

13-1255

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**CAROL KING, on behalf of herself  
and all others similarly situated,**

**Plaintiff**

v.

**WEST VIRGINIA'S CHOICE, INC.,  
a West Virginia corporation, and  
MULBERRY STREET  
MANAGEMENT SERVICES, INC.,  
a West Virginia corporation,**

**Defendants.**

**CIVIL ACTION NO. 12-C-1796  
Honorable James C. Stucky**

FILED  
20.10.01 31 AM 11:25  
KANEY L. S. CLARK  
KANAWHA COUNTY CIRCUIT COURT

**FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING DEFENDANT  
WEST VIRGINIA'S CHOICE, INC. AND ORDER GRANTING MOTION FOR  
SUMMARY JUDGMENT**

On August 28, 2013, this matter came before the Court for a hearing on the Motion for Summary Judgment of Defendant West Virginia's Choice, Inc. Plaintiff appeared by counsel, Cameron S. McKinney and The Grubb Law Group. Defendants appeared by counsel, Patrick E. McFarland and Patrick E. McFarland, P.L.L.C., and by counsel, David K. Hendrickson and Christopher S. Arnold and Hendrickson & Long, P.L.L.C.

Before the Court are the:

- Motion for Summary Judgment of Defendant West Virginia's Choice, Inc. with supporting Memorandum;
- Affidavit of Dennis J. Parrucci ("Parrucci Affidavit");
- Affidavit of David Wilson ("Wilson Affidavit");
- Excerpts of the transcript of the deposition of Carol King;
- Copies of Plaintiff's check stubs;
- Plaintiff's Responses to Requests for Admission, Request Nos. 1-21;

103-105

- Plaintiff's Memorandum of Law in Opposition to Defendants' West Virginia's Choice, Inc.'s and Mulberry Street Management Services, Inc.'s Motions for Summary Judgment; and,
- Reply of Defendants, West Virginia's Choice, Inc. and Mulberry Street Management Services Inc., to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment.<sup>1</sup>

Upon review of the proceedings in this case; a review of the undisputed evidence presented to the Court, and after considering the arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law<sup>2</sup>:

### FINDINGS OF FACT

1. In her Complaint, Plaintiff Carol King seeks to recover monetary damages and declaratory and injunctive relief pursuant to the West Virginia Minimum Wage and Maximum Hours Standards ("MWMHS" or the "Act"), W.Va. Code § 21-5C-1, *et seq.* See Complaint, ¶ 1. In particular, she contends that Defendants have violated the MWMHS by failing to pay Plaintiff and putative class members for hours allegedly worked in excess of 40 hours per week at a rate of one and one-half times each such employee's regular rate as provided by W.Va. Code § 21-5C-3. See Complaint, ¶¶ 12, 25-26.

2. Defendant West Virginia's Choice, Inc. ("WV Choice") is a West Virginia corporation that, following a medical assessment by a physician, and pursuant to a plan of care prepared by a trained nurse in accordance with that assessment, provides in-home

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<sup>1</sup> This Reply brief was submitted by Defendants at the conclusion of the hearing and accepted by the Court.

<sup>2</sup> These Findings of Fact and Conclusions of Law are made upon review and consideration of the record in this case after discovery conducted by the parties and upon Defendants' respective Motions for Summary Judgment; and, to the extent any findings and conclusions contained in the previous Order Denying Defendants' Motion to Dismiss differ from the Findings of Fact and Conclusions of Law herein, they are expressly overruled.

companionship services to people who, due to age or infirmity, are unable to care for themselves.

*See Parrucci Affidavit ¶ 2.*

3. WV Choice is also “a business enterprise that has an annual gross volume of sales made or business done which exceeds \$ 500,000.00, exclusive of excise taxes.” Affidavit of David Wilson at ¶ 3.

