

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO**

**KRISTIN HABENICHT, individually and
behalf of all other similarly situated persons,**

Plaintiffs,

v.

**KEYCORP, KEYBANK N.A., individually
and d/b/a KEYBANK and KEY,**

Defendants.

CLASS ACTION COMPLAINT

INTRODUCTION

1. This case is brought to remedy the failure of Defendants KEYCORP and KEYBANK N.A. (hereafter collectively “Defendants”) to pay Plaintiffs overtime premium pay as required by the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., state wage payment laws and the common law of contract and quasi-contract. Plaintiffs are mortgage loan officers (“loan officers”) for Defendants. Like loan officers throughout the mortgage industry, they work very long hours.
2. Prior to March 2011, Defendants failed to record loan officers’ hours and failed to pay them overtime compensation at the rate of time and one-half. In or about March 2011, Defendants recognized that its loan officers are not exempt from the FLSA and changed its compensation structure to pay them a monthly commission, from which the hourly pay during that month was deducted. Defendants began treating its loan officers as FLSA non-exempt workers, with overtime at the rate of time and one-half for each hour over forty worked in a workweek. Defendants promised its loan officers to pay this way in a written contract with each loan officer.
3. In or about 2011, Defendants paid some sums to loan officers in recognition of the

amounts it owed them in the past for failing to pay them overtime. Defendants did not ask loan officers how much overtime they had worked, did not disclose how it calculated the amount of back pay it was giving, failed to provide an accounting, and failed to pay liquidated damages due to loan officers for Defendants' failure to pay overtime in the past.

4. Because it began paying loan officers overtime, and because Defendants recognized that they are not exempt from the FLSA, Defendants were required to pay time and one-half for all hours over forty worked in a workweek.
5. Upon information and belief, Defendants did not pay its loan officers full back pay or liquidated damages for its failure to compensate them as FLSA non-exempt employees prior to March 2011.
6. After the change in or about March 2011, to evade its FLSA obligations as well as its contractual promise to loan officers, Defendants pressured its loan officers to underreport their work hours. Defendants and its officials and supervisors told loan officers that no matter how many hours they worked, they should not report more than eight hours in a day, and it pressured them not to report more than forty hours per week on their time sheets.
7. Loan officers must work long hours, well over forty in a week, in order to do their jobs and to make money, since they must engage in extensive promotional activities necessary to originating loans, activities such as meeting with realtors and attorneys, attending open houses, networking, and working to process their loans through to closing.
8. Defendants requires loan officers to bear expenses which are for the benefit and convenience of Defendants, such as travel expenses and cell phone expenses, among

others.

9. Defendants knew or should have known that loan officers worked hours in excess of those they reported. Defendants pressured loan officers to underreport their hours. Defendants knew that loan officers worked well more than forty hours per week prior to promising them overtime at the rate of time and one-half, and Defendants did not change loan officers' responsibilities when it moved to the new compensation system.
10. Defendants also knew or should have known that Plaintiffs were required to bear Defendants' business expenses.
11. Plaintiffs seek unpaid wages for the overtime hours they worked, liquidated damages, costs and attorneys' fees as well as declaratory relief. Plaintiffs bring this claim individually and on behalf of other similarly situated employees under the collective action provisions of the FLSA. 29 U.S.C. § 216(b).
12. In addition, by the conduct described in this Class Action Complaint, Defendants have violated the common law of contract as well as the wage and hour laws of the various states in which the loan officers worked, by failing to pay their employees promised overtime compensation at the rate of time and one-half.
13. Defendants have also violated the common law doctrines of contract and quasi-contract by failing to honor their promise to pay premium pay at the rate of time and one-half. Plaintiff KRISTIN HABENICHT brings these claims individually and on behalf of other similarly situated employees under the class action provisions of Fed. R. Civ. P. 23.

JURISDICTION

14. Jurisdiction is conferred upon this Court by 29 U.S.C. § 216(b) of the Fair Labor Standards Act, by 28 U.S.C. § 1331, this action arising under laws of the United States,

and by 28 U.S.C. § 1337, this action arising under Acts of Congress regulating commerce. Jurisdiction over Plaintiffs' claims for declaratory relief is conferred by 28 U.S.C. §§ 2201 and 2202.

