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

Jon Mark LaMonte,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	
Crawford & Company,	:	1:10-cv-02658-JOF
	:	
Defendant.	:	

ORDER

This matter is before the court on Defendant's Motion for Summary Judgment [39] and Plaintiff's Motion for Leave to File Amended Initial Disclosures [48].

I. Background

A. Procedural History

Plaintiff, Jon Mark LaMonte, filed the present suit against Defendant, Crawford & Company, on August 24, 2010, alleging that Defendant violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, by failing to pay Plaintiff overtime compensation. On September 8, 2011, Defendant moved for summary judgment.

B. Facts[1]

Jon LaMonte was employed as a surveyor by Crawford & Company from January 2002 through August 6, 2010, when he was laid off. As a surveyor, he conducted inspections of homes and prepared reports of those inspections in connection with warranty claims and class action settlement programs. LaMonte worked relatively autonomously. He did not report to a corporate office; rather, he worked from his home office and in the field traveling to and conducting inspections. Accordingly, LaMonte scheduled his own work on a daily basis. There was no set time he was required to start or finish work and the schedule he set each day depended on several variables, including claim types, distance to each location, and weather. Nonetheless, LaMonte was required to complete and submit a timecard each week to report his hours worked, including overtime hours.[2] Crawford's policy is that overtime hours are to be preapproved by a supervisor if at all possible, but that all hours worked, including non-preapproved overtime hours, are to be accurately recorded on an employee's timesheet. LaMonte completed, signed, and submitted his timecards, but claims that he filled them out inaccurately at the express direction of his supervisor, Bob Hansard, in order to fictitiously show 40 hours regardless of the actual number of hours worked. LaMonte

[1] The following facts are undisputed.

[2] Despite LaMonte's testimony that the schedule he set each day was dependent on several variables, almost all of his time cards indicate his working hours were 8:00 a.m. to 5:00 p.m., with an hour-long lunch break.

asserts that despite the 40 hours reflected on just about all of his timecards, on average he worked 60 hours per week, without receiving overtime compensation as required by the FLSA. Crawford refutes this and argues that LaMonte has failed to submit sufficient evidence of his overtime work to withstand summary judgment.

II. Discussion

A. Preliminary Matters

Crawford seeks to exclude two declarations attached to LaMonte's brief in response to the motion for summary judgment. First, Crawford objects to the declaration of Karen B. Fortune. Ms. Fortune is a Certified Public Accountant and partner in IAG Forensics, a public accounting firm specializing in forensic accounting, fraud investigation, and litigation support. LaMonte hired Ms. Fortune and others in her firm to review and analyze 13 data files of emails in Lotus Notes file format, which were provided by Crawford to LaMonte on the last day of discovery. Essentially, Ms. Fortune has provided a summary of these emails, breaking them down by the date and times at which they were sent. The purpose is to provide evidence of the times at which LaMonte was allegedly working overtime.

Crawford argues that Ms. Fortune's declaration should be excluded because LaMonte failed to disclose her as an expert or otherwise during or after discovery. First, the court disagrees with Crawford's characterization of Ms. Fortune as an expert witness. All that Ms. Fortune has done is extract data from the Lotus Notes files provided by Crawford and

summarize the thousands of emails contained therein by grouping them according to the date and time the emails were sent. This task did not require her to render an expert opinion to help the trier of fact to understand the evidence or determine a fact in issue. It is, rather, a summary of the voluminous data provided by Crawford to LaMonte. Her declaration is therefore admissible under Federal Rule of Evidence 1006, which contemplates the presentation of summaries, charts, or calculations to prove the content of voluminous writings.

Second, at the time that LaMonte filed his initial disclosures and amended initial disclosures, he did not yet have possession of the data files containing the company emails. Crawford apparently provided those files to LaMonte on the last day of discovery. Crawford cannot exclude the summary of those data files and emails on the basis that the party engaged by LaMonte to summarize them was not disclosed until *after* LaMonte came in possession of the necessary files. Crawford's objection to Ms. Fortune's declaration is overruled.

Crawford next seeks to exclude the declaration of LaMonte, arguing that it constitutes sham testimony because it contradicts his previous deposition testimony. The court may disregard an affidavit as a "'sham' if it flatly contradicts earlier deposition testimony without valid explanation." *Faulk v. Volunteers of America*, 444 Fed. Appx. 316, 318 (11th Cir. 2011). "But the court must be careful to distinguish 'between discrepancies which create

transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence.'" *Id.* (quoting *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986).

