No. 17-1187

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Maryam Balbed,

Plaintiff-Appellant,

v.

Eden Park Guest House, LLC, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Maryland

BRIEF OF APPELLANT MARYAM BALBED

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May 8, 2017

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, identify all such owners:

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If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Brian Wolfman Date: 05/08/2017

Counsel for: Maryam Balbed

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I certify that on 05/08/2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Brian Wolfman 05/08/2017
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Other Authorities

JURISDICTIONAL STATEMENT

Plaintiff-appellant Maryam Balbed appeals from a final summary judgment that disposed of all claims of all parties. The district court had subject-matter jurisdiction over her federal claims under 29 U.S.C. § 216(b) and 28 U.S.C. § 1331 and over her state-law claims under 28 U.S.C. § 1367. The district court entered judgment on January 10, 2017, JA 924, and the notice of appeal was filed on February 8, 2017, JA 925. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether 29 C.F.R. § 785.23, concerning the presumptive number of hours an employee is deemed to have worked in certain circumstances under the Fair Labor Standards Act (FLSA), overrides all other statutory requirements and regulations that govern the employer-employee relationship under the Act.

The independent issues presented are whether:

(a) an employer may count room and board in calculating minimum wage under the FLSA even though it failed to keep records of their cost, as the FLSA and its regulations require;

(b) an employer may count housing provided in violation of local law as wages under the FLSA;

(c) an employer may, in calculating minimum wage under the FLSA, count the purported retail value of room and board—including profit margin—rather than the actual cost to the employer of providing the items; and

(d) the particular agreement at issue here was a "reasonable agreement" under 29 C.F.R. § 785.23.

2. Whether the district court erred in dismissing the state-law claims without considering whether 29 C.F.R. § 785.23 impliedly preempts the requirement under Maryland wage-and-hour law that an employee be paid the minimum wage for each hour she works (and, where applicable, for overtime).

STATEMENT OF THE CASE

I. Legal background

A. The FLSA. The Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*., requires employers to pay their employees an hourly minimum wage, 29 U.S.C. § 206(a), at either the federal wage rate or the applicable state or local rate, whichever is higher, *id.* § 218(a). Employees are also entitled to overtime for all work hours over forty per week at one-and-one-half times their ordinary rate of pay. *Id.* § 207(a).

In calculating the minimum wage and overtime, "wages" includes cash. 29 U.S.C. § 203(m). It also may include in-kind compensation, which is defined as "the reasonable cost . . . to the employer of furnishing [an] employee with board, lodging, or other facilities." *Id.*

The FLSA requires employers to "make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him." 29 U.S.C. § 211(c). Employers must "preserve" these records under regulations issued by the Department of Labor. *Id.*

B. Federal regulations

1. The Department of Labor issues and enforces FLSA regulations including, in part 516, how employers must comply with the recordkeeping requirement of 29 U.S.C. § 211(c). The regulations "specif[y] the records needed for deductions from and additions to wages for 'board, lodging, or other facilities.'" 29 C.F.R. § 516.1(b)(2).

Of particular relevance here, the regulations impose special recordkeeping requirements on employers who want to include in an employee's wages the cost of facilities such as room and board, 29 C.F.R. § 516.27(a), especially if cash wages alone do not meet the employee's minimum wage, *id.* § 516.27(b) (requiring employers whose cash wages alone do not meet minimum-wage requirements to "maintain records showing on a workweek basis those additions to or deductions from wages").

Part 531 concerns determinations regarding the "reasonable cost" of board, lodging, or other facilities. 29 C.F.R. § 531.2(b). All wages paid in-kind, "including board, lodging, and other facilities," must be valued at "not more than the actual cost to the employer" of providing those items. *Id.* § 531.3(a). Notably, "reasonable cost does not include a profit to the employer." *Id.* § 531.3(b). Employers are prohibited from counting towards an employee's wages "facilities furnished in violation of any Federal, State, or local law, ordinance or prohibition." *Id.* § 531.31.

2. Part 785, titled "Hours Worked," "discusses the principles involved in determining what constitutes working time," 29 C.F.R. § 785.1, including, in 29 C.F.R.

§§ 785.20-25, how to count "Sleeping Time and Certain Other Activities." One of these regulations, 29 C.F.R. § 785.23, provides a narrow exception to the general requirement that an employee must be compensated for all hours actually spent at work by allowing employers and employees to reach a "reasonable agreement" regarding the number of hours presumptively worked when the employee resides on the employer's premises. *Id.*

C. Maryland state and local law. Like federal law, Maryland law requires employees to be paid a minimum wage for every hour worked, Md. Code Ann., Lab. & Empl. § 3-413, and time-and-a-half for overtime, *id.* § 3-415. Maryland law contains no analogue to the just-mentioned "reasonable agreement" regulation, 29 C.F.R. § 785.23.

In Maryland, employers are allowed to deduct the cost of in-kind wages from the employees' cash wages only if the employer complies with all other applicable laws and regulations. Md. Code Ann., Lab. & Empl. § 3-503. Maryland law requires employers to keep records of the number of hours worked by employees and the wages paid. *Id.* § 3-424. Maryland also imposes specific requirements on employers who seek to pay employees in-kind. As under federal law, "[t]he reasonable cost of board, lodging, or other facilities may be included as part of an employee's wage," but only if the cost does not "[e]xceed the actual cost to the employer." Md. Code Regs. 09.12.41.18. And "[t]he employer shall demonstrate the actual cost of the board, lodging, or facilities furnished." *Id.*

The Montgomery County, Maryland minimum wage during the time relevant to this suit was $9.55 per hour. Montgomery County Code § 27-68.

II. Facts

Wage-and-hour disputes involving the laws and regulations described above can be fact-intensive, and the employee's particular job tasks are often important to a full understanding of the dispute. Moreover, where the dispute involves the possible application of a section 785.23 agreement, the facts bear on whether an employment agreement was or was not "reasonable." In this appeal from a grant of summary judgment to the employer, we therefore describe in some detail the defendants' business, the employment contract, and the expectations and realities of the employment relationship.

A. Eden Park Guest House. Defendants-appellees Etty-Bela Mukendi and Bruno Mukendi have owned and operated defendant-appellee Eden Park Guest House, LLC, an inn in Takoma Park, Maryland, for more than twenty years, often with their children's help. JA 129, 191.[1]

Eden Park has nine guestrooms. JA 144. In 2005, the cellar was refurbished to include a bedroom and bathroom, a conference room, an office for Mrs. Mukendi,

[1] Eden Park, the Mukendis, and their daughter, Trezila Schulbaum, are the defendants below. Defendants acknowledge that Mrs. Mukendi, as the Inn's general manager, is a statutory employer suable under the FLSA. ECF 33, at 14-15. A dispute remains about the individual liability of Mr. Mukendi and Mrs. Schulbaum.

and an office for Mr. Mukendi's management business. JA 235-36. The bedroom was not meant for guests; the Mukendis obtained permits only for the nine upstairs bedrooms. JA 236, 146. Instead, it was meant for the Mukendis' children, who often stayed overnight and prepared breakfast for guests the next morning. JA 237, 191. The children would also sometimes pitch in by cleaning guestrooms. JA 193-94. If none of the family members was available to clean, defendants would hire day workers and pay them an hourly wage. JA 194-97.

At a routine family business meeting, the family set a goal to have someone on the premises "24 hours a day or as much as possible" to ensure guest satisfaction, answer the phone, and receive walk-up inquiries from potential guests. JA 394-98. Mrs. Mukendi explained that "some people just come to the door and knock, and they want to get information. If no one is there, it would be bad." JA 398. The ideal innkeeper for Eden Park would be someone who understood that "cleanness and neatness is very important in our business." JA 183. In April 2015, defendants hired their first fulltime live-in innkeeper, but she lasted less than a week because she lacked the time required to run the Inn. JA 178-79.

B. Ms. Balbed's Arrival. Shortly after, Maryam Balbed arrived as a guest at the Inn on her way to New York. JA 37, 185. She paid $450 per week for the guestroom she occupied. JA 825. The parties disagree about whether Ms. Balbed or Mrs. Mukendi first suggested that Ms. Balbed become the innkeeper. JA 52, 186-89. Before either had made her final decision, however, a guestroom became infested

with bedbugs. JA 46. Ms. Balbed helped to exterminate the bedbugs, showing Mrs. Mukendi what products to purchase and how to spray the room so that the Mukendis did not have to pay an exterminator. JA 45-48. For the next two weeks, Ms. Balbed helped defendants spray the mattress and guestroom for "a couple of hours a day." JA 47-50, 351-52. After that, Ms. Balbed officially became the live-in innkeeper and served until January 2016. JA 908.

C. The Employment Agreement. In late July 2015, Mrs. Mukendi had Ms. Balbed sign an "Innkeeper Live-In Contract." JA 611-13. The contract listed the job's responsibilities, the hours Ms. Balbed was expected to work, and her compensation. *Id.*

1. Duties. Ms. Balbed's duties "included but [were] not limited to:

- Administrative duties include but are not limited to: answering phones, making reservations, checking and replying to emails.
- Minor social media activities.
- Serve breakfast.
- Check guests in and out and process nightly audits.
- Clean public areas and guest rooms after check out or at a guest's request.
- Ensure complete guest satisfaction."

JA 611.

