

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DONALD MARTIN, Jr.	:	
	:	
PATRICIA A. MANBECK	:	
	:	
JEFF ROBERTS	:	
	:	
JOSE ROJAS	:	
	:	
RANDALL L. SUMNER	:	
	:	No.: 13-834C
Plaintiffs,	:	
v.	:	Judge Patricia E. Campbell-Smith
	:	
THE UNITED STATES OF AMERICA	:	Collective Action
	:	
Defendant.	:	
_____	:	

FIRST AMENDED COMPLAINT

COME NOW the original Plaintiffs Donald Martin, Jr., Patricia A. Manbeck, Jeff Roberts, Jose Rojas and Randall L. Sumner, and the opt-in Plaintiffs whose names and identifying information are included on Appendix A hereto, on their own behalves and on behalf of all others similarly situated, and allege as follow:

INTRODUCTION

1. The “Original Plaintiffs” and the “Opt-In Plaintiffs,” as those terms are defined below, bring this collective action lawsuit individually and on behalf of other similarly situated individuals who would have been barred from working by their employer, the Defendant United States of America, during the October 2013 government shutdown except that they were classified as “essential employees” or “excepted employees” (“Essential Employees”). These

Essential Employees were not paid for work between October 1, 2013 and October 5, 2013 (the “Five Days”) on their regularly scheduled payday (“Scheduled Payday”) for biweekly pay period nineteen from September 22, 2013 through October 5, 2013 (“Pay Period 19”). As a result, Essential Employees were not paid the minimum wage for each hour worked during the Five Days, or alternatively, many Essential Employees were paid less than \$290 (the minimum wage of \$7.25 per hour times forty hours per week) for work performed during the week of September 29, 2013 through October 5, 2013 (the “Week”). Plaintiffs seek liquidated damages under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (“FLSA”), for themselves and all other Essential Employees at the rate of \$7.25 per hour times the number of hours worked during the Five Days, or alternatively, for themselves and other Essential Employees in an amount equal to the difference between \$290 and the amount paid on the Scheduled Payday for work performed during the Week.

2. In addition, Essential Employees who are classified as non-exempt from the overtime requirements of the FLSA were not paid on their Scheduled Payday for work performed during the Five Days in excess of the applicable overtime thresholds. Plaintiffs seek liquidated damages under the FLSA for themselves and all other FLSA non-exempt Essential Employees in the amount of any overtime payments to which they were entitled on the Scheduled Payday.

3. In addition, when it chose not to compensate Essential Employees whom it had classified as exempt from the FLSA on their Scheduled Payday, Defendant failed to pay them on a salary basis. Because Defendant did not pay the FLSA Exempt Essential Employees on a salary basis, they are entitled to overtime pay at the applicable rates for overtime work performed during the Week. Plaintiffs seek the difference between the overtime pay that FLSA Exempt

Essential Employees received and one and one-half times their regular rate times the number of overtime hours worked plus liquidated damages equal to one and one-half times their regular rate times the number of overtime hours worked for themselves and all other FLSA Exempt Essential Employees for the failure of Defendant to pay them at the correct overtime rates.

4. Plaintiffs bring this action on their own behalves and on behalf of all government employees who (a) were classified by Defendant as “Essential Employees,” (b) performed work for Defendant at any time during the Five Days, and (c) were not paid for such work on their Scheduled Payday. The members of this proposed collective action, including the Plaintiffs, are referred to as “Members.”

JURISDICTION AND VENUE

5. The United States Court of Federal Claims has jurisdiction and venue over this action pursuant to 28 U.S.C. § 1491(a), or alternatively, 28 U.S.C. § 1346(a)(2), inasmuch as this is a claim against the United States founded on an Act of Congress and for damages in a case not sounding in tort.

PARTIES

6. Original Plaintiff Donald Martin was an employee of Defendant classified as FLSA non-exempt in its Bureau of Prisons within the Department of Justice during Pay Period 19. Plaintiff was classified as an Essential Employee and performed work for Defendant for 4 days during the Five Day period for which Plaintiff was not compensated on the Scheduled Payday.

