

FLSA Decision Finds Employer Had No Actual or Constructive Knowledge of Police Officer "Off-The-Clock" Overtime Claims.

The Seventh Circuit for the U.S. Court of Appeals recently affirmed judgment in favor of a public agency police employer because the employer lacked actual or constructive knowledge that members of its police department were performing off-the-clock Fair Labor Standards Act (FLSA) overtime work on their smartphones. In *Allen v. City of Chicago*, current and former members of the Chicago Police Department's Bureau of Organized Crime ("Department") claimed they were owed FLSA overtime pay for monitoring and responding to email on their smartphones after normal work hours.

In *Allen*, the central issue was whether the Department maintained an "unwritten policy" that prevented or discouraged officers from claiming overtime for work performed using their smartphones.

The Department allowed officers to claim overtime compensation by submitting "time due slips" to their supervisors for overtime work performed. At trial, the plaintiffs introduced evidence of the general orders, or "guidelines and responsibilities" applicable to officers' use of Department-issued smartphones. These guidelines stated that officers were not required to use smartphone devices while off-duty and that officers would only be compensated for overtime work in two circumstances: (1) if the officer was on a "call-back" assignment; or (2) if a superior directed and authorized overtime for the work. Many plaintiffs did not submit slips for off-duty work done on their mobile devices, claiming that they did not do so because the Department discouraged overtime claims for work they performed after hours on their smartphones.

The Department presented evidence that showed that supervisors regularly approved officer's time due slips, which were processed by the payroll department. The Department also presented data showing that plaintiffs collectively reported and received pay for 3,000 to 4,000 overtime hours per year from 2011 to 2014.

The trial court determined that the general orders did not create a policy of not compensating plaintiffs for overtime worked, nor did they reaffirm an unwritten policy to do so. There was also no culture to discourage submitting time due slips for responding to email off-duty. The Court found it significant that some plaintiffs did submit slips for work performed on their smartphones after work hours and received overtime compensation. There was no evidence that any officer was reprimanded or disciplined for claiming overtime compensation for after-hours smartphone work. The trial court concluded that the City was not liable for the uncompensated hours for the additional reason that plaintiffs failed to prove that the City had actual or constructive knowledge that officers were performing after-hours uncompensated work on their smartphones.

On appeal, the Seventh Circuit affirmed the ruling in favor of the City. The Seventh Circuit agreed that the Department's general orders did not establish an unwritten policy that denied plaintiffs overtime compensation for off-duty smartphone work. The Seventh Circuit also rejected the plaintiffs' claims that the City could have known about uncompensated work through an examination of all of its records. Employers are held to the "reasonable diligence standard [which] asks what the employer should have known," not what "it could have known." While the Department knew about some off-duty smartphone work, it did not know that such work was not being reported or paid. Moreover, the plaintiffs knew the procedures for claiming overtime pay and used them.

Allen v. City of Chicago (7th Cir., 2017) 865 F.3d 936.

NOTE:

The decision reminds employers to: review and update policies on overtime compensation and remote work; and provide training on those policies. Developing clear policies, and training employees in their proper use, may enable agencies to defend against off-the-clock FLSA overtime lawsuits.