

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASAD PERVAIZ SHEIKH; ZENA DIXON; and
PAUL HUXTABLE, individually and on behalf of
all others similarly situated,

Plaintiffs,

vs.

ALIGN COMMUNICATIONS, INC.

Defendant.

Civil Action No.

CLASS ACTION COMPLAINT FOR
DAMAGES, RESTITUTION AND
INJUNCTIVE RELIEF

JURY TRIAL DEMAND

Plaintiffs Asad Pervaiz Sheikh, Zena Dixon, and Paul Huxtable (“Plaintiffs”), individually and on behalf of all others similarly situated, by their attorneys, The Law Office of Christopher Q. Davis, alleges, upon personal knowledge and upon information and belief as to other matters, as follows:

PRELIMINARY STATEMENT

1. This is a collective and class action brought by Individual and Representative Plaintiffs Asad Pervaiz Sheikh, Zena Dixon, and Paul Huxtable all putative plaintiffs (collectively “Plaintiffs”), on their own behalf and on behalf of the Proposed Classes identified below. Plaintiff and the putative class members were or are employed by Defendant Align Communications, Inc. (“Align”) in their United States offices as IT Engineers are responsible for performing repetitive and rote administrative IT duties. Align’s IT Engineers were denied overtime compensation, subjected to Defendant’s unlawful practice of failing to maintain accurate records, and making unlawful separate transaction deductions from wages in violation

of federal and state wage and hour laws. These employees are similarly situated under Federal Rule of Civil Procedure 23 and the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 216(b).

2. The Collective Class is made of all persons who are or have been employed by Defendant as IT Engineers at any time within the United States within three years prior to this action’s filing date through the date of the final disposition of this action (the “Collective Class Period”) and who were subject to Defendant’s unlawful practices of: (i) misclassifying Plaintiffs as exempt from the FLSA, failing to pay a predetermined weekly salary “free and clear” of any unlawful kickbacks, and/or failing to pay overtime premiums for all hours worked over 40 during the period prior to Defendant’s reclassification of its IT Engineer workforce in 2014; and (ii) for the entire Class Period preceding and following Defendant’s reclassification of its IT Engineer workforce as overtime eligible in 2014, failing to compensate Plaintiffs for all hours worked over 40 by common policy which limited payment of overtime premiums for overtime-compensable labor.

3. The Class is made up of all persons who are or have been employed by Defendant as IT Engineers within the States of New York and New Jersey within the period of six years and three years, respectively, prior to the filing date of this Complaint (“the Class Period”) and who were subject to Defendant’s unlawful practices of failing to pay overtime premiums pursuant to the commonly-applied policies identified in Subparagraphs 2(i) and 2(ii) above, failing to maintain accurate timekeeping records, and engaging in unlawful “separate transaction” deductions from salary and wages.

4. Plaintiffs seek relief for the Class pursuant to the applicable provisions of the New York Labor Law (“NYLL”) and Collective Class under the Fair Labor Standards Act

(“FLSA”), to remedy the Defendant’s failure to pay all wages due and for recordkeeping failures, in addition to injunctive relief.

PARTIES

5. Individual and representative Plaintiff Asad Pervaiz Sheikh resides in New Jersey. He was previously employed by Defendant as an IT Engineer in their Manhattan location between 2012 and 2014.

6. Individual and representative Plaintiff Zena Dixon resides in New Jersey. She was previously employed by Defendant as an IT Engineer in their Manhattan and New Jersey locations between 2008 and 2014.

7. Individual and representative Plaintiff Paul Huxtable resides in New York. He was previously employed by Defendant as an IT Engineer in their Manhattan and New Jersey locations between 2012 and 2014.

8. Defendant’s offices are commonly operated and managed pursuant to common policies and practices, including common employee compensation and FLSA classification policies applicable to all locations.

9. Defendant is a domestic corporation doing business in New York and elsewhere, and maintaining corporate headquarters in New York, New York. Defendant maintains US-based offices in New York, New Jersey, California, Virginia, Texas, and Illinois.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337 and supplemental jurisdiction over Plaintiffs’ state law claims pursuant to 28 U.S.C. § 1367. The Court also has jurisdiction over Plaintiffs’ state law claims pursuant to 28 U.S.C. § 1332.

