APPENDICES

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APPENDIX A

No. 23–1793

JULIE A. SU, ACTING SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff, Appellee,
v.
F.W. WEBB COMPANY,
Defendant, Appellant.

Appeal from the United States District Court
for the District of Massachusetts

[Hon. Angel Kelley, *U.S. District Judge*]

Before

Barron, *Chief Judge*,

Selya and Kayatta, *Circuit Judges*.

Rachel Cowen, with whom *James M. Nicholas*, *Henry Leaman*, and *McDermott Will & Emery LLP* were on brief, for appellant.

Joseph E. Abboud, Attorney, U.S. Department of Labor, Office of the Solicitor, with whom *Seema Nanda*, Solicitor of Labor, *Jennifer S. Brand*, Associate Solicitor, and *Rachel Goldberg*, Counsel for Appellate Litigation, were on brief, for appellee.

August 1, 2024

KAYATTA, ***Circuit Judge***. The Acting Secretary of Labor brought this action against F.W. Webb Company ("Webb"), an industrial product wholesaler, alleging that Webb misclassified its Inside Sales Representatives ("ISRs") as exempt administrative employees in violation of the Fair Labor Standards Act's overtime and

recordkeeping requirements. The district court granted judgment to the Secretary on both claims, finding that the ISRs did not qualify for the exemption because their "primary duty" is not "directly related to the management or general business operations" of Webb or its customers. *See* 29 C.F.R. § 541.200(a)(2). For the following reasons, we are unpersuaded by Webb's appeal from that judgment.

I.

A.

Webb is a wholesale distributor of engineering and construction products including plumbing, heating, cooling, and PVF (pipes, valves, and fittings) equipment and fixtures. Webb's principal business is to make "wholesale sales of those products to contractors in various industries, government organizations, institutions such as universities and hospitals, industrial buyers, and other customers who work in construction, building maintenance, and infrastructure." *Su* v. *F.W. Webb Co.*, 677 F. Supp. 3d 7, 11–12 (D. Mass. 2023). Webb generates its revenue from three categories of employees "who directly sell the products to customers": ISRs, outside salespersons, and counter salespersons. *Id.* at 12.

Webb's principal office is in Bedford, Massachusetts, but it also operates more than a hundred storefront locations across nine states in New England and the mid-Atlantic. *Id*. During the relevant period of the Secretary's investigation, Webb employed over 600 ISRs across those nine states. *Id.* Webb employs far more ISRs than it does outside or counter salespersons, which number around 300–350 and 100 respectively. During the period in question, Webb classified all of its ISRs as administrative employees exempt from the Fair Labor Standards Act's ("FLSA") overtime requirements, and at least some ISRs worked over forty hours during some workweeks without receiving FLSA overtime premiums. *Id.*

It is uncontested that Webb generates revenue from its ISRs though the sales transactions they complete with customers. *Id.* It is also uncontested that the ISRs directly interact with customers throughout the sales process, from a customer's initial contact to the delivery of purchased products. *Id.* In the interim, ISRs work with the customer to "figure out what the right product or products [are]." ISRs specialize in various product areas, but Webb considers all its ISRs to have the same position and basic duties. *Id.* ISRs report to the general manager supervising the store at which they work, but at some stores they may also report to an "inside sales manager." *Id.* ISRs themselves do not have management duties over other employees.

A representative March 2019 job description posted by Webb stated that ISRs "will work cooperatively with . . . other members of the sales team to grow existing customers, to create new customers and meet or exceed monthly sales quotas at the appropriate gross margin while increasing customer satisfaction." Specific job responsibilities are listed as follows: processes and maintains customers' orders; creates transfers between various Webb locations to fulfill customer orders; attains specialty material through the use of purchase orders; recommends, sources, and prices bids for customers; makes pricing decisions on orders/bids to maintain competitiveness in the marketplace; follows up on long lead time purchase orders, keeping customers informed of any changes; effectively handles customer-service issues; schedules and manages customer deliveries; produces bids for customer approval; manages credits to Webb standards; and additional duties as assigned. *Id.*

Unlike Webb's counter salespersons, who primarily provide quotes and conduct simple over-the-counter sales transactions in stores, ISRs spend only a minority of their time providing readymade quotes to customers from a

specified parts list. *Id.* at 12–13. Counter salespersons primarily service customers who physically visit a Webb storefront location to purchase a specified product, such as "small equipment pieces, fittings, [and] valves." By contrast, while ISRs also complete similar kinds of transactions to those performed by counter salespersons, they principally interact with customers over phone and email -- and often on more significant projects. Also unlike counter salespersons, ISRs have discretion and authority to deviate from Webb's pricing matrix when dealing with customers. *Id.* at 13.

Webb expects its ISRs to "possess the knowledge and expertise in their respective [product] areas in order to advise their customers on the best solutions for their needs." *Id.* Principally, this involves working with the customer, who might not know which specific part or item they require, to identify the specific item that best meets their goals. *Id.* Often a customer will provide an ISR with specifications for a project -- such as in connection with the customer's preparation of a bid in response to a request for proposal -- and ask the ISR to provide quotes for all the products needed to meet those specifications, based on Webb's inventory and items the ISR can source. *Id.* Accordingly, several ISRs aver that they spend a majority of their time "advising" or "consulting" customers on the best solutions for their projects, a process which often culminates in the customer making one or more purchases. As Webb's COO acknowledges, "[t]he end game is completing the sale[.]" Webb does not charge customers consulting fees for ISRs' time spent guiding them toward specific products for their project or bid.

Webb admits that it hopes its ISRs' interactions with customers lead to a sale. But regardless of the outcome, Webb views ISRs' services as "important to maintaining the pipeline of transactions in the future" by promoting

customer relationships. As Webb explains, "[e]nsuring that the customers are satisfied and will return to Webb for their [respective] needs is an integral part of [an ISR's] duties." To that end, ISRs act as "Webb's eyes and ears on the marketplace," providing general managers with information about competitors for Webb's development of marketing and pricing strategies. *Id.*

ISRs' additional duties include providing technical support to outside salespersons -- who are not as "technically savvy" as ISRs -- such as information on the selection and sufficiency of particular products. ISRs also perform various duties after a particular sale is made, including tracking Webb inventory once a customer makes an order, following up on an order's shipping status, interacting with third-party manufacturers if necessary, and addressing customer complaints. *Id.*

ISRs are compensated in accordance with grade levels as determined by seniority and experience, as well as pay tiers within those grade levels, which are determined by an ISR's annual performance appraisal. *Id.* at 13–14. To document ISRs' performance appraisals, Webb uses a standard form completed by each ISR's general manager. The form is divided into two sections: section A, which looks at "key responsibilities," and section B, which measures "behavioral responsibilities." The manager completing the form assigns ratings for a set of criteria within each of these sections based on software metrics that Webb uses to track ISRs' activities during the work day. *Id.* at 13.

Section A measures "key responsibilities" by assessing ratings for an ISR across four categories. The first, "sales and GP budget," asks if the employee met sales and profit targets for the year. *See id.* The second, "bid and bid follow-up," is based on the number of bids written, win rate, and follow up rate. Third, "open orders" measures the number of open order sales past due, open orders past due, and open

orders with follow up required. Fourth and finally, "communication" is measured by the number of phone calls answered, not answered, as well as the number of an ISR's calendar entries.

As for Section B, the "behavioral responsibilities" component measures "customer focus"; "drive for results"; "integrity, interpersonal savvy, and organizational agility"; "listening and negotiating"; "functional/technical skills"; "technical learning"; and "problem solving." For example, the "customer focus" rating is based on whether the ISR, among other things, "[i]s dedicated to meeting the expectations and requirements of internal and external customers," and "[a]cts with customers in mind." Similarly, "drive for results" measures if an ISR is "consistently one of the top performers" and is "[v]ery bottom-line oriented."

B.

After completing an investigation, the Secretary filed suit against Webb in July 2020. In addition to asserting an FLSA retaliation claim not relevant here, the Secretary alleged that Webb misclassified its ISRs as administrative employees exempt from the FLSA's overtime and recordkeeping requirements, failed to pay ISRs the requisite overtime premium under the FLSA for certain weeks, and failed to maintain records of hours worked for non-exempt employees. After discovery, the district court granted the Secretary's motion for partial summary judgment on both its overtime and recordkeeping claims. *F.W. Webb Co.*, 677 F. Supp. 3d at 28–29.

The district court found that Webb's core business purpose was to sell its products, and that the ISRs' primary duty was to make sales by servicing Webb's customers. *Id.* at 20. Accordingly, since the ISRs effectively "produce the product or provide the service that the company is in business to provide," *id.* at 19 (quoting *Walsh v. Unitil Serv. Corp.*, 64 F.4th 1, 7 (1st Cir. 2023)), the district court

concluded that the ISRs' primary duty was not "directly related to the management or general business operations of the employer" as required to qualify for the administrative employee exemption, 29 C.F.R. § 541.200(a)(2). The court found that the FLSA's overtime and recordkeeping requirements applied to ISRs, and that Webb violated both requirements by failing to pay ISRs overtime or keep proper records. *F.W. Webb Co.*, 677 F. Supp. 3d at 28–29. After all remaining claims and defenses were resolved by agreement and final judgment was entered in the Secretary's favor, Webb's timely appeal followed.

II.

We review a district court's entry of summary judgment de novo, viewing the record in the light most favorable to the nonmovant -- here, Webb -- and drawing all reasonable inferences in its favor. *Martinez v. Novo Nordisk Inc.*, 992 F.3d 12, 16 (1st Cir. 2021). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A.

The FLSA requires that covered employers pay certain employees an overtime premium "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Employers must also keep records tracking covered employees' work hours. *Id.* § 211(c); 29 C.F.R. § 516.2(a).

