UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BRIAN CASEY, *et al.*,,	:	Case No. 3:13cv-3
	:	
Plaintiffs,	:	Judge Timothy S. Black
	:	
vs.	:	
	:	
QIK PIK, INC., *et al*.,	:	
	:	
Defendants.	:	

DECISION AND ENTRY: (1) GRANTING IN PART PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT (Doc. 13); (2) AWARDING PLAINTIFFS UNPAID OVERTIME AND LIQUIDATED DAMAGES; (3) DECLINING TO AWARD REIMUBURSEMENT FOR MILEAGE CLAIMED; AND (4) ORDERING SUPPLEMENTAL BRIEFING ON PLAINTIFFS' REQUEST FOR MILEAGE REIMBURSEMENT

This case is before the Court on Plaintiffs' Motion for Default Judgment. (Doc. 13). Defendants have not filed a response to Plaintiffs' Motion and the time for doing so has expired. Accordingly, Plaintiffs' Motion for Default Judgment is ripe for decision.

I. FACTS ALLEGED

Defendant Qik Pik, Inc. ("Qik Pik") is engaged in the business of providing roadside assistance to stranded motorists. Defendant Qik Pik Roadside Service is a proprietorship and/or alter ego of Qik Pik responsible for Qik Pik's business in Dayton, Ohio. Defendant Christopher Butler ("Butler") is the sole shareholder of Qik Pik and the owner of Qik Pik Roadside Service.

Qik Pik's dispatchers receive calls regarding stranded motorists twenty-four hours per day, seven days a week. Upon receiving a call for roadside service, Qik Pik's dispatchers

would forward the calls to a driver employed in the area of the stranded motorist. The local driver would then use his own vehicles to provide services to the stranded motorist.

Plaintiffs Brian Casey ("Casey"), Stephen Denton ("Denton") and Joel Pointing ("Pointing") all worked for Qik Pik Roadside Service as drivers in the Dayton, Ohio area. Each Plaintiff was paid weekly. Casey earned $12.00 per assistance call, Denton earned $14.00 per assistance call, and Pointing earned $11.00 per assistance call. The money earned per call was the only money paid to Plaintiffs for their work.

Throughout their employment, Plaintiffs were prohibited from working any other job while "on-call" for Defendants. Each Plaintiff routinely worked more than forty hours per week for Defendants. In addition, Defendants required each Plaintiff, as a condition of their employment, to work at least twelve hour shifts, six days a week. Plaintiffs did not receive overtime pay for hours they worked "on-call" when those hours exceeded forty hours in a work week.

II. STANDARD OF REVIEW

Applications for default judgment are governed by Fed. R. Civ. P. 55(b)(2). "Following the clerk's entry of default pursuant to Fed. R. Civ. P. 55(a) and the party's application for default under Rule 55(b), 'the complaint's factual allegations regarding liability are taken as true, while allegations regarding the amount of damages must be proven.'" *Broadcast Music, Inc. v. Pub Dayton, LLC*, No. 3:11-CV-58, 2011 WL 2118228, *2 (S.D. Ohio May 27, 2011) (citing *Morisaki v. Davenport, Allen & Malone, Inc.*, No. 2:09-cv-0298 MCE DAD, 2010 WL 3341566, at *1 (E.D. Cal. Aug. 23, 2010) (citing *Dundee*

Cement Co. v. Howard Pipe & Concrete Products, 722 F.2d 1319, 1323 (7th Cir.1983) (further citations omitted)).

"[W]hile liability may be shown by well-pleaded allegations, '[t]he district court must . . . conduct an inquiry in order to ascertain the amount of damages with reasonable certainty.'" *Id*. (citing *Osbeck v. Golfside Auto Sales, Inc.*, No. 07-14004, 2010 WL 2572713, at *5 (E.D. Mich. Jun. 23, 2010)); *see also Brown v. Int'l Asset Group, LLC*, 2012 WL 6002512, *2 (S.D. Ohio Nov 30, 2012). Where a sum uncertain is presented, Rule 55(b)(2) "allows but does not require the district court to conduct an evidentiary hearing." *Vesligaj v. Peterson*, 331 Fed. Appx. 351, 354-55 (6th Cir. 2009). Instead, the court can determine damages based upon affidavits submitted by the parties. *Pub Dayton*, 2011 WL 2118228 at *2 (citing *Schilling v. Interim Healthcare of Upper Ohio Valley, Inc.*, No. CIV A 206-CV-487, 2007 WL 152130 (S.D. Ohio Jan. 16, 2007); *LaFarge North America Inc. v. Wells Group, Inc.*, No. 4:08-cv-95, 2009 WL 2601854 (E.D. Tenn. Aug. 24, 2009); *Frazier v. Absolute Collection Serv., Inc.*, 767 F.Supp.2d 1354 (N.D. Ga. Feb. 3, 2011)).

