**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**
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**No. 17-1694**

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**FILED**
Feb 28, 2018
DEBORAH S. HUNT, Clerk

**ROBERT HALL, et al.,**

**Plaintiffs-Appellants,**

**v.**

**PLASTIPAK HOLDINGS, INC., et al.,**

**Defendants-Appellees.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN**

**BEFORE: BOGGS, CLAY, and KETHLEDGE, Circuit Judges.**

**CLAY, Circuit Judge.** In this statutory collective action, Plaintiffs Robert Hall, Ebony Martin, Roderick Smartt, Jason Trent, and Steve Trent allege that their employer, Plastipak Holdings, Inc., Plastipak Packaging, Inc., Plastipak Technologies, LLC, Plastipak, and William C. Young (collectively, "Plastipak"), paid them insufficient overtime, in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. On May 25, 2017, the district court granted summary judgment to Plastipak, concluding that Plastipak's pay practices complied with the FLSA. For the reasons set forth below, we **AFFIRM** the judgment.

## FACTUAL AND PROCEDURAL HISTORY

Plaintiffs are current and former employees of Defendant, Plastipak. While employed at Plastipak, they qualified for protection under the FLSA. As relevant here, the FLSA requires that employees be paid an overtime premium of "time-and-one-half" for all hours worked in

excess of forty hours in a week. 29 U.S.C. § 207(a)(1). Various methods can be used to calculate this overtime premium, depending on the particular employment circumstances. One such method is the "Fluctuating Workweek" ("FWW") method, described in 29 C.F.R. § 778.114(a). Under this approach, employees receive a fixed salary as compensation for all hours worked, whether above or below forty hours, plus an overtime premium for each overtime hour. *Id*.

Plastipak paid Plaintiffs according to the FWW method since at least 2011. In 2015, Plaintiffs sued Plastipak in the district court, alleging that the FWW method had been improperly applied to them. In particular, they argued that their overtime premiums had been insufficient; that they had not received a fixed salary; and that they had never reached an understanding with Plastipak that the FWW method would be used. The district court granted summary judgment for Plastipak, ruling that Plastipak had satisfied the requirements of the FWW method. It determined that Plastipak's pay practices were more generous than required by the FWW method; that Plaintiffs had been paid a fixed salary because their paychecks had remained constant (excluding overtime premiums); and that Plaintiffs had clearly understood that they would be paid pursuant to the FWW method, noting that Plaintiffs had signed employment documentation to that effect. *Hall v. Plastipak Holdings, Inc.*, 254 F. Supp. 3d 961 (E.D. Mich. 2017).

On appeal, Plaintiffs challenge the district court's ruling, again arguing that Plastipak's pay practices did not satisfy the requirements of the FWW method. Plaintiffs also argue that the district court granted summary judgment before they had the opportunity to complete discovery.

## DISCUSSION

### Standard of Review

"We review *de novo* the district court's grant of summary judgment." *Gillis v. Miller*, 845 F.3d 677, 683 (6th Cir. 2017). Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "When evaluating a summary judgment motion, the reviewing court must construe the facts in the light most favorable to the non-movant." *Gillis*, 845 F.3d at 683. "This court reviews for abuse of discretion a claim that summary judgment was prematurely entered because additional discovery was needed, and the argument is not preserved for appeal unless it is first advanced in the district court." *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 627 (6th Cir. 2002).

### Analysis

This case turns on whether Plastipak's pay practices satisfied the requirements of the FWW method. The FWW method can only be used if four requirements are met: (1) the employee's hours fluctuate from week to week; (2) the employee receives a fixed salary that does not vary with the number of hours worked (excluding overtime premiums); (3) the fixed salary at least equals the minimum wage; and (4) the employer and employee share a "clear mutual understanding" that the employer will pay the fixed salary regardless of the number of hours worked. 29 C.F.R. § 778.114(a). Plaintiffs do not dispute that the first and third conditions were met in this case. Instead, they focus on the second condition (requiring a "fixed salary") and the fourth condition (requiring a "mutual understanding"). They also challenge Plastipak's specific method of compensating overtime.

