UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:19-cv-20683-UU

APOLINAR MEJIA,

Plaintiff,

v.

FORNOS CORP., *et al*.,

Defendants.
_____/

ORDER ON DEFENDANTS' MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE is before the Court upon that Defendants Fornos Corp. and Marcelino Francos' Motion for Final Summary Judgment, D.E. 28 (the "Motion"). The Court has reviewed the Motion and the pertinent portions of the record and is otherwise fully advised of the premises. For the reasons discussed below, the Motion is GRANTED.

I. Procedural Background

On February 21, 2019, Plaintiff commenced this action on behalf of himself and others similarly situated, alleging that Defendants Fornos Corp. d/b/a El Gallegazo Restaurant (the "Restaurant") and Marcelino Francos ("Francos") (collectively, "Defendants") failed to pay Plaintiff and those similarly situated overtime wages at the rate of time and a half of their regular rates, in violation of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (the "FLSA"). D.E. 1. Plaintiff also alleges that Defendants terminated his employment in retaliation for protected activity under the FLSA. *Id.* According to his amended Statement of Claim, Plaintiff is owed a total amount of $19,980.60 (representing $9,990.30 unliquidated damages and $9,990.30 liquidated damages) for unpaid overtime and lost wages, as well as a reasonable amount of attorney's fees and costs. D.E. 24.

On April 11, 2019, the Court entered its Scheduling Order for Pretrial Conference and Trial, requiring that the parties file their pretrial motions, including summary judgment motions, by August 30, 2019. D.E. 14. On August 22, 2019, Defendants filed the instant Motion for Summary Judgment. Pursuant to Local Rule 7.1(c), Plaintiff's response was due on September 5, 2019. As of the date of this Order, Plaintiff has not responded.

II. Factual Background

The Court cannot grant summary judgment solely by virtue of a party's default. *United States v. One Piece of Property, 5800 S.W. 4th Ave., Miami, Florida*, 363 F.3d 1101 (11th Cir. 2004) ("[t]he district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed but, rather, must consider the merits of the motion."). However, the Court may take the moving party's statement of material facts as admitted pursuant to Local Rule 56.1(b):

> **Effect of Failure to Controvert Statement of Undisputed Facts.** All material facts set forth in the movant's statement filed and supported as required above will be deemed admitted unless controverted by the opposing party's statement, provided that the Court finds that the movant's statement is supported by evidence in the record.

Local Rule 56.1(b). Accordingly, as Defendants' statement of material facts is supported by facts in the record, *see* Mot. at 2–4 & Ex. 1–2, the Court deems Defendants' statement of material facts as admitted. *See id.* As the facts are uncontroverted, the Court does not recite them in full here, but a brief summary of the facts is as follows.

As to his overtime claims, Plaintiff alleges that he was employed at the Restaurant from February 2014 through February 14, 2019. Mot. at 2 ¶ 1; D.E. 1 ¶ 8. The relevant three-year statutory period is for the years 2016 through 2019. Mot. at 2 ¶ 1; D.E. 1 ¶ 21. First, Defendants swear that the Restaurant is not an enterprise engaged in commerce within the meaning of the FLSA because the Restaurant's gross revenues fall below the $500,000 jurisdictional threshold. *See* Mot. at 2–3 ¶¶ 2–8 & Ex. 1. Specifically, the Restaurant's revenues were all—with the

exception of a "minor amount of cash"—deposited into a Continental National Bank account, which reflects the following gross revenues: (1) $363,283.52 for the year 2016; (2) $329,891.31 for the year 2017; (3) $371,077.31 for the year 2018; and (4) $205,746.96 for the first two quarters of 2019. *Id.* at 2 ¶¶ 4–5 & Ex. 1. If added to the bank account deposits, the "minor amount of cash" still would not increase the Restaurant's revenues to $500,000.00. *Id.* at 2 ¶ 4 & Ex. 1. Plaintiff's sole knowledge of Defendants' gross sales revenues is based on his overhearing a cashier (possibly a manager) stating that the gross sales for one weekend, Friday and Saturday, were $3,700.00, and his knowledge that sales would drop on a Sunday; this speculation does not support a finding that the Restaurant's annual gross sales were jurisdictionally sufficient. *Id.* at 3 ¶¶ 6–7 & Ex. 2. In sum, Plaintiff could not possibly offer at trial any evidence to establish that the Restaurant grossed $500,000.00 per year or more. *See id.* at 3 ¶¶ 6–8 & Ex. 2. Second, Plaintiff alleges that he is individually covered because, as a cook, he "regularly handled and worked on goods and materials that were produced for commerce and moved across State lines at any time in the course of business." Mot. at 4 ¶ 9; D.E. 1 ¶ 23.

