IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

TONYA L. TATI, Plaintiff, v. BEST CARE TRANSPORT SERVICES, LLC, Defendant.	CIVIL ACTION FILE NO. 4:11-CV-0246-HLM-WEJ

FINAL REPORT AND RECOMMENDATION

Plaintiff, Tonya L. Tati, filed this action [4] on October 11, 2011, against defendant, Best Care Transport Services, LLC ("Best Care"), alleging that it failed to pay her overtime compensation in violation of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("FLSA").

Now pending before the Court are cross-motions for summary judgment. (See Def.'s Mot. Summ. J. [26]; Pl.'s Cross-Mot. Summ. J. [44].) For the reasons explained below, the undersigned **REPORTS** that the undisputed material facts show that plaintiff is covered by the FLSA, and that there is a genuine factual dispute as to whether defendant failed to pay her at the prescribed rate for hours worked in

excess of forty per workweek. Therefore, the undersigned **RECOMMENDS** that both Motions be **DENIED**.

I. STATEMENT OF FACTS

The Court draws the material facts largely from the parties' submissions. In support of its Motion for Summary Judgment, defendant as movant filed a Statement of Material Facts as to Which There is no Genuine Issue to be Tried ("DSMF") [27]. See N.D. Ga. R. 56.1(B)(1). As required by Local Rule 56.1(B)(2)(a), Ms. Tati as respondent submitted Plaintiff's Response to Defendant's Statement of Undisputed Material Facts ("R-DSMF") [43-1]. As required by Local Rule 56.1(B)(2)(b), she also submitted Plaintiff's Statement of Additional Undisputed Material Facts ("PAMF") [43-2], to which defendant submitted a response as required by Local Rule 56.1(B)(3) (see Def.'s Resp. to Pl.'s Stmt. of Add'l Material Facts ("R-PAMF") [52]).[1] In support of her Cross Motion for Summary Judgment, Ms. Tati relies upon R-DSMF and PAMF. (Pl.'s Cross Mot. Summ. J. 1.)

[1] Plaintiff filed a reply [53-1] to R-PAMF. Such a reply is not contemplated by the Local Rules and plaintiff did not seek the Court's permission to file that document; thus, the Court need not consider Plaintiff's Reply to Defendant's Response to Plaintiff's Statement of Additional Undisputed Facts.

In those instances where a party admits the other's proposed fact, the Court deems it undisputed for purposes of this Report and Recommendation and cites both the proposed fact and the response. In those instances where a party denies a proposed fact (in whole or in part), the Court reviews the record to determine whether the proposed fact is disputed and, if so, whether any dispute is material. The Court sometimes modifies a party's proposed fact per the record cited in the other party's response.

The Court excludes proposed facts that are immaterial (DSMF ¶¶ 3 (sentence 2), 5, 11-12, 14; PAMF ¶¶ 3, 10, 23, 39, 46-47, 50, 59) or stated as issues or legal conclusions (PAMF ¶ 21). Local Rule 56.1 instructs respondents to summary judgment motions to file a statement setting forth additional material facts, i.e., facts not addressed in DSMF. See N.D. Ga. R. 56.1(B)(2)(b). Therefore, the Court does not include facts contained in PAMF that are repetitive or similar to those proposed by defendant and addressed by the Court in reviewing DSMF and R-DSMF (PAMF ¶¶ 1-2, 4-9, 11-12, 22, 40, 57-58). Finally, the Court includes some facts drawn from its own review of the record. See Fed. R. Civ. P. 56(c)(3).

A. Best Care's Business

Best Care is a medical transportation service provider in Cartersville, Georgia. (DSMF ¶ 1; R-DSMF ¶ 1.) It specializes in transporting Georgia residents to and from hospitals, doctors' appointments, pharmacies, and other health-care providers located within Georgia.[2] (DSMF ¶ 1; R-DSMF ¶ 1.) In each of the years 2009, 2010, and 2011, defendant had an annual gross sales volume of $500,000 or more. (PAMF ¶ 60; R-PAMF ¶ 60.)

