IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1632

R. ALEXANDER ACOSTA, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Appellee,

v.

FIRE & SAFETY INVESTIGATION CONSULTING SERVICES, LLC; CHRISTOPHER HARRIS, Individually and as owner of Fire & Safety Investigation Consulting Services, LLC,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of West Virginia

BRIEF OF THE SECRETARY OF LABOR

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this case pursuant to section 17 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 217. Jurisdiction was also vested in the district court under 28 U.S.C. 1331 (federal question jurisdiction) and 28 U.S.C. 1345 (vesting jurisdiction in the district courts over suits commenced by an agency or officer of the United States).

This Court has jurisdiction pursuant to 28 U.S.C. 1291. The district court entered an order on May 3, 2018 granting summary judgment in part to Plaintiff-Appellee Secretary of Labor ("Secretary") and denying summary judgment to Defendants-Appellants Fire & Safety Investigation Consulting Services, LLC and Christopher Harris (collectively "Fire & Safety"). Joint Appendix ("J.A.") 1264-96. The court entered a final judgment on that same date. J.A. 1297. On May 17, 2018, the court granted the Secretary's motion for an amended judgment and clarification of the court's order and entered an amended final judgment. J.A. 1302-05. Fire & Safety filed a timely notice of appeal on June 4, 2018. J.A. 1306-07; *see* Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that Fire & Safety paid its employees the same hourly rate for non-overtime and overtime hours, and thereby failed to pay the overtime premium required by the FLSA.

2. Whether the district court correctly concluded that Fire & Safety failed to make and maintain records of each employee's hours of work each day and thereby failed to keep records as required by the FLSA.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

On February 22, 2017, the Secretary filed a complaint against Fire & Safety alleging that it violated the FLSA's overtime provision in section 7(a) and recordkeeping provision in section 11(c), 29 U.S.C. 207(a), 211(c). J.A. 15-23. The Secretary sought to recover unpaid overtime compensation owed to 71 employees under the FLSA and an equal amount in liquidated damages, as well as a permanent injunction to enjoin Fire & Safety from committing future violations of the FLSA. J.A. 15-23, 1187-90; *see* 29 U.S.C. 216(c), 217.[1]

On May 3, 2018, the district court granted in part the Secretary's motion for summary judgment, concluding that Fire & Safety violated the FLSA's overtime and recordkeeping requirements, that Fire & Safety's owner Christopher Harris was an individual employer under the FLSA, that Fire & Safety was liable for $817,902.11 in back wages, which was the amount calculated by the Department of Labor's Wage and Hour Division ("Wage and Hour"), and that Fire & Safety was liable for an equal amount of liquidated damages. J.A. 1264-96.[2] The court

[1] As with back wages, any liquidated damages recovered by the Secretary will be paid to the employees.

[2] Fire & Safety has not appealed Christopher Harris' status as an individual employer under the FLSA, the back wage calculations that were the basis for the back wage award, or the award of liquidated damages.

denied the Secretary's request for injunctive relief, concluding that the Secretary had not shown cause for such relief. J.A. 1293-95.[3] The district court denied Fire & Safety's motions for summary judgment and for attorney's fees and costs. J.A. 1295-96. The court also rejected Fire & Safety's objection to the Secretary's inclusion of three additional employees in the list of employees to whom back wages were owed. J.A. 1271-72.[4] The court entered final judgment on May 3, 2018. J.A. 1297.

On May 11, 2018, the Secretary filed a motion to amend the judgment and clarify the court's May 3 order. J.A. 1298-1301. Specifically, the Secretary requested that the judgment reflect both the fact that the court issued a judgment award in favor of the Secretary and the amount of the award because neither was stated in the May 3 judgment, and that the court clarify whether it had dismissed the Secretary's claim for injunctive relief. J.A. 1298-1301. On May 17, 2018, the court granted the motion, making clear that it was awarding judgment to the

[3] The Secretary has not appealed the district court's denial of the requested injunctive relief.

[4] The Secretary originally identified 68 employees owed back wages, who were listed in Schedule A attached to the complaint. J.A. 22-23, 1268. After learning during discovery of three additional employees to whom back wages were owed, the Secretary revised the list in Schedule A to add the three additional employees. J.A. 1187-90, 1271-72. Fire & Safety objected to the Secretary's revised Schedule A. J.A. 1272. Fire & Safety has not appealed the district court's ruling rejecting its objection.

Secretary in the amount of $1,635,804.22, which consisted of $817,902.11 in back wages and $817,902.11 in liquidated damages, and clarifying that it dismissed with prejudice the claim for injunctive relief. J.A. 1302-04. That same day, the court entered an amended final judgment to that effect. J.A. 1305.

Fire & Safety appealed on June 4, 2018. J.A. 1306-07. On July 9, 2018, the district court denied Fire & Safety's motion for stay of judgment pending appeal. J.A. 1308-14.

B. Statement of Facts

1. Fire & Safety provides onsite safety and environmental consulting services, as well as fire investigation and security guard services, in the oil and gas industry in West Virginia and Pennsylvania. J.A. 302, 349, 1265. The employees at issue in this case are Fire & Safety's onsite safety consultants ("consultant-employees"). J.A. 1265-66. During the relevant period, from December 23, 2014 through December 6, 2016, the consultant-employees were regularly scheduled to work what Fire & Safety called a "hitch," whereby consultant-employees were scheduled to work 12 hours per day for 14 consecutive days, followed by 14 consecutive days off. J.A. 315, 362, 565, 1266. This equated to 84 hours of work per workweek, or 168 hours of work for a two-week hitch. J.A. 315, 565, 1266. Sometimes, the consultant-employees worked fewer than the full 168 hours in a two-week hitch. J.A. 934-75.

2. During the relevant period, Fire & Safety paid the consultant-employees a "hitch rate." J.A. 362, 566, 1266. When the consultant-employees worked the full two-week hitch of 168 hours (i.e., 14 consecutive 12-hour days), Fire & Safety paid a fixed amount known as the "hitch rate." J.A. 579-80.

3. When a consultant-employee worked fewer than the full 168 hours in the two-week period, Fire & Safety paid that consultant-employee using an hourly rate that Fire & Safety called a "blended rate." J.A. 583-86, 1267. In such circumstances, Fire & Safety divided the fixed hitch rate amount for that consultant-employee by 168 hours (i.e., the total number of work hours scheduled in a two-week hitch) to produce a "blended rate" per hour, and then multiplied that hourly "blended rate" by the number of hours that the consultant-employee actually worked in the two-week period; the resultant number was the total amount paid to the consultant-employee for the two-week period. J.A. 580-86, 1267. For example, if a consultant-employee's fixed amount of pay for a two-week hitch was $5,000, his "blended rate" was $29.76 per hour ($5,000 divided by 168 hours). J.A. 585-86. When the consultant-employee worked only four days in a two-week hitch period, he was paid $1,428.48 (four days times 12 hours/day times $29.76/hour). J.A. 585-86, 950 (Rocky Stone, whose hitch rate was $5,000, was paid $1,428.57 for four days); *see* J.A. 934-75. Similarly, when the consultant-employee worked fewer than 40 hours in a week, such as one day (i.e., 12 hours),

he was paid $357.12 (one day times 12 hours/day times $29.76/hour). J.A. 949 (Hugo Rull, whose hitch rate was $5,000, was paid $357.14 for one day); *see* J.A. 934-75. Thus, when consultant-employees worked fewer than 168 hours in the two-week hitch period, their hourly "blended rate" was 1/168th of the fixed amount of pay for the two-week hitch.[5]

