

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(WESTERN DIVISION)

Civil Action No. 3:21-cv-30015-MGM

JOSEPH GIGUERE,
on behalf of himself and all others similarly
situated,

Plaintiff,

v.

HOMEWORKS ENERGY, INC., MARTIJN
FLEUREN, individually and MAX
VEGGERBERG, individually,
Defendants.

**FIRST AMENDED COLLECTIVE AND
CLASS ACTION COMPLAINT**

**LEAVE TO FILE GRANTED ON
SEPTEMBER 30, 2021**

I. PRELIMINARY STATEMENT

1. Employers in Massachusetts must not take deductions from their employee's wages based on customer complaints or other performance issues. *See, Awuah v. Coverall North America, Inc.* 460 Mass. 484, 493 (2011). Employers must also factor in "all remuneration for employment paid to, or on behalf of the employee" when calculating overtime pay. 29 U.S.C. § 207(e) ("regular hourly rate" defined).
2. Here, Defendants took deductions from the wages of Plaintiff and other similarly situated employees when the company received customer complaints, when a worker left a tool at the work site, or for other actions that the employer wished to disincentivize. Defendants also did not include all of Plaintiff's income when calculating overtime pay.
3. Defendants' failure to pay all wages due under the law deprived Plaintiff and other similarly situated employees the full wages they were entitled to receive by law and renders them liable for hundreds of thousands of dollars in back wages, liquidated damages and attorneys' fees.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction over Plaintiff's Fair Labor Standards Act ("FLSA") claims pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 216(b).
5. This Court has jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367 since they are so related to his FLSA claims that they form part of the same case or controversy.
6. Venue is proper in this district under 28 U.S.C. §§ 1391(b)-(c) because the acts or omissions giving rise to the claims in this Complaint took place in this judicial district.

III. PARTIES

7. Plaintiff Joseph Giguere ("Plaintiff" or "Giguere") is an adult resident of West Springfield, Massachusetts. Giguere works for Defendant, HomeWorks Energy, Inc., as a Crew Lead and, previously, as a Tech I.
8. Defendant HomeWorks Energy, Inc. ("HomeWorks") is a domestic for-profit corporation incorporated under the laws of the Commonwealth of Massachusetts with operations in this judicial district and throughout the Commonwealth. It is an employer as that term is defined under the Massachusetts Wage Act.
9. Defendant Martijn Fleuren ("Fleuren") is the President of HomeWorks and, accordingly, is individually liable for Plaintiffs' claims pursuant to M.G.L. c. 149 §§ 148, 150.
10. Defendant Max Veggeberg ("Veggeberg") is the Treasurer of HomeWorks and, accordingly, is individually liable for Plaintiffs' claims pursuant to M.G.L. c. 149 §§ 148, 150.

11. At all relevant times, Defendants have been, and continue to be, employers engaged in interstate commerce and/or the production of goods for commerce, within the meaning of the FLSA, 29 U.S.C. §§206(a) and 207(a).
12. Upon information and belief, at all relevant times, Defendants have had gross revenues in excess of \$500,000.00 per year.
13. Plaintiff consents in writing to be a party to this action, pursuant to 29 U.S.C. § 216(b). The named Plaintiff's written consent is attached to the Complaint filed on February 5, 2021, and incorporated by reference.

IV. LEGAL PRINCIPLES

A. Deductions from Wages

14. The Massachusetts Wage Act requires "prompt and full payment of wages due." *Camara v. Attorney General*, 458 Mass. 756, 759 (2011).
15. The Massachusetts Wage Act mandates that "[e]very person having employees in his service shall pay weekly or bi-weekly such each employee the wages earned by him within six days of the termination of the pay period during which the wages were earned...." M.G.L. c. 149 § 148.
16. Employers may not except themselves from the requirements of § 148 by "special contract" with the employee. *Id.*
17. Employers must not take any deductions from their employees' wages unless those deductions are authorized by law. *See, Awuah v. Coverall North America, Inc.* 460 Mass. 484, 493 (2011) (holding that the Wage Act prohibits an employer from "deducting, or withholding payment of, any earned wage.")
18. Employers may not impose impermissible pay deductions even if the employee agrees to the deduction by "special contract." *Id.*

