SJC-13176

RUTCHADA DEVANEY & others[1] vs. ZUCCHINI GOLD, LLC,[2] & another.[3]

Suffolk. January 7, 2022. - April 14, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Massachusetts Wage Act. Labor, Wages, Overtime compensation, Federal preemption, Damages. Federal Preemption. Statute, Federal preemption. Evidence, Expert opinion. Witness, Expert.

Civil action commenced in the Superior Court Department on September 21, 2015.

The case was tried before Paul D. Wilson, J., and motions to alter or amend the judgment were considered by him.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Christopher F. Hemsey for the defendants.
Michaela C. May (Eric R. LeBlanc also present) for the plaintiffs.

---

[1] Thewakul Rueangjan and Thanyathon Wungnak.

[2] Doing business as Rice Barn.

[3] Chalermpol Intha.

Ben Robbins & Daniel B. Winslow, for New England Legal Foundation, amicus curiae, submitted a brief.

Osvaldo Vazquez, of Florida, Hillary Schwab, Joseph Michalakes, & Audrey Richardson, for Massachusetts Employment Lawyers Association & others, amici curiae, submitted a brief.

WENDLANDT, J. This case presents the question whether the comprehensive remedial scheme provided by the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq., for recovery of damages when an employer violates the Federal overtime law, 29 U.S.C. § 207, precludes an employee from alternatively pursuing remedies under the wage act, G. L. c. 149, § 148, for the untimely payment of overtime wages due solely pursuant to the FLSA. Because awarding such State law remedies would actually conflict with the Federal remedies provided in the FLSA, and because we must construe our State laws to avoid preemption if possible, we conclude that such State law remedies are not available in these circumstances. Further concluding that the jury instructions for the calculation of overtime wages under the FLSA contained a methodological error resulting in an award to the plaintiff employees of two and one-half times their regular rate and that the defendants' remaining claims lack merit, we remand for proceedings consistent with this opinion.[4]

[4] We acknowledge the amicus briefs filed by the New England Legal Foundation and the Massachusetts Employment Lawyers Association, Immigrant Worker Center Collaborative, Justice at Work, Matahari Women Workers Center, Massachusetts Jobs with

1. Background. We recite the facts in the light most favorable to the jury verdict. See O'Brien v. Pearson, 449 Mass. 377, 383 (2007). The plaintiffs, Rutchada Devaney, Thewakul Rueangjan, and Thanyathon Wungnak, were employees of a Needham-based restaurant called the Rice Barn, which was owned and operated by the defendant Zucchini Gold, LLC, which in turn was owned by the defendant Chalermpol Intha (collectively, Rice Barn). The restaurant was open seven days each week, including for lunch and dinner on weekdays and for dinner on weekends.

Rice Barn failed to keep complete, contemporaneous records of the plaintiffs' hours of work or of wages paid.[5] Nevertheless, the parties agree that the plaintiffs routinely worked more than forty hours per week.[6] Devaney's work responsibilities generally included packing and preparing food, as well as coordinating orders with customers and the kitchen. She typically worked six or seven days per week, for a total of

---

Justice, Fair Employment Project, Inc., and Massachusetts AFL-CIO.

[5] Accordingly, the plaintiffs relied on testimony and their own records to establish their hours, work responsibilities, and wages.

[6] The restaurant was open to the public for 44.5 hours every week, and the plaintiffs worked additional hours to prepare for each shift and clean afterwards.

fifty to sixty hours per week.[7] Rueangjan worked as a chef, preparing and cooking hot meals. He also was responsible for cleaning his work station. Between lunch and dinner, Rueangjan worked on food preparation and took a ten minute break. He worked seven days per week, for approximately sixty-four to 70.5 hours per week on average. Wungnak's primary responsibility was making appetizers. On days when she worked on catering projects, Wungnak arrived at around 6 A.M. She worked seven days per week, rarely taking breaks during her shifts, for a weekly total of between sixty-four and 72.25 hours worked.

