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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford.

Edward B. ROACH in his individual capacity
and on behalf of all similarly situated employees

v.

MORAN FOODS, INC.

No. X04HHDCV116023386S. | March 16, 2012.

Opinion

BRIGHT, J.

I. INTRODUCTION

*1 This action arises out of the way in which the defendant, Moran Foods, Inc. d/b/a Save-A-Lot Ltd. (“SAL”) calculates the overtime pay for its Assistant Sales Managers (“ASMs”), in particular the plaintiff, Edward Roach. There is no factual dispute over the method used by SAL. Moran uses what is referred to as the Fluctuating Work Week (“FWW”) methodology. As described more fully below, the FWW methodology calculates an employee's overtime pay on a week by week basis by dividing the employee's weekly salary by the total hours worked by the employee that week. The plaintiff claims that the FWW methodology violates Connecticut's wage and hour laws because it does not use a standard forty-hour work week as the basis for the overtime rate calculation. Because there is no factual dispute over how the plaintiff's overtime rate has been calculated, the parties have filed cross motions for summary judgment asking the court to determine whether the FWW methodology is permitted under Connecticut law.¹

II. UNDISPUTED FACTS

The following facts are undisputed and provide the context within which the court must resolve the legal issue presented by the parties. SAL is a national discount supermarket chain operating in 37 states, including Connecticut. SAL employs ASMs in its stores. Their duties include: assisting the store

manager in training and managing employees; working to maximize store profits; and, in the absence of the store manager, directing the store team in accordance with SAL policies. An ASM's hours vary week to week depending on SAL's needs. SAL classifies ASMs as non-exempt employees for purposes of federal and state wage and hour laws. Consequently, they are entitled to receive overtime pay for hours worked in excess of forty hours in any given week.

Roach began employment with SAL as an ASM trainee in October of 2010. He became an ASM in January of 2011. Roach was hired at an annual salary of \$45,000. While it was expected that Roach's hours would vary from week to week, it was understood by Roach and SAL that he would receive overtime pay for hours worked in excess of forty hours in a week.

Since he began working as an ASM, SAL has used the FWW methodology to calculate Roach's overtime pay. Under that approach, SAL takes Roach's allocable weekly salary and divides that by the number of hours worked by Roach that week. That results in Roach's “regular rate” for that week. SAL then takes 50% of that rate and multiplies it by the hours Roach worked in excess of 40 hours to determine Roach's overtime pay for the week.

By way of example, assume that Roach's weekly salary is \$900.² If he worked 40 hours in a week, his regular rate under the FWW methodology would be \$22.50 ($\$900/40$). If he worked 45 hours, his regular rate would be \$20.00 ($\$900/45$). In addition to his \$900 regular salary, Roach would also receive overtime pay of \$50.00 ($.5(\$20) \times 5 \text{ hrs}$). By contrast, if Roach's overtime pay was calculated based on what his hourly rate would be using a forty-hour work week methodology, as opposed to the FWW methodology, it would be \$168.75 ($1.5 (\$22.50) \times 5 \text{ hrs}$).

*2 Not surprisingly, the more hours an ASM works the greater the difference in overtime pay calculation between the FWW methodology and a forty-hour work week methodology. For example, if an ASM works 60 hours, the FWW methodology would yield overtime pay of \$150 ($.5 (\$900/60) \times 20$). Using a forty-hour work week methodology, the overtime pay would be \$675 ($1.5 (\$900/40) \times 20$). As these examples make clear, as an ASM works more hours per week his regular rate continues to decline, as does the amount he gets paid for each hour of overtime. There is a limit though. SAL acknowledges that an ASM's regular rate can never drop below the applicable minimum wage. Thus, using the numbers set forth above, if an ASM worked 100

hours in a week, his regular rate would be \$9.00, close to, but still above, the minimum wage required in Connecticut. In addition to his \$900 weekly salary, the ASM would also receive overtime pay of \$270 (.5 (\$9.00) x 60). The result is that the ASM's incremental pay for working 40 more hours than in the 60 hour example above is \$120, or \$3 per hour. By contrast, if the ASM was paid overtime using a forty-hour work week, his overtime pay would be \$2,025 (1.5 (\$22.50) x 60). Under this methodology, the ASM's incremental rate of pay for each hour over 40 never changes. It is always \$33.75, 1.5 times the regular rate of \$22.50.