7. Original Plaintiff Patricia A. Manbeck was an employee of Defendant classified as FLSA non-exempt in its Bureau of Prisons within the Department of Justice during Pay Period 19. Plaintiff was classified as an Essential Employee and performed work for Defendant for 4

days during the Five Day period for which Plaintiff was not compensated on the Scheduled Payday.

8. Original Plaintiff Jeff Roberts was an employee of Defendant classified as FLSA non-exempt in its Bureau of Prisons within the Department of Justice during Pay Period 19. Plaintiff was classified as an Essential Employee and performed work for Defendant for 3 days during the Five Day period for which Plaintiff was not compensated on the Scheduled Payday.

9. Original Plaintiff Jose Rojas was an employee of Defendant classified as FLSA exempt in its Bureau of Prisons within the Department of Justice during Pay Period 19. Plaintiff was classified as an Essential Employee and performed work for Defendant for 4 days during the Five Day period for which Plaintiff was not compensated on the Scheduled Payday.

10. Original Plaintiff Randall L. Sumner was an employee of Defendant classified as FLSA non-exempt in its Bureau of Prisons within the Department of Justice during Pay Period 19. Plaintiff was classified as an Essential Employee and performed work for Defendant for 3 days during the Five Day period for which Plaintiff was not compensated on the Scheduled Payday.

11. The five Original Plaintiffs have given their written consents to be parties Plaintiffs in this action pursuant to 29 U.S.C. § 216(b). Such written consents, containing each Original Plaintiff's name, address and signature, were appended to the original Complaint.

12. The 1,023 Opt-In Plaintiffs identified in Appendix A hereto were employees of Defendant during Pay Period 19. They worked in the agencies identified in Appendix A at that time. Defendant classified each of the Opt-In Plaintiffs as an Essential Employee during Pay Period 19 and each of them performed work during the Five Day period for which he or she was not compensated on the Scheduled Payday.

13. The Opt-In Plaintiffs have given their written consents to be parties Plaintiffs in this action pursuant to 29 U.S.C. § 216(b). Such written consents, containing each Opt-In Plaintiff's name, address and signature, are appended as Appendix B hereto. The Original Plaintiffs and Opt-In Plaintiffs are referred to together as the "Plaintiffs" in this Complaint.

14. Defendant United States is an "employer" and "public agency" within the meaning of 29 U.S.C. § 203(d), (x).

ADDITIONAL FACTUAL ALLEGATIONS
RELEVANT TO ALL MEMBERS

15. Defendant was partially shut down from October 1, 2013 through October 16, 2013.

16. The partial shutdown did not affect some government employees, including some or all members of the military, employees who were "exempted" from the shutdown because their positions are not funded by annually appropriated funds, such as the Postal Service and the Federal Reserve, or Presidential appointees who are not covered by the leave system in 5 U.S.C. chapter 63.

17. Defendant designated all of its employees in agencies and positions that were affected by the partial shutdown either as Essential Employees or as Non-Essential Employees. Essential Employees were required to report to work and perform their normal duties, but were not compensated for work performed on or after October 1, 2013 until the partial shutdown ended and their next scheduled payday occurred.

18. Upon information and belief, there were approximately 1.3 million Essential Employees, including each of the Plaintiffs, during the partial shutdown in October 2013.

19. Members typically are paid biweekly.

20. For most or all Members, the first pay period affected by the partial shutdown commenced Sunday, September 22, 2013 and ended Saturday, October 5, 2013. Upon information and belief, the Scheduled Payday for all Members as to the work performed during this period was Friday, October 11, 2013, Tuesday, October 15, 2013, or Thursday, October 17, 2013.

21. The Members, including the Plaintiffs, were not paid on their Scheduled Payday for work performed during the Five Days. To the extent that they were paid for work performed during the Five Days, such payment was made after their Scheduled Payday.

22. As a result, the Members, including the Plaintiffs, were not paid for work performed between October 1, 2013 and October 5, 2013, on the date when such payment was due, in violation of the FLSA.

23. Members are paid pursuant to schedules that permit their pay rates to be calculated as a certain amount per hour.

24. On their Scheduled Payday, each Member received information showing the amount received for work performed during the Week or during Pay Period 19.

