2014 IL App (1st) 130979-U

FIFTH DIVISION
June 20, 2014

No. 1-13-0979

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHRISTINA MONSON, individually and on behalf of a certified class of persons similarly situated, Plaintiffs-Appellants, v. MARIE'S BEST PIZZA, INC., PETER SKIOURIS, and ATHENA SKIOURIS, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County, 08 CH 11616 Honorable Neil H. Cohen, Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendants provided sufficient documentation to show that they were not profiting from the meal credit program provided to their employees, the circuit court properly granted summary judgment in favor of defendants.

¶ 2 Plaintiffs appeal from a February 21, 2013, order of the circuit court granting defendants' motion for summary judgment and denying plaintiffs' motion for partial summary judgment. On appeal, plaintiffs contend that the circuit court's order of February 21, 2013, should be reversed

because it incorrectly found that summary judgment in favor of defendants was proper. We affirm.

¶ 3 Marie's Best Pizza, Inc. (Marie's Best) is an Illinois corporation that operates a Giordano's Pizza franchise in Oak Park, Illinois. During the time period relevant to the claims in the lawsuit, November 23, 2003, through March 28, 2009 (class period), Marie's Best provided employees with an opportunity to eat meals prepared by the restaurant as part of their compensation and deducted $0.25 per hour from employees' wages for the program (meal credit program).

¶ 4 On March 27, 2008, plaintiff Christina Monson, filed a class action complaint against Marie's Best, Peter Skiouris, and Athena Skiouris (defendants), and Athena's Best Pizza, Inc., Jason's Pizza, Inc., and Downers CMJ, Inc., who are not parties to this appeal. In it, plaintiff alleged that Peter and Athena Skiouris, "through their control, through share ownership or otherwise, and/or operation of Marie's Best *** had responsibility for formulating and implementing the payroll policies complained of herein." Plaintiff further alleged that defendants had a policy and practice of deducting $0.25 per hour from plaintiff's wages as part of a meal credit program and that the cost to defendants to provide the meal credit program was substantially less than the amount defendants collected from their employees for the program. Plaintiff claimed that, therefore, the policy and practice violated both the Illinois Wage Payment and Collection Act (Collection Act) (820 ILCS 115/1 *et seq*. (West 2008)) and the Illinois Minimum Wage Law (Minimum Wage Law) (820 ILCS 105/1 *et seq*. (West 2008)).

¶ 5 On July 10, 2008, plaintiff filed a motion for class certification.

¶ 6 On September 24, 2009, defendants filed their response to the motion for class certification, which included 24 surveys filled out by employees of Marie's Best stating that they

voluntarily agreed to be a part of the food deduction program, that they used the program, and that they did not ask to be removed from the meal program. Defendants also included several pages of kitchen tickets filled out by employees making use of the food deduction program.

¶ 7 Finally, defendants attached an affidavit from Peter Skiouris, who averred that under the food deduction program, Marie's Best deducted $0.25 per hour from its employees' wages on a bi-weekly basis. Skiouris said that Marie's Best informed all potential employees about the program during interviews, and confirmed that each interviewee agreed to participate in the program. Employees were not required to eat the meals available to them under the food deduction program. Skiouris also explained how he calculated the approximate cost of each employee meal to Marie's Best: he calculated the cost of ingredients based on attached invoices showing the bulk cost of ingredients, and then dividing the bulk cost by the number of meal servings the restaurant is able to produce from the bulk order.

¶ 8 On December 18, 2009, the circuit court granted plaintiff's motion for class certification and certified two sub-classes in the matter. In its written order, the circuit court stated that the "threshold issue of any claim against Defendants under the [Minimum Wage Law] is whether the deduction of $0.25 per hour from every employee's paycheck constituted the reasonable cost of furnishing meals to the employees and did not include any profits for Defendants." The court also observed that Illinois law did not dictate how reasonable cost is to be determined and explained:

> "Under federal law, it is clear that an employer's reasonable costs of providing meals to its employees may be determined by the average reasonable cost of providing employee meals without regard to whether any individual employee actually takes

> advantage of the employer provided meals. As such, whether Defendants' deduction of $0.25 per hour from their employees' paychecks represented the reasonable cost of providing meals to the employees may be determined other than on an individual employee basis and is a common question of fact, not an individual one. There is no need to determine the cost of each different variety of meal provided or to determine how many meals each employee ate during each pay period."

