

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

APRIL WHITE and BRUCE BOGACH,
individually, and on behalf of all others similarly
situated,

Plaintiffs,

v.

PUBLIX SUPER MARKETS, INC.,

Defendant.

Civil Action No.

JURY DEMAND

COMPLAINT

COME NOW the Plaintiffs April White (“White”) and Bruce Bogach (“Bogach”) (collectively “Plaintiffs”), by and through undersigned counsel, and file this Complaint as follows:

1.

Plaintiffs bring this lawsuit on their own behalf, and on behalf of all those similarly situated, against Defendant Publix Super Markets, Inc. (“Publix” or “Defendant”) to recover overtime pay, liquidated damages, prejudgment interest, costs, and attorney’s fees under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.* Plaintiffs White and Bogach file herewith their “Consent” to join this collective action under 29 U.S.C. § 216(b).

Parties

2.

Plaintiff White is a resident of Robertson County, Tennessee, and has worked for Publix in a department of a Publix grocery store within this judicial district since approximately May,

2012, as a full-time hourly paid (“Hourly Associate”) decorator employee in the bakery department of a Publix grocery store. Plaintiff White is also an opt-in Plaintiff in the case styled *Ott v. Publix Super Markets, Inc.*, No. 3:12-cv-00486 (M.D. Tenn.)(Campbell, J.), as to her claims for hours worked under a separate job title as a “FWW Associate.”

3.

Plaintiff Bogach is a resident of Sumner County, Tennessee, and has worked for Publix in a department of a Publix grocery store within this judicial district since approximately February, 2012, as a full-time Hourly Associate baker employee in the bakery department of a Publix grocery store. Plaintiff Bogach is also an opt-in Plaintiff in the case styled *Ott v. Publix Super Markets, Inc.*, No. 3:12-cv-00486 (M.D. Tenn.)(Campbell, J.), as to his claims for hours worked under a separate job title as a “FWW Associate.”

4.

Plaintiffs bring this action both individually, and as a collective action under 29 U.S.C. § 216(b) on behalf of Publix’s current and former Hourly Associates who work or worked in a Publix grocery store during the period beginning three years prior to the filing date of this Complaint (the “relevant period”) and who worked over forty hours in one or more work weeks during the relevant period (collectively, the “Similarly Situated Hourly Associates”).

5.

Publix is a Florida corporation registered to do business in the State of Tennessee, and was properly served with process in this case by service upon its registered agent, Corporate Creations Network, Inc., 205 Powell Pl, Brentwood, TN 37027.

Jurisdiction and Venue

6.

Pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 216(b), this Court has original jurisdiction over the claims set forth in this Complaint arising under the FLSA.

7.

Publix employed Plaintiffs and employed/employs others in this judicial district, owns and operates grocery stores transacting business in this judicial district, and is registered to transact business in the State of Tennessee.

8.

Publix is, and has been at all times during the relevant period, an “enterprise” having two or more employees directly engaged in commerce, and/or engaged in the production of goods for commerce, and/or handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce (including but not limited to the handling and sale of groceries and products that are produced in and delivered from other states or foreign countries), as those terms are defined under the FLSA, with annual gross revenues in excess of \$500,000.00, and is also an “employer” as that term is defined under the FLSA.

9.

Publix is subject to the jurisdiction of this court.

10.

Venue is proper in this court under 28 U.S.C. § 1391, because Plaintiffs worked for and received payment from Publix in this judicial district, and a substantial portion of the events giving rise to this lawsuit occurred in this judicial district.

Facts Related To All Counts

11.

Publix owns and operates a chain of grocery stores in Alabama, Florida, Georgia, North Carolina, South Carolina, and Tennessee.

12.

Plaintiffs and the Similarly Situated Hourly Associates performed similar job duties, were compensated pursuant to centralized pay policies, and were subjected to similar pay practices while employed as Hourly Associates, and are “employees” entitled to the protections of the FLSA pursuant to 29 U.S.C. §§ 203(e) & 207(a).

13.

Publix paid and continues to pay all Hourly Associates under the same centralized and uniformly applied compensation structure, in accordance with the compensation and benefit terms set forth in the document entitled “Your Associate Handbook” (“Associate Handbook”) during the relevant period, including the Associate Handbook versions having publication dates of January 1, 2011 and thereafter.

14.

Publix uniformly classified its Hourly Associates as non-exempt under the FLSA at all times during the relevant period and acknowledged their entitlement to overtime compensation under the FLSA for hours worked over forty in a work week.

15.

Publix published its compensation plan for all Hourly Associates in the Associate Handbooks in effect during the relevant period, including the Associate Handbook versions having publication dates of January 1, 2011 and thereafter.

