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SCOTUS Takes a Pass on "Gap Time" Dispute

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It's two months into argument season at the Supreme Court, and we're always keeping our fingers crossed that the justices will take up a wage and hour issue and clear up some ambiguities in the law or a circuit split.

Top billing this SCOTUS term goes to *Helix Energy Solutions Group, Inc. v. Hewitt*, in which the Court will address whether a supervisor who earned more than $200,000 a year but was paid on a daily basis is exempt from the overtime laws as a "highly compensated employee" under 29 C.F.R. § 541.601, notwithstanding the salary basis rules in 29 C.F.R. § 541.602 and 29 C.F.R. § 541.604. The Court held arguments on October 12, and you can read the transcript here. We'll report on that decision as soon as it's published.

This week's news is a denial of a petition for a writ of certiorari in *Cleveland County, North Carolina v. Conner*, a case about gap time. The plaintiff in the case—an EMT worker—was paid under a fairly complex set of ordinance-based and contractual terms, but the gist of her claim was that the county shorted her on straight-time pay she was owed under her contract, and by doing do violated the Fair Labor Standards Act. The district court dismissed the claim, on the ground that the FLSA governs minimum wage and overtime pay, but not straight-time pay (assuming no minimum wage violation). On appeal, however, the Fourth Circuit noted that "there are situations … that fall between [the minimum wage and overtime] provisions of the FLSA. It explained:

> "In addition to seeking unpaid overtime compensation, employees may seek to recover wages for uncompensated hours worked that fall between the minimum wage and the overtime provisions of the FLSA, otherwise known as gap time …. Gap time refers to time that is not directly covered by the FLSA's overtime provisions because it does not exceed the overtime limit, and to time that is not covered by the FLSA's minimum wage provisions because … the employees are still being paid a minimum wage when their salaries are averaged across their actual time worked. (*Internal citations and alterations omitted.*)"

The Court of Appeals differentiated between two types of gap time—"pure gap time" and "overtime gap time"—with the former referring to unpaid straight time in a week in which an employee works no overtime, and the latter referring to unpaid straight time in a week in which the employee works overtime. The court noted, correctly, that no provision of the FLSA addresses gap time of either type, and that there is no cause of action under the FLSA for "pure gap time" absent a minimum wage or overtime violation by the employer. Such claims would arise, if at all, under state law.

On the other hand, the circuit court noted that courts are divided on whether an employee can bring an "overtime gap time claim" under the FLSA. While the statute itself is silent on the issue, the U.S. Department of Labor's interpretation of the FLSA—set forth in 29 C.F.R. § 778.315—states that:

> "[C]ompensation for … overtime work under the Act cannot be said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours under his contract (express or implied) or under any applicable statute has been paid."

In its simplest sense, the argument for recognizing "overtime gap time" claims under the FLSA is this: Say an employer promises an overtime-eligible employee base pay of $1,000 per week for up to 40 hours of work, and the employee works more than 40 hours in a given week. In that scenario, the employee's hourly overtime rate would by $37.50 ($1000 ÷ 40 yields a regular rate of $25, and time-and-a-half on $25 is $37.50). But if the employer only pays the employee $800 in base pay for the week and not the promised $1,000, the regular rate becomes $20 ($1000 ÷ 40) and the hourly overtime rate becomes $30 (time-and-a-half on $20). So the employee is short-changed $7.50 on each overtime hour, which the Fourth Circuit found violates 29 C.F.R. § 778.315 and the spirit, if not the letter, of the FLSA.

"Pure gap time" is different, in this important sense: it only arises when the employee has not worked any overtime in the week. So there is no possibility of short-changing the employee on overtime pay, and—assuming the employee has, on average, received the minimum wage for all hours worked that week—no other provision of the FLSA that provides any relief. (The employee is ostensibly free to seek relief under an applicable state wage payment law or common law for failure to pay promised compensation.)

The Fourth Circuit concluded that 29 C.F.R. § 778.315 has the "power to persuade," and therefore is entitled to "considerable deference" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). As such, the court held that "overtime gap time claims" are indeed cognizable under the FLSA, and that "courts must ensure employees are paid all of their straight time wages first under the relevant employment agreement, before overtime is counted." The court acknowledged a circuit split on the issue, with the Second Circuit declining to afford deference to 29 C.F.R. § 778.315 and rejecting "overtime gap time" claims as lacking a statutory basis ("So long as an employee is being paid the minimum wage or more, [the] FLSA does not provide recourse for unpaid hours below the 40–hour threshold, even if the employee also works overtime hours the same week.").

The county filed a petition for a writ of certiorari with the Supreme Court, presenting not only the question of whether the FLSA permits "overtime gap time" but also seeking clarification on how federal courts should apply the *Skidmore* doctrine to agency interpretations such as 29 C.F.R. § 778.315. The Supreme Court denied the petition on December 12, leaving both questions for another day.

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