

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOSEPH HARDESTY,
7733 Anderson Oaks Drive
Cincinnati, OH, 45255

: Case No. 16-298
:
: Judge _____
:

and

DEREK CHIPMAN,
1002 Wermeling Lane
Elsmere, KY, 41018

:
: **COLLECTIVE ACTION AND CLASS**
: **ACTION COMPLAINT**
:
: **JURY DEMAND ENDORSED**
: **HEREON**
:

and

MADELINE HICKEY,
1711 Mills Avenue
Cincinnati, OH, 45212

Individually and on behalf of All
Other Similarly Situated Employees of
Defendants,

Plaintiffs,

v.

THE KROGER CO.,
1014 Vine Street
Cincinnati, OH 45202

Statutory Agent:
CSC-Lawyers Incorporating Service
(Corporation Service Company)
50 W. Broad St. Suite 1800
Columbus, OH 43215

And

KROGER G.O., LLC,
1014 Vine Street
Cincinnati, OH 45202

Statutory Agent:
CSC-Lawyers Incorporating Service

(Corporation Service Company) :
50 W. Broad St. Suite 1800 :
Columbus, OH 43215 :

Defendants.

Now come Plaintiffs Joseph Hardesty, Madeline Hickey, and Derek Chipman (“Plaintiffs”), by and through counsel, and bring this action against Defendant Kroger G.O., LLC, and The Kroger Co., Inc. (hereinafter “Defendant” or “Kroger”), under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* (“FLSA”), and applicable Ohio state laws, to recover unpaid overtime compensation for themselves and on behalf of the class.

I. PRELIMINARY STATEMENT

Plaintiffs, on behalf of themselves and all other similarly-situated employees of Kroger, bring this FLSA action as a collective action, and, with respect to an Ohio class, bring a Rule 23 Class Action under Ohio law, against Kroger seeking appropriate monetary, and declaratory relief based on Defendant’s willful failure to compensate employees for overtime work as required under the FLSA, 29 U.S.C. §§ 201, *et seq.*, and the Ohio Minimum Fair Wage Standards Act (“OMFWSA”), O.R.C. §§ 4111.01, *et seq.* Plaintiffs sue as individuals, and as representatives under the collective action provisions of 29 U.S.C. § 216(b), and, with respect to Ohio employees, as individuals and representatives of a class action under O.R.C. §§ 4111.03, 4111.10 and 4113.15. In particular, Plaintiffs allege that Defendant misclassified Plaintiffs and the class they seek to represent as exempt employees, and have failed to pay the Plaintiffs and the class they seek to represent the additional hourly pay and overtime compensation to which they are entitled under both federal and state law.¹

II. JURISDICTION AND VENUE

¹ Plaintiffs’ Consents to Participate in the Collective Action are attached as Exhibit A.

1. This action arises under the statutes of the United States for violation of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201, *et seq.*

2. Under the provisions of 29 U.S.C. § 216(b), this Court has jurisdiction over this matter as an action brought by Plaintiffs as individuals, and as a collective action brought by Plaintiffs on behalf of all current and former similarly-situated employees of Kroger’s Center of Recruiting Excellence (“CoRE Center”) in Blue Ash, Ohio.

3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under a Federal Statute, 29 U.S.C. § 216(b).

4. This Court has jurisdiction over Plaintiffs’ state claims pursuant to 28 U.S.C. § 1367.

5. Defendant Kroger is subject to personal jurisdiction in the State of Ohio because it is incorporated in Ohio, its principal place of business is in Ohio, and it transacts business and employs a significant number of employees within the State of Ohio. O.R.C. § 2307.382.

6. Venue is proper in the Southern District of Ohio pursuant to 28 U.S.C. § 1391 because Kroger’s principal place of business is within this District in the State of Ohio, Kroger conducts business within this District in the State of Ohio, all of the acts outlined within this Complaint occurred in this District in the State of Ohio, and all Plaintiffs were employed within this District in the State of Ohio.