It is undisputed that Roach has received less in overtime pay as a result of SAL using the FWW than he would have received had SAL used the forty-hour work week methodology. It is for this reason that Roach is challenging the legality of the FWW methodology under Connecticut law.³

III. SUMMARY JUDGMENT STANDARD

"In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party ... The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law ... and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Citations and internal quotation marks omitted.) *Liberty Mut. Ins. v. Lone Star Indus., Inc.*, 290 Conn. 767, 787, 967 A.2d 1 (2009). "It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact ... are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court [in support of a motion for summary judgment]." *Home Ins. Co. v. Aetna Life & Casualty, Co.*, 235 Conn. 185, 202, 663 A.2d 1001 (1995).

IV. DISCUSSION

SAL's use of the FWW is not unprecedented, or even unusual. It is unquestionably permitted under federal law as an accepted methodology for the calculation of overtime pay for non-exempt employees who work hours which fluctuate from week to week. In fact, the Supreme Court explicitly held, seventy years ago, that the FWW methodology is a permissible way to calculate overtime pay under the Fair

Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942). According to the Court: "Where the employment contract is for a weekly wage with variable or fluctuating hours the same method of computation produces the regular rate for each week. As that rate is on an hourly basis, it is regular in the statutory sense, inasmuch as the rate per hour does not vary for the entire week, though week by week the regular rate varies with the number of hours worked. It is true that the longer the hours, the less the rate and the pay per hour. This is not an argument, however, against this method of determining the regular rate of employment for the week in question. Apart from the Act, if there is a fixed weekly wage regardless of the length of the workweek, the longer the hours the less are the earnings per hour." 316 U.S. 580, 62 S.Ct. 1221. Since then, the U.S. Department of Labor has codified the FWW as an appropriate method for the calculation of overtime payments for non-exempt workers who are paid a fixed salary but work varying hours from week to week. 29 C.F.R. § 778.114 (2011).⁴

*3 The fact that the FWW methodology is permitted under FLSA does not end the court's inquiry. The FLSA provides a floor, not a ceiling, for worker protection. *Rogers v. City of Troy, N.Y.*, 148 F.2d 52, 57 (2d Cir.1998). When the FLSA was enacted in 1938, Congress explicitly reserved to the states the right to enact stronger legal protections for employees. 29 U.S.C. § 218(a) ("No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law ..."); see also *Overnite Transp. Co. v. Tianti*, 926 F.2d 220, 222 (2d Cir.1991) ("every Circuit that has considered the issue has reached the same conclusion—state overtime wage law is not preempted by ... the FLSA"). Consequently, the court must determine whether the FWW is permitted under Connecticut's wage and hours law.

The court's analysis starts with the language of the operative statute, [General Statutes § 31-76c](#). It provides that "[n]o employer, except as otherwise provided herein, shall employ any of his employees for a workweek longer than forty hours, unless such employee receives remuneration for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." The plaintiff argues that this language compels the court to conclude that SAL must pay him one and one-half times his regular rate of \$22.50 per hour for every hour over forty. The issue is not so simple because [§ 31-76c](#) does not specify the manner in which overtime should be calculated.⁵

Significantly, the Supreme Court had little trouble concluding in *Missel* that the FWW methodology was permissible even though the language of the FLSA is substantially the same as that in § 31–76c. 29 U.S.C. § 207(a)(1) provides that “[e]xcept as otherwise provided in this section, an employer shall not employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.” Based on the similar language in the two statutes, the defendant argues that this court should adopt the same construction as did the Supreme Court. SAL argues that it is particularly appropriate to do so because *Missel* was decided 70 years ago, and since then neither the Connecticut Legislature nor the Department of Labor have taken any steps to reject the holding of *Missel* or the FWW methodology.

