

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SINAN ORAL, et al.	:	
	:	
	:	
v.	:	98-CV-6394
	:	
	:	
AYDIN CORPORATION, et al.	:	

MEMORANDUM AND ORDER

Oral, representing a group of former employees of defendants Aydin Corporation and L-3 Communications Aydin Corporation (“Aydin”), is seeking recovery against Aydin for a violation of the Fair Labor Standards Act, 29 U.S.C. §201 et seq. (“FLSA”). Oral alleges that Aydin failed to (1) compensate this class of employees for hours worked in excess of forty per week in violation of 29 U.S.C. §§ 207 and 215(a)(2) of the FLSA, and (2) make, keep, and preserve records of wages, hours and other conditions of employment in violation of 29 U.S.C. §§ 211(c) and 215(a)(5) of the FLSA.¹

Aydin filed a motion for partial summary judgment and Oral has filed a motion for summary judgment. I will grant Defendants’ motion in part and deny in part. I will deny Oral’s motion.

¹Oral concedes that he cannot maintain a private cause of action against Aydin under §§ 211(c) and 215(a)(5) because there is no private right of action to enforce the recordkeeping provisions of the FLSA. See e.g., Aviles v. Kunkle, 765 F.Supp. 358, 369 n.12 (S.D. Tex. 1991), *vacated on other grounds*, 978 F.2d 201(5th Cir. 1992) (“The FLSA, however, contains no private enforcement mechanism if the employer fails to maintain such records”). Therefore, I will grant Aydin’s motion for summary judgment on this ground and dismiss Oral’s recordkeeping violation claim under the FLSA.

I. Factual Background²

On December 10, 1998, plaintiff Sinan Oral filed this action against his former employer, Aydin, on behalf of himself and as a representative of others similarly situated. This class now includes approximately 85 opt-in plaintiffs. Members of this class are all former employees of Aydin who, at the time they were employed, were classified by Aydin as “exempt” from the usual overtime pay requirement of the FLSA. As such, Aydin did not compensate them for overtime work. These employees submitted weekly timesheets that required them to account for their time in tenths of an hour. They were also instructed to include a maximum of eight hours worked per day on their timesheets even when they worked more than eight hours.

Oral challenges what he refers to as Aydin’s policy and practice of “partial day deduction.” When employees classified as exempt from the FLSA worked less than eight hours a day (characterized by Oral as a “partial day absence”), they had to account for the missed time. An employee classified as exempt from the FLSA accounted for missed time by either (1) being docked pay for the partial day absence; (2) making up the missed time, presumably by coming in early or staying late on subsequent workdays; or (3) using vacation or sick leave to cover the absence. Oral contends that all three methods of handling partial day absences vitiated class members’ status as employees exempt from the overtime requirement of the FLSA and seeks compensation for unpaid overtime.

Aydin and Oral have moved for summary judgment on several grounds. Aydin moves for partial summary judgment on the grounds that: (1) the alleged FLSA violations were not willful,

²Because I will consider Aydin’s grounds for summary judgment first, I present the facts in the light most favorable to Oral.

and, therefore, a two year statute of limitations applies; (2) only employees who were actually docked pay are entitled to relief; (3) for those employees who were docked actual pay, Aydin is entitled to use the “window of correction” to compensate them; and (4) Oral cannot make out a private action for alleged record-keeping violations and is not entitled to injunctive relief.

Oral moves for summary judgment on the following grounds: (1) as a matter of law, Aydin violated the FLSA by misclassifying him and other Aydin employees as salaried employees exempt from overtime pay requirements and then failing to pay them overtime pay; (2) as a matter of law, Aydin’s violations of the FLSA were willful and, therefore, the three year statute of limitations applies; (3) as a matter of law, Aydin violated the FLSA by failing to keep adequate payroll records³; and (4) as a matter of law, Oral and the class of employees are entitled to liquidated damages because Aydin’s violations of the FLSA were not in good faith.

