Wimberly Lawson
Wright Daves & Jones, PLLC
Attorneys & Counselors at Law

Briefly

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WAGE-HOUR CASE ADDRESSES AUTOMATIC MEAL DEDUCTION PAYROLL SYSTEM

Mary Moffatt Helms

"…the standard for constructive knowledge of overtime work is whether the employer should have known, not whether it could have known, and it is not required that an employer go through records to determine whether or not its employees were working beyond their scheduled hours. "

A recent federal appeals case addresses company policies that provide for employees receiving an unpaid meal break that is automatically deducted from their paychecks. *Dwight v. Baptist Memorial Healthcare Corp.*, 19 WH Cas. 2d 1441 (CA 6 2012). The employee handbook contained these policies as well as policies providing that if an employee's meal break was missed or interrupted because of a work-related reason, the employee would be compensated for the time worked during the meal break. The employees were instructed to record all time spent performing work during meal breaks in an "exception log" whether the meal break was partially or entirely interrupted. The plaintiff, an employee, signed a document that stated she understood the meal break policy and, therefore, understood that if you work during a meal break, you had to record that time in an exception log in order to be compensated for the time.

The plaintiff followed this policy on at least one occasion when she reported missing a meal break, and she was compensated for her time. From time to time, however, she told her supervisor that she was not getting a meal break, but on these occasions she never specifically told her supervisors that she was not compensated for missing her meal breaks. Eventually, the plaintiff stopped reporting her missed meal breaks in the exception log. In addition to the exception log, the plaintiff knew the employer's procedure for reporting payroll errors. Plaintiff admitted that when she used this procedure the errors were handled immediately. However, she did not utilize these procedures to correct the interrupted meal break errors that she failed to report because she felt it would be "an uphill battle." The plaintiff ultimately sued contending that she was due overtime for the missed meal breaks.

While there are few cases dealing with missed meal breaks under the wage-hour laws as compared to the case law for unpaid overtime, the Sixth Circuit Court of Appeals analogized the two situations. The court cited other cases indicating that where an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of the wage-hour laws. Further, the standard for constructive knowledge of overtime work is whether the employer should have known, not whether it could have known, and it is not required that an employer go through records to determine whether or not its employees were working beyond their scheduled hours. Further, where the employer has specific procedures for employees to follow in order to be paid overtime, and the employees ignore these procedures, it is much less likely that constructive knowledge on the part of the employer of the overtime work will be found.

In the decision, the appeals court upholds the district court's summary judgment ruling in favor of the employer. In the ruling, the majority opinion states that if an employer establishes a reasonable process for an employee to report uncompensated work time, the employer is not liable for non-payment if the employee fails to follow the

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Gerard Jabaley

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EEOC OFFERS ADVICE TO EMPLOYERS ON CRITICAL ADA ISSUES

EEOC Commissioner Chai Feldblum offered advice to employers at an American Bar Association meeting held in November. Feldblum indicated that the requirement of reasonable accommodation may still apply to an employee with a disability who has exhausted FMLA or employer-provided leave. While leave policies may work best with "clear, defined lines," under the ADA no such clear lines exist because employers must still individually assess whether additional leave is a reasonable accommodation. Thus, at least on the employee's request, an employer must still engage in an ADA interactive process after an employee with a disability has exhausted his FMLA or employer-provided normal leave. Under such circumstances, it is completely legitimate for the employee to provide medical information about his condition as it relates to the need for additional leave. In most circumstances, the employee must initiate the interactive process by indicating a need for accommodation, although no particular words are needed to start the process.

Regarding complying with the interactive process, speakers at the November conference suggested that the employer must do more than just say no when an employee suggests an accommodation. The ADA may require an employer to at least consider the request and both employer and the employee may thereafter have an obligation to consider making additional proposals.

An issue that often arises is an employee's request for light duty. Light duty may or may not be a reasonable accommodation, depending in large part whether the employer offers light duty jobs or reserves such positions for employees with work-related injuries. The courts generally rule that an employer has no obligation to provide temporary employment that excuses the worker from doing the job's essential functions.

A critical issue regarding job descriptions is the significance of attendance as an essential function. Regular and predictable attendance in the workplace can potentially be an essential function or qualification standard, according to speakers at the conference. It is helpful for employers to include regular attendance as an essential function in job descriptions that really require such attendance. The issue is quite controversial since some contend that employers are required to accommodate absences caused by a disability, at least absent undue hardship to the employer. It may make a difference whether the employee timely disclosed the disability and the need for the accommodation.

Employers need to be careful about their job descriptions, as courts sometimes "hold employers to what they say" in such descriptions. That is, if an employer leaves out, in the job description, a function that it later contends is essential, a judge or jury may rule against the employer because the function was not stated in the job description. On the other hand, an employer may have less of a problem if it "forgives" an employee with a disability from meeting every essential job function, as to setting an adverse precedent for other cases.

How long an employer must keep an employee's job open who is unable to work due to a disability, may depend on the impact on a job of having the employee out indefinitely. Further, the employer may have an obligation to reassign the disabled employee to a vacant job for which he is qualified. The employer need not, however, create a new job for the worker with the disability.

