**[Cite as *Bautista v. Ohio Univ.*, 2022-Ohio-3085.]**

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| DELFIN BAUTISTA<br><br>Plaintiff<br><br>v.<br><br>OHIO UNIVERSITY<br><br>Defendant | Case No. 2020-00592JD<br><br>Judge Dale A. Crawford<br><br>DECISION |

**{¶1}** Defendant Ohio University (OU or University) moves for a summary judgment in its favor on all claims alleged in a First Amended Class and Collective Action Complaint filed by Plaintiff delfin bautista. bautista, who uses "they/them pronouns" and "the lowercase spelling of their name" (First Amended Complaint, ¶ 1), opposes the University's motion. Because, after the evidence is construed most strongly in favor of bautista, no genuine issue of material fact exists and the University is, as a matter of law, entitled to a judgment in its favor, the University's motion for summary judgment shall be granted.

## I. Background

**{¶2}** bautista was employed as the Director of the LGBT Center at Ohio University from about June 13, 2013, until about January 2019.[1] The parties agree that, at all times relevant, bautista was an employee within the meaning of 29 U.S.C. 203(e),

[1] First Amended Complaint, ¶ 1; Answer to First Amended Complaint, ¶ 1. bautista alleges that they were the Director of the LGBT Center from June 2013 until their termination in or around January 2019. (First Amended Complaint, ¶ 1.) According to Gigi S. Secuban, Ph.D., Ohio University's Vice President for Diversity and Inclusion, bautista's employment contract was not renewed. (Secuban, Deposition, 30.) In a deposition, bautista testified that they were considered an "administrative employee and not part of the bargaining unit or the union, because [they were not] hourly." (bautista Deposition, at 183.)

R.C. 4111.03(D)(3), and R.C. 4112.01 (A)(3) and that Ohio University was an employer within the meaning of 29 U.S.C. 203(d), R.C. 4111.03(D)(2), and R.C. 4112.01 (A)(2).[2] The parties further agree that, at all times relevant, Ohio University was subject to overtime provisions of the Fair Labor Standards Act and the Ohio Minimum Wage Fairness Act.[3]

**{¶3}** During bautista's employment at the University, the University had a Purchase Card (PCard) program.[4] The University required employees to submit PCard expenses for approval.[5] bautista asserts that the University frequently forced bautista, and similarly situated employees, to pay back sales taxes, business meal expenses, travel insurance expenses and other business expenses that they made with a PCard.[6] bautista further asserts that the University had a policy to charge employees, including bautista, for entire purchases if the University was dissatisfied with the detail included on a receipt provided by the vendor and submitted to the University as part of the PCard procedure.[7]

**{¶4}** bautista maintains that Ohio University's PCard practices violate the Fair Labor Standards Act because bautista's salary "was not paid 'free and clear' as required by the Fair Labor Standards Act [FLSA] and its associated regulations." (First Amended Complaint, ¶ 19.) bautista alleges:

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[2] First Amended Complaint, ¶ .3, and B.6; Answer to First Amended Complaint, ¶ 3, 6.

[3] First Amended Complaint, ¶ 7; Answer to First Amended Complaint, ¶ 7.

[4] First Amended Complaint, ¶ 8; Answer to First Amended Complaint, ¶ 8, 12. Julie R. Allison, Associate Vice President for Finance, Controller, at Ohio University, testified that the PCard "is short for the purchasing card, which is a University credit card that employees can use to make low dollar purchases." (Allison Deposition, 9.) The University has several types of PCards: purchasing card, travel card, and controlled value card. (Allison Deposition, 9-10.)

[5] First Amended Complaint, ¶ 15; Answer to First Amended Complaint, ¶ 15.

[6] First Amended Complaint, ¶ 16.

[7] First Amended Complaint, ¶ 18.

