JONES v. THE JUDGE GROUP, INC.

2013 | Cited 0 times | E.D. Pennsylvania | October 25, 2013

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

MORGAN JONES, individually and on : CIVIL ACTION behalf of all others similarly situated, : Plaintiff, : : : No. 11-6910 v. : : : JUDGE TECHNICAL SERVICES INC., :

Defendant. :

Goldberg, J. October 25, 2013

MEMORANDUM OPINION Plaintiff, Morgan Jones, initiated this purported collective action against Defendant, Judge Technical Services Inc., for violations of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ssified him and other employees as exempt under 29 U.S.C. § 213(a)(17) (the -employee exemption), and subsequently failed to pay them overtime compensation. Several motions are currently before the nt (Doc. No. 73); and Plaintiffs motion

to issue notice to similarly situated individuals (Doc. No. 67). For the reasons set forth below, ion for sanctions will be granted in part, but not based upon sanctionable conduct; Plaintiffs motion to issue notice to similarly situated individuals will be granted.

I. FACTUAL AND PROCEDURAL HISTORY

Unless otherwise indicated, the following facts are undisputed: 1 Defendant Judge Technical Services, Inc. is a staffing company that places individuals with specialized technical knowledge into temporary employment positions. Placement is effectuated through recruiters, who locate individuals and match them with available job opportunities. Once placed in a position, the individual remains the employee of Defendant, rather than the business for which the individual performs work. Since November 2008, Stmt. of Undisputed Facts ¶¶ 1 2, 6.)

Defendant maintains a variety of pay structures for its employees. The pay structures at agreements, which apply only to employees who Defendant has classified as e -employee than eight hours in a day, unless that employee works more than ten hours in a day. If the

employee works more than ten hours in a day and the manager approves, the employee will be entitled to be paid an additional fee for services provided after the 11 th

Under the hours per week, and receive no additional compensation for hours worked in excess of forty

1 In response to some paragraphs in Defendants Statement of Undisputed Facts, Plaintiff denies a portion of the paragraph without stating facts that contradict the facts described by Defendant. We do not consider Plaintiffs unsubstantiated responses to create a factual dispute for the purpose of our analysis. See Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226, 233 (3d Cir. 2002) (noting that a non-movant may not rest upon mere allegations, general denials or vague statements to show that there is a genuine dispute of material fact); Robin Constr. Co. v. U.S., 345 F.2d 610, 613 (3d Cir. 1965) (Mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment.) (internal quotation marks omitted).

hours per week. (Id. at ¶¶ 10, 15-18) (alterations omitted). Defendant considers employees designated under either structure as exempt under § 213(a)(17).

Plaintiff Morgan Jones initially contacted Defendant through one of its recruiters, Robert Helsel. In July 2011, Defendant successfully placed Plaintiff in a position as Senior Project Manager with Citigroup. When Plaintiff started at Citigroup, he was classified by Defendant as exempt from overtime requirements under 29 U.S.C. § 213(a)(17) and was subject to Id. at ¶¶ 20, 27, 30-31, 51.)

urs into -based time reporting system maintained and controlled by Defendant. In addition to reporting his time in EaZyTyme, Plaintiff also reported his work hours directly to Citigroup for purposes of effectuating payment from Citigroup to over forty hours per week and occasionally over fifty hours per week. (Id. at ¶¶ 39-40, 46, 52.)

Beginning on November 14, 2011, Plaintiff was taken out of the Professional Day structure and paid on an hourly basis. (Id. at ¶¶ 13-14, 56-57.)

On November 3, 2011, Plaintiff filed the purported FLSA collective action and d Persons Pursuant to 29 U.S.C Plaintiffs motion on January 22, 2013, motion was filed on February 22, Judith Kramer, a former attorney with the United States Department of Labor. On February 28,

of

On April 4, 2013, oral argument was held. The motions are fully briefed and ready for disposition. We address each in turn. II.

