

# Employment Law Briefing



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# Costly breaks

## *What is and isn't compensable time under the FLSA*

**D**o employees required to stay on site during meal periods earn compensable time under the Fair Labor Standards Act (FLSA)? The answer depends on the circumstances. But employers can glean some insight from the decision of the U.S. Court of Appeals for the Sixth Circuit in *Ruffin v. MotorCity Casino*.

### **Who primarily benefits?**

According to the FLSA, an employee's meal period is considered compensable if he or she spends the time predominantly for the employer's benefit. An employee is considered relieved of duty and not entitled to compensation under the FLSA if he or she:

- Can pursue his or her mealtime adequately and comfortably,
- Isn't engaged in the performance of any substantial duties, and
- Doesn't spend time predominantly for the employer's benefit.

In this case, the employees were casino guards and the trial court granted summary judgment in the employer's favor. The plaintiffs appealed.

### **What are the factors?**

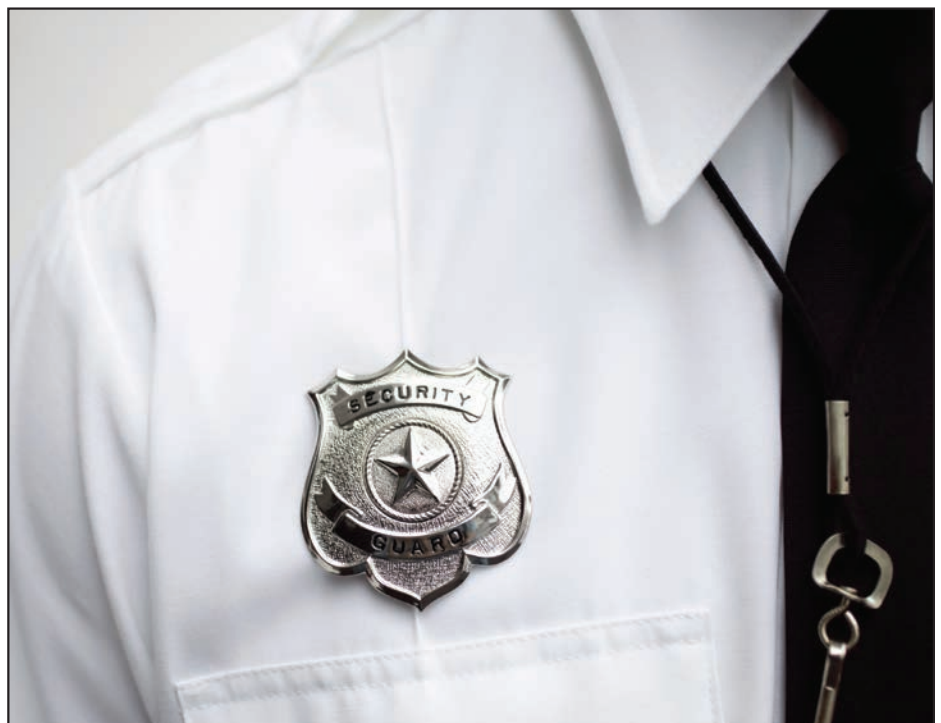
The appeals court affirmed, holding that the totality of the circumstances weighed in favor of the meal break benefiting the plaintiffs rather than the employer. One relevant factor was whether the plaintiffs substantially performed any job duties during meal breaks. They argued that monitoring their two-way radios was a substantial job duty. But the court held that listening to radio messages, and being available to respond if called upon, wasn't a substantial job duty.

The plaintiffs failed to set forth any evidence that monitoring their radios interfered with their breaks, as they were free to eat, drink and socialize with other

employees. What's more, while on meal breaks, the plaintiffs could enjoy activities such as reading, using their cell phones or employer-provided computers, and watching televisions in the break rooms and cafeteria.

*An employee's meal period is considered compensable if he or she spends the time predominantly for the employer's benefit.*

Another factor was whether the employer's business frequently interrupted meal periods. Guards were required to monitor their radios and respond to emergencies. If they failed to do so, the guards were subject to discipline. But emergencies were infrequent and meal time lost because of an emergency could be made up.



## Similar situation, different result

An interesting contrast to *Ruffin v. MotorCity Casino* (see main article) can be found in *Beasley v. Hillcrest Medical Center*. This decision, handed down by the U.S. Court of Appeals for the Tenth Circuit, considered whether nurses' meal times were compensable when they often had to work into their meal breaks.

The plaintiffs were paid for shifts they worked, less one half hour for lunch. To receive overtime pay, the hospital required employees to complete a form and obtain their supervisors' signatures. The hospital had paid all of the plaintiffs' requests for overtime. But the plaintiffs alleged that they didn't request payment for interrupted lunches because they'd thought they were entitled to overtime only when completely missing the meal.