II. Discussion

A. Summary Judgment Standard

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A court must determine “whether the evidence presents a sufficient [factual] disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). At the summary judgment stage, the Court must view the evidence, and draw all reasonable inferences, in the

³This will be denied. See supra note 1.

light most favorable to the non-moving party. See Dici v. Com. of Pa., 91 F.3d 542, 547 (3d Cir. 1996). This standard is the same for cross-motions for summary judgment. See Appelmans v. City of Philadelphia, 826 F.2d 214, 216 (3d Cir. 1987). However, when the nonmoving party “bears the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry that burden.” Foulk v. Donjon Marine Co., Inc., 144 F.3d 252, 258 n.5 (3d Cir. 1998) (quoting Wetzel v. Tucker, 139 F.3d 380, 383 n. 2 (3d Cir. 1998)).⁴

B. Fair Labor Standards Act

The FLSA requires employers to pay employees overtime when they work for more than forty hours per week. Section 207(a)(1) of the FLSA provides that:

[N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or the production of goods for commerce, 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 of not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. §207(a)(1).

Certain employees are exempt from this overtime pay requirement. Section 213(a) of the FLSA provides that § 207 shall not apply to “any employee employed in a bona fide executive, administrative, or professional capacity.” 29 U.S.C. § 213(a)(1). The Secretary of Labor has promulgated regulations interpreting the language of § 213(a)(1). According to these regulations,

⁴Federal Rule of Civil Procedure 56(c) allows summary judgment when the moving party is entitled to “judgment as a matter of law.” Because Aydin’s motion for summary judgment does not request a “judgment,” the motion is improper. Because of the circumstances, however, I will treat this motion as a motion in limine and will address it here.

to be employed in a “bona fide executive, administrative or professional capacity” and, thus, to qualify as exempt from the FLSA’s overtime pay requirement, an employee must, among other things, be paid “on a salary basis.”⁵ See 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e). Department of Labor regulations further define what it means to be paid “on a salary basis”:

An employee is considered to be paid “on a salary basis” within the meaning of the regulations if under his employment agreement he regularly receives each pay period...a predetermined amount constituting all or part of his compensation, which amount is not *subject to reduction* because of variations in the quality or quantity of the work performed.

29 C.F.R. § 541.118(a) (emphasis added).

An employee may bring an action against his or her employer for failing to pay the employee overtime as required under § 207(a)(1). Section 216(b) of the FLSA provides that:

any employer who violates the provisions of...section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid...overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

29 U.S.C. § 216(b). The statute of limitations period to file such an action is two years, or three years if the violation was “willful.” 29 U.S.C. § 225(a).

In some instances, however, an employer will be allowed to take advantage of a “window of correction” to reimburse an employee for an improper deduction without being liable to the employee for overtime pay or other damages provided for under the FLSA.

Pursuant to Department of Labor regulations, an employer may reimburse a salaried employee for an impermissible deduction and still maintain the exempt status of that employee if the deduction was (1) inadvertent, or (2) made for reasons other than lack of

⁵The Department of Labor regulations also set forth additional requirements to constitute as exempt from the FLSA’s overtime pay requirement, none of which are at issue in this case. See 29 C.F.R. §§ 541.1, 541.2, 541.3.

work. 29 C.F.R. § 541.118(a)(6).

In Auer v. Robbins, 519 U.S. 452 (1997), the Supreme Court addressed when an employer improperly categorizes an employee as one employed in a “bona fide executive, administrative, or professional capacity” as provided in 29 U.S.C. § 213(a)(1). In doing so, the Supreme Court deferred to the Secretary of Labor’s interpretation of § 213(a)(1) and ratified the Secretary’s regulations, 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e), which establish that such an employee must be paid on “a salary basis,” and 29 C.F.R. § 541.118(a) which explains that “on a salary basis” means “not subject to reduction because of variations in the quality or quantity of work performed.” Auer, 519 U.S. at 456-61. The Court then went on to hold that, under § 541.118(a), an employee’s compensation is “subject to reduction” when the employer has either: (1) “an actual practice of making such deductions” or (2) “an employment policy that creates a significant likelihood of such deductions” which means it must be a “clear and particularized policy—one which ‘effectively communicates’ that deductions will be made in specified circumstances.” See id. at 461.

