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Second Circuit Rejects FLSA Gap Time Claims and Explores FLSA Pleading Requirements

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In *Lundy v. Catholic Health System of Long Island, Inc.*, 2013 U.S. App. LEXIS 4316 (2d Cir. Mar. 1, 2013), the Second Circuit Court of Appeals recently held for the first time that the Fair Labor Standards Act (FLSA) does not provide a claim for uncompensated "gap" time wages even when employees work overtime, provided the alleged uncompensated time does not drop employees' wages below the minimum wage. Gap time is time worked under 40 hours in a week. For example, an employee may work 39 hours in a week but be paid for only 35, in which case she has four hours of uncompensated gap time. If she works 42 hours in a week but is paid for only 38, she has two hours of uncompensated gap time (hours 39 and 40) and two hours of unpaid overtime (hours 41 and 42). In *Lundy*, the Second Circuit held that employees must plead "some" amount of uncompensated but compensable time worked over 40 in a week, but left open the possibility, depending on the case, that employees may need to also plead an approximation of overtime hours to establish a plausible claim. The decision also bolsters employers' arguments that district courts may exercise supplemental jurisdiction to decide state law claims even where the court dismisses all federal law claims.

Background

The case was brought as a putative class and collective action by three non-exempt, clinical employees who worked at Good Samaritan Medical Hospital Medical Center, one of many healthcare defendants in the suit. The employees originally asserted several federal and state law causes of action, although on appeal the only claims addressed were the employees' overtime and gap time claims under the FLSA and the New York Labor Law (NYLL), and claims under the Racketeer Influenced and Corrupt Organizations Act (RICO). All the employees' causes of action were based on allegations that their employer failed to compensate them for time worked during meal breaks, before and after scheduled shifts, and during required training sessions. After prolonged litigation, ultimately involving four amended complaints and an admonition from the court to the employees' counsel to stop "hiding the ball," the district court dismissed all claims.

Gap Time Claims Are Prohibited Under the FLSA

On appeal, the Second Circuit affirmed the dismissal of claims for overtime and gap time wages under the FLSA, holding as to gap time wages that: "So long as an employee is being paid the minimum wage or more, [the] FLSA does not provide recourse for unpaid hours below the 40-hour threshold, even if the employee also works overtime hours in the same week." *Lundy* thus extends the Second Circuit's prohibition of FLSA gap time claims to weeks in which employees did work over 40 hours in week. Previously the Second Circuit held that the FLSA did not provide recovery for gap time wages in weeks where employees worked below the 40-hour threshold.[1] *Lundy* thus limits, at least within the Second Circuit, employers' potential FLSA liability for uncompensated overtime hours over 40 in a week, and prohibits FLSA claims for uncompensated hours under 40 in a week in all instances, provided employees' wages do not fall below the minimum wage. The court did opine, however, that employees may bring claims for gap time under state law theories, including a basic contract action.

The Second Circuit distinguished *Lundy from Monahan v. County of Chesterfield*,[2] a Fourth Circuit decision in which the court relied on U.S. Department of Labor (DOL) interpretative guidance[3] to hold that gap time was recoverable under the FLSA. In declining to follow *Monahan* and its reliance on the DOL's interpretative guidance, The Second Circuit found that the DOL's interpretation was not persuasive because it provided no statutory interpretation or reasoned explanation.

FLSA Pleading Requirements for Overtime

The Second Circuit had not previously considered the degree of specificity needed to plead an FLSA overtime claim. In *Lundy* it noted that some courts within the circuit required an approximation of the total uncompensated hours worked in a given workweek in excess of 40 hours, while others deemed sufficient an allegation that plaintiffs worked some amount in excess of 40 hours without compensation. The Second Circuit 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." But the court opined that determining whether a plausible claim has been pleaded is "a context-specific task," and acknowledged that "under a case-specific approach, some courts may find that an approximation of overtime hours worked may help draw a plaintiff's claims closer to plausibility." This language suggests that simply pleading "some" hours worked in excess of 40 in a week may not always be sufficient to state a plausible claim, and leaves the door open for employers to challenge complaints that do not provide an approximation of unpaid overtime hours.

Applying the facts in *Lundy*, the Second Circuit affirmed dismissal of the employees' FLSA overtime claims because they did not plead any instances where they in fact worked over 40 hours in a week but were denied overtime pay. Rather, the complaint alleged that employees "typically" worked uncompensated pre- and post-shift time and mandatory training time, "typically" missed or experienced interrupted meal breaks, and "occasionally" worked additional shifts. But the complaint did not allege any instances where such "typical" and "occasional" occurrences in fact resulted in uncompensated time for hours worked over 40 hours in a particular week. The Second Circuit found that these allegations were "nothing but low-octane fuel for speculation, not the plausible claim that is required."

Exercise of Supplemental Jurisdiction

The district court also dismissed the NYLL claims with prejudice, stating that the employees' FLSA and NYLL claims are examined under the same legal standards, and the analysis dismissing the FLSA claims applied with equal force to the NYLL claims. On appeal, the employees challenged the district court's exercise of supplemental jurisdiction over the NYLL claims after it dismissed the federal claims, and noted the court was arguably inconsistent in dismissing the NYLL claims with prejudice after observing there may be valid gap time claims under the NYLL. The Second Circuit agreed with the lower court's observation that – in contrast to the FLSA – the NYLL provided a remedy for gap time claims, reversed the dismissal of the NYLL gap time claims, and remanded them to the district court for further consideration. This aspect of the decision is a reminder for employers to consider the possible differences between the FLSA and state law.

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1 *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487 (2d Cir. 1960).

2 95 F.3d 1263 (4th Cir. 1996).

3 29 C.F.R. §§ 778.315, 778.317, 778.322.

However, the Second Circuit affirmed the dismissal of the NYLL overtime claims based on the same pleading deficiencies noted under the FLSA. In affirming, the court emphasized that the exercise of supplemental jurisdiction is within the sound discretion of district courts, who should "consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise" supplemental jurisdiction. Although "[o]nce all federal claims have been dismissed, the balance of factors will 'usually' point toward a declination," the exercise of supplemental jurisdiction is appropriate where: "state law claims are analytically identical" to federal claims; state law claims implicate federal interests such as preemption; the dismissal of federal claims was late in the litigation; or state law claims involve settled as opposed to novel issues. The Second Circuit's approval of exercising supplemental jurisdiction over state law claims even upon the dismissal of all federal claims provides helpful ammunition for employers to argue that federal courts should retain jurisdiction of supplemental state law claims and not remand them state courts.

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