

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

ADENAMAR GONZALES, LEONARDO  
COBOS-PEREZ, LUIS ENRIQUE  
GARCIA-GALVES, ERASTO  
JOVEL-OSORIO, JORDAN VELAZQUEZ,  
FRANCISCO VILLANUEVA-VILLATORO,  
NOE ARNOLODO ZAMORA-RODRIQUEZ,  
AREIL GARCIA-LAPARRA, and  
YUCUNDO REYNOSO,

08-CV-943-BR

OPINION AND ORDER

Plaintiffs,

v.

STERLING BUILDERS, INC., an  
Oregon corporation d/b/a  
P.I.C CONSTRUCTION, INC., MST  
CONSTRUCTION, INC., and JADE  
PROPERTIES INC.; THOMAS SCOTT  
MICKEL; HAMMER CONSTRUCTION, LLC;  
CLEAR CREEK CUSTOM HOMES, L.L.C.;  
JOSE CERVANTES-CHICO; LC  
CONSTRUCTION AND REMODELING, LLC;  
LARRY R. COWLISHAW; AND LARRY B.  
COWLISHAW,

Defendants.

**D. MICHAEL DALE**

P.O. Box 1032  
Cornelius, OR 97113  
(503) 357-8290

**MEG HEATON**

Northwest Workers' Justice Project  
917 S.W. Oak Street  
Suite 412  
Portland, OR 97205  
(503) 525-8454

Attorneys for Plaintiffs

**STEVEN C. BURKE**

Case & Dusterhoff, LLP  
9800 S.W. Beaverton Hillsdale Hwy.  
Suite 200  
Beaverton, OR 97005  
(503) 641-7222

Attorneys for Defendants LC Construction and  
Remodeling, Inc.; Larry B. Cowlshaw; and Larry R.  
Cowlshaw

**BROWN, Judge.**

This matter comes before the Court on the Motion (#63) for Summary Judgment of LC Construction and Remodeling, Inc., and Larry B. Cowlshaw. For the reasons that follow, the Court **GRANTS** Defendants' Motion.

**BACKGROUND**

In October 2006 Defendant LC Construction, acting as a general contractor, entered into a contract with Defendant

Sterling Builders, Inc., d/b/a P.I.C. Construction Inc., to provide framers for a residential construction project. P.I.C., in turn, subcontracted with Defendant Hammer Construction, LLC, to provide the framers for the project. Hammer hired Plaintiffs to perform the necessary framing work.

Plaintiffs performed framing work on the project from October through December 2006. LC Construction paid P.I.C. all amounts due P.I.C. in the time required under their contract. The record does not reflect whether P.I.C. paid Hammer the amount due under its agreement with Hammer.

At some point Hammer's workers "walked off the job" because they were not being paid. The record does not reflect whether Plaintiffs were some or all of the Hammer employees who walked off the job. As a result of the "walkoff," LC Construction stopped paying P.I.C. and began paying Hammer directly.

On August 11, 2008, Plaintiffs filed a Complaint in this Court against Sterling Builders d/b/a P.I.C. Construction Inc., MST Construction Inc., and Jade Properties Inc.; Thomas Scott Mickel d/b/a TSM Construction; Hammer Construction, LLC; Arturo Aguilar Alvarado; Clear Creek Custom Homes, LLC; Jose Cervantes-Chico; Gennadiy Construction, LLC; LC Construction and

Remodeling, LLC; Larry Cowlishaw;<sup>1</sup> Alberto Diaz Painting, Inc.; and Alberto Diaz. Plaintiffs alleged Defendants violated the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*, when they failed to pay Plaintiffs the federal minimum wage, to pay certain Plaintiffs their federal overtime wages, and to pay Plaintiffs promptly upon termination of their employment. Plaintiffs also alleged these Defendants violated Oregon's wage-and-hour laws when they failed to pay Plaintiffs Oregon's minimum wage, to pay certain Plaintiffs Oregon's overtime wages, and to pay Plaintiffs promptly upon termination of their employment. Plaintiffs also alleged claims for fraud and negligent misrepresentation against Cervantes-Chico.

On March 12, 2009, the Court granted Plaintiffs' Motion to Dismiss Defendants Arturo Aguilar Alvarado; Gennadiy Construction, LLC; Alberto Diaz Painting, Inc.; and Alberto Diaz without prejudice. On that same day the Court granted Plaintiffs' Motion for Entry of Default as to Defendants Sterling Builders, Inc. (and its associated d/b/as); Thomas Scott Mickel; Hammer Construction, LLC; Clear Creek Custom Homes, LLC; and Jose Cervantes-Chico.

---

<sup>1</sup> The original Complaint did not specify whether Plaintiffs' brought claims were against Larry B. Cowlishaw or Larry R. Cowlishaw. On April 28, 2009, Plaintiffs filed the Declaration of Meg Heaton in which she testified Plaintiffs had learned during discovery that there were two Larry Cowlishaws associated with LC Construction: Larry B. Cowlishaw and Larry R. Cowlishaw.

On May 26, 2009, Plaintiffs filed an Amended Complaint to bring claims against Larry B. Cowlshaw and Larry R. Cowlshaw and to remove Defendants Arturo Aguilar Alvarado, Gennadiy Construction LLC, Alberto Diaz Painting Inc., and Alberto Diaz as parties.

On October 2, 2009, the Court entered an Order dismissing Larry R. Cowlshaw with prejudice.

After entry of the various dismissals and defaults in this matter, the only remaining undefaulted Defendants are Larry B. Cowlshaw and LC Construction.

On December 9, 2009, Defendants Larry B. Cowlshaw and LC Construction filed a Motion in which they seek summary judgment as to all of Plaintiffs' claims against them.

On March 3, 2010, the Court heard oral argument on Defendants' Motion and took the Motion under advisement.

#### **STANDARDS**

Federal Rule of Civil Procedure 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9<sup>th</sup> Cir. 2005). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the

pleadings and show there is a genuine issue of material fact for trial. *Id.*

An issue of fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9<sup>th</sup> Cir. 2002)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court must draw all reasonable inferences in favor of the nonmoving party. *Id.* "Summary judgment cannot be granted where contrary inferences may be drawn from the evidence as to material issues." *Easter v. Am. W. Fin.*, 381 F.3d 948, 957 (9<sup>th</sup> Cir. 2004)(citing *Sherman Oaks Med. Arts Ctr., Ltd. v. Carpenters Local Union No. 1936*, 680 F.2d 594, 598 (9<sup>th</sup> Cir. 1982)).