During the time of plaintiff's employment, Best Care and its employees operated solely within Georgia; drivers never transported passengers from, to, or through, any other state or transportation hub (e.g., airport, seaport, etc.). (DSMF ¶ 7; R-DSMF ¶ 7; accord DSMF ¶ 6 (plaintiff transported passengers in the Cartersville area); R-DSMF ¶ 6 (plaintiff transported passengers within fifty-mile radius of Cartersville).)

Best Care both purchases and rents the vehicles used by its employees. (PAMF ¶ 27; R-PAMF ¶ 27; see also PAMF ¶ 36; R-PAMF ¶ 36.) During plaintiff's employment, Best Care employees operated two Toyota Sienna minivans, one Honda

[2] Since 2004, Best Care has maintained a Motor Carrier of Property Permit with the Georgia Department of Revenue. (DSMF ¶¶ 8-9; R-DSMF ¶¶ 8-9.)

minivan, a series of Ford vans, and a Kia Sedona. (PAMF ¶ 29; R-PAMF ¶ 29.)[3] Best Care maintains those vehicles, including regular oil changes and purchases of between $50,000 and $100,000 worth of gasoline annually. (PAMF ¶¶ 28,[4] 37[5]-38, 44; R-PAMF ¶¶ 28, 37-38, 44; Def.'s Resp. Pl.'s Second Request for Admissions [45-5] ¶ 21.)

At least one part of each vehicle in defendant's fleet was made in Japan. (PAMF ¶¶ 31-32[6]; see also Kenney Dep. 60.) Likewise, the gasoline, oil, and

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[3] Each of those vehicles weigh less than 10,000 pounds. (PAMF ¶¶ 34-35; R-PAMF ¶¶ 34-35.)

[4] The Court sustains defendant's partial objection to PAMF ¶ 28 and does not include the portion of that proposed fact stating that vehicle maintenance is a necessary part of defendant's business because that statement is not supported by the record citation. (See R-PAMF ¶ 28.)

[5] The Court sustains defendant's partial objection to PAMF ¶ 37 and does not include the portion of that proposed fact stating that gasoline is a necessary part of defendant's business because that statement (although obviously true) is not supported by the record citation. (See R-PAMF ¶ 37.)

[6] The Court overrules defendant's objections to PAMF ¶¶ 31-32 because the record citation clearly supports its stipulation that at least one part of every vehicle in its fleet was manufactured outside Georgia and Best Care's objection is argumentative. (See R-PAMF ¶ 31-32; Kenney Dep. [46] 60 (citing PDF pagination).) PAMF ¶ 33 (stating that the minivans used by Best Care were not manufactured in Georgia) is repetitive of the point made in PAMF ¶¶ 31-32 (which defendant conceded); therefore, the Court need not include that additional proposed fact.

uniforms used in defendant's business are products produced out of state. (PAMF ¶¶ 41-43, 45; R-PAMF ¶¶ 42-43.)[7] Additionally, Best Care employees (excluding drivers) used the United States Postal Service, Federal Express, UPS, telephone systems, e-mail, and credit cards for business purposes. (PAMF ¶¶ 52-56; R-PAMF ¶¶ 52, 54-56.)[8] Finally, Best Care issued Motorola and Sprint/Nextel cellular telephones to its drivers. (PAMF ¶¶ 49, 51; R-PAMF ¶¶ 49, 51.)

[7] The Court overrules defendant's partial objections to PAMF ¶¶ 41 and 45 because defendant's refusal to acknowledge that the gasoline and oil it purchased likely were produced out of state is argumentative and serve only to delay this case. (See R-PAMF ¶¶ 41, 45.)

[8] The Court overrules defendant's objection to PAMF ¶ 53 (stating that defendant used overnight delivery services) because that proposed fact is supported by the record citation. (See R-PAMF ¶ 53.)