III. ANALYSIS

Plaintiffs each move for default judgment on their individual claims for unpaid overtime pay under the Fair Labor Standards Act ("FLSA") and Ohio law. [1] Pursuant to the FLSA, "employees may not be required to work more than forty hours per seven-day week

[1] Ohio Rev. Code § 4111.03(A) provides that "[a]n employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours worked in excess of forty hours in one workweek, in the manner and methods provided in . . . of the 'Fair Labor Standards Act[.]'" *See also Johnson v. Phoenix Group, LLC*, No. 3:12-cv-88, 2013 WL 1345799, *2 (S.D. Ohio Apr. 2, 2013). Under Ohio law, "[a]ny employer who pays any employee less than wages to which the employee is entitled under section 4111.03 of the Revised Code, is liable to the employee affected for the full amount of the overtime wage rate, less any amount actually paid to the employee by the employer, and for costs and reasonable attorney's fees as may be allowed by the court." Ohio Rev. Code § 4111.10(A); *see also Johnson* , 2013 WL 1345799 at *2.

without overtime compensation at a rate not less than one and one-half times their regular pay." *Wood v. Mid-America Mgmt. Corp.*, No. 1:04-cv-1633, 2005 WL 1668503, at *4 (N.D. Ohio Jul. 18, 2005) (citing *Elwell v. Univ. Hospitals Home Care Services*, 276 F.3d 832 (6th Cir. 2002); 29 U.S.C. § 207(a)(1); *Bowers v. NOL, LLC*, 114 F. App'x 739 (6th Cir. 2004)); *Bauer v. Singh*, No. 3:09-cv-194, 2010 WL 5088126, *8 (S.D. Ohio Dec. 7, 2010).

"The FLSA broadly defines 'employee' as 'any individual employed by an employer,' 29 U.S.C. § 203(e)(1), and 'employ' as 'to suffer or permit to work[.]'" *Werner v. Bell Family Med. Center*, --- F. App'x --- , 2013 WL 3215148, *2 (6h Cir. Jun. 27, 2013) (citing 29 U.S.C. § 203(e)(1) and (g)). To determine whether an individual meets the definition of "employee" under the FLSA, courts, giving "full effect to this remedial legislation," must "employ the 'economic reality' test[.]" *Id*. (citing of *Ellington v. City of East Cleveland*, 689 F.3d 549, 555 (6th Cir. 2012)).

The economic reality test requires a determination as to "whether the putative employee is economically dependent upon the principal or is instead in business for himself[.]" *Id*. (quoting *Lilley v. BTM Corp.*, 958 F.2d 746, 750 (6th Cir. 1992)). In making this determination, courts consider "the following non-exhaustive considerations: (1) the permanency of the employment relationship; (2) the degree of skill required for rendering services; (3) the worker's investment in equipment or materials for the task; (4) the worker's opportunity for profit or loss, depending upon skill; (5) the degree of the alleged employer's right to control the manner in which the work is performed; and (6) whether the service rendered is an integral part of the alleged employer's business[.]" *Id*. (citing *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir. 1984)).

Here, by virtue of Defendants' default, Defendants admit that Plaintiffs are employees. Defendants also admit underlying facts supporting the existence of an employer and employee relationship. Plaintiffs' jobs required no special expertise or training. In addition, Defendants were not permitted to perform work for themselves or any other employer while on call for Defendants. In fact, Defendants controlled the hours Plaintiffs were required to work and controlled other conditions of the employment relationship between them and Plaintiffs. Finally, the service rendered by Plaintiffs was an integral part of Defendants' roadside assistance business.

Thus, the only question remaining is damages. In determining the amount of unpaid wages under the FLSA, an employee bears the "burden of proving that he performed work for which he was not properly compensated." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946). Here, by virtue of their default, Defendants admit that they failed to maintain time records on behalf of their employees for payroll purposes. Where an employer fails to maintain adequate and accurate records, "the plaintiff's *burden of proof is relaxed*, and, upon satisfaction of that relaxed burden, the onus shifts to the employer to negate the employee's inferential damage estimate." *Id*. (citing *Myers v. Copper Cellar Corp.*, 192 F.3d 546 (6th Cir. 1999); *Anderson*, 328 U.S. at 686-87).