We first turn to the fixed salary requirement. Under the FWW method, the employee must receive a fixed salary "for whatever hours he is called upon to work in a workweek, whether few or many," as well as "extra compensation" for overtime work. *Id*. The applicable regulation provides specific instructions for how to calculate this overtime compensation:

> Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

*Id*. In other words, the FWW method calculates overtime premiums according to the following formula:

$$\text{overtime premium} = \frac{1}{2} \text{ x } \frac{\text{salary}}{\text{40 hours + overtime hours}} \text{ x overtime hours}$$

The parties agree that Plastipak did not use this formula. Instead, Plastipak used a different one:

$$\text{overtime premium} = \frac{\text{salary}}{\text{40 hours}} \text{ x overtime hours}$$

When compared, these formulae show that Plastipak's approach was more generous than the FWW's approach in two ways. First, Plastipak used a higher base salary rate: it divided base salary by *40 hours*, whereas the FWW method divides base salary by the sum of *40 hours and overtime hours*. Second, Plastipak paid the full salary rate for overtime hours, whereas the FWW method requires only a minimum of half of the salary rate. Taken together, these changes

ensured that Plaintiffs were paid more than twice the minimum overtime premiums.[1] That was plainly permissible. § 778.114(a) (explaining that overtime must be compensated at a rate "not less than" the minimum rate under the FWW method).

Nonetheless, Plaintiffs advance four challenges to Plastipak's application of the FWW method. None persuades. First, Plaintiffs argue that they were not given a "fixed salary" because, if they worked less than 40 hours per week, they were "docked" vacation time to make up the difference. This argument fails because Plaintiffs concede that they were docked vacation time *only when they actually requested time off.* (*See* Plfs.' Br. at 15 ("Plaintiffs do not dispute that their working hours fluctuated from week to week, although they only fluctuated below forty hours if Plaintiffs chose to take time off. Without exception Plastipak had work for Plaintiffs in excess of forty hours every week of Plaintiffs' employment.").) Reducing an employee's bank of vacation time is obviously appropriate in such circumstances. *See* DOL Opinion Letter FLSA, 1999 WL 1002399, at *2 (May 10, 1999) ("[D]eductions may be made from vacation or sick leave banks because of absences for personal reasons or illness, as long as no deductions are made from an employee's salary."). Indeed, it would be absurd to suggest that a vacationing employee should be paid twice for not working, once because the employee took paid vacation and a second time because the employee is guaranteed a fixed salary. *Cf. Samson v. Apollo Res., Inc.*, 242 F.3d 629, 639 (5th Cir. 2001) (explaining that the FWW's fixed-salary requirement

[1] This is illustrated by the example provided in 29 C.F.R. § 778.114(b). Specifically, the example considers a hypothetical employee who is paid a weekly salary of $600 under the FWW method. *See* 29 C.F.R. § 778.114(b). If the employee works 50 hours one week and 48 hours the next, the example specifies that, under the FWW method, the employee should be paid $660 and $650, respectively, for those two weeks of work. *Id.* In other words, the employee should receive an overtime premium of $60 the first week, and $50 the second week. Under Plastipak's method, however, the employee would receive more generous overtime premiums. Specifically, Plastipak would pay an overtime premium of $150 for the first week (10 hours at $15 per hour) and $120 for the second week (8 hours at $15 per hour).

"does not mean, however, that the employer must pay the full salary even though the employee decides not to work all the hours that he is called upon to work. To hold otherwise would allow for a tremendous abuse of the FWW method by employees.").

Second, Plaintiffs argue that Plastipak underpaid them because, in their view, their overtime pay rate equaled their non-overtime rate, and thus fell short of the time-and-one-half requirement. This argument fails because it misunderstands the FWW method. Under the FWW method, the employee "has already received straight-time compensation on a salary basis for all hours worked," and thus has already been compensated for overtime hours. 29 C.F.R. § 778.114(b). Therefore, "only additional half-time pay [for overtime hours] is due." *Id.* Here, Plastipak paid overtime premiums at the *full* salary rate, which is more than half the salary rate.[2] Consequently, Plaintiffs' overtime hours were actually compensated twice—once as part of the salary arrangement and once when calculating overtime premiums. Plastipak did not merely satisfy the time-and-one-half requirement, Plastipak exceeded it.

