No. 17-1187

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

(CORRECTED) BRIEF OF APPELLEES

June 26, 2017

Brian M. Maul, Esq.
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Counsel for Appellees

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is not required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-1187 Caption: Maryam Balbed v. Eden Park Guest Housse, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Eden Park Guest House, LLC
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s Brian M. Maul Date: March 3, 2017

Counsel for: Appellees

CERTIFICATE OF SERVICE

****

I certify that on March 3, 2016 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 M. Maul
(signature)

March 3, 2016
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 17-1187 Caption: Maryam Balbed v. Eden Park Guest Housse, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Etty Bela Mukendi
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

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No. 17-1187 Caption: Maryam Balbed v. Eden Park Guest Housse, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Bruno Mukendi
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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No. 17-1187 Caption: Maryam Balbed v. Eden Park Guest Housse, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Trezilla Mukendi
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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Signature: /s Brian M. Maul Date: March 3, 2017

Counsel for: Appellees

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/s Brian M. Maul
(signature)

March 3, 2016
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STATEMENT OF ISSUES

1. Whether the District Court correctly held that 29 C.F.R. §785.23 permits an employer and employee to enter into a "reasonable agreement" regarding (*inter alia*) the number of hours the employee is required to work and the amount of compensation to be paid to the employee for that work?

2. Whether the District Court correctly held that state/county law cannot eviscerate the purposes of, and contravene, federal law?

STATEMENT OF THE CASE

Appellant Balbed sued Appellees under the Fair Labor Standards Act ("FLSA") and Maryland state/county wage laws. At the close of discovery, Balbed filed a Motion for Partial Summary Judgment. Appellees Eden Park Guest House, LLC ("Eden Park" or the "Inn"), Etty Mukendi ("E. Mukendi"), Bruno Mukendi ("B. Mukendi"), and Trezila Mukendi ("T. Mukendi") ("Appellees") filed a Response to Balbed's Motion for Partial Summary Judgment and a Cross-Motion for Summary Judgment ("Cross Motion"), based upon 29 C.F.R. §785.23. Balbed filed a Response to the Cross Motion and Appellees' filed a Reply to Balbed's Response.

Upon holding oral arguments on January 9, 2017, the District Court denied Balbed's Motion for Partial Summary Judgment and granted Appellees Cross Motion for Summary Judgment.

STATEMENT OF FACTS

1. Appellee Eden Park is a small, unprofitable, 9-room, bed and breakfast (the "Inn") located in Takoma Park, Maryland. JA 144, 169. The Inn is run/operated by Etty Mukendi, who is the General Manager of the Inn and the Inn's designative representative in this matter. JA 127, 129-30, 137, 477, 478. Among her many duties, Ms. Mukendi is the sole family member in charge of hiring/firing of employees at the Inn. JA 127. No meeting or discussion ever took place among Appellees regarding the hiring of Balbed. JA 181-82.

2. Ms. Mukendi's five children (one of whom is a named Appellee, Trezila Mukendi) take turns throughout the week to assist with the Inn's operations (*e.g.*, cleaning, checking in guests, and reservations). JA 153, 180, 197-98. Trezila Mukendi has no ownership/membership interest in the Inn, played no role whatsoever in the hiring of Appellant Balbed or setting of compensation terms, and merely provided cleaning/breakfast training to Balbed. JA 54, 511-13, 517, 520, 522, 524-25, 526-29, 547-49, 553-55, 560-62. Balbed was specifically informed that she should follow the directives of Appellee Etty Mukendi, not those of Appellee Trezila Mukendi. JA 56.

3. Etty Mukendi's husband, Appellee Bruno Mukendi, was also named as a Member of Eden Park when it was registered as an LLC in 2006 (the other Member

being Etty Mukendi). JA 149. However, Mr. Mukendi has no involvement in the hiring/firing decisions of the Inn, including with respect to the hiring of Plaintiff. JA 127, 458-63. Mr. Mukendi's sole role has been assisting Etty Mukendi with the filing of paperwork (*e.g.*, taxes, articles, mortgage, permits) for Eden Park, as well as procuring plumbers/electricians for the building and performing outdoor maintenance/yard work for the building.[1] JA 147-49, 153-54, 161-62, 425, 453, 464, 478-79.

4. Bruno Mukendi runs/owns a separate, independent business and receives no income from Eden Park (as an employee or otherwise). JA 127-28, 419, 431, 442-45. That business is called the Washington International Management Institute ("WIMI") and operates from the same address/building as the Inn. JA 128-29, 433-36. Bruno Mukendi has no involvement whatsoever in the day-to-day operations of the Inn. JA 416.

5. From June 15, 2015 to July 12, 2015 (before Balbed began performing any work as an employee of the Inn), Balbed rented a room at the Inn at the rate of $450/week–or $1,800/month. JA 37, 38, 825. There is no dispute that Balbed was living at the Inn between July 12th and July 23rd, but there is no evidence that Balbed

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[1] As noted hereinafter, WIMI and the Inn operate from the same building/address and, thus, such work is not exclusively done for the benefit of the Inn.

paid for her room/board at the Inn between July 12th and July 23, 2015 (the date of her hire).

6. In July 2015, Appellee Etty Mukendi hired Balbed as an Innkeeper. JA 42. Although there appears to be a fact dispute as to who approached whom first for the position, with Appellees testifying that the Inn hired Balbed as an act of charity to prevent her from becoming homeless, such fact disputes are not material to the disposition of this appeal. *Compare* JA 52, *with* JA 185-89, 493-503, 537.

7. Balbed understood that Etty Mukendi was Balbed's "boss." JA 95. Bruno Mukendi had no involvement whatsoever with the decision to hire Balbed nor determining/controlling her compensation or other terms of employment set forth in the Agreement. JA 458-91, 463. Although Balbed suggested during her deposition that she believed Bruno Mukendi was also her boss, her ostensible basis for such belief was from allegedly overhearing conversations between Etty Mukendi and Bruno Mukendi, conversations that were in French, a language which Balbed does not speak and, therefore, admittedly has no idea as to what was discussed. Moreover, Balbed could not recall any specific topics that were discussed between Etty Mukendi and Bruno Mukendi, except possibly things that needed to be fixed. JA 105-08.

8. As required by Appellee Eden Park in order for Balbed to become an employee, on July 23, 2015, Balbed signed the agreement with Eden Park for Balbed

to be employed as an Innkeeper for Eden Park (the "Agreement").[2] Etty Mukendi signed the Agreement on behalf of Eden Park and explained the Agreement to Balbed JA 190. Balbed acknowledged signing that Agreement and understanding that it was an employment contract. JA 43-44. Mr. Bruno Mukendi played no role whatsoever in the drafting/offering of the Agreement to Balbed. JA 212-13.

9. Balbed's primary point of contact was Etty Mukendi. JA 103. Otherwise, by Balbed's own admission, nobody else at the Inn dictated Baled's schedule and Balbed was left to her own discretion to perform her work under the Agreement. JA 104.

10. Pursuant to the Agreement, in exchange for Balbed performing the tasks set forth in the Agreement, Balbed received $800 per month and was allowed to live at the Inn rent free the expensive area of Takoma Park, Maryland, plus she received free utilities, laundry, phone, and breakfast/food.[3] JA 90-91, 206-210. Such terms were discussed with Balbed. JA 238.

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[2] Balbed believes she offered to assist with some pest control while she was renting a room at the Inn and before she signed the Agreement, but Balbed confirmed that she was not "even an employee at this point." JA 45-48. By Balbed's own admission, other "work" Balbed claims she performed prior to signing the Agreement was not at the direction/instruction of Appellees as an employee but, rather, Balbed "just started doing it" on her own. JA 51-52. Balbed never asked to be compensated for such work. JA 52.

[3] The value of the free breakfast is $7/day. JA 62, 248.

11. Balbed was paid $800 per month (plus reimbursements) as agreed. JA 118, 810-23.

12. The value of living at the Inn rent free is at least $850/month and as much as $1,800/month (at $450/week). JA 239-47, 826-27. As noted above, Balbed paid the rate of $450/week for the other room she stayed in as a guest. The room that Balbed stayed in as the Innkeeper was similar in size and/or comparable to the room Balbed stayed in as a guest and, in fact, the Innkeeper room is slightly larger (13' X 10' versus 12 X 9.7') and has more amenities (*e.g.*, a private bathroom, queen-sized bed, a window, closet, fire alarm detector and sprinkler head). JA 239, 826-27. Ms. Mukendi's own children slept in the Innkeeper room. JA 237. Thus, the total compensation Balbed received under the Agreement ranges from $2,200 per month ($800 stipend; $850/month for room; and $550 for remaining free utilities, breakfast/food, phone and laundry) to as much as $3,150 ($800 stipend; $1,800/month for room; and $550 for remaining free utilities, breakfast/food, phone and laundry). JA 284-85, 826-27.

13. Pursuant to the terms of the Agreement, Balbed was expected to work approximately 29 hours per week (plus "checking in" guests as necessary[4]). JA 611.

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[4] It was not necessary for Balbed to "check out" guests since guests pay upon arrival. JA 277-78.

Appellees Eden Park/Etty Mukendi confirmed the work schedule in the Agreement, that Balbed was given days off, that Balbed was not expected to work if there was no work that had to be done, but that Balbed would often do what she feels like doing rather than what she is told to do. JA 214, 274-76.

14. It only takes approximately 5 minutes to "check in" guests. JA 317.

15. Thus, the total compensation Balbed received in exchange for the expectation of 29 hours/week (or approximately 116 hours/month) of work is the equivalent of at least $19/hr. ($2,200 ÷ 116 hrs.) and as much as $27/hr. ($3,150 ÷ 116 hrs.). Moreover, even if Balbed had been instructed/required to work 40 hours per week (which she was not), such compensation would still be the equivalent of at least $13.75/hr. ($2,200 ÷ 160 hrs.) and as much as $19.70/hr. ($3,150 ÷ 160 hrs.).

16. The Inn took into consideration such factors (*e.g.*, tasks assigned, time for completion, etc.) in setting the terms of work/compensation in the Agreement, and Balbed never expressed to Appellees that such consideration was lacking. JA 379-82, 486-90. Indeed, the Agreement speaks for itself as far as the relevant factors being considered (*i.e.*, the Agreement clearly sets forth Balbed's work schedule and/or the expected time frames for the completion of that work in exchange for receipt by Balbed of $800/month and free room and board, utilities, breakfast/food, laundry and phone). JA 611-616.

