

A Tale Of Two Crews - Companies Failing To Keep Proper Time Records Risk Having Employees Fill The Void

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Employees who claim they are entitled to unpaid overtime wages bear the burden of proving that they performed the work for which they were not properly compensated. However, the Fair Labor Standards Act (FLSA) also requires employers to make, keep and preserve records regarding the total hours that their non-exempt employees work during a workweek. When an employer's records are not sufficient, a court may "relax" the employee's burden and allow them to demonstrate overtime compensation through other means – notably through their own testimony about the number of hours they worked. A good example of how this evidentiary standard can play out – to the detriment of an employer – was seen earlier this week in a decision out of the Eastern District of Michigan: *Davis v. Richland Maintenance, Inc.*, Case No. 2:13-cv-15187-MFL-LJM. The case involved a floor care and cleaning company that divided its workforce into two teams: (1) a strip crew, who was responsible for waxing and cleaning floors at a single location, and (2) a service crew, who was responsible for performing various cleaning services at up to four separate customer locations per shift. Strip crew members were required to fill out timesheets at their workplace which recorded the start and end of their shifts. Although some of the documentation was missing, the court generally was satisfied that the timesheets captured all of the hours that the strip crew worked. Service crew members also were required to fill out timesheets, however, their timesheets only recorded the time spent working at a specific customer's facility and did not cover the time spent traveling between worksites or their "down" time (described as the time between assignments where the crew performed no work, but also were prohibited from pursuing their own personal activities). Unlike the strip crew, it was evident to the court that the service crew's timesheets did not capture all of the hours they worked. After both crews collectively filed a claim against the company to recover unpaid overtime compensation for allegedly working 12 hours each per day, the court was faced with having to consider the sufficiency of the evidence the plaintiffs had presented. With respect to the strip crew, the court rejected the testimony they offered regarding 12 hour workdays as being sufficient and instead relied on the timesheets. The court reasoned that the timesheets, which covered all work from the start to the end of a shift, were good enough to present a fair, accurate and contemporaneous account of the employee's work – and thereby compute the employee's average weekly hours and overtime. The service crew, however, was a different story. Their timesheets did not reflect all hours worked and failed to account for time spent traveling or their "down" time. Additionally, the timesheets did not accurately reflect meal breaks: the company routinely deducted an hour each day for a meal break, but there was no evidence that employees actually took uncompensated meal breaks and there was evidence that the breaks, in fact, were not taken. Accordingly, the court did not consider the timesheets to be the best evidence of the hours actually worked by the service crew employees and instead relied on the employees' testimony concerning the number of hours they worked. This

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case is yet another reminder of the importance of accurately and diligently keeping track of non-exempt employee work time and making sure that the company's records are maintained and preserved. As illustrated here, if an employer fails to make and keep such records, employees may be allowed by a court to fill gaps with their own testimony about what they did and how long they spent at work. While an employer can try to rebut such testimony, this quite literally gets into a he-said/she-said dispute – and one that easily could be avoided simply by having proper records.