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United States District Court,
E.D. Virginia,
Richmond Division.

Julie A. HEROLD, Pro Se Plaintiff,
v.
BENEVIS, LLC, Defendant.

Civil Case No. 3:14–cv–771–JAG
|
Signed 01/08/2016

Attorneys and Law Firms

Julie A. Herold, Midlothian, VA, pro se.

Alison Drew Stuart, Steven David Brown, Isler Dare PC, Richmond, VA, for Defendant.

MEMORANDUM ORDER

John A. Gibney, Jr., United States District Judge

***1** This matter comes before the Court on the motion for summary judgment filed by the defendant, Benevis, LLC ("Benevis"). (Dk. No. 7.) At the motion hearing held on January 8, 2016, the plaintiff, Julie Herold, orally moved to amend her Bill of Particulars to add a breach of contract claim. The Court GRANTED this motion. For the reasons stated from the bench, and summarized below, the Court GRANTS Benevis's motion for summary judgment on Herold's claims under the Fair Labor Standards Act of 1938 ("FLSA"), the Virginia Minimum Wage Act ("VMWA"), and the Health Insurance Portability and Accountability Act ("HIPAA"). The Court REMANDS the remaining breach of contract claim to the Chesterfield County General District Court for further proceedings.

I. BACKGROUND

Julie Herold worked for Kool Smiles, a subsidiary of Benevis, as a community educator from January to September 2012, traveling to different locations to educate the public about the dental practices for which Benevis provided non-clinical business support services. Herold used her own car to travel between these locations. At times, Herold also used her personal cell phone to conduct business on Benevis's behalf. Benevis paid Herold $9.00 per hour for pay periods ending January 9, 2012, through July 1, 2012. Benevis paid Herold $9.13 per hour for pay periods ending July 15, 2012, through September 9, 2012. Additionally, Benevis reimbursed Herold a total of $353.64 of expenses during her period of employment.

On September 12, 2014, Herold filed a Warrant in Debt against Benevis in the Chesterfield County Small Claims Division to recover $4,398.00. After Benevis removed the case to Chesterfield County General District Court, Herold filed a Bill of Particulars setting forth her claims against Benevis. Factually, Herold alleges that Benevis did not reimburse her for miles driven or cell phone use, causing her "net pay to decline to a level that was less than minimum wage on many occasions." (Dk. No. 1–2, at 3.) Herold also alleges that Benevis required her to violate HIPAA. Legally, Herold seems to allege three counts: (1) violation of the minimum wage requirements of the FLSA; (2) violation of the VMWA; and (3) violation of HIPAA.

Benevis moved for summary judgment on all of Herold's claims. At the January 8, 2016 motion hearing, Herold stated that she did not have a written contract with Kool Smiles. Herold did, however, remember her supervisor telling her that Kool Smiles would reimburse her for miles travelled from the office, located at Southside Plaza, to the various education locations. Herold orally moved to amend her Bill of Particulars to add a breach of contract claim. The Court granted this motion, adding as paragraph nine a breach of contract claim. Specifically, paragraph nine of the Bill of Particulars shall read: "Benevis did not reimburse Herold for all miles promised under the oral contract."

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II. STANDARD OF REVIEW

The Federal Rules of Civil Procedure allows parties to move for summary judgment on any claim or defense. Fed. R. Civ. P. 56(a). The familiar principles governing summary judgment allow the court to grant it if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* If "a party ... fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," the court should enter summary judgment against that party. *Celotex Corp. v. Catrett*, *477* U.S. 317, 322 (1986). In deciding a summary judgment motion, the court must draw all reasonable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, *All* U.S. 242, 255 (1986). Once the movant satisfies its showing for summary judgment, the burden shifts to the non-moving party to establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–88 (1986). Finally, relevant here, "[courts] are always obliged to construe liberally the contentions being pursued by pro se parties." *Sinclair v. Mobile 360, Inc.*, 417 Fed.Appx. 235, 243 (4th Cir. 2011) (unpublished) (citing *Gordon v. Leeke*, *574* F.2d 1147, 1151 (4th Cir. 1978)) (applying the liberal construction for pro se parties to consideration of evidence at the summary judgment stage).

III. DISCUSSION

***2** Herold claims that Benevis's failure to reimburse her for mileage and cell phone expenses dropped her wages below the minimum wage. Under the FLSA, employers must pay employees wages not less than $7.25 per hour. 29 U.S.C. § 206. Under Department of Labor regulations, "[t]he wage requirements of the Act will not be met where the employee 'kicks-back' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee." 29 C.F.R. § 531.35. The regulation gives the example of where an employer requires an employee to provide his own tools of the trade, concluding that "there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the [FLSA]." *Id; see, e.g.*, *Bellaspica v. PJPA, LLC*, 3 F. Supp. 3d 257, 259 (E.D. Pa. 2014) (holding that employer must reimburse pizza delivery drivers for miles driven "if not doing so would cause [the drivers'] net earnings to drop below the minimum wage").