17. Other personnel who performed similar duties at the Inn as Balbed verified that it only takes approximately 5 hours/day to perform those duties and about 4 hours/day for cleaning and making breakfast, which were the primary, time-consuming duties. JA 216-22, 350, 830-31. On a per room basis, it does not take more than 30 minutes to clean a room. JA 528.

18. Nevertheless, after quitting and suing Appellees in January 2016, Balbed claimed that she worked approximately *100+ hours per week, every week, without a single day off*, for the entire six month period she worked at the Inn. JA 838-39.

19. Appellees were absolutely shocked to learn for the first time, upon the filing of the suit, that Balbed was claiming to have worked practically every waking minute she was present at the Inn, including during periods when there was only one guest staying at the Inn. JA 255-56, 332. Indeed, Etty Mukendi had told Balbed to pick up the phone and call her if Balbed ever felt overwhelmed with any tasks, however, Balbed never did so. JA 257. Balbed was given days off and was not expected to work every day. JA 274-76, 530-31, 535, 611.

20. Balbed admitted that it would have been impossible for Appellees to observe her during the entire day or to know/record the number of hours that she was "working." JA 109-110. Appellees Eden Park/Etty Mukendi likewise confirmed that it would be impossible to keep track of the live-in Innkeepers work hours and that the

Inn had to trust Balbed to work when she was supposed to work. JA 252-53, 280-83.

21. Balbed was reimbursed for all items she purchased for the Inn for which she requested reimbursement. JA 93-94.

22. Prior to being hired, Balbed–by her own admission–was told during the interview process that there would be "many times" when it would be slow and when the Inn would "literally be paying [her] to do nothing," during which time Balbed could engage in personal matters not related to work at the Inn. JA 39. Balbed was never told it was a 24/7 job. JA 509.

23. While Balbed worked at the Inn, the majority of the Inn's 9 rooms were unoccupied more often than not. JA 846.

24. Although Balbed claims that she discussed her work schedule with Appellees in the two months after signing the Agreement (JA 76-86) and asked for a raise once right after she first started working (JA 100-101), there is no evidence that any subsequent agreement/understanding to modify the terms of the Agreement was ever discussed or reached.

25. Balbed often engaged in personal/pet "projects" around the Inn, which were not part of her job duties under the Agreement and were not required/asked of her by the Inn. JA 296, 299, 369, 611-616. For example, Balbed testified during her deposition that she (i) put toiletries in a cabinet for sale to guests and made signs for

the same (JA 66); (ii) assembled a tea/coffee stand (JA 67); (iii) re-decorated and re-arranged furniture in the guest rooms (JA 69-72); (iv) performed yard work (JA 72); (v) placed flowers and decorative objects around the Inn (JA 73-74); (vi) made holiday decorations the "better part of hours every day for the better part of a week" (JA 75); and (vii) placed art books around the Inn (JA 75). Such tasks were not required of Balbed. JA 611-616. Balbed not only had sufficient personal time and but had "too much time on her hands" to engage in her own personal/pet projects, including moving random furniture around against the Inn's wishes and refusing to put it back. JA 365.

26. Similarly, Balbed could have just offered eggs/bacon/fruit for breakfast, however, Balbed took it upon herself to make breakfast from scratch, which was not required of her by the Agreement and/or the Inn. In fact, even when the Inn instructed Balbed to stop making bread since the guests had complained about it, Balbed still insisted on making bread. JA 286, 288-89.

27. Although not relevant to any dispositive issue, it is also worth noting that Balbed had time management and attention-to-detail performance issues. JA 540-44.

28. Although Balbed filed this lawsuit on January 19, 2016, Balbed worked at the Inn until approximately January 31, 2016, at which time she quit. JA 99-100, 205.

29. Due to the filing of the lawsuit, after January 19, 2016, the Inn required Balbed to begin keeping track of her time, which confirmed that Balbed was exaggerating her work hours/time and even in bed sleeping at the time she claimed to be working. JA 329-337, 348, 350.

30. Since quitting and filing this lawsuit, Balbed has not worked and has not even attempted to find work. JA 35-36.

SUMMARY OF ARGUMENT

In the typical employer-employee relationship, the employer and employee cannot enter into a contract/agreement which waives an employee's statutory rights and/or which lessens an employer's statutory burdens. However, by law, a different set of rules apply to an employee who is living on/at an employer's property. The reason why the normal rules do not apply to a live-in employee is simple and well illustrated by the case *sub judice*: it is impossible for an employer to keep track of the time actually devoted to productive work by the on-site employee. Thus, to avoid such disputes over the hours "worked" by a live-in employee and/or to prevent a live-in employee from inflating/manufacturing the number of hours they claim to have been "working," the law carves out a statutory exception and allows employers and

such live-in employees to reach a "reasonable agreement" regarding the compensation of the employee and the hours/work to be performed.

It is undisputed that Balbed and the Inn entered into such an agreement regarding the hours/work to be performed and the compensation to be paid for such work. Balbed was expected to work 29 hours per week (plus checking in guests as necessary), and in exchange Balbed would receive a $800/month cash stipend, plus free room and board (valued at $850 to $1,800 per month), and free utilities, phone, and laundry, and breakfast/food. Thus, a large portion of Balbed's agreed-upon compensation was in the form of *living rent/mortgage/expense free in the costly area of Takoma Park, Maryland.*

As demonstrated *infra*, (i) pursuant to 29 C.F.R. §785.23, an employer is not required to keep track/documentation of the number of hours supposedly "worked" by the live-in employee; (ii) pursuant to 29 C.F.R. §785.23, the employer is permitted to rely upon the work hours set forth in the agreement as being the number of hours the employee will in fact "work"; (iii) pursuant to 29 C.F.R. §785.23, an employee is not permitted to seek additional compensation by simply claiming to have worked more than the number of hours set forth in such agreement; and (iv) in addition to the $800/month stipend to be paid for the hours to be worked under the Agreement, the Agreement also factored into Balbed's compensation the benefit/value of living rent

free in Takoma Park, as well as living practically expense free (free utilities, laundry, breakfast/food, and phone), and when such benefits are factored in, Balbed received anywhere from $13.75/hour to $27/hour (however, no such findings regarding the number of hours "actually worked" or the rate of pay are necessary in light of the existence of the Agreement).

ARGUMENT

I. STANDARD OF REVIEW

The review of a grant of summary judgment is *de novo*. *Foster v. Univ. of Md. E. Shore,* 787 F.3d 243, 248 (4th Cir. 2015).

Federal Rule of Civil Procedure 56(a) provides that summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

"A party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleadings but rather must set forth specific facts showing that there is a genuine issue for trial." *Bouchat v. Balt. Ravens Football Club*, 346 F.3d 514, 522 (4th Cir. 2003).

II. BALBED'S CLAIMS ARE GOVERNED BY, AND BARRED BY, THE FEDERAL "LIVE-IN EMPLOYEE" EXCEPTION

As noted *supra*, Balbed worked as a live-in innkeeper at the Inn. As also noted *supra*, Balbed claims to have worked 112 hours per week (16 hours/day), seven days a week, for approximately 29 weeks straight without a single day off.

Foreseeing the possibility of a live-in employee asserting wage claims for practically every hour that they were present on the employer's premises, regulations were passed to specifically address (and prevent) this exact situation. As set forth in 29 C.F.R. §785.23:

> 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. ...Emphasis supplied.

This Court has previously had the opportunity to apply this regulation to live-in employees alleging wage-statute violations and claiming to have "worked" numerous hours without compensation.

In *Myers v. Baltimore County*, 50 Fed. Appx. 583 (4th Cir. 2002), employees who served as live-in caretakers for certain parks in Baltimore County alleged

wage/overtime violations under the FLSA and MWHL. Under Baltimore County's caretaker program, the employer (Baltimore County) offered free accommodation to the employees (plus water) and, in exchange, the employees agreed in writing to: (1) be continuously present in the park; (2) clean the comfort station and other park areas, as necessary; (3) tour the park in the morning and open the park gate to allow public access; (4) tour the park in the evening and close the public access; (5) maintain a Daily Caretaker log of any park maintenance required due to damage or vandalism. *Id.* at 585.

At the close of discovery, the District Court granted the employer's motion for summary judgment, concluding that the parties' agreement took into consideration the applicable facts and was "reasonable" as a matter of law, in accordance with 29 C.F.R. §785.23. On appeal, this Court affirmed the District Court's grant of summary judgment to the employer, making the following findings/holdings:

> (i) There is a presumption, under 29 C.F.R. §785.23, that when an employee resides on his employer's premises he is not working the entire time he is on the premises and that the employees "were not working every hour they were in the park" (*Id.* at 587-588);
>
> (ii) While it was clear that the employees performed compensable work, 29 C.F.R. §785.23 recognizes that "it would be difficult to determine the exact hours the [employees] worked" since "[u]nsupervised employees living on their employer's premises may divide their time between 'work' and personal pursuits and the work performed is often sporadic in nature" (*Id.* at 588);

(iii) "[I]t would have been administratively burdensome to record the time it took to complete every duty" (*Id.* at 589);

(iv) "An agreement is acceptable under 29 C.F.R. §785.23 if it falls ***within a broad range of reasonableness***, considering its terms and all of the facts and circumstances of the parties' relationship." (*Id.* at 589) (citation and internal quotations omitted) (emphasis supplied);

(v) There was no dispute of material fact as to whether the agreement was reasonable where the employees received ***rent-free accommodations*** (with an ***estimated rental value of $700/month per the employer's manual)*** in exchange for the work they performed (*Id.* at 589);

(vi) The District Court did not err by failing to make a finding as to the exact number of hours the employees' worked "because ***the purpose of 29 C.F.R. 785.23 is to address situations in which it is difficult, if not impossible, to determine the exact time worked" and, accordingly, a finding of the exact hours worked is not required to determine whether the agreement is reasonable*** (*Id.* at 589) (emphasis supplied);

(vii) "In light of the nature and unpredictability of the [employees'] duties, the District Court was correct to conclude that ***rent-free accommodation in exchange for serving as a [live-in employee] was a reasonable agreement as a matter of law***." *Id.* at 591 (emphasis supplied).