The plaintiffs ostensibly were paid a fixed daily rate on weekdays; on weekends, when the restaurant was open for dinner only, the plaintiffs were paid one-half the daily rate. The record showed, however, that the plaintiffs were not always paid flat sums per day or per half day. For example, pay stub records for Devaney and Rueangjan reflect that, rather than paying a fixed day rate regardless of the hours worked, Rice Barn paid the plaintiffs fractions of their daily rates to account for plaintiffs' absences on any given day. For Wungnak, Rice Barn kept no records whatsoever. In order to be paid their wages, the plaintiffs submitted to Rice Barn weekly documentation of days they had worked; these documents include a

[7] Devaney rarely took a break during the day, often eating her own meals while working.

column for setting forth the number of hours worked on any given day.

The plaintiffs were paid additional sums for extra cleaning and for catering. Rice Barn also did not have records of these additional sums.

2. Procedural history. In September 2015, the plaintiffs brought the present action against Rice Barn, alleging violations of the FLSA for failure to pay overtime wages, violations of the wage act for failure to pay the FLSA overtime wages in a timely manner, and violations of the Federal and State minimum wage laws.[8] On the plaintiffs' motion for summary judgment, a Superior Court judge (motion judge) allowed summary judgment as to Rice Barn's liability under the Federal overtime law and the wage act.

Thereafter, a jury trial commenced before a different Superior Court judge (trial judge) solely on the issue of damages. The trial judge instructed the jury that damages under the Federal overtime law should be calculated by multiplying the plaintiffs' regular rate by one and one-half times. The jury returned a verdict in favor of each plaintiff. The trial judge

[8] See 29 U.S.C. § 206; G. L. c. 151, § 1. The plaintiffs' minimum wage law claims were not part of the trial for damages, and they are not raised on appeal.

trebled the damages awards and awarded attorney's fees and costs pursuant to the wage act.

The trial judge declined Rice Barn's posttrial request for remittitur but amended the award of prejudgment interest. Rice Barn timely appealed. We transferred the matter sua sponte from the Appeals Court.

3. Discussion. a. Availability of wage act remedies for violations of Federal overtime law. The wage act requires timely payment of "wages earned." G. L. c. 149, § 148. Rice Barn maintains that the trial judge erred in permitting the plaintiffs to elect the remedies provided by the wage act where, as here, the plaintiffs did not pursue a claim for violation of the State overtime law, G. L. c. 151, § 1A,[9] and the sole basis for Rice Barn's liability was pursuant to the Federal overtime law, which itself provides a remedy.[10] The plaintiffs respond

[9] The State overtime law, G. L. c. 151, § 1A, specifically exempts restaurant workers, like the plaintiffs, from its provisions. The wage act was modeled after the FLSA. See Arias-Villano v. Chang & Sons Enters., Inc., 481 Mass. 625, 630 (2019). However, while the overtime exemption for restaurant workers initially present in the FLSA was eliminated in a 1977 amendment, Pub. L. No. 95-151, 91 Stat. 1245, 1252 (1977), the Commonwealth has not yet followed suit. Two bills currently pending in the Legislature, 2021 House Doc. No. 1960 and 2021 Senate Doc. No. 1225, would eliminate this exception.

[10] Contrary to the plaintiffs' assertion, Rice Barn did not waive this argument. Rice Barn appealed from "all aspects of the 'Amended Judgment on Jury Verdict,'" which included the motion judge's partial grant of summary judgment on liability.

that a "host of cases" have construed the wage act to allow employees to recover under the act when their employers failed to timely pay overtime compensation owed exclusively under the FLSA.

While these cases construe the phrase "wages earned" in the wage act to include overtime wages due under the FLSA[11] and, on that basis, conclude that the wage act provides an alternative avenue for relief for violations of the Federal overtime law,[12]

Nor was the argument waived by Rice Barn's acknowledgement in pretrial filings that the motion judge had held it to be liable.

[11] See, e.g., Lambirth v. Advanced Auto, Inc., 140 F. Supp. 3d 108, 111 (D. Mass. 2015), quoting Black's Law Dictionary 1716 (9th ed. 2009) ("wage" includes "every form of remuneration payable for a given period to an individual for personal services, including salaries . . . and any similar advantage received from the employer"). See Tze-Kit Mui v. Massachusetts Port Auth., 478 Mass. 710, 712 (2018), quoting Water Dep't of Fairhaven v. Department of Envtl. Protection, 455 Mass. 740, 744 (2010) ("the 'principal source of insight into legislative intent'" is "the plain language of the statute").

