COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2013-01724 BLS 1

DEAN DEVITO, JASON OLIVIERA, ALEX VELAZQUEZ, individually, and on behalf of a class

vs.

LONGWOOD SECURITY SERVICES, INC. and JOHN T. CONNELLY

MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT and TO DECERTIFY THE CLASS

On June 17, 2015, this court (Frison, J.) certified a class of plaintiffs consisting of security officers employed, currently or in the immediate past, by defendant, Longwood Security Services. The principal claim of plaintiffs and the class is that Longwood failed to pay them in full for wages earned. The claim is brought under the Wage Act, G.L. c. 149, § 148. Briefly stated, the claim is that for each eight hour shift, thirty minutes were deemed to be a meal break. Longwood did not include in the employees' hours worked the thirty minutes per shift for the unpaid meal break. Plaintiffs claim that the thirty minutes should be compensated as wages earned because they remained on duty during the meal breaks.

The issue presented by these motions is what legal standard should be applied to determine whether the thirty minute meal break is compensable working time. Both sides agree that the issue is one that no Massachusetts appellate court has addressed. Longwood contends that the test for compensation should be whether the employee's meal break time was spent

predominantly for the benefit of the employer (the "predominant test"). Plaintiffs, on the other hand, contend that the test for compensation should be whether the employee was relieved of all duties (the "relief from duties test") during the meal break. Based upon Longwood's view that the predominant test is applicable, it moves for summary judgment and decertification of the class.

BACKGROUND

The parties' Joint Statement of Material Facts ("SMF") does not comply with Superior Court Rule 9A. Instead of precise statements of undisputed fact, the SMF consists of broad, argumentative statements of position and equally argumentative responses. Of the 82 numbered paragraphs in the SMF, the vast majority are disputed, denied or qualified by the party opposing the statement. On that basis alone, the court could conclude that because of the disputes over material facts summary judgment should be denied. In fact, this court in two previous rulings denied the parties' attempts to obtain summary judgment. Nevertheless, the parties persuasively presented at oral argument that it would aid resolution of the case, and would be necessary in any event for the trial of the case, for the court to determine which test for compensable time should be applied to plaintiffs' claims under Massachusetts law.

Longwood provides private security services at numerous locations, such as housing developments, hospitals and colleges. Longwood employed each of the plaintiffs as security officers. Longwood maintains a policy whereby officers may take a meal break, called a "10-7", for the "max amount of time" of thirty minutes. Longwood does not pay the officers for the thirty

minute meal break.[1] During the meal break, officers must remain in uniform and are not allowed to leave their assigned sector without permission. Longwood's written policy states that "you must keep your radio on while on break and respond when called to, even if during your break."

DISCUSSION

As referenced above, plaintiffs' principal claim is under the Wage Act, G.L. c. 149, § 148. Plaintiffs also claim that Longwood's failure to count the thirty minute meal breaks as compensable, working time affected whether their hours per week exceeded forty. They allege that the meal break time should be counted and, as a result, in some weeks they failed to receive overtime pay in violation of G. L. c. 151, § 1A. For both claims,[2] the issue is whether the meal break time should be counted as compensable, working time.

The Wage Act mandates that an employer pay its employees "the wages earned" within a certain time period. The statute does not define "wages earned." The Massachusetts Department of Labor Standards, however, promulgated applicable regulations. In 2003, the regulations were codified at 455 Code Mass. Reg. §§ 2.00 *et seq*. In January 2015, the regulations were re-codified at 454 Code Mass. Regs. § 27.01 *et seq*. The regulations were codified "[t]o clarify practices and policies in the administration and enforcement of the Minimum Fair Wages Act." *Id.* While the Minimum Fair Wages Act refers to c. 151 of the General Laws (see, § 22 of c. 151), Longwood does not dispute that the regulations apply to plaintiffs' Wage Act claim under c. 149. See

---

[1] According to plaintiffs, Longwood assumes that officers take a thirty minute meal break per shift and "automatically" deducts thirty minutes from hours worked. Longwood denies the allegation but fails to state how it accounts for the unpaid meal breaks. SMF ¶ 79. It is undisputed that the meal breaks are unpaid.

[2] Plaintiffs also assert common law claims for breach of contract and unjust enrichment.

Longwood's Reply to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, p. 2.[3]

The regulations define "Working Time" at 454 Code Mass. Regs. § 27.02:[4]

> Includes all time during which an employee is required to be on the employer's premises or to be on duty, or to be at the prescribed work site or at any other location, and any time worked before or after the end of the normal shift to complete the work. Working time does not include meal times during which an employee is *relieved of all work-related duties*. Working time includes rest periods of short duration, usually 20 minutes or less. (Emphasis added).

In addition, 454 Code Mass. Regs. § 27.04 provides the following:[5]

> All on-call time is compensable working time unless the employee is not required to be at the work site or another location, and is effectively free to use his or her time for his or her own purposes.

Plaintiffs submit that these regulations and the predecessor regulations at 455 Code Mass. Regs. § 2.01 (the "regulations") constitute the governing law with respect to the test to apply for determining whether the thirty minute meal break provided by Longwood must be paid as wages earned.

In *Taggart* v. *Town of Wakefield*, 78 Mass. App. Ct. 421 (2010), the Appeals Court considered the regulations as a source of authority for determining whether certain types of hours worked should be counted for the purposes of a claim for wages earned under the Wage Act,

---

[3] See also, G.L. c. 23, § 1, empowering the department with authority and responsibility over the administration and enforcement of c. 149, as well as c. 151.

[4] The definition of "Working Time" in 455 Code. Mass. Regs. § 2.01 is identical in all material respects. The definition in § 2.01 does not include the last sentence of § 27.02, and omits a phrase irrelevant to the issue of this case.

