

Overtime payment takes a back seat

By James H. Kizziar, Jr., Bracewell & Giuliani LLP

A recent federal appeals court ruling highlights the importance of both employers and their employees fully comprehending a company's overtime policy. In *Kellar v. Summit Seating*¹, Susan Kellar sued her employer, Summit Seating (Summit), claiming that she had not been paid overtime for pre-shift work, claiming this action violated the Fair Labor Standards Act (FLSA). The FLSA requires employers to pay overtime to non-exempt employees who work more than 40 hours in a work week. Kellar bore the burden of proving that she performed overtime work for which she was not properly compensated, while Summit bore the burden of establishing that an exemption from the FLSA applied.

Kellar worked as a sewing manager for Summit, a manufacturer of seats for buses, trucks and vans. Kellar, who was paid on an hourly basis, managed seven to eight employees and was responsible for supplying sewers with their products, tracking supplies, ensuring that work was completed on schedule, and training junior employees.

Kellar claimed that during her employment with Summit, she regularly arrived at work early, between 15 and 45 minutes before the start of her 5 a.m. shift. She claimed that with the exception of a five-minute break, all of the time she spent between her arrival and the beginning of her shift was spent working, preparing for the day's shift.

Kellar was never told by anyone that she had to arrive early, and she testified that she did it voluntarily because it would have been a "hassle" to show up at 5 a.m. and still get her subordinates up and running close to the start of their 5 a.m. work shift. Kellar's time cards reflected that she often punched in early, although when she forgot to clock in, she would write the official shift start time on her time card.

At Summit, it was routine for employees to clock in early and socialize until the start of their shifts. Nevertheless, Kellar was adamant that she spent her pre-shift time at Summit working rather than socializing. Kellar's supervisors, Ray and Sue Fink, Summit's owners, never observed Kellar

arriving or working early, because they typically arrived between 7 and 8 a.m. Kellar testified that she had a good relationship with the Finks, and she had no reservations about going to them with any problems.

Kellar also was aware that Summit's handbook policy prohibited employees from working overtime without pre-approval. However, Kellar never told the Finks that she was working before the start of her shift and never reported any errors with her paychecks, requested any overtime pay or mentioned during weekly production meetings that her schedule needed to be adjusted to account for her pre-shift work.

After eight years of employment with Summit, Kellar resigned and sued the company in district court. The district court dismissed Kellar's claim and she appealed.

Although the 7th Circuit Court of Appeals held that Kellar's pre-shift work was compensable under the FLSA, rather than non-compensable preliminary activity or de minimis work, it nonetheless held that Summit was not required to pay for overtime work it did not know about and had no reason to know about.

While the mere issuance of a rule prohibiting overtime work without approval is insufficient to shield an employer from overtime liability, the employer must know or have reason to believe that the employee is performing extra work. In this case, Kellar pointed to her time cards as proof that the Finks knew she was performing pre-shift work. However, the court found that the mere fact that she was clocking in early was insufficient to alert Summit that she was performing pre-shift work, since Kellar conceded that it was routine for employees to punch in early and then socialize until the beginning of their shifts.

The Finks, who were aware of the clocking in early and socializing practice, had no reason to believe that Kellar alone was arriving early in order to work. The court also concluded that Kellar's behavior raised no flags, because when she forgot to punch in, she simply wrote in her arrival time as the beginning of her scheduled shift; during her eight-year employment at Summit, she never told the owners she was working

overtime; and there was no indication that anyone else at Summit knew about her pre-shift work. In addition, at the managers' weekly scheduling meetings, Kellar never mentioned her pre-shift work or that she was not being properly compensated, even though she professed to have a good relationship with the owners.

Kellar also was aware of Summit's policy prohibiting unapproved overtime work and had even reprimanded an employee for clocking in early. Based on all of the evidence, the appeals court concluded that Summit had little reason to know or even suspect that Kellar was performing unpaid overtime work in violation of its policy. Based on this reasoning, the appellate court dismissed Kellar's claims against Summit.

This is an unusual case where the employer was unaware that an employee was violating its policy by working unpaid overtime. In many cases, managers or supervisors are aware, thus imputing knowledge and creating wage/overtime liability to the employer. A policy against overtime without pre-approval is of little effect if it is not enforced by the employer and obeyed by the employee.

¹664 F.3d 169 (7th Cir. 2011)

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- Employers and their employees must fully comprehend a company's overtime policy. FLSA requires employers to pay overtime to non-exempt employees who work more than 40 hours in a work week.