NYSBA WINTER 2014 | VOL. 39 | NO. 1

Labor and Employment Law Journal

A publication of the Labor and Employment Law Section
of the New York State Bar Association

Inside

Misclassification and the "Fluctuating Work Week": A Potential Schism in Wage and Hour Litigation

By Paul F. Millus and Kieran X. Bastible

At its core, the concept behind the Fair Labor Standards Act (FLSA) is simple and straightforward. If an employee is not exempt under the FLSA, that employee is entitled to be paid time and one half for every hour worked each week the employee works over 40 hours—whether the employee works 45 hours one week and 35 hours the next. That the employee receives a salary in no way, in and of itself, exempts the employee from this protection under the FLSA. Yet, despite what should be a simple analysis, 7,764 FLSA cases were filed in federal court in 2013 according to the Federal Judicial Center—a ten percent increase from 2012.[1] In the ten previous years the number of collective actions under the FLSA filed in federal court increased nearly 500%.[2] There is no question that litigation in this area of the law is ever expanding, requiring employers to know their obligations and employees to know their rights.

Misclassification

One of the primary issues engendering a significant amount of litigation is due to an employer's misclassification of workers. Misclassification generally occurs in two ways. First, the employer mistakenly classifies the employee as exempt under the law because the employer believes that the employee falls under the executive, administrative, professional, or outside sales employees' exemptions.[3] These are broad categories and each case is fact specific. In addition to these categories, the U.S. Department of Labor lists thirty-six other exempt classifications of employees by job title on its website. The next major area where classification comes into play is where the employer contends that the "employee" is actually an independent contractor, which is fertile ground for future writing.

Lady Gaga and the "Fluctuating Work Week"

If the employer has misclassified an employee, what is the employer's recourse when the litigation begins? There are very few options for the employer to minimize the poor decision that resulted in the misclassification in the first instance. However, there is a little known but potentially game changing concept in the law known as the "fluctuating work week" (FWW), which could have a great impact on wage and hour litigation in the future. The FWW has its roots in 1968, when the U.S. Department of Labor (DOL) issued a bulletin interpreting this section of the FLSA to address the payment of overtime to salaried employees "who do not customarily work a regular schedule of hours."[4] The bulletin was issued in connection with two Supreme Court cases decided the same day that had addressed payment of overtime to employees who had fluctuating hours from week-to-week, and who wished to receive a predictable, flat rate of pay: *Overnight Motor Transp. Co. v. Missel*, and *Walling v. A.H. Belo Corp.*[5] The relevant portions of the DOL FWW bulletin provide that an employee employed on a salary basis may have hours of work that fluctuate from week to week. The salary may be paid to the employee pursuant to an *understanding* with the employer that the employee will receive such fixed amount as straight time pay for whatever hours the employee is called upon to work in a workweek, whether few or many. Payment for overtime hours at one-half an employee's regular hourly rate satisfies the overtime pay requirement because such hours have already been compensated at the straight-time rate, under the salary arrangement. The FWW method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the lawful minimum hourly wage.[6]

Thus, five factors must be present before an employer may use the FWW method to pay a non-exempt employee: (1) the employee's hours fluctuate from week to week; (2) the employee receives a fixed weekly salary which remains the same regardless of the number of hours the employee works during the week; (3) the fixed amount is sufficient to provide compensation at a regular rate not less than the legal minimum wage; (4) the employer and the employee have a clear mutual understanding that the employer will pay the employee a fixed salary regardless of the number of hours worked; and (5) the employee receives a fifty percent (50%) overtime premium in addition to the fixed weekly salary for all hours worked in excess of forty (40) during the week.[7] As noted, the reasoning underlying the half pay rate is that the employee is already being compensated for all base hourly pay including the hours worked over 40 hours per week.[8]

In 2013, a Federal District Judge in the case of *O'Neill v. Mermaid Touring, Inc. and Stephanie Germanotta a/k/a Lady Gaga*[9] revisited the concept of FWW, and issued a decision denying Ms. Gaga's motion for summary judgment in a wage and hour case. Lady Gaga sought to have the FWW method employed, which would have significantly limited the measure of damages sought by the plaintiff. Of note, there was no evidence of a prior agreement between plaintiff and Lady Gaga that plaintiff would be paid a fixed salary regardless of the hours worked *and* would receive a one-half overtime premium because Lady Gaga never classified plaintiff as a exempt employee under the FLSA. Indeed, because Lady Gaga

admittedly misclassified plaintiff, there never would have been any talk of overtime because Lady Gaga believed the plaintiff was being paid all that she was entitled to irrespective of the hours she worked. In denying summary judgment, the court noted that neither the Second Circuit nor any court in the S.D.N.Y. had opined on whether the DOL's FWW bulletin and methodology may be applied retroactively to determine the measure of overtime damages for employees who have been misclassified as exempt, while other federal courts have divided on the issue.[10]

The court concluded that Ms. Gaga did not establish the factual predicate for application of the FWW methodology, agreeing with those circuit and district court decisions finding that the DOL FWW bulletin is not remedial in nature, and thus not applicable to calculation of overtime damages where an employee has been misclassified. However, the court further noted that several courts have applied the FWW methodology—not as a result of the DOL FWW bulletin—but instead as a natural outgrowth of the Supreme Court's decisions in *Missel and Walling*.[11] In that regard, the court, while still denying summary judgment, would have permitted the jury to make a factual finding as to whether the plaintiff's employment involved fluctuating hours or instead was "24/7" (as plaintiff maintained)—if the matter went to trial.[12] If the jury were to find the plaintiff worked fluctuating hours, the Court left open the question as to whether a half pay multiplier, based on *Missel* and *Walling*, was appropriate.