11. In addition, the Court has jurisdiction over Plaintiffs' claims under the FLSA pursuant to 29 U.S.C. § 207 *et seq.*

12. This Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

13. Venue is proper in the United States District Court, Southern District of New York pursuant to 28 U.S.C. § 1391, because the wage violations which give rise to Plaintiffs' claims occurred in this District.

14. Defendant is subject to personal jurisdiction in New York.

COLLECTIVE ACTION ALLEGATIONS

15. Plaintiffs bring FLSA claims on behalf of themselves and other employees similarly situated as authorized under 29 U.S.C. § 216(b). The employees similarly situated are:

Collective Class: All employees who are or have been employed by Defendant as IT Engineers and who reported to their US offices at any point during the Collective Class Period and who earned and were not paid lawful overtime premiums under the FLSA pursuant to the policies and practices applicable to the Collective Class identified in Subparagraphs 2(i) and 2(ii) above.

16. Defendant employed Plaintiffs during the Collective Class Period.

17. On information and belief, Defendant had employed more than 100 other IT Engineers during the collective class period through its US-based offices.

18. Before January 2014 (the "Misclassification Period"), All IT Engineers were classified by the Defendant as exempt under the FLSA according to common policy applicable to all Collective Class members.

19. During the Misclassification Period, all IT Engineers were paid a weekly salary which purported to pay them for the hours worked during their scheduled daily shifts each week.

These shifts were 8 hours in length and the Collective Class Members' scheduled weekly work never exceeded 40 hours.

20. During the Misclassification Period, certain projects and tasks were compensable by additional compensation, but overtime pay was otherwise not available to the Collective Class for hours worked beyond 40 in a workweek.

21. When Lead Plaintiff Zena Dixon did not receive overtime pay for overtime-eligible hours she had worked during the Misclassification Period, she asked Director of Human Resources Bill Clark about it, and he responded, "We don't pay overtime".

22. On more than one occasion, Lead Plaintiff Asad Pervaiz Siekh attempted to record hours worked over 40 in a workweek for certain compensable work time and was informed by Defendant's manager that he would not be compensated for the hours and instructed not to record them.

23. For certain approved purposes such as server migrations, the Collective Class members were paid at a "straight time" rate (i.e. hourly at their regular rate of pay).

24. Members of the Collective Class, including Lead Plaintiff Asad Pervaiz Sheikh, complained about Defendant's failure to pay them lawful overtime premiums for hours worked over 40 in a workweek.

25. Both before and after Defendant reclassified its IT Engineer workforce as nonexempt and overtime eligible, Defendant maintained a practice of refusing to compensate IT Engineers for overtime work that Defendant did not consider compensable under commonly applied policies.

26. All of the Defendant's IT Engineers perform duties typical of IT support specialists. The primary duties of IT Engineers consist of installing, configuring, testing, and troubleshooting computer applications, networks, and hardware on behalf of Defendant's clients.

27. These tasks were repetitive and regularly required physical exertion and manual labor.

28. Further, the duties of IT Engineers do not involve the exercise of discretion, or the comparison and the evaluation of possible courses of conduct before making a decision.

29. IT Engineers maintained computer systems and networks by testing and repairing hardware, software, and network IT infrastructure according to the specifications designed by others.

30. IT Engineers' duties do not involve the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications. Nor do they involve the design, development, documentation, analysis, creation, testing or modification of computer systems, programs, or operating systems based on and related to user or system design specifications.

31. Under the FLSA, the duties performed by the Collective Class of IT Engineers are nonexempt in nature and, as such, Defendant was required to pay them lawful overtime premiums for all hours worked in a workweek over 40.

32. However, prior to 2014, Defendant authorized a misclassification of all of its IT Engineers, including Plaintiffs, as FLSA exempt and did not, as a matter of policy, pay them overtime premiums for hours worked in excess of 40 hours in a work week.

33. Further, Defendant failed to reimburse IT Engineers for all of their out of pocket business expenses, including certain transportation related-costs, and failed to reimburse Plaintiffs for car mileage and the use of their personal cell phones in amounts proportionate to their business-related use.