The appeals court stated that the issue wasn't whether meals were interrupted, but whether the degree of interruption caused the plaintiffs to spend their meal periods primarily for the hospital's benefit. The record showed that, along with facing restrictions on where they could take meal breaks, the plaintiffs often had to continue answering phones, talking with doctors, observing computer monitors and coordinating incoming patient arrivals during meal periods. This work interrupted 75% to 95% of the unpaid meal time.

The hospital argued that, because it paid overtime and managers had testified that they were unaware of the plaintiffs' uncompensated overtime, it shouldn't be held liable under the Fair Labor Standards Act. But the court held that, even though the employer may not have known the plaintiffs were working uncompensated overtime, it knew they were performing their assigned duties. Thus, the appeals court overturned the trial court's grant of summary judgment in favor of the employer.

The court recognized that, in some cases, monitoring a radio might constitute a substantial job duty, rather than a de minimis activity. But emergency calls at this casino rarely interrupted meal periods. So the court held that, because the plaintiffs regularly enjoyed their meals without interruptions, the periods predominantly benefited them — not their employer.

### Where can they go?

Last, the appeals court analyzed whether the plaintiffs' inability to leave casino property during meal breaks made it compensable time. The court stated that the relevant question was whether the employer required guards to take meals on premises as an indirect way of obtaining unpaid work from them.

Although the plaintiffs couldn't leave casino property, have food delivered or entertain visitors, they were provided areas such as break rooms and a cafeteria — where free food and drinks were provided. They were also able to socialize and enjoy their time as they pleased. Thus, merely requiring guards to remain on premises didn't convert the break into compensable time.

### How are you liable?

This case demonstrates that, as long as you ensure that employees are predominantly benefiting from a meal break, that time won't likely be deemed compensable under the FLSA. Bear in mind, however, that requiring employees to perform certain activities during meal periods or prohibiting them from leaving the premises may increase your liability for additional compensation. ♦



# The importance of appearances: An ADEA case

In *Daniels v. School District of Philadelphia*, the U.S. Court of Appeals for the Third Circuit weighed claims that an employer violated the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act and the Pennsylvania Human Relations Act. The resulting decision holds a critical lesson about the importance of appearances.

## Principal conflict

The plaintiff had been working as an elementary school teacher when her position was terminated because of budget cuts. Thereafter, she taught middle school.

During parent-teacher conferences at the middle school, the principal made some comments that the plaintiff felt were ageist. After speaking to the principal about the comments, the plaintiff felt that the principal became antagonistic toward her. The school district required monitoring of teachers, but the plaintiff believed that the principal monitored her more closely than other, younger teachers.

At the end of the school year, the principal cut one position. The school district decided which teachers would stay and which would be transferred. But the principal had told two students that she'd written the plaintiff out of the budget. The plaintiff was selected for transfer but

received late notice of the decision and was uninvolved in the selection process.

## Multiple complaints

The school district assigned the plaintiff to another middle school. After she began the assignment, the plaintiff filed a complaint with the Pennsylvania Human Relations Commission (PHRC) alleging age discrimination based on the principal's comments and monitoring of her. She also asserted race discrimination based on her transfer and the principal's failure to give her timely notice of the transfer.

The plaintiff eventually filed a second complaint with the PHRC alleging that the school district had retaliated against her because she'd filed the original complaint, and the new middle school's principal and assistant principal were treating her adversely. Neither the principal nor the assistant principal knew of the plaintiff's PHRC complaints.

*The court held that protected activity includes not only an employee's filing of formal charges, but also informal protests of discriminatory employment practices.*

Thereafter, the plaintiff was reassigned to an elementary school. Her troubles continued and she supplemented her PHRC complaint with added complaints about the elementary school's principal. This principal was also unaware of the previous complaints at the time of the alleged adverse actions.

The plaintiff then took a medical leave. Under school district policy, an employee is evaluated by a school district physician to determine the need for continued leave. The plaintiff requested an evaluation from an outside psychiatrist, who concluded that her anxiety and depression arose from her dispute and not from a definable illness. Therefore, he found that she could return to work.



The plaintiff disagreed and didn't go back, resulting in her termination. At trial, the district court granted summary judgment in the employer's favor. The plaintiff appealed.

### No connection

The Third Circuit affirmed the trial court's finding that the plaintiff couldn't support her retaliation claims. The court applied the *McDonnell Douglas* framework because there was no direct evidence of retaliation. Under this framework, a prima facie case is established by proving that:

- The plaintiff engaged in a protected activity,
- There was an adverse action by the employer either after or contemporaneous with the protected activity, and
- The employee's protected activity and the adverse action are causally connected.

