

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

DAVID ATIS, on behalf of himself and those
similarly situated,
355 Independence Boulevard
Lawnside, NJ 08045

Plaintiff,

v.

FREEDOM MORTGAGE CORPORATION
907 Pleasant Valley Avenue, #3
Mount Laurel, NJ 08054

and

JOHN DOES 1-10

Defendants.

INDIVIDUAL AND COLLECTIVE ACTION
FOR UNPAID OVERTIME UNDER FLSA

INDIVIDUAL AND CLASS ACTION FOR
UNPAID OVERTIME AND UNPAID
WAGES UNDER NEW JERSEY WAGE
AND HOUR LAW AND NEW JERSEY
WAGE PAYMENT LAW

No. 1:15-cv-03424-RBK-JS

JURY TRIAL DEMANDED

**SECOND AMENDED INDIVIDUAL, CLASS, AND COLLECTIVE ACTION CIVIL
COMPLAINT**

David Atis (“Named Plaintiff”), individually, and on behalf of himself and those similarly situated (hereinafter referred to as “Plaintiffs”), hereby complains as follows against Defendant Freedom Mortgage Corporation and John Does 1-10 (hereinafter collectively referred to as “Defendants”).

INTRODUCTION

1. Named Plaintiff has initiated the instant action to redress violations by Defendant of the Fair Labor Standards Act (“FLSA”), the New Jersey Wage and Hour Law (“NJWHL”), and the New Jersey Wage Payment Law (“NJWPL”) (these New Jersey laws will be collectively referred to as “New Jersey Wage Laws”). Named Plaintiff asserts that Defendants failed to pay Named Plaintiff and Plaintiffs proper overtime compensation in violation of said laws. As a result of the aforesaid unlawful actions, Named Plaintiff and Plaintiffs have suffered harm.

JURISDICTION AND VENUE

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

3. This Court may properly maintain personal jurisdiction over Defendants because Defendants' contacts with this state and this judicial district are sufficient for the exercise of jurisdiction over Defendants to comply with traditional notions of fair play and substantial justice.

4. This Court has original subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the claims herein arise under laws of the United States, the FLSA, 29 U.S.C. § 201 *et seq.*

5. Venue is properly laid 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

6. The foregoing paragraphs are incorporated herein as if set forth in full.

7. Named Plaintiff is an adult individual with an address as set forth above.

8. Defendant Freedom Mortgage Corporation is an entity with an address as set forth above.

9. Defendants John Doe 1 through John Doe 5 are presently unknown persons who, directly or indirectly, directed, aided, abetted, and/or assisted with creating and/or executing the policies and practices of Defendants which resulted in Defendants' failing to pay Named Plaintiff and Collective Plaintiffs proper compensation pursuant to federal and state law.

10. Defendants John Doe 6 through John Doe 10 are presently unknown persons who had control over processing payroll regarding Named Plaintiff and Collective Plaintiffs.

11. 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

12. Named Plaintiff brings 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 as a loan officer, or in positions with similar duties subject to Defendants' unlawful pay practices and policies described herein and who worked for Defendants at any point in the three years preceding the date the instant action was initiated (the members of this putative class are referred to as "Collective Plaintiffs").

13. Named Plaintiff and Collective Plaintiffs are similarly situated, have substantially similar job duties, have substantially similar pay provisions, and are all subject to Defendants' unlawful policies and practices as described herein.

14. There are numerous similarly situated current and former employees of Defendants who were compensated improperly 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.

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

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

CLASS ACTION ALLEGATIONS

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

18. Named Plaintiff brings his claims asserting violations of the New Jersey Wage Laws as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and on behalf of all persons presently and formerly employed by Defendants as delivery drivers and/or in similar positions with similar duties, and who were subject to Defendants’ unlawful pay practices and policies at any point in the six years preceding the date the instant action was initiated (the members of this putative class are referred to as “Class Plaintiffs”).

