IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-02074-MSK-KMT

ERIN JOHNSON, and
JOCELYN KLEIN, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

COLORADO SEMINARY, a/k/a UNIVERSITY OF DENVER, d/b/a "Fisher Early Learning Center,"

Defendant.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANT'S LIABILITY FOR UNPAID OVERTIME COMPENSATION UNDER THE FAIR LABOR STANDARDS ACT

Plaintiffs Erin Johnson and Jocelyn Klein, on behalf of themselves and the opt-in members of their conditionally-certified collective action, Erica Beringer, Sara Flansburg, Lindy Gunn, Laura Sciarcon, and Susan Tate (collectively, "the Plaintiffs"), by and through the undersigned counsel from the Sawaya & Miller Law Firm and Towards Justice, a Colorado non-profit legal services organization, pursuant to Rule 56 of the Federal Rules of Civil Procedure, hereby move the Court for summary judgment as to the liability of the Defendant, Colorado Seminary, a/k/a University of Denver, d/b/a "Fisher Early Learning Center" ("DU") under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("FLSA"), and in support thereof state as follows:

INTRODUCTION

The Plaintiffs are entitled to summary judgment as to DU's liability on Count I of the Complaint, failure to pay overtime compensation in violation of the FLSA, because the undisputed facts establish that: (1) the Plaintiffs are covered by the FLSA; and (2) DU failed to properly pay the Plaintiffs overtime compensation. *See Rayfield v. Sandbox Logistics, LLC*, 217 F. Supp. 3d 1299, 1300 (D. Colo. 2016) (identifying elements of FLSA overtime claim). The Plaintiffs are entitled to liquidated damages under the FLSA because DU cannot prove that it acted in good faith and with reasonable grounds to believe it was not violating the FLSA. *Robertson v. Bd. of Cty. Comm'rs of Cty. of Morgan*, 78 F. Supp. 2d 1142, 1162 (D. Colo. 1999) ("a court is required to award liquidated damages in addition to actual damages for violations of the FLSA" unless the employer proves that it acted in good faith and with reasonable grounds to believe it was not violating the FLSA). A three-year statute of limitations applies to the Plaintiffs' FLSA claims because the undisputed facts demonstrate that DU "showed reckless disregard for the matter of whether its conduct violated the statute." *See Mumby v. Pure Energy Servs. (USA), Inc.*, 636 F.3d 1266, 1272 (10th Cir. 2011) (identifying standard for "willfulness"). Therefore, the Plaintiffs respectfully move the Court to grant summary judgment as to the Defendant's liability for failing to pay overtime compensation.

STATEMENT OF UNDISPUTED FACTS

DU is a Colorado nonprofit corporation with its principal office at 2199 South University Boulevard, Denver Colorado 80208. ECF No. 33 (Scheduling Order) at 6. DU does business of more than $500,000.00 per year and is subject to the requirements of the FLSA. *Id.* at 7; Exhibit 1: Tankersley Notes ("Fair Labor Standards Act is the law");

Exhibit 2: Second Rule 30(b)(6) Dep. of DU through Hema Visweswaraiah ("DU Dep. II") at 56:4-57:10 (FELC Director Rebecca Tankersley created Exhibit 1 during discussions with DU's counsel in June/July of 2016).

DU owns and operates Fisher Early Learning Center ("FELC"), which is a large child care center in Denver, Colorado. ECF No. 33 at 6-7; Exhibit 2: DU Dep. II at 20:11-16 ("[FELC] falls under the large child care center" definition of Colorado's child care regulations, 12 C.C.R. 2509-8). Karen Riley ("Riley") was the Director of FELC from June 2010 to April/May 2011. Exhibit 2: DU Dep. II at 40:19-22. Riley now oversees FELC as part of her duties as a Dean of DU's School of Education. Exhibit 3: Rule 30(b)(6) Dep. of DU through Karen Riley ("Riley Dep.") at 13:10-18. Rebecca Tankersley ("Tankersley") was the Director of FELC from April/May 2011 to April 2017. Exhibit 4: Tankersley Dep. at 9:19-10:16. Hema Visweswaraiah ("Visweswaraiah") was the Associate Director of FELC from August 2010 to April 2017 and is its current Director. Exhibit 2: DU Dep. II at 66:24-67:4; Exhibit 5: First Rule 30(b)(6) Dep. of DU through Hema Visweswaraiah ("DU Dep. I") at 7:11-20.

Amy King ("King") was DU's Vice Chancellor of Human Resources and responsible for human resources management throughout the university in 2016. Exhibit 6: Pinnock Dep. at 12:12-13:22. In November 2016, King asked DU's Director of People Development, Ken Pinnock ("Pinnock") to become the "point person" to manage DU's reclassification of the caregiver employees at FELC, whom DU called "Master Teachers" and "Associate Teachers" ("FELC Employees") from "exempt" from the overtime provisions of the FLSA to "nonexempt." *Id.* at 13:14-22; *see id.* at 35:14-36:10 (testifying

that caregiver/teachers at FELC "supervise children" and that "[t]he focus is, of course, keeping the children safe, have structured activities throughout the day, different kinds of events, exercises").

