UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-30002

(Summary Calendar)

WELLMAN GRUNBERG,

Plaintiff-Appellant,

versus

THE CITY OF NEW ORLEANS,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA-93-410-M)

(October 4, 1994)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Wellman Grunberg appeals the district court's dismissal of his suit against the City of New Orleans alleging violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19 (1988). Finding no clear error, we affirm.

I

Wellman Grunberg works for the City of New Orleans ("the

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

City") as a Housing Field Supervisor in the Office of Housing and Urban Affairs. His duties consist primarily of overseeing housing inspectors and representing the City in municipal court in prosecutions of city code violations.

Grunberg's normal work hours are from 8:30 a.m. to 4:30 p.m., Monday through Friday, with one unpaid hour for lunch. At the end of each day, Grunberg records the number of hours he worked on a payroll time sheet or "RAMS" card. The RAMS cards contain spaces for recording holiday time, annual leave, sick leave, civil leave, leave without pay, regular time, and overtime. At the end of the week, Grunberg and his supervisor, Norris Butler, sign the card. Between January, 1990, and January, 1993, Grunberg's RAMS cards reflect that his hours per week exceeded 35 only once.

During this period, the City lacked sufficient funds to compensate employees for overtime hours. The City also had a policy of prohibiting the use of compensatory time off in lieu of overtime payment. Grunberg's court appearances, however, sometimes took place after normal working hours, and his total hours per day occasionally exceeded seven. To avoid the need to pay Grunberg overtime, the City allowed him to take a corresponding amount of time off the day following any evening he worked after hours. If Grunberg could not take the hours off, the City paid him at one and one-half times his regular rate. The City failed to keep any records of the agreement or the number of hours Grunberg spent in court. However, Butler and his supervisor, Gregory Brooks, testified that Grunberg agreed to and followed this arrangement

without complaint for almost three years.[1]

Grunberg filed suit under the FLSA, claiming damages due to the City's alleged failure to pay him overtime compensation. After a non-jury trial, the district court dismissed the action, and Grunberg appeals.

II

Grunberg contends that the district court erred when it dismissed his claim based on its finding that Grunberg never worked over 35 hours without compensation. We review a district court's factual findings under the FLSA for clear error. *See* Fed. R. Civ. P. 52(a); *Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d 1042, 1044 (5th Cir. 1987), *cert. denied*, 484 U.S. 924, 108 S. Ct. 286, 98 L. Ed. 2d 246 (1987). A finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City,* 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985). If, on the other hand, the district court's account of the evidence is "plausible in light of the record viewed in its entirety," we may not reverse, even if we are convinced that we would have weighed the evidence differently. *Id.* "When there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.*

Section 207 of the FLSA entitles employees within its scope to overtime compensation equal to at least one and one-half times

[1] Grunberg denied ever making or following such an agreement.

their regular rate for any hours they work over forty.[2] 28 U.S.C. § 207(a) (1988). An employee suing for unpaid overtime compensation under the FLSA bears the burden of proving by a preponderance of the evidence that he performed work for which he was not properly compensated. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87, 66 S. Ct. 1187, 1192, 90 L. Ed. 1515 (1946). When an employer fails to keep adequate records, the employee meets the required burden "if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 687, 66 S. Ct. at 1192. If precise evidence of hours worked by the employee is not available due to the employer's failure to keep adequate records, the employee "may satisfy [his] burden with admittedly inexact or approximate evidence." *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1330-31 (5th Cir. 1985). The burden then shifts to the employer to produce evidence of the exact amount of work performed or to negate the reasonableness of the inference to be drawn from the employee's evidence. *Mt. Clemens*, 328 U.S. at 687-88, 66 S. Ct. at 1192.

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[2] Grunberg argues that the City's practice of paying overtime for hours worked over 35 per week establishes 35 hours as the relevant maximum. While the Department of Labor's regulations *permit* employers to pay overtime for hours worked over a number less than forty, failure to do so does not give rise to an FLSA claim unless the employee works more than the statutory maximum of forty. *See* 29 C.F.R. § 778.102 (1993) ("If no more than the maximum number of hours prescribed in the [FLSA] are actually worked in the workweek, overtime compensation pursuant to section [207(a)] need not be paid. Nothing in the Act, however, will relieve an employer of any obligation he may have assumed by contract . . . to pay premium rates for work in excess of . . . the normal or regular workweek.").

Grunberg contends that the district court erroneously found that he never worked over 35 hours per week without compensation. Two of Grunberg's supervisors testified that Grunberg agreed to take time off whenever his court appearances required him to work late on a given day. They also testified that Grunberg adhered to this agreement.[3] Furthermore, the RAMS cards for the period, which Grunberg filled out and signed, reflect that he worked only 35 hours per week, except for one occasion when the City compensated him for one hour of overtime.

Grunberg also argues that if in fact an agreement between Grunberg and the City did exist, the City violated the record-keeping requirements of 29 U.S.C. §§ 207(o) and 29 C.F.R. § 553.50 (1993). Section 207(o) permits employers to compensate their employees who work overtime with time off in lieu of monetary overtime compensation. 29 C.F.R. § 553.50 then imposes various record-keeping requirements on public agencies that opt to compensate their employees with "compensatory time off" under section 207(o). Grunberg's agreement was designed to *avoid* the need to pay him overtime compensation, however, and therefore the time he took off was not compensatory overtime within the meaning of section 207(o).

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[3] Grunberg argues that the district court should not have relied on the supervisors' testimony because he flatly denied making or following the agreement. However, credibility determinations are the province of the district court. *See Anderson v. Bessemer City*, 470 U.S. 564, 575, 105 S. Ct. 1504, 1512, 84 L. Ed. 2d 518 (1985) ("[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.").

The district court's findings are plausible in light of the entire record and therefore are not clearly erroneous. *See Anderson*, 470 U.S. at 573-74, 105 S. Ct. at 1511. The record adequately supports the district court's finding that the City carried its burden of negating Grunberg's prima facie case.

III

For the forgoing reasons we **AFFIRM**.