

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STEVEN ROMAN,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 96-256-P-DMC</i>
)	
MAIETTA CONSTRUCTION, INC.,)	
)	
<i>Defendant</i>)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

Findings of Fact

1. At all relevant times, Maietta Construction, Inc. (“Maietta”) was an employer doing sufficient business to subject it to coverage under the overtime provisions of the Fair Labor Standards Act (“FLSA”).
2. Plaintiff Steven Roman (“Roman”) was employed by Maietta from the fall of 1987 through June 26, 1995.
3. Beginning in 1985, Roman served as crew chief for the stock car or cars raced by Michael Maietta, Sr., a son of the owner of Maietta. He performed this work as a volunteer, without expectation of payment. At all relevant times, the stock cars were not owned by Maietta.

¹ Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

4. Michael Maietta, Sr., is not, and at all relevant times was not, an officer, owner or director of Maietta. He was, however, employed by Maietta in a supervisory position at all times relevant to this lawsuit.

5. Roman became interested in stock car racing in the late 1970s. Before 1984, he owned and raced two stock cars, serving as crew chief and paying the drivers of those cars a percentage of the winnings. During this time, he also served as crew chief on two stock cars that he did not own. He considered the members of the crews on the cars that he owned to be volunteers and did not pay them. He was not paid for his work as crew chief on the cars that he did not own and in fact considered himself a volunteer when he worked in that capacity. He met Michael Maietta, Sr. at the race track where both of them did most of their racing.

6. Beginning in 1984, Roman provided building and repair services for the stock cars raced by Michael Maietta, Sr., at Roman's body shop, which was the business from which he then made his living, in Windham, Maine. Roman was paid for these services.

7. In 1987 Roman asked Michael Maietta, Sr. whether he could be employed by Maietta as a welder. Michael Maietta, Sr. approached his father, Louis Maietta, Sr., an owner of Maietta, with this request and Louis Maietta, Sr. approved the hiring of Roman as a welder at \$12 per hour.

8. Also in 1987, Louis Maietta, Sr. gave permission for the stock cars owned by Michael Maietta, Sr. to be moved from Roman's Windham shop to the Maietta business premises in Scarborough, Maine, on the condition that no one work on the cars during regular business hours.

9. Roman regularly worked on the stock cars at Maietta's Scarborough premises during business hours. He recorded all of the time during which he worked on the stock cars at Maietta's business premises on his time cards which were processed through the company's time clock. All of the

supervisors at the premises, who were sons of Louis Maietta, Sr., were aware of these activities but did not direct Roman to stop. Whenever Louis Maietta, Sr. learned that Roman was working on the stock cars during business hours, he would tell Roman to stop or tell one of his sons to tell Roman to stop. However, Louis Maietta, Sr.'s supervisor sons continued thereafter to permit Roman to work on the stock cars while on Maietta's time clock. Roman was paid by Maietta for all the hours he recorded that he had worked at Maietta's business premises, including the hours spent working on the stock cars, with the exceptions noted below.

10. In 1989, Roman's hourly rate of pay was increased to \$16. This was his rate of pay when his employment by Maietta was terminated.

11. Shortly after Roman ceased working for Maietta he requested that Maietta pay him additional wages which he contended were due to him. This request was made in writing through his attorney in July 1995.

12. Roman was frequently paid time and one-half by Maietta for overtime hours worked. Many of these hours were spent by Roman working on the stock cars.

13. At some time during his employment Roman and Louis Maietta, Jr., one of Louis Maietta, Sr.'s sons and vice-president and a director of Maietta, agreed that any hours over 40 in a given week spent by Roman working on the stock cars at Maietta's business premises would be "held" rather than included in his paycheck for that week and that Roman could take compensatory time off in exchange for the "held" hours. Roman tried to take Fridays off.

14. Serving as crew chief for the stock cars included being present at weekly races from April through October every year. Races were usually held on Saturday. Some races occurred on Sundays or on Friday or Wednesday nights. On occasion there were two races in a week. Roman did not

serve as crew chief after the 1994 season.

15. The agreed terms and conditions of Roman's employment by Maietta did not include his services as crew chief for Michael Maietta, Sr.'s stock cars and particularly did not include his time at the race track.

16. Between June 9, 1993 and August 24, 1994 Maietta "held" a total of 120.75 hours from Roman's time cards. This means that Roman was not compensated for these "held" hours in his next regular paycheck. Instead, to the extent he was compensated for these hours, payment was accomplished in stages or increments by paying him on the basis of a 40-hour work week in weeks when he in fact worked fewer than 40 hours. Roman and Maietta, acting through Louis Maietta, Jr., agreed to this arrangement and referred to these hours as "compensatory time." During this same time period — June 9, 1993 to August 24, 1994 — Maietta paid Roman for a total of 105 hours in compensatory time at the rate of \$16 per hour.

17. Maietta advertised at the race track where Michael Maietta, Sr. raced most often as part of a "package" that it arranged with the owner of the track after it was hired to pave the track for the first time. Maietta provided some services, but no cash, to Michael Maietta, Sr. in connection with his racing and its name was painted on the stock cars as a sponsor.

