

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WILLIAM ANDERSON,)
)
 Plaintiff,)
)
 v.) Civ. No. 08-330-B-W
)
 THERIAULT TREE HARVESTING,)
 INC., *et al.*,)
)
 Defendants)

RECOMMENDED DECISION

William Anderson has sued his former employer, Theriault Tree Harvesting, and a related company, JNJ Logging, Inc., alleging wage and hour violations under both Maine state law and federal law. Mr. Anderson also claims he was discriminated against at the time of his termination in violation of the Maine Whistleblower Protection Act. The Defendants have moved for partial summary judgment, limiting their motion to the whistleblower claim. Mr. Anderson has also moved for partial summary judgment, asking that the Court rule that Theriault Tree Harvesting and JNJ Logging are integrated enterprises. Mr. Anderson also seeks a legal declaration that the Defendants failed to pay him all of the compensation owed him for the overtime hours he worked. He requests judgment as to liability on the first four counts of his second amended complaint.

The Court referred both motions for report and recommendation pursuant to 28 U.S.C. § 636(b). I recommend that the Court grant the Defendants' motion and enter judgment in their favor on Count V. I also recommend that the Court grant the Plaintiff's motion, in part, with an order finding that Theriault Tree Harvesting and JNJ Logging are integrated enterprises and that

the salary paid to Mr. Anderson was not a lawful "guaranteed wage plan" under the Fair Labor Standards Act. In all other respects, I recommend that the Court deny the Plaintiff's motion.

MATERIAL FACTS

The following factual statement is drawn from the parties' competing statements of material facts, filed in accordance with Local Rule 56, and from the record cited in support of those statements. See Doe v. Solvay Pharms., Inc., 350 F. Supp. 2d 257, 259-60 (D. Me. 2004) (outlining the mandatory procedure for establishing factual predicates needed to support or overcome a summary judgment motion); Toomey v. Unum Life Ins. Co., 324 F. Supp. 2d 220, 221 n.1 (D. Me. 2004) (explaining "the spirit and purpose" of Local Rule 56).

A. The Relationship of Theriault Tree Harvesting and JNJ Logging

On March 26, 1996, Theriault Tree Harvesting, Inc., a Maine corporation, was formed. Lynn Theriault is the sole shareholder and President of Theriault Tree Harvesting. On June 22, 2005, JNJ Logging, Inc., also a Maine corporation, was formed. Lynn Theriault is a 50% shareholder in JNJ and Mark Theriault, Lynn's husband, also holds a 50% interest in JNJ. JNJ was formed because Lynn and Mark Theriault hoped to acquire workmen's compensation insurance at a lower premium than the premium paid by Theriault Tree Harvesting. Theriault Tree Harvesting often hires JNJ as a subcontractor. Both companies are engaged in the logging business. Mark Theriault works for JNJ and is the field supervisor for logging operations in the woods. Mark Theriault supervises activities of both Theriault Tree Harvesting and JNJ employees. JNJ and Theriault Tree Harvesting do not own any equipment jointly, although both companies do own some equipment and/or vehicles. During the period of time at issue in this case, JNJ offered its employees health insurance as an employment benefit and Theriault Tree

Harvesting did not. (Defs.' Response to Statement of Material Facts and Additional Statement ¶¶ 1-9 Additional, Doc. No. 43.)

Theriault Tree Harvesting and JNJ work jointly on logging operations. When they do, JNJ receives its payment as a subcontractor for Theriault Tree Harvesting. In 2006, Theriault Tree Harvesting employed 28 employees for 20 or more weeks. In 2007 it employed 20 employees for 20 or more weeks.¹ In 2006, JNJ employed 10 employees for 20 or more weeks. In 2007 it employed 11 employees for 20 or more weeks. Mark Theriault and Lynn Theriault manage Theriault Tree Harvesting and JNJ. Mr. Theriault supervises employees in the field and Mrs. Theriault handles the bookkeeping. Mr. Theriault supervises the employees without regard to which company pays them and it is admitted by the Defendants that he does not even know which employees are paid by which employer. The main office for both corporations is in Stratton, Maine. During logging operations some of the employees stay in the woods at camps available near work sites. (Pl.'s Statement of Material Facts ¶¶ 1-7, 39, Doc. No. 32.)

B. William Anderson's Wage and Hour Claims

Mr. Anderson worked for the Defendants as a logger over the course of a 16-month period that ended on August 21, 2007. Because the work was seasonal he did not work this entire 16-month period. There were periods in the spring, called "mud season," when Mr. Anderson and his co-workers would not work. Mr. Anderson operated a piece of machinery called a grapple skidder. A grapple skidder is a piece of equipment used to pull downed trees through the woods. Mr. Anderson would haul those downed trees out of the woods and put them in a pile near a machine called a delimeter. The delimeter operator would then use the delimeter to strip the limbs off of the trees. According to Mr. Theriault, Mr. Anderson was a very good

¹ These facts establish that Theriault Tree Harvesting was subject to the FLSA's overtime requirements. 29 U.S.C. § 213(a)(28).

worker. When Mr. Anderson started working for Theriault Tree Harvesting in May of 2006, he received an hourly wage of \$12 per hour. During this period when he received an hourly wage, Mr. Anderson always worked over 40 hours per week and usually worked 60 hours. (Id. ¶¶ 8-11.)

In September 2006, Mr. Theriault gave Mr. Anderson what Mr. Theriault characterizes as a promotion and commenced paying him a salary of \$700 per week. According to Mr. Theriault, when he worked as a salaried employee, Mr. Anderson worked a schedule of 4.5 12-hour days per week, or 54 hours per week. Mr. Theriault testified that Mr. Anderson's hours varied. He claims that when Mr. Anderson worked over 54 hours during a week he would work less than 54 hours in a subsequent week in order to make up for that time. The parties appear to agree that this amounted to a "comp time" arrangement. As such, according to Mr. Theriault, Mr. Anderson averaged 54 hours per week. (Id. ¶¶ 12-13.) The Defendants did not keep any records of the number of hours that Mr. Anderson actually worked during the period when he received a salary. (Id. ¶ 36.) Mr. Anderson does not agree that there were many weeks (other than certain holiday and mud season weeks) when he worked less than a 60-hour week. (Pl's Reply Statement ¶ 16, Doc. No. 56.)

Mr. Anderson worked fewer than 54 hours during the holiday weeks of Thanksgiving, Christmas, and New Years. He also worked a shortened week right before "mud season" began in 2007. Mr. Anderson received less than \$700 in salary during these shorter work weeks. (Pl.'s Statement ¶ 14.)² Mr. Anderson worked a total of 36 weeks under this salary arrangement. The parties dispute whether Mr. Anderson or the Theriaults came up with the idea that Mr. Anderson

² Defendants deny all of these facts in this paragraph stating that his overall compensation was typical of the pay he received each week he was paid on a salary basis and they cite as support paragraph nine of the Lynn Theriault affidavit which references the payroll records relied upon by Anderson as well. The payroll records show he did not receive a \$700 salary during the weeks in question, to the extent those weeks can be identified in the payroll records.

should receive a salary. According to Mr. and Mrs. Theriault, Mr. Anderson wanted to receive net pay of \$600 per week, i.e., \$600 per week after deductions for taxes. The Theriaults agreed to provide Mr. Anderson with a gross salary of \$700 per week. The Theriaults also agreed to pay Mr. Anderson mileage reimbursements that pushed Mr. Anderson's net weekly paycheck over the \$600 threshold. (Id. ¶¶ 14-16.)

The mileage reimbursement stipend was approximately \$100 to \$150 each week under a "mileage reimbursement" category. Mr. Theriault maintains this stipend compensated Mr. Anderson for use of his vehicle, but was also negotiated between Anderson and the Theriaults as a way to increase Anderson's weekly take-home pay. (Defs.' Response to Statement ¶ 14 Additional.) The higher mileage reimbursement figure of \$150.00 was received during the Christmas 2006 and New Year 2007 weeks, when Mr. Anderson worked fewer hours and received less in salary than normal. (Pl.'s Statement ¶ 38.)

