

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

JUL 10 2013

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION**

JAMES W. McCORMACK, CLERK
By: *[Signature]* *[Signature]*
DEP. CLERK

MARCO ANTONIO VENEGAS, VICTOR
HERNANDEZ, J. ELIAS BALDERAS, OTZIEL
HERNANDEZ, ALBINO BALDERAS, OSCAR
MIGUEL ACOSTA, SALVADOR DE JESUS
IBARRA, and OSCAR MANUEL DIAZ, on
behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Case No. 3:13-cv-00036-SWW

MURRAY DRYWALL AND INSULATION OF
TEXAS, INC. and LUCAS ENTERPRISES, INC.,

Defendants.

PLAINTIFFS' FIRST AMENDED COLLECTIVE ACTION COMPLAINT

Marco Antonio Venegas, Victor Hernandez, J. Elias Balderas, Otziel Hernandez, Albino Balderas, Oscar Miguel Acosta, Salvador de Jesus Ibarra, and Oscar Manuel Diaz ("Named Plaintiffs"), on behalf of themselves and all others similarly situated, hereby complain as follows against Defendant Murray Drywall and Lucas Enterprises, Inc.

INTRODUCTION

1. Named Plaintiffs have initiated the instant action to redress violations by Defendants Murray Drywall and Insulation of Texas Inc. and Lucas Enterprises, Inc. (collectively hereinafter "Defendants") of the Fair Labor Standards Act ("FLSA"). Named Plaintiffs assert that Defendants engaged in a pattern or practice of unlawful conduct which resulted in the violation of their rights under the FLSA, 29 USC § 201 et seq.

2. Named Plaintiffs bring this action on behalf of all current and former persons who were, are or will be employed by Defendants to perform construction work for Defendants at any time after November 28, 2011 and through the final disposition of this action, and who were, are or will be eligible for but did not receive pay for all compensable time worked, including, but not limited to, overtime compensation and pay for weekly safety meetings.

3. Named Plaintiffs generally worked six (6) days per week at times ranging from nine (9) to twelve (12) hours per day.

4. At all times Defendants were joint employers of Named Plaintiffs.

5. Named Plaintiffs seek a declaration that their rights have been violated, an award of unpaid wages, an award of liquidated damages and an award of the reasonable attorney's fees and associated costs to make them whole for damages they have suffered and to ensure that they and future workers will not be subjected by Defendants to such illegal conduct in the future.

JURISDICTION AND VENUE

6. This Court may properly maintain personal jurisdiction over Defendants because Defendants' business dealings with this state and this judicial district are sufficient contact for this Court's exercise of jurisdiction over Defendants, to comply with traditional notions of fair play and substantial justice.

7. Jurisdiction is conferred upon this Court by 29 U.S.C. § 216(b), this action arising under the laws of the FLSA, 29 U.S.C. § 201 *et seq.*; by 28 U.S.C. § 1337, this action arising under the Acts of Congress regulating commerce; and by 28 U.S.C. § 1331, this action involving questions of federal law. This Court is empowered to enter a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

8. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b)(1) and (b)(2), because Defendants reside in and/or conduct business in this judicial district and because a substantial part of the acts and/or omissions giving rise to the claims set forth herein occurred in this judicial district.

PARTIES

9. Plaintiff Marco Antonio Venegas is an adult individual residing in LaVergne, Rutherford County, TN.

10. Plaintiff Victor Hernandez is an adult individual residing in LaVergne, Rutherford County, TN.

11. Plaintiff J. Elias Balderas is an adult individual residing in Byhalia, Marshall County, MS.

12. Plaintiff Otziel Hernandez is an adult individual residing in LaVergne, Rutherford County, TN.

13. Plaintiff Albino Banderas is an adult individual residing in Southaven, Desoto County, MS.

14. Plaintiff Oscar Miguel Acosta is an adult individual residing in Charlotte, Mecklenburg County, NC.

15. Plaintiff Salvador de Jesus Ibarra is an adult individual residing in Charlotte, Mecklenburg County, NC.

16. Plaintiff Oscar Manuel Diaz is an adult individual residing in Charlotte, Mecklenburg County, NC.

17. Defendant Murray Drywall and Insulation of Texas, Inc., is an entity having its principle place of business at 11105-3829 Sapp Brothers Drive, Omaha, NE 68138.

18. Defendant Murray Drywall is engaged in business, performing construction work in Jonesboro, Arkansas, within the jurisdiction of this Court.

19. Defendant Murray Drywall, an employer of Named Plaintiffs, is “an enterprise engaged in commerce or in the production of goods for commerce.” 29 U.S.C. § 206.

