Comp Time on Demand?

Do we now have the long awaited answer to the question of whether police officers can take compensatory time off on demand?

This summer the United States Supreme Court denied *certiorari* in *Cleveland v. Beck* ("*Beck*"). That decision to refuse to hear this dispute concerning the use of compensatory time by Cleveland police officers has been touted by many as being the long-awaited final "word" on whether compensatory time must be granted on demand. The Fop's attorneys have considered the questions this decision raise and offer the following.

Is there a sufficiently final word to resolve this question of whether compensatory time must be granted on demand by the employee? First, one must clarify the question be asked. If the question is: Can officers demand to take and will receive comp time whenever they choose, even if the Employer must call back someone else to work overtime, the answer is that *Beck* did not provide the answer to that question. *Beck* does not provide a final answer, but rather is a brick in the road to determining just what an officer can demand and under what circumstances that demand will have to be met. If, however, the question is whether officers now can take the position that the employer's denial of comp time off solely on the basis that it will cause overtime is a violation of federal law --- then the answer is yes. While these questions seem very similar, the case law shows that the courts treat the two questions differently.

These cases involve 29 USC §207(o)(5) of the Fair Labor Standards Act, which provides that an employee who has accrued comp time and who has requested use of the comp time, *"…shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not "unduly disrupt" the operations of the public agency."*

In Houston Police Officers' Union v. City of Houston, 330 F.3d 298 (5th Cir. 2003), *cert. denied* 540 U.S. 879, 124 S.Ct. 300, 157 L.Ed.2d 143 (2003), the Fifth Circuit absolutely rejected the idea that a public employer had no right to deny a police officer's request for comp time. In Houston, the City's denial of comp time use was based upon manpower/staffing concerns. In the face of expert testimony (testimony that was uncontroverted in the record), the Fifth Circuit found that the evidence showed that "comp time use on demand" would unduly disrupt the operations of the department because it would "…*severely impact the operational efficiency and effectiveness of HPD and undermine the Department's continued efforts to provide the required levels of service within the budget allocations provided in the City of Houston".* The U.S. Supreme Court denied *cert* in the Houston case, too. The Fifth Circuit Court of Appeals held that in the face of unrebutted evidence that allowing the unfettered use of comp time would cause financial hardship upon the effectiveness of the Houston Police Department to operate, such requests would "unduly disrupt" police operations and therefore denial of such requests do not violate §207(o)(5) of the FLSA).

Beck v. City of Cleveland, 390 F.3d 912 (6th Cir.), *cert. denied*, _____ U.S. _____ (2005) does nothing different from *Houston*, except stand with *Houston* as the other bookend. In *Beck*, the City of Cleveland offered no evidence (no expert testimony) to support its claim that unfettered requests would financially hurt the City. It offered only argument. With no evidence to support the City's argument, the Sixth Circuit held that " … *[A]bsent a clear showing by the City of undue disruption of its police services, due to severe financial constraints to pay overtime to substitute officers, the City's denials of Police Officers' timely requests for accrues compensation leave must be held to violate Section 207(o)(5)."*

The Court placed the burden of showing "undue disruption" on the employer and when it failed to offer any evidence of such disruption, the Court ruled against the employer. But, the Sixth Circuit

did not embrace the notion that unfettered comp time requests were therefore acceptable. In fact, the Sixth Circuit basically set forth the guidelines for a public employer to prevail in this type of action --- and the guidelines look as if they were taken from the *Houston* decision: *"The City did not present any proof of the financial impact on the police department's budget from the Police Officers' timely leave request. The City did not offer any proof as to how that sum impacted the City's finances. The district court inferred an adverse financial impact upon the City based solely on the amount of the Police Officers' accumulated leave. The City did not present any proof on the total amount of compensatory leave denied Police Officers under its policy, a factor that if high enough would defeat the congressional purpose in establishing compensatory leave for public employees. Nor is there expert proof that the City's operational needs would be unduly disrupted by granting Police Officers' leave request."*

(Sidebar Note: Give the plaintiff's lawyer credit --- the same plaintiff's lawyer in Houston and Milwaukee --- credit for picking his defendant. This case established that the burden of proof is on the employer to show undue disruption. The denial of *cert* by the US Supreme Court in this case is not an affirmation that police officers can use comp time at their discretion; rather, the case confirms that the burden of proof in such cases is not met by argument and inference but by mathematical calculations).