Mr. Theriault testified that these mileage reimbursements were actual reimbursements for when Mr. Anderson used his personal pick-up truck for business purposes. He testified that they had no relation to the hours Mr. Anderson worked. (Id. ¶ 17; Defs.' Response to Statement ¶ 17.) In contrast, Ms. Theriault testified at her deposition that Mr. Anderson received these mileage reimbursements as a lump sum in order to increase his net salary to \$600 per week. She testified that he did not actually use his personal pick-up truck for business purposes. (Pl.'s Statement ¶ 18.) However, when asked whether any of the reimbursements were actual reimbursements for use of the pick-up truck, Mrs. Theriault testified that she did not know. (Id. ¶ 19.)

In addition to his wages and salary, the Defendants provided Mr. Anderson with lodging in a logging camp. Mr. Anderson lived in this logging camp with other employees of Theriault Tree Harvesting and JNJ while he worked. Mark Theriault allowed Anderson to stay at the cabin

after he found out Anderson had been sleeping in his truck. (Id. ¶ 20.) Mr. Anderson started staying in the logging camp on or about June 20, 2006 (while he was still paid on the basis of an hourly rate). He continued to stay there during the weeks he worked in the woods, returning to an apartment in Millinocket, Maine, on the weekends and off-season when he was not working, through the end of his employment. (Id. ¶ 21.) In time, Mr. Anderson's girlfriend moved in with him at the camp and stayed there until his departure from Theriault Tree Harvesting's employ in early August 2007. (Defs.' Response To Statement ¶ 24.) Anderson's girlfriend did not work. She lived in the camp and spent her days running the generator so she could watch television and run other appliances, including an air conditioner. (Id. ¶ 25.) Theriault Tree Harvesting indicated in response to an interrogatory that it cost between \$100 and \$150 per week for it to provide this lodging to Mr. Anderson. (Pl.'s Statement ¶ 22.) Between June 20, 2006, and September 23, 2006, Mr. Anderson earned \$12.00 per hour. After Mr. Anderson began staying in the camp, and while he was receiving compensation on the basis of a \$12.00 per hour rate, his overtime hours were paid at the rate of \$18.00 per hour and his overtime premium was not calculated to account for the cost of his lodging. (Id. ¶ 31.)

Not everyone who worked for Theriault Tree Harvesting lived at the camp and Theriault Tree Harvesting did not condition employment upon its workers living in the camp. (Defs.' Response to Statement ¶ 22 Additional.) Theriault Tree Harvesting was required to provide housing for its Canadian employees for visa purposes. (Id. ¶ 23.) Theriault Tree Harvesting's housing for these workers included not only the Goldbrook camp where Anderson lived, but also an apartment in Jackman and one near the main office in Stratton. Mr. Theriault testified that in the summer of 2007 eight employees were housed at the Stratton location and that four of them were Canadians. (Pl.'s Reply Statement ¶ 23.)

After his employment ended, Mr. Anderson filed a complaint with the Maine Department of Labor because the Defendants had not paid him all of the overtime compensation he believed he was owed. The Maine Department of Labor communicated Mr. Anderson's demand for overtime compensation to Theriault Tree Harvesting but Mr. Anderson did not receive the overtime compensation he believed was owed him. During the course of this litigation, Mr. Anderson has demanded, through counsel, that Theriault Tree Harvesting pay him the overtime compensation that he claims it owes him. To date, Theriault Tree Harvesting has not paid the overtime compensation that Mr. Anderson has demanded. (Pl. 's Statement ¶¶ 23-25.)

According to Theriault Tree Harvesting payroll records, in 32 of the 36 weeks that Mr. Anderson worked on a salary basis, he received \$700 in salary. Of the remaining four weeks of this 36-week period, Mr. Anderson worked more than 40 hours in two of them. These were the weeks of Christmas and New Years. During these weeks, Mr. Anderson worked approximately 46 hours each week and he received a salary of \$600 and change for each week. (Id. ¶ 29.) During the week of Thanksgiving 2006, Mr. Anderson earned \$500 in salary plus a \$77.70 mileage stipend. During the week before mud season, in April 2007, Mr. Anderson earned \$150 in salary plus \$27.75 from his mileage stipend. Mr. Anderson worked fewer than 40 hours in these weeks. (Id. ¶ 30; Defs.' Response to Statement ¶ 30.)

Anderson was familiar with wage and hour statutes and understood how overtime compensation was calculated. (Defs.' Response to Statement ¶ 17 Additional.) Lynn and Mark Theriault claim they did not know that they were violating the FLSA and had no reason to believe they were paying Anderson in violation of law. (Defs.' Response to Statement ¶ 26 Additional.)

C. The WhistleBlower Retaliation Claim

When Mr. Anderson started work in late March 2006, he was partnered with an individual named Billy Bernier. Mr. Anderson was laid off for a mud season, and then returned to work in approximately June 2007. When he returned to work, Mr. Anderson was again partnered with Mr. Bernier. Although Mr. Anderson did not want to work with Mr. Bernier, Mark Theriault asked him to try and make a go of it. Mr. Anderson said he would try and he went to work with Billy Bernier in June 2007. (Defs.' Statement of Material Facts ¶¶ 3-8, Doc. No. 30; Pl.'s Response ¶ 35, Doc. No. 45.) In regard to their respective duties, Mr. Anderson would haul trees out of the woods with his skidder and leave them in a pile near Mr. Bernier's delimeter. Mr. Bernier would use his delimeter to strip the limbs off of the trees. (Pl.'s Response ¶ 39.)

During his time working with Mr. Bernier in the summer of 2007, Mr. Anderson told Mr. Theriault on multiple occasions that Mr. Bernier was a "ticking time bomb" and a "bully with a gun." (Pl.'s Response ¶ 36.)³ Mr. Anderson knew that Mr. Bernier carried a handgun at work. (Id.) Lynn Theriault confirmed at her deposition that Mr. Bernier had a reputation for having a short temper. (Id. ¶ 38.) Mr. Anderson and Mr. Bernier worked out in the woods many miles away from any towns or cities. (Pl.'s Response ¶ 39.) In addition to working together, Mr. Anderson and Mr. Bernier both lived in the same logging camp. The logging camp was also out in the woods many miles away from any towns or cities. Mr. Anderson stayed in a cabin with his girlfriend about 100 feet from Mr. Bernier's cabin. (Id. ¶¶ 40-43.)

³ Mr. Theriault qualifies this statement by noting that he has no recollection of Anderson speaking to him about Bernier in June 2007. He also qualifies the next statement, denying that Theriault spoke to him on multiple occasions and noting that the handgun was kept in Bernier's truck and not on his person.

On August 2, 2007, Mr. Anderson had a dispute at his job site with Mr. Bernier concerning work schedules.⁴ According to Mr. Anderson, Mr. Bernier said he would punch Mr. Anderson in the face and also threatened to kill him. (Defs.' Statement ¶ 11; Pl.'s Response ¶¶ 11, 44, 47.) Mr. Bernier's performance was persuasive enough to cause Mr. Anderson to flee the scene. (Pl.'s Response ¶¶ 47-49.) Mr. Bernier did not draw a firearm on Mr. Anderson. Nor did Mr. Bernier tell Mr. Anderson that he was going to shoot him. However, he did tell Anderson he was going to kill him and Anderson was concerned because Bernier routinely brought a handgun with him to the workplace. When Mr. Anderson left the scene of the dispute, Mr. Bernier did not try to chase him. (Defs.' Statement ¶¶ 12-14; Pl.'s Response ¶ 13.) Mr. Anderson and his girlfriend headed for their apartment in Millinocket. On their way back to Millinocket, Mr. Anderson stopped in order to call the Somerset County Sheriff's Department. He told the Sheriff's Department about Mr. Bernier's threats. Mr. Anderson was advised to speak with the Millinocket Police Department the next day. (Pl.'s Response ¶ 50.)

After this incident, Mr. Anderson sought and obtained a Protection from Harassment Order against Mr. Bernier. This order forbade Mr. Bernier from being in the "vicinity" of Mr. Anderson's "home" or "place of employment," without reasonable cause. (Defs.' Statement ¶ 15; Pl.'s Response ¶ 51; Temporary Order on Compl. for Prot. from Harassment, Doc. No. 45-3; see also 5 M.R.S. § 4654(4)(F).) In the order, the court scheduled a hearing for August 24, 2007, at which time Mr. Bernier could be heard. (Pl.'s Response ¶ 51.)