4. Plaintiff Carol King was hired by WV Choice on January 14, 2011, as an in-home direct care worker who provides these companionship services. *See Parrucci Affidavit ¶ 7.*

5. With offices in Morgantown, Parkersburg, Charleston, Huntington, Beaver, Moundsville, Elkins and Keyser, WV Choice employs approximately 2000 employees at any given time. *Parrucci Affidavit ¶ 3.*

6. All of WV Choice’s employees (including Plaintiff Carol King) are referred to by WV Choice as direct care workers who provide companionship services to the elderly or infirm. If any incidental general household work is performed by WV Choice’s direct care workers, which it rarely if ever is, any such incidental general household work does not, and did not, equal or exceed 20% of the work performed in any given week by any direct care worker, including but not limited to Plaintiff Carol King. *See Parrucci Affidavit ¶ 5; Req. for Admissions, Request Nos. 1-21.* None of WV Choice’s direct care worker employees (including plaintiff, Carol King) provide trained nursing services or any other type of services that would be equivalent to trained nursing services. *Parrucci Affidavit ¶ 6.*

7. While employed by WV Choice, Plaintiff Carol King, among other tasks of the same or similar nature, provided the following types of in-home companionship services:

assisting clients with personal care, meal preparation, bed-making, prompting to take medications, washing clothing, dressing and personal grooming. *See Parrucci Affidavit* ¶ 8; Req. for Admissions, Request Nos. 4-15; and excerpts of the Deposition of Plaintiff at pp. 109-117. These services are typical of the types of in-home companionship services that in-home direct care workers like Plaintiff and other employees of WV Choice provide. *See Parrucci Affidavit* ¶8. All of the in-home companionship services performed by Plaintiff Carol King, and those performed by all other WV Choice employees were provided following a medical assessment by a physician, and pursuant to a plan of care prepared by a trained nurse in accordance with that assessment. *Id.*

8. In connection with the performance of her work with WV Choice, Plaintiff routinely handles and works with goods and materials that have been moved or produced in commerce. For example, she handles and purchases food, household cleaning supplies, medications, and personal hygiene and grooming products, which have been purchased at nationally-known stores such as Dollar General, in conducting the companionship services that she provides. Plaintiff's Deposition at pp. 111-117.

9. WV Choice further engages in interstate commerce by way of its employment of certain direct care workers. Some direct care workers employed by WV Choice reside in states surrounding West Virginia. These out-of-state employees travel across state lines into West Virginia to provide companionship services in the homes of individuals residing in this State. Affidavit of David Wilson at ¶ 4. Direct care workers in the employ of WV Choice, in the course and scope of their duties, also take residents who reside in West Virginia into other states

surrounding West Virginia to obtain goods and services from out of state providers. Affidavit of David Wilson at ¶ 5. WV Choice has also used the U.S. Mails to send paychecks to some of its out-of-state employees and currently uses direct deposit banking services to distribute pay from its West Virginia bank to the out-of-state banks of some of its out-of-state employees. Affidavit of David Wilson at ¶¶ 6-7.

#### CONCLUSIONS OF LAW

1. Pursuant to Rule 56(b) of the Rules of Civil Procedure, “[a] party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party’s favor as to all or any part thereof.” Rule 56 also provides in pertinent part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

W.Va. R. Civ. P. 56(c). “Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 459 S.E.2d 329, 335 (1995). Additionally, while the facts and evidence are to be considered in the light most favorable to the nonmoving party, “the nonmoving party must nonetheless offer some concrete evidence from which a reasonable... [finder of fact] could return a verdict in ... [its] favor.” *Id.* at 336-37. As stated by the Court in *Williams*:

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party; (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Syl. pt. 3, *Williams*, 194 W.Va. 52, 459 S.E.2d 329. And, in Syllabus Point 1 of *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995), the Supreme Court of Appeals of West Virginia further articulated that the existence of “factual issues” does not necessarily preclude the award of summary judgment, stating this:

The mere fact that a particular cause of action contains elements which typically raise a factual issue for jury determination does not automatically immunize the case from summary judgment. The plaintiff must still discharge his or her burden under West Virginia Rule of Civil Procedure 56(c) by demonstrating that a legitimate jury question, i.e., a genuine issue of material fact, is present.