Defendants gave Ms. Balbed a checklist of cleaning tasks to be completed each day. JA 82, 545. Ms. Balbed also did other work, including yardwork such as clearing the back and front yards, JA 270, and removing the weeds from the garden, JA 296; pest control, JA 352-53; household repairs such as painting, JA 361-62, 453, and fixing

the bathroom drywall, JA 301-04; and making general improvements for the guests such as rearranging furniture, JA 359-61, creating a toiletries cabinet, JA 367-68, decorating for the holidays, JA 368-69, and assembling a tea cart, JA 371.

Mrs. Mukendi told Ms. Balbed that "if something isn't done here, and you're the innkeeper, you're the only one here. How is it going to get done?" JA 57. As Ms. Balbed put it: "My understanding was that everything relating to the guest house was my job. . . . My understanding came from complaints coming to me [that] there weren't enough guests; and so therefore I was expected to be responsible for bringing them in the door as well." JA 105.

In addition to cleaning and breakfast, Ms. Balbed focused on improving Eden Park's appearance, boosting its social media presence, and increasing its online booking ratings. JA 53, 64, 105, 120. Her efforts did not go unnoticed. Once, Mr. Mukendi noted that the improvements she made, particularly in the yard, were "really something, you know, to be proud of." JA 454.

Ms. Balbed's primary social-media task was improving the Airbnb online reservation pages, which "was presented to [her] as the top priority." JA 61. Airbnb provides ratings for customers, with five stars as the highest. The system analyzes multiple factors, including the response rate to guest bookings and messages. JA 64. Eden Park apparently had a poor track record for responses (sometimes not responding at all) before Ms. Balbed's arrival, so, using the Airbnb app on her cell-

phone, she concentrated on being more responsive to increase the Inn's ratings and attract "all of the possible business that we could get." *Id.*

Another Airbnb consideration is guest feedback. Ms. Balbed "wanted to really hype the business via these profiles" and "make sure that guests got the correct information before they made a booking," otherwise the guest might "write a negative review because we promised something and not delivered." JA 63. Ms. Balbed thus spent a lot of time correcting grammar and location information on the Inn's profile pages. JA 61. Each of the nine guestrooms had an individual booking page, but "[t]he profile pages for the different rooms didn't agree." JA 62. For example, on some pages, the "guests were still making reservations with the [incorrect] assumption that there was a free breakfast." *Id.*

Another ratings factor is the quality of a guest's arrival. JA 84. Although Airbnb generally allows that a key be left for guests to let themselves in, Ms. Balbed and the defendants "had conversations that that wasn't really an ideal, safe thing to do." JA 83. And "the arrival comments were not good" when Ms. Balbed was not there to let guests in. JA 84. For that reason, Ms. Balbed greeted guests at check-in, sometimes waiting up until 11 p.m. to greet them. *Id.*

Eden Park's ratings improved in less than a month after Ms. Balbed became the innkeeper. By mid-August, Ms. Balbed reported that the Inn had received its fifth consecutive 5-star review, prompting one of the Mukendi children to text her: "Praise God. Thank you, Maryam, for helping us to be a 5-star." JA 383-84.

2. Work-hour schedule. The contract contained a weekly work-hour schedule consisting of seventy-one working hours divided between breakfast, cleaning, and check-in tasks. She was to work one hour during breakfast every day of the week, for a total of seven hours. JA 611. It also required her to clean the guestrooms and common areas from 10 a.m. to 2 p.m. Tuesday through Friday, and from 10 a.m. to 4 p.m. on Saturday, for a total of twenty-two hours. *Id.* On Sunday and Monday, she was allowed to take the midday off "as needed." *Id.* The schedule also required her to work during check-in and closing every day of the week. *Id.* Check-in time was from 4 p.m. to 9:30 p.m., and closing was at 10 p.m. "every day unless otherwise specified," for a total of forty-two additional hours each week. *Id.* In total, as noted, the contract specified seventy-one required weekly work hours.[2]

After Ms. Balbed filed suit alleging that she worked well over twenty-nine hours each week, defendants created post-hoc timesheets estimating how many hours Ms. Balbed worked every day by looking only at the guest reservation book and the breakfast book—logs detailing how many guestrooms were occupied each night and which guests ordered breakfast. JA 253-55, 269. These after-the-fact estimates describe particular tasks that defendants assumed Ms. Balbed performed and the

[2] The district court based its findings on the assumption that the contract required only twenty-nine hours. JA 909-10. That total includes only the breakfast and cleaning hours and excludes entirely the time required by the contract for check-ins and closing—which is generally when Ms. Balbed also worked on the Airbnb correspondence, greeting Airbnb guests, and other social-media improvements.

amount of time they believed it should have taken to perform each task on every single day of her employment, from July 23, 2015 to January 31, 2016. JA 617-809. Their own estimates show that for thirteen of the twenty-three weeks in 2015, Ms. Balbed worked more than twenty-nine hours. *See, e.g.*, JA 621-27; 705-11; 775-81.

Mrs. Mukendi neither knew for sure, nor asked Ms. Balbed, how long it took to complete certain tasks. JA 266-67, 296-97. Being unable to recall the dates, Mrs. Mukendi listed many of those tasks, such as yardwork and repairs, on "random" dates. JA 300. Mrs. Mukendi acknowledged that at least one time entry was completely inaccurate—"Personal project on bathroom 3rd floor: sanded and painted piece of drywall on the bathtub side." JA 301-05; *see also* JA 742.[3] Ms. Balbed spent at least six hours working on that task over more than a week, but Mrs. Mukendi gave her credit for only one hour. JA 301-05.[4]

There are several disputes of fact arising from the parties' testimony, the contract schedule, and defendants' estimated timesheets. For example, although the contract provided that Ms. Balbed would work only one hour for breakfast,

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[3] Defendants labeled many Inn-improvement tasks "personal project." JA 296; *e.g.*, JA 645 ("Personal project: removed weeds in rear garden."); JA 675 ("Personal project: removed bushes from fence."); JA 736 ("Personal project: filled hole close to kitchen cabinet and plastered the bottom of kitchen window to look even.").

[4] Each timesheet shows three figures: (1) "Total Hours Worked" (the sum of the estimated hours spent on tasks that day); (2) thirty minutes or an hour of "Customer and administrative services"; and (3) "Total General" hours. JA 617. On many occasions, defendants' totals are inaccurate. *E.g.*, JA 691, 697, 721.

defendants' timesheets reflect that breakfast should have taken her two hours each day, from 7:30 a.m. to 9:30 a.m. *E.g.*, JA 647-49, 779. Additionally, Ms. Balbed testified that the Mukendis' daughter Trezila told her that the innkeeper position was "a 24/7 job," JA 40, and that there was not enough time each day for her to complete all tasks on the daily checklist, JA 86. And while Mrs. Mukendi and Trezila testified that it should typically take only thirty minutes to clean a guestroom, JA 306, 528, most of defendants' timesheets estimate that it should have taken an hour to clean a guestroom. *See, e.g.*, JA 680, 731, 780. Indeed, apart from an hour of snow shoveling on January 20, 2016, JA 798, defendants' timesheets never show that Ms. Balbed worked at all after 3 p.m., even though Mrs. Mukendi admitted that it was "very helpful" to have Ms. Balbed working at night, JA 399.

Other discrepancies concern whether Ms. Balbed had Sundays and Mondays off. According to Ms. Balbed, Mrs. Mukendi told her that she was not to leave the premises unless it was her scheduled time off—that is, unless it was Sunday or Monday *after* breakfast. JA 835. And although the contract said that, on Sundays and Mondays, she only had to serve breakfast, the timesheets show that the Mukendis expected her to work for at least thirty minutes on those days doing "customer and administrative services"—that is, answering the phone and responding to client messages. *See, e.g.*, JA 697, 711, 719, 775; *see also* JA 274-76. And Ms. Balbed had to clean rooms on her purported days off at least seven times. *See, e.g.*, JA 697, 711.

3. Compensation. The contract provided that Ms. Balbed would receive "a stipend of $800 per month," a bedroom and private bathroom in the cellar, utilities, laundry, and breakfast. JA 611. Though the contract called for seventy-one hours per week, the parties agreed below that Ms. Balbed would be owed at least $1,107 per month total compensation for a bare minimum of twenty-nine hours of work each week at the appropriate minimum-wage rate of $9.55 per hour. JA 911. That is, she would need to receive at least $307 of in-kind compensation in addition to the $800 per month in cash.[5]

Defendants contend that the bedroom's value was at least $850 and as much as $2,350 per month. JA 826. This figure is based on Mrs. Mukendi's claimed experience and some research she performed approximately three months after Ms. Balbed filed suit. JA 826, 239-45. The larger estimate is what Mrs. Mukendi believed was the rental value of the room. "No one," she testified, "has to tell me [the value of the room]. I fix the price." JA 239. As noted earlier, defendants obtained County permits to rent the nine guestrooms, but did not obtain approval or a permit from the County to authorize guests to sleep in the room Ms. Balbed occupied while working at the Inn. JA 472-75, 236. No documents reflect the actual cost to defendants of the room that

[5] $1,107 is based on four weeks in a month. In fact, there are about 4.3 weeks in a month, so the actual figure should be about $1,190 per month for twenty-nine hours each week. Using the full seventy-one hours required by the contract, Ms. Balbed is owed $9.55 per hour for the first forty hours, and $14.32 per hour for the remaining thirty-one hours (overtime). In total, Ms. Balbed should have been paid $825.92 each week ($382 regular and $443.92 overtime), or $3,551.46 each month.

