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U.S. DISTRICT COURT

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DISTRICT OF UTAH

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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

JASON SWEAT and SUE RENZELLO
Individually and on Behalf of Others
Similarly Situated

Plaintiffs,

vs.

BATTELLE MEMORIAL INSTITUTE, a
corporation,

Defendant.

CLASS ACTION

COMPLAINT FOR VIOLATION OF FAIR
LABOR STANDARDS ACT OF 1938;
AND UTAH PAYMENT OF WAGES ACT

JURY DEMANDED

Case: 2:07cv00401
Assigned To : Stewart, Ted
Assign. Date : 6/19/2007
Description: Sweat et al v. Battelle
Memorial Institute

Representative Plaintiffs, Jason Sweat and Sue Renzello, (hereinafter referred to as "Plaintiffs"), by their attorneys Jesse Brar, Sharon Preston, and Mick Harrison, allege, upon personal knowledge as to themselves and upon information and belief as to other matters, as and

for their Complaint against Battelle Memorial Institute (hereinafter "Battelle" and/or "Defendant"), allege as follows:

PRELIMINARY STATEMENT

1. This is a class/collective action, seeking unpaid wages, including unpaid overtime compensation and interest thereon, liquidated damages and other penalties, injunctive and other equitable relief and reasonable attorneys' fees and costs, under the Fair Labor Standards Act as amended, 29 U.S.C. §§ 201 et seq. This action further invokes diversity jurisdiction and the supplemental jurisdiction of this Court to consider claims arising under Utah law (Utah Payment of Wages Act).

2. Representative Plaintiffs bring this action on behalf of themselves and all other persons similarly situated (hereinafter referred to as the "Class Members," the "Plaintiff Classes" and/or, more specifically, the "FLSA Class" and/or the "Utah Class") who are, or have been, employed by the Defendant within the applicable statutory periods.

3. The "Utah Class" period is designated as the time from May 1, 2001 through the trial date, based upon the allegation that the violations of Utah law, as described more fully below, have been ongoing since that time. The "FLSA Class" period is designated as the time from September 1, 2003 through the trial date, based upon the allegation that the violations of the FLSA, as described more fully below, have been willful and ongoing since at least this date. During these class periods, Battelle have had a consistent policy of (1) permitting, encouraging, and/or requiring its non-exempt monitoring technicians (including, but not necessarily limited to persons holding positions for defendant entitled "registered representatives" and/or "financial

consultants"), including Representative Plaintiffs and members of both Classes, to work-off-clock, including working in excess of forty (40) hours per week, without paying them regular and overtime wages as required by the FLSA and Utah law.

INTRODUCTION

4. The Fair Labor Standards Act of 1938, as amended, §§ 201 et seq., (hereinafter referred to as "the Act" or the "FLSA") provides for minimum standards for both wages and overtime entitlement, and details administrative procedures by which covered work time must be compensated. The enactment of the provisions of the FLSA provide the Federal Courts with substantial authority to stamp out abuses portal-to-portal activities as well as the overtime pay provisions at issue in this Complaint.

5. According to Congressional findings, the existence of labor conditions detrimental to the maintenance of the minimum standard of living engenders unfair commercial competition, labor disputes, barriers to commerce and the free flow of goods in commerce, and interferes with the orderly and fair marketing of goods.

6. Utah Payment of Wages Act (Utah Code Ann. §§ 34-28-1 to -19) provides additional protections to workers, including, but not necessarily limited to, entitlements to all wages and other benefits for all the time worked.

7. Representative Plaintiffs are informed and believe and, based thereon, allege that, within the Class Periods, Defendant conducted and currently conducts monitoring and related activities

TOCDF, in Tooele, Utah. In so doing, Defendant has employed hundreds of individuals in recent years in monitoring-technician and other non-exempt hourly employment positions.

8. Representative Plaintiffs are informed and believe and, based thereon, allege that supervisors, managers, and/or officers of Battelle knew of these facts and legal mandates, yet, nonetheless, repeatedly authorized and/or ratified the violation of the laws cited herein.

9. Despite Battelle's knowledge of the Plaintiff Classes' entitlement to premium (overtime) pay, and meal and/or rest periods for all applicable work periods, Battelle failed to provide the same to members of the Plaintiff Classes in violation of the FLSA and Utah state statutes. This action is brought to redress and end this long-time pattern of unlawful conduct.

