IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

JIMMY BELUE, ET AL.	§	**PLAINTIFFS**
	§	
VS.	§	**CASE NO. 2:07CV1004-KS-MTP**
	§	
WAYNE FARMS LLC	§	**DEFENDANT**
	§	
CONSOLIDATED WITH	§	
	§	
ROBERT THOMAS DUNN, ET AL.	§	**PLAINTIFFS**
	§	
VS.	§	**CASE NO. 2:07CV1005-MTP**
	§	
WAYNE FARMS LLC	§	**DEFENDANT**

BRIEF SUPPORTING DEFENDANT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT (SHORT WEEKS)

I. Introduction

This Plaintiff should be dismissed because he cannot establish a claim for unpaid overtime under the Fair Labor Standards Act (FLSA).

	Name	Most Hours Worked in one Week[1]	Hours and Earnings Report
1	Gallagher, Michael L.	11.2	ALB012045 (Ex. 1)

II. Summary Judgment Standard

Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). To support a motion for summary judgment, "the moving

[1]This is the most hours that the Plaintiff worked in any single work week since October 2003, which is three years prior to the filing of the first consents to join this action. Wayne Farms still asserts that the applicable statute of limitations period runs backwards from the time that each individual Plaintiff filed his or her consent. However, for simplicity's sake, Wayne Farms has looked as far back as October 2003 for everyone to determine maximum hours worked.

party...[has] the burden of showing the absence of a genuine issue as to any material fact." *Burleson v. Tex. Dept. of Criminal Justice*, 393 F.3d 577, 589 (5th Cir 2004). Material facts are those that "could affect the outcome of the action." *Weeks Marine, Inc. v. Fireman's Fund Ins. Co.*, 340 F.3d 233, 235 (5th Cir. 2003) (citations omitted). Disputes about material facts are genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party" on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In evaluating a motion for summary judgment, the court views all evidence "in the light most favorable to the non-moving party" and "draw[s] all reasonable inferences in its favor." *Breen v. Texas A&M Univ.*, 485 F.3d 325, 331 (5th Cir. 2007). If the movant satisfies its initial burden, then the burden shifts back to the nonmoving party to produce evidence indicating that a genuine issue of material fact exists for each essential element of its case. *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 246-47 (5th Cir. 2003). The nonmovant is not entitled to merely rest on her pleadings, but must set forth "specific facts showing there is a genuine issue for trial." *DirecTV, Inc. v. Robson*, 420 F.3d 532, 536 (5th Cir. 2005). If the nonmovant responds and still "no reasonable juror could find for the nonmovant, summary judgment will be granted." *Caboni v. General Motors Corp.*, 278 F.3d 448, 451 (5th Cir. 2002).

III. Plaintiffs Cannot Produce Evidence That They Worked Any Overtime at Wayne Farms

To establish a claim for uncompensated overtime under FLSA, a plaintiff must demonstrate:

(1) that he worked overtime hours without compensation;

(2) the amount and extent of the work as a matter of just and reasonable inference; and

(3) that the employer "suffered" or "permitted" him to work uncompensated overtime.

Maciel v. City of Los Angeles, 569 F.Supp.2d 1038, 1043 (C.D. Cal. 2008). "[A]n employee cannot succeed on a claim under the FLSA if his average wage for a period in which he works *no overtime* exceeds minimum wage." *Bolick v. Brevard County Sheriffs Dept.*, 937 F.Supp. 1560, 1568 (M.D. Fla. 1006) (emphasis added). "[P]artial summary judgment is appropriate where there is no dispute that the plaintiffs' salary is above the minimum wage, and they are owed no overtime." *Id.* If an employee never works more than forty hours in a week, the employer could not possibly violate the FLSA by failing to pay her overtime compensation. *Green v. Dallas County Schools*, 2005 WL 1630032, at *3 (N.D. Tex. July 6, 2005). *See also, Covington v. Cooper*, 426 F.Supp. 1118, 1123 (S.D. Miss. 1977) (employee who only worked two hours per day was not entitled to any overtime pay).

