

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

DAVID D. DESERRE, SR.
individually and on behalf
of all others similarly situated,
416 Stoneridge Terrace
DeForest, Wisconsin

Plaintiff,

Case No. 3:09-cv-422

v.

WALTCO, INC.
112 Packerland Drive
Green Bay, Wisconsin

Defendant.

COLLECTIVE AND CLASS ACTION COMPLAINT

PRELIMINARY STATEMENT

1. This is a collective and class action brought by Individual and Representative Plaintiff David D. DeSerre, Sr. (the "Named Plaintiff") on his own behalf and on behalf of the members of the proposed classes identified below. The Named Plaintiff and the putative class members were employed by Waltco, Inc. ("Defendant"). The Named Plaintiff and the putative class members have been or currently are employed by Defendant as drivers. Defendant misclassified the Named Plaintiff and putative class members as "exempt" and, therefore, denied them payment of overtime wages as required by state and federal wage and hour laws. The

Named Plaintiff and 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).

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.

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

PARTIES

4. Individual and representative Plaintiff David D. DeSerre, Sr., the Named Plaintiff, is an adult resident of DeForest, Wisconsin. The Named Plaintiff was employed as a driver by Defendant in Madison, Wisconsin, within the time period prescribed by the applicable statute of limitations. The Named Plaintiff brings these claims on behalf of the Wisconsin Overtime Class and the Collective Class.

5. The Named Plaintiff brings this action on behalf of himself and on behalf of other similarly situated employees pursuant to 29 U.S.C. § 216(b). The Named Plaintiff's consent form is attached to this Complaint and incorporated

herein as Exhibit A. The **Collective Class** of similarly situated employees is defined as:

All persons who are or have been employed as drivers by Waltco, Inc. at any time during the past three years and who were denied payment of overtime wages.

6. The Named Plaintiff brings this action on behalf of himself and the Wisconsin Overtime Class pursuant to Fed. R. Civ. P. 23. The **Wisconsin Overtime Class** is defined as:

All persons who have been or are employed as drivers by Waltco, Inc. at any time during the past two years and were denied overtime wages.

7. Defendant Waltco, Inc. ("Waltco") is a Wisconsin company with its principal place of business in Green Bay, Wisconsin. Waltco is an "employer" within the meaning of 29 U.S.C. § 203(d). Waltco's registered agent of service is Robert W. Walters, Jr., 112 Packerland Drive, Green Bay, Wisconsin.

CLASS ALLEGATIONS

8. The Named Plaintiff brings the Second Claim for Relief on his own behalf and on behalf of the Wisconsin Overtime Class pursuant to Rule 23 (a) and (b) of the Federal Rules of Civil Procedure.

9. The persons in the Wisconsin Overtime Class are so numerous that joinder of all members is impracticable. Although the precise number of such persons is unknown, upon information and belief, Defendant has employed at least 200 persons who satisfy the definition of the Wisconsin Overtime Class.

10. There are questions of law and fact common to the Wisconsin Overtime Class that predominate over any questions solely affecting individual members of the Class, including, but not limited to:

- (a) Whether Defendant unlawfully failed to pay overtime compensation in violation of, and within the meaning of, Wisconsin Statute § 103.03 and Wisconsin Administrative Code § DWD 274.03;
- (b) Whether the Named Plaintiff and the Wisconsin Overtime Class are exempt from overtime compensation under Wisconsin Law;
- (c) Whether Defendant employed the Named Plaintiff and members of the Wisconsin Overtime Class within the meaning of Wisconsin Law; and
- (d) The proper measure of damages sustained by the Wisconsin Overtime Class.

11. The Named Plaintiff's claims are typical of those of the Wisconsin Overtime Class. The Named Plaintiff, like other class members, was subjected to Defendant's policy and practice of refusing to pay overtime in violation of Wisconsin law. The Named Plaintiff's job duties were and are typical of those of other class members.

12. The Named Plaintiff will fairly and adequately protect the interests of the Wisconsin Overtime Class and has retained counsel experienced in complex wage and hour litigation.

13. 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.

14. Class certification of the Second Claim for Relief is appropriate under Fed. R. Civ. P. 23(b)(3), because questions of law and fact common to the Wisconsin Overtime Class predominate over any questions affecting only individual members of the Wisconsin Overtime Class, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. Defendant's common and uniform policies and practices denied the Wisconsin Overtime Class the overtime pay to which they are entitled. The damages suffered by the individual 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 Defendant's practices.

