

COMMONWEALTH OF MASSACHUSETTS

SUFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1784CV02336

OMAR ADEM AND STEPHEN MARTINEZ

vs.

M11 MOTORS, LLC, D/B/A MERCEDES-BENZ OF BURLINGTON
AND BERNARDO MORENO

OMNIBUS MEMORANDUM OF DECISION ON PRETRIAL MOTIONS

After hearing, the Court ORDERS as follows:

Plaintiffs' Motion in Limine Regarding Destruction of Evidence (Docket No. 49):

ALLOWED IN PART. While on this record Plaintiffs' argument of wholesale destruction of relevant time records is overblown, Plaintiffs make a narrower claim of destruction that is not.

Defendant Moreno conceded in a deposition that he received monthly reports reflecting anyone who worked overtime in the dealership. His controller averred that she also saw overtime reports. Affidavit of Lynn Salagovic, attached to Docket No. 50 as Ex. 1, at ¶ 3. Moreno testified he provided his lawyers all documents related to M11, but these monthly reports were not among them. Moreno testified that he did not retain documents when M11 was sold in 2018 and taken over by new owners, and that he shredded documents sometime in October through December of 2020. At argument, Defendants' counsel candidly conceded that the defense could not demonstrate with evidence beyond Moreno's own testimony that all records that were shredded were preserved electronically. The inference is clear: Defendants either did not retain or shredded at least these monthly reports.

Focusing simply on them, the monthly reports reflecting overtime were relevant to this case, whether or not salespeople were listed in them. Thus, whether negligently or intentionally, the Defendants lost or destroyed evidence that they were required to preserve and which they knew or should have known was relevant. Keene v. Brigham and Women's Hosp., Inc., 439 Mass. 223, 234 (2003); Mass. Guide to Evid. § 1102. Defendants claim this destruction is harmless because Moreno testified these reports "never" had salespeople on them, and thus Plaintiffs cannot show prejudice. See Zaleskas v. Brigham & Women's Hosp., 97 Mass. App. Ct. 55, 75-76 (2020). But the record on these points is largely, and perhaps solely, based on Moreno's own testimony. As this Court noted in denying cross-motions for summary judgement (Docket No. 36), this case turns on the parties' credibility, where thorough cross-examination, aided by contemporaneous documents, is likely to be crucial. Plaintiffs should not be forced to take Moreno's word about the substance of these reports. Further, the Defendants' arguments ignore that they had an obligation under G. L. c. 151, § 15 and 454 CMR 27.07 (2) to "keep a true and accurate record of the employee's name ... hours worked each day, ... [and] dates worked each week" and maintain them "on file for at least three years ... within the Commonwealth." Adem worked for Defendants from February 2015 until July 2017, and filed suit in July 2017 on behalf of himself and a claimed class of similarly-situated individuals. At the time suit was filed, Defendants were required to preserve records spanning the entirety of Adem's employment (and of others in the then-alleged class over that time frame). Moreover, the filing of a Wage Act claim put the defense on notice that records of overtime were relevant; indeed, the discovery dispute heard on January 2020 made clear that Adem was seeking time and scheduling records as part of his discovery.

Defendants properly argue that "a judge should impose the least severe sanction necessary to remedy the prejudice to the nonspoliating party." Keene, 439 Mass. at 235. In light of the facts here, the Court intends to permit Plaintiffs to examine Moreno (and any other witness with knowledge) about the loss of these overtime reports and will be prepared to instruct the jury that may be entitled to draw an adverse inference from the loss of the records. See Gath v. M/A-Com, Inc., 440 Mass. 482, 488 (2003) (among remedies for spoliation are "allowing the party who has been aggrieved by the spoliation to present evidence about the ... lost evidence and the circumstances surrounding the spoliation ... as well as instructing the jury on the inferences that may be drawn from spoliation."). To the extent the trial testimony reflects a greater loss of relevant evidence, the Court will review the appropriateness of its remedy.

Plaintiffs' Motion in Limine Regarding Anderson v. Mt. Clemens Pottery Co. (Docket No. 52) **ALLOWED IN PART**. As discussed at the hearing, if Plaintiffs make the necessary showing that overtime work was performed and the Defendants had actual or constructive knowledge of it, see Vitali v. Reit Mgt. & Research, LLC, 88 Mass. App. Ct. 99, 103-104 (2015), and Prime Comms. Inc. v. Sylvester, 34 Mass. App. Ct. 708, 709 (1993), the burden will shift to the Defendants "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. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." Anderson, 328 U.S. 680, 687-688 (1946). The Court thus will not bar the Defendants from offering evidence to negate the inference, as they did at summary judgment -- e.g., with evidence of Adem's lack of compliance with time keeping or with the process to seek approval for overtime and his termination for absenteeism and tardiness -- or from stating in opening that they will do so, but the Court intends

in the Pre-Charge to alert the prospective jury members of this issue and to the possibility that the Defendants may bear the burden of proof on it.

Plaintiffs' Motion in Limine Consistent with the Stipulation of the Parties (Docket No. 55): DENIED. The stipulation required the Defendants, within two weeks, to "attempt to find and produce" time and scheduling records, and if they "cannot find to produce documents," the Defendants would either (1) represent whether the records ever existed, that Defendants no longer had them, and identify third parties who may, or (2) stipulate "that generally defendant scheduled commissioned inside sales employees such as the plaintiff and putative class members to 50 hours per week and that commissioned inside sales employees such as the plaintiff and putative class members generally worked 50 hours per week." The intent of the stipulation was thus clear -- Defendants were either to promptly comply with agreed-to discovery commitments, and if not, make a factual representation or an extremely damaging admission. Within the two weeks, Defendants produced an ADP report summarizing the hours worked as well as some time cards for Adem and stipulated that "generally speaking all salespeople were scheduled for slightly less than 50 hours a week which included lunch and other required breaks."

While Plaintiffs understandably may find this production less than complete, the Defendants did more than attempt to find documents, it produced what documents they had responsive to these two categories, thus satisfying the pre-condition in the stipulation. Moreover, to the extent the Plaintiffs believed the production did not satisfy the stipulation, that issue should have been raised in a motion before the eve of trial, particularly where the first paragraph of the stipulation could have been pursued by the defense rather than the more damaging stipulation in the second paragraph. At trial, however, the Court intends to hold the Defendants

to the stipulation cited above: that "generally speaking all salespeople were scheduled for slightly less than 50 hours a week which included lunch and other required breaks."

Defendants' Motion to Exclude Certain Plaintiffs' Intended Witnesses (Docket No. 57):

DENIED. The Court will address any specific objections to the testimony of Plaintiff's witnesses at trial.

SO ORDERED.

M. D. Ricciuti
MICHAEL D. RICCIUTI
Justice of the Superior Court

August 5, 2022