C. Decision of the District Court

1. On May 3, 2018, the district court granted summary judgment to the Secretary, concluding that Fire & Safety violated the FLSA's overtime requirement, 29 U.S.C. 207(a), by failing to pay the consultant-employees an overtime premium for their overtime hours. J.A. 1274-86. The court cited the FLSA regulation at 29 C.F.R. 778.309, which explains that an employer may pay a fixed sum for overtime when an employee works a fixed number of overtime hours each week where the fixed sum is determined by multiplying the employee's overtime rate by the number of overtime hours regularly worked. J.A. 1275. The court noted that Fire & Safety argued that it complied with section 778.309 based on its proffered evidence that it claimed showed that it had agreed with its

[5] Another way of calculating this, as explained by Fire & Safety, which leads to the same mathematical result, was that the fixed two-week hitch amount was divided in half to obtain the hitch amount per week. This number was divided by 84 hours (one-half of the 168 hours in a two-week hitch) to obtain the hourly "blended rate." Thus, the hourly "blended rate" was 1/84th of the fixed weekly pay (which is the same mathematically as 1/168th of the fixed pay for two weeks). J.A. 580-82.

consultant-employees to pay them a fixed amount for a two-week hitch (i.e., 168 hours) that included overtime compensation and that it had informed them of the non-overtime and overtime hourly rates of pay that were purportedly the basis for the fixed hitch amount. J.A. 1276-77.

The court concluded that even if an agreement existed between Fire & Safety and the consultant-employees that the fixed amount of pay for a hitch included overtime compensation, such agreement "clearly" did not reflect the regular rate of pay (i.e., the non-overtime hourly rate of pay) "actually in effect." J.A. 1277. The court cited Supreme Court precedent and a Department of Labor ("Department") regulation that the regular rate is an actual fact regardless of any designation by the parties or agreement purporting to use a different hourly rate. J.A. 1277 (citing 29 C.F.R. 778.108, *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199 (1947), and *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945)).

The court concluded that Fire & Safety's pay scheme suffered from the same defects as the pay scheme that the Supreme Court held invalid under the FLSA in *Asselta*. J.A. 1278-85. Specifically, the court noted that Fire & Safety did not actually use the purportedly agreed-upon non-overtime and overtime hourly rates to calculate pay when consultant-employees worked fewer than 168 hours in a two-week hitch. J.A. 1283-84. Instead, Fire & Safety used the hourly "blended

rate" to calculate pay when consultant-employees worked fewer than 168 hours, including when they worked fewer than 40 hours in a week. J.A. 1284. The court explained that, similar to the deficient pay scheme at issue in *Asselta*, this evidence established that Fire & Safety paid the hourly "blended rate" uniformly for both non-overtime and overtime hours worked and that this hourly "blended rate" was in fact the regular rate. J.A. 1282-86. These actual facts show that this hourly "blended rate," and therefore the fixed hitch amount from which it was derived, did not include the requisite overtime premium. J.A. 1282-86.

2. The court further concluded that Wage and Hour's calculations of the amount of back wages owed for uncompensated overtime were proper and awarded a total of $817,902.11 in back wages. J.A. 1287-89. Wage and Hour calculated back wages by multiplying each consultant-employee's overtime hours worked from December 23, 2014 through December 6, 2017 by one-half of the regular hourly rate actually in effect, i.e., the "blended rate" derived from that consultant-employee's fixed hitch amount. J.A. 1288.

3. The court also concluded that an equal amount of liquidated damages was warranted because Fire & Safety failed to show that it undertook any effort to determine if its hitch compensation scheme, which it adopted in 2014, complied

with the FLSA. J.A. 1289-93.[6] Instead, the evidence showed that Fire & Safety "took an 'ostrichlike' approach forbidden under the Act[,]" which is "exactly the type of conduct that liquidated damages under the FLSA are meant to address." J.A. 1290-93 (quoting *Roy v. Cty. of Lexington*, 141 F.3d 533, 548-49 (4th Cir. 1998)).

4. Lastly, the district court concluded that Fire & Safety failed to keep proper records, including records of the hours each consultant-employee worked each day, in violation of the FLSA's recordkeeping requirements at 29 U.S.C. 211(c) and 29 C.F.R. 516.2(a)(7). J.A. 1286-87.

SUMMARY OF ARGUMENT

1. The district court correctly rejected Fire & Safety's claim that the fixed hitch amount, and the hourly "blended rate" that Fire & Safety derived from that amount, included overtime compensation; it instead properly concluded that Fire & Safety paid its consultant-employees for all non-overtime and overtime hours worked using the same hourly rate of pay, i.e., the hourly "blended rate," without making adequate provision for overtime compensation. Consistent with well-established principles that the regular rate, upon which overtime compensation is calculated, is based on the employer's actual practice, courts look to the actual

[6] Fire & Safety adopted the hitch compensation scheme before December 23, 2014, which was before the beginning of the period for which back wages were sought in this case. J.A. 566.

facts of how the employer paid its employees to determine whether a fixed amount of pay for a fixed number of hours includes overtime compensation. The Supreme Court in *Asselta* looked to the actual facts of how the employer paid its employees and concluded that the employer's pay scheme, in which the employer paid for non-overtime and overtime hours using a single hourly rate of pay, did not include overtime compensation and therefore did not comply with the FLSA. Subsequent cases have followed *Asselta* in considering similar pay schemes.

Like the employers in *Asselta* and the other cases, Fire & Safety claimed that the fixed amount of pay (i.e., the fixed hitch amount), and the hourly "blended rate" derived from that amount, included overtime compensation. As in those cases, however, the actual facts show that Fire & Safety paid its consultant-employees the hourly "blended rate" uniformly, irrespective of the number of hours actually worked. These actual facts thus indicate that the hourly "blended rate" (which in effect was the regular rate) and the fixed hitch amount from which that hourly rate was derived did not, in fact, include overtime compensation, irrespective of any after-the-fact allocation of them into non-overtime and overtime components. Therefore, the district court correctly concluded that Fire & Safety did not pay the requisite overtime premium for the overtime hours that the consultant-employees worked. The result was that Fire & Safety owed overtime

compensation for all of the consultant-employees' overtime hours worked at a rate of one-half of the regular rate in effect, i.e., the hourly "blended rate."

Regardless of Fire & Safety's assertion, which does not have clear support in the record, that there was an agreement between Fire & Safety and its consultant-employees that the fixed amount of pay included overtime compensation, any such agreement is irrelevant because the actual facts show that Fire & Safety did not pay its employees in accordance with such agreement and the actual facts are dispositive. Additionally, the policy goals underlying the FLSA's overtime provision support the district court's conclusion that Fire & Safety's fixed hitch amount of pay, and the hourly "blended rate" derived therefrom, did not include overtime compensation.

