disfavored penalty; the FLSA creates a strong presumption in favor of doubling, a presumption overcome only by an employer's affirmative showing by "plain and substantial" evidence, both subjective good faith and objective reasonableness. *Id.*

An employer's showing that its FLSA violation was not purposeful is insufficient to establish that it acted in good faith. *Id.* Nor is good faith demonstrated by the absence of complaints on the part of employees or conformity with industry-wide practice. *Id.*, *Wilamowsky*, 833 F.2d at 19-20. "Industry custom" is not a defense to liquidated damages *SNET*, 121 F.3d at 71. Moreover, industry custom may be attributable to nothing more than "widespread evasion of labor laws." *Ling Nan Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 74 (2d Cir. 2003).

B. Defendants Cannot Establish a Good Faith/Reasonable Belief that their Pay Policies Comply with the FLSA

A full year after Judge Sifton awarded summary judgment that Harry's home care nurses were entitled to time and a half for overtime, Harry's continued to pay straight time for overtime hours. *E.g.*, Ex. 3 (Burke-Hylton) at 53-98; Ex. 3 (Bhola) at 20-23. It is respectfully submitted that such defiance precludes a showing of good faith.

As noted in Judge Sifton's Order, Dkt. No. 53, defendants' business model is substantially identical to that of the defendant in *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988). *Superior Care* is the leading authority in this Circuit on the independent contractor/employee distinction generally and in the nursing industry particularly. Its holdings have been repeatedly reaffirmed and endorsed in the last 22 years (*e.g. Chao v. Gotham*

Registry, Inc., 514 F.3d 280 (2d Cir. 2008)). In other words, the law is well settled. Defendants cannot possibly establish that their belief – that home care nurses are not entitled to overtime – is reasonable.

Conclusion

For the foregoing reasons, plaintiffs respectfully request that this Court issue an Order granting them summary judgment on damages, ordering defendants to pay them $370,183.95 and an equal amount as liquidated damages and granting such other and further relief as to this Court may seem just, fair and equitable.

Dated: New York, New York
June 25, 2010

Respectfully submitted,

_____/s/_______________________

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Tel: (212) 371-0033
Attorneys for Plaintiff

To: Robert Schirtzer, Esq.
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Attorneys for Defendants
(718) 261-2400

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA GAYLE, Individually, On Behalf of All Others Similarly Situated and as Class Representative,

Plaintiff,

- against -

HARRY'S NURSES REGISTRY, INC., and HARRY DORVILIER a/k/a HARRY DORVILIEN,

Defendants.

07 Civ. 4672 (CPS) (KAM)

AFFIDAVIT

STATE OF NEW YORK)
) ss:
COUNTY OF)

CLAUDIA GAYLE, being duly sworn, deposes and says:

1. I am the plaintiff in this action. I make and submit this affidavit in opposition to defendant's motion for summary judgment and in support of my cross-motion to authorize notice of the action. I have personal knowledge of all facts stated in this affidavit.

2. I was employed by defendants as a licensed practical nurse from February 2007 until November 2007.

3. When I was employed by Harry's as a field nurse, I did not receive time and a half for overtime hours worked. This is because Harry's treated me as an independent contractor. Harry's required me to execute an memorandum of agreement stating that I was an independent contractor.

4. I am not, and never have been, in business for myself. I have no business cards, have never advertised, and have never solicited a patient directly. I am entirely dependent upon

referrals from Harry's and similar placement agencies.

5. Harry's paid me in my own name. That is, I received my compensation from Harry's directly. I did not form a corporation or other business entity for the provision of nursing services, either during the time I worked for Harry's or before or after that time.

6. Harry's required me to obtain malpractice insurance, but none of the nursing jobs I have ever had has required professional liability insurance.

7. I believe that all of the field nurses employed by defendants are paid as described in above, and I am informed that Harry Dorvilier has so testified. I have been informed that this pay practice is unlawful.

8. I believe that most of the field nurses employed by defendants are unaware that the pay practice is unlawful, that many, if not most, of them, lack the resources to hire private counsel to prosecute a lawsuit on their behalf and that, if given the opportunity, they would opt in to the above-captioned lawsuit.

9. Having been informed by counsel that a different legal standard applies to determinations of employee status under the Fair Labor Standards Act and New York Labor Law determinations of whether workers' compensation premiums may lawfully be charged to employees, I now consent to the dismissal of the Fourth Cause of Action set forth in my Complaint.

____
Claudia Gayle

Sworn to before me
this __ day of August, 2008

____
Notary Public

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA GAYLE, Individually, On Behalf of All Others Similarly Situated and as Class Representative,

Plaintiff,

- against -

HARRY'S NURSES REGISTRY, INC., and HARRY DORVILIER a/k/a HARRY DORVILIEN,

Defendants.

07 Civ. 4672 (CPS) (KAM)

AFFIDAVIT

STATE OF NEW YORK)
) ss:
COUNTY OF)

PATRICIA ROBINSON, being duly sworn, deposes and says:

1. On or about March 24, 2008, I caused to be filed with this court a consent to join this action for unpaid overtime premium pay. I make and submit this affidavit in opposition to defendant's motion for summary judgment and in support of Claudia Gayle's cross-motion to authorize notice of the action. I have personal knowledge of all facts stated in this affidavit.

2. I was employed by defendants as a licensed practical nurse and registered nurse for approximately 2 ½ years ending in early 2008. I was paid at different hourly rates depending on whether I was doing LPN work or RN work.

3. When I was employed by Harry's as a field nurse, I did not receive time and a half for overtime hours worked. This is because Harry's treated me as an independent contractor. Harry's required me to execute an memorandum of agreement stating that I was an independent contractor.

4. I am not, and never have been, in business for myself. I have no business cards, have never advertised, and have never solicited a patient directly. I am entirely dependent upon referrals from Harry's and similar placement agencies.

5. Harry's paid me in my own name. That is, I received my compensation from Harry's directly. I did not form a corporation or other business entity for the provision of nursing services, either during the time I worked for Harry's or before or after that time.

6. Harry's required me to obtain malpractice insurance, but none of the nursing jobs I have ever had has required professional liability insurance.

7. I believe that all of the field nurses employed by defendants are paid as described in above, and I am informed that Harry Dorvilier has so testified. I have been informed that this pay practice is unlawful.

8. I believe that most of the field nurses employed by defendants are unaware that the pay practice is unlawful, that many, if not most, of them, lack the resources to hire private counsel to prosecute a lawsuit on their behalf and that, if given the opportunity, they would opt in to the above-captioned lawsuit.

____
Patricia Robinson

Sworn to before me
this __ day of August, 2008

____
Notary Public

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-------------------------------------x

CLAUDIA GAYLE, Individually, On Behalf of All Others Similarly Situated and as Class Representative,

Plaintiff,

- against -

HARRY'S NURSES REGISTRY, INC., and HARRY DORVILIER a/k/a HARRY DORVILIEN,

Defendants.

-------------------------------------x

07 Civ. 4672 (CPS) (KAM)

AFFIDAVIT

STATE OF NEW YORK)
) ss:
COUNTY OF BRONX)

~~CHERILYNN~~ Cherrline WILLIAMS-WEST, being duly sworn, deposes and says:

1. I am a registered nurse. I was employed as a nursing supervisor by Harry's Nurses Registry, Inc. ("Harry's"), for approximately one year ending November 2007. During the period of my employment, my job duties and responsibilities included monitoring the patients and the nurses (both licensed practical nurses and registered nurses) placed by Harry's in their homes.

2. Within 90 days of the time that a nurse was placed in service by Harry's, I (or another of the nursing supervisors employed by Harry's) would go into the field, that is, to the home of the patient. While there, I would observe and assess the nurse's skills, for example, hand washing (because many patients breathe through ventilators and are fed through gastric tubes, the nurse's hand washing is of paramount importance). I would also check the book of doctor's orders relating to the patient, to make sure the orders with respect to medication and dosage were up-to-date. Nurses who had been in service for extended periods would receive

supervision of this kind every 6 months. I, or one of my colleagues, would also perform an assessment of this kind within 48 hours of the time that Harry's began to care for a patient.

3. During my employment at Harry's, I was also responsible for documentation, that is, review of assessments performed by nurses in the field. For example, I would work with the nurse by teaching her how to do a proper head-to-toe assessment of the patient, including such things as mental capacity, heart rate, condition of tracheotomy, sound of lungs, with a focus on the condition being treated. I would also talk to the nurses about such things as infection control and legal issues in nursing. On occasion, I would be accompanied on these in-service assessments by vendors of medical equipment (e.g., ventilators) or their technicians so that I could better instruct the nurses on the use of equipment. These monthly assessments typically lasted 4-5 hours. That is, each month, I (or another nursing supervisor) would spend 4-5 hours in the field with each nurse placed in service by Harry's.

~~Cherilynn~~ Williams-West
Cherilmi

Sworn to before me
this 13th day of ~~July~~ August, 2008

Notary Public

HEICHA ORTIZ
Notary Public - State of New York
NO. 01OR6187551
Qualified in Bronx County
My Commission Expires 5/16/2012

594 Fed.Appx. 714
This case was not selected for
publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals,
Second Circuit.

Claudia GAYLE, Individually, On Behalf of All Others Similarly Situated, and as Class Representative, Aline Antenor, Anne C. Depasquale, Annabel Llewellynhenry, Eva Myers–Granger, Lindon Morrison, Natalie Rodriguez, Jacqueline Ward, Dupont Bayas, Carol P. Clunie, Ramdeo Chankar Singh, Christaline Pierre, Lemonia Smith, Barbara Tull, Henrick Ledain, Merika Paris, Edith Mukandi, Martha Ogunjana, Merlyn Patterson, Alexander Gumbs, Serojnie Bhog, Genevieve Barbot, Carole Moore, Raquel Francis, Marie Michelle Gervil, Nadette Miller, Paulette Miller, Bendy Pierre–Joseph, Rose–Marie Zephirin, Sulaiman Ali–El, Debbie Ann Bromfield, Rebecca Pile, Maria Garcia Shands, Angela Collins, Brenda Lewis, Soucianne Querette, Sussan Ajiboye, Jane Burke Hylton, Willie Evans, Pauline Gray, Eviarna Toussaint, Geraldine Joazard, Niseekah Y. Evans, Getty Rocourt, Catherine Modeste, Marguerite L. Bhola, Yolanda Robinson, Karlifa Small, Joan–Ann R. Johnson, Lena Thompson, Mary A. Davis, Nathalie Francois, Anthony Headlam, David Edward Levy, Maud Samedi, Bernice Sankar, Marlene Hyman, Lucille Hamilton, Patricia Robinson, Plaintiffs–Appellees,

v.

HARRY'S NURSES REGISTRY, INC.,
Harry Dorvilien, Defendants–Appellants.*

No. 12–4764–cv.
|
Dec. 8, 2014.

Synopsis

Background: Employer appealed decisions of the United States District Court for the Eastern District of New York, at 2009 WL 605790 and 2010 WL 5477727, Garaufis, J., and Sifton, J., which granted nurses summary judgment on their unpaid overtime class action claims under the Fair Labor Standards Act (FLSA).

Holdings: The Court of Appeals held that:

[1] nurses were employees, rather than independent contractors, for purposes of overtime under FLSA;

[2] nurses did not perform companionship services so as to fall within exemption to FLSA; and

[3] state investigator's decision not to pursue nurse's complaint for failure to pay overtime was not a "full adjudication on the merits" for purposes of collateral estoppel.

Affirmed.

