

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-2464

ZOE HOLLIS, individually and on behalf of all
others similarly situated, Plaintiff - Appellant,

v.

R&R RESTAURANTS, INC, an Oregon corporation
doing business as Sassy's; STACY MAYHOOD; IAN
HANNIGAN; FRANK FAILLACE, Defendants -
Appellees.

Filed November 18, 2025

Before: MCKEOWN, PAEZ, and SANCHEZ, Circuit Judges

OPINION

PAEZ, Circuit Judge:

Zoe Hollis, a dancer at a Portland strip club called Sassy’s, sued the club’s owners and managers under the Fair Labor Standards Act (“the FLSA” or “the Act”) for misclassifying its dancers as independent contractors and violating corresponding wage and hour provisions. After Hollis filed the complaint, Frank Faillace—a partner and manager of both Sassy’s and another club called Dante’s— canceled an agreement for Hollis to perform at a weekly variety show at Dante’s. In emailing Hollis to cancel her performance, Faillace cited the suit against Sassy’s, explaining his intent to protect Dante’s from legal liability. After receiving Faillace’s email, Hollis amended the complaint to allege that Faillace’s decision to bar Hollis from performing at Dante’s constituted retaliation in violation of the FLSA.

The district court granted summary judgment to the defendants, reasoning that the FLSA only provides a private right of action for retaliation committed by current employers. In other words, the district court concluded that Hollis must have been employed by Dante’s when Faillace canceled Hollis’s scheduled performance to have a cause of action for retaliation. We reverse.

In *Arias v. Raimondo*, we drew on the Act’s broad language and remedial purpose to hold that the

plaintiff could bring an FLSA retaliation claim against his former employer's attorney for seeking to have him deported to thwart his wage and hour lawsuit against the employer. 860 F.3d 1185, 1192 (9th Cir. 2017). In this opinion, we further clarify the boundaries of the FLSA's private right of action for retaliation. While the Act requires an underlying employment relationship, it covers retaliation committed by the employer or "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. §§ 215(a)(3), 216(b), 203(d). In the context of retaliation, the phrase "indirectly in the interest of an employer" does not require an agency relationship with the actual employer or the conferral of any direct benefit to the employer.

I.

Because we review the district court order granting the defendants' summary judgment motion, we recount the facts in the light most favorable to Hollis. *See Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 662 (9th Cir. 2021).

Hollis prefers the gender-neutral pronouns "they" and "them," so we follow that preference throughout this opinion. Hollis danced at Sassy's approximately three to five times a week from June 2017 until March 2019, pursuant to a contract purporting to designate them an independent contractor. No special training, licenses, experience, or skills were required to dance at Sassy's, although dancers briefly auditioned for a manager. A manager provided Hollis with a weekly schedule every Sunday, based partly on Hollis and the other dancers' interest and availability. Hollis was allowed to work for other clubs during the same period and did so for a couple of months.

Sassy's controlled customer entry, set minimum prices for dances, required dancers to rotate between the stage and the floor, and hired and managed DJs, bartenders, and bouncers. Sassy's controlled the music, although Hollis and the other dancers could make selections from a list of pre-approved songs when no DJ was present. Sassy's required dancers on stage to remove their clothing in a specified order: "teasing" during the first song, removing their top during the second, and removing their bottoms during the third. Sassy's set minimum prices that dancers could charge for certain dances and required customers to tip dancers on stage at least one dollar, although the one-dollar rule was often not enforced.

Hollis's labor at Sassy's was governed by a robust set of rules, violations of which could result in termination. For example, dancers had to maintain their hair, makeup, and physical appearance to certain standards, and Hollis's schedule was reduced because they chose to wear their natural hair instead of a wig. Other rules concerned dancers' interactions with customers, requiring that any issues or disputes be handled only by security or bar staff, as well as dancers' handling of money, requiring them to keep one-dollar bills in bundles of twenty.

Hollis was required to pay "house fees" to Sassy's for each shift. Hollis and the other dancers also tipped the club bartenders, DJs, and bouncers, who would "make working [there] miserable" otherwise. Hollis, however, did not pay for any dance poles, facilities, utilities, advertising or other bills for Sassy's, nor did Hollis have management responsibilities.

On two occasions, Hollis also performed a pole dance at a weekly variety showcase called “Sinferno Cabaret,” hosted by an adult entertainment club called Dante’s. On June 22, 2021, Hollis received an email confirming their scheduled slot to perform at Dante’s for a third time, on July 25. The email also solicited Hollis’s requests for future performance slots at Dante’s.

Six days later, Hollis filed a collective action under 29 U.S.C. § 216(b) against R&R Restaurants, Stacy Mayhood, and Ian Hannigan—the business entity that operates Sassy’s and two of its owner-managers—alleging that Sassy’s misclassified its dancers as independent contractors instead of employees to avoid paying minimum wage and overtime. The complaint also alleged that the defendants were taking illegal kickbacks in the form of “house fees” and unlawfully retaining dancers’ tips.

On July 19, 2021, Faillace emailed Hollis to cancel their scheduled performance at Dante’s, citing the lawsuit against Sassy’s. In pertinent part, the email read:

As you may or may not remember, I am one of the partners in Sassy’s. A few days ago we were served papers there for a class action lawsuit, of which you are the primary plaintiff.

That makes things complicated. Especially since it is regarding the claim of being an employee versus an independent contractor as stated in the contract with Sassy’s. Since you would be performing at Dante’s as an

independent contractor, that puts another business that I'm a partner in at risk for a lawsuit. Therefore, we have been strongly advised to not have you perform at Dante's.

The email goes on to explain that the decision was unrelated to Hollis's activism concerning racial and cultural bias at strip clubs. Rather, Faillace expressed "shar[ing] most of [Hollis's] goals." "But when it comes to performers being independent contractors versus employees, we disagree." He wrote that "[t]his is a serious lawsuit [for] which the legal bills alone . . . could easily put Sassy's (or any of our other clubs) out of business." Finally, he wrote, "I'm sorry that you won't be able to perform at Dante's, and I'm sorry that this has ended up this way."

Weeks later, Hollis amended the complaint. The First Amended Complaint ("FAC") added Faillace to the misclassification and wage-related claims at Sassy's and alleged that Faillace's cancellation of Hollis's scheduled performance at Dante's constituted retaliation in violation of the FLSA and Oregon state law. The defendants filed a motion for summary judgment and, after the district court initially held the motion in abeyance to accommodate discovery disputes, filed a renewed motion for summary judgment.

On November 2, 2023, a magistrate judge issued findings and recommendations on the defendants' summary judgment motion. He found that Hollis's wage-related claims were barred by the applicable statute of limitations. He also concluded that although Hollis's FLSA retaliation claim against Faillace was timely, it "fail[ed] as a matter of law" because undisputed evidence showed that Hollis was

“not an employee of Dante’s or Faillace’s at the time of the alleged retaliation.” Lastly, because there were no other remaining federal-law claims, the magistrate judge recommended dismissing the state-law retaliation claims without prejudice.

On March 26, 2024, the district court adopted the magistrate judge’s findings and recommendations in full and granted the defendants’ summary judgment motion. Notably, the district court adopted the magistrate judge’s determination that Hollis could not bring a successful retaliation claim without establishing “that [they were] an employee of Dante’s.” On appeal, Hollis challenges only the district court’s decision on the FLSA retaliation claim.

II.

We review *de novo* a district court’s grant of summary judgment. *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1041 (9th Cir. 2017). “Summary judgment is appropriate only when ‘there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.’” *Id.* (quoting Fed. R. Civ. P. 56(a)). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

III.

We first hold that the district court erred in requiring Hollis to establish that an employee-employer relationship existed with Dante’s at the time of the alleged retaliation. The defendant in an FLSA retaliation action need not be the actual employer and the plaintiff need not have been

employed by the actual employer when the retaliation occurred. *See Arias*, 860 F.3d at 1191–92. Rather, the defendant need only have “act[ed] . . . indirectly in the interest of an employer in relation to an employee” in committing the alleged retaliation. 29 U.S.C. § 203(d). Faillace’s undisputed conduct satisfies this requirement.

Next, an FLSA retaliation claim requires an underlying employment relationship, *see id.* §§ 215(a)(3), 216(b) (referencing “an employee”), but the employee-employer relationship at issue here is the one between Hollis and Sassy’s, over which Hollis filed this lawsuit and was subsequently subjected to retaliation. We leave it to the district court to determine on remand whether Hollis’s work at Sassy’s satisfied our “economic realities” test for establishing employee status. *See, e.g., Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997). In ascertaining whether Hollis was an employee of Sassy’s, it is not relevant that any FLSA wage and hour claims based on the alleged misclassification are time-barred.

Finally, we leave to the district court or trier of fact to determine on remand whether Faillace’s acts in canceling Hollis’s scheduled performance and barring them from future work at Dante’s constituted retaliation. The defendants argue that Faillace was merely protecting his business interests at Dante’s from a similar lawsuit by Hollis, but this argument fails. An FLSA defendant cannot be allowed to take retaliatory actions against an FLSA plaintiff to limit legal liability created by the defendant’s alleged violations of the Act.

