IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-35158

ELAINE L. CHAO,
Secretary of Labor,
U.S. Department of Labor,

Plaintiff-Appellee,

v.

A-ONE MEDICAL SERVICES, INC., a corporation, ALTERNATIVE REHABILITATION HOME HEALTHCARE, INC., a corporation, LORRAINE BLACK, an individual and HANAHN KORMAN, an individual,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Washington

BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT OF JURISDICTION

The Secretary of Labor ("Secretary") agrees with the statement of jurisdiction contained in Appellants' brief, pursuant to Circuit Rule 28-2.2. In the interest of completeness, the Secretary states the following. The district court had subject matter jurisdiction over this case pursuant to sections 16(c) and 17 of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 216(c) and 29 U.S.C. 217, and pursuant to 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). Appellants filed a timely notice of appeal on January 31, 2002 of the district court's final judgment entered on December 4, 2001. See Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that A-One Medical Services, Inc. and Alternative Rehabilitation Home Healthcare, Inc., which were both engaged in the home health care business and were commonly controlled for a common business purpose, constituted a single "enterprise" covered by the FLSA.

2. Whether the district court correctly concluded that A-One and Alternative, which were jointly managed and shared office space, clients, and employees, were "joint employers" who must aggregate the hours worked by their employees for purposes of paying overtime under the Act.

3. Whether the district court correctly concluded that A-One and Alternative willfully violated the FLSA by failing to pay overtime to eight employees when the combined hours the employees worked for A-One and Alternative exceeded forty hours in a work week.

4. Whether the district court correctly awarded liquidated

damages based on the employers' failure to meet their substantial burden to show that they acted in good faith and in an objectively reasonable manner in failing to comply with the overtime provisions of the FLSA.

5. Whether the district court correctly concluded that res judicata principles did not foreclose the award of back wages for overtime to two former employees in this action brought by the Secretary by virtue of Appellants' contention that those employees previously counterclaimed for overtime compensation as part of an action Appellants had brought against the employees in county court.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

On March 13, 2001, the Secretary filed a complaint (District Court Civil Docket ("D.") 1; Appellants' Record Excerpts ("RE") 35), alleging that A-One Medical Services, Inc. ("A-One") and Alternative Rehabilitation Home Healthcare, Inc. ("Alternative"), both of which placed nurses to provide home health services, and Lorraine Black, president/owner of A-One, and Hanahn Korman, owner of Alternative, willfully violated the overtime and recordkeeping requirements of the FLSA. See 29 U.S.C. 207, 211(c), 215(a)(2), 215(a)(5). The Secretary sought unpaid overtime compensation and an equal amount in liquidated damages on behalf of eight employees, and a permanent injunction

to enjoin Defendants from committing future violations of the Act. See 29 U.S.C. 216(c), 217.

The Secretary and Defendants filed motions for summary judgment (D. 22, D. 47). Exhibits and declarations filed with the motions and responses set forth the undisputed facts in this case. See Appellee's Supplementary Record Excerpts ("SRE") 3-104; RE 46-134. On November 28, 2001, the district court denied the motion for summary judgment filed by the Defendants and granted the motion for summary judgment filed by the Secretary on all issues except for the issuance of a prospective injunction. D. 57, RE 7-24. The district court concluded that Defendants, covered as a single enterprise and liable as joint employers, willfully violated the overtime provisions of the FLSA, and ordered that they pay $7,294.85 in back wages and an equal amount in liquidated damages. Id. Judgment was entered on December 4, 2001. D. 58, RE 25. Defendants' timely notice of appeal followed. RE 1.

B. Statement of Facts

1. The Operation of A-One and Alternative

Defendants A-One and Alternative are engaged in the business of employing nurses and nurse's aides to provide home health services. RE 8, 12; SRE 44-45, 94. Home health care services provided by A-One and Alternative include nursing care, physical therapy, occupational therapy, speech therapy, and medical

social work. Id.; RE 48; SRE 3. The nurses employed by A-One and Alternative administered drugs and medications and utilized equipment that were produced and or manufactured outside the State of Washington.

A-One and Alternative are Washington corporations separately incorporated on different dates and owned by Lorraine Black and Hanahn Korman, respectively. RE 8, 48, 50 (Black Declaration at ¶¶s 2, 18), 132, 134. Black has been the sole stockholder, president, vice president, and secretary of A-One since she incorporated the company in 1988. SRE 42-43. The annual dollar value of A-One's business exceeded $1,800,000.00 for the years 1998, 1999 and 2000. RE 11-12; SRE 12. The annual dollar value of Alternative's business did not exceed $500,000.00 for each of those years. RE 12, 53.

A-One and Alternative maintained separate licenses to provide home health care services in different counties in Washington, separate tax identification numbers, separate employee records including time sheets, nursing forms, rates of pay, and reimbursement rates; they filed separate corporate documents and tax returns; and they issued separate pay checks. RE 13, 50 (Black Declar. at ¶19), 114; SRE 23, 34-35. The pay period for A-One was from Saturday to Friday and the pay period for Alternative was from Thursday to Wednesday every two weeks. SRE 23.

In 1996, Black entered into negotiations to purchase the stock of Alternative because Alternative's Certificate of Need, which was extremely difficult to obtain,[1] could enable A-One to provide Medicare services in certain counties of the Puget Sound area. RE 8; RE 49 (Black Declar. at ¶10); SRE 46, 75. Alternative, however, needed to obtain Medicare certification before the purchase took place and A-One could make use of Alternative's valuable Certificate of Need. SRE 56. Therefore, Black agreed to help Alternative obtain its Medicare certification while Korman resolved the company's debts. RE 8-9, 49 (Black Declar. at ¶11); SRE 53.[2]

To facilitate the Medicare certification, Black agreed to allow, with the patients' permission, the transfer of A-One patients to Alternative to enable Alternative to have "an adequate census for [Medicare certification] survey purposes." RE 50 (Black Declar. at ¶14); SRE 60-63; see SRE 37. During this time, Korman managed the care of private patients and Black admitted Medicare patients in her name and oversaw those patients' care and charts in order to pass the survey to obtain

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[1] The State of Washington requires a Certificate of Need in order for a licensed home health care provider to obtain Medicare certification. A home health provider must prove that a Medicare need exists for its services in order to obtain such certificate. RE 8, 49 (Black Declar. at ¶ 9).

[2] Alternative's Medicare certification became effective on February 22, 1999. SRE 3-4.

Medicare certification. SRE 55-56, 61-62, 68. A-One assisted Korman with staffing and supervision of Alternative's patient care. SRE 57.

In 1998, Korman and Black agreed to an amendment to the sales agreement for the purchase of Alternative by A-One, which left Korman with authority over the care of one Alternative patient, and held A-One responsible for services rendered by Alternative after March 1, 1998. RE 126; see SRE 71-72, 80-82. Korman worked for A-One between March and April 1998 while providing case management for one of Alternative's clients. SRE 99-100. Korman's only function, after April 1998, was to represent Alternative in court, depositions, and legal matters until the sale of the company, although she remained the sole owner and president of Alternative. RE 126-127; SRE 86-91.

Beginning in March or April 1998, A-One oversaw and managed the clinical operations of Alternative pursuant to the agreement resulting from mediation over the contract for A-One's purchase of Alternative. RE 13; RE 50 (Black Declar. at ¶18); SRE 71-73, 80-82, 88. A-One's management duties over Alternative involved "mak[ing] sure that everything runs smoothly . . . everything that's involved in managing her company." RE 109. Specifically, A-One oversaw the patient care of Alternative, supervised Alternative's employees, contracted for accounting

services for Alternative, contracted with vendors for Alternative, answered Alternative's telephones at the office it shared with A-One, and oversaw the paperwork necessary to comply with government requirements. RE 15, 109. Black also prepared the policy and procedure manual for Alternative. SRE 55.

