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Second Circuit Rules "Gap Time" Claims Impermissible Under FLSA, Even Where An Employee Worked Overtime

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By Michael D. Ray



The Second Circuit Court of Appeals recently addressed "gap time" claims brought by a purported class under the Fair Labor Standards Act (FLSA). Lundy, et al. v. Catholic Health Systems of Long Island, Inc., No. 12-1453 (March 1, 2013). Specifically, the court addressed, among other things, whether an employee may.....

The Second Circuit Court of Appeals recently addressed "gap time" claims brought by a purported class under the Fair Labor Standards Act (FLSA). *Lundy, et al. v. Catholic Health Systems of Long Island, Inc.*, No. 12-1453 (March 1, 2013). Specifically, the court addressed, among other things, whether an employee may recover for unpaid wages for hours worked under 40 in weeks where the employee worked more than 40 hours. In other words, in addition to overtime damages, the plaintiffs sought compensation for unpaid time they asserted they worked under 40 hours per week.

The Second Circuit held that the FLSA provides relief for two things and only two things—minimum wages and overtime wages. Because the "gap time" claim did not assert that plaintiffs were not paid the minimum wage for all hours worked and, by definition, the "gap time" claim sought relief for non-overtime hours, the court dismissed it. In reaching its holding, the court expressly rejected the U.S. Department of Labor's (DOL) regulations on the issue. *See, e.g.,* 29 C.F.R. Sec. 778.315 (stating "...extra compensation for the excess hours of overtime work cannot be said to be paid to an employee unless all the straight time compensation due him for the nonovertime hours under his contract (express or implied)...has been paid."). The court found the DOL's regulation to be unpersuasive in light of the plain language of the FLSA.

On a related note, the court also dismissed the FLSA claims on the basis that the plaintiffs failed to meet the initial pleading standard. The court held that "to state a plausible FLSA overtime claim, a plaintiff must sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours." The court held that the plaintiffs' complaint, which had already been amended multiple times at the district court level, failed to specifically identify any such specific weeks and that dismissal was warranted as a result.

At least in the Second Circuit, the *Lundy* opinion made clear that:

- Gap time claims are not viable regardless of whether an employee exceeds 40 hours of work in a week; and
- To survive a motion to dismiss, plaintiffs must expressly plead both that (a) they worked more than 40 hours in a week, and (b) there was uncompensated time in excess of the 40 hours.

For employers in other circuits, the *Lundy* case provides very persuasive grounds for arguing that "gap time" claims should not be viable as a matter of law. As the Second Circuit panel (which included former U.S. Supreme Court Justice Sandra Day O'Connor, sitting by designation) opined, that the DOL's regulations addressing "gap time" are not supported by the plain language of the FLSA, and thus are unpersuasive. This logic should resonate in every circuit.

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