16.

According to the compensation plan set forth in the January 1, 2011 version of the Associate Handbook, each Hourly Associate's "total compensation includes the pay you receive for hours worked, bonuses, benefits, etc."

17.

According to the compensation plan set forth in the Associate Handbook, Hourly Associates are paid an hourly rate, and Hourly Associates are also eligible to receive (and were in fact paid in accordance with the Associate Handbook during the relevant period) other compensation in addition to their hourly rate (Hourly Associates), including but not limited to a quarterly retail bonus ("retail bonus"), a contractual bonus that accrues at a fixed amount each month and is paid in or about the first week of December each year and is subject to recoupment if paid in advance ("Holiday Bonus"), holiday pay that is conditioned upon the employee working at least 50% of the scheduled day before, of, and after the Publix-recognized holiday if scheduled ("Holiday Pay") in the amount of a lump sum eight (8) hours for Hourly Associates, as well as Tuition Reimbursement, Prevention Plus, CQI, and WinPPlus payments.

18.

According to the compensation plan set forth in the Associate Handbook, Hourly Associates are paid an "hourly rate of pay for hours worked (40 and below), plus a time-and-one-half rate for hours worked over 40," in addition to other compensation including but not limited to a retail bonus, Holiday Bonus, Holiday Pay in the amount of a lump sum eight hours, and Tuition Reimbursement, Prevention Plus, CQI, and WinPPlus payments.

19.

The retail bonus, Holiday Bonus, Tuition Reimbursement, Prevention Plus, CQI, and WinPPlus payments are non-discretionary bonuses as that term is defined under the FLSA, and

must therefore be included in the calculation of the regular rate for the work weeks covered by the bonus.

20.

Publix did not include the Holiday Bonus, Tuition Reimbursement, Prevention Plus, CQI, and WinPPlus payments in the calculation of the regular rate in calculating the overtime compensation paid to its Hourly Associates during the relevant period, including but not limited to Plaintiffs.

21.

If a Publix Hourly Associate fails to work at least 50% of the scheduled day the day before, of, and after the Publix-recognized holiday if scheduled, that employee does not receive Holiday Pay.

22.

Holiday Pay is paid as a lump sum amount (eight hours for Hourly Associates) without regard to whether the employee worked overtime hours, and/or the number of overtime hours worked.

23.

Holiday Pay is also not paid at a rate of at least time-and-a-half the rate established in good faith for like work performed in non-overtime hours on other days.

24.

Holiday Pay is contingent upon working at least 50% of scheduled hours on the days immediately preceding and following a Publix-recognized holiday, and is therefore not paid exclusively for work by the employee on days exclusively limited to "Saturdays, Sundays,

holidays, or regular days of rest, or on the sixth or seventh day of the workweek” under 29 C.F.R. § 778.203(c), the regulation interpreting 29 U.S.C. § 207(e)(6) of the FLSA.

25.

Holiday Pay is separate from, and earned in addition to, Holiday Premium pay earned for hours actually worked on the Publix-recognized holiday itself.

26.

Holiday Pay does not fall within any of the exclusions from the FLSA’s regular rate requirements, and must therefore be included in the calculation of the regular rate for the work weeks in which the employee worked the hours required to earn the Holiday Pay.

27.

Publix did not include Holiday Pay in the calculation of the regular rate in calculating the overtime compensation paid to its Hourly Associates during the relevant period, including but not limited to Plaintiffs.

28.

As but one non-exhaustive example of Holiday Bonus that Publix failed to include in the regular rate for overtime paid to Plaintiffs on various occasions throughout the relevant period, Plaintiff White was paid Holiday Bonus on or about December 11, 2012, for months in 2012 that included weeks during which she also worked over 40 hours in the work week as an Hourly Associate, but Publix did not include that Holiday Bonus in the calculation of her regular rate for overtime paid for those pay periods, has not paid that unpaid overtime amount to date, and has not paid liquidated damages for its failure to pay that overtime amount to date.

29.

As but one non-exhaustive example of Holiday Bonus that Publix failed to include in the regular rate for overtime paid to Plaintiffs on various occasions throughout the relevant period, Plaintiff Bogach was paid Holiday Bonus on or about December 11, 2012, for months in 2012 that included weeks during which he also worked over 40 hours in the work week as an Hourly Associate, but Publix did not include that Holiday Bonus in the calculation of his regular rate for overtime paid for those pay periods, has not paid that unpaid overtime amount to date, and has not paid liquidated damages for its failure to pay that overtime amount to date.

30.

