

1a

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 16-20601

CHERYL KIRK,
Plaintiff-Appellant,
v.
INVESCO, LIMITED,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas,
USDC No. 4:15-CV-833

(Filed Jul. 6, 2017)

Before: KING, PRADO, and SOUTHWICK, Circuit
Judges.

PER CURIAM:*

Plaintiff-Appellant Cheryl Kirk sued her former employer, Defendant-Appellee Invesco, Ltd. (“Invesco”), alleging that Invesco violated the Fair Labor Standards Act (“the FLSA” or “the Act”). Kirk argued that Invesco misclassified her as an employee exempt

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

from the overtime provisions of the Act and deprived her of overtime pay to which she was legally entitled. The district court granted summary judgment in favor of Invesco. We AFFIRM.

I. BACKGROUND

A. Facts

Cheryl Kirk began working as the IT Training Manager at Invesco on April 15, 2011. Beginning in 2012 or 2013, Lisa Soanes, Invesco's Head of IT Risk and Controls, Software Compliance, and IT Training, became Kirk's direct supervisor. Per employee policy, Kirk was expected to work 37.5 hours each week but was paid the same amount regardless of the actual number of hours she worked. Indeed, Kirk stated that the total number of hours and the period of time during which she worked fluctuated daily depending on when trainings were scheduled. Although she apparently used a timekeeping program, Kirk testified that these records are not accurate.¹ She explained that because these time records "don't get fed into the . . . time and attendance program that actually pays people," the program "is not a true . . . recording of anybody's hours."

¹ Kirk testified that when she was first hired as an employee, one of her supervisors informed her that her "time [was] not going to be billed back to any projects" and therefore the time she recorded "d[id]n't really matter." Although in 2014 Soanes told Kirk that she should accurately bill her time, Kirk testified that she chose to violate that policy going forward.

Kirk testified that on average she worked more than 60 hours per week. In support of this assertion, Kirk offered the following evidence:

- Her own testimony that she worked an average of 60 hours per week and that she probably spent “about 7 to 10 hours enrolling people” in training classes per day;
- A list of work emails over five groups of consecutive days throughout three years showing emails sent before, during, and after regular work hours, including on weekends;
- GPS phone records showing that Kirk was at work for 13 hours and 38 minutes on December 9, 2013; 11 hours and 14 minutes on April 21, 2014; and 11 hours and 24 minutes on September 11, 2014;
- Her mother’s testimony that (1) she observed Kirk working “on and off” about two evenings per week between 7:00 p.m. and 11:00 p.m. or 12:00 a.m.; (2) she believed Kirk “probably worked 9, 10 hours a day or longer” on weekdays, and “probably five to six hours a day on Saturday and Sunday”; (3) she observed Kirk making work phone calls using her landline before 6:00 a.m.; and (4) she believed Kirk “stayed at Invesco working many nights after what [she] thought would be . . . quitting time,” sometimes not even getting home from work until around 10:00 p.m.;
- Invesco supervisor David Jordan’s testimony that Kirk “indicated she had to work over the

weekend, late at night” and that he had no reason to disbelieve her;

- Invesco policies showing that as IT Training Manager, Kirk was required to work 37.5 hours each week, typically during regular business hours.

Beginning in June 2015, shortly after Kirk filed this lawsuit, Soanes gave Kirk several written performance improvement plans describing alleged deficiencies in Kirk’s work and conduct and detailed instructions on how to improve. On October 15, 2015, Kirk was terminated, purportedly for sending “insubordinate and unprofessional” emails and failing to timely complete assignments.

B. Procedural History

On March 31, 2015, Kirk sued Invesco alleging that the company had misclassified her as an exempt employee under the FLSA and failed to pay her overtime as required by law. On December 28, 2015, Kirk filed a motion for partial summary judgment. Invesco likewise moved for summary judgment on January 21, 2016. In May 2016, a magistrate judge recommended that the district court deny Kirk’s motion and grant Invesco’s. Kirk filed objections to the magistrate’s recommendation, but on August 18, 2016, the district court overruled these objections and adopted the magistrate judge’s recommendation. This appeal followed.

II. DISCUSSION

A. Standard of Review

We review a grant of summary judgment de novo using the same standard as the district court. *Williams v. Henagan*, 595 F.3d 610, 615 (5th Cir. 2010). Summary judgment is warranted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “If the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, then there is no genuine issue for trial.” *Harvill v. Westward Commc’ns, L.L.C.*, 433 F.3d 428, 433 (5th Cir. 2005) (quoting *Steadman v. Tex. Rangers*, 179 F.3d 360, 366 (5th Cir. 1999)). “In considering a summary judgment motion, all facts and evidence must be taken in the light most favorable to the non-movant.” *LeMaire v. La. Dep’t of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007).

B. Analysis

On appeal, Kirk makes four arguments: (1) she was improperly classified as an exempt employee under the FLSA’s administrative exemption; (2) Invesco did not act in good faith in attempting to comply with the FLSA; (3) the time-and-a-half method of calculating overtime damages is appropriate in this case; and (4) the district court erred in holding that Kirk failed to raise sufficient evidence that she worked overtime during the relevant time period. The district court granted summary judgment only on the basis that

Kirk had failed to raise an issue of material fact over whether she actually worked overtime. Therefore, this is the only issue we address on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (“It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below.”); *Humphries v. Elliott Co.*, 760 F.3d 414, 418 (5th Cir. 2014).

“An employee bringing an action pursuant to the FLSA, based on unpaid overtime compensation, must first demonstrate that she has performed work for which she alleges she was not compensated.” *Harvill*, 433 F.3d at 441. Where accurate time records are unavailable – as both parties agree is the case here – an employee has met this burden of proof if she “proves that [she] has in fact performed work for which [she] was improperly compensated and if [she] produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.” *Id.* (alterations in original) (quoting *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), *superseded by statute on other grounds by* Portal-to-Portal Act of 1947, 29 U.S.C. § 254). “The burden [then] shifts to the employer 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.” *Id.* (quoting *Anderson*, 328 U.S. at 687-88). In order to raise a “just and reasonable inference” as to the amount and extent of her work, an employee need not prove “the precise extent of uncompensated work.” *Anderson*, 328 U.S. at 687. But an employee must provide more than mere

“unsubstantiated assertions.” *Harvill*, 433 F.3d at 411; see *Ihegword v. Harris Cty. Hosp. Dist.*, 555 F. App’x 372, 375 (5th Cir. 2014).