See also Garofolo v. Donald B. Heslep Assocs., 405 F.3d 194 (4th Cir. 2005) (affirming district court's grant of summary judgment to employer, based upon 29 C.F.R. §785.23, where employees acted as resident managers for storage facility and lived full time in an apartment above the business office and entered into an employment agreement with the employer setting forth the expected hours of

employment (40 hours), job duties, and compensation of $900/month, health/dental benefits and an apartment ***valued at*** $750/month–and rejecting employees' contention that they worked more than 40 hours per week since "it is not enough for the plaintiffs to show that they worked more than agreed" and they "must show that the agreement provided an unreasonably short amount of time to perform the assigned tasks," and holding that *the employer "was entitled to rely upon the [employees] to follow the clear terms of their employment agreement*" and that the district court was not required to make a finding regarding the actual number of hours worked by the employees since "[i]mposing such a requirement would defeat the purpose of section 785.23" since that regulation "contemplates situations in which it would be difficult, if not impossible, to determine the exact amount of time worked") (emphasis supplied).

Similarly, in *Brock v. City of Cincinnati*, 236 F.3d 793 (6th Cir. 2001), police-officer employees brought wage-statute claims against their employer for failing to adequately pay them for certain tasks related to care of police dogs. The police officers had entered into a written agreement regarding the compensation they were to receive for such work, however, the district court ruled that their agreement was not reasonable and entered judgment in favor of the police officers. *Id.* at 795. On

appeal, the Sixth Circuit held as a matter of law that the agreement was reasonable under §785.23:

> As the Supreme Court noted in *Muscoda*[5], if precisely accurate computation of the amount of time expended in 'work' is difficult or impossible, reasonable provisions of a contract or custom may govern the computation of work hours. Because of the difficulty in determining the exact hours worked in circumstances where unsupervised employees can divide their time between 'work' and personal pursuits, any reasonable agreement of the parties which takes into account all of the pertinent facts will be accepted. 29 C.F.R. §785.23. Similarly, when 'work' might itself be a personal pursuit, resolving whether particular efforts were expended necessarily and primarily for the benefit of the employer proves so unrealistic that *courts should not only accept and enforce reasonable agreements, but should encourage them. Id.* at 805 (emphasis supplied).
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> Our review of the facts and circumstances revealed in the record leaves us convinced that the parties reached a reasonable agreement. Nothing disclosed in the record indicates that [the employer] must have known that [the amount of] compensatory time far under-approximated the actual amount of FLSA 'work' performed by the [employees]. ... The [employer's] package was comprehensive; that it included a relatively small amount of paid time does not, by itself, render the agreement unreasonable. *Id.* at 807 (emphasis supplied).
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> [The employees] have failed to introduce evidence to satisfy their burden of showing that the agreement provided an unreasonably short amount of time to perform the assigned tasks that constitute FLSA work **and** an unreasonably small amount of non-monetary benefits to compensate them for any time deficiency. *Id.* (bolding in original text).

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[5] *Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944).

See also Barraza v. Pardo, 2015 U.S. Dist. LEXIS 94006 at *12-16 (S.D. Fla. July 20, 2015) (holding that plaintiff's wage/overtime claims were barred by §785.23, where the plaintiff worked as a live-in housekeeper for the defendants, the parties had entered into an agreement setting forth an eight-hour per day work schedule and compensation of $1,440/month plus living expenses, the plaintiff alleged that she worked an average of 73 hours per week and, thus, was only paid $4.10 per hour, and stating that–just as in the *Garofolo* case–an agreement reached pursuant to section 785.23 is binding if it is reasonable in light of all of the pertinent facts of the employment relationship "irrespective of the number of hours plaintiff claims to have worked," and noting that employers were entitled to rely on plaintiff to follow the clear terms of the agreement); *Krause v. Manalapan Twp.*, 486 Fed. Appx. 310, 314 (3rd Cir. 2012) (affirming district court's grant of summary judgment to employer based upon §785.23, rejecting the employees' contention that the employer's "knowledge of whether they were working more than four hours per week is a genuine issue of material fact" since "an agreement was made between the parties and the regulations recognize that determining actual time worked can be difficult and is not a necessity" and "*a reasonable agreement need not match the actual number of hours worked*") (emphasis supplied); *Rudolph v. Metro. Airports Comm'n.*, 103 F.3d 677, 684 (8th Cir. 1996) (reversing jury award in favor of employees and entering

judgment in favor of employer since a reasonable agreement had been reached concerning employees' at-home work schedule in accordance with §785.23 and holding that it is "not enough for plaintiffs to show that they worked more than agreed" but that they "must show that the agreement provided an unreasonably short amount of time to perform the assigned tasks" and finding that there is "no evidence that a reasonable employer would necessarily have known that [the amount of time set forth in the agreement] was too short a time to perform the tasks [the employer] told the [employees] to perform").

In the case *sub judice*, Balbed worked as a live-in innkeeper and, as admitted by Balbed, it would have likewise been impossible for Eden Park to track and confirm every minute/hour of the day that Balbed was performing actual work for Eden Park versus the time when Balbed was engaged in non-work-related activity (*e.g.*, sleeping, engaged in personal projects, resting, taking cigarette breaks, talking with her daughter, making personal phone calls, etc.).

Furthermore, without receiving any instructions from Eden Park, Balbed engaged in numerous personal/pet "projects" while she lived and worked at the Inn (presumably during the considerably "down time" she had when the Inn was practically vacant), and such projects were not required (or even requested) of Balbed under the Agreement and/or by the Inn.

Thus, the Employment Agreement entered into by Eden Park and Balbed is the exact type of reasonable agreement that §785.23 permits, contemplates, condones, encourages, and even requires (*supra*, "will be accepted") be enforced.

Defendant Etty Mukendi has run the Inn for approximately 14 years and has personal knowledge regarding the value of rooms for rent in Takoma Park. Based upon her extensive experience, the monthly value of such room and board is/was at least $1,400 ($850 for room itself and $550 for remainder of free benefits) and as much as $2,350 ($1,800 for room itself and $550 for remainder of free benefits). And such figures do not include the $800/month stipend payment, which would equate to compensation of at least $2,200/month and as much as $3,150/month, well above minimum wage even assuming (*arguendo*) that Balbed had worked 40 hours per week in contravention of the Agreement's 29 hours per week.

As a property owner and/or owner/operator of the Inn with extensive business experience regarding the market value of rentable rooms in Takoma Park and/or at the Inn, Ms. Mukendi is recognized under Maryland law as qualified to offer an opinion regarding the value of such room and board at the Inn/Property. *See e.g., Lakewood Engineering & Mfg. Co. v. Quinn*, 91 Md. App. 375, 389 (1992) (taking note "of the long-standing rule than an owner of property can testify as to its value"); *Smith v. Potomac Electric Power Co.*, 236 Md. 51, 60-61 (1964) (noting that

Maryland has "recognized as to both real and personal property the rule that an owner of property is at least presumptively qualified to testify to its value").

Balbed presented absolutely no evidence in the District Court regarding the value of her room and board and/or to raise a dispute of material fact regarding the same.

Furthermore, unlike the employees in *Myers*, not only did Balbed (and her daughter) get to live at the Inn rent free, but she also received a $800/month stipend and *lived practically expense free* (*e.g.*, free utilities/phone, free use of laundry for which guests paid $7 per use, and free breakfast/food for which guests also paid $7).

Also, the majority of Eden Park's 9 rooms were more often vacant than occupied while Balbed worked at the Inn. Accordingly, no sane business/inn owner would expect to pay an employee overtime (let alone 30+ hours of overtime every week) when the majority of the rooms were vacant the majority of the time, and Balbed's claim to have worked 112 hours per week (even when only 1 of the 9 rooms was occupied) is patently unreasonable. *See e.g., Kelly v. Hines-Rinaldi Funeral Home, Inc.*, 847 F.2d 147, 148 (4th Cir. 1988) ("[I]t is not realistic to assume that [the employer] would employ someone for 69 hours per week, thereby incurring large overtime expense, to perform the tasks assigned to [the employee]").

This is the exact situation that §785.23 is intended to protect employers from: a live-in employee making outrageous claims to have worked practically every hour of the day and seeking to hold an employer–and an employer of modest means at that–liable for six figures in allegedly unpaid wages/overtime, liquidated damages, and attorneys' fees/costs.

A. 29 C.F.R. §785.23 IS A *SUI GENERIS* REGULATION AND THE RECORD-KEEPING REQUIREMENTS OF 29 U.S.C. 203(m) ARE ENTIRELY INAPPLICABLE TO §785.23

Balbed argues that Appellees cannot claim the protections of 29 C.F.R. §785.23 unless they complied with the record-keeping requirements of 29 C.F.R. §516.27, which is a regulation implementing 29 U.S.C. 203(m) (sometimes referred to as "Section 3(m)"). Balbed's Pl's. Brief at pp. 19-22.

However, on its face, 29 C.F.R. §516.27 applies to "Board, lodging, or other facilities" ***under section 3(m) of the Act,***" and "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).***" *See* 29 C.F.R. §516.27(a) (emphasis supplied). Similarly, the Department of Labor Bulletin relied upon by Balbed in the District Court specifies that such requirements only apply to board/lodging credits sought ***under Section 3(m) of the FLSA.*** JA 847-48.

Indeed, the primary case relied upon by Balbed involved an employer seeking a "wage deduction" under Section 203(m) for the actual cost of lodging and, tellingly, did not involve the application of 29 C.F.R. §785.23. Balbed's Brief at pp. 20-21 (*citing Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468 (11th Cir. 1982), where employees were paid as little as $0.17/hour for their work and the employer claimed that it did not intend to create an employment relationship with the employees).[6]

Appellees are not seeking to include the "cost" of board/lodging within the definition of "wages" paid to Balbed and are not claiming any relief under Section 3(m) of the Act. As illustrated by *Myers* and the other cases cited to above, an employer invoking §785.23 is not seeking a credit toward "wages" for the "reasonable cost" of board/lodgings under Section 3(m) but, rather, is seeking to establish the estimated value of the non-compensatory benefits (including room/board) as one of the various factors contributing to a finding of a "reasonable agreement" under §785.23.