West Headnotes (4)

[1] **Labor and Employment**
Persons in particular employments

Nurses working for health-care service engaged in providing nurses to individuals, hospitals, and nursing homes were "employees" of the service, rather than "independent contractors," and thus, were

protected by FLSA, even though nurses were transient work force and service's supervisory visits to jobsites were infrequent; nurses had no opportunity for profit or loss, their investment in business was negligible, they provided most integral part of service's operation, their hourly rate was fixed, and service exercised substantial control over manner and conditions of their work. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

1 Cases that cite this headnote

[2] **Labor and Employment**
Domestic or companionship services

Registered nurses (RN) and licensed practical nurses (LPN) did not perform "companionship services," so as to fall within exemption to FLSA overtime provision for domestic companionship workers, but instead, provided home healthcare aid to individuals and nursing home residents. Fair Labor Standards Act of 1938, § 1, 29 U.S.C.A. § 201; 29 C.F.R. § 552.6.

Cases that cite this headnote

[3] **Labor and Employment**
Liquidated Damages

Nurses' failure to argue that their employer willfully violated FLSA had no bearing on the propriety of liquidated-damages awarded by district court in nurses' class action against employer seeking unpaid overtime. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

6 Cases that cite this headnote

[4] **Labor and Employment**
Investigations in general

New York State Department of Labor investigator's decision not to pursue nurse's complaint against employer alleging failure to pay overtime wages, was not a "full adjudication on the merits," as required for collateral estoppel to apply in nurses' later class action against employer seeking overtime wages pursuant to FLSA. Fair Labor Standards Act of 1938, § 1, 29 U.S.C.A. § 201.

1 Cases that cite this headnote

***716** Appeal from the United States District Court for the Eastern District of New York (Garaufis, J. and Sifton, J.).

ON CONSIDERATION WHEREOF, it is hereby **ORDERED, ADJUDGED,** and **DECREED** that the orders and judgment of the district court be and hereby are **AFFIRMED.**

Attorneys and Law Firms

Jonathan Adam Bernstein, Levy Davis & Maher LLP, New York, NY, for Plaintiffs–Appellees.

Raymond Nardo, Mineola, N.Y. (Mitchell L. Perry, White Plains, NY, on the brief), for Defendants–Appellants.

PRESENT: ROBERT A. KATZMANN, Chief Judge, RALPH K. WINTER, Circuit Judge, VICTOR MARRERO, District Judge. **

SUMMARY ORDER

Defendants–Appellants Harry's Nurses Registry, Inc. ("Harry's") and Harry Dorvilien appeal from a September 18, 2012 judgment of the United States District Court for the Eastern District of New York (Garaufis, *J.*), which followed four orders (Garaufis, *J.* and Sifton, *J.*) that culminated in a grant of summary judgment to the plaintiff class on their unpaid overtime claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201–219. A fifth order (Garaufis, *J.*) adopted in full a magistrate judge's report and recommendation to

correct the judgment and grant attorneys' fees, yielding an amended judgment dated October 16, 2013. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

We review de novo a district court's grant of summary judgment, resolving all ambiguities and drawing all reasonable inferences in favor of the non-moving party. *See* *Wrobel v. Cnty. of Erie,* 692 F.3d 22, 27 (2d Cir.2012). Summary judgment is appropriate only where "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." Fed.R.Civ.P. 56(a); *see also* *Celotex Corp. v.* *717 *Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The appellants' principal contention is that the district court erred in determining that the nurses listed and placed by Harry's were employees rather than independent contractors. We find that the district court was correct. Whether a worker is treated as an employee or an independent contractor under FLSA is determined not by contractual formalism but by "economic realities." *See* *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 727, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947) (internal quotation marks omitted). Our analysis of the relationship turns on the economic-reality test, which weighs

> (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.

Brock v. Superior Care, Inc., 840 F.2d 1054, 1058–59 (2d Cir.1988). "No one of these factors is dispositive; rather, the test is based on a totality of the circumstances." *Id.* at 1059.

[1] The relationship between Harry's and the nurses who are plaintiffs here is nearly indistinguishable from the relationship between Superior Care and the plaintiffs in *Brock,* whom we held to be employees under FLSA. *See* *id.* at 1057–58. The district court here explored the first factor at length, finding that Harry's exercises significant control over the nurses, both economically and professionally. We agree. Indicia of economic control present here include Harry's policies that: prohibit a nurse from contracting independently with placements, although its nurses may be listed with other agencies; prohibit a nurse from subcontracting a shift to another nurse; prohibit a nurse from taking a partial shift, although a nurse may decline a whole shift; and prohibit a nurse who is unilaterally terminated from collecting contract damages, expectation damages, or liquidated damages, permitting only unpaid wages as damages. Furthermore, the hourly rate paid is not negotiated but is fixed by Harry's. Indicia of professional control present here include: the work of Harry's nursing director and nursing supervisors, who monitor the nurses' daily phone calls reporting to shifts, collect documents and conduct on-site training four to five hours each month, communicate with doctors to ensure that their prescribed care is being carried out, and handle emergencies; the ability of a nursing supervisor to require a nurse to attend continuing education to maintain their licenses; an in-service manual that nurses had to certify having read and understood; training by Harry's covering HIV confidentiality, ventilators, oxygen, and other medical subjects; and a requirement that each shift include a comprehensive assessment of the patient in the form "progress notes," which nurses had to submit to get paid.

Another critical factor is that the nurses have no opportunity for profit or loss whatsoever; they earn only an hourly wage for their labor and have no downside exposure. The nurses have no business cards, advertisements, or incorporated vehicle for contracting with Harry's, and they are paid promptly regardless of whether the insurance carrier pays Harry's promptly. We agree with the district court that this second factor weighs heavily in favor of the nurses' status as

employees. That the nurses are skilled workers in a transient workforce "reflects the nature of their profession and not their success *718 in marketing their skills independently." *Id.* at 1061. Finally, the appellants cavil that the nurses are not integral to Harry's Nurses Registry, notwithstanding that "Nurses" is—literally—Harry's middle name. But placing nurses accounts for Harry's only income; the nurses are not just an integral part but the sine qua non of Harry's business. Considering all these circumstances, we agree with the district court that these nurses are, as a matter of economic reality, employees and not independent contractors of Harry's.

[2] The remainder of the appellants' arguments merit less discussion. First, Harry's again fights its name by arguing that its nurses were not nurses but instead home health aides and were therefore unprotected by FLSA because of its exemption for domestic companionship workers. *See* *Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 161–62, 127 S.Ct. 2339, 168 L.Ed.2d 54 (2007). Having not been raised in the district court, this affirmative defense is waived on appeal, *see* *Saks v. Franklin Covey Co.,* 316 F.3d 337, 350 (2d Cir.2003), but it is also wrong: The plaintiffs are all registered nurses (RNs) or licensed practical nurses (LPNs) who do not perform a "companionship service" within the meaning of the exemption at issue. *See* 29 C.F.R. § 552.6 ("The term 'companionship services' does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse."). A related argument advanced by the appellants is that the nurses are not covered by FLSA because they do not meet the threshold requirement of having performed overtime "work," having often left jobs at hospitals caring for 40 patients to now care only for one patient in a home, a "97.5% reduction in task responsibility." Appellants' Br. 43. This argument does violence to the dictionary definition of work as well as to the dignity of nurses, and we reject it emphatically.

[3] Second, the appellants misunderstand FLSA's liquidated damages provision, which presumptively awards "an additional equal amount as liquidated damages," 29 U.S.C. § 216(b), but provides for an affirmative defense in the event that a liable defendant had a reasonable, good-faith belief of compliance. *See* *Brock v. Wilamowsky,* 833 F.2d 11, 19 (2d Cir.1987) ("Double damages are the norm, single damages the exception." (internal quotation marks and alteration omitted)). The defendants failed to carry their "difficult" burden to prove this affirmative defense; the nurses' failure to argue that defendants willfully violated FLSA has no bearing on the entirely proper liquidated-damages award. *Id.*

Third, the appellants suggest that the class of nurses should be decertified because its members lack commonality. This argument contains no citation to the record, and it is unpersuasive in any event. The district court found commonality among the class based on affidavits from some but not all of its members, the kind of "sensible" approach that we endorsed in *Myers v. Hertz Corp.,* 624 F.3d 537, 554–55 (2d Cir.2010). Using affidavits from five of the thirty-five class members whose time records demonstrated overtime violations was well within the bounds of reason and practicality. *See* *Reich v. S. New England Telecomms. Corp.,* 121 F.3d 58, 67 (2d Cir.1997). The defendants took no discovery directed at commonality, which accounts for the appellants' lack of citations to the record and leaves us without a basis on which to disturb the district court's initial finding of commonality.

The appellants' fourth subsidiary argument is that the New York State Public Health Law should govern the outcome *719 because Harry's is governed by Article 36 whereas Superior Care was governed by Article 28. But state law does not trump FLSA, which permits states and localities to exceed its protections with higher minimum wages or lower maximum workweeks but not to weaken its protections in the other direction. *See* 29 U.S.C. § 218(a).

[4] A fifth and final quibble that we discuss arose in the appellants' reply brief concerning one plaintiff, Willie Evans, who had lodged an unsuccessful complaint alleging overtime violations with the New York State Department of Labor. This argument was not adequately presented in the appellants' opening brief, which cited Evans as

an example but made no argument concerning collateral estoppel. *See* *Norton v. Sam's Club,* 145 F.3d 114, 117 (2d Cir.1998). And its merits fail in any event—an investigator declined to pursue Evans's complaint, but that is far different from the full adjudication on the merits required for collateral estoppel. *See* *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 106, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991).

We have considered the appellants' remaining arguments and find them to be without merit. For the reasons stated herein, the judgment of the district court is **AFFIRMED.**

All Citations

594 Fed.Appx. 714, 165 Lab.Cas. P 36,294, 23 Wage & Hour Cas.2d (BNA) 1635

Footnotes

* The Clerk of Court is directed to amend the caption.

** Hon. Victor Marrero, United States District Judge for the Southern District of New York, sitting by designation.

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840 F.2d 1054

28 Wage & Hour Cas. (BN 1016, 28 Wage & Hour

Cas. (BN 801,

28 Wage & Hour Cas. (BN 940, 56 USLW 2475,

108 Lab.Cas. P 35,029, 108 Lab.Cas. P 35,053

William E. BROCK, Secretary of Labor, United States

Department of Labor, Plantiff-Appellee,

v.

SUPERIOR CARE, INC.; National Nursing Services, Inc.; Ann

T. Mittasch, Individually and as President; and

Robert M. Rubin, Individually and as

Secretary and Treasurer,

Defendants-Appellants.

No. 407, Docket 87-6195.

United States Court of Appeals,

Second Circuit.

Argued Dec. 1, 1987.

Decided Feb. 16, 1988.

Opinion on Motion to Clarify April 5, 1988.

1

Defendant Superior Care, Inc., two of its officers, and its wholly owned subsidiary (collectively "Superior Care") appeal from a judgment of the District Court for the Eastern District of New York (Leonard D. Wexler, Judge), entered after a bench trial, enjoining it from violating the record-keeping and overtime pay provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. Secs. 207, 211(c), 215(a)(2), and 215(a)(5) (1982 & Supp. III 1985), and awarding liquidated damages. Superior Care is a health-care service that provides nurses to individuals, hospitals, and nursing homes. The District Court found that the nurses were "employees" subject to the FLSA and that the defendants' violations were willful for purposes of the three-year statute of limitations. The Court enjoined Superior Care from withholding $697,140.66 of unpaid overtime compensation and awarded an equal amount as statutory liquidated damages. We agree with the District Court that the nurses are employees covered by the FLSA and that Superior Care's violations of the Act were willful. However, we conclude that the Secretary may not collect liquidated damages because the Secretary did not bring this action under the provision authorizing such damages.

