No. 13-____

IN THE
Supreme Court of the United States

MARGARET WHITE, ET AL.
Petitioners,
v.
BAPTIST MEMORIAL HEALTH CARE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Fair Labor Standards Act of 1938, an employer may escape liability for unpaid time worked based on an employee's failure to formally report extra work time, when the employer knew or should have known that the employee had worked during that time.

PARTIES TO THE PROCEEDING

Petitioner is Margaret White. She was plaintiff in the District Court and appellee in the Court of Appeals. She brings this action on her own behalf and on behalf of a putative class of similarly situated persons.

Respondents are Baptist Memorial Health Care Corporation, and Baptist Memorial Hospital–Desoto, Inc., They were defendants in the District Court and appellants in the Court of Appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

PETITION FOR A WRIT OF CERTIORARI

Margaret White respectfully petitions for a writ of certiorari to review a judgment of the Sixth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is reported at 699 F.3d 869. The order of the District Court for the Western District of Tennessee Decertifying Collective Action (App. 34a) is unreported. The order of the U.S. District Court for the Western District of Tennessee Granting Summary Judgment for Defendants (App. 69a) is unreported.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on November 6, 2012. The court denied rehearing on February 22, 2013. On May 1, 2013, Justice Kagan granted an extension of time for filing this petition to July 22, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 203(g) of the Fair Labor Standards Act of 1938 ("FLSA" or "the FLSA"), as amended, defines "employ" to "include[] to suffer or permit to work."

Section 207(a)(1) of the FLSA provides: "Except as otherwise provided in this section, no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 211 of the FLSA provides: "(c) every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practice of employment maintained by him, and shall preserve such records for such periods of time…."

INTRODUCTION

Petitioner Margaret White, an emergency room nurse, sued her former employer for the uncompensated time she regularly worked during unpaid meal breaks. Her employer, Baptist Memorial, maintained a policy during her employment that required employees to submit the time they worked during unpaid breaks in an "exception log" in order to be paid for such time. The plain text of the Fair Labor Standards Act gives every employer the obligation to maintain records of the time worked by its employees, and the Second, Fifth, Eighth, Ninth and Eleventh Circuits have all rejected the idea that an employer can extinguish liability for unpaid time worked by delegating recordkeeping to its employees.

The Sixth Circuit, without statutory support, held that an employer is not liable for a claim under the Fair Labor Standards Act where an employee does not follow an employer's "reasonable process" for reporting time worked regardless of whether the employer otherwise knew or should have know that the work was performed. As of this writing, the *White* opinion has already been cited by two district courts, yet it overrides the will of Congress, the Department of Labor's regulations concerning wage and hour law, and conflicts with established Supreme Court precedent.

The Court should grant Ms. White's petition to correct this significant departure from 75 years of Fair Labor Standards Act jurisprudence, resolve this

significant conflict among the federal Courts of Appeals, and reverse the Sixth Circuit.

STATEMENT OF THE CASE

This case arises as a suit by Petitioner Margaret White against Respondent Baptist Memorial Health Care Corporation ("Baptist Memorial"). White worked as an emergency room nurse at one of Baptist Memorial's hospitals from 2005-2007. App. 2a. Baptist Memorial established a policy that employees who worked shifts of six hours or more would receive an unpaid meal break that would be automatically deducted from the employee's paycheck. App. 2a. The policy dictated that employees whose meal breaks were missed or interrupted for a work-related purpose would be compensated for the time worked during the meal break, but only if the employee recorded any time spent working during meal breaks in an exception log. App. 2a-3a.

The "policy" was mentioned only once to employees at orientation and Baptist Memorial did not follow up or enforce this policy. App. 38a-39a. Additionally, evidence was also admitted that peers and supervisors pressured nurses to refrain from reporting time worked during breaks. App. 32a-33a. For instance, supervisors led employees to believe that getting "a bite" while working did not count as a missed meal break, App. 32a, and (according to Ms. White) they refused to approve even formally-reported missed meal breaks unless her entire unit missed the meal break, App. 79a.

On multiple occasions while working for Baptist Memorial as an emergency room nurse, White worked through lunch, either partially or entirely, and did not receive compensation for that time. App. 18a. White testified that she had indicated some breaks as missed or interrupted in the exception log and was not compensated. App. 30a-31a. But even as to time that she did not report in the exception log, White had told her supervisors and the human resources department, verbally and on an employee survey, that she was not getting a meal break. App. 32a. As mentioned above, on at least one occasion White received a fifteen or twenty minute break, but one of her supervisors told her that it counted as her lunch break because "you got a bite." App. 32a. White also complained about the missed lunch breaks directly to another one of her supervisors. White eventually stopped reporting her missed meal times in the exception log entirely because she felt it would be an "uphill battle." App. 3a-4a.

White filed suit against Baptist Memorial in 2008, alleging violations of the FLSA for failing to compensate her for working during her lunch breaks, and she moved for conditional class certification. App. 4a. Baptist Memorial denied an obligation to compensate White for her overtime because she failed to report the missed meal breaks in the exception log, and, although White told her supervisors that she was missing meal breaks, she did not tell her supervisors that she was not getting paid for those meal breaks. App. 18a.

The United States District Court for the Western District of Tennessee held that White could not

recover for unpaid wages under the FLSA. Because White knew the reporting requirements, but failed to formally report her missed meal breaks, the court granted summary judgment in favor of Baptist Memorial. App. 85a. The district court also decertified the opt-in class action stemming from the suit on grounds that these opt-in plaintiffs had no FLSA claim and were not sufficiently similarly situated to each other. App. 68a. White then appealed the district court's rulings to the Sixth Circuit Court of Appeals.

The Sixth Circuit affirmed, placing the burden on the shoulders of the employee to formally report worked time initially, as well as to report that she was not being compensated properly. The majority held that, because White had failed to report missed meal breaks, she could not recover unpaid compensation under the FLSA. App. 17a. Writing for the majority, Judge Siler held that "[u]nder the FLSA, if an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process." App. 13a.

With respect to Baptist Memorial's knowledge of her missed meal breaks, the majority noted that White had reported to her supervisors that she had missed meal breaks, but it also stated that she had not told her supervisors that she was not being compensated. App. 13a-14a. Thus, the majority reasoned, there was "no way" Baptist Memorial could have known that she was not being compensated for missed meal breaks. Therefore, it held, Baptist

Memorial had no actual or constructive knowledge of White's uncompensated, missed meal breaks. *Id.*

Judge Moore, writing in dissent, believed a different result was required, noting that "[t]he law is clear that an employer with actual or constructive knowledge that an employee is working without compensation violates the Fair Labor Standards Act irrespective of whether the employee has properly reported that time." App. 18a. Judge Moore observed that "[t]he mere existence of a policy requiring an employee to inform management of a missed break does not relieve an employer from its obligation to provide compensation for that time." App. 21a (citing Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, FLSA2008-7NA, at *1-2 (May 15, 2008)).

Judge Moore would have held that summary judgment was inappropriate because she believed there was a dispute of fact as to whether Baptist Memorial had actual knowledge of the time White worked (to the extent she was not compensated for time reported on the exception log). But Judge Moore further argued that the district court and the majority also erred in its analysis of the effect of a reporting policy on the legal analysis of an employer's "constructive knowledge" of extra work. App. 19a.

> An employee's failure to report extra hours can be relevant to rebutting a claim of constructive knowledge in cases where an employer's ability to unearth the employee's extra work would otherwise be difficult through reasonable diligence. … But the employee's failure to report

> remains just one piece of circumstantial evidence suggesting a lack of constructive knowledge; an employer who sees his employees working late … may not be as credible in relying on the employee's reporting failures.

App. 25a-26a. By contrast, the majority opinion viewed Baptist Memorial's policy requiring reporting as essentially a "safe harbor" against claims for compensation that is sufficient to support summary judgment against the employee, notwithstanding the employer's undisputed awareness of facts that suggest the employee was not getting full compensation.

Judge Moore noted that the fact that White did not tell her supervisors she was not getting *paid* (in addition to telling them, as she did, that she was not getting her breaks) was not proof that Baptist Memorial had no responsibility to compensate her. The supervisors knew White was missing meal breaks, and that meal breaks were automatically uncompensated, and they did not make any effort to ensure White was recording her time on the exception log. "Baptist's decision to use an automatic-deduction and self-reporting system for missed breaks is permissible, but the consequences of an employee's failure to report a missed break still fall on the employer, not the employee." App. 33a.

The Sixth Circuit denied rehearing *en banc* on February 22, 2013, and this Petition followed.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Explanation of the Law Contradicts 75 Years of FLSA Jurisprudence, Which Hold Compensable All Time Worked by an Employee that is Known or Should be Known to an Employer.

For 75 years, the FLSA has placed the burden on employers of compensating employees for all time worked, whether or not the work complied with company policies regarding work hours. The Sixth Circuit has reversed that burden, creating an incentive for employers to remain willfully ignorant of the time their employees have worked, inviting them to establish company policies designed to allow them to escape liability for time their employees actually worked, regardless of their knowledge of that time.

A. The Text and Implementing Regulations of the FLSA Establish that the Employer Bears the Burden of Making and Keeping Records of Employee Work.

Congress drafted the FLSA to protect at-risk workers from sub-standard wages and excessive hours by controlling industry employment practices. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706-707 (1945) (finding Congress's primary focus in passing the Act was to aid those with the least amount of leverage in the nation's working population). Specifically, if an employer "suffers or permits" an employee protected by the FLSA to work, it must pay her at least minimum wage, and if

the work is overtime – more than forty hours a week – the employer is obligated to pay her one and a half times her wages. 29 U.S.C. § 207 (a)(1) (2006).

The plain text of the FLSA gives *employers* the responsibility to "make, keep and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practice of employment maintained by him," and ensure compliance with the Act. 29 U.S.C. § 211(c) (2006). Congress mandated that employees injured by an employer's non-compliance are entitled to sue privately, rather than relying solely on civil enforcement mechanisms. 29 U.S.C. § 216(b) (2006).

The Department of Labor has promulgated stringent regulations to enforce the FLSA, further clarifying an employer's responsibility to maintain records of time worked by his employees. The Department of Labor explained in 29 C.F.R. § 785.11 that an employer is obligated to pay for any time it knows or suspects its employees have worked. "Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. . . . The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time," and thus is obligated to compensate the employee for that time. 29 C.F.R. § 785.11 (2012). An employer has the final and ultimate responsibility to monitor its workplace to prevent extra time if it does not wish to pay for extra time.

> [I]t is the duty of the management to exercise its control and see that the work is not

> performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.
>
> 29 C.F.R. § 785.13 (2012).

B. Precedent Establishes that the Employer's Burden to Keep Records of Employee Work Means that It Must Pay All Time of Which the Employer Is, or Should Be, Aware, Even If the Employee Failed to Follow the Employer's Policies.

This Court has previously acknowledged that the employer bears the burden of keeping records of time worked. Where an employer fails to keep records, "the solution … is not to penalize the employee by denying [her] any recovery on the ground that [s]he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty." *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 686 (1946). In fact, Ms. White could not have waived her right to compensation even if she wanted to—because "the purposes of the [FLSA] require that it be applied even to those who would decline its protections." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985). In light of this Court's holding in *Tony & Susan Alamo Foundation*, the waiver of the right to be paid based on the mere

failure of an employee to report her time is unlawful because it amounts to an employee "volunteering" her time for her employer—something this Court has expressly refused to allow. *Id.* Rather, the question is whether the employer should have to pay for that time because it knew or should have known of the worked time, even if it was outside of what the employee reported formally.

The FLSA, its implementing regulations, the precedent of this Court in cases such as *Anderson*, and the precedent of multiple federal circuits all agree that if an employer has actual or constructive knowledge of time worked, the employer is obligated to pay the employee for that time, regardless of whether the employee violated company work or reporting policies. *See Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 365 (2d Cir. 2011)*; see also Reich v. Stewart*, 121 F.3d 400, 407 (8th Cir. 1997) ("The key inquiry is not whether overtime work was authorized, but whether Stewart was aware that Petty was performing such"). An employer has actual knowledge when it (through its supervisors) "knows" the employee has continued to work, and it has constructive knowledge when it "has reason to believe" the employee continued to work, regardless of whether the work was requested or reported. *Reich*, 121 F.3d at 407.

As *White* noted, App 6a**,** cases involving missed meal breaks are subject to the same analysis as the plethora of cases involving overtime. For example, in *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 828 (5th Cir. 1973), an automotive manufacturer was liable for overtime even though its

repossession specialists failed to comply with the company's established overtime reporting policies. And in *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 365 (2d Cir. 2011), the Second Circuit reversed summary judgment for the employer because the employee alleged that his supervisors knew he was not recording the time he worked beyond forty hours a week, despite an official policy to the contrary.

Indeed, if an employer merely has reason to *suspect* an employee is working overtime – even despite employer policy – the employer has an obligation to investigate, and to pay the time actually worked. For example, in *Reich v. Department of Conservation and Natural Resources*, the Eleventh Circuit found that the Department had actual and constructive knowledge of employee overtime, despite the fact that some officers followed their overtime policy, because (1) the Department knew it had an overtime problem based upon a prior study, (2) employees complained about being limited to forty hours a week, (3) the Department knew its officers were unusually busy due to the season, and (4) there were inconsistencies in the officers' time sheets that should have alerted supervisors to unpaid overtime. 28 F.3d 1076, 1083 (11th Cir. 1994). The mere fact that it had an overtime policy and urged its employees to follow it did not absolve the Department of its responsibility to monitor its workplace. *Id.*

Similarly, in *Brennan,* 482 F.2d 825, an automotive manufacturer had constructive knowledge when its repossession specialists failed to comply with the company's established overtime

reporting policies because the time the specialists did report was artificially low, giving the company reason to investigate further. 482 F.2d at 485. In both of these cases, the inconsistency between what was being formally reported according to policy and other facts of which the employer was aware amounted to "constructive knowledge" because an investigation would have revealed more work time than what was reported.

The federal circuits have consistently held an employer's obligation to pay extra time can be excused only in those rare situations where an employer did not and should not have known that the overtime work was performed, *i.e.* it had no "actual" or "constructive" knowledge. *E.g. Hertz v. Woodbury Cnty., Iowa*, 566 F.3d 775, 782 (8th Cir. 2009) (finding remotely located police department was not obligated to go through reams of dispatch data and compare it to official timesheets to uncover officers' unpaid overtime, where the officers had not alerted supervisors to the additional time); *Newton v. City of Henderson*, 47 F.3d 746, 749 (5th Cir. 1995) (refusing to find city police department should have known an undercover officer, seconded to the Drug Enforcement Agency, was falsifying his time sheets and underreporting his time); *Forrester v. Roth's I. G. A. Foodliner, Inc.,* 646 F.2d 413, 414 (9th Cir. 1981) (finding employer lacked constructive knowledge when one of its employees purposefully falsified records to hide his overtime and there was no other evidence that should have made the employer suspicious). In other words, an employee can sue her employer for back wages when the employee works, is not paid, and the employer knew

or should have known about the time worked; and an employer can escape liability for time that was worked but not paid only in the extremely rare situation where the employee actively conceals the work, or the employer had no other reason to suspect additional time was worked.

C. The Sixth Circuit's Decision Reverses the Employer's Burden to Pay Time of Which it Has Actual or Constructive Knowledge.

