

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

JOSE LOZOYA;)	
ANTONIO MALDONADO; and)	
MARIO PENA, on behalf of)	
themselves, individually, and on behalf)	Civil Action No:12-cv-01048-JLK-KLM
of those similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	
)	
ALLPHASE LANDSCAPE)	FLSA collective,
CONSTRUCTION, INC., a Colorado)	and state law class
corporation, doing business as)	action
ALL PHASE LANDSCAPE; and)	
)	
DONALD TROY TINBERG;)	
MARK FISHER; and)	
LYLE FAIR, in their individual and)	
corporate capacities,)	
)	
Defendants.)	

**SECOND AMENDED COLLECTIVE AND CLASS ACTION
COMPLAINT
(JURY TRIAL DEMANDED)**

1. Plaintiffs, Jose Lozoya, Antonio Maldonado, and Mario Pena, on behalf of themselves and those similarly situated, through undersigned counsel at the Sawaya & Miller Law Firm, make the following allegations in support of this Collective and Class Action Complaint, brought pursuant to the federal Fair Labor Standards Act of 1938, 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. (The Colorado Wage

Act along with the Colorado Minimum Wage Order No. 28 are referenced below as the “Colorado Wage and Hour Law”):

PARTIES

2. All Plaintiffs are current or former employees of All Phase Landscape Construction, Inc. (“All Phase Landscape” or “the Company”), as defined by 29 U.S.C. § 203(e), and Colorado state laws. Plaintiffs are laborers who do landscape work and snow removal, and they bring this action on behalf of themselves and all other current and former laborers who are hourly, non-exempt employees of All Phase Landscape within the state of Colorado (“laborers”).

3. Individual and representative Plaintiff, Jose Lozoya, is a resident of the state of Colorado, over the age of eighteen (18) years. He has worked as an hourly non-exempt employee of the Company since approximately March of 2011 to the present.

4. Individual and representative Plaintiff, Antonio Maldonado, is a resident of the state of Colorado, over the age of eighteen (18) years. He has worked as an hourly non-exempt employee of the Company since approximately December of 2008 to the present.

5. Individual and representative Plaintiff, Mario Pena, is a resident of the state of Colorado, over the age of eighteen (18) years. He has worked as an hourly non-exempt employee of All Phase Landscape since approximately May of 2008 to the present.

6. Defendant, All Phase Landscape, is a Colorado corporation, with a principal office address of 16080 Smith Rd., Aurora, CO 80011.

7. Defendant, All Phase Landscape, does business within the state of Colorado.

8. Defendant, All Phase Landscape, operates, *inter alia*, in the landscape and snow removal businesses.

9. Defendant, Mark Fisher, is a corporate officer and member of the senior management team at the Company. He is being sued in his individual, as well as his corporate capacity.

10. Mr. Fisher regularly works at the Company's principal office location. He is involved on a regular basis with decision making about the operations of the Company, including the decisions concerning the pay practices challenged in this Complaint. He has personally stated to the Company's staff that the pay practices challenged in this Complaint are the pay practices that will be utilized by the Company.

11. As set out further below, Defendant, Mark Fisher, has personally retaliated against Plaintiff Jose Lozoya and other laborers because of this lawsuit and a wage and hour complaint made in or around December 2011 by Plaintiff Lozoya to the Colorado Department of Labor and Employment about the pay practices challenged in this Complaint.

12. Defendant, Lyle Fair, is a member of the senior management team and supervises laborers. He is being sued in his individual, as well as his corporate capacity.

13. Defendant Fair regularly works at the Company's principal office location. He is involved on a regular basis with decision making about the operations of the Company, including the decisions concerning the pay practices challenged in this Complaint. He has personally stated to the Company's staff that the pay practices challenged in this Complaint are the pay practices that will be utilized by the Company.

14. As set out further below, Defendant, Lyle Fair, has personally retaliated against Plaintiff Jose Lozoya and other laborers because of this lawsuit and a wage and hour complaint made in or around December 2011 by Plaintiff Lozoya to the Colorado Department of Labor and Employment about the pay practices challenged in this Complaint.

15. Defendant, Donald Troy Tinberg ("Troy Tinberg"), is the Chief Executive Officer of All Phase Landscape. He is being sued in his individual, as well as his corporate capacity.

16. Defendant Tinberg regularly works at the Company's principal office location. He is involved on a regular basis with decision making about the operations of the Company, including the decisions concerning the pay practices challenged in this Complaint.