Oral claims that Aydin violated § 207 of the FLSA by misclassifying certain employees as salaried and, therefore, exempt from the overtime pay requirement and not paying them overtime. According to Oral, these employees should not have been classified as exempt from the overtime pay requirement because they were not, in fact, paid “on a salary basis” as required by Department of Labor regulations and defined by 29 C.F.R. § 541.118. Oral asserts that under the Auer salary basis test, Aydin had both an actual practice and a clear employment policy of making deductions for partial day absences from the pay of employees classified as salaried. According to Oral, in response to Aydin’s policy and

practice of partial day deduction, employees classified as salaried and exempt from the FLSA overtime pay requirement were forced to choose among one of three options when they worked less than eight hours a day. They either (1) were docked pay for that time, (2) made up the missed time, or (3) used vacation or sick leave to cover the time. Having to choose among any of the three options, Oral contends, was inconsistent with Regulation § 541.118(a)'s test for being paid "on a salary basis" because it rendered employees' compensation "subject to reduction because of variations in the...quantity of the work performed." Thus, Oral argues that because these employees classified as salaried by Aydin were not paid on a salary basis as set forth in 29 C.F.R. § 541.118, they did not meet one of the basic requirements to qualify as exempt from the FLSA's overtime provisions and are now entitled to reimbursement for the overtime hours they worked.

C. Applicable Statute of Limitations

Aydin moves for summary judgment based on the claim that a two year statute of limitations applies in this case. Section 255(a) of the FLSA provides that an action under the FLSA "may be commenced within two years after the cause of action accrued...except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. § 255(a). If the applicable statute of limitations is two years, then only those employees whose cause of action accrued on or after December 1996 are entitled to relief. Aydin claims that Oral cannot make out a willful violation claim and, therefore, the applicable statute of limitations under 29 U.S.C. 255(a) is two years.

In McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988), the Supreme Court

instructed as to when there has been a “willful” violation of the FLSA. The Court held that a violation is willful if “the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA].” Id. at 133; see also Reich v. Gateway Press Inc., 13 F.3d 685, 702 (3d Cir. 1994). The Supreme Court made clear that in order to be willful, a defendant must act with more than mere negligence. See McLaughlin, 486 U.S. at 133.

The evidence submitted by Oral is sufficient to conclude that “legitimate questions of law and fact” exist regarding whether any violation by Aydin of the FLSA was willful, making summary judgment inappropriate. Reich, 13 F.3d at 702. Kane, a former Human Resources Director for Aydin, testified in deposition that he brought the partial day deduction practice to the attention of Aydin’s in-house counsel as early as 1992. Aydin’s in-house counsel testified that he tried to raise the conflict between Aydin’s policy and the FLSA regulations with the former CEO of Aydin, Mr. Hakimoglu, who dismissed the counsel’s concerns. Ayoob, a former Corporate Human Resources Director for Aydin, testified that in 1998 he brought the policy of partial day docking to the attention of then CEO Bard who also dismissed his concerns. (Plaintiffs’ Ex. R, 36; Ex. U, 28, Ex. Q, 39-42). Defendants’ motion for summary judgment on the basis of a two year statute of limitations will be denied.

D. Auer Salary Basis Test

Aydin also moves for summary judgment on the ground that under § 216(b) of the FLSA, only those employees actually docked pay are entitled either to overtime compensation or reimbursement for the dockings. Oral contends that Aydin is liable to the entire class of similarly situated employees, which includes employees who made up for time

missed during partial day absences, and employees who used sick or vacation leave to cover these absences in addition to employees whose pay was actually docked. The issue involves which employees under the Auer salary basis test were “subject to reduction” in pay and, therefore, were not salaried employees exempt from the FLSA’s overtime requirement. Under Auer, if Aydin had in place either (1) a clear policy of partial day deductions for employees it classified as salaried, or (2) an actual practice of such deductions, these employees, as a matter of law, were not exempt from the FLSA’s overtime pay requirement. See Auer, 519 U.S. at 461. Aydin has the burden to show affirmatively that its employees are exempt from the overtime requirements of the FLSA. See Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974) (noting “the general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof”); Brock v. Claridge Hotel and Casino, 846 F.2d 180, 183 (3d Cir. 1988).

1. Clear and Particularized Employment Policy

Aydin has moved for summary judgment on the claim that it did not have a clear and particularized policy of partial day deductions within the meaning of the Auer salary basis test. In Auer, the Supreme Court made clear that for an employment policy to create “a significant likelihood” of impermissible deductions, it must be “clear and particularized...[and] ‘effectively communicate[]’ that deductions will be made in specified circumstances.” Auer, 519 U.S. at 461. Oral concedes that Aydin had no written partial day deduction policy. (Plaintiffs’ Memorandum in Opposition to Defendants’ Motion for Summary Judgment, 4 n.3). Oral asserts that this policy was “regularly communicated” to

employees classified as exempt, yet fails to point to direct evidence of this communication. (Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, 28). Instead, Oral relies on testimony of various witnesses that a partial day deduction policy did, in fact, exist within Aydin. Ayoob, former Corporate Director of Human Resources, testified in deposition that he was told about the policy from at least two Aydin employees; Clancy, in-house counsel, testified that Aydin founder and CEO Hakimoglu made it clear that no employee was to be paid for time they did not work; Payroll office employee Belardi testified that he was told of the policy by "someone in the corporate office." (Plaintiffs' Ex. Q, 40, Ex. U, 30. Ex. V, 15).

