COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT

MIDDLESEX, ss. 11.2 Civil Action No. 2181CV00680

ANDREW JEFFERSON, on behalf of himself and all others similarly situated,

Plaintiff

v.

UTS OF MASS., INC., WILLIAM P. CRABTREE, and STEVEN T. CRABTREE,

Defendants

OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO MASS. R. CIV. P. 12(b)(6)

Defendant UTS of Mass., Inc. ("UTS") specializes in testing, inspecting, and evaluating construction materials and practices. Plaintiff Andrew Jefferson worked for the company as a staff engineer. Like everyone in the class he seeks to represent, he used his own vehicle to perform his duties for the company, paying for his own gas, insurance, supplies, and maintenance, and incurring other operating expenses, including depreciation. The complaint alleges that UTS failed to comply with 454 CMR 27.04(4)(d), which provides that "[a]n employee required or directed to travel from one place to another after the beginning of or before the close of the work day…*shall be reimbursed for all transportation expenses*." *Id.* (emphasis added).

As alleged in the complaint, Mr. Jefferson and the class intend to use the IRS reimbursement rate to provide a reasonable estimate of their transportation expenses and to show that UTS's reimbursements were inadequate. Although the complaint is clear on that point, UTS misstates Mr. Jefferson's position. According to UTS, Mr. Jefferson's

claims are based on the premise that "Massachusetts law *requires* employers to reimburse employees for work-related travel at the maximum rate that the [IRS] allows individuals to receive for mileage reimbursement purposes." (Motion, p.2) (underlining in original). That is not Mr. Jefferson's position. If, for example, UTS had contemporaneously requested records of his transportation expenses, and had reimbursed all of those expenses on an ongoing basis, then he would not have brought this action. Instead, UTS reimbursed him and his co-workers on a mileage basis, but the rate it used was artificially low and far below the IRS rate.

Even though UTS reimbursed its employees on a mileage basis, it now argues that employees must, as a matter of law, prove their damages by submitting records of their "actual" expenses. But given its mileage reimbursement method, UTS does not require its employees to submit or maintain any records of their transportation expenses, such as receipts for fuel costs, preventative maintenance (including oil changes, new tires, etc.), repairs, insurance costs, or anything else. As UTS knows, therefore, its employees had no reason to maintain accurate or complete records of their transportation expenses. Indeed, in reliance on UTS's mileage reimbursement policy, Mr. Jefferson made no effort to maintain such records.

UTS's position is wrong for at least three reasons. First, numerous courts, including in Massachusetts, have reached the commonsense conclusion that it is appropriate to use the IRS rate in cases alleging an inadequate reimbursement of transportation expenses. *See, e.g., Escorbor v. Helping Hands Co., Inc.*, 2016 WL 2942356, at *1 (Mass. Super. Apr. 20, 2016) (denying motion to dismiss wage claim under Massachusetts law, observing that the plaintiff "plausibly calculates travel expense

in a reasonable way, such as the IRS reimbursement rate, which exceeds 50 cents per mile."). Second, under well-established legal principles governing wage claims, UTS cannot benefit from its own failure to maintain contemporaneous records relevant to its employees' compensation by arguing that its employees must prove a wage violation using such non-existent records. And, third, plaintiffs may prove damages through any method that provides for a reasonable estimate, and in this case the IRS mileage rate provides a means for Mr. Jefferson and the class to do so. As a result, and as discussed in more detail below, UTS's motion to dismiss must be denied.

Facts

Plaintiff Andrew Jefferson ("Mr. Jefferson") is a Massachusetts resident. (Cmplt. ¶ 1). UTS is a Massachusetts corporation with a principal office located in Stoneham, Massachusetts. (Cmplt. ¶ 2). The company is a full-service testing agency specializing in testing, inspection, and evaluation of construction materials and practices. (Cmplt. ¶ 5).

