

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Omar Morrison, Carli Galasso, and Manuel Toppins, individually and on behalf of other similarly situated Assistant Store Managers,	:	CIVIL ACTION NO.:
	:	
Plaintiffs,	:	3:09-CV-1285 (AWT)
	:	
V.	:	April 19, 2011
	:	
Ocean State Jobbers, Inc.,	:	
	:	
Defendant	:	

**FOURTH AMENDED COLLECTIVE
AND CLASS ACTION COMPLAINT**

Plaintiff Omar Morrison hereby offers this Fourth Amended Collective and Class Action Complaint to correct class periods in paragraphs 23 and 31.

I. INTRODUCTION

1. This action is brought on behalf of all assistant managers employed by Defendant Ocean State Jobbers, Inc. (hereinafter “Ocean State”). Defendant has misclassified Plaintiffs Omar Morrison, Carli Galasso, Manuel Toppins, and other similarly situated employees as exempt under federal and state overtime laws and failed to pay them overtime pay for hours above 40 in a workweek.

2. Plaintiffs allege on behalf of themselves and other similarly situated current and former assistant store managers of Defendant who elect to opt into this action pursuant to the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 216(b) (the “Collective Action Class”), that they are: (i) entitled to unpaid wages from Defendant for all overtime hours worked by them, as required by law, and (ii) entitled to liquidated damages pursuant to the FLSA, 29 U.S.C. §§ 201 *et seq.*

3. Plaintiff Morrison further complains, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of himself and a class of other similarly situated current and former assistant store managers of Defendant employed within the State of Connecticut (the “Connecticut Class”) that they are entitled to back wages from Defendant for all overtime work for which they did not receive overtime premium pay and an award of liquidated damages, plus the cost of litigation and reasonable attorneys fees as required by the Connecticut Minimum Wage Act (“CMWA”) (Conn. Gen. Stat. Section 31-58, *et seq.*).

4. Plaintiffs Carli Galasso and Manuel Toppins further complain, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of themselves and a class of other similarly situated current and former assistant store managers of Defendant employed within the State of Massachusetts (the “Massachusetts Class”) that they are entitled to back wages from Defendant for all overtime work for which they did not receive overtime premium pay and an award of treble damages, plus the cost of litigation and reasonable attorneys fees as required by the Massachusetts Minimum Fair Wage Law, (Mass. Gen. Laws, ch. 151, §§ 1 - 22.)

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over Plaintiffs’ FLSA claims pursuant to 28 U.S.C. § 1331 and 29 U.S.C. Section 216(b).

6. This Court has jurisdiction over plaintiffs’ state law claims pursuant to 28 U.S.C. Section 1367 since it is so related to their FLSA claims that it forms part of the same case or controversy.

7. This court has jurisdiction over plaintiffs’ state law claims pursuant to 28 U.S.C. § 1332(d)(2)(A), the Class Action Fairness Act (“CAFA”). The parties are diverse and the

amount in controversy exceeds \$5,000,000, exclusive of interest and costs.

8. At least one member of the proposed class is a citizen of a state different from that of at least one defendant. Plaintiffs' claims involve matters of national or interstate interest.

9. Citizenship of the members of the proposed class is dispersed among a substantial number of states.

10. This Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. Sections 2201 and 2202.

11. Venue is proper in this district under 28 U.S.C. § 1391(b)-(c) because the acts or omissions giving rise to claims in this Complaint took place in this judicial district.

12. This court has personal jurisdiction over defendant pursuant to Connecticut's long-arm statute because it transacts business in the State of Connecticut, it enters into employment contracts with the Assistant Store Managers, including Plaintiff Morrison, and its conduct in violating the Fair Labor Standards Act and the Connecticut Minimum Wage Act is tortious as that term is defined under the long arm statute.

III. THE PARTIES

13. Plaintiff Omar Morrison is an individual residing within this judicial district. He worked for defendant from approximately June 2008 to September 2009. During that time, plaintiff held the position of Assistant Store Manager. He worked at defendant's Ledyard, Manchester, Wethersfield, and Willimantic, Connecticut stores. In this position, plaintiff routinely worked 50 hours a week, or more, though he was never paid overtime.

