U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210

November 2, 2015

Marcia M. Waldron
Clerk of the Court
United States Court of Appeals for the Third Circuit
James A. Byrne Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: *Smiley v. E.I. DuPont De Nemours and Company, et al.*, No. 14-4583 (3d Cir.)

Dear Ms. Waldron:

In an order dated August 5, 2015, this Court invited the Department of Labor ("Department") to file an *amicus curiae* letter brief addressing the issues presented in the above-referenced case. In response, the Secretary of Labor ("Secretary") files this *amicus curiae* letter brief addressing whether an employer that has agreed to treat bona fide meal break time as hours worked under the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. 201 *et seq.*, may use the compensation paid to employees for the meal breaks to offset unpaid overtime compensation required by the FLSA. As discussed below, an employer may not use the compensation paid to employees for bona fide meal breaks to offset unpaid overtime compensation required by the FLSA where the employer has agreed to treat the meal break time as hours worked, as evidenced by characterizing the meal breaks as part of the employees' regularly scheduled hours of work in the employee handbook and including the meal breaks in each employee's total number of hours worked each week, as well as including the compensation paid for the meal breaks in determining the employee's regular rate of pay. In such circumstances, the compensation for the meal breaks is compensation for those hours of work and cannot be used to offset compensation owed for other hours of work.

Statutory and Regulatory Background

The FLSA requires employers to pay their employees one and one-half times the employees' "regular rate" of pay for any hours worked over forty in a workweek. 29 U.S.C. 207(a)(1). Section 7(e) defines the "regular rate" at which an employee is employed to include "all remuneration for employment" paid to employees except specific categories of payments set out in subsections (e)(1) through (e)(8). 29 U.S.C. 207(e). Thus, any payment or compensation made to an employee must be included in the regular rate unless it falls within one of the categories set out in subsections (e)(1)-(8). *See* 29 C.F.R. 778.200(c) (all remuneration for employment paid to employees which does not fall within one of the statutory exclusions in

(e)(1)-(8) must be added into the total compensation received by the employee before his regular rate can be determined).[1]

As relevant here, section 7(e)(2) excludes the following types of compensation from the regular rate:

> payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment[.]

29 U.S.C. 207(e)(2). Payments such as vacation pay or payments for travelling expenses are excluded from the calculation of the regular rate because their inclusion would distort the regular rate. For example, an employee who is paid $10 per hour (i.e., her regular rate is $10 per hour) and works 50 hours in a week in which she also receives a $100 payment for travelling expenses is entitled to $500 in regular wages (50 hours x $10) plus $50 in overtime (10 hours x $5). But if the travelling expense payment of $100 were included in the regular rate, that rate would be $12 per hour ($100/50 hours = $2 extra per hour) rather than $10, and the employee would be entitled to $60 in overtime (10 hours x $6) rather than $50.

If compensation paid by an employer is excluded from the regular rate pursuant to one of the categories in subsections (e)(1)-(8), section 7(h) prohibits, with certain exceptions, an employer from using that compensation to offset required minimum wages or overtime compensation:

> **(h) Extra compensation creditable toward overtime compensation**
>
> **(1)** Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 or overtime compensation required under this section.

---

[1] The regulations further explain the regular rate. Section 778.109 states:

> The "regular rate" under the Act is a rate per hour. The Act does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek . . . . The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid.

29 C.F.R. 778.109.

> **(2)** Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

29 U.S.C. 207(h) (emphases in original).[2] Thus, for example, if the employer described above paid only the regular rate of $10 per hour for the 10 overtime hours worked, but failed to pay the extra overtime premium of $5 per hour for those 10 hours of overtime (i.e., failed to pay $50 in overtime) that it owed under the FLSA, it could not rely on its $100 payment for travelling expenses to offset its liability for unpaid overtime. Although the total amount paid by the employer for the week ($600, which consists of $500 for 50 hours of work + $100 payment for travelling expenses) would still exceed the minimum amount required by the FLSA ($550, which would consist of $500 for 50 hours of work + $50 for 10 overtime hours), section 7(h) makes clear that the $100 travelling expense payment cannot be used to offset the $50 in overtime owed under the Act.