At least one court has found this argument persuasive. In *Fakouri v. Pizza Hut of America, Inc.*, 824 F.2d 470 (6th Cir.1987), the court addressed the question of whether the FWW was permitted under Michigan law. Michigan's overtime law is very similar to the FLSA and § 31–76c. It provides that “[e]xcept as otherwise provided in this section, an employee shall receive compensation at not less than 1 1/2 times the regular rate at which the employee is employed for employment in a workweek in excess of 40 hours.” Mich. Comp. Laws § 408.384a(1). Based on the similarity between the Michigan statute and the FLSA, the court held that the FWW methodology was permitted under Michigan law. In doing so, the court noted that “[b]oth the federal and the Michigan statutes employ the term ‘regular rate’ without defining it. Both require that overtime compensation be paid at 1 1/2 times the ‘regular rate.’ By the time the Michigan legislature enacted the overtime compensation provisions of the Michigan Minimum Wage Law, 1974 Mich. Pub. Acts 304 (effective April 1, 1975), the term ‘regular rate’ had been firmly defined by federal courts and the fluctuating workweek method of calculating overtime compensation had been approved by the Supreme Court for over thirty years. The Michigan legislature elected to employ language similar to that incorporated in the FLSA and used the term ‘regular rate’ in delineating employers’ overtime compensation obligations.” *Fakouri*, 824 F.2d 474.

*4 The defendant argues that this reasoning applies with equal force to § 31–76c, which was adopted in 1967, 25 years after *Missel*. It further argues that such a conclusion is supported by the fact that Connecticut's Department of

Labor has never brought an enforcement action to prevent an employer from using the FWW methodology in Connecticut.

Although the Connecticut Legislature, Department of Labor, and our appellate courts have not squarely addressed whether the FWW methodology is permitted in Connecticut, the first two have taken some actions since *Missel* that are relevant to this court's analysis. In addition, one superior court decision has addressed the issue.

Pursuant to [General Statutes § 31–61 et seq.](#), the Department of Labor establishes “wage boards” for various occupations to determine fair minimum wage standards for those occupations. It is undisputed that SAL's ASMs are under the jurisdiction of the Mercantile Trade wage board. [Sections 31–62–D1 et seq. of the Regulations of Connecticut State Agencies](#) set forth the minimum wage rates for persons employed in the mercantile industry. Section 31–62–D2(c), defines “Overtime” as “[o]ne and one-half times the employee's regular hourly rate shall be paid for all hours in excess of forty in any work week.”⁶ It does not describe how to calculate overtime pay. However, § 31–62–D4 does provide guidance on how the regular hourly rate should be computed for at least some mercantile workers. It provides that “[e]ach employer shall establish a regular hourly rate for employees covered by this order. When an employee is paid commission in whole or in part for his earnings, the regular hourly rate for the purpose of computing overtime shall be determined by dividing the employee's total earnings by the number of hours in the usual work week as supported by time records made in accordance with the provisions of section 31–62–D8.” With the exception to a change to the section number of the regulation, this language has not changed since it was first included in the Mercantile Wage Order of 1950.

The plaintiff claims that the language of § 31–62–D4 is significant for two reasons. First, he claims that by requiring the employer to *establish* a regular *hourly* rate, the Department intended to preclude the practice of employers calculating a weekly regular rate under the FWW methodology. The court disagrees. A regular rate can be “established” weekly. The mere use of that word “established” conveys no insight into the Department's thinking. Nor does the use of the word “hourly.” As the defendant points out, the phrases “regular rate” and “regular hourly rate” are used interchangeably under the FLSA. For example, the federal regulation that defines “regular rate” under the FLSA provides that “[t]he regular rate is an hourly rate” and “[t]he regular hourly rate of pay of an employee is determined by dividing his total remuneration for

employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid.” 29 C.F.R. § 778.109 (2010).⁷ As this language makes clear, use of the word hourly in a regulation or administrative order is not inconsistent with applying the FWW methodology.⁸

*5 Second, the plaintiff claims that by setting forth a specific method for computing the “regular rate” for employees earning commissions, an inference can be drawn that the Department did not intend for a method other than one based on a forty-hour work week be used for any other employees. The defendant responds by claiming that because the methodology set forth for commission workers clearly does not apply to ASMs, SAL is free to use any acceptable method, including the FWW, to calculate the regular hourly rate. The court is not persuaded by either argument. The Work Order does not proscribe the use of the FWW for commission workers. Instead, it provides that such workers' regular rates are to be calculated using their “usual” work week. This method appears to be something in between calculating the regular rate every week based on hours worked in that particular week, and setting one regular rate that applies for all weeks. Thus, the court cannot determine whether the Department intended to set forth a methodology that should be used in lieu of the forty-hour work week method or the FWW, which had been approved in *Missel* eight years earlier.