BACKGROUND

2

Superior Care is a New York corporation engaged in the business of referring temporary health-care personnel, primarily nurses, to individual patients, hospitals, nursing homes, and other health care institutions. Nurses who wish to work for Superior Care are interviewed and placed on a roster. As work opportunities become available, Superior Care assigns nurses from the list. The nurses are free to decline a proposed referral for any reason. Once an assignment is accepted, the nurse reports directly to the patient, where treatment is prescribed by the patient's physician. Superior Care supervises its nurses through visits to the job sites once or twice a month. Nurses are also required to submit to Superior Care patient care notes that the nurses keep pursuant to state and federal law. The length of a particular assignment depends primarily upon the patient's condition and may vary from less than a week to several months.

3

Patients contract directly with Superior Care, not with the nurses, and the nurses are prohibited from entering into private pay arrangements with the patients. The nurses are paid an hourly wage by Superior Care. Most of the time, the hourly wage is set by Superior Care, depending on the market conditions in the local geographic area. Occasionally, if an assignment involves special patient treatment or an inconvenient location, nurses may be able to negotiate a pay rate just for that job. Superior Care permits its nurses to hold other jobs, including positions with other nursing-care providers. Many of the nurses take advantage of this opportunity and are listed with several health-care providers simultaneously. Thus, many of the nurses work for Superior Care only several weeks a year, and few rely on Superior Care for their primary source of income.

4

During the relevant time periods, Superior Care maintained two payrolls for its nursing staff. One payroll included nurses for whom employee payroll taxes were deducted ("taxed nurses"), and the other payroll included nurses for whom no payroll taxes were deducted ("nontaxed nurses"). Superior Care considered the taxed nurses to be employees and did not permit them to work overtime. The

nontaxed nurses were permitted to work overtime, but they were considered to be independent contractors and consequently were not paid time and a half for overtime hours. The determination whether a nurse appeared on the taxed or nontaxed payroll was usually made unilaterally by Superior Care or, at times, at a nurse's request. The parties stipulated that the two sets of nurses perform exactly the same work.

5

Superior Care was first investigated by the Department of Labor in 1979 at which time no FLSA violations were found. In February 1980 and January 1981, additional investigations were conducted, overtime violations were discovered, and Superior Care agreed to pay approximately $32,000 in back wages and to comply with the FLSA in the future. Richard Mormile, the Department of Labor compliance officer who conducted the 1980 and 1981 investigations, testified that during those investigations he was shown the records of only the taxed employee nurses. Superior Care inquired of Mormile whether the taxed nurses could be treated as independent contractors rather than employees. Mormile advised that the nurses were employees. He suggested that if Superior Care disagreed, it could obtain a formal opinion on the matter from the Department of Labor's Regional Solicitor's office. Superior Care never sought such an opinion.

6

The existence of the two separate payrolls was discovered during a subsequent investigation conducted from November of 1981 until mid-1982. During this investigation, Mormile learned that several hundred nontaxed nurses were being paid straight-time wages for overtime hours. On the basis of this investigation, the Secretary of Labor initiated the present suit. The Secretary's complaint alleged jurisdiction under section 17 of the FLSA, 29 U.S.C. Sec. 217, and asked for an injunction restraining Superior Care from withholding the unpaid overtime wages. The complaint also alluded to the possibility of liquidated damages, although it did not mention section 16 of the Act, which authorizes such a remedy.

7

The District Court found that the nurses were "employees" within the meaning of the FLSA and that the exemption for bona fide professional employees, 29 U.S.C. Sec. 213(a)(1) (1982), was unavailable. The District Court further determined that Superior Care's overtime and record-keeping violations were willful, thereby making applicable a three-year statute of limitations period, 29 U.S.C. Sec. 255(a) (1982). The Court enjoined Superior Care from withholding $697,140.66 in back pay owed from December 1980. The Court also awarded an equal amount as statutory liquidated damages. 29 U.S.C. Sec. 216(c) (1982).

DISCUSSION

8

On this appeal, Superior Care contends that (1) the nurses are independent contractors, not subject to the FLSA, (2) even if the nurses are employees, they are bona fide professional employees exempt from the Act's overtime pay requirements, (3) any violations of the Act were not willful and should therefore have been subject to a two-year statute of limitations, and (4)

liquidated damages should not have been awarded because the Secretary failed to allege a violation of section 16 of the Act authorizing such an award. We conclude that only Superior Care's contention as to liquidated damages has merit; the decision of the District Court was in all other respects correct.

A. Employment Status

9

The FLSA defines "employee" as "any individual employed by an employer," and to "employ" as including "to suffer or permit to work." 29 U.S.C. Secs. 203(e)(1), 203(g) (1982 & Supp. III 1985). The definition is necessarily a broad one in accordance with the remedial purpose of the Act. See United States v. Rosenwasser, 323 U.S. 360, 363, 65 S.Ct. 295, 296, 89 L.Ed. 301 (1945); Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748, 754 (9th Cir.1979).

10

Several factors are relevant in determining whether individuals are "employees" or independent contractors for purposes of the FLSA. These factors, derived from United States v. Silk, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947) (Social Security Act), and known as the "economic reality test," include: (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business. See id. at 716, 67 S.Ct. at 1469; Rutherford Food Corp. v. McComb, 331 U.S. 722, 730, 67 S.Ct. 1473, 1476, 91 L.Ed. 1772 (1947); Donovan v. DialAmerica Marketing, Inc., 757 F.2d 1376, 1382-83 (3d Cir.), cert. denied, 474 U.S. 919, 106 S.Ct. 246, 88 L.Ed.2d 255 (1985); Real v. Driscoll Strawberry Associates, Inc., supra, 603 F.2d at 754; Usery v. Pilgrim Equipment Co., Inc., 527 F.2d 1308, 1311 (5th Cir.), cert. denied, 429 U.S. 826, 97 S.Ct. 82, 50 L.Ed.2d 89 (1976); cf. Carter v. Dutchess Community College, 735 F.2d 8, 12 (2d Cir.1984) (considering somewhat different factors in "economic reality" test where question was whether an employment relationship existed between a prison inmate and an outside employer). No one of these factors is dispositive; rather, the test is based on a totality of the circumstances. See Rutherford Food Corp. v. McComb, supra, 331 U.S. at 730, 67 S.Ct. at 1476; Usery v. Pilgrim Equipment Co., Inc., supra, 527 F.2d at 1311. The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves.

See Bartels v. Birmingham, 332 U.S. 126, 130, 67 S.Ct. 1547, 1549, 91 L.Ed. 1947 (1947) (Social Security Act); Donovan v. Tehco, Inc., 642 F.2d 141, 143 (5th Cir.1981) (FLSA).

11

The existence and degree of each factor is a question of fact while the legal conclusion to be drawn from those facts--whether workers are employees or independent contractors--is a question of law. Thus, a district court's findings as to the underlying factors must be accepted unless clearly erroneous, while review of the ultimate question of employment status is de novo. See Brock v. Mr. W. Fireworks, Inc., 814 F.2d 1042, 1043-45 (5th Cir.), cert. denied, --- U.S. ----, 108 S.Ct. 286, 98 L.Ed.2d 246 (1987); Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1469 (9th Cir.1983). In the present case, the District Judge properly looked to the economic reality test and the Silk factors in deciding that the nurses were employees. Superior Care contends that some of his findings of fact were clearly erroneous and that he relied on irrelevant evidence. We disagree.

12

At the outset, we reject Superior Care's claim that the trial judge impermissibly relied on evidence of employee status beyond the five economic reality factors set forth in Silk and subsequent cases. The District Judge thought it significant that Superior Care had treated its taxed nurses as employees and that these nurses perform exactly the same work as the nontaxed nurses. We agree. The factors that have been identified by various courts in applying the economic reality test are not exclusive. Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided. See Brock v. Mr. W. Fireworks, Inc., supra, 814 F.2d at 1043; Usery v. Pilgrim Equipment Co., Inc., supra, 527 F.2d at 1311. Though an employer's self-serving label of workers as independent contractors is not controlling, see, e.g., Real v. Driscoll Strawberry Associates, Inc., supra, 603 F.2d at 755; Usery v. Pilgrim Equipment Co., Inc., supra, 527 F.2d at 1315, an employer's admission that his workers are employees covered by the FLSA is highly probative. See Halferty v. Pulse Drug Co., Inc., 821 F.2d 261, 268 n. 5 (5th Cir.), modified on other grounds on rehearing, 826 F.2d 2 (1987).

13

Analysis of the five economic reality factors fully supports the District Court's conclusion that the nurses are employees. The District Judge found, without dispute, that the nurses had no opportunity for profit or loss and that their investment in the business was negligible. With respect to the importance of the nurse's role, Judge Wexler found that "the services rendered by the nurses constituted the most integral part of Superior Care's business, which is to provide health care personnel on request." Both of these findings are amply supported in the record, and both weigh heavily in favor of the District Judge's conclusion that the nurses are employees.

14

As to control, the District Court found that Superior Care unilaterally dictated the nurses' hourly wage, limited working hours to 40 per week where nurses claimed they were owed overtime, and supervised the nurses by monitoring their patient care notes and by visiting job sites. Superior Care argues that the finding of control is clearly erroneous because the parties stipulated that supervisory visits to the job sites were infrequent. Though visits to the job sites occurred only once or twice a month, Superior Care unequivocally expressed the right to supervise the nurses' work, and the nurses were well aware that they were subject to such checks as well as to regular review of their nursing notes. An employer does not need to look over his workers' shoulders every day in order to exercise control. See Donovan v. DialAmerica Marketing, Inc., supra, 757 F.2d at 1383-84 (where nature of home research industry precludes direct supervision, lack of direct control over manner of work does not weigh in favor of independent contractor status).

15

The remaining two factors, skill and independent initiative, and permanence of the work relationship, were not expressly considered by the District Court. Superior Care argues that these factors weigh decisively in its favor. We conclude that though these factors may weigh slightly in favor of independent contractor status, they do not tip the balance in favor of Superior Care.

16

As the Secretary concedes, the nurses are skilled workers who require several years of specialized training. However, the fact that workers are skilled is not itself indicative of independent contractor status. A variety of skilled workers who do not exercise significant initiative in locating work opportunities have been held to be employees under the FLSA. See, e.g., Robicheaux v. Radcliff Material, Inc., 697 F.2d 662, 666-67 (5th Cir.1983) (welders); Walling v.

Twyeffort, Inc., 158 F.2d 944 (2d Cir.), cert. denied, 331 U.S. 851, 67 S.Ct. 1727, 91 L.Ed. 1859 (1947) (tailors); Dunlop v. Imperial Tool and Manufacturing, Inc., 77 Lab.Cas. p 33,304 (N.D. Tex.1975)(tool and die maker); cf. Donovan v. DialAmerica Marketing, Inc., supra, 757 F.2d at 1387 (where distributors in home research business exercised "business-like initiative," in recruiting new home researchers, skill factor weighed in favor of independent contractor status). The nurses in the present case possess technical skills but nothing in the record reveals that they used these skills in any independent way. Rather, they depended entirely on referrals to find job assignments, and Superior Care in turn controlled the terms and conditions of the employment relationship. As a matter of economic reality, the nurses' training does not weigh significantly in favor of independent contractor status.

