

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

CURTIS SCHREIBER, individually, and on
behalf of a class of others similarly situated,

Plaintiff,

v.

BANK OF AMERICA, N.A.,

Defendant.

Case No. 09-CV-1336 EFM/DWB

JURY TRIAL DEMANDED

COMPLAINT
Collective Action under the FLSA

COMES NOW the Plaintiff, individually and on behalf of all others similarly situated, by and through his counsel, for his Complaint against Defendant Bank of America, N.A. (“BOA”), and hereby states and alleges as follows:

1. BOA provides financial services – including banking, lending, credit card and insurance services – to consumers nationwide. BOA’s policy and practice is to deny earned wages and overtime pay to its hourly employees at its call center facilities. BOA’s deliberate failure to pay call center employees their earned wages and overtime compensation violates the Fair Labor Standards Act (“FLSA”).

2. Plaintiff previously worked as a call center employee at BOA’s call center located in Wichita, Kansas. This lawsuit is brought as a collective action under the FLSA to recover unpaid wages owed to Plaintiff and all other similarly situated workers employed in BOA call centers nationwide.

3. The United States Supreme Court has held that, among other things, preparatory work duties that are integral and indispensable to the principal work activity are compensable under the FLSA. *See IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005). Although *Alvarez* arose in the

donning and doffing context in a meat processing plant, its holding is directly applicable to the call centers operated by BOA.

4. Because call center operators routinely violate wage and hour laws, the United States Department of Labor has recently issued guidance concerning the application of the FLSA to employees working in call centers. The Department of Labor instructs: "Covered employees must be paid for all hours worked in a workweek. In general, 'hours worked' includes all time an employee must be on duty, or on the employer's premises . . . from the beginning of the first principal activity of the workday to the end of the last principal activity of the workday. Also included is any additional time the employee is allowed (i.e., suffered or permitted) to work. An example of the first principal activity of the day for agents/specialists/representatives working in call centers includes starting the computer to download work instructions, computer applications, and work-related emails." *See* Fact Sheet #64: Call Centers under the Fair Labor Standards Act (FLSA), U.S. Dept. of Labor, Employment Standards Admin., Wage and Hour Division (Revised July 2008) (emphasis added) (attached as Exhibit A).

5. In order to perform their duties, Plaintiff and similarly situated employees engage in numerous preparatory activities, as well as related work activities performed at the end of the work day, that are integral and indispensable to their principal work activity. BOA's policy and practice is not to pay call center employees for this work time, and consequently call center employees are consistently working "off the clock" and without pay. Accordingly, under the holding of *Alvarez*, as well as under consistent rulings and interpretations of the United States Department of Labor, Plaintiff and all similarly situated employees are entitled to compensation for the time they spend performing work-related activities pre- and post-shift.

JURISDICTION AND VENUE

6. The FLSA authorizes court actions by private parties to recover damages for violation of the FLSA's wage and hour provisions. Jurisdiction over Plaintiff's FLSA claims are based upon 29 U.S.C. § 216(b) and 28 U.S.C. § 1331.

7. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b) and (c), because a substantial part of the events giving rise to the claims occurred in this jurisdiction.

PARTIES

8. BOA is a Delaware corporation with its principal place of business in North Carolina. BOA does business in the State of Kansas and nationwide.

9. Plaintiff is a current resident of Kansas who worked as a call center employee at BOA's call center in Wichita, Kansas during the last three years. Attached as Exhibit B is Plaintiff's consent to become a party plaintiff pursuant to 29 U.S.C. § 216(b).

GENERAL ALLEGATIONS

10. BOA operates call centers in numerous states across the country. Upon information and belief, BOA operates call centers in the following states: California, Florida, Rhode Island, Kansas, New Mexico, Nevada, Maine, and Texas.

11. The principal job duty of a BOA telephone-dedicated call center employee is to take calls from or make calls to new or existing BOA customers in order to provide customer service. The customer service provided by BOA call center employees includes activating or updating accounts, assisting with billing inquiries, addressing billing, credit and collections issues, and selling or suggesting BOA products and services.

12. BOA paid Plaintiff and its other call center employees on an hourly basis, and classified Plaintiff and its other call center employees as "non-exempt" under the FLSA.

13. BOA call center employees are not allowed to accurately record all the time they work. Employees are not allowed to clock in until the beginning of their scheduled shift; however, they must be ready to take phone calls as soon as their shift begins. A number of critical tasks must be performed before a call center employee is ready to take a call from, or make a call to, a BOA customer. These tasks include: (1) finding a computer station; (2) retrieving their headsets and other necessary equipment from their lockers; (3) logging in to a computer; (4) logging on to BOA's network; (5) opening relevant computer programs and software applications; (6) reviewing memoranda and e-mail; and (7) completing other essential tasks. Call center employees are not compensated for this time, yet they cannot perform their job duties without accomplishing these tasks.

14. Similarly, call center employees are required to clock out immediately upon the conclusion of their last call of the day. Consequently, BOA's policy is not to pay for time spent (1) shutting down the relevant computer programs and software applications; (2) logging off of BOA's network; (3) logging off of the computer; (4) cleaning up their workstation; (5) returning their equipment to their lockers; and (6) completing other essential tasks.

15. All BOA non-exempt call center employees (also called "overtime eligible associates") utilize the same timekeeping system called "eWorkplace" provided by Fidelity Investments.

16. eWorkplace automatically populates all overtime eligible associates' timesheets with their scheduled hours.