Part 778 of the regulations specifically addresses overtime compensation and the regular rate. *See* 29 C.F.R. Part 778. Section 778.201(c) elaborates on the instances when an employer may use compensation already paid to offset required overtime compensation:

> Section 7(h) of the Act specifically states that the extra compensation provided by these three types of payments [described in sections 7(e)(5), (6), and (7)] may be credited toward overtime compensation due under section 7(a) for work in excess of the applicable maximum hours standard. No other types of remuneration for employment may be so credited.

29 C.F.R. 778.201(c) (emphasis added). Similarly, section 778.216 makes clear that payments of the type described in section 7(e)(2), 29 U.S.C. 207(e)(2), cannot be credited toward overtime compensation required by the FLSA. *See* 29 C.F.R. 778.216.

Section 778.320 discusses time for which compensation is paid that in the usual course would not be considered hours worked under the FLSA, but which might be considered hours worked in certain circumstances:

> In some cases an agreement provides for compensation for hours spent in certain types of activities which would not be regarded as working time under the Act if no compensation were provided. Preliminary and postliminary activities and time spent in eating meals between working hours fall in this category. The agreement

[2] Paragraph (e)(5) excludes from the regular rate extra compensation provided by a premium rate for certain hours worked in excess of eight in a day, forty hours in a workweek, or the employee's normal working hours; (e)(6) excludes from the regular rate extra compensation provided by a premium rate for work on certain days of the week, such as Saturday or Sunday; (e)(7) excludes from the regular rate extra compensation provided by a premium rate pursuant to an employment contract or collective-bargaining agreement for work outside specified hours. *See* 29 U.S.C. 207(e)(5)-(7). None of the parties contend that the compensation at issue in this case – compensation for bona fide meal breaks – falls within any of these three categories.

> of the parties to provide compensation for such hours may or may not convert them into hours worked, depending on whether or not it appears from all the pertinent facts that the parties have agreed to treat such time as hours worked. Except for certain activity governed by the Portal-to-Portal Act (see paragraph (b) of this section), the agreement of the parties will be respected, if reasonable.
>
> (a) *Parties have agreed to treat time as hours worked.* Where the parties have reasonably agreed to include as hours worked time devoted to activities of the type described above, payments for such hours will not have the mathematical effect of increasing or decreasing the regular rate of an employee if the hours are compensated at the same rate as other working hours. The requirements of section 7(a) of the Act will be considered to be met where overtime compensation at one and one-half times such rate is paid for the hours so compensated in the workweek which are in excess of the statutory maximum.
>
> (b) *Parties have agreed not to treat time as hours worked.* Under the principles set forth in § 778.319, where the payments are made for time spent in an activity which, if compensable under contract, custom, or practice, is required to be counted as hours worked under the Act by virtue of Section 4 of the Portal-to-Portal Act of 1947 (see parts 785 and 790 of this chapter), no agreement by the parties to exclude such compensable time from hours worked would be valid. On the other hand, in the case of time spent in activity which would not be hours worked under the Act if not compensated and would not become hours worked under the Portal-to-Portal Act even if made compensable by contract, custom, or practice, the parties may reasonably agree that the time will not be counted as hours worked. Activities of this type include eating meals between working hours. Where it appears from all the pertinent facts that the parties have agreed to exclude such activities from hours worked, payments for such time will be regarded as qualifying for exclusion from the regular rate under the provisions of section 7(e)(2), as explained in §§ 778.216 to 778.224. The payments for such hours cannot, of course, qualify as overtime premiums creditable toward overtime compensation under section 7(h) of the Act.

