Podium

Labor Dept. Is Subverting Wage Law

BY MARC LINDER
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MARIA IS AN assistant manager at the local fast-food restaurant. She works 72 hours a week for a $300 salary. That comes to $4.16 an hour — less than the minimum wage. How can her employer get away with it?

Maria is not alone. Imposing unpaid overtime on fast-food workers who double as low-level supervisors is rampant in an industry whose extraordinary profits depend on paying minimum wage or less. Does the law really permit employers to label more than 9 million private-sector employees salaried "executives" and make them work overtime without pay? What makes employers think they have the right to pin that label on their workers is an obsolete federal labor regulation, 29 C.F.R. 541, that defines so-called exempt executives as supervisors receiving a weekly salary of $155 or more.

Despite the fact that the minimum wage has more than doubled and consumer prices have almost tripled in the past 18 years, the salary test that makes Maria's situation possible has not been revised since 1975. Because the government has failed to adjust this salary to take inflation into account, the test has become irrational. Unless Congress intervenes quickly, the courts might declare the entire regulation invalid, opening the way to overtime pay for millions of low-paid supervisors. To be realistic, the test should be raised to at least $500.

Ever since the national wage and hour law was enacted in 1938, the Fair Labor Standards Act has excluded "any employee employed in a bona fide executive...capacity." But Congress didn't intend to give employers carte

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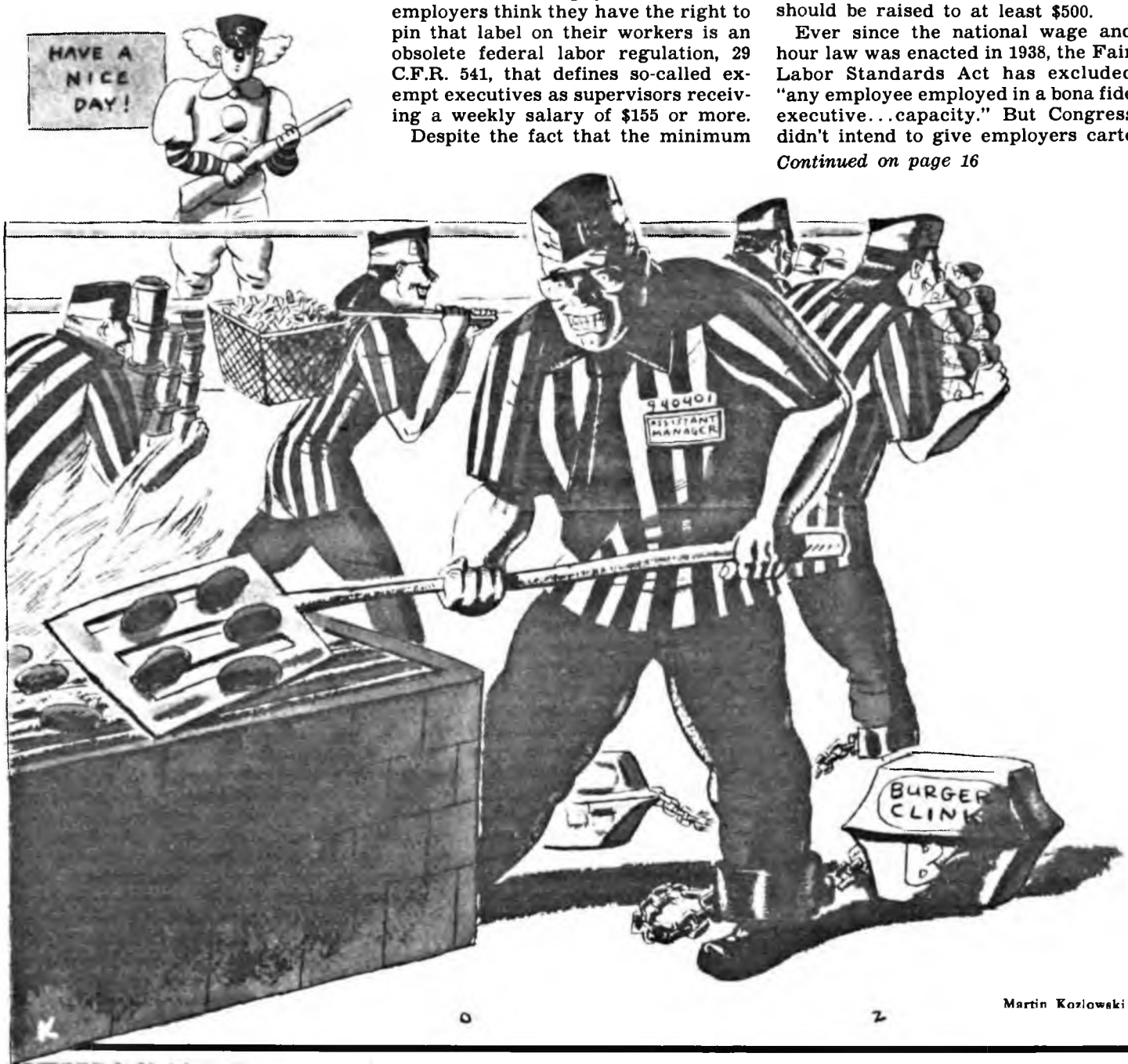