18. Roman sustained an injury while working at Maietta in August 1994. He returned to work at Maietta in November 1994 and his relationship with Maietta and with Michael Maietta, Sr. deteriorated thereafter.

Conclusions of Law

1. The parties do not dispute that Roman was employed by Maietta. The dispute concerns the scope of that employment. Both parties rely on 29 U.S.C. § 203(g), the statutory definition of “employ,” which is defined for purposes of the FLSA as including “to suffer or permit to work.” This definition, and the case law construing it, is not particularly helpful in determining whether particular activities were part of an individual’s employment by another.

2. Maietta did not “suffer or permit” Roman to work on the stock cars owned by Michael Maietta, Sr., or as crew chief for Michael Maietta, Sr., at the race tracks. The work performed by Roman at the race tracks was not primarily for the benefit of Maietta; indeed, the benefit to Maietta, if any, is too tenuous to provide the basis for any legal liability to pay wages for that work. *See, e.g., Reich v. Conagra, Inc.*, 987 F.2d 1357, 1359-61 (8th Cir. 1993) (employees who used employer’s products free of charge to make display models for company stores at home were not necessarily employees while engaged in that activity). In *Republican Pub. Co. v. American Newspaper Guild*, 172 F.2d 943, 945 (1st Cir. 1949), the First Circuit held that a newspaper theater editor’s attendance at theaters for the purpose of writing reviews constitutes mental or physical exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer. This is the Supreme Court’s definition of work or employment as those terms are used in the FLSA. *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). Roman’s work at the race tracks does not meet this definition. Maietta is not liable for regular wages or overtime pay for the hours spent by Roman in this activity under the FLSA or under the state statutes governing employment relationships upon which Roman bases his claim.

3. Maietta did not hire Roman to perform work on the stock cars at its shop. However, it acquiesced in his performance of such work while on the company clock, even though its top management personnel were all well aware of his activities in this regard, and paid him for doing such work. It is estopped by this conduct to contend that it is not liable to Roman for the overtime hours represented on his time cards for which it has not yet paid him, even though these hours represent work performed on the stock cars at its business premises.

4. Roman contends that his agreement with Maietta to take compensatory time instead of cash for his earned overtime is illegal. He relies on 29 U.S.C. § 207(o) in this regard. However, that subsection of the statute merely sets limits and conditions for the use of compensatory time in lieu of overtime compensation for employees of public agencies; it does not by its terms or by necessary inference prohibit the use of overtime compensation by private employers. Indeed, at least two courts have included compensatory time calculations in their consideration of FLSA claims. *Donovan v. United Video, Inc.*, 725 F.2d 577, 584 (10th Cir. 1984); *Reich v. Newspapers of New England, Inc.*, 834 F. Supp. 530, 541-42 (D.N.H. 1993), *aff'd* 44 F.3d 1060 (1st Cir. 1995).

5. Maietta paid Roman when he took compensatory time at his regular rate of \$16 per hour. Because overtime requires compensation at a rate not less than one and one-half times the employee's regular rate, 29 U.S.C. § 207(a)(2), Roman is entitled to an additional \$8 per hour for the 105 hours of compensatory time for which he was paid, and \$24 per hour for the 15.75 hours of overtime for which he was not paid, for a total of \$1,218.

6. Roman argues that payment for overtime must be included in the next paycheck after the period in which the overtime was worked, citing 29 C.F.R. §§ 778.106 and 778.315 and 26 M.R.S.A. § 621, and that Maietta failed to meet this legal requirement. The liquidated damages provided in

the FLSA are intended to compensate the employee for the lack of timely payment of overtime. *Biggs v. Wilson*, 1 F.3d 1537, 1542 (9th Cir. 1993). State law also provides liquidated damages as a remedy. 26 M.R.S.A. § 670.

7. Under both 29 U.S.C. § 216(b) and 26 M.R.S.A. § 670, Roman is entitled to liquidated damages in the amount of the unpaid overtime and attorney fees in addition to the amount calculated above. Prejudgment interest is not available under the FLSA when liquidated damages are awarded. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715-16 (1945); *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 910-11 (3d Cir. 1991).

8. Roman contends that he is also entitled to interest on the basic amount of damages and an additional amount equal to the basic amount under 26 M.R.S.A. § 626-A because he demanded payment of the amount due within a reasonable time after his employment was terminated and Maietta did not pay him. These remedies are inconsistent with those provided in the FLSA. While the First Circuit has held that the FLSA does not preempt state legislation in the areas of wages and working conditions, *e.g.*, *Maccabees Mut. Life Ins. Co. v. Perez-Rosado*, 641 F.2d 45, 46 (1st Cir. 1981), it has not specifically addressed the issue of remedies. Courts that have directly addressed this issue have held that section 216(b) of the FLSA is the exclusive remedy for enforcement of rights created under the FLSA. *E.g.*, *Tombrello v. USX Corp.*, 763 F. Supp. 541, 544 (N. D. Ala. 1991), and cases cited therein. I find this analysis persuasive. Roman is not entitled to damages in excess of those provided by the FLSA.

Accordingly, judgment shall enter in favor of the plaintiff in the amount of \$2,436.00, plus costs and a reasonable attorney fee.

So ordered.

Dated this 13th day of August, 1997.

David M. Cohen
United States Magistrate Judge