Based on the evidence presented by Oral, Oral has not shown that Aydin had a "clear and particularized" policy that "effectively communicate[d] that deductions will be made in specified circumstances." Auer, 519 U.S. at 461. At best, the evidence presented by Oral demonstrates that the policy was communicated randomly. Aydin employees learned of the company's policy haphazardly, if at all. Even considering the evidence in the light most favorable to Oral, Oral has not shown that Aydin had a "clear and particularized" policy of making impermissible deductions. Therefore, I will grant summary judgment to Aydin on the basis that no clear policy existed within the meaning of the Auer salary basis test.

2. Actual Practice of Deductions

Auer established that an employer cannot claim that its employees are salaried employees exempt from the FLSA if it has an actual practice of making impermissible deductions to the pay of these employees. See Auer, 519 U.S. at 461. The deductions at issue in this case, deductions to the pay of employees classified as salaried for partial day

absences, are impermissible because such deductions render the pay of these employees “subject to reduction because of variations in...the quantity of the work performed” in violation of 29 C.F.R. § 541.118(a). Thus, if Aydin actually deducted the pay of employees classified as salaried for partial day absences, a fact which Oral must prove, Aydin cannot claim an exemption from the FLSA for these employees. The more difficult question, however, is whether Aydin is entitled to an exemption from the FLSA for those employees classified as salaried who were not actually docked pay but either (1) made up for a partial day absence by working extra hours, or (2) used sick or vacation leave to cover the absence.⁶

Aydin does move for summary judgment on the ground that any employee who used sick or vacation leave to cover for a partial day absence is not entitled to relief under the FLSA. Aydin contends that fringe benefits such as sick and vacation leave do not constitute “compensation” for purposes of determining whether an employee’s compensation has been subject to reduction under the Auer salary basis test. The Third Circuit has not spoken on this issue of the use of sick or vacation leave to cover partial day absences. In those circuits that have considered this issue, there are two lines of cases. Both lines, however, address an

⁶Aydin did not move for summary judgment on the specific claim that employees who made up for partial day absences by working extra hours are not entitled to relief under the FLSA. However, because Oral does present this as one option that the class of opt-in plaintiffs used in order to avoid being docked pay, I will consider it. For purposes of determining whether an employee is paid “on a salary basis,” working extra hours to make up for a partial day absence is no different than having one’s pay docked for a partial day absence. Both involve counting the hours that an employee has worked and subjecting an employee to a reduction in compensation based on quantity of time worked. Both methods for dealing with partial day absences are inconsistent with 29 C.F.R. § 541.118(a)’s definition of being paid “on a salary basis.” Whether, in fact, Aydin had a practice of allowing employees to make up for partial day absences by working extra time in order to avoid being docked pay will be a question of fact for a jury to decide.

employer *policy* regarding partial day absences, and not an employer *practice* of deducting pay for partial day absences which is at issue in this case.

First, there are circuit cases that involve an employer policy requiring employees classified as salaried to use their sick or vacation leave to cover partial day absences *or be docked pay*. At least three circuits have held that an employee subject to this kind of policy is not paid “on a salary basis” as defined under 29 C.F.R. § 541.118(a), and, therefore, is not exempt from the FLSA’s overtime pay requirement. See Spralding v. City of Tulsa, 95 F.3d 1492, 1501 (10th Cir. 1996) (holding that employees who were subject to having their pay reduced under an unwritten policy requiring them to cover partial day absences with sick or vacation leave or be docked pay were not paid “on a salary basis”); Kinney v. District of Columbia, 994 F.2d 6, 11 (D.C. Cir. 1993) (“employees paid under a system that subjects them, even theoretically, to docking for absences by the hour” are not paid “on a salary basis”); Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 614-15 (2d Cir. 1991) (same). While these cases were all decided prior to Auer, the Supreme Court’s decision in Auer did not have an impact on them.⁷