"Gap time" refers to

> time that is not covered by the overtime provisions because it does not exceed the overtime limit, and . . . time that is not covered by the minimum wage provisions because, even though the work is uncompensated, the employees are still being paid a minimum wage when their salaries are averaged across their actual time worked.

Green, 2005 WL 1630032, at *3 (omission in original). Almost all courts that have addressed the issue of gap time have held that a plaintiff cannot state a claim under the FLSA if he works less than 40 hours per week and receives payment in excess of what he would have been paid had he worked 40 hours per week at minimum wage.[2] Furthermore, several courts have granted

[2] *See e.g., Ladegaard v. Hard Rock Concrete Cutters Inc.*, 2004 WL 1882449, at * 5 (N.D. Ill. Aug. 18, 2004); *Green*, 2005 WL 1630032, at *3 (gap time claim not cognizable under the FLSA); *Maciel*, 569 F.Supp.2d at 1056 (a pure gap time claim is untenable under the FLSA); *Carter v. City of Charleston, South Carolina*, 995 F.Supp. 620, 621 (D.S.C. 1997) ("Pure gap time claims are not cognizable under the FLSA when the hours worked do not exceed the overtime threshold and the employee has been paid for those hours at the statutory minimum wage."); *Davis v. City of Loganville,*

partial summary judgment for the defendant on an FLSA claim when the plaintiff has never worked more than 40[3] hours per week. *See e. g.*, *Maciel*, 569 F.Supp.2d at 1056; *Green*, 2005 WL 1630032, at *3-4; *Bolick*, 937 F.Supp. at 1569; *Arnold v. State of Arkansas*, 910 F.Supp. 1385, 1393-94 (E.D. Ark. 1995).

The Plaintiffs attempted to add a claim for "gap time" to their Complaint in their Motion for Leave to File Amended Complaint. Doc. 11, filed in S.D. Miss. 2:07cv1004. Because gap time is not a cognizable claim under the FLSA, the Plaintiffs disguised their gap time claim as a state law claim for unjust enrichment. However, this Court denied the Plaintiffs' Motion, and so Plaintiffs have not properly asserted a claim for gap time. Doc. 17, filed in S.D. Miss. 2:07cv1004.

The Plaintiff listed above cannot demonstrate that he worked any overtime hours at Wayne Farms. The Plaintiff never worked more than 40 hours per week. The most hours that the Plaintiff worked in one week is 11.2 hours. The hours worked per week are evidenced under the regular hours ("RegHrs") column on each Plaintiff's hours and earnings history report, which are drawn from employment records that Wayne Farms has produced to Plaintiffs and that are stipulated to be authentic. *See* Business Records Stipulation, Doc. 25, 2:07md1872.[4]

The Plaintiff listed in the table above only worked 11.2 hours in his one week of employment at Wayne Farms. For Mr. Gallagher to have any claim for unpaid overtime under the FLSA, he would have to show that he spent more than 28.8 hours per week, or on average,

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Georgia, 2006 WL 826713, at *9 (M.D. Ga. Mar. 28, 2006) ("widely-accepted rule of law that employers are not obligated under the FLSA to compensate employers for "gap time" as long as employees receive at least the statutory minimum wage for all nonovertime hours worked").

[3] The Plaintiffs in some of the cases were police or firemen, where the applicable FLSA maximum hours was a number of hours over a two week period or over twenty-eight days.

[4] Plaintiffs are also paid six minutes per day for personal time at their regular rate; this can be found under the personal time hours ("PTHrs") column on the earnings and history reports.

almost 6 hours per day, in off-line work not captured by the swipes of his line's Master time card. Plaintiff will not be able to demonstrate that he spent more than 28.8 hours per week in uncompensated off-line work, and therefore, he has no claim for overtime under the FLSA as he never worked more than 40 hours in any given work week.

