

19-1647

Thomas v. Bed, Bath & Beyond

1 **UNITED STATES COURT OF APPEALS**

2
3 **FOR THE SECOND CIRCUIT**

4
5 August Term 2019

6
7 (Submitted: April 14, 2020

Decided: June 15, 2020)

8
9 Docket No. 19-1647-cv

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11
12 DANYELL THOMAS, INDIVIDUALLY AND ON BEHALF OF ALL OTHER
13 EMPLOYEES SIMILARLY SITUATED, RASHAUN F. FRAZER, INDIVIDUALLY
14 AND ON BEHALF OF ALL OTHER EMPLOYEES SIMILARLY SITUATED, ANDRAE
15 WHALEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHER EMPLOYEES
16 SIMILARLY SITUATED, CHERYL A. STRYCHARZ, INDIVIDUALLY AND ON
17 BEHALF OF ALL OTHER EMPLOYEES SIMILARLY SITUATED, DANIELLE
18 BROWN, INDIVIDUALLY AND ON BEHALF OF ALL OTHER EMPLOYEES
19 SIMILARLY SITUATED,

20
21 *Plaintiffs - Appellants,*

22
23 HECTOR CARABALLO, CUTHBERT BAPTISTE, ELIZABETH PADILLA, KARLA
24 REYNOSA, BYRAN LAFOREST, ROBERT GUY DESIR, RADICA KUTWARU,
25 ANDREW CERTOMA, VILLACRES BYRON, JOHN CUTAJAR, ALEXIS CARREE,
26 ANTHONY ROLLOCK, JOSE ALBERTO CASSIA, LATIA DIAZ, LEROY CLARKE,
27 TOMIKA M. BOYD, LOUISA PERRY, MARIA C. MAHAN, ELENI MIGLIS,

28
29 *Plaintiffs,*

30
31 v.

32
33 BED BATH & BEYOND INC.,

34
35 *Defendant - Appellee.*
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1 Before: CALABRESI, PARKER, and LIVINGSTON, *Circuit Judges*.

2

3 Appellants are employees of Appellee Bed Bath & Beyond (BBB). Prior
 4 to March 2015, BBB calculated appellants' overtime compensation using the
 5 fluctuating workweek (FWW) method. Appellants contend that BBB was
 6 precluded from using the FWW method and that BBB therefore owes
 7 appellants compensation for unpaid overtime. We hold that appellants failed
 8 to demonstrate a genuine dispute of material fact regarding whether their
 9 wage payments were inconsistent with the FWW method. We therefore
 10 AFFIRM the district court's order granting BBB's motion for summary
 11 judgment and denying appellants' motion for summary judgment.

12

13

14 JAMES E. MURPHY, Virginia & Ambinder, LLP, New York, NY, *for*
 15 *Plaintiffs-Appellants*.

16 JONATHAN L. SULDS, Greenberg Traurig, LLP, New York, NY
 17 (Justin F. Keith, Kelly M. Pesce, Greenberg Traurig, LLP, Boston,
 18 MA, *on the brief*), *for Defendant-Appellee*.

19

20

21 CALABRESI, *Circuit Judge*:

22 This dispute examines the limits of employers' ability to calculate
 23 overtime compensation using the fluctuating workweek (FWW)
 24 method. Section 207 of the Fair Labor Standards Act caps non-exempt
 25 employees' non-overtime hours and requires employers to pay as
 26 overtime compensation "a rate not less than one and one-half times the
 27 [employee's] regular rate." 29 U.S.C. § 207. In a pair of decisions handed
 28 down in 1942, the Supreme Court recognized what has come to be

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1 known as the FWW method. This formula for calculating overtime
2 compensation—described in more detail below—may sometimes result
3 in decreasing the size of the “regular rate” which, under § 207, forms the
4 basis for determining required overtime pay. Employers seeking to use
5 the FWW method for establishing overtime pay must, however, comply
6 with certain requirements, including the payment of a guaranteed
7 weekly wage.

8 Appellants in this case allege that their employer was precluded
9 from using the FWW method and consequently that the employer
10 underpaid appellants for overtime work. Specifically, appellants assert
11 three violations of the FWW method: (i) that they did not receive fixed
12 and guaranteed weekly wages, (ii) that their schedules did not fluctuate
13 above and below the FLSA non-overtime limit of 40 hours per week, and
14 (iii) that employers using the FWW method may not permit employees
15 who work on holidays or previously scheduled days off to shift their
16 paid time off to later dates. We hold that appellants failed to
17 demonstrate a genuine dispute of material fact regarding whether they
18 received fixed and guaranteed weekly wages. We also hold that the
19 FWW method does not require employees’ hours to fluctuate above and

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1 below 40 hours per week, and that BBB's practice of permitting
2 employees to take days of paid time off on later dates after working on
3 holidays or previously scheduled days off is consistent with the FWW
4 method. We therefore **AFFIRM** the district court's order granting BBB's
5 motion for summary judgment and denying appellants' motion for
6 summary judgment.