[12] The cases rely on the oft acknowledged legislative intent of the wage act "to prevent the unreasonable detention of wages." Lipsitt v. Plaud, 466 Mass. 240, 245 (2013), quoting Melia v. Zenhire, Inc., 462 Mass. 164, 170 (2012). See Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006), quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934) ("a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated"). See, e.g., Li v. Foolun, Inc., 273 F. Supp. 3d 289, 292 (D. Mass. 2017) ("A failure to pay overtime wages under the FLSA is also a violation of the [w]age [a]ct"); Lambirth, 140 F. Supp. 3d at 111 (there is "no indication that

they do not address the more salient question presented by Rice Barn's argument -- namely, whether the FLSA's comprehensive remedial scheme for recovery of damages when an employer violates the Federal overtime law precludes an employee from alternatively pursuing wage act remedies for the untimely payment of overtime wages due solely under the FLSA. Instead, these cases highlight that, if the wage act is construed to permit application of its remedial scheme for violations of the Federal law, a conflict between the two laws may arise. See, e.g., Carroca vs. All Star Enters. & Collision Ctr., Inc., U.S. Dist. Ct., No. 12-11202-DJC (D. Mass. July 10, 2013) (noting potential for "windfall" if employee is allowed to recover under both wage act and FLSA, and opting to award wage act's more generous remedy -- treble damages). In these circumstances, our construction does not end with the plain meaning analysis; instead, if possible, "[w]e must . . . seek to avoid [the] conflict with Federal law and possible preemption under the supremacy clause."[13] Wright's Case, 486 Mass. 98, 108 (2020).

[the wage act] was meant to exclude overtime wages" required under FLSA); Carroca vs. All Star Enters. & Collision Ctr., Inc., U.S. Dist. Ct., No. 12-11202-DJC (D. Mass. July 10, 2013) ("Defendants are liable under [the wage act] where they did not pay all of 'the wages earned by [employee]' within the statutory pay period," including overtime wages owed under FLSA).

[13] Under the supremacy clause, U.S. Const. art. VI, cl. 2, "[F]ederal statutes and regulations properly enacted and promulgated can nullify conflicting [S]tate or local actions"

In doing so, we start with the "basic assumption that Congress [does] not intend to displace [S]tate law" (citation omitted).[14] Anderson v. Sara Lee Corp., 508 F.3d 181, 192 (4th Cir. 2007). That presumption is "particularly strong [in the present context] given [S]tates' lengthy history of regulating employees' wages and hours." Knepper v. Rite Aid Corp., 675 F.3d 249, 262 (3d Cir. 2012), citing California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 330 (1997). See Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987) ("pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State"). Significantly, the FLSA sets forth a "savings clause," expressly providing that the FLSA does not preempt State laws establishing a higher minimum wage or shorter maximum work week. See 29 U.S.C. § 218(a). Thus, we are concerned with neither express preemption nor field preemption. See Knepper, supra.

(citation omitted). Anderson v. Sara Lee Corp., 508 F.3d 181, 191 (4th Cir. 2007). Conflicts between Federal and State laws, where they exist, are governed by the principles of preemption. See, e.g., Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 368 (1986); Roma, III, Ltd. v. Board of Appeals of Rockport, 478 Mass. 580, 587 (2018).

[14] "The purpose of Congress is . . . the 'ultimate touchstone' of a preemption analysis." Anderson, 508 F.3d at 192, quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992).

Moreover, an employer can comply with both the wage act's requirement that wages earned be paid timely and the FLSA's requirement that overtime hours be paid at one and one-half times the regular rate.[15] See English v. General Elec. Co., 496 U.S. 72, 79 (1990); Aldridge v. Mississippi Dep't of Corrections, 990 F.3d 868, 875 (5th Cir. 2021) ("It is not 'impossible' to comply with both [F]ederal and [S]tate law . . . overtime compensation requirements"). Accordingly, we confine our analysis to considering whether recovery under the wage act "actually conflicts" with the FLSA in the sense that doing so "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (citations omitted). English, supra.

A brief overview of both laws guides our analysis.

i. Federal overtime law. Congress enacted the Federal overtime law in 1938 "to protect workers . . . by establishing [F]ederal minimum wage, maximum hour, and overtime guarantees that could not be avoided through contract." Knepper, 675 F.3d at 253-254. It aimed "to guarantee compensation for all work or employment engaged in by employees covered by the [FLSA]" (alteration and citation omitted). Reich v. New York City Transit Auth., 45 F.3d 646, 648-649 (2d Cir. 1995).

