

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

PATRICK CHAVEZ, et al.,

Plaintiffs,

vs.

No. CIV 02-0562 JH/ACT

CITY OF ALBUQUERQUE,

Defendant.

PLAINTIFFS' WRITTEN CLOSING ARGUMENT

Plaintiffs present this closing argument following the trial on the remaining issues held on September 10, 2007. This case was brought under the provisions of the Fair Labor Standards Act (FLSA), the federal law that requires payment of time-and-a-half the “regular rate of pay” to employees who work hours in excess of their normal work period, which for most City employees is a 40-hour workweek.

The City admits that it calculates its employees overtime wages by using a unique “dual calculation.” Rather than combining the agreed upon benefits of the collective bargaining agreements (CBAs), which establish what the City actually pays its employees, with the provisions of the FLSA, the City instead performs two separate and independent calculations for each employee and for each pay period, paying only the higher of the two calculations. Police employees, with an express provision purportedly waiving calculation of the “regular rate” under the FLSA in exchange for contractual benefits, are even denied the “dual calculation” afforded the other City employees. The result is the

same, however, and all the affected employees are short-changed to the extent that inclusion of non-discretionary add-on pay in a “regular rate” calculation would otherwise and correctly raise their overtime wages.

The Summary Judgment Decision

In its Memorandum Opinion, Doc. 250, the Court clearly set out the positions of the parties:

The parties dispute whether the City’s method of performing two separate calculations of overtime, one pursuant to the FLSA (which includes nondiscretionary bonuses but not nonwork pay) and the other pursuant to the CBA (which includes paid leave as days worked but not nondiscretionary bonuses), and choosing to pay the employee the higher of the two, comports with the requirements of the FLSA. Defendants argue that the FLSA does not enhance overtime entitlements pursuant to CBAs (and conversely that CBAs do not enhance entitlements under the FLSA), and that Plaintiffs therefore err in trying to overlap the calculations. Plaintiffs claim that the City’s novel method of making one calculation under the FLSA that ignores the requirements of the CBAs and another calculation under the CBAs that ignores the FLSA is unprecedented and in violation of the FLSA. The facts are not in dispute, and the Court therefore may decide this issue as a matter of law.

Court’s Memorandum Opinion, at pp. 10-11. The Court then held that:

The City’s method of calculating FLSA overtime independent of the agree-upon wages in the CBAs violates the FLSA. . . . By wholly ignoring the CBAs, the City misunderstands the “very nature of the regular rate calculation under the FLSA.” *Walling*, 325 U.S. at 424. To comply with the FLSA, the City must look to the governing CBA to determine the payments to which it agreed, and from the CBA, mathematically calculate the regular rate of pay.

Opinion, at p. 12. Since the City cannot dispute that it fails to “look to the governing CBA to determine the payments to which it agreed,” much of the overtime pay issue in this case has already been decided against the City.

What the Court did not decide summarily, and left for the trial, were two related questions: 1) whether the City properly includes all regularly-paid, nondiscretionary bonuses and add-ons in its calculation of the regular rate of pay; and 2) whether the City properly credits payments against its FLSA overtime liabilities? Given the City's stubborn reliance on its dual calculation methodology, the answer to both questions is "no."

Calculation of the Regular Rate of Pay

"Calculation of the correct 'regular rate' is the linchpin of the FLSA overtime requirement." *O'Brien v. Town of Agawam*, 350 F.3d 279, 294 (1st Cir. 2003). The "regular rate" used to calculate overtime pay "is the hourly rate *actually* paid to the employee for the normal, non-overtime work week." *Aaron v. Wichita*, 54 F. 3d. 652, 655 (10th Cir. 1995); citing, *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199 (1947). The regular rate "must be discerned from what actually happens under the governing employment contract." *Agawam*, citing 29 C.F.R. Sec. 778.108; *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 462-63 (1948).

In *Walling v. Youngerman-Reynolds Harwood Co.*, 325 U.S. 419, 424, 425 (1945), cited by Plaintiffs in their summary judgment briefs and included by the Court in its Memorandum Opinion, at p. 12, the U.S. Supreme Court held that "once the parties have decided upon the amount of wages and the mode of payment. . . . determination of the regular rate becomes a matter of mathematical computation."