A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9<sup>th</sup> Cir. 1990). When the nonmoving party's claims are factually implausible, that party must "come forward with more persuasive evidence than otherwise would be necessary." *Wong v. Regents of Univ. of Cal.*, 379 F.3d 1097 (9<sup>th</sup> Cir. 2004), *as amended by* 410 F.3d 1052, 1055 (9<sup>th</sup> Cir. 2005) (citing *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1149 (9<sup>th</sup> Cir. 1998)).

The substantive law governing a claim or a defense determines whether a fact is material. *Miller v. Glenn Miller*

*Prod., Inc.*, 454 F.3d 975, 987 (9<sup>th</sup> Cir. 2006). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Id.*

### **DISCUSSION**

Defendants move for summary judgment on the grounds that they are not employers within the meaning of either the FLSA or Oregon's wage-and-hour laws.<sup>2</sup> Pursuant to Federal Rule of Civil Procedure 11, Oregon Revised Statute § 20.105, and the FLSA Defendants also seek attorneys' fees incurred in defending them against Plaintiff's claims.

**I. Claims against Defendants by Plaintiffs Giovanni Ballesteros-Moreno, Leonardo Cobos-Perez, Luis Enrique Garcia-Galvez, Erasto Jovel-Osorio, Francisco Villanueva-Villatoro, Noe Arnoldo Zamora-Rodriguez, Ariel Garcia-Laparra, and Yucundo Reynoso.**

Defendants assert they are entitled to summary judgment as to all claims against Defendants brought by Plaintiffs Giovanni Ballesteros-Moreno, Leonardo Cobos-Perez, Luis Enrique Garcia-Galvez, Erasto Jovel-Osorio, Francisco Villanueva-Villatoro, Noe Arnoldo Zamora-Rodriguez, Ariel Garcia-Laparra, and Yucundo Reynoso because these Plaintiffs have not offered any evidence to

---

<sup>2</sup> Defendants also assert they did not commit either fraud or negligent misrepresentation against Plaintiffs. Although it is unclear in Plaintiffs' Amended Complaint, Plaintiffs clarified at oral argument that they intended to bring those claims only against Cervantes-Chico against whom default already has been entered.

support their claims that Defendants violated the FLSA and Oregon's wage-and-hour laws.

Plaintiffs offered the Declarations of Jordan Velazquez and Adenamar Gonzalez in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment. These Declarations, however, do not contain specific testimony as to the work performed by Plaintiffs, the amounts paid to any Plaintiff, the amounts owed to any Plaintiff, or any other information as to Plaintiffs other than Velazquez and Gonzales. The Declaration of Gonzalez contains tangential evidence at best as to the work of the other Plaintiffs in this matter when he testifies he "worked in a crew with the other Plaintiffs in this case."

On this record, the Court concludes Plaintiffs have not offered sufficient evidence as to the claims against Defendants brought by Giovanni Ballesteros-Moreno, Leonardo Cobos-Perez, Luis Enrique Garcia-Galvez, Erasto Jovel- Osorio, Francisco Villanueva-Villatoro, Noe Arnoldo Zamora-Rodriguez, Ariel Garcia-Laparra, and Yucundo to create any jury question as to Plaintiffs' claims. Accordingly, the Court grants Defendants' Motion for Summary Judgment as to those Plaintiffs.

## **II. Plaintiffs' claims under the FLSA.**

As noted, Defendants assert they are entitled to summary judgment as to Plaintiffs' FLSA claims because they were not Plaintiffs' employer within the meaning of the FLSA.



**A. Standards.**

Congress enacted the FLSA to remedy "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well being of workers." 29 U.S.C. § 202(a). The Supreme Court has made clear that the FLSA is to be construed expansively in favor of coverage because broad coverage is essential to accomplish the goals of this remedial legislation. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296-97 (1985). See also *Hale v. State of Ariz.*, 967 F.2d 1356, 1362 (9<sup>th</sup> Cir. 1992)(same).

The FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). The Supreme Court has described the FLSA's definition of an employee as "the broadest definition that has ever been included in any one act." *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945)(internal quotations and citation omitted). The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The FLSA defines "'employ' expansively to mean 'suffer or permit to work.'" *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992)(quoting 29 U.S.C. §§ 203(e), (g)). "[T]he words 'suffer' and 'permit' as used in the statute mean with the knowledge of the employer." *Forrester v. Roth's IGA Foodliner, Inc.*, 646 F.2d 413, 414 (9<sup>th</sup> Cir. 1981)(internal quotations and citation

omitted). The Supreme Court has emphasized the "striking breadth" of the definition of "employee" and has noted it "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Nationwide Mut. Ins. Co.*, 503 U.S. at 326.

Under the FLSA "[n]either the common law concepts of 'employee' and 'independent contractor' nor contractual provisions purporting to describe the relationship are determinative of employment status." *Nash v. Res., Inc.*, 982 F. Supp. 1427, 1433 (D. Or. 1997)(citing *Real v. Driscoll*, 603 F.2d 748, 754-55 (9<sup>th</sup> Cir. 1979)). "[D]etermination of whether an employer-employee relationship exists does not depend on 'isolated factors but rather upon the circumstances of the whole activity.'" *Bonnette v. Cal. Health and Welfare Agency*, 704 F.2d 1465, 1469 (9<sup>th</sup> Cir. 1983)(quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)). "The touchstone is 'economic reality.'" *Id.* (quoting *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961)).

The Ninth Circuit has identified regulatory and nonregulatory factors the Court should consider when determining the economic realities of a potential employer-employee relationship. See *Torres-Lopez v. May*, 111 F.3d 633, 640 (9<sup>th</sup> Cir. 1997).

**B. Regulatory Factors.**

The Ninth Circuit has identified four "regulatory factors" the Court should consider when determining the economic realities of a potential employer-employee relationship:

"[W]hether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and( 4) maintained employment records."

*Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1324 (9<sup>th</sup> Cir. 1991)(quoting *Bonnette*, 704 F.2d at 1470). "[T]hese particular factors are merely guidelines. . . . The determination of whether an employer-employee relationship exists does not depend on isolated factors but rather upon the circumstances of the whole activity." *Id.* (quotations omitted).

At oral argument, Plaintiffs conceded Defendants did not have the power to hire or to fire Plaintiffs or to determine the rate and method of payment to Plaintiffs. Plaintiffs also conceded Defendants did not maintain employment records for Plaintiffs. Although Plaintiffs assert Defendants supervised and/or controlled Plaintiffs' conditions of employment because they "controlled . . . the overall work schedule by determining when work on the [entire] project began and had to be completed," Plaintiffs conceded at oral argument that there is not any evidence that Defendants directly set Plaintiffs' work schedule. Plaintiffs, however, assert Defendants indirectly determined

Plaintiffs' work schedule because LC Construction as the general contractor set the parameters for the project's beginning and end dates.