UTS employed Mr. Jefferson from September 2018 to February 2021 as a staff engineer. (Cmplt. ¶ 20). During that time, he drove approximately 76,445 miles as part of his employment with UTS. (Cmplt. ¶ 21). Like everyone in the proposed class, he was required to use his own car to perform his work duties. (Cmplt. ¶¶ 6-7). As a result, he and everyone in the proposed class incurred toll and non-toll transportation expenses, including fuel, insurance, preventative maintenance, repairs, depreciation, and all other costs or expenses associated with the operation of an automobile. (Cmplt. ¶ 7).

UTS Reimbursement Policy

UTS has a long-standing policy of reimbursing its employees for their non-toll transportation expenses on a per-mile basis, but at the rate of only 35 cents per mile.

(Cmplt. ¶ 16).[1] On information and belief, that rate is not based on any reasonably current studies or data regarding all transportation costs, including fuel, insurance, preventative maintenance, repairs, depreciation, or any other costs or expenses associated with the operation of an automobile. (Cmplt. ¶ 17).

UTS's reimbursement policy did not depend on any individual circumstances, other than the number of miles driven and tolls paid. (Cmplt. ¶ 18). It did not, for example, depend on the type of car an employee drove, the fuel efficiency of the employee's car, the type of gas (or other fuel) the employee used, the type or amount of insurance the employee had, the amount of preventative maintenance the employee performed, or the cost of any repairs, among other individual variables. (Cmplt. ¶ 18).

UTS did not require its employees to maintain or submit any receipts or other records of their transportation expenses other than those related to tolls. (Cmplt. ¶ 19). Indeed, there was no reason to do so, because employees were being paid on a per-mile basis. (Cmplt. ¶ 19). In effect, UTS's policy put employees on notice that they did not need to maintain or submit any receipts or other records of their non-toll transportation expenses. (Cmplt. ¶ 19). Understandably, in reliance upon UTS's policy not to require him to maintain or submit records of his non-toll transportation expenses, Mr. Jefferson did not undertake efforts to keep such records. (Cmplt. ¶ 22).

[1] UTS required employees to submit tolls separately for reimbursement, and Mr. Jefferson did so. The transportation expenses referenced in this opposition, therefore, refer to non-toll expenses, as indicated by the allegations in the complaint.

Annual, Data-Based IRS Reimbursement Rate

According to the IRS "[t]he standard mileage rate for business use is based on an annual study of the fixed and variable costs of operating an automobile."[2] (Cmplt. ¶ 12). In 2018, the standard IRS reimbursement rate for transportation expenses was 54.5 cents per mile; in 2019, it was 58 cents per mile; and in 2020, it was 57.5 cents per mile. (Cmplt. ¶¶ 8-10). The 2021 standard IRS reimbursement rate is 56 cents per mile. (Cmplt. ¶ 11).

Violation of Massachusetts Law

Massachusetts regulations require employers, like UTS, to reimburse employees, like Mr. Jefferson and the proposed class members, "for all transportation expenses."[3] (Cmplt. ¶ 13). Given that the IRS reimbursement rate is based on real data concerning the total expenses of operating an automobile, while UTS's reimbursement rate is not based on any current data (and likely no data at all), UTS's employees were under-reimbursed for their transportation expenses, in an amount equal to the difference between 35 cents per mile and the IRS reimbursement rate for each year at issue, for each mile driven by each employee. (Cmplt. ¶ 23).

Argument

1. Massachusetts law requires reimbursement of "all" transportation expenses, not "actual" transportation expenses.

UTS stipulated when moving to dismiss the original complaint that a failure to comply with the Massachusetts wage regulations constitutes a violation of the Massachusetts wage laws. When presented with the amended complaint, however, it

[2] https://www.irs.gov/newsroom/irs-issues-standard-mileage-rates-for-2021.

