

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PATRICIA FOGG
and RICHARD BOYLE,

PLAINTIFFS,

v.

CIVIL ACTION NO.
2:16-cv-00699-JHE

OVER THE MOUNTAIN SEDAN, LLC,
and BRUCE McCORMICK,

DEFENDANTS

SETTLEMENT AGREEMENT

I. JURISDICTION

COME NOW the Plaintiffs, Patricia Fogg and Richard Boyle (“Plaintiffs”), and the Defendant Bruce McCormick (“Defendant”), and jointly move for the Court to approve the Parties’ Settlement Agreement, which represents a resolution of a disputed matter under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (“FLSA”).

In support of this Motion, the Parties state as follows:

1. Plaintiffs initiated this action against Defendants, alleging that Defendants unlawfully failed to pay overtime wages for hours worked in excess of forty during multiple work weeks in violation of the FLSA. (Doc. 1). Plaintiff Boyle also asserted a count alleging violation of the FLSA anti-retaliation statute.

Plaintiffs filed an Amended and Restated Complaint that re-asserted the original complaint and Plaintiff Fogg asserted a count alleging violation of the FLSA anti-retaliation statute. In order to facilitate the settlement and dismissal of this action, Plaintiffs filed a motion to dismiss Defendant Over the Mountain Sedan, LLC without prejudice. (Doc. 44). The Court granted this motion and directed the parties to file a revised settlement agreement. (Doc. 45).

2. Plaintiffs believe that the cause of action, allegations, and contentions asserted in this action have merit and that the evidence developed to date supports the cause of action asserted. Defendant McCormick denies Plaintiffs' allegations and denies that Plaintiffs are due any relief. As such, this is a disputed claim. However, the Parties recognize and acknowledge that the expense in time and money of litigation, the uncertainty and risk of litigation, as well as the difficulties and delays inherent in such litigation, make settlement of this matter a mutually appealing resolution.

3. Accordingly, the Parties have reached a Settlement Agreement to resolve the Plaintiffs' claims for overtime premium. The Agreement is set forth below at pages 6-11. Pursuant to applicable Eleventh Circuit precedent, this Court is empowered to review and approve the provisions of such settlement agreements in actions brought for back wages under the FLSA. *See Lynn Food Stores v. United States*, 679 F.2d 1350 (11th Cir. 1982). Because the Parties have agreed that the

terms reflected in this Agreement are mutually satisfactory and that they represent a fair and reasonable resolution of a bona fide dispute, the Parties respectfully request that the Court approve the Settlement Agreement.

4. In support of this request that the Court approve the Parties' Settlement Agreement, Plaintiffs submit that each is accepting a comprised settlement of the wages potentially owed under the terms of the Settlement Agreement for the alleged unpaid overtime wages to which each claims to be entitled. Additionally, Plaintiffs' counsel represents that: (a) Plaintiffs fully understand the Agreement and (b) Plaintiff has consulted with their counsel of record before agreeing to the Agreement and has entered into it knowingly and voluntarily. Plaintiffs and Defendant agreed to this settlement with the supervision of a settlement conference conducted by United States Magistrate Judge Herman N. Johnson.

The Parties respectfully understand that this Court must approve the below Settlement Agreement as a fair and reasonable compromise of disputed issues under the FLSA in order to be valid.

MEMORANDUM OF LAW

5. Employees can settle and release claims under the FLSA in two ways. First, employees can settle and waive their claims under the FLSA if the Secretary of Labor supervises the payment of unpaid wages by the employer to the employee. *See* 29 U.S.C. § 216(c) (2008); *Lynn's Food Stores, Inc. v. United States*, 679 F.2d

1350, 1353 (11th Cir. 1982). Second, in the context of a private lawsuit brought by an employee against an employer under the FLSA (as is the case here), an employee may settle and release FLSA claims if the parties present the district court with a proposed settlement, and the district court enters a stipulated judgment approving the fairness of the settlement. *Lynn's Food Stores, Inc.*, 679 F.2d at 1353; *see also D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 113 n.8 (1946) (discussing propriety of allowing settlement of FLSA claims where district court has reviewed terms of settlement agreement).

