IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

JOSE IGNACIO MAZAHUA REYES, NABEEL AL SHAIKHLI, HSIT HSIT, INGRYD NIEVES ESTRADA, MANUELA PENA, RY SOM, and COLUMBUS WAH, individually and on behalf of all other similarly situated Plaintiffs, v. PORTLAND SPECIALTY BAKING, LLC, a Domestic Limited Liability Company, Defendant.	Case No. 16CV25324 OPINION AND ORDER RE: DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Defendant Portland Specialty Baking, LLC's Motion to Dismiss or in the alternative Motion for Summary Judgment came before the Honorable Kathleen M. Dailey, Circuit Court Judge, on February 10, 2017. Plaintiffs appeared by and through their attorneys, Corinna Spencer-Scheurich, Michael Dale, and Phil Goldsmith. Defendant appeared by and through their attorneys, Robyn Aoyagi and Scott Seidman.

The Court took the parties' motions and briefing under advisement, and for the reasons set forth below now GRANTS in part and DENIES in part Defendant's Motion to Dismiss or in the Alternative for Summary Judgment.

FACTS

This is a putative class action on behalf of current and former employees of Defendant Portland Specialty Baking, LLC ("PSB") for damages and declaratory and injunctive relief. PSB is a commercial baked goods manufacturing company located in Gresham, Oregon that employs or employed Plaintiffs on its production line. The named Plaintiffs are five current employees

and two former employees of PSB, who are or were paid on an hourly basis. Plaintiffs seek to represent a class of all current and former production workers who worked for PSB between August 8, 2014 and the present.

DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

I. Plaintiffs' First Claim for Relief (failure to pay both daily and weekly overtime)

The issue raised in Plaintiffs' First Claim for Relief is whether an employee who works both more than 10 hours in a 24-hour period and more than 40 hours in the same workweek is entitled to receive an overtime premium both for hours worked in excess of 10 hours in a day and for hours worked in excess of 40 hours in the same workweek. The parties agree that Plaintiffs were not paid both daily and weekly overtime. (Pls.' Response to Def.'s Mot. to Dismiss or for Summ. J. 4:9-13; Def.'s Mot. to Dismiss 2:16-20; 7:12-13.)

Oregon overtime statutes do not specifically address the relationship between the two overtime laws and how overtime should be calculated when an employee works both more than 10 hours in one day and more than 40 hours in one week. This issue presents a matter of statutory interpretation.

ORS 653.261 provides that "...after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of the employees..." ORS 653.261(1). Under ORS 652.020, which applies to manufacturing employees and employees in other enumerated industries, certain non-exempt hourly employees, including employees working in manufacturing, are entitled to be paid overtime for work in excess of 10 hours in one day: "No person shall be employed in any mill, factory or manufacturing establishment in this state more than 10 hours in any one day...However,

employees may work overtime not to exceed three hours in one day, conditioned that payment be made for said overtime at the rate of time and one-half the regular wage." ORS 652.020(1).

The Oregon Bureau of Labor and Industries (BOLI) Wage and Hour Division provides employers with guidance through its published Technical Assistance for Employers and Field Operations Manuals regarding compliance with state overtime laws. Prior to December 2016, BOLI's Technical Assistance for Employers stated that "When employees who are entitled to and have worked daily overtime have also worked more than 40 hours in the workweek, the employer should calculate overtime wages for hours worked on both a daily basis and a weekly basis *and then pay the greater amount of the two*." (Richardson Dec. Ex. 1.)

In December 2016, subsequent to the filing of this lawsuit, BOLI revised the Technical Assistance materials to read: "When employees who are entitled to and have worked daily overtime have also worked more than 40 hours in the workweek, the employer should calculate overtime wages earned for hours worked on both a daily basis and a weekly basis *and then pay both amounts*."[1] Thus, under BOLI's most recent guidance materials, daily manufacturing overtime and weekly overtime laws operate independently of one another, permitting no offset of one by the payment of the other. (Avakian Dec. ¶ 5, 7, Ex.1). Taking the example in Defendant's Motion to Dismiss at Page 6, BOLI's current position would be that no offset of one type of overtime should be permitted for another. As a consequence, under BOLI's latest interpretation an employee at PSB working a 44-hour workweek consisting of four 11-hour workdays would be entitled to four hours of daily overtime, and four hours of weekly overtime, totaling eight hours of overtime pay.

