IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ELITE CLEANING COMPANY, INC., d/b/a ELITE BUILDING SERVICES,	)	
Plaintiff,	)	
v.	)	Civil Action No. 690-N
WALTER CAPEL and ARTESIAN WATER COMPANY, INC.,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: February 3, 2006
Decided: June 2, 2006

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PARSONS, Vice Chancellor.

This action is before the Court on Defendants, Artesian Water Company, Inc. ("Artesian") and Walter Capel's, motion for summary judgment. Plaintiff, Elite Cleaning Company, Inc. ("Elite"), filed this action on September 10, 2004 alleging that Capel, a former janitor for Elite, breached his noncompetition agreement and that Artesian tortiously interfered with Elite's rights under that agreement. Elite seeks an injunction as well as $565,000 in damages. Capel asserted a counterclaim alleging that Elite violated the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 ("FLSA"), by not compensating him for overtime and travel time between jobsites. For the reasons stated, Defendants' motion for summary judgment is granted in part and denied in part.

I. BACKGROUND

A. Facts

Elite is a privately held corporation located in New Castle, Delaware. It has approximately 150 employees and is owned by Cheryl Ecton, its president. Elite provides basic janitorial services, including floor care services, carpet cleaning, ceiling tile cleaning, and ultrasonic cleaning services to residences and commercial enterprises. About 98% of Elite's business is in Delaware, with the remainder in Pennsylvania.

Companies that use Elite's services either contract with Elite directly or hire another company for which Elite acts as a subcontractor. In this case Artesian hired Capital Cleaning Services ("Capital") who hired Elite as a subcontractor. Capital, a New York corporation, subcontracts its work to cleaning companies all over the United States. Elite has worked as one of Capital's subcontractors for approximately five years and receives a substantial amount of work from it.

An independent contractor agreement defines the relationship between Elite and Capital. In particular the agreement contains a nonsolicitation provision that prevents Elite from soliciting business from any of Capital's clients during the term of the agreement and for a period of two years following its termination. Further, when Elite cleans Artesian's building they bill Capital not Artesian.

In December 2000, Capel began working as a janitor for Elite. When he first started working for Elite the company required Capel to sign several pre-employment forms including an acknowledgement that provides:

> I hereby understand and agree to abide by the Elite Cleaning Co., Inc. Employee Manual. Failure to do so may result in immediate termination, disciplinary or legal action.
>
> I also hereby understand and agree to abide by the Elite Cleaning Co., Inc., solicitation and Agreement Not To Compete, Section VII of this Employee Manual. Failure to do so will result in immediate termination and legal action.[1]

The parties dispute whether Elite provided a copy of the referenced employee manual to Capel. In this litigation, Elite has not produced the version of the employee handbook that the acknowledgement form refers to; instead, it produced a copy of Elite's current employee manual entitled "Elite Building Services Employee Manual."[2] Elite

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[1] Defs.' App. to Opening Br. in Supp. of their Mot. for Summ. J. ("DOB App.") A22.

[2] The Elite Building Services Employee Manual was issued in July 2003 and evidently replaced the earlier version entitled "Elite Cleaning Co., Inc. Employee Manual." Compare Compl. Ex. C with Compl. Ex. B.

alleges the current version contains the same language as the earlier Employee Manual in all relevant respects.[3] The 2003 version states:

> 7. SOLICITATION AND AGREEMENT NOT TO COMPETE
>
> Solicitation and/or job procurement of any client held by Elite Building Services, for a period of 2 years from termination or release of employment is prohibited by any employee either active or inactive. Any second or third party involvement is prohibited. Being hired by the client for any type of job is prohibited for a period of 2 years from termination or release of employment. This violation will result in immediate termination and legal action.
>
> While employed by Elite Building Services, all personnel are prohibited from working for any other business in the janitorial field that would stimulate a conflict of interest.[4]

As a janitor, Capel performed basic cleaning duties, such as emptying trash cans, dusting, vacuuming, sweeping, and mopping.[5] His job required no special skills. Elite paid Capel between $8 and $10 per hour and did not provide him with any benefits. [6] When Capel worked for Elite he would go directly to the job site and clean the building.

In the spring of 2004, while working for Elite, Capel noticed a job posting on Artesian's bulletin board for a "Facilities Maintenance" or custodian position.[7] This

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3 Pl.'s App. to Answering Br. in Opp'n to Defs.' Mot. for Summ. J. ("PAB") B109 (Ecton Aff. ¶ 9).

4 DOB App. A21.

5 DOB App. A58-59.

6 DOB App. A57-58

7 The parties dispute whether Capel initially accepted a position as a custodian with a job description including vacuuming and cleaning or as a facilities manager with

position paid substantially more than Elite and included health insurance for Capel and his family.[8]

Artesian hired Capel in March 2004. Shortly before he began working for Artesian Capel notified Elite of his intention to change jobs. Approximately two weeks later, Capel's supervisor informed him that his pre-employment contract barred his employment by Artesian.

On Capel's last day of work at Elite, April 19, 2004, he met with Ecton at her request. She informed Capel that he could not work for Artesian because he had signed a covenant not to compete. Capel responded that he did not know of any restrictions on his ability to work for Artesian and that he took the position at Artesian because it presented a more favorable situation for himself and his family.

Subsequently, Elite sent Capel and Artesian several letters informing them that unless Artesian terminated Capel Elite would commence legal proceedings against them. Artesian responded by offering to provide Elite with cleaning opportunities if it would drop its demand that Artesian fire Capel. Elite rejected this offer and sued Artesian and Capel on September 10, 2004. Shortly thereafter Artesian discontinued using Capital for cleaning services.

