UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DEBRA ARTT, an individual, BRADLEY HUGHES, an individual, ADAM ISRAEL, an individual, STEPHEN RANIERO, an individual, SOPHIA ROGERS, an individual, SHANE SAVAGE, an individual, and SCOTT GAYNE, an individual, on behalf of themselves and those similarly situated,

Plaintiffs,

vs.

ORANGE LAKE COUNTRY CLUB REALTY, INC. d/b/a ORANGE LAKE RESORTS, a Florida corporation,

Defendant.
_____/

CASE NO.: 6:14-cv-956-Orl-40TBS

PLAINTIFF, DEBRA ARTT'S, MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Plaintiff, Debra Artt ("Plaintiff"),[1] by and through her undersigned counsel, opposes the relief requested by Defendant, Orange Lake Country Club Realty, Inc. ("Defendant") in its motion to compel production of documents (Doc. 36) because the information sought by Defendant is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence, Defendant's requests are grossly overbroad and, based upon Defendant's past practice

[1] On July 31, 2015, a mediation conference was held that resulted in the partial resolution of this case. Specifically, the claims of all the other plaintiffs and opt-in plaintiffs, Bradley Hughes, Adam Israel, Stephen Raniero, Sophia Rogers, Shane Savage, Nic Pineda, and Scott Gayne, were resolved pending approval by this Court. (Doc. 37). The parties are in the process of drafting settlement documents and a motion to approve the settlements, which will be filed shortly. Thus, although the arguments contained herein may be applied to all the plaintiffs, this opposition is only filed on behalf of Debra Artt. If necessary, the undersigned requests leave to amend so that the other settled plaintiffs may join this opposition.

of propounding irrelevant and intrusive requests of Plaintiff in this matter, the requests appear to be made simply to cause Plaintiff annoyance, undue burden and expense.

I. Background.

Plaintiff sold timeshare interests for Defendant until she was terminated in January 2014. She had not performed any selling activities since April 2013 when she went on leave. She does not allege she was owed any overtime during that period of leave. After her termination, Plaintiff filed an overtime claim under the Fair Labor Standards Act ("FLSA") alleging unrecorded off the clock work from June 2011 until April 2013 (the "relevant time period"), which caused her time records to be inaccurate during that period and resulted in under payments of overtime. For example, Plaintiff was the top selling sales representative on Defendant's "Elite" line for the 2011 calendar year. However, Defendant's earning statements reflect no overtime payments to Plaintiff that year, which would be nearly impossible given the time commitment required of her to become the top selling representative in 2011.[2] On average, Plaintiff alleges approximately 20 hours of overtime for certain workweeks while employed by Defendant. As is evident from the overtime calculations provided to Defendant's counsel on October 24, 2014, Plaintiff is not alleging overtime is owed for every workweek during the relevant time period.

In this case thus far, Defendant has sought the following irrelevant information through its discovery requests to which Plaintiff objected:

- For the period of your employment with Defendant, all cellular telephone bills that reflect the date and/or time of all incoming and outgoing telephone calls.[3]

[2] "So for calendar year 2011, you testified that you were number one – the number one salesperson at Orange Lake?" "Yes." "And this [earning statement] is – references you incurred zero overtime for that year?" "It does." "Is that accurate?" "No." (Plaintiff Depo., p. 283, ll. 11-19).

[3] *See Devries v. Morgan Stanley & Co. LLC*, 2015 U.S. Dist. LEXIS 27293 * 19 (S.D. Fla. March 2, 2015) (In resolving a motion to compel in a FLSA case where employees asserted that their employer failed to pay them for all hours worked, including overtime hours, where the at-issue request sought "All documents relating to telephone calls made or received (including the times and duration of each such call) and text messages, instant messages and

- For the period of your employment with Defendant, all home telephone bills that reflect the date and/or time of all incoming and outgoing telephone calls.[4]

- All documents that you have used in connection with your job search efforts following your separation of employment from Defendant that reflect or describe your job duties, responsibilities, wages, hours worked, commissions, or bonuses as an employee of Defendant, including, without limitation, resumes, employment applications, documents submitted or filed in conjunction with any claim for unemployment compensation, correspondence with prospective employers, and correspondence with job placement agencies.