In its motion for sanctions, Defendant requests that the Court strike the declaration of partial summary judgment. Defendant also request that fees and costs be awarded. Defendant

asserts that Plaintiff violated his discovery obligations by failing to disclose Kramer as a witness under Federal Rules of Evidence 26(a)(1) and 26(e), and that this failure is prejudicial because it deprived Defendant of the opportunity to depose Kramer during the discovery period. Defendant thus inadmissible. Mot. for Sanctions 4, 5-9.)

mention of expert discovery deadlines, 2

and that Kramer was retained as an expert less than two weeks before her declaration was attached to his response. Plaintiff acknowledges that he did not supplement his initial disclosures or interrogatory answers to identify Kramer as an expert before he filed his response, but notes that he offered to supplement his initial disclosures and discovery responses, produce Kramer for deposition and support a request to extend the summary judgment briefing schedule to allow Defendant to submit a reply brief addressing the -4, 6-7, 9-14.)

2 At a Rule 16 conference held on March 5, 2012, wherein a discovery schedule was discussed, strike the collective action allegations before moving forward with discovery. Therefore, we did not set deadlines for expert discovery.

A. Legal Standards Federal Rule of Civil Procedure 37(c)(1) permits a court to exclude evidence and impose 26(a -

unless it demonstrates that its conduct was substantially justified or is harmless. FED. R. CIV. P.

37(c)(1); Waites v. Kirkbride Ctr., 2012 WL 3104503, at *6 (E.D. Pa. July 30, 2012). The imposition of sanctions for abuse of discovery under Rule 37 is within the sound discretion of the trial court. Newman v. GHS Osteopathic, Inc., Parkview Hosp. Div., 60 F.3d 153, 156 (3d Cir. 1995).

In determining whether to exclude evidence, a district court must consider the following factors: (1) the prejudice or surprise of the party against whom the excluded evidence would have been admitted; (2) the ability of the party to cure that prejudice; (3) the extent to which allowing the evidence would disrupt the orderly and efficient trial of the case or other cases in the court; and (4) bad faith or willfulness in failing to comply with a court order or discovery obligation. Nicholas v. Pa. State Univ., 227 F.3d 133, 148 (3d Cir. 2000). The United States Court of Appeals for the Third Circuit has cautioned th In re TMI Litig., 193 F.3d 613, 621 (3d Cir.

1999).

In cases where the timeliness of disclosing expert identities and reports is at issue, a request for exclusion is typically granted only where the trial date is fast approaching. Ciocca v. BJ.s Wholesale Club, Inc., 2011 WL 3563560, at *5 (E.D. Pa. Aug. 12, 2011); see also Womack

v. Smith, 2012 WL 1245752, at *10 (M.D. Pa. Apr. 13, 2012) (excluding testimony of lay witnesses where trial was mere weeks away); Klatch-Maynard v. Sugarloaf Twp., 2011 WL 2006424, at *3-*5 (M.D. Pa. May 23, 2011) (excluding testimony where expert reports were filed on the eve of trial and over three-and-a-half years after the deadline for expert reports passed). Further, with respect to the final Nicholas element, bad faith conduct in the context of untimely expert disclosures is generally only found where the conduct could be deemed to have been done to gain a tactical advantage. Ciocca, 2011 WL 3563560, at *5 (citing Konstantopoulos v. Westvaco Corp., 112 F.3d 710, 720-21 (3d Cir. 1997)). Questionable practices or conduct on counsels part by failing to communicate with the court or opposing counsel typically do not rise to the level of bad faith. Id. at *5.

Even where there is no discovery violation, an expert declaration can be excluded if it falls outside the permissible scope of Federal Rule of Evidence 702. See Countryside Oil Co., Inc. v. Travelers Ins. Co., 928 F. Supp. 474, 482 (D.N.J. 1995) (noting that only evidence which is admissible at trial may be considered in ruling on a summary judgment motion). This determination is also left to the discretion of the trial court. United States v. Leo, 941 F.2d 181, 196 (3d Cir.1991) Berckeley Inv. Grp., Ltd. v. Colkitt, 455 F.3d 195,

217 (3d Cir. 2006).

Although Federal Rule of Evidence 704(a) allows an expert witness to give expert testimony that embraces an ultimate issue to be decided by the trier of fact, an expert witness is prohibited from rendering a legal opinion. Id. This standard is no different for a witness who is qualified as an expert and is also an attorney. Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefits Plan & Trust Agreement, 812 F. Supp. 1376, 1378 (E.D.Pa.1992) (holding that

expert testimony as to whether employers practice violated ERISA was an inadmissible legal conclusion). Ultimately, district courts prohibit experts from offering legal opinions because such testimony is not helpful to the trier of fact. See Leo, 941 F.2d at 197. In other words, an

Berckeley, 455 F.3d at 217.