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[1] *BOLI Technical Assistance for Employers, Manufacturing: Daily Overtime and Maximum Hours Restrictions*, OREGON.GOV, http://www.oregon.gov/boli/TA/pages/t_faq_tamanufacturing.aspx (last visited Feb. 21, 2017)

Plaintiffs suggest an interpretation that differs from, but adopts most of the way BOLI has reconciled the two statutes. Under Plaintiffs' interpretation, the first three daily overtime hours incurred in a week would be counted as daily overtime, while the 8th, 9th, and 10th hours of overtime on the fourth day would be counted as weekly overtime. In order to avoid double-counting the 11th hour (hereinafter "the 11th hour") of work on the fourth day, the 11th hour would be treated as only one hour of overtime (whether it is classified as weekly, daily, or generic overtime[2]), totaling seven hours of overtime pay. Plaintiffs' interpretation of ORS 653.261(1) is to therefore only treat the 11th hour (and hours after the 11th hour falling on Day 4) as weekly overtime (or generically as "overtime"), meaning that no double-counting would occur for the 11th hour and all hours subsequent to the 11th hour that fall on the same day.

The Court finds Plaintiffs' end-of-week adjustment to calculating overtime hours is internally inconsistent. If Plaintiffs are correct that PSB employees are entitled to pay for both daily and weekly overtime, and that the two types of overtime are distinct, why wouldn't an employee also be entitled to daily and weekly overtime for the 11th hour of work? The obvious answer is that such a double-payment violates the "one and one-half times the regular rate" clause of ORS 653.261(1). However, in positing that the 11th hour should merely be counted as either daily or weekly overtime, but not both, Plaintiffs undermine the foundation of their argument – that daily and weekly overtime are distinct types of overtime that must be compensated separately.[3]

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[2] At oral argument on February 10, 2017, Counsel for Plaintiffs did not specify how the Court should categorize the 11th hour of overtime. Ms. Spencer-Scheurich stated: "But it wouldn't be duplicative of receiving overtime later in the week, especially under our calculation where that last hour is one or the other but not both." (Corinna Spencer-Scheurich, Oral Argument, 2/10/17)

[3] "The legislative and administrative records show that these are two separate overtime schemes and that they were never intended to protect the employer from paying both obligations." (Pls.' Response to Def.'s Mot. to Dismiss or for Summ. J. 7:20-21.)

Plaintiffs' reading of the statutory scheme creates two different meanings for the word "overtime" – one meaning that applies prior to the 11th hour, and another meaning that applies at the 11th hour. In asking the Court to impose parallel interpretations of the word "overtime," Plaintiffs' actual position is that the Court should construe ORS 653.261 and ORS 652.020 inconsistently, based on which hour of the week is at issue.

The Court must construe statutes on the same subject as consistent with one another, so as to give effect to all. *State of Oregon v. Langdon*, 151 Or.App. 640, 645 (1997) ("We must construe statutes on the same subject as consistent and in harmony with one another…and construe relevant statutes so as to give effect to all"), *review allowed* 327 Or. 431 (1998), *affirmed* 330 Or. 72 (2000); *See also Burt v. Blumenauer*, 87 Or. App. 263, 265 (1987) ("It is axiomatic that, in enacting subsequent legislation, the legislature's knowledge of earlier enactments is presumed. When several statutory provisions are involved, we should render a construction that gives effect to all of them, if possible.").

