

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA
(Martinsburg Division)**

**ANNA COBERLY and JAMES M.
STEVENS, individually and on
behalf of others similarly situated,**

Plaintiffs,

v.

Civil Action No. 1:16-CV-216 (Keeley)

**ECM ENERGY SERVICES, INC.
and HENRY WAHL,**

Defendants.

ELECTRONICALLY FILED Nov 14 2016 U.S. DISTRICT COURT Northern District of WV
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COMPLAINT

NOW COME Plaintiffs Anna Coberly and James M. Stevens, by and through their undersigned counsel, and file this Complaint against Defendants ECM Energy Services, Inc. and Henry Wahl, making claims to recover unpaid minimum wages and unpaid overtime wages under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq., individually and on behalf of others similarly situated as provided in 29 U.S.C § 216(b), and seeking a declaration under the Declaratory Judgment Act, 28 U.S.C. § 2201, that the mandatory arbitration provision and waiver of class and collective actions in the arbitration agreements between Plaintiffs and similarly situated employees and Defendants are unconscionable and unenforceable, stating as follows:

PARTIES

1. Plaintiff Anna Coberly (“Plaintiff Coberly”) is an individual residing in Shinnston, Harrison County, West Virginia.

2. Plaintiff James M. Stevens (“Plaintiff Stevens”) is an individual residing in Grafton, Taylor County, West Virginia.

3. Defendant ECM Energy Services, Inc. (“Defendant ECM”) is a corporation organized pursuant to the laws of the State of Delaware, authorized to do business in the State of West Virginia.

4. Defendant ECM has a principal office located at 130 Court Street, Williamsport, Pennsylvania 17701, and a place of business at 99 Pallet Street, Bridgeport, West Virginia 26330.

5. Defendant ECM is an energy services company focused on natural gas and oil trucking and water logistics, specializing in the deployment of water trucks and traffic cars for natural gas and oil drilling operations, and providing traffic control, water manifold management and lime kiln distribution services throughout Pennsylvania, Ohio, and West Virginia.

6. Defendant Henry Wahl (“Defendant Wahl”) is the Chief Executive Officer, President, and Owner of Defendant ECM.

7. Defendant Wahl at all relevant times, has had extensive managerial responsibilities and substantial control of the terms and conditions of the work of Plaintiffs and similarly situated employees including, without limitation, hiring and firing employees, setting schedules, setting employees’ pay rates, and directing the daily operations of Defendant ECM.

8. At all relevant times, Defendants were acting through their agents, supervisors, directors, officers, employees and assigns, and within the full scope of such agency, office, employment, or assignment.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over Plaintiffs' claims under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. ("FLSA") pursuant to 28 U.S.C. § 1331 because these claims arise under the laws of the United States.

10. This Court has jurisdiction over Plaintiffs' request for a declaration under the Declaratory Judgment Act, 28 U.S.C. § 2201 because there is an "actual controversy" within this Court's jurisdiction, i.e. Plaintiffs' claims under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq., for this Court to decide.

11. At all relevant times, Plaintiffs and similarly situated employees were employees of Defendants and worked from Defendants' West Virginia facilities.

12. Venue is appropriate in the U.S. District Court for the Northern District of West Virginia pursuant to 28 U.S.C. § 1391(b) because Defendants reside in this judicial district and a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this judicial district.

FACTS

13. Plaintiff Coberly worked for Defendants as a "traffic employee" from approximately March 7, 2015 until approximately October 24, 2015.

14. Plaintiff Stevens worked for Defendants as a "traffic employee" from approximately November 1, 2011 until approximately April 25, 2015.

15. Defendants treated Plaintiffs and similarly situated employees as "non-exempt" employees under the FLSA and do not contest Plaintiffs' and similarly situated employees' entitlement to minimum wage and overtime wages for hours worked over 40 hours in a workweek pursuant to the FLSA.

16. During the relevant time period, Defendants paid Plaintiffs and similarly situated employees a “day rate” for each day of work by Plaintiffs and similarly situated employees.

Plaintiffs and similarly situated employees received no wages in addition to the “day rate.”