This “regular rate” is not just the basic rate of pay for the normal workweek but includes “all remuneration for employment paid to, or on behalf of, an employee.” § 207(e). The regular rate “must reflect all payments which the parties have agreed shall be received regularly during the work week, exclusive of overtime payments.” There are, however, exceptions:

. . . but the list of exceptions is exhaustive, see Sec. 778.207(a), the exceptions are to be interpreted narrowly against the employer, see *Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 295-96 (1959), and the employer bears the burden of showing that an exception applies, see *Idaho Sheet Metal Workers, Inc. v. Wirtz*, 383 U.S. 190, 209 (1966).

Agawam, at 294. The City has failed to meet its burden of proving any exceptions.

Inclusion of Add-ons and Bonuses

Despite the requirements of the Fair Labor Standards Act, the City does not include any add-ons and bonuses when calculating the “regular rate” pursuant to its collective bargaining agreements. These contracts contain an “hours of paid leave count as hours worked” provision. The City interprets these contracts as allowing calculation of overtime payments using a regular rate that does not include the required add-ons and remunerations in the employees’ “regular rate of pay.” The Court has already ruled that, based on the undisputed facts and as a matter of law, those employees’ pay must be calculated under the provisions of the FLSA so as to *include* what the City *excludes*, holding that “(t)he City’s method of calculating FLSA overtime independent of the agreed-upon wages in the CBAs violates the FLSA.” Memorandum Opinion, at p. 12.

Additionally, there are some add-ons and non-discretionary bonus payments that the City excludes even from its dual calculations. These include “skill pay,” which the City pays for additional qualifications and educational attainments, and the buy-back (or sell-back) provisions for unused accrued sick leave and vacation time. *Acton v. City of Columbia, Missouri*, 436 F.3d 969, 976-980 (8th Cir. 2006). Despite its burden to justify any exemptions or exclusions from its “regular rate” calculations, the City failed to present any evidence concerning its exclusion of these add-on payments in its regular rate calculations.

Claimed Credits and Offsets

A similar situation applies with respect to the credits and offsets taken by the City for hours “paid but not worked.” The City claims the right to take “credit” against unpaid overtime wages for hours of paid leave for which the City paid straight-time wages, as in a week when an employee was sick for a day but then worked an additional eight hours over the normal 40 hour week. These payments may neither be excluded from the regular rate of pay nor credited against owed overtime as “premium pay.” 29 U.S.C. Sec. 207(e) and (h).

The City simply ignores its commitment in the collective bargaining agreements to count days of paid leave as days worked, just as it refuses to comply with the provisions in its CBAs and the City Rules and Ordinance that require it to calculate overtime wages under its collective bargaining agreements “in accordance with” the FLSA. Thus, while the City contends that it almost always owes less under the FLSA than under the CBAs,

that is because the City is disregarding its contractual obligations when purporting to perform its FL:SA calculations, incorrectly crediting itself for what it must pay under its contractual obligations, and choosing the higher of the two.

The City's reliance on *Lamon v. City of Shawnee, Kansas*, 972 F.2d 1145, 1148 (10th Cir. 1992), Trial Transcript at pp. 10, 106, 108, is curiously misplaced. In *Lamon*, fifteen police officers and sergeants alleged that the City had failed to pay for meal periods and preparation for pre-shift briefings. The jury found that Shawnee had established a 28-day work period in accordance with the FLSA. Plaintiffs' appeal centered on the question of whether the City had established "a bona fide 28-day/171-hour work period under Sec. 207(k) of the FLSA." Defendants' cross-appeal focused on whether the meal-time was compensable and, if so, "the proper calculation of mealtime compensation." *Id.*, at 1155.

Nothing in *Lamon v. Shawnee* concerned the use of dual calculations or related to the interaction between collective bargaining agreements and the FLSA's provisions for calculation of the regular rate of pay. Here the City contends without any evidentiary support that its claimed use of a 43-hour workweek for Albuquerque Police officers divests it of any obligation to include the add-ons mandated by the FLSA in the police officers' regular rate of pay, or at least allows it to set a more lengthy threshold before the FLSA comes into play.

The City's argument in that regard is unreasonable, however, and the City has failed to even prove its adoption of a Section K plan. *Birdwell v. City of Gadsden*, 970

F.2d 802, 805 (11th Cir. 1992); *O'Brien v. Town of Agawam*, 350 F.3d 279, 291-292 (1st Cir. 2003). The notion that a different number of hours controls police overtime is contradicted not only by the City's failure to expressly adopt any different overtime provision, but also by the City's agreement to use a 40-hour week and its long-standing agreement and arrangement to pay police officers' overtime after 40 hours of work. Furthermore, the use of a 7-day workweek under Section K would be no different than the 7-day workweek the City has already established for paying its police officers.