Additionally, Plaintiff was paid more than minimum wage;[5] he was paid $9.05 per hour, which is higher than minimum wage. Thus, because Plaintiff never worked overtime and was always paid more than minimum wage, Plaintiff cannot establish a claim under the FLSA.

IV. Plaintiff Should be Prohibited from Offering any Evidence in Opposition to this Motion

On June 9, 2008, in accordance with Pretrial Order No. 2, paragraph 7, defense counsel sent Plaintiffs' counsel a list of Plaintiffs whose claims defense counsel believed should be dismissed in the form of a dismissal spreadsheet. Each of the Plaintiffs listed in this Motion was designated as a requested dismissal, for the reason underlying this Motion – short weeks / no overtime. Plaintiffs were required to respond, in writing, by August 1, 2008; the Court granted them a final extension until October 1, 2008. *See* Doc. 35 in 2:07md1872. Plaintiffs did not respond to the dismissal requests in writing. They disclosed no reason for rejecting dismissal. They identified no documents supporting their position. In short, they ignored these commands of Pretrial Order No. 2, paragraph 7. Due to Plaintiffs' failure to adequately respond and their resulting failure to obey the Court's Order, Wayne Farms requests that the Court exclude all facts and documentation suggesting that these Plaintiffs should not be dismissed.

Rule 16(f)(1)(C) states that the Court may "issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney . . . fails to obey a scheduling

[5] Plaintiffs have not properly alleged a claim for failure to pay at least minimum wage in their complaint. This point is made only to reiterate that the Plaintiffs targeted in this Motion have no cognizable claim under the FLSA, for overtime or minimum wage.

order or other pretrial order." Because Plaintiffs have clearly failed to obey the Court's Pretrial Order No. 2, any just sanctions or those allowed by Rule 37(b)(2)(A) are appropriate at this time. Rule 37(b)(2)(A) provides sanctions for a party's failure to obey a discovery order, including "(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence." In accordance with this Rule, Plaintiffs should be prohibited from opposing this Motion for Partial Summary Judgment and also prohibited from introducing any facts or documents regarding such matters into evidence.[6]

V. Conclusion

This Plaintiff's claims must be dismissed, with prejudice, because she cannot establish a claim for unpaid overtime under the FLSA.

Respectfully submitted this the 17th day of November, 2008.

WAYNE FARMS LLC

BY: BALCH & BINGHAM LLP

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[6] *See e.g. Fleming & Assoc. v. Newby & Tittle*, 529 F.3d 631 (5th Cir. 2008) (Federal Rule 16 permits exclusion of expert report submitted after scheduling order deadline); *Edmonds v. Beneficial Miss., Inc.*, 212 Fed.Appx. 334 (5th Cir. 2007) (Federal Rules 26 and 37 permitted court to exclude credit report which plaintiff failed to disclose prior to discovery deadline); *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 380 (5th Cir. 1996) (Federal Rules 16 and 37 authorize court to impose sanctions on disobedient party by refusing to allow that party to introduce designated matters into evidence, such as expert opinions provided subsequent to the deadline required by the court's scheduling order); *Jones v. Flowserve FCD Corp.*, 73 Fed.Appx. 706 (5th Cir. 2003) (court did not abuse its discretion in striking summary judgment affidavit which contained three expert opinions not previously disclosed during discovery); *Velez v. Awning Windows, Inc.*, 375 F.3d 35, 42-43 (1st Cir. 2004) (defendants prohibited from opposing plaintiff's claims because defendants failed to comply with scheduling order); *Ware v. Rodale Press, Inc.*, 322 F.3d 218 (3rd Cir. 2003) (plaintiff precluded from introducing evidence of damages at trial after repeated non-compliance with discovery requests and scheduling orders which required such disclosure); *Rabb v. Amatex Corp.*, 769 F.2d 996 (4th Cir. 1985) (appellate court affirmed trial court's decision to preclude plaintiff's evidence for failure to comply with discovery orders).