Black told the "scheduler" for A-One -- Donita Iverson -- that her services were being contracted out to Alternative, and Iverson took direction from Korman for six months until Korman "disappeared" and Black supervised all the work of the scheduler for the two companies. SRE 34. The scheduler shared by the two companies scheduled employees to work for both companies, which included scheduling care for patients who had been transferred from one company to the other. RE 14-15; SRE 35-37.

When a patient was transferred from one company to another, the families of the transferred patients were told that A-One was going to eventually purchase Alternative, in order to reassure patients that their care arrangements would not change. SRE 54-56. Some of the transfers were made by A-One to ensure that the government surveyors who reviewed patient charts as part of the process by which Alternative was to obtain Medicare certification would not see clients who did not have Medicare needs on Alternative's charts. SRE 52, 55, 61-63, 68, 70-71, 85.

To preserve continuity of care of patients transferred

between A-One and Alternative, nurse employees were given the choice of transferring with the transferred patients or declining the patient assignment once the transfer was made. RE 50 (Black Declar. at ¶15). This policy was consistent with "the longstanding practice of A-One to allow its employees to accept or decline a patient assignment." Id. at ¶16. While there was no formal arrangement between the companies to share employees, the employees of both companies were offered patient assignments to the other company that they could accept or decline. RE 13; RE 51 (Black Declar. ¶22). The scheduler would coordinate the assignments so that a nurse could work some hours during the week for an A-One client and other hours for an Alternative client while providing continuity of care for both patients. RE 114. A nurse who worked for A-One and then worked for Alternative would fill out an application packet for Alternative prior to being put on that payroll. Id. A nurse who worked for Alternative and then began working for A-One was required to fill out separate paperwork, including an employment contract for A-One. SRE 27.

For example, an A-One patient who Becky Lockard had cared for since July 1998 was transferred to Alternative. See SRE 23. A-One had paid Lockard overtime for all hours she worked over 40 hours a week after she took on this patient. When the patient was switched from being an A-One client to being a client of

Alternative in February 1999, however, Lockard did not receive overtime pay for caring for this patient because she was told that she "was technically working for two different companies." Id. Lockard discussed the matter with Black, who "explained that there were two separate companies with separate payrolls and an employee had to work over 40 hours a week at each company to receive pay at the overtime rate." Id. Lockard stated that she had "the same pay and the same supervisor whether I was working for A-One or for Alternative Rehab." Id.; RE 14. While she saw patients for both companies, she received one pay check from A-One, and even when she received a separate check from Alternative for her work for that company, Black signed that check. Id.

Lockard was directed to change all references on the transferred patient's chart from "A-One" to "Alternative" by either cutting off the top of a document with A-One letterhead or covering the smaller references to A-One with Alternative address stickers. SRE 24; see SRE 67-68. At the request of a caller from A-One on or around February 2, 1999, Rebecca Goodrich, a case manager with the Department of Social and Health Services of the State of Washington ("DSHS"), recorded the patient transfer by filling out a Contract Request Form, dated February 2, 1999: "A-One- changing name to Alternative Rehabilitation Home Health Care" for a child client. RE 14; SRE

16, 18-20, 9. On December 4, 2000, Black wrote to Goodrich, on Alternative stationary, as "Administrator" of Alternative, describing the care the patient needed and referring to the patient as "our most fragile client." RE 13; SRE 8.

Kathleen Yarbrough was hired by Korman to work as a nurse for Alternative, and began working in April 1998 under Korman's supervision for an hourly rate of $20. SRE 26-27. Before filling out separate paperwork to work for A-One in June 1998, she was assigned a second patient for Alternative, but Black demanded that she reimburse Alternative for the difference between the $20 hourly rate that Alternative paid and the $17.50 rate that A-One paid. Id. By this time, Black and another employee were supervising Yarbrough's work for Alternative patients. SRE 28. Yarbrough noticed sometime in 1998 that Black was signing the checks she received from Alternative. SRE 27, 77-78 .

During the summer of 1998, Yarbrough worked for patients of Alternative and A-One and expressed concern to the scheduler and to Black that she was not getting paid overtime. Black responded to her complaints by telling her what a great nurse she was and telling her to "count her blessings." SRE 26-27. She told Yarbrough repeatedly that "she would go broke if she had to pay the nurses who worked on the state-pay cases for the overtime." SRE 29. Black also told Yarbrough that vacation

time would only accrue after she worked for both A-One and Alternative. Id.

On occasion, Black delegated her management authority over A-One and Alternative. SRE 1. For example, on May 5, 2000, Black executed a 30-day transfer of daily management authority for "A-One Services, Inc., A-One Home Health Services, Inc. [a sister corporation to A-One servicing Medicare patients], and Alternative Home Healthcare, Inc." to Diane Kelly, RN, and Anita Drammeh, a scheduler, "to make any and all necessary decisions regarding patient care, interaction with the State and its various agencies, staffing of the corporations and any other concerns which may arise," other than the right or authority to sign checks on behalf of the corporation. Id.

Both corporations operated at the same address. RE 8. "For cost-savings," Black "agreed to allow Alternative to occupy space in the office building" she owned: 3114 Oakes Avenue, Everett, Washington. RE 50 (Black Declar. at ¶17). The sign at the building read "A-One." SRE 28. Lorraine Black signed and filed a form with the Secretary of State officially changing Alternative's address for its Registered Agent to 3114 Oakes Avenue, the same address as that for A-One's Registered Agent. RE 14, 46-47; SRE 2.

An employee of both companies, Angela Goshorn, generated the payroll for Alternative under Black's ultimate supervision. SRE

48. Before Ms. Goshorn, another employee of both companies, Lisa Rhoddie, generated the payroll for Alternative under the supervision of Judy's Tax and Accounting service. SRE 48-49. Even though checks were generated by two different accountants on two different bank accounts, payroll checks from A-One and Alternative were mailed in one envelope. RE 14; SRE 29. Alternative paid A-One for its management duties until early 2000, when it lacked the revenue to do so. RE 51 (Black Declar. at ¶20); SRE 72.

2. Wage Violations

In April 1999, Karen Ann Murphy, an investigator with the Wage Hour Division of the U.S. Department of Labor, began an investigation into the compliance of A-One with the FLSA. RE 9; SRE 11. Black told Murphy that her daughter handled the payroll for A-One and referred Murphy to Judy's Bookkeeping to gain access to Alternative's payroll records. SRE 12. That firm referred the investigator back to A-One where Alternative's payroll records had been forwarded. SRE 13. A-One payrolls and Alternative payrolls were reviewed on site at the offices the companies shared, during which time Murphy tracked each employee's hours and wages by work week and performed the wage computations. Id.

When the hours worked per week for both companies were combined, eight employees -- Marcie Angst, Susan Hewes, Becky

Lockard, Ila Millard, Kathleen Peterson, Carlie Raff, Lin Renfro, and Kathleen Yarbrough -- were found not to have been paid overtime in accordance with section 7 of the FLSA, 29 U.S.C. 207(a)(1), which requires employees to be paid at least one and one-half times their regular rate of pay for each hour worked over forty hours in a work week. SRE 13; see RE 77-85 (Form WH-56 Summaries of Unpaid Wages); SRE 39-40 (complete Form WH-56 for Kathleen Yarbrough).