B. Driver Compensation

Best Care pays drivers, including plaintiff, a commission based on their assignments and number of miles driven.[9] (DSMF ¶ 3; R-DSMF ¶ 3; Kenney Dep. 21.)[10] Best Care pays drivers $9.00 per hour to attend company meetings and when they are delayed for one hour or more due to traffic or vehicle maintenance. (Kenney Dep. 22-23; Kenney Decl. [27-1] 2.) Defendant attempts to keep drivers on "runs" all the time (PAMF ¶ 18; R-PAMF ¶ 18), and does not pay drivers for the

[9] DSMF ¶ 4 asserts that Best Care paid plaintiff one and one-half times the federal minimum wage for all hours worked. (DSMF ¶ 4.) However, plaintiff contends that more of her time was compensable (defendant only paid drivers for the time spent transporting a passenger) under the law. (See R-DSMF ¶ 4.) Thus, DSMF ¶ 4 fails to account for plaintiff's gap or down time when calculating her rate of pay. Whether such time is compensable under the FLSA "depends on the degree to which the employee may use the time for personal activities." Birdwell v. City of Gadsden, 970 F.2d 802, 807 (11th Cir. 1992). "[I]f the employee was 'engaged to wait,' then he or she is entitled to be compensated for that time, but if the employee was 'waiting to be engaged,' then the employer is not obligated to pay." LaPorte v. Gen. Elec. Plastics, Bus. Grp. Burkville, Ala., 838 F. Supp. 549, 554 (M.D. Ala. 1993). There is a genuine dispute as to how much of that gap time is compensable, thereby affecting defendant's calculation of plaintiff's hourly rate. Thus, the Court sustains plaintiff's objections to DSMF ¶ 4.

[10] Plaintiff objects only to DSMF ¶ 3's contention that she was paid on a purely commission basis. (See R-DSMF ¶ 3.) That objection is supported by Ms. Kenney's deposition, in which she testified that Best Care supplemented driver pay in certain situations. Thus, the undersigned sustains plaintiff's partial objection to DSMF ¶ 3 and includes information clarifying defendant's payment system in the sentence following this note.

time spent waiting for an assignment, waiting for short maintenance (e.g., an oil change), or refueling vehicles (PAMF ¶¶ 15-16; R-PAMF ¶¶ 15-16; Kenney Dep. 21-22).

Drivers can use the time between assignments for personal business (or go home), as long as they are available via a cellular telephone supplied by defendant and remain fit to drive legally. (PAMF ¶¶ 14, 17, 48; R-PAMF ¶¶ 14, 17, 48; see also Kenney Dep. 18; Kenney Decl. II [52], at 19 ¶ 6.)[11] During the "gap" or "down" time in between scheduled pick-ups, drivers are subject to being called on a cellular telephone and told to get an additional passenger either immediately or later in the day. (PAMF ¶ 14; R-PAMF ¶ 14; Kenney Dep. 19.) Best Care regularly and unpredictably calls drivers during down time based on daily passenger demand. (PAMF ¶ 19[12]; see also Kenney Dep. 19.) When called, drivers usually must leave immediately for an appointment. (PAMF ¶ 20; R-PAMF ¶ 20.)

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[11] The parties dispute the term used for the time that drivers have between calls (see PAMF ¶¶ 14-15, 20; R-PAMF ¶¶ 14-15, 20); that dispute is immaterial and the Court uses both terms interchangeably. (See Kenney Dep. 18 (referring to that time as a "gap" when the driver is "free").)

[12] The Court overrules defendant's objection to PAMF ¶ 19 because that fact is supported by the record citation and defendant failed to refute it directly. (See R-PAMF ¶ 19.)

C. Plaintiff's Employment

Best Care employed Ms. Tati (a Georgia resident) as a minivan driver from October 4, 2009 until September 3, 2011. (DSMF ¶ 2; R-DSMF ¶ 2.) Ms. Tati also worked as a dispatcher periodically[13] (approximately fourteen times). (Tati Decl. [43-4] ¶ 4.)[14]

During her employment, plaintiff drove a vehicle (a Toyota Sienna) which defendant had registered as an intrastate vehicle with the Georgia Department of Revenue. (DSMF ¶ 10; R-DSMF ¶ 10; PAMF ¶ 30; R-PAMF ¶ 30.) Plaintiff refueled that vehicle daily, purchasing gasoline from various locations (e.g., Kangaroo, BP, Shell) depending on price. (R-DSMF ¶ 13.)[15]

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[13] When working as a dispatcher, plaintiff earned $10.00 per hour. (Kenney Dep. 41-42.)