If anything, there is at least some evidence to suggest that the Department does not view the Mercantile Wage Order as prohibiting the use of the FWW methodology. In 1996, the Office of Legislative Research issued a report comparing state and federal labor laws. See Office of Legislative Research, Research Report 96-R-1426, (December 19, 1996), available at http://search.cga.state.ct.us/dtSearch_lpa.html (last visited March 16, 2012).⁹ Included within the report, was a comparison of state and federal overtime laws. *Id.*, at 6–12. The report states that its analysis was “based on a comparison of federal and state laws and regulations and on information provided by the state Labor Department.” *Id.*, at 2. The report specifically discusses the “Fluctuating work week for nonexempt employees paid on a salary basis.” *Id.*, at 7. The report concludes that the practice is “[a]llowed by state practice in accordance with federal regulations.” *Id.* It is unclear whether this conclusion is based on the author's review of the federal and state statutes or on information she received from the Department. Certainly, it is consistent with the fact that the Department has never taken action against an employer for using the FWW in Connecticut.

Were this the totality of Connecticut's legislative and administrative history regarding the FWW, the court would conclude that this case is much like *Fakouri*. The history as set forth above, shows little or no attempt by the Legislature or the Department to prevent the use of a practice that had been federally sanctioned in a similar statute in 1942.

There is more that must be considered though. In 2003, the Legislature specifically addressed how overtime pay is calculated for some workers. In particular, the General Assembly took up a measure to exempt delivery drivers from the Mercantile Wage Order's method for calculating the regular rate for commission-earning workers. The concern expressed by the proponents of the legislation was that the drivers were being compensated using a “variable rate overtime” method (essentially the FWW methodology) even though they earned only nominal commissions. Thus, the more hours they worked, the lower their hourly pay and overtime pay was when their regular rate was calculated based on their “usual work week.” In the words of one driver who testified, “[t]he longer you work the less you make an hour.” Conn. Labor and Public Employee Committee Joint Favorable Report, concerning House Bill 6670, entitled “An Act Concerning the Calculation of Overtime Payments.” Available at http://search.cga.state.ct.us/dtSearch_lpa.html (last visited March 16, 2012).

*6 The bill proposed, HB 6670, was intended to replace subdivision (1) of [General Statutes § 31–76b](#), which sets forth the definition of “regular rate” used in subsequent sections, including 31–76c. Substitute House Bill No. 6670, January 2003 Sess., § 1. In particular, the following language was proposed to be added to [§ 31–76b](#): “For the purpose of calculating the overtime rate of compensation required to be paid to an employee who is not exempt from the overtime requirements of chapter 558, the employee's regular rate shall be one-fortieth of the employee's weekly remuneration, except as otherwise permitted under [29 CFR 778.114](#), as from time to time amended.” Had it been adopted, this language would have accomplished two things. First, it would make clear that the general rule in Connecticut is that an employee's overtime pay would have to be calculated on a forty-hour work week basis. Second, it would have codified the use of the FWW methodology as an exception to this rule.¹⁰ Consequently, had the above language been adopted, it is clear that the plaintiff would have no claim.

The language as proposed was not adopted. Instead, an amendment was made to change the relevant language

to: “For the purpose of calculating the overtime rate of compensation required to be paid to an employee who is (i) employed as a delivery driver or sales merchandiser, (ii) paid on a base salary and commission basis, and (iii) not exempt from the overtime requirements of this chapter, the employee's regular rate shall be one-fortieth of the employee's weekly remuneration.” Substitute House Bill No. 6670, § 1, as amended by House Amendment Schedule A. This is the language that was ultimately passed and currently constitutes the last sentence of § 31–76b(1).¹¹

The amendment did two things. First, it limited the explicit requirement that overtime be calculated on a forty-hour work week to certain delivery drivers. It also removed the explicit approval of the FWW methodology.