2. Fire & Safety waived its argument on appeal that it complied with the FLSA's recordkeeping requirements because it did not contest before the district court the Secretary's request for summary judgment on this issue. Even if it had not waived the issue, the undisputed facts show that Fire & Safety violated the FLSA's recordkeeping requirements because it failed to make and maintain the requisite records of each consultant-employee's hours of work.

3. Lastly, a remand is not warranted here because there is no dispute over a material fact as to Fire & Safety's failure to comply with the FLSA's overtime

requirement and its failure to comply with the FLSA's recordkeeping requirements.

STANDARD OF REVIEW

This Court employs a de novo standard of review of a district court's grant of summary judgment. *See Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 145 (4th Cir. 2017).

ARGUMENT

I. FIRE & SAFETY FAILED TO PAY THE OVERTIME PREMIUM REQUIRED BY THE FLSA WHEN IT PAID ITS CONSULTANT-EMPLOYEES THE SAME HOURLY RATE OF PAY FOR ALL NON-OVERTIME AND OVERTIME HOURS

A. Statutory and Regulatory Background

1. The FLSA requires employers to pay their employees "one and one-half times the regular rate at which [the employees are] employed" for any hours worked over 40 in a workweek. 29 U.S.C. 207(a)(1).[7] Thus, the regular rate is the hourly rate for non-overtime hours; one and one-half times the regular rate is the hourly rate for overtime hours. *See, e.g.*, *Flood v. New Hanover Cty.*, 125 F.3d 249, 251 (4th Cir. 1997) ("The employee's 'regular rate' is the hourly rate that the employer pays the employee for the normal, nonovertime forty-hour workweek.").

[7] The FLSA defines the "regular rate" at which an employee is employed to include "all remuneration for employment" paid to the employee except eight specific categories of payments. 29 U.S.C. 207(e). Neither this definition nor the categories of excludable payments are at issue in this case.

The regular rate plays a significant role in the overtime provision of the FLSA. As section 7(a)(1) makes clear, it is central to determining the amount of overtime compensation owed to employees. *See* 29 U.S.C. 207(a)(1). "The keystone of Section 7(a) is the regular rate of compensation. On that depends the amount of overtime payments which are necessary to effectuate the statutory purposes. The proper determination of that rate is therefore of prime importance." *Youngerman-Reynolds*, 325 U.S. at 424.

It is well established that the regular rate is based on the actual amount that the employer paid its employees for their non-overtime hours of work. *See* 29 C.F.R. 778.108. The "regular rate" refers to "the hourly rate actually paid for the normal, non-overtime workweek." *Walling v. Helmerich & Payne*, 323 U.S. 37, 40 (1944) (emphasis added); *see Youngerman-Reynolds*, 325 U.S. at 424-25 (the regular rate "is not an arbitrary label chosen by the parties; it is an actual fact"). "Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts." *Youngerman-Reynolds*, 325 U.S. at 424-25; *see Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 464 (1948) ("As the regular rate of pay cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee, it must be drawn from what happens under the

employment contract."); *Smiley v. E.I. Dupont De Nemours & Co.*, 839 F.3d 325, 330 (3d Cir. 2016) (citing *Youngerman-Reynolds*, 325 U.S. at 424-25), *cert. denied*, 138 S. Ct. 2563 (2018). Thus, the regular rate is an actual fact that requires looking beyond what the parties have purported to do.

2. When an employee works a fixed number of overtime hours each workweek, the Department's regulation at 29 C.F.R. 778.309 recognizes that it will "of course" be proper to pay the employee a fixed sum each week. The full text of this regulation states:

> Where an employee works a regular fixed number of hours in excess of the statutory maximum each workweek, it is, of course, proper to pay him, in addition to his compensation for nonovertime hours, a fixed sum in any such week for his overtime work, determined by multiplying his overtime rate by the number of overtime hours regularly worked.

29 C.F.R. 778.309. In such situations, the fixed amount of pay includes both non-overtime and overtime compensation for the set number of overtime hours such that no additional compensation is due for those overtime hours.[8]

This regulation does not provide an alternative means of calculating the regular rate and/or overtime compensation when an employee works a fixed number of overtime hours each week. Nothing in this regulation permits an

[8] For instance, if an employee is paid $10 per hour and works 60 hours each workweek, the employee's weekly pay will consistently be $700, which consists of 40 non-overtime hours at $10 per hour (which equals $400) and 20 overtime hours at $15 per hour (which equals $300).

employer to pay an hourly "blended rate" that purportedly includes overtime compensation for every hour worked when the employee works less than the fixed number of overtime hours. Indeed, by stating that the fixed sum is determined by multiplying the employee's overtime rate by the number of overtime hours worked each workweek, the regulation treats the fixed sum that includes overtime compensation as necessarily incorporating the concepts of a regular rate for non-overtime hours and one and one-half times the regular rate (i.e., the "overtime rate") for all the overtime hours worked each workweek. Thus, the regulation applies standard FLSA principles for calculating overtime compensation by stating that when an employee works a fixed number of overtime hours each week, the resultant amount of pay to the employee will be the same every week – the amount each week does not vary because the number of overtime hours worked each week does not vary.[9]

[9] Thus, Fire & Safety's argument that it complied with section 778.309, Br. 3-4, 10-11, 17-23, is misplaced. Because section 778.309 is a straightforward application of standard and well-established regular-rate and overtime principles rather than establishing some alternative means of compliance, the relevant issue is whether Fire & Safety adhered to those well-established principles. As discussed below, it did not.

B. The Actual Facts in This Case Show that Fire & Safety's Hourly "Blended Rate," and Therefore the Fixed Amount of Pay from which the "Blended Rate" Was Derived, Did Not Truly Include Overtime Compensation; Rather, the Actual Facts Show that Fire & Safety Paid for Non-Overtime and Overtime Hours Using the Same Hourly "Blended Rate" Without Paying the Overtime Premiums Required by the FLSA.

1. When an employer asserts that a fixed amount of pay for a fixed number of hours included overtime compensation, courts must look to the actual facts of the employer's pay practices to determine whether the fixed amount in fact included overtime compensation or instead was only the straight-time pay for all the hours worked but did not include the overtime premium for any overtime hours worked.[10] As the Fifth Circuit explained, in situations when employees consistently work more than 40 hours per week and are paid a fixed amount, such as a weekly salary, "the question arises whether the weekly payment genuinely represents payment at a regular rate for the first [40] hours plus time and a half for

[10] As discussed in more detail below, while an agreement between an employer and its employees that a fixed amount of pay for a fixed number of hours includes overtime compensation "is instructive, the Supreme Court has held that it is not necessarily determinative" of whether the fixed amount in fact includes overtime compensation. *Adams v. Dep't of Juvenile Justice*, 143 F.3d 61, 67 (2d Cir. 1998) (citing *Asselta*, 331 U.S. at 204). The facts showing how the employer actually paid the employees trumps any such agreement. *See Asselta*, 331 U.S. at 209; *Adams*, 143 F.3d at 70. "[I]n testing the validity of a wage agreement under the Act the courts are required to look beyond that which the parties have purported to do." *Asselta*, 331 U.S. at 204. Thus, consistent with the well-established principle discussed above that the regular rate is based on actual facts, the actual facts control in determining whether a fixed amount in fact includes overtime compensation.