7 **I. Factual and Legal Background**

8 **A.**

9 Appellants are Department Managers (DMs) currently or
10 formerly employed by appellee Bed Bath & Beyond (BBB), a home-
11 goods retailer. Until March 2015, BBB calculated appellants' overtime
12 compensation using the fluctuating workweek (FWW) method. After
13 March 2015, BBB switched to paying DMs overtime based on 150% of a
14 non-FWW hourly rate.

15 The FWW method operates as follows: for non-exempt employees
16 paid a fixed weekly salary,

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1 (a) calculate the hourly “regular rate” for a given week by
2 dividing a non-exempt employee’s fixed weekly salary by the number
3 of hours the employee actually worked during that week;

4 (b) divide the hourly “regular rate” for a given week in half; and

5 (c) pay non-exempt employees the fixed weekly rate, plus the
6 hourly half-rate for each overtime hour. *Overnight Motor Transp. Co. v.*
7 *Missel*, 316 U.S. 572, 580 (1942), *superseded by statute on other grounds as*
8 *stated in Trans World Airlines, Inc. v. Thurson*, 469 U.S. 111, 128 n.22 (1985).

9 Each time BBB hired or promoted an appellant to the DM position,
10 BBB provided that individual with documents explaining BBB’s method
11 for calculating overtime compensation. These documents included a
12 Department Manager Acknowledgment form which stated:

13 At the time I was hired, I was told what my anticipated weekly
14 compensation will be and how it will be calculated.

15
16 I understand that my weekly compensation consists of two
17 components: (1) a base weekly salary; and (2) an additional
18 amount for all hours above 40 that I work during a week.

19
20 I understand that my base weekly salary is compensation for all
21 hours I work in a week. I will get paid this base salary for each
22 week I work, whether or not I work 40 hours in that week, subject
23 to the Company’s sick day and leave policies.

24

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1 I further understand that I will be scheduled for no less than 47
2 hours per week, but that my actual hours worked will fluctuate
3 depending on the needs of my store.

4

5 *Thomas v. Bed Bath & Beyond, Inc.*, 309 F. Supp. 3d 121, 126 (S.D.N.Y.
6 2018). Similar documents that were provided to appellants at the time
7 they were hired and on later dates also described this payment
8 arrangement. *Id.*

9 BBB produced documents covering over 1,500 weeks during
10 which appellants worked for BBB prior to March 2015. These documents
11 reflect that “in almost every week at issue, the plaintiff DMs in fact either
12 worked 40 or more hours, or, when annual or sick leave time taken that
13 week was added to their actual hours worked, were credited with
14 having worked 40 or more hours.” *Id.* at 127. During six weeks, however,
15 appellants performed no work and received no pay. During six other
16 weeks, appellants’ pay stubs reflected some but fewer than 40 hours of
17 work or credited paid time off.¹ These latter instances are central to this

¹ “Credited paid time off” refers to time away from work that an employer expressly permits and agrees to compensate in the same manner as it would time spent working. Employers use systems of credited paid time off to track and manage employees’ paid leave. For example, an employer might stipulate that employees receive 150 hours of paid time off per year and credit 3 such hours for time spent at a

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1 case, for they are also the only six instances in which appellants did not
2 contemporaneously receive full weekly salaries (apart from the six
3 weeks with no work and no pay).

4 On occasion, BBB asked DMs to work on holidays or previously
5 scheduled days off. When this happened, BBB would permit DMs to
6 take paid time off on later dates.

7 **B.**

8 On October 18, 2016, appellants filed a complaint on behalf of
9 DMs and Assistant Managers (AMs) employed by BBB in New York,
10 New Jersey, and Connecticut. Appellants filed their second amended
11 complaint, the operative complaint in this case, on June 28, 2017.

12 Appellants' second amended complaint seeks overtime wages
13 pursuant to the FLSA, 29 U.S.C. §§ 207, 216(b); New York Labor Law §
14 663; and 12 New York Codes, Rules, and Regulations §§ 146-1.4, 1.6.

doctor's appointment, without reducing that employee's pay. The FWW method does not preclude employers from managing paid leave in this way. The DOL has opined, however, that employers using the FWW method may not make deductions from employees' pay for time spent away from work, even "where there is no paid leave to substitute for employee absences." Opinion Letter, Dep't of Labor, 1999 WL 1002399, at *2 (May 10, 1999).

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1 After the conclusion of discovery, the parties cross-moved in October
2 and November of 2017 for summary judgment on the issue of liability.

3 On February 21, 2018, the district court (Engelmayer, J.) granted
4 BBB's motion for summary judgment and denied appellants' motion for
5 summary judgment, both as to the DMs. *Thomas*, 309 F. Supp. 3d at 139.
6 The AMs' claims were subsequently settled. On May 6, 2019, the district
7 court entered final judgment, and appellants (DMs) timely filed a notice
8 of appeal on June 3, 2019.

9 C.

10 Section 207 of the Fair Labor Standards Act (FLSA) limits covered
11 employees' weekly non-overtime hours (currently to 40) and requires
12 employers to pay as overtime compensation "a rate not less than one
13 and one-half times the [employee's] regular rate." 29 U.S.C. § 207. The
14 Supreme Court has observed that, "[b]y this requirement, although
15 overtime was not flatly prohibited, financial pressure was applied to
16 spread employment to avoid the extra wage and workers were assured
17 additional pay to compensate them for the burden of a workweek
18 beyond the hours fixed in the [FLSA]." *Missel*, 316 U.S. at 577–78.