The defendant argues that by limiting the requirement to use a forty-hour work week to one particular occupation, the Legislature confirmed that it did not intend to require it for others, like ASMs. Not surprisingly, the plaintiff argues that by removing language that would have explicitly approved the use of the FWW in Connecticut, the Legislature made clear that that method of calculating overtime is not permissible in Connecticut.

A careful review of the legislative history regarding the amendment to HB 6670 leads the court to conclude that the defendant is correct. First, there is little doubt that the issue the General Assembly was addressing in HB 6670 was how overtime was calculated for delivery drivers who had very little ability to earn additional commissions by working harder. In particular, all of the witnesses who testified before the Labor Committee in support of HB 6670 were Pepsi delivery drivers and their union representatives. The testimony of these witnesses showed that they viewed themselves differently than salaried workers like the plaintiff. For example, Dennis Novak, the secretary/treasurer of Teamsters Local 1040 testified that “[a]lthough the [variable rate overtime] system appears to be legal as applied to salary workers, it shouldn't be used when calculating wages for certain drivers and sales merchandisers. These employees are far from meeting the definition of salary employees.” Conn. Labor and Public Employee Committee Public Hearing Transcript for March 25, 2003, concerning House Bill 6670, p. 19. Mr. Novak went on to point out that the benefits for the drivers were calculated based on the number of hours they worked. For example, if a driver only worked 24 hours per week, the employer's contributions to the employee's health and pension benefits were based on 24 hours worked, not 40. As Mr. Novak noted, “[w]hen these workers suffer a

reduction in their wages and contributions to their benefit plans, whether daily or weekly, it's because they are hourly employees. A salary employee would suffer no reduction.” *Id.*, at 20.

*7 This issue resonated with at least some members of the Committee. For example, Rep. Esposito commented that “[the drivers] punch a timecard and their hours are calculated by that. And like I said, their health benefits are based on an hourly basis. If they work less hours, they get credit for less hours ... *If they 're going to use the variable rate, they should give you full credit and make you a salaried employee.*” (Emphasis added.) *Id.*, at 29.

Based on the proceedings before the Labor Committee, it appears that there was no intention to prohibit the use of the FWW methodology in calculating overtime for salaried employees like the plaintiff. This is confirmed by the fact that the original version of HB 6670 that was before the Labor Committee explicitly adopted the federal regulation that codified the FWW methodology.

The question then is whether the amendment to HB 6670 was intended to expand the reach of the bill to make clear that the FWW methodology could not be used for salaried employees like the plaintiff. The legislative history of the amendment makes clear that the answer is no. In proposing the amendment to the House, Rep. Ryan stated: “We do have some situations where we find that [variable rate overtime] is an undue burden on workers. In other situations, variable overtime works well. Therefore, we want to make a distinction that this only applies to those individuals where this adversely affects their overtime payment.” House Session Transcript on HB 6670, p. 1 (May 29, 2003). Rep. Ryan went on to specifically identify the intended beneficiaries of the legislation. “These are the people that basically deliver the product and like I said, can actually lose more money the longer they work.” *Id.*, at 2. Rep. Ryan in no way suggested that the reference to C.F.R. § 778.114 was removed from the bill because the proponents of the amendment wanted to make clear that the FWW methodology could not be used at all in Connecticut. To the contrary, Rep. Ryan went on to explain that the amendment was made because “[w]e felt that this was something that would put more people at ease, making a[sic] more of a clarification on who it would affect.” *Id.*, at 7.

The fact that the amendment was not intended to substantively expand the reach of the original HB 6670 to absolutely preclude use of the FWW is further confirmed by the fact that Rep. Ryan and other members of the Labor Committee did not

see the amendment until it was being debated and voted on in the House. After explaining that the amendment was intended to clarify what employees it applied to, Rep. Ryan stated: “quite honestly, I just got the amendment when I came in here this morning.” *Id.* Rep. Cafero initially expressed surprise that the amendment was being offered without further discussion among those originally involved in drafting HB 6670. *Id.*, at 5–6. He then stated his support of the amendment after Rep. Ryan stated that it was offered as a “clarification” of whom it was intended to cover. *Id.*, at 7. Similarly, Rep. Flaherty was “perturbed” to find out about the amendment two minutes before it was debated on the House floor. *Id.*, at 14. Discussing the original version of HB 6670, Rep. Flaherty commented that “this bill, when it came to the Labor Committee ... deals with specific cases of employees where there are two forms of compensation and where the employees are not exempt from overtime.” *Id.* He then stated that he would support the amendment because “I think it will still address the problem as Rep. Ryan pointed out.” *Id.*