---

[15] See 29 U.S.C. § 207, discussed infra.

The FLSA "provides an unusually elaborate enforcement scheme." Anderson, 508 F.3d at 192, quoting Kendall v. Chesapeake, 174 F.3d 437, 443 (4th Cir. 1999). It authorizes workers to file private actions against employers,[16] in State or Federal court, to recover unpaid overtime wages, liquidated damages in an additional equal amount, and costs and attorney's fees. 29 U.S.C. § 216(b). An employer may escape liquidated damages by showing to the court's satisfaction that it acted in good faith and had a reasonable ground for believing that it did not violate the FLSA. See 29 U.S.C. § 260. A claim for unpaid overtime brought under the Federal overtime law is subject to a two-year statute of limitations period, unless the claim arises from "a willful violation," in which case a three-year limitations period applies. See 29 U.S.C. § 255(a); Anderson, supra.

The FLSA also authorizes criminal penalties for willful violations. 29 U.S.C. § 216(a). Significantly, the FLSA mandates that an employee's right of action "shall terminate upon the filing of a complaint by the Secretary of Labor." 29 U.S.C. § 216(b).

---

[16] Corporate officers with "operational control of a corporation's covered enterprise" may be deemed "employer[s] along with the corporation, jointly and severally liable under the FLSA for unpaid wages." Donovan v. Agnew, 712 F.2d 1509, 1511 (1st Cir. 1983).

ii. Wage act. The wage act aims to "protect wage earners from the long-term detention of wages by unscrupulous employers as well as [to] protect society from irresponsible employees who receive and spend lump sum wages." Melia v. Zenhire, Inc., 462 Mass. 164, 170 (2012), quoting Cumpata v. Blue Cross Blue Shield of Mass., Inc., 113 F. Supp. 2d 164, 167 (D. Mass. 2000). It thus requires timely payment of "wages earned." G. L. c. 149, § 148. See Donis v. American Waste Servs., LLC, 485 Mass. 257, 261 (2020), quoting G. L. c. 149, § 148 ("the Wage Act requires that '[e]very person having employees in his [or her] service shall pay . . . each such employee the wages earned by him [or her]' within a prescribed time period").

The wage act provides its own enforcement scheme. It empowers the Attorney General to bring a civil action against wage act violators. See Melia, 462 Mass. at 170. Employers, including certain officers of corporations, who violate the wage act are subject to civil and criminal sanctions. See G. L. c. 148, § 149; G. L. c. 149, § 27C.

Pursuant to G. L. c. 149, § 150, employees also have a private right of action against employers who violate the wage act. The remedies available under the wage act are, in some instances, more generous than those available under the FLSA. For example, employers who violate the wage act are strictly liable. Also, successful employees are entitled to a mandatory

award of treble damages, as liquidated damages, for any lost wages and other benefits. G. L. c. 149, § 150. Civil actions under the wage act are subject to a three-year statute of limitations. G. L. c. 149, § 150.

iii. Statutory construction in view of preemption concerns. From this overview, it is clear that allowing an employee aggrieved by a violation of the Federal overtime law to elect State wage act remedies for untimely payments of wages due solely under the FLSA would present an "obstacle to the accomplishment and execution of the full purposes and objectives" of the FLSA. See Sawash v. Suburban Welders Supply Co., 407 Mass. 311, 314 (1990). Crucially, where the source of the required overtime premium is exclusively pursuant to the FLSA, the wage act claims for untimely payments depend entirely on showing the employer violated the FLSA; the employees "invoke [S]tate law only as the source of remedies for the alleged FLSA violations." Anderson, 508 F.3d at 193. The timeliness claim under the wage act is based on the same proof, the same facts, and the same underlying liability; there is "no basis for their [w]age [a]ct claims other than this violation of" the FLSA. Donis, 485 Mass. at 265. See Anderson, supra.