Thus, it is important to understand *Missel* and *Walling* if employers seek to viably claim that they need not pay time and one half overtime. Conversely, these decisions are just as important to employees who may find their FLSA damage claims severely compromised. If the point of the FLSA is to compensate non-exempt employees for work performed over 40 hours per week *on a week to week basis*, the argument that, irrespective of the fact they worked in excess of 40 hours for weeks at a time, they are limited to a half hour rate premium for overtime, could potentially change the way plaintiffs and defendants approach wage and hour litigation.

In *Missel*, the Court found there was an employment contract for a weekly wage with variable or fluctuating hours but failed to state an hourly wage and there was no explicit provision for overtime.[13] The Court rejected the employer's contention that the contract should not be construed as paying the employee only his "regular rate," regardless of hours worked. While the Court noted that the wages actually paid the employee were large enough to cover both base pay and fifty percent overtime pay so as to not run afoul of the minimum wage provisions of the FLSA, the contract had no limit on the maximum number of hours the employee could work for his "regular rate," nor any provision for the payment of additional compensation should the regular rate, divided by the hours actually worked, fall below the minimum wage. Thus, the *Missel* Court found the employment contract in non-compliance with the FLSA.[14]

In *Walling*, the Court upheld an arrangement between the employer and the employee whereby the employee was advised that he would be receiving a certain hourly rate paid and a guaranteed minimum payment per week to compensate the employee for overtime at a one and one half rate for each hour over a 44-hour workweek in effect at the time.[15] Distinguishing *Walling* from *Missel*, the Court cited the parties' agreement that the employee would receive a basic hourly rate of pay and not less than time and one half of overtime and found it carried out the intention of Congress. In both decisions, the result turned on the existence or absence of an explicit agreement between the parties and what was determined to be the "regular rate of pay" for overtime calculation purposes. While *Missel* did not explicitly provide for a half pay premium, the court in Lady Gaga's case found that the *Walling* decision "provides figures that permit the reader to confirm that there was such an agreement and the Court intended to approve a half pay multiplier."[16]

The Fourth, Seventh, First and Fifth Circuits have applied the FWW to misclassified employees.[17] Others in the Fourth and Seventh Circuits have applied the FWW methodology based on the decision in *Missel*.[18] In the Lady Gaga case, the issue that would have been presented to the jury was whether the plaintiff's hours did indeed fluctuate. If so, as noted, the Court indicated it might revisit the issue of whether *Missel* and *Walling* applied and thus whether the FWW half pay multiplier was the appropriate measure of damages.

There are many questions which can be drawn by the district court analysis in the Lady Gaga case. If it were demonstrated that the plaintiff's hours did fluctuate would she then be relegated to a claim seeking one half hour of overtime per overtime hour as opposed to time and one half? In a broader sense, could this be so when the employer paid a weekly salary with no agreement on the part of the employer as to whether that salary included an overtime premium? Also, it is clear that the provisions of the FLSA cannot be waived,[19] so does that mean that an employer, provided it could demonstrate some measure of fluctuating hours, be able to *post facto* defend an action and significantly lessen the claim of a salaried employee by raising the FWW defense in response to the complaint? What if employers believe they can save on overtime costs by working salaried employees very heavily during busy weeks and sending them home on less busy weeks if that works out economically to their benefit? Considering the dearth of case law in this circuit and others the answers to these questions are elusive. All of this could be avoided if the employer and the employee have an agreement when they begin their association as to how the employee is to be paid, and whether that pay cover hours in excess of 40 hours per week

Endnotes

1. Federal Judicial Caseload Statistics for the period ending September 30, 2013.
2. Federal Judicial Caseload Statistics for the period ending March 30, 2013.
3. 29 C.F.R. Part 541.
4. 29 C.F.R. § 778.114(c).
5. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942); *Walling v. A.H. Belo Corp.*, 316 U.S. 624 (1942).
6. 29 C.F.R. § 778.114.
7. 29 C.F.R. § 778.114(a).
8. 29 C.F.R. § 778.114(b).
9. *O'Neill v. Mermaid Touring Inc.*, No. 11 Civ. 9128 (S.D.N.Y. Sept. 10, 2013).
10. *O'Neill* at *10.
11. *O'Neill* at *13.
12. *Id.*
13. *Missel*, 316 U.S. at 581.
14. *Id.* at 581.
15. *Walling*, 316 U.S. at 635.
16. *O'Neill v. Mermaid Touring Inc.* *13, *citing Walling*, 316 U.S. at 634.
17. *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351, 357 (4th Cir. 2011); *Urnikis–Negro v. Am. Family Prop. Servs.*, 616 F.3d 665, 681 (7th Cir. 2010); *Clements v. Serco, Inc.*, 530 F.3d 1224, 1230–31 (10th Cir. 2008), *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 39 (1st Cir. 1999); and *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135 (5th Cir. 1988).
18. *Desmond v. PNGI Charles Town Gaming, LLC*, 630 F.3d 351 (4th Cir. 2011); *Urnikis–Negro v. Am. Family Prop. Servs.*, 616 F.3d 665 (7th Cir. 2010).
19. *See, e.g., Lynn's Food Stores v. United States*, 679 F.2d 1350, 1352 (11th Cir. 1982) (internal citations omitted).

Paul F. Millus and Kieran X. Bastible are colleagues at Meyer, Suozzi, English and Klein, P.C. in Garden City, Long Island. Mr. Millus was the lead attorney for the plaintiff in *O'Neill v. Mermaid Touring, Inc.*