The Sixth Circuit's published decision in *White v. Baptist Memorial Health Care Corp.*, 699 F.3d 869, 876 (6th Cir. 2012), sets out a dangerous and incorrect legal standard for an employer's duties under the FLSA that is opposed to this well-established jurisprudence. *See, e.g., Valcho v. Dallas Cnty. Hosp. Dist.*, 658 F. Supp. 2d 802, 812-13 (N.D. Tex. 2009) (finding that nurses' frequently interrupted meal breaks gave the hospital actual knowledge despite nurses failure to report extra time); *DeMarco v. Nw. Mem'l Healthcare*, 2011 WL 3510896 (N.D. Ill. Aug. 10, 2011) (finding weight of authority to refute hospital's argument that nurse's non-compliance with hospital's overtime policy obviates its need to pay overtime).

The Sixth Circuit held, "[u]nder the FLSA, if an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process." *White*, App. 13a. This "reasonable process" obviates an employer's responsibility to investigate further when it has reason to know of violations of its work

policies, and creates a shield against liability, even where the supervisors are aware that employees are working extra time and fail to attempt to enforce the purported "policy." App. 13a-14a. The Sixth Circuit failed to cite any portion of the statutory text of the FLSA or its implementing regulations, nor did it apply well-established concepts regarding actual or constructive knowledge of time worked. This fundamental shift in an employer's responsibility is in direct contravention of the statute and applicable regulations.

The Sixth Circuit undoubtedly sought an easy way to dispose of FLSA cases on summary judgment by effectively creating a "safe harbor" for employers. But in so doing, it has invented a new doctrine without any textual or policy basis, and created a new set of problems. Apart from being inconsistent with the policies and implementing regulations of the FLSA, *White* has created a new rule that threatens to multiply litigation in other settings by introducing the term "reasonable process," a phrase far less susceptible to easy definition.

Nevertheless, district courts have already begun to follow *White* because it appears to provide an easy way to dispose of FLSA cases – notwithstanding the utter lack of textual support for the Sixth Circuit's novel test. District courts from the Seventh and Eleventh circuits have already cited to *White* and discussed an employee's reporting duty as compared to the employer's knowledge. *Creely v. HCR ManorCare, Inc.*, No. 3:09 CV 2879, 2013 WL 377282, at *3 (N.D. Ohio, Jan. 31, 2013); *Allen v. City of Chicago*, No. 10 C 3183, slip op. at 4 (N.D. Ill.,

Jan. 14, 2013); *Myers v. Critter Control, Inc.*, No. 12–0015–N, 2012 WL 6062059 (S.D. Ala. Dec. 6, 2012). There is a high risk that this legal error will continue to spread quickly if not corrected, costing of millions of dollars as this new test is litigated, and doing lasting damage to the remedial purpose of the statute and the will of Congress.

II. The White Opinion Creates a Split Among the Circuits as to Whether Employers Can Eliminate Liability by Delegating the Obligation to Record Time Worked to Employees.

Besides creating a new and ill-defined rule that is unsupported by the statutory text and 75 years of precedent, the Sixth Circuit has also created conflict among the federal circuits regarding the use of time reporting policies to avoid liability.

In the *White* opinion, the Sixth Circuit sharply diverges from the Second and Eleventh Circuits, which have consistently held that an employer must pay its employees time of which it is or should have been aware, even if the employee did not formally report that time. Notwithstanding *White*'s reliance on cases from the Fifth, Eighth and Ninth Circuits, those circuits have ruled similarly to the Second and Eleventh Circuits in other cases. None of these cases goes as far as *White* in absolving an employer of responsibility for paying for extra time based merely on the failure to formally report time.

For example, in the Second Circuit, "an employer who has knowledge that an employee is working, and who does not desire the work be done, has a duty to

make every effort to prevent its performance. This duty arises even . . . where the employee fails to report his overtime hours." *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 288 (2d Cir.2008). The Second Circuit more recently held that "an employer's duty under the FLSA to maintain accurate records of its employees' hours is non-delegable. . . . In other words, once an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation simply because the employee failed to properly record or claim his overtime hours." *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 363 (2d Cir. 2011).

Similarly, the Eleventh Circuit ruled that, even where employees violate work policies and fail to report overtime, "if an employer knows or has reason to believe that the employee continues to work," it must count as work time any additional hours beyond an employee's regular hours. *Reich v. Dept. of Conservation and Nat. Resources* 28.F.3d 1076, 1082 (11th Cir. 1994). *Reich* further held that "it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed . . . and it cannot sit back and accept the benefits without compensating for them." In so holding, the Eleventh Circuit observed that "the cases must be rare where prohibited work can be done… and knowledge or the consequences of knowledge avoided." *Id.* (*quoting People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.,* 121 N.E. 474, 476 (1918)).

In *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 828 (5th Cir. 1973), discussed *supra*, an

automotive manufacturer was liable for overtime even though its repossession specialists failed to comply with the company's established overtime reporting policies. An employer is liable for paying its employees for time worked that the employer does know or should know is occurring at its worksite. *See Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 512 (5th Cir. 1969) ("The cases must be rare where prohibited work can be done within the plant, and knowledge or the consequences of knowledge avoided.") Conversely, *Newton v. City of Henderson*, 47 F.3d 746 (5th Cir. 1995), on which the Sixth Circuit relied, does not purport to overrule this well-established precedent. Rather, the Fifth Circuit concluded only that there was insufficient evidence on the facts of that particular case that the employer had reason to suspect that employees were working extra time and filling out false payroll records.

Likewise, the Eighth Circuit held in *Reich v. Stewart*, 121 F.3d 400, (8th Cir. 1997) that an employee was not obligated to report and seek overtime pay in order to be entitled to compensation in his lawsuit. "Moreover, the fact that Petty did not seek overtime pay is irrelevant because Petty cannot waive his entitlement to FLSA benefits. A contrary holding would be detrimental to the [FLSA's] legislative policy of spreading work to more employees by requiring employers to pay each individual a premium for excessive hours." *Id.* at 407 (internal citations and quotation marks omitted). The Sixth Circuit in *White* relied on *Hertz v. Woodbury Cnty., Iowa*, 566 F.3d 775 (8th Cir. 2009), but like the *Newton* case from the Fifth Circuit, *Hertz* did not purport to establish a rule that an

overtime policy could insulate an employer from liability. Rather, the Eighth Circuit merely affirmed that, under the facts presented in that case, the employee presented insufficient evidence from which to conclude that the employer had reason to suspect that employees were working overtime. *Id.* at 782.

The Sixth Circuit also cited *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413 (9th Cir. 1981). However, in that case, the employee had intentionally not reported overtime nor reported it to his employer. In ruling the employee in that case was not entitled to compensation, it stated:

> This is not to say that an employer may escape responsibility by negligently maintaining records required by the FLSA, or by *deliberately turning its back on a situation*. However, where the acts of an employee *prevent an employer from acquiring knowledge*, here of alleged uncompensated overtime hours, the employer cannot be said to have suffered or permitted the employee to work in violation of s 207(a).

Id. at 414-15 (emphasis added). By contrast, the rule in *White* allows an employer to deliberately turn its back on the hours of work time of which it is aware, so long as the hours were not reported through a formal process or it was not otherwise put on formal notice.

The *White* decision creates perverse incentives. It encourages employers to become ostriches and erect poorly-enforced policies so they can avoid liability for failing to compensate employees for all time they

actually worked. In doing so, it overrides the will of Congress, and conflicts with this Court's established precedent interpreting the FLSA to protect workers from overreaching employers. This clear error of law should be corrected before *White's* shortsightedness becomes entrenched.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests that the court should issue a writ of certiorari.

Respectfully submitted,

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July 18, 2013

APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 11–5717

MARGARET WHITE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF–APPELLANT,

v.

BAPTIST MEMORIAL HEALTH CARE CORPORATION; BAPTIST MEMORIAL HOSPITAL–DESOTO, INC., DEFENDANTS–APPELLEES

Nov. 6, 2012

Appeal from the United States District Court for the Western District of Tennessee

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Before SILER and MOORE, Circuit Judges; VAN TATENHOVE, District Judge [*]

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[*] The Honorable Gregory F. Van Tatenhove, United States District Judge for the Eastern District of Kentucky, sitting by designation.

SILER, Circuit Judge:

Plaintiff Margaret White appeals the district court rulings that granted summary judgment for Defendant Baptist Memorial Health Care Corp. (Baptist) and decertified her class action against Baptist. She argues the district court incorrectly held that Baptist's policy for compensating hourly employees for missed meal breaks was lawful under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq. White states this ruling caused the district court to wrongfully grant Baptist's motions for summary judgment and class action decertification. For the following reasons, we affirm.

I.

A.

White was a nurse for Baptist from August 2005 to August 2007 and treated patients that came to the emergency department. She did not have a regularly scheduled meal break due to the nature of her job at the hospital. Meal breaks occurred during her shift as work demands allowed.

During her new employee orientation, White received a copy of Baptist's employee handbook. The handbook stated employees working shifts of six or more hours receive an unpaid meal break that is automatically deducted from their pay checks. The handbook also provided that if an employee's meal break was missed or interrupted because of a work

related reason, the employee would be compensated for the time she worked during the meal break. Baptist employees were instructed to record all time spent performing work during meal breaks in an "exception log" whether the meal break was partially or entirely interrupted.

White signed a document that stated she understood the meal break policy and, therefore, understood that if she worked during her meal break, she had to record that time in an exception log in order to be compensated for her time.

White recorded the occasions where her meal break was partially or entirely interrupted in the exception log. She stated that when she reported missing a meal break, which her entire nurse unit missed as well, she was compensated for her time. She also states that there were occasions where she individually missed meal breaks but was not compensated. But on at least one occasion when she reported missing a meal break individually, she was compensated for her time. From time to time she told her supervisors that she was not getting a meal break and she also told Baptist's human resources department. However, she never told her supervisors or the human resources department that she was not compensated for missing her meal breaks.

Eventually, White stopped reporting her missed meal breaks in the exception log despite Baptist's instructions for employees to record their time in the log. She does not remember or have records of when

her meal breaks were interrupted, either entirely or partially, and Baptist failed to compensate her.

In addition to the exception log, White knew Baptist's procedure to report and correct payroll errors. If there was an error, she could report the mistake to a nurse manager who would resolve the issue. White stated that when she used this procedure the errors were "handled immediately." However, she did not utilize this procedure to correct the interrupted meal break errors that she failed to report because she felt it would be "an uphill battle."

B.

White filed suit and moved for conditional class certification against Baptist in 2008, alleging violations of the FLSA for failing to compensate her for working during her lunch breaks. The district court granted in part and denied in part White's motion for conditional class certification. After Baptist moved for summary judgment and class decertification, the district court granted Baptist's motions.

II.

We review summary judgment rulings de novo. Provenzano v. LCI Holdings, Inc., 663 F.3d 806, 811 (6th Cir.2011). Summary judgment should be granted to the moving party if there is no genuine issue of material fact and that party is entitled to judgment as a matter of law. Id. We must draw all

reasonable inferences in the nonmoving party's favor. Id.

Under the FLSA, we review class action certification rulings for an abuse of discretion. O'Brien v. Ed Donnelly Enterprises, Inc., 575 F.3d 567, 584 (6th Cir.2009).

III.

A.

"[A]n FLSA plaintiff must prove by a preponderance of the evidence that he or she performed work for which he or she was not properly compensated." Myers v. Copper Cellar Corp., 192 F.3d 546, 551 (6th Cir.1999) (citations and internal quotation marks omitted). "Work not requested but suffered or permitted is work time." 29 C.F.R. § 785.11.

An automatic meal deduction system is lawful under the FLSA. See generally Hill v. United States, 751 F.2d 810 (6th Cir.1984) (The U.S. Postal Service's automatic 30 minute lunch deduction system was upheld against a FLSA suit brought by a postman plaintiff where he claimed that he was continuously on duty during his mealtime and should be compensated for his mealtime.). "Time spent predominantly for the employer's benefit during a period, although designated as a lunch period or under any other designation, nevertheless constitutes working time compensable under the

provisions of the [FLSA]." F.W. Stock & Sons, Inc. v. Thompson, 194 F.2d 493, 496–97 (6th Cir.1952) (citation and internal quotation marks omitted). "As long as the employee can pursue his or her mealtime adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time predominantly for the employer's benefit, the employee is relieved of duty and is not entitled to compensation under the FLSA." Hill, 751 F.2d at 814. A de minimis rule applies when "the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours." Id. at 815. Compensation is necessary "only when an employee is required to give up a substantial measure of his time." Id.

If an "employer knows or has reason to believe that [a worker] is continuing to work [then] the time is working time." 29 C.F.R. § 785.11. Therefore, the issue is whether Baptist knew or had reason to know it was not compensating White for working during her meal breaks.

1.

There is a dearth of case law on compensation for missed meal breaks under the FLSA as compared to the case law on unpaid overtime. But "[a] claim for non-payment of work during an established mealtime is analytically similar to an unpaid overtime claim." Hertz v. Woodbury County, 566 F.3d 775, 783 (8th Cir.2009) (citation omitted). Since "[t]he gravamen of [White's] complaint is that [she]

performed 'work' during mealtimes, [she is essentially arguing] that the work amounted to overtime because it was in addition to their already-scheduled, eight-hour shift, and the work during these mealtimes went uncompensated." Id.

In Hertz, police officers sued under the FLSA for unpaid overtime compensation and for work performed during mealtimes. 566 F.3d at 777–78. The County tracked the duty-status of an officer through a program called the Computer Aided Dispatch (CAD), which recorded when an officer radioed that he was on active duty and when he radioed that he had completed his shift. Id. at 779. Officers were required to submit paperwork to their supervisors to be paid overtime and "requests were 'rarely denied.' " Id. The police officers argued that the County had constructive knowledge of the amount of overtime worked because of its access to the CAD records and, therefore, "the County knew or should have known that they were working overtime." Id. at 781.

The Eighth Circuit held, "Access to records indicating that employees were working overtime, however, is not necessarily sufficient to establish constructive knowledge." Id. at 781–82 (citing Newton v. City of Henderson, 47 F.3d 746, 749 (5th Cir.1995)). The court ruled, "The FLSA's standard for constructive knowledge in the overtime context is whether the County 'should have known,' not whether it could have known." Id. at 782 (citation omitted). It went on to say, "It would not be

reasonable to require that the County weed through non-payroll CAD records to determine whether or not its employees were working beyond their scheduled hours. This is particularly true given the fact that the County has an established procedure for overtime claims that Plaintiffs regularly used." Id. (citing Newton, 47 F.3d at 749).

Turning to the issue of unpaid work during meal times, the court held the officers were "in the best position[ ]" to prove that they were working during their mealtimes and "[t]o require ... the County [to] prove a negative—that an employee was not performing 'work' during a time reserved for meals—would perversely incentivize employers to keep closer tabs on employees...." Id. at 784. The court concluded that "under the FLSA, the employee bears the burden to show that his or her mealtimes were compensable work." Id.

In Newton, a city police officer was assigned to a U.S. Drug Enforcement Agency (DEA) Task Force, which had the authority to control his daily duties, but he remained employed by the City, which still had the responsibility for paying his salary and benefits as well as overtime. 47 F.3d at 747. The City told the officer that it could pay him 12.5 hours of overtime per pay period but no more than that because the City could not afford it. Id. at 747–48. The officer "submitted time reports to the City and was paid for all of the hours claimed on [the] time reports." Id. at 748.