[14] The Court sustains plaintiff's objection to the footnote attached to DSMF ¶ 2 (stating that plaintiff only worked as a dispatcher three times) because plaintiff contradicts it in her Declaration. (See R-DSMF ¶ 2.) For the purposes of defendant's Motion, the Court must view the facts in the light most favorable to plaintiff as nonmovant. See Turnes v. AmSouth Bank, N.A., 36 F.3d 1057, 1060 (11th Cir. 1994). Thus, the undersigned restates the proposed fact in the sentence preceding this note. Additionally, that dispute is immaterial at this stage.

[15] The Court sustains plaintiff's objection to DSMF ¶ 13 (stating that Ms. Tati did not purchase supplies on defendant's behalf) because she has directly refuted that proposed fact. (See R-DSMF ¶ 13.) In her Declaration, plaintiff avers that she purchased gasoline (with a credit card issued to her by defendant) for her assigned

Typically, the day before she was to work, Best Care would give plaintiff a manifest of trips for the next day. (Kenney Dep.17, 20; Tati Decl. ¶ 23.) When her shift began, plaintiff would retrieve her assigned vehicle at Best Care and drive to the first appointment. (Kenney Dep. 17; Tati Decl. ¶ 23.)[16] The time of her first appointment varied, as did the amount of time it took Ms. Tati to drive from Best Care to the location of that first passenger. (Kenney Dep. 17, 20; Tati Decl. ¶ 23.)

While at Best Care, plaintiff did not keep her own records detailing the hours that she worked. (PAMF ¶ 24; R-PAMF ¶ 24.) Best Care documented the times when Ms. Tati picked up and dropped off passengers on a Trip Reimbursement Form. (PAMF ¶ 26; R-PAMF ¶ 26.)[17] Those records did not directly reflect the

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vehicle every day she was employed. (See Tati Decl. ¶ 17.)

[16] Defendant disputes PAMF ¶ 13 to the extent that it states plaintiff's workday began when she retrieved her vehicle. (See R-PAMF ¶ 13.) The undersigned addresses the issue of compensable time supra note 9 and infra note 18. Thus, that proposed fact is restated in the paragraph preceding this note to address both defendant's objection and reflect the record citation accurately.

[17] The Court sustains defendant's objection to PAMF ¶ 25 (stating that it did not keep records of the hours worked by plaintiff) because that issue–how much of plaintiff's time was compensable–is the one before the Court. (See R-PAMF ¶ 25.) Moreover, as set forth in the sentence preceding this note, the parties agree that the time records kept by defendant only record pick-up and drop-off times. (PAMF ¶ 26; R-PAMF ¶ 26.)

amount of time it took plaintiff to drive to or from an appointment. (PAMF ¶ 26; R-PAMF ¶ 26.) Defendant paid plaintiff at least one and one-half times the federal minimum wage during at least eighteen of the ninety-eight weeks it employed her. (PAMF ¶ 61; R-PAMF ¶ 61.)[18]

Because the parties agree that Best Care comported with FLSA pay requirements during eighteen of the ninety-eight weeks it employed her, only the remaining eighty weeks are at issue. The undersigned reviews the applicable summary judgment standard before addressing the parties' Motions.

II. SUMMARY JUDGMENT STANDARD

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party moving for summary judgment bears the initial burden of "informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of material fact." Rice-Lamar v. City of Fort Lauderdale, 232 F.3d 836, 840 (11th Cir.

[18] For the reasons set forth supra note 9, the Court sustains defendant's partial objection to PAMF ¶ 61 and objection to PAMF ¶ 62 (calculating plaintiff's regular rate for each workweek) because there is a genuine factual dispute as to how much of plaintiff's gap time (if any) was compensable.

2000) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Those materials may include "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

The non-moving party is then required "to go beyond the pleadings" and present competent evidence "showing that there is a genuine issue for trial" Celotex, 477 U.S. at 324. Generally, "[t]he mere existence of a scintilla of evidence" supporting the non-movant's case is insufficient to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). If in response the non-moving party does not sufficiently support an essential element of his case as to which he bears the burden of proof, summary judgment is appropriate. Rice-Lamar, 232 F.3d at 840. "In determining whether genuine issues of material fact exist, [the Court] resolve[s] all ambiguities and draw[s] all justifiable inferences in favor of the non-moving party." Id. (citing Anderson, 477 U.S. at 255).