In these circumstances, allowing the plaintiffs to pursue wage act remedies for FLSA violations would amount to

circumvention of the remedy prescribed by Congress.[17] As discussed supra, the FLSA enforcement scheme for Federal overtime violations permits, at most, double damages, and employers may avoid such damages if they can establish, to the court's satisfaction, that they acted in good faith and upon a reasonable basis. Actions under the FLSA generally must be brought within the two-year limitations period, and the Secretary of Labor can step in to police employers' violations, which in turn forecloses a private enforcement action. By contrast, under the wage act, employers are strictly liable and assessed mandatory treble damages for violations. It provides a three-year statute of limitations and has no provision for the treatment of private actions upon a Federal agency's enforcement decisions.

---

[17] While our decision in Donis concerned a conflict between two State laws (as opposed to a potential conflict between Federal and State laws), it provides a useful analogue. There, the "central thrust" of the employees' wage act claims for untimely payment of wages earned was the substantive right to payments established by the prevailing wage act, "which itself already provides its own remedy." Donis, 485 Mass. at 265. Because the two acts provided "conflicting mechanisms to recover the same underpayment of wages," we saw "no reason why a plaintiff should be able to evade procedural limitations that the Legislature ha[d] adopted [under the prevailing wage act], simply by stating a duplicative statutory claim [under the wage act]." Id. at 267, 268. Similarly, here, where the sole basis for the employees' claim is a violation of the Federal overtime law, allowing them to proceed under the wage act would vitiate Congress's decision to create its own enforcement scheme under the FLSA.

Indeed, while Federal "courts are all over the map on whether plaintiffs may bring [S]tate law claims in addition to FLSA claims for the same conduct, . . . [t]he common thread is this: When the FLSA provides a remedial measure, it conflicts with similar [S]tate law causes of action and thus preempts them; when the FLSA does not provide a remedial measure, there is no preemption." Aldridge, 990 F.3d at 872. See, e.g., id. at 876 (concluding FLSA preempts redundant State law negligence, conversion, and other tort-based claims, and stating that plaintiffs "may not sue simultaneously under both [S]tate law and the FLSA . . . if [S]tate law does not independently provide for such a cause of action"); Anderson, 508 F.3d at 194 (finding that FLSA preempted State contract, negligence, and fraud claims that were merely duplicative of FLSA-based claims); Fuller vs. Wyndham Vacation Resorts, Inc., U.S. Dist. Ct., No. 4:16-cv-1476 (D.S.C. July 12, 2016) (concluding that because plaintiff's causes of action for minimum wage and overtime arise solely out of FLSA, duplicative State claims were preempted; "in order for Plaintiff's [wage law] claim to survive Defendant's motion to dismiss, she must have alleged that Defendant did more than violate the FLSA"); Moeck vs. Gray Supply Corp., U.S. Dist. Ct., No. 03-1950 (D.N.J. Jan. 6, 2006) (holding State fraud and misrepresentation claims were preempted by FLSA, because "claims

directly covered by the FLSA [such as overtime], must be brought under the FLSA").[18]

To avoid this conflict, we conclude that where, as here, the plaintiffs' sole claim for overtime wages rests on the FLSA, they are limited to the remedies provided under the FLSA. See Wright's Case, 486 Mass. at 108. Thus, the trial judge's trebling of damages pursuant to the wage act was error, and a determination of the appropriate damages under the Federal overtime law is necessary.

b. Day rate. Rice Barn next challenges the trial judge's instruction that the amount of overtime wages owed to the plaintiffs is calculated, inter alia, by multiplying their regular rate by one and one-half.[19] We review the methodology of

---

[18] Some of these cases concern Federal preemption of State common-law claims; however, we have previously acknowledged that there is no basis to treat State statutory claims any differently when analyzing whether an actual conflict exists. See Donis, 485 Mass. at 268.

[19] Contrary to the plaintiffs' argument, Rice Barn preserved this objection. Prior to trial, Rice Barn submitted a proposed jury instruction setting forth its position that one-half was the proper multiplier for the determination of the overtime wages due to the plaintiffs. Rice Barn also objected to the use of the one and one-half multiplier during trial. In considering Rice Barn's position, the trial judge expressly stated his understanding that regardless of his decision, the issue would likely be appealed. See Flood v. Southland Corp., 416 Mass. 62, 67 (1993) ("there can be circumstances where the request [for a jury instruction], the pretrial ruling, and the objection to the ruling are so explicit that a postcharge objection need not be made").

computing overtime wages de novo. See Plymouth Retirement Bd. v. Contributory Retirement Appeal Bd., 483 Mass. 600, 603-604 (2019). See also Dacar v. Saybolt, L.P., 914 F.3d 917, 924 (5th Cir. 2018).

