

**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' MOTION AND MEMORANDUM FOR A NEW TRIAL

Plaintiffs present this Motion and Memorandum for a New Trial pursuant to Rule 59, Fed. R. Civ. Proc. 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 work week.

Rule 59 provides that:

A new trial may be granted . . . on all or part of the issues . . . for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

In this case, after about 760 present and former City employees had opted in and after more than five years of contentious litigation, on August 10, 2007, the Court issued a 47-page Memorandum Opinion and Order, apparently deciding the two most important issues in the case and leaving several other issues for a trial. (Doc. 250). The City moved for reconsideration. (Doc. 252).

Then, after a trial on limited undecided issues that lasted only a half-day on September 10, 2007, and after submission of briefs and proposed revised findings and conclusions, the Court issued its Findings of Fact, making 115 “Findings” over 30 pages and presenting “Legal Analysis and Conclusions of Law” in the other 26 pages of the 56-page ruling. At the heart of Plaintiffs’ present motion for a new trial is the apparent confusion and disparity between the Court’s August, 2007, summary judgment rulings and the January, 2008, opinion, analysis, and partial judgment

On the two major issues that the Court summarily decided on August 18, 2007, application of a “dual calculation” methodology for overtime pay and calculation of the “regular rate of pay,” Plaintiffs’ counsel must now confess their lack of understanding of the Court’s rulings. It is that lack of understanding and clarity, and of course disagreement with the result, that prompts this motion for a new trial.

Dual Calculation of Overtime Wages

At issue with respect to the City’s “dual calculation” methodology was the amount of the overtime wages the City must pay to its employees who work overtime. A provision in most of the City’s collective bargaining agreements (all except the Transit Department contract with City bus and van drivers), stated that hours of paid leave are counted as work hours for purposes of calculating overtime wages.

The Court initially ruled that this meant that the City must calculate employees’ overtime wages under the provisions of the collective bargaining agreements *and* the provisions of the FLSA that set the employees’ “regular rate of pay.” Plaintiffs based their trial presentation on

their understanding (or misunderstanding) of the Court's prior summary determination on that issue. Now, in its "Legal Analysis and Conclusions of Law," the Court explains that:

its conclusion that the City must look to the CBAs (collective bargaining agreements) to calculate the "regular rate" does not stand for the proposition that the City must look to the CBAs to determine what *hours* are counted towards reaching the FLSA overtime hour threshold.

(Doc. 278, at p. 32. Emphasis in original).

This is surprising to Plaintiffs, both because it apparently contradicts the Court's prior holding that the City's "method of calculating FLSA overtime independent of the agreed-upon wages in the CBAs violates the FLSA," (Doc. 250, at p. 12), and because it redefines "normal work week" in a manner contrary to "what actually happens." By definition, an employees' "normal work week" is the time, excluding overtime work, that he is expected to work each week. This time is defined for all City employees in the City's law and the collective bargaining agreements as a 40-hour week. It plainly *includes*, rather than excludes, hours and days of paid leave.

In its summary judgment memorandum, the Court 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 non-work 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.

(Doc. 250, 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.

(Id., at p. 12). Since the City could not dispute that it failed to apply the "regular rate" enhancement provisions of the FLSA "to determine the *payments to which it agreed*" under its employee contracts, thereby failing "(t)o comply with the FLSA," Plaintiffs reasonably believed that by the time of the trial much of the overtime pay issue in this case had already been decided against the City.

Now, however, the Court holds that the City must only "look to the governing CBA" to determine the *rate of pay*, not the "*payments to which it agreed*." For City employees working overtime, this is a drastic change in the Court's ruling, one which comes as a surprise to the Plaintiffs and one which now approves what the Court had seemingly disapproved, "as a matter of law," just before the trial: that "the City's method of calculating FLSA overtime independent of the agree-upon wages in the CBAs violates the FLSA."

On August 10, 2007, the Court said the City's method of calculation *violates the FLSA*, (Doc. 250, at p. 12). Now, on January 17, 2008, the Court concludes that the City's method of calculation *does not violate the FLSA*, even though the City may violate the terms of its collective bargaining agreements:

Although the Court has concluded that the City's failure to count hours paid but not worked towards the FLSA overtime threshold does not violate the FLSA, such a failure could violate a contract or CBA which specifically provides that the City must, for the purpose of computing overtime under the FLSA (as distinguished from computing overtime under the contract), consider paid leave as time worked. That claim, however, is not before the Court, and the Court therefore expresses no opinion regarding the merits of such a claim.

Doc. 278, at p. 38, fn 4.

