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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1981CV01763

MATTHEW SUTTON[1] & another[2]

vs.

JORDAN'S FURNITURE, INC.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT

The plaintiff, Matthew Sutton ("Sutton"), a former sales consultant for defendant Jordan's Furniture, Inc. ("Jordan's"), filed this class action[3] lawsuit alleging that Jordan's failed to pay Sutton and other sales consultants overtime and Sunday premium pay separate and apart from their commissions, in violation of the Massachusetts Overtime Statute, G. L. c. 151A, § 1A, and the Wage Act, G. L. c. 149, §§ 148, 150.[4] The matter is presently before the court on Jordan's motion for summary judgment on all counts and Sutton's partial motion for summary judgment on Count 1 (failure to pay overtime) and Count 2 (failure to pay Sunday premium pay) as to liability. After hearing and careful review, for the following reasons, Jordan's motion is **ALLOWED** in part and **DENIED** in part, and Sutton's motion is **ALLOWED**.

BACKGROUND

The following is a brief recitation of the undisputed material facts, with certain additional facts reserved for later discussion.

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[1] Individually and on behalf of all others similarly situated.
[2] Amie Arestani, individually and on behalf of all others similarly situated.
[3] By order dated December 21, 2020, the court (Barry-Smith, J.) granted Sutton's motion for class certification.
[4] The court (Krupp, J.) previously dismissed co-plaintiff Amie Arestani's claims for lack of subject matter jurisdiction.

Jordan's is a Massachusetts corporation that owns and operates a chain of furniture retail stores in Massachusetts and other states. It employs sales consultants to sell furniture, bedding, and other related products. Jordan's employed Sutton as a sales consultant at its Natick store from February 2016 until his resignation on January 2, 2019.

At all relevant times, Jordan's compensation policies with respect to its sales consultants were set forth in its "Sales Draw Plan" and "Sales Commission Plan" memoranda, which were available to all sales consultants.[5] According to those plans, sales consultants were paid on a commission basis with a recoverable draw, which Jordan's calculated on an hourly basis.[6] An employee's recoverable draw included the employee's hourly base pay for regular hours worked, overtime hours, and premium pay for working on a Sunday. Jordan's then deducted, or recovered, the employee's draw from his or her commissions and paid the employee their draw plus any commissions they had earned in excess of their draw. If the employee did not generate enough commissions to cover the draw, Jordan's carried the negative draw balance forward and deducted that sum from the sales consultant's future commissions. If the sales consultant's commissions exceeded the draw, the difference was used to pay back a negative draw balance, if any, that was carried forward from previous weeks. Commissions were "earned" once an item had been paid for and received by the customer and were calculated at the end of the week. Commissions earned during a given pay period were paid at the end of the following week.

Jordan's calculated a sales consultant's draw payments on an hourly basis using two hourly draw rates. The first hourly draw rate was for "regular" hours worked and was equal to the Massachusetts minimum wage in effect at the time. The second hourly draw rate was for

[5] Jordan's also discussed its commission plan with new sales consultants during their training period, and all new sales consultants were required to sign a Sales Compensation Program Agreement confirming that they understood Jordan's compensation policies.

[6] As explained in more detail below, a draw is an advance on future commissions.

overtime and Sunday hours, for which Jordan's paid a premium draw rate equal to one and one-half times the Massachusetts minimum wage rate in accordance with the Overtime Statute, G. L. c. 151, § 1A, and the Sunday pay law, G. L. c. 136, § 6(50).[7] These two types of draws were recoverable from the sales consultant's commissions as described in the preceding paragraph.[8]

On at least one occasion during his tenure, Sutton worked overtime, and on multiple occasions, he worked on Sundays. Jordan's paid him in accordance with the foregoing policy.

DISCUSSION

The crux of this dispute is whether Jordan's compensation plan for sales consultants satisfied *Sullivan v. Sleepy's LLC*, 482 Mass. 227, 236 n.16, 237 (2019) ("*Sleepy's*"), in which the Supreme Judicial Court held that employers must pay employees "separate and additional . . . payments beyond their draws and commissions" for working overtime and Sundays. The Class Action Complaint in this matter ("Complaint") contends that Jordan's compensation plan did not meet these requirements, and thus Jordan's violated the Overtime Statute (Count 1) and the Wage Act and the Sunday pay law (Count 2). The Complaint also alleges that Jordan's violated the Wage Act by requiring employees to work on Sundays without paying its employees premium pay (Count 3). Jordan's moves for summary judgment on all counts and asserts several arguments in support of its motion. Sutton has cross-moved for partial summary judgment on Counts 1 and 2 with respect to liability only. The parties' arguments are addressed below.