15. This Court has supplemental jurisdiction over the state claim raised by virtue of 28 U.S.C. § 1367(a).

VENUE

16. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).
17. Upon information and belief, Defendants KEYCORP and KEYBANK N.A. reside in this district.
18. The cause of action set forth in this Complaint arose in this District.

PARTIES

A. Plaintiffs

19. Plaintiff KRISTIN HABENICHT was an employee of Defendants. Her "Consent to Sue" is attached to the back of this complaint.
20. Plaintiff KRISTIN HABENICHT worked for Defendants in the state of Washington.
21. Plaintiff KRISTIN HABENICHT was engaged in commerce in her work for Defendants.

B. Represented Parties under FLSA

22. The term "Plaintiffs" as used in this complaint refers to the named Plaintiff and any additional represented class members pursuant to the collective action provision of 29 U.S.C. § 216(b).
23. The named Plaintiff represents current and former "all loan officers who have worked for Defendants since March 24, 2010 and the date of final judgment in this matter in a non-supervisory capacity".
24. The named Plaintiff brings this case as a collective action for class members throughout

the U.S. as defined in the preceding paragraph, under the collective action provision of the FLSA as set forth in 29 U.S.C. § 216(b).

C. Class Action Allegations

25. Plaintiff KRISTIN HABENICHT brings the Second, Third, and Fourth Causes of Action under Rule 23 of the Federal Rules of Civil Procedure, on behalf of herself and a class of persons consisting of “all people performing work as a mortgage loan officer who have worked for Defendants since March 24, 2010 and the date of final judgment in this matter in a non-supervisory capacity”.
26. Excluded from the Class are Defendants’ legal representatives, officers, directors, assigns, and successors, or any individual who has, or who at any time during the class period has had, a controlling interest in Defendants; the Judge(s) to whom this case is assigned and any member of the Judges’ immediate family; and all persons who will submit timely and otherwise proper requests for exclusion from the Class.
27. 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 not known to Plaintiffs, the facts on which the calculation of that number can be based are presently within the sole control of Defendants.
28. Upon information and belief, the size of the Class is at least 100 workers.
29. Defendants acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.
30. The Second, Third, and Fourth Causes of Action are properly maintainable as a class action under Federal Rule of Civil Procedure 23(b)(3). There are questions of law and

fact common to the Class that predominate over any questions solely affecting individual members of the Class, including but not limited to:

- a. whether Defendants pressured Plaintiffs not to correctly report their hours;
- b. whether Defendants failed to keep true and accurate time records for all hours worked by the Plaintiffs and the Class;
- c. what proof of hours worked is sufficient where an employer fails in its duty to maintain true and accurate time records;
- d. whether Defendants failed and/or refused to pay the Plaintiff and the Class overtime pay for hours worked in excess of 40 hours per workweek;
- e. the nature and extent of Class-wide injury and the appropriate measure of damages for the Class;
- f. whether Defendants' policy of failing to pay overtime was instituted willfully or with reckless disregard of the law; and
- g. whether Defendants correctly calculated and compensated the Plaintiff and the Class for hours worked in excess of 40 per workweek.

31. The claims of the Plaintiffs are typical of the claims of the Class they seek to represent. The Plaintiffs and the Class members work or have worked for Defendants and have been subjected to their policy and pattern or practice of failing to pay overtime wages for hours worked in excess of 40 hours per week. Defendants acted and refused to act on grounds generally applicable to the Class, thereby making declaratory relief with respect to the Class appropriate.