We discuss each of these issues below.

A.

The district court concluded that a claim under the FLSA retaliation provision, 29 U.S.C. § 215(a)(3), requires the plaintiff to have been employed by the retaliator at the time of the retaliation. Not so. Interpreting § 215(a)(3) in *Arias*, we held that an employee may bring a retaliation claim (1) against individuals other than the actual employer (2) for retaliatory conduct that occurred after the employment terminated. *See* 860 F.3d at 1192. Faillace argues that he nonetheless cannot be held liable because he was not acting as an agent of Sassy's in terminating the agreement for Hollis to perform at Dante's. But the statute only requires Faillace to have been acting "indirectly in the interest of" Sassy's. *See* 29 U.S.C. § 203(d). Hollis argues that Faillace satisfied this requirement by terminating the agreement for Hollis to perform because of the lawsuit they filed against Sassy's.

The relevant statutory text provides: "it shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter." *Id.* § 215(a)(3). Section 216(b) then creates a private right of action against any "employer" who violates § 215(a)(3), and § 203(d) defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee."

In *Arias*, we held that the employer's attorney, Raimondo, could be held liable for retaliating against his client's former employee, Arias. 860 F.3d at 1187, 1192. Arias, who was undocumented, sued his former employer for workplace violations,

including the failure to provide overtime pay and breaks for rest and meals. *Id.* at 1187. As the case approached trial, Raimondo repeatedly contacted U.S. Immigration and Customs Enforcement (“ICE”) to seek Arias’s deportation. *Id.* at 1187–88. In holding that Arias had stated a viable FLSA retaliation claim against Raimondo, we emphasized the statute’s “remedial and humanitarian” purpose. *Id.* at 1192 (quoting *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944)). We also emphasized the FLSA’s broad definition of “employer” as evincing clear congressional intent to extend the reach of § 215(a)(3) beyond “actual employers.” *Id.* at 1191–92. Drawing on the analogous domain of Title VII, we explained that a rule limiting retaliation claims to adverse employment actions would frustrate the purpose of the statute because employers could “effectively retaliate against an employee by taking actions not directly related to his employment.” *Id.* at 1191 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006)).

In sum, while the FLSA retaliation provision only protects employees, *Arias* held that the employment relationship need not be current, the retaliator need not be the actual employer, and the retaliation need not take the form of an adverse employment action.

It is undisputed that Faillace was an owner and manager of Sassy’s and that Hollis cannot prevail on the retaliation claim unless they were employed by Sassy’s. Assuming that Hollis establishes an employer-employee relationship with Sassy’s on remand, Faillace was Hollis’s employer under the relevant legal standard. Defendants nonetheless argue that Faillace was not acting as Sassy’s agent

when he emailed Hollis to cancel the performance agreement at Dante's. Rather, they assert that "Faillace acted solely in his capacity as the proprietor of Dante's" in barring Hollis from performing there. But this argument misunderstands the statute, which does not require that the retaliator directly benefit the actual employer nor act under that employer's instructions to be considered an "employer" under 29 U.S.C. § 203(d). Rather, the FLSA only requires that the retaliator act "indirectly in the interest of an employer in relation to an employee." *Id.*

The FLSA defines "employer" to include (1) the actual employer, (2) persons acting "directly in the interest" of that employer, and (3) persons acting "indirectly in the interest" of the employer. *See id.* As noted above and like other courts, we identify the actual employer or employers through an economic realities test. *See, e.g., Torres-Lopez*, 111 F.3d at 639. The second category, consisting of persons acting "directly in the interest" of the employer, is also conceptually straightforward. For example, in *Arias*, Raimondo acted directly in the interest of Arias's former employer because he was the employer's attorney and agent, and because deporting Arias would have directly benefited the employer by impeding Arias's lawsuit. *See* 860 F.3d at 1187. In that scenario, Raimondo was retained by the employer to defend against the very lawsuit that his retaliatory actions would have thwarted. *Id.*

To act "*indirectly* in the interest" of the employer must then capture some lesser nexus than the nexus between Raimondo and Arias's former employer. Even if Faillace were not an owner-manager of Sassy's, his conduct would fit into this

third category. The defendants argue that Faillace did not act to directly benefit Sassy's nor did he act as an agent of Sassy's, but, under the statute, Hollis did not need to establish that he acted in such a manner. Hollis only needed to show that Faillace acted indirectly in the interest of Sassy's via the allegedly retaliatory conduct. Hollis adequately alleged that Faillace did so by cancelling the agreement for Hollis to perform at Dante's because of Hollis's lawsuit against Sassy's. This constituted an indirect effort to minimize any liability of Sassy's as well as Dante's. Moreover, Faillace's action allegedly penalized Hollis for filing the lawsuit and would dissuade a reasonable person in Hollis's position from filing a lawsuit in the first place. To satisfy the low bar of "acting indirectly in the interest of [the] employer," there is no requirement that Faillace act under instructions from the rest of the Sassy's partners or confer a direct benefit on Sassy's.

In defining an employer to include "any person acting directly or indirectly in the interest of the employer in relation to an employee" Congress ensured that a private right of action for retaliation under 29 U.S.C. § 216(b) would reach any defendant who violated the statute's prohibition on retaliating against an employee because of their protected activity. This interpretation conforms with our observation in *Arias* that the statutory definition of "employer" has a "clear[]" broadening effect. 860 F.3d at 1191–92. Moreover, the language referring to "any person acting directly or indirectly in the interest of the employer" was included when the Act was enacted in 1938 and stayed in place when the definition of "employer" was amended in 1974. See Fair Labor Standards Act of 1938, Pub. L. No. 75-

718, § 3, 52 Stat. 1060; Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55, 58. It was not a congressional accident or relic, but carries a specific meaning which we must recognize.¹

B.

As we noted above, the FLSA only protects “employees.” *See* 29 U.S.C. § 215(a)(3) (prohibiting discrimination “against any employee because such employee has filed any complaint . . . related to this chapter”); *see also* *Arias*, 860 F.3d at 1190 (“[A] person who

1.

The defendants argue that Hollis cannot establish an employer-employee relationship with Sassy’s because any misclassification claims are time-barred. This is patently incorrect. There is

¹ Other courts have noted that the FLSA’s prohibition on retaliation under § 215(a)(3) extends to “any person,” while the private right of action under § 216(b) only reaches an “employer.” *See Kim v. Lee*, 576 F. Supp. 3d 14, 27–28 (S.D.N.Y. 2021), *aff’d*, No. 22-61, 2023 WL 2317248 (2d Cir. Mar. 2, 2023). But this difference does not appear to indicate congressional intent to limit the possible defendants in a private action. Rather, it reflects the fact that a private right of action under § 216(b) only extends to activities closely related to an employer (violations of wage and hour, retaliation, and tip retention provisions), while the list of prohibitions under § 215(a) also includes activities unrelated to the employer (e.g., prohibiting commerce involving goods produced in violation of the FLSA). *Compare* 29 U.S.C. § 215(a) *and id.* § 216. never worked for the employer does not fit anywhere in the FLSA.”). Because Hollis claims that Faillace retaliated against them for filing a protected complaint concerning their employment at Sassy’s, they must establish an employment relationship with Sassy’s.

nothing in the FLSA's text or purpose that requires plaintiffs who were misclassified as independent contractors to prevail on a misclassification claim as a predicate condition to bringing a retaliation action or claim. Rather, the meaning of the word "employee" is defined by the Act and well developed by our precedents. 29 U.S.C. § 203(e), (g); *see, e.g., Torres-Lopez*, 111 F.3d at 638–39.

Under 29 U.S.C. § 203(e), "employee" means any individual employed by an employer." Section 203(g) further advises that "[e]mploy" includes to suffer or permit to work." To determine whether an individual is an employee or an independent contractor under the FLSA, this court has applied the economic realities test, which provides that "employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979) (quoting *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947)). In applying the economic realities test, we consider all factors relevant to the circumstances of the case. *Torres-Lopez*, 111 F.3d at 639.

We have previously outlined nonexhaustive factors relevant to identifying an employment relationship for FLSA purposes. For instance, in *Real*, we considered:

- 1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
- 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- 3) the alleged employee's investment in equipment or materials required

for his task, or his employment of helpers;
4) whether the service rendered requires a special skill;
5) the degree of permanence of the working relationship; and
6) whether the service rendered is an integral part of the alleged employer's business.

603 F.2d at 754. And in *Bonnette v. California Health and Welfare Agency* we considered whether the employer “(1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.” 704 F.2d 1465, 1470 (9th Cir. 1983).

Only economic realities determine employee status, not the intent of the parties or contractual characterizations. *See Real*, 603 F.2d at 755. “The ultimate determination must be based ‘upon the circumstances of the whole activity.’” *Bonnette*, 704 F.2d at 1470 (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)). As long as Hollis can show that their work at Sassy's satisfied the economic realities test, then it is no obstacle to their retaliation action that any misclassification claim is time barred.