As but one non-exhaustive example of Holiday Pay that Publix failed to include in the regular rate for overtime paid to Plaintiffs on various occasions throughout the relevant period, Plaintiff Bogach was paid Holiday Pay at a lump sum of eight hours pay at his hourly rate for the pay period of September 1 through September 7, 2012 (which included the Publix-recognized Labor Day holiday on September 3, 2012), during which he also worked over 40 hours in that work week as an Hourly Associate, but Publix did not include that Holiday Pay in the calculation of his regular rate for overtime paid for that pay period, has not paid that unpaid overtime amount to date, and has not paid liquidated damages for its failure to pay that overtime amount to date.

31.

As but one non-exhaustive example of one of the additional types of compensation that Publix failed to include in the regular rate for overtime paid to Plaintiffs on various occasions throughout the relevant period, Plaintiff Bogach was paid a non-discretionary Prevention Plus bonus for the pay period for September 8 through September 14, 2012, a week during which he

also worked over 40 hours in that work week, but Publix did not include that Prevention Plus bonus in the calculation of his regular rate for overtime paid for that pay period, has not paid that unpaid overtime amount to date, and has not paid liquidated damages for its failure to pay that overtime amount to date.

32.

Plaintiffs, during their employment as Hourly Associates, and the Similarly Situated Hourly Associates who worked over 40 hours in one or more work weeks within the relevant period, received hourly overtime pay that was calculated based on regular rates that failed to include all non-excludable compensation under the FLSA, including but not limited to Holiday Bonus and Holiday Pay, and therefore Plaintiffs and the Similarly Situated Hourly Associates were therefore denied all overtime compensation owed to them under the FLSA.

33.

Plaintiffs therefore bring this collective action seeking to represent the following class of similarly situated individuals:

Publix's current and former full-time Hourly Associates who work or worked in any Publix stores and who worked over forty hours in one or more work weeks at any time during the period beginning three years prior to the filing date of this Complaint.

COUNT ONE – FLSA VIOLATIONS

34.

Plaintiffs reassert and incorporate herein the allegations contained in the preceding paragraphs.

35.

On numerous occasions during the relevant period, Publix suffered or permitted Plaintiffs and the Similarly Situated Hourly Associates to work more than 40 hours in a work week

without receiving overtime compensation at time-and-a-half their properly calculated regular rate for hours worked over 40 under the FLSA -- i.e., their regular rate inclusive of their base rate and all other compensation not otherwise excludable under 29 U.S.C. § 207(e) (“regular rate”).

36.

Despite being aware that the FLSA applied to its employees, and despite having received complaints within the relevant period from certain Similarly Situated Hourly Associates regarding failure to pay the required overtime compensation under the FLSA, Publix violated and continues to violate the FLSA by not paying Plaintiffs or the Similarly Situated Hourly Associates overtime compensation at the required rate, in addition to liquidated damages and interest for overtime not promptly paid in each paycheck for the applicable pay period.

37.

Publix knew or acted with reckless disregard that its compensation practices alleged above violated the FLSA.

38.

Publix was sued on May 15, 2012, in the case styled *Ott v. Publix Super Markets, Inc.*, No. 3:12-cv-00486 (M.D. Tenn.)(Campbell, J.), for failure to include non-excludable compensation including but not limited to Holiday Bonus and Holiday Pay in the calculation of the regular rate paid for overtime to its FWW Associate positions, but has not changed its compensation practices since that lawsuit in order to include such compensation in its regular rate calculations for Hourly Associates.

39.

Publix’s failure to pay the overtime compensation required by the FLSA to Plaintiffs and the Similarly Situated Hourly Associates was willful.

40.

Plaintiffs and the Similarly Situated Hourly Associates are entitled to recover their back overtime pay at the rate of one and a half times their applicable regular rate, in addition to an equivalent amount as liquidated damages, prejudgment interest, attorney's fees, and costs pursuant to 28 U.S.C. § 216(b).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter a declaratory judgment that the overtime pay practices referenced above violated the FLSA and that Publix's violation of the FLSA was willful, and further enter a judgment:

1. Awarding Plaintiffs and the Similarly Situated Hourly Associates their back overtime pay at one and a half times their properly calculated regular rates, an equivalent amount as liquidated damages, and prejudgment interest, for all hours worked over 40 in a work week during the maximum three year time period prior to the filing of their claims through the date of judgment;

2. Awarding Plaintiffs and the Similarly Situated Hourly Associates their costs and attorney's fees; and

3. Granting such further other and further relief as the Court finds just and proper in this action.

PLAINTIFFS DEMAND A TRIAL BY JURY.

Respectfully submitted this 16th day of May, 2014.

/s/ Charles Yezbak, III

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