III. PARTIES

7. Plaintiffs are filing this action as individuals and as named representatives in a collective action on behalf of themselves and all other similarly-situated current and former Kroger employees. Plaintiffs’ written consent forms for bringing this action to collect unpaid wages, including unpaid overtime wages are attached as Exhibit A.

8. Plaintiff Joseph Hardesty is an individual residing in Hamilton County, Ohio. He was employed by Kroger from on or about February 23, 2015, to on or about September 14, 2015. At all times relevant to this litigation, Plaintiff Joseph Hardesty was employed as a Recruiter at Kroger's CoRE Center, in Blue Ash, Ohio.

9. Plaintiff Madeline Hickey is an individual residing in Hamilton County, Ohio. She was employed by Kroger from on or about October 31, 2014, to on or about April 1, 2015. At all times relevant to this litigation, Plaintiff Madeline Hickey was employed as a Recruiter at Kroger's CoRE Center in Blue Ash, Ohio.

10. Plaintiff Derek Chipman is an individual who resided in Elsmere, Kentucky, while employed by Kroger, and currently resides in Elsmere, Kentucky, and attends post-graduate school in Brooklyn, New York. He was employed by Kroger from on or about February 23, 2015, to on or about August 6, 2015. At all times relevant to this litigation, Plaintiff Derek Chipman was employed as a Recruiter at Kroger's CoRE Center in Blue Ash, Ohio.

11. Upon information and belief, Defendant Kroger G.O., LLC is a limited liability company organized and existing under the laws of the State of Ohio, and is a wholly owned subsidiary of The Kroger Co.

12. Defendant The Kroger Co. is one of the world's largest grocery retailers, which owns numerous grocery and retail stores around the United States and in other countries. The principal offices of The Kroger Co. are located in Cincinnati, Hamilton County, Ohio.

13. Upon information and belief Defendant's The Kroger Company and Kroger G.O., LLC are employers and enterprises engaged in interstate commerce.

IV. CLASS ALLEGATIONS (FOR COUNTS II, III AND IV)

14. The potential class is defined to include all current and former employees at Kroger's CoRE Center who held the position of Recruiter since the start of the CoRE Center's operations in Blue Ash, Ohio, in 2014, to the date of judgment in this matter.

15. Upon information and belief here are approximately 200 or more employees Kroger classifies as "Recruiters" at its CoRE Center in Blue Ash, Ohio.

16. The question of fact/law which is common to the class is whether Kroger has misclassified its Recruiters as exempt employees under the FLSA.

17. The claims of Joseph Hardesty, Derek Chipman, and Madeline Hickey are typical of the claims of the class members in that they have been employed as Recruiters at the Kroger CoRE Center and have been subjected to the same duties, job requests, policies, procedures, training and misclassification as other Kroger CoRE Center Recruiters.

18. Joseph Hardesty, Madeline Hickey, and Derek Chipman are adequate representatives of the class in that they suffer from the same misclassification and their interests are not inconsistent with interests of the other members of the proposed class. Further, they have retained competent counsel through whom they can vigorously prosecute the interests of the class.

19. The representatives' claims are typical of the class in that both the representatives and the individuals in the potential class have been misclassified as exempt under the FLSA.

V. FACTUAL ALLEGATIONS

20. Upon information and belief, Kroger's CoRE Center is a call center located in Blue Ash, Ohio, with over 300 employees. The CoRE Center makes outbound calls to and receives inbound calls from online applicants who have applied for employment at various Kroger-owned grocery and retail stores throughout the United States. Recruiters schedule such applicants for interviews at stores in which they applied.

21. Plaintiffs were employed by Kroger's CoRE Center as Recruiters.

22. As Recruiters, Plaintiffs' primary responsibilities included making telephone screening calls to individuals who had applied online to Kroger-owned stores throughout the United States.

