

The 6th Circuit Splits the Pie in Parker v. Battle Creek Pizza FLSA Litigation

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NEWSLETTER TBA CONNECT

Classic Domino's ads warned to "Avoid the Noid." Recently, the plaintiff's bar has been the Noid for pizzerias and similar restaurants. These employers typically pay delivery drivers minimum wage, minus a tip credit, and reimburse the drivers for their vehicle costs. Not surprisingly, it is not practicable to reimburse exact costs. Instead, employers traditionally have used the IRS mileage rate for business deductions. More recently, though, some employers have turned away from the IRS rate, which as a national average overpays drivers in Tennessee, and instead used a regional rate. The plaintiffs' bar has responded by filing Fair Labor Standards Act (FLSA) lawsuits alleging that employers have failed to reimburse drivers for their full costs, resulting in the drivers receiving less than minimum wage. Moreover, these disputes over pennies have morphed into six- and seven-figure litigation as FLSA collective actions.

On March 12, the U.S. 6th Circuit Court of Appeals in *Parker v. Battle Creek Pizza, Inc.*, 95 F.4th 1009 (6th Cir. 2024), entered the fray by issuing a ruling in a consolidated appeal of two district court decisions. A Michigan court had granted partial summary judgment to employees, who argued that employers should use the IRS rate, while an Ohio court had granted partial summary judgment to employers, who maintained that reimbursing a "reasonable approximation" of costs sufficed.^[1] The 6th Circuit disagreed with both lower courts and remanded the cases for further proceedings. While the decision suggested one approach, the only thing certain going forward is that there will be more litigation.

I. The Parker Decision

A. The Parties' Positions

The FLSA requires that the minimum wage of \$7.25 per hour must be "paid finally and unconditionally or 'free and clear'" of any "kick-back" to the employer.^[2] Thus, if an employee must "provide tools of the trade," the employer will violate the FLSA if "the cost of such tools purchased by the employee cuts into the minimum wage or overtime wages required ..."^[3] With a minimum-wage employee, this means that the employer must reimburse 100% of the cost of such "tools."^[4]

The defendants, Battle Creek Pizza and Team Pizza, paid their drivers minimum wage, minus a "tip credit."^[5] Because the employees had to provide their own cars, they "incur[red] substantial expenses — for gas, maintenance, insurance, and so on, along with depreciation."^[6] Team Pizza reimbursed drivers \$0.28 per mile, while Battle Creek Pizza reimbursed drivers \$1.00 or \$1.50 per delivery, depending on the timeframe.^[7] The employers argued, and the Ohio court agreed, that they complied with the FLSA by reimbursing drivers for a "reasonable approximation" of their costs.^[8]

The plaintiffs, by contrast, argued that the "reimbursements fell short of the plaintiff's expenses — thereby cutting into their statutory minimum wages." Instead, they insisted, and the Michigan court agreed, that the employers should have used either actual costs or the IRS rate.

B. The 6th Circuit Rejected the Employers' Position.

As a bad omen for the defendants, the 6th Circuit began by criticizing them for relying on "a daisy chain of regulations" to argue that "they can reimburse their drivers whatever the defendants themselves determine to be a reasonable approximation of the drivers' costs."^[9] As a key link in the chain, the defendants cited § 778.217, which excludes the reimbursement of expenses from an employee's "regular rate" so as not to inflate the employee's overtime rate.^[10] At the same time, § 778.217 "prevents an employer from deflating an employee's regular rate" by exaggerating expenses and "disguising wages as reimbursements."^[11] To strike this balance, § 778.217 provides that "the actual or reasonably approximate amount" of certain expenses ... will not be regarded as part of the employee's regular rate[.]"^[12]

The employers tried to apply this "reasonably approximate amount" language from the overtime regulation to the minimum wage context, but the 6th Circuit declined to take this "inferential leap."^[13] The court first held that the language did not apply to vehicle costs even in the overtime context because "§ 778.217(b)(1) says that '[t]he actual amount' — and not some reasonable approximation thereof — 'expended by an employee in purchasing ... tools' will 'not be regarded as part of the employee's regular rate[.]'"^[14] The court further reasoned that, while insufficiently reimbursing costs would not reduce the overtime rate, "when (as here) an employee's hourly wage is the bare minimum wage, any underpayment of her cost of providing tools will cut into her minimum wages."^[15]

The employers next urged the 6th Circuit to defer to a 2020 Department of Labor (DOL) Wage & Hour Division (WHD) Opinion Letter, which concluded that the “regulations permit reimbursement of a reasonable approximation of actual expenses incurred by employees for the benefit of the employer by any appropriate methodology; the IRS business standard mileage rate is not legally mandated by the WHD’s regulations but is presumptively reasonable ...”^[16] The court, however, ruled that “the letter more briefly presents the same arguments we reject above, so we do not find it persuasive.”^[17]