The certified classes were specifically defined as:

> "All persons who worked for Defendants as hourly employees at any time between March 27, 2005 and the present who were paid no more than $0.24 per hour more than the prevailing minimum wage or pursuant to the Tip Credit Provision of the Minimum Wage Law and had a $0.25 per hour food deduction taken from their wages (the 'Tipped Employees Sub-Class'),"

and:

> "All persons who worked for Defendants as hourly employees at any time between March 27, 2005 and the present who earned at least $0.25 per hour above the prevailing minimum wage and had a $0.25 per hour food deduction taken from their wages (the 'Hourly Wage Sub-Class')."

¶ 9 On April 1, 2011, plaintiff requested leave to file an amended complaint in order to extend the class period. Originally, the class period extended back to March 27, 2005.

However, two and a half years after the initial complaint was filed, plaintiff's counsel realized they had miscalculated the statute of limitations period for plaintiff's claim under the Collection Act.

¶ 10 On June 10, 2011, the circuit court granted plaintiff leave to file a new complaint extending the class period for plaintiff's claim under the Collection Act back to November 28, 2003. Plaintiff filed her corrected amended complaint on June 22, 2011, and defendants filed their answer to the amended complaint on July 6, 2011.

¶ 11 After extensive discovery, on December 10, 2012, both parties filed motions for summary judgment. Plaintiff filed a motion for partial summary judgment on the issue of liability, arguing that the evidence showed defendants earned a profit on the meal credit program in violation of both the Minimum Wage Law and the Collection Act. Essentially, plaintiff argued that defendants' hourly deduction violated the Minimum Wage Law because the deduction resulted in tipped employees being paid less than an amount equal to the Illinois minimum wage, minus the amount of tip credit allowed under the Minimum Wage Law. She also argued that the deduction violated the Collection Act because defendants were failing to pay plaintiff the full amount due for all hours worked as a result of the deduction. In support of her motion, plaintiff attached in pertinent part defendants' payroll records showing the deductions taken for the meal credit program, a transcript of plaintiff's discovery deposition, and a spreadsheet which showed the cost of food to defendants.

¶ 12 In her discovery deposition, plaintiff said that she did not eat a meal under the meal credit program every shift she worked, and she knew of several other employees who also did not eat a meal during every shift worked. Plaintiff said she recalled the hiring managers mentioned the food deduction program during her interview, so she was aware of it when she was hired.

Plaintiff also said she asked "at least on three separate occasions in [her] first year of employment" for the managers to be removed from the food deduction program but was told it was not an option by Juan Rico. Although she discussed the food deduction program with other employees who she said were not happy about the program, she had no evidence that the employees did not agree or consent to the program. Plaintiff had no idea how much food her coworkers ate everyday but remembered that "they might not want to eat that food that day."

¶ 13 On December 11, 2012, defendant filed a request for leave to file an amended motion for summary judgment, which was granted on December 27, 2012. In their motion, defendants presented a chart showing the cost of each meal plus a fountain beverage based on invoices showing the cost of ingredients. According to the chart, the cheapest meal plus fountain beverage from the employee menu, averaged over the entire class period, cost defendants $1.87 to provide. The average cost to defendants in providing a meal and fountain beverage during the entire class period was $2.64.

¶ 14 In support of the amended motion for summary judgment, defendants attached, in pertinent part, transcripts from the discovery deposition of Peter Skiouris, Juan Rico, and Christina Monson, the affidavit of Peter Skiouris, the employee menu, the regular menu, payroll records showing the meal program deductions, a sample of invoices for ingredients purchased by the restaurant, the transcript from the discovery deposition of Gaurangkumar Patel, a CPA retained by defendants, and his expert report in which he was asked to "review the time cards of employees at Marie's Best Pizza, Inc., for the years 2004 to 2009", and several charts showing: what ingredients were included in each meal, the cost of ingredients each month from January 2004 through March 2009, the cost to make each meal monthly from January 2004 through March 2009, and the cost of beverages from January 2004 through March 2009.

¶ 15 In his affidavit, Peter Skiouris averred that from 1984 through March 28, 2009, Marie's Best had used the meal credit program. In exchange, an employee was entitled to a free meal chosen from a list of fourteen meals on a special employee menu and at least one drink from the soda fountain during each shift. Skiouris also explained how the cost of ingredients used in each meal was calculated based on the provided ingredient invoices and the amount of each ingredient used per meal.