Even though Kirk presented the district court with more than just her own assertions, we agree with the district court’s conclusion that this “additional evidence is insufficient to substantiate her testimony that she worked overtime.” Kirk presented a list showing work emails sent before, during, and after regular work hours, including on weekends. The list, however, shows only two- to three-day snapshots of such email activity over the course of three years. Moreover, while this record demonstrates that Kirk did work outside of normal work hours, it does not validate Kirk’s assertion that she worked more than forty hours in any given week. In fact, Kirk admitted that the window during which she worked varied depending on when trainings were scheduled and that any records or logs of her work time would not account for breaks she took during the day. Accordingly, the mere existence of emails sent outside of normal work hours does not raise a justifiable inference that Kirk worked any overtime during the relevant time period.

The same reasoning applies to the other evidence Kirk presented in support of her overtime claim. The GPS phone records, which show that Kirk worked some long days, demonstrate only that she worked eleven- to thirteen-hour days three separate times over the course of two years but not that she worked more than forty hours in any week during which those days occurred. Kirk’s mother’s testimony likewise does not

support an inference that Kirk worked overtime. Kirk's mother testified that she occasionally witnessed Kirk using the computer "on and off" in the evening, making conference calls late at night, and making work phone calls early in the morning. Nevertheless, Kirk's mother admitted that she could only remember actually seeing Invesco work on Kirk's computer four or five times and lacked any personal knowledge of how much time Kirk spent making work phone calls. Because Kirk's mother's testimony only accounts for sporadic occasions during which Kirk worked outside of typical work hours, it likewise does not raise a question of fact as to whether Kirk worked overtime. Finally, Jordan's testimony that he had no reason to disbelieve Kirk's complaints to him about working weekends and nights similarly fails to raise a question of fact as to whether Kirk worked more than forty hours in any week during the relevant time period.

Given that Kirk has presented only evidence of sporadic instances during which she worked outside of typical work hours and has admitted that the window during which she worked varied depending on when and where trainings were scheduled, we hold that she has failed to present sufficient evidence allowing a just and reasonable inference that she worked overtime.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's summary judgment in favor of Invesco.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

CHERYL KIRK,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	CIVIL ACTION H-15-833
INVESCO, LTD.,	§	
	§	
<i>Defendant.</i>	§	

ORDER ADOPTING MEMORANDUM & RECOMMENDATION

(Filed Aug. 18, 2016)

Pending before the court is the Magistrate Judge’s Memorandum and Recommendation (the “M&R”) (Dkt. 60), recommending that plaintiff Cheryl Kirk’s (“Kirk”) motion for partial summary judgment (Dkt. 38) be denied and that defendant Invesco, Ltd.’s (“Invesco”) motion for summary judgment (Dkt. 43) be granted. Kirk filed objections to the M&R. Dkt. 64. Having reviewed the M&R, the objections to the M&R, the related briefing, the record evidence, and the applicable law, the court **OVERRULES** Kirk’s objections and **ADOPTS** the M&R.

I. BACKGROUND

On March 31, 2015, Kirk filed this lawsuit against her then-employer Invesco to collect unpaid overtime wages pursuant to the Fair Labor Standards Act (“FLSA”). Dkt. 1. Kirk began working for Invesco on a

contract basis in September of 2010 and was later hired as an employee on April 15, 2011. *Id.* at 2. During her employment, Kirk held the position of “IT Training Manager.” *Id.* at 3. Invesco classified Kirk as exempt from the FLSA’s overtime pay requirements and paid her a fixed weekly salary. *Id.* at 5. As a result, Kirk received no additional compensation for the hours she worked in excess of forty in a given week. *Id.* Kirk alleges that she worked approximately sixty hours per week. *Id.* at 4. Kirk contends that Invesco willfully misclassified her as an exempt employee in violation of the FLSA and therefore is obligated to compensate her for the overtime hours she worked in the three years prior to filing this lawsuit. *Id.* at 5-6.

On October 28, 2015, the court referred this case to the Magistrate Judge for full pretrial management. Dkt. 21. On December 28, 2015, Kirk filed a motion for partial summary judgment. Dkt. 38. On January 21, 2016, Invesco also filed a motion for summary judgment. Dkt. 43.

On May 4, 2016, the Magistrate Judge issued the M&R regarding the parties’ motions for summary judgment. Dkt. 60. Although the parties’ motions raised several issues, the M&R addressed a single point: whether Kirk had produced sufficient evidence to establish that she worked more than forty hours per week. *Id.* at 4-5. The Magistrate Judge held that Kirk failed to produce sufficient, competent evidence to raise a fact issue regarding whether she ever worked more than forty hours in any week of her employment. *Id.* at 4-5, 19. The Magistrate Judge therefore

recommended granting Invesco's motion for summary judgment. *Id.* at 19. Because the Magistrate Judge found that Kirk could not prove that she worked overtime hours, the Magistrate Judge did not decide whether Kirk was properly classified as an exempt employee under the FLSA. *Id.* at 4-5.

On May 13, 2016, Kirk filed objections to the M&R. Dkt. 64. On May 26, 2016, Invesco responded. Dkt. 67. On May 31, 2016, Kirk filed a reply in support of her objections. Dkt. 68.

II. LEGAL STANDARDS

A. Motion for Summary Judgment

A court shall grant summary judgment when a “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). “[A] fact is genuinely in dispute only if a reasonable jury could return a verdict for the non-moving party.” *Fordoche, Inc. v. Texaco, Inc.*, 463 F.3d 388, 392 (5th Cir. 2006). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986). If the party meets its burden, the burden shifts to the non-moving party to set forth specific facts showing a genuine issue for trial. Fed. R. Civ. P. 56(e). The court must view the evidence in the light most favorable to the non-movant and draw all justifiable inferences in favor of the non-movant. *Env'tl.*

Conservation Org. v. City of Dall., Tex., 529 F.3d 519, 524 (5th Cir. 2008).

B. Review of a Magistrate Judge’s Recommendation

For dispositive matters, the court “determine[s] de novo any part of the magistrate judge’s disposition that has been properly objected to.” Fed. R. Civ. P. 72(b)(3). “The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.” *Id.* “When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” Fed. R. Civ. P. 72(b), Advisory Comm. Note (1983). For nondispositive matters, the court may set aside the magistrate’s order only to the extent that it is “clearly erroneous or contrary to law.” Fed. R. Civ. P. 72(a).

III. ANALYSIS

Kirk has filed objections regarding (a) certain discovery rulings made by the Magistrate Judge and (b) the Magistrate Judge’s substantive holding that Kirk presented insufficient evidence that she worked overtime hours. Dkt. 64. The court will address each set of objections in turn.

