

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

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| NANCY WOLFSLAYER, et al., | : | |
| Plaintiffs, | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| IKON OFFICE SOLUTIONS, INC., | : | No. 03-6709 |
| Defendant. | : | |

MEMORANDUM AND ORDER

Schiller, J.

November 8, 2004

Plaintiff Nancy Wolfslayer brings this action on behalf of herself and a prospective class of others similarly situated for violation of the Fair Labor Standards Act (“FLSA”) and the Pennsylvania Wage Payment and Collection Act. Presently before the Court are the parties’ cross-motions for summary judgment. For the reasons set forth below, Defendant’s motion is granted in part and denied in part; Plaintiff’s motion is denied.

I. BACKGROUND

The following facts are undisputed. Defendant IKON manufactures and sells document management products (such as copiers, printers, and toner) and employs over 30,000 people worldwide. (Pl.’s Mot. For Partial Summ. J. Ex. C at 3 [hereinafter “Pl.’s Mot.”].) Plaintiff Nancy Wolfslayer worked for IKON from February 7, 2000 until October 3, 2003 in four different positions. (Wolfslayer Aff. ¶2.) During the course of Plaintiff’s employment, Defendant embarked on an initiative to make its operations more efficient, called “e-IKON.” (Def.’s Mot. For Summ. J. Ex. N at 4 [hereinafter “Def.’s Mot.”].) As part of e-IKON, Defendant decided to outsource its warehousing and shipping operations to UPS and Exel (the “third party logistics” or “3PLs”).

(Wolfslayer Dep. at 99-101.) To accomplish this outsourcing, Defendant had to upgrade its computer software to an Oracle platform and reconcile its shipping and warehousing processes to those of the 3PLs. (Wolfslayer Aff. ¶ 5.) Plaintiff worked on these efforts. (*Id.* ¶¶ 6-9.)

IKON paid Plaintiff a salary and considered her exempt from FLSA's overtime pay requirements. Nevertheless, IKON required salaried employees, such as Plaintiff, to fill out time sheets for each two week pay period so that the company could track their accrued leave time (such as sick time and vacation time). (Pl.'s Opp'n to Def.'s Mot. Ex. L at D0302-D0303 (March 2001 Employee Handbook), Ex. M at D0124 (April 2003 Employee Handbook).) As the pay of FLSA-exempt employees was not tied to hours worked, such employees were paid the same amount no matter how many hours they entered on each time sheet or actually worked. (Grafje Dep. at 25-28.) IKON did not record how many hours salaried employees actually worked during each pay period. (*Id.* at 26-27.)

IKON's Employee Handbook describes the company's vacation and sick leave policy. This policy changed twice during Plaintiff's employment. Effective January 2000, IKON allowed exempt employees to use vacation and sick time in half-day increments, but prohibited them from borrowing against vacation or sick time that had not yet accrued. (Def.'s Mot. Ex. A at D0225.) In March 2001, IKON changed two aspects of its policy. IKON continued to allow exempt employees to use sick and vacation time in half-day increments; however, IKON began allowing exempt employees to borrow vacation time against their full annual vacation in whole day increments, and also made all employees responsible for negative vacation balances "to the extent allowed by law." (*Id.* Ex. D at D0311.) In April 2003, IKON added a provision that if exempt employees exhausted their annual sick and vacation time, and then missed yet more time from work, their pay would be

docked in whole day increments. (*Id.* Ex. F at D0134.) The provision stated, however, that “exempt employees will not have their pay docked in partial-day increments.” (*Id.*)

II. STANDARD OF REVIEW

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). The moving party bears the initial burden of identifying those portions of the record that it believes illustrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the moving party makes such a demonstration, then the burden shifts to the nonmovant, who must offer evidence that establishes a genuine issue of material fact that should proceed to trial. *Id.* at 324; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). “Such affirmative evidence – regardless of whether it is direct or circumstantial – must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance.” *Williams v. Borough of West Chester*, 891 F.2d 458, 460-61 (3d Cir. 1989).

When evaluating a motion brought under Rule 56(c), a court must view the evidence in a light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also Pollock v. Am. Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986). A court must, however, avoid making credibility determinations or weighing the evidence in ruling on summary judgment. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm’n*, 293 F.3d 655, 665 (3d Cir. 2002).