Plaintiffs also assert LC Construction "had the economic power to shut off payments to subcontractors and substitute others in their place." To support these assertions, Plaintiffs rely on the Declarations of Adenamar Gonzales and Jordan Velazquez.

Gonzalez testifies in his Declaration that Larry B. Cowlshaw "supervised our work. He used to visit the work site every two or three days." Gonzales Decl. ¶ 4. Gonzales further testifies in pertinent part:

5. On several occasions [Larry B. Cowlshaw] showed me and my supervisor, Jose Cervantes, the plans for the house we were working on.

6. We discussed changes to the plans, and [Larry B. Cowlshaw] showed me on the plans where the changes were required to be made.

7. [Larry B. Cowlshaw] gave me a card for the LC Construction and Remodeling company, and told me that he owned the company.

8. On one occasion [Larry B. Cowlshaw] required that we move a stairway that had already been framed in.

9. [Larry B. Cowlshaw] said that if I had questions about how to carry out the work, I should call him.

Gonzales Decl. at ¶¶ 5-9. Velazquez does not testify as to any interaction with Larry B. Cowlshaw or as to Cowlshaw's alleged

supervision of the construction project.

Even considering these Declarations in the light most favorable to Plaintiffs, they do not establish that Larry B. Cowlshaw or LC Construction "controlled . . . the overall work schedule by determining when work on the [entire] project began and had to be completed" or "had the economic power to shut off payments to subcontractors and substitute others in their place." Moreover, even if Defendants had this authority, the Court concludes the authority to set an overarching start and finish date for a construction project does not establish Defendants had the authority or ability to supervise or to control work conditions, particularly when, as here, the general contractor hired a subcontractor who hired a second subcontractor, who, in turn, hired Plaintiffs.

On this record, the Court finds the regulatory factors do not support a conclusion that Plaintiffs were employees of Defendant Larry B. Cowlshaw or LC Construction.

**C. Nonregulatory factors.**

As noted, the regulatory factors are "merely guidelines. . . . The determination of whether an employer-employee relationship exists does not depend on [these] isolated factors." *Gilbreath*, 931 F.2d at 1324. For example, in "several FLSA cases . . . the courts considered many . . . non-regulatory factors" including

(1) whether the work was a "specialty job on the production line," *Rutherford*, 331 U.S. at 730, 67 S. Ct. at 1477;

(2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without "material changes," *id.*;

(3) whether the "premises and equipment" of the employer are used for the work, *id.*; see also *Real*, 603 F.2d at 754 (considering the alleged employee's "investment in equipment or materials required for his task, or his employment of helpers");

(4) whether the employees had a "business organization that could or did shift as a unit from one [worksite] to another," *Rutherford*, 331 U.S. at 730, 67 S. Ct. at 1477;

(5) whether the work was "piecework" and not work that required "initiative, judgment or foresight," *id.*; see also *Real*, 603 F.2d at 754 (considering "whether the service rendered requires a special skill");

(6) whether the employee had an "opportunity for profit or loss depending upon [the alleged employee's] managerial skill," *Real*, 603 F.2d at 754;

(7) whether there was "permanence [in] the working relationship," *id.*; and

(8) whether "the service rendered is an integral part of the alleged employer's business," *id.*

*Torres-Lopez*, 111 F.3d at 640. Although *Torres-Lopez* involved claims under both the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), the Ninth Circuit considered the nonregulatory factors when evaluating the plaintiffs' claims under both the FLSA and the AWPA.

Here Plaintiffs primarily rely on the nonregulatory factors set out in *Torres-Lopez* to establish that LC Construction and/or Larry B. Cowlshaw's actions constituted supervision and control of Plaintiff's conditions of employment to the degree that Larry B. Cowlshaw and/or LC Construction were Plaintiffs' employers within the meaning of the FLSA.

In *Torrez-Lopez*, the plaintiffs brought an action against the defendant, a cucumber grower, under the FLSA and AWPA on the ground that the defendant failed to pay them minimum wages. The Ninth Circuit examined the regulatory and nonregulatory factors and concluded the defendant "exercised significant control over the farmworker's working conditions . . . [and] exercised a substantial degree of supervision over the work performed by the farmworkers. " *Id.* at 642. The court noted:

First, [the defendant] controlled the overall harvest schedule and the number of workers needed for harvesting by staggering the planting dates of the cucumbers. [The defendant] also advised Ag-Labor about when to begin the harvest. [The defendant] had the power to decide which days were suitable for harvesting; for example, it called off the harvest one day because of a shortage of bins.

Second, . . . [the defendant] had the right to inspect all the work performed by the farmworkers, both while it was being done and after the cucumbers were picked. [The] daily presence [of the defendant's job supervisor] in the fields helped to ensure that the farmworkers performed satisfactorily. Ag-Labor, through Rodriguez, also communicated three to four times a week with [the

defendant's job supervisor's] to ensure that [he] was satisfied.

*Id.* Based on the nonregulatory and regulatory factors, the Ninth Circuit concluded the defendant was the plaintiffs' employer pursuant to the FLSA and AWPA.<sup>3</sup>

Accordingly, the Court analyzes the nonregulatory factors here.

**1. First nonregulatory factor.**

The parties dispute whether the framing work performed by Plaintiffs is a "specialty job on the production line." In *Rutherford* the plaintiffs were "skilled [beef] boners" on a production line at the defendant's slaughterhouse. The Supreme Court concluded the plaintiffs in that case performed a speciality job on the production line. 331 U.S. at 724.

Here Gonzales and Velazquez testify in their Declarations that "[w]hile framing involves some level of skill, basically, it is something that a person can learn to do in a few days." Gonzalez Decl. ¶ 13; Velazquez Decl. ¶ 6. The parties agree framing is one part of building a house for construction. It is questionable, however, whether framing, a skill one can learn in a "few days," is equivalent to the skill required in

---

<sup>3</sup> The Court notes the parties conceded at oral argument that they were unable to find any cases analyzing the employer/employee relationship under the FLSA in the context of a construction project involving a general contractor and several subcontractors.



boning beef. In addition, Plaintiffs assert in their Response to Defendants' Motion for Summary Judgment that the work they performed was work that "requires no great 'initiative, judgment, or foresight.'" Pls.' Resp. at 13 (quoting *Torres-Lopez*, 111 F.3d at 644 and *Rutherford*, 331 U.S. at 730). Plaintiffs' testimony and assertions suggest they were not performing work that was the equivalent of the "specialty job on the production line" in *Rutherford*.