32. The Named Plaintiff will fairly and adequately represent and protect the interests of the Class.

- a. The Named Plaintiff understands that, as a class representative, she assumes a fiduciary responsibility to the Class to represent its interests fairly and adequately;
 - b. The Named Plaintiff recognizes that as a class representative, she must represent and consider the interests of the Class just as she would represent and consider her own interests;
 - c. The Named Plaintiff understands that in decisions regarding the conduct of the litigation and its possible settlement, she must not favor her own interests over those of the Class;
 - d. The Named Plaintiff recognizes that any resolution of a class action lawsuit, including any settlement or dismissal thereof, must be in the best interests of the Class; and
 - e. The Named Plaintiff understands that in order to provide adequate representation, she must remain informed of developments in the litigation, cooperate with class counsel by providing them with information and any relevant documentary material in their possession, and testify, if required, in a deposition and in trial.
33. The Named Plaintiff has retained counsel competent and experienced in complex class action employment litigation.
34. A class action is superior to other available methods for the fair and efficient adjudication of this litigation - particularly in the context of wage litigation like the present action, where individual Plaintiffs may lack the financial resources to vigorously prosecute a lawsuit in federal court against a corporate defendants. The members of the Class have been damaged and are entitled to recovery as a result of Defendants' common and uniform policies, practices, and procedures. Although the relative damages suffered by

individual members of the Class are not *de minimis*, such damages are small compared to the expense and burden of individual prosecution of this litigation against Defendants. In addition, class treatment is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about Defendant' practices.

D. Defendants

35. Defendant KEYCORP lists its principal office address as 127 Public Sq., Cleveland, OH 44114. Upon information and belief, Defendant KEYCORP is a Bank having its headquarters and office in Ohio and places of business in Ohio.
36. Defendant KEYCORP is a Fortune 500 company. It offers banking services to customers in approximately 14 states including Ohio. KeyCorp is one of the nation's largest bank-based financial services companies, with more than 15,000 employees and assets of approximately \$89 billion. KEYCORP and its subsidiary and related companies provide investment management, retail and commercial banking, consumer finance, and investment banking products and services to individuals and companies throughout the United States and, for certain businesses, internationally. KEYCORP's businesses deliver their products and services through branches and offices, a network of ATMs; telephone banking centers, and a website. Upon information and belief, KEYCORP is approximately the 19th largest bank in the United States based on total deposits and approximately the 24th largest bank in the United States by total assets.
37. Defendant KEYBANK N.A. lists its principal office address as 127 Public Sq., Cleveland, OH 44114. Upon information and belief, Defendants KEYBANK N.A. is a Bank having its headquarters and office in Ohio and places of business in Ohio.

38. Upon information and belief, Defendants individually and collectively grossed more than \$500,000 in each of the last ten calendar years.
39. Defendants individually and collectively are an enterprise engaged in interstate commerce for purposes of the Fair Labor Standards Act.
40. Defendants KEYCORP and KEYBANK N.A. employed Plaintiffs and participated directly in employment decisions regarding the Plaintiffs the rights for which they seek redress in this case.
41. All actions and omissions described in this complaint were made by Defendants directly or through its supervisory employees and agents.

FACTS

42. Plaintiff KRISTIN HABENICHT began employment with Defendants in or about January 2011. Plaintiff KRISTIN HABENICHT left employment with Defendants in or about August 2011.
43. Plaintiffs were loan officers employed by Defendants to originate mortgage loans.
44. Plaintiffs' job responsibilities were established by Defendants.
45. The recording and tracking of Plaintiff loan officers' job responsibilities is administered and monitored jointly by Defendants.
46. Upon information and belief, the method by which Plaintiffs were paid was established jointly by Defendants.
47. Plaintiffs and class members regularly worked more than 40 hours per week for Defendants.
48. In or about March 2011, Defendants changed their compensation structure to pay loan officers under a combination commission and salaried wage structure. The pay consisted

of a monthly commission, from which the base pay during that month was deducted. As of March 2011, Defendants treated loan officers as FLSA non-exempt workers requiring that it pay loan officers overtime at the rate of time and one-half for each hour over forty worked in a workweek. Defendants promised its loan officers to pay this way in a written contract with each loan officer.