*8 Overall, the House discussions of the amendment to HB 6670 indicate that the amendment was intended to address the same problem as the original version of HB 6670, but in a more focused way. It did so by specifically identifying the class of employees to which the bill applied. Once it did so, the reference to C.F.R. § 778.114 became unnecessary and superfluous. Thus, it is not at all surprising that it was removed. Certainly, there is nothing whatsoever in the legislative history before the House to indicate that its removal was intended as a substantive expansion of the reach of HB 6670.

The debate before the Senate, although much more abbreviated, leads to the same conclusion. Sen. Prague described HB 6670 as amended as making “changes to the allowable method of calculating overtime *for certain employees*.” (Emphasis added.) Senate Session Transcript on HB 6670, p. 2 (June 3, 2003). Sen. Prague further stated that “[t]his bill prohibits variable rate overtime for such employees earning both salary and commission and employed as delivery drivers or sales merchandisers.” *Id.* She then specifically addressed the purpose of the amendment to HB 6670. “The House Amendment ‘A’ *narrowed the prohibition on variable rate overtime*, so it only applies to those employed as delivery driver or sales merchandisers and two, paid on a base salary of [sic] commission basis.” (Emphasis added.) *Id.* Senator Prague’s comments, in the context of how HB 6670 was proposed and amended, can only be reasonably read as an indication that after the passage of the bill, variable

rate overtime, or the FWW, was only prohibited as to those employees specifically identified in the bill.

It is true that Sen. Prague also stated that the amendment “also strikes a provision that maintain [sic] the use of variable rate overtime for fixed salary employees whose jobs require a fluctuating work week.” *Id.* As noted above though, the court does not read anything substantive into that change. The language regarding C.F.R. § 778.114 was only necessary to preserve use of the FWW under the original version of HB 6670, which would have otherwise required the regular rate to be calculated based on a forty-hour week as to *all* employees. Once the intended beneficiaries of the statute were explicitly identified, there was simply no need to include the exception protecting use of the FWW for employees such as the plaintiff.

The court’s conclusion is further supported by how HB 6670 has been understood since its adoption. The Summary of 2003 Public Acts prepared by the Office of Legislative Research concluded its discussion of HB 6670 by noting that “[v]ariable rate overtime for salaried workers, who by law are subject to overtime rules and work irregular schedules, is not affected by the act’s relatively narrow prohibition.” Office of Legislative Research, 2003 Summary of Public Acts Part 1, p. 253 (10/2003) available at <http://www.cga.ct.gov/olr/publicationsbyyear.asp> (Last visited March 16, 2012). “Although the comments of the office of legislative research are not, in and of themselves, evidence of legislative intent, they properly may bear on the legislature’s knowledge of interpretive problems that could arise from the bill.” (Internal quotation marks and citations omitted.) *McCoy v. Commissioner of Public Safety*, 300 Conn. 144, 169, 12 A.3d 948 (2011). Consequently, our Supreme Court has referred to the analysis of the Office of Legislative Research to ascertain legislative intent. See, e.g., *State v. Tabone*, 279 Conn., 527, 542, 902 A.2d 1058 (2006).

*9 In addition, Connecticut’s Department of Labor has made no efforts, either before or after the adoption of HB 6670, to prohibit companies such as SAL from using the FWW methodology. It is particularly significant that no enforcement action has taken place since 2003 because the debate over HB 6670 made clear that the Department was keenly aware of issues surrounding the use of variable rate overtime. John McCarthy from the Department testified during the discussion of HB 6670 before the Labor Commission. When asked by Senator Prague what the system at issue was called, Mr. McCarthy stated: “The variable rate for fluctuating hours. And, so, certainly we’d be happy

to speak to the fact that what is being done presently is not outside the law. If it was, we would have been doing something about it.” Conn. Labor and Public Employee Committee Public Hearing Transcript for March 25, 2003, concerning House Bill 6670, *supra*, p. at 23. The fact that the Department has done nothing about the continued use of the FWW methodology since 2003 confirms that it shares the same view as does the Office of Legislative Research and this court. The FWW methodology is permitted under Connecticut law.

