

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

IN THE UNITED STATES DISTRICT COURT 04 DEC -7 PM 4: 02

DISTRICT OF NEW MEXICO

CLERK-ALBUQUERQUE

**PATRICK CHAVEZ, JEANNINE CHAVEZ,
RUDY CAMPOS, MICHAEL COCCHIOLA,
and FORTINO ORTEGA**

**on behalf of themselves and all other
City employees who have been paid
overtime that was improperly determined
under 29 U.S.C.A. § 207(a)(1) (Section
7(a)(1) of the Fair Labor Standards Act),**

Plaintiffs,

CIV 02-0562-NV DJS

v.

CITY OF ALBUQUERQUE,

Defendant.

**FIRST AMENDED COMPLAINT FOR VIOLATION OF THE FAIR LABOR
STANDARDS ACT**

COME NOW Plaintiffs, by and through their attorneys, The Bregman Law Firm, P.C. (by Sam Bregman) and the Branch Law Firm (by Turner W. Branch and Clyde DeMersseman), and file the following First Amended Complaint for Violation of the Fair Labor Standards Act (hereinafter FLSA):

1. Plaintiff Patrick Chavez is an individual residing at 4604 Taylor Ridge NW, Albuquerque, Bernalillo County, New Mexico 87120.
2. Plaintiff Jeannine Chavez is an individual residing at 3851 Montgomery Blvd. NE, Albuquerque, Bernalillo County, New Mexico, 87109.
3. Plaintiff Rudy Campos is an individual residing at 4146 Sunset Gardens SW, Albuquerque, Bernalillo County, New Mexico, 87121.

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4. Plaintiff Michael Cocchiola is an individual residing at 4453 9th Avenue, Rio Rancho, Sandoval County, New Mexico, 87124.
5. Plaintiff Fortino Ortega is an individual residing at 4316 Roger Road SW, Albuquerque, Bernalillo County, New Mexico, 87121.
6. Defendant City of Albuquerque is a municipality of the State of New Mexico.
7. Federal jurisdiction exists because the controversy involves a matter of federal law under 28 U.S.C. § 1331 for the recovery of overtime wages under the FLSA, 29 U.S.C. § 207.
8. Plaintiff Patrick Chavez is a firefighter employed by the City of Albuquerque who has worked overtime, and has been only partially paid for that overtime, but was not fully compensated for the overtime worked in accordance with the FLSA.
9. Plaintiff Jeannine Chavez is a dispatcher employed by the City of Albuquerque Police Department who has worked overtime, and has been only partially paid for that overtime, but was not fully compensated for the overtime worked in accordance with the FLSA.
10. Plaintiff Rudy Campos is transport officer employed by the City of Albuquerque working for the City's Department of Corrections who has worked overtime, and has been only partially paid for that overtime, but was not fully compensated for the overtime worked in accordance with the FLSA.
11. Plaintiff Michael Cocchiola is a firefighter employed by the City of Albuquerque who has worked overtime, and has been only partially paid for that overtime, but was not fully compensated for the overtime worked in accordance with the FLSA.
12. Plaintiff Fortino Ortega is a field technician employed by the City of Albuquerque Public Works Department who has worked overtime, and has been only partially paid for that overtime, but was not fully compensated for the overtime worked in accordance with the FLSA.

13. This collective action is filed on the Plaintiffs' behalf pursuant to the FLSA, 29 U.S.C. § 216(b). Specifically, Plaintiff Chavez brings this action on behalf of all current and former employees of the Defendant City of Albuquerque that have worked and been partially paid for overtime, but not been fully compensated under the FLSA for such overtime, including, but not limited to, the personnel the Defendant City of Albuquerque employed or employs in the Fire Department, Police Department, the Corrections Department and/or the Detention Center; Department of Solid Waste Management Department; Public Works Department; Transit Department; Parks and Recreation Department; and all other departments, divisions or units.

14. The within Plaintiffs have a right of recovery under the FLSA, 29 U.S.C. § 207 (a)(1) for unpaid overtime wages owed to the Plaintiffs for hours worked in excess of their normal work weeks.

15. Besides being otherwise obligated to follow the provision of the FLSA, the Defendant the City of Albuquerque, through the Albuquerque Code of Ordinances § 31-1-11, recognizes its obligation to pay overtime under the provisions of the FLSA.

16. Under the provision of FLSA the within Plaintiffs are owed overtime wages in an amount equal to one and one-half their "normal hourly rate of pay" for hours worked in excess of their normal work weeks, typically 40 hours per week.

17. Under the provision of the FLSA the "normal hourly rate of pay" includes not only a persons "base" or "regular pay", but should also include other factors that compensate employees for hours worked, including, but not limited to the following factors, which upon information and belief, are used by the Defendant City of Albuquerque: shift differential pay; hazardous duty pay; longevity pay; super longevity pay; holiday pay; bilingual pay; educational pay; and, firearms qualifications.

18. Plaintiffs "Statements of Earnings and Deductions" which are received with their paycheck, indicates that the overtime rate of pay they receive are derived solely by calculating time and a half from his "normal" or "base" rate of pay and other factors, such as those mentioned above, are not used in calculating the overtime rate of pay.

19. For years the Courts have held that most of the above factors are not be excluded from the calculation of the regular rate of pay, and thus the Defendant City of Albuquerque's improper calculation of overtime rates should be seen as willful. See *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 468 – 469, 92 L. Ed. 1502, 68 S. Ct. 1186 (1947); *Featsent et al. v. City of Youngstown*, 70 F.3d 900 (6th Cir. 1995).

20. Upon information and belief, Defendant City of Albuquerque employs the same procedures in factoring the overtime pay for all of its employees that work overtime and thus all employees of the Defendant City of Albuquerque, which upon information and belief is approximately 6,500 people, could be subject to the same improper overtime calculations as those outlined above.

21. An "opt in" collective action under 29 U.S.C.A. § 216(b) is appropriate in this case because all Plaintiffs are similarly situated as outlined in this Complaint.

22. Pursuant to 29 U.S.C. § 216(b), Defendant owes Plaintiffs unpaid overtime wages, liquidated damages in an amount equal to the overtime wages, attorneys' fees and costs.

WHEREFORE, Plaintiffs pray that this Court grant them relief as follows

1. Overtime wages owed: the difference between the overtime that was received under the improperly calculated regular rate of pay and the overtime that should have been paid under a properly calculated regular rate of pay;

2. Liquidated damages in an amount equal to the unpaid amount of overtime wages owed;
3. Pre-judgment and post-judgment interest;
4. Attorney's Fees and costs associated with bringing this lawsuit; and,
5. For such further relief as this Court deems necessary, just, and proper.

Respectfully submitted,

THE BREGMAN LAW FIRM, P.C.

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