The officer filed a FLSA suit because he claimed that the City did not compensate him for all of the overtime hours he worked as a member of the Task Force. Id. at 747. He admitted "that he never made a demand for payment for unauthorized overtime hours until he resigned." Id. at 748. He did, however, submit forms to the DEA that stated the overtime hours he was claiming in his lawsuit. Id. The officer understood that the DEA forms were not for payroll purposes and did not provide the forms to the City until he resigned. Id. But he claimed that the City knew he was working more overtime hours than he reported to them because he reported his activities to his City supervisors on a daily basis. Id. Even though he admitted that in these daily oral reports he did not specify the number of hours he was working, the officer argued that, based on these reports, his City supervisors "must have known that he was working overtime." Id.

One of the officer's City supervisors had access to information regarding the activities of the Task Force as well as the activities of its individual members. The trial court found that based on this access to the Task Force's activities, the City had constructive knowledge that the officer was working overtime. Id. at 749. But the Fifth Circuit reversed, holding that "as a matter of law such 'access' to information does not constitute constructive knowledge that [the officer] was working overtime." Id.

The court ruled that the city had "specific procedures" for the officer to follow in order to be paid overtime and the officer ignored these procedures. Id. The court reasoned:

> If we were to hold that the City had constructive knowledge that [the officer] was working overtime because [his City supervisor] had the ability to investigate whether or not [the officer] was truthfully filling out the City's payroll forms, we would essentially be stating that the City did not have the right to require an employee to adhere to its procedures for claiming overtime.

Id. The issue was not if the officer's City supervisor "could have known that [the officer] was working overtime hours," but "whether he should have known." Id.

> In light of the fact that [his City supervisor] explicitly ordered [the officer] not to work overtime and in light of the fact that [the officer] admits that he never demanded payment for overtime already worked, it is clear that access to information regarding the Task Force's activities, standing alone, is insufficient to support the conclusion that the City should have known that [the officer] was working overtime.

Id. Therefore, the evidence did not "support [the officer's] contention that the City should have known that the hours reported on his City time sheets were incorrect." Id. at 750.

The Ninth Circuit, in Forrester v. Roth's I.G.A. Foodliner, Inc., 646 F.2d 413, 414 (9th Cir.1981), held that "where an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of [the FLSA]." Elaborating on this principle, the court stated, "[t]he relevant knowledge is not 'I know that the employee was working,' but 'I know the employee was working and not reporting his time.' " Raczkowski v. TC Const. Co., Inc., 8 F.3d 29 (table), 1993 WL 385483, at *1 (9th Cir.1993) (citing Forrester).

The plaintiff in Forrester knew he had to report overtime on his time sheet and that his employer regularly paid reported overtime. 646 F.2d at 414. He was paid for the overtime he reported and he admitted that had he reported the additional overtime hours that were the subject of his lawsuit that he would have been paid for those hours too. Id. The court ruled:

> An employer must have an opportunity to comply with the provisions of the FLSA. This is not to say that an employer may escape responsibility by

> negligently maintaining records required by the FLSA, or by deliberately turning its back on a situation. However, where the acts of an employee prevent an employer from acquiring knowledge, here of alleged uncompensated overtime hours, the employer cannot be said to have suffered or permitted the employee to work in violation of [the FLSA].

Id. at 414–15.

Finally, we have held, in an unpublished opinion, that:

> At the end of the day, an employee must show that the employer knew or should have known that he was working overtime or, better yet, he should report the overtime hours himself. Either way, the employee bears some responsibility for the proper implementation of the FLSA's overtime provisions. An employer cannot satisfy an obligation that it has no reason to think exists. And an employee cannot undermine his employer's efforts to comply with the FLSA by consciously omitting overtime hours for which he knew he could be paid.

Wood v. Mid–America Mgmt. Corp., 192 Fed.Appx. 378, 381 (6th Cir.2006).

2.

Under the FLSA, if an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process. See Hertz, 566 F.3d at 781–82; Newton, 47 F.3d at 749–50; Forrester, 646 F.2d at 414–15. When the employee fails to follow reasonable time reporting procedures she prevents the employer from knowing its obligation to compensate the employee and thwarts the employer's ability to comply with the FLSA. See Hertz, 566 F.3d at 781–82; Newton, 47 F.3d at 749–50; Forrester, 646 F.2d at 414–15. See also Raczkowski, 8 F.3d 29 (table), 1993 WL 385483, at *1; Wood, 192 Fed.Appx. at 381.

Each time White followed Baptist's procedures for being compensated for interrupted meal breaks or for payroll errors she was compensated. But now White states she decided not to follow Baptist's procedures for being compensated for interrupted meal breaks and argues that Baptist violated the FLSA for not compensating her for interrupted meal breaks. White occasionally told her supervisors that she was not getting her meal breaks. But she never told her supervisors that she was not being compensated for missing her meal breaks. Accordingly, there is no way Baptist should have

known she was not being compensated for missing her meal breaks. Therefore, her claims fail.

White cites a number of cases to advance her position that Baptist should have known she was working during her meal breaks despite its reporting system. However, these cases involved situations where the employer prevented the employees from reporting overtime or were otherwise notified of the employees' unreported work. See, e.g., Kuebel v. Black & Decker Inc., 643 F.3d 352, 356–57 (2d Cir.2011) (employer did not allow the employee to report overtime); Chao v. Gotham Registry, Inc., 514 F.3d 280, 283–84, 287–91 (2d Cir.2008) (employer had "full knowledge" that its employees were working overtime and failed to compensate them); Allen v. Bd. of Pub. Educ., 495 F.3d 1306, 1316 (11th Cir.2007) (employer prevented the employee from reporting overtime hours); Pabst v. Okla. Gas & Elec. Co., 228 F.3d 1128, 1131 (10th Cir.2000) (dispute revolved around whether all scheduled "on-call" time for technicians could constitute overtime or only time when they were called into work); Reich v. Dep't of Conservation & Natural Res., 28 F.3d 1076, 1083–84 (11th Cir.1994) (employer had constructive knowledge when supervisors were "specifically instructed" to "closely monitor" hours to ensure compliance with the no overtime policy and when the employer knew that the monitoring was not being done based on a previous study); Mumbower v. Callicott, 526 F.2d 1183, 1188 (8th Cir.1975) (with the employer's knowledge, the employee was never relieved for a meal break and always had to eat her

meal while she worked); Brennan v. Gen. Motors Acceptance Corp., 482 F.2d 825, 827 (5th Cir.1973) (employer discouraged employees from reporting overtime); Burry v. National Trailer Convoy, Inc., 338 F.2d 422, 425–27 (6th Cir.1964) (employer knew the employee's time sheets were inaccurate).

Here, there is no evidence that Baptist discouraged employees from reporting time worked during meal breaks or that they were otherwise notified that their employees were failing to report time worked during meal breaks. White alleges that Baptist only allowed her to use the exception log when she missed her entire meal break. However, the district court correctly disregarded this assertion because it came from a post-deposition declaration that contradicted her earlier deposition testimony, which indicated that she had entered partially missed meal breaks in the exception log. Under Cleveland v. Policy Mgt. Sys. Corp., 526 U.S. 795, 806, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999), "a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity." "A directly contradictory affidavit should be stricken unless the party opposing summary judgment provides a persuasive justification for the contradiction." Aerel, S.R.L. v. PCC Airfoils, L.L.C., 448 F.3d 899, 908 (6th Cir.2006) (citations omitted). White did not offer an explanation for the

contradiction. Accordingly, the district court rightly ignored White's new position in her post-deposition declaration.

Baptist established a system to compensate its workers for time worked during meal breaks. When White utilized the system she was compensated and when she failed to use the system she was not compensated. Without evidence that Baptist prevented White from utilizing the system to report either entirely or partially missed meal breaks, White cannot recover damages from Baptist under the FLSA.

B.

Section 216(b) of the FLSA allows similarly situated employees to recover compensation from their employer in "opt-in" class action litigation. 29 U.S.C. § 216(b). See also Comer v. Wal–Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir.2006). District courts determine whether plaintiffs are similarly situated in a two-step process, the first at the beginning of discovery and the second after all class plaintiffs have decided whether to opt-in and discovery has concluded. Comer, 454 F.3d at 546. District courts use a "fairly lenient standard" that "typically results in conditional certification of a representative class" when determining whether plaintiffs are similarly situated during the first stage of the class certification process. Id. at 547 (citation and internal quotation marks omitted). Here, the district court applied the fairly lenient standard at the first stage

and conditionally certified a class of Baptist employees.

At the second stage of the class certification process, district courts apply a "stricter standard" and more closely examine "the question of whether particular members of the class are, in fact, similarly situated." Id. Lead plaintiffs "bear the burden of showing that the opt-in plaintiffs are similarly situated to the lead plaintiffs." O'Brien, 575 F.3d at 584 (citation omitted).

White bears the burden of showing that she and the opt-in plaintiffs are similarly situated. However, the district court properly dismissed her FLSA claim. Therefore, "[w]ithout a viable claim, [White] cannot represent others whom she alleged were similarly situated." In re Family Dollar FLSA Litigation, 637 F.3d 508, 519 (4th Cir.2011). Just as opt-in plaintiffs are not similarly situated to a lead plaintiff if their claims are dismissed, O'Brien, 575 F.3d at 586, a lead plaintiff cannot be similarly situated and represent opt-in plaintiffs without a viable claim. In re Family Dollar FLSA Litigation, 637 F.3d at 519. Since White cannot meet her burden that she is similarly situated to the opt-in plaintiffs because her FLSA claims were dismissed, decertification was proper.

AFFIRMED.

KAREN NELSON MOORE, Circuit Judge, dissenting.

At the heart of this case is the following simple fact: During her time as a nurse in the Baptist Hospital Emergency Room, White would occasionally work through lunch, either partially or entirely, and not receive compensation for that time. The defendants (collectively, "Baptist") do not appear to dispute this claim factually, but blame White for failing to report the missed lunch on an exception log used by her department. The district court granted summary judgment in favor of Baptist because White had presented no evidence that Baptist knew or should have known that she was working through lunch without compensation in violation of the Fair Labor Standards Act ("FLSA"). This is contrary to the record, which contains evidence from which a jury could find that Baptist had actual knowledge that White was working without compensation, namely, her deposition testimony that she had recorded missed lunches on the exception log and was not compensated for that time. Despite this evidentiary record, which we must view in White's favor on summary judgment, the majority affirms. I cannot agree, and I therefore respectfully dissent.

The law is clear that an employer with actual or constructive knowledge that an employee is working without compensation violates the Fair Labor Standards Act irrespective of whether the employee has properly reported that time. Summary judgment in these cases is exceedingly rare, because an

employer's knowledge of unpaid work often turns on disputed issues of fact.[1] The district court and now the majority err by relying primarily on cases analyzing evidence of constructive knowledge, which frequently do consider a plaintiff's own failure to report hours, without first considering the evidence in support of actual knowledge. Because the plaintiff here has set forth evidence of actual knowledge of her work, summary judgment on this basis was inappropriate.

The parties generally agree on the relevant legal standard. To establish a prima facie claim under the FLSA for unpaid time, the plaintiff must show "by a preponderance of evidence that he or she performed work for which he or she was not properly compensated." Myers v. Copper Cellar Corp., 192 F.3d 546, 551 (6th Cir.1999) (internal quotation marks and alterations omitted). "Work not requested but suffered or permitted is work time" if "[t]he employer knows or has reason to believe that [the

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[1] Baptist itself seems to be aware that the district court's decision is against the great weight of the case law, devoting only the last six pages of its seventy-page brief to the propriety of summary judgment (and spending two of them on a strained waiver argument). Baptist at one point even calls the district court's conclusion that Baptist lacked knowledge of White's work a "fact-specific finding," Appellee Br. at 29, which is inherently inappropriate on summary judgment.

employee] is continuing to work." 29 C.F.R. § 785.11. The responsibility for maintaining accurate records regarding when an employee is working at all times falls on the employer. 29 U.S.C. § 211(c) (requiring that employers "shall make, keep, and preserve" records of every employee's hours); see also 29 C.F.R. § 516.2(a). As Judge Friendly once put it long ago:

> The obligation [to pay overtime under the FLSA] is the employer's and it is absolute. He cannot discharge it by attempting to transfer his statutory burdens of accurate record keeping and of appropriate payment[ ] to the employee. The employer at its peril had to keep track of the amount of overtime worked by those of its employees....

Caserta v. Home Lines Agency, Inc., 273 F.2d 943, 946 (2d Cir.1959) (internal quotation marks, alterations, and citations omitted).

An employer is not required to use time-sheets to assure accurate reporting of hours and may institute a policy of automatically deducting a lunch period from an employee's compensation. See Hill v. United States, 751 F.2d 810, 811 (6th Cir.1984), cert. denied, 474 U.S. 817, 106 S.Ct. 61, 88 L.Ed.2d 50 (1985). However, the implementation of such a policy does not shift the burden onto the employee to ensure accurate reporting of hours or alleviate the employer's obligations to pay for time actually worked under the FLSA:

> [I]t is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

29 C.F.R. § 785.13; see also Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, FLSA2007–1NA, at *1 (May 14, 2007) (implementation of automatic pay deduction for lunch breaks "does not violate the FLSA so long as the employer accurately records actual hours worked, including any work performed during the lunch period" (emphasis added)); Wage & Hour Div., U.S. Dep't of Labor, Fact Sheet # 53, at *3 (July 2009) ("When choosing to automatically deduct 30–minutes per shift, the employer must ensure that the employees are receiving the full meal break.").

The mere existence of a policy requiring an employee to inform management of a missed break does not relieve an employer from its obligation to provide compensation for that time. See Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, FLSA2008–7NA, at *1–2 (May 15, 2008) (an employer "must compensate the employee for all hours worked including the time worked during the missed meal period," even if the "employee fails to take a meal break and does not notify the manager"

in direct violation of company policy). See also Reich v. Dep't of Conservation and Natural Res., Ala., 28 F.3d 1076, 1083 (11th Cir.1994) ("There is no indication in the record that the Department did anything ... to discourage the overtime required by the vast majority of its officers to properly perform their duties other than to promulgate its policy against such work."). When an employer automatically deducts pay for lunch, particularly in an environment like an understaffed emergency room where the record suggests that it may be difficult to take an uninterrupted lunch break let alone a break at all, the employer should do more than simply point to a policy against such practices to escape responsibility. The employer must pay its employees for any missed or interrupted lunch break the employer knows or should have known the employee was not taking, even if the employee failed to report the missed break.

The cases consistently confirm this principle: An employer must pay its employees for any time the employer knows or should have known the employee is working, even if the employee fails to report the work. See Kuebel v. Black & Decker Inc., 643 F.3d 352, 363 (2d Cir.2011) ("[O]nce an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation simply because the employee failed to properly record or claim his overtime hours."); Chao v. Gotham Registry, Inc., 514 F.3d 280, 288 (2d Cir.2008) (Sotomayor, J., joining) ("An employer who has knowledge that an employee is working, and who

does not desire the work be done, has a duty to make every effort to prevent its performance. This duty arises even ... where the employee fails to report his overtime hours." (citations omitted)); Pabst v. Okla. Gas & Elec. Co., 228 F.3d 1128, 1133 (10th Cir.2000) ("To claim, then, that [the employer] did not know [the employees] were working because they did not report every hour of their evenings and weekends as overtime is misleading."); Holzapfel v. Town of Newburgh, 145 F.3d 516, 524 (2d Cir.) ("[O]nce an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation even where the employee fails to claim overtime hours."), cert. denied, 525 U.S. 1055, 119 S.Ct. 619, 142 L.Ed.2d 558 (1998).