A. Discovery Issues

1. Log In Records

On December 9, 2015, Kirk filed a motion to compel, seeking records regarding when she logged into Invesco's network or computers. Dkt. 36. On January 7, 2016, the Magistrate Judge granted Kirk's motion but required the documents to be produced at Kirk's expense. Dkt. 41. On February 2, 2016, Kirk filed a motion for reconsideration of the Magistrate Judge's order after Invesco indicated that it would cost over \$1.13 million to produce these documents. Dkt. 45. Kirk asked that Invesco be required to produce these documents at its own expense. *Id.* On February 11, 2016, the Magistrate Judge heard oral argument on the motion for reconsideration. Dkt. 52. At the hearing, counsel for Invesco emphasized that, while Invesco kept records of when a person logged into their system, it kept no records of when a person logged out. Dkt. 65 at 8-9. The Magistrate Judge noted that the relevance of documents showing when Kirk logged into Invesco's system was significantly diluted by the fact that there were no records of when she logged out. *Id.* at 9. Accordingly, the Magistrate Judge found that the relevance of the log in documents was not proportional to the \$1.13 million cost of production and denied Kirk's motion for reconsideration. *Id.* at 12.

In Kirk's objections, Kirk re-asserts the arguments she made in front of the Magistrate Judge and requests that the court order Invesco to produce all of Kirk's log in records. Dkt. 64 at 3. Federal Rule of Civil

Procedure 72 requires that a party object to a magistrate judge's order on a nondispositive matter within 14 days. Fed. R. Civ. P. 72(a). A party "may not assign as error a defect in the order not timely objected to." *Id.* Kirk's objections were filed over three months after the Magistrate Judge denied Kirk's motion for reconsideration. Therefore, Kirk failed to timely object to the Magistrate Judge's holding. Further, the court agrees with the Magistrate Judge's determination that information regarding when Kirk logged into Invesco's system, without any corresponding information regarding when Kirk logged out of the system, is not sufficiently probative to justify the \$1.13 million cost of production. Kirk's objection is **OVERRULED**.

2. Computer Image

At the February 11, 2016 hearing on Kirk's motion for reconsideration, the following exchange occurred:

[KIRK]: Your Honor, can I ask about – I still don't know what happens to her work computer. Can I be permitted to get her work computer that she utilized at work and – because I think that's separate than a backup tape.

[THE MAGISTRATE JUDGE]: I would agree, but a lot of times companies – you know, someone's out the door, they wipe the computer. Do you still have her computer in an unwiped state?

[INVESCO]: I believe they have an image of it.

[THE MAGISTRATE JUDGE]: Okay. Then give it to [Kirk].

Dkt. 65 at 12. On March 30, 2016, Invesco produced an image of Kirk's computer. Dkt. 64 at 3. Kirk objects that the image Invesco produced violates the Magistrate Judge's order because it was not a "true image" of Kirk's computer. *Id.* The image apparently contained a "series of folders" but was missing "primary default user data storage folders" and "the majority of system/registry files commonly examined during device forensic analyses." *Id.* at 4.

The exchange at the February 11, 2016 hearing merely indicates that Invesco had an image of Kirk's computer and would be required to produce it. There was no discussion regarding what information that image contained. Further, the Magistrate Judge made no ruling regarding how the image should be produced or what information she expected would appear on the image. Therefore, the court has no basis to conclude that the image produced by Invesco failed to comply with the Magistrate Judge's order. Further, the court notes that Kirk did not attempt to inform the Magistrate Judge that her discovery order had allegedly been violated. Rather, Kirk raised the issue for the first time as an objection to the M&R. Kirk's objection is OVERRULED.

B. Evidence of Overtime Hours

Kirk objects to the Magistrate Judge's conclusion that Kirk has produced insufficient evidence at the

summary judgment stage to establish that she ever worked more than forty hours in a week. Kirk primarily contends that (1) the M&R is inconsistent with Supreme Court precedent set forth in *Anderson v. Mt. Clemens Pottery Co.*; (2) the M&R improperly finds that Kirk's testimony is insufficient evidence to support her allegations that she worked overtime hours; and (3) even if Kirk's testimony is insufficient on its own, Kirk's testimony is effectively substantiated by her emails, her GPS phone records, and her mother's testimony. Dkt. 64 at 2.

1. *Anderson v. Mt Clements Pottery Co.*

Kirk argues that the Magistrate Judge misapplied *Anderson v. Mt. Clements Pottery Co.* by improperly placing the burden on Kirk to prove the precise extent of her uncompensated work. Dkt. 64 at 5-7. In *Anderson*, the Court explained the legal framework applicable to claims for unpaid overtime compensation under the FLSA:

An employee who brings suit under § 16(b) of the Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under

§ 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

When the employer has kept proper and accurate records the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. 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 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.

328 U.S. 680, 686-88, 66 S. Ct. 1187 (1946), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84, *as recognized in Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513 (2014). In following the *Anderson* framework, the court must first determine whether Invesco kept "proper and accurate records" of Kirk's hours. The Magistrate Judge found that Invesco's records were inadequate and inaccurate. Dkt. 60 at 10-12. Kirk testified that her supervisor had told her that the time she recorded in Invesco's system did not matter because she was not being paid by the hour. Dkt. 48, Ex. 20 at 210. Therefore, Kirk testified that she "just randomly" put her hours into the system. *Id.* Kirk explained that the system was "not a true, you know, recording of anybody's hours . . . this is simply just to track how much is – hours are spent on projects. It's not meant to pay anybody." *Id.* at 211. Further, she stated that, by inputting her time into the system, she was just "filling in numbers to make sure that management doesn't get on a report. Doesn't have anything to do with how many hours I'm actually working." *Id.* at 212. Kirk's testimony leaves no question that the Magistrate Judge correctly determined that Invesco's records were

inaccurate or inadequate. Further, the court notes that the Magistrate Judge's conclusion on this issue is consistent with Kirk's litigation position. *See* Dkt. 48 at 10 (Kirk's brief) (arguing that Kirk's testimony provided evidence that Invesco's records were inaccurate or inadequate).

Under *Anderson*, where the employer's records are inaccurate or inadequate, the employee then has the burden to "produce[] sufficient evidence to show the amount and extent of [her] work as a matter of just and reasonable inference." 328 U.S. at 687. Kirk is correct that this standard explicitly does not require her to prove "the precise extent of uncompensated work." *Id.* However, at no point did the Magistrate Judge require Kirk to prove the precise extent of her uncompensated work. Rather, consistent with *Anderson*, the Magistrate Judge explicitly found that Kirk had failed to meet her burden to produce sufficient evidence to raise a "just and reasonable inference" that she worked more than forty hours during any week of her employment. Dkt. 60 at 19. Because the Magistrate Judge found that Kirk failed to meet her burden, the Magistrate Judge's *Anderson* analysis was complete, and the burden did not shift to Invesco. *See Ihigword v. Harris Cty. Hosp. Dist.*, 555 F. App'x 372, 374 (5th Cir. 2014) (explaining that the employee bears the initial burden to produce sufficient evidence that she has performed work for which she was not compensated). The court finds nothing in the M&R that deviates from the standard set forth in *Anderson*. Accordingly, Kirk's objection is **OVERRULED**. The court will address the

sufficiency of Kirk's overtime evidence separately below.