In the context of reimbursement for miles driven, "[o]rdinary home-to-work travel is ... not compensable ... unless a contract or custom of compensation exists between the employer and the employees[, or unless] ... [t]ravel... is an indispensable part of performing one's job." *Vega v. Gasper*, 36 F.3d 417, 424 (5th Cir. 1994); *see* 29 U.S.C. § 254(a) ("[N]o employer shall be subject to any liability or punishment under the [FLSA] ... on account of the failure of such employer to pay an employee minimum wages ... for or on account of... traveling to and from the actual place of performance of the principal activity ...."); *see also Ralph v. Tidewater Constr. Corp.*, 361 F.2d 806, 809 (4th Cir. 1966) (holding boat ride to bridge-tunnel construction site lasting between fifteen minutes and an hour not compensable under the FLSA).

In this case, Benevis required Herold to drive to different locations as part of her job.[1] Recognizing this, and taking Herold's statements at the motion hearing as true, Benevis agreed to reimburse Herold for miles driven from her office location to various education locations.[2] In support of her FLSA claim, Herold submitted a mileage spreadsheet,[3] itemizing her travel on certain dates during her employment. (*See* Dk. No. 9–1.) Even construing the mileage spreadsheet in Herold's favor, her wage never fell below the minimum wage, as summarized in the following chart:

Tabular or graphic material set at this point is not displayable.

[**Editor's Note:** The preceding image contains the reference for footnote[4,5,6,7]]

***3** Turning to Herold's remaining claims, her VMWA claim gets subsumed into the FLSA inquiry. *See* Va. Code Ann. § 40.1–28.10 ("Every employer shall pay to each of his employees wages at a rate not less than the federal minimum wage ... as prescribed by the [FLSA]."). Further, even if her HIPAA claim made sense, private rights of action based on HIPAA violations do not exist. *See, e.g.*, *Acara v. Banks*, 470 F.3d 569, 571 (5th Cir. 2006). Thus, the Court grants summary judgment to Benevis on the VMWA and HIPAA claims.

IV. CONCLUSION

To summarize, the Court GRANTS Benevis's motion for summary judgment. The Court also GRANTS Herold's oral motion to amend her Bill of Particulars to include a breach of contract claim. Finally, the Court REMANDS the remaining breach of contract claim to the Chesterfield County General District Court.

Should Herold wish to appeal this Memorandum Order, she must file written notice of appeal with the Clerk of Court within thirty (30) days of the date of entry. Failure to file a notice of appeal within that period may result in the loss of the right to appeal.

It is so ORDERED.

All Citations

Not Reported in F.Supp.3d, 2016 WL 7177600

Footnotes

1 The Court only considers Herold's argument regarding Benevis's alleged failure to reimburse her for miles driven. It does not consider her argument regarding Benevis's failure to reimburse her for cell phone expenses, as Herold admitted that Benevis did not require her to use her personal cell phone; she simply recognized that use of her personal cell phone "was in the best interests of both the customer and the company." (Dk. No. 8–3, at 10.)

2 Indeed, Herold's pay stubs reflect that Benevis did reimburse her for some expenses. (*See* Dk. No. 8–2.)

3 Benevis argues that the Court should not consider the mileage spreadsheet because Herold did not disclose it during discovery. The Court will consider the spreadsheet, taking into account both the email exchanges that occurred between the parties and Herold's pro se status.

4 The Court calculated the miles driven each pay period from the mileage spreadsheet by adding (1) the entries where Herold drove from her office at Southside Plaza to an education location or between education locations, and (2), for the entries to and from home, the number of miles over her normal commute to Southside Plaza (12.44 miles). This method removes Herold's commute from the calculation, but gives her the benefit of the doubt, and the benefit of Kool Smiles's reimbursement policy for mileage, (*see* Dk. No. 12–4). The Court excluded as unreliable any listing of an average "due to lost records." The Court resolved any discrepancies in the mileage spreadsheet in Herold's favor, namely the two departures listed from the same location on April 19, 2012 and May 23, 2012. (*See* Dk. No. 9–1.)

5 The IRS mileage reimbursement rate in 2012 was $0.555 per mile.

6 This final figure does not even take into account the amounts Benevis actually reimbursed Herold for expenses. (*See* Dk. No. 8–2.)

7 Herold's pay stub for this period included two hours for a working interview. (*See* Dk. No. 8–2, at 1.) The Court does not know whether these two entries correlated with an entry on the mileage spreadsheet, but did not include these two hours, as more favorable to Herold.

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