The Plaintiffs were employed by DU as FELC Employees at various times between August 29, 2014 and November 30, 2016 ("Relevant Period"). *See* Exhibit 7: Def. Resp. to Discovery at 5, RFA No. 3 (admitting that "each of the Plaintiffs worked more than 40 hours during at least one workweek" between June 30, 2014 and November 30, 2016).[1] Each of the Plaintiffs worked more than 40 hours per week during multiple weeks of the Relevant Period. *Id.*; *see id.* at 15-16, ROG 6 (testifying that "adjustments" reflected in Exhibit 8 are "Defendant's good-faith estimate of the hours worked by the Plaintiffs"); Exhibit 8: Pl. Spreadsheets with DU Comments.[2]

At all times during the Relevant Period, DU classified the Plaintiffs and all FELC Employees "exempt" from the overtime requirements of the FLSA. Exhibit 7: Def. Resp. to Discovery at 5, RFA No. 1. As a result, DU did not pay the FELC Employees overtime compensation of one and one-half times their regular rates of pay for the hours they

[1] For clarity, the Plaintiffs note that the "Relevant Period" was defined differently in Plaintiffs' discovery requests, to include the period for which DU promised to pay overtime compensation, June 30, 2014 to November 30, 2016 (hereinafter "Payment Period"). The period that is relevant to Plaintiffs' FLSA claims is distinct, beginning August 29, 2014 – three years prior to the filing of the Complaint. *See* 29 U.S.C. § 255.

[2] DU asked the Plaintiffs to submit spreadsheet s of the overtime hours they worked. ECF No. 33 (Scheduling Order) at 4. These spreadsheets were submitted electronically, and Tankersley and Visweswaraiah inserted their reductions and comments into the electronic files. *See* Exhibit 2: DU Dep. II at 116:2-23 (explaining that Tankersley wrote most of the comments). Each of the spreadsheets included in Exhibit 8 was created and submitted by a Plaintiff, with the exception of the columns labeled "Adjusted," "Comments," "Column1," "Column2," "Key," and "Adjusted total," which were created by Tankersley and Visweswaraiah.

worked in excess of 40 per week at any time during the Relevant Period. *Id.* at 6, RFA No. 4.

DU's classification of the FELC Employees as "nonexempt" was in place since at least August 2010. Exhibit 2: DU Dep. II at 15:20-24. DU does not have any knowledge, records, or information regarding the reasons that it classified the FELC Employees as "exempt" prior to 2016. *Id.* at 40:11-18 (Q: "Do you have any knowledge as to what the people who classified the employees as exempt, what they believed at the time they classified them?" A: "I don't." Q: "Do you know of anyone at DU who does know what those people believe [sic]?" A: "I don't know of anyone"); *id.* at 44:6-10 (Q: "But you don't know the reasons for the decisions prior to February of 2016, correct?" A: "No." Q: "And no one at DU does?" A: "Not to my knowledge"); Exhibit 7: Def. Resp. to Discovery at 17-18, ROG No. 8 ("Defendant does not have any information regarding the specific individuals involved in the initial decision to classify the [FELC Employees] as exempt or the communications about that decision").

DU did not perform any kind of investigation into whether the FELC Employees were properly classified as "exempt" during the Relevant Period, or at any time between April/May 2011, when Tankersley became the director, and May 2016. Exhibit 4: Tankersley Dep. at 9:19-10:16, 17:8-20 (Q:…"did you engage in any investigation to determine whether they were exempt or nonexempt?" A: "No." Q: "Are you aware of [DU] doing any kind of investigation or review of the exempt status of the employees before 2016?" A: "No."). Nor did DU consult the United States Department of Labor ("USDOL") or the Colorado Department of Labor and Employment ("CDLE") to

determine whether its practices complied with the FLSA. Exhibit 7: Def. Resp. to Discovery at 21, ROG No. 11 ("there were no communications with the Department of Labor pertaining to this matter"); *id.* at 22 ("Defendant states that it did not communicate with any governmental agencies regarding the classification of the [FELC Employees]").

In May 2016, DU conducted an audit of its payment policies in anticipation for new regulations from the USDOL that were set to go into effect on December 1, 2016 and to raise the "salary basis" test for certain FLSA exemptions from $455.00 per week ($23,660.00 per year) to $913 per week ($47,476.00 per year). ECF No. 33 (Scheduling Order) at 4, 7; *see* Exhibit 1: Tankersley Notes (discussing "new minimum salary threshold"); *see also* Exhibit 9: *Nevada v. U.S. Dept. of Labor*, (D. Tex. Nov. 20, 2016) at 7 (discussing USDOL regulations). During the audit, DU was advised by its counsel that the Plaintiffs and the other FELC Employees were, in fact, non-exempt and entitled to overtime compensation under the FLSA. Exhibit 10: Pinnock E-mail Jan. 9, 2017 ("we have discovered that employees who had been classified as exempt or not eligible for overtime are in fact non-exempt, eligible for overtime"); Exhibit 6: Pinnock Dep. at 42:14-25 (Q: "Do you know why the teachers were reclassified?" A: "The decision was a recommendation at that time from legal counsel,… it was a big surprise to management and then, of course, the employees that they were, in fact, nonexempt"); *see* Exhibit 4: Tankersley Dep. at 19:3-25 (testimony by Tankersley that Riley and King told her that the FELC Employees were "misclassified as exempt"). DU therefore owed the current and former employees overtime compensation for the hours they worked in excess of 40

per week. Exhibit 6: Pinnock Dep. at 73:16-21 (testifying that DU was "determining what money was owed to the teachers").

Having discovered in May 2016 that the FELC Employees were nonexempt, DU decided that it would pay them overtime compensation for the hours they worked in excess of 40 per week during the period from June 1, 2014 to November 30, 2016 ("Payment Period"). Exhibit 7: Def. Resp. to Discovery at 8, RFA No. 11 ("Defendant admits that it offered to pay overtime hours for hours worked by [FELC Employees] in excess of 40 per week from June 1, 2014 to November 30, 2016"). The individuals involved in the decision to reclassify the FELC Employees as "nonexempt" and pay them overtime compensation were Tankersley, Riley, King, and DU's counsel.[3] Exhibit 2: DU Dep. II at 57:13-20.