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a job description that did not include vacuuming or cleaning. Compare DOB App. A98 with PAB App. B120. For purposes of the pending motion, I assume Elite's position is correct and the job included vacuuming and cleaning.

[8] PAB App. B120.

B. Procedural History

Elite filed its verified complaint on September 10, 2004. The complaint seeks a temporary restraining order, preliminary injunction and permanent injunction, enjoining Capel for a period of two years from working for Artesian. Elite also seeks damages and attorneys' fees.

Capel filed an answer and counterclaim on October 12, 2004. The counterclaim seeks to hold Elite liable for violations of the FLSA. In particular it alleges that Elite willfully engaged in the practice of failing to pay Capel (i) overtime for all work he performed in excess of 40 hours per week at a rate of not less than one and one half times his regular rate of pay, (ii) wages for work he performed during meal breaks, and (iii) wages for his travel time between worksites and time spent obtaining various supplies for Elite. As damages Capel seeks to recover the amounts owed for unpaid overtime compensation, unpaid travel time compensation, liquidated damages equal to the amount of back pay due him and his attorneys' fees.

Defendants have moved for summary judgment in their favor on all the counts of Elite's complaint and on Capel's counterclaim. Having considered the parties' briefs and heard argument on that motion and for the reasons stated in this memorandum opinion, the Court has determined to grant the motion in all respects except for the FLSA claim as to unpaid travel time.

II. ANALYSIS

A. Standard

Under Court of Chancery Rule 56, the Court will grant summary judgment only when the parties do not dispute any issue of material fact and the moving party is entitled to judgment as a matter of law.[9] The Court must view the facts in the "light most favorable to the nonmoving party, and the moving party has the burden of demonstrating that there is no material question of fact."[10] A party opposing summary judgment, however, "may not rest upon the mere allegations or denials of [their] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial. If [the party] does not so respond, summary judgment, if appropriate, shall be entered against [them]."[11] The Court "also maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application."[12]

B. The Noncompetition Agreement

Capel challenges the noncompetition agreement's enforceability as well as its application to him. As to the applicability of the agreement Capel contends that the noncompetition agreement only prevents Capel from working for a client of Elite and that

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9 Ch. Ct. R. 56(c); *Motorola, Inc. v. Amkor Tech., Inc.*, 849 A.2d 931, 935 (Del. 2004).

10 *Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979) (citing *Judah v. Delaware Trust Co.*, 378 A.2d 624, 632 (Del. 1977)).

11 Ch. Ct. R. 56(e).

12 *Cooke v. Oolie*, 2000 WL 710199, at *11 (Del. Ch. May 24, 2000).

Artesian is not Elite's client. Capel also asserts that his duties at Artesian differ from those at Elite. Finally, Capel contends that the noncompetition agreement only applies to current employees. In my opinion, these questions involve fact driven issues that are disputed by the parties and cannot be resolved on a motion for summary judgment. In that regard, I note, for example, that Elite has adduced evidence and alleged several facts that call into question the integrity and credibility of Capel. Assuming those allegations are true and drawing all reasonable inferences from them in Elite's favor, as required on a motion for summary judgment, the Court cannot rely on anything that Capel personally has averred for purposes of the pending motion. Because I find that whether the noncompetition agreement, if valid and enforceable, would apply to Capel is not ripe for summary judgment, I will not address that issue further.

When seeking specific performance of a covenant not to compete, the plaintiff has the burden of establishing her case by clear and convincing evidence.[13] Where a restriction on the ability to be gainfully employed is involved, the customary sensitivity of a court of equity to the particular interests affected by its remedies is heightened.[14]

When assessing the enforceability of a noncompetition agreement the Court must first determine whether the plaintiff had a valid contract with the defendant and, if so, whether it was breached.[15] Next the court must determine whether the noncompetition

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13 *Id.* at *17.

14 *McCann Surveyors, Inc. v. Evans*, 611 A.2d 1, 3 (Del. Ch. 1987).

15 *All Pro Maids, Inc. v. Layton*, 2004 Del. Ch. LEXIS 116, at *8 (Del. Ch. Aug. 9, 2004).

agreement is reasonable in scope and duration, both geographically and temporally. Then the court must assess the legitimate economic interest of the party enforcing the covenant, and finally balance the equities.[16] If it appears that the interests the employer seeks to protect are slight or ephemeral while the consequences of specific enforcement to the employee are grave, equity may well leave the plaintiff to pursue his legal remedies and decline to grant the special remedy of injunction.[17]

Delaware courts have favored the public interest of competition in their review of noncompetition agreements.[18] Nevertheless, the courts will specifically enforce a former employee's agreement not to compete in the proper circumstances, when its purpose and reasonable operation is to protect the legitimate interests of the former employer and it is not otherwise void as against public policy or contrary to the equities presented.[19]

A noncompetition agreement will only be enforced to protect the legitimate economic interests of the employer. Interests which the law has recognized as legitimate include protection of employer goodwill and protection of employer confidential information from misuse.[20] Courts also consider whether the restrictions on competition

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16 Due to the unique circumstances of this case, I will address whether Elite has a legitimate economic interest to enforce the noncompetition agreement before discussing whether the agreement has a reasonable scope.

17 *McCann*, 611 A.2d at 9.