6. In detailing the circumstances justifying court approval of an FLSA settlement in the litigation context, the Eleventh Circuit has stated as follows:

Settlements may be permissible in the context of a suit brought by employees under the FLSA for back wages because initiation of the action by the employees provides some assurance of an adversarial context. The employees are likely to be represented by an attorney who can protect their rights under the statute. Thus, when the parties submit a settlement to the court for approval, the settlement is more likely to reflect a reasonable compromise of disputed issues than a mere waiver of statutory rights brought by an employer's overreaching. If a settlement in an employee FLSA suit does reflect a reasonable compromise over issues, such as FLSA coverage or computation of back wages that are actually in dispute, we allow the district court to approve the settlement in order to promote the policy of encouraging settlement of litigation.

Lynn's Food Stores, Inc., 679 F.2d at 1354.

7. In the instant action, the Court should approve the Parties' Settlement Agreement to resolve Plaintiffs' FLSA claims against Defendant McCormick. The

proposed Settlement Agreement arises out of an action that was adversarial in nature. The parties disputed the merits of this case, with Plaintiffs contending that Defendant violated the FLSA by failing to pay overtime premium for hours worked in excess of forty in work week and Defendant disputing Plaintiffs' factual allegations that Plaintiffs worked the hours claimed, and, even if liability were established, the damages Plaintiffs could reasonably recover. Plaintiffs and their counsel discussed the claims and the parties formulated their own proposed settlement figures. The Parties then engaged in settlement discussions based on their independent calculations and analysis.

8. The Parties entered into this settlement in recognition of the risks inherent in any litigation – specifically, for Plaintiffs, the risk of no recovery or a recovery that is less than the one obtained through this proposed agreement, and for the Defendant, the risk of a verdict against it on the merits. The Settlement Agreement provides Plaintiffs with a compromise of the claimed unpaid overtime wages sought in this lawsuit, and a payment of attorneys' fees and costs to their counsel for prosecuting this matter, it represents a fair and reasonable compromise of this matter.

9. Because the Settlement Agreement represents a fair and reasonable compromise over bona fide FLSA wage disputes and was negotiated at arms' length, the Court should approve this settlement.

SETTLEMENT AGREEMENT

II. PLAINTIFF'S STATEMENT OF CLAIMS

10. This action is brought pursuant to the FLSA, 29 U.S.C. § 201 *et seq.* for equitable and declaratory relief and to remedy violations of the FLSA by Defendants, which have deprived Plaintiffs of their lawful wages in regard to every hour worked over forty in a work week at a rate below the overtime premium rate for hours worked in excess of forty in work week. This action was brought to recover unlawful denial of overtime premium pay for hours worked in excess of forty in work week in the form of unpaid minimum wages and overtime wages and an equal amount in liquidated damages owed to the Plaintiffs.

11. Plaintiffs contends each worked for the Defendants during various work weeks between January 1, 2014, through May 11, 2016. During approximately those work weeks during that period Defendants classified Plaintiffs as independent contractors and did not compensate Plaintiffs for any overtime premium. Defendants produced to Plaintiffs' attorneys its payroll records, internal correspondence and schedules detailing the hours it contends Plaintiffs worked during each work week and the compensation paid on the work performed each work week. For purposes of the calculations, Plaintiffs are claiming that each was paid straight pay for hours in excess of 40 in a work week, but was not paid overtime premium for each hour worked under Defendants' rate format. This failure to pay

overtime premium resulted in various damages each work week; such that the accurate calculation of damages is inherently difficult. Defendant McCormick denies Plaintiffs worked this many hours in any given week and maintain that Plaintiffs were adequately compensated as independent contractors. As such, this is a highly disputed claim.

III. DEFENDANTS' STATEMENT OF DEFENSES

13. Defendant McCormick contends that any violation of the FLSA were inadvertent and its actions were made in good faith. Defendant McCormick further states Plaintiffs did not work as many hours as claimed. Defendant McCormick argues Plaintiffs were paid based on an agreed upon commission and tips for each assigned ride.

IV. Settlement Terms

In an effort to resolve the lawsuit, Defendants produced trip logs, pay records, expense receipts, internal correspondence and schedules, to aid Plaintiffs' evaluation of their claims and Defendants' defenses.

The Parties recognize that gathering the testimonial evidence during the liability period and whether Defendant McCormick operated in "good faith" would significantly increase litigation costs and potentially jeopardize the settlement amounts and delay payment of the settlements. These disputes would likely remain unresolved, require summary judgment filings, and ultimately a trial.

