2017 PA Super 407

TAWNY L. CHEVALIER AND ANDREW HILLER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED v. GENERAL NUTRITION CENTERS, INC. AND GENERAL NUTRITION CORPORATION Appellants	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1437 WDA 2016

Appeal from the Judgment Entered September 6, 2016
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): G.D. 13-017194

TAWNY L. CHEVALIER AND ANDREW HILLER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED v. GENERAL NUTRITION CENTERS, INC., AND GENERAL NUTRITION CORPORATION Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 92 WDA 2017

Appeal from the Order Entered December 29, 2016
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): G.D. 13-017194

BEFORE: MOULTON, J., SOLANO, J., and MUSMANNO, J.

CONCURRING/DISSENTING OPINION BY SOLANO, J.:

FILED DECEMBER 22, 2017

The lead opinion provides an insightful analysis of the complex and difficult issues presented by this case. In my view, however, the parties have presented questions under the Pennsylvania Minimum Wage Act of 1968 (PMWA), 43 P.S. §§ 333.101 to 333.115, that should not be decided by the courts in the first instance.

The governing statute, which requires payment for overtime "as prescribed in regulations promulgated by the [S]ecretary [of Labor and Industry]," PMWA § 4(c), 43 P.S. § 333.104(c), commits questions regarding the appropriate way to calculate overtime to an expert administrative agency that is far better equipped to resolve such issues than are the courts. The parties have extensively briefed technical issues involving the intricacies of various calculation methods. The trial court resolved these issues by making pronouncements about the methods' implications for state labor policy and employment rates. The Supreme Court has instructed, however, that "where the subject matter is within an agency's jurisdiction and where it is a complex matter requiring special competence, with which the judge or jury would not or could not be familiar, the proper procedure is for the court to refer the matter to the appropriate agency" for exercise of that agency's primary jurisdiction. Elkin v. Bell Tel. Co., 420 A.2d 371, 377 (Pa. 1980) (emphasis omitted). And yet, the trial court made no such referral here, and the parties, undoubtedly conscious of the cost implications of another round of litigation, have expressed no interest in such a course of action. Nor, ironically, has the Department of Labor and Industry, which, because

these issues "implicate[] . . . policy choices," declined to respond to our invitation to share its views on these matters.

Faced with this state of affairs, I believe that the controlling question that is before us is whether the Secretary has promulgated regulations in which he has "prescribed" a method of calculating overtime pursuant to his authority under Section 4(c) of the PMWA.[1] I agree with Judge Moulton that, in the absence of such regulations, Pennsylvania allows overtime to be calculated in the same way as it was calculated under Section 7(a)(1) of the federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(a)(1), at the time the PMWA was enacted in 1968. As the lead opinion recounts, the language of Section 4(c) — "Employes shall be paid for overtime not less than one and one-half times the employe's regular rate . . ." — is borrowed from and closely tracks that of Section 7(a)(1) of the FLSA. The Legislature gave the Secretary authority to promulgate regulations that departed from the FLSA's method, but nothing in the statute suggests that the Legislature intended the default method applicable in the absence of such regulations to be

---

[1] No party questions the authority of the Secretary to promulgate regulations on overtime, and there is no question that the Legislature intended to bestow that authority. Not only does Section 4(c) of the PMWA say that overtime shall be "as prescribed in regulations promulgated by the secretary," but the section continues: "the secretary shall promulgate regulations with respect to overtime subject to the limitations that no pay for overtime in addition to the regular rate shall be required except for hours in excess of forty hours in a workweek." 43 P.S. § 333.104(c). Section 9 states that "[t]he secretary shall make and, from time to time, revise regulations . . . defining and governing . . . overtime standards[.]" *Id.* § 333.109.

different from the federal standard approved in Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942), which was well established under Section 7(a)(1) at that time.

Nor do I find any license in the PMWA to engage in an examination of whether some alternative overtime calculation method would better comport with state legislative policy goals. Policy determinations are to be made by our political bodies, not the courts. See Charlie v. Erie Ins. Exch., 100 A.3d 244, 260 (Pa. Super. 2014). If the sixteen Labor Secretaries (from nine gubernatorial administrations) who have served in that office from the time of the PMWA's enactment have not found those policies so clear as to base new regulations on them, that is not a task to be undertaken by this Court.