18 *Tristate Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886, at *15 (Del. Ch. Apr. 15, 2004).

19 *See Research & Trading Corp. v. Pfuhl*, 1992 WL 345465, at *12 (Del. Ch. Nov. 18, 1992).

20 *Id.*

would work an undue hardship on the employee.[21] Likewise, where a noncompetition agreement would harm the public interest the court may hold the agreement invalid.[22]

1. Is there a valid contract between Capel and Elite?

a. Can a noncompetition agreement contained in an employee manual be incorporated by reference in a summary "agreement" signed by the employee?

Capel asserts that the noncompetition agreement is not valid because Elite merely referred to it in a five line acknowledgement form that Capel signed when he began working for Elite (the "Acknowledgement"). In particular, Capel asserts that courts do not recognize agreements in employee manuals as contracts. Capel further asserts that Elite failed to meet its burden of proving a contract existed because it did not produce the specific employee manual referenced in the summary document Capel signed. Specifically, Elite produced the current version of its employee manual entitled "Elite Building Services Employee Manual" whereas Capel's Acknowledgement refers to the "Elite Cleaning Co., Inc. Employee Manual." Consequently, Capel argues that Elite cannot bind him to an agreement that it did not even produce in this litigation.[23]

Elite responds that employee handbooks are contracts and that there has been no change in the noncompetition provision of the employee handbook. Additionally, Elite

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21 *Delaware Exp. Shuttle, Inc. v. Older,* 2002 WL 31458243, at *13 (Del. Ch. Oct. 23, 2002).

22 *Hammermill Paper Co. v. Palese,* 1983 WL 19786, at *4 (Del. Ch. June 14, 1983).

23 Capel denies having a copy of any Elite Employee Manual. PAB App. B56.

asserts that it specifically informed Capel about the noncompetition agreement when it hired him.

"The law is well settled, [] that an employee handbook, which does not set forth terms, conditions, or duration of employment, does not constitute a contract between an employer and employee."[24] The mere existence of an employee handbook does not create an enforceable contract right, particularly where there is no written employment contract and there has been no promise of employment for a definite or fixed period of time.[25]

In this case the "Elite Building Services Employee Manual" (the "Employee Manual") sets forth guidelines for employees relating to: 1) conduct, 2) dress code, 3) wages, 4) attendance, 5) accident/emergency situations, 6) solicitation, 7) safety and security, and 8) disciplinary action.[26] The Employee Manual does not say *anything* about the duration of Capel's employment.

Further, Elite cited no document that addresses whether it employed Capel as an "at will" employee or for a fixed period of time. In employment law, there is a strong

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[24] *Bray v. L.D. Caulk Dentsply Int'l*, 748 A.2d 406, 2000 WL 313423, at *1 (TABLE) (Del. 2000).

[25] *Bray v. L.D. Caulk Dentsply Int'l*, 1999 WL 1225966, at *2 (Del. Super. Oct. 22, 1999) ("Here, all of Plaintiff's breach of contract claims arise from the employee handbook. There was no written contract, nor was Plaintiff promised employment for a definite or fixed period of time. Plaintiff was an 'at will' employee. After considering the facts in the light most favorable to [plaintiff], I find that [defendant] is entitled to summary judgment on [plaintiff's] claim for breach of contract.").

[26] Verified Compl. Ex. B.

presumption against permanent positions. In fact, this presumption is so strong that "it usually is not rebutted by an agreement which specifies that it is for 'permanent' or 'lifetime' employment."[27] Rather, a clear and definite intention to overcome the presumption of at will employment must be expressed in a contract.[28]

Because Elite presented no evidence that it employed Capel for a fixed period of time I will follow the strong presumption in favor of at will employment. Thus, the Employee Handbook itself does not constitute a valid contract.[29]

Whether Capel's signing of the five line Acknowledgement provides a basis for enforcing the noncompetition agreement in the Employee Manual presents a closer question. Elite required Capel to sign this summary document to obtain his job as a janitor, but offered him nothing beyond at will employment at $8 per hour and no benefits in exchange. There also is conflicting evidence on whether Capel actually received a copy of the employee manual at the time he signed the Acknowledgment.

Further, Elite has not produced the version of its employee handbook that it seeks to enforce. In this regard, Elite alleges that the later Employee Manual it did produce contains the same language as the prior version that Capel acknowledged. In support of that allegation, Elite relies on a statement to that effect in Ecton's Affidavit, citing two

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[27] *Carlson v. Hallinan*, 2006 WL 771722, at *10 (Del. Ch. Mar. 21, 2006) *quoting Greene v. Oliver Realty, Inc.*, 526 A.2d 1192, 1196 (Pa. Super. 1987) (internal quotations omitted).

[28] *Id.* (internal quotations omitted).

[29] *Bray*, 1999 WL 1225966, at *2.

letters from 1997 and 1999, respectively, from its counsel to third parties quoting virtually the same noncompetition language that appears in the first two sentences of Section 7 of the 2003 Employee Manual.[30] In the 2003 Employee Manual those two sentences read: "Solicitation and/or job procurement of any client held by Elite Building Services, for a period of 2 years from termination or release of employment is prohibited by any employee either active or inactive. Any second or third party involvement is prohibited."