In *Bell v. Iowa Turkey Growers Cooperative*, 407 F. Supp. 2d 1051, 1063-64 (S.D. Iowa, 2006), the Court addressed the method of paying an admitted short-changing of employees when their employer failed to include a shift differential in the "regular rate." The slightly reduced repayment because of "sixth day premium payments [the employer] has already made" to be calculated "on a pay period by pay period basis" bears no relation to the issues in this case.

Nor is there any basis for the City's reliance on *Nolan v. City of Chicago*, 125 F. Supp. 2d 324, 330-331 (N.D. Ill., 2000), where the Court addressed the FLSA's allowance of credits for payment of "certain contractual overtime payments." These payments were for three specific and limited categories of payments set out in 29 U.S.C. Sec. 207(e)(5)-(7). They are further limited to "extra compensation provided by a premium rate paid," but did not include the type of "credits" incorrectly taken by the City of Albuquerque as offsets for payment at regular (not "premium") pay rates for days not worked due to sick leave, vacation leave, and other paid time off. *Kohlheim v. Glynn*

County, Georgia, 915 F.2d 1473 (11th Cir. 1990), which concerned claimed credits against overpayments made before implementation of the FLSA, also does not support either the City's dual calculation methodology or its taking of credits paid but unworked time against owed overtime pay.

On the other hand, a Tenth Circuit case exactly on point held that "fringe benefits" such as paid vacations "may not be credited toward overtime compensation due under the Act." *Dunlop v. Gray-Goto, Inc.*, 528 F.2d 792, 794-795 (10th Cir. 1976). In that case the employees and employer agreed that in lieu of overtime pay "they would receive the fringe benefits above referred to."

In our view any such private agreement or understanding between the parties cannot circumvent the overtime pay requirements of the Act. In this regard see *Brooklyn Bank v. O'Neil*, 324 U.S. 697, 704 (1945) where the Supreme Court held that "where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with public interest will not be allowed when it would thwart the legislative policy which it was designed to effectuate." See also *Mitchell v. Greinetz*, 235 F.2d 621 (10th Cir. 1956) where we held that waiver of statutory wages under the Fair Labor Standards Act is not permissible. It is on this basis then that we conclude that the trial court erred in permitting fringe benefits to be set off against overtime pay otherwise due.

The City's contention that it may properly withhold overtime pay by offsetting its obligations with non-overtime contractual pay is without legal support or justification.

Trial Testimony and Exhibits

The Plaintiffs' witnesses testified to what appears on their pay accounts, which represents not what they, their unions, and the City have agreed upon, both with respect to add-ons and non-discretionary bonuses and with respect to owed overtime wages for

hours and days of paid leave, but rather what the City has chosen to pay them. The issues of failure to include non-discretionary add-on pay and the improper taking of credits against owed overtime pay are intertwined in the City's dual calculation methodology.

The fact of the City's incorrect payment of Plaintiffs is demonstrated in the witnesses' testimony concerning the Plaintiffs' pay records. The City has argued that going deeper into its pay records, for example by breaking down the pay record week by week, would show the legitimacy of its pay calculations. However, the City presented no such evidence at the trial and completely failed to rebut the employees' claim to additional overtime pay based on showing that the City failed to include add-on pay in calculating their regular rate of pay. This testimony and the City's failure to rebut it demonstrates the City's disregard of the provisions of the FLSA and the statutory rights of its employees to the proper calculation of their overtime wages.

Furthermore, the testimony of the City's only witness, Laurice Chappell, confirmed that when calculating employee overtime for all employees except police employees the City makes "two separate calculations." The City does not make any calculation of overtime pay due to police employees under the provisions of the FLSA. Even though the City's collective bargaining agreements provide that paid leave time will count as time worked for purposes of calculating overtime wages, Ms. Chappell testified that the City has not considered paid leave time as hours worked for purposes of calculating overtime. At the same time, when calculating overtime due pursuant to the union contracts, she said that the City does not include add-on non-discretionary remuneration

in the regular rate of pay and pays overtime at only the base rate. Thus, the testimony of both the employees and the City's financial witness confirm that the regular rate and overtime pay calculations made by the City did not include any longevity pay, shift differential pay, superlongevity pay, or hazardous duty pay. "Skill pay" and sick leave and vacation leave buy back (or sell-back) pay are two kinds of non-discretionary bonuses that the City has agreed to pay to certain of its employees. The testimony also showed that the City does not include "skill pay" or sick leave or vacation leave buy-back (or sell-back) pay in making any of its "regular rate" calculations.