the excess hours or, instead, represents a single wage rate applied to the first [40] hours and the excess hours uniformly." *Nunn's Battery & Elec. Co. v. Goldberg*, 298 F.2d 516, 519 (5th Cir. 1962); *see Adams*, 143 F.3d at 67 (the regulations at 29 C.F.R. 778.108 and 778.309 "do not resolve whether the salary of an employee who regularly works more than [40] hours per week should or should not be presumed to include an overtime premium").[11]

The Fifth Circuit in *Nunn's Battery* noted that the Supreme Court and other courts "have often disregarded an employer's assertions" that the fixed amount included required overtime compensation and have concluded instead that the fixed amount was straight-time pay for all hours worked but did not include the required overtime premium. *Nunn's Battery*, 298 F.2d at 519 (citing *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 581 (1942), *Beechwood Lumber Co. v.*

[11] When an employer pays its employees a fixed amount, be it as a daily, weekly, monthly, or annual salary, rather than paying them on an hourly basis, the fixed amount typically does not include overtime compensation and the employer owes overtime compensation for any overtime hours worked in addition to the fixed amount. *See* 29 C.F.R. 778.112-.114. In such situations, the regular rate is calculated by dividing the weekly compensation (if paid on a monthly or annual basis, the salary is reduced to its weekly equivalent) by the hours worked each week; the resultant number is the regular hourly rate for each week. *See Bay Ridge*, 334 U.S. at 464; *see also* 29 C.F.R. 778.109, .112-.114. The overtime compensation that is due is one-half times that regular rate for each overtime hour worked that corresponding week, rather than one and one-half times the regular rate, because the employee has already received straight-time compensation as part of the fixed amount for all of the hours worked including the overtime hours. *See* 29 C.F.R. 778.112-.114.

Tobin, 199 F.2d 878 (5th Cir. 1952), and *Bibb Mfg. Co. v. Walling*, 164 F.2d 179 (5th Cir. 1947) and concluding that there was no basis to treat the fixed payments at issue as including overtime compensation); *see Asselta*, 331 U.S. at 204-05 (concluding that a fixed weekly payment was for all hours worked at a single rate and did not include the requisite overtime premium).

Asselta is particularly instructive in this inquiry. In that case, a collective bargaining agreement ("CBA") provided that employees were paid a fixed weekly amount for working 46 hours per week (except for watchmen employees, who were paid a fixed weekly amount for working 54 hours per week). *See* 331 U.S. at 202.[12] The CBA stated that the fixed weekly amount included payments for straight time and overtime. *See id.* Rather than expressly stating an hourly rate of pay that the fixed weekly amount was based on, the CBA set out a formula for deriving the regular rate for non-overtime hours from the fixed weekly amount. *See id.* at 202-03. As an initial matter, *Asselta* acknowledged that "[a] wage plan is not rendered invalid simply because instead of stating directly an hourly rate of pay[,]" the parties agreed to pay a fixed weekly amount that included regular and overtime compensation and agreed to a formula for calculating the corresponding

[12] For ease of discussion, we describe *Asselta* with reference to only the employees who were scheduled to work 46 hours per week. The Court noted, however, that the same principles and therefore the same analysis and conclusion applied to the watchmen's schedule and pay. *See* 331 U.S. at 202 n.4, 203, 205, 206 n.7 & n.8.

hourly rate. *Id.* at 204. The Court explained, however, that "the crucial questions in this case . . . are whether the hourly rate derived from the formula here presented was, in fact, the 'regular rate' of pay within the statutory meaning and whether the wage agreement under consideration, in fact, made adequate provision for overtime compensation." *Id.*

The Court examined whether the actual facts showed that the fixed weekly salary included overtime compensation. *See* 331 U.S. at 202-06. When an employee worked fewer or more than 46 hours in a week, the employer calculated his pay by dividing the fixed weekly salary by 46 hours, which corresponded to the number of hours the employee was scheduled to work, and applying that hourly rate to the hours actually worked. *See id.* at 202-05. Using this method, the hourly rate remained constant regardless of whether an employee worked exactly 46 hours, or more or fewer than 46 hours. *See id.* at 202, 205-06. This was particularly notable for part-time workers who did not work overtime hours. *See id.* at 203-06. The employer calculated their hourly rate of pay for their non-overtime hours by dividing the weekly salary for full-time workers by 46 hours (i.e., the number of hours that full-time employees were scheduled to work). *See id.* As the Court explained, this method of payment "indicated an intention to compensate an hour's labor by payment of a pro-rata share of the weekly wage." *Id.* at 205. The result was that the hourly rate for part-time workers' non-overtime

hours was derived from an amount that supposedly included overtime pay. *See id.* at 205-06. The Court reasoned that "[t]he payment of 'overtime' compensation for non-overtime work raises strong doubt as to the integrity of the hourly rate upon the basis of which the 'overtime' compensation is calculated." *Id.* at 205.

The Court concluded that the employer's actual practice of using an hourly rate that purportedly included overtime compensation to calculate pay for employees when they worked fewer than 40 hours indicated that the fixed weekly salary from which the hourly rate was derived did not, in fact, include any overtime compensation. *See* 331 U.S. at 204-06, 209. Consequently, the employer's pay scheme did not include an "adequate provision for overtime compensation[.]" *Id.* at 204-05. The result was that the regular rate, upon which overtime needed to be calculated, was the hourly rate the employer actually paid (which was the fixed weekly salary divided by the 46 scheduled hours). *See id.* at 204; *see also* WHD Opinion Letter FLSA2006-7NA, 2006 WL 4512949 (May 4, 2006) (concluding that employer's "blended rate" pay plan did not comply with the FLSA's overtime provision because the employer paid the same "adjusted" hourly rate for all hours worked up to 48, which showed that the adjusted rate was in fact the regular rate and, therefore, the blended rate pay plan incorrectly assumed that overtime had already been paid or was included in the adjusted rate).