Another controversial issue is whether an employee can be disciplined or terminated for "misconduct," when the misconduct comes from a disability. For example, suppose an employee with a disability commits a form of

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UNIONS GET MORE AGGRESSIVE IN EMPLOYER RELATIONSHIPS, PERHAPS BASED ON ELECTION RESULTS AND IMPROVING ECONOMY

Howard Jackson

"Historically, when the economy is bad, many employees, union and non-union alike, have had a "don't rock the boat" mentality that having any type of job is better than being the highest paid worker in the unemployment line."

Due to bad economic conditions over the last few years, many unions have accepted cuts in pay and benefits. Historically, when the economy is bad, many employees, union and non-union alike, have had a "don't rock the boat" mentality that having any type of job is better than being the highest paid worker in the unemployment line. Some developments are beginning to suggest that the situation may be changing.

A current example is the union movement's arch-enemy, Wal-Mart. Wal-Mart is not only the largest employer in the U.S., but is entirely union-free. Moreover, it has gained market shares from other companies that are traditionally unionized. The unions have taken notice and are doing everything possible to "stir things up."

The number of union-related work stoppages involving more than 1,000 workers, which reached an all-time low of just 5 in 2009, rose to 13 as of October, 2012. Pilots at American Airlines are destroying the airline's flight schedules, nurses are striking in California, unions have forced the maker of the Twinkie and Hostess brands out of business and workers at Wal-Mart are constantly being encouraged by unions to stir up trouble. Indeed, a popular union publication is called "A Trouble Maker's Guide."

There is a union-support group called OUR Wal-Mart asking Wal-Mart employees to walk out of its stores across the country during the busiest days of the holiday season. Charges and counter-charges are pending at the Labor Board, with the unions contending that Wal-Mart has retaliated against workers who have or might participate in the work stoppages. Wal-Mart is taking the unusual action of filing a charge itself with the NLRB, seeking an injunction to stop the protests, and claiming that the unions are in essence seeking recognition from Wal-Mart without establishing a majority or without filing for an election with the NLRB. Some of the protests use themes of outrage at wealth, somewhat similar to the "99%" movement.

Hostess Brands, the maker of Twinkies and Wonderbread, is going out of business and liquidating due mainly to a strike by its bakers' union. All of its 18,500 workers will lose their jobs, some immediately and others over the next few months. The other major union at Hostess Brands, the Teamsters, had accepted the contractual concessions, and some union members say that the bakery workers made a "terrible choice based solely on terrible information from their leadership."

Some union elements may feel they have tacit support resulting from President Obama's re-election, as the union movement takes a lot of credit in getting the President re-elected.

KNOW YOUR ATTORNEY
FREDRICK J. BISSINGER

FREDRICK J. BISSINGER is Regional Managing Member of the Nashville, Tennessee office of the firm, which he joined in 1999. His law practice includes an emphasis in employment discrimination and wrongful discharge litigation, ADA and FMLA compliance, workers' compensation, and general liability. He received his Bachelor of Science, *cum laude*, in Economics from Washington & Lee University and his law degree from the Seton Hall University School of Law. Prior to entering private practice, Fred served in the United States Navy Judge Advocate General Corps from 1993-1997. Fred is a member of the Tennessee Bar Association and the Mid-South Workers' Compensation Association and is the 2012-2013 Legal Advisor for Middle Tennessee Society for Human Resource Management.

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established process. The court cites the fact that no evidence appeared that the employer discouraged employees from reporting time worked during meal breaks or that the employer was otherwise notified that its employees were failing to report time worked during meal breaks. The dissenting judge feels the majority opinion is too broad, citing the principle that an employer must pay its employees for any time the employer knows or should have known the employee is working, even if the employee fails to report the work.

Editor's Note - The case fully supports the use of an automatic meal deduction system, and points out the value of having some type of reporting system to report changes from regularly scheduled hours and/or a review of payroll hour errors. The dissenting opinion deviates from the majority by stating that an employee's failure to report remains just one piece of circumstantial evidence suggesting a lack of constructive knowledge, and that an employer who sees its employees working late or who pressures employees not to report hours may not be as credible in relying on the employee's reporting failures. The dissent also cites favorably the use of systems whereby employees are presented with a copy of the work hours for each pay period and asked to review the entries and sign to attest to the record's accuracy.

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insubordination or falls asleep because of their disability or medication associated with that disability. The general rule appears to be that an employer may discipline or terminate employees who violate work rules, even though the violation relates to a disability's effects.

An example of how careful that employer must be in responding to an issue, is the issue of telecommuting. An employer responding to a request for telecommuting from an employee with a disability who needs to work from home, by simply saying that it has "no policy" on telecommuting, is not a good answer because an employer has a "reasonable accommodation" obligation in spite of the absence of a specific policy in point. Indeed, even if the employer had a specific policy, the policy might have to be modified in an individual case as a reasonable accommodation. A much better answer would be to refer to what the job actually requires, particularly in terms of why on-site presence is necessary.

The above points came from various speakers at the November, 2012, ABA meeting of the Section of Labor and Employment Law.