bar issued a formal ethics opinion shedding light on what is meant
6 by “legal services.”¹ The question considered in the ethics opinion was: “May a
7 lawyer ethically outsource legal support services abroad, if the individual
8 providing the services is either a nonlawyer or a lawyer not admitted to practice
9 in the United States (collectively ‘foreign assistants’)?” In its opinion, the Bar’s
10 Ethics Committee opined that:

11 A lawyer may use foreign assistants for administrative
12 support services such as document assembly,
13 accounting, and clerical support. A lawyer may also use
14 foreign assistants for limited legal support services such
15 as reviewing documents; conducting due diligence;
16 drafting contracts, pleadings, and memoranda of law;
17 and conducting legal research. Foreign assistants may
18 not exercise independent legal judgment in making
19 decisions on behalf of a client. . . . The limitations on the
20 type of legal services that can be outsourced, in

¹ The ethics opinion technically referred only to “legal support services.” Nothing in the opinion or in the relevant North Carolina caselaw suggests that there is any meaningful difference between “legal services” and “legal support services.”

1 conjunction with the selection and supervisory
2 requirements associated with the use of foreign
3 assistants, insures that the client is competently
4 represented. *See* Rule 5.5(d). Nevertheless, when
5 outsourcing legal support services, lawyers need to be
6 mindful of the prohibitions on unauthorized practice of
7 law in Chapter 84 of the General Statutes and on the
8 prohibition on aiding the unauthorized practice of law
9 in Rule 5.5(d).

10
11 N.C. State Bar Ethics Committee, 2007 Formal Ethics Op. 12 (Apr. 25, 2008).

12 The district court found that (1) under North Carolina law, document
13 review is considered “legal support services,” along with “drafting contracts,
14 pleadings, and memoranda of law[,] and conducting legal research;” (2) the
15 ethics opinion draws a clear line between legal support services, like document
16 review, and “administrative support services,” like “document assembly,
17 accounting, and clerical support;” and (3) by emphasizing that only lawyers may
18 undertake legal work, the ethics opinion makes clear that “document review, like
19 other legal support services, constitutes the practice of law and may be lawfully
20 performed by a non-lawyer only if that non-lawyer is supervised by a licensed
21 attorney.” *Lola*, 2014 WL 4626228, at *11–12 (alteration in the original). Thus, the
22 district court concluded, any level of document review is considered the “practice
23 of law” in North Carolina. *Id.* at 12. The district court also concluded that because

1 FLSA’s regulatory scheme carves doctors and lawyers out of the salary and duty
2 analysis employed to discern if other types of employees fall within the
3 professional exemption, a fact-intensive inquiry is at odds with FLSA’s
4 regulatory scheme. *Id.* at *13.

5 We disagree. The district court erred in concluding that engaging in
6 document review per se constitutes practicing law in North Carolina. The ethics
7 opinion does not delve into precisely what type of document review falls within
8 the practice of law, but does note that while “reviewing documents” may be
9 within the practice of law, “[f]oreign assistants may not exercise independent
10 legal judgment in making decisions on behalf of a client.” N.C. State Bar Ethics
11 Committee, 2007 Formal Ethics Op. 12. The ethics opinion strongly suggests that
12 inherent in the definition of “practice of law” in North Carolina is the exercise of
13 at least a modicum of independent legal judgment.²

14

² Were it an option, we might have opted to certify the question of how to define “practice of law” to the North Carolina courts. *See AGI Assocs. LLC v. City of Hickory, N.C.*, 773 F.3d 576, 579 n.4 (4th Cir. 2014) (“A lack of controlling precedent on the state rule of decision can merit certification of the issue to the state’s highest court. The State of North Carolina, however, has no certification procedure in place for federal courts to certify questions to its courts.”).

1 Although the parties do not cite, and our research did not reveal, a case
2 directly on point, two decisions of the North Carolina courts that relied, in part,
3 on the exercise of legal judgment to support a finding of unauthorized practice of
4 law also support such a conclusion. *Lienguard*, 2014 WL 1365418, at *9–11 (lien
5 filing service engaged in unauthorized practice of law in preparing claims of
6 lien); *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11–cvs–15111, 2014 WL 1213242, at
7 *12 (N.C. Super. Ct. Mar. 24, 2014) (noting that the “scrivener’s exception” to the
8 unauthorized practice of law allows “unlicensed individuals [to] record
9 information that another provides without engaging in [the unlicensed practice
10 of law] as long as they do not also provide advice or express legal judgments”).

11 Moreover, many other states also consider the exercise of some legal
12 judgment an essential element of the practice of law. *See, e.g., In re Discipline of*
13 *Lerner*, 197 P.3d 1067, 1069-70 (Nev. 2008) (“exercise of legal judgment on a
14 client’s behalf” key to analysis of whether a person engaged in the unauthorized
15 practice of law); *People v. Shell*, 148 P.3d 162, 174 (Colo. 2006) (“[O]ne of the
16 touchstones of Colorado’s ban on the unauthorized practice of law is an
17 unlicensed person offering advice or judgment about legal matters to another
18 person for use in a specific legal setting”); *Or. State Bar v. Smith*, 942 P.2d 793, 800

1 (Or. Ct. App. 1997) (“The ‘practice of law’ means the exercise of professional
2 judgment in applying legal principles to address another person’s individualized
3 needs through analysis, advice, or other assistance.”); *In re Discipio*, 645 N.E.2d
4 906, 910 (Ill. 1994) (“The focus of the inquiry” into whether person engaged in
5 unauthorized practice of law is, in fact, “whether the activity in question required
6 legal knowledge and skill in order to apply legal principles and precedent.”); *In*
7 *re Rowe*, 80 N.Y.2d 336, 341–42 (1992) (authoring an article on the legal rights of
8 psychiatric patients who refuse treatment did not constitute the practice of law
9 because “[t]he practice of law involves the rendering of legal advice and opinions
10 directed to particular clients”).

11 The gravamen of Lola’s complaint is that he performed document review
12 under such tight constraints that he exercised no legal judgment whatsoever—he
13 alleges that he used criteria developed by others to simply sort documents into
14 different categories. Accepting those allegations as true, as we must on a motion
15 to dismiss, we find that Lola adequately alleged in his complaint that he failed to
16 exercise any legal judgment in performing his duties for Defendants. A fair
17 reading of the complaint in the light most favorable to Lola is that he provided
18 services that a machine could have provided. The parties themselves agreed at

1 oral argument that an individual who, in the course of reviewing discovery
2 documents, undertakes tasks that could otherwise be performed entirely by a
3 machine cannot be said to engage in the practice of law. We therefore vacate the
4 judgment of the district court and remand for further proceedings consistent with
5 this opinion.

6 **CONCLUSION**

7 For the reasons given above, the judgment of the district court is vacated,
8 and this matter remanded.