3. Prior Investigations

The Wage and Hour Division of the Department of Labor conducted two investigations of A-One prior to initiating the investigation that culminated in the filing of this lawsuit. In 1991, Wage-Hour found that A-One owed back wages of $9,873.00 to 46 employees for overtime pay violations of the FLSA, which were paid. In 1994, Wage and Hour found that A-One owed back wages of $8,054.69 to 45 employees for allowing compensatory time in lieu of paying overtime to these employees, which again were paid. And in 1994, Wage and Hour also assessed civil money penalties against A-One for its willful and repeated violations; A-One paid penalties in the amount of $1,200. SRE 12. Lorraine Black signed the 1994 settlement document and agreed individually and on behalf of A-One to comply with the FLSA in the future. SRE 11-12.

4. Action To Enforce Non-Competition Agreements

The employment agreement between A-One and its employees contained a liquidated damages clause that became effective "if the employee goes to work for an A-One customer facility, home care or private duty client, or competing health care agency or subcontracting agency for that client or customer within 90 days of the employee's last assignment with that client through A-One." RE 61 at ¶3.0.

During 2000, several employees left the employment of A-One and Alternative and accepted positions with a competitor. RE 9. A-One, believing that these former employees were soliciting its patients, filed small claims actions for breach of employment agreements against Ila Millard and Kathleen Yarbrough in July 2000 in Snohomish County District Court, Everett, Washington. RE 9, 69-70, 75.

Yarbrough made a counter-claim for "vacation pay and did not pay Medicare on W2 but did collect from my pay check." RE 72; SRE 104. While Yarbrough orally requested "overtime pay" when appearing before the county court, her counter-claim did not include a claim for overtime wages. RE 72, 91; SRE 104. There is no documentation in the record of any ruling by, or discussion in, the court on the request for overtime. See RE 91- 92. Millard made a counterclaim for "1) liquidated damages in breach of employee agreement; 2) Harassment [and] 3) unpaid

overtime," which the county court denied. RE 76, 107; SRE 101. She was not represented by counsel, and was not aware of whether state or federal law required hours worked over 40 hours in a work week to be compensated at an overtime rate. SRE 102. At the hearing, the judge did not give Millard the opportunity to present any evidence or testimony to support her counterclaim. Id.

C. The District Court's Decision

In its decision dated November 28, 2001, the district court granted partial summary judgment for the Secretary. RE 7. The court concluded that undisputed facts showed that A-One and Alternative were a single "enterprise" and "joint employers" for whom eight employees worked and were willfully denied overtime wages in violation of the FLSA. Thus, the district court ordered Defendants to pay $7,294.85 in back wages and an equal amount in liquidated damages, but denied the Secretary's request for the issuance of a prospective injunction. Id.

The district court stated that A-One and Alternative were both covered by the FLSA, because they met the statutory criteria for an "enterprise" under section 3(r)(1) of the Act, 29 U.S.C. 203(r)(1). RE 16.

First, according to the court, both employers are "related" because they perform the identical activities of providing home health care services. Second, the court determined that the

undisputed facts adduced by the Secretary establish "common control," in light of the fact that Black, the sole shareholder and president of A-One, maintained control over both companies. In this regard, the district court pointed out that Black supervised the day-to-day activities of Alternative employees as well as the employees of A-One; Black testified to reviewing the payrolls, contracts, and paperwork for government compliance for Alternative. In further support of "common control," the court noted that the two companies actually shared employees such as nurses and a scheduler, who arranged for employees to treat patients who had been transferred from one company to the other; the companies also received phone calls on the same line and shared the same office space, identified as the offices of A-One. RE 15.

Third, the court stated that there was a "common business purpose" -- "to service home health patients, who were clients of either company, utilizing the same pool of nurses, the same scheduler, and the same phone service." The court also noted that a "common business purpose" was evidenced by Black's intention to strengthen Alternative by managing the company preparatory to merging it with A-One. Thus, the court determined that there was enterprise coverage under the FLSA. RE 16.

Based on these same facts, the district court concluded that A-One and Alternative were joint employers. Because all of employees' work for A-One and Alternative benefited both employers, and because the employers were not "completely disassociated," the employees' hours must be aggregated for overtime purposes pursuant to 29 C.F.R. 791.2(a). RE 17.

Quoting the McLaughlin v. Richland Shoe Co., 486 U.S. 128, 13 (1988), standard for "willfulness," the district court concluded that the Secretary established that the Defendants "knew or showed reckless disregard for the matter of whether its conduct was prohibited" by the FLSA based on the undisputed testimony of former employees that Black attempted to maintain the appearance of separateness of the two companies, in part to avoid paying the employees overtime. The court thus applied the three-year statute of limitations applicable to willful violations of the Act. RE 19. For this same reason, the district court concluded that the companies' failure to comply with the FLSA was not in good faith or predicated upon objective reasonable grounds, and thus awarded liquidated damages. RE 21.

The district court rejected Defendants' res judicata defense with regard to two of the employees whom A-One sued in small claims court in Snohomish County, Washington, for violation of a non-competition agreement when they left A-One and Alternative to work for a competitor. The court concluded

that former employees Kathleen Yarbrough and Ila Millard may have initiated counterclaims for overtime in the small claims actions, but that no record evidence existed to show that there was an identity of claims since "it in unclear what the legal and factual basis was for the counterclaim." RE 23. There was also nothing in the record showing that the former employees had presented the small claims court with any evidence considered and rejected on the merits as to overtime. Id. The court further stated that no authority was presented for the proposition that a counterclaim arising out of a private contract action precludes the Secretary from seeking back wages on behalf of undercompensated employees for violations of a statute the Secretary is charged with enforcing. RE 23.

Finally, the district court denied the Secretary's request to enjoin the employers from further violations of the FLSA based on an assumption of current compliance and it being unlikely that the employers could avoid the FLSA's overtime provision in the future because of the pending sale. In the words of the court, "the Secretary has not demonstrated that future violations are likely to occur." RE 23.

SUMMARY OF ARGUMENT

The district court properly determined that the employers violated the overtime requirements of the FLSA over a three-year period and owed eight former employees $7,294.85 in back wages

for unpaid overtime work, and an equal amount in liquidated damages. As properly determined by the district court, A-One and Alternative were covered by the overtime provisions as an "enterprise" within the meaning of section 3(r)(1) of the Act, 29 U.S.C. 203(r)(1). The corporations were engaged in identical activities and shared the common business purpose of merging to provide health care services to patients in their homes. Undisputed evidence further establishes that, in preparation for the sale of Alternative to A-One, both companies operated under the common control of Lorraine Black, who made all management decisions for both corporations. A-One and Alternative also shared clients, utilized the same staff to schedule clients, and assigned the same nurses to provide services to clients of both companies. In some instances, employees received paychecks from either A-One or Alternative, both of which were signed by Black and were sent in the same envelope. In sum, the same employees managed the day-to-day operations of both companies in the same office, at the direction and under the control of Black. The companies thus formed a single enterprise.

The "economic reality" was that the nurses employed by Alternative and A-One were treated as a pool of employees available to provide services to individual patients of either employer in accordance with the needs of the companies and the patients. Both the internal management of the companies, as

well as their interactions with the Office of the Secretary of State of Washington and DSHS, indicate that the employers were not disassociated from each other and actually operated under the common control of Lorraine Black. Thus, A-One and Alternative, and their sole owners Black and Korman, were "joint employers" of their "common" employees and were required, under the FLSA and its implementing regulations, to aggregate the hours worked by these employees in a work week to determine whether they were owed overtime pay. The joint employers were liable for overtime owed to eight nurses who worked in excess of 40 hours in a work week for clients of both A-One and Alternative.