B. Analysis The Judith E. Kramer Declaration as improperly

offering a legal opinion. The declaration is used egal interpretation of the computer-employee exemption, which is a question of law for the Court to decide. Further, the declaration provides impermissible legal conclusions rather than evidence that would assist the trier of fact in determining a fact at

We note that ev his disclosures to identify Kramer violated Rule 26(e), exclusion of the declaration may not be warranted under Rule 37. A trial date has not been supplement was willful or in bad faith. Indeed, Plaintiff offered to cure any prejudice by supplementing his initial disclosures and discovery

responses, produce Kramer for deposition and consent to a request to extend the summary judgment briefing schedule to allow Defendant

III. OTION FOR PARTIAL SUMMARY JUDGMENT

Defendant has filed four counterclaim causes of action: Computer Fraud and Abuse; Common Law Fraud; Breach of Fiduciary Duty; and Conversion. Defendant has moved for

partial summary judgment on its counterclaims for fra retaliation and FLSA claims. We address each argument in turn.

A. Legal Standard Summary Judgment Under Federal Rule of Civil Procedure 56(a), shows that there is no genuine dispute as to any material fact and the movant is entitled to

which a reasonable jury could return a verdict for the non-moving party. Kaucher v. Cnty of Bucks, 455 F.3d 418, 423 (3d Cir. 2006) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A factual dispute is material if it might affect the outcome of the case under governing law. Id. (citing Anderson, 477 U.S. at 248). Under Rule 56 the court must view evidence in the light most favorable to the nonmoving party. Galena v. Lone, 638 F,3d 186, 196 are insufficient to overcome a motion for summary judgment. Schaar v. Lehigh Valley Health

Servs., Inc., 732 F. Supp. 2d 490, 493 (E.D. Pa, 2010) (citing Williams v. Borough of W. Chester, Pa., 891 F.2d 485, 461 (3d Cir. 1989)).

responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates Celotex Corp. v. Cartrett, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the Celotex burden can be met by showing that the non-moving party has lement essential to that

After the moving party has met its initial burden, summary judgment is appropriate if the non- in the record, including depositions, documents, electronically stored information, affidavits or

genuine issue of material fact or by showing that the materials cited do not establish the absence

FED. R. CIV. P. 56(c)(1)(A)-(B). Only evidence which is admissible at trial may be considered in ruling on the motion. Countryside Oil Co., Inc. v. Travelers Ins. Co., 928 F. Supp. 474, 482 (D.N.J. 1995).

B. Fraud and Conversion Counterclaims Defendant has moved for summary judgment on its own counterclaims filed against

s timekeeping system. 3

On at least three occasions, Plaintiff entered hours in EaZyTyme that did not correspond to the hours he worked at Citigroup for that particular week. 11. 4

During this week, Plaintiff entered that he had worked seventy hours in EaZyTyme, but only entered fifty hours in the Citigroup timekeeping system.

deposition he explained that he entered seventy hours in EaZyTyme at the direction of his recruiter, Robert Helsel. Plaintiff explained that the purpose of entering additional hours was to obtain compensation for hours of unpaid time he had previously worked. Plaintiff also testified that he indicated in the comment section of his October timesheet the basis for over-reporting his 3 Unless otherwise indicated, the facts surrounding the counterclaims are undisputed. 4 In its reply brief, Defendant clarifies that, while it intends to prove that Plaintiff committed timecard fraud with respect to other weeks, the week ending October 30, 2011 is the only week

64, 67 68; Pl Stmt. of Genuine Issues ¶¶ 66.)

Defendant counters that Helsel never instructed Plaintiff to over-report his time in order to receive additional compensation, nor did Helsel possess the authority to permit Plaintiff to enter falsified time entries or to alter the terms of his compensation. Plaintiff responds that his Assignment Agreement specifically stated that questions about pay should be directed to his -72; Pl -72.)

Plaintiff also points out that Defendant billed Citigroup for the seventy hours he entered in EaZyTyme, and that his supervisor at Citigroup approved the EaZyTyme hours. He also cites ercinski, who testified that if Citigroup approved hours, then Defendant would have billed Citigroup for that time. However, Wiercinski stated that she was unsure of whether Citigroup had approved the hours at issue.