In its summary ruling the Court addressed “payments,” plainly meaning the amount of overtime wages paid to City employees working overtime. These *payments* result from multiplication of the number of hours of overtime work by time-and-a-half of the overtime (or “regular”) rate of pay. The Court now appears to approve what it previously disapproved, saying it did not mean that “the City must look to the CBAs to determine what *hours* are counted towards reaching the FLSA overtime hour threshold.” At least to Plaintiffs’ understanding, that is precisely what the Court said and presumably “meant,” when it held that “the City must look to the governing CBA to determine the *payments* to which it agreed.” (Emphasis added).

Again, since the amount of overtime *pay* received by employees (“the payments to which it agreed”) is a product of the *hours worked* times the *rate of pay*, it is hard for Plaintiffs to understand the distinction now being made by the Court. Similarly, when the Court now holds that the terms of the collective bargaining agreements do *not* “determine what hours are counted towards reaching the FLSA overtime hour threshold,” the prior holding about the amount of overtime pay being calculated in conjunction with benefits agreed upon in the CBAs, is contradicted. The bargaining agreements include hours of paid leave counted as hours worked as a benefit; and the definition of the “normal 40-hour work week” under the terms of the CBAs include (rather than exclude) paid leave time such as hours of vacation or sick leave.

Plaintiffs alleged that the effect of the City’s dual calculation method was that the affected employees were 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. Up to and including the time of the trial that seemed to be the holding of the Court as well.

In fact, following the Court's summary judgment decisions, two things happened. First, the Magistrate Judge issued an Order setting a status conference to "address discovery and pretrial motions deadlines in connection with the damages trial to be set by the Honorable Judge Judith C. Herrera." (Doc. 251). Second, the City moved for reconsideration of the Court's holding on payment of overtime wages. (See, Doc. 253.) Obviously both the Magistrate Judge and the City shared Plaintiffs' understanding (or misunderstanding) that the Court had ruled in favor of the employees and against the City's dual calculation methodology that deprived the employees of the overtime wages to which they were entitled under their bargaining agreements *and* the FLSA.

"What Actually Happens" and Authorities Therefor

Plaintiffs contended, and the Court appeared to agree, that the rate of overtime pay "must be discerned from what actually happens under the governing employment contract." *O'Brien v. Town of Agawam*, 350 F.3d 279 (1st Cir. 2003), 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 (Doc. 250, 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."

The Court's present ruling is not only contrary to its prior ruling, but it is contrary to the requirement that the regular rate of pay is only calculated *after* the employer and employees have "decided upon the amount of wages and the mode of payment." While the Court continues to agree that the regular rate calculation is dependent upon "what actually happens" under the

collective bargaining agreements, which in most of Plaintiffs' contracts provide that "hours of paid leave constitute time worked," a distinction is now made that eviscerates the collective bargaining agreements, by not requiring the application of the "regular rate" to what the employer and employees have "decided" about "the amount of wages and the mode of payment."

The employees' regular rates "must be drawn from what happens under the employment contract." *Bay Ridge Operating Co. v. Aaron*, 334 U.S. at 464. "(I)t is an actual fact." *Walling*, 325 U.S. at 424 (1945). So too, the normal work week is set out in the employment contracts and statutes, and in this case it includes the agreed upon provision that hours of paid leave count as time worked for the purpose of calculating overtime wages under the FLSA. The City, and now the Court, reject the prescription of the FLSA that requires the employees' regular rate of pay to be based on what it actually pays. The Court has now sided with the City, concluding that even though the regular rate is computed from what is actually paid, the amount received as "actual pay" need not include the regular rate enhancements.

In *Wheeler v. Hampton Township*, 399 F.3d 238 (3rd. Cir., 2005), the Township's police officers made the same deal as the Albuquerque Police officers: no additional remunerations, bonuses, or pay incentives would be included in the regular rate calculation but non-work pay would count as days worked. The officers subsequently contended

that the Township's method of calculating overtime short-changed them under the FLSA, even though they agreed to that method in a collective bargaining agreement. The Township argues that, while the officers bargained away in the agreement one of their rights under the FLSA, the Township over-compensated the officers by bargaining away a more valuable right under the FLSA and thus offset the Township's liability under the Act.

Wheeler, 399 F.3d at 240. The Township "argued that the Officers traded their right to have incentive/expense pay added . . . in the CBA's overtime calculation in exchange for the inclusion of non-work pay. . . which" the Township contended "is not required under the FLSA."

The Township's contention in *Wheeler* was exactly the same as the City of Albuquerque's argument that it picks the higher of the bargaining agreement calculation and the FLSA calculation so the scheme benefits the employer and the employees. In *Wheeler* the appellate court questioned the basis for the Township's defense:

We agree that under § 207(e)(2), the Township did not have to agree to a CBA (collective bargaining agreement) that included non-work pay in its regular rate. Assuming, as do the parties, that such pay already is included in the CBA, however, we disagree that under § 207(e)(2) the Township does not have to include non-work pay in its regular rate. The CBA requires the Township to do so, and § 207(e) nowhere suggests that we should relieve the Township of that obligation.

