

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MACEO RODGERS and LEE MCCLUNG,	§	
on behalf of themselves and on	§	
behalf of all others similarly situated,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. _____
	§	
SPAR BUSINESS SERVICES, INC.,	§	JURY DEMANDED
ROBERT G. BROWN and	§	
WILLIAM H. BARTELS,	§	
Defendants.	§	

PLAINTIFFS' ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs, MACEO RODGERS and LEE MCCLUNG, on behalf of themselves and on behalf of all others similarly situated, and files this Original Complaint complaining of Defendants SPAR BUSINESS SERVICES, INC., ROBERT G. BROWN and WILLIAM H. BARTELS (all Defendants sometimes collectively referred to herein as "Defendants"), and for cause of action would show the Court the following:

I.

INTRODUCTION

1. This action seeks damages, liquidated damages, attorneys' fees, taxable costs of the court, pre-judgment and post-judgment interest as a result of civilly wrongful conduct in violation of the laws of the United States.

1.2 Plaintiffs, by counsel, brings this action for damages and other legal and equitable relief for Defendants' violations of the laws requiring payment of overtime compensation. Defendants overtime pay policies violate the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq..

1.3 Plaintiffs bring this action for violation of the FLSA as a collective action, pursuant to Section 16(b) of the FLSA, 29 U.S.C. § 216(b), on behalf of the following class of similarly situated employees:

All merchandisers who were, are, or will be hired and employed by Defendant SPAR Business Service Inc. (formerly SPAR Marketing Services, Inc.) as alleged independent contractors during the period of three years prior to the date of commencement of this action through the date of judgment in this action.

1.4 Defendants Robert G. Brown and William H. Bartels are the owners of SPAR Business Services, Inc. (“SPAR”) Mr. Brown and Mr. Bartels control and have controlled SPAR, derive profits from its business, and set employee compensation and personnel policies. Mr. Brown and Mr. Bartels had control over the conditions and terms of Plaintiffs and others employment with SPAR. They continue to have control over the conditions and terms of current and future employees of SPAR. They had the authority to hire, fire, and discipline Plaintiffs. They had the authority, and continue to have the authority, to hire, fire and discipline all employees of SPAR. They had the authority to determine rates of pay and make schedules for Plaintiffs and other employees with SPAR. They continue to have the authority to determine rates of pay and make schedules for current and future employees of SPAR.

II.

THE PARTIES

2.1 Plaintiffs are individuals who can be contacted through counsel.

2.2 Defendant SPAR Business Services, Inc. can be served through its president, Robert G. Brown at his last known place of employment at 333 Westchester Avenue, South Building, Suite 204, White Plains, NY 10604.

2.3 Defendant ROBERT G. BROWN is an individual who can be served at his last known place of employment at 333 Westchester Avenue, South Building, Suite 204, White Plains, NY 10604.

2.4 Defendant WILLIAM H. BARTELS is an individual who can be served at his last known place of employment at 333 Westchester Avenue, South Building, Suite 204, White Plains, NY 10604.

III.

JURISDICTION, VENUE AND CONDITION PRECEDENT

3.1 The amount in controversy exceeds the jurisdictional minimum amount in controversy for this Court. The Plaintiff was and is employed with Defendants. This Court has jurisdiction over Plaintiff's FLSA claims pursuant to 28 U.S.C. §1331 and 29 U.S.C. §216(b).

3.2 Venue for this action lies in the Galveston Division of the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. § 1391(b) as the events giving rise to Plaintiffs' claims occurred substantially in that district.

3.3 All conditions precedent have been performed or have occurred.

IV.

FACTS

4.1 Plaintiffs were employed as merchandisers working for Defendant SPAR Business Services, Inc. ("SPAR").

4.2 Plaintiffs were paid approximately \$9 to \$10 an hour and were not paid time and a half for hours worked in excess of 40 hours per week.