25. Because Members were paid for a maximum of only two days during the Week, each Member was not paid at all on the Scheduled Payday for three or more days of scheduled work during the Week if working a five day workweek or for two or more days of scheduled work during the Week if working a four day workweek.

26. If compliance with the FLSA's minimum wage is evaluated on an hourly basis, then Defendant paid each Member less than minimum wage on the Scheduled Payday.

27. The minimum wage applicable to Members is \$7.25 per hour, or \$290 for a forty hour week.

28. Because Members were paid for a maximum of only two days during the Week, many Members were paid less than \$290 for work performed during the Week.

29. If compliance with the FLSA's minimum wage is evaluated on a weekly basis, then Defendant paid many Members less than minimum wage on the Scheduled Payday.

30. Defendant conducted no analyses to determine whether its failure to pay Members the minimum wage for work performed during the Five Days complied with the FLSA and relied on no authorities indicating that its failure to pay Members the minimum wage for work performed during the Five Days complied with the FLSA.

31. Guidance issued by Defendant's Department of Labor, U.S. DEP'T OF LABOR, WAGE & HOUR DIVISION, DOL FACT SHEET #70: FREQUENTLY ASKED QUESTIONS REGARDING FURLOUGHS AND OTHER REDUCTIONS IN PAY AND HOURS WORKED ISSUES (Nov. 2009), *available at* <http://www.dol.gov/whd/regs/compliance/whdfs70.pdf>, indicates that under the circumstances Defendant violated the FLSA by not paying Members minimum wage on the Scheduled Payday for work performed during the Five Days.

32. Defendant's violation of the FLSA described above is willful, and in conscious or reckless disregard of the requirements of the FLSA.

33. As a result of the actions alleged above, the Members, including the Plaintiffs, have suffered monetary damages and are entitled to statutory liquidated damages.

ADDITIONAL FACTUAL ALLEGATIONS
RELEVANT TO MEMBERS CLASSIFIED AS NON-EXEMPT
FROM THE FLSA OVERTIME PROVISIONS

34. Defendant is obligated to pay overtime pay for work performed in excess of applicable thresholds which may differ for FLSA non-exempt employees classified as law enforcement employees or fire fighters than for other FLSA non-exempt employees. For overtime work performed during Pay Period 19, the FLSA obligated Defendant to make such overtime payments on the Scheduled Payday.

35. Defendant did not pay non-exempt Members on the Scheduled Payday for work in excess of the applicable overtime thresholds performed during the Five Days.

36. Defendant conducted no analyses to determine whether its failure to pay non-exempt Essential Employees overtime pay on the Scheduled Payday for work performed during the Five Days complied with the FLSA and relied on no authorities indicating that its failure to pay overtime to non-exempt Essential Employees on the Scheduled Payday complied with the FLSA.

37. Defendant's violation of the FLSA described above is willful and in conscious or reckless disregard of the requirements of the FLSA.

38. As a result of the actions alleged above, the non-exempt Members, including the non-exempt Plaintiffs, have suffered monetary damages and are entitled to statutory liquidated damages.

ADDITIONAL FACTUAL ALLEGATIONS
RELEVANT TO MEMBERS CLASSIFIED AS EXEMPT FROM THE FLSA
OVERTIME PROVISIONS

39. Employees are not exempt from payment of overtime under the managerial, professional or administrative exemptions unless, among other requirements, they are paid on a

salary basis. An employee is not paid on a salary basis if the employer fails to pay the agreed compensation at the scheduled time, except under certain circumstances not applicable here.

40. Defendant failed to pay the FLSA Exempt Members, including the FLSA Exempt Plaintiffs, on the Scheduled Payday for work performed during the Five Days, which is inconsistent with paying them on a salary basis.

41. For the Week, therefore, the FLSA Exempt Members, including the FLSA Exempt Plaintiffs, were not exempt from payment of overtime at the rate of one and one-half times their regular rate.

42. Defendant pays FLSA exempt employees at a reduced overtime rate set forth at 5 U.S.C. § 5542 for each hour worked in excess of the applicable thresholds, but pays FLSA non-exempt employees one and one-half times their regular rates for each hour worked in excess of the applicable thresholds.

