IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MATTHEW KREAMER, *et al.*, Plaintiff,	:	4:15-cv-01075-MWB
v.	:	
GRANT PRODUCTION TESTING SERVICES, INC., Defendant.	:	

PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT

Originating Plaintiff Matthew Kreamer ("Plaintiff"), on behalf of himself and the certified class/collective, respectfully moves, pursuant to Fed. R. Civ. P. 15(a), for leave to file the accompanying Amended Complaint. See Doc. 55-1; see also Doc. 55-2 (redlined version).

To date, Plaintiff has been pursuing his Fair Labor Standards Act ("FLSA") and Pennsylvania Minimum Wage Act ("PMWA") claims solely against Defendant Grant Production Testing Services, Inc. ("Grant Inc."). However, in recently filed papers, Grant Inc.'s former counsel informed the Court and Plaintiff's counsel for the first time that Grant Inc. has been winding down its business operations and may not be financially viable going forward. In light of this revelation – which comes *after* Plaintiff's counsel and the judicial system have

invested significant time and resources on this litigation – Plaintiff is concerned that he and other members of the certified class/collective may be severely prejudiced unless additional individuals and a corporate entity are added to this litigation as named defendants. Thus, the proposed amended complaint seeks to join the following as additional named defendants: (i) a related company called Grant Production Testing Services Ltd. ("Grant Ltd.") (ii) Cathy Mason, a human resources executive for both Grant Inc. and Grant Ltd.; and (iii) Grant Stevens, the chief executive officer of both Grant Inc. and Grant Ltd. As discussed in the accompanying brief, the record evidence indicates that each of these additional defendants can be liable to Plaintiff and the class/collective under the FLSA/PMWA's especially broad definition of "employer."

WHEREFORE, Plaintiff respectfully requests the Court grant this motion and sign and enter the accompanying proposed order.

Dated: August 5, 2016

Respectfully submitted,

/s/ Mark J. Gottesfeld
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R. Andrew Santillo
Mark J. Gottesfeld
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Dresher, PA 19025

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Plaintiff's Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MATTHEW KREAMER, on behalf of himself and similarly situated employees,	ELECTRONICALLY FILED ON August 5, 2016
Plaintiff,	4:15-cv-01075-MWB
v.	CLASS/COLLECTIVE ACTION
GRANT PRODUCTION TESTING SERVICES, INC., GRANT PRODUCTION TESTING SERVICES LTD., CATHY MASON, and GRANT STEVENS	
Defendants.	

COMPLAINT – CLASS/COLLECTIVE ACTION

Plaintiff Matthew Kreamer ("Plaintiff"), on behalf of himself and similarly situated employees, brings this class/collective action lawsuit against Defendants Grant Production Testing Services, Inc., Grant Production Testing Services Ltd., Cathy Mason, and Grant Stevens (collectively "Defendants"), seeking all available relief under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq*., and the Pennsylvania Minimum Wage Act ("PMWA"), 43 P.S. §§ 333.101, *et seq*. Plaintiff's FLSA claim is asserted as a collective action under FLSA Section 16(b), 29 U.S.C. § 216(b), while his PMWA claim is asserted as a class action under Federal

Rule of Civil Procedure 23.[1]

JURISDICTION AND VENUE

1. Jurisdiction over the FLSA claim is proper under 29 U.S.C. § 216(b) and 28 U.S.C. § 1331.

2. Jurisdiction over the PMWA claim is proper under 28 U.S.C. § 1367.

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

PARTIES

4. Plaintiff is an individual residing in Cogan Station, Pennsylvania (Lycoming County).

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

6. Defendant Grant Production Testing Services, Inc. ("Grant Inc.") is a corporate entity registered to do business in the Commonwealth of Pennsylvania, and regularly conducting business within this judicial district. Specifically, Grant Inc. has its headquarters and a shop located in Williamsport, PA.

7. Defendant Grant Production Testing Services Ltd. ("Grant Ltd.") is a corporate entity headquartered in Canada.

8. Defendant Cathy Mason ("Mason") is an individual residing,

[1] FLSA collective action claims and Rule 23 class action claims may proceed together in the same lawsuit. *See Knepper v. Rite Aid Corp.*, 675 F.3d 249 (3d Cir. 2012).

upon information and belief, in Canada.

9. Defendant Grant Stevens ("Stevens") is an individual residing, upon information and belief, in Canada.

10. Defendants are employers covered by the FLSA and the PMWA.

FACTS

11. Grant Inc. and Grant Ltd. are companies specializing in oil and gas well production testing. Grant Inc. and Grant Ltd. were joint employers of Plaintiff and other Field Employees. Grant Inc. and Grant Ltd. jointly employ high-ranking employees, such as Mason and Stevens, whom are directly responsible for the corporate policies and practices challenged in this lawsuit. Grant Inc. and Grant Ltd. exerted significant control over Plaintiff and other Field Employees and failed to pay Plaintiff and other Field Employees overtime premium for hours worked over 40 per week.

12. Mason is the HR Payroll Controller for Grant Inc. and the HR Payroll Manager for Grant Ltd. Throughout her employment, Mason has exerted significant control over Plaintiffs and other Field Employees and was personally aware of and personally responsible for the failure to pay Plaintiff and other Field Employees overtime premium for hours worked over 40 per week.

13. Stevens is the President for both Grant Inc. and Grant Ltd.

Stevens had operational control over Grant Inc. and Grant Ltd. and made decisions concerning their day-to-day operations. Stevens exerted significant control over Plaintiff and other Field Employees and was responsible for the failure to pay Plaintiff and other Field Employees overtime premium for hours worked over 40 per week.

14. During the three-year time period relevant to this lawsuit, Defendants have employed over thirty employees who perform work at oil and gas rigs located throughout the United States, including within this judicial district. These individuals hold various job titles such as, for example, "Flowback Operator," "Well Test Operator", "Operator," "Night Operators," "Supervisors," "Senior Supervisors" and are referred to herein as "Field Employees."

15. Plaintiff was employed by Defendants as a Field Employee from approximately January 2014 until May 2015.

16. Defendants paid Plaintiff and other Field Employees on a day-rate basis.

17. For example, Defendants paid Plaintiff a day rate of $220.00 for "Field Day[s]" and $110.00 for "Shop Day[s]."

18. Each Field Day shift typically lasts approximately 12 hours, while each Shop Day shift lasts approximately 8 hours.

19. Plaintiff and other Field Employees regularly work over 40 hours per week.

20. For example, during the sixteen day period ending January 31, 2014,[2] Defendants credited Plaintiff with working 14 Field Days and 2 Shop Days, which represents approximately 184 hours.

21. Even though both the FLSA and the PMWA entitle day-rate employees to extra overtime premium compensation for hours worked over 40 per week, *see*, *e.g.*, 29 C.F.R. § 778.112; 34 Pa. Code § 231.43(b), Defendants did not pay Plaintiff and other Field Employees any extra overtime premium compensation for their overtime hours.

22. By failing to pay the overtime premium to Plaintiff and other Field Employees, Defendants have acted willfully and with reckless disregard of clearly applicable FLSA provisions.

CLASS/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 individuals employed by Defendants in Pennsylvania during any time between June 1, 2012 and July 15, 2015 and assigned (in whole or in part) to work at oil or gas facilities located in the United States.

[2] Defendants pay their Field Employees on a "semi-monthly" basis rather than weekly or bi-weekly.

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 PMWA claim as a class action pursuant to Federal Rule of Civil Procedure 23 on behalf of all individuals employed by Defendants in Pennsylvania during any time between June 1, 2012 and July 15, 2015 and assigned (in whole or in part) to work at oil or gas facilities located in the Commonwealth of Pennsylvania.

26. Class action treatment of Plaintiff's PMWA claim is appropriate because, as alleged below, all of Federal Rule of Civil Procedure 23's class action requisites are satisfied.

27. The class includes 34 individuals, all of whom are readily ascertainable based on Defendants' standard payroll records and are so numerous that joinder of all class members is impracticable.

28. Plaintiff is a class member, his claims are typical of the claims of other class members, and he has no interests that are antagonistic to or in conflict with the interests of other class members.

29. Plaintiff will fairly and adequately represent the class members

and their interests, and he has retained competent and experienced counsel who will effectively represent the class members' interests.

30. Questions of law and fact are common to all class members, because, *inter alia,* this action concerns Defendants' companywide timekeeping and pay policies, as summarized herein. The legality of these policies will be determined through the resolution of generally applicable legal principles to a common set of facts.

31. Class certification is appropriate under Federal Rule of Civil Procedure 23(b)(3) because common questions of law and fact predominate over questions affecting only individual class members and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation.

COUNT I
(Alleging FLSA Violations)

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

33. The FLSA requires that employees receive overtime premium compensation "not less than one and one-half times" their regular pay rate for hours worked over 40 per week. *See* 29 U.S.C. § 207(a)(1).

34. Defendants violated the FLSA by failing to pay Plaintiff and the proposed FLSA collective any overtime premium for hours worked over 40

per week.

COUNT II
(Alleging PMWA Violations)

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

36. The PMWA requires that employees receive overtime premium compensation "not less than one and one-half times" the employee's regular pay rate for hours worked over 40 per week. *See* 43 P.S. § 333.104(c).

37. Defendants violated the PMWA by failing to pay Plaintiff and other Rule 23 class members any overtime premium for hours worked over 40 per week.

PRAYER FOR RELIEF

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

A. An order permitting this action to proceed as a collective and class action;

B. Prompt notice, pursuant to 29 U.S.C. § 216(b), of this litigation to all members of the FLSA collective informing them of this action and permitting them to join (or "opt-in" to) this action;

C. Unpaid wages and prejudgment interest to the fullest extent

permitted under federal and state law;

D. Liquidated damages to the fullest extent permitted under the FLSA;

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

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

JURY TRIAL DEMANDED

Plaintiff demands a jury trial as to all claims so triable.

Date: August 5, 2016

Respectfully,

/s/ Mark J. Gottesfeld
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*admitted *pro hac vice*

Plaintiff's Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MATTHEW KREAMER, on behalf of himself and similarly situated employees, Plaintiff, v. GRANT PRODUCTION TESTING SERVICES, INC.,~~,~~ GRANT PRODUCTION TESTING SERVICES LTD., CATHY MASON, and GRANT STEVENS Defendants.	~~CIVIL ACTION~~ ELECTRONICALLY FILED ON ~~June 1, 2015~~August 5, 2016 4:15-cv-01075-MWB CLASS/COLLECTIVE ACTION

COMPLAINT – CLASS/COLLECTIVE ACTION

Plaintiff Matthew Kreamer ("Plaintiff"), on behalf of himself and similarly situated employees, brings this class/collective action lawsuit against Defendants Grant Production Testing Services, Inc., Grant Production Testing Services Ltd., Cathy Mason, and Grant Stevens (collectively "Defendants"), seeking all available relief under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq*., and the Pennsylvania Minimum Wage Act ("PMWA"), 43 P.S. §§ 333.101, *et seq*. Plaintiff's FLSA claim is asserted as a collective action under FLSA Section 16(b), 29 U.S.C. § 216(b), while his PMWA claim is asserted as a class action under Federal

Rule of Civil Procedure 23.[1]

JURISDICTION AND VENUE

1. Jurisdiction over the FLSA claim is proper under 29 U.S.C. § 216(b) and 28 U.S.C. § 1331.

2. Jurisdiction over the PMWA claim is proper under 28 U.S.C. § 1367.

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

PARTIES

4. Plaintiff is an individual residing in Cogan Station, Pennsylvania (Lycoming County).

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

6. Defendant Grant Production Testing Services, Inc. ("Grant Inc.") is a corporate entity registered to do business in the Commonwealth of Pennsylvania, and regularly conducting business within this judicial district. Specifically, Grant Inc. has its headquarters and a shop located in Williamsport, PA.

7. Defendant Grant Production Testing Services Ltd. ("Grant Ltd.") is a corporate entity headquartered in Canada.

8. Defendant Cathy Mason ("Mason") is an individual residing,

[1] FLSA collective action claims and Rule 23 class action claims may proceed together in the same lawsuit. *See Knepper v. Rite Aid Corp.*, 675 F.3d 249 (3d Cir. 2012).

upon information and belief, in Canada.

9. Defendant Grant Stevens ("Stevens") is an individual residing, upon information and belief, in Canada.

~~7~~10. Defendant~~s is an~~ are employer~~s~~ covered by the FLSA and the PMWA.

FACTS

~~8~~11. ~~Defendant~~ Grant Inc. and Grant Ltd. are companies ~~is a company~~ specializing in oil and gas well production testing. Grant Inc. and Grant Ltd. were joint employers of Plaintiff and other Field Employees. Grant Inc. and Grant Ltd. jointly employ high-ranking employees, such as Mason and Stevens, whom are directly responsible for the corporate policies and practices challenged in this lawsuit. Grant Inc. and Grant Ltd. exerted significant control over Plaintiff and other Field Employees and failed to pay Plaintiff and other Field Employees overtime premium for hours worked over 40 per week.

12. Mason is the HR Payroll Controller for Grant Inc. and the HR Payroll Manager for Grant Ltd. Throughout her employment, Mason has exerted significant control over Plaintiffs and other Field Employees and was personally aware of and personally responsible for the failure to pay Plaintiff and other Field Employees overtime premium for hours worked

over 40 per week.

13. Stevens is the President for both Grant Inc. and Grant Ltd. Stevens had operational control over Grant Inc. and Grant Ltd. and made decisions concerning their day-to-day operations. Stevens exerted significant control over Plaintiff and other Field Employees and was responsible for the failure to pay Plaintiff and other Field Employees overtime premium for hours worked over 40 per week.

~~9~~14. During the three-year time period relevant to this lawsuit, Defendants ha~~ves~~ employed ~~hundreds of employees~~ over thirty employees who perform work at oil and gas rigs located throughout the United States, including within this judicial district. These individuals hold various job titles such as, for example, "Flowback Operator,"~~[2]~~ "Well Test Operator", "Operator," "Night Operators," "Supervisors," "Senior Supervisors" and are referred to herein as "Field Employees."

~~10~~15. Plaintiff was employed by Defendants as a Field Employee from approximately January 2014 until May 2015.

~~11~~16. Defendants paid Plaintiff and other Field Employees on a day-rate basis.

~~[2] In the absence of discovery, Plaintiff is not aware of each of the formal job titles that Defendant has given to every employee performing work at oil and gas rigs throughout the United States.~~

~~12~~17. For example, Defendants paid Plaintiff a day rate of $220.00 for "Field Day[s]" and $110.00 for "Shop Day[s]."

~~13~~18. Each Field Day shift typically lasts approximately 12 hours, while each Shop Day shift lasts approximately 8 hours.

~~14~~19. Plaintiff and other Field Employees regularly work over 40 hours per week.

~~15~~20. For example, during the sixteen day period ending January 31, 2014,[3] Defendants credited Plaintiff with working 14 Field Days and 2 Shop Days, which represents approximately 184 hours.

~~16~~21. Even though both the FLSA and the PMWA entitle day-rate employees to extra overtime premium compensation for hours worked over 40 per week, *see*, *e.g.*, 29 C.F.R. § 778.112; 34 Pa. Code § 231.43(b), Defendants did not pay Plaintiff and other Field Employees any extra overtime premium compensation for their overtime hours.

~~17~~22. By failing to pay the overtime premium to Plaintiff and other Field Employees, Defendants ~~has~~have acted willfully and with reckless disregard of clearly applicable FLSA provisions.

CLASS/COLLECTIVE ACTION ALLEGATIONS

~~18~~23. Plaintiff brings his FLSA claim as a collective action pursuant to

[3] Defendants pay~~s~~ their~~its~~ Field Employees on a "semi-monthly" basis rather than weekly or bi-weekly.

FLSA Section 16(b), 29 U.S.C. § 216(b), on behalf of all individuals employed by Defendants in Pennsylvania during any time between June 1, 2012 and July 15, 2015 ~~within the past three years~~ and assigned (in whole or in part) to work at oil or gas facilities located in the United States.

~~19~~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.

~~20~~25. Plaintiff brings his PMWA claim as a class action pursuant to Federal Rule of Civil Procedure 23 on behalf of all individuals employed by Defendants in Pennsylvania during any time between June 1, 2012 and July 15, 2015 ~~within the past three years~~ and assigned (in whole or in part) to work at oil or gas facilities located in the Commonwealth of Pennsylvania.

~~21~~26. Class action treatment of Plaintiff's PMWA claim is appropriate because, as alleged below, all of Federal Rule of Civil Procedure 23's class action requisites are satisfied.

~~22~~27. The class~~, upon information and belief,~~ includes ~~over 100~~ 34 individuals, all of whom are readily ascertainable based on Defendant~~'~~s' standard payroll records and are so numerous that joinder of all class

members is impracticable.

~~23~~28. Plaintiff is a class member, his claims are typical of the claims of other class members, and he has no interests that are antagonistic to or in conflict with the interests of other class members.

~~24~~29. Plaintiff will fairly and adequately represent the class members and their interests, and he has retained competent and experienced counsel who will effectively represent the class members' interests.

~~25~~30. Questions of law and fact are common to all class members, because, *inter alia,* this action concerns Defendant~~'~~s' companywide timekeeping and pay policies, as summarized herein. The legality of these policies will be determined through the resolution of generally applicable legal principles to a common set of facts.

~~26~~31. Class certification is appropriate under Federal Rule of Civil Procedure 23(b)(3) because common questions of law and fact predominate over questions affecting only individual class members and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation.

COUNT I
(Alleging FLSA Violations)

~~27~~32. All previous paragraphs are incorporated as though fully set forth herein.

~~28~~33. The FLSA requires that employees receive overtime premium compensation "not less than one and one-half times" their regular pay rate for hours worked over 40 per week. *See* 29 U.S.C. § 207(a)(1).

~~29~~34. Defendant~~s~~ violated the FLSA by failing to pay Plaintiff and the proposed FLSA collective any overtime premium for hours worked over 40 per week.

COUNT II
(Alleging PMWA Violations)

~~30~~35. All previous paragraphs are incorporated as though fully set forth herein.

~~31~~36. The PMWA requires that employees receive overtime premium compensation "not less than one and one-half times" the employee's regular pay rate for hours worked over 40 per week. *See* 43 P.S. § 333.104(c).

~~32~~37. Defendant~~s~~ violated the PMWA by failing to pay Plaintiff and other Rule 23 class members any overtime premium for hours worked over 40 per week.

PRAYER FOR RELIEF

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

A. An order permitting this action to proceed as a collective and

class action;

B. Prompt notice, pursuant to 29 U.S.C. § 216(b), of this litigation to all members of the FLSA collective informing them of this action and permitting them to join (or "opt-in" to) this action;

C. Unpaid wages and prejudgment interest to the fullest extent permitted under federal and state law;

D. Liquidated damages to the fullest extent permitted under the FLSA;

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

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

JURY TRIAL DEMANDED

Plaintiff demands a jury trial as to all claims so triable.

Date: ~~June 1, 2015~~August 5, 2016

Respectfully,

/s/ ~~R. Andrew Santillo~~Mark J. Gottesfeld
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*admitted *pro hac vice* ~~admission anticipated~~

Plaintiff's Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MATTHEW KREAMER, Plaintiff, v. GRANT PRODUCTION TESTING SERVICES, INC., Defendant.	:	4:15-cv-01075-MWB

ORDER

AND NOW, this _____ day of _____, 2016, upon consideration of Plaintiffs' "Motion for Leave to Amend the Complaint" ("Motion") (Doc. 55), Plaintiffs' supporting brief and exhibits (Doc. 56), and all other papers and proceedings herein, it is hereby **ORDERED** that the Motion is **GRANTED** and that the Clerk of Court shall: (1) file the proposed Amended Complaint (Doc. 55-1) and (2) add Grant Production Testing Services Ltd., Cathy Mason, and Grant Stevens as defendants to this action.

_____
HON. MATTHEW W. BRANN
UNITED STATES DISTRICT JUDGE

CERTIFICATION OF NON-CONCURRENCE

I declare, subject to the penalty of perjury and pursuant to Local Civil Rule 208.2(d), that Plaintiffs' counsel was unable to obtain the concurrence of Defendant Grant Production Testing Services, Inc. concerning this motion due to the withdrawal of its counsel on June 27, 2016. *See* Doc. 45.

Date: August 5, 2016

/s/ Mark J. Gottesfeld
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MATTHEW KREAMER, Plaintiff, v. GRANT PRODUCTION TESTING SERVICES, INC., Defendant.	:	4:15-cv-01075-MWB

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR LEAVE TO AMEND THE COMPLAINT

Original Plaintiff Matthew Kreamer ("Plaintiff") on behalf of himself and the conditionally certified class and collective (collectively "Plaintiffs"), by and through their undersigned counsel, respectfully submit this brief in support of their Motion for Leave to Amend the Complaint ("Motion") (Doc. 55).

To date, Plaintiff has been pursuing his Fair Labor Standards Act ("FLSA") and Pennsylvania Minimum Wage Act ("PMWA") claims solely against Defendant Grant Production Testing Services, Inc. ("Grant Inc."). However, in recently filed papers, Grant Inc.'s former counsel informed the Court and Plaintiff's counsel for the first time that Grant Inc. has been winding down its business operations and may not be financially viable going forward. In light of this revelation – which comes *after* Plaintiff's counsel and the judicial system have invested significant time and resources on this litigation – Plaintiff is concerned

that he and other members of the certified class/collective may be severely prejudiced unless additional individuals and a corporate entity are added to this litigation as named defendants. Thus, the proposed amended complaint seeks to join the following as additional named defendants: (i) a related company called Grant Production Testing Services Ltd. ("Grant Ltd.") (ii) Cathy Mason, a human resources executive for both Grant Inc. and Grant Ltd.; and (iii) Grant Stevens, the chief executive officer of both Grant Inc. and Grant Ltd. As discussed below, the record evidence indicates that each of these additional defendants can be liable to Plaintiff and the class/collective under the FLSA/PMWA's especially broad definition of "employer."

I. Procedural History

A. The lawsuit was filed and Grant Inc.'s Counsel Entered Their Appearance

Plaintiff filed this lawsuit on June 1, 2015 solely against Grant Inc. asserting claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.*, and the Pennsylvania Minimum Wage Act ("PMWA"), 43 P.S. §§333.101, *et seq.* on behalf of himself and other "Field Employees."[1] *See* Doc. 1. Grant Inc. is a

[1] Field Employees held job titles such as "Well Test Operators," "Operators," "Night Operators," "Supervisors," and "Senior Supervisors." *See* Cathy Mason Deposition ("Mason Deposition) at 15:4-15:10 attached hereto as Exhibit A; Grant Inc.'s Responses to Plaintiffs' Interrogatory Requests at No. 7 attached hereto as Exhibit B.

company specializing in oil and gas well production testing. *See* Plaintiff's Complaint (Doc. 1) at ¶ 8; Defendant's Answer (Doc 13) at ¶ 8. This lawsuit concerns Grant Inc.'s company-wide policy of paying Plaintiffs a fixed amount (or "day rate" for each day worked. *See* Complaint at ¶¶ 11-12. Grant Inc. does not dispute this policy. *See* Answer ¶¶ 11-12. As a result of this policy, Plaintiffs allege that Grant Inc. failed to pay overtime premium compensation to Plaintiffs for hours worked over 40 in a workweek as required by the FLSA and PMWA. *See* 29 C.F.R. § 778.112; 34 Pa. Code § 231.43(b). Counsel for Grant Inc. entered their appearance in this lawsuit, *see* Docs. 10 and 12, and filed an Answer on July 6, 2015. *See* Doc. 13.

B. The parties engage in discovery and Plaintiffs obtain evidence that Grant Inc. changed it pay practices as a result of this lawsuit

Following the Rule 16 conference with the Court, the parties engaged in discovery in advance of Plaintiffs' motion for class certification and conditional certification. Grant Inc. served responses to Plaintiffs' written discovery and produced responsive documents on September 4, 2015. Plaintiffs took a deposition pursuant to Rule 30(b)(6) on September 15, 2015 of Grant Inc.'s HR Payroll Controller Cathy Mason ("Mason"). Mason testified that in response to this lawsuit, Grant Inc. abandoned its day-rate pay practices in July 2015 and started paying its Field Employees on an hourly basis including overtime premium pay for

hours over 40. *See* Mason Dep. (Exhibit A) at 36:11-36:20; 37:14-38:13; 7:7-7:11.[2]

C. Plaintiffs file their motion for class certification and conditional certification

Plaintiffs filed their motion in support of class certification of the PMWA class and conditional certification of the FLSA collective on December 18, 2015, *see* Doc. 28, and Plaintiffs filed their supporting brief on December 30, 2015, *see* Doc. 29. While Grant Inc. did not concur in this motion, it ultimately filed a notice of non-opposition on January 13, 2016. *See* Doc. 32.

D. The Court grants Plaintiffs' motion for class certification and conditional certification

On February 1, 2016, the Court granted Plaintiffs' motion for class certification and conditional certification and entered an Order certifying the following class/collective: "All field employees who worked for Grant Production Testing Services, Inc. in Pennsylvania during any time between June 1, 2012 and July 15, 2015." *See* Doc. 33. The Court issued an Order finalizing the language of

[2] The Court referred this case to mediation and assigned Attorney Katherine Oliver as the mediator on August 4, 2015. *See* Doc. 20. A mediation was scheduled for November 11, 2015. However, Grant Inc. canceled the mediation on November 10, 2015.

the class/collective notice form on May 11, 2016. *See* Doc. 38.[3]

E. Twenty (20) individuals join the conditionally certified FLSA collective and thirty-three individuals are part of the certified PMWA class

On May 25, 2016, the Court-approved notice was mailed out to all individuals who worked as Field Employees for Grant Inc. in the past three years along with a "Consent to Become Party Plaintiff" form ("consent form") so that they could join the FLSA collective pursuant to 16(b) of the FLSA. Prior to this mailing, seven (7) individuals opted-in to this lawsuit to join the FLSA collective. *See* Docs. 6-8, 22, 25-26, and 31. Thirteen (13) additional individuals submitted consent forms in response to the May 25, 2016 mailing. *See* Docs. 39-44, 46-47, 49-50, 52-54. Thus, to date, in addition to Plaintiff, twenty (20) other individuals have opted-in to this lawsuit pursuant to section 16(b) of the FLSA. Moreover, Plaintiff's Rule 23 class (in which all individuals who were employed by Grant Inc. as Field Employees in the past three years are class members unless they "opt-out") consists of 33 individuals, in addition to Plaintiff.

[3] Counsel for both parties discussed the proposed notice form to be sent to prospective members of the Class/Collective. Due to minor disagreements over some language in the proposed notice form, the parties filed separate briefs submitting their respective positions on the notice language. *See* Docs. 34-37. The Court issued an order resolving those differences on May 11, 2016. *See* Doc. 38.

F. On June 27, 2016, this Court and Plaintiffs' counsel learned for the first time that Grant Inc. had ceased operations and is in the process of dissolution

On June 27, 2016, Grant Inc.'s counsel moved to withdraw as counsel in this lawsuit informing the Court and the undersigned counsel for the first time that Grant Inc. "ceased operations on August 24, 2015 and is in the process of dissolution." Doc. 45 at ¶ 5. This Court granted Grant Inc.'s counsel's motion on July 6, 2016. *See* Doc. 51. Prior to this filing, neither the Court nor Plaintiffs' counsel had any reason to believe that Grant Inc.'s business operations were in jeopardy. In fact, by all accounts, until counsel filed its motion to withdraw, Grant Inc. was actively litigating this case. Discovery had been exchanged, the class/collective was certified, notice was sent, and mediation was being explored. In sum, this lawsuit bore none of the hallmarks of a financially stressed employer defendant.

II. Legal Standard for Amendment of the Complaint

Under Federal Civil Rule 15, when 21 days have passed after service of a responsive pleading, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). In this circuit, the "touchstone" for deciding whether or not to grant leave to amend is whether the

opposing party will be unduly prejudiced. *See Evans Prods. Co. v. West Am. Ins. Co.*, 736 F.2d 920, 924 (3d Cir. 1984) ("The primary consideration in determining whether leave to amend under [Rule 15] should be granted is prejudice to the opposing party."). Where there is no prejudice to the opposing party, a motion for leave to amend a pleading should be liberally granted. *See Long v. Wilson*, 393 F.3d 390, 400 (3d Cir. 2004).[4]

III. The Broad Definition of Employer

The FLSA's definition of "employer" is among the broadest ever enacted and includes "any person acting directly or ***indirectly*** in the interest of the employer in relation to an employee." 29 U.S.C. § 203(d) (emphasis supplied);[5] *In re: Enterprise Rent-A-Car Wage & Hour Employment Litigation*, 683 F.3d 462, 467-68 (3d Cir. 2012) ("The Supreme Court has even gone so far as to acknowledge that the FLSA's definition of an employer is the broadest definition

[4] *See also Williams v. Exeter Township*, 2012 U.S. Dist. LEXIS 42217, *13 (M.D. Pa. March 27, 2012) ("In the absence of a finding of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility of amendment, it is an abuse of discretion to deny leave to amend."); *F.P. Corp. v. Ken Way Transp.*, 1992 U.S. Dist. LEXIS 3576, *3 (E.D. Pa. Mar. 17, 1992) ("allowing the amendment [to add new parties] will not unduly delay the final adjudication of this action and promotes the policy of avoiding piecemeal litigation.").

[5] Pennsylvania's law's definitions are consistent with those of the FLSA. *See* 43 Pa. Stat.§ 333.103(f) & (g).

that has ever been included in any one act.") (internal quotations omitted).

Both the FLSA and PMWA allow for corporate executives, supervisors, and corporate entities to be found liable to employees as "joint employers." As explained by the Third Circuit, "***multiple persons or entities*** can be responsible for a single employee's wages as 'joint employers' in certain situations." *Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 148 (3d Cir. 2014) (emphasis supplied). Joint employment exists "where two or more employers exert significant control over the same employees-- whether from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment." *In re: Enterprise*, 683 F.3d at 468 (3d Cir. 2012) (internal brackets and quotations omitted). One instance of joint employment is "where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that ***one employer*** controls, is controlled by, or ***is under common control with another employer.***" *Id.* (*quoting* 29 C.F.R. § 791.2(b)) (emphasis supplied) (internal bracket omitted).

The Third Circuit has provided a non-exhaustive list of factors to consider in determining joint employment: (1) authority to hire and fire; (2) authority to promulgate rules, assignments, conditions of employment, schedules, rate and

method of payment; (3) involvement in day-to-day supervision; and (4) actual control of employee records. *See In re: Enterprise*, 683 F.3d at 469. Significantly, the Third Circuit emphasized that these are not the only factors that should be considered:

> We emphasize, however, that these factors ***do not constitute an exhaustive list*** of all potentially relevant facts and should not be blindly applied. A determination as to whether a defendant is a joint employer must be based on a consideration of the total employment situation and the economic realities of the work relationship. Therefore, district courts should not be confined to narrow legalistic definitions and must instead consider all the relevant evidence, including evidence that does not neatly fall within one of the above factors.

Id. at 469 (emphasis original) (internal citations omitted).[6]

For example, two corporate entities have been found to be joint employers when both companies are essentially the same company or both have some involvement pertaining to the overtime violations at issue. *See Chao v. A-One Med. Servs.*, 346 F.3d 908 (9th Cir. 2003); *Perez-Benites v. Candy Brand, LLC*, 2011 U.S. Dist. LEXIS 55003, *31-32 (W.D. Ark. 2011); *McKinney v. United*

[6] Moreover, "[u]ltimate control is not necessarily required to find an employer-employee relationship under the FLSA, and even 'indirect' control may be sufficient." *Id.* at 468; *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 966 (6th Cir. 1991) ("[t]o be classified as an employer, it is not required that a party have exclusive control of a corporation's day-to-day functions.").

Stor-All Ctrs. LLC, 656 F. Supp. 2d 114, 133 (D.C. Cir. 2009); *Yaklin v. W-H Energy Servs.*, 2008 U.S. Dist. LEXIS 84807, *23-24 (S.D. Tex. Oct. 22, 2008); *Henderson v. UPMC*, 2010 Pa. Dist. & Cnty. Dec. Lexis 43, *9-11 (Allegheny Cty. C.C.P. Feb. 24, 2010).

Likewise, high-ranking employees are often found to be joint employers liable for overtime violations: "[a]side from the corporate entity itself, a company's owners, officers, or supervisory personnel may also constitute joint employers for purposes of liability under the FLSA." *Thompson*, 748 F.3d at 153 (internal quotations omitted); *see also Dole v. Elliot Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991) ("[t]he overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages."); *Ford v. Lehigh Valley Restaurant Group, Inc.*, 2015 Pa. Dist. & Cnty. Dec. LEXIS 26, *6 (Lackawanna Cty. May 8, 2015) (discussing PMWA liability of corporate executives). Similarly, individuals who are responsible for overtime violations are also potentially liable as a joint employer. *See Thompson*, 748 F.3d at 154 (individuals properly named as defendants where allegation that they were responsible for overtime violations); *Ford* , 2015 Pa. Dist. & Cnty. Dec. LEXIS 26, *6 (same); *Almaraz v. Vision Drywall & Paint, LLC*,

2014 U.S. Dist. LEXIS 66923, *35-36 (D. Nev. May 15, 2014) (same).

IV. Grant Ltd., Cathy Mason, and Grant Stevens Will Not Be Unduly Prejudiced by Plaintiffs Filing Their Proposed Amended Complaint Adding Them as Defendants

Even though the FLSA and PMWA permit a plaintiff to name corporate executives, supervisors, and closely-related corporate entities as defendants, *see* Section III *supra*, it is the Plaintiffs' counsel's practice (based on litigating hundreds of FLSA/PMWA actions) to refrain from initially naming them as defendants in the absence of a good faith belief that the plaintiffs will be prejudiced if they proceed solely against the "primary" employer. This practice generally enables the parties and the court system to avoid unnecessary dispositive motions, wasteful discovery, and the contentious litigation climate that unfolds when individual executives and managers are "personally" sued.

However, based on Grant Inc.'s counsel's recent representation to this Court, it is clear that Plaintiffs will be prejudiced if no additional entities or individuals are named as defendants in this lawsuit because Grant Inc. is purportedly in the process of dissolution and will soon be a defunct entity. Under these circumstances, Plaintiffs should be permitted to amend their Complaint to add three (3) parties (Grant Ltd., Cathy Mason, and Grant Stevens) as defendants. As discussed below, each of these parties qualify as Plaintiffs' employers under the

broad definitions in both the FLSA and PMWA.