Based on the undisputed testimony of former employees that Black attempted to maintain an appearance of separateness of the two companies in part to avoid paying overtime compensation, and that employees of both companies expressly were scheduled to work in excess of 40 hours in a work week for the two companies without being paid overtime compensation (a fact of which they complained), the failure to pay overtime to these employees was a willful violation of the FLSA, and a three-year statute of limitations was properly applied. Moreover, the willfulness determination should be upheld because A-One and Black had a history of FLSA investigations, knew the overtime requirement of the Act, and should have been either aware of its application to

the nurses whose employment they controlled or sought advice to determine whether it applied. After two prior investigations by Wage-Hour, which Black settled by paying back wages of unpaid overtime as well as civil money penalties, Black knew or acted with reckless disregard of the overtime requirements of the Act by continuing to withhold overtime payments to nurses working for both A-One and Alternative for the more than 40 hours of work they performed in a work week for both companies.

Liquidated damages were properly awarded to fully compensate the nurses for lost overtime wages. A-One and Alternative failed to show that they acted in "good faith" and had objectively "reasonable grounds" for believing that their refusal to pay overtime when a nurse worked more than 40 hours combined for A-One and Alternative in a work week did not violate the FLSA. The statements of Black and Korman regarding the efforts they made to maintain the paper formalities of separate legal entities are insufficient evidence of "good faith" compliance with the Act or reasonable grounds to believe that their actions did not violate the Act. The facts in this case unquestionably show that Black and A-One controlled all aspects of the business operations of the companies, including the assignment of patients and nurses to A-One and Alternative. In light of these willful violations, the district court could not help but determine that the Defendants did not meet the

heavy burden of showing the good faith and the objective reasonableness of their actions necessary to avoid the usual award of liquidated damages.

The alleged counterclaims for overtime arising out of prior actions brought in Snohomish County Court by A-One against two former employees who the Secretary determined were owed overtime pay in this action were not, according to the record evidence, identical claims to the action brought by the Secretary, and were not brought by parties in privity with the Secretary in this action. (In fact, the record shows that only one of these employees actually filed a counterclaim for overtime.) Accordingly, the principles of res judicata do not apply.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT ALTERNATIVE PERFORMED THE SAME ACTIVITIES AS A-ONE UNDER THE COMMON CONTROL OF A-ONE AND ITS PRESIDENT LORRAINE BLACK FOR A COMMON BUSINESS PURPOSE AND THEREBY CONSTITUTED A SINGLE COVERED "ENTERPRISE" WITHIN THE MEANING OF SECTION 3(r) OF THE FLSA

A. Standard of Review

This Court reviews a grant of summary judgment de novo. See Baldwin v. Trailer Inns, Inc., 266 F.2d 1104, 1111 (9th Cir. 2001). Review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c), under which summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id. Viewing the evidence in the light most favorable to the nonmoving part, this Court must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. See Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc); Adcock v. Chrysler Corporation, 166 F.3d 1290, 1292 (9th Cir.), cert. denied, 528 U.S. 816 (1999). This standard is generally applicable to the present case, in which cross-motions for summary judgment were filed.

Specifically, in reviewing a grant of summary judgment issued on the grounds that the defendant did not meet the FLSA requirements for "enterprise" coverage, this Court has applied a de novo standard of review. See Zorich v. Long Beach Fire Department and Ambulance Service, 118 F.3d 682, 684 (9th Cir. 1997). Where, as here, the parties present a record of undisputed facts, the question of whether two or more businesses constitute an "enterprise" for FLSA coverage purposes becomes purely a question of law. See Brennan v. Plaza Shoe Store, Inc., 522 F.2d 843, 846 (8th Cir. 1975).

B. The District Court Properly Concluded That A-One and Alternative Constituted A Single "Enterprise" Within The Meaning of Section 3(r) of the FLSA.[3]

The FLSA's overtime compensation requirements apply to any employee "who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce,[4] for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which

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[3] The questions of enterprise coverage and liability are separate issues. "[W]e hold that the enterprise analysis is different from the analysis of who is liable under the FLSA. The finding of an enterprise is relevant only to the issue of coverage. Liability is based on the existence of an employer-employee relationship." Patel v. Wargo, 803 F.2d 632, 637 (11th Cir. 1986). As the court stated in Donovan v. Grim Hotel Co., 747 F.2d 966, 969 (5th Cir. 1984), cert. denied sub nom. Grim Hotel v. Brock, 471 U.S. 1124 (1985), "[T]he obligation of the corporations to conform to the Act's wage and hour requirements [i.e., coverage] depends on whether the hotel corporations, viewed together, constitute an 'enterprise.'" After concluding that the hotel corporations were an enterprise, the court in Grim Hotel examined separately the question of individual employer liability. Id. at 971. See also Brennan v. Arnheim & Neely, Inc., 410 U.S. 512, 516 (1973) (indicating that the questions of enterprise coverage and who is an employer are distinct); Donovan v. Agnew, 712 F.2d 1509, 1510-16 (1st Cir. 1983) (same).

[4] The FLSA defines commerce as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. 203(b).

he is employed." 29 U.S.C. 207(a)(1). The threshold coverage question in this case is whether the overtime protections of the FLSA extend to the employees of both A-One and Alternative because the two entities together constitute a single "enterprise" within the meaning of the Act.

Appellants contend that the jurisdictional amount for "enterprise" coverage has not been met. App. Br. at 8. A-One and Black admit that they are subject to coverage under the FLSA; they specifically admit that A-One's annual dollar volume of business for the years 1998-2000 exceeded $500,000.00. See 29 U.S.C. 203(s)(1)(A)(ii).[5] SRE 6. Alternative did not have an annual dollar volume of business for all the relevant years that satisfied the statutory threshold for enterprise coverage, $500,000.00. RE 12, 53. But the fact that Black determined that the gross sales for Alternative declined from $538,158 for 1998 to $369,645 for 1999, and to below $210,000 for 2000 (RE

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[5] The jurisdictional paragraphs of the complaint alleged individual and enterprise coverage, RE at 37, Doc. 1 (Complaint ¶s IV, V, VI, VII), although the Secretary's Motion for Summary Judgment did not reference any particular jurisdictional provision of the FLSA or discuss the application of "enterprise" coverage by name when asserting that the FLSA covers both entities "by virtue of A-One's annual dollar volume." D. 23 (Plaintiff's Motion for Summary Judgment at 7-8). Appellants characterize this omission as "significant" in arguing that the district court improperly found that the indicia of "enterprise" coverage are present in this case. However, both the complaint and the Secretary's brief jurisdictional statement in her motion were sufficient to invoke the "enterprise" issue.

53), does not preclude its coverage as part of an enterprise, as Appellants appear to assert (App. Br. at 8). Instead, the gross sales data reflect that Alternative met the statutory threshold dollar value for enterprise coverage on its own in 1998, and that it would meet the threshold in 1999 and 2000 if its sales were combined with those of A-One. By definition, the "enterprise" and not each individual entity that comprises the enterprise must have an annual gross volume of sales made or business done of not less than $500,000.00. See 29 C.F.R. 779.201 ("The 'enterprise' is the unit for determining whether the conditions of . . . the requisite dollar volume are met."). In this case, the "enterprise" consisting of A-One and Alternative, see infra, meets the statutory threshold amount for coverage under the Act.

Section 3(r)(1) of the Act defines "enterprise" as:

> the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units . . . but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that is will sell, or sell only, certain goods . . .or (B) that it will join with other such establishments in the same industry . . ., or (C) that it will have the exclusive

right to sell the goods.