Wheeler, at 243.

Section 207(e) states that an employee's "regular rate" of pay "*shall not be deemed* to include . . . payments made for occasional periods when no work is performed." The Third Circuit Court held that the "pivotal language is 'shall not be deemed.'"

The function of § 207(e)(2) is to forbid this Court from *deeming* that the CBA include non-work pay. We will follow that injunction, for the parties agree that the CBA already contains non-work pay in the regular rate. There is thus nothing for this Court to "deem." The deed is already done by the parties' own hands. . . . Consequently, we see no textual reason to "credit" the Township for including such pay in its regular rate.

Wheeler, at 244.

The Court's most recent decision here, that under the FLSA the City of Albuquerque does not have to abide by what it agreed to in the collective bargaining agreements, is contrary to the ruling of the Third Circuit Court of Appeals in *Wheeler*. Since the Court cited *Wheeler* in its summary judgment ruling, quoting the same "shall not be deemed" language, yet now appears to reject that ruling, Plaintiffs are at least entitled to reconsideration and an opportunity to present facts at trial which will support their contentions that the required overtime pay must not only

“include non-work pay in its regular rate,” but that the amount of payment must also include the provisions of the collective bargaining that hours of paid leave be included in the threshold used to reach the overtime pay which is calculated in accordance with the FLSA.

Another appellate court addressed whether the FLSA requires inclusion of contractual benefits “in the officers’ ‘regular rate’ for purposes of overtime calculation under the FLSA.” *O’Brien v. Town of Agawam*, 350 F.3d 279, 294 (1st Cir. 2003). Because the regular rate “must be discerned from what actually happens under the governing employment contract” the court held that the contractual add-on incentive pay must be included in the regular rate calculation. *Id.* As in *Wheeler*, no distinction was made between the contractual provision concerning “what actually happens” and the amount of pay ultimately received by the employees under their contracts, as the properly calculated regular rate of pay was incorporated into the payments actually made under the collective bargaining agreements. That is what the Court, in its most recent ruling denies the employees of the City of Albuquerque.

The Court previously ruled on and rejected the City’s argument that provisions in the collective bargaining agreements, most expressly the Police contracts, denying inclusion of add-ons and wage bonuses in the regular rate of pay, were properly applicable in this case. The City had argued that “Plaintiffs err in trying to overlap contractual overtime and statutory overtime.” (Doc. 232, City’s Summary Judgment Memo at p. 13). However, no citation to authority or other support for the City’s “dual method of pay calculations whereby it compares the employee’s wage entitlements under the applicable CBA (i.e., contractual wages) to the employee’s wage entitlements under the FLSA (i.e., statutory wages),” Doc. 232, Fact 11, “for each employee for each pay period,” *Id.*, was presented.

The Court, however, has now ruled that the City's computation methodology, albeit still without authority, is correct based on the presentation of evidence at trial, which showed, according to the Court's view, that in all cases the calculation under the FLSA provisions is less than the calculation of overtime under the collective bargaining agreements. The reason for this showing at trial and Plaintiffs' failure to present contrary evidence, is that Plaintiffs reasonably believed that the issue had already been decided in their favor and against the "dual calculation" methodology that is now suddenly supported. Just as the "regular rate of pay" is the wage actually paid to the employee, the "normal 40-hour work week" is also the norm set out in the CBAs, which constitutes actual practice and clearly determine the way City employees are paid: i.e., "what actually happens."

Plaintiffs read the law to require the City to pay overtime wages at a rate that includes *both* the provisions of the applicable CBA *and* the requirements of the FLSA, not one or the other. As a result of the City's, and now the Court's, reading of "and" to mean "or," the City selects the higher of the two, rather than the total of the agreed upon provisions *and* the statutory requirements.

As Plaintiffs contended earlier in the case, "the court should not overturn what the employees bargained for with the City in good faith; at the same time, the court cannot condone the City's violations of the requirements of the FLSA." Since that is what the Court now apparently does, and because that very substantial change is neither understood nor accepted, Plaintiffs respectfully request an opportunity for rehearing and reconsideration of this issue. The summary judgment rulings effectively precluded further presentation of evidence and testimony

on the decided matters at the trial, leaving Plaintiffs without the opportunity to present their position and the evidence supporting it.

