

Court voids hotel's compensation agreement with housekeeper

Summary judgement granted to employee on overtime claims

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A district court granted summary judgment on the entirety of the wage-and-hour claims brought by a former housekeeper of the Soniya Hotel in Manhasset, N.Y. *Balczyrak-Lichosyt v. Soniya Hotel, LLC*, No. 16-cv-4386 (SIL), 2018 WL 4861393, 2018 U.S. Dist. LEXIS 168228 (E.D.N.Y. Sept. 28 2018).

The employee, Gabriela Balczyrak-Lichosyt, worked as one of the hotel's housekeepers between 2009 and 2015. During this time, she was given a weekly paycheck for up to 40 hours of work each week, and cash at her regular hourly rate for every hour that she worked in excess of 40 hours during the week. In addition, the hotel provided her with a room within the hotel for the entirety of her employment, \$100 each month in cash to purchase a MetroCard, paid lunch breaks, vacation, and health insurance.

The parties did not dispute that Balczyrak-Lichosyt regularly worked more than 40 hours a week, or that she received cash at her regular hourly rate for her overtime hours. Rather, the dispute centered on whether and how she was compensated for time and a half for each overtime hour. The Soniya argued that Balczyrak-Lichosyt entered into an agreement with the hotel to "waive" overtime payments so long as the hotel continued to provide her with non-monetary compensation and benefits, including a hotel room, paid lunch breaks and vacation, health insurance and the MetroCard. Neither the value of the room, which was calculated to be approximately \$125 per night, nor the MetroCard was included in her regular rate of pay. The hotel maintained payroll records but no records of cash payouts.

Include room, board in overtime calculations

The hotel in *Balczyrak-Lichosyt* may have had its housekeeper's best interests in mind when it provided her with a room and a transportation card as part of her wages, but failing to properly account for those additions to her compensation for the purposes of calculating overtime ended up being a \$500,000 mistake.

According to the U.S. Department of Labor, when an employer offers lodging and board as credit toward wages, it must meet five requirements to be in compliance with the Fair Labor Standards Act:

- The lodging is regularly provided by the employer or similar employers.
- The employee voluntarily accepts the lodging.
- The lodging is furnished in compliance with applicable federal, state or local law.
- The lodging is provided primarily for the benefit of the employee rather than the employer.
- The employer maintains accurate records of the costs incurred in furnishing the lodging.

When an employee is provided with employer-provided lodging and board, for the purposes of calculating overtime, the employer must include total earnings, including commissions, certain bonuses, the cost of the room, board and other facilities provided primarily for the employee's benefits, to determine total earnings. Once the total earnings number has been ascertained, the employer can determine the regular rate of pay by dividing total earnings in a workweek by the total number of hours worked. The regular rate cannot be less than the applicable minimum wage in the employer's jurisdiction.

The DOL does allow for some exclusions from the regular rate of pay. These include:

- Gifts or discretionary bonuses.
- Payments for time not worked.
- Reimbursements for expenses.
- Profit sharing plans or stock options.
- Retirement and various insurance plan contributions.
- Overtime premium payments.

Balczyrak-Lichosyt. Generally, a two-year statute of limitations applies to back pay recovery. However, a willful violation has a three-year statute of limitations to allow the employee to recover unpaid wages. The DOL's Wage and Hour Division may bring suit to restrain employer from violating the FLSA and/or obtain back wages and damages. Employees also have the option of filing private suit for back pay, liquidated damages, plus attorney and court fees.

Balczyrak-Lichosyt denied that she ever agreed to have the value of her housing apply to the gap in her overtime payments.

United States Magistrate Judge Steven I. Locke of the Eastern District of New York was unmoved by the hotel's reliance on the agreement. First, the court noted that both the value of the housing at \$125 per night and the \$100 MetroCard cash was part of the housekeeper's total compensation and should have been included in the determination of her true regular hourly rate for the purposes of calculating accurate overtime.

The hotel admitted that it did not incorporate these items into her regular rate. Therefore, the court held that the hotel violated the Fair Labor Standards Act by not including these items in the calculation.

Second, the court held that because the hotel customarily furnished these items to the house-keeper — regardless of how many hours she worked each week and even if it was less than 40 hours — it could not apply these benefits to the money owed the housekeeper for overtime.

Third, the court disregarded the hotel's contention that it did not "customarily furnish" these perks to Balczyrak-Lichosyt, but rather applied it to her overtime compensation under their agreement. Such agreements, the court stated, are unenforceable because they contravene the protections afforded employees under the overtime provisions of the FLSA.

The court also noted that whether a benefit is "customarily furnished" impacts whether the benefit should be counted as "wages," not whether it should be included in the regular rate for over-time. The court emphasized that the regular rate is calculated by looking at "all remuneration" paid to the employee, including the room and cash provided to Balczyrak-Lichosyt in this case.

Having found liability under the FLSA and the parallel provisions of the New York Labor Law, the court granted summary judgment to Balczyrak-Lichosyt and awarded all of the damages sought by the employee in the total amount of \$517,000.

The hotel has filed a notice of appeal of the court's decision.

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