Succinctly, the “essence of the inquiry the court must make [on a motion for summary judgment] is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’ ” *Williams*, 459 S.E.2d at 338 (citation omitted).

2. Plaintiff claims that Defendants violated the MWMHS by failing to pay overtime wages to Plaintiff and putative class members as provided by W.Va. Code § 21-5C-3. See Complaint, ¶¶ 12, 25-26. This Act, however, applies *only* to “employees” and “employers” specifically defined therein. The term “employer,” as it is intended to mean in the MWMHS, is defined in W.Va. Code § 21-5C-1(e):

the term 'employer' shall not include any individual, partnership, association, corporation, person or group of persons or similar unit if eighty percent of the persons employed by him are subject to any federal act relating to minimum wage, maximum hours and overtime compensation.

W.Va. Code § 21-5C-1(e).

3. Here, the undisputed evidence establishes that more than 80% of the persons employed by WV Choice, including Plaintiff, are subject to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), a federal act relating to minimum wage, maximum hours and overtime compensation.

4. The FLSA is a federal act that relates to minimum wage, maximum hours and overtime compensation. 29 U.S.C. § 201 *et seq.* Plaintiff does not dispute this fact.

5. In 1974, Congress amended the FLSA to include "domestic service" employees. For the purpose of the FLSA and its related regulations, "domestic service employment" is described as follows:

...services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

29 C.F.R. § 552.3.

6. Plaintiff admits that she is "employed in 'domestic service employment' to provide 'companionship services' for 'individuals who (because of age or infirmity) are unable to care for themselves' as these terms are used in 29 C.F.R. §§ 552.3 and 552.6, and 29 U.S.C. § 213 (a)(15). See Req. for Admissions, Request Nos. 4-5. Plaintiff's admissions

are further supported by her deposition testimony and the Affidavit of Dennis Parrucci. *See* excerpts of the transcript of the deposition of Carol King; Parrucci Affidavit.

7. The undisputed evidence establishes that all of WV Choice's employees are direct care workers employed in "domestic service employment" to provide "companionship services" to the elderly or infirm as these terms are used in 29 C.F.R. §§ 552.3 and 552.6, and 29 U.S.C. §213(a)(15). *See Parrucci Affidavit* ¶ 5. As evidenced by the Affidavit of Dennis Parrucci, President of WV Choice, all of WV Choice's employees are referred to by WV Choice as in-home direct care workers who, following a medical assessment by a physician, and pursuant to a plan of care prepared by a trained nurse in accordance with that assessment, provide companionship services to homebound people who, because of age or infirmity, are unable to care for themselves. The services performed by these employees include: assisting clients with personal care, meal preparation, bed-making, prompting to take medications, washing clothing, dressing and personal grooming. *See Parrucci Affidavit* ¶ 8; Req. for Admissions, Request Nos. 4-15; and excerpts of the Deposition of Plaintiff at pp. 109-117. If any incidental general household work is performed by WV Choice's in-home direct care workers, which it rarely if ever is, any such incidental general household work does not, and did not, equal or exceed 20% of the work performed in any given week by any direct care worker, including but not limited to Plaintiff Carol King. *See Parrucci Affidavit* ¶ 5. *See also*, 29 C.F.R. §§ 552.3 and 552.6.

8. Plaintiff does not dispute that the FLSA is a federal act that relates to minimum wage, maximum hours and overtime compensation or that she and the other in-

home direct care workers employed by WV Choice provide companionship services to the elderly and infirm. Rather, Plaintiff contends that, because she and the other in-home direct care workers are exempt from receiving overtime wages under the FLSA, 29 U.S.C. §213(a)(15), they are not “subject to” this Act and that WV Choice, therefore, meets the definition of an “employer” under the MWMHS. Plaintiff’s argument contravenes the plain language of W.Va. Code § 21-5C-1(e) and the recognized intent and application of the MWMHS and FLSA.