The FLSA imposes an "absolute duty" on employers to pay nonexempt employees subject to the statute "'at a rate not less than one and one half times the regular rate' at which employed" for all hours worked over forty in a week. George Lawley & Son Corp. v. South, 140 F.2d 439, 442 (1st Cir. 1944), quoting 29 U.S.C. § 207. See Lalli v. General Nutrition Ctrs., Inc., 814 F.3d 1, 2 (1st Cir. 2016), quoting 29 U.S.C. § 207(a)(1). The first step in the determination of the overtime wages due is the determination of the "regular rate." The regular rate "refers to the hourly rate actually paid the employee for the normal, non-overtime workweek for which he [or she] is employed." Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 424 (1945). The regular rate is an "actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation." Id. at 424-425.

Where an employer pays an employee an hourly rate, the regular rate generally is the hourly rate. 29 C.F.R. § 778.110. The FLSA, however, does not require compensation to be based on an hourly rate; instead, earnings may be determined on another

basis, such as a piece rate, day rate, salary, or commission. 29 C.F.R. § 778.109. In such cases, however, the regular rate must nevertheless be expressed in terms of an hourly rate; thus, the quotient that is the "rate per hour" must be derived mathematically. Id. Conveniently, the Federal regulations set forth examples detailing the necessary calculations for certain scenarios.

Rice Barn contends that because the plaintiffs ostensibly were paid a daily rate for each day worked, the outstanding overtime wages owed to the plaintiffs fall within the illustrative example codified in 29 C.F.R. § 778.112. Section 778.112 applies to employees who are paid "a flat sum for a day's work . . . without regard to the number of hours worked in the day . . . and [who] receive[] no other form of compensation for services." 29 C.F.R. § 778.112. See Dufrene v. Browning-Ferris, Inc., 207 F.3d 264, 266 (5th Cir. 2000) (describing day rate employees as those employees "guaranteed a day's pay, regardless of the number of hours worked that day"). Where an employer's payment methodology falls within § 778.112, the "regular rate is determined by totaling all the sums received at such day rates . . . in the workweek and dividing by the total hours actually worked." 29 C.F.R. § 778.112. The employee "is then entitled to extra half-time pay at this rate for all hours worked in excess of [forty] in the workweek." Id.

The record does not support Rice Barn's contention that the plaintiffs were paid a flat sum for a day's work regardless of the hours the plaintiffs actually worked in a day. Rather, the testimony and other evidence showed that the plaintiffs' day rate was offset by the hours they were absent from work during the workday, and their wages were halved when the restaurant was open for dinner only. See, e.g., Thomas vs. Waste Pro USA, Inc., U.S. Dist. Ct., Case No. 8:17-CV-2254-T-36CPT (M.D. Fla. Sept. 30, 2019) ("To the extent that [employer] would pay [employees] only the half day rate if their daily task took less than four hours, instead of the full day rate for their daily task, the Court finds that this is not consistent with paying a day rate, or compliant with the FLSA"); Turner v. BFI Waste Servs., LLC, 268 F. Supp. 3d 831, 838 (D.S.C. 2017) (because employee was "not paid the day rate for a partial day of work, it is clear that [employee] was not a day-rate employee"); Solis v. Hooglands Nursery, LLC, 372 Fed. Appx. 528, 529 (5th Cir. 2010) (per curiam) (where employees' wages "were reduced when the employees worked less than a full day," employer did not have valid day rate plan under 29 C.F.R. § 778.112). Accordingly, Rice Barn's payment scheme does not fall within the exemplary day rate scheme set forth in 29 C.F.R. § 778.112.