As to his retaliation claims, Plaintiff alleges that the first time he asked Francos to pay him overtime wages was in 2017. Mot. at 4 ¶ 10 & Ex. 2. At that time, Plaintiff demanded that Francos either pay him more (i.e., give him a raise) or start paying him overtime. *Id.* Francos gave Plaintiff a raise, and Plaintiff thereafter continued to request overtime pay. *See id.* Plaintiff alleges that his employment was terminated on February 14, 2019, after having asked the previous Sunday (February 10, 2019) for overtime pay and having been told no because he was already given a raise. *See id.* at 4 ¶ 11 & Ex. 2. In fact, Plaintiff's employment was terminated because he was stealing food supplies from the restaurant. *Id.* at 4 ¶ 12 & Ex. 1.

III. Legal Standard

Summary judgment is authorized only when the moving party meets its burden of demonstrating that "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. When determining whether the moving party has met this burden, the Court must view the evidence and all factual inferences in the light most favorable to the non-moving party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rojas v. Florida*, 285 F.3d 1339, 1341-42 (11th Cir. 2002).

The party opposing the motion may not simply rest upon mere allegations or denials of the pleadings; after the moving party has met its burden of proving that no genuine issue of material fact exists, the non-moving party must make a showing sufficient to establish the existence of an essential element of that party's case and on which that party will bear the burden of proof at trial." *See Celotex Corp. v. Catrell*, 477 U.S. 317 (1986); *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997); *Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir. 1989).

If the record presents factual issues, the Court must not decide them; it must deny the motion and proceed to trial. *Envntl. Def. Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co. v. Cont'l Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969). If reasonable minds might differ on the inferences arising from undisputed facts, then the Court should deny summary judgment. *Impossible Elec. Techs., Inc. v. Wackenhut Protective Sys., Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[T]he dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

Moreover, the party opposing a motion for summary judgment need not respond to it with evidence unless and until the movant has properly supported the motion with sufficient evidence. *Adickes*, 398 U.S. at 160. The moving party must demonstrate that the facts underlying the relevant legal questions raised by the pleadings or are not otherwise in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 611-12 (5th Cir. 1967). The Court must resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party. *Liberty Lobby, Inc.*, 477 U.S. at 255.

IV. Discussion

A. Count I – Overtime Wages

Under the FLSA, "an employer is required to pay overtime compensation if the employee can establish enterprise coverage or individual coverage." *Thorne v. All Restoration Servs., Inc.*, 448 F.3d 1264, 1265–166 (11th Cir. 2006) (footnote omitted). The text of the FLSA provides that "no employer shall employ any of his employees who…is engaged in commerce or in the production of goods for commerce" (individual coverage) or who "is employed in an enterprise engaged in commerce or in the production of goods for commerce" (enterprise coverage) "for a workweek longer than forty hours unless such employee receives" overtime pay at a rate of at least one-and-one-half times his regular rate. 29 U.S.C. § 207(a); *see also Guzman v. Irmadan, Inc.*, 551 F. Supp. 2d 1368, 1370 (S.D. Fla. 2008), *aff'd*, 322 F. App'x 644 (11th Cir. 2009). Plaintiff bears the burden of establishing coverage. *See, e.g., Solano v. A Navas Party Production, Inc.*, No. 09-22847-CIV, 2011 WL 98819, at *6 (S.D. Fla. Jan. 12, 2011).

For enterprise coverage, an "enterprise engaged in commerce or in the production of goods for commerce" is defined as an enterprise that "has employees engaged in commerce or in the

production of goods for commerce" and "whose annual gross volume of sales made or business done is not less than $500,000…." 29 U.S.C. § 203(s)(1)(A); *see also Guzman*, 551 F. Supp. 2d at 1370. Here, the evidence supporting Defendants' uncontroverted statement of material facts shows that, at all relevant times, Defendants had less than $500,000.00 in annual gross volume of sales made or business done. *See* Mot. at 2–3 ¶¶ 1–8 & Exs. 1–2. Plaintiff thus has not shown and cannot show that he is entitled to enterprise coverage.

For individual coverage, an employee is "engaged in commerce" only if he is "directly participating in the actual movement of persons or things in interstate commerce by (i) working for an instrumentality of interstate commerce, *e.g.*, transportation or communication industry employees, or (ii) by regularly using the instrumentalities of interstate commerce in his work, *e.g.*, regular and recurrent use of interstate telephone, telegraph, mails, or travel." *Thorne*, 448 F.3d at 1266 (citing *McLeod v. Threlkeld*, 319 U.S. 491, 497 (1943); 29 C.F.R. § 776.23(d)(2) (2005); 29 C.F.R. § 776.24 (2005)). And an employee is "engaged…in the production of goods for commerce" if his "work is closely related and directly essential to the production of goods for commerce." *Id.* at 1268 (citing 29 C.F.R. § 776.18 (2005)).