The City's determination of whether the employee has actually worked the requisite hours during the workweek to be entitled to overtime pay under the FLSA excludes hours and days of paid but unworked leave. The City "takes credits for hours paid but not worked," such as sick leave, holidays, or vacation time, "to offset its overtime liability."

Willfulness and Good Faith

When an employer is found liable for unpaid overtime wages, the FLSA provides that the employees are entitled to "an additional equal amount as liquidated damages." 29 U.S.C. Sec. 216(b). If an employer wishes to avoid the award of liquidated damages, the employer has the substantial burden of proving good faith. *Vega v. Gasper*, 36 F.3d 417, 427 (5th Cir. 1994). The employer must show that it acted "in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the

FLSA.” 29 U.S.C. Sec. 250; *Herman v. Palo Group Foster Home*, 183 F.3d 468, 474 (6th Cir. 1999). Such proof necessarily requires the presentation of testimony. *Beebe v. United States*, 640 F.2d 1283 (Ct. Cl. 1981).

In the absence of any testimony or evidence of good faith a “District Court has no power or discretion to reduce an employer’s liability for the equivalent of double unpaid wages.” *McClanahan v. Mathews*, 440 F.2d 320, 322 (6th Cir. 1971); citing 29 C.F.R. Sections 790.15, 790.22(c). “There is a strong presumption in favor of doubling” the overtime pay damages with the award of liquidated damages. *Shea v. Galaxie Lumber & Construction Company*, 152 F.3d 729, 733 (7th Cir. 1998). Since the City Defendant failed to present any evidence or testimony on the subject of good faith, the Court should find that the award of liquidated damages is appropriate.

A similar inquiry into the Defendant’s “willfulness” determines whether a two-year or a three-year statute of limitations will be used:

The term “willful” is a term of art as used in the FLSA context. The Tenth Circuit has rejected the view that a “willful violation” requires an intentional disregard or deliberate indifference to the requirements of the FLSA. A violation is willful if the employer “knew or should have known of an appreciable possibility that the employees were covered by the [FLSA]

Donovan v. Public Service Company of New Mexico, 607 F. Supp. 784, 786 (D.C. NM 1984); *EEOC v. Central Kansas Medical Center*, 705 F.2d 1270, 1274 (10th Cir. 1983).

Here the City’s contentions show a plain disregard for the “regular rate” provisions of the law and a stubborn insistence on a dual calculation methodology that fails to comply with

the law. The City's opening argument at the trial demonstrates that the City still believes it "has acted in good faith in doing its calculations. It has followed the contracts, and it has followed the FLSA where the act applies." Since neither the law nor the evidence in this case support the City's contentions, the Court should hold that the City's actions were both willful and not in good faith.

Conclusion

Plaintiffs are entitled to overtime wages amounting to not less than one and one-half times the "regular rate" at which they are employed for hours worked outside of their normal work hours. An employee's "regular rate of pay" as defined in the FLSA and by the Department of Labor includes all non-discretionary bonus payments as additions to the employee's base rate of pay. The "regular rate" "is the hourly rate actually paid to the employee."

The regular rate of pay "must be drawn from what happens under the employment contract." The City's collective bargaining agreements, the City's Rules, and its Merit System Ordinance, all require computation and payment of overtime wages "in accordance with the Fair Labor Standards Act;" the FLSA requires the City to include all additional non-discretionary remunerations in the overtime pay calculations.

The methodology employed by the City in the calculation of overtime wages results in the significant underpayment of overtime wages. This is, in part, because the City fails to include non-discretionary pay bonuses in the regular rate of pay when calculating the overtime wages of almost all City employees who work overtime.

Contractual benefits such as paid vacations, sick leave, and other leave for which non-overtime pay was paid may not properly be credited toward overtime pay owed to employees under the FLSA, even if there is an agreement between the employer and employees that such benefits may be substituted for correctly calculated overtime pay.

In order to avoid the payment of liquidated damages in an amount equal to the overtime wages owed, the City had the burden of showing that it acted in good faith. Plaintiffs are entitled to the award of liquidated damages because the City failed to present any evidence of good faith in calculating its employees' overtime wages. Finally, the City's failure to pay the correct amount of overtime to its employees is willful and entitles Plaintiffs to a three-year statute of limitations.

The Court is respectfully requested to enter its findings and conclusions in accordance with the foregoing argument, evidence, and authority.

Respectfully submitted,

Electronically signed and filed

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I hereby certify that the foregoing was filed electronically and a copy has been forwarded by the Court to the following at their e-mail addresses on September 25, 2007:

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