> Defendant OU classified Plaintiff bautista and other employees who were subject to the university wide PCard policies as exempt from the FLSA's minimum wage and overtime requires pursuant to the executive, administrative, and professional exemptions provided in 29 U.S.C. 213(a)(1). As such, Defendant OU is subject to the Salary Basis Test in relation to Plaintiff bautista and the other employees that Defendant OU issued a PCard to and classified as exempt. Because Defendant OU has an acutal [sic] practice of charging back its "exempt" employees, including Plaintiff bautista, for legitimate work-related expenses, Defendant OU fails the Salary Basis Test in relation to these employees and these employees are therefore entitled to overtime. * * * Because Plaintiff bautista and similarly situated employees that Ohio University classified as "Administrative Exempt" were subject to the "Salary Basis Test," this business expense kickback policy leads to a failure of the "Salary Basis Test" which results in overtime wages being due to Plaintiff bautista and similarly situated employees.

(First Amended Complaint, ¶ 22.) bautista further alleges that the University's PCard policies violate overtime provisions contained within R.C. 4111.03. (First Amended Complaint, ¶ 46.)

**{¶5}** baustista seeks, among other things, designation of the action as a collective action under the Fair Labor Standards Act, class certification under Civ.R. 23, a declaratory judgment, overtime pay, liquidated damages, prejudgment interest, and post-judgment interest. (First Amended Complaint, 11-13.)

**{¶6}** On December 20, 2021, bautista moved for collective certification under the Fair Labor Standards Act and class certification under Civ.R. 23.[8] The University opposed bautista's requests for collective certification and class certification. With the University's response, the University submitted evidence of an internal audit of certain PCard holders from July 1, 2017, through August 3, 2018. According to this evidence, University auditors

> determined that additional testing should be performed on the transactions of delfin bautista. Not only did bautista have the highest overall spend, but also the highest percentage of expenses related to business meetings and entertainment, highest percentage of PCard transactions from vendors considered higher risk, and highest incident rate and dollar amount of PCard reimbursements. In addition, bautista had a far greater number of questionable transactions noted during the initial time period review.

(Memorandum dated December 14, 2018, 2.)[9] In another memorandum dated December 14, 2018, University auditors noted that

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[8] In the First Amended Class and Collective Action Complaint, bautista asserts:

> The class which Plaintiff seeks to represent and for whom Plaintiff seeks the right to send "opt-in" notices for purposes of the collective action, and of which Plaintiff is themself a member, is composed of and defined as follows:
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> > All former and current employees who were classified as exempt from the FLSA's minimum wage and overtime requires pursuant to the executive, administrative, and professional exemptions provided in 29 U.S.C. 213(a)(1), and were issued a PCard by Defendant OU.

(First Amended Complaint, ¶ 25.) And pursuant to Civ.R. 23, bautista seeks certification of a class, which bautista defines as:

> All former and current employees, employed in the State of Ohio, who were classified as exempt from the FLSA's minimum wage and overtime requires pursuant to the executive, administrative, and professional exemptions provided in 29 U.S.C. 213(a)(1), and were issued a PCard by Defendant OU.

(First Amended Complaint, ¶ 29.)

[9] See Defendant's Exhibit filed on June 21, 2022 (Affidavit of Mary Ann Boyle that certifies the truth and accuracy of the memorandum).

> bautista's PCard spending steadily increased from FY14 to the date of our procedures, August 3, 2018, ($15,091 to $35,855), including spending related to Business Meals & Entertainment ($2,867 to $17,358). This occurred in spite of budget overspending and budget concerns expressed by Dr. Shari Clarke in an email on March 23, 2017, where each unit was urged to not spend down their budget and to have all budgets end the fiscal year in the black. Dr. Clarke's email further requested that no purchases of promotional items, food or entertainment be made. Between the date of Dr. Clarke's email and fiscal year end, bautista made $2,240 of PCard purchases of this type, resulting in a budget deficit for FY17 of $2,166 * * *.

(Memorandum dated 14, 2018, 1.)[10]

**{¶7}** After bautista's motion for collective certification and class certification was briefed by the parties, the Court determined that bautista's motion should be held in abeyance.[11]

**{¶8}** On May 17, 2022, the University moved for a summary judgment on all claims alleged by bautista in their First Amended Class and Collective Action Complaint. The University essentially maintains that it is entitled to a summary judgment in its favor because

(1) Any reimbursement required under the University's PCard policies for unallowable expenditures cannot reduce a University employee's predetermined salary in violation of the salary basis test, since the PCard allows employees to access University funds that are separate from the employee's salary;

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[10] See Defendant's Exhibit filed on June 21, 2022 (Affidavit of Mary Ann Boyle that certifies the truth and accuracy of the memorandum).

