IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

PATRICK CHAVEZ, JEANNINE CHAVEZ, RUDY CAMPOS, MICHAEL COCCHIOLA, and FORTINO ORTEGA on behalf of themselves and all other City employees who have been paid overtime that was improperly determined under 29 U.S.C.A. § 207(a)(1) (Section 7(a)(1) of the Fair Labor Standards Act),

CIV 02-0562 JH/ACT

Plaintiffs,

v.

CITY OF ALBUQUERQUE,

Defendant.

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A NEW TRIAL

The Defendant, City of Albuquerque ("City"), by its attorneys, presents the following Memorandum in Opposition to Plaintiffs' Motion For a New Trial.

BACKGROUND[1]

Plaintiffs, present and former City employees, sued the City under the Fair Labor Standards Act ("FLSA") arguing the City improperly calculates overtime for its employees. Docket 278 ¶ 1.[2] The City uses a dual method for calculating overtime. It calculates overtime for each employee under the FLSA and under terms of the governing collective bargaining

[1] On January 17, 2008, this court issued Findings of Facts and Conclusions of Law. Defendant repeats only the basic facts to explain the context for why the Court should deny Plaintiffs' Motion for a New Trial.

[2] Defendant refers to documents in the Court's record by their docket number and specific page or paragraph number; for example, "docket # at #," or "docket # at ¶ #." Defendant refers to specific portions of Plaintiffs' Motion And Memorandum For A New Trial as "Pl. Mot. #."

agreement ("CBA") and pays the employee the amount that is higher.[3] *Id*. ¶ 28. The FLSA calculation is distinct from the CBA calculation. The parties do not dispute that certain add-ons and bonuses must be included in the FLSA regular rate calculation. *Id*. ¶¶ 18 – 22, 25, 26. Conversely, the CBAs do not require the City to include these add-ons and bonuses in the calculation. *Id*. ¶ 18. However, the CBAs are more generous than the FLSA in other aspects. Under the CBA, the City counts certain hours paid but not actually worked towards the overtime threshold, again beyond what the FLSA requires. *Id*. 37-38.

On August 10, 2007, this Court issued a Memorandum Opinion and Order (the "2007 Order") wherein it granted in part and denied in part Plaintiffs' and the City's Motions for Summary Judgment. Docket 250. The Court held a bench trial September 10, 2007. Docket 278 at 1. On January 17, 2008, it issued Findings of Fact and Conclusions of Law (the "2008 Order") finding in favor of the City on all remaining issues except for the inclusion of benefit sale back proceeds in overtime. Docket 278. This complex issue has lead to a split between the Eighth and Sixth Circuits.

In the Court's Findings and Conclusions, it conducted and explained the dual mathematical calculation that the City performs, and confirmed what the City has maintained all along: that when it pays employees pursuant to the CBA calculation rather than the FLSA calculation, it is because employees are paid more under the CBA calculation than the FLSA requires. *See* docket 278 at 15-30. On February 1, 2008, Plaintiffs moved for a new trial. Docket 284.

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[3] This is true for *most* City employees. The City however, does not perform a dual calculation for Police Department Employees. Since pay under the CBA is always higher for these employees, the City simply pays them this higher amount. *See* Docket 278 ¶ 39-43.

ARGUMENT

Plaintiffs move for a new trial under Rule 59 of the Federal Rules of Civil Procedure. Rule 59(a) provides:

> (1) *Grounds for New Trial*. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:
>
> (B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

Plaintiffs argue that they are entitled to a new trial because of the "apparent disparity and confusion between the Court's August, 2007, summary judgment rulings and the January, 2008, opinion, analysis and partial judgment." *See* Pl. Mot. 2. Plaintiffs appear to argue that because they misunderstood the Court's 2007 Order, they chose not to put on evidence at trial, and are now entitled to a new trial. *See id*. at 2-3. Plaintiffs' argument fails.

First, Plaintiffs have not pointed to a single case where a rehearing was granted under similar circumstances "in a suit in equity in federal court." Absent from Plaintiffs' Memorandum is *any* case law supporting their argument that they are entitled to a new trial. Indeed, the City is aware of no such case law. Second, Plaintiffs cannot use their Motion for a New Trial to reargue the case on the merits. Plaintiffs persist in making arguments that are contrary to law and that this Court has already rejected. And in terms of evidence, they have pointed to no evidence whatsoever, whether new or old, that could lead to a contrary result. Third, the record clearly shows that Plaintiffs were not misled, and if they were confused it was no fault of the Court's or of the City's. Finally, Plaintiffs are not entitled to a new trial on what they call the "other issue" because their position is contrary to federal regulations.