- Your complete federal income tax return for the tax years 2011 through the present, including all schedules and attachments appended to the filed tax return.

- Any and all IRS Form W-2s you received from any individual or entity (other than Orange Lake) for income earned by you, or wages paid to you, during the time you were employed by Orange Lake.

- Any and all IRS Form 1099s you received from any individual or entity (other than Orange Lake) for money paid to you during the time you were employed by Orange Lake.

- Please identify any accountant or tax preparer who assisted you in completing and/or filing your federal income tax return for the tax years 2011 through the present.

- Identify all Health Care Providers and Health Care Facilities from whom you have received consultation, treatment, and/or examination for any reason from June 19, 2011 through your last day of employment with Orange Lake. Please include: (i) the address of each Health Care Provider and Health Care Facility; (ii) the date(s) and time(s) on which the service was provided.

Similarly, during Plaintiff's deposition, she was asked about her 90 year old mother's residence,[5] her children and their business,[6] her husband's businesses and financial dealings,[7] her financial investments,[8] and other irrelevant information.

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e-mail you sent or received during your employment . . . ." The trial court denied the request and explained, "[T]he court does not find that this Request for Production is designed to lead to discoverable evidence. Furthermore, the Court finds that this request is overbroad and invasive . . . ."

[4] *See* footnote 3 *supra*.

[5] "Is your mother in assisted living or is she living with you?" (Plaintiff Depo., p. 56, ll. 8-9).

[6] "Are [your children] presently in college?" (Plaintiff Depo., p. 53, l. 8); "How old is [your middle daughter]?" (Plaintiff Depo., p. 53, l. 16); "Was [your youngest daughter] at home at that time?" (Plaintiff Depo., p. 56, ll. 13-14); "What is the name of [your children's] business?" (Plaintiff Depo., p. 53, l. 20); "Is there a corporate name?" (Plaintiff Depo., p. 54, l. 5); "What does this business do?" (Plaintiff Depo., p. 54, l. 18); "Do you have an

Now, Defendant seeks a discovery frolic through Plaintiff's social media accounts on the chance the accounts "*may* indicate days and times when . . . Plaintiff was off from work, out to dinner, engaging in childcare, grocery shopping, or engaging in recreational or other personal activity away from the workplace . . . ." (Doc. 36, p. 7) (Emphasis added). Thus, Defendant's requests simply "hinge[] on the hope of finding something – anything – relevant to this litigation," which should not be tolerated. *See Palma v. Metro PCS Wireless, Inc.*, 2014 U.S. Dist. LEXIS 65564, at * 7 (M.D. Fla., April 29, 2014). These are improper bases for Defendant's request and, as discussed below, have been soundly rejected by other federal courts located in Florida. The discovery sought by Defendant is also irrelevant and too broad.

II. Plaintiff's relevancy and overbroad objections are well-founded and, accordingly, Defendant's motion must be denied in its entirety.

In *Palma*, an employer in a FLSA overtime lawsuit sought to compel, among others, former employees' posts to social media accounts from 2010 to the present relating to "any job descriptions or similar statements about this cause or job duties and responsibilities or hours worked which Plaintiffs posted on LinkedIn, Facebook or other social media sites." The trial court sitting in the Middle District of Florida, Tampa Division, found the requested information irrelevant. "Whether or not an opt-in Plaintiff made a Facebook post during work hours or about work has no bearing on total hours worked or whether their job position qualifies for an

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investment in this company?" (Plaintiff Depo., p. 55, l. 5); "And when did this business get up and running?" (Plaintiff Depo., p. 55, ll. 10-11).

[7] "And what does [your husband] do for a living?" (Plaintiff Depo., p. 50, l. 19); "Is he doing anything else?" (Plaintiff Depo., p. 51, l. 6); "Did he have a business that he sold?" (Plaintiff Depo., p. 51, l. 8); "Did your husband ever own a construction company?" (Plaintiff Depo., p. 52, ll. 24-25); "Does Shane [Savage] owe your husband any money?" (Plaintiff Depo., p. 60, l. 3).