Since Capel signed the Acknowledgment in 2000, I consider Elite's evidence sufficient to support an inference for purposes of evaluating a motion for summary judgment that the 2000 version of the employee manual included substantively the same language as that just quoted. There is an important difference, however, between the letters Elite relies upon and Section 7 of the 2003 Employee Manual. The latter document contains additional language that is not mentioned in either the 1997 or 1999 letter. The noncompetition provision in the 2003 Employee Manual also states:

> Being hired by the client for any type of job is prohibited for a period of 2 years from termination or release of employment. This violation will result in immediate termination and legal action.
>
> While employed by Elite Building Services, all personnel are prohibited from working for any other business in the janitorial field that would stimulate a conflict of interest.

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[30] The language from the earlier letters is substantively identical to the first two sentences in the Employee Manual, but reflects the company's previous name. Compare Compl. Ex. B with PAB App. B112-13.

Apart from a conclusory and imprecise assertion by Ecton, Elite presented no evidence that the 2000 employee manual included this additional language.[31] Indeed, the record supports an inference that the additional language was added in 2003. For example, the form of acknowledgment attached to the 2003 Employee Manual contains significant additional language that was not included in the Acknowledgment Capel signed in 2000.[32] Therefore, I find that Elite has failed to prove the existence of a noncompetition agreement that includes anything beyond the first two sentences of Section 7 of the 2003 Employee Manual.

The facts of this case support at least a colorable argument that the noncompetition agreement is not enforceable as a matter of contract law. The legal significance of the brief, standard form Acknowledgment is questionable based on its wholesale reliance on the employee manual, the absence of any promise to employ Capel for a definite time period, and the relatively unskilled nature of the job for which Capel was hired.[33] Because there appear to be genuine issues of material fact on at least some of those matters, however, I do not believe this question can be resolved on summary judgment.

b. Did Elite's failure to pay Capel overtime excuse his performance under the noncompetition agreement?

Capel contends that the noncompetition agreement is unenforceable because Elite breached any employment agreement that existed by not paying Capel for overtime or

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31 *Atamian v. Hawk*, 842 A.2d 654, 658 (Del. Super. 2003) ("The nonmovant cannot create a genuine issue for trial through bare assertions or conclusory allegations.").

32 Compare Compl. Ex. B with Compl. Ex. C.

33 *See Bray*, 1999 WL 1225966, at *2.

travel expenses. I have held *infra* that Capel is entitled to summary judgment on his FLSA claim, but only to the extent that Elite failed to pay Capel overtime. Therefore, I will limit my discussion to whether that failure excuses Capel's performance under the noncompetition agreement.

"If [a] plaintiff [is] guilty of any material breach of his employment contract, he may not enforce its provisions against the defendant."[34] In *Dickinson Medical Group, P.A. v. Foote*, for example, the court found that the medical group's failure to pay a physician a $4,150 bonus provided for in her employment agreement constituted a material breach and excused the physician from performance under her covenant not to compete.[35]

Similarly in this case Elite agreed to compensate Capel for his labor. By not fully compensating Capel for his work as required by the FLSA, Defendants argue that Elite breached the employment agreement it had with Capel. Defendants failed to cite any case, however, in which a court actually held that a violation of the FLSA constitutes a "breach" of an at will employment relationship equivalent to a breach of contract. Furthermore, Elite underpaid Capel by at least $232 in overtime or about 29 hours of work at $8 an hour. While $232 is not a great deal of money, it arguably might be material given Capel's rate of compensation. In relative terms, the amount is not much different from the unpaid bonus found to be material breach in *Dickinson*.

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34 *Schutzman v. Gill*, 154 A.2d 226, 230 (Del. Ch. 1959).

35 1989 WL 40965, at *7-8 (Del. Super. Mar. 23, 1989).

Based on the novelty of the breach issue as a matter of law and the fairly undeveloped factual record on the question of materiality, I find that Defendants have not shown that they are entitled to summary judgment that the FLSA violation renders the noncompetition agreement unenforceable. In my opinion, a more thorough development of the record would help clarify the law and its application to the facts of this case on that issue.[36]

2. Does the noncompetition agreement serve a legitimate economic interest of Elite?

Defendants contend that Elite does not have any legitimate economic interest that needs the protection of a noncompetition agreement. They assert that Elite's covenant would prevent legitimate, ordinary competition. Elite responds that it has a legitimate economic interest in preventing its employees from working directly for their clients thereby cutting Elite out of the business process. Courts often refer to this as a company's interest in protecting itself from disintermediation. Disintermediation is the actualization of the ever-present cry to eliminate the middleman, i.e., direct solicitation, negotiation and contracting between the customer and the worker.

Elite asserts that if it cannot prevent an employee like Capel from working directly with its clients it will go out of business because all of its clients could hire Elite's employees directly. Artesian responds that Elite's interest in preventing disintermediation is minor at best. Artesian also contends that even without the protection of a noncompetition agreement Elite would not be eliminated from its line of

[36] *See Cooke v. Oolie*, 2000 WL 71099, at *11.

business because employers use Elite due to the unique benefits their business offers. Particularly, Elite's clients receive the benefit of not having to hire and manage a cleaning staff.

"Eliminating the middleman is at first blush a facile and attractive alternative. However, middlemen exist because they provide a useful and highly-valued service."[37] Elite did not identify any other interest its noncompetition agreement served other than disintermediation. Thus, if Elite's covenant with its employees is to have a legitimate justification, that justification must be to protect Elite's role as a middleman in the market for cleaning services.