A look at additional cases in this area reveals there seems to be a common thread: whether an employer's policy denying comp time (because it will cause overtime) is a violation of the FLSA (as an unduly disruption of the agency) depends upon the evidence presented. In *Debraska v. City of Milwaukee*, 131 F. Supp.2d 1032 (ED Wisc. 2000), the District Court found that the City's administration of its comp time policy violated the FLSA, but added; "*It is possible that adopting the measures proposed by the plaintiffs would in some cases or perhaps many cases impose an unreasonable burden, depending upon the circumstances."* In *Canney v. Town of Brookline*, 2000 WL 1612703 (D Mass 2000), the District Court found that the payment of *one* officer overtime to allow another officer to use compensatory time does not constitute an "undue disruption" and "*…[O]n the present record nothing indicates that having to pay one or more officers overtime in cash, to permit another officer to take compensatory time would effect the police department's 'ability to provide services of acceptable quality and quantity."*

The only case in conflict seems to be *Mortensen v. County of Sacramento*, 368 F.3d 1082 (9th Cir 2004), wherein the Ninth Circuit seems to adopt the idea that forcing the employer to pay overtime so another employee can take comp time is *per se* unduly disruptive. 368 F.3d at 1090. This case seems tube the anomaly because the Ninth Circuit accepted "argument" in lieu of mathematics as sufficient cause to find in favor of the employer

So, back to the issue of whether there a sufficiently final word to resolve this question for our purposes? I believe the answer no --- if the question is: Can officers demand to take comp time whenever they choose, even if the Employer must call back someone else to work overtime? The answer is that *Houston* and *Beck* (and *Mortensen*) tells us "not necessarily", but there now is a way for officers to nevertheless take the position in a federal suit that denying comp time solely on that basis without adequate proof that it will cause a disruption is a violation of federal law. *Beck* makes it clear that where the plaintiff alleges a violation of federal law has occurred in the denial of comp time use, the burden of proof is on the employer to show undue disruption would occur if the officers' timely requests must be honored by hiring back additional officers at a premium rate of pay.

So, the conclusions we can draw from this line of cases are:

- (1) There is no employee "right" to use comp time solely at an employee's discretion;
- (2) Employees are permitted instead to use comp time within a reasonable period after making the request if the use of the comp time does not "unduly disrupt" the operations of the public agency;

- (3) Whether the requested use of comp time "unduly disrupts the operations of a public agency" is an evidentiary issue:
    - (i) a single employee request to use comp time that requires an employer to pay overtime for a replacement employee <u>*does*</u> <u>*not*</u> constitute "undue disruption" (*Mortensen*);
    - (ii) the burden of proof to show undue disruption, even in cases where the plaintiffs seek the unfettered right to comp time, is on the employer:
        - (a) conjecture, inference and argument are insufficient evidence (*Mortensen*);
        - (b) the burden of proof can be met by showing mathematical evidence of severe financial impact.

The next question that arises after *Beck is* what position should we take in bargaining in units where the contract is silent on the subject or in units where the contract sets a different standard (such as the comp time requests will be granted so long as they do not result in overtime)? Use of comp time is a mandatory subject of bargaining. In *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999), the Sixth Circuit found that a union's agreement on what constitutes a "reasonable period" is to be given discretion: *"The city and the union in this case have agreed, then, that the reasonable period for requesting the use of banked compensatory time begins thirty days prior to the date in question and ends when the number of officers requesting the use of compensatory time on the given date would bring the precinct's staffing levels to the minimum level necessary for efficient operation. We are loath to interfere with this agreement."*

The Court in *Debraska v. City of Milwaukee*, 131 F. Supp.2d 1032 (ED Wisc. 2000), however, ruled that while the Secretary of Labor's regulations permit parties the freedom to define "reasonable period", the regulations do not permit the parties any contractual freedom to define "undue disruption". 131 F. Supp2d at 1037. If that is so, then any compromise bargained by a union and an employer is still subject to review by way of a federal suit filed by officers effected by the compromise. Note: in *Long Beach Police Officers' Association v. Luman*, 200 WL 1729693 (CD Cal 2001), the District Court found a union is not a proper party to a federal action alleging a violation of §207(o). While this issue was not apparently raised in these other cases, the FLSA seems clear on this point.

Without question officers should attempt to bargain whatever rules on comp time use that favor their members; however, we should be cognizant that the rules are subject to review in federal court. We might agree, for example, that comp time requests be made up to one hour before the start of a shift --- and a court may later find that such an agreement does not comply with the requirement that comp time be taken in a reasonable period. We might agree that employees cannot get comp time if it causes overtime --- and a court may later find that such an agreement is improper because there is no evidence that comp time use unduly disrupts operations in a particular department. Or, we might agree that employees can get comp time even if it causes overtime --- and a court may later find that such an agreement is improper because evidence shows that unfettered comp time use unduly disrupts operations in a particular department.