17

With respect to permanence of the working relationship, the record indicates that the nurses are a transient work force. They typically work for several employers, most work for Superior Care only a small percentage of the time (78% worked 13 weeks or less in 1982), they earn relatively little from Superior Care (88% earned less than $5,000 from Superior Care in 1982), and few maintain continuing relationships with Superior Care (90% turnover rate in three-year period). Nevertheless, these facts are not dispositive of independent contractor status. We have previously said that employees may work for more than one employer without losing their benefits under the FLSA. Walling v. Twyeffort, Inc., supra, 158 F.2d at 947; see also 29 C.F.R. Sec. 791.2 (1987). Nor has the fact that the worker does not rely on the employer for his primary source of income require a finding of independent contractor status. See Donovan v. DialAmerica Marketing, Inc., supra, 757 F.2d at 1385 (home researchers); Halferty v. Pulse Drug Co., Inc., supra, 821 F.2d at 267-68 (night ambulance dispatcher). Finally, even where work forces are transient, the workers have been deemed employees where the lack of permanence is due to operational characteristics intrinsic to the industry rather than to the workers' own business initiative, see Brock v. Mr. W. Fireworks, Inc., supra, 814 F.2d at 1053-54 (firework stand operators employees notwithstanding 80% turnover because of seasonal nature of work). In the present case, the fact that these nurses are a transient work force reflects the nature of their profession and not their success in marketing their skills independently.

18

The totality of the circumstances reveals that as a matter of economic reality the nurses are employees. Superior Care treats them as employees. Superior Care exercises substantial control

over the manner and conditions of their work. They have no opportunity for profit or loss, nor do they have any independent investment in the business. Their services are the most integral part of Superior Care's operation. Under these circumstances, it cannot be said that the nurses are in business for themselves.

B. Professional Exemption

19

Superior Care next argues that even if the nurses are "employees" under the FLSA, they are bona fide professional employees exempt from the overtime pay requirements of the FLSA pursuant to section 13(a)(1) of the Act, 29 U.S.C. Sec. 213(a)(1) (1982). Section 13(a)(1) provides an exemption for "any employee employed in a bona fide ... professional capacity ... (as such terms are defined and delimited ... by regulations of the Secretary ...)." One of the criteria in the regulations for bona fide professional employees is compensation for services "on a salary or fee basis at a rate of not less than $170 per week...." 29 C.F.R. Sec. 541.3 (1987).[1] Compensation on a salaried basis occurs when an employee regularly receives, each pay period, a predetermined amount, not subject to reduction because of variations in the quality or quantity of work performed. 29 C.F.R. Sec. 541.118 (1987). An employee is paid on a fee basis when he receives a fixed sum for a single job regardless of the time required for its completion. 29 C.F.R. Sec. 541.313 (1987). Here, the nurses do not come within the definition of bona fide professional employees in section 541.3 because they are paid on an hourly basis and not by fee or salary. See Donovan v. Carls Drug Co., Inc., 703 F.2d 650, 652 (2d Cir.1983) (pharmacists paid an hourly rate).

C. Statute of Limitations

20

The FLSA provides a statute of limitations of two years unless the cause of action arises from a "willful violation," in which case a three-year limitations period applies. 29 U.S.C. Sec. 255(a) (1982). Thus, the Secretary may recover an additional year of back wages when a violation is willful. In the present case, the District Court determined that Superior Care's violations were willful because it had been put on notice of its noncompliance with the Act during the 1980 and 1981 investigations, yet had continued to pay nurses at straight time rates for overtime work. The

District Court awarded back pay for violations from December 1980, three years prior to the filing of the Secretary's suit.

21

Superior Care argues that the District Judge applied the incorrect legal standard in deciding whether the violations were willful for purposes of the FLSA statute of limitations. The District Court applied the standard established by this Court in Donovan v. Carls Drug Co., Inc., supra, which ruled that "[e]mployers 'willfully' violate the FLSA when (1) they know that their business is subject to FLSA and (2) their practices do not conform to FLSA requirements." 703 F.2d at 652. Superior Care points out that subsequent to Carls Drug the Supreme Court adopted a slightly more rigorous test of "willfulness" for purposes of determining whether a plaintiff is entitled to an award of liquidated damages under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Sec. 626(b) (1982). Trans World Airlines, Inc. v. Thurston, **469 U.S. 111**, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). Under this test, an ADEA violation is "willful" for purposes of awarding liquidated damages if the defendant "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." Id. at 126, 105 S.Ct. at 624. In Thurston, the Court made no ruling as to whether its "willfulness" standard applies to the FLSA. The Court emphasized the difference between the liquidated damages provisions of the ADEA and the FLSA, noting that the former requires proof of willfulness and the latter provides that such damages are mandatory. Id. at 125, 105 S.Ct. at 623. The Court also noted without comment that the courts of appeals are divided on the issue whether the "willfulness" standard applicable to liquidated damages under the ADEA applies to the determination of the applicable ADEA statute of limitations. Id. at 128 n. 21, 105 S.Ct. at 625 n. 21.

22

This Court recently considered the appropriate "willfulness" standard for purposes of the ADEA statute of limitations in light of Thurston. Russo v. Trifari, Krussman & Fishel, Inc., **837 F.2d 40**, (2d Cir.1988). We held that the Thurston standard of willfulness for ADEA liquidated damages applies to willfulness for the ADEA statute of limitations. In making that determination, we acknowledged that, in light of Thurston, we were not applying the "willfulness" standard that Carls Drug had established for purposes of the FLSA statute of limitations. We reckoned with the Carls Drug "willfulness" standard in Russo because we recognized that the limitations provisions of both the ADEA and the FLSA are identical; the limitations provision for FLSA actions is contained in section 6 of the Portal-to-Portal Act of 1947, 29 U.S.C. Sec. 255(a) (1982), and the ADEA

incorporates section 6 by explicit reference, id. Sec. 626(e)(1). Now that Russo has applied the Thurston standard to the ADEA statute of limitations, we are obliged to apply that same standard to the FLSA statute of limitations, since the two limitations provisions not only use identical wording, they are in fact the same provision. Thus, as in Russo, a violation is willful for purposes of the FLSA limitations provision only if the employer knowingly violates or shows reckless disregard for the provisions of the Act. See Russo v. Trifari, Krussman & Fishel, Inc., supra, **837 F.2d 40**, 44-45; Halferty v. Pulse Drug Co., Inc., **826 F.2d 2** (5th Cir.1987) (on rehearing); Brock v. Richland Shoe Co., **799 F.2d 80** (3d Cir.1986), cert. granted, --- U.S. ----, 108 S.Ct. 63, 98 L.Ed.2d 27 (1987).

23

Even under the somewhat heightened standard of "reckless disregard," however, Superior Care's violations of the FLSA were unquestionably willful. It is undisputed that Superior Care was on actual notice of the requirements of the FLSA by virtue of its earlier violations, its agreement to pay $32,000 in back pay, and its promise to comply with the Act in the future. Moreover, the Department of Labor compliance officer who conducted the 1980 and 1981 investigations specifically advised Superior Care officials at that time that the nurses were employees. The compliance officer even suggested that Superior Care obtain an opinion letter from the Department if it disagreed, but Superior Care never pursued this option. Failure to obtain a ruling, even when one has not been suggested, has resulted in a determination of willful violation under the reckless disregard standard. See Brock v. Wilamowsky, **833 F.2d 11** (2d Cir.1987).

D. Liquidated Damages

24

Finally, Superior Care contends that the District Court's award of liquidated damages was improper because the Secretary framed his complaint under a provision of the FLSA that does not permit such damages. Superior Care argues that because the choice of remedies implicates a defendant's constitutional right to a jury trial, the Secretary is limited to the specific cause of action that he alleges. We agree.

25

The FLSA establishes three distinct causes of action against employers who have committed violations of the Act: (1) an injured employee may sue under section 16(b), 29 U.S.C. Sec. 216(b) (1982), for unpaid overtime or minimum wages, plus an equal amount as liquidated damages; (2) the Secretary of Labor may sue under section 16(c), 29 U.S.C. Sec. 216(c) (1982), on behalf of an employee, for unpaid overtime or minimum wages, plus an equal amount as liquidated damages; and (3) the Secretary may sue under section 17, 29 U.S.C. Sec. 217 (1982), for injunctive relief, including an injunction against the withholding of previously unpaid minimum or overtime wages.[2]

See Castillo v. Givens, 704 F.2d 181, 186 n. 11 (5th Cir.), cert. denied, 464 U.S. 850, 104 S.Ct. 160, 78 L.Ed.2d 147 (1983); Marshall v. Hanioti Hotel Corp., 490 F.Supp. 1020, 1022 (N.D. Ga.1980). Under sections 16(b) and 16(c) employers "shall be liable" for liquidated damages in an amount equal to unpaid back wages, but the district judge, in his discretion, may reduce the amount if the employer shows that his violations were in good faith.[3] 29 U.S.C. Sec. 260 (1982).

In no case may the trial judge award liquidated damages greater than the amount of underlying back pay liability. Id. The legislative history of the FLSA reveals that Congress intended to permit recovery of liquidated damages only in suits under sections 16(b) and 16(c), the two provisions expressly authorizing such damages; when the Secretary sues under section 17 for injunctive relief, liquidated damages are unavailable. See S.Rep. No. 145, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S. Code Cong. & Admin. News 1620, 1659; Donovan v. Brown Equipment and Service Tools, Inc., 666 F.2d 148, 156 (5th Cir.1982); E.E.O.C. v. Gilbarco, Inc., 615 F.2d 985, 991 (4th Cir.1980).

26

The defendant's right to a jury trial depends upon which of the three FLSA causes of action is pursued. Suits under section 17 for injunctive relief, even though they may result in an order requiring the employer to remit unpaid wages, have been considered equitable in nature; the award of back pay, without liquidated damages, is in the nature of restitution, and the defendant has no right to a jury trial. See, e.g., In re Don Hamilton Oil Co., 783 F.2d 151 (8th Cir.1986); Paradise Valley Investigation and Patrol Services, Inc. v. United States District Court, District of Arizona, 521 F.2d 1342 (9th Cir.1975); Wirtz v. Jones, 340 F.2d 901 (5th Cir.1965); Marshall v. Kreten Char-Broil, Inc., 507 F.Supp. 445 (E.D.N.Y.1980). Suits by an employee or by the Secretary for back wages under section 16, in contrast, have been considered to be actions at law, and the employer has a right to a jury. See Lorillard v. Pons, 434 U.S. 575, 580 & n. 7, 98 S.Ct.

866, 870 & n. 7 (1978); E.E.O.C. v. Corry Jamestown Corp., **719 F.2d 1219**, 1221 (3d Cir.1983); Marshall v. Hanioti Hotel Corp., supra, 490 F.Supp. at 1023; 5 Moore's Federal Practice p 38.27, at 38-220 to 38-221 (2d ed. 1986). However, since an award of liquidated damages under section 16 is within the discretion of the district judge, 29 U.S.C. Sec. 260, no right to a jury is available on that issue. See McClanahan v. Mathews, 440 F.2d 320, 322 (6th Cir.1971); Donovan v. River City Construction Co., 101 Lab.Cas. (CCH) p 34,591 (E.D.N.C.1984). The jury is required only to determine liability for and the amount of an award of back pay. The statutory scheme gives the Secretary a choice: If he wants to recover liquidated damages, he can sue under section 16(c), in which case the employer is entitled to a jury trial on the back pay award; if the Secretary prefers not to have a jury trial, he can sue for an injunction under section 17 and obtain a back pay award as an equitable remedy incidental to the injunction.

