

Eleventh Circuit Rules that Employer Cannot Assert Worker Misconduct Equitable Defenses in FLSA Unpaid Overtime Claim Where Employer Knew Employee was Under-reporting Time

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The Eleventh Circuit Court of Appeals recently issued an opinion holding that an employer cannot assert equitable defenses based on an employee's misconduct in under-reporting hours as a total bar to the employee's FLSA claim where the employer was aware of the employee's conduct.

In *Bailey v. TitleMax of Georgia, Inc.*, a former TitleMax employee sued for unpaid overtime, which, he claimed, was the result of working certain hours off the clock and because his supervisor changed his time records to decrease the number of reported hours. A Georgia District Court found that the supervisor did in fact direct him to under-report hours, and on other occasions, the supervisor edited the time records directly.

But TitleMax still said the court should toss the case because the former employee had violated the company's policies in several ways: (i) by working off the clock in violation of a policy requiring accurate reporting of hours; (ii) by failing to object to his supervisor changing his time records in violation of a policy requiring regular verification of time; and (iii) by violating a policy instructing employees with a problem at work to notify the company. Accordingly, TitleMax argued that Mr. Bailey's claim was barred by the equitable defenses of unclean hands and *in pari delicto* (requiring the employer to show that plaintiff bears at least substantially equal responsibility for alleged violation and that barring suit would not "substantially interfere" with policy goals of statute). The District Court agreed with TitleMax, and granted summary judgment.

On appeal, the Eleventh Circuit reversed. The court first cited its own prior decisions articulating the principle that the goal of the FLSA is to "counteract the inequality of bargaining power between employees and employers." Drawing on this principle, the court reasoned that allowing an employer to escape FLSA liability by asserting equitable defenses based on under-reporting where the employer "knew or had reason to know" of such under-reporting was contrary to the FLSA's goal. The court reasoned that "[t]o hold otherwise would allow an employer to wield its superior bargaining power to pressure or even compel its employees to under-report their work hours, thus neutering the FLSA's purposeful reallocation of that power." The court also considered TitleMax's inability to cite to any case law where either the United States Supreme Court or any sister Circuit approved the use of equitable defenses as a total bar to an employee's FLSA claim when the employer knew the employee under-reported his hours.

Bailey reminds us of some important lessons. First, pay non-exempt employees for every hour they work even if they violate a company policy. You are free to discipline them for violating that policy, but don't dock their *earned* wages. Second, having written time reporting policies in place is not enough; effective supervisor training and employer vigilance, in addition to those comprehensive policies, will go a long way in ensuring wage and hour law compliance and keeping an employer out of trouble.

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