Plaintiff here was a cook in the local Restaurant. Mot. at 4 ¶ 9; D.E. 1 ¶¶ 9, 23. Courts routinely reject the claim that local restaurant cooks are individually covered as "engage[d] in commerce or in the production of goods for commerce." *See, e.g.*, *McLeod*, 319 U.S. at 493; *Martinez v. Jade Palace*, 414 F. App'x 243, 244–47 (11th Cir. 2011); *Martin v. Briceno*, No. 11-23228-CIV, 2014 WL 2587484, at *1, *3–4 (S.D. Fla. June 10, 2014); *Monelus v. Tocodrian, Inc.*, 598 F. Supp. 2d 1312, 1314–15 (S.D. Fla. 2008); *Casseus v. First Eagle, L.L.C.*, No. 07-23228-CIV, 2008 WL 1782363, at *4–5 (S.D. Fla. Apr. 18, 2008); *Lopez v. Top Chef Inv., Inc.*, No. 07-

21598-CIV, 2007 WL 4247646, at *2 (S.D. Fla. Nov. 30, 2007). Thus, Plaintiff has not shown and cannot show that he is entitled to individual coverage.

Because the uncontroverted statement of material facts and supporting evidence show that Plaintiff can neither establish enterprise coverage nor individual coverage, Plaintiff cannot show that he was entitled to any overtime payments. Defendants are entitled to summary judgment in their favor on Count I.

B. Count II - Retaliation

The FLSA prohibits an employer from discharging or in any other manner discriminating against any employee because he has asserted his rights under the FLSA. *See* 29 U.S.C. § 215(a)(3). A *prima facie* case of FLSA retaliation requires the plaintiff-employee to prove: (1) he engaged in protected activity, (2) he subsequently suffered adverse action by the employer, and (3) a causal connection existed between the employee's activity and the adverse action. *Wolf v. Coca-Cola Co.*, 200 F.3d 1337, 1342–43 (11th Cir. 2000). "If the employer asserts a legitimate reason for the adverse action, the plaintiff may attempt to show pretext." *Id.* at 1343. "In demonstrating causation, the plaintiff must prove that the adverse action would not have been taken 'but for' the assertion of FLSA rights." *Id.*

The unrefuted evidence here shows that Plaintiff cannot establish a *prima facie* FLSA retaliation claim. First, there is too great a temporal gap between when Plaintiff first asserted his alleged FLSA overtime rights and when he was terminated. *See, e.g., Raspanti v. Four Amigos Travel, Inc.*, 266 F. App'x 820, 822–23 (11th Cir. 2008) (noting that a FLSA retaliation plaintiff could establish causation based on a "close temporal proximity" between protected activity and termination, but holding that termination seven months and three weeks after employer received notice of protected activity was not sufficiently close). Plaintiff first sought overtime pay in 2017

but was not terminated until February 14, 2019. *See* Mot. at 4 ¶¶ 10–11 & Ex. 2. This two-year gap cannot demonstrate "but for" causation.

Moreover, Plaintiff's demand for either overtime pay or a raise, *see id.*, is too vague to satisfy the "protected expression" element. *Cf. Alvarado v. I.G.W.T. Delivery Sys., Inc.*, 410 F. Supp. 2d 1272, 1278–79 (S.D. Fla. 2006) (signing letters agreeing to work on a fixed salary and not receive overtime compensation not a "protected activity" because employees did not clearly assert rights under the FLSA).

Finally, even if Plaintiff could establish a *prima facie* case of retaliation, Defendants have shown a legitimate reason for Plaintiff's termination: his theft of food supplies from the Restaurant. *See* Mot. at 4 ¶ 12 & Ex. 1. This legitimate reason is undisputed by Plaintiff. Plaintiff has not shown and cannot show pretext.

For all of these reasons, summary judgment in favor of Defendants is warranted for on Count II.

V. Conclusion

Deeming Defendants' statement of material facts as admitted and having reviewed the Record and the merits of Defendants' Motion, the Court finds that, for the reasons discussed *supra*, Defendants are entitled to summary judgment. Accordingly, it is

ORDERED AND ADJUDGED that Defendants Fornos Corp. and Marcelino Francos' Motion for Final Summary Judgment, D.E. 28, is GRANTED. The Court will separately enter final judgment. It is further

ORDERED AND ADJUDGED that the case is DISMISSED WITH PREJUDICE. The Clerk of Court SHALL administratively close this case. All future hearings are CANCELLED and all pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this _6th__ day of September, 2019.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

cc: counsel of record