Plaintiffs' interpretation fails to "give effect to all" provisions of both statutes. Under their reading of the statutory scheme, employees would be deprived of the 11th hour daily overtime to which they are entitled under ORS 652.020(1) – daily overtime that Plaintiffs argue at other points in their briefing is a "distinct"[4] and "separate"[5] type of overtime. By suggesting that an employee is entitled to both daily and weekly overtime, but not daily overtime for the 11th hour, Plaintiffs' interpretation violates their own reading of ORS 652.020(1) because such an interpretation would be inconsistent with the requirement of ORS 652.020(1) that "…employees may work overtime not to exceed three hours in one day, conditioned that payment be made for

[4] Pls.' Response to Def.'s Mot. to Dismiss or for Summ. J. 7: 2
[5] Pls.' Response to Def.'s Mot. to Dismiss or for Summ. J. 7: 20

said overtime at the rate of time and one-half the regular rate." ORS 652.020(1). While employees of PSB would be paid at the rate of time and one-half the regular rate for the 11th hour under Plaintiffs' end-of-week adjustment, they would not be compensated for that hour as daily overtime. For the same reason that Plaintiffs' interpretation would violate Plaintiffs' own reading of the daily overtime statute, it would also violate Plaintiffs' own reading of the weekly overtime statute and its attendant administrative rule, OAR 839-020-0030(1).[6]

Finally, under ORS 174.010, "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted…" ORS 174.010; *See also Moustachetti v. State of Oregon*, 319 Or. 319, 326 (1994). In attempting to utilize Plaintiffs' construction of ORS 653.261 and ORS 652.020, the only avenue for reconciliation of both statutes is through an end-of-week adjustment to the daily and weekly overtime hours owed to employees. The Court finds no textual basis in either ORS 653.261 or ORS 652.020 for such an adjustment.

Defendant's interpretation of the statutory scheme is that (consistent with BOLI's pre-December 2016 interpretation) an employer subject to both ORS 652.020 and ORS 653.261 must calculate both daily and weekly overtime and pay the greater of the two. (Def.'s Mot. to Dismiss 2:18-20.) In a 44-hour workweek for a PSB employee consisting of four 11-hour workdays, under Defendant's interpretation an employee would be owed four hours of overtime pay. Thus, under this hypothetical, Defendant's interpretation is that if the employer pays an hour of overtime each day, then it has met both its daily and weekly overtime commitment because the

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[6] *See* OAR 839-020-0030(1) ("Except as provided in OAR 839-020-0125 to 839-020-0135, all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefits of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1).")

overtime hours paid during the week are considered in calculating how much weekly overtime is due. (Def.'s Reply in Support of Mot. to Dismiss; 11:21-24; Def.'s Mot. to Dismiss 6:2-6.)

The Court finds that Defendant's interpretation of ORS 652.020 and ORS 653.261 is the proper interpretation of the statutory scheme. In contrast to Plaintiffs' interpretation, employing BOLI's pre-December 2016 interpretation of overtime laws creates a consistent reading of the statutory scheme by treating an overtime hour as something that must be paid at the rate of time and one-half the regular wage once in all circumstances – not twice in some circumstances and once in others. First, for employers to pay "the greater" of daily or weekly overtime owed to employees is consistent with ORS 652.020 because it ensures that an employee is paid at least "time and one-half the regular wage" for daily overtime hours worked. *See* ORS 652.020. Whether daily or weekly overtime is greater in a given week has no effect on the employee receiving at least time and one-half the regular wage. Second, consistent with ORS 653.261, when an employee is paid the greater of daily or weekly overtime, no double-counting of the 11th hour occurs that would violate ORS 653.261(1)'s prohibition on receiving overtime pay after 40 hours at a rate higher than one and one-half times the regular rate of pay. *See* ORS 653.261(1). Third, this is consistent with OAR 839-020-0030 because when the greater of daily or weekly overtime is paid, all work performed in excess of forty hours per week is paid at the rate of no less than one and one-half times the regular rate of pay.

Defendant's Motion to Dismiss Plaintiffs' First Claim for Relief is GRANTED.