**2. Second nonregulatory factor.**

Here there is not any evidence in the record as to whether responsibility under the contracts passed from one labor contractor to another without "material changes."

**3. Third nonregulatory factor.**

There is not any evidence on the record as to whether Defendants owned the premises on which Plaintiffs' work occurred. The parties conceded at oral argument that they did not know whether Defendants owned the premises at issue and, in light of the nature of the project and Defendants' position as general contractor, that it is unlikely Defendants owned the premises. In addition, Plaintiffs conceded there is not any evidence that Plaintiffs used Defendants' equipment for their work.

**4. Fourth nonregulatory factor.**

Plaintiffs assert they did not have a business

organization that could or did "shift as a unit from one worksite to another" and point to the Declarations of Velazquez and Gonzalez to support their assertion. Velazquez and Gonzalez testified: "After we quit working on the job for LC Construction and Remodeling[, ] . . . [we] were able to work on one other job together for about two months. After that we never worked together again." Velazquez Decl. ¶ 8; Gonzalez Decl. ¶ 15.

On this record, the Court concludes there is not a factual basis from which jurors could find Plaintiffs acted regularly as a business organization that shifted from one worksite to another.

**5. Fifth and Sixth nonregulatory factors.**

The parties do not dispute Plaintiffs' framing work was piece work and did not require "initiative, judgment or foresight" and that Plaintiffs did not have any opportunity for profit or loss "depending on managerial skill[s]."

**6. Seventh nonregulatory factor.**

Plaintiffs concede their relationship with LC Construction and/or Larry R. Cowlshaw did not last past the construction project at issue. Nevertheless, Plaintiffs assert it is the nature of construction work in general that relationships do not last beyond a single project, and, therefore, the Court should apply a "relative permanence" standard to determine whether there was "permanence [in] the

working relationship." Plaintiffs cite a number of cases from the Fifth Circuit, the Southern District of New York, and the Eastern District of North Carolina to support their assertion that the Court should apply a relative permanence standard. The Court notes, however, those cases did not involve construction work. In addition, the courts in those cases described the "relative permanence" standard as "recurring and relatively permanent, although seasonal." See, e.g., *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1328 (5<sup>th</sup> Cir. 1985).

Here Defendants note Plaintiffs worked on this project for three months in 2006 and have never worked for them on any project again, and, therefore, there is not any permanence in their relationship. The Court agrees. This record does not reflect Plaintiffs and Defendants had any kind of recurring or relatively permanent relationship.

**7. The eighth nonregulatory factor.**

The parties do not dispute framing is an integral part of constructing homes.

In summary, the majority of regulatory and nonregulatory factors do not support a conclusion that Plaintiffs were employees of either Larry B. Cowishaw or LC Construction within the meaning of the FLSA. Plaintiffs have, at best, provided evidence from which jurors could find Plaintiffs were employees of some entity, but not that they were Defendants' employees.

The record reflects Larry R. Cowlshaw and/or LC Construction hired P.I.C., who hired Hammer Construction, who hired Plaintiffs. Although Larry B. Cowlshaw may have occasionally been on-site, the record does not support the conclusion that Larry B. Cowlshaw or LC Construction supervised or controlled Plaintiffs' employment. The Court, therefore, concludes Plaintiffs have not provided any factual record from which jurors could find that Larry B. Cowlshaw and/or LC Construction was their employer within the meaning of the FLSA.

Accordingly, the Court grants Defendants' Motion for Summary Judgment as to Plaintiffs' FLSA claims.

### **III. Oregon Law**

Under Oregon law independent contractors are not "employees" and, therefore, are "not entitled to the protection of Oregon or federal minimum wage and overtime laws." *Perri v. Certified Languages Int'l, LLC*, 187 Or. App. 76, 81 (2003)(citing Or. Rev. Stat. § 652.310(2)). To determine the status of a worker, Oregon courts apply "a common law 'right to control' test." *Perri*, 187 Or. App. at 82. "The principal factors under that test are (1) the right to, or the exercise of, control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire." *Id.* (citing *Castle Homes, Inc. v. Whaite*, 95 Or. App. 269, 272 (1989)). "No one factor is dispositive; they are to be viewed in their totality." *Perri*, 187 Or. App. at 82 (citation

omitted). Oregon courts have noted these factors are "similar to" the four factors examined under the FLSA's economic-realities test. *Id.*

Plaintiffs conceded at oral argument that the analysis of Defendants' status was not materially different under Oregon law, and, therefore, if the Court concluded Defendants are entitled to summary judgment under the FLSA, the Court's conclusion should be the same as to Plaintiffs' claims under Oregon's wage-and-hour laws. The Court agrees.

Accordingly, because the Court has concluded Defendants are entitled to summary judgment as to Plaintiffs' FLSA claims, the Court also concludes Defendants are entitled to summary judgment as to Plaintiffs' claims under Oregon's wage-and-hour laws. The Court, therefore, grants Defendants' Motion for Summary Judgment as to Plaintiffs' claims under Oregon's wage-and-hour laws.

#### **IV. Defendants' request for attorneys' fees.**

In their Motion for Summary Judgment, Defendants seek attorneys' fees under the FLSA, Oregon Revised Statute § 20.105, and Federal Rule of Civil Procedure 11 on the grounds that there is "no objective factual or legal basis for the claims against Defendants," Plaintiffs' counsel "has demonstrated a reckless disregard for the law, and this lawsuit is abusive."

Although the Court has granted Defendants' Motion for Summary Judgment, the Court does not agree Plaintiffs lacked an

objective legal or factual basis for their claims against Defendants or that Plaintiffs' counsel demonstrated reckless disregard for the law. The nature of an employment relationship under the FLSA and Oregon's wage-and-hour laws in the construction context is complicated and unclear and requires a court to engage in a multifactor analysis that includes extrapolating conclusions from various other employment contexts.

Accordingly, on this record and in the exercise of its discretion, the Court denies Defendants' request for attorneys' fees under the FLSA, Oregon Revised Statute § 20.105, and/or Federal Rule of Civil Procedure 11.

#### **CONCLUSION**

For these reasons, the Court **GRANTS** the Motion (#63) for Summary Judgment of LC Construction and Larry B. Cowlshaw and **DENIES** Defendants' request for attorneys' fees.

The Court **DIRECTS** Defendants LC Construction and Larry B. Cowlshaw to submit a form of judgment no later than May 21, 2010.

IT IS SO ORDERED.

DATED this 6<sup>th</sup> day of May, 2010.