19. Employers may not deduct wages as a penalty for an employee's performance. *Awuah v. Coverall*, 460 Mass. at 493 (“[i]f an employee's work is inadequate, [the employer] is free to implement sanctions, including termination; [the employer] is not free to withhold— much less recapture—the employee's earned wages.”)
20. Employers who violate the Wage Act by taking illegal deductions are liable for three times the amount of the unpaid wages, plus court costs and reasonable attorney's fees. M.G.L. c. 149 § 148.

B. Overtime Wages

21. Employers subject to the FLSA must pay employees at a rate of one and one-half times the employee's “regular hourly rate” for all hours worked in excess of forty per week, unless the employer can prove that an overtime exemption applies. 29 U.S.C. § 207 *et. seq.*
22. When calculating an employee's regular hourly rate, an employer must factor in “all remuneration for employment paid to, or on behalf of the employee.” 29 U.S.C. § 207(e) (“regular hourly rate” defined).
23. An employer's failure to include “incentive payments” (payments in excess of the employee's hourly rate in reward for good performance) as part of the employee's “regular hourly rate” violates the FLSA.

C. Individual liability of Defendant Fleuren and Defendant Veggeberg

24. The Massachusetts Wage Act states that “[t]he president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section.” M.G.L. c. 149 §§ 148, 150.

25. Defendant Fleuren, is the President of HomeWorks and Defendant Veggeberg is the Treasurer of HomeWorks. Accordingly, both parties are individually liable under the Massachusetts Wage Act.
26. Corporate officers and directors are individually liable under the FLSA when they: (1) have the power to hire and fire employees; (2) supervise and control employee work schedules and conditions of employment; (3) determine the rate and method of compensation; and/or (4) maintain office records.
27. Defendant Fleuren's and Defendant Veggeberg's exercise of that authority was the direct cause of failure to pay wages as set forth below. Accordingly, Defendant Fleuren and Defendant Veggeberg are employers of Plaintiff and all other similarly situated individuals as that term is defined in the FLSA.

D. *Violations of the FLSA constitute a violation of Massachusetts Wage Act*

28. The Defendants' failure to pay all overtime wages owed pursuant to the FLSA also constitutes a failure to pay timely wages pursuant to the Massachusetts Wage Act. *See Lambirth v. Advanced Auto, Inc.*, 140 F. Supp. 3d 108 (D. Mass. 2015) (holding that an employee could pursue claim for treble damages under Massachusetts Wage Act for unpaid overtime wages due under federal law, where employee established his right to overtime wages owed under the Fair Labor Standards Act.

V. STATEMENT OF FACTS

29. Defendant, HomeWorks, is in the business of providing home energy assessments and installation services to customers throughout Massachusetts and New York.
30. HomeWorks employs a compensation plan for Crew Leads, Technicians, in-house auditors, and employees in other positions, in which those employees receive

“incentive” payments to encourage productivity and “disincentive” deductions to punish employees for undesired events.

31. HomeWorks takes disincentive deductions from employees when HomeWorks receives a customer complaint, when a worker leaves a tool at the worksite, or for other performance issues that the employer wishes to disincentivize.
32. HomeWorks calculates overtime without factoring in “incentive payments” into the hourly overtime rate. This failure to include incentive payments in the calculation of an employee’s regular hourly rate results in HomeWorks retaining wages that should be paid to its workers.
33. Giguere is employed by HomeWorks as a Crew Lead performing insulation installations.
34. Giguere has worked for HomeWorks as a Crew Lead since on or about February 13, 2020.
35. From on or about November 18, 2019, until his promotion to Crew Lead, Giguere worked as a Tech I performing insulation installations.
36. As Crew Lead, Giguere is assigned to work approximately 45 to 55 hours per week.
37. Giguere is compensated by HomeWorks on an hourly basis and presently earns \$20.00 per hour for his work.
38. Pursuant to its compensation plan, HomeWorks regularly adjusts or adjusted the wages of Giguere and other similarly situated employees based on so-called “incentives” and “disincentives”.
39. Under this plan, Giguere and others receive wages in the amount of *the greater of* their hourly wages *or* 10.2% of the revenues created by installations completed during the pay period.

