

COMPANY'S UNPAID BREAK PROGRAM DRAWS THE IRE OF THE THIRD CIRCUIT, AND LEADS TO LIABILITY

By Kevin J. O'Connor*

In a precedential decision yesterday, the United States Court of Appeals for the Third Circuit in Department of Labor v. American Future Systems, Inc., 16-2685 (3d Cir. Oct. 13, 2017), chastised an employer's "flex time" program as one disguised to deprive employees of the ability to take short, paid breaks, which have historically been protected by the DOL. The decision affirms a judgment of \$1,916,000.00 against the employer which was comprised of \$958,000.00 for unpaid minimum wages and an equal amount in liquidated damages.

In a colorful opinion drawing an analogy to wizards and salespeople doubling as sprinters, the Court ruled that employers are obligated to pay their employees for breaks of twenty minutes or less under the Fair Labor Standards Act ("FLSA"). The Court affirmed a district judge's ruling granting the secretary of the U.S. Department of Labor's motion for partial summary judgment on its claims that Progressive Business Publications ("Progressive") failed to pay a minimum wage by forcing employees to clock out anytime they wanted a break that exceeded 90-seconds.

Progressive is a large Pennsylvania company that publishes and distributes publications. The opinion says that the employees were paid hourly at minimum wage and received bonuses based on the number of sales per hour, while logged into the company's computer system. In 2009, the employer changed from a system allowing for two paid, fifteen minute breaks a day, to a system that eliminated paid breaks but allowed employees to log off their computers anytime they wished.

Under this "flex time" plan, employees who quickly logged back on (within 90 seconds) would be paid for their time. Those who did not would not be paid for the time logged off. The "flex time" plan was premised on the employees being permitted to choose how much they wished to work during the daytime hours, so long as they did not exceed 40 hours. Each employee would estimate in advance how many hours she would work in the next two weeks, and could be disciplined for failing to meet that estimate.

The Court's decision states that, on average, representatives were paid about 5 hours per day at a minimum wage rate of \$7.25.

In some rather colorful language, the Court recognized that the "policy that Progressive refers to as 'flexible time' forces employees to choose between such basic necessities as going to the bathroom or getting paid unless the employee can sprint from computer to bathroom, relieve him or herself while there, and then sprint back to his or her computer in less than 90 seconds." The Court ruled that this violated a regulation adopted by the DOL's Wage and Hour Division, 29 CFR § 785.18, which provides that

"[r]est periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time."

The Court resorted to an analogy from Harry Potter to make its point:

"Indeed, unless he or she has access to something akin to a Portkey, if an employee is sufficiently athletic to get from workstation to bathroom, relieve himself or herself, wash his or her hands, and return to the workstation in ninety seconds, it is highly unlikely that the employee would

be working at Progressive for a minimum wage rather than playing for a professional sports franchise or advertising a brand of athletic footwear. Moreover, given the time restraints imposed by certain biological necessities beyond the employee's control, we doubt an employee could manage this feat even if he or she had access to a Portkey. *See* J.K. Rowling, Harry Potter and the Goblet of Fire 70 (Scholastic Inc. 1st ed. 2000) (In the Harry Potter series, Portkeys are "objects that are used to transport wizards from one spot to another . . .").

The Court ruled that this flex time policy violated FLSA.

While the Court did not deal with this issue, it should be mentioned that this flex time policy, as described in the opinion, could subject an employer to liability for discrimination claims as well as wage and hour claims. If an employee who has a medical disability of some kind is mandated to take unpaid breaks through the day and could prove economic harm from the policy with a failure to accommodate his/her disability, this could be yet another area of exposure for using such a flex time policy.

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