14. Plaintiff Carli Galasso is an individual residing in Palmdale, California. She worked for defendant from approximately March 2008 to May 2009. During that time, plaintiff held the position of Assistant Store Manager. She worked at defendant's Foxboro, Massachusetts

and Medford, Massachusetts stores. In this position, plaintiff routinely worked 50 hours a week, or more, though she was never paid overtime.

15. Plaintiff Manuel Toppins is an individual residing in Providence, Rhode Island. He has worked for defendant since 1991. During the period of this claim, plaintiff held the position of Assistant Store Manager. He worked at defendant's Whitinsville, Massachusetts store. In this position, plaintiff routinely worked 50 hours a week, or more, though he was never paid overtime.

16. Defendant Ocean State Jobbers, Inc. is a corporation organized and existing under the laws of Rhode Island. Its principal office is located at 375 Commerce Park Road, North Kingstown, Rhode Island. In this Complaint, "Ocean State" refers (unless otherwise stated) to the named defendant and all successor, predecessor, subsidiary and related entities to which these allegations pertain.

17. Defendant is the parent of various affiliates, including corporations and limited liability companies which own and operate discount retail stores throughout New England and New York. Ocean State refers to itself in its Corporate and Policies and Procedures and other documents as "Ocean State Jobbers Inc. & Affiliates."

18. Defendant is not a passive holding company for its affiliates. Instead, it actively manages and directs the affairs of those affiliates, setting overall company-wide policies and procedures that are required to be followed in each store.

19. It is from its corporate headquarters that Ocean State operates the various stores by the creation, publication, and enforcement of its Corporate Policies and Procedures. These procedures include procedures for the recruitment, hiring, training, compensation, management, and termination of various store personnel including Assistant Store

Managers.

20. Ocean State, which is subject to FLSA requirements, is an employer within the meaning of the FLSA. Ocean State was the employer of plaintiff and all other Assistant Store Managers in the seven states in which they work, including Rhode Island, Massachusetts, Connecticut, Maine, New Hampshire, Vermont and New York because it had the power to hire and fire those employees, it supervised and controlled their work schedules and conditions of employment, it had the authority to set their rates and methods of payment and maintained their employment record.

THE NATIONWIDE COLLECTIVE ACTION

21. Plaintiff Morrison brings the first cause of action on behalf of himself and all other Ocean State Assistant Store Managers at all Ocean State stores who have worked for defendant as Assistant Store Managers in all stores in Rhode Island, Connecticut, Massachusetts, Vermont, New Hampshire and New York, between August 18, 2006 and the date of final judgment in this matter.

22. Plaintiff brings this count under 29 U.S.C. § 216(b) of the Fair Labor Standards Act. Plaintiff and the other Assistant Store Managers are similarly situated in that they are all subject to Ocean State's common plan or practice of designating them as exempt from the overtime requirements of the FLSA when in fact their work, as described and defined by the job description and required by Ocean States, is not exempt.

THE CONNECTICUT RULE 23 CLASS

23. Plaintiff Omar Morrison brings the second cause of action under Rule 23 of the Federal Rules of Civil Procedure, for himself and on behalf of a class consisting of all persons who have worked for defendant as Assistant Store Managers in Connecticut between December 4, 2007 and the date of final judgment in this matter.

24. As to plaintiff's claims for money damages, pursuant to Conn. Gen. Stat. Section 31-58 *et seq.*, Morrison sues on behalf of himself and all other members of the above-defined Connecticut class. Class certification for these Connecticut law claims is appropriate under Rule 23(a) and Rule 23(b)(3) because all the requirements of the Rules are met.

25. The class is so numerous that joinder of all members is impracticable. Upon information and belief, and pursuant to records obtained from Defendant, there are over 109 Assistant Store Managers who have worked for defendant in Connecticut.

26. There are questions of law and fact common to the class, including whether or not the putative class members worked overtime but were not paid overtime in violation of Connecticut law.

27. The named plaintiff's claims are typical of those of the class members. Plaintiff's claims encompass the challenged practices and course of conduct of defendant. Furthermore, plaintiff's legal claims are based on the same legal theories as the claims of the putative class members. The legal issues as to which federal and state laws are violated by such conduct apply equally to plaintiff and to the class.

