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FEATURED CASE:

Second Circuit Upholds $17.78 million Judgment Against City of New York for Unpaid Overtime

***Perry v. City of New York*, No. 21-2095 (2d Cir. Aug. 25, 2023).**

The City unsuccessfully appealed the decision, primarily claiming it cannot be held liable for the overtime because the plaintiffs failed to report the extra work being performed that led to overtime. The Second Circuit held that employer knowledge of an employee not being paid is irrelevant to FLSA liability. An employer is liable under FLSA if it "suffers or permits" the work.

Background: A group of EMTs and paramedics alleged that their employer, the City of New York, violated the FLSA by failing to pay them for certain work-related activities. After a twelve-day trial, a jury agreed, and the District Court entered a $17.78 million judgment against the City.

Appeal: This was a class action involving plaintiffs that were similarly situated with regard to the City's policy or practice requiring EMT and paramedic overtime to conduct uncompensated pre- and post-shift work. At the trial, both parties were granted partial summary judgment with key questions being submitted to the jury, which found the City liable. The district court entered a final judgment, and the City moved for a judgment as a matter of law, which was denied. The City appealed and the Second Circuit affirmed.

Analysis:

The City raised four issues on appeal: the plaintiffs failed to request overtime pay, therefore the verdict cannot stand; the willfulness finding was not supported by the evidence; erroneous jury instructions led to miscalculated damages; and the jury should be considered de minimis.

1. Suffer or Permit to Work for Unpaid Overtime

Primarily, the City contends that its liability for unpaid overtime should be contingent upon employees reporting the extra work and explicitly requesting payment. In essence, it suggests that it is not obligated to compensate for mandated overtime work unless expressly requested to do so. The court firmly rejected this argument. The key factor was whether the employer requires, knows about, or should have known about the work; whether or not the employee requests payment is not relevant.

The FLSA mandates that employers must pay overtime wages for work they "suffer or permit," which includes work they require, know about, or should have known about. The evidence presented during the trial indicated that EMTs and paramedics were expected to be prepared to respond to calls immediately after their scheduled shifts began. This expectation was supported by performance evaluations and regulations requiring punctual reporting for duty with all equipment and readiness. To meet this requirement, EMTs had to perform preliminary tasks before their shifts, including a thorough ambulance inspection. These tasks were not cursory, as per EMS training documents, and involved checking equipment for safety and functionality.

The Second Circuit determined that it was reasonable for a jury to infer that EMTs needed to arrive ahead of schedule to ready their equipment and personal protective gear in order to meet the City's requirements. This inference found further support in the testimonies of various witnesses, encompassing EMTs and supervisors alike, who confirmed that the designation of an EMT as "ready for duty" was contingent upon the completion of these preparations.

Similarly, post-shift work was also required due to the need to exchange equipment, provide information to the oncoming tour, and store gear. EMTs had to keep their equipment ready throughout their shifts, as they could be called for assignments up until the last minute of . Consequently, post-shift work was necessary to fulfill these job requirements.

In summary, the jury had sufficient evidence to conclude that the City maintained a policy or practice of requiring EMTs and paramedics to perform compensable pre-shift and post-shift work, which constituted a violation of the FLSA. The City's counterargument that some EMTs arrived right at the start of their shifts and were not reprimanded did not negate the countervailing evidence, as the nature of the job and performance expectations still necessitated the extra work. This verdict was legally justified based on the evidence presented at trial.

2. The Jury’s Willfulness Finding Was Supported by the Evidence

To establish willfulness in the context of FLSA violations, the employee must demonstrate that the employer either knew or displayed reckless disregard for whether its actions were in violation of the Act. On appeal, the City faced a heavy burden to demonstrate that no reasonable jury could have supported this finding.

The jury found that the City willfully violated the FLSA, resulting in tolling the statute of limitations and a full liquidated damages award. The Second Circuit ruled that the evidence supported this finding, as the City appeared to be aware of its FLSA obligations but did little to address the issue. Despite its knowledge and awareness, the City took minimal steps to rectify the situation, leading to the inference that it was reckless in its approach to ensure compensation for EMTs. The City's claim that it believed employees would request overtime for extra-shift work was not convincing, as it never confirmed this assumption or audited the uncompensated minutes logged in the timekeeping system. The City's argument that it consulted with attorneys who approved its practices did not absolve it of willfulness, as the violation stemmed from requiring and then failing to pay for work.