The appeals court held that protected activity includes not only an employee's filing of formal charges, but also informal protests of discriminatory employment practices. The burden then shifts to the employer to present a legitimate, nonretaliatory reason for having taken the adverse

action. Thereafter, the burden returns to the plaintiff to demonstrate that the employer's explanation was false, and that the actual reason for the adverse action was retaliation.

The plaintiff could prove that she'd engaged in a protected activity and that she'd suffered adverse actions by the employer after engaging in that protected activity. But she couldn't causally connect her protected activity with the adverse actions because the decision-makers were unaware of her protected activity. Moreover, the plaintiff couldn't rebut her employer's legitimate, nondiscriminatory reason for terminating her: She failed to return to work after an independent medical evaluation cleared her to do so.

### What appears to be

When terminating an employee, the adverse action shouldn't appear to be retaliatory for previously made protests of discriminatory employment practices. Even if the employee's complaints were informal, such as remarks to management, the appearance of retaliation can lead to costly legal proceedings. ♦

# Taking a swipe at the "cat's paw" theory of retaliation

Something called the "cat's paw" theory may sound cute. But, if a plaintiff successfully argues a claim under the approach, this kitten can show its claws to employers. The U.S. Court of Appeals for the First Circuit took a swipe at such a case recently in *Ameen v. Amphenol Printed Circuits, Inc.*

### Leave requested

In March 2012, the plaintiff requested and received a two-week leave under the Family and Medical Leave Act (FMLA). After returning, he declined requests to work overtime. The company agreed that overtime wasn't mandatory, but there was a dispute as to whether it was expected.

In April, the plaintiff requested personal (not FMLA) leave. At a meeting to discuss the request, the company's

Operations Manager (OM) stated that it was a busy time for the company. The plaintiff said he was going whether the leave was approved or not, though he did agree to work some overtime upon his return. The leave was ultimately approved.

When the plaintiff returned, however, he still declined to work overtime. The OM alleged that he'd expressed disappointment over the plaintiff's failure to work overtime, while the plaintiff claimed that the OM had gotten angry about it.

### Investigation conducted

In late June, the OM received a report that two of the plaintiff's co-workers



had accused him of cheating on his time card and taking extended breaks. The company allowed a 30-minute unpaid lunch break and a 15-minute paid break each day, for a total of 45 minutes. An investigation revealed that the plaintiff would punch out every day for about 30 minutes but continue working. Then, at another time, he'd leave the property for about an hour.

Therefore, over a two-year period, he was paid for an additional fifteen minutes of time a day he didn't actually work. The OM went to his supervisor with this information and the two decided to terminate the plaintiff.

The OM's supervisor didn't, however, know that the plaintiff had taken FMLA leave or that he'd been declining overtime. Following the termination, the plaintiff filed a claim alleging retaliation for taking FMLA leave and not working overtime (which he considered informal FMLA leave). The district court granted summary judgment in the employer's favor, and the plaintiff appealed.

### **Burdens shifting**

On appeal, the plaintiff cited the "cat's paw theory" in arguing for the company's liability. An employer may be liable as the "cat's paw" of a discriminating supervisor when the employer takes an adverse employment action against an employee based on information provided by a supervisor — even though the employer itself had no knowledge of the supervisor's discriminatory motivation.

To establish a prima facie case of retaliation, a plaintiff needs to show that he or she availed him- or herself of a protected right under the FMLA and was adversely affected by an employment decision. He or she also must causally connect the protected activity and the employer's decision.

The burden then shifts to the employer to set forth a legitimate, nondiscriminatory reason for the employment decision. From there, the plaintiff retains the burden of showing that the employer's stated reason is a pretext for retaliation for having taken leave.

### **Theory declawed**

In this case, the First Circuit affirmed the trial court's grant of summary judgment in the employer's favor. The appeals court found that the company had a legitimate reason for the plaintiff's termination, and that the employee had failed to dispute the evidence that he took

an additional 15 minutes of paid break daily over a two-year period.

The appeals court also held that the plaintiff couldn't establish pretext because, to demonstrate retaliation for engaging in FMLA-protected activity, the plaintiff would have had to prove that the retaliator knew about his protected activity. Otherwise, there would be no motive to retaliate. But the plaintiff failed to establish the existence of retaliatory intent on the part of the decision-maker (the OM's supervisor), who didn't know that he'd ever taken FMLA leave.