Another feature of the FLSA also supports our understanding that a plaintiff need not prevail on a misclassification claim to establish an employer-employee relationship. The FLSA explicitly protects individuals from retaliation for “fil[ing]” a complaint. 29 U.S.C. § 215(a)(3). That complaint need not result in a favorable judgment. In fact, the

Supreme Court has interpreted § 215(a)(3)'s reference to "fil[ing] any complaint" to protect complaints that are merely informal and oral in nature. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 17 (2011). Imposing a requirement that the plaintiff *be successful* in separate *litigation* on the underlying protected complaint is therefore inconsistent with the Supreme Court's interpretation of the FLSA's requirements for maintaining a retaliation claim.

Finally, the defendants argue that "the FLSA statute of limitations bars all aspects of a claim, including any underlying argument supporting it." But the defendants do not support this argument with any relevant authority. The statute of limitations on a legal claim for damages does not bar a plaintiff from asserting the truth of that claim as a factual matter in order to prevail in a separate action or claim that is not time barred.

2.

Because the district court did not decide whether Hollis's work at Sassy's satisfied the economic realities test, we remand that issue so that the court may address it in the first instance or allow any material factual disputes to be resolved by the trier of fact. *See Bonnette*, 704 F.2d at 1469 (noting that whether a party is an "employer" for FLSA purposes is a legal question).

Several of our sister circuits have applied the economic realities test to find that exotic dancers were employees of the clubs where they worked. Because these courts applied factors similar or identical to those outlined in *Real* and evaluated circumstances closely mirroring Hollis's work arrangement at Sassy's, they may provide some

guidance to the district court on remand. *See, e.g., McFeeley v. Jackson St. Ent., LLC*, 825 F.3d 235, 241–44 (4th Cir. 2016); *Verma v. 3001 Castor, Inc.*, 937 F.3d 221, 229–32 (3d Cir. 2019); *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 326–29 (5th Cir. 1993); *see also Harris v. Diamond Dolls of Nevada, LLC*, 521 F. Supp. 3d 1016, 1023–24 (D. Nev. 2021). However, the economic realities test is fact-bound, requiring application of all relevant factors to the particular facts of the plaintiff’s work arrangement. *Torres-Lopez*, 111 F.3d at 639. We express no views on the merits of this issue.

C.

Because we remand this case to the district court for further proceedings, we address a final issue that the defendants raise in support of the district court’s judgment. Namely, the defendants contend that Faillace’s conduct in canceling Hollis’s scheduled performance at Dante’s and refusing to contract with Hollis for further performances there did not constitute retaliation as a matter of law because it was a legitimate business decision to limit Dante’s liability. Taking the facts in the light most favorable to Hollis at this stage of the proceedings, we disagree.

1.

The FLSA states that “it is unlawful for any person to discharge or in any other manner discriminate against” a current or former employee because they “filed any complaint under or related to” the FLSA. 29 U.S.C. § 215(a)(3). The retaliatory conduct need not be limited to adverse employment action, and instead covers “adverse action” more generally. *See Arias*, 860 F.3d at 1190–91; *see also Darveau v. Detecon, Inc.*, 515 F.3d 334, 341–43 (4th

Cir. 2008) (A plaintiff asserting FLSA retaliation must show that “(1) he engaged in an activity protected by the FLSA; (2) he suffered adverse action by the employer subsequent to or contemporaneous with such protected activity; and (3) a causal connection exists between the employee’s activity and the employer’s adverse action.”). The statutory language is broad, covering “any other manner” of discrimination against the complaining employee. 29 U.S.C. § 215(a)(3). Conduct constitutes retaliation if it is “harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 57 (stating the standard in the analogous Title VII context).

Conduct that violates the FLSA anti-retaliation provision includes soliciting the former employee’s deportation by ICE, *Arias*, 860 F.3d at 1187–88, as well as informing a prospective employer that an employee had filed a complaint with the Department of Labor, *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 141, 147 (6th Cir. 1977). We have also held that the refusal to renew time-limited employment contracts constituted retaliation in analogous contexts. *See MacIntyre v. Carroll Coll.*, 48 F.4th 950, 954–55 (9th Cir. 2022) (holding that nonrenewal of a golf coach’s limited-term employment contract constituted retaliation under Title IX); *see also Perry v. Sindermann*, 408 U.S. 593, 596–98 (1972) (holding that nonrenewal of a nontenured professor’s one-year contract could constitute retaliation for protected speech).

Finally, at least one district court has ruled that a plaintiff stated a valid FLSA retaliation claim where “the alleged retaliation consists of the

employer's refusal to provide its former employee work as an independent contractor, work that the employer was not contractually obligated to provide, but which the employer indicated would be provided." *Boscarello v. Audio Video Sys., Inc.*, 784 F. Supp. 2d 577, 578–79 (E.D. Va. 2011). As the summary judgment record shows, Hollis had contracted to perform at Dante's Sinferno Cabaret in the past, was scheduled to perform at least once more, and reasonably expected to be able to continue to do so in the future.

Canceling a scheduled work agreement and barring a worker from future contract opportunities cuts the worker off from an income source. It deprives the worker of funds they would otherwise have been able to earn. Refusing to contract with a worker is not categorically less likely to dissuade that worker from making a complaint than termination or demotion. On this record, a trier of fact could reasonably find that Faillace's actions were sufficiently harmful to constitute retaliation.

2.

The defendants argue that Faillace's email to Hollis canceling the performance agreement and barring them from future performances at Dante's constituted a legitimate business decision to protect Dante's from legal liability. As evidence in support of this theory, the defendants point out that Hollis was allowed to continue to provide trainings for the staff of Dante's and Faillace's other clubs.

But this argument—that the cancellation of the performance agreement constituted a “reasonable, protective decision in the absence of legal certainty”—makes little sense. Hollis had already worked at Dante's twice and there was no reason

that a third session would meaningfully increase the club's legal exposure. Moreover, Hollis's work at Dante's was not under the same terms as their work at Sassy's. At Dante's, they performed one brief pole dance within a predesignated time slot during a weekly variety showcase. At Sassy's, they danced for hours, multiple times a week, subject to the club's rules for exotic dancers, who were the main business of that club.

Although employers are not liable for adverse actions motivated by legitimate, nonretaliatory business reasons, such reasons usually include the employee's performance or the needs of the business. *See, e.g., Knickerbocker v. City of Stockton*, 81 F.3d 907, 911 (9th Cir. 1996). The defendants cite no case establishing that an adverse action can be taken against a former employee because of that employee's protected complaint as long as the action was motivated by the desire to avoid future litigation or increased liability from the same employee.

Indeed, a rule allowing employers to evade liability for FLSA retaliation by claiming that they were merely minimizing legal exposure to serve the financial interests of their business would severely weaken the statutory protection. For instance, it would suggest that firing an individual complaining of minimum wage violations is a justified business decision because it limits the backpay or liquidated damages that the employee might recover in a wage and hour suit. FLSA-covered employers cannot take adverse actions against FLSA plaintiffs and then avoid retaliation liability by explaining those actions as attempts to limit legal exposure created by their alleged violations of the Act. In other words, a financial

interest in minimizing liability does not justify bald retaliation.

///

IV.

We reverse the district court's order granting summary judgment to the defendants and remand for further proceedings consistent with this opinion. By their text, the FLSA provisions conferring a private right of action for retaliation, 29 U.S.C. §§ 215(a)(3), 216(d), and 203(d), do not require that the plaintiff be a current employee of the retaliator, but merely require that the retaliator act "indirectly in the interest of" the plaintiff's former employer in relation to the plaintiff. Faillace's conduct satisfies this requirement. On remand, the district court must determine whether Hollis was an employee of Sassy's and whether Faillace's conduct constituted retaliation in violation of the Act. In light of the foregoing, the state law claims are reinstated and can also be addressed on remand.

REVERSED AND REMANDED for further proceedings consistent with this opinion.

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APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 3:21-cv-00965-YY

ZOE HOLLIS, PLAINTIFF
individually and on behalf of all others similarly
situated

v.

R & R RESTAURANTS, INC DBA SASSYS, *et al.*,

DEFENDANTS

Filed: March 26, 2024

JUDGMENT

Based on the Court's ORDER,

IT IS ADJUDGED that this case is TERMINATED. Plaintiff's claims under the Fair Labor Standards are terminated with prejudice, and Plaintiff's state law retaliation claim is dismissed without prejudice.

DATED this 26th day of March, 2024.

/s/ Michael H. Simon
Michael H. Simon
United States
District Judge

24a

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 3:21-cv-00965-YY

ZOE HOLLIS, PLAINTIFF
individually and on behalf of all others similarly
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v.

R & R RESTAURANTS, INC DBA SASSYS, *et al.*,

DEFENDANTS

Filed: March 26, 2024

ORDER

Michael H. Simon, District Judge.

United States Magistrate Judge Youlee Yim You issued Findings and Recommendation in this case on November 30, 2023. Judge You recommended that this Court grant in part Defendants' motion for summary judgment. Specifically, Judge You recommended granting the motion with respect to Plaintiff's wage-related claims under the Fair Labor Standards Act (FLSA) as time barred and FLSA retaliation claim on the merits, and decline supplemental jurisdiction over Plaintiff's state law

retaliation claim and dismiss that claim without prejudice.