29 C.F.R. 778.320 (italicized emphases in original, underlined emphases added).

Discussion

1. As noted above, 29 U.S.C. 207(h) addresses payments that are excluded from the regular rate and identifies which of those payments can be used as a credit against required overtime compensation. With three exceptions not relevant here, section 7(h) provides that compensation that is excluded from the regular rate pursuant to section 7(e) cannot be credited toward overtime compensation owed under the FLSA. This is consistent with the regulation at 29 C.F.R. 778.320. Section 778.320(b) explains that the parties can agree not to treat bona fide meal breaks as hours worked; if they do so, the payment for the bona fide meal break can be excluded from the regular rate under section 7(e)(2), in which case the compensation paid for the meal

break cannot, in accordance with 29 U.S.C. 207(h)(1), offset required overtime compensation. *See* 29 C.F.R. 778.320(b).[3]

Opinion letters issued by the Department's Wage and Hour Administrator make clear that when the parties agree to treat non-compensable time not as hours worked, compensation for such time is excluded from the regular rate pursuant to section 7(e)(2) and therefore is not creditable toward required overtime compensation in accordance with section 7(h). Specifically citing section 778.320, the Administrator stated in a December 3, 1996 opinion letter that if an employer and its employees agree that payment for half of a bona fide thirty-minute meal break does not make the meal break hours of work, then the meal break is not converted into hours of work and the meal break payment may be excluded from the calculation of the employees' regular rate. *See* Opinion Letter (FLSA), 1996 WL 1031805, at *1 (Dec. 3, 1996). The Administrator thus noted that the meal break payment cannot offset any required overtime compensation. *See id.*; *see also* Opinion Letter (FLSA), 1996 WL 1031776, at *1 (May 6, 1996) (citing section 778.320 and opining that an employer's payment for travel time that is not hours worked under the FLSA "does not convert the hours into hours worked under the FLSA[,]" and noting that the payments cannot offset any required overtime compensation).

Allowing employers to use compensation excludable from the regular rate to offset their overtime obligations under the FLSA would undermine the Act's "dual purpose[s] of inducing the employer to reduce the hours of work . . . and of compensating the employees for the burden of a long workweek." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 423-24 (1945). Those purposes depend on "increasing the employer's labor costs by 50% at the end of the 40-hour week" and "giving the employees a 50% premium for all excess hours[.]" *Id.*

2. Section 7(h) does not address, however, payments that are included in the regular rate and whether those payments can be used as a credit against required overtime compensation. It is

[3] Subsection (e)(2) includes three provisions listing different types of compensation for periods when no work is performed that can be excluded from the regular rate: (1) vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; (2) reasonable payments for traveling or other expenses; and (3) other similar payments which are not made as compensation for an employee's hours of employment. *See* 29 U.S.C. 207(e)(2). The regulations at 29 C.F.R. 778.217 through 778.224 explain these different types of compensation. Section 778.218 addresses the provision in section 7(e)(2) concerning "vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause" and says that payments for lunch breaks are not these types of payments. *See* 29 C.F.R. 778.218(b). Section 778.224, by contrast, discusses what qualifies under the separate category of "'[o]ther similar payments'" as excludable from the regular rate under subsection (e)(2). Compensation for bona fide meal breaks reasonably qualifies as "'[o]ther similar payments'" under this regulation and therefore is excludable from the regular rate. This is confirmed by the explicit statement in section 778.320 that compensation for bona fide meal breaks not treated as hours worked can be excluded from the regular rate under section 7(e)(2). *See Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 909 (9th Cir. 2004) (citing section 778.320 in concluding that the compensation for bona fide meal breaks that the parties agreed not to treat as hours worked was properly excluded from the regular rate).

silent as to that issue. But section 778.320(a) of the regulations, together with fundamental principles of the FLSA, indicate that an employer that agrees to treat non-compensable time such as a bona fide meal break as hours worked despite not being required to do so by the FLSA must include the payment for that meal break in the regular rate and, as a result, necessarily cannot use that payment to offset unpaid overtime compensation.