The plaintiff is correct that this court's conclusion runs counter to that of the only other Connecticut court to have addressed the issue. In *Stokes v. Norwich Taxi, LLC*, Dkt. No. 4100689, 2006 WL 3690920, judicial district of New London at Norwich, 2006 Ct.Sup. (LOIS) 21521 (November 15, 2006, Leuba, JTR.), *aff'd*, 289 Conn. 465, 958 A.2d 1159 (2008), the plaintiff claimed that he was not properly paid overtime under both the FLSA and Connecticut overtime laws. As to the FLSA claim, the plaintiff who was compensated using the FWW methodology, claimed that the defendants had not properly employed that methodology. He also claimed that use of the FWW was not permitted under Connecticut law. The jury returned a verdict for the plaintiff on both claims. The defendants then filed a motion to set aside the verdict. The court, after thoroughly examining the issues regarding the FLSA claim, upheld the jury's verdict. As to the plaintiff's claim under Connecticut law, the court's entire discussion was as follows: “The Defendants' claims regarding the fluctuating workweek method have no bearing on the jury's verdict under Connecticut law. Connecticut's statutory scheme, and the regulations promulgated thereunder contain no ‘fluctuating workweek method’ exception to the requirement that overtime be paid to non-exempt employees on the basis of a 40–hour week.” *Id.*, at 4.¹² It is unclear whether the defendants presented any of the arguments presented by SAL here. It is also unclear whether the court reviewed either the legislative history of HB 6670 or how the Department has viewed the FWW methodology. In any event, for the reasons set forth above, the court disagrees with the conclusion reached by the court in *Stokes*.

Based on all of the above considerations, the Sixth Circuit's rationale in *Fakouri* applies with even greater force here. Not only has Connecticut taken no steps to generally reject the FWW methodology that has been used under the FLSA since 1942, our Legislature has identified, in § 31–76b(1), a specific category of employees to which the method may not be applied. It is undisputed that the plaintiff is not included in that designated group of employees. There is also no question that the Legislature could have completely rejected the FWW methodology when it amended § 31–76b(1) in 2003. Both it and the Department were aware of 29 C.F.R. § 778.114, and the fact that it was at the time being used in Connecticut for salaried workers like the plaintiff. Despite this knowledge, the Legislature amended § 31–76b(1) to carve out only a narrow exception to the use of variable rate overtime. Finally, the Legislature has done nothing since 2003 to change § 31–76b(1) in response to the Office of Legislative Research's conclusion that the amendment to that statute did not affect the use of variable rate overtime for salaried employees. When this legislative history is coupled with the Department's lack of enforcement against the FWW, the only reasonable conclusion the court can reach is that the FWW methodology is authorized under Connecticut law, as it relates to salaried ASMs like the plaintiff.

V. CONCLUSION

*10 For all of the foregoing reasons, the plaintiff's motion for summary judgment is denied. As to the defendant's motion for summary judgment, while the court has found that the use of the FWW methodology is permitted in Connecticut, there is still an issue as to whether the defendant has properly applied the methodology to the plaintiff. The defendant claims that the undisputed facts show that it has complied with all of the requirements for use of the FWW methodology. The plaintiff has represented that he needs additional discovery to respond to the defendant's motion on this point. Consequently, the defendant's motion for summary judgment is denied without prejudice to being renewed after the plaintiff has completed the necessary discovery.

Footnotes

- 1 The plaintiff seeks summary judgment as to liability only.
- 2 Using \$45,000 per year, Roach's weekly salary would be \$865.38 (\$45,000/52). For demonstrative purposes, it is easier to use round numbers.
- 3 While Roach objects to the way his overtime pay is calculated under the FWW methodology, he ignores the fact that under that methodology he receives his allocable weekly pay even if he works less than forty hours in a week. Using a weekly payment of \$900, an ASM who works only 20 hours in a week would have an effective hourly rate of \$45.00 for that week.