Under the Federal Magistrates Act (Act), the Court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1). If a party objects to a magistrate judge’s findings and recommendations, “the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” *Id.*; Fed. R. Civ. P. 72(b)(3).

For those portions of a magistrate judge’s findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152 (1985) (“There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate’s report to which no objections are filed.”); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*) (holding that the court must review *de novo* magistrate judge’s findings and recommendations if objection is made, “but not otherwise”). Although in the absence of objections no review is required, the Magistrates Act “does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard.” *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Rule 72(b) of the Federal Rules of Civil Procedure recommend that “[w]hen no timely objection is filed,” the Court review the magistrate judge’s recommendations for “clear error on the face of the record.”

Plaintiff timely filed an objection. Plaintiff argues that Judge You erroneously concluded that Plaintiff’s wage-related claims under the FLSA are

time barred and that the Court should grant summary judgment against Plaintiff's claim for FLSA retaliation because Plaintiff is not an "employee" under the statute. Plaintiff, however, merely rehashes her arguments presented before Judge You. Objections that merely restate previously presented arguments, however, are improper. *See, e.g., El Papel LLC v. Inslee*, 2021 WL 71678, at *2 (W.D. Wash. Jan. 8, 2021) ("Because the Court finds that nearly all objections are merely a rehash of arguments already raised and decided upon by the Magistrate Judge, the Court will not address each objection here."); *Eagleman v. Shinn*, 2019 WL 7019414, at *4 (D. Ariz. Dec. 20, 2019) ("[O]bjections that merely repeat or rehash claims asserted in the Petition, which the magistrate judge has already addressed in the [Report and Recommendation], are not sufficient under Fed. R. Civ. P. 72."); *Shiplot v. Veneman*, 620 F. Supp. 2d 1203, 1206 n.2 (D. Mont. 2009), *aff'd*, 383 F. App'x 667 (9th Cir. 2010) (explaining that objections that merely rehash arguments presented to the magistrate judge are improper); *see also* Fed. R. Civ. P. 72(b)(3) (directing the court to "determine de novo any part of the magistrate judge's disposition that has been *properly* objected to" (emphasis added)). Considering the Findings and Recommendation as without objection, the Court finds no clear error.

Even if Plaintiff's objections were properly lodged, upon de novo review, the Court agrees with and adopts Judge You's Findings and Recommendation. As Judge You explained, Plaintiff failed to offer evidence of willfulness to expand the statute of limitations applicable to Plaintiff's wage-related claims under the FLSA. Plaintiff previously stated that discovery was required to do so, but failed to take that discovery after the Court provided

additional time. Plaintiff also failed to challenge Defendants' discovery responses as insufficient. Plaintiff's reliance on Defendants' purportedly incomplete discovery responses to raise an issue of fact thus fails, nor do those discovery responses show willfulness on their face.

For her FLSA retaliation claim, Plaintiff states in a conclusory fashion that there are issues of fact that she was an employee of Dante's, but fails to cite evidence showing such an issue of fact. Plaintiff then focuses on arguing that an *employer* need not be the *person* who engaged in the retaliation, but Judge You's decision turned on whether Plaintiff was an *employee*. Plaintiff fails to raise an issue of fact that she was an employee of Dante's.

The Court ADOPTS Judge You's Findings and Recommendation, ECF 118.

The Court GRANTS IN PART Defendants' Motion for Summary Judgment (ECF 42) and Renewed Motion for Summary Judgment (ECF 98). The Court grants summary judgment against Plaintiff's wage-related and retaliation claims under the FLSA. The Court declines supplemental jurisdiction over Plaintiff's state law retaliation claim and dismisses that claim without prejudice.

IT IS SO ORDERED.

DATED this 26th day of March, 2024

/s/ Michael H. Simon
Michael H. Simon
United States
District Judge

28a

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 3:21-cv-00965-YY

ZOE HOLLIS, PLAINTIFF
individually and on behalf of all others similarly
situated

v.

R & R RESTAURANTS, INC DBA SASSY'S, *et al.*,

DEFENDANTS

Filed: November 2, 2023

FINDINGS AND RECOMMENDATIONS

YOU, Magistrate Judge.

FINDINGS

Plaintiff has brought suit against R & R Restaurants, Inc., the business entity that operates Sassy's, an adult entertainment club in Portland, Oregon, and individuals involved in managing Sassy's, including Stacy Mayhood, Ian Hannigan, and Frank Faillace. Plaintiff alleges defendants misclassified performers who worked at the club as "independent contractors," instead of employees, to avoid paying minimum wage. First Am. Compl. ¶ 1, ECF 16. Plaintiff asserts a number of wage-related claims under the Fair Labor Standards Act ("FLSA") against all defendants. *Id.* ¶¶ 99–131. Plaintiff also asserts retaliation claims under the FLSA and Oregon state law against defendant Faillace in connection with work that plaintiff did at a different adult entertainment venue in Portland that Faillace partly owns and operates. *Id.* ¶¶ 132–50.

Defendants have filed a motion for summary judgment, ECF 42, and a renewed motion for summary judgment, ECF 98. As explained below, plaintiff's FLSA wage-related claims are untimely because this suit was not commenced within the two-year statute of limitations for FLSA claims and plaintiff has not produced evidence that defendants' alleged FLSA violations were "willful," which would expand the limitations period to three years. Plaintiff's FLSA retaliation claim against individual defendant Faillace was timely brought, but fails as a matter of law because the undisputed evidence shows that plaintiff was not an "employee" at the time of the alleged retaliation. The failure of plaintiff's federal

claims leaves plaintiff's retaliation claims under Oregon law. Neither party has offered fully developed arguments about the propriety of these claims. Thus, there is no reason to exercise supplemental jurisdiction over plaintiff's remaining state law claims and those claims should be dismissed without prejudice.

I. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56(a), “[t]he court shall grant summary judgment 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.” The party moving for summary judgment bears the initial responsibility of informing the court of the basis for the motion and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party does so, the nonmoving party must “go beyond the pleadings” and “designate ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 324 (citing Fed. R. Civ. P. 56(e)). The court “does not weigh the evidence or determine the truth of the matter, but only determines whether there is a genuine issue for trial.” *Balint v. Carson City, Nev.*, 180 F.3d 1047, 1054 (9th Cir. 1999). “Reasonable doubts as to the existence of material factual issue are resolved against the moving parties and inferences are drawn in the light most favorable to the non-moving party.” *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).

II. Procedural Background—Plaintiff's Failure to Complete Discovery

When defendants initially filed their motion for summary judgment in June of 2022, plaintiff's primary argument was that the motion should be denied as premature or, at the very least, a decision on the motion should be deferred so that plaintiff could continue to conduct discovery. Opp. Mot. Summ. J. 1, ECF 45 (“Defendants stonewall plaintiff’s ability to depose them and [sic] evidence, yet argue plaintiff cannot meet their¹ burden of demonstrating the existence of disputed material facts. Plaintiff and their counsel have diligently pursued discovery in this matter, and plaintiff’s inability to proffer evidence to support their opposition to defendants’ motion is not because it does not exist, it is because defendants refuse to sit for examination under oath.”).² Specifically, plaintiff stated that depositions of defendants and other witnesses were necessary to, among other things, “demonstrate that defendants’ conduct in misclassifying [plaintiff]” and other entertainers who worked at the club “was willful and not in good faith.” *Id.* at 8.

The undersigned judge agreed that plaintiff should be given the opportunity to conduct depositions. As observed in the order holding defendants’ motion for summary judgment in abeyance, the court had “previously stayed the deadline to complete fact

¹ Plaintiff uses they/them pronouns. Opp. Mot. Summ. J 1 n.1, ECF 103.

² To improve readability, the capitalization of party names, the “Court,” and “Motion” in quoted portions of the parties’ briefing has been eliminated. Other changes to quoted portions of the parties’ briefing are indicated by brackets and ellipses as appropriate.

discovery while resolving plaintiff[']s motion for conditional certification of the FLSA collective action.” Order (Nov. 21, 2022), ECF 81 (internal citations omitted). “The stay was lifted after the motion for conditional certification was granted in part on May 2, 2022.” *Id.* Just one month after the stay was lifted, defendants filed their motion for summary judgment. *Id.* The order holding the motion for summary judgment in abeyance was driven by the fact that discovery had been stayed while the court resolved the motion for conditional certification, and also by the attorneys’ failure to communicate clearly with each other during conferrals regarding discovery issues and in the run-up to defendants’ motion for summary judgment. *Compare* Opp. Mot. Summ. J. 6–8, ECF 45 *with* Reply 24–28, ECF 51. It appeared that the breakdown in communication contributed to plaintiff’s inability or failure to depose several individuals, and plaintiff’s counsel represented that they could not effectively respond to defendants’ motion for summary judgment without the opportunity to conduct those depositions. Opp. Mot. Summ. J. 1, ECF 45. Under all of these circumstances, some flexibility in finishing the depositions was warranted.³

Defendants objected to the November 21, 2022 order holding the motion for summary judgment in abeyance, but Judge Simon overruled those objections and ordered that plaintiff’s requested depositions “shall take place by March 6, 2023.” Order (Jan. 3, 2023), ECF 89. Judge Simon also set a

³ In the time since granting the motion for conditional certification, two plaintiffs filed consents to join the suit. *See* ECF 50, 53. The court subsequently granted defendants’ motion to dismiss those plaintiffs for lack of standing because they failed to adequately allege that they ever worked at defendants’ clubs. Order (Mar. 27, 2023), ECF 99.