20. While working at the NEA Baptist Memorial Hospital construction project in Jonesboro, Arkansas, with a primary place of business in Nebraska, Defendant Murray Drywall was engaged in commerce or in the production of goods for commerce or has employees handling, selling, communicating or otherwise working on goods or materials that have been moved in or produced for commerce by any person through its numerous construction projects among the several States, including, but not limited to projects in Louisiana, Virginia, Florida, Texas, Mississippi, Georgia, and North Carolina.

21. Defendant Murray Drywall is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000.00.

22. Defendant Lucas Enterprises, Inc. is an entity having its principal place of business at 1707 Willis Drive, Hartsville, SC 29550-6966.

23. Defendant Lucas Enterprises is engaged in business, performing construction work in Jonesboro, Arkansas, within the jurisdiction of this Court.

24. Defendant Lucas Enterprises, an employer of Named Plaintiffs, is “an enterprise engaged in commerce or in the production of goods for commerce.” 29 U.S.C. § 206.

25. While working at the NEA Baptist Memorial Hospital in Jonesboro, Arkansas, with a primary place of business in South Carolina, Defendant Lucas Enterprises was engaged in commerce or in the production of goods for commerce or has employees handling, selling, communicating or otherwise working on goods or materials that have been moved in or produced for commerce by any person through its numerous construction projects among the several States.

26. Defendant Lucas Enterprises, upon information and belief, is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000.00.

27. Upon information and belief, because of their interrelation of operations, common management, centralized control of labor relations, common employee oversight, common financial controls and other factors, Defendants are sufficiently interrelated and integrated in their activities, labor relations, oversight and management that they may be treated as a single employer for purposes of the instant action.

28. At all times relevant herein, Defendants acted by and through their agents, servants, and employees, each of whom acted at all times relevant herein in the course and scope of their employment with and for Defendants.

FLSA COLLECTIVE ACTION ALLEGATIONS

29. All claims set forth in Count I of this action are brought pursuant to the FLSA, 29 U.S.C. § 216(b).

30. Named Plaintiffs bring this action for violations of the FLSA as a collective action pursuant to Section 16(b) of the FLSA, 29 U.S.C. § 216(b), on behalf of all persons presently and formerly employed by Defendants in non-exempt positions subject to Defendants'

unlawful pay practices and policies described herein and who worked for Defendants at any point in the three (3) years preceding the date the instant action was initiated.

31. Named Plaintiffs were individually hired by an agent of Defendant Lucas Enterprises, however, at all times relevant to this action, Defendants acted as joint employer of Named Plaintiffs.

32. Named Plaintiffs and all others similarly situated worked and work at different construction sites of Defendants but are subjected to the same unlawful wage policies and practices described herein.

33. There are numerous similarly situated current and former employees of Defendants who were compensated improperly for work performed and for overtime work, in violation of the FLSA and who would benefit from the issuance of a Court Supervised Notice of the instant lawsuit and the opportunity to join in the present lawsuit.

34. Similarly situated employees are known to Defendants, are readily identifiable by Defendants and can be located only through Defendants' records.

35. Therefore, Named Plaintiffs should be permitted to bring this action as a collective action for and on behalf of themselves and those employees similarly situated, pursuant to the "opt-in" provisions of the FLSA, 29 U.S.C. § 216(b).

GENERAL ALLEGATIONS

36. The foregoing paragraphs are incorporated herein as if set forth in their entirety.

37. Defendant Murray Drywall was engaged to assist in the construction of NEA Baptist Memorial Hospital located at 4800 E Johnson Ave., Jonesboro, Ark 72401.

38. Defendant Lucas Enterprises was engaged to assist in the construction of NEA Baptist Memorial Hospital located at 4800 E Johnson Ave., Jonesboro, Ark 72401.

39. Defendant Murray Drywall, in conjunction with Defendant Lucas Enterprises, hired Named Plaintiffs to enable Defendant Murray Drywall to fulfill its obligations under the above referenced contract.

40. Defendants arranged to share the services of Named Plaintiffs.

41. In hiring Named Plaintiffs as employees, Defendant Lucas Enterprises acted in the interest of Defendant Murray Drywall in relation to Named Plaintiffs.

42. At all times relevant to this Complaint, Defendant Lucas Enterprises was under common control of Defendant Murray Drywall as it relates to Named Plaintiffs.

