IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:96-CV-955-BR(2)

JARVIN OMAR ZELAYA, LUIS A. BERNAL, REYES HERNANDEZ-FLORES, EDUARDO BERNAL, VICTOR M. BERNAL, and CARLOS RUIZ-ZAPIEN, on behalf of themselves and all other similarly situated persons,

Plaintiffs,

v.

J.M. MACIAS, INC., d/b/a MI CASITA RESTAURANTE MEXICANO, JUAN M. MACIAS, DENISE MACIAS, the wife of JUAN M. MACIAS, FRANCISCO MACIAS, CARLOS MACIAS, JESUS MACIAS, GABRIEL MACIAS, and JAY MORRIS,

Defendants.

MEMORANDUM AND RECOMMENDATION

This cause is before the court on cross-motions for summary judgment. The parties have responded, and Plaintiffs have filed a reply to Defendants' response. Defendants have not filed a reply to Plaintiffs' response, but the time for reply has passed and all the motions are ripe for ruling.

BACKGROUND

Plaintiffs are current and former employees of La Casita Mexicano Restaurante locations in Fayetteville and Rockingham. They bring this action pursuant to Section 207 of the Fair Labor Standards Act, alleging that the owners and managers of the Mexican restaurants failed to pay required overtime wages. Defendants are J.M. Macias Inc., a closely held corporation based

in Fayetteville that operates approximately 10 La Casita restaurants across North Carolina, and various members of the Macias family, which owns and operates the corporation.[1]

Plaintiffs seek declaratory and injunctive relief, back wages, liquidated damages and attorney's fees. Plaintiffs also seek to certify this case as a class action pursuant to 29 U.S.C. § 216(b). They originally brought claims under the North Carolina Wage and Hour Act, but in an order dated February 17, 1998, District Judge W. Earl Britt declined to exercise pendent jurisdiction over the state claims and dismissed them.

Defendants deny that they have failed to pay required overtime, arguing that pay for overtime hours was included in the Plaintiffs' weekly salaries. While they concede that the restaurant business is governed by the FLSA, the individual Defendants argue that they are not "employers" under the statutory definition.

ANALYSIS

Plaintiffs have filed a motion for summary judgment as to liability on their FLSA overtime claim, and Defendants also have filed a motion for summary judgment. Summary judgment is appropriate when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby Inc., 477 U.S.

---

[1] A default judgment has been entered against Defendant Jay Morris, the corporation's bookkeeper.

242, 247 (1986). The party seeking summary judgment must come forward and demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Once the moving party has met its burden, the non-moving party must then affirmatively demonstrate that there is a genuine issue of material fact that requires trial. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). When making the summary judgment determination, the facts and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Anderson, 477 U.S. at 255.

Plaintiffs seek summary judgment on the issue of liability under the FLSA. Defendants respond to Plaintiffs' motion by arguing that FLSA claims generally should not be decided on summary judgment because the damages issues often present questions of material fact that must be resolved by a jury. This argument misapprehends the goal of Plaintiffs' motion. Plaintiffs do not ask for summary judgment as to damages; they merely ask the court to decide whether Defendants have violated the FLSA by failing to pay overtime wages.[2] Plaintiffs concede that were they to win this motion, they would still be required to prove damages at a trial. The undersigned now turns to the merits of the motions.

---

[2] Although Plaintiffs do not formally withdraw their minimum-wage contentions under 29 U.S.C. § 206, they do not press them in their summary judgment motion. As shown below, it is clear that Plaintiffs were paid at least minimum wage. Therefore, summary judgment on the minimum-wage claim should be ALLOWED.

As an initial matter, Plaintiffs must establish that they were employees of an entity covered by the FLSA in the three years preceding the inception of this action. The parties agree that each Plaintiff is or was an employee of the Mi Casita restaurant chain during the relevant time. However, there is some dispute as to which of the Defendants was an "employer," as defined by statute.

Under Section 203(d) of the FLSA, an employer is "any person acting directly or indirectly in the interest of an employer in relation to an employee." Whether an individual or entity is an employer under the FLSA is a question of law. See Patel v. Wargo, 803 F.2d 632, 634 (11th Cir. 1986). An individual who has a significant ownership interest, controls significant functions of the business, determines salaries or makes hiring and firing decisions may be held jointly and severally liable with the business. See Fegley v. Higgins, 19 F.3d 1126, 1131 (6th Cir.), cert. denied, 513 U.S. 875 (1994); see also Donovan v. Agnew, 712 F.2d 1509, 1510 (1st Cir. 1989) (corporate officer with operational control qualifies as an "employer").

Defendants argue that there is no evidence that any of the individual Defendants exercised the degree of control necessary to be deemed an "employer." In response, Plaintiffs point to Defendants' answer, in which Defendants stated that ". . . each of the corporate officers and any employees had a supervisory role in his corporate or supervisory capacity . . . in each of the restaurants operated, owned or controlled by Mi Casita."