March 20, 2023 deadline for plaintiff to submit a supplemental brief regarding defendants' motion for summary judgment. *Id.*

Inexplicably, however, the depositions did not occur by March 6, 2023. Nor did plaintiff submit any supplemental briefing on the motion for summary judgment by March 20, 2023, or file any motion for extension of time of those deadlines. Instead, after both deadlines passed, defendants filed a Renewed Motion for Summary Judgment on March 24, 2023. ECF 98. In it, defendants argued that plaintiff had missed both deadlines, that “[n]early two years has lapsed since Plaintiff commenced this action, and nearly one year since Defendants filed their motion for summary judgment,” and that plaintiff “has had a full and fair opportunity to develop their case and to take depositions.” Renewed Mot. Summ. J. 4, ECF 98. Defendants thus requested a decision on the merits of their motion for summary judgment. *Id.*

The court promptly set a status conference to discuss plaintiff's failure to meet the court-ordered deadlines for conducting the depositions and for filing a supplemental brief in opposition to defendants' motion for summary judgment. *See* ECF 100. As part of the scheduling order, the court ordered that plaintiff's local counsel was required to appear. *Id.* At the April 13, 2013 status conference, local counsel did not appear despite being ordered to do so.⁴ And plaintiff's *pro hac vice* counsel, who was new to the case, failed to provide any compelling explanation for the failure to meet the court's deadlines. Later that same day, plaintiff filed an Opposition to Defendants' Renewed Motion for Summary Judgment in which

⁴ Plaintiff's local counsel later explained it was due to a calendaring error.

plaintiff again asked the court to defer any ruling on defendants' motion so that plaintiff can "make every effort possible to take the depositions of Defendants and essential individuals." Opp. Renewed Mot. Summ. J. 6, ECF 103.

But the time to "make every effort possible" to take the requested depositions has passed and no further deferral is warranted. Plaintiff's counsel had ample opportunity to conduct the depositions and failed to do so; even with the benefit of a court-ordered deadline by which the depositions were to be completed, plaintiff's counsel apparently did not make any serious effort to obtain the testimony that they have repeatedly represented is so critical to their case. Further delaying the case would be prejudicial to defendants, who have been waiting now more than a year for their motion to be decided. At some point, the case simply must move on, notwithstanding plaintiff's counsel's failure to diligently conduct discovery. *See Moersch v. Zahedi*, 228 F. Supp. 3d 1079, 1084 (C.D. Cal. 2017) (denying request for additional time to conduct discovery to respond to motion for summary judgment where the party did "not provide a single specific reason as to why [it] has not had time to procure any evidence despite his having ample time to do so—this case base been pending for almost a year"); *Harris v. City of Seattle*, 315 F. Supp. 2d 1112, 1116 (W.D. Wash. 2004), *aff'd*, 152 F. App'x 565 (9th Cir. 2005) (denying request for continuance of motion for summary judgment where party did not show "good cause why [it] has not pursued [the requested] discovery within the discovery period, which was over one year long").

The analysis proceeds, then, on the current record.

II. Standing

Defendants first assert that plaintiff lacks standing to bring this suit because plaintiff cannot establish a concrete, personalized injury. Mot. Summ. J. 9, ECF 42. The argument appears to be based on the theory that plaintiff has not produced evidence sufficient for defendants to determine whether plaintiff appropriately filed a personal income tax return or paid taxes on the tips and dance fees they received during the relevant time. *Id.* at 10–13. That is a bridge too far. All that standing requires is for plaintiff to show that “(1) [plaintiff] has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). It is undisputed that plaintiff did in fact perform at defendants’ club. *See* Mot. Summ. J. 4–6, ECF 42. It is undisputed that defendants did not pay plaintiff minimum wage for the hours plaintiff performed there. *Id.* at 5. If plaintiff was an “employee” under the FLSA, then defendants are required to pay a minimum wage. *See* 29 U.S.C. § 216(b) (“Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages[.]”). Thus, plaintiff has done enough here to establish constitutional standing.

Defendants cite no case holding that potential tax implications have any relevance to the issue of a plaintiff’s standing to bring an FLSA wage claim against a purported employer. *See* Mot. Summ. J. 10–13, ECF 42. Defendants’ position would require a

plaintiff in an FLSA suit to prove that the plaintiff was current on federal tax obligations in order to sue for failing to pay a minimum wage. Taken to its furthest extremes, defendants' view of standing would potentially exclude a plaintiff with any debt larger than the prayer for damages from suing in federal court. Defendants cite no case to support such a strained reading of standing jurisprudence. Whatever issues plaintiff may have with the Internal Revenue Service or other tax collecting agency—which are, of course, not parties to this suit—as a result of plaintiff's past earnings and tax filings, or that may result from any recovery from defendants in this case, defendants have not adequately shown the relevance of those issues for determining constitutional standing to sue in this context. *See Beltran v. Maxfield's, LLC*, No. 2:13-cv-01043-LA, 2014 WL 7139808, at *2 (E.D. Wis. Dec. 12, 2014) (rejecting argument that FLSA plaintiffs lacked standing because they “would have taken home less . . . had [the defendant] paid minimum wage and withheld the appropriate taxes”).

It may be true that tax implications would at some point in this litigation become relevant. The court is fully aware that, in the event plaintiff is deemed to be an employee of defendants, the parties will likely vigorously dispute the extent to which any recovery by plaintiff should be limited to avoid any windfall. *See* Mot. Summ. J. 10, ECF 42 (“Plaintiff’s FLSA Wage and Hour Claims attempt to enlist the Court to support their unambiguous fraud against both Sassy’s and the government.”). But none of the authorities cited by defendants establish that plaintiff lacks the constitutional right to bring an FLSA claim in federal court because defendants are not satisfied with the evidence produced in discovery regarding plaintiff’s federal tax reporting or payment history.

III. FLSA Statute of Limitations

Defendants next assert that plaintiff's FLSA wage-related claims are time-barred because plaintiff filed this action on June 28, 2021, "more than two years after last performing at Sassy's on March 3, 2019." Mot. Summ. J. 24, ECF 42. Plaintiff does not dispute the March 3, 2019 cutoff date, but instead relies on the theory that the defendants' FLSA violations were "willful," which would extend the statute of limitations period to three years. Opp. Mot. Summ. J. 1, ECF 45.

Under the FLSA, claims must be commenced within "two years after the cause of action accrued . . . except that a cause of action arising out of a willful violation may be commenced within three years[.]" 29 U.S.C. § 255(a); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908–09 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005) (internal quotation marks and citation omitted). "A violation is willful if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA." *Flores v. City of San Gabriel*, 824 F.3d 890, 906 (9th Cir. 2016) (simplified) (citing *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 920 (9th Cir. 2003)). "An employer need not violate the statute knowingly for its violation to be considered willful under § 255(a), although 'merely negligent' conduct will not suffice[.]" *Id.* (simplified) (citing *Alvarez*, 339 F.3d at 908; *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)). "The three-year statute of limitations may be applied where an employer disregarded the very possibility that it was violating the statute, although a court will not presume that conduct was willful in the absence of evidence." *Id.* (simplified) (citing *Alvarez*, 339 F.3d at 908–09). The plaintiff bears the burden of establishing willfulness for statute of limitations purposes. *Taylor v. AutoZone*,

Inc., No. 3:10-cv-08125-PCT-FJM, 2011 WL 13120815, at *1 (D. Ariz. Oct. 26, 2011) (citing *McLaughlin*, 486 U.S. at 135); *Acosta v. Hoa Salon Roosevelt, Inc.*, No. 2:17-cv-00961-JLR, 2019 WL 330197, at *6 (W.D. Wash. Jan. 25, 2019).

Plaintiff first asserts that defendants failed to adequately respond to “written discovery targeting the steps defendants took to (1) ascertain the dictates of the FLSA and (2) take active steps to comply with the FLSA[.]” Opp. Mot. Summ. J. 28, ECF 45. Defendants responded to those discovery requests by stating as follows: “Like most small businesses, [the club] does not have a dedicated staff member in charge of FLSA compliance. Nonetheless, the FLSA was complied with and all factors of the economic realities test were met with respect to plaintiff’s work as a performer at this venue.” *Id.*; see also Martinez Decl., Ex. 3 at 6, ECF 47-3. Plaintiff’s counsel characterizes this response as “word salad,” and describes some initial efforts to meet and confer with opposing counsel regarding the sufficiency of the response. Opp. Mot. Summ. J. 28, ECF 45. On the current record, defendants’ response does not provide any evidentiary support for the proposition that defendants “showed reckless disregard for,” or failed to take “affirmative action to assure compliance with,” its FLSA obligations. *Flores*, 824 F.3d at 906. Plaintiff argues that further clarity on defendants’ discovery response is “one of the issues for which defendants’ depositions are necessary.” Opp. Mot. Summ. J. 28, ECF 45. However, as explained above, plaintiff failed to conduct the requested depositions before the deadline to do so expired.