Using Defendants' records, the Parties were able to estimate the total number of regular and overtime hours worked for which Plaintiffs claimed Defendants did not pay the Plaintiffs the proper overtime compensation for hours worked in excess of forty in a work-week. Throughout settlement negotiations, the Parties discussed the strengths and weaknesses of their respective positions. Notably, the parties recognized the inherent risks with continued litigation. The Plaintiffs believe that the amount each will receive pursuant to this settlement reflect a reasonable compromise of disputed claims in light of Defendant McCormick's financial posture and ability to pay. While still denying liability, Defendant McCormick believes that the amount Plaintiffs will receive pursuant to this settlement reflects an amount in excess of complete and total satisfaction for any unpaid overtime wages and liquidated damages that each could expect to recover if they were to prevail on their FLSA claims at trial.

Plaintiffs' attorneys' fees were negotiated at arm's length and Defendant McCormick agrees that the sum of \$8,600.00 for attorneys' fees and \$400.00 for the reimbursement of the filing fee and postage to serve the Complaint are fair and reasonable.

Plaintiffs agrees that \$8,600.00 should be paid to their attorneys in light of the favorable negotiation and \$400.00 for the recovery of the filing fee and postage. Plaintiffs' counsel expended time studying Defendants' records, as well as time

negotiating with Defendant McCormick, preparing an individualized damages calculation, and the present settlement agreement. Defendant has agreed that this amount be awarded to counsel for Plaintiff. Defendant McCormick has agreed to pay this amount in light of the costs, work performed, hours spent, likely hourly rates awardable, and in an effort to expedite payment to Plaintiff and to avoid costs and delay associated with continued litigation and fee petition.

Plaintiffs understand that the total amount to be paid to each is calculated as described below. Accordingly, Defendant McCormick shall wire \$1,200 per month for a period of eighteen months commencing November 5, 2017, and due the fifth of each month thereafter until such balance is satisfied, into the Trust Account of Fonteneau & Arnold, LLC, or otherwise submit a check that is due to be delivered on the fifth of each month:

Of those proceeds Plaintiffs will receive the following total amount:

\$350 per month to Plaintiff Patricia Fogg;

\$350 per month to Plaintiff Richard Boyle;

\$500 per month to Fonteneau & Arnold, LLC.

The sum total of the payment is Total Remuneration to Plaintiff Fogg is \$6,300.00;

The sum total of the payment is Total Remuneration to Plaintiff Boyle is \$6,300.00;

The sum total of the payment is Total Remuneration to Fonteneau & Arnold, LLC is \$9,000 representing \$8,600 in attorneys' fees and \$400 in costs;

Defendant McCormick to issue a 1099 to Fonteneau & Arnold, LLC.

The Parties represent that they have reached a reasonable and fair resolution of Plaintiffs' FLSA claims. The Parties represent that they engaged in a good faith, arms' length negotiations in an effort to resolve the matter. The record indicates that a bona fide dispute existed regarding Defendant McCormick's classification of Plaintiffs as independent contractors.

Plaintiffs understand that confidentiality is a material inducement to this settlement. Defendant McCormick acknowledges that the Court may strike this provision.

A Proposed Stipulated Judgment, Approval of Settlement and Order of Dismissal is attached as **Exhibit A**.

CONCLUSION


All Parties have reached settlement as to all issues and claims, including the issue of attorneys' fees. Undersigned counsel for Plaintiffs affirms to the Court that he has authority from his clients and from Defendant McCormick to submit the above settlement agreement resolving this dispute on these specific terms and that there are no other terms that have not been stated. The Settlement is contingent on this Court's approval.

THIS WILL CERTIFY THAT ALL PARTIES HAVE AGREED TO THE ABOVE. FURTHER, THE PARTIES HAVE AGREED THAT ALLEN D. ARNOLD WILL E-FILE THE FOREGOING *SETTLEMENT AGREEMENT AND JOINT MOTION FOR SETTLEMENT APPROVAL*.

Date: October 27th, 2017



Allen D. Arnold
Fonteneau & Arnold, LLC
Counsel for the Plaintiffs
2151 Highland Avenue South, Ste. 205
Birmingham, AL 35205
205.252.1550 – Office
205.502.4476 – Facsimile
allen@5pointslaw.com



Bruce McCormick
Defendant
11 Leavenworth Road, Apt. 302
Shelpton, CT 06484