Lastly, the employers argued that “computing their drivers’ actual costs of providing vehicles for their work would be ‘impossible.’” The 6th Circuit, though, ruled that “the employers themselves created this situation: first by paying their drivers the bare minimum wage; then by requiring them to provide their own vehicles to deliver pizzas on the defendant’s behalf; and finally by cutting it close (at least according to the allegations here) as to whether they have adequately reimbursed their drivers for the cost of providing those vehicles. Remove any of those elements and these cases likely do not get filed.”^[18] Ultimately, the court concluded that the FLSA “specifies — to the penny — the minimum wage that an employer must pay ‘each’ of its employees. An employer must therefore pay each employee at least that amount, not a ‘reasonable approximation’ thereof.”^[19]

C. The 6th Circuit Rejected the Employees’ Position.

The 6th Circuit next examined the plaintiffs’ insistence on the IRS rate. In rejecting this approach, the court stressed that “the Act’s specificity cuts both ways. For the plaintiffs too want to use an approximation — albeit a more generous one — for reimbursement of their vehicle costs.”^[20] Notably, the IRS “rate is a nationwide average, which tends to overpay drives in states where gas taxes are relatively low (like Ohio) and underpay drivers where gas taxes are high (like California).”^[21] Among other variables, the IRS rate overestimates depreciation costs for older vehicles.^[22] Indeed, “the IRS rate does not even purport to measure the vehicle costs of any individual employee.”^[23] The FLSA, though, “mandates that ‘each’ employee be paid at least the specified minimum wage. By its terms, that is an individual entitlement, not a generalized collective one.”^[24]

Like the employers, the drivers asked the 6th Circuit to defer to an agency resource. Specifically, the DOL Field Operations Handbook (FOH) states that “the IRS rate ‘may be used (in lieu of actual costs and associated recordkeeping) for FLSA purposes.”^[25] The FOH, however, “itself expressly disclaims any interpretive purpose.”^[26] In any event, the court ruled that the applicable regulation is “crystal clear” in requiring employers to reimburse employees for “the cost” of providing tools for work.^[27] “What is difficult ... is calculating those expenses for a particular driver. But that is not because of any ambiguity in the regulation.”^[28]

D. The Path Forward

Having rejected both parties’ positions, the 6th Circuit acknowledged that “the facts of this case present a dilemma.”^[29] The “costs are undisputedly hard to calculate. Meanwhile, as in most cases, the plaintiff in FLSA cases bears the burden of proof. That combination of circumstances might allow employers to use lowball estimates of drivers’ costs and then leave it to them to prove those estimates wrong.”^[30] Ultimately, the 6th Circuit remanded the case to the district courts, while suggesting that a burden-shifting approach may (or may not) work.

For example, the employee might present prima facie proof that a reimbursement was inadequate; the employer might then bear the burden of showing that the reimbursement bore a demonstrable relationship to the employee’s actual costs, and then the employee would bear the burden of proving the employer’s reasoning wrong. Or perhaps such an arrangement might not be appropriate. In any event the parties and the district courts might want to consider these or other ideas on remand.^[31]

II. Choices for Employers

The 6th Circuit’s ruling in *Parker* leaves uncertainty not just for lower courts but also for employers. Tennessee employers could reduce litigation risk by reimbursing drivers based on the IRS rate, but that rate will exceed their actual costs, which could create a business disadvantage. Alternatively, an employer could use a regional model, which would save labor costs but increase litigation risk. Notably, lawsuits have even challenged regional rates calculated by Motus, the same company the IRS uses to compute the national rate. Ironically, the employee’s victory in persuading the 6th Circuit to focus on actual costs and an “individual entitlement” may undercut their class certification efforts. Finally, as additional protection, employers may consider requiring employees to sign arbitration agreements with class/collective action bars.

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[1] *Id.* at 1102.

[2] *Id.* (quoting 29 U.S.C. § 206(a)(1)) and 29 C.F.R. § 531.35).

[3] *Id.*

[4] *Id.*

[5] *Id.* at 1012-13 (citing 29 C.F.R. § 531.50).

[6] *Id.* at 1013.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 1014 (citing 29 C.F.R. § 778.217).

[11] *Id.*

[12] *Id.* (quoting 29 U.S.C. § 778.217(b)(2)).

[13] *Id.*

[14] *Id.* at 1015 (citing 29 U.S.C. § 778.217(b)(1)) (emphasis from court).

[15] *Id.* (emphasis in original). The court also rejected a similar argument the employers made based on the use of the term “reasonable payments” in a statutory section focusing on overtime pay. *Id.* (citing 29 U.S.C. § 207(e), (h)).

[16] *Id.* at 1016 (citing FLSA2020-12 and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

[17] *Id.*

[18] *Id.*

[19] *Id.* (citing 29 U.S.C. § 206(a)(1)(C)).

[20] *Id.*

[21] *Id.*

[22] *Id.* at 1016-17.

[23] *Id.* at 1017.

[24] *Id.* (citing 29 U.S.C. § 206(a)(1)(C)).

[25] *Id.* (quoting FOH, § 30c15).

[26] *Id.*

[27] *Id.* (citing 29 C.F.R. § 531.35).

[28] *Id.* (emphasis in original).

[29] *Id.* at 1018.

[30] *Id.*

[31] *Id.* at 1019 (citing, c.f., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971)).