Tankersley disagreed with the decision to reclassify the FELC Employees. *See* Exhibit 11: Tankersley E-mail July 6, 2016. On July 6, 2016, Tankersley sent Riley an e-mail expressing her view that FELC employees should remain classified as "exempt," notwithstanding the fact that other child care centers classified their preschool teachers as "nonexempt." *Id.* She attached what she called "a multitude of documents" to her e-mail, including descriptions of the job duties of the FELC Employees, various FLSA exemptions Tankersley believed might apply to the FELC Employees, the credentials that

[3] Subsequent to that decision, King asked Pinnock to be the "point person" for Human Resources in the reclassification of the FELC employees and the payment of overtime compensation because King was planning to leave DU soon after November 2016. Exhibit 6: Pinnock Dep. at 13:14-22. Pinnock was the former head of employee relations, where he oversaw all policies, procedures, discipline, and union matters at the University. *Id.* at 11:6-11. Pinnock testified that he is familiar with the requirements of federal wage and hour law. *Id.* at 11:22-13:1.

were obtained by FELC Employees, FELC Employee shifts, and the FELC events that Tankersley believed DU might be unable to offer if it had to pay overtime compensation to FELC Employees. *Id.* at 3-15, 18-21. She also attached the entirety of 12 C.C.R. 2509-8 – Colorado's child care regulations that govern FELC and the FELC Employees. *Id.* at 15-17, 22-24; Exhibit 12: Tankersley E-mail July 6, 2016 part II; Exhibit 13: Child Care Regs.; *see* Exhibit 2: DU Dep. II at 13:11-14:24.[4]

Riley reviewed the "multitude of documents" and responded to Tankersley's e-mail on July 26, 2016, stating, in relevant part:

> Hi Becky
>
> I wanted to follow up on the email that you sent regarding the compensation structure for Fisher. Although I completely agree with the information that you presented it does not meet the criteria for keeping the staff in salaried positions according to the legal guidelines. As such I think we are going to need to move forward with the proposed transition.
>
> …
>
> I know this is disappointing and frustrating. I wish that there was another avenue for us to pursue, but I think we have exhausted all alternative routes. Thank you for all of your work on this and please let me know if you have any questions.
>
> Karen

Exhibit 14: Riley E-mail July 26, 2016.

[4] The documents in Exhibit 11, Exhibit 12, and Exhibit 13 were produced together by DU as Tankersley's July 6, 2016 e-mail to Riley. In addition to Exhibit 13, Tankersley attached approximately 330 pages from 12 C.C.R. 2509-8 that do not seem to apply to "large child care centers" like FELC. *See* Exhibit 2: DU Dep. II at 20:11-16 (testifying that FELC is a "large child care center"). The undersigned has omitted those pages to avoid filing irrelevant information, but will make them available upon request.

The USDOL regulations that had been scheduled to increase the salary basis for certain FLSA exemptions on December 1, 2016 never went into effect because the United States District Court for the District of Texas issued an injunction against the regulations on November 22, 2016. Exhibit 9: *Nevada v. U.S. Dept. of Labor*, (D. Tex. Nov. 22, 2016) at 15. On November 23, 2016, King sent an e-mail to the FELC Employees stating:

> All,
>
> As you are aware, an injunction was made late yesterday afternoon regarding the FLSA regulatory changes. This has required employers to quickly consider what they will be doing with those positions as impacted by the regulatory change.
>
> As I was attempting to get communication out to the community, I mistakenly did not take out the FELC email distribution list. As stated in the meeting, FELC teachers are deemed non-exempt by the Department of Labor because the Center is licensed by the Department of Health and Human Services rather than the Department of Education. Without that requirement, your work otherwise meets the exemption requirements; therefore, we still have to move forward in the direction we have been regarding collecting overtime and shifting to overtime pay.
>
> I apologize for the error I made. If you have any questions, please let me know.
>
> Amy

Exhibit 15: King E-mail Nov. 23, 2016.

King's statement that FELC Employees "are deemed non-exempt by the Department of Labor" was based on the advice she received from DU's counsel. Exhibit 7: Def. Resp. to Discovery at 12, ROG 11.

DU did not have accurate time records reflecting the overtime hours worked by the FELC Employees during the Payment Period. Exhibit 7: Def. Resp. to Discovery at

6, RFA No. 5 ("Defendant admits that it did not require FELC Teachers to record all hours they worked"); at 14-15, ROG No. 5 (representing that DU's only "policy or practice of recording the hours that [FELC Employees] worked" was a policy to keep track of paid time off and to record requests for classroom coverage); Exhibit 2: DU Dep. II at 89 ("we didn't track hours worked at that time"). Accordingly, DU asked the FELC Employees to "document" their overtime hours for the Payment Period and to submit a spreadsheet of those hours to DU. Exhibit 16: Tankersley E-mail Nov. 17, 2016. Tankersley told the Employees:

> I realize that you won't necessarily have specific dates for those times you worked early or late to clean, plan, or other tasks. I advise that you estimate and record average hours per week spent on these activities.

