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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Ed E. Alonzo,
Plaintiff,

v.
Akal Security Incorporated,
Defendant.

No. CV-17-00836-PHX-JJT
ORDER

At issue is Defendant Akal Security, Inc.’s Motion for Summary Judgment (Doc. 68, Mot.) supported by Defendant’s Statement of Facts (Doc. 69, DSOF), to which Plaintiff Ed E. Alonzo filed a Response (Doc. 75, Resp.) and responsive Statement of Facts (Doc. 76, PSOF) and Defendant filed a Reply (Doc. 83, Reply)¹. For the reasons that follow, the Court will grant Defendant’s Motion.

I. BACKGROUND

Defendant is a federal government contractor, and Plaintiff worked for Defendant as an Aviation Security Officer (“ASO”). (DSOF ¶ 2.) ASOs are responsible for the supervision of persons being expelled from the United States, or “deportees,” during both domestic travel between holding facilities and international travel to the deportees’ home countries. (DSOF ¶ 1.) Once the deportees are transported abroad, ASOs travel on a return flight to the United States. (PSOF ¶ 3.)

¹ Defendant also filed a Reply Statement of Facts (Doc. 84), which the Local Rules prohibit, LRCiv 56.1(b), and the Court thus did not consider.

1 Defendant maintained a written Timekeeping Policy for ASOs, and Plaintiff
2 testified that he read and understood the Timekeeping Policy. (DSOF ¶¶ 6, 8.) In pertinent
3 part, the Policy provided for a one-hour unpaid meal period during certain return flights
4 when no deportees were present, with a few exceptions not relevant here. (DSOF ¶ 6.)
5 Plaintiff signed an Employee Offer Letter with Defendant that similarly set forth a one-
6 hour unpaid meal period policy. (DSOF ¶¶ 9–10.) Moreover, Defendant and the
7 International Union, Security, Police and Fire Professionals of America entered into a
8 Collective Bargaining Agreement that included a comparable unpaid meal period policy.
9 (DSOF ¶¶ 14–16.) Plaintiff was a party to that Collective Bargaining Agreement as a
10 member and officer of the Union. (DSOF ¶ 13.)

11 Defendant’s Timekeeping Policy instructed ASOs to completely disengage from all
12 work duties during the meal period. (DSOF ¶¶ 6–7.) Defendant required ASOs to record
13 time worked during meal periods if special circumstances necessitated that an ASO perform
14 work during these periods. (DSOF ¶¶ 6–7.) The Policy further mandated that the ASO notify
15 his/her supervisor if such a situation arose. (DSOF ¶ 7.) Plaintiff testified that he never
16 recorded any time worked during a meal period. (DSOF ¶ 22.) However, at least in the
17 Complaint, Plaintiff alleged that an “ASO may not take any lunch break” and Defendant
18 deducted one hour of compensation from his/her pay anyway. (Doc. 1, Compl. ¶ 11.)

19 Plaintiff brought this case as a hybrid class action, (Compl.; Doc. 44), and the Court
20 denied Plaintiff’s Motion to Certify a Conditional Class because Plaintiff failed to show that
21 other ASOs alleged that they worked without compensation during their meal breaks. (Doc.
22 51.) Additionally, the Court dismissed two counts of Plaintiff’s Complaint for failure to state
23 a claim. (Doc. 27.) In the remaining count—Count II—Plaintiff alleges that Defendant’s
24 automatic one-hour pay deduction for meal periods, deducted regardless of whether Plaintiff
25 took a meal period or worked through the hour, violated the overtime provisions of the Fair
26 Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.* (Compl. ¶¶ 14, 36–39.) Defendant
27 now moves for summary judgment on the remaining claim.

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1 **II. LEGAL STANDARD**

2 Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is
3 appropriate when: (1) the movant shows that there is no genuine dispute as to any material
4 fact; and (2) after viewing the evidence most favorably to the non-moving party, the
5 movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*,
6 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th
7 Cir. 1987). Under this standard, “[o]nly disputes over facts that might affect the outcome
8 of the suit under governing [substantive] law will properly preclude the entry of summary
9 judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A “genuine issue”
10 of material fact arises only “if the evidence is such that a reasonable jury could return a
11 verdict for the nonmoving party.” *Id.*

12 In considering a motion for summary judgment, the court must regard as true the
13 non-moving party’s evidence, if it is supported by affidavits or other evidentiary material.
14 *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party
15 may not merely rest on its pleadings; it must produce some significant probative evidence
16 tending to contradict the moving party’s allegations, thereby creating a material question
17 of fact. *Anderson*, 477 U.S. at 256–57 (holding that the plaintiff must present affirmative
18 evidence in order to defeat a properly supported motion for summary judgment); *First Nat’l*
19 *Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

20 “A summary judgment motion cannot be defeated by relying solely on conclusory
21 allegations unsupported by factual data.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
22 1989). “Summary judgment must be entered ‘against a party who fails to make a showing
23 sufficient to establish the existence of an element essential to that party’s case, and on
24 which that party will bear the burden of proof at trial.’” *United States v. Carter*, 906 F.2d
25 1375, 1376 (9th Cir. 1990) (quoting *Celotex*, 477 U.S. at 322).