The Second Circuit applied *Asselta* to a similar pay structure in *Adams*. Pursuant to a CBA, the employees in *Adams* were paid a fixed salary for a 60-hour workweek. *See* 143 F.3d at 64. The CBA provided a formula for calculating the non-overtime hourly rate based on the fixed salary for 60 hours of work. *See id.* at 68. The court noted that the relevant question ultimately was "whether what actually occurred under the wage contract – as opposed to the mere terms of the contract – reflected an FLSA-sanctioned arrangement[.]" *Id.*

The court explained that the evidence in the record was inconclusive as to what actually occurred, specifically with regard to what occurred when an employee worked less than a full 60-hour week. *See* 143 F.3d at 68. The pay scheme's compliance with the FLSA turned on whether, when an employee worked one hour less than her schedule, for instance, the employee would be docked 1/60th of her weekly salary, which was the pro rata share of her weekly salary, or would be docked one hour at her overtime rate, which was one and one-half her hourly rate based on the formula in the CBA. *See id.* at 68, 70.[13] If the

[13] The court provided a useful example of the difference between the two methods of docking. *See* 143 F.3d at 70. Assuming the CBA-formula hourly rate for non-overtime hours was $10 per hour, the weekly salary for a 60-hour week would be $700 ($10 per hour x 40 regular straight time hours + $15 per hour x 20 overtime hours). If an employee worked 59 hours in a particular week and she was docked the pro rata share of her weekly salary, she would have been docked $11.67 (1/60th of $700). By contrast, if the employee was docked according to the CBA-hourly rate, she would have been docked $15 (one hour at the overtime rate of one and one-half of $10). *See id.*

facts showed that the employee was docked the pro rata share of her weekly salary (which some of the evidence suggested was the case), then the case would be similar to *Asselta* where the Supreme Court held that a similar pay scheme was not in compliance because it did not adequately provide for overtime compensation. *See id.* at 68-70. Citing *Asselta*, the court noted that the fact that it was more generous to the employees in *Adams* to deduct a pro rata share did not prevent the docking practice from being relevant to determining if the employer's actual practice complied with the FLSA. *See id.* at 69 n.9. The court ultimately concluded, however, that there was insufficient evidence in the record to determine what actually occurred, and remanded for further development of the record on the question of pay docking. *See id.* at 70.

Lastly, a similar pay scheme was soundly rejected in *Lopez v. Genter's Detailing, Inc.*, No. 09-0553, 2011 WL 5855269 (N.D. Tex. Nov. 21, 2011), *affirmed* 511 F. App'x 374 (5th Cir. Feb. 13, 2013). There, the employer claimed that the hourly rate shown on the employees' pay stubs was a blended rate that included overtime compensation based on 96 hours of work for a two-week period but that the real regular rate was a lower amount than that shown on the pay stubs. *See id.* at *1. Relying on *Asselta*, the court rejected the employer's argument because the employer never paid any employee using the allegedly real regular rate when the employee worked more or less than 40 hours per week. *See id.* at *3-4.

Instead, the facts showed that the employer paid the rate on the paystub for every hour worked, regardless of whether the employee worked more or less than 40 hours per week. *See id.* Therefore, the court concluded that the rate shown on the pay stubs was the regular rate and the employer failed to pay the requisite overtime premium. *See id.*

2. Fire & Safety's actual pay practices show that it paid its consultant-employees for both non-overtime and overtime hours using the same hourly rate, which was the hourly "blended rate." J.A. 1284. It is undisputed that when an employee worked less than the full two-week hitch schedule, including when he worked fewer than 40 hours in a week, Fire & Safety calculated his hourly rate of pay by dividing the fixed hitch amount by 168 hours (i.e., the scheduled hours for two weeks of work) and used that hourly rate, which Fire & Safety called the "blended rate," to pay for the hours actually worked. J.A. 580-86, 934-75, 1267. For instance, when a consultant-employee worked 12 hours (i.e., one 12-hour day) in a week, Fire & Safety paid the consultant-employee for 12 hours at the hourly "blended rate," which supposedly included overtime compensation. J.A. 949. The result was that employees who worked less than a full hitch schedule, including when they worked fewer than 40 hours, were paid a pro rata share of the fixed hitch amount. *See Asselta*, 331 U.S. at 205; *Adams*, 143 F.3d at 68-70.

There is no evidence that Fire & Safety ever paid its consultant-employees using the purported non-overtime and overtime rates that were supposedly the basis for the fixed hitch amount. As the court noted, although there is no requirement that the regular or non-overtime rate be reflected in a written agreement, it is significant that Fire & Safety did not contemporaneously record any purported non-overtime rate and overtime rate. J.A. 1283-84 & n.2. The court pointed out that, in response to Wage and Hour's request for payroll information, Fire & Safety's internal accountant had to calculate the missing straight-time rates to include them in a spreadsheet. J.A. 1283-84 (citing J.A. 620-23); *see* J.A. 604-05 (Fire & Safety's internal accountant testified that the records that Fire & Safety produced for the Wage and Hour investigation had to be modified to add the hourly rate). Indeed, as the court noted, the first time Fire & Safety's internal accountant heard the term "blended rate" was during the Wage and Hour investigation. J.A. 1284 n.2 (citing J.A. 637). In sum, the undisputed facts show that each week, regardless of the number of hours worked, Fire & Safety paid its consultant-employees the "blended rate" for every hour of work. J.A. 1284 (citing J.A. 583-84); *see Lopez*, 2011 WL 5855269, at *3-4.

Thus, similar to what occurred in *Asselta* and *Lopez*, the actual facts here establish that the hourly "blended rate" was the regular rate and that the hourly "blended rate" and the fixed hitch amount from which that hourly rate was derived

did not include overtime compensation.[14] Therefore, the district court correctly concluded that Fire & Safety owed overtime compensation for all overtime hours worked at one-half the regular rate, i.e., the hourly "blended rate." J.A. 1284; *see* WHD Opinion Letter FLSA2006-7NA, 2006 WL 4512949 (the employer was obligated to pay half-time of regular rate actually in effect for overtime hours where it paid the same "adjusted" hourly rate for all hours worked up to 48 per week).[15]

3. Fire & Safety's attempt to distinguish *Asselta* is unpersuasive. Fire & Safety asserts that the problem that the Supreme Court identified in *Asselta* was that the employer was trying, through the CBA, to avoid paying overtime until an employee worked more than 46 hours. Br. 24-25. Fire & Safety further asserts

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[14] If Fire & Safety's fixed hitch amount (and the hourly "blended rate" derived therefrom) had truly included overtime compensation, then the hourly rate that it paid when consultant-employees worked fewer than 40 hours would have been based on the non-overtime hourly rate that was purportedly the basis for the fixed hitch amount. Likewise, when an employee worked four days (48 hours) in a two-week hitch period, the pay would have been based on 40 hours at the purported non-overtime hourly rate and eight hours at the purported overtime hourly rate, not 48 hours at the "blended rate." Fire & Safety has not identified a single instance when an employee's purported non-overtime and overtime hourly rates were used to calculate his pay.

[15] The Secretary does not dispute Fire & Safety's statement, Br. 16-17, that, as the Plaintiff, the Secretary bears the burden of proof of establishing that Fire & Safety violated the FLSA's overtime provision by not paying the consultant-employees the requisite overtime premium. *See, e.g.*, *Benshoff v. City of Va. Beach*, 180 F.3d 136, 140 (4th Cir. 1999). Nothing in the district court's decision suggests, however, that the court failed to hold the Secretary to that burden.

that, unlike the pay system in *Asselta*, its pay system was designed to pay employees a fixed sum that included straight-time and overtime compensation. Br. 25. Not only does Fire & Safety not accurately characterize the problems identified by the Supreme Court in *Asselta*, which was that the employer paid the same hourly rate for all hours worked and therefore did not pay the requisite overtime premium, but Fire & Safety assumes the very conclusion that is at issue (i.e., that the fixed amount it paid its consultant-employees included overtime compensation), which has been demonstrated not to have been the case.