In support of its sham testimony argument, Crawford points only to minor discrepancies between LaMonte's declaration and deposition testimony. For example, Crawford asserts that LaMonte's declaration is sham testimony in the following instance:

> Through his declaration, Plaintiff asserts that "[w]hen he returned to his home office, [he] would enter . . . claims data . . . ." (LaMonteDecl. ¶ 15, Dkt. 43-5). He essentially suggests that he always worked from his home office after his last claim. But his prior testimony allows no such blanket statement. First, Plaintiff testified—and he admits that he testified—that he did not necessarily return home after completing his last claim, but rather may have done other non-work tasks, like going to the grocery store. (Pl.'s Resp. to Def.'s Facts ¶ 37, Dkt. 43-1). Second, his testimony shows that even once he returned home, his tasks varied. (Pl. Dep. 71:14-17, Ex. A (Q: "When you arrived home from your last claim, what would be the first thing that you would do when you got home?"; A: "It's different every day.").

Def.'s Obj., at 6. LaMonte's assertion that he would enter claims data when he returned home is not contradicted by his testimony that he would occasionally go to the grocery store after conducting a field inspection or that he may do something else when he first arrives home. From the statements, the timing of when he would supposedly enter claims data is unclear. But there is no inherent contradiction between the declaration and deposition testimony in Crawford's first example. Next, Crawford points to a second supposed contradiction:

> Similarly, through his declaration, Plaintiff now asserts that his "workday almost always ended long after 5:00 p.m." and that he would "often work late

> into the evening . . .” As shown above, however, Plaintiff concedes that his continuous workday routinely ended sooner, as he often did non-work tasks after his last claim, like going to the grocery store.

Def.’s Obj., at 7. Again, there is nothing contradictory in stating that his workday almost always ended long after 5:00 p.m. and admitting that other, normal life activities may sometimes intervene. LaMonte could work until 5:00 p.m., then take a break and go to the grocery store and eat dinner with his family, and start work again until late in the evening. In that scenario, his workday would still end long after 5:00 p.m. Crawford’s other examples suffer some similar flaws. Thus, the court finds that LaMonte’s declaration is not sham testimony and Crawford’s second objection is overruled.

B. Fair Labor Standards Act

The FLSA requires employers to pay time and a half for hours that an employee works in excess of the standard 40 hour work week. *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1156 (11th Cir. 2008). In order for LaMonte to recover under the FLSA, he must show that (1) he worked overtime hours without compensation, and (2) Crawford had knowledge, or should have had knowledge, of his overtime work. *Gaylord v. Miami-Dade Cnty.*, 78 F. Supp. 2d 1320, 1325 (S.D. Fla. 1999) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)).

i. Performance of Uncompensated Work

An employee bringing a claim under the FLSA for unpaid overtime compensation has the burden of proving that he performed work for which he was not properly compensated. With regard to this burden, the Supreme Court has stated that

> [w]hen the employer has kept proper and accurate records the employee may easily discharge this burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty. . . . In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946).[3]

[3] Crawford insists that a stricter burden, requiring LaMonte to proffer "specific facts" showing that there is a genuine issue for trial, applies here because Crawford properly maintained time records of LaMonte's work hours and there is no inherently justifiable reason to distrust such records. LaMonte, however, has testified that he was directed to falsify his timecards, and has also provided the court with evidence of nearly 1,000 emails he sent to his supervisors outside the standard work hours indicated on his time sheets. Crawford's own case law demonstrates that when a plaintiff has presented such evidence, courts apply the Supreme Court's "just and reasonable inference" standard. *See Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 441 (5th Cir. 2005) (applying this standard where plaintiff asserted that her employer required her to turn in false time sheets); *Simmons v. Wal-mart Assocs., Inc.*, No. 2:04-CV-51, 2005 WL 1684002, at *9-11 (S.D. Ohio July 19, 2005) (applying this standard where plaintiff asserted that his employer required him to work off the clock in excess of 200 times).

Crawford argues LaMonte has failed to adduce sufficient evidence showing that he worked more than 40 hours per week without compensation. LaMonte, in contrast, responds that the evidence of his overtime work is "overwhelming." LaMonte's evidence consists of (1) his own testimony that he worked, on average, 60 hours per week, and always worked from home both before leaving to conduct inspections in the field and after returning home from inspections, as well as on weekends; (2) LaMonte's wife's testimony largely corroborating his own; and (3) documentation showing nearly 1,000 "after-hours" and weekend work-related email correspondence that LaMonte prepared and sent to his supervisors since 2005. LaMonte's documentary evidence regarding the emails shows the following:

- From January 2, 2005, through August 3, 2010, LaMonte sent Mr. Hansard, his supervisor, 160 emails outside the work times reflected in his time records. In the three years immediately preceding initiation of this lawsuit, LaMonte sent 11 emails addressed to or copied to Mr. Hansard before 8:00 a.m. on weekdays; 78 emails after 5:00 p.m. on weekdays; and 37 emails on weekends.