Mr. Anderson spoke to Mrs. Theriault on August 3, 2007. He told Mrs. Theriault about what happened out in the woods with Mr. Bernier the previous day. He told her that he had

⁴ According to Mr. Anderson, his schedule affected Mr. Bernier's schedule because they had to work together. (Pl.'s Response ¶ 45.) Mr. Theriault denies this statement and maintains that Anderson wanted to change his schedule and Theriault simply did not care how it was worked out, just so the work got done. (Mark Theriault Dep. 51-55.) According to Theriault, it was alright with him if Bernier and Anderson worked different schedules.

obtained a protection from harassment order against Mr. Bernier. (Id. ¶ 53.)⁵ Mrs. Theriault told Mr. Theriault about her conversation with Mr. Anderson. (Id. ¶ 54.) In a subsequent phone call on August 5, 2007, Mr. Anderson spoke to Mr. Theriault about the incident. Mr. Theriault indicated that Mrs. Theriault had told him what Mr. Anderson told her about the incident in the woods with Mr. Bernier. Mr. Anderson told Mr. Theriault that he needed to work in a different place than Mr. Bernier. Mr. Theriault told Mr. Anderson to take a week off from work and he would figure something out. (Id. ¶ 55.) Mr. Anderson was "okay" with the idea of taking a week off from work. (Defs.' Statement ¶¶ 15-18; Pl.'s Response ¶ 55.)

Mr. Anderson took off the week of August 6-10, 2007. He then returned to work the following Monday, August 13, 2007. When he reported for work that Monday,⁶ Mr. Theriault told him he would continue working at the Goldbrook location. Mr. Theriault also told Mr. Anderson he would work with a different partner, not with Billy Bernier. At Goldbrook, Mr. Anderson was assigned to work with a man named Gilles. According to Mr. Anderson, Billy Bernier was working approximately 500 feet away from him. During this week, there were times when Billy Bernier might have to drive on the logging road near Mr. Anderson and would pass within six feet of Mr. Anderson. Mr. Anderson concedes that on the occasions when Mr. Bernier drove by him, he could have stepped away. During the entire week he worked at Goldbrook, Mr. Bernier did not engage in any threatening acts toward Mr. Anderson, though Mr. Anderson

⁵ The Defendants qualify this statement by noting Lynn Theriault's deposition testimony that she does not recall Anderson saying anything about a protection order. She also asserts in an affidavit that she was only upset because Anderson told her he was going to the hospital due to work-related stress and she knew she would have to file a worker's compensation claim because of that fact. (Lynn Theriault Dep. at 81; Lynn Theriault Aff. ¶ 2.) The Theriaults consistently deny the statements that suggest they knew about the Protection Order, but Anderson says he told both of them and the evidence is viewed in the light most favorable to Anderson at this juncture.

⁶ During his week off from work, according to Anderson, Mr. Theriault told Mr. Anderson that he was going to move Mr. Anderson's worksite to a location about an hour outside of Jackman, Maine. He told Mr. Anderson to report there on August 13, 2007. This worksite was well over 20 miles away from the Goldbrook worksite where the threat occurred. Mr. Theriault said that Mr. Bernier would work someplace other than this Jackman worksite. (Pl.'s Response ¶ 56.) Mr. Anderson reported to this worksite early in the morning of August 13, 2007. Mr. Theriault met him there and told Mr. Anderson that he would have to return to Goldbrook to work. (Id. ¶ 57.)

maintains that he felt threatened by Mr. Bernier's presence. (Id. ¶¶ 19-27; Pl.'s Response ¶ 27.) Mr. Theriault continued to permit Mr. Bernier to sleep in the same logging camp where Mr. Anderson slept, although the men slept in different cabins. (Pl.'s Response ¶ 58.)

During the following weekend, Mr. Anderson read over the Protection from Harassment Order and decided that he was possibly "breaking the law" by working too close to Mr. Bernier. After discussing with Mark Theriault the following Monday (August 20, 2007) his feelings about the Protection from Harassment Order, Mr. Anderson concluded that he did not have a safe place to work because he was "within gun range of Billy Bernier" and in close proximity to Bernier while working at Goldbrook. Mr. Anderson claims that Mr. Theriault declined his request for another place to work other than Goldbrook and told Mr. Anderson to rip up the order and get back to work. As a result, Mr. Anderson got in his pick-up and left the job site. Mr. Theriault did not tell Mr. Anderson he was fired. (Defs.' Statement ¶¶ 28-31; Pl.'s Response ¶¶ 59-60.)

Mr. Anderson filed a charge of discrimination with the Maine Human Rights Commission alleging violations of the Maine Whistleblower Protection Act. The Commission investigated the case and determined that there were reasonable grounds to believe that the Defendants discriminated against Mr. Anderson in violation of the Act. (Id. ¶ 61.)

DISCUSSION

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When

reviewing the record for a genuine issue of material fact, the Court must view the summary judgment facts in the light most favorable to the nonmoving party and credit all favorable inferences that might reasonably be drawn from the facts without resort to speculation. P. R. Elec. Power Auth. v. Action Refund, 515 F.3d 57, 62 (1st Cir. 2008). If such facts and inferences could support a favorable verdict for the nonmoving party, then there is a trial-worthy controversy and summary judgment must be denied. Azimi v. Jordan's Meats, Inc., 456 F.3d 228, 241 (1st Cir. 2006).

There are two motions for summary judgment before the Court. In the first, the defendants jointly move for judgment to the effect that Mr. Anderson fails to generate a genuine issue of material fact in support of his whistleblower retaliation claim. (Defs.' Mot. for Summary J., Doc. No. 29.) In the second, Mr. Anderson seeks judgment in his favor on counts I through IV, to the effect that "the Defendants "fail[ed] to pay Mr. Anderson all of the overtime compensation that they were required to pay." (Pl.'s Mot. for Partial Summary J. at 1, Doc. No. 31.) Additionally, Mr. Anderson seeks a judgment to the effect that, "for purposes of all Counts, TTH and JNJ formed an integrated enterprise and, consequently . . . are both liable for the violations of Mr. Anderson's rights." (Id.) I begin with the Defendants' motion.

A. The Defendants' Motion for Summary Judgment

In Count V of his second amended complaint, Mr. Anderson alleges that the Defendants terminated his employment in retaliation for whistleblower activity. (Second Am. Compl. ¶¶ 28-30.) The Defendants contend that Mr. Anderson cannot prove a prima facie violation of the Maine Whistleblower Protection Act. A prima facie case of whistleblower retaliation consists of three elements. The plaintiff must demonstrate (1) that he engaged in protected activity; (2) that he suffered an adverse employment action; and (3) that a causal nexus exists between the

activity and the adverse action. LePage v. Bath Iron Works Corp., 2006 ME 130, ¶ 19, 909 A.2d 629, 636. The Defendants challenge Mr. Anderson on all three elements. I find that Mr. Anderson fails to generate a genuine issue of material fact as to the imposition of an adverse employment action, without assuming that the facts demonstrate protected activity.

Adverse employment actions are those actions taken by the employer that "adversely affect the employee's compensation, terms or other conditions of employment." DiCentes v. Michaud, 1998 ME 227, ¶ 21, 719 A.2d 509, 516. "An employee has suffered an adverse employment action when the employee has been deprived [] of 'something of consequence' . . . or the employer has withheld 'an accouterment of the employment relationship[.]'" LePage, 2006 ME 130, ¶ 20, 909 A.2d at 636 (quoting Blackie v. State of Maine, 75 F.3d 716, 725 (1st Cir. 1996)). In addition to actual adverse employment actions, "threats by an employer against the employee's status of employment may [also] constitute discriminatory acts" under the Maine Whistleblower Protection Act, id. ¶ 21, but only if the threats concern the employee's "compensation, terms, conditions, location or privileges of employment," id. ¶ 22 (quoting 26 M.R.S. § 833(1)). For example, an employee's subjective "feeling" that his job is in jeopardy because the employer "gave him hell" is not enough to demonstrate an adverse employment action. Id. ¶¶ 22-24.

