IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GERALD LAYDEN, BRIAN FRAIPONT, and LESLIE BROWN,	:	
Plaintiffs,	:	CIVIL ACTION
v.	:	NO. 01-2196
HSL BUILDERS, INC., TIMOTHY R. McCARTHY, JR., JOHN KISTLER, CARL ALEXANDER, III and JENNIFER CHECK,	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J. June 26, 2002

Plaintiffs bring this action pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. and the Pennsylvania Wage and Hour Act alleging that Defendants failed to pay them the required rate of pay for overtime hours worked during their employment with HSL Builders, Inc. ("HSL"). Presently before the Court is Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment. For the reasons stated below, Plaintiffs' motion is GRANTED and Defendants motion is DENIED.

I. BACKGROUND

Gerald Layden ("Layden"), Brian Fraipont ("Fraipont") and Leslie Brown ("Brown") (referred to herein collectively as "Plaintiffs") are former employees of HSL. HSL provides construction management services for clients doing residential or commercial construction projects. Layden and Fraipont worked as punch-out mechanics for HSL during 1998 and 1999. See Complaint at ¶¶ 18, 19. Brown worked as a carpenter for HSL during 1999 and 2000. See Complaint at ¶ 20. Plaintiffs worked overtime during their employment with HSL on a regular basis. Layden was paid a rate of $22.00 per hour for every hour worked, whether over or under 40 hours a week. Layden contends that he worked a total of 802 hours of time in excess of 40 hours per week during his employment at HSL. Fraipont and Brown were paid a rate of $19.00 per hour for hours worked in a given week up to 40, and time-and-a-half ($28.50) for hours worked over 40 and up to 56 hours in a given week. Any hours worked over 56 in a given week were compensated by receiving "banked" hours at the rate of one hour banked for each hour worked. These banked hours were available only for paid time off. Fraipont contends that he worked a total of 85 hours in excess of the 56 hours per week for which he was properly compensated. Brown contends that she worked a total of 53 hours in excess of the 56 hours per week for which she was properly compensated.

II. STANDARD

A motion for summary judgment shall be granted if the Court determines "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In addition, "[i]nferences to be drawn from the underlying facts contained in the evidential sources . . . must be viewed in the light most favorable to the party opposing the motion. The non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt." Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976). However, if the nonmovant's evidence is merely colorable, or is not significantly probative, or just raises some metaphysical doubt as to the material facts, summary judgment may be granted. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

III. DISCUSSION

The FLSA requires employers to pay its employees premium pay for hours worked in excess of 40 in a given week. See 29 U.S.C. § 207(a). Section 207 provides in pertinent part:

> Maximum hours
>
> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours specified at a rate of not less than one and one-half times the regular rate at which he is employed.

Plaintiffs allege that Defendants failed to pay overtime compensation as required by the FLSA and seek back wage compensation, liquidated damages, attorneys' fees and costs. Defendants contend that they are not subject to the FLSA and thus not required to compensate Plaintiffs with premium pay for overtime hours. Alternatively, Defendants assert that they are excused from the overtime pay requirements because Plaintiffs are exempt employees under the FLSA.

A. Applicability of the FLSA

HSL moves for summary judgment asserting that it is not required to pay Plaintiffs premium pay for overtime because it is not subject to the FLSA and its overtime requirements. The minimum wage and overtime requirements apply to employees of an "enterprise engaged in commerce." 29 U.S.C. §§ 206, 207. "To be considered an enterprise, a business must satisfy three elements. It must 1) be engaged in related activities, 2) under unified operation or common control, and 3) have a common business purpose." Reich v. Gateway Press, Inc., 13 F.3d 685, 694 (3d

Cir. 1994) (citing 29 U.S.C. § 203(r)(1)[1]). To be considered an "enterprise engaged in commerce" requires two additional conditions be satisfied. First, the enterprise must have "employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling or otherwise working on goods or materials that have been moved in or produced for commerce by any person[.]" 29 U.S.C. § 203(s)(1)(A)(i). Second, the enterprises' annual gross volume sales must be $500,000 or greater. 29 U.S.C. § 203(s)(1)(A)(ii).

