

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 1:13-cv-217-WJM-KLM

JEFFERY D. BREWER,

Plaintiff,

v.

MONTROSE MEMORIAL HOSPITAL, INC., and
BOARD OF TRUSTEES FOR MONTROSE MEMORIAL HOSPITAL,

Defendants.

**FIRST AMENDED COMPLAINT
(JURY TRIAL DEMAND)**

BACKGROUND

1. Jeffery D. Brewer, the Plaintiff, through his undersigned counsel from the Sawaya & Miller Law Firm in Denver, Colorado, makes the following allegations as his First Amended Complaint against the Defendants, Montrose Memorial Hospital, Inc. (“MMHI”), and the Board of Trustees for Montrose Memorial Hospital (“the Board”).

2. From approximately February of 1993 until the present time, Mr. Brewer has been employed at the Montrose Memorial Hospital (the “Hospital”) as a computer network administrator. For a relatively brief period of time during his employment, the Hospital outsourced Mr. Brewer’s work to a third-party private employer, but during that entire time, Mr. Brewer’s job function at the Hospital did not materially change, and subsequent to the outsourcing agreement, Mr. Brewer’s position was again brought within the employment of the Hospital Board, itself.

3. In approximately October 2010, the Board entered into an Operating Lease Agreement (“Agreement”) with the MMHI, a Colorado nonprofit entity, to lease the operation of the Hospital to the MMHI. At some time in or around December 2010, the transfer date under that Agreement occurred, and the operations of the Hospital passed into the hands of the MMHI.

4. Pursuant to the terms of the Agreement either the Board or MMHI or both may be liable for sums due to Mr. Brewer for unpaid wages incurred through his work at the Hospital for times prior to the commencement of the lease of the Hospital by MMHI, and accordingly, the Board may be an indispensable party to this lawsuit for any such wage and hour claims.

5. This lawsuit is brought pursuant to the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201, *et seq.* (“FLSA”); the Colorado Wage Act, C.R.S. §§ 8-4-101, *et seq.*; and Colorado Minimum Wage Order No. 28, 7 C.C.R. § 1103-1, and pursuant to Colorado statutory and common law contract claims. (The Colorado Wage Act, along with the Colorado Minimum Wage Order No. 28, are referenced in this complaint as the “Colorado Wage and Hour Law.”).

6. This action seeks damages under the FLSA, Colorado Wage and Hour Law, and Colorado contract law for unpaid regular and overtime wages worked by the Mr. Brewer but not paid by his employers, the MMHI and the Board, and for which claims and damages the Hospital is responsible. Notwithstanding the above allegations, or allegations subsequently made in this First Amended Complaint, to the extent that the Board was not and is not an entity defined by the Colorado Wage Act and / or the Colorado Minimum Wage Order No. 28, as a covered Employer, Mr. Brewer’s claims against that entity are limited to relief sought under the FLSA and / or Colorado contract law.

PARTIES

7. Jeffery Brewer, the plaintiff, is over the age of 21, and resides in Montrose, Colorado.

8. The Hospital is a non-profit corporation organized under the laws of the state of Colorado.

9. The Hospital is a resident of the state of Colorado, with a principle place of business located at 800 South Third Street, Montrose, Colorado 81401.

10. Mr. Brewer has worked at the Hospital, and for it and/or its predecessor in interest, from on or about February 1993, until the present. He is still employed by the Hospital.

11. The MMHI is a Colorado nonprofit entity that entered into an Agreement with the Hospital Board to lease and operate the Hospital under Agreement originally entered into on or about October 15, 2010.

12. The Hospital Board is a body corporate and political subdivision of the state of Colorado, pursuant to C.R.S. §25-3-301, *et seq.*, which prior to the effective date of the above referenced Agreement owned and operated the Hospital, and for which Mr. Brewer was and has been employed.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1331 with respect to the plaintiffs' claims under the FLSA. Venue is proper in the District of Colorado under 28 U.S.C. § 1391(b).

14. The Court has supplemental jurisdiction, pursuant to 28 U.S.C. § 1367(a), over Mr. Brewer's claims under the Colorado Wage and Hour Law, and Colorado contract law.

15. The Hospital, and each of the above captioned defendants is subject to personal jurisdiction in the State of Colorado for the purpose of this lawsuit.

FEDERAL AND COLORADO WAGE AND HOUR LAW AND CONTRACT CLAIMS

16. From approximately July 2008 (when the Hospital was being operated by the Board) until approximately June 10, 2012, (when the Hospital was then being operated by the MMHI), the Hospital had a uniform policy and practice of consistently requiring its computer support employees, and specifically Mr. Brewer, to work more than forty hours per week for a set salary amount, without overtime compensation.