26 **III. ANALYSIS**

27 Defendant moves for summary judgment on Plaintiff’s claim for unpaid overtime
28 wages accrued during one-hour meal periods. In support, Defendant argues that the

1 evidence undisputedly demonstrates that Plaintiff received *bona fide* meal breaks of at least
2 one hour on the designated flights and that, under the parties' agreements, Plaintiff's meal
3 period was non-compensable. Defendant thus contends that Plaintiff cannot meet his
4 burden to show that the meal periods are compensable. Defendant also maintains that, if
5 Defendant is liable for an FLSA violation, Plaintiff is not entitled to liquidated damages
6 because Defendant relied in good faith on the advice of counsel.

7 In response, Plaintiff argues that a genuine dispute of fact exists as to whether he
8 worked during the unpaid meal period on the designated flights, precluding summary
9 judgment. As such, the Court must determine if Plaintiff has raised a genuine dispute
10 regarding whether he received one-hour *bona fide* meal periods or whether he performed
11 work for which he was not compensated under the FLSA.

12 The FLSA requires that employees be compensated for all hours worked. The term
13 "hours worked" includes:

14 (a) All time during which an employee is required to be on duty or to be on
15 the employer's premises or at a prescribed workplace and (b) all time during
16 which an employee is suffered or permitted to work whether or not he is
17 required to do so. Thus, working time is not limited to the hours spent in
18 active productive labor, but includes time given by the employee to the
19 employer even though part of the time may be spent in idleness.

19 29 CFR § 778.223. Work performed during travel time is included in the calculation of
20 "hours worked," except during *bona fide* meal periods. *Id.* § 785.41. "*Bona fide* meal
21 periods are not worktime." *Id.* § 785.19. To qualify as a *bona fide* meal period, "[t]he
22 employee must be completely relieved from duty for the purposes of eating regular meals."
23 *Id.* But "[i]t is not necessary that an employee be permitted to leave the premises if he is
24 otherwise completely freed from duties during the meal period." *Id.*

25 In *Brennan v. Elmer's Disposal Serv., Inc.*, 510 F.2d 84, 88 (9th Cir. 1975), the
26 Ninth Circuit Court of Appeals held that employees must be paid during meal periods when
27 they engage in work related duties. In a later case, the Ninth Circuit noted, "Some circuits
28 have declined to defer to 29 CFR § 785.19's 'completely relieved from duty' language or

1 interpreted it to mean that an employee is entitled to compensation for a meal period only
2 if he or she ‘predominately benefits’ from the meal period.” *Busk v. Integrity Staffing*
3 *Solutions, Inc.*, 713 F.3d 525, 531 n.4 (9th Cir. 2013) (citations omitted), *reversed on other*
4 *grounds*, 135 S. Ct. 513 (2013). Here, as in *Busk*, “the distinction between the ‘completely
5 relieved from duty’ and ‘predominant benefit’ standards does not matter for this case,” *id.*,
6 because Plaintiff proffers no evidence he actually worked during a meal period.

7 It is the employee’s “burden of proving that he performed work for which he was
8 not properly compensated.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–87
9 (1946). When an “employer’s records are inaccurate or inadequate and the employee
10 cannot offer convincing substitutes,” the employee should not be penalized “by denying
11 him any recovery [because] he is unable to prove the precise extent of uncompensated
12 work.” *Id.* In such a situation, “an employee has carried out his burden if he proves that he
13 has in fact performed work for which he was improperly compensated and if he produces
14 sufficient evidence to show the amount and extent of that work as a matter of a just and
15 reasonable inference.” *Id.*

16 Plaintiff does not dispute that he was aware of the Timekeeping Policy, including
17 that he was not compensated for one-hour meal periods, and that the time sheets for the
18 relevant flights recorded a one-hour meal period; the fact that the time sheets did not
19 specify the exact time of the meal period during a particular flight is of no moment to the
20 question of compensability. *See Harp v. Starline Tours of Hollywood, Inc.*, 2015 WL
21 4589736, at *6 (C.D. Cal. July 27, 2015) (collecting cases). Plaintiff thus has raised no
22 genuine dispute that Defendant properly recorded the number of unpaid meal period hours.