Ms. Balbed used, nor did they ever inform her what they considered that cost to be. JA 246-47.

Defendants also contend that the monthly cost of utilities, meals, laundry, and phone service that Ms. Balbed used was $550. JA 826. No documents exist to support any of these costs either, but Mrs. Mukendi claimed that the breakfast itself was worth $7 per day because that was what the guests paid. JA 248-49.

III. Proceedings below

Ms. Balbed sued defendants to recover minimum wage and overtime pay under the FLSA and Maryland state and local law. JA 14-17. She filed a motion for partial summary judgment arguing that defendants could not receive any credit for her room and board toward her minimum wage under the FLSA because defendants did not maintain records of the cost of room and board and because the lodgings did not comply with local law requiring a permit to use a cellar room for sleeping. ECF 27-1, at 8-13.

Ms. Balbed also argued that defendants did not pay her minimum wage in violation of federal and state law because the cash wages defendants paid her were insufficient to cover the hours she worked. ECF 27-1, at 13-17. She maintained that her contract with Eden Park was not a "reasonable agreement" under 29 C.F.R. § 785.23, which concerns whether and how employers may count their employees' time when their employees live on the employers' property. ECF 27-1, at 17-21. The contract was not reasonable, she argued, because it did not fairly consider the time it

would actually take to complete her duties. *Id.* She also sought partial summary judgment as to defendants' liability for minimum wages and overtime under Maryland state and local law and on the question of the individual defendants' liability as statutory employers. *Id.* at 27-35. These arguments left for trial determinations on the exact amounts to which Ms. Balbed was entitled.

Defendants cross-moved for summary judgment, contending that the employment contract was a "reasonable agreement" under 29 C.F.R. § 785.23 that overrides any recordkeeping requirements, making it unnecessary to inquire into the hours Ms. Balbed actually worked. Defendants also argued that section 785.23 authorized them to include in-kind items in calculating Ms. Balbed's minimum wage despite their failure to abide by applicable federal and state recordkeeping requirements. (And defendants simply ignored Ms. Balbed's argument that it was unlawful to include the cost of the room because it is in a cellar and requires a permit if used for sleeping.) Defendants did not contest that defendant Etty-Bela Mukendi was a statutory employer who could be held individually liable, but argued that Bruno Mukendi and Trezila Schulbaum were not. ECF 29, at 28-29.

The district court granted defendants' motion and dismissed all of Ms. Balbed's claims with prejudice. JA 907-22. The court acknowledged the dispute between Ms. Balbed and defendants about how to calculate the in-kind wages and the "disagreement" surrounding how many hours Ms. Balbed actually worked per week. JA 912.

The court then turned, however, to 29 C.F.R. § 785.23, which it called the "basic standard" applicable to the parties' disagreement. JA 912. Relying on this Court's unpublished decision in *Myers v. Baltimore County*, 50 Fed. App'x 583 (4th Cir. 2002), the district court first seemed to view section 785.23 according to its text as a regulation solely about the calculation of *hours*—which is how *Myers* viewed it, 50 Fed. App'x at 589-90. *See* JA 916.

But the court went on to suggest, as defendants had argued, that section 785.23 overrode any regulatory requirements for recordkeeping and calculation of in-kind *wages*, JA 920, topics which *Myers* did not address at all. (The plaintiffs in *Myers*, city park caretakers, did not dispute the value of their in-kind wages and argued only that they were entitled to "compensation for every *hour* that they were required to be present in the park." 50 Fed. App'x at 586, 592 (emphasis added).) Apparently because of its interpretation of *Myers*, the district court did not analyze 29 C.F.R. § 516.27, the regulation that requires an employer to keep records substantiating the cost of in-kind items provided to employees, or address Ms. Balbed's argument that 29 C.F.R. § 531.31 prevented defendants from including the cellar apartment as in-kind wages because its unpermitted use violated local law.

Having granted summary judgment to defendants on the FLSA claims, JA 921-22, the district court did not address any individual-liability issues. *See supra* note 1. The district court did not address Ms. Balbed's separate state-law claims at all.

SUMMARY OF ARGUMENT

The FLSA permits employers to count the cost of room, board, and other in-kind items towards minimum wage only if the employer keeps proper records and complies with state and local law. Defendants failed to keep *any* contemporaneous records of the room and board and violated the local housing code by having Ms. Balbed sleep in the cellar without a permit. For these reasons, they should not have been permitted to include the room and board in her wages at all.

The FLSA also prohibits employers from crediting toward minimum wage improperly calculated in-kind wages. Because defendants failed to provide evidence of the actual cost *to them* of providing room and board to Ms. Balbed, and instead relied on unsubstantiated estimations that impermissibly included profit, the district court should not have credited any in-kind wages—leaving Ms. Balbed with compensation substantially below the applicable minimum wage.

Section 785.23 provides a mechanism for employers and employees to reach a "reasonable agreement" only as to weekly "working hours" when the employee resides on the employer's premises. It says nothing about calculating the value of any in-kind items like room and board. Further, section 785.23 agreements must unambiguously state the number of working hours, and the contract's work schedule here specified seventy-one weekly working hours, not twenty-nine hours as defendants argued below.

In addition, to be reasonable, these agreements must afford the employee at least minimum wage and include enough "working hours" to complete her duties. Even under the most generous valuations of the purported wages, Ms. Balbed never received the minimum wage. And it was impossible for Ms. Balbed to complete all of the duties of a fulltime live-in innkeeper in only twenty-nine hours. Thus, the contract was not a "reasonable agreement" under section 785.23, and the district court should have held that defendants must pay Ms. Balbed what the FLSA requires for each hour she actually worked.

Ms. Balbed's state-law claims are not preempted by 29 C.F.R. § 785.23. The Maryland Wage and Hour Law requires that an employee be compensated at the minimum wage (and, where applicable, for overtime) for every hour worked. Maryland's decision to do so, and not to have an analogue to section 785.23, is not an obstacle to the accomplishment of federal objectives and therefore is not preempted.

ARGUMENT

Standard of Review

This Court reviews a grant of summary judgment *de novo*. *Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 248 (4th Cir. 2015). It should reverse a grant of summary judgment if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

I. Defendants failed to comply with the FLSA and its regulations.

A. An employer may not include in-kind items in an employee's wages unless the employer complies with federal recordkeeping laws, and defendants did not do so.

1. Under the FLSA, an employer may count in-kind items towards an employee's minimum wages only if the employer meets mandatory statutory and regulatory requirements. "An employer who makes deductions from the wages of employees for 'board, lodging, or other facilities' . . . *shall* maintain and preserve records substantiating the cost of furnishing each class of facility." 29 C.F.R. § 516.27(a) (emphasis added). Defendants admit that they did not keep any contemporaneous records regarding the cost of providing Ms. Balbed with her cellar room or breakfast, or of allowing her to use the Inn's utilities. JA 246-49.

The regulations speak directly to situations where the amount paid in-kind "so affect[s] the total cash wages due in any workweek . . . as to result in the employee receiving less in cash than the applicable minimum hourly wage." 29 C.F.R. § 516.27(b). "[T]he employer shall maintain records showing on a workweek basis those additions to or deductions from wages." *Id.*; *accord Donovan v. Williams Chem. Co.*, 682 F.2d 185, 189 (8th Cir. 1982).

2. Recordkeeping must be contemporaneous. Where the employer fails to meet its obligation to keep contemporaneous records of in-kind wages, the employee cannot be expected to shoulder this burden because the FLSA's public policy and remedial nature "militate against" placing it on the employee. *See Anderson v. Mt.*

Clemens Pottery Co., 328 U.S. 680, 687 (1946). Thus "it is the employer who has the duty under . . . the Act to keep proper records," *id.*, and "the employer has the burden of showing that he has satisfied the conditions imposed by the FLSA and regulations in order to be entitled to a credit for the reasonable cost of meals and lodging provided to employees," *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 474 (11th Cir. 1982).[6]

Employers who fail to keep records may not later rely on a post-hoc unsubstantiated estimate of the reasonable cost of providing the employee with room and board in the event of a dispute. "[A]n employer's unsubstantiated estimate of his cost, where the employer has failed to comply with the recordkeeping provisions of the FLSA, . . . does not satisfy the employer's burden of proving reasonable cost." *New Floridian Hotel*, 676 F.2d at 475.

