

4th Circuit: Unpaid Overtime Computed

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By Farah Mollo

Employees who are paid a fixed weekly salary that is intended to cover all hours worked and who are misclassified as exempt from overtime pay under the Fair Labor Standards Act (FLSA) should receive 50 percent, rather than 150 percent, of their regular rate for all hours worked in excess of 40 hours in a given workweek, according to the 4th U.S. Circuit Court of Appeals.

Former racing officials of Charles Town Gaming sued their former employer for unpaid overtime after they were discharged for having unanimously declared the wrong horse the winner of a race. Prior to their discharge, the human resource director for Charles Town Gaming had designated the racing official position as exempt from overtime under the administrative exemption of the FLSA. The human resource director reached this conclusion with the assistance of a computer program.

Charles Town Gaming had paid the racing officials a fixed weekly salary that the parties intended to cover all hours worked. The officials often worked overtime, but because they were deemed to fall within the administrative exemption of the FLSA, they were not paid additional compensation.

The district court had found that the administrative exemption did not apply, therefore, the officials had been entitled to overtime payment. The racing officials, however, challenged the manner in which the district court calculated the overtime payment. The district court had used a 50 percent premium. The district court also had found that Charles Town Gaming's violation of the FLSA was willful which served to expand its liability period from two years to three years. Charles Town Gaming challenged the willfulness ruling. The 4th Circuit affirmed the district court's calculation of overtime, but vacated the district court's judgment as to willfulness and remanded for a trial on that issue.

The crux of the disagreement between the parties on appeal was whether the former racing officials should receive 50 percent or 150 percent of the regular rate for all hours worked in excess of 40 hours in a given workweek. The 4th Circuit followed prior rulings from the 1st, 5th, 7th, and 10th Circuits and held that a 50 percent overtime premium was appropriate in calculating unpaid overtime compensation.

The 4th Circuit noted that the U.S. Department of Labor has approved the use of a 50 percent overtime premium to calculate unpaid overtime compensation in mistaken classification cases. Moreover, the court emphasized that the racing officials and Charles Town Gaming had agreed to a reduced hourly wage in exchange for a fixed weekly salary which covered all hours worked and met the minimum wage requirements. Following Supreme Court precedent on this issue, the court noted that, in *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942), the Supreme Court had used the 50 percent formula to compute overtime due an employee who was paid a fixed weekly salary intended to cover all hours worked.

Lastly, relying on traditional principles of compensatory damages, the court noted that the former racing officials had already been paid straight time pay for all hours worked in a given workweek, thus the "loss suffered" is the 50 percent premium for their overtime

hours.

In support of its challenge of the willfulness issue, Charles Town Gaming relied on the following facts to convince the court that a trial on the issue was warranted. First, personnel had testified that the FLSA designation on the job descriptions was created by a computer program. Second, the designation was a typographical error. And, third, the error was mistakenly carried forward to the job description in later revisions.

Desmond v. PNGI Charles Town Gaming, 4th Cir., Nos. 09-2189, 09-2190, 09-2192, 09-2254 (Jan. 14, 2011).

Professional Pointer: The fact that this case revolves around the payment of unpaid overtime underscores the reality of increased FLSA litigation in recent years. With regard to the payment of overtime, if employers pay employees a fixed salary and are later deemed to have misclassified those employees as exempt from overtime, it will be helpful for the employer to be able to demonstrate that the fixed salary was intended to cover all hours worked and met the minimum wage requirements. Lastly, it must be remembered that willful violations of the FLSA increase an employer's liability period from two to three years.

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