A. Grant Ltd.

Grant Ltd. was Plaintiffs' joint employer based on the following evidence demonstrating the similarities between the two corporate entities, its significant control over Plaintiffs, and the sharing of the same decision-making employees:

- Both Grant Inc. and Grant Ltd. run the same exact type of business - oil and gas well testing. *See* Complaint at ¶ 8; Answer at ¶ 8; Mason Dep. at 9:3-9:7 (Exhibit A); Website of Grant Ltd. attached hereto as Exhibit C. The only discernible difference between the two companies is that Grant Ltd. is a Canadian corporation whereas Grant Inc. is an American corporation. *See* Mason Dep. at 7:12-7:20 (Exhibit A).
- Grant Inc. and Grant Ltd. jointly employ the same decision-making level employees who exert common control over both companies. For example, Grant Inc. and Grant Ltd. both have the same President, Grant Stevens, running their operations. *See* Mason Dep. (Exhibit A) at 11:12-11:22; Exhibit D. In this capacity, Stevens exerted significant control over Plaintiffs. *See* pp. 13-14, *infra*.
- Further, Grant Inc. and Grant Ltd. jointly employ Mason. *See* Mason Dep. at 7:7-7:24 (Exhibit A). Mason serves as the HR Payroll Controller at Grant Inc. and the HR Payroll Manager for Grant Ltd. *See id.* In these positions, Mason exerted significant control over Plaintiffs and was directly responsible for, *inter alia*, determining the payroll practices for Plaintiffs. *See* pp. 12-13, *infra*.
- The common control over Grant Inc. and Grant Ltd. is further evidenced by the fact that Mason uses the same exact email address, emason@grantpts.com , for her work with both companies. *See* Exhibits D and E.
- Moreover, Grant Inc. and Grant Ltd. both provide a nearly identical job description for "Well Test Operators" - one of the specific job titles for Field Employees. *See* Well Test Operator job descriptions attached hereto as Exhibit F. Specifically, the job description provided by both companies contains almost the exact same duties

and responsibilities in 22 separate bullet points.[7] *See id.* Indeed, Mason testified that she updated the job description at one point. *See* Mason Dep. (Exhibit A) at 20:16-20:23.

Based on the above, Plaintiffs are able to state a plausible claim that Grant Ltd. was their joint employer.

B. Cathy Mason (HR Payroll Controller and HR Payroll Manager)

Cathy Mason also exerted significant control over Plaintiffs as evidenced by her significant involvement concerning the job duties, timekeeping, payroll, and compensation practices pertaining to Plaintiffs as evidenced by:

- Mason is the HR Payroll Controller for Grant Inc. and the HR Payroll Manager for Grant Ltd. *See* Mason Dep. (Exhibit A) at 7:7-7:24.
- Mason determined the payroll practices for Plaintiffs, *see* Grant Inc.'s Interrogatory Response No. 4 (Exhibit B),
- Mason took part in decisions related to the method by which Plaintiffs were paid, *id.* at Inter. Resp. No. 2,
- Mason was directly responsible for corporate decision making related to timekeeping, compensation, and/or payroll practices. *See id.*
- Mason was identified as one of two individuals with the most knowledge concerning the number of hours that each Plaintiff worked per week, *see id.* at Inter. Resp. No. 17. Indeed, Mason entered the time worked by Plaintiffs into a time sheet. *See* Mason Dep. (Exhibit A) at 29:2-29:23.
- Mason updated the job description outlining the job duties and responsibilities for Plaintiffs who worked as Well Test Operators. *See* Mason Dep. (Exhibit A) at 20:16-20:23.

[7] The ***only*** difference in that Grant Inc.'s job description states that a Well Test Operator "Utilizes Skills Passport and Training Matrix for personal growth and opportunity" whereas Grant Ltd.'s job description states that a Well Test Operator "Utilizes field training program to develop personal job skills to the maximum."

- Mason testified as the 30(b)(6) corporate representative on behalf of Grant Inc. in this lawsuit. *See* Exhibit A.
- Mason provided answers to Grant Inc.'s interrogatory responses, *see* Inter. Resp. No. 1 (Exhibit B), and provided a sworn verification regarding the interrogatory responses on behalf of Grant Inc., *see id.*
- Mason provided a detailed sworn verification attached to Grant Inc.'s counsel's motion to withdraw as counsel asserting *inter alia* on behalf of Grant Inc. that she was authorized to provide the verification on behalf of Grant Inc., that Grant Inc. had ceased operations and was in the process of dissolution, and that Grant Inc. had requested that its counsel withdraw from this lawsuit. *See* Doc. 45.
- Mason had control over Plaintiffs' compensation records as evidenced by a sample email in which she sent a payroll document to one of the class members. *See* Exhibit E.

As a result of the above evidence, it is clear that Mason had significant control over Plaintiffs to qualify as an employer under the FLSA and PMWA.

C. Grant Stevens (President)

Grant Stevens ("Stevens"), as the President and Founder of both Grant Inc. and Grant Ltd., *see* Mason Dep. (Exhibit A) at 11:12-11:24 and Exhibit D, is also potentially liable as a joint employer because he exercised operational control over both corporate entities and Plaintiffs. For example,

- Mason reported directly to Stevens, *see* Mason Dep. (Exhibit A) at 11:12-11:24, which is significant because Mason *inter alia* determined the payroll practices for Plaintiffs, *see* Grant, Inc.'s Interrogatory Response No. 4 (Exhibit B), and took part in decisions related to the method by which Plaintiffs were paid, *id.* at Inter. Resp. No. 2.
- Plaintiffs' direct supervisors reported directly to Stevens. *See* Mason Dep. (Exhibit A) at 19:12-20:1.
- Because of Steven's operational control over both entities and because

Mason directly reported to him, Stevens was aware of and also responsible for the manner in which Plaintiffs were paid.

- Stevens provided answers to Grant Inc.'s interrogatory responses. *See* Inter. Resp. No. 1 (Ex. B).

Several courts have relied on similar evidence to find that a chief executive qualifies as an employer under the FLSA. *See Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 966 (6th Cir. 1991) (chief corporate officer was joint employer because he controlled significant aspects of the corporation).[8]

V. Conclusion

For the reasons stated above, Plaintiffs respectfully request the Court grant their Motion, and direct Plaintiffs to file with the Clerk the proposed amended complaint. *See* Doc. 55-1.

[8] *See also Ford*, 2015 Pa. Dist. & Cnty. Dec. LEXIS 26, *6 (granting motion to amend complaint to add CEO as defendant because he was in a position to change compensation policy but failed to do so); *Roberts v. Apple Sauce, Inc.*, 945 F. Supp. 2d 995, 1005 (N.D. Ind. 2013) (allegations regarding President's ownership and day-to-day control of operations sufficient to survive motion to dismiss); *Aikens v. FSG of SW Fla., Inc.*, 2006 U.S. Dist. LEXIS 62536, *6-7 (M.D. Fla. Sept. 1, 2006) (allegation that individual defendants had operational control over companies sufficient); *Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184 (S.D.N.Y. 2003) (finding founders/owners of corporations to be liable because they "exercised operational management of" the corporations "and that is sufficient under the law to satisfy the broad statutory definition of employer") (internal quotations omitted);

Date: August 5, 2016

Respectfully submitted,

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Exhibit A

In The Matter Of:

Matthew Kreamer, et al. v

Grant Production Testing Services, Inc.

CATHY MASON

September 15, 2015

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MATTHEW KREAMER, et al.,

Plaintiffs,

v.

GRANT PRODUCTION TESTING SERVICES, INC.,

Defendant. NO. 4:15-cv-01075-MWB

Tuesday, September 15, 2015

TRANSCRIPT of testimony of CATHY MASON by telephone conference call, as taken by and before Cherilyn M. McCollum, a Registered Professional Reporter, commencing at 2:02 o'clock in the afternoon.

APPEARANCES:

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ALSO PRESENT:

Katherine Ratcliffe, Notary Public

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(It is hereby stipulated and agreed by and between counsel that signing, sealing, certification and filing are waived;

It is further stipulated and agreed by and between counsel that all objections, except as to the form of the question, are reserved until the time of trial.)

CATHY MASON, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. SANTILLO:

Q. Good afternoon, Ms. Mason.

A. Good afternoon.

Q. My name is Andy Santillo. I'm an attorney at the law firm of Winebrake & Santillo, and I'm one of the attorneys representing Matthew Kreamer in a lawsuit called Matthew Kreamer versus Grant Production Testing Services pending in the Middle District of Pennsylvania. I'm going to be taking your deposition over the telephone today per the request of your counsel.

Where are you located today, Ms. Mason?

A. I'm located in Calgary, Alberta

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Canada.
Q. I know you're on the phone and I introduced myself to you a few moments ago. Is there anyone else in the room with you besides the notary who swore you in?
A. No, there's no one else.
And I have a quick question. Does she need to stay or can she leave now?
(Discussion held off the record.)
(The notary public exits.)
BY MR. SANTILLO:
Q. Ms. Mason, have you ever been deposed before?
A. Never.
Q. I'm sure your counsel gave you some background, but I'm going to be asking you a series of questions and I'm going to be asking for you to provide verbal answers to those questions. Obviously, since it's over the telephone, we can't have head shrugs and um-hmm and uh-huh type answers.
A. Okay.
Q. If you don't understand any of my questions, please let me know and I'll rephrase it.

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If you need a break at any time, please let us know, and we can take a short break. I just ask that you wait until I'm completed with the question and your answer is completed before we take that break.
Again, if there's any questions that you don't understand, please let me know.
Now, I've provided your counsel with eight documents that were marked with yellow stickers, Plaintiff's Exhibits 1 through 8. Do you have those with you?
A. Yes, I do.
Q. Okay. I'm going to ask you if you could first take what was premarked as Plaintiff's Exhibit 1. Do you see that?
A. Yes.
Q. This is called a notice of deposition and there are nine numbered paragraphs on this. Will you be able to testify to each of these topics?
A. Yes.
Q. Is there any reason why you wouldn't be able to give truthful testimony today?
A. No.

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Q. Okay. Ms. Mason, who is your current employer?
A. Grant Production Testing Services.
Q. And how long have been employed by Grant Production?
A. Ten years.
Q. Okay. And what is your current position?
A. On the Canadian side I'm HR payroll manager; on the U.S.-based side, HR payroll controller.
Q. Okay. Now, you said that -- you differentiated there between a Canadian side and a U.S. side. Is there different divisions within Grant Production Testing Services, Incorporated for those two divisions?
A. Grant Production Testing Services, Limited is the Canadian side. Grant Production Testing Services, Inc. is the American side. They are two separate entities.
Q. Okay. So it's a separate entity. And you're the controller of the Grant Production Testing Services, Inc. Is that correct?
A. Yes.

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Q. I'm going to focus my questions, when I say Grant Production, to the Grant Production Testing Services, Inc., or the U.S. entity. Can we sort of agree that that's how we're going to refer to it going forward?
A. Agreed.
Q. Okay. Where is Grant Production headquartered?
A. 2700 Lycoming Creek Road, Williamsport, Pennsylvania.
Q. Okay. Did Grant Production have any other -- strike that.
When I said headquartered, is there office space there?
A. Yes.
Q. Okay. Is there also a shop at that location in Williamsport, Pennsylvania?
A. Yes.
Q. Does Grant Production have any other similar locations, meaning office or shop space in the United States?
A. No.
Q. Okay. So the Williamsport what I'll call office is the only Grant Production facility

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in the United States?
A. Correct.
Q. Okay. Can you tell me what Grant Production does?
A. We go out to the wells and we test what's flowing back from the oil wells or the gas wells.
Q. Are those at existing well sites or are those at sites that are under construction, I guess?
A. Pre-existing well sites.
Q. Pre-existing.
Who hires Grant Production?
A. Oil and gas companies.
Q. Can you give me an example?
A. Carrizo. Inflection.
Q. How long has Grant Production had U.S. operations?
A. That would be four years.
Q. So 2011?
A. November of 2011 is when we incorporated.
Q. Was there any operations in the United States prior to November of 2011?

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A. No.
Q. Has Grant Production had any other sites in the United States besides the Williamsport, Pennsylvania site during that four-year period?
A. No.
Q. What about prior to November of 2011?
A. No.
Q. Okay. Does Grant Production have any employees in the United States?
A. Yes.
Q. Are you able to testify as to how many they've had during -- since November of 2011?
A. Since November 2011 it's approximately 42.
Q. Have those 42 employees since November of 2011, have they -- were they based at the Williamsport, Pennsylvania location?
A. Yes.
Q. Did they work outside of the state of Pennsylvania?
A. No.
Q. Are you able to give me sort of a

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breakdown of what the organizational structure is for the Grant Productions, who is the head of the company --
MR. MILLER: Andy, I'm going to object. I don't see that this is covered by the notice of deposition.
MR. SANTILLO: I'm just trying to get some basic background, Kurt, that's all.
Are you instructing your client not to answer?
MR. MILLER: What was the question?
MR. SANTILLO: Can you give me a basic breakdown of the organization, who is in charge, second in charge? That's all I'm going for.
MR. MILLER: Go ahead and answer.
A. There is myself and then there is the operations manager and then there is -- I guess you could say Grant Stevens.
Q. Okay. And Grant Stevens is the president of the company?
A. That's correct.
Q. And you report to Mr. Stevens?
A. I do.

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Q. And then is the operations manager, is that currently Adam McIver, I-v-e-r?
A. No.
Q. Who is the operations manager?
A. Shawn Pilon, P-i-l-o-n.
Q. Was Adam McIver ever the operations manager for the U.S. operations?
A. Yes.
Q. When did he cease holding that position?
A. September 15th of 2014.
Q. And then, I'm sorry, what was the name of the individual that held that position since Mr. McIver left?
A. Shawn Pilon.
Q. Okay. Ms. Mason, I'm going to ask you to pull out the exhibit that was premarked Plaintiff's Exhibit 2.
A. Okay.
Q. Do you have that in front of you?
A. Yes.
Q. Have you seen this document before?
A. Yes.
Q. I'm going to represent this is the

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complaint -- the class and collective action complaint that Matthew Creamer filed against Grant Production Testing Services. It's sort of the initiating document of the lawsuit.
Do you also have what's premarked as Plaintiff's Exhibit 3 in front of you?
A. Yes.
Q. Have you seen this document before?
A. Yes.
Q. I'm going to represent to you this is the answer that your counsel filed in response to Plaintiff's Exhibit 2, the complaint.
Did you have any role in helping your counsel draft this document?
A. Yes.
Q. You did? Was that a yes? I'm sorry.
A. Yes.
Q. Okay. Do you have what's been premarked as Plaintiff's Exhibit 4 in front of you?
A. Yes.
Q. Okay. Have you ever seen this document before?
A. Yes.

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Q. This is Responses to Plaintiff's First Interrogatories to Defendant. Can you turn to page 10 of this document?
A. Okay.
Q. And there's a -- it's titled "Verification," and I believe it says -- is that your signature on that page 10?
A. Yes.
Q. Okay. So did you assist your counsel in responding to plaintiff's interrogatory requests?
A. Yes.
Q. I'm going to pull out what was premarked Plaintiff's Exhibit 5, which looks like a list of employees.
Do you have that document in front of you?
A. Yes.
Q. Have you seen that document before?
A. Yes.
Q. Did you have any role in the creation of that document?
A. Yes.
Q. Can you tell me what that

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document -- what that list is?
A. This is the list of all of our field employees that we've had since 2012.
Q. And when you say "field employees," what job titles do those individuals have?
A. This is either operator, night operator, or supervisor.
Q. Are senior supervisors included on this list?
A. Yes.
Q. Okay. Are these individuals -- do you know how these individuals were compensated by Grant Production Services?
A. Day rate.
Q. Day rate. And what do you understand a day rate to mean?
A. It's an amount that we pay an employee for a day's work.
Q. Okay. And each of the individuals listed on Exhibit 5 were paid a day rate by Grant Production Services?
A. Yes.
Q. Okay. Have you ever heard of the job title of flowback operator?

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A. Vaguely.
Q. Okay. Does Grant Production Services employ individuals in the position of flowback operator?
A. (No response.)
Q. I'm sorry?
A. I'm sorry. It's hard to answer that because flowback is what they're doing. They're called an operator, but they're flowing back fluids. Each company can call them whatever they want. We call them operators.
Q. Fair enough.
A. Other companies, will, yes, call them flowback operator.
Q. Okay. Is there a -- let me ask you this. On this list that was marked as Exhibit 5, are shift supervisors also included on this list?
A. Yes.
Q. Okay. And what about a nightshift supervisor?
A. Yes.
Q. Okay. And you said -- you referred -- you made a reference to an operator job title. Is that considered a well test operator?

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A. Yes.
Q. Do you have what was premarked Plaintiff's Exhibit 6 in front of you?
A. Yes.
Q. Okay. This is -- this was produced by your counsel. It's called a well test operator job description, and that's what it reflects?
A. Yes.
Q. Is this the job description for what you were referring to as an operator?
A. Yes.
Q. So I just want to make sure I'm clear. If you go back to Exhibit 5, this is a list of all well test operators, night operators, supervisors, and senior supervisors who were employed by Grant Production in the United States since 2012?
A. Correct.
Q. And each of these individuals were paid on what you described as a day-rate basis?
A. Correct.
Q. And each of these individuals also worked in Pennsylvania?
A. Correct.

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Q. Are there any other individuals who worked in the United States and were paid on a day-rate basis outside of those who are -- since 2012, outside of those who are listed on Exhibit 5?
A. No.
Q. Can you tell me how this list was compiled?
A. It was pulled out of our accounting system.
Q. What is your accounting system?
A. Accpac or Sage Accpac.
Q. Okay. Is there a specific -- is it specific to the Grant Production Services U.S. operations?
A. Yes.
Q. Was there -- is there any particular code or job title that had to be inputted to pull this list together?
A. FLD, which means field.
Q. Okay. And what does that stand for?
A. Field.
Q. Okay. And you said these individuals were paid on a day-rate basis; is that correct?

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A. Yes.
Q. Did they receive any other compensation for hours worked over 40 in a workweek besides their day rate?
A. They were paid subsistence, vacation pay.
Q. Is that it?
A. Yes.
Q. And what's subsistence pay?
A. It's $45 per day that they work in the field for meals.
Q. Okay. You can put aside Exhibit 5. Do you have Exhibit 6, which was the job description for the well test operator, in front of you right now?
A. Yes.
Q. Do you see under the position it says "reports to" and it says "district manager"?
A. Correct.
Q. Who is the -- is that the same as the operations manager you identified earlier?
A. Yes.
Q. Okay. And who does the operations manager report to?

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A. The president.
Q. Okay. Have there been more than -- I know you identified two individuals as the operations or district manager for Grant Production since November of 2011. Is there -- has anybody else held that position?
A. Yes.
Q. Who else?
A. Andy Wagner.
Q. Anybody else?
A. No.
Q. Okay. Does Grant Production Services employ more than one operations or district manager at a time?
A. No.
Q. And I see down -- if you look at this exhibit document, at the bottom left-hand corner it says "July 2014." Is that when this description was drafted?
A. No, it's when it was updated.
Q. When it was updated. Do you know who updated it?
A. Myself.
Q. Okay. Did you draft the original

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job description?
A. No.
Q. Okay. Do you know who did?
A. Ron Green.
Q. Okay. Do you have separate job descriptions for the supervisor position?
A. Yes.
Q. And do you have a separate description for the night operator?
A. Yes.
Q. And then what about the senior supervisor position?
A. No, we classify that as the supervisor.
Q. Okay. And if I could take you back to Exhibit 5 real quickly. Is it Grant's policy to classify these individuals as overtime eligible or not eligible for overtime pay?
A. No.
Q. Not eligible for overtime pay?
A. No, it's not our policy to classify them.
Q. Does it have -- but you did pay each of these individuals a day rate?

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A. Correct.
Q. Does it consider any of these -- the positions that are contained on Exhibit 5 to be not eligible for overtime pay?
A. When we classify -- or didn't classify them. When we started paying them day rate, they were considered -- the overtime was considered in their day rate.
Q. Okay. So that you considered them to be -- strike that.
When did you begin paying field employees on a day-rate basis?
A. June of 2012.
Q. How did you pay them prior to June of 2012?
A. Hourly.
Q. Okay. Is it fair to say that anybody who has been employed -- strike that.
Is it fair to say that anybody who has worked as a field employee for Grant Production Services since June 2012 has been paid on a day-rate basis?
A. Yes.
Q. Is that across-the-board practice?

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A. Yes.
Q. When have you updated -- if I can turn you back to Exhibit 6. When you updated Exhibit 6 in July of 2014, was there a particular reason to do it or was it just sort of a general review of files?
A. General review.
Q. I'd like to bring your attention to what was marked as Plaintiff's Exhibit 7.
Do you have that document in front of you?
A. Yes.
Q. And there's what's called a Bates number down in the lower right-hand corner. It looks like it's GPT 000002 through 11.
Do you have each of those pages in front of you?
A. Yes.
Q. Can you tell me what this is?
A. This is Matt Kreamer's itemized paycheck per pay period.
Q. Okay. And just a little bit of housekeeping, I see there's a -- the first -- the top entry on this is redacted. Is that somebody

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besides Mr. Kreamer?
A. Yes.
Q. Okay. And do you know how this document was created?
A. It's a report pulled from Accpac.
Q. Okay. Did you pull this document?
A. Yes.
Q. So would you be able to walk me through -- we can start with Mr. Kreamer's, I guess the -- on the page GPT 2. If you could walk me through how to read this document.
A. Okay. It shows you the period is from January the 1st to January the 15th of 2014.
Q. Uh-huh.
A. Check date was January the 31st of 2014.
Q. Uh-huh.
A. Check amount was $1,062.27.
Q. Okay.
A. EFT means it was deposited into his account.
Q. Okay.
A. EFT run was number 90. Below it has a breakdown of what he was paid for. His regular

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FLD is his field days. He was paid -- I know it says hours, but it's field days of five at a rate of $220 per day.
Q. Okay.
A. He was paid $44 of vacation pay on top of that --
Q. Okay.
A. -- for total earnings of $1,144. Below that is all of his taxes for a total tax of 281.73.
Q. Okay.
A. He was then paid $200 for subsistence.
Q. Okay.
A. Which gave him the total, the 1062.27.
Q. So I just want to make sure I understand correct. The hours column, that is actually the number --
A. Days.
Q. The number of days?
A. Yes, correct.
Q. Okay. And his field rate, is that the same for all individuals holding the well

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operator position at Grant?
A. No.
Q. Okay. It differs by employee?
A. It differs by experience.
Q. By experience, okay.
And then did Mr. Kreamer also get paid a certain day rate for when he worked at the shop?
A. Yes.
Q. And was that different from the 220 a day?
A. Yes.
Q. And what was that?
A. 110.
Q. Okay. If I can turn you back to Plaintiff's Exhibit 5. Did these individuals also get paid one day rate for field work and another day rate for shop work?
A. Yes.
Q. What's the difference between field -- the field work that they -- well, strike that.
Did these individuals get a higher day rate for their field work versus their shop

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work?
A. Yes.
Q. And what is the difference between field work and shop work?
A. Length.
Q. Length meaning what?
A. Hours worked.
Q. Okay. Does location have anything to do with it?
A. No.
Q. Okay. So if someone was paid a shop rate, that just means they worked -- did they work at the shop in Williamsport, Pennsylvania?
A. Yes.
Q. Okay. And how many -- and is there a standard length of the shift when they work at the shop in Williamsport, Pennsylvania?
A. It's from 7:30 a.m. until 4:30 p.m. with an hour lunch.
Q. And what are they doing at the shop?
A. Working on equipment, cleaning equipment, getting equipment ready for a job.
Q. Okay. And then the field rate, is that -- is there a standard length of that shift?

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A. Sorry, the what?
Q. The field day rate.
A. It's typically 12 hours.
Q. Okay. And is that performed at the shop or at a well?
A. At a well.
Q. Okay. And that's for a specific client like we mentioned earlier?
A. Correct.
Q. And the shop time, is that for a specific client?
A. No.
Q. Is there any way to determine how many hours Mr. Kreamer worked based on, if we could use Exhibit 7, page 2, in this particular two-week period?
A. You could basically take the five days, times it by 12, but it's not going to be an accurate because there are days where they only worked six hours and they still get paid for 12. So by doing a rough estimate you can take the five, times it by 12 and that's how many hours.
Q. Does Grant record the hours worked on a weekly basis?

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A. No.
Q. Let me ask you this. How does -- if you could walk me through how a field worker performs their job and then that ultimately results in a pay stub. Is there a reporting -- like the reporting system, can you walk me through that?
A. Yes. The employee goes to the field, whether they're an operator, they go to the field with the rest of the crew. They have a time sheet. Their names are also put on our tickets for the customer. Then after the 15-day period from the 1st to the 15th, for example, by the 19th the time sheet is required into the office. It is -- has the date on it, the location, and under whether it was field or shop they would then put a number one. They would also put their -- if they were paid subsistence, they would put the number one under subsistence. The information is then given to the operations manager, which then signs off on it confirming they were in the field. It is then given to me. I enter their time sheet into a spreadsheet. It is then entered into Accpac, and then their pay is calculated.
Q. Does Accpac actually generate the

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checks?
A. Accpac generates the information. I put it in to the bank, which then pays them through electronic fund transfer.
Q. Okay. I just want to take a step back. So you mentioned two things: a time sheet and a ticket.
A. Yes.
Q. Are they both maintained by the Grant Production's field employees?
A. Their time sheets are maintained. The tickets the senior supervisor creates. It is then given to the customer for signature, given back to the manager, who then provides it to me. I then create an invoice.
Q. I see. And do the tickets track the days worked?
A. Yes.
Q. Okay. So you could tell if someone worked a Monday, Tuesday, Wednesday versus a Wednesday, Thursday, Friday in a particular week by the ticket?
A. More so by a date.
Q. I see. And what about with the time

Page 31

sheet?
A. The time sheet I could see if it was Sunday, Monday, Tuesday, which days, but from the 1st to the 15th then to the 16th to the last day of the month.
Q. Are the field employees, if I can harken back to Exhibit 5, are they all paid on a semimonthly basis?
A. Yes.
Q. And is there any paperwork that the employees are required to fill out when they're doing a shop day?
A. No, sir.
Q. Are there time sheets for shop days?
A. Yes, there is. The manager keeps track on a daily operation spreadsheet of who is in the field and who is in the shop.
Q. Okay. And you said you enter this data into a spreadsheet that then goes into the accounting software; is that correct?
A. Correct.
Q. Is it an Excel spreadsheet?
A. Yes.
Q. And is that then maintained on the

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computer systems for Grant Production?
A. Yes.
Q. And are you able to -- and I just want to go back here. As field employees, and I guess that would refer to those in Exhibit 5, are those individuals -- have those individuals worked on any wells outside of the state of Pennsylvania?
A. No.
Q. Okay. The individual -- the individuals who have worked as field employees since June of 2012, are they all contained in the Accpac accounting software?
A. Yes.
Q. And they would all be the individuals who were paid on this day-rate basis that we've been discussing; is that correct?
A. Correct.
Q. And their last known address, that would be able to be generated by the Accpac system?
A. Correct.
Q. So you would be able to -- so then that's how you were able to identify each of the individuals on Exhibit 5; is that correct?
A. That is correct.

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Q. And then you would also be able to determine the number -- strike that.
How would you be able to determine the individuals on Exhibit 5 how many days they worked in the field since June of 2012?
A. By exactly what I pulled for Mr. Kreamer.
Q. Okay. And that would be looking at the field rate and shop rate?
A. Correct.
Q. So you would be able to generate basically, if you were using Mr. Kreamer's payroll documents being Exhibit 7 here, you'd be able to pull that for each of the field employees identified on Exhibit 5?
A. Correct.
Q. Okay. And if you could take a look at Exhibit 7 again on the page -- the second page Bates-stamped GPT 000003.
A. Yes.
Q. And I'm looking in the far left-hand column and I see a regular FLD. Is that the field rate?
A. Yes.

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Q. And then regular SHP. Is that the shop rate?
A. Correct.
Q. And then, I'm sorry, what did you say the -- can you tell me what regular STAT is again?
A. That's if they worked a stat holiday. We give them extra money for it.
Q. What's considered a stat holiday?
A. That one there, I'm presuming down in the States -- I don't know if that would have been New Year's, I don't think so, but you have another stat holiday after New Year's in January.
Q. Okay. But is it sort of a -- like Christmas, New Year's, those types of holidays?
A. Right, correct.
Q. Okay. Then you identified the regular subsistence, that's sort of meal pay?
A. Yes, correct.
Q. And then the regular VACPD, that's vacation paid?
A. Yes, correct.
Q. Can you think of any other types of pay that would fall under that -- in that column of

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these types of payroll documents as you sit here today?
A. There would be something that's called "cells" and that's for an employee who is either a night supervisor or a day supervisor, if they use their own cell phone, they get paid for that. You would also see things such as "other," which we have given employees advances before and then we've removed the advances from a different pay.
Q. Okay. So if I could go back to Exhibit 5, I see Mr. Kreamer is one of the individuals listed there as a field employee.
A. Correct.
Q. So he would be paid the same manner by Grant Production as the other field employees you identified there; is that correct?
A. Correct.
Q. And so you would be able to determine the days that individuals were in the shop -- strike that.
You'd be able to determine based on company records, either through the accounting software or those Excel spreadsheets, the days that

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these individuals on Exhibit 5 were either in the shop or working in the field during a particular week; is that correct?
A. That's correct.
Q. And you described the way in which hours were reported for individuals for shop time and for their work in the field. Has that changed at all since November of 2011?
A. Yes, it changed June of 2012 when we went to a day rate. Prior to that we were hourly.
Q. Okay. That's a good point. So starting in June 2011 have you changed the way individuals record their days in the field versus their days in the shop, meaning with the time sheets and tickets and the spreadsheets?
A. Yes, we have.
Q. How so?
A. We -- due to this lawsuit, we have reverted the employees back to hourly, so the time sheets are now in hours instead of days.
Q. When did you start paying field employees such as though -- strike that.
Do you have Exhibit 5 in front of you?

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A. Yes.
Q. Do you know if any of those individuals are current employees?
A. Yes.
Q. Okay. When did you start -- can you tell me offhand which of those are current employees? Like is there any -- like I see some have capital letters for their entire name. Does that mean they're current employees or former?
A. No, that was just -- the person before me, the way they used to put it into -- or I shouldn't say that. The administrator, the way she used to put it into Accpac.
Q. When did you start paying field employees on an hourly basis?
A. The first pay was, I believe, August the 15th.
Q. Was that when --
A. That would be the period of July 16th through July 31st.
Q. So beginning July 16th to July 31st you started paying field employees such as the well test operators, night operators, supervisors, and senior supervisors on an hourly basis?

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A. Correct.
Q. And when they -- are you recording the number of hours that they work on a single -- in a single seven-day workweek?
A. Correct.
Q. And are they receiving overtime pay or time and a half for each hour when they work over 40 hours in a seven-day workweek starting in mid-July of 2015?
A. Yes.
Q. And is that a company-wide change for Grant Production Services in the United States?
A. Yes. Minus our office staff.
Q. Okay. Was there any kind of memos or new job descriptions that were issued to inform field employees of this change in Grant Production's compensation practices?
A. There was a job offer.
Q. A job offer? What do you mean by that?
A. It just -- for employees that were still with us or new employees it would show what their hourly rate would be.
Q. For those who are currently employed

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when Grant made this change, did they get a new job offer even though they weren't new to the position?
A. Yes.
Q. Okay. Was that by memo or was it a letter they had to sign and send back?
A. Letter they had to sign. The manager -- operations manager spoke to each one individually.
Q. In that letter was there any request that they release legal claims?
A. No.
Q. Okay. If you could just bear with me, I think I'm almost done.
Ms. Mason, I just have one more question. I appreciate your time today. You mentioned prior -- I guess prior to the change in mid-July when field employees were moved from -- from Grant Production moved from a day-rate compensation plan to an hourly compensation plan that there was a -- when they were in the shop there was a lunch period?
A. Yes.
Q. How long was that lunch period supposed to be?

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A. The employees could either take a half hour and two 15 minute breaks or one full hour.
Q. Okay. Was there any such -- was there any such period, a meal period in field days prior to the change from day rate to hourly?
A. Not set, no.
MR. SANTILLO: Okay. All right. If you could just give me one moment, I just need to take a 60-second break.
(Recess at 2:46 p.m.)
(Resumed at 2:48 p.m.)
BY MR. SANTILLO:
Q. Ms. Mason, again, thank you for your time. I just want to confirm. I know we used the term "field employees" and you testified about how Mr. Kreamer was compensated. Was that similar to each of the individuals we identified as field employees?
A. Yes.
Q. And when we say "field employees," that would include each of the individuals you've listed in Exhibit 5; is that correct?
A. That's correct.

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MR. SANTILLO: Okay. I have no further questions. Thank you for your time.

MR. MILLER: And I have no questions. Thank you.

(2:49 p.m.)

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C E R T I F I C A T E

I, Cherilyn M. McCollum, a Certified Court Reporter and Notary Public, do hereby certify that the foregoing is a true and accurate computer-aided transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I do further certify that I am neither of counsel nor attorney for any party in this action and that I am not interested in the event nor outcome of this litigation.

_____
Certified Court Reporter
XI02094
Notary Public
My commission expires 3-22-16

Dated: _____

C E R T I F I C A T E

I, Cherilyn M. McCollum, a Certified Court Reporter and Notary Public, do hereby certify that the foregoing is a true and accurate computer-aided transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I do further certify that I am neither of counsel nor attorney for any party in this action and that I am not interested in the event nor outcome of this litigation.

Cherilyn M. McCollum
Certified Court Reporter
XI02094
Notary Public
My commission expires 3-22-16

Dated: 9-16-15

C E R T I F I C A T E

I, Katherine Ratcliffe, a Notary Public, do hereby certify that, prior to the commencement of the examination, the witness and/or witnesses were sworn by me to testify to the truth and nothing but the truth at the time, place and on the date hereinbefore set forth.

Notary Public
~~My commission expires~~

Katherine Ratcliffe
Student-at-Law

Dated: Sept. 15, 2015

MATTHEW FORD and ELISABETH YUSCAVAGE, on behalf of themselves and similarly situated employees, Plaintiffs vs. LEHIGH VALLEY RESTAURANT GROUP, INC., Defendant

NO. 14 CV 3227

COMMON PLEAS COURT OF LACKAWANNA COUNTY, PENNSYLVANIA

2015 Pa. Dist. & Cnty. Dec. LEXIS 26

May 8, 2015, Decided

PRIOR HISTORY: *Ford v. Lehigh Valley Rest. Grp., Inc., 2015 Pa. Dist. & Cnty. Dec. LEXIS 11 (2015)*

COUNSEL: [*1] Peter Winebrake, Esquire R. Andrew Sintillo, Esquire Mark J. Gottesfeld, Esquire Winebrake & Sintillo, LLC, Dresher, PA, Counsel for Plaintiffs.

Richard L. Hackman, Esquire David J. Freedman, Esquire Paul W. Minnich, Esquire Barley Snyder, LLP, Lancaster, PA.

Geff Blake, Esquire Blake & Walsh, LLC, Scranton, PA, Counsel for Defendant.

JUDGES: Terrence R. Nealon, Judge.