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1 *Id.* at 574. His timesheets “show[ed] an average workweek of 65 hours,
2 with a maximum of 80” and reflected “wide fluctuations in the time
3 required to complete his duties.” *Id.* Additionally, the district court in
4 *Missel* observed that the employee “was paid his weekly salary
5 regardless of absent time.” *Missel v. Overnight Motor Transp. Co.*, 40 F.
6 Supp. 174, 176 (D. Md. 1941).

7 The Supreme Court held that the employee’s hourly “regular
8 rate” for the purposes of § 207 was the quotient of his fixed weekly salary
9 divided by the number of hours actually worked in a given week. *Missel*,
10 316 U.S. at 580. This meant that the employee’s weekly wage constituted
11 the employee’s straight time pay for *all* hours worked in a given week—
12 whether they were non-overtime or overtime hours. *See id.* This method
13 of calculating the employee’s “regular rate” resulted in an overtime
14 premium (to be paid for each overtime hour) of 50% of the “regular
15 rate.” *See id.* In the parlance of FLSA litigation, the *actual* weekly wage
16 supplied the “time” in “time-and-a-half” for all hours worked.

17 The Court’s opinion in *Missel* thus recognized the following
18 formula for determining the employee’s proper § 207 compensation.

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1 First, calculate the hourly “regular rate” for a given week by dividing
2 the fixed weekly wage by the total number of hours the employee
3 actually worked during that week. Second, divide this hourly “regular
4 rate” for a given week in half. Third, multiply the hourly half-rate by the
5 number of overtime hours and add that total to the employee’s fixed
6 weekly wage. *See id.*

7 Where the number of hours an employee works in a week varies,
8 that employee’s “regular rate” will fluctuate week to week, and weeks
9 with more hours will yield decreasing “regular rates.” The *Missel* Court
10 reasoned that this result “is not an argument . . . against this method of
11 determining the regular rate” because “[a]part from the [FLSA] if there
12 is a fixed weekly wage regardless of the length of the workweek, the
13 longer the hours the less are the earnings per hour.” *Id.*

14 On the same date that the Supreme Court decided *Missel*, the
15 Court also issued an opinion in *Walling v. A. H. Belo Corp.* (“*Belo*”), which
16 like *Missel* involved the application of § 207 to a weekly wage. 316 U.S.
17 at 630–35. The employment agreement in *Belo* introduced an additional
18 wrinkle. That agreement precluded the employee from receiving any

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1 compensation beyond the fixed weekly rate until the employee worked
2 over 54 ½ hours in a week (10 ½ hours over the then-prevailing FLSA
3 limit of 44 hours). *Id.* at 628–29.

4 The agreement accomplished this result by setting the employee’s
5 “basic rate of pay” at \$0.67 per hour for non-overtime hours and setting
6 the rate for overtime hours at “not less than one and one-half time such
7 basic rate,” while also guaranteeing that the plaintiff “shall receive
8 weekly, for regular time and for such overtime as the necessities of the
9 business may demand, a sum not less than . . . \$40.” *Id.* at 628. The Court
10 interpreted this provision as establishing—and requiring payment of—
11 a fluctuating overtime rate of at least 150% of the “basic rate” for hours
12 worked between 44 and 54 ½ hours. *Id.* at 631–32. For example, “if an
13 employee works 50 hours in a given week, . . . his \$40 wage consists of
14 \$29.48 for the first 44 hour[s] (44 [times] \$.67) plus \$10.52 for the
15 remaining six hours.” *Id.* at 632.

16 The Court acknowledged that “when the employee works less
17 than 54 ½ hours during the week his pay is determined by the \$40
18 guaranty” and that the “basic rate” and fluctuating overtime rate were

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1 in a sense “artificial[.]” *Id.* at 632–33. However, the Court reasoned that
2 “nothing in the [FLSA] forbids such fluctuation” and that Congress had
3 not “provide[d] a rigid definition of ‘regular rate.’” *Id.* at 632–34.

4 At the close of its opinion, the Court emphasized the security that
5 weekly guarantees offer. As the Court explained,

6 [w]here the question is as close as this one, it is well to follow the
7 Congressional lead and to afford the fullest possible scope to
8 agreements among the individuals who are actually affected. This
9 policy is based upon a common sense recognition of the special
10 problems confronting employer and employee in businesses
11 where the work hours fluctuate from week to week and from day
12 to day. Many such employees value the security of a regular
13 weekly income. They want to operate on a family budget, to make
14 commitments for payments on homes and automobiles and
15 insurance.

16
17 *Id.* at 635. In other words, according to the Court, the security of having
18 a \$40 weekly wage offset any diminution in overtime pay that what
19 would become known as the FWW method might bring about.

20 Significantly, in the aftermath of *Missel* and *Belo*, the Supreme
21 Court decided a series of cases involving the application of § 207 to

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1 payment structures that did not include weekly guarantees.² A common
 2 thread linking these cases is the Court’s effort to cabin the flexibility that
 3 *Belo* promised employers to situations in which a fixed weekly wage was
 4 in fact present. *See, e.g., Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37,
 5 41–42 (1944).