JURISDICTION AND VENUE

10. This Court has jurisdiction of this action pursuant to the provisions of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201 et seq., including under 29 U.S.C. §§ 207, 216, and 217. This Court also has jurisdiction in light of the existence of a controversy arising under the laws of the United States (28 U.S.C. §1331), diversity jurisdiction under 28 U.S.C. §1332, and supplemental jurisdiction to consider claims arising under Utah state law, pursuant to 28 U.S.C. §1367.

11. Venue as to Defendant is proper in this judicial district, pursuant to 28 U.S.C. § 1391. Battelle maintains offices in the Central District of Utah and transacts business, has agents, and is otherwise within this Court's jurisdiction for purposes of service of process. The unlawful acts alleged herein have a direct effect on Representative Plaintiffs and those similarly situated within

the State of Utah and within this judicial district. Battelle conducts its operations and has employed numerous Class Members in this judicial district.

PARTIES

PLAINTIFFS

12. Representative Plaintiff Jason Sweat is a natural person and, during the relevant time period identified herein, was employed by Battelle at the Tooele Chemical Agent Disposal Facility (TOCDF) in Tooele, Utah.

13. Representative Plaintiff Jason Sweat was employed by Battelle from October 2002 to November 2004 as a Monitoring Technician II.

14. Representative Plaintiff Sue Renzello is a natural person and is, during the relevant time period identified herein, was employed by Battelle in Tooele Chemical Agent Disposal Facility (TOCDF) in Tooele, Utah.

15. Representative Plaintiff Sue Renzello has been employed by Battelle since on or about 1994 as a Monitoring Technician.

16. At all times herein relevant, the Representative Plaintiffs were, and/or now are, persons within each of the Classes of persons further described and defined herein.

DEFENDANT

17. At all times herein relevant, defendant Battelle Memorial Institute (hereinafter "Battelle" and/or "Defendant") was, and is, a corporation organized under the laws of the State of Ohio,

with its principal place of business in the State of Ohio, and conducting business within the above-entitled judicial district.

18. Defendant, Battelle, was at all times relevant hereto and continues to be engaged as a U.S. Government contractor responsible for monitoring and related activities for the chemical warfare agent disposal operations at the Tooele Chemical Agent Disposal Facility (TOCDF) in Tooele, Utah.

19. Defendant, Battelle, was at all times relevant hereto and continues to be a subcontractor to EG&G Defense Materials, Inc., a contractor to the U.S. Army responsible for chemical warfare agent disposal operations at the Tooele Chemical Agent Disposal Facility (TOCDF) in Tooele, Utah.

20. Representative Plaintiffs are informed and believe and, on that basis, allege that Defendant has directly and/or indirectly employed and/or exercised control over the wages, hours and working conditions of the Representative Plaintiffs and the Class Members.

21. Battelle has failed to pay to the above individually named Plaintiffs and other current and former non-exempt hourly employees, the regular wages, overtime wages, and additional compensation including Sunday premiums, for all hours worked and hours worked over forty hours per week as required by the UPWA and the FLSA as alleged below in greater detail.

CLASS ACTION ALLEGATIONS

22. Representative Plaintiffs bring this action individually and as a class action on behalf of all persons similarly situated and proximately damaged by Battelle's conduct, including, but not necessarily limited to, the following Plaintiff Classes:

- a. FLSA Class: All persons who are, or have been, employed by defendant Battelle, as monitoring technicians or other similarly situated non-management employees, within the applicable statutory period(s).
- b. Utah Class: All persons who are, or have been, employed by defendant Battelle in the State of Utah, as monitoring technicians or other similarly situated non-management employees, within the applicable statutory period(s).

23. Pursuant to 29 U.S.C. § 216(b), the representative Plaintiffs and other similarly situated employees hereby submit, attached as Exhibit 1 hereto, their written consents to serve as party plaintiffs and to join the FLSA class.

24. Defendant, its officers and directors are excluded from each of these Classes.

25. This action has been brought and may properly be maintained as a class/collective action under Fed. R. Civ. P., Rule 23 and 29 U.S.C. § 216 because there is a well-defined community of interest in the litigation and the proposed Classes are easily ascertainable.