[11] Entry, February 22, 2022.

(2) The University's PCard policies do not violate the salary basis test, because University employees are not subject to reimbursement based on variations in quality or quantity of work; and

(3) The University's recoupment of misappropriated or impermissibly expended public funds does not violate the salary basis test.

**{¶9}** In response, bautista urges denial of the University's summary-judgment motion because, according to bautista, genuine issues of material fact remain whether the University can satisfy the FLSA's "salary-basis" test and "duties test" and because the University has not met its evidentiary burden "on any relevant overtime exemption defense" for bautista or the putative class members. bautista maintains that the University has not articulated how bautista was properly classified as exempt under any exemption of the FLSA. bautista further maintains that, if the University requires an employee to pay the University back for a purchase (or part of a purchase) that was made in furtherance the employee's job duties, then the University effectively is reducing the amount of the compensation that it has paid to the employee. bautista thus reasons that OU's policy results in a reduction in compensation based on quality of work. bautista also re-asserts a request for the Court to grant their motion for class certification.

**{¶10}** In reply, the University contends that, in bautista's response, bautista attempts to create genuine issues of material fact where none exist and bautista fails to establish required evidentiary showings to defeat the University's summary-judgment motion. The University maintains that the sole dispute in this case has concerned whether the University violated the salary-basis test under the FLSA. The University further maintains that the record is devoid of any instance of bautista challenging their exempt status under the FLSA and bautista has failed to point to a single disputed material fact that relates to their duties. Additionally, the University maintains that bautista fails to articulate any argument in support of their claim that the duties test is not satisfied, as bautista in their response merely lists the tests for the administrative, executive, and

professional exemptions under the FLSA and bautista merely states that the University has not shown that it properly classified Plaintiff as an exempt employee.

## II. Law and Analysis

### A. Legal Standard

**{¶11}** A summary judgment terminates litigation to avoid a formal trial in a case where there is nothing to try. *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1, 2, 433 N.E.2d 615 (1982); *Schroeder v. Nationwide Mut. Ins. Co.*, 10th Dist. Franklin No. 92AP-1728, 1993 Ohio App. LEXIS 2319, *3 (Apr. 27, 1993). Civ.R. 56(C) "provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Grady v. State Emp. Rels. Bd.*, 78 Ohio St.3d 181, 183, 677 N.E.2d 343 (1997).

**{¶12}** Under Civ.R. 56 a party who moves for summary judgment "bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). A party who moves for summary judgment "must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment." *Dresher* at 292-293. *See* Civ.R. 56(C).[12]

[12] Pursuant to Civ.R. 56(C), 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." Any evidence that is not specifically listed in Civ.R. 56(C) "is only proper if it is incorporated into an appropriate affidavit

If a moving party "fails to satisfy its initial burden, the motion for summary judgment must be denied." *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997). But if a party who moves for summary judgment has satisfied its initial burden, then a nonmoving party "has a reciprocal burden outlined in the last sentence of Civ.R. 56(E)." *Dresher* at 293. *See* Civ.R. 56(E) ("[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party").

**B. The Fair Labor Standards Act and Exempt Employees.**

**{¶13}** In 1938, Congress enacted the Fair Labor Standards Act (FLSA), *see* 75 P.L. 718, 52 Stat. 1060, which, as amended, is codified at 29 U.S.C. 201 et seq. The United States Supreme Court has explained, "Congress enacted the FLSA in 1938 with the goal of "protect[ing] all covered workers from substandard wages and oppressive working hours." *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 739, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981); * * * Among other requirements, the FLSA obligates employers to compensate employees for hours in excess of 40 per week at a rate of 1½ times the employees' regular wages. * * *. The overtime compensation requirement, however, does not apply with respect to all employees." *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 147, 132 S.Ct. 2156, 183 L.Ed.2d 153 (2012).

**{¶14}** Public employees fall within the scope of the FLSA. *Worley v. City of Cincinnati*, 1st Dist. Hamilton No. C-990506, 2000 Ohio App. LEXIS 3856, at *10-11 (Aug.