[8] "Do you have an investment in any companies other than buying stock?" (Plaintiff Depo., p. 55, ll. 20-21); "What's the size of the trust that Shane [Savage's] boss Tom is handling for your family trust?" (Plaintiff Depo., p. 60, ll. 8-9); "Is the business [Shane Savage presently works for] getting any money from the trust?" (Plaintiff Depo., p. 61, ll. 2-3); "Do you know if Mr. Phillips paid Mr. Savage any money for bringing the trust – your family trust to that business?" (Plaintiff Depo., p. 61, l. 25; p. 62, ll. 1-2); "When your mom – when your mom passes, does all – does the trust all revert to you or are there other individuals named as beneficiaries?" (Plaintiff Depo., p. 63, ll. 2-4).

exemption under the FLSA." *See Palma*, 2014 U.S. Dist. LEXIS 65564, at * 5. This logic is even more compelling as it relates to any purported social media posts made by Plaintiff *while not at work*, which is the information Defendant now seeks to compel. Quite simply, Defendant is not entitled to this information.

The trial court in *Palma* also found the at-issue request "too broad." *Id.* at * 3, 5. The court explained "Defendant 'does not have a generalized right to rummage at will through information that Plaintiff has limited from public view.'" *Id.* at * 3 (quoting *Davenport v. State Farm Mut. Auto. Ins. Co.*, U.S. Dist. LEXIS 20944, 2012 WL 555759, at * 1 (M.D. Fla. Feb. 21, 2012)).[9] Indeed, a discovery request must be tailored so that it "appears reasonably calculated to lead to the discovery of admissible evidence." *Davenport*, U.S. Dist. LEXIS 20944, at * 3. "Otherwise, the Defendant would be allowed to engage in the proverbial fishing expedition, in the hope that there might be something of relevance in Plaintiff's [social media] account[s]." *Id.* Defendant should be precluded from engaging in such an expedition in this matter.

Here, Defendant's requests are significantly broader than the request seeking social media posts concerning job descriptions and hours that was denied in *Palma*. Specifically, Defendant seeks to compel "all" profiles, messages, direct messages, photographs, videos and online communications "at any time between 7:00 a.m. and 7:00 p.m. on any date between June 19, 2011 and [her] last day of employment with Orange Lake," (Doc. 36, p. 2), as well as "any and all information contained in [her social media accounts] that [she] posted at any time between 7:00 a.m. and 7:00 p.m. on any date between June 19, 2011 and [her] last day of

[9] Defendant cites *Davenport* as supporting its position. That case in inapposite. The trial court in that case ordered production of photographs from a plaintiff's social networking sites because the plaintiff's "physical condition is at issue" as well as "quality of life." *Davenport*, U.S. Dist. LEXIS 20944, at * 4. Plaintiff's physical condition is not at issue here. The defendant in *Palma*, a FLSA overtime case, relied on a case similar to *Davenport* where physical condition was an issue, which was rejected by the court. *See Palma*, 2014 U.S. Dist. LEXIS 65564, at * 4 ("But here, Plaintiffs' physical condition is not an issue.")

employment with Orange Lake." Plaintiff objected to these requests because they seek irrelevant and immaterial information, among others, and because the information sought is not reasonably calculated to lead to the discovery of admissible evidence. The request is also overbroad.

At the time of her response to Defendant's requests, Plaintiff believed Defendant sought this information in an effort to determine if Plaintiff was using social media while at work and, therefore, not working. Defendant does not challenge this and, thus, apparently agrees with Plaintiff's and *Palma's* assessment that this information is irrelevant to that determination. Instead, Defendant argues that "the focus of the disputed requests is Plaintiffs' social media content, if any, that relates to times *they were not at work* . . . ," although Defendant's request does not contain any such limitation. (Doc. 36, p. 7) (Emphasis added). As *Devries* illustrates, Defendant's requests may properly be denied.