HSL contends that (1) it is not an enterprise; (2) it is not engaged in commerce; and (3) its gross receipts did not exceed $500,000 during the period of time pertinent to this litigation.

1. Enterprise Status

The business activities of HSL appear to be related, performed through unified operation and common control, and for a common business purpose. See Reich, 13 F.3d at 694. HSL's business activities are related in that it provides all types of construction management services to its clients. HSL's operation is unified in that it is a corporation at a single location with

1. Section 203(r) defines "enterprise" in pertinent part as "the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor."

Tim McCarthy as the sole owner, shareholder and President in charge of running the company. Finally, HSL's common business purpose is to negotiate construction or maintenance contracts and perform the associated work required thereunder. Therefore, HSL must be considered an enterprise within the meaning of section 3(r) of the Fair Labor Standards Act. See 29 U.S.C. § 203(r).

2. Engaged in Commerce

Next, HSL states that at the time of Plaintiffs' employment it "subbed out" 100% of the construction activities and that its job was only to manage the completion of the construction. Therefore, HSL argues, because it did not have any employees on site who were doing the actual construction duties, it did not produce any goods and cannot be considered an entity "engaged in commerce."

It is enough to bring an entity under the purview of the FLSA when that entity has bought goods that have been moved in interstate commerce and these goods have been used in the course of the entity's employees' employment. See, e.g., Marshall v. Brunner, 668 F.2d 748, 751-52 (3d Cir. 1982) (employer who used trucks, truck bodies, tires, batteries, accessories, sixty-gallon containers, shovels, brooms, oils and gas that had been manufactured out of state and had moved in interstate commerce was subject to the FLSA). Timothy McCarthy, in his deposition testimony, explains that in addition to

managing residential and commercial construction projects, HSL also, from time to time, provides HVAC service work, punch-out work, and clean-up services. It is a reasonable inference that these manual type services, as well as the provision of construction management services, would require HSL to purchase goods that have been moved in interstate commerce, and used these goods in the course of its business. In support of this inference, Plaintiffs' exhibits include copies of expense checks which Layden received as reimbursement for purchases of tools and the like. In addition, an expense report details purchases made at Builders Square, Sears and Home Depot, including keys, paint, nails, dryer cord, phone wires, hooks, chains and outlet boxes. Thus, it appears from the record that HSL purchased goods that have been moved in interstate commerce, and that HSL used these goods in the course of its business. Therefore, the Court concludes that Defendants engaged in commerce.

3. Annual Gross Volume of Sales of at Least $500,000

The second of the statutory conditions for finding that an enterprise engaged in commerce requires the enterprise to have annual gross volume of sales not less than $500,000. See 29 U.S.C. § 203 (s)(1)(A)(ii). HSL asserts that its gross receipts did not exceed $500,000. In support of its assertion, HSL attaches its 1998 and 1999 tax returns to their motion, which show HSL's gross receipts to be $375,255 in 1998 and $205,244 in

1999. Plaintiffs contest HSL's tax returns through the affidavit of Edward Waddington, Certified Public Accountant. Mr. Waddington states that, in his professional opinion, HSL's tax returns were not properly completed and notes deficiencies within the documents which suggest that there may be financial activity of HSL which was not reported accurately in the tax returns. Thus, an issue of fact exists with respect to HSL's annual gross volume of sales.

In sum, because it cannot be determined whether HSL had annual gross volume of sales of at least $500,000, issues of fact exist with respect to whether HSL is subject to the FLSA. Therefore, Defendants cross-motion for summary judgment on this point must be denied. For purposes of addressing the parties remaining summary judgment arguments, the Court will assume that HSL is subject to the FLSA. In the event that it is determined at trial that Defendants are subject to the FLSA and its overtime requirements, the resolution of the issues discussed below control.