A district court's discretion whether to grant a new trial is "particularly broad, and its discretion to grant or refuse a motion for a new trial will not be reversed absent a gross abuse of discretion." *York v. AT&T Co.*, 95 F.3d 948, 958 (10th Cir. 1996) (*citing Holmes v. Wack*, 464

F.2d 86, 89 (10th Cir. 1972)). A motion under Rule 59 is "generally not regarded with favor, and is granted only with great caution." *Smith v. Cochran*, 182 Fed. Appx. 854, 864 (10th Cir. 2006).

I. THE COURT CANNOT GRANT PLAINTIFFS A NEW TRIAL WHERE THEY CHOSE NOT TO PUT ON EVIDENCE THAT WAS AVAILABLE TO THEM AT THE TIME OF TRIAL

Plaintiffs' tactical decision concerning its choice of evidence at trial is not a reason for which the Court may grant a new trial. Plaintiffs have not pointed to any case where a court granted a new trial in this situation. Rule 59 authorizes the trial court to grant a motion for a new trial *only* "for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court." Fed. R. Civ. P. 59. No federal court the City is aware of has granted a motion for a new trial based on the argument that the court misled the movant.

Case law illustrates that the burden of demonstrating a new trial is appropriate is a fairly onerous one. The "trial court should grant a motion under… [Rule 59] only to correct manifest errors of law or to present newly discovered evidence." *U.S. v. Metric Constr., Inc.*, No. Civ. 02-1399JB/LAM, 2007 WL 1302606, at *10 (D. N.M. Mar. 1, 2007) (*citing Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)); *see also York*, 95 F.3d at 958 (verdict must stand unless "clearly, decidedly or overwhelmingly" against the weight of the evidence) (citations omitted). Here, there was no manifest error of law on the points Plaintiffs dispute. *See infra* Argument § II. Rather, the Court's decision on those points fully accords with the law.

Moreover, Plaintiffs cite to no evidence to justify granting a new trial. Plaintiffs argue they are "at least entitled to reconsideration and an opportunity to present facts at trial." Pl. Mot. 8. However, Plaintiffs' memorandum lacks any description of the evidence they would seek to introduce at a new trial. At trial, Plaintiffs indeed attempted through their witnesses and through

cross-examination of the City's witness, to establish factually that the City did not pay its employees properly under the FLSA. Plaintiffs nevertheless failed to prove this assertion at trial, and proffer no new evidence now that would lead to a different result. As such, Plaintiffs do not meet the standard for a new trial based on new evidence.

For the court to grant a new trial based on new evidence, the movant must show:

> (1) the evidence… [is] newly discovered since the trial;
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> (2) [the movant] was diligent in discovering the new evidence;
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> (3) the newly discovered evidence … [is] not be merely cumulative or impeaching;
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> (4) the newly discovered evidence… [is] material; and
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> (5) that a new trial, with the newly discovered evidence would probably produce a different result.

Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 727 (10th Cir. 1993) (denying defendant's motion for new trial under Rule 60, stating "if a party, through negligence or a tactical decision, fails to present evidence that was available" it may not "find refuge" under Rule 60); *see Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990) (Rule 60 standard for granting new trial based on new evidence applies to Rule 59 motions); *Hartzell v. Honda Motor Co. Ltd.*, 930 F.2d 33, No. 90-4016, 1991 WL 50540 (10th Cir. April 8, 1991) (unpublished) (denying plaintiff's motion for a new trial under Rule 60 where the reason plaintiff did not have certain documents at time of trial was plaintiff's own fault).

Plaintiffs cannot make it past the first prong of the test. They do not allege that they now have new evidence not available at the trial. Rather, they claim confusion, believing they had already won, and therefore chose not to put on evidence. Under these circumstances, the Court should deny Plaintiffs' Motion. *See Lyons*, 994 F.2d at 727.

II. A MOTION FOR A NEW TRIAL IS NOT THE PROPER VEHICLE FOR PLAINTIFFS TO REARGUE THE MERITS.

The purpose of a Rule 59 motion for a new trial is not to give the losing party a second chance to make the same arguments on which the party already lost. *Metric Constr., Inc.*, 2007 WL 1302606, at *11 (A Rule 59 Motion "may not be used as a vehicle for the losing party to rehash arguments previously considered and rejected by the district court") (citations omitted); *Lyons*, 994 F.2d at 725 ("a gross injustice would be worked… if we… required the entire suit to be relitigated simply because" plaintiff "lost the first time") (citations omitted).