III. DISCUSSION

Plaintiff Nancy Wolfslayer requests overtime pay from Defendant on the ground that IKON erroneously classified her as exempt from FLSA's overtime requirements. First, she asserts that the job tasks she performed did not allow IKON to classify her as exempt. Second, she claims that while the IKON compensation scheme which governed her and thirty-three other similarly situated employees ostensibly treated them as salaried employees, certain provisions of the scheme caused them to be effectively treated as hourly workers entitled to overtime pay.¹

FLSA generally requires employers to pay employees overtime when they work more than forty hours per week. 29 U.S.C. § 207(a)(1) (2003) (“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 of not less than one and one-half times the regular rate at which he is employed.”). Certain employees, however, are exempt from FLSA's overtime pay requirement. Specifically, employees do not have to be paid for hours worked over forty in a week if they are “employed in a bona fide executive, administrative, or professional capacity.” 29 U.S.C. § 213(a)(1) (2003). FLSA grants authority to define the term “administrative”² to the Secretary of Labor (“the Secretary”), who has issued regulations that define and interpret §

¹ The Complaint requests class certification only as to the “salary” claim. (Compl. ¶ 25-32.) Plaintiff Nancy Wolfslayer alone alleges that her job duties do not comport with the standards required for exemption from overtime pay under FLSA. As described more fully below, an employee classified as exempt will be awarded overtime pay if they meet either prong of a two prong test. Thus, while Nancy Wolfslayer can recover overtime pay if she succeeds on either her “duties” claim or her “salary” claim, the putative class members must succeed on their “salary” claim to obtain overtime pay.

² The parties agree that neither the executive nor the professional exemption apply.

213(a)(1). These regulations have the binding effect of law. *See Auer v. Robbins*, 519 U.S. 452, 458 (1997) (holding that FLSA grants the Secretary broad authority to define and delimit scope of FLSA exemptions); *see generally Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) (holding that regulations issued by administrative agency pursuant to grant of statutory authority have force and effect of law). To show that an employee is an exempt “administrative employee,” an employer must demonstrate that an employee earns at least \$250.00 per week³ and meets both a “duties” test and a “salary basis” test. 29 C.F.R. § 541.2(e)(2) (2003).

Thus, to succeed on her claim for overtime pay, Plaintiff must show that her duties did not comport with the FLSA’s definition of a bona fide “administrative” employee, or that IKON’s compensation scheme really treated her as an hourly, not salaried, worker. By contrast, to avoid paying Plaintiff overtime, Defendant must prove both that Plaintiff’s duties were administrative and that she was paid a salary in accordance with the regulations’ definitions.⁴

A. Duties Test

Defendant moves for summary judgment on the duties test, arguing that it properly classified Plaintiff’s duties as administrative within the exemption’s definition. (Def.’s Mot. ¶ 3.) The duties

³The parties agree that, at all relevant times, Plaintiff earned at least \$250.00 per week.

⁴ FLSA exemptions are narrowly construed and the employer has the burden at trial to show affirmatively that its employees are exempt from FLSA’s overtime requirements. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974) (noting “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”); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (FLSA exemptions “are to be narrowly construed against the employers seeking to assert them”); *Brock v. Claridge Hotel & Casino*, 846 F.2d 180, 183 (3d Cir. 1988) (employer bears “burden of proving the applicability of the exemption” to FLSA). Moreover, “if the record is unclear as to some exemption requirement, the employer will be held not to have satisfied its burden.” *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 900 (3d Cir. 1991) (*citing Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 206 (1966)).

test examines the actual tasks that an employee performs, because only certain job duties permit an employer to avoid payment of overtime. 29 C.F.R. § 541.2. The duties test consists of two prongs. *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 901 (3d Cir. 1991). First, an employee is not properly classified as an exempt administrative employee unless the employer can show that her primary duty at work directly relates to the employer’s management policies or general business operations. *Id.* at 901; *see also* 29 C.F.R. § 541.2(e)(2). The court’s inquiry under the first prong subsumes two subsidiary questions: (a) whether an employee is a “production” rather than an “administrative” worker; and (b) whether the employee’s work is of “substantial importance” to the employer. *Cooper Elec.*, 940 F.2d at 902 (emphasis in original). Only non-production workers whose jobs are substantially important may be exempt. Second, the worker must be paid overtime unless the employer shows that the employee’s primary duty includes work requiring the exercise of “discretion and judgment.” *Id.* at 901; *see also* 29 C.F.R. § 541.2(e)(2). The Third Circuit has cautioned that “[t]hese inquiries are fact intensive.” *Id.* In this case, genuine questions of material fact exist on both inquiries, and therefore Defendant’s motion for summary judgment is denied on this issue.

1. *General Business Operations*

a. Administration/Production

Employees engaged in “production” work are covered by FLSA and must be paid overtime; “administrative” employees may be exempt. *Cooper Electric* held that the “administrative/productive work dichotomy is not to be understood as covering only work involving the manufacture of tangibles.” 940 F.2d at 903. Instead, when determining whether an employee engaged in production work, “it is important to consider the nature of the employer’s business.” *Id.*

For example, if a company's business is selling products, then a production worker may "produce sales"; in other words, the term production "is not limited to manufacturing activities." *Id.* at 903. An employee is engaged in administrative work when, whatever the nature of the employer's business, the employee "'services' his employer's business," which "denotes employment activity *ancillary* to an employer's principal production activity." *Id.*