B. Plaintiffs' Exempt Status

The FLSA exempts from its overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity[.]" 29 U.S.C. § 213(a)(1). Thus, if Plaintiffs are exempt employees, HSL would not be required to pay them premium pay for overtime. In order for an employer to be

exempt from the FLSA's overtime requirements under either the executive, administrative or professional exemption, the employee must be paid on a salary basis. See 29 C.F.R. §§ 541.117, 541.214, 541.311. Plaintiffs move for summary judgment as to their non-exempt status asserting that they were not paid on a salary basis and thus, none of the exemptions which could be claimed by Defendant would be applicable.

The test for whether an employee is paid on "a salary basis" is set out at 29 C.F.R. § 541.118(a):

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.

Plaintiffs rely on the hourly pay structure under which they were compensated as evidence that they were not paid on a salary basis. Specifically, Plaintiffs Fraipont and Brown were paid $19.00 per hour for hours worked in a given week up to 40, and time-and-a-half for hours worked over 40 and up to 56 hours in a given week. Any hours worked over 56 in a given week were compensated by receiving "banked" hours at the rate of one hour banked for each hour worked. These banked hours were available

only for paid time off. Plaintiff Layden was paid $22.00 per hour for every hour he worked, whether it was over or under 40 in a given week. These facts are supported by the payroll records attached as exhibits to Plaintiffs' motion. Thus, Plaintiffs argue that because they were all compensated at an hourly rate and rarely received the same amount from week to week, due to the fluctuation in the amount of hours worked, it cannot be said that they were paid a "predetermined amount" each week as required under the salary basis test of 29 C.F.R. § 541.118(a).

Defendants admit that Plaintiffs were paid on an hourly basis. However, Defendants assert that throughout the workday, Plaintiffs exercised their own judgment with respect to what job tasks were performed and for how long, as opposed to HSL dictating how each hour of the work day should be allocated for particular tasks. Defendants argue that this is the earmark of a salaried employee.

Both parties rely on Brock v. Claridge Hotel & Casino, 846 F.2d 180 (3d Cir. 1988) to support their respective positions. In Brock the United States Court of Appeals for the Third Circuit (the "Third Circuit") analyzed a "weekly salary guarantee" of employees at an Atlantic City casino. This guarantee, in the form of a contract, assured certain casino employees a weekly salary of $250 for any week in which the employee performed work. The casino employees achieved the $250

guarantee when the amount of hours worked, multiplied by the employee's hourly rate, reached $250. Wages over the $250 minimum were paid by the hour, according to the number of hours the employee had worked. The guarantee at issue was met generally because the casino employees who brought suit were well-paid. The Third Circuit held that the casino employees who were paid by the hour but received a $250 minimum weekly payment were not entitled to exemption from FLSA's overtime provision. In so holding, the Third Circuit emphasized that any form of hourly compensation is inconsistent with a salary status.

The Third Circuit also noted that a salaried employee is one who "decides for himself how much a particular task is worth, measured in the number of hours he devotes to it." Brock, 846 F.2d at 184. In contrast, as to hourly employees, "it is the employer who decides the worth of a particular task, when he determines the amount to pay the employee performing it." Id.

However, Brock does not convert the salary basis test into a single prong, whereby any employee that has the latitude of deciding for himself the number of hours to devote to a particular task will be considered compensated on a salary basis. Defendants transpose Brock's teachings. Brock does not instruct, as Defendants attempt to argue, that such latitude is an indication of salary status. Rather, Brock instructs that salary is an indication of such latitude. No matter how much discretion

Plaintiffs were given to accomplish their varied job responsibilities, Defendants cannot escape the fact that they compensated Plaintiffs hourly. Thus, Plaintiffs were not paid on a salary basis and a finding of exempt status is not appropriate.