Exhibit 17: Second Tankersley E-mail Nov. 17, 2016.[5]

Each Plaintiff submitted a spreadsheet to DU reflecting her best recollection of the overtime hours she worked in excess of 40 per week during the Payment Period, including the Relevant Period. *See* Exhibit 8: Pl. Spreadsheets with DU Comments. Tankersley and Visweswaraiah reviewed the Plaintiffs' spreadsheets and made reductions to each Plaintiff's and other FELC Employee's hours based on their own estimates of what they thought the overtime hours should have been. Exhibit 8: Pl. Spreadsheets with DU Comments; *supra,* note 2 (adjustments and comments added by DU); Exhibit 2: DU Dep. II at 115:3-117:10 (DU reduced hours submitted by FELC Employees and paid them amounts reflected in Dep. Ex. 66, attached as Exhibit 18); *id.* at 126:5-128:20 (DU

[5] The undersigned has redacted the e-mail addresses of the FELC Employees, who were copied on Tankersley's e-mail. An un-redacted version will be made available on request.

reduced hours based on best estimate); *id.* at 135:16-136:18 (Q: "So based on all those considerations and all that information, you all estimated what [Johnson] might have done as far at this item?" A: "Correct"); *id.* at 140:107-14 ("I think, again, we took maybe some reasonable estimates of the period and the activity").[6] DU paid the Plaintiffs and the other FELC Employees the reduced amounts it had estimated. Exhibit 2: DU Dep. II at 115:3-117:10 (payments reflected in Dep. Ex. 66); Exhibit 18: Dep. Ex. 66 – Payments to FELC Employees; Exhibit 7: Def. Resp. to Discovery at 15-16, ROG 6 (adjustments reflected in Exhibit 8 are "Defendant's good-faith estimate of the hours worked by the Plaintiffs"). DU did not pay the FELC Employees liquidated damages in an amount equal to the overtime pay that was owed but was not paid to them during the Relevant Period.

[6] Tankersley and Visweswaraiah, not Pinnock – the human resources "point person" who had knowledge of federal wage and hour law – made DU's decisions about the hours for which FELC Employees would be paid. Exhibit 6: Pinnock Dep. at 60:2-19 (Tankersley and Visweswaraiah made decisions regarding reductions, and Pinnock did not verify hours); *id.* at 11:22-23:1 (Pinnock has knowledge of federal wage and hour law). Tankersley has admitted that she did not know what hours were "compensable" in 2016, when she instructed FELC Employees to submit their overtime, and that she remains confused regarding the compensability of certain hours. Exhibit 4: Tankersley Dep. at 116:1-117:17 (Tankersley did not know what hours were "compensable" in December 2016); *id.* at 85:1-18 (admitting that she still does not know whether FELC Employees' conversations with parents in the parking lot are "compensable"). Visweswaraiah has admitted that no one at DU has actual knowledge of the overtime worked by the Plaintiffs, and that the Plaintiffs themselves were in the best position to say what hours were worked outside the normal business day. Exhibit 5: DU Dep. I at 20:5-24. DU has claimed that Riley also "reviewed the spreadsheets," but Riley's knowledge of the overtime worked was very limited. *See* Exhibit 7: Def. Resp. to Discovery at 22, ROG 13 (representing that Tankersley, Visweswaraiah, and Riley "reviewed the spreadsheets" to determine the amount of overtime worked during the Relevant Period); ECF No. 26-1 (Riley Decl.) ¶ 14 (testifying that "Erin Johnson, Jocelyn Klein, and Laura Sciarcon claimed to have worked an extreme number of overtime hours"); Exhibit 3: Riley Dep. at 51:10-53:7 ("I don't know what I would consider to be not extreme"); *id.* at 16:17-19 (Q: "Do you have any understanding of the kinds of hours that would qualify for overtime hours verses not?" A: "No").

Exhibit 7: Def. Resp. to Discovery at 9, RFA No. 14 ("Defendant admits that it did not specifically designate any compensation paid to the Plaintiffs as liquidated damages").

CLAIMS AND DEFENSES UPON WHICH JUDGMENT IS SOUGHT

A. THE PLAINTIFFS ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT AS TO THE DEFENDANT'S LIABILITY ON CLAIM 1: FAILURE TO PAY OVERTIME COMPENSATION IN VIOLATION OF THE FLSA.

1. BURDEN OF PROOF AND ELEMENTS:

"The FLSA requires employers to pay their employees overtime for each hour worked over 40 in a workweek." *Perez v. El Tequila, LLC*, 847 F.3d 1247, 1252 (10th Cir. 2017) (citing 29 U.S.C. § 207(a)(1)). "The overtime rate is at least one and one-half times the employee's regular rate." *Id.*

To succeed on a claim for overtime compensation under the FLSA, a plaintiff must prove that: (1) she is an employee covered by the FLSA; and (2) her employer failed to properly compensate her for the overtime she worked. *See Brown v. ScriptPro, LLC*, 700 F.3d 1222, 1230 (10th Cir. 2012) ("To succeed on an FLSA claim for unpaid overtime, the plaintiff has the burden of proving that he performed work for which he was not properly compensated"); *Rayfield*, 217 F. Supp. 3d at 1300 (citing *Renteria–Camacho v. DIRECTV, Inc.*, 14–2529, 2015 WL 1399707, at *2–3 (D. Kan. Mar. 26, 2015) in holding that "[t]he requirements to state a claim of a FLSA violation are quite straightforward, requiring plaintiff to show a failure to pay overtime compensation and/or minimum wages to covered employees—no more"); *see Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (in the absence of accurate employer records,

employee may "show the amount and extent of that work as a matter of just and reasonable inference").[7]

2. THE UNDISPUTED FACTS ESTABLISH THAT DU IS LIABLE FOR FAILURE TO PAY OVERTIME IN VIOLATION OF THE FLSA.

Element 1: The Plaintiffs are Covered by the FLSA.

A. DU does not dispute that it does business of more than $500,000.00 per year or that DU is covered by the FLSA. *See* ECF No. 33 (Scheduling Order) at 6-7.

B. In a meeting with Riley and DU's counsel in June or July of 2016, Tankersley noted that the "Fair Labor Standards Act is the law and is described on the DU Human Resources home page," indicating that DU knew that FELC and its Employees were covered by the FLSA. Exhibit 2: DU Dep. II at 56:4-57:10 (Tankersley created Dep. Ex. 30 during discussions with counsel in June/July of 2016).