The FLSA exempts from these provisions "any employee employed in a bona fide executive, administrative, or professional capacity . . . as such terms are defined and delimited from time to time by regulations of the Secretary." 29 U.S.C. § 213(a)(1). The Secretary's regulations define those working in an "administrative" capacity as those employees: (1) who are compensated on a salary or fee basis

pursuant to 29 C.F.R. § 541.600 at a rate of not less than $844 per week (subject to certain exceptions); (2) whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (3) whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200(a). To fall under the exemption, "each of the three prongs must be satisfied and the employer bears the burden of establishing each prong." *Unitil Serv. Corp.*, 64 F. 4th at 5 (citing *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 7–8 (1st Cir. 1997)).

The parties do not dispute that Webb's ISRs meet the applicable salary basis test (prong one) and the independent judgment and discretion test (prong three) to qualify for the administrative employee exemption. This appeal therefore turns on the exemption's second prong, i.e., whether their "primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers."[1] 29 C.F.R. § 541.200(a)(2).

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[1] The Secretary's regulations also provide that:

> An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

29 C.F.R. § 541.201(c). Here, Webb has never argued that the ISRs' primary duty directly relates to the management or general business operations of Webb's customers as opposed to Webb itself. We therefore find any such argument waived. *See United States v. Zannino*, 895 F.2d 1, 9 n.7, 17 (1st Cir. 1990) (noting that arguments not raised below are deemed waived on appeal, as are issues only "adverted to in a

The Secretary's regulations expand on the meaning and scope of the exemption's "primary duty" requirement. First, "primary duty" is defined as "the principal, main, major or most important duty that the employee performs," which "must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." *Id.* § 541.700(a). The regulations note that "[t]he amount of time spent performing exempt work can be a useful guide" to the analysis, and thus "employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement." *Id.* § 541.700(b). "Time alone, however, is not the sole test," and "[e]mployees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the . . . requirement if the other factors support such a conclusion." *Id.* Those factors include, inter alia, "the relative importance of the exempt duties as compared with other types of duties" and "the employee's relative freedom from direct supervision." *Id.* § 541.700(a).

Additionally, the regulations make clear that employees will meet the primary duty requirement only if they "perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." *Id.* § 541.201(a). To that end, the regulations also provide that:

> Work directly related to management or general business operations [can] includ[e], but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health;

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perfunctory manner, unaccompanied by some effort at developed argumentation").

> personnel management; human resources; employee benefits; labor relations; public relations[;] government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

Id. § 541.201(b).

B.

We now consider whether the ISRs' "primary duty" is "directly related to the management or general business operations" of Webb under the FLSA's administrative employee exemption.[2] 29 C.F.R. § 541.200(a)(2). This court recently clarified that, in conducting this analysis, "it is often useful to identify and articulate the business purpose of the employer," meaning "the production or provision of 'the very product or service that the' employer . . . 'offers to the public.'" *Unitil Serv. Corp.*, 64 F.4th at 6 (quoting *John Alden Life Ins. Co.*, 126 F.3d at 9). Here, the district court identified Webb's business purpose as "produc[ing] wholesale sales of its products to its customers." *F.W. Webb Co.*, 677 F. Supp. 3d at 20. Webb did not dispute this characterization of its business purpose below and does not challenge it on appeal. We thus accept it as an undisputed fact for purposes of our analysis.

Having identified Webb's business purpose, we next conduct a "relational" analysis, "compar[ing] the employee's primary duty to the business purpose of the employer" to determine whether that duty "directly relates to the business purpose of the employer or, conversely, is directly related to the 'running or servicing of the business.'" *Unitil Serv. Corp.*, 64 F.4th at 6–7 (quoting 29 C.F.R. § 541.201(a)). Put another way, we consider "whether an employee's primary duties are 'ancillary' to the business's

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[2] Webb does not claim that ISRs' primary duty relates to the management or general business operations of Webb's customers.

'principal production activity' or 'principal function.'" *Id.* at 7 (quoting *John Alden Life Ins. Co.*, 126 F.3d at 10).[3]

We agree with the district court that the undisputed facts show that the ISRs' primary duty is "to help sell Webb's products" by delivering discrete customer sales, and that this duty is "'directly related' to Webb's business purpose of making wholesale sales of its products." *F.W. Webb Co.*, 677 F. Supp. 3d at 20, 22. The ISRs are therefore ineligible for the exemption. *Id.* at 20.

Indeed, there is simply no support for the claim that ISRs primarily function to "promote sales generally" or to provide some amorphous advisory or technical support role as opposed to delivering individual sales of Webb products themselves. Webb admits that ISRs do not work in "marketing," that they directly interact with customers throughout the sales process, and that they generate revenue for Webb in the form of sales that they make. The record does not show that ISRs have any policymaking authority within Webb apart from providing information to those

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[3] *Unitil Service Corporation* noted that its analytical framework "has its roots in what has sometimes been referred to as the 'administrative-production dichotomy,'" which, while not dispositive, "can be useful in assessing whether the [primary duty requirement] has been satisfied." 64 F.4th at 7. We find that for a wholesaler like Webb, *Unitil Service Corporation's* analysis is instructive. We therefore reject Webb's assertion that the district court's implicit reliance on the administrative-production dichotomy was error. Nor do we read the district court opinion as having treated this dichotomy as dispositive.

Additionally, because the district court's use of the administrative-production dichotomy was proper, we reject Webb's argument that the district court's reliance on *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896 (3d Cir. 1991) somehow requires reversal. Even assuming, arguendo, that *Martin* is not as persuasive as the district court found, the district court never considered itself bound by *Martin*. So, Webb's quibbles with some stale aspects of *Martin's* reasoning -- such as its narrow construction of FLSA exemptions -- miss the mark.

formulating policy, or that they have managerial duties over other employees. Even if ISRs sometimes provide technical support to outside salespersons, there is no claim of that being their primary duty. In sum, ISRs do not "perform work directly related to assisting with the running or servicing" of Webb, as distinguished, for example, "from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201(a). Webb is a wholesaler, and ISRs make those wholesales. Their primary duties are not "administrative" in any sense of the word.

In an attempt to ward off this conclusion, Webb argues that the ISRs' primary duty involves exemption-qualifying "high-level customer service" and that the district court committed several errors in finding otherwise. In particular, Webb argues that the district court improperly discounted evidence of ISRs' work as "advisors, consultants, and concierges" to deliver "solutions" and ensure customer satisfaction, and that "these customer service duties constitute the bulk of ISRs' work time." To that end, Webb points to several affidavits from individual ISRs stating that they spend a majority of their time providing such "advisory" duties while only a small percentage of their time "quoting specific parts."[4]

Much the same could be said of the many salespersons in many industries who advise customers in selecting a product with the aim of at some point making a sale. Consider salespersons in a clothing store. They can be said to provide high-level customer service advising clients on size

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[4] On this point, Webb fails to specify what if any portion of the ISRs' work time is spent performing post-sale concierge work "beyond any actual sale." We thus analyze ISRs' purported "high-level customer service responsibilities" in the aggregate. And in any event, Webb elsewhere concedes that the ISRs perform no customer-service duties "outside the context of making sales or sales that ha[ve] been made."

and style choices to ensure customer satisfaction by providing clothing solutions. Yet these individuals are clearly not exempt under the FLSA. *Reiseck v. Universal Commc'ns of Miami, Inc.*, 591 F.3d 101, 107 (2d Cir. 2010), *abrogated in part by Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 87 (2018).

We also reject Webb's passing argument -- made during oral argument but nowhere in its briefs -- that our decision in *Cash v. Cycle Craft Co.*, 508 F.3d 680, 683 (1st Cir. 2007), coupled with the Secretary's examples of exempt administrative employees at 29 C.F.R. § 541.203, counsels otherwise. For one, as the district court found, *Cash* is distinguishable because the exempt Harley-Davidson employee in question was responsible for improving customer satisfaction generally and was not involved in individual sales. *F.W. Webb Co.*, 677 F. Supp. 3d at 22 (discussing *Cash*, 508 F.3d at 681–82, 686); *cf. John Alden Life Ins. Co.*, 126 F.3d at 10 (noting the distinction between "promoting sales" generally and sales efforts "focused simply on particular sales transactions"). Additionally, the thrust of this well-worn distinction between particular sales and general sales promotion points to the conclusion that ISRs are more akin to non-exempt employees whose primary duty is "selling financial products" as opposed to those whose primary duties involve "advising the customer regarding the advantages and disadvantages of different financial products" and "marketing, servicing or promoting the employer's financial products." 29 C.F.R. § 541.203(b). At bottom, customer advice rendered in the context of making a particular sale is simply not "directly related to the management or general business operations" of an employer whose core business purpose is making sales. *Id.* § 541.200(a)(2).

Webb also analogizes the ISRs to a class of employees this court found exempt in another case: *Marcus v. American Contract Bridge League*, 80 F.4th 33 (1st Cir. 2023).

Following its penchant for avoiding a "relational" analysis comparing the ISRs' primary duty to Webb's business purpose under the rubric of *Unitil Service Corporation*, *see* 64 F.4th at 6, Webb instead trains its analysis on comparing the ISRs' duties to those of "field supervisors and area managers" working for the bridge tournament operator in *Marcus*. 80 F.4th at 48–49. Webb argues that because the exempt field supervisors and area managers in *Marcus* spent 25 percent of their time performing "high-level customer service-oriented responsibilities" that directly related to the running of the bridge organization's business, *id.* at 49, the ISRs -- whom Webb says spend 50–95 percent of their time performing similar work -- are exempt a fortiori. But this argument misconstrues what *Marcus* actually held.

In *Marcus*, the employees in question were expected (1) to "develop, implement, and manage strategic and long-term processes and programs, including tournament planning/review"; (2) to be the "[f]irst point of contact for issues related to tournament operations and staff"; (3) to "[e]stablish and maintain effective relationships with tournament sponsors"; and (4) to exercise "significant supervisory authority over other employees." *Id.* at 48–49. Therefore, the court found that the field supervisors and area managers' primary duty was directly related to the running and management of the bridge tournament operator. *See id.* at 49. *Marcus* never made any categorical finding that the 25 percent of the employees' time spent performing customer-service work was sufficient to satisfy the exemption's primary duty requirement. Rather, it properly reached its conclusion "based on all the facts in [that] particular case, with a major emphasis on the character of the employee[s'] job as a whole." 29 C.F.R. § 541.700(a).