OPINION BY: Terrence R. Nealon

OPINION

CIVIL ACTION - LAW

ORDER

The plaintiffs in this class action suit alleging violations of the Minimum Wage Act of 1968 ("MWA"), *43 P.S. § 333.102 et seq.*, and the Wage Payment and Collection Law ("WPCL") *43 P.S. § 260.1 et seq.*, have filed a motion seeking to amend their MWA claim to add the named defendant's franchisor, Red Robin Gourmet Burgers, Inc. a/k/a Red Robin International, Inc. ("Red Robin, Inc."), and defendant's Chief Executive Officer, James Ryan, ("Ryan") as defendants. (Docket Entry No. 18). The parties have filed their supporting and opposing memoranda of law, (Docket Entry Nos. 17, 21), and following the completion of oral argument on May 6, 2015, plaintiffs' motion to amend was submitted for a decision. (Docket Entry No. 19).

Plaintiffs contend that Defendant, Lehigh Valley Restaurant Group, Inc. ("Lehigh Valley"), violated the MWA's **[*2]** minimum wage provisions by allowing "expos" to share in tip pool funds even though they allegedly did not "customarily and regularly receive tips," as required by Section 3(d) of the MWA, *43 P.S. § 333.103(d)*, for a valid tip pool sharing arrangement. *See Ford v. Lehigh Valiev Restaurant Group. Inc.. 2015 Pa. Dist. & Cnty. Dec. LEXIS 11, 2015 WL 1872254 (Lacka. Co. 2015)*. Citing the MWA's definition of the word "Employer" which "includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting, directly or indirectly, in the interest of an employer in relation to any employe," *43 P.S. § 333.103(g)*, plaintiffs assert that Lehigh Valley's CEO, Ryan, could conceivably constitute a covered "employer" since he "has been a shareholder and business partner of [Lehigh Valley] since its founding in 1992," his "photograph and signature appears at the beginning of the Team Member Handbook that describes the compensation policies challenged in this lawsuit," and he

was "involved in the decisions relating to the tip pool policy that became effective January 30, 2013" and which abolished the tip pool participation of expos. (Docket Entry No. 17 at pp. 4-7, Exhibits B, C, F). Plaintiffs also maintain that Red Robin, Inc. may be deemed a covered "employer" under the MWA inasmuch as (a) Lehigh Valley's Human Resources Director, **[*3]** David Novick, "discussed proposed changes to the tip pooling practices" with Red Robin, Inc.'s Vice President of Human Resources on a currently unknown date, and (b) Mr. Novick forwarded an email to Red Robin, Inc.'s Director of Risk Management on February 12, 2014, attaching a "memo from our law firm on tipped employe issues," which memo Lehigh Valley argues is protected by the attomey-client privilege. (Id. at pp. 4, 6, Exhibits C, E).

In opposing the proffered amendment, Lehigh Valley maintains that "Mr. Ryan's involvement in the revised 2013 tip pool policy is not the issue in this case, but rather the question is whether Mr. Ryan was involved in propagating the purportedly unlawful tip pool in effect prior to January 2013." (Docket Entry No. 21 at p. 5). Quoting deposition - 2 - testimony, Lehigh Valley submits "that the initial decision to allow expos to share in the tip pool occurred" in the 1990s when "Mr. Ryan did not head the company, but rather the leadership roles were held by Steve Hanzlik and Jim Mitich." (Id. at p. 9 & Exhibit E at pp. 19-20). Lehigh Valley asserts that "plaintiffs continue to wrongfully equate certain individuals' knowledge and involvement with the 2013 revised tip pool policy **[*4]** with the implementation of the purportedly unlawful tip pool in effect prior to January 2013." (Id. at p. 9).

With respect to the proposed addition of Red Robin, Inc. as a defendant, Lehigh Valley argues that the inquiry by its Human Resources Director to Red Robin, Inc.'s Vice President of Human Resources as to "how Red Robin [Inc.] handles tip sharing...evidences that [Red Robin, Inc.] had no control over Lehigh Valley's tip sharing policy inasmuch as Mr. Novick was inquiring as to how [Red Robin, Inc.] handled its tip sharing." (Id. at p. 4). Furthermore, Lehigh Valley avers "that a February 2014 email - -sent one full year after the tip pool policy was changed" does not provide any evidence "that [Red Robin, Inc.] and Lehigh Valley are in privity with respect to the policies underlying this lawsuit." (Id.). According to Lehigh Valley, "plaintiffs' attempts to add [Red Robin, Inc.] amount to nothing more than a 'fishing expedition' without any basis in law or fact." (Id. at p. 7).

The amendment of pleadings is governed by *Pa.R.C.P. 1033* which "provides for liberal amendment of a complaint as long as it does not allege a new cause of action, violate the law or prejudice the opposing party." *Rehrer v. Youst. 2014 PA Super 87, 91 A.3d 183, 186 n.l (Pa. Super. 2014)*. "The policy underlying **[*5]** this rule of liberal leave to amend is to insure that parties get to have their cases decided on the substantive case presented, and not on legal formalities." *Hill v. Ofalt. 2014 PA Super 17, 85 A.3d 540, 557 (Pa. Super. 2014)*; *accord Dusman v. Board of Directors of Chambersburg Area School District. 2015 Pa. Commw. LEXIS 160, 2015 WL 1612018, at *6 (Pa. Cmwlth. 2015)* (stating that "pleadings may be amended at the discretion of the trial court and that amendments to pleadings will be liberally allowed to secure a determination of cases on their merits."). *Rule 1033* was amended in 2014 and "now explicitly provides that a party may amend their pleading to 'add a person as a party.'" *Hill, supra* (quoting *Pa.R.C.P. 1033*). Although a court generally should exercise its discretion to permit amendment of a pleading, where a party will be unable to state a claim on which relief could be granted, leave to amend should be denied. *Bavada Nurses. Inc. v. Com.. Department of Labor and Industry. 607 Pa. 527, 558, 8 A.3d 866, 884 (2010)*; *Schwarzwaelder v. Fox. 2006 PA Super 61, 895 A.2d 614, 621 (Pa. Super. 2006)*.

During the oral argument on May 6, 2015, Lehigh Valley confirmed that Ryan became its CEO in 2010 and that its tip pool policy at issue was not changed until 2013. The parties' oral argument also reflected that much is still unknown with regard to the communication(s) between Lehigh Valley's Human Resources Director, Mr. Novick, and Red Robin, Inc.'s Vice President of Human Resources. For example, the record does not currently indicate when that inquiry was made, **[*6]** why Mr. Novick contacted Red Robin, Inc. concerning its tip pooling practices, what response(s), if any, that Mr. Novick received to his inquiry, and whether Red Robin, Inc. played any direct or indirect role in the continuation or termination of Lehigh Valley's tip pooling policy. In that regard, it is noteworthy that counsel represented during the oral argument that Mr. Novick's discovery deposition is scheduled to be conducted during the week of May 11, 2015.

The existing record is sufficient to support the addition of Ryan as a named defendant in connection with plaintiffs' MWA claim. In his capacity as Lehigh

Valley's - 4 - CEO, Ryan was in a position to change Lehigh Valley's tip pool sharing policies in 2010, 2011 and 2012, but apparently declined to do so. *See International Ass'n of Theatrical Stage Employees. Local Union No. 3 v. Mid-Atlantic Promotions. Inc. 2004 PA Super 276, 856 A.2d 102, 105 (Pa. Super. 2004)* ("Decisions dealing with personnel matters and the expenditure of corporate funds are made by corporate officers...."), *app. denied, 583 Pa. 690, 878 A.2d 864 (2005)*. As such, Ryan arguably qualifies as an "individual...acting, directly or indirectly, in the interest of an employer in relation to any employe." *43 P.S. § 333.103(g)*. For that reason, plaintiffs' request to amend the complaint to add Ryan as a named defendant will be granted.

Red Robin, Inc.'s status as a **[*7]** putative employer under the MWA is far less clear based upon the available record. A franchisor may assume an agency relationship vis a vis its franchisee if either the franchise agreement or the parties' actual practice grants the franchisor the right to control a significant portion of the franchisee's operations or employee relations. *See Spencer v. Resorts and Spas. Ltd.. 684 F. Supp. 842, 845-847 (M.D. Pa. 1988)* (Nealon, C.J.). The circumstances surrounding Mr. Novick's communications with Red Robin, Inc.'s Vice President of Human Resources relative to its tip pool sharing practices will shed considerable light on the unresolved issue of whether Red Robin, Inc. possessed the requisite control and, therefore, could be deemed an entity "acting, directly or indirectly, in the interest of an employer in relation to any employe" for purposes of MWA liability. It is also conceivable that plaintiffs could succeed with an argument that Lehigh Valley and Red Robin, Inc. were "joint employers" of the class servers based upon the degree of control, if any, that Red Robin, Inc. exercised over the terms and conditions of their employment with Lehigh Valley. *See Myers v. Garfield & Johnson Enterprises. Inc.. 679 F. Supp. 2d 598, 606-611 (E.D. Pa. 2010)* (franchise employee's allegations were sufficient to state claim against franchisor under joint employer **[*8]** theory). However, absent further information and clarification with respect to Mr. Novick's communication(s) with Red Robin, Inc. about its tip pooling practices, a determination cannot yet be made as to whether Red Robin, Inc. may be a covered employer for purposes of the MWA. Consequently, any ruling on plaintiffs' request to add Red Robin, Inc. as a named defendant will be deferred pending the completion of Mr. Novick's deposition and the submission of supplemental argument by the parties.

AND NOW, this 8th day of May, 2015, upon consideration of "Plaintiffs' Motion to Amend the Complaint," the memoranda of law submitted by the parties, and the oral argument of counsel on May 6, 2015, and based upon the reasoning set forth above, it is hereby ORDERED and DECREED that:

1. Plaintiffs' motion to amend the complaint is GRANTED to the extent that plaintiffs are granted leave of court to amend the complaint pursuant to *Pa.R.C.P. 1033* to add James Ryan as a named defendant;

2. Any ruling on plaintiffs' motion to amend the complaint to add Red Robin Gourmet Burgers, Inc. a/k/a Red Robin International, Inc. as a named defendant is DEFERRED pending the completion of the deposition of Mr. David Novick;

3. The **[*9]** parties shall be afforded thirty (30) days from the completion of the deposition of David Novick to submit supplemental memoranda of law addressing the proffered addition of Red Robin Gourmet Burgers, Inc. a/k/a/ Red Robin International, Inc. as a named defendant; and

4. Plaintiffs' motion to add Red Robin Gourmet Burgers, Inc., a/k/a Red Robin International, Inc. as a named defendant will become ripe for disposition following the parties' submission of their supplemental memoranda of law.

BY THE COURT:

/s/ Terrence R. Nealon

Terrence R. Nealon

Henderson v. Univ. of Pittsburgh Med. Ctr.

Common Pleas Court of Allegheny County, Pennsylvania, Civil Division

February 22, 2010, Decided; February 24, 2010, Filed

NO. GD09-013303

Reporter
2010 Pa. Dist. & Cnty. Dec. LEXIS 43

MARY C. HENDERSON, an individual, on behalf of herself and others similarly situated, Plaintiff vs UPMC d/b/a the University of Pittsburgh Medical Center; UPMC Group; UPMC Presbyterian Shadyside; UPMC South Side; UPMC St. Margaret; UPMC McKeesport; UPMC Passavant; UPMC Braddock; UPMC Horizon; UMPC Northwest; UPMC Bedford Memorial; Magee-Womens Hospital of UPMC; UPMC Mercy, Defendants

Counsel: [*1] For Plaintiff: Joseph N. Kravec, Jr., Esquire, John C. Evans, Esquire, Pittsburgh, PA; Gary F. Lynch, Esquire, R. Bruce Carlson, Esquire, Stephanie K. Goldin, Esquire, New Castle, PA; Paul A. Lagnese, Esquire, Pittsburgh, PA; James M. Pietz, Esquire, Pittsburgh, PA; Ellen M. Doyle, Esquire, Pittsburgh, PA.

For UPMC, Defendant: John J. Myers, Esquire, Mariah L. Lewis, Esquire, Pittsburgh, PA.

Judges: HONORABLE R. STANTON WETTICK, JR., J.

Opinion by: R. STANTON WETTICK, JR.

Opinion

OPINION AND ORDER OF COURT

WETTICK, J.

This is a class action brought by a nurse working at UPMC Presbyterian Shadyside ("Shadyside Hospital") to recover money for alleged uncompensated work that she was required to perform. Defendants are UPMC and eleven hospitals, including the hospital (Shadyside Hospital) where Ms. Henderson works.

The complaint alleges that UPMC is a healthcare system that includes 20 hospitals, eleven of which are named defendants in this lawsuit. UPMC is the parent company of each of the eleven hospitals.

Plaintiff's claims are based on the Pennsylvania Wage Payment and Collection Law, 43 P.S. § 260.1 *et seq*., the Pennsylvania Minimum Wage Act of 1968, 43 P.S. § 333.101 *et seq*., and Pennsylvania common law.

The preliminary [*2] objections of UPMC seeking dismissal of plaintiff's claims against UPMC based on the Wage Payment and Collection Law and the Minimum Wage Act are the subject of this Opinion and Order of Court. [1]

Under the Wage Payment Law, every employer is required to pay wages within certain periods of time (43 P.S. § 260.3). Employees may sue to recover unpaid wages and counsel fees in any common pleas court (43 P.S. § 260.9a). In certain circumstances, the employee may also recover liquidated damages in an amount equal to twenty-five percent of the total amount of unpaid wages (43 P.S. § 260.10).

The Wage Payment Law defines the term *employer* as follows:

> [E]very person, firm, partnership, association, corporation, receiver or other officer of a court of this Commonwealth and any agent or officer of any of the above-mentioned classes employing any person in this Commonwealth. 43 P.S. § 260.2a.

The Law does not define the terms *employee* or *employ*.

The Minimum Wage Act establishes minimum wages which every "employer" shall [*3] pay to each of his or her employees (43 P.S. § 333.104(a)). The Minimum Wage Act provides that employees shall be paid for overtime not less than one and one-half times the employee's regular rate (43 P.S. § 333.104(c)), The Act also provides for each employer of employees to keep a true and accurate record of the hours worked by each employee and the wages paid to each employee (43 P.S. § 333.108). Under § 333.113, any employee paid by his or her employer less than the minimum wages

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[1] I wish to thank counsel for furnishing briefs that succinctly and competently present the respective positions of their clients and for their effective presentations at oral argument.

provided for by the Act may recover in a civil action the full amount of the minimum wage less the amount actually paid, together with costs and reasonable attorney fees that may be allowed by the court.

At § 333.103(f) (footnote omitted), (g), and (h), the Minimum Wage Act defines the terms *employ, employer*, and *employee* as follows:

> (f) "**Employ**" includes to suffer or *to* permit to work.
>
> (g) "**Employer**" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting, directly or indirectly, in the interest of an employer in relation to any employee.
>
> (h) "**Employee**" includes any individual employed by an employer.

In this Opinion, I consider whether UPMC [*4] comes within the above definitions of *employer* of the Wage Payment Law and/or the Minimum Wage Act based solely on allegations that UPMC, as the parent of Shadyside Hospital, required Shadyside Hospital and the other defendant hospital entities to adopt the wage policies that are the subject of plaintiffs complaint. [2]

This issue is important to both parties. If plaintiff prevails, she will claim that she is an appropriate class representative for employees of each of the defendant hospital entities that allegedly are required to use UPMC wage policies. If UPMC prevails, plaintiff can be a class representative for only Shadyside Hospital employees.

With respect to the Wage Payment Law, plaintiff raises the following argument: The definition of *employer* includes every corporation employing any person and the agent or officer of the corporation employing any person. Third persons [*5] cannot impose compensation programs. Thus, if UPMC is requiring Shadyside Hospital to adopt UPMC's compensation program, it is doing so in its capacity as an employer. According to plaintiff, there is no reason why there cannot be more than one employer within the meaning of the Wage Payment Law where more than one entity is imposing the terms and conditions of plaintiffs employment.

Alternately, plaintiff contends that when a parent and a subsidiary hold themselves out as separate entities, actions of the parent designed to further the interests of the subsidiary may be characterized as actions of an agent of the subsidiary employer.

UPMC contends that any compensation programs that it requires its hospitals to follow [3] are not imposed because of UPMC's status as the employer of persons working for these hospitals or as an agent of the hospitals. To the contrary, such policies are imposed because of a parent/subsidiary relationship between UPMC and Shadyside Hospital. If the Legislature had intended for the term *employer* to include the parent of a subsidiary, it would have said so.

I do not find merit to UPMC's position that the Legislature never intended to reach a parent corporation because the definition of *employer* does not include the word *parent*. In all likelihood, the Legislature did not include the parent of a subsidiary within the definition of *employer* because it did not intend to impose liability on a parent that exercised no control over the manner in which employees of a subsidiary would be compensated. *Compare, Ward v. Whalen*, 18 Pa. D. & C.3d 710 (1981).

When I consider only the language of the Act, I do not find the positions of either plaintiff or UPMC to be convincing. While the Wage Payment Law defines the term *employer*, the definition is not helpful. It is clear that the term *employer* is meant to be broader than a traditional definition based on the exercise of control. However, the definition provides little guidance as to the outer limits of the term *employer* Since the language of the Wage Payment Law does not provide clear direction as to whether UPMC is an employer under the Wage Payment Law for purposes of challenges to the legality of compensation policies that its hospitals are allegedly required to follow, [*7] I look to the purpose of the Law.

Recovery under the Wage Payment Law is not limited to recovery against the immediate corporate employer. Instead, the Law also allows recovery against other decision makers whose decisions resulted in unpaid wages.

In *International Association of Theatrical Stage Employees v. Mid-Atlantic Promotions, Inc.*, 2004 PA

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[2] At this stage of the litigation, I do not consider whether plaintiff would be able to raise a claim under the Wage Payment Law upon a showing that UPMC exercised control over the day-to-day operations of Shadyside Hospital, that Shadyside Hospital was not a financially independent entity, or other related theories.

[3] It appears that UPMC challenges the allegations that the policies that are the subject of plaintiff's [*6] complaint are mandated by UPMC.

Super 276, 856 A.2d 102, 105 (Pa. Super. 2004), the Superior Court explained the reason why the Wage Payment Law is intended to reach decision makers:

> On appeal to this Court, the employee argued the trial court's finding was contrary to the legislative intent and the plain meaning of the WPCL. This Court stated the purpose of the legislature holding officers or agents liable:
>
> > [W]as to subject these persons to liability in the event that a corporation or similar entity failed to make wage payments. Its reason for doing so is obvious. Decisions dealing with personnel matters and the expenditure of corporate funds are made by corporate officers and it is far more likely that the limited funds of an insolvent corporation will be used to pay wages and that a work force will be reduced while the corporation is still capable of meeting its obligations to its employees [*8] if personal liability is imposed on the persons who make these decisions.
>
> *Id*. at 343-44, 568 A.2d 682 (quoting *Laborers Combined Funds of Western Pennsylvania v. Mattei*, 359 Pa.Super. 399, 518 A.2d 1296 (1986)). Thus, the *Mohney* Court reasoned there is no basis for liability under the WPCL, if there is no indication that a defendant "exercised a policy-making function in the company." *Id*. at 345, 568 A.2d 682 (adopting reasoning of *Central Pennsylvania Teamsters Pension Fund v. Burten*, 634 F.Supp. 128 (E.D.Pa. 1986)).

If UPMC's decisions resulted in employees of a subsidiary hospital not receiving wages which the subsidiary hospital should have paid, the purpose of the Law is furthered by defining the term *employer* to reach this entity which allegedly made decisions that resulted in employees not being paid for work performed. If the CEO of Shadyside Hospital made the decision to adopt these policies, he or she is liable. There is no reason why the Legislature would not have intended to reach a decision maker that is above the CEO. [4] The Law can be, and should be, construed to provide that any person, firm, partnership, association, or corporation making decisions resulting in employees [*9] not receiving wages to which they are entitled, is, for purposes of these decisions, "employing" such persons. [5]

I next consider whether UPMC is covered by the Minimum Wage Act with respect to the mandated policies that are the subject of plaintiffs complaint.

As I stated at page 2, an employee may bring a civil action against his or her employer to recover the full amount of the minimum wage less the amount actually paid. Plaintiff contends that the definition of *employer* (§ 333.102(g)) reaches UPMC. This definition includes [*10] any "corporation" or "any person or group of persons acting directly or indirectly in the interest of an employer in relation to any employee." Plaintiff contends that UPMC is "any person" acting "indirectly" in the interest of an employer in relation to any employee. [6]

UPMC, on the other hand, focuses upon the definitions of *employee* ("any individual employed by an employer") and *employ* ("to suffer or to permit to work"). It appears to contend that the Act only allows an employee, defined as an individual employed by an employer, to sue the entity that employed the employee.

The language supports plaintiff's position that UPMC is covered by the Minimum Wage Act. Plaintiff is an individual who is employed by Shadyside Hospital because only Shadyside Hospital suffers or permits plaintiff to work. Since plaintiff is an employee of Shadyside Hospital, she is entitled to bring a civil action against [*11] "her employer" which is defined to include any person acting "indirectly, in the interest of an employer in relation to any employee." 43 P.S. § 333.103(g) (emphasis added).

Furthermore, a legislative intent to reach those who have made the decision to pay an employee less than

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[4] See 1 Pa.C.S. § 1928(c) which provides that legislation shall be liberally construed to effect its objects.

[5] UPMC relies on *Commonwealth v. Pro-Pak Foods, Inc*., 65 D&C2d 494 (C P. Dauphin 1974), where the Dauphin County Common Pleas Court ruled that a parent corporation could be subject to the Wage Payment Law only upon an instrumentality theory of ignoring the corporate entity. In that case, the Commonwealth did not appear to make the arguments which plaintiff makes in this case, and I do not find the Court's reasoning to be convincing, assuming that it was addressing a situation in which the subsidiary failed to pay wages because of decisions made by the parent.

[6] The term *person*, defined in the Statutory Construction Act at 1 Pa.C.S. § 1991, provides that a *person* "includes a corporation, partnership, limited liability company, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person."

the wage payments required under the Act is shown through the use of a definition of *employer* that includes persons acting indirectly in the interest of the employer in relation to the employee. The reading of the term *employer* in this fashion is consistent with the provisions of the Minimum Wage Act governing penalties (§ 333.112(b)) which provide that any "employer or the officer or agent of any corporation" who pays or agrees to pay less than the minimum wage shall upon conviction in a summary proceeding be sentenced to pay a fine or to undergo imprisonment.

For these reasons, I enter the following Order of Court:

ORDER OF COURT

On this 22 day of February, 2010, it is ORDERED that UPMC's preliminary objections seeking dismissal of Counts I and II are overruled.

BY THE COURT:

/s/ Wettick J.

WETTICK, J.

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Perez-Benites v. Candy Brand, LLC

United States District Court for the Western District of Arkansas, El Dorado Division

May 20, 2011, Decided; May 20, 2011, Filed

No. 1:07-CV-1048

Reporter
2011 U.S. Dist. LEXIS 55003; 2011 WL 1978414

ROSALINO PEREZ-BENITES, LUIS ALBERTO ASENCIO-VASQUEZ, and PASCUAL NORIEGA-NARVAEZ, on behalf of themselves and all others similarly situated, PLAINTIFFS v. CANDY BRAND, LLC, ARKANSAS TOMATO SHIPPERS, LLC, CHARLES SEARCY, RANDY CLANTON, and BROOKS LISENBEY, DEFENDANTS

Subsequent History: Magistrate's recommendation at Perez-Benites v. Candy Brand, LLC, 2012 U.S. Dist. LEXIS 189065 (W.D. Ark., Nov. 21, 2012)

Prior History: Perez-Benites v. Candy Brand, LLC, 2010 U.S. Dist. LEXIS 115590 (W.D. Ark., Oct. 27, 2010)

Counsel: [*1] For Rosalino Perez-Benites, Individually and on behalf of all others similarly situated, Luis Alberto Asencio-Vasquez, Individually and on behalf of all others similarly situated, Pascual Noriega-Narvaez, Individually and on behalf of all others similarly situated, Plaintiffs: Daniel Werner, LEAD ATTORNEY, Southern Poverty Law Center, Immigrant Justice Project, Montgomery, AL; James M. Knoepp, LEAD ATTORNEY, Southern Poverty Law Center, Atlanta, GA; Michelle R. Lapointe, LEAD ATTORNEY, Attorney at Law, Atlanta, GA; Edward J. Tuddenham, Attorney at Law, New York, NY; John Lindsay Burnett, Lavey and Burnett, Little Rock, AR.

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For Brooks Linesby, Defendant: Charles D. Skip Davidson, Sr, LEAD ATTORNEY, Davidson Law Firm, Ltd., Little Rock, AR; Floyd Mattison Thomas, [*2] III, LEAD ATTORNEY, F. Mattison Thomas, III, Attorney at Law, El Dorado, AR; Jerry Paul Davidson, LEAD ATTORNEY, Davidson Law Firm, Little Rock, AR; Andrew L Clark, Sr., Clark Byarlay Sparks, Little Rock, AR; Hani W. Hashem, Hashem Law Firm PLC, Monticello, AR.

Judges: Robert T. Dawson, United States District Judge.

Opinion by: Robert T. Dawson

Opinion

MEMORANDUM OPINION AND ORDER

Currently before the Court are five separate motions for summary judgment. All are ripe for consideration. The first is a Motion for Summary Judgment on behalf of Defendant Randy Clanton (Docs. 194-196), for which Plaintiffs filed a Response (Doc. 220-221) and Defendant Clanton filed a Reply (Doc. 224). The second is a Motion for Partial Summary Judgment on behalf of Defendants Candy Brand, LLC, Arkansas Tomato Shippers, LLC, and Charles Searcy (Docs. 197 and 201), for which Plaintiffs filed a Response (Doc. 225). The third is an Amended Motion for Summary Judgment on behalf of Defendant Brooks Lisenbey (Docs. 198-200), for which Plaintiffs filed a Response (Docs. 226-227). The fourth is Plaintiffs' Motion for Partial Summary Judgment Related to Violations of the Fair Labor Standards Act and H-2A Employment Contracts (Docs. 203-204, 207, [*3] 208-218), for which Defendants filed Responses (Docs. 228-229, 231, 232-244), and Plaintiffs filed a Reply (Doc. 246). The fifth and final motion is Plaintiffs' Motion for Summary Judgment Related to Employer Status and Liability of Charles Searcy, Randy Clanton, Brooks Lisenbey, and Arkansas Tomato Shippers, LLC (Docs. 205-207, 208-218), for which Defendants filed Responses (Docs. 228, 230-231, 234-244), and Plaintiffs filed a Reply (Doc. 245).

As explained herein, the Court has made the following determinations:

Motion for Summary Judgment on behalf of Randy Clanton (Doc. 194) is **DENIED**;

Motion for Partial Summary Judgment on behalf of Defendants Candy Brand, LLC, Arkansas Tomato Shippers, LLC, and Charles Searcy (Doc. 197) is **DENIED**;

Amended Motion for Summary Judgment on behalf of Defendant Brooks Lisenbey (Doc. 198) is **DENIED**;

Plaintiffs' Motion for Partial Summary Judgment Related to Violations of the FLSA and H-2A Employment Contract (Doc. 203) is **GRANTED**; and

Plaintiffs' Motion for Summary Judgment Related to Employer Status and Liability of Charles Searcy, Randy Clanton, Brooks Lisenbey, and Arkansas Tomato Shippers, LLC (Doc. 205) is **GRANTED**.

I. Background

Plaintiffs are Mexican [*4] nationals who were employed in the Defendants' tomato farming and packing shed operations in and around Bradley County, Arkansas, pursuant to H-2A temporary guestworker visas. Defendants are Candy Brand, LLC, an Arkansas corporation formed by Defendant Arkansas Tomato Shippers, LLC ("ATS"), and Randy Clanton Farms, Inc. ATS is owned, in part, by Defendant Charles Searcy. Mr. Searcy served as managing member of both ATS and Candy Brand. ATS owned a tomato packing facility at Hermitage, Arkansas, which was leased to Candy Brand each year during the tomato harvest. Defendant Randy Clanton is the president and sole shareholder of Randy Clanton Farms, Inc., and a producer of tomatoes. Mr. Searcy and Mr. Clanton, along with Defendant Brooks Lisenbey formed the senior management team of Candy Brand between 2003 and 2007, sharing primary responsibility for managing the operations and jointly making decisions affecting the company. All three individual Defendants were involved in the day-to-day management of Candy Brand's tomato harvesting, packing, and selling operation.

Candy Brand contracted with two outside companies, AgWorks, Inc., in 2003 and International Labor Management Corporation [*5] (ILMC) from 2004 through 2007, to process the H-2A visa paperwork required to obtain Mexican workers to harvest and pack tomatoes in Arkansas. Ag Works and ILMC also served as Candy Brand's agents in their interactions with the U.S. Department of Labor ("DOL") regarding the H-2A guestworker program. Defendants did their own recruitment and hiring of guestworkers, sending the names of Mexican nationals selected to AgWorks or ILMC, which in turn coordinated with Mexican firms to process prospective H-2A workers' visas, handle Consular interactions, and transport workers from Monterrey, Mexico, to Hermitage, Arkansas. [1]

During the period relevant to this litigation, Defendants were certified to employ approximately 1,800 H-2A workers. Plaintiffs bring claims on behalf of themselves and others similarly [*6] situated, alleging that Defendants failed to reimburse the H-2A workers during their first week of employment for costs the workers incurred for passports, visas, visa processing, transportation, and border crossing. Plaintiffs claim that Defendants' failure to reimburse the workers for these costs in the first work week reduced the workers' first weeks' earnings below the minimum wage requirements of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, and the applicable Adverse Effect Wage Rate ("AEWR") mandated by the terms and conditions of the H-2A employment contracts.

Plaintiffs also allege that Defendants failed to pay overtime wages for work done in the tomato packing sheds when that work exceeded 40 hours per week. Claims for overtime pay are made pursuant to the FLSA.

Finally, Plaintiffs allege that when H-2A workers completed 50% of their contract periods, the Defendants failed to provide them with adequate reimbursement for their travel expenses and subsistence costs in journeying from their hometowns in Mexico to the consular offices in Monterrey, and then to Hermitage, Arkansas, in violation of the H-2A contract. Plaintiffs also allege that once the contract period [*7] ended, Defendants failed to reimburse Plaintiffs for travel back to Mexico and for subsistence costs for travel in violation of the contract.

Plaintiffs allege two separate claims for damages. Count

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[1] The record reflects that in 2007, Defendant Candy Brand paid for and provided a bus for H-2A workers to travel from Monterrey to Hermitage; otherwise from 2003-2006, transportation to and from Monterrey was coordinated and made available to H-2A guestworkers through Mexican companies that were retained by Defendants, and Plaintiffs paid the cost of this transportation at the time of transport.

I includes all FLSA-based collective action claims for minimum wage deficiencies and for failure to pay overtime compensation to those working in the tomato packing sheds. Count II includes all breach of employment contract claims based on the H-2A contracts, as embodied in the relevant clearance orders. The Count II claims arise from Defendants allegedly failing to pay the AEWR in the first work week as mandated by the DOL for H-2A workers, failing to comply with the minimum wage and overtime provisions of the FLSA, as required by the contracts, failing to keep accurate and adequate records with respect to the workers' earnings, and failing to furnish workers with accurate hours and earnings statements.

On October 31, 2008, the Court granted preliminary certification of Plaintiffs' Count I FLSA claims for minimum wage and overtime violations. The Court certified an opt-in class for the Count I claims pursuant to 29 U.S.C. § 216 (b). (Doc. 66) There are 97 individuals who consented to participate [*8] in this opt-in class.

On March 23, 2010, the Court certified two Rule 23 (b)(3) classes seeking relief for the Count II breach of contract claims based on the H-2A contracts. The two Rule 23 classes consist of: (1) all non-supervisory workers employed by Defendants at any time between 2003 and the date of judgment in this matter who were employed pursuant to H-2A temporary work visas, and (2) all non-supervisory workers employed in the Defendants' packing shed operations at any time between 2003 and the date of judgment in this matter — irrespective of visa status— who did not receive overtime pay during work weeks when they worked more than forty (40) hours. (Doc. 174)

Shortly after this litigation was initiated in the summer of 2007, the decision was made to cease Candy Brand's operations in the tomato farming business. A decision was also made to cease ATS's involvement in the tomato farming business and sell off ATS's assets. Therefore, as of the date of this order, both Defendant Candy Brand and Defendant ATS are not conducting tomato related business, though they remain viable limited liability companies.

The various motions for summary judgment revolve around the same few issues [*9] of both fact and law. The individual Defendants raise the issue of whether they are "employers" pursuant to the FLSA and H-2A contracts, whether the Arkansas LLC Act or any other corporations law provision would shield the individual Defendants from liability for acts committed by the LLC Defendants, and whether the "agriculture exemption" applies to Count I opt-in packing shed workers and Count II, Class (2) packing shed workers seeking overtime pay. [2]

Defendant Clanton's Motion for Partial Summary Judgment (Docs. 194-196) asks that the Court limit his FLSA liability to only those Plaintiffs who worked in the tomato fields, not any who worked in the packing shed. Mr. Clanton argues that he was not an "employer," as defined by the FLSA, of the packing shed workers, because [*10] he did not directly supervise them. He also seeks immunity from Plaintiffs' H-2A contract claims pursuant to the Arkansas LLC Act (A.C.A. 4-32-304), which limits liability for breach of contract to the LLC itself, and not to the individual members of the LLC.

Defendant Lisenbey's Amended Motion for Summary Judgment (Docs. 198-200) also argues that he was not an FLSA "employer" of any of the Plaintiffs, whether working in the fields or the packing sheds. Instead, Mr. Lisenbey asserts that he was merely the buyer and seller of produce for his employer, Mckinstry Trading. Mr. Lisenbey also argues that he was not an "employer" under the H-2A contract, and even if he were, the Arkansas LLC Act would shield him from liability.

Defendants Candy Brand, ATS, and Searcy assert in their Motion for Partial Summary Judgment (Docs. 197 and 201) that the Plaintiff class members who were packing shed workers are not entitled to overtime pay under the FLSA because Candy Brand qualifies for the "agriculture exemption" for its packing shed activities. Defendant Searcy maintains that he cannot be sued individually for H-2A breach of contract claims, due to protections provided by the corporate/LLC structure. [*11] Moreover, these Defendants argue that the statute of limitations of the FLSA should control over the statute of limitations governing the H-2A contracts, and thus Plaintiffs should not recover on the five year statute of limitations for their breach of contract claims.

Plaintiffs move for summary judgment on two issues, both of which are also raised by Defendants in their

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[2] Defendants also question whether the five-year statute of limitations on contracts is applicable in light of the fact that the FLSA has a different statute of limitations. Defendants' argument on this point was ruled upon in a previous order. The Court held that the FLSA does not provide an exclusive remedy for violations of its provisions (Doc. 173). Plaintiffs' breach of contract claims are not preempted by the FLSA.