The Court is not aware of any Delaware case that specifically addresses whether disintermediation is a legitimate economic interest. Other jurisdictions have addressed that issue, however. For example, in *Consultants & Designers, Inc. v. Butler Service Group, Inc.*, the plaintiff located employees for clients who needed short-term, highly skilled technical workers that they could not obtain from their local areas.[38] The plaintiff, serving as a middleman, would locate such workers who also were relatively mobile in fields such as engineering, designing, drafting, and data processing. Due to their diminished job security and lack of other employee benefits, clients had to pay these temporary employees a substantial premium (approximately 30%) over employees they

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[37] *Consultants & Designers, Inc. v. Butler Serv. Group, Inc.*, 720 F.2d 1553, 1558 (11th Cir. 1983).

[38] 720 F.2d 1553, 1555.

hired directly.[39] Therefore, to prevent disintermediation the plaintiff required all of its employees to sign a noncompetition agreement that prevented them from working for one of the plaintiff's clients for at least 90 days following the completion of their assignments.[40] Based on those facts, the court in *Consultants & Designers, Inc.*, held that the plaintiff had a legitimate interest in protecting itself from disintermediation.[41]

Several other jurisdictions also have held that disintermediation is a legitimate economic interest.[42] When considered in the context of their facts, the holdings in those cases make sense. The facts of this case, however, are much different. Elite did not have to train its employees, like Capel, and those employees do not possess a high level of skill. They work for only slightly more than minimum wage and receive no benefits. In addition, there is no evidence that Elite discloses trade secrets or valuable proprietary information to such employees. Therefore, while I find that Elite has a legitimate interest

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39 *Id.*

40 *Id*. at 1556.

41 *Id.* at 1559.

42 *Aerotek, Inc. v. Burton*, 835 So.2d 197, 201 (Ala. Civ. App. 2001) (finding that the plaintiff had a legitimate interest in preventing disintermediation); *Volt Servs. Group v. Adecco Employment Servs., Inc.*, 35 P.3d 329, 334 (Or. Ct. App. 2001) ("In the absence of an enforceable restrictive covenant, plaintiff's employees simply could have agreed with Nike to eliminate the middleman, thereby diverting all of plaintiff's business—a process known as disintermediation."); *Borg-Warner Protective Servs. Corp. v. Guardsmark, Inc.*, 946 F. Supp. 495, 502 (E.D. Ky. 1996) ("the interest of the much maligned but time-honored middleman is a legitimate one that deserves protection against disintermediation.") (internal quotations omitted).

in preventing disintermediation, I consider that interest very weak in the case of janitors, like Capel.

3. Is the noncompetition agreement reasonable in scope?

Elite argues that because courts have recognized two years as a reasonable length of time for a noncompetition agreement the length of the agreement in this case is reasonable. Further they assert that the agreement is reasonable in geographic scope because it only prevents Capel from working for Elite's clients. Defendants respond that the noncompetition agreement is unreasonable in scope.

Under Delaware law, the courts will not enforce a noncompetition agreement "that is more restrictive than an employer's legitimate interests justify or that is oppressive to an employee."[43] Noncompetition agreements covering limited areas for two or fewer years generally have been found reasonable.[44] In *RHIS, Inc. v. Boyce*, however, Vice Chancellor Lamb found a two year restriction unreasonable.[45]

The *RHIS* case involved a noncompetition agreement with a home inspector who had no prior home inspecting experience before his employment with plaintiff. At trial plaintiff identified two primary reasons it needed the protection of a noncompetition agreement:

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43 *RHIS, Inc. v. Boyce*, 2001 WL 1192203, at *6-7 (Del. Ch. Sept. 26, 2001) (internal citations omitted).

44 *Am. Homepatient, Inc. v. Collier*, 2006 WL 1134170, at *2 n.5 (Del. Ch. Apr. 19, 2006).

45 2001 WL 1192203, at *6-7.

> (1) that it paid for Boyce to acquire his [American Society of Home Inspectors] certification and, thus, had some right to prevent Boyce from using that certification to compete against it, and (2) that, as a part of his employment at RHIS, Boyce developed relationships with RHIS's business referral sources that he should not be able to exploit to the detriment of RHIS.[46]

The Court held that plaintiff did not have a protectible interest in Boyce's home inspection license and that "a two year restriction on a former employee soliciting business from his former employer's referral network is unreasonably long."[47] Therefore, the court reformed the agreement and entered an injunction prohibiting Boyce from soliciting business from any person known by him to have been a referral source of RHIS for one year.[48]

Similarly, I find that Elite has not demonstrated a need for a two year noncompetition agreement to protect itself from disintermediation. Courts that have analyzed covenants designed to protect an employer from disintermediation have found restrictions for less than one year reasonable.[49] None of these cases, however, involved

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46 *Id.* at *5

47 *Id.* at *7.

48 *Id.*

49 *Volt Servs.*, 35 P.3d at 198 (finding a temporary employment agency's 90-day restrictive covenant reasonable to protect against disintermediation); *Aerotek, Inc.*, 835 So.2d at 202 (finding a 180 day restrictive covenant that was limited to a single employer reasonable to prevent disintermediation with respect to an employment agency that placed highly skilled temporary workers); *Consultants & Designers, Inc.*, 720 F.2d at 1557-58 (finding a 90 day restrictive covenant reasonable to prevent disintermediation with respect to an employment agency that placed highly skilled, relatively mobile, technically trained workers in specific fields).

an unskilled worker, like Capel, who received no specialized training. Thus, as in *RHIS*, I find the temporal scope of Capel's two year noncompetition agreement unreasonable. Although the Court arguably could reform Capel's noncompetition agreement to specify a significantly shorter period, I do not consider that appropriate here because I find the agreement as a whole unenforceable.