Martin Kozlowski

Overtime Waived for Too Many

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blanche to deprive their employees of minimum-wage and overtime rights by arbitrarily calling them executives. It required the Labor Department to issue regulations defining the real executives who didn't need to be protected from overreaching employers.

The regulations that the Labor Department issued in 1938 prescribed a minimum salary test. At $30 per week, it was three times the weekly minimum wage. In periodically raising the salary test level in tandem with increases in the minimum wage during the next three decades, the Labor Department acted in the belief that the most important test is the amount of compensation.

But by 1978, after the ratio between the salary test and the weekly minimum wage had fallen to its lowest level ever, 1.5-to-1, the Labor Department criticized itself by announcing that the test no longer provided "basic minimum safeguards" as contemplated by the act for protecting low-paid executives. After the outgoing Carter administration finally raised the salary test in 1981, the Reagan administration rolled it back, suspending the increase indefinitely.

Because there's never been another increase, now that the minimum wage is $4.25, the Labor Department permits employers to pay "executives" salaries of $155 — less than the minimum wage of $170 for a 40-hour week — and to make these "executives" work unlimited overtime free of charge.

That employers do take advantage in precisely this way of entry-level hybrid supervisor-workers is clear from reported litigation against one of the largest fast-food chains. Its deliberate corporate policy of requiring "exempt" assistant managers to spend more than half of their 54-hour workweeks performing the same work as the people they supervise was driven by the company's desire to avoid paying premium overtime rates, or any wages at all. The appeals court agreed with the trial court that if assistant managers abstained from production work, more hourly employees would be needed, thereby "blowing payroll" — breaking the store's hourly labor budget. *Donovan v. Burger King Corp.*, 675 F.2d 516 (2d Cir. 1982).

Such practices directly subvert the purpose of the statutory overtime premium, which is to apply financial pressure on employers to spread employment among additional workers in order to avoid having to pay the extra overtime wage. The rationale for excluding "bona fide" executives is that they are so well paid and have so much control over their hours that employers shouldn't have to pay overtime for discretionary hours worked. But the extraordinarily broad group that the Labor Department's neglect has created sweeps in millions of workers whose salary and autonomy are far removed from that model.

(According to the most recent survey by the National Restaurant Association, one-quarter of fast-food assistant managers earn less than $15,000.)

Before his appointment as secretary of Labor, while he was teaching at Harvard University, Robert Reich agreed that "compared to the old blue-collar jobs that have been lost, these [minimum-wage fast-food] jobs represent a serious setback." Mr. Reich now has the power to change his own department's regulations, which permit employers to abuse the definition of "executive." He can do so by increasing the salary test to a level beyond which society stops worrying about exploitation.

Recently Congress set that level at 6.5 times the minimum wage for computer programmers. Restoring the executive salary test to three times the minimum wage therefore hardly would be radical. Unlike solutions to some other problems, Secretary Reich can achieve this one by a stroke of the pen — and he should, before a federal court embarrasses him by declaring the salary test invalid. Eighteen years of inaction is enough.