2. The Sufficiency of Kirk's Testimony

Kirk argues that the Magistrate Judge incorrectly found that Kirk's testimony was insufficient to establish that she worked overtime hours. Dkt. 64 at 7-9. Kirk contends that, in an FLSA misclassification case, an employee's mere testimony of overtime hours worked is sufficient evidence to defeat an employer's motion for summary judgment. *Id.* at 9. In support of this position, Kirk relies primarily on two, non-binding district court cases. *See Clark v. Centene Co. of Tex., L.P.*, 104 F. Supp. 3d 813 (W.D. Tex. 2015); *Johnson v. Big Lots Stores, Inc.*, 604 F. Supp. 2d 903 (E.D. La. 2009). Even assuming that these opinions stand for the proposition that an employee's unsubstantiated testimony is sufficient evidence to survive summary judgment, the court finds that the weight of authority does not support this position.

In *Ihegword*, plaintiff sued defendant for failure to pay overtime wages in violation of the FLSA. 555 F. App'x at 373. Plaintiff "estimate[d] from memory alone that she worked approximately twelve hours of uncompensated overtime a week." *Id.* at 374. The district court found that there was a "complete lack of evidence, other than [plaintiff's] unsubstantiated assertions speculated from memory, to prove that she actually worked overtime for which she was not compensated." *Id.* at 375. Therefore, the district court

granted summary judgment to defendant. *Id.* On appeal, the Fifth Circuit affirmed and explicitly agreed with the district court's holding that "an unsubstantiated and speculative estimate of uncompensated overtime does not constitute evidence sufficient to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* Other courts have similarly held that a plaintiff's unsubstantiated assertion that she worked overtime hours is insufficient to satisfy her evidentiary burden at the summary judgment stage. *See Dixon v. First Choice Messengers, Inc.*, No. 4:14-CV-02895, 2016 WL 774680, at *3 (S.D. Tex. Feb. 29, 2016) (Hoyt, J.) (holding that plaintiff's "own unsubstantiated assertions that she worked an estimated fifteen hours of unpaid overtime per week" were insufficient to raise a genuine issue of material fact for trial); *Oti v. Green Oaks SCC, LLC*, No. 4:13-CV-816-A, 2015 WL 329216, at *3 (N.D. Tex. Jan. 23, 2015) (granting summary judgment to defendant on plaintiff's FLSA claim where plaintiff relied solely on her "admitted guess as to how many overtime hours she worked"). Accordingly, the court finds that Kirk's testimony that she worked sixty hours per week, unless properly substantiated by other evidence, is insufficient to establish that she performed overtime work for which she was not compensated. Kirk's objection is **OVERRULED**.

3. Kirk's Additional Evidence

Kirk objects that, even if her testimony alone is insufficient to avoid summary judgment, she presented other evidence that properly substantiates her

testimony. Dkt. 64 at 10-11. Specifically, Kirk submitted (1) a list of the dates and times when she sent emails, (2) GPS phone records, indicating her location during particular days, and (3) her mother's deposition testimony. The Magistrate Judge found that this evidence was insufficient to substantiate Kirk's testimony. Dkt. 60 at 14-17. The court agrees.

Email Records. Kirk's email records show that she was working at certain particular moments. *See* Dkt. 48, Ex. 25. However, the fact that Kirk sent emails at particular times does not raise a just and reasonable inference that Kirk worked more than forty hours in any given week. In fact, in reviewing Kirk's email records, the Magistrate Judge found that the records could support no more than seventeen hours of work in any particular week.

GPS Phone Records. Kirk submitted GPS phone records, showing her location throughout the day, on four days: December 9, 2013; April 21, 2014; September 11, 2014; March 10, 2015. Dkt. 48, Ex. 26. These records suggest that Kirk was at work for particularly long periods on these four days. However, as the Magistrate Judge pointed out, none of these four days is in the same week. Therefore, the records do not support an inference regarding whether Kirk worked over forty hours in those weeks.

Kirk's Mother's Deposition. Kirk's mother testified that she periodically saw Kirk working "on and off" during evening hours and witnessed Kirk making phone calls in the early morning. Dkt. 48, Ex. 27 at

19-20, 39. She further testified that Kirk had not told her how many hours per week she worked on average. *Id.* at 21. Kirk's mother could recall only "four or five times" where she saw Invesco work on Kirk's computer. Dkt. 55, Ex. 3 at 38. The court agrees with the Magistrate Judge that, although this testimony indicates that Kirk occasionally worked from home beyond normal business hours, it is not sufficiently specific to allow the court to infer that Kirk worked over forty hours in any given week.

The court finds that Kirk's additional evidence is insufficient to substantiate her testimony that she worked overtime hours. Kirk's objection is **OVERRULED**.

On a de novo review of the record, the court finds that Kirk has failed to produce sufficient evidence to raise a just and reasonable inference that she performed work for which she was not properly compensated. The court finds that Kirk's objections to the M&R are without merit. Accordingly, Kirk's objections are **OVERRULED** and the M&R is **ADOPTED IN FULL**.

IV. CONCLUSION

Kirk's objections (Dkt. 64) are **OVERRULED**, and the M&R (Dkt. 60) is **ADOPTED IN FULL**. Kirk's motion for partial summary judgment (Dkt. 38) is **DENIED**. Invesco's motion for summary judgment (Dkt. 43) is **GRANTED**. Kirk's claims are **DISMISSED**.

24a

WITH PREJUDICE. A final judgment will issue consistent with this opinion.

Signed at Houston, Texas on August 18, 2016.

/s/ Gray H. Miller
Gray H. Miller
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHERYL KIRK,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION NO.
v.	§	H-15-833
	§	
INVESCO, LTD.,	§	
	§	
Defendant.	§	

MEMORANDUM AND RECOMMENDATION

(Filed May 4, 2016)

Pending before the court¹ are Plaintiff's Motion for Partial Summary Judgment (Doc. 38) and Defendant's Motion for Summary Judgment (Doc. 43). The court has considered the motions, the responses, replies, sur-replies, the evidence, and the applicable law. For the reasons set forth below, the court **RECOMMENDS** that Plaintiff's motion be **DENIED** and Defendant's motion be **GRANTED**.

¹ This case was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Federal Rule of Civil Procedure 72. *See* Doc. 21.

I. Case Background

Plaintiff filed this case under the provisions of the Fair Labor Standards Act² (“FLSA”) against her then-current employer.