28. The named plaintiff will fairly and adequately protect the interests of the class. The plaintiff's claims are not antagonistic to those of the putative class and he has hired counsel skilled in the prosecution of class actions.

29. Common questions of law and fact predominate over questions affecting only individuals, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy. This proposed class action under Fed. R. Civ. P. 23 presents few management difficulties, conserves the resources of the parties and the court system, protects the rights of each class member and maximizes recovery to them.

30. As to plaintiff's claims for injunctive relief, pursuant to Conn. Gen. Stat. Section 31-58 *et seq.*, plaintiff sues on behalf of himself and all other members of the above-defined class. Class certification for these state law claims is appropriate under Rule 23(a) for the reasons set forth in Paragraph 12 above. Class certification for these state law claims also is appropriate under Rule 23(b)(2), because all the requirements of the rule are met, in that defendant has acted on grounds generally applicable to the class when it classified the positions of Assistant Store Manager as exempt, so that it is appropriate to issue final injunctive relief to the class as a whole.

THE MASSACHUSETTS RULE 23 CLASS

31. Plaintiffs Carli Galasso and Manuel Toppins bring the second cause of action under Rule 23 of the Federal Rules of Civil Procedure, for themselves and on behalf of a class consisting of all persons who have worked for defendant as Assistant Store Managers in Massachusetts between August 31, 2008 and the date of final judgment in this matter.

32. As to plaintiffs' claims for money damages, pursuant to the Massachusetts Minimum Fair Wage Law, Galasso and Toppins sue on behalf of themselves and all other members of the above-defined Massachusetts class. Class certification for these Massachusetts law claims is appropriate under Rule 23(a) and Rule 23(b)(3) because all the requirements of the Rules are met:

33. The class is so numerous that joinder of all members is impracticable. Upon information and belief, and pursuant to records obtained from Defendant, there are over 184 Assistant Store Managers who have worked for defendant in Massachusetts.

There are questions of law and fact common to the class, including whether or not the putative class members worked overtime but were not paid overtime in violation of Massachusetts law.

34. The named plaintiffs' claims are typical of those of the class members. Plaintiffs' claims encompass the challenged practices and course of conduct of defendant.

Furthermore, plaintiffs' legal claims are based on the same legal theories as the claims of the putative class members. The legal issues as to which federal and state laws are violated by such conduct apply equally to plaintiff and to the class.

35. The named plaintiffs will fairly and adequately protect the interests of the class. The plaintiff's claims are not antagonistic to those of the putative class and she has hired counsel skilled in the prosecution of class actions.

36. Common questions of law and fact predominate over questions affecting only individuals, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy. This class action under Fed. R. Civ. P. 23 presents few management difficulties, conserves the resources of the parties and the court system, protects the rights of each class member and maximizes recovery to them.

37. As to plaintiffs' claims for injunctive relief, pursuant to the Massachusetts Labor Law, plaintiffs sue on behalf of themselves and all other members of the above-defined class. Class certification for these state law claims is appropriate under Rule 23(a) for the reasons set forth in Paragraph 12 above. Class certification for these state law claims also is

appropriate under Rule 23(b)(2), because all the requirements of the rule are met, in that defendant has acted on grounds generally applicable to the class when it classified the positions of Assistant Store Manager as exempt, so that it is appropriate to issue final injunctive relief to the class as a whole.

STATEMENT OF FACTS

38. At all relevant times, plaintiffs worked as Assistant Store Managers for Ocean State. There are hundreds of Ocean State Assistant Store Managers around the Northeast who share a common job title and description. They report directly to a Store Manager who is the real management authority of the store.

39. Ocean State's corporate headquarters closely monitored each store in which plaintiffs worked. Each store had computer access to the "HUB", a communications system linked to Ocean State's home office. Each store was subject to the rules and regulations contained in the "Corporate Policies and Procedures.

40. Plaintiffs' performance, as well as the overall performance of each store, was closely monitored by the District Manager to ensure compliance with corporate directives. Assistant Store Managers are uniformly trained through training materials prepared by defendant and corporate trainers who travel around the northeast ensuring that the corporate training materials are used.

41. Ocean State owns and/or leases the properties, either by itself or through its subsidiaries, on which its stores are located.

