

Gainer v District Council 37 of the Am. Fedn. of State, County & Mun. Empls.
2024 NY Slip Op 31738(U)
May 17, 2024
Supreme Court, New York County
Docket Number: Index No. 152133/2022
Judge: Dakota D. Ramseur
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

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SAVIAN GAINER, ORLANDO RIVERA, JUSTINE
ESPINOZA, JULIAN DEJESUS, RAMON MARRERA,
SHAWN GREY, CLAUDIA QUICK, NANCY DE DELVA,
NICOLE LAING, ANDY CAZE, ANTHONY GRAVES,
NICOLE COLEMAN, TANYA MILLER

INDEX NO. 152133/2022

MOTION DATE 04/06/2023

MOTION SEQ. NO. 003

Plaintiffs,

- v -

DISTRICT COUNCIL 37 OF THE AMERICAN
FEDERATION OF STATE, COUNTY & MUNICIPAL
EMPLOYEES,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for DISMISSAL.

Plaintiffs, Savian Gainer, Orlando Rivera, Justine Espinoza, Julian DeJesus, Ramon Marrera, Shawn Grey, Claudia Quick, Nancy De Delva, Nicole Liang, Andy Caze, Anthony Graves, Nicole Coleman, and Tanya Miller, individually, and on behalf of all others similarly situated (plaintiffs), commenced this class action alleging that between October 6, 2017 and December 31, 2020, defendant, District Council 37 of the American Federation of State, County & Municipal Employees (DC 37), systematically misclassified plaintiffs as exempt from overtime wages, underpaid them by improperly denying them overtime pay, and failed to provide them with wage statements reflecting overtime worked and owed (NYSCEF doc. no. 47, second amended complaint¹). DC 37 now moves pursuant to CPLR 3211(a)(1) and (7), to dismiss the second amended complaint as to all but two of the plaintiffs in this class action seeking, among other things, unpaid overtime. The motion is opposed. For the following reasons, the motion is denied.

FACTUAL ALLEGATIONS

Plaintiffs and all class members were employees of DC 37, a division of the American Federation of State, County & Municipal Employees, and a labor union representing more than 150,000 public and non-profit workers in New York City (*id.*). Savian Gainer and Orlando

¹ The Court notes that the parties agree that the resolution of motion sequence 002 included granting plaintiff leave to file the second amended complaint. Defendant did not oppose plaintiff's motion to file the second amended complaint pursuant to the February 14, 2023 stipulation (NYSCEF doc. no. 43)

Rivera were employed as Political Legislative Aides (*id.*). Justine Espinoza, Julian DeJesus, Ramon Marrera, Shawn Grey, Nancy De Delva, Andy Caze, Anthony Graves, Nicole Coleman, and Tanya Miller were employed as Organizers (*id.*). Claudia Quick was employed as a Council Representative (*id.*).

Plaintiffs claim that DC 37 hired Savian Gainer as a Political Legislative Aide on November 3, 2013, and misclassified him as an exempt administrative employee from October 2, 2017 to December 31, 2020 (*id.*). Similarly, plaintiffs claim that DC 37 hired Orlando Rivera as a Political Legislative Aide on June 30, 2014, and misclassified him as an exempt administrative employee from October 6, 2017 to December 31, 2020 (*id.*).

Plaintiffs also assert that DC 37 hired Julian DeJesus as an Organizer on August 31, 2015, and misclassified him as an exempt administrative employee from October 6, 2017 to December 31, 2020 (*id.*). Plaintiffs further assert that DC 37 hired Ramon Marrera as an Organizer on November 1, 2017, and misclassified him as an exempt administrative employee from October 6, 2017 to December 31, 2020 (*id.*). In addition, plaintiffs claim that DC 37 hired Shawn Grey as an Organizer on September 25, 2017, and misclassified him as an exempt administrative employee from October 6, 2017 to December 13, 2020 (*id.*). Plaintiffs also claim that DC 37 hired Nancy De Delva as an Organizer on September 1, 2019, and misclassified her as an exempt administrative employee from September 1, 2019 to December 31, 2020 (*id.*). Plaintiffs further claim that DC 37 hired Anthony Graves as an Organizer on January 22, 2018, and misclassified him as an exempt administrative employee from January 22, 2018 to December 31, 2020 (*id.*). In addition, plaintiffs claim that DC 37 hired Andy Caze, Nicole Coleman, and Tanya Miller as Organizers on September 1, 2019, and misclassified them as exempt administrative employees from September 1, 2019 to December 31, 2020 (*id.*). Plaintiffs also claim that DC 37 hired Claudia Quick as a Council Representative on July 2, 2018, and misclassified her as an exempt administrative employee from July 2, 2018 and December 31, 2020 (*id.*).

Plaintiffs filed a complaint seeking, among other things, unpaid wages on March 11, 2022 (NYSCEF doc. no. 2). On August 9, 2022, plaintiffs filed an amended complaint seeking, among other things, unpaid wages (NYSCEF doc. no. 17). By Stipulation entered February 21, 2023, DC 37 consented to plaintiffs' cross-motion to further amend the pleadings (NYSCEF doc. no. 43).