27

In the present case, the Secretary's complaint stated that "[j]urisdiction of this action is conferred upon the Court by section 17 of the Act." The complaint did not make any reference to section 16, although in the claim for relief it stated that "[a]dditional amounts of backwages [sic] and liquidated damages may be owed to certain present and former employees ... who are presently unknown to plaintiff...." (Emphasis added). Moreover, a list of injured employees was annexed to the complaint, a procedural requirement of section 16 but not section 17. Prior to trial, Superior Care filed a motion in limine seeking to exclude any evidence pertaining to liquidated damages on the theory that the Secretary had failed to proceed under the section authorizing such an award. The motion was denied and the trial judge, construing the Secretary's complaint as alleging a cause of action under both sections 16(c) and 17, ultimately ordered Superior Care to pay liquidated damages in an amount equal to the unpaid overtime compensation.

28

The Secretary, acknowledging that liquidated damages are available only under section 16, argues that the complaint should be read as invoking section 17 for an injunction against withholding back pay and section 16 for the additional remedy of liquidated damages. Although the Secretary's position would have been clearer in the District Court if the complaint had invoked section 16 as the basis for liquidated damages, we agree that the failure to cite this provision does not necessarily preclude relief to which the Secretary would otherwise be entitled. See

Fed.R.Civ.P. 8, 54(c). The question remains, however, whether liquidated damages are available in a suit seeking back pay as an equitable remedy under section 17.

29

The FLSA does not allow liquidated damages where, as here, the employer has no right to a jury on the underlying issue of unpaid overtime compensation. As indicated above, Congress has limited the remedy of liquidated damages to actions under section 16 where the employer has a right to a jury trial on the back pay issue. Although the judge always has discretion to reduce the amount of liquidated damages for which a defendant is liable if the employer shows good faith, the statutory scheme sets the maximum amount of liquidated damages at the amount of the back pay award, which the employer is entitled to have the jury determine. See 29 U.S.C. Secs. 216, 260. If the Secretary is permitted to collect section 16 liquidated damages in an action where the overtime wage issues are determined by the judge pursuant to section 17, then the employer is stripped of the protection that the Act provides by limiting the amount of liquidated damages to the amount of the jury's back pay award. Marshall v. Hanioti Hotel Corp., supra, 490 F.Supp. at 1024.

30

The Secretary contends that Superior Care's objections to the liquidated damages are not properly raised because Superior Care never requested a jury to determine the overtime wage award. But Superior Care had no right to ask for a jury. When confronted with the Secretary's complaint, which sought overtime wages exclusively under section 17, Superior Care correctly concluded that no jury right was available and took the position that the Secretary was thereby precluded from seeking liquidated damages, whether or not his complaint could be viewed as seeking liquidated damages under section 16. Superior Care expressed its position in its motion in limine. Had the Secretary wanted to be sure he could get liquidated damages, he could have amended his complaint to seek overtime wages under section 16(c). Having elected to pursue overtime wages only under section 17, and gained what he apparently thought was the advantage of avoiding a jury trial on that component of relief,[4] the Secretary has no valid claim for liquidated damages.

31

The judgment of the District Court is modified to delete the award of liquidated damages and, as modified, is affirmed.

MOTION FOR CLARIFICATION

PER CURIAM:

32

The Secretary of Labor has moved for clarification of our decision of February 16, 1988, to determine whether upon the remand for entry of a new judgment the Secretary is entitled to recover prejudgment interest. Our prior decision upheld the Secretary's entitlement to collect unpaid overtime wages for the benefit of the employees but disallowed an additional equal sum for liquidated damages. Brock v. Superior Care, Inc., supra at 1054. The Secretary contends that with liquidated damages disallowed, the judgment should now include prejudgment interest. We agree.

33

It is well settled that in an action for violations of the Fair Labor Standards Act prejudgment interest may not be awarded in addition to liquidated damages. Brooklyn Savings Bank v. O'Neil, **324 U.S. 697**, 714-16, 65 S.Ct. 895., 905-07, 89 L.Ed. 1296 (1945); Joiner v. City of Macon, **814 F.2d 1537**, 1539 (11th Cir. 1987). Among other purposes, liquidated damages compensate for the delay in receiving wages that should have been paid. In this case liquidated damages were disallowed, not because the purpose to be served by such damages were not implicated, but solely because such damages are not available when the Secretary elects to sue under section 17 of the FLSA. Once we have disallowed liquidated damages, there is no reason to deny the Secretary the opportunity to collect prejudgment interest, which is normally awarded in FLSA suits in the absence of liquidated damages. See Brock v. Casey Truck Sales, Inc., **839 F.2d 872** (2d Cir. 1988); Donovan v. Sovereign Security , Ltd., **726 F.2d 55**, 57-58 (2d Cir. 1984).

34

Accordingly, we recall the mandate and modify our prior decision to the extent of authorizing the District Court upon remand to consider the Secretary's request for prejudgment interest under the standards customarily applied to such claims.

*

The Honorable William P. Gray of the United States District Court for the Central District of California, sitting by designation

1

Payment on a salary or fee basis is not a requisite to bona fide professional employee status in the case of "an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof...." 29 C.F.R. Sec. 541.3(e) (1987). However, this exception does not apply to nurses. 29 C.F.R. Sec. 541.314(c) (1987)

2

Section 17 is framed as a jurisdictional provision, providing the district courts with jurisdiction for suits by the Secretary seeking an injunction. Sections 16(b) and 16(c) create causes of action for damages, authorizing such suits "in any court of competent jurisdiction." 29 U.S.C. Sec. 216(c) (1982)

3

As used in the FLSA "liquidated damages" is something of a misnomer. It is not a sum certain, determined in advance as a means of liquidating damages that might be incurred in the future. It is an award of special or exemplary damages added to the normal damages

4

The Secretary has indicated that the complaint in this action follows the form that has long been used in actions to recover unpaid overtime and minimum wages under the FLSA. When asked at oral argument the reasons for this long-standing practice, counsel was unable to offer an explanation. In other litigation where the Secretary has similarly attempted to split his cause of action between the injunctive provisions of section 17 and the liquidated damages provision of section 16(c), counsel has conceded, perhaps more candidly than here, that the Secretary finds jury trials too time consuming

and so frames the complaint in order to try the case as expeditiously as possible. See Marshall v. Hanioti Hotel Corp., supra, 490 F.Supp. at 1025

United States Court of Appeals,Second Circuit.

Elaine L. CHAO, Secretary of Labor, Plaintiff-Appellant, v. GOTHAM REGISTRY, INC., Gotham Per Diem, Inc., Defendants-Appellees.

Docket No. 06-2432-cv.

Decided: January 24, 2008

Before: JACOBS, Chief Judge, CARDAMONE, and SOTOMAYOR, Circuit Judges. Maria Van Buren, Washington, D.C. (Howard M. Radzely, Solicitor of Labor, Steven J. Mandel, Associate Solicitor, Paul L. Frieden, U.S. Department of Labor, Office of the Solicitor, Washington, D.C., of counsel), for Plaintiff-Appellant. Steven Kapustin, Blue Bell, Pennsylvania (Barry A. Furman, Kaplin, Stewart, Meloff, Reiter & Stein, P.C., Blue Bell, Pennsylvania, of counsel), for Defendant-Appellee.

In 1937 America was in the depths of a depression and employment was scarce. President Franklin Roosevelt introduced a measure to address this problem in a bill that became the Fair Labor Standards Act. The bill aimed to raise the pay of the underpaid and reduce the hours of the overworked or, as stated in the Presidential message accompanying the proposed legislation, to obtain “a fair day's pay for a fair day's work.” 81 Cong. Rec. 4983 (1937) (message of President Roosevelt). Today, things are different, particularly in the nursing profession where there are not enough nurses to meet the demand for their services. This shortage and the frequent resort to overtime to compensate for it precipitated the instant action.

The litigation before us was initiated in 1992 in the United States District Court for the Southern District of New York before Judge Louis L. Stanton by the Secretary of Labor against defendants Gotham Registry, Inc. and its affiliate Gotham Per Diem, Inc. Suit was brought under the provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (FLSA or Act), and resulted on June 6, 1994 in a consent judgment against Gotham, requiring it to pay its nurses time and one-half wages for overtime in compliance with the Act. On December 29, 2004 plaintiff Elaine L. Chao, the current Secretary of Labor (Secretary or plaintiff), filed a petition for adjudication of civil contempt against Gotham Registry, Inc. and its president, Caroline Barrett (collectively, Gotham, employer or staffing agency), for their alleged failure to abide by the terms of the consent judgment. The Secretary sought an order requiring Gotham to pay back wages plus interest from January 1, 1999 through the present. On January 19, 2005 Gotham filed a response and counterclaim to the petition denying any violation of the consent decree and requesting the district court to vacate the decree's injunctive provision because of changed circumstances.

Judge Stanton, who had maintained jurisdiction over this matter since its inception, conducted an evidentiary hearing on March 20, 2006. At the close of plaintiff's case, Gotham moved for judgment in its favor pursuant to Fed.R.Civ.P. 52(c). Judge Stanton granted that motion from the bench and held Gotham not in contempt of the consent judgment. In an order entered March 23, 2006 the district court denied the Secretary's petition. From this order the Secretary appeals.

BACKGROUND

We turn to the facts. A typical Gotham placement begins when one of its client hospitals requests a nurse to fill a temporary vacancy or to support hospital personnel during a peak period. Gotham then offers the assignment to a nurse on its register, and the nurse who accepts the position reports directly to the hospital. The nurse is required to sign in and out on daily time sheets, which are compiled and reviewed by the hospital and forwarded to Gotham each week. Gotham is not permitted to go on hospital premises to verify the nurse's hours or otherwise supervise his or her performance. The hospital pays Gotham an hourly fee multiplied by the number of hours worked by the nurse and Gotham pays most of this money to the nurse.

Until the early 1990s, Gotham did not pay its nurses overtime wages for hours worked in excess of 40 hours in any workweek because it viewed the nurses as independent contractors. After the Department of Labor commenced an enforcement action in 1992 against the staffing agency asserting that its practice of paying nurses straight-time wages for overtime hours violated the Act, Gotham consented to treat the nurses on its register as employees for purposes of the Act. Specifically, the 1994 consent judgment included a prospective injunction requiring Gotham to comply with 29 U.S.C. § 207(a) by paying its nurses time and one-half wages for time worked over 40 hours in any week.

As Gotham's clients do not pay Gotham a premium for overtime hours in all cases, Gotham's promise to abide by the Act quickly proved expensive. After seeking advice of counsel, the staffing agency adopted a policy designed to check unauthorized overtime or, failing that, insulate itself from claims for time and one-half compensation for unauthorized hours. Gotham's overtime policy is printed on the time sheets completed by its nurses and reads: “You must notify GOTHAM in advance and receive authorization from GOTHAM for any shift or partial shift that will bring your total hours

to more than 40 hours in any given week. If you fail to do so you will not be paid overtime rates for those hours."

In the course of their assignments at client hospitals, Gotham nurses are sometimes asked to work overtime by hospital staff. Nurses who agree to work an unscheduled shift will on occasion contact Gotham first to request approval in compliance with Gotham's rule. If Gotham authorizes an assignment, the nurse is guaranteed premium wages for any resulting overtime. But three out of four approval requests are denied. At other times, nurses accept unscheduled shifts without obtaining the staffing agency's approval. When these nurses report their overtime for the preceding week, Gotham attempts to negotiate with the hospital to procure an enhanced fee for the overtime hours already worked. If Gotham succeeds-as it does ten percent of the time-it pays the nurse time and one-half wages for the unauthorized overtime hours. Otherwise, the nurse receives straight-time wages for the extra hours worked.