- a. Numerosity: A class action is the only available method for the fair and efficient adjudication of this controversy. The members of the classes are so

numerous that joinder of all members is impractical, insofar as Representative Plaintiffs are informed and believe and, on that basis, allege that the total number of Class Members exceeds 100 individuals. Membership in the Plaintiff Classes will be determined upon analysis of employee and payroll, among other, records maintained by Defendant.

b. Commonality: The Representative Plaintiffs and the Class Members share a community of interests in that there are numerous common questions and issues of fact and law which predominate over any questions and issues solely affecting individual members, thereby making a class action superior to other available methods for the fair and efficient adjudication of the controversy. Consequently, class certification is proper under FRCP Rule 23(b)(3) and 29 U.S.C. § 216(b). These common questions include, but are not necessarily limited to:

- i. Whether Defendant violated the FLSA by willfully failing to pay overtime compensation to Battelle employees for all the work performed in excess of 40 hours per week;
- ii. Whether Defendant unlawfully failed to pay regular wages in violation of the Utah Payment of Wage Act, Utah Code. Ann. §§ 34-28-1 to -19.

c. Typicality: The Representative Plaintiffs' claims are typical of the claims of the Plaintiff Classes. The Representative Plaintiffs and all members of the

Plaintiff Classes sustained injuries and damages arising out of and caused by Battelle's common course of conduct in violation of state and federal law, as alleged herein.

- d. Superiority of Class Action: Since the damages suffered by individual Class Members, while not inconsequential, may be relatively small, the expense and burden of individual litigation by each member makes, or may make it, impractical for Class Members to seek redress individually for the wrongful conduct alleged herein. Should separate actions be brought or be required to be brought by each individual Class Member, the resulting multiplicity of lawsuits would cause undue hardship and expense for the Court and the litigants. The prosecution of separate actions would also create a risk of inconsistent rulings, which might be dispositive of the interests of other Class Members who are not parties to the adjudications and/or may substantially impede their ability to adequately protect their interests. Moreover, the Representative Plaintiffs are informed and believe, and based thereon allege, that Defendant, in refusing to pay overtime to the FLSA Class Members and the Utah Class Members, has acted and refused to act on grounds generally applicable to all claims, thereby making appropriate injunctive and monetary relief for all members of each class. Consequently, Class certification is proper under FRCP Rule 23(b)(2) and 29 U.S.C. § 216(b).

- e. Adequacy of Representation: The Representative Plaintiffs in this class action are adequate representatives of the Plaintiff Classes, in that the Representative Plaintiffs' claims are typical of those of the Plaintiff Classes and the Representative Plaintiffs have the same interests in the litigation of this case as the Class Members. The Representative Plaintiffs are committed to vigorous prosecution of this case, and have retained competent counsel, experienced in litigation of this nature. The Representative Plaintiffs are not subject to any individual defenses unique from those conceivably applicable to the Class as a whole. The Representative Plaintiffs anticipate no management difficulties in this litigation.

COMMON FACTUAL ALLEGATIONS

26. Representative Plaintiffs and other employees were and/or are employed by the Defendant pursuant to a written contract.
27. As described herein, Battelle has, for years, willfully and knowingly failed to adequately compensate the monitoring technicians and other similarly situated employees within the class definitions identified above for wages, including premium (overtime) wages due, under the FLSA (29 U.S.C. §§ 206 and 207), and the Utah Wage Payment Act, Utah Code. Ann. §§ 34-28-1 to -19. Moreover, Battelle has knowingly failed to compensate the employees for work performed during meal or lunch breaks.

28. As a direct and proximate result of Battelle's unlawful conduct, as set forth herein, Representative Plaintiffs and Class Members have sustained damages, as described above, including loss of earnings for hours of overtime worked on behalf of Defendant, in an amount to be established at trial. As a further direct and proximate result of Defendant's unlawful conduct, as set forth herein, Representative Plaintiffs and Class Members are entitled to recover attorneys' fees and costs, pursuant to 29 U.S.C. § 216(b) and/or Utah law.