Whether an employer has actual or constructive knowledge of unpaid work is a question of fact. Holzapfel, 145 F.3d at 521. As such, it is ill-suited for resolution on summary judgment when the evidence is genuinely in dispute. See Curry v. Scott, 249 F.3d 493, 508 (6th Cir.2001) (holding district court erred in determining defendants had no actual knowledge on summary judgment because inquiry "should have been left to the trier of fact"). For this reason, summary judgment is routinely reversed for the precise reasons used by the district court and the majority in this case. Kuebel, 643 F.3d at 365 (reversing summary judgment); Brown v. Family Dollar Stores of Ind., LP, 534 F.3d 593, 596–97 (7th Cir.2008) (same); Allen v. Bd. of Pub. Educ. for Bibb Cnty., 495 F.3d 1306, 1321 (11th Cir.2007) (same); Pabst, 228 F.3d at 1133 (same).

The majority distinguishes these cases by arguing that summary judgment is affirmed in other circuits when a plaintiff fails to report her hours under an established system for doing so. But the majority misses the mark; these cases all involve only an attempt to prove constructive knowledge, not actual knowledge, and when so viewed they actually support the general principle of denying summary judgment when there is evidence in the employee's favor. See Hertz v. Woodbury Cnty., 566 F.3d 775, 782 (8th Cir.2009) (upholding jury verdict of no actual knowledge of overtime work and no constructive knowledge because no evidence that hours of field officers were being under-reported or that officers were discouraged from using the overtime system); Newton v. City of Henderson, 47 F.3d 746, 748–49 (5th Cir.1995) (reversing bench trial because no actual knowledge that undercover officer with irregular, off-site hours was working overtime, and the City's mere access to information that could show such information was insufficient without more); Davis v. Food Lion, 792 F.2d 1274, 1277–78 (4th Cir.1986) (holding no clear error in bench-trial finding of no actual or constructive knowledge when overtime-prohibition policy was regularly enforced through reprimands and discipline, overtime work was unnecessary for job performance, and the employee then deliberately concealed his overtime work despite being warned to stop).

It is important to be clear about the relevance of an employee's failure to report time worked in these

cases. An employee may not voluntarily decline compensation for time worked. See Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 302, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985) ("[T]he purposes of the [FLSA] require that it be applied even to those who would decline its protections."). No court has held that failing to report hours can defeat a claim under the FLSA where the employer had actual knowledge of the work performed. Holding otherwise would be akin to holding that an employee may waive FLSA protections by not reporting time her employer knows about, which would defeat the very purposes of the FLSA and be contrary to direct Supreme Court precedent. Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 740, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981) (noting FLSA rights cannot be waived); see also Allen, 495 F.3d at 1321 ("[E]ven if these Plaintiffs did not inform their supervisors that they were not recording their hours, a jury could still charge the Board with constructive knowledge.").

An employee's failure to report extra hours can be relevant to rebutting a claim of constructive knowledge in cases where an employer's ability to unearth the employee's extra work would otherwise be difficult through reasonable diligence. For example, when an employee works offsite or stays late without telling his employer, and there is a complete lack of evidence that would suggest to his employer that he was doing this work (i.e., he reported overtime in the past, his normal duties do not require overtime, other coworkers do not work overtime, no one ever saw him working late, etc.), the

employee's suggestion that his employer should have known he was working falls flat. In such situations, asking the employee to tell the employer he is working makes sense. But the employee's failure to report remains just one piece of circumstantial evidence suggesting a lack of constructive knowledge; an employer who sees his employees working late or who pressures employees not to report hours may not be as credible in relying on the employee's reporting failures. See Reich, 28 F.3d at 1083–84 (holding employer had constructive knowledge of overtime despite policy and irregular off-site hours because employer could have acquired actual knowledge of work through the exercise of reasonable diligence); see also Allen, 495 F.3d at 1321; Brennan v. Gen. Motors Acceptance Corp., 482 F.2d 825, 827 (5th Cir.1973).

In the rare case that affirms summary judgment for the employer (only two published opinions have done so to my knowledge), the evidence of actual knowledge is completely absent and the evidence suggesting constructive knowledge is a mere scintilla at best. In Forrester v. Roth's I.G.A. Foodliner, Inc., 646 F.2d 413, 414–15 (9th Cir.1981), the Ninth Circuit affirmed summary judgment for the employer because the employee had failed to report overtime hours and there was no evidence the employer should have known of the work. Forrester does broadly suggest that "where the acts of an employee prevent an employer from acquiring knowledge, ... the employer cannot be said to have [committed a violation of the FLSA]." Id. at 414–15. But this

language must be read in context, however, because Forrester also reaffirms that "[a]n employer who is armed with [knowledge of his employee's work] cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation." Id. at 414.

The other published opinion has already been mentioned—in Allen, the Eleventh Circuit affirmed summary judgment for some plaintiffs despite reversing for others. Allen, 495 F.3d at 1323. Summary judgment was affirmed against three plaintiffs who had presented no evidence that their employer had actual knowledge of their overtime and insufficient evidence of constructive knowledge: one plaintiff stayed late without being asked and without telling anyone, another performed work at home without telling anyone, and the third had simply alleged that "there must have been time" that went unreported despite testifying that she never worked off the clock. Id. at 1323.

However, although summary judgment was affirmed against those three plaintiffs, the Eleventh Circuit in Allen simultaneously reversed summary judgment against other plaintiffs who also never informed their supervisors that they were working overtime. One of these plaintiffs, Eleanor Welch, was never discouraged from reporting her hours correctly, but the court noted that she presented evidence that her supervisor "knew that she would be with the children all day without a break." Id. at

1322. As a result, the employer's constructive knowledge was an issue of fact for trial and summary judgment was inappropriate.

There are no published cases in our circuit addressing this issue. In an unpublished opinion, we affirmed summary judgment for the employer for reasons consistent with denying summary judgment here today. See Wood v. Mid–Am. Mgmt. Corp., 192 Fed.Appx. 378, 381 (6th Cir.2006) (unpublished opinion). In Wood, the employee regularly worked unsupervised as a maintenance technician at an apartment complex. Id. at 378. He later sued for overtime of around five hours every day, but he put forth no evidence that his employer had actual or constructive knowledge that he was performing the extra after-hours work. Summary judgment was appropriate not solely because the plaintiff had failed to report his extra hours, but because he presented no evidence of actual knowledge and even less evidence to establish constructive knowledge of those hours. The work did not need to be done after-hours, and when Wood did suggest to a manager that he was working overtime, he was encouraged to report all his time and was never discouraged from doing so. Id. at 380–81. Wood reaffirms the general principle that an employer must have actual or constructive knowledge of the uncompensated work, and constructive knowledge cannot be based on conjecture alone. Id. at 381 ("An employer cannot satisfy an obligation that it has no reason to think exists." (emphasis added)).

Here, perhaps due to White's own less-than-clear explanation of the evidence establishing actual or constructive knowledge below, the district court appears to suggest that an employee's failure to report can generally relieve an employer of its obligation to ensure accurate time reporting, regardless of other evidence suggesting actual or constructive knowledge. The district court concluded that courts deny recovery "in FLSA cases where an employee is aware of her employer's system for reporting work that falls outside the employee's normal, forty-hour shift but fails to report that work." R. 258 (D. Ct. Order at 8) (Page ID # 6499). The majority, without explanation or support in the FLSA, adopts this broad exception to the traditional requirements of the FLSA. The underlying principle is more nuanced than the broad brush the majority applies to sweep away an otherwise valid claim for relief. At no point does Wood or any of these cases suggest that an employer with actual knowledge of overtime can defeat its obligations by pointing to incomplete time-sheets. There are no cases, on summary judgment or otherwise, where an employee's failure to report hours actually known to be worked by the employer defeats a claim under the FLSA.

That leaves only the question of whether there is evidence of actual or constructive knowledge on the record in this case. As an initial matter, there are several facts that are undisputed. Baptist had a policy of automatically deducting pay for thirty minutes from every shift over six hours. Baptist

employees were instructed to take a thirty-minute lunch break every day, and White acknowledged receipt of this information upon starting at Baptist. R. 90–8 (White Dep. at 82–83) (Page ID # 2665–66). Baptist employees were instructed to report any instance when they were unable to take a full, uninterrupted lunch break, and they were told they would be compensated or permitted to take the break later. White testified that she knew how to report any partial or missed lunch break—on an exception log in her department—and on several occasions she used the log to report a missed lunch and successfully received her pay.[2] Id. at 84–85 (Page ID # 2667–68).

But there was also evidence suggesting that White was not compensated at all for some missed lunch breaks, and that her employer had actual knowledge of the missed break and failed to pay her for it.[3] White testified that on previous occasions, she

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[2] The parties spend a great deal of time debating White's knowledge of how to record her time properly and very little time on Baptist's knowledge that she was failing to report properly. I agree with the district court, however, that White's deposition trumps her after-filed declaration and establishes that she knew she could report any missed or interrupted break on the exception log. R. 258 (3/23/11 D. Ct. Order 13–16) (Page ID # 6504–07).

[3] These facts distinguish this case from our recent unpublished opinion in Frye v. Baptist Memorial

had indicated a missed or interrupted break in the exception log and was not paid for it. Id. at 86–87 (Page ID # 2670). If believed by a jury, this evidence would constitute actual knowledge of uncompensated work. Summary judgment was therefore improperly granted on the basis of this disputed fact alone.[4]

Hospital, Inc., —— Fed.Appx. ——, No. 11–5648, 2012 WL 3570657 (6th Cir. Aug. 21, 2012), where a different plaintiff was also attempting to bring a class action against Baptist for its system of automatically deducting pay for lunch breaks. Although we made no ruling on the merits of the individual plaintiffs' FLSA claims in that suit, id. at ——, 2012 WL 3570657 at *4, resolving the appeal on other grounds, we also observed that the lead plaintiff "abandoned his only evidence" on the issue of whether Baptist had knowledge of the deficiencies in its reporting system, id. at ——, 2012 WL 3570657 at *6.

[4] As the holder of the payroll records, Baptist could have easily responded to White's statement with a list of all times White completed the exception log and her payroll records demonstrating the inaccuracy of her testimony. Instead, Baptist provided one exception log and evidence that White was compensated that one time. Without the documentary evidence, Baptist is essentially asking this court to make a credibility decision to disbelieve White's statements, which is inappropriate on summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Furthermore, the evidence of constructive knowledge here is also strong. White testified at her deposition that she had once received a break of only fifteen or twenty minutes and one of her supervisors, Sharon Fiveash, told her that counted as her lunch break because "you got a bite." Id. at 89–90 (Page ID # 2673). She testified that she complained about the missed lunch breaks directly to her supervisor, Chad Jones, and to the ER director, and she even complained about it on her employee surveys. Id. at 107 (Page ID # 2680). White admitted that her complaints were about the lack of a break and not lack of pay, id. at 108 (Page ID # 2681), but her supervisors knew that she was working through lunch, knew that lunches were automatically uncompensated, and never responded to White's complaints by asking her to make sure she signed the exception log for the missed break.[5] A reasonable

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[5] By way of example, in other Baptist departments the employees were presented with a copy of the exception logs for each pay period and asked to review their entries and sign to attest to the record's accuracy. R. 233–1 (Defs.' Mot. to Decertify at 7) (Page ID # 5046). Other Baptist employees who told their supervisors they missed lunches were immediately instructed to record the missed lunch on the exception log. See id. at 22, 25, 33 (Page ID # 5061, 5064, 5072). See e.g., Wood, 192 Fed.Appx. at 381 (employee instructed to report extra hours when reported to management). Baptist could have presented such evidence of similar behavior in White's department to support its motion for summary judgment, but did not.

juror could interpret these actions as pressure from White's immediate supervisors not to report her missed lunches, which at a minimum would constitute constructive knowledge of the unpaid time. See Brennan, 482 F.2d at 827–28.

Baptist's decision to use an automatic-deduction and self-reporting system for missed breaks is permissible, but the consequences of an employee's failure to report a missed break still fall on the employer, not the employee. Unlike many of the above-cited cases, White performed all her work in a hospital on an emergency-room floor surrounded by Baptist employees and was under active supervision by either a charge nurse or some other supervisor at all times. White has met her burden of presenting evidence from which a jury could find that her employer knew or should have known that she was missing lunches and not receiving pay (or potential overtime). Whether the discouragement White received from her supervisors was truly not about seeking pay for that missed break is not resolvable on summary judgment. For all of these reasons, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

Case No. 08–2478

MARGARET WHITE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF,

v.

BAPTIST MEMORIAL HEALTH CARE CORPORATION, AND BAPTIST MEMORIAL HOSPITAL–DESOTO, INC., DEFENDANTS

May 17, 2011

Order Granting Defendants' Motion to Decertify Collective Action

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SAMUEL H. MAYS, JR, District Judge

Plaintiff Margaret White ("White") alleges that Defendants Baptist Memorial Health Care Corporation ("BMHCC") and Baptist Memorial Hospital–DeSoto, Inc. ("Baptist Desoto" and, collectively, "Baptist") violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 et seq., by

failing to compensate her and other similarly situated hourly employees for all hours worked. (See Compl. ¶¶ 1–2, ECF No. 1.) Before the Court is Baptist's February 15, 2011 Motion to Decertify Collective Action. (See Mot. to Decertify Collective Action, ECF No. 233.) White responded in opposition on March 15, 2011. (See Pl.'s Resp. to Defs.' Mot. to Decertify Collective Action, ECF No. 250.) Baptist replied on April 12, 2011. (See Reply in Supp. of Mot. to Decertify Collective Action, ECF No. 261.) ("Baptist's Reply") For the following reasons, Baptist's motion is GRANTED.

I. Background[1]

BMHCC is the non-profit, parent corporation of a number of subsidiary corporations operating hospital facilities in the Mid–South. (See Ray Decl. ¶¶ 4–5, ECF No. 233–3.) One of those subsidiaries is Baptist DeSoto, which operates a hospital in Southaven, Mississippi. (Id. ¶ 6.) When this litigation began in the fall of 2008, Baptist DeSoto had more than sixty departments staffed by approximately 1,600 employees working in positions that would be non-exempt under the FLSA. (See Banks Decl. ¶ 3, ECF

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[1] The facts in this Part come from affidavits, declarations, and depositions submitted by the parties and are recited for background purposes only. Although the Court must consider the parties' evidence to decide Baptist's motion, it does not engage in fact finding.

No. 233–3.) One of those employees was White, who worked as a nurse in Baptist DeSoto's emergency department from 2005 to August 1, 2007. (See Banks Decl. ¶ 5.)

Baptist required its hourly employees to take daily, uncompensated meal breaks. (See Baptist Policy Manual, Ex. 3, ECF No. 233–4.) To account for those breaks, Baptist's payroll system automatically deducted from each hourly employee's compensation an amount representing the time the employee received for meal breaks during the relevant pay period. (See Garrison Dep. 18:16–18:20, Mar. 22, 2010, ECF No. 250–2.) If an employee experienced any work-related interruption during a meal break, no matter how brief, the employee was to receive a subsequent, uninterrupted meal break or be paid as if she had worked through the entire meal break.[2] (See Banta Dep. 40:16–41:17, Mar. 22, 2010, ECF No. 250–3.)