The lead opinion concludes that because no regulations have been promulgated to prescribe a change, the method of calculating the "regular rate" from which the overtime rate is calculated under the PMWA may permissibly be the same as that used under the FLSA. I agree. I part ways with my colleagues, however, with respect to their conclusion that the overtime multiplier mandated by the PMWA must be calculated in a manner different from that used under the FLSA.

The lead opinion concludes that when Section 4(c) of the PMWA says that the payment for overtime must be "not less than one and one-half times the employe's regular rate," it means that the total hourly compensation paid for the overtime hours must be 1½ times higher than

the employee's regular rate, rather than an amount that is equal to 1½ times the regular rate — the amount required under the FLSA. The difference is that the FLSA method subtracts from the additional hourly compensation for overtime the compensation that already has been paid to the employee for the overtime hours as part of the employee's salary, while the lead opinion's method does not.[2] The lead opinion concludes that this different method is required because in 1977 the Secretary promulgated regulations saying so.[3] I do not agree that this is what those regulations say.

---

[2] The difference is illustrated in footnote 2 of the lead opinion. Under the FLSA method applicable to an employee whose salary does not vary according to the number of hours worked, the amount paid to the employee as 1½ times her regular rate for overtime hours is determined as follows: (1) the employee already has been paid 100% of her regular rate ($20/hr. in the lead opinion's example) for the overtime hours (her regular rate multiplied by 1) as part of her salary, and that amount therefore need not be added again; (2) she needs, however, to be paid an extra $10/hr. (that is, an additional one-half of her regular rate) to bring her overtime rate up to an amount that equals 1½ times her regular rate. See 29 C.F.R. § 778.114(a) ("[p]ayment for overtime hours at one-half [the regular] rate in addition to the salary satisfies the overtime pay requirement"). Under the lead opinion's method, however, the overtime payment must equal an additional 1½ times the regular rate, or an extra $30/hr. ($20 x 1½); this will be paid in addition to the employee's regular $20/hr. salary covering the overtime hours.

[3] In part, the lead opinion bases this conclusion on three federal trial court decisions that considered this question, Verderame v. RadioShack Corp., 31 F. Supp. 3d 702, 709-10 (E.D. Pa. 2014); Foster v. Kraft Foods Global, Inc., 285 F.R.D. 343, 348 (W.D. Pa. 2012); and Cerutti v. Frito Lay, Inc., 777 F. Supp. 2d 920, 945 (W.D. Pa. 2011). As the lead opinion acknowledges, federal decisions are not controlling on this question of Pennsylvania law, and I find these decisions unpersuasive for the same reasons as I discuss in the text.

The first regulation cited in this discussion is 34 Pa. Code § 231.41, which is entitled "Rate" and states: "Except as otherwise provided in section 5(a)–(c) of the act (43 P. S. § 333.105(a)–(c)), each employee shall be paid for overtime not less than 1-1/2 times the employee's regular rate of pay for all hours in excess of 40 hours in a workweek." This section merely repeats what the PMWA says in Section 4(c): "Employes shall be paid for overtime not less than one and one-half times the employe's regular rate." Everyone appears to concede that this language in the statute does not reveal how to make the "one and one-half times" calculation; to me, repetition of the same language in the regulation therefore is no more enlightening. This regulation adds nothing to resolution of how to calculate the 1½ multiplier.

I reach the same conclusion with respect to the Secretary's safe-harbor regulation, 34 Pa. Code § 231.43(d):

> No employer may be deemed to have violated [the overtime regulations] by employing an employee for a workweek in excess of the maximum workweek applicable to the employee under § 231.41 if, under an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in the workweek in excess of the maximum workweek applicable to the employee under § 231.41:
>
> (1) In the case of an employee employed at piece rates, is computed at piece rates not less than 1 1/2 times the bona fide piece rates applicable to the same work when performed during nonovertime hours.
>
> (2) In the case of an employee's performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than 1 1/2

> times the bona fide rate applicable to the same work when performed during nonovertime hours.
>
> (3) Is computed at a rate not less than 1 1/2 times the rate established by the agreement or understanding as the basic rate to be used in computing overtime compensation thereunder; and if the average hourly earnings of the employee for the workweek, exclusive of payments described in subsection (a)(1)—(7), are not less than the minimum hourly rate required by applicable law and if extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

Insofar as is relevant here, this regulation says no more than that an employer who complies with the overtime requirements of the statute will not be held to violate it.[4] In words identical to those used in Section 4(c) of the PMWA (except that they employ numerals instead of the words "one and one-half"), it says that the overtime must be at a rate "not less than 1 1/2 times" the regular rate. Again, the regulation adds nothing new on the question before us and, in particular, says nothing about how to calculate the 1½ multiplier.[5]

---

[4] The regulations repeat a similar concept in Section 231.43(f), which says that an employer at a retail or service establishment will not be in violation if a workweek exceeds 40 hours and "[t]he regular rate of pay of the employee is in excess of 1 1/2 times the minimum hourly rate applicable." 34 Pa. Code § 231.43(f)(1).