On April 6, 2023, plaintiffs filed the second amended complaint on behalf of a class of all current and former Political Legislative Aides, Organizers, and Council Representatives employed by DC 37 (NYSCEF doc. no. 47). Plaintiffs state that the questions of law common to the class are (1) whether DC 37 misclassified its employees; (2) whether plaintiffs and the class are exempt under the NYCRR; (3) whether DC 37 engaged in a practice of failing to pay plaintiffs and the class all wages due for overtime hours; and (4) whether DC 37 failed to provide plaintiffs and the class with accurate wage statements (*id.*). Plaintiffs claim that they were not exempt from New York's overtime regulation for the period 2017 to 2020 because, among other things, their pay was less than the weekly pay threshold for the administrative exemption set forth in 12 NYCRR § 142-2.14 (*id.*).

The second amended complaint alleges that DC 37 violated Labor Law §§ 650 *et seq.* and applicable regulations by willfully failing to pay plaintiffs and the other class members overtime (first cause of action), and that DC 37 violated Labor Law §§ 190 *et seq.* by failing to provide plaintiffs and the other class members with accurate wage statements (fourth cause of action) (*id.*). The second, third, and fifth causes of action in the second amended complaint are withdrawn (*id.*). In addition, Justine Espinoza and Nicole Liang voluntarily discontinued their claims against DC 37 (NYSCEF doc. nos. 76, 77, notices of discontinuance).

DC 37 now seeks to dismiss the claims brought by the named Organizers and Council Representatives in the second amended complaint.

DISCUSSION

Under CPLR 3211(a)(1), dismissal is warranted where the documentary evidence conclusively establishes a defense as a matter of law (CPLR 3211[a][1]). On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]).

As stated, the second amended complaint alleges that DC 37 failed to pay plaintiffs overtime wages and provide them with accurate wage statements. “Article 6 of the Labor Law governs employers’ payment of wages and benefits to employees” (*Bynog v Cipriani Grp, Inc.*, 1 NY3d 193, 198 [2003]). An employer is subject to civil liability for failure to pay wages as required by Labor Law § 191 (*see Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220, 224-225 [2000]).

New York law imposes a minimum overtime rate of 1 ½ times the employee’s regular rate of pay for hours worked in excess of 40 hours per week (12 NYCRR § 142-2.2; *Mohammed v Start Treatment & Recovery Ctrs., Inc.*, 64 Misc 3d 1, 2 [Sup Ct, Kings County, Appellate Term 2019]). However, employees in bona fide executive, administrative, or professional capacities are exempt from that requirement (12 NYCRR § 142-2.14).

While the question of how employees spend their time working is a question of fact, the question of whether the employees’ particular undisputed activities exclude the employees from overtime benefits is a question of law (*see Mohammed*, 64 Misc 3d at 7). The viability of plaintiffs’ claims for unpaid overtime wages under article 6 of the Labor Law and related regulations turns on whether plaintiffs were exempt from the requirements of those laws, which mandate payment for hours worked in excess of 40 hours per week (Labor Law § 652; 12 NYCRR § 142-2.2).

Plaintiffs assert that they were employed by DC 37 as Political Legislative Aides, Organizers, and Council Representatives, and that DC 37 misclassified them as exempt administrative employees from 2017 to 2020. Employees work in an administrative capacity if they receive an annual salary above a certain level and their primary duties consist of office or

non-manual work directly related to the employer's business or administrative operations, which means work of substantial importance to the employer's business or administrative operations rather than production work (*see* 12 NYCRR § 142-2.14[c][4]; *Matter of Conners [Commissioner of Labor]*, 9 AD3d 703, 705 [3d Dept 2004] ["The performance of administrative duties generally requires the exercise of discretion and independent judgment"]).

Plaintiffs do not dispute that the description of the duties of Organizers and Council Representatives in the second amended complaint satisfy the administrative employee exemption since the duties, as alleged, reflect duties consisting of non-manual work directly related to DC 37's business or administrative operations, rather than production work. In fact, the duties of Organizers are described to include:

"Providing services including but not limited to: conducting house-visits and worksite visits to non-union workers to assess workplace concerns and union support; setting up and attending hearings related to Organizing, including PERB and NLRB hearings, creating and compiling reports on current organizing activities; scheduling and leading meetings of workers being organized; creating campaign plans and maintaining accurate records; preparing outreach materials and leaflets; mentoring newer organizers and member activists, working collaboratively with DC 37 staff, local leadership and volunteer member organizers"

(second amended complaint at ¶ 49). The pleadings describe the duties of Council Representatives to include:

"Provid[ing] services including handling grievances for the members of their Division, including relevant Agencies; visiting the various work locations to discuss and try to resolve problems members may have on the job; setting up and attending hearings, labor-management meetings; arbitrations; scheduling meetings with members; compiling reports; coordinating collective bargaining proposals for locals; and taking responsibility for all other union and job-related activities affecting the locals being serviced"

(*id.*, ¶ 83). The pleadings clearly allege that plaintiffs performed non-manual work directly related to DC 37's business or administrative operations rather than production work.

