

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

LINDA STONE, on behalf of herself and those
similarly situated,
12109 Forest Lake Road
Montrose, PA 18801

Plaintiff,

v.

TROY CONSTRUCTION, LLC
8521 McHard Road
Houston, TX 77053

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 PENNSYLVANIA
MINIMUM WAGE ACT AND
PENNSYLVANIA WAGE PAYMENT AND
COLLECTION LAW

CIVIL ACTION NO:

JURY TRIAL DEMANDED

INDIVIDUAL, COLLECTIVE, AND CLASS ACTION COMPLAINT

Linda Stone (hereinafter referred to as “Named Plaintiff”), on behalf of herself and those similarly situated (hereinafter referred to as “Class Plaintiffs”), by and through undersigned counsel, hereby complains as follows against Defendants Troy Construction, LLC and John Does 1-10 (hereinafter collectively referred to as “Defendants”).

INTRODUCTION

1. Named Plaintiff has initiated the instant action to redress Defendants’ violations of the Fair Labor Standards Act (“FLSA”) and the Pennsylvania Minimum Wage Act and Pennsylvania Wage Payment and Collection Law (hereinafter collectively “Pennsylvania Wage Laws”). Named Plaintiff asserts that Defendants failed to pay Named Plaintiff and those similarly situated proper overtime compensation in violation of the FLSA and Pennsylvania Wage Laws.

JURISDICTION AND VENUE

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

3. This Court, in accordance with 28 U.S.C. § 1331, has original subject matter jurisdiction over Named Plaintiff's federal claims because this civil action arises under laws of the United States, the FLSA, 29 U.S.C. § 201 *et seq.* This Court has supplemental jurisdiction over related state law claims because they arise out of the same circumstance and are based upon a common nucleus of operative fact.

4. 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.

5. Pursuant to 28 U.S.C. § 1391(b)(1) and (b)(2), venue is properly laid in this judicial district because all of the acts and/or omissions giving rise to the claims set forth herein occurred in this judicial district and Defendants are deemed to reside where they are subject to personal jurisdiction, rendering Defendants residents of 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 Troy Construction, LLC is a pipeline construction company operating in Pennsylvania.

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 those similarly situated proper compensation pursuant to the FLSA.

10. Defendants John Doe 6 through John Doe 10 are presently unknown persons who had control over processing payroll for Named Plaintiff and those similarly situated.

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 bring this action for violations of the FLSA as a collective action pursuant to Section 16(b) of the FLSA, 29 U.S.C. § 216(b), on behalf of all persons presently and formerly employed as hourly employees and/or as non-exempt employees who, during at least one (1) workweek over the last three (3) years worked in excess of 40 hours and received per diem payments (the members of this putative class are referred to as “Class Plaintiffs”).

13. Named Plaintiff’s claims are typical of the claims of the Class Plaintiffs, because Named Plaintiff, like all Class Plaintiffs, was an employee of Defendants within the last three years whom Defendants required to work more than 40 hours per workweek and then failed to properly pay overtime wages as required by the Fair Labor Standards Act (“FLSA”).

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. Therefore, Named Plaintiff should be permitted to bring this action as a collective action for and on behalf of themselves and those

employees similarly situated, pursuant to the “opt-in” provisions of the FLSA, 29 U.S.C. § 216(b).

CLASS ACTION ALLEGATIONS

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

17. Named Plaintiff brings her claims asserting violations of the Pennsylvania Wage Laws as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of herself and on behalf of all persons presently and formerly employed by Defendants in Pennsylvania as hourly employees and/or as employees with non-exempt duties who, during at least one (1) workweek over the last three (3) years, worked in excess of 40 hours and received per diem payments (the members of this putative class are a sub-class of Class Plaintiffs referred to as “Pennsylvania Plaintiffs”).

18. 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 estimated to be at least forty (40) employees.

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

20. 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.

21. 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.

22. 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.

23. 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 Defendants.

24. 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 (1) whether Defendants failed to pay proper overtime to Pennsylvania Plaintiffs for hours worked in excess of 40 per workweek; and (2) whether Defendants had any good faith basis to conclude that their failure to pay Pennsylvania Plaintiffs at least 1.5 times their regular rate for hours over 40 was legal.

FACTUAL BACKGROUND

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

26. Named Plaintiff worked for Defendants as a “Spotter” from on or about January 12, 2013 until on or about March 9, 2013.

27. Named Plaintiff’s primary duty included the performance of manual labor at Defendants’ construction site in Hallstead, Pennsylvania.

28. Class Plaintiffs’ primary duties include/included the performance of manual labor at Defendants’ construction sites.

29. At all times relevant herein, Defendants considered Named Plaintiff as a non-exempt employees entitled to overtime compensation as required by the FLSA and Pennsylvania Wage laws.

