[Cite as *Stabler v. Ohio Univ.*, 2017-Ohio-6959.]

JOHN STABLER Plaintiff v. OHIO UNIVERSITY Defendant	Case No. 2015-00880 Judge Patrick M. McGrath Magistrate Holly True Shaver DECISION

{¶1} On May 1, 2017, the parties filed cross-motions for summary judgment pursuant to Civ.R. 56. On May 22, 2017, the parties both filed their respective responses. The motions are now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.,* 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317 (1977).

{¶4} At all relevant times, plaintiff was employed as an Officer in Charge for defendant's police department, and his employment was subject to a Collective

Bargaining Agreement (CBA). On November 15, 2013, plaintiff used force during the arrest of an individual. On November 20, 2013, Chief Andrew Powers issued a memorandum which notified plaintiff that he was being placed on administrative leave with pay during the pendency of an investigation into the use of force. (Defendant's Exhibit B.) In the memorandum, Chief Powers referred plaintiff to Article 24 of the CBA for additional information regarding internal investigations. (*Id*.) On November 21, 2013, Deborah Shaffer, Senior Associate Vice President for Finance and Administration, sent plaintiff a letter confirming that he had been placed on paid administrative leave pending the outcome of the investigation. (Defendant's Exhibit C.) In the letter, Shaffer informed plaintiff that he would remain on paid administrative leave until a final determination was issued; that he was not permitted to be on the Ohio University campus unless defendant requested his presence; and that he was required to turn in his university issued keys, identification card, and other departmental issued items. (*Id*.) Shaffer further stated: "You are required to be available by telephone to Ohio University during the University's business hours of 8:00 a.m. and 5:00 p.m., Monday through Friday. If, for any reason, you cannot be available during these hours at your cell phone number * * * you are required to contact the Employee and Labor Relations Department * * * to provide additional contact information. Failure to be contacted during these hours may result in loss of pay and/or disciplinary action." (*Id*.) Plaintiff returned to active duty on or about November 20, 2014, after the Athens County Prosecutor reviewed the case and declined to pursue criminal charges. (Defendant's Exhibit D; Plaintiff's Exhibit 3.)

{¶5} Plaintiff asserts that defendant violated the Fair Labor Standards Act of 1938, 29 USCS Section 201 et seq. (FLSA) when it placed him on paid administrative leave. Specifically, plaintiff argues that the language in Shaffer's letter, requiring him to be available by telephone for a nine-hour period from 8:00 a.m. to 5:00 p.m., Monday through Friday, means that he worked more than 40 hours per week from November 21,

2013 through November 20, 2014. Plaintiff seeks overtime wages for the 5 additional hours per week that he had to be available by phone during his paid administrative leave. Defendant asserts that it complied with the FLSA and that plaintiff is not entitled to any additional wages.

{¶6} Under the FLSA, an employer must compensate its covered employees for any hours worked in excess of 40 hours per week by paying overtime compensation at a rate not less than one and one-half times the regular rate of pay. *See* 29 USCS § 27. The parties agree that plaintiff's employment was subject to the FLSA. It is also undisputed that pursuant to Article 25(B) of the CBA, the decision to place plaintiff on paid administrative leave was discretionary, and that plaintiff was placed on administrative leave with pay at his regular hourly rate, per the policy. (Defendant's Exhibit A, p. 26.) Furthermore, plaintiff testified that his schedule prior to being placed on administrative leave was a "straight eight" shift, where he worked from 3 to 11 p.m. with no set meal period, but that he ate during his shift if he had the opportunity. (Plaintiff's deposition, p. 23.) Plaintiff does not dispute that he was paid 40 hours per week at his regular rate of pay while he was on administrative leave. The dispositive issue is whether plaintiff has brought forth any evidence to show that he performed work in excess of 40 hours per week when he was on paid administrative leave.

{¶7} "[A]n FLSA plaintiff must prove by a preponderance of the evidence that he or she 'performed work for which he [or she] was not properly compensated.'" *Myers v. Copper Cellar Corp.*, 192 F.3d 546, 551 (6th Cir.1999), quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946). "Work not requested but suffered or permitted is work time." 29 C.F.R. § 785.11.

{¶8} Under the FLSA, an employee may be compensated for time spent "engaged to be waiting." *Skidmore v. Swift,* 323 U.S. 134, 137 (1944). However, the issue of whether an employee is engaged to be waiting depends on whether the time spent is "predominately for the employer's benefit or for the employee's." *Armour & Co.*

v. Wantock, 323 U.S. 126, 133 (1944). "An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while 'on call.' An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working on call." 29 CFR 785.17 "The question in on-call cases is whether the employer's restrictions on [its employees'] time prevent the employees from effectively using the time for personal pursuits. To be considered work time, an employee's on-call time must be severely restricted." *Rutlin v. Prime Succession, Inc.*, 220 F.3d 737, 743-44 (6th Cir.2000), quoting *Aiken v. City of Memphis*, 190 F.3d 753, 760 (6th Cir.1999).

{¶9} Plaintiff asserts that the time that he spent on administrative leave was predominately for defendant's benefit, in that during the investigation, it was beneficial for the university not to have plaintiff on campus. Plaintiff asserts that the activities that he engaged in during his administrative leave are not relevant to this claim because the university benefitted from his absence during a pending investigation. However, for plaintiff to prove that he was entitled to overtime compensation, the court must examine how he spent his time during administrative leave to determine whether the time spent was predominately for the employer's benefit or for the employee's. *Armour & Co., supra.*

{¶10} Plaintiff testified that during the time that he was on paid administrative leave, the work that he performed for defendant was that he was "ready for calls, as I was required to be pursuant to my letter" from Shaffer. (Plaintiff's deposition, p. 36.) Plaintiff was interviewed on campus on two different days during his administrative leave, and he estimated that each interview lasted less than eight hours. (*Id.,* pp. 26-28.) Plaintiff received three phone calls from the university during his administrative leave. (Plaintiff's Response to Defendant's Interrogatory No. 6.) Plaintiff testified that he did not have access to any electronic databases for the university during his leave,

including email. (Plaintiff's deposition, p. 36.) Defendant placed few restrictions on plaintiff's administrative leave time. Specifically, he was not supposed to be present on the university campus without permission, he was not to discuss the ongoing investigation with other OU police department employees, and he needed to be available by cell phone during the university's normal business hours. (Defendant's Exhibit C.) Plaintiff was not required to remain at his home during his administrative leave. The activities that plaintiff engaged in during his administrative leave included helping his mother clean her house, taking walks, watching television, working in his vegetable garden and helping clean up a camp site for the Boy Scouts. (Plaintiff's deposition, pp. 38-47.)

{¶11} Construing the evidence most strongly in favor of plaintiff, the only reasonable conclusion is that defendant did not "severely restrict" the time that plaintiff was on paid administrative leave. Consequently, plaintiff cannot prove that he spent more than 40 hours per week doing compensable work predominantly for the benefit of defendant. Therefore, the only reasonable conclusion is that defendant did not violate the FLSA and defendant is entitled to summary judgment as a matter of law.

PATRICK M. MCGRATH
Judge

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JOHN STABLER Plaintiff v. OHIO UNIVERSITY Defendant	Case No. 2015-00880 Judge Patrick M. McGrath Magistrate Holly True Shaver JUDGMENT ENTRY

{¶12} A non-oral hearing was conducted in this case upon the parties' cross-motions for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. Plaintiff's motion for summary judgment is DENIED. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

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