Plaintiff next asserts that defendants’ willfulness can be shown by their lack of a good faith belief that plaintiff was an independent contractor and not an employee. *Id.* The issue of “good faith” under the

FLSA arises in the context of determining what damages to award for an employer's violation of the statute: "An employer who violates the FLSA 'shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.'" *Flores*, 824 F.3d at 904–05 (quoting 29 U.S.C. § 216(b)). "However, if the employer shows that it acted in 'good faith' and that it had 'reasonable grounds' to believe that its actions did not violate the Act, 'the court may, in its sound discretion, award no liquidated damages[.]'" *Id.* (quoting 29 U.S.C. § 260). The employer bears the burden to establish good faith by showing it "had an honest intention to ascertain and follow the dictates of the Act and that it had reasonable grounds for believing that its conduct complied with the Act." *Id.* at 905 (simplified).

It is true that the issues of "good faith" and "willfulness" are necessarily intertwined. *See Chao*, 346 F.3d at 920 ("Of course, a finding of good faith is plainly inconsistent with a finding of willfulness.") (citing *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1130 (9th Cir. 2002) (noting the contrapositive, that a finding of good faith precludes a finding of willfulness)). But that does not mean the two concepts are interchangeable. *See Alvarez*, 339 F.3d at 9110 ("Even a finding that the employer did not act willfully does not preclude an award of liquidated damages.") (simplified) (quoting *Cox v. Brookshire Grocery Co.*, 919 F.2d 354, 357 (5th Cir. 1990)). For one, the plaintiff bears the burden to establish willfulness, while the employer bears the burden to establish good cause—thus the "double damages" based on an employer's lack of good faith is "the norm," while the three-year statute of limitations for a willful violation

is “not the norm.” *Tumulty v. FedEx Ground Package Sys., Inc.*, No. 2:04-cv-01425-MJP, 2005 WL 1979104, at *7 (W.D. Wash. Aug. 16, 2005) (explaining “[t]here is a distinct difference between the double damages determination and the willfulness determination”).

Here, plaintiff has failed to produce evidence sufficient to raise a question of fact as to defendants’ willfulness. At the hearing on the current motion, plaintiff’s counsel argued that willfulness can be shown by (1) defendants’ use of an “Independent Contractor Agreement” that designated plaintiff as an independent contractor and not an employee of the club, and (2) the existence of many federal court decisions from around the country that, according to plaintiff, have “summarily rejected” arguments from “exotic dance clubs” that the entertainers who worked in the clubs should be classified as independent contractors instead of employees. *See also* Opp. Mot. Summ. J. 29–30, ECF 45; Mot. Summ. J. 4–5, ECF 42 (citing Answer, Ex. A at 1, ECF 20-1 (Independent Contractor Agreement)).

But plaintiff has not explained or otherwise cited to any authority to support the proposition that defendants’ use of a written independent contractor agreement, standing alone, is indicative of their “reckless disregard” for the requirements under the FLSA. Plaintiff cites to some two dozen cases, and states that defendants could not have in good faith believed that they were complying with the FLSA in the face of this “overwhelming federal authority that dancers are employees[.]” Opp. Mot. Summ. J. 29–31, ECF 45. But only one of the cited cases is from a court in the Ninth Circuit, and in that case the question whether the entertainers were independent contractors or employees for FLSA purposes was not at issue. *See Thornton v. Crazy Horse, Inc.*, No. 3:06-

cv-00251-TMB, 2012 WL 2175753, at *1 (D. Alaska June 14, 2012) (analyzing FLSA claims on behalf of plaintiffs who were “formerly employed” by defendants). Plaintiff has not cited any case from the Ninth Circuit establishing that entertainers such as plaintiff are properly classified as “employees,” and has offered no authority or analysis explaining why defendants should have relied on these out-of-circuit cases to make changes to their business practices. *See Carlino v. CHG Med. Staffing, Inc.*, 460 F. Supp. 3d 959, 971 (E.D. Cal. 2020) (denying plaintiff’s motion for summary judgment on the issue of willfulness in part because “there is no Ninth Circuit authority addressing the specific issue of whether per diems that vary with the amount of hours worked in a week are part of an employee’s regular rate”).

Moreover, there are other cases not cited by plaintiff where the entertainers were properly classified as independent contractors based on their individualized facts. *Hilborn v. Prime Time Club, Inc.*, No. 4:11-cv-00197-BSM, 2012 WL 9187581, at *1 (E.D. Ark. July 12, 2012) (ruling on summary judgment that entertainers were not employees of defendant-club under FLSA); *Nelson v. Texas Sugars, Inc.*, 838 F. App’x 39, 43 (5th Cir. 2020) (affirming jury verdict that entertainers were not employees under FLSA); *State ex rel. Roberts v. Acropolis McLoughlin, Inc.*, 150 Or. App. 180, 192–93 (1997) (affirming ruling that entertainers were not employees of the club under Oregon law after a certain date). Thus, even assuming a majority of cases have found that entertainers were employees under the FLSA, there is some conflict in the case law that supports defendants’ position. *See Carlino*, 460 F. Supp. 3d at 971 (ruling that the two-year statute of limitation applied to an FLSA action in part because the defendant “adopted a position that was supported

by [a] district court’s decision” and thus was not a willful FLSA violation, even though the position was “inconsistent with that taken by other circuits and has since been rejected by other district courts in California who have been called upon to consider it”). This split in authority is understandable given the “fact-intensive” analysis required to determine whether an individual is properly classified as an independent contractor or employee. *See Perez v. Oak Grove Cinemas, Inc.*, 68 F. Supp. 3d 1234, 1242 (D. Or. 2014) (explaining that “[c]ourts consider the facts as a whole and rely on six factors to analyze the economic realities of the relationship” in determining whether individual is an employee under the FLSA).

Finally, plaintiff offers no evidence showing that defendants failed to take any affirmative action in light of what the cases cited by plaintiff purportedly required them to do. *See In re City of Redondo Beach FLSA Litig.*, No. 2:17-cv-09097-ODW-SKX, 2019 WL 6310264, at *10 (C.D. Cal. Nov. 25, 2019) (finding plaintiffs failed to establish willfulness because they “cite[d] to absolutely no factual or evidentiary support” showing that the defendant “took no affirmative action in light of” new case law); *cf. Acosta v. Senvoy, LLC*, No. 3:16-cv-2293-PK, 2018 WL 3722210, at *10 (D. Or. July 31, 2018) (finding willful violation where undisputed evidence showed that defendant was aware of new decisions from the Ninth Circuit and the Oregon Employment Department, “but did not seek legal advice on how these rulings might affect Defendants’ compliance with the FLSA”).

In sum, there are simply no facts in the record to support a finding that defendants’ conduct was willful here, and thus the two-year statute of limitations applies. *See Hoa Salon*, 2019 WL 330197 at *7 (“[M]erely negligent conduct will not suffice [to

establish willfulness], and a court will not presume that conduct is willful in the absence of evidence[.]” (internal quotation marks omitted) (citing *McLaughlin*, 486 U.S. at 133; *Alvarez*, 339 F.3d at 909) (internal citation omitted); *Flores v. City of San Gabriel*, 824 F.3d 890, 906 (9th Cir. 2016) (“An employer need not violate the statute knowingly for its violation to be considered ‘willful’ under [the FLSA], although ‘merely negligent’ conduct will not suffice.”) (internal citations omitted). Plaintiff last performed at defendants’ club in March of 2019, and plaintiff commenced this action on June 28, 2021. Plaintiff’s FLSA claims, which include plaintiff’s first through fifth claims for relief, are therefore barred as untimely. *See* First Am. Compl. ¶¶ 99–136, ECF 16.

IV. Retaliation Claims

Defendants also seek summary judgment on plaintiff’s retaliation claims under the FLSA, Oregon state law, and Oregon public policy. Mot. Summ. J. 25, ECF 42. Plaintiff asserts these retaliation claims solely against individual defendant Faillace, who is a joint owner of Sassy’s (the primary club at which plaintiff performed between 2018 and 2019) and Dante’s (another club in Portland where plaintiff performed twice in the summer of 2021). *See* First Am. Compl. ¶¶ 132–136, ECF 16; Faillace Decl. ¶¶ 2–3, ECF 44; Ridgeway Decl., Ex. D (Hollis Dep.) 75:20–25, ECF 43-4; Hollis Decl. ¶¶ 3, 52, ECF 46. Sometime around June of 2021, plaintiff was “invited” to perform at Dante’s Sinferno Cabaret show, a weekly event that has been running for over twenty years, and which features a variety of acts including “fire shows, burlesque performances, contortion, juggling,” pole dancing, and more. Faillace Decl. ¶ 3, ECF 44; Hollis Dep. 76:4-14, ECF 43-4; Martinez Decl., Ex. 22 at 2–3, ECF 47-22.