Although the automatic deduction policy applied to all Baptist hospitals, there was no system-wide policy allowing employees to cancel the automatic

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[2] This Order refers to Baptist's policy of requiring hourly employees to take daily meal breaks and its practice of deducting automatically an amount of compensation equal to the time employees received for those breaks as the "meal break policy" or "automatic deduction policy".

deduction when they experienced interrupted or missed meal breaks. "Each [d]epartment [was] free to formulate the procedure that work[ed] best for its employees to govern how exceptions [were] recorded" in that department. (See Banks Decl. ¶ 8.) Many departments maintained "exception logs," paper records where employees were able to note interrupted or missed meal breaks. (See id.)

Within Baptist DeSoto, the departments had been instructed to use an exception log formatted and distributed by the hospital's human resources director. (See Banks Dep. 23:16–23:23, 48:3–49:3, Aug. 20, 2010, ECF No. 250–4). Although some departments did not use that particular log, many of them maintained some type of paper record for employees to report time worked during meal breaks. (See Simpson Decl. ¶¶ 4–5, ECF No. 233–3; Stone Decl. ¶¶ 5–6, ECF No. 233–3.) In a few departments, employees were permitted to verbally inform their supervisors about time worked during meal breaks. (See V. Johnson Dep. 74:15–74:20, Jan. 11, 2011, ECF No. 233–3; King Dep. 9:18–10:3.) Whether through an exception log or another process, an hourly employee had to self-report her missed or interrupted meal breaks to Baptist to ensure she received proper compensation.[3] (See Garrison Dep. 23:20–23:22.)

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[3] This Order refers to the requirement that Baptist employees take some affirmative action to cancel or

All Baptist DeSoto employees learned about the automatic deduction policy at a system-wide orientation after they were hired. (See B. Johnson Dep. 17:21–18:5, 20:11–20:20, Mar. 23, 2010, ECF No. 250–5.) Baptist DeSoto also conducted a facility-specific orientation, where employees received copies of the model exception log developed by human resources and instructions on how to complete it. (See id. 44:17–46:15.) The individual departments at Baptist DeSoto also conducted department-level orientations, where the automatic deduction policy was discussed. (See Barbaree Dep. 16:20–17:2, Mar. 23, 2010, ECF No. 250–6.) After those orientations, Baptist did not regularly assess employees' understanding of and compliance with the exception procedures and did not regularly discipline employees for working through meal breaks without reporting that time. (See id. 43:15–44:17.) Baptist's Policy Manual discussed the meal break policy, however, and was available on Baptist's intranet. (See id. 29:2–29:9.)

At a corporate level, Baptist did not train department managers on educating new employees about the automatic deduction policy and exception procedures during departmental orientations and did not monitor or audit those orientations. (See Rhea Dep. 25:5–26:15, 28:4–29:10, Mar. 22, 2010, ECF No.

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reverse the automatic deduction for meal breaks as the "exception procedures".

250–8.) Baptist instructed managers on the automatic deduction policy and exception procedures in their initial training class and, occasionally, at monthly meetings. (See B. Johnson Dep. 41:5–41:24.) In the training class, managers were told that they should use their department's process for exceptions and that employees would be paid for time worked during meal breaks. (See Barbaree 34:7–34:20.) Baptist did not regularly assess managers' understanding and departments' implementation of the automatic deduction policy and exception procedures. (See Garrison Dep. 29:12–29:20, 63:5–64:1; B. Johnson Dep. 43:21–44:17; 50:20–51:6.)

On July 16, 2009, the Court conditionally certified a class of hourly employees of Baptist DeSoto "who suffered automatic deductions for lunch or other breaks[,] but who actually worked all [or] part of one or more of those lunches or breaks" without receiving compensation. (See Order Granting in Part and Denying in Part Pl.'s Mot. for Conditional Certification and Notice 3, 19–20, ECF No. 46; Order Approving Notice and Notice Plan, ECF No. 49.) Since then, approximately two hundred current and former Baptist DeSoto employees have joined the collective action as opt-in plaintiffs (the "Opt-in Plaintiffs"). (See Notices of Consent to Join, ECF No. 40, ECF Nos. 51–59, ECF Nos. 59–83.) The Court granted summary judgment in favor of Baptist on White's individual FLSA claim on March 23, 2011, but the Opt-in Plaintiffs' claims remain before the Court. (See Order Granting Defs.' Mot. for Summ. J., ECF No. 258.)

II. Jurisdiction

Because White alleges violations of the FLSA, this Court has subject matter jurisdiction under the general grant of federal question jurisdiction in 28 U.S.C. § 1331.

III. Standard of Review

Section 216(b) of the FLSA permits employees to recover unpaid overtime compensation by suing an employer "in behalf of ... themselves and other employees similarly situated." 29 U.S.C. § 216(b). "Section 216(b) establishes two requirements for a representative action: 1) the plaintiffs must actually be 'similarly situated,' and 2) all plaintiffs must signal in writing their affirmative consent to participate in the action." Comer v. Wal–Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir.Mich.2006) (citing 29 U.S.C. § 216(b) and Hoffmann–La Roche, Inc., v. Sperling, 493 U.S. 165, 167–68 (1989)). Unlike a class action under Federal Rule of Civil Procedure 23, in a collective or representative action under the FLSA, similarly situated employees must "opt into" the action by filing written consents. Compare 29 U.S.C. § 216(b), with Fed.R.Civ.P. 23; see also Comer, 454 F.3d at 546. Employees named in the collective action complaint are called "named" or "lead" plaintiffs, and those who opt in by later

filing written consents are called "opt-in" plaintiffs. See Frye v. Baptist Mem. Hosp., No. 07–2708, 2010 WL 3862591, at *2 n.4 (W.D.Tenn. Sept. 27, 2010). Unlike absent class members in a Rule 23 class action, opt-in plaintiffs who file written consents and join the collective action are party plaintiffs. O'Brien v. Ed Donnelly Enters., 575 F.3d 567, 583 (6th Cir.2009) (citation omitted).

To determine whether plaintiffs are similarly situated, courts generally employ a two-stage inquiry. See id.; Comer, 454 F.3d at 546; Frye, 2010 WL 3862591, at *2. "The first takes place at the beginning of discovery. The second occurs after all of the opt-in forms have been received and discovery has concluded."[4] Comer, 454 F.3d at 546 (citation and internal quotation marks omitted).

At the first stage, courts apply a "fairly lenient" standard to determine whether plaintiffs are similarly situated, relying on the pleadings and any filed affidavits. See Comer, 454 F.3d at 547; Carter v. Jackson–Madison Cnty. Hosp. Dist., No. 1:10–cv–01155–JDB–egb, 2011 WL 1256625, at *13 (W.D.Tenn. Mar. 31, 2011); Pacheco v. Boar's Head

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[4] Technically, a motion to decertify the collective action triggers the second-stage analysis. For that reason, courts often refer to the second stage as the "decertification stage." See, e.g., Wilks v. Pep Boys, No. 3:02–0837, 2006 WL 2821700, at *2 (M.D.Tenn. Sept. 26, 2006).

Provisions Co., Inc., 671 F.Supp.2d 957, 959 (W.D.Mich.2009); Fisher v. Mich. Bell Tel. Co., 665 F.Supp.2d 819, 825 (E.D.Mich.2009) (citations omitted). Named plaintiffs need only make a "modest factual showing" of class-wide discrimination. See Comer, 454 F.3d at 546; Jackson, 2011 WL 1256625, at *14; Pacheco, 655 F.Supp.2d at 825 (citations omitted); cf. Fisher, 655 F.Supp.2d at 825 (noting that named plaintiffs must "submit evidence establishing at least a colorable basis for their claim that a class of similarly situated plaintiffs exists" (citation and internal quotation marks omitted)). If a court concludes that the potential opt-in plaintiffs are similarly situated to the named plaintiffs, the court conditionally certifies the class, and potential opt-in plaintiffs are provided notice and an opportunity to join the action by filing written consents. See Comer, 454 F.3d at 547; Carter, 2011 WL 1256625, at *18; Fisher, 655 F.Supp.2d at 828–29. Although courts typically grant conditional certification, that certification is "by no means final." See Comer, 454 F.3d at 547 (citation omitted).

At the second stage, courts apply a "stricter standard." Id.; Jordan v. IBP, Inc., 542 F.Supp.2d 790, 812 (M.D.Tenn.2008) ("The burden of demonstrating that class members are similarly situated is significantly higher at the decertification stage ...." (citation omitted)). Named plaintiffs "bear the burden of showing that the opt-in plaintiffs are similarly situated to the [m]." O'Brien, 575 F.3d at 584 (citation omitted). Because the second stage follows discovery, a court "has much more

information on which to base its decision" and "examine[s] more closely the question of whether particular members of the class are, in fact, similarly situated." Comer, 454 F.3d at 547 (citation and internal quotation marks omitted); see Frye, 2010 WL 3862591, at *2 (citations omitted); cf. White v. MPW Indus. Servs., 236 F.R.D. 363, 366 (E.D.Tenn.2006) (contrasting its first-stage analysis with the second-stage analysis and explaining that, at the second stage, a court "makes a factual determination on the similarly situated question" (citing Mooney v. Aramco Servs. Co, 54 F.3d 1207, 1213 (5th Cir.1995))). To avoid decertification, the named plaintiffs must introduce "substantial evidence" that the opt-in plaintiffs are similarly situated. Frye, 2010 WL 3862591, at * 2 (citations omitted); see Crawford v. Lexington–Fayette Urban Cnty. Gov't, No. 06–299–JBC, 2008 WL 2885230, at *5 (E.D.Ky. July 22, 2008) (citations omitted); cf. Heldman v. King Pharm., Inc., No. 3–10–1001, 2011 WL 465764, at *3 (M.D.Tenn. Feb. 2, 2011) (contrasting first-stage analysis with second-stage analysis and explaining that, at the second stage, a plaintiff must show "substantial evidence" (citing Frye, 2010 WL 3862591, at *2))).

Although the "similarly situated" requirement is elevated at the second stage, it remains less stringent than the requirement that common questions predominate in certifying class actions under Rule 23. O'Brien, 575 F.3d at 584 (citing Grayson v. K Mart Corp., 79 F.3d 1086, 1095–96 (11th Cir.1996)). Plaintiffs need not be identically

situated to proceed collectively. Comer, 454 F.3d at 546–47; Frye, 2010 WL 3862591, at *3; Crawford, 2008 WL 2885230, at *5 (citations omitted). At the second stage, "the question is simply whether the differences among the plaintiffs outweigh the similarities of the practices to which they were allegedly subjected." Monroe v. FTS USA, LLC, —— F.Supp.2d ——, 2011 WL 442050, at *12 (W.D.Tenn. Feb. 7, 2011) (citing Frye, 2010 WL 3862591, at *3); see also Wilks v. Pep Boys, No. 3:02–0837, 2006 WL 2821700, at *3 (M.D.Tenn. Sept. 26, 2006) (citation omitted).

If a court concludes that the plaintiffs are similarly situated, it denies the motion to decertify, and the action proceeds collectively. See Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218 (11th Cir.2001); Monroe, 2011 WL 442050, at *12, 15 (citations omitted). If the court concludes that plaintiffs are not similarly situated, it "decertifies the class, and the opt-in plaintiffs are dismissed without prejudice. The class representatives—i.e. the original plaintiffs—proceed to trial on their individual claims." Hipp, 252 F.3d at 1218 (citations and internal quotation marks omitted); Frye, 2010 WL 3862591, at *3, 10 (citation omitted); see also Alvarez v. City of Chicago, 605 F.3d 445, 450 (7th Cir.2010) (explaining that "[w]hen a collective action is decertified, it reverts to one or more individual actions on behalf of the named plaintiffs"); Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 916 n.2 (5th Cir.2008) (explaining that, if plaintiffs are not similarly situated, the court "must dismiss the opt-in

employees, leaving only the named plaintiff's original claims"); cf. O'Brien, 575 F.3d at 573 (affirming dismissal of the opt-in plaintiffs and noting that most later filed individual actions); Fox v. Tyson Foods, Inc., 519 F .3d 1298, 1301 (11th Cir.2008) (affirming decertification of an FLSA collective action, dismissal of the opt-in plaintiffs, and severance of named plaintiffs into multiple individual actions) (citations omitted).

IV. Analysis

A. Named Plaintiff's Lack of an FLSA Claim

At the decertification stage, the question is whether the "the opt-in plaintiffs are similarly situated to the lead plaintiffs." O'Brien, 575 F.3d at 584 (citation omitted). Baptist argues that, because the Court granted summary judgment in favor of Baptist on White's individual FLSA claim, she is not similarly situated to the Opt-in Plaintiffs and decertification is proper. (See Baptist's Reply 27–28.)

Where a named plaintiff's FLSA claim has failed, she "cannot represent others whom she alleged were similarly situated." See Grace v. Family Dollar Store, Inc. (In re Family Dollar FLSA Litig.), —— F.3d ——— , 2011 WL 989558, at *10 (4th Cir. Mar. 22, 2011). In In re Family Dollar, the Court of Appeals for the Fourth Circuit affirmed a district court's grant of summary judgment in favor of the defendant on the named plaintiff's FLSA claim. See id. at *9. Having concluded that the named plaintiff had no claim, the

court decided that it need not address whether the district court's refusal to certify her collective action was also proper because, "[w]ithout a viable claim," she could not have been similarly situated to the employees she sought to represent. See id.

The court's reasoning in In re Family Dollar comports with that of the Court of Appeals for the Sixth Circuit in O'Brien, which considered the converse of the facts in In re Family Dollar. See O'Brien, 575 F.3d at 586. In O'Brien, the Court of Appeals affirmed a district court's decertification of a collective action because the only opt-in plaintiff whose claims had not been previously mooted or claim-precluded had no viable claim "because she failed to allege that she suffered from either unlawful practice ." See id. Because the opt-in plaintiff had no claim, she was "clearly not similarly situated to the lead plaintiffs." Id. Considered together, In re Family Dollar and O'Brien stand for the proposition that named plaintiffs and opt-in plaintiffs must have viable FLSA claims to be deemed similarly situated and proceed collectively under Section 216. See In re Family Dollar, 2011 WL 989558, at *10; O'Brien, 575 F.3d at 586.

Although numerous Opt-in Plaintiffs have joined this collective action, White is the only named plaintiff. (See Compl. ¶ 1.) This Court granted summary judgment on White's FLSA claim because there was no evidence that she had performed work for which she was not properly compensated. See White v. Baptist Mem. Health Care Corp., No. 08–

2478, 2011 WL 1100242, at *7 (W.D.Tenn. Mar. 23, 2011). "Without a viable claim," White cannot be similarly situated to the Opt-in Plaintiffs she seeks to represent, whose FLSA claims have not been adjudicated on the merits. See In re Family Dollar FLSA Litig., 2011 WL 989558, at *10. Because White's FLSA claim failed on the merits, but the Opt-in Plaintiffs' claims have not been adjudicated, White cannot meet her burden of showing that she and Opt-in Plaintiffs are similarly situated. See In re Family Dollar, 2011 WL 989558, at *10; cf. O'Brien, 575 F.3d at 586. Decertification is proper.

B. Partial Decertification

In O'Brien, the Court of Appeals explained that, where some plaintiffs have not alleged violations of the FLSA, the "court should examine whether partial decertification is possible." O'Brien, 575 F.3d at 586. "The option of partial certification is important to consider, because it counters the argument that a collective action must be totally decertified if some members are not similarly situated to the others." Id. The court explained that "plaintiffs who are not similarly situated ... could be dismissed while keeping intact a partial class."

