IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID VERDERAME, Plaintiff, v. RADIOSHACK CORPORATION, Defendant.	2:13-cv-02539-MSG

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Date: November 7, 2013

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In opposing Defendant's Motion for Judgment on the Pleadings (Doc. 22), Plaintiff refers the Court to the facts and arguments described in his summary judgment brief. See Doc. 23. In addition, after reviewing Defendant's Motion, Plaintiff makes the following points:

A. Regardless of How Defendant's Overtime Plan is Characterized, It is Entirely a Creature of the Federal FWM and Lacks Any Basis Under the PMWA.

Defendant explains that its overtime pay plan is based on the federal FWM, see Def. Br. (Doc. 22-1) at 1, 7-8, 10, and emphasizes the "mathematical fact" that such FWM plans actually result in employees receiving "time and one-half" overtime pay, id. at 3, 5, 9-11.

Defendant's proposition that FWM overtime pay constitutes "time and one-half" pay rests on an employer's ability under the FWM to spread an employee's weekly salary across ***all*** work hours (including overtime hours) during the week. As a result, the employee, ***by sole virtue of his weekly salary***, receives "straight-time" pay for all work hours (including overtime hours). Thus, when the employee receives his extra "half-time" payment for each overtime hour, he will have been paid at a "time and one-half" rate for each overtime hour. After all, "straight-time" plus "half-time" equals "time and one-half." See generally Def. Br. (Doc. 22-1) at 9-11.

But here's the catch: The ***only reason*** an employer is allowed to spread the employee's weekly salary across all work hours and thereby receive straight-time credit for the overtime hours is because the ***federal FWM*** regulation explicitly permits the employer to do so. In particular, the FWM permits the employer to reach an understanding with the employee "that he will receive [his fixed salary] as straight time pay for whatever hours he is called upon to work in a workweek." 29 C.F.R. § 778.114(a); see also id. ("the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the

workweek"); id. (under FWM, overtime hours "have already been compensated at the straight time regular rate, under the salary arrangement").[1]

In sum, the "mathematical fact" espoused by Defendant is, itself, purely a creature of the federal FWM regulation. Absent the FWM, Defendant's mathematics go out the window.

Unfortunately for Defendant, this is not a federal FLSA case. It is a PMWA case, and Defendant's analysis avoids the central issue: Whether ***the PMWA*** provides a basis for Defendant's practice of (i) spreading Plaintiff's salary across all hours worked, (ii) receiving straight time credit for all overtime hours, and (iii) making a mere half-time payment for each overtime hour.

Defendant's Achilles' heel is its inability to locate any PMWA language that mirrors (or even resembles) the FWM or otherwise provides Pennsylvania employers with the privilege of spreading an employee's weekly salary across all work hours and thereby receiving straight-time credit for any overtime hours. Defendant relies on 34 Pa. Code § 231.43(d)(3) as the PMWA analogue to the FWM. See Def. Br. (Doc. 22-1) at 12-13. But this analogy cannot withstand scrutiny. Section 231.43(d)(3) – unlike the FWM regulation – neither states nor suggests that an employer can spread the weekly salary across all work hours and thereby receive straight time credit for any overtime hours. See 34 Pa. Code § 231.43(d)(3). This places § 231.43(d)(3) in stark contrast with the FWM, which explicitly repeats this central principle three separate times.

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[1] Moreover, even under federal law, the principal benefit an employer derives from the FWM – the ability to spread the salary across all work hours and thereby receive straight-time credit for the overtime hours – is a ***privilege***, not a right. As Defendant acknowledges, employers can utilize the FWM ***only if*** five separate conditions are met. See Def. Br. (Doc. 22-1) at 8 (citing cases). If any of these conditions are not satisfied, the FWM cannot be utilized, and the employer is prohibited from spreading the employee's salary across all work hours and receiving straight-time credit for the overtime hours. See, e.g., Heder v. City of Two Rivers, 295 F.3d 777, 779-80 (7th Cir. 2002); Cowan v. Treetop Enterprises, Inc., 163 F. Supp. 2d 930, 938-42 (M.D. Tenn. 2001); Dingwall v. Friedman Fisher Associates, P.C., 3 F. Supp. 2d 215, 221-22 (N.D.N.Y. 1998); Yorman v. Dinkins, 865 F. Supp. 154, 164-65 (S.D.N.Y. 1994).

