

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of May, two thousand twenty-six.

PRESENT: RAYMOND J. LOHIER, JR.,
BETH ROBINSON,
ALISON J. NATHAN,
Circuit Judges.

SANDRA HERAS,

Plaintiff-Appellee,

v.

No. 25-1048-cv

METROPOLITAN LEARNING
INSTITUTE, INC., BORIS
DAVIDOFF,

Defendants-Appellants.

FOR DEFENDANTS-APPELLANTS: CHRISTOPHER RYKACZEWSKI,
Rego Park, NY

FOR PLAINTIFF-APPELLEE: JACOB ARONAUER, New York,
NY

Appeal from a judgment of the United States District Court for the Eastern District of New York (Diane Gujarati, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Metropolitan Learning Institute, Inc. (“MLI”) and Boris Davidoff, the director and president of MLI, appeal from the March 4, 2025 judgment of the United States District Court for the Eastern District of New York (Gujarati, *J.*), entered after a bench trial, awarding Sandra Heras overtime wages, spread-of-hours pay, liquidated damages, statutory damages arising from failure to provide wage statements, and pre-judgment interest pursuant to the Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL). We assume the parties’ familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

On appeal, Defendants argue that they were not obligated to comply with the FLSA and NYLL’s overtime pay requirements because Heras, their former

employee, fell within the scope of the “outside salesman” exemption.¹ See 29 U.S.C. § 213(a)(1). This exemption applies to “an employee who regularly works away from the employer’s business and whose primary job duty is to make sales or to obtain orders or contracts for services.” *Flood v. Just Energy Mktg. Corp.*, 904 F.3d 219, 223 (2d Cir. 2018); see 29 C.F.R. § 541.500(a). An employer bears the burden of establishing that an employee qualifies as exempt. *Dejesus v. HF Mgmt. Servs., LLC*, 726 F.3d 85, 91 n.7 (2d Cir. 2013). “The question of how an employee spends his or her time working is one of fact, while the question of whether those work activities exempt him or her from the FLSA is one of law.” *Flood*, 904 F.3d at 227.

We agree with the District Court that Defendants failed to establish that Heras was “making sales” in her capacity as a post-secondary vocational school recruiter.² See *id.* at 229. “Employees have a primary duty of making sales if they

¹ We need not separately analyze the “outside salesmen” exemption under the NYLL and FLSA because the exemption applies equally under both statutes. *Gold v. N.Y. Life Ins. Co.*, 730 F.3d 137, 145 (2d Cir. 2013) (quotation marks omitted); *Flood v. Just Energy Mktg. Corp.*, 904 F.3d 219, 228 n.5 (2d Cir. 2018).

² Because Defendants have never asserted that Heras “obtain[ed] orders or contracts for services,” 29 C.F.R. § 541.500(a)(1)(ii), we treat the argument as abandoned, see *LoSacco v. City of Middletown*, 71 F.3d 88, 92 (2d Cir. 1995).

obtain a commitment to buy from the customer and are credited with the sale.” *Id.* (citation modified) (quoting Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122-01, 22162–63 (Apr. 23, 2004)). As a “recruiter[],” Heras was “merely stimulating interest in [the school], but not obtaining a commitment.” *Id.* at 231. Even though Defendants claim that employees who recruited more students were paid higher salaries, they cannot point to any record evidence that Heras received a commission or was otherwise compensated for her successful recruitment efforts. *See id.* at 225–26. Accordingly, the District Court did not err in concluding that Heras had no “primary duty” to “mak[e] sales.” *Id.* at 229 (quotation marks omitted).

Urging a contrary conclusion, Defendants assert that the District Court improperly discredited the testimony of a campus director, James Bruce, on the existence of a policy for compensating recruiters for student enrollment. We are not persuaded. The District Court found that Bruce’s “demeanor on cross-examination” undermined his credibility and “that he appeared to be seeking opportunities to advance the defense theory of the case.” App’x 250–51. “It is within the province of the district court as the trier of fact to decide whose

testimony should be credited.” *Krist v. Kolombos Rest. Inc.*, 688 F.3d 89, 95 (2d Cir. 2012). Seeing no other evidentiary basis for MLI’s purported policy of “incentive compensation,” *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 166 (2012), we decline Defendants’ invitation to “second-guess the bench-trial court’s credibility assessments,” *Krist*, 688 F.3d at 95.

Defendants next contend that the District Court erred in insufficiently examining whether Heras’s position was unsuitable to hourly pay and whether Heras independently solicited new clients. Assuming without deciding that the exemption analysis turns in part on these factors, both weigh in favor of Heras. Neither party disputes that Heras received an hourly wage. And as the District Court found, Heras neither “determine[d] students’ eligibility to enroll,” nor decided “what location to go to with respect to recruiting students.” App’x 252–53. Under these circumstances, we see no error in the District Court’s conclusion that Defendants failed to meet their burden of establishing that Heras was an “outside salesman.” 29 U.S.C. § 213(a)(1).

We have considered Defendants' remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court