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April 5, 2006

Hon. Richard M. Berman
U.S. District Judge
U.S. District Court for the Southern District of New York
40 Centre St.
New York, NY 10007

Paralegals:
Anibal R. Garcia
Janice Pickering
Carolyn Mow
Amanda K. Niknam

Re: *Ayers, et al., v. SGS Control Service, Inc., et al.*, 03 Civ 9078 (RMB)(RLE)

Your Honor,

I am writing to request permission to move for summary judgment on the defendants' pay practices that violate the Fair Labor Standards Act (FLSA). The FLSA overtime law requires payment at a minimum rate of time and half for hours over forty, 29 U.S.C. §207, and also requires that the overtime be paid with the base wages or as soon thereafter as practical. 29 C.F.R. §778.106. Plaintiffs would like to move shortly for judgment in their favor on each of the following claims. The motion seeks a declaration with respect to the defendants' pay policies which are expressed in their Employee Handbook and company memoranda and as to which there are no disputed issues of fact.

DELAYED PAYMENT OF OVERTIME FOR ALL INSPECTORS

Defendants pay the plaintiff inspectors' overtime on a delayed basis, regularly more than a month after it is earned. In most weeks, the Plaintiffs' overtime and incentive pay were a large part of their compensation. Defendants paid the overtime late even though they could pay the overtime wages earlier under several pay methods. The practice was in contravention of 29 C.F.R. §778.106 (requiring that payment of overtime accompany the base wages or as soon thereafter as practical).

ILLEGAL USE OF THE FLUCTUATING WORK WEEK TO REDUCE OVERTIME

Under the FLSA, covered employees must be paid overtime at a rate of time and a half their regular hourly rate. 29 U.S.C. §207(a)(1). Defendants however, utilize the "fluctuating work week" ("FWW") method of overtime pay calculation. *See e.g., Yourman, et al. v. Dinkins, et al.*, 865 F.Supp 154, 163, fn. 15 (S.D.N.Y. 1994) *rev'd on other grounds*. Under the FWW, an employer is permitted to pay a fixed salary for all hours worked and then pay only a ½ time rate for the hours over forty, calculating the regular or base rate by dividing the fixed pay by all the

hours worked. *Id.* Using the FWW, an employer can reduce the cost of overtime substantially. As occurred this case, an employer can work an employee 120 hours per week for as little additional pay as \$2.68 for each overtime hour worked.

Thus, the FWW method of calculating overtime can result in a drastic reduction in an employer's overtime obligations. There are four threshold requirements before the FWW method can be used, however: (1) the employee's hours must fluctuate from week to week; (2) the employee must receive a fixed amount as straight time pay that does not vary with the number of hours worked during the week (excluding overtime premiums); (3) the fixed amount must be sufficient to provide compensation every week at a regular rate that is at least equal to the minimum wage; and (4) the employer and employee must share a clear mutual understanding that the employer will pay that fixed salary regardless of the number of hours worked. 29 C.F.R. §778.114(a), (c); *O'Brien, et al., v. Town of Agawam, et al.*, 350 F.3d 279, 288 (1st Cir. 2003). To use the FWW method, an employer must meet each requirement. *O'Brien, et al., v. Town of Agawam, et al.*, 350 F.3d 279, 288 (1st Cir. 2003); *Dingwall v. Friedman Fisher Assocs. P.C.*, 3, F.Supp.2d 215, 221 (N.D.N.Y. 1998) (“[The FWW] method is an exception to the normal rights of the employee and thus the employer bears the burden of proving that all the requirements for applying the method are present.”) *Yourman, et al. v. Dinkins, et al.*, 865 F.Supp 154, 165 (S.D.N.Y. 1994) (citing *Burgess v. Catawba County*, 805 F.Supp. 341, 348 (W.D.N.C.1992)) *rev'd on other grounds*.

The Defendants in this case have failed to meet all the requirements of the FWW method because:

- (1) the salary amount that defendants paid plaintiffs regularly was regularly insufficient to meet the minimum wage. Indeed, defendants here have already lost summary judgment on this issue in another court: *Ferrer v. SGS Control Services, Inc.*, 04 CV 00916 (MD Fl. 2005)(Oral ruling granting summary judgment to plaintiffs), transcript attached as Exhibit A;
- (2) defendants did not pay plaintiffs a fixed amount as straight time pay for all hours worked. They periodically paid plaintiffs “sea pay” and “day off pay” as part of their base wages, rather than a “fixed amount” as straight time wages, *O'Brien*, 350 F.3d at 288;
- (3) the Plaintiffs did not have a clear mutual understanding that they would receive a fixed amount as straight time pay for all hours worked. On the contrary, the Plaintiffs understood that their straight time pay would vary each week with sea pay when they worked offshore, day off pay when they worked on their day off and a minimum wage bump up when their salary did not meet the minimum wage; and
- (4) the Plaintiffs did not receive an overtime premium for all the hours that they worked. The Defendants’ pay policy was that OGC inspectors were not to report

more than 16 hours of work in a day. As a result of the policy, OGC plaintiffs either did not report hours that they worked over 16 in a day, or they reported them but were not paid for them.

PAYING INSPECTORS A LOWER RATE FOR OVERTIME INSPECTIONS THAN PAID FOR BASE RATE INSPECTIONS

Defendants turn the overtime requirement of 29 U.S.C. §207 on its head by establishing a lower commission rate for inspections conducted in the overtime hours, than for inspections conducted within the first forty hours. *Employee Handbook*, p.3. In fact, DOL regulations, 29 C.F.R. § 778.316,¹ make clear that this blatant attempt to pay lower rates when overtime is worked is not legal. *See Schneider v. City of Springfield*, 2000 WL 988279 (S.D.Oh. 2000). Defendants' practice of setting a lower rate for inspections conducted in overtime hours runs afoul of the FLSA. 29 U.S.C. §207; 29 C.F.R. § 778.316. The result of the illegal practice was that plaintiffs worked substantial hours "off the clock."

CONCLUSION

Defendants failed to comply with the FLSA in paying its inspectors. Plaintiffs request the opportunity to move for partial summary judgment that defendants' payroll practices, as stated in their Employee Handbooks and company memoranda, violated the FLSA.

Thank you.

Sincerely,

Dan Getman

cc: Hon. Ronald L. Ellis
U.S. Magistrate Judge

David Long-Daniels
(By mail and email)

¹§ 778.316 Agreements or practices in conflict with statutory requirements are ineffective.

While it is permissible for an employer and an employee to agree upon different base rates of pay for different types of work, *it is settled under the Act that where a rate has been agreed upon as applicable to a particular type of work the parties cannot lawfully agree that the rate for that work shall be lower merely because the work is performed during the statutory overtime hours, or during a week in which statutory overtime is worked.*