Section 778.320(a) explains that the parties can agree to treat a bona fide meal break as hours worked; if they do so, the payments for the bona fide meal break must be included in the regular rate. *See* 29 C.F.R. 778.320(a). And in turn, such payments cannot be used as an offset for unpaid overtime compensation. *See* 29 C.F.R. 778.201(c) ("Section 7(h) of the Act specifically states that the extra compensation provided by these three types of payments [described in sections 7(e)(5), (6), and (7)] may be credited toward overtime compensation due under section 7(a) for work in excess of the applicable maximum hours standard. No other types of remuneration for employment may be so credited.") (emphasis added).

There is no authority for the proposition that compensation already paid for hours of work can be used as an offset and thereby be counted a second time as statutorily-required compensation for other hours of work. Permitting a credit in such a situation would violate the requirement that compensation for hours worked be paid free and clear because it would permit the employer to pay the employee for hours worked, but then essentially take that payment back to use it as a credit against required overtime compensation. *See* 29 C.F.R. 531.35 (wages are not considered to have been to paid unless they are paid "finally and unconditionally or 'free and clear'"). Permitting an employer to offset in such circumstances would permit the employer to double-count the compensation. Compensation for specific hours of work, regardless of whether the compensation is for productive work time, for example, or for a bona fide meal break that the employer has agreed to treat as work time, cannot be allocated as compensation for other hours of work, and therefore cannot be used to offset overtime compensation due for those other hours of work. There is no reason to distinguish between compensation for productive work time and compensation for bona fide meal breaks that the parties treat as hours worked. Thus, for example, if an employer chooses to compensate its employees for bona fide meal break**s** and to treat those meal breaks as hours worked, that compensation is already allocated to the hours worked during the meal breaks and cannot be allocated to other hours worked for which overtime compensation is required. *Cf. Wheeler v. Hampton Twp.*, 399 F.3d 238, 245 (3d Cir. 2005) (concluding that the FLSA does not permit an employer to use compensation for non-working time such as holidays and sick days that was included in the employees' base salary (i.e., the regular rate) as an offset).

While this Court confronted a different scenario in *Wheeler*, the Court's analysis is instructive. In *Wheeler*, a collective bargaining agreement ("CBA") provided for compensation for certain non-working time (e.g., holidays, sick days, etc.) and also provided for specified incentive and expense payments. *See* 399 F.3d at 241. The CBA included the compensation for non-work time in calculating the regular rate, but did not include the incentive and expense payments in calculating the regular rate. *See id.* at 243. This Court noted that under section 7(e) the regular rate need not include the non-work pay, but must include the incentive and expense payments (i.e., the opposite of how the CBA treated these two types of payments). *See id.* at 241-43. The employer argued that the FLSA allowed it to use the inclusion of the non-work compensation in

the regular rate to offset the unlawful exclusion of the incentive and expense payments from the regular rate on the ground that inclusion of the non-work compensation resulted in a higher regular rate than would have been the case had the incentive and expense payments been included instead. *See id.* at 243. This Court held that the employer did not qualify for the credit allowed under section 7(h)(2) because the non-work compensation was not of the type described in subsections (e)(5), (6), or (7). *See id.* at 245; 29 U.S.C. 207(e)(5)-(7). "Where a credit is allowed, the [FLSA] says so." *Id.* The Court's conclusion, albeit in a different context, that the FLSA does not permit an employer to use compensation for non-work that was included in the regular rate as an offset is relevant here. *See id.*