4. Balancing the equities

Capel contends that the balance of the equities favors him because Elite's economic interest is weak at best and enforcement of the noncompetition agreement would undermine his ability to support his family. Elite responds that Capel is a low level worker who easily could obtain employment elsewhere with similar compensation. Moreover, they assert that if the noncompetition agreement is not enforced Elite's clients could eliminate them from the work cycle or its employees might try to take away the work they do through Elite.[50]

Elite's business interest in disintermediation is minor given the fact that Capel does not have any knowledge of Elite trade secrets or customer lists, has no special skills or training, is not highly compensated, and has not been shown to have been trying to take business away from Elite or to have caused that effect.[51] Although the Court is not

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50 Ecton Aff. ¶¶ 6-7; PAB App. B109.

51 DOB App. A68. There is no evidence that Artesian's purpose in posting the job opening for which Capel applied and was hired was to displace Capital or its subcontractor Elite as their cleaning service. To the extent Elite contends that Capel's obtaining a "facilities maintenance" job at Artesian violates the noncompetition agreement regardless of Artesian's intent, I note that the two sentence agreement that applied in 2000 is not clear on that point. The agreement

aware of any Delaware case that specifically addresses the enforceability of a noncompetition agreement against a comparably unskilled employee, other jurisdictions have dealt with this issue.

A New Hampshire court refused to enforce a noncompetition agreement for light industrial laborers who were not in a position to appropriate the company's goodwill and were without access to sensitive information, because it was "contrary to public policy and would impose an undue hardship, particularly for at-will employees who could be discharged at any time."[52]

Similarly, a Rhode Island court ruled that "singling out employees at relatively low levels of employment, such as that of the defendant, rather than those at the middle and upper levels, for post-employment noncompetition agreements suggests that the purpose of those agreements is not so much to protect an employer's trade secrets and

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prohibits "[s]olicitation and/or job procurement of any client held by Elite." As noted above, it is debatable whether Artesian, which contracted with Capital, was a client of Elite. In addition, the terms "solicitation and/or job procurement of" could be read to require taking work away from Elite. Perhaps recognizing this limitation, Elite expanded its 2003 noncompetition provision by adding the following sentence: "Being hired by the client for any type of job is prohibited for a period of 2 years from termination or release of employment." Compl. Ex. B.

[52] *Nat'l Employment Serv. Corp. v. Olsten Staffing Serv. Inc.*, 761 A.2d 401, 405 (N.H. 2000) (finding a 90 day noncompetition agreement for temporary employees unreasonable and unenforceable). *See also Accent Stripe Inc. v. Taylor*, 204 A.D.2d 1054, 1055 (N.Y. App. Div. 1994) (Refusing to grant a preliminary injunction to enforce a noncompetition agreement because plaintiff was not likely to succeed on the merits since "[d]efendant's position as an epoxy rig operator is not highly compensated and requires no unique skills or specialized training . . . [and] defendant was not shown to have knowledge of trade secrets or to have threatened disclosure of such secrets to his new employer to plaintiff's disadvantage.").

confidential business information but rather to exercise economic control over certain classes of employees."[53] Thus, after balancing the harms the court concluded "that far greater harm [would] befall this defendant, if preliminary relief is granted, than any harm the plaintiff has demonstrated will befall it, if he is allowed to continue his employment with its competitor." [54]

Likewise, Capel was an at will employee of Elite who did not have access to any sensitive information, received no training, and received compensation (without benefits) only slightly above minimum wage. Under these circumstances the balance of the equities weighs against enforcement of the noncompetition agreement. Enforcing the agreement would work serious hardship on Capel and discourage him from seeking better employment and greater security for his family elsewhere. Elite, on the other hand, has a minor interest in protecting itself from disintermediation, and reasonably could have protected that interest with far less onerous restrictions, such as imposing a modest requirement of liquidated damages to discourage clients from hiring away its employees. On balance, based on a careful review of the facts of this case, I find that Capel is entitled to summary judgment that the noncompetition agreement is unenforceable.

C. The Tortious Interference Claim

Artesian asserts that Elite does not have a valid tortious interference claim because it did not have a business opportunity with Artesian since Elite's contract with Capital

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53 *Narragansett Coated Paper Corp. v. Lapierre*, 1998 WL 388400, at *2-3 (R.I. Super. June 30, 1998).

54 *Id*.

prohibited Elite from working directly with Artesian. Consequently, Artesian argues that Elite had no reasonable expectation of obtaining business from it. Moreover, Artesian points out that even Elite's President, Ecton, admitted that Artesian did not have an obligation to continue doing business with Capital and could discontinue using them (and thus indirectly Elite) at any time. Elite disagrees, claiming that Artesian was its client and that Artesian knowingly aided Capel in violating the noncompetition agreement.

The elements of a claim of tortious interference with contract are: (i) the existence of a valid contract; (ii) the interferer's knowledge of the contract; (iii) intentional interference that induces or causes a breach of the contract; and (iv) damages.[55] The Court applies these elements to a particular case in light of a defendant's privilege to compete or protect her business interests in a fair and lawful manner.[56] Additionally, a party to a contract may not bring a tortious interference claim against a co-party to the same contract.[57]

Elite's tortious interference claim fails for several reasons. First, Elite cannot state a claim against Artesian for tortious interference with Capel's noncompetition agreement because I have found that agreement unenforceable.[58] Second, Elite did not show that it had a reasonable expectation of obtaining business from Artesian. Although Elite dealt

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55 *Am. Homepatient, Inc. v. Colier*, 2006 WL 1134170, at *4 (Del. Ch. Apr. 19, 2006).