[3] 454 CMR 27.04(4).

changed course, and now it simply acknowledges, without making any stipulations, the legal authority supporting Mr. Jefferson's position that a violation of the regulation is a wage violation. (Motion, pp.6-7). As UTS recognizes, "those courts to consider the issue have upheld the regulation's validity under both the Wage Act and the minimum wage law. (Motion, p.6). This Court should do likewise. *See, e.g., Garcia v. Right at Home, Inc.*, 2016 WL 3144372, at *4 (Mass. Super. Jan. 19, 2016).

The regulation at issue could not be clearer about what it requires – that is, employers are required to reimburse employees for "all" transportation expenses, not "actual" transportation expenses. 454 CMR 27.04(4). Courts repeatedly have held, as they must, that "all" means "all." *See, e.g., Commissioners of Bristol County v. Federal Nat. Mortg. Ass'n*, 978 F.Supp.2d 69, 74 (D.Mass. 2013) (every single court that has addressed the issue of whether defendants are exempt from "all taxation" has found that "all" means "all"). "All" is, by definition, the broadest possible term, giving employees the strongest right to reimbursement for the use of their own vehicle to conduct an employer's business. And that is precisely what the IRS mileage reimbursement rate is intended the capture – the *total real costs* of using a vehicle, not just gas expenses. *See, e.g., Waters v. Pizza to You, LLC*, ___ F. Supp. 3d ___, 2021 WL 1839974, at *5 (S.D.Ohio May 7, 2021) ("The IRS mileage rate is the real cost of driving a vehicle.").[4]

UTS's repeated assertion that an employee needs to prove "actual" expenses is not supported by the language of the regulation. The problem with UTS's use of the term

[4] *See also id.* ("The IRS bases these rates on cost data and analysis compiled every year by Runzheimer International, an independent research firm that contracts to the IRS. Runzheimer International uses data from across the country and measures auto insurance premiums, gas prices, maintenance costs, depreciation and other costs that go into operating a vehicle.") (citation and internal quotation marks omitted).

"actual" is that term's inherent ambiguity. For example, "actual" might mean all expenses for which an employee incurs an out-of-pocket cost, such as gas, for which there could be a receipt. But "actual" also could be defined to include costs that are potentially just as significant but for which there are no specific receipts or records, such as wear-and-tear or depreciation. If UTS is using the term in the former sense, then it is attempting to impose a limitation that does not appear in the regulation itself. If it is using "actual" in the latter sense – as the equivalent of "all" – then it should avoid confusion by sticking to the language used in the regulation, which is "all."

An employee's ability to prove "all" transportation expenses – out-of-pocket and otherwise – is considerably less burdensome and inherently more accurate when using the IRS reimbursement rate than by attempting to document each specific cost or expense associated with a particular vehicle's use for business purposes. That is particularly true where a vehicle is used both for business and non-business purposes, as is common. And the advantage of using the IRS reimbursement rate is even more clear where, as in this case, an employer does not require the maintenance or submission of contemporaneous records, meaning that many such records were never created or no longer exist.

2. The IRS rate is the *only* appropriate measure of damages where an employer fails to reimburse an employee's actual transportation expenses.

As noted above, another Massachusetts court already has recognized, when presented with a similar motion to dismiss in a wage case, that it is reasonable to calculate travel expenses using the IRS reimbursement rate. *Escorbor*, 2016 WL 2942356, at *1. Given that UTS's reimbursement rate was far below the IRS rate for the years in question, it is straightforward and logical to conclude that UTS failed to reimburse "all" travel expenses, thereby violating Massachusetts law.

Not only is it reasonable to use the IRS rate, but in the context of this case, where UTS did not maintain contemporaneous records of actual expenses, Mr. Jefferson and the proposed class will be able to use the IRS rate as a matter of law. Under federal law,[5] the Department of Labor and numerous courts have concluded that an employer must account for an employee's transportation expenses in one of two ways: (1) by reimbursing the employee's expenses through the submission and maintenance of contemporaneous receipts or records, or (2) by using the applicable IRS reimbursement rate.