In deciding a summary judgment motion, the court's function is not to resolve issues of material fact but rather to determine whether there are any such issues to be tried. Anderson, 477 U.S. at 251. The applicable substantive law will identify those facts that are material. Id. at 248. Facts that are disputed, but which do not affect the outcome of the case, are not material and thus will not preclude the entry of summary judgment. Id. Genuine disputes are those in which "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. For factual issues to be "genuine," they must have a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). When the record as a whole could not lead a rational trier of fact to find for the non-movant, there is no "genuine issue for trial." Id. at 587.

Cross-motions for summary judgment do not change the above standard. Latin Am. Music Co. v. Archdiocese of San Juan of the Roman Catholic & Apostolic Church, 499 F.3d 32, 38 (1st Cir. 2007). Rather, "a court must consider each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." Warshauer v. Chao, No. 4:06-CV-0103-HLM, 2008 WL 2622799, at *24 (May 7, 2008) (internal citations and quotations omitted). "Both motions must be denied if there is a genuine issue of material fact. But if there

is no genuine issue and one or the other party is entitled to prevail as a matter of law, the court will render judgment." 10A Charles Alan Wright et al., Federal Practice & Procedure § 2720 (3d ed. 2009).

III. ANALYSIS

Defendant argues that it is exempt from FLSA requirements because neither it nor plaintiff engaged in interstate commerce during her employment. (Def.'s Mot. Summ. J. 8-16.) Specifically, defendant asserts that plaintiff has failed to support her allegations that the use of products made out of state brings it within the purview of the FLSA. (Def.'s Reply 3-7.) Alternatively, Best Care contends that, even assuming it is governed by the FLSA, plaintiff was exempt from overtime pay requirements because her position could be regulated by the Secretary of Transportation (i.e., the Motor Carrier Act exemption) and/or the majority of her pay was commission. (Def.'s Mot. Summ. J. 17-21; Def.'s Reply 8-12.)

Plaintiff responds that defendant is subject to the FLSA based on enterprise liability because its employees handle materials that moved in interstate commerce. (Pl.'s Resp. [43] 3-7.) Ms. Tati also contends that the Motor Carrier Act exemption does not apply because Best Care acknowledges that its drivers, including herself,

never transported clients to or through another state. (Id. at 13-17.)[19] In her Cross Motion for Summary Judgment, Ms. Tati argues that defendant is liable to her for $6,095.58 in unpaid overtime. (Pl.'s Cross Mot. 5-8.) Defendant disputes that amount, arguing that plaintiff's calculation includes non-compensable down time and that Ms. Tati earned more than one and one-half times the federal minimum wage for the hours she actually worked. (Def.'s Resp. in Opp'n [50] 12-13.)

The Court must first determine whether the FLSA applies to defendant before addressing the parties' arguments regarding various exemptions to the Act's overtime compensation requirements and plaintiff's damages demand.

A. Applicability of the FLSA

The FLSA requires employers who meet its preconditions to pay non-exempt employees the minimum wage, 29 U.S.C. § 206(a), and overtime pay for hours worked in excess of forty per workweek, id. § 207(a)(1). An employer is governed by the FLSA based on enterprise liability if it (1) "has employees engaged in

[19] For the reasons discussed infra Parts III.A-B.1, the undersigned concludes that plaintiff is covered by the FLSA and that the Motor Carrier Act exemption does not apply to her. Thus, the Court need not address plaintiff's alternative arguments that the Secretary of Transportation may not regulate defendant's drivers because they transport "sick or injured persons," and that the SAFETEA-LU Technical Corrections Act of 2008, Pub. L. No. 110-244, § 306, 122 Stat. 1572 (2008), restored FLSA coverage for certain drivers (herself included). (See Pl.'s Resp. 15.)

commerce or in the production of goods for commerce, or . . . has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person" and (2) has at least $500,000 of annual gross sales volume. Id. § 203(s)(1)(A). The Act defines "commerce" as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." Id. § 203(b).

