Nos. 10-4269/10-4361

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMY BADEN-WINTERWOOD, et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

LIFE TIME FITNESS, INC.,

Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Southern District of Ohio

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as amicus curiae in support of the Plaintiffs-Appellees. The district court correctly determined that the testifying employees in this collective action suit brought under the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. 201 et seq., were fairly representative of those employees who did not testify. Accordingly, the court reasonably concluded that there was sufficient evidence to show the amount and extent of uncompensated hours of work performed as a matter of just and

reasonable inference. The district court's decision should therefore be affirmed.

STATEMENT OF INTEREST OF THE SECRETARY OF LABOR

The Secretary has a statutory mandate to administer and enforce the FLSA. See 29 U.S.C. 204, 211(a), 216(c), 217. The Secretary has compelling reasons to participate as amicus curiae in this appeal in support of the employees because the ability for employees, or the Secretary acting on their behalf, to prove damages in an FLSA overtime case is crucial to achieving compliance under the Act. Both the Secretary and employees use representative testimony as a method of proving damages in cases where the employer has failed to maintain accurate or adequate records of the number of hours that the employees have worked.

A decision constraining the ability for employees to use representative testimony to prove damages in FLSA cases, if consistent with the employer's argument on appeal, could require every worker in an FLSA suit brought in this Circuit to appear at trial or lose their right to back wages, even where the court has previously concluded that the employer has violated the overtime pay provisions of the Act for those workers. Such a decision would make it much more burdensome to bring actions on behalf of undercompensated employees even where, as here, the action involves a common practice and policy underlying the back pay claims. The overly-strict standards for the sufficiency of

representative testimony advocated by the employer in this case would also unduly curb the ability of district courts to conduct trials in the most efficient manner possible.

STATEMENT OF THE ISSUE

Whether the district court correctly concluded that the testifying employees in this FLSA collective action suit were fairly representative of those employees who did not testify so that the court could reasonably conclude that there was sufficient evidence to show the amount and extent of uncompensated hours of work performed as a matter of just and reasonable inference.

STATEMENT OF THE CASE

A. Statement of Facts and Course of Proceedings

1. The Plaintiffs in this FLSA collective action have asserted claims against their employer, Defendant Life Time Fitness, Inc. ("LTF"), for unpaid overtime wages, as well as declaratory and injunctive relief. See Baden-Winterwood, et al. v. Life Time Fitness Inc., 729 F. Supp. 2d 965, 966 (S.D. Ohio July 30, 2010).[1] LTF owns and operates approximately 90 heath and fitness centers across the United States. Id. The Plaintiffs are 24 current or former employees of LTF who, with one exception, worked as "Department Heads" in three different

[1] Unless otherwise noted, the facts recited here are taken from the district court's ruling.

Departments: eleven are Department Heads in Member Activities, five are Department Heads in the Life Café, and seven are Department Heads in the Life Spa. Id. at 967.[2] The Plaintiffs were employed at various LTF club locations throughout the United States during the relevant period.

2. Both parties moved for summary judgment on the issue of liability. See Baden-Winterwood, 729 F. Supp. 2d at 967. The district court and, on appeal, this Court determined that LTF unlawfully violated the overtime pay provisions of the FLSA by incorrectly classifying the Plaintiffs as exempt. Id. at 967-68; see Baden-Winterwood v. Life Time Fitness, No. 2:06-cv-99, 2007 WL 2029066 (S.D. Ohio July 10, 2007), aff'd in part, rev'd in part, 566 F.3d 618 (6th Cir. 2009).

3. On remand, the district court scheduled a bench trial to determine the amount of back wages, if any, to which the employees were entitled. See Baden-Winterwood, 729 F. Supp. 2d at 968, 976-77. The employees intended to present testimony from a representative sample of employees in order to prove damages for all the Plaintiffs, but LTF objected and contended

[2] One of the Plaintiffs is a Director of Project Management Organization; another is a part-time Department Head employee. See Baden-Winterwood, 729 F. Supp. 2d at 967, 977. Because these employees testified on their own behalf at trial and did not serve as representative witnesses, the relevant Plaintiffs for purposes of this amicus brief are the remaining 22 employees, all of whom worked as Department Heads in three different Departments.

that each individual Plaintiff should be required to testify in order to receive back pay. Id.; see R. 96, 97.[3] The parties filed briefs on the issue and, on January 21, 2010, the district court issued an order permitting the use of representative testimony at trial. R. 96-98.