40. For example, for the week of September 28, 2020, Giguere worked 51.81 hours as a Crew Lead at an hourly rate of \$20.00, for a total of \$1,154.30. Because Giguere's "incentive" of \$1,323.52 based on his revenues from installations exceeded his regular hourly wages, he received his incentive pay less the aforementioned improper deduction.
41. Because Giguere's "incentive" payment typically exceeded his hourly wages, Giguere's compensation was predominantly based on his "incentive" rather than his regular hourly wages.
42. HomeWorks' compensation plan did not pay overtime on the incentive payments of Giguere, and other employees based on hours worked in excess of forty per week.
43. HomeWorks' compensation plan for Tech 2s provided for payment of the greater of the Tech 2s hourly wages or 7.4% of revenues created by installations completed during the pay period. Tech 1s received the greater of their hourly wages, or 5.2% of revenues created by installations.
44. HomeWorks' compensation plan for Giguere and other similarly situated employees did not pay overtime on incentive payments based on hours worked in excess of forty per week.
45. HomeWorks' failure to pay overtime on incentive payments to Giguere and similarly situated employees, for hours worked in excess of forty per week violates the FLSA, which requires that employers factor in such payments in calculating an employee's "regular hourly rate." 29 U.S.C. 207(e) ("regular hourly rate" defined).
46. HomeWorks' compensation plan for Giguere and similarly situated employees provides for "disincentive" deductions from wages for employees accused of actions that HomeWorks seeks to disincentivize.

47. For example, HomeWorks reduced Giguere's wages by \$150.00 for the week of September 28, 2020, by \$150.00 for the week of October 2, 2020, by \$150.00 for the week of 10/26/20, and by \$150.00 for the week of November 9, 2020. HomeWorks took these deductions on the basis of an alleged customer complaints or performance issues that were never fully explained to him.
48. Upon information and belief, all similarly situated employees receive disincentive deductions for customer complaints, for leaving a tool at a job site, or for other actions that HomeWorks unilaterally deems deserving of a disincentive deduction.
49. HomeWorks' imposition of disincentive deductions violates the Massachusetts Wage Act in that the disincentive deductions constitute an impermissible wage deduction. *See, Camara v. Attorney General*, 458 Mass. 756 (2011); 454 C.M.R. § 27.05.
50. HomeWorks' conduct as described above constitutes a willful violation of the FLSA in that it knew that it was required to pay Plaintiff and the class overtime calculated as described above and that it was not entitled to make the deductions it did but nonetheless improperly paid Plaintiff and the class in violation of those laws.
51. On January 12, 2021, Giguere, received authorization from the Massachusetts Office of the Attorney General, Fair Labor Division, to pursue civil claims against Defendants for wage violations on his own behalf and "on behalf of other similarly situated employees." (See, Authorization Letter attached to Complaint filed on February 5, 2021, as Exhibit "A".)

VI. COLLECTIVE AND CLASS ACTION ALLEGATIONS

A. *The FLSA Class*

52. Plaintiff brings this action on behalf of himself and other similarly situated Crew Leads, Technicians, in-house Auditors, and any other position subject to Defendant's

“incentive” and “disincentive” policies, present or former, who were and/or are denied overtime wages due to Defendants’ failure to include their incentive pay in the calculation of their regular rate as described above.

53. In addition, and in the alternative, Plaintiff brings this action in his individual and personal capacity, separate and apart from the class claims set forth herein.