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under Civ.R. 56(E)." *Pollard v. Elber*, 2018-Ohio-4538, 123 N.E.3d 359, ¶ 22 (6th Dist.) However, courts "may consider other evidence if there is no objection on this basis." *State ex rel. Gilmour Realty, Inc. v. City of Mayfield Hts.*, 122 Ohio St.3d 260, 2009-Ohio-2871, 910 N.E.2d 455, ¶ 17; *Pollard* at ¶ 22.

25, 2000). In *Auer v. Robbins*, 519 U.S. 452, 457, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), the United States Supreme Court noted:

> The FLSA did not apply to state and local employees when the salary-basis test was adopted in 1940. See 29 U.S.C. § 203(d) (1940 ed.); 5 Fed. Reg. 4077 (1940) (salary-basis test). In 1974 Congress extended FLSA coverage to virtually all public-sector employees, Pub. L. 93-259, § 6, 88 Stat. 58-62, and in 1985 we held that this exercise of power was consistent with the Tenth Amendment, *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985) (over-ruling *National League of Cities* v. *Usery*, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976)). The salary-basis test has existed largely in its present form since 1954, see 19 Fed. Reg. 4405 (1954), and is expressly applicable to public-sector employees, see 29 CFR §§ 553.2(b), 553.32(c) (1996).

**{¶15}** Pursuant to 29 C.F.R. 541.0(a), "[s]ection 13(a)(1) of the Fair Labor Standards Act, as amended, provides an exemption from the Act's minimum wage and overtime requirements for any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel * * *), * * * as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the

Administrative Procedure Act."[13] *See Christopher*, 567 U.S. 142 at 147 (discussing the delegation of authority to the United States Department of Labor to issue regulations).[14]

> In 2010, the Eighth District Court of Appeals for the state of Ohio remarked:
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> [T]he FLSA exemptions are narrowly construed against the employer, and the employer must demonstrate by clear and affirmative evidence that the employee is covered by the exemption. *Burson v. Viking Forge Corp*. (N.D. Ohio 2009), 661 F.Supp.2d 794, citing *Ale v. TVA* (C.A. 6 2001), 269 F.3d 680. There is a presumption of non-exemption. *Burson* at 798-799. "Application of the exemption is limited to those circumstances plainly and unmistakably within the exemption's terms and spirit.*" Jastremski v. Safeco Ins. Cos*. (N.D. Ohio 2003), 243 F.Supp.2d 743, 747, citing *Douglas v. Argo-Tech Corp*. (C.A.6, 1997), 113 F.3d 67, 70. The manner in which an employee spends his time is a question of fact, while the determination

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[13] The United States Court of Appeals for the Sixth Circuit has stated, "To establish an overtime exemption for executive, administrative or professional employees, 29 U.S.C. § 213(a)(1), an employer must satisfy three tests: 'a (1) duties test; (2) salary level test; and (3) salary basis test.'" *Acs v. Detroit Edison Co.*, 444 F.3d 763, 767 (6th Cir.2006), quoting *Takacs v. Hahn Auto. Corp.*, 246 F.3d 776, 779 (6th Cir. 2001).

The Tenth District Court of Appeals for the state of Ohio has stated, "Ohio defers to federal regulations and applicable federal case law for determination of eligibility for overtime compensation." *Clark v. Ohio Dept. of Rehab. & Correction*, 10th Dist. Franklin No. 15AP-597, 2016-Ohio-718, ¶ 7, citing *Briscoe v. Columbus Metropolitan Area Community Action Org.*, 10th Dist. No. 81AP-887, 1982 Ohio App. LEXIS 13116 (Mar. 9, 1982). And the United States Court of Appeals for the Fifth Circuit has noted that the Department of Labor regulations "are entitled to judicial deference, * * * and are the primary source of guidance for determining the scope and extent of exemptions to the FLSA." *Spradling v. City of Tulsa*, 95 F.3d 1492, 1495 (10th Cir.1996). *But see Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155, 132 S.Ct. 2156, 183 L.Ed.2d 153 (2012) (describing deference that should be accorded to an agency's interpretation).