42. Job applicants apply for jobs in the various stores in the various states by completing an online job application which is processed in the corporate office.

43. Ocean State employees, including Assistant Store Managers are subject to

performance measurement standards developed by the corporate office and carried out in the stores.

44. While plaintiffs and the class have been given the title of Assistant Store Manager, in fact, based on their duties, their real and primary function is to perform nonexempt functions, including such tasks as unloading deliveries, sorting and processing the delivery and stocking shelves. Ocean State profits from this business model to the extent that it does not pay for the hours worked by Assistant Store Managers beyond forty in a week. In fact, defendant mandates that its Assistant Store Managers work at least 48 hours per week during most weeks and 54 during the “seasonal” time of year.

45. Defendant classifies all Assistant Store Managers as exempt from the overtime requirements of the FLSA, regardless of store location, volume, or size.

46. The decision to classify Assistant Store Managers as exempt was made by defendant’s corporate officers based on the general job description of the position, but was carried out in each state, including Connecticut and Massachusetts, by the issuance of payments which did not include the legally required overtime premiums for all hours over 40 in a week.

47. The FLSA, the CMWA, and the Massachusetts Labor Law have certain exemptions from its overtime requirement including exemptions for bona fide executive employees.

48. The primary duty of plaintiff and all other Assistant Store Managers is not management and therefore Ocean State is not entitled to deny them overtime pay under the executive exemption or any other exemption.

Time Spent on Exempt v. Non -Exempt Tasks

49. Assistant Store Managers do not spend most of their time on exempt tasks. Instead, most of their time is spent performing non-exempt duties. The Store/Assistant Store Manager job description even indicates that it is the Store Manager who is “responsible for the timely and consistent execution of all Merchandising, Operational, and Human Resource policies and procedures...” The Assistant Manager merely “participates in managing the entire store while maintaining specific areas of responsibility.” In fact, Assistant Store Managers spend most of their time performing non-exempt tasks such as opening shipments, stocking shelves and organizing the store.

Relative Importance of Exempt Tasks to Non -Exempt Tasks

50. The non-exempt duties that Assistant Store Managers perform are more important to the Ocean State business model than the exempt duties that they are required to perform. Moreover, few if any of these duties qualify as administrative tasks under the regulations because they do not relate to the management or general business operations. Instead they consist of carrying out the day to day affairs of the company and do not require the exercise of discretion and independent judgment on matters of significance.

51. Even as to these few exempt tasks that they perform, the various Ocean State’s operations manuals strictly prescribe them, and the District Managers and Store Managers closely scrutinize Assistant Store Managers’ compliance with the manuals and other corporate directives. Assistant Store Managers are not allowed to perform any of these tasks outside of the strict limitations established by the various Ocean State operations manuals, company directives or their Store Manager’s supervision.

52. It is a key to Ocean State's business model that the Assistant Store Manager performs significant amounts of manual labor and other non-exempt functions given each stores' limited payroll budget. If the Assistant Store Managers did not perform these manual labor and non-exempt functions, Ocean State would have to employ other employees, including more cashiers, janitors and stock persons.

Relative Freedom from Supervision

53. Assistant Store Managers are rarely free from the close supervision and micromanagement of Ocean State's management, which controls virtually every aspect of the stores' day-to-day operations. Ocean State, through its store operations manuals and company directives, micro-manages many of the details of the operations of these stores.

Relationship between Assistant Store Manager's' Salary and the Wages of Other Non-Exempt Workers

54. The Assistant Store Manager's salary is comparable to that of their non-exempt store associate, especially when the overtime that they spend on the job is considered.

Partial Day Docking / Failure to pay Assistant Store Managers on a Salaried Basis

55. Throughout their employment, Plaintiffs have been subject to policies which violates the salaried basis test and which results in partial day dockings of their pay. These policies result in partial day dockings of their pay when they work less than 50 hours in a week and do not have any remaining sick, vacation or personal time to use.

56. In fact, Plaintiff Omar Morrison's pay was docked by four hours in August 2009 because he only worked 46 hours in a week and did not have sufficient sick, vacation or personal time to cover the four extra hours.