[5] The statutory language also is repeated in Section 231.43([a]), which states that the regular rate from which the overtime rate is calculated does not include extra compensation for premium work on extra days "where such premium rate is not less than 1 1/2 times the rate established in good faith for like work performed in nonovertime hours on other days" or, if there is an employment contract, "where the premium rate is not less than 1 1/2 times the rate established in good faith by the contract or agreement for like work performed during the workday or workweek." 34 Pa. Code
(Footnote Continued Next Page)

The result advanced by the lead opinion is influenced principally by 34 Pa. Code § 231.43(b), which states:

> If the employee is paid a flat sum for a day's work or for doing a particular job without regard to the number of hours worked in the day or at the job and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at the day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for hours worked in excess of 40 in the workweek.

34 Pa. Code § 231.43(b) (emphasis added). Notably, this is the only regulation promulgated by the Secretary that actually discusses the method of calculating overtime. Critically, it says to calculate overtime in the same way as overtime is calculated under the FLSA — by adding "extra half-time pay," not an extra one and one-half of the worker's pay. The regulation thus directly supports the conclusion that the Secretary intended overtime to be calculated under the PMWA in the same way as it was calculated under federal law.

The lead opinion reasons, however, that because all of the other regulations repeat the "not less than one and one-half times" language from the statute and only this regulation mentions calculating overtime by adding "extra half-time pay," it must be that all of the other regulations do not contemplate calculating overtime by adding only the extra one-half of the regular rate (the FLSA method). Instead, the opinion posits that the other

(Footnote Continued) ———————————
§ 234.43([a])(6), (7). The Secretary's frequent repetition of the statutory language in these regulations does not advance our inquiry.

regulations must intend something else: adding another full 1½ times (an additional 150%) of the regular rate. This conclusion necessarily assumes that the Secretary intended by the 1977 regulations to provide for overtime to be calculated in a different (and less generous) manner for employees covered by Section 231.43(b) than for all other employees. But I discern nothing in the regulations (or the statute) to support such an intent. Section 231.43(b) applies to employees who are paid a flat sum for a day's work or a flat sum for a particular job. No one has proffered any reason why the Secretary would elect to treat those employees differently than others.

If a distinction between Section 231.43(b) and the other regulations were the key to resolving the overtime calculation question presented by this case, I would have expected the Department of Labor and Industry to advise us accordingly in response to the inquiry that we addressed to it by our September 22, 2017 order.[6] The Department surely is familiar with its regulations on this subject, would know whether the Secretary promulgated Section 231.43(b) to create a distinction in overtime calculation methods among different classes of employees, and would also be aware that this distinction provided a simple and direct answer to the calculation question. Instead, however, the Department's response was at best noncommittal and

---

[6] Our order asked, "for hours worked over 40, is the overtime to be paid to salaried employees an additional one and one-half times the regular rate, or an additional one-half times the regular rate"?

at most agnostic. The response undermines any attribution of such great significance to Section 231.43(b).

In sum, the Secretary has not promulgated regulations stating that overtime is to be calculated by adding an additional 150% of an employee's regular rate when paying overtime. The regulations parroting the statutory language simply do no more than to parrot the statutory language. They state nothing about how to do the calculation. The only regulation addressing the subject, Section 231.43(b), says to calculate overtime in the same way as is done under the FLSA. Nothing in the regulations states that Section 231.43(b) is an exception to calculation rules that would otherwise apply. Finally, the fact that the Secretary did not promulgate a regulation similar to the federal regulation that formally codified the holding in Missel is a red herring: the default position under the statute is that the federal method approved in Missel already applied, and because the Secretary promulgated no regulations that departed from that method, there was no need for another regulation reiterating the existing default rule.

For these reasons, I respectfully dissent from the portion of my colleagues' decision regarding the 1½ multiplier. I otherwise concur with the result.