In *Devries*, an employer in an FLSA case sought to compel "All documents relating to any personal or other activities unrelated to work that you engaged in during your employment . . . , including personal telephone calls, texts, preparing, sending, or receiving personal electronic mail or facsimiles, eating meals, doctor's appointments, attending classes or other educational activities, or conducting personal business or other activities unrelated to work." *Devries v. Morgan Stanley & Co. LLC*, 2015 U.S. Dist. LEXIS 27293 * 15 (S.D. Fla., March 2, 2015). The court properly denied the request. "[T]he Court does not find that this Request for Production is designed to lead to discoverable evidence. Furthermore, the Court finds that this request is invasive and overbroad." *Id.* at * 16. Similarly, the employer in *Devries* sought, "All documents relating to any dates and times that you were not working during your employment . . . , including calendars, schedules, daytimers, or other evidence showing when you were *not at work or not working*." *Id.* (Emphasis added). This is the precise sort of information Defendant seeks

to discover through Plaintiff's social media content. The employer in *Devries* argued, as Defendant does here, that this request was relevant to the employees' "claim to have worked off the clock when their branches were open." *Id.* at * 17. The court was not convinced and denied the request. As it had with the previous request, the court did not find that the request was "designed to lead to discoverable evidence," and found that the "request is invasive and overboard." *Id.* Similarly here, Defendant's motion must be denied.

Despite Defendant's statement that its "focus" is social media content relating to times Plaintiff was "not at work" (Doc. 7, p. 7), Defendant's requests are not so limited. As explained in Defendant's motion, it is seeking social media content posted by Plaintiff while not at work, as well as "*all social media content* created during the relevant three-year period and falling within the hours between 7:00 a.m. and 7:00 p.m., when they claim they were working off the clock." (Doc. 36, pp. 7-8, n. 5) (Emphasis added). As Defendant explains, "This would enable Defendant to analyze that information in its entirety, make an independent judgment as to what such information shows about the times when Plaintiffs claim they worked, and if necessary, cross examine Plaintiffs on those issues." The employer in *Devries* sought to compel production of a request similar to Defendant's. Specifically, "All messages and posting that you, or anyone acting on your behalf, transmitted or received through social media sites, including Facebook, Instagram, WhatsApp, Twitter, and LinkedIn, during your employment with Defendants . . . ." *Devries*, 2015 U.S. Dist. LEXIS 27293, at * 18. The employer argued that the request was proper "as it seeks relevant information pertaining to Plaintiff's claim that they worked off the clock." *Id*. at * 19. Defendant here makes the same unpersuasive argument ("[A]ny information that is part of Plaintiffs' social media content . . . which indicates, either directly or indirectly, that Plaintiffs were engaging in non-work related activities outside of the workplace, is directly

relevant to proving or disproving Plaintiffs' off the clock claim."). Not surprisingly, the court in *Devries* did not find this argument compelling and, citing *Palma*, denied the request. Plaintiff respectfully requests that this Court do the same here.

III. Narrowing the scope of Defendant's overbroad requests will not cure the undue burden associated with the requests.

Inexplicably, Defendant alleges that "it is not possible for Defendant to limit the scope of [its] request to any particular days of the week as Plaintiffs did not work a consistent weekly schedule of days worked." This argument is flawed for several reasons. None of the plaintiffs claim that they worked off the clock everyday between the hours of 7:00 a.m. and 7:00 p.m. as Defendant alleges. (Doc. 36, pp. 6-7). Defendant's time records show all the plaintiffs clocking in and clocking out on work days. The records also show days off, vacation days, and medical leave days, among others. In addition, Defendant produced Plaintiff's work schedules for the relevant three year time period that show scheduled days on and days off of work. Moreover, Plaintiff's overtime calculation that Defendant received on October 24, 2014, clearly reveals that it is limited only to dates when Defendant's time records show Plaintiff clocking in and clocking out in a workday. As a result, the overtime calculation reflects no overtime hours for the work periods ending on the following workweeks:

- June 26, 2011
- July 24, 2011
- September 11, 2011
- September 18, 2011
- November 13, 2011
- December 11, 2011
- January 15, 2012
- February 12, 2012
- June 3, 2012
- July 15, 2012
- August 26, 2012
- September 2, 2012
- September 9, 2012

- September 16, 2012
- September 23, 2012
- September 30, 2012
- October 14, 2012
- October 28, 2012
- November 4, 2012
- November 11, 2012
- December 9, 2012
- December 23, 2012
- December 30, 2012
- January 6, 2013
- January 13, 2013
- January 20, 2013
- January 27, 2013
- February 3, 2013
- February 10, 2013
- March 31, 2013
- April 7, 2013 through termination in January 2014 (Plaintiff was out on leave and not working during this period).