(Defendants' Answer ¶ 16). This admission, standing alone, does not establish that each, or any, of the individual Defendants exercised the type of control that courts have generally required to deem an individual an employer under the FLSA. However, it does raise a question of fact as to what degree of control was exercised. While the ultimate determination of employer status is a question of law for the court, that determination is made only after evaluating the facts. Because there appears to be a dispute as to what level of control these individual Defendants exercised, summary judgment is inappropriate on this issue.

Although the individual Defendants argue that they should not be held liable, there is no question that the corporation as an entity is an employer under the FLSA. By statute, any "enterprise . . . comprised of one or more retail or service establishments" that has annual gross sales of at least $500,000 is subject to the FLSA's overtime provisions. 29 U.S.C. § 203(s)(1)(A)(ii). As Plaintiffs point out in their motion, Defendants initially denied that they were engaged in an enterprise subject to FLSA regulation. However, they subsequently have admitted a volume of business sufficiently great to bring them under the statute. In fact, in their motion papers, Defendants admit that Mi Casita is governed by the FLSA. (See Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Summ J. at 1.) Therefore, to the extent that J.M. Macias Inc. owns and operates the restaurants, it is liable for any failure to pay overtime wages.

Plaintiffs have established that they were employees of an entity subject to the FLSA. The undersigned now must consider their contentions as to liability. The FLSA, in relevant part, states:

> Except as otherwise provided in this section, no 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 above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a). The regular rate of pay is defined as "any remuneration for employment paid to, or on behalf of, the employee," but it does not include one-time bonuses, gifts, etc. 29 U.S.C. § 207(d). The regular rate may be fixed by a contract or collective bargaining agreement, but in this case, there was no written or oral agreement as to an hourly rate.

When there is no set hourly rate, the Court generally must determine that rate by dividing weekly pay by 40, or whatever number of hours was contemplated in the employment agreement. For example, if a busboy makes $320 a week for a 40-hour week, his regular rate would be $8 per hour. If he worked 50 hours in a given week, his employer would be required to pay him at a rate of $12 for each hour over 40 hours. The key principle is that the employer must pay a premium for overtime hours worked. Plaintiffs contend that Defendants failed to pay this premium despite requiring Plaintiffs to work overtime.

There is no dispute that these Defendants worked overtime

hours. Defendants contest the specific numbers of hours worked, but in his deposition, Defendant Juan M. Macias, the president of the closely held corporation, admitted that restaurant employees worked up to 50 hours a week. (See Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Summ J. at 5.)

There also appears to be no dispute that Plaintiffs did not receive overtime pay as such. Normally, a defendant can point to payroll records to show how many hours an employee worked and how much pay the employee received. However, in this case, Defendants paid their workers a lump sum in cash and kept no records. The total amount paid did not fluctuate from pay period to pay period. If a waiter was paid $400 a week one week, the waiter would be paid $400 the next week, regardless of how many hours the waiter worked in any given week. The Defendants did not denominate any portion of this pay as an "overtime premium."

Defendants' primary defense is that although they did not explicitly label a portion of Plaintiffs' pay "overtime," they paid their workers an amount sufficient to satisfy their obligations under the FLSA. This argument does not withstand close analysis.

Defendants' argument goes as follows:

Assume Plaintiff A worked 50 hours per week at the minimum wage of $4.25. If Plaintiff A is paid at $4.25 per hour for the first 40 hours, he receives $170 for the regular work week. For the 10 hours of overtime, he is paid $6.375, time and a half, for a total of $63.75. For the week, he earns $233.75. This amount,

Defendants say, was the minimum amount they were required to pay under the FLSA. The evidence is undisputed that all Mi Casita employees, including Plaintiffs, earned between $300 and $425, depending on their job description and experience. Therefore, Defendants say, Plaintiffs received more than the required compensation, and their suit for additional wages is baseless.

While it is true that Plaintiffs received more than minimum wage,[3] it is clear that they did not receive appropriate overtime compensation. Under the FLSA, employers are required to pay a premium for hours of overtime worked. Defendants' after-the-fact attempt to justify their lump-sum payments by breaking them down into regular wages and overtime wages does not change the central fact: they did not pay their employees an overtime premium based on the number of overtime hours worked.

Regulations and case law clearly support Plaintiffs' position. This is illustrated by the following example drawn from 29 C.F.R. § 778.310:

Suppose an employer proposes to pay a flat sum of $75 to employees who must work on Sundays. Despite the fact that the employer might think she was paying overtime, the $75 flat sum would not be counted as an overtime premium.