6 These decisions culminated in *Bay Ridge Operating Co. v. Aaron*, in
 7 which the Court expressly tied *Belo* to the presence of a weekly
 8 guarantee. 334 U.S. 446, 462 (1948). The Court in *Bay Ridge* explained that
 9 where “guaranteed weekly wages were involved, we have reaffirmed
 10 [*Belo*] as a narrow precedent principally because of public reliance upon
 11 a congressional acceptance of the rule there announced.” *Id.*

12 **E.**

13 In 1968, the Department of Labor (DOL) issued an interpretive
 14 rule, 29 C.F.R. § 778.114, elaborating on the method for calculating
 15 overtime pay introduced in *Missel* and *Belo*. 33 Fed. Reg. 986, 990–91 (Jan.

² *See Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37 (1944); *United States v. Rosenwasser*, 323 U.S. 360 (1945); *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945); *Walling v. Harnischfeger Corp.*, 325 U.S. 427 (1945); *Walling v. Halliburton Oil Well Cementing Co.*, 331 U.S. 17 (1947); *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199 (1947).

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1 26, 1968). The rule labeled this approach “the ‘fluctuating workweek’
2 method of overtime payment.” *Id.* at 991.³

3 Subsection (a) explains how to apply the fluctuating workweek
4 (FWW) method and why it is an application of, as opposed to an
5 exception to, § 207:

6 An employee employed on a salary basis may have hours of work
7 which fluctuate from week to week and the salary may be paid
8 him pursuant to an understanding with his employer that he will
9 receive such fixed amount as straight time pay for whatever hours
10 he is called upon to work in a workweek, whether few or many.
11 Where there is a clear mutual understanding of the parties that
12 the fixed salary is compensation (apart from overtime premiums)
13 for the hours worked each workweek, whatever their number,
14 rather than for working 40 hours or some other fixed weekly work
15 period, such a salary arrangement is permitted by the [FLSA] if
16 the amount of the salary is sufficient to provide compensation to
17 the employee at a rate not less than the applicable minimum wage
18 rate for every hour worked in those workweeks in which the
19 number of hours he works is greatest, and if he receives extra
20 compensation, in addition to such salary, for all overtime hours
21 worked at a rate not less than one-half his regular rate of pay.
22 Since the salary in such a situation is intended to compensate the
23 employee at straight time rates for whatever hours are worked in
24 the workweek, the regular rate of the employee will vary from
25 week to week and is determined by dividing the number of hours
26 worked in the workweek into the amount of the salary to obtain

³ The Department of Labor revised 29 C.F.R. § 778.114 in 2011, but its text remained virtually the same as it was in 1968. *Compare* 29 C.F.R. § 778.114 (2011), *with* 33 Fed. Reg. at 990–91. On June 8, 2020, following notice and comment, DOL issued a revised version of the regulation, with an effective date of August 7, 2020. 85 Fed. Reg. 34,970 (June 8, 2020).

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1 the applicable hourly rate for the week. Payment for overtime
2 hours at one-half such rate in addition to the salary satisfies the
3 overtime pay requirement because such hours have already been
4 compensated at the straight time regular rate, under the salary
5 arrangement.

6
7 29 C.F.R. § 778.114(a).

8 Subsection (b) applies the FWW method to a hypothetical
9 employee who, over the course of four weeks, “works 40, 37.5, 50, and
10 48 hours.” *Id.* § 778.114(b). The hypothetical employee receives a
11 guaranteed weekly rate of \$600, exclusive of overtime premiums and
12 regardless of time actually worked. *Id.* His total compensation for the
13 four weeks comes out to \$600, \$600, \$660, and \$650, respectively. *Id.*

14 Subsection (c), reiterating much of the information contained in
15 subsection (a), emphasizes the prerequisites for using FWW:

16 The “fluctuating workweek” method of overtime payment may
17 not be used unless the salary is sufficiently large to assure that no
18 workweek will be worked in which the employee’s average
19 hourly earnings from the salary fall below the minimum hourly
20 wage rate applicable under the [FLSA], and unless the employee
21 clearly understands that the salary covers whatever hours the job
22 may demand in a particular workweek and the employer pays the
23 salary even though the workweek is one in which a full schedule
24 of hours is not worked. Typically, such salaries are paid to
25 employees who do not customarily work a regular schedule of
26 hours and are in amounts agreed on by the parties as adequate
27 straight-time compensation for long workweeks as well as short
28 ones, under the circumstances of the employment as a whole.

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1 Where all the legal prerequisites for use of the “fluctuating
2 workweek” method of overtime payment are present, the [FLSA],
3 in requiring that “not less than” the prescribed premium of 50
4 percent for overtime hours worked be paid, does not prohibit
5 paying more. On the other hand, where all the facts indicate that
6 an employee is being paid for his overtime hours at a rate no
7 greater than that which he receives for nonovertime hours,
8 compliance with the [FLSA] cannot be rested on any application
9 of the fluctuating workweek overtime formula.

10
11 *Id.* § 778.114(c).