All of this time should have been excluded from Defendant's grossly overbroad request. The requested social media information for these workweeks is clearly not relevant to any off the clock or overtime issues. In reality, it certainly was possible for Defendant to limit its request. It simply made no effort to do so.

Even if Defendant had significantly narrowed the scope of its request, it would still have been properly denied as it was in *Palma*. ("This is my finding despite that Defendant has narrowed the scope of its request to seek only social media information relating to this case and Plaintiffs' job." *See Palma*, 2014 U.S. Dist. LEXIS 65564, at * 6.) For example, if Defendant had limited its requests to Plaintiff's social media content posted or generated while Plaintiff was off the clock during a day Defendant's time records show as a workday for Plaintiff, such a request would still be unduly burdensome (and irrelevant for the reasons stated *supra*). As explained in *Palma*, "[T]he burden of requiring all of the opt-in Plaintiffs to review all of their postings on potentially multiple social media sites over a period of four years and determine

which posts relate to their job, hours worked, or this case would be 'an extremely onerous and time-consuming task.'" *Id.* at * 5. "This is especially so when Defendant has nothing more than its 'hope that there might be something of relevance' in the social media posts." *Id.* The burden discussed in *Palma* is no less significant here. As a result, Defendant's motion to compel should be denied.

IV. It is Defendant's statutory obligation to keep accurate time records.

Defendant's allege "the requested social media documents are particularly critical because none of the Plaintiffs have any documentation establishing the exact number of hours they worked off the clock." (Doc. 36, p. 6). Defendant's statement implicitly acknowledges the inaccuracy of its time records. Regardless, it is the employer's duty to keep proper records of the employee's wages, hours, and other conditions and practices of employment. *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 687, 687, 66 S.Ct. 187 (1946). Where, as here, an employer disregards its recordkeeping burden, Plaintiff's burden of proof is relaxed as she must show the amount and extent of her off the clock work "as a matter of just and reasonable inference."[10] *Id.* at 687-88; *See Riley v. The Town of Basin*, 1992 U.S. App. LEXIS 8621 at *17-19 (10th Cir. 1992) (citing *Mt. Clemens Pottery* and holding that trial court utilized "too onerous" a standard when it placed the burden on the employee to prove "the precise amount of overtime worked); *see, also, Jones v. Carswell Property Maintenance, Inc.*, 2012 U.S. Dist. LEXIS 6042 (S.D. Fla. 2012) ("employee's burden is not great and the Eleventh Circuit has found an employee can successfully shift the burden of proof by presenting his own testimony indicating the employer's

[10] "In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." *Id.* at 687-88.

time records cannot be trusted and that he worked the claimed overtime"). Plaintiff has met her burden through her testimony at a full-day deposition, through her interrogatory answers, and through other evidence. Thus, Plaintiff should not be penalized through the disclosure of three years' worth of her social media content simply because she does not have "documentation establishing the exact number of hours they worked off the clock." In any event, the production sought by Defendant will not reveal any of Plaintiff's off the clock hours.

V. Conclusion.

Defendant's invasive discovery practices seeking irrelevant information must not be tolerated. This is an overtime lawsuit under the FLSA. It is not an invitation to open the doors to three years' worth of Plaintiff's social media content (or, her medical records, phone records, tax returns, financial dealings, her spouse's businesses, her children's business, etc.). The arguments set forth by Defendant have been attempted in other venues and soundly rejected. Plaintiff respectfully asks that this Court do the same here and deny the relief requested in Defendant's motion to compel. Compelling Plaintiff to disclose three years' worth of social media content could cause a chilling effect on employees' future FLSA claims, which would contravene the legislative purpose of the FLSA.

Date: August 12, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **August 12, 2015**, I electronically filed the foregoing with the Clerk of Court by using CM/ECF system.

s/ Christopher A. Pace
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