Plaintiff began working for Defendant, an asset management firm, as a contract worker in October 2010.³ Defendant hired Plaintiff on April 15, 2011, as the IT (Information Technology) Training Manager and paid her a salary of \$80,000 per year, plus bonuses.⁴ Defendant classified Plaintiff as an exempt employee under the terms of the FLSA.⁵ Lisa Soanes, Defendant’s Head of IT Risk and Controls, Software Compliance, and IT Training, became Plaintiff’s supervisor sometime in 2012 or 2013.⁶

Plaintiff filed this action on March 31, 2015, against Invesco, Inc.; Invesco, Ltd.; and Invesco Advisors, Inc.⁷ A few weeks later, Plaintiff filed a Notice of Dismissal as to Invesco, Inc., and Invesco Advisors,

² See 29 U.S.C. §§ 201-219.

³ See Doc. 42-1, Ex. A to Def.’s Resp. to Pl.’s Mot. for Partial Summ. J., Lisa Soanes’ (“Soanes”) 30(b) (6) Dep. p. 22; Doc. 42-2, Ex. B to Def.’s Resp. to Pl.’s Mot. for Partial Summ. J., Pl.’s Dep. p. 55; Doc. 43-2, Ex. B to Def.’s Mot. for Summ. J., Pl.’s Dep. p. 206.

⁴ Doc. 42-2, Ex. B to Def.’s Resp. to Pl.’s Mot. for Partial Summ. J., Pl.’s Dep. pp. 80-81, 185-86.

⁵ See Doc. 38-7, Ex. 7 to Pl.’s Mot. for Partial Summ. J., Def.’s Resps. to Pl.’s 1st Set of Interrogs. No. 1.

⁶ See Doc. 42-3, Ex. C to Def.’s Resp. to Pl.’s Mot. for Partial Summ. J., Soanes’ Dep. pp. 6, 42.

⁷ See Doc. 1, Compl.

Inc.⁸ She simultaneously filed an amended complaint to reflect the dismissal of those two defendants.⁹

Plaintiff's only alleged cause of action is a violation of the FLSA's requirements on overtime compensation.¹⁰ Plaintiff alleged that Defendant misclassified her as an exempt employee, thereby illegally depriving her of overtime pay.¹¹ Plaintiff requested unpaid overtime wages and FLSA liquidated damages, as well as attorneys' fees and costs.¹² Plaintiff also requested a court order requiring Defendant to pay Plaintiff overtime in the future.¹³

The court held two discovery conferences before referring the case to the undersigned.¹⁴ After referral, the court held several more discovery conferences.¹⁵ In the meantime, Defendant terminated Plaintiff's employment on October 15, 2015, "for a series of e-mails

⁸ See Doc. 3, Notice of Dismissal.

⁹ See Doc. 4, Pl.'s 1st Am. Compl.

¹⁰ See *id.* pp. 2, 5-6.

¹¹ See *id.* p. 5.

¹² See *id.* p. 6.

¹³ See *id.*

¹⁴ See Doc. 13, Min. Entry Dated Sept. 1, 2015; Doc. 18, Min. Entry Dated Oct. 14, 2015; Doc. 21, Order Dated Oct. 28, 2015.

¹⁵ See Doc. 28, Min. Entry Dated Nov. 3, 2015; Doc. 34, Min. Entry Dated Nov. 18, 2015; Doc. 40, Min. Entry Dated Jan. 7, 2016; Doc. 51, Min. Entry Dated Feb. 11, 2016.

and performance issues that occurred previously and leading up to that day.”¹⁶

In late December 2015, Plaintiff initiated dispositive-motion practice with the filing of the pending Motion for Partial Summary Judgment.¹⁷ Defendant followed suit with the filing of the pending Motion for Summary Judgment.¹⁸ During the course of briefing the motions, the parties attempted mediation but were unsuccessful in resolving the suit.¹⁹

The briefing is complete, and the court now addresses the two pending dispositive motions. Plaintiff seeks the following three rulings: (1) that she was misclassified as an exempt employee; (2) that Defendant did not act in good faith in classifying her as exempt, resulting in liability for liquidated damages in the same amount as actual damages; and (3) that Plaintiff is entitled to actual damages for unpaid overtime work in an amount calculated pursuant to the time-and-a-half method rather than the fluctuating-workweek (“FWW”) method.

Defendant argues that it properly classified Plaintiff as exempt under the administrative exemption. Defendant further argues, should the court find a fact issue as to Plaintiff’s exempt status: (1) that it acted in good faith; (2) that the FWW method applies to

¹⁶ Doc. 48-5, Ex. 21 to Pl.’s Resp. to Def.’s Mot. for Summ. J., Soanes’ Dep. p. 29.

¹⁷ See Doc. 38, Mot. for Partial Summ. J.

¹⁸ See Doc. 43, Mot. for Summ. J.

¹⁹ See Doc. 53, Alt. Dispute Resolution Mem.

calculate overtime damages; (3) that Plaintiff produced no evidence that Defendant acted willfully, thus limiting the statute of limitations to two years; and (4) that Plaintiff produced insufficient evidence to establish that she worked any hours for which she was not fully compensated.

At the core level, this is a suit for unpaid overtime compensation. The parties disagree on a number of preliminary and ancillary issues including whether Plaintiff is even entitled to overtime pay at all and, if so, at what rate and in what amount. However, none of those issues matter if Plaintiff has failed to produce sufficient, competent summary judgment evidence to raise a fact issue on whether she worked more than forty hours in any week during her employment. The court begins and, as it happens, ends with the issue of overtime evidence.²⁰

II. Summary Judgment Standard

Summary judgment is warranted when the evidence reveals that no genuine dispute exists on any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Stauffer v. Gearhart*, 741 F.3d 574, 581 (5th Cir. 2014). A material

²⁰ Because the court does not reach any of the other arguments, the court does not need to consider evidence relevant only to those arguments. As a result, the court **OVERRULES AS MOOT** the parties' objections to the admissibility of Plaintiff's 2012, 2013, and 2014 performance reviews and the first page of Marguerite Novak's 2010 performance review.

fact is a fact that is identified by applicable substantive law as critical to the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 271 F.3d 624, 626 (5th Cir. 2001). To be genuine, the dispute regarding a material fact must be supported by evidence such that a reasonable jury could resolve the issue in favor of either party. See *Royal v. CCC & R Tres Arboles, L.L.C.*, 736 F.3d 396, 400 (5th Cir. 2013) (quoting *Anderson*, 477 U.S. at 248).

The movant must inform the court of the basis for the summary judgment motion and must point to relevant excerpts from pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of genuine factual issues. *Celotex Corp.*, 477 U.S. at 323; *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). The movant may meet this burden by demonstrating an absence of evidence in support of one or more elements of the case for which the nonmovant bears the burden of proof. See *Celotex Corp.*, 477 U.S. at 322; *Exxon Corp. v. Oxxford Clothes, Inc.*, 109 F.3d 1070, 1074 (5th Cir. 1997).