Second, there are cases that involve an employer policy of directly deducting an employee’s sick or vacation leave, but not docking an employee’s pay, for a partial day absence. At least one circuit has held that this type of policy is not inconsistent with the

⁷Auer merely reconciled a split in the circuits over the issue of whether an exemption from the FLSA is lost only when an employer makes actual deductions to employee pay or whether the possibility or threat of deduction is enough to lose the exemption. See Auer, 519 U.S. at 460-61. Auer held that actual deductions in pay are not necessary to establish that employees are non-exempt from the FLSA if the employer has a clear and particularized policy that creates a “‘significant likelihood’ of such deductions.” Id. at 461.

definition of a salaried employee under 29 C.F.R. § 541.118(a). See Webster v. Public School Employees of Washington, Inc., 247 F.3d 910, 917 (9th Cir. 2001) (holding that because leave time does not constitute salary, an employer policy that deducts leave time for partial day absences of salaried employees is not inconsistent with § 541.118(a)). See also Cooke v. General Dynamics Corp., 993 F.Supp. 50, 52-55 (D. Ct. 1997) (noting that in cases which found that a policy of partial day deductions from leave accounts did not violate the FLSA, the employers did not have a concomitant policy that employees were to be docked pay for such partial day absences).

The issue presented here is how these cases relate to an employer practice of deducting the pay of employees classified as salaried for partial day absences unless sick or vacation leave was used to cover the absences. The Tenth Circuit's decision in Spralding, the D.C. Circuit's decision in Kinney, and the Second Circuit's decision in Martin suggest that employees who are either docked pay or threatened to be docked pay for partial day absences are not salaried employees under 29 C.F.R. § 541.118(a). The Ninth Circuit's decision in Webster does not hold otherwise. Under the employer policy in Webster, employees were not docked pay, nor was there a threat that they would be docked pay if they did not use sick or vacation leave to cover a partial day absence.

Here, viewing the evidence in the light most favorable to Oral, the class of opt-in plaintiffs did face a threat that their pay would be docked for a partial day absence unless they used sick or vacation leave to cover the absence. Such a practice is inconsistent with the definition of what it means to be a salaried employee under 29 C.F.R. § 541.118(a). As the Court noted in Kinney, "Payment on salary basis is thought to identify executive,

administrative, and professional personnel precisely because it indicates employees who are given discretion in managing their time and their activities and who are not answerable merely for the number of hours worked.” Kinney, 994 F.2d at 11. Employees who used sick or vacation leave to cover for partial day absences did so only under threat of and to avoid being docked. An employer whose intent is to require employees classified as salaried to substitute their leave or work extra time to avoid being docked pay loses the right to claim that this leave or extra time is not, in essence, salary.

Summary judgment on the claim that employees who used sick or vacation leave to cover partial day absences are not entitled to relief under the FLSA is inappropriate when the use of sick or vacation leave is done under the threat of being docked. The question of whether Aydin did, in fact, have such a practice of deducting or threatening to deduct the pay of employees classified as salaried for partial day absences unless they covered the missed time will be for a jury to decide. Therefore, I will deny Aydin’s motion for summary judgment on this claim.

3. Window of Correction

Aydin also moves for summary judgment on the ground that it is entitled to use the “window of correction” to reimburse opt-in plaintiffs for any improper deductions. When available to an employer, the window of correction allows an employer to reimburse an employee for the improper deduction without losing the employee’s exemption from the FLSA. The window of correction is established by 29 C.F.R. § 541.118(a)(6) which provides:

The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.⁸

In Auer, the Supreme Court interpreted the window of correction set forth in 29 C.F.R. § 541.118(a)(6). The Court held that the window of correction was available to an employer who had made *one* improper deduction in pay for disciplinary reasons, even though the deduction was not inadvertent. See Auer, 519 U.S. at 463. Rejecting the plaintiffs' argument that the window of correction should not be available because the deduction in pay was not inadvertent, the Court stated, "That the deduction...was not inadvertent is true enough, but the plain language of the regulation sets out 'inadvertence' and 'made for reasons other than lack of work.'" Id. The Court, then, read the "inadvertence" and "lack of work" requirements of § 541.118(a)(6) in the conjunctive. Aydin argues that, like the employer in Auer, it should be allowed to use the window of correction because any deductions it may have made, whether inadvertent or not, were not made due to a lack of work available to the employees.