It is this scenario that gives rise to the Secretary's contention that Gotham's overtime practices violate 29 U.S.C. § 207(a) and, by extension, the 1994 consent judgment. The plaintiff's petition seeks back wages in excess of $100,000 plus pre-judgment interest for the period from January 1999 through June 2002 and calls for an accounting of Gotham's wage obligations from 2002 to the present. After a one-day trial in March 2006, Judge Stanton granted Gotham's motion for judgment based on partial findings at the conclusion of the Secretary's case. He denied the Secretary's petition to hold defendants in contempt. The district court also denied the Secretary's claim concerning record-keeping violations and Gotham's counterclaim to dissolve the injunction, but neither of these latter two rulings have been appealed.

The Secretary challenges that portion of the district court's March 20, 2006 judgment that denies her petition for civil contempt against Gotham. That court believed the unauthorized hours did not constitute work under the Act or, if these were working hours, the legal question was too much in doubt to warrant civil contempt. On this

appeal the Secretary presents us with two questions: first, whether Gotham's overtime practices violate the Act; and second, if so, whether the violation provides an adequate basis for civil contempt.
We think the trial court erred in labeling the nurses' overtime hours as anything other than work and answer the first question in the affirmative. But because we believe Gotham acted on a reasonable interpretation of then unsettled law, we answer the second question in the negative, and affirm the district court's judgment on the alternative ground that the Secretary did not meet her burden to prove contempt.

DISCUSSION

I Standard of Review

We review the denial of a petition for civil contempt under the abuse of discretion standard. Dunn v. N.Y. State Dep't of Labor, 47 F.3d 485, 490 (2d Cir.1995). While we uphold the district court's factual findings unless they are clearly erroneous, the ultimate legal question of whether an employee is entitled to overtime pay under the FLSA is subject to plenary review. See Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 743, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981); Holzapfel v. Town of Newburgh, 145 F.3d 516, 521 (2d Cir.1998). Further, where a party challenges a principle of law relied on by the district court in making a discretionary determination, we review de novo its choice and interpretation of such principles. Scalisi v. Fund Asset Mgmt., 380 F.3d 133, 137 (2d Cir.2004).

II Violation of the Act's Overtime Provisions

Our first question is whether Gotham's failure to pay time and one-half wages to its nurses for unauthorized overtime violated the Act's overtime provisions. The Act provides that “no employer shall 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.” 29 U.S.C. § 207(a)(1).

“Employ” is defined in the Act as including “to suffer or permit to work,” 29 U.S.C. § 203(g), but Congress did not define the word “work.” See IBP, Inc. v. Alvarez, 546 U.S. 21, 25, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005). The broad meaning that has emerged from Supreme Court cases describes work as exertion or loss of an employee's time that is (1) controlled or required by an employer, (2) pursued necessarily and primarily for the employer's benefit, and (3) if performed outside the scheduled work time, an integral and indispensable part of the employee's principal activities. Holzapfel, 145 F.3d at 522; see Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598, 64 S.Ct. 698, 88 L.Ed. 949 (1944); see also Armour & Co. v. Wantock, 323 U.S. 126, 133, 65 S.Ct. 165, 89 L.Ed. 118 (1944) (clarifying that exertion is not required to satisfy definition of work); Steiner v. Mitchell, 350 U.S. 247, 252-53, 76 S.Ct. 330, 100 L.Ed. 267 (1956) (addressing exertion outside of scheduled working time).

The Supreme Court has explained that the Act's overtime provisions were aimed not only at raising wages but also at limiting hours. Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 576-78, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942). In other words, these provisions were designed to remedy the “evil of overwork” by ensuring workers were adequately compensated for long hours, as well as by applying financial pressure on employers to reduce overtime. Id. at 577-78, 62 S.Ct. 1216; see also United States v. Rosenwasser, 323 U.S. 360, 361, 65 S.Ct. 295, 89 L.Ed. 301 (1945). In service of the statute's remedial and humanitarian goals, the Supreme Court consistently has interpreted the Act liberally and afforded its protections exceptionally broad coverage. See, e.g., Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 296, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985); Rosenwasser, 323 U.S. at 362, 363 & n. 3, 65 S.Ct. 295;

Tenn. Coal, 321 U.S. at 597, 64 S.Ct. 698 (“Such a statute must not be interpreted or applied in a narrow, grudging manner.”).

A. The Unauthorized Overtime Is Work

Gotham argues it neither benefits from nor controls the nurses' unauthorized overtime and, accordingly, such time does not constitute work under the Tennessee Coal test (as extended in subsequent cases and elaborated in Holzapfel). Tenn. Coal, 321 U.S. at 598, 64 S.Ct. 698; Holzapfel, 145 F.3d at 522. Gotham seeks support for this proposition in the trial court's findings that (1) Gotham lacks primary control over the nurses' performance of unscheduled shifts; (2) the decision to engage in overtime is made by nurses and hospitals acting in furtherance of their own interests; (3) the income generated by these unauthorized hours is offset by the administrative burdens of operating Gotham's overtime arrangement; and (4) Gotham does not desire the overtime to be performed. Although we detect no clear error in these factual findings, the legal conclusion drawn from them-that the nurses' overtime is not work under the Act-we think is wrong.

Whether a nurse is working a morning, afternoon or night shift in emergency care, an operating room, or on a hospital floor, the overtime hours are indistinguishable from the straight-time hours. Such work from the nurses' standpoint is fungible. Work is work, after all. Nurses who work overtime, at the hospitals' request, often continue doing the same kind of work they were doing on their regular shifts. In that respect we believe the district judge mischaracterized the Act when he commented that the extra or overtime work is not “work” under the statute.

As a threshold matter, application of the Tennessee Coal test to the facts of this case is something of a red herring. Contrary to the district court's belief, the Supreme Court's definition (with roots in Webster's Dictionary, see Tenn. Coal, 321 U.S. at 598, 64 S.Ct. 698 n. 11) does not purport to establish a “special meaning” for work, but simply to guide the courts in applying the word as it is commonly used and understood, id. at 598,

64 S.Ct. 698. Further, if an activity fails the Tennessee Coal test, we understand that result to mean the activity is not work and is not compensable. Here, no party disputes that the performance of overtime at least entitled the nurses to compensation at a regular rate of pay. What Gotham implies is that the nurses' overtime belongs to a new category of exertion, call it quasi-work, that was not contemplated by the drafters of the Act and is subject to its own compensation rules.

Gotham conceded in the 1994 consent judgment and again in its appellate brief that it "employs" its nurses for purposes of the Act. The classification of the nurses' regularly scheduled activities as work within the meaning of the Act follows from this concession. See, e.g., 29 U.S.C. § 203(g) (defining "employ" to include suffering or permitting work). It is significant, therefore, that there seems to be no distinction between the exertion of Gotham's nurses during unauthorized and authorized hours. In the typical case, by contrast, the Tennessee Coal test is applied to ascertain whether an activity that is markedly different from an employee's primary activities may yet qualify as work. See, e.g., Tenn. Coal, 321 U.S. at 592, 64 S.Ct. 698 (travel time to ore mines); Holzapfel, 145 F.3d at 519 (dog grooming and care by K-9 police officers); Leone v. Mobil Oil Corp., 523 F.2d 1153, 1154 (D.C.Cir.1975) (accompaniment of federal occupational safety investigators during plant inspection).

Turning to the specific elements of the test for purposes of the case at hand, the staffing agency's contention that the overtime is not work because it does not benefit Gotham is unpersuasive. It is plain that if Gotham were not bound to comply with the Act and instead paid its nurses straight-time wages for overtime without administrative inconvenience, all hours clocked by the nurses would satisfy the benefit prong of the Tennessee Coal test. It is only by subtracting from Gotham's benefit the costs of its attempted adherence to federal law that the nurses' overtime ceases to benefit Gotham.

Hence, Gotham finds itself in a situation that we suppose quite common in the business world in which the revenues gained from overtime fall short of the costs

incurred. Gotham's implication that unprofitable labor is not work under the Act leads us to a number of untenable conclusions; most pertinent here, an employer would be permitted to avoid the Act whenever the overtime provisions threaten success in achieving Congress' goal of curtailing overtime by bringing its cost above its benefit to the employer.

Gotham also insists that it lacks the degree of control over the nurses' unauthorized shifts contemplated in the definition of work. We note, however, that Gotham is not permitted to supervise its nurses on hospital grounds at any time, including regular scheduled shifts, and possesses no less control over a nurse's activities during unauthorized shifts than at other times. The only discernible difference suggested by Gotham relates to the decision-reached by the hospital and nurse without Gotham's participation-that unauthorized work be performed. Gotham's limited control over a nurse's decision to work overtime does not change the nature of the exertion that follows and thus does not bear on whether such exertion is work. Such circumstances may be relevant to the separate question whether Gotham suffered or permitted such work, the inquiry to which we now turn.

B. The Suffer or Permit Standard

Gotham is liable for the nurses' compensation for the overtime hours only if it employed the nurses during this time, that is, if it suffered or permitted the nurses to work. See 29 U.S.C. § 203(g).

1. Gotham's Knowledge

It is clear an employer's actual or imputed knowledge that an employee is working is a necessary condition to finding the employer suffers or permits that work. See, e.g., Holzapfel, 145 F.3d at 524; Davis v. Food Lion, 792 F.2d 1274, 1276 (4th Cir.1986); Forrester v. Roth's I.G.A. Foodliner, Inc., 646 F.2d 413, 414 (9th Cir.1981) (explaining that knowledge affords employer the opportunity to comply with the Act).

Information that Gotham's nurses regularly worked overtime was communicated to Gotham each week on the nurses' time sheets. Gotham's insistence that it acquired its knowledge only after the fact misses the point. We have never suggested that an employer's knowledge need arise concurrently with the performance of overtime, for good reason. The Act's overtime provisions apply to work performed off premises, outside of the employer's view and sometimes at odd hours, where an employer's concurrent knowledge of an employee's labor is not the norm. See 29 C.F.R. § 785.12. It would appear impractical, for example, to require a K-9 officer to report to his supervisor before and after grooming his dog. See Holzapfel, 145 F.3d at 524; see also Reich v. Dep't of Conservation & Natural Res., 28 F.3d 1076, 1079-80, 1084 (11th Cir.1994) (requiring overtime be paid to officers who worked in field and often at night with infrequent contact with supervisors). Moreover, a requirement of concurrent knowledge would allow employers to escape their obligations under the Act by purposefully eschewing knowledge as to when such work was performed.

We regard Gotham's knowledge as sufficient to afford it the opportunity to comply with the Act. See Forrester, 646 F.2d at 414. An employer who has knowledge that an employee is working, and who does not desire the work be done, has a duty to make every effort to prevent its performance. Reich v. Stewart, 121 F.3d 400, 407 (8th Cir.1997); Forrester, 646 F.2d at 414 ("An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation. "); Mumbower v. Callicott, 526 F.2d 1183, 1188 (8th Cir.1975) ("The employer who wishes no such work to be done has a duty to see it is not performed."); 29 C.F.R. § 785.13. This duty arises even where the employer has not requested the overtime be performed or does not desire the employee to work, or where the employee fails to report his overtime hours. See Kosakow v. New Rochelle Radiology Assocs., 274 F.3d 706, 718 (2d Cir.2001); Holzapfel, 145 F.3d at 524; 29 C.F.R. §§ 785.11-.12.

2. Gotham's Rule Against Unauthorized Overtime

Gotham endeavored to reduce unwanted overtime by promulgating a rule requiring its employees to obtain prior approval for any work that would result in overtime and informing them that, absent such approval, they would be paid straight-time wages for the ensuing overtime. We do not agree with the Secretary's interpretation of Gotham's rule as one that disclaims liability for unauthorized overtime without barring its performance outright. A straightforward reading indicates the rule serves as both a prohibition and a warning as to the consequence of its violation.