17. The U.S. Department of Labor, Wage and Hour Division (“DOL”) conducted an investigation of Defendants and its pay practices in connection with their “traffic employees” during the period from May 11, 2014 to January 1, 2016.

18. The DOL concluded in its investigation that Defendants had failed to pay Plaintiffs and similarly situated employees all the minimum and/or overtime wages to which Plaintiffs and similarly situated employees were entitled.

19. The DOL concluded in its investigation that Defendants owe 68 “traffic employees” in West Virginia a total of \$169,069.43 in back wages.

20. The DOL concluded in its investigation that Defendants owe 34 “traffic employees” in Pennsylvania a total of \$35,761.52 in back wages.

21. The DOL concluded in its investigation that Defendants owe 55 “traffic employees” in Ohio a total of \$181,986.30 in back wages.

22. Plaintiff Coberly received a letter dated July 19, 2016 from the DOL stating Defendants owe Plaintiff Coberly \$4,458.84 in unpaid minimum wages or unpaid overtime wages.

23. Plaintiff Stevens received a letter dated July 27, 2016 from the DOL stating Defendants owe Plaintiff Stevens \$3,248.58 in unpaid minimum wages or unpaid overtime wages.

24. At approximately the same time as the letters from the DOL to Plaintiffs, the DOL sent similar letters to Defendants' "traffic employees" similarly situated to Plaintiffs stating amounts owed by Defendants to the similarly situated employees.

25. Defendants purportedly required Plaintiffs and at least some similarly situated employees to sign agreements as a condition of employment which provide that any claims arising from Plaintiffs' or the similarly situated employees' employment must be submitted to binding arbitration as the exclusive remedy.

26. Despite a request by Plaintiffs' counsel on or about October 4, 2016 for complete and executed copies of any arbitration agreements purportedly entered into by Plaintiffs, Defendants have not provided complete and executed copies of any arbitration agreements.

27. Defendants have provided to Plaintiffs' counsel an unsigned copy of a "Mutual Agreement to Arbitrate Claims" which Defendants contend is an example of the arbitration agreements executed by Plaintiffs and similarly situated employees.

28. The example of the arbitration agreement provided by Defendants is silent or ambiguous with regard to whether Plaintiffs and the similarly situated employees must pay a portion of the arbitrators' fees.

29. The example of the arbitration agreement provided by Defendants further provides that the employees waive their right to bring, maintain, participate in, or receive money from any class, collective, or representative action, whether in court or arbitration.

(Similarly Situated Employees)

30. During the relevant time period, Defendants employed approximately 150 "traffic employees" in West Virginia, Pennsylvania, and Ohio, who performed the same or materially

similar duties as Plaintiffs and who were paid in the same manner as Plaintiffs, i.e. a day rate for all hours worked in each work day, without any overtime wages.

31. During the relevant time period, Defendants failed to pay the similarly situated employees all of the minimum wages and/or overtime wages to which the similarly situated employees were entitled.

**COUNT ONE: CLAIM FOR UNPAID WAGES AND UNPAID OVERTIME WAGES
UNDER THE FAIR LABOR STANDARDS ACT**

32. Plaintiffs incorporate by reference Paragraphs 1 through 31 of this Complaint as if fully set forth herein.

33. Each Defendant is an “employer” as defined in the FLSA at 28 U.S.C. § 203.

34. Defendant ECM is an “enterprise engaged in commerce” as defined in the FLSA at 28 U.S.C. § 203.

35. Defendant Wahl at all relevant times, has been an owner and agent of Defendant ECM, had extensive managerial responsibilities and substantial control of the terms and conditions of the work of Plaintiffs, and all similarly situated employees, and consequently, is an “employer” under the FLSA.

36. Defendants were required to pay Plaintiffs, and all similarly situated employees, minimum wages and overtime wages at a rate of one and one-half times Plaintiffs’ and the similarly situated employees’ regular rates for all hours worked in excess of 40 hours in a work week pursuant to the FLSA, 28 U.S.C. § 207.

37. Defendants failed to pay Plaintiffs and all similarly situated employees all wages and overtime wages due and owing to Plaintiffs and the similarly situated employees in violation of the FLSA, 28 U.S.C. § 207.