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[7] Effective January 1, 2019, the statutory premium rate for Sunday pay was reduced from one and one-half times to one and four-tenths the minimum wage rate.

[8] Although working on holidays and Sundays is subject to the premium pay standards, see G. L. c. 136, §§ 6(50), and 13, at all relevant times of this dispute, Jordan's paid its sales consultants additional premium pay separate and apart from their draws and commissions when they worked on certain holidays, and such payments were not included in the formula for calculating commissions. In other words, Jordan's did not include holiday premium pay in a sales consultant's recoverable draw; holiday pay was paid to the employee on a nonrecoverable basis.

A. Standard of Review

Summary judgment shall be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 714 (1991). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. *Pederson v. Time, Inc.,* 404 Mass. 14, 17 (1989). The moving party may satisfy this burden by submitting affirmative evidence negating an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner v. Technical Commc'ns Corp.,* 410 Mass. 805, 809 (1991); *Kourouvacilis,* 410 Mass. at 716. Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond with evidence of specific facts establishing the existence of a genuine dispute. *Pederson,* 404 Mass. at 17. The opposing party cannot rest on its pleadings and mere assertions of disputed facts to defeat the motion for summary judgment. *LaLonde v. Eissner*, 405 Mass. 207, 209 (1989).

When deciding a motion for summary judgment, the court considers pleadings, deposition transcripts, answers to interrogatories, admissions on file, and affidavits. Mass. R. Civ. P. 56(c). The court reviews the evidence in the light most favorable to the nonmoving party but does not weigh evidence, assess credibility, or find facts. *Attorney Gen. v. Bailey*, 386 Mass. 367, 370 (1982). Where, as here, the court is presented with cross motions for summary judgment, the standard of review is identical for both motions. *Epstein v. Board of Appeals of Boston,* 77 Mass. App. Ct. 752, 756 (2010).

B. Overview of *Sleepy's* and Whether Jordan's Compensation Plan Met the Requirements Contained Therein

Sutton asserts two claims on behalf of himself and the certified class with respect to Jordan's compensation plan. The first claim arises under the Overtime Statute, G. L. c. 151, § 1A, which requires employers to pay employees a rate of not less than one and one-half times the employee's regular rate when the employee works more than forty hours in a workweek.[9] The second claim arises under the Wage Act, G. L. c. 149, §§ 148, 150, and the Sunday pay law, G. L. c. 136, § 6(50), which require retail employers to pay employees statutorily-defined premium compensation when they work on Sundays. The purpose behind these statutes is "to reduce the number of hours of work, encourage the employment of more persons, and compensate employees for the burden of a long workweek." *Sleepy's*, 482 Mass. at 233-234, quoting *Mullally v. Waste Mgmt. of Mass., Inc.*, 452 Mass. 526, 531 (2008). See *id.* at 239 (stating overtime statute and Sunday pay law share similar purposes).

In *Sleepy's,* the Supreme Judicial Court addressed payment arrangements for commissioned-based employees to determine whether certain arrangements satisfied the Overtime Statute and Sunday pay law. The Court ultimately held that employees who are paid on a commission basis with a recoverable draw must be paid "separate and additional payments" when they work overtime or Sundays even if their draws and commissions equaled or exceeded their total overtime and Sunday compensation. 482 Mass. at 228-229. Because this Court's interpretation of *Sleepy's* is critical to resolving the instant motions, a brief discussion of the case is warranted.