Moreover, Webb admits that -- unlike the employees in *Marcus* who were charged with developing "long-term processes and programs," 80 F.4th at 48 -- the ISRs do not

perform any customer-service duties "outside the context of making sales or sales that had been made." And also unlike those employees, ISRs do not exercise any significant supervisory authority over other employees. Thus, even taking Webb's argument on its face, *Marcus* does not move the needle toward finding the ISRs exempt.

Nor is there much to support the notion that ISRs are merely internal technical support specialists in contrast to Webb's customer-facing outside and counter salespersons. There is no dispute that ISRs themselves generate revenue for Webb in the form of producing particular sales, or that ISRs liaise with customers directly, from the initial communication to after an order is made. While sometimes an ISR may be "latched onto" an outside salesperson to provide technical support for a customer, the record admits to no general structure whereby the outside salespersons deal with customers while ISRs provide merely internal support to the outside salespersons. Rather, Webb itself asserts that ISRs are charged with dealing with Webb's more important customers themselves. This conclusion also finds further support in how Webb measures ISR performance for purposes of compensation, which considers each ISR's sales and profits, the number of bids written that lead to completed sales, the number of phone calls made, and even how "bottom-line oriented" each ISR proves to be.

All in all, it strains credulity to read the ISRs' amorphous customer-service duties as anything but central to Webb's business purpose of producing wholesale sales of its products. If we accepted that ensuring "customer satisfaction" and the "long-term integrity of the business" through making individual sales was sufficiently ancillary to Webb's business purpose to render ISRs exempt, then few salespersons would ever receive FLSA overtime protection.

III.

For the foregoing reasons, the judgment of the district court is *affirmed*.

APPENDIX B

District of Massachusetts

JULIE A. SU, Acting Secretary of Labor, United States Department of Labor, Plaintiff, v. F.W. WEBB COMPANY, Defendant.	Civil Action No. 20-CV-11450-AK

MEMORANDUM AND ORDER

A. KELLEY, D.J.

Plaintiff Julie Su, the Acting Secretary of the United States Department of Labor ("the "Secretary"), brings this action against Defendant F.W. Webb Company ("Webb") pursuant to the Fair Labor Standards Act of 1938 (the "FLSA"), as amended, 29 U.S.C. § 201 *et seq.*, asserting three claims for (1) misclassifying its Inside Sales Representatives ("ISRs") as exempt from overtime pay; (2) failing to maintain records of the hours each of their non-exempt employees worked; and (3) unlawfully retaliating against employees by dissuading them from speaking freely to the Secretary's investigators. [Dkt. 1 at ¶¶ 61-67]. The Secretary has moved for partial summary judgment on its overtime, recordkeeping, and retaliation claims. [Dkt. 63]. Webb has also moved for partial summary judgment as to the Secretary's retaliation claim. [Dkt. 60].

For the following reasons, the Secretary's motion for summary judgement [Dkt. 63] is **GRANTED IN PART** on the following issues: (1) Webb's ISRs are not administratively exempt under the FLSA; (2) Webb failed to pay its ISRs the premium required by the FLSA for all overtime hours worked from August 4, 2018 to present; and (3) Webb violated the recordkeeping requirements of the FLSA. The Secretary and Webb's motion for summary judgment [Dkt. 60; Dkt. 63] are both **DENIED** on the issue of whether Webb violated the anti-retaliation requirements of the FLSA.

I. FACTUAL BACKGROUND

In evaluating both motions for summary judgment, the Court relies upon the Secretary's statement of material facts in favor of its motion for partial summary judgment [Dkt. 65], Webb's response to those facts [Dkt. 68], and the Secretary's reply to Webb's response [Dkt 73]. It additionally incorporates Webb's statement of material facts in support of its motion for partial summary judgment [Dkt. 62] and the Secretary's response thereto [Dkt. 71]. Those facts admitted by each party are presumed true and those facts denied by each party, or raised only in rebuttal, are considered contested.

Webb is a wholesale company that sells plumbing, heating, cooling, PVF (pipes, valves, and fittings), industrial products, and related fixtures and equipment. [Dkt. 65, Secretary of Labor's Statement of Material Facts ("Pl.'s SMF"), at ¶ 2]. Webb's principal business is making wholesale sales of those products to contractors in various industries, government organizations, institutions such as universities and hospitals, industrial buyers, and other customers who work in construction, building maintenance, and infrastructure. [*Id.* at ¶ 5]. Webb generates its revenue from employees who directly sell the products to customers in the positions of inside sales, outside sales, and counter

sales. [*Id.* at ¶¶ 7-8]. Robert Mucciarone is Webb's Chief Operating Officer and manages Webb's overall operations. [*Id.* at ¶ 12]. Ruth Martin is Webb's Senior Vice President of Human Resources and manages Webb's human resources department. [*Id.* at ¶ 13]. Webb's principal office is in Bedford, Massachusetts, but it operates over 100 storefront locations across nine different states including Massachusetts, Connecticut, Rhode Island, New Hampshire, Vermont, Maine, New York, New Jersey, and Pennsylvania. [*Id.* at ¶¶ 1, 4].

A. INSIDE SALES REPRESENTATIVES

During the relevant period, Webb employed over 600 ISRs across nine states, more than the number of its outside salespersons or counter salespersons. [*Id.* at ¶¶ 14, 19]. Throughout that time, Webb classified its ISRs as exempt administrative employees for the purposes of the FLSA. [*Id.* at ¶ 15]. Webb generates revenue from its ISRs through the sales transactions that they complete with customers. [*Id.* at ¶ 16]. Despite working in various product areas, Webb considers its ISRs to have the same position and basic duties. [*Id.* at ¶ 18]. ISRs report to the general manager in charge of the store where they work, and in some stores, they may report to an inside sales manager in addition to the store's general manager. [*Id.* at ¶ 20]. During the relevant period, at least some of Webb's ISRs worked more than 40 hours in at least some workweeks but were not paid the FLSA overtime premium for those additional hours. [*Id.* at ¶¶ 21-22].

It is uncontested that the ISRs interact directly with Webb's customers throughout the sales transaction process, beginning with the customer's initial contact with an ISR and ending with the delivery of products that the customer purchases. [*Id.* at ¶¶ 25-26, 28]. Webb has used two versions of the job description for an ISR during the relevant period. [*Id.* at ¶ 33]. Job postings for open ISR positions are

reviewed and approved by Webb's management, including by Ruth Martin in human resources, before they are distributed to potential candidates. [*Id.* at ¶ 35]. One previous job description stated that "[p]revious sales experience [is] preferred." [*Id.* at ¶ 39]. A job posting for an ISR in March 2019, which is representative of other job postings for the role, described the responsibilities as being to:

- process and maintain customer orders;
- create transfers between various F.W. Webb locations;
- attain specialty material through the use of purchase orders;
- meet and exceed sales and gp goals;
- effectively handle customer service issues;
- schedule and manage customer deliveries;
- produce bids for customer approval;
- manage credits to F.W. Webb standards; and
- other duties as assigned.

[*Id.* at ¶ 40]. ISRs do not work in any of the following areas: marketing, accounting, accounts receivable, data governance, e-commerce, human resources, IT, or accounts payable. [*Id.* at ¶ 29].

Webb's ISRs spend a minority of their time providing quotes on a specified parts list, unlike its counter salespeople who primarily provide quotes and conduct sales transactions with customers in stores. [Dkt. 68, Defendant's Additional Disputed Material Facts ("Def.'s ADMF") at ¶¶ 76-77]. Webb's counter salespeople are paid hourly and have no authority to deviate from Webb's pricing matrix. [*Id.* at ¶¶ 77, 79].

Webb views the unique role its ISRs play as part of what distinguishes it from its competition. [*Id.* at ¶ 81]. The company expects its ISRs to possess the knowledge and expertise in their respective areas in order to advise their customers on the best solutions for their needs. [*Id.*].

Unlike counter salespeople, ISRs work closely with customers on specific projects where the customer may not know the specific parts or items they need to meet their goals. [*Id.* at ¶ 87]. Another distinguishing factor is that while counter salespeople are bound by Webb's pricing matrix and have no authority to deviate from it, ISRs do have discretion and authority on pricing and can go outside of the matrix's parameters. [*Id.* at ¶ 79, 103].

While Webb hopes that its ISRs' interactions with customers will lead to a sale, even if they do not, Webb views the services its ISRs provide as promoting and preserving relationships with customers so that they will continue to do business with Webb. [*Id.* at ¶ 83]. The ISRs are "Webb's eyes and ears on the marketplace." [*Id.*]. ISRs are generally given the specifications and blueprints for a project, and then are asked to provide a quote for all the products needed to meet the specifications for that project based on Webb's inventory, items available in alternative places, and alternative products which could meet the requested specifications. [*Id.* at ¶ 89]. In addition to finding products, ISRs work with Webb's customers on designs, application selection, and specification changes. [*Id.* at ¶ 91]. When a customer needs a product that Webb does not stock, the ISRs will source the product based on their understanding of the customer's needs and the products on the market. [*Id.* at ¶ 94].

Customers often consult with ISRs when preparing bids for projects to submit in response to a "Request for Proposal (RFP)." [*Id.* at ¶ 95]. In these instances, ISRs help increase the competitiveness of those bids by helping to obtain a better price on the materials needed. [*Id.*]. ISRs also support Webb's outside salespersons by addressing technical questions and providing information about the appropriateness of particular products. [*Id.* at ¶ 98]. After an order is made, ISRs help track Webb's inventory, follow up

on shipping status, interact with third-party manufacturers if necessary, and address customer concerns and complaints. [*Id.* at ¶ 102]. In addition to these duties, ISRs provide general managers with information about competitors for the development of marketing strategies. [*Id.* at ¶ 99].

ISRs receive annual performance appraisals from Webb, which are documented on a standard form. [Pl.'s SMF at ¶ 43]. These are completed or approved by the general manager who supervises a particular ISR. [*Id.* at ¶ 44]. The performance appraisal is divided into Section A, which looks to "Key Responsibilities," and Section B, which looks to "Behavioral Responsibilities" and "Opportunities for Growth." [*Id.* at ¶ 47]. The manager performing the appraisal for the ISR assigns a rating based on the software metrics that Webb utilizes to track the activities of the ISRs during the sales process. [*Id.* at ¶¶ 46, 48].

The Section A ratings are based on "Sales and GP Budget," "Bid & Bid Follow-Up," "Open Orders," and "Communication." [*Id.*]. For "Sales and GP Budget," the ISRs are rated based on their overall sales and profits for the given year as compared to the sales and profits that Webb expected from them. [*Id.* at ¶ 49]. The "Bid & Bid Follow-Up" portion is based on the number of bids, or quotes, that ISRs wrote for customers that year, the percentage of those bids that became completed sales, and their follow-up in regard to open bids that have not resulted in completed sales. [*Id.* at ¶ 50]. The "Open Orders" portion evaluates ISRs on their efforts to act timely on bids that have opened on Webb's computer system but have not yet resulted in completed sales. [*Id.* at ¶ 51]. Lastly, the "Communication" portion rates ISRs on the number of phone calls that were made to their direct lines and whether they were answered, as well as the outgoing calls they made during that year. [*Id.* at ¶ 52]. Webb creates an "annual scorecard" featuring thirty sales metrics for each ISR which is then given to the

manager responsible for completing their annual performance appraisal. [*Id.* at ¶ 53].

ISR compensation is based on grade levels, which are determined by seniority and experience, and pay tiers within those grade levels, which are determined by performance as measured by the annual performance appraisal. [*Id.* at ¶¶ 54-56].

During the relevant period, for its ISRs who worked outside of Maine, Webb did not use a timekeeping system to track the hours ISRs worked and did not keep complete records of the actual hours ISRs worked. [*Id.* at ¶¶ 57-58].

B. THE SECRETARY'S INVESTIGATION

On October 2017, the Department of Labor's ("DOL") Wage and Hour Division initiated the investigation that gave rise to this lawsuit. [*Id.* at ¶ 59; Dkt. 62, Defendant's Concise Statement of Material Facts ("Def.'s SMF") at ¶ 3]. The investigation was conducted by Jeannie Kruja and Nuno Montrond, the Division's Assistant Director, who participated in certain aspects of the investigation after March 2019. [*Id.* at ¶¶ 1-2]. On December 29, 2017, Webb's counsel provided Kruja with a list of all current ISRs and requested that Kruja inform them of who they selected to interview so they could "give them a head's up [sic] and instruction to cooperate." [D's ADMF at ¶ 114]. The DOL first attempted to contact eighty-five Webb employees it believed were ISRs, and it obtained substantive responses from forty-eight of those employees. [Def.'s SMF at ¶¶ 4-5].

On three separate occasions, the Secretary mailed questionnaires and or letters to Webb employees, including ISRs. [Pl.'s SMF at ¶ 60]. The first set was sent to approximately sixty employees on or about January 4, 2018. [*Id.* at ¶ 61]. At least one ISR reported to his manager that he received a DOL message on January 9, 2018, before receiving any communications from Mucciarone, and thought the

letter was spam. [D's ADMF at ¶ 120]. When Webb became aware of that mailing from the DOL, they asked the Secretary's investigator to provide a list of names of the employees whom the Secretary had contacted in that mailing. [Pl.'s SMF at ¶ 62]. The Secretary sent an email in response identifying the employees to whom the Secretary had mailed the letters and questionnaires and additionally shared copies of the questionnaires and letters that the Secretary had sent to Webb's employees. [*Id.* at ¶¶ 63-64].

Webb made employees available for Kruja to interview in person at several of its locations. [D's ADMF at ¶ 108]. Kruja gave Webb advance notice of every location where she interviewed employees, and Webb personnel brought employees to the rooms where the investigators were stationed. [*Id.* at ¶¶ 110-11]. As a result, Webb knew the identities of the employees interviewed at its locations. [*Id.* at ¶ 112].

During the investigation, Mucciarone sent three different emails to Webb's employees about DOL's activities. The first was sent on January 10, 2018, to the employees to whom the Secretary had sent its January 2018 mailing. [Pl.'s SMF at ¶ 65]. That first email stated as follows:

> Folks,
>
> The Department of Labor is doing a random audit of Webb to assure that we are paying employees appropriately. The audit has been going on for a few weeks and we are in the final stages of it. They would like to speak to some employees with the job description of "Inside Sales". As a result you may be contacted or you may have already been contacted by phone or by letter. The DOL may ask you questions about your job which may include your hours of work, duties, your expertise, etc. ...

> Webb is very comfortable that the audit will result favorably and so we encourage you to be forthcoming and honest. We wanted to let you know so that you would not be caught unaware and not know what to do. If you feel strongly that you do not want to participate that is ok too. But really there is no reason not to answer the questions.
>
> If they do contact you please let us know, so we can track how many employees have been asked to be interviewed. Any questions feel free to contact Ruth Martin or myself.
>
> Many Thanks,
>
> Bob

[Dkt. 60-6].

Prior to this, the Secretary had received responses from approximately fifteen to twenty of the employees who were contacted. [Pl.'s SMF at ¶ 66]. After Webb requested access to the Secretary's materials in January of 2018, Kruja sent Webb the list of employees she had sent a contact letter or mail interview form to and provided Webb a copy of the letters as well. [D's ADMF at ¶¶ 116-117].

The Secretary mailed a second set of letters and questionnaires to a group of Webb employees on or around February 23, 2018, including ISRs. [Pl.'s SMF at ¶ 67]. On February 28, 2018, after learning about the Secretary's second mailing, Mucciarone sent another email about the DOL's investigation to the employees whom Webb believed had been contacted or were about to be contacted by the Secretary. [*Id.* at ¶ 68]. This email, which was sent to a listserv that included all of Webb's ISRs [*Id.* at ¶ 69], stated as follows:

> Ladies and Gentlemen,
>
> The Department of Labor audit continues. This is a random audit. It is performed to be sure we are

> paying employees correctly. We had thought we were in the final 5 stages weeks ago, but it appears more notifications may have gone out again. It appears they are still concentrating on inside sale [sic] positions. I write this so you are not caught unaware should you receive a notification.
>
> Again, we fully expect that the audit will have a favorable result, so if you get a notification feel free to answer any questions honestly should you decide to participate and answer questions. By no means are you compelled to answer and should you decide not to answer or participate, that is fine too.
>
> If you have been contacted, please let Ruth or myself know so we can track how many people have been contacted. Any questions certainly contact either one of us.
>
> Many Thanks,
>
> Bob

[Dkt. 60-7].

Kruja said the response rate to the written questionnaires the DOL sent in January 2018 was "excellent" and that the response rate to the February 2018 written questionnaires was slightly lower but not noticeably low. [Def.'s SMF at ¶ 15].

On March 8, 2019, the Secretary sent a third set of letters and questionnaires to twelve Webb employees. [*Id.* at ¶ 16]. Those twelve employees included some that Kruja had contacted earlier in 2018 but who had not responded. [*Id.* at ¶ 17].

On March 12, 2019, Mucciarone sent a third email about the Secretary's investigation to the employees whom Webb believed had been contacted or were about to be contacted by the Secretary as part of the investigation. [Pl.'s SMF at ¶ 71]. This email was sent to a listserv that

included all of Webb's ISRs and a listserv that included all employees in the estimator job category. [*Id.* at ¶ 72]. The March 2019 email, which was the third and final email, stated as follows:

> Ladies and Gentlemen,
>
> The Department of Labor continues to audit how Webb pays it's [sic] employees. It is performed to be sure we are paying employees correctly. This has been going on for over a year. We had thought they were done and now we hear of more notifications going out to Webb employees. I write to you so you will be aware should you receive a notification. We feel we are in fact paying all of our employees as the law provides, and we do expect a favorable result when all is done. If you receive a notification, feel free to answer any questions honestly should you decide to participate. By no means are you compelled to answer any questions and should you decide not to participate and answer any questions that is entirely ok. Not to participate is your right.
>
> If you have been contacted, please let Ruth or myself know so we can track who has been contacted. Any questions certainly contact either Ruth or myself.
>
> Thank you,
>
> Bob

[Dkt. 60-8].

Webb asserts that Mucciarone sent these three emails because he wanted to keep track of the employees who spoke to the DOL. [Def.'s SMF at ¶ 19]. One reason offered for this was so that Webb could ascertain the information supplied by employees to the DOL. [*Id.*]. Webb asserts that Mucciarone also wanted to know what inquiries were made, whether there were any biases in the DOL's inquiries, and

what the nature and magnitude of the investigation was in order to prepare Webb's defense in any subsequent litigation. [*Id.*].

The DOL received one or two responses to the approximately twelve interview requests it sent on March 8, 2019. [*Id.* at ¶ 21]. After Mucciarone's March 2019 email, Kruja noticed a lower response rate to the written questionnaires she sent than usual. [*Id.* at ¶ 22]. The week following Mucciarone's March 2019 email, Kruja allegedly received between five and six "unidentified voice messages from Webb employees who stated that Webb was keeping a list of workers who spoke to Investigator Kruja and requested Investigator Kruja stop contacting them." [*Id.* at ¶ 23]. Kruja deleted those unidentified voicemails at some point when her voicemail mailbox was full. [*Id.* at ¶ 24]. Kruja and the DOL did not preserve or make any record of those voicemails. [*Id.* at ¶ 27]. No one apart from Kruja listened to the voicemails. [*Id.* at ¶ 28]. The DOL further alleges that Kruja spoke to two anonymous Webb employees who refused to participate in the investigation because they were troubled by the fact that Webb was allegedly keeping a list of workers who spoke to the investigators. [*Id.* at ¶ 29]. At least one of those workers was an ISR. [*Id.* at ¶ 30]. Neither referenced the Mucciarone emails in their statements. [*Id.*].

Kruja spoke to two additional Webb employees who believed their communications with the DOL were being tracked and who were informed by more senior employees at Webb that they could suffer consequences for participating in the investigation. [*Id.* at ¶ 31]. During a visit to a Northern Massachusetts Webb location, Montrond interviewed two employees in person. [*Id.* at ¶ 32]. One of the Webb employees reported that he had seen Mucciarone's March 2019 email and was not concerned by it. [*Id.* at 33]. The other was reportedly uncomfortable during the

interview and was reluctant to provide Montrond a copy of Mucciarone's March 2019 email. [*Id.* at ¶ 34]. That employee had not been contacted by the DOL prior to the interview. [*Id.* at ¶ 35]. He did eventually provide a copy of the email via a photo taken on his phone that he shared via text. [*Id.* at ¶ 36]. In April 2019, the DOL learned of the existence of the emails sent by Mucciarone in January 2018 and February 2018. [*Id.* at ¶ 38].

The Secretary initiated this action on July 31, 2020. [Dkt. 1]. During discovery, Webb sought to compel production of redacted portions of the documents that the Secretary had provided them. [Dkt. 40 at 4]. Those redactions withheld details, including names, about the employees whom the Secretary interviewed during its investigation, under the informer's privilege. [*Id.*]. The Court denied Webb's request, in part because of the policy considerations in favor of protecting the anonymity of informants until shortly before or during a trial. [Dkt. 59].

After the conclusion of discovery, Webb filed a partial summary judgment motion [Dkt. 60], which was in turn opposed by the Secretary. [Dkt. 70]. The Secretary filed its own motion for partial summary judgment [Dkt. 63], which Webb has opposed [Dkt. 67]. Following the submission of additional briefing as to both motions for summary judgment, the Court held a motion hearing in March 2023 before taking the matter under advisement.

II. LEGAL STANDARD

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991) (citing *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990)). Summary judgment may be granted when the record, viewed in the light most favorable to the non-moving party, presents no "genuine issue of material fact," and the moving party is

entitled to judgment as a matter of law. *Paul v. Murphy*, 948 F.3d 42, 49 (1st Cir. 2020) (citation omitted). The Court must consider (1) whether a factual dispute exists; (2) whether the factual dispute is "genuine," such that a "reasonable fact-finder could return a verdict for the nonmoving party on the basis of the evidence"; and (3) whether a fact genuinely in dispute is material, such that it "might affect the outcome of the suit under the applicable substantive law." *Scott v. Sulzer Carbomedics, Inc.*, 141 F. Supp. 2d 154, 170 (D. Mass. 2001); see also *Napier v. F/V DEESIE, Inc.*, 454 F.3d 61, 66 (1st Cir. 2006). Courts must evaluate "the record and [draw] all reasonable inferences therefrom in the light most favorable to the non-moving parties." *Est. of Hevia v. Portrio Corp.*, 602 F.3d 34, 40 (1st Cir. 2010) (citing *Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178, 183–84 (1st Cir. 1999)). A non-moving party may "defeat a summary judgment motion by demonstrating, through submissions of evidentiary quality, that a trialworthy issue persists." *Paul*, 948 F.3d at 49 (citation omitted). Where, as here, the Court is deciding on cross-motions for summary judgment, "the court must consider each motion separately, drawing inferences against each movant in turn." *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 6 (1st Cir. 1997). The Court "may enter summary judgment only if the record, read in this manner, reveals that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Hevia*, 602 F.3d at 40 (internal citations omitted).

III. DISCUSSION

The Secretary argues that it is entitled to summary judgment on its overtime and recordkeeping claims because: (1) Webb did not pay ISRs an overtime premium for the overtime hours they worked; (2) Webb admits it did not keep time-keeping records for its ISRs; and (3) Webb cannot meet its burden to prove that the ISRs are exempt

under the FLSA's administrative exemption. [Dkt. 64 at 9]. Webb counters that summary judgment is inappropriate here because there exists a genuine issue of material fact as to the primary duties of the ISRs which is necessary to resolve before determining whether the administrative exemption applies. [Dkt. 67 at 1].

The Secretary further argues that it is entitled to summary judgment on its retaliation claims because the emails were sent to employees engaged in protected activity in a manner that would have dissuaded a reasonable employee from speaking freely to the Secretary. [Dkt. 64 at 17-18]. Webb argues that it should be granted summary judgment instead on the Secretary's retaliation claim because the Secretary cannot make a prima facie case of unlawful retaliation under the FLSA, as no Webb employee experienced adverse action and because Webb had legitimate, non-retaliatory reasons for sending its emails. [Dkt. 61 at 9-10, 17].

A. OVERTIME AND TIMEKEEPING

The critical question regarding the Secretary's overtime and recordkeeping claims is whether the administrative exemption of the FLSA applies to the ISRs. The Secretary argues that the ISRs are ineligible for the administrative exemption because their primary duty is to produce sales, Webb's principal business is producing sales, and the ISRs are not predominately engaged in administrative work. [*Id.* at 12-16]. Webb responds that the ISRs are covered under the administrative exemption because their primary duty is providing solutions to Webb's customers, they help develop strategy, and they enjoy broad discretion and authority on matters of significance as part of their role. [Dkt. 67 at 11-15, 17].

Under the FLSA, when employees work longer than forty hours during the workweek, their employer is obligated to pay them at a rate not less than one and one-half

times their regular rate. 29 U.S.C. § 207(a)(1). An employer is liable for the failure to pay overtime wages if they have actual or constructive knowledge of overtime work performed. *Manning v. Bos. Med. Ctr. Corp.*, 725 F.3d 34, 43 (1st Cir. 2013). When an employee is covered by the FLSA's overtime requirements, the employer is obligated to keep records tracking the hours that employee spent working. 29 C.F.R. § 516.2(a).

The FLSA's overtime requirements have exemptions, including for employees in a "bona fide . . . administrative" role. 29 U.S.C. § 213(a)(1). In determining the parameters of these exemptions, the Court looks to the Secretary of Labor's regulations. *Cash v. Cycle Craft Co.*, 508 F.3d 680, 683 (1st Cir. 2007). While these regulations "merely state the Secretary's official position on how the statutes should be interpreted," the Court must give them "controlling weight unless [the court finds them] to be arbitrary, capricious, or contrary to the statute." *Id.* (quoting *John Alden*, 126 F.3d at 8). These exemptions are to be given a fair, rather than narrow, interpretation. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018).

According to the Secretary of Labor's regulations clarifying the FLSA, an employer must prove that the administrative exemption applies by demonstrating that its employees are:

(1) compensated on a salary or fee basis pursuant to § 541.600 at a rate of not less than $684 per week;

(2) whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200(a). The employer bears the burden of establishing that each of the three elements apply. *John Alden*, 126 F.3d at 7-8. The first element here is not in dispute. [Dkt. 67 at 9 n.5].

The First Circuit has recently clarified that to meet the second element under the administrative exemption test, a "relational" analysis is required. *Walsh v. Unitil Serv. Corp.*, 64 F.4th 1, 5 (1st Cir. 2023). This requires courts to examine the employee's primary duty. The primary duty is the main, or most important, duty, that the employee performs and "generally means that the employee spends at least 50% of his or her time performing the duty." *Id.* If the primary duty is "directly related" to the "management or general business operations of the employer," the second element is satisfied and the employee may meet the administrative exemption. *Id.* (quoting 29 C.F.R. § 541.200(a)). To meet that requirement, "an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201(a). Conversely, if the employees' primary duty relates to their employer's business purpose, "in that they produce the product or provide the service that the company is in business to provide," the administrative exemption cannot apply. *Unitil Serv. Corp.*, 64 F.4th at 7. To determine an employer's business purpose, courts may look at what the "product or service [is] that the employer or its customers offers to the public." *Id.* at 6 (quoting *John Alden*, 126 F.3d at 9). In other words, the Court, when employing the relational analysis, examines whether an employee's primary duties are focused on carrying out the business's "principal production activity" or on other "ancillary" matters related to the business's overall operations and

management. *Id.* at 7. Those in the latter category may qualify for the exemption while those in the former cannot.

In *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 903-05 (3d Cir. 1991), the Third Circuit concluded that inside salespersons at a wholesale business had the primary duty of "producing" sales and thus were non-exempt "production" employees rather than "administrative" employees. Cooper Electric's primary business was selling electrical products, and its inside salespersons spent the majority of their time making telephone sales of electrical products. *Id.* at 899, 902. Some of the tasks those inside salespersons were responsible for included negotiating with manufacturers and customers over pricing and product purchases. *Id.* at 904. The Third Circuit found that this did not alter its conclusion, as those activities could not be characterized as "servicing of Cooper's Business" and were instead "part and parcel" of the activity of "producing sales." *Id.* at 904. The fact that the inside salespersons advised customers on which additional products to purchase was considered a supplement to their sales work. *Id.* at 905.

Webb's business purpose is to produce wholesale sales of its products to its customers. [Pl.'s SMF at ¶ 5]. The company generates its revenue from the sale of its products via its salespersons, including its ISRs. [*Id.* at ¶¶ 7-8]. Since the ISRs' primary duty closely relates to Webb's business purpose, "in that they produce the product or provide the service that the company is in business to provide," Webb cannot meet the second prong of the administrative exemption test. *See Unitil Serv. Corp.*, 64 F.4th at 7. In other words, Webb's business purpose is to sell Webb's products, and the ISRs' primary duty is to help sell Webb's products. *See Cooper Elec.*, 940 F.2d at 904.

Even if it accepts Webb's characterization of the ISRs' primary duty, a reasonable jury would be unable to determine that the ISRs' work relates to Webb's management or

general business operations. Webb asserts that the most important function ISRs serve is to "create solutions for its customers" and that its ISRs' primary duty relates to advising customers on product selection, assisting customers with ongoing projects, advising customers on design and specifications, assisting customers in preparing proposals, and formulating Webb's sales strategy by providing general managers with information about competitors. [D's ADMF at ¶¶ 23, 24, 28(g), 30, 81-83, 86-88, 90-91]. Yet ISRs only partake in all of these activities, especially the customer facing work, in order to facilitate the sale of Webb products. *See Cooper Elec.*, 940 F.2d at 904. As in *Cooper Elec.*, the ISRs here all make discrete sales, and thus their work is not akin to the more administrative role of promoters or marketers who work to promote sales generally. *Id.* at 905.

Webb asserts that it employs ISRs in order to differentiate itself from its competitors by having its ISRs provide a higher level of service, such as by helping customers determine which combinations of equipment, systems, and products would enable them to meet their needs. [D's ADMF at ¶ 82]. Therefore, even under Webb's own characterization, the reason they employ ISRs is to better help customers buy the Webb products they need. The fact that ISRs bring with them knowledge and expertise, and are allowed to exercise discretion in setting pricing, does not transform the sales-focused function of their role. *See Cooper Elec.*, 940 F.2d at 903-04, 906.

Even the job title of Inside Sales Representative underscores that the reason Webb employs its ISRs is to sell their products.[1] The original job description included "previous

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[1] The particular job title given to an employee is not determinative, as it is the duties and responsibilities that determine whether an employee qualifies as exempt. *John Alden*, 126 F.3d at 10. However, here,

sales experience" as a qualification for the role. [Pl.'s SMF at ¶ 39]. In the job description used to hire ISRs in March 2019, which was reviewed and approved by Webb's management, nearly all the responsibilities it describes relate to various steps an ISR would need to complete in order to finalize sales of Webb products. [*Id.* at ¶¶ 35, 40].

The Court also reaches this conclusion because sales performance is central to how Webb evaluates the job performance of its ISRs. The general managers who supervise the ISRs look at the individual ISR's sales and profits, the number of bids written for customers and the percentage of those bids that became completed sales, and data about the number of phone calls made to the ISR's phone line. [*Id.* at ¶¶ 49-53]. The ISRs' performance as based on those metrics determines the pay tiers into which Webb places its ISRs. [*Id.* at ¶¶ 54-56]. Webb makes clear that its ISRs do more than simply take orders. [D's ADMF at ¶ 99]. They may advise management on strategy or work to improve relationships with customers. But ISRs are ultimately valued and compensated for their ability to assist customers in purchasing Webb's products.

Webb's ISRs assert that they spend much more time on helping customers, doing in-depth research on their needs, and finding the associated available products than on completing orders. [Dkt. 69-1 at ¶ 7; 69-2 at ¶ 8; 69-3 at ¶¶ 7-8; 69-4 at ¶ 14; 69-5 at ¶ 6; 69-6 at ¶ 6; 69-7 at ¶ 6, 13-15; 69-8 at ¶ 7; 69-9 at ¶ 13; 69-10 at ¶ 14]. Be that as it may, the goal of their research is to provide customers information about which Webb products they should purchase. *See Cooper Elec.*, 940 F.2d at 904. These ISRs may be experts, but they are experts whose primary function is helping to sell Webb products. This logic applies equally to the

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the ISRs' job title is a reflection of their duties and responsibilities, which is primarily to help get Webb sell Webb products.

work ISRs do to help customers even when sales do not occur. [*See* D's ADMF at ¶ 83]. While Webb hopes that a by-product of the ISRs' giving advice may be that it promotes and preserves relationships with future customers, the ISRs' primary intention for giving that advice is for it to lead to sales. [*See id.*].

Webb argues that *Cooper Electric* is inapposite here because the inside salespersons there played a different, more circumscribed, role, whereas its ISRs provide advice, gather facts, and build relationships with customers. [Dkt. 67 at 12-15]. While there may be differences between the *scope* of the two roles, there is not a significant difference in the *purpose* that the inside sales representatives serve. Even though they may have greater responsibilities and expertise, Webb's ISRs' primary duties are still closer to Webb's principal function of selling Webb's products than to the ancillary duties related to the running or servicing of the business. *See Unitil Serv. Corp.*, 64 F.4th at 7.

This is also why Webb's analogy to the marketing representatives in *John Alden* fails. 126 F.3d at 7-10. In *John Alden*, the company, John Alden, worked on "designing, creating, and selling insurance policies." *Id.* at 9. The marketing representatives' primary duty was to promote John Alden's insurance policies to independent insurance agents who then sold them, as well as the insurance policies of John Alden's competitors, to members of the general public. *Id.* at 4. Unlike the ISRs here, the marketing representatives therein worked to promote customer sales "*generally*" rather than working on particular sales transactions. *Id.* at 10 (emphasis in original). This aligned the activities of the marketing representatives more with servicing the business than with John Alden's principal production activity, which was the creating and selling of insurance policies. *Id.* Similarly, in *Cash v. Cycle Craft Company, Inc.*, 508 F 3d 680, 686 (1st Cir. 2007), the primary duty of a Harley-

Davidson employee was considered related to management because he was responsible for improving customer satisfaction *generally*. (emphasis added). The plaintiff therein coordinated various Harley-Davidson departments to ensure that the motorcycles purchased were properly outfitted and delivered, and that customers were providing positive feedback reports. *Id.* These comparisons differ significantly from the role the ISRs play here. The employee in *Cash* was not involved in the sale of the motorcycles. *Id.* at 681-82. Here, however, Webb's ISRs' primary duty of helping customers buy Webb products is "directly related" to Webb's business purpose of making wholesale sales of its products, and their work is not related to increasing sales generally. *See Unitil Serv. Corp.*, 64 F.4th at 4.

The facts presented here, even after drawing all reasonable inferences therefrom in the light most favorable to Webb, do not create a genuine issue of material fact. Webb may be able to add context to the ISRs' role, but that would not change their function. On their claim that the ISRs do not qualify for the FLSA's administrative exemption, the Secretary is entitled to judgment as a matter of law. As a result, the Court also grants summary judgment for the Secretary on Webb's failure to pay its ISRs the premium required by the FLSA for all overtime hours worked from August 4, 2018, to present, and on Webb's violation of the recordkeeping requirements of the FLSA.

B. RETALIATION

Both parties move for summary judgment on the retaliation claim. The Secretary asserts it is entitled to summary judgment because it is undisputed that the employees who received the emails from Mucciarone were engaged in the protected activity of providing the Secretary information; that the emails were sent to employees who Webb knew were about to speak to the DOL; and that the timing, tone, and content of the emails might well have dissuaded

a reasonable Webb employee from speaking freely to the Secretary. [Dkt. 64 at 17-24]. The Secretary argues that an employee complying with Mucciarone's email request would be forced to give up their right to speak to the Secretary confidentially. [*Id.* at 21-22]. The Secretary further asserts that a reasonable employee would be less likely to speak to the Secretary after being told in the emails that Webb was tracking who was being contacted. [*Id.* at 22]. Webb argues it is entitled to summary judgment on the Secretary's retaliation claim because no Webb employee experienced any adverse employment action; the Secretary does not provide evidence to show that employees were deterred from participating; the full context of the emails does not demonstrate retaliatory action; and the emails were sent for nondiscriminatory reasons. [Dkt. 61 at 10-18].

The goal of the FLSA is to prohibit "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11 (2011) (quoting 29 U.S.C. § 202(a)). The FLSA relies on workers being able to freely report violations of the law in order for its enforcement to be effective. To enforce its standards, the FLSA relies not upon "continuing detailed federal supervision or inspection of payrolls," but upon "information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Id.* (internal citations omitted). Effective enforcement thus depends on employees feeling "free to approach officials with their grievances." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). The FLSA's anti-retaliation provision enables enforcement by preventing the "'fear of economic retaliation' . . . [from] inducing workers 'quietly to accept substandard conditions.'" *Kasten*, 563 U.S. at 11 (quoting *Mitchell*, 361 U.S. at 292).

Section 15(a)(3) of the FLSA prohibits "any person" from "discriminating against any employee" for engaging in activity protected under the FLSA. 29 U.S.C. § 215(a)(3). To prevail on its retaliation claim, the Secretary must prove that: (1) an employee engaged in conduct protected by the FLSA; (2) the employer or another person subjected the employee to an adverse action; and (3) the adverse action was taken because of the protected conduct. *Travers v. Flight Servs. & Sys., Inc.*, 808 F.3d 525, 531 (1st Cir. 2015).

1. Protected Conduct

The employees Webb emailed were engaged in protected conduct when they participated in the investigation or planned to provide information to the DOL officials conducting the investigation. 29 U.S.C. § 215(a)(3) (prohibiting discrimination against any employee "who has testified or is about to testify in any such proceeding"); *Kasten*, 563 U.S. at 14 (holding that oral complaints are protected so long as they clearly make "an assertion of rights protected by the statute and a call for their protection"); *Claudio-Gotay v. Becton Dickinson Caribe, Ltd.*, 375 F.3d 99, 103 (1st Cir. 2004) (noting that an employee is not required to file a formal complaint to receive protection under FLSA but is required to take some kind of action); *Miller v. Metro Ford Auto. Sales, Inc.*, 519 F. App'x 850, 851 (5th Cir. 2013) (noting that the FLSA prohibits employers from discriminating against an employee for "participating in investigations or other proceedings"); *Bowen v. M. Caratan, Inc.*, 142 F. Supp. 3d 100, 1023 (E.D. Cal. 2015) (holding that a reasonable jury could find that an employee whom the DOL was planning to interview was "about to testify").

Here, Mucciarone sent the emails either when Webb's ISRs had already "testified" or were "about to testify" through their participation in the Secretary's investigation. 29 U.S.C. § 215(a)(3); *Kasten*, 563 U.S. at 13 (finding that FLSA should be interpreted similar to the National Labor

Relations Act ("NLRA"), whose antiretaliation provision "protect[s] workers who neither filed charges nor were 'called formally to testify' but simply 'participate[d] in a [National Labor Relations] Board investigation'"); *Bowen*, 142 F. Supp. 3d at 1023; *Uronis v. Cabot Oil & Gas Corp.*, 49 F.4th 263, 274 (3d Cir. 2022) (finding that to "testify" includes the filing of an informational statement with a government entity, and that in order to enable the FLSA's enforcement, "about to testify" under Section 15(a)(3) is to be given broad rather than narrow interpretation). Each email was sent shortly after the Secretary sent out its questionnaires and letters. [Pl.'s SMF at ¶¶ 61-65, 67-72]. Webb was aware that at least some of the employees already had or were about to provide information to the Secretary's investigators when Mucciarone sent the emails. [*Id.* at ¶¶ 63, 68, 71]. Furthermore, Webb does not dispute that its employees were engaged in protected activity when speaking with the DOL's investigators. As such, Webb's employees were engaged in protected activity when the allegedly adverse action occurred.