/s/ Anna J. Brown

---

ANNA J. BROWN  
United States District



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

ADENAMAR GONZALES, LEONARDO  
COBOS-PEREZ, LUIS ENRIQUE  
GARCIA-GALVES, ERASTO  
JOVEL-OSORIO, JORDAN VELAZQUEZ,  
FRANCISCO VILLANUEVA-VILLATORO,  
NOE ARNOLODO ZAMORA-RODRIQUEZ,  
AREIL GARCIA-LAPARRA, and  
YUCUNDO REYNOSO,

08-CV-943-BR

OPINION AND ORDER

Plaintiffs,

v.

STERLING BUILDERS, INC., an  
Oregon corporation d/b/a  
P.I.C CONSTRUCTION, INC., MST  
CONSTRUCTION, INC., and JADE  
PROPERTIES INC.; THOMAS SCOTT  
MICKEL; HAMMER CONSTRUCTION, LLC;  
CLEAR CREEK CUSTOM HOMES, L.L.C.;  
JOSE CERVANTES-CHICO; LC  
CONSTRUCTION AND REMODELING, LLC;  
LARRY R. COWLISHAW; AND LARRY B.  
COWLISHAW,

Defendants.



**D. MICHAEL DALE**

P.O. Box 1032  
Cornelius, OR 97113  
(503) 357-8290

**MEG HEATON**

Northwest Workers' Justice Project  
917 S.W. Oak Street  
Suite 412  
Portland, OR 97205  
(503) 525-8454

Attorneys for Plaintiffs

**STEVEN C. BURKE**

Case & Dusterhoff, LLP  
9800 S.W. Beaverton Hillsdale Hwy.  
Suite 200  
Beaverton, OR 97005  
(503) 641-7222

Attorneys for Defendants LC Construction and  
Remodeling, Inc.; Larry B. Cowlshaw; and Larry R.  
Cowlshaw

**BROWN, Judge.**

This matter comes before the Court on the Motion (#63) for Summary Judgment of LC Construction and Remodeling, Inc., and Larry B. Cowlshaw. For the reasons that follow, the Court **GRANTS** Defendants' Motion.

**BACKGROUND**

In October 2006 Defendant LC Construction, acting as a general contractor, entered into a contract with Defendant

Sterling Builders, Inc., d/b/a P.I.C. Construction Inc., to provide framers for a residential construction project. P.I.C., in turn, subcontracted with Defendant Hammer Construction, LLC, to provide the framers for the project. Hammer hired Plaintiffs to perform the necessary framing work.

Plaintiffs performed framing work on the project from October through December 2006. LC Construction paid P.I.C. all amounts due P.I.C. in the time required under their contract. The record does not reflect whether P.I.C. paid Hammer the amount due under its agreement with Hammer.

At some point Hammer's workers "walked off the job" because they were not being paid. The record does not reflect whether Plaintiffs were some or all of the Hammer employees who walked off the job. As a result of the "walkoff," LC Construction stopped paying P.I.C. and began paying Hammer directly.

On August 11, 2008, Plaintiffs filed a Complaint in this Court against Sterling Builders d/b/a P.I.C. Construction Inc., MST Construction Inc., and Jade Properties Inc.; Thomas Scott Mickel d/b/a TSM Construction; Hammer Construction, LLC; Arturo Aguilar Alvarado; Clear Creek Custom Homes, LLC; Jose Cervantes-Chico; Gennadiy Construction, LLC; LC Construction and

Remodeling, LLC; Larry Cowlishaw;<sup>1</sup> Alberto Diaz Painting, Inc.; and Alberto Diaz. Plaintiffs alleged Defendants violated the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*, when they failed to pay Plaintiffs the federal minimum wage, to pay certain Plaintiffs their federal overtime wages, and to pay Plaintiffs promptly upon termination of their employment. Plaintiffs also alleged these Defendants violated Oregon's wage-and-hour laws when they failed to pay Plaintiffs Oregon's minimum wage, to pay certain Plaintiffs Oregon's overtime wages, and to pay Plaintiffs promptly upon termination of their employment. Plaintiffs also alleged claims for fraud and negligent misrepresentation against Cervantes-Chico.

On March 12, 2009, the Court granted Plaintiffs' Motion to Dismiss Defendants Arturo Aguilar Alvarado; Gennadiy Construction, LLC; Alberto Diaz Painting, Inc.; and Alberto Diaz without prejudice. On that same day the Court granted Plaintiffs' Motion for Entry of Default as to Defendants Sterling Builders, Inc. (and its associated d/b/as); Thomas Scott Mickel; Hammer Construction, LLC; Clear Creek Custom Homes, LLC; and Jose Cervantes-Chico.

---

<sup>1</sup> The original Complaint did not specify whether Plaintiffs' brought claims were against Larry B. Cowlishaw or Larry R. Cowlishaw. On April 28, 2009, Plaintiffs filed the Declaration of Meg Heaton in which she testified Plaintiffs had learned during discovery that there were two Larry Cowlishaws associated with LC Construction: Larry B. Cowlishaw and Larry R. Cowlishaw.

On May 26, 2009, Plaintiffs filed an Amended Complaint to bring claims against Larry B. Cowlshaw and Larry R. Cowlshaw and to remove Defendants Arturo Aguilar Alvarado, Gennadiy Construction LLC, Alberto Diaz Painting Inc., and Alberto Diaz as parties.

On October 2, 2009, the Court entered an Order dismissing Larry R. Cowlshaw with prejudice.

After entry of the various dismissals and defaults in this matter, the only remaining undefaulted Defendants are Larry B. Cowlshaw and LC Construction.

On December 9, 2009, Defendants Larry B. Cowlshaw and LC Construction filed a Motion in which they seek summary judgment as to all of Plaintiffs' claims against them.

On March 3, 2010, the Court heard oral argument on Defendants' Motion and took the Motion under advisement.

#### **STANDARDS**

Federal Rule of Civil Procedure 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9<sup>th</sup> Cir. 2005). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the

pleadings and show there is a genuine issue of material fact for trial. *Id.*

An issue of fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9<sup>th</sup> Cir. 2002)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court must draw all reasonable inferences in favor of the nonmoving party. *Id.* "Summary judgment cannot be granted where contrary inferences may be drawn from the evidence as to material issues." *Easter v. Am. W. Fin.*, 381 F.3d 948, 957 (9<sup>th</sup> Cir. 2004)(citing *Sherman Oaks Med. Arts Ctr., Ltd. v. Carpenters Local Union No. 1936*, 680 F.2d 594, 598 (9<sup>th</sup> Cir. 1982)).