38. Defendants' failure to pay wages and overtime wages in violation of the FLSA was willful.

COUNT TWO: REQUEST FOR DECLARATION THAT THE ARBITRATION PROVISIONS AND WAIVER OF COLLECTIVE AND CLASS ACTIONS BETWEEN PLAINTIFFS, SIMILARLY SITUATED EMPLOYEES AND DEFENDANTS IS UNCONSCIONABLE AND UNENFORCEABLE

39. Plaintiffs incorporate by reference Paragraphs 1 through 38 of this Complaint as if fully set forth herein.

40. The Declaratory Judgments Act, 28 U.S.C. § 2201, provides that in "a case of actual controversy within its jurisdiction...any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

41. An actual controversy exists between Plaintiffs and Defendants regarding Defendants' failure to pay Plaintiffs wages and overtime wages to which they were entitled under the FLSA, and this Court has subject matter jurisdiction over said controversy.

42. The arbitration agreement contains a mandatory arbitration provision and a waiver of class and collective actions.

43. The arbitration provision is unconscionable under West Virginia law and unenforceable because, inter alia:

(a) Plaintiffs were compelled to enter into the arbitration agreements in order to work for Defendants and the arbitration provision is an unconscionable contract of adhesion.

(b) The arbitration provision is silent or ambiguous with regard to whether Plaintiffs and the similarly situated employees must pay a portion of the arbitrators' fees and, consequently, places an undue and unconscionable financial burden on Plaintiffs and

the similarly situated employees in any attempt to exercise and vindicate their legal rights through a legal claim.

44. The arbitration provision further provides that the arbitrator may not preside over any form of representative, class, or collective proceedings.

45. The provision restricting the arbitrator's authority to preside over representative, class, or collective proceedings is unconscionable and unenforceable under West Virginia law.

46. The waiver of representative, class, or collective proceedings contained in the arbitration provision violates the rights of employees to pursue work-related legal claims together as provided by the National Labor Relations Act, 29 U.S.C. § 157, and is, consequently, unenforceable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of similarly situated employees, pray for the following relief:

- (a) That this Court certify this action as an FLSA collective action and certify a class of employees similarly situated to Plaintiffs Coberly and Stevens;
- (b) That Plaintiffs Coberly and Stevens be designated as the collective class representatives;
- (c) That they and the certified class may have a trial by jury;
- (d) That they and the certified class be awarded all damages provided by law, including but not limited to, unpaid overtime wages;
- (e) That they and the certified class be awarded liquidated damages as provided by the FLSA;
- (f) That they and the certified class be awarded attorneys' fees and costs;
- (g) That this Court issue a declaration pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, that the mandatory arbitration agreement and waiver of representative, class and collective actions in the arbitration agreement

between Plaintiffs and similarly situated employees and Defendants are unconscionable and unenforceable;

- (g) That they and the certified class be awarded such other relief as this Court may deem as just and equitable.

ANNA COBERLY and JAMES M. STEVENS,

By Counsel

s/ Mark Goldner

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JS 44 (Rev. 08/16)

CIVIL COVER SHEET

1:16-CV-216 Received: 11/14/2016

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
 ANNA COBERLY and JAMES M. STEVENS, individually and on behalf of others similarly situated,

(b) County of Residence of First Listed Plaintiff Harrison County
 (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
 Mark Goldner, Esq./Maria W. Hughes, Esq.
 Hughes & Goldner, PLLC, PO Box 11662, Charleston, WV 25339
 (304) 400-4816

DEFENDANTS
 ECM ENERGY SERVICES, INC. and HENRY WAHL

County of Residence of First Listed Defendant _____
 (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Tort Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input checked="" type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	IMMIGRATION		
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions		

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation - Transfer
- 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

FLSA 29 USC 216(b)

Brief description of cause:
 claim for unpaid minimum and overtime wages - collective action

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$ _____

CHECK YES only if demanded in complaint:
 JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE 11/14/16 SIGNATURE OF ATTORNEY OF RECORD Mark Goldner

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [FLSA Class Action Suit Filed Against ECM Energy Services](#)