C. Liquidated Damages

Plaintiffs also move for summary judgment with respect to their request for liquidated damages. The FLSA provides that "[a]n employer who violates the [overtime] provisions of . . . section 207 . . . shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation, . . . and in an additional equal amount as liquidated damages . . . ." 29 U.S.C. § 216(b). Thus, "[w]hen an employer violates the overtime wage provision of [the FLSA], section 216(b) provides for payment of both unpaid wages and an equivalent amount of mandatory liquidated damages." Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 907 (3d Cir. 1991) (emphasis in the original) "The liquidated damages provision amounts to a Congressional recognition that failure to pay the statutory minimum and overtime wages may be so detrimental to the maintenance of the minimum standard of living 'necessary for health, efficiency and general well-being of workers' that double payment must be made to compensate employees for losses they might suffer by not receiving their lawful pay when it was due."

Brooks v. Village of Ridgefield Park, 185 F.3d 130, 137 (3d Cir. 1999) (quoting Section 2(a) 52 Stat. 1060.)

Congress subsequently mitigated the harshness of the liquidated damage provision of Section 216(b) with the enactment of Section 260 of the Portal-to-Portal Act. Id. This section permits the district court in its sound discretion to withhold or reduce the amount of liquidated damages "if the employer shows . . . that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260. The Third Circuit has explained the good faith and reasonableness requirements as follows:

> The good faith requirement is a subjective one that "requires that the employer have an honest intention to ascertain and follow the dictates of the Act." . . . The reasonableness requirement imposes an objective standard by which to judge the employer's conduct . . . Ignorance alone will not exonerate the employer under the objective reasonableness test . . .

Martin, 940 F.2d at 907-08 (quoting Williams v. Tri-County Growers, Inc., 747 F.2d 121, 129 (3d Cir. 1984))(emphasis in original). The "defendant employer bears the 'plain and substantial burden of proving he is entitled to discretionary relief from the FLSA's mandatory liquidated damages provision." Martin, 940 F.2d at 907. "To carry his burden, a defendant employer must show that he took affirmative steps to ascertain

the Act's requirements, but nonetheless, violated its provisions." Martin, 940 F.2d at 908.

HSL argues that it acted in good faith because it believed Plaintiffs to be exempt employees, not entitled to overtime compensation. However, it appears that HSL did not do any analysis or conduct any inquiry to determine whether Plaintiffs qualified for an exemption. Timothy McCarthy admits that he was responsible for making sure HSL had personnel policies that met all applicable laws and that he supervised these policies sufficiently such that they met the applicable legal requirements. Yet, Mr. McCarthy did not have knowledge of, or involvement in, Plaintiffs' compensation structure. If Mr. McCarthy had affirmatively attempted to ascertain the FLSA's requirements, he would have been on notice that Plaintiffs' hourly pay structure entitled them to overtime at a rate of time and a half for any and all hours worked over 40 in a given week. Mr. McCarthy's failure to inquire into the FLSA's overtime pay requirements and its application to HSL employees paid on an hourly basis precludes a determination that Defendants subjective good faith was reasonable.

IV. CONCLUSION

Defendants' Motion for Summary Judgment as to the applicability of the FLSA to HSL is denied. Based upon the record before the Court, an issue of fact exists with respect to

whether HSL's annual gross volume sales is at least $500,000. Plaintiffs' Motion for Summary Judgment is granted. If it is determined at trial that HSL is subject to the FLSA and its overtime requirements, Defendants will be required to pay Plaintiffs back wages because Plaintiffs are non-exempt employees under the FLSA. Defendants will also be required to pay Plaintiffs liquidated damages pursuant to 29 U.S.C. § 216(b).

An appropriate Order follows.

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Defendants.	:	

ORDER

AND NOW, this 26th day of June, 2002, upon consideration of Plaintiffs' Motion for Summary Judgment (Docket No. 10), Defendants' response in opposition thereto (Docket No. 14), along with other matters of record, it is hereby **ORDERED** that Plaintiffs' Motion is **GRANTED**.

Upon consideration of Defendants Cross-Motion for Summary Judgment (Docket No. 14) and Plaintiffs response in opposition thereto (Docket No. 15), it is hereby **ORDERED** that Defendants cross-motion is **DENIED**.

TRIAL on the remaining issues is set for Tuesday, September 17, 2002 at 9:30 a.m. in Courtroom 14A.

BY THE COURT:

RONALD L. BUCKWALTER, J.