1. Legal Standards Fraud and Conversion To prevail on a claim for fraud under Pennsylvania law, 5

a plaintiff must show: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994).

To succeed on a cause of action for conversion, a plaintiff must prove facts to support that a defendant intentionally acted to deprive plaintiff of his right in property in, or use or

5 The parties agree that Pennsylvania law governs counterclaims.

possession of, a chat without lawful justification. Stevenson v. Economy Bank of Ambridge, 197 A.2d 721, 726 (Pa.

1964). Money is considered a chattel for these purposes and may be the subject of conversion. Shonberger v. Oswell, 530 A.2d 112, 114 (Pa. Super. Ct. 1987).

2. Analysis Defendant urges that the undisputed facts establish that Plaintiff deliberately falsified his hours as part of a successful effort to extract from Defendant compensation to which he was not entitled, and that he continues to wrongfully retain those funds. Defendant also contends that Helsel did not possess either actual or apparent authority to do so. (Def. for Partial Summ. J. 2 6.) 6

We conclude that the facts surround s present classic issues of disputed material facts. factual issues relating to whether Plaintiff had the intent to mislead Defendant when he over-reported hours in the EaZyTyme system. Plaintiff has presented evidence from which a factfinder could conclude that Helsel authorized the inflated hours and that he had the apparent authority to do so. The nature and extent of authorityconduct in relation to his belief of that authority, are genuine issues of material fact for the factfinder to determine.

6 Pennsylvania law recognizes both actual and apparent authority. Stout Street Funding LLC v. Johnson expressly grants to an agent, while apparent authority exists where the principal, by words or conduct, leads people with whom the alleged agent deals to believe that the principal has granted City of Phila. v. One Reading Ctr. Assocs., 143 F. Supp. 2d 508, 517 (E.D. Pa. 2001) (citations omitted) (internal quotation marks omitted). The s authority is a question of fact for the factfinder. Hydraulics, Inc. v. Susquehanna Const. Corp., 606 A.2d 532, 534-35 (Pa. Super. Ct. 1992).

There also is a genuine issue of fact as to whether Defendant sustained any injury. Defendant asserts that it suffered an economic injury in the amount of $955.80, in that it paid Plaintiff for twenty additional hours not performed the week ending October 30, 2011. However, according to Plaintiff, his Citigroup supervisor approved those hours. If Citigroup was it is unclear whether Defendant would still have an injury.

Additionally, because the factual issues above also relate to whether Plaintiff was given permission to inflate his time entries, summary judgment is also inappropriate with respect to

C. Defendant next seeks summary judg Plaintiff alleges that, as a result of the filing of the instant FLSA action, Defendant engaged in adverse actions against him.

1. Legal Standard In analyzing a claim of unlawful retaliation under the FLSA, we look to the familiar burden-shifting framework articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Cononie v. Allegheny Gen. Hosp., 29 Fed. Appx. 94, 95 (3d Cir. 2002). Under this framework, a plaintiff must first establish a prima facie case by proving: (1) that he engaged in activity protected under the FLSA; (2) that he subsequently or contemporaneously suffered an adverse employment action; and (3) a causal connection between his protected activity and the Wildi v. Alle-Kiski Med. Ctr., 659 F. Supp. 2d 640, 664 (W.D. Pa. 2009).

To satisfy the second prong of his prima facie case, a plaintiff must demonstrate that he suffered a materially adverse action Id. at 665 (quoting Burlington

Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)) (internal quotation marks omitted). A counterclaim may constitute a materially adverse action, but courts have generally required a plaintiff to demonstrate that the counterclaim is baseless in order to satisfy this element. See e.g., , 519 F. Supp. 2d 765, 781 (N.D. Ill. 2007); Ramos v. Hoyle, 2009 WL 2151305, at *8 (S.D. Fla. July 16, 2009).

With respect to the causal link element, two main factors are relevant: (1) timing or (2) evidence of ongoing antagonism. Wildi, 659 F. Supp. 2d at 666. A plaintiff may rely on a broad array of evidence to establish a causal link between his complaints and the materially adverse action. Id. An unusually suggestive proximity in time between the protected activity and the adverse action may be sufficient, on its own, to establish the requisite causal connection. Id.