If the moving party carries its burden, the nonmovant may not rest on the allegations or denials in his pleading but must respond with evidence showing a genuine factual dispute. *Stauffer*, 741 F.3d at 581 (citing *Hathaway v. Bazany*, 507 F.3d 312, 319 (5th Cir. 2007)). Conclusory allegations, unsubstantiated assertions, improbable inferences, unsupported speculation, or only a scintilla of evidence will not carry this burden. *Brown v. City of Hous., Tex.*, 337 F.3d 539, 540-41

(5th Cir. 2003). If the evidence would not allow a reasonable jury to decide the dispute in favor of the non-movant, the dispute is not genuine. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)).

When the parties file cross-motions for summary judgment, the court must “review each party’s motion[] independently, viewing the evidence and inferences in the light most favorable to the nonmoving party.” *Tidewater Inc. v. United States*, 565 F.3d 299, 302 (5th Cir. 2009) (quoting *Ford Motor Co. v. Tex. Dept of Transp.*, 264 F.3d 493, 499 (5th Cir. 2001)). The successful movant will carry its “burden of establishing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law.” *Shaw Constructors v. ICF Kaiser Eng’rs*, 395 F.3d 533, 538-39 (5th Cir. 2004).

III. Analysis

The FLSA generally requires employers to compensate employees at a rate of not less than one and one-half times the regular hourly rate for the hours worked in excess of forty per week. *See* 29 U.S.C. § 207(a) (1); *Coffin v. Blessey Marine Servs., Inc.*, 771 F.3d 276, 279 (5th Cir. 2014). An action for unpaid overtime compensation requires proof of: (1) “an employer-employee relationship during the unpaid overtime periods claimed;” (2) FLSA coverage of the plaintiff’s activities; (3) the employer’s violation of the FLSA’s overtime wage requirements; and (4) the amount of

overtime compensation owed. *Johnson v. Heckmann Water Res. (CVR), Inc.*, 758 F.3d 627, 630 (5th Cir. 2014). An FLSA plaintiff bears the burden of proof on all elements of her claim. *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 636 (5th Cir. 2001).

“An employee bringing an action pursuant to the FLSA, based on unpaid overtime compensation, must first demonstrate that she has performed work for which she alleges she was not compensated.” *Ihegword v. Harris Cty. Hosp. Dist.*, 555 F. App’x 372, 374 (5th Cir. 2014) (unpublished) (quoting *Harvill v. Westward Commc’ns, LLC*, 433 F.3d 428, 441 (5th Cir. 2005)). A plaintiff may rely on the employer’s records if they are “proper and accurate” or, if the records are “inaccurate or inadequate,” may produce “sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.” *Rosales v. Lore*, 149 F. App’x 245, 246 (5th Cir. 2005) (unpublished) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)); *see also Ihegword*, 555 F. App’x at 374.

If the plaintiff carries her burden, the burden shifts to the employer to produce either “evidence of the precise amount of work performed” or evidence that counters the reasonableness of drawing an inference in favor of the plaintiff. *Ihegword*, 555 F. App’x at 374 (quoting *Harvill*, 433 F.3d at 441); *Rosales*, 149 F. App’x at 246 (*Anderson*, 328 U.S. at 687-88). The employer’s failure to meet the shifted burden results in an award of damages to the plaintiff, even if the amount of the award is only approximate. *Ihegword*, 555 F. App’x at 374 (quoting *Harvill*, 433 F.3d at 441).

Recently, the Fifth Circuit decided an appeal that is instructive here. In *Fairchild v. All Am. Check Cashing, Inc.*, 815 F.3d 959, 963, 964 (5th Cir. 2016), the plaintiff sought payment for overtime hours that she allegedly worked during two periods when she was classified as an hourly employee. The employer's policies prohibited hourly employees from working overtime without prior approval and required that all employees accurately report the hours they worked in its timekeeping system. *Id.* at 963. The plaintiff neither sought authorization to work the overtime in question nor reported it through her employer's timekeeping system. *Id.* at 965. In fact, according to her testimony, she intentionally did not report the unauthorized overtime because her employer prohibited it. *Id.*

The district court did not accept the plaintiff's assertion, as to the first period claimed, that her employer had knowledge that she worked overtime on the basis of computer usage reports. *Id.* The plaintiff did not offer computer usage reports in support of the hours she allegedly worked during the second period, and the district court found that the only evidence of overtime work was her own unsubstantiated testimony. *See id.*

The Fifth Circuit affirmed, stating that the plaintiff could not prevail on the overtime claim for hours that she deliberately failed to report in violation of her employer's policy and that her employer had no reason to believe she had worked. *See id.* The Fifth Circuit also found that the district court did not clearly err in

finding that the plaintiff failed to produce sufficient evidence that she had worked any overtime. *See id.* On the insufficiency of evidence, the Fifth Circuit compared the case to *Ihegword*, an unpublished case in which the court had found that “unsubstantiated assertions speculated from memory” were not enough to sustain an overtime claim. *See id.* (quoting *Ihegword*, 555 F. App’x at 375). In the *Ihegword* opinion, the Fifth Circuit agreed with the district court that “an unsubstantiated and speculative estimate of uncompensated overtime does not constitute evidence sufficient to show the amount and extent of that work as a matter of just and reasonable inference.” *Ihegword*, 555 F. App’x at 375.

Here, Defendant moved for summary judgment in its favor on the basis that Plaintiff cannot prove that she performed work for which she was not properly compensated. Defendant submitted time records for the weeks of March 25, 2013, through February 8, 2015, and most of the following weeks through June 7, 2015.²¹ By the court’s count, the records report work hours for 112 weeks.²² They record more than forty but less than fifty hours of work during forty-one weeks, fifty or more but less than sixty during twenty-one weeks, and sixty or more during nine weeks.²³

²¹ *See* Doc. 43-5, Ex. E to Def.’s Mot. for Summ. J., Pl.’s time records.

²² *See id.*

²³ *See id.*

Plaintiff takes issue with the Defendant's time records, alleging that they are not accurate and they are not complete. On the first issue, Plaintiff contends that Defendant's time records were not accurate and underreported the hours that she worked. Plaintiff's deposition testimony leaves no question that the records were inaccurate.

Plaintiff testified that, when she transitioned from contract worker to IT Training Manager, her then-supervisor, David Jordan ("Jordan") told her, "Your time is not going to be billed back to any projects or you're not going to be working really on any projects, so it doesn't really matter what you put in there."²⁴ Later in her deposition, she reiterated that she was told that it did not matter what category or task she selected or how many hours she reported in the time-keeping system because she was a manager and was not being paid by the hour.²⁵

Although she was aware, at least from the beginning of 2014, that she was required to report accurately the time she worked, she admitted that she "just randomly" put in how many hours she had worked, for some weeks less than forty and for others forty or more.²⁶ She further impeached the accuracy of her time reporting:

²⁴ Doc. 48-4, Ex. 20 to Pl.'s Resp. to Def.'s Mot. for Summ. J., Pl.'s Dep. p. 206.