17. All overtime eligible associates must submit their timesheets to management for approval.

18. As a part of this approval process, if an overtime eligible associate records hours outside of the pre-populated scheduled hours, BOA allows managers to unilaterally modify or decrease the time recorded by overtime eligible associates. Additionally, BOA allows managers to instruct overtime eligible associates to modify or decrease their recorded time before the manager will approve.

19. Upon information and belief, BOA routinely and illegally deletes overtime hours recorded on overtime eligible associates' timesheets, or requires its employees to delete such recorded overtime hours, to avoid paying overtime.

20. Because BOA's timekeeping system records and tracks all modifications and deletions made to the time entered by overtime eligible associates, instances of illegal reductions of overtime will be readily ascertainable on a class wide basis.

21. BOA could easily and accurately record the actual time call center employees spend working, including, for example, by placing a time clock at the door of the call center. In fact, BOA requires call center employees to swipe a security badge that automatically records when they arrive at and leave the call center, but this system is not used for payroll.

22. Upon information and belief, BOA is adhering to the same policy and practice with respect to call center employees at all its other call centers nationwide.

23. The net effect of BOA's policy and practice, instituted and approved by company managers, is that BOA willfully fails to pay overtime compensation and willfully fails to keep accurate time records in order to save payroll costs. BOA enjoys ill-gained profits at the expense of its hourly employees.

COLLECTIVE ACTION ALLEGATIONS

24. Plaintiff reasserts and re-alleges the allegations set forth in paragraphs 1 through 23 above.

25. Plaintiff brings Count I, the FLSA claim, as an “opt-in” collective action pursuant to 29 U.S.C. § 216(b).

26. The FLSA claim may be pursued by those who opt-in to this case, pursuant to 29 U.S.C. § 216(b).

27. Plaintiff, individually and on behalf of all other similarly situated employees, seeks relief on a collective basis challenging, among other FLSA violations, BOA’s practice of failing to accurately record all hours worked and failing to pay employees for all hours worked, including overtime, and illegally modifying time records. The number and identity of other plaintiffs yet to opt-in and consent to be party plaintiffs may be determined from the records of BOA, and potential class members may easily and quickly be notified of the pendency of this action.

COUNT I

Violation of the Fair Labor Standards Act of 1938

**(Brought Against BOA by Plaintiff Individually and
on Behalf of All Others Similarly Situated)**

28. Plaintiff reasserts and re-alleges the allegations set forth in paragraphs 1 through 27 above.

29. At all times material herein, Plaintiff has been entitled to the rights, protections, and benefits provided under the FLSA, 29 U.S.C. §§ 201, *et seq.*

30. The FLSA regulates, among other things, the payment of overtime by employers whose employees are engaged in interstate commerce, or engaged in the production of goods for

commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce. 29 U.S.C. § 207(a)(1).

31. BOA is subject to the overtime pay requirements of the FLSA because it is an enterprise engaged in interstate commerce and its employees are engaged in commerce.

32. BOA violated the FLSA by failing to pay for overtime. In the course of perpetrating these unlawful practices, BOA has also willfully failed to keep accurate records of all hours worked by its employees.

33. Section 13 of the FLSA, codified at 29 U.S.C. § 213, exempts certain categories of employees from overtime pay obligations. None of the FLSA exemptions apply to Plaintiff or call center employees.

34. Plaintiff and all similarly situated employees are victims of a uniform compensation policy. Upon information and belief, this uniform policy, in violation of the FLSA, has been applied to all call center employees in BOA's call centers located nationwide.

35. Plaintiff and all similarly situated employees are entitled to damages equal to the mandated overtime premium pay within the three years preceding the filing of this Complaint, plus periods of equitable tolling, because BOA acted willfully and knew, or showed reckless disregard of whether their conduct was prohibited by the FLSA.

36. BOA has acted neither in good faith nor with reasonable grounds to believe that its actions and omissions were not a violation of the FLSA, and as a result thereof, Plaintiff and other similarly situated employees are entitled to recover an award of liquidated damages in an amount equal to the amount of unpaid overtime pay described pursuant to Section 16(b) of the FLSA, codified at 29 U.S.C. § 216(b). Alternatively, should the Court find BOA did not act

willfully in failing to pay overtime pay, Plaintiff and all similarly situated employees are entitled to an award of prejudgment interest at the applicable legal rate.

37. As a result of the aforesaid willful violations of the FLSA's overtime pay provisions, overtime compensation has been unlawfully withheld by BOA from Plaintiff and all similarly situated employees. Accordingly, BOA is liable pursuant to 29 U.S.C. § 216(b), together with an additional amount as liquidated damages, pre-judgment and post-judgment interest, reasonable attorneys' fees, and costs of this action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief as follows: Plaintiff and all similarly-situated employees demand judgment against BOA and pray for: (1) compensatory damages; (2) liquidated damages; (3) attorneys' fees and costs as allowed by Section 16(b) of the FLSA; (4) pre-judgment and post-judgment interest as provided by law; and (5) such other relief as the Court deems fair and equitable.

DESIGNATION OF PLACE OF TRIAL

Plaintiffs hereby designate Wichita, Kansas as the place of trial.

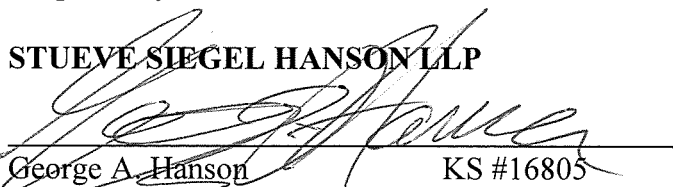
DEMAND FOR JURY TRIAL

Plaintiff hereby requests a trial by jury of all issues triable by jury.

Dated: October 28, 2009

Respectfully submitted,

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