Accordingly, "[w]hen an employer keeps inaccurate or inadequate records … a FLSA plaintiff does not need to prove every minute of uncompensated work[,]" and instead, a FLSA plaintiff "can estimate … damages, shifting the burden to the employer." *Id*. at 602-03. Absent an employer's ability to negate the employee's estimated work hours, "the 'court

may award damages to the employee, even though the result be only approximate.'" *Id*. at 602-03 (citation omitted).

A. Overtime Pay

Here, in an effort to prove damages for unpaid overtime compensation, each Plaintiff submits an affidavit generally testifying about the average number of hours they worked per week during their employment with Defendants.

Brian Casey

Casey worked from June 22, 2011 until January 28, 2012, and testifies that he worked an average of 126 hours a week in 2011 and an average of 72 hours a week in 2012. Based on the employment timeline provided by Casey, the Court calculates that Casey would have worked 27 full weeks in 2011, plus an additional four days. Assuming Casey worked 126 hours each of those 27 full weeks, plus 18 hours each of those additional four days, the Court calculates that Casey would have worked a total of 3,474 hours in 2011; 1,120 regular hours and 2,354 overtime hours. Based upon the minimum hourly wage of $7.40 for Casey's regular hours, and an $11.10 hourly overtime wage, Casey should have earned $34,417.40 in 2011. Casey states Defendants paid him only $20,598.30 in wages, a difference of $13,819.10 that Casey was not paid based upon his estimates. Casey, however, only seeks the specific sum of $8,790.80 in overtime wages for 2011.

Casey also testifies that he worked 260 regular hours and 208 hours of overtime from January 1, 2012 until January 26, 2012, averaging approximately 72 work hours per week. Based on Casey's estimates, and assuming he worked 12 hour days each of the last five days leading up to his termination on January 26, 2012, the total hours he could have worked in

2012 would have been 276 hours. In other words, it is unclear how Casey worked 208 overtime hours during January 2012, in addition to 260 regular hours.

If Casey worked an average of 72 hours per week in 2012, as he testifies, he would have worked 160 regular hours and 116 overtime hours. Based upon minimum wage of $7.70 in 2012, Casey should have earned $1,232 in regular wages for his work in 2012. Based upon an overtime wage of $11.55 per hour in 2012, Casey should have earned $1,339.80 in overtime wages. In total, Casey should have been paid a total of $2,571.80 in 2012. Casey states he was paid $2,966.70 in 2012. Thus, based upon the average hours Casey states he worked until January 6, 2012, he fails to prove any lost wages in 2012.

Accordingly, based on the foregoing, the Court awards Casey $8,790.80 in unpaid overtime wages.

Stephen Denton

According to the timeline of Denton's employment from July 2012, until his termination on October 15, 2012, Denton could have worked a maximum of 15 weeks. Denton estimates that he worked approximately 80 hours per week, which would result in a total of 1,200 hours that Denton worked for Defendants (15 weeks times 80 hours per week). A total of 600 of those hours would have been regular hours, with the remaining 600 hours overtime hours. Denton, however, testifies that he worked only 440 regular hours as compared to 616 overtime hours.

If Denton worked 600 regular hours and 600 overtime hours during his employment at the minimum wage of $7.70 per hour and the overtime wage of $11.55 per hour, Denton should have been paid a total of $11,550. Denton testifies, however, that Defendants only

paid him $9,721. While it appears from his estimates that Denton is owed $1,829, he seeks only $781.80 in pay.[2]

Accordingly, based on the foregoing, the Court awards Denton the total of $781.80 in unpaid overtime wages he requests.

Joel Ponting

Ponting worked from August 2012 until September 2012, working approximately 80 hours per week. Assuming Ponting worked eight weeks during those two months, based on his estimates of hours worked per week, he would have worked 320 regular hours and 320 overtime hours in those eight weeks. However, Ponting testifies that he worked only 240 regular hours as compared to 360 overtime hours.

Based upon his estimates, Ponting should have been paid $2,464 in regular wages and $3,696 in overtime wages, for a total of $6,160 in wages during his employment. Ponting testifies that Defendants paid him $2,000, a difference of $4,160. Ponting testifies that he is owed $4,006 in unpaid wages.