¶ 16 In his deposition, Peter said that the employees are told of the program when they are hired and voluntarily participate in the program. He was unaware of an employee ever declining to participate in the program. He also explained that when an employee wanted to order food during a shift, he or she would fill out and sign a kitchen ticket, have the ticket "confirmed" by a manager, then pass the ticket to the kitchen. Employees were also permitted to have soft drinks "all the time," not just during meals.

¶ 17 In his May 10, 2012, discovery deposition, Juan Rico, a store manager, attested that under the food deduction program employees were entitled to one meal per eight-hour shift. To receive a meal, employees were supposed to fill out a kitchen ticket, have it signed by the manager, and then submit the ticket to the cook.

¶ 18 Gaurangkumar Patel’s report included explanations of calculations including: the average hours worked by all employees during a shift each month and year of the class period; the average hours per meal shift (an 8-hour period that an employee works during a day) worked by the employees for each month, year, and total during the class period; the average hours per shift plaintiff Monson worked during each month, year, and total of the class period, the average hours per meal shift worked by plaintiff Monson during each month, year, and total of the class

period. Based on Patel's calculations, the average number of hours per shift over the class period was 6.68 hours.

¶ 19 On February 21, 2013, the circuit court granted defendants' motion for summary judgment and denied plaintiff's motion for partial summary judgment. In a written order, the court stated:

> "The average shift worked by employees during the class period was 6.68 hours. As $0.25 was deducted for each hour an employee worked, the average amount deducted from each employee per shift was $1.67. Defendants made no profit and, therefore, did not deduct more than the reasonable cost of employee meals. There was no violation under either the IMWL or the IWPCA and Defendants are entitled to summary judgment.
>
> Plaintiff suggests that Defendants were required to calculate the actual cost per employee meal prior to instituting the food deduction program and that Defendants failure to do so entitled Plaintiff to summary judgment. Plaintiff fails to cite to any authority, however, that would find an employer liable where the employer is able to establish that it did not deduct more than the reasonable cost of providing employee meals."

¶ 20 On appeal, plaintiff contends that the circuit court erred in granting defendants' motion for summary judgment and denying her motion for summary judgment, arguing that defendants failed to satisfy their burden of proof showing they did not profit from the meal credit program. Specifically, plaintiff claims that in order to show their meal credit program did not violate the

Wage Law or the Payment Collection Act, defendants were required to retain adequate records demonstrating its actual cost incurred in providing employees with meals. Plaintiff concludes "the record demonstrates that Defendants failed to meet this burden because they have not produced sufficient records showing their actual cost to operate the Meal Credit program at any time during the class period." (Emphasis in original.)

¶ 21 Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001). In considering a motion for summary judgment, all the " 'pleadings, depositions, admissions, exhibits, and affidavits on file in the case' " must be construed in favor of the non-moving party. *Richardson v. Bond Drug Co.*, 387 Ill. App. 3d 881, 884 (2009) (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)). If the plaintiff cannot establish each element of his cause of action, summary judgment for the defendant is proper. *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1085 (2009). We review the circuit court's decision to grant summary judgment *de novo*. *Morris*, 197 Ill. 2d at 35.

¶ 22 The current appeal turns on the question of whether defendants' meal credit program violated the Minimum Wage Law or Collection Act. Although both parties agree that a meal credit program is not a *per se* violation of these statutes, the parties disagree on the correct approach to answering the question. Plaintiff argues that the trial court "incorrectly held that Defendants could use estimated costs and figures, rather than actual data, to determine the actual cost Defendants incurred in operating the meal credit program". Defendants, in turn, argue that the trial court correctly determined the reasonable cost of providing meals through the meal credit program using the calculated cost of each meal and comparing that with the average

amount deducted from an employee's paycheck per shift. To determine the correct method, we must interpret the statutes.

¶ 23 "The cardinal rule of statutory interpretation is to ascertain and give effect to the intent of the legislature." *Kraustack v. Anderson*, 223 Ill. 2d 541, 552 (2006). " 'To ascertain the legislative intent, the court must look first to the language of the statute, examining the language of the statute as a whole, and considering each part or section in connection with every other part or section.' " *Mermelstein v. Rothner*, 349 Ill. App. 3d 800, 803 (2004) (quoting *Antunes v. Sookhakitch*, 146 Ill. 2d 477, 484 (1992)).