- 4 29 C.F.R. § 778.114 provides: (a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.
- (b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose total weekly hours of work never exceed 50 hours in a workweek, and whose salary of \$600 a week is paid with the understanding that it constitutes the employee's compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 37.5, 50, and 48 hours, the regular hourly rate of pay in each of these weeks is \$15.00, \$16.00, \$12.00, and \$12.50, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid \$600; for the second week \$600.00; for the third week \$660 (\$600 plus 10 hours at \$6.00 or 40 hours at \$12.00 plus 10 hours at \$18.00); for the fourth week \$650 (\$600 plus 8 hours at \$6.25, or 40 hours at \$12.50 plus 8 hours at \$18.75).
- (c) The 'fluctuating workweek' method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula."
- 5 General Statutes § 31-76b does set forth a definition of regular rate. As discussed more fully *infra*, that definition does provide a method for calculating the overtime rate for certain delivery drivers, but does not explicitly discuss the methodology for employees like the plaintiff and other ASMs.
- 6 In addition to this regulation the Department also publishes a mandatory order that must be posted and maintained wherever persons covered by the order are employed. The mandatory order defines "Overtime" as "Not less than one and one-half times the employee's regular rate of pay after 40 hours a week." Available at <http://www.ctdol.state.ct.us/wgwkstnd/poster-mercantile.pdf> (Last visited March 16, 2011.)
- 7 29 C.F.R. § 778.109 provides: "The 'regular rate' under the Act is a rate per hour. The Act does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek, with certain statutory exceptions discussed in §§ 778.400 through 778.421. The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. The following sections give some examples of the proper method of determining the regular rate of pay in particular instances: (The maximum hours standard used in these examples is 40 hours in a workweek).
- 8 Similarly, the use of the word "hourly" as it relates to overtime calculations does not appear to be significant to the Connecticut Department of Labor. For example in Reg. 31-62-D2, the phrase "regular hourly" rate is used yet in the mandatory orders published pursuant to that regulation, the word "hourly" is deleted.
- 9 It is unclear who requested the report, who received it, and to what use, if any, it was put.

- 10 The Bill Analysis of HB 6670, prepared by the Office of Legislative Research specifically stated that “[t]he bill only allows variable rate overtime for employees on a fixed salary whose jobs require fluctuating hours, as permitted by a federal exception.” Office of Legislative Research, Bill Analysis for Substitute House Bill 6670, as amended by House Amendment Schedule A. Available at <http://www.cga.ct.gov/olr/publicationsbyyear.asp> (Last visited March 16, 2012).
- 11 **General Statutes § 31–76b(1)** provides: “The ‘regular rate’ at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include (A) sums paid as gifts; payments in the nature of gifts made at Christmastime or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production or efficiency; (B) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of the employer’s interests and properly reimbursable by the employer; and other similar payments to an employee that are not made as compensation for the employee’s hours of employment; (C) sums paid in recognition of services performed during a given period if either, (i) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement or promise causing the employee to expect such payments regularly; (ii) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the approval of the Labor Commissioner who shall give due regard, among other relevant factors, to the extent to which the amounts paid to the employee are determined with regard to hours of work, production or efficiency; (D) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident or health insurance or similar benefits for employees; (E) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under [section 31–76c](#), or in excess of the employee’s normal working hours or regular working hours, as the case may be; (F) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or (G) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal or regular workday, not exceeding the maximum workweek applicable to such employee under [section 31–76c](#), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek. For the purpose of calculating the overtime rate of compensation required to be paid to an employee who is (i) employed as a delivery driver or sales merchandiser, (ii) paid on a base salary and commission basis, and (iii) not exempt from the overtime requirements of this chapter, the employee’s regular rate shall be one-fortieth of the employee’s weekly remuneration.”
- 12 The Supreme Court never reached this issue on appeal because it found that the defendants’ violations of the FLSA were dispositive. *Stokes v. Norwich Taxi, LLC*, *supra*, 289 Conn. at 487, 958 A.2d 1195.