

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOE RIVERA on his own behalf
and on behalf of all others similarly situated,

29 U.S.C. § 216(b) Collective Action

Plaintiff,

vs.

No.

McCOY CORPORATION
(d/b/a/ "McCoy's Building Supply"),

Defendant.

COLLECTIVE ACTION COMPLAINT

Plaintiff Joe Rivera ("Plaintiff"), on behalf of himself and similarly situated employees, brings this collective action lawsuit against Defendant McCoy Corporation ("Defendant"), seeking all available relief under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.* and the New Mexico Minimum Wage Act ("MWA"), NMSA 1978 §§ 50-4-1, *et seq.* Plaintiff's FLSA claim is asserted as a collective action pursuant to FLSA Section 16(b), 29 U.S.C. § 216(b), and his MWA claim is asserted as a collective action pursuant to NMSA 1978 § 50-4-26(D). The following allegations are based on personal knowledge as to Plaintiff's own conduct and are made on information and belief as to the acts of others.

JURISDICTION AND VENUE

1. Jurisdiction over Plaintiff's FLSA claim is proper under 29 U.S.C. § 216(b) and 28 U.S.C. § 1331 and § 1332.
2. Jurisdiction over Plaintiff's MWA claim is proper under 28 U.S.C. §

1367(a) and, possibly, under 28 U.S.C. § 1332(d).

3. Venue in this Court is proper under 28 U.S.C. § 1391.

PARTIES

4. Plaintiff is an individual residing in Roswell, New Mexico.

5. Plaintiff is an employee covered by the FLSA and the MWA.

6. Defendant is a corporate entity doing business in New Mexico and headquartered in San Marcos, Texas.

7. Defendant employs individuals, including Plaintiff, who engaged in interstate commerce or in the production of goods for interstate commerce or engaged in handling, receiving, selling, or otherwise working on goods or materials that have been moved in or produced for interstate commerce.

8. Defendant is an employer covered by the FLSA and the MWA.

FACTS

9. Defendant is "one of the nation's largest family-owned building supply retailers."

10. Defendant has at least 86 retail locations in five states that operate under the name "McCoy's Building Supply," including Arkansas, Mississippi, New Mexico, Oklahoma, and Texas ("Stores").

11. From approximately May 2014 until approximately August 2014, Plaintiff was employed by Defendant as an "Assistant Store Manager" ("ASM")¹ and was assigned to Defendant's Roswell, New Mexico Store.

12. Defendant paid Plaintiff a salary as while he was employed as an ASM.

¹ From approximately December 2013 until approximately May 2014, Plaintiff was employed as an "Assistant Manager in Training." This case does not concern Plaintiff's employment in this position.

13. Plaintiff spent almost all of his time as an ASM performing non-managerial duties such as servicing customers, stocking shelves, working the cash register, and cleaning the store.

14. Plaintiff often worked over 40 hours per week as an ASM. In particular, Plaintiff estimates that he regularly worked between 50 and 60 hours during a typical week and sometimes more.

15. Defendant did not pay Plaintiff any compensation for hours worked over 40 per week while he was employed as an ASM.

16. During the past three years, Defendant has employed over one hundred ASMs at its Stores.

17. Regardless of Store location, Defendant's ASMs are paid a salary.

18. Regardless of Store location, Defendant's ASMs are classified as exempt from receiving overtime pay.

19. Regardless of Store location, Defendant's ASMs work over 40 hours per week.

20. Regardless of Store location, Defendant does not pay its ASMs any compensation for hours worked over 40 per week.

21. Defendant has acted willfully and with reckless disregard of clearly applicable FLSA provisions by failing to pay Plaintiff and other ASMs any compensation for hours worked over 40 during the workweek.

22. Defendant's policy of non-payment of overtime wages to ASMs is longstanding and has been in effect continuously since its inception. Thus, Defendant has engaged in a continuing course of conduct relating to its violations of the MWA as to Plaintiff and as to the potential New Mexico members of the collective.

COLLECTIVE ACTION ALLEGATIONS

23. Plaintiff brings his FLSA claim as a collective action pursuant to FLSA Section 16(b), 29 U.S.C. § 216(b), on behalf of: All ASMs employed by Defendant since January 5, 2012.

24. Plaintiff's FLSA claim should proceed as a collective action because Plaintiff and other potential members of the collective, having worked pursuant to the common policies described herein, are "similarly situated" as that term is defined in 29 U.S.C. § 216(b) and the associated decisional law.

25. Plaintiff brings his MWA claim as collective action pursuant to Section 50-4-26(D) NMSA 1978 on behalf of: All ASMs employed by Defendant in its New Mexico Stores.

26. Plaintiff's MWA claim should proceed as a collective action because Plaintiff and other potential members of the collective, having worked pursuant to the common policies described herein, are "similarly situated" as that term is defined in Section 50-4-26(D) NMSA 1978 and the associated decisional law.

COUNT I
(Alleging FLSA Violations)

27. All previous paragraphs are incorporated as though fully set forth herein.

28. Plaintiff and the collective are employees entitled to the FLSA's protections.

29. Defendant is an employer covered by the FLSA.

30. The FLSA entitles employees to overtime compensation "not less than one and one-half times" their regular pay rate for all hours worked over 40 per week. See 29 U.S.C. § 207(a)(1).

31. Defendant violated the FLSA by failing to pay Plaintiff and the collective any compensation, including overtime premium compensation, for hours worked over 40 per week.

32. In violating the FLSA, Defendant acted willfully and with reckless disregard of clearly applicable FLSA provisions and, thus, has committed a willful violation of the FLSA.

COUNT II
(Alleging MWA Violations)

33. All previous paragraphs are incorporated as though fully set forth herein.

34. Plaintiff and the class are employees entitled to the MWA's protections.

35. Defendant is an employer covered by the MWA.

36. The MWA entitles employees to overtime compensation not less than "one and one-half times the employee's regular hourly rate of pay for all hours worked in excess of forty hours." Section 50-4-22 NMSA 1978.

37. Defendant violated the MWA by failing to pay Plaintiff and the class any compensation, including overtime premium compensation, for hours worked over 40 per week.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and other class members, seeks the following relief:

- A. An order permitting this action to proceed as collective actions;
- B. Unpaid wages (including overtime wages) and prejudgment interest to the fullest extent permitted under federal and state law;
- C. Liquidated and treble damages to the fullest extent permitted under the

FLSA and MWA;

D. Litigation costs, expenses, and attorneys' fees to the fullest extent permitted under federal and state law; and

E. Such other and further relief as this Court deems just and proper.

Date: January 5, 2014

Brandt P. Milstein, Esq.
MILSTEIN LAW OFFICE
595 Canyon Boulevard
Boulder, CO 80302
Phone: (303) 440-8780

Peter Winebrake*
R. Andrew Santillo*
Mark J. Gottesfeld*
WINEBRAKE & SANTILLO, LLC
715 Twining Road, Suite 211
Dresher, PA 19025
Phone: (215) 884-2491

**pro hac vice* admission anticipated

Attorneys for Plaintiff