In that case, the plaintiff employees worked as salespeople at retail stores operated by the defendant employers. *Id.* at 239. Similar to Jordan's sales consultants, the plaintiffs were paid

[9] The regular rate for Sutton and the other class members was the Massachusetts minimum wage then in effect.

on a commission-plus-draw plan involving a recoverable draw, which is an advance that the employee pays back once he or she has earned sufficient commissions. *Id.* at 239 n.7. The employees' wages consisted of a $125 per day draw plus sales commissions earned in excess of the draw. *Id.* at 239. On at least one occasion, the employees worked more than forty hours in a week and also worked on at least one Sunday. *Id.* On these occasions, the employers did not pay the employees any additional compensation beyond their recoverable daily draw and commissions; however, the amount of compensation the employees received always equaled or exceeded their overtime and Sunday pay. *Id.* at 230. As a result, the defendant employers argued that the employees had received all compensation to which they were entitled, and thus, there could be no violation of the Overtime Statute or Sunday pay law. *Id.*

The case came before the SJC on two certified questions from the Massachusetts Federal District Court, which asked, in short, if commissioned-based employees work more than forty hours in a workweek or work on a Sunday, whether those employees are entitled to any additional compensation for those hours even if the employees' total compensation (through draws and commissions) was equal to or greater than one and one-half times the employee's regular rate or the minimum wage for all hours worked above forty hours or on a Sunday. *Id.* at 228-229. With respect to both overtime and Sunday pay, the Court concluded that it did not matter that the amount the plaintiff employees received fully compensated them for time worked; rather, the plaintiffs were entitled to "separate and additional payments" for their overtime and Sunday hours, and the draws and commissions the employees had received could not be "retroactively allocated" to cover the employers' overtime and Sunday pay obligations. See *id.* at 228.

In reaching its conclusion, the Court relied on the purpose of the Overtime Statute, regulatory guidance, and "previous case law establishing that in most circumstances, employers may not retroactively reallocate and credit payments made to fulfill one set of wage obligations against separate and independent obligations." *Sleepy's*, 482 Mass. at 233. As quoted above, the purpose of the Overtime Statute is "to reduce the number of hours of work, encourage the employment of more persons, and compensate employees for the burden of a long workweek." *Id.* at 233-234, quoting *Mullally,* 452 Mass. at 531. Therefore, a compensation arrangement that pays the employee the same amount regardless of whether he or she worked forty or fifty hours a week undermines these purposes. Moreover, if employers were permitted to reallocate payments made for one purpose to a different purpose, then employers would "lack an incentive to comply with the wage and overtime statutes in the first place." *Id.* at 236.

Unlike in *Sleepy's*, where the plaintiff employees received a $125.00 daily recoverable draw, Jordan's tracked and calculated each sales consultant's hours and "paid" the employee their applicable hourly rate for each hour worked (whether minimum wage or premium pay for working overtime or Sundays). Jordan's claims that these sums were guaranteed and paid to the sales consultants each week and were never repaid or returned to Jordan's. The court disagrees. Despite Jordan's attempts to characterize its payment plan otherwise, Jordan's paid its sales consultants exclusively through commissions and weekly draws,[10] with no separate and additional amounts allocated as payment for overtime and Sundays.

According to the record evidence, Jordan's calculated each sales consultant's weekly compensation by deducting their recoverable draw, which included the amounts owed to the employee for regular hours worked as well as premium pay for overtime and Sundays, from the

[10] Jordan's also paid its sales consultants other types of sales-based incentive pay not relevant here.

employee's commissions and then paid the employee commissions in excess of the recoverable draw, if any. If the sales consultant did not generate enough commissions in a week to cover their draw, Jordan's carried forward that negative balance to the next payroll period and deducted it from whatever commissions the employee had earned the following week. Because the sales consultant's overtime and Sunday pay took the form of a recoverable draw that was offset by or recovered from their commissions, Jordan's, in effect, was not paying anything towards the employee's overtime and Sunday pay. In other words, Jordan's treated the sales consultant's commissions as a pool of money from which it withdrew funds to cover its statutory premium pay obligations. However, as the Court held in *Sleepy's*, this type of payment arrangement is not permissible under the Overtime and Sunday pays statutes. See 482 Mass. at 233 ("[E]mployers may not retroactively reallocate and credit payments made to fulfill one set of wage obligations against separate and independent obligations."). Other decisions of this court have reached the same conclusion with respect to compensation plans similar to Jordan's. See *Shoemaker v. Clay Family Dealerships, Inc.,* 2021 Mass. Super. LEXIS 4 at *1, *5-6 (Mass. Super. 2021); *Martinez v. Burlington Motor Sports, Inc.,* 2020 Mass. Super. LEXIS 92 at *1-8 (Mass. Super. 2020). Accordingly, the court agrees with Sutton that Jordan's failed to remit separate and additional payments to its sales consultants for overtime and Sundays, and thus, Jordan's compensation plan violated the Overtime and Sunday pay statutes.