C. The Plaintiffs worked at FELC supervising children during the Relevant Period. *See* Exhibit 8: Pl. Spreadsheets with DU Comments; Exhibit 6: Pinnock Dep. at 35:14-36:10 (caregiver/teachers at FELC "supervise children" and "[t]he focus is, of course,

[7] The amount of overtime for which the Plaintiffs were not properly compensated is not at issue in this Motion, which deals only with DU's liability for failing to pay overtime compensation during the Relevant Period. By failing to timely pay the overtime compensation due to the Plaintiffs, DU became liable for overtime compensation and "an additional equal amount as liquidated damages." *See Perez*, 847 F.3d at 1252 ("employers that violate the FLSA's overtime and minimum wage requirements are liable not just for unpaid wages, but also for 'an additional equal amount as liquidated damages'" (citing 29 U.S.C. § 216(b)). To the extent that the amount of damages may need to be established, the Plaintiffs intend to do so "as a matter of just and reasonable inference" at trial. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (holding that in the absence of accurate employer records, employee may "show the amount and extent of that work as a matter of just and reasonable inference").

keeping the children safe, have structured activities throughout the day, different kinds of events, exercises").

D. Tankersley testified that Riley and King told her that the FELC Employees were "misclassified as exempt" in 2016. Exhibit 4: Tankersley Dep. at 19:3-25.

E. "DU determined that the [FELC Employees] should be reclassified from exempt to nonexempt." ECF No. 33 (Scheduling Order) at 4.

F. Pinnock testified that the reclassification "was a recommendation at that time from legal counsel." Exhibit 6: Pinnock Dep. at 42:14-25; *id.* at 12:12-13:22.

G. Pinnock further testified that "it was a big surprise to management and then, of course, the employees that they were, in fact, nonexempt." *Id.*

H. Tankersley argued against the reclassification and sent Riley information regarding the jobs of the FELC Employees, the regulations applicable to the FELC Employees, and the FLSA exemptions that she believed might apply to the FELC Employees. Exhibits 11 and 12: Tankersley E-mail July 6, 2016; Exhibit 13: Child Care Regs. Riley replied to the e-mail stating that she agreed with Tankersley but that that "the information that [Tankersley] presented does not meet the criteria for keeping the staff in salaried positions according to the legal guidelines." Exhibit 14: Riley E-mail July 26, 2016. Riley further stated, "I wish that there was another avenue for us to pursue, but I think we have exhausted all alternative routes." *Id.*

I. Tankersley's July 6, 2016 e-mail indicates that the "decision" to which she objects was made based on a "brief comparison to other child care centers," demonstrating that

DU had performed such a comparison and learned that other child care centers classified their caregivers as "nonexempt." Exhibit 11: Tankersley E-mail July 6, 2016.

J. On November 23, 2016, King e-mailed the FELC Employees, admitting that the FELC Employees were "deemed non-exempt by the Department of Labor." Exhibit 13: King E-mail Nov. 23, 2016. DU states that King's e-mail "was relaying her own understanding and interpretation of advice from DU's legal counsel." Exhibit 7: Def. Resp. to Discovery at 12, ROG 11.

K. On January 9, 2017, Pinnock sent Tankersley an e-mail he drafted for the FELC Employees which acknowledged "we have discovered that employees who had been classified as exempt or not eligible for overtime are in fact non-exempt, eligible for overtime." Exhibit 10: Pinnock E-mail Jan. 9, 2017.

L. Pinnock testified that he has knowledge of federal wage and hour law. Exhibit 6: Pinnock Dep. at 11:22-13:1.

Element 2: The Plaintiffs Worked Overtime for which They Were Not Properly Compensated by DU.

A. DU admits that "each of the Plaintiffs worked more than 40 hours during at least one workweek" between June 30, 2014 and November 30, 2016. Exhibit 7: Def. Resp. to Discovery at 5, RFA No. 3.

B. DU further acknowledged these overtime hours in its response to the Plaintiffs' Interrogatories, stating that Tankersley's and Visweswaraiah's "adjustments" to Plaintiffs' spreadsheets (attached as Exhibit 8) represent "Defendant's good-faith estimate of the hours worked by the Plaintiffs"). Exhibit 7: Def. Resp. to Discovery at 5, ROG 6. Such adjustments reflect that each Plaintiff worked overtime hours during

multiple weeks of their employment with DU. Exhibit 8: Pl. Spreadsheets with DU Comments.

C. DU admits that at no time prior to November 30, 2016 did DU pay the FELC Employees overtime compensation of one and one-half times their regular rates of pay for the hours they worked in excess of 40 per week. Exhibit 7: Def. Resp. to Discovery at 6, RFA No. 4.

D. DU did not have accurate time records of the overtime hours worked by the FELC Employees during the Payment Period. Exhibit 7: Def. Resp. to Discovery at 6, RFA No. 5 ("Defendant admits that it did not require FELC Teachers to record all hours they worked"); at 14-15, ROG No. 5 (representing that DU's only "policy or practice of recording the hours that [FELC Employees] worked" was a policy to keep track of paid time off and to record requests for classroom coverage).

E. Speaking of the Payment Period, Visweswaraiah testified, "we didn't track hours worked at that time." Exhibit 2: DU Dep. II at 89.

F. Because it did not have accurate records of the FELC Employees' overtime, DU asked the FELC Employees to "document" their overtime hours for the Payment Period and to submit a spreadsheet of those hours to DU. Exhibit 16: Tankersley E-mail Nov. 17, 2016. Tankersley told the Employees to "estimate and record average hours spent per week" on activities for which they did not have specific dates or times. Exhibit 17: Second Tankersley E-mail Nov. 17, 2016. The Plaintiffs followed Tankersley's instructions and submitted electronic spreadsheets to DU. Exhibit 8: Pl. Spreadsheets with DU Comments.