19. The class is so numerous that the joinder of all class members is impracticable. Named Plaintiff does not know the exact size of the class, as such information is in the exclusive control of Defendants; however, on information and belief, the number of potential class members is upon information and belief at least 40.

20. Named Plaintiff’s claims are typical of the claims of the putative class members, because Named Plaintiff, like all Class Plaintiffs, was subject to the same unlawful wage policies and practices of Defendants.

21. Named Plaintiff will fairly and adequately protect the interests of the putative class because Named Plaintiff’s interests are coincident with, and not antagonistic to, those of the class. Named Plaintiff has retained counsel with substantial experience in the prosecution of class claims involving employee wage disputes.

22. Defendants have acted and refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole insofar as Defendants have applied consistent unlawful wage policies to the entire class and have refused to end these policies.

23. No difficulties are likely to be encountered in the management of this class action that would preclude its maintenance as a class action. The class will be easily identifiable from Defendants' records.

24. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Such treatment will allow all similarly situated individuals to prosecute their common claims in a single forum simultaneously. Prosecution of separate actions by individual members of the putative class would create the risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for Defendants. Furthermore, the amount at stake for individual putative class members may not be great enough to enable all of the individual putative class members to maintain separate actions against Defendant.

25. Questions of law and fact that are common to the members of the class predominate over questions that affect only individual members of the class. Among the questions of law and fact that are common to the class are whether Defendants unlawfully misclassified Plaintiffs as exempt.

26. Questions of law and fact that are common to the members of the class predominate over questions that affect only individual members of the class. Among the questions of law and fact that are common to the class are whether Defendants unlawfully failed to pay Plaintiffs the full amount of wages due.

FACTUAL BACKGROUND

27. The foregoing paragraphs are incorporated herein as if set forth in full.

28. Named Plaintiff and Plaintiffs worked for Defendants as loan officers, or in similar positions classified as exempt by Defendants.

29. Named Plaintiff's and Collective Plaintiffs' duties predominantly included: originating loans, completing preliminary applications, collecting documents, preparing loan applications, and transmitting the information to processing.

30. Named Plaintiff regularly worked over 40 hours per week.

31. Plaintiffs regularly worked/work over 40 hours per week.

32. Named Plaintiff was compensated as an exempt salary employee of Defendants, who within the last three years was employed by Defendants.

33. Each paycheck issued to Named Plaintiff provides that he was compensated as an exempt salaried employee.

34. Plaintiffs were/are employees of Defendants, who within the last six years were employed by Defendants as loan officers, Assistant Vice President of Sales, or in similar positions classified as exempt by Defendants.

35. Upon information and belief, each paycheck issued to Plaintiffs provides that they were compensated as exempt salaried employees.

36. Defendants designated Named Plaintiff as an exempt employee under federal and state law.

37. Defendants designated Plaintiffs as exempt employees under federal and state law.

38. Upon information and belief, Defendants have maintained an unlawful wage payment system for at least the last six years and have enforced such unlawful policies.

UNLAWFUL FAILURE TO PAY OVERTIME COMPENSATION

39. The foregoing paragraphs are incorporated herein as if set forth in full.

40. During at least one workweek in the two year period preceding the filing of this lawsuit, Named Plaintiff worked in excess of forty (40) hours for Defendants in a workweek.

41. Upon information and belief, during at least one workweek in the two year period preceding the filing of this lawsuit, Plaintiffs worked in excess of forty (40) hours for Defendants in a workweek.

42. During at least one workweek in the two year period preceding the filing of this lawsuit, Defendants failed to compensate Named Plaintiff at the rate of time-and-one-half his regular rate of pay for each hour that Named Plaintiff worked in excess of forty in a workweek.

43. Upon information and belief, during at least one workweek in the two year period preceding the filing of this lawsuit, Defendants failed to compensate Plaintiffs at the rate of time-and-one-half their regular rate of pay for each hour that they worked in excess of forty in a workweek.

44. At all times relevant to this action, Defendants did not pay Named Plaintiff on an hourly basis.

45. Upon information and belief, at all times relevant to this action, Defendants did not pay Plaintiffs on an hourly basis.