The Department of Labor's Field Operations Handbook ("FOH") specifically provides that transportation costs may be determined by reference to the IRS reimbursement rate "in lieu of actual costs and associated recordkeeping." Dept. of Labor, Wage & Hour Div., Field Operations Handbook, § 30c15(a) (issued 6/30/2000), available online at https://www.dol.gov/agencies/whd/field-operations-handbook (last visited Sep. 1, 2021). Courts repeatedly have held that "[t]he DOL Handbook is entitled to judicial deference." *Burton v. DRAS Partners, LLC*, 2019 WL 5550579, at *3 (N.D.Ill. Oct. 27, 2019) (citations omitted). *See also Newman v. Advanced Technology Innovation Corp.*, 749 F.3d 33, 37 (1st Cir. 2014) ("The Department of Labor Wage and Hour Division's Field Operations Handbook…contains further guidance, which we treat as persuasive authority."). Other than these two methods – an employer's contemporaneous recording of actual expenses or reimbursement using the IRS rate – no others are

[5] Massachusetts courts regularly look to federal law when interpreting parallel provisions of the Massachusetts wage laws. *Vitali v. Reit Management & Research, LLC*, 88 Mass. App. Ct. 99, 103 (2015).

permitted, including an employer's use of its own randomly determined and artificially low mileage reimbursement rate, which was UTS's method.

Numerous courts have embraced this position. Most recently, in *Waters*, the district court engaged in an extensive analysis before concluding that plaintiffs in a wage case may prove their transportation expenses by using the IRS reimbursement rate where the defendants did not track and pay actual expenses. 2021 WL 1839974, at *10 ("As a matter of law, …the proper measure of minimum wage compliance for…drivers is to either (1) track and pay [a] drivers' actual expenses or (2) pay the mileage reimbursement rate set by the Internal Revenue Service."), *quoting Hatmaker v. PJ Ohio, LLC*, 2019 WL 5725043, at *7 (S.D.Ohio, 2019) (internal quotation marks omitted). As the court explained further, plaintiffs alleging an underpayment of wages may meet their burden of proof by "showing they were not compensated by an amount equal to the minimum hourly wage plus the mileage reimbursement rate set by the Internal Revenue Service," and defendants can rebut any such evidence *only* "by showing that they tracked and paid actual expenses and paid an amount equal to the minimum hourly wage rate plus actual expenses." *Id*. UTS cannot do so here.

In addition to *Waters* and *Hatmaker*, other courts have reached the same result. *See, e.g., Burton, supra*, 2019 WL 5550579, at *3 ("Based on the DOL Handbook, district courts and arbitrators repeatedly hold that…drivers are owed the difference between the reimbursements provided and the IRS rate when the employer fails to keep records of their actual expenses."); *Brandenburg v. Cousin Vinny's Pizza, LLC*, 2018 WL 5800594, at *4 (S.D.Ohio Nov. 6, 2018) (employer had to use "adequate reimbursement rate, using either the IRS mileage rate or actual reimbursement of cost"); *Cornish v. Deli*

Management, Inc., 2016 WL 5934077, at *4 (D.Md., Oct. 12, 2016) (holding that plaintiffs sufficiently stated claim by alleging that defendant reimbursed transportation expenses at a rate below the IRS rate); *Zellagui v. MCD Pizza, Inc.*, 59 F. Supp. 3d 712, 716 (E.D.Pa. 2014) ("Because [the employer] failed to keep detailed contemporaneous records of its delivery drivers' actual expenses, Plaintiff and the Class members are entitled to be reimbursed at the IRS rate.").

In *Orth v. J & J & J Pizza, Inc.*, 2020 WL 1446735 (D.Mass. Mar. 25, 2020), which involved claims under both federal law and the Massachusetts wage law, the district court addressed a motion to dismiss similar to UTS's motion here. In denying the motion, the court relied on its observation that "[c]ourts have regularly found that, consistent with the [DOL] Handbook, an employer must provide reimbursement at the IRS rate when they do not keep records of employees' actual vehicle expenses." *Id.* at *3.