Tellingly, in none of the §785.23 cases cited above are the requirements of 29 C.F.R. §516.27 even mentioned, let alone discussed or analyzed.

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[6] Similarly, none of the other cases relied upon by Balbed involved the existence of a written employment agreement and an employer invoking §785.23. Balbed Brief at p. 21 (citing *Epps v. Way of Hope, Inc.*, 2010 WL 2025573 (D. Md. May 18, 2010), and *Marroquin v. Canales*, 505 F. Supp. 2d 283 (D. Md. 2007)).

Indeed, in *Myers*, the $700/month estimated ***"rental value"*** (not "***cost***") for room and board was derived solely from the employer's ***Caretaker's Manual***. *Id.* at 589. Likewise, in *Garofolo*, the room and board was valued at $750/month with no basis/foundation given for such valuation. *Garofolo*, 405 F.3d at 197.

§29 C.F.R. §785.23 is an independent, all-encompassing, *sui generis* regulation. Per the cases cited above, §785.23 does not contain any record-keeping requirements in order for an employer to invoke its application and the existence of a "reasonable agreement" puts an absolute end to any inquiry as to whether an employer has satisfied its payment obligations to an employee. *See supra* pp. 16-22.

B. THE VALUE OF ROOM AND BOARD IS UNDISPUTABLY A FACTOR THAT A COURT MUST CONSIDER WHEN DETERMINING THE EXISTENCE OF A "REASONABLE AGREEMENT" UNDER §785.23

Balbed makes the novel argument that §785.23 is "inapplicable" and that the District Court was prohibited from taking into consideration the free room and board received by Balbed when determining whether a "reasonable agreement" exists. Balbed's Brief at p. 23.

Tellingly, Balbed's position is contradicted by §785.23 and every published decision applying §785.23 cited above. §785.23 provides that "any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted." Obviously, "all of the pertinent facts" includes the value of free room

and board received by a live-in employee, as made universally clear by the cases applying §785.23. *See supra* pp. 16-22, *citing, inter alia, Myers v. Baltimore County*, 50 Fed. Appx. 583, 589-591 ("In light of the nature and unpredictability of the [employees'] duties, the District Court was correct to conclude that ***rent-free accommodation in exchange for serving as a [live-in employee] was a reasonable agreement as a matter of law***" and "there are no genuine issues of material fact regarding whether [the live-in employees'] agreement was reasonable" since in exchange for their work they "received ***rent-free accommodation*** [with a rental value of $700/month] in or near a county park ***and free water***, which is a substantial benefit"), *Garofolo v. Donald B. Heslep Assocs.*, 405 F.3d 194 (4th Cir. 2005) (affirming district court's grant of summary judgment to employer based upon a finding of a reasonable agreement under 29 C.F.R. §785.23, which analysis factored in an apartment ***valued at*** $750/month).

It is also worth noting that, per §785.2, the applicable regulations provide a "practical guide for employers and employees as to how the office representing the public interest in its enforcement will seek to apply it," however, "[t]he ultimate decisions on interpretations of the act are made by the courts." Emphasis supplied.

C. BALBED REPEATEDLY REPRESENTED TO THE DISTRICT COURT THAT THE AGREEMENT PROVIDES FOR A 29-HOUR WORK WEEK AND, THUS, IS PREVENTED FROM NOW ATTEMPTING TO FALSELY INFLATE THE NUMBER OF HOURS OF WORK REQUIRED UNDER THE AGREEMENT

Balbed repeatedly represented to the District Court that the Agreement required her to work 29 hours per week. *See* Balbed's Mot. for Partial Summary Judgment [ECF 27] at p. 15, 19, 20; *See also* Balbed's Reply Brief [ECF 30] at p. 2 n.1 (setting forth work schedule in Agreement and stating that "[t]his totals **29 hours** of scheduled work each week"); Transcript of Summ. J. Mot. Hearing at JA 878, 880 (Balbed's counsel[7] confirming that Agreement provides for "29 hours" of work). [8]

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[7] That such representations were made by Balbed's counsel and not Balbed herself is of no effect. *See e.g., Rouse v. Lee*, 339 F.3d 238, 249-50 (4th Cir. 2003) ("Under our system of representative litigation, each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.") (citations omitted); *Janusz v. Gilliam*, 404 Md. 524, 539 (2008) ("In Maryland, there is a *prima facie* presumption that an attorney has authority to bind his client by his actions relating to the conduct of litigation.").

[8] As noted therein, Appellees' counsel originally added the hours incorrectly and came up two hours short, for a total of 27 hours, which was the result of Appellees' counsel only including 4 hours for "Guest Room and common area cleaning" for Saturday (which is the amount of time devoted to that task for Tuesday through Friday), however, Saturday provides for 6 hours of time for such task (10 a.m. - 4 p.m.). JA 611. Appellees' counsel conceded the 29 hour total as proffered by Balbed's counsel (JA 860), upon re-reviewing the Agreement agreed that 29 hours is the correct total (JA 902), and that the Agreement clearly sets forth the hours of work required (JA 904). During the hearing, the District Court and counsel utilized the 29 hour total. JA 863, 878, 880, 902, 910, 918, 920.

Balbed's counsel conceded that the Agreement only required Balbed to "be available" to check in guests and then close at 10:00 p.m. *See* Balbed's Mot. for Partial Summary Judgment [ECF 27] at p. 15. The undisputed testimony is that it only takes about 5 minutes to check guests into the Inn (*see supra* at p. 8), which qualifies as *de minimis*, non-compensable time. *See Myers*, 50 Fed. Appx. at 588 n.6 ("Most courts, including the Fourth Circuit, treat daily periods of approximately 10 minutes as *de minimis*" and, therefore, non-compensable).

Furthermore, the undisputed testimony was that the majority of the rooms at the Inn were vacant more often than they were occupied (*See supra* at p. 11), and that cooking and cleaning were the primary, time-consuming duties of the Innkeeper–which were included within the 29-hour work schedule (*See supra* pp. 8-9).

Accordingly, when issuing its ruling, the District Court read the Agreement's work schedule and noted that "the parties don't dispute that at least nominally the contract appears to require 29 hours of service." JA 909.

In addition, as correctly noted by the District Court, even if several more hours were allotted under the Agreement in addition to the 29 hours of work, Balbed was still paid far in excess of the highest minimum wage rate of $9.55/hr. under the Montgomery County wage statute. JA 910-11, 918, 920-21.

By way of example, using the undisputed monthly compensation paid of at least $2,200 ($800 stipend, $850/month for room, $210 for breakfast/food at $7/day, and $340 for utilities, laundry, and phone), the Agreement could have provided for approximately 50 hours per week of work and Balbed still would have been compensated in excess of the Montgomery County minimum wage rate (50 hours/week X 4.34 weeks/per month = 217 hours/month; $2,200/month divided by 210 hours/month = $10.14/hour). Similarly, even using just the minimum value of room and board ($850) plus the $800 stipend equates to $1,650, which at $9.55/hour would equate to minimum wage pay for approximately 40 hours/week of work ($1,650/month ÷ $9.55/hour = 172.77 hours/month ÷ 4.34 weeks/month = 39.81 hours/week).

In order to avoid such inevitable conclusions, Balbed changes her position on appeal and now fantastically proclaims that the Agreement required her to work 71 hours per week. Balbed's Brief at p. 25. Obviously, Balbed is now attempting to distort the terms of the Agreement, terms which all the parties and the District Court agreed were not in dispute, as outlined above. Such a "fast and loose" approach to the representation of facts before this Court should not be countenanced. *See e.g., Buckley v. Airshield Corp.*, 116 F. Supp. 2d 658, 671 (D. Md. 2000) ("Acting on the assumption that there is only one truth about a given set of circumstances, the courts

apply judicial estoppel to prevent a party from benefitting itself by maintaining mutually inconsistent positions regarding a particular situation.").

Furthermore, Balbed never made such argument before the District Court that the Agreement required 71 hours of work and, thus, has waived such argument. *See Haney v. USAA Cas. Ins. Co.*, 331 Fed. Appx. 223, 230 (4th Cir. 2009) ("Failure to raise an argument before the district court typically results in the waiver of that argument on appeal.").

Moreover, the notion that the Inn (a small, 9-room, unprofitable business) would employ Balbed for 30+ hours/week of overtime is patently unreasonable. *See e.g., Kelly v. Hines-Rinaldi Funeral Home, Inc.*, 847 F.2d 147, 148 (4th Cir. 1988) ("[I]t is not realistic to assume that [the employer] would employ someone for 69 hours per week, thereby incurring large overtime expense, to perform the tasks assigned to [the employee]"); *See also* JA 920 (District Court noting that it is "patently unreasonable" for Balbed to "suddenly" claim to be working "sixty or a hundred" hours against such a "small operation as this").

Lastly, per the cases cited *supra*, there is no requirement in §785.23 that a "reasonable agreement" must set forth an exact number of hours/minutes to be worked. Nevertheless, as the District Court proceedings demonstrate, Balbed clearly

understood that the Agreement required 29 hours of work per week (plus *de minimis* time checking in guests).

D. 29 C.F.R. §785.46 CONTAINS THE "GENERAL" REQUIREMENTS FOR FLSA RECORD KEEPING AND, THUS, IS NOT APPLICABLE TO THE SUI GENERIS "LIVE-IN" EMPLOYEE REGULATION SET FORTH IN §785.23

Balbed argues that §785.46 ("Statements of ***General Policy*** or Interpretation Not Directly Related to Regulations") requires an employer to comply with FLSA record-keeping requirements in order to claim the protections of the "live-in" employee regulation (§785.23). Balbed Brief at pp. 25-26 (emphasis supplied). §785.46 provides, in relevant part, "Section 11(c) of the Act authorizes the Secretary to promulgate regulations requiring the keeping of records of hours worked, wages paid and other conditions of employment." Balbed's argument appears to be that, since both §785.46 and §785.23 are contained within the same §785, §785.46 must apply to §785.23. Balbed's argument is fallacious.

First, §785.46 sets forth the "**general policy**" applicable to most FLSA claims (which requires employers to maintain such records), however, such regulation logically cannot apply to the *sui generis*, "live-in" employee exemption of §785.23.