However, the parties disagree as to whether the pleadings satisfactorily allege that the salaries of plaintiffs Organizers and Council Representatives satisfy the administrative employee exemption. To qualify for the administrative employee exemption between 2018 and 2020, plaintiffs had to have been paid a salary of at least "\$825 per week [or \$42,900 annually] on and after December 31, 2016; \$975 per week [or 50,700 annually] on or after December 31, 2017; \$1,125 per week [or \$58,500 annually] on or after December 31, 2018" (12 NYCRR § 142-2.14[c][4]).

Here, the pleadings allege that Julian DeJesus, Ramon Marrera, Shawn Grey, Nancy De Delva, Andy Caze, Anthony Graves, Nicole Coleman, Tanya Miller, and Claudia Quick had annual salaries of \$55,161 in 2019, and \$56,265 in 2020. Based on the facts alleged, the salaries of plaintiffs Organizers and Council Representatives do not satisfy the administrative employee exemption for the period from 2018 to 2020.

However, in seeking dismissal of the claims, DC 37 essentially maintains that based on the plain language of 12 NYCRR § 142-2.14(c)(4)(ii)(d), plaintiffs' expense allowances should be included as a component of their salaries for purposes of determining whether their salaries satisfy the administrative employee exclusion.

Research reveals no statute or case law addressing whether expense allowances should be included as a component of salaries when determining if employees qualify for the administrative employee exemption. Labor Law § 190(1) defines the term "wages," as used in Labor Law article 6, to mean "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." 12 NYCRR § 142-2.14(c)(4)(ii)(d) broadly defines the term "salary" as "inclusive of board, lodging, other allowances and facilities." However, since the laws imposing minimum overtime rates are remedial, their exemptions are narrowly construed (*see Thomas v Meyers Assoc., L.P.*, 39 Misc 3d 1217[A] [Sup. Ct., New York County 2013], citing *Mohammed*, 64 Misc 3d 1, 6).

In *Maillard v New York State Teachers' Retirement Sys.* (57 AD3d 1299 [3d Dept 2008]), on which plaintiffs rely, the court affirmed a determination of the New York State Teachers' Retirement System, excluding an expense allowance under the applicable collective bargaining agreement from the petitioner's average salary for purposes of determining his final retirement benefit. However, *Maillard* does not address whether expense allowances should be included as a component of salaries when determining if employees qualify for the administrative employee exemption. In that case, the court determined that the conclusion that such income did not constitute regular compensation, within the meaning of Retirement and Social Security Law § 443(a), which states that "[r]egular salary earned shall exclude termination pay and payments which are not part of the salary base and/or are not paid over a period of years: for example, bonuses and one-time-only increments," was neither arbitrary nor capricious (*id.*). Thus, as the holding in *Maillard* concerned a distinct statutory scheme that accounted for payments apart from the employee's salary when determining regular compensation, whereas here, where no such provision exists, the holding in *Maillard* is inapplicable herein.

Here, it is important to note that DC 37 treats employee salaries and expense allowances distinctly in several instances. For example, employee salaries and expense allowances are addressed separately in the plaintiffs' job offers (NYSCEF doc. no. 25) and the contract between DC 37 and Union members (NYSCEF doc. no. 70). Given the ambiguity of whether expense allowances should be included as a component of salaries when determining whether employees qualify for the administrative employee exemption and construing the pleadings in the light most favorable to plaintiffs, the Court holds that the allegations in the cause of action for unpaid overtime are sufficient to survive a motion to dismiss.

Based on the foregoing analysis, plaintiffs' cause of action seeking accurate wage statements also remains viable. Thus, defendants' motion to dismiss is denied.

Furthermore, a review of the inventory for this matter reveals that plaintiff has not served or filed the second amended complaint. Accordingly, plaintiffs shall file and serve the second amended complaint upon defendant within twenty days.

Accordingly, it is hereby,

ORDERED that defendants motion to dismiss the second amended complaint is denied; and it is further

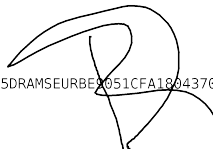
ORDERED that plaintiffs shall serve a copy of the second amended complaint in the proposed form annexed to the moving papers in motion sequence 002 (NYSCEF doc. no. 36) upon defendant within twenty (20) days; and it is further

ORDERED that defendant shall serve an answer to the second amended complaint within twenty (20) days from the date of said service; and it is further

ORDERED that plaintiff shall serve a copy of this order, with notice of entry, upon defendant and The Trial Support Office within ten (10) days; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 34 on June 18, 2024 at 9:30 a.m.

This constitutes the decision and order of the Court.

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DAKOTA D. RAMSEUR, J.S.C.

5/17/2024
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE