

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

RAMON B. OSORIO JR.,
individually and on behalf of all others
similarly situated,

Plaintiff,

v.

RUST-OLEUM CORPORATION, INC.,
Defendant.

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Case No:

JURY TRIAL DEMANDED

COLLECTIVE ACTION COMPLAINT

Ramon B. Osorio Jr., (“Plaintiff”) individually and on behalf of all others similarly situated, by and through his undersigned attorneys, hereby brings this Collective Action against Rust-Oleum Products, Inc. (“Defendant”) to recover unpaid overtime compensation, liquidated damages, attorney’s fees, costs, and other relief as appropriate under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (“FLSA”). Plaintiff’s allegations are based upon knowledge as to matters relating to himself and upon information, belief and the investigation of counsel as to all other matters:

JURISDICTION AND VENUE

1. This Court has subject-matter jurisdiction over Plaintiff’s FLSA claims pursuant to 28 U.S.C. § 1331 because Plaintiff’s FLSA claims present a federal question under 29 U.S.C. § 201, *et seq.*

2. This Court has jurisdiction over Plaintiff’s collective action FLSA claim pursuant to 29 U.S.C. § 216(b), which provides that suit under the FLSA “may be maintained against any employer . . . in any Federal or State court of competent jurisdiction.”

3. Defendant’s annual sales exceed \$500,000 and it has more than two employees, so the FLSA applies in this case on an enterprise basis. Defendant’s employees engaged in interstate

commerce and therefore they are also covered by the FLSA on an individual basis.

4. Venue lies in in this District pursuant to 28 U.S.C. § 1391 because the Defendant is incorporated in this District and subject to personal jurisdiction in this District.

PARTIES

5. Plaintiff is an adult resident of Illinois who was a maintenance mechanic, hourly production worker for Defendant from approximately January 2018 until approximately February 2021.

6. Defendant is an Illinois corporation with a registered address of 11 E. Hawthorne Parkway Vernon Hills, Illinois 60061, which is also its world headquarters. *See* <https://www.rustoleum.com/pages/about-rust-oleum/Global/north-america/> (last accessed May 5, 2022).

MATERIAL FACTS

7. Around October 2020, Defendant hired Plaintiff on an hourly basis to work as a production Operator and, thereafter promoted him to work as a Line Leader at one of its production facilities in Vernon Hills, Illinois. During the relevant time period, Defendant paid Plaintiff at the rate of \$24.05 per hour.

8. Beginning around 2020, in addition to the base wage rate it paid all hourly employees, Defendant incorporated a non-discretionary production bonus into its payment structure based on the number of gallons of product produced. Plaintiff and other hourly employees were eligible for, and regularly received, these non-discretionary production bonuses in addition to their base hourly rate.

9. During this time, Defendant also regularly scheduled its hourly employees to work “second shift,” any time between 4:00pm and 2:00am, during which they paid the employees an

extra \$1 per hour as a shift premium. Similarly, for shifts on Sundays, Defendant paid their hourly employees a double-time premium. Plaintiff and other hourly employees were eligible for, and regularly received, these non-discretionary shift premiums in addition to their base hourly rate.

10. Defendant did not include these routine, non-discretionary bonuses and premiums in calculating its hourly employees' regular or overtime premium wage rates. As a result, Plaintiff and the other hourly workers at Defendant's production facilities in Vernon Hills, Illinois, who regularly worked over 40 hours per workweek, were always paid overtime wages calculated based on a regular rate that did not include any of their earned production bonuses or shift premiums.

11. During the relevant period, Defendant paid Plaintiff \$1,700 per year in "bonus" and "gain sharing" that was not included in the calculation of Plaintiff's regular or overtime rates.

12. During the relevant period, Defendant also paid Plaintiff a \$1 per hour "shift 4 premium" and a "doubletime" rate on Sundays that were not included in the calculation of Plaintiff's regular or overtime rates.

FLSA COLLECTIVE ACTION ALLEGATIONS

13. Pursuant to 29 U.S.C § 216(b), Plaintiff brings his FLSA claim as a collective action for: "all Rust-Oleum Products, Inc. hourly employees who: (a) were eligible for and received shift differential pay, non-discretionary attendance bonuses, and/or peak-demand pay for work performed from three years from the date of the filing of this lawsuit until the present and (b) whose overtime rates during this period did not account for this pay as required by FLSA and its attendant regulations" (the "FLSA Collective").

14. Plaintiff and the FLSA Collective are "similarly situated," as this term is used in 29 U.S.C § 216(b) because, among other things, they all were eligible for, and Defendant did provide

them with non-discretionary bonuses and premium pay, but did not consider these sums to be part of their regular rate for calculating their overtime wages.

15. Resolution of this action requires inquiry into common facts.

16. The FLSA Collective members are known to Defendant, are readily identifiable, and can be located through payroll records Defendant is required to maintain pursuant to the FLSA. 29 U.S.C. § 211(c); 29 C.F.R. § 516 *et seq.*

17. Conditional certification of this case as a collective action pursuant to 29 U.S.C § 216(b) is proper and necessary so the FLSA Collective members can be notified of this action and allowed to join this action collectively adjudicate their claims.

18. Many similarly-situated current and former Rust-Oleum employees have not been paid all overtime wages owed to them, so would benefit from the issuance of a court-supervised notice.

COUNT I
VIOLATIONS OF THE FLSA, 29 U.S.C. §§ 201, *et seq.*
FAILURE TO PAY REQUIRED OVERTIME

19. Plaintiff incorporates the foregoing paragraphs as if fully stated herein.

20. Defendant is an employer within the meaning of 29 U.S.C § 203(d).

21. Plaintiff and the FLSA Collective are employees within the meaning of 29 U.S.C § 203(e).

22. Under the FLSA, Defendant’s hourly employees were and are entitled to be paid for all overtime hours worked in each workweek at a rate of at least 1.5 times their “regular rate” of pay.

23. Under the FLSA, the regular rate is the “keystone” to calculating the correct overtime rate. *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945). It is “the

hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed.” *See* 29 C.F.R. § 778.108.

24. No matter how an employee is paid—whether by the hour, by the piece, on a commission, or on a salary—the employee’s compensation must be converted to an equivalent hourly rate from which the overtime rate can be calculated. 29 C.F.R. §778.109. “The regular hourly rate of pay is determined by dividing the employee’s total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by the employee in that workweek for which such compensation was paid.” *Id.*

25. There is a statutory presumption that remuneration in any form must be included in the regular rate calculation. Employers are responsible for establishing that any premium payment should be excluded from the regular rate calculation. *Madison v. Resources for Human Dev. Inc.*, 233 F.3d 187 (3rd Cir. 2000). Thus, determining the regular rate starts from the premise that all payments made to Defendant’s hourly employees for work performed are included in the base calculation.

26. The FLSA and its implementing regulations thus specifically require that an employee’s regular rate of pay account for all forms of remuneration, including his or her hourly pay, plus any and all routine and non-discretionary bonuses, including “extra premiums as night shift differentials... and premiums paid for hazardous, arduous, or dirty work.” *See* 29 C.F.R. §778.207(b) (“[e]xtra overtime compensation must be separately computed and paid on payments such as bonuses or shift differentials which are not included in the computation of the established basic rate....”).

27. The FLSA and its implementing regulations outline eight types of payments that need not be included in calculating an employee’s regular rate. *See* 29 U.S.C. § 207(e). However,

Defendant's shift premiums, production bonuses, and other remuneration do not fall within any of the statutory exclusions from the regular rate described in 29 U.S.C. §§ 207(e)(1)-(8).

28. By knowingly failing to include any and all shift premiums, production bonuses, and other remuneration into its hourly employees' regular rate when calculating their overtime rates and failing to pay all overtime wages its employees actually earned, Defendant willfully violated the FLSA.

RELIEF REQUESTED

WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated, requests the following relief:

- a. Designation of this action as a collective action pursuant to the FLSA, 29 U.S.C. § 216(b), and an order directing Defendant to provide to Plaintiff a list of all persons employed by them who were eligible for and did receive any shift-differential, production, and/or other non-discretionary bonus on at least one paycheck on which they also earned overtime compensation for work above 40 hours as required. This list shall include the last known address, email, and telephone number of each such person, so that Plaintiff can give such persons notice of this action and an opportunity to make an informed decision about whether to participate;
- b. A complete accounting of all the compensation Plaintiff and all others similarly situated are owed;
- c. A declaratory judgment that the practices complained of herein are unlawful under the FLSA;
- d. An award of compensatory damages, an equal amount of liquidated damages as required by the FLSA ;
- e. An award of damages representing the employer's share of FICA, FUTA, state unemployment insurance, and any other required employment taxes;
- f. An award of prejudgment and post-judgment interest;
- g. An award of costs and expenses of this action together with reasonable attorneys' and litigation costs, and a service award for the Named Plaintiff; and

h. Such other and further relief as this Court deems just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues in this Complaint that are so triable as a matter of right.

Respectfully submitted,

/s/ James B. Zouras

James B. Zouras

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CERTIFICATE OF SERVICE

I, the attorney, hereby certify that on May 6, 2022, I electronically filed the attached with the Clerk of the Court using the ECF system which will send such filing to all attorneys of record.

/s/ James B. Zouras