²⁵ See *id.* p. 210.

²⁶ See *id.* pp. 210; Doc. 43-2, Ex. B to Def.'s Mot. for Summ. J., Pl.'s Dep. pp. 220-22.

This is not a true, you know, recording of anybody's hours. This is just a project management tracking system. These don't get fed into the, the time and attendance program that actually pays people. So this is simply just to track how much is – hours are spent on projects. It's not meant to pay anybody.

....

Again to me this is, this is me filling in numbers to make sure that management doesn't get on a report [sic]. Doesn't have anything to do with how many hours I'm actually working.²⁷

Because Plaintiff's time reporting "[did not] have anything to do with how many hours [she] actually work[ed],"²⁸ none of the records are reliable, not even for the weeks in which she reported working more than forty hours. Even though Plaintiff estimated that she worked "more than sixty hours a week on average," she was unable even to verify the accuracy of the few sixty-plus-hour weeks (nine out of 112) that she did report.²⁹ In fact, she testified, "I couldn't tell you whether they're accurate or not based upon – I think they would be closer than the previous time."³⁰ Therefore, by her

²⁷ Doc. 48-4, Ex. 20 to Pl.'s Resp. to Def.'s Mot. for Summ. J., Pl.'s Dep. pp. 211-12.

²⁸ *Id.* p. 212.

²⁹ *See id.* pp. 206, 210-12.

³⁰ *Id.* p. 211; *see also* Doc. 43-2, Ex. B to Def.'s Mot. for Summ. J., Pl.'s Dep. p. 218 (stating that "they may not be entirely accurate"). Plaintiff explained that she had a reason other than accuracy for reporting more hours: she wanted to alert her supervisor

own doing and according to her own admission, the time records were completely inaccurate.

With regard to their completeness, Plaintiff argues that the relevant time frame is March 31, 2012, through October 15, 2015,³¹ not March 25, 2013, through June 7, 2015. The court assumes Plaintiff is correct and considers all evidence of the hours she worked during the longer period. Because the submitted time records are incomplete,³² they are inadequate as well as inaccurate. Having successfully established that Defendant's time records are both inaccurate and inadequate, Plaintiff bears the burden of producing "sufficient evidence to show the amount and extent of [her] work as a matter of just and reasonable inference." *Ihegword*, 555 F. App'x at 374; *Rosales*, 149 F. App'x at 246.

The evidence includes a few statements about Plaintiff's working hours. Jordan testified that he did not instruct Plaintiff on what her working hours

that she was performing the work of two employees. *See* Doc. 48-4, Ex. 20 to Pl.'s Resp. to Def.'s Mot. for Summ. J., Pl.'s Dep. p. 210.

³¹ According to Plaintiff, the relevant time period began three years prior to the filing of the suit. This is based on her assertion that Defendant acted willfully in misclassifying her position as exempt. Although the court does not enter a ruling on willfulness, the court assumes, for purposes of this memorandum, that a three-year statute of limitations applies.

³² For the time period following the week of June 7, 2015, Plaintiff stopped submitting time sheets. *See* Doc. 43-1, Ex. A to Def.'s Mot. for Summ. J., Soanes' Dep. p. 19; Doc. 48-8, Ex. 24 to Pl.'s Resp. to Def.'s Mot. for Summ. J., Final Written Warning p. 2.

should be when she became the IT Training Manager.³³ Soanes, who followed Jordan as Plaintiff's supervisor, stated in a July 2015 Performance Improvement Plan that Plaintiff had worked from home without informing Soanes, which was unacceptable, but that working from home was acceptable with advance approval.³⁴ At her deposition, Plaintiff testified that her office hours varied, depending on her training responsibilities.³⁵

Plaintiff intimated, in her deposition testimony, that she could verify the hours she worked by comparing the time sheets with her calendar.³⁶ When asked whether she had done so, Plaintiff responded, "I don't think I did, no."³⁷ Regardless, Plaintiff did not submit her calendar or any evidence of hours worked based on documentation in her calendar. Rather, as evidence of the hours she actually worked, Plaintiff submitted a list of the dates and times at which she sent emails,³⁸ four GPS (global positioning system) timelines,³⁹ and

³³ See Doc. 42-4, Ex. D to Def.'s Resp. to Pl.'s Mot. for Partial Summ. J., Jordan's Dep. p. 33.

³⁴ See Doc. 48-7, Ex. 23 to Pl.'s Resp. to Def.'s Mot. for Summ. J. p. 3.

³⁵ See Doc. 42-2, Ex. B to Def.'s Resp. to Pl.'s Mot. for Partial Summ. J., Pl.'s Dep. p. 196.

³⁶ See Doc. 43-2, Ex. B to Def.'s Mot. for Summ. J., Pl.'s Dep. p. 219.

³⁷ *Id.*

³⁸ See Doc. 48-9, Ex. 25 to Pl.'s Resp. to Def.'s Mot. for Summ. J., Email List.

³⁹ See Doc. 48-10, Ex. 26 to Pl.'s Resp. to Def.'s Mot. for Summ. J., Timelines.

the deposition testimony of her mother.⁴⁰ Defendant challenges the admissibility of all three of these exhibits. Defendant argues that the first two exhibits are not authenticated, contain hearsay, and are not relevant and that the third includes testimony that was not based on personal knowledge.

Although Plaintiff did not provide an affidavit to authenticate the first two exhibits, the court finds that the issue could be resolved quite easily. The list and the timelines appear to be created and/or generated by Plaintiff, and she should be able to affirm that they are what she claims them to be. *See* Fed. R. Evid. 901(a). The list and timelines do not contain hearsay, as they are submitted to indicate hours worked rather than the actual truth of their contents. *See* Fed. R. Evid. 801(c). They are relevant to the amount and extent of Plaintiff's work. *See* Fed. R. Evid. 401. Plaintiff's mother's deposition testimony is admissible with regard to her personal observations, but all speculations therein are not competent summary judgment evidence. Defendant's objections to the email list and timelines are **OVERRULED**. Defendant's objections to Plaintiff's mother's deposition testimony is [sic]

The court turns to the content of these exhibits. The email list included five groups of consecutive days during which Plaintiff sent emails over certain time

⁴⁰ *See* Doc. 48-11, Ex. 27 to Pl.'s Resp. to Def.'s Mot. for Summ. J., Nancy Kirk's Dep. Excerpts.

periods.⁴¹ The first set covered the dates September 18 and 19, 2013.⁴² On those days, the email times spanned six hours and one hour and forty-one minutes respectively.⁴³ The second set covered March 15, 2014, to March 17, 2014, and included a Saturday and a Sunday.⁴⁴ The email times spanned one hour and thirty-two minutes on Saturday, about two hours on Sunday, and about three hours and forty-five minutes on Monday.⁴⁵

The third set covered Friday, Saturday, and Sunday, August 8, 2014, through August 10, 2014.⁴⁶ The email times spanned thirty-nine minutes on Friday, six hours and thirty-nine minutes on Saturday, and just under ten hours on Sunday.⁴⁷ The fourth set covered November 5, 2014, through November 6, 2014, and included blocks of email time that together totaled six hours and eleven minutes for the two days.⁴⁸ The fifth set covered May 4, 2015, through May 5, 2015, and included blocks of email time that together totaled about twelve hours for the two days.⁴⁹

⁴¹ See Doc. 48-9, Ex. 25 to Pl.'s Resp. to Def.'s Mot. for Summ. J., Email List.