C. Retroactive Application

Jordan's alternatively argues that it is entitled to summary judgment because *Sleepy's* should not be given retroactive application. Because this argument has been considered and rejected by several other decisions of this court, only a brief explanation is warranted. See *Martinez*, 2020 Mass. Super. LEXIS 92 at *8 n.16, and cases cited; *Sargent v. Copeland Enters.,*

2020 Mass. Super. LEXIS 653 at *2-5 (Mass. Super. 2020); *Shoemaker v. Clay Family Dealerships, Inc.*, 2020 Mass. Super. LEXIS 59 at *1 (Mass. Super. 2020); *Malebranche v. Colonial Auto. Grp., Inc.*, 2019 Mass. Super. LEXIS 1229 at *6 (Mass. Super. 2019); *Wright v. Balise Motor Sales Co.*, 2019 Mass. Super. LEXIS 593 *10-13 (Mass. Super. 2019); *Colleton v. Sentry W., Inc.*, 2019 Mass. Super. LEXIS 1248 at *2-7 (Mass. Super. 2019).

Generally, when the Supreme Judicial Court construes a statute, it gives an interpretation that reflects the Court's view of its meaning from the date of the statute's enactment; it does not analyze whether that interpretation has retroactive or prospective effect. *Eaton v. Federal Nat'l Mortg. Ass'n*, 462 Mass. 569, 587 (2012). A departure from this general rule is warranted if retroactive application "would fail to protect the reasonable expectations of the parties." *Shapiro v. Worcester*, 464 Mass. 261, 268 (2013). In making this determination, the court considers three factors: (1) whether the decision creates a novel rule; (2) whether retroactive application will serve the purposes of that rule; and (3) whether hardship, injustice, or inequity would result from retroactive application. *American Int'l Ins. Co. v. Robert Seuffer GMBH & Co. KG*, 468 Mass. 109, 120-121 (2014). Applying these factors, this Court concludes that *Sleepy's* should be given retroactive effect.

First, *Sleepy's* did not create a novel rule such that it "mark[ed] a substantial departure from prior precedent." *Id.* *Sleepy's* "did not reflect a dramatic shift in the law[;]" nor did it "contradict or overrule prior precedent." *Wright,* 2019 Mass. Super. LEXIS 593 at *11. Rather, the Court relied on three of its own recent decisions on the same issue, see *Sleepy's*, 482 Mass. at 235, as well as the plain language of 454 Code Mass. Regs. § 27.03(3) (2015), the minimum wage and overtime rates regulation, from which the Court concluded that retroactive crediting of commission payments as overtime wages was prohibited. *Id.* at 236-237.

Jordan's, nevertheless, argues that *Sleepy's* created a novel, unforeshadowed rule because it was contrary to opinion letters Jordan's had obtained and relied on from the Division of Occupational Safety ("DOS") in 2003 and 2009. Jordan's claims that these letters clearly established that employers could satisfy their overtime and Sunday pay obligations to commissioned sales consultants by paying the equivalent of one and one-half times the minimum wage for all hours worked in excess of forty hours and on a Sunday. Jordan's, however, fails to recognize that these opinion letters were identical to those the defendants had received in *Sleepy's,* see 482 Mass. at 232 n.13, 233 n.14, and the Court in that case held that although the opinion letters caused some confusion, they did not directly conflict with the text or purpose of the underlying statutes and regulation, and found that the letters correctly identified the minimum wage and overtime pay obligations as separate and independent.[11] *Id.* at 237 n.18. As such, the Court's holding "did not reflect a dramatic shift in the law nor contradict prior precedent but rather, relied soundly upon prior case precedent from other SJC cases and the Code of Mass. Regulations." *Sargent,* 2020 Mass. Super. LEXIS 653 at *4.

Additionally, Jordan's argues that because the Court characterized the questions in Sleepy's as ones of "first impression," it necessarily follows that the principles of law contained therein are novel and could not have been predicted. 482 Mass. at 228. This argument is also without merit. "The fact that the question had not been answered before . . . does not mean that it represented a 'new' interpretation." *McIntire, petitioner*, 458 Mass. 257, 262 (2010).