If a plaintiff demonstrates a prima facie case, then the burden shifts to the employer to produce a legitimate, nonretaliatory reason for the adverse action. Id. at 664. If the employer meets that burden, then the ultimate burden of persuasion shifts back to the plaintiff to demonstrate that the articulated reasons are a pretext for discrimination. Id.

2. Analysis Defendant contends that Plaintiff has presented insufficient evidence that he suffered an adverse action. Specifically, Defendant asserts that the filing of its counterclaims cannot constitute an adverse action because the claims are not baseless. A counterclaim is baseless when it is frivolous that is, sanctionable. See Ergo, 519 F. Supp. 2d at 781. Where a claim is presented for a proper purpose, is warranted by existing law and is premised on factual

contentions that have evidentiary support, it will not be deemed frivolous. See FED. R. CIV. P. 11(b).

Plaintiff responds that the counterclaims for fraud and conversion are baseless because his supervisor at Judge, Robert Helsel, instructed him to report extra time for the week ending October 30, 2011 to make up for unpaid time he had previously worked. As noted previously, Defendant denies this allegation. 7

Because there is a genuine dispute as to whether Plaintiff was instructed to over-report his time, we do not find the counterclaims baseless on this ground.

Plaintiff also contends the claims are baseless because Defendant did not sustain a cognizable injury. (See supra Part III.B.) Because the record does not clearly show whether or not Defendant received payment from Citigroup for the hours Plaintiff reported, there is a question as to whether Defendant suffered an inju we decline to enter summary judgment on the basis that Plaintiff cannot demonstrate an adverse

action. 8

Defendant also asserts that Plaintiff has failed to demonstrate a causal connection between his protected activity and an adverse action. Because we find that a jury could conclude with respect to that adverse action.

Plaintiff has presented evidence that Defendant filed its counterclaims less than eleven weeks after Plaintiff filed his initial complaint. (See Doc. Nos. 1, 22.) This close temporal See Fasold v. Justice, 409 F.3d 178, 7 At his deposition, Helsel stated he never instructed Plaintiff to over-report his time to make up for unpaid time. (Helsel Dep. 82.) 8 counterclaims for violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, and conversion at this time.

190 (3d Cir. 2005) (passage of less than three months between protected activity and adverse 9

D. FLSA Claim FLSA claim for misclassification under 29 U.S.C. § 213(a)(17), the computer-employee exemption. This (29 U.S.C. §§ 206 and 207) shall not apply with respect to:

any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is--

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; (B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; 9 We note that it is unclear whether Plaintiff is also basing his retaliation claim on his termination. (Compare Fourth Am. Compl. ¶¶ 29-30 (treating termination as separate adverse action) with antagonistic act in support of the causal connection requirement)). Regardless, we find that Plaintiff has not set forth a genuine issue of material fact that Defendant terminated him because he initiated the instant lawsuit. First, Plaintiff has presented no evidence to demonstrate that Defendant, rather than Citigroup, terminated his placement. (See ¶ 78.) Further, to the extent that Plaintiff claims that Defendant retaliated again him by failing to engage in a good faith effort to place him with another company after his Citigroup placement terminated, Plaintiff has offered no evidence beyond unsupported assertions or mere suspicions to support his contention. Indeed, with respect to him into a sham job placement effort for a position that had already been fi evidence that the position was filled is inadmissible hearsay. Even assuming that the position was filled, Plaintiff has presented no evidence that Defendant had knowledge of this fact. Further, Plaintiff has not come forward with any other evidence that Defendant did not act diligently in attempting to place him in another position (See 293-95, 343-45, 353- 55.) are legally insufficient to establish an issue of material fact.

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or (D) a combination of duties described in subparagraphs (A), (B), and

(C) the performance of which requires the same level of skills, and who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour. 29 U.S.C. § 213(a)(17). This exemption thus has two criteria: (1) that the employee perform

Defendant asserts that it is entitled to judgment on the second criteria, reasoning that the requirement is met so long as an employee is paid an average hourly wage of $27.63 or more in a Defendant explains that because it is undisputed that, in any given week, Plaintiff was always paid an average hourly wage well above $27.63, there is no dispute Support of Mot. for Partial Summ. J. 7-14.)