30. At all times relevant herein, Defendants considered Class Plaintiffs as non-exempt employees entitled to overtime compensation as required by the FLSA

31. At all times relevant herein, Defendants considered Pennsylvania Plaintiffs as non-exempt employees entitled to overtime as required by the Pennsylvania Wage laws.

32. Named Plaintiff did not have the authority to hire or fire other employees of Defendants.

33. Class Plaintiffs do/did not have the authority to hire or fire other employees of Defendants.

34. Named Plaintiffs do not have the authority to schedule employees of Defendants.

35. Class Plaintiffs do/did not have the authority to schedule employees of Defendants.

36. At no time did Named Plaintiff’s primary duty consist of the performance of office or non-manual work directly related to management or general business operations, nor

did Named Plaintiff exercise discretion or independent judgment over matters of significance on behalf of Defendants.

37. At no time do/did Class Plaintiffs' primary duties consist of the performance of office or non-manual work directly related to management or general business operations, nor do/did Class Plaintiff exercise discretion or independent judgment over matters of significance on behalf of Defendants.

38. Accordingly, Named Plaintiff was a non-exempt employees entitled to overtime compensation as required by the FLSA and the Pennsylvania Wage laws.

39. Accordingly, Class Plaintiffs are/were non-exempt employees entitled to overtime compensation as required by the FLSA.

40. Accordingly, Pennsylvania Plaintiffs are/were non-exempt employees entitled to overtime compensation as required by the Pennsylvania Wage laws.

UNLAWFUL OVERTIME RATES

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

42. Named Plaintiff regularly worked for Defendants in excess of 40 hours per workweek.

43. Class Plaintiffs worked for Defendants in excess of 40 hours per workweek during at least one workweek within the last three years.

44. At all times relevant herein, Defendants had a company-wide policy wherein it provided per diem pay, in addition to other wages, to its non-exempt employees.

45. Defendants paid Named Plaintiff a per diem of \$109.00 ("Per Diem Pay") in addition to her base hourly rate of \$10.75 per.

46. The per diem which Defendants paid Named Plaintiff was not a legitimate, reasonable reimbursement of expenses incurred by Named Plaintiff on Defendants' behalf or for Defendants' convenience.

47. The per diem was provided to Named Plaintiff as wages, subject to tax and all other withholdings, in Named Plaintiff's paychecks.

48. Accordingly, Named Plaintiff received the per diem for services that she rendered, and the per diem should have been included in her regular rate.

49. Defendants pay/paid Class Plaintiffs a base hourly rate plus a per diem.

50. The per diem which Defendants pay/paid Class Plaintiffs are/were not a legitimate, reasonable reimbursement of expenses incurred by Class Plaintiffs on Defendants' behalf or for Defendants' convenience.

51. The per diem is/was provided to Class Plaintiffs as wages, subject to tax and all other withholdings, in Class Plaintiffs' paychecks.

52. Accordingly, Class Plaintiffs receive/received the per diem for services that they render/rendered, and the per diem should be/have been included in their regular rates.

53. Defendants failed to include Named Plaintiff's per diem in the gross wages for determining Named Plaintiff's regular rate.

54. Failing to include the per diem in Named Plaintiff's regular rate calculation resulted in a diluted overtime rate of pay.

55. Defendants fail/failed to include Class Plaintiffs' per diem in the gross wages for determining Class Plaintiffs' regular rates.

56. Failing to include the per diem in Class Plaintiffs' regular rate calculations resulted in diluted overtime rates of pay.

57. Accordingly, Defendants fail/failed to properly pay Named Plaintiff and Class Plaintiffs 1.5 times their regular rate for all hours worked in excess of 40 in a workweek.

58. By way of example only, during the workweek of January 21, 2013 to January 27, 2013 (**See Exhibit A**):

- a. Defendants paid Named Plaintiff for a total of 83 total hours of work;
- b. Defendants paid Named Plaintiff \$10.75 per hour for 83 regular hours (totaling \$892.25);
- c. Defendants paid Named Plaintiff an overtime premium of \$5.375 per hour (representing a 50% premium over Named Plaintiff's base hourly rate of \$10.75) for 43 hours (totaling \$231.13);
- d. Defendants paid Named Plaintiff a \$109 per diem for seven (7) days (totaling \$793.00);
- e. To calculate Named Plaintiff's correct overtime rate, Defendants should have added all the remuneration Named Plaintiff earned (minus only amounts earned as 50% overtime premiums) and divided that number by the total hours Named Plaintiff worked each workweek. Then Defendants should have divided that number by 2 and provided same to Named Plaintiff as the minimum overtime premium.
- f. For the workweek in question, Named Plaintiff's regular rate, including the per diem payments, results in a regular rate of \$19.94 ($(\$10.75 \text{ per hour} * 83 \text{ hours}) + \$763.00 \text{ per diem pay} / 83 \text{ total hours}$).
- g. Therefore, Defendants should have paid Named Plaintiff a minimum overtime premium of \$9.97 ($\$19.94 / 2$)

h. Accordingly, the minimum premium Defendants should have paid Named Plaintiff for her 43 hours worked in excess of 40 during the workweek was \$428.71 (\$9.97 per hour * 43 hours).

i. However, Defendants paid Named Plaintiff a premium of only \$231.13 for her overtime hours and therefore shorted Named Plaintiff \$197.58 for this workweek.