56 *Malpiede v. Townson*, 780 A.2d 1075, 1099 (Del. 2001).

57 *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1058 (Del. Ch. Nov. 27, 1984).

58 *Am. Homepatient, Inc.*, 2006 WL 1134170, at *4 (absent a breach there cannot be tortious interference with a contract).

with Artesian on a regular basis, it did so only indirectly in its capacity as a subcontractor to an Artesian vendor, Capital. In fact, Artesian's agreement with Capital prohibited them from directly hiring Elite.[59] Consequently, Elite never had a reasonable expectation of working directly with Artesian and it presented no evidence that Capel's acceptance of employment with Artesian was likely to have caused Artesian to terminate its contract with Capital.

Moreover, Capital not Artesian decided which subcontractor would clean Artesian's facilities.[60] Furthermore, Ecton acknowledged that Artesian had the right to discontinue business with Capital (and thus indirectly Elite) at any time.[61] The only reasonable inference from the evidence presented in connection with Defendants' motion for summary judgment is that Artesian decided to fire Capital because Elite sued it. That was Artesian's prerogative. Therefore, I conclude that Artesian is entitled to summary judgment on Elite's claim for tortious interference.

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59 DOB App. A49-50.

60 DOB App. A48-51.

61 DOB App. A77. *See Gilbert v. El Paso Co.*, 1988 Del. Ch. LEXIS 150, at *40 (Del. Ch. 1988) ("To constitute tortious interference, the act that is claimed to have interfered with the contract relationship or business opportunity must itself have been wrongful.").

D. Capel's Fair Labor Standards Act ("FLSA") Claim[62]

Capel makes two claims under the FLSA. First, he claims Elite did not compensate him for overtime. Second, he asserts that Elite did not compensate him for travel time between job sites.

At the argument on Defendants' summary judgment motion I noted several inconsistencies between Elite's payroll records and the sheet Defendants attached to their opening brief purporting to summarize the amount of Capel's alleged unpaid wages and travel time.[63] Consequently, following argument, Capel sent a letter to the Court reducing the number of pay periods for which he seeks damages. Specifically, the letter asserts that Capel seeks $233.60 in unpaid overtime compensation for the pay periods between (1) July 29 and August 11, 2002, and (2) August 12 and August 25, 2002, as well as unpaid travel time in the amount of $155.76.[64] Thus, Capel now seeks a revised amount of $389.36 in unpaid wages, $389.36 in liquidated damages, and attorneys' fees.

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62 The FLSA is contained in 29 U.S.C. §§ 201-219 (2006).

63 I also observed that the time sheets Elite provided to Capel are difficult to read and to follow due to heavy redacting and the poor quality of the copies. Furthermore, I could not resolve at least one inconsistency in Elite's payroll records, and believe that problems with its recordkeeping contributed to the apparent inconsistencies in some of Capel's numbers. "It is well-settled that when an employer fails to keep adequate records of its employees' compensable work periods, as required under the FLSA, employees seeking recovery for overdue wages will not be penalized due to their employer's record-keeping default." *Reich v. Southern New Eng. Telecomm. Corp.*, 121 F.3d 58, 69 (2d Cir. 1997).

64 Capel did not reduce the amount of his request for compensation for lost travel time.

Elite alleges that it paid Capel $509.48 in overtime compensation shortly after he filed his counterclaim and made every effect to resolve the issue after Capel brought it to their attention. Apart from its time records, the only evidence Elite presented on the FLSA case is the following conclusory statement in Ecton's Affidavit: "I have thoroughly reviewed the counterclaim documentation presented by Walter Capel's counsel and I am quite certain that Mr. Capel owes Elite in excess of $300.00 as an overpayment of the claimed amount due. Elite owes no money whatsoever to Capel for any overtime claim."[65] "Accord and satisfaction[, however,] is not a valid defense in a private action brought under the FLSA."[66] Thus, I find this argument unpersuasive.[67]

The question before me is whether the evidence supports a grant of summary judgment to Capel on his FLSA claim. To prevail on such a motion, the employee need only present evidence sufficient to support a just and reasonable inference that he has performed work for which he was entitled to additional compensation, but did not receive it.[68] Upon such a showing, the burden shifts to Elite to present evidence sufficient to

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65 PAB App. B111.

66 *Morrison v. Exec. Aircraft Refinishing, Inc.*, 2005 US Dist. LEXIS 10190, at *11 (S.D. Fla. Apr. 8, 2005).

67 Nevertheless, the Court will reduce any damages award to Capel under the FLSA by up to $509.48 to account for any payment he received from Elite after the commencement of this action.