12 The DOL has also published opinion letters considering the
13 implications of FWW for time-off policies. Two opinion letters from May
14 1999 are representative. In the first, the DOL determined that
15 “deductions may be made from vacation or sick leave banks because of
16 absences for personal reasons or illness, as long as no deductions are
17 made from an employee’s salary,” even “where there is no paid leave to
18 substitute for employee absences.” Opinion Letter, Dep’t of Labor, 1999
19 WL 1002399, at *2 (May 10, 1999). The second May 1999 letter allows that
20 “disciplinary deductions, which do not cut into the required minimum
21 wage or overtime compensation, may be made for willful absences or
22 tardiness or for a situation such as an employee being sent home from
23 work because of drunkenness.” Opinion Letter, Dep’t of Labor, 1999 WL
24 1002415, at *2 (May 28, 1999); *see also* Opinion Letter, Dep’t of Labor, 2006

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1 WL 1488849, at *1 (May 12, 2006) (noting that, except for disciplinary
2 actions, “an employer utilizing the fluctuating workweek method of
3 payment may not make deductions from an employee’s salary for
4 absences occasioned by the employee”).

5 * * *

6 Congress, however, has not codified the FWW method in the
7 FLSA. And our Court has not previously addressed the FWW approach
8 in a published opinion.

9 **II. Application**

10 **A.**

11 Appellants allege that Bed Bath & Beyond (BBB) did not pay them
12 truly fixed weekly wages. In support of this allegation, appellants
13 identify six instances in which an appellant’s hours worked and credited
14 paid time off totaled fewer than 40 hours (the FLSA’s applicable limit),
15 and in which that appellant received an amount less than that
16 appellant’s supposedly fixed weekly wage.⁴

⁴ As explained earlier, “credited paid time off” refers to time away from work that an employer agrees to compensate in the same manner as it would time spent working.

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1 Out of the over 1,500 weeks’ worth of pay records submitted to
2 the district court, these are also the only workweeks—excluding weeks
3 in which no work was performed—in which appellants’ hours worked
4 and credited paid time off totaled fewer than 40 hours. In a nutshell,
5 therefore, appellants argue that they were not in fact recipients of
6 weekly wage guarantees, because the only times their hours worked
7 dropped below the FLSA non-overtime limit, BBB paid them an amount
8 less than their supposedly fixed weekly wages.

9 The six weeks in question are as follows:

10 (a) Underpayment in three weeks which BBB claims resulted from
11 “payroll errors.” *Thomas*, 309 F. Supp. 3d at 133. BBB issued payments
12 rectifying two of these payroll errors prior to the date on which
13 appellants filed their complaint. BBB rectified the third payroll error,
14 which amounted to \$50, on January 5, 2018.

15 (b) The fourth underpayment occurred in a week when an
16 appellant received an amount less than that appellant’s weekly rate
17 because that appellant’s last day of employment with BBB fell in the
18 middle of a workweek. *Id.*

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1 (c) The fifth underpayment involved BBB's payment to Appellant
2 Reynosa for only 28.75 hours. *Id.* BBB and appellants agreed that this
3 reduction in pay resulted from unpaid vacation that Appellant Reynosa
4 negotiated with BBB at the time she was hired. *Id.*

5 (d) The sixth and final underpayment occurred when BBB
6 reduced Appellant Frazer's pay by one day on account of leave taken
7 pursuant to the Family and Medical Leave Act (FMLA). *Id.* Appellant
8 Frazer had been absent from work on FMLA leave throughout the entire
9 previous week, and his absence continued through the Monday of the
10 week in question. *Id.*

11 The Supreme Court decisions permitting the FWW method and
12 the DOL's regulations thereafter make the existence of a fixed weekly
13 wage guarantee for straight time pay a core prerequisite for the FWW
14 method. Courts must therefore take seriously allegations that weekly
15 rates were not in fact guaranteed. Both *Missel* and *Belo* involved weekly
16 guarantees, and *Belo* included an extended discussion of the value of
17 such guarantees. *Missel*, 316 U.S. at 580; *Belo*, 316 U.S. at 631–35. And the
18 Supreme Court's later decisions applying § 207 to employment

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1 agreements lacking such guarantees further highlight the role that
 2 weekly guarantees played in *Missel* and *Belo*. E.g., *Bay Ridge Operating*
 3 *Co.*, 334 U.S. at 462. Moreover, 29 C.F.R. § 778.114 expressly requires a
 4 “clear[] understand[ing] that the salary covers whatever hours the job
 5 may demand in a particular workweek” and that “the employer pays
 6 the salary even though the workweek is one in which a full schedule of
 7 hours is not worked.”⁵ 29 C.F.R. § 778.114(c).

8 On a more fundamental level, treating a guaranteed weekly wage
 9 as the central prerequisite for use of the FWW method follows from the
 10 method’s status as an *application of* and not an exception to § 207. It is
 11 only because a guaranteed weekly wage serves as straight time pay for
 12 all hours worked in a week regardless of the number of hours actually
 13 worked that the Supreme Court permitted use of such a wage to
 14 calculate an employee’s FLSA “regular rate” even when an employee’s
 15 hours exceed the non-overtime limit. In contrast, a purported weekly

⁵ Courts have generally found the version of 29 C.F.R. § 778.114 currently in effect to be a persuasive interpretation of the Supreme Court’s FWW decisions. *See, e.g., O’Brien v. Town of Agawam*, 350 F.3d 279, 287 n.15 (1st Cir. 2003). The weight to be given to 29 C.F.R. § 778.114 has not been squarely presented in this case.

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1 rate that decreases when hours drop below a certain level cannot be a
2 fixed weekly wage for the purposes of § 207. Rather, it is an hourly rate
3 paid on a weekly basis and thus would not justify the FWW method,
4 which leads to decreasing “regular rates” as hours actually worked
5 increase above the non-overtime limit.

6 While courts must take seriously allegations that employees have
7 not received truly fixed weekly wages, such skepticism should be just
8 that and nothing more, and we are satisfied that the district court
9 proceeded appropriately in this case. BBB’s correction, *prior to the*
10 *commencement of litigation*, of the payroll errors responsible for two of the
11 disputed weeks indicates that the three weeks involving payroll errors
12 are not cause for alarm. Although BBB did not resolve the third week
13 until after the district court issued its order, the amount (\$50) was small
14 relative to the appellants’ weekly wages. Similarly, the week in which
15 an appellant’s last day of employment fell in the middle of the week is
16 of no concern. BBB had no obligation to pay appellants their wages for
17 days after their employment ended.

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1 The remaining two instances of alleged nonpayment of a fixed
2 weekly wage require more attention. At first glance, BBB’s agreement at
3 the time of Appellant Reynosa’s hiring to permit Appellant Reynosa to
4 take unpaid vacation during negotiated periods of time may seem to
5 flout the FWW method. Given BBB’s active negotiation of this
6 arrangement, it might even suggest the absence of an understanding
7 that appellants’ weekly wages were guaranteed. And such an
8 interpretation might perhaps be justified in a different context. But here,
9 where BBB provided multiple written notices explaining the FWW
10 method and where appellants do not identify any other instance of
11 similar arrangements for unpaid vacation, the record cannot support an
12 inference of actual absence of a fixed weekly wage.

13 Appellant Frazer’s unpaid day while on FMLA leave is puzzling.
14 The DOL has promulgated a regulation permitting employers using the
15 FWW method to pay employees temporarily according to a different
16 method when employees take time off from work pursuant to the
17 FMLA. 29 C.F.R. § 825.206(b). Specifically, “the employer, during the
18 period in which intermittent or reduced schedule FMLA leave is
19 scheduled to be taken, may compensate an employee on an hourly basis

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1 and pay only for the hours the employee works.” *Id.* In such
2 circumstances, an employee’s hourly rate is “determined by dividing
3 the employee’s weekly salary by the employee’s normal or average
4 schedule of hours worked during weeks in which FMLA leave is not
5 being taken.” *Id.* However, “[i]f an employer chooses to follow this
6 exception from the fluctuating workweek method of payment, the
7 employer must do so uniformly, with respect to all employees paid on a
8 fluctuating workweek basis for whom FMLA leave is taken on an
9 intermittent or reduced leave schedule basis.” *Id.*

10 The district court did not assess BBB’s compliance with 29 C.F.R.
11 § 825.206(b), instead assuming for the purposes of its decision that this
12 one instance of alleged underpayment was inconsistent with the FWW
13 method. *Thomas*, 309 F. Supp. 3d at 136. It is not clear from the record
14 whether BBB in fact met all the conditions of 29 C.F.R. § 825.206(b).

15 As with Appellant Reynosa’s negotiated unpaid vacation,
16 however, we think the totality of facts in the instant case precludes an
17 inference from this single day of possible underpayment that BBB did
18 not generally pay appellants guaranteed weekly wages. This is

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1 especially true given that 29 C.F.R. § 825.206(b) expressly permits
2 temporary departures from the FWW method when employees take
3 leave pursuant to the FMLA.

4 We must, however, also view the six alleged instances of
5 nonpayment of a fixed weekly wage together in the total context of the
6 over 1,500 weeks' worth of pay records submitted in the case before us.
7 That the six weeks in which appellants received less than their weekly
8 rates were—according to appellants—also the *only* weeks for which
9 appellants' actual hours worked and credited paid time off totaled fewer
10 than 40 hours is perhaps appellants' strongest argument. The essence of
11 a guaranteed weekly wage is an employee's receipt of that wage for
12 weeks with less than 40 hours of actual work. And BBB does not
13 expressly identify any weeks during which an appellant received a full
14 weekly rate where that appellant's actual hours worked and credited
15 paid time off totaled fewer than 40 hours.

16 Nevertheless, we agree with the district court that appellants fall
17 short of establishing a genuine dispute of material fact. With a different
18 record, the absence of weeks with fewer than 40 hours of actual work

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1 and credited paid time off in which full pay was given might well weigh
2 heavily in our analysis. *Cf. Yourman v. Giuliani*, 229 F.3d 124, 130 (2d Cir.
3 2000) (recognizing the relevance of many fact-intensive factors for
4 evaluating allegedly impermissible pay deductions from salaried
5 employees). Here, however, we view as salient that the two more
6 puzzling instances of alleged underpayment bear no connection to each
7 other or to the other four disputed weeks. And we also give weight to
8 BBB's prompt correction prior to the initiation of litigation of the alleged
9 payroll errors that led to underpayment. After the corrections, these do
10 constitute instances of full payment when less than 40 hours were
11 worked. Moreover, BBB's distribution of multiple clear documents
12 explaining the FWW method to appellants counters any possible
13 suggestion of hidden attempts to undercut a fixed weekly wage.

