

U.S. DISTRICT COURT
BOISE, IDAHO
ORIGINAL

WILLIAM H. THOMAS (ISB 3154)
DANIEL E. WILLIAMS (ISB 3920)
CHRISTOPHER F. HUNTLEY (ISB 6056)
HUNTLEY PARK, LLP
250 S. Fifth St., Suite 660
P.O. Box 2188
Boise, ID 83701-2188
Telephone: (208) 345-7800
Fax: (208) 345-7894
wnthomas@huntleypark.com
danw@huntleypark.com
chuntley@huntleypark.com

4 JUL 14 PM 9:24
FILED BY [unclear] IDAHO
Cameron [unclear] Clerk

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE STATE OF IDAHO

KIMBERLEY SMITH, MICHAEL)
B. HINCKLEY, JACQUELINE T.)
HLADUN, MARILYN J. CRAIG,)
JEFFERY P. CLEVINGER, and)
TIMOTHY C. KAUFMANN,)
individually and on behalf)
of those similarly situated,)

Case No. CIV 01-0244-S-BLW

**PLAINTIFFS' BRIEF IN
OPPOSITION TO DEFENDANT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT RE: STATUTES OF
LIMITATION**

Plaintiffs,)

vs.)

MICRON ELECTRONICS, INC., a)
Minnesota corporation,)

Defendant.)

Plaintiffs submit their Brief in Opposition to Defendant's Motion for Partial Summary

Judgment Re: Statutes of Limitation as follows:

**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT RE: STATUTES OF LIMITATION, P. 1**

219

BACKGROUND

Plaintiff Kimberley Smith filed an initial Complaint on behalf of herself and a class of others who were similarly situated. In the Complaint, she alleged that Micron Electronics, Inc. ("MEI"), as her employer, failed to pay her and other employees for overtime hours that were worked off the clock. She alleged that MEI's practices violated the Fair Labor Standards Act ("FLSA") as well as Idaho State wage laws. An Amended Complaint was filed on June 1, 2001. That Amended Complaint added Plaintiff Michael B. Hinckley as a named Plaintiff. The Amended Complaint continued to claim violations of the FLSA and Idaho wage laws.

On April 23, 2002, additional Plaintiffs were added in a Second Amended Complaint. The Second Amended Complaint also asserted that MEI violated the FLSA and Idaho state wage laws. The Second Amended Complaint was brought on behalf of the named Plaintiffs, as well as those similarly situated. In this Complaint, an additional basis for a collective action based on Federal Rule of Civil Procedures, Rule 23, was alleged. The basis for this class action was also based on MEI's failure to pay its inside sales representatives wages that were due under Idaho law.

In the Second Amended Complaint, paragraph 49, the Plaintiffs requested that the Court equitably toll any statute of limitations that may be applicable to MEI employees who were denied overtime compensation.

In paragraph 65 of the Second Amended Complaint, Plaintiffs also assert that "MEI's FLSA violations were willful" under 29 U.S.C. § 255(a), and that MEI "did not act in good faith in failing to pay proper overtime pay."

For purposes of their opposition to Defendant's Motion for Partial Summary Judgment re Statutes of Limitation, Plaintiffs also rely on their Statement of Material Facts filed concurrently with this brief.

PLAINTIFFS' ARGUMENTS

I. SUMMARY JUDGMENT STANDARDS.

Federal Rule of Civil Procedure 56©) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show an absence of an issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once the moving party does so, the non-moving party must go beyond the pleadings and designate specific facts showing a genuine issue for trial. *Id* at 324. The court must "not weigh the evidence or determine the truth of the matter, but only determines whether there is a genuine issue for trial." *Balint v. Carson City*, 180 F3d 1047, 1054 (9th Cir 1999) (citation omitted). A "'scintilla of evidence,' or evidence that is 'merely colorable' or 'not significantly probative,'" does not present a genuine issue of material fact. *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F2d 1539, 1542 (9th Cir), *cert. denied*, 493 U.S. 809, 107 L. Ed. 2d 20, 110 S. Ct. 51 (1989) (emphasis in original) (citation omitted).

The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F2d 626, 631-32 (9th Cir 1987). The court must view the inferences drawn from the facts "in the light most favorable to the nonmoving party." *Id* at 631 (citation omitted). Thus, reasonable doubts about the existence of a factual issue should be resolved against the moving party. *Id* at 630-31. "However, in construing

the FLSA, [a court] must be mindful of the directive that it is to be liberally construed to apply to the furthest reaches consistent with Congressional direction. Mitchell v. Lublin, McGaughy & Assoc., 358 U.S. 207, 211, 3 L. Ed 2d 243, 79 S. Ct. 260 (1959).” *Biggs v. Wilson*, 1 F.3d 1537, 1539 (9th Cir. 1993).