Mr. Anderson argues that the Defendants subjected him to an adverse employment action because he was "constructively discharged" on account of the Defendants' failure to isolate him from Mr. Bernier. (Pl.'s Opposition Mem. at 14, Doc. No. 44.) The test for constructive discharge "is whether a reasonable person facing such unpleasant conditions would feel compelled to resign." King v. Bangor Fed. Credit Union, 611 A.2d 80, 82 (1992). The record reflects that Mr. Theriault separated Mr. Anderson and Mr. Bernier so that they would not have

to work directly with each other. This compromise worked without incident for a week's time. Thereafter, Mr. Anderson refused to continue working within range of Mr. Bernier out of concern that Bernier's temper would flare up again because he had recently been served with the protective order and out of concern over his own compliance with the protection from harassment order.⁷ Mr. Anderson argues that Mr. Theriault "effectively terminated" him because he wanted Mr. Anderson to rip up the order and get over it. This, says Mr. Anderson, left him no choice but to resign. (Pl.'s Opposition Mem. at 14-15.)

Mr. Anderson fails to raise a genuine issue of material fact with this evidence. Mr. Theriault rearranged work teams so that Mr. Anderson and Mr. Bernier would not have to work together. When Mr. Anderson raised the further objection that he and Mr. Bernier could not be anywhere within each other's vicinity, Mr. Theriault refused to take any further measure to separate the two, but he did not impose any adverse employment action on Mr. Anderson or threaten one. Mr. Anderson's argument that he was subjected to an adverse action by virtue of having to work near Mr. Bernier fails because neither the location nor the conditions of Mr. Anderson's employment became any less favorable after the alleged protected activity. The Defendants are entitled to judgment as a matter of law on Count V.

B. Plaintiff's Motion for Summary Judgment

Mr. Anderson requests summary judgment on three primary issues. First, he requests judgment as a matter of law to the effect that the Defendants failed to pay him overtime compensation during the 36-week period of time that he received a salary. Second, Mr. Anderson asks the Court to declare that the cost of his lodging must be factored into any

⁷ Mr. Anderson says that he expressed his refusal to work near Mr. Bernier because of a reasonable fear of serious physical injury or death. (Pl.'s Opposition Mem. at 7-9.) As for the reasonableness of his fear, Mr. Anderson notes that August 20 was the first day they would have worked together after the police served Mr. Bernier with the protective order, although he also acknowledges that Mr. Bernier knew of the protective order no later than August 13. (Id. at 8-9.)

computation of his regular wage. (Pl.'s Mot. at 4.) Although his motion suggests only "a couple" of discrete issues concerning the wage claims (*id.*), in fact it raises challenges to various additional issues raised by the defendants over the course of discovery. (*Id.* at 10-17.) Third, Mr. Anderson requests that the Court recognize that there is no genuine issue of material fact concerning the defendants' level of integration as employers and that they are integrated employers under both federal and Maine law. (*Id.* at 17-20.) I discuss these issues out of order and start with the integrated enterprise theory.

1. The Integrated Enterprise Theory

Mr. Anderson requests that this court rule as a matter of law that JNJ Logging and Theriault Tree Harvesting, even though separately incorporated, are an integrated enterprise for purposes of employment related statutes. Traditional employment cases involving the integrated enterprise theory commonly address issues of parent-subsidiary liability where the employee seeks to have the larger number of employees created by the two entities aggregated. This case, involving sister corporations, differs somewhat from the traditional parent-subsidiary configuration, but the parties suggest no reason why the same factors would not apply.⁸ "The factors considered in determining whether two or more entities are a single employer under the integrated-enterprise test are: (1) common management; (2) interrelation between operations; (3) centralized control over labor relations; and (4) common ownership." Torres-Negron v. Merck

⁸ Rather than an "integrated enterprise" this arrangement might be more properly described as multiple commercial entities constituting joint employers for purposes of the application of employment laws. See, e.g., Virgo v. Riviera Beach Assocs., Ltd., 30 F.3d 1350, 1359-61 (11th Cir. 1994) (concluding that property management company, which directly employed the aggrieved employee, and the limited partnership that owned the property being managed, constituted joint employers and, thus, their employees could be aggregated to satisfy the jurisdictional requirements of Title VII). The "joint employer" concept recognizes that the business entities involved are in fact separate but that they share or co-determine the conditions of employment. Rivas v. Federacion de Asociaciones Pecuarias de P. R., 929 F.2d 814, 820 n. 17 (1st Cir. 1991) (discussing applicability of "joint employer" concept in the context of Age Discrimination in Employment Act). In Rivas, the First Circuit rejected the "integrated enterprise" factors as inappropriate to the joint employer inquiry. *Id.* n.16. Instead, the court considered a number of different tests, including the Second Circuit's five-factor test. *Id.* at 821 (citing Clinton's Ditch Co-op Co., Inc. v. NLRB, 778 F.2d 132, 138-39 (2d Cir. 1985) (emphasizing five factors: (1) hiring and firing; (2) discipline; (3) pay, insurance and records; (4) supervision; and (5) participation in the collective bargaining process).

& Co., 488 F.3d 34, 42 (1st Cir. 2007). Of these four factors, the third factor, control of labor operations, is a "primary consideration in evaluating employer status." Romano v. U-Haul Int'l., 233 F.3d 655, 666 (1st Cir. 2000). The First Circuit follows a "flexible" approach that "focuses on employment decisions." Id.

The defendants do not dispute that the Maine Law Court has embraced the "integrated enterprise" concept in the context of Maine's Whistleblowers' Protection Act. Batchelder v. Realty Res. Hospitality, LLC, 2007 ME 17, 914 A.2d 1116. Nor do they quarrel with the notion that federal courts have applied the integrated enterprise factors in the context of the Fair Labor Standards Act. In fact, Courts of Appeal have recognized that the "remedial purposes of the FLSA require courts to define 'employer' more broadly than the term would be interpreted in traditional common law applications." Dole v. Elliot Travel & Tours, Inc., 942 F.2d 962, 965 (6th Cir. 1991) (quoting McLaughlin v. Seafood, Inc., 867 F.2d 875, 877 (5th Cir. 1989) (per curiam), and determining that corporation's president was personally liable under FLSA). Nor do they take issue with the notion that the Maine Law Court would, in all probability, look to analogous federal law in construing its own wage and hour law and thus would likely apply an integrated enterprise test in those circumstances. Gordon v. Maine Cent. R.R., 657 A.2d 785, 786 (Me. 1995) (rejecting a plaintiff's argument that it was error for the trial court to look to the FLSA, federal regulations, and federal case law to construe a term found in the Maine wage statutes).

Applying the Romano factors to the facts developed by the parties, JNJ Logging and Theriault Tree Harvesting formed an integrated enterprise. The two corporations shared common ownership through Lynn Theriault. Ms. Theriault provides the business management and Mr. Theriault provides labor management for both companies. Finally, the logging

operations between the two companies are integrated. For instance, the trees cut by JNJ's employees become part and parcel of the Theriault Tree Harvesting hauling operation. Thus, the three "lesser" integrated enterprise factors are easily satisfied. The crucial question is whether JNJ and Theriault Tree Harvesting have centralized control over labor relations. It is apparent that the centralized control rests with Lynn and Mark Theriault for both corporations. Whether the four factor "integrated enterprise" test espoused by the parties or the joint employer five factor test set forth by the Second Circuit applies in this case, the result is the same. Lynn or Mark Theriault determined who worked for which company, how much they were paid, whether or not they would be provided benefits such as health insurance, how the employees would be supervised and disciplined, and all the other terms of the contractual employment relationship.

In applying these various factors to the facts of this case, I note that JNJ was formed for employment related purposes in an attempt to secure lower workers' compensation rates. That fact also provides support for the notion that these two corporations had centralized control in terms of labor-related issues. Mark Theriault, who provided labor management in the field for both corporations, did not even know for which company his individual employees worked. Although there was no collective bargaining with any of these employees, any employment contract that Mark Theriault formed with an individual worker was without regard to which corporation employed him. Certainly the employee management of the two companies was fully integrated. Additionally, the record is silent as to how the determination was made as to which company individual employees would be assigned, but it is apparent that the decision had to be made by Lynn Theriault who kept the books for both companies, given that Mark Theriault professed not to know for whom the employees worked. Based on the undisputed record developed in this case, Anderson is entitled to summary judgment on this issue and the total

number of employees between the two corporations may be aggregated for purposes of Anderson's various statutory employment claims and any judgment ultimately entered for Mr. Anderson would be the responsibility of both entities.