43. Defendant is obligated to pay FLSA Exempt Members at the rate of one and one-half times their regular rates for work performed during the Week in excess of the applicable thresholds.

44. Defendant did not pay FLSA Exempt Members for overtime work performed during the Five Days on the Scheduled Payday, and did not pay FLSA Exempt Members at any time at the rate of one and one-half times their regular rates for work performed during the Week in excess of the applicable thresholds.

45. Defendant conducted no analyses to determine whether its failure to pay FLSA Exempt Essential Employees for work performed during the Five Days altered their status to FLSA non-exempt or whether its failure to pay FLSA Exempt Essential Employees overtime pay on the Scheduled Payday for work performed during the Five Days complied with the FLSA.

Defendant also relied on no authorities indicating that it complied with the FLSA when it failed to pay overtime to FLSA Exempt Essential Employees on the Scheduled Payday and failed to pay FLSA Exempt Essential Employees at more than the reduced overtime rates even though it did not pay them on a salary basis for the Week.

46. Defendant's violations of the FLSA described above are willful and in conscious or reckless disregard of the requirements of the FLSA.

47. As a result of the actions alleged above, the FLSA Exempt Members have suffered monetary damages and are entitled to payment of the difference between the amounts they were paid for overtime performed during the Week and one and one-half times their regular rates for each hour of overtime work, as well as to liquidated damages equal to one and one-half times their regular rate times the number of overtime hours worked during the Week.

COLLECTIVE ACTION ALLEGATIONS

48. Defendant uniformly failed to pay Plaintiffs and many or all Members throughout the United States minimum wages and overtime wages on their Scheduled Payday. Defendant also uniformly failed to treat FLSA Exempt Members throughout the United States consistently with their being paid on a salary basis on their Scheduled Payday.

49. The amount of liquidated damages due Plaintiffs and other Members, and the amount of unpaid overtime and liquidated damages due Members who worked overtime during the Five Days, can be computed for all Members using the same methodologies and Defendant's payroll records and employee data.

50. Based on reports in various sources, Plaintiffs are informed and believe that there are about 1.3 million Members who were affected by the actions and failure to act alleged here. A collective action is the most efficient means for resolution of the claims alleged.

51. Defendant knows the work email addresses of all Members who still work for the Defendant. Defendant can communicate with those Members at those work email addresses more speedily and at less expense than Plaintiffs could communicate with them by any means. Defendant should be required to give electronic notice of this collective action using Court-approved language at those work email addresses to all Members who still work for the Defendant because of the large number of Members and the ease with which Defendant may communicate with the Members electronically at those email addresses. Defendant also should be required to provide to Plaintiffs contact information for all Members who no longer work for the Defendant.

COUNT ONE

FAILURE TO PAY MINIMUM WAGES TIMELY AS REQUIRED UNDER THE FLSA

52. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.

53. Defendant failed to pay Members for work performed during the Five Days on the Scheduled Payday. As a result, all Members were paid less than minimum wage if the obligation is determined on an hourly basis, and many Members were paid less than minimum wage if the obligation is determined on a weekly basis.

54. Defendant's failure to pay Members minimum wage on their Scheduled Payday violated the FLSA. Defendant's violation was willful and in conscious or reckless disregard of the requirements of the FLSA.

55. As a result, Plaintiffs and other Members suffered injuries, including monetary damages, and are entitled to statutory liquidated damages.

COUNT TWO

**FAILURE TO PAY OVERTIME TO MEMBERS CLASSIFIED AS NON-EXEMPT
FROM THE FLSA OVERTIME PROVISIONS
AS REQUIRED UNDER THE FLSA**

56. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.

57. Defendant failed to pay overtime to Members classified as non-exempt from the FLSA overtime provisions who worked in excess of the applicable threshold for overtime pay during Pay Period 19.

58. Many Members classified as non-exempt from the FLSA's overtime provisions worked in excess of the applicable threshold for overtime pay.