Defendant disputes plaintiff's contention that it meets the first prong above for the purposes of enterprise liability (defendant admits having at least $500,000 in sales each year plaintiff was employed–the second prong). Best Care argues that it is a wholly intrastate business and that the use of vehicles, gasoline, and motor oil (or any other items that may have moved in commerce) by its drivers does not constitute the "handling" of "materials" under the FLSA. (Def.'s Mot. Summ J. 7.)

The Eleventh Circuit examined this issue at length in Polycarpe v. E&S Landscaping Service, Inc., 616 F.3d 1217 (11th Cir. 2010) (per curiam), a consolidated appeal of six cases that required interpretation of the handling clause to determine whether items used by the plaintiff employees constituted materials, and thereby triggered enterprise liability for the defendant employers. The Circuit determined that "[w]hether an item counts as 'materials' will depend on two things:

1) whether, in the context of its use, the item fits within the ordinary definition of 'materials' under the FLSA and 2) whether the item is being used commercially in the employer's business." Polycarpe, 616 F.3d at 1225-26.

Because the FLSA does not specifically define materials, the Polycarpe court examined common definitions of that term and the legislative history of the 1974 amendment that added it. 616 F.3d at 1222-24. It concluded that "materials" means "tools or other articles necessary for doing and making something" that "have a significant connection with the employer's commercial activity," i.e., not "internally and incidentally consumed" by the business. Id. at 1226. The Circuit then applied that definition to various business contexts, identifying as materials the soap used by a commercial laundry and the china plates used by a caterer. Id. In dicta, the Polycarpe court suggested that the lawn mowers, trucks, and gasoline used by employees of the defendant landscapers might qualify as materials under the handling clause. Id. at 1228. The Circuit remanded the case with instructions that the district court determine whether those items were produced in, or moved, interstate and, if so, whether they met the definition of materials (thereby triggering enterprise coverage). Id.

Here, at minimum, defendant's fleet of vehicles and the gasoline and motor oil upon which it runs, constitute materials within the definition of the FLSA. Those things are "articles necessary" for picking up and dropping off passengers–defendant's sole commercial purpose. Moreover, defendant has admitted that at least one part of every vehicle used by its drivers moved interstate. Best Care's suggestion that Polycarpe is inapplicable here because drivers simply perform a "service" and do not deliver or leave interstate items with clients is inapposite to the Circuit's explicit examples of "materials" sufficient to trigger enterprise liability. If, as the Polycarpe court observes, the detergent used by a commercial laundry constitutes a "material" for purpose of the handling clause, then so would the vehicles, gasoline, motor oil, and other items necessary to drive clients to and from appointments. Clearly, those items are not merely incidental to, or internally consumed by, Best Care. Additionally, whether defendant or its employees purchased those items intrastate is irrelevant because the handling clause only requires that materials "were in the past produced in or moved interstate" and does not take into account "whether they were most recently purchased intrastate." Polycarpe, 616 F.3d at 1228.

For the reasons set forth above, the undersigned **REPORTS** that, at a minimum, the vehicles used by defendant's drivers, which defendant admits were produced out of state and thus moved in interstate commerce (see Kenney Dep. 60), constitute materials under the handling clause sufficient to trigger FLSA enterprise liability.[20] Therefore, there is no genuine dispute that Best Care's drivers handled materials that had moved in commerce. Accordingly, defendant must comport with FLSA minimum wage and overtime requirements. However, because Best Care argues that plaintiff falls under one or more of the FLSA exemptions, the Court turns next to that issue.

B. Exemptions to the FLSA Overtime Provision

The FLSA has a number of exemptions to its overtime provision. See e.g., 29 U.S.C. §§ 207(i), 213(b)(1). Defendant asserts that two of those apply to plaintiff–the Motor Carrier Act exemption and the commissioned-work exemption. The undersigned examines each in turn.

[20] Additionally, a reasonable jury could find that gasoline, motor oil, and other items necessary for Best Care's drivers to transport passengers constitute materials that moved in interstate commerce.

