

Opinion No. 57-75

April 16, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Howard M. Rosenthal,
Assistant Attorney General

TO: To; Robert H. Sprecher, Assistant District Attorney, Fifth Judicial District, Roswell,
New Mexico

QUESTIONS

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"Whether or not the exemption from the seventy-five (75c) cent per hour minimum wage (said exemption being contained in Section 59-3-21, subparagraph (c), subparagraph 1., New Mexico Statutes Annotated 1953, as amended in 1955) still applies to drug stores serving food to be consumed on the premises or are drug stores, regardless of whether or not they serve food to be consumed on the premises, not entitled to the exemption under the above quoted statute and therefore required to pay a minimum wage of seventy-five (75c) cents per hour."

CONCLUSION

On the basis of the Opinion in the single case of Burch v. Foy, S. Ct. No. 6117, we are of the opinion that drug stores serving food and drink, as well as those that do not, are excluded from § 59-3-21 (c) (1), N.M.S.A., 1953 Comp., and all employees of both kinds of drug stores are to be paid a minimum wage of 75c per hour.

OPINION

ANALYSIS

Page 4, line 7, of the majority opinion written by Chief Justice Lujan commences an outline of the defendant-appellant's position on differentiation between drug store employees engaged in food and drink services and those not, and concludes, on line 22:

"We are not impressed with this argument."

Following this, for approximately one and one-half pages, we find presentation of the reasoning of the Court leading to the above quoted conclusion.

Page 6, line 23, reads:

"Under the provisions of § 3 (a) (1) of the act the plaintiff is required to pay his employees the minimum wage of 75c per hour. On the other hand his competitors' employees, because they work in drug stores, **whether they serve food and drink for consumption on the premises or not**, are declared to be 'service employees' and need only be paid 50c per hour. Thus, appellee's competitors obtain a competitive advantage because they are entitled to pay a lower minimum wage to its (sic) employees performing the same functions as in direct competition with appellee's employees.

"We are of opinion that the act under consideration constitutes class legislation of the most objectionable kind insofar as it refers to drug store employees. The classification is arbitrary and oppressive and without any valid reason for its basis." (Underlining ours.)

Omitting a portion of the Opinion, on page 7, line 11, we find:

"The invalid provision of the act heretofore mentioned can easily be separated from the remaining provisions, so that the other employers and employees enumerated therein are in no wise affected by the partial invalidity and should be permitted to stand."

Hence by reason of the foregoing, and other portions of the Opinion in which the Court refers to drug stores serving food and drink and those that do not - added to the dissent filed by Justice Sadler in which this precise point constitutes the "fork in the road" between majority and minority opinions, (although the entire Court agrees on the fundamental validity of the Minimum Wage Act), we are led to the belief that, quoting page 7, line 32, et seq.: "We declare that Section 2 (1) of the Act, insofar as it relates to drug stores is invalid and that the remaining provisions are valid," means that drug stores serving food and drink and those that do not are both stricken from the exception to the general rule, and must pay a minimum wage of 75c per hour.