2. The Wage and Hour Claims

In his second amended complaint, Mr. Anderson alleges in three counts a violation of three provisions of Maine wage law and, in a fourth count, a violation of the maximum hours / overtime pay provision of the Fair Labor Standards Act:

- (I) 26-A M.R.S. § 626-A, failure to make timely payment of wages;
- (II) 26-A M.R.S. § 664, made actionable by § 670, failure to pay 1.5 times the regular hourly rate for all hours actually worked in excess of forty hours;
- (III) 26 M.R.S. § 626, failure to pay earned wages; and
- (IV) 29 U.S.C. § 207, failure to pay 1.5 times the regular hourly rate for all hours actually worked in excess of forty hours.

(Second Am. Compl., Doc. No. 27.) As I understand Mr. Anderson's motion, he seeks partial summary judgment on the following issues related to these claims: (1) his regular hourly wage rate calculation should include the value of the lodging that was provided to him by his employer, thus increasing the value of his premium overtime pay; (2) as a non-exempt employee he was entitled to overtime pay on top of his \$700.00 per week salary for any hours over 40 per week; (3) defendants are liable for liquidated damages under the FLSA because defendants failed to plead a good faith affirmative defense; and (4) defendants are liable as a matter of law for liquidated damages in varying amounts under Maine statutory law, without exception. Based upon the parties' memoranda and the summary judgment record, I conclude that Mr. Anderson is entitled to judgment as a matter of law that the Defendants violated the FLSA

because they compensated him using an invalid guaranteed wage plan. However, I conclude that Mr. Anderson's other summary judgment requests should not be granted.

a. Lodging as a component of Anderson's regular wage.

In May of 2006 Anderson began working for Theriault Tree Harvesting at the rate of \$12.00 per hour for a 40 hour week. It appears undisputed that when he worked overtime, which he did virtually every week, he received 1.5 times his hourly salary for the actual hours of overtime worked, resulting in paychecks that varied from week to week. In June 2006, while Anderson was being compensated at an hourly rate, Mark Theriault offered Anderson the use of a logging camp as a living accommodation and Anderson moved into the camp. The record does not reflect any adjustment in Anderson's hourly compensation based on his use of the camp.

Under the FLSA, the term "wage" is defined to include "the reasonable cost, as determined by the Administrator [Secretary], to the employer of furnishing such employee with board, lodging or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." 29 U.S.C. § 203(m). Similarly, Maine law defines "wages" to include the reasonable cost to the employer of lodging provided to the employee. 26 M.R.S. § 663(5). Mr. Anderson argues that, in order to compute his base wage, the finder of fact must include in his weekly rate of compensation the cost of the camp accommodations that Theriault Tree Harvesting offered him beginning June 20, 2006, which will have the effect of enhancing his hourly rate for work performed after that date. Thus, if Anderson worked a "typical" 54 hour work week while he was salaried, his regular rate of pay was \$700 in salary and at least \$100 in lodging, making his regular hourly rate of compensation \$14.81 ($\$700 + \$100 = \800, divided by 54 hours = \$14.81 per hour).⁹ This figure would then

⁹ A similar function would be used to determine his hourly rate prior to the date on which he began receiving a weekly salary.

become the basis upon which any overtime figure was calculated, in Mr. Anderson's view. Not so, Defendants argue, because there is no evidence that the lodgings extended to Mr. Anderson were ever negotiated as part of Mr. Anderson's compensation. (Doc. No. 42 at 10-11.)

A reading of the statutes and regulations in question does not reflect that every provision of lodging by an employer must be reduced to a dollar value and treated as a component of the employee's regular wage for purposes of calculating the overtime rate. With respect to the FLSA, the Supreme Court has observed that the statute entitles the employer "to credit for the reasonable cost of these benefits," which suggests that the employer's provision of lodging and similar benefits may in some cases serve to offset an employee's claim for wages. Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 301 n.23 (1985). See, e.g., Donovan v. Williams Chem. Co., 682 F.2d 185, 189 (8th Cir. 1982) (reviewing trial court's decision to apply a credit in favor of employer for cost of lodging, to be applied against employee's minimum wage and overtime claims). However, in other circumstances, the employer's provision of lodging is treated as enhancing the employee's "regular rate" of pay for purposes of calculating overtime compensation, such as where the employer treats the cost of lodging as a component of the employee's wages and correspondingly reduces the employee's pay.¹⁰ 29 C.F.R. § 778.116. The latter scenario involves deductions made by an employer against the employee's wages in accordance with the agreement of the parties, 29 C.F.R. § 531.37, or the treatment of lodging as "an addition to wages," 29 C.F.R. § 516.27, as compared with an optional accommodation extended to the worker that is not used by the employer as a deduction against wages or regarded by the parties as an addition to, or component of, wages. See Estanislau v. Manchester Developers, LLC, 316 F. Supp. 2d 104, 108-109 (D. Conn. 2004) (explaining that employer may

¹⁰ Sometimes the employer wants the cost of lodging to be included in the wage calculation in order to avoid violating the minimum wage requirement.

credit lodging toward overtime pay when the parties mutually understand that lodging is a component of the worker's salary and that the weekly salary is meant to compensate overtime hours paid at the premium rate).

There is no evidence in this summary judgment record that the parties agreed or understood that Mr. Anderson's use of the camp would be treated as something that would either reduce or enhance his wages. I am not persuaded that 29 U.S.C. § 203(m) or 26 M.R.S. § 663(5) mandate that the cost of lodging be included in a regular rate calculation when the provision of lodging is not material to the employment contract and is outside of the parties mutual contemplation concerning compensation. On this score, Mr. Anderson does not offer a statement to the effect that his use of the camp was considered by anyone to be a component of or an addition to his wages or salary. (Pl.'s Statement of Material Facts ¶¶ 20-22.) For their part, the Defendants assert that use of the camp was not a material aspect of either the wage or the salary agreement because all compensation, including overtime compensation at the premium rate, was otherwise accounted for. I recommend that the Court not grant Mr. Anderson's request for judgment in his favor on the narrow issue of whether his use of the camp enhances his regular rate. He simply fails to demonstrate that his use of the camp was relevant to the parties' agreement respecting his wage or salary.¹¹

b. The \$700 salary and overtime compensation

Allegedly in response to Mr. Anderson's desire to "net" at least \$600.00 every week, the parties came up with a revised payment scheme in September 2006. Prior to this time, Mr. Anderson had been receiving overtime pay calculated on the basis of the number of overtime hours works, based on an understanding that his premium rate was \$18.00 per hour. According

¹¹ Theriault Tree Harvesting and JNJ have not asserted anywhere in their answer that they are entitled to have the cost of the camp applied as a credit against Mr. Anderson's claim for overtime wages.

to the Defendants, the new arrangement was for Anderson to receive a \$700 weekly salary based upon the understanding that Anderson would work in excess of 40 hours per week as he had prior to that time. If one assumes (as Defendants argue) that Anderson's wage was regarded as \$10.00 per hour regular time and \$15.00 per hour overtime for a 60 hour week, the numbers would work out to a \$700 salary. The Defendants assert that this was necessarily the parties' understanding at the time because they understood that the salary would compensate Mr. Anderson for up to 60 hours of work. (Defs.' Opposition Mem. at 8, Doc. No. 42.)¹²

Mr. Anderson casts these facts in a whole different light. He maintains that, if there was an agreement for a set number of hours, it was for 54 hours, so that whatever his weekly wage was (whether \$700, or \$800, or more) that wage must be divided by 54 rather than 60. (Pl.'s Mot. at 5.) If so, then using \$700 as a weekly wage would result in a regular hourly rate of \$12.96 and an overtime rate of \$19.44.¹³ Using these numbers, if Mr. Anderson worked 60 hours in a given week, he should have received wages in the amount of \$518.40 (40 hrs. at \$12.96) plus \$388.80 (20 hrs. at \$19.44), for a total of \$907.20.¹⁴

¹² Alternatively, the Defendants argue that, if a violation is found, Mr. Anderson's regular rate would be computed as \$11.67 based on \$700 divided by 60 hours. (Defs.' Opposition Mem. at 14.) On this theory, a 40-hour week earns \$466.80, and therefore the Defendant would have a \$233.20 credit toward the overtime due to Mr. Anderson for any given week. With an overtime rate of \$17.51 per hour, this credit would not be consumed unless Mr. Anderson worked more than 13.32 hours of overtime. The Defendants characterize this approach as a hybrid application of the "fluctuating workweek" and "fixed weekly salary" method of computing an employee's regular rate of pay under Department of Labor regulations set forth at 29 C.F.R. § 778.113(a) and 29 C.F.R. § 778.114(a). (Defs.' Opposition Mem. at 14-15.) First Circuit precedent suggests that 29 C.F.R. § 113 is the appropriate regulation, O'Brien v. Town of Agawam, 350 F.3d 279, 287-88 (1st Cir. 2003).