In viewing the evidence in the light most favorable to Oral, the question presented in

⁸"Lack of work" within 29 C.F.R. § 541.118(a)(6) does not refer to the situation presented here where an employee is deducted pay for hours not worked. As the prior sentence in § 541.118(a)(6) makes clear, "lack of work" refers to the situation when there is "no work available." When an employer makes a deduction to the pay of an employee because there is no work available, § 541.118(a)(6) establishes that such an employer may not use the window of correction because it cannot show that it intended to pay its employees on a salary basis.

this case is whether Aydin is entitled to use the window of correction when it had an actual practice of impermissible deductions to the pay of employees classified as salaried. This is a different question than the question the Supreme Court faced in Auer. Auer did not address the issue of whether the window of correction is available to an employer that has either a policy creating a significant likelihood of improper deductions or an actual practice of such deductions.

Subsequent history of the interpretation of the window of correction provision establishes that Aydin is not entitled to use this provision to reimburse employees for any improper deductions to the extent that it had an actual practice of impermissible deductions. Since the Court's ruling in Auer, the Secretary of Labor has taken the position in amicus briefs submitted to circuit courts facing this precise issue that an employer with such a policy or practice may not use the window of correction because such an employer cannot show an objective intention to pay its employees on a salary basis as required under § 541.118(a)(6). These circuit courts agreed with the Secretary of Labor's interpretation and ruled that the window of correction is not available to an employer with a policy creating a significant likelihood of deductions or an actual practice of deductions. See Whetsel v. Network Property Services, LLC, 246 F.3d 897, 901-04 (7th Cir. 2001) (applying deference to the Secretary of Labor's interpretation of the window of correction and holding that the window of correction is not available to an employer with a policy or practice of improper deductions); Takacs v. Hahn Automotive Corp., 246 F.3d 776, 782-83 (6th Cir. 2001) (same); Yourman v. Giuliani, 229 F.3d 124, 128 (2d Cir. 2000) (same); Klem v. County of Santa Clara, 208 F.3d 1085, 1091-93 (9th Cir. 1999) (same).

The Secretary of Labor’s interpretation of the window of correction and the analysis employed by those circuits that have faced the issue is sound, and I adhere to it. As the Ninth Circuit explained in Klem v. County of Santa Clara, 208 F.3d 1085 (9th Cir. 1999), only those employers who pay their employees on a salary basis and, thus, are entitled to claim an exemption from the FLSA in the first place may use the window of correction:

To interpret the rule otherwise would allow an employer to treat its employees as exempt for overtime purposes while, at the same time, intentionally failing to comply with the “salary basis” rule. In the event that its employees sued for overtime pay, such an employer simply could use the window of correction to comply retroactively with the salaried-basis requirements. According to the Secretary [of Labor], such a result would render the “salary basis” rule “essentially meaningless” and run counter to the rule that FLSA exemptions are to be construed narrowly.

Klem, 208 F.2d at 1092. To the extent that Aydin had an actual practice of impermissible deductions, it is not entitled to use the window of correction. Because I find that this will be a question for the jury, I will deny Aydin’s motion for summary judgment on this ground.

F. Oral’s Claims for Summary Judgment

Oral moves for summary judgment on two grounds: (1) Aydin had an actual practice of impermissible deductions vitiating the class members’ status as employees exempt from the FLSA’s overtime requirement, and (2) the class of employees is entitled to liquidated damages because Aydin did not act in good faith. I consider the evidence in the light most favorable to Aydin.

1. Actual Practice

Under the Auer salary basis test, if an employer has an actual practice of making impermissible deductions to the pay of employees classified as salaried by their employers,

the employees lose their status as salaried employees exempt from the FLSA's overtime pay requirement. See Auer, 519 U.S. 461. Oral contends that Aydin had an actual practice of making deductions to the pay of employees classified as salaried when those employees were absent for part of a day. While Auer may have established the "actual practice" test, Auer itself does not provide much guidance as to what constitutes an actual practice of impermissible deductions. Oral submits a mass of payroll records that they assert prove Aydin had an actual practice of partial day deductions. According to Oral, these records alone establish that Aydin docked the pay of salaried employees 459 times in a labor pool of salaried employees that fluctuated from 150 to 450, from the company's inception in 1967 through 1999. (Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, 31, Exs. BB, CC). These records indicate that the time period over which the deductions were made ranged from 1988 to 1999. Oral also presents an affidavit of Randy Ayoob, a former Corporate Director for Human Resources at Aydin, stating that he reviewed the payroll records submitted by Oral and that each record "reflects that an exempt employee was docked pay under Aydin's partial day deduction policy/practice because of a partial day absence." (Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, 31, Ex. O). In considering whether an actual practice of partial day deductions existed within Aydin, Oral also asks that I consider his claim that a "significant amount of payroll and time records" were not produced by Aydin because the company failed to make or keep such records. (Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, 9-10).