In the instant case, Plaintiff argues that for at least part of her tenure at IKON her work was "production" oriented. She claims that during a six-month period her job changed from deploying the Oracle software (which the parties do not dispute is administrative work) to helping orders get "out the door" to customers, which Plaintiff claims is production work when the nature of IKON's business – selling document management machine – is taken into account. (Wolfslayer Dep. at 165-168.) Defendant replies that Plaintiff's job duties were eminently administrative, such as training employees on Oracle, tracking problems with Oracle, and reporting on those problems in daily meetings amongst the 3PLs and IKON. (Wolfslayer Dep. at 226-33.) This is a material dispute of fact and is not amenable to summary judgment.

b. Substantial Importance to Employer

The second part of the duties test's first prong permits "only employees whose work substantially affects the *structure* of an employer's business operations and management policies [to] be characterized as administrative workers" and thus exempt from FLSA. *Cooper Elec.*, 940 F.2d at 906. Defendant contends that e-IKON was an enormous project, of huge significance to IKON's business, and "sanctioned by the highest levels of management." (Def.'s Mot. Ex. N at 8.) As *Cooper Electric* makes clear, though, the importance of the project to Defendant's business *as a whole* does not mean that Plaintiff's work *in particular* was substantially important. *See Cooper*

Elec., 940 F.2d at 906 (noting substantial importance “must be addressed in terms of the consequences of each employee’s efforts alone, not the effect of [similarly situated employees] as a group.”). Therefore, Defendant also states that Plaintiff’s role on the e-IKON team was an important part of the overall process. (Wolfslayer Dep. at 226-238.) Defendant calls Plaintiff “the symbolic face of IKON to UPS and Exel . . . [and] the symbolic face of Oracle to IKON employees during go-live.” (Def.’s Reply at 13.) Defendant cites to Plaintiff’s deposition testimony in which Plaintiff stated that she trained IKON employees on Oracle, tracked problems with the Oracle software, reported on the software in daily meetings, and facilitated conference calls. (Wolfslayer Dep. at 227-238.) In addition, Defendant cites to a Job Posting Application that Plaintiff completed in which she described herself as “instrumental” in the “development and implementation” of the processes that would transition IKON’s warehouse and distribution business to UPS and Exel. (Wolfslayer Dep. at 256-65.)

In response, Plaintiff retorts that despite her self-promoting job description, the proper focus is on an employee’s actual daily activities, rather than a job description. Plaintiff states that in reality her duties were limited to supporting the transition of IKON’s warehousing and shipping functions, and that her work did not substantially affect the structure of Defendant’s business. (Wolfslayer Aff. ¶ 15.) There are considerable disputes of fact regarding Plaintiff’s role and importance to the e-IKON project and at IKON generally, and these questions can only be appropriately resolved by the trier of fact.

2. *Exercise of Discretion*

Finally, the parties dispute the degree of latitude Plaintiff enjoyed in her work. The regulations require that an employee exercise discretion and independent judgment to be exempt

from FLSA. 29 C.F.R. § 541.207. This determination “must be applied in the light of all the facts involved in the particular employment situation in which the question arises.” *Id.* at § 541.207(b). According to the relevant regulations, discretion and independent judgment involve evaluating possible courses of conduct and making a decision with respect to matters of significance that is free from immediate direction or supervision. *Id.* at § 541.207(a).

Defendant claims that although Plaintiff did not have authority to make business-related decisions, she exercised considerable discretion in her communications with UPS and Exel: she decided when to communicate, how to communicate, and what to say. (Wolfslayer Aff. at 256-65, 270-72.) Defendant also stresses that Plaintiff prioritized her tasks and planned her work day accordingly. (*Id.* at 664-67.) Finally, Defendant contends that when Plaintiff trained other employees in Oracle, she had to answer questions, and that no one could or did tell her when and how to answer questions. (*Id.* at 296-303.) Instead, Defendant asserts that the Company relied on Plaintiff to use her judgment to describe Oracle implementation and the 3PLs in the best possible light. (*Id.*)

In response, Plaintiff asserts that although her duties “required the exercise of some skill or knowledge” to apply prescribed procedures or determine which procedures to follow, these were not “matters of significance” within the meaning of the regulation’s requirements. (Wolfslayer Aff. ¶¶ 7-8, 11-12.) Indeed, Plaintiff states that she never made decisions without the approval of her immediate supervisor. (*Id.* at ¶ 11.)

A material question of fact remains, however, regarding whether Plaintiff’s limited decision-making autonomy these choices granted Plaintiff discretion and independent judgment “with respect to matters of significance” as required by the regulations for a FLSA exemption. 29 C.F.R. §

541.207(a). In sum, the parties have submitted materially different narratives of what Plaintiff's job duties were, the importance of her work, and how much discretion she had. The determination of whether Plaintiff's duties are properly classified as administrative requires a choice between these competing factual narratives. Accordingly, the Court denies Defendant's motion for summary judgment on the "duties" test.

