

**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' REPLY TO DEFENDANT'S
RESPONSE TO MOTION FOR A NEW TRIAL**

Plaintiffs present the following Reply to The City of Albuquerque's Response to Plaintiffs' Motion for a New Trial pursuant to Rule 59, Fed. R. Civ. Proc.

"Misunderstanding" Serious Disparity

The City argues that Plaintiffs "misunderstood" the Court's summary judgment ruling and there is no disparity between the Court's summary judgment decision and the later rulings on the same facts and law. This was addressed in Plaintiffs' rehearing motion, where it is noted that there is a serious disparity between the Court's summary judgment ruling that the City's dual calculation methodology was not in compliance with the FLSA and the ruling after trial that dual calculations do comply with the FLSA.

Plaintiffs did not "misunderstand" what the Court held in its summary judgment ruling. The "governing CBA" determines and defines the normal workweek, above which hours worked are "overtime." There is no ambiguity at all in the Court's ruling that "the City cannot use the FLSA as a sword to strip employees of their rights secured by the CBAs by using two separate calculations of overtime pay." (Doc. 250, at p. 16). The Court granted Plaintiff's Motion for

Summary Judgment on the question of the City's calculation of the FLSA overtime independent of the CBAs." (Doc. 250, at p. 46). That is what the Plaintiffs understood, and it was certainly a "surprise" when the Court later approved the use of "two separate calculations of overtime pay" one "independent of the CBAs," the other "independent" of the FLSA.

Legal Fiction

According to the City's Post-Trial Memorandum of Law, "(t)he parties agreement under the contract to consider the unworked holiday as hours worked for contractual overtime is a *legal fiction* and does not change the status of the unworked day into a worked day under the FLSA." (Doc. 275, at p. 4; emphasis added).

What the Court's summary judgment decided as a matter of law, however, is that the "hours of paid leave count as days worked" collective bargaining provisions are included in the employees' "normal, non-overtime workweek," because that is what the employer agreed to. Thus, the so-called "legal fiction" of hours of paid leave counting as time worked applies to the establishment of the "normal non-overtime workweek" leaving the calculation of overtime work, that is, the hours worked over the normal 40-hour workweek, to the FLSA and requiring use of an enhanced "regular rate" for calculation of overtime wages.

If a City employee, for example, takes Monday and Tuesday off because he is ill, and then works all day on Wednesday, Thursday, and Friday, he has worked, under the terms of the CBA, a full 40-hour week. If he then works an additional 15 hours over the weekend or nights, those are properly considered overtime hours, and the City does, in fact, pay time and a half for such hours. The City's present contention that under the FLSA those 15 hours are not overtime under the FLSA because the employee has only "worked" three 8-hour days (for a total of 24 hours)

and the additional 15 hours are under the 40 hour threshold is the real fiction, one which is neither supported by the law nor the contract, nor is it what *actually happens* under the City's rules and agreements.

In fact, what happens when an employee works more than the normal 40-hour workweek, which includes days of paid leave, is that the employee is paid overtime. It should be obvious that hours worked after the normal workweek, whether they are additional hours or days beyond the normal workweek, are properly considered "overtime" work. The problem is that the City fails to pay that overtime at the "regular rate of pay" as required by the FLSA, contending that those additional hours are within the 40 hour threshold, even though they clearly are not. That is the result and effect of the "dual calculation" methodology, and it is the result that the Court found in violation of the FLSA.

Ignoring the CBAs Violates the FLSA

In the Court's summary judgment ruling it noted that "The City does not point to any regulation or authority supporting its decision not to consider CBA requirements in calculating the regular rate of pay under the FLSA." (Doc. 250, at p. 5). Nor can it be denied that the Court unambiguously stated that:

The City's method of calculating FLSA overtime independent of the agreed-upon wages in the CBAs violates the FLSA. The FLSA and Supreme Court precedent specifically require employers to consider all payments the parties have agreed employees shall receive. . . . By wholly ignoring the CBAs, the City misunderstands the "very nature" of the regular rate calculation under FLSA. To comply with the FLSA, the City must look to the governing CBA to determine the payments to which it agreed . . .

(Doc. 250, at p. 12, citations omitted). The Court ruled that "(b)y ignoring the CBAs in determining the regular rate of pay, the City violates the FLSA. Plaintiffs, therefore, are entitled

to summary judgment in their favor on this issue.” (Doc. 250, at p. 13, underlining added). That is also what the City sought to have reconsidered. (City’s Memorandum, Doc. 253, at p. 1).

The Collective Bargaining Agreements for the most part state that the employees’ pay shall be calculated under the provisions of the CBA’s and the provisions of the FLSA. When the City uses its dual calculations, however, the two calculations separate the “regular rate” calculation under the FLSA from the payment of overtime wages under the CBAs. That is what the Court ruled initially, and that is what Plaintiffs based their trial preparation and presentation on; that is the primary reason Plaintiffs are asking for a rehearing.