**FIRST CLAIM FOR RELIEF UNLAWFUL FAILURE TO PAY OVERTIME WAGES
(FLSA Class)**

29. Representative Plaintiffs incorporate in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein. At all relevant times hereto, Defendant has been, and is, an employer engaged in commerce, as defined under 29 U.S.C. § 203(b) and (d). At all times relevant hereto, EG&G has been an "enterprise engaged in commerce or in the production of goods for commerce" as defined under 29 U.S.C. §203(s)(1). As such, Battelle employed members of the FLSA Class as monitoring technicians and other similar positions.

30. Representative Plaintiffs are informed and believe, and thereon allege, that Battelle has required, or requires, the FLSA Class Members as part of their employment to work without additional compensation, such as overtime, in excess of the forty hours per week maximum under 29 U.S.C. § 207(a)(1). That Section provides the following:

Except as otherwise provided in this section, no employer shall employ any of his employees...for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified

at a rate which is not less than one and one-half times the regular rate at which he is employed.

31. Representative Plaintiffs and other similarly situated employees work three-day and four-day shifts in alternating weeks. Each shift is 12 hours long or longer.

32. Representative Plaintiffs and other similarly situated employees are paid for 12 hours per shift or 48-hours in a four-day week.

33. Representative Plaintiffs are informed and believe, and thereon allege, that Battelle compensates the monitoring technicians and other similarly situated non-management employees, for the hours worked over 40 hours in a week, at the rate of one and a half times the regular rate and Battelle's practice has been to do so with the exceptions alleged herein as a basis for plaintiffs' claims.

34. Defendant has willfully failed to pay the representative Plaintiffs and similarly situated employees for the work performed. During each shift week plaintiffs are paid overtime for only 8 hours in a 48-hour work week even though Plaintiffs actually work 13 hours per day rather than 12 hours per day.

35. Representative Plaintiffs are informed and believe, and thereon allege, that Battelle has not compensated monitoring technicians and other similarly situated employees for all the hours worked beginning from the time at which the employees picked up (or donned) their mask carriers at the Mask Trailer and deposited (or doffed) them back at the end of the workday.

36. During the relevant time period, the representative Plaintiffs and other similarly situated employees arrived at the Mask Trailer at the beginning of their shifts. They picked up (or their

mask carriers (containing the mask and nerve agent antidote kits) at the Mask Trailer before going through the Entry Control Facility (ECF) gate and arriving at the Personnel Maintenance Building (PMB) where they change out of their street clothes into the company provided clothing. After changing clothes the Plaintiffs and other similarly situated employees arrived at their respective work stations.

37. During the relevant time period, the representative Plaintiffs and other similarly situated employees arrived back at the PMB building at the end of their shifts where they were required to take a shower and change back into their street clothes, after which they go back through the ECF gate and arrived back at the Mask at the Mask Trailer and deposited their mask carrier back in their lockers at the Mask Trailer.

38. Representative Plaintiffs are informed and believe, and thereon allege, that Battelle has willfully failed to pay regular and/or overtime wages to its monitoring technicians and other similarly situated non-management employees for work performed each workday while engaged in activities, including but not limited to, the following:

- a. at the start of a shift—picking up the mask carrier at the Mask Trailers, waiting in line to get inside the double-fenced plant area, and then changing in cotton goods at the PMB Building; and walking to the work stations;
- b. lunch time—during this time the Plaintiffs are required to be on the premises, in Defendant's uniform, on call and available for work, and are frequently called back to work; and

c. at the end of a shift—on taking shower and changing in personal clothing, walking back through the ECF gate, and depositing the mask carrier back at the Mask Trailer.

39. For refusing to pay for the above mentioned work performed by the FLSA class Plaintiffs, EG&G has violated the regular wage and overtime provisions of the FLSA.

40. Defendant has failed to keep records of time spent by employees off the clock in violation of 29 U.S.C. § 211(c) and § 215(a).

41. Indeed, in the performance of their duties for Defendant, members of the FLSA Class often did work over forty hours per week, yet did not receive overtime compensation for the work, labor and services they provided to Defendant, as required by the FLSA, 29 U.S.C. §§ 206 and 207. The precise number of unpaid overtime hours will be proven at trial.

42. Representative Plaintiffs propose to undertake appropriate proceedings to have such FLSA Class Members aggrieved by Defendant's unlawful conduct notified of the pendency of this action and join this action as plaintiffs, pursuant to 29 U.S.C. § 216(b), by filing written consents to join the collective action with the Court.