As to the second factor of the retroactive test, retroactive application of *Sleepy's* is consistent with the purposes of the Overtime Statute and Sunday pay law. In fact, the Court

[11] In discussing the significance of the opinion letters, the Court noted, "An opinion letter interpreting a statute or regulation does not have the binding force attributable to a full blown regulation[,] . . . [and] [w]e will generally defer . . . to an agency's interpretation . . . if it is not contradicted by the text or purpose of the underlying statute" (citation and internal quotations omitted). *Id.* at 232 n.11.

specifically relied on the language and purposes of those statutes in reaching its conclusion. *Sleepy's,* 482 Mass. at 233. Therefore, it would be illogical to limit the application of the holding in *Sleepy's* to prospective cases.

Furthermore, Jordan's contention that retroactive application cannot right the wrongs of past work hours or change employers' past hiring practices is unavailing. "[I]f the Court subscribed to . . . [Jordan's] contention that retroactive application is unnecessary because the past cannot be changed, there would rarely be a case in which a rule was not applied prospectively." *Colleton,* 2019 Mass. Super. LEXIS 1238 at *6.

Finally, retroactive application of *Sleepy's* will not result in inequity or hardship to Jordan's. Jordan's argues that it relied in good faith on the DOS opinion letters and that the DOS mislead Jordan's into believing its compensation practices were lawful. However, as discussed in *Sleepy's* and above, the letters did not permit the payment practices employed by Jordan's; therefore, any reliance on the DOS letters was not justifiable. *Sleepy's*, 482 Mass. at 236-237. Although Jordan's contends that retroactive application would put an enormous financial strain on employers already struggling by the severe disruptions caused by the COVID-19 pandemic, Jordan's has not articulated a specific and unique hardship it would suffer that would outweigh the inequitable result of Sutton and the class being denied wages to which they are entitled.

Accordingly, Jordan's arguments against retroactive application are without merit.

D. Constitutionality of Overtime Regulation Cited in *Sleepy's*

Jordan's also makes several arguments that the overtime regulation, 454 Code Mass. Regs. § 27.03(3) (2015), upon which *Sleepy's* partially relies, is unconstitutional as applied to Jordan's compensation plan. The court disagrees.

The regulation states:

> "**Overtime Rate**. One and one half times an employee's regular hourly rate, such regular hourly rate not to be less than the basic minimum wage, for work in excess of 40 hours in a work week, except as set forth in M.G.L. c. 151A, § 1A. . . . Whether a nonexempt employee is paid on an hourly, piece work, salary, or any other basis, such payments shall not serve to compensate the employee for any portion of the overtime rate for hours worked over 40 in a work week, except that this limitation applies only to the 'one-half' portion of the overtime rate (one and 'one-half' times an employee's regular hourly rate) when overtime is determined on a *bona fide* fluctuating workweek basis" (emphasis in original).

454 Code Mass. Regs., § 27.03(3) (2015).

First, Jordan's argues that Section 27.03(3) is unconstitutionally vague because it does not provide fair notice of what it prohibits or requires "so that persons of common intelligence may conform their conduct to the law." *Schoeller v. Board of Registration of Funeral Dirs. & Embalmers,* 463 Mass. 605, 611 (2012). Jordan's contends that the regulation fails this test because whether an employee is paid on an "hourly, piece work, salary, or any other basis" draws in all conceivable forms of compensation, which means that even the payment of hourly overtime premium pay would not count towards the employer's obligation to pay overtime pay. 454 Code Mass. Regs., § 27.03(3) (2015) (emphasis added). However, the court finds such an interpretation to be nonsensical.

In *Sleepy's*, the Court held that the plain language of Section 27.03(3) prohibits crediting payments against an employer's overtime obligations, and thus, the regulation entitles employees to separate and additional overtime payments beyond draws and commissions. 482 Mass. at 236-237. Although there is some confusion by the reference to "portion of the overtime rate" as opposed to a "portion of the employee's wages paid at the overtime rate," it is clear that the phrase "regular hourly rate" is "being used as a variable in a formula for calculating the hourly overtime rate of pay." *Id.* at 237 n.17 (emphasis added). "There is no indication that, because commissions and drawing accounts are excluded from the calculation of this variable, the

Legislature intended to allow employers to credit commissions against overtime obligations." *Sleepy's*, 482 Mass. at 237 n.17. In order words, Section 27.03(3) merely provides guidance on how to calculate the minimum amount of compensation that an employee must receive for overtime hours.