23. The online applicants typically applied for entry-level positions at Kroger, including but not limited to clerking positions in various departments (produce, meat, seafood, floral, etc.), stockers, cashier, and bagger positions.

24. These screening calls were meant to obtain data regarding an applicants' minimum qualifications and fitness for employment for a position at one of Kroger's stores by asking each applicant the same three questions. If an applicant's responses met the qualifications for a position, a Recruiter was to schedule an in-store interview for the applicant at the Kroger store to which they applied.

25. At no time did Plaintiffs have the authority to make hiring or other personnel management decisions beyond scheduling an in-store interview.

26. In performing these telephone screening calls, Kroger directed Plaintiffs to ask online applicants three pre-established questions. These questions generally solicited the following information:

- a. What interested you in working for Kroger?
- b. What job related and/or academic achievement you are most proud of?, and
- c. How would you show friendly customer service at Kroger?

27. Plaintiffs were directed not to ask anything outside the scope of these three pre-established questions during the screening process.

28. If an online applicant was able to minimally answer these three pre-established questions, the Recruiter was directed to schedule the applicant for an in-store interview.

29. Applicants rarely provided responses which were not adequate enough to automatically trigger the scheduling of an interview.

30. On the occasions in which an applicant did fail to provide the minimal response required, management at the CoRE Center would review the applicant's responses and ultimately determine if an interview should be scheduled.

31. A scheduled interview at a particular Kroger store in no way committed Kroger to hiring a particular applicant.

32. Recruiters never made hiring decisions with respect to a job applicant.

33. Upon information and belief, the decision to hire or recommend hiring of applicants was made by a local store's management personnel.

34. Recruiters had no interaction with online job applicants prior to the telephone screening.

35. Following the telephone screening and scheduling of an in-store interview, Recruiters had no further interaction with job applicants.

36. Since Kroger's CoRE Center began its operations in 2014, Kroger has treated the call center Recruiters as employees who were exempt from the requirements of the FLSA.

37. As a result of being classified as exempt employees, all Recruiters were permitted and/or required to work over 40 hours a week.

38. The Recruiters' supervisors were aware that Recruiters worked over 40 hours a week.

39. Kroger did not, and does not, pay additional hourly wages or overtime to its Recruiters and has not paid additional hourly wages or overtime to Plaintiffs.

40. Plaintiffs, as Recruiters, have consistently worked over 40 hours a week each week they were employed. In particular, Plaintiffs were consistently required to (a) enter the workplace thirty to sixty minutes prior to beginning their phone screening calls, (b) return from lunch approximately fifteen to thirty minutes prior to the end of their designated lunch break, and/or (c) remain thirty to sixty minutes after the end of their shift to finish making screening calls and/or to finish work related to screening calls made that day. This resulted in Recruiters working in excess of 45-50 hours per week.

41. Plaintiffs consistently have not been compensated for hours worked over 40 hours per week.

42. Kroger CoRE Center's Recruiters are similarly situated in that they are subject to the same Kroger policy which wrongfully designates the Recruiters as exempt from the FLSA, resulting in a failure to pay additional hourly wages and overtime for hours worked in excess of 40 hours per week.

43. All Kroger CoRE Center Recruiters perform essentially the same duties.

44. All Recruiters receive standardized training from Kroger regarding their job duties at the CoRE Center.

45. All Recruiters use three pre-established questions, set by Kroger, in performing phone screening interviews at the CoRE Center.

46. All Recruiters exercise no discretion with respect to matters of significance, as the information Recruiters convey to applicants, the methods of interviewing applicants, the lists of

applicants whom they are to call or receive calls from, and the number of interviews to schedule per day are determined by Kroger management.

47. All Recruiters follow the same process in scheduling interviews set by Kroger, and are thus fungible/interchangeable with the other Recruiters at the call center.

48. All Recruiters are assigned the list and number of online job applicants to call each day from Kroger.

49. Kroger has not acted in good faith in failing to pay overtime to its Kroger CORE Center Recruiters.

50. Because Kroger's violation of the FLSA in failing to pay overtime is willful, it is liable for the overtime it has failed to pay during the past three years, pursuant to 29 U.S.C. § 255.