¹³ These numbers are not the numbers Mr. Anderson uses in his memorandum of law because he also adds \$100 to his weekly wage to account for lodging, thereby increasing his regular rate. For reasons already discussed, Mr. Anderson is not entitled to summary judgment on the issue of whether his use of the camp was a component of his wages.

¹⁴ Under his original wage agreement (\$12/hr), Mr. Anderson would receive \$840 in wages for a 60-hour week and \$732 for a 54-hour week.

The most important issue raised by this motion is whether or not Anderson was an employee for whom a flat salary without regard to overtime calculations is permissible under the FLSA. Mr. Anderson says that his \$700 salary arrangement with Theriault Tree Harvesting does not qualify as a valid overtime arrangement as a matter of law and requests partial summary judgment to the effect that the Defendants are liable to him for liquidated damages on Counts I through IV. (Pl.'s Mot. at 7, 12-15.)

For purposes of the FLSA, the applicable statutory provision is 29 U.S.C. § 207(f), which provides that compensation for "[e]mployment necessitating irregular hours of work" can be arranged for in "a bona fide individual contract"¹⁵ that calls for "a weekly guaranty of pay for not more than sixty hours" based on a regular rate that would not violate the minimum hourly rate and accounting for overtime at the rate of one and one-half times the regular rate. 29 U.S.C. § 207(f). The Department of Labor has determined that "[u]nless the pay arrangements in a particular situation meet the requirements of section 7(f) as set forth, all the compensation received by the employee under a guaranteed pay plan is included in his regular rate and no part of such guaranteed pay may be credited toward overtime compensation due under the Act." 29 C.F.R. § 778.403. The Department has recognized that the compromise reflected in the FLSA's acceptance of a "guaranteed wage plan" is designed to benefit the employee by affording "the security of a regular weekly income" and to benefit the employer "by enabling him to anticipate and control in advance at least some part of his labor costs." *Id.* § 788.404.¹⁶ The Department

¹⁵ The Department of Labor characterizes a bona fide individual contract as existing where the employee is aware of and has agreed to the method of compensation in advance of performing the work. Such an agreement does not have to be in writing, but "both the making of the contract and the settlement of its terms" must have proceeded "in good faith." 29 C.F.R. § 778.407.

¹⁶ The statutory exception in 29 U.S.C. § 207(f) for what the Department of Labor refers to as "guaranteed wage plans" came into being in the wake of the Supreme Court's decisions in *Walling v. A.H. Belo Corp.*, 316 U.S. 624 (1942), and *Walling v. Halliburton Oil Well Cementing Co.*, 331 U.S. 17 (1947), both of which cases approved of such plans as complying with the wage requirements of the FLSA.

aims to police the guaranteed wage plan provision to ensure that it cannot be used to "nullify[] the overtime requirements of the Act." Id. The Department restricts the availability of the exemption to situations in which "[t]he nature of the employee's duties" prevent him and his employer from "control[ing] or anticipat[ing] with any degree of certainty the number of hours he must work from week to week." Id. § 778.405. The applicability of the exemption is "always a question of fact." Id. However, the Department withholds the exemption in cases where the employee's hours never fall below "the statutory weekly limit on nonovertime hours." Id. Thus: "Any employment in which the employee's hours fluctuate only in the overtime range above the maximum workweek prescribed by the statute lacks the irregularity of hours . . . and so fails to meet the requirements of section 7(f)." Id. § 778.406 (titled: "Nonovertime hours as well as overtime hours must be irregular if section 7(f) is to apply"). An additional regulatory requirement is that "[t]he amount of the guaranty may not be subject to proration or deduction in short weeks." Id. § 778.410(a).

The undisputed facts in this case reflect that Mr. Anderson worked fewer than 40 hours per week in two of the weeks during which he received compensation in the form of a salary. However, in every instance in which his hours dropped appreciably, including in other weeks when he worked approximately 46 hours, Theriault Tree Harvesting reduced his salary. Consequently, even if the record could be construed as reflecting a sufficient degree of irregularity (because the number of weekly hours occasionally dropped below 40), the salary was not a valid guaranteed wage plan under the FLSA because the wage was not guaranteed for those weeks in which the number of hours dropped appreciably. Cf. O'Brien v. Town of Agawam, 350 F.3d 279, 288 (1st Cir. 2003) (addressing requirement that salary be fixed regardless of number of hours worked, but applying 29 C.F.R. § 778.114).

The burden falls on the employer to establish the Section 207(f) exemption to the requirement that hours be recorded and wages be calculated based on the number of hours actually worked. Donovan v. Richland Shoe Co., 623 F. Supp. 667, 669 (E.D. Penn. 1985) (granting summary judgment to plaintiff where employer failed to carry its burden of proof on the § 207(f) exemption). The Defendants fail to establish that Mr. Anderson's salary guaranteed a set wage regardless of the number of hours he worked in a given week, which means that they have failed, as a matter of law, to establish that their guaranteed wage plan was lawful for purposes of the FLSA, as construed by the Department of Labor in 29 C.F.R. §§ 778.405, 778.406. Mr. Anderson is entitled to summary judgment on this solitary legal issue.

Because there is no inherent conflict between the restrictions the Department has imposed with respect to the §207(f) exemption and the language of § 207(f), and because there is nothing inherently unreasonable about the Department's requirement that the employee's wage guarantee cannot be reduced in weeks involving fewer hours, the Department's regulatory restriction is entitled to deference. Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 161, 165 (2007) (deferring to a labor regulation concerning companionship workers despite an apparent conflict with a provision of the FLSA) (citing Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 843-44 (1984)). By extension, because it is undisputed that Theriault Tree Harvesting failed to pay the same salary in work weeks involving appreciably reduced hours, there is a violation of the FLSA as a matter of law.

c. The mileage adjustment

Mr. Anderson expresses concern in his motion that the Defendants will argue that the mileage reimbursement paid to him should be used as a credit against any unpaid overtime premium. His position is that, if the mileage reimbursement is determined to have been a

component of his wages, then the amount of the reimbursement simply gets factored into the calculation of his regular rate. (Pl.'s Mot. at 15-17.) The Defendants do attempt to make such a case, arguing that the Court should treat the disguised wage as an offset against unpaid overtime. (Defs.' Opposition Mem. at 21.) Mr. Anderson wants a ruling that this contention is foreclosed by 29 C.F.R. § 778.310. (Pl.'s Mot. at 16.) This regulation provides:

A premium in the form of a lump sum 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. . . . [W]here extra compensation is paid in the form of a lump sum for work performed in overtime hours, it must be included in the regular rate and may not be credited against statutory overtime compensation due.

