

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**AMY BADEN-WINTERWOOD,  
individually and on behalf of others  
similarly situated,**

**Plaintiffs,**

**v.**

**Case No. 2:06-cv-99  
JUDGE GREGORY L. FROST  
Magistrate Judge Mark R. Abel**

**LIFE TIME FITNESS, INC.,  
Defendant.**

**OPINION AND ORDER**

This matter is before the Court on the parties' simultaneous briefing of the issue of Tina Seals's salary level test claim. (Doc. # 99, "Plaintiffs' Memorandum"; Doc. # 100, "Defendant's Memorandum.")

**I. Background**

This case was remanded to this Court from the Sixth Circuit on August 20, 2009. (Doc. # 90.) On August 21, 2009, the Court scheduled a telephone status conference to be held on September 17, 2009. (Doc. # 91.) At that conference, the parties indicated that they were engaged in settlement discussions that they believed would resolve the issues remaining in this action.

The parties had failed to reach a settlement by November 2009, so the Court scheduled another status conference to be held on December 16, 2009. (Doc. # 93.) As a result of that conference the Court issued a briefing schedule on the issues still to be decided in this matter and scheduled a bench trial for June 21, 2010. The issue to be determined at trial is the amount of overtime pay to which each plaintiff is entitled.

The first issue on which the Court ordered briefing was whether representative testimony to determine damages was appropriate. (Docs. # 96, 97.) The parties indicated that a decision on that issue would promote settlement. The Court determined that representative testimony was suitable for this action. (Doc. # 98.) The parties again, however, were unable to reach settlement.

Thus, the Court required the parties to brief the remaining two issues discussed at the December 2009 status conference, *i.e.*, the Tina Seals and the statute of limitations issues. With regard to the statute of limitations issue, the parties reached agreement and filed a stipulation as to that issue. (Doc. # 95.) The Tina Seals issue is currently before the Court.

## **II. Analysis**

The parties disagree as to the nature of the issue the Sixth Circuit remanded to this Court regarding Tina Seals. Plaintiffs argue that, although they did not plead an overtime compensation pay claim based upon the salary level test, the claim is properly before the Court based upon Rule 15(b) of the Federal Rules of Civil Procedure, which allows amendment of the complaint to conform to the evidence. Plaintiffs further assert that the Sixth Circuit unambiguously directed this Court to determine “the merits” of that claim, *i.e.*, whether Seals’s compensation met the salary level test. Defendant argues that this claim was never properly before the Court and that the Court should not allow insertion of it at this stage of the litigation.

On February 13, 2006, Plaintiffs, a class of 24 individuals that are current or former employees of Defendant, filed their complaint alleging that Defendant violated the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.* by treating Plaintiffs as overtime-exempt

employees. Specifically, Plaintiffs claimed that Defendant's compensation plan was not consistent with the salary-basis test set forth in the FLSA regulations, 29 C.F.R. § 541.602, and thus, that Plaintiffs were not exempt from overtime compensation. Defendant countered that its compensation plan was at all times compliant with the FLSA, or, in the alternative, that, if Plaintiffs were entitled to overtime compensation, such compensation was limited to that earned during the time period in which Defendant made actual deductions from Plaintiffs' salaries.

Plaintiffs and Defendant filed motions for summary judgment addressing the salary basis test. In Plaintiffs' motion, however, Plaintiffs in a footnote stated:

As for the salary *level* test, under 29 U.S.C. § 541.600, Plaintiffs must be paid a minimum of \$455 per week or \$23,660 per year to qualify for the exemption. All Plaintiffs make at least this amount except Plaintiff Tina Seals who was paid \$12,000 per year because she was classified by Life Time Fitness as "part-time." See Defendant's chart of Plaintiffs' salary as provided to the undersigned on November 15, 2006 attached and marked as Exhibit "E." However, the number of hours Plaintiff actually worked in a given work week is a factual issue disputed by the parties. Because Plaintiff Seals does not meet the salary level test required for exemption, she is entitled to overtime for this reason alone.

(Doc. # 62-1 at 9 fn. 6) (emphasis added). In its memorandum in opposition to Plaintiffs' motion for summary judgment Defendant does not respond to this argument.

In Plaintiff's memorandum in opposition to Defendant's motion for summary judgment, Plaintiffs repeat this exact argument in another footnote. (See Doc. # 72 at 5 fn. 4.) Defendant again makes no response to this argument.

In its Opinion and Order on the parties' cross motions for summary judgment, this Court set forth the analysis required to establish an overtime exemption under the FLSA, explaining that the employer must satisfy three tests: " 'a (1) duties test; (2) salary level test; and (3) salary basis test.' " *ACS v. Detroit Edison Co.*, 444 F.3d 763, 767 (6th Cir. 2006) (quoting *Takacs v.*

*Hahn Auto. Corp.*, 246 F.3d 776, 779 (6th Cir. 2001)); see also 29 C.F.R. § 541.700 (2004) (duties test); 29 C.F.R. § 541.600 (2004) (salary level test); 29 C.F.R. § 541.602 (2004) (salary basis test).” (Doc. # 75 at 12.) The Court bifurcated the time period at issue, finding that the Supreme Court’s interpretation of the salary-basis test in *Auer v. Robbins*, 519 U.S. 452 (1997), controlled for the time period before August 23, 2004, while 29 C.F.R. § 541.603 controlled for the time period between August 23, 2004 and March 3, 2006. Applying these tests, the Court concluded that certain Plaintiffs were entitled to overtime compensation but only for the three pay periods occurring in November and December, 2005, when actual deductions were taken from Plaintiffs’ pay. The Court did not address Plaintiffs salary level test argument.