59. The above conduct is merely an example of Defendants' unlawful overtime policies and practices. Defendants' practices of providing wages under the designation "per diem" to arbitrarily reduce the regular rate (and overtime rate) occur/occurred consistently to Named Plaintiff and Class Plaintiffs for nearly all pay periods, save only the pay periods where Named Plaintiff and Class Plaintiffs do/did not work in excess of 40 hours or where per diem payments are/were not provided.

60. Defendants' conduct regularly injures/injured Named Plaintiffs and Class Plaintiffs in this way throughout their employment with Defendants.

61. Defendants' practice of not applying all shift differentials to determine the regular rate consistently occurs/occurred in nearly all pay periods that Named Plaintiffs and Class Plaintiffs work/worked, save only the pay periods where Named Plaintiffs and Class Plaintiffs do/did not work in excess of 40 hours or where shift differentials are/were not provided.

62. As a result of Defendants' aforesaid illegal actions, Named Plaintiffs and Class Plaintiffs have suffered damages.

COUNT I

Violations of the Fair Labor Standards Act (FLSA)
(Failure to Pay Proper Overtime Compensation)
(Named Plaintiff and Class Plaintiffs v. Defendants)

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

64. At all times relevant herein, Defendants were and continue to be “employers” within the meaning of the FLSA.

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

66. At all times relevant herein, Named Plaintiff and Class Plaintiffs are/were employed with Defendants as “employees” within the meaning of the FLSA.

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

68. Defendants’ violations of the FLSA include, but are not limited to, not paying Named Plaintiff and Class Plaintiffs at least 1.5 times their regular rate of pay for all hours worked in excess of forty per workweek as explained *supra*.

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

70. Defendants’ conduct caused Named Plaintiff and Class Plaintiffs to suffer damages.

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

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

72. At all times relevant herein, Defendants have and continue to be “employers” within the meaning of the Pennsylvania Wage Laws.

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

74. At all times relevant herein, Named Plaintiff and Pennsylvania Plaintiffs are/were employed with Defendants as “employees” within the meaning of the Pennsylvania Wage Laws.

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

76. Defendants’ conduct in failing to pay Named Plaintiff and Pennsylvania Plaintiffs proper overtime compensation for all hours worked beyond 40 per workweek violated the Pennsylvania Wage Laws.

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

78. Defendants’ conduct caused Named Plaintiff and Pennsylvania Plaintiffs to suffer damages.

COUNT III
Violations of the Pennsylvania Wage Laws
(Failure to Pay Wages Earned)
(Named Plaintiffs and Pennsylvania Plaintiffs v. Defendants)

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

80. Defendants’ conduct in failing to pay Named Plaintiff and Pennsylvania Plaintiffs all wages earned violated the Pennsylvania Wage Laws.

81. Defendants’ conduct caused Named Plaintiff and Pennsylvania Plaintiffs to suffer damages.

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

A. Defendants are to be prohibited from continuing to maintain its illegal policy, practice or custom in violation of federal and state law;

B. Defendants are to compensate, reimburse, and make Named Plaintiff, Class Plaintiffs, and Pennsylvania Plaintiffs whole for any and all pay and benefits they would have received had it not been for Defendants' illegal actions;

C. Named Plaintiff, Class Plaintiffs, and Pennsylvania Plaintiffs are to be awarded liquidated damages for Defendants' illegal actions, as provided under applicable law;

D. Named Plaintiff, Class Plaintiffs, and Pennsylvania Plaintiffs are to be awarded the costs and expenses of this action and reasonable legal fees as provided under applicable law;

E. Named Plaintiff, Class Plaintiffs, and Pennsylvania Plaintiffs are to be awarded any and all other equitable and legal relief as the Court deems appropriate.

Respectfully Submitted,

/s/ Justin Swidler

Justin L. Swidler, Esq.

Richard S. Swartz, Esq.

Matthew D. Miller, Esq.

SWARTZ SWIDLER, LLC

1878 Marlton Pike East, Ste. 10

Cherry Hill, NJ 08003

Phone: (856) 685-7420

Fax: (856) 685-7417

Dated: February 18, 2014

DEMAND TO PRESERVE EVIDENCE

1. All Defendants are hereby directed to preserve all physical and electronic information pertaining in any way to Named Plaintiff's and Class Plaintiffs' employment, to their 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.