Given the hybrid pay structure utilized by Rice Barn, the plaintiffs' regular rate -- their rate per hour -- must be

computed so as to allow calculation of the overtime wages due in view of that regular rate. See Serrano v. Republic Servs., Inc., 227 F. Supp. 3d 768, 771 (S.D. Tex. 2017), quoting 29 C.F.R. § 778.109 ("[T]he FLSA does not prohibit particular pay structures. It merely requires that they be properly interpreted for minimum wage and overtime calculations. And the regulations 'give some examples of the proper method of determining the regular rate of pay in particular instances'"). The numerator of the rate per hour quotient is defined by the FLSA "to include all remuneration for employment paid to . . . the employee" for a given week subject to enumerated exceptions not applicable here. 29 U.S.C. § 207(e). See Walling, 325 U.S. at 424 ("The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek . . ."). Significantly, however, the statute does not set forth the divisor required to calculate the regular rate. Instead, the divisor has been defined by regulation and case law, which provide that the regular rate "is determined by dividing [the employee's] total remuneration for employment . . . in any workweek by the total number of hours actually worked by [the employee] in that workweek for which such compensation was paid." 29 C.F.R. § 778.109. See Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 464 (1948) ("We think the most reasonable conclusion is that Congress intended

the regular rate of pay to be found by dividing the weekly compensation by the hours worked . . ."); Chavez v. Albuquerque, 630 F.3d 1300, 1312-1313 (10th Cir. 2011) ("proper divisor is hours worked" in workweek).

Rice Barn is correct that because the calculation of the regular rate (as set forth in 29 C.F.R. § 778.109, supra) was based on the employee's actual hours worked, including any hours over forty that the plaintiffs worked,[20] the plaintiffs effectively have already been paid for a portion of the overtime wages due to them under the FLSA. As such, when calculating damages for failure to pay overtime as required by the FLSA, the plaintiffs are entitled only to the remaining "one-half" outstanding balance in the "time and one-half" calculation.[21]

---

[20] If, instead, the divisor were forty hours, then the regular rate would only include the employee's compensation for the first forty hours during the workweek. However, the use of forty hours as the divisor is not supported by the "actual fact[s]" of the employment relationship in the present case, see Walling, 325 U.S. at 424, and, in any event, is not what is prescribed by the regulations or applicable Federal case law.

[21] A simplified mathematical example is illustrative. If an employee is paid $600 per week and works fifty hours per week, her regular rate is twelve dollars per hour ($600 divided by fifty hours actually worked in a week). The employee's overtime rate is eighteen dollars per hour (one and one-half times the employee's regular rate of twelve dollars). The total renumeration to which the employee is entitled under the FLSA is $660, which is derived by one of two equivalent methods.

The employer can pay the employee the regular rate (twelve dollars) for nonovertime hours (forty hours), resulting in $480 per workweek in regular wages, and one and one-half the regular

rate (eighteen dollars) for overtime hours (ten hours, which is the number of hours in excess of forty hours that the employee worked per week), resulting in an additional $180 per workweek in overtime wages. In total, the employee would receive $660 ($480 in regular wages plus $180 in overtime wages).

Alternatively, the employer can pay the employee the regular rate (twelve dollars per hour) for all hours worked (fifty hours) plus an additional one-half the regular rate (six dollars, which is one-half times twelve dollars) for overtime hours (ten hours, which is the number of hours in excess of forty hours that the employee worked per week) to arrive at the same renumeration owed to the plaintiff, $660. Accord Chavez, 630 F.3d at 1313 ("The same result is achieved if the [employer] pays straight time for all hours and an additional one-half straight time on overtime hours, or if the [employer] pays straight time for nonovertime hours and one and one-half straight time on overtime hours"). Under either scenario, because the employee was already paid $600, the employee's damages (prior to the addition of any liquidated damages) are sixty dollars.

In this case, however, the trial judge improperly mixed these two methods, resulting in the plaintiffs receiving two and one-half times their regular rate for overtime hours. Specifically, the plaintiffs already received their regular rate for all hours worked, including overtime hours (as in the second scenario above). The trial judge, however, instructed the jury to use the one and one-half multiplier (as in the first scenario above) to calculate the overtime wages.

Using the numbers from our example, the hypothetical employee already received $600 in wages during the workweek, $120 of which were attributable to overtime hours (twelve dollars times ten hours of overtime). The trial judge's instruction would result in an additional overtime compensation of $180 (or eighteen dollars per hour times ten hours of overtime). Thus, in the example, the employee would get a total renumeration of $600 plus $180, or $780, rather than the $660 owed under the FLSA. This was error. As this example shows, the employee received $300 ($120 plus $180) for the ten overtime hours; this resulted in an overtime rate of thirty dollars per hour, or two and one-half times the employee's regular rate of twelve dollars per hour instead of the eighteen per hour required under the FLSA.