Plaintiffs and Defendant appealed this decision. In Plaintiffs’ briefing to the Sixth Circuit, Plaintiffs, *inter alia*, argued that this Court erred in declining to address the salary level test argument they had mentioned in two footnotes - an argument Plaintiffs characterized as “a separate basis for overtime” for Seals. Defendant argued that Seals’s claim was not sufficiently preserved.

The Sixth Circuit reviewed the decision and concluded:

[T]he Court **AFFIRMS** the district court’s decision bifurcating the class period, finding that violations of 29 C.F.R. § 541.602 occurred in November and December of 2005, and limiting § 541.603 overtime compensation to those three pay periods. However, the Court **REVERSES** the district court insofar as it found that the pre-August 23, 2004 compensation plan did not create a substantial likelihood of deductions. The Court, therefore, concludes that Life Time Fitness is liable for overtime compensation to those Plaintiffs employed and subject to the corporate bonus-pay plan from January 1, 2004 to August 23, 2004. Finally, the Court **REMANDS** the issue of whether Plaintiff Tina Seals’s compensation met the salary-level test to the district court for further consideration consistent with this opinion.

(Doc. # 88 at 24) (emphasis in original).

The only other time the Sixth Circuit mentioned the Seals's salary level test claim was in a footnote:

Plaintiffs also claim that Plaintiff Tina Seals has a separate basis for overtime compensation because Seals's compensation did not meet the salary-level test. However, this issue was not adequately presented to the district court, and genuine issues of material fact remain as to Seals's compensation level. As such, our summary judgment review requires that this issue be remanded to the district court for further consideration.

*Id.* at 2, fn. 1.

In Defendant's Memorandum, Defendant argues that this Court should deny Plaintiffs' attempt to insert into this action a salary level test claim that was not pled in their complaint. Defendant contends that the Sixth Circuit did not assess whether Seals's claim could actually be pursued in this lawsuit, and that this Court ordered briefing on that issue.

In Plaintiffs' Memorandum, Plaintiffs admit that they did not plead this claim in their complaint. However, Plaintiffs argue that the Sixth Circuit directed this Court to rule on the merits of this claim in the language the Court quoted above, *i.e.*, "the Court **REMANDS** the issue of whether Plaintiff Tina Seals's compensation met the salary-level test to the district court for further consideration consistent with this opinion."

Reviewing the Sixth Circuit opinion, it is clear that Sixth Circuit remanded the issue raised by Plaintiffs, that is, the issue of Seals meeting the salary level test. It is also clear that the circuit court directed this Court to consider that issue consistent with its opinion. In its opinion, it determined that the issue had not been adequately briefed before this Court. In the current briefing, however, Plaintiffs do not brief the issue any further than they did in their footnote in their motion for summary judgment and Defendant does not brief the issue at all.

Instead, the bulk of Plaintiffs' Memorandum and the entirety of Defendant's

Memorandum is directed to the issue of whether Seals's salary level test claim is properly before the Court. As to that argument, Plaintiffs posit that, although they did not assert Seals's salary level test claim in their complaint, this Court should amend the complaint under Rule 15(b) of the Federal Rules of Civil Procedure, which provides:

When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move -- at any time, even after judgment -- to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Fed. R. Civ. P. 15(b).

The Court initially notes that, by its express terms, Rule 15(b) applies only to amendment during or after trial. However, the Sixth Circuit has applied Rule 15(b) at the summary judgment stage. *See Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1030 (6th Cir. 1992). The Sixth Circuit indicated that the primary concern in permitting late amendment is possible prejudice to the defendant. *See id.* (quoting Fed. R. Civ. P. 15(b): "*the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits*") (emphasis in original); *see also Byrd v. Brandenburg*, 922 F. Supp. 60, 65 (N.D. Ohio 1996) ("The primary concern for most courts is possible prejudice to the defendant from a late amendment.") (citing *UBS Securities, Inc. v. Tsoukanelis*, 852 F.Supp. 244, 247 (S.D.N.Y. 1994)).

Here, Defendant fails to set forth any argument that it would be prejudiced by the inclusion of Seals's salary level test claim, nor does the Court find any. Indeed, the claim appears to be subsumed in the context of this case and would not require any new discovery. *See Bryd*, 922 F. Supp. at 65 (factor leaning toward lack of prejudice is whether "claim that is added was subsumed in the context of the case and would require no new discovery"). Further, Defendant here is not subject to unfair surprise. While the pre-discovery Plaintiffs believed they were misclassified as overtime exempt employees because of Defendant's failure to comply with the salary basis test, discovery revealed that Seals also was misclassified because she did not meet the salary level test. Moreover, Defendant impliedly consented to the issue being considered by the Sixth Circuit by not objecting to Plaintiffs' insertion of it at the summary judgment stage. Finally, the Court will not simply rely on Plaintiffs' assessment of the evidence, but will provide Defendant the opportunity to file a memorandum addressing the merits of the claim.

Accordingly, the Court concludes that Defendant will suffer no prejudice by the amendment of the complaint to conform to the evidence before the Court, which indicates that Tina Seals is alleging an alternative basis for relief under the salary level test.

### **III. Conclusion**

Based on the foregoing, the Court **AMENDS** the complaint to reflect Tina Seals's claim for relief under the salary level test. The parties shall file simultaneous briefs addressing the merits of Seals's claim on April 13, 2010, *i.e.*, whether Seals's compensation met the salary level test. In those briefs, the parties are also directed to address the propriety of Seals's claim, if it survives the merits briefing, being tried at the June 21, 2010 trial.

**IT IS SO ORDERED.**

/s/ Gregory L. Frost  
GREGORY L. FROST  
UNITED STATES DISTRICT JUDGE