4. The district court subsequently held a bench trial on the issue of damages. See Baden-Winterwood, 729 F. Supp. 2d at 966, 976-77. At trial, the employees presented six witnesses, consisting of two Department Heads from each of the three Departments in which the relevant Plaintiffs worked, who testified on behalf of themselves and as representatives of the nontestifying Plaintiffs. Id. at 977.[4] These six employees generally testified about their job duties, requirements, and experiences, as well as the number of hours that they worked during the relevant time period. Id. at 977-85. LTF presented testimony from two management employees. Id. at 985-86. The employer's witnesses generally testified that each of the LTF club locations was different with respect to size, member usage, amount of work performed by the employees, and managerial style. Id.

[3] Citations to the district court docket are given as "R. __," followed by the applicable docket entry number.

[4] As noted above, the Plaintiffs also presented two additional witnesses who testified solely on their own behalf.

B. The District Court's Decision

On July 30, 2010, the district court issued an opinion and order, awarding back wages to each of the Plaintiffs. See Baden-Winterwood, 729 F. Supp. 2d 965.[5] In its decision, the court explained that the employees were entitled to prove their damages under the "relaxed" standard set forth in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946) because liability had already been established and LTF had failed to keep records of the hours that the Plaintiffs worked. See Baden-Winterwood, 729 F. Supp. 2d at 989-91.[6] The court therefore determined that the Plaintiffs only had to produce "'sufficient evidence to show the amount and extent of [their] work as a matter of just and reasonable inference.'" Id. at 991 (quoting Mt. Clemens, 328 U.S. at 687). After carefully considering the credibility of each witness and the totality of the evidence before it, including admitted exhibits and depositions, the district court concluded that the testifying employees carried their burden of proving damages and that LTF

[5] In its decision, the district court also determined that one of the nontestifying Plaintiffs should be dismissed from the suit because she failed to respond to LTF's discovery requests. See Baden-Winterwood, 729 F. Supp. 2d at 1000. The Plaintiffs have filed a cross-appeal regarding this dismissal. In her amicus brief, however, the Secretary presents argument only on the issue of the sufficiency of the representative testimony.

[6] Mt. Clemens has been superseded on other grounds by the Portal-to-Portal Act. See, e.g., Carter v. Panama Canal Co., 463 F.2d 1289, 1293 (D.C. Cir. 1972).

did not meet its burden of refutation under Mt. Clemens. Id. at 991-95.

The court then concluded that the employees were entitled to prove damages for the nontestifying Plaintiffs through the use of representative testimony. See Baden-Winterwood, 729 F. Supp. 2d at 995-1000. It explained that it is well-established throughout the federal courts, including this Court, that employees can prove their damages "as a matter of just and reasonable inference" through the use of fairly representative testimony. Id. at 995. The court noted that the weight to be given to the testimony is a function of the quality, not the quantity, of that testimony. Id.

After carefully reviewing and summarizing the testimony of each testifying witness, the court concluded that the two testifying employees from each of the three job categories in which the Plaintiffs worked were adequately representative of those who did not testify so that the court could reasonably conclude that there was sufficient evidence to show the amount and extent of uncompensated work as a matter of just and reasonable inference. See Baden-Winterwood, 729 F. Supp. 2d at 997-99. The court explained that the evidence indicated that the job duties, expectations, and goals for all of the Plaintiffs were generally uniform, regardless of the club location in which they worked, because all the Plaintiffs worked

as Department Heads. Id. at 997-98. It noted that LTF's Standard Operating Plan set forth common objectives for each Department and that all the Plaintiffs were subject to the same expectations regarding their scheduled working hours and were covered by the same compensation plan. Id. at 997. Moreover, the court noted that all the Department Heads were required to participate in meetings with each other and were "generally familiar" with the number of hours that the other Department Heads worked. Id. The court observed that each testifying employee believed, based on these meetings, that the other Department Heads were required to work similar hours to his or her own. Id.

Finally, the court noted that "at trial, Plaintiffs testified fairly uniformly about the causes requiring them to stay late and work overtime. For example, all Department Heads were responsible for filling in for an absent employee, supervising club events, and making themselves visible and available to club members." Baden-Winterwood, 729 F. Supp. 2d at 997. Because two witnesses testified for each of the three Departments in which the Plaintiffs worked, the court found that the testifying employees had firsthand knowledge of each of the relevant job positions, which it considered "an essential element in supporting an award of back pay." Id. at 998. The court also noted that, although it did not place much emphasis

on the number of testifying employees, "the 'sample' employees equal a large percentage of the employees whom they represent, which certainly weighs in favor of the appropriateness of the representation." Id.