Plaintiff counters that the statute sets forth an hour-by-hour, rather than an averaging, approach, and thus computer employees must be paid at least $27.63 for each hour worked -by- ten he argues that th Mot. for Partial Summ. J. 9-12.)

-employee exemption. 1. Legal Standard

The initi Valansi v.

Ashcroft, 278 F.3d 203, 209 (3d Cir. 2002) (quoting Marshak v. Treadwell, 240 F.3d184, 192 (3d Cir. 2001) (internal quotation marks omitted)). Where the language of the statute is clear, our inquiry is complete. In re Phila. Newspapers, LLC, 599 F.3d 298, 304 (3d Cir. 2010). However, if the language is ambiguous easonably susceptible of different Dobrek v. Phelan, 419 F.3d 259, 264 (3d Cir. 2005) (quoting Co., 470 U.S. 451, 473 n.27 (1985)).

United States v. Gregg, 226 F.3d 253,

United States v. Introcaso, 506 F.3d 260, 267 (3d Cir. 2007) (quoting Nugent v. Ashcroft, 367 F.3d 162, 170 (3d Cir. 2004)). Additionally, where, as here, the statute at issue is within 549 F.3d 272, 275 (3d Cir. 2008); see also Chevron U.S.A.,

Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

2. Analysis With the above precepts in mind, and after examination of the statutory language, the Department of Labor regulations and the canons of construction applicable to FLSA exemptions, we conclude that an employee paid on an hourly basis may only be classified as exempt under 29 U.S.C. § 213(a)(17) if that employee is compensated at least $27.63 for each and every hour he or she works.

We initially find that the statutory language is susceptible to different interpretations. Neither the FLSA nor the implementing regulations set forth a formula for determining whether

plausible interpretations of the provision. That said, it appears that a more exact reading of the language is that it requires an employer to pay the requisite sum for each and every hour worked.

Indeed, the language of the provision in question specifically refers to compensation on an , and is silent regarding the use of a weekly or averaging basis.

Defendant argues we should treat the $27.63 hourly rate as a minimum wage provision, and points to Dove v. Coupe, 759 F.2d 167, 171-72 (D.C. Cir. 1985), a case which allowed a minimum wage requirement to be met by looking at the average of hours worked. While we have carefully considered Dove, we decline to follow its holding, in part because that case focused on minimum wage requirements while t Plaintiff from overtime compensation.

Defendant also posits that applying the workweek standard effectuates congressional intent. Defendant asserts that the averaging approach ensures that the purpose of the minimum wage -standard wages . . . due Dove, 759 F.2d at 171 (quoting Brooklyn Sav. Bank v. , 324 U.S. 697, 706 (1945) (internal quotation marks omitted)) is met. Defendant as the period for determining whether an employee has received wages at a rate not less than the

statutory minimum, and that this interpre in Support of Mot. for Partial Summ. J. 8- wage theories not at issue here.

in this case, the $27.63 requirement is not a minimum wage test, but rather a compensation test for applicability of the exemption pertaining to overtime. fails to recognize that his claims are for unpaid overtime under § 207, not for unpaid minimum

wages under § 206, and that there is a significant distinction between those provisions. Section 206 is directed at providing a minimum standard of living while § 207 is concerned with deterring long hours by making those hours more expensive for the employer. In light of these

and case law is misplaced. The fact that § 213(a) refers to both §§ 206 and 207 does not mean, as Defendant urges, that the overtime provisions of § 207 can be conflated with minimum wage principles.

The parties also dispute which construction of § 213(a)(17) best effectuates the purpose of the FLSA. Because neither legislative history nor the regulations clarify whether the computer-

United States v. Introcaso, 506 F.3d 260, 267 (3d Cir. 2007) (internal quotation marks omitted).

Plaintiff argues that the FLSA is remedial in nature, and thus should be construed liberally in favor of employees. He also notes that, in light of this remedial purpose, courts have consistently found that FLSA exemptions must be narrowly construed, that is, against the -10.) Defendant counters that, because the FLSA contains criminal penalties for violations of the minimum wage and overtime requirements, the rule of lenity dictates that a less harsh meaning should be applied in

interpreting the computer- J. 10-11.)

and purpose, there Barber v.