34. Under the FLSA, requiring employees to make out-of-pocket reimbursements from compensation already received resulted in employees not receiving their predetermined

salaries when due on a “guaranteed” basis or “free and clear” and produces impermissible reductions in compensation because of the quality of the work performed under the terms of the employer’s policies, contrary to 29 C.F.R. § 541.602(a).

35. Therefore, Defendant’s failure to pay Plaintiffs a “bona fide” salary amounts to a separate basis for their improper assertion of relevant exemptions in denying them overtime eligibility.

36. These deductions were also separately unlawful under NYLL Section 193 as impermissible deductions from wages.

37. As such, Plaintiffs were not paid a “bona fide” salary necessary for Defendant to appropriately classify Plaintiffs as FLSA exempt.

38. Defendant’s conduct, as set forth in this Complaint, was willful and in bad faith, and has caused significant damages to Plaintiffs and the Collective Class.

39. Defendant is liable under the FLSA for failing to properly compensate Plaintiffs and the Collective Class, and as such, notice should be sent to the Collective Class. There are numerous similarly situated current and former employees of Defendant who were subject to the aforementioned policy in violation of the FLSA and who would benefit from the issuance of a Court supervised notice of the present lawsuit and the opportunity to join in the present lawsuit. Those similarly situated employees are known to the Defendant and are readily identifiable through Defendant’s records.

CLASS ALLEGATIONS

40. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the following defined class:

Proposed Classes: **NY Classes:** All employees who are or have been employed by Defendant as IT Engineers and who reported to their NY offices at

any point during the Class Period and who: (i) earned and were not paid lawful overtime premiums under the FLSA pursuant to the policies and practices applicable to the Collective Class identified in Subparagraphs 2(i) and 2(ii) above; (ii) were subjected to unlawful wage deductions as a consequence of Defendant's failure to reimburse the Plaintiffs for out of pocket business expenses identified in Paragraph 32 above.

NJ Class: All employees who are or have been employed by Defendant as IT Engineers and who reported to their NJ offices at any point during the equitably tolled 6-year NJ Class Period and who: (i) earned and were not paid lawful overtime premiums under the FLSA pursuant to the policies and practices applicable to the Collective Class identified in Subparagraphs 2(i) and 2(ii) above; (ii) were subjected to unlawful wage deductions as a consequence of Defendant's failure to reimburse the Plaintiffs for out of pocket business expenses identified in Paragraph 32 above.

41. Plaintiffs incorporate by reference the facts alleged in Paragraphs 17 through 38 above.

42. At all times during the Class Period, Defendant authorized a misclassification of all of its IT Engineers, including Plaintiffs, as FLSA exempt and have, as a matter of policy, not paid them overtime premiums for hours worked in excess of 40 hours.

43. Numerosity: The Proposed Classes is so numerous that joinder of all members is impracticable. Plaintiffs are informed and believe, and on that basis allege, that during the relevant time period, Defendant employed in excess of 40 people who satisfy the definition of the Proposed Classes.

44. Typicality: The Plaintiffs' claims are typical of the members of the Proposed Classes. Plaintiff is informed and believes that, like other IT Engineers, the putative plaintiffs were subject to the aforementioned unlawful policies during the Class Period. Plaintiffs had the same duties and responsibilities as other Class members. All Plaintiffs were subject to Defendant's policy and practice of unlawfully classifying IT Engineers as exempt from the

FLSA during the Misclassification period, and otherwise uniformly failing to pay lawful overtime premiums for all hours worked in excess of 40 during a work week.

45. Superiority: A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

46. Adequacy: Plaintiffs will fairly and adequately protect the interests of the Proposed Classes, and have retained counsel experienced in complex FLSA and NYLL class and collective action litigation.

47. Commonality: Common questions of law and fact exist to all members of the Proposed Classes and predominate over any questions solely affecting individual members of the Proposed Classes, including but not limited to:

- a. Whether Defendant improperly classified the Proposed Classes of IT Engineers as exempt under the NYLL;
- b. Whether Defendant unlawfully failed to pay appropriate overtime compensation to members of the Proposed Classes in violation of NYLL;
- c. Whether Defendant employed Plaintiff and the Proposed Classes within the meaning of New York law;
- d. The proper measure of damages sustained by the Proposed Classes; and
- e. Whether Defendant's actions were "willful."