Having therefore concluded that the employees met their burden of proving damages inferentially under Mt. Clemens and that the employer did not carry its burden of refutation, the court then determined the amount of back wages owed to each nontestifying Plaintiff. See Baden-Winterwood, 729 F. Supp. 2d at 999-1000, 1004-10. The court thoroughly reviewed the testimony presented for each Department in which the Plaintiffs worked and calculated the average number of hours worked in each Department, as determined by the "fairly representative" testimony of the testifying Plaintiffs. Id. at 999-1000.[7] The court determined the amount to be paid to each of the Plaintiffs for their uncompensated hours and liquidated damages based on a

[7] The court was careful to exclude any testimony that it did not find to be fairly representative. For example, in evaluating the testimony of the Member Activities Department Heads, the court noted that Plaintiff Chaney worked 55 hours per week, and that Plaintiff Baden-Winterwood worked 53 hours per week during one time period, 50 hours per week during another period, and 89 hours one week because of a work-related camping trip. See Baden-Winterwood, 729 F. Supp. 2d at 999-1000. The court determined that it was "inappropriate to take as representative the week that Baden-Winterwood worked 89 hours during a white-water rafting and camping trip. This job duty by all accounts was not a regular activity in which the Members Activities Department Heads engaged." Id. at 1000.

formula to which the parties had previously stipulated. Id. at 1000-01, 1004-10.

SUMMARY OF ARGUMENT

Where an employer has failed to maintain proper records of hours worked as required by the FLSA, employees need only prove their damages "as a matter of just and reasonable inference." Mt. Clemens, 328 U.S. at 687. Courts, including this Court, have consistently held that employees can meet their burden of proof under Mt. Clemens through the use of testimony from representative employees; it is not necessary for all affected employees to testify at trial in order to prove violations or to recover back wages. In evaluating the sufficiency of such testimony, courts examine whether the testimony is "fairly representative" of the larger group of employees for whom back wages are being sought, focusing on whether the job duties of the testifying employees are substantially similar to those performed by the nontestifying employees.

As a preliminary matter in this case, the district court correctly determined that the employees were entitled to prove their damages inferentially under Mt. Clemens because LTF failed to maintain records of their work hours. The court also properly concluded that the employees could satisfy this lessened burden of proving damages through the use of representative testimony. At trial, the employees presented

testimony from two Department Heads in each of the three relevant Departments in which the Plaintiffs worked, all of whom provided generally consistent testimony regarding their job duties, the conditions of their employment, and the fact that they worked overtime.

The district court therefore properly concluded that the testifying employees were fairly representative of the class members who did not testify, thereby enabling the court to reasonably conclude that the employees had satisfied their burden of producing "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." Mt. Clemens, 328 U.S. at 687. Accordingly, the district court's decision should be affirmed.

ARGUMENT

THE DISTRICT COURT PROPERLY DETERMINED THAT THE TESTIFYING EMPLOYEES WERE SUFFICIENTLY REPRESENTATIVE OF THOSE EMPLOYEES WHO DID NOT TESTIFY SO THAT THE COURT COULD REASONABLY CONCLUDE THAT THERE WAS SUFFICIENT EVIDENCE TO PROVE DAMAGES AS A MATTER OF JUST AND REASONABLE INFERENCE

A. As a Threshold Matter, the District Court Correctly Concluded that the Employees Were Entitled to Prove Their Damages Inferentially Under *Mt. Clemens*.

The Supreme Court established the standard of proof for an award of back wages in FLSA cases where an employer has kept inadequate or inaccurate records in Mt. Clemens, 328 U.S. at 686-88. In that case, the Court held that when an employer has failed to keep adequate or accurate records of employees' hours,

employees should not effectively be penalized by denying them recovery of back wages on the ground that the precise extent of their uncompensated work cannot be established. Id. at 687; see Reich v. S. New England Telecomm. Corp., 121 F.3d 58, 69 (2d Cir. 1997); Dove v. Coupe, 759 F.2d 167, 174 (D.C. Cir. 1985). Specifically, the Supreme Court concluded that where an employer has not maintained adequate or accurate records of hours worked, an employee need only prove that "he has in fact performed work for which he was improperly compensated" and produce "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." Mt. Clemens, 328 U.S. at 687. Once the employee establishes the amount of uncompensated work as a matter of "just and reasonable inference," the burden then shifts to the employer "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." Id. at 687-88. If the employer fails to meet this burden, the court may award damages to the employee "even though the result be only approximate." Id. at 688.

Courts have consistently upheld the award of approximate damages in this context because any imprecision in the calculation of damages ultimately stems from the employer's unlawful failure to maintain records. See S. New England Telecomm. Corp., 121 F.3d at 69 (noting that a "rule preventing

employees from recovering for uncompensated work because they are unable to determine precisely the amount due would result in rewarding employers for violating federal law"); Brock v. Seto, 790 F.2d 1446, 1448 (9th Cir. 1986) ("Mt. Clemens Pottery leaves no doubt that an award of back wages will not be barred for imprecision where it arises from the employer's failure to keep records as required by the FLSA."). In such circumstances, the district court must simply "'do the best [it can] in assessing damages.'" Reeves v. Int'l Tel. & Tel. Corp., 616 F.2d 1342, 1351 (5th Cir. 1980) (citation omitted); see Brock v. Norman's Country Market, Inc., 835 F.2d 823, 828 (11th Cir. 1988) (district courts have a "great deal of discretion in determining the most accurate amount to be awarded" where an employer's records are inaccurate).

As a preliminary matter, the district court in this case correctly determined that the employees were entitled to prove their damages under the just and reasonable inference standard enunciated in Mt. Clemens because it was undisputed that LTF had not kept records of the hours that the Plaintiffs worked. See Baden-Winterwood, 729 F. Supp. 2d at 989-91.[8] This Court, along with numerous other Circuits, has explicitly provided that the "relaxed" Mt. Clemens standard applies to employees' proof of

[8] As noted above, this Court had already determined that the employees in this case had been misclassified as exempt. See Baden-Winterwood, 566 F.3d 618.

damages in such cases. See, e.g., O'Brien v. Ed Donnelly Enter., Inc., 575 F.3d 567, 602 (6th Cir. 2009). Because the Mt. Clemens just and reasonable inference standard was clearly applicable, the district court properly rejected LTF's argument that employees must prove by a preponderance of the evidence the hours of uncompensated work.[9]

B. The District Court Correctly Concluded that the Employees Were Entitled to Use Representative Testimony to Prove Their Damages and that the Testifying Employees Were Sufficiently Representative of Those Employees Who Did Not Testify.

1. Courts, including this Court, have consistently held that employees can meet their burden of proof as set forth in Mt. Clemens through the use of testimony from representative employees; it is not necessary for all affected employees to testify at trial in order to prove FLSA violations or to recover back wages. See Morgan v. Family Dollar Stores, Inc., 551 F.3d

[9] In support of its "preponderance of the evidence" argument, LTF relied primarily on Myers v. Copper Cellar Corp., 192 F.3d 546 (6th Cir. 1999), and O'Brien, 575 F.3d at 567. As the district court properly determined, however, these cases actually support the employees' right to prove their damages inferentially. See Baden-Winterwood, 729 F. Supp. 2d at 989-91. In Myers, this Court reaffirmed that the Mt. Clemens standard may only be used where an employer has failed to keep proper records. See 192 F.3d at 551-52. In O'Brien, this Court clarified that, in such a situation, Mt. Clemens lessens a plaintiff's burden of proving damages, but not her burden of showing the existence of an FLSA violation. See 575 F.3d at 602-03. Because liability had already been established and LTF had failed to keep proper records here, the district court correctly concluded that the employees could prove their damages by way of inferential estimate.

1233, 1278-79 (11th Cir. 2008), cert. denied, 130 S. Ct. 59 (2009); Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 310 (4th Cir. 2006); Grochowski v. Phoenix Constr., 318 F.3d 80, 88 (2d Cir. 2003); S. New England Telecomm. Corp., 121 F.3d at 67-68; Dep't of Labor v. Cole Enter., Inc., 62 F.3d 775, 781 (6th Cir. 1995); Reich v. Gateway Press, Inc., 13 F.3d 685, 701-02 (3d Cir. 1994); Sec'y of Labor v. DeSisto, 929 F.2d 789, 792 (1st Cir. 1991); McLaughlin v. Ho Fat Seto, 850 F.2d 586, 589 (9th Cir. 1988); Brock v. Tony & Susan Alamo Found., 842 F.2d 1018, 1019-20 (8th Cir. 1988); Donovan v. Williams Oil Co., 717 F.2d 503, 506 (10th Cir. 1983); Donovan v. New Floridian Hotel, Inc., 676 F.2d 468, 472 (11th Cir. 1982).[10]