O'Brien did not consider the situation presented by this action—where a court has concluded on the merits that a named plaintiff has no FLSA claim, but the opt-in plaintiffs' FLSA claims have not been adjudicated on the merits. Indeed, in explaining that a court should consider decertification, the O'Brien

court implied that the named plaintiffs' FLSA claims must be viable: "Plaintiffs who do present evidence that they are similarly situated to the lead plaintiffs should not be barred from the opportunity to be part of a FLSA collective action, because the collective action serves an important remedial purpose." Id. (emphasis added).

Because White's individual FLSA claim has been dismissed, she is not similarly situated to the Opt-in Plaintiffs. See In re Family Dollar, 2011 WL 989558, at *10. Before the Court granted summary judgment on White's claim, however, she had responded to Baptist's motion to decertify and advanced various arguments on behalf of the Opt-in Plaintiffs in her capacity as named plaintiff. (See Pl.'s Resp.; Mem. in Supp. of Resp. to Def.'s Mot. to Decertify Collective Action, ECF No. 250–1 ("Pl.'s Mem.").) Because the remaining Opt-in Plaintiffs are party plaintiffs, the Court will consider White's arguments and the evidence in the record to decide whether some or all of the Opt-in Plaintiffs are similarly situated to one other such that, although White's individual FLSA claim has been adjudicated, partial decertification is possible. See O'Brien, 575 F.3d at 583, 585–86.

The Court of Appeals has not created "comprehensive criteria for informing the similarly-situated analysis." See id. at 585. Courts generally consider (1) the factual and employment settings of the individual plaintiffs, (2) the likely defenses that appear to be individual to each plaintiff, and (3) the degree of fairness and the procedural impact of

resolving the claims collectively. See id. at 584–85; Monroe, 2011 WL 442050, at *12; Frye, 2010 WL 3862591, at *3; Crawford, 2008 WL 2885230, at *5; Jordan, 542 F.Supp.2d at 812; Wilks, 2006 WL 2821700, at *3 (citations omitted).

1. Factual and Employment Settings

In considering plaintiffs' factual and employment settings, courts review issues such as location, job duties, supervision, and salaries. Frye, 2010 WL 3862591, at *3; Crawford, 2008 WL 2885230, at *5; Wilks, 2006 WL 2821700, at *3 (citations omitted). Baptist argues that the Opt-in Plaintiffs' disparate factual and employment settings make decertification proper. (See Mem. of Law and Facts in Supp. of Defs.' Mot. to Decertify Collective Action 10–43, ECF No. 233–1.) ("Baptist's Mem.") White argues that the purported differences among the Opt-in Plaintiffs' factual and employment settings are superficial and irrelevant because their "common theory exists without regard to job duties, location, or supervision." (See Pl.'s Mem. 14–28.)

Although the Opt-in Plaintiffs were all employees of Baptist DeSoto, each worked in one of more than sixty different departments at the hospital. (See Banks Decl. ¶ 3.) Their job duties varied significantly, depending on their departments. Some of the Opt-in Plaintiffs worked in specialized medical departments, focusing on patient care. (See, e.g., Corey Dep. 16:10–16:21, 18:11–20:18, ECF No. 234 (stating that she provided direct care to patients

while working in the "ICU step-down" department); see also Lee Dep. 31:1–31:11, Dec. 7, 2010, ECF No. 234; McPhail Dep. 41:20–43:23, ECF No. 234; Vierhout Dep. 20:25–21:4, ECF No. 234.) Other Opt-in Plaintiffs worked in non-medical departments, supporting the hospital's core function of providing patient care. (See, e.g., V. Johnson Dep. 26:9–27:23, Jan. 11, 2011, ECF No. 234 (stating that she did not provide direct care to patients while working in the admissions department); see also Howard Dep. 35:14–35:19, Dec. 12, 2010, ECF No. 234; McClore Dep. 18:12–18:24, Jan. 14, 2011, ECF No. 234.)

Within departments, job duties also varied. In departments focused on medical care, staff nurses worked "on the floor" and provided direct care to patients. (See, e.g., Corey Dep. 16:10–16:21, 18:11–20:18 (explaining that she assessed and monitored patients and administered their medications).) By contrast, unit coordinators provided administrative support to those providing direct care. (See, e.g., Griggs Dep. 28:25–30:6, July 31, 2010, ECF No. 234 (explaining that her primary duty as a unit coordinator was entering orders in a computer).) The duties of some Opt-in Plaintiffs varied from shift to shift depending on their department's needs. (See, e.g., Pipkin Dep. 41:7–42:14, Nov. 16, 2010, ECF No. 234 (explaining that, as a charge nurse, she generally assigned patients to the other nurses and managed the unit but that, when the unit was busy, she also provided direct care to patients).) The job duties of Opt-in Plaintiffs who worked in non-medical departments also varied. (See, e.g., Ester

Dep. 27:10–33:9, Oct. 13, 2010, ECF No. 234 (explaining that, as a "dipper" and dish washer in the food and nutrition department, she worked exclusively in the kitchen and dish room and did not provide patient care); Mitchell Dep. 50:5–50:12, 52:3–54:8, Sept. 3, 2010, ECF No. 234 (explaining that, as a catering associate in the food and nutrition department, she delivered food directly to patients in the hospital).)

Differences in the Opt-in Plaintiffs' job duties are highly relevant to their claims that they worked during meal breaks without compensation because their job duties dictated whether and why they experienced missed or interrupted meal breaks. Some Opt-in Plaintiffs working in medical departments did not have scheduled meal breaks and had to care for their patients during meal breaks. (See, e.g., Corey Dep. 46:9–47:23.) By contrast, some Opt-in Plaintiffs working in non-medical departments had scheduled meal breaks. (See, e.g., Howard Dep. 46:7–47:15.) Some Opt-in Plaintiffs in non-medical departments were required to carry pagers during their shifts, and their meal breaks were interrupted. (See, e.g., Mitchell Dep. 54:9–55:11 (explaining that, as a catering associate, she carried a pager and that her meal breaks would be occasionally interrupted by requests for service she received on the pager).)

Because there was no central policy for reporting time worked during meal breaks, Opt-in Plaintiffs reported missed and interrupted breaks in different ways, depending on the systems their departments used. (See Banks Decl. ¶ 8.) Many departments used exception logs. (See id.) In some departments, if an hourly employee experienced a missed or interrupted meal break, management attempted to schedule a later meal break, and, if that were not possible, the employee recorded the missed or interrupted break in an exception log. (See Simpson Decl. ¶ 4.) In other departments, employees verbally informed their supervisors about time worked during meal breaks. (See V. Johnson Dep. 74:15–74:20; King Dep. 9:18–10:3.)

Despite these differences, White argues that the Opt-in Plaintiffs are similarly situated because the Opt-in Plaintiffs can "demonstrate the existence of common policies or practices with respect to missed and interrupted meal breaks." (See Pl.'s Mem. 18.) Specifically, White argues that all of the Opt-in Plaintiffs were subject to Baptist's automatic deduction policy, its "attempt [ ] to shift the burden of ensuring they are paid for all time worked from [Baptist] to them, and Baptist's "inadequate education, training, and monitoring" about its automatic deduction policy and exception procedures. (See id. at 26–27.) According to White, Baptist's policies and practices make the Opt-in Plaintiffs similarly situated. (See id.)

Although showing a "unified policy of violations" is not required, see O'Brien, 575 F.3d at 585, a material factor in considering plaintiffs' factual and employment settings is whether they were affected by a single decision, policy, or plan. See Frye, 2010 WL 3862591, at *5; Crawford, 2008 WL 2885230, at *4; Wilks, 2006 WL 2821700, at *3 (citations omitted). "[I]t is clear that plaintiffs are similarly situated when they suffer from a single, FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs." O'Brien, 575 F.3d at 585. "The existence of this commonality may assuage concerns about plaintiffs' otherwise varied circumstances." Wilks, 2006 WL 2821700, at *3 (citations omitted).

To bind together otherwise differently situated employees, an alleged common policy must potentially violate the FLSA. See O'Brien, 575 F.3d at 585; see Oetinger v. First Residential Mortg. Network, Inc., No. 3:06–CV–381–H, 2009 WL 2162963, at *3 (W.D.Ky. July 16, 2009) (explaining that "companies may indeed apply company-wide policies to their employees, but these policies must cause the alleged FLSA violation for the policy to be considered as a factor in determining whether employees are 'similarly situated' for purposes of bringing a collective action"). Standing alone, an employer policy providing automatic deductions for meal breaks does not violate the FLSA. See Fengler v. Crouse Health Found., Inc., 595 F.Supp.2d 189, 195 (N.D.N.Y 2009); see also Wage and Hour Div.,

U.S. Dep't of Labor Fact Sheet No. 53, The Health Care Industry and Hours Worked (July 2009), ECF No. 373–16, available at http:// www.dol.gov/whd/regs/compliance/ whdfs53.pdf (recognizing that the FLSA permits automatic deduction policies) ("DOL Fact Sheet"). Therefore, Baptist's mere adoption of a system that, by default, deducts meal breaks from its employees' compensation does not constitute a unified policy of FLSA violations capable of binding together the Opt-in Plaintiffs.

Where an employer's formal policy is to compensate employees for all time worked, courts have generally required a showing that the employer's "common or uniform practice was to not follow its formal, written policy." Pacheco, 671 F.Supp.2d at 959. There must be a showing that "enforcement of the automatic deduction policy created a policy-to-violate-the-policy." See Saleen v. Waste Mgmt., Inc., No. 08–4959, 2009 WL 1664451, at *4 (D. Minn. June 15, 2009) (citing Thompson v. Speedway SuperAmerica, LLC, No. 08–CV–1107 (PJS/RLE), 2009 WL 130069, at *2 (D.Minn. Jan. 9, 2009)) (denying conditional certification where employees failed to show a corporate decision by employer not to follow its formal policy of paying for time worked during meal breaks).

Baptist's official policy is to compensate employees for time worked during meal breaks. (See Banks Decl. ¶ 6.) There is no direct evidence that Baptist maintained a de facto policy to the contrary.

Most Opt-in Plaintiffs deposed by Baptist admit that, when they used their departments' exception procedures, Baptist paid them for time worked during meal breaks. (See Collective Ex. 9, ECF No. 236.) Nor is there circumstantial evidence that would permit the Court to infer any illicit de facto policy on Baptist's part. Most Opt-in Plaintiffs deposed by Baptist admit that they were never discouraged from or retaliated against for reporting time worked during meal breaks. (See Collective Ex. 8, ECF No. 235–1 .)

White also argues that the Opt-in Plaintiffs are similarly situated because they were all subject to Baptist's "attempt to shift enforcement of the FLSA ... to its employees." (See Pl.'s Mem. 21–26.) White emphasizes that Baptist required its employees to self-report time, although it was aware that they were working through meal breaks and that Baptist could have implemented a more accurate system to monitor employees and ensure they were compensated. (See id. at 22–23.) The essence of White's argument is that, by shifting the burden to its employees, Baptist abdicated its FLSA duties. (See id.)

Under the FLSA, management has a duty "to exercise its control and see that the work is not performed if it does not want it to be performed." 29 C.F.R. 785.13. An employer "cannot sit back and accept the benefits [of work] without compensating for them." Id . ("The mere promulgation of a rule against such work is not enough. Management has

the power to enforce the rule and must make every effort to do so.") An employer's failure "to police and oversee hourly workers and their supervisors to ensure that[,] when working through or during unpaid meal breaks[,] they are compensated ..." potentially violates the FLSA. Fengler, F.Supp.2d at 195; see also DOL Fact Sheet (explaining that an employer implementing an automatic deduction policy for meal breaks remains "responsible for ensuring that the employees take ... meal break[s] without interruption").

At least two courts have conditionally certified collective actions based on "shifting the burden" theories similar to White's. See Kuznyetsov v. W. Penn Allegheny Health Sys., No. 2:09–cv–00379–DWA, 2009 WL 1515175, at *5, (W.D. Pa. June 1, 2009); Camesi v. Univ. of Pittsburgh Med. Ctr., No. 09–85J, 2009 WL 1361265, at *4 (W.D.Pa. May 14, 2009). The defendants in these cases were medical centers that required their hourly employees to initiate cancellation of their automatic deductions when they worked through meal breaks. See Kuznyetsov, 2009 WL 1515175, at *3–5; Camesi, 2009 WL 1361265, at *1–2. In both cases, however, the courts spoke at the lenient first stage of the similarly situated analysis, which they recognized in granting conditional certification. See Kuznyetsov, 2009 WL 1515175, at *5 ("Arguably, Defendants' policies shift the responsibility to the employees. Consequently, I find this evidence is sufficient at this stage to proceed with conditional certification.") (emphasis added); Camesi, 2009 WL 1361265, at *4

(concluding that the medical center's "arguable attempt to shift statutory responsibilities to [its] workers constitutes an 'employer policy' susceptible to challenge at this stage in the proceedings.") (emphasis added).

Because this action is at the second stage, the burden is higher. At the first stage, plaintiffs need make only a "modest factual showing" that they are similarly situated. See Comer, 454 F.3d at 546; Jackson, 2011 WL 1256625, at *14; Pacheco, 655 F.Supp.2d at 825 (citations omitted); cf. Fisher, 655 F.Supp.2d at 825. At the second stage, plaintiffs must offer substantial evidence that they are, in fact, similarly situated. Comer, 454 F.3d at 547. See Heldman, 2011 WL 465764, at *3; Frye, 2010 WL 3862591, at * 2; Crawford, 2008 WL 2885230, at *5.

At this stage of the litigation, to support a "shifting the burden" theory capable of binding the Opt-in Plaintiffs together, there must be "substantial evidence" that Baptist, in fact, shirked its FLSA responsibilities. As this Court explained in Frye,

> A natural consequence of any employer's adopting an automatic deduction policy is that employees will be required to cancel the deduction if they work through meal breaks. In this sense, any automatic deduction policy 'shifts the burden' to employees. Because the FLSA permits automatic deduction policies, standing alone, this

> so-called 'burden shift' cannot form the basis of an alleged FLSA violation.

Frye, 2010 WL 3862591, at *7. Standing alone, Baptist's requiring its employees to self-report time worked during meal breaks to ensure they received compensation does not support a common theory of statutory violations capable of overcoming the Opt-in Plaintiffs' otherwise disparate factual and employment settings. Therefore, the Opt-in Plaintiffs are not similarly situated based on that fact alone.

White attempts to bolster her "shifting the burden" theory by pointing to Baptist's "inadequate education, training, and monitoring" about its automatic deduction policy and exception procedures. (Pl.'s Mem. 18–21, 26.) According to White, because of those inadequate measures, "Opt-in [P]laintiffs from across all departments consistently claim that they were not made aware of the general meal break policy ... or their departments' implementation of that policy during orientation." (See id. at 18.) White also argues the Opt-in Plaintiffs frequently learned about the policy and procedures from their non-supervisory co-workers and that they were "consistently unaware of the accurate meaning of an uninterrupted meal break ... or of their ability to note partially missed meal breaks on exception logs." (See id . at 19.)