In short, the jury's finding of willfulness was supported by evidence indicating that the City was aware of its FLSA obligations but failed to take reasonable steps to ensure compliance, thus justifying the award of liquidated damages.

3. Jury Instructions on Damages

The calculation of damages was primarily based on “CityTime” records that meticulously tracked EMTs' time at the station, including "slivers" of extra time worked beyond their scheduled shifts. To prevent overcompensation, adjustments were made. This included deducting slivers for which overtime had already been paid and adhering to the FLSA's requirement that overtime pay applies only after forty hours in a workweek.

Slivers were also rounded to the nearest fifteen minutes, mirroring EMTs' typical overtime requests. Additionally, plaintiffs capped their claims at fifteen minutes per sliver, ensuring fair compensation for actual work time while preventing overpayment.

The City's argument centered on the notion that CityTime merely recorded presence at the station, necessitating proof that each sliver represented 100 percent compensable work time. Plaintiffs contended that pre-shift briefings, immediately following scanning into CityTime, triggered the "continuous workday" doctrine.

The court disagreed with the City, citing legal principles permitting a reasonable approximation of damages when precise calculations are hindered by inadequate records. It emphasized that the law doesn't demand unattainable accuracy but rather a just and reasonable inference regarding damages.

Several factors supported the general accuracy of the plaintiffs' damages calculation. Evidence showed that EMTs often received pre-shift briefings immediately after scanning into CityTime. Plaintiffs' adjustments minimized discrepancies, and the rounding rule and fifteen-minute cap further ensured minimal overcounting. Consequently, the court upheld the verdict.

4. Jury Instructions on De Minimis Standard

The City's final ground for appeal revolves around the district court's instruction to the jury, suggesting that the EMT-plaintiffs' post-work equipment exchanges were not "de minimis."

The City argued that the EMTs' **post-shift tasks should be considered de minimis**. However, the court rejected this argument, emphasizing that the de minimis doctrine should not allow employers to subdivide required work into smaller tasks to evade FLSA liability. The court cited relevant factors such as the administrative difficulty of recording time, the size of the claim in the aggregate, and the regularity of the tasks. In this case, all factors weighed against deeming the post-shift work as de minimis. Ultimately, the court decided not to remand for a new trial, as no jury could reasonably conclude that the EMT-plaintiffs' post-shift work was de minimis and, therefore, non-compensable.

Perry v. City of New York

SHORT SUMMARIES:

8th Circuit – Section 1983 / Monell – Fourth Amendment – Fifth Amendment

In March 2016, a St. Louis police officer encountered plaintiff Mary Meier's truck due to a wanted report, leading to the arrest of its occupants and a call to Doc's Towing to hold the vehicle. Despite attempts to retrieve the truck, it remained with Doc's Towing until a "release order" was obtained by Meier's attorney in April, incurring storage fees.

Meier filed a § 1983 lawsuit against the City of St. Louis and Doc's Towing, alleging Fourth and Fourteenth Amendment violations, and asserting a Monell claim against the City due to the truck's unlawful detention. After surviving summary judgment and settling with Doc's Towing, Meier's case against the City proceeded to trial. The court ruled in favor of the City on the unreasonable seizure claim but found in favor of Meier on her due process claim, awarding compensatory damages, partially reduced on appeal.

The Eighth Circuit upheld the verdict, affirming that the due process violation was fairly attributable to the City. The trial record demonstrated a close connection between the City and the unlawful detention, as evidenced by SLMPD's actions, including labeling the vehicle as "wanted," directing detainment, and specifying the release process. The court rejected the City's argument that there was no evidence of a custom or practice, highlighting a pattern of similar actions by the City in handling such situations. As a result, the court affirmed the judgment against the City.

Meier v. City of St. Louis

10th Circuit – Telecom Act of 1996 – Supremacy Clause

Plaintiff NMSurf, Inc. sued a group of City of Santa Fe officials, claiming that Santa Fe's telecommunication ordinance breached the Telecommunications Act of 1996, and is therefore preempted.