Indeed, §785 as a whole is titled "Hours Worked" and addresses ***all*** FLSA rules and regulations related to "***Hours Worked***," under all employee/employer circumstances. *See* Addendum, attached hereto. Thus, §785.46 (as its title suggests)

contains the "***general policy***" ("not directly related to regulations") regarding an employer's record-keeping duties under the FLSA (as found in §516).

Second, as explained *supra*, the very purpose of §785.23 is to address the "unique" situation where an employee lives on the employer's premises full time (which makes it difficult or impossible to accurately keep track of the hours worked by that employee) and, thus, §785.23 addresses that reality by allowing the employer and employee to enter into a "reasonable agreement" that controls the employee's work hours and compensation. *See supra* pp. 16-22.

Third, every single regulation found in §785 does not–and logically cannot–apply to §785.23; if they did, §785.23 would be rendered meaningless. For example, §785.11 ("General") provides, "Work not requested but suffered or permitted is work time." And Subpart B (§785.5 to §785.9) sets forth the "Principles for Determination of Hours Worked." Thus, if §785.11 and/or Subpart B applied to the "live-in" employee exemption (§785.23), then §785.23 could not permit an employer and employee to enter in a "reasonable agreement" which controls work hours and compensation. Likewise, §785.8 ("Effect of custom, contract, or agreement") specifically provides, "The principles [for determination of hours worked] are applicable, even though there may be a custom, *contract, or agreement* not to pay for the time so spent ...") (emphasis supplied). Thus, if Balbed's argument were correct,

then §785.8 would nullify §785.23, since §785.8 prohibits an employer from entering into a contract or agreement which controls the hours "worked" by the employee.

The two, non-authoritative cases relied upon by Balbed do not support her argument. Balbed Brief at p. 26 (*citing Maldonado v. Alta Heathcare Group*, 17 F. Supp. 3d 1181 (M.D. Fla. 2014), and *Herman v. Paol Group Foster Home*, 976 F. Supp. 696 (W.D. Mich. 1999)).

First, in *Maldonado*, the employer argued that the value of the live-in employee's room and board should be "deducted" from the employee's wages as a reasonable/actual "cost" under Section 203(m). *Id.* at 1191. Thus, the employer failed to realize what this Court determined in *Myers* and *Garafolo*: that, under §785.23, the "value" or room and board is one of the "pertinent facts" when assessing whether the agreement as a whole is "reasonable," and such value is not being sought as a "deduction" to the employee's wages under Section 203(m). Moreover, the employer in that case operated a nursing home, and specific regulations applicable only to nursing homes required employees to be paid for any interruptions in sleep time, which the employer admitted to violating and which entirely distinguishes that case from the case *sub judice*. *Id.* at 1191.

Similarly, in *Herman*, §785.23 was never even mentioned or invoked. Instead, that case involved an employer who failed to pay employees during "sleep periods"

under 29 C.F.R. 785.21 and 29 C.F.R. 785.22, even though those employees were required to work during such "sleep periods" and, thus, the employer failed to compensate the employees for all "hours worked" under §785.11. *Id.* at 702-703. As noted by the *Herman* court, "In the instant case, it is undisputed that the employees of [employer] worked overnight shifts which were not considered compensable time. Thus, the question is simply whether plaintiff has met its burden to show that the employees "worked" during that period." *Id.* at 703.

For all the foregoing reasons, the "general policies" regarding FLSA record keeping are not applicable to §785.23, which is specifically intended to address the "live-in" employee situation where it is difficult if not impossible to maintain such records.

E. ANY ALLEGED VIOLATION OF MONTGOMERY COUNTY HOUSING REGULATIONS IS IRRELEVANT TO WHETHER BALBED RECEIVED A VALUE OR BENEFIT UNDER §785.23 IN THE FORM OF FREE ROOM AND BOARD

Balbed argues that the value of the free room and board that she received for approximately six months should not have been factored into the Agreement on the purported ground that such room and board was "furnished in violation of federal and local law." Balbed Brief at p. 27 (*citing* Section 203(m), 29 C.F.R. §531.31, and Section 203(m) Field Bulletin)).

§531.31 provides, in relevant part, that the "reasonable cost of board, lodging, or other facilities may be considered a part of the wage paid an employee only where 'customarily' furnished to the employee. ... Facilities furnished in violation of any Federal, State, or local law, ordinance or prohibition will not be considered facilities 'customarily' furnished."

Balbed's entire argument is premised upon Section 203(m)'s (as effectuated through 29 C.F.R. §531.31) applicability to §785.23. Tellingly, the two cases relied upon by Balbed do not involve or address §785.23 but, rather, involve employers seeking a "deduction" from the employees "paid wages" under Section 203(m) and/or §531.31. *See* Balbed Brief at p. 27 n. 7 (*citing Osias v. Marc*, 700 F. Supp. 842 (D. Md. 1988) (denying employer's attempt to include the cost of furnishing lodging to migrant workers under Section 203(m) and/or §531.31), and *Soler v. G & U, Inc.*, 768 F. Supp. 452 (S.D.N.Y. 1991) (denying employer's attempt to deduct cost of lodging from wages paid to migrant workers under Section 203(m) and/or §531.31)).[9]

For all the reasons already set forth above in Section I(A), Balbed's argument is incorrect as a matter of law: (i) 29 C.F.R. §531.31 only applies to lodging/boarding

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[9] Balbed also cites to *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 474 (11th Cir. 1982), for the proposition that it is the employer's burden to establish permissible lodging "credits," however, that case also did not involve §785.23 but, rather, an employer seeking "reasonable cost" deductions to wages under 29 U.S.C.A. 203(m).

"costs" sought as part of the "paid wages" under 29 U.S.C. 203(m); (ii) Appellees are not seeking to include the "cost" of board/lodging within the definition of "wages" paid to Balbed and are not claiming any relief under Section 203(m); (iii) the Department of Labor Bulletin relied upon by Balbed specifies that it only applies to board/lodging credits sought ***under Section 3(m) of the FLSA*** (JA 847-48); and (iv) as illustrated by the *Myers* case and others cited to above, an employer invoking §785.23 is seeking the estimated value of the room/board as one of the various factors constituting a "reasonable agreement" under §785.23.

Indeed, Courts which have addressed the issue have held that, in order for room and board to be taken into consideration under §785.23, an employer need only provide "adequate sleeping facilities." *See e.g., Beaston v. Scotland School for Veterans' Children,* 693 F. Supp. 234, 238 (M.D. Pa. 1988) (holding that "upon consideration of all of the evidence, the court is unable to conclude that the [employees] are furnished inadequate sleeping facilities or that they are unable to get normal rest," where employees had their owns bedroom and access to bathroom, kitchen and other living facilities); *Hendricks v. Okla. Prod. Ctr. Group Homes, Inc.*, 159 Fed. Appx. 875 (10th Cir. 2005) (affirming district court's grant of summary judgment to employer since employer and employee entered into a reasonable agreement and employees' sleeping facilities were "adequate" pursuant under

§785.23 and/or §785.22); *Bouchard v. Regional Governing Bd. of Region V Mental Retardation Services*, 939 F.2d 1323, 1331 (8th Cir. 1991) (holding that employment agreement between employer and employees was reasonable agreement under §785.23, that the sleeping facilities were "adequate" as long as the employer furnished employee with "a separate sleeping room" which allowed employee to sleep through the night, and that "[a]ny other decision would violate Congress' stated purpose not to award employees' windfall payments ... of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay."); *Trocheck v. Pellin Emergency Med. Serv., Inc.*, 61 F. Supp. 2d 685, 695-95 (N.D. Ohio 1999) (holding that "the most telling indicator of whether the sleeping facilities were adequate is whether [the employee] ever indicated in any way that they were not"); *See also Citaramanis v. Hallowell*, 328 Md. 142, 160, 164 (Md. 1992) (holding in context of landlord-tenant relationship that the "absence of a rental housing license in and of itself does not establish the right to recover rent paid" and noting that such a result "would bestow an unjust enrichment upon the complaining party") (citations omitted).

As noted by the District Court, Balbed received the benefit of living practically expense free and, thus, should be estopped from now attempting to invalidate that benefit and unjustly enriching herself. JA 888.

Moreover, if Balbed contends (which she does) that Appellees violated the FLSA on the purported ground that the lodging she received was in violation of local laws (and, thus, that the value of such lodging could not be considered by the District Court), then it was her burden to demonstrate such violation with admissible evidence at the summary judgment stage. *See e.g., Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946) (holding that an employee who brings suit for unpaid minimum wages or unpaid overtime compensation has the burden of proving she was not properly compensated); *Windham v. American Brands, Inc.*, 539 F.2d 1016, 1021 (4th Cir. 1976) (holding that "the burden of proof is upon the plaintiffs to establish defendants' alleged violations of law").

Thus, since Balbed contends that such lodging was a "cellar" space which required written permission from the County for use and not a "basement" space (which does not), it was Balbed's burden to establish that fact, which she failed to do through any proffered evidence. In fact, as Balbed herself notes, "Mr. Mukendi testified that he believed the space met the requirements for basement dwellings, which are different from cellars." Balbed Brief at p. 28. Thus, Balbed failed to carry her burden of establishing any alleged violation of the County Code.

Lastly, such highly-technical, alleged housing violations (*e.g.*, failure to obtain written permission) should not be allowed to form the basis of a windfall to an

employee without a showing by the employee that the facilities were, as a matter of fact, so substandard so as to be of little or no value to the employee. *See e.g., Osias v. Marc*, 700 F.Supp. at 845 ("Because the Department of Labor's investigative report found the housing to be ***seriously substandard***, the employer may not credit the cost of furnishing the facilities against minimum wage obligations.") (emphasis supplied).

For all the reasons stated above, the Inn and/or Ms. Mukendi provided "adequate sleeping facilities" to Balbed so as to permit the District Court to consider the value of such facilities as part of its "reasonable agreement" analysis under §785.23.

F. BALBED FAILED TO OFFER ANY EVIDENCE WHATSOEVER TO REFUTE THE ADMISSIBLE VALUATION EVIDENCE PRESENTED BY APPELLEES

Although she never complained about the value or conditions of such free room and board while she was receiving them, Balbed now attempts to attack the value of the room and board she received on several grounds, none of which are meritorious.