1. The Motor Carrier Act Exemption

The FLSA exempts from the overtime pay requirement "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service"–also known as the Motor Carrier Act exemption. See 29 U.S.C. § 213(b)(1). This exemption applies if the Secretary has the power to regulate the employee and is not dependent on the Secretary actually having exercised that power. See Abel v. So. Shuttle Servs., Inc., 631 F.3d 1210, 1212-13 (11th Cir. 2011) (per curiam).

The Eleventh Circuit has interpreted the Motor Carrier Act exemption to authorize the Secretary "to regulate the maximum hours of service of employees who are employed (1) by a common carrier by motor vehicle; (2) engaged in interstate commerce; and (3) whose activities directly affect the safety of operations of such motor vehicles." Abel, 631 F.3d at 1213 (internal quotation marks and citations omitted). Indeed, the Circuit has specifically examined the application of that exemption to shuttle services. Id. at 1211.

In Abel, the defendant shuttle service transported passengers to and from three South Florida airports. 631 F.3d at 1211. Although the trips were entirely intrastate, a large number of those passengers booked the service through internet package

deals–a combination purchase of airfare, hotel, and shuttle service to and from the airport. Id. at 1212. The Circuit concluded that there was a sufficient connection between the defendant and an interstate carrier (i.e., the airports) to make the shuttle service part of a continuous stream of interstate travel sufficient to satisfy the second prong of the Motor Carrier Act exemption. Id. at 1216-17.

In reaching that conclusion, the Circuit relied in part on the Supreme Court's discussion in United States v. Yellow Cab, 332 U.S. 218 (1947), which examined the difference between intrastate and interstate travel in circumstances where a portion of the journey begins and ends in a single state. See Abel, 631 F.3d at 1216. The Supreme Court concluded that "in the absence of some special arrangement," even a local taxi cab ride at the beginning or end of a multi-state journey would not be part of interstate commerce. Yellow Cab, 332 U.S. at 231-32. However, the Yellow Cab court explained that bundling both the inter- and intrastate transportation under one contract would change such a taxi cab ride to one that "is clearly a part of the stream of commerce." Id. at 228.

Here, the undisputed evidence shows that defendant provided solely intrastate shuttle service to and from medical providers in and around Cartersville. Moreover, there is no evidence that those trips were part of a longer interstate journey. Thus,

even assuming defendant is a common carrier whose activities affect the safe operation of motor vehicles (prongs one and three of the Motor Carrier Act exemption); defendant has not carried its burden to establish that drivers engaged in interstate commerce (prong two). See Walters v. Am. Coach Lines of Miami, Inc., 575 F.3d 1221, 1226 (11th Cir. 2009) ("The employer bears the burden of showing its entitlement to [the Motor Carrier Act exemption]."). Thus, the Secretary of Transportation does not have the power to regulate defendant's drivers.

Accordingly, the undersigned **REPORTS** that the Motor Carrier Act exemption is not applicable to plaintiff, and defendant cannot rely on it to deny her overtime pay required by the FLSA.

2. The Commissioned-Work Exemption

Pursuant to the FLSA's commissioned-work exemption:

> No employer shall be deemed to have violated [the overtime provisions of the Act] by employing any employee of a retail or service establishment for a workweek in excess of [forty hours], if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum [wage], and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services.

29 U.S.C. § 207(i); see also Klinedinst v. Swift Invs., Inc., 260 F.3d 1254, 1254 n.2 (11th Cir. 2001). Exemptions to the FLSA are construed narrowly, the Act should

be interpreted liberally in the employee's favor, and the employer bears the burden of proving their applicability by "clear and affirmative evidence." Birdwell, 970 F.2d at 805.

Defendant argues that plaintiff has admitted it is a "service" establishment based on the Complaint's allegation that Best Care provides transportation services, and argues that it paid her at least one and one-half times the federal minimum wage for the hours recorded on its Trip Reimbursement Form. (See Def.'s Mot. Summ. J. 18, citing Compl. ¶ 6.) Plaintiff disputes that defendant qualifies as a retail or service establishment as contemplated by the FLSA, and argues that her regular rate of pay only exceeded the minimum wage during eighteen of the ninety-eight weeks she worked for Best Care.[21] (Pl.'s Resp. 11-13.)

