

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Case No. 1:16-cv-00955

RICHARD E. SWIGER, individually, and
on behalf of all others similarly situated,

Plaintiffs,

v.

BREG, INC., VISCENT LLC, and
ORTHORX, INC.,

Defendants.

**COMPLAINT-
COLLECTIVE ACTION
29 U.S.C § 216(b)**

INTRODUCTION

Plaintiff Richard E. Swiger (“Swiger” or “Plaintiff”) brings this action on behalf of himself and on behalf of all others similarly situated, to recover unpaid wages, overtime, liquidated damages, attorneys’ fees, and interest at the legal rate, from his former employers Breg, Inc. (“Breg”), Viscent LLC (“Viscent”), and OrthoRx, Inc. (“OrthoRx”), or collectively, “Employers” or Defendants”, for violations of the Fair Labor Standards Act (hereinafter “FLSA”), 29 U.S.C. § 201 et seq., and the North Carolina Wage and Hour Act (hereinafter “NCWHA”), N.C.G.S. § 95-25.1 et seq. At all times alleged in this Complaint, Plaintiff was the victim of a uniform policy and practice to deprive him of lawful wages in willful violation of the FLSA and NCWHA.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1337 (commerce), 28 U.S.C. § 1331 (federal question), and 29 U.S.C. § 216(b) (FLSA) and 28 U.S.C. § 1367 (supplemental jurisdiction).

2. Venue is proper in this Court under 28 U.S.C. § 1391. The causes of action asserted herein occurred and/or accrued in Orange County, North Carolina. Venue is also appropriate in this Court because Defendants own and/or operate one or more businesses in Orange County, North Carolina. In addition, Defendants' unlawful conduct occurred in, among other places, North Carolina.

PARTIES

3. Plaintiff is a natural person residing in Wake County, North Carolina and at all relevant times asserted in this Complaint, was an employee at two facilities owned and operated by Defendants in Chapel Hill, North Carolina, one located in Meadowmont Shopping Center ("Meadowmont"), 400 Meadowmont Village Circle, Suite 425, Chapel Hill, NC 27517, and the other, at UNC Orthopaedic Clinic at the Ambulatory Care Center ("ACC") 102 Mason Farm Road, Chapel Hill, NC 27599-7745.

4. Defendant Breg is a foreign business, organized under the laws of the State of California, duly domesticated within the State of North Carolina, with a principal office located at 2885 Loker Ave. E, Carlsbad, CA 92010, which at all times hereafter owned and operated a business in Chapel Hill, North Carolina.

5. Defendant Viscent is a foreign business organized and operating under the laws of the State of Delaware, with a principal office located at 5204 Tennyson Parkway,

Suite 100, Plano, TX 75024, which at all times hereafter owned and operated a business in Chapel Hill, North Carolina.

6. Defendant OrthoRx is a foreign business, organized and operating under the laws of the State of Delaware, duly domesticated within the State of North Carolina, with a principal office located at 5204 Tennyson Parkway, Suite 100, Plano, TX 75024, which at all times hereafter owned and operated a business in Chapel Hill, North Carolina.

7. Upon information and belief, beginning in 2013, but prior to October 2014, Swiger was an employee of OrthoRx d/b/a Carolina Brace Systems, licensed in North Carolina to conduct business under the OrthoRx d/b/a Carolina Brace Systems name at Meadowmont and ACC in Chapel Hill, NC.

8. Upon information and belief, Swiger was also an employee of Viscent, who owned and operated, in whole or in part, OrthoRx d/b/a Carolina Brace Systems. Swiger believed he was an employee of Viscent. Swiger was directed in his employment, by or through Viscent, and was reimbursed for expenses from Viscent.

9. Viscent and OrthoRx have the same principal office, 5204 Tennyson Parkway, Suite 100, Plano, TX 75024.

10. Upon information and belief, beginning in October 2014, and continuing to the present, Swiger was an employee of Breg and Breg owned and operated both the Meadowmont and ACC facilities in Chapel Hill, NC.

11. Defendants are enterprises, as defined in 29 U.S.C. § 203(r)(1) and N.C.G.S. § 95-25.2(18), engaged in business in the State of North Carolina.

