

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ROBERTA FOSBINDER-BITTORF
individually and on behalf
of all others similarly situated,
4905 Shore Acres Road
Monona, Wisconsin 53716

Plaintiff,

Case No: 10-cv-714

vs.

SSM HEALTH CARE OF WISCONSIN, INC.
c/o Registered Agent for Service
Mary Starman-Harrison
707 South Mills Street
Madison, Wisconsin 53715

Defendant.

COLLECTIVE AND CLASS ACTION COMPLAINT

INTRODUCTION

1. This is a collective and class action brought by Individual and Representative Plaintiff, Roberta Fosbinder-Bittorf (the Plaintiff) on her own behalf and on behalf of the members of the proposed classes identified below. The Plaintiff works as a nurse for SSM Health Care of Wisconsin, Inc. (SSM) and was denied wages for on-duty meal periods, under an illegal pay policy. Under this policy, nurses were not free from work during meal periods and were denied pay for those on-duty meal periods. The Plaintiff and the putative class members are similarly situated under

Federal Rule of Civil Procedure 23 and the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 216(b), as they suffered identical wage losses under this policy.

JURISDICTION AND VENUE

2. This Court has original jurisdiction to hear this complaint and to adjudicate the claims stated herein under 28 U.S.C. § 1331, this action being brought under the Fair Labor Standards Act, 29 U.S.C. § 201, *et. seq.* The Court has subject matter jurisdiction over the state law claims pursuant to 28. U.S.C. § 1367.

3. Venue is proper in the United States District Court for the Western District of Wisconsin because SSM Health Care of Wisconsin, Inc. operates a facility in this district and because the events giving rise to these claims occurred in this district.

PARTIES

4. The Defendant, SSM Health Care of Wisconsin, Inc. (SSM), is a foreign non-stock corporation, with its principal place of business in St. Louis, Missouri. SSM is an “employer” within the meaning of 29 U.S.C. § 203(d). SSM’s registered agent for service is Mary Starmann-Harrison, 707 South Mills Street, Madison, Wisconsin.

5. SSM is an enterprise engaged in commerce within the meaning of 29 USC § 203(s)(1).

6. Roberta Fosbinder-Bittorf, the Plaintiff, is an adult resident of Monona, Wisconsin. The Plaintiff was employed as a nurse by SSM in Madison, Wisconsin within the time period prescribed by the applicable statute of limitations.

The Plaintiff brings these claims on behalf of the Wisconsin Unpaid Wage Class and the Collective Class. The Plaintiff's signed consent form is filed as Exhibit A to this complaint and is incorporated herein.

7. The Plaintiff brings this action on behalf of herself and on behalf of other similarly situated employees pursuant to 29 U.S.C. § 216(b). The **Collective Class** of similarly situated employees is defined as:

All persons who have been or are currently employed by SSM as a nurse at St. Mary's Hospital and who have been denied minimum and/or overtime wages for on duty meal periods at any time three years prior to the commencement of this lawsuit to the present.

8. The Plaintiff brings this action on behalf of herself and the Wisconsin Unpaid Wage Class pursuant to Fed. R. Civ. P. 23. The **Wisconsin Unpaid Wage Class** is defined as:

All persons who have been or are currently employed by SSM as a nurse at St. Mary's Hospital and who have been denied wages for on-duty meal periods at any time two years prior to the commencement of this lawsuit to the present.

CLASS ALLEGATIONS

9. The Plaintiff brings the Second Claim for Relief on her own behalf and on behalf of the Wisconsin Unpaid Wage Class, defined in paragraph 8, supra, pursuant to Rule 23 (a) and (b) of the Federal Rules of Civil Procedure.

10. The persons in the class identified above are so numerous that joinder of all members is impracticable. Although the precise number of such persons is

unknown, upon information and belief, SSM has employed hundreds of people who satisfy the definition of the class.