On June 28, 2021, plaintiff filed the initial complaint in this lawsuit, which named only Sassy's and two of the managers of that club—Mayhood and Hannigan. *See* Compl. ¶¶ 10–14, ECF 1. On July 19, 2021, Faillace emailed plaintiff to say that plaintiff could no longer perform at Dante's because of the lawsuit against Sassy's:

I have been dreading writing this to you, and our attorney has cautioned against it, but you and I have had a good working relationship over the last year, and out of respect for that I thought it best that I write you directly.

As you may or may not remember, I am one of the partners in Sassy's. A few days ago we were served papers there for a class action lawsuit, of which you are the primary plaintiff.

That makes things complicated. Especially since it is regarding the claim of being an employee versus an independent contractor as stated in the contract with Sassy's.

Since you would be performing at Dante's as an independent contractor, that puts another business that I'm a partner in at risk for a lawsuit. Therefore, we have been strongly advised to not have you perform at Dante's.

Martinez Decl., Ex. 21 at 1, ECF 47-21 (excerpted). On August 24, 2021, plaintiff filed a First Amended Complaint that added Faillace as a defendant and asserted the FLSA and state law retaliation claims, as well as other FLSA wage claims, against him. First Am. Compl. ¶¶ 132–150, ECF 16.

Because of the close temporal proximity between Faillace’s email and plaintiff’s filing of the First Amended Complaint, the FLSA retaliation claim is not subject to the same analysis regarding timeliness as plaintiff’s FLSA wage-related claims. But even assuming, without deciding, that plaintiff’s FLSA retaliation claim against Faillace is independently viable after plaintiff’s other FLSA wage-related claims are dismissed as untimely, *see* Pl. Supp. Br. 2, ECF 116, defendants are entitled to summary judgment on plaintiff’s FLSA retaliation claim because plaintiff was not an employee of Dante’s or Faillace’s at the time of the alleged retaliation.

The FLSA’s anti-retaliation provision provides that it “shall be unlawful for any person to discharge or in any other manner discriminate against *any employee* because such employee has filed any complaint under or related to this chapter.” 29 U.S.C. § 215(a)(3) (emphasis added); *see also Arias v. Raimondo*, 860 F.3d 1185, 1189 (9th Cir. 2017). Plaintiff seems to argue that, despite the plain language of the statute prohibiting retaliation “against any employee,” it is not necessary to analyze whether plaintiff was an employee of Faillace or Dante’s in 2021 at the time of the alleged retaliatory conduct. Opp. Mot. Summ. J. 32, ECF 45. Plaintiff relies on *Arias*, in which the Ninth Circuit held that the term “any person” in the FLSA anti-retaliation provision “reach[es] beyond actual employers” to cover individuals like the defendant in that case, who was an attorney working on behalf of the client-employer.

Arias, 860 F.3d at 1191–92. But in *Arias*, there was no dispute that an employment relationship existed between the plaintiff and the dairy company where plaintiff worked. *Id.* at 1186–87. Thus, the case simply has no relevance here because the key question posed by the pending motion is whether plaintiff was an “employee” at the time of the alleged retaliation.

The undisputed evidence in the record shows that plaintiff was not an employee of Faillace or Dante’s at the time of Faillace’s email in July of 2021. The Ninth Circuit uses the “economic realities test” to determine employment status under the FLSA. *Perez*, 68 F. Supp. 3d at 1242 (citing *Boucher v. Shaw*, 572 F.3d 1087, 1091 (9th Cir. 2009)) (additional citations omitted). There are six factors to consider:

- 1) The degree of the alleged employer’s right to control the manner in which the work is to be performed;
- 2) The alleged employee’s opportunity for profit or loss depending upon his managerial skill;
- 3) The alleged employee’s investment in equipment or materials required for his task, or his employment of helpers;
- 4) Whether the service rendered requires a special skill;
- 5) The degree of permanence of the working relationship; and

6) Whether the service rendered is an integral part of the alleged employer's business.

Id. (citing *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981)). “The presence of any individual factor is not dispositive of whether an employee/employer relationship exists.” *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979). Instead, the determination depends “upon the circumstances of the whole activity.” *Id.* (citation omitted); see also *Olson v. United States by & through Dep't of Energy & Bonneville Power Admin.*, No. 3:15-cv-02216-HZ, 2018 WL 2090604, at *6 (D. Or. Apr. 30, 2018).

It is undisputed that Dante's is a “a live performance venue hosting a broad range of shows, including live music, karaoke with a live band, and cabaret shows, which include many unique acts such as fire performances, pole dances, DJs, circus acts, and burlesque.” Faillace Decl. ¶ 2, ECF 44. It is also undisputed that sometime in 2021, plaintiff was invited to perform at Dante's weekly cabaret show based in part on their skills as a pole dancer. Hollis Dep. 86:22– 87:7, ECF 43-4. According to Faillace, “Dante's invites only the most skilled and talented performers to perform at Sinfemo Cabaret and allows the performers to perform how they wish, as it is their art on display, after all.” Faillace Decl. ¶ 3, ECF 44. Plaintiff's two performances at the cabaret were “one-off events,” for which plaintiff spent “a bunch of time . . . planning what the routine would be” because it was “choreographed.” Hollis Dep. 78:13–16, 103:4–7. ECF 434. Plaintiff thought the work at Dante's was different than the work at Sassy's because of the

preparation and choreography that was involved. *Id.* at 102:25–103:7.⁵

The working relationship between plaintiff and Dante’s was temporary, and plaintiff’s performances were not “integral” to Dante’s business. The Sinferno Cabaret is a weekly event that has been running for over twenty years; plaintiff performed there just two times, and the performance was for one song, a small part of an overall show that lasted more than two hours and featured at least nine other performances. *Id.* at 75:23–78:2; *see also* Faillace Decl. ¶ 3, ECF 44; Martinez Decl., Ex. 22 at 3, ECF 47-22. Plaintiff asserts that Dante’s had “rules, policies, and requirements” to follow, and that Dante’s determined how much to charge customers. Opp. Mot. Summ. J. 33, ECF 45. But it is undisputed that plaintiff had full artistic control over their performances at Dante’s. Faillace Decl. ¶ 3, ECF 44. And the fact that the Sinferno Cabaret was a ticketed event whereby Dante’s controlled customer access or made money from ticket sales simply reflects the club’s business model as a live performance venue, and does not transform plaintiff’s two-time, five-minute performances into an employment relationship with Dante’s. *See Boucher*, 572 F.3d at 1091 (“The determination of whether an employer-

⁵ The court affords little weight to plaintiff’s assertions in their post-deposition declaration that the “only difference” between their work at Sassy’s and Dante’s was that their performance “was for a specific time and not recurring throughout the night as in Sassy’s.” Hollis Decl. ¶ 55, ECF 46; *see Brewer v. Gen. Nutrition Corp.*, No. 4:11-cv-3587-YGR, 2014 WL 5877695, at *12 (N.D. Cal. Nov. 12, 2014) (explaining that declarations “carr[y] less weight than spontaneous statements made [in] depositions, particularly where the deposition testimony is at odds with the declaration”).

employee relationship exists does not depend on isolated factors but rather upon the circumstances of the whole activity.”) (citation and quotation marks omitted). Thus, while Faillace’s email may have been misguided, unwise, or even malicious, it does not run afoul of the FLSA’s prohibition on retaliating against “an employee.” 29 U.S.C. § 215(a)(3).

Having determined that plaintiff’s FLSA wage-related claims are barred as untimely and plaintiff’s FLSA retaliation claim against Faillace fails as a matter of law, the last task is to evaluate plaintiff’s remaining claims against Faillace for state law retaliation under O.R.S. 659A.230 and common law wrongful termination in violation of public policy. *See* First Am. Compl. ¶¶ 137–50, ECF 16. Faillace asserts that these state law claims are subject to the same analysis as plaintiff’s FLSA retaliation claims—in other words, that these claims also fail as a matter of law because there is no employment relationship between plaintiff and Faillace or Dante’s. Mot. Summ. J. 25–28, ECF 42. Neither party has fully explored the contours of these state law claims or whether the same FLSA factors are used in determining whether an employment relationship exists in the context of these state law claims. *See id.*; Opp. Mot. Summ. J. 32–34, ECF 45; Reply 31–32, ECF 51. And while defendants’ position has some facial appeal, defendants’ briefing is short on citations to applicable authority and the court’s own research has not revealed a clear answer for exactly how to proceed. *See, e.g., Dinicola v. State*, 280 Or. App. 488, 506 (2016) (examining meaning of “employee” in various Oregon statutes and distinguishing from FLSA definition of “employee” in certain circumstances).