FACTUAL ALLEGATIONS – OVERTIME WAGES

12. Upon Information and belief, beginning in February 2013, Viscent and/or OrthoRx employed Swiger as an Orthotic Fitter in its facilities at ACC and Meadowmont, Chapel Hill, North Carolina. Swiger was paid a salary, designated as exempt. Defendants did not record Mr. Swiger's hours at work, neither regular nor overtime. Swiger was paid on a bi-monthly basis, and was never paid overtime.

13. As an Orthotic Fitter, under Viscent and/or OrthoRx, and later an Orthotist, under Breg, Viscent and/or OrthoRx, Swiger's primary job duty was to fill medical prescriptions, as issued by the treating physician, Swiger did not analyze or diagnose patients for proscribed therapy.

14. Swiger's employers kept a supply of products on hand to readily meet patient needs.

15. The vast majority of patients were fit with off-the-shelf products.

16. When fitting off-the-shelf products, Swiger would select the product conforming to the needs of the patient as stated by the given physician, explain its use to the patient and provide the patient the instruction sheet included in the box.

17. Swiger regularly worked for Defendants five days a week at ACC from 8:00am to 5:00pm. Following the end of his shift at the ACC facility, but in the same day's work, Swiger regularly drove to Meadowmont and continued work in the evenings. At neither facility did Swiger perform managerial or administrative duties. At neither facility

did Swiger have authority to supervise, hire or fire employees, nor did he have any input on personnel matters beyond his own employment.

18. Swiger worked hours in excess of forty hours per week.

19. Defendants classified Swiger as a salary, exempt employee.

20. Upon information and belief, after Defendant Breg merged with Viscent parent, United Orthopedic Group, LLC (“UOG”) in late 2014, Breg designated Swiger as a manager, even though his job functions and responsibilities remained the same.

21. Swiger was not exempt from overtime pay under FLSA because he was not employed in a bona fide executive, administrative or professional capacity.

22. Swiger’s day-to-day job responsibilities as an Orthotist were essentially identical to an Orthotic Fitter. The practical difference between the two positions was a matter of title, a result of the Orthotist certification obtained in August 2013.

23. Defendants’ classifications and its policy and practice with respect to the payment of overtime wages to Swiger violated the FLSA and NCWHA, and deprived Swiger of the lawful wages to which he was entitled.

FACTUAL ALLEGATIONS – WILLFUL CONDUCT

24. Defendant Viscent, and/or OrthoRx, had an obligation to make proper inquiry into their FLSA compliance obligations and failed to do so, classifying Mr. Swiger, upon his hire as an Orthotic Fitter, as exempt, and further, upon his certification as an Orthotist, he continued to be classified as exempt.

25. Defendant Breg had an obligation to make proper inquiry into their FLSA compliance obligations, and failed to do so, or, having inquired, ignored or willfully attempted to avoid their legal obligations, and continued to classify Mr. Swiger as exempt.

26. Upon information and belief and without disclosure to Swiger, Defendant Breg titled Swiger as a manager, even though he supervised no employees and performed no managerial responsibilities.

27. Upon information and belief, Defendant Breg changed Swiger's title to manager in a willful attempt to justify his classification as exempt and avoid their legal obligations.

28. Upon information and belief, Defendants employ multiple persons across the country, no less than 40, as Orthotists and/or Orthotic Fitters, and classify all of them as FLSA exempt.

COLLECTIVE CLAIMS UNDER FLSA

29. Plaintiff brings this on his own behalf and as collective action on behalf of others similarly situated to recover unpaid compensation, in the form of overtime compensation, pursuant to FLSA. For at least three years prior to filing this complaint, Defendants have had a uniform policy and practice of classifying Orthotists and Orthotic Fitters as exempt, without overtime compensation. Plaintiff and others similarly situated are or were employed with the Defendants in positions denominated Orthotist or Orthotic Fitter.

30. On information and belief, Defendant Viscent and/or OrthoRx managed the classification of employees for FLSA purposes, including Swiger and other Orthotists and Orthotic Fitters, from Swiger's initial hire in early 2013, up until the merger with Breg, in a centralized and uniform fashion, from its Plano, TX home.

31. On information and belief, Defendant Breg managed the classification of employees for FLSA purposes, including Orthotists and Orthotic Fitters, in a centralized and uniform fashion, from its Carlsbad, CA home.

32. On further information and belief, Defendant Viscent and/or OrthoRx's payroll function was operated in a centralized and uniform manner from their Plano, TX home office and Plaintiff's paychecks were regularly issued from this centralized payroll operation. On information and belief, paychecks for all similarly situated employees were issued from the same, centralized payroll department in Defendant's Plano, TX home office for all states in which Defendant operates.

33. On further information and belief, Defendant Breg's payroll function is operated in a centralized and uniform manner from its Carlsbad, CA home office and Plaintiff's paychecks were regularly issued from this centralized payroll operation. On information and belief, paychecks for all similarly situated employees were issued from the same, centralized payroll department in Defendant's Carlsbad, CA home office for all states in which Defendant operates.

34. Plaintiff and others similarly situated were paid a specified salary and were not paid any overtime compensation notwithstanding they worked in excess of 40 hours per week and performed no managerial duties.

35. Plaintiff and others similarly situated who elect to participate in this action seek unpaid overtime wage compensation, an equal amount of liquidated damages, attorneys' fees, and costs pursuant to 29 U.S.C. § 216(b).

36. Defendants are enterprises engaged in commerce or in the production of goods for commerce as defined by § 203(s)(1) of the FLSA.

37. Defendants are employers as defined by § 203(d) of the FLSA.

38. At all times material to this action, the Plaintiff and others similarly situated are and/or were employees of Defendants as defined by § 203(e)(1) of the FLSA, and worked for Defendant within three years preceding the filing of this action.

39. The provisions set forth in §§ 206 and 207, respectively, of the FLSA apply to Defendants, and all members of the Plaintiff class herein were covered by §§ 206 and 207 of the FLSA while they were employed by Defendants.

40. At all times relevant to this action, Defendants employed Plaintiff and others similarly situated in the capacity of Orthotists and Orthotic Fitters.

41. The Plaintiff and others similarly situated were required to perform non-exempt work without overtime compensation.

42. Defendants have knowingly and intentionally failed and/or refused to pay the Plaintiff and others similarly situated overtime compensation as required by the provisions of the FLSA.

43. For at least three years, Defendants have been or should have been aware of the requirements of the FLSA and its corresponding regulations, notwithstanding it willfully refused and failed to pay its Orthotists and Orthotic Fitters overtime wages as required by FLSA.

44. Defendants have failed, and on information and belief, continue to fail, to maintain accurate time records for Plaintiffs and other similarly situated employees as required by the FLSA.

45. Defendants willfully violated the FLSA by failing to keep accurate time records of all hours worked by Plaintiff and other similarly situated employees.

46. The foregoing conduct constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a), as Defendants knew or showed reckless disregard for the fact that its compensation practices were in violation of these laws.

47. Plaintiff, and other similarly situated present and former employees, are entitled to statutory damages equal to the mandated overtime premium pay within the three (3) (or more) years preceding the filing of this Complaint.

48. Defendants have shown a reckless disregard for the FLSA's overtime requirements. Although Defendants had an obligation to make proper inquiry into their

FLSA compliance obligations, they failed to do so or, having inquired, they ignored or willfully attempted to avoid their legal obligations.

49. Defendants have not acted in good faith with respect to the failure to pay overtime compensation. Defendants have no legitimate reason to believe their actions and omissions were *not* a violation of the FLSA, thus entitling Plaintiff, and those similarly situated, to recover an award of liquidated damages in an amount equal to the amount of unpaid overtime compensation described above.

50. There are numerous employees and former employees of Defendants who are similarly situated to Plaintiff who have been denied overtime compensation in violation of the FLSA, who would benefit from the issuance of Court-Supervised Notice and opportunity to join the present lawsuit. Those similarly situated employees and former employees are best known to Defendants and are readily identifiable from Defendants' records.

51. Accordingly, the proposed class is all Orthotists, Orthotic Fitters and former Orthotists and Orthotic Fitters who are or have been employed with Defendants within the United States for the last three years, who have worked overtime hours and who have not been compensated overtime wages. The foregoing proposed class should be given Court-Supervised Notice of this lawsuit and opportunity to join herein.

52. Plaintiff consents to become a party plaintiff in this representative FLSA action pursuant to 29 U.S.C. § 216(b), as evidenced by Plaintiff's "Consent to Become Party to Collective Action Under 29 U.S.C. § 216," filed herewith.

FIRST CLAIM FOR RELIEF
(Violation of the Fair Labor Standards Act)

53. Plaintiff re-alleges and incorporates the preceding and subsequent paragraphs as if fully set forth herein.

54. Defendants violated Swiger's rights under the FLSA by failing to pay Swiger overtime compensation for hours worked in excess of forty (40) hours for each workweek that Swiger worked between June 2013 and February 2016.