II. THE FLSA PROVIDES FOR EITHER A TWO OR THREE-YEAR STATUTE OF LIMITATIONS.

The statute of limitations under the FLSA, 29 U.S.C. § 255(a) is two years on actions to enforce the act, but that statute provides in addition a three-year limitations period for a cause of action arising out of a willful violation. In the Ninth Circuit “[a] violation is willful if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA].” *Chao v. A-One Medical Services, Inc.*, 346 F.3d 908 (9th Cir. 2003) citing, *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 100 L. Ed 2d 115, 108 S. Ct. 1677 (1988); *SEIU, Local 102 v. County of San Diego*, 60 F.3d 1346, 1356 (9th Cir. 1994) (quoting *Richland Shoe*). Also, the Ninth Circuit in *Alvarez*, supra, permitted a finding of willfulness where the evidence demonstrated that the “employer disregarded the very ‘possibility’ that it was violating the statute . . .” *Alvarez* at 908-09 (quoting *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 141 (2d Cir. 1999).

MEI’s Motion for Partial Summary Judgment is premature since the issue of whether or not the FLSA’s two or three-year statute of limitations applies has not yet been decided. At page 12 of its Memorandum in Support of Motion for Partial Summary Judgment, MEI merely recites the standards for application of the three-year statute of limitations and asserts that Plaintiffs have not met their burden of proof with regard to this issue. To date, the issue has never been

before the Court which is why the Plaintiffs have not put on any evidence of willfulness. The issue simply has never been raised by either side nor presented to the Court for a determination. Without a determination regarding this issue, MEI's Partial Summary Judgment Motion is, at best, premature and should be denied.

III. THE COURT SHOULD APPLY EQUITABLE TOLLING AND ANY LIMITATIONS PERIODS SHOULD BEGIN TO RUN FROM THE DATE PLAINTIFFS FIRST FILED THEIR COMPLAINT

Plaintiffs contend in their Second Amended Complaint that any applicable statutes of limitation should be subject to the doctrine of equitable tolling. Second Amended Complaint, Para. 49, Docket No. 94. The Ninth Circuit has long-recognized a court's ability to toll the statute of limitations in Fair Labor Standards Act cases. *Partlow v. Jewish Orphans' Home of Southern California, Inc.*, 645 F.2d 757 (9th Cir. 1981).

Factual situations where the doctrine of equitable tolling has been applied was discussed in *Miller v. Beneficial Management Corp.*, 977 F.2d 834 (3d Cir. 1992). The Court said at 845 citing *Kocian v. Getty Ref. & Mktg Co.*, 707 F.2d 748, 753 (3d Cir.):

three principal, though not exclusive, situations where equitable tolling may be appropriate . . . (1) [if] the defendant has actively misled the plaintiff, (2) if the plaintiff has in "some extraordinary way" been prevented from asserting his rights or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum.

The Court further said,

Equitable tolling applies "where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights" . . . Furthermore, the 'contention that only 'egregious actions of active deception' can toll the limitation period has no support in the law.' *Id.* (Citations omitted).

More recently, in *Henchy v. City of Absecon*, 148 F. Supp. 2d 435 (D. N.J. 2000) the court denied a motion for summary judgment based on the FLSA's two year statute of limitations. Plaintiff argued that the statute of limitations should be equitably tolled because the employer repeatedly assured plaintiff that his overtime compensation was proper and also because the employer had failed to post the requisite minimum wage and overtime notices required under Department of Labor regulations.

In another U.S. District Court case, *Hasken v. City of Louisville*, 173 F. Supp. 2d 654 (W.D. Ky. 2001) the court found that there was a genuine issue of material fact on whether the statute of limitations was tolled during the time period that the employees did not know how their overtime was calculated. The employer argued that the statute of limitations had expired for several employees because the claims were more than 3 years old. Plaintiffs argued that the limitations period was tolled because they did not learn about the employer's improper pay calculations until they read about it in the newspaper. The employer argued that the posted notices provided sufficient notice. The court disagreed and concluded that the postings failed to address the critical issue of the method by which the hourly rate was calculated.