In its motion, UTS relies heavily on an opinion letter issued in August 2020 by the Department of Labor, in the waning days of the Trump administration. (Motion, pp.13-14). The letter was contrary to the Department's position of 20 years, as reflected in the FOH, and opined that an employer may reimburse employees for their transportation expenses using a "reasonable approximation" of such expenses, rather than tracking actual expenses or using the IRS reimbursement rate. *Waters,* 2021 WL 1839974, at *6. That letter, however, has been extensively and persuasively criticized, and deemed unworthy of any persuasive weight. *Id.* at *6-10. Among other things, the letter misrepresents existing legal authority, misconstrues record-keeping regulations, disclaims the authority of the FOH (despite having relied on it as authority in prior litigation), usurps the role of courts, is vague and unreasonable, and represents an abrupt

change in the Department's longstanding position without any clear basis for that abrupt change. *Id.*[6]

Moreover, the opinion letter is rooted in specific language that appears in federal regulations but that is entirely absent from Massachusetts regulations. As a result, even if the letter carried weight as an interpretation of federal law, it carries no weight as an interpretation of Massachusetts law. The specific language on which the letter relies is found in federal overtime regulations. Those regulations state that when an employer is calculating an employee's "regular rate" (which is used to determine the employee's overtime rate) it may exclude travel expense reimbursements, subject to this limitation: "only the actual or *reasonably approximate* amount of the expense is excludable from the regular rate." 29 C.F.R. § 778.217(c)(1). The opinion letter relies on this specific language to conclude that an employer may reimburse transportation expenses in a manner that "reasonably approximates" the amount of the expenses. *Waters*, supra, 2021 WL 1839974, at *8. Likewise, the federal court decisions on which UTS relies (Motion, p.14 n.7) are rooted in this same regulatory language. *See, e.g., Bradford v. Team Pizza, Inc.*, 2021 WL 2142531, at *4 (S.D.Ohio, May 26, 2021) ("other courts have determined that employers may reimburse…drivers' expenses under the 'reasonable approximation' standard set forth in 29 C.F.R. § 778.217").

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[6] Even if the opinion letter constituted any authority, it does not state that a plaintiff is *precluded* from proving a wage violation by reference to the IRS reimbursement rate. It says only that an employer may rely on a reasonable approximation of expenses. Plainly, the IRS rate is one reasonable approximation. That the IRS rate is substantially greater than UTS's rate constitutes evidence that UTS's rate was not a reasonable approximation. Moreover, the complaint alleges that UTS's rate is not based on any reasonably current data (Cmplt. ¶ 17), further supporting an inference that the rate does not constitute a reasonable approximation of expenses.

Even if that analysis were correct under federal law (and there is authority to the contrary, *Waters,* 2021 WL 1839974, at *6-10), it cannot extend to Massachusetts law. The Massachusetts regulation requires that employers reimburse employees for "all" transportation expenses and say nothing about a "reasonable approximation" of those expenses. 454 CMR 27.04(4). Indeed, nothing in the Massachusetts regulations, either in section 27.04 or elsewhere, limits or relaxes an employer's obligation to reimburse "all" transportation expenses. As a result, the opinion letter, and all the federal court decisions that rely on the "reasonable approximate" language of 29 C.F.R. § 778.217(c)(1), are inapposite.

The Defendants also place great weight on a California court's application of a California statute, *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554 (2007), but that reliance is misplaced, for multiple reasons. First, the issue the California case was deciding was this: "Labor Code section 2802, subdivision (a), requires an employer to indemnify its employees for expenses they necessarily incur in the discharge of their duties. *May an employer satisfy this statutory obligation by paying employees increased wages or commissions instead of separately reimbursing them for their actual expenses*?" *Id.* at 558-59 (emphasis added). The issue was not, as it is here, whether an employee could challenge a mileage reimbursement rate that is substantially below the IRS rate. As a result, any statements upon which UTS relies are merely dicta.