Whether Gotham's pre-approval rule satisfied its legal obligation to prevent unwanted overtime involves a question of first impression in this Circuit, complicated by Gotham's limited control over the nurses. Our starting point is the Department of Labor (Department) regulation addressing such rules.

In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

29 C.F.R. § 785.13 (emphasis added); accord Reich v. Dep't of Conservation, 28 F.3d at 1084; Wirtz v. Bledsoe, 365 F.2d 277, 278 (10th Cir.1966) ("It has long been established that the purpose of the [FLSA] cannot be frustrated by an employer's instructions or even a contract not to work overtime."). Although courts are responsible for final decisions concerning interpretation of the Act, see 29 C.F.R. § 785.2; Kirschbaum v. Walling, 316 U.S. 517, 523, 62 S.Ct. 1116, 86 L.Ed. 1638 (1942), the Department's explanations bearing on the meaning of "suffer or permit" and "work" in §§ 785.11-.13 are entitled to our respect. Cf. Kavanagh v. Grand Union Co., 192 F.3d 269, 272 (2d Cir.1999). The long-standing regulations in Part 785 reflect the Department's expertise on interpretive questions that are essential to the administration of the Act. Cf. Barnhart v. Walton, 535 U.S. 212, 222, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002); Leary v. United States, 395 U.S. 6, 25, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969).

In Reich v. Dep't of Conservation, the Eleventh Circuit adopted the position laid out in 29 C.F.R. § 785.13 and held liable an employer that, like Gotham, had limited concurrent control over its employees' work schedules. 28 F.3d at 1083-84. The case involved a state agency charged with enforcing game and fish laws, which employed enforcement officers posted throughout the state. Id. at 1078. The officers, whose job it was to answer citizen complaints around the clock, worked from home under minimal supervision. Id. at 1078-79. The state agency promulgated a rule forbidding officers to work more than 40 hours per week, but had actual and constructive knowledge that some officers continued to work overtime without reporting the extra hours. Id. at 1079-80. The Eleventh Circuit concluded the agency could not avoid overtime compensation simply by adopting a policy against overtime and issuing periodic warnings. Id. at 1084.

Gotham's efforts to distinguish Reich v. Dep't of Conservation do not convince us. The staffing agency points out that the majority of employees involved in the Eleventh Circuit's case were unable to perform their duties within a 40 hour workweek, id. at 1081 & n. 12, while Gotham nurses can fulfill their obligations-at least to Gotham-without incurring overtime. Given this difference, Gotham urges us instead to follow Lindow v. United States, 738 F.2d 1057, 1061-62 & n. 3 (9th Cir.1984), where the Ninth Circuit held an employer may insulate itself from overtime claims by notifying its employees that overtime is not expected, so long as the employees can complete their duties within regular hours and are under no pressure to perform overtime.

In Lindow, employees of the Army Corps of Engineers were in the habit of arriving fifteen minutes early to exchange information with their colleagues working the earlier shift, review the log book, drink coffee, and socialize. Id. at 1059, 1061. A portion of this time was classified by the court as working time. Id. at 1059-61. The Corps issued a letter informing its employees that they were not required to arrive early, but some employees continued to do so. Id. at 1060-61. The Ninth Circuit held that the

letter relieved the Corps of liability for overtime compensation because the Corps did not require or pressure the employees to work overtime and the work could have been performed during regular hours. Id. at 1061 & n. 3.

In the instant case, the district court found the unauthorized shifts were controlled and required by the hospitals and by the employees. It is not obvious to us that the nurses do not on occasion work overtime because they feel unable to satisfactorily perform their duties to hospital supervisors or patients within their scheduled hours. It is plain that Lindow's rationale does not extend to employees whose jobs require them on occasion to work beyond regular hours, whether the requirement is enforced by the employer or inherent in the nature of the work. See id.

Even setting aside this concern and assuming that the nurses elect to work overtime without any compulsion to do so, we decline to follow Lindow. First, the Supreme Court has rejected the argument that an employer may avoid its obligations under the Act upon proof that its employees voluntarily engage in inadequately compensated work. See Tony & Susan Alamo Found., 471 U.S. at 302, 105 S.Ct. 1953 ("[T]he purposes of the Act require that it be applied even to those who would decline its protections."); Barrentine, 450 U.S. at 740, 101 S.Ct. 1437. More generally, as the Eleventh Circuit recognized in Reich v. Dep't of Conservation, "[t]he reason an employee continues to work beyond his shift is immaterial; if the employer knows or has reason to believe that the employee continues to work, the additional hours must be counted." 28 F.3d at 1082 (citing 29 C.F.R. § 785.11). In other words, once it is established that an employer has knowledge of a worker's overtime activities and that those activities constitute work under the Act, liability does not turn on whether the employee agreed to work overtime voluntarily or under duress.

Second, Lindow's holding was premised on the finding that the duties carried out during overtime could have been completed within the regular workday. 738 F.2d at 1061. We previously explained that this fact alone does not excuse an employer from the

FLSA's overtime provisions. Holzapfel, 145 F.3d at 522. In addition, the scenario presented to us differs from Lindow inasmuch as the nurses who were asked to work overtime provided services in addition to those performed during their regular hours and so by definition were unable to complete their work within those regular hours. Application of the Act's overtime provisions in this case would put to Gotham and its client hospitals the choice to either pay a premium for overtime or engage other nurses to provide the additional services. This choice-which was not implicated in Lindow where the Corps presumably could have barred overtime without altering its demand for labor or budget-plays an important role in the FLSA's incentive structure to reduce overtime, spread employment and compensate workers for the burden of long hours. See Missel, 316 U.S. at 577-78, 62 S.Ct. 1216.

We are of course aware that the conditions prevailing in the present market for nurses in the United States influence the options open to Gotham and its client hospitals. We have identified nothing in these conditions to recommend carving an exception to the Act's overtime provisions, however, and will not ask nurses to shoulder the burden of the nation's nursing shortage by denying them their rights under the Act. On our reading, the FLSA presumes that employers, not employees, are in the best position to address the evils of overwork and underpay. This presumption is no less true in the nursing profession than in any other. Finally, the Supreme Court instructs that employees cannot waive the overtime protections granted them in the FLSA without nullifying the Act's purposes and setting aside the legislative goals it wanted effectuated. Barrentine, 450 U.S. at 740, 101 S.Ct. 1437.

3. Gotham's Duty to Prevent Unwanted Overtime

In an ordinary employer-employee relationship, management is believed to have ready access to a panoply of practical measures to induce compliance with its formal rule against overtime. In such cases, a presumption arises that an employer who is armed with knowledge has the power to prevent work it does not wish performed. Where this

presumption holds, an employer who knows of an employee's work may be held to suffer or permit that work. We suppose that this presumption explains why several cases and Department regulations seem to treat an employer's knowledge as not only necessary, but also sufficient, to establish its liability under the Act. See, e.g., 29 C.F.R. §§ 785.11-.12; Holzapfel, 145 F.3d at 524; Doe v. United States, 372 F.3d 1347, 1360-61 (Fed.Cir.2004) (collecting cases).

Gotham seeks to rebut this presumption on the basis that its power to control the nurses is severely constrained by the nature of its business and the labor market in which it deals. Gotham portrays its role as nothing more than an employment agency matching the requirements of hospitals with the qualifications of nurses and maintains that it has no ability to control nurses who violate its rule.

We recognize that Gotham does not have at its disposal all the instruments of control available to ordinary employers. That said, the law does not require Gotham to follow any particular course to forestall unwanted work, but instead to adopt all possible measures to achieve the desired result. See 28 C.F.R. § 785.13. Gotham has not persuaded us that it made every effort to prevent the nurses' unauthorized overtime: for example, it did not explain why it could not keep a daily, unverified tally of its nurses' hours and reassign shifts later in the week that would result in overtime; or refuse to assign any shifts to nurses who habitually disregard Gotham's overtime rule. Notably, Gotham admitted at trial that a nurse who disregards its pre-approval rule faces no adverse consequences beyond straight-time wages for the ensuing overtime, while one who disregards Gotham's other policies is subject to contractual penalties. If Gotham were serious about preventing unauthorized overtime, it could discipline nurses who violate the rule. It could also entirely disavow overtime hours, announcing a policy that it does not, under any circumstances, employ a nurse for more than 40 hours in a week. Any hours over the limit would not be billed to the hospital and would not result in any compensation for the nurse (as opposed to the current policy of regular pay).

Alternatively, Gotham could simply contract in advance with the hospitals to charge a higher fee when nurses are working overtime, thus shifting the decision to those best placed to judge when overtime is cost-effective and avoiding the need for an anti-overtime policy to begin with.

We confess we are skeptical whether an employer with full knowledge respecting the activities of its employees ever lacks power, at the end of the day, to require those it retains to comply with company rules that implicate federal law. Gotham in any event has not overcome the presumption here that it possessed such power. It follows that Gotham suffered or permitted the nurses' overtime and, by failing to compensate them in accordance with 29 U.S.C. § 207(a), violated the Act and the 1994 consent judgment.

III Denial of Petition for Contempt Affirmed

We turn now to whether that violation subjects Gotham to being held in contempt. A federal court has the authority to punish contempt of a consent decree. United States v. Int'l Bhd. of Teamsters, 899 F.2d 143, 146 (2d Cir.1990). However, the judicial power of contempt is circumscribed and "[t]he failure to meet the strict requirements of an order does not necessarily subject a party to a holding of contempt." Dunn, 47 F.3d at 490. A party may be held in civil contempt only where a plaintiff establishes (1) the decree was clear and unambiguous, and (2) the proof of non-compliance is clear and convincing. Id. Although the defendant's conduct need not be willful, a plaintiff must also prove that (3) the defendant has not been reasonably diligent and energetic in attempting to comply. City of New York v. Local 28, Sheet Metal Workers' Int'l Ass'n, 170 F.3d 279, 283 (2d Cir.1999); Dunn, 47 F.3d at 490; see also Levin v. Tiber Holding Corp., 277 F.3d 243, 250 (2d Cir.2002) (noting plaintiff's burden of proof). While we disagreed with the district court's determination that the unauthorized work was not compensable as overtime, we now affirm its alternative holding that the Secretary did not carry her burden to prove contempt.

A. The Decree Was Ambiguous with Respect to Gotham's Conduct

The Supreme Court has cautioned that contempt is a powerful weapon under any circumstance and, when founded on a decree that the defendant could not comprehend, it can be a ruinous one. Int'l Longshoremen's Ass'n v. Phil. Marine Trade Ass'n, 389 U.S. 64, 76, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967). To ensure fair notice to the defendant, the decree underlying contempt must be sufficiently clear to allow the party to whom it is addressed to ascertain precisely what it can and cannot do. King v. Allied Vision Ltd., 65 F.3d 1051, 1058 (2d Cir.1995); N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1351-52 (2d Cir.1989); see also Fed.R.Civ.P. 65(d) (requiring injunctive orders to be "specific in terms" and "describe in reasonable detail . the act or acts sought to be restrained"); Phil. Marine, 389 U.S. at 74-76, 88 S.Ct. 201 (reversing contempt based on injunctive decree that did not satisfy the specificity and clarity requirements set forth in Rule 65); Int'l Bhd. of Teamsters, 899 F.2d at 146.