- In those emails sent to Mr. Hansard, LaMonte frequently referenced the work that he was performing at times outside the working hours indicated in the time records. For example, in an email sent to Mr. Hansard at 7:37 a.m. on April 28, 2009, LaMonte referenced claims he sent in the previous night. In an email sent at 9:40 p.m. on August 1, 2007, he stated, "Both are completed and were exported last night." In an email sent at 10:42 p.m. on September 11, 2008, LaMonte stated, "I will try to send those claims over the weekend . . . " In an email sent at 10:52 p.m. on September 25 ,2008, LaMonte wrote, "I will probably work a week straight so working over the weekend will be a must."

- From January 2, 2005, through August 3, 2010, LaMonte sent 446 work-related emails to Mr. Peters, who was acting as LaMonte's supervisor for a period, at times outside the work times reflected in the time records. In the three years preceding this lawsuit, LaMonte sent one email to Mr. Peters before 8:00 a.m. on a weekday, 11 emails after 5:00 p.m. on weekdays, and one email on a weekend.

- From January 2, 2005, through August 3, 2010, LaMonte sent 270 work-related emails to a Ms. Moore at times outside the work hours reflected in the time records. In the three years preceding this lawsuit, LaMonte sent one email to Ms. Moore before 8:00 a.m. on a weekday; nine emails after 5:00 p.m. on a weekday; and one email on a weekend.
- On January 26, 2010, LaMonte reported via email to a Mr. Klosson that he started entering a "claim as quickly and accurately as I could. I started at 7:16 and finished at 8:00." LaMonte wrote, "I have tried to inspect 7 claims a day on average and could do 8 if I needed to get caught up . . . . Considering the above listed time line, which is pretty average under the new requirements, that makes for a 12 hour day before drive time. We are only allowed to report 8 hours a day . . . . That leads me to ask about the possibility of paying us some overtime."
- From January 2, 2006, through August 3, 2010, LaMonte sent 54 work-related emails to Mr. Klosson at times outside the hours reflected in the time records. In the three years preceding this lawsuit, LaMonte sent nine emails after 5:00 p.m. on weekdays and four emails on weekends.

Pl.'s Resp., at 4-7.

LaMonte contends that his testimony, that of his wife, and these emails, which were sent outside of his official work hours and reference work he completed outside those hours, establish that he worked in excess of 40 hours per week without being adequately compensated. Crawford responds that LaMonte cannot now use his admittedly false time

cards as evidence that he worked all of the eight-hour shifts indicated on those cards in addition to the hours reflected in the emails. Because LaMonte's work hours varied each day, Crawford insists that the falsified time cards cannot be used to establish that any so-called "after-hours" work actually represented overtime work. Crawford also points to certain discrepancies or inconsistencies in LaMonte and his wife's testimony that it reasons undermine his assertion that he worked 60 hours per week. Further, Crawford submits evidence that all of LaMonte's supervisors repeatedly advised him to accurately record all hours worked.

A comparison of LaMonte's evidence to that presented by plaintiffs before other courts in this circuit leads to the conclusion that LaMonte has produced sufficient evidence to withstand summary judgment. In *Diaz v. Jaguar Restaurant Group, LLC*, the court relied solely upon the plaintiff's testimony regarding her usual work schedule, which was uncorroborated through others' testimony or documentary evidence, to deny the employer's motion for summary judgment. 649 F. Supp. 2d 1343, 1363-64 (S.D. Fla. 2009). Similarly, in *Santelicies v. Cable Wiring*, Judge Jordan held that the plaintiff's testimony, which was also unsubstantiated through others' testimony or documentary evidence, presented a sufficient basis to deny summary judgment on the issue, leaving it to the trier of fact to determine how credible the plaintiff was. 147 F. Supp. 2d 1313, 1329 (S.D. Fla. 2001). Here, LaMonte has presented a stronger case. He has testified that he regularly worked more than