Because at least fifteen of the Opt-in Plaintiffs make those claims, there is some support for them.[5] (See Collective Ex. H, ECF No. 250–9.) However, the vast majority of the Opt-in Plaintiffs deposed by Baptist testified that they were aware of their departments' exception procedures for reporting time worked during meal breaks, and many of them conceded that they used those procedures. (See Collective Ex. 7, ECF No. 235.) If Baptist's education, training, and monitoring were, in fact, inadequate, there would be more evidence that the Opt-in

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[5] Baptist argues that the Court should not consider the declarations in support of White's arguments because they were submitted through the ECF electronic filing system, but do not include scanned ink signatures. (See Baptist's Reply 14–15.) Under the local rules of this district, third-party affidavits "are to be filed electronically as a scanned image." See W.D. Tenn. Civ. R. Electronic Case Filing (ECF) Policies & Procedures 10.5. White's declarations were submitted as scanned images, but the signatures are type-written, not handwritten. (See Collective Ex. H.) Although the declarations are arguably in violation of the local rules, other district courts have overlooked similar technical shortcomings. See Sammons v. Baxter, No. 1:06–cv–137, 2007 WL 325752, at *4 (E.D.Tenn. Jan. 31, 2007) (considering a plaintiff's affidavit although it was "not a scanned version of the original affidavit and [did] not contain the actual signature of the affiant," in violation of the court's electronic case filing rules and procedures). The Court will consider White's submitted declarations.

Plaintiffs were unaware of Baptist's policies. That a handful of Opt-in Plaintiffs were unaware of the meal break policy and exception log procedures does not constitute substantial evidence that Baptist shirked its FLSA duties and that the otherwise disparately situated Opt-in Plaintiffs are, in fact, similarly situated. See Comer, 454 F.3d at 547; Heldman, 2011 WL 465764, at *3; Frye, 2010 WL 3862591, at * 2; Crawford, 2008 WL 2885230, at *5.

Where employees sometimes use procedures to report time worked outside their normal shifts, but neglect to do so for all time worked, an employer has no reason to know of the unreported time. Cf. Wood v. Mid–Am. Mgmt. Corp., 192 F. App'x. 378, 380 (6th Cir.2006) (concluding that, because an employee had reported some of his overtime hours, the employer "had no reason to suspect that he neglected to report other overtime hours"). Many of the employees deposed by Baptist admit that they sometimes used the exception procedures. (See Collective Ex. 7.) Because many employees admit that they sometimes used the exception procedures, Baptist had no reason to know that uncompensated work was regularly occurring during meal breaks, that employees were generally unaware of how to use the exception procedures, and that more education, training, and monitoring were needed to improve compliance with its policies. Cf. Wood, 192 F. App'x at 380 ("Quite sensibly, 'an employer cannot suffer or permit an employee to perform services about which the employer knows nothing.' ") (quoting Holzapfel v. Town of Newburgh, 145 F.3d 516, 524 (2d Cir.1998)).

Baptist has shown that the Opt-in Plaintiffs are disparately situated with regard to location, job duties, and supervision. The record contains little evidence of a common FLSA-violative policy or common theory of FLSA violations capable of binding them together. Based on the record before the Court, the differences among the Opt-in Plaintiffs' factual and employment settings outweigh the similarities between them. The first factor weighs in favor of decertification.

2. Individualized Defenses

The second relevant factor is the extent to which defenses appear to be individual to each plaintiff. Wilks, 2006 WL 2821700, at *7. The presence of many individualized defenses makes a representative class unmanageable, and "several courts have granted motions for decertification on this basis." Crawford, 2008 WL 2885230, at *9 (quoting Moss v. Crawford & Co., 201 F.R.D. 398, 410 (W.D.Pa.2000)).

Baptist argues that its defenses are "just as disparate and individualized as the facts and circumstances of the" Opt-in Plaintiffs' employment. (See Baptist's Mem. 43–60.) According to Baptist, it would be forced to conduct individualized evidentiary inquiries to determine, among other things, whether each Opt-in Plaintiff experienced missed or interrupted meal breaks, knew of or used the exception procedures, was discouraged from using those procedures, and, ultimately, worked enough

hours to be eligible for overtime compensation. (See id. at 43–44.) Baptist also asserts that it would raise defenses based on bankruptcy, the statute of limitations, and credibility that are individual to each plaintiff. (See id. 45–57.) White argues that Baptist's arguments do not support decertification because they are common to any FLSA collective action. (See Pl.'s Mem. 28–31.)

That a defendant, and a court, may be required to conduct individualized evidentiary inquiries into each opt-in plaintiff's FLSA claim does not necessarily make collective treatment improper. See O'Brien, 575 F.3d at 584–85 (explaining that "such a collection of individualized analyses is required of the district court"); Monroe, 2011 WL 442050, at *14 (explaining that "many of the purported defenses ... [were] clearly amenable to classwide determination"); Crawford, 2008 WL 2885230, at *10–11 (noting that many of the asserted defenses were "uniform and suitable for assertion against each plaintiff who testifies at trial"). If the plaintiffs' claims are "unified by common theories of ... statutory violations," they are similarly situated, "even if the proofs of these theories are inevitably individualized and distinct." See O'Brien, 575 F.3d at 585.

Bankruptcy and credibility defenses do not necessarily preclude collective treatment. See Crawford, 2008 WL 2885230, at *10–11 (explaining that "contradictions in testimony among the plaintiffs are matters of credibility for the factfinder,

not individualized defenses" and that the "lack of standing due to bankruptcy filings would not require individualized proof at trial") (citations omitted); cf. Monroe, 2011 WL 442050, at *14 (explaining that credibility was an issue for the finder of fact that could be raised against opt-in plaintiffs testifying in a representative capacity at trial). A defense based on the statute of limitations, including whether the FLSA's two-year limitations period for non-willful violations or three-year limitations period for willful violations applies, also does not preclude collective treatment. Cf. Monroe, 2011 WL 442050, at *14 (explaining that whether "management knew of the methods being used to deny overtime pay and whether Defendants acted willfully" were "clearly amenable to classwide determination").

If the Opt-in Plaintiffs' factual and employment settings were similar, the defenses Baptist raises would not make a collective action unmanageable. See O'Brien, 575 F.3d at 584–85; Monroe, 2011 WL 442050, at *14; Crawford, 2008 WL 2885230, at *10. Unlike the plaintiffs in O'Brien, Monroe, and Crawford, the record does not contain substantial evidence that the Opt-in Plaintiffs are similarly situated. See O'Brien, 575 F.3d at 584–85; Monroe, 2011 WL 442050, at *13; Crawford, 2008 WL 2885230, at *5–9. As in Frye, although Baptist's purported individualized defenses would not preclude collective action if the Opt-in Plaintiffs were similarly situated, those defenses do not necessarily weigh in favor of collective treatment. See Frye, 2010 WL 3862591, at *8–9. The second factor is neutral.

3. Fairness and Manageability

To analyze the third factor, courts consider whether collective treatment comports with the purposes of the FLSA, which Congress intended to be "broadly remedial and humanitarian." Wilks, 2006 WL 2821700, at *8 (quoting Donovan v. Brandel, 736 F.2d 1114, 1116 (6th Cir.1984)). Courts balance the reduced cost to individual plaintiffs and any increased judicial utility that might result from collective action against the potential detriment to the defendant and any possible judicial inefficiency. See id. (citing Hoffman–La Rouche, Inc. v. Sperling, 493 U.S. 165, 170 (1989)); see also Crawford, 2008 WL 2885230, at * 11 (explaining that, in analyzing the third factor, courts "consider that the primary objectives of a § 216(b) collective action are: (1) to lower costs to the plaintiffs through the pooling of resources; and (2) to limit the controversy to one proceeding which efficiently resolves common issues of law and fact that arose from the same alleged activity" (citation and internal quotation marks omitted))). As a remedial statute, the FLSA "must not be interpreted or applied in a narrow, grudging manner." Dunlop v. Carriage Carpet Co., 548 F .2d 139, 144 (6th Cir.1977). However, "the remedial nature of the FLSA, standing alone, does not justify allowing a case to proceed collectively." See

Crawford, 2008 WL 2885230, at * 11 (citation and internal quotation marks omitted).

Baptist argues that, because of the Opt-in Plaintiffs' varied employment settings and its individualized defenses, the collective action would "consist of hundreds of 'mini-trials' in which each [Opt-in] Plaintiff attempted to prove a series of small, off-the-clock claims" and would require it to depose nearly every Opt-in Plaintiff in preparation. (See Baptist's Mem. 60–61.) White argues that the case should proceed collectively because, it if were decertified and the Opt-in Plaintiffs filed individual claims, each would have to establish proof about Baptist's automatic deduction policy, because that policy forms the basis of each of their claims. (See Pl.'s Mem. 31–34.) White also argues that, because the automatic deduction policy was implemented at a departmental level, "representative testimony would be exceedingly manageable." (See id. at 32.)

That a collective action might result in "mini-trials" does not necessarily justify decertification. See Monroe, 2011 WL 442050, at *14. Where a collective action is decertified, and the opt-in plaintiffs file individual claims, the claims that would otherwise have been "mini-trials" within the collective action become their own independent actions. See Monroe, 2011 WL 442050, at *14. Where opt-in plaintiffs have shown that they are similarly situated, plaintiffs are deprived of the benefit of pooling their resources and judicial economy is reduced. See id. ("If not addressed as a collective action, the claims of the

plaintiff class would have to be heard in individual suits—perhaps requiring more than 300 mini-trials."); Crawford, 2008 WL 2885230, at * 11–12 ("Not only would decertification place each plaintiff back at square one without the benefit of pooled resources, but also the court would be required to consider the same common question of whether the defendant had a de facto policy or practice of denying the plaintiffs a bona fide meal period.") Because White has not shown that the Opt-in Plaintiffs are similarly situated, however, there is no judicial economy to be gained by allowing their claims to proceed collectively. The only possible results are unfairness to Baptist and manageability problems for the Court. See Frye, 2010 WL 3862591, at *11–12.

White argues that representative testimony at a departmental level would resolve any fairness and manageability issues. (See Pl.'s Mem. 32.) Although representative testimony could theoretically assuage the Court's concerns, White has not directed the Court to any deposition testimony that would be representative. In addressing the Opt-in Plaintiffs' factual and employment circumstances, the only evidence she submits are declarations, not depositions. (See id. 14–28.) If representative testimony that would resolve the fairness and manageability issues in this litigation were readily available, the Court would expect White to rely on that testimony to support her argument that the Opt-in Plaintiffs are similarly situated. There is no representative testimony before the Court that would

resolve the fairness and manageability issues inherent in proceeding collectively.[6] The third factor weighs in favor of decertification.

No substantial evidence of a common policy or theory of FLSA violations overcomes the Opt-in Plaintiffs' otherwise disparate and factual employment settings. Although individualized defenses would not preclude proceeding collectively, because the Opt-in Plaintiffs are not similarly situated, doing so would be unfair to Baptist and inefficient for the Court. On balance, the differences among the Opt-in Plaintiffs outweigh the similarities of the practices to which they were allegedly subjected. See Monroe, 2011 WL 442050, at *12. Baptist's motion to decertify is well-taken.

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[6] For the same reason, White's argument for partial decertification of the Opt-in Plaintiffs based on department is not well-taken. (See Pl.'s Resp. 18.) White argues that any differences among the Opt-in Plaintiffs "would support the creation of various sub-classes from each department or floor rather than the complete decertification of the collective action." (Id.) Because White has not proffered testimony that would be representative of the departmental sub-classes she proposes, partial decertification would not resolve the fairness and manageability issues in this litigation.

V. Conclusion

Because White no longer has an FLSA claim, she is not similarly situated to the Opt-in Plaintiffs. Considering the Opt-in Plaintiffs themselves, there is not substantial evidence that they are similarly situated to one other. Decertification is proper.

Baptist's Motion is GRANTED. The claims of all plaintiffs other than White are DISMISSED WITHOUT PREJUDICE.

So ordered.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

Case No. 08–2478

MARGARET WHITE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF,

v.

BAPTIST MEMORIAL HEALTH CARE CORPORATION, AND BAPTIST MEMORIAL HOSPITAL–DESOTO, INC., DEFENDANTS

March 23, 2011

Order Granting Defendants' Motion for Summary Judgment

SAMUEL H. MAYS, JR, District Judge.

Plaintiff Margaret White ("White") alleges that Defendants Baptist Memorial Health Care Corporation and Baptist Memorial Hospital–DeSoto, Inc. ("Baptist Desoto") (collectively, "Baptist") violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, et. seq., by failing to compensate her

and other similarly situated hourly employees for all hours worked. (See Compl. ¶¶ 1–2, ECF No. 1.)

Before the Court is Baptist's March 23, 2010 motion for summary judgment on White's individual FLSA claim. (See Defs.' Mot. for Summ. J., ECF No. 90.) White responded in opposition on August 16, 2010. (See Pl.'s Resp. to Defs.' Mot. for Summ. J., ECF No. 122 .) Baptist replied on September 3, 2010. (See Reply to Pl.'s Resp. to Defs.' Mot. for Summ. J., ECF No. 130.) For the following reasons, Baptist's motion is GRANTED.

I. Background[1]

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[1] All facts in this Part come from Baptist's Statement of Undisputed Material Facts. (See Statement of Undisputed Facts, ECF No. 90–1.) Because White has not responded to Baptist's statement, Baptist's facts are deemed admitted. See W.D. Tenn. Civ. R. 7.2(d)(3) (requiring a party opposing summary judgment to respond to the moving party's statement of undisputed facts "by affixing to the response copies of the precise portions of the record relied upon to evidence ... that the ... designated material facts are at issue"); Akines v. Shelby Cnty. Gov't, 512 F.Supp.2d 1138, 1147–48 (W.D.Tenn.2007) (explaining that, where the non-moving party fails to follow Local Rule 7.2(d)(3), courts in this judicial district "consider the [moving party's] statement of undisputed material facts as having been admitted").

From August 2005 through August 2007, White worked as a nurse at Baptist DeSoto. (See Statement of Undisputed Facts ¶ 1, ECF No. 90–1.) ("Facts") While employed by Baptist, White primarily worked in the "fast track" area of the Baptist DeSoto emergency department, where she handled patients who had come to the emergency department with relatively minor health issues. (Id. ¶ 2.) White also "floated" in the emergency department from the beginning of her shift at 6:45 a.m. until the fast track area opened at 10:00 a.m. (Id. ¶ 3.) While floating, White assisted with triage, admissions, and charts. (Id.)

During her September 2005 orientation, shortly after starting her employment, White received a copy of Baptist's employee handbook (the "Handbook"). (See id. ¶ 4.) According to the Handbook, employees working shifts of six or more hours were to receive an unpaid meal break period that would be automatically deducted from their pay checks. (See id. ¶ 5.) The Handbook provided that, if an employee missed her meal break or if her break were interrupted, due to her workload, staffing shortages, or another reason, the employee would receive compensation for the time worked. (Id.) On September 16, 2005, White signed an orientation checklist stating that her supervisor, Chad Jones, had reviewed various Baptist policies with her, including the meal break policy. (See id. ¶ 6.)

White was aware that, if she worked any time in addition to the normal hours of her shift, she was to

record that time in an "exception log" so that she would receive compensation for it. (Id. ¶ 7.) White also knew that, if she worked through or during a meal break, she was to report that time in the exception log. (Id.) Baptist employees were instructed to record in the exception log any and all time spent performing work during meal breaks, whether that work resulted in a meal break being completely missed or only interrupted. (Id. ¶ 8.)