Second, Jordan's argues that Section 27.03(3) conflicts with the minimum wage law, G. L. c. 151, § 1, because Jordan's paid its sales consultants hourly premium pay for all overtime and Sunday hours; therefore, if the regulation were applied to Jordan's in the same manner as in *Sleepy's,* Jordan's would be required to pay its sales consultants twice for the same overtime and Sunday hours. This argument is not persuasive either. As discussed throughout this decision, the court disagrees that Jordan's, in fact, paid its sales consultants separate and additional overtime and Sunday premium pay.[12]

Third, the court disagrees with Jordan's that the Court in *Sleepy's* relied heavily on Section 27.03(3). It is evident from the length and substance of the Court's discussion that the Court primarily based its decision on the purpose of the Overtime Statute and Sunday pay law as well as its own recent decisions, which demonstrated that the Overtime Statute required separate and additional overtime compensation to be provided to the employee regardless of whether the employee received a recoverable draw or commission equal to or exceeding the overtime and premium pay rate. 482 Mass. at 235. The Court's brief discussion of the plain language of Section 27.03(3) merely signified that the regulation similarly prohibited retroactive crediting of

[12] To the extent that Jordan's argues that the SJC's application of Section 27.03(3) to Sunday premium pay is unconstitutional and invalid, this argument also fails. In Sleepy's, the Court held that an employee's entitlement to separate and additional Sunday premium pay stems from the purpose of the Sunday pay law, which shares the same purpose as the Overtime Statute, G. L. c. 151, § 1A. 482 Mass. at 239. Therefore, the basis for awarding Sunday premium pay is found in the Sunday pay law, G. L. c 136, § 6(50), not the regulations, and as a result, the scope of Section 27.03(3) is irrelevant with respect to Sunday pay.

payments against an employer's overtime obligations when those payments are made for a different purpose. *Sleepy's,* 482 Mass. at 236.

Finally, Jordan's argues that the purpose of Section 27.03(3) is to address the fluctuating workweek method of calculating overtime, which is inapplicable in this case. This argument is also unavailing. The plain language of the regulation speaks for itself, and the Court in *Sleepy's* implicitly held that the fluctuating workweek proviso in Section 27.03(3) had no limitation on or application in that case. *Id.* at. 232 n.10.

Accordingly, Jordan's constitutional arguments also fail.

E. Private Right of Action for Wage Act claims

Counts 2 and 3 of the Complaint assert claims under the Wage Act, G. L. c. 149, §§ 148, 150, for alleged violations of the Sunday pay statute, also known as a Blue Law or Sunday closing law, G. L. c. 136, §§ 6(50). See *Zayre Corp. v. Attorney Gen.,* 372 Mass. 423, 424 (1977) ("Laws which regulate trade and commerce on Sundays have been in existence in this Commonwealth and elsewhere since colonial times."). Jordan's argues that summary judgment in its favor is warranted on these claims because there is no private right of action for Sunday pay violations. The court disagrees with respect to Count 2 but agrees as to Count 3.

The Wage Act's enforcement section, G. L. c. 149, § 150, para. 2, lists twelve statutes for which a violation thereof creates a private right of action under the Wage Act. Jordan's argues that because the Sunday pay law is not among those enumerated, there is no private right of action in this case. This argument is unavailing.

First, the existence of a private right of action to recover unpaid Sunday pay under the Wage Act was implicitly recognized by the Court in *Sleepy's,* 482 Mass. at 230, and the Appeals Court has explicitly held that employees can seek unpaid wages pursuant to the Wage Act for

violations of other Blue laws. See *Drive-O-Rama, Inc. v. Attorney Gen.*, 63 Mass. App. Ct. 769, 769-770 (2005) (holding employer's failure to pay premium pay for work performed on legal holidays under G. L. c. 136, § 13 violated Wage Act). Likewise, other decisions of this court have concluded that employees may pursue wages under the Wage Act for Sunday pay law violations. See *Shoemaker*, 2021 Mass. Super. LEXIS 4 at *6-7 (concluding Wage Act affords plaintiff private right of action to recover unpaid Sunday and holiday pay); *Bassett v. Triton Techs., Inc.*, 2017 Mass. Super. LEXIS 32 at *4 (Mass. Super. 2017) ("The statutory right of action created under the Wage Act encompasses claims that an employee who worked on a Sunday has not been paid the higher wage required under G. L. c. 136, § 6(50).").