I recommend that the Court not enter an order on this issue at this time. Given the way the parties have approached this issue in terms of the factual record, it is not undisputed that the mileage reimbursement was a disguised wage. If the facts ultimately demonstrate that the mileage reimbursement was a component of Mr. Anderson's wage, then the foregoing regulation would require that it be included in the regular rate computation, unless the Defendants can demonstrate that the mileage reimbursement was actually designed to pay the premium for a specific number of overtime hours. The Defendants' current factual presentation does not suggest this is likely, but, still, the parties have not even agreed that the mileage reimbursement was a component of Mr. Anderson's wage. A mileage reimbursement is not included in the regular rate of pay if it is paid for actual miles traveled or a reasonable approximation of the same. 29 C.F.R. § 778.217 (b)(3). Until it is established on the record that the mileage reimbursement was some manner of disguised wage, there is no reason to grant summary judgment with respect to the applicability, or impact, of 29 C.F.R. § 778.310.

d. Liquidated damages

It is not possible at this time to determine the amount of Mr. Anderson's claim for liquidated damages for two reasons. First, Mr. Anderson fails to establish that the number of overtime hours he worked can be determined based on undisputed evidence. How many hours he worked is a genuine issue of material fact. Additionally, there is a factual question whether the mileage reimbursement should be factored in to the computation of Mr. Anderson's regular hourly rate. Nevertheless, Mr. Anderson wants the Court to issue an order to the effect that he is entitled to liquidated damages as a matter of law under both the FLSA and the Maine wage statutes.

In opposition to this request, the Defendants assert that the \$700 salary agreement was a valid overtime arrangement. I have concluded that it cannot be viewed in this way under the FLSA as a matter of law, due to the Department of Labor's reasonable interpretation of 29 U.S.C. § 207(f). In the event that the Court should agree, the Defendants' fallback position is that some measure of damages is called for that cannot be determined on the existing record. (Defs.' Opposition Mem. at 9: "Assuming, *arguendo*, that Plaintiff's \$700 per week salary does not include overtime premiums . . . then at issue is what amount of overtime is owed to Plaintiff and how that amount is properly calculated.") I agree with this assessment by the Defendants and, accordingly, recommend that the Court issue a judgment to the effect that the Defendants have liability under the FLSA.

The Defendants do argue, however, that genuine issues of material fact preclude summary judgment on the issue of whether they are liable for liquidated damages over and above unpaid overtime wages. (*Id.* at 17-23.) According to the Defendants, entitlement to liquidated

damages under the FLSA presents a question of fact, citing 29 U.S.C. § 216(b) and § 260.

Section 216(b) provides as follows:

Any employer who violates the provisions of section 6 or section 7 of this Act [29 USCS §§ 206 or 207] *shall* be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

Id. § 216(b) (emphasis added). This language obviously does not aid the Defendants. However, section 260 provides that:

if the employer shows to the satisfaction of the court 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 Fair Labor Standards Act . . . , the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act [29 USCS § 216].

Id. § 260. According to the Defendants, there is a question of fact on this record whether their violation of the FLSA overtime provisions was in good faith and proceeded from a reasonable belief that the salary arrangement did not violate the Act. (Defs.' Opposition Mem. at 18.) They rely on the appearance that the change from wage compensation to salary compensation resulted in increased net compensation to Mr. Anderson and consistent compensation as well, as compared with Mr. Anderson's pay under the hourly wage approach, which fluctuated between a low of \$464.57 and a high of \$723.63 in net pay.¹⁷ They also assert that Theriault Tree Harvesting well understood its obligation to pay time and a half for overtime work and that there is no evidence it sought to avoid this obligation. (Defs.' Opposition Mem. at 19.) Among other arguments in opposition to this position, Mr. Anderson asserts that the good faith defense is an

¹⁷ On one version of the facts, Mr. Anderson's \$700 weekly salary would have amounted to a negotiated pay cut, except if Theriault Tree Harvesting used the mileage reimbursement scheme to ensure just over \$600 in net take home pay, which would ensure that Mr. Anderson's net weekly pay check would be higher than the average pay received under the hourly wage approach.

affirmative defense that the Defendants waived by their failure to assert it among the affirmative defenses contained in their answer. (Pl.'s Mot. at 9.)

The burden associated with the good faith defense is high and double damages are the norm. In some circuits, the employer is denied recourse to the good faith defense unless it can demonstrate that it took affirmative steps to determine the dictates of the FLSA and then to comply with them. See, e.g., Torres v. Gristede's Operating Corp., 628 F. Supp. 2d 447, 465 (S.D.N.Y. 2008) ("Here, [defendant] fails to make any credible evidentiary showing that it, for instance, took 'active steps to ascertain the dictates of the FLSA and then act to comply with them.' Accordingly, Defendants cannot meet their burden, and Plaintiffs are entitled to liquidated damages as a matter of law.") (quoting Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 142 (2d Cir. 1999)). In others, the defense turns on "proof of the employer's subjective intent to comply with the Act, as well as evidence of objective reasonableness in the employer's application of the Act." Castro v. Chicago Housing Auth., 360 F.3d 721, 730 (7th Cir. 2004); see also Morgan v. Speak Easy, LLC, 625 F. Supp. 2d 632, 658 (N.D. Ill. 2007) (denying summary judgment on the issue of liquidated damages based on a genuine issue whether defendants in fact paid the required wage).

I recommend that the Court withhold judgment on the availability of liquidated damages under the FLSA. Although the Defendants did not assert the good faith issue among their affirmative defenses, they repeatedly denied Mr. Anderson's allegations that their violations of applicable statutes were "willful." (Ans. to Second Am. Compl. ¶¶ 14, 18, 21, 25.) It is not clearly the law that the good faith provision must be pled as an affirmative defense in order for the Court to exercise its discretion under Section 260 of the FLSA. Section 260 requires the employer to "show" good faith, but it does not require that the defense be pleaded, as compared

with other defenses under the Act. See Herndon v. Wm. A. Straub, Inc., 17 F. Supp. 2d 1056, 1063 (E.D. Miss. 1998) ("declin[ing] to hold that 29 U.S.C. § 260 must be pleaded as an affirmative defense"). This result has been upheld even on the basis of an analysis of general rules of pleading affirmative defenses, at least where no unfairness or surprise results for the plaintiff.

Defendant's denial in the Answer that its actions were willful is certainly enough to put plaintiff on notice that it would utilize the good faith defense. The court does not believe that plaintiff is in any way prejudiced by defendant's failure to specifically plead good faith as an affirmative defense in its answer. It will therefore be treated as properly plead.

Statham v. United States, No. 00-699C, 147 Lab. Cas. (CCH) P34,651, 2002 U.S. Claims Lexis 264, *32, 2002 WL 31292278, *10 (Fed. Cl. 2002). The Defendants' denial of a willful violation is minimally sufficient to enable them to make a showing of a good faith violation of the FLSA.

Ultimately, there is a genuine issue in this case whether the Defendants actually paid Mr. Anderson compensation in excess of what he would be owed under a strict application of the Act. A finding that the salary and mileage reimbursement approach was designed to assure compensation in excess of the statutory requirement could justify a discretionary denial of liquidated damages based on a reasonable and good faith (albeit unorthodox) approach to the payment of wages. The existence of harm to Mr. Anderson does seem to rely, on one version of the facts, on a strict application of rules promulgated by the Department of Labor, rather than on any inherently obvious injustice. On the other hand, the testimony of the Theriaults does not portray any affirmative effort to determine the legality of their salary approach by reference to any outside source of authority. However, the language of Section 260 does not expressly impose a duty to investigate. In this regard, the Court enjoys a measure of discretion as to the availability of liquidated damages, so long as it finds good faith and a reasonable basis for the

employer's subjective belief that the Act's overtime pay requirement was not violated. Chao v. Hotel Oasis, Inc., 493 F.3d 26, 35 (1st Cir. 2007) ("Because the FLSA leaves the decision to depart from the norm of awarding double damages to the district court, we review only for abuse of discretion.") (citation omitted); McLaughlin v. Hogar San Jose, Inc., 865 F.2d 12, 14 (1st Cir. 1989) ("Congress has in unambiguous language expressly granted the primary decisional power in this respect to the district court, not to the Secretary or the courts of appeal.").

e. Count by count

The fact that the Defendants have violated the overtime-related requirements of the FLSA does not necessarily mean that they have violated the Maine statutes identified in counts I through III of the amended complaint. I address each count briefly.