23 The Court has reviewed all the evidence Plaintiff points to in his Response to
24 Defendant’s Motion, and although the evidence addresses Defendant’s procedures
25 regarding meal periods—and includes many conclusory statements—the Court saw no
26 evidence that Plaintiff actually worked during the unpaid meal periods. (*E.g.*, Resp. at 2
27 (citing PSOF ¶ 95 (“The ASOs ‘are held captive on the plane.’”)); Resp. at 5 (citing PSOF
28 ¶ 66 (“ASOs have duties upon their return to Phoenix.”)), ¶ 74 (“[Plaintiff] was required to

1 travel for [Defendant] on the return flight.”), ¶ 76 (“[Plaintiff] could not leave the aircraft,
2 run personal errands on the return flight, make cell phone calls, surf the internet, send a
3 text message, smoke, drink alcohol, stream TV or movies”), ¶ 77 (“[Plaintiff] was
4 required to return on the flight back to Phoenix, regardless of no detainees being on
5 board.”), ¶ 78 (“[Plaintiff] could not visit his home, the bank, the pharmacy, the barbershop
6 or even make a doctor’s appointment on the return flight.”)).) That is, Plaintiff points to no
7 evidence that, during the relevant flights he worked, he either did not predominantly benefit
8 from a one-hour meal period or was not completely relieved from duty during a one-hour
9 meal period.

10 Indeed, at his deposition—the transcript of which the Court read in its entirety—in
11 response to counsel for Defendant’s question, “Did you perform any work during an unpaid
12 break during your time at [Defendant]?”, Plaintiff responded, “No.” (Doc. 69-2, Alonzo
13 Dep. at 42.) Counsel for Defendant then asked whether Plaintiff ever had “a special
14 circumstance wherein you were required to perform work during an unpaid meal period,”
15 and Plaintiff responded, “Yes.” (Alonzo Dep. at 42.) When asked repeatedly to elaborate
16 about details or amounts of time, Plaintiff responded “I don’t recall” or “I don’t know.”
17 (E.g. Alonzo Dep. at 45-46.) But when counsel for Defendant asked, “Can you think of
18 any [empty return leg] flight during which you did not have at least one hour of free time?”,
19 Plaintiff responded, “No.” (Alonzo Dep. at 90.) Plaintiff also testified that he never
20 reported to Defendant that he worked during an unpaid meal period. (Alonzo Dep. at 43.)
21 Plaintiff’s denial of performing work during an unpaid meal period, lack of written records,
22 and lack of knowledge or recollection as to encountering special circumstances in which
23 he worked during a meal period is not evidence from which a reasonable jury could
24 conclude that Plaintiff was required to work during an unpaid meal period.

25 Under the FLSA, *bona fide* meal periods are permissible, and an employer need not
26 permit employees to leave the premises during meal periods so long as they are freed from
27 their duties. 29 CFR § 785.19. To resist summary judgment, Plaintiff has the burden to
28 proffer at least some evidence that creates a genuine dispute of material fact—here, as to

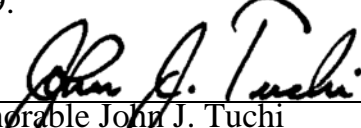
1 whether Defendant did not compensate him for time he actually worked. *See Anderson*,
2 477 U.S. at 256–57. In his Response to Defendant’s Motion, Plaintiff has pointed to
3 irrelevant facts and, at most, generalized, conclusory allegations, but Plaintiff has not met
4 his burden of proffering evidence that he actually engaged in work related duties *during* an
5 unpaid lunch period or that he did not get at least one hour of free time on the relevant
6 flights—indeed, his deposition testimony is precisely the opposite.²

7 Because Plaintiff has not raised a genuine dispute as to whether Defendant is liable
8 to Plaintiff for an FLSA violation, the Court need not reach Defendant’s Motion as to
9 liquidated damages.

10 **IT IS THEREFORE ORDERED** granting Defendant’s Motion for Summary
11 Judgment (Doc. 68).

12 **IT IS FURTHER ORDERED** directing the Clerk of Court to enter judgment for
13 Defendant and close this case.

14 Dated this 12th day of March, 2019.

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17 Honorable John J. Tuchi
18 United States District Judge
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27 ² Plaintiff asks the Court to consider a case that another plaintiff brought against
28 Defendant in another District, which case has gone to trial. The Court has not reviewed the
facts of that case but presumes that the plaintiff in that case proffered sufficient evidence
to create a genuine dispute as to whether he or she was required to work during unpaid
meal periods, which Plaintiff here has not done.