Fire & Safety's reliance on *Adams* fares no better. Fire & Safety is incorrect when it argues, Br. 22-23, 27, that *Adams* approved of paying a fixed sum for a schedule that includes overtime but docking an employee for time not worked on a pro rata basis. In fact, *Adams* concluded the opposite: if the facts on remand showed that the employer docked an employee for time not worked on a pro rata basis, such a pay scheme would not comply with the FLSA for the same reasons that the Supreme Court explained in *Asselta*, *see* 143 F.3d at 70, that the fixed weekly salary (corresponding to the number of scheduled hours) did not include overtime compensation because the hourly rate actually paid was the same regardless of the number of hours worked (i.e., even for non-overtime hours).

There is likewise no merit to Fire & Safety's argument, Br. 12, 18-23, that Wage and Hour's Field Operations Handbook ("FOH") lends support to Fire &

Safety's pay scheme of using an hourly "blended rate" that supposedly includes overtime compensation to pay consultant-employees when they worked less than a full two-week hitch schedule. The FOH provision that Fire & Safety relies upon is titled "Lump-sum overtime payments" and states in full:

> Under appropriate circumstances, and where close scrutiny reveals there is a clear understanding between the employer and the employee that a lump-sum payment is predicated on at least time and one-half the established rate, and that overtime payment is clearly intended, the fact that the payment is a lump sum will not result in a violation if it equals or exceeds the proper overtime payment due. For example, during a limited period each year hourly-rated employees worked after regular hours on a special job for their employer. Under a clearly understood agreement with his/her employees, the employer, based on experience paid for this special job in a lump sum arrived at by computing time and one-half the regular rate for the estimated special job hours, and then adding an additional bonus amount. This policy shall be applied very narrowly and shall not be applied to lump-sum payments which are nothing more than bonuses for working undesirable hours.

FOH, Ch. 32, ¶ 32j06, *available at* https://www.dol.gov/whd/FOH/FOH_Ch32.pdf.

The scenario that this FOH provision addresses is distinctly different from Fire & Safety's pay scheme. This provision is for situations when, for a "limited period," an employer pays employees performing "a special job" a lump sum for an estimated number of overtime hours. In this scenario, pay that equals or exceeds the overtime premium due does not constitute a violation. This provision is not applicable to a situation where employees work a fixed number of overtime hours each workweek and the employer claims that a fixed payment includes

overtime compensation. Moreover, Fire & Safety did not pay a lump sum when its consultant-employees worked less than a full hitch schedule; rather, it paid them a pro rata share of the full hitch amount for the hours they worked.

C. Regardless of Whether There Was an Agreement Between Fire & Safety and Its Consultant-Employees that the Fixed Hitch Amount Included Overtime Compensation, Any Such Agreement Is Irrelevant Because the Undisputed Actual Facts Differed from Such Agreement and the Actual Facts Are Dispositive.

1. Fire & Safety devotes much of its brief to its assertion that there was an agreement between it and its consultant-employees as to the non-overtime and overtime hourly rates of pay and that the fixed hitch amount that was supposedly based on those rates included overtime compensation. Br. 3, 6, 9, 19-21, 25-26. Even if there were such an agreement, and it is not clear from the record that there was, it would be of no help to Fire & Safety given that the actual facts of how it paid its consultant-employees were not consistent with any such agreement and the regular rate is necessarily based on the actual facts. *See Asselta*, 331 U.S. at 204-05 ("[I]n testing the validity of a wage agreement under the Act the courts are required to look beyond that which the parties have purported to do."); *cf. Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 666-67 (5th Cir. 1983) (a contract stating that workers were independent contractors as opposed to employees under the FLSA was not dispositive of their status; rather, the economic realities determine that status).

Fire & Safety has not cited to any case, nor are we aware of any, in which a court has held that where there was such an agreement but the actual facts show that the employer did not adhere to the agreement, the agreement controlled and the fixed amount of pay was deemed to have included all the requisite overtime compensation. Indeed, in addressing pay schemes similar to Fire & Safety's (but where there clearly were written agreements that the fixed sum included overtime compensation), the Supreme Court and the Second Circuit concluded that, regardless of any such agreement, the actual facts showed that the agreement was not followed and it was the actual facts that controlled. *See Asselta*, 331 U.S. at 204-06, 209; *Adams*, 143 F.3d at 70; *see also Lopez*, 2011 WL 5855269, at *3-4. This is consistent with the principle discussed above that the regular rate is based on actual facts, not agreements or designations purporting to use a different hourly rate for non-overtime hours.

Thus, while Fire & Safety put forth some evidence of an agreement or understanding between Fire & Safety and the consultant-employees, which was disputed, the district court correctly concluded that any such agreement or understanding did not ultimately matter because Fire & Safety's actual practices differed from such an agreement or understanding. J.A. 1276-77. As noted above, Fire & Safety has not pointed to a single instance of when it actually used the purported non-overtime and overtime hourly rates to calculate consultant-

employees' pay when they worked less than a full hitch schedule. Thus, the district court correctly reasoned that Fire & Safety's actual practice of using the hourly "blended rate" as the regular rate was dispositive, not the rate that might have been contained in any agreement.

2. Fire & Safety's reliance, Br. 19-20, on *Smith v. Association of Maryland Pilots*, 89 F.3d 829, 1996 WL 349998 (4th Cir. 1996) (per curiam) (unpublished), is unavailing. In that case, this Court affirmed summary judgment in the employer's favor because there was undisputed evidence of a clear understanding between the parties that the monthly wage included overtime compensation and the employee did not present any evidence that the actual facts differed from the agreement. *See id.* at *1-2. Unlike *Smith*, the undisputed facts here show that Fire & Safety's actual practice did not conform to any agreement it might have had with the consultant-employees.

3. It additionally bears noting that the mere fact that an employee works a fixed number of overtime hours each workweek and receives a fixed amount of pay is not sufficient to show that the fixed amount of pay includes overtime compensation. *See, e.g.*, *Brennan v. Elmer's Disposal Serv., Inc.*, 510 F.2d 84, 87-88 (9th Cir. 1975) (where there was no agreement regarding the purported regular rate, "the mere allocation of a portion of the fixed weekly salary as 'regular' compensation and another portion to time and one-half the 'regular'

compensation did not satisfy the overtime provisions of the Act"); *Brennan v. Valley Towing Co.*, 515 F.2d 100, 105 (9th Cir. 1975) (while employer's argument that the fixed monthly salary could be broken down into regular and overtime pay components was "imaginative, it ignore[d] the established principle that the regular rate is not a hypothetical construction but an actual fact" and there was no agreement or communication between the parties, or even contemplation by the employer, that a "stepped-up overtime rate" was included for the regularly scheduled overtime hours) (internal quotation marks omitted); *Acosta v. KDE Equine, LLC*, No. 15-562, 2018 WL 1573230, at *7 (W.D. Ky. Mar. 30, 2018) (the fact that an employee regularly worked a constant number of overtime hours was not, without more, evidence that the salary was intended to include overtime compensation). Thus, the fact that Fire & Safety's fixed hitch amount could, retrospectively, be broken down into non-overtime and overtime components does not establish that the fixed hitch amount in fact included overtime compensation.