G. In or around May 2016, DU made payments to the Plaintiffs and the other FELC Employees, which are reflected in Plaintiffs' Deposition Exhibit 66. Exhibit 18: Dep. Ex. 66 – Payments to FELC Employees.[8]

H. DU's payments to the FELC Employees were based on Tankersley's and Visweswaraiah's own estimates of the overtime hours that should have been worked. Exhibit 7: Def. Resp. to Discovery at 15-16, ROG 6.

I. "Defendant admits that it did not specifically designate any compensation paid to the Plaintiffs as liquidated damages." Exhibit 7: Def. Resp. to Discovery at 9, RFA No. 14.

J. Moreover, Pinnock testified that the FELC Employees did not receive liquidated damages from DU. Exhibit 6: Pinnock Dep. at 45:8-46:15 (Q: "And the caregivers didn't get liquidated damages as part of the payments that you ended up making to them, correct?" A: "Correct").

K. To properly compensate the Plaintiffs for the overtime they performed during the Relevant Period, DU was required to pay them "the amount of their… unpaid overtime compensation [and] an additional equal amount as liquidated damages." 29 U.S.C. § 216(b); *see Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707, 713-14 (1945) (employee paid all overtime compensation entitled to bring suit for liquidated damages); *Evans v. Loveland Auto. Investments, Inc.*, 632 F. App'x 496, 498 (10th Cir. 2015) ("Liquidated damages awarded under FLSA are compensatory rather than punitive").

[8] The payment amounts are reflected in the first column labeled "$ with OT." The second column with that label – the last column on the page – reflects a hypothetical amount that would have been paid to the FELC Employees if they had been paid at a different hourly rate.

In *Brooklyn Savings Bank*, the United States Supreme Court held that liquidated damages "constitute compensation for the retention of a workman's pay." 324 U.S. at 707. In that case, the employer computed the overtime compensation due to an employee after the employee left employment and offered the employee a check for the full amount in exchange for a release of all FLSA claims. *Id.* at 700. The court held that the FLSA "provides absolutely that the employer shall be liable for liquidated damages in an amount equal to minimum wages overdue; liability is not conditioned on default at the time suit is begun." *Id.* at 711. As such, the employer was liable to the employee for liquidated damages even if the check it tendered reflected full payment of the back wages that were due. *Id.* at 704-707, 713-14. The Court also held that the employee's waiver of FLSA rights was void. *Id.* at 704-707.

L. While DU might argue that there is a dispute of fact regarding whether any actual damages for unpaid overtime are owed after its attempt to reimburse the Plaintiffs for their unpaid overtime, there is no dispute that those overtime payments were late and thus no dispute that liquidated damages accrued. *See Brooklyn Savings Bank*, 324 U.S. at 707, 713-14. As such, summary judgment may be entered as to the Defendant's liability on Count I, with the amount of damages to be determined at trial.

B. THE PLAINTIFFS ARE ENTITLED TO LIQUIDATED DAMAGES UNDER THE FLSA BECAUSE THE DEFENDANT CANNOT PROVE THAT IT ACTED IN GOOD FAITH AND BASED ON A REASONABLE BELIEF THAT ITS CONDUCT WAS NOT A VIOLATION OF THE FLSA.

1. BURDEN OF PROOF AND ELEMENTS:

Generally, employers that violate the FLSA's overtime and minimum wage requirements are liable not just for unpaid wages, but also for 'an additional equal amount as liquidated damages.'" *Perez*, 847 F.3d at 1252 (citing 29 U.S.C. § 216(b)). "However, if the employer can

establish that his conduct was both in good faith and based on a reasonable belief that his conduct was not in violation of the FLSA, the court may, in its discretion, award less or no liquidated damages." *Id.; cf. Mumby v. Pure Energy Servs. (USA), Inc.*, 636 F.3d 1266, 1272 (10th Cir. 2011) (citing 29 U.S.C. § 260); *Robertson v. Bd. of Cty. Comm'rs of Cty. of Morgan*, 78 F. Supp. 2d 1142, 1162 (D. Colo. 1999) ("The employer has the burden of showing both that it acted in good faith and that it had reasonable grounds for believing that its actions did not violate the Act").

"While the reasonableness requirement is an objective standard, the good-faith inquiry is subjective, requiring an 'honest intention to ascertain and follow the dictates' of the FLSA." *Mumby*, 636 F.3d at 1272 (citing *Dep't of Labor v. City of Sapulpa, Okl.*, 30 F.3d 1285, 1289 (10th Cir. 1994)).

2. THE DEFENDANT CANNOT PROVE THAT IT ACTED IN GOOD FAITH AND BASED ON A REASONABLE BELIEF THAT ITS CONDUCT WAS NOT IN VIOLATION OF THE FLSA.

Element 1: DU Cannot Prove that It Acted In Good Faith.

A. DU admits that at all times during the Relevant Period, it classified the Plaintiffs as "exempt" from the overtime requirements of the FLSA. Exhibit 7: Def. Resp. to Discovery at 5, RFA No. 1.

B. DU admits that it does not have any evidence related to its decision to classify the FELC Employees as "exempt." Exhibit 7: Def. Resp. to Discovery at 17-18, ROG No. 8 ("Defendant does not have any information regarding the specific individuals involved in the initial decision to classify the [FELC Employees] as exempt or the communications about that decision").

C. Visweswaraiah testified that DU classified the FELC Employees as "exempt" as far back as 2010. Exhibit 2: DU Dep. II at 15:20-24 (Q: "Are you aware of any decision to classify the employees as exempt or not exempt prior to the fall of 2016?" A: "No. When I came to [FELC] in August of 2010, everybody was in exempt positions").