A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9<sup>th</sup> Cir. 1990). When the nonmoving party's claims are factually implausible, that party must "come forward with more persuasive evidence than otherwise would be necessary." *Wong v. Regents of Univ. of Cal.*, 379 F.3d 1097 (9<sup>th</sup> Cir. 2004), *as amended by* 410 F.3d 1052, 1055 (9<sup>th</sup> Cir. 2005) (citing *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1149 (9<sup>th</sup> Cir. 1998)).

The substantive law governing a claim or a defense determines whether a fact is material. *Miller v. Glenn Miller*

*Prod., Inc.*, 454 F.3d 975, 987 (9<sup>th</sup> Cir. 2006). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Id.*

### **DISCUSSION**

Defendants move for summary judgment on the grounds that they are not employers within the meaning of either the FLSA or Oregon's wage-and-hour laws.<sup>2</sup> Pursuant to Federal Rule of Civil Procedure 11, Oregon Revised Statute § 20.105, and the FLSA Defendants also seek attorneys' fees incurred in defending them against Plaintiff's claims.

**I. Claims against Defendants by Plaintiffs Giovanni Ballesteros-Moreno, Leonardo Cobos-Perez, Luis Enrique Garcia-Galvez, Erasto Jovel-Osorio, Francisco Villanueva-Villatoro, Noe Arnoldo Zamora-Rodriguez, Ariel Garcia-Laparra, and Yucundo Reynoso.**

Defendants assert they are entitled to summary judgment as to all claims against Defendants brought by Plaintiffs Giovanni Ballesteros-Moreno, Leonardo Cobos-Perez, Luis Enrique Garcia-Galvez, Erasto Jovel-Osorio, Francisco Villanueva-Villatoro, Noe Arnoldo Zamora-Rodriguez, Ariel Garcia-Laparra, and Yucundo Reynoso because these Plaintiffs have not offered any evidence to

---

<sup>2</sup> Defendants also assert they did not commit either fraud or negligent misrepresentation against Plaintiffs. Although it is unclear in Plaintiffs' Amended Complaint, Plaintiffs clarified at oral argument that they intended to bring those claims only against Cervantes-Chico against whom default already has been entered.

support their claims that Defendants violated the FLSA and Oregon's wage-and-hour laws.

Plaintiffs offered the Declarations of Jordan Velazquez and Adenamar Gonzalez in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment. These Declarations, however, do not contain specific testimony as to the work performed by Plaintiffs, the amounts paid to any Plaintiff, the amounts owed to any Plaintiff, or any other information as to Plaintiffs other than Velazquez and Gonzales. The Declaration of Gonzalez contains tangential evidence at best as to the work of the other Plaintiffs in this matter when he testifies he "worked in a crew with the other Plaintiffs in this case."

On this record, the Court concludes Plaintiffs have not offered sufficient evidence as to the claims against Defendants brought by Giovanni Ballesteros-Moreno, Leonardo Cobos-Perez, Luis Enrique Garcia-Galvez, Erasto Jovel- Osorio, Francisco Villanueva-Villatoro, Noe Arnoldo Zamora-Rodriguez, Ariel Garcia-Laparra, and Yucundo to create any jury question as to Plaintiffs' claims. Accordingly, the Court grants Defendants' Motion for Summary Judgment as to those Plaintiffs.

## **II. Plaintiffs' claims under the FLSA.**

As noted, Defendants assert they are entitled to summary judgment as to Plaintiffs' FLSA claims because they were not Plaintiffs' employer within the meaning of the FLSA.

**A. Standards.**

Congress enacted the FLSA to remedy "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well being of workers." 29 U.S.C. § 202(a). The Supreme Court has made clear that the FLSA is to be construed expansively in favor of coverage because broad coverage is essential to accomplish the goals of this remedial legislation. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296-97 (1985). See also *Hale v. State of Ariz.*, 967 F.2d 1356, 1362 (9<sup>th</sup> Cir. 1992)(same).

The FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). The Supreme Court has described the FLSA's definition of an employee as "the broadest definition that has ever been included in any one act." *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945)(internal quotations and citation omitted). The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The FLSA defines "'employ' expansively to mean 'suffer or permit to work.'" *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992)(quoting 29 U.S.C. §§ 203(e), (g)). "[T]he words 'suffer' and 'permit' as used in the statute mean with the knowledge of the employer." *Forrester v. Roth's IGA Foodliner, Inc.*, 646 F.2d 413, 414 (9<sup>th</sup> Cir. 1981)(internal quotations and citation



omitted). The Supreme Court has emphasized the "striking breadth" of the definition of "employee" and has noted it "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Nationwide Mut. Ins. Co.*, 503 U.S. at 326.

Under the FLSA "[n]either the common law concepts of 'employee' and 'independent contractor' nor contractual provisions purporting to describe the relationship are determinative of employment status." *Nash v. Res., Inc.*, 982 F. Supp. 1427, 1433 (D. Or. 1997)(citing *Real v. Driscoll*, 603 F.2d 748, 754-55 (9<sup>th</sup> Cir. 1979)). "[D]etermination of whether an employer-employee relationship exists does not depend on 'isolated factors but rather upon the circumstances of the whole activity.'" *Bonnette v. Cal. Health and Welfare Agency*, 704 F.2d 1465, 1469 (9<sup>th</sup> Cir. 1983)(quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)). "The touchstone is 'economic reality.'" *Id.* (quoting *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961)).

The Ninth Circuit has identified regulatory and nonregulatory factors the Court should consider when determining the economic realities of a potential employer-employee relationship. See *Torres-Lopez v. May*, 111 F.3d 633, 640 (9<sup>th</sup> Cir. 1997).

**B. Regulatory Factors.**

The Ninth Circuit has identified four "regulatory factors" the Court should consider when determining the economic realities of a potential employer-employee relationship:

"[W]hether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and( 4) maintained employment records."

*Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1324 (9<sup>th</sup> Cir. 1991)(quoting *Bonnette*, 704 F.2d at 1470). "[T]hese particular factors are merely guidelines. . . . The determination of whether an employer-employee relationship exists does not depend on isolated factors but rather upon the circumstances of the whole activity." *Id.* (quotations omitted).

At oral argument, Plaintiffs conceded Defendants did not have the power to hire or to fire Plaintiffs or to determine the rate and method of payment to Plaintiffs. Plaintiffs also conceded Defendants did not maintain employment records for Plaintiffs. Although Plaintiffs assert Defendants supervised and/or controlled Plaintiffs' conditions of employment because they "controlled . . . the overall work schedule by determining when work on the [entire] project began and had to be completed," Plaintiffs conceded at oral argument that there is not any evidence that Defendants directly set Plaintiffs' work schedule. Plaintiffs, however, assert Defendants indirectly determined

Plaintiffs' work schedule because LC Construction as the general contractor set the parameters for the project's beginning and end dates.

