

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION**

JIMMY BELUE, ET AL.	§		PLAINTIFFS
	§		
VS.	§	CASE NO. 2:07CV1004-KS-MTP	
	§		
WAYNE FARMS LLC	§		DEFENDANT
	§		
<u>CONSOLIDATED WITH</u>	§		
	§		
ROBERT THOMAS DUNN, ET AL.	§		PLAINTIFFS
	§		
VS.	§	CASE NO. 2:07CV1005-MTP	
	§		
WAYNE FARMS LLC	§		DEFENDANT

DEFENDANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT (SHORT WEEKS)

COMES NOW Wayne Farms LLC, moving the Court to enter partial summary judgment dismissing with prejudice 1 (1%) of our 93 Plaintiffs because, even assuming, *pro arguendo*, that his off-line tasks required as much as 28 extra weekly hours, he never worked more than 40 hours in any contestable work week and consequently, does not have an FLSA overtime claim. In support of this Motion, Wayne Farms would show:

1. The FLSA requires payment of a minimum hourly wage and an overtime premium wage for work in excess of 40 hours per work week. An employee has no minimum wage claim if her average wage, for a period in which he or she worked no overtime, exceeds the minimum wage. There is no genuine dispute that Wayne Farms paid all Plaintiffs at least the minimum wage. This is solely an overtime action.

2. “Gap time” refers to time that is not covered by the overtime provisions because it does not exceed the overtime limit, and time that is not covered by the minimum wage provisions because the employees are paid above minimum wage.

3. “Gap time” claims are not cognizable under the FLSA when the hours worked are less than 40 hours per week and the employee has been paid at least minimum wage for hours worked.

4. According to Wayne Farms’ pay records, this Plaintiff never worked more than 11.2 hours in any contestable work week. The hours worked per week are shown under the regular hours (“RegHrs”) column on each Plaintiff’s hours and earnings history report, stipulated to be authentic. *See* Business Records Stipulation, Doc. 25, 2:07md1872.

5. Plaintiffs, of course, claim that Wayne Farms’ “Master Card” system failed to record some number of daily minutes they spent in off-line tasks that they characterize as FLSA “work.” For that assertion to be material to the outcome of this Motion, however, the Plaintiff targeted by this Motion would have to show that he spent more than 28.8 hours per week in off-line work not captured by the swipes of his line’s Master time card.

6. This Plaintiff cannot genuinely dispute Wayne Farms’ assertion that, even if he worked off-line without compensation, his weekly uncompensated minutes never pushed his total weekly work over 40 hours.

7. Therefore, this Plaintiff should be dismissed, based on these genuinely indisputable facts:

	<u>Name</u>	<u>Most Hours Worked in one Week¹</u>	<u>Hours and Earnings Report</u>
1	Gallagher, Michael L.	11.2	ALB012045 (Ex. 1)

¹ This is the most hours that the Plaintiff worked in any single work week since October 2003, which is three years prior to the filing of the first consents to join this action. Wayne Farms still asserts that the applicable statute of limitations period runs backwards from the time that each individual Plaintiff filed his or her consent. However, for simplicity’s sake here, Wayne Farms has looked as far back as October 2003 for everyone to determine maximum hours worked.

8. On June 9, 2008, in accordance with Pretrial Order No. 2, paragraph 7, defense counsel sent Plaintiffs' counsel a list of Plaintiffs whose claims defense counsel believed should be dismissed in the form of a dismissal spreadsheet. Each of the Plaintiffs listed in this Motion was designated as a requested dismissal, for the reason underlying this Motion – short weeks / no overtime.

9. Plaintiffs who refused dismissal were required to respond, in writing, by August 1, 2008, explaining their grounds for refusing and citing supporting documents; the Court granted them a final extension until October 1, 2008. *See* Doc. 35 in 2:07md1872.

10. Plaintiffs did not respond to the dismissal requests in writing. They disclosed no reason for rejecting dismissal. They identified no documents supporting their position. In short, they ignored these commands of Pretrial Order No. 2, paragraph 7.

11. Federal Rule of Civil Procedure Rule 16(f)(1)(C) states that the Court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney fails to obey a scheduling order or other pretrial order. Wayne Farms asks the Court to prohibit these disobedient Plaintiffs from opposing the factual assertions of this Motion, as authorized by Rule 37(b)(2)(A)(ii).

WHEREFORE, Wayne Farms LLC moves the Court to enter partial summary judgment dismissing this Plaintiff from these actions, with prejudice, taxing to him all related costs.

Respectfully submitted this the 17th day of November, 2008.

WAYNE FARMS LLC

BY: BALCH & BINGHAM LLP

s/Anne Harlan Latino

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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