The leading case is the Eleventh Circuit's decision in *Donovan v. New Floridian Hotel*. There, the defendant, a retirement community operator, had kitchen help,

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[6] *Accord Herman v. Collis Foods, Inc.*, 176 F.3d 912, 920 (6th Cir. 1999) ("[T]he burden of proving that a deduction from wages represents the reasonable cost of the meals furnished is on the employer.") (citing *New Floridian Hotel*, 176 F.3d at 475); *Donovan v. Williams Chem. Co.*, 682 F.2d 185, 189 (8th Cir. 1982) (denying an employer credits for room and board provided to employees because "the employer did not keep the required records and offered no evidence except its own statement as to what the company considered the worth of the" housing); *Brennan v. Veterans Cleaning Serv., Inc.*, 482 F.2d 1362, 1370 (5th Cir. 1973) (imposing on the employer the burden of keeping track of deductions from wages for in-kind benefits); *Perez v. P. Ohana Hostel Corp.*, 2013 WL 6862684 (D. Hi. 2013) ("When seeking a wage credit under the FLSA, the employer has the burden of proving its reasonable costs.") (citing *New Floridian Hotel*, 676 F.2d at 474).

maids, and waitresses live on the premises. 676 F.2d at 470. But like defendants here, the employer did not pay the employees enough in cash wages to meet the federal minimum wage and so, also like defendants here, acknowledged that it needed to include the cost of in-kind items to meet the minimum. Because the employer "failed to prove the reasonable cost of the meals and lodging which they claim was furnished to employees," the Eleventh Circuit held that the employer could not include the cost of meals, lodging, or other facilities "in employee wages for purposes of the FLSA." *New Floridian Hotel*, 676 F.2d at 473. Put another way, an employer's "[f]ailure to maintain such documentation is fatal to an employer's attempt to count room and board as wages paid to an employee." *Epps v. Way of Hope, Inc.*, 2010 WL 2025573, at *3 (D. Md. May 18, 2010) (citing *Jones v. Way of Hope, Inc.*, 2009 WL 3756843, at *3 (D. Md. Nov. 6, 2009), and *Marroquin v. Canales*, 505 F. Supp. 2d 283, 292-93 (D. Md. 2007)).

3. Good and important reasons support these recordkeeping requirements. The FLSA requires employers to make and preserve records and authorizes the issuance of regulations, 29 U.S.C. § 211(c), "to enable the Secretary of Labor to effectively enforce the FLSA's minimum wage and overtime provisions and the regulations issued thereunder." Records to be Kept by Employers, 52 Fed. Reg. 24894-01 (July 1, 1987). Without accurate records of both cash and in-kind wages, the Department of Labor would be hampered in bringing enforcement actions and the courts would be hampered in determining whether employees have been paid the minimum wage.

This, in turn, would frustrate the Act's purposes: maintaining a "minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202.

Prohibiting employers from taking deductions as in-kind wages when they fail to keep any records is thus more than regulatory micromanaging. Recordkeeping requires employers to do the necessary math, adding the cost of any in-kind and cash wages to reach the minimum wage, or subtracting the cost of any in-kind items from the total minimum wage to determine the required amount of cash wages. "Without these figures, proper calculation of the correct pay under the Act is impaired," frustrating the government's ability to enforce its own laws. *Herman v. Palo Grp. Foster Home, Inc.*, 976 F. Supp. 696, 701 (W.D. Mich. 1997).

4. As noted, defendants do not dispute that, absent inclusions for room and board, they have not paid Ms. Balbed the minimum wage. Nor can defendants dispute that in light of their failures to keep records of the in-kind items, ordinarily, they would not be allowed to include them in calculating her wages. And, as a general proposition, the protections afforded to employees by the FLSA may not be "abridged by contract or otherwise waived" because that would frustrate the purposes of the Act. *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945)).

Below, defendants had one—and only one—response to these basic, indisputable propositions: that 29 C.F.R. § 785.23 exempts them from otherwise

applicable FLSA regulations regarding recordkeeping, including those that apply specifically to in-kind wages. For starters, this blunderbuss approach cannot be squared with the Supreme Court's repeated admonition that "FLSA exemptions are to be 'narrowly construed against . . . employers' and are to be withheld except [where] 'plainly and unmistakably within their terms and spirit.'" *Auer v. Robbins*, 519 U.S. 452, 462, (1997) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).

And as we now show, for three independent reasons, this argument is flatly incorrect.

a. Section 785.23 is simply inapplicable because it has nothing to do with the circumstances under which an employer may count room and board as in-kind wages. Rather, it concerns how an employee's *time*—that is, the employee's *hours*—may be calculated, as is evident from the regulation's text and its placement in the overall regulatory structure.

Section 785.23 is a part of a series of regulations titled "Hours Worked," which "discusses the principles involved in determining what constitutes working time." 29 C.F.R. § 785.1. Section 785.23's text makes crystal clear that it concerns only how, in certain circumstances, an employee's time (that is, her hours) may be calculated. Because of the importance of this provision to defendants' arguments, we quote it in full:

> An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the *time* he is on the premises. Ordinarily, he may engage in normal private

> pursuits and thus have enough *time* for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact *hours* worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. (Skelly Oil Co. v. Jackson, 194 Okla. 183, 148 P. 2d 182 (Okla. Sup. Ct. 1944); Thompson v. Loring Oil Co., 50 F. Supp. 213 (W.D. La. 1943)).

29 C.F.R. § 785.23 (emphases added).

The two cases cited in section 785.23 underscore its irrelevance here. *Skelly Oil Co. v. Jackson* focused on "whether the hours worked by an oil pumper on a producing lease, on which the pumper lived, are to be computed and determined on the basis of the number of hours during which such pumper under his agreement with the company was required to be on or near the lease" or, rather, based on "a reasonable computation and agreement as to hours worked which is as great as or greater than the amount of hours actually worked but less than the amount of hours during which the pumper was required to be available." 148 P.2d at 184. Similarly, *Thompson v. Loring Oil Co.* addressed "the theory that since [the employee] was subject to call for the 12 hour period he should be paid for the full 12 hours per day." 50 F. Supp. at 216.

b. Section 785.23 is not applicable here because, under defendants' own understanding of the contract, the contract did not specify an agreed-upon number of weekly hours. As explained, section 785.23 has just one purpose: to allow an employer and an employee to reach a reasonable agreement regarding which hours spent on the

employer's premises are (and are not) working hours under the FLSA. Logically, then, a section 785.23 reasonable agreement must specify the agreed-to number of hours. Defendants argued below that the contract specifies twenty-nine hours of weekly work time. ECF 29, 2 & n.3. But that is plainly wrong. The weekly schedule *in the contract itself* specifies that Ms. Balbed work seventy-one hours each week. JA 611. Thus, if the contract is enforceable as a "reasonable agreement," it may only be based on seventy-one (not twenty-nine) hours. More to the point, defendants cannot rely on section 785.23 because, on their own terms (twenty-nine weekly work hours), they have not complied with the regulation's foundational requirement—stating with clarity the number of hours that should be viewed as "reasonable."

c. Even assuming the contract met the requirements for section 785.23, part 785 of the regulations—which contains the "reasonable agreement" regulation—does not exempt an employer from part 516's recordkeeping requirements. Just the opposite: Part 785 observes that "the Act authorizes the Secretary to promulgate regulations requiring the keeping of records of hours worked, wages paid and other conditions of employment," and then explains that "[t]hese regulations are published in part 516 of this chapter." 29 C.F.R. § 785.46. This cross-reference thus expressly contemplates that employers seeking to take advantage of section 785.23 (and any other regulatory authorizations in part 785) must comply with the recordkeeping constraints of part 516. Put the other way around, the cross-reference would be nonsensical if it did not apply to agreements consummated under part 785. *See*

Maldonado v. Alta Healthcare Grp., 17 F. Supp. 3d 1181, 1191-92 (M.D. Fla. 2014) (finding employment agreement under section 785.23 "unreasonable as a matter of law" because employer failed to substantiate the cost of in-kind items in violation of sections 516.27 and 531.3); *Herman v. Palo Grp. Foster Home, Inc.*, 976 F. Supp. at 703 (recordkeeping requirements of section 516.27 apply where employers and employees enter into an agreement regarding the number of working hours under section 785.22).

And this makes perfect sense. Just as "when two statutes are capable of co-existence," they should be harmonized wherever possible, *Morton v. Mancari*, 417 U.S. 535, 551 (1974), so too with two regulations. Courts must "regard each as effective." *Id.*

* * *

In sum, defendants may not count room and board in calculating the minimum wage to which Ms. Balbed was entitled. Without counting these amounts, defendants concede that they did not pay Ms. Balbed the minimum wage. JA 865-66. This Court should reverse the grant of summary judgment to defendants, and direct the district court to grant Ms. Balbed partial summary judgment on her claim that defendants failed to pay her the minimum wage.

B. The district court should not have permitted defendants to include the purported value of the room in Ms. Balbed's wages because furnishing the room violated federal and local law.

The district court erred in including the value of the room for another, independent reason: It was furnished in violation of federal and local law. As explained earlier, a "wage" under the FLSA may "include[] the reasonable cost" of lodging if it is "customarily furnished by [an] employer to his employees." 29 U.S.C. § 203(m). But "[f]acilities furnished in violation of any Federal, State, or local law, ordinance or prohibition *will not* be considered facilities 'customarily' furnished." 29 C.F.R. § 531.31 (emphasis added). This ban includes local laws requiring residency permits. Dep't of Labor, Wage & Hour Div., Field Assistance Bulletin No. 2015-1, Credit Toward Wages under Section 3(m) of the FLSA for Lodging Provided to Employees (2015), https://www.dol.gov/whd/FieldBulletins/fab2015_1.pdf (reproduced at JA 848) ("Field Assistance Bulletin") (The Department of Labor "will not allow a section 3(m) credit if the lodging provided does not have or has been denied a required occupancy permit or is not zoned for residential use.").[7]

Montgomery County, Maryland law requires homeowners to seek prior approval from the County's Department of Housing & Community Affairs before a

[7] *See Osias v. Marc*, 700 F. Supp. 842, 844-45 (D. Md. 1988) (employer could not include housing in wages because the housing did not comply with local housing codes); *Soler v. G & U, Inc.*, 768 F. Supp. 452, 466 (S.D.N.Y. 1991) (denying wage deductions to an employer who failed to comply with housing code and rejecting "the owners' claim that 'substantial compliance' with the law is sufficient").

cellar can be used for sleeping. Montgomery County Code § 26-5(e) ("Cellar space must not be used as habitable space without written permission from an enforcing agency."). "The burden to segregate permissible credits from impermissible ones" was on defendants, and they have not met the burden of proving that the cellar room complied with the local ordinance. *See Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 474 (11th Cir. 1982). Quite the contrary, defendants acknowledged that they did not seek approval from the County for the cellar room, but only for the nine upstairs guestrooms. JA 210, 430-31.