[14] In, *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 147, 132 S.Ct. 2156, 183 L.Ed.2d 153 (2012), the United States Supreme Court explained that that, in the Fair Labor Standards Act, Congress delegated authority to the United States Department of Labor (DOL) to issue regulations "from time to time" to "defin[e] and delimi[t]" terms. The United States Supreme Court stated that the DOL "promulgated such regulations in 1938, 1940, and 1949. In 2004, following notice-and-comment procedures, the DOL reissued the regulations with minor amendments. See 69 Fed. Reg. 22122 (2004) . The current regulations are nearly identical in substance to the regulations issued in the years immediately following the FLSA's enactment. See 29 CFR §§541.500-541.504 (2011)." *Christopher* at 147-148.

> whether his duties fall within an exemption is a question of law. *Jastremski* at 747, citing *Schaefer v. Indiana Michigan Power Co*. (W.D. Mich. 2002), 197 F.Supp.2d 935 (reversed on other grounds).

*White v. Murtis M. Taylor Multi-Service Ctr.*, 188 Ohio App.3d 409, 2010-Ohio-2602, 935 N.E.2d 873, ¶ 12 (8th Dist.) *Accord Lott v. Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326, 330-331, (5th Cir.2000).[15]

**{¶16}** Notably, however, in *Encino Motorcars, LLC v. Navarro*, ___U.S.___, 138 S.Ct. 1134, 1142, 200 L.Ed.2d 433 (2018), the United States Supreme Court rejected the principle that exemptions to the FLSA should be construed narrowly as a useful guidepost for interpreting the FLSA. In *Encino Motorcars*, the United States Supreme Court stated, "Because the FLSA gives no 'textual indication' that its exemptions should be construed narrowly, 'there is no reason to give [them] anything other than a fair (rather than a "narrow") interpretation.'" *Id.* quoting A. Scalia & B. Garner, Reading Law 363 (2012).

### C. The Ohio Minimum Wage Fairness Act parallels the Fair Labor Standards Act.

**{¶17}** In November 2006, Ohio voters "approved the Fair Minimum Wage Amendment to the Ohio Constitution, which establishes a minimum rate that employers must pay their employees and requires annual adjustments of that amount. Article II, Section 34a." *Haight v. Minchak*, 146 Ohio St.3d 481, 2016-Ohio-1053, 58 N.E.3d 1135, ¶ 6. In *Haight*, the Ohio Supreme Court stated, "Shortly after [Ohio voters approved the Fair Minimum Wage Amendment], the General Assembly enacted Am.Sub.H.B. No. 690

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[15] In *Lott v. Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326, 330-331, (5th Cir.2000), the United States Court of Appeals for the Fifth Circuit has noted: "[W]hether an employee is exempt from the FLSA's overtime compensation provisions * * * is primarily a question of fact[.] * * * However, the ultimate decision whether the employee is exempt from the FLSA's overtime compensation provisions is a question[] of law." "In deciding whether an employee is exempt * * * [a] Court first asserts findings of historical fact, which include such findings as whether the employer controlled the number of hours the employee worked. * * * Second, [a] Court must make inferences from the facts in applying the regulations and interpretations * * *. Lastly, [a] court must make the ultimate determination of whether an employee was exempt." *Lott* at 331.

('H.B. 690'), 151 Ohio Laws, Part V, 9576, to implement the provisions of Article II, Section 34a." *Haight* at ¶ 7. *See* H.B. 690 (amending certain statutes contained within R.C. Chapter 4111 and enacting R.C. 4111.14 to implement Section 34a, Article II, of the Ohio Constitution and amending R.C. 4111.08, effective January 1, 2010, to apply certain record-keeping provisions only to employers subject to Ohio's overtime law).

**{¶18}** Effective July 6, 2022, pursuant to R.C. 4111.03(A), "[e]xcept as provided in section 4111.031 of the Revised Code, an employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours worked in excess of forty hours in one workweek, in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the 'Fair Labor Standards Act of 1938,' 52 Stat. 1060, 29 U.S.C.A. 207, 213, as amended, and, effective beginning on the effective date of this amendment, sections 2 and 4 of the 'Portal to Portal Act of 1947,' 29 U.S.C. 252 and 254. * * *." *See* 29 U.S.C. 213(a)(1) (exemption for any employee employed in a bona fide executive, administrative, or professional capacity). According to R.C. 4111.03(D)(3), as used in R.C. 4111.03, the term "employee" "means any individual employed by an employer but does not include: * * * (d) Any individual * * * employed in a bona fide executive, administrative, or professional capacity as such terms are defined by the 'Fair Labor Standards Act of 1938,' 52 Stat. 1060, 29 U.S.C.A. 201, as amended."