[5] The definition of on-call time in 455 Code. Mass. Regs. § 2.01 is "[a]n on-call employee who is not required to be at the work site, and who is effectively free to use his or her time for his or her own purposes, is not working while on call."

G.L. c. 149, § 148. "Generally, the types of activities that are considered to be hours worked and compensable are defined through the State regulatory process. The division of occupational safety (DOS or division) administers and interprets the Minimum Fair Wage Law, G.L. c. 151, and the regulations promulgated pursuant to that statute." *Id.* at 423, citing the regulations. The Appeals Court then noted that "[w]e apply the same rules of construction to regulations as to statutes, and accordingly ascribe the ordinary and common meanings to undefined terms." *Id.* at 425 (citation omitted). See also, *DeSaint* v. *Delta Air Lines, Inc.*, 2015 WL 1888242 at *9 (D. Mass. (O'Toole, J.) 2015)(applying the same Massachusetts "working time" regulations to claim under Wage Act).

The definition set forth in the regulations for "working time" is exactly what plaintiffs contend is the applicable test to determine whether their unpaid thirty minute meal time is compensable as wages earned. There is no ambiguity that would cause the court to go any further.[6] The thirty minute meal time is compensable unless the employee is relieved of all work-related duties. It will be for the finders of fact to determine the terms, rules and practices of plaintiffs' employment and whether plaintiffs were relieved of all work-related duties during their meal breaks. The regulations provide the governing law. *Global NAP's, Inc.* v. *Awiszus*, 457 Mass. 489, 496 (2010)("a properly promulgated regulation has the force of law and must be

---

[6] I disagree with the federal court in *Raposo* v. *Garelick Farms, LLC*, 2014 WL 2468815*8 (D. Mass. 2014) that "all work-related duties" is a term that does not have a plain meaning.

given the same deference accorded to a statute").[7][8]

Longwood counters with arguments based entirely on federal law developed under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. Longwood cites several decisions of federal courts of appeal[9] and district courts holding that the test for whether an unpaid meal break is compensable time is the predominant test. See e.g., *Babcock* v. *Butler County*, 806 F. 3d 153, 156 (3d Cir. 2015)(adopting the predominant benefit test which asks "whether the officer is primarily engaged in work-related duties during meal periods" quoting *Armitage* v. *City of Emporia*, 982 F. 2d 430, 432 (10th Cir. 1992)).

A combination of two reasons, unique to federal law, appears to underlie the adoption of the predominant test by some federal courts. First, the federal cases reference a decades-old decision of the United States Supreme Court interpreting the FLSA, *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944). In *Armour,* the Court affirmed a judgment in favor of employees seeking to be paid for time when they were on-call and on premises. In doing so, the Court stated "[w]hether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case." *Id.* The second reason arises from the nature of a federal regulation. In 1961, the United States Department of Labor issued a regulation to interpret the FLSA standard. In 29 C.F. R. § 785.19, the DOL stated that an

---

[7] Longwood does not challenge that the regulations were properly promulgated.

[8] Plaintiffs also cite opinion letters from the Department of Labor Standards and the Attorney General supporting the conclusion that the applicable test is "relieved from all duties." Such letters are entitled to substantial deference by this court. *Global NAP's Inc.*, 457 Mass. at 496-497.

[9] The United States Court of Appeals, First Circuit has apparently not rendered a decision as to which test to apply under the FLSA or Massachusetts law.

employee "must be completely relieved from duty" to have a bona fide, unpaid meal time. Federal courts adopting the predominant test have "eschewed a literal reading of a Department of Labor regulation." *Babcock*, 806 F. 3d at 156. That is because the federal regulations, unlike the Massachusetts regulations under G.L. c. 149, § 148, are considered for guidance, only, and not as controlling law. *O'Hara* v. *Menino*, 253 F. Supp. 2d 147, 153 (2003).

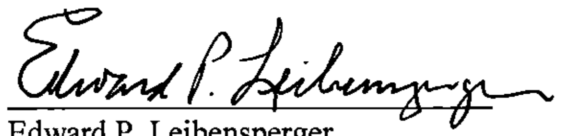
Longwood urges this court to adopt the predominant test. It points to Massachusetts authority holding that, in general, G.L. c. 151, § 1A was "intended to be essentially identical to" the FLSA. *Mullally* v. *Waste Management of Massachusetts, Inc.*, 452 Mass. 526, 531 (2008). Longwood argues that this question of how to define working time should come out the same way as under the FLSA. But the Supreme Judicial Court's analysis in *Mullally* is illustrative. The Court, having referenced the FLSA, proceeded to look to the Massachusetts regulations (455 Code Mass. Regs. § 2.02 (3)) to determine the relevant issue (calculation of base pay) *not* FLSA precedent. *Id.* at 534-535. Stated another way, where the plain, unambiguous language of the Massachusetts statute and the Massachusetts regulations governs the legal standard for liability, there is no reason to draw on FLSA interpretation. See *Goodrow* v. *Lane Bryant, Inc.*, 432 Mass. 165, 169-170 (2000)(where neither the Massachusetts statute nor the corresponding regulation, or any Massachusetts appellate decision, defines a key term, the court should apply the common meaning of words, legislative history, and then to interpretations of analogous federal statutes, for guidance).

Here, the definition of "Working Time" in the Massachusetts regulations is unambiguous. No further interpretive guidance is necessary or appropriate. The governing law is the "relieved of all work-related duties" test as defined in the regulations.

CONCLUSION

Longwood's argument for summary judgment depends entirely on the court adopting the predominant test. In addition, Longwood's motion to decertify the class is based on adoption of the predominant test. Having rejected that test, both motions are **DENIED**.

By the Court,



Edward P. Leibensperger
Justice of the Superior Court

December 23, 2016