White used the exception log to record instances where she had missed her meal break in its entirety and where her break had been interrupted. (Id. ¶ 9.) According to White, when she used the exception log to record meal breaks missed because her entire unit had worked through them, she received full compensation for the time she had recorded and worked. (Id. ¶ 10.) Although she alleges that she was not paid on certain occasions when she had recorded that she had missed her meal break individually, White has also admitted that, when she recorded a "no lunch" entry in the exception log on February 23, 2007, she was paid for that time. (Id. ¶ 11.) Other entries in the exception log demonstrate that White's entire unit did not miss its meal break that day. (Id.)

At some point during her employment, White stopped recording her missed meal breaks in the exception log, although she had been told to record all hours that she worked. (Id. ¶ 15.) White does not know when she experienced missed or interrupted meal breaks and was not compensated for that work. (Id. ¶ 16.) She did not keep records of instances

where she was not compensated for work performed during meal breaks. (Id.)

In addition to the exception log, White was aware of the general procedure to report and correct payroll mistakes. (See id. ¶ 12.) She knew that she could report a payroll issue to a nurse manager, who would then resolve the issue. (See id.) Although White acknowledges that, when she used that procedure, mistakes in her compensation were "handled immediately," she did not use it to address Baptist's alleged failure to compensate her for missed meal breaks because she felt she would be "fighting an uphill battle." (Id. ¶¶ 12–13.)

II. Jurisdiction

Because White alleges violations of the FLSA, this Court has subject matter jurisdiction under the general grant of federal question jurisdiction in 28 U.S.C. § 1331.

III. Standard of Review

Under Federal Rule of Civil Procedure 56, the party moving for summary judgment "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden–Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir.1986). The moving party can meet this burden by pointing out to

the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of her case. See Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir.1989).

When confronted with a properly supported motion for summary judgment, the respondent must set forth specific facts showing that there is a genuine issue for trial. A genuine issue for trial exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). One may not oppose a properly supported summary judgment motion by mere reliance on the pleadings. See Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Instead, the nonmovant must present "concrete evidence supporting [her] claims." Cloverdale Equip. Co. v. Simon Aerials, Inc., 869 F.2d 934, 937 (6th Cir.1989) (citations omitted). The district court does not have the duty to search the record for such evidence. See InterRoyal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir.1989). The nonmovant has the duty to point out specific evidence in the record that would be sufficient to justify a jury decision in her favor. See id. "Summary judgment is an integral part of the Federal Rules as a whole, which are designed to secure the just,

speedy, and inexpensive determination of every action[,] rather than a disfavored procedural shortcut." FDIC v. Jeff Miller Stables, 573 F.3d 289, 294 (6th Cir.2009) (internal quotation marks and citations omitted).

IV. Analysis

Congress enacted the FLSA in 1938 to provide a "minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). "Consistent with this goal, the [FLSA] requires employers to pay their employees time-and-a-half for work performed in excess of forty hours per week." Wood v. Mid–America Mgmt. Corp., 192 F. App' x 378, 379–80 (6th Cir.2006) (quoting Acs v. Detroit Edison Co., 444 F.3d 763, 764–65 (6th Cir.2006)) (internal quotation marks omitted); see 29 U.S.C. § 207(a)(1). To establish a prima facie case for relief under the FLSA, an employee "must prove by a preponderance of evidence that he or she 'performed work for which he [or she] was not properly compensated.' " Myers v. Copper Cellar Corp., 192 F.3d 546, 551 (6th Cir.1999) (citing Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 686–87, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), superseded by statute on other grounds as stated in Carter v. Panama Canal Co., 463 F.2d 1289, 1293, (D.C.Cir.1972)); see also O'Brien v. Ed Donnelly Enters., 575 F.3d 567, 602 (6th Cir.2009) (citations omitted).

Baptist argues that, because White failed to report her missed or interrupted meal breaks in the

exception log, she cannot show by a preponderance of the evidence that she performed uncompensated work in excess of forty hours per week. (See Mem. in Supp. of Defs.' Mot. for Summ. J. 10–12, ECF No. 90–1.) ("Baptist's Mem.") Although White has acknowledged that she has no records that would show when she worked during meal breaks without receiving compensation (see Facts ¶¶ 15–16), she argues that there are two genuine issues of material fact. The first is whether her reporting missed and interrupted meal breaks in the exception log would have been "futile." (See Mem. in Supp. of Pl.'s Resp. to Defs.' Mot. for Summ. J. 5–7, ECF No. 122–1.) ("Pl.'s Mem.") The second is whether employees were instructed to report "partially missed breaks" in the exception log. (See id. 7–8.)

Under FLSA regulations, "[w]ork not requested but suffered or permitted is work time" if the "employer knows or has reason to believe that [the employee] is continuing to work." 29 C.F.R. § 785 .11. That said, "the employee bears some responsibility for the proper implementation of the FLSA's overtime provisions." Wood, 192 F. App'x at 381. "An employer cannot satisfy an obligation that it has no reason to think exists. And an employee cannot undermine his employer's efforts to comply with the FLSA by consciously omitting overtime hours for which he knew he could be paid." Id.

Courts in this circuit have denied recovery in FLSA cases where an employee is aware of her employer's system for reporting work that falls

outside the employee's normal, forty-hour shift but fails to report that work. See id., 192 F. App'x at 380–81; Berger v. Cleveland Clinic Found., No. 1:05 CV 1508, 2007 U.S. Dist. LEXIS 76593, at *37–40, 2007 WL 2902907 (N.D.Ohio Sept. 29, 2007). In Wood, the Sixth Circuit affirmed a district court's grant of summary judgment in favor of an employer where an employee had reported some, but not all, of his overtime work and the overtime work consisted of duties similar to those the employee performed during his regular hours. See Wood, 192 F. App'x at 380–81 (explaining that "an employee must show that the employer knew or should have known that he was working overtime or, better yet, he should report the overtime hours himself"). In Berger, a district court granted summary judgment in favor of an employer where an employee knew that he could be reimbursed for missing full lunch breaks but nonetheless failed to report them. See 2007 U.S. Dist. LEXIS 76593, at *39, 2007 WL 2902907 (rejecting the employee's argument that reporting those missed lunches would have been futile).

Although Baptist automatically deducted meals breaks from employees' compensation, it also maintained a policy of compensating employees for all hours they worked. (See Facts ¶ 5.) Whether an employee missed her meal break entirely or merely experienced an interruption, she was to receive compensation. (See id.) White has admitted that she knew she was to report any time she worked during meal breaks in the exception log. (See id. ¶ 7.)

Despite her knowledge of Baptist's policy, White argues that using the exception log for missed meal breaks was futile because she was required to obtain the approval of her supervisor when recording missed breaks in the log. (See Pl.'s Mem. 7.) According to White, "[i]f an employee is told that they [sic] need supervisory approval of an exception, and no supervisor is willing to approve that exception, a jury could easily determine that use or attempted use of the [exception log] is futile." (See id.) If using the exception log were found to be futile, Baptist's records would be "inaccurate or inadequate," White would be able to prove her lost compensation by submitting an estimate of her damages, and Baptist would be required to negate that estimate. (See id.)

White correctly argues that, "if the employer kept inaccurate or inadequate records, the plaintiff's burden of proof is relaxed, and, upon satisfaction of that relaxed burden, the onus shifts to the employer to negate the employee's inferential damage estimate." Myers, 192 F.3d at 551 (citation omitted). That burden-shifting framework, first articulated by the Supreme Court in Mt. Clemens Pottery, 328 U.S. at 688, applies only to a plaintiff's ability to prove damages, see O'Brien, 575 F.3d at 603. "Mt. Clemens Pottery does not help plaintiffs show that there was a violation under the FLSA. It would only allow them to prove damages by way of estimate, if they had already established liability." Id.

White's futility argument does not establish that she performed work for which she was not compensated for at least two reasons. First, the facts before the Court demonstrate that, when White used the exception log, she received full compensation. (See Facts ¶ 9.) Although White maintains that she received compensation only for meal breaks that her entire unit missed, the undisputed facts demonstrate that, on at least one occasion, February 23, 2007, White reported a "no lunch" in the exception log and received compensation for that missed meal break, although her entire unit did not miss it. (See id. ¶¶ 10–11.) That demonstrates that using the exception log was not futile.

Second, "ceasing to keep track of one's missed lunches does not solve the problem of not being reimbursed, but instead precludes the possibility of future reimbursement by preventing the employer from discovering the unpaid work." See Berger, 2007 U.S. Dist. LEXIS 76593, at *39, 2007 WL 2902907. By failing to make use of the exception log, White prevented Baptist from knowing whether it owed her overtime compensation under the FLSA. See Wood, 192 F. App'x at 381. There is no evidence that White otherwise notified Baptist of particular times when she worked during her meal breaks and no evidence that Baptist had knowledge of those times. Because "[a]n employer cannot satisfy an obligation that it has no reason to think exists," White's futility argument does not allow her to establish Baptist's liability under the FLSA. See id.; see also Berger,

2007 U.S. Dist. LEXIS 76593, at *39, 2007 WL 2902907.

White attempts to distinguish her futility argument from the plaintiff's argument in Berger, 2007 U.S. Dist. LEXIS 76593, at *37–40, 2007 WL 2902907 by focusing on the requirement that she obtain approval from a supervisor before noting a missed meal break in the exception log. (See Pl.'s Mem. 6–7.) In her post-deposition affidavit, White avers that she "was told that [she] could not make a claim for payment for a missed meal break unless [her] charge nurse or [her] supervisor confirmed that [she had] missed the meal break and approved of [her] claim for payment before the end of [White's] or their shift." (See White Decl. ¶ 6, ECF No. 122–2.) She also avers that "my supervisors and charge nurses rarely gave their approval to claim payment for a missed meal break unless my entire unit had to miss the break." (See White Decl. ¶ 7.)

In Berger, the district court rejected a similar futility argument. See Berger, 2007 U.S. Dist. LEXIS 76593, at *26–29, 39, 2007 WL 2902907. In that case, an employee had not been reimbursed for approximately five to seven meal breaks that had been recorded in the employer's log, had received a "dirty look" when he mentioned those breaks to his supervisor, and had received no assistance from the employer's human resources department when reporting his payroll issues. See id. at *26–29. However, because the plaintiff had been "compensated for numerous instances in which he

worked overtime ... [and] reimbursed for a missed lunch on September 21, 2001, all of which he had noted in the logbook," the court concluded that recording overtime in the employer's exception log was not futile. Id. at *39. ("These examples demonstrate that recording one's work deviations was not futile.")

Although White was required to obtain her supervisor's approval when recording a missed meal break in the exception log, that requirement does not mean that using the log was futile. White received compensation when she recorded missed meal breaks in the exception log, and there is evidence that her supervisors approved missed meal breaks. (See Facts ¶¶ 9–11; White Decl. ¶ 7.) Also, unlike Berger, the record here demonstrates that whenever White used Baptist's payroll correction procedure, mistakes in her compensation were "handled immediately." (See Facts ¶ 12.) Therefore, White's argument that using the exception log was futile because Baptist required her to obtain the approval of her supervisor is not well-taken.

White alternatively argues that there is a genuine issue of material fact about whether employees were instructed to report "partially missed breaks" in the exception log. (See id. 7–8.) White relies on her post-deposition affidavit, in which she states, "I did not know I could claim payment for meal breaks when I was interrupted and did not receive my entire break." (See White Decl. ¶ 6.) Baptist argues that this Court should not

consider that portion of White's affidavit because it conflicts with her prior deposition testimony. (See Reply to Pl.'s Resp. to Defs.' Mot. for Summary Judgment 5–8, ECF No. 130.) ("Baptist's Reply")

The Supreme Court has held that "a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity." Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999) (citations omitted); see O'Brien, 575 F.3d at 588 (applying the rule to an affidavit filed after a motion for summary judgment that conflicted with the affiant's prior deposition testimony in an FLSA case) (citations omitted). A court "deciding the admissibility of a post-deposition affidavit at the summary judgment stage must first determine whether the affidavit directly contradicts the nonmoving party's prior sworn testimony." Aerel, S.R.L. v. PCC Airfoils, L.L.C., 448 F.3d 899, 908 (6th Cir.2006) (citations omitted). "A directly contradictory affidavit should be stricken unless the party opposing summary judgment provides a persuasive justification for the contradiction." See id. (citation omitted). "If, on the other hand, there is no direct contradiction, then the district court should not strike or disregard that affidavit unless the court determines that the affidavit constitutes an attempt

to create a sham fact issue." Id. (citation and internal quotation marks omitted).

During her deposition, White testified as follows:

Q. If you put it in the exception log, did you get paid for it?

A. Got paid for it.

Q. Okay. Do you ever recall an instance where you put something in the exception log and you were not paid for it?

A. Yes.

Q. Can you tell me what that was?

A. Some of my lunch breaks, I did not get my full break, and some days I didn't get a break at all. And when I would get my paycheck, I could look at it and tell if I was paid or not paid.

Q. And you are saying you put that in the exception log but you weren't paid for it?

A. Right.

Q. So you went and wrote it down that you didn't get a full lunch or you missed your lunch?

A. Yes.

(See White Dep. 86:9–87–1, Nov. 18, 2008, ECF No. 90–8 (emphasis added).) Her testimony demonstrates that White recorded both missed and interrupted meal breaks in the exception log. By recording interrupted meal breaks in the exception log, she was claiming a right to compensation for working during those breaks. (See Facts ¶ 8.)

That White recorded interrupted meal breaks in the exception log directly contradicts the statement in her post-deposition affidavit that she "did not know [she] could claim payment for meal breaks when [she] was interrupted and did not receive my entire break." (See White Decl. ¶ 6.) White has not attempted to explain the contradiction between her deposition testimony and her later affidavit. See Aerel, S.R.L., 448 F.3d at 908. Therefore, the Court must disregard White's affidavit on that point. See id.

White argues that "[n]umerous plaintiffs in this action have claimed that their understanding of the meal break policy at Baptist did not include compensation for partially missed breaks, and/or that the subject of partially missed breaks was never mentioned to them," citing the declarations of various opt-in plaintiffs. (See Pl.'s Mem. 8.) Whether other, opt-in plaintiffs knew that they were permitted to claim payment for interrupted meals is irrelevant to whether White knew. The undisputed facts in the record demonstrate that White knew she could use the exception log to receive compensation

for interrupted meals and that she did so. (See Facts ¶ 7; White Dep. 86:9–87:1.)

Based on the record before the Court, a reasonable jury could not conclude that White performed work for which she was not properly compensated. See Myers, 192 F.3d at 551. Because White has offered no evidence suggesting that Baptist had reason to know when she missed meal breaks, she cannot recover for unpaid wages under the FLSA. See Wood, 192 F. App'x at 381; Berger, 2007 U.S. Dist. LEXIS 76593, at *37–40, 2007 WL 2902907. Because she has failed to establish a prima facie claim under the FLSA, summary judgment is appropriate. See Wood, 192 F. App'x at 381; Berger, 2007 U.S. Dist. LEXIS 76593, at *37–40, 2007 WL 2902907.

V. Conclusion

For the foregoing reasons, Baptist's motion for summary judgment on White's FLSA claim is GRANTED.

So ordered.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 11–5717

MARGARET WHITE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF–APPELLANT,

v.

BAPTIST MEMORIAL HEALTH CARE CORPORATION; BAPTIST MEMORIAL HOSPITAL–DESOTO, INC., DEFENDANTS–APPELLEES

Feb. 22, 2013

Order

Before SILER and MOORE, Circuit Judges; VAN TATENHOVE, District Judge*

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*Hon. Gregory F. Van Tatenhove, United States District Judge for the Eastern District of Kentucky, sitting by designation.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk