**KPMG LOSES A COUPLE OF MOTIONS IN AN OVERTIME CASE**

***Anthony H. Catanach Jr. and J. Edward Ketz***

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All of the large accounting firms are experiencing litigation dealing with the issue of overtime. One such case that commenced on January 19, 2011 is Pippins, Schindler, and Lambert v. KPMG, LLP. KPMG filed several motions in this case and recently the judge denied two of them. While early, it isn’t looking good for KPMG.

We earlier discussed these overtime cases in “[Consistency in Accounting and Legal Discourses: The Overtime Cases](http://blogs.smeal.psu.edu/grumpyoldaccountants/archives/336).” While we are sympathetic to the position of the Big Four, we noted that they might have a hard time meeting the exemptions in the Fair Labor Standards Act (FLSA), which normally requires payment of at least 150 percent of one’s salary when the employee works overtime.

The FLSA provides two exemptions that might apply in this case. The first exemption exists if the worker is an administrative employee. For this to occur, the employee’s primary duty must involve the management or general business operations of the firm. The second exemption, the learned professional exemption, accrues if the worker’s primary duty involves the performance of work that requires knowledge of an advanced type and acquired by specialized intellectual instruction.

Difficulty arises with both of these possible exemptions because they come face-to-face with Code of Professional Conduct [Rule 201](http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/et_200.aspx) and PCAOB [Standard No. 10](http://pcaobus.org/Standards/Auditing/Pages/Auditing_Standard_10.aspx). Rule 201 and Standard No. 10 require partners and managers of audit firms to supervise the accounting associates. They must inform them of the audit objectives and the audit procedures; additionally, the partners and managers have to monitor the work of the associates. Such oversight appears to negate any assertions for an administrative or professional exemption.

Be that as it may, we find interesting recent activity in the Pippins, Schindler, and Lambert v. KPMG case. The first motion concerned whether KPMG has to preserve computer hard drives of its former associates. The audit firm argued against this requirement primarily because of the expense, which it estimated to be at least $1.5 million. It claimed that the benefits did not justify the costs. KPMG suggested that it preserve only a random sample of 100 hard drives. Further, KPMG sought the court to order the plaintiffs to bear the costs of preserving the hard drives.

Judge Colleen McMahon denied all parts of the motion. She noted that plaintiffs desire access to the hard drives because they might contain information pertaining to the job duties performed by the audit associates and to the hours they worked. In addition, as the court conditionally certified FLSA collective action, more employees or former employees may opt-in the collective lawsuit. Accordingly, as information on the hard drives is relevant to the case and because more individuals may join the collective action, Judge McMahon ordered preservation of all the hard drives.

The judge apparently was miffed at KPMG. She chastises the firm as “unreasonable.” Specifically she calls unreasonable

“(1)KPMG’s refusal to turn over so much as a single hard drive so its contents could be examined; and (2) its refusal to do what was necessary in order to engage in good faith negotiations over the scope of preservation …”

Thus, on February 3, 2012, Judge McMahon denied KPMG’s motion in its entirety.

In a different matter, KPMG supplied a redacted filing when it opposed plaintiffs’ motion for conditional certification. KPMG redacted various parts because it asserted confidentiality with respect to its “audit policies, practices and procedures.” In a June 29, 2011 order, the judge asked the two sides to recommend experts to testify to this point, but neither side proffered any independent expert. Then on February 7, 2012 Judge McMahon ordered KPMG to file an unredacted copy of all previously submitted documents that contained redactions. KPMG was supposed to do this by 5pm on February 8, but had not done so as of our writing; instead, it was asking for an extension.

Of course, we are still at an early stage in this case and thus do not know and cannot predict the outcome. Nonetheless, we find it interesting that the court has rejected KPMG’s motion not to preserve the hard drives. The judge’s argument about the relevance of the hard drives seems compelling to us.

The second motion on the confidentiality of audit procedures and methods is more interesting. We wonder whether these procedures and methods are sufficiently different from those employed by other accounting firms. If not, we think the confidentiality argument bogus. But, if they do possess some proprietary value, we wonder how KPMG could prove it unless they do in fact disclose the procedures and methods.

This is going to be an important case. We shall update the particulars as they occur.

*This essay reflects the opinion of the authors and not necessarily the opinions of The Pennsylvania State University, The American College, or Villanova University.*