B. Salary Basis Test

Both parties move for summary judgment on the question of whether IKON's compensation scheme effectively treated Plaintiff and thirty-three other similarly situated employees as hourly, rather than salaried, employees, and therefore improperly denied them overtime pay. As noted above, to be exempt from FLSA's overtime pay requirements, not only must employees perform appropriate duties, but they also must be paid "on a salary basis" within the meaning of the Department of Labor's regulations. This second requirement is known as the "salary basis test." According to this test, an employee is salaried if regularly paid "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). In other words, a salaried employee's pay should not be "docked," because "a salaried employee is paid the same regardless of the number of hours worked." *Klein v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 990 F.2d 279, 284 (7th Cir. 1993). If the structure of an employer's compensation scheme does not meet the salary basis test, FLSA requires that the employee receive overtime pay.

However, the general rule that employees whose pay may be docked are not "salaried" (and thus must be paid overtime) is subject to two limitations. First, only partial-day deductions from salary are prohibited by the salary basis test. See *Donovan v. Carls Drugs Inc.*, 703 F.2d 650, 652

(2d Cir. 1983) (holding that exempt employee “may not be docked pay for fractions of a day of work missed”); *Mich. Ass’n of Gov’t Employees v. Mich. Dep’t of Corr.*, 992 F.2d 82, 84 (6th Cir. 1993) (interpreting regulatory silence regarding partial-day deductions as implication that such deductions are inconsistent with salary status). Employers can deduct salary in whole day increments if employees classified as exempt are absent for one or more full days for personal reasons. 29 C.F.R. § 541.118(a)(2). Similarly, full day pay deductions for absences due to sickness or disability can be made if an employee classified as exempt has exhausted his leave allowance under his employer’s bona fide benefits plan or practice. *Id.* at § 541.118(a)(3).

Second, there is a difference between partial day deductions from base pay and partial day reductions of fringe benefits, such as vacation or sick leave time. Where an employer requires employees to use sick or vacation leave to cover partial day absences or be docked pay, employees are not paid on a salary basis under FLSA regulations.⁵ However, where the employment policy directly reduces employee sick or vacation leave for partial day absences, but does not dock, or threaten to dock, employees’ pay for those partial day absences, employees are paid on a salary

⁵*See, e.g., Spradling v. City of Tulsa*, 95 F.3d 1492, 1501 (10th Cir. 1996) (holding city’s policy “inconsistent with the salary test” where unwritten policy reduced leave time for absences of less than a day and subjected pay to docking if employee lacked sufficient leave time); *Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993) (holding salary basis test not met where pay reduced, in hourly increments, for partial-day absences if employee did not have sufficient accrued annual leave time); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 615 (2d Cir. 1991) (holding that “an employee who can be docked pay for missing a fraction of a workday must be considered an hourly, rather than a salaried, employee”); *Oral v. Aydin Corp.*, Civ. A. No. 98-6394, 2001 U.S. Dist. LEXIS 20625, at *21-22, 2001 WL 1735063, at *6 (E.D. Pa. Oct. 31, 2001) (holding invalid employer practice of deducting pay of employees classified as salaried for partial day absences unless sick or vacation leave was used to cover absences).

basis.⁶ Thus, “compensation” and “amount” in 29 C.F.R. § 541.118(a) refer only to base pay salary, which is distinct from fringe benefits like sick or vacation time. 29 C.F.R. § 541.118(a) (referring to “a predetermined amount constituting all or part of [employee’s] compensation, which amount is not subject to reduction” due to quantity of work performed); *see, e.g., Webster*, 247 F.3d at 917. Accordingly, the Wage and Hour Division of the Department of Labor has issued opinion letters stating that “it is permissible to substitute or reduce the accrued leave in [a bona fide benefit] plan for the time an employee is absent from work even if it is less than a full day without affecting the salary basis of payment, if by substituting or reducing such leave the employee receives in payment an amount equal to his or her guaranteed salary.” Wage & Hour Op. Ltr., 2001 WL 1558766, at *2 (Feb. 16, 2001).

These two limitations to the no-docking rule are framed by the requirements set forth by the United States Supreme Court in *Auer v. Robbins*, 519 U.S. 452 (1997). In *Auer*, salaried police officers claimed their employer’s compensation scheme did not comply with the salary basis test because a police department manual listed disciplinary infractions that could result in deductions to pay. The officers’ claim was rejected because the pay deductions outlined in the manual had never been applied to salaried employees and the policy did not require an inference of such deductions. *Id.* at 462. *Auer* thus held that a mere “theoretical possibility” of deductions does not make an employee’s compensation “subject to” such deductions. *Id.* at 461. Rather, an employee’s