17. Throughout the last 20 years, Mr. Brewer has been employed at Hospital as a Network Administrator.

18. Mr. Brewer's duties do not include and have never included the creation, improvement, or modification of computer technology and programming, and he is not subject to the exemption from overtime for computer professionals set out in 29 U.S.C. 213(a)(17).

19. In recognition of that fact, in or about June of 2012, the Hospital changed the plaintiff's pay from salaried—as an employee exempt from the overtime requirements of the FLSA and Colorado Wage and Hour and contract law—to that of an hourly employee, non-exempt from the overtime requirements of the FLSA and Colorado Wage and Hour and contract law.

20. From approximately 2005 until approximately June 2012, the Hospital has had a custom of periodically changing the exemption status of employees who continued in their same job duties from non-exempt to exempt, and then back again to non-exempt, all in a willful process of violating the employees' right to be paid for their hourly and overtime work.

21. The Hospital's changing approach to Mr. Brewer's exemption status reflected a desire to save money for itself by willfully ignoring the requirements of the FLSA, the Colorado Wage and Hour Law, and Colorado contract law, even though his job duties did not change over that time period.

22. Even though he regularly worked overtime, Mr. Brewer was not paid any overtime compensation during the approximately 4 year period from July 2008, to June 2012, when he was again changed from a salaried exempt employee to an hourly non-exempt employee who was paid overtime.

23. During that 4 year period from July 2008, to June 2012, Mr. Brewer regularly worked more than 40 hours per week, and was not paid at the overtime rate of time-and-a-half for his work over 40 hours a week.

24. Mr. Brewer's regular rate of pay during that 4 year period was \$37.17.

25. In this action, Mr. Brewer seeks his unpaid overtime compensation, an equal amount or more for liquidated damages, applicable interest, and reasonable attorneys' fees and costs, pursuant to 29 U.S.C. §216(b) under a 3 year statute of limitations governing Plaintiff's wage and hour statutory law claims, and under the 6 year statute of limitations governing Plaintiff's Colorado contract law claim.

26. At all times material to this action, the Hospital was an enterprise engaged in commerce or in the production of goods for commerce as defined by §203(s)(1) of the FLSA.

27. At all times relevant to this action, the Hospital, operating both under the Board and then under the MMHI, was the "employer" of Mr. Brewer, as defined by §203(d) of the FLSA.

28. At all times material to this action, the Plaintiff was an "employee" of the Hospital, as defined by §203(e)(1) of the FLSA, and worked for the Hospital, including the Board and then the MMHI, within the territory of the United States for more than 19 years preceding the filing of this lawsuit.

29. The provisions set forth in 29 U.S.C. §§206 and 207, respectively, of the FLSA, apply to Mr. Brewer while he has been employed at the Hospital.

30. At all times relevant to this action, the Hospital employed Mr. Brewer as a Network Administrator; and since it began operating the Hospital, MMHI has been an employer of Mr. Brewer as that term is defined under the Colorado Wage and Hour law, as well as under Colorado contract law.

31. Mr. Brewer does not have any educational, graduate or post-graduate degree in computer programming or computer sciences; and he does not have any certification for advanced training in computer programming or sciences, other than occasionally attending proprietary vendor trainings in "off-the-shelf" products that have been purchased by the Hospital.

32. The primary duties of Mr. Brewer has not involved determining hardware, software or system functional specifications, or working on the design, development, documentation, analysis, creation, testing or modification of computer systems or programs. The duties in the preceding sentence were given to proprietary vendors of the computer systems or programs that were purchased off-the-shelf by the Hospital. On occasion, and at the direction of his supervisor, the Plaintiff would see whether any proprietary off-the-shelf program functioned as advertised; but if there was any problem with any such program, the plaintiff would have the

vendor address and make any repair or modification to the program. Mr. Brewer would not take such action.

33. The duties of Mr. Brewer have not directly related to the management or general business operations of Hospital or the Hospital's customers.

34. Mr. Brewer has exercised no discretion or independent judgment with respect to matters of significance during his employment by the Hospital.

35. While working for the Hospital, Mr. Brewer has had no the authority to formulate, affect, interpret, or implement management policies or operating practices.

36. While working for the Hospital, Mr. Brewer has carried out no major assignments in conducting the operations of the business of the Hospital.

37. While working for the Hospital, Mr. Brewer has performed no work that affected business operations to a substantial degree.