¶ 24 The Minimum Wage Law requires that an employer pays an employee no less than a wage set by the statute. 820 ILCS 105/4(a)(1) (West 2008). Under the Wage Law, "wages" are defined as:

> "[C]ompensation due to an employee by reason of his employment, including allowances determined by the Director in accordance with the provisions of this Act for gratuities and, when furnished by the employer, for meals and lodging actually used by the employee." 820 ILCS 105/3(b) (West 2008).

The Minimum Wage Law further provides that any employee who is paid by his employer less than the wage to which the Minimum Wage Law entitles him may recover in a civil action the amount of any underpayment, reasonable attorney's fees, and damages. 820 ILCS 105/12(a) (West 2008).

¶ 25 The Collection Act defines "wages" as "any compensation owed an employee by an employer pursuant to an employment contract or agreement between the 2 parties." 820 ILCS 115/2 (West 2008). Section 9 of the Collection Act prohibits employers from taking deductions

from employee wages, unless the deduction is "to the benefit of the employee" or "made with the express written consent of the employee, given freely at the time the deduction is made." 820 ILCS 115/9 (West 2008).

¶ 26 We first note that plaintiff bases her argument on a misreading of the statutes. Throughout her appellate brief and her reply brief, plaintiff repeatedly argues that the court should not have granted summary judgment in favor of defendants because defendants failed to demonstrate the "actual cost" of running the meal credit program: "as Plaintiffs have repeatedly stated, Illinois law requires the trial court to determine the actual cost Defendants incurred to operate the Meal Credit program." However, plaintiff fails to support these claims of what Illinois law requires with any case law. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities and pages of the record relied on.") In addition, contrary to plaintiff's repeated assertions, neither the Minimum Wage Law nor the Collection Act requires that an employer show the actual cost of a meal credit program.

¶ 27 Nowhere in the plain language of the Minimum Wage Law or the Collection Act is the phrase "actual cost." The regulations interpreting the Minimum Wage Law provide that an employer may charge an employee the "reasonable cost to the employer of furnishing meals" to the employee and may not profit from the charge. 56 Ill. Admin. Code § 210.200(b). The same regulations also provide that the "*reasonable cost* of meals and lodging furnished by the employer and *actually used* by the employee may be considered as part of the wage paid an employee only where customarily furnished to the employee." [Emphasis added.] *Id.* Administrative regulations are entitled to "enhanced acknowledgement and respect from our courts," but they are not binding. *People ex rel. Dept. of Labor v. MCC Home Health Care, Inc.*,

339 Ill. App. 3d 10, 21 (2003) (citing *Lauer v. American Family Life Insurance Co.*, 199 Ill. 2d 384, 388 (2002)).

¶ 28 The plain language of the statute allows for an employer to have a meal credit program. The regulations provide that an employer may charge an employee the reasonable cost for meals actually consumed. However, neither the statute nor the regulations define "reasonable cost" and there is no Illinois case law on point.

¶ 29 Where, as here, there is an absence of Illinois cases on an issue, the reviewing court may take guidance from federal cases that interpret a substantially similar law. *Lewis v. Giordano's Enterprises, Inc.*, 397 Ill. App. 3d 581, 587 (2009); see also *Bernardi v. Village of North Pekin*, 135 Ill. App. 3d 589, 591 (1985) ("in the absence of Illinois decisions dealing with a particular labor law issue, Federal decisions dealing with a substantially similar law, while not controlling, may be helpful and relevant"). Moreover, according to the Illinois Administrative Code, when interpreting the Minimum Wage Law, one may refer to the regulations interpreting the Fair Labor Standards Act of 1938, as amended (FLSA) (29 U.S.C. 201 *et seq*.). See 56 Ill. Admin. Code § 210.120 ("For guidance in the interpretation of the Act and this Part, the Director may refer to the Regulations and Interpretations of the Administrator, Wage and Hour Division, U.S. Department of Labor, administering the [FLSA]"). Therefore, we turn to federal decisions dealing with the FLSA for guidance.