**{¶19}** A federal district court sitting in Ohio has observed: "Ohio's minimum wage and hour statute, O.R.C. § 4111 *et seq*., 'expressly incorporates the standards and principles found in the FLSA,' *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 501 (6th Cir. 2007) (citing Ohio Rev. Code § 4111.03(A)), and accordingly is interpreted similarly." *Dillworth v. Case Farms Processing, Inc.*, N.D.Ohio No. 5:08CV1694, 2009 U.S. Dist. LEXIS 76947, at *13 (Aug. 27, 2009). *Accord Douglas v. Argo-Tech Corp.,* 113 F.3d 67, 69 (6th Cir.1997), fn. 2 (observing that R.C. 4111.03 parallels the FLSA and

determining that a claim brought under R.C. 4111.03 should be approached in a unitary fashion).

**D. Discussion**

**{¶20}** bautista's allegations resolve to whether a request by the University to a "salary basis" employee for reimbursement under the University's PCard policy due to the employee's misuse of PCard funds constitutes a failure of the "salary basis test" under the FLSA, which, in turn, results in overtime wages being due to the "salary basis" employee.

**{¶21}** A California appellate court has remarked that 29 C.F.R. 541.602 (salary basis) "is simply a test applied to see if an employer may properly classify and pay an employee as an exempt, salaried employee or must pay the employee for overtime work." *Serv. Emps. Internatl. Union, Local 250 v. Colcord*, 160 Cal.App.4th 362, 371, 72 Cal.Rptr.3d 763 (2008). In common usage, the term "salary" means an "agreed compensation for services" that is "paid at regular intervals on a yearly basis, as distinguished from an hourly basis." *Black's Law Dictionary* 1603 (11th Ed.2019). Pursuant to 29 C.F.R. 541.602(a), as a general rule, an employee "will be considered to be paid on a 'salary basis' within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." *See Hughes v. Gulf Interstate Field Servs.*, 878 F.3d 183, 188 (6th Cir.2017), quoting 29 C.F.R. 541.602(a) (describing salary-basis test).

**{¶22}** A "salary basis" employee may be subject to a deduction in compensation in certain circumstances under the Fair Labor Standards Act's implementing regulations. *See* 29 C.F.R 541.602(b) (exceptions to the prohibition against deductions from pay in the salary basis requirement). A federal district court has observed, "The language and structure of FLSA and its implementing regulations do not support an extension of the 'no

disciplinary deduction' rule *to prohibit deductions unrelated to the 'quality or quantity' of work performed*." (Emphasis added.) *Yuen v. U.S. Asia Commer. Dev. Corp.*, 974 F.Supp. 515, 523 (E.D.Va.1997). *Accord Auer v. Robbins*, 519 U.S. 452, 456, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (former 29 C.F.R. 541.118(a) embraces reductions in pay for disciplinary violations). Thus, pursuant to 29 C.F.R. 541.602(b), in certain circumstances and, provided that a deduction is unrelated to variations in the "quality or quantity" of work performed, see 29 C.F.R. 541.602(a), a "salary basis" employee, who is governed by the Fair Labor Standards Act, may be subject to a deduction in compensation.

**{¶23}** A review of the University's PCard policy shows that the policy is unrelated to an employee's variations in the "quality or quantity" of work; rather the University's PCard policy serves to protect against the misuse of University funds. Under the University's Purchasing Card Policy 55.074(A), "[t]he procedures established here * * * serve to protect the University from fraud and other deliberate or accidental misuse of its funds."