9. The question of whether WV Choice meets the definition of an “employer” who is governed by the MWMHS does not depend on whether Plaintiff is *entitled to* overtime wages under the FLSA as advocated by Plaintiff. Rather, the issue is whether these workers are *subject to* this federal Act. *See* W.Va. Code § 21-5C-1(e).

10. The definition in W.Va. Code § 21-5C-1(e) uses the phrase “subject to,” which is defined as “governed by or affected by” according to Black’s Law Dictionary. *See* Black’s Law Dictionary 1278 (5<sup>th</sup> ed. 1979). Thus, in determining whether WV Choice is an “employer” as defined by the MWMHS, the issue is not whether 80% of WV Choice’s employees are “entitled to” overtime wages under the FLSA but whether 80% of its employees are “subject to” that federal Act. *See* W.Va. Code § 21-5C-1(e). The plain language and intent of the statute are clear and must be enforced. *See e.g.* Syl. Pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975) (“The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature”); Syl. Pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968) (“Where the language of a

statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation”).

11. The U.S. Supreme Court has recognized that “domestic service” employees (like Plaintiff and the other in-home direct care workers employed by WV Choice) who provide “companionship services” are subject to the FLSA’s wage, hour and overtime laws. *See Long Island Care at Home, LTD. v. Coke*, 551 U.S. 158 (2007).

12. In addition, while exempted from the minimum and maximum hour requirements of the FLSA pursuant to 29 U.S.C. §213 (a)(15), WV Choice and its employees are not exempted from other provisions of the FLSA. For example, they are not exempted from the FLSA’s regulations regarding discrimination on the basis of sex (§206(d)(1)), obligations to make, keep, and preserve records of the persons employed by them and of wages, hours, and other conditions and practices of employment maintained by them and to make reports therefrom to the Administrator as shall be required (§ 211), restrictions on the employment of minors (§212), and regulations regarding the employment of students (§ 214). The fact that the FLSA exempts these companionship service workers from overtime wages does not contradict or change the fact that these workers are *subject to* (i.e. governed or affected by) the provisions of the FLSA, a federal act “federal act relating to minimum wage, maximum hours and overtime compensation. W.Va. Code § 21-5C-1(e). *See Coke*, 551 U.S. 158.

13. Plaintiff cites to *Adkins v. City of Huntington*, 191 W.Va. 317, 445 S.E.2d 500 (1994) and *Haney v. County Commission of Preston County*, 212 W.Va. 824, 575 S.E.2d 434 (2002) to support the proposition that the words “*subject to*” and “*entitled to*” are

synonymous for the purpose of determining who is exempt from “employer” status under the MWMHS. These cases do not, however, support Plaintiff’s erroneous claim.

14. With respect to *Adkins, supra*, Plaintiff suggests that the West Virginia Supreme Court of Appeals “held that the City of Huntington was entitled to the §21-5D-1(e) ‘exemption’ because the firefighters ... were already entitled to specific overtime compensation under the FLSA.” See Memorandum of Law in Opposition to Defendants’ Motions for Summary Judgment, p. 7 (emphasis added). In fact, the court made no such holding or finding. Rather, the issue in *Adkins* was whether a political subdivision of the State (the City of Huntington) was an “employer” as defined by W.Va. Code § 21-5C-1(e). The court answered the question affirmatively. There was, however, no discussion about, let alone a holding from the court, equating “subject to” in W.Va. Code § 21-5C-1(e) with “entitled to” as advocated by Plaintiff in this case. Indeed, the parties in *Adkins* stipulated to the fact that eighty percent of the City’s employees were subject to federal wage and hour laws. *Adkins*, 191 W.Va. at 318, 445 S.E.2d at 501.