¶ 30 Section 203(m) of the FLSA defines wages as "the reasonable cost *** of furnishing such employee with board, lodging, or other facilities, if such *** are customarily furnished by such employer to his employees." 29 U.S.C. § 203(m). In addition, the FLSA provides that the "fair value" of the board, lodging, or other facilities is "based on average cost to the employer, *** or average value to groups of employees, or other appropriate measures of fair value. Such

evaluations *** shall be used in lieu of actual measure of cost in determining the wage paid to any employee." *Id.*

¶ 31 In *Herman v. Collis Foods, Inc.*, 176 F. 3d 912 (6th Cir. 1999), the Sixth Circuit interpreted the FLSA and the federal regulations interpreting the statute in regards to a meal credit program. *Herman*, 176 F. 3d at 913. There, the United States Secretary of Labor (Secretary) brought an action against the defendant, accusing defendant of illegally holding wages owed to employees under the FLSA. *Id*. at 916. Under the restaurant's meal credit program, employees were entitled to order any menu item for free during their shifts, except for a select few items for which they were required to pay half price. *Id*. at 915. In exchange, a meal credit was deducted from each employee's wages. *Id*. Although the meal credit program applied to all hourly-paid employees, not all chose to accept the meals. *Id*. In support of its argument that the meal credit program did not violate the FLSA, the defendant provided the court with income statements, which the district court found were "sufficient to allow the court to make its own calculations as to the reasonable cost of meals offered to [the defendant's] employees for each of the years in question." *Id*. at 915-16.

¶ 32 The parties filed cross-motions for summary judgment on the issue of the meal credit program, the district court granted the defendant's motion and denied the Secretary's motion, and dismissed the case. *Id*. The Secretary appealed and the sole question on appeal was "whether the FLSA permits [defendant] to deduct the average cost of a meal from every employee's paycheck on a per-shift basis." *Id*. The Secretary also argued that the provided records were insufficient to comply with the FLSA record-keeping requirement, because the estimates "bear no relationship to the actual cost of the meals furnished, because [the defendant]

credited the estimated cost against employees' wages on a uniform basis, regardless of the amount of food that its employees in fact consumed." *Id*. at 919.

¶ 33 The Sixth Circuit observed that, according to the regulations interpreting the FLSA and promulgated by the Secretary, "facilities (such as meals) are 'customarily furnished' to employees only if their acceptance of such facilities is 'voluntary and uncoerced.' " *Id*. at 913 (citing 29 C.F.R § 531.30). "Reasonable cost" is interpreted to mean " 'not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.' (Emphasis added.)" *Herman*, 176 F. 3d at 913 (citing 29 C.F.R. § 531.3(a)).

¶ 34 The Sixth Circuit first concluded that the Secretary could not require employers to give employees an option of whether to accept meals under a meal credit program because the FLSA focuses on "whether the meals are 'customarily furnished by' the employer." *Herman*, 176 F. 3d at 918. The Sixth Circuit also noted that the FLSA protects against the risk of employee exploitation that might result from an employer being able to force an employee to accept a meal credit program because it prohibits employers from profiting from a meal credit program. *Id*. (citing 29 C.F.R. § 531.3(b)). The Sixth Circuit then stated:

> "We hold that the § 203(m) meal deduction *** is not dependent upon proof that such meals are actually consumed by all employees. By focusing instead on the cost to employers of the meals that they customarily make available to their employees, we produce a result that is consistent both with invalidating the voluntariness requirement and with the FLSA's policy of preventing employers from exploiting § 203(m) deductions for profit."
> *Herman*, 176 F. 3d at 918.

¶ 35 As to the FLSA record-keeping requirements, the Sixth Circuit noted that the FLSA interpretive regulations required that employers keep individual records of deductions from employees' salaries wages but also provided that " 'no particular degree of itemization is prescribed.' " *Id*. at 919 (citing 29 C.F.R. § 516.27(a)). Although the court found that an unsubstantiated estimate of cost would be insufficient to comply with the FLSA, the defendant had met the record-keeping requirement by providing the cost of food it had purchased and showing the meal credit deduction on the weekly paycheck of each employee. *Herman*, 176 F. 3d at 919-20.