2. In evaluating the adequacy of such testimony, courts focus on whether the testimony is "fairly representative" of the larger group of employees for whom back wages are being sought, including whether the job duties of the testifying employees are substantially similar to those performed by the nontestifying employees. See Morgan, 551 F.3d at 1279-80; DeSisto, 929 F.2d at 793; Ho Fat Seto, 850 F.2d at 589. Courts generally consider factors such as "the nature of the work involved, the working

[10] As the Eleventh Circuit has explained, "Although Mt. Clemens never used the term 'representative testimony,' subsequent courts have interpreted it to authorize some employees to testify about the number of hours they worked and how much they were paid so that other non-testifying plaintiffs could show the same thing by inference." Morgan, 551 F.3d at 1278-79.

conditions and relationships, and the detail and credibility of the testimony" in making this determination. DeSisto, 929 F.2d at 793 (internal quotation marks omitted). Inconsistencies in employees' testimony, however, do not necessarily negate the suitability of such testimony as representative.[11] Rather, the employees' burden under Mt. Clemens is satisfied by showing a generally consistent pattern within each job category from which a reasonable inference may be drawn, thereby shifting the burden to the employer to negate this showing with precise evidence. See Mt. Clemens, 328 U.S. at 686-88; see also Ho Fat Seto, 850 F.2d at 589; Donovan v. Simmons Petroleum Corp., 725 F.2d 83, 86 n.3 (10th Cir. 1983).

Courts generally look to the quality, not the quantity, of the adduced representative testimony as a whole to see whether it fairly represents the activities of the nontestifying employees. See, e.g., Morgan, 551 F.3d at 1279-80; S. New England Telecomm. Corp., 121 F.3d at 67-68; Takacs v. Hahn Auto.

[11] The Fourth Circuit, for example, has described as "meritless" an employer's argument that minor inconsistencies in representative testimony rendered the district court's factual findings clearly erroneous. Donovan v. Bel-Loc Diner, Inc., 780 F.2d 1113, 1116-17 (4th Cir. 1985) (pattern or practice established by representative testimony as a matter of just and reasonable inference even though some employees were not "victims of the general pattern" and received breaks), disapproved of on other grounds, McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988); see Ho Fat Seto, 850 F.2d at 589 (fairly representative testimony satisfied the employees' burden under Mt. Clemens even though "inconsistent in terms of exact days and hours of overtime worked").

Corp., No. C-3-95-404, 1999 WL 33127976, at *2 (S.D. Ohio Jan. 25, 1999). While it is true that some courts have found representative testimony to be insufficient to prove damages where the sampling of testifying employees was too small, there is no bright line standard as to the number or percentage of representative employees that must testify.[12] Courts have not set arbitrary percentages below which representative testimony is insufficient as a matter of law to meet the employees' burden in FLSA overtime cases. See, e.g., S. New England Telecomm. Corp., 121 F.3d at 67-68; DeSisto, 929 F.2d at 793-94.

Where employees work in several job categories, some courts have concluded that "at a minimum, the testimony of a

[12] Numerous courts, including the Supreme Court, have upheld damages under the FLSA for nontestifying plaintiffs based on the fairly representative testimony of a small percentage of the employees. See, e.g., S. New England Telecomm. Corp., 121 F.3d at 66-68 (39 employees testified out of approximately 1,500 employees, representing 2.6% of the plaintiffs); Bel-Loc Diner, Inc., 780 F.2d at 1115 (testimony of 22 representative employees sufficient to support award back wages to 98 employees); Donovan v. Burger King Corp., 672 F.2d 221 (1st Cir. 1982) (6 employees provided representative testimony, along with stipulations from 20 other employees, on behalf of 246 employees, constituting 2.4% of the plaintiffs). Indeed, in Mt. Clemens itself, the testimony of only 8 employees, representing 2.7% of the group, supported an award of back wages for approximately 300 employees. See S. New England Telecomm. Corp., 121 F.3d at 68; but see Reich v. S. Md. Hosp., Inc., 43 F.3d 949, 951-52 (4th Cir. 1995) (concluding that the district court abused its discretion by finding liability based on the testimony of 1.6% of the employee population seeking back wages); DeSisto, 929 F.2d at 793-94 (concluding that the testimony of 1 employee on behalf of 244 others holding a variety of positions at different job sites was inadequately representative).