First, Balbed again attempts to mix the standards of Section 203(m) with the *sui generis* regulation found at §785.23, arguing that Appellees could only deduct the "actual cost" of her lodging from her wages. Balbed's Brief at pp. 29-32. As already established *supra*, such argument is fallacious as a matter of law.

Second, Balbed now appears to challenge the value of the other amenities provided to her (*e.g.*, utilities, laundry, breakfast, and phone) (the "Amenities"). Balbed Brief at pp. 32-34. However, such argument is unavailing for several reasons:

(1) Even if all the Amenities are excluded *in toto*, the undisputed evidence is that Balbed was compensated above even the highest minimum wage required under County law. *See supra* at pp. 23, 32 (establishing that, at a minimum, the room Balbed received was worth $850/month–and as much as $1800/month–which when coupled with her $800/month stipend equals at least $1,650/month); JA 865-66 (Balbed's counsel conceding that the highest minimum wage Balbed could be entitled to is $1,107.80/month).[10]

(2) Moreover, Balbed never presented any evidence to the District Court relating to, and/or challenging, the evidence presented by Appellees concerning the value of the room/board and/or Amenities and, thus, Balbed has waived any such arguments on appeal. *See supra* p. 31, *citing Haney*, 331 Fed. Appx. at 230.

(3) Furthermore, Ms. Mukendi, a knowledgeable owner of the property, was certainly qualified to testify as to the value of the Amenities in her experienced opinion–evidence which was never disputed by Balbed. *See supra* at p. 23;

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[10] Even using the new $1,190/month figure of Balbed's new appellate counsel (*See* Balbed Brief at p. 13 n.5), the $1,650/month in compensation received by Balbed still exceeds that amount.

(4) In addition, Ms. Mukedi's valuation for breakfast was based upon the $7/day charged to guests and, thus, was supported by admissible/credible evidence.

It is also worth noting that Balbed's daughter also received free room and board and Amenities. JA 188-190, 209-10.

Nevertheless, as noted above, even if the Amenities were excluded *in toto*, the value received by Balbed still exceeds the highest possible minimum wage and, thus, the Agreement was reasonable as found by the District Court.

G. THE AGREEMENT WAS "REASONABLE" BY ANY AND ALL MEASURES

Balbed argues that the Agreement was not "reasonable" for three reasons, none of which hold up to scrutiny.

First, Balbed reiterates her argument that the Agreement was not "reasonable" because it purportedly required her to work 71 hours and not 29 hours as she previously represented to the District Court. Balbed Brief at p. 35. For the reasons already stated, Balbed's attempt to falsely inflate the number of work hours required under the Agreement is impermissible. *See supra* at pp. 29-32.

Second, Balbed argues that the Agreement is not reasonable "because it resulted in Ms. Balbed being paid less than minimum wage." Balbed's Brief at p. 36. However, Balbed's entire argument on that point is premised upon (i) the Agreement requiring her to work at least 71 hours and/or (ii) the free room and board received

by Balbed not being factored into the reasonableness analysis. As already explained in detail *supra*, those are not the governing facts or law of this matter.

Third, Balbed argues that the Agreement did not "take into consideration all of the pertinent facts" at the time it was created since it purportedly provides "an unreasonably short amount of time to perform the assigned tasks" and "29 hours was not enough time for Ms. Balbed to complete the tasks that she was required to perform for the Inn." Balbed Brief at pp. 37-38. Balbed's argument fails for several reasons:

(1) On its face, the Agreement specifies the number of hours required and the compensation to be received for such work and took into consideration "all the pertinent facts";

(2) The Inn/Ms. Mukendi were aware that the main tasks of cooking and cleaning took less than 29 hours per week and presented such evidence to the District Court (*See supra* pp. 8-9);

(3) Balbed never presented evidence to the District Court that 29 hours was "not enough time" and/or was an unreasonably short amount of time for her to complete her tasks and, thus, Balbed has waived such argument;

(4) Under existing precedent, it was Balbed's burden to prove with admissible evidence that the Agreement provided an unreasonable amount of time

and compensation to perform the assigned tasks, which she never proffered to the District Court. *See e.g., Garafolo*, 405 F.3d at 200-201 (holding that employees "must show that the agreement provided an unreasonably short amount of time to perform the assigned tasks " and "it is not enough for [employees] to show that they worked more than agreed," rejecting employee's argument that the agreement was unreasonable on ground that she worked more than 40 hours per week, and rejecting employees' time estimates/charts as insufficient evidence demonstrating that "they were working the entire time they were present at the [business" as their claim suggested); *Brock*, 236 F.3d at 807 ("[The employees] have failed to introduce evidence to satisfy their burden of showing that the agreement provided an unreasonably short amount of time to perform the assigned tasks that constitute FLSA work **and** an unreasonably small amount of non-monetary benefits to compensate them for any time deficiency.") (bolding in original text).

Indeed, the evidence presented to the District Court demonstrated that the majority of the Inn's rooms were vacant more often then they were occupied, that Balbed had too much free time on her hands to spend all day making decorations and moving furniture around against the Inn's wishes, and that Balbed spent most of her time engaged in her personal pet projects which were not required of her by the Agreement or the Inn. *See supra* at pp. 11-12.

The remainder of Balbed's argument is spent setting forth the "guiding principles" to be applied by the trier of fact to resolve the "genuine disputes over the amount of time Ms. Balbed spent working." Balbed's Brief at pp. 40-42. However, since the District Court correctly determined that the Agreement in question is reasonable, such Agreement is "binding" under the *sui generis* regulation of §785.23, there is no genuine dispute of fact to be resolved by a trier of fact and, thus, no further response to such "guiding principles" is required.

Nevertheless, Appellees would also point out that Balbed's "engaged to wait" versus "waiting to be engaged" argument is a red herring: §785.23 is a *sui generis* regulation for "live-in" employee who are permanently residing on their employer's premises and the very purpose of §785.23 is to eliminate such disputes over whether the employee was working, waiting to work, and/or engaged in personal pursuits.

Similarly, Balbed's argument that Appellees "are required to pay for the time Ms. Balbed actually spent working, not just the time defendants subjectively believe the tasks should have taken" is contravened by this Court's precedent applying/analyzing §785.23 (*supra*), which establishes the exact opposite: the agreement controls the number hours "worked" by the employee, and the employer is entitled to assume that the employee is only working the hours required under the agreement.

Indeed, Balbed relies upon *Holzapfel v. Town of Newburgh*, 145 F.3d 516 (2nd Cir. 1998). However, the *Holzapfel* case did not involve §785.23 but, rather, work performed "off site" under 29 C.F.R. §785.12 and whether an employer must have actual or constructive knowledge of such work in order to be required to pay an employee for such work, which is is irrelevant to the case *sub judice*. *Id.* at 522-24. In fact, the *Holzapfel* court specifically stated that §785.23 "has no application to this case." *Id.* at 526.

III. BALBED'S STATE/COUNTY CLAIMS ARE ALSO BARRED

As a preliminary matter, Appellees would point out that the District Court did not "puzzlingly ignore" Balbed's state/county wage law claims. Balbed's Brief at p. 43. Balbed's state/county wage claims were discussed at length at the summary judgment hearing. JA 871-876; JA 875 (District Court noting that in the *Myers* case this Court held that, since the employer did not violate the FLSA, it did not violate the wage/overtime laws of the Maryland statute). For the reasons set forth below, the District Court correctly dismissed Balbed's state/county law claims.

A. Balbed's State/County Claims "Rise or Fall" with Her FLSA Claims

As noted by the District Court (JA 875), this Court–and others–have held that when an employee is seeking recovery for the same alleged wages/overtime under the corresponding federal/state/county statutes, as is the case here per Balbed's

Complaint (JA 7-17), the employee's state/county wage claims "rise or fall" with the employee's FLSA claim. *See e.g., Myers*, 50 Fed. Appx. at 590-91 ("Because [the employer] paid the [employees] no less than the minimum wage under the FLSA, the agreement also does not violate the minimum wage or overtime compensation provisions of the MWHL."); *Turner v. Human Genome Scis., Inc.*, 292 F. Supp. 2d 738, 744 (D. Md. 2003) ("The requirements under MWHL mirror those of the federal law; as such, Plaintiffs' claim under the MWHL stands or falls on the success of their claim under the FLSA."); *Bonilla v. DOPS, Inc.*, 2016 U.S. Dist. LEXIS 25696 at *8-10 (D. Md. Feb. 29, 2016) (noting that the "MWHL is the State parallel to the FLSA and the requirements of that provision 'mirror those of the federal law," and "thus, plaintiff's claim under the MWHL stands or falls on the success of his claim under the FLSA," and that "[b]oth the FLSA and the MWHL rely on regulations to define and interpret" their provisions); *Martinez v. K&S Mgmt. Servs.*, 2016 U.S. Dist. LEXIS 25798 at *2 n.2, 16-17 (D. Md. March 2, 2016) (stating that the "MWHL mirrors the federal FLSA law, and the Plaintiffs' MWHL claim 'stands or falls on the success of their claim under the FLSA'" and finding that employers had failed to pay the required minimum wage under federal, state and county wage laws and that defendants "have not identified any ***regulation*** or other provision providing an exception to the minimum wage requirement under these circumstances") (emphasis

supplied); *Sigala v. Abrof VA, Inc.*, 2016 U.S. Dist. LEXIS 55174 at *19, n.9 (D. Md. April 21, 2016) ("Because the MWHL is Maryland's state parallel to the FLSA, the Court's conclusion respecting the FLSA applies with equal force to Plaintiff's MWHL claims."); *Brown v. White's Ferry, Inc.*, 280 F.R.D. 238, 242 (D. Md. March 12, 2012) ("The MWHL is the State parallel to the FLSA, and the requirements of that provision mirror those of the federal law. Thus, Plaintiff's claim under the MWHL 'stands or falls on the success of their claims under the FLSA.'"); *Jennings v. Rapid Response Delivery, Inc.*, 2011 U.S. Dist. LEXIS 65862 at *15 (D. Md. June 15, 2011) ("The MWHL mirrors the federal law, and the Plaintiff's MWHL claim 'stands or falls on the success of their claim under the FLSA.'"); *Rollins v. Rollins Trucking, LLC*, 2016 U.S. Dist. LEXIS 1492 at *4-5 (D. Md. Jan. 7, 2016) ("Under the FLSA, employers must provide all covered employees with a minimum wage, currently fixed at $7.25 per hour. 29 U.S.C. §206(a). Employers must also pay an overtime rate of one and one-half times the regular rate of pay for each hour worked in excess of forty per week. 29 U.S.C. §207(a). The MWHL requires Maryland employers to pay a minimum wage equal to the greater of the prevailing federal rate or the state rate [currently $8.25]; the MWHL includes an overtime provision similar to the FLSA's overtime requirement. *Md. Code Ann., Labor & Empl.* §§3-413, 3-415. Because the provisions of the MWHL closely track those of the FLSA, an employee's

MWHL claim will 'stand or fall on the success of his claim under the FLSA.'").