Motions for Summary Judgment. First, Plaintiffs argue that individual Defendants Clanton, Lisenbey, and Searcy, as well as Defendant ATS are all "employers" along with Candy Brand with respect to all Plaintiffs, whether field workers or shed workers, and with respect to both FLSA claims and H-2A contract claims. [3] (Docs. 205-206). Second, Plaintiffs move for Partial Summary Judgment with respect to whether Defendants' failure to adequately reimburse Plaintiffs during their first work weeks for expenses incurred for passports, visas, visa processing, border fees, and transportation expenses violated the minimum wage provisions of the FLSA and the H-2A employment contracts; whether Plaintiffs were properly reimbursed at both the 50% and 100% points of their H-2A work contracts; whether Defendants are entitled to the [*12] overtime exemption for agriculture work for those Plaintiffs working in the packing sheds; and whether Plaintiffs are entitled to a three-year statute of limitations on their FLSA claims and to liquidated damages. (Docs. 203-204).

The Court will address the arguments and claims made in all five summary judgment motions in order to determine if a genuine issue of material fact exists regarding: 1) whether Defendants are considered "employers" pursuant to the FLSA and the H-2A contracts; 2) whether Defendants are liable for overtime pay; 3) whether Plaintiffs are entitled to reimbursement for certain expenses and how that reimbursement would affect minimum wage/AEWR wage rates for work done by Plaintiffs; 4) whether Plaintiffs' claims are affected by statute of limitations questions; and 5) whether Plaintiffs are entitled to liquidated damages for their FLSA claims.

II. Standard of Review

In determining whether summary judgment is appropriate, the moving party bears the burden of establishing both the absence of a genuine issue of material fact and that it is entitled to [*13] judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Nat'l. Bank of Commerce of El Dorado, Ark. v. Dow Chem. Co.*, 165 F.3d 602 (8th Cir. 1999). The Court must review the facts in a light most favorable to the party opposing a motion for summary judgment and give that party the benefit of any inferences that logically can be drawn from those facts. *Canada v. Union Elec. Co.*, 135 F.3d 1211, 1212-13 (8th Cir. 1998) (citing *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983). In order for there to be a genuine issue of material fact, the non-moving party must produce evidence "such that a reasonable jury could return a verdict for the nonmoving party." *Allison v. Flexway Trucking, Inc.*, 28 F.3d 64, 66 (8th Cir. 1994) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

Once the moving party demonstrates that the record does not disclose a genuine dispute on a material fact, the non-moving party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in Rule 56, must set forth specific [*14] facts showing that there is a genuine issue for trial. *Ghane v. West*, 148 F.3d 979, 981 (8th Cir. 1998)(citing *Burst v. Adolph Coors Co.*, 650 F.2d 930, 932 (8th Cir. 1981)). Furthermore, "[w]here the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1315 (8th Cir. 1996)(quoting *Crain v. Bd. of Police Comm'rs*, 920 F.2d 1402, 1405-06 (8th Cir. 1990)).

III. Discussion

A. Employer Status of Defendants Clanton, Lisenbey, Searcy, and ATS

1. Analysis of the Law on Employer Status

a. FLSA and H-2A Contract Definitions

The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee. . ." 29 U.S.C. § 203 (d). The FLSA further defines an "employee" as "any individual employed by an employer," (*id.* at § 203 (e)(1)) and "employ" as "to suffer or permit to work" (*id.* at § 203 (g)). There may be multiple simultaneous employers under the FLSA. *Corley v. Carco Capital Corp.*, 2006 U.S. Dist. LEXIS 46560, 2006 WL 1889563 (W.D. Ark. July 10, 2006)(citing *Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002); *Brown v. L & P Industries, LLC*, 2005 U.S. Dist. LEXIS 39920, 2005 WL 3503637 (E.D. Ark. Dec. 21, 2005); [*15] *Donovan v. Agnew*, 712 F.2d 1509, 1510 (1st Cir. 1987).

The federal regulations defining the employer/employee relationship for temporary employment of foreign workers in the United States are nearly identical to the statutory definitions found in the FLSA. For the 2003-2007 time period pertaining to Plaintiffs' claims, Title 20

[3] The parties apparently agree that Defendant Candy Brand is an "employer" under the FLSA and H-2A contract definitions.

of the Code of Federal Regulations, section 655.100 (b) defines an H-2A guestworker "employer" as one who "suffers or permits" a person to work. [4] Such an employer is characterized by his ability to "hire, pay, fire, supervise or otherwise control the work of any such employee." *Id.*

The guestworker program regulations also contemplate liability for joint employers: "[a]n association of employers. . . shall be considered as a joint employer with an employer member if it shares with the employer member one or more of the definitional indicia." *Id.; see also Martinez-Bautista v. D&S Produce*, 447 F.Supp.2d. 954, 961 (E.D. Ark. 2006); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, (5th Cir. 1985)(labor [*16] contractor that petitioned in its name for H-2 guestworkers and individual growers who used H-2 workers' services were joint employers and therefore both responsible for violations of H-2 regulations); *Hernandez v. Two Brothers Farm, LLC*, 579 F.Supp.2d 1379, 1383 (S.D. Fla. 2008) (claims for breach of the H-2A employment contract may be brought against individuals who meet the definition of "employer" under the H-2A regulations).

Recovery is possible against any Defendants found to be "employers" for both FLSA violations and breaches of the H-2A employment contracts as embodied in the relevant work clearance orders, which were virtually identical for all potential class members between 2003 and 2007.

b. LLC Act Immunity for Corporate Officers

Defendants Clanton, Lisenbey, and Searcy argue that Candy Brand's corporate structure should shield them from individual liability. They cite the Arkansas LLC Act's shielding provisions for this proposition of law. A.C.A. § 4-32-304. The Arkansas LLC Act limits liability for acts committed by the LLC to the corporation itself, and not to the individual members or officers of the LLC. Defendants Candy Brand, ATS, and Charles Searcy in their Amended [*17] Motion for Partial Summary Judgment (Doc. 197) cite general principles of corporations law, as well as supporting Arkansas cases, in urging the Court to find that "[i]t is axiomatic that shareholders, officers, or employees of a corporate entity are not a proper party relative to a breach of contract claim against the corporate entity. . . Generally, individual defendants would not even be permitted to defend in their individual capacity for breach of contract claims against a corporate entity." (Doc. 197, p. 12.)

Defendants' arguments on this issue are unpersuasive. The Supremacy Clause of the U.S. Constitution trumps state law on the issue of liability and immunity for breach of contract. *See* U.S. Const., Art. VI, Cl. 2; Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986) ("[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."); *see also Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613, 99 S. Ct. 1905, 60 L. Ed. 2d 508 (1979)("[E]ven though th[e] [Supremacy] Clause is not a source of any federal rights, it does 'secure' federal rights by according them priority whenever they come in conflict with state law. In that sense all federal [*18] rights, whether created by treaty, by statute, or by regulation, are 'secured' by the Supremacy Clause.")

In our instant case, the DOL, through the authority delegated it by Congress, enacted regulations governing participation in the federal H-2A guestworker program. As part of those regulations, an enforceable contract was made between H-2A workers and any individuals or entities that fall within the DOL's definition of "employer." The definition of "employer" in the H-2A contract setting is expansive, just as it is under the FLSA's definition. The federal government, when enacting the legislation governing how and whether U.S. employers may petition for foreign workers to assist with temporary, seasonal work, contemplated that such an "employer" with the ability to "hire, pay, fire, supervise or otherwise control the work of any such employee" would be required to compensate H-2A workers at a rate not less than the federal minimum wage, the prevailing wage rate in the area, or the "Adverse Effect Wage Rate" ("AEWR"), whichever is higher. *See* 20 C.F.R. § 655.102 (b)(9). The AEWR is the minimum wage rate that the DOL determines is necessary to ensure that wages of similarly-situated [*19] domestic workers will not be adversely affected by the employment of H-2A workers. 20 C.F.R. § 655.100 (b).

Defendants cannot avail themselves of either common law or state contract law provisions as a shield from liability for a federally-mandated obligation to pay H-2A workers the rate that is necessary to maintain domestic wage parity. If Defendants are "employers" pursuant to the federal regulations governing the terms of the H-2A

[4] The regulations governing the H-2A program in effect during the period relevant to this lawsuit (2003-2007) are from 1987. All citations to the Code of Federal Regulations in this Memorandum are from the 1987 regulations.

guestworker contracts, then they are liable for any breaches of those contracts.

Though there is little guidance in the case law of the Eighth Circuit on the individual liability of corporate officers and shareholders in FLSA and H-2A contract violations, the few cases that have been decided bear out the Court's holding. A corporate officer with operational control of the corporation's day-to-day functions is an employer within the meaning of the FLSA. In *Wirtz v. Pure Ice Co., Inc.*, 322 F.2d 259, 262-63 (8th Cir 1963), the controlling stockholder of a corporation was not deemed an "employer" under the FLSA, but the Court observed that such an individual would be an employer if he owned stock, had the authority to manage and direct the business, and could [*20] hire and fire employees. An injunction pursuant to an FLSA enforcement action against a corporate employer was upheld on appeal in *Chambers Construction Co. v. Mitchell*, 233 F.2d 717, 724 (8th Cir. 1956), where the Court found that the president and general manager of a corporation "was engaged in the active management of the affairs of the corporation, although he was 'shown not to have assumed any special obligation individually to pay the wages or salaries of Chambers Construction Company's employees. . .'"

More recently, in *Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002), the Eighth Circuit affirmed that "individual liability does exist under the FLSA" (citing *Rockney v. Blohorn*, 877 F.2d 637 (8th Cir. 1989), which compares the definition of "employer" under ERISA to the same definition under the FLSA).

District courts in Arkansas have applied the Eighth Circuit's general guidance on employer liability for FLSA violations. In *Corley v. Carco Capital Corp.*, 2006 U.S. Dist. LEXIS 46560, 2006 WL 1889563 (W.D. Ark. July 10, 2006), found joint liability was found under the FLSA for a defendant company that held 100% of the stock in the company that was plaintiffs' listed employer. The individual defendant who [*21] was chairman of the board, a shareholder, had supervisory authority over employees, and had authority to set, alter, and terminate plaintiffs' salaries, was also found to be a joint employer and personally liable for plaintiffs' damages. 2006 U.S. Dist. LEXIS 46560, [WL] at *2. Similarly, in *Brown v. L&P Industries, LLC*, 2005 U.S. Dist. LEXIS 39920, 2005 WL 3503637 (E.D. Ark. Dec. 21, 2005), the Court found an individual defendant who was the owner of an LLC liable as a joint employer under the FLSA, even though the individual lived out of state. 2005 U.S. Dist. LEXIS 39920, [WL] at *12-13. The Court found that the defendant was an "employer" pursuant to the FLSA and was personally liable for plaintiff's unpaid overtime compensation and liquidated damages. The Court considered that the individual defendant "maintained telephone contact with L&P personnel on a daily basis. . . held final authority over all of L&P's functions, including decisions about employee compensation, and he made the final decision to terminate Brown [the plaintiff]." For all of these reasons, the individual defendant in that case was found to be an employer under the FLSA and could not hide behind the LLC's corporate structure to avoid personal liability.

Other circuits have found that "a corporate [*22] officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages." *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1987); *see also Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 966 (6th Cir. 1991)("To be classified as an employer, it is not required that a party have exclusive control of a corporation's day-to-day functions. The party need only have operational control of significant aspects of the corporation's day-to-day functions."). A determination of whether an individual is an employer within the meaning of the FLSA is not governed by formalistic labels or a common law notion of the employment relationship. *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194 (5th Cir. 1983). Rather, the focus is on the totality of the circumstances of whether the individual in question is sufficiently involved in the day-to-day operations of the corporation. *Id.* at 194-195. With this standard in mind, the Court will apply the law on employer liability to the facts of the case.

2. Application of the Law to the Undisputed Facts

a. Defendant Clanton

Defendant Randy Clanton asks the Court [*23] to find that he was an employer of Plaintiff field workers only, not packing shed workers. Clanton argues that he was not a member of the Candy Brand, LLC, entity, and that he did not exercise the necessary control over the packing shed employees to subject him to personal liability for their overtime claims. (Doc. 195, p. 3).

The Court disagrees. To be an "employer" of H-2A workers pursuant to the H-2A contract, Mr. Clanton need only have the ability to "hire, pay, fire, supervise or otherwise control the work of any such employee." 20 C.F.R. § 655.102 (b)(9). This standard is easily met.

There is no precedent for parsing out the workers into those who spent most of their time in the fields and those who spent most of their time in the packing shed. Mr. Clanton clearly supervised or controlled the work of H-2A employees, and that fact meets the requirements for purposes of finding employer liability.

Furthermore, an examination of the deposition testimony reveals that Mr. Clanton was not merely directing field workers exclusively; he was actively participating in the hiring, firing, and management of the business as a whole, of which an integral part was the H-2A workers' field and [*24] packing shed labor. Plaintiffs have painstakingly cited to multiple pages of deposition testimony taken in this case. Those facts evidence Mr. Clanton's employer status both under the H-2A contract provisions and the FLSA. An individual such as Mr. Clanton who has a significant ownership interest and operational control of major aspects of the corporation's day-to-day functions meets the "active management" test for FLSA employer liability, as described in *Chambers Construction Co. v. Mitchell*, 233 F.2d 717, 724 (8th Cir. 1956), and explained further in *Brown v. L&P Industries, LLC*, 2005 U.S. Dist. LEXIS 39920, 2005 WL 3503637 (E.D. Ark. Dec. 21, 2005).

Below are some of the undisputed facts that establish Mr. Clanton's status as employer, both under the H-2A contracts and the FLSA, and subject him to joint and several liability:

(1) Clanton was president and 100% shareholder of Randy Clanton Farms, Inc., and through that ownership, a partner and owner of Defendant Candy Brand, LLC. Candy Brand/ATS/Searcy Dep. Vol. I at 37, 39, 111; R. Clanton Dep. at 15-16.

(2) Clanton had the authority to hire and fire Candy Brand employees, react to labor costs, modify or recommend changes to Candy Brand's work rules, and serve [*25] as a contact for workers seeking to return to Candy Brand the following year. K. Clanton Dep. at 35-36, 125-126; R. Clanton Dep. at 89-90, 134-135, 209-210; Candy Brand/ATS/Searcy Dep. Vol I at 58-59, 102-103, 181-184.

(3) Clanton had the authority to set wages for both field and packing shed workers. K. Clanton Dep. at 35, 149; Candy Brand/ATS/Searcy Dep. Vol II at 33-34 and Vol. I at 89-90.

(4) Clanton hired and trained field supervisors and determined when field crews would start the work day. R. Clanton Dep. at 137-139; Candy Brand/ATS/Searcy Dep. Vol. II at 33-34, 54-56, 71-74, 89-90.

(5) Clanton visited the packing shed daily and supervised the work there. R. Clanton Dep. at 146; M. Martinez Morales Dep. at 26-27; B. Burboa Leyva Dep. at 27; D. Arriaga Guzman Dep. at 22.

(6) Clanton had the authority to request that individual H-2A workers be added to Candy Brand's list of workers to cross from Mexico to the U.S., make the determinations as to how many field and packing shed workers Candy Brand needed to request on its H-2A worker applications, and directed how all H-2A worker crossings should be coordinated so that workers would arrive in Arkansas on particular dates. Candy Brand/ATS/Searcy [*26] Dep. Vol. I at 95-96, 108-109, 144-145, 176; Docs. 209-7 and 209-19; R. Clanton Dep. at 32-34, 64-65.

(7) Clanton had the authority to sign Candy Brand employee payroll checks. Candy Brand/ATS/Searcy Dep. Vol. I at 79-80.

(8) Clanton was aware that Candy Brand's non-reimbursement policy for visa and travel fees may not be in compliance with FLSA requirements, as he had discussed the relevant case law with Defendant Searcy. Candy Brand/ATS/Searcy Dep. Vol. I at 194-195.

For these and other reasons enumerated by Plaintiffs in their Brief (Doc. 245), there is no genuine issue of material fact that Defendant Clanton is an employer under both the H-2A contracts and the FLSA.

b. Defendant Lisenbey

Defendant Brooks Lisenbey argues that he was neither employed by Candy Brand nor an owner of Candy Brand. However, as refuted above, those two facts do not negate the fact that Defendant Lisenbey actively managed employees or had the authority to hire, fire, pay, supervise, or otherwise exert operational control over the business and the Plaintiff workers who bring this lawsuit.

It is undisputed that Defendant Lisenbey was an employee of his wife's company, Mckinstry Trading [5],

[5] Mckinstry Trading was the community property by marriage of Mr. and Mrs. Lisenbey and was transferred to Mr. Lisenbey

and was tasked with the [*27] job of selling Candy Brand's tomatoes for McKinstry. In his capacity as salesman of Candy Brand's inventory, Mr. Lisenbey was directly and substantially involved in the day-to-day management of Candy Brand. Mr. Lisenbey's duties and responsibilities primarily included supervising the packing shed operations. But Mr. Lisenbey was also generally involved with the hiring and supervision of H-2A workers for Candy Brand. He traveled to Mexico on behalf of Candy Brand to learn about the process of hiring H-2A workers (B. Lisenbey Dep. at 114-118) and then went to Monterrey, Mexico, to visit with the Consulate there (B. Lisenbey Dep. at 123-124). Far from the mere produce salesman Mr. Lisenbey makes himself out to be, he meets both the U.S. government's H-2A contract definition and the FLSA's definition of "employer."

Below are some of the undisputed facts that establish Mr. Lisenbey's status as employer and subject him to joint and several liability:

> (1) Candy Brand's interrogatory responses and other documents list Mr. Lisenbey as one of the three managers of the Candy Brand business and as the supervisor/manager of the packing shed operations. Docs 210-4 and 210-8; *see also* K. Clanton Dep. at 47-48.
>
> (2) Lisenbey had the authority to hire and fire employees, including the supervisors of the H-2A workers, and could determine whether workers would be paid on an hourly basis or by a daily rate. R. Clanton Dep. at 135-135, 279-280; K. Clanton Dep. at 35-36; B. Lisenbey Dep. at 81-82, 168-169.
>
> (3) Lisenbey traveled to Monterrey, Mexico, on behalf of Candy Brand and informed Candy Brand's consular processing agent that he had hand selected and hired some of the Candy Brand H-2A workers. Rodriguez, Jr./Solstice Dep. at 33-38.
>
> (4) Both Defendants Clanton and Searcy consulted with Lisenbey before determining how many field and packing shed workers would be requested on H-2A applications. R. Clanton Dep. at 32-34, 64-65; Candy Brand/ATS/Searcy Dep. Vol. I at 108-109, 144-145, [*29] 176; Doc 209-19.
>
> (5) Lisenbey disciplined Candy Brand workers he thought were doing a poor job (B. Lisenbey Dep. at 70-71), sent a memo to workers related to procedures for clocking in and out and threatened them with non-payment of wages for noncompliance with rules (Doc. 213-4), and made an announcement to Candy Brand employees about what fees they should and should not have to pay to become H-2A workers at Candy Brand (B. Lisenbey Dep. at 130-133).
>
> (6) Lisenbey was so intimately involved in the Candy Brand business that he signed an indemnification agreement with Defendants Searcy and Clanton, stating among other things that if money were paid to Candy Brand by the U.S. Department of Agriculture for the tomato crop years 2003-2007, the money would be split evenly between Lisenbey's company and Clanton's company. Doc. 207-1.

For these and other reasons enumerated by Plaintiffs in their Brief (Doc. 245), there is no genuine issue of material fact that Defendant Lisenbey is an employer under both the H-2A contracts and the FLSA.

c. Defendant Searcy

Mr. Searcy admits that he is an employer as defined by the FLSA (Doc. 243, ¶ 1). However, he contends that each H-2A employment contract mandated [*30] by the DOL listed only Candy Brand as the employer, and thus Candy Brand is the only proper defendant employer in an H-2A breach of contract action.

Plaintiffs correctly point out that because Mr. Searcy meets the definition of "employer" under the FLSA, he also meets the definition under the H-2A regulations. As discussed herein, there is no prohibition against seeking damages for both FLSA claims and H-2A breach of contract claims. Most district courts in the Eighth Circuit agree that the FLSA's savings clause, which allows states to enact stricter wage, hour, and child labor provisions than the federal government, indicates that the FLSA does not provide an exclusive remedy for its violations. In fact, "it would seem that state law may offer an alternative legal basis for equal or more generous relief for the same alleged wrongs." *Cortez v. Neb. Beef, Inc.*, 266 F.R.D. 275, 2010 WL 604629 (D. Neb. 2010).

Furthermore, the record reflects that the employer listed on the 2004-2006 contracts is in fact "Charles Searcy, Plant Manager." (Docs. 245-1, 245-2, 245-3). The name

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as part of his divorce proceedings. Mckinstry Trading was one of the owners of ATS and Candy Brand. ATS owned the packing shed facility that is discussed in the instant case, and Mr. Lisenbey purchased this packing facility outright on behalf of one of his other [*28] companies after this lawsuit was filed.

"Candy Brand" does not appear in the 2004 and 2005 contracts. For these and other reasons, the evidence is such that there [*31] is no genuine issue of material fact that Defendant Searcy is an employer under both the H-2A contracts and the FLSA.

d. Defendant ATS

Defendant ATS is a joint employer along with Candy Brand. Candy Brand was owned by and under the control of ATS, and ATS employees supervised the Candy Brand packing shed workers (B. Lisenbey Dep. at 73, 77-79, 87-90; Candy Brand/ATS/Searcy Dep. Vol. I at 48-49). Defendant Searcy had the authority to sign both Candy Brand employee payroll checks and ATS employee payroll checks. Mr. Searcy was the managing member of both Candy Brand and ATS, and he routinely dispensed with formalities in operating both entities. Specifically, the facts show that there was no formal process with respect to Candy Brand making draws against the ATS line of credit. If Candy Brand needed money, Mr. Searcy would write himself a check from one corporate account to the other (Candy Brand/ATS/Searcy Dep. Vol II at 319-320). As ATS financed Candy Brand's operations, Mr. Searcy provided a personal guarantee for loans obtained by both ATS and Candy Brand. In addition, Mr. Searcy negotiated the terms of the $2 million line of credit between ATS and Candy Brand on behalf of both entities [*32] (Candy Brand/ATS/Searcy Dep. Vol. II at 233-234). Mr. Searcy was the person who made the decision to cease operating Candy Brand and to sell off the assets of ATS sometime in 2007 or 2008 (Candy Brand/ATS/Searcy Dep. Vol. II at 321-22). In short, there is no distinction between Candy Brand and ATS: both companies are essentially Defendant Searcy, and admittedly so.

The economic ties between ATS and Candy Brand were such that the two companies met the standard concerning FLSA joint employment under 29 C.F.R. § 791.2 (b). The regulation states: "[w]here the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer. . ." then a joint employment relationship exists. *Id. See Hearnsberger v. Gillespie*, 435 F.2d 926, 930-31 (8th Cir. 1970)(where individual defendant was the primary stockholder in separate corporate defendant, economic ties between the two entities meant that joint employment was "firmly sustained by the Act and by caselaw").

Furthermore, Candy [*33] Brand and ATS are an integrated enterprise pursuant to the four-factor test announced in *Sandoval v. American Building Maintenance Industries, Inc.*, 578 F.3d 787, 793-796 (8th Cir. 2009). The doctrine announced in *Sandoval* establishes a standard by which courts may essentially pierce the corporate veil for purposes of establishing employer liability in labor and employment law cases. This doctrine has been applied in the context of the FLSA (*see Pearson v. Component Tech. Corp.*, 247 F.3d 471, 486 (3d Cir. 2001) and other federal employment statutes to determine liability of a parent corporation for acts of its subsidiary. The test involves whether separately incorporated entities have (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. *Id.* No one factor is dispositive.

Applying the four *Sandoval* factors to Mr. Searcy's common ownership and management of ATS and Candy Brand, it is clear that all four factors are met, and ATS is liable to Plaintiffs as an employer pursuant to the H-2A contracts, whether under the integrated enterprise doctrine or pursuant to the plain language of 29 C.F.R. § 791.2 (b).

B. [*34] Overtime Exemption for Agriculture Work

Defendants argue that they were not required to pay overtime wages to packing shed employees because that work qualified for an agricultural exemption from FLSA overtime provisions. 29 U.S.C. § 213 (b)(12). [6] Defendants are entitled to this exemption if they can show that the packing shed work was performed by a farmer as an incident to that farmer's farming operations. The problem is that if that farmer packs produce grown by other farmers, he loses the exemption. *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 766 n. 15, 69 S. Ct. 1274, 93 L. Ed. 1672 (1949)("[P]rocessing on a farm of commodities produced by other farmers is incidental to or in conjunction with the farming operations of the other farmers and not incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done. Such processing is, therefore, not within the definition of agriculture."); *Marshall v. Gulf &*

[6] It is undisputed that packing [*35] shed workers often worked more than 40 hours per work week and were not paid overtime wages.

Western Industries, Inc., 552 F.2d 124, 126 (5th Cir. 1977)("The fact that tomatoes grown by independent farmers were processed by Gulf & Western prevents it from receiving the claimed [agricultural] exemption.")

The Court is persuaded that the packing shed workers employed by Defendants packed tomatoes grown by individuals and entities other than Candy Brand, including Dale McGinnis, Lowry Farms, Inc., A-W Produce, Inc., and others. Defendants do not deny that their employees packed tomatoes grown by other farmers; however, Defendants counter that such outside produce was only *de minimis* to Defendants' overall operation (Doc. 232). Defendant Searcy states in an affidavit that he believes that repacking outside tomatoes accounted for less than two percent of the packing shed production of Candy Brand as a whole. This amount, he argues, is *de minimis*.

It is Defendants' burden to show they are entitled to the agricultural exemption. *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 291, 79 S. Ct. 756, 3 L. Ed. 2d 815 (1959); 29 C.F.R. § 780.2. Defendants have failed to meet that burden. Though Defendant Searcy's opinion is that the outside tomatoes were a very small percentage of total packing production, he provides no evidence to counter Plaintiffs' compelling showing that Candy Brand's federal tax returns reflect outside purchases of [*36] produce accounting for over 10% of Candy Brand's total operational expenses in 2006 and 2007 (Docs. 211-19 and 211-20). Those outside purchases do not even include the tomatoes farmed by Dale McGinnis and A-W Produce. Dale McGinnis's employee, Ascension Fonseca, testified that he deferred to Mr. McGinnis regarding how and when to plant tomatoes on McGinnis's land, and Mr. McGinnis checked on tomato plant growth, applied fungicide, and loosened the soil in preparation for planting, among other farming tasks (Fonseca Dep. at 25, 31-36, 44-47, 59). Though Candy Brand's employees harvested Mr. McGinnis's tomatoes, the evidence shows that Candy Brand was not the exclusive farmer of the crop. In fact, Mr. McGinnis was paid by Candy Brand for tomatoes grown on land that Candy Brand leased from other persons. Docs. 209-35 and 209-36.

A-W's farms were in Texas, some 700 miles away from Candy Brand's Arkansas operations. A-W provided its own labor in growing the tomatoes. Though Defendant Clanton counseled A-W at times during the 2005 season, and Candy Brand shared some costs involved in growing the tomatoes that year, Candy Brand can best be described as an investor in A-W's tomato crop. When [*37] Candy Brand packed A-W's crop, Candy Brand was not the farmer of that crop for A-W was the farmer.

Candy Brand was on notice that it may be liable for overtime wages due to the fact that its packing shed workers packed tomatoes for several other growers. In 2003, AgWorks, Inc., which was Defendants' agent in their interactions with the DOL in applying for H-2A guestworkers, advised Candy Brand in writing that packing shed employees may be eligible for overtime pay (Doc. 207-4, p. 6). Defendants expressed in writing their legal concern over their decision to not pay overtime wages to H-2A workers (Doc. 210-7). Nevertheless, the facts show that Defendants failed to consult a legal expert regarding overtime compensation and the agricultural exemption, and Defendants apparently decided to take their chances that the exemption would apply. The Court holds that the exemption does not apply, and Defendants are liable for any overtime compensation owed to the Count I opt-in Plaintiffs who were employed in the Defendants' packing shed and Count II, Class (2) Plaintiffs who worked in the packing shed facilities.

C. Reimbursement of Plaintiffs' Expenses

1. Analysis of the *Arriaga* Case

The U.S. Department [*38] of Labor recently affirmed that under the FLSA, employers are obligated to reimburse travel and immigration-related costs to temporary foreign guestworkers if the costs reduce the workers' wages below the federal minimum wage during the first work week. Doc. 213-11. The DOL cited favorably to the 11th Circuit case of *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002), in issuing its Field Assistance Bulletin in 2009, noting that "travel and immigration-related costs for workers hired under the H-2B program are for the primary benefit of their employers, and the employers therefore must reimburse the employees for these costs in the first work week if the costs reduce the employees' wages below the minimum wage." Field Assistance Bulletin No. 2009-2 (Aug. 21, 2009). This reasoning is not limited to the H-2B context, as the DOL added that "[t]he same type of analysis . . . would have to be performed whenever an employee must travel for temporary employment from the point of hire to a distant worksite location." *Id.* at 9 n.3.

This Court agrees with other courts in concluding that the *Arriaga* decision is well-reasoned and correctly

decided, and that Plaintiffs are entitled [*39] to reimbursement of the expenses they incurred to travel to the United States and work for Defendants. *See, e.g., Morante-Navarro v. T & Y Pine Straw, Inc.*, 350 F.3d 1163, 1166 n.2 (11th Cir. 2003)(H-2B guestworkers entitled to reimbursement); *De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F.Supp.2d 1295, 1315 (N.D. Ga. 2008)(H-2B guestworkers entitled to reimbursement); *Martinez-Bautista v. D&S Produce*, 447 F.Supp.2d 954, 963-64 (E.D. Ark. 2006)(H-2A guestworkers entitled to reimbursement); *De Luna-Guerrero v. North Carolina Grower's Ass'n*, 338 F.Supp.2d 649, 662 (E.D. N.C. 2004)(H-2A guestworkers entitled to reimbursement).

In *Arriaga*, the Eleventh Circuit addressed whether an employer must reimburse foreign H-2A guestworkers' visa and travel costs under the FLSA. The court ruled that the costs of H-2A guestworkers' visas and travel from their home country to the United States were incurred "for the primary benefit and convenience of their employer." *Arriaga*, 305 F.3d at 1242. In ruling that workers' international travel and guestworker visas were not the same as board and lodging (which are not reimbursable costs), the Court emphasized that employees' visa and travel costs were [*40] "an inevitable and inescapable consequence" of the employer's hiring foreign guestworkers. *Id.* Because these costs were inherent in the employer's choice of foreign employees, they were an "incident of and necessary to the employment," 29 C.F.R. § 531.32 (a). Thus, the employers were obligated under the FLSA to reimburse the foreign workers if failure to do so would drop the workers' wages below the minimum wage. *Arriaga*, 305 F.3d at 1242. An employer cannot escape its minimum wage obligations by requiring employees to pay directly for costs that it would be prohibited from deducting from their pay. *Id.* at 1236.

Reimbursement of costs was appropriate during the workers' first work weeks. The *Arriaga* court held that employees' travel and visa costs were not expenses they would have incurred normally in the course of life, but rather, like a work uniform or tools, were costs necessitated by the job itself. *Id.* at 1243-44. Because these expenses arose pre-employment, reimbursement during the first work week would have been mandatory. *Id.* at 1237.

It is important to make clear that *Arriaga*'s holding is based on the FLSA, not on H-2A regulations. In applying the holding of *Arriaga* to the [*41] case at bar, it is evident that the pre-employment costs associated with H-2A workers' employment with Defendants should have been reimbursed during the first work weeks. The passport, visa processing, visa, transportation, and border crossing expenses that workers bore as a condition of their employment in Arkansas were not costs that would have arisen in the ordinary course of life. *See Arriaga*, 305 F.3d at 1243-44. Defendants knew that their H-2A workers bore substantial costs in obtaining visas to work in Arkansas. These costs included the fees that workers paid to Defendants' agents in Mexico who performed the critical service of processing visas smoothly and insuring that workers arrived in Arkansas during designated times. Moreover, Defendants were well aware of the pass-through costs that their H-2A workers bore personally in paying visa processing agents and passport, visa, and border crossing fees.

As early as March 2003, Defendants' agent AgWorks sent them a set of requirements associated with the employment of H-2A workers, including a summary of the *Arriaga* decision (Doc. 207-4, pp. 9-10). Defendants Searcy and Clanton discussed the implications of the *Arriaga* decision [*42] with one another, but without reading the opinion or consulting an attorney, they opted not to follow *Arriaga* and reimburse workers for pre-employment costs. Candy Brand/ATS/Searcy Dep. Vol. I at 194-95, 206-08. In addition, from as early as November 2005, Defendants' agent ILMC mailed Defendants several letters warning them of legal issues related to the failure to reimburse workers for visa and travel expenses (Docs. 207-12, 209-29, 209-30). These warnings were unavailing.

The Court finds that all Plaintiffs were entitled to reimbursement of these pre-employment costs during their first work weeks, and Defendants are liable for failing to do this.

2. Analysis of the FLSA Minimum Wage Law and the H-2A Contracts' AEWR Requirement

To participate in the H-2A guestworker program, employers file forms with the federal government that comply with federal regulations. 20 C.F.R. § 655.102 (b). These regulations establish the minimum benefits, wages, and working conditions that must be offered to employees and form the contracts between employers and employees. *See Arriaga*, 305 F.3d at 1233 n.5 ("clearance orders ultimately become the work contract between the employers and the farmworkers").

To [*43] ensure that the employment of H-2A workers did not adversely affect the wages and working conditions of U.S. workers, Defendants were obligated

to pay the higher of the federal minimum wage, the prevailing wage, or the Adverse Effect Wage Rate ("AEWR") for each hour worked. [7] Payment of the AEWR is important for many reasons, not the least of which is protection of U.S. workers from facing unfair competition if employers were permitted to undercut wages by paying foreign workers a drastically reduced wage.

In addition to the requirement that Defendants pay the AEWR to H-2A workers, Defendants were also contractually obligated to "comply with applicable federal, State, and local employment related laws and regulations." 20 C.F.R. § 655.103 (b). The FLSA is one such law that the H-2A contracts incorporate. As a result, failure to pay the federal minimum wage, in addition to being a violation of the FLSA, also constitutes a breach of the H-2A contract.

It is undisputed that Defendants did not reimburse workers during the first work weeks for the passport, visa processing, visa, transportation, [*44] and border crossing expenses the workers incurred for Defendants' benefit. The legal effect of requiring employees to bear these costs is the same as if Defendants deducted these expenses from employees' wages. *Arriaga*, 305 F.3d at 1236. Failure to reimburse Plaintiffs for these expenses during their first work weeks effectively reduced Plaintiffs' wages below the AEWR in violation of the H-2A contracts. Defendants are liable for these deficiencies.