4.3 At all times relevant to this lawsuit, Plaintiffs were classified by SPAR as independent contractors.

4.4 Plaintiffs and the other merchandisers were improperly classified as independent contractors. They should have been classified as employees. This was done by Defendants, in part, to avoid paying overtime to Plaintiffs and the other merchandisers.

4.5 Plaintiffs and the other merchandisers easily meet the “economic realities test” in determining whether they are owed overtime under the FLSA.

4.6 SPAR had the power to hire and fire Plaintiffs and all of its other merchandisers.

4.7 SPAR determined the rate and method of payment to Plaintiffs and all of its other merchandisers.

4.8 SPAR maintained work time records for Plaintiffs and all of its other merchandisers and Plaintiffs and all of Spar’s other merchandisers were paid by the hour.

4.9 SPAR’s merchandisers did not perform specialty jobs requiring specialized training or skill.

4.10 SPAR’s merchandisers contractual terms with Plaintiffs and all of its other merchandisers were uniform.

4.11 SPAR’s merchandisers did not employ others to assist in performing the job.

4.12 SPAR’s clients provided the premises necessary to perform the work.

4.13 SPAR’s merchandisers did not have an opportunity for profit or loss depending on management skill.

4.14 SPAR’s merchandisers performed a service that was an integral part of SPAR’s business.

4.15 At all times relevant, Defendants have been, and continues to be, an “employer” as defined by the FLSA. Defendants employed Plaintiffs and other merchandisers.

4.16 Plaintiffs consents in writing to be a part of this action, pursuant to 29 U.S.C. §216(b).

Plaintiffs Rogers and McClung, and additional similarly situated individuals who are interested in joining this case as opt-in plaintiffs, bring this cause for violations of the FLSA for unpaid straight pay and overtime wages. As this case proceeds, it is likely that once they are given notice of this lawsuit other individuals will sign consent forms and join as plaintiffs.

4.17 There are over 7000 similarly situated current and former employees who were not properly paid their hours worked in excess of forty hours per week and were mis-classified as independent contractors and who would benefit from the issuance of a Court Supervised Notice of the present lawsuit and the opportunity to join in the present lawsuit. Members of the proposed class and Plaintiffs therefore should be permitted to pursue their claims collectively pursuant to 29 U.S.C. §216(b). Pursuit of this action collectively will provide the most efficient mechanism for adjudicating the claims of Plaintiffs and members of the proposed class.

V.

CAUSES OF ACTION

5.1 The allegations contained in Paragraphs 1.1 through 1.4 and 4.1 through 4.17 are hereby incorporated by reference for all counts and causes of action.

FLSA Violations

5.2 At all times relevant, Defendant SPAR has been, and continues to be, an “employer” as defined by the FLSA. SPAR employed Plaintiffs and others to perform merchandising services on behalf of SPAR clients.

5.3 At all times relevant, Defendants Robert G. Brown and William H. Bartels have been, and continues to be, an “employer” as defined by the FLSA.

5.4 Plaintiffs consent in writing to be a part of this action, pursuant to 29 U.S.C. §216(b). Plaintiffs, and additional similarly situated individuals who are interested in joining this case as opt-in plaintiffs, bring this cause for violations of the FLSA for unpaid overtime wages. As this case proceeds, it is likely that other individuals will sign consent forms and join as plaintiffs.

5.5 The FLSA requires each covered employer such as Defendants to compensate all non-exempt employees at a rate of not less than one and one-half times the regular rate of pay for work performed in excess of forty hours per work week. Defendants have violated this policy.

5.6 Plaintiffs, and all additional similarly situated individuals, are entitled to be paid the overtime compensation for all hours worked in excess of forty hours per work week. Plaintiffs and members of the proposed class are not employed in a bona fide executive, administrative, or a professional capacity pursuant to 29 U.S.C. §213(a)(1) and corresponding regulations. Plaintiffs and members of the proposed class are not subject to any other exemptions set forth in the FLSA or administrative regulations. Plaintiffs and members of the proposed class were improperly misclassified as independent contractors.