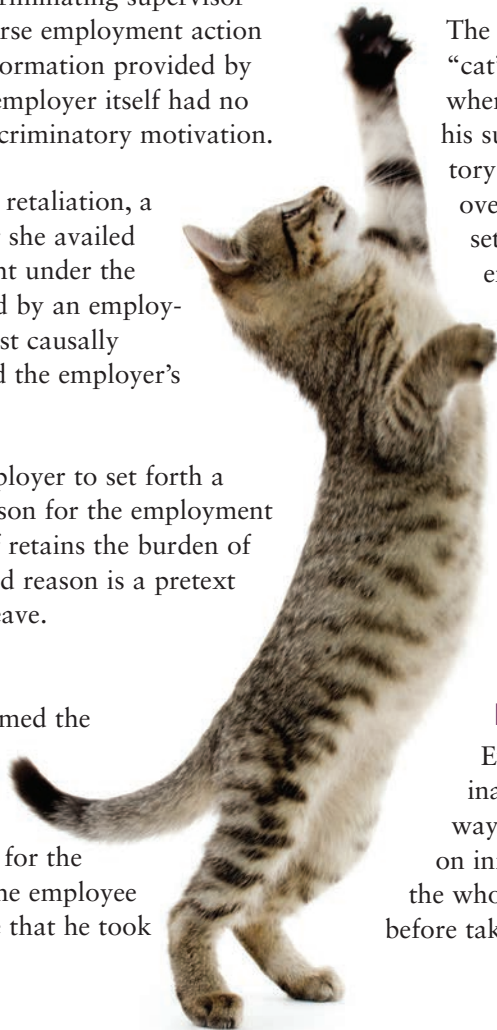
*Over a two-year period,  
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The court then went on to analyze the plaintiff's "cat's paw" theory, in which it was alleged that, when the OM reported the "extra 15 minutes" to his supervisor, he was motivated by a discriminatory animus because the plaintiff wouldn't work overtime. The court found that the employee didn't set forth any evidence of a similarly situated employee who received more favorable treatment from the OM to prove a discriminatory animus on the part of the OM (who had allegedly manipulated the decision-maker into acting as his "cat's paw").

Last, the court found that there was no evidence of discriminatory animus on the part of the OM's supervisor. Therefore, the plaintiff had failed to meet his burden to prove that the company's stated reason for his termination was pretextual.

### **Lesson to be learned**

Even if you're unaware of an employee's discriminatory animus and don't act in a discriminatory way, you could still face legal liability by relying on information from that employee. Be sure to get the whole story — and consult with your attorney — before taking an adverse employment action. ♦



# Do your pay rates match actual job responsibilities?

Just about every company faces a challenge in matching pay rates to job responsibilities. Make a misstep here that falls along gender lines and an employee could file a claim under the Equal Pay Act (EPA). Such was the case in *Riser v. QEP Energy*.

## Assigning job duties

The female plaintiff was an “Administrative Services Representative” earning \$47,382 annually. Her job responsibilities included managing a fleet of vehicles and performing facilities management duties. Later, she also managed construction projects in several states.

The employer had a pay classification system consisting of 15 grades, and the plaintiff was classified as a Grade 5. The classification was based on the company’s knowledge of the tasks that Administrative Assistants typically perform, not on actual job duties. The plaintiff twice requested title and pay changes to no avail.

## Hiring new employees

The company hired a male for a new “Fleet Administrator” position, partly because of substantial overtime the plaintiff had accrued performing her fleet administration and facilities management duties. The plaintiff’s account of her fleet administration duties was used to establish a job description for the new position, which was classified as Grade 7 with a \$62,000 salary.

The plaintiff trained the new Fleet Administrator until she was terminated — allegedly for poor performance. Following the termination, her employer hired a second male as a Facilities Manager, which was also classified as a Grade 7 position with a \$66,000 salary. His duties included overseeing construction projects, managing a facility and its employees, and handling maintenance and security at field offices.

The plaintiff filed suit alleging, among other things, that her employer had violated the EPA by paying her less than the two male employees in question. The employer argued that she couldn’t establish that her job was “substantially equal” to the two male employees’ jobs. The company asserted that it had a bona fide, gender-neutral pay classification system. A trial court granted summary judgment in the employer’s favor, and the plaintiff appealed.

## Questioning the legitimacy

To establish a prima facie case of pay discrimination under the EPA, a plaintiff must demonstrate that she was performing work that was substantially equal to that of male employees — considering the skills, duties, supervision, effort and responsibilities of the job. She must also prove that working conditions were basically the same yet the male employees were paid more.

The U.S. Court of Appeals for the Tenth Circuit reversed the trial court’s summary judgment. The court found that the plaintiff had performed all of the tasks that were eventually passed to the newly hired male employees. It also rejected the employer’s affirmative defense that the pay differential was attributable to a bona fide, gender-neutral pay classification system.

The appeals court stated that the employer’s pay grade wasn’t based on the plaintiff’s actual job duties but on those of employees with her job title. Therefore, given that she’d fulfilled the same duties as the two recently hired male employees, and had performed both jobs before they were separated into two different positions, a reasonable jury could legitimately question the substantial differences in compensation.

## Getting the facts

It’s not enough that men and women with the same job titles are being paid equally. When determining pay rates, get the facts about each employee’s actual job duties and responsibilities. ♦



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*“Above all, we are at your service ...”*



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