15. In *Haney*, a *per curium* opinion, the West Virginia Supreme Court of Appeals, addressing an issue similar to the one in *Adkins*, ruled that the Preston County Commission, as a political subdivision, also fell within W.Va. Code § 21-5C-1(e)’s definition of “employer.” *Haney*, 212 W.Va. at 829, 575 S.E.2d at 439. The court, however, remanded the case for a determination as to whether at least eighty percent of the county commission’s employees, as opposed to only the Sheriff’s employees, were subject to federal wage and hour laws. *Id.* Although the *Haney* opinion uses the terms “subject to” and “covered by,”

there is absolutely no discussion - much less any conclusion - that an employer falls within W.Va. Code § 21-5C-1(e)'s exception only if eighty percent of the persons employed by him are "covered by" a federal act, i.e. "entitled to" benefits under a federal act, as opposed to "subject to" a federal act. Such an interpretation ignores the express language of W.Va. Code § 21-5C-1(e) which says "subject to" (defined as "governed or affected by") rather than "covered by" or "entitled to" which have different meanings. See Black's Law Dictionary 1278 (5<sup>th</sup> ed. 1979). Accordingly, the term "*entitled to*" must not be substituted in place of "*subject to*" in W.Va. Code §21-5D-1(e).

16. Several courts addressing the specific issue in this case have found that exemption from the overtime wage requirements of the FLSA does not equal a finding that the employer/employee is not "subject to" the FLSA. In *Brown v. Ford Storage and Moving Company*, 224 P.3d 593 (Kan. App. 2010)<sup>3</sup>, the court, after recognizing that the plaintiff truck drivers were exempt from the overtime pay requirements of the FLSA, further found that, because the defendants were not "employers" under the Kansas Minimum Wage and Maximum Hours Law, they also had *no* duty to pay their drivers overtime wages under Kansas law. Syl. Pt. 7 and 8, *Brown*, 224 P.3d at 594. The Kansas statute at issue was similar to West Virginia's statute, W.Va. Code § 21-5C-1(e). The Kansas statute provides that only "employers" are required to pay overtime compensation. K.S.A. 44-1204(a). The definition of "employer" in the Kansas Minimum Wage and Maximum Hours Law excludes those employers "*subject to*" the FLSA. *Brown*, 224 P.3d at 594, *citing*, K.S.A. 44-1202(d)

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<sup>3</sup> A copy of this case was previously provided to Plaintiff's counsel and the Court.

(emphasis added). Recognizing the fact that the plaintiff drivers were exempt from the overtime pay requirements of the FLSA, the *Brown* court specifically held that “the claimed employers in the case at bar are *subject to* FLSA regulation, [therefore,] they are not ‘employers’ as that term is used in the Kansas Minimum Wage and Maximum Hours Law.” Syl. Pt. 8, *Brown*, 224 P.3d at 594. And, “[b]ecause they are not ‘employers’ pursuant to the Kansas Minimum Wage and Maximum Hours Law, they owe their employees no duty to pay overtime wages under Kansas law pursuant to the plain language of” the applicable statute. *Id.* See also, *Jones v. OS Restaurant Services, Inc.*, 245 P.3d 624 (Okl. Civ. App. 2010) (holding that Oklahoma’s minimum wage and hour act’s definition of “employer” excluded the defendant restaurant owner from coverage under that act, including the requirement to pay overtime wages, because the employer was “subject to” and complying with FLSA); *Parker v. Schilli Transportation*, 686 N.E.2d 845, 850 (Ind. Ct. App. 1997) (holding that the plaintiff’s claim for overtime wages failed where the defendant employer was an “employer” within the meaning of the FLSA and where state law provided that an “employer” subject to state wage laws “shall not include any *employer* who is *subject to*” the wage provisions of the FLSA).