⁴² See *id.* p. 5.

⁴³ See *id.*

⁴⁴ See *id.* p. 4.

⁴⁵ See *id.*

⁴⁶ See *id.* p. 3.

⁴⁷ See *id.*

⁴⁸ See *id.* p. 2.

⁴⁹ See *id.* p. 1.

The times recorded for sent emails during those sets of dates were not all during typical business hours. However, nothing indicates that Plaintiff did any other work on these days and nothing rules out that she adjusted the hours she worked on other days to compensate for early morning, evening, or weekend hours worked. The total number of hours for each set of consecutive days did not even come close to forty hours, a weekly prerequisite for working overtime. In fact, the most hours recorded in any of the sets were a little more than seventeen.

Similarly, the GPS timelines are snapshots of single days and hardly suggest that Plaintiff worked more than forty hours in any given week. The timeline dates are Monday, December 9, 2013; Monday, April 21, 2014; Thursday, September 11, 2014; and Tuesday, March 10, 2015.⁵⁰ They suggest that Plaintiff was at “Work” for thirteen hours and thirty-eight minutes, eleven hours and fourteen minutes, eleven hours and twenty-four minutes, and seven hours and eleven minutes respectively.⁵¹ None of these days are in the same week as any of the other three or as any of the dates on the email list. Evidence of one long work day on its own does not allow an inference of a workweek in excess of forty hours.

Not only do these two exhibits fail to raise the question whether Plaintiff worked more than forty

⁵⁰ See Doc. 48-10, Ex. 26 to Pl.’s Resp. to Def.’s Mot. for Summ. J., Timelines.

⁵¹ See *id.*

hours in any week, collectively they cover only nine weeks out of the 185 weeks Plaintiff claims to be the relevant period. No reasonable jury could draw the conclusion from this evidence that Plaintiff worked sixty hours per week on average. Moreover, Plaintiff admitted in her deposition that knowing when the first and last emails were sent would not account for breaks, lunch, doctor appointments, and any other periods when she was not working during the day.⁵²

The final piece of evidence Plaintiff offers in support of her claim that she worked more than forty hours a week is the deposition testimony of her mother, Nancy Kirk (“Nancy”).⁵³ Nancy testified that she observed Plaintiff working periodically during visits to Nancy’s home on weekday evenings.⁵⁴ Nancy estimated that Plaintiff would appear to be working on and off from 7:00 p.m. to 11:00 p.m. or midnight.⁵⁵ Plaintiff also used Nancy’s land-line telephone on occasion for conference calls in the early morning hours.⁵⁶

Nancy admitted that Plaintiff never told her how many hours per week on average that she worked and that Nancy had no way of knowing whether Plaintiff

⁵² See Doc. 43-2, Ex. B to Def.’s Mot. for Summ. J., Pl.’s Dep. pp. 212-14.

⁵³ See Doc. 48-11, Ex. 27 to Pl.’s Resp. to Def.’s Mot. for Summ. J., Nancy Kirk’s Dep.

⁵⁴ See *id.* pp. 19-20.

⁵⁵ See *id.* p. 20.

⁵⁶ See *id.* pp. 38-39.

took any personal time when she was working at Defendant's offices.⁵⁷ Nancy said that Plaintiff emailed to notify Nancy when Plaintiff got home late from the office.⁵⁸ Nancy also admitted that she did not have personal knowledge of what Plaintiff was doing when she was on the computer at Nancy's house, having actually seen identifiable work on the computer screen only four or five times.⁵⁹ Nancy said that she would walk into the room of her house where Plaintiff was on the computer or telephone "off-and-on."⁶⁰

Nancy's testimony supports a finding that Plaintiff worked outside of normal business hours and worked away from the office at times. However, it lacks the specificity necessary to determine when those hours may have put her over forty hours of work in any given week. To extrapolate that Plaintiff worked any overtime, much less twenty hours of overtime per week, from Nancy's testimony is purely to speculate.

Plaintiff's attempt at reconstructing the actual hours she worked fails. Her snapshots of hours worked on a few days and her mother's observations of Plaintiff on unspecified evenings and mornings does not lead to a just and reasonable inference that Plaintiff worked more than forty hours during any week of her

⁵⁷ See *id.* p. 21; Doc. 55-3, Ex. 3 to Def.'s Reply in Support of its Mot. for Summ. J., Nancy's Dep. pp. 40-41.

⁵⁸ See Doc. 55-3, Ex. 3 to Def.'s Reply in Support of its Mot. for Summ. J., Nancy's Dep. p. 40.

⁵⁹ See *id.* pp. 37-38.

⁶⁰ *Id.* p. 37.

employment. Therefore, Plaintiff cannot maintain her suit for the payment of overtime work. As this recommendation is dispositive of the case, the court need not address the other disputes of the parties.

IV. Conclusion

Based on the foregoing, the court **RECOMMENDS** that Plaintiff's motion be **DENIED** and Defendant's motion be **GRANTED**.

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties who have fourteen days from the receipt thereof to file written objections thereto pursuant to Federal Rule of Civil Procedure 72(b) and General Order 2002-13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk electronically. Copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, 515 Rusk, Suite 7019, Houston, Texas 77002.

SIGNED in Houston, Texas, this 4th day of April, 2016.

/s/ Nancy Johnson

U.S. MAGISTRATE JUDGE

45a

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20601

CHERYL KIRK,
Plaintiff-Appellant

v.

INVESCO, LIMITED,
Defendant-Appellee

Appeal from the United States District Court for the
Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed Aug. 23, 2017)

(Opinion 7/6/17, 5 Cir., ___, ___ F.3d ___)

Before KING, PRADO, and SOUTHWICK, Circuit
Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a
Petition for Panel Rehearing, the Petition for
Panel Rehearing is DENIED. No member of the
panel nor judge in regular active service of the
court having requested that the court be polled on
Rehearing En Banc (FED R. APP. P. and 5TH CIR.

R. 35), the Petition for Rehearing En Banc is DENIED.

- () Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edward C. Prado
UNITED STATES CIRCUIT JUDGE