Moreover, the H-2A contracts require that travel and daily subsistence costs for workers' transportation to the place of employment be reimbursed at the 50% point of the contract. Defendants' own clearance order from 2003 (Doc. 210-22) states: "After fifty percent of the employment period is complete, the employer will reimburse the worker for reasonable cost of transportation and subsistence from the place of recruitment to the grower's location." 20 C.F.R. § 655.102 (b)(5)(i)(requiring reimbursement for transportation and daily subsistence costs incurred from the place "from which the worker has come to work for the employer to the place of employment"). However, Defendants admit that they paid H-2A workers at the 50% point of their contracts [*45] a $100 flat payment for the costs of transportation and subsistence, regardless of the actual costs of transportation incurred by the workers, and ignored the daily subsistence rate set forth each year in the Federal Register. [8] Defendants' breached the H-2A contracts when they failed to pay full transportation and subsistence costs at the 50% point of the contracts.

Similarly, Defendants' breached the H-2A contracts when they failed to pay full transportation and subsistence costs at the end of the contract terms for reimbursement of travel from Arkansas back to Plaintiffs' homes in Mexico. The federal regulations regarding this requirement state that return transportation and costs of daily subsistence "from the place of employment to the place from which the worker . . . came to work for the employer" must be reimbursed at the end of the contract terms. 20 C.F.R. § 655.102 (b)(5)(ii). Defendants were obligated to pay for the H-2A workers' transportation [*46] each year from Hermitage, Arkansas, to the workers' homes. They were also required to pay daily subsistence costs for the workers' trips home.

D. Liquidated Damages and Three-Year Statute of Limitations for FLSA Claims

Liquidated damages are not punitive, but rather are "intended in part to compensate employees for delay in payment of wages owed under the FLSA." *Hultgren v. County of Lancaster*, 913 F.2d 498, 509 (8th Cir. 1990)(citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707, 65 S. Ct. 895, 89 L. Ed. 1296 (1945)). An award of liquidated damages is mandatory under 29 U.S.C. § 216 (b) absent an employer's showing of good faith and reasonable grounds for the belief that it was not in violation of the FLSA. *Braswell v. City of El Dorado*, 187 F.3d 954, 957 (8th Cir. 1990). If the employer fails to come forward with plain and substantial evidence to satisfy both the good faith and reasonableness requirements, the court must award liquidated damages. *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3d Cir. 1984). The employer's burden is "a difficult one, with double damages being the norm and single damages being the exception." *Chao v. Barbeque Ventures*, 547 F.3d 938, 941 (8th Cir. 2008).

In this case, [*47] Defendants were aware of their obligation to pay packing shed workers overtime wages and to reimburse their H-2A employees' pre-employment expenses. Defendants' U.S. agents during the relevant time period, AgWorks and ILMC, assisted

[7] It is undisputed that in the instant case, the AEWR was the highest of the three wage rates listed.

[8] Defendants' partial reimbursement of $100 for Plaintiffs' initial travel costs at the 50% point of the contracts cannot absolve Defendants from liability for minimum wage violations incurred during the first work weeks of the contracts.

Defendants with the H-2A application process and in doing so alerted them to the possibility of liability. The DOL sent Defendants multiple letters, advising them of FLSA requirements related to reimbursement of expenses for H-2A workers. Deposition testimony establishes that Defendants Searcy and Clanton were aware of the *Arriaga* decision and its implications, but they failed to obtain legal advice regarding their business's compliance with *Arriaga*'s requirements. Defendants admit that packing shed workers were never given overtime pay. This fact is undisputed.

Defendants admit that they did not reimburse Plaintiffs for passports, visas and visa processing, transportation, border crossing expenses, or transportation and subsistence costs after the first work week, in contravention of FLSA requirements announced in *Arriaga*. They also admit that their policy and practice was to reimburse H-2A workers only $100 each for the costs of transportation from their [*48] homes in Mexico to the Defendants' workplace in Hermitage, Arkansas, regardless of the fact that the actual costs of transportation incurred by Plaintiffs exceeded $100. Even though Defendants' agents AgWorks and ILMC provided Defendants with detailed instructions and worksheets describing how to properly calculate travel reimbursement under the H-2A regulations (including estimates for travel costs from various cities all over Mexico, not simply from the Consular offices in Monterrey), Defendants did not take into account Plaintiffs' actual costs for transportation and continued to reimburse them a flat rate of $100 each after the 50% point of the contracts was completed.

After the completion of the contracts each year, it is undisputed that Defendants failed to reimburse Plaintiffs for transportation costs from Monterrey to class members' home cities in violation of the contract. The evidence is clear that Defendants also failed to pay any H-2A class member for the costs of daily subsistence during travel, whether at the 50% point or at the 100% point of the contract period, again in violation of the H-2A regulations. Though Defendant Searcy admitted in deposition to this failure [*49] to reimburse as "just a screw-up on our part," the poor judgment Defendants exhibited is striking.

Lack of knowledge is not enough to establish good faith. *Chao*, 574 F.3d at 941. It is "hard to mount a serious argument that an employer who has acted in reckless disregard of its FLSA obligations has nonetheless acted in good faith." *Jarrett v. ERC Props.*, 211 F.3d 1078, 1084 (8th Cir. 2000). In light of the evidence of Defendants' reckless disregard of the FLSA's requirements, the Count I opt-in Plaintiffs are entitled to an award of liquidated damages in an amount equal to the unpaid minimum and overtime wages they are due under the FLSA.

Regarding the statute of limitations applicable to FLSA claims, the statute extends the limitations period from two years to three years if Plaintiffs can prove that the Defendants' violation of the Act was "willful." 29 U.S.C. § 255 (a). A "willful" violation is one where "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988). The regulations interpreting the FLSA state that a violation shall be deemed "in reckless disregard [*50] . . . if the employer should have inquired further into whether its conduct was in compliance with the Act" and failed to do so. 29 C.F.R. § 578.3 (c)(3).

The Court finds that the Defendants acted in reckless disregard for the matter of whether their conduct was prohibited by the FLSA, and the three-year statute of limitations will apply to Plaintiffs' FLSA claims. [9]

IV. Conclusion

Motion for Summary Judgment on behalf of Randy Clanton (Doc. 194) is **DENIED**;

Motion for Partial Summary Judgment on behalf of Defendants Candy Brand, LLC, Arkansas Tomato Shippers, LLC, and Charles Searcy (Doc. 197) is **DENIED**;

Amended Motion for Summary Judgment on behalf of Defendant Brooks Lisenbey (Doc. 198) is **DENIED**;

Plaintiffs' Motion for Partial [*51] Summary Judgment Related to Violations of the FLSA and H-2A Employment Contract (Doc. 203) is **GRANTED**; and

Plaintiffs' Motion for Summary Judgment Related to Employer Status and Liability of Charles Searcy, Randy

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[9] Defendants are subject to liability for Plaintiffs' breach of the H-2A contract for the full five years of the statute of limitations period for written instruments. There is nothing remarkable about a contract claim that relies on the FLSA and has a longer statute of limitations than the FLSA. As discussed above, Defendants are considered employers for the purposes of determining liability for violations of the FLSA and for breaches of the H-2A employment contracts.

Clanton, Brooks Lisenbey, and Arkansas Tomato Shippers, LLC (Doc. 205) is **GRANTED**.

The parties are to attend a Status Conference in El Dorado today to discuss the remaining issues to be set for trial.

IT IS SO ORDERED this 20th day of May 2011.

/s/ Robert T. Dawson

Robert T. Dawson

United States District Judge

End of Document

Williams v. Exeter Twp.

United States District Court for the Middle District of Pennsylvania

March 26, 2012, Decided; March 27, 2012, Filed

CIVIL ACTION NO. 3:11-CV-1931

Reporter
2012 U.S. Dist. LEXIS 42217; 2012 WL 1038757

NEIL WILLIAMS, Plaintiff, v. EXETER TOWNSHIP, et al., Defendants.

Counsel: [*1] For Neil Williams, Plaintiff: Robert V. Davison, Kingston, PA; Wendi D. Barish, WEBER GALLAGHER SIMPSON STAPLETON FIRES & NEWBY LLP, Philadelphia, PA.

For Exeter Township, Nancy Smith, Chief of Police, Benjamin Gadomski, Supervisor of Exeter Township, Donald Hoffman, Supervisor of Exeter Township, John Coolbaugh, Supervisor of Exeter Township, Defendants: Thomas Geroulo, Weber, Gallagher, Simpson, Stapleton, Fires & Newby, LLP, Scranton, PA; Wendi D. Barish, WEBER GALLAGHER SIMPSON STAPLETON FIRES & NEWBY LLP, Philadelphia, PA.

Judges: A. Richard Caputo, United States District Judge.

Opinion by: A. Richard Caputo

Opinion

MEMORANDUM

Presently before the Court is the Motion to Partially Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. 3) filed by Defendants Exeter Township, Nancy Smith, John Coolbaugh, Benjamin Gadomski, and Donald Hoffman. Defendants move to dismiss, with prejudice, Count II of the Complaint on the basis that Plaintiff's Pennsylvania Whistleblower Act claim, 43 P.S. §§ 1421, *et seq.*, is time barred. (Doc. 3.) Because the Whistleblower Act claim, as alleged, is time barred, the Court will dismiss the Whistleblower claim. However, Plaintiff will be given leave to amend his Complaint [*2] to properly state a claim pursuant to the Pennsylvania Whistleblower Act.

I. Background

Plaintiff filed the present action against Defendants Exeter Township, Chief of Police Nancy Smith, Supervisor John Coolbaugh, Supervisor Benjamin Gadomski, and Supervisor Donald Hoffman (collectively "Defendants"). (Doc. 1.) Count I of Plaintiff's Complaint asserts claims under 42 U.S.C. § 1983. (Doc. 1.) Count II, labeled "State Claims," appears to assert claims for wrongful discharge, malicious prosecution, abuse of process, and violation of the Pennsylvania Whistleblower Act, 43 P.S. §§ 1421, *et seq.*

As set forth in Plaintiff's Complaint, the relevant facts are as follows:

On October 31, 2006, Plaintiff Neil Williams was hired by Exeter Township as Road Department Foreman. (Doc. 1.) When Plaintiff was hired, Nancy Smith was employed by the Exeter Township Police Department as a Sergeant. (Doc. 1.) In December of 2009, Smith was appointed Chief of Police of Exeter Township. (Doc. 1.) While Plaintiff was employed as Road Department Foreman, Defendant Smith repeatedly harassed Plaintiff. (Doc. 1.) Plaintiff frequently indicated to Defendant Smith that the harassment was unwelcome and Plaintiff informed [*3] the Exeter Township Board of Supervisors of Defendant Smith's conduct. (Doc. 1.) The Board of Supervisors, however, refused to take action. (Doc. 1.) At some time after February 5, 2010, Defendant Smith met with Township Supervisors and requested that Plaintiff's employment be terminated. (Doc. 1.) Moreover, in September of 2010, Defendant Smith filed criminal charges against Plaintiff for Public Drunkeness and Disorderly Conduct. (Doc. 1.) The charges, however, were ultimately dismissed by the Luzerne County Court of Common Pleas on December 22, 2010. (Doc. 1.)

While Plaintiff was employed as Road Department Foreman, Defendant Coolbaugh was a Supervisor of Exeter Township and also an employee in the Exeter Township Road Department. (Doc. 1.) During Plaintiff's employment, Plaintiff became aware of discrepancies involving Defendant Coolbaugh's payroll submissions

and his actual time worked. (Doc. 1.) After Defendant Coolbaugh informed Plaintiff that he was not required to submit punched time cards, Plaintiff raised the issue at Exeter Township public meetings in November and December of 2009. (Doc. 1.) Defendant Coolbaugh, however, told Plaintiff to sit down and shut up at the meetings. [*4] (Doc. 1.) Thereafter, Defendant Coolbaugh engaged, on a daily basis, in demeaning, harassing, and threatening Plaintiff. (Doc. 1.) In January of 2010, Defendant Coolbaugh became the Exeter Township Road Master. (Doc. 1.)

Defendants Gadomski and Hoffman were also Exeter Township Supervisors during Plaintiff's employment as Road Department Foreman. (Doc. 1.) In early January of 2010, Plaintiff informed Defendants Gadomski and Hoffman of Defendant Coolbaugh's improper conduct, including discrepancies in Defendant Coolbaugh's payroll submissions in relation to his time worked. (Doc. 1.) Although Defendants Gadomski and Hoffman assured Plaintiff that they would resolve his issues with Defendant Coolbaugh, Plaintiff was informed shortly thereafter that he was laid off from his position. (Doc. 1.) After he was terminated, Plaintiff attempted to collect his paycheck for accrued vacation pay, but Plaintiff was informed that Defendant Coolbaugh would not sign the check. (Doc. 1.)

On February 18, 2010, at an improperly scheduled Special Meeting of the Exeter Township Board following an Executive Session called by Defendant Hoffman, Defendant Coolbaugh moved to have Plaintiff fired. (Doc. 1.) Defendant [*5] Gadomski seconded the motion and Defendant Hoffman approved the motion. (Doc. 1.) At the next public meeting, in March of 2010, the Board rescinded the action taken at the February 18, 2010 meeting and "re-fired" Plaintiff due to a procedural defect at the Special Meeting. (Doc. 1.) Plaintiff attempted to speak at the meeting where he was "re-fired," but Defendant Coolbaugh told him "to shut up and prohibited him from speaking at the public meeting." (Doc. 1.) Plaintiff later learned he was fired for insubordination, but the State Unemployment Office found this claim to be unsubstantiated. (Doc. 1.)

At the April and May of 2010 public meetings, Plaintiff requested to retrieve his personal property from the Exeter Township Building, but Plaintiff Coolbaugh refused to allow Plaintiff to recover his property. (Doc. 1.)

After being fired, Plaintiff attended multiple Township Board meetings to address issues related to the use of time cards by supervisor-employees. (Doc. 1.) As a result, the Board, on July 12, 2010, passed a motion requiring supervisor-employees to submit punched time cards. (Doc. 1.) This motion, however, was rescinded by a vote of Defendants Coolbaugh, Hoffman, and Gadomski [*6] on August 2, 2010. (Doc. 1.)

At the conclusion of a Board meeting on September 7, 2010, Plaintiff and Defendant Gadomski engaged in an argument in front of several witnesses. (Doc. 1.) During the argument, Defendant Gadomski admitted to Plaintiff that he got him fired as Road Department Foreman and also threatened to get Plaintiff fired from his private sector job. (Doc. 1.)

After Plaintiff commenced this action on October 18, 2011, Defendants filed the present partial motion to dismiss. (Doc. 3.) Defendants seek to dismiss Count II [1] of Plaintiff's Complaint with prejudice. (Doc. 3.) According to Defendants, a Pennsylvania Whisteblower Act claim must be filed within 180 days of the alleged violation. (Doc. 3.) Defendants argue that because the last event alleged by Plaintiff occurred on March 4, 2011 (Doc. 9), [2] the Whistleblower Act claim is untimely as Plaintiff's Complaint was filed over 180 days after March 4, 2011. (Doc. 9.) Plaintiff opposes Defendants' partial motion to dismiss and asserts "that discovery conducted in the case will reveal that Defendant Supervisors continued their retaliation" after March 4, 2011. (Doc. 8.) Plaintiff also requests the Court to grant him leave [*7] to amend Count II of the Complaint. (Doc. 8.) Defendants' motion has been fully briefed and is now ripe for disposition.

II. Discussion

A. Motion to Dismiss Under 12(b)(6)

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[1] Defendants argue that Count II only asserts a claim for violation of the Pennsylvania Whistleblower Act, 43 P.S. §§ 1421, *et seq.* (Doc. 3.) The Court, however, construes Count II, labeled "State Claims," as also alleging claims for wrongful discharge, malicious prosecution, and abuse of process. (Doc. 1.) As Plaintiff will be given leave to amend his Whistleblower Act claim, the Court suggests that Plaintiff more clearly identify his claims for the convenience of the parties.

[2] Although Plaintiff's opposition to Defendants' partial motion to dismiss identifies March 4, 2011 as the most recent date of relevant events, the most recent date identified in the Complaint appears to be the dismissal of Plaintiff's criminal charges by the Luzerne County Court of Common Pleas on December 22, 2010. (Doc. 1.)

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). When considering a Rule 12(b)(6) [*8] motion, the Court's role is limited to determining if a plaintiff is entitled to offer evidence in support of their claims. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The Court does not consider whether a plaintiff will ultimately prevail. *See id.* A defendant bears the burden of establishing that a plaintiff's complaint fails to state a claim. *See Gould Elecs. v. United States*, 220 F.3d 169, 178 (3d Cir.2000).

"A pleading that states a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a). The statement required by Rule 8(a)(2) must give the defendant fair notice of what the ... claim is and the grounds upon which it rests. *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Detailed factual allegations are not required. *Twombly*, 550 U.S. at 555. However, mere conclusory statements will not do; "a complaint must do more than allege the plaintiff's entitlement to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009). [*9] Instead, a complaint must "show" this entitlement by alleging sufficient facts. *Id.* "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009).

As such, the inquiry at the motion to dismiss stage is "normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged." *Malleus v. George*, 641 F.3d 560, 563 (3d Cir.2011).

Dismissal is appropriate only if, accepting as true all the facts alleged in the complaint, a plaintiff has not pleaded "enough facts to state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, meaning enough factual allegations "'to raise a reasonable expectation that discovery will reveal evidence of"' each necessary element. *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir.2008) (quoting *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a [*10] 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S.Ct. at 1949. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 129 S.Ct. at 1949.

In deciding a motion to dismiss, the Court should consider the allegations in the complaint, exhibits attached to the complaint, and matters of public record. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir.1993). The Court may also consider "undisputedly authentic" documents when the plaintiff's claims are based on the documents and the defendant has attached copies of the documents to the motion to dismiss. *Id.* The Court need not assume the plaintiff can prove facts that were not alleged in the complaint, *see City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 263 & n.13 (3d Cir.1998), or credit a complaint's "'bald assertions"' or "'legal conclusions."' *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir.1997) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429-30 (3d Cir.1997)).

Additionally, [*11] while courts do not typically dismiss claims as time barred on a motion to dismiss, "a court may . . . dismiss a claim under 12(b)(6) where the bar is 'apparent on the face of the complaint."' *Metso Paper USA, Inc. v. Bostik, Inc.*, No. 3:08-CV-772, 2011 U.S. Dist. LEXIS 73629, 2011 WL 2670320, at *3 (M.D.Pa. July 8, 2011) (quoting *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir.2002)). Thus, "the determination of whether a plaintiff's claim is barred by the statute of limitations involves issues of fact and therefore, the statute of limitations is normally addressed at the summary judgment stage or at trial." *Kiser v. A.W. Chesterton Co.*, 770 F.Supp.2d 745, 747 (E.D.Pa.2011).

B. Dismissal of Plaintiff's Pennsylvania Whistleblower Act Claim

Defendants request dismissal of Plaintiff's Pennsylvania Whisteblower Act claim, 43 P.S. §§ 1421, *et seq.*, on the basis that the claim is time barred. (Doc. 3.) The Whisteblower Act provides:

> A person who alleges a violation of this act may bring a civil action in a court of competent jurisdiction for appropriate injunctive relief or damages, or both, within 180 days after the occurrence of the alleged violation.

43 P.S. § 1424(a). As recognized by this Court, "despite the use of [*12] the permissive 'may,' the Whistleblower Law's '180-day time limit is mandatory, and courts have no discretion to extend it.'" *Campion v. Northeast Utilities*, 598 F. Supp. 2d 638, 645 (M.D. Pa. 2009) (quoting *O'Rourke v. Pennsylvania Dep't of Corr.*, 730 A.2d 1039, 1042 (Pa. Commw. Ct. 1999)).

Although the Court will generally not dismiss a claim as time barred on a motion to dismiss, the Court agrees with Defendants that Plaintiff's Whisteblower Act claim, as alleged, is barred by the Whistleblower Law's 180-day time limit, as no events have been alleged to have occurred since December 22, 2010. *See Metso Paper USA, Inc.*, 2011 U.S. Dist. LEXIS 73629, 2011 WL 2670320, at *3; *see also Campion*, 598 F. Supp. 2d at 645. Thus, Plaintiff's Whistleblower Act claim will be dismissed.

C. Leave to Amend

Defendants argue that Plaintiff should be denied leave to amend Count II of the Complaint because "any proposed curative amendment would be absolutely futile." (Doc. 9.) The Court disagrees with Defendants, however, and Plaintiff will be given leave to amend the Complaint.

Rule 15 of the Federal Rules of Civil Procedure permits a court to grant a party leave to amend its pleadings. *See* Fed. R. Civ. P. 15(a)(2). "The court should [*13] freely give leave when justice so requires." *See id.* In the absence of a finding of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, [or] futility of amendment," it is an abuse of discretion to deny leave to amend. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *see also Arthur v. Maersk, Inc.*, 434 F.3d 196, 202-03 (3d Cir.2006). The Third Circuit has made clear that the touchstone for the denial of leave to amend is undue prejudice to the non-moving party. *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413-14 (3d Cir.1993).

Here, it is not apparent that amendment of Plaintiff's Whistleblower claim would be futile. As Plaintiff's opposition to Defendants' partial motion to dismiss claims the Supervisor Defendants continued a pattern of impermissible conduct after March 4, 2011 (Doc. 8), it would be premature to dismiss the claim with prejudice at this time without providing Plaintiff the opportunity to clarify this claim. And, as Plaintiff has not previously been granted leave to amend, the Court believes it would be an abuse of discretion to [*14] deny Plaintiff the chance to amend his Complaint. *See Foman*, 371 U.S. at 182. Plaintiff will therefore be given twenty-one (21) days to file an amended complaint.

III. Conclusion

For the reasons stated above, Defendants' partial motion to dismiss (Doc. 3) will be granted in part and denied in part. Plaintiff's Pennsylvania Whistleblower Act claim will be dismissed without prejudice. Plaintiff, however, will be granted leave to file an amended complaint.

An appropriate order follows.

March, 26, 2012

Date

/s/ A. Richard Caputo

A. Richard Caputo

United States District Judge

ORDER

NOW, this 26th day of March, 2012, **IT IS HEREBY ORDERED** that:

(1) Defendants' Partial Motion to Dismiss Plaintiff's Complaint (Doc. 3) is **GRANTED in part and DENIED in part.**

(2) Plaintiff's Pennsylvania Whistleblower Act claim is **DISMISSED without prejudice.** Plaintiff is given leave to amend the Complaint within **twenty-one (21) days** of this Order to cure the deficiencies identified in the accompanying Memorandum. If Plaintiff fails to timely amend his Complaint, Defendants may move the Court to dismiss the Pennsylvania Whistleblower Act claim with prejudice.

/s/ A. Richard Caputo

A. Richard Caputo

United States District Judge

Yaklin v. W-H Energy Servs.

United States District Court for the Southern District of Texas, Corpus Christi Division

October 22, 2008, Decided; October 22, 2008, Filed

CIVIL ACTION NO. C-07-422

Reporter
2008 U.S. Dist. LEXIS 84807; 2008 WL 4692419

BERT YAKLIN, et al, Plaintiffs, VS. W-H ENERGY SERVICES, INC., et al, Defendants.

Subsequent History: Motion denied by Yaklin v. W-H Energy Servs., 2008 U.S. Dist. LEXIS 93026 (S.D. Tex., Nov. 17, 2008)

Counsel: [*1] For Bert Yaklin, Jose A. Garcia, Felipe Rodriguez, Jr., Baldemar Gonzalez, Pedro E. Salinas, Ricardo Guzman, Russell Shaw, Fabian Arredondo, Matthew Saenz, Richard Charles, Samuel G. Rojas, Michael Rivera, Individually, and on behalf of all others similarly situated, Reynaldo Sanchez, Olivero Gonzales, Jr., Omar Gonzales, Plaintiffs: Jon D Brooks, LEAD ATTORNEY, Brooks LLP, Corpus Christi, TX.

Antonio DeLeon, Plaintiff, Pro se, Orange Grove, Tx.

Daniel Guerra, Plaintiff, Pro se, Alice, TX.

Luis Javier Vasquez, Plaintiff, Pro se, San Diego, TX.

Todd Michael Garino, Plaintiff, Pro se, Beeville, TX.

Ruben Gonzalez, Jr., Plaintiff, Pro se, Orange Grove, TX.

Juan David Saenz, Plaintiff, Pro se, San Diego, TX.

John H Moreno, Plaintiff, Pro se, Hebbronville, TX.

Michael Dale Myers, II, Plaintiff, Pro se, Alice, Tx.

Rene Buentello, Jr., Plaintiff, Pro se, Alice, Tx.

Juan Antonio Gonzalez, Jr., Plaintiff, Pro se, Woodsboro, Tx.

Ernesto Vela, Plaintiff, Pro se, Alice, Tx.

Roberto Aleman, Plaintiff, Pro se, Mathis, Tx.

Marco Antonio Perez, Plaintiff, Pro se, Robstown, Tx.

For W-H Energy Services, Inc., Coil Tubing Services, LLC, Defendants: Christopher E Moore, Walter W Christy, LEAD ATTORNEYS, Coats Rose, [*2] New Orleans, LA.

Steven Torres, Claimant, Pro se, Taft, TX.

Ramiro Contreras, Claimant, Pro se, Fruita, CO.

Angel Rey Hernandez, Claimant, Pro se, Cuero, TX.

Cristobal E. Laso, Jr., Claimant, Pro se, San Diego, TX.

Francisco Martinez, Claimant, Pro se.

Joseph Daniel O'Hara, Claimant, Pro se, Alice, TX.

Jeremy L Vasquez, Claimant, Pro se, Alice, TX.

Javier Morin, Claimant, Pro se, San Diego, TX.

Judges: Janis Graham Jack, United States District Judge.

Opinion by: Janis Graham Jack

Opinion

ORDER

On this day came on to be considered Defendants' Motion for Summary Judgment (D.E. 93), and Defendants' Motion to Strike Incompetent Evidence and for Leave to File a Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment (D.E. 103). For the reasons discussed below, Defendants' Motion for Summary Judgment is hereby DENIED, and Defendants' Motion to Strike and for Leave is hereby GRANTED in part and DENIED in part.

I. Jurisdiction.

The Court has federal subject matter jurisdiction over

this case pursuant to 28 U.S.C. § 1331 because Plaintiffs bring suit pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq*.

II. Procedural Background.

On November 2, 2007, Plaintiffs filed their original complaint with [*3] the Court, alleging a collective action against Defendants for unpaid overtime in violation of the FLSA. (D.E. 1.) On May 2, 2008, the Court conditionally certified a class comprised of:

> All persons employed by either Defendant in "Service Tech I" or "Service Tech II" positions at Defendants' Alice, Texas facility between December 1, 2004, and the present.

(D.E. 27 at 5.) Defendants have since reached a settlement agreement with the members of the class (subject to approval by the Court). (D.E. 94-97.) Plaintiff Yaklin, however, is not a member of the class and, thus, is proceeding with respect to his individual claims.

On August 15, 2008, Defendants filed a motion for summary judgment, arguing that Plaintiff Yaklin is not entitled to overtime pay because he is an exempt employee to whom the overtime pay provisions of the FLSA do not apply. (D.E. 93.) On September 2, 2008, Plaintiff Yaklin filed his response in opposition to Defendants' motion. (D.E. 102.) On September 3, 2008, Defendants filed a motion to strike certain pieces of Plaintiff's evidence as "incompetent," and for leave to file a reply in support of their motion for summary judgment. (D.E. 104.)

III. Factual Background.

The [*4] undisputed facts are as follows:

Plaintiff Yaklin was employed by Defendants [1] between May 1, 2003, and February 19, 2007. (D.E. 102, Ex. A.) He was a salaried employee who worked in excess of forty hours per week, but was not paid overtime. (D.E. 93, Ex. A (Yaklin Dep.) at 91:20-25, 93:15-94:1.) At the time he was terminated, his salary was approximately $ 4500.00 per month. (Id. at 94:5-6; D.E. 102, Ex. A.) At no time during the term of his employment was he paid less than $ 1820.00 per month ($ 455.00 per week). (D.E. 93, Ex. A (Yaklin Dep.) at 94:10-14.)

Plaintiff's job responsibilities included the following:

> Inputting the fuel logs in the computer … [p]urchasing nitrogen, order[ing] parts, issu[ing] PO's [*i.e*., purchase orders], input[ting] all the bills into a database that was sent to Broussard for pay, [running] parts, [taking] water readings for the wash system, help[ing] [*5] mechanics after hours in the shop, [taking] care of the parts room, [keeping] them stocked and up to date, [and] issu[ing] out parts when mechanics or supervisors need[ed] them.

(D.E. 93, Ex. A (Yaklin Dep.) at 23:9-21.) The parties disagree with respect to the amount of discretion and independent judgment that Plaintiff exercised in performing these tasks.

IV. Defendants' Motion for Summary Judgment.

A. Summary Judgment Standard.

Federal Rule of Civil Procedure 56 states that summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). "[O]n summary judgment, the moving party has the initial burden of establishing that there are no issues of material fact and that it is entitled to judgment in its favor as a matter of law." Breen v. Tex. A&M Univ., 485 F.3d 325, 331 (5th Cir. 2007) (citing Rivera v. Houston Indep. Sch. Dist., 349 F.3d 244, 246-47 (5th Cir. 2003)). "If [*6] the moving party meets this burden, the burden then shifts to the non-moving party to point to evidence showing that an issue of material fact exists." Breen, 485 F.3d at 331 (citing Rivera, 349 F.3d at 247). "In determining whether summary judgment is appropriate, we view all of the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." Breen, 485 F.3d at 331 (citing Coleman v. Sch. Bd. of Richland Parish, 418 F.3d 511, 515-16 (5th Cir. 2005)).

B. Defendants Have Properly Pled Their Affirmative Defenses.

Plaintiff spends a large portion of his response in opposition to Defendants' motion for summary judgment arguing that Defendants cannot prevail on their motion because the affirmative defenses on which their motion

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[1] Plaintiff alleges that he was employed by both Defendant W-H Energy Services, Inc. ("W-H") and Defendant Coil Tubing Services, LLC ("Coil Tubing"), (D.E. 102 at 14), while Defendants allege that Plaintiff was employed by Defendant Coil Tubing only (D.E. 93 at 21-22). This dispute is addressed in section IV(E) below.

is based-*i.e*., that Plaintiff is exempt from the FLSA's overtime pay provisions pursuant to 29 U.S.C. §§ 213(a)(1) (the "Administrative Exemption") and 213(b)(1) (the "Motor Carrier Act Exemption")-"are not plead as affirmative defenses by the Defendants" and, thus, "are waived." (D.E. 102, PP 6-10.) Defendants' Answer to Plaintiffs' Fifth Amended Complaint, the operative answer in this case and the answer cited by [*7] Plaintiff to support his waiver argument, however, expressly pleads both of these affirmative defenses. (D.E. 63, Affirmative Defense and/or Avoidance No. 8 ("Pursuant to 29 U.S.C. § 213(b)(1) …, Plaintiffs … were at all pertinent times exempt from the maximum-hour provisions of the FLSA.") & Affirmative Defendant and/or Avoidance No. 18 ("Pursuant to 29 U.S.C. § 213(a)(1) …, Plaintiffs … were at all pertinent times highly compensated employees exempt from the minimum-wage and maximum-hour provisions of the FLSA").) Furthermore, Defendants have maintained throughout this litigation that Plaintiff is exempt from the FLSA's overtime pay provisions pursuant to the Motor Carrier Act Exemption. (See D.E. 26 (Response in Opposition to Plaintiffs' Motion for Notice to Potential Class Members, filed April 22, 2008) at 10-14 (arguing that Plaintiffs are exempt from the FLSA's minimum-wage and maximum-hour provisions pursuant to the Motor Carrier Act Exemption). '"Where the [affirmative defense] is raised in the trial court in a manner that does not result in unfair surprise … technical failure to comply precisely with Rule 8(c) (requiring that affirmative defenses be pled) is not fatal.'" Rogers v. McDorman, 521 F.3d 381, 385-386 (5th Cir. 2008) [*8] (quoting Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999)). "The concern is that '[a] defendant should not be permitted to "lie behind a log" and ambush a plaintiff with an unexpected defense.'" Rogers, 521 F.3d at 385 (quoting Ingraham v. United States, 808 F.2d 1075, 1079 (5th Cir. 1987)). Plaintiff cannot plausibly argue that he was ambushed in this case.

C. The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. ("FLSA").

"As a general rule, the FLSA provides that employees are entitled to receive overtime pay at one and one-half times their regular rate for all hours worked in excess of forty per week." Diaz v. Team Oney, Inc., No. 08-12904, 291 Fed. Appx. 947, 2008 U.S. App. LEXIS 18970, at *3 (11th Cir. Sept. 3, 2008) (citing 29 U.S.C. § 207(a)(1)); see also Brown v. AGM Entm't, Inc., No. H-07-3439, 2008 U.S. Dist. LEXIS 51167, at *3 (S.D. Tex. July 3, 2008). "There are, however, several exemptions." Brown, 2008 U.S. Dist. LEXIS 51167, at *3. As discussed above, Defendants rely on two exemptions to the FLSA's overtime pay provisions in their motion for summary judgment: (1) the Administrative Exemption, 29 U.S.C. § 213(a)(1), and (2) the Motor Carrier Act Exemption, 29 U.S.C. § 213(b)(1).

Exemptions [*9] to the FLSA are "narrowly construed against the employers seeking to assert them and their application [is] limited to those establishments plainly and unmistakably within their terms and spirit." Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392, 80 S. Ct. 453, 4 L. Ed. 2d 393 (1960). The burden of invoking these exemptions rests on the employer. Id. at 394 n.11.

1. The Administrative Exemption, 29 U.S.C. § 213(a)(1).

The Administrative Exemption exempts from the FLSA's overtime requirements "any employee employed in a bona fide … administrative … capacity …" 29 U.S.C. § 213(a)(1). The Code of Federal Regulations states that:

> The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (1) Compensated on a salary or fee basis at a rate of not less than $ 455 per week …;
>
> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
>
> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200(a).

Regardless of whether or not Plaintiff meets the first two requirements [*10] set forth above, Defendants cannot demonstrate on summary judgment that Plaintiff qualifies for the Administrative Exemption because there exists an issue of fact with respect to whether or not Plaintiff meets the third requirement, *i.e*., whether or not Plaintiff's "primary duty include[d] the exercise of discretion and independent judgment with respect to matters of significance." Id. The Code of Federal Regulations states that "the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.202(a). The Code further states that:

> The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries [*11] out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; ***whether the employee has authority to commit the employer in matters that have significant financial impact***; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long-or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. § 541.202(b) (emphasis added).