11. There are questions of law and fact common to the Rule 23 Class that predominate over any questions solely affecting individual members of the class, including, but not limited to:

- (a) Whether SSM unlawfully failed to compensate the Plaintiff and members of the putative class for on-duty meal periods within the meaning of Wisconsin Administrative Code § DWD 272.04;
- (b) Whether SSM unlawfully failed to pay minimum wages to the Plaintiff and members of the putative class in violation and within the meaning of Wisconsin Statute § 104.02 and Wisconsin Administrative Code § DWD 272.03;
- (c) Whether SSM unlawfully failed to pay wages to the Plaintiff and members of the putative class in violation and within the meaning of Wis. Stat. § 109.03;
- (d) The nature and amount of compensable work performed by the Plaintiff and members of the putative class;
- (e) Whether SSM employed the Plaintiff and members of the putative class within the meaning of Wisconsin Law; and
- (f) The proper measure of damages sustained by the Plaintiff and members of the putative class.

12. The Plaintiff's claims are typical of those of the Wisconsin Unpaid Wage Class. The Plaintiff, like other Wisconsin Unpaid Wage Class members, was subjected to SSM's illegal pay practice of denying pay for on-duty meal periods resulting in a wage loss.

13. The Plaintiff will fairly and adequately protect the interests of the Wisconsin Unpaid Wage Class and has retained counsel experienced in complex wage and hour litigation.

14. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, particularly in the context of wage and hour litigation where individual plaintiffs lack the financial resources to vigorously prosecute separate lawsuits in federal court against a large corporate defendant, particularly those with relatively small claims.

15. Class certification of the First and Second Claims for Relief is appropriate under Fed. R. Civ. P. 23(b)(3), because questions of law and fact common to the Wisconsin Unpaid Wage Class predominate over any questions affecting only individual members of the Wisconsin Unpaid Wage Class, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. SSM's common and uniform policies and practices denied the Wisconsin Unpaid Wage Class the wages for work performed to which they are entitled. The damages suffered by the individual Wisconsin Unpaid Wage Class members are small compared to the expense and burden of individual prosecution of this litigation. In addition, class certification is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about SSM's pay practices.

16. The Plaintiff intends to send notice to all members of the Wisconsin Unpaid Wage Class to the extent required by Rule 23.

FIRST CLAIM FOR RELIEF
FAILURE TO PAY WAGES FOR ON-DUTY MEAL PERIODS
IN VIOLATION OF WISCONSIN LAW

17. The Plaintiff individually and on behalf of the Wisconsin Unpaid Wage Class alleges and incorporates by reference the allegations in the preceding paragraphs.

18. Wisconsin Administrative Code § DWD 272.04(1)(c) requires an employer, such as SSM, to pay employees for “on-duty” meal periods.

19. At all relevant times, Defendant had a policy and practice of automatically deducting a thirty (30) minute meal period from nurses’ daily pay regardless of whether the employee was free from work for at least thirty (30) minutes.

20. The Plaintiff and members of the putative Wisconsin Unpaid Wage Class were required to remain “on-duty” during their meal periods, and were not compensated for the thirty (30) minute meal period.

21. As a result of Defendant’s failure to pay the Plaintiff and putative Wisconsin Unpaid Wage Class members wages for these “on-duty” meal periods, Defendant has violated, and continues to violate, Wisconsin Statute §§ 103.03, 109.03 and Wisconsin Administrative Code § DWD 272.04.

22. The Plaintiff on behalf of herself and members of the putative Wisconsin Unpaid Wage Class seeks recovery of attorneys’ fees, costs, and expenses of this action to be paid by Defendant, as provided by Wisconsin Statute § 109.03(6).

23. The Plaintiff on behalf of herself and members of the putative Wisconsin Unpaid Wage Class seeks damages in the amount of the unpaid wages and overtime wages earned and due as provided by Wisconsin Statute §§ 103.02 and 109.03 and Wisconsin Administrative Code § DWD 272.04, and any penalties due under Wisconsin Statute § 109.11, as well as such other legal and equitable relief from Defendant's unlawful and willful conduct as the Court deems just and proper.

**SECOND CLAIM FOR RELIEF:
FAILURE TO PAY MINIMUM WAGE
COMPENSATION IN VIOLATION OF WISCONSIN LAW**

24. The Plaintiff individually and on behalf of the Wisconsin Unpaid Wage Class alleges and incorporates by reference the allegations in the preceding paragraphs.

25. The foregoing conduct, as alleged, violates Wis. Stat. § 103.03, Wis. Stat. § 104.03, and Wisconsin Administrative Code § DWD 272.03.

26. At all relevant times, SSM has been, and continues to be, an "employer" within the meaning of Wis. Stat. § 103.001 and Wis. Stat. § 104.01.