The two primary cases on which the district court relied in concluding that Defendants E.I. DuPont de Nemours and Company and Adecco U.S.A., Inc. (collectively "DuPont") could use the meal break compensation to offset any unpaid overtime compensation did not analyze the offset issue in any detail and therefore offer little guidance in the instant case. *See Smiley v. E.I. DuPont De Nemours & Co.*, No. 3:12-cv-2380, 2014 WL 5762954, at *7-8 (M.D. Pa. Nov. 5, 2014) (citing *Barefield v. Vill. of Winnetka*, 81 F.3d 704, 707-10 (7th Cir. 1996); *Avery v. City of Talladega*, 24 F.3d 1337, 1342-47 (11th Cir. 1994)). In *Barefield* and *Avery*, the main issue before the respective courts was the applicability of the partial overtime exemption in 29 U.S.C. 207(k) for certain employees engaged in fire protection or law enforcement activities and whether a thirty-minute paid meal break was a bona fide break, which turned on whether the meal break time was used predominantly for the employer's benefit. *See Barefield*, 81 F.3d at 707-10; *Avery*, 24 F.3d at 1342-47. After thoroughly analyzing those issues, the courts noted, with no analysis, that because the meal breaks were bona fide and therefore not compensable hours worked under the FLSA, the employer could use the meal break compensation to offset the unpaid overtime compensation. *See Barefield*, 81 F.3d at 710; *Avery*, 24 F.3d at 1344, 1347. In *Barefield*, the employees had also argued that the payment for the meal breaks automatically converted the meal breaks into work time. *See* 81 F.3d at 711. The Seventh Circuit rejected that argument, reasoning that nothing in the statute, regulations, or case law prevents an employer from compensating its employees for forty hours even if they work less. *See id.* Because these cases presume that an offset is permitted in such situations but provide no analysis of the issue, they should not be determinative of the outcome here. Of particular note in this regard is the fact that neither of these decisions refers to 29 U.S.C. 207(h), which sets out the parameters for compensation that is creditable toward required overtime compensation; 29 C.F.R. 778.201, which indicates that the only credit an employer may take is for the type of compensation outlined in 29 U.S.C. 207(e)(5)-(7); or 29 C.F.R. 778.320, which prohibits an employer from taking a credit for payment of bona fide meal breaks.

The Ninth Circuit decision in *Ballaris v. Wacker Siltronic Corp.*¸ 370 F.3d 901 (9th Cir. 2004), offers limited guidance because, while presenting similar facts, it differs in one critical aspect. The employees in *Ballaris*, similar to the employees here, worked twelve-hour shifts, were paid for a bona fide meal break during those shifts, and claimed that they were not paid for donning, doffing, and "pass-down" time (similar to the shift relief time in this case). *See id.* at 904-05; *Smiley*, 2014 WL 5762954, at *1. Unlike the instant case, however, the employer in *Ballaris* excluded the meal break compensation when calculating the employees' regular rate and the parties agreed that the meal break period was excluded from each employee's total hours worked. *See* 370 F.3d at 909. Relying heavily on section 778.320, the Ninth Circuit concluded

that the meal break payment was properly excluded from the regular rate pursuant to 29 U.S.C. 207(e)(2). *See* 370 F.3d at 909. The court further concluded that, because the meal break payment was excluded from the regular rate pursuant to section 7(e)(2), section 7(h)(1) prohibited the employer from using those payments as a credit against its unpaid overtime compensation. *See id.* at 913. Nonetheless, part of the court's reasoning is particularly relevant to this case:

> Even without section 7(h), we emphasize that it would undermine the purpose of the FLSA if an employer could use agreed-upon compensation for non-work time (or work time) as a credit so as to avoid paying compensation required by the FLSA. . . . Crediting money already due an employee for some other reason against the wage he is owed is not paying that employee the compensation to which he is entitled by statute. It is, instead, false and deceptive "creative" bookkeeping that, if tolerated, would frustrate the goals and purposes of the FLSA.

370 F.3d at 914. Thus, while *Ballaris* addressed different facts, the court's observation of the fundamentally unfair result of allowing agreed-upon wages to offset unpaid overtime compensation owed under the FLSA is equally applicable in this circumstance and counsels for allowing crediting only in very narrow circumstances as set forth in 29 U.S.C. 207(h). This conclusion also finds support in 29 C.F.R. 778.201(c), which states:

> Section 7(h) of the Act specifically states that the extra compensation provided by these three types of payments [described in sections 7(e)(5), (6), and (7)] may be credited toward overtime compensation due under section 7(a) for work in excess of the applicable maximum hours standard. <u>No other types of remuneration for employment may be so credited.</u>