29 U.S.C. 203(r)(1). See generally Zorich, 118 F.3d at 684-86; Donovan v. Scoles, 652 F.2d 16 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982). There is thus a three-part test for enterprise coverage: related activities, unified operation or common control, and common business purpose. See Arnheim & Neely, Inc., 410 U.S. at 518; 29 C.F.R. 779.202.[6]

Whether several businesses constitute a single "enterprise" "is a question to be resolved in each case on the basis of all the particular facts of the case." Plaza Shoe Store, Inc., 522 F.2d at 846. The activities of businesses are "related" for purposes of "enterprise" coverage when they are "the same or similar," such as individual stores in a chain, or when they are "auxiliary and service activities." S. Rep. No. 145, 87th Cong., 1st Sess. 41 (1961), reprinted in 1961 U.S.C.C.A.N. 1620, 1660. See also 29 C.F.R. 779.206; Plaza Shoe Store, 522 F.2d at 848 (dress shop and shoe store selling items of wearing apparel to general public entering premises that housed both stores engaged in related activities). Activities "directed toward the same business objective or to similar objectives in which the group

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[6] Skidmore v. Swift, 323 U.S. 134, 140 (1944), holds that the Secretary's interpretive regulations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." See also United States v. Mead, 533 U.S. 218, 227-28 (2001); 29 C.F.R. 779.9.

has an interest" are performed for a "common business purpose." 29 C.F.R. 779.213. There is a close relationship between the "related activities" and the "common business purpose" criteria. See Plaza Shoe Store, 522 F.2d at 847; Wirtz v. Savannah Bank & Trust Co. of Savannah, 362 F.2d 857, 861 (5th Cir. 1996).

"'Common' control . . . exists where the performance of the described activities are controlled by one person or a number of persons, corporations, or other organizational units acting together." 29 C.F.R. 779.221. Control "includes the power to direct, restrict, regulate, govern, or administer the performance of activities." Id. And, "[t]he fact that the firms are independently incorporated or physically separate . . . is not determinative [of whether "control" is present]." S. Rep. No. 1487, 92nd Cong., 2d Sess. (1966), reprinted in, 1966 U.S.C.C.A.N. 3002, 3009. As one court has stated, "We must look beyond formalistic corporate separation to the actual or pragmatic operation and control, whether unified or, instead, separate as to each unit." Donovan v. Grim Hotel Co., 747 F.2d at 970.

A-One and Alternative were engaged in "related" activities under the Act. They performed the same activity of providing home health care services. They shared patients and employees, offering the services of the same employees to patients of both companies. The same scheduler prepared the assignments for the

nurses, thereby evidencing the identical nature of the work. And, the policy of offering the nurses the option to decline work applied whether the scheduler offered the nurses work for A-One patients or Alternative patients. SRE 34, 22.

These related activities by themselves show a common business purpose. Moreover, from the time they entered into negotiations in 1996 for the eventual sale of Alternative to A-One, the companies were operated with the common business purpose of obtaining and maintaining Medicare certification for Alternative, and the long term profit of the intended merged company. The value of Alternative to A-One was its Certificate of Need, which enabled Alternative to obtain Medicare Certification, and thereby provide home health care services to Medicare patients in counties where A-One did not have its own Medicare certification. Black thus worked to rearrange the patient load of Alternative so that it could obtain Medicare certification in the State of Washington. RE 49 (Black Declar. at ¶¶s 9, 10). Specifically, A-one transferred clients to Alternative in order for it to maintain the minimum number of patients necessary to receive Medicare certification. SRE 37.

In the operation of the companies, Black exercised complete control over A-One and Alternative. After execution of the sales agreement, and through mediation to facilitate the sale, Black assumed even greater control over the day-to-day

operations, until early 1999, when her operational control became total and Korman's role was reduced to that of a nominal owner and legal representative of Alternative.

Indeed, Black admitted that she managed the day-to-day operations of Alternative and acted on its behalf with respect to employees, patients, and the state government agencies. RE 14, 50 (Black Declar. at ¶18); see SRE 1, 8 (letter to state agency regarding care of patient of Alternative signed by Black as Administrator of Alternative). Thus, Black signed state contracts with DSHS on behalf of both A-One and Alternative. SRE 35. The nursing supervisor supervised employees of both companies and A-One office staff sent out separate paychecks from A-One and Alternative. RE 14; SRE 35-36. While employees may have usually been paid by separate checks from different bank accounts that were generated by different accountants, Black signed the checks, and the checks were mailed in the same envelope. RE 14; SRE 29, 22. And for a period, Black generated the payrolls for both companies. SRE 35. Canceled payroll checks were returned to the shared office address and were filed away and maintained there. SRE 36.

The office worker who created the nurses' schedules, the "scheduler," reported to both Korman and Black on the status of the patients assigned to Alternative and A-One for the first six months of the companies' association; thereafter, she reported

solely to Black about the patients for both companies. SRE 34. The scheduler also interviewed, hired, and performed office work for both companies. SRE 36. In fact, all the office staff answered the phone lines for both companies; there was no separate telephone equipment or answering service. Id. And, while Black ensured that the records for each company were kept separate, the same personnel maintained and created the records. RE 14; SRE 34.

As noted, A-One and Black did take some steps to maintain Alternative's operations as "separate and distinct." Nevertheless, the formalities observed do not defeat enterprise coverage under the Act, as Appellants contend. App. Br. at 9. Taken as a whole, the foregoing facts reflect beyond peradventure Appellants' related activities, the common services they provided within the State of Washington, the assistance Black and A-One provided to enable Alternative to obtain Medicare certification, and the operational control Black and A-One exerted over Alternative. Contrary to Appellants' assertion, even if Korman did not relinquish financial ownership of the company, "the focus of the inquiry is the *performance* of the related activities. Common control of performance may be established in the absence of common ownership." Dole v. Odd Fellows Home Endowment Board, 912 F.2d 689, 693 (4th Cir. 1990).

Appellants argue that the exceptions provided in section

3(r)(1) preclude a finding that the two companies constitute a single "enterprise." Specifically, Appellants contend that the role Black played assisting and overseeing the clinical operations of Alternative was that of an independent contractor, thereby placing that role outside the category of "related activities." App. Br. at 9-10. The Department's own regulations refer to the Senate Report in clarifying that the term "independent contractor as used in section 3(r) has reference to an independent business which performs services for other businesses as an established part of its own business activities." 29 C.F.R. 779.233(b) (citing S. Rep. No. 145, 87th Cong., 1st Sess., p. 40). For example, the payroll services that Judy's Tax and Accounting Service provided to Alternative would not make Judy's a part of the A-One and Alternative "enterprise." Unlike Judy's, however, A-One did not provide scheduling and nurse supervision for any employees other than its own and those of Alternative.

Moreover, the management agreement entered into by Black and Korman in 1999 does not fit within the "enterprise" definition exception for independently owned retail or service establishments under certain franchise and other arrangements. See 29 C.F.R. 779.226-232. The Senate Report, quoted at 29 C.F.R. 779.229 (S. Rep. 145, 87th Cong., 1st Sess., p. 42), explains the types of services that Congress envisioned by this

exception: central warehousing, advertising, managerial advice, store engineering, accounting systems, site locations, and hospitalization and life insurance protection. Id. Unlike these examples, however, A-One essentially controlled all daily operations of Alternative. Therefore, this exception does not apply to defeat enterprise coverage for A-One and Alternative under the Act.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT A-ONE AND ALTERNATIVE ARE "JOINT EMPLOYERS" AND THAT THE HOURS WORKED FOR BOTH ENTITIES MUST BE AGGREGATED TO DETERMINE COMPLIANCE WITH THE OVERTIME REQUIREMENTS OF THE FLSA

A. Standard of Review

The determination of whether an entity is a "joint employer" under the FLSA is a question of law which is subject to de novo review by this Court. Torres-Lopez v. May, 111 F.3d 633, 638 (9th Cir. 1997); Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1469 (9th Cir. 1983).