Plaintiffs also assert LC Construction "had the economic power to shut off payments to subcontractors and substitute others in their place." To support these assertions, Plaintiffs rely on the Declarations of Adenamar Gonzales and Jordan Velazquez.

Gonzalez testifies in his Declaration that Larry B. Cowlshaw "supervised our work. He used to visit the work site every two or three days." Gonzales Decl. ¶ 4. Gonzales further testifies in pertinent part:

5. On several occasions [Larry B. Cowlshaw] showed me and my supervisor, Jose Cervantes, the plans for the house we were working on.

6. We discussed changes to the plans, and [Larry B. Cowlshaw] showed me on the plans where the changes were required to be made.

7. [Larry B. Cowlshaw] gave me a card for the LC Construction and Remodeling company, and told me that he owned the company.

8. On one occasion [Larry B. Cowlshaw] required that we move a stairway that had already been framed in.

9. [Larry B. Cowlshaw] said that if I had questions about how to carry out the work, I should call him.

Gonzales Decl. at ¶¶ 5-9. Velazquez does not testify as to any interaction with Larry B. Cowlshaw or as to Cowlshaw's alleged

supervision of the construction project.

Even considering these Declarations in the light most favorable to Plaintiffs, they do not establish that Larry B. Cowlshaw or LC Construction "controlled . . . the overall work schedule by determining when work on the [entire] project began and had to be completed" or "had the economic power to shut off payments to subcontractors and substitute others in their place." Moreover, even if Defendants had this authority, the Court concludes the authority to set an overarching start and finish date for a construction project does not establish Defendants had the authority or ability to supervise or to control work conditions, particularly when, as here, the general contractor hired a subcontractor who hired a second subcontractor, who, in turn, hired Plaintiffs.

On this record, the Court finds the regulatory factors do not support a conclusion that Plaintiffs were employees of Defendant Larry B. Cowlshaw or LC Construction.

**C. Nonregulatory factors.**

As noted, the regulatory factors are "merely guidelines. . . . The determination of whether an employer-employee relationship exists does not depend on [these] isolated factors." *Gilbreath*, 931 F.2d at 1324. For example, in "several FLSA cases . . . the courts considered many . . . non-regulatory factors" including

(1) whether the work was a "specialty job on the production line," *Rutherford*, 331 U.S. at 730, 67 S. Ct. at 1477;

(2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without "material changes," *id.*;

(3) whether the "premises and equipment" of the employer are used for the work, *id.*; see also *Real*, 603 F.2d at 754 (considering the alleged employee's "investment in equipment or materials required for his task, or his employment of helpers");

(4) whether the employees had a "business organization that could or did shift as a unit from one [worksite] to another," *Rutherford*, 331 U.S. at 730, 67 S. Ct. at 1477;

(5) whether the work was "piecework" and not work that required "initiative, judgment or foresight," *id.*; see also *Real*, 603 F.2d at 754 (considering "whether the service rendered requires a special skill");

(6) whether the employee had an "opportunity for profit or loss depending upon [the alleged employee's] managerial skill," *Real*, 603 F.2d at 754;

(7) whether there was "permanence [in] the working relationship," *id.*; and

(8) whether "the service rendered is an integral part of the alleged employer's business," *id.*

*Torres-Lopez*, 111 F.3d at 640. Although *Torres-Lopez* involved claims under both the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), the Ninth Circuit considered the nonregulatory factors when evaluating the plaintiffs' claims under both the FLSA and the AWPA.

Here Plaintiffs primarily rely on the nonregulatory factors set out in *Torres-Lopez* to establish that LC Construction and/or Larry B. Cowlshaw's actions constituted supervision and control of Plaintiff's conditions of employment to the degree that Larry B. Cowlshaw and/or LC Construction were Plaintiffs' employers within the meaning of the FLSA.

In *Torrez-Lopez*, the plaintiffs brought an action against the defendant, a cucumber grower, under the FLSA and AWPA on the ground that the defendant failed to pay them minimum wages. The Ninth Circuit examined the regulatory and nonregulatory factors and concluded the defendant "exercised significant control over the farmworker's working conditions . . . [and] exercised a substantial degree of supervision over the work performed by the farmworkers. " *Id.* at 642. The court noted:

First, [the defendant] controlled the overall harvest schedule and the number of workers needed for harvesting by staggering the planting dates of the cucumbers. [The defendant] also advised Ag-Labor about when to begin the harvest. [The defendant] had the power to decide which days were suitable for harvesting; for example, it called off the harvest one day because of a shortage of bins.

Second, . . . [the defendant] had the right to inspect all the work performed by the farmworkers, both while it was being done and after the cucumbers were picked. [The] daily presence [of the defendant's job supervisor] in the fields helped to ensure that the farmworkers performed satisfactorily. Ag-Labor, through Rodriguez, also communicated three to four times a week with [the

defendant's job supervisor's] to ensure that [he] was satisfied.

*Id.* Based on the nonregulatory and regulatory factors, the Ninth Circuit concluded the defendant was the plaintiffs' employer pursuant to the FLSA and AWPA.<sup>3</sup>

Accordingly, the Court analyzes the nonregulatory factors here.

**1. First nonregulatory factor.**

The parties dispute whether the framing work performed by Plaintiffs is a "specialty job on the production line." In *Rutherford* the plaintiffs were "skilled [beef] boners" on a production line at the defendant's slaughterhouse. The Supreme Court concluded the plaintiffs in that case performed a speciality job on the production line. 331 U.S. at 724.

Here Gonzales and Velazquez testify in their Declarations that "[w]hile framing involves some level of skill, basically, it is something that a person can learn to do in a few days." Gonzalez Decl. ¶ 13; Velazquez Decl. ¶ 6. The parties agree framing is one part of building a house for construction. It is questionable, however, whether framing, a skill one can learn in a "few days," is equivalent to the skill required in

---

<sup>3</sup> The Court notes the parties conceded at oral argument that they were unable to find any cases analyzing the employer/employee relationship under the FLSA in the context of a construction project involving a general contractor and several subcontractors.

boning beef. In addition, Plaintiffs assert in their Response to Defendants' Motion for Summary Judgment that the work they performed was work that "requires no great 'initiative, judgment, or foresight.'" Pls.' Resp. at 13 (quoting *Torres-Lopez*, 111 F.3d at 644 and *Rutherford*, 331 U.S. at 730). Plaintiffs' testimony and assertions suggest they were not performing work that was the equivalent of the "specialty job on the production line" in *Rutherford*.