D. The Policy Underlying the FLSA's Overtime Compensation Requirement Supports Affirmance.

1. The policy underlying the FLSA's overtime provision supports affirming the district court's decision. Congress enacted the FLSA to remedy "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and the general well-being of workers …." 29 U.S.C. 202(a). The Supreme Court and this Court have repeatedly recognized the

remedial purpose of the FLSA. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016) (recognizing "the 'remedial nature of [the FLSA] and the great public policy which it embodies"); *McFeeley v. Jackson St. Entm't, LLC*, 825 F.3d 235, 240 (4th Cir. 2016) (recognizing the FLSA's "remedial and humanitarian" purposes) (internal quotation marks omitted). As to the FLSA's overtime provision specifically, the Supreme Court long ago recognized that "the Congressional purpose in enacting Section 7(a) was twofold: (1) to spread employment by placing financial pressure on the employer through the overtime pay requirement; and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act." *Helmerich & Payne*, 323 U.S. at 40; *see Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111, 121 (4th Cir. 2015) (citing *Helmerich & Payne*, 323 U.S. at 40).

Fire & Safety's pay scheme is contrary to this dual purpose. A ruling permitting an employer to claim, after the fact, that a fixed amount of pay for a fixed number of hours included overtime compensation when the actual facts show that, in effect, the fixed amount of pay did not include overtime compensation would allow employers to thwart the policy goals that the FLSA's overtime requirement serves. "It is the 'actual fact' of a stepped-up rate for overtime which propagates the goals of the Act, and not the hypothetical retrospective construction of such a rate structure." *Valley Towing*, 515 F.2d at 106. Requiring the payment

of overtime compensation when an employer claims that the fixed sum it paid employees included overtime compensation, but the actual facts show that it paid the employees the same hourly rate for both non-overtime and overtime hours, is consistent with and furthers the dual purpose of the FLSA's overtime provision because it does not allow a scheme of payment to override an employer's actual pay practices, thereby ensuring that the facts on the ground regarding employees' compensation are determinative. In other words, requiring that overtime compensation reflect the reality of an employer's actual pay practices most reliably ensures that employment is spread and that employees do not suffer from the undue burden of working in excess of 40 hours per week without being fairly compensated for such work by the virtue of receiving a premium. While "[i]t was not the purpose of Congress in enacting the [FLSA] to impose upon the almost infinite variety of employment situations a single, rigid form of wage agreement[,]" *Asselta*, 331 U.S. at 203-04, it is the employer's obligation to ensure that whatever pay scheme it adopts, it adequately provides for the overtime compensation required by the FSLA. Fire & Safety failed to satisfy this obligation.

2. There is no merit to Fire & Safety's argument, Br. 28, that the district court's ruling provides the consultant-employees with a "windfall" that they did not expect. While some consultant-employees may not have expected an award of back wages and liquidated damages because they did not know that Fire & Safety

was violating the FLSA, that is not a basis for denying these employees their statutorily-entitled wages. *Cf. Chao v. Barbeque Ventures, LLC*, 547 F.3d 938, 942 (8th Cir. 2008) (the absence of employee complaints does not establish the employer's good faith and therefore is not a basis to avoid liquidated damages); *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997) (same). FLSA liability does not hinge on whether employees whose rights were violated knew or understood the nature of the violations. Such a requirement would be contrary to the remedial purpose of the FLSA. *Cf. Barrentine v. Arkansas–Best Freight Sys., Inc.,* 450 U.S. 728, 740 (1981) (an employee's right under the FLSA to receive overtime compensation "cannot be . . . waived because this would nullify the purposes of the statute and thwart the legislative policies [the FLSA] was designed to effectuate") (internal quotation marks omitted); *Reich v. Stewart*, 121 F.3d 400, 407 (8th Cir. 1997) ("[T]he fact that [the employee] did not seek overtime pay is irrelevant because [the employee] cannot waive his entitlement to FLSA benefits.").

3. There is likewise no merit to Fire & Safety's argument, Br. 11, 22, 26, that it overpaid the consultant-employees when they worked less than a full hitch schedule. This claim is based on a fiction that the consultant-employees were paid a non-overtime hourly rate for hours worked up to 40 and an overtime hourly rate for hours over 40 per week. The undisputed facts show that this never happened.

Rather, the undisputed actual facts show that when the consultant-employees worked fewer than 168 hours in a two-week period, Fire & Safety paid them the same hourly rate, i.e., the "blended rate," for every hour. These actual facts thus show that this hourly rate and the fixed hitch amount from which it was derived did not include overtime compensation.

II. FIRE & SAFETY VIOLATED THE FLSA'S RECORDKEEPING REQUIREMENTS

1. The FLSA requires employers to make and maintain records of each employee's wages and hours of employment, among other things. *See* 29 U.S.C. 211(c). Pursuant to the Wage and Hour Administrator's delegated rulemaking authority, *see id.*, regulations require that employers make and maintain records of, among other things, the hours worked each day and workweek by their non-exempt employees (employees who are entitled to be paid the minimum wage and overtime), *see* 29 C.F.R. 516.2(a)(7). For employees who work a fixed schedule, the regulations require that the employer make and maintain records of the schedule of daily and weekly hours the employee normally works and, in weeks in which more or less than the scheduled hours are worked, make and maintain records that show the "exact number of hours worked each day and each week." 29 C.F.R. 516.2(c)(2).

2. There is no merit to Fire & Safety's argument on appeal, Br. 28-31, that it complied with the FLSA's recordkeeping requirements. As an initial matter, Fire

& Safety waived this argument on appeal. It did not address, let alone attempt to refute, the Secretary's argument in his summary judgment motion before the district court that it violated the FLSA's recordkeeping requirements. J.A. 298 (portion of Secretary's motion seeking summary judgment on recordkeeping violations), 1093-1113 (Fire & Safety's response, which did not refute or address recordkeeping violations). Nor did it argue in its motion for summary judgment that it complied with the recordkeeping requirements. J.A. 30-56. In short, it did not contest the Secretary's request for summary judgment that it violated the FLSA's recordkeeping requirements. Indeed, Fire & Safety raised none of the recordkeeping arguments before the district court that it now raises in its appeal brief. Its appellate brief is the first time that Fire & Safety has argued that it complied with the specific requirements for employees who work a fixed schedule, which are set out at 29 C.F.R. 516.2(c).[16]

[16] In concluding that Fire & Safety violated the FLSA's recordkeeping requirements, the district court addressed the regulation at 29 C.F.R. 516.2(a)(7), which requires that employers make and maintain records of hours worked each day by each employee. J.A. 1286-87. Thus, the district court's conclusion that Fire & Safety violated the FLSA's recordkeeping requirements applied to all employees, including those who worked their full hitch schedule. The district court did not, however, address the recordkeeping requirement at section 516.2(c) for employees working on fixed schedules. Nor did the court have reason to do so given that Fire & Safety never raised the argument that it had complied with section 516.2(c) (indeed, it raised no argument at all regarding its recordkeeping).

