



**In the Matter of:**

**TEXAS ROADHOUSE  
MANAGEMENT CORP.,**

**RESPONDENT.**

**ARB CASE NO. 14-037**

**ALJ CASE NO. 2013-FLS-009**

**DATE: July 21, 2015**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Respondent:*

**Daniel B. Boatright, Esq.; *Little Mendelson, P.C.*; Kansas City, Missouri**

*For the Administrator, WHD:*

**M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Paul L. Frieden, Esq.; Steven W. Gardiner, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia**

**BEFORE: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*. Judge Corchado, dissenting.**

### **FINAL DECISION AND ORDER**

This case arises under section 16(e) of the Fair Labor Standards Act of 1938 (FLSA), as amended, 29 U.S.C.A. § 201, et seq. (West 1998 & Supp. 2014), and its implementing regulations at 29 C.F.R. Parts 578 and 580 (2014). Respondent Texas Roadhouse Management Corp. appealed to the Administrative Review Board (ARB) a Decision and Order of a Department of Labor Administrative Law Judge (ALJ).<sup>1</sup> This D. & O. affirmed the Wage and Hour Division's (WHD) assessment of a civil money penalty against Respondent for repeated violations of 29 U.S.C.A., §§ 206 and 207. For the following reasons, the ARB summarily affirms the ALJ's Decision and Order.

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<sup>1</sup> *Texas Roadhouse Mgt. Corp.*, ALJ No. 2013-FLS-009 (Feb. 11, 2014) (D. & O.).

## BACKGROUND<sup>2</sup>

Based on WHD's investigation in late 2011 and early 2012 of Texas Roadhouse's restaurant in Hickory, North Carolina, WHD determined that Texas Roadhouse violated FLSA sections 6 and 7, 29 U.S.C.A. §§ 206 and 207. D. & O. at 2. The Hickory restaurant did not have a prior history of FLSA violations. WHD found that Texas Roadhouse violated the FLSA because (1) Respondent improperly paid twelve head waitresses working at the Hickory restaurant a tip credit wage for performing administrative work at the end of their shifts instead of the applicable minimum wage, resulting in underpayment of wages, and (2) Respondent failed to properly factor production bonus payments into one employee's overtime compensation, resulting in underpayment of wages. *Id.* WHD determined that Texas Roadhouse owed a total of \$5,055.92 in back wages to thirteen Hickory restaurant employees. Respondent agreed to pay the back wages and to comply with the FLSA in the future. *Id.*

In early 2012, WHD conducted an investigation of Texas Roadhouse's restaurant in Bangor, Maine. The Bangor restaurant did not have a prior history of FLSA violations. WHD determined that Texas Roadhouse violated sections 6, 7, and 11 of the FLSA. *Id.* at 3. Specifically, WHD found that thirty-three Bangor restaurant employees were not being paid as required for time spent on their rest/smoke breaks, resulting in underpayment of wages in the total amount of \$3,820.21. *Id.* Texas Roadhouse paid back wages to its employees for these underpayments, and agreed to comply with the FLSA in the future. *Id.*

By letter dated May 29, 2013, WHD notified Texas Roadhouse that it was assessing a civil money penalty pursuant to FLSA section 16(e), 29 U.S.C.A. § 216(e), against it in the amount of \$880.00 related to the Bangor violation. WHD cited the Hickory restaurant violation as the "previous violation" that subjected Respondent to the civil money penalty for a repeat violation of the FLSA. *Id.*

Texas Roadhouse timely served notice of exception to the civil money penalty, which preserved Respondent's exception to any determination that the Bangor restaurant violation constituted either a willful or repeated violation of the FLSA, and also preserved Respondent's exception to the amount assessed. An Order of Reference was subsequently filed with the Office of Administrative Law Judges, that submitted the matter for final determination by an ALJ regarding entry of the assessment and the amount of the penalty, as provided by 29 C.F.R. Parts 578 and 580.

The only issue before the ALJ was whether Texas Roadhouse engaged in repeated violations of the FLSA. D. & O. at 4. Upon cross-motions by WHD and Texas Roadhouse for summary decision, the ALJ issued the Decision and Order appealed here granting WHD's motion, thereby subjecting Texas Roadhouse to the civil money penalty assessment.

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<sup>2</sup> The parties do not dispute the facts in this case and stipulated to them.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board authority to issue final agency decisions under the FLSA.<sup>3</sup> The FLSA, at 29 U.S.C.A. § 216(e)(4), affords any party against whom civil money penalties have been assessed the opportunity to challenge any such assessment through administrative procedures, including the opportunity for hearing, established by the Secretary of Labor in accordance with section 554 of Title 5 (the APA).

The ARB reviews de novo an ALJ's grant of a motion for summary decision, i.e., under the same standard that an ALJ employs. The Board is guided in its consideration by 29 C.F.R. § 18.72 (2015 Thomson Reuters), governing an ALJ's grant of summary decision. Pursuant to 29 C.F.R. § 18.72(a), the ALJ shall grant summary decision "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law."

