

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 09-CV-23420-ASG

SEAN DUFFIE,
individually and on behalf of
others similarly situated,

Plaintiff,

v.

AFFORDABLE FAMILY HEALTH PLANS, LLC., a Florida Limited Liability Company,
ELIBERTO JUAN GRACIA JR., Individually,
and ARIEL MARTINEZ, Individually,

Defendants.

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AMENDED COLLECTIVE ACTION COMPLAINT

Plaintiff, SEAN DUFFIE (“Plaintiff”), was an employee of Defendant, AFFORDABLE FAMILY HEALTH PLANS, LLC., (“AFHP”), ELIBERTO JUAN GRACIA JR (“EJGJ”), individually, and ARIEL MARTINEZ (“AM”), individually (collectively “Defendants”) and brings this action for unpaid overtime compensation, declaratory relief, and other relief under the Fair Labor Standards Act, as amended, 29 U.S.C. § 216(b) (the “FLSA”).

At all times relevant hereto Plaintiff was a non-exempt commission paid inside “Insurance Sales Agent,” and performed related activities for Defendants in, among others, Dade County, Florida. The other putative Plaintiffs that already have, and will, join this lawsuit are non-exempt commission paid inside “Insurance Sales Agents” who earned less than \$100,000 in compensation from Defendants in one or more years during the applicable statute of limitations, and who worked for Defendants at their offices throughout Florida.

FACTS

1. Plaintiff, SEAN DUFFIE, was an employee of Defendants as more fully alleged herein. Plaintiff brings this action on behalf of himself and on behalf of other, current and former employees of Defendants similarly situated to him for overtime compensation and other relief under the Fair Labor Standards Act, as amended, 29 U.S.C. § 201 *et seq.* (the “FLSA” or the “Act”).

2. At all times material hereto, Plaintiff was employed by Defendants as a non-exempt commission paid inside “Insurance Sales Agent,” performing the duties of an inside or telemarketing sales person, primarily within the personal jurisdiction and venue of this Court.

3. Plaintiff was employed by Defendants, from approximately March, 2008, through May, 2008.

4. Defendants should be in possession of all of the time and wage records for all of Plaintiff's and similarly situated employees' workweeks.

5. Defendant, AFHP is a Florida Limited Liability Company that sells insurance and related services and products, for compensation out of its offices in Dade County, Florida and elsewhere, principally under the trade name “Affordable Family Health.”

6. Defendants suffer persons such as Plaintiff and others similarly situated to work on their behalf in performing the duties of an inside or telemarketing sales “Insurance Sales Agent” for the insurance and related services Defendants offer.

7. At all times relevant to this action, EJGJ was an individual resident of the State of Florida, who owned and operated AFHP, and who regularly exercised the authority to: (a) hire and fire employees of AFHP; (b) determine the work schedules for the employees of AFHP; and (c)

control the finances and operations of AFHP. By virtue of having regularly exercised that authority on behalf of AFHP, EJGJ is an employer as defined by 29 U.S.C. 201 *et. seq.*

8. At all times relevant to this action, AM, was an individual resident of the State of Florida, who operated AFHP, and who regularly exercised the authority to: (a) hire and fire employees of AFHP; (b) determine the work schedules for the employees of AFHP; and (c) control the finances and operations of AFHP. By virtue of having regularly exercised that authority on behalf of AFHP, AM is an employer as defined by 29 U.S.C. 201 *et. seq.*

9. Each Defendant directly or indirectly acted in the interest of an employer toward Plaintiff and others similarly situated at all material times, including without limitation directly or indirectly controlling the terms of employment of Plaintiff and others similarly situated. Alternately, Defendants are joint employers of Plaintiff and other similarly situated non-exempt workers in that each Defendant acts in the interest of the other in relation to Plaintiff and other similarly situated workers. As a further alternative, Defendants are joint employers in that they are not completely disassociated with respect to the terms of compensation and employment of Plaintiff and others similarly situated.

10. At all times material hereto, Plaintiff and all the similarly situated employees were performing their duties for the benefit of and on behalf of Defendants.

11. This cause of action is brought as a collective action to recover from Defendants overtime compensation, liquidated damages, a declaratory judgment, and the costs and reasonable attorney's fees under the provisions of Title 29 U.S.C. §216(b) on behalf of Plaintiff and all other current and former employees similarly situated during the material time.

12. The asserted class for this collective action includes all current and former employees similarly situated to Plaintiff, who were non-exempt hourly/commission paid inside “Insurance Sales Agents” who earned less than \$100,000 in compensation from Defendants in one or more years during the applicable statute of limitations, and who worked for Defendants at their offices around the country, during the time period of OCTOBER 2006 through current (the "material time").