46. At all times relevant to this action, Defendants paid Named Plaintiff a salary and did not provide additional compensation for hours worked in excess of 40 in a workweek.

47. Upon information and belief, at all times relevant to this action, Defendants paid Plaintiffs a salary and did not provide additional compensation for hours worked in excess of 40 in a workweek.

48. At all times relevant to this action, since Defendants did not provide additional compensation to Named Plaintiff for hours worked in excess of 40 in a workweek, Defendants failed to pay the full amount of wages due to Named Plaintiff.

49. Upon information and belief, at all times relevant to this action, since Defendants did not provide additional compensation to Plaintiffs for hours worked in excess of 40 in a workweek, Defendants failed to pay the full amount of wages due to Plaintiffs.

50. Defendants' decision to pay Named Plaintiff and Plaintiffs a salary and to not provide additional compensation for hours worked in excess of 40 in a workweek caused Defendants not to pay Named Plaintiffs and Plaintiffs time and one-half their regular rate of pay for said hours worked in excess of 40 in a workweek.

51. Defendants regularly required Named Plaintiff to participate in originating loans, completing preliminary applications, collecting documents, preparing loan application, and transmitting the information to processing.

52. Upon information and belief, Defendants implemented the same scheme as described in paragraphs 47 and 48 above to avoid paying proper overtime with respect to the Plaintiffs.

53. At all times relevant hereto, Defendants scheduled Named Plaintiff's and Plaintiffs' work schedules.

54. At no time did Named Plaintiff have the responsibility to hire or fire employees of Defendants.

55. At no time did Plaintiffs have the responsibility to hire or fire employees of Defendants.

56. At no time did Named Plaintiff exercise discretion and independent judgment over non-manual work involving matters of significance for Defendants.

57. At no time did Plaintiffs exercise discretion and independent judgment over non-manual matters involving matters of significance for Defendants.

58. At all times relevant to this action, Named Plaintiff did not perform any meaningful or typical managerial and/or supervisory duties for Defendants.

59. At no time did Plaintiffs perform any meaningful or typical managerial and/or supervisory duties for Defendants.

60. As a result of Defendants' aforesaid conduct, Named Plaintiff has suffered damages.

61. As a result of Defendants' aforesaid conduct, Plaintiffs have suffered damages.

COUNT I
Fair Labor Standards Act ("FLSA")
(Failure to Pay Overtime Compensation)
(Named Plaintiff and Collective Plaintiffs v. Defendants)

62. The foregoing paragraphs are incorporated herein as if set forth in full.

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

64. At all times relevant herein, Defendants were/are responsible for paying wages to Named Plaintiff and Collective Plaintiffs.

65. At all times relevant herein, Named Plaintiff and Collective Plaintiffs were/are employed with Defendants as "employees" within the meaning of the FLSA.

66. 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 40 hours per workweek.

67. Defendants' violations of the FLSA include, but are not limited to, misclassifying Named Plaintiff and Collective Plaintiffs as exempt under the FLSA.

68. Defendants' violations of the FLSA include, but are not limited to, failing to pay Named Plaintiff and Collective Plaintiffs overtime compensation for hours worked over 40 per workweek.

69. Defendants' violations of the FLSA include, but are not limited to, failing to pay Named Plaintiff minimum wage for all hours worked.

70. Defendants' conduct in failing to pay Named Plaintiff and Collective Plaintiffs properly was/is willful and was/is not based upon any reasonable interpretation of the law.

71. As a result of Defendants' unlawful conduct, Named Plaintiff and Collective Plaintiffs have suffered damages as set forth herein.

COUNT II
Violations of the New Jersey Wage Laws
(Failure to pay Overtime Compensation)
(Named Plaintiff and Class Plaintiffs v. Defendants)

72. The foregoing paragraphs are incorporated herein as if set forth in full.

73. At all times relevant herein, Defendants have and continue to be employers within the meaning of the New Jersey Wage Laws.

