WAGE AND HOUR QUARTERLY

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PRISON GUARDS REPRESENTED BY THE WINEBRAKE LAW FIRM OBTAIN IMPORTANT FLSA VICTORY IN FEDERAL COURT

On May 30, 2008, the United States District Court for the Middle District of Pennsylvania issued an important decision in *Gallagher, et al. v. Lackawanna County*, 3:07-cv-00912-TIV, reaffirming the right of unionized prison guards employed in Scranton, Pennsylvania to pursue their Fair Labor Standards Act ("FLSA") claim notwithstanding the existence of a collective bargaining agreement between their union and their employer. The guards are represented by The Winebrake Law Firm, and the Court's opinion is published at 2008 U.S. Dist. LEXIS 43722 (M.D. Pa. May 30, 2008).

In *Gallagher*, a group of Lackawanna County (PA) correctional sergeants and officers filed a federal court lawsuit asserting that, under the FLSA, they were entitled to full compensation, including overtime pay, for time spent attending daily pre-shift meetings and picking up radio batteries. Under the FLSA, attendance at pre-shift meetings constitutes compensable work time *unless* the company proves that ***each*** of the following four criteria are satisfied:

(a) Attendance is outside of the employee's regular working hours;

(b) Attendance is in fact voluntary;

(c) The . . . meeting is not directly related to the employee's job; and

(d) The employee does not perform any productive work during such attendance.

29 CFR § 785.27.

The county sought dismissal of the lawsuit, alleging that the existence of a collective bargaining agreement ("CBA") between the county and the prison prohibited the guards from pursuing their FLSA lawsuit in federal court.

United States District Judge Thomas I. Vanaskie's 26-page opinion rejected the county's argument. The Court concluded that "Plaintiffs' lawsuit . . . arises not under the CBA but under federal law" and that "adjudication of Plaintiffs' claim will not involve the interpretation and application of the [CBA], but instead will require this Court to apply the FLSA and its applicable regulations, as well as pertinent case law, in order to determine whether Plaintiffs' time attending pre-shift meetings and picking up radio batteries is compensable." The Court added: "That the provisions of the FLSA and the CBA may overlap does not obliterate the distinction between rights conferred statutorily versus contractually." Moreover, "nothing in the CBA precludes Plaintiffs from asserting their FLSA claims directly in federal court." For these reasons, the Court held that Plaintiffs could pursue their rights in federal court without regard to the CBA or its grievance process.

In addition to rejecting the County's motion to dismiss, the Court granted the guards' motion for conditional certification. As a result, all prison guards and sergeants employed at the Lackawanna County Prison within the past three years will receive Court-authorized notice of the lawsuit and be given an opportunity to join the lawsuit pursuant to the FLSA's "opt-in" mechanism. The Court's conditional certification decision includes language that will be especially helpful to workers' rights practitioners in future FLSA collective actions. First, the Court summarized the virtues of the

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"collective action device," observing that it allows workers to "benefit from reduced individual costs that result from pooling of resources" and enables the judiciary to "benefit[] from efficient adjudication in a single proceeding of common issues that arise from the same employment practice."

Second, the Court recounted the "extremely lenient standard" applicable to conditional certification motions. Third, the Court held that, for notice purposes, the class should be defined as extending three years — rather than two years — from the date of the conditional certification order.

FEDERAL COURT CONFIRMS FLSA RIGHTS OF HAZLETON, PENNSYLVANIA BEEF WORKERS REPRESENTED BY THE WINEBRAKE LAW FIRM

On April 10, 2008, hundreds of beef workers in Wyalusing, Pennsylvania achieved an important victory over their employer, Cargill Meat Solutions, when Senior District Judge William J. Nealon denied the company's summary judgment motion. The case, entitled *In re Cargill Meat Solutions Wage and Hour Litigation*, is published at 2008 U.S. Dist. LEXIS 31824 (M.D. Pa. Apr. 10, 2008). The workers are represented by **The Winebrake Law Firm** as well as **Kenney Egan McCafferty & Young, P.C.** (Plymouth Meeting, PA) and **O'Malley & Langan, P.C.** (Scranton, PA).

The Hazleton workers, like thousands of other beef and poultry workers represented by our firm, seek compensation for all time spent performing pre-shift and post-shift activities associated with sanitation and the wearing and maintenance of gear required by their jobs. The Hazleton workers, for example, wear various combinations of gear, including hard hats, eye protection, face shields, hearing protection, mesh belly guards, mesh sleeves, mesh gloves, wizard sleeves, wizard gloves, knife scabbards, hairnets, cotton gloves, frocks, plastic aprons, rubber aprons, plastic gloves, rubber gloves, plastic sleeves, and cut resistant gloves. In addition, the Hazleton workers seek compensation for time spent traveling between the changing area and the work station. In recent decisions, the Supreme Court, the Third Circuit Court of Appeals, and the United States Department of Labor have frowned upon the continued failure of the beef and chicken industry to compensate workers for these types of activities. *See IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005); *DeAsensio v. Tyson Foods, Inc.*, 500 F.3d 361 (3d Cir. 2007); U.S. Department of Labor Wage and Hour Advisory Memorandum 2006-2 (May 31, 2006).