B. The District Court Correctly Concluded That A-One and Alternative Are "Joint Employers" Under the FLSA.

The district court correctly stated that its determination as to enterprise coverage inexorably led to the conclusion that Black and A-One were "joint employers" of the nurse employees of Alternative and Korman pursuant to the broad definition of the employer-employee relationship under the FLSA, and the Department's clarifying regulations on "joint employment." The

FLSA defines "employ" to "include[] to suffer or permit to work." 29 U.S.C. 203(g). The Act's definition of "employer," 29 U.S.C. 203(d), "includes any person acting directly or indirectly in the interest of an employer in relation to an employee," and is not limited by the common law concept of "employer." And "employee" is simply defined as "any individual employed by an employer." 29 U.S.C. 203(e)(1). This court, looking to these statutory definitions, has stated that "[t]he FLSA broadly defines the 'employer-employee relationship[s]' subject to its reach." Torres-Lopez, 111 F.3d at 638. See also Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 325 (1992) (citing Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 (1947)); United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945); Bonnette, 704 F.2d at 1469; Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748, 754 (9th Cir. 1979).

These expansive statutory definitions permit two or more employers to jointly employ someone for purposes of the FLSA, as in Falk v. Brennan, 414 U.S. 190, 195 (1973). In Falk, the Supreme Court concluded that a real estate management firm was an "employer" within the meaning of the FLSA of maintenance workers who were concededly employees of the property owners. The Court based its conclusion in Falk on the real estate firm's "managerial responsibilities at each of the buildings, which gave it substantial control of the terms and conditions of the

work of these employees." As this Court has stated, "[T]he concept of joint employment should be defined expansively under the FLSA." Torres-Lopez, 111 F.3d at 639.

The Department's longstanding regulations, codified at 29 C.F.R. 791.2, provide additional guidance in determining when a joint employment relationship is present under the FLSA. Section 791.2(a) provides as follows:

> A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the Act depends upon all the facts in the particular case. . . . [I]f the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act.

29 C.F.R. 791.2(a) (footnotes omitted).

Section 791.2(b) provides three separate examples of joint employment where either "the employee performs work which simultaneously benefits two or more employers," as in the "joint employment" of farmworkers by farm labor contractors and growers, or where the employee "works for two or more employers at different times during the workweek," as in the present case:

> (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to

> interchange employees; or
> (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
> (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

29 C.F.R. 791.2(b)(1), (2), (3) (footnotes omitted).

Neither the caselaw nor the interpretive regulations, which as noted above are entitled to Skidmore deference, see 29 C.F.R. 791.1 (introductory statement referencing Skidmore), suggest or require a rigid test to determine the nature of an employment relationship. See Bonnette, 704 F.2d at 1469-70; Driscoll Strawberry Associates, 603 F.2d at 756. "[T]he determination of the relationship does not depend on such isolated factors, but rather upon the circumstances of the whole activity." Rutherford Food Corp., 331 U.S. at 730. The touchstone of the inquiry is "economic reality." Bonnette, 704 F.2d at 1469 (quoting Goldberg v. Whitaker House Co-operative, Inc., 366 U.S. 28, 33 (1961)).[7] In fact, this Court in Bonnette, noting that the district court used a four-part test (power to hire and fire, exercising control over work schedules, determining rate

[7] Appellants agree that the "economic reality" of the employment relationship and not any particular factor or set of factors is the controlling test in determining whether A-One and Alternative were "joint employers" of the eight nurses. App. Br. at 17-19.

and method of payment, and maintaining employment records) to determine whether the California Health and Welfare Agency were employers of "chore workers" providing domestic in-home services to disabled public assistance recipients, stated that "[t]he four factors considered by the district court provide a useful framework for analysis in this case, but they are not etched in stone and will not be blindly applied." 704 F.2d at 1470. "A court should consider all those factors which are relevant to [the] particular situation in evaluating the economic reality of an alleged joint employment relationship under the FLSA." Torres-Lopez, 111 F.3d at 639 (internal quotation marks omitted).

In the present case, reference to the FLSA joint employment interpretive regulations, quoted above, are sufficient in themselves to show the economic reality of the situation. As Appellants concede, A-One and Alternative were both "employers" of the nurses involved in the present case. App. Br. at 11. It is true that there was no formal agreement or understanding between A-One and Alternative and their respective employees that employees would be shared or directed to work for the other employer. See RE 48 (Black Declar. at ¶¶s 16, 19, 22). Yet even in the absence of a formal agreement, the nurses performed work for both employers and continued to provide home health

services to patients of one company when they were transferred and became clients of the other company. Black decided whether it benefited A-One or Alternative to have a particular patient, and transferred the patient in accordance with that assessment. Black also decided whether to offer to transfer the nurse who regularly provided that patient with services. See RE 50; SRE 53-54, 59-64, 68, 75. The "economic reality" was that the nurses employed by Alternative and A-One were treated as a pool of employees available to provide services to individual patients of either company in accordance with the needs of the companies and the patients. Thus, there was "an arrangement between the employers to share the employee's services, as, for example, to interchange employees." 29 C.F.R. 791.2(b)(1).

Appellants contend that Black's oversight of the clinical operations of Alternative did not involve the use of Alternative's employees "for A-One's services or benefit" (App. Br. at 12). The regulations state that joint employment may be established "[w]here one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee." 29 C.F.R. 791.2(b)(2). A-One did in fact act in the interest of itself and Alternative in relation to the employees who worked for both companies. Indeed, for a period of time, Alternative paid A-One for A-One's management duties (see RE 50-51 (Black Declar. at ¶¶s 19-20),

and those duties were still provided even after Alternative stopped paying A-One in early 2000 due to lack of revenue. Id. Black stated that the "benefit derived from the services [A-one provided to Alternative] is the maintenance of Alternative's continued existence for the potential sale." RE 51 (Black Declar. at ¶20). Furthermore, since 1998, by helping Alternative obtain clients with Medicare-qualifying needs through the transfer of such clients from A-One to Alternative, Black and A-One facilitated Alternative's Medicare certification, which benefited Alternative directly and A-One indirectly. See App. Br. at 12. As Black herself testified, once Alternative obtained Medicare certification, its sale to A-One would allow A-One to provide Medicare service to almost all the counties in the Puget Sound area (see RE 48-49, Black Declar. at ¶¶s 9-14, SRE 68-72).

Moreover, as the district court found, and as the Secretary has described in detail above, A-One and Alternative were not completely disassociated with respect to the employment and control of the employees through A-One's and Black's extensive control of Alternative. See 29 C.F.R. 791.2(b)(3). Even personnel of DSHS, the state agency involved in providing Medicaid compensation for home health services to companies with state contracts, believed that A-One and Alternative were the same company when A-One notified the agency of the transfer of

an A-One patient to the care of Alternative. SRE 15, 18.

For the foregoing reasons, the district court correctly applied the applicable statutory and regulatory principles, and relevant caselaw, in holding both companies and their sole owners liable for overtime payments to the employees who worked for both employers for more than 40 hours during a work week.