5.7 Defendants, pursuant to their policies and practices, failed and refused to pay overtime wages to Plaintiff and other employees for all their hours worked. By failing to pay overtime compensation, Defendants have violated, and continue to violate, the FLSA, 29 U.S.C. §201, et seq.

5.8 The conduct of Defendants, as alleged, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. §255(a). As such, a three year statute of limitations applies to such violations.

5.9 Plaintiffs seek to send notice of this lawsuit to all potential collective class members who worked for Defendants within the last three years as further described above.

5.10 The systems and practices of Defendants, and the duties of Plaintiffs and those similarly situated to her have existed for at least three years throughout Defendants' business.

5.11. There are numerous other similarly situated employees and former employees of the Defendants who have been denied overtime compensation in violation of the FLSA and who would benefit from the issuance of Court-Supervised Notice of the present lawsuit and the opportunity to join the present lawsuit. Those similarly situated employees are known to Defendants and are readily identifiable and able to be located through Defendants' records.

5.12 Defendants have not made a good faith effort to comply with the FLSA with respect to compensation of Plaintiff and other similarly situated present and former employees.

5.13 SPAR had a common pay policy of not paying its employees overtime and wrongfully classifying all similarly situated merchandisers as independent contractors. This common pay policy was implemented by Defendants Brown and Bartels.

VI.

DAMAGES

6.1 As a result of Defendants' unlawful conduct, Plaintiffs and others similarly situated have suffered damages in the amounts of their unpaid overtime compensation, lost wages, liquidated damages as provided by the FLSA 29 U.S.C. §216(b), interest, and such other legal and equitable relief as the Court deems just and proper.

6.2 Plaintiffs, on behalf of themselves and others similarly situated, seek recovery of attorneys' fees and costs as provided by the FLSA 29 U.S.C. §216(b).

6.3 Plaintiffs seek all reasonable attorneys' fees in this case, including preparation and trial of this lawsuit, post-trial, pre-appeal work, any appeal work, making or responding to an application for writ of error, an appeal to the Supreme Court if an application for writ of error is granted, and post-judgment discovery and collection in the event execution on the judgment is necessary.

VII.

EQUITABLE TOLLING AND EQUITABLE ESTOPPEL

7.1 Defendants have misrepresented to their employees that it was properly paying overtime compensation. In addition, Defendants failed to post the wage and hour poster required by 29 C.F.R. § 516.4.

7.2 As such, the statute of limitations should be equitably tolled for the opt-in plaintiffs from the date this lawsuit was filed to the present and/or Defendants should be equitably estopped from asserting a statute of limitations defense regarding Plaintiff and the potential opt-in plaintiffs. The equitable tolling doctrine and equitable estoppel doctrine should apply to and be tolled for any plaintiff who opts-in to this lawsuit from the day they were hired to the present.

VIII.

JURY DEMAND

8.1 Plaintiffs hereby demand a trial by jury of all the issues and facts in this case and tenders the requisite fee.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that the Plaintiffs be allowed to give notice of this collective action, or that the court issue such notice, to all persons who are presently, or have at any time during the three years immediately preceding the filing of this lawsuit,

up through and including the date of this Court's issuance of court-supervised notice, been employed by Defendants as described above. Such notices shall inform them that this civil action has been filed, of the nature of the action, and of their right to join.

Plaintiffs request that Defendants be adjudged, decreed, and declared to be in violation of the rights of Plaintiffs under the FLSA.

Plaintiffs request that Defendants be cited to appear and answer herein, and, upon final trial, have Judgment against Defendants, jointly and severally, as requested above, and as follows:

1. Judgment against Defendants for all damages alleged in this petition;
2. Interest before and after judgment at the highest rate provided by law, until paid;
3. Reasonable and necessary attorneys' fees and costs of suit;
4. Declaratory relief; and
5. Such other and further relief to which Plaintiffs may be justly entitled.

Respectfully submitted,

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/s/ John F. Melton

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