17. On information and belief, Defendant, Troy Tinberg, personally knew about, approved of, or actually directed, the retaliation, as set out further below, against Plaintiff Jose Lozoya because of Plaintiff Lozoya's complaint made in or around December 2011 to the Colorado Department of Labor and Employment about the pay practices challenged in this Complaint.

JURISDICTION

18. Under 28 U.S.C. § 1331, this Court has original jurisdiction to hear this Complaint and to adjudicate the stated claims. This action is being brought under the FLSA. Each representative Plaintiff has signed a consent form to join this lawsuit, copies of which have been filed with the Court.

19. This Court has supplemental jurisdiction over the Colorado state law class action claims in this Complaint under 28 U.S.C. § 1367. Those state claims derive from the same common core of operative facts as the federal claims.

20. The Court has personal jurisdiction over All Phase Landscape because it is qualified to do business in Colorado with the Colorado Secretary of State, and does business within the state of Colorado.

21. The Court has personal jurisdiction over the individually and corporately named Defendants because each such Defendant resides and works within the State of Colorado at All Phase Landscape, at the Company's principal office address of 16080 Smith Rd., Aurora, CO 80011.

22. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because Defendants operate out of a facility in Aurora, Colorado, and all of the events giving rise to the Plaintiffs' claims have occurred and presently are occurring in this district.

BACKGROUND

23. This is a Collective and Class Action Complaint ("Complaint") brought to obtain monetary, declaratory, and injunctive relief on behalf of those, under the FLSA, who consent to representation, and under Rule 23, to those included in the class of individuals who are similarly situated to the representative Plaintiffs, and who are part of the below-described class under the Colorado Wage and Hour Law.

24. Plaintiffs bring this action on behalf of themselves and other similarly situated laborers who consent to representation, pursuant to 29 U.S.C. § 216(b) to address Defendants' violations of the FLSA. Additionally, they bring this action on behalf of themselves and other similarly situated laborers pursuant to Federal Rule of Civil Procedure, Rule 23, to address the Defendant All Phase Landscape's violations of the Colorado Wage and Hour Law.

25. This action is brought to obtain unpaid back, current and/or future wages, overtime, reimbursement for improper wage and/or pay deductions, liquidated damages, emotional distress, punitive damages, attorneys' fees, costs of litigation, pre-judgment interest, and any other remedies to which the Plaintiffs and those similarly situated may be entitled.

26. Plaintiffs and the similarly situated laborers were, or are, employees of All Phase Landscape. They travel or travelled from an All Phase Landscape facility, or from their residences, to perform landscape work and/or snow removal at locations outside of an All Phase Landscape facility. Laborers were subject to the same pay policies and practices described herein in that they are not paid for all time worked, regardless of whether they begin their workday at a Company facility or at a Company worksite.

FACTUAL ALLEGATIONS FOR ALL CLAIMS

27. Defendants' actions, as alleged throughout this Complaint, have been willfully taken. Defendants' willfulness is supported by, among other facts, the Company's written policy regarding travel time for laborers, which on its face violates the controlling state and federal wage and hour laws.

Failure To Pay The Agreed Upon Hourly Rate Or Minimum Wage Time

“Windshield Time Policy”

28. Defendants required and currently require Plaintiffs and the similarly situated laborers to perform unpaid work at the beginning and end of each of their work days.

29. Until approximately the beginning of April, 2012, Defendants required laborers who perform landscape services to report to the All Phase Landscape facility at a set time, however, Defendants did not start compensating laborers until they arrived

to the first job site or at least 15 minutes subsequent to their start time at the Company's facility.

30. When laborers arrived to the All Phase Landscape facility each work day, they were required to do work that was integral and indispensable to their principal work activities, including discarding trash and clippings, loading equipment and tools into trucks and refilling machine and equipment fluids.

31. While traveling to their first job site, laborers would commonly discuss work related issues, such as the day's schedule and determine who was going to complete certain tasks at the job site.

32. During the winter months, laborers who do snow removal are subject to the same policy and not paid until the work starts on the job site and are stopped being paid when the work ends on the job site, regardless of the actual compensable time the laborers work.

33. At the end of each work day, the Company did not compensate the laborers who were required to return to the Company's facility for at least 15 minutes of work time before they arrived back at the Company's facility.