III. THE DISTRICT COURT PROPERLY DETERMINED THAT BY FAILING TO PAY OVERTIME AS JOINT EMPLOYERS DEFENDANTS WILLFULLY VIOLATED THE FLSA AND WERE THEREFORE SUBJECT TO A THREE-YEAR STATUTE OF LIMITATIONS.

A. Standard of Review

The issue of willfulness should generally be reviewed as a mixed question of fact and law. See Herman v. RSR Security Services, 172 F.3d 132, 139 (2d Cir. 1999); Martin v. Selker Brothers, Inc., 949 F.2d 1286, 1292 (3d Cir. 1991). Cf. Rykoff v. United States, 40 F.3d 305, 307-08 (9th Cir. 1994) (willfulness under the Internal Revenue Code). However, where the underlying facts concerning willfulness are not in dispute, as in the present case, the appellate court should review the district court's legal conclusion regarding willfulness de novo. See Reich v. Waldbaum, Inc., 52 F.3d 35, 39 (2d Cir. 1995); Reich v. State of New York, 3 F.3d 581, 587 (2d Cir. 1993), cert. denied, 510 U.S. 1163 (1994).

B. The District Court Properly Awarded Back Wages For Three Years' Unpaid Overtime Based On Willful Violations of the FLSA By A-One And Alternative, Who, Despite Being Joint Employers, Failed To Aggregate The Number Of Hours Worked In A Work Week By The Employees Of Both Companies.

Section 6(a), 29 U.S.C. 255(a), of the Portal-to-Portal Act, 29 U.S.C. 251 *et seq.*, provides for a statute of limitations of three years rather than two years for a willful violation of the FLSA. The Supreme Court has held that violations are willful where the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by" the Act. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988). See SEIU, Local 102 v. County of San Diego, 60 F.3d 1346, 1356 (9th Cir. 1995), cert. denied, 516 U.S. 1072 (1996); Baker v. Delta Air Lines, Inc., 6 F.3d 632, 644 (9th Cir. 1993).

Applying this standard, the district court concluded that the Defendants willfully violated the FLSA and were thereby liable for the overtime violations of the preceding three years instead of the preceding two years. The district court based its conclusion on the undisputed evidence that Black knew or should have known that the FLSA prohibited the failure to pay overtime under the circumstances. Specifically, the court relied on the steps taken by Black, as de facto manager of A-One and Alternative, to maintain the appearance of separateness of the two companies, which was designed in part to avoid paying

overtime.

Thus, according to the district court, separate time cards were used for each company at the same time that at least one employee was "encouraged to work overtime using clients from each company." SRE 23. A-One paid nurse Lockard overtime until the patient who brought her workload over 40 hours in a work week was transferred to Alternative. Id. At that point, Lockard was told that she no longer was entitled to overtime because she was then "technically" working for two employers. Id. The scheduler, Iverson, complained to Black that nurses were working overtime without being paid overtime compensation. SRE 37.

And finally, the district court noted that Yarbrough, a nurse, complained that she was not being paid overtime. SRE 28. Black told Yarbrough that she should "think of all the blessings [she's] getting and what a great nurse [she] was instead of paying [her] overtime." Id. The district court correctly concluded that these facts at least point to a showing of reckless disregard for the overtime requirements of the FLSA.

Moreover, A-One had a history of FLSA investigations by the Wage and Hour Division of the Department of Labor, which led to A-One's payment of back wages as well as civil money penalties for violations of the overtime requirements of the Act. Thus, A-One and Black had undisputed knowledge of the overtime

requirements of the Act based on those several investigations of A-One beginning in 1991, in which a Wage-Hour investigator had found that A-One and Black violated the FLSA by engaging in pay practices to avoid paying overtime to nurse employees. RE 48-49 (Black Declar. at ¶¶s 5-8). See RSR Security Services Ltd., 172 F.3d at 141-42 (corporation's chairman willfully violated FLSA by not making effort to ascertain possibility that corporation was violating the FLSA after evidence that prior pay practices had violated the law); Hodgson v. Cactus Craft of Arizona, 481 F.2d 464, 467 (9th Cir. 1973) ("There was a sufficient basis for the court's finding that Cactus Craft's violations were willful. Two previous investigations of Cactus Craft's labor practices had resulted in warnings against further violations of the FLSA. Pursuant to a third investigation leading to the present action it was evident that promises of future compliance had not been kept.").

In short, when it is clear that the FLSA is applicable, and it is beyond dispute what the Act requires, knowing conduct that violates the Act will be deemed willful. Black, at minimum, acted in reckless disregard of the Act by not seeking compliance advice when the question arose of whether payment of overtime should continue once nurses under her control began working more than 40 hours in a work week for patients of both companies.

It simply is not material that none of the investigations

focused specifically on the question of whether A-One and Alternative were "joint employers" for purposes of computing overtime under the FLSA. Thus, in Dole v. Elliot Travel & Tours, Inc., 942 F.2d 962, 966-67 (6th Cir. 1991), a travel agency and its owner were found to have willfully violated the FLSA based on affidavits of the Wage and Hour investigator and the owner stating that prior investigations had disclosed FLSA violations by the predecessor travel company, that the owner had agreed to pay unpaid overtime wages, and that he gave assurance of future compliance. The court in Elliot did not find it material that "at no time prior to institution of this action did the compliance officer inform defendants that commissions were to be added into gross pay for purposes of computing overtime." Id. at 967. And, as the Second Circuit stated in Waldbaum, "Even if, as Waldbaum contends, prior investigations by the Secretary regarding Waldbaum's compliance with the FLSA did not focus upon the duties performed by the Employees, they sufficed to acquaint Waldbaum with the general requirements and policy of the statute, and no more is required to resolve the clear issue whether hourly employees are subject to the FLSA." 52 F.3d at 41.

Appellants argue that there is a "genuine issue of material fact concerning Black's intent." App. Br. At 28. Black's intent to avoid paying overtime by maintaining the outward

indicia of employment by separate companies for purposes of the Act, however, is not in dispute. It was precisely that intent to avoid paying overtime, by means of maintaining separate records according to whether the patients were nominally being served by A-One or Alternative, and in the face of complaints by nurses and the scheduler, that persuaded the district court to find that the violations were willful. The testimony of Black, DSHS employees Goodrich and Summers, the nurses, and Iverson, the scheduler, establish the transferring of patients and employees between the entities and the resultant merging of the identities of the companies. That testimony demonstrates that A-One and Alternative actually were operated by Black as the single business entity they planned to officially become after the sale of Alternative to A-One. Thus, Black knew or should have known, or at least acted in reckless disregard of the fact, that she was required to aggregate the hours worked by all the employees at issue to determine whether overtime compensation was due.

IV. THE DISTRICT COURT'S AWARD OF LIQUIDATED DAMAGES WAS PROPER BECAUSE THE COMPANIES FAILED TO MEET THEIR SUBSTANTIAL BURDEN TO SHOW THAT THEY ACTED IN GOOD FAITH AND IN AN OBJECTIVELY REASONABLE MANNER IN CONNECTION WITH THEIR OVERTIME VIOLATIONS.

A. Standard of Review

This Court has stated that generally the appropriate standard of review for liquidated damages is "clearly erroneous"

for whether the employer acted with subjective good faith and de novo for whether the employer acted in an objective reasonable manner. See Bratt v. County of Los Angeles, 912 F.2d 1066, 1071-72 (9th Cir.), cert. denied, 498 U.S. 1086. However, just as with willfulness, the underlying facts with regard to liquidated damages are beyond serious dispute here. Therefore, the district court's conclusion that liquidated damages were appropriate should be reviewed de novo. See Waldbaum, Inc., 52 F.3d at 39; State of New York, 3 F.3d at 587.