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. . . .” (Id., at p. 12). The Court even stated that:

The City’s reliance on the FLSA regulations, is likewise irrelevant, because the examples contained therein do not sanction the City’s choice to use two separate and distinct calculations, one statutory and one contractual, to determine an employee’s overtime. To the contrary, the FLSA and its regulations specifically require an employer to consider “all remuneration for employment paid to, or on behalf of, the employee.”

(Doc. 250, at p. 45).

In this case the *actual pay includes*, rather than excludes, pay for hours of paid leave. Pay for leave time, such as vacation and sick leave, is “remuneration for employment paid to, or on behalf of, the employee.” The calculation of those payments separately allows the City to pay for the hours mandated by the employment contract without consideration of the add-on remuneration which was the basis of this lawsuit. Conversely, the calculation of the payments under the FLSA, includes the add-ons but excludes the benefits agreed upon in the CBAs and is almost always lower.

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 of the law and the Court's summary determination on that issue. Then, in its January, 2008, "Legal Analysis and Conclusions of Law," the Court explained 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). On August 10, 2007, the Court held "as a matter of law" ignoring the CBAs violates the FLSA; that is no less true today, the Court's most recent ruling notwithstanding.

As stated in Plaintiffs' Motion, this change was a surprise, 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.

The matters listed for trial, moreover, did not include any revisiting of the dual calculation methodology, and Plaintiffs were justified in believing that a matter that had been conclusively decided by the Court would not be abruptly reversed. One cannot calculate the regular

rate on the basis of what is actually paid, and then continue the calculations by finding that, at least under the terms of the FLSA, that is not what is actually paid.

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. (Doc. 250, at p. 12). Plaintiffs reasonably believed that by the time of the trial most of the overtime pay issue in this case had already been decided against the City.

Wheeler Undistinguished

In its response, the City attempts to distinguish *Wheeler v. Hampton Township*, 399 F.3d 238 (3rd. Cir., 2005), where 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.

In its summary judgment ruling, the Court addressed the same argument made by both the Township in *Wheeler* and the City of Albuquerque in this case. 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.'" *Wheeler*, at 244.

The City now states that the situation in *Wheeler* is distinguishable because the employees in *Wheeler* "waived" the inclusion of add on remuneration into the regular rate of pay in exchange for recognition of their "hours of paid leave count as hours worked." That is, however, exactly what the Albuquerque Police Officers did as well, impermissibly waiving their right to a calculation of overtime wages in conformance with the FLSA (and therefore including the add-on remuneration in the regular rate) in exchange for the inclusion of the bargained for "hours of paid leave" in their workweek and in the calculation of overtime wages under the FLSA.

Federal Civil Procedure Rule 59

The City contends in opposition to the motion that Rule 59 limits rehearings to "reason(s) for which a rehearing has heretofore been granted in a suit in equity in federal court." The City points out that Plaintiffs have not cited any case where, for exactly the same reasons, a rehearing has been granted. This argument has little merit. These are far from technical differences;

they go to the heart of Plaintiffs claims and the City's defenses, making a substantial 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.

First, no case has been found that presents exactly the same set of circumstances, i.e., a summary judgment ruling that a dual method of calculating FLSA overtime payments was not in compliance with the federal law, followed by a ruling that such a method was in compliance with the law. First, it is far from certain that there have been no similar cases. There are, of course, many district courts and only a few of the interim rulings from those courts are actually published. In this case, for example, neither the summary judgement ruling nor the later findings and partial judgment were reported, and if the Court were to grant a re-hearing, it is unlikely that would be published either.

Second, there is no reason to take the language so literally. In commentary to the 1966 Amendment to Rule 59, it is stated that "the particularity called for in stating the grounds for a new trial motion (when the Court raises the issue) is the same as that required for all motions by Rule 7(b)(1). The latter rule does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on."

Third, the provisions of Rule 60, Fed. R. Civ. Proc., which allows relief from Judgment or Order include "surprise" among the reasons for allowing relief. Since a motion under Rule 60 can be filed within a year after the challenged judgment, it would be incongruous to require a stricter standard for rehearing under Rule 59, which must be filed within ten days.

Finally, if a literal meaning were to be given to the provision, the only way a matter could be subject to a rehearing would be if it had happened before in exactly the same way. There could never be a first time for any particular situation to arise and be given a rehearing, no matter how worthy of rehearing. As Defendant wrote, when seeking reconsideration of the Court's summary judgment ruling:

The Federal Rules of Civil Procedure indicate clearly a general policy to disregard narrow technicalities and to bring about the final determination of justiciable controversies without undue delay. And that being their purpose, they should be liberally construed.

(City's Reply, Doc. 262, at p. 2, citing *American Fidelity & Casualty Co. v. All American Bus Lines*, 190 F.2d 234, 236 (10th Cir., 1951)).

Conclusion

The issues tried to the Court in September, 2007, were limited to whether the City had correctly applied credits and offsets and whether all add-on remunerations had been included in the regular rate calculations. This plainly did not include the more substantial issues summarily decided just prior to the trial. Plaintiffs are requesting, in the interest of justice and a fair trial, an opportunity to be heard and present evidence on the same subjects that were previously decided summarily and then reversed without Plaintiffs having an opportunity to be heard.

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 March 3, 2008.

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