34. When laborers returned to the Company facility each work day, they were required to do work that that was integral and indispensable to their principal work activities, including unloading equipment and tools, disposing of trash and clippings and completing paperwork.

35. The Company called this policy “Windshield Time.” This “Windshield Times Policy” violated the FLSA and Colorado Wage and Hour Law by failing to compensate laborers for at least thirty (30) minutes a day of time they actually worked.

36. In or prior to December, 2011, Plaintiff, Lozoya, complained about this unlawful employment practice and policy to the Defendants and management at All Phase Landscape, but they refused to change such unlawful employment practice.

37. In or about December, 2011, Plaintiff Lozoya made a complaint about this unlawful employment practice and policy to the Colorado Department of Labor and Employment.

38. Defendants subsequently became aware of that complaint in late 2011 or early 2012.

“Subsequent Policy”

39. Thereafter, Defendants changed their “Windshield Time” policy for laborers to a policy that also was not in compliance with the FLSA or the Colorado Wage and Hour Law.

40. This revised policy also failed to properly compensate laborers for their actual work time for which they should have received compensation. This revised policy (“Subsequent Policy”) has been uniformly applied to and enforced against laborers since the beginning of April, 2012, by the Defendants.

41. Under the Subsequent Policy, laborers who perform landscape services are given the option to report to the first job site or the Company facility at a specified time. Those who report to the Company facility are transported by the Company to the work site, and Defendants then reduce their actual time worked by the above-described windshield policy. If a laborer reports to the job site, he or she is not paid until the work starts at the job site, regardless of their actual start time. Although for practical reasons, most if not all laborers report to the Company work site, under both options the Defendants do not compensate the laborers for all time worked.

42. Laborers who do snow removal are subject to the same policy and are not paid until the work starts on the job site and are stopped being paid when the work ends on the job site, regardless of the actual compensable time that the laborers work.

43. This Subsequent Policy fails to compensate the Plaintiffs for all their time worked at the beginning or the end of each work day, in violation of the FLSA and Colorado Wage and Hour Law.

“Time Restriction Policy”

44. Upon information and belief, Defendants established and have enforced another compensation and pay policy whereby they refuse to pay laborers for actual work performed that exceeds the amount of time the Defendants decide to allocate for the particular work being performed.

45. Pursuant to this policy (“Time Restriction Policy”) Defendants have regularly mis-recorded and / or falsified time records for laborers, which has resulted in laborers not being paid for all time worked. Defendants do not maintain an accurate account of time records for laborers. Instead, they have a practice and policy under which supervisory staff records a gross total of hours, and/or parts of hours, to be credited to the Plaintiffs which does not accurately reflect the actual time worked by the Plaintiffs and the similarly situated individuals.

46. Those hours are calculated to match contract bids or estimates for expected work time for a client job, rather than actual time worked by laborers.

47. Defendants do not accurately record the actual number of hours worked by laborers, but rather under-record them, and do not pay laborers for all their time worked.

48. In this way, the Defendants fail to meet the requirements of the FLSA and 29 C.F.R. part 516, and Colorado Wage Order 28, Sec. 12, to keep proper and accurate records relating to the hours worked, the pay, and the compensation for the Plaintiffs and the similarly situated individuals.

49. As one example of this unlawful policy, for a period of time laborers performed weekly landscape work at the Summit job site. It consistently took the laborers up to 10 hours per week to complete this work, however, the Defendants only paid the laborers who were working on this job site for 7 hours of work.

50. This Time Restriction Policy is and has been in violation of the FLSA and Colorado Wage and Hour Law because it does not compensate laborers for all their time worked.

“Reimbursement Policy”

51. Defendants, additionally, have adopted and enforced a uniform worker equipment and damage reimbursement policy (“Reimbursement Policy”), in violation of both the FLSA and Colorado Wage and Hour Law.

52. Under this Reimbursement Policy, Defendants unlawfully charge back to laborers, and deduct from their hourly pay, charges for normal wear and tear on equipment, materials, and other property damaged during the employees’ work.

53. These deductions violate the FLSA, to the extent that the application of this Policy reduces the hourly pay to laborers to pay below the mandated minimum hourly wage and/or the agreed upon hourly rate of pay.

54. This Policy violates the Colorado Wage and Hour Law by making improper deductions under the controlling state law.

55. Defendants’ unlawful employment policies and practices described above have resulted in their failure to pay for all the hours at the agreed upon hourly rate of pay and/or minimum wage, worked by laborers.