NMSurf sued Santa Fe in 2017, alleging Santa Fe had impermissibly delayed action on its application in violation of the Telecom Act, which requires open and non-discriminatory access to public rights-of-way for the provision of telecommunications services. It also asserted a claim under the Supremacy Clause that Santa Fe's ordinance is preempted by § 253 of the Telecom Act. The district court granted Santa Fe's motion to dismiss, holding that § 253 does not provide a private right of action for damages and that only the Federal Communications Commission ("FCC") has the authority to preempt the enforcement of a state or local telecommunications provision. NMSurf appealed, presenting two key issues: first, whether Santa Fe's two percent fee on revenues violated § 253(a) of the Telecom Act. But as NMSurf's cost increase was minimal and Santa Fe's ordinance lacked significant discretion to block providers, the Tenth Circuit found it didn't materially inhibit NMSurf's services and was therefore not a violation. Second, NMSurf argued that Santa Fe's professional services contract with competing local telecom company conferred an unfair competitive advantage, citing hypothetical references from FCC orders. However, the court found no evidence of such barriers for NMSurf, leading to the affirmation of the dismissal of their second claim based on the Cyber Mesa contract.

NMSURF v. City of Santa Fe

W.D. Tex. – First Amendment - Campaign Fundraising – Blackouts

Plaintiffs Virden and Clark challenged an Austin City ordinance imposing a one-year campaign fundraising blackout period before elections, which had been extended from six months following a legal challenge. Virden, a former city council candidate, filed the lawsuit to start fundraising for her mayoral candidacy in 2021 during the blackout period. She argued that it was necessary for public communication and campaign account building. After initial denials, the court allowed her to amend her complaint and add Clark as a plaintiff. Clark, a Texas resident, wanted to donate to Virden's campaign in 2021 and remained interested in Austin politics in 2022. Both plaintiffs contended that the extended blackout period infringed on their First Amendment rights.

The City of Austin moved for summary judgment, claiming that the nominal damages claim was time-barred and that Virden lacked standing. However, the court emphasized that the accrual date for these claims was a matter of federal law, rejecting the City's reliance on a specific case, *Peter Henderson Oil*. The court noted that the blackout period ordinance was different from the cited case, and the City had not provided explicit notice of the blackout period directly to the Plaintiffs, thus rejecting the time-bar argument.

Regarding Virden's standing, the court found that she had established it earlier when she announced her intention to run for office. However, the court agreed with the City that her candidacy-based claims for injunctive and declaratory relief were moot, given her vague intentions to run in the future.

The court also examined whether the claims for injunctive and declaratory relief were moot. Without a concrete plan to donate to a campaign subject to the blackout period, both Virden and Clark had failed to demonstrate a threatened injury. The court noted that their current intentions to donate were unclear, and they had not shown a serious intention to engage in the conduct proscribed by law.

Finally, the court considered the "capable of repetition, yet evading review" exception to the mootness doctrine but concluded that it did not apply in this case, as the case had been litigated for 2.5 years, and the claims had not evaded review.

In summary, the court found that the Plaintiffs had established their claims for nominal damages, particularly in the case of Clark, whose allegations of past injury were largely unopposed by the City.

Virden v. City of Austin

NH Supreme Court – Right To Know Laws – Retention of Records

In June 2021, Plaintiff Ortolano requested specific correspondence records from the City of Nashua under the Right-to-Know Law, and after initially promising to provide the records, the City faced a lawsuit when it failed to do so. Testimony during a subsequent bench trial revealed the City's email retention policy and its claim that backup tapes were not readily accessible for record retrieval. In February 2022, the trial court ordered the City to search its backup tapes for records, finding them readily accessible, and mandated remedial training for compliance with Right-to-Know Law requests, with specific training details to be determined later. The City's request for reconsideration was denied, leaving the court to finalize the training details based on the parties' submissions. The City filed a motion to reconsider, the trial court denied the motion and the City appealed.

The court waived the interlocutory nature of the appeal to consider its merits, focusing on the Right-to-Know Law's goal of ensuring public access to government records and accountability. They noted the statute's broad construction favoring disclosure and the burden of proof on the party seeking nondisclosure.. The court upheld the trial court's determination that the requested emails on backup tapes were readily accessible to the City based on testimony and previous successful retrievals. The City's argument that the emails were initially and legally deleted was dismissed because the trial court had already found them to be readily accessible. Concerning remedial training, the court held that the trial court's order was still pending and would address specific details after the parties' submissions, rejecting the City's argument that such training was unnecessary due to existing resources. Therefore, the court affirmed the trial court's decision and remanded for further proceedings.

Ortolano v. City of Nashua