Thomas, 130 S.Ct. 2499, 2508-09 (2010) (quoting Muscarello v. United States, 524 U.S. 125, 139 (1998)) which a United States v. Wells, 519 U.S. 482, 499 (1997) (quoting Reno v. Koray, 515 U.S. 50, 65 (1995) (internal quotation marks omitted)). That is not the case here.

While the relevant unit for determining compliance with the computer-employee

impression, the appropriate construction of FLSA exemptions is not. The United States Court of Appeals for the Third Circuit has held that the FLSA must be construed liberally in favor of employees, and that statutory exemptions should thus be construed narrowly. Lawrence v. City of Phila., 527 F.3d 299, 310 (3d Cir. 2008) (citing Tony & Susan Alamo Found Labor, 471 U.S. 290, 296 (1985), Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728,

739 (1981) and Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960)). Therefore, an employer seeking to apply an exemption to the FLSA must prove that the employee and/or plainly and unmistakably Id. (quoting Arnold, 361 U.S. at 392) (emphasis omitted).

With the above canon of construction in mind, we conclude that the hour-by-hour approach advocated by Plaintiff best accords with the remedial nature of the FLSA. Exemptions are to be construed narrowly and their application must be established by the employer.

Defendant has not persuaded us that the computer- nd

required by the plain language of the provision, that the legislative history or regulations support its interpretation, or that the interpretation best accords with the purpose of the FLSA. Therefore, we find that, as a matter of law, the computer-employee exemption is applicable only where, assuming the primary duties test is met, an employee paid on an hourly basis receives compensation at a rate of $27.63 for each and every hour worked.

Applying this standard, we conclude that Plaintiff was misclassified as exempt under

respect to this claim. IV. PLAINTIF MOTION FOR CLASS CERTIFICATION

Plaintiff Jones and opt-in Plaintiff Kenneth Webb seek to conditionally certify the instant case as a collective action under the FLSA. Plaintiffs propose that the class consist of:

All current and former workers employed by The Judge Group, Pay Plan at any time from (3 years before the facilitation of notice), to the present. (See

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Under the FLSA, employees may bring a collective action on behalf o themselves and 29 U.S.C. § 216(b). Although the FLSA does not define nd c Woodard v. FedEx Freight E., Inc., 250 F.R.D. 178, 190-91 (M.D. Pa. 2008).

In deciding whether a suit brought under § 216(b) of the FLSA may move forward as a collective action, courts typically employ a two-tiered analysis. Initially, a plaintiff seeking to

factual nexus between the manner in which the Symczyk v. Genesis HealthCare Corp., 656 F.3d 189, 192-93 (3d Cir. 2011) grounds, 133 S. Ct. 1523 (2013).

If the plaintiff meets his burden during the initial phase, the class will be conditionally certified for purposes of notice and pre-trial discovery. After more onerous; he must show by a preponderance of the evidence that he is similarly situated to each plaintiff who has opted in to the collective action. Id.

Here, we find that Plaintiffs have met their initial burden in demonstrating that they are similarly situated to the following class members:

All current and former workers employed by The Judge Group, Pay Plan who worked in excess of forty hours in a given week at any time from (3 years before the facilitation of notice), to the present. Plaintiffs have set forth evidence that they and the proposed class members were subject to computer-employee exemption; that the employees recorded their hours in the same fashion in

certain hours worked in excess of forty; that, as discussed in Part III.D, failure to pay $27.63 for

each hour worked renders the exemption inapplicable and places Defendant in violation of the

way each was compensated. Therefore, the proposed class members, including named Plaintiff

Jones and opt-in Plaintiff Webb, policy of exempting employees. See Craig v. Rite Aid Corp., 2009 WL 4723286, at *3 (M.D. Pa. Dec. 9, 2009) (finding that a collective class of employees, who were alleged to be misclassified as exempt, is appropriate for conditional certification).

Accordingly, we will conditionally certify the class, as modified above, and permit them to issue their proposed form of notice. 10 V. CONCLUSION

ctions will be granted in part denied and Plaintiffs Motion for Class Certification will be granted.

An appropriate Order follows.

10 We find th is fair and adequate. given our summary judgment determination. As such, Plaintiffs may file an amended proposed

notice within ten days of entry of this Memorandum Opinion. Defendant may file a response to such notice within seven days thereafter.