For the foregoing reasons, Balbed's state/county wage claims were properly dismissed by the District Court.

B. "Conflict/Obstacle Preemption" Bars Balbed's State/County Claims

As argued before the District Court, federal "conflict/obstacle" preemption also required the dismissal of Balbed's state/county claims.[11]

To allow Balbed's state/county claims to go forward despite her FLSA claim being barred by §785.23 would eviscerate the purpose, intent and effect of 29 C.F.R. §785.23. As recognized by 29 C.F.R. §785.23, as well as every case to apply 29 C.F.R. §785.23, it is difficult if not impossible to ascertain the number of hours "worked" by a live-in employee (and, thus, how much an employee should be paid for such work), which is why 29 C.F.R. §785.23 allows an employee and employer to enter into a reasonable agreement.

However, if state/county wage claims which mirror an employee's FLSA claims are not also barred, then 29 C.F.R. §785.23 would be rendered meaningless,

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[11] Even at the time *Myers* was decided, the FLSA itself recognized that federal law does not expressly preempt state/county claims. *See* 29 U.S.C. 218(a) ("No provision of this Act ... shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act ..."). However, the issue of "express" preemption is irrelevant to the issue of "conflict/obstacle" preemption.

since employers could enter into reasonable agreements with their live-in employees and follow the exact requirements of that regulation, yet still be held liable for six figures under state/county laws to employees (like Balbed) claiming to have worked every waking hour they lived on the employer's premises. Obviously, no reasonable employer would find any comfort under 29 C.F.R. §785.23 if that employer could still be held liable for allegedly unpaid wages/overtime under corresponding state/county wage laws.

Thus, adopting Balbed's position would not only discourage such agreements but would render such agreements null and void for all practical purposes since employer liability under state/county wage laws is no less onerous than under the FLSA (and, in fact, potentially more so, given the higher wage rates). However, because of the potential for employees to claim to have worked practically every waking hour like in the case *sub judice*, courts should not only enforce such agreements but "encourage" them:

> As the Supreme Court noted in *Muscoda*[12], if precisely accurate computation of the amount of time expended in 'work' is difficult or impossible, reasonable provisions of a contract or custom may govern the computation of work hours. Because of the difficulty in determining the exact hours worked in circumstances where unsupervised employees can divide their time between 'work' and personal pursuits, any

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[12] *Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944).

> reasonable agreement of the parties which takes into account all of the pertinent facts will be accepted. 29 C.F.R. §785.23. Similarly, when 'work' might itself be a personal pursuit, resolving whether particular efforts were expended necessarily and primarily for the benefit of the employer proves so unrealistic that courts should not only accept and enforce reasonable agreements, but should encourage them. *Brock v. City of Cincinnati*, 236 F.3d 793, 805 (6th Cir. 2001) (emphasis supplied).

Accordingly, allowing an employer to be held liable under state/county wage claims where a federal law dictates that the employer not be held liable under the corresponding/parallel federal statute for the exact same unpaid wages/overtime claims would frustrate, and in fact eviscerate, the full purposes and objectives of federal law, a result which by Balbed's own admission is not permitted. *See* Balbed's Response Brief [ECF 30] at p. 11 (citing *Anderson v. Sara Lee Corp.*, 508 F.3d 181 (4th Cir. 2007) for proposition that "obstacle preemption" exists only when state law "stands as an obstacle to the accomplishment of the full and purposes and objectives of federal law."); *See also Gade v. Nat'l. Solid Wastes Mang. Ass'n.* 505 U.S. 88, 103-106 (U.S. 1992) (holding that, under conflict/obstacle preemption, "a state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach that goal," since "under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must

yield."); *H&R Block East Enters. v. Raskin*, 591 F.3d 718, 722-23 (4th Cir. 2009) (noting that there are three different types of preemption–express preemption, field preemption, and conflict preemption–and that conflict preemption exists when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); *Columbia Venture, LLC v. Dewberry & Davis, LLC,* 604 F.3d 824, 829-30 (4th Cir. 2009) ("Obstacle preemption is a type of conflict preemption authorized by the Supremacy Clause. It applies where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. This occurs where state law interferes with the *methods* by which the federal statute was designed to reach its goal. ... ***Preemption under an obstacle preemption theory is more an exercise of policy choices by a court than strict statutory construction.***") (emphasis supplied); *Md. Code. Ann., Labor & Employ.* §3-413 *Case Notes* in Addendum hereto (recognizing applicability of *Myers* and §785.23 to state wage claims); *Anderson*, 508 F.3d at 191 ("The Supremacy Clause of the Constitution renders federal law 'the supreme Law of the Land ... As a result, federal statutes ***and regulations*** properly enacted and promulgated can nullify conflicting state or local actions.") (emphasis supplied); *Turner*, 292 F. Supp. 2d 738, 744, n.2 (D. Md. 2003) ("[The U.S. Labor] Secretary's "power to promulgate

regulations under the FLSA is pursuant to an express grant of authority from Congress and, as a result, the regulations have the force and effect of law.").

Similarly, 29 C.F.R. §785.23 is such a fact-specific regulation (only applicable to "live-in" employees), that federal law has fully occupied this particular area/topic/issue (*i.e*, field preemption exists). *Anderson*, 508 F.3d at 191, n.10 ("[F]ield preemption occurs when Congress occupies the field by regulating so pervasively that there is no room left for the states to supplement federal law."). (internal quotations and citation omitted).

Balbed has no direct response to the above-referenced cases/rationale. Instead, Balbed avoids the issue by focusing on the general purpose of the FLSA rather than the relevant purpose/objective of §785.23. Balbed's Brief at p. 44 (arguing that the purpose of the FLSA is to "achieve certain minimum labor standards" and to guarantee compensation "for all actual work" and, thus, that "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," and "for these reasons, the Maryland Wage and Hour Law is not preempted by 29 C.F.R. §785.23").

Likewise, rather than contend with the case law cited above which is directly on point, Balbed attempts to bolster her argument by drawing analogies to preemption cases where the FLSA exempts a certain category of employees but where state law

did not. Balbed's Brief at p. 45 *(citing Overnite Transportation Co. v. Tianti*, 926 F.2d 220 (2nd Cir. 1991) (in a two-page opinion, holding that "this case concerns a state law regulating overtime wages" involving a category of employees who are exempt from the FLSA but not exempt under the Connecticut state statute–*i.e.*, "loaders"–and that the FLSA, per §18(a) "explicitly permits states to mandate greater overtime benefits," but also noting that in the *Pettis*[13] case the court "concluded that because New York's overtime wage laws did not interfere with the [Federal law], it was not preempted") (underlining supplied); *Maccabees Mut. Life Ins. Co. v. Perez-Rosado*, 641 F.2d 45 (1st Cir. 1981) (in a 1-page opinion, holding that category of employees who were exempt under FLSA but not exempt under Puerto Rico's state laws from–"outside salesmen"–were entitled to vacation/bonus benefits under the state wage law, and stating in a single paragraph that conflict preemption did not exist where the conflict identified "is that the FLSA exempts 'outside salesmen' from protective wage benefits while the two Puerto Rican statues do not" since the FLSA "merely exempted such employees from the minimal federal protection offered in the Act").[14]

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[13] *Pettis Moving Co. v. Roberts*, 784 F.2d 439 (2nd Cir. 1986).

[14] Similarly, in *Knepper v. Rite Aid Corp.*, 675 F.3d 249 (3rd Cir. 2012), a case involving opt-in versus opt-out *procedures* for class actions under federal and state law, the court, upon considering the lengthy history of the opt-in/out laws

As set forth above, Appellees' preemption conflict/obstacle argument is based upon an entirely different set of facts and policy considerations than cases dealing with specific categories of employees who are exempt under the FLSA but expressly not exempt under state law and, thus, where courts have held that such state laws supplement–but do not conflict with–the stated FLSA purpose of providing a floor of minimal protection to employees. Appellees' conflict/obstacle preemption argument is based upon the specific purpose/intent of §785.23 to "encourage" employers and employees to enter into binding agreements for the purpose of avoiding such disputes between employees and employers regarding the hours "worked" by, and the compensation owed to, the employee. If an employee can simply toss such an agreement "out the window" and sue an employer under state/county wage laws for claimed work/overtime wages, liquidated damages, and attorneys' fees, the entire purpose/intent behind §785.23 would be completely eviscerated since such an agreement would not be worth the paper on which it is written.

Accordingly, the District Court correctly dismissed Balbed's state/county wage claims.

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and their purpose, determined that the state laws at issue did not create "an obstacle to Congress' purpose." *Id.* at 263.

CONCLUSION

For all the foregoing reasons, Appellees respectfully request that this Court affirm the decision of the District Court granting Appellees' Cross Motion for Summary Judgment and dismissing Balbed's claims with prejudice. Appellees also respectfully request that this Court award them costs against Appellant Balbed.

Respectfully submitted,

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June 26, 2017

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,917 words, as calculated by WordPerfect X6, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii) 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 WordPerfect X6, 14-point, Times New Roman proportionally-spaced typeface.