II. Plaintiffs' Second Claim for Relief (failure to pay daily overtime)

Defendant's Motion to Dismiss or in the Alternative for Summary Judgment on Plaintiffs' Second Claim for Relief was previously withdrawn by Defendant.

III. Plaintiffs' Third Claim for Relief (timely payment upon termination)

Plaintiffs' Third Claim for Relief alleges that Defendant failed to pay all wages due upon termination to Plaintiffs Ry Som and Columbus Wah (as well as any other members of the putative class who are no longer employees of Defendant) in violation of ORS 652.140. (Compl. ¶ 33.) The issue before the Court is whether the alleged conduct of failing to pay daily overtime under ORS 652.020(1) creates separate liability against Defendant under ORS 652.140, as well as liability for penalty wages under ORS 652.150.

Plaintiffs cite *Cornier v. Tulacz*, 176 Or.App. 245 (2001) in support of the proposition that "Plaintiffs Som and Wah are entitled to ORS 652.150 penalty wages for a separate and distinct violation of ORS 652.140, in addition to overtime violations under ORS 653.055." (Pls.' Response to Def.'s Mot. to Dismiss or for Summ. J. 16:19-20.) In *Cornier*, the Court found that:

> "...this case does not present an instance of double penalties for the same conduct, and we do not address that issue, because here the violation that occurred during employment was underpayment for overtime, while the violation at termination was nonpayment for accrued vacation. Plaintiff has asserted separate violations for separate acts of her employer. Third, if this case did present two claims for two penalties based on the same employer misconduct, one of those claims would probably fail under *Hurger v. Hyatt Lake Resort, Inc.*, 170 Or.App. 320, 328, 13 P.3d 123 (2000)..."

176 Or.App. 245 at 250. In the instant case, Plaintiffs suggest that a "separate" violation of Oregon's employment statutes has occurred from Defendant's alleged failure to pay daily overtime wages in violation of ORS 652.020. *Cornier* is distinguishable because in that case the court considered the question of how many penalties a plaintiff may be entitled to when separate conduct that constitutes separate violations of employment laws are at issue.

Although Oregon courts have not always spoken with a single voice on questions of duplicative penalties under Oregon employment statutes,[7] since *Hurger* and *Cornier*, the Oregon

[7] *See Berger v. DIRECTV, Inc.* 2015 WL 1799996, *11 (D. Or. 2015) ("While these cases fall short of conclusively establishing that an ORS 652.140 claim will not lie based on ongoing-underpayment facts, the courts of this district have consistently interpreted them as standing collectively for that proposition."); *See also Saldana v. Slingluff,*

District Court has provided consistent guidance on the issue:

> "Cases from this district that address the issue after *Hurger* and *Cornier* uniformly conclude unpaid minimum or overtime wages do not automatically trigger a second penalty under § 652.150 for late payment of wages after termination in violation of Oregon Revised Statute § 652.140."

Herb v. Van Dyke Seed Co., Inc. 2012 WL 4210613, 3* (D. Or. 2012). In discussing the holding in *Mathis v. Housing Authority of Umatilla County*, 242 F.Supp.2d 777 (D. Or. 2002) the *Herb* court noted that:

> "...Plaintiff could not recover penalties under § 652.150 and § 653.055 for the same conduct reasoning that the defendant "committed only one wrongful act, namely not paying [the plaintiff] overtime wages. A violation of the overtime statute does not automatically create a second violation of the statute requiring prompt payment of all wages due and owing at termination when an employee quits or is terminated.""

2012 WL 4210613 at *3, *citing* 242 F.Supp.2d 777 at 788.

The Court adopts the reasoning of Defendant and finds that terminated Plaintiffs including Ry Som and Columbus Wah may not recover double penalty wages for the same alleged wrong (failure to pay daily overtime under ORS 652.020) by invoking ORS 652.140 and ORS 652.150.

Defendant's Motion to Dismiss Plaintiffs' Third Claim for Relief is GRANTED.