68 *Gatto v. Mortgage Specialists of Ill., Inc.*, 2006 WL 681063, at *3 (N.D. Ill. Mar. 13, 2006) *citing Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 686-88 (1946), *superceded by the Portal to Portal Act of 1947*, § 4(a)(1), 29 U.S.C.A. § 254(a)(1), *on other grounds.*

demonstrate the existence of a genuine issue of material fact pertaining to Capel's FLSA counterclaim.[69]

1. Overtime

Elite admittedly is a covered employer under the FLSA.[70] Elite also admits that for the period of his employment Capel was a nonexempt, hourly employee. Further, Elite concedes that they failed to pay Capel "some" overtime.[71]

The applicable provision of the FLSA, 29 U.S.C. § 207(a)(1), provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

The summary of Capel's hours for the pay period beginning on August 12 and ending on September 1, 2002 shows that he worked a total of 138.97 hours during that three week period. Therefore, at a minimum, Elite should have paid Capel 120 hours at regular pay and 18.97 hours at a rate of at least one and one-half times the regular pay rate. Thus, Elite underpaid Capel by $75.88 during that time period.[72]

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69 *Tunnell v. Stokley*, 2006 WL 452780, at *2 (Del. Ch. Feb. 15, 2006).

70 *See* Counterclaim & Answer to Counterclaim ¶ 6.

71 Letter from Jeffrey Martin, Esq. to the Court dated March 16, 2006 at 3.

72 *See* DOB App. A162. This conclusion is based on Elite's summary payroll records. Elite's more detailed records for shorter periods within the same time interval covered by the summary are extremely difficult to read and seemingly inconsistent. DOB App. A161-175. Accordingly, the Court has relied on the

Similarly, Capel worked 119.03 hours for the pay period beginning on July 29, and ending on August 11, 2002.[73] Consequently, Elite should have paid Capel 80 hours at regular pay and 39.03 hours at the overtime rate. Thus, Elite underpaid Capel by $156.12 during this time period. In total, Elite underpaid Capel by $232 for overtime he worked.

2. Travel time

Capel asserts that because Elite's payroll records do not show any compensation for his travel time between jobsites he has met his burden of proving that Elite violated the FLSA by failing to compensate him for travel time. Elite retorts that Capel should not receive compensation for travel time because they allege he did not go from job to job, but instead went home when traveling between job sites. In support of this allegation Elite avers that Capel lives five minutes from Artesian and that it takes approximately 17 minutes to travel between job sites. Yet, Capel requests compensation for travel times ranging from 32 to 110 minutes.

The regulations pertaining to the FLSA provide:

> Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. . . . If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the

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summary documents, which should be at least as favorable to Elite as the more detailed records.

[73] *See* DOB App. A171.

> employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.[74]

In my opinion, Elite has presented sufficient evidence to support a reasonable inference that Capel did not travel directly from job site to job site, considering the close proximity of his home and the questionable length of the travel time. Although such an inference may prove to be incorrect at trial, it precludes a grant of summary judgment in favor of Capel on his FLSA claim for failure to pay travel expenses.

3. Liquidated damages and attorneys' fees

Elite contends that they do not have to pay Capel attorneys' fees or liquidated damages because they corrected the underpayment in his wages as soon as Capel brought it to Elite's attention. Capel counters that any time an employer violates the FLSA by failing to pay overtime or travel expenses the court must award the employee liquidated damages and attorneys' fees.

In 29 U.S.C. § 216, the FLSA provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.
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> * * * *
>
> The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

[74] 29 C.F.R. § 785.38.

Under Section 216, liquidated damages are compensatory, not punitive in nature.[75] These damages are intended to compensate employees for losses they might suffer by reason of not receiving their lawful wage at the time it was due.[76] An award of liquidated damages is mandatory and the court has no discretion to deny such an award unless the employer shows that it "acted in good faith and that [it] had reasonable grounds" for believing it was not in violation of the FLSA. The employer has the burden of demonstrating both elements.[77]

Further, the statute mandates an award of attorneys' fees to reflect the congressional intent that wronged employees be able to seek recovery of unpaid wages without incurring burdensome expenses for legal fees and costs.[78]

Elite's sole argument against this Court awarding liquidated damages, costs, and attorneys' fees under the FLSA is that they did not know they failed to pay Capel overtime and paid the overtime as soon as he brought it to their attention. Elite did not pay Capel for unpaid overtime until January 28, 2005, over 9 months after his last day at Elite and 28 months after Capel performed the work.[79] An employer, however, cannot use ignorance to support a claim that it acted in good faith and had reasonable grounds

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75 *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982).

76 *Id.*

77 *Brock v. Claridge Hotel & Casino*, 846 F.2d 180, 187 (3d Cir. 1988).

78 *Roofers Local 307 v. G & M Roofing*, 732 F.2d 495, 502 (6th Cir. 1984).

79 Letter from Jeffrey Martin, Esq. to the Court dated March 16, 2006 at 2. Capel's last day at Elite was April 19, 2004.

for believing it was not in violation of the FLSA.[80] Thus, Elite's ignorance of its failure to pay Capel provides no defense to his claim for liquidated damages, costs, and attorney's fees under the FLSA.

III. CONCLUSION

For the reasons stated Defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART. In particular, all of the claims in Elite's Verified Complaint are dismissed with prejudice and judgment is entered in favor of Capel and against Elite on Capel's Counterclaim under the FLSA for unpaid overtime in the amount of $232 in actual damages and $232 in liquidated damages, plus a reasonable attorney's fee and costs. In all other respects, Capel's motion for summary judgment is denied.

Trial on any remaining issues will proceed as scheduled on June 22, 2006. Furthermore, Capel is directed to submit its detailed petition for attorney's fees and costs on the FLSA claim for unpaid overtime within 20 days of the date of this memorandum opinion. Elite shall file any opposition to that submission within 20 days thereafter.

IT IS SO ORDERED.

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[80] *Rogers v. Savings First Mortgage, LLC*, 362 F. Supp. 2d 624, 638 (D. Md. 2005).