29 C.F.R. 778.201(c) (emphasis added).

3. In sum, as section 778.320(b) makes clear, when an employer does not agree to treat bona fide meal breaks as hours worked, compensation paid for the meal breaks is excludable from the regular rate under 29 U.S.C. 207(e)(2), in which case 29 U.S.C. 207(h)(1) prohibits using that compensation to offset required overtime compensation. As section 778.320(a) makes clear, when an employer agrees to treat bona fide meal breaks as hours worked despite not being required to do so by the FLSA, the compensation paid for the meal breaks must be included the in the regular rate. Because the compensation is for those hours worked, the employer cannot use that compensation to offset unpaid overtime compensation owed for other hours of work as that would be impermissibly double-counting the compensation, as discussed above. Thus, regardless of whether an employer agrees to treat the bona fide meal break as hours worked, the compensation paid for the meal break cannot be used to offset required overtime compensation under section 7(h). *See* 29 U.S.C. 207(h); *Wheeler*, 399 F.3d at 245 ("Where a credit is allowed, the [FLSA] says so.").

4. Despite the conclusion that compensation for bona fide meal breaks cannot be used to offset required overtime compensation regardless of whether the parties agreed to treat the bona fide

meal breaks as hours worked, the Secretary addresses the issues presented in the manner in which they were framed by this Court and litigated by the parties, i.e., accepting the premise that the existence of an agreement to treat the bona fide meal breaks as hours worked is critical to the analysis.[4] It is the evidence in the record that determines whether an employer has agreed to treat bona fide meal breaks as hours worked. This is confirmed by the preamble in the Federal Register that accompanied the 1981 revision to the regulation at section 778.320. *See* U.S. Dep't of Labor, Wage & Hour Div., Overtime Compensation, 46 Fed. Reg. 7308 (Jan. 23, 1981). It clarified that although an employer's payment for non-compensable time such as a bona fide meal break does not automatically convert the time into hours worked, the parties can nonetheless agree to treat such time as hours worked. *See id.* The preamble noted that the previous version of section 778.320 "very strongly implied that payment for time spent in the specified activities [such as eating meals between work hours] would almost invariably convert them into hours worked." *Id.* The revision changed the language to avoid this implication and to state expressly that whether or not payments convert the time spent in such activities into hours worked depends on whether the facts show that the parties agreed to treat such time as hours worked. *See id.*; *see also* U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook, Ch. 32, § 32j09(2) (2000) (citing section 778.320(b) and explaining that "the conversion of certain activities into hours of work by virtue of the employer's payment for such time depends on 'whether or not it appears from all the pertinent facts that the parties have agreed to treat such time as hours worked'"), available at http://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

The language in section 778.320 suggests that the agreement may be implied by the conduct of the parties. "The agreement of the parties to provide compensation for such hours may or may not convert them into hours worked, depending on whether or not it appears from all the pertinent facts that the parties have agreed to treat such time as hours worked." 29 C.F.R. 778.320 (emphasis added). "[A]n agreement cognizable for purposes of the FLSA overtime inquiry may arise by conduct." *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 938 (9th Cir. 2004) (concluding that an agreement existed regarding policy for twenty-four-hour duty shift compensation and citing cases where implied agreements were found based on conduct of the parties); *see Owens v. Local No. 169, Ass'n of W. Pulp & Paper Workers*, 971 F.2d 347, 354-55 (9th Cir. 1992) (concluding that an agreement existed regarding on-call time because, although the employer unilaterally imposed the call-in policy, the employees accepted the terms of that agreement by continuing to work); *cf. Reich v. Lucas Enters., Inc.*, 2 F.3d 1151, 1993 WL 307080, at *2-3 (6th Cir. 1993) (per curiam) (unpublished) (concluding that the conduct of the parties did not show an implied agreement to treat paid meal breaks as hours worked).