IV. Plaintiffs' Fourth Claim for Relief (exceeding maximum working hours in manufacturing)

Plaintiffs' Fourth Claim for Relief seeks declaratory and injunctive relief "...to prevent Defendants from requiring or permitting production workers from working more than 13 hours in a 24-hour period in violation of ORS 652.020." (Compl. ¶ 42.) Plaintiffs' prayer for declaratory and injunctive relief is brought under ORS 28.010 and ORS 28.080, respectively.

2011 WL 4625706, *4 (D. Or. 2011) ("As plaintiffs acknowledge, absent guidance from the Oregon Supreme Court, it is unclear whether a single act can give rise to two wage and hour penalties, resulting in inconsistent results in this court.") *North Marion School Dist. No. 15 v. Acstar Ins. Co.*, 343 Or. 305, FN 3 (2007); ("Courts that have been faced with the argument that the termination penalty is an exclusive remedy for failure to pay wages owed have rejected that argument, although some courts have disallowed a double recovery.")

(Compl. ¶ 42.) For this Claim to stand, the controversy before the Court must be justiciable.[8] Pursuant to ORS 28.120, "The purpose of this chapter is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered." ORS 28.120. There is no present "uncertainty" or "insecurity" pertaining to the question of whether or not, pursuant to ORS 652.020, PSB may require its employees to work for more than 13 hours during a 24-hour period. Therefore, the Court finds no legal basis for issuing declaratory relief on this Claim. Defendant withdrew its Motion to Dismiss and in the alternative Motion for Summary Judgment against Plaintiffs' Second Claim for Relief, based on the factual questions that arose during the course of this motion litigation. Because there is question of fact as to whether any Plaintiff worked more than 13 hours in a 24-hour period the Court denies both Defendant's Motion to Dismiss and in the alternative Motion for Summary Judgment as to Plaintiffs' claim for an injunction.

Defendant's Motion to Dismiss Plaintiffs' Fourth Claim for Relief is GRANTED as to the declaratory relief claim, and DENIED as to the injunction claim.

V. Plaintiffs' Fifth Claim for Relief (violation of Oregon sick leave law)

Plaintiffs' Fifth Claim for Relief seeks declaratory relief that Defendant's attendance points policy violates ORS 653.641, and an injunction ordering Defendants to "(a) remove accrued sick leave absences from its 'attendance points' policy and notify current employees of

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[8] *See Chernaik v. Kitzhaber*, 263 Or. App. 463, 476 (2014) ("As we recently have observed, the Uniform Declaratory Judgments Act has "an uneasy relationship with the constitutional concept of justiciability." *Hale,* 259 Or.App. at 383, 314 P.3d 345. "The statutes announce that their purpose 'is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and [they are] to be liberally construed and administered.' ORS 28.120. * * * The statutory authority to issue declaratory judgments, however, is constrained by constitutional justiciability requirements. The Supreme Court has held that the [Act] does not give courts authority to issue declaratory rulings 'in a vacuum; they must resolve an actual or justiciable controversy.' Courts cannot exercise jurisdiction over nonjusticiable controversies because a court cannot render advisory opinions. Thus, if a claim for a declaratory judgment does not involve a justiciable controversy, a court does not have jurisdiction to consider it." *Id.* (citations and footnote omitted)")

the change in policy and (b) remove from personnel records and undo the consequences of any points, written warnings and other adverse employment actions that any present employees have received as a result of taking protected leave since January 1, 2016." (Compl. ¶ 50-51.)

Prior to January 1, 2016, PSB had an attendance policy that included a points-based system pertaining to absences that could now be classified as protected under ORS 653.641. *See* Spencer-Scheurich Dec. ¶ 12; Ex. 9. However, as Defendant rightly points out, "There was nothing unlawful about such policies prior to January 1, 2016." (Def.'s Mot. to Dismiss or for Summ. J. 14:11-12.) As such, the issue before the Court is not whether Defendant's prior attendance policy violates ORS 653.641, but whether Defendant violated ORS 653.641 subsequent to January 1, 2016. Since January 1, 2016, PSB's attendance policy includes a formula under which employees may be issued points if they are late or absent from work, and point accumulation may lead to an adverse employment action under this policy. (Richardson Dec. ¶ 10; Ex. 3.)