Second, and in any event, the California decision obviously is not binding on this court. It lacks persuasive value given, among other things, that it involves a statute that is materially different from the Massachusetts regulation. California law requires an employer "to indemnify its employees for expenses they *necessarily* incur in the

discharge of their duties." *Id.* at 558–59. As a result, in contrast with the Massachusetts requirement that "all" transportation expenses be reimbursed, a California employer may challenge the reasonableness of an employee's alleged expenses. For example, the employer may challenge the employee's choice of automobile, because that choice will impact costs such as depreciation, fuel, maintenance, and repairs. *Id.* at 568. Or the employer may challenge the brand or gasoline or tires that an employee chooses. *Id.* This added complication, unique to California law (compared to federal or Massachusetts law), makes the option of contemporaneous tracking of actual expenses unduly onerous, creating a greater need for other means of reimbursing expenses. *Id.* at 569.

Third, the dicta upon which UTS relies, when read in proper context, does not support UTS's position. Consistent with Mr. Jefferson's position here, the court observed that the IRS rate is "based on national average expenses for fuel, maintenance, repair, depreciation, and insurance," and that the "IRS mileage rate is also widely used and accepted by private business employers for calculating reimbursable employee automobile expenses." *Id.* at 569. It then noted that even the IRS rate may *undercompensate* an employee's actual expenses, so an employee still "must be permitted to challenge the resulting reimbursement payment." *Id.* That employee-friendly statement goes beyond what Mr. Jefferson is claiming here, which is that the IRS rate is sufficient. The court then went on to say that an employee and employer also could set a different mileage rate as a matter of "negotiation and agreement between employer and employee," but even then the employee can challenge the adequacy of the payment. *Id.* at 569-70. One way to do so would be to show "that the reimbursement amount that the employer has paid is less than the actual expenses that the employee has necessarily

incurred for work-required automobile use." *Id.* at 569. The court did not state, however, that this was the *only* way an employee could challenge the reimbursement amount. Indeed, the court later said that an employee could challenge the adequacy of a reimbursement payment "by comparing the payment with the amount that would be payable under *either* the actual expense method *or* the mileage reimbursement method." *Id.* at 571 (emphasis added). And that is precisely what Mr. Jefferson proposes to do here – that is, challenge the adequacy of a reimbursement payment by comparing it to the IRS mileage reimbursement rate.

Fourth, all of the administrative authority cited by the *Gattuso* court supports Mr. Jefferson's position. That authority repeatedly recognizes the IRS rate as presumptively reasonable, and in a final opinion put the burden on employers if they chose to pay a lower rate: "If an employer wants to pay less than this established IRS rate, the *employer* bears to burden of proving that the employee's costs of operating the vehicle for work is actually less." *Id.* at 566 (brackets in original). The court's subsequent comments are consistent with this position. If *Gattuso* were the law here, then, UTS would bear the burden of showing that its low rate was sufficient. UTS gets it backwards, arguing incorrectly that Mr. Jefferson bears the burden of showing that UTS's low rate was insufficient.

As a result, all of the relevant and persuasive authority, from Massachusetts and other jurisdictions, supports Mr. Jefferson's position. The decisions from which UTS cherry-picks quotes or alleged principles are distinguishable given, among other things, their reliance on underlying statutes or regulations that have language materially different from the Massachusetts regulation at issue.

3. Use of the IRS rate is consistent with long-standing law concerning an employer's obligations to maintain all contemporaneous records relevant to wages and an employee's right to estimate damages when the employer fails to do so.