Failure To Pay For Overtime

56. During the work weeks when laborers work more than 40 hours per week, Defendants' unlawful employment policies and practices described above have resulted in their failure to pay for all the overtime hours worked by laborers.

57. Additionally, Plaintiffs and similarly situated individuals on certain work days during the applicable statute of limitation period have worked more than twelve (12) hours during a continuous work day.

58. Defendants, however, as a matter of their regular and wrongful employment compensation policies and practices, fail to pay laborers at their overtime rate for all time worked over twelve (12) hours during a continuous work day.

59. The Defendants' conduct with respect to their failure to properly pay laborers for their overtime has been willful and has caused significant damages to laborers.

Retaliation Claims

60. In or around December of 2011, Plaintiff Lozoya made a complaint to the Colorado Department of Labor and Employment about one or more of the Defendants' unlawful employment policies and / or practices described above ("DOL Complaint").

61. The fact that Plaintiff Lozoya made the DOL Complaint became known to the Defendants at the end of 2011 or the beginning of 2012. Plaintiff Lozoya was subjected to retaliation by the Defendants because he made the DOL Complaint.

62. Defendants Tinberg, Fisher and Fair were Plaintiff Lozoya's superiors and/or supervisors at All Phase Landscape.

63. In March 2012, Plaintiff Lozoya received a complimentary and positive employment evaluation and was told by supervisory staff that he would be promoted and given a raise at All Phase Landscape.

64. However, because of Plaintiff Lozoya's filing of the DOL Complaint, Defendants Tinberg, Fisher and Fair made a decision, and / or joined in a decision to refuse and or delay Plaintiff Lozoya that pay raise and a promotion that had been recommended.

65. At the end of March or the beginning of April, 2012, after having received a positive and complimentary review by his supervisor, described above, Plaintiff Lozoya was told by Defendant Fair that if he wanted to get a raise and a promotion he would have to withdraw his DOL Complaint and settle his claims for the amount the Defendants were offering him to pay for back wages, which amount was insufficient to compensate him for all hours worked.

66. Within a day or two of Defendant Fair making those comments, Defendant Fisher stated to Plaintiff Lozoya that he was not going to promote someone who was

costing the Company money, and that he (Lozoya) would have to withdraw his DOL Complaint to get the referenced raise and promotion.

67. On information and belief, Defendant Tinberg, knew of and/or approved of these retaliatory statements by Defendants Fair and Fisher.

68. Additionally, because of Plaintiff Lozoya's complaint, Defendants Tinberg, Fisher and Fair established and/or approved of the change of the above-described Windshield Policy to the above-described Subsequent Policy for all laborers. The Subsequent Policy, as described, resulted in creating an unlawful compensation policy or practice that reduced laborers' compensation at least as much as or more than the unlawful Windshield Policy.

69. On or about the beginning of April 2012, Defendants conducted a meeting with laborers. In response to concerns by their employees about the Subsequent Policy, the Defendants stated, or approved that the following response by the Company be given to such employee concerns: If you do not like the new policy, you can blame Jose Lozoya.

70. Because of Defendants' retaliation, Plaintiff Lozoya has suffered humiliation, alienation from other workers, and emotional distress within the workplace, as well as lost wages.

71. Subsequent to the filing of Plaintiff Lozoya's complaint with the DOL, and the Defendants' knowledge of that complaint, the Defendants have further

attempted to violate the rights of laborers by calling the Plaintiffs and similarly situated laborers into private meetings with one or more of them and attempting to unduly influence the Plaintiffs and similarly situated individuals to waive their rights to proper payment for all their time worked under the FLSA and the Colorado Wage and Hour Law.

72. Subsequent to the filing of this lawsuit, the Defendants have singled out Plaintiff Lozoya by requiring him to have daily meetings with management while other foreman are not required to have such daily meetings and are monitoring his work more closely, in retaliation for him and the other named Plaintiffs filing this lawsuit.

73. In further retaliation, the Defendants have indicated to Plaintiffs and other similarly situated laborers that the filing of this lawsuit is going to cause the Company to declare bankruptcy, which directly implies to the laborers that they will be without a job as a result of this lawsuit, which is further retaliation by Defendants.

The Individually Named Defendants Are Personally Liable

74. The Individually Named Defendants, Tinberg, Fisher and Fair (“Individually Named Defendants”), are individually, and jointly and severally liable to the Plaintiffs and the similarly situated laborers for any and all remedies, damages and / or other relief sought in this Complaint under the FLSA.

75. The Individually Named Defendants established, approved, and / or implemented the wrongful compensation policies and / or practices imposed on the Plaintiffs and the similarly situated laborers.

76. The Individually Named Defendants were the employers and/or the joint employers, along with All Phase Landscape of the Plaintiffs and the similarly situated laborers for one or more of the following reasons:

- a) As the Chief Executive Officer, Defendant Tinberg had the ultimate control over the Company's day-to-day business operations;
- b) Defendant Tinberg had control over the nature and structure of the employment relationship between All Phase Landscape and the Plaintiffs and the similarly situated laborers;
- c) Defendant Fisher supervised and/or controlled conditions of employment between All Phase Landscape and the laborers.
- d) Defendant Fair supervised and/or controlled conditions of employment between All Phase Landscape and the laborers.
- e) Defendants Tinberg, Fair and Fisher actively participated in or assisted with the creation and/or implementation of the unlawful employment policies and/or practices that led to the violations of

the FLSA and the Colorado Wage and Hour Law alleged in this Complaint.

FIRST CLAIM FOR RELIEF

Failure To Pay For All Hours Worked In Violation Of The FLSA

77. Plaintiffs and the similarly situated laborers repeat and incorporate by this reference the allegations contained in paragraphs 1-76 above.

78. By their actions alleged above, Defendants willfully, knowingly, and/or recklessly violated the FLSA provisions and corresponding controlling federal regulations.

79. Defendants willfully, knowingly, and/or recklessly engaged in a widespread pattern and practice of violating the controlling provisions of the FLSA, as set out herein, by failing to properly pay laborers for all hours worked, including but not limited to preparation time, waiting time, travel time, and other work time.

80. As a result of Defendants' violation of the FLSA, Plaintiffs and similarly situated laborers have suffered damages by failing to receive wages for all hours worked in accordance with the FLSA.

81. Defendants have not made a good faith effort to comply with the FLSA with respect to the compensation of the Plaintiffs and those similarly situated employees.

82. As a result of the unlawful acts of Defendants, the Plaintiffs and those similarly situated laborers have been deprived of their wages for all hours worked in an amount to be determined at trial, and are entitled to the recovery of such amounts, liquidated damages, pre- and post-judgment interest, attorneys' fees, costs, and other compensation and legal remedies, and additionally, such declaratory and injunctive or other equitable relief, as the law allows.

SECOND CLAIM FOR RELIEF

Failure To Pay Overtime Compensation In Violation Of The FLSA

83. Plaintiffs and the similarly situated laborers repeat and incorporate by this reference the allegations contained in paragraphs 1-82 above.

84. By their actions alleged above, Defendants willfully, knowingly, and/or recklessly violated the FLSA provisions and corresponding controlling federal regulations.

85. Defendants willfully and intentionally engaged in a widespread pattern and practice of violating the controlling provisions of the FLSA, as set out herein, by failing to properly pay overtime compensation to the Plaintiffs and the similarly situated laborers for all hours worked, in accordance with §§ 203, 206 and 207, *inter alia*, of the FLSA.

86. As a result of Defendants' violation of the FLSA, the Plaintiffs and those similarly situated laborers have suffered damages by failing to receive wages for all

overtime hours worked in accordance with §§ 203, 206 and 207, *inter alia*, of the FLSA.

87. Defendants have not made a good faith effort to comply with the FLSA with respect to its compensation of the Plaintiffs and those similarly situated employees.

88. As a result of the unlawful acts of Defendants, the Plaintiffs and those similarly situated laborers have been deprived of their wages for all hours worked in an amount to be determined at trial, and are entitled to the recovery of such amounts, liquidated damages, pre- and post-judgment interest, attorneys' fees, costs, and other compensation and legal remedies, and additionally, such declaratory and injunctive or other equitable relief, as the law allows.

THIRD CLAIM FOR RELIEF

Rule 23 Class Action Colorado State Claims For Wages, Overtime and Improper Deductions

89. Plaintiffs and the similarly situated laborers repeat and incorporate by this reference the allegations contained in paragraphs 1-88 above.

90. Plaintiffs and those similarly situated bring their Third Claim for Relief as a class action pursuant to Rule 23 (a) and (b) of the Federal rules of Civil Procedure. The Class for the Plaintiffs and the similarly situated individuals is defined as all

current and former laborers who were hourly, non-exempt employees of All Phase Landscape within the state of Colorado during the applicable statutory period.