Defendants argue that Plaintiff "had the authority to commit [Defendants] to purchases that were financially significant," and, thus, that Plaintiff exercised discretion and independent judgment with respect [*12] to matters of significance. (D.E. 93 at 12.) Defendants, however, ignore Plaintiff's testimony that his authority to make purchases for Defendants had substantial limitations. (D.E. 93, Ex. A at 47:1-18.) Specifically, during his deposition, Plaintiff testified as follows:

> Q: And how did you determine what amount of nitrogen to purchase?
>
> A: Mr. Luera or Mr. Belano [*i.e.*, Plaintiff's supervisors] would tell me. And I would just make the phone call, basically, is what I did.

(Id. at 27:7-11.)

> Q: Did - how did you make a determination to order soda ash from the place in Alice?
>
> A: Mr. Belano or Mr. Luera.

(Id. at 42:5-7.)

> Q: And then would you make the - make the call on who to ultimately buy them [the parts] from?
>
> A: I would go give the price to Mr. Belano or Luera, show them what it was going to cost us. And they'd tell me who to get it from, and I'd call them and get it.

(Id. at 43:17-22.)

> Q: And is it - you testified that you would exceed that budget virtually every day.
>
> A: If I was to exceed the limit that they [Mr. Luera and Mr. Belano] had set on the computer, you know, I was to go and let them know. I had a limit that I could purchase up to $ 500 without any question if I needed to get it. [*13] If it was over $ 500, then I had to go, you know, and let them know what it was I was needing and, you know, they approved it, signed it.

(Id. at 47:10-14.)

This testimony suggests that it was Mr. Luera and Mr. Belano who exercised discretion and independent judgment with respect to financially significant purchases, not Plaintiff. This evidence is sufficient to raise a factual issue regarding whether or not Plaintiff qualifies for the administrative exemption. See Martinez v. Global Fin. Servs., L.L.C., C.A. No. H-07-0591, 2008 U.S. Dist. LEXIS 574, at *5 (S.D. Tex. Jan. 4, 2008) (holding that, where there was conflicting evidence and "[t]he parties describe[d] Plaintiff's job responsibilities differently," there existed an issue of fact with respect to whether or not Plaintiff qualified for the administrative exemption).

Defendants point to 29 C.F.R. § 541.203(f), which states that "purchasing agents" are administrative employees, to support their argument that Plaintiff qualifies for the Administrative Exemption. This regulation states that "[p]urchasing agents with authority to bind the company on significant purchases generally meet the duties requirements for the administrative [*14] exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs." (Id.) As discussed above, there exists an issue of fact with

respect to whether or not Plaintiff had the authority to "bind the company on significant purchases." (Id.) And Plaintiff's testimony demonstrates that Plaintiff was required to consult with Mr. Luera and Mr. Belano when making the majority of his purchases, not merely purchases of "raw materials in excess of the contemplated plant needs." (Id.)

2. The Motor Carrier Act Exemption, 29 U.S.C. § 213(b)(1).

The Motor Carrier Act Exemption exempts from the FLSA's overtime requirements "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49." 29 U.S.C. § 213(b)(1). Section 31502 states that the Secretary of Transportation may prescribe requirements for (1) "a motor carrier," and (2) "a motor private carrier, when needed to promote safety of operation," 49 U.S.C. § 31502(b), and 29 C.F.R. § 782.7(a) explains that "[t]he exemption of an employee [*15] from the hours provisions of the Fair Labor Standards Act under section 13(b)(1) depends both on [1] the class to which his employer belongs [*i.e.*, whether the employer qualifies as a "Motor Carrier" or "Motor Private Carrier"] and on [2] the class of work involved in the employee's job."

Defendants assert, and Plaintiff does not dispute, that Defendants qualify as "motor private carriers" within the meaning of the statute. (D.E. 93 at 16; D.E. 102 at 11.) Thus, to demonstrate that the Motor Carrier Act Exemption applies, Defendants must prove that Plaintiff's job involved the requisite "class of work." 29 C.F.R. § 782.7(a). The Code of Federal Regulations outlines the classes of work that qualify an employee for the Motor Carrier Act exemption, stating that "[t]he exemption is applicable … [*16] to those employees and those only whose work involves engagement in activities consisting wholly or in part of a class of work which is defined: (i) As that of a driver, driver's helper, loader, or mechanic, and (ii) as directly affecting the safety of operation of motor vehicles on the public highways in transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act." 29 C.F.R. § 782.2(b)(2) (citing Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695, 67 S. Ct. 954, 91 L. Ed. 1184 (1947); Levinson v. Spector Motor Service, 330 U.S. 649, 67 S. Ct. 931, 91 L. Ed. 1158 (1947); Morris v. McComb, 332 U.S. 422, 68 S. Ct. 131, 92 L. Ed. 44 (1947).)

i. There Exists An Issue of Fact With Respect To Whether or Not Plaintiff is a "Driver."

Defendants argue that Plaintiff qualifies as a "driver" as contemplated by the Motor Carrier Act. (D.E. 93 at 17.) They base this assertion on Plaintiff's testimony that he drove a commercial vehicle from the state of Texas to Broussard, Louisiana twice while employed by Defendants. (D.E. 93 at 17, Ex. A (Yakin Dep.) at 65:15-66:9.) The Code of Federal Regulations, however, states that:

> [W]here the continuing duties of the employee's job have no substantial direct effect on such safety of operation or ***where such safety-affecting [*17] activities are so trivial, casual, and insignificant as to be de minimis***, the exemption will not apply to him in any workweek so long as there is no change in his duties. [citing Pyramid, 330 U.S. 695, 67 S. Ct. 954, 91 L. Ed. 1184; Levinson, 330 U.S. 649, 67 S. Ct. 931, 91 L. Ed. 1158; Morris, 332 U.S. 422, 68 S. Ct. 131, 92 L. Ed. 44; Rogers Cartage Co. v. Reynolds, 166 F.2d 317 (6th Cir. 1948); Opelika Bottling Co. v. Goldberg, 299 F.2d 37 (5th Cir. 1962); Tobin v. Mason & Dixon Lines, Inc., 102 F.Supp. 466 (E.D. Tenn. 1951).] If in particular workweeks other duties are assigned to him which result, in those workweeks, in his performance of activities directly affecting the safety of operation of motor vehicles in interstate commerce on the public highways, the exemption will be applicable to him those workweeks, but not in the workweeks when he continues to perform the duties of the non-safety-affecting job.

(29 C.F.R. § 782.2(b)(3) (emphasis added).) The fact that Plaintiff drove across state lines only twice during the four years he was employed by Defendants suggests that this activity was "de minimus." See Talton v. I.H. Caffey Distrib. Co., 1:02-CV-1048, 2004 U.S. Dist. LEXIS 6894, at *15 (M.D.N.C. Mar. 11, 2004) (stating that a single trip across state lines "falls [*18] squarely within the de minimus exception to interstate activities"); Dole v. Circle "A" Constr., Inc., 738 F. Supp. 1313, 1322 (D. Idaho 1990) (a driver is not exempt under the Motor Carrier Act merely because he takes one or two interstate trips); Kimball v. Goodyear Tire & Rubber Co., 504 F. Supp. 544, 548 (E.D. Tex. 1980) (denying Motor Carrier Act exemption where only 0.17% of trips were interstate); Coleman v. Jiffy June Farms, Inc., 324 F. Supp. 664 (S.D. Ala. 1970), aff'd, 458 F.2d 1139 (5th Cir. 1971) (where only 0.23% of driver employee's deliveries were interstate, Motor

Carrier Act exemption did not apply). And, while Defendants assert that Plaintiff "was required to be available to travel interstate at any given time as part of his routine job duties," they have presented no evidence to that effect. (D.E. 93 at 18.) Defendants, thus, have failed to demonstrate as a matter of law that Plaintiff qualifies as a "driver" as contemplated by the Motor Carrier Act. *See* Lambert v. Statewide Transp., Inc., C.A. No. 6:04-CV-00985, 2005 U.S. Dist. LEXIS 43920, at *17 (W.D. La. Oct. 12, 2005) (denying summary judgment where "[t]he record [was] insufficient for the Court to determine [*19] whether the Motor Carrier Act exemption applie[d]").

ii. There Exists An Issue of Fact With Respect To Whether or Not Plaintiff is a "Loader."

Defendants also assert that Plaintiff qualifies as a "loader" as contemplated by the Motor Carrier Act. (D.E. 93 at 19.) The Code of Federal Regulations states that:

> A "loader," as defined for Motor Carrier Act jurisdiction … is an employee of a carrier subject to section 204 of the Motor Carrier Act … whose duties include, among other things, the proper loading of his employer's motor vehicles so that they may be safely operated on the highways of the country. A 'loader' may be called by another name, such as 'dockman,' 'stacker,' or 'helper,' and his duties will usually also include unloading and the transfer of freight between the vehicles and the warehouse, but he engages, as a 'loader,' in work directly affecting 'safety of operation' ***so long as he has responsibility when such motor vehicles are being loaded, for exercising judgment and discretion in planning and building a balanced load or in placing, distributing, or securing the pieces of freight in such a manner that the safe operation of the vehicles on the highways in interstate or foreign [*20] commerce will not be jeopardized***. [citing Levinson, 330 U.S. 649, 67 S. Ct. 931, 91 L. Ed. 1158; Pyramid, 330 U.S. 695, 67 S. Ct. 954, 91 L. Ed. 1184; Walling v. Huber & Huber Motor Express, 67 F. Supp. 855 (W.D. KY. 1946).]

(29 C.F.R. § 782.5(a) (emphasis added).)

Defendants have not presented any evidence that Plaintiff exercised "judgment and discretion in planning and building a balanced load." (Id.) While Plaintiff did testify that he "filled the nitrogen tanks on … the pump and the transport," (D.E. 93, Ex. A at 61:11-19), there is no evidence regarding whether or not he had any discretion over how this task was accomplished, or merely followed the instructions of his superiors. Defendants also argue that Plaintiff "loaded coil tubing reels weighing approximately 100,000 pounds onto trailers." (D.E. 93 at 20.) Plaintiff, however, testified that:

> The actual mechanics did that part. I didn't. I would assist. I'd go get them a wrench or get them a tube of grease or a part they would need out of the parts room. They actually would do the work on it. I was just there assisting them.

(D.E. 93, Ex. A at 57:23-58:2.) In light of the parties' conflicting accounts of Plaintiff's "loading" responsibilities, the Court finds that there exists an issue of [*21] fact with respect to whether or not Plaintiff qualifies as a "loader" as contemplated by the Motor Carrier Act. See Martinez, 2008 U.S. Dist. LEXIS 574, at *5.

D. The Statute of Limitations.

"A cause of action under the FLSA must be commenced within two years [after] the cause of action accrues." Tullous v. Tex. Aquaculture Processing Co. LLC, C.A. No. H-06-1858, 579 F. Supp. 2d 811, 2008 U.S. Dist. LEXIS 77595, at *25 (S.D. Tex. Sept. 30, 2008) (citing 29 U.S.C. § 255(a)). "Nevertheless, a three-year statute of limitations applies for 'willful' violations of the FLSA." Id. at *26. "A violation is 'willful' if an employer 'knew or showed reckless disregard for … whether its conduct was prohibited by the statute.'" Id. (quoting Singer v. City of Waco, 324 F.3d 813, 821 (5th Cir. 2003)).

The Court has been unable to determine on summary judgment whether an FLSA violation occurred in this case. "[T]riable issues of fact remain as to … Plaintiff['s] claims that [he] worked overtime without compensation; as such, … a determination of which statute of limitations to apply must be reserved until it is determined whether a violation of the FLSA occurred in this case." Allen v. Bd. of Pub. Educ., 495 F.3d 1306, 1324 (11th Cir. 2007). [*22] If the jury determines that an FLSA violation occurred, it may then make the requisite willfulness determination.

E. There Exists and Issue of Fact With Respect to Whether or Not Defendant W-H Is Plaintiff's Employer.

Defendants argue that Defendant W-H is not a proper Defendant in this action, as it is not Plaintiff's employer. (D.E. 93 at 21-22.) Specifically, Defendants argue that Defendant Coil Tubing is Plaintiff's employer, and that

Defendant W-H is merely Coil Tubing's parent company. (Id.) "An 'employer' subject to the FLSA is 'any person acting directly or indirectly in the interest of an employer in relation to an employee …'" Lehman v. Legg Mason, Inc., 532 F. Supp. 2d 726, 733 (M.D. Pa. 2007) (citing 29 U.S.C. § 203(d)). "Liability for violating an employee's rights under FLSA ***has attached to a parent corporation*** for the acts of a subsidiary when the parent substantially controls the terms and conditions of employment at its subsidiary on a regular basis." Lehman, 532 F. Supp. 2d at 733 (citing E.E. Falk v. Brennan, 414 U.S. 190, 195, 94 S. Ct. 427, 38 L. Ed. 2d 406 (1973)) (emphasis added); see also Tullous, 579 F. Supp. 2d 811, 2008 U.S. Dist. LEXIS 77595, at *23 (using the "economic realities" test to determine whether separate [*23] entities constitute "joint employers" for purposes of the FLSA); Takacs v. Hahn Auto. Corp., Case No. C-3-95-404, 1999 U.S. Dist. LEXIS 21694, at *12 (D. Ohio Apr. 23, 1999) (using the "single employer" or "integrated enterprise" test to determine the liability under the FLSA of a parent corporation for the acts of its subsidiaries). The mere fact that Defendants W-H and Coil Tubing are separate corporate entities is not sufficient to shield Defendant W-H from liability for FLSA violations against Defendant Coil-Tubing's employees.

Defendants argue that Plaintiff has presented "no evidence" that there exists a connection between Defendant W-H and Defendant Coil Tubing sufficient to impose liability against Defendant W-H. (D.E. 93 at 23.) Plaintiff, however, has provided the Court with (1) testimony from Defendants' employee, James Chism, that W-H and Coil Tubing are "one in the same," (D.E. 102, Ex. D at 7:2-6), and (2) an employee handbook, titled "Coil Tubing Services and W-H Energy Services Employee Handbook," suggesting that employees of Coil Tubing, in fact, work for both entities (Id., Ex. E). The Court finds this evidence sufficient to raise an issue of fact with respect to whether [*24] or not Defendant W-H constitutes Plaintiff's "employer" as contemplated by the FLSA.

V. Defendants' Motion to Strike and for Leave.

Defendants seek to strike Exhibit A to Plaintiff's response in opposition to Defendants' motion for summary judgment, Plaintiff's employee exit form and employee evaluations, on the basis that it has not been properly authenticated. (D.E. 103.) Defendants also seek to strike Exhibit B to Plaintiff's response in opposition to Defendants' motion for summary judgment, the Declaration of Bert Yaklin, on the basis that it "contradicts Plaintiff's deposition testimony." (Id.) Because the Court did not consider Exhibits A or B in making its summary judgment determination, the Court need not resolve these issues on the merits and, instead, denies Defendants' requests as moot.

Defendants also seek leave to file a reply in support of their motion for summary judgment, presumably the reply attached as Exhibit 1 to their motion to strike and for leave. (Id., Ex. 1.) In the interests of justice, the Court hereby grants Defendants' motion for leave, and notes that it considered Defendants' reply brief in making its summary judgment determination.

VI. Conclusion. Based on [*25] the foregoing:

(1) Defendants' Motion for Summary Judgment is DENIED in its entirety;

(2) Defendants' Motion to Strike and for Leave is GRANTED in part and DENIED in PART:

(a) Defendants' motion to strike Exhibits A and B to Plaintiff's response in opposition to Defendants' motion for summary judgment is DENIED as MOOT; and

(b) Defendants' motion for leave to file a Reply is GRANTED.

SIGNED and ORDERED this 22nd day of October, 2008.

/s/ Janis Graham Jack

Janis Graham Jack

United States District Judge

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Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MATTHEW KREAMER, on behalf of himself and similarly situated employees,	)	CIVIL ACTION
Plaintiff,	)	
v.	)	Case No. 4:15-cv-01075-MWB
GRANT PRODUCTION TESTING SERVICES, INC.,	)	
Defendant.	)	

DEFENDANT'S RESPONSES TO
PLAINTIFF'S FIRST INTERROGATORIES TO DEFENDANT

Pursuant to Federal Rule of Civil Procedure 33, Defendant, Grant Production Testing Services, Inc. ("GPT"), submits the following responses and objections to Plaintiff's First Interrogatories to Defendant as follows:

GENERAL OBJECTIONS AND CONDITIONS

A. General Objections.

1. Defendant objects to the Requests, including the Definitions and General Instructions sections, to the extent that the Requests purport to seek information contained in privileged communications protected from disclosure by the attorney-client privilege and/or work-product doctrine. Defendant reserves the right to claim any applicable privilege or protection with respect to these answers, and information provided in response to the Requests which may otherwise qualify for such privilege or protection is not intended to and therefore should not constitute a waiver of that privilege or protection.

2. Defendant objects to the Requests to the extent that the Requests seek or may be deemed to seek the disclosure of information about third parties that might constitute an improper invasion of the right of privacy of such person or entity.

3. Defendant objects to the Requests to the extent that the Requests purport to impose requirements or obligations on Defendant that are in excess of or in addition to requirements and obligations imposed by the Federal Rules of Civil Procedure.

4. Defendant objects to the Requests to the extent that the Requests are unduly burdensome, unreasonably cumulative or duplicative and/or seek information that is equally available to Plaintiff and/or seek information in the possession and control of parties other than Defendant.

B. General Conditions.

1. Defendant submits these responses without conceding the relevancy, materiality, or admissibility of any information, documents, or other information produced, and without prejudice to its right to object to further discovery or to the admissibility of any evidence.

2. Defendant expressly reserves the right to file additional objections to the Requests.

3. Documents containing privileged and/or confidential information have been removed or redacted.

4. Defendant expressly reserves the right to supplement its responses to the Requests.

INTERROGATORIES

1. Please state the full name, residence address, business address, and telephone number of each person answering these interrogatories.

RESPONSE: Kurt A. Miller, Esq., Clark Hill PLC, One Oxford Centre, 301 Grant St., 14th Floor, Pittsburgh, PA 15219; (412) 394-2363

Amanda MacDonald, Esq., Clark Hill PLC, One Oxford Centre, 301 Grant St., 14th Floor, Pittsburgh, PA 15219; (412) 394-2507

Grant Stevens, c/o Clark Hill PLC, One Oxford Centre, 301 Grant St., 14th Floor, Pittsburgh, PA 15219; (412) 394-2363

Cathy Mason, c/o Clark Hill PLC, One Oxford Centre, 301 Grant St., 14th Floor, Pittsburgh, PA 15219; (412) 394-2363

2. Identify all persons responsible for corporate decision making related to timekeeping, compensation, and/or payroll practices. Your answer should include the persons who took part in decisions relating to the method by which Plaintiffs were paid.

RESPONSE:

Cathy Mason, c/o Clark Hill PLC, One Oxford Centre, 301 Grant St., 14th Floor, Pittsburgh, PA 15219; (412) 394-2363

Adam McIver, c/o Clark Hill PLC, One Oxford Centre, 301 Grant St., 14th Floor, Pittsburgh, PA 15219; (412) 394-2363

3. Please state your factual and legal basis for the following statement in paragraph 11" of your answer: "GPT states that the day rates that GPT has paid to its non-exempt employees are calculated to include pay of time-and-one-half the employees' regular hourly rates for all hours that the employee works in excess of 40 hours per workweek."

RESPONSE: GPT objects to Interrogatory No. 3 on the ground that the interrogatory seeks information beyond the scope of discovery for purposes of class and conditional certification.

4. Identify by name, address, phone number and title all persons who determine your payroll practices for your day rate paid workers in the United States. Your answer should include the managerial hierarchy of payroll decisions. For example, if you have a central human relations manager who is involved with payroll decisions, please identify that person or those persons.

RESPONSE: GPT objects to Interrogatory No. 4 on the ground that the phrase "managerial hierarchy" is vague and ambiguous. Without waiving this objection, GPT states that the following individuals determine payroll practices for GPT's day rate paid workers in the United States:

Cathy Mason, Controller, c/o Clark Hill PLC, One Oxford Centre, 301 Grant St., 14th Floor, Pittsburgh, PA 15219; (412) 394-2363

Adam McIver, Operations Manager, c/o Clark Hill PLC, One Oxford Centre, 301 Grant St., 14th Floor, Pittsburgh, PA 15219; (412) 394-2363

5. Please identify your corporate structure, including all parent companies and all subsidiary companies. Your answer should include your current corporate structure and the corporate structure as it existed during the time period subject to this lawsuit. For instance, if you had acquired or sold any subsidiary companies at any time during the three year period prior to the filing of this lawsuit, please identify such companies and state the date when such event occurred.

RESPONSE: GPT objects to Interrogatory No. 5 on the grounds that the phrase "corporate structure" is vague and ambiguous. GPT further objects to Interrogatory No. 5 on the ground that the interrogatory seeks information beyond the scope of discovery for purposes of class and conditional certification.

6. Identify all day rate paid workers, as defined above, (current and former) by name, address, phone number, social security number, position, dates of employment, and states where employed with you from June 1, 2012 forward.

RESPONSE: GPT objects to Interrogatory No. 6 on the ground that the interrogatory seeks confidential information about third parties. GPT further objects to Interrogatory No. 6 to the extent the interrogatory seeks information about the states where GPT employed the workers on the ground that the information sought is beyond the scope of discovery for purposes of class and conditional certification. Without waiving this objection, GPT states that the document produced in response to Request No. 1 of Plaintiff's First Request for Production of Documents to Defendant provides the information sought to which GPT has not objected.

7. Please identify the job title and responsibilities of each Plaintiff.

RESPONSE: GPT objects to Interrogatory No. 7 on the ground that the phrase "each Plaintiff" is vague and ambiguous. Without waiving this objection, GPT states that Matthew Kreamer's job title was Well Test Operator. Mr. Kreamer's responsibilities included those in the Well Test Operator job description attached hereto.

8. For each week of each Plaintiffs employment, identify Plaintiffs hours worked and hourly rate of pay or day rate of pay. Please include in your answer any changes in each of the Plaintiffs rates of pay and when such changes were effective. If there were any changes to the rate of pay of any Plaintiff, describe why the changes were made.

RESPONSE: GPT objects to Interrogatory No. 8 on the ground that the phrase "each Plaintiff" is vague and ambiguous. Without waiving this objection, GPT states that the documents produced in response to Request No. 2 of Plaintiff's First Request for Production of Documents to Defendant show Mr. Kreamer's hours worked and day rate of pay. With respect to Matthew Kreamer's rate of pay, GPT states that his day rate of pay on the days that he worked in the field

was $220.00. GPT further states that on the days that Mr. Kreamer worked in the shop, his day rate of pay was $110.00. There were no changes to Mr. Kreamer's rate of pay.

9. Please explain in full detail how you kept track of each Plaintiffs time worked and who was in charge of tracking each Plaintiffs time.

RESPONSE: GPT objects to Interrogatory No. 9 on the ground that the phrase "each Plaintiff" is vague and ambiguous. GPT further objects to Interrogatory No. 9 on the ground that the interrogatory seeks information beyond the scope of discovery for purposes of conditional and class certification.

10. Describe how you calculated each Plaintiffs pay and what, if any, distinctions exist between the method of calculating the pay for each Plaintiff. Your answer should include whether and how you calculated any premium pay for hours worked over 40 in a workweek.

RESPONSE: GPT objects to Interrogatory No. 10 on the ground that the phrase "each Plaintiff" is vague and ambiguous. GPT objects to Interrogatory No. 10 on the ground that the interrogatory seeks information beyond the scope of discovery for purposes of conditional and class certification.

11. Please explain in full detail, the duties and responsibilities of your workers, as defined above. For each task that a worker is required to perform, please state the amount of time that is expected to complete each task.

RESPONSE: GPT objects to Interrogatory No. 11 to the extent the interrogatory seeks information about the amount of time within which each worker is expected to complete each task on the ground that the interrogatory is overly broad and unduly burdensome and oppressive. Without waiving these objections, GPT states that the duties and responsibilities of workers in the position of Well Test Operator include those in the job description attached hereto.

12. Please state whether any Plaintiff has ever been involved in any disciplinary action. If so, please:

(a) Explain the dates and circumstances surrounding the disciplinary action;

(b) Identify the person or persons involved including their names, addresses, and relationship to the plaintiff and defendant;

(c) The effect of the disciplinary action on each of the plaintiffs compensation scale or opportunity for promotions or wage increases; and

(d) The names and addresses of other employees who have been subject to similar disciplinary actions.

RESPONSE: GPT objects to Interrogatory No. 12 on the ground that the phrase "any Plaintiff" is vague and ambiguous. GPT further objects to Interrogatory No. 12 on the ground that the interrogatory seeks information beyond the scope of discovery for purposes of conditional and class certification. GPT further objects to Interrogatory No. 12 on the ground that the interrogatory seeks information not reasonably calculated to lead to discovery of admissible evidence.

13. Please identify all states where you employ workers, as defined above. Include in your answer the number of workers located in each state that you identified..

RESPONSE: GPT objects to Interrogatory No. 13 on the ground that the interrogatory seeks information beyond the scope of discovery for purposes of conditional and class certification.

14. Do you contend that the Plaintiffs are exempt from overtime under the FLSA? If so, please state your legal and factual basis for that contention.

RESPONSE: GPT objects to Interrogatory No. 14 on the ground that the interrogatory seeks information beyond the scope of discovery for purposes of conditional and class certification.

15. Please state each Plaintiffs work schedule. If Plaintiffs work schedule changed, please state when his scheduled changed and by how many hours it changed.

RESPONSE: GPT objects to Interrogatory No. 15 on the ground that the phrase "each Plaintiffs" is vague and ambiguous. Without waiving this objection, GPT states that Mr. Kreamer did not work a set schedule, so it cannot be determined when his work schedule changed or by how many hours it changed.

16. Please identify the exact number of hours that you claim each Plaintiff worked per week for you. If it is your contention that you do not know how many hours he worked per week, please so state.

RESPONSE: GPT objects to Interrogatory No. 16 on the ground that the phrase "each Plaintiffs" is vague and ambiguous. Without waiving this objection, GPT states that Matthew Kreamer did not work a set schedule. On days when Mr. Kreamer worked in the field, he worked 12 hours a day. On days when Mr. Kreamer worked in the shop, he worked 8 hours a day.

17. Identify, by name, address, title and phone number the witnesses with the most knowledge regarding the following subjects:

(a) The number of hours that each Plaintiff worked per week for you;

(b) Defendant's rules and policies regarding paying overtime;

(c) Defendant's rules and policies regarding overtime rate;

(d) Defendant's rules and policies regarding workers, as defined above, working more than 40 hours a week;

(e) Whether Defendant's practices complied with wage laws, including the FLSA;

(f) Other witnesses whom you believe have knowledge relevant to the claims or defenses in this case

For each such person, identify what function he/she performs or knowledge (by subject) he/she possesses.

RESPONSE: GPT objects to Interrogatory No. 17 on the ground that the phrase "each Plaintiff" is vague and ambiguous. GPT further objects to subsections (b), (c), (d), (e), and (f) of Interrogatory No. 17 on the ground that the interrogatory seeks information beyond the scope of discovery for purposes of conditional and class certification. Without waiving these objections, GPT states that the following people have knowledge about subsection (a).

1. Cathy Mason (Controller), c/o Clark Hill PLC, One Oxford Centre, 301 Grant St., 14th Floor, Pittsburgh, PA 15219.

2. Adam McIver (Operations Manager), c/o Clark Hill PLC, One Oxford Centre, 301 Grant St., 14th Floor, Pittsburgh, PA 15219.

18. Please identify the immediate supervisor of each Plaintiff and all other persons who were directly or indirectly involved or responsible for Plaintiffs supervision.

RESPONSE: GPT objects to Interrogatory No. 18 on the ground that the phrase "each Plaintiff" is vague and ambiguous. GPT further objects to Interrogatory No. 18 on the ground that the interrogatory seeks information beyond the scope of discovery for purposes of conditional and class certification.

19. Please state your annual gross revenues for the past 5 years, by year.

RESPONSE: GPT objects to Interrogatory No. 19 on the ground that the interrogatory seeks confidential business information and information not reasonably calculated to lead to discovery of admissible evidence. GPT further objects to Interrogatory No. 19 on the ground that the interrogatory seeks information beyond the scope of discovery for purposes of conditional and class certification.

20. If you allege that you have a good faith basis that you complied with the FLSA, please describe your basis for your good faith allegation.

RESPONSE: GPT objects to Interrogatory No. 20 on the ground that the interrogatory seeks information beyond the scope of discovery for purposes of conditional and class certification.

21. Identify your largest domestic customers, by percentage of your revenue, for the last 5 years.

RESPONSE: GPT objects to Interrogatory No. 21 on the ground that the interrogatory seeks confidential business information and information not reasonably calculated to lead to discovery of admissible evidence. GPT further objects to Interrogatory No. 21 on the ground that the interrogatory seeks information beyond the scope of discovery for purposes of conditional and class certification.

Dated: September 4, 2015

Respectfully submitted,

Kurt A. Miller
Pa I.D. No. 37850

CLARK HILL PLC
One Oxford Centre
301 Grant Street, 14th Floor
Pittsburgh, PA 15219
Telephone: (412) 394-2363
Facsimile: (412) 394-2555

Attorneys for Defendant, Grant Production Testing Services, Inc.

VERIFICATION

I, Cathy Mason, am authorized to make this statement and verification on behalf of Grant Production Testing Services, Inc. I have read the foregoing Defendant's Responses to Plaintiff's First Interrogatories to Defendant. The statements of fact set forth therein are true and correct to the best of my personal knowledge, information, and belief.

This statement and verification is subject to the penalties of perjury.

Date: Sept 3, 2015

C. Mason

Cathy Mason

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of **DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST INTERROGATORIES TO DEFENDANT** has been served, via email, this 4th day of September 2015, as follows:

Peter Winebrake
R. Andrew Santillo
Mark J. Gottesfeld
Winebrake & Santillo, LLC
715 Twining Road, Suite 211
Dresher, PA 19025
pwinebrake@winebrakelaw.com

Galvin B. Kennedy
Kennedy Hodges, L.L.P.
711 W. Alabama Street
Houston, TX 77006
gkennedy@kennedyhodges.com

Kurt A. Miller

Exhibit C

GRANT™ PRODUCTION TESTING SERVICES LTD.

Every Day

About Grant PTS

Grant Production Testing Services Ltd., is a leader in Foothills Critical Sour, Post Stimulation Flow-back and Inline Services. Grant PTS was started in 2001 and has grown to be an industry recognized service provider here in Canada.

We are focused on continual improvement, growth and expansion opportunities. That said, we are doing extensive work in the Montney, Cardium and Deep Basin area's for various clients.

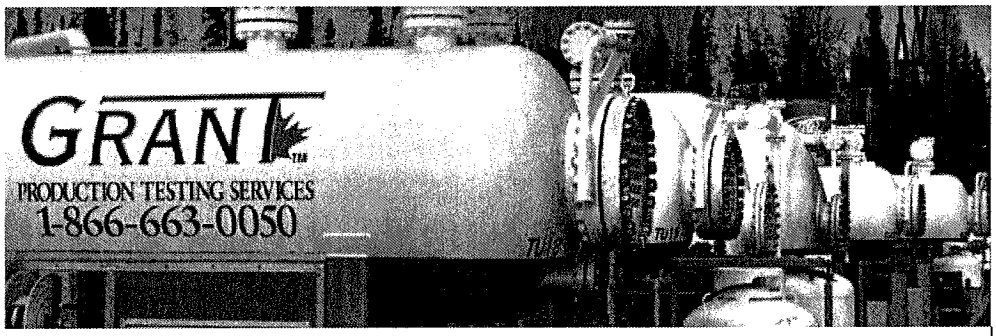
Corporate Head Office: Suite 200, 505 - 8th Ave. SW Calgary, AB Canada Ph. 403.663.0050 Toll free: 1.866.663.0050

Grant Production Testing Services Ltd.

Oil & Energy
51-200 employees

254 followers Follow

Home Premium Insights



Grant Production Testing Services Ltd., is an industry leading provider of Critical Sour, Post Stimulation Flow-back and Inline Testing Services. Grant PTS was incorporated in 2001 and has grown to be one of the largest privately owned Well Testing Service providers in Canada.

Our management team brings over 130+ years of direct Well Testing and Flow-back experience to the table and our dedicated team members are focused on providing our clients with the best in class service, quality equipment and competent trained personnel. Our growth and recognized expertise within the industry is directly related to our commitment to safety and operational excellence.

Specialties
Production Testing, Frac Flow-Back and Recovery, LPG Frac Recovery, Inline Testing, Multi-Well Pads, Well Clean-Ups and Work-Overs, Abandonment Operations

Website
http://www.grantpts.com

Industry
Oil & Energy

Type
Privately Held

Headquarters
200, 505 - 8th Ave. SW Calgary, Alberta T2P 1G2 Canada

Company Size
51-200 employees

Founded
2001

Did you know this about Grant Production Testing Services Ltd.?

13% change in total headcount over the last 2 years

Get the full picture

How You're Connected

50 Employees on LinkedIn

See all

Ads By LinkedIn Members

M&A Negotiation Trends
Join the ABA for FREE for what's-market in M&A of private & public targets.

Learn More »

Attorney Leads (Local)
We Need Local Attorneys Looking for Clients. Sign up to Receive Leads Today

Learn More »

People Also Viewed

Skyline Well Testing
McDaniel
United Fabrication
Medeng
ATK Oilfield Transportation Inc.

Exhibit D

GRANT™
PRODUCTION TESTING SERVICES LTD.