i. Count I

In Count I, Mr. Anderson alleges a violation of 26 M.R.S. § 621-A, which he asserts as a basis for entitlement to treble damages, attorney's fees, and costs under 26 M.R.S. § 626-A. The "penalties" of Section 626-A apply when judgment is rendered in favor of an employee in an action to recover unpaid wages under subchapter 2 of the Act. Mr. Anderson alleges a violation of Section 621-A, which requires timely and full payment of wages within certain regular intervals of time. The record in this case demonstrates timely paychecks issued on a weekly basis in the full amount set by the parties' agreement. It is highly doubtful that this claim is even actionable on this record. This case concerns a theory of liability arrived at based on a very specific analysis of how overtime compensation is to be calculated. Mr. Anderson complains that he was paid too little during a period in which he received his wages in the form of a salary. This case is about failure to pay the proper overtime rate, a concern addressed in subchapter 3 of the Maine wage statute. It is not really about the timeliness of payments, which were made on a

weekly basis. As such, Section 626-A may have no application to the facts of this case. Cf. In re Wage Payment Litig. v. Wal-Mart Stores, Inc., 2000 ME 162, ¶ 18, 759 A.2d 217, 224 (observing that claims under subchapter 3, 26 M.R.S. §§ 661-672, were properly dismissed where the action concerned the timeliness of payments rather than the amount of payments and holding that the plaintiffs could only pursue claims under Sections 621 and 626-A of subchapter 2). Consequently, the Court should not grant Mr. Anderson's request for summary judgment on this count.¹⁸

ii. Count II

In Count II, Mr. Anderson alleges a violation of 26 M.R.S. § 664 and seeks redress pursuant to 26 M.R.S. § 670. Section 664 prohibits employers from paying less than the rates that Section 664 specifies. With respect to overtime wages: "An employer may not require an employee to work more than 40 hours in any one week unless 1 1/2 times the regular hourly rate is paid for all hours actually worked in excess of 40 hours in that week." 29 U.S.C. § 664(3). There is a genuine issue of material fact with respect to how many hours Mr. Anderson worked. There is also a genuine issue of material fact whether the salary paid to Mr. Anderson was sufficient to pay him the premium rate on his overtime hours. Mr. Anderson wants his salary of \$700, his mileage reimbursement, and the Defendants' cost of providing the camp to be lumped together and treated as his weekly wage. (Pl.'s Mot. at 5-6 & 17 n.11.) In effect, he would have the Court rule that his regular hourly rate was in the neighborhood of \$16.63, with an overtime

¹⁸ The Defendants cite Roman v. Maietta Construction for the proposition that "the FLSA is the exclusive remedy for enforcement of rights created under the FLSA." 147 F.3d 71, 76 (1st Cir. 1998). They maintain that Mr. Anderson cannot "assert" a claim under Maine law at the same time as he asserts a claim under the FLSA. (Defs.' Opposition Mem. at 22.) This is a misapplication of the language quoted from Roman. The point made in Roman was simply that because the plaintiff "received compensation under the FLSA for his claims, he [could] not recover again under Maine law." Id. Mr. Anderson argues that a recovery of treble damages under 26 M.R.S. § 626-A would not amount to a prohibited double recovery so long as treble damages under this provision are not stacked atop double damages under the FLSA. (Pl.'s Reply Mem. at 13, Doc. No. 55.) He is correct that such claims can coexist in a case, but for reasons set out in this discussion, I doubt that Mr. Anderson has proper claims under 26 M.R.S. § 626 or under 26 M.R.S. § 626-A.

rate of \$24.95.¹⁹ I do not read Section 664 as requiring such a result. On one interpretation of the facts, Theriault Tree Harvesting paid Mr. Anderson \$798.05 for most of the weeks he worked (\$700 salary and \$98.05 mileage, and excluding lodging for reasons explained in part B.2.a of this discussion), in order to guarantee him roughly \$600 in net take home pay every week. Using these figures, and assuming 54 hours of work, Mr. Anderson's regular hourly rate would exceed \$13.00 per hour, more than his prior wage of \$12.00 per hour.²⁰ Although I have explained in the body of this discussion why the Defendants have violated the FLSA based on a guaranteed wage plan that does not comply with U.S. Department of Labor regulations, it does not automatically follow that the compensation paid to Mr. Anderson failed to include adequate overtime compensation for purposes of Maine labor law.²¹ The parties have not addressed that distinct issue in their memoranda. Accordingly, I recommend that the Court not grant Mr. Anderson's request for summary judgment on this count.

iii. Count III

In Count III, Mr. Anderson alleges a violation of 26 M.R.S. § 626 because the Defendants failed to pay him all overtime wages allegedly due for hours worked throughout the period of his employment upon his demand following the cessation of his employment. Section 626 requires that an employer must pay an employee leaving employment "in full within a reasonable time after demand at the office of the employer where payrolls are kept and wages are

¹⁹ This theoretical regular rate calculation is based on the sum of \$700 in salary, \$100 in lodging, and \$98.05 in mileage reimbursement, divided by 54.

²⁰ This calculation is based on the formula: $40x + 1.5x(y) = \$798.05$, where x equals the regular rate and y equals the number of overtime hours. Using 14 as the number of overtime hours (based on 54 total hours) allows the equation to be solved as $x = \$13.08$. If 20 is inserted for y (based on 60 total hours), the regular rate drops to 11.40 per hour. Using this formula, the tipping point between a regular wage that exceeds \$12 per hour and one that falls below \$12 per hour exists somewhere between 57 and 58 total weekly hours.

²¹ The Court may ultimately conclude that the U.S. Department of Labor's regulatory response to the Belo case and the Halliburton Oil Well case, see note 16, *supra*, should inform its construction of Maine law, but it is not a foregone conclusion.

paid." Failure to pay the departing employee when he would normally receive his pay or within two weeks of demand exposes the employer to liability in treble damages. 26 M.R.S. § 626.

The Maine wage statutes are drawn in a fashion that makes it highly doubtful that a claim for an allegedly long-term violation of Section 664's overtime requirements can serve as the basis for a claim under Section 626 for the reasons addressed in relation to Count I, above. Section 664 corresponds with Section 670 and the penalties and remedies of Section 670 are, as a matter of law, the penalties and remedies that apply in this kind of scenario. Avery v. Kennebec Millwork, Inc., 2004 ME 147, ¶¶ 9-10, 861 A.2d 634, 636-37. It does not appear that there has ever been a demand for failure to pay wages in a timely fashion, except to the extent that Mr. Anderson has asserted a violation of the overtime rate provision of the Maine wage statutes well after his separation from employment. For this reason, I recommend that the Court not grant Mr. Anderson's request for summary judgment in his favor on this count.

iv. Count IV

In Count IV, Mr. Anderson claims a violation of Section 207 of the Fair Labor Standards Act based on the allegation that the Defendants required him to work in excess of 40 hours without paying him the premium rate for overtime hours. The Defendants themselves argue that they were providing Mr. Anderson with a wage guarantee. Their approach was unlawful under FLSA regulations that this Court should defer to for purposes of this count. Because the undisputed facts of this case demonstrate, as a matter of law, that the Defendants violated the Department of Labor's regulatory restrictions on guaranteed wage plans, Mr. Anderson is entitled to summary judgment to the effect that a violation of the FLSA is made out on the record.

CONCLUSION

For the reasons set forth in the foregoing discussion, I RECOMMEND that the Court grant the Defendant's Motion for Summary Judgment against the Whistleblower claims. I further RECOMMEND that the Court GRANT, IN PART, Mr. Anderson's Motion for Partial Summary Judgment, by entering judgment to the effect that a violation of Section 207 of the FLSA is established as a matter of law and that JNJ Logging and Theriault are an integrated enterprise for purposes of Mr. Anderson's action.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within fourteen (14) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within fourteen (14) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

January 20, 2010

ANDERSON v. THERIAULT TREE HARVESTING,
INC

Assigned to: JUDGE JOHN A. WOODCOCK, JR
Referred to: MAGISTRATE JUDGE MARGARET J.
KRAVCHUK
Cause: 29:206 Collect Unpaid Wages

Date Filed: 09/29/2008
Jury Demand: Defendant
Nature of Suit: 710 Labor: Fair
Standards
Jurisdiction: Federal Question

Plaintiff

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V.

Defendant

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