74. At all times relevant herein, Named Plaintiff and Class Plaintiffs were/are employed with Defendants as "employees" within the meaning of the New Jersey Wage Laws.

75. At all times relevant herein, Named Plaintiff and Class Plaintiffs wages should have been determined on a time and/or commission basis.

76. Under the New Jersey Wage Laws, an employer must pay an employee at least one and one half times his or his regular rate for each hour worked in excess of forty hours per workweek.

77. Under the New Jersey Wage Laws, an employer must pay an employee the full amount of wages due.

78. Defendants violated the FLSA by not paying Named Plaintiff and Class Plaintiffs at least one and one half times their regular hourly rate of pay for all hours worked in excess of forty per workweek.

79. Defendants' conduct in failing to pay Named Plaintiff and Class Plaintiffs properly is willful and not based upon any reasonable interpretation of the law.

80. As a result of Defendants' unlawful conduct, Named Plaintiff and Class Plaintiffs have suffered damages as set forth herein.

COUNT III
New Jersey Wage Laws
(Failure to pay Wages Earned)
(Named Plaintiff and Class Plaintiffs v. Defendants)

81. The foregoing paragraphs are incorporated herein as if set forth in full.

82. Under the New Jersey Wage Laws, an employer must pay an employee all wages due and may not fail to pay an employee for all hours worked.

83. At all times relevant herein, Named Plaintiff and Class Plaintiffs wages should have been determined on a time and/or commission basis.

84. Under the New Jersey Wage Laws, an employer must pay an employee the full amount of wages due.

85. Defendants' violated of the New Jersey Wage Laws by not paying Named Plaintiff and Class Plaintiffs at least one and one half times their regular rate for all hours worked over 40 in a workweek.

86. Defendants' violated the New Jersey Wage Laws by not paying Named Plaintiff and Class Plaintiffs the full amount of wages due.

87. Defendants' conduct in failing to pay Named Plaintiff and Class Plaintiffs properly was willful and was not based upon any reasonable interpretation of the law.

88. As a result of Defendants' unlawful conduct, Named Plaintiff and Class Plaintiffs have suffered damages as set forth herein.

WHEREFORE, Named Plaintiff and Plaintiffs pray that this Court enter an Order providing that:

(1) Defendants are to be prohibited from continuing to maintain their illegal policy, practice, or customs in violation of federal wage and hour laws;

(2) Defendants are to compensate, reimburse, and make Named Plaintiff and Plaintiffs 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.

(3) Named Plaintiff and Plaintiffs are to be awarded, pursuant to the FLSA, liquidated damages in an amount equal to the actual damages in this case;

(4) Named Plaintiff and Plaintiffs are to be awarded the costs and expenses of this action and reasonable legal fees as provided by applicable law.

(5) Named Plaintiff and Plaintiffs are to be awarded all other relief this Court deems just and proper.

(Signature on next page)

Respectfully Submitted,

/s/ Daniel A. Horowitz

Daniel A. Horowitz, Esq.

Justin L. Swidler, Esq.

Richard S. Swartz, Esq.

SWARTZ SWIDLER, LLC

1101 North Kings Highway, Suite 402

Cherry Hill, NJ 08034

Phone: (856) 685-7420

Fax: (856) 685-7417

Date: November 16, 2015

DEMAND TO PRESERVE EVIDENCE

All Defendants are hereby directed to preserve all physical and electronic information pertaining in any way to Named Plaintiff's and Plaintiffs' employment, to Named Plaintiff's and Plaintiffs' cause of action and/or prayers for relief, and to any defenses to same, including, but not limited to, electronic data storage, closed circuit TV footage, digital images, computer images, cache memory, searchable data, emails, spread sheets, employment files, memos, text messages, any and all online social or work related websites, entries on social networking sites (including, but not limited to, Facebook, Twitter, MySpace, etc.), and any other information and/or data and/or things and/or documents which may be relevant to any claim or defense in this litigation.