D. Visweswaraiah further testified that neither she nor any other person at DU is aware of DU's reasons for classifying the FELC Employees as "exempt." *Id.* at 44:6-10 (Q: "But you don't know the reasons for the decisions prior to February of 2016, correct?" A: "No." Q: "And no one at DU does?" A: "Not to my knowledge").

E. Tankersley admitted that she did not perform any kind of investigation into or review of the FELC Employees' classification, and that she is not aware of any other person at DU having done so prior to 2016. Exhibit 4: Tankersley Dep. at 9:19-10:16, 17:8-20 (Q:…"did you engage in any investigation to determine whether they were exempt or nonexempt?" A: "No." Q: "Are you aware of [DU] doing any kind of investigation or review of the exempt status of the employees before 2016?" A: "No.")

F. DU admits that it did not consult the United States Department of Labor ("USDOL") or the Colorado Department of Labor and Employment ("CDLE") to determine whether its practices complied with the FLSA. Exhibit 7: Def. Resp. to Discovery at 21, ROG No. 11 ("there were no communications with the Department of Labor pertaining to this matter"); *id.* at 22 ("Defendant states that it did not communicate with any governmental agencies regarding the classification of the [FELC Employees]").

G. Because there is no evidence of the actions DU took prior to classifying the FELC Employees as "exempt" – let alone evidence that DU acted with an "honest intention to

ascertain and follow the dictates of the FLSA" – DU is liable for liquidated damages under the FLSA. *See Mumby,* 636 F.3d at 1272.

Element 2: DU Cannot Prove that It Acted Based Upon a Reasonable Belief that Its Conduct was Not in Violation of the FLSA.

A. DU admits that it does not have any knowledge of the decision to classify the FELC Employees as "exempt" prior to 2016. Exhibit 7: Def. Resp. to Discovery at 17-18, ROG No. 8 ("Defendant does not have any information regarding the specific individuals involved in the initial decision to classify the [FELC Employees] as exempt or the communications about that decision").

B. DU's 30(b)(6) designee, Visweswaraiah, admitted that DU does not know what the individuals who classified the FELC Employees as "exempt" believed. Exhibit 2: DU Dep. II at 40:11-18 (Q: "Do you have any knowledge as to what the people who classified the employees as exempt, what they believed at the time they classified them?" A: "I don't." Q: "Do you know of anyone at DU who does know what those people believe [sic]?" A: "I don't know of anyone").

C. The e-mail correspondence between Riley and Tankersley in July 2016 suggests that even a "brief comparison to other child care centers" would have revealed that child care workers are generally classified as "exempt." Exhibit 11: Tankersley E-mail July 6, 2016 at 2 (DU's "decision" to reclassify was "based on a brief comparison of other child care centers"). DU's apparent failure to conduct such a comparison at any time prior to 2016 cannot be called reasonable.

D. Because there is no basis to determine the "belief" upon which DU based its decision to classify the FELC Employees as "exempt," DU cannot satisfy its burden of

proving that it acted "based upon a reasonable belief that his conduct was not in violation of the Act." *See Perez*, 847 F.3d at 1252. As such, the Plaintiffs are entitled to liquidated damages as a matter of law. *See* 29 U.S.C. § 260.

C. THE PLAINTIFFS' CLAIMS ARE SUBJECT TO A THREE-YEAR STATUTE OF LIMITATIONS BECAUSE DU ACTED WITH RECKLESS DISREGARD FOR WHETHER ITS ACTIONS VIOLATED THE FLSA.

1. BURDEN OF PROOF AND ELEMENTS:

"To fall under the three-year limitation, the plaintiff must show that "the employer either knew or showed reckless disregard for the matter of whether its conduct violated the statute." *Mumby*, 636 F.3d at 1270 (citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)); *Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1299 (10th Cir. 2018) (holding that plaintiffs have "the burden of persuasion on the willfulness issue"). "Reckless disregard can be shown through 'action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Mumby*, 636 F.3d at 1270 (citing *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 68 (2007); *see Allen v. Bd. of Pub. Educ. for Bibb Cty.*, 495 F.3d 1306, 1323–24 (11th Cir. 2007) ("The three-year statute of limitations may apply even when the employer did not knowingly violate the FLSA; rather, it may apply when it simply disregarded the possibility that it might be violating the FLSA").

The "operative inquiry" in determining willfulness "focuses on the ***employer's diligence in the face of a statutory obligation***, not on the employer's mere knowledge of relevant law." *Id.* (citing *McLaughlin*, 486 U.S. at 134-35 and *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 129-30 (1985)) (emphasis added).

2. THE UNDISPUTED FACTS ESTABLISH THAT DU DISREGARDED THE POSSIBILITY THAT IT WAS VIOLATING THE FLSA.

A. As discussed above, DU did not take any steps to determine whether the FELC Employees were appropriately classified between 2010 and 2016, and probably did not do so between 2000 and May 2016. Exhibit 2: DU Dep. II at 15:20-24 (Q: "Are you aware of any decision to classify the employees as exempt or not exempt prior to the fall of 2016?" A: "No. When I came to [FELC] in August of 2010, everybody was in exempt positions"); Exhibit 7: Def. Resp. to Discovery, ROG 1 (discussing the founding of FELC in 2000 and admitting that "[t]he exemption status of the [FELC Employees] never came into question until 2016 when DU conducted an exemption analysis in light of pending changes to the Department of Labor Regulations").

B. DU admits that it "does not have any information regarding the specific individuals involved in the initial decision to classify the FELC Teachers as exempt or the communications about that decision." Exhibit 7: Def. Resp. to Disc. at 9-11, ROG 8.