PHONE LIST - March 2, 2012

CALGARY HEAD OFFICE #200, 505 – 8th Ave SW T2P 1G2	**BUS: 403-663-0050** **FAX: 403-663-0051**
GRANDE PRAIRIE AREA OFFICE Bay F 11499 - 95th Avenue T8V 5P7	**BUS: 780-539-3100** **FAX: 780-539-3008**
KINDERSLEY AREA OFFICE Office: 1001 Main Street Shop: 1204 9th Ave West Mailing Adress: Box 1986 Kindersley, Sk S0L 1S0	**BUS: Line 1: (306)463-3672** **BUS: Line 2: (306)463-3683** **FAX: (306)463-3673**
RED DEER AREA OFFICE 6750 Golden West Ave T4P 1A8	**BUS: 403-314-0042** **FAX: 403-314-5510**
WWW.GRANTPTS.COM	**TOLL FREE: 1-866-663-0050**

Office Personnel	Email	Cellular	Office/ Home	Area
STEVENS, Grant - President	grant@grantpts.com	403-819-0429	403-663-3668	HO
BANNERMAN, Lorrie - Operations Admin, SK	lbannerman@grantpts.com		306-463-3672	SK
BEAN, Cindy - Operations Admin, GP	cbean@grantpts.com		780-539-3100	GP
CHURSKY, Ryan - GP Field Superintendent	rchursky@grantpts.com	587-297-3751		GP
CLAXTON, Megan - Sales Administrator	mclaxton@grantpts.com	403-519-1398	403-663-3667	HO
DAVE, Suraj - IT Manager	sdave@grantpts.com	403-804-1497	403-663-3276	HO
DONE, Sandy - Office Administrator	sdone@grantpts.com	403-819-8889	403-663-0050	HO
FULKERTH, Marty - HSE Manager	mfulkerth@grantpts.com	403-700-7970	403-663-3677	HO
GREEN, Ron -Vice President US	rgreen@grantpts.com	403-620-0153	403-663-3670	HO
JOLLYMORE, Gregg - General Manager	gjollymore@grantpts.,com	403-710-5474	403-213-3257	HO
JOHNSON, Gord- Operations Manager Kindersley	gjohnson@grantpts.com	306-604-9019		SK
MASON, Cathy - HR	cmason@grantpts.com	403-809-7944	403-663-3672	HO
McFarlane, Lauren - Controller	lmcfarlane@grantpts.com	403-680-5298	403-663-3670	HO
MCKINLEY, Kandy - Operations Admin RD	kmckinley@grantpts.com		403-314-0042	R
MOEN, Brandon - Data Analyst HO	bmoen@grantpts.com	403-970-9003	403-663-674	HO
MONEY, Dustin - Operations Manager RD	dmoney@grantpts.com	403-358-6576	403-755-1766	R
NELSON, Mike - Assistant Manager RD	mnelson@grantpts.com	403-396-4868		R
ONUSHKO, Greg -Sales & Marketing Mgr.	gonushko@grantpts.com	403-519-1743	403-663-3671	HO
PATRICK, Tyler - Sales Representative	tpatrick@grantpts.com	403-809-4725	403-663-3669	HO
PLACE, Cale - RD Field Superintendant	cplace@grantpts.com	403-396-3465		R
POFFENROTH, Wade	wpoffenroth@grantpts.com	403-304-6006		R
MEIKLEM, Brian- Operations Manager, GP	bmeiklem@grantpts.com	780-897-1424		GP
SATRE, Kevin, Shop Manager, GP	ksatre@grantpts.com	587-297-0635		GP
WEISHAAR, Austin - Well Test Data Specialist	aweishaar@grantpts.com	403-472-8910		HO
WRIGHT, Cindy - Quality Manager	cwright@grantpts.com	403-816-3661	403-663-3663	HO

Senior Supervisors	Other	Cellular	Home	Loc	Veh/Code
BALDWIN, James		403-357-9687	403-886-5778	R	
BOHME, Marc		780-814-3926		GP	MB#1
CAINES, Levi		403-869-1074	403-938-0115	R	LC#1
DASSONVILLE, Richard		780-832-3361		GP	RD#1
DUGUAY, Gabe		403-597-7217	403-348-5666	R	
ELLINGSON, Alma		403-332-1686	403-942-0078	SK	
FAUBERT, Jean-Claud		780-832-0759	780-830-0403	GP	JC#1
FOTHERINGHAM, Brett		403-969-0139		R	BF#1
GODENIR, Travis		403-771-1880		R	TG#1
GOODWIN, Ryan		403-461-5755			
GORDON, Kyle		403-466-4265		R	KG#1

GRANT PRODUCTION TESTING SERVICES LTD. Every Day

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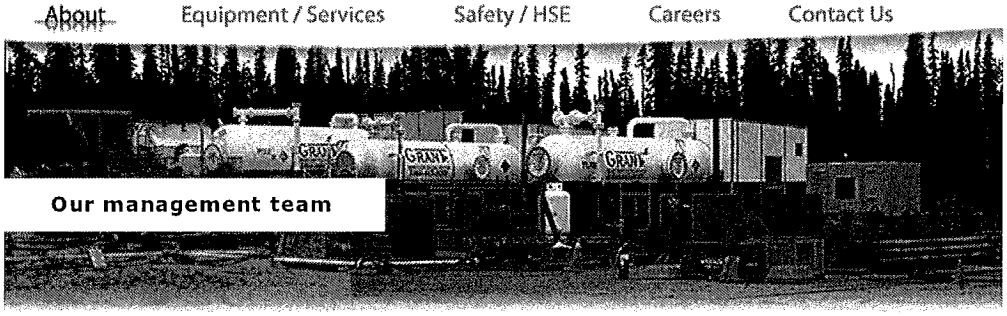
» About Us

- History
- Management / Staff
- Core Values
- Community Support



Grant Stevens

Founder and President of Grant Production Testing Services Ltd.

Grant Stevens has been in the oil and gas industry since 1973 and has been directly involved with well testing since 1976. Grant was first hired as an operator and became one of the strongest supervisors among his peers in only a few short years. Grant left his 21 year field career when he was offered the position of President with another well testing company. In 2001, three years after accepting the position of President the company had been purchased by a much larger firm. At this point Grant had found that there wasn't enough room to implement any of his beliefs and thoughts within the organization and came to the decision to start his own Well Testing Company. On March 1st 2001 Grant Production Testing Services Ltd. was formed and has since grown to become an industry leader in production testing services within Canada.

Dustin Money started out his Well Testing career as an operator in 1992 and quickly worked his way up to a supervisor position which he pursued until 1998 when he was presented with the opportunity to manage an area office. Shortly after accepting the Area Manager position Dustin was presented with another opportunity to open an operations base in Brooks to cover southern Alberta and Saskatchewan. Over the next two years Dustin was able to build a successful base that still operates to this day. In February of 2002 Dustin was approached by Grant Stevens to become a manager for Grant PTS. In December of 2002 Dustin moved his family to Red Deer to open another operation center. In his 10+ years with Grant Dustin has found himself in many positions including HSE, HR, QC, Admin, Operations and Management.

Cindy Wright C.E.T. is the Quality Manager at Grant Production Testing Services Ltd. She has been with the company since 2005. She is an API certified In-service Vessel and Piping Inspector and a Certified Engineering Technologist. She started in the Quality Control and Assurance department in 2000 and has 3 years well testing/underbalanced drilling experience.

Exhibit E

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

---------- Forwarded message ----------
From: **Cathy Mason** <cmason@grantpts.com>
Date: Mon, Jul 28, 2014 at 3:44 PM
Subject: Payroll Advice for Allen, Kale from Grant Production Testing Services Inc
To: "Allen, Kale" <kaleallen1@gmail.com>

The following documents are included in this transmission.

Payroll Advice for Employee ID [ALLKAL01]

Best regards,
Cathy Mason

Grant Production Testing Services Inc
Tel :
Fax :
Email : cmason@grantpts.com

Sent by DocuFire

175

NON-NEGOTIABLE

7/31/2014 ***2,503.03

Kale Allen
503 North Center Street
Canton, PA 17724

NON-NEGOTIABLE

	Period Start	Period End	Check Date	Check Number
	7/1/2014	7/15/2014	7/31/2014	175
Employee Name	**Employee No**	**Soc. Sec. No**	**Hours Paid**	**Check Amount**
Allen, Kale	ALLKAL01		25.00	$2,503.03

Current Earnings	Current Deductions	Current Taxes	YTD Earnings	YTD Subject to FIT	YTD Net Pay
3,365.00	33.74	868.23	22,687.00	20,007.00	17,456.00

Category	Earning/Ded/Tax	Type	Hours	Rate or %	Pieces or Base	Amount	Year to Date	Balance
Earnings	Field Day	Regular	11.00	225.00		2,475.00	16,762.50	
	Shop Day	Regular	3.00	112.50		337.50	2,250.00	
	STAT						225.00	
	Subsistence	Regular	11.00	40.00		440.00	2,680.00	
	VAC 4%	Regular		4.00000	2,812.50	112.50	769.50	
Taxes	FIT				2,925.00	494.01	3,105.48	
	Medicare				2,925.00	42.41	290.11	
	Soc Sec				2,925.00	181.35	1,240.44	
	PA SIT				2,925.00	89.80	614.21	
	WMSD				2,925.00	58.50	400.14	
	Service Tax					2.16	19.44	
Other	Other R						75.00	
	Subsistence			40.00		40.00	600.00	
Direct Deposit	Chemung Canal			100.00		2,503.03		

Exhibit F

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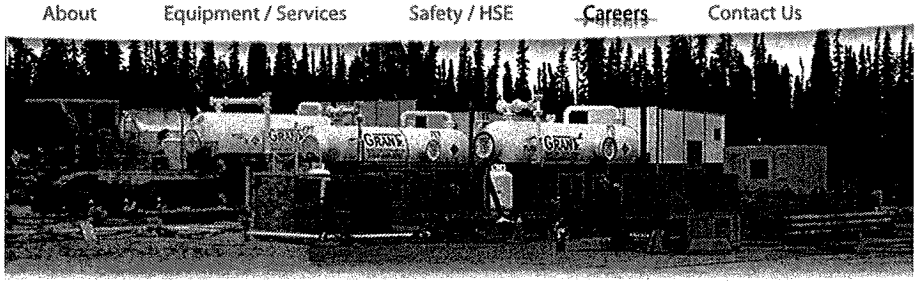
» Careers



At Grant Production Testing Services, our greatest advantage is our people.

The key to our success has been and will continue to be employing people who possess a high quality of competence and leadership which gives us the ability to achieve excellence above all others in our field.

We have implemented the Skills Passport training program in order to provide all new and experienced employees a consistent training platform to grow from.

Grant PTS is an equal opportunity company that provides a safe, professional and welcoming work environment for all employees.

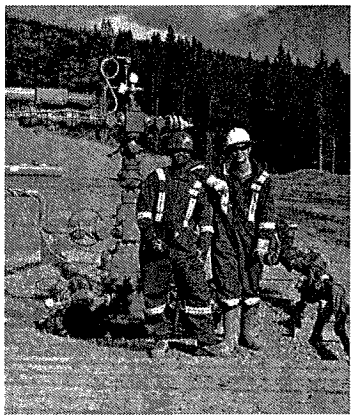
Submit resume:
careers@grantpts.com

Open Job Positions:

POSITION: WELL TEST OPERATOR

REPORTS TO: District Manager

DESCRIPTION: The Well Test Operator is an entry level position, working directly with the Supervisor and Sr. Supervisor on customer locations, under direct supervision and will assist with daily operations, assembly of separation equipment, data collection and reporting. The Well Test Operator will be part of a team work environment and execute the required duties in a safe manner. As an Operator, you will be required to work in remote locations for extended periods of time.



DUTIES AND RESPONSIBILITIES:
The Operator, reporting directly to the Supervisor is responsible for carrying out specific duties during their assigned shift. These responsibilities include those listed in this job description, and any others delegated by the job supervisor or manager.

- Actively participates in all company safety programs
- Works with other crew member operators and supervisors to improve job performance.
- Ensures all safe work practices are followed
- Assists in the maintenance of all district test equipment to ensure its readiness for work.
- Assists with the preventative maintenance on equipment
- Assists with the regular maintenance of equipment when required
- Assists with the routine maintenance on vehicles and helps keep them clean and ready for use
- Follows all government, industry and company regulations and policies which affect the workplace and the work being carried out
- Assists in the operation of test equipment in a safe and competent manner when required to do so.
- Helps with the organization and works in conjunction with crew members to ensure an efficient job from rig-in to rig-out.
- Works along with other crew members to ensure efficient use of time and labor on location and in the shop.
- Effectively communicates with the job / shift supervisor and other crew members to ensure job completion on location and in the shop
- Assists with operations and crew activities throughout the assigned shift
- Assists crew to maintain safe work procedures and a clean work environment.
- Assists in gathering accurate reliable data throughout the shift
- Gathers all field data sheets and presents them in a neat organized manner to the job supervisor

- Utilizes field training program to develop personal job skills to the maximum
- Makes efficient use of all Grant resources and replenishes supplies when required
- Helps in the control field expenses, i.e. Reduce – Reuse - Recyle
- Ensures that all paperwork is handed into the supervisor on time and in a neat organized manner
- Assists in general duties in the operations bases – i.e. shop and yards
- Attends all company sponsored safety training
- Acquires and demonstrates a basic knowledge of corporate operating and safety policies

Corporate Head Office: Suite 200, 505 - 8th Ave. SW Calgary, AB Canada Ph. 403.663.0050 Toll free: 1.866.663.0050

GRANT™
PRODUCTION TESTING SERVICES INC.

JOB DESCRIPTION

POSITION: **WELL TEST OPERATOR**
REPORTS TO: District Manager

DESCRIPTION: The Well Test Operator is an entry level position, working directly with the Supervisor and Sr. Supervisor on customer locations, under direct supervision and will assist with daily operations, assembly of separation equipment, data collection and reporting. The Well Test Operator will be part of a team work environment and execute the required duties in a safe manner. As an Operator, you will be required to work in remote locations for extended periods of time.

DUTIES AND RESPONSIBILITIES:

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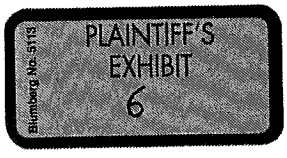
- **Actively participates in all company safety programs**
- Works with other crew member operators and supervisors to improve job performance.
- Ensures all safe work practices are followed
- Assists in the maintenance of all district test equipment to ensure its readiness for work.
- Assists with the preventative maintenance on equipment
- Assists with the regular maintenance of equipment when required
- Assists with the routine maintenance on vehicles and helps keep them clean and ready for use
- Follows all government, industry and company regulations and policies which affect the workplace and the work being carried out
- Assists in the operation of test equipment in a safe and competent manner when required to do so.
- Helps with the organization and works in conjunction with crew members to ensure an efficient job from rig-in to rig-out.
- Works along with other crew members to ensure efficient use of time and labor on location and in the shop.
- Effectively communicates with the job / shift supervisor and other crew members to ensure job completion on location and in the shop
- Assists with operations and crew activities throughout the assigned shift
- Assists crew to maintain safe work procedures and a clean work environment.
- Assists in gathering accurate reliable data throughout the shift
- Gathers all field data sheets and presents them in a neat organized manner to the job supervisor
- Utilizes Skills Passport and Training Matrix for personal growth and opportunity
- Makes efficient use of all Grant resources and replenishes supplies when required
- Helps in the control field expenses, i.e. Reduce – Reuse - Recycle
- Ensures that all paperwork is handed into the supervisor on time and in a neat organized manner
- Assists in general duties in the operations bases – i.e. shop and yards
- Attends all company sponsored safety training
- Acquires and demonstrates a basic knowledge of corporate operating and safety policies

July 2014



Aikens v. FSG of SW Fla., Inc.

United States District Court for the Middle District of Florida, Fort Myers Division

September 1, 2006, Decided

Case No. 2:06-cv-215-FtM-29SPC, Case No. 2:06-cv-328-FtM-29SPC

Reporter
2006 U.S. Dist. LEXIS 62536; 2006 WL 4792783

APRIL AIKENS, Plaintiff, vs. FSG OF SW FLORIDA, INC.; JILL PERANICH; DAN PERANICH, Defendants. WALTER HALL; JAMES R. CHAMBERS; DAWN WATERS; LINDA OLDAKER, Plaintiffs, vs. DAN PERANICH; LISA PERANICH, Defendants.

Counsel: [*1] For April Aikens, Plaintiff: Jason L. Gunter, James M. Scarmozzino, Webb, Scarmozzino & Gunter, P.A., Ft. Myers, FL U.S.A.

For FSG of SW Florida, Inc., doing business as Fowler Street Grill, Jill Peranich, individually, Dan Peranich, individually, Defendants: Geralyn Farrell Noonan, Law Office of Geralyn Farrell Noonan, P.A., Ft. Myers, FL.

Judges: JOHN E. STEELE, United States District Judge.

Opinion by: JOHN E. STEELE

Opinion

OPINION AND ORDER

This matter comes before the Court on defendants' Motion to Dismiss Complaint for Failure to State a Cause of Action upon which Relief can be Granted (Doc. # 16), filed on May 17, 2006, before the consolidation of the cases. Plaintiff April Aikens filed a Memorandum of Law in Opposition (Doc. # 17) on May 26, 2006. On June 8, 2006, defendants filed a Memorandum of Law in Support (Docs. # 27-# 29) three times, presenting a response for each of the named defendants. [1] Also before the Court is plaintiff April Aikens' Motion to Strike Defendants' Memorandum of Law and Affidavits in Support of Defendants' Motion to Dismiss Complaint (Doc. # 30) and Opposition (Doc. # 31) thereto.

[1] Defendants are advised that electronic filing allows more than one party to be selected when filing a document on behalf of more than one party.

[*2] **I.**

In deciding a motion to dismiss, the Court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiffs. Christopher v. Harbury, 536 U.S. 403, 406, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002). A complaint should not be dismissed unless it appears beyond doubt that plaintiffs can prove no set of facts that would entitle them to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (footnote omitted); Marsh v. Butler County, Ala., 268 F.3d 1014, 1022 (11th Cir. 2001) (*en banc*). The Court must limit its consideration to well-pleaded factual allegations, documents central to or referenced in the complaint, and matters judicially noticed. La Grasta v. First Union Sec., Inc., 358 F.3d 840, 845 (11th Cir. 2004). To satisfy the pleading requirements of Fed. R. Civ. P. 8, a complaint simply must give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). However, dismissal is warranted under Fed. R. Civ. P. 12(b)(6) [*3] if, assuming the truth of the factual allegations of plaintiffs' complaint, there is a dispositive legal issue which precludes relief. Neitzke v. Williams, 490 U.S. 319, 326, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); Brown v. Crawford County, Ga., 960 F.2d 1002, 1009-10 (11th Cir. 1992). The Court need not accept unsupported conclusions of law or of mixed law and fact in a complaint. Marsh, 268 F.3d at 1036 n.16. While the federal pleading burden is not great, it nonetheless requires fair notice of the claim and the grounds upon which the claim rests. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 125 S. Ct. 1627, 1634, 161 L. Ed. 2d 577 (2005).

II.

Plaintiff April Aikens (Aikens) seeks to recover unpaid overtime compensation and damages pursuant to the Fair Labor Standards Act (FLSA). (Doc. # 1, P 1.) Plaintiff alleges that defendants had a policy and practice of requiring or permitting work in excess of 40

hours each workweek without paying time and one-half, id. at P 2, and that she was an employee of defendants during all relevant times, id. at P 10. Defendant FSG of SW Florida, Inc. does business as Fowler Street Grill (hereinafter FSG) . (Id. at P 7.) Defendants [*4] Jill Peranich and Dan Peranich are alleged to be the owners and/or officers of FSG having operational control over the enterprise. (Id. at PP 8-9.)

Plaintiff alleges that she does not meet the requirements for an exemption, id. at P 15; that she regularly worked in excess of 40 hours, id. at P 16; and that she did not receive overtime payments for work in excess of 40 hours, id. at P 17. Plaintiff filed the one-count Complaint seeking relief under the FLSA, including damages, post-judgment interest, fees, and costs.

Defendants seek to dismiss the Complaint, arguing that plaintiff Aikens was never employed by defendants for any period; that the individual defendants should be dismissed as the facts are insufficient to "pierce FSG's corporate veil"; and that plaintiff failed to specifically allege the hours, days, or other periods of worked overtime.

A.

Plaintiff argues, in her response to the motion to dismiss, that the Motion to Dismiss should be denied for failure to comply with Middle District of Florida Local Rule 3.01 (a), which at the time stated:

> In making any written motion or other application to the Court for the entry of an order of any kind, [*5] . . ., the moving party shall file and serve with such motion or application a brief or legal memorandum with citation of authorities in support of the relief requested.

The Local Rules were amended as of May 31, 2006, and Local Rule 3.01(a) now states:

> In a motion or other application for an order, the movant shall include a concise statement of the precise relief requested, a statement of the basis for the request, and a memorandum of legal authority in support of the request, all of which the movant shall include in a single document not more than twenty-five (25) pages.

After the response and after the effective date of the amendment, defendants filed Memoranda of Law in support (Docs. # 27-# 29) of the motion to dismiss as separate documents and attached matters outside the four corners of the Complaint. Regardless of the untimeliness of the memoranda, the filings were made after the response was filed, and could only be construed as unauthorized Replies. As a result, the memoranda will be stricken (along with the attached Affidavits and Public Inquires) and not considered.

B.

Federal Rule of Civil Procedure 8 [*6] requires a short, plain statement such that defendants have adequate notice of the claim. Plaintiff is not required to prove her allegation that she was actually employed by defendants, and there is nothing to indicate that plaintiff could not establish facts to support the contention that she actually worked at FSG. At this stage of the proceedings and taking all allegations as true, defendants' motion to dismiss is denied with respect to this issue.

C.

The Fair Labor Standards Act of 1938 defines an employer as including "any person [2] acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency. . . ." 29 U.S.C. § 203(d). "The overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages." Patel v. Wargo, 803 F.2d 632, 637-38 (11th Cir. 1986) (quoting Donovan v. Agnew, 712 F.2d 1509, 1511 (1st Cir. 1983)) (citations omitted). Plaintiff alleges that the individual defendants had "operational control" [*7] over the enterprise [3], and at this stage of the proceedings, the allegation is sufficient. The motion to dismiss will be denied as to this issue.

D.

Defendants' request for attorney's fees in the amount of $ 5,650.00, pursuant to Fla. Stat. § 57.105, is denied because the Court finds that the Complaint states a claim and sanctions are not appropriate.

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[2] "Person" is defined as "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." 29 U.S.C. § 203(a).

[3] An "enterprise" is "means the related activities performed [] by any person or persons for a common business purpose, ... 29 U.S.C. § 203(r)(1).

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Defendants' Motion to Dismiss Complaint for Failure to State a Cause of Action upon which Relief can be Granted (Doc. # 16), and the request for sanctions pursuant to Fla. Stat. § 57.105 [*8] contained therein, is **DENIED.**

2. Plaintiff April Aikens' Motion to Strike Defendants' Memorandum of Law and Affidavits in Support of Defendants' Motion to Dismiss Complaint (Doc. # 30) is **GRANTED** to the extent that the Memoranda (Docs. # 27-# 29) are **stricken** and were not considered, and is **DENIED** as to the request for attorney's fees and costs.

3. The Court declines to impose sanctions under 28 U.S.C. § 1927.

DONE AND ORDERED at Fort Myers, Florida, this 1st day of September, 2006.

JOHN E. STEELE

United States District Judge

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Almaraz v. Vision Drywall & Paint, LLC

United States District Court for the District of Nevada

May 15, 2014, Decided; May 15, 2014, Filed

2:11-CV-01983-PMP-PAL

Reporter
2014 U.S. Dist. LEXIS 66923

OSCAR ALMARAZ, et al., Plaintiffs, v. VISION DRYWALL & PAINT, LLC, et al., Defendants.

Prior History: Almaraz v. Vision Drywall & Paint, LLC, 2012 U.S. Dist. LEXIS 29149 (D. Nev., Mar. 5, 2012)

Counsel: [*1] For Oscar Almaraz, Ismael Perez Cruz, Plaintiffs: Katherine Daubert, Law Offices of Rachel Wilson, Tucson, AZ; Rachel Wilson, Henderson, NV.

For Vision Drywall & Paint, LLC, Javier Bernal Rodriguez, Manuel Rodolfo Rodriguez, Las Vegas Land Contracting, LLC, doing business as Dunhill Homes, Burke Construction Group, Inc., Richmond American Homes of Nevada, Inc., Harmony Homes, Inc., KB Home Las Vegas, Inc., KB Home Nevada, Inc., Defendants: Cory G. Walker, Littler Mendelson, P.C., Las Vegas, NV; Dustin L. Clark, Hilary B Muckleroy, Littler Mendelson, Las Vegas, NV; Kristina Escamilla Gilmore, City of Henderson, Henderson, NV; R. Calder Huntington, Holland & Hart LLP, Las Vegas, NV; Rick D Roskelley, Littler Mendelson, PC, Las Vegas, NV.

For Desert Wind Homes of Nevada II, Inc., doing business as Russell Rogers Development, Defendant: Cory G. Walker, Littler Mendelson, P.C., Las Vegas, NV; Dustin L. Clark, Hilary B Muckleroy, Littler Mendelson, Las Vegas, NV; Kristina Escamilla Gilmore, City of Henderson, Henderson, NV; R. Calder Huntington, Holland & Hart LLP, Las Vegas, NV.

Judges: PHILIP M. PRO, United States District Judge.

Opinion by: PHILIP M. PRO

Opinion

ORDER

Presently before the Court is Plaintiffs' Motion for [*2] Summary Judgment as to Vision Drywall & Paint, LLC and Individual Defendants (Doc. #75),[1] filed on March 21, 2013. Defendants Vision Drywall & Paint, LLC, Javier Rodriguez, and Manuel Rodriguez filed a Response (Doc. #86) on April 29, 2013. Plaintiffs filed a Reply (Doc. #91) on May 16, 2013.

I. BACKGROUND

Named Plaintiffs Oscar [*3] Almaraz ("Almaraz"), Ismael Perez Cruz ("Perez Cruz"), and Efren Gonzalez are drywall laborers who brought this action on behalf of themselves and other similarly situated current and former employees of Defendant Vision Drywall & Paint, LLC ("Vision") for alleged Fair Labor Standards Act ("FLSA") and Nevada state law wage and hour violations. Twenty-four other employees filed opt-in consents with the Court. (Notice of Filing Opt-In Consent Forms (Doc. ##9, 15, 37, 38, 39, & 63).) One of the named Plaintiffs, Efren Gonzalez, and four of the opt-in Plaintiffs subsequently were dismissed from the case, resulting in a total class of twenty-two Plaintiffs. (Order (Doc. #70); Order (Doc. #73).)

Individual Defendants Javier Bernal Rodriguez and Manuel Rodolfo Rodriguez are brothers who are Vision's managing members, and each own a fifty percent interest in the company. (Compl. (Doc.# 1) at ¶ 18; Answer (Doc. #26) at ¶ 18; Pls.' Mot. for Summ. J.

[1] Plaintiffs' counsel failed to redact Plaintiffs' home addresses and social security numbers from Exhibits A and U to this Motion, in contravention of United States District Court, District of Nevada Special Order No. 108. Special Order No. 108 provides that "parties shall refrain from including, or shall partially redact" social security numbers, names of minor children, dates of birth, financial account numbers, and home addresses. To protect Plaintiffs' personal identification information, the Clerk of Court shall seal Plaintiffs' Motion for Summary Judgment as to Vision Drywall & Paint, LLC and Individual Defendants (Doc. #75) in its entirety. Plaintiffs' counsel shall re-file the entire Motion, including all exhibits, with appropriate redactions to all exhibits per Special Order No. 108, for the public record within seven (7) days from the date of this Order.

as to Vision Drywall & Paint, LLC & Individual Defs. (Doc. #75) ["Pls.' MSJ as to Vision"], Ex. N at 16, Ex. T at 20.) Plaintiffs allege Javier and Manuel Rodriguez, along with Vision, were Plaintiffs' joint employers. (Compl. at ¶ 41.) In their capacity [*4] as co-owners of Vision, Javier and Manuel Rodriguez shared managerial duties such as obtaining new business, visiting project sites, and communicating with general contractors regarding bids, project schedules, or issues on the project sites. (Pls.' MSJ as to Vision, Ex. N at 17, 28-29, Ex. T at 21, 64-66, 87-88, 91-92, Ex. V at 25.) According to Manuel Rodriguez, he and his brother "run the company, both of us." (Pls.' MSJ as to Vision, Ex. T at 91-92.) Manuel Rodriguez hired Vision supervisor Heber Chavez. (Id. at 28.) He also hired Jesus Munoz and Sabino Placido as regular employees, and they eventually were promoted. (Id. at 28-29.) Vision's controller, Mimi Gaumond, was responsible for payroll. (Pls.' MSJ as to Vision, Ex. R at 76, Ex. T at 94-96.)

Almaraz and Perez Cruz, however, testified they were hired by Vision supervisors or crew leaders. (Defs.' Opp'n to Pls.' Mot. for Summ. J. (Doc. #86), Ex. B at 45-46, Ex. F at 86.) Some of the opt-in Plaintiffs also testified that they were hired by Vision supervisors or crew leaders and that they filled out applications at Vision's office. (Id., Ex. K at 39-40, Ex. W at 47-48, Ex. Y at 48-49.) Almaraz, Perez Cruz, and various other [*5] Plaintiffs testified that they did not know Javier and Manuel Rodriguez. (Id., Ex. B at 109-110, Ex. E at 65, Ex. F at 153, Ex. J at 69, Ex. K at 72, Ex. W at 76, Ex. Y at 84.)

Defendants Las Vegas Land Contracting LLC d/b/a Dunhill Homes; Burke Construction Group, Inc.; Richmond American Homes of Nevada, Inc.; Harmony Homes, Inc.; Desert Wind Homes of Nevada II, Inc. d/b/a Russell Rogers Development; KB Home Las Vegas, Inc.; and KB Home Nevada, Inc. (collectively, the "General Contractor Defendants") are various general contractors who subcontracted with Vision for drywall installation and finishing services. (Compl. at ¶¶ 19-25; Answer at ¶¶ 19-25; Pls.' Mot. for Summ. J. as to General Contractor Defs. (Doc. #77) ["Pls.' MSJ as to General Contractor Defs."], Exs. A, G, Q, V, Z, CC.) Plaintiffs allege that they worked on the General Contractor Defendants' projects and that the General Contractor Defendants, along with Vision, were Plaintiffs' joint employers. (Compl. at ¶¶ 43, 45, 47, 49, 51, 53, 55.)

According to named Plaintiffs Almaraz and Perez Cruz, while employed by Vision to work on the General Contractor Defendants' projects, they were not paid the minimum wage, were not paid [*6] overtime, and were promised a certain rate of pay but were paid another. (General Contractor Defs.' Mot. Summ. J. (Doc. #76) ["Defs.' MSJ"], Ex. T, Ex. U.) In his deposition, Almaraz testified he regularly worked Monday to Saturday for approximately eleven hours per day, and Perez Cruz testified he regularly worked twelve hours per day. (Resp. to Defs.' Mot. for Summ. J. (Doc. #85) ["Resp. to Defs.' MSJ"], Ex. I at 124, Ex. J at 85.) Opt-in Plaintiffs Christian Lomeli, Erik Demha Roque, German Bravo Martinez,[2] Jaime Barraza, Joel Solis, Jose Garcia Cruz, Porfirio Pamplona Santos, Raul de la Cruz Rodriguez, and Jose Palacio also testified they regularly worked over forty hours per week. (Pls.' MSJ as to Vision, Ex. D at 75, Ex. E at 38, Ex. F at 35, 40, Ex. G at 47, 70, Ex. I at 61-62, Ex. J at 79, 87-88, Ex. K at 90, Ex. L at 32-33, Ex. M at 82.)

In his deposition, however, Almaraz was unable to estimate the number of hours of overtime compensation he is owed by Vision. (Defs.' Opp'n to Pls.' Mot. for Summ. J. (Doc. #86) ["Defs.' Opp'n to Pls.' MSJ"], Ex. F at 176-78.) Perez Cruz testified that although there were many weeks in which he worked more than forty hours, he could not identify the particular weeks he worked overtime. (Defs.' MSJ, Ex. C at 88.) Almaraz and Perez Cruz also stated that there were periods when work was slow, including the holidays, and periods when they did not work more than forty [*8] hours per week. (Defs.' MSJ, Ex. B at 116, 124, Ex. C at 70-71, 86-88, 99-101; Defs.' Opp'n to Pls.' MSJ, Ex. B at 79.) Perez Cruz further testified that his crew completed more houses than other crews because they worked faster. (Defs.' Opp'n to Pls.' MSJ, Ex. B at 67-68.) Opt-in Plaintiffs

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[2] German Bravo Martinez testified he worked from 5:00 a.m. to 9:00 or 10:00 p.m. with twenty to thirty minute lunch and dinner breaks, seven days per week. (Defs.' Opp'n to Pls.' Mot. for Summ. J. (Doc. #86), Ex. U at 35-36, 42-43.) This testimony indicates he worked over 100 hours per week. Elsewhere in his deposition, he testified he worked [*7] "[a]round 80" hours per week. (Id. at 40.) He further testified he gave Erik Demha Roque rides to and from work, but Roque testified Roque usually worked fifty to sixty hours per week. (Id. at 36-37, Ex. E at 38.) Elsewhere in his deposition, Roque testified that when he was working on the Tuscany project, he worked from 5:00 a.m. or 6:00 a.m. until 7:00 p.m. or 8:00 p.m., or sometimes as late as 10:00 p.m. (Pls.' Reply to Defs.' Opp'n to Pls.' Mot. for Summ. J. (Doc. #91), Ex. E at 48.) However, the excerpts of Roque's deposition provided to the Court do not state how many days per week he worked at the Tuscany project. (Id.)

Jaime Barraza, Raul de la Cruz Rodriguez, and Jose Garcia Cruz also were unable to estimate the overtime compensation they are owed by Vision. (Pls.' MSJ as to Vision, Ex. G at 76, Ex. L at 63; Defs.' Opp'n to Pls.' MSJ, Ex. D at 92.) Opt-in Plaintiff Christian Lomeli testified that although he could not approximate the total overtime hours for which he had not been paid by Vision, he "almost always" was "short a payment for 10 or 20 hours." (Pls.' MSJ as to Vision, Ex. D at 86.)

Additionally, Almaraz and Perez Cruz stated there were various irregularities with respect to Vision's payroll practices. (Defs.' MSJ, Ex. T, Ex. U.) For instance, Almaraz stated he never received paychecks; instead, his crew leader Celestino Monterrosas Silva would cash crew members' paychecks, keep a portion of the checks for income tax, and then pay them "whatever he thinks we deserve." (Defs.' MSJ, Ex. T; see also Pls.' [*9] MSJ as to Vision, Ex. B at 94.) Regarding a project called Perry Plaza, Almaraz stated he was promised $48.65 per hour, but that he was paid only $1,000 for a five-day work week because a percentage of his pay had to be given to various Vision supervisors and crew leaders. (Defs.' MSJ, Ex. T; Pls.' MSJ as to Vision, Ex. B at 157-58.)

Perez Cruz stated that he and his crew members received paychecks made out to other people, cashed the paychecks at a liquor store, pooled the money, and then divided it in equal parts among the crew members. (Defs.' MSJ, Ex. U.) Some other Vision crew members also would cash their own checks, pool the money, and then divide it equally amongst themselves. (Pls.' MSJ as to Vision, Ex. D at 69, Ex. H at 48.) Some Vision employees were paid in cash, and some in a combination of checks and cash. (Pls.' MSJ as to Vision, Ex. B at 94, Ex. G at 52, Ex. I at 50-52, Ex. J at 53, Ex. L at 29, 31, Ex. M at 48.) Various Plaintiffs testified they did not complain to their supervisors or to Vision's offices regarding their payment issues. (Defs.' Opp'n to Pls.' MSJ, Ex. B at 11, 58, 153, Ex. J at 52-53, Ex. K at 58, Ex. L at 56, 88.)