See pp. 1-2 supra (quoting 29 C.F.R. § 778.114(a)). As such, § 231.43(d)(3) regulation cannot possibly serve as Pennsylvania's equivalent to the FWM.[2]

After § 231.43(d)(3) is eliminated as a possible basis for the FWM, Defendant is left with no possible statutory or regulatory authority for incorporating the FWM into the PMWA. This should bring an end to Defendants' argument. As Judge Bissoon observed: "Had the Pennsylvania regulatory body wished to authorize one-half-time payment under Section 231.43(d), it certainly knew how to do so." Foster, 285 F.R.D. at 345.[3]

B. 34 Pa. Code § 231.43(b) Further Contradicts Defendant's Argument.

As discussed above, the PMWA – unlike the FLSA – lacks any mechanism for an employer to spread an employee's weekly *salary* across all work hours and thereby receive straight-time credit for the overtime hours. Notably, however, the PMWA regulations do contain a specific provision that endorses this payment scheme for day-rate employees. In particular, 34 Pa. Code § 231.43(b) addresses the calculation of overtime pay for employees "paid a flat sum for a day's work" (a.k.a. "day-rate employees"). Id. This regulation treats Pennsylvania day-rate employees the way Defendant wants to treat Plaintiff: It allows the employer to spread the total of all day-rate payments across all work hour (including overtime hours) during the week and provides the employer "regular rate" credit for all such hours. See id. Next, the regulation explicitly provides that the employee "is then entitled to ***extra half-time pay*** at this rate for hours

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[2] In addition, as emphasized in the Foster and Cerutti decisions and explained in Plaintiff's summary judgment brief, § 231.43(d)(3)'s explicit requirement that overtime be computed "at a rate not less than 1 ½ times the rate established by the agreement" stands in stark contrast to 29 C.F.R. § 778.114(a)'s explicit reference to "half-time pay." See Plf. Br. (Doc. 23) at 6-7.

[3] Section 231.43(d)(3) is by no means a hollow provision. The regulation allows employers and employees to mutually reach an agreement regarding the rate that will be used to calculate overtime. However, the provision does not enable an employer to spread a weekly salary across all work hours and use this salary-spreading as a basis for only paying extra half-time for overtime work. See Foster, 285 F.R.D. at 447 n. 4.

worked in excess of 40 during the workweek." Id. In essence, the PMWA adopts for day-rate employees an overtime calculation method that is conceptually and mathematically akin to the FWM methodology.

Section 231.43(b) demonstrates that Pennsylvania rulemakers understand what language needs to be used in order to permit employers to (i) spread regular payments across overtime hours and receive straight-time credit for such payments and (ii) as a result, only pay "extra half-time pay" for the overtime hours. The PMWA's explicit description of such a methodology in this day-rate regulation makes the absence of a similar provision for salaried employees even more glaring and further undermines Defendant's argument. See Hamden v. Rumsfeld, 548 U.S. 557, 578 (2006) ("a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the statute.").

C. Plaintiff's Response to Some of Defendant's Additional Arguments.

Finally, Plaintiff offers the following responses to a few additional arguments in Defendant's Motion:

First, Defendant asserts that Foster and Cerutti "impermissibly attempted to create state law." Def. Br. (Doc. 22-1) at 17.[4] This criticism is unjustified. Federal judges frequently are called upon to interpret state law, and, under such circumstances, their analysis (while perhaps not constituting "binding state law") is entitled to consideration in future federal or state court cases. Here, Plaintiff does not argue that Foster and Cerutti are binding precedent; he merely argues that Your Honor should follow these decisions because they are thoughtful and well-reasoned. Defendant cannot brush aside the Foster and Cerutti opinions based on the mere fact that they were written by federal judges.

[4] This assertion seems ironic, considering that *Defendant* removed this lawsuit to federal court and thereby forfeited the opportunity to have a state court judge decide this matter. See Doc. 1.