Accordingly, based on the foregoing, the Court awards Ponting the total of $4,006 in unpaid overtime wages he requests.

B. Liquidated Damages

With regard to liquidated damages, the FLSA provides that:

> [a]ny employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in

[2] All or part of this discrepancy may, perhaps, be attributed to the fact that the Court's calculations are based upon the assumption that Denton worked all of July 2012, when, in fact, he may not have worked that full month. Again, Denton only testifies that his employment with Defendant commenced in July 2012, without providing a specific beginning date.

> 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.

29 U.S.C. § 216(b). The Sixth Circuit holds that "[l]iquidated damages under the FLSA 'are compensation, not a penalty or punishment.'" *Martin v. Indiana Michigan Power Co.*, 381 F.3d 574, 584 (6th Cir. 2004) (citing *Elwell v. Univ. Hosp. Home Care Serv.*, 276 F.3d 832, 840 (6th Cir. 2002)).

Liquidated damages are mandatory unless "the employer shows to the satisfaction of the court that the act or omission giving rise to such action [*i.e.*, failure to pay overtime and/or minimum wage] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the" FLSA. 29 U.S.C. § 260; *see also Martin*, 381 F.3d at 584. If the employer satisfactorily demonstrates the required showing under § 260, "the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title." *Id*.

Based on the foregoing, the Court awards liquidated damages to Casey in the amount of $8,798.80, to Denton in the amount of $781, and to Ponting in the amount of $4,006, pursuant to 29 U.S.C. § 216(b).

C. Individual Liability of Butler

Under the FLSA, an "'[e]mployer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee[.]" 29 U.S.C. § 203(d). An individual, such as "a corporate officer with operational control[,]" can be deemed an "employer" under the FLSA along with the business entity itself. *Fegley v. Higgins*, 19 F.3d 1126, 1131 (6th Cir. 1994).

To determine if an individual party is an "employer" under the FLSA, courts use an "economic reality" test. *Strange v. Wade*, No. 1:09-cv-316, 2010 WL 3522410, at * 3 (S.D. Ohio Sept. 8, 2010) (citing *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991)). In making this determination, courts "focus upon the degree of an individual's 'operational control of significant aspects of the corporation's day to day functions . . . and who personally made decisions' regarding the corporation's direction." *Id*. (citations omitted). A significant factor to consider is an individual's financial control over the subject business entity. *Id*.

Here, Defendants, by virtue of their default, admit that Butler is the sole shareholder of Qik Pik, Inc., and that Butler is the owner of Qik Pik Roadside Service. According to allegations deemed admitted, Butler made the decision to knowingly misclassify Plaintiffs as independent contractors for the purpose of avoiding overtime payments. Thus, absent any opposition by Defendants, the Court concludes that the facts plead sufficiently demonstrate that Butler, in addition to Qik Pik, Inc. and Qik Pik Roadside Service, is an "employer" for purposes of the FLSA. Accordingly, Defendants are liable, joint and severally, for unpaid overtime and liquidated damages.

D. Mileage

In addition to overtime wages, Plaintiffs seek compensation for the mileage they drove in their personal vehicles during the performance work duties on behalf of Defendants. Plaintiffs' motion fails to set forth the grounds and authority permitting such recovery under the FLSA. Plaintiffs shall supplement their Motion with authority supporting their claim for reimbursement of mileage within 21 days from the date of this Order.

IV. CONCLUSION

Based on all of the foregoing the Court **GRANTS** Plaintiffs' Motion for Default Judgment in part as follows:

1. Plaintiff Brian Casey is awarded unpaid overtime in the amount of $8,798.80 and liquidated damages in the amount of $8,798.80, for a total damages award of **$17,597.60**.

2. Plaintiff Stephen Denton is awarded unpaid overtime in the amount of $781 and liquidated damages in the amount of $781, for a total damages award of **$1,562.00**.

3. Plaintiff Joel Ponting is awarded unpaid overtime in the amount of $4,006 and liquidated damages in the amount of $4,006, for a total damages award of **$8,012.00**.

The Court declines to award reimbursement for mileage and **ORDERS** that Plaintiffs supplement their Motion for Default within 21 days from the entry of this Order supporting the relief requested in that regard with argument and citations of authority.

IT IS SO ORDERED.

Date: 11/12/13

s/ Timothy S. Black
Timothy S. Black
United States District Judge