48. The case is maintainable as a class action under Fed. R. Civ. P. 23(b)(1) because prosecution of actions by or against individual members of the class would result in inconsistent or varying adjudications and create the risk of incompatible standards of conduct for Defendant. Further, adjudication of each individual member's claim as a separate action would be

dispositive of the interest of other individuals not party to this action, impeding their ability to protect their interests.

49. Class certification is also appropriate under Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to the Proposed Classes predominate over any questions affecting only individual members of the Proposed Classes, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. Defendant's common and uniform policies and practices denied the Proposed Classes the wages to which they are entitled. The damages suffered by the individual members of the Proposed Classes are small compared to the expense and burden of individual prosecution of this litigation. In addition, class certification is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about Defendant's practices.

50. Plaintiffs intend to send notice to all members of the Proposed Classes to the extent required by Rule 23. The names and addresses of the Proposed Classes are available from Defendant

AS AND FOR A FIRST CAUSE OF ACTION
(Unlawful Failure to Pay Overtime Compensation under the Fair Labor Standards Act)

51. Plaintiffs allege and incorporate by reference the allegations in the preceding paragraphs.

52. Plaintiffs' consent in writing to be a part of this action, pursuant to 20 U.S.C. § 216(b). Plaintiffs' written consent form is attached hereto. Also attached are the written consent forms of additional similarly situated individuals who are interested in joining this case as opt-in plaintiffs. Plaintiffs anticipate that as this case proceeds, other individuals will sign consent forms and join as plaintiffs.

53. At all relevant times, Defendant has been an “employer” engaged in interstate commerce and/or in the production of goods for commerce, within the meaning of the FLSA, 20 U.S.C. § 203. At all relevant times, Defendant has employed and continues to employ IT Engineers, including Plaintiffs, and the Collective Class members. At all relevant times, upon information and belief, Defendant has had gross operating revenues in excess of \$500,000.00.

54. The FLSA requires each covered employer such as Defendant to compensate all non-exempt employees at a rate of not less than one and one-half times the regular rate of pay for work performed in excess of forty hours per work week.

55. During their employment with Defendant, within the applicable statute of limitations, Plaintiffs and the other Collective Class members worked in excess of forty hours per workweek without overtime compensation. Despite the hours worked by Plaintiff and the Collective Class members, Defendant willfully, in bad faith, and in knowing violation of the Federal Fair Labor Standards Act, failed and refused to pay them overtime compensation.

56. By failing to accurately record, report, and/or preserve records of hours worked by Plaintiff and the Collective Class, Defendant has failed to make, keep, and preserve records with respect to each of its employees sufficient to determine their wages, hours, and other conditions and practices of employment, in violation of the FLSA, 20 U.S.C. § 201, *et seq.*

57. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA, within the meaning of 29 U.S.C §§ 216(b) and 255(a), and such other legal and equitable relief as the Court deems just and proper.

58. Plaintiffs, on behalf of themselves and the Collective Class, seek recovery of their attorneys’ fees and costs to be paid by Defendant, as provided by the FLSA, 29 U.S.C. § 216(b)

AS AND FOR A SECOND CAUSE OF ACTION
(New York Labor Law: Unpaid Overtime Wages)

59. Plaintiffs allege and incorporate by reference the allegations in the preceding paragraphs.

60. At all relevant times, Plaintiffs were employees and Defendant has been an employer within the meaning of the New York Labor Law.

61. The overtime wage provisions of Article 19 of the New York Labor Law and its supporting regulations apply to Defendant.

62. Defendant has failed to pay Plaintiffs and the Rule 23 Class the overtime wages to which they were entitled under the New York Labor Law.

63. By Defendant's failure to pay Plaintiffs and the Rule 23 Class Members premium overtime wages for hours worked in excess of 40 hours per week, they have willfully violated the New York Labor Law Article 19, §§ 650 *et seq.*, and the supporting New York State Department of Labor Regulations, including but not limited to the regulations in 12 N.Y.C.R.R. Part 142.

64. Due to Defendant's violations of the New York Labor Law, Plaintiffs and the Rule 23 Class Members are entitled to recover from Defendant their unpaid overtime wages, reasonable attorneys' fees and costs of the action, and pre-judgment and post-judgment interest.