Third, Plaintiffs argue that they never understood that they would be paid under the FWW method, and therefore it should not have been used. This argument fails because Plaintiffs clearly agreed to be paid under the FWW method. Each Plaintiff signed a document acknowledging that Plastipak would satisfy the time-and-one-half requirement through the FWW method. (Defs.' Br. at 7–8 (citing employment documentation and/or admissions from all plaintiffs).) The documents even described the specific formula Plastipak would use, with numerical examples. *Id.* In addition, Plaintiffs accepted their paychecks for years without complaint. Taken together, this proves the parties reached an understanding. *See Highlander v. K.F.C. Nat. Mgmt. Co.*, 805 F.2d 644, 648 (6th Cir. 1986) (holding that an employee understood

[2] In addition, as explained earlier, Plastipak's method of computing the base salary rate was more generous than what the FWW method requires.

she would be paid under the FWW method where, among other factors, the employee "had signed and acknowledged the explanatory calculation form indicating that she understood the Fair Labor Standard Act's fluctuating work week method of overtime compensation"); DOL Opinion Letter FLSA, 1973 WL 335242, at *1 (Feb. 26, 1973) ("Where an employee continues to work and accept payment of a salary for all hours of work, her acceptance of payment of the salary will validate the fluctuating workweek method of compensation as to her employment."). Although Plaintiffs argue that they did not understand every computational detail, such a perfect understanding was not required. *See* DOL Opinion Letter FLSA, 2009 WL 648995, at *2 (Jan. 14, 2009) ("[T]he Department's regulations do not require that the 'clear and mutual understanding' extend to the method used to calculate the overtime pay. Rather, 29 C.F.R. § 778.114 only requires that the employees have a clear and mutual understanding that they would be paid on a salary basis for all hours worked." (quotation marks and citation omitted)); *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 40 (1st Cir. 1999) ("The parties must only have reached a 'clear mutual understanding' that while the employee's hours may vary, his or her base salary will not.").

Fourth, Plaintiffs argue that they should have been given additional time for discovery. In particular, they assert that discovery was needed to determine whether Plastipak would have reduced their salary had they failed to work when their vacation banks were empty, a practice arguably prohibited by the FWW's "fixed salary" requirement. Plaintiffs' discovery argument fails, however, because it was not preserved. Under Federal Rule of Civil Procedure 56(d), "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the [district] court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any

other appropriate order." Compliance with Rule 56(d) is essential: "[I]f the appellant has not filed either a Rule 56[] affidavit or a motion that gives the district court a chance to rule on the need for additional discovery, this court will not normally address whether there was adequate time for discovery." *Plott v. Gen. Motors Corp., Packard Elec. Div.*, 71 F.3d 1190, 1196 (6th Cir. 1995). Plaintiffs in this case filed a Rule 56 declaration in the district court. (R. 57-17, declaration.) However, that declaration—and Plaintiffs' summary judgment opposition—focused on the need for information about Department of Labor audits, as well as "records regarding the relationships among the corporate Defendant, Plastipak Packaging, Inc., Plastipak Holdings, Inc., and Plastipak Technologies, LLC." (*Id.* at ¶ 2; *see also* R. 57, summary judgment opp., PageID# 1326–27, 1345–47.) There was no specific mention of a need for documents addressing whether Plastipak would have reduced Plaintiffs' salary had they failed to work when their vacation banks were empty. Consequently, the district court was not on notice that Plaintiffs sought discovery on that issue, and it did not abuse its discretion by entering summary judgment before discovery was complete. *See Summers v. Leis*, 368 F.3d 881, 887 (6th Cir. 2004) ("[A litigant] must state with 'some precision the materials he hopes to obtain with further discovery, and exactly how he expects those materials would help him in opposing summary judgment.'" (quoting *Simmons Oil Corp. v. Tesoro Petroleum Corp.*, 86 F.3d 1138, 1144 (Fed. Cir. 1996)).

Finally, Plaintiffs argue that Plastipak did not track their hours on a weekly basis; rather, Plastipak considered only the number of hours worked in each two-week pay period. Thus, Plaintiffs conclude, Plastipak could not have known whether they worked overtime in any given

week.[3] Plastipak denies maintaining insufficient records, and in fact asserts that it turned over detailed time records during discovery. We need not resolve this dispute. Plaintiffs did not raise this argument in their opposition to summary judgment. Therefore, it is not properly before this Court. *See McFarland v. Henderson*, 307 F.3d 402, 407 (6th Cir. 2002) (explaining that, in general, "[i]ssues not presented to the district court but raised for the first time on appeal are not properly before the court" (quoting *J.C. Wyckoff & Assoc., Inc. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1488 (6th Cir. 1991)).

## CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

[3] For example, consider an employee who worked 80 hours in a two-week pay period. Without information on how much that employee worked each week, it is impossible to know whether the employee worked 40 hours each week (in which case no overtime would be due) or whether the employee worked over 40 hours one week and less the other week (in which case overtime would be due for the week in which the employee worked over 40 hours).