Vision paid Plaintiffs a piece rate [*10] rather than an hourly rate.[3] (Pls.' MSJ as to Vision, Ex. N at 39-40, Ex. Q at 43, Ex. S, Ex. T at 37; Defs.' Opp'n to Pls.' MSJ, Ex. A at ¶ 5.) According to Defendant Javier Rodriguez, "[b]y paying crew members piece-rate, they tend to work more steadily and do not have to be supervised all of the time." (Defs.' Opp'n to Pls.' MSJ, Ex. A at ¶ 5.) The piece rates were set by Mimi Gaumond, Javier or Manuel Rodriguez, or Vision's "estimator." (Pls.' MSJ as to Vision, Ex. N at 26, 29; Defs.' Opp'n to Pls.' MSJ, Ex. Z at 30-31.) Heber Chavez testified that each house has a price based on the piece rate system, and that the crew members decide how the money is going to be divided amongst themselves based on the hours each crew member worked. (Pls.' MSJ as to Vision, Ex. Q at 51-53.)

Mimi Gaumond testified during her November 13, 2012, deposition that Vision formerly did not track employees' hours, but stated "we made that change this year. We do track all the hours." (Pls.' MSJ as to Vision, Ex. R at 62-63.) Regarding Vision's former procedure for calculating employees' pay when [*11] hours were not tracked, Mimi Gaumond testified:

> We knew it took about x amount of time for them to do all this work here for all these guys. And then back then, it was an average of, you know, they would make about $20 an hour. We just took an average of what they would actually make an hour. So we just based the hours based on that, on their rate.

(Id. at 63.) Various examples of Vision time sheets from 2011 do not include a column for recording the number of hours employees worked. (Pls.' MSJ as to Vision, Ex. O; Pls.' MSJ as to General Contractor Defs., Ex. J at VDP000170, VDP000095, VDP000046, VDP002826, VDP000048.) However, another Vision time sheet dated October 24, 2011, includes a column for recording hours. (Pls.' MSJ as to General Contractor Defs., Ex. J at VDP000102.)

Regarding the current procedure for tracking hours,[4] Defendant Manuel Rodriguez stated Vision's policy is that individual employees "have to record their own times, when they start and finish." (Pls.' MSJ as to Vision, Ex. T at 38.) Defendant Javier Rodriguez and Mimi Gaumond, however, testified that Vision supervisors are supposed to write down how many hours each employee works, and that if the supervisor is [*12] not on the job site, the crew leaders assist supervisors in tracking hours. (Pls.' MSJ as to Vision, Ex. N at 32-33, Ex. R at 48-49; Defs.' Opp'n to Pls.' MSJ, Ex. A at ¶ 4.) Each week, employees verify that the number of hours reported by their supervisor is

[3] One opt-in Plaintiff testified he was paid by the hour, not by the piece. (Pls.' MSJ as to Vision, Ex. E at 39.)

[4] Based on the evidence in the record, it is unclear when this procedure for tracking hours was implemented and whether this procedure existed at the time of the events in question.

correct by signing a verification sheet showing their total number of hours worked. (Defs.' Opp'n to Pls.' MSJ, Ex. A at ¶ 4, Ex. G at ¶ 9.) Several Plaintiffs also testified that it was a Vision supervisor who recorded either their hours or the number of houses they had completed. (Pls.' MSJ as to Vision, Ex. C at 62, Ex. D at 68, Ex. H at 42-43.) Other Plaintiffs testified that they did not track their own hours, that no one else kept track of their hours, or that they did not know whether anyone kept track of their hours. (Pls.' MSJ as to Vision, Ex. F at 36, Ex. G at 76, Ex. J at 61, Ex. K at 85, Ex. L at 34.)

Vision required employees to sign an "Employee Overtime Obligation" form stating Vision "discourages overtime work" and in which employees [*13] agreed "not to work overtime without first getting specific authorization from my supervisor or other management personnel." (Pls.' MSJ as to Vision, Ex. P; Defs.' Opp'n to Pls.' MSJ, Ex. A at ¶ 3, Ex. 1.) Several Plaintiffs testified they did not read the policy regarding overtime, did not remember signing the policy, or were not aware of the policy. (Pls.' MSJ as to Vision, Ex. B at 92-93, Ex. C at 59, Ex. F at 48, Ex. G at 52, Ex. I at 49-50, Ex. J at 93.) In contrast, Defendants argue several Plaintiffs acknowledged they were aware of or had signed Vision's policy regarding overtime. (Defs.' Opp'n to Pls.' MSJ at 5-6.) However, with the exception of two Plaintiffs, it is somewhat unclear from the deposition testimony Defendants submit in support of this argument exactly which document Plaintiffs are acknowledging having signed. (See Defs.' Opp'n to Pls.' MSJ, Ex. B at 61, Ex. C at 49-50, Ex. E at 41.) As for two Plaintiffs who are testifying about the overtime policy, one states he had not read the policy and the other states he did not remember seeing the policy, and they both testify it was not their signature on the document. (Defs.' Opp'n to Pls.' MSJ, Ex. D at 93-95, Ex. F [*14] at 93.)

Vision's supervisors were instructed not to allow employees to work more than forty hours per week. (Pls.' MSJ as to Vision, Ex. N at 33; Defs.' Opp'n to Pls.' MSJ, Ex. A at ¶ 4, Ex. G at ¶¶ 4, 6, Ex. H at ¶ 4, Ex. I at ¶¶ 4-6.) Supervisor Sabino Placido states in his declaration that "I do not remember crew members working any overtime hours." (Defs.' Opp'n to Pls.' MSJ, Ex. H at ¶ 4.) Similarly, supervisor Heber Chavez averred that "I do not remember crew members ever working more than eight (8) hours in a day or more than forty (40) hours in a week" and that "I have never allowed crew members [to] work more than eight (8) hours a day or more than forty (40) hours a week." (Defs.' Opp'n to Pls.' MSJ, Ex. I at ¶¶ 4, 6.) Supervisor Jesus Munoz stated in his declaration that "only very rarely have crew members worked more than eight (8) hours a day or more than forty (40) hours a week." (Defs.' Opp'n to Pls.' MSJ, Ex. G at ¶ 10.)

Regarding employees' knowledge of the overtime policy, supervisor Heber Chavez testified employees "know [*15] that they have eight hours from the time that they start or if they took a break, they know when is eight hours, or I call them for them to stop working." (Pls.' MSJ as to Vision, Ex. Q at 43.) He further testified that although he was not always present at the jobsite when employees left at the end of the day, he would call them to find out what time they left "to make sure they [didn't] work more than eight hours." (Id. at 41.) Defendant Manuel Rodriguez also testified that Vision supervisors are not present on jobsites all day long. (Pls.' MSJ as to Vision, Ex. T at 69.)

In the event employees worked overtime, Defendant Javier Rodriguez averred the employees are paid "piece and one-half." (Defs.' Opp'n to Pls.' MSJ, Ex. A at ¶ 5.) Vision's Piecework Agreement similarly states that employees will be paid at "piece and one half" for any overtime. (Pls.' MSJ as to Vision, Ex. S.) Javier and Manuel Rodriguez testified that Vision employees occasionally worked on Saturdays and sometimes worked more than eight hours per day, but that they never worked on Sundays. (Pls.' MSJ as to Vision, Ex. N at 28, 34, Ex. T at 37.) Mimi Gaumond testified that employees would work on Saturdays when they [*16] did not work earlier in the week and "because they may have started a house in the middle of the week or Thursday where they need to get it completed." (Pls.' MSJ as to Vision, Ex. R at 45-46.) Supervisors Jesus Munoz and Sabino Placido averred that they do not allow crew members to work Saturdays unless they did not work at least one day earlier in the week and that employees do not work on Sundays. (Defs.' Opp'n to Pls.' MSJ, Ex. G at ¶ 6, Ex. H at ¶ 5.)

Defendant Javier Rodriguez testified that Vision had not paid overtime pursuant to its overtime policy in the five years before his 2012 deposition because "we barely stay busy right now. There's hardly any work out there." (Pls.' MSJ as to Vision, Ex. N at 55; Defs.' Opp'n to Pls.' MSJ, Ex. A at ¶ 6.) Javier Rodriguez further averred that because many of the jobsites are in residential areas and the general contractors limit the hours in which construction can take place, "it can be very difficult for crew members to work overtime even if necessary." (Defs.' Opp'n to Pls.' MSJ, Ex. A at ¶ 7.) Supervisor Heber Chavez similarly averred that "[o]ver the last six

years, drywall work has been really slow. Crew members would only work [*17] two or three days a week, maybe four at the most. Many crew members left Vision and went to work for other drywall companies to try and find more hours during this time." (Defs.' Opp'n to Pls.' MSJ, Ex. I at ¶ 5.) Supervisors Jesus Munoz and Sabino Placido similarly stated that work had been slow during the recession. (Defs.' Opp'n to Pls.' MSJ, Ex. G at ¶¶ 7-8, Ex. H at ¶ 6.) Vision submits declarations from seven Vision employees who are not parties to this case stating that Vision employees typically do not work more than forty hours per week. (Defs.' Opp'n to Pls.' MSJ, Exs. MS.) In its responses to Plaintiffs' Interrogatories, however, Vision states that it paid Almaraz "$102 in overtime wages on June 17, 2011 for 3.4 hours of overtime work paid based on a regular rate of $20 an hour" and that on December 30, 2011, it paid Jaime Barraza "$160.20 for 5.3 hours of overtime work . . . based on a regular rate of $20 an hour." (Defs.' Opp'n to Pls.' MSJ, Ex. V at 4.)

Plaintiffs brought suit against Defendants, alleging collective action claims under the FLSA, 29 U.S.C. §§ 206 and 207, for failure to pay minimum wages and overtime wages (counts one and two). (Compl. at 11-13.) Plaintiffs [*18] also alleged Nevada state law class action claims to recover wages, overtime wages, and waiting time penalties, and for breach of contract (counts three through six). (Id. at 13-18.) The Court dismissed Plaintiffs' state law class action claims without prejudice to pursue the claims in state court. (Order (Doc. #23) at 2.) On June 22, 2012, the Court conditionally certified the action as a representative collective action for the FLSA claims. (Order (Doc. #41).)

Plaintiffs now move for summary judgment on their 29 U.S.C. § 207 claim for failure to pay overtime wages against Vision. Plaintiffs also move for summary judgment on the issue of whether individual Defendants Javier and Manuel Rodriguez are jointly and severally liable with Vision for Plaintiffs' damages because they are Plaintiffs' joint employers. Vision and Javier and Manuel Rodriguez oppose Plaintiffs' Motion.

II. ANALYSIS

Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c). A fact is "material" if it might affect [*19] the outcome of a suit, as determined by the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). An issue is "genuine" if sufficient evidence exists such that a reasonable fact finder could find for the non-moving party. Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002). Initially, the moving party bears the burden of proving there is no genuine issue of material fact. Leisek v. Brightwood Corp., 278 F.3d 895, 898 (9th Cir. 2002). After the moving party meets its burden, the burden shifts to the non-moving party to produce evidence that a genuine issue of material fact remains for trial. Id. The Court views all evidence in the light most favorable to the non-moving party. Id.

A. Failure to Pay Overtime (Claim Two)

Plaintiffs move for summary judgment on their 29 U.S.C. § 207 claim against Vision, arguing Vision violated § 207 by failing to pay overtime to Plaintiffs. Plaintiffs further argue that although Vision may not have explicitly requested or authorized overtime, it permitted it by using a piece rate pay system that implicitly encouraged overtime, having constantly changing work schedules and a lack of supervision at project [*20] sites, failing to maintain precise records of Plaintiffs' hours, and permitting irregular payroll practices. Given the infirmities in Vision's record keeping system and the distribution of pay checks, Plaintiffs argue the Court should allow Plaintiffs to establish damages based on Plaintiffs' estimates of the number of overtime hours they worked for which they were not paid.

Plaintiffs further argue Vision willfully violated the FLSA and therefore the three-year limitations period should apply. According to Plaintiffs, Vision was aware that piece-rate workers are entitled to overtime as evidenced by Vision's Piece Rate Agreement. Plaintiffs further argue that Javier and Manuel Rodriguez were forced to pay $1.2 million in back wages due to failure to pay overtime and failure to properly record employees' hours at Desert Plastering, a different company the brothers own. Plaintiffs also argue that pursuant to 29 U.S.C. § 216(b), they are entitled to recover an additional amount of liquidated damages equal to their actual damages for unpaid overtime wages because Vision did not act in subjective good faith and did not have objectively reasonable grounds for believing its conduct complied [*21] with the FLSA.

Vision responds that even if there is no reliable record of Plaintiffs' hours, Plaintiffs have not met their prima facie

burden of establishing both that they performed work for which they were not properly compensated and the amount and extent of that work to a just and reasonable inference. Vision further responds that Plaintiffs knew of Vision's overtime policy, Vision's supervisors ensured adherence to the policy, and Vision's supervisors testified Plaintiffs were not working more than forty hours per week for Vision. Thus, to the extent unauthorized, uncompensated overtime work was being performed, Vision argues it was without Vision's knowledge and that Plaintiffs made efforts to avoid detection as evidenced by the fact they did not complain to their supervisors or Vision's office regarding payment issues.

Vision further argues that the declarations of other Vision employees show that Vision employees did not work more than forty hours per week and that Plaintiffs' testimony regarding their hours is contradicted by other testimony. Vision also contends that on the rare occasions Plaintiffs worked overtime, they were paid. Vision further argues that Plaintiffs do [*22] not provide any evidence of the hours they claim to have worked and that Plaintiffs' contradictory statements and generalizations about their hours are not sufficient to meet Plaintiffs' burden at summary judgment.

Regarding willfulness and the three year statute of limitations, Vision argues Plaintiffs are not entitled to summary judgment on these issues because they have failed to establish any FLSA violations. Vision also contends Plaintiffs are not entitled to summary judgment on the issue of liquidated damages because Vision acted in subjective good faith and had objectively reasonable grounds for believing its conduct complied with the FLSA. Specifically, Vision argues it had policies and supervision in place to ensure compliance with the FLSA.

Subject to certain exceptions, the FLSA requires employers to pay overtime to employees working more than forty hours in a single work week "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). An employer who violates this section is liable to the affected employees for their unpaid overtime compensation, as well as for an equal amount as liquidated damages. Id. § 216(b). To establish [*23] a claim for denial of overtime compensation under the FLSA, Plaintiffs must prove (1) they were employed by Vision, (2) they were engaged in interstate commerce or in the production of goods for commerce or were otherwise covered by the FLSA in their capacity as employees of Vision, (3) they worked in excess of forty hours in a single work week, and (4) Vision did not pay their overtime compensation. 29 U.S.C. § 207(a)(1); Chao v. Rivendell Woods, Inc., 415 F.3d 342, 343-44, 348 (4th Cir. 2005).

Claims under § 207 seeking overtime compensation require that the employer knew the employee was working uncompensated overtime hours. Forrester v. Roth's I.G.A. Foodliner, Inc., 646 F.2d 413, 414 (9th Cir. 1981) (stating that the words "suffer" and "permit" in 29 U.S.C. § 203(g)'s definition of "employ" as "to suffer or permit to work" mean "with the knowledge of the employer" (quotation omitted)). An employer who knows an employee is working overtime "cannot stand idly by" or "deliberately turn[] its back on a situation" and allow an employee to work overtime without compensation, even if the employee does not make a claim for overtime compensation. Id. "However, where an employer has no [*24] knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of [§] 207." Id.

Here, Plaintiffs do not point to any evidence in the record that they advised Vision they were working uncompensated overtime hours or that they asked for authorization to work overtime. In fact, several Plaintiffs testified they did not complain to their supervisors or to Vision's office regarding their payment issues. Although it is unclear from the record whether Plaintiffs were aware of Vision's written "Employee Overtime Authorization" form that discouraged overtime work and required pre-authorization for overtime hours, Vision supervisors stated in their declarations that they did not allow employees to work unauthorized overtime. Supervisor Heber Chavez testified that if he was not at a jobsite to enforce the overtime policy, he would call crew members and remind them that they were not to work more than eight hours.

Moreover, supervisors Heber Chavez and Sabino Placido stated in their declarations that they [*25] do not remember their crew members working overtime hours. Defendant Javier Rodriguez and supervisors Heber Chavez, Sabino Placido, and Jesus Munoz also stated that given the recent economic recession, work in the construction industry had been very slow and it would have been difficult for Plaintiffs to get enough hours to be able to work overtime. Javier Rodriguez further averred that it is difficult to work overtime even when necessary due to hours restrictions at residential job

sites. Finally, Vision submitted evidence that Almaraz and Jaime Barraza were paid overtime in 2011, which suggests Vision paid overtime when it was aware its employees had worked overtime hours.

Viewing the facts in the light most favorable to Vision on Plaintiffs' Motion, there remain issues of fact as to whether Vision knew Plaintiffs allegedly worked uncompensated overtime hours. The Court therefore will deny Plaintiffs' Motion on their § 207 claim. Given that issues of fact remain as to whether Vision knew of Plaintiffs working uncompensated overtime hours, the Court need not reach the issue of whether Plaintiffs have met their burden of proving they performed work for which they were not properly compensated [*26] in violation of § 207 and the amount and extent of that work. Further, the Court need not reach the issues of whether the ordinary two-year limitations period or the three-year limitations period for willful violations of the FLSA applies in this case, or whether Plaintiffs are entitled to liquidated damages pursuant to 29 U.S.C. § 216(b). The Court therefore will deny Plaintiffs' Motion on these bases.

B. Joint Employer/Individual Liability

Plaintiffs also move for summary judgment on the issue of whether Defendants Javier and Manuel Rodriguez are Plaintiffs' joint employers and therefore are jointly and severally liable with Vision for Plaintiffs' damages. Plaintiffs contend Javier and Manuel Rodriguez are Plaintiffs' joint employers under the "economic reality" test. Defendants respond that Javier and Manuel Rodriguez are not Plaintiffs' joint employers and that members of a limited liability company are not personally liable for FLSA violations based on their position or title at the company rather than the economic reality of their involvement in the company.

The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an [*27] employee." 29 U.S.C. § 203(d). An individual is an employer under the FLSA and is subject to liability if he or she "exercises control over the nature and structure of the employment relationship, or economic control over the relationship." Boucher v. Shaw, 572 F.3d 1087, 1091 (9th Cir. 2009) (quotation omitted) (holding that individual managers were employers under the FLSA); see also Lambert v. Ackerley, 180 F.3d 997, 1011-1012 (9th Cir. 1999) (en banc) (holding that individual defendants who were the chief operating officer and chief executive officer of a corporation were employers under the FLSA). Moreover, under the FLSA, two or more employers may employ a person jointly. Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1469 (9th Cir. 1983), abrogated on other grounds by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985); 29 C.F.R. § 791.2(a). Each joint employer is individually responsible for complying with the FLSA with respect to the entire employment. Bonnette, 704 F.2d at 1469 (citing 29 C.F.R. § 791.2(a)).

The Court applies an "economic reality" test to determine whether an individual may be held liable as an employer under the FLSA, as well as [*28] to determine whether a joint employment relationship exists. See Boucher, 572 F.3d at 1090-91 (quotation omitted); Torres-Lopez v. May, 111 F.3d 633, 639 (9th Cir. 1997) (quotation omitted). Under this test, the Court considers "'whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of payment, (3) determined the rate and method of payment, and (4) maintained employment records.'" Moreau v. Air France, 356 F.3d 942, 946-47 (9th Cir. 2004) (quoting Bonnette, 704 F.2d at 1470). However, the test is not mechanical and these are not necessarily the only factors the Court should consider. Bonnette, 704 F.2d at 1470. Ultimately, the determination is "based upon the circumstances of the whole activity." Id. (quotation omitted).

Under the FLSA, the definition of "employer" as well as the concept of joint employment are given an "expansive interpretation." Lambert, 180 F.3d at 1012 (quotation omitted); Torres-Lopez, 111 F.3d at 639. Whether a party is an employer for purposes of the FLSA is a question of law for the Court, assuming the underlying facts are not disputed. See Bonnette, 704 F.2d at 1469.

1. [*29] Power to Hire and Fire Employees

Although Plaintiffs concede that Javier and Manuel Rodriguez did not personally hire or fire them, Plaintiffs argue Javier and Manuel Rodriguez's power to hire and fire Plaintiffs can be inferred from other aspects of their day-to-day operational control of Vision. Defendants respond that there is no evidence Javier and Manuel Rodriguez had the power to hire and fire employees besides supervisors. Defendants further respond that Plaintiffs were hired by Vision supervisors or crew leaders, and that Plaintiffs did not know Javier and Manuel Rodriguez. Defendants also argue that because

Plaintiffs are the moving parties, factual inferences must be drawn in Defendants' favor. Thus, Defendants argue it is improper for the Court to infer that because Javier and Manuel Rodriguez were involved in other aspects of Vision's day-to-day operations such as securing business and hiring supervisors, they also had the power to hire and fire lower level employees like Plaintiffs.

Plaintiffs do not point to any evidence in the record indicating Javier and Manuel Rodriguez directly hired or fired Plaintiffs. However, Manuel Rodriguez testified in his deposition that he [*30] hired other employees lower level employees. Specifically, he testified he hired Jesus Munoz, who "was just an employee at the beginning, and because of his capabilities, we move[d] him up to being our field superintendent." (Pls.' MSJ as to Vision, Ex. T at 28.) He further testified he hired Sabino Placido, who started off as a "regular employee" working as a painter, and eventually was promoted by Manuel Rodriguez. (Id. at 29.) Moreover, the record indicates Javier and Manuel Rodriguez are the ultimate decision makers at Vision, and exercise significant control over Vision's day-to-day functions such as hiring supervisors, working to obtain new business, communicating with general contractors, and visiting project sites.

In contrast, Defendants point to evidence in the record indicating that some Plaintiffs were hired by Vision supervisors and crew leaders, though Plaintiffs visited Vision's office to fill out employment applications. Defendants also point to various Plaintiffs' testimony stating that they did not know or speak to Javier and Manuel Rodriguez, however, it is unclear how this evidence bears on the brothers' ability to hire and fire Plaintiffs. Viewing the facts and [*31] drawing all justifiable inferences in the light most favorable to Defendants, given that Manuel Rodriguez actually hired other employees and that Javier and Manuel Rodriguez had the power to hire and fire supervisors, as well as their significant control over other aspects of Vision's day-to-day operations, this factor weighs in favor of finding a joint employment relationship.

2. Supervise and Control Work Schedules and Conditions of Employment

Plaintiffs concede that Javier and Manuel Rodriguez did not personally set Plaintiffs' work schedules. However, Plaintiffs argue Javier and Manuel Rodriguez supervised and controlled Plaintiffs' work schedules and conditions of employment because they are responsible for obtaining new business for Vision and communicating with general contractors to put together schedules, to check on projects' progress, or to deal with issues on the project sites. Plaintiffs further argue that because Javier and Manuel Rodriguez are the qualified individuals on Vision's contractor's license, they are required to exercise regular control over Vision and its employees pursuant to Nevada Revised Statutes § 624.260(3).

Defendants respond that Javier and Manuel Rodriguez's [*32] involvement in procuring contracts for Vision does not mean they set Plaintiffs' schedules by ensuring there was work to be performed. They further argue Javier and Manuel Rodriguez's involvement in working with the general contractors to set the construction schedules does not mean they dictated when any particular employee would be required to come to work. They also argue the evidence indicates Plaintiffs' work assignments, supervision, and conditions of employment were handled by Vision supervisors, not Javier and Manuel Rodriguez. As for Plaintiffs' argument regarding Vision's contractor's license, Defendants argue § 624.260(3)(b) provides that the applicant may delegate responsibilities such as hiring, superintending, promoting, transferring, discharging, or disciplining employees.

Plaintiffs provide evidence that Javier and Manuel Rodriguez influenced the general parameters of Plaintiffs' employment by procuring contracts for Vision and working with the general contractors on the overall construction schedules. However, Plaintiffs do not point to any evidence in the record indicating that Javier and Manuel Rodriguez were involved in scheduling Plaintiffs' hours or that they controlled [*33] the day-today conditions of Plaintiffs' employment such as giving Plaintiffs work assignments or checking the quality of their work. To the contrary, the record indicates that Vision supervisors assigned Plaintiffs to specific project sites and oversaw Plaintiffs' work. Specifically, supervisor Heber Chavez gave Perez Cruz work assignments, checked the quality of his work, and "was the person in charge of everything." (Defs.' Opp'n to Pls.' MSJ, Ex. B at 67-68, 102-103, 108.) Similarly, other Plaintiffs testified that their supervisors or crew leaders assigned work, checked the quality of their work, and provided tools. (Defs.' Opp'n to Pls.' MSJ, Ex. C at 46-47, Ex. D at 89-92, Ex. T at 67, Ex. Y at 84.)

This is a close question given Javier and Manuel Rodriguez's daily involvement in Vision's affairs and Manuel Rodriguez's testimony that he and his brother

"run the company, both of us." However, viewing the facts and drawing all justifiable inferences in the light most favorable to Defendants, issues of fact remain as to whether Javier and Manuel Rodriguez supervised and controlled Plaintiffs' work schedules and conditions of employment. Thus, this factor weighs against finding a [*34] joint employment relationship.

3. Rate and Method of Payment

Plaintiffs argue Javier and Manuel Rodriguez are responsible for Plaintiffs' rate and method of pay because the brothers decided to pay Plaintiffs by the piece and because they have the power to change the piece rate. Defendants respond that multiple individuals, including Vision's estimator and Mimi Gaumond, were involved in the setting of piece rates and that Javier and Manuel Rodriguez were only two corporate actors in a larger process. They further respond that various Plaintiffs testified it was their crew leaders who determined their pay by paying Plaintiffs in cash or deciding what Plaintiffs would be paid on a daily basis.

Viewing the facts and drawing all justifiable inferences in the light most favorable to Defendants, this factor weighs in favor of a finding of joint employment relationship. The evidence indicates that Javier and Manuel Rodriguez were responsible for the decision to pay Plaintiffs by the piece. In both his deposition and his declaration, Javier Rodriguez stated that he prefers the piece rate system because employees tend to work more steadily and do not need to be supervised constantly. The record [*35] further indicates that piece rates were set by Javier or Manuel Rodriguez, Mimi Gaumond, or Vision's "estimator." Focusing on the totality of the circumstances and the economic reality of the situation, the fact that Javier and Manuel Rodriguez chose the piece rate system and determined the piece rates indicates they yielded significant control over what Plaintiffs were paid.

Defendants point to evidence in the record indicating that other factors determined Plaintiffs' pay. For instance, Almaraz stated he never received paychecks; instead, his crew leader Celestino Monterrosas Silva would cash crew members' paychecks, keep a portion of the checks for income tax, and then pay them what he thought they deserved. Almaraz further stated he did not receive the amount he was promised for the Perry Plaza project because a percentage of his pay had to be given to various Vision supervisors and crew leaders. Perez Cruz stated that he and his crew members received paychecks made out to other people, cashed the paychecks at a liquor store, pooled the money, and then divided it in equal parts among the crew members. Some other Vision crew members also would cash their own checks, pool the money, [*36] and then divide it equally amongst themselves. Further, although each house had a price based on the piece rate system, supervisor Heber Chavez testified that the crew members decided how the money was going to be divided amongst themselves based on the hours each crew member worked. Although the amount of money Plaintiffs ultimately received may had varied due to these factors, it does not change the fact that Javier and Manuel Rodriguez determined the rate and method of payment at Vision. Thus, this factor weighs in favor of finding a joint employment relationship.

4. Maintain Employment Records

Plaintiffs argue Javier and Manuel Rodriguez maintained employment records because they delegated payroll duties to Vision's controller, Mimi Gaumond. Defendants respond that although an employer may not delegate certain management duties to others, Javier and Manuel Rodriguez are not employers under the FLSA, and therefore never were entrusted with the burden of maintaining employment records in the first place.

The parties do not point to specific evidence in the record regarding Javier and Manuel Rodriguez's involvement in maintaining employment records. The only evidence in the record concerning [*37] employment records is the evidence indicating that Mimi Gaumond is responsible for Vision's payroll, Mimi Gaumond's testimony that Vision did not begin tracking its employees' hours until 2012, and evidence regarding Vision's current procedure for tracking hours. Thus, this factor is neutral. See Carmen v. S.F. Unified Sch. Dist., 237 F.3d 1026, 1028-31 (9th Cir. 2001) (stating that a court need not "comb the record" looking for a genuine issue of material fact if the party has not brought the evidence to the court's attention) (quotation omitted)).

Although the issue of joint employment is a question of law for the Court, it must be based on the underlying facts. Bonnette, 704 F.2d at 1469. Considering the totality of the circumstances and the economic reality of the relationship between Plaintiffs and Javier and Manuel Rodriguez, and viewing all facts and drawing all inferences in favor of Javier and Manuel Rodriguez as the non-moving parties, material issues of fact remain regarding the economic and workplace realities of the parties' relationship. This is a close question which

ultimately will depend upon credibility determinations by the trier of fact. In the Court's view, absent [*38] additional evidence, the trier of fact could reasonably find Javier and Manuel Rodriguez were Plaintiffs' joint employers. However, given the relative paucity of Plaintiffs' evidence, credibility issues, and the fact that the summary judgment standard requires the Court to construe the evidence in favor of Javier and Manuel Rodriguez, the Court will deny Plaintiffs' Motion for Summary Judgment on this issue.

III. CONCLUSION

IT IS ORDERED that Plaintiffs' Motion for Summary Judgment as to Vision Drywall & Paint, LLC and Individual Defendants (Doc. #75) is hereby DENIED.

IT IS FURTHER ORDERED that the Clerk of Court shall seal Plaintiffs' Motion for Summary Judgment as to Vision Drywall & Paint, LLC and Individual Defendants (Doc. #75) in its entirety. Plaintiffs' counsel shall re-file the entire Motion, including all exhibits, with appropriate redactions to all exhibits, for the public record in accordance with Special Order No. 108 within seven (7) days from the date of this Order.

DATED: May 15, 2014

/s/ Philip M. Pro

PHILIP M. PRO

United States District Judge

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F.P. Corp. v. Ken Way Transp.

United States District Court for the Eastern District of Pennsylvania

March 17, 1992, Decided ; March 19, 1992, Filed; March 20, 1992, Entered

CIVIL ACTION NO. 91-5125

Reporter
1992 U.S. Dist. LEXIS 3576

F.P. CORP., Plaintiff v. KEN WAY TRANSPORTATION, INC., Defendant

Counsel: [*1] FOR F.P. CORP., PLAINTIFF, DWIGHT L. KOERBER, JR., KRINER KOERBER & KIRK, 110 NORTH SECOND STREET, P.O. BOX 1320, CLEARFIELD, PA 16830, USA. JOHN T. SIEGLER, SIMS, WALKER & STEINFELD, P.C., 1275 K STREET, NW, STE. 775, WASHINGTON, DC 20005, USA.

FOR KEN WAY TRANSPORTATION, INC., DEFENDANT, CHARLES C. THEBAUD, JR., PAUL H. LAMBOLEY, NEWMAN & HOLTZINGER, P.C., 1615 L STREET, NW, STE. 1000, WASHINGTON, DC 20036, USA.

Judges: Huyett, 3rd

Opinion by: DANIEL H. HUYETT, 3RD

Opinion

MEMORANDUM AND ORDER

HUYETT, J.

March 17, 1992

Plaintiff has brought an undercharge action against defendant for interstate transportation services plaintiff performed for defendant. As grounds for its suit, plaintiff invokes 49 U.S.C. § 10761 and the filed rate doctrine, claiming that defendant paid less than the tariff on file with the Interstate Commerce Commission ("ICC"). [1] Plaintiff has filed a motion to amend the complaint to which Defendant responds.

[*2] After responsive pleadings have been filed, a plaintiff may amend the complaint only with leave of the court, and leave shall be freely given when justice so requires. Fed. R. Civ. P. 15(a). "It is well-settled that prejudice to the non-moving party is the touchstone for the denial of an amendment." *Cornell and Co., Inc. v. Occupational Safety and Health Review Commission,* 573 F.2d 820, 823 (3d Cir. 1978). The court should take three factors into account when assessing prejudice: the good faith of the movant, the extent to which there has been undue delay, and whether the amendment would needlessly delay the final resolution of the case. *Cahill v. Carroll,* 695 F. Supp. 836, 838 (1988). Additionally, motions to amend pursuant to Rule 15(a) often implicate Rule 20(a) which governs permissive joinder. *Strawhecker v. Laurel School District,* 100 F.R.D. 7, 13-4 (W.D.Pa. 1983). Rule 20(a) provides that "all persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series [*3] of transactions occurrences and if any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a).

Plaintiff filed its motion to amend less than twenty days after defendant filed its answer. Plaintiff alleges that the liability of the newly named defendants R.M. Palmer Company and M. Polaner, Inc. arises out of the same transactions that involved defendant Ken Way, and that the new defendants may bear some or all of the liability for the alleged undercharge. Defendant Ken Way argues against allowing the amendment by stating that it stood in a different relationship to plaintiff than the proposed defendants and therefore is not liable. This is an argument on the merits of plaintiff's suit, not an argument against allowing the amendment. The fact that several co-defendants might have different levels of liability does not make an amendment to the complaint inappropriate. Also, allowing the amendment will not unduly delay the final adjudication of this action and promotes the policy of avoiding piecemeal litigation.

[1] "Tariff" is the statutory term for the rate a common carrier charges a shipper for transportation services. The Supreme Court uses the terms "tariff" and "rate" interchangeably -- hence the term "filed rate doctrine." *See e.g.*, *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* U.S. , 110 S. Ct. 2759, 2762 (1990).

Finally, plaintiff made its motion to amend in a timely fashion and the Court has no reason to doubt plaintiff's good faith.

As is [*4] stated below, the Clerk will mark the amended complaint filed as of the date of this order. For statute of limitations purposes, the timely filing of a motion to amend, and not the final court approval of the motion, is sufficient to meet the requirement of Fed. R. Civ. P. 3 that "a civil action is commenced by the filing of a complaint with the court." *Longo v. Pennsylvania Elec. Co.,* 618 F. Supp. 87, 89 (W.D.Pa. 1985), *aff'd,* 856 F.2d 183 (3rd Cir. 1988); *see also Mayes v. AT&T Information Systems, Inc.,* 867 F.2d 1172 (8th Cir. 1989). [2]

Accordingly, The Court will grant plaintiff's motion to amend the complaint. An appropriate order follows.

Daniel H. Huyett, 3rd, Judge

ORDER

HUYETT, J.

March 17, 1992

Upon consideration [*5] of plaintiff's motion to amend the complaint, defendant's response, and the foregoing memorandum of law, plaintiff's motion to amend the complaint is GRANTED, and the Clerk shall mark the amended complaint attached to plaintiff's motion filed as of this date. Plaintiff shall serve the amended complaint upon the opposing parties by the most expeditious means possible and shall notify the Court by letter promptly after service is made. A Rule 16 conference then will be held.

IT IS SO ORDERED.

Daniel H. Huyett, 3rd, Judge

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[2] These cases stand for the principal that the amended complaint will be treated substantively as if it had been filed on the date the motion to amend was filed, regardless of the date on which the Clerk actually stamps the document.

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