**{¶24}** Ohio Adm.Code 3337-55-02(A), which applies to Ohio University, provides that the "use of university monies or resources * * * must have a business purpose" and that "[a]buse of university resources may result in the need to make restitution to the university and in disciplinary action, up to and including termination." If the University requires restitution from a "salary basis" employee for PCard misuse or abuse, such restitution constitutes restoration of misused university funds to the University. *See generally Heckler v. Community Health Servs.*, 467 U.S. 51, 63, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984) ("[p]rotection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law"); *State v. Hale*, 60 Ohio St.3d 62, 64, 573 N.E.2d 46 (1991) ("[c]ase law establishes the absolute right of the state to recover funds disbursed in excess of a statutory allowance, even when there is no intent to defraud"). Application of the PCard policy may not be reasonably equated to a

deduction from salary based on variations of an employee's "quality" or "quantity" of work performed. *Accord Serv. Emps. Internatl. Union, Local 250 v. Colcord*, 160 Cal.App.4th 362, 363, 72 Cal.Rptr.3d 763 (2008) (finding that nothing in 29 C.F.R. 541.602 suggested that the federal salary basis regulation (or its state law equivalent) in any way controlled an employer's legal right to recover salary and benefits previously paid to a faithless employee as damages or as restitution in a civil lawsuit for breach of fiduciary duty).

**{¶25}** Since the Ohio Minimum Wage Fairness Act incorporates the standards and principles found in the Fair Labor Standards Act, *see Dillworth v. Case Farms Processing, Inc.*, N.D.Ohio No. 5:08CV1694, 2009 U.S. Dist. LEXIS 76947, at *13 (Aug. 27, 2009); *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 501 (6th Cir.2007), it follows that, under the Ohio Minimum Wage Fairness Act, the University lawfully may require a "salary basis" employee to provide restitution to the University for misuse of PCard funds because such restitution does not diminish the actual compensation paid to a "salary basis" employee because of variations in the quality or quantity of work performed.

**{¶26}** When the evidence is viewed most strongly in favor of bautista, as required by Civ.R. 56, reasonable minds can only conclude that there is no genuine issue as to any material fact and that the University is entitled to judgment, as a matter of law, with respect to bautista's claim of a failure of the "salary-basis test" by the University in its application of the University's PCard policy.

**{¶27}** bautista's motion for collective certification and class certification—which the Court has held in abeyance—therefore is moot. *See City of Grove City v. Clark*, 10th Dist. Franklin No. 01AP-1369, 2002-Ohio-4549, ¶ 11 (actions or opinions are moot when they have become fictitious, colorable, hypothetical, academic or dead). The Ohio Supreme Court has stated:

> It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately

> affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.

*Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970). Judicial restraint dictates that a determination of bautista's requests for collective certification and class certification are best left for another day. *See PDK Laboratories, Inc. v. United States Drug Enforcement Administration* (D.C.Cir.2004), 362 F.3d 786, 799, 360 U.S. App. D.C. 344 (Roberts, J., concurring in part and concurring in judgment) (expressing "the cardinal principle of judicial restraint," *i.e.*, "if it is not necessary to decide more, it is necessary not to decide more"). *See also State ex rel. Luken v. Corp. for Findlay Mkt. of Cincinnati*, 135 Ohio St.3d 416, 2013-Ohio-1532, 988 N.E.2d 546, ¶ 25; *Meyer v. UPS*, 122 Ohio St.3d 104, 2009-Ohio-2463, 909 N.E.2d 106, ¶ 53.

## III. Conclusion

**{¶28}** The Court holds that the University's motion for summary judgment should be granted.

DALE A. CRAWFORD
Judge

**[Cite as *Bautista v. Ohio Univ.*, 2022-Ohio-3085.]**

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|---|---|
| DELFIN BAUTISTA<br><br>Plaintiff<br><br>v.<br><br>OHIO UNIVERSITY<br><br>Defendant | Case No. 2020-00592JD<br><br>Judge Dale A. Crawford<br><br>JUDGMENT ENTRY |

**{¶29}** For reasons set forth in the Decision filed concurrently herewith, the Court GRANTS Defendant's Motion For Summary Judgment. Judgment is rendered in favor of Defendant. Court costs are assessed to Plaintiff. The Clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DALE A. CRAWFORD
Judge

**Filed July 13, 2022**
**Sent to S.C. Reporter 9/2/22**