57. As a result of these policies, which applied to all Assistant Store Managers during the period of this claim, they were not paid on a "salaried basis" as required to avoid paying

overtime under the FLSA. Accordingly, all Assistant Store Managers were not exempt and were entitled to overtime pay.

58. Ocean State's violations have been willful and intentional in that it has known all along what the law requires and that the primary duty of its Assistant Store Managers has been to perform non-exempt work.

59. As a result of Ocean State's willful violations of the FLSA, Morrison and all other similarly situated Assistant Store Managers have suffered damages in that they have not received proper compensation.

LEGAL CLAIMS

COUNT ONE VIOLATION OF THE FAIR LABOR STANDARDS ACT

60. Based on the foregoing, Ocean State's conduct in this regard was a willful violation of the Fair Labor Standards Act, 29 U.S.C. Sections 201 *et seq.*

61. Plaintiff Omar Morrison and all other similarly situated Assistant Store Managers who opt into this litigation are entitled to compensation for all overtime hours worked, liquidated damages, attorneys' fees and court costs.

COUNT TWO VIOLATION OF THE CONNECTICUT MINIMUM WAGE ACT

62. Based on the foregoing, Ocean State's conduct in this regard was a willful violation of the Connecticut Minimum Wage Act, Conn. Gen. Stat. Section 31-58, *et seq.*

63. Defendant's conduct in violation this law was unreasonable, arbitrary and/or in bad faith.

64. Accordingly, plaintiff Omar Morrison and all other similarly situated Assistant Store Managers who opt into this litigation are entitled to compensation for all overtime hours worked, liquidated damages, attorneys' fees and court costs.

COUNT THREE VIOLATION OF THE MASSACHUSETTS MINIMUM FAIR WAGE LAW

65. Based on the foregoing, Ocean State's conduct in this regard was a willful violation of the Massachusetts Minimum Fair Wage Law, Mass. Gen. Laws, ch. 151, §§ 1 -22.

66. Defendant's Massachusetts Minimum Fair Wage Law violations have caused Plaintiffs and the Class irreparable harm for which there is no adequate remedy at law.

67. Defendant's conduct in violation this law was willful, unreasonable, arbitrary and/or in bad faith.

68. Accordingly, plaintiffs Galasso, Toppins, and all other similarly situated Assistant Store Managers who opt into this litigation are entitled to recover from Defendant their unpaid wages for all hours worked, damages for unreasonably delayed payment of wages, treble damages and reasonable attorneys' fees and court costs.

DEMAND FOR RELIEF,

Plaintiffs claim:

- a. Certification of the Connecticut and Massachusetts counts as class actions pursuant to Fed. R. Civ. P. 23(b)(2) and (3) and appointing Plaintiffs and their counsel to represent those Classes;
- b. An award of unpaid overtime wages under the Fair Labor Standards Act, and the Connecticut Minimum Wage Act and the Massachusetts Minimum Fair Wage Law;
- c. An award of Liquidated damages under the Fair Labor Standards Act,
- d. An award of Liquidated damages under Connecticut Minimum Wage Act;
- e. An award of Liquidated treble damages under the Massachusetts Minimum Fair Wage Law;
- f. A declaratory judgment that the practices complained of herein are unlawful under the FLSA;
- g. Interest and costs;
- h. Attorneys' fees under the Fair Labor Standards Act, and the Connecticut Minimum Wage Act and the Massachusetts Minimum Fair Wage Law;
- i. Injunctive relief in the form of an order directing Defendant to comply with the Connecticut Minimum Wage Act and the Massachusetts Minimum Fair Wage Law;
- j. Such other relief as in law or equity may pertain.

JURY DEMAND

Plaintiffs demand a trial by jury by all issues so triable.

Omar Morrison, Carli Galasso, and Manuel Toppins, individually and on behalf of other similarly situated individuals

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CERTIFICATION OF SERVICE

I hereby certify that on April 19, 2011, a copy of **Fourth Amended Collective and Class Action Complaint** dated April 19, 2011 was filed electronically [and service made by mail to anyone unable to accept electronic filing]. Notice of this filing will be sent by email to all parties by operation of the Courts electronic filing system [or by mail for anyone unable to accept electronic filing]. Parties may access this filing through the Courts system.

/s/Richard E. Hayber

Richard E. Hayber