14 Given all these circumstances, we hold that appellants have failed
15 to establish a genuine dispute of material fact as to whether appellants'
16 weekly wages were truly fixed and guaranteed.

17

18

1 **B.**

2 Appellants also challenge the district court’s determination that
 3 the limited fluctuations in their weekly schedules did not preclude use
 4 of the FWW method. Appellants contend (a) that non-exempt
 5 employees’ weekly hours must both fall below and rise above the FLSA
 6 non-overtime limit of 40 hours with some frequency in order for
 7 employers to use the FWW method, and (b) that their weekly schedules
 8 did not fluctuate in this manner.⁶ The district court rejected this
 9 argument, concluding that appellants’ schedules need not fluctuate
 10 above and below 40 hours and that appellants’ schedules were not fixed.
 11 *Thomas*, 309 F. Supp. 3d at 137–38.

12 Appellants’ argument is unavailing. Nothing in § 207, *Missel, Belo*,
 13 or 29 C.F.R. § 778.114 compels fluctuation in weekly schedules above
 14 and below 40 hours. And, as explained earlier, it is instead the weekly

⁶ In their reply brief before this Court, appellants also argue that their schedules did not fluctuate at all. “[A]rguments not raised in an appellant’s opening brief, but only in [a] reply brief, are not properly before an appellate court” *McCarthy v. S.E.C.*, 406 F.3d 179, 186 (2d Cir. 2005). Accordingly, we decline to consider whether the fluctuating workweek method requires some minimum degree of fluctuation in schedules. We take no position on that issue, but we note that the latest revisions to 29 C.F.R. § 778.114 address the question. *See* 85 Fed. Reg. at 34,992.

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1 guarantee that is foundational to the FWW method. Neither *Missel* nor
2 *Belo* restricts the FWW method to situations where employees’ weekly
3 schedules fluctuate above and below the limit on non-overtime hours
4 set by the FLSA, and the formula that these decisions recognized
5 contains no internal principle for imposing such a limitation. In *Missel*,
6 the Supreme Court reasoned simply that because a fixed weekly wage
7 may be divided by the number of hours actually worked, “[n]o problem
8 is presented in assimilating the computation of overtime for employees
9 under contract for a fixed weekly wage for regular contract hours which
10 are the actual hours worked, to similar computations for employees on
11 hourly rates.” 316 U.S. at 580. In *Missel* and *Belo* the Court did apply this
12 formula to situations in which employees’ schedules were irregular, but
13 the formula’s logic in no way required hours to fluctuate above and
14 below the FLSA limit.

15 The facts of *Missel* itself, moreover, contradict the notion that
16 weeks with hours under the FLSA limit must balance weeks with hours
17 over the FLSA limit. In *Missel*, the employee’s timesheets “show[ed] an
18 average workweek of 65 hours, with a maximum of 80.” 316 U.S. at 574.
19 With an average workweek well above the then-prevailing non-

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1 overtime limit, it would have been impossible for the employee's weeks
2 with fewer hours than the limit to "make up" for the longer weeks. And
3 *Missel* expressly confronted the problem of decreasing marginal hourly
4 rates and dismissed that objection. *Id.* at 580 ("It is true that the longer
5 the hours the less the rate and the pay per hour. This is not an argument,
6 however, against this method of determining the regular rate of
7 employment for the week in question. Apart from the [FLSA] if there is
8 a fixed weekly wage regardless of the length of the workweek, the
9 longer the hours the less are the earnings per hour.").

10 Likewise, although 29 C.F.R. § 778.114 uses the label "fluctuating
11 workweek," the text of the regulation observes merely that, "[t]ypically,
12 such salaries are paid to employees who do not customarily work a
13 regular schedule of hours." 29 C.F.R. § 778.114(c) (emphasis added). This
14 permissive language stands in contrast to the regulation's clear
15 commands with respect to what *is* required if the FWW method is to be
16 used. The FWW method "may not be used unless the salary is
17 sufficiently large to assure that no workweek will be worked in which
18 the employee's average hourly earnings from the salary fall below the
19 minimum hourly wage." *Id.* And FWW cannot be used "unless the

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1 employee clearly understands that the salary covers whatever hours the
2 job may demand in a particular workweek and the employer pays the
3 salary even though the workweek is one in which a full schedule of
4 hours is not worked.” *Id.*

5 Appellants cite a few cases in which courts have suggested that
6 an employee’s schedule must fluctuate both above and below the FLSA
7 limit of 40 hours so that weeks with fewer hours and higher hourly
8 regular rates balance out weeks with longer hours and lower hourly
9 regular rates. Tellingly, all of these decisions also identify alternative
10 grounds for their holdings. For example, the Seventh Circuit once
11 remarked that a group of employees “d[id] not fit the [FWW] model
12 because [they] . . . *never* work[ed] fewer than [their scheduled hours]”
13 and there was consequently “no shortfall of time (and correspondingly
14 higher hourly rate) in one pay period that might make up for longer
15 work in another.” *Heder v. City of Two Rivers*, 295 F.3d 777, 780 (7th Cir.
16 2002). But that decision turned at least in part—if not entirely—on the
17 court’s conclusion that the employees’ pay *in fact* decreased in weeks of