Whereas the FLSA prohibits unions from waiving individuals' rights, any "bargain" we enter into will be subject to review. The only escape from this review is to never bargain any provisions on comp time use --- which is *not* clearly not preferable. Like in *Memphis*, the Courts and the DOL are willing to give deference to the parties' agreements, but not controlling deference. It seems that a parties' agreement is evidence on the issues of "reasonable period" and "undue disruption", but not *determinative* proof. Thus, whether our contracts are silent or have some restrictions, the issue of their "legality" cannot be determined until the employer provides evidence regarding the impact of the clause. Presumably, whatever clause an employer enters into with us must not be "unduly disruptive" in the eyes of the employer otherwise it would not have agreed to it.

The fact that any agreement we reach is susceptible to review should be our leverage with the Employer in bargaining. Negotiators should consider the impact of informing the Employer that since neither we nor the employer can prevent the employees from filing a federal case alleging a violation of FLSA, we should reach a deal that will make our members less likely to do so. Granted, in some places the strategy may not work and it brings up the age-old issue of how much should we educate our adversaries. This approach is probably more appropriate with sophisticated counsels who already have some idea as to the law in this area.

Next we consider what if the contract has a savings clause - should we serve notice to the employers that the Supreme Court has somehow declared the existing limits on overtime use now to be illegal - or are our existing contract clauses mere negotiated changes to FLSA which are permitted and must be bargained back "out" of the contract? The action by the US Supreme Court is only inaction. By denting *cert*, the Court has not ruled on this issue, but only let the lower court's ruling stand. The denial of *cert* is not an "affirmation" of the ruling. Additionally, there is nothing new in Beck that changes the application of the FLSA. *Beck* merely ratifies that the other side of the spectrum of the *Houston* case exists. In *Houston*, if the employer meets the burden of proving undue disruption, there is no FLSA violation; now, with *Beck*, if the employer fails to meet the burden of proving undue disruption, there is an FLSA violation.
Moreover, no case has yet issued that triggers a savings clause. *Beck* does not invalidate any comp time provision in any contract (other than maybe in Cleveland, and there it may have only invalidated the *application* of the contract provision, not the actual language).

So what do we do the next time we bargain? Must we offer a *quid pro quo* if we take the issue to the table to change the language? If we don't, what will be the significance in an interest arbitration context of not having done so? If we are seeking to improve our language, all the normal rules regarding breakthroughs and improvements apply. This issue is no different. And the next question comes into direct play. How can we counter the Employer's argument that pay increases will have to be depressed because of the increased overtime costs that will result from changing the language in existing contracts that deny the use of comp time where it will result in a severe increase in their overtime budget?

A proposal for unfettered discretion in taking comp time is as foolish as asking for 50% pay raise --- the chances of success at the table or interest arbitration will be slim to none. A proposal that limits the employer's exposure has a better chance of success, but the fatal land mines regarding breakthroughs and *quid pro quo* still need to navigated in order to have any likely success at interest arbitration if bargaining fails. Additionally, it should be reiterated that whatever we bargain (i.e., if it were that officers could take up to 16 hours of comp time per year without the request being subject to denial for manpower reasons), there is no existing guideline upon which to estimate whether a federal court (upon review in an FLSA action) would deem it appropriate.

Moreover, problems will arise regardless of what we bargain. What happens when the entire shift scheduled to work Christmas all demand to use their comp time that day? The result is that we will have just bargained a clause whereby officers who are not scheduled to work Christmas will now be forced back to work. So do you prohibit the use on holidays? Do you limit the number of officers who can use this provision to one per shift? Would such restrictions be in violation of the FLSA? While it seems easy to propose some type of "compromise", there are pitfalls.

That considered, what other associated issues remain to be litigated in terms of comp time use? Also, does this impact the *Harris County* decision concerning forcing the use of comp time? The *Beck* Court distinguished its ruling from the US Supreme Court's decision in Harris County and quoted the Supreme Court as stating: *"§207(o)(5) is more properly read as a minimal guarantee that an employee will be able to make some use of compensatory time when he requests to use it. As such the proper* expression unius *inference is that an employer may not, at least in the absence of an agreement, deny an employee's request to use compensatory time for a reason other than that provided in §207(o)(5)."* Thus, the two cases are distinct, but the dicta provides

some insight that the Supreme Court might agree that: (1) a labor contract may permit denial of comp time for a reason other than that found in §207(o)(5); and (2) §207(o)(5) otherwise provides the basis for a legitimate denial of comp time as requested by the officer or officers.

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