Second, Defendant asserts that the PMWA should be interpreted consistently with the FLSA and cites to various cases that purportedly support of this assertion. See Def. Br. (Doc. 22-1). It is true that courts look to federal guidance in interpreting PMWA provisions that mirror or very closely resemble parallel FLSA provisions. But this is not such a case. Here, Plaintiff argues (and Defendant cannot effectively dispute) that the PMWA does not contain any statutory or regulatory equivalent to the federal FWM. Under these circumstances, the decisional law overwhelmingly holds that the FLSA may not be used to "fill in the missing gaps" within the PMWA. See Plf. Br. (Doc. 23) at 8-13 (discussing cases). This principle is well-established in Pennsylvania, as most recently exemplified by last week's *Philadelphia Legal Intelligencer* article entitled "Beware the Perils of Varying State Wage-and-Hour Laws." See Exhibit A.

Third, Defendant briefly discusses Judge Gawthrop's 1996 Friedrich opinion and makes a passing reference to Judge Caputo's 2004 Evans opinion. See Def. Br. (Doc. 22-1) at 15-16. However, as Defendant concedes, the parties in these cases did not dispute the applicability of the FWW under Pennsylvania law, and, therefore, the judges did not consider the legal issue relevant to the instant lawsuit. See id. at 16; accord Foster, 285 F.R.D. at 346-47 (explaining that Friedrich is irrelevant to analysis of whether PMWA permits FWM).

Fourth, Defendant presents the Court with a February 26, 2003 letter in which a Deputy Chief Counsel from the Pennsylvania Labor Law Compliance Division addresses a discovery dispute with a Media, PA attorney. See Def. Br. (Doc. 22-1) at 16 and Ex. E (Doc. 22-8). Even if this letter is somehow relevant, its contents would support *Plaintiff's* argument that the PMWA regulations do not contain any analogue to the FWM. See Letter (Doc. 22-8) at 2 ("there was no official publication or binding norm concerning this issue in any Department document, the *Pennsylvania Code*, or the *Pennsylvania Bulletin*.").

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Respectfully,

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Exhibit A

Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Judgment on the Pleadings

WAGE AND HOUR

Beware the Perils of Varying State Wage-and-Hour Laws

BY ANDREA M. KIRSHENBAUM
Special to the Legal

In the Federalist Papers, James Madison advocated for ratification of the Constitution, citing to the limited powers of the "general government," and stating that "the states, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction." So began the great federalism experiment of our Constitution.

Fast-forward more than 225 years and the reality of federalism in the patchwork of various wage-and-hour laws throughout the United States is breathtaking in its challenges for employers. This is especially so for multistate employers operating in several jurisdictions with varying wage-and-hour requirements.

While Congress enacted the Fair Labor Standards Act (FLSA) in 1938, most states (and even some localities) also have enacted a variety of wage-and-hour laws, many of which contain provisions that are more protective than the FLSA—these provisions often are far-reaching, relating, for example, to overtime eligibility and break requirements. In the last several years, employers throughout the country increasingly have had their pay practices challenged under state as well as federal law. These challenges have come in several different jurisdictions, and

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are not confined to those states that have a reputation for being employee-friendly such as California and New York.

For example, in 2010 in *Bayada Nurses v. Commonwealth*, 8 A.3d 866, 883 (Pa. 2010), the Supreme Court of Pennsylvania rejected a challenge to regulations promulgated by the Pennsylvania Department of Labor and Industry pursuant to its authority to issue regulations under the Pennsylvania Minimum Wage Act (PMWA), stating that "the FLSA does not supersede state law; Pennsylvania may enact and impose more generous overtime provisions than those contained under the FLSA which are more beneficial to employees." The practical result of that case was that thousands of home care workers in Pennsylvania were entitled to overtime when the same workers in approximately 35 other states were not (approximately 15 states had laws similar to the law in Pennsylvania). This is but one example of a difference between a state law and the FLSA that the plaintiffs wage-and-hour bar in Pennsylvania has seized upon in recent years to challenge the pay practices of Pennsylvania employers.

Other recent litigation in Pennsylvania includes several cases challenging the payment of health care workers under the FLSA's 8/80 method of calculating overtime. In those cases, the plaintiffs argued that the use of the FLSA's alternative method of calculating the wages of health care workers on the basis of a 14, rather than seven-day period, violated the PMWA. Many of those cases resulted in summary judgment being granted to the plaintiffs. The ultimate result of this litigation (in addition to costing Pennsylvania health care employers a pretty penny) was the amendment of the PMWA specifically to permit the 8/80 method for calculating overtime for health care employers.

Employers should analyze their current pay practices and policies with an eye toward compliance with state and local law as well as federal law.