⁶ *See, e.g., Webster v. Public Sch. Employees of Wash.*, 247 F.3d 910, 917 (9th Cir. 2001) (holding that “‘amount’ and ‘compensation’ in the regulation refers to salary and therefore a reduction in the paid leave time does not affect the Plaintiffs’ status as salaried employees . . . [b]ecause leave time is not salary”); *Cooke v. Gen. Dynamics Corp.*, 993 F. Supp. 50, 54-55 (D. Conn. 1997) (stating that “compensation . . . relates to a predetermined salary, not employee benefits,” and holding that “where the only deductions for partial-day absences are to an employee’s paid leave accounts . . . the salaried status of an employee has not been violated”).

compensation is “subject to” deduction only when the employer’s policy permits deductions “as a practical matter,” i.e., “if there is either an actual practice of making such deductions or an employment policy that creates a ‘significant likelihood’ of such deductions.” *Id.* Therefore, while actual deductions are unnecessary, “in their absence [there must be] a clear and particularized policy – one which ‘effectively communicates’ that deductions will be made in specified circumstances.” *Id.* This Court will now analyze IKON’s allegedly improper policy through the lens of *Auer*.

1. Actual Practice

Beginning in April 2003, IKON’s policy stated that employees classified as exempt from FLSA’s overtime pay requirements “who have exhausted all available sick and vacation time may have their pay docked in full day increments when they are absent for illness or personal reasons. Exempt employees will not have their pay docked in partial day increments.” (Pl.’s Mot. Ex. M at D0134.) Plaintiff has presented two instances which she claims demonstrate that IKON had an actual practice of docking the pay of employees in the putative class in violation of the salary basis test. First, Plaintiff asserts that IKON docked her January 11, 2002 paycheck by \$30.46 “because she exhausted her leave accruals and missed time from work.” (Wolfslayer Aff. ¶ 17.) This claim is utterly without merit. Defendant has clearly shown that the disputed paycheck encompassed the end of 2001 and the beginning of 2002. (Def.’s Mot. Ex. K.) Because Plaintiff earned slightly more in 2002 than in 2001, the January 11 check was \$30.46 less than Plaintiff’s other 2002 checks, as it included pay based on two different pay rates during one pay period. (*Id.* Exs. L, M.) Accordingly, the \$30.46 deficit does not show that Defendant had an actual practice of making improper deductions.

Plaintiff’s second example of an allegedly improper deduction involves Heather Plasencio,

another member of the putative class. In 2003, Plasencio had exhausted her accrued vacation and sick time, had borrowed her yearly limit of vacation time, and then missed more work. According to Plaintiff, IKON deducted one whole day increment of pay from Plasencio's salary. (Pl.'s Mot. Ex. CC at D1853.) This deduction, however, is explicitly allowed by the Secretary's FLSA regulations, which provide that if an employer has a plan that provides compensation for sick and vacation time, "deductions for absences of a day or longer because of sickness or disability may be made . . . after [the employee] has exhausted his leave allowance thereunder." 29 C.F.R. § 541.118(a)(3). Furthermore, *Oral v. Aydin Corp.*, Civ. A. No. 98-6394, 2001 U.S. Dist. LEXIS 20625, 2001 WL 1735063 (E.D. Pa. Oct. 31, 2001), a case upon which Plaintiff relies heavily, is not to the contrary. In *Oral*, the employer required salaried employees to use sick or vacation leave to "cover" any partial day absence from work. *Id.* If they did not use leave time to cover their missed hours, they were docked pay or had to stay late. *Id.* The court determined that plaintiffs faced a "threat" of docking for partial day absences unless they used their leave to cover the absences, which "is inconsistent with the definition of what it means to be a salaried employee." *Id.* at *22-23. In the present case, by contrast, IKON's policy specifically states that "exempt employees will not have their pay docked in partial day increments." (Pl.'s Mot. Ex. M at D0134.) Unlike in *Oral*, the specter of partial-day pay deductions does not hang over the heads of IKON employees. Thus, Plaintiff has not presented any evidence of an actual improper deduction.

2. *Significant Likelihood*

Because IKON did not have an actual practice of improperly docking salaried employees' pay, Plaintiff must meet the "significant likelihood" prong of the *Auer* test to be non-exempt from FLSA under the salary basis test. *See Auer*, 519 U.S. at 461. Plaintiff challenges two IKON policies

that, according to Plaintiff, create a significant likelihood of improper deductions. First, the policy has stated since March 2001 that all IKON employees

will be responsible for any negative vacation balances that may result from the ‘borrowing’ of vacation time. To the extent permitted by law, the Company will deduct from your final paycheck the value of any negative vacation balance.