51. Kroger has misclassified and continues to misclassify the CoRE Center Recruiters as exempt under the FLSA and the OMFWSA.

COUNT I
(Fair Labor Standards Act)

52. The allegations of Paragraphs 1-51 are herein incorporated by reference.

53. Plaintiffs bring their FLSA claims individually and pursuant to 29 U.S.C. §216(b) as a representative action on behalf of the following opt-in class:

All persons who were, or are, employed with Kroger as a Recruiter at the CoRE Center in Blue Ash, Ohio, at any time from three years prior to the filing of this Complaint to entry of judgment in this case.

54. Plaintiffs are similarly situated to all former and current Recruiters described in the above opt-in class.

55. Kroger has violated the Fair Labor Standards Act, and in particular 29 U.S.C. § 207 by misclassifying its Recruiters as exempt employees.

56. As a result of Kroger's misclassification, Plaintiffs as individuals, Plaintiffs as representatives for the class, and the members of the class that Plaintiffs seek to represent (all Recruiters who have worked at Kroger's CoRE Center since its inception in 2014 through the date of judgment) have been deprived of wages and overtime for work they have performed in excess of a 40 hour work week.

57. Kroger's misclassification has been willful.

58. Kroger did not act in good faith in misclassifying its Recruiters as exempt.

COUNT II
(Ohio Wage Law)

As a further and separate cause of action, Plaintiffs state as follows:

59. The allegations of 1-58 are herein incorporated by reference.

60. Plaintiffs bring their claims under OMFWSA, O.R.C. § 4111.10 on behalf of all persons who worked for Kroger as Recruiters at its CoRE Center in Blue Ash, Ohio, at any time from three years prior to the filing of this Complaint to entry of judgment in this case.

61. Kroger has violated the OMFWSA, O.R.C. § 4111.01 *et seq.*, by misclassifying their Recruiters as exempt employees.

62. As a result of Kroger's misclassification, Plaintiffs as individuals, Plaintiffs as representative for the class, and the members of the class that Plaintiffs seek to represent have been deprived of wages for work they have performed in excess of a 40 hour work week.

63. Kroger's misclassification has been willful.

64. Kroger did not act in good faith in misclassifying its Recruiters as exempt.

65. As a consequence of this misclassification, Plaintiffs seek to bring a Rule 23(b)(3) Class action on the part of all persons who have worked and are working for Kroger as Recruiters at its CoRE Center in Blue Ash, Ohio.

66. Plaintiffs can meet the numerosity, commonality, typicality, and adequate representation requirements for a Rule 23 class action as set forth in the Class Allegations in paragraphs 14 through 19 above.

67. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The expense of individual litigation may be prohibitive and render it impractical for class members to sue Kroger for wrongfully withheld hourly pay and overtime wages.

COUNT III
(Ohio Law, Unjust Enrichment)

As a further and separate cause of action, Plaintiffs state as follows:

68. The allegations of Paragraphs 1-67 are herein incorporated by reference.

69. Plaintiffs and the similarly-situated Kroger CoRE Center Recruiters, conferred a benefit upon Kroger when they worked hours and provided services to the Defendant and performed such other acts and conduct for Kroger's benefit.

70. The benefits were conferred by Plaintiffs and those similarly-situated, without receiving just compensation from Kroger for the services rendered.

71. Kroger thereby has been unjustly enriched by the benefits conferred by Plaintiffs and those similarly-situated.

72. Plaintiffs, and those similarly-situated, are entitled to just compensation for the reasonable value of services rendered to Defendant.

73. As a consequence of this misclassification, Plaintiffs seek to bring a Rule 23(b)(3) Class action on the part of all persons who have worked and are working for Kroger as Recruiters at its CoRE Center in Blue Ash, Ohio.