40 hours per week, preparing for work each week day before 8:00 a.m. and finishing reports of inspections after 5:00 p.m. and on weekends. He also testified regarding his work trips to Tennessee and Alabama that necessitated longer hours. His wife has largely corroborated this testimony, testifying that LaMonte spent much time in his home office early in the morning, later at night, and on weekends. Most importantly, LaMonte has presented documentary evidence in the form of numerous emails showing that he was working and composing emails at times earlier and later than the hours recorded on the official time cards. This documentary evidence corroborates LaMonte and is wife's testimony. There is a clear factual dispute as to when LaMonte completed his work for Crawford and how many hours he actually worked. Crawford offers many arguments in rebuttal that go to the credibility of LaMonte and his wife. Such credibility determinations, however, should be left to the jury. *See Santelicies*, 147 F. Supp. 2d at 1329. Drawing all inferences in LaMonte's favor, the court finds that LaMonte has presented sufficient evidence to create a genuine issue of material fact as to the first element of his prima facie case.

ii. Crawford's Knowledge

LaMonte's claim survives summary judgment if a reasonable jury can conclude from the evidence that Crawford had actual or constructive knowledge that he was working unpaid overtime. *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306, 1318 (11th Cir. 2007). For

similar reasons as above, the court finds that LaMonte has presented sufficient evidence to withstand summary judgment.

LaMonte testified that he complained to Mr. Hansard and other company officials that he was being required to submit inaccurate time records and complained to Mr. Hansard that he was unfairly denied overtime compensation. He testified that in the one instance where he did record overtime on his timecard, Crawford rejected the timecard as inaccurate. LaMonte Dep., at 98-99. Additionally, LaMonte's after-hours emails put Crawford on notice that the hours on LaMonte's time cards did not accurately reflect the hours he was actually working. Furthermore, in one email, LaMonte complained to Mr. Klosson about the long hours and actually requested overtime compensation due to the alleged limitation on the hours he was allowed to report. Crawford again attempts to undermine LaMonte's credibility by pointing out problems in his testimony and declarations and providing conflicting written testimony from its own supervisors;[4] as stated earlier, however, such arguments go to the weight of LaMonte's testimony, and should be resolved at trial by the jury rather than this court on a motion for summary judgment.

---

[4] For example. Crawford points out that LaMonte's testimony is contradicted by Mr. Hansard's written testimony. Crawford also argues that LaMonte's assertion is undermined by the fact that during his deposition he failed to recall one specific conversation with Mr. Hansard about overtime, and only generally recalled the fact that he commented many times to Mr. Hansard that he worked way more than 40 hours per week. Such arguments go to the weight of LaMonte's testimony, however, and should be resolved by the jury rather than this court.

iii. Willfulness

Finally, Crawford seeks summary judgment on LaMonte's claim that it willfully violated the FLSA. "The statute of limitations for claims seeking unpaid overtime wages generally is two years, but if the claim is one 'arising out of a willful violation,' another year is added to it." *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1162. To establish that a violation of the Act was willful, LaMonte must prove by a preponderance of the evidence that Crawford either knew that its conduct was prohibited by the statute or showed reckless disregard about whether it was. *Id.* at 1164.

Again, the court finds that LaMonte has presented sufficient evidence to make it to the jury on the willfulness question. There is no claim by Crawford that it was somehow exempt from the FLSA or that it was unaware of its obligations under the Act to pay covered employees an overtime premium. Rather, Crawford argues that it had a policy in place requiring employees to seek preapproval for overtime hours, but to also record all hours worked, even non-preapproved overtime hours. Crawford maintains that it repeatedly advised LaMonte of this policy and told him to accurately record his hours. In contrast, LaMonte testified that he was directed by his superiors to falsify his time sheets to show only 40 hours of work per week, regardless of the actual hours worked in any one week, and that the one time he recorded overtime on his timecard it was rejected. This evidence is

clearly in direct conflict. The court finds that the willfulness question, under these facts, must be left for the jury.[5]

III. Conclusion

For these reasons, the court DENIES Defendant's Motion for Summary Judgment [39] and DENIES AS MOOT Plaintiff's Motion for Leave to File Amended Initial Disclosures [48].

IT IS SO ORDERED this 17th day of August, 2012.

S/ J. Owen Forrester
J. OWEN FORRESTER
SENIOR UNITED STATES DISTRICT JUDGE

[5] Courts in this circuit have assumed that the question of wilfulness is one for the jury. *See, e.g.*, *Alvarez Perez*, 515 F.3d at 1163 n.3 ("In the district court, the court and the parties assumed that the jury was to decide willfulness, and the parties have assumed that in their briefs and arguments to use. So, we assume it too.");