(Def.’s Mot. Ex. D at D0311.) Plaintiff argues that such final-check deductions created a “significant likelihood” of improper deductions. (Pl.’s Mot. ¶ 34(f).) However, this policy does not meet the *Auer* “significant likelihood” test, because it is not a “clear and particularized policy . . . directed at employees in [Plaintiff’s] category.” *Auer*, 519 U.S. at 461-62. The *Auer* Court held that “overly broad-based policies” fail to “‘effectively communicate’ that pay deductions are an anticipated form of punishment for employees *in [Plaintiff’s] category.*” *Id.* (emphasis in original). Here, the March 2001 policy expressly limits its own application “to the extent permitted by law.” This limitation means that IKON cannot subject exempt employees to deductions disallowed by FLSA. *Auer* held that “broad-based” policies which may be “give[n] full effect” without drawing any inference that they apply to employees in a plaintiff’s category do not make such employees “subject to” improper reductions. *Id.* at 461. In this case, not only can the March 2001 policy be given full effect without application to exempt employees – it can *only* be given full effect by not applying to those employees. Therefore, it cannot form the basis of a “significant likelihood” salary basis challenge. *Id.*; *see also Balgowan v. New Jersey*, 115 F.3d 214 (3d Cir. 1997) (rejecting claim of FLSA violation by group of Department of Transportation (“DOT”) engineers because policy at issue applied to all DOT employees, and did not necessarily affect DOT engineers).

Second, in April of 2003, IKON changed the Employee Handbook to include the following:

“Sick leave may be used in increments of . . . half days for salaried employees Exempt employees who are ineligible for and/or who have exhausted all available sick and vacation time may have their pay docked in full-day increments when they are absent for illness or personal reasons.”

(Pl.’s Mot. Ex. M at D0134.) Although salary is deducted only in whole day increments, which on its face is permitted by FLSA regulations, Plaintiff argues that requiring salaried employees to substitute leave for missed time at work in less than full days subject ultimately to having pay docked violates FLSA. Essentially, Plaintiffs’ claim is that reductions of leave time in half-day increments possibly followed by reductions of salary in full day increments if the employee has run out of leave time violates the FLSA regulations. Defendants respond that this policy is permissible under the salary basis test because it only provides for partial day reductions to leave entitlements and because any deductions from salary are made only in whole-day increments.

Neither party disputes that the policy implemented in April 2003 complies with the Department of Labor’s interpretation of 29 C.F.R. 541.118(a). *See, e.g., Wage & Hour Op. Ltr.*, 2001 WL 1558766, at *2 (Feb. 16, 2001); (*see also* Oral Arg. R. at 8 (Oct. 1, 2004) (Plaintiff’s counsel stated that “the Department of Labor wage and hour opinion letters . . . would seem to indicate [Defendant’s] analysis is the – is the correct legal analysis”).) Ordinarily, this would be fatal to Plaintiff’s argument, as the Supreme Court has explicitly stated that “[b]ecause the salary-basis test is a creature of the Secretary’s own regulations, his interpretation of it is, under our jurisprudence, controlling unless ‘plainly erroneous or inconsistent with the regulation.’” *Auer*, 519 U.S. at 461. Plaintiff nevertheless claims that “the Secretary’s interpretation of its own regulations in those Wage and Hour Opinions is inconsistent with the regulation itself.” (Oral Arg. R. at 9 (Oct. 1, 2004).) Plaintiff bears a heavy burden in demonstrating such an inconsistency, for it is an “established

proposition” of law that “an agency’s construction of its own regulations is entitled to substantial deference.” *Lyng v. Payne*, 476 U.S. 926, 939 (1986). Agency interpretation has been called the “ultimate criterion” in construing administrative regulations, and it is “of controlling weight unless” plainly erroneous or inconsistent with the regulation’s language. *United States v. Larionoff*, 431 U.S. 864, 872 (1977) (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945)).

Plaintiff does not meet her burden. As stated above, the baseline regulation merely requires that to be properly classified as exempt (and thus entitled to overtime) under the salary basis prong, an employee must receive a salary, which is “a predetermined *amount* constituting all *or part* of his compensation.” 29 C.F.R. § 541.118(a) (emphasis added). The provisions that follow, (a)(1), (a)(2), and (a)(3), set forth different circumstances under which this “amount” may be deducted, but all state that such deductions must be in whole-day increments only. *Id.* at §§ 541.118(a)(1)-(a)(3). Because the regulations do not define “amount” or “compensation,” the Secretary has issued opinion letters interpreting these terms. In the Secretary’s construction, the term “amount” refers to an employee’s base pay only, not an employee’s so-called “fringe benefits,” such as sick or vacation leave.⁷ Therefore, reductions to fringe benefits can be made in partial days, while deductions to cash pay can only occur in full day increments. *See Wage & Hour Op. Ltr*, 1994 WL 1004772, at *2 (Apr. 13, 1994) (“It has been our long standing position that where an employer has bona fide benefits plans, it is permissible to substitute or reduce the accrued leave in the plans . . . even if it is less than a full

⁷ For example, the Secretary has stated that “sick and personal leave accounts . . . are not required by either the FLSA or its implementing regulations,” and therefore “as long as the employee . . . is always paid a salary . . . the additions to and deductions from the employees’ leave accounts in less than a full day’s amount are permissible.” *Wage & Hour Op. Ltr.*, 1998 WL 852645, at *3 (Jan. 26, 1998). This construction of the term “amount” is supported by the Ninth Circuit, which has bluntly stated that “leave time is not salary.” *Webster*, 247 F.3d at 917.

day.”).