The court, recognizing the potential that its subject matter jurisdiction may be implicated if

plaintiff's federal claims fell away, asked the parties to submit additional briefing on the question of "whether the court should exercise supplemental jurisdiction over plaintiff's state law claims if summary judgment is granted in defendant's favor on plaintiff's FLSA claims." Order (Sept. 21, 2023), ECF 115; *see also Cal. Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 280 (9th Cir. 1974) ("It has long been held that a judge can dismiss sua sponte for lack of jurisdiction."); FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Both sides filed supplemental briefing. In plaintiff's supplemental briefing, plaintiff reasserted the merits of their willfulness argument and argued that the retaliation claim remained viable even if the court found that the FLSA wage-related claims were untimely. Pl. Supp. Br., ECF 116. The defense provided some additional argument for why the state law claims require an employee relationship, and argued, alternatively, that the court should decline to exercise supplemental jurisdiction if the federal claims are dismissed.

Again, as detailed above, all of plaintiff's federal law claims are barred as untimely or otherwise fail as a matter of law, and given there is a lack of clarity on how to evaluate plaintiff's state law claims at this juncture, it is appropriate to decline to exercise supplemental jurisdiction over plaintiff's state law claims. 28 U.S.C. § 1367(c)(3); *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997) ("The Supreme Court has stated, and we have often repeated, that 'in the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.' ") (quoting *Carnegie-Mellon Univ. v.*

Cohill, 484 U.S. 343, 350 n.7 (1988)); *Fichman v. Media Ctr.*, 512 F.3d 1157, 1162–63 (9th Cir. 2008) (“Having granted judgment on the federal claims, the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over the state claims.”).

RECOMMENDATIONS

Defendants’ motion for summary judgment, ECF 42, and renewed motion for summary judgment, ECF 98, should be granted in part and denied in part. Summary judgment should be granted as to plaintiff’s FLSA wage-related claims because those claims were not filed within the two-year statute of limitations and there is no evidence that defendants acted willfully for purposes of extending the limitations period to three years. Summary judgment should be granted as to plaintiff’s FLSA retaliation claim against defendant Faillace because the undisputed evidence shows that plaintiff was not an employee of Faillace or Dante’s at the time of the alleged retaliation. Where all of plaintiff’s federal claims are dismissed, supplemental jurisdiction should be declined as to plaintiff’s remaining state law claims, which should be dismissed without prejudice.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Thursday, November 16, 2023. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

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NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED November 2, 2023.

/s/ Youlee Yim You
Youlee Yim You
United States
Magistrate Judge

APPENDIX E

29 U.S.C. § 203

§203. Definitions

As used in this chapter—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of title 5),

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(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the ¹ Government Publishing Office;

(B) any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or

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agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

(5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the

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production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) ² of title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

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(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

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(m)(1) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee.

(2)(A) In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to—

(i) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and

(ii) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in clause (i) and the wage in effect under section 206(a)(1) of this title. The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply

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with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

(B) An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit.

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry.

(o) Hours Worked.—In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r)(1) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a

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common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(2) For purposes of paragraph (1), the activities performed by any person or persons—

(A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or

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(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(C) in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose.

(s)(1) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that—

(A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated);

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.

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(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

(y) "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue

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worker, ambulance personnel, or hazardous materials worker, who—

(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

(2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

(June 25, 1938, ch. 676, §3, 52 Stat. 1060; 1946 Reorg. Plan No. 2, §1(b), eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Oct. 26, 1949, ch. 736, §3, 63 Stat. 911; Pub. L. 87–30, §2, May 5, 1961, 75 Stat. 65; Pub. L. 89–601, title I, §§101–103, title II, §215(a), Sept. 23, 1966, 80 Stat. 830–832, 837; Pub. L. 92–318, title IX, §906(b)(2), (3), June 23, 1972, 86 Stat. 375; Pub. L. 93–259, §§6(a), 13(e), Apr. 8, 1974, 88 Stat. 58, 64; Pub. L. 95–151, §§3(a), (b), 9(a)–(c), Nov. 1, 1977, 91 Stat. 1249, 1251; Pub. L. 99–150, §§4(a), 5, Nov. 13, 1985, 99 Stat. 790; Pub. L. 101–157, §§3(a), (d), 5, Nov. 17, 1989, 103 Stat. 938, 939, 941; Pub. L. 104–1, title II, §203(d), Jan. 23, 1995, 109 Stat. 10; Pub. L. 104–188, [title II], §2105(b), Aug. 20, 1996, 110 Stat. 1929; Pub. L. 105–221, §2, Aug. 7, 1998, 112 Stat. 1248; Pub. L. 106–151, §1, Dec. 9, 1999, 113 Stat. 1731; Pub. L. 109–435, title VI, §604(f), Dec. 20, 2006, 120 Stat. 3242; Pub. L. 113–235, div. H, title I, §1301(b), Dec. 16, 2014, 128 Stat. 2537; Pub. L. 115–141, div. S, title XII, §1201(a), Mar. 23, 2018, 132 Stat. 1148.)

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29 U.S.C. § 215

§215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207 of this title, or in violation of any regulation or order of the Secretary issued under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Secretary issued under section 214 of this title;

(3) to discharge or in any other manner discriminate against any employee because such

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employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 212 of this title;

(5) to violate any of the provisions of section 211(c) of this title, or any regulation or order made or continued in effect under the provisions of section 211(d) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect; and

(6) to violate any of the provisions of section 218d of this title.

(b) For the purposes of subsection (a)(1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

(June 25, 1938, ch. 676, §15, 52 Stat. 1068; Oct. 26, 1949, ch. 736, §13, 63 Stat. 919; 1950 Reorg. Plan No. 6, §§1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1263; Pub. L. 117-328, div. KK, §102(b)(1), Dec. 29, 2022, 136 Stat. 6095.)

29 U.S.C. § 216

§216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) or 218d of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) or 218d of this title, including without limitation employment reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 203(m)(2)(B) of this title shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in the preceding

sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) or 218d of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have

under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947 [29 U.S.C. 255(a)], it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did

not so appear, on the subsequent date on which his name is added as a party plaintiff in such action. The authority and requirements described in this subsection shall apply with respect to a violation of section 203(m)(2)(B) of this title, as appropriate, and the employer shall be liable for the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and an additional equal amount as liquidated damages.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 [29 U.S.C. 251 et seq.] on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) ¹ of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Civil penalties for certain violations

(1)(A) Any person who violates the provisions of sections ² 212 or 213(c) of this title, relating to child labor, or any regulation issued pursuant to such sections, shall be subject to a civil penalty not to exceed—

(i) \$11,000 for each employee who was the subject of such a violation; or

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(ii) \$50,000 with regard to each such violation that causes the death or serious injury of any employee under the age of 18 years, which penalty may be doubled where the violation is a repeated or willful violation.

(B) For purposes of subparagraph (A), the term "serious injury" means—

(i) permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(2) Any person who repeatedly or willfully violates section 206 or 207 of this title, relating to wages, shall be subject to a civil penalty not to exceed \$1,100 for each such violation. Any person who violates section 203(m)(2)(B) of this title shall be subject to a civil penalty not to exceed \$1,100 for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages, as described in subsection (b).

(3) In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be

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considered. The amount of any penalty under this subsection, when finally determined, may be—

(A) deducted from any sums owing by the United States to the person charged;

(B) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(C) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title or a repeated or willful violation of section 215(a)(2) of this title, to be paid to the Secretary.

(4) Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5 and regulations to be promulgated by the Secretary.

(5) Except for civil penalties collected for violations of section 212 of this title, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provision of section 9a of this title. Civil penalties collected for violations of section 212 of this title shall be deposited in the general fund of the Treasury.

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(June 25, 1938, ch. 676, §16, 52 Stat. 1069; May 14, 1947, ch. 52, §5(a), 61 Stat. 87; Oct. 26, 1949, ch. 736, §14, 63 Stat. 919; 1950 Reorg. Plan No. 6, §§1, 2, 15 F.R. 3174, 64 Stat. 1263; Aug. 8, 1956, ch. 1035, §4, 70 Stat. 1118; Pub. L. 85–231, §1(2), Aug. 30, 1957, 71 Stat. 514; Pub. L. 87–30, §12(a), May 5, 1961, 75 Stat. 74; Pub. L. 89–601, title VI, §601(a), Sept. 23, 1966, 80 Stat. 844; Pub. L. 93–259, §§ 6(d)(1), 25(c), 26, Apr. 8, 1974, 88 Stat. 61, 72, 73; Pub. L. 95–151, §10, Nov. 1, 1977, 91 Stat. 1252; Pub. L. 101–157, §9, Nov. 17, 1989, 103 Stat. 945; Pub. L. 101–508, title III, §3103, Nov. 5, 1990, 104 Stat. 1388–29; Pub. L. 104–174, §2, Aug. 6, 1996, 110 Stat. 1554; Pub. L. 110–233, title III, §302(a), May 21, 2008, 122 Stat. 920; Pub. L. 115–141, div. S, title XII, §1201(b), Mar. 23, 2018, 132 Stat. 1148; Pub. L. 117–328, div. KK, §102(b)(2), Dec. 29, 2022, 136 Stat. 6096.)