17. Recognition of the Legislature’s intent in enacting W.Va. Code § 21-5C-1(e) and practical application of the MWMHS and FLSA by the West Virginia Division of Labor and the U.S. Department of Labor further support the conclusion that WV Choice is not an “employer” as governed by the MWMHS. When the West Virginia Legislature decided to create a distinction between entities where 80% or more of its employees are subject to a

federal act relating to minimum wage and overtime compensation, and entities where less than 80% of the employees are subject to a federal act relating to minimum wage and overtime compensation, the Legislature clearly recognized that there would be situations where application of the requirements set forth in the FLSA might result in no overtime being paid to a particular employee or group of employees. Otherwise, the Legislature would not have made such a distinction. To ignore the plain meaning of W.Va. Code § 21-5C-1(e) would essentially render that statute meaningless which is impermissible under West Virginia law. *See e.g. Davis Memorial Hosp. v. West Virginia State Tax Com'r*, 222 W.Va. 677, 686, 671 S.E.2d 682, 691 (2008) (recognizing that interpretation of a statute which renders a section, clause or word meaningless is contrary to the rules of statutory interpretation).

18. Moreover, both the West Virginia Division of Labor and the United States Department of Labor recognize that West Virginia law does not require the payment of minimum or overtime wages to in-home direct care workers/home health care workers like the Plaintiff in this case. For example, in an informational bulletin provided by the West Virginia Division of Labor, the Division expressly notes that "Some industries," including "In-Home Health Care Providers" are "automatically covered under federal law and are therefore exempt from the West Virginia minimum wage provisions regardless of specific employee activity." *See* West Virginia Division of Labor informational bulletin attached to WV Choice's Motion for Summary Judgment as Exh. D; and, U.S. Dept. of Labor informational bulletin attached to WV Choice's Motion for Summary Judgment as Exh. E

(discussing state minimum wage and overtime regulations and stating that “West Virginia does not apply minimum wage and overtime provisions to home health care workers”). The interpretation and application of the MWMHS and the FLSA by the West Virginia Division of Labor and U.S. Dept. of Labor should be given deference by this Court. *See e.g. Coke*, 551 U.S. at 173 (giving deference to the Dept. of Labor’s interpretations of its regulations); *IPI, Inc. v. Burton*, 217 W.Va. 181, 187, 617 S.E.2d 531, 537 (2005) (recognizing that interpretations as to the meaning and application of statutes rendered by the governing agency, as the governmental body charged with the administration and enforcement of the agency’s statutory law, should be accorded deference if such interpretations are consistent with the legislation’s plain meaning and ordinary construction); and *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W.Va. 573, 592, 466 S.E.2d 424, 443 (1995) (recognizing the circumstances in which deference should be given to agency interpretations of its own statutes).

19. Plaintiff has argued that the FLSA is not applicable because WV Choice engages in purely intrastate commerce. This contention is mistaken. Pursuant to the FLSA, an enterprise “engaged in commerce or in the production of goods for commerce” is as an enterprise that has two or more employees who are directly engaged in commerce or that has employees handling goods or materials that have been moved in commerce. The operative statute specifically defines an “enterprise” as one that:

(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).

See 29 U.S.C. § 203(s)(1)(A) (emphasis added). Providing further clarification, the Code of Federal Regulations state:

An enterprise ... will be considered to have employees engaged in commerce or in the production of goods for commerce, including the handling, selling, or otherwise working on goods that have been moved in commerce by any person if ... it regularly and recurrently has at least two or more employees engaged in such activities. On the other hand, it is plain that an enterprise that has employees engaged in such activities only in isolated or sporadic occasions, will not meet this condition.

29 C.F.R. § 779.238 (emphasis added).

20. The jurisdictional reach of the FLSA is expansive. As stated by the court in *Shomo v. Junior Corp.*, 2012 WL 2700498 (W.D. Va. 2012), “it is well established that local business activities fall within the FLSA when an enterprise employs workers who handle goods or materials that have moved or have been produced in interstate commerce.” *See id.* at \* 4 citing *Brock v. Hamad*, 867 F.3d 804, 808 (4th Cir.1989) (per curiam). *See also Diaz v. HBT, Inc.*, 2012 WL 294749, at \*3 (D.Md. Jan. 31, 2012) (Where materials used by employees during operations have traveled at some point in interstate commerce, enterprise coverage exists, even though the plaintiff could show that he was not directly engaged in the actual movement of goods in commerce.)