Those courts which have considered whether an employer had an actual practice of

making impermissible deductions have recognized that this determination is to be made on a case by case basis. See e.g., Yourman v. Giuliani, 229 F.3d 124, 130 (2d Cir. 2000) (noting that there is no bright line test for what constitutes an actual practice of impermissible deductions). The number of improper deductions is a factor to consider. Numerous impermissible deductions over a significant period of time may be indicative of a practice of such deductions. See Block v. City of Los Angeles, 253 F.3d 410, 419 (9th Cir. 2001) (upholding a finding of actual practice of deductions where plaintiffs proved 13 improper suspensions over a six year period); Klem v. Santa Clara County, 208 F.3d 1085, 1095 (9th Cir. 1999) (affirming district court’s ruling that 53 impermissible pay deductions among 5,300 exempt employees over a six-year period constituted an “actual practice”); Belton v. Sigmon, 101 F.Supp.2d 435, 439 (W.D. Va. 1998) (finding of actual practice of deductions where employer made 26 deductions out of 73 partial day absences over a period of a year and a half). Cf. Paresi v. City of Portland, 182 F.3d 665, 668 (9th Cir. 1999) (two impermissible deductions do not constitute an actual practice); DiGiore v. Ryan, 172 F.3d 454, 464-65 (7th Cir. 1999) *overruled on other grounds by Whetsel v. Network Property Services, LLC*, 246 F.3d 897 (7th Cir. 2001) (five suspensions under unusual circumstances not enough to establish an actual practice).

I find that Aydin has raised enough doubt about the validity of the employment records submitted by Oral to withstand summary judgment on the question of whether Aydin had an actual practice of partial day deductions. This is not a case where the defendant has stipulated to the improper deductions. Cf. Block v. City of Los Angeles, 253 F.3d at 419 (City stipulated to nineteen suspensions without pay). While Oral has submitted hundreds of

pages of payroll records, the records are not presented in a way that allows me to discern that they report what Oral says they report. Whether an actual practice of impermissible deductions existed is a factual question suited to resolution by a jury. Therefore, I will deny Oral's motion for summary judgment on this claim.

2. Liquidated Damages

Lastly, I turn to Oral's claim for summary judgment on the ground that the class is entitled to liquidated damages. Section 216(b) of the FLSA provides for the recovery of liquidated damages against an employer who violates the overtime pay requirement of § 207. 29 U.S.C. 216(b). Section 260 of the FLSA further provides:

[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the...[FLSA], the court may, in its sound discretion, award no liquidated damages or award any amount thereof.

29 U.S.C. 260. Oral's claim for summary judgment on liquidated damages is premature. Oral first must prove that the class of employees is entitled to judgment in this matter before the issue of damages is ripe for consideration. He has not yet done so.⁹ Summary judgment on this issue, therefore, will be denied.

An appropriate order follows.

⁹Although the legal standards are not the same, the evidence presented by Aydin that it did not act willfully for purposes of the applicable statute of limitations is sufficient to raise a genuine issue of material fact as to whether Aydin acted in good faith for purposes of liquidated damages.

ORDER

AND NOW, this _____ day of October 2001, it is hereby **ORDERED** that:

(1) The claim for recordkeeping violations under the FLSA against defendants Aydin Corp. and L-3 Communications Aydin Corp. is **DISMISSED AS MOOT**.

(2) The motion for summary judgment of defendants Aydin Corp. and L-3 Communications Aydin Corp. (Docket Entry #71) is **GRANTED IN PART** and **DENIED IN PART**. I make the following rulings: (1) no partial day deduction policy existed within the meaning of the Auer v. Robbins, 519 U.S. 452 (1997), salary basis test; (2) whether a two or three year statute of limitations applies in this action is a question of fact; (3) which plaintiffs are entitled to recover in this action is a question of fact; and (4) defendants are not necessarily entitled to use the window of correction.

(3) The motion for summary judgment of plaintiffs Oral et al. (Docket Entry # 73) is **DENIED**.

ANITA B. BRODY, J.

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