Second, Jordan's reliance on *Donis v. American Waste Services, LLC*, 485 Mass. 257 (2020), is misplaced. In Donis, the plaintiffs sued their employer, claiming that for several years, they were paid less than the wages required by the Prevailing Wage Act, G. L. c. 149, §§ 26-27H, which mandates the payment of wages for certain public project workers. *Id.* at 258. The plaintiffs claimed that by violating the Prevailing Wage Act, the defendants also violated the Wage Act, G. L. c. 149, §§ 148, 150. *Id.* On appeal, the Court held that the plaintiffs could not recover under the Wage Act for a violation of the Prevailing Wage Act because permitting them to do so would provide them with a duplicative means of recovery, which "would render the remedies provided by the Prevailing Wage Act meaningless." *Id.* The Court further held that the plaintiffs could not "avoid the limitations that the Prevailing Wage Act . . . [placed] on their recovery by pursuing an otherwise duplicative claim under the Wage Act."[13] *Id.* Unlike in Donis, here there are no private remedies set forth in the Sunday pay law; therefore, Sutton and the certified class are not pursuing an otherwise duplicative claim under the Wage Act or

[13] Under the Wage Act, the plaintiffs would have been entitled to recover directly from corporate officers, whereas under the Prevailing Wage Act, they could not. *Id.*

attempting to avoid conflicting limitations under the Sunday pay statute because no such limitations exist. For these reasons, a private right of action exists with respect to claims for unpaid wages for Sunday pay violations.

However, turning to the substance of Suttons' two Wage Act claims, it appears that there are no notable distinctions between these claims. As a result, the court will enter summary judgment on Count 3 on the ground that it is redundant of Count 2. Count 2 specifically alleges that Jordan's violated the Wage Act by failing to pay sales consultants premium pay for working Sundays and Count 3 similarly alleges that Jordan's violated the Wage Act by requiring sales consultants to work on Sundays without paying employees the premium rate. To the extent that Count 3 asserts a statutory claim, in other words, it is a claim not relating to the payment of wages but rather to a violation of the Sunday work requirement in G. L. c. 136, § 6(50), the court agrees with Jordan's that no private right of action for such a claim exists. See *Salvas v. Wal-mart Stores, Inc.*, 452 Mass. 337, 372-373 (2008) (concluding violation of meal break statute, G. L. c. 149, § 100, did not create private right of action). Because each claim is merely a restatement of the other, the court will enter summary judgment in Jordan's favor on Count 3.

Accordingly, Jordan's motion for summary judgment on Count 3 (requiring work on Sundays) is **ALLOWED**.

F. Sutton's Partial Motion for Summary Judgment

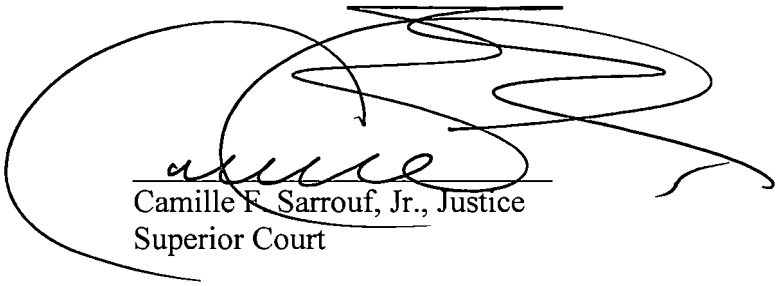
Because the court finds that Jordan's compensation plan violated the requirements set forth in *Sleepy's,* Sutton's partial motion for summary judgment as to liability on Count 1 (failure to pay overtime) and Count 2 (failure to pay Sunday premium pay) is **ALLOWED**, and Jordan's motion for summary judgment on those claims is **DENIED**.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Jordan's motion for summary judgment is **ALLOWED** on Count 3 (requiring work on Sundays), but is otherwise **DENIED**.

It is further **ORDERED** that Sutton's partial motion for summary judgment on Count 1 (failure to pay overtime) and Count 2 (failure to pay Sunday premium pay) is **ALLOWED** as to liability.

The court will schedule a status conference to address further proceedings in conjunction with this Decision and Order.



September 22, 2021

Camille F. Sarrouf, Jr., Justice
Superior Court