A motion for reconsideration is not appropriately used to request the Court to reconsider what it has already considered and decided. Appeal is the proper way to question the decision of a court that a party does not agree with. However, in this case the procedural posture is nowhere near so simple. The Court was asked, by the City, to reconsider its summary judgment ruling. (Doc. 253). The Court denied the City's motion, which it had taken under advisement. (Doc. 280). Yet, at least from Plaintiffs' perspective, the Court actually *did* reconsider, reversing its prior ruling on the "dual calculation" issue and approving the City's method of calculating overtime wage payment. Plaintiffs therefore respectfully request further consideration (or "reconsideration") and urge the Court, under the facts and circumstances in this case, to allow the opportunity for a new trial.

If this were a mere technical difference, Plaintiffs would not be asking for reconsideration and a new trial. To the contrary, however, this issue lies at the heart of the case, making a huge difference in both the method and amount of calculation of Plaintiffs' overtime wages and how Plaintiffs would have presented their case at trial had they known or understood the Court's present view prior to the trial.

The Other Issue

The other issue Plaintiffs ask the Court to re-visit and allow for rehearing concerns the City's calculation of the overtime rate of pay using the number of hours worked in the pay period (rather than the number of hours in the employees' "normal work week," which is usually 40) and multiplying by one-half rather than one-and-a-half. This was summarily decided in favor of

the City (Doc. 250, at pp. 16-29), but unlike the “dual calculation” issue it was neither reviewed nor altered by the Court following the trial.

Going back to the basic premise behind the calculation of overtime under the FLSA, “the ‘regular rate’ under the Act is a rate per hour.” 29 C.F.R. Sec. 778.109. “The Supreme Court has described it as the hourly rate actually paid to the employee for the *normal, non-overtime work week* for which he is employed – an ‘actual fact.’” 29 C.F.R. Sec. 778.108. Again, the rule is that the “regular rate” is “what actually happens.” The regular rate is the hourly rate an employer pays the employee “for the normal, non-overtime work week for which he is employed.” *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945).

Since the amount divided by a number of hours to calculate the actual pay rate is the normal amount of pay for a regular, non-overtime work week, which in this case is an hourly rate plus pay enhancements, the divisor for a 40-hour work week is 40. It is erroneous to divide by the total hours worked including overtime, which in extreme examples can be more than twice the number of hours in a normal work week, because that results in an hourly rate that can be as low as half the actual “regular rate.” That is what the Court has approved, and it makes little or no sense.

As a result of dividing by the hours worked in the particular work week, including overtime hours, rather than dividing by the normal, non-overtime hours in employees’ work weeks, the City arrives at a lower hourly “regular rate of pay,” one that in extreme cases of low base pay and high overtime work may even result in less than the minimum wage. The City then compounds this error by multiplying by one-half rather than one-and-a-half.

There is no ambiguity in the law or the regulations, even though by applying inapplicable “production bonus” situations, or “fluctuating work weeks,” or other facts unrelated to “what actually happens” in the payment of Albuquerque City employees who are paid hourly wages for a 40-hour work week, the City may find some justification for its regressive scheme.. The Court’s summary decision on this issue was not raised at or after the trial, having been summarily decided as a matter of law and being most appropriately addressed by Plaintiffs’ challenge on appeal. Nonetheless, Plaintiffs view the Court’s decision as confusing, unreasonable, and without sound basis in the law, and suggest that if the Court revisits the “dual calculation” issue then it would be similarly appropriate to review the arithmetic calculation issue as well.

The “regular rate” as defined by the law is the rate agreed upon by the parties. It should not vary from one week to the next, depending on the number of hours worked by the employee in the particular week; it should not be different for each employee, depending on the number of hours worked. Because Plaintiffs firmly believe there is no substantial justification for the City’s calculation methodology, even though that was previously approved by the Court, Plaintiffs respectfully request reconsideration on that issue as well.

Conclusion

The Court agreed in a summary judgment decision in August, 2007, that under the FLSA, 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 and that payment of overtime wages “must be drawn from what happens under the employment contract.” (Doc. 250). The City’s collective bargaining agreements, the City’s Rules, and its Merit System Ordinance, all require computation and payment of overtime wages “in accor-

dance with the Fair Labor Standards Act;” the City’s Labor-Management Relations Ordinance requires the City to comply with the terms of its collective bargaining agreements, which in this case requires the City to count most employees’ hours of paid leave in the calculation of overtime as “hours worked.”

The methodology employed by the City in the calculation of overtime wages results in the significant underpayment of overtime wages, which the Court now, in January, 2008, has approved along with approval of the same “dual calculation” methodology that was previously held to violate the FLSA . In the process, Plaintiffs were denied the right and opportunity for trial, testimony, or additional argument on these issues. The limited issues tried to the Court early in September, 2007, did not include the more substantial issues summarily decided just a month before the trial. Plaintiffs are requesting nothing more than an opportunity to be heard and present evidence on the subjects that were previously decided and then, without any trial or hearing, abruptly reversed.

Respectfully submitted,

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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 February 1, 2008.

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