The Court's April 10 decision flatly held that "the time Plaintiffs spent donning, doffing, gathering, maintaining, and sanitizing work-related gear and equipment and the time spent traveling between the changing area and the production line, before and after shifts and during break times, is compensable under the FLSA and the Portal to Portal Act."

The Court then turned to the company's defenses that the workers' FLSA claims were barred by Section 3(o) of the FLSA. Under Section 3(o), "time spent in changing clothes at the beginning or end of each workday" can be excluded from compensable work time "by the express terms of or by custom or practice under a bona fide collective-bargaining agreement." Judge Nealon rejected this argument in an extensive and scholarly analysis of the Section 3(o) defense in which he explained that (i) the gear and equipment at issue was not "clothing" and (ii) the company failed to satisfy the "custom or practice" requirement.

Finally, the Court rejected the company's arguments that the workers' FLSA claim is subject to the "good faith defense" and that the workers' Pennsylvania Minimum Wage Act claim is preempted by federal law.

Judge Nealon's 70-page decision is sure to be an important precedent in Trial Lawyers' continuing legal battle to bring economic justice to beef and poultry workers and their families.

FLSA MYTHBUSTER: WORKERS USUALLY MUST BE PAID FOR "UNAUTHORIZED" OVERTIME

Each quarter, our FLSA Mythbuster (identity and whereabouts still unknown) visits Corporate America's Land of Make-Believe to uncover common workplace rules that violate the FLSA. Today's column emanates from Hazleton, Pennsylvania, where The Boss has instructed his low wage employees that working beyond the scheduled 40 hour workweek generally is not permitted and that no one will be paid for "unauthorized" overtime. Of course, The Boss almost never "authorizes" overtime, even though (i) the employees cannot possibly complete their assigned work within a 40 hour workweek and (ii) everyone, including The Boss and his middle managers, knows that the employees routinely work in excess of 40 hours.

The Boss is violating the FLSA. Department of Labor regulations clearly require that:

> Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

29 CFR § 785.11. Moreover, under DOL regulations, The Boss — not the employee — is responsible for ensuring that "unauthorized" work is not tolerated. In, particular:

> In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

29 CFR § 785.113. Put differently — and as recognized by several federal courts — overtime pay is due whenever The Boss has either "actual or constructive knowledge" of the overtime work. *See Barvinchak v. Indiana Regional Medical Center*, 2007 U.S. Dist. LEXIS 72805, * (W.D. Pa. Sept. 28, 2007). Moreover, The Boss's knowledge "is measured in accordance with his duty to inquire into the conditions prevailing in his business." *Reyna v. Conagra Foods, Inc.*, 2006 U.S. Dist. LEXIS 89690, *13 (M.D. Ga. Dec. 11, 2006) (quoting *Reich v. Dep't of Conservation & Natural Resources*, 28 F.3d 1076, 1082 (11th Cir. 1994)).

In sum, ignorance should not be bliss for greedy employers who implement "unauthorized overtime" rules in violation of the FLSA.

"QUARTERLY QUOTE"

"The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little."

Franklin Delano Roosevelt, 1937

ANDY SANTILLO JOINS THE WINEBRAKE LAW FIRM AS A PARTNER

In April 2008, Attorney Andy Santillo joined The Winebrake Law Firm as an equity partner. Prior to joining our firm, Andy was employed as a litigation associate at Trujillo Rodriguez & Richards, a highly regarded civil litigation firm in Philadelphia.

Andy is a 2004 graduate of Temple University School of Law where he served as the Editor-in-Chief of the *Temple Political & Civil Rights Law Review*. He is a member of the Pennsylvania and New Jersey state bars, and he also is admitted to practice before the Third Circuit Court of Appeals and United States District Court for the District of New Jersey, the Eastern District of Pennsylvania, the Middle District of Pennsylvania.

Andy is a valuable addition to The Winebrake Law Firm and its fight for fair wages on behalf of American workers and their families.

ABOUT THE WINEBRAKE LAW FIRM

Workers deserve to get paid for ***all time spent working***, and most workers are entitled to valuable ***overtime pay*** when they work over 40 hours in a workweek. Yet, every year, millions of American workers are cheated out of their full pay because they do not understand their rights under the Nation's complex wage and hour laws.

Wage and hour law violations hurt working families. When a company violates the law, it should be held accountable. ***No one is above the law.***

The Winebrake Law Firm believes workers pursuing their wage and hour rights are entitled to the same high quality legal representation enjoyed by big corporations. We also understand that workers have a right to be treated with the same level of professionalism, courtesy, and respect accorded to corporate CEOs.

The Winebrake Law Firm goes to Federal Court to fight for workers who have been deprived of full regular pay and overtime pay in violation of the federal Fair Labor Standards Act ("FLSA") and similar state laws. Attorneys Pete Winebrake and Andy Santillo have negotiated settlements in federal wage and hour lawsuits worth millions of dollars to American workers and their families.

The wage and hour laws are complicated. Don't hesitate to contact ***The Winebrake Law Firm*** for a ***free consultation*** if you believe the wage and hour rights of you or one of your clients may have been violated. Workers never pay a fee unless they recover.

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