representative employee from, or a person with first-hand knowledge of, each of the categories is essential to support a back pay award." DeSisto, 929 F.2d at 793; see S. Md. Hosp., Inc., 43 F.3d at 952 (rejecting representative testimony based in part on "a variety of departments, positions, time periods, shifts, and staffing needs"); but see New Floridian Hotel, Inc., 676 F.2d 468 (awarding back pay to 207 employees based partially on representative testimony of 23 employees located in 3 different retirement facilities and performing a wide range of different jobs). At the very least, therefore, employees' ability to meet their burden under Mt. Clemens is strengthened by procuring evidence from each affected job category or classification.

3. In this case, the district court concluded that the employees could use representative testimony to meet their burden of proving damages under the just and reasonable inference standard set forth in Mt. Clemens. See Baden-Winterwood, 729 F. Supp. 2d at 989-91, 995-97. The district court also determined that the testifying employees were sufficiently representative of the nontestifying employees so that the court could reasonably conclude that the Plaintiffs had presented enough evidence to satisfy their burden of proving damages by inference. Id. at 995-1000. At trial and on appeal, however, LTF has advanced several arguments as to why the

testimony proffered by the employees was inadequately representative. LTF primarily asserts that the testimony presented was not fairly representative because (1) the testifying employees did not have firsthand knowledge of the number of hours worked by the nontestifying Plaintiffs, and (2) each Plaintiff's work experience was too highly individualized to be considered fairly representative of other employees. Specifically, LTF argues that each Plaintiff's work experience was unique because the Plaintiffs all worked in disparate employment settings (e.g., in clubs of different sizes and member usage) at different locations across the country and possessed varying levels of work experience and skill, which affected the number of hours per week that they worked. These arguments, however, are unpersuasive. The testimony of the testifying employees was sufficiently representative in this case.

4. Testifying employees are not required to have firsthand knowledge of the precise number of hours worked by nontestifying employees; that is the very essence and purpose of representative testimony. See Bel-Loc Diner, Inc., 780 F.2d at 1116 (stating that "[t]here is no requirement that to establish a Mt. Clemens pattern or practice, testimony must refer to all nontestifying employees. Such a requirement would thwart the purposes of the sort of representational testimony clearly

contemplated by Mt. Clemens"). Testifying employees need only have firsthand knowledge of their own job experiences and duties. Where their employer has failed to keep records of time worked, employees only bear the burden of demonstrating through generally consistent testimony a pattern of substantially similar work from which a reasonable inference may be extrapolated, thereby shifting the burden to the employer to negate this showing with precise evidence. See Morgan, 551 F.3d at 1279-80; DeSisto, 929 F.2d at 793; Ho Fat Seto, 850 F.2d at 589.

In this case, the employees fulfilled their burden of proving damages by presenting testimony that showed a consistent pattern of overtime work. Because of the nature of their work, as well as the fact that all the Plaintiffs are employed in different locations, none of the six employees who testified as representative witnesses could supply specific information about the number of hours worked by the other employees for whom back wages were sought. As noted above, however, all of the Plaintiffs occupied the same managerial job position. At trial, two employees with firsthand knowledge of the Department Head position in each of the three Departments in which all of the relevant Plaintiffs worked testified. See Baden-Winterwood, 729 F. Supp. 2d at 997. These employees provided substantially similar, if not identical, testimony about their job duties,

expectations, goals, and recommended scheduled hours. Id. The testifying employees proved a generally consistent pattern regarding the nature and conditions of their employment and the fact that they performed overtime work. Moreover, the district court noted that all of the testifying employees testified consistently about the reasons why they could not complete their work within their paid shifts. Id. For example, all of the Plaintiffs were responsible for covering for absent employees, overseeing club events, and making themselves available to club members. Id.[13]

5. Employees' testimony regarding the nature and extent of their work need not be identical in order to be sufficiently representative. In evaluating the adequacy of representative testimony, courts focus on whether the work activities performed by the employees were substantially similar, not whether the number of hours that they worked was the same. See Morgan, 551 F.3d at 1279-80; Ho Fat Seto, 850 F.2d at 589; Bel-Loc Diner, Inc., 780 F.2d at 1116-17. As the Tenth Circuit has explained, representative testimony is simply not "limited to situations where the employees leave a central location together at the

[13] The district court properly did not focus on the raw number of testifying employees, but correctly noted that the fact that a high percentage of the overall group of employees for whom back wages were being sought testified at trial (6 out of 22 employees) supported the conclusion that the use of representative testimony was appropriate in this case. See Baden-Winterwood, 729 F. Supp. 2d at 998.

beginning of a work day, work together during the day, and report back to the central location at the end of the day." Simmons Petroleum Corp., 725 F.2d at 86 n.3.