15. The Named Plaintiff intends to send notice to all members of the Wisconsin Overtime Class to the extent required by Rule 23.

FIRST CLAIM FOR RELIEF:
FAILURE TO PAY OVERTIME COMPENSATION IN VIOLATION OF THE FLSA

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

17. Defendant is an employer within the meaning of the 29 U.S.C. § 203(d) and (g).

18. 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.

19. During the applicable statute of limitations, the Named Plaintiff and members of the putative Collective Class performed work in excess of forty (40) hours per week without receiving overtime compensation.

20. These practices violated the FLSA, including, but not limited to, 29 U.S.C. § 207. As a result of these violations, the Named Plaintiff and members of the putative Collective Class have suffered a wage loss.

21. Defendant knew or showed reckless disregard for the fact that it failed to pay the Named Plaintiff and members of the putative Collective Class overtime compensation in violation of the FLSA.

SECOND CLAIM FOR RELIEF:
FAILURE TO PAY OVERTIME COMPENSATION
IN VIOLATION OF WISCONSIN LAW

22. The Named Plaintiff individually and on behalf of the Wisconsin Overtime Class alleges and incorporates by reference the allegations in the preceding paragraphs.

23. The foregoing conduct, as alleged, violated § 103.03, Wis. Stat., and Wisconsin Administrative Code § DWD 274.03.

24. At all relevant times, Defendant has been, and continues to be, an “employer” within the meaning of Wis. Stat. § 103.001. At all relevant times, Defendant has employed, and/or continues to employ, “employee[s],” including the

Named Plaintiff and the members of the putative Wisconsin Overtime Class, within the meaning of Wis. Stat. § 103.001.

25. Section § 103.02, Wis. Stats., and Wisconsin Administrative Code § DWD 274.03 require an employer, such as Defendant, to pay overtime compensation to all non-exempt employees. The Named Plaintiff and members of the putative Wisconsin Overtime Class are not exempt from overtime pay requirements under Wisconsin law.

26. At all relevant times, Defendant had a policy and practice of failing and refusing to pay overtime pay to the Named Plaintiff and the putative Wisconsin Overtime Class members for their hours worked in excess of forty (40) hours per workweek.

27. As a result of Defendant's willful failure to pay overtime wages earned and due to the Named Plaintiff and the putative Wisconsin Overtime Class members, Defendant has violated, and continues to violate, Wis. Stat. §§ 103.03, 109.03, and Wisconsin Administrative Code § DWD 274.03.

28. The Named Plaintiff, on behalf of himself and members of the putative Wisconsin Overtime Class, seeks recovery of attorneys' fees, costs, and expenses of this action to be paid by Defendant, as provided by Wis. Stat. § 109.03(6).

29. The Named Plaintiff, on behalf of himself and members of the putative Wisconsin Overtime Class, seeks damages in the amount of the unpaid wages earned and due as provided by Wis. Stat. §§ 103.03 and 109.03, and Wisconsin Administrative Code § DWD 274.03, and any penalties due under Wis. Stat.

§ 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.

PRAYER FOR RELIEF

WHEREFORE, The Named Plaintiff, on behalf of himself and all members of the Collective Class and Wisconsin Overtime Class prays 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 Overtime Class;
- C. An order designating David D. DeSerre Sr. as Named Plaintiff and as a representative of the Wisconsin Overtime 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 Defendant violated the FLSA and Wisconsin wage and hour law;
- F. An order finding that these violations were willful;
- G. Judgment against Defendant in the amount equal to the Plaintiff's and the Collective 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: July 6, 2009

HAWKS QUINDEL EHLKE & PERRY, S.C.

By:  _____

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WALTCO, INC.

PLAINTIFF CONSENT FORM

I hereby consent to make a claim against Walco, Inc. for overtime wage pay. If this case does not proceed collectively, I also consent to join any subsequent action to assert these claims against Walco, Inc. During the past three years there were weeks that I worked over 40 hours as a driver for Walco, Inc. and did not receive overtime compensation.

 7/2/2009

Signature and Date

DAVID DESERRE

Print Name

