

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

2017 MAR 27 PM 2: 37
CLERK, US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS, FLORIDA
CASE NO.:

MAYKOL POZO and
MICHAEL BUTLER, individually,
and on behalf of all others similarly situated,

Plaintiffs,

vs.

2 17-CV-170-POM-99M/M

DIRECT HEATING & COOLING, INC., a
Florida Profit Corporation; and
MITZIE FOX-LERNER, individually.

Defendants,

_____ /

COMPLAINT

Plaintiffs, MAYKOL POZO and MICHAEL BUTLER, by and through their undersigned counsel, file this Complaint against the Defendants, DIRECT HEATING AND COOLING, INC., and MITZIE FOX-LERNER, individually, collectively “Defendants”, and hereby sets forth this collective action for violation of the Fair Labor Standards Act under 29 U.S.C. § 216(b) and states as follows:

Introduction

1. This is an action brought pursuant to the Fair Labor Standards Act, as amended, (29 U.S.C. §201 et seq., hereinafter called the “FLSA”) to recover unpaid overtime compensation, liquidated damages, and reasonable attorney’s fees and costs.

Jurisdiction and Venue

2. This Court has jurisdiction over this claim pursuant to 28 U.S.C. § 1331 and 29 U.S.C. §216(b).

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), as the events or omissions giving rise to the claims alleged herein occurred in Lee County, Florida.

Parties

4. Plaintiff, MAYKOL POZO, was and is a citizen of the State of Florida, domiciled in Lee County, Florida and was employed by the Defendants. Specifically, Plaintiff performed heating and cooling maintenance work as a technician for the Defendants.

5. Plaintiff, MICHAEL BUTLER, was and is a citizen of the State of Florida, domiciled in Lee County, Florida and was employed by the Defendants. Specifically, Plaintiff performed heating and cooling maintenance work as a technician for the Defendants.

6. At all times material hereto Defendant DIRECT HEATING & COOLING, INC. was and is a Florida Profit Corporation, and is engaged in business in Lee County, Florida.

7. At all times material hereto Defendant MITZIE FOX-LERNER is a resident of Lee County, Florida.

8. At all times material, MITZIE FOX-LERNER was an individual who owned and/or operated and/or managed DIRECT HEATING & COOLING, INC. and who regularly exercised the authority to (1) hire and fire employees (2) determine work schedules for employees, and (3) control the finances and operations of DIRECT HEATING & COOLING, INC.

9. By virtue of MITZIE FOX-LERNER having held and exercised the authority to (1) hire and fire employees (2) determine work schedules for employees, and (3) control the finances and operations of DIRECT HEATING & COOLING, INC., MITZIE FOX-LERNER is an employer as defined by 29 U.S.C. §201 et seq.

10. Plaintiff MAYKOL POZO was engaged in commerce within the meaning of §6 and §7 of the FLSA.

11. Plaintiff MICHAEL POZO was engaged in commerce within the meaning of §6 and §7 of the FLSA.

12. MAYKOL POZO was an employee of the Defendants within the meaning of the FLSA.

13. MICHAEL BUTLER was an employee of the Defendants within the meaning of the FLSA.

14. Defendants were Plaintiffs' employers within the meaning of the FLSA at all times material to this action.

15. At all times material hereto, Defendant, DIRECT HEATING & COOLING, INC., was and continues to be Florida a corporation engaged in business in Florida with the annual gross revenue of the Defendant business enterprises is in excess of five hundred thousand dollars (\$ 500,000.00) per annum during the three years preceding the filing of this Complaint.

16. At all times material, Defendants were authorized to do business in the State of Florida.

17. At all times material hereto, Defendant had two or more employees handling, selling, or otherwise working on goods or materials that had been moved in or procured for commerce such as: vehicles, power tools, and other heating and cooling service equipment manufactured out of state or overseas.

18. At all times material and relevant to this action, the work performed by the Plaintiffs was directly essential to the business performed by the Defendants.

General Allegations

19. This action is to include each and every employee who worked for the Defendant at any time in the past three years.

20. From approximately April 2015 to January 2017 Defendants hired Plaintiff MAYKOL POZO as an employee to perform work on customer's heating and cooling units.

21. From approximately March 2014 to September 2015 and June 2016 to January 2017, Defendants hired Plaintiff MICHAEL BUTLER as an employee to perform work on customer's heating and cooling units.

22. Plaintiffs' job duties included, but were not limited to, attending appointments at customer's homes to service, install, repair units at scheduled appointments that were set forth by the Defendants.

23. Throughout Plaintiffs' employment, they were required to do "off the clock" work, which consisted of returning the person who was helping them (hereinafter "helper") to the location of their vehicle without compensation.

24. In all, or nearly all, of his weeks of employment with the Defendants, MAYKOL POZO worked in excess of forty (40) hours in a work week.

25. In all, or nearly all, of his weeks of employment with the Defendants, MICHAEL BUTLER worked in excess of forty (40) hours in a work week.

26. From the beginning of MAYKOL POZO'S employment to present, Defendants failed to compensate MAYKOL POZO at a rate of one and one-half times Plaintiff's regular rate for all hours worked in excess of forty (40) hours per work week.

27. From the beginning of MICHAEL BUTLER'S employment to present, Defendants failed to compensate MICHAEL BUTLER at a rate of one and one-half times Plaintiff's regular rate for all hours worked in excess of forty (40) hours per work week.

28. Specifically, the practice in place was that the Defendants insisted on having Plaintiffs work off the clock with no additional amounts as to an overtime premium, which led to a failure to pay overtime.

29. Plaintiffs, and all others who are similarly situated, should be compensated at the rate of one and one-half times the rate of regular pay for all hours worked in excess of forty (40) hours per work week, as required by the FLSA.

30. The majority of Plaintiffs' pay and time records are in the Defendants' possession.

31. The additional persons who may become plaintiffs in this action also worked for the Defendants as flat, daily rated employees, who worked under the same conditions, and pursuant to the policies, practices, and procedures applicable to Plaintiffs, were denied proper overtime compensation for overtime hours due to these policies, practices, and procedures.

32. Plaintiffs are personally aware of other similarly situated employees who have been subjected to the above described policy.

33. Defendants have violated 29 U.S.C. § 207 from at least June 2013 to present in that:

- a. Plaintiffs, and those similarly situated, worked in excess of forty (40) hours in one work week for the period in which they were employed with the Defendants;
- b. No payments or provisions for payment have been made by the Defendants to properly compensate MAYKOL POZO and MICHAEL BUTLER, and those similarly situated at the statutory rate of one and one-half times the regular rate for all hours worked in excess of forty (40) per work week as provided by the FLSA due to the above described policies and practices, and

c. Defendants have failed to maintain proper time records as mandated by the FLSA.

34. Upon information and belief, Defendants' failure and/or refusal to properly compensate the Plaintiffs and those similarly situated, as the rates required by the FLSA was willful.

35. Defendants failed and/or refused to properly disclose or apprise Plaintiffs of their rights under the FLSA.

36. Plaintiffs have retained the firm of VILES & BECKMAN, LLC to represent Plaintiffs in the litigation and have agreed to pay the firm a reasonable fee for its services.

COUNT 1: RECOVERY OF OVERTIME COMPENSATION

37. Plaintiff re-alleges paragraphs 1-36 above as though fully set forth herein.

38. From the beginning of their employment, Plaintiffs worked in excess of forty (40) hours in one or more work weeks for which the Plaintiffs were not compensated at the statutory rate of one and one-half times Plaintiff's regular rate of pay.

39. Plaintiffs were, and are, entitled to be paid at the statutory rate of one and one-half times Plaintiffs' regular rate of pay for those hours worked in excess of forty (40) hours in a work week.

40. Defendants' actions were willful and/or showed reckless disregard for the provisions of the FLSA, as evidenced by their failure to compensate the Plaintiffs, and those similarly situated, at the statutory rate of one and one-half times their regular rate of pay for the hours worked in excess of forty (40) hours per work week when they knew, or should have known, same was and is due.