Because it did not contest summary judgment on this issue below, Fire & Safety has waived its right to seek reversal on that issue before this Court. "Issues raised for the first time on appeal are generally not considered by this Court." *Zoroastrian Ctr. & Darb-E-Mehr of Metro. Wash., D.C. v. Rustam Guiv Found. of N.Y.*, 822 F.3d 739, 753 (4th Cir. 2016); *see Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) (issues raised for the first time on appeal are deemed waived in the absence of "exceptional circumstances"). There are no "exceptional circumstances" here. Therefore, this Court should not countenance the raising of arguments for the first time on appeal.

3. Even if Fire & Safety had not waived this argument on appeal, there is no merit to its argument, Br. 28-31, that it complied with the FLSA's recordkeeping requirements at 29 C.F.R. 516.2(c) for employees who work fixed schedules. To support its assertion that it made and maintained records of each consultant-employee's hours of work each day when that the consultant-employee worked less than the scheduled hours, as required by section 516.2(c)(2), Fire & Safety points to three instances when, it claims, it recorded hours worked per day when a consultant-employee worked less than the full two-week hitch. Br. 30. Specifically, Fire & Safety points to comments in the "notes" field of a payroll spreadsheet that: (1) consultant-employee Jordan Curry worked only 10 hours for the period covered by the pay date of December 26, 2014, J.A. 938; (2) consultant-

employee Cody Feathers worked 54 hours (i.e., four and one-half 12-hour days) for the period covered by the pay date of June 12, 2015, J.A. 959; and (3) consultant-employee Stephen Barbour worked 133.5 hours (11 12-hour days plus 1.5 hours) for the period covered by the pay date of April 3, 2015, J.A. 956.

This is a specious argument. These notations do not show the "exact number of hours worked each day" that 29 C.F.R. 516.2(c)(2) requires when an employee works more or less than the fixed schedule. For instance, a record that an employee worked 54 hours in a two-week pay period does not indicate the specific number of hours that employee worked each day in that two-week period. Fire & Safety argues that these three "notations would not be possible unless hours worked each day were being tracked and recorded." Br. 30. Notably, however, Fire & Safety has not pointed to anything in the record showing that it tracked and recorded the hours that each consultant-employee worked each workday when they did not work their full schedule, which is what 29 C.F.R. 516.2(c)(2) requires. Indeed, there are no records showing the hours each consultant-employee worked each day in those weeks when they worked less than a full hitch schedule. Fire & Safety did not produce any such records during the course of this case. J.A. 652 (Declaration from Wage and Hour official that the records obtained from Fire & Safety during Wage and Hour's investigation revealed that Fire & Safety did not have records of the hours each employee worked each workday), 1063 (same

statement in deposition of same official). Thus, Fire & Safety failed to create and maintain records of each consultant-employee's daily hours of work as required by the FLSA.[17]

And even if the three examples did show the hours worked each workday for those three consultant-employees as required by section 516.2(c)(2), the FLSA's recordkeeping requirement does not allow a few employees to stand in for all employees. Rather, records must be kept with respect to each employee. *See* 29 U.S.C. 211(c) (requiring that an employer make, keep, and preserve records "of the persons employed by him") (emphasis added); 29 C.F.R. 516.2(a) (requiring that an employer keep records "with respect to each employee to whom section 6 or both sections 6 and 7(a) of the Act apply") (emphasis added); 29 C.F.R. 516.2(c) (requiring that, for employees that work fixed schedules, an employer keep records of the schedule of daily and weekly hours that "the employee" normally works and the exact number of hours worked each day and week when the employee works other than the scheduled hours) (emphasis added). In sum, three instances of records that reference hours worked from among the records that Fire & Safety

[17] Given that the undisputed facts show that Fire & Safety did not comply with the recordkeeping requirements for employees working fixed schedules set out at 29 C.F.R. 516.2(c), which require employers to record the hours worked each day when an employee works more or less than the scheduled hours, Fire & Safety certainly did not comply with the more exacting requirements at section 516.2(a)(7), which require employers to record hours worked each and every workday.

kept for more than 70 employees over a two-year period hardly demonstrate compliance with the FLSA's recordkeeping requirements. J.A. 934-75, 982-97.

Lastly, Fire & Safety makes much of the Secretary's statement in his summary judgment pleading that there was "'no dispute that [Fire & Safety's] payroll records accurately reflect the hours worked and pay received by these employees.'" Br. 10, 29 (quoting J.A. 281). The payroll records to which this refers are the larger group of records from which the three instances of references to hours worked discussed above were taken. J.A. 934-75, 982-97. While the Secretary did not (and does not) dispute the accuracy of those records, that does not change the fact that they do not show the hours that consultant-employees worked each day in those weeks when they worked less than the full two-week hitch schedule.

III. THERE IS NO BASIS TO REMAND THIS CASE

There is no merit to Fire & Safety's alternative argument, Br. 31-33, that there are disputed material facts that warrant a remand. Specifically, Fire & Safety contends that there are disputed facts about whether Fire & Safety and its consultant-employees agreed to a pay scheme in which Fire & Safety paid a fixed amount for a fixed schedule and the fixed amount included both straight-time and overtime compensation. Fire & Safety also argues that there are, at a minimum, disputed facts about whether it made and maintained proper records.

Vacating the district court's grant of summary judgment and remanding would be warranted only if there were a dispute over a material fact. Summary judgment is proper where "there is no genuine dispute as to any material fact[.]" Fed. R. Civ. P. 56(c). "A material fact is one 'that might affect the outcome of the suit under the governing law.'" *Spriggs v. Diamond Auto Glass,* 242 F.3d 179, 183 (4th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)). Therefore, mere "[f]actual disputes that are irrelevant or unnecessary will not be counted." *Liberty Lobby,* 477 U.S. at 248. Thus, reversal of a grant of summary judgment and remand is proper only if there is a dispute regarding a material fact; it is not warranted if the dispute concerns a fact that is irrelevant or not material to the resolution of the legal issue.

The district court in this case properly granted summary judgment to the Secretary because there is no disputed material fact. As discussed above, any disputed facts about what Fire & Safety and the consultant-employees agreed to or understood regarding their pay scheme are not material facts; they are ultimately irrelevant in light of the undisputed facts about how Fire & Safety actually paid its employees, particularly when they worked fewer than the 168 hours in the two-week hitch schedule. This case is unlike *Adams* where there were disputed material facts about how the employer actually compensated its employees. *See* 143 F.3d at 70. Here, there is no dispute about the actual facts showing how Fire

& Safety compensated the consultant-employees. Likewise, there is no dispute about the information contained in the records that Fire & Safety made and maintained and the fact that they did not contain an accounting of the number of hours worked as required by the FLSA. Thus, Fire & Safety's last ditch argument seeking a remand is not persuasive.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and (7). This document is proportionally spaced in 14-point font, and contains 10,654 words, based on the word count provided by my word processor and Microsoft software.

Dated: October 30, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2018, a true and correct copy of the foregoing Brief of the Secretary of Labor was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system, and that service on all counsel of record will be accomplished by this system.

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