27. At all relevant times, The Plaintiff and the putative Wisconsin Unpaid Wage Class members were SSM employees within the meaning of Wis. Stat. § 103.001(5) and Wis. Stat. § 104.01(2).

28. Wisconsin Statute § 104.02 and Wisconsin Administrative Code § DWD 274.03 require an employer to pay employees at least the minimum wage prescribed by Wisconsin Administrative Code § DWD 274.03 for all hours worked.

29. During the applicable statute of limitations, The Plaintiff and members of the Wisconsin Unpaid Wage Class performed work for which they received less than the Wisconsin minimum wage, including time spent working during an unpaid meal periods.

30. As a result of SSM's willful failure to pay minimum wages due to the Plaintiff and the putative Wisconsin Unpaid Wage Class members, SSM has violated, and continues to violate Wis. Stat. §§ 103.03, 104.03; 109.03 and Wisconsin Administrative Code § DWD 272.03.

31. The Plaintiff on behalf of herself and members of the putative Wisconsin Unpaid Wage Class seeks recovery of attorneys' fees, costs, and expenses of this action to be paid by SSM, as provided by Wis. Stat. § 109.03(6).

32. The Plaintiff on behalf of herself and members of the putative Wisconsin Unpaid Wage Class seeks damages in the amount of the unpaid wages earned and due as provided by Wis. Stat. §§ 103.03, 104.03 and 109.03, and Wisconsin Administrative Code § DWD 272.03, and any penalties due under Wis. Stat. § 109.11, as well as such other legal and equitable relief from SSM's unlawful and willful conduct as the Court deems just and proper.

THIRD CLAIM FOR RELIEF:
FAILURE TO PAY OVERTIME AND MINIMUM WAGE
COMPENSATION IN VIOLATION OF THE FLSA

33. The Plaintiff individually and on behalf of the Collective Class alleges and incorporates by reference the allegations in the preceding paragraphs.

34. SSM is an employer within the meaning of 29 U.S.C. § 203(d).

35. The Plaintiff and the members of the Collective Class are employees within the meaning of 29 U.S.C. § 203(e).

36. The FLSA requires each covered employer to compensate all non-exempt employees at a rate of not less than one and one-half times their regular rate of pay for work performed in excess of forty (40) hours per workweek.

37. The FLSA requires each covered employer to compensate all non-exempt employees at a rate not less than the federal minimum wage for all hours worked.

38. During the applicable statute of limitations, the Plaintiff and members of the Collective Class performed work in excess of forty (40) hours per week without receiving overtime compensation, including, but not limited to, time spent working during their unpaid half hour meal period.

39. During the applicable statute of limitations, the Plaintiff and members of the Collective Class performed work for which they received less than the federal minimum wage, including time spent working or on call during an unpaid meal break.

40. These practices violate the FLSA including but not limited to, 29 U.S.C. §§ 206, 207. Because of these violations, the Plaintiff and members of the collective class have suffered a wage loss.

41. SSM knew or showed reckless disregard for the fact that it failed to pay the Plaintiff and members of the Collective Class overtime and minimum wage compensation in violation of the FLSA.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, on behalf of herself and all members of the Collective Class and the Wisconsin Unpaid Wage Class pray for the following relief:

- A. An order designating this action as a collective action on behalf of the Collective Class and issuance of notice pursuant to 29 U.S.C. § 216(b) to all similarly situated individuals;
- B. An order certifying this action as a class action on behalf of the proposed Wisconsin Unpaid Wage Class;
- C. An order designating the Plaintiff as the Named Plaintiff and as a representative of the Wisconsin Unpaid Wage Class;
- D. Leave to add additional plaintiffs by motion, the filing of written consent forms, or any other method approved by the Court;
- E. An order finding that SSM violated the FLSA and Wisconsin wage and hour law;
- F. An order finding that these violations were willful;
- G. Judgment against SSM in the amount equal to the Plaintiff's and the Collective Class' and Wisconsin Unpaid Wage Class' unpaid back wages at the applicable overtime rate;
- H. An award in the amount of all liquidated damages and penalties as provided under Wisconsin law and the FLSA;
- I. An award in the amount of all costs and attorneys' fees incurred in prosecuting these claims; and

J. Such further relief as the Court deems just and equitable.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury.

Dated this 23rd day of August 2011.

HAWKS QUINDEL, S.C.

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