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ADDENDUM

- PART 780 -- EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT
- PART 782 -- EXEMPTION FROM MAXIMUM HOURS PROVISIONS FOR CERTAIN EMPLOYEES OF MOTOR CARRIERS
- PART 783 -- APPLICATION OF THE FAIR LABOR STANDARDS ACT TO EMPLOYEES EMPLOYED AS SEAMEN
- PART 784 -- PROVISIONS OF THE FAIR LABOR STANDARDS ACT APPLICABLE TO FISHING AND OPERATIONS ON AQUATIC PRODUCTS
- PART 785 -- HOURS WORKED
  - Part 785 Note
  - SUBPART A -- GENERAL CONSIDERATIONS
    - § 785.1 Introductory statement.
    - § 785.2 Decisions on interpretations; use of interpretations.
    - § 785.3 Period of effectiveness of interpretations.
    - § 785.4 Application to Walsh-Healey Public Contracts Act.
  - SUBPART B -- PRINCIPLES FOR DETERMINATION OF HOURS WORKED
    - § 785.5 General requirements of sections 6 and 7 of the Fair Labor Standards Act.
    - § 785.6 Definition of "employ" and partial definition of "hours worked".
    - § 785.7 Judicial construction.
    - § 785.8 Effect of custom, contract, or agreement.
    - § 785.9 Statutory exemptions.
  - SUBPART C -- APPLICATION OF PRINCIPLES
    - § 785.10 Scope of subpart.
  - EMPLOYEES "SUFFERED OR PERMITTED" TO WORK
    - § 785.11 General.
    - § 785.12 Work performed away from the premises or job site.
    - § 785.13 Duty of management.

WAITING TIME

- § 785.14 General.
- § 785.15 On duty.
- § 785.16 Off duty.
- § 785.17 On-call time.

REST AND MEAL PERIODS

- § 785.18 Rest.
- § 785.19 Meal.

SLEEPING TIME AND CERTAIN OTHER ACTIVITIES

- § 785.20 General.
- § 785.21 Less than 24-hour duty.
- § 785.22 Duty of 24 hours or more.
- § 785.23 Employees residing on employer's premises or working at home.

PREPARATORY AND CONCLUDING ACTIVITIES

- § 785.24 Principles noted in Portal-to-Portal Bulletin.
- § 785.25 Illustrative U.S. Supreme Court decisions.
- § 785.26 Section 3(o) of the Fair Labor Standards Act.

LECTURES, MEETINGS AND TRAINING PROGRAMS

- § 785.27 General.
- § 785.28 Involuntary attendance.
- § 785.29 Training directly related to employee's job.
- § 785.30 Independent training.
- § 785.31 Special situations.
- § 785.32 Apprenticeship training.

TRAVELTIME

29 CFR 785.46

This document is current through the June 7, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 ("Regulatory Freeze Pending Review"), certain regulations will be delayed pending further review. See Publisher's Note under affected rules. Title 3 is current through June 2, 2017.

§ 785.46 Applicable regulations governing keeping of records.

Section 11(c) of the Act authorizes the Secretary to promulgate regulations requiring the keeping of records of hours worked, wages paid and other conditions of employment. These regulations are published in part 516 of this chapter. Copies of the regulations may be obtained on request.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

52 Stat. 1060; 29 U.S.C. 201-219; *29 U.S.C. 254.* Pub. L. 104-188, *100 Stat. 1755.*

History

[26 FR 190, Jan. 11, 1961]

Annotations

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE SUBTITLE:

CROSS REFERENCES: Railroad Retirement Board: See Employees' Benefits, 20 CFR chapter II.

Social Security Administration: See Employees' Benefits, 20 CFR chapter III.

EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in 20 CFR chapters I, IV, V, VI, VII; 30 CFR chapter I; 41 CFR chapters 50, 60, and 61; and 48 CFR chapter 29.

Md. LABOR AND EMPLOYMENT Code Ann. § 3-413

Current through chapters effective through June 1, 2017, of the 2017 Regular Session of the Maryland General Assembly.

Annotated Code of Maryland > LABOR AND EMPLOYMENT > TITLE 3. EMPLOYMENT STANDARDS AND CONDITIONS > SUBTITLE 4. WAGES AND HOURS > PART III. REQUIRED WAGES

§ 3-413. Payment of minimum wage required

(a) "Employer" defined. -- In this section, "employer" includes a governmental unit.

(b) In general. -- Except as provided in subsection (d) of this section and § 3-414 of this subtitle, each employer shall pay:

(1) to each employee who is subject to both the federal Act and this subtitle, at least the greater of:

(i) the minimum wage for that employee under the federal Act; or

(ii) the State minimum wage rate set under subsection (c) of this section; and

(2) each other employee who is subject to this subtitle, at least:

(i) the greater of:

1. the highest minimum wage under the federal Act; or

2. the State minimum wage rate set under subsection (c) of this section; or

(ii) a training wage under regulations that the Commissioner adopts that include the conditions and limitations authorized under the federal Fair ***Labor*** Standards Amendments of 1989.

(c) State minimum wage. -- The State minimum wage rate is:

(1) for the 6-month period beginning January 1, 2015, $ 8.00 per hour;

(2) for the 12-month period beginning July 1, 2015, $ 8.25 per hour;

(3) for the 12-month period beginning July 1, 2016, $ 8.75 per hour;

(4) for the 12-month period beginning July 1, 2017, $ 9.25 per hour; and

(5) beginning July 1, 2018, $ 10.10 per hour.

(d) Exceptions. --

(1)

(i) Except as provided in paragraph (2) of this subsection and subject to subparagraph (ii) of this paragraph, an employer may pay an employee a wage that equals a rate of 85% of the State minimum wage established under this section if the employee is under the age of 20 years.

(ii) An employer may pay to an employee the wage provided under subparagraph (i) of this paragraph only for the first 6 months that the employee is employed.

(2) (i) This paragraph applies only to an employer that is an amusement or a recreational establishment, including a swimming pool, if the employer:

1. operates for no more than 7 months in a calendar year; or

2. for any 6 months during the preceding calendar year, has average receipts that do not exceed one-third of the average receipts for the other 6 months.

(ii) An employer may pay an employee a wage that equals the greater of:

1. 85% of the State minimum wage established under this section; or

2. $ 7.25.

History

An. ***Code*** 1957, art. 100, § 83; *1991, ch. 8, § 2*; *1992, ch. 22, § 1*; *2006, chs. 2, 557*; *2014, ch. 262, § 1*.

Annotations

Notes

EFFECT OF AMENDMENTS. --

Chapter 2, Acts 2006, effective February 16, 2006, added (1)(ii) [(b)(1)(ii)]; added "the greater of" to the end of the introductory language of (1) [(b)(1)]; added "or" to the end of (1)(i) [(b)(1)(i)]; and rewrote (2)(i) [(b)(2)(i)]. *Chapter 2, Acts 2006*, passed over the veto of the Governor in the House on January 12, 2006, and in the Senate on January 17, 2006.

Chapter 557, Acts 2006, effective July 1, 2006, added (a) and made related changes.

Section 1, ch. 262, Acts 2014, effective July 1, 2014, added (a); in the introductory language of (b), added "subsection (d) of this section and"; in (b)(1)(ii) and (b)(2)(ii)2, substituted "the State minimum wage rate set under subsection (c) of this section" for "a wage that equals a rate of $6.15 per hour"; and added (c) and (d).

EDITOR'S NOTE. --

For codification of the federal Fair ***Labor*** Standards amendments of 1989, referred to in (b)(2)(ii), see *29 U.S.C.S. § 201* et seq.

Section 2, ch. 2, Acts 2006, provides that "this Act shall take effect January 1, 2006"; however, ch. 2, Acts 2006, passed over the veto of the Governor in the House on January 12, 2006, and in the Senate on January 17, 2006, and became effective February 16, 2006, pursuant to *Article II, § 17(d) of the **Maryland** Constitution.*

Chapters 2 and 557, Acts 2006, each amended this section. Neither of the 2006 amendments referred to the other, and the language has been resolved to give effect to both, as each made identical amendments; ch. 557 also added (a).

EDITOR'S NOTE. --

Many of the cases appearing in the notes to this article were decided under the former statutes in effect prior to the 1991 revision. These earlier cases have been moved to pertinent sections of the revised material where they may be useful in interpreting the current statutes.

Case Notes

MARYLAND LAW REVIEW. --For note, "The ***Maryland*** Survey: 2000-2001: Recent Decisions; II. Commercial Law," see *61 Md. L. Rev. 824 (2002).*

CITY MINIMUM WAGE ORDINANCES. --A city minimum wage ordinance, in including certain businesses exempted under State law and prescribing higher minimum wage than that prescribed by State law, was not in conflict with State minimum wage law, but supplemental and complementary thereto. *Mayor of Baltimore v. Sitnick, 254 **Md.** 303, 255 A.2d 376 (1969).*

AGREEMENT DID NOT VIOLATE ***MARYLAND*** WAGE AND HOUR LAW. --Because employees were paid no less than the minimum wage under the Fair ***Labor*** Standards Act under an agreement whereby the employees received rent-free accommodation in or near a county park and free water in exchange for work as caretakers, the agreement also did not violate the minimum wage or overtime compensation provisions of the *Maryland Wage and Hour Law. Myers v. Baltimore County, -- F.3d --, 2002 U.S. App. LEXIS 20958 (4th Cir. 2002),* cert. denied, *538 U.S. 964, 123 S. Ct. 1755, 155 L. Ed. 2d 517 (2003).*

SUMMARY JUDGMENT IMPROPER BECAUSE OF ISSUE OF MATERIAL FACT. --In an action in which employees alleged that an employer violated the overtime and minimum wage provisions of the ***Maryland*** Wage and Hour Law, the employees were not entitled to summary judgment because there was a genuine dispute regarding the number of hours worked by the employees. Although the employees submitted declarations stating that they worked eighty hours per week on average, the employer's interrogatory responses indicated that the employees worked only forty hours or less each week. *Brown v. White's Ferry, Inc., 280 F.R.D. 238 (D. Md. 2012).*

*APPLIED IN McLauglin v. Murphy, 372 F. Supp. 2d 465 (D. **Md**. 2004).*

STATED IN Harker v. State Use Indus., 990 F.2d 131 (4th Cir.), cert. denied, 510 U.S. 886114 S. Ct. 238126 L. Ed. 2d 192 (1993); *Shanks v. Lowe, 364 **Md**. 538, 774 A.2d 411 (2001).*

CITED IN Watkins v. C. Earl Brown, Inc., 173 F. Supp. 2d 409 (D. Md. 2001).

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE ARTICLE

Annotated ***Code*** of ***Maryland***

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2017, a copy of the foregoing was served via CM/ECF electronic filing upon:

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