41. Defendants failed to properly disclose or apprise Plaintiffs of Plaintiffs' rights under the FLSA.

42. Due to the intentional, willful, and unlawful acts of the Defendants, Plaintiffs and those similarly situated, suffered and continue to suffer damages and lost compensation for time worked over forty (40) hours per week, plus liquidated damages.

43. Based upon information and belief, the employees and former employees of Defendants similarly situated to the Plaintiff were not paid proper overtime for hours worked in excess of forty (40) hours in one or more work weeks because Defendants have failed to properly pay Plaintiffs proper overtime wages at time and one-half of the lawful regular rate of pay for such hours, pursuant to a policy, plan, or decision equally applicable to similarly situated employees.

44. Plaintiffs are entitled to an award of reasonable attorney's fees and costs pursuant to 27 U.S.C. § 216(b).

WHEREFORE, Plaintiffs, MAYKOL POZO and MICHAEL BUTLER on behalf of himself and all others similarly situated, pray for relief as follows:

a. Designation of this action as a collective action on behalf of the proposed members of the FLSA representative action and prompt issuance of notice pursuant to 29 U.S.C. §216(b) to all similarly situated members of the FLSA opt-in class, apprising them of the pendency of this action and permitting them to assert timely FLSA claims in this action by filing individual Consents To Sue pursuant to U.S.C. §216(b);

b. Designation of Plaintiffs, as Representative Plaintiffs of the putative members of the FLSA representative action;

c. A declaratory judgment that the practices complained of herein are unlawful under the FLSA, 29 U.S.C. §201, et seq.;

- d. An injunction against Defendants and their officers, agents, successors, employees, representatives, and any and all persons acting in concert with Defendant, as provided by law, from engaging in each of the unlawful practices, policies, and patterns set forth herein;
- e. An award of damages for overtime compensation due for the Plaintiffs and the putative members of the class, including liquidated damages, to be paid by Defendants;
- f. Costs and expenses of this action incurred herein, including reasonable attorneys' fees and expert fees;
- g. Pre-Judgment and Post-Judgment interest, as provided by law; and
- h. Any and all such other and further legal and equitable relief as this Court deems necessary, just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs do hereby demand a Jury Trial and all issues and claims so triable.

Respectfully submitted this 27th day of March, 2017.

VILES & BECKMAN, LLC
Attorneys for the Plaintiffs
6350 Presidential Court, Suite A
Fort Myers, Florida 33919
Telephone: 239-334-3933
Facsimile: 239-334-7105
Email: Maria@vilesandbeckman.com
Secondary: AQosborne@vilesandbeckman.com

By: _____

Maria R. Alaimo Esquire
Florida Bar Number: 103870

JS 44 (Rev. 11/15)

CIVIL COVER SHEET

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

MAYKOL POZO and MICHAEL BUTLER, individually, and on behalf of all others similarly situated

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

(c) Attorneys (Firm Name, Address, and Telephone Number)

Maria R. Alaimo, Esq., Viles & Beckman, LLC
6350 Presidential Court, Suite A, Fort Myers, FL 33919 (239)-334-3933

DEFENDANTS

DIRECT HEATING & COOLING, INC., a Public Corporation and MITZIE FOX-LERNER, individually

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES)

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

Attorneys (If Known)

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 MIDDLE DISTRICT OF FLORIDA
 FORT MYERS, FLORIDA

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)

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 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	PERSONAL INJURY <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 IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<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

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

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Fair Labor Standards Act, as amended 29 U.S.C. 201., et seq.

Brief description of cause:
Unpaid overtime wages

VII. REQUESTED IN COMPLAINT:

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

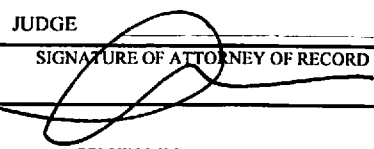
CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE 3/27/17 SIGNATURE OF ATTORNEY OF RECORD 

FOR OFFICE USE ONLY

RECEIPT # ITM01924 AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

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ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Direct Heating & Cooling Sued for Unpaid Overtime Wages](#)