Plaintiffs persist in making the same argument again because their confusion throughout this case persists on one issue: their refusal to recognize that the FLSA only concerns itself with hours actually worked. 29 U.S.C. § 207(e). It does not concern itself with hours not worked in calculating overtime pay. Indeed, that confusion best explains their misunderstanding of the Court's rulings on the Motions for Summary Judgment, the City's Motion to Reconsider, and the Court's Findings and Conclusions here at issue.

In any event, the Court should still deny Plaintiffs' Motion because their interpretation of the law in this regard is wrong. The Court's January 2008 Findings of Fact and Conclusions of Law fully accords with the applicable law on these points. In a thorough, well-reasoned opinion, this Court held that the City's dual calculation method for calculating over-time complies with the FLSA. The Court performed and explained the dual mathematical calculation that the City performs and confirmed that when the City pays employees pursuant to the CBA calculation rather than the FLSA calculation, it is because the CBA calculation renders a higher amount of pay for its employees. *See* docket 278 at 15-30. Employees therefore always receive as much as they are entitled to under the FLSA—or more when they are paid under the CBA.

Plaintiffs' arguments to the contrary confuse the issues, asserting that the CBA somehow alters the requirements of the FLSA and conversely, that the FLSA alters what was bargained for under the CBA. *See, e.g.,* Pl. Mot. 9 (arguing the FLSA overtime pay calculation must include "the provisions of the collective bargaining [agreement] that hours of paid leave be included in the threshold used to reach the overtime pay"). There is no basis in law for this argument. *See* docket 278 at 10 ("In contrast [to the CBA], the FLSA… does not contain an explicit provision requiring employers to count hours paid as hours worked.") That the parties bargained for paid leave to be included in the CBA for a *contractual* overtime threshold does not change the statutory requirements of the FLSA. *See Lamon v. City of Shawnee*, 972 F.2d 1145, 1151-52 (10th Cir. 1992). Again, the FLSA is only concerned with time worked.

Plaintiffs rely almost entirely on *Wheeler v. Hampton Township*, 399 F.3d 238 (3d Cir. 2005), in support of their argument that the CBA somehow changes how the City must calculate overtime under the FLSA. However, *Wheeler* stands for a different proposition. In *Wheeler*, defendant calculated overtime under a CBA believing that its employees had waived certain rights under the FLSA upon entering into the CBA. *Id*. at 243. It did not perform a dual calculation like the City does. Here, the City never contended its employees had waived any FLSA rights. That is *why* it performs the dual calculation. If the FLSA calculation results in a higher payment, employees are entitled to that amount. If the calculation under the CBA is higher, employees receive that amount. By receiving overtime pay pursuant to the CBA, here, unlike in *Wheeler* employees are not giving up FLSA rights, since they in fact receive *more* pay than they are entitled to under the FLSA. In *Wheeler*, the agreement specifically added non-work pay to the regular rate. *Id*. at 244. That is not the case here. Unlike in *Wheeler*, the City's position receives support from the very sections of the Act, 7(e) and 7(h), that were cited by the

Wheeler Court. *Id.* at 243, 245; s*ee also* docket 237 at 13-14 (explaining in detail why *Wheeler* does not control). The 2008 Order is fully in accord with the law on these points and Plaintiffs have cited no authority to the contrary. The Court should deny Plaintiffs' Motion for a New Trial.

III. PLAINTIFFS WERE NOT MISLED BY THE COURT

Plaintiffs' argument that they were misled by the Court's 2007 Order is unavailing. The Court made it very clear in the 2007 Order, that it was granting in part and denying in part both Plaintiffs' and the City's Motions for Summary Judgment. *See* docket 250 at 45-47. The Court specifically held, *inter alia*:

> Plaintffs' Motion for Summary Judgment on the question whether the City properly includes all regularly-paid, nondiscretionary bonuses and add-ons in its calculation of the regular rate under the FLSA is DENIED.

Docket 250 at 46. This holding as to the FLSA calculation is distinct from any holding as to the CBA calculation. Now Plaintiffs argue that they "reasonably believed that by the time of trial much of the overtime pay issue in this case bad already been decided against the City." Pl. Mot. 4. Given the clear language of the Court's holding, Plaintiffs cannot reasonably argue that the question of the City's inclusion of bonuses and add-ons in the regular rate was off the table at trial.