Mr. Mukendi testified that he believed the space met the requirements for basement dwellings, which are different from cellars. *See* Montgomery County Code § 26-5(f). This testimony, however, is insufficient to establish that the room is a basement. *See* Montgomery County Code § 26-2 (defining "basement" as the "portion of a building located below the first floor joists, at least half of whose clear ceiling height is above the mean level of the adjacent ground," and "cellar" as the "portion of a building located below the first floor joists, at least half of whose clear ceiling height is below the mean level of the adjacent ground."). It bears noting in this regard that, in their summary-judgment papers below, defendants did not even contest Ms. Balbed's argument that 29 C.F.R. § 531.31 prohibited them from including the purported value

of the room as wages, let alone counter her argument with evidence of County approval.[8]

Because defendants had not received approval from Montgomery County to use the cellar room for sleeping purposes, they were not entitled to count the room as in-kind wages, no matter its purported value. The district court committed reversible error for this reason as well.

C. The district court should not have permitted defendants to include room and board in Ms. Balbed's wages because the purported values are incorrectly calculated and unsubstantiated.

As explained above, defendants' failures both to keep records and to comply with local law are fatal to including the room and board in Ms. Balbed's wages, and this Court should reverse on these bases alone. As we now show, the district court also erred by allowing defendants a wage offset based on incorrectly calculated and unsubstantiated values for these in-kind items.

The value of in-kind wages is the "reasonable cost . . . to the employer" of room and board "customarily furnished" to an employee. *See* 29 U.S.C. § 203(m). The "reasonable cost" is equal to the "actual cost" of providing an employee with a

[8] In any case, defendants did not prove below that the room was a basement that could be lawfully used as living space. *See* Montgomery County Code § 26-5(f) ("Basement space. Basement space must not be used as habitable space unless, in addition to all other requirements of this Chapter: (1) the floor and walls and are impervious to leakage of underground and surface runoff water and insulated against dampness; and (2) the minimum aggregate glass area of windows required by this Chapter is located entirely above the grade of the ground adjoining the window area.").

particular item. 29 C.F.R. § 531.3(a). The actual cost shall "not include a profit to the employer." *Id.* § 531.3(b). Thus, employers determine reasonable cost by adding "the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5½ percent) for interest on the depreciated amount of capital invested by the employer." *Id.* § 531.3(c). Defendants bear the burden of proving that the value of the items provided to Ms. Balbed did not include profit. *See Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 474 n.12 (11th Cir. 1982); *see also Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1514 (11th Cir. 1993) (reversing because district court "erroneously placed the burden of proof on" employees to prove wage offsets were unreasonable rather than on employers to prove they were reasonable).

1. Defendants made no attempt below to establish the actual cost of the room and board, and the little anecdotal evidence they offered impermissibly included profit. They asserted, without any documentary proof, that the room's value was at least $850 per month and as much as $1,800 per month. JA 826. But Eden Park never claimed these estimates as wages paid to employees on its 2015 tax filings. JA 603. And defendants made both estimates only after they had been sued, and both include a profit margin. The $850 estimate was based on Mrs. Mukendi's unsubstantiated claim about general rental prices in Takoma Park and a graph displaying the average market prices for standalone apartments in Montgomery County. JA 826. The $1,800

estimate was based on the rental price for the regular, aboveground guestroom Ms. Balbed occupied before being hired. *Id.* Use of neither estimate is lawful.

Courts have consistently held that including in wages the price that would be paid by a guest or client is impermissible. *E.g.*, *New Floridian Hotel*, 676 F.2d at 474. "'Actual cost' is strictly the specific costs Defendant incurred in providing the apartment, such as the mortgage payments it made, and any other relevant costs, *not what it could have made otherwise*." *Estanislau v. Manchester Developers, LLC*, 316 F. Supp. 2d 104, 109 (D. Conn. 2004) (emphasis added). As noted earlier, the employer bears the burden of providing evidence of the actual cost. "Records of mortgage payments, a rental agreement and records of rent checks, or utility bills, for example, [may] suffice as bases for actual cost calculations." Field Assistance Bulletin, JA 852. Thus, if an employer bases its price estimate on the market value, and fails to produce evidence showing the profit that should be deducted, a district court may not speculate on what actual cost is. *New Floridian Hotel*, 676 F.2d at 476; *see Caro-Galvan*, 993 F.2d at 1514 (rejecting "as insufficient [an employer's] unsubstantiated estimates of costs.").

The $850 estimate was based on Mrs. Mukendi's supposed knowledge of the local rental market. JA 826, 829. But her bare testimony is not sufficient to establish the actual cost to the Inn. *Caro-Galvan*, 993 F.2d at 1514. And the $1,800 estimate was based on the price defendants charged guests to stay in an upstairs guestroom. JA 826. But the bedroom Ms. Balbed used was located in the cellar and was never rented out to guests. JA 210. What is more, the room was never even intended for guests because

defendants only secured permits from the County to rent the nine upstairs rooms. JA 430-31. So Eden Park was not missing out on *any* rental income it would have otherwise received had Ms. Balbed not been occupying the room. In light of these circumstances, any price estimate based on the fair-market value of a similarly-sized, aboveground apartment or hotel room would be an inadequate basis for speculating on the actual cost *to defendants* of the room that Ms. Balbed occupied.

In sum, until an employer produces evidence that demonstrates the actual cost of providing a bedroom to an employee, such as a mortgage payment, the employer may not offset the minimum-wage requirement at all. Because defendants failed to produce any legally acceptable evidence establishing the actual cost of the room, the district court should have considered the value of the room to be zero.

2. Defendants' efforts to claim value for the remaining in-kind items (a supposed $500 per month for utilities, laundry, breakfast, and local telephone service, JA 826) is similarly flawed. As with the bedroom, defendants' breakfast value impermissibly included profit. Defendants asserted that Ms. Balbed was compensated with a free $7 breakfast every day for a total of $210 per month. *Id.* First, that price was what Eden Park charged guests for breakfast, JA 248, which includes, in addition to profit, not only the cost of the food itself, but also the cost of preparing and serving it to the guests. It was not the actual cost of allowing Ms. Balbed to eat the breakfast food that she herself prepared. Second, defendants "revoked" this benefit and told her she was not allowed to eat the same breakfast as the guests. JA 839. As

with the cellar room, the district court should not have allowed defendants to offset the minimum wage by $210 each month without proof that $7 was the actual cost to defendants of providing Ms. Balbed with breakfast food. *E.g.*, *New Floridian Hotel*, 676 F.2d at 475 (employer did not satisfy the burden of proving reasonable cost where the employer "testified that he estimated the cost of lunch to be $1.00 and dinner to be $2.00.").

Even more problematic is defendants' failure to produce *any* evidence of the cost of the remaining items (utilities, laundry, and local telephone service), while claiming that she received at least $340 monthly in-kind compensation for these items. JA 826. A simple affidavit listing a conjectural price "does not provide any substantiation as to how [Eden Park] determined the reasonable cost of [the utilities], let alone the detailed justification required under 29 C.F.R. §§ 516.27(a) and 531.3(c)." *Maldonado v. Alta Healthcare Grp.*, 17 F. Supp. 3d 1181, 1192 (M.D. Fla. 2014) (a "one-page, bare-bones document" listing prices for room, food, utilities, and cable was "completely unsubstantiated," and thus, the "deduction" of utilities from the employee's pay was "impermissible").

Defendants bore the burden to show what percentage of Eden Park's overall utility bills and phone bill Ms. Balbed used each month. "The portion of the cost of the residence in which an employee lives that may be counted as part of wages must be a reasonable approximation of the worker's share of the housing." Field Assistance Bulletin, JA 852. A reasonable approximation might have been ascertained by

installing separate electric and water meters for her room and bathroom, much like those found in many apartment buildings. Alternatively, the Department of Labor will accept an employer's reasonable approximation of an average monthly utility rate. *See id.* At the very least, defendants needed to produce evidence showing what the utility bills actually were and how they arrived at Ms. Balbed's monthly share. A proportional calculation would have been vital in this case because Ms. Balbed occupied a small cellar room, and, other than perhaps minor individual use of water and lights on her purely personal time, it is difficult to see how Ms. Balbed's use of utilities imposed any marginal cost, let alone the $340 per month conjured by defendants. For this reason as well, partial summary judgment should have been entered for Ms. Balbed.

D. The employment agreement was not a "reasonable agreement" under 29 C.F.R. § 785.23, and Ms. Balbed was entitled to minimum wages and overtime pay for hours actually worked.

Independent of the arguments that the purported value of room and board should not have been counted, the employment agreement was itself unreasonable. Therefore, defendants should have paid Ms. Balbed for minimum wage and any overtime due for all hours she worked.