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1 fewer than 40 hours. *Id.* Thus, the key guaranteed fixed weekly wage
 2 requirement for the use of the FWW method was not met.⁷

3 Accordingly, we reject appellants’ argument and hold that the
 4 FWW method does not require weekly schedules to fluctuate above and
 5 below the FLSA non-overtime limit of 40 hours per week. So long as
 6 employees receive as compensation for straight time pay a weekly rate
 7 that is truly fixed and guaranteed, and so long as employers and
 8 employees come to a clear mutual understanding regarding the FWW
 9 method, employers may calculate overtime using that method
 10 irrespective of whether the number of hours employees work each week
 11 fluctuates above and below the FLSA limit.⁸

⁷ The other cases—all from district courts—cited by appellants also provide alternate grounds for decision. *See Costello v. Home Depot USA, Inc.*, 944 F. Supp. 2d 199, 206-07 (D. Conn. 2013) (absence of a clear mutual understanding that the employer would use the FWW method); *Hasan v. GPM Invs., LLC*, 896 F. Supp. 2d 145, 150 (D. Conn. 2012) (same); *Hunter v. Sprint Corp.*, 453 F. Supp. 2d 44, 61 (D.D.C. 2006) (same); *Spataro v. Gov’t Emp’rs Ins. Co.*, No. 13-cv-5020, 2014 WL 3890222, at *3 (E.D.N.Y. Aug. 6, 2014) (failure to allege nonpayment of overtime premium for hours worked in excess of 40); *Blotzer v. L-3 Commc’ns. Corp.*, No. 11-cv-274, 2012 WL 6086931, at *10–11 (D. Ariz. Dec. 6, 2012) (holding that the FWW method is inapplicable in misclassification cases).

⁸ Although the latest revisions to 29 C.F.R. § 778.114 do not go into effect until August 2020, we note that our holding today is consistent with these revisions. *See* 85 Fed. Reg. at 34,975 (“The [DOL] is . . . clarifying that the regulation does not require that an employee’s hours must sometimes fluctuate below forty hours per week . . .”).

1 C.

2 Appellants also argue that BBB’s practice of permitting employees
3 to take days of paid time off on later dates after working on holidays or
4 previously scheduled days off is inconsistent with the FWW method.⁹
5 And some courts have held that hours-based bonuses or “shift
6 differentials” are inconsistent with the FWW method because such
7 amounts increase employees’ straight time pay, and 29 C.F.R. § 778.114
8 requires that employees receive “a fixed amount as straight time pay for
9 whatever hours [worked] . . . whether few or many.” *O’Brien*, 350 F.3d
10 at 288–90.

11 But even assuming *arguendo* that hours-based bonuses preclude
12 use of the FWW method, BBB’s time-off policy did not involve any such
13 bonuses. Under BBB’s policy, if an employee worked during a holiday
14 or on a previously scheduled day off, BBB would permit that employee

⁹ In their reply brief before this Court, appellants contend that BBB’s policy results in additional compensation because the New York Labor Law implies a private cause of action to recover the value of unused days of paid time off. We decline to consider this argument. *McCarthy*, 406 F.3d at 186.

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1 to take a paid day off on a later date of the employee's choosing. And,
2 as the district court held, this practice "does not lead to such an
3 employee's receipt of any *additional* compensation for hours worked."
4 *Thomas*, 309 F. Supp. 3d at 132. It therefore does not amount to payment
5 of hours-based bonuses.

6 Nothing in the FLSA, *Missel*, *Belo*, or 29 C.F.R. § 778.114 prohibits
7 BBB's practice, and the DOL's opinion letters applying § 778.114 suggest
8 that employers enjoy broad latitude in allocating days of paid time off,
9 so long as they do not dock employees' pay. Far from docking
10 employees' pay, BBB merely shuffled days of paid time off so as not to
11 penalize employees who worked on holidays or previously scheduled
12 days off.¹⁰

13 CONCLUSION

14 We hold that appellants failed to establish a genuine dispute of
15 material fact regarding whether they received guaranteed weekly

¹⁰ We note that this holding also is consistent with the recently announced revisions to 29 C.F.R. § 778.114, which "clarify that bonus payments, premium payments, and other additional pay are consistent with using the fluctuating workweek method of compensation" provided that such payments are "included in the calculation of the regular rate" as appropriate under the FLSA. *See* 85 Fed. Reg. at 34,974.

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1 wages, that the FWW method of calculating overtime compensation
2 does not require employees' schedules to fluctuate above and below the
3 FLSA non-overtime limit of 40 hours per week, and that BBB's policy of
4 permitting employees to take days of paid time off on later dates after
5 working on holidays or previously scheduled days off is consistent with
6 the FWW method. We therefore **AFFIRM** the district court's grant of
7 BBB's motion for summary judgment and its denial of appellants'
8 motion for summary judgment.