See, e.g., Kliger vs. Liberty Saverite Supermkt., Inc., U.S. Dist. Ct., No. 17-CV-02520 (E.D.N.Y. Sept. 17, 2018) (plaintiff, who had already been paid regular hourly rate for overtime hours, was owed only one-half times his regular rate for all hours over forty). Thus, the trial judge's instruction to multiply the regular rate by one and one-half in calculating damages overcompensated the plaintiffs, effectively giving the plaintiffs a windfall of two and one-half times their regular rate for each overtime hour worked. "The FLSA does not require this." Turner, 268 F. Supp. 3d at 837 (rejecting argument "that the FLSA requires that [employee] receive the regular rate for all hours worked and one and one-half of the regular rate for overtime hours, [because] this would lead to [employee] receiving two and one-half times his regular rate for overtime hours"). For this reason, we remand the matter to the trial court to reduce the damages award appropriately, using the one-half multiplier.

c. Plaintiffs' expert witness. We need not dwell long on Rice Barn's objection to the trial judge's allowance of expert testimony on the issue of damages. It was not an abuse of discretion to allow the plaintiffs' expert to supplement his report and to testify to the overtime wages owed in view of the trial judge's adoption of Rice Barn's own position that the regular rate should be calculated using the actual hours worked

(rather than forty hours), and Rice Barn suffered no prejudice. See Hammell v. Shooshanian Eng'g Assocs., Inc., 73 Mass. App. Ct. 634, 638 (2009) ("The admissibility of belatedly disclosed expert opinion rests within the sound discretion of the trial judge"); Resendes v. Boston Edison Co., 38 Mass. App. Ct. 344, 350 (1995), quoting Solimene v. B. Grauel & Co., KG, 399 Mass. 790, 799 (1987) ("The conduct and scope of discovery is within the sound discretion of the judge," and it "will not be disturbed on appeal absent a 'showing of prejudicial error resulting from an abuse of discretion'"). The expert disclosed his methodology prior to trial and conformed it to Rice Barn's own position and the trial judge's adoption of the same, and Rice Barn took advantage of the opportunity to cross-examine him.[22]

d. Weight of the evidence. Rice Barn also argues that the jury's verdict on the plaintiffs' damages is unsupported by the weight of the evidence. We review the evidence in the light most favorable to the jury verdict, assessing whether "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable

[22] Rice Barn's further objection to the expert's testimony, on the basis that it was unnecessary, was not raised. Indeed, when asked, Rice Barn's counsel specifically said, "I'm not questioning that." Accordingly, the objection is waived. See Fishman v. Brooks, 396 Mass. 643, 649 (1986).

inference could be drawn in favor of the plaintiff." Dobos v. Driscoll, 404 Mass. 634, 656, cert. denied, 493 U.S. 850 (1989), quoting Poirier v. Plymouth, 374 Mass. 206, 212 (1978).

Rice Barn's records of the plaintiffs' working time were incomplete, at best, violating its duty to maintain such records. See 29 U.S.C. § 211(c) ("Every employer . . . shall make, keep, and preserve such records of the persons employed by [the employer] and of the wages, hours, and other conditions and practices of employment maintained by [the employer], and shall preserve such records for [prescribed] periods of time . . ."); Vitali v. Reit Mgt. & Research, LLC, 88 Mass. App. Ct. 99, 109 (2015), quoting Kuebel v. Black & Decker Inc., 643 F.3d 352, 363 (2d Cir. 2011) ("an employer's duty under the FLSA to maintain accurate records of its employees' hours is non-delegable"). In such cases, "[t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had [it] kept records" in accordance with the FLSA. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 688 (1946), superseded by statute on other grounds. Instead, employees can rely on general testimony and estimates to show the time they worked. Id. at 687-688.

The plaintiffs testified as to the hours they worked on average, along with their job descriptions and tasks. Based on

this evidence, the jury reasonably could have approximated the plaintiffs' damages.

4. Conclusion. For the foregoing reasons, the case is remanded for recalculation of damages consistent with this opinion.[23]

So ordered.

[23] We deny the plaintiffs' request for appellate costs and attorney's fees, because the plaintiffs are not the prevailing party on appeal. See G. L. c. 149, § 150.