1. As explained (at 23-24), a section 785.23 agreement is used when an employee lives on the employment premises and keeping track of exactly how many hours the employee works may be difficult. Instead of attempting to calculate the exact number of hours worked each week, the parties may agree on an average number that the employee will spend completing the assigned duties, and the

employer then pays the employee based on the agreed-upon average. A district court may accept a section 785.23 agreement regarding total hours worked, but only when it is "reasonable" and "takes into consideration all of the pertinent facts." 29 C.F.R. § 785.23. As this Court has observed, this provision is not "an exception to the FLSA over-time pay requirements," but rather "offers a methodology for calculating how many hours the employees actually worked within the meaning of the FLSA." *Garofolo v. Donald B. Helsep Ass'n*, 405 F.3d 194, 199 n.6 (4th Cir. 2005) (quotation marks omitted) (quoting *Leever v. Carson City*, 360 F.3d 1014, 1018 n.2 (9th Cir. 2004)). And defendants bear the burden of proving that the employment agreement was reasonable. *Id.* at 199-200.

As we now explain, the district court erred in finding the contract was a reasonable agreement under section 785.23 for three independent reasons.

a. First, as explained above (at 24-25), the contract does not qualify as a section 785.23 reasonable agreement because it does not specify the agreed-to number of work hours—at least not on defendants' terms. Defendants' fixation on twenty-nine hours runs headlong into their own defense: Either the contract's work schedule represents the precise number of agreed-upon hours, or it does not. If it does, then the number of hours is seventy-one, not twenty-nine. *See supra* 9-10; JA 611. If it does not, then the contract is not a section 785.23 reasonable agreement at all because it is missing the regulation's most indispensable component—the agreed-to number of hours. At the very best for the defendants, the work schedule's working-hour

obligation is ambiguous, and it is a "general maxim" of contract law that ambiguities are construed "most strongly against the drafter." *United States v. Seckinger*, 397 U.S. 203, 210, 216 (1970); *see* Restatement (Second) of Contracts § 206 (Am. Law Inst. 1981).

b. Second, the agreement was not reasonable because it resulted in Ms. Balbed being paid less than minimum wage. The rights and protections afforded employees by the FLSA may not be "abridged by contract or otherwise waived." *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945)). An agreement that abridges the employee's right to minimum wage—the most fundamental of the Act's rights—is not reasonable. *See Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 602-03 (1944) ("Any custom or contract falling short of [Congress's] basic [national policy of guaranteeing compensation for all work], like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.").

To illustrate, for seventy-one hours of work each week, defendants should have paid Ms. Balbed $825 per week ($3,551 per month). *See supra* note 5. But because defendants are not entitled to include the purported values of the in-kind items in total wages, Ms. Balbed actually received only $800 per month. In other words, defendants underpaid Ms. Balbed by more than $2,000 each month.

Even if we assume (incorrectly) that the FLSA authorized defendants to count room and board toward Ms. Balbed's wages, at the inflated, unsubstantiated rates

suggested by defendants ($850 for the room and $550 for the utilities and breakfast), they paid Ms. Balbed only $2,200 each month—more than $1,000 below the wages guaranteed by the Act. Not even the highest purported value of the room ($1,800) would satisfy defendants' obligation, because the total would be only $3,150 per month—still considerably below the amount Ms. Balbed should have received. Under any valuation, Ms. Balbed worked more than fulltime for over six months and never earned the minimum wage, let alone overtime.[9]

c. Third, even if this Court concludes (countertextually) that the work schedule unambiguously required only twenty-nine hours, the agreement would still not be reasonable because defendants did not "take[] into consideration all of the pertinent facts" at the time it was created. 29 C.F.R. § 785.23. "[T]he number of hours actually worked is clearly 'pertinent' to the question of how much compensation ought to be paid for that work." *Leever*, 360 F.3d at 1020-21 (citing Dep't of Labor, Wage & Hour Div., Op. Ltr., 1993 WL 901171 (Aug. 11, 1993)). As this Court puts it, section 785.23 agreements cannot "provide an unreasonably short amount of time to perform the assigned tasks." *Garofolo*, 405 F.3d at 201 (quoting *Rudolph v. Metro. Airports Comm'n*, 103 F.3d 677, 684 (8th Cir. 1996)). In other words, an employer's "obligation" is "to make an investigation as to the number of hours" needed to perform the tasks

[9] Even at the twenty-nine-hour limit urged by defendants, Ms. Balbed was not paid the minimum wage. *See supra* note 5.

assigned to the employee *before* the employment agreement is signed. *Leever*, 360 F.3d at 1021 n.6.

Twenty-nine hours was not enough time for Ms. Balbed to complete the tasks that she was required to perform for the Inn. It comprises only the hours scheduled for breakfast and cleaning—excluding *any* time for check-ins and closing. JA 611, 909. The twenty-nine-hour claim assumes that Ms. Balbed never checked in a single guest (let alone answered the phone), or responded to the Airbnb messages or did other social-media-related work. But Ms. Balbed did all these things and much more. *See supra* at 7-9.

Ms. Balbed was required to finish a series of daily tasks on a checklist, whether guests were present or not, and there was not enough time for her to complete every task each day. JA 82, 86. And cleaning was not the only task for which Ms. Balbed was responsible. Mrs. Mukendi told her that "if something isn't done here, and you're the innkeeper, you're the only one here. How is it going to get done?" JA 57, 105. As Ms. Balbed described, Mrs. Mukendi "spoke in such a way as if the thought of me limiting my work to cooking and cleaning was ridiculous, absurd," "and her tone suggested that it was something I should have known." JA 57.

Ms. Balbed's work directly benefitted the Inn and was consistent with the duties listed in the contract.[10] For example, the contract required her to handle the

[10] *See* JA 611 (job responsibilities "include but are not limited to . . . 6. Ensure complete guest satisfaction"); *see also* JA 615 ("Employee shall provide EPGH with all

social media and Airbnb interactions. JA 53, 64, 611. Because Airbnb's rating system considers the Inn's response rate to guest and potential guest inquiries, Ms. Balbed spent much of her time updating and maintaining the Inn's account as the inquiries came in on her phone. JA 64. Before Ms. Balbed's arrival, Eden Park had a poor track record responding to requests from potential customers (sometimes not responding at all), and it was her job to turn things around to attract "all of the possible business that we could get." *Id.* Ms. Balbed was required to answer the Inn's phone until at least 10 p.m. JA 83. She was also responsible for waiting up for late-arriving guests, some of whom did not arrive until after 11 p.m. JA 84. Mrs. Mukendi stated that the only time Ms. Balbed was not required to answer the phone was on her days off, JA 275-76, but the defendants' own timesheets show that they expected her to answer calls every day, *e.g.*, JA 677, 740, 781.

2. For the reasons just explained, the agreement was not "reasonable" under section 785.23, and the Court should reverse and remand for a determination of the minimum wage and overtime due Ms. Balbed based on the hours she actually worked.

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information, suggestions, and recommendations regarding EPGH's business, of which Employee has knowledge, that will be of benefit to EPGH."); JA 614 ("Employee agrees to perform faithfully, industriously, and to the best of Employee's ability, experience, and talents, all of the duties that may be required by the express and implicit terms of this Contract, to the reasonable satisfaction of EPGH. Such duties shall be provided at such place(s) as the needs, business, or opportunities of EPGH may require from time to time."). Twenty-nine hours does not take into account the time spent on these tasks.

The parties' genuine disputes over the amount of time Ms. Balbed spent working must be resolved by the trier of fact, guided by the following principles.

a. Defendants must compensate Ms. Balbed for all her work that benefitted Eden Park. "[O]nce an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation." *Holzapfel v. Town of Newburgh*, 145 F.3d 516, 524 (2d Cir. 1998); *see also Reich v. Dep't of Conservation & Nat. Res.*, 28 F.3d 1076, 1078-79 (11th Cir. 1994) (holding the defendant to imputed knowledge of employee's overtime work); 29 C.F.R. § 785.11 (Where an employer "knows or has reason to believe that" the employee is working past the end of the shift, "the time is working time.").

Defendants were well aware of the tasks Ms. Balbed performed, as evidenced (in part) by their own post-hoc timesheets. *E.g.*, JA 270 (clearing the back and front yards); JA 296 (removing the weeds from the garden); JA 352-53 (pest control); JA 361-62, 453 (painting), JA 301-04 (fixing the bathroom drywall); JA 359-61 (rearranging furniture); JA 367-68 (putting together a toiletries cabinet); JA 368-69 (decorating for the holidays); JA 371 (assembling a tea cart). Even though, in this litigation, defendants have pejoratively called some of these tasks "personal projects," *e.g.*, JA 645, every task directly benefitted the Inn consistent with the duties listed in the contract, *see supra* note 10.

Moreover, defendants are not entitled to "sit back and accept the benefits without compensating for them," even if one accepts the highly doubtful claim that

they did not want the tasks performed. 29 C.F.R. § 785.13. An employer "must make every effort" to ensure the employee does not continue to perform undesired tasks. *Id.* So, an agreement may be reasonable when it explicitly states employees were not permitted to work overtime without prior approval. *Rudolph v. Metro. Airports Comm'n*, 103 F.3d 677, 684 (8th Cir. 1996). But here, as explained above, defendants did just the opposite under an agreement that imposed a wide range of responsibilities on the employee and expressly noted that it was "not limited to" those responsibilities. JA 611.