**2. Second nonregulatory factor.**

Here there is not any evidence in the record as to whether responsibility under the contracts passed from one labor contractor to another without "material changes."

**3. Third nonregulatory factor.**

There is not any evidence on the record as to whether Defendants owned the premises on which Plaintiffs' work occurred. The parties conceded at oral argument that they did not know whether Defendants owned the premises at issue and, in light of the nature of the project and Defendants' position as general contractor, that it is unlikely Defendants owned the premises. In addition, Plaintiffs conceded there is not any evidence that Plaintiffs used Defendants' equipment for their work.

**4. Fourth nonregulatory factor.**

Plaintiffs assert they did not have a business



organization that could or did "shift as a unit from one worksite to another" and point to the Declarations of Velazquez and Gonzalez to support their assertion. Velazquez and Gonzalez testified: "After we quit working on the job for LC Construction and Remodeling[, ] . . . [we] were able to work on one other job together for about two months. After that we never worked together again." Velazquez Decl. ¶ 8; Gonzalez Decl. ¶ 15.

On this record, the Court concludes there is not a factual basis from which jurors could find Plaintiffs acted regularly as a business organization that shifted from one worksite to another.

**5. Fifth and Sixth nonregulatory factors.**

The parties do not dispute Plaintiffs' framing work was piece work and did not require "initiative, judgment or foresight" and that Plaintiffs did not have any opportunity for profit or loss "depending on managerial skill[s]."

**6. Seventh nonregulatory factor.**

Plaintiffs concede their relationship with LC Construction and/or Larry R. Cowlshaw did not last past the construction project at issue. Nevertheless, Plaintiffs assert it is the nature of construction work in general that relationships do not last beyond a single project, and, therefore, the Court should apply a "relative permanence" standard to determine whether there was "permanence [in] the

working relationship." Plaintiffs cite a number of cases from the Fifth Circuit, the Southern District of New York, and the Eastern District of North Carolina to support their assertion that the Court should apply a relative permanence standard. The Court notes, however, those cases did not involve construction work. In addition, the courts in those cases described the "relative permanence" standard as "recurring and relatively permanent, although seasonal." See, e.g., *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1328 (5<sup>th</sup> Cir. 1985).

Here Defendants note Plaintiffs worked on this project for three months in 2006 and have never worked for them on any project again, and, therefore, there is not any permanence in their relationship. The Court agrees. This record does not reflect Plaintiffs and Defendants had any kind of recurring or relatively permanent relationship.

**7. The eighth nonregulatory factor.**

The parties do not dispute framing is an integral part of constructing homes.

In summary, the majority of regulatory and nonregulatory factors do not support a conclusion that Plaintiffs were employees of either Larry B. Cowishaw or LC Construction within the meaning of the FLSA. Plaintiffs have, at best, provided evidence from which jurors could find Plaintiffs were employees of some entity, but not that they were Defendants' employees.

The record reflects Larry R. Cowlshaw and/or LC Construction hired P.I.C., who hired Hammer Construction, who hired Plaintiffs. Although Larry B. Cowlshaw may have occasionally been on-site, the record does not support the conclusion that Larry B. Cowlshaw or LC Construction supervised or controlled Plaintiffs' employment. The Court, therefore, concludes Plaintiffs have not provided any factual record from which jurors could find that Larry B. Cowlshaw and/or LC Construction was their employer within the meaning of the FLSA.

Accordingly, the Court grants Defendants' Motion for Summary Judgment as to Plaintiffs' FLSA claims.

### **III. Oregon Law**

Under Oregon law independent contractors are not "employees" and, therefore, are "not entitled to the protection of Oregon or federal minimum wage and overtime laws." *Perri v. Certified Languages Int'l, LLC*, 187 Or. App. 76, 81 (2003)(citing Or. Rev. Stat. § 652.310(2)). To determine the status of a worker, Oregon courts apply "a common law 'right to control' test." *Perri*, 187 Or. App. at 82. "The principal factors under that test are (1) the right to, or the exercise of, control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire." *Id.* (citing *Castle Homes, Inc. v. Whaite*, 95 Or. App. 269, 272 (1989)). "No one factor is dispositive; they are to be viewed in their totality." *Perri*, 187 Or. App. at 82 (citation

omitted). Oregon courts have noted these factors are "similar to" the four factors examined under the FLSA's economic-realities test. *Id.*

Plaintiffs conceded at oral argument that the analysis of Defendants' status was not materially different under Oregon law, and, therefore, if the Court concluded Defendants are entitled to summary judgment under the FLSA, the Court's conclusion should be the same as to Plaintiffs' claims under Oregon's wage-and-hour laws. The Court agrees.

Accordingly, because the Court has concluded Defendants are entitled to summary judgment as to Plaintiffs' FLSA claims, the Court also concludes Defendants are entitled to summary judgment as to Plaintiffs' claims under Oregon's wage-and-hour laws. The Court, therefore, grants Defendants' Motion for Summary Judgment as to Plaintiffs' claims under Oregon's wage-and-hour laws.

#### **IV. Defendants' request for attorneys' fees.**

In their Motion for Summary Judgment, Defendants seek attorneys' fees under the FLSA, Oregon Revised Statute § 20.105, and Federal Rule of Civil Procedure 11 on the grounds that there is "no objective factual or legal basis for the claims against Defendants," Plaintiffs' counsel "has demonstrated a reckless disregard for the law, and this lawsuit is abusive."

Although the Court has granted Defendants' Motion for Summary Judgment, the Court does not agree Plaintiffs lacked an

objective legal or factual basis for their claims against Defendants or that Plaintiffs' counsel demonstrated reckless disregard for the law. The nature of an employment relationship under the FLSA and Oregon's wage-and-hour laws in the construction context is complicated and unclear and requires a court to engage in a multifactor analysis that includes extrapolating conclusions from various other employment contexts.

Accordingly, on this record and in the exercise of its discretion, the Court denies Defendants' request for attorneys' fees under the FLSA, Oregon Revised Statute § 20.105, and/or Federal Rule of Civil Procedure 11.

#### **CONCLUSION**

For these reasons, the Court **GRANTS** the Motion (#63) for Summary Judgment of LC Construction and Larry B. Cowlshaw and **DENIES** Defendants' request for attorneys' fees.

The Court **DIRECTS** Defendants LC Construction and Larry B. Cowlshaw to submit a form of judgment no later than May 21, 2010.

IT IS SO ORDERED.

DATED this 6<sup>th</sup> day of May, 2010.

/s/ Anna J. Brown

---

ANNA J. BROWN  
United States District