21. Here, the first prong of the enterprise coverage test has been satisfied:

- Plaintiff routinely handles goods that have been moved or produced in commerce in connection with the companionship services that she is employed to provide. *See* 29 U.S.C. §203(s)(1)(A)(1). She testified that she

routinely handles and purchases food, household cleaning supplies, medications, and personal hygiene and grooming products, which have been purchased at nationally-known stores such as Dollar General, in conducting the companionship services that she provides. Plaintiff's Deposition at pp. 111-117.

- At any given time, WV Choice employs 2000 direct care workers. *Parrucci Affidavit* ¶ 3. These workers provide services typical of the types of in-home companionship services that Plaintiff provides. *Parrucci Affidavit* ¶ 3.
- WV Choice further engages in interstate commerce by way of its employment of certain direct care workers who, for example, reside in States other than West Virginia and cross the state line to provide companionship services in the homes of West Virginia residents. Direct care workers in the employ of WV Choice, in the course and scope of their duties, also take residents who reside in West Virginia into other states surrounding West Virginia to obtain goods and services from out of state providers. Affidavit of David Wilson at ¶ 5. WV Choice has also used the U.S. Mails to send paychecks to some of its out-of-state employees and currently uses direct deposit banking services to distribute pay from its West Virginia bank to the out-of-state banks of some of its out-of-state employees. Affidavit of David Wilson at ¶¶ 6-7.

22. The second prong of the enterprise coverage test (*See* 29 U.S.C. §203(s)(1)(A)(ii)) is also met as WV Choice is a business enterprise that has an annual gross volume of sales made or business done which exceeds \$ 500,000.00, exclusive of excise taxes. Affidavit of David Wilson at ¶ 3. There is no evidence in the record to dispute this fact.

23. Finally, contrary to Plaintiff's contention, the "savings clause" of the FLSA, 29 U.S.C. § 218(a), does not apply in this case. The MWMHS applies only to "employers" as that term is defined by that Act. WV Choice does not meet the definition of an "employer" under the provisions of the MWMHS, W.Va. Code § 21-5C-1, *et seq.* Therefore, the MWMHS does not apply and this Court is not required to engage in a comparison between the two laws.

24. In the matter now before this Court, the undisputed evidence establishes that WV Choice is not an “employer” as defined by the MWMHS. More than 80% of the persons employed by WV Choice are subject to the FLSA. See W.Va. Code § 21-5C-1(e). As a matter of law, Defendants do not meet the definition of an “employer” under the provisions of West Virginia’s MWMHS, W.Va. Code § 21-5C-1 *et seq.*, and are not responsible for overtime pay under the MWMHS as requested by Plaintiff. WV Choice has met its burden under Rule 56 and sufficiently demonstrated the absence of evidence supporting Plaintiff’s claims. Plaintiff has failed to offer any facts to dispute those presented by Defendants or offer evidence of a genuine issue of material fact for trial. Accordingly, there is no genuine issue of fact to be tried and inquiry concerning the facts is not necessary to clarify the application of the law. WV Choice’s Motion must be granted, and Plaintiff’s Complaint should be dismissed as a matter of law.

For the reasons set forth herein, the Court hereby GRANTS West Virginia’s Choice, Inc.’s Motion for Summary Judgment and ORDERS that Plaintiff’s claims against Defendant West Virginia’s Choice, Inc. are hereby DISMISSED as a matter of law.

Having also dismissed the claims against Defendant Mulberry Street Management Services, Inc. in the “Findings of Fact and Conclusions of Law Regarding Defendant Mulberry Street Management Services, Inc. and Order Granting Motion for Summary Judgment,” this civil action is hereby DISMISSED in its entirety, with prejudice, and shall be stricken from the docket of this Court.

Plaintiff’s objections and exceptions to this ruling are reserved.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

ENTERED this 31 day of Oct, 2013.

James C. Stucky  
James C. Stucky, Judge

Prepared by:

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STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 14th  
DAY OF November  
Cathy S. Gatson CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

and

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