In this case the testimony of numerous MEI sales representatives indicates there were widespread, egregious and intentional violations of the FLSA occurring throughout MEI. As demonstrated by the testimony of the numerous former employees who were deposed, all, in some form or another worked off the clock. (Plaintiffs' Statement of Material Facts). Plaintiffs were limited in the number of overtime hours they could record, but encouraged to work beyond those hours. (Plaintiffs' Statement of Material Facts, testimony of Isaac B. Moffett, Jeffrey R. Parrish, Carren Seibert-Mattson, Jeffrey Clevenger, Marilyn Craig, T. Scott Wells, Jarame M.

Ell, Jacqueline Hladun, David Thom, Timothy Kaufmann, James Wells, Michele Saari, Kevin M. Henderson, Dale Hope and Tawni Weaver). Supervisors intentionally encouraged this off-the-clock work. (Plaintiffs' Statement of Material Facts, testimony of Isaac B. Moffett, Jeffrey R. Parrish, Carren Seibert-Mattson, Marilyn Craig, David Thom, Timothy Kaufmann, James Wells, Michele Saari, Kevin M. Henderson, Dale Hope and Tawny Weaver). Several of the deponents testified that they did not know how their wages were being calculated, especially with regard to including their commission in the overtime calculations. (Plaintiffs' Statement of Material Facts, testimony of T. Scott Wells, Jacqueline Hladun, Alan Garcia, Ryan Keen and Dale Hope).

Despite attempts to place the blame on employees who worked off the clock, it is clear that supervisors ignored the practice or did nothing to stop it since they had many tools at their disposal to determine the actual hours the employees were working besides visually seeing them working before or after normal working hours. (Plaintiffs' Statement of Material Facts, testimony of Carren Seibert-Mattson, T. Scott Wells, and Jarame M. Ell). The decisions to allow employees to work off the clock were based on budget considerations rather than following the law of the FLSA. (Plaintiffs' Statement of Material Facts, Kim Smith and Michelle Saari). The commission system and the opportunity to earn more than the \$7 to \$9 per hour motivated employees to ignore the rules and work off the clock. (Plaintiffs' Statement of Material Facts: Isaac B. Moffett, Jeffrey Clevenger, Marilyn Craig, T. Scott Wells, David Thom, Ryan Keen, and James Wells.) Complaints about the consumer system fell on deaf ears. Most employees lived in fear of retaliation. (Plaintiffs' Statement of Facts: Isaac B. Moffett, Carren Seibert-Mattson, and Jacqueline Hladun.)

The above summary only begins to catalog some of the illegal practices employed by MEI

to get the most out of its employees for the least amount of money. These flagrant patterns provide an ample basis upon which the Court can find misconduct sufficient to invoke equitable tolling. Based on these facts employees would not have been able to articulate when the FSLA had been violated and thereafter file a lawsuit to stop the statutes of limitation from running. Under these circumstances, it would be appropriate to allow equitable tolling to toll all statutes of limitation until the first complaint in this matter was filed June 1, 2001.

IV. NO STATUTES OF LIMITATION SHOULD RUN AGAINST PLAINTIFFS' RULE 23 CLASS ACTION.

MEI's discussion of the opt-in nature of an FSLA class action is correct, but it is inapplicable to Plaintiffs' other class action claim. In their Second Amended Complaint, Plaintiffs have asserted a Rule 23 class action with regard to their state law claims for unpaid wages. In *Partlow, infra*, the Ninth Circuit pointed out that "[t]he procedures for instituting a class action under the FSLA differ significantly from the procedures mandated under Rule 23 of the Federal Rules of Civil Procedure. Courts had uniformly held that the standard Rule 23 procedures court-directed notice to members of a certified class who must affirmatively request to be excluded from a lawsuit to avoid becoming a party are inapplicable within FSLA actions. Under the FSLA, a member of the class who is not individually named in the complaint is not a party to the lawsuit unless he affirmatively "opts in" by filing a written consent with the Court." *Id.* at 758 (citations omitted).

The filing of a plaintiff class action tolls the statute of limitations for all potential class members. *American Pipe & Construction Co., et al. v. Utah, et al.*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). The rationale expressed in *American Pipe* and other United States

Supreme Court cases was explained as follows:

In the traditional litigation context, the Supreme Court has recognized that “statutes of limitations are primarily designed to assure fairness to defendant.” Notice and repose are central aspects of such statutes – notice of the need to preserve evidence to defend a claim, and expectation of repose after a designated time period has expired because the legislature has determined that at the expiration of that period, considerations of unfairness to the defendant outweigh the factor of affording the plaintiffs a reasonable time to assert a claim. The Supreme Court has also recognized that judicial economy deriving from litigative efficiency is a basic objective of a class action. In *American Pipe*, which considered the tolling of the statute of limitations in the context of plaintiff class action litigation, the Supreme Court issued a tolling rule that considered and reconciled the objectives of both Rule 23 and statutes of limitations. In ruling that the filing of a plaintiff class action tolled the statute of limitations for all potential class members, the court observed that the limitations tolling would avoid the need for plaintiff class members to file protective motions to join or intervene in the event the class was subsequently denied, thus promoting litigation efficiency and economy which is a principal purpose of Rule 23. Equally important, *American Pipe* stressed that the filing of a complaint initiating a plaintiff class action notifies the defendants “not only of the substantive claims being brought against them, but also the number and generic identities of the potential plaintiffs.” Accordingly, under this tolling rule, the defendants will have notice within the limitations period of the scope of prospective litigation against them.

2 Alba Conte & Herbert Newberg, *Newberg on Class Actions*, Section 4:54 (4thEd. 2002).

When Plaintiffs filed their Second Amended Complaint their Rule 23 class action allegation will relate back to the original filing date of June 1, 2001. Under Federal Rule of Civil Procedure 15 (c)(2) “An amendment of a pleading relates back to the date of the original pleading when (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . .” The circumstance described in Rule 15 (c)(2) is exactly the factual situation presented here. In Plaintiffs’ original complaint, the amended complaint and the second amended complaint,

Plaintiffs have always claimed that MEI unlawfully failed to pay them wages that they were owed. The conduct complained of in the first complaint was the same as that set forth in the second amended complaint. Therefore, the second amended complaint should relate back to the original filing date, June 1 2001.

**V. PORTIONS OF PLAINTIFFS' UNPAID OVERTIME WAGES ARE
SUBJECT TO THE TREBLING PROVISION OF IDAHO CODE §§ 45-614 AND 45-615**

Under the regulatory framework of the FLSA, individual states may enact wage and hour laws that provide for remedies that are more generous than those provided by the FLSA.

Regulation 29 C.F.R. § 778.5 expresses that rule in pertinent part as follows:

§ 778.5 Relation to other laws generally. Various Federal, State and local laws require the payment of minimum hourly, daily or weekly wages different from the minimum set forth in the Fair Labor Standard Act, and the payment of overtime compensation computed on bases different from those set forth in the Fair Labor Standards Act. Where such legislation is applicable and does not contravene the requirements of the Fair Labor Standards Act, nothing in the act, the regulations or the interpretations announced by the Administrator should be taken to override or nullify the provisions of these laws. . . .

Under Idaho's wage claim statute, I.C. § 45-615(2), a "plaintiff shall be entitled to recover from the defendant either the unpaid wages plus the penalties provided for in section 45-607, Idaho Code; or damages in the amount of three (3) times the unpaid wages found due and owing, whichever is greater." In the event an employee has been paid wages and is claiming additional wages Idaho Code, § 45-614 limits the recovery to "six (6) months from the accrual of the cause of action."

Here, some of the time claimed by the Plaintiffs will fall within the six month time period. For those wages that are satisfy these provisions of the Idaho Code, Plaintiffs request that

the Court treble those damages in accordance with Idaho law.

VI. CLAIMS UNDER IDAHO CODE 44-1502(3).

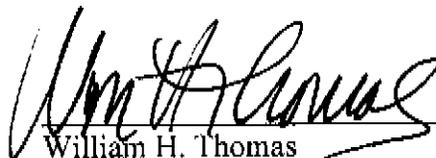
Plaintiffs do not allege that MEI failed to pay them the minimum wage as required by either the FLSA or Idaho Code 44-1502(3) and therefore agree to dismiss only those claims.

CONCLUSION

There are multiple factual disputes presented by this motion for partial summary judgment defendant's motion should be denied.

DATED this 14th day of July, 2004.

HUNTLEY PARK, LLP



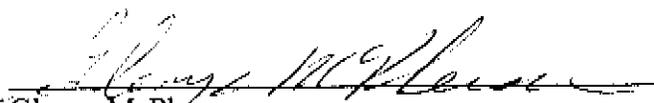
William H. Thomas
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2004, a true and correct copy of the foregoing instrument was served upon opposing counsel as indicated below:

Kim J. Dockstader
Gregory C. Tollefson
STOEL RIVES LLP
101 S. Capitol Blvd., Suite 1900
Boise, ID 83702-5958

Via Hand Delivery
 Via Facsimile 389-9040
 Via U. S. Mail


Glenys McPherson