91. This action is properly maintainable as a class action under the Federal Rules of Civil Procedure, Rule 23, because the class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims or defenses of the representative parties are typical of the claims or defenses of the class; and the representative parties will fairly and adequately protect the interests of the class.

92. This action is also properly maintainable as a class action under the Federal Rule of Civil Procedure, Rule 23 because questions of law or facts common to the members of the class predominate over any questions affecting only individual members; and because a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

93. The members of the class identified above are so numerous that joinder of all members is impracticable. The exact number of the class is unknown, but may be determined from the records maintained by Defendant All Phase Landscape, and according to the Defendant, at any one time may amount to over 100 people (<http://www.allphaselandscape.net/aboutus.html> April, 17, 2012).

94. There are numerous and substantial questions of law and fact common to all of the member of the Class, including, but not limited to the following:

- a) Whether Defendant failed to pay laborers the agreed upon rate of pay and violated the minimum wage and overtime requirements by not paying the Plaintiffs and the similarly situated individuals for the time they spent performing off-the-clock;
- b) Whether Defendant failed to pay laborers the agreed upon rate of pay and violated the minimum wage and overtime requirements by not paying the Plaintiffs and the similarly situated individuals for their travel or other work time during the work day; by failing to keep accurate records of time worked; and by making improper deductions under the controlling state law; and
- c) Whether the actions of the Defendant were willful.

95. Defendant is expected to raise common defenses to this class action, including denial that their actions violated the law.

96. The named representative Plaintiffs will fairly and adequately protect the interests of the Class and they have retained counsel experienced and competent in the litigation of complex class actions.

97. The claims of the named representative Plaintiffs are typical of the claims of the Class. The named representative Plaintiffs have the same interest and suffer from the same injury as the Class members. The named representative Plaintiffs and the

Class they seek to represent are and were not paid for the time they spend and spent performing the uncompensated work before, after and during their work shifts.

98. Upon information and belief, no other member of the Class has an interest in individually controlling the prosecution of his or her claim(s), especially in light of the relatively small value of each claim and the difficulties involved in bringing individual litigation against one's employer. However, if any such class member should become known, he or she can "opt out" of this action upon receipt of the class action notice pursuant to the Federal Rules of Civil Procedure, Rule 23(c)(2)(B).

99. The Court has the resources and abilities to effectively manage this class action.

100. The named representative Plaintiffs intend to send notice to all members of the Class to the extent required by Rule 23. The names and addresses of the Class are available from the Defendant.

101. By their actions alleged above, Defendant willfully, knowingly, and / or recklessly violated the Colorado Wage and Hour Law provisions and corresponding controlling Colorado regulations.

102. Defendant willfully and intentionally engaged in a widespread pattern and practice of violating the controlling provisions of the Colorado Wage and Hour Law, and corresponding controlling Colorado regulations, as set out above, by:

- a) failing to properly pay laborers for all hours worked;

- b) failing to pay laborers minimum wage;
- c) failing to pay laborers the agreed upon rate of pay;
- d) failing to properly pay for all overtime worked;
- e) making improper deductions from the wages of laborers; and
- f) retaliating against laborers for filing this lawsuit and complaining about the pay policies and practices described within this Complaint.

103. As a result of Defendant's violation of the Colorado Wage and Hour Law, the Plaintiffs and those similarly situated laborers have suffered damages by failing to receive minimum wage, the agreed upon hourly rate of pay, overtime and payment for all hours worked in accordance with the Colorado Wage and Hour Law.

104. Defendant has not made a good faith effort to comply with the Colorado Wage and Hour Law with respect to its compensation of the Plaintiffs and those similarly situated employees.

105. As a result of the unlawful acts of Defendant, laborers have been deprived of their wages, overtime and payments for all hours worked in an amount to be determined at trial, and are entitled to the recovery of such amounts, liquidated damages, pre- and post-judgment interest, attorneys' fees, costs, and other

compensation and legal remedies, and additionally such declaratory and injunctive or other equitable relief, as the law allows.

FOURTH CLAIM FOR RELIEF

Individual Liability Of Defendants

Tinberg, Fisher And Fair under FLSA

106. Plaintiffs and the similarly situated laborers repeat and incorporate by this reference the allegations contained in paragraphs 1-105 above.

107. The Individually Named Defendants, Troy Tinberg, Mark Fisher and Lyle Fair, have not made a good faith effort to comply with the FLSA respect to their compensation of laborers.

108. By their actions alleged above, the Individual Named Defendants Tinberg, Fisher and Fair, intentionally, willfully, knowingly, and / or recklessly violated the controlling provisions of the FLSA and corresponding controlling federal regulations.

109. The Individually Named Defendants willfully and intentionally engaged in a widespread pattern and practice of violating the controlling provisions of the FLSA and corresponding controlling federal regulations, as set out above, by:

- a) failing to properly pay laborers for all hours worked;
- b) failing to pay laborers minimum wage;

- c) failing to pay laborers the agreed upon rate of pay;
- d) failing to properly pay for all overtime worked;
- e) making improper deductions from the wages of laborers; and
- f) retaliating against laborers for filing this lawsuit and complaining about the pay policies and practices described within this Complaint.

110. As a result of the Individually Named Defendants' violations of the FLSA and the corresponding regulations of the FLSA, the Plaintiffs and the similarly situated laborers have suffered damages by failing to receive minimum wage and payment for all hours worked, overtime and have been the subject of improper deductions.

111. As a result of the unlawful acts of Individually Named Defendants, Plaintiffs and those similarly situated laborers have been deprived of their wages, minimum wage, overtime and payments for all hours worked in an amount to be determined at trial, and are entitled to the recovery of such amounts, liquidated damages, pre- and post-judgment interest, attorneys' fees, costs, and other compensation and legal remedies, and also including such declaratory and injunctive or other equitable relief, as the law allows.

FIFTH CLAIM FOR RELIEF

Retaliation Against Plaintiff Lozoya and Similarly Situated Laborers Under FLSA

112. Plaintiffs and the similarly situated individuals repeat and incorporate by this reference the allegations contained in paragraphs 1-111 above.

113. By their actions alleged above, Defendants intentionally, willfully, knowingly, and / or recklessly violated the controlling provisions of the FLSA along with the controlling regulations associated with such laws, prohibiting retaliation for the making of a complaint concerning wage and hour issues in the workplace.

114. Plaintiff Lozoya has lost wages because of the wrongful retaliation by the Defendants, including the individually named Defendants.

115. As a result of Defendants' violation of the anti-retaliation provisions of the FLSA and its associated regulations, Plaintiff Lozoya and similarly situated laborers have suffered damages in the nature of pain and suffering and emotional distress, and is entitled to the recovery of actual, compensatory and punitive damages, as well as pre- and post-judgment interest, attorneys' fees, costs, and such other compensation and legal remedies, and also including such declaratory and injunctive or other equitable relief, as the law allows.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, and the similarly situated laborers, who will opt into this action pursuant to § 216(b) of the FLSA and / or who are described within the Rule 23 definition of any class certified by the Court, pray for the following relief:

- A. Certification of a class and any necessary subclasses pursuant to § 216(b) of the FLSA, and Rule 23, to be described as all laborers who are hourly, non-exempt employees of All Phase Landscape in Colorado and perform or performed landscape work and/or snow removal for the Company during the applicable statutory period;
- B. Judgment against Defendants that their violations of the FLSA were willful.
- C. Judgment against Defendant All Phase Landscape that its violations of the Colorado Wage and Hour Law were willful.
- D. Judgment against Defendants as prayed for above for an amount equal to Plaintiffs' and the similarly situated laborers' unpaid back wages, including the agreed upon hourly rate and minimum and overtime rates;
- E. An amount equal to unpaid back wages as liquidated damages pursuant to the FLSA;
- F. An award of prejudgment interest (to the extent liquidated damages are not awarded);
- G. A penalty assessed against Defendant All Phase Landscape under the Colorado Wage and Hour Law for each violation of the law and for each violation of the accurate record keeping requirements of the law;

- H. All legal and equitable relief available under the FLSA and the Colorado Wage and Hour Law;
- I. All available actual damages, compensatory damages, and punitive damages;
- J. Costs and attorneys' fees, to the extent allowed by law; and
- K. Such further relief as the Court deems equitable and just.

JURY DEMAND

Plaintiffs demand that this matter be tried to a jury.

Respectfully submitted, this 19th day of September, 2012.

s/ David H. Miller

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September 2012, I electronically filed the foregoing Second Amended Collective and Class Action Complaint with the Clerk of the Court using CM/ECF system which will send notification of such filing to the following email addresses:

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