54. The FLSA class is defined as follows:

All current and former Crew Leads, Technicians, in-house Auditors, and employees of any other position who were subject to Defendant’s “incentive” and/or “disincentive” policies and who were employed by HomeWorks in Massachusetts from three years prior to the date of the filing of this complaint through the date of final judgment in this matter.

55. Plaintiff reserves the right to amend said class definition consistent with information obtained through discovery.

56. Plaintiff sues on behalf of himself and those members of the FLSA class who have filed or will file with the Court their consents to sue. This is an appropriate collective or representation action under 29 U.S.C. § 216(b), sometimes referred to as an “opt-in class action,” in that the Plaintiff and the members of the putative class, are similarly situated.

B. *The Massachusetts Rule 23 Class*

57. Plaintiff seeks to represent a class of plaintiffs defined as Crew Leads, Technicians, in-house Auditors and employees in all other positions subject to Defendants’ “incentive” and/or “disincentive” policies and who are currently or formerly employed by Defendants in Massachusetts at any of its Massachusetts locations, during the period beginning three years prior to the date of commencement of this action through and including the date of judgment in this action.

58. Plaintiff brings this action under Rule 23 of the Massachusetts Rules of Civil Procedure, for himself and on behalf of the above defined class and pursuant to Mass. R. Civ. P. 23 for Defendants' failure to calculate overtime pay properly and for illegal deductions from the pay of the class.
59. Class certification for these claims is appropriate under Rule 23(a) and Rule 23(b)(3) because all the requirements of the Rules are met.
60. The class is so numerous that joinder of all members is impracticable. Upon information and belief, there are hundreds of putative class members employed by HomeWorks in Massachusetts.
61. There are questions of law and fact common to the class. All class members were, or continue to be, employees of HomeWorks who were subject to unlawful deductions from wages in violation of Massachusetts law and who were denied timely payment of all wages owed. Common questions of law include: (1) whether the "disincentive" payments constitute an unlawful deduction from wages; and (2) whether HomeWorks' calculation of employees' "regular hourly rates" resulted in the failure to pay timely wages as required by M.G.L. c. 149 § 148.
62. 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 HomeWorks. 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 laws are violated by such conduct apply equally to Plaintiff and to the class.
63. 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.

64. 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. There is a well-defined community of interest in the questions of law and fact affecting the Class as a whole. The questions of law and fact common to the Class predominate over any questions affecting solely the individual members. Among the common questions of law and fact is whether members of the Class were denied timely payment of overtime wages and/or were subject to unlawful wage deductions pursuant to Defendant's "incentive" and "disincentive" policies.
65. This proposed class action under Rule 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.

VII. CAUSES OF ACTION

COUNT I: COLLECTIVE ACTION CLAIM UNDER 29 U.S.C. § 216(b) FOR VIOLATION OF THE OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT ON BEHALF OF PLAINTIFF AND THE FLSA CLASS (vs. Defendant HomeWorks)

66. HomeWorks' failure to factor in Plaintiff's "incentive payments" in calculating his "regular hourly rate" resulted in non-payment of overtime wages owed.
67. Based on the foregoing, HomeWorks' conduct in this regard was a willful violation of the FLSA, in that HomeWorks knew or should have known that such payments should have been factored into the calculation of an employee's "regular hourly rate."
68. Accordingly, Plaintiff, and all other members of the FLSA class are entitled to compensation for all the overtime wages owed, liquidated damages, attorneys' fees and court costs, pursuant to 29 U.S.C. § 216(b).

COUNT II:
COLLECTIVE ACTION CLAIM UNDER 29 U.S.C. § 216(b) FOR VIOLATION OF THE OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT ON BEHALF OF PLAINTIFF AND THE FLSA CLASS (vs. Defendant Fleuren)

69. Fleuren's failure to factor in Plaintiff's "incentive payments" in calculating his "regular hourly rate" resulted in non-payment of overtime wages owed.
70. Based on the foregoing, Fleuren's conduct in this regard was a willful violation of the FLSA, in that Fleuren knew or should have known that such payments should have been factored into the calculation of an employee's "regular hourly rate."
71. Accordingly, Plaintiff, and all other members of the FLSA class are entitled to compensation for all the overtime wages owed, liquidated damages, attorneys' fees and court costs, pursuant to 29 U.S.C. § 216(b).

COUNT III:
COLLECTIVE ACTION CLAIM UNDER 29 U.S.C. § 216(b) FOR VIOLATION OF THE OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT ON BEHALF OF PLAINTIFF AND THE FLSA CLASS (vs. Defendant Veggeberg)

72. Veggeberg's failure to factor in Plaintiff's "incentive payments" in calculating his "regular hourly rate" resulted in non-payment of overtime wages owed.
73. Based on the foregoing, Veggeberg's conduct in this regard was a willful violation of the FLSA, in that Veggeberg knew or should have known that such payments should have been factored into the calculation of an employee's "regular hourly rate."
74. Accordingly, Plaintiff, and all other members of the FLSA class are entitled to compensation for all the overtime wages owed, liquidated damages, attorneys' fees and court costs, pursuant to 29 U.S.C. § 216(b).

COUNT IV:

CLASS ACTION CLAIM FOR UNLAWFUL DEDUCTIONS FROM WAGES IN VIOLATION OF M.G.L. c. 149 §§ 148, 150 (vs. Defendant HomeWorks)

75. Based upon the foregoing, HomeWorks violated the Massachusetts Wage Act by taking deductions against the wages of the employees pursuant to HomeWorks' "disincentive" policy.
76. Accordingly, Plaintiff, and all other members of the Massachusetts Class are entitled to compensation for the full amount of their unpaid wages, as well as liquidated damages, attorney's fees, and court costs pursuant to M.G.L. c. 149 § 148.

COUNT V:

CLASS ACTION CLAIM FOR UNLAWFUL DEDUCTIONS FROM WAGES IN VIOLATION OF M.G.L. c. 149 §§ 148, 150 (vs. Defendant Fleuren)

77. Based upon the foregoing, Fleuren violated the Massachusetts Wage Act by taking deductions against the wages of the employees pursuant to HomeWorks' "disincentive" policy.
78. Accordingly, Plaintiff, and all other members of the Massachusetts Class are entitled to compensation for the full amount of their unpaid wages, as well as liquidated damages, attorney's fees, and court costs pursuant to M.G.L. c. 149 § 148.

COUNT VI:

CLASS ACTION CLAIM FOR UNLAWFUL DEDUCTIONS FROM WAGES IN VIOLATION OF M.G.L. c. 149 §§ 148, 150 (vs. Defendant Veggeberg)

79. Based upon the foregoing, Veggeberg violated the Massachusetts Wage Act by taking deductions against the wages of the employees pursuant to HomeWorks' "disincentive" policy.
80. Accordingly, Plaintiff, and all other members of the Massachusetts Class are entitled to compensation for the full amount of their unpaid wages, as well as liquidated damages, attorney's fees, and court costs pursuant to M.G.L. c. 149 § 148.

COUNT VII:
**CLASS ACTION CLAIM FOR FAILURE TO PAY TIMELY OVERTIME WAGES
IN VIOLATION OF M.G.L. c. 149 §§ 148, 150 (vs. Defendant HomeWorks)**

81. Based upon the foregoing, HomeWorks violated the Massachusetts Wage Act by failing to make timely payment for all overtime wages owed pursuant to the FLSA. See *Lambirth v. Advanced Auto, Inc.*, 140 F.Supp.3d (D.Mass. 2015) (holding that a Plaintiff make seek remedies under the Massachusetts Wage Act for an employer's failure to timely pay overtime wages as required by the FLSA).
82. Accordingly, Plaintiff, and all other members of the Massachusetts Class are entitled to compensation for the full amount of their unpaid wages, as well as liquidated damages, attorney's fees, and court costs pursuant to M.G.L. c. 149 § 148.

COUNT VIII:
**CLASS ACTION CLAIM FOR FAILURE TO PAY TIMELY OVERTIME WAGES IN
VIOLATION OF M.G.L. c. 149 §§ 148, 150 (vs. Defendant Fleuren)**

83. Based upon the foregoing, Fleuren violated the Massachusetts Wage Act by failing to make timely payment for all overtime wages owed pursuant to the FLSA. See *Lambirth v. Advanced Auto, Inc.*, 140 F.Supp.3d (D.Mass. 2015) (holding that a Plaintiff make seek remedies under the Massachusetts Wage Act for an employer's failure to timely pay overtime wages as required by the FLSA).
84. Accordingly, Plaintiff, and all other members of the Massachusetts Class are entitled to compensation for the full amount of their unpaid wages, as well as liquidated damages, attorney's fees, and court costs pursuant to M.G.L. c. 149 § 148.

COUNT IX:
**CLASS ACTION CLAIM FOR FAILURE TO PAY TIMELY OVERTIME WAGES
IN VIOLATION OF M.G.L. c. 149 §§ 148, 150 (vs. Defendant Veggeberg)**

85. Based upon the foregoing, Veggeberg violated the Massachusetts Wage Act by failing to make timely payment for all overtime wages owed pursuant to the FLSA.

See Lambirth v. Advanced Auto, Inc., 140 F.Supp.3d (D.Mass. 2015) (holding that a Plaintiff may seek remedies under the Massachusetts Wage Act for an employer's failure to timely pay overtime wages as required by the FLSA).

86. Accordingly, Plaintiff, and all other members of the Massachusetts Class are entitled to compensation for the full amount of their unpaid wages, as well as liquidated damages, attorney's fees, and court costs pursuant to M.G.L. c. 149 § 148.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff claims, individually and on behalf of all other similarly situated persons:

1. That, at the earliest possible time, Plaintiff be allowed to give notice of this collective action, or that the Court issue such notice, to all persons who are presently, or have been at any time during the three years immediately preceding the filing of this suit, employed by Defendants as Crew Leads, Tech 1s, Tech 2s, in-house auditors, Team Leads, and many other HomeWorks' positions, in Massachusetts. Such notice shall inform them that this civil action has been filed, the nature of the action, and of their right to join this lawsuit if they believe they were denied proper wages;
2. Certification of this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of members of the Massachusetts class and the appointment of Plaintiff and his counsel to represent the class;
3. Unpaid overtime wages under the FLSA;
4. Unpaid wages and restitution for unlawful deductions under the M.G.L. c. 149 §§ 148, 150;
5. Liquidated damages under the FLSA;
6. Treble damages under M.G.L. c. 149 § 150;

7. Payment of an incentive award for the named Plaintiff;
8. Pre-Judgment and Post-Judgment interest, as provided by law;
9. Attorneys' fees and costs of suit under the FLSA and M.G.L. c. 149 §§ 148, 150, including expert fees; and
10. Such other and further relief as the Court deems just and equitable.

IX. JURY DEMAND

Plaintiff demands a trial by jury for all issues so triable.

Dated: September 30, 2021

The Plaintiff,
JOSEPH GIGUERE,
 individually and on behalf of all other
 similarly situated,
 By his Attorneys,

/s/ Raymond Dinsmore
 Raymond Dinsmore, Esq. (BBO # 667340)
 Hayber, McKenna & Dinsmore, LLC
 One Monarch Place, Suite 1340
 Springfield, MA 01144
 Tel: 413-785-1400; Fax: 860-218-9555
 e-Mail: rdinsmore@hayberlawfirm.com

/s/ Richard E. Hayber
 Richard E. Hayber, Esq. (Bar # ct11629)
 Hayber, McKenna & Dinsmore, LLC
 750 Main Street, Suite 904
 Hartford, CT 06103
 Tel: 860-920-5362; Fax: 860-218-9555
 e-Mail: rhayber@hayberlawfirm.com

CERTIFICATE OF SERVICE

I, Raymond Dinsmore, hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on September 30, 2021.

/s/ Raymond Dinsmore (BBO # 667340)
Raymond Dinsmore