Plaintiff relies on *Klein v. Rush Presbyterian-St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993), to support her position that the Secretary's interpretation of its own regulation is clearly erroneous, but this case is not on point. In *Klein* Defendant implemented a comp time policy for its nurses. 990 F.2d at 281. If a nurse worked more than eight hours on a shift, the excess hours were put in a comp time bank, whereas if a nurse worked less than eight hours on a shift, he or she had to use accrued comp time or enter negative comp time to maintain an eight hour total for that shift. *Id.* Although a nurse's pay was never reduced for negative comp time, nurses were periodically paid for blocks of accumulated positive comp time. *Id.* The court held that this policy violated FLSA because working one less hour meant the employee “was going into a form of debt since any later accumulated comp time had to pay off that debt.” *Klein* 990 F.2d at 284. The court's holding was predicated on the idea that since accumulated comp time was paid to the nurses, deductions from accumulated comp time were in effect deductions to salary. Since the hospital's policy allowed these deductions in hourly increments, the policy violated FLSA. *Klein* is inapposite to the present case because *Klein* dealt solely with possible deductions from pay in less than full day increments, not with reductions in fringe benefits which may later occasion a full day deduction in pay. The dispute in the present case centers on the relationship between fringe benefits and salary; specifically, whether reductions in fringe benefits in less than full day increments means that salary is effectively being reduced in less than full day increments.

In conclusion, this Court cannot conclude that the Secretary's clear pronouncement that “amount” refers only to a sum of money is plainly erroneous or inconsistent with the regulatory

language.⁸ Thus, Defendant has met its burden by demonstrating that no genuine issue of material fact exists regarding whether IKON's compensation scheme contravenes the salary basis standard. Accordingly, summary judgment for Defendant is appropriate on this issue. Furthermore, as the putative class members were paid on a "salary basis" and were properly exempt from receiving overtime pay, the class will not be certified. Moreover, as Plaintiff is a salaried employee within the meaning of FLSA, she will be designated an administrative employee not deserving of overtime pay if Defendant can carry its burden at trial on the "duties" test. *See supra* Part III(a).

C. Willfulness

Plaintiff has also sought to extend the time period for which she may recover overtime pay by alleging that Defendant willfully violated FLSA, and Defendant moves for summary judgment on this issue. FLSA provides that any action for unpaid overtime compensation "may be commenced within two years after the cause of action accrued." 29 U.S.C. § 255(a) (2004). If, however, the cause of action arises out of a willful violation, it may be commenced within three years after the cause of action accrued. *Id.* A cause of action under FLSA for unpaid overtime "accrues" whenever the employer fails to pay the required compensation for any particular workweek. 29 C.F.R. § 790.21(b) (2003). An action is commenced on the date a complaint is filed. *Id.* at § 790.21(b)(1). Plaintiff filed her complaint on December 9, 2003. Therefore, Plaintiff may seek damages from December 9, 2001 through October 7, 2003 (the date of her termination), unless IKON's FLSA violation is considered willful, in which case Plaintiff may seek damages from December 9, 2000.

⁸ Moreover, the regulation states that the predetermined amount which cannot be deducted except in full day increments need only be "part" of an employee's total compensation. 29 C.F.R. § 541.118(a) Thus, even if benefits are included in the definition of "compensation," they could be a different "part" of the compensation package, and thus reducible in less than whole day amounts without violating the regulation's language.

The determination of whether a FLSA violation was willful is a question of law on which the plaintiff bears the burden of proof. *Adams v. United States*, 350 F.3d 1216, 1229 (Fed. Cir. 2003) (holding that plaintiff bears burden); *Martin v. Selker Bros. Inc.*, 949 F.2d 1286, 1292 (3d Cir. 1991) (holding that willfulness is question of law). To show willfulness, Plaintiff must show that IKON either: (1) knew; or (2) showed reckless disregard as to whether its conduct was prohibited by the statute.⁹ *McLaughlin v. Richmond Shoe Co.*, 486 U.S. 128, 133 (1988); *Brock v. Richland Shoe Co.*, 799 F.2d 80, 81 (3d Cir. 1986) (“[I]t is clear that willfulness is akin to intentionality . . . [a]t the very least a willful act requires reckless disregard of the consequences”).