49. In or about 2011, Defendants paid some sums to loan officers in recognition of the amounts it owed them in the past for failing to pay them overtime. Defendants did not ask loan officers how much overtime they had worked, did not disclose how it calculated the amount of back pay it was giving, failed to provide an accounting, and failed to pay liquidated damages due to loan officers for Defendants' failure to pay overtime in the past.
50. To evade its FLSA obligations as well as its contractual promise to loan officers, beginning in or about March 2011, Defendants pressured its loan officers to underreport their work hours.
51. In or about March 2011, Defendants' officials told loan officers not to correctly report their hours. Defendants' officials told Plaintiffs that no matter how many hours they worked, they should not report more than eight hours in a work day. The Plaintiffs were pressured not to report more than forty hours per week on their time sheets.
52. Loan officers must work long hours, well over forty in a week, in order to make commission income exceeding their floor, since they must engage in extensive promotional activities necessary to originating loans, activities such as meeting with realtors and attorneys, attending open houses, networking, etc. They must also engage in extensive loan processing activities to see that the loans they originate are processed

- through to closing.
53. Defendants knew or should have known that Plaintiffs and class members were working in excess of forty hours in a work week.
 54. Loan officers told Defendants that they were working overtime hours but reporting only forty.
 55. Defendants knew or should have known that Plaintiffs and class members were not recording all the hours they worked, particularly those in excess of forty hours in a week.
 56. Defendants knew or should have known that Plaintiffs were recording their hours of work in rote fashion even though a loan officers' hours are never routine, since they must answer calls from prospective customers at all hours of the day, including in the evening and at night.
 57. Defendants require loan officers to bear expenses which are for the benefit and convenience of Defendants, such as travel expenses and cell phone expenses, among others.
 58. Defendants told Plaintiffs not to record their hours over forty and otherwise dissuaded class members from recording hours of work in excess of forty in a work week.
 59. In or about October 28, 2011, Defendants attempted to lay the groundwork for an argument that it did not know that loan officers worked more than forty hours in a week, by disseminating a false and misleading email memorandum, which set forth a new procedure for overtime work. This email memo did not change any of Plaintiffs' work responsibilities, but informed Plaintiffs that they would have to obtain written permission to work overtime hours, that this permission would not be granted unless the loan officer had 3 mortgages in the pipeline, and that at most 5 hours of overtime work would be granted. Defendants knew that

if loan officers did not work hours over forty in a week, they would never have 3 loans in the pipeline, they never would be able to make any commission at all, and thus would be compelled to underreport their hours in order to eventually obtain commissions. The memo thus, without saying so explicitly, threatened Plaintiffs and class members by refusing to give them commissions if they recorded hours in excess of forty in a week. Thus, the email continues Defendants' practice of coercing loan officers into underreporting their hours.

60. Defendants required Plaintiffs and class members to do various work for which they were not to record their hours as work hours. Such off-the-clock work included attendance at trainings, meetings, at other times.
61. Upon information and belief, Defendants failed to keep accurate time records for all the work Plaintiffs and the class members did on a daily or weekly basis.
62. Defendants failed to pay the Named Plaintiffs and the class members overtime compensation at the rate of time and one-half for all hours worked over 40 in a week.
63. Defendants required Plaintiffs to purchase tools of the trade for their work for Defendant, which included cell phones and computers.
64. Defendants failed to reimburse Plaintiffs for their purchase of all work tools and supplies, or for their work travel between work locations.
65. Defendants promised to pay Plaintiffs a salary and time and one-half their regular hourly rate for hours worked over 40 in a week.
66. This promise was stated in writings given to each loan officer.
67. Defendants failed to pay Plaintiffs the promised rate for each hour they worked.
68. Defendants' stated policy was to pay Plaintiffs time and one-half their regular hourly rate for hours worked over 40 in a week.

69. Defendants did not pay Plaintiffs time and one-half their regular hourly rate for hours worked over 40 in a week.
70. Defendants' failure to pay Plaintiffs and class members the proper wages required by law was willful.