55. Swiger and all others similarly situated were entitled to all the rights and protections of the FLSA and Defendants' failure to pay Swiger overtime was in violation of the FLSA.

56. Defendants acted willfully and with reckless disregard for Swiger's rights under the FLSA.

57. Plaintiff and all others similarly situated are entitled to back pay for all overtime hours worked during his employment with Defendants in an amount equal to one and one-half times his regular rate of pay.

58. As a result of Defendants' willful and reckless actions, Swiger and all others similarly situated are entitled to recover liquidated damages pursuant to 29 U.S.C. § 216(b).

59. Plaintiff and all others similarly situated are entitled to recover attorney's fees pursuant to 29 U.S.C. § 216(b).

SECOND CLAIM FOR RELIEF
(Violation of the North Carolina Wage and Hour Act)

60. The Plaintiff re-alleges and incorporates the preceding and subsequent paragraphs as if fully set forth herein.

61. The factual allegations in paragraphs 10-28 above, also amount to violations of the NCWHA, necessitating an award of unpaid wages, damages, attorney's fees and interest at the legal rate.

62. Defendants violated Swiger's rights under the NCWHA by failing to pay Swiger overtime compensation for hours worked in excess of forty (40) hours for each workweek that Swiger worked between June 2013 and February 2016.

63. Defendants violated Swiger's rights under the NCWHA by failing to pay Swiger all wages due on the regular payday.

64. Swiger was entitled to all the rights and protections of the NCWHA and Defendants' failure to pay Swiger was in violation of the NCWHA.

65. Defendants acted willfully and with reckless disregard for Swiger's rights under the NCWHA.

66. Swiger is entitled to back pay for all overtime hours worked during his employment with Defendants in an amount equal to one and one-half times his regular rate of pay.

67. As a result of Defendants' willful and reckless actions, Swiger is entitled to recover liquidated damages pursuant to N.C. Gen. Stat. § 95-25.22.

68. Swiger is entitled to recover his attorney's fees pursuant to N.C. Gen. Stat. § 95-25.22(d).

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Swiger, individually and on behalf of all other similarly situated employees and former employees of Defendants, prays the Court for the following relief:

- A. At the earliest possible time, he be allowed to give notice, or that the Court issue such Notice, to all Defendants' employees and former employees during the three years immediately preceding the filing of this suit, to all other potential Plaintiffs who may be similarly situated informing them that this action has been filed, the nature of the action, and of their right to opt-into this lawsuit if they worked overtime but were not paid overtime wages therefore, pursuant to 29 U.S.C. § 216(b);
- B. Designate this action as a collective action on behalf of the FLSA collective class pursuant to 29 U.S.C. § 216(b);
- C. Enter judgment declaring that the acts and practices complained of herein are violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*;
- D. Enter judgment that the Plaintiff, and all others similarly situated, be awarded damages in the amount of their respective unpaid overtime wage compensation, plus an equal amount of liquidated damages pursuant to 29 U.S.C. § 216(b), and prejudgment interest;
- E. Enter judgment that Defendant's violations of the FLSA were willful;
- F. Declaring that Defendant's conduct violates NCWhA;
- G. Enter judgment awarding Plaintiff, and those similarly situated, reasonable attorney's fees and costs of this suit, pursuant to N.C. Gen. Stat. § 95-25.22(d) and 29 U.S.C. § 216(b);
- H. Enter judgment for post-judgment interest at the applicable legal rate;
- I. Grant leave to amend to add additional plaintiffs by motion, the filing of written consent forms, or any other method approved by the Court; to add

claims under applicable state and federal laws, including claims for minimum wages pursuant to 29 U.S.C. § 206; and/or to add other Defendants who meet the definition of Plaintiffs' employer, pursuant to 29 U.S.C. § 203(d);

- J. Enjoin Defendant from future violations of the FLSA through the mandated payment of overtime compensation to similarly situated employees for hours worked in excess of forty (40) per week;
- K. Such other legal and equitable relief including, but not limited to, any injunctive and/or declaratory relief, to which they may be entitled; and

Such further relief as this Court deems just and appropriate

Dated: July 14, 2016. Respectfully submitted,

RICHARD SWIGER,

By His Undersigned Attorneys

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