5. The record of the parties' conduct in the instant case demonstrates that DuPont treated the meal breaks as hours worked. DuPont's statement in its employee handbook describing the compensation for the meal breaks, together with the fact that DuPont included the meal break compensation in calculating the employees' regular rate and included the meal break time in the

[4] It bears noting that the issue of whether bona fide meal breaks are treated as hours worked is not an irrelevant determination; it has independent significance. Treating the meal breaks as hours worked increases an employee's total hours worked each workweek, thereby putting that employee's total hours at the forty-hour threshold for earning overtime compensation sooner than would otherwise occur if the meal breaks were not included as hours worked.

total hours worked for each employee, show that the parties effectively agreed to treat the meal breaks as hours worked. While it is true that the mere act of paying for the bona fide meal breaks does not alone convert the breaks into hours worked, *see* 29 C.F.R. 778.320, there is considerably more than mere payment in this case.

DuPont's Meal Break Policy in its employee handbook states, in relevant part:

> Employees working in areas requiring 24 hour per day staffing and are required to make shift relief will be paid for their lunch time as part of their scheduled work shift.

App. 229 (emphasis added). The first part of the sentence – "[e]mployees working in areas requiring 24 hour per day staffing and are required to make shift relief" – defines the category of employees to whom the Meal Break Policy applies. The phrase "will be paid for their lunch time as part of their scheduled work shift" indicates that these employees' twelve-hour scheduled work shifts include their paid lunch time. Thus, this statement indicates that the meal breaks were included with the productive work time in the total twelve hours that employees worked each shift.

In addition, the fact that DuPont included the compensation for the meal breaks in calculating the employees' regular rate and included the three thirty-minute meal breaks in each employee's total hours worked per shift further show that the meal breaks were treated as hours worked. The district court stated that the parties agreed that the compensation for the meal breaks was included in determining the employees' regular rate of pay. *See Smiley*, 2014 WL 5762954, at *4 n.6, *8. Neither party appears to dispute this on appeal. Plaintiffs point out that their own paystubs reflect the inclusion of the three thirty-minute meal breaks per shift in the total hours worked each workweek; they were always paid for twelve hours per shift, which included the three thirty-minute meal breaks. *See* Pls.' Br. 18. Thus, DuPont counted the three thirty-minute meal breaks in determining each employee's total hours worked each week.

DuPont does not contest that it included the meal breaks in each employee's total hours worked for each week. Instead, DuPont attempts to discount this fact by providing an explanation for why it included the meal breaks in the hours worked, saying that it must include the meal breaks in employees' hours "so that the time is included in the regular rate[.]" Dfs.' Br. 14. Doing so, DuPont argues, enables it to use the meal break compensation to offset the required overtime compensation. *See id.* Putting aside the circular nature of this reasoning, this argument is unavailing. The reason that DuPont has chosen to pay its employees who work twelve-hour shifts for three thirty-minute bona fide meal breaks, whatever that reason may be, is not determinative of whether that time forms a part of the hours worked. The fact is that DuPont admits that it included the time for these breaks in the total hours worked and included the compensation paid for these breaks in determining the employees' regular rate of pay. In doing so, DuPont agreed to treat the bona fide meal breaks as hours worked.

6. The fact that meal breaks are bona fide breaks for which the FLSA does not require an employer to compensate employees is irrelevant in determining whether the parties have agreed to treat the bona fide meal breaks as hours worked. The Sixth Circuit in *Lucas Enterprises* and

the district court in this case erred in concluding otherwise. In *Lucas Enterprises*, the Sixth Circuit concluded that the conduct of the parties did not indicate an implied agreement to treat meal breaks as hours worked despite the employer's practice of including the meal breaks in the total hours worked each week for purposes of determining when an employee worked overtime hours. *See* 1993 WL 307080, at *2-3. The court based its conclusion primarily on the fact that the employees were free to use the meal break time for their own purposes, which showed, the court concluded, that the parties did not agree to treat the meal breaks as hours worked. *See id.* The employer's inclusion of the meal breaks in the total hours worked each week was not enough, according to the court, to show that the parties agreed to treat the meal breaks as hours worked as required by section 778.320. *See id.* The court's analysis of this issue in *Lucas Enterprises*, however, was flawed because it ignored that section 778.320 specifically contemplates that a bona fide meal break (i.e., a break where the employees are free to use the time for their own purposes) can be hours worked if the parties so agree. The relevant inquiry is not whether the meal breaks were bona fide or not, but whether the parties treated the concededly bona fide meal breaks as hours worked.