B. The District Court Correctly Awarded Liquidated Damages.

The FLSA provides that "[a]ny employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. 216(b). Liquidated damages are not a penalty, but compensation to the employees for the delay in receiving the wages due as a result of the employer's FLSA violation. See Local 246 Utility Workers Union of America v. Southern California Edison Co., 83 F.3d 292, 298 (9th Cir. 1996) (citing Brooklyn Savings Bank v. O'Neil, 324 U.S. 698, 707 (1945)). As the Seventh Circuit has stated, "Double damages are the norm, single damages the exception." Walton v. United

The prior Wage and Hour overtime investigations of A-One -- while not relied on by the district court in concluding that liquidated damages should be awarded -- also indicate that Black knew the requirements of the FLSA's overtime requirements. The fact that these prior investigations were conducted in connection with different practices to avoid paying overtime compensation than the one used here (including an incorrect utilization of "compensatory time"),[8] which Black employed to avoid paying $9,873.00 in back wages to 46 employees in 1991 and $8,054.69 in overtime back wages to 45 employees in 1994, did not absolve Black of the responsibility to ascertain whether the practice used here was violative of the overtime requirements of the Act. SRE 12, 6, 7. This is highlighted by the fact that in settlement of the civil money penalties assessed for FLSA overtime violations in 1994, Black agreed individually and on behalf of A-One to comply with the FLSA in the future. SRE 6-7, 11-12; RE 48-49 (Black Declar. at ¶¶s 1, 2). It was her responsibility to ensure compliance in the instant case.

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[8] Contrary to Appellants' assertion (App. Br. at 19), A-One's use of compensatory time was not in accordance with the FLSA. Collins v. Lobdill, 188 F. 3d 1124 (9th Cir. 1999), cert. denied sub nom. Collins v. Spokane Valley Fire Protection District No. 1, 529 U.S. 1107 (2000), on which Appellants rely, involved the application of section 7(o) of the FLSA, 29 U.S.C. 207(o), and 29 C.F.R. Part 553, concerning the application of "compensatory time" to employees of state and local governments. The option of offering "compensatory time" in lieu of payment of overtime is not available to employers in the private sector.

Also, Black was aware at the outset of the investigation in 1999 (leading to the instant action) that the Wage and Hour investigator was requesting basic recordkeeping information for both A-One and Alternative by letters addressed to both companies at the same address and through requests to her directly. SRE 12. If at that time Black had "an honest intention to ascertain what [the FLSA] requires and to act in accordance with it," Bratt, 912 F.2d at 1072, she could have then made an inquiry that demonstrated her "good faith" compliance, but she did not do so.

Black also had no objective reasonable grounds to believe that failing to aggregate the hours worked by A-One and Alternative nurses for overtime purposes was in compliance with the FLSA. She intended to maintain the formalities of operating two separate companies to avoid paying overtime but, as noted above, she operated and controlled the business of the two corporate entities by, inter alia, determining which company was to assume responsibility for the care of the various client/patients of each, overseeing treatment plans for patients of both companies, transferring clients between the companies, and offering nurses the opportunity to "follow the patient" when she transferred a patient from A-One to Alternative or from Alternative to A-One. Black sued her former nurses for

violating the "non-competition" clause when they left the employment of A-One and Alternative and continued to provide care for former patients of those companies, while permitting them to provide continuity of care without invoking the "non-competition" clause of their contracts when following a patient who was transferred between the two companies. This marks the unreasonableness of any belief on Black's part that she was in compliance with the overtime requirements of the FLSA.

Thus, the district court's conclusion that the employers had not met their substantial burden to avoid liquidated damages should be affirmed.

V. THE DISTRICT COURT PROPERLY REJECTED DEFENDANTS' AFFIRMATIVE DEFENSE THAT RES JUDICATA BARRED RECOVERY BY FORMER EMPLOYEES YARBROUGH AND MILLARD BASED ON THEIR SMALL CLAIMS COURT COUNTERCLAIMS FOR OVERTIME COMPENSATION FILED SUBSEQUENT TO A-ONE'S SUITS TO ENFORCE NON-COMPETITION AGREEMENTS.

A. Standard of Review

The question of whether res judicata applies is to be reviewed de novo. See Cabrera v. City of Huntington Park, 159 F.3d 374, 381 (9th Cir. 1998); Lea v. Republic Airlines, Inc., 903 F.2d 624, 634 (9th Cir. 1990).

B. Res Judicata Does Not Bar The Secretary's Overtime Claims Against Any Employees Of A-One and Alternative.

Appellants appeal the district court's rejection of their res judicata defense to liability for overtime violations with respect to two former employees, Yarbrough and Millard. App.

Br. 15-16. Appellants alleged in district court that the overtime issue was litigated and lost in counterclaims to two small claims cases that A-One brought in Snohomish County District Court, Washington, against Yarbrough and Millard, who they claimed breached the non-competition clause in their employment contracts with A-One. Id.; see RE 52-53 (Black Declar. at ¶¶s 30-33), 91-93, 107.

In order for res judicata to apply there must be: 1) an identity of claims, 2) a final judgment on the merits, and 3) identity or privity between parties. See Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 323-24 (1971); Sidhu v. Fletco Co., Inc., 279 F.3d 896, 900 (9th Cir. 2002).

First, Kathleen Yarbrough did not even assert a counter-claim seeking overtime wages (RE 72; SRE 104). See App. Br. at 16. Second, Black's affidavit, her deposition testimony, and the small claims court records do not establish the nature of the overtime counter-claim that Millard presented.[9] Finally, and most significantly, the Secretary is not bound by judgments in private cases because the Secretary is not in privity with

[9] This Court has laid out the following test to determine whether two suits contain identical claims: "(1) whether the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether the two suits involve infringement of the same right; (3) whether substantially the same evidence is presented in the two actions; and (4) whether the two suits arise out of the same transactional nucleus of facts." Sidhu, 279 F.3d at 900.

private parties. See Bechtel Petroleum, Inc. v. Webster, 796 F.2d 252, 253 (9th Cir. 1986) (affirming district court's decision rejecting res judicata in the context of an FLSA action brought by the Secretary after an action brought pursuant to Alaska Wage Hour Act on basis of the district court's opinion reported at 636 F. Supp. 486 (N.D. Cal. 1984)). See also Donovan v. Crisostomo, 689 F.2d 869, 876-77 (9th Cir. 1982) (noting in the context of addressing an evidentiary question that the Secretary, not the employees, is the real party in interest in an FLSA suit brought by the Secretary). Cf. Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 694 (7th Cir. 1986) (en banc) ("The Secretary of Labor's interest in an ERISA action is thus clearly separate and distinct from the private plaintiffs' interests and thus cannot be barred by the doctrine of res judicata.").

Appellants have clearly failed to meet their burden of proving the affirmative defense of res judicata. See Leisek v. Brightwood Corp., 278 F.3d 895, 900 (9th Cir. 2002) (burden of proving an affirmative defense is on the party asserting it). Accordingly, the district court determination that the principle of res judicata did not bar any of the Secretary's overtime claims was correct and should be affirmed.

CONCLUSION

For the reasons discussed above, the decision of the district court should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 11th day of July, 2002, two copies of the Brief of the Secretary and one copy of the Supplemental Excerpts of Record were sent by first class United States mail to:

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Certificate of Compliance

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is Monospaced (Courier New, 12 point), has 10.5 or fewer characters per inch and contains 11,575 words.

Date — Lois R. Zuckerman

Statement of Related Cases

There are no related cases pending in this Court.

Date — Lois R. Zuckerman