It is more than a little ironic that defendants hired someone to be their fulltime, live-in innkeeper—in other words, someone who would "be there 24 hours a day or as much as possible," JA 398, and who "could not leave the Eden Park Guest House premises unless it was her 'day off'," JA 835—but now argue that they are obligated to pay her for only the breakfast and cleaning hours, a total of only twenty-nine hours of work each week. Recall in this regard that the contract also required Ms. Balbed to be available from 4 p.m. to 9:30 p.m. each night for check-in, and at 10 p.m. for closing. JA 611. During those forty-two hours, even when she was not performing her required social-media work, checking-in guests, answering the phone, or completing other tasks, Ms. Balbed was required to be at Eden Park and available to guests. To use common FLSA parlance, she was "engaged to wait," not "wait[ing] to be engaged." *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944); *see Kelly v. Hines-Rinaldi Funeral Home, Inc.*, 847 F.2d 147, 149 (4th Cir. 1988). At the very least, determining

whether Ms. Balbed was one or the other is "a question of fact to be resolved by appropriate findings of the trial court." *Skidmore*, 323 U.S. at 136-37.

b. Defendants are required to pay for the time Ms. Balbed actually spent working, not just the time defendants subjectively believe the tasks should have taken. Employers cannot withhold wages earned "solely on the grounds that the employee could have completed his tasks during the scheduled hours." *Holzapfel*, 145 F.3d at 522. Ms. Balbed testified that it was impossible to finish all of the tasks on the daily checklist every day. JA 86. Defendants noted below that, according to Trezila Schulbaum, Ms. Balbed had time-management problems, and that it should only have taken thirty minutes to clean a guestroom. JA 540; ECF 29, at 12; *see also* JA 830-31; 306; 528. Crediting one party's testimony over the other's is a matter for the trier of fact (not for resolution on summary judgment).

II. Ms. Balbed's state-law claims are not preempted.

If this Court affirms the district court's grant of summary judgment on Ms. Balbed's FLSA claims, her claims under Maryland state law remain and must be addressed. *See* JA 7-8 (complaint setting out state-law claims). As noted earlier, defendants have conceded, as they must, that the FLSA entitled Ms. Balbed to the applicable Montgomery County Maryland, minimum-wage rate. JA 864, 910-11; *see* 29 U.S.C. § 218(a). Therefore, if this Court holds that Ms. Balbed's FLSA claims may proceed for one or more of the reasons described above, it need not reach any other Maryland-law issues. However, defendants argued below that Ms. Balbed's Maryland-

law claims are preempted by section 785.23 (and the district court, puzzlingly, ignored those claims, *see* JA 921-22). ECF 33, at 9-14.

Before explaining why these claims are not preempted, we would be remiss if we did not note a predicate jurisdictional issue. As mentioned, this Court would be in a position to address the preemption question if only state-law claims remained. When district courts are in that situation, they sometimes dismiss the state-law claims without prejudice under the supplemental jurisdiction statute. *See* 28 U.S.C. § 1367(c)(3). Thus, if this Court finds itself in that situation, it may wish to remand the state-law claims to the district court to exercise discretion whether to consider them or to dismiss without prejudice. *See Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir. 1995). On the assumption, however, that this Court wishes to address the preemption issue, we now turn to it.

A. Background preemption principles

In light of the Constitution's concerns with encroachment on traditional state prerogatives, any preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (cases and quotation marks omitted). To be sure, under the Supremacy Clause, state law must give way to the definitive commands of contrary federal law. That occurs most unmistakably when Congress, in the text of a statute, expressly preempts

state law. *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). That has not happened here; indeed, the FLSA says nothing about overriding state law.

Absent express preemption, state law may be impliedly preempted if, and only to the extent that, it actually conflicts with federal law. *Wyeth*, 555 U.S. at 576. Under conflict preemption, state law is preempted where it is impossible for the regulated party to comply with both state and federal duties. *Id.* at 581. That does not apply here. Defendants could simply pay Ms. Balbed the applicable Montgomery County minimum wage for every hour she worked (and for any overtime pay due), and they would comply with both the FLSA and Maryland Wage and Hour Law. *See* Md. Code Ann., Lab. & Empl. § 3-413.

Conflict preemption may also occur where state law stands as an obstacle to the accomplishment of congressional objectives. *Altria*, 496 U.S. at 79. Defendants rely on this species of preemption. ECF 33, at 10-11. This preemption category is premised on reading congressional tea leaves to discern a preemptive purpose that appears nowhere in Congress's express text. It therefore must be narrowly cabined lest courts risk treading inadvertently on the Constitution's "delicate balance" aimed at preserving state sovereignty. *Wyeth*, 555 U.S. at 584-85 (Thomas, J., concurring).

B. 29 C.F.R. § 785.23 does not preempt Ms. Balbed's Maryland-law claims.

Maryland's Wage and Hour Law requires an employee to be paid the minimum wage (and, where applicable, overtime) for every hour worked. *See* Md. Code Ann., Lab. & Empl. § 3-413. The FLSA's purpose is to ensure the "health, efficiency, and

general well-being of workers." 29 U.S.C. § 202. The Act's "central aim" is to achieve "certain *minimum* labor standards," *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (emphasis added)—that is, to create a floor, not a ceiling for workers' economic well-being. The federal minimum-wage and overtime provisions, 29 U.S.C. §§ 206, 207(a), are "necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all actual work or employment." *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944). A state wage law that seeks to do the same thing—pay people minimum amounts for every hour they work—is not therefore an obstacle to congressional objectives. For these reasons, the Maryland Wage and Hour Law is not preempted by 29 C.F.R. § 785.23.

1. This conclusion is powerfully supported by two strains of case law. The first is a series of decisions holding that the FLSA does not preempt state law where the FLSA expressly exempts a category of workers from its protections while state wage-and-hour law covers them.

In *Overnite Transportation Co. v. Tianti*, 926 F.2d 220 (2d Cir. 1991) (per curiam), for example, Connecticut law mandated payment of overtime wages without exempting loading-dock employees, a category of workers exempted from the FLSA's overtime requirements. *Id.* at 221-22. Connecticut law was not preempted, the Second Circuit held, for a simple reason: Congress had not expressly "prevent[ed] the *states* from regulating overtime wages paid to workers exempt from the FLSA." *Id.* at 222 (internal quotation marks and citation omitted). Put another way, Connecticut law

built on the FLSA's minimum standards without posing any obstacle to the Act's overall goal of ensuring workers' economic well-being.

Similarly, in *Maccabees Mutual Life Insurance Co. v. Perez-Rosado*, 641 F.2d 45 (1st Cir. 1981), the First Circuit concluded that the FLSA's categorical exemption for "outside salesmen" did not preempt Puerto Rico laws providing workers vacation and bonus pay. *Id.* at 47. "[T]he provision of these benefits," the court held, "is not contrary to the policy of the FLSA, which is to protect employees from excessive hours and substandard wages." *Id.* at 46. "[T]he FLSA did not exempt 'outside salesmen' from all kinds of wage and hour protection," the court explained, but "merely exempted such employees from the minimal federal protection offered in the Act." *Id.* at 47.[11]

The second line of authority holds that opt-out class actions filed under state law are not preempted by the FLSA even though the FLSA expressly *bars* opt-out class actions (and allows representative actions only to the extent that each claimant affirmatively opts in). *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 257-58 (3d Cir. 2012). In *Knepper*, the Third Circuit reasoned that "[n]othing in the plain text" of FLSA's opt-

[11] *Accord Tidewater Marine W., Inc. v. Bradshaw*, 927 P.2d 296, 301-02 (Cal. 1996) (FLSA provision exempting seamen from right to overtime does not preempt California law requiring employers to pay seaman overtime.); *Baxter v. M.J.B. Inv'rs*, 876 P.2d 331, 336 (Or. Ct. App. 1994) (rejecting claim that FLSA exemption for certain elder-care workers preempts state law because if the FLSA "exempts a category of employees from overtime standards, but state law does not contain that exemption, state law applies.").

out bar "addresses the procedure for state-law claims." *Id.* at 261. Preemption of state wage laws under which employees bring opt-out class actions, the court observed, effectively "would bar enforcement of all state wage and hour laws that did not exceed the [substantive] standards of the FLSA, a significant intrusion on state authority and a reversal of the traditional presumption against preemption, which is particularly strong given states' lengthy history of regulating employees' wages and hours." *Id.* at 262. And the Third Circuit is not alone. It "join[ed] the Second, Seventh, Ninth, and D.C. Circuits" in ruling that state-law opt-out class actions are not "inherently incompatible" with the FLSA's opt-in requirement. *Id.* at 262-63 (citing cases).

2. If the FLSA preempts neither state laws protecting workers categorically exempt from the FLSA's protections, nor the potent tool of opt-out class actions despite the FLSA's ban on them, it surely lacks preemptive force here.