43. Named Plaintiffs were interviewed by an agent of Defendant Lucas Enterprises.

44. None of the Named Plaintiffs lived in Arkansas. They were contacted by telephone while at their homes outside of Arkansas and advised to report to Jonesboro. Therefore, all Named Plaintiffs traveled from their homes, across State lines into Arkansas, in order to live in Arkansas while they performed their job duties for Defendants' NEA Baptist Memorial Hospital construction site in Jonesboro.

45. Verifications of Named Plaintiffs' eligibility to work in the United States and identity, including proof of valid license, social security and work cards, were performed by both Defendant Murray Drywall and Defendant Lucas Enterprises.

46. Proof of Named Plaintiffs certifications to operate certain types of tools and machinery were required by agents of Defendant Murray Drywall.

47. If Named Plaintiffs did not have proper certifications an agent of Defendant Murray Drywall required and set up the necessary certifications for Named Plaintiffs to take.

48. Defendant Murray Drywall maintained a daily presence on the job site, including having its agents on the site as well as keeping a trailer on site which was designated as the "Murray Drywall Trailer".

49. Day to day operations on the job site, including scheduling, work orders, inspection of work, and lunch break were controlled by Defendant Murray Drywall.

50. Agents of both Defendant Murray Drywall and Defendant Lucas Enterprises were physically present on the job site to supervise and guide Named Plaintiffs' daily activities.

51. Agents of Defendant Murray Drywall conducted on site safety meetings in front of the Murray Drywall Trailer.

52. Whether Named Plaintiffs were meeting production expectations was determined by an agent of Defendant Murray Drywall.

53. Certain tools for the job, which were used by Named Plaintiffs, were, upon information and belief, transported across state lines and supplied by Defendant Murray Drywall. These tools included metal studs, drywall, pins, shot guns (for driving pins into concrete or metal), fast track tools, chop saws, cords, lifts, and safety equipment.

54. Further, in addition to the tools and equipment provided to Named Plaintiffs by Defendant Murray Drywall and Defendant Lucas Enterprises, Named Plaintiffs purchased and transported hand tools and equipment in interstate commerce in order to carry out their jobs at the NEA Baptist Memorial Hospital construction site in Jonesboro, Arkansas.

55. Named Plaintiffs' arrival to and departure from the work site was recorded on Defendant Murray Drywall's time sheets.

56. Named Plaintiffs were simultaneously employed by Defendant Murray Drywall and Defendant Lucas Enterprises.

57. Although an agent of Defendant Lucas Enterprises told Named Plaintiffs they would be paid \$16 per hour, he also informed Named Plaintiffs that the final word on what they would be paid would be determined by Defendant Murray Drywall.

58. Defendants paid Named Plaintiffs at rates varying from \$13.95 per hour to \$19.00 per hour.

59. Defendants utilized a "signup sheet" system which was used to track Named Plaintiffs' arrival and departure time at the work site.

60. The sign-up sheet was not always available when Named Plaintiffs arrived at the site.

61. Times reflected on the sign-up sheet did not always accurately reflect the time Named Plaintiffs arrived and began work.

62. Regardless of what time Named Plaintiffs signed in and began work, Defendants would pay Named Plaintiffs starting at 7:00 a.m.

63. For example, if Named Plaintiffs arrived at the site, signed in at 6:30 a.m. and began work, Named Plaintiffs would not be paid for the first thirty (30) minutes of their shift.

64. Defendants required Named Plaintiffs to attend once per week Safety Trainings; however Named Plaintiffs were not permitted to sign in until after the Safety Trainings concluded.

65. Named Plaintiffs routinely worked in excess of forty (40) hours per week.

66. Plaintiff Marco Antonio Venegas worked for Defendants from February 14, 2012 until October 19, 2012 as a carpenter who, among other duties, placed metal studs in the tracks and did framing work at the NEA Baptist Memorial Hospital construction project. His rate of pay was \$14.00 per hour. During his employment with Defendants, he generally worked nine (9) to twelve (12) hour days, six (6) days per week, and was not paid overtime for his weekly hours in excess of forty (40). For example, on March 26, 2012, he attended the weekly safety meeting which started at 6:30 a.m. He signed in to work at 7:00 a.m. and worked until 4:30 p.m., taking a thirty (30) minute lunch break at 12:00 noon, and no other breaks during the day. Further, on March 29, 2012, Plaintiff Venegas signed in at 6:30 a.m. and worked until 6:00 p.m., taking a thirty (30) minute lunch break at 12:00 noon, and no other breaks during the day.