As noted, UTS did not require its employees to submit or maintain records of their transportation expenses. There was no reason to do so, because employees were reimbursed based on the number of miles they drove. It was plainly reasonable for employees, like Mr. Jefferson, to rely on that policy by not keeping contemporaneous records of their expenses. (Cmplt. ¶ 22). It would be grossly unfair to allow UTS, after being challenged about the adequacy of its reimbursement rate, to deflect any such challenge by requiring employees to produce records that will be burdensome or impossible to assemble. *Cf. Hatmaker v. PJ Ohio, LLC*, 2020 WL 1129325, at *4 (S.D.Ohio Mar. 6, 2020) ("Defendants will not be permitted to put Plaintiffs through the trouble, effort, and expense required by demanding that drivers produce information the drivers likely no longer have and had no reason or duty to keep."). Indeed, if UTS had reimbursed transportation expenses at the facially ridiculous rate of only one cent per mile, it could use this same argument to avoid any liability.

Courts have recognized this problem, which arises in wage cases in various forms, and have adopted a fair and practical solution. A similar problem may arise, for example, where an employer fails to record its employees' hours, thereby impairing the employees' ability to prove how many hours they worked for purposes of minimum wage, overtime, or other non-payment of wage cases. This problem was recognized over 70 years ago, in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), where the Court observed that "[w]hen the employer has kept proper and accurate records [relevant to an employee's compensation,] the employee may easily discharge his burden by securing

the production of those records." *Id*. at 687. When, however, an employer fails to keep all such records, "[t]he solution…is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work." *Id*. After all, to do so "would place a premium on an employer's failure to keep proper records in conformity with his statutory duty" and "would allow the employer to keep the benefits of an employee's labors without paying due compensation." *Id*. As a result, the Court held "that an employee has carried out his burden if he…produces sufficient evidence to show the amount and extent of [his damages] as a matter of just and reasonable inference." *Id*.

Massachusetts courts have adopted this same principle. Indeed, the Appeals Court reaffirmed it recently, stating that courts must "ensure that employees are not 'penalize[d]' for their inability 'to prove the precise extent of uncompensated work' because of the 'employer's failure to keep proper records.'" *Donis v. American Waste Services, LLC*, 95 Mass. App. Ct. 317, 329 (2019), *rev'd on other grounds* 484 Mass. 257 (2020), *quoting Mt. Clemens*. *See also Wiedmann v. The Bradford Group, Inc*., 444 Mass. 698, 704 (2005) (in light of statutory recordkeeping requirements, employers have duty to maintain all documents that bear on a question of wages).

Under Massachusetts and federal law, UTS is obligated to keep all contemporaneous records related to an employee's compensation, including records of transportation expenses. That principle is firmly established in Massachusetts statutes and regulations. *See, e.g*., M.G.L. c. 149, § 52C (requiring employers to keep a personnel record with all information relevant to a worker's employment); M.G.L. c. 151, § 15 (requiring employers to keep records of an employee's pay, hours, and other

information); 454 CMR 27.07 (requiring employers to keep records of an "employee's name, complete address, social security number, occupation, amount paid each pay period, hours worked each day, rate of pay, vacation pay, any deductions made from wages, any fees or amounts charged by the employer to the employee, dates worked each week, and such other information as the Director or the Attorney General in their discretion shall deem material and necessary."). Because work-related transportation expenses directly affect (by reducing, dollar for dollar) an employee's wages, employers are required to keep records of such expenses, at least where the employer intends to limit an employee's reimbursement based on such records.

Based on record-keeping requirements that parallel those under Massachusetts law, federal law requires employers to maintain records of transportation expenses. In *Waters*, for example, the district court observed that "a reasonably diligent employer must in some manner maintain records of vehicle costs…." 2021 WL 1839974, at *6 (citation omitted). The court added that "[t]he obligation of [FLSA compliance] is the employer's and it is absolute. He cannot discharge it by attempting to transfer his statutory burdens of accurate recordkeeping…to the employee." *Id.* (citation and internal quotation marks omitted; brackets in original). *See also Hatmaker*, 2019 WL 5725043, at *7 ("The regulations also require employers to maintain records of total wages paid each pay period. … Because employee-incurred expenses affect total wages, this provision also requires employers to maintain records of delivery drivers' vehicle expenses.") (citations and internal quotation marks omitted).