43. Defendant's violations of the FLSA were willful violations of the FLSA, within the meaning of 29 U.S.C. § 255(a).

44. As a result of the foregoing, Representative Plaintiffs seek judgment against Defendant on their own behalf, and on behalf of those FLSA Class Members similarly situated who file written consents to join in this action, for all unpaid wages, including overtime wages owed by

Defendant to the Representative Plaintiffs and the FLSA Class, pursuant to 29 U.S.C. §§ 206 and 207, together with an award of an additional equal amount as liquidated damages, and costs, interest, and reasonable attorneys' fees, as provided for under 29 U.S.C. § 216(b).

**SECOND CLAIM FOR RELIEF
UNLAWFUL FAILURE TO PAY REGULAR WAGES
(Utah Class)**

45. Representative Plaintiffs incorporate in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.

46. As hereinabove alleged, Battelle has willfully failed to pay to Plaintiffs and other members of the Utah Class accrued regular wages under Utah Payment of Wages Act ("UPWA") (Utah Code Ann. §§ 34-28-1 to -19).

47. The plaintiffs are paid regular wages 36 hours in each 36-hour work week even though Plaintiffs actually work more than 36 hours in a 36-hour work week. That is, Plaintiffs are not regular wages for the off-the-clock work performed each workday.

48. At all relevant times, Battelle had a policy and practice of failing and refusing to pay regular wages to the Representative Plaintiffs and to Utah Class members for their hours worked in excess of 36 hours in a 36-hour work week.

49. For refusing to pay for the above mentioned work performed by the Utah class Plaintiffs, EG&G has violated the regular wage and other provisions of the UPWA.

50. The Representative Plaintiffs, on behalf of themselves and the Utah Class members, seek the amount of their underpayments based on Battelle' failure to pay regular wages for work

performed in excess of 36-hours in a 36-hour work week, as provided by UPWA, as well as prejudgment interest, and such other legal and equitable relief from Battelle' unlawful and willful conduct as the Court deems just and proper.

RELIEF SOUGHT

WHEREFORE, the Representative Plaintiffs, on behalf of themselves and the Plaintiff Classes, prays for judgment and the following specific relief against defendant Battelle as follows:

1. That the Court declare, adjudge and decree that this action is a proper class/collective action and certify the proposed FLSA Class, the Utah Class and/or any other appropriate subclasses under FRCP Rule 23 and 29 U.S.C. § 216;
2. That the Court declare, adjudge and decree that Defendant violated the overtime provisions of the FLSA as to the Representative Plaintiffs and the Plaintiff Classes;
3. That the Court declare, adjudge and decree that Defendant violated the payment of regular wage provisions of the UPWA as to the Representative Plaintiffs and the Plaintiff Classes;
4. That the Court declare, adjudge and decree that Defendant willfully violated its legal duties to pay overtime under the FLSA and Utah state law;
5. That the Court declare, adjudge and decree that (a) the Representative Plaintiffs and the FLSA Class Members were at all times relevant hereto, and are, entitled to be paid overtime for work beyond 40 hours in a week; and (b) the amounts to

which Representative Plaintiffs and the FLSA Class Members are entitled is to be doubled as liquidated damages and awarded thereto;

6. That the Court make an award to Representative Plaintiffs, the FLSA Class of damages and/or restitution for the amount of unpaid overtime compensation, including liquidated damages thereon, and penalties in an amount to be proven at trial;
7. That the Court make an award to Representative Plaintiffs, the Utah Class of damages and/or restitution for the amount of unpaid regular compensation, including interest thereon, and penalties in an amount to be proven at trial;
8. For all other Orders, findings and determinations identified and sought in this Complaint;
9. For Interest on the amount of any and all economic losses, at the prevailing legal rate;
10. For reasonable attorneys' fees, pursuant to 29 U.S.C. § 216(b) and as otherwise provided by law; and
11. For costs of suit and any and all such other relief as the Court deems just and proper.

JURY DEMAND

Representative Plaintiffs and the Plaintiff Classes hereby demand trial by jury on all issues triable of right by jury.

Respectfully Submitted,

Dated: June 15, 2007



Jesse S. Brar
Sharon L. Preston
Mick G. Harrison

Attorneys for Plaintiffs

Exhibits/
Attachments
to this document
have **not** been
scanned.

Please see the
case file.