67. Plaintiff Victor Hernandez worked for Defendants from March 27, 2012 until September 26, 2012 as a carpenter, who, among other duties, hung dense glass and installed ceiling track at the NEA Baptist Memorial Hospital construction project in Jonesboro, Arkansas. His rate of pay was \$14.00 per hour. During his employment with Defendants, he generally worked nine (9) to twelve (12) hour days, six (6) days per week, and was not paid overtime for his weekly hours in excess of forty (40). For example, on April 2, 2012, he attended the weekly safety meeting which started at 6:30 a.m. He signed in to work at 7:00 a.m. and worked until 4:30 p.m., taking a thirty (30) minute lunch break at 12:00 noon, and no other breaks during the day. Further, on April 11, 2012, Plaintiff Hernandez signed in at 6:30 a.m. and worked until

6:30 p.m., taking a thirty (30) minute lunch break at 12:00 noon, and no other breaks during the day.

68. Plaintiff J. Elias Balderas worked for Defendants from January 17, 2012 until February 10, 2012 as a carpenter, who, among other duties, was a sheetrock hanger at the NEA Baptist Memorial Hospital construction project in Jonesboro, Arkansas. His rate of pay was \$13.95 per hour. During his employment with Defendants, he generally worked nine (9) to twelve (12) hour days, six (6) days per week, and was not paid overtime for his weekly hours in excess of forty (40). For example, on February 6, 2012, he attended the weekly safety meeting which started at 6:30 a.m. He signed in to work at 6:45 a.m. and worked until 4:30 p.m., taking a thirty (30) minute lunch break at 12:00 noon, and no other breaks during the day.

69. Plaintiff Otziel Hernandez worked for Defendants from March 27, 2012 until September 26, 2012 as a carpenter, who, among other duties, hung dense glass and installed ceiling track at the NEA Baptist Memorial Hospital construction project in Jonesboro, Arkansas. His rate of pay was \$14.00 per hour. During his employment with Defendants, he generally worked nine (9) to twelve (12) hour days, six (6) days per week, and was not paid overtime for his weekly hours in excess of forty (40). For example, on April 2, 2012, he attended the weekly safety meeting which started at 6:30 a.m. He signed in to work at 7:00 a.m. and worked until 4:30 p.m., taking a thirty (30) minute lunch break at 12:00 noon, and no other breaks during the day. Further, on April 11, 2012, Plaintiff Hernandez signed in at 6:30 a.m. and worked until 6:30 p.m., taking a thirty (30) minute lunch break at 12:00 noon, and no other breaks during the day.

70. Plaintiff Albino Balderas worked for Defendants from January 17, 2012 until February 10, 2012 as a carpenter, who, among other duties, framed walls and laid top tracks at

the NEA Baptist Memorial Hospital construction project in Jonesboro, Arkansas. His rate of pay was \$13.95 per hour. During his employment with Defendants, he generally worked nine (9) to twelve (12) hour days, six (6) days per week, and was not paid overtime for his weekly hours in excess of forty (40). For example, on February 6, 2012, he attended the weekly safety meeting which started at 6:30 a.m. He signed in to work at 6:45 a.m. and worked until 4:30 p.m., taking a thirty (30) minute lunch break at 12:00 noon, and no other breaks during the day.

71. Plaintiff Oscar Manuel Diaz worked for Defendants from November 28, 2011 until February 15, 2013 as a framing technician and drywall hanger at the NEA Baptist Memorial Hospital construction project. During his employment with Defendants, he averaged fifty-two (52) hours per week and was not paid overtime for his weekly hours in excess of forty (40). His rate of pay was \$17.00 per hour.

72. Plaintiff Salvador de Jesus Ibarra worked for Defendants from November 28, 2011 until August 26, 2012 as a carpenter, who, among other duties, hung drywall and framed walls at the NEA Baptist Memorial Hospital construction project. During his employment with Defendants, he averaged fifty-two (52) hours per week and was not paid overtime for his weekly hours in excess of forty (40). His rate of pay was \$17.00 per hour.

73. Plaintiff Oscar Miguel Acosta worked for Defendants from November 28, 2011 until February 15, 2013 as a framing technician at the NEA Baptist Memorial Hospital construction project. During his employment with Defendants, he averaged fifty-two (52) hours per week and was not paid overtime for his weekly hours in excess of forty (40). His rate of pay was \$19.00 per hour.

74. Named Plaintiffs generally worked six (6) days per week at times ranging from nine (9) to twelve (12) hours per day.

75. At no time during Named Plaintiffs' employment with Defendants were Named Plaintiffs paid any overtime pay as required by the FLSA.