13. In the course of employment with Defendants, the Plaintiff and the other employees in the asserted class regularly worked overtime hours (that is, hours in excess of forty (40) hours per workweek, referred to herein as “overtime hours”) and were not paid overtime compensation at an overtime rate of time and one-half of their regular rate of pay (the “overtime rate”) for all of the overtime hours worked, based in part upon Defendants’ custom and practice of failing to, among other things, credit time actually worked and failing to calculate the correct regular rate of pay from which to determine the proper overtime rate of pay, among other violations of the FLSA.

14. Defendants employed Plaintiff and those similarly situated to him, under a compensation plan, whereby they paid Plaintiff, and those similarly situated to him, solely commissions, and failing to pay Plaintiff and those similarly situated to Plaintiff any additional wage in weeks in which they worked in excess of 40 hours.

15. In all weeks where Plaintiff and the other similarly situated employees earned commissions, Defendants paid Plaintiff solely his commissions, and failed to pay Plaintiff appropriate overtime, or any overtime whatsoever.

16. By failing to pay overtime to Plaintiff and the putative class as articulated in Paragraph 17 above, Defendants violated 29 C.F.R. §778.118.

17. Defendants do not possess any records that show in each workweek during Plaintiff's employment with Defendants in which he worked more than forty (40) hours per week, that they properly paid Plaintiff appropriate overtime wages.

18. The records, if any, concerning the number of hours actually worked by Plaintiff and all other employees in the asserted class, and the compensation actually paid to such employees should be in the possession and custody of Defendants.

19. Subject matter jurisdiction is conferred on this Court by Title 28 U.S.C. §1337 and by Title 29 U.S.C. §216(b).

20. At all times pertinent to this Complaint, Defendants were an enterprise engaged in interstate commerce or in the production of goods for commerce as defined §3(r) and 3(s) of the Act, 29 U.S.C. §203(r) and 203(s).

21. At all times relevant hereto, the annual gross sales volume of the Defendants was in excess of \$500,000.00 per annum.

22. By nature of their work, Plaintiff and those employees similarly situated worked in interstate commerce so as to fall within the protections of the Act.

23. At all times pertinent to this Complaint, Defendants failed to comply with Title 29 U.S.C. §§ 201-209 in that Plaintiff and those employees similarly situated performed services and labor for Defendants for which Defendants made no provision to pay Plaintiff and the other employees in the asserted class full and proper overtime compensation to which they were lawfully entitled for all of the hours worked in excess of forty within a workweek.

24. Plaintiff has retained the undersigned counsel to represent him individually and on behalf of the asserted class, and has incurred attorney's fees and costs in bringing this action.

Pursuant to 29 U.S.C. § 216(b), Plaintiff is entitled to recovery of reasonable attorney's fees and costs if he prevails in this action.

COUNT I
RECOVERY OF OVERTIME COMPENSATION

25. Plaintiff re-alleges, and incorporates here by reference, all allegations contained in Paragraphs 1 through 24 above.

26. Plaintiff is entitled to be paid time and one-half of Plaintiff's respective regular rates of pay for each hour worked in excess of forty (40) hours per work week. All similarly situated employees (comprising the members of the asserted class) are similarly owed their full overtime rate for each overtime hour they worked and were not properly paid.

27. By reason of the said intentional, willful and unlawful acts of Defendants, Plaintiff and the similarly situated employees in the asserted class have suffered damages plus incurring costs and reasonable attorney's fees.

28. As a result of Defendants' willful violation of the Act, Plaintiff and those similarly situated to Plaintiff are entitled to liquidated damages.

29. Plaintiff demands a jury trial.

WHEREFORE, Plaintiff, SEAN DUFFIE, and those persons similarly situated to Plaintiff who have or will opt into this collective action, demand judgment against Defendants, jointly and severally, for the payment of compensation for all overtime hours at one and one-half their regular rate of pay due them for the hours worked by them for which they have not been properly paid, liquidated damages, reasonable attorney's fees and costs of suit, prejudgment interest, and for all other appropriate relief.

Dated: December 1, 2009

Respectfully submitted,

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s/ ANDREW FRISCH
Andrew Frisch
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 1st day of December 2009, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send notice of electronic filing to all parties of record.

I also CERTIFY that I mailed a copy of the foregoing to counsel of record for Defendants, who agreed to accept service on behalf of all defendants, by U.S. Mail to:

Stuart Goldstein, Esq.
LAW OFFICES OF GOLDSTEIN & SORDO
9350 South Dixie Highway, 10th Floor
Miami, FL 33156

s/ ANDREW FRISCH
Andrew Frisch, Esquire