As alleged in the complaint, UTS failed to keep any records of transportation expenses, other than the miles reported by its employees. That failure directly and

substantially prejudiced Mr. Jefferson and the proposed class if, as UTS contends, they have to prove their damages through such records. Under the *Mt. Clemens* doctrine, therefore, Mr. Jefferson should be permitted to prove his damages through any evidence that estimates his damages "as a matter of just and reasonable inference." 328 U.S. at 687. Using the IRS rate to estimate damages is plainly just and reasonable, and surely more accurate than an estimate based on memory alone or incomplete records.

4. Plaintiffs can prove their damages using any evidence that permits a just and reasonable estimates of their damages, and the IRS reimbursement rate constitutes such evidence.

Even if Mr. Jefferson did not have the benefit of all of the wage decisions cited above, UTS's motion still would be unfounded. It is a bedrock principle of Massachusetts law that damages "need not be proved with mathematical precision," but rather "the extent of damages often must be left to estimate and judgment." *Coady v. Wellfleet Marine Corp*., 62 Mass. App. Ct. 237, 245 (2004) (citation and internal quotation marks omitted). As a result, "[e]vidence that enables the jury to arrive at an approximate estimate of damages is sufficient." *Id., citing Agoos Leather Cos. v. American & Foreign Ins. Co*., 342 Mass. 603, 608). That principle holds in any case, but it applies with particular force where, as here, a defendant is responsible for a plaintiff's inability to prove damages with precision. *Id*. at 245-46, *citing Augat, Inc. v. Aegis, Inc*., 417 Mass. 484, 491 ("the defendants should not be permitted to escape the consequences of their wrongful conduct that caused harm to the plaintiffs if some reasonable damages calculation can be made") *and Our Lady of the Sea Corp. v. Borges*, 40 Mass. App. Ct. 484, 488 (1996) ("A tortfeasor may not complain that damages cannot be ascertained with precision when his wrongdoing caused the uncertainty"). UTS failed to require the

submission or maintenance of expense records, while also leading its employees to believe that there was no reason to keep such records (by reimbursing them on a mileage basis), so it cannot complain about employees using an alternative method to estimate their transportation expenses.

Numerous courts have recognized that the IRS reimbursement rate may be used as evidence of transportation expenses, or have recognized that a jury may do so. *See, e.g., See, e.g., Escorbor*, 2016 WL 2942356, at *1 (plaintiff "plausibly calculates travel expense in a reasonable way, such as the IRS reimbursement rate"); *Zellagui*, 59 F. Supp. 3d at 716 ("the Court finds that the IRS rate is a reasonable approximation of the actual per mile vehicle expenses incurred by Plaintiff and the Class members"); *Perrin v. Papa John's Int'l, Inc.*, 114 F. Supp. 3d 707, 721-22 (noting authority that IRS mileage reimbursement rate may constitute a reasonable approximation of transportation expenses but leaving to jury whether to use that rate).

In effect, UTS's motion constitutes a premature and groundless motion in limine, seeking to limit Mr. Jefferson's evidence to a particular form – i.e., whatever records or receipts he may be able to scrape together in order to prove his so-called "actual" transportation expenses. Notably, UTS says nothing about how he could use such records or receipts to calculate his wear-and-tear and depreciation, which underscores the folly of its position that Mr. Jefferson must be limited to such records. UTS's position is simply wrong. Like any other plaintiff, Mr. Jefferson can prove his damages using any "[e]vidence that enables the jury to arrive at an approximate estimate of damages," *Coady*, 62 Mass. App. Ct. at 245, including the IRS reimbursement rate.

Conclusion

For the foregoing reasons, UTS's motion to dismiss must be denied.

ANDREW JEFFERSON, on behalf of
himself and all others similarly situated

By his attorneys,

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Dated: September 8, 2021

CERTIFICATE OF SERVICE

I certify that on this date I served a copy of the foregoing document, by electronic mail, on counsel for the Defendants.

Dated: September 8, 2021

/s/ *Stephen Churchill*
Stephen Churchill