---

[3] The evidence is undisputed that the lowest-paid worker made $300 a week. During the relevant time period, the minimum wage was $4.25. Unless the lowest-paid employee worked more than 70 hours a week, his salary exceeded minimum wage. There is no evidence in the record suggesting that any employee worked 70 hours a week. Therefore, Plaintiffs' minimum-wage claims must fail.

> The reason for this is clear. **If the rule were otherwise, an employer desiring to pay an employee a fixed salary regardless of the number of hours worked in excess of the applicable maximum hours standard could merely label as overtime pay a fixed portion of such salary sufficient to take care of compensation for the maximum number of hours that would be worked.** The Congressional purpose to effectuate a maximum hours standard by placing a penalty upon the performance of excessive overtime work would thus be defeated.

29 C.F.R. § 778.310 (emphasis added). Defendants essentially were trying to pay a lump sum for overtime hours worked, regardless of their number. They did not confine this principle to Sundays, as in the regulations example; rather, they expanded it to the entire week. However, the principle remains the same, as does the Congressional policy. The FLSA was passed to penalize employers who required their employees to work more than 40 hours a week. Employers are not allowed make an end run around the statute by paying a lump sum and then working backwards to justify it. See 29 C.F.R. § 778.308 ("To qualify as an overtime premium under section 7(e)(5),(6) or (7), the extra compensation for overtime hours must be paid pursuant to **a premium rate which is likewise a rate per hour. . . .**") (emphasis added).

Courts that have considered the issue concur with the regulations.

> A premium in the form of a lump sum which is paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium even though the amount of money may be equal to or greater than the sum owed on a per hour basis.

Alexander v. United States, 32 F.3d 1571, 1578 (Fed. Cir. 1994). "Constant pay for varying workweeks including overtime is not permitted except as specified in Section 7(f)." Donovan v. McKissick Products Co., 719 F.2d 350, 353 (10th Cir. 1983) (citing 29 C.F.R. § 778.403, discussed infra), cert. denied, 467 U.S. 1215 (1984). Thus, it is clear that Defendants have violated the FLSA by failing to pay a per-hour overtime premium.

There is one exception to the overtime-premium requirement. If an employee is required to work irregular overtime hours, an employer may, under certain circumstances, pay that employee a lump sum meant to include regular as well as overtime hours.

> No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work; and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

29 U.S.C. § 207(f). This section provides the only mechanism for an employer to pay an employee a lump sum when the employee works overtime and the employee's hours vary. See 29 C.F.R. § 778.403. However, § 207(f) only applies when both the employee's non-overtime hours and overtime hours fluctuate. "[W]here the fluctuations in an employee's hours of work resulting from his

duties involve only overtime hours worked in excess of the statutory maximum hours, the hours are not 'irregular' within the purport of section 7(f) and a payment plan lacking this factor does not qualify for the exemption." 29 C.F.R. § 778.406; see Crenshaw v. Quarles Drilling Corp., 798 F.2d 1345, 1349 (10th Cir. 1986).

In the present case, Defendants have not established that the Plaintiffs' hours were irregular. Plaintiffs claim to have worked "in excess of 50 hours," but there is other evidence that they worked a maximum of 50 hours per week. In any event, in their brief, Defendants concede that "the hours for all restaurants and employees were the same." (Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Summ J., at 5 n. 1.)

From the evidence before it, the Court cannot conclude that Plaintiffs worked sufficiently "irregular" hours to bring § 207(f) into play. In addition, there is no evidence that Plaintiffs' non-overtime hours fluctuated. Other than pointing out that Plaintiffs might have taken an occasional day off, Defendants present no evidence that Plaintiffs ever worked anything other than 40 regular hours, plus overtime hours.

In sum, Defendants have not presented evidence sufficient to convince the Court that § 207(f) should apply. In fact, they have presented no evidence tending to support that conclusion. Since § 207(f) is the "only provision of the Act which allows an employer to pay the same total compensation each week to an employee who works overtime and whose hours of work vary from

week to week," 29 C.F.R. § 778.403, Defendants have no defense for their failure to pay overtime premiums. Therefore, Plaintiffs are entitled to summary judgment on this issue.

Questions of material fact remain as to the amount of overtime worked and the amount of overtime premiums due. To calculate damages, the court must determine the Plaintiffs' regular rates of pay based on their weekly salaries, and it also must determine whether liquidated damages would be appropriate.

CONCLUSION

For all the foregoing reasons, the undersigned RECOMMENDS that Plaintiffs' motion for partial summary judgment as to liability be ALLOWED on the overtime claims and DENIED as to the minimum-wage claims. The undersigned further RECOMMENDS that Defendants' motion for summary judgment be ALLOWED as to the minimum-wage claims and DENIED in all other respects.

SO RECOMMENDED, this the 1st day of October, 1998.

ALEXANDER B. DENSON
United States Magistrate Judge

#250