There is no disparity between the 2007 Order and 2008 Order, as Plaintiffs claim. *See* Pl. Mot. 2. The Court in its earlier decision concluded the undisputed point that the City must look to the CBAs to determine what *pay* to include in the regular rate calculation; it did not, however, decide a "separate and distinct issue" whether the City must look to the CBA to determine what *hours* count in the *statutory* FLSA calculation. Docket 278 at 31-32.

The Court's decisions are consistent and reach the correct result. If Plaintiffs did not understand the issues that remained for trial, it is not because the Court misled them. Any

misunderstanding on Plaintiffs' part of the issues that remained for trial does not allow this Court to grant Plaintiffs' motion for a new trial. *See Hartzell*, 1991 WL 50540, at *1 (district court properly denied plaintiff's motion for a new trial[4] where plaintiff argued he failed to obtain certain documents in discovery because of confusion about the scope of the discovery order).

Plaintiffs also point to the City's Motion for Reconsideration of the 2007 Order as proof that 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." Pl. Mot. 6. As the 2007 Order made clear, the Court granted in part and denied in part both Plaintiffs' and the City's Motions for Summary Judgment. Docket 250 at 45 – 47. In moving for reconsideration on certain issues, the City made it clear these issues remained alive. Further, the City sought to clarify that it does not calculate overtime independent of the CBA. *See* Docket 250 ¶ (1) ("Plaintiffs' Motion for Summary Judgment on the question of the City's calculation of the FLSA overtime independent of the CBAs is granted"); docket 253 at 1-2. Rather, the City includes non-discretionary bonuses and remunerations provided for in the CBA in calculating an employee's overtime pay under the FLSA. Moreover, the Court had not yet ruled on the Motion at the time of trial, and this certainly should have alerted Plaintiffs that these issues remained for trial. They should have known to put on all available evidence, if indeed there was any, to defeat the City's Motion. *See* docket 280.

Further refuting Plaintiffs' argument they were misled, is that Plaintiffs did in fact put on evidence at trial on issues they now claim should be retried. For example, Plaintiffs put on evidence on the issue whether certain add-ons are properly included in the City's overtime

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[4] In *Hartzell,* Plaintiff moved for a new trial under Federal Rule of Civil Procedure 60. The court's analysis however is equally applicable to a Rule 59 Motion. *See Jones*, 921 F.2d at 878 (explaining distinction between evidence warranting Rule 59 and Rule 60 relief is one of degree rather than kind).

calculation, s*ee* docket 278 ¶¶ 24, 27, and they put on evidence of several employees' pay stubs. *See* docket 278 ¶¶ 45, 47, 93. At trial, the City supported its position with testimonial and documentary evidence that it properly included certain forms of pay in calculating the regular rate. Plaintiffs' evidence failed to refute this. This is not grounds for a new trial.

IV. PLAINTIFFS ARE NOT ENTITLED TO A NEW TRIAL ON WHAT THEY CALL "THE OTHER ISSUE"

Plaintiffs also ask the court to revisit the issue of "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." Pl. Mot. 11.

Again, Plaintiffs point to no case that would allow the court to reconsider this issue at a new trial. Instead, Plaintiffs continue to argue in favor of double-counting and their version of what they wish the law to be is simply wrong. In the 2007 Order, the Court held, "authority clearly supports the City's method of using the total hours actually worked as the divisor in calculating the regular rate." Docket 250 at 17 - 21 (*citing Zumerling v. Devine*, 769 F.2d 745, 752 (Fed. Cir. 1985); 29 C.F.R. § 778.109, 778.110(b)). The Court also rejected Plaintiffs' argument that the City may never use a "one-half multiplier." *Id*. at 21 – 25 ("This method of calculating overtime pay, using a one-half multiplier… is explicitly recognized and sanctioned by the FLSA regulations"); 29 C.F.R. § 778.209. The Court applied the law to the facts and held correctly on both of these issues and there is no reason to revisit them now. Further, Plaintiffs themselves admit that a motion for a new trial is not the proper vehicle to challenge the Court's holding on this issue – an issue that was not even raised at trial. *See* Pl. Mot. at 13 (this issue would be "most appropriately addressed by Plaintiffs' challenge on appeal.")

CONCLUSION

For the reasons herein, Defendant the City of Albuquerque respectfully requests that the Court deny Plaintiffs' Motion For a New Trial.

Respectfully submitted:

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