Most recently, the plaintiffs bar in Pennsylvania has taken aim at the fluctuating workweek method of calculating wages under the FLSA, arguing that this method, which specifically is provided for by federal regulation, has no analogue under Pennsylvania law. Two judges of the U.S. District Court for the Western District of Pennsylvania have agreed, holding that the fluctuating workweek method of calculating overtime is impermissible under Pennsylvania law.

This litigation may be the tip of the iceberg for Pennsylvania employers. Significant differences between the FLSA and the PMWA create fertile ground for inadvertent employer error, the end result being expensive wage-and-hour claims, which often are litigated in more plaintiff-friendly state court.

Similarly, several other states have laws divergent from the FLSA in numerous areas. Some state wage-and-hour statutes do not provide for the same exemptions from overtime as those found in the FLSA. For some

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jurisdictions, this is due to the failure to adopt revisions to their wage-and-hour laws or regulations mirroring the more employer-friendly U.S. Department of Labor regulations put in place in 2004. For example, several jurisdictions do not have exemptions for computer professionals similar to the exemption under the FLSA, including Indiana and Connecticut. In recognition of the challenges posed to employers by differing exemptions from overtime under federal and state law, in 2011, New Jersey's Department of Labor and Workforce Development adopted new regulations mirroring the FLSA's exemptions.

Other jurisdictions are moving further away from the FLSA, putting in place more protective requirements. By way of example, recently many states have enacted legislation related to the classification of workers as independent contractors, rather than as employees. If classified as employees, many of these workers would be entitled to overtime for all hours worked over 40 in a workweek. According to the National Conference of State Legislatures, there have been some 50 pieces of worker misclassification legislation introduced (some of which have been enacted) in 24 states in 2013, including Connecticut, Delaware, Florida, Michigan and Texas. This means state-by-state distinctions surrounding worker misclassification, and a confusing and complex situation for employers. For example, in April, the District of Columbia enacted legislation providing for civil penalties where workers are found to have been misclassified and permitting worker lawsuits with remedies of up to treble damages for lost wages and benefits as well as restitution payments. Other possible remedies under the D.C. law are stop-work orders and public contract debarment. Under this law, employers must provide notice to workers of their status as independent contractors and the implications of such status.

Many jurisdictions have rules and regulations regarding paid meal breaks, an area not addressed or required under the FLSA, including Oregon, New Hampshire, Minnesota and Massachusetts. The states of Alaska, California, Colorado and Nevada all have laws regarding overtime pay that go beyond the FLSA by providing for pay for daily overtime, instead of just a 40-hour workweek.

More change may be on the way for state and local minimum-wage laws as well. According to the Department of Labor, as of January, 18 states and Washington, D.C., had a minimum-wage level that was more than the current federal level of $7.25 per hour. This means the employers of workers in states such as Washington, Ohio, Florida and Massachusetts must contend with a different set of state laws with regard to minimum wage. This November, voters in the city of SeaTac, Wash., home to Seattle-Tacoma International Airport, will decide whether to raise their minimum wage to $15 an hour. And, according to a recent report from the Council of State Governments, "at least 10 states are debating raising their [minimum wage] rates."

Employers of all sizes should be aware of state- and locality-specific wage-and-hour laws and take steps to mitigate against the risk of litigation brought by employees challenging pay practices as violative of those laws. To reduce this risk, and to proactively address the rising tide of state law wage-and-hour litigation, employers should analyze their current pay practices and policies with an eye toward compliance with state and local law as well as federal law. Employers also should stay current with the dynamic pace of ever-changing state and local wage-and-hour laws, as they could prove to be a moving target in the coming months and years. Armed with the knowledge created by an analysis of current pay practices, employers can work to put in place compliant policies prior to facing expensive wage-and-hour litigation. •

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companies, and we're always on the side of the policyholders," said Ann Kramer, an insurance recovery partner at Reed Smith, which has answered frequent questions for NYLAG on insurance issues. "So we're happy to be able to fill that void."

Many firms with insurance clients still found ways to get involved. Weil, Gotshal & Manges, for example, represents some of the world's largest insurance and reinsurance companies. But it wrote pro bono appeals letters on behalf of 40 storm victims who were denied emergency aid from FEMA, an area where it had no conflicts.

"We did what we could, and as it happened that turned out to be quite a lot," said Weil's pro bono coordinator, Miriam Buhl.

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