CLASS-WIDE FACTUAL ALLEGATIONS

71. Defendants failed to record Plaintiffs' hours of work.
72. Defendants knew or should have known that Plaintiffs worked hours over forty and worked hours that they did not report.
73. Upon information and belief, it was Defendants' willful policy and pattern or practice not to pay its employees, including Plaintiffs, the Class Members, and the FLSA Collective Members (collectively "Class Members"), for all hours of work at their promised rate of pay, at the regular rate of pay, or pay an overtime premium for all work that exceeded 40 hours in a week.
74. Defendants' unlawful conduct, as set forth in this Class Action Complaint, has been intentional, willful, and in bad faith, and has caused significant damages to Plaintiffs and the Class Members.
75. Defendants were aware or should have been aware that the law required it to pay non-exempt employees, including Plaintiffs and the Class Members, an overtime premium of time and one-half for all work-hours it suffered or permitted in excess of 40 per workweek. Upon information and belief, Defendants applied the same unlawful policies and practices to its employees in every state in which it operated.

FIRST CAUSE OF ACTION (FAIR LABOR STANDARDS ACT)

76. Defendants failed to pay overtime wages to Plaintiffs in violation of the Fair Labor Standards

Act, 29 U.S.C. § 207 et seq. and its implementing regulations.

77. Defendants' failure to pay proper wages for each hour worked over 40 per week was willful within the meaning of the FLSA.
78. Defendants' failure to comply with the FLSA overtime wage protections caused Plaintiffs to suffer loss of wages and interest thereon.

**SECOND CAUSE OF ACTION
(STATE LABOR LAW)**

79. Plaintiffs re-allege and incorporate by reference all allegations in all preceding paragraphs.
80. Defendants failed to pay overtime wages to the Plaintiff class in violation of the laws guaranteeing the same in each state in which the Plaintiffs worked.
81. Defendants made de facto unlawful deductions from Plaintiffs' wages by having the Plaintiffs bear employer expenses.
82. Defendants' failure to comply with state wage and hour protections caused Plaintiffs to suffer loss of wages and interest thereon.

**THIRD CAUSE OF ACTION
(COMMON LAW CONTRACT
AND/OR QUASI-CONTRACT)**

83. Plaintiff re-alleges and incorporate by reference all allegations in all preceding paragraphs.
84. Defendants promised orally and in writing to pay Plaintiffs at a set hourly rate for each hour of work up to forty in a work week, and at the rate of time and one-half for hours worked over forty.
85. Plaintiffs performed labor for Defendants knowing of Defendants' promise.
86. Defendants failed to pay the promised regular rate and the overtime premium wages to the Plaintiff class in violation of their promise to pay overtime.
87. Defendants' failure to pay overtime as promised violated Plaintiffs' rights under the common

law doctrines of contract and/or quasi-contract.

WHEREFORE, Plaintiffs request that this Court enter an Order:

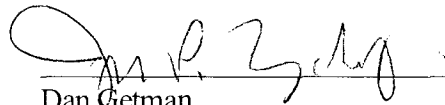
1. Declaring that the Defendants violated the Fair Labor Standards Act;
2. Declaring that the Defendants' violations of the FLSA were willful;
3. Granting judgment to Plaintiffs and represented parties for their claims of unpaid wages as secured by the Fair Labor Standards Act, as well as an equal amount in liquidated damages, and prejudgment interest;
4. Awarding Plaintiffs and represented parties their costs and reasonable attorneys' fees;
and
5. With respect to the Class:
 - A. Certification of this action as a class action;
 - B. Designation of Plaintiffs as Class Representatives;
 - C. A declaratory judgment that the practices complained of herein are unlawful under appropriate state law, including contract and state overtime guarantees;
 - D. Granting Plaintiffs appropriate equitable and injunctive relief to remedy Defendants' violations of state law, including but not necessarily limited to an order enjoining Defendants from continuing its unlawful practices;
 - E. Granting an award of damages, liquidated damages, appropriate statutory penalties, and restitution to be paid by Defendants according to proof;
 - F. Granting an award of Pre-Judgment and Post-Judgment interest, as provided by law;
 - G. Granting such other injunctive and equitable relief as the Court may deem just

and proper; and

- H. Awarding Plaintiffs attorneys' fees and costs of suit, including expert fees and costs.

Dated: December 1, 2011

Respectfully Submitted,



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