The FLSA does not define "retail or service establishment," but courts have looked to the definition contained in a repealed section of the Act–§ 213(a)(2)–when interpreting that phrase. See Ebersole v. Am. Bancard, LLC, No. 08-80703-CIV, 2009 WL 2524618, at *2 (S.D. Fla. Aug. 17, 2009); see also Reich v. Delcorp, Inc., 3 F.3d 1181, 1183 (8th Cir. 1993). That section defines "retail or service

[21] It is undisputed that commission comprised more than half of plaintiff's pay–the second prong of the exemption. (See Def.'s Mot. Summ. J. 18; Pl.'s Resp. 11 n.7.)

establishment" as "1) an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and 2) is recognized as retail sales or services in the particular industry." 29 U.S.C. § 213(a)(2) (repealed 1990).

Additionally, there are a number of interpretative bulletins that provide guidance on the meaning of the phrase. See 29 C.F.R. §§ 778.1, 779.0 (stating that parts 778 & 779 are the Department of Labor's official interpretation of the FLSA's application to retail/service establishments). Section 779.316 explains that "'retail or service establishment' as used in the [FLSA] does not encompass establishments in industries lacking a 'retail concept.'" Id. § 779.316. That section is followed by § 779.317, which specifically identifies "transportation companies" as lacking a "retail concept." Id. § 779.317. Additionally, § 779.318 states that retail or service establishments have the following characteristics: 1) typically sell goods or services to the general public; 2) serve the everyday needs of the community; 3) perform a function in the business organization of the nation which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization; and 4) do not take part in the manufacturing process. Id. § 779.318(a).

Further, retail and service establishments provide the general public services for the comfort and convenience of such public in the course of its daily living. Id.

The Court is mindful that it must "closely circumscribe the FLSA's exemptions," applying an exemption only to those workers "plainly and unmistakably *within its terms and spirit*.'" Nicholson v. World Bus. Network, Inc., 105 F.3d 1361, 1364 (11th Cir. 1997) (quoting A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945) (emphasis added)). Given that directive and the above guidance, defendant has not demonstrated, as a matter of law, that it is a retail or service establishment exempt from the FLSA's overtime pay provisions. Moreover, Ms. Tati's allegation that Best Care provides transportation services is insufficient to satisfy defendant's burden.

In addition, there is a genuine fact dispute as to whether plaintiff's regular rate of pay exceeded one and one-half times the federal minimum wage (the first prong of the commissioned-work exemption). The parties dispute how much (if any) of plaintiff's drive time without a passenger and gap or down time was compensable, thereby preventing the Court from determining plaintiff's regular or hourly rate as a matter of law. At this stage of the litigation, that dispute precludes defendant from establishing that Ms. Tati's regular rate was more than one and one-half times the

minimum wage (the first prong of the commissioned-work exemption). Likewise, plaintiff cannot establish a definitive damages calculation for her alleged unpaid overtime.

For the reasons discussed above, the undersigned **REPORTS** that defendant has not established as a matter of law that it is a retail or service establishment as contemplated by the FLSA. Thus, it is not clear that the commissioned-work exemption applies to plaintiff. Additionally, the undersigned also **REPORTS** that a genuine factual dispute remains as to how much of Ms. Tati's time was compensable, thereby precluding the calculation of both her regular rate of pay and the unpaid overtime she alleges is due her. Accordingly, because neither party has proved its case as a matter of law, the undersigned **RECOMMENDS** that both their motions for summary judgment be **DENIED**.

IV. CONCLUSION

For the reasons explained above, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment [26] and Plaintiff's Cross Motion for Summary Judgment [44] be **DENIED**.

Furthermore, given Ms. Tati's estimation that Best Care owes her $6,095.58 in overtime pay, this is a matter that should be resolved through settlement. If the

parties cannot achieve that result on their own, then, at the Court's request, the undersigned will assist them in meditation.

The Clerk is **DIRECTED** to terminate the reference to the Magistrate Judge.

SO RECOMMENDED, this 20th day of August, 2012.

Walter E. Johnson

WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE