UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ANDREW YOUNG, individually and on behalf of others similarly situated,	:	
Plaintiff,	:	04 Civ. 5968 (LTS) (GWG)
-v.-	:	**REPORT AND RECOMMENDATION**
COOPER CAMERON CORPORATION,	:	
Defendant.	:	

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GABRIEL W. GORENSTEIN, UNITED STATES MAGISTRATE JUDGE

Andrew Young has sued his employer Cooper Cameron Corporation ("Cooper") for failure to pay premium overtime wages in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. Young alleges that he regularly worked more than forty hours per week in his position with Cooper as a Product Design Specialist ("PDS") and that Cooper failed to pay him overtime compensation.

Young now moves for partial summary judgment on the issues of (1) whether the FLSA applies to his job duties; and (2) whether he is entitled to liquidated damages. For the reasons explained below, the motion should be granted.

I. BACKGROUND

Cooper "is a global provider of pressure control, processing, flow control and compression systems as well as project management and aftermarket services for the oil & gas and process industries." See Cooper Cameron Corporation's Rule 56.1 Statement of Material Facts as to Which It Contends There Exists a Genuine Issue to be Tried (attached to Defendant Cooper Cameron Corporation's Local Civil Rule 56.1(b) Statement in Opposition to Plaintiff's

Motion for Summary Judgment, filed Feb. 17, 2006 (Docket #38)) ("Def. 56.1"), ¶ 1. Cooper employs three categories of PDS's, which it calls PDS I, PDS II, and PDS III. See Job Descriptions (reproduced in Exhibit H to Declaration of Jennifer B. Rubin, filed Feb. 17, 2006 (Docket #41) ("Rubin Decl.")). A PDS I is required to possess "[t]echnical knowledge and 8 or more years related experience" in the field. Job Descriptions at 1. A PDS II is required to possess "technological knowledge with 12 or more years' related experience" in the field. Id. at 2. A PDS III is required to possess a "technological background and 15 or more years related experience" in the field. Id. at 3. Cooper classifies all its employees in the position of PDS, including Young, as "exempt" employees for purposes of the FLSA. See Def. 56.1 ¶ 16.

On June 25, 2001, Cooper offered Young employment for the "exempt position of [PDS] II in the Engineering Department." See Def. 56.1 ¶ 11. Young worked for Cooper as a PDS II from July 2001 until March 2004. See Plaintiff's 56.1 Statement of Material Facts as to Which There Is No Genuine Issue to be Tried, dated Jan. 19, 2006 (attached to Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, filed Jan. 19, 2006 (Docket #36) ("Pl. Mem.")) ("Pl. 56.1"), ¶ 2. Young asserts that he worked more than 40 hours per week – an issue that is not the subject of his summary judgment motion.

According to the job description, Young's position required him, inter alia, to "[p]roduce a working design to meet a general industry design or to satisfy a customer's requirements." See Job Descriptions at 2. Young's primary job duty was "to generate designs, details, part lists and assembly drawings for skids and packaging of equipment on skids." See Deposition of the Defendant, Cooper Cameron Corporation, by Mac Melton Kennedy, dated Mar. 29, 2005 (excerpts attached as Ex. D to Declaration of Michael J.D. Sweeney, dated Jan. 19, 2006

(attached to Notice of Motion, filed Jan. 19, 2006 (Docket #35) ("Sweeney Decl."), and as Ex. C to Rubin Decl.)) ("Kennedy Dep."), at 72-73. The manner in which Young produced these designs is discussed further below.

Young's own education prior to working at Cooper consisted of a high school diploma, as well as classes in electrical engineering, geometry, and math and science at various universities. He does not have a college degree. See Def. 56.1 ¶ 4; Pl. 56.1 ¶ 15. Young also attended training courses in "AutoCAD," a computer program he used to generate drawings, see Def. 56.1 ¶ 5, and in "geometric dimensioning and tolerancing," a course that Cooper required of both its engineers and PDS's. See id. Young had 20 years of experience in the design drafting field prior to being hired by Cooper. See id. ¶ 6.

No PDS, including Young, had a college degree. See Pl. 56.1 ¶¶ 15-16; Kennedy Dep. at 121-22. A Cooper representative testified that a PDS need not have undertaken a "course of specialized intellectual instruction or study," that schooling was "not necessary," and that a PDS need not "go outside [the] job" to obtain the training needed to become a PDS. See Kennedy Dep. at 122-23.

Young now moves for summary judgment on the issues of whether the professional exemption and the liquidated damages provisions of the FLSA apply in this case.

II. APPLICABLE LEGAL PRINCIPLES

A. Law Governing Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure states that summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). A genuine issue of material fact "may reasonably be resolved in favor of either party" and thus should be left to the finder of fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

In determining whether a genuine issue of material fact exists, the evidence of the nonmovant "is to be believed" and the court must draw "all justifiable inferences" in favor of the nonmoving party. Id. at 255 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970)). Nevertheless, once the moving party has shown that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law, "the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial,'" Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)) (emphasis in original), and "may not rely on conclusory allegations or unsubstantiated speculation," Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998) (citing cases). In other words, the nonmovant must offer "concrete evidence from which a reasonable juror could return a verdict in his favor." Anderson, 477 U.S. at 256.

Where "the nonmoving party bears the burden of proof at trial, summary judgment is warranted if the nonmovant fails to make a showing sufficient to establish the existence of an element essential to [its] case." Nebraska v. Wyoming, 507 U.S. 584, 590 (1993) (quoting Celotex, 477 U.S. at 322) (internal quotation marks omitted) (alteration in original). Thus, "[a] defendant moving for summary judgment must prevail if the plaintiff fails to come forward with enough evidence to create a genuine factual issue to be tried with respect to an element essential

to its case." Allen v. Cuomo, 100 F.3d 253, 258 (2d Cir. 1996) (citing Anderson, 477 U.S. at 247-48).

B. Law Governing FLSA Claims

The FLSA was designed to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). It "'guarantee[s] compensation for all work or employment engaged in by employees covered by the Act.'" Reich v. New York City Transit Auth., 45 F.3d 646, 648-49 (2d Cir. 1995) (quoting Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 602 (1944)).

The FLSA requires employers to pay overtime for "employment in excess of [forty hours per week] at a rate not less than one and one-half times the regular rate at which [the employee] is employed." 29 U.S.C. § 207(a)(1). The FLSA, however, exempts certain employees from its overtime requirements, including "any employee employed in a bona fide executive, administrative, or professional capacity. . . ." 29 U.S.C. § 213(a)(1). The Second Circuit has held that "because the FLSA is a remedial act, its exemptions . . . are to be narrowly construed," and "an employer bears the burden of proving that its employees fall within an exempted category of the Act." Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 614 (2d Cir. 1991) (citations omitted), cert. denied, 506 U.S. 905 (1992); see also Reich v. State of Wyo., 993 F.2d 739, 741 (10th Cir. 1993) ("the employer must show the employees fit 'plainly and unmistakenly within [the exemption's] terms'") (citing Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960)) (alteration in original).

III. DISCUSSION

A. Professional Exemption

1. The Regulations

Cooper relies solely on the "professional exemption" to justify its decision not to pay Young overtime. Under the Department of Labor ("DOL") regulations governing Young's employment at Cooper, the professional exemption from the FLSA's overtime rules, see 29 U.S.C. § 213(a)(1), applied to employees

> (a) Whose primary duty consists of the performance of . . . [w]ork requiring knowledge of an advance [sic] type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, . . . and (b) Whose work requires the consistent exercise of discretion and judgment in its performance.

29 C.F.R. § 541.3(a), (b) (2002).[1] The regulations thus set up two elements to determine whether an individual is a professional: one involving "knowledge" and the other involving "discretion." Both must be satisfied for an employer to obtain the exemption. See, e.g., De Jesus-Rentas v. Baxter Pharmacy Services Corp., 400 F.3d 72, 74 (1st Cir. 2005); Vela v. City of Houston, 276 F.3d 659, 675 (5th Cir. 2001). "The analysis does not involve a particular formula, but rather, the test 'must be applied in the light of all the facts involved in the particular employment situation in which the question arises.'" Seltzer v. Dresdner Kleinwort Wasserstein, Inc., 356 F. Supp. 2d 288, 301 (S.D.N.Y. 2005) (citing 29 C.F.R. § 541.207(b)).

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[1]We cite to the 2002 version of the regulations throughout because the regulations in effect at the time of Young's employment – not the amendments to the regulations effective as of August 2004, see 69 Fed. Reg. 22,122, 22,260 (Apr. 23, 2004) – govern this matter. See, e.g., Belt v. EmCare, Inc., 444 F.3d 403, 406 n. 5 (5th Cir. 2006); Kennedy v. Commonwealth Edison Co., 410 F.3d 365, 369 (7th Cir. 2005).

The first element in the requirement – that the knowledge be “of an advance[d] type” – must, “generally speaking . . . be knowledge which cannot be attained at the high school level.” 29 C.F.R. § 541.301(b) (2002). “[T]he professions which meet the requirement for a prolonged course of specialized intellectual instruction and study include law, medicine, nursing, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical, and biological sciences, including pharmacy and registered or certified medical technology and so forth.” Id. § 541.301(e)(1). The worker thus must be more than a “highly skilled technician[].” Id. § 541.301(e)(2).

While there are exceptions to the requirement of attaining knowledge through a “prolonged course of specialized intellectual instruction and study,” such as a self-trained lawyer, “[t]he word ‘customarily’ implies that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession.” 29 C.F.R. § 541.301(d) (2002). The purpose of the exemption is to cover the “occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry, etc.” Id. However, the professional exemption “does not include the members of such quasi-professions as journalism in which the bulk of the employees have acquired their skill by experience rather than by any formal specialized training.” Id.

2. Cooper’s Contentions Regarding Young’s Work

Cooper characterizes Young’s work as follows: under the supervision of Mac Melton Kennedy, Young was in charge of doing “skid layout” for Hydraulic Power Units (“HPU”), which are used to provide pressurized fluid for the purpose of moving large hydraulic cylinders used in a drilling rig. See Def. 56.1 ¶ 32. Young had comprehensive knowledge of the HPU

product line, which included valves, regulators, pipings, pumps, and reservoirs. See id. ¶ 33. Young's primary duty was to create "fabrication drawings" to be used by the Cooper shop to make a product part (generally an HPU). Young was responsible for modifying drawings and "clean[ing] them up" so that "people with less experience" than he had could understand them. See id. ¶ 35. Young received information from engineers regarding these drawings, but he created the final work product to be used by the shop. See id.

Once a "hydraulic schematic" had been created and sizing calculations completed on the pumps and reservoir, Young was responsible for determining the location of the components and the fabrication details of the skid or frame, as well as the hardware required to assemble the components onto the skid. See id. ¶ 36. Young was responsible for modifying an existing design to make it more functional, and he had the authority to work with the shop and independently direct the shop to change the specifications for an HPU design. See id. ¶ 37. Young was also responsible for producing a working design of an HPU to meet a general industry design – that is, he would use information from an engineer to design a layout that took into account a customer's specifications. See id. ¶ 39.

Young also modified existing designs to incorporate new technology or functional improvements. See id. ¶ 43. That is, he modified designs according to a client's specifications, which sometimes required him to search for new technology to accommodate a client's request. See id. Young was also responsible for assessing whether manufactured parts could be used "as is" or whether they needed "rework." Young worked directly with the shop to insure that the details of the fabrication drawing were correct. See id. ¶ 44.

With respect to the knowledge required for his work, Cooper notes that Young had 20

years of experience in the design drafting field prior to joining Cooper, working as a mechanical designer in the engineering departments of several companies, and also had an expertise in fabrication drawing. See id. ¶ 6. With respect to the knowledge requirements for the PDS II position in general, Cooper asserts that "an advanced degree is not required for the position" but that a PDS "operates within Cooper Cameron's engineering department, performs work requiring knowledge of an advanced type in a field of science or learning and works closely with Cooper Cameron's engineers." See id. ¶ 16.

3. Whether Young's Duties Met the "Knowledge" Prong

As previously noted, the regulations state that the professional exemption applies to work that requires knowledge "customarily acquired by" specialized study, and that "[t]he word 'customarily' implies that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession." 29 C.F.R. § 541.301(d) (2002). Here, Cooper has pointed to nothing that suggests Young's duties involved work "requiring knowledge of an advance[d] type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study." See id. § 541.3(a)(1) (2002) (emphasis added). Cooper's arguments regarding Young's own education are of little relevance since Young's personal circumstances tell us nothing about the duties he was being required to perform as a PDS. Rather, what matters is the knowledge that was required for his "primary duty." See id. § 541.3(a). Thus, the regulations specifically note that "persons with professional training" are not exempt if they are performing "subprofessional" work. See 29 C.F.R. § 541.308(b) (2002). One example given is the field of "engineering," in which the regulation recognizes there are persons with "'engineer' titles" or who are trained in engineering but who are actually working

as "junior engineers, or draftsmen." Id.

In any event, other than certain courses of limited duration, at least two of which were not a prerequisite for employment as a PDS at Cooper, Young's educational attainments consisted merely of a high school diploma as well as classes in electrical engineering, geometry, and math and science at various universities over the years. See Def. 56.1 ¶ 4; Pl. 56.1 ¶ 15. In fact, Cooper could identify no PDS who had obtained any degree, be it a two-year or four-year college degree or any type of specialized degree. See Kennedy Dep. at 120-22. Plainly, this does not show that the work Young performed required knowledge "customarily" obtained by means of a "prolonged course of specialized intellectual instruction and study."

Nor is it of any moment that Young's work required a high level of technical skill and knowledge since that too is insufficient under the regulations. See 29 C.F.R. § 541.301(e)(2) (2002) (workers "must be more than highly skilled technicians"). What matters is whether the knowledge required is one that is "customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes." See 29 C.F.R. § 541.3(a)(1) (2002). Cooper, which bears the burden of proof on this point, has provided no evidence at all that this is the case.

To the contrary, Cooper's own witness at a deposition, who spoke for the company pursuant to Fed. R. Civ. P. 30(b)(6), made clear the nature of the knowledge required for the PDS job. He testified:

> Q: So you gain the experience [of a PDS] on-the-job there?
> A: Yes.
> Q: And schooling is not necessary?
> A: Correct.

Q: Where else would you get the training?
A: It would be on-the-job. You would pick it up on-the-job, yes. I guess you could classify it as on-the-job training.
Q: You need not go outside your job to get the training of a Product Design Specialist professional?
A: That's correct.

Kennedy Dep. at 122-23. See also Deposition of Denise Bailey, dated Apr. 11, 2005 (reproduced as Ex. I to Sweeney Decl.), at 27 (testifying that a PDS could gain knowledge through on-the-job training and that no college degree was required). In a declaration submitted with Cooper's motion papers, Kennedy conclusorily asserts that a PDS's work requires "knowledge of an advanced type in a field of science," see Declaration of Mac Melton Kennedy, filed Feb. 17, 2006 (Docket #40), ¶ 4, but gives no information of what sort of knowledge he is talking about and how it is customarily acquired. What is left unrefuted by Kennedy's declaration is Kennedy's prior testimony that a PDS need not have undertaken a "course of specialized intellectual instruction or study." See Kennedy Dep. at 122. Kennedy's testimony on this point is corroborated by the job descriptions for the PDS positions – none of which requires more than a high school education. See Job Descriptions at 1-3.

Thus, whatever knowledge Young's job required, it was not of an advanced type in a field of science or learning "customarily acquired by a prolonged course of specialized intellectual instruction and study." See 29 C.F.R. § 541.3(a)(1) (2002); see also id. § 541.301(d) ("in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession"). That Young's job was difficult or involved highly technical skills is simply insufficient under the regulations.

This conclusion is supported by case law. For example, in Reeves v. International Tel. & Tel. Corp., 357 F. Supp. 295 (W.D. La. 1973), the court found no professional exemption for a

microwave field engineer, noting that "almost all persons employed in this field acquired their knowledge through self-study and on-the-job training which consisted of working with technical equipment over long periods of time." See id. at 303. The court added that although the plaintiff's knowledge was "of a highly technical nature in a field of science, it is not acquired customarily through a prolonged course of specialized intellectual instruction." See id. In many other instances, courts have found no professional exemption for jobs performed by highly skilled individuals where the jobs did not require advanced academic training. See, e.g., Vela, 276 F.3d at 675 (paramedics who must "complete . . . 880 hours of specialized training in didactic courses, clinical experience, and field internship"); Fife v. Harmon, 171 F.3d 1173, 1177 (8th Cir. 1999) (airfield operation specialists who are required to have either a bachelor's degree in a related field, four years of full-time experience in aviation administration, or an equivalent combination of experience and education); Debejian v. Atlantic Testing Laboratories, Ltd., 64 F. Supp. 2d 85, 89 (N.D.N.Y. 1999) (steel-testing technicians who need only "a high school education . . . in addition to some specialized, but not lengthy, training and hands-on experience").

Conversely, where the exemption has been found to apply, the employees in question had virtually always earned specialized academic degrees or completed courses of instruction related to their field of employment, in addition to undergoing extensive training. See Rutlin v. Prime Succession, Inc., 220 F.3d 737, 742 (6th Cir. 2000) (funeral director and embalmer who had to be state-licensed, "complete a year of mortuary science school and two years of college, including classes such as chemistry and psychology, take national board tests covering embalming, pathology, anatomy, and cosmetology, practice as an apprentice for one year, and

pass an examination given by the state"); Owsley v. San Antonio Indep. Sch. Dist., 187 F.3d 521, 524-25 (5th Cir. 1999) (athletic trainers who were required to achieve, at a minimum, a bachelor's degree, 1800 hours' apprenticeship in a three-year period, completion of five 3-hour credit college courses in specific areas of study, and a CPR test), cert. denied, 529 U.S. 1020 (2000); Reich v. State of Wyo., 993 F.2d at 741 (game wardens who were required to have a baccalaureate degree in wildlife management, wildlife biology, or a closely related field, plus ten weeks of basic law enforcement training before starting, and forty hours every two years once they begin); Tomney v. International Center for Disabled, 357 F. Supp. 2d 721, 740 (S.D.N.Y. 2005) (vocational rehabilitation counselor who was required to have a master's degree in the rehabilitation field and additional work experience as a counselor).

Cooper relies heavily on Dingwall v. Friedman Fisher Associates, P.C., 3 F. Supp. 2d 215 (N.D.N.Y. 1998), in which a "design engineer" who designed electrical systems was held to be exempt from the FLSA's requirements. Dingwall is not relevant for at least two reasons. First, there is no evidence that a PDS functions as an "engineer." Rather, the only evidence from Cooper on this score was that any work by a PDS had to be checked by an engineer. See Def. 56.1 ¶ 46. Second, the employee in Dingwall had an associate's degree in Electrical Technology – a fact relied upon heavily by the court in Dingwall to find that his work in "designing electrical systems" met the regulatory test. See 3 F. Supp. 2d at 218-19. Here, of course, no PDS was required to have any advanced academic training. Nor does any PDS (including Young) have a degree of any kind beyond a high school diploma.

In sum, no reasonable juror could find that the knowledge required for Young's work met the professional exemption test. For this reason alone, Young must be found to be a non-exempt

employee and it is thus unnecessary to determine whether his duties met the "discretion" prong of the professional exemption analysis.

B. Liquidated Damages

1. Legal Standard

An employer who violates the FLSA's overtime provision, see 29 U.S.C. § 207(a)(1), "shall be liable" to the employee for unpaid overtime and "an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). Such liquidated damages "are considered compensatory rather than punitive in nature." Reich v. Southern New England Telecommunications Corp., 121 F.3d 58, 71 (2d Cir. 1997). They "'constitute[] compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.'" Id. (citing Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945)). Nonetheless, the FLSA provides that liquidated damages "may" be avoided, in the court's "sound discretion," if the employer "shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not in violation of the [Act]." 29 U.S.C. § 260; Caserta v. Home Lines Agency, Inc., 273 F.2d 943, 947-48 (2d Cir. 1959). Thus, "even assuming that the employer meets its burden in this regard, the district court nonetheless may, in the exercise of its discretion, award liquidated damages under the express language of the statute." See SNET, 121 F.3d at 71 n.5.

"Under 29 U.S.C. § 260, the employer bears the burden of establishing, by 'plain and substantial' evidence, subjective good faith and objective reasonableness." SNET, 121 F.3d at 71 (citing Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 907 (3d Cir. 1991); Brock v.

Wilamowsky, 833 F.2d 11, 19 (2d Cir. 1987)). The burden "is a difficult one to meet, however, and '[d]ouble damages are the norm, single damages the exception.'" Wilamowsky, 833 F.2d at 19 (citation omitted); accord Herman v. RSR Sec. Servs., Ltd., 172 F.3d 132, 142 (2d Cir. 1999).

"'Good faith' in this context requires more than ignorance of the prevailing law or uncertainty about its development. It requires that an employer first take active steps to ascertain the dictates of the FLSA and then move to comply with them." SNET, 121 F.3d at 71 (citing Cooper Elec., 940 F.2d at 908).

2. Application to Young's Case

Cooper asserts that any violation of the FLSA with regard to the classification of the PDS II position was in good faith and objectively reasonable. See Defendant Cooper Cameron Corporation's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, filed Feb. 17, 2006 (Docket #42), at 16-19. It points to several actions it has taken, none of which is sufficient to satisfy Cooper's burden on the "good faith" element.

First, Cooper states that "the initial determination to classify the Product Design Specialist II position as exempt was made in the early 1990s by Cooper Industries, Cooper Cameron's predecessor, in accordance with the HAY job classification system, which analyzes three factors, including: 'Know How,' 'Problem Solving,' and 'Accountability.'" See Declaration of Denise Bailey, filed Feb. 17, 2006 (Docket #39) ("Bailey Decl."), ¶ 4; Def. 56.1 ¶ 20. This statement does nothing to show Cooper's good faith since Cooper provides no evidence the HAY job classification system can properly serve as a proxy for the FLSA's requirements.

Second, Cooper states that in 1998, it "retained KPMG, a consulting firm, to conduct

another in-depth review of its engineering staff using the Factor Evaluation System (FES), a classification system, which analyzes eight factors . . . ." See Bailey Decl. ¶ 5. KPMG interviewed Cooper staff to determine "each position's job duties and responsibilities and assigned a score for each of the eight factors. The total score then determined the exempt grade of the job. KPMG recommended that Cooper Cameron retain the Product Design Specialist II's exempt status." Id. The eight factors listed, however – including, for example, "Thinking Challenge," "Diversity," and "Accountability" – do not relate to the professional exemption under the FLSA. Thus there is not the slightest indication that the analysis KPMG performed was anchored in any way to the requirements of the FLSA. Without such a showing, KPMG's ultimate recommendation to Cooper that it continue to classify the PDS II position as exempt is not one that Cooper could have reasonably relied upon.

Finally, Denise Bailey, an employee in Cooper's Human Resources department, states that she "made a concerted effort to both stay on top of all FLSA current developments and to increase my knowledge about the FLSA's applications," which included attending FLSA seminars presented by law firms, consulting "various publications" such as legal articles and government web sites, and discussing job classifications with a human resources manager at a company whose workers perform similar job duties to the PDS's at Cooper. See Bailey Decl. ¶¶ 6-11; Def. 56.1 ¶¶ 22, 24-27. This too is insufficient since it fails to show that Cooper conducted an actual analysis of the PDS II position that demonstrated the position to be within an FLSA exemption. To benefit from the "good faith" exemption under section 260, it is insufficient for the employer merely to show that it harbored an employee with knowledge of the FLSA in general. Rather, the employer must show at a minimum that it undertook to apply the

FLSA's requirements to the particular job at issue. See generally SNET, 121 F.3d at 71 (FLSA "requires that an employer first take active steps to ascertain the dictates of the FLSA and then move to comply with them"). Cooper provides no evidence that such a job-specific analysis was ever done.

The only possible evidence on this point is Bailey's assertion that in 2000 she talked to an unidentified human resources manager at a company where she had previously worked and that this manager "agreed with me that the position should remain exempt." See Bailey Decl. ¶ 9. No further details are provided on the substance of this conversation. In any event, Bailey does not assert that she acquired any knowledge as to the FLSA prior to her starting work at Cooper in 2000. See id. ¶ 6. Thus, her conversation with her former colleague does not reflect that an individual at Cooper with knowledge of the FLSA's requirements actually applied that knowledge to analyze Cooper's PDS II position. The fact that the company at which Bailey formerly worked may have also classified a similar position as exempt is irrelevant inasmuch as good faith is not "demonstrated by . . . simple conformity with industry-wide practice." See SNET, 121 F.3d at 71 (citing Cooper Elec., 940 F.2d at 910; Wilamowsky, 833 F.2d at 19-20).

Notably, Cooper makes no suggestion that it sought advice from counsel with regard to job classifications under the FLSA. See SNET, 121 F.3d at 72 ("[N]owhere in their briefs does SNET contend that it was relying on the advice of informed counsel. Thus, SNET's inquiry was insufficient, in itself, to compel a finding of good faith and, indeed, supported a finding to the contrary."); Dingwall, 3 F. Supp. 2d at 223 ("it is well-established that defendant has an affirmative obligation to seek legal counsel to ensure that its policies and actions comply with the FLSA"). Even where a company has contacted counsel for advice on job classifications,

courts in this circuit have found a lack of good faith if the company's questions were not sufficiently specific to the job or jobs at issue. See, e.g., Bowrin v. Catholic Guardian Soc., 417 F. Supp. 2d 449, 472-73 (S.D.N.Y. 2006) ("While it is undisputed that [defendant] had conversations with counsel generally about coverage under the Act, defendant does not proffer evidence that it discussed in detail the nature of services provided," nor evidence "of conversations with counsel or work product from counsel on the issue of whether the . . . program would subject it to FLSA coverage"); Debejian, 64 F. Supp. 2d at 91-92 (where employer improperly exempted a particular employee, general inquiries to counsel were not sufficient, and specific details respecting that employee ought to have been disclosed to counsel).

Cooper's citation to Nelson v. Ala. Inst. for Deaf & Blind, 896 F. Supp. 1108 (N.D. Ala. 1995), does not affect this analysis. In Nelson, a representative of the employer had met with a United States Department of Labor Wage and Hour specialist, who had "assured her that her proposed compensation plan was in compliance with FLSA." Id. at 1115. Here, by contrast, there was no such effort made and, indeed, the record is devoid of evidence that any individual with expertise in the FLSA (let alone a Department of Labor official) made a determination that the PDS position came within the professional exemption.

Accordingly, summary judgment should be granted on the issue of Young's entitlement to liquidated damages under 29 U.S.C. § 216(b).

Conclusion

For the foregoing reasons, Young's motion for partial summary judgment (Docket #35) should be granted on the issues of (1) the applicability of the FLSA to Young's employment and (2) Young's entitlement to liquidated damages under 29 U.S.C. § 216(b).

PROCEDURE FOR FILING OBJECTIONS
TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have ten (10) days from service of this Report and Recommendation to serve and file any objections. See also Fed. R. Civ. P. 6(a), (e). Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with copies sent to the Hon. Laura T. Swain and the undersigned at 500 Pearl Street, New York, New York 10007. Any request for an extension of time to file objections must be directed to Judge Swain. If a party fails to file timely objections, that party will not be permitted to raise any objections to this Report and Recommendation on appeal. See Thomas v. Arn, 474 U.S. 140, 144-45 (1985).

Dated: June 6 2006
New York, New York

____
GABRIEL W. GORENSTEIN
United States Magistrate Judge

Copies to:

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Getman Law Office
9 Paradies Lane
New Paltz, New York 12561

Jennifer DiMarco
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666 Third Avenue
New York, New York 10017

Hon. Laura T. Swain
United States District Judge

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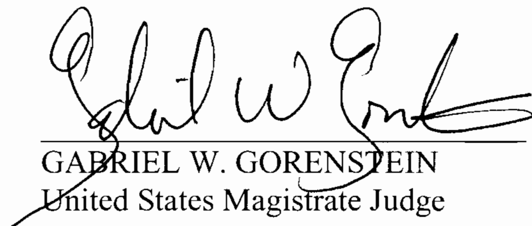

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