In a somewhat similar fashion to what the Sixth Circuit did in *Lucas Enterprises*, the district court in this case based its conclusion that the parties did not agree to treat the meal breaks as hours worked primarily on the fact that the parties agreed that the meal breaks were bona fide breaks and on the fact that the regulation on meal breaks at 29 C.F.R. 785.19 states that bona fide meal breaks are not compensable hours worked under the FLSA. *See Smiley*, 2014 WL 5762954, at *6. The district court's conclusion rests on a fundamental misunderstanding of sections 785.19 and 778.320 of the regulations. Section 785.19 merely stands for the proposition that the FLSA does not require that bona fide meal breaks be treated as compensable hours worked; it does not prohibit an employer from voluntarily treating bona fide meal breaks as hours worked. Moreover, as noted above, section 778.320 expressly contemplates that the parties may agree to treat bona fide meal breaks as hours worked. While the mere payment for otherwise non-compensable time is not alone sufficient to convert the time to hours worked, the parties may agree to treat the time as hours worked (and such agreement may be shown by conduct). Thus, the fact that the meal breaks are bona fide breaks for which the FLSA does not require DuPont to compensate Plaintiffs has no bearing on whether the parties agreed to treat the bona fide meal breaks as hours worked.[5]

[5] Even if the district court were correct that DuPont did not agree to treat the bona fide meal breaks as hours worked, the court erred in concluding that DuPont could use the meal break compensation as credit against the unpaid overtime compensation. Section 778.320, upon which the district court relied, is clear that when bona fide meal breaks are not treated as hours worked, the compensation for such meal breaks is excludable from the regular rate under 29 U.S.C. 207(e)(2) and therefore is not creditable under 29 U.S.C. 207(h) towards required overtime compensation. *See* 29 C.F.R. 778.320. This was the result that the Sixth Circuit in *Lucas Enterprises* ultimately reached. The Sixth Circuit noted that "the regulations contain repeated prohibitions against the crediting of payments for hours not worked toward overtime compensation due under the Act." 1993 WL 307080, at *4 (citing, as examples, 29 C.F.R. 778.216's statement that payments made for hours not worked cannot be credited toward overtime compensation due under the FLSA and section 778.320's statement that payments for bona fide meal times qualify for the exclusion from the regular rate under section 7(e)(2) and

DuPont's description of the meal break compensation in its employee handbook, together with the inclusion of the meal break compensation in the calculation of the regular rate and the inclusion of the meal break time in the total hours worked each workweek for each employee, show that DuPont treated the meal breaks as hours worked. Therefore, it cannot use the compensation paid for the meal breaks to offset the unpaid overtime compensation it owes for the donning, doffing, and shift relief work that the Plaintiffs performed. To permit offsetting in such circumstances would be to permit DuPont to double-count the meal break compensation, first as compensation for the meal breaks that it treated as hours worked, and second as compensation for the pre- and post-shift unpaid work that Plaintiffs performed.

For the reasons set forth above, an employer that has agreed to treat bona fide meal breaks as hours worked may not use the compensation paid for the meal breaks to offset unpaid overtime compensation required under the FLSA.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

/s Rachel Goldberg
RACHEL GOLDBERG
Senior Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W., Room N-2716
Washington, D.C. 20210
(202) 693-5555

---

such payments cannot be credited toward overtime compensation due). Thus, although the Sixth Circuit first concluded that there was no implied agreement to treat the bona fide meal breaks as hours worked, the court ultimately concluded that the compensation for the meal breaks was excludable from the regular rate (despite the fact that the employer had included the compensation in the regular rate), and therefore could not be used to offset unpaid overtime compensation. *See id.*; *see also Ballaris* 370 F.3d at 913 (concluding that compensation for bona fide meal breaks that the parties agreed not to treat as hours worked was excluded from the regular rate under section 7(e)(2) and therefore was not creditable toward required overtime compensation).