59. Defendant violated the FLSA by failing to pay overtime pay on the Scheduled Payday to Members classified as non-exempt from the FLSA's overtime provisions who worked in excess of the applicable threshold for overtime pay. Its violation was willful, and in conscious or reckless disregard of the requirements of the FLSA.

60. As a result, Members covered by the FLSA's overtime provisions suffered injuries, including monetary damages, and are entitled to statutory liquidated damages.

COUNT THREE

**FAILURE TO PAY OVERTIME TO MEMBERS CLASSIFIED AS EXEMPT FROM
THE FLSA OVERTIME PROVISIONS
AS REQUIRED UNDER THE FLSA**

61. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.

62. Defendant did not pay FLSA Exempt Plaintiffs and other FLSA Exempt Members on a salary basis on their Scheduled Payday for work during the Week, consistent with their classification as exempt from the FLSA.

63. Defendant failed to pay overtime on the Scheduled Payday to FLSA Exempt Members who worked in excess of the applicable threshold for overtime pay during the Week, and subsequently failed to pay overtime at the appropriate rates to FLSA Exempt Members who should have been paid for overtime hours during the Week as if they were non-exempt employees.

64. Many FLSA Exempt Members worked in excess of the applicable threshold for overtime pay.

65. Defendant violated the FLSA on the Scheduled Payday by failing to pay the appropriate overtime pay to the FLSA Exempt Members who worked in excess of the applicable threshold for overtime pay during the Week. Defendant's violation was willful, and in conscious or reckless disregard of the requirements of the FLSA.

66. As a result, FLSA Exempt Members suffered injuries, including monetary damages, and are entitled to statutory liquidated damages.

COUNT FOUR

VIOLATION OF THE BACK PAY ACT

67. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.

68. Plaintiffs and other Members suffered an unjustified personnel action in that they were forced to work without knowing if and when they would be paid, without being paid on their Scheduled Pay Day for work performed during the Five Days, and without being paid minimum wage or for overtime work in accordance with the FLSA.

69. As a result, if statutory liquidated damages are not awarded, Plaintiffs are entitled under the Back Pay Act, 5 U.S.C. § 5596, to payment of interest from their Scheduled Payday to

the date of judgment for all amounts not paid in violation of the FLSA, to attorneys' fees and to reimbursement of expenses.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court grant relief against Defendant as follows:

(a) Enter a declaration that Defendant has violated its statutory and legal obligations and deprived Plaintiffs and all other Members of their rights, privileges, protections and compensation under the law, that the violations were not in good faith and that Defendant did not have reasonable grounds for believing that its acts complied with its obligations under the FLSA, and that the violations were willful;

(b) Convene a collective action pursuant to 29 U.S.C. § 216(b) and require Defendant to provide electronic notice to all Members who are still employed by it and provide to Plaintiffs the last known names and addresses (including electronic mail addresses) and other contact information of all Members in a readily readable and useable electronic format;

(c) Award Members monetary damages in the form of liquidated damages under the FLSA equal to an amount that they should have been paid to satisfy the FLSA's minimum wage requirements on the Scheduled Payday for work performed during the Week;

(d) Award Members classified as non-exempt from the FLSA's overtime provisions monetary damages in the form of liquidated damages under the FLSA equal to the amount of overtime compensation that they should have been paid on the Scheduled Payday for work performed during the Week;

(e) Award FLSA Exempt Members monetary damages equal to the difference between what they were paid for overtime hours worked and one and one-half times their regular rate times the number of overtime hours worked during the Week, together with liquidated

damages equal to one and one-half times their regular rate times the number of overtime hours worked during the Week;

(f) Should the Court determine that Defendant acted in good faith and had reasonable grounds for believing that its actions were not in violation of the FLSA, then award Members prejudgment interest on the amounts owed;

(g) Award Plaintiffs and all other Members their reasonable attorneys' fees to be paid by Defendant, and the costs and disbursements of this action; and

(f) Grant such other legal and equitable relief as may be just and proper.

Respectfully submitted,

January 27, 2014

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Of Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2014, the foregoing FIRST AMENDED COMPLAINT was served through the Court's Electronic Filing System.

Sharon A. Snyder
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/s/ Michael D. Lieder
Michael D. Lieder