## DISCUSSION

The only issue in dispute before the ARB is whether Respondent Texas Roadhouse engaged in "repeated" violations of the FLSA. FLSA section 16(e)(2) provides that "[a]ny person who repeatedly or willfully violates section 206 or 207 of this title [29 U.S.C.A. §§ 206 and 207] shall be subject to a civil penalty not to exceed \$1,100 for each such violation."<sup>4</sup> FLSA section 206 covers minimum wage requirements, and section 207 covers maximum hours and overtime wage requirements. The FLSA implementing regulations provide, pertinent to the present case, that a violation of section 206 or 207 of the FLSA shall be deemed a "repeated" violation "[w]here the employer has previously violated section 6 or 7 [section 206 or 207] of the Act, provided the employer has previously received notice, through a responsible office of the Wage and Hour Division or otherwise authoritatively, that the employer allegedly was in violation of the provisions of the Act."<sup>5</sup>

Citing the FLSA's plain meaning and its implementing regulations, the ALJ found that Texas Roadhouse engaged in "repeated" violations, as defined by the FLSA at 29 U.S.C.A. § 16(e)(2) and at 29 C.F.R. § 578.3(b). Accordingly the ALJ found that it was proper to impose the civil money penalty related to the Bangor restaurant violations because of the previous FLSA violations at the Hickory restaurant. We agree with the ALJ that neither the FLSA nor its implementing regulations require the previous and subsequent violation to be the "same or

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<sup>3</sup> Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

<sup>4</sup> 29 U.S.C.A § 216(e)(2); *see also* 29 C.F.R. § 578.3(a).

<sup>5</sup> 29 C.F.R. § 578.3(b)(1).

similar,” as Respondent argues on appeal. Nor are we persuaded by Respondent’s argument that the meaning of “repeatedly” under the FLSA be interpreted in the same manner as it has been interpreted under the Occupational Safety and Health Act (OSHA), at 29 U.S.C.A. § 666(a), by Federal and administrative courts. The interpretation of “repeatedly” as that term appears in OSHA is unpersuasive because, as the ALJ noted, the definition of “repeatedly” under the FLSA is defined by regulation, but that term under OSHA is not.

29 C.F.R. § 578’s regulatory history lends additional support for the ALJ’s interpretation of what constitutes a “repeated” FLSA violation, given WHD’s rejection of comments urging it to “change” section 578.3(b) “so that only an identical minimum wage or overtime violation be considered a ‘repeated’ violation, and that the statute should not be read to allow the finding of a repeated violation on the basis of a previous violation of either the minimum wage or overtime provisions.” 57 Fed. Reg. 49,128 (Oct. 29, 1992).

Finally, we agree with the ALJ that even if the FLSA were interpreted to require similar violations before civil penalties could be imposed, the Hickory and Bangor violations were similar to the extent that both involved the improper payment to employees for the hours they worked. Nor are we persuaded by Respondent’s argument that the Hickory and Bangor violations were dissimilar because the two restaurants operated under entirely different management teams separated geographically by 1,000 miles. As the ALJ pointed out (D. & O. at 9), WHD addressed this exact issue when it adopted the FLSA regulations, rejecting the argument of several commentators that a repeated violation should not be charged “to multi-establishment employers when the violations occurred at different establishments.” 57 Fed. Reg. 49,128 (Oct. 29, 1992).

## **CONCLUSION**

For the foregoing reasons, the ALJ’s Decision and Order is **AFFIRMED**.

**SO ORDERED.**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

**Judge Corchado, dissenting:**

I dissent. There is no question that the failure to pay workers what they are due under the law is a very serious matter for the workers. Employers should exercise extreme caution in deciding not to pay for work breaks, electing not to pay at least minimum wage, and calculating

base pay for determining the amount of overtime pay owed. It is also important to vigorously enforce the regulatory provision for civil monetary penalties when employers “repeatedly” or “willfully” violate section 206 or 207.

In this case, whatever “repeatedly” means under the statute, I am not convinced that the Administrator met the regulatory provision that defines “repeated” violation as one where the employer has “previously received notice” of a violation. I assume this requirement means “previous” to committing the next violation. In this case, the violations were virtually overlapping. The violation time periods covered in this case were almost entirely overlapping: North Carolina “between January 26, 2010 and January 24, 2012” and Maine “from April 1, 2010 to March 31, 2012.”<sup>6</sup> It seems to me that the plain meaning of the regulation requires “successive” violations and that the “repeated” violation must occur after the notice of the first violation. Whether this occurred in this case is not clear, and the burden falls on the Administrator to prove a violation. The Board has de novo review over summary decisions. Moreover, this error is fundamental enough that I must respect it regardless whether the parties raised this issue or not. I would consider remanding for further findings or clarification on this point. Finally, if WHD does not do so already, I suggest that a clear warning should be included with the notice of the first violation telling employers that further violations of section 206 or 207 anywhere in the company, can be deemed a “repeated” violation subjecting the company to civil monetary penalties. Such a warning would hopefully prevent further violations in companies like Texas Roadhouse that operates hundreds of restaurants across the country. If violations occur after being clearly notified of the potential for civil monetary penalties for any violation in the company, there should be little question about imposing civil monetary penalties.

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

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<sup>6</sup> Statement of the Administrator in Response to Petition for Review, pp. 3-4.