

FAIR LABOR STANDARDS ACT
(29 USC §216)

This case arises under the Fair Labor Standards Act, the federal law that provides for the payment of ~~minimum wages~~ [and/or time-and-a-half overtime pay]. The Plaintiff claims that the Defendant did not pay him the ~~minimum wage~~ [and/or overtime pay] required by law.

The Plaintiff, in order to prevail, must prove by a preponderance of the evidence three things:

1. That the Plaintiff was employed by the Defendant during the time period involved;
2. That the Defendant's business [or businesses under a unified operation or common control] employed at least two persons engaged in commerce or in the production of goods for commerce and had annual gross sales of at least \$ _____; and
3. That the Defendant failed to pay the Plaintiff the ~~minimum wage~~ [or overtime pay] required by law.

The term "commerce" has a very broad meaning and includes any trade, commerce, transportation, transmission or communication between any state and any place outside that state.

The minimum wage which the Act required to be paid during the period of time involved in this case was \$ _____ per hour.

In determining whether an employer has paid the minimum wage it is entitled to a credit for the reasonable costs to

it of furnishing certain non-cash items [unless excluded under the terms of a union contract applicable to Plaintiff], such as meals and lodging if furnished for the benefit of the employee and voluntarily accepted by the employee.

The Act requires an employer to pay its employees at a rate of at least one and one-half times their regular rate for time worked in one work week over 40 hours. This is commonly known as time-and-a-half pay for "overtime" work.

The employee's "regular rate" during a particular week is the basis for calculating any overtime pay due him for that week.

The "regular rate" for a week is determined by dividing the first 40 hours worked into the total wages paid for those 40 hours. The overtime rate, then, would be one and one-half of that rate and would be owing for each hour in excess of 40 hours worked during the work week.

The Defendant claims that even if you should find that the Plaintiff has proved all the necessary elements of his claim, the minimum wage law [the overtime pay law] does not apply because it is exempt from those requirements.

The particular exemption claimed by the Defendant is [insert applicable exemption].

29 USC 213

(7)

In order to receive the benefit of this exemption, the Defendant has the burden of proving by a preponderance of the evidence [list or describe essential elements of the claimed exemption].

If upon consideration of all the evidence you find that the Plaintiff has failed to prove one or more of the elements of his/her claim, your verdict should be for the Defendant.

Or, if the Defendant has satisfied you by a preponderance of the evidence that it is exempt from the minimum wage law [overtime pay law], then your verdict should be for the Defendant even though the Plaintiff has proven the elements of his claim.

If, however, you find that the Plaintiff has proved by a preponderance of the evidence all of the elements of his claim, and that the Defendant has failed to establish its claim of exemption from the minimum wage law [or, the overtime pay law], then you must turn to the question of damages which Plaintiff is entitled to recover.

The measure of damages is the difference between what the employee should have been paid under the Act and the amount that you find he actually was paid.

Judge's Copy
FILED APR 18 1983

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Action No. 83-117

LINZELL HOWELL

PLAINTIFF

VS

MEMORANDUM IN
RESPONSE TO PLAINTIFF'S
OBJECTION TO REMOVAL AND MOTION TO
REMAND TO STATE COURT

COAL MAC SALES, INC.

DEFENDANT

** ** * * * * *

Comes the Defendant, Coal Mac Sales, Inc., and in response to Plaintiff's Objection to removal and Motion to remand to state court and files the following memorandum.

While the Pike Circuit Court is a Court of competent jurisdiction, pursuant to the Fair Labor Standards Act, this Court has concurrent jurisdiction of this matter. Pursuant to U.S.C. Section 1441(a), this action is removable from the Pike Circuit Court to the United States District Court for the Eastern District of Kentucky, 28 U.S.C. Section 1441(a), provides

Except as otherwise expressly provided by act of congress, any civil action brought in a state court of which the District Courts of the United States have an original jurisdiction, may be removed by the Defendant or the Defendants, to the District Court of the United States for the district and division embracing the place where such action is pending.

The cases relied upon by the Plaintiff pre-date the 1948 revision of 28 U.S.C. Section 1441(a), and are not applicable.

See Rossi v Singer Sewing Machine Co., 127 F.Supp. 53 (DC Conn, 1953). In Buckles v Morristown Kayo Co., 132 F. Supp. 555 (DC TN 1955), the Court held that Section 16B of the Fair Labor Standards Act contained no language that could fairly be construed as destroying removability.

Therefore, the Defendant submits that the Plaintiff's Motion to remand to state court should be overruled.

Respectfully submitted,

STRATTON, MAY & HAYS, PSC
P.O. Drawer 851
Pikeville, Kentucky 41501

BY: Stephen L. Hogg
Stephen L. Hogg

This is to certify that a true copy of the foregoing was this day mailed to Hon. Lawrence R. Webster, P.O. Drawer 712, Pikeville, Kentucky 41501, this 18th day of April, 1983.

Stephen L. Hogg
Stephen L. Hogg

Civil Action No. 83-117, HOWELL v. COAL MAC SALES, INC (LABOR)

Prelim. Conf. 17 Jun 83, 11 AM

Plaintiff sues employer for work as a night watchman, following a regular 40-hour week, for which he was not paid time-and-a-half. 29 U.S.C. 207(a)(1) requires that any employee working longer than 40 hours per week shall be compensated at a rate not less than one and one-half times the regular rate at which he is employed.

He claims he should be paid for 800 hours of such under-compensated work, asking for \$6,600 for work performed, 6,600 as liquidated damages, \$4,400 for attorney fees.

Larry Webster for Plaintiff. Steve Hogg for defendant/

Goomba for President

there is an exception for watchmen
but if ~~isn't~~ not applicable -
then it is a question of fact for
a jury to determine no. of hours
overtime, if any?