C. It is undisputed that prior to 2016, DU did not conduct any kind of investigation, review, or analysis to verify whether it was in compliance with the FLSA, even though it knew that the FELC Employees were working more than 40 hours per week. *See* Exhibit 4: Tankersley Dep. at 17:8-20; *see* Exhibit 11: Tankersley E-mail July 6, 2016 (arguing that FELC events would suffer if FELC Employees had to receive overtime for all of the hours they worked over 40). Accordingly, DU failed to exercise any "diligence in the face of a statutory obligation," instead taking the unjustifiably high risk that it was not paying the FELC Employees appropriately for their overtime hours. *See Mumby,* 636 F.3d at 1270.

D. During discovery, the Plaintiffs served DU with interrogatories asking for the facts that support its Affirmative Defense No. 3: "Any claim for minimum wage and/or overtime liability and liquidated damages for a period in excess of two years prior to filing is barred by the statute of limitations… as any violations of the Fair Labor Standards Act which may have occurred were not willful." Exhibit 7: Def. Resp. to Discovery at 9-12, ROG 1; *see id.* at 17-18, ROG 8. DU responded by: (1) claiming that FELC is special among child care centers because of its curriculum and services offered to disabled children; (2) asserting that FELC "followed the Ricks Center model [the elementary school for gifted children at DU] and classified its teachers as exempt professionals;" and finally, (3) admitting that "[t]he exemption status of the [FELC Employees] never came into question until 2016 when DU conducted an exemption analysis in light of pending changes to the Department of Labor Regulations." *Id.* at 9-12, ROG 1.

E. Whether or not FELC is special among daycare centers, there is no evidence that DU considered its curriculum or services extended to children with disabilities when it decided not to pay overtime to the FELC Employees. On the contrary, Visweswaraiah, testified that she did not believe that these factors were taken into account when DU initially classified the FELC Employees. Exhibit 2: DU Dep. II at 42:9-44:10 (Q: "Do you know whether any of the information in the two paragraphs [of DU's response to ROG 8]…was taken into account in deciding how to classify the caregivers?" A: "Well, when [FELC] began in 2000, it wasn't nationally accredited…nor were many of the teachers in the process of obtaining a master's degree. So I don't believe that this information was used, you know, in 2000, around that time, to make the decision"); *see* Exhibit 7: Def. Resp. to Discovery at 17-18, ROG 8.

F. Nor is there any evidence that DU "followed the Ricks Center Model" when it decided to classify the FELC Employees as "exempt." Exhibit 2: DU Dep. II at 44:6-10 (Q: "But you don't know the reasons for the decisions prior to February of 2016, correct?" A: "No." Q: "And no one at DU does?" A: "Not to my knowledge"). Instead, the record shows that even now, DU distinguishes between FELC and Ricks, classifying the teachers at Ricks as "exempt" while classifying the FELC Employees as "nonexempt." Exhibit 2: DU Dep. II at 37:19-15-39:14.

G. DU's allegations that it classified the FELC Employees as "exempt" because of its curriculum or because of Ricks are speculation, which "carry no probative weight in summary judgment proceedings." *See Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1201 (10th Cir. 2015) (citing *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir.2004), further holding that allegations "must be based on more than mere speculation, conjecture, or surmise").

H. Ignoring such speculation, DU's only real response to the Plaintiffs' request for the facts in support of its Affirmative Defense No. 3 was the admission that "[t]he exemption status of the [FELC Employees] never came into question until 2016 when DU conducted an exemption analysis in light of pending changes to the Department of Labor Regulations." *Id.* at 9-12, ROG 1. In other words, DU simply "disregarded the possibility" that the FELC Employees were entitled to overtime compensation for at least six years. *See Allen*, 495 F.3d at 323.

I. DU is a large institution with an in-house Office of General Counsel that "provides legal advice and counsel on the broad spectrum of legal issues that arise in the operation of the University." Exhibit 19: DU General Counsel Homepage.

J. Despite being advised by competent counsel, DU failed to act with the diligence necessitated by the FLSA. Exhibit 4: Tankersley Dep. at 17:8-20 (testifying that there was no investigation or review).

K. Even in May 2016, when DU learned that the FELC Employees were misclassified, it took no action to inform the Employees or pay back wages until November, six months later. *See* Exhibit 1: Tankersley Notes; Exhibit 11: Tankersley E-mail July 6, 2016 at 2, 5 (arguing with reclassification that was scheduled for August 2016); Exhibit 14: Riley E-mail July 26, 2016 (stating that FELC Employees could not remain "in salaried positions according to legal guidelines"); Exhibit 20: Tankersley E-mail Nov. 14, 2016 (announcing "change in the law that will make [FELC Employees] eligible for overtime pay as of December 1, 2016).

L. DU thus acted with reckless disregard for whether its conduct was in compliance with the FLSA, and accordingly, Plaintiffs' FLSA claims are subject to a three-year statute of limitations. *See* 29 U.S.C. § 255.

CONCLUSION

WHEREFORE, the Plaintiffs respectfully move the Court to grant summary judgment for the Plaintiffs as to the Defendant's liability under the Fair Labor Standards Act for unpaid overtime compensation for the period from August 29, 2014 to November 30, 2016, and for all other and further relief as may be appropriate and just.

DATED this 25th day of January, 2019.

Respectfully submitted,

/s/ Adam M. Harrison

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CERTIFICATE OF SERVICE

I certify that on this 25th day of January, 2019, I filed the foregoing Motion and its accompanying Exhibits through the Court's CM/ECF system, which generated true and accurate copies of these documents to all counsel of record.

/s/ Adam M. Harrison
_____
Adam M. Harrison