Section 785.23 acknowledges that it is "difficult to determine the exact hours worked" by an employee residing on her employer's premises and looks to a "reasonable agreement" to determine hours, 29 C.F.R. § 785.23, while Maryland law seeks to count every hour worked, Md. Code Ann., Lab. & Empl. § 3-413. Thus, as this Court has observed, "rather than providing employers with an exception to the FLSA over-time pay requirements, section 785.23 simply offers a methodology for calculating how many hours the employees actually worked within the meaning of the FLSA." *Garofolo v. Donald B. Helsep Ass'n*, 405 F.3d 194, 199 n.6 (4th Cir. 2005)

(citation and quotation marks omitted). That state law employs a different means—tracking every hour rather than using an agreement to estimate hours—for achieving the same basic goal therefore does not create an obstacle to congressional objectives. Indeed, it furthers those objectives. For that reason, Ms. Balbed's Maryland-law claims are not preempted, and she should have been paid for every hour she worked, as Maryland law demands.[12]

CONCLUSION

This Court should reverse the district court's grant of summary judgment to defendants. It should direct the district court to grant Ms. Balbed's motion for partial summary judgment on the ground that defendants failed to pay the wages due her under the FLSA, leaving questions of the precise amounts due and undecided issues of individual liability for resolution on remand. If the Court affirms on the FLSA issues, it should either remand the Maryland state and local claims to the district court in the first instance for a decision on whether to retain supplemental jurisdiction, or

[12] Because, as just shown, section 785.23 does not preempt Maryland law requiring that employees be paid the minimum wage for all of their work hours, it follows that section 785.23 cannot possibly preempt Maryland's requirements for in-kind-wage recordkeeping and valuation, Md. Code Ann., Lab. & Empl. § 3-503; Md. Code Regs. 09.12.41.18. Those requirements have nothing to do with ascertaining a worker's compensable hours and so could not pose any obstacle to congressional objectives.

hold that those claims are not preempted by the FLSA and remand for further proceedings on their merits.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument. The decisional process will be significantly aided by oral argument, which would allow the Court, among other things, to determine whether one regulation, 29 C.F.R. § 785.23, overrides all otherwise applicable federal and state law, an issue this Court has never considered. Moreover, this Court may need to address the FLSA's preemptive reach over state wage-and-hour law, and oral argument would allow the Court to more fully explore that issue.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,690 words, as calculated by Word 2013, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced typeface.

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STATUTORY AND REGULATORY ADDENDUM

29 U.S.C. § 203(m)

"Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. . . .

29 U.S.C. § 211(c) – Records

Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder. The employer of an employee who performs substitute work described in section 207(p)(3) of this title may not be required under this subsection to keep a record of the hours of the substitute work.

29 C.F.R. § 785.23 – Employees residing on employer's premises or working at home.

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. (Skelly Oil Co. v. Jackson, 194 Okla. 183, 148 P. 2d

182 (Okla. Sup. Ct. 1944); Thompson v. Loring Oil Co., 50 F. Supp. 213 (W.D. La. 1943).)

29 C.F.R. § 516.27 – "Board, lodging, or other facilities" under section 3(m) of the Act.

(a) In addition to keeping other records required by this part, an employer who makes deductions from the wages of employees for "board, lodging, or other facilities" (as these terms are used in sec. 3(m) of the Act) furnished to them by the employer or by an affiliated person, or who furnishes such "board, lodging, or other facilities" to employees as an addition to wages, shall maintain and preserve records substantiating the cost of furnishing each class of facility except as noted in paragraph (c) of this section. Separate records of the cost of each item furnished to an employee need not be kept. The requirements may be met by keeping combined records of the costs incurred in furnishing each class of facility, such as housing, fuel, or merchandise furnished through a company store or commissary. Thus, in the case of an employer who furnishes housing, separate cost records need not be kept for each house. The cost of maintenance, utilities, and repairs for all the houses may be shown together. Original cost and depreciation records may be kept for groups of houses acquired at the same time. Costs incurred in furnishing similar or closely related facilities, moreover, may be shown in combined records. Where cost records are kept for a "class" of facility rather than for each individual article furnished to employees, the records must also show the gross income derived from each such class of facility; e.g., gross rentals in the case of houses, total sales through the store or commissary, total receipts from sales of fuel, etc.

(1) Such records shall include itemized accounts showing the nature and amount of any expenditures entering into the computation of the reasonable cost, as defined in part 531 of this chapter, and shall contain the data required to compute the amount of the depreciated investment in any assets allocable to the furnishing of the facilities, including the date of acquisition or construction, the original cost, the rate of depreciation and the total amount of accumulated depreciation on such assets. If the assets include merchandise held for sale to employees, the records should contain data from which the average net investment in inventory can be determined.

(2) No particular degree of itemization is prescribed. However, the amount of detail shown in these accounts should be consistent with good accounting practices, and should be sufficient to enable the Administrator or authorized representative to verify the nature of the expenditure and the amount by reference to the basic records which must be preserved pursuant to § 516.6(c)(2).

(b) If additions to or deductions from wages paid (1) so affect the total cash wages due in any workweek (even though the employee actually is paid on other than a workweek basis) as to result in the employee receiving less in cash than the applicable minimum hourly wage, or (2) if the employee works in excess of the applicable maximum hours standard and (i) any additions to the wages paid are a part of wages, or (ii) any deductions made are claimed as allowable deductions under sec. 3(m) of the Act, the employer shall maintain records showing on a workweek basis those additions to or deductions from wages. (For legal deductions not claimed under sec. 3(m) and which need not be maintained on a workweek basis, see part 531 of this chapter.)

(c) The records specified in this section are not required with respect to an employee in any workweek in which the employee is not subject to the overtime provisions of the Act and receives not less than the applicable statutory minimum wage in cash for all hours worked in that workweek. (The application of section 3(m) of the Act in nonovertime weeks is discussed in part 531 of this chapter.)

29 C.F.R. § 531.3 – General determinations of "reasonable cost."

(a) The term reasonable cost as used in section 3(m) of the Act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.

(b) Reasonable cost does not include a profit to the employer or to any affiliated person.

(c) Except whenever any determination made under § 531.4 is applicable, the "reasonable cost" to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5 1/2 percent) for interest on the depreciated amount of capital invested by the employer: *Provided*, That if the total so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices. As used in this paragraph, the term "good accounting practices" does not include accounting practices which have been rejected by the Internal Revenue Service for tax purposes, and the term "depreciation" includes obsolescence.

(d)(1) The cost of furnishing "facilities" found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

(2) The following is a list of facilities found by the Administrator to be primarily for the benefit of convenience of the employer. The list is intended to be illustrative rather than exclusive: (i) Tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer; (iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

29 C.F.R. § 531.31 – "Customarily" furnished.

The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where "customarily" furnished to the employee. Where such facilities are "furnished" to the employee, it will be considered a sufficient satisfaction of this requirement if the facilities are furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employees engaged in the same or similar trade, business, or occupation in the same or similar communities. See Walling v. Alaska Pacific Consolidated Mining Co., 152 F. (2d) 812 (C.A. 9), cert. denied, 327 U.S. 803; Southern Pacific Co. v. Joint Council (C.A. 9) 7 W.H. Cases 536. Facilities furnished in violation of any Federal, State, or local law, ordinance or prohibition will not be considered facilities "customarily" furnished.

Maryland Code, Labor and Employment, § 3-503 – Deductions

An employer may not make a deduction from the wage of an employee unless the deduction is:

(1) ordered by a court of competent jurisdiction;

(2) authorized expressly in writing by the employee;

(3) allowed by the Commissioner because the employee has received full consideration for the deduction; or

(4) otherwise made in accordance with any law or any rule or regulation issued by a governmental unit.

Md. Code Regs. 09.12.41.18 – Reasonable Cost

A. The reasonable cost of board, lodging, or other facilities may be included as part of an employee's wage if the:

(1) Facilities are customarily and regularly available to all similarly situated employees;

(2) Employee's acceptance of the facility is voluntary and uncoerced; and

(3) Employee receives the benefits of the facility for which he or she is charged.

B. The reasonable cost of board, lodging, or other facilities included as part of the wage paid to an employee may not:

(1) Exceed the actual cost to the employer; and

(2) Include profit to the employer or to any person or establishment affiliated with the employer.

C. The reasonable cost of furnishing board, lodging, or other facilities may include the cost of operation and maintenance.

D. The employer shall demonstrate the actual cost of the board, lodging, or facilities furnished.

E. In a food and drink establishment, if the actual cost of food consumed by an employee cannot be determined, the reasonable cost is half the price customarily and regularly charged a member of the general public.

F. The cost of furnishing board, lodging, or other facilities primarily for the benefit or convenience of the employer may not be included as part of an employee's wage.

Montgomery County Code § 26-2 - Definitions.

In this Chapter, the following words and phrases have the following meanings unless the context clearly indicates otherwise:

. . .

Basement: That portion of a building located below the first floor joists, at least half of whose clear ceiling height is above the mean level of the adjacent ground.

Cellar: That portion of a building located below the first floor joists, at least half of whose clear ceiling height is below the mean level of the adjacent ground.

Montgomery County Code § 26-5 – Space, use, and location.

The owner of any dwelling or dwelling unit must assure compliance with the following standards during human habitation:

. . .

(e) Cellar space. Cellar space must not be used as habitable space without written permission from an enforcing agency.

(f) Basement space. Basement space must not be used as habitable space unless, in addition to all other requirements of this Chapter:

(1) the floor and walls and are impervious to leakage of underground and surface runoff water and insulated against dampness; and

(2) the minimum aggregate glass area of windows required by this Chapter is located entirely above the grade of the ground adjoining the window area.

CERTIFICATE OF SERVICE

I certify that on May 8, 2017, I electronically filed this Brief of Appellant Maryam Balbed using the CM/ECF System, which will send notice of the filing to the following registered CM/ECF user: appellees Eden Park Guest House, LLC, et al.'s attorney of record, Brian M. Maul (Brian@bmaullaw.com).

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