AS AND FOR A SECOND CAUSE OF ACTION
(New Jersey Wage and Hour Law: Unpaid Overtime Wages)

65. Plaintiffs allege and incorporate by reference the allegations in the preceding paragraphs.

66. At all relevant times, Plaintiffs were employees and Defendant has been an employer within the meaning of the New Jersey Wage and Hour Law.

67. Defendant has failed to pay Plaintiffs and the Rule 23 Class the overtime wages to which they were entitled under N.J.S.A. 34:11-56a *et seq.*

68. By Defendant's failure to pay Plaintiffs and the Rule 23 Class Members premium overtime wages for hours worked in excess of 40 hours per week, they have willfully violated the New Jersey Wage and Hour Law.

69. Due to Defendant's violations of the New Jersey Wage and Hour Law, Plaintiffs and the Rule 23 Class Members are entitled to recover from Defendant their unpaid overtime wages, reasonable attorneys' fees and costs of the action, and pre-judgment and post-judgment interest.

AS AND FOR A THIRD CAUSE OF ACTION
(New Jersey Wage Payment Act: Failure to Reimburse Out of Pocket Business Expenses)

70. Plaintiffs allege and incorporate by reference the allegations in the preceding paragraphs.

71. At all relevant times, Plaintiffs were employees and Defendant has been an employer within the meaning of the New Jersey Wage Payment Act.

72. Defendants failed to reimburse Plaintiffs for out of pocket for business expenses they were required to pay, including certain transportation expenses, and failed to reimburse the Plaintiffs for mileage and business-related use of the personal cell phone at amounts proportionate to their business-related use.

73. By Defendant's failure to pay Plaintiffs and the Rule 23 Class Members premium overtime wages for hours worked in excess of 40 hours per week, they have willfully violated the New Jersey Wage and Hour Law.

74. Due to Defendant's violations of the New Jersey Wage Payment Act, Plaintiffs and the Rule 23 Class Members are entitled to recover from Defendant unpaid wages, reasonable attorneys' fees and costs of the action, and pre-judgment and post-judgment interest.

AS AND FOR A FOURTH CAUSE OF ACTION
(New York Labor Law: Failure to Reimburse Out of Pocket Business Expenses)

75. Plaintiffs allege and incorporate by reference the allegations in the preceding paragraphs.

76. Defendants failed to reimburse Plaintiffs for out of pocket for business expenses they were required to pay, including certain transportation expenses, and failed to reimburse the Plaintiffs for mileage and business-related use of the personal cell phone at amounts proportionate to their business-related use.

77. By Defendant's failure to pay Plaintiffs and the Rule 23 Class Members premium overtime wages for hours worked in excess of 40 hours per week, they have willfully violated the New York Labor Law.

78. Due to Defendant's violations of the New York Labor Law, Plaintiffs and the Rule 23 Class Members are entitled to recover from Defendant unpaid wages, reasonable attorneys' fees and costs of the action, and pre-judgment and post-judgment interest.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all members of the Proposed Classes, pray for relief as follows:

A. That the Court determine that this action may proceed as a class action under Rule 23(b)(1) and (3) of the Federal Rules of Civil Procedure;

B. That Defendant is found to have violated the provisions of the New York Labor Law, the New Jersey Wage and Hour Law, and the New Jersey Wage Payment Act as to Plaintiffs and the Class;

C. That Defendant is found to have violated the Federal Fair Labor Standards Act as to Plaintiffs and the Class;

D. That Defendant's violations as described above are found to be willful;

E. An award to Plaintiffs and the Class for the amount of unpaid wages owed, including interest thereon, and penalties, including liquidated damages, subject to proof at trial;

F. That Defendant further be enjoined to cease and desist from unlawful activities in violation of the FLSA, NJ wage and hour statutes, and the NYLL;

G. An award of reasonable attorney's fees and costs pursuant to the NYLL and 29 U.S.C. § 216 and/or other applicable law; and

H. For such other and further relief, in law or equity, as this Court may deem appropriate and just.

JURY DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury as to all issues so triable.

DATED: September 21, 2015

The Law Office of Christopher Q. Davis, PLLP

s/ _____

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