74. Kroger CoRE Center Recruiters working in the State of Ohio.

75. Plaintiffs can meet the numerosity, commonality, typicality, and adequate representation requirements for a Rule 23 class action as set forth in the Class Allegations in paragraphs 14 through 19 above.

76. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The expense of individual litigation may be prohibitive and render it impractical for class members to sue Kroger for wrongfully withheld hourly pay and overtime wages.

COUNT IV
(Failure to Pay Wages in Violation of Ohio law)

As a further and separate cause of action, Plaintiffs state as follows:

77. The allegations of Paragraphs 1-76 are herein incorporated by reference.

78. Plaintiffs bring their claims under O.R.C. § 4113.15 on behalf of all persons who worked for Kroger as Recruiters at its CoRE Center in Blue Ash, Ohio, prior to the filing of this Complaint to entry of judgment in this case.

79. Defendants violated O.R.C. § 4113.15 by failing to pay Plaintiffs and those similarly situated all wages owed to them within thirty days of the regularly scheduled payday for each pay period in which Plaintiffs and those similarly situated worked.

80. As a result of Kroger's failure to pay such wages, Plaintiffs as individuals, Plaintiffs as representative for the class, and the members of the class that Plaintiffs seek to represent are entitled to such wages and an additional amount as liquidated damages.

81. As a consequence of this misclassification, Plaintiffs seek to bring a Rule 23(b)(3) Class action on the part of all persons who have worked and are working for Kroger as Recruiters at its CoRE Center in Blue Ash, Ohio.

82. Plaintiffs can meet the numerosity, commonality, typicality, and adequate representation requirements for a Rule 23 class action as set forth in the Class Allegations in paragraphs 14 through 19 above.

83. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The expense of individual litigation may be prohibitive and render it impractical for class members to sue Kroger for wrongfully withheld hourly pay and overtime wages.

WHEREFORE, the named Plaintiffs, individually and on behalf of those similarly-situated persons request the following relief:

- A. An Order permitting this litigation to proceed as a FLSA collective action and an Ohio class action with Plaintiffs designated as Class Representatives.
- B. Prompt notice, to all collective action class members regarding their right to “opt-in” to this litigation.
- C. Payment of unpaid hourly pay and overtime wages pursuant to O.R.C. § 4111.01 *et seq.*, and the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*
- D. Payment of all unpaid wages pursuant to O.R.C. § 4113.15.
- E. A declaratory judgment finding that: i) Kroger has misclassified its Recruiters at the CoRE Center as exempt, ii) Defendant Kroger was obligated to pay Plaintiffs and similarly situated employees overtime compensation for all hours worked in excess of forty hours per week; iii) Defendant Kroger’s failure to pay Plaintiffs and similarly situated employees overtime compensation constitutes a violation of the FLSA and OMFWSA; iv) Defendant Kroger’s misclassification of Plaintiffs and similarly situated employees as exempt from the FLSA and OMFWSA was improper, willful, and not in good faith; and v) Plaintiffs

and those similarly-situated are entitled to proper compensation, liquidated damages and reasonable attorneys' fees pursuant to the FLSA and OMFWSA.

- F. Liquidated damages.
- G. Pre-judgment and post-judgment interest
- H. Attorneys' fees and costs.
- I. Such other injunctive and equitable relief as this Court may deem just and proper.

~~Respectfully submitted,~~

~~Peter A. Saba (0055535)~~
Joshua M. Smith (0092360)
Sharon J. Sobers (0030428)
STAGNARO, SABA
& PATTERSON CO., L.P.A.
2623 Erie Avenue
Cincinnati, Ohio 45208
(513) 533-2701
(513) 533-2711 (fax)
pas@sspfirm.com
Attorneys for Plaintiffs

DEMAND FOR TRIAL BY JURY

Plaintiffs demand a jury on all issues triable to a jury.

~~Respectfully submitted,~~

~~Peter A. Saba (0055535)~~