The existence of some variation in the work pattern of testifying plaintiffs does not render their testimony insufficiently representative. In Ho Fat Seto, for example, the Ninth Circuit held that although the testimony of 5 employees was inconsistent in terms of the exact number of days and hours of overtime worked, the testimony established as a matter of just and reasonable inference that 23 nontestifying employees regularly worked overtime, and that the burden was not on the employees to prove the precise extent of their uncompensated overtime work. See 850 F.2d at 589. Courts have awarded back wages to nontestifying employees based on representative testimony despite the fact that the employees worked different schedules and hours. See, e.g., Brennan v. Gen. Motors Acceptance Corp., 482 F.2d 825, 827, 829 (5th Cir. 1973) (affirming award of back wages to 11 nontestifying employees based on the testimony of 16 employees, even though employees "work on their own and without direct supervision" and possessed jobs that "naturally demand long and irregular hours in the field"); Herman v. Hector I. Nieves Transp., Inc., 91 F. Supp. 2d 435 (D. P.R. 2000) (representative testimony of 14 truck drivers sufficient to support an award of back wages to

approximately 100 employees, even where the number of hours that each employee worked was different), aff'd on other grounds, 244 F.3d 32 (1st Cir. 2001); Marshall v. Brunner, 500 F. Supp. 116 (W.D. Pa. 1980) (testimony of 48 employees working a range of overtime hours and subject to different wage rates was adequately representative to support back wages for 93 employees), aff'd in part, rev'd in part on other grounds, 668 F.2d 748 (3d Cir. 1982).

Here, LTF asserts that, because the Plaintiffs had some control over their schedules and consequently worked varying hours each week, none of the employees could provide representative testimony on behalf of any other employees. This narrow focus on the number of work hours to which the employees testified, however, is misplaced. The employees were not required to prove that all class members worked the same length of time every week under identical conditions. The basic principle of representative testimony is that a sampling of employees can provide evidence about the nature and conditions of their work experience and, if their work activities are substantially similar to those of the other employees for whom back wages are sought, the court can reasonably infer that the nontestifying employees worked substantially similar hours. Because LTF failed to maintain proper records, the employees need not establish the number of hours that they worked with

exactitude nor do they need to prove that the number of hours applied to the nontestifying employees was precisely accurate.

Even if the testimony of the employees ranged somewhat regarding the exact number of hours worked per week, the testifying employees testified consistently as to the important aspects of their work experience and performance. The testifying employees presented substantially similar testimony regarding their expected and actual job duties, their inability to complete their work within their paid shifts, and the reasons why they had to work overtime. See Baden-Winterwood, 729 F. Supp. 2d at 977-85, 997-98.[14] Any variations in the employees' testimony, such as the number of hours worked, were of little significance compared to the overall similarities regarding essential elements of their jobs.

Moreover, to fairly account for any variance in the number of work hours to which each employee testified, the district court averaged the number of hours worked by the representative employees for each Department in which the Plaintiffs were employed and applied that figure to calculate damages for the

[14] Importantly, LTF had the opportunity to cross-examine each testifying employee and to present its own evidence refuting the representative nature of the testimony proffered. LTF, however, did not present any testimony from other Department Heads challenging the credibility or typicality of the testimony presented by the Plaintiffs.

nontestifying employees in each Department.[15] As noted above, the district court was also careful to exclude any testimony regarding the amount of overtime worked that was not fairly representative. See Baden-Winterwood, 729 F. Supp. 2d at 999-1000.

6. Courts have awarded back wages to nontestifying employees based on representative testimony even where the employees work at different job sites, as long as the testimony as a whole is fairly representative of the nontestifying employees. See, e.g., New Floridian Hotel, Inc., 676 F.2d 468 (court awarded back pay to 207 employees based on representative testimony of 23 employees, located in 3 different retirement facilities); Burger King Corp., 672 F.2d 221 (6 employees from 6 restaurants provided representative testimony on behalf of 246 employees at 44 restaurants).[16] As one district court in this

[15] Awarding back wages to nontestifying employees based on the average number of hours testified to by employees is an established method of calculating damages in FLSA overtime cases. See, e.g., Hector I. Nieves Transp., Inc., 91 F. Supp. 2d at 440-41 (explaining that "the only fair way" to establish hours worked by nontestifying employees for whom no employment records existed was to average the number of hours worked by the other employees based on representative testimony and trip records); Brunner, 500 F. Supp. at 122 (court averaged number of overtime hours to which 48 truck drivers testified and applied that result to calculate back wages for 93 employees).