76. At no time during Named Plaintiffs' employment with Defendants were Named Plaintiffs compensated for their attendance to mandatory, on site, safety meetings.

77. At no time during Named Plaintiffs' employment with Defendants were any taxes or other deductions taken from their wages.

78. The aforementioned conduct has caused damages to Named Plaintiffs and all others similarly situated.

COUNT I

Violation of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.

79. Pursuant to 29 U.S.C. § 216(b), Named Plaintiffs have consented in writing to be party plaintiffs in this FLSA action. Their written consents are attached to this Complaint as Exhibit 1 and incorporated herein.

80. At all times relevant herein, Defendants have and continue to be "employers" within the meaning of the FLSA.

81. At all times relevant herein, Defendants were and are responsible for paying wages to Named Plaintiffs and all others similarly situated.

82. At all times relevant to this action Defendants "suffered or permitted" Named Plaintiffs to work and "employed" others similarly situated within the meaning of the FLSA, 29 § 203(g).

83. Under the FLSA, an employer must pay an employee at least one and one half times his or her regular rate of pay for each hour worked in excess of forty hours per workweek, 29 U.S.C. § 206.

84. Defendants' violations of the FLSA include, but are not limited to: (1) unlawfully requiring Named Plaintiffs and all others similarly situated to sign in for work after finishing weekly safety trainings; (2) unlawfully docking the compensable pay of Named Plaintiffs and all others similarly situated by paying Named Plaintiffs and all others similarly situated as if they began each workday at 7 a.m., regardless of what time they actually signed in and began work; and (3) unlawfully compensating Named Plaintiffs and all others similarly situated overtime at less than 1.5 times their regular rate.

85. Named Plaintiffs are victims of Defendants compensation policies which operate to compensate Named Plaintiffs at a rate less than the federally mandated overtime wage rate.

86. This policy violates the FLSA and continues to be applied to all individuals who work or have worked for Defendants in excess of forty (40) hours per work week.

87. Defendants' conduct in failing to pay Named Plaintiffs and all others similarly situated properly was and is willful and was and is not based upon any reasonable interpretation of the law.

88. As a result of Defendants' unlawful conduct, Named Plaintiffs and all others similarly situated have suffered damages as set forth herein.

PRAYER FOR RELIEF

WHEREFORE, Named Plaintiffs and all others similarly situated pray for relief as follows:

1. That this Honorable Court certify this case as a collective action in accordance with 29 U.S.C. § 216(b) with respect to the FLSA claims as set forth in Count I;

2. That this Honorable Court designate each Named Plaintiff as a representative of the class he or she seeks to represent;

3. Appropriate and equitable relief to remedy Defendant's violation of federal law, including that Defendants are to be prohibited and enjoined from continuing to maintain their illegal policy, practice or customs in violation of federal wage and hour laws;

4. Ordering that Defendants disclose in computer readable format, or in print if no computer readable format is available, the names and addresses of all those individuals who are similarly situated and permitting Named Plaintiffs to send notice of this action to all those similarly situated individuals;

5. Declaration that Defendants willfully violated the FLSA and its regulations, as set forth in Count I;

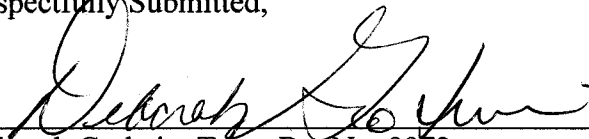
6. That Defendants compensate, reimburse, and make Named Plaintiffs and all others similarly situated whole for any and all pay and benefits they would have received had it not been for Defendants' illegal actions, including but not limited to past lost earnings.

7. Named Plaintiffs and all others similarly situated are to be awarded, pursuant to the FLSA, liquidated damages in an amount equal to the actual damages in this case;

8. Named Plaintiffs and all others similarly situated are to be awarded the costs and expenses of this action and reasonable attorney's and legal fees as provided by applicable law.

9. Named Plaintiffs and all others similarly situated are to be awarded all other relief this Court deems just and proper.

Respectfully Submitted,



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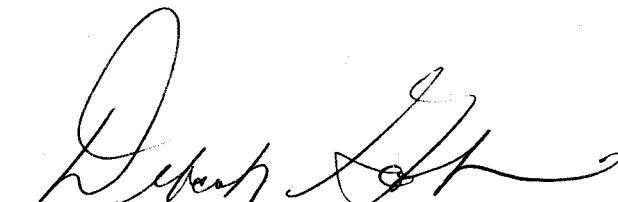
CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2013 I mailed a copy of the foregoing Amended Complaint, via U.S. Mail, postage prepaid, to the following:

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