2. Adverse Action

In addressing the second and third elements, the Court must evaluate whether Mucciarone's emails, and their surrounding context, constitute "adverse action." The standard for determining whether an act rises to that level is an objective one. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 55 (2006) (emphasizing, in the context of a Title VII retaliation claim, that the standard for evaluating whether harm has occurred is objective); *Lockridge v. The Univ. Of Maine Sys.*, 597 F.3d 464, 472 (1st Cir. 2010) (describing test for materially adverse action as "objective," which "should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances" (quoting *Burlington N.* at 71)); *Booker v. Mass. Dep't of Pub. Health*, 612 F.3d 34, 43 (1st Cir.

2010) ("[W]hether an action is materially adverse is judged by an objective rather than a subjective standard."); *Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997) ("We regard Title VII . . . . and FLSA as standing in *pari passu* and [treat] judicial precedents interpreting one such statute as instructive in decisions involving another."); *Scalia v. F.W. Webb Co.*, No. 20-CV-11450-ADB, 2021 WL 1565508, at *4 (D. Mass. Apr. 21, 2021). Although the standard is objective, it is articulated in "general terms" because the "significance of any given act will often depend on the particular circumstances" and context. *Burlington N.*, 548 U.S. at 69 (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81-82 (1998)). An "act that would be immaterial in some situations is material in others." *Id.*

The Secretary asserts that the emails constituted adverse action because they forced Webb's workers into a dilemma, depriving some employees of their right to keep their participation confidential while discouraging others from participating at all. [*See* Dkt. 64 at 19-23]. The emails, the Secretary argues, would therefore have dissuaded a reasonable employee in the ISRs' position from speaking freely to the investigators.

An act taken by an employer that would discourage its employees from participating in a DOL investigation can be considered materially adverse. *See F.W. Webb Co.*, 2021 WL 1565508, at *5; *Booker*, 612 F.3d at 44 (finding that a jury instruction which stated that discouraging complaints about unlawful practices constituted adverse action under *Burlington N.* was not clearly erroneous); *Figueroa v. Cactus Mexican Grill LLC*, 575 F. Supp. 3d 208, 217-18 (D. Mass. 2021) (holding that discouraging plaintiff from participating in DOL investigation through threats of termination plausibly stated a claim for retaliation under FLSA); *Trant v. Murray*, 589 F. Supp. 3d 50, 58 (D.D.C. 2022) (stating that a reasonable jury could find that

discouraging employee from filing complaint constitutes a materially adverse action); *McBurnie v. City of Prescott*, 511 F. App'x 624, 625 (9th Cir. 2013) (holding that a reasonable jury could find that an employer surveilling an employee and singling them out for complaining about their overtime policy could, among other actions, constitute adverse action); *Fallon v. Potter*, 277 F. App'x 422, 428 (5th Cir. 2008) (holding that a genuine issue of material fact existed as to whether comments discouraging an employee from filing complaints by emphasizing the futility of doing so might have dissuaded a reasonable employee from pursuing their claims).[2]

Here, because there is a material dispute as to whether the emails could have had such an effect, summary judgment is inappropriate. The emails were received shortly after the DOL's investigators contacted Webb employees, when those employees would be considering whether, and to what extent, they wanted to participate in the

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[2] Webb highlights the fact that the Court in *Burlington N.* stated that the antiretaliation provision does not protect employees from all retaliation, only that which produces an injury or harm. 548 U.S. at 67. Webb argues that because there is no demonstration of harm here, no reasonable employee could find the actions adverse. [Dkt. 61 at 11]. The decision in *Burlington N.* draws a distinction between harm that is trivial and harm that is "materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" 548 U.S. at 68. (internal citations omitted). Since the emails, as well as the surrounding context, may have dissuaded a reasonable employee from participating in the investigation, they can be considered materially adverse under the standard articulated in *Burlington N. See id.* Stated another way, Webb's argument fails here because being dissuaded from participating in an investigation is a harm in and of itself that is sufficient to be characterized as retaliation. *See e.g. F.W. Webb Co.*, 2021 WL 1565508, at *5; *Booker*, 612 F.3d at 44; *Figueroa*, 575 F. Supp. 3d at 217-18; *Trant*, 589 F. Supp. 3d at 58; *Fallon*, 277 F. App'x at 428.

investigation. [Pl.'s SMF at ¶¶ 61-65, 67-72]. Having been sent by the highest levels of management, the emails would have commanded a line employee's attention. [*Id.*]. Each of the three emails concluded with a statement like "[i]f you have been contacted, please let Ruth or myself know so we can track how many people have been contacted." [Dkt. 60-6; Dkt. 60-7; Dkt. 60-8]. If read as a directive, this would force employees to choose between giving up the confidentiality of their communications or disobeying an order from upper management. The former could deprive employees of their ability to speak freely to the DOL. This is underscored by the fact that the purpose offered by Mucciarone for sending the emails included discovering the information supplied by employees to the DOL. [Def.'s SMF at ¶ 19]. A reasonable employee may have hoped to keep the details of what they told the DOL investigators confidential, especially if they were critical of management.[3] However, an

[3] Defendant argues that the employee's informer's privilege does not create a bar to an employer who seeks to learn about the scope and character of a governmental investigation. [Dkt. 76 at 3-6]. The employee's informer's privilege protects the Secretary from disclosing the identity of its witnesses or the information provided by witnesses during discovery. *Brock v. J.R. Sousa & Sons, Inc.*, 113 F.R.D. 545, 546 (D. Mass. 1986). The privilege, which is qualified, is held by the Government. *Roviaro v. United States*, 353 US 53, 59 (1957). Defendant's argument conflates separate issues, namely the ability of the DOL to keep the names of its informers secret and the ability of employees to speak freely with and express grievances to DOL officials. The informer's privilege governs the former. The legal protection underpinning the latter is the FLSA, whose enforcement depends on employees being able to approach officials with their grievances, and its antiretaliation provision, which protects the employees who do so. *See Mitchell*, 361 U.S. at 292; 29 U.S.C. § 215(a)(3). It is not the case that Defendant can take no action to protect itself, to conduct its own investigation, or to speak with its employees about how they should conduct themselves when contacted by investigators. It is the case, however, that it is impermissible for an employer to act in a manner that would dissuade a reasonable employee from exercising their rights, including their

employee disobeying a directive could reasonably perceive that they were risking employment consequences by doing so. Such a predicament could dissuade a reasonable employee from exercising their rights to participate.[4] Webb's statement about its desire to "track" how many and who of its employees were contacted further underlines the predicament the emails may have created.[5] [*Id.*]. Summary judgment is inappropriate for Webb here, because the timing, tone, content, and stated justifications for the emails could persuade a reasonable jury that the emails sent by Webb management during the investigation constituted retaliation.

At the same time, a reasonable jury could, in assessing the surrounding context, reach the opposite conclusion. The emails, when read in full, could be perceived as benign. In addition to notifying employees about the existence of the investigation, about which there was some confusion [D's ADMF at ¶ 120], the first two emails encouraged

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rights to participate in an investigation, under the FLSA. *See F.W. Webb Co.*, 2021 WL 1565508, at *5.

[4] Webb argues that the emails, which contain statements like "feel free to answer any questions honestly," could not have discouraged participation. [Dkt. 76 at 2-3]. While employees may have taken that instruction into consideration, the remainder of the emails, including the instruction to disclose participation, could have impacted a reasonable employee's decision to participate.

[5] Webb's emails could also be perceived as escalating in tone. The earlier emails include encouragement to participate honestly while the third email does not. Notably, while the first two emails ask employees to let management know if they heard from investigators in order to "track how many employees have" been contacted, and the final email asks employees to let management know "so we can track *who* has been contacted." [Dkt. 60-6; Dkt. 60-7; Dkt. 60-8 (emphasis added)]. Whether that difference, or the suggestion of "tracking," would be sufficient to dissuade an employee from participating is a material dispute of fact.

employees to be forthcoming and honest with investigators. [Dkt. 60-6; Dkt. 60-7]. The third email omits this encouragement but does not directly discourage participation either. [Dkt. 60-8]. While there was a lower response rate than usual to the third mailing, with only one or two employees responding, that mailing was sent to around twelve employees, in particular to those who had previously not participated. [Def.'s SMF at ¶¶ 17, 21-22]. At least one employee who received the March 2019 email and reported he was not concerned by it. [*Id.* at 33].

There is a material dispute of fact as to whether the employees would perceive the emails, and their surrounding context, as depriving them of their ability to participate in the investigation confidentially.[6] The statement "[i]f you have been contacted, please let Ruth or myself know" could be read as an optional request, which would have no bearing on an employee's decision to participate, or as a directive, which would. Mucciarone asserts, and the Secretary disputes, that he did not expect employees to inform him if they had spoken with the DOL but did not feel comfortable disclosing that to him.[7] [Def.'s SMF at ¶ 20]. The

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[6] Webb highlights the fact that, after the first mailing, Kruja provided Webb the names of the sixty employees she had sent contact letters to and the questions she had asked them. [D's ADMF at ¶¶ 116-117]. Webb also helped set up interviews, many of which were conducted at its facilities. [*Id.* at ¶¶ 108, 110-114]. At oral argument, Webb argued that this undermines the Secretary's claims that Webb's request to inform management in Mucciarone's emails was unlawful. While relevant, Kruja's actions do not appear to have provided management with the contents of employees' responses or the names of individuals contacted in subsequent mailings. Whether Kruja's disclosures undermined the confidentiality of employee participants in a manner that would have made Mucciarone's email requests irrelevant is a material fact in dispute.

[7] Defendant highlights the similarity of Mucciarone's emails to a letter sent in *Walsh v. MedStaffers LLC*, No. 1:21-CV-1730, 2021 WL

outcome of the retaliation therefore turns on an assessment of Mucciarone's credibility, an evaluation of the relationship between Webb's management and employees, and an interpretation of how a reasonable employee would read the emails in light of their text and surrounding context. A jury is best suited to fulfill that task. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.").

Webb argues that the Secretary fails to provide sufficient evidence to conclude that employees found the challenged action materially adverse. [Dkt. 61 at 10-15]. It points out that Kruja characterized the response rate after DOL's first set of mailings as "excellent" and that the response rate after the second set was lower but not noticeably low. [Def.'s SMF at ¶ 15]. Additionally, it asserts that no evidence of any disciplinary action taken in response to an employee's participation has been offered either. One employee reported that they saw the March 2019 email and were not concerned by it. [*Id.* at ¶ 33]. Some of the circumstantial evidence indicating that the emails had a chilling effect, such as the deleted voicemails in Kruja's inbox, may

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5505825, at *5 (M.D. Pa. Nov. 24, 2021) (finding FLSA retaliation claim based on letter advising employees interviewed by DOL investigators to "answer only the question that is asked, and wait for the next question" did not have a likelihood of success on the merits). The analysis in *MedStaffers* does not persuade the Court here, as the contents of the emails have key differences. There was no language in the *MedStaffers* email that could be read as a directive telling employees to inform management about their participation and the information they shared. Also, *MedStaffers* concerned a preliminary injunction and was therefore governed by a different legal standard; the court's decision therein was not intended to "say Secretary Walsh cannot prevail on his claims." *Id.* at 7.

ultimately be inadmissible at trial.[8] [*Id.* at ¶¶ 24-29]. All of this information is relevant context about the impact the emails would have on a reasonable employee. However, since the standard for determining adverse action is objective, such evidence is not necessarily required for the Secretary to prove their claim. *See Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997) (holding that retaliatory action, even though it did not detrimentally impact employee, violated Title VII); *EEOC v. L.B. Foster Co.*, 123 F.3d 746, 754 (3d Cir. 1997) ("An employer who retaliates can not escape liability merely because the retaliation falls short of its intended result.").

3. Causation

To establish the third element of causation, the Secretary must offer evidence "from which a reasonable factfinder could infer that the employer retaliated against [the employee] for engaging in the protected activity." *Blackie v. State of Me.*, 75 F.3d 716, 723 (1st Cir. 1996). In other words, the Secretary must show that "but for" the employee's confidential participation in the investigation, the adverse action that Webb took, in this case the emails they sent, would not have occurred. *See Kearney v. Town of Wareham*, 316 F.3d 18, 24 (1st Cir. 2002) (applying "but for" causation standard for FLSA retaliation claim); *but see Travers*, 808 F.3d at 531 (applying "but for" causation while

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[8] Webb argues that Kruja deleting the voicemails, despite their importance, has prejudiced Webb and that references to the voicemails should be struck from the record as a sanction for the spoliation of evidence. [Dkt. 61 at 15-16]. Since the Court's decision to deny Webb's motion for summary judgment is based instead on the emails themselves and their impact on a reasonable employee, it need not consider Kruja's subjective evidence about employees feeling dissuaded from participating. The evidence may still be relevant at trial, and Webb may properly raise their objections to its admissibility in a motion in limine.

stating "we need not decide the precise standard of causation that a plaintiff must meet to prove unlawful retaliation" under FLSA claim).[9]

Since it is undisputed that Mucciarone's emails were sent to employees preparing to respond, or not, to the Secretary's mailings [Dkt. 65, Pl.'s SMF at ¶¶ 63-65, 67-68, 70-71], whether the Secretary can establish causation largely turns on whether the emails constituted adverse action. Since a genuine dispute exists on that issue, it is inappropriate to evaluate whether causation has been established.

Webb argues that no causal link is possible because they sent their emails in response to the DOL's ongoing outreach to Webb employees—not to chill employee participation. [Dkt. 61 at 16]. The Court notes that Webb has already stated that one of the reasons they sent the emails was to, among other factors, keep track of the employees who spoke with the DOL and to ascertain the information supplied to the DOL by employees. [Def.'s SMF at ¶ 19]. This would clearly establish a causal connection between the employees' protected conduct and Defendant's actions in response. Webb may be able to prove that they would have taken their action regardless, as part of their email response was allegedly motivated by other factors, such as to clear up confusion among employees over the investigation. [See D's ADMF at ¶ 120]. There is a triable issue of fact as to whether that is the case.[10]

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[9] The First Circuit's guidance on the causation standard here leaves room for uncertainty, given its language in *Travers*. *Travers*, 808 F.3d at 531. However, given that here, as in *Travers*, the parties have agreed that the statute requires plaintiff to show "but-for" causation, the Court will evaluate the Secretary's claim under that standard. *See id.*; [Dkt. 64 at 24 n.12; Dkt. 61 at 16-17].

[10] Webb further argues that under the *McDonnell Douglas* burden shifting framework, the DOL cannot rebut their legitimate, non-retaliatory reasons for sending the emails. [Dkt. 61 at 9, 17-19]. They assert

IV. CONCLUSION

For the above stated reasons, the Secretary's motion for summary is **GRANTED** as to their claim that Webb violated the FLSA's overtime and recordkeeping requirements as alleged in Counts One and Two of the Secretary's Complaint. [Dkt. 1 at ¶¶ 61-65; Dkt. 63]. The Court holds that

1. Webb's Inside Sales Representatives ("ISRs") are not administratively exempt under the FLSA;

2. Webb has failed to pay its ISRs the premium required by the FLSA for all overtime hours worked from August 4, 2018, to present; and

3. Webb violated the recordkeeping requirements of the FLSA.

Summary judgment for both parties is **DENIED** as to the Secretary's retaliation claim, as alleged in Count Three

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that the emails were sent to help Webb defend itself in potential litigation, to advise employees of their rights, and to understand the scope of the DOL's investigation. [*Id.*]. Given the difficulty in ascertaining intent, the *McDonnell Douglas* framework exists to guide Courts analyzing discrimination claims when plaintiffs do not have a "smoking gun" evidence of a discriminatory motive. *Velez v. Thermo King de Puerto Rico, Inc.*, 585 F.3d 441, 447 (1st Cir. 2009) (analyzing application of *McDonnell Douglas* framework to ADEA claim). Under the framework, defendants offer legitimate, non-discriminatory reasons for their challenged actions and plaintiffs seek to demonstrate that the offered reasons were not the true reasons but were instead a "pretext" for discrimination. *Id.* at 447-48. When, as here, plaintiff's claim relies on direct evidence, there is no need for the Court to undergo that inquiry. *Zampierollo-Rheinfeldt v. Ingersoll-Rand de Puerto Rico, Inc.*, 999 F.3d 37, 50-52 (1st Cir. 2021) (describing when *McDonnell Douglas* applies and outlining examples of direct evidence). The Secretary relies on the text of the emails and Webb's stated justifications for them, which should be considered "direct evidence."

of the Secretary's Complaint. [Dkt. 1 at ¶¶ 66-67; Dkt. 60; Dkt. 63].

SO ORDERED.

Dated: June 16, 2023

/s/ Angel Kelley
Hon. Angel Kelley
United States District
Judge

APPENDIX C

No. 23-1793

JULIE A. SU, Acting Secretary of Labor,
United States Department of Labor,
Plaintiff - Appellee,

v.

F.W. WEBB COMPANY,
Defendant - Appellant.

Before

Barron, *Chief Judge*,
Selya, Kayatta, Gelpí, Montecalvo, Rikelman, and Aframe
Circuit Judges.

Order of Court

Entered: September 4, 2024

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc: Donald C. Lockhart, Scott M. Miller, Rachel Goldberg, Mark A. Pedulla, Joseph E. Abboud, James M. Nicholas, Rachel B. Cowen, Henry A. Leaman

APPENDIX D

29 U.S.C. § 213(a)(1) – Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

> **(1)** any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities)

29 C.F.R. § 541.2 – Job titles insufficient.

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part.

29 C.F.R. § 541.200 – General rule for administrative employees

(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at not less than the level set forth in § 541.600;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(b) The term "salary basis" is defined at § 541.602; "fee basis" is defined at § 541.605; "board, lodging or other facilities" is defined at § 541.606; and "primary duty" is defined at § 541.700.

29 C.F.R. § 541.201 – Directly related to management or general business operations.

(a) To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers. The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

(b) Work directly related to management or general business operations includes, but is not limited to, work in

functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

(c) An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

29 C.F.R. § 541.203 – Administrative exemption examples.

(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

(b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income,

assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

(c) An employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(d) An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(e) Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption. However, personnel clerks who "screen" applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption. Such personnel clerks typically will reject all applicants who do not meet minimum standards for the particular job or for employment by the company. The minimum standards are usually set by

the exempt human resources manager or other company officials, and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or other company officials. Thus, when the interviewing and screening functions are performed by the human resources manager or personnel manager who makes the hiring decision or makes recommendations for hiring from the pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(f) Purchasing agents with authority to bind the company on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.

(g) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

(h) Employees usually called examiners or graders, such as employees that grade lumber, generally do not meet the duties requirements for the administrative exemption. Such employees usually perform work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the

employee's memory for a manual of standards does not convert the character of the work performed to exempt work requiring the exercise of discretion and independent judgment.

(i) Comparison shopping performed by an employee of a retail store who merely reports to the buyer the prices at a competitor's store does not qualify for the administrative exemption. However, the buyer who evaluates such reports on competitor prices to set the employer's prices generally meets the duties requirements for the administrative exemption.

(j) Public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.

29 C.F.R. § 541.700 – Primary duty.

(a) To qualify for exemption under this part, an employee's "primary duty" must be the performance of exempt work. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an

employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.