The Third Circuit has expressly rejected an “extension of the statute of limitations [to three years] when the employer was merely negligent with regard to overtime and recordkeeping provisions of FLSA.” *Richland Shoe*, 799 F.2d at 83. Instead, it has been said that “stubborn non-compliance in the face of contrary judicial authority” amounts to willfulness, *EEOC v. Westinghouse Elec. Corp.*, 869 F.2d 696, 712 (3d Cir. 1989), or, at the very least, that the employer must have “suspected that his actions might violate FLSA,” *Facchiano Constr. Co. v. United States Dep’t of Labor*, 987 F.2d 206, 214-215 (3d Cir. 1993). The Court has reasoned that a high willfulness bar gives effect to Congress’s intention of a two-tiered scheme of liability. *Id.* at 83. For instance, in *Selker Bros.*, the Third Circuit found reckless disregard when testimony established that the employer said he knew there was a “fine line” regarding the legality of paying his employees on a commission basis, and that the employer instructed someone to “hush it up.” 949 F.2d at 1296. The Court held that this awareness of a possible violation, combined with “evident indifference toward the requirements

⁹ Plaintiff does not contend that IKON possessed the actual knowledge that is required to meet the first prong of this test. *Selker Bros.*, 949 F.2d at 1296.

imposed by the FLSA,” merited a finding of willfulness. *Id.*

Defendant argues that the facts of the present case are distinct from *Selker Bros.* because they exhibit IKON’s awareness of and attempted adherence to FLSA’s requirements. IKON has a process for determining whether jobs are exempt from FLSA’s overtime pay requirements. (McTaggart Dep. at 10.) Supervisors send staffing requisitions or job descriptions to the compensation department. (*Id.*) After reviewing the documentation, the compensation department makes a FLSA classification decision. (*Id.* at 11.) If the documentation is not sufficient, the compensation department will contact the employee’s manager and/or the local human resources representative to gather additional information. (*Id.*) Furthermore, IKON’s payroll department routinely audits payroll records to determine if an exempt employee was paid appropriately. (Grafje Dep. at 110.) Finally, the human resources department circulates bulletins so that the human resources staff can stay informed of company policy changes or developments in the law. (*Id.* at 112.)

Plaintiff responds that despite IKON’s policy of reviewing job descriptions, no one at IKON inquired as to Plaintiff’s actual job duties. (McTaggart Dep. at 19; Rosales Dep. at 70.) Moreover, Plaintiff asserts that no one at IKON analyzed Plaintiff’s actual duties before the exemption determination was made. (Penniston Dep. at 54-55.) Finally, because IKON’s director of compensation could not produce any documentation of a job description submitted by Plaintiff’s managers to the human resources department (McTaggart Dep. at 35-37, 41-46), Plaintiff claims that Defendant had a reckless disregard for the classification process.

Because Plaintiff must prove willfulness at trial, Defendant can discharge its burden on summary judgment “by ‘showing’ . . . that there is an absence of evidence to support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325. IKON has met this standard here. The Third Circuit has

consistently required an affirmative showing to hold a defendant liable for the extra year of damages that willfulness allows, and, even assuming that Plaintiff's allegations are true, IKON's behavior is closer to evincing mere negligence rather than reckless disregard. *See, e.g., Selker Bros.*, 949 F.2d at 1296; *see also Facchiano Constr.*, 987 F.2d at 214-15. As noted above, IKON has numerous compliance policies (McTaggart Dep. at 10-12, 14-17) and audit policies (Grafje Dep. at 94-96, 108-12, 129-30) to ensure that the company in fact does not violate FLSA. There is no evidence that IKON's behavior even approached the "stubborn non-compliance in the face of contrary judicial authority" required by the Third Circuit's jurisprudence. *Westinghouse Elec.*, 869 F.2d at 712. Therefore, summary judgment in favor of Defendant is appropriate on this issue, and the actionable period in this case will be from December 9, 2001 until October 7, 2003.

IV. CONCLUSION

For the reasons set forth above, Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted in part and denied in part. An appropriate Order follows.

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

| | | |
|-------------------------------------|---|---------------------|
| NANCY WOLFSLAYER, et al., | : | |
| Plaintiffs, | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| IKON OFFICE SOLUTIONS, INC., | : | No. 03-6709 |
| Defendant. | : | |

ORDER

AND NOW, this 8th day of **November, 2004**, upon consideration of Plaintiff's Motion for Partial Summary Judgment, Defendant's Motion for Summary Judgment, the responses thereto, following oral argument thereon on October 1, 2004, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Defendants' Motion for Summary Judgment (Document No. 8) is **GRANTED in part** and **DENIED in part**, as follows:
 - a. Judgment is entered in favor of Defendants and against Plaintiffs as to Counts I and IV of the Amended Complaint.
 - b. In all other respects, Defendants' Motion for Summary Judgment is **DENIED**.
2. Plaintiff's Motion for Partial Summary Judgment (Document No. 9) is **DENIED**.

BY THE COURT:

Berle M. Schiller, J.