[16] See also Stillman v. Staples, Inc., No. 07-849, 2009 WL 1437817 (D. N.J. May 15, 2009) (court affirmed award of back wages to 342 sales managers at stores across the country based on the testimony of 13 representative employees); McLaughlin v.

Circuit has accurately explained, "There is no requirement that there be testimony from workers on each shift for the entire back pay period in order to establish the requisite pattern of violation. Nor is there a requirement of testimony from workers from each of the places of work." Nat'l Electro-Coatings, Inc. v. Brock, No. C86-2188, 1988 WL 125784, at *8 (N.D. Ohio July 13, 1988) (citation omitted).

In this case, the six representative witnesses who testified at trial for the Plaintiffs worked at six different club locations. Although LTF's two management witnesses generally testified that each of the different LTF club locations was different in terms of size, member usage, and managerial style, those differences do not render the testifying employees' testimony unrepresentative. Regardless of location, the Plaintiffs all occupied the same job position, performed substantially similar tasks, and were subject to the same general corporate standards, requirements, and compensation plans. See Baden-Winterwood, 729 F. Supp. 2d at 997-98. The employees who testified were consistent in stating that they were unable to complete their work within their paid shift hours and in describing the reasons why they worked overtime. Id.

DialAmerica Mktg., Inc., 716 F. Supp. 812 (D. N.J. 1989) (court awarded back wages to approximately 350 nontestifying employees based on the representative testimony of 43 employees, 24 of whom testified at trial; all of the employees worked out of their own homes).

7. Similarly, the fact that employees may possess different skills and work at varying levels of efficiency does not render the use of representative testimony inappropriate. See DialAmerica Mktg., Inc., 716 F. Supp. at 826 ("Although production rates may vary among [employees], this discrepancy is an insufficient basis upon which to deny recovery for employees who establish undercompensation pursuant to the FLSA."). LTF implies that several, if not all, of the Plaintiffs would not have needed to work overtime if they had been more productive during their paid shifts; this argument, however, has been rejected by courts in analyzing FLSA overtime claims. See Holzapfel v. Town of Newburgh, N.Y., 145 F.3d 516, 522 (2d Cir. 1998) ("Neither may overtime compensation be denied solely on the grounds that the employee could have completed his tasks during scheduled hours, thereby avoiding the need for overtime altogether."); New Floridian Hotel, Inc., 676 F.2d at 471 n.3 ("An employee is entitled to compensation for the hours he or she actually worked, whether or not someone else could have performed the duties better or in less time").[17] If the fact

[17] As the Fifth Circuit has properly concluded, the fact that two employees testified they had performed the same work duties in less time than the plaintiff is "unimportant" and has "little bearing" on a plaintiff's entitlement to back wages. Skipper v. Superior Dairies, Inc., 512 F.2d 409, 419 (5th Cir. 1975). In that case, the court explained that a fact-finder could certainly find that another employee was a "faster worker" than the plaintiff, but such a fact "would not detract from the

that some employees are able to perform work tasks more quickly than others would itself be enough to render representative testimony insufficient, then the entire concept of representative testimony would be eviscerated because efficiency rates necessarily vary within any group of employees.

In sum, the use of representative testimony in this case should be upheld. If the employees' testimony is deemed insufficiently representative for the reasons asserted by the employer, employees and the Secretary will lose a crucial method of proving damages in cases brought under the FLSA in this Circuit.

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binding effect" of the employee's own testimony regarding his hours of work. Id.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and (d), and 32(a)(7)(C), and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the applicable type volume limitation, typeface requirements, and type style requirements.

1. This brief complies with the type volume limitation because it contains 6,639 words, including footnotes but excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements because it has been prepared in monospace typeface, Courier New, in 12 point font in text and 12 point font in footnotes. This brief was prepared using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of March, 2011, the Secretary of Labor's Brief as Amicus Curiae in Support of Plaintiffs-Appellees is being filed electronically and notice of such filing will be issued to all counsel of record through the Court's electronic filing system, including the following:

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