¶ 36 In *Morgan v. Speak Easy, LLC*, 625 F. Supp. 2d 632 (N.D. Ill. 2007), the plaintiff brought suit against the defendants claiming that the defendants violated both the FLSA and the Minimum Wage Law, arguing that he was not paid the applicable minimum wage for the all the hours he worked as a server at the defendants' restaurant. *Morgan*, 625 F. Supp. 2d at 636, 638. In pertinent part, the defendants claimed that the plaintiff received compensation in the form of meals at the restaurants where the plaintiff worked. *Id*. at 639. In response, the plaintiff argued that although he ate meals while on the clock at the restaurant, he was not aware the meals were credited against his compensation. *Id*. at 640. The plaintiff also argued that the defendants did not know the actual cost of the meals the plaintiff ate and had no supporting documentation to prove the cost. *Id*. The parties filed cross-motions for summary judgment. *Id*. at 636.

¶ 37 On the issue of the defendants' meal compensation policy, the Northern District first noted that the FLSA and the Minimum Wage Law both allow employers to deduct the reasonable cost of meals from an employee's wages so long as the reasonable cost is not more than the actual cost of meals and includes no profit to the employer. *Id*. at 655 (citing 29 U.S.C. § 203(m); 29 C.F.R. § 531.29; 820 ILCS 105/3 (West 2008); 56 Ill. Admin. Code § 210.200(b)).

The court also held that although employers do not need to keep itemized records of the cost of furnishing meals to individual employees, employers are required to " 'maintain records to substantiate the cost of furnishing a class of non-cash benefits under § 203(m) [of the FLSA].' " *Morgan*, 625 F. Supp. 2d at 655 (citing *Herman*, 176 F. 3d at 914 (citing 29 C.F.R. § 516.27(a)). The employer has the burden of proving that a wage deduction for a meal credit program represented the reasonable cost of the meals furnished. *Morgan*, 625 F. Supp. 2d at 655.

¶ 38 However, in granting the plaintiff's motion for summary judgment, the *Morgan* court found that the defendants had failed to meet their burden. *Id*. Although the defendants provided meal tickets filled out by the plaintiff with the price of each meal on the ticket, the plaintiff argued that the prices on the tickets reflected the retail prices of the meals. *Id*. The defendant did not provide any evidence to the contrary: "they do not have any menus available to compare the listed price of [the plaintiff's] meals. Nor did they submit paychecks showing meal-credit deductions, or records reflecting the price of all food purchases." *Id.*

¶ 39 Although the Minimum Wage Law and Collection Act do not directly parallel the language of the FLSA, we find that these cases persuasive. No court has yet found fit to interpret the Minimum Wage Law or the Collection Act to require an employer to show the actual cost of providing a meal credit program and the plain language of the statutes do not require a showing of "actual cost." In interpreting the FLSA, courts have declined to require an employer to show the actual cost of providing a meal credit program. *Herman*, 176 F. 3d at 920. Although the Minimum Wage Law provides that wages include compensation for "meals and lodging actually used by the employee," a more stringent requirement than in the FLSA, plaintiff here is not disputing that she actually used the meal credit program, nor has plaintiff suggested that any employee of Marie's Best was not actually using the meal credit program. Moreover, plaintiff

incorrectly assumes that "actual cost" and meals "actually used" have the same meaning. We disagree. Taking into consideration the plain language of the Minimum Wage Law and the Collection Act, and the cases interpreting similar provisions of the FLSA, we find that, under Illinois law, an employer is not required to show the actual cost of a meal credit program to justify use of the program. However, per the language of the statute, an employer should be able to justify the reasonable cost of meals actually used by the employees through the program, without profit to the employer.

¶ 40 In the present case, defendants presented sufficient evidence to substantiate their claim that the meal credit program was proper. Defendants offered 6,700 meal tickets from the period of mid-April 2008 through March 2009, or the last 11.5 months of the program (relevant time period), representing the meals actually consumed by the employees during that time period. Based on Patel's report, 5,923 shifts were worked by the employees during the relevant time period. The average length of these 5,923 shifts was 6.49 hours. Therefore, on average, defendants deducted $ 1.62 per shift from the employees' wages for the meal credit program during the relevant time period, or approximately $9,595.26 total. In their brief, defendants then averaged out the cost of the least expensive meal and the most expensive meal with a fountain beverage during the entire class period, coming up with an average meal cost of $2.64. Using this number, defendants estimated the cost to provide employees with meals during the relevant time period was $17,688 (6,700 meals at a cost to defendants of $2.64). However, our own calculations show that, based on the charts, the cheapest meal offered to employees during the relevant time period, an Italian sausage sandwich with fries, cost an average of $1.69. Therefore, even if the employees only ordered the cheapest meal for each of the 6,700 employee meal tickets during the relevant time period, and did not have a fountain beverage with their meals, it

would have cost defendants $11,323 to provide the employee meals for the meal credit program. In other words, during the relevant time period defendants spent at least $1,727.74 more than they deducted from the employees' paychecks for the meal credit program. Based on this evidence, we conclude that defendants have established that they did not profit from the meal credit program during the relevant time period.

¶ 41 Although defendants did not present records to show the number of meals actually used by the employees for the remainder of the class period, based on the record we conclude that the defendants have clearly shown that they did not profit from the meal credit program. Defendants presented extensive evidence to show the cost to defendants for the meals provided to the employees, the average length of the shifts worked for each month of the entire class period, and also presented surveys taken from the Giordano's employees in March 2009 showing that they used the meal program on a "regular basis" and wanted to continue using the meal program. We note that plaintiff has not provided any factual evidence to contradict any of the evidence provided by defendants. Plaintiff instead argues that she did not take a meal during every shift. However, "facts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion." *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986). Therefore, we must take as true all the evidence presented by defendants. Specifically, defendants presented invoices showing the cost of ingredients and charts showing the average cost to them for each meal offered to the employees. In his affidavit, Peter Skiouris explained in detail how they calculated the cost of each meal based on the cost of ingredients in bulk and the amount of each ingredient used in each meal. After reviewing the employee time cards, Gaurangkumar Patel put together the charts showing the number of shifts by the employees worked during each month of the class

period and the average length of each shift worked during each month of the class period. Defendants also provided surveys from the current employees, aside from plaintiff, who were working in March 2009. Each employee indicated that they voluntarily took part in the meal program, that they used the meal program on a "regular basis," they did not request to stop taking part in the program, and that they wanted to continue to take part in the meal program. In addition, defendants provided the 6,700 employees meal tickets which, combined with the other evidence presented, demonstrates that defendants charged a reasonable cost of meals actually used by employees for the last 11.5 months of the class period. Plaintiff has offered no evidence to contradict the provided meal tickets and there is nothing to suggest that the number of meals consumed by employees during the remainder of the class period would have differed from the last 11.5 months of the class period. Because defendants clearly established the number of meals consumed by the employees during the last 11.5 months of the class period, we can infer that the number of meals consumed by employees during the remainder of the class period would not have differed significantly. Therefore, taking all the evidence presented by defendants as true in the absence of any contrary evidence, under these circumstances, we find that defendants proved there were no genuine issues of material fact as to whether they profited from the meal credit program. Accordingly, the circuit court properly granted summary judgment in favor of defendants and properly denied plaintiff's request for partial summary judgment on the issue of liability.

¶ 42 Plaintiff also contends that defendants failed to offer substantial records to support the meal credit program. We disagree, and find there was substantial evidence presented. We also find the case upon which she relies is distinguishable from the present case. See *Cuevas v. Tsagalis, Inc.*, 149 Ill. App. 3d 977 (1986). In *Cuevas*, the circuit court had found that the

defendant was entitled to deduct a meal credit of $6 per day from the plaintiff. *Cuevas*, 149 Ill. App. 3d at 981. On appeal, the court noted that an employer's " 'unsubstantiated estimate of his cost' " was not sufficient to satisfy his burden of proving *reasonable cost*. *Id*. at 986 (quoting *Donovan v. New Floridian Hotel, Inc.*, 676 F. 2d 468, 475 (11th Cir. 1982)). The court concluded that the trial court erred in allowing the defendant a $6 per day credit because it "had before it no testimony other than the unsubstantiated estimate of Angelo Tsagalis that he was daily crediting plaintiff for meals valued at $10." *Cuevas*, 149 Ill. App. 3d at 986. In contrast, defendants here had pages of invoices substantiating the cost of ingredients, an affidavit explaining how the cost of each meal was calculated based on the cost of ingredients, a report from an accountant finding the average length of each employee shift, and meal tickets showing plaintiff actually used the meal credit program. Plaintiff has not cited to any case law in support of her argument that defendants were required to keep every employee meal ticket during the duration of the program and we will not create such a requirement. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities *** relied on").

¶ 43 Because we are affirming the judgment of the trial court in all respects, we need not address defendants' argument that the class should be decertified.

¶ 44 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 45 Affirmed.