The issue before the Court is whether Defendant's current attendance policy denied, interfered with, or restrained Plaintiffs from taking legally protected sick leave to which Plaintiffs were entitled under ORS 653.601 through ORS 653.661, or whether Defendant applied an absence control policy that included sick time absences covered under ORS 653.601 through ORS 653.661 as an absence that may lead to an adverse employment action. *See* ORS 653.641. The Court finds that Defendant's attendance policy complies with ORS 653.641 on its face. The parties agree that prior to the change in law, ORS 653.641, resulting in a change in policy by PSB, employees were assigned points when using sick leave. Although Plaintiffs have offered affidavits detailing their subjective anxiety about taking legally protected sick leave based on their experience of being assigned points for doing so, the affidavits are not sufficient to create a

question of fact because they do not substantiate allegations that, subsequent to January 1, 2016, Defendant has taken any specific action to "deny, interfere with, restrain or fail to pay for sick time" under ORS 653.641(1), or that Defendant has applied an "absence control policy that includes sick time absences covered under ORS 653.601 to 653.661 as an absence that may lead to or result in an adverse employment action against the employee" under ORS 653.641(3). *See* ORS 653.641. Plaintiffs' speculation that certain employees were "assumedly issued a point"[9] for taking protected sick does not create a question of fact[10] under ORS 653.641. Plaintiffs have supplied no evidence that Defendant has included protected sick leave absences in its attendance points policy, or taken any adverse employment actions against employees for taking protected sick leave since January 1, 2016.

The evidence before the Court does not support that Defendant took any action which lends itself to a justiciable controversy.[11] *See* ORS 28.010; ORS 28.080; ORS 659A.885. When viewing the facts in the light most favorable to Plaintiffs there is no genuine dispute about an issue of material fact that supports a declaration or injunction preventing Defendant from doing the same.

Defendant's Motion for Summary Judgment on Plaintiffs' Fifth Claim for Relief is GRANTED.

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[9] Pls.' Response to Def.'s Mot. to Dismiss or for Summ. J. 26:5

[10] See *Mannex Corp. v. Bruns*, 250 Or. App. 50, 57 (2012) ("Thus, aside from what plaintiff admits was speculation, plaintiff did not present any evidence to create a genuine issue of fact about defendant's personal interest in the business relationship between plaintiff and PCC. We "recognize that the line between permissible inferences from facts and impermissible speculation is a fine line indeed."***284* State v. Baty, 243 Or.App. 77, 86, 259 P.3d 98 (2011). In the present case, however, the inference of some ulterior motive beyond a desire to help her employer, based on rumors (denied by both parties) of a failed romance and a "best guess" regarding an old family feud, clearly falls on the speculative side of the line. We conclude that the trial court correctly granted summary judgment to defendant on plaintiff's IIER claim.")

[11] *See Chernaik v. Kitzhaber*, 263 Or. App. 463, 476 (2014)

ORDER

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss Plaintiffs' First Claim for Relief is GRANTED. Defendant's Motion to Dismiss or in the Alternative for Summary Judgment on Plaintiffs' Second Claim for Relief was previously withdrawn. Defendant's Motion to Dismiss Plaintiffs' Third Claim for Relief is GRANTED. Defendant's Motion to Dismiss Plaintiffs' Fourth Claim for Relief is GRANTED as to the declaratory relief claim, and DENIED as to the injunction claim. Defendant's Motion for Summary Judgment on Plaintiffs' Fifth Claim for Relief is GRANTED.

DATED THIS 9 day of March, 2017.

Kathleen M. Dailey
Circuit Court Judge

Original - Court
cc: Plaintiffs, Defendant