38. While working for the Hospital, Mr. Brewer has had no authority to commit the Hospital in matters that had significant financial impact.

39. While working for the Hospital, Mr. Brewer has had no authority to negotiate and bind the Hospital on significant matters.

40. While working for the Hospital, Mr. Brewer's has had no primary duty of providing independent expert advice to management.

41. While working for the Hospital, Mr. Brewer has not been involved substantially in planning long or short-term business objectives.

42. While working for the Hospital, Mr. Brewer has not independently resolved matters of significance on behalf of management.

43. Mr. Brewer's positions at the Hospital were not exempt from overtime under the FLSA or Colorado contract law at any time, and they were not exempt from the Colorado Wage and Hour Law since MMHI took over operations of the Hospital.

44. The Hospital, both through its Board and through the MMHI, has intentionally failed and/or refused to pay Mr. Brewer according to the provisions of the FLSA, and Colorado contract law, and as applicable to the MMHI, the Colorado Wage and Hour Law.

45. The systems, practices and duties of Mr. Brewer have existed from at least approximately July 2008 until June of 2012.

46. Mr. Brewer has not been exempt from the requirement to be paid overtime from on or about June 2008, until up to the present time.

47. During that over 4 year period the Hospital, both through its Board and subsequently through the MMHI, has been aware of the requirements of the FLSA, the Colorado Wage and Hour Law, and their corresponding regulations, and the Colorado law on contract. Despite this knowledge, the Hospital failed to pay Mr. Brewer for all hours worked in excess of 40 hours per work week at one-and-a-half times his regular hourly rate or more, and has willfully violated the overtime provisions of the Fair Labor Standards Act, the applicable Colorado Wage and Hour Law, and Colorado contract law.

48. The Hospital has engaged in pattern and practice of violating the provisions of FLSA, the Colorado Wage and Hour Law, and Colorado contract law by failing to pay Mr. Brewer in accordance with the requirements of the applicable referenced laws.

49. As a result of Hospital's violations of the FLSA, the Colorado Wage and Hour Law, and Colorado contract law, Mr. Brewer has suffered damages by failing to receive

compensation in accordance with §207 of the FLSA, the Colorado Wage and Hour Law, and Colorado contract law.

50. In addition to the amount of unpaid wages and benefits owing to Mr. Brewer, he is also entitled to recover an additional equal amount or more as liquidated damages pursuant to 29 U.S.C. §216(b) and prejudgment interest; and additionally, under the Colorado Wage and Hour Law, he is entitled to such further amounts as set out in C.R.S. § 8-4-101, *et seq.*

51. The Hospital's actions in failing to compensate the plaintiffs, in violation of the FLSA, Colorado Wage and Hour Law, and Colorado contract law were willful.

52. The Hospital has not made a good faith effort to comply with the FLSA, the Colorado Wage and Hour Law, or Colorado contract law.

53. Mr. Brewer is additionally entitled to an award of attorney's fees pursuant to 29 U.S.C. §216(b), and as applicable, the Colorado Wage and Hour Law.

54. Throughout Mr. Brewer's and the Hospital's employment relationship, Mr. Brewer has worked under an express contract for which he was and is entitled to payment at the agreed hourly rate, plus any sums for premium and/or overtime work at the applicable statutory rate, for all work performed.

55. The Hospital has breached that contract by failing to pay Mr. Brewer for all such sums due.

WHEREFORE, the Plaintiff, Mr. Brewer, pursuant to §216(b) of the FLSA, the Colorado Wage and Hour Law, as applicable, and Colorado contract law prays for the following relief:

a. A declaratory judgment that the practices complained of herein are unlawful under FLSA, the Colorado Wage and Hour Law, as applicable, and Colorado contract law;

b. An award of damages in the amount of his unpaid overtime compensation, plus an equal amount of liquidated damages pursuant to 29 U.S.C. §216(b); and any further damages allowed under the applicable law going back up to 3 years from the date of the filing of this complaint; and under Colorado contract law going back 6 years from the date of the filing of this complaint;

c. Plaintiffs reasonable attorneys' fees, including the costs and expenses of this action, including expert fees;

d. Pre-judgment and post-judgment interest, as provided by law; and

e. Such other legal relief to which the Plaintiff may be entitled.

JURY TRIAL DEMANDED

Mr. Brewer further demands that this matter be tried to a jury on all issues of fact in this case.

Dated: This 26th day of February, 2013.

Respectfully submitted,

SAWAYA & MILLER LAW FIRM

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