UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-21276-CIV-HUCK/TURNOFF

[redacted],

Plaintiff,

v.

[Defendant A], a/k/a
[Defendant A] and [Defendant B]

Defendants.
_____/

DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO RULE 50(a)

Defendants, [Defendant A] and [Defendant B] ("Defendants"), through their undersigned attorneys, hereby move the Court pursuant to Federal Rule of Civil Procedure 50(a) for judgment as a matter of law, and state:

BACKGROUND

Plaintiff has filed this action pursuant to § 207 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*., for failure to pay overtime wages. The Court granted in part and denied in part the Defendants' Motion to Dismiss, which it had converted into a Motion for Summary Judgment. Because no reasonable jury could find for the Plaintiff as to four (4) key issues, Defendants now move the Court to enter judgment as a matter of law as to these four (4) issues: 1) that the Defendants' activities do not affect interstate commerce as the FLSA uses those terms; 2) that the fluctuating workweek method of calculating overtime wages applies in the instant case; 3) any failure to pay overtime on the Defendants' part was not willful, thus the two-

year statute of limitations applies to Plaintiff's claim; and 4) no reasonable jury could find that the Plaintiff worked overtime hours. Defendants will discuss these four issues in turn.

MEMORANDUM OF LAW

I. Legal standard for granting a Rule 50(a) Motion

Federal Rule of Civil Procedure 50(a) reads in full:

> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

Fed. R. Civ. P. 50(a). "[I]n ruling on a motion for judgment as a matter of law, the court is to inquire whether there is any 'legally sufficient evidentiary basis for a reasonable jury to find for [the opponent of the motion].'" *Weisgram v. Marley Co*., 528 U.S. 440, 453-54 (2000). A jury need not have returned a verdict before the trial court may grant a Rule 50(a) motion: "If the evidence that the plaintiff presented at trial is insufficient for the jury reasonably to return a verdict for the plaintiff, the defendant is entitled to judgment regardless of whether the jury did return a verdict." *Pickett v. Tyson Fresh Meats, Inc.***,** 420 F.3d 1272, 1278 n.6 (11th Cir. 2005). Where a lawsuit will not survive a motion for a directed verdict under the standards of Rule 50(a), waiting for a jury verdict is inappropriate. *Cox v. C.H. Masland & Sons, Inc.*, 607 F.2d 138, 145 (5th Cir. 1979).

II. No reasonable jury could find that the Defendants' activities "substantially affect interstate commerce" as that term is contemplated under the FLSA

Defendants' activities must have a substantial effect on interstate commerce to be subject to regulation under the FLSA, because no federal legislation enacted pursuant to the Commerce Clause power of Congress can properly regulate intrastate activity that has no substantial economic effect in interstate commerce. *United States v . Lopez,* 514 U.S. 549, 559-60 (1995). Moreover, under FLSA jurisprudence, "commerce" and "interstate commerce" are narrower terms of art than in other areas of Commerce Clause jurisprudence. As the United States Supreme Court has clearly held, "we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states [because] Congress did not exercise in this Act the full scope of the commerce power." *Walling v. Jacksonville Paper Co.,* 317 U.S. 564, 571 (1943).

In cases arising under the FLSA, there are two possible ways in which an employee may demonstrate that the employer is covered under the Act: 1) individual coverage, and 2) enterprise liability. The Court has already ruled that Defendants are not subject to enterprise liability. *Order on Defendants' Motion for Summary Judgment*. Individual coverage "remains limited to those employees directly engaged in interstate commerce or in the production of goods for interstate commerce." *Rivera v. Heights Landscaping, Inc*., 2004 WL 434214 *3 (N.D. Ill. 2004). For purposes of determining individual coverage, "mere use, physical touching, or consumption of goods" that have traveled in interstate commerce is not enough. *Joles v. Johnson County Youth Servs. Bureau, Inc.,* 885 F.Supp. 1169 (S.D.Ind.1995). Plaintiffs cannot establish individual coverage merely by showing that in the course of their work they used goods that originated out of state. *Rivera*, 2004 WL 434214 at *3. In the instant case, it makes no

difference whether the Plaintiff used transmission fluid or other auto parts that had previously traveled in interstate commerce, nor does it matter where the cars on which he worked were made. Such facts are only appropriate for determining *enterprise* liability for an "enterprise engaged in commerce" under the FLSA statutory definition in 29 U.S.C. § 203(s), an inquiry that would be out of place here because Court has already ruled that Defendants are not subject to enterprise liability. *Order on Defendants' Motion for Summary Judgment*. Thus,

III. No reasonable jury could find that the fluctuating workweek method of calculating overtime wages does not apply in this case

The Eleventh Circuit has held that the application of the "fluctuating workweek" calculation method is properly determined by a judge, not a jury. *Davis v. Friendly Express Inc.*, 2003 WL 21488682 at *2 (11th Cir. 2003) (holding that the district court had properly concluded, as a matter of law, that the fluctuating workweek standard applied to the calculation of the plaintiff's overtime compensation under 29 C.F.R. § 778.114).[1] In *Davis*, the Eleventh Circuit affirmed the district court's grant of summary judgment in favor of the defendant-employer on the issue of the applicability of the fluctuating workweek method of calculation. Moreover, the Department of Labor has promulgated Title 29 of the Code of Federal Regulations in order to clarify precisely how the provisions of the FLSA are to be implemented by the courts. 29 C.F.R. § 778.114 concerns the fluctuating workweek method of calculating overtime payments for employees who, like Plaintiff, receive a fixed salary each week regardless of the actual number of hours worked. 29 C.F.R. § 778.114(a) states in relevant part:

> such a salary arrangement is permitted by the Act if [1] the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in

[1] Other district courts have reached exactly the same conclusion. *Tumulty v. FedEx Ground Package System, Inc.*, 2005 WL 1979104 at *1 (W.D. Wash. 2005) (holding that "as a matter of law, the appropriate method of calculating any overtime compensation due is the 'fluctuating workweek' method outlined in 29 C.F.R. § 778.114.")

> which the number of hours he works is greatest, and [2] if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay.

29 C.F.R. § 778.114(a). These two requirements are easily met in this case. First, the amount of salary Plaintiff received from Defendants was "sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest." Plaintiff received a weekly salary of $500.00 for his work for [Defendant A]. Plaintiff has testified that he worked an average of 48 hours per week during the time he worked for Defendant [Defendant A]. Even taking this assertion as true, dividing $500.00 by 48 hours yields a pay rate of $10.41 per hour, well above both the federal and the Florida minimum wages. Plaintiff also claims that he sometimes worked 50 hours in a week. *Id*. Again, taking this assertion as true, Plaintiff received a pay rate of at least $10.00 per hour during those weeks. Thus, the regular rate paid to the Plaintiff in every week he worked for Defendants far exceeded the federally-mandated minimum wage, even "in those workweeks in which the number of hours worked is greatest." 29 C.F.R. § 778.114(a). Second, the language of the regulation makes clear that an employee who is paid a regular *weekly* salary, as opposed to an *hourly* wage, is to receive overtime compensation of only *one-half* the regular rate of pay for any hours worked over forty, *not* the one-and-one-half rate that hourly wage employees receive:

Because the Eleventh Circuit has ruled that the application of the fluctuating workweek method by a district court as a matter of law is appropriate, and because the regulations concerning the fluctuating workweek calculation method are so explicit, there is nothing for a jury to decide here. The Eleventh Circuit has held quite clearly that in FLSA cases, the "plaintiff carries the burden of proving all elements of a FLSA claim." *Davis v. Friendly Express Inc.*,

2003 WL 21488682 at *3 n.4 (11th Cir. 2003). While "the employer generally bears the burden of showing that the exemption applies… *the fluctuating workweek method is an alterative* [sic] *means of complying with the overtime provisions of FLSA; it is no exemption from those provisions*." *Id.* (emphasis added). Thus, the burden of showing why the Court should deviate from the regulations propounded by the Department of Labor concerning the fluctuating workweek calculation method falls squarely on Plaintiff, who has produced no evidence to carry that burden.

Further, there existed a clear mutual understanding between Plaintiff and the Defendant concerning the payment Plaintiff was to receive. The Eleventh Circuit has determined that, in a case where "the base amount was constant although the number of hours varied from week to week," the plaintiff-employee "received a regular lesson - in the form of [his] paychecks - about how the fluctuating workweek plan operates." *Davis v. Friendly Express Inc.*, 2003 WL 21488682 at *2 (11th Cir. 2003) (citing *Griffin v. Wake County,* 142 F.3d 712, 716-17 (4th Cir.1998)). This "regular lesson" constituted a "clear mutual understanding" for the Eleventh Circuit. *Id.* Plaintiff received an identical lesson here by accepting his weekly paycheck over the course of several years.

Plaintiff clearly understood that the straight $500.00 salary he received each week covered whatever hours he was required to work. Plaintiff has presented no evidence that he ever had any alternative understanding of how he was to be compensated for his work: there is only his testimony that he understood the $500.00 he received each week was meant to cover all the hours he worked. The "clear mutual understanding" requirement of 29 C.F.R. § 778.114 does not require that the "employer hold an employee's hand and specifically tell him or her precisely how the payroll system works." *Griffin v. Wake County,* 142 F.3d 712, 717 (4th

Cir.1998). Further, where the employer and the employee have clearly agreed that the employee will be compensated with a fixed weekly salary no matter how many hours in a given week the employee in fact worked, courts have found that this implied employment agreement satisfied the "clear mutual understanding" requirement of the case law and 29 C.F.R. § 778.114(a). *Dooley v. Liberty Mut. Ins. Co.*, 307 F.Supp.2d 234, 251 (D.Mass. 2004); *Mayhew v. Wells*, 125 F.3d 216, 219 (4th Cir. 1997); *Zoltek v. Safelite Glass Corp.*, 884 F.Supp. 283, 286 (N.D. Ill. 1995). By accepting a fixed weekly salary for fluctuating hours from the Defendants throughout the course of his employment, Plaintiff received the "regular lesson" he needed under the regulation and under Eleventh Circuit jurisprudence in order to have a "clear mutual understanding" of the fluctuating workweek method of overtime compensation.

IV. No reasonable jury could find that Defendants' failure to pay any overtime wages due to Plaintiff was willful

An action under the FLSA for unpaid overtime wages is barred unless commenced within two years of accrual, except that an action arising out of a willful violation may be brought up to three years after the cause of action accrued. 29 U.S.C. § 255(a). An employer's violation of the FLSA is "willful" for purposes of determining the limitations period if the employer either knew or acted with reckless disregard for whether its conduct was prohibited by the Act. *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 133 (1988). Willful behavior is conduct that is more than simply negligent or unreasonable. *Id*. Plaintiff has presented no evidence that Defendants either knew or acted with reckless disregard for whether their conduct was prohibited by the Act. In fact, [Defendant B] has presented uncontested evidence that he spoke with an accountant concerning overtime payments to employees and was informed that he was not in violation of any wage laws or regulations.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court enter judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a) as to the four (4) issues discussed above.