We agree with the Secretary that the incorporation into the consent judgment of certain provisions of the FLSA does not, by itself, render the decree ambiguous. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191-92, 69 S.Ct. 497, 93 L.Ed. 599 (1949). The proper measure of clarity, however, is not whether the decree is clear in some general sense, but whether it unambiguously proscribes the challenged conduct. Perez v. Danbury Hosp., 347 F.3d 419, 424 (2d Cir.2003). If, as we believe to be the case here, the law relied on by the party seeking contempt is ambiguous in its application to the challenged conduct, contempt will not lie. See, e.g., Rajah Auto Supply Co. v. Grossman, 207 F. 84 (2d Cir.1913) (per curiam) (affirming denial of contempt motion where plaintiff's case was too doubtful on the facts and the law to warrant contempt); United States ex rel. IRS v. Norton, 717 F.2d 767, 774 (3d Cir.1983) ("[A]ny ambiguity in the law should be resolved in favor of the party charged with contempt."); Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16 (1st Cir.1991) (stating prudential rule that ambiguities in court orders should be read in light favorable to party charged with contempt); cf. Vertex Distrib. v. Falcon Foam Plastics, Inc., 689 F.2d 885,

889 (9th Cir.1982) (explaining that party should not be held in contempt if his actions appear based on a good faith and reasonable interpretation of the order).

It should be apparent that the novel question addressed above, whether employees must be paid overtime wages for work that their employer has prohibited and does not desire, was not the subject of an obvious answer. On the contrary, when the Secretary brought its petition for contempt to the district court, there was a substantial question as to the legality of Gotham's overtime arrangement and “fair ground of doubt as to the wrongfulness of the defendant's conduct.” Cal. Artificial Stone Paving Co. v. Molitor, 113 U.S. 609, 618, 5 S.Ct. 618, 28 L.Ed. 1106 (1885); King, 65 F.3d at 1058.
From another angle, it seems unreasonable that Gotham be required, on pain of contempt, to arrive at a correct answer to such a difficult question of first impression. See Radio Corp. of Am. v. Cable Radio Tube Corp., 66 F.2d 778, 782-83 (2d Cir.1933) (noting potential unfairness to defendant where contempt proceedings used to resolve substantial dispute); United States v. Accetturo, 842 F.2d 1408, 1416 n. 4 (3d Cir.1988) (suggesting trial court consider relief from contempt in circumstances of case of first impression). But cf. Apple Computer, Inc. v. Formula Int'l, Inc., 594 F.Supp. 617, 623 (C.D.Cal.1984) (issuing contempt order despite novel nature of underlying legal issue after finding defendant's alleged interpretation was a “mere pretext” to avoid an injunction).

B. Gotham Was Reasonably Diligent in Attempting to Comply

Additionally, Gotham's efforts to comply with the consent judgment were adequate to warrant relief from contempt. We have noted already that the staffing agency's legal obligations were difficult to discern and its managerial role vis-à-vis the nurses made compliance more challenging than would be the case in an ordinary employment context. See Dunn, 47 F.3d at 490 (affirming trial court's denial of petition for contempt where situation faced by defendant was complex and largely outside its control). Against that backdrop, Gotham sought the advice of counsel before adopting

its overtime policy; it made its nurses aware of the rule; it discouraged its nurses from accepting overtime shifts without seeking prior approval and discouraged its clients from offering those shifts; and, when its instructions were disregarded, it negotiated with the hospitals to procure an overtime premium retrospectively. While these steps did not exhaust all means available to Gotham to ensure that overtime was not performed (and thus were inadequate to satisfy the strict standards for compliance with the Act), they are evidence of Gotham's diligent and energetic efforts to comply in a reasonable manner with the 1994 consent judgment.

Consequently, we conclude the district court acted within its discretion in declining to impose contempt under a decree that did not, at the relevant time, unambiguously proscribe Gotham's actions and, one, moreover, with which the employer attempted to comply in a reasonable manner.

CONCLUSION

For these reasons, the judgment of the district court denying the Secretary's petition for civil contempt is affirmed.

The district court entered a consent decree requiring Gotham Registry, a staffing agency for healthcare professionals, to comply with the overtime requirements of the Fair Labor Standards Act ("FLSA") for nurses it "employ [s]." The only question presented on this appeal is whether we should affirm the ruling by the district court, which is presumed to know its own injunction, that Gotham is not in contempt. See JTH Tax, Inc. v. H & R Block Eastern Tax Svcs., Inc., 359 F.3d 699, 705 (4th Cir.2004).

The majority agrees that Gotham is not in contempt. I concur in that result, because it is obvious to me that Gotham was not in violation of the FLSA when it refused to pay overtime to employees whom it forbid to work overtime, and (when they violated their employer's instructions) were not acting as employees under the relevant Tennessee Coal test. I cannot sign the majority opinion because it holds that Gotham's practice

violates the FLSA-though Gotham could not be expected to know this until so advised by the majority's ambitious, consequential and dubious rulings.

The correct test for whether Gotham must pay overtime is set out in Tennessee Coal: whether the work was "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." Tenn. Coal, Iron & RR. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598, 64 S.Ct. 698, 88 L.Ed. 949 (1944).

The majority recites the test, duly records the district court's findings as to each prong, and concedes that "we detect no clear error in these factual findings . " Maj. Op. at 286, supra. It would seem that if this court were going to transcend the question presented and gratuitously answer an underlying question (Were the nurses acting as employees when they did what the employer forbid?), it might content itself with the formulation of the Supreme Court and findings of an experienced district judge. The justification offered by the majority opinion is that "application of the Tennessee Coal test to the facts of this case is something of a red herring." Maj. Op. at 286, supra. I do not find this ichthyological approach useful.

Tennessee Coal prescribes a two-part definition of "work" under the FLSA: an employee's efforts (1) must be "controlled or required by the employer" and (2) "pursued necessarily and primarily for the benefit of the employer and his business." Tenn. Coal, 321 U.S. at 598, 64 S.Ct. 698 (emphasis added).

As to control: the district court found that Gotham lacked control over the nurses' performance of unscheduled shifts, that nurses and hospitals decide whether overtime will be performed based on their own interests, and that Gotham does not desire the performance of overtime. Q.E.D. Though conceding that a nurse's decision to work overtime is "unauthorized work" that is "reached by the hospital and nurse without Gotham's participation," Maj. Op. at 287, supra, the majority argues that such "limited control [sic] . does not change the nature of the exertion that follows and thus does not bear on whether such exertion is work." Id. This is an extreme simplification-and

useless, because the necessary analytical tools are readily available in Tennessee Coal and in Labor Department regulations.

The applicable regulation requires that an employer “exercise its control and see that the work is not performed if it does not want it to be performed”: “[t]he mere promulgation of a rule against such work is not enough.” 29 C.F.R. § 785.13. To this we owe Chevron deference. Gotham's preauthorization rule bars the performance of unauthorized overtime and refuses compensation at overtime rates for such unauthorized hours. Of course a rule is insufficient unless it is applied and enforced. But Gotham has enforced this rule conscientiously, as the findings of the district court confirm: 75 percent of preauthorization requests are turned down, and unauthorized overtime shifts are reimbursed at the overtime rate only on the rare occasions (about ten percent of the time) when Gotham persuades the hospital to agree retroactively to an overtime rate. Gotham should not be pressed to more oppressive measures. Suspension would be ineffective because the nurses are professionals in great demand who can (and often do) work for multiple staffing agencies: there are at least 25 in competition with Gotham in the New York area alone. Gotham should not be required to rely on undercover agents to obtain advance knowledge of an unauthorized overtime shift, or on enforcers to drag nurses from the bedside of the sick. See Davis v. Food Lion, 792 F.2d 1274, 1277 (4th Cir.1986) (holding that if required work could be performed within 40 hours, and if the employer enforced its 40-hour rule, employer lacked actual or constructive knowledge of the overtime work). The nurses' overtime efforts are therefore neither controlled nor required by Gotham.

As to the second Tennessee Coal consideration-whether the activity is “pursued necessarily and primarily” for the employer's benefit-the Secretary has demonstrated no error in the trial court's finding that the additional shifts do not necessarily benefit Gotham. The district court found that the documented administrative costs alone would wipe out any remaining profit if Gotham were to pay an overtime rate on shifts

reimbursed at a straight-time rate. This finding is amply supported by the record: Gotham's CEO testified that unauthorized overtime triggers additional costs such as time spent tracking, confirming, and negotiating rates for overtime hours with hospitals. No wonder Gotham forbids overtime. It cannot be said that such shifts are “pursued necessarily and primarily” for Gotham's benefit.

Under Tennessee Coal, the shifts in question were not performed in Gotham's “employ” within the meaning of the FLSA, and Gotham therefore did not violate the consent decree. In lieu of undertaking the prescribed analysis under Tennessee Coal, the majority announces the tautology that “[w]ork is work, after all.” Maj. Op. at 286, supra. The majority complains that “Gotham has not persuaded us that it made every effort to prevent the nurses' unauthorized overtime,” Maj. Op. at 290, supra (emphasis added), and goes on to speculate as to how Gotham might (within the law) effectively stop it. For example, the majority cites Gotham's supposed failure to explain (though never asked) “why it could not keep a daily, unverified tally of its nurses' hours and reassign shifts later in the week that would result in overtime.” Maj. Op. at 290, supra. I do not understand this formulation and I would be surprised if Gotham or the nurses did. Moreover, the majority ignores the fact that nurses often work for more than one agency. The majority also taxes Gotham for its supposed failure to explain why it does not “refuse to assign any shifts to nurses who habitually disregard Gotham's overtime rule.” Maj. Op. at 290, supra. In other words, Gotham could fire them. Perhaps: maybe an employer can discipline an employee for habitually staying in the operating room or on a ward. I say “maybe” because I don't know, and the reason I don't know is because this argument has not been made to us and has not been briefed by the parties and input has not been solicited from the members of the nursing profession who have the largest stake in this question. I am compelled to add that the majority does not know either, for the same reasons.

The majority next posits that “Gotham could simply contract in advance with the hospitals to charge a higher fee when nurses are working overtime.” Maj. Op. at 291, supra. That of course begs the (not “simple”) question of what happens when a nurse working for Gotham works at more than one hospital or when a nurse works at one or more hospitals for multiple agencies.

Finally, the majority opinion says that an agency can “entirely disavow overtime hours, announcing a policy that it does not, under any circumstances, employ a nurse for more than 40 hours in a week.” Maj. Op. at 291, supra. Thus the majority holds that an employer can enforce its overtime restriction by paying the employee nothing at all for such hours. That may be. And this certainly will solve Gotham's problem and ensure that a staffing agency can comply with the labor laws (at least those applicable in the Second Circuit) and avoid contempt. But this holding may come as a surprise to the Secretary of Labor. And it runs counter to the position of every party; as the majority concedes, “no party disputes that the performance of overtime entitled the nurses to compensation at the regular rate of pay at least.” Maj. Op. at 286, supra. My strong view is that this appellate panel should affirm the denial of contempt without reaching and deciding large underlying questions of labor law. Maybe a staffing agency can and should pay nurses zero dollars per overtime hour worked. But though as a panel-member I am drawn into a critique of the majority's unnecessary analysis, I would not decide that question on this appeal because we lack the benefit of input from the parties (and amici) and we lack findings by a district judge made on the basis of a developed record.

The majority opinion affirms the denial of the contempt motion, on the ground of the “then unsettled law” prevailing when Judge Stanton made his ruling. Maj. Op. at 284, supra. I agree that the law was then unsettled (though I think it is little good we have now done in that department). It is obvious that the agency system in which Gotham and many nurses operate is a preferred market mechanism of a profession whose

services are much in demand. The majority has upended the way in which many nurses elect to make a living. Nurses evidently have the bargaining power to sell their services to individual hospitals without becoming employees, without joining unions, and without submitting themselves to the work schedules of wage slaves. In short, nurses use agencies create for themselves the freedom and profit opportunities available to other professionals whose services are in great demand. The majority opinion unsettles these market arrangements.

Judge JACOBS concurs in a separate opinion. Chief Judge JACOBS concurs in a separate opinion.