

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

MARILU FRUCTUOSO, MARGARITA	§	
VILLEGAS, OSCAR MURILLO, MARIA	§	
GARCIA AND JOSEFA YANEZ, ON BEHALF OF	§	
THEMSELVES AND ALL OTHERS SIMILARLY	§	CIVIL ACTION NO. 1:10-cv-951-LY
SITUATED,	§	
PLAINTIFFS	§	
	§	
v.	§	COLLECTIVE ACTION
	§	(JURY DEMANDED)
HEB GROCERY COMPANY, LP,	§	
PASTRANAS PRODUCE, INC.	§	
DEFENDANTS	§	

PLAINTIFFS' ORIGINAL COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT COURT:

COME NOW, Plaintiffs Marilu Fructuoso, Margarita Villegas, Oscar Murillo, Maria Garcia and Josefa Yanez (collectively, "Plaintiffs") on behalf of themselves and all others similarly situated and file this Original Complaint against their joint employers HEB Grocery Company, LP ("HEB") and Pastranas Produce, Inc. ("Pastranas Produce") (collectively, "Defendants") and in support thereof would show as follows:

I. INTRODUCTION

1.1 This matter is related to an FLSA collective action currently pending before the Honorable Lee Yeakel, which is styled and numbered *Rosa Canela, et al. v. HEB Grocery Company, LP and Pastranas Produce, Inc.*, Civil Action No. 1:10-cv-788-LY. Moreover, Plaintiff Josefa Yanez has claims pending in the *Canela* matter.

1.2 Defendants do not pay their in store produce and fruit workers minimum wage or overtime compensation (hereafter "Produce Workers"). The Produce Workers work long hours performing manual labor cutting, preparing and/or packaging fresh produce and fruit in HEB

stores across Texas. Although these Produce Workers work far in excess of forty hours per week, they do not receive minimum wages or overtime.

1.3 Likewise, Defendants did not pay the Plaintiffs in this lawsuit overtime. Plaintiffs in this lawsuit were given the job title of “supervisor” and/or “inspector.” The job duties of the Plaintiffs required them to go around to various HEB stores conducting inspections of the work of the Produce Workers, reporting to HEB in store supervisors to provide them with information and receive instructions, scheduling and gathering paperwork relating to the work of the Produce Workers in the HEB stores, as well as other miscellaneous duties as required by Defendants.

1.4 On various occasions, Plaintiffs complained to Defendants about their failure to pay minimum wages and/or overtime compensation. As a result, Plaintiffs were retaliated against and ultimately terminated.

1.5 Plaintiffs bring this action pursuant to the provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (“FLSA”) on two grounds: (a) for retaliation; and (b) as a collective action for failure to pay overtime wages to Plaintiffs and those similarly situated.

1.6 Plaintiffs seek to recover unpaid overtime wages, back pay, front pay, mental anguish damages, compensatory damages, liquidated damages, punitive damages, attorney’s fees, litigation costs, costs of court, pre-judgment and post-judgment interest and injunctive relief under the provisions of the FLSA.

II. JURISDICTION AND VENUE

2.1 Jurisdiction of this action is conferred on this Court by 29 U.S.C. § 216(b) and by the provisions of 28 U.S.C. § 1337 relating to “any civil action or proceeding arising under any act of Congress regulating commerce.”

2.2 Venue is proper in the Western District of Texas pursuant to 28 U.S.C. § 1391(b), because among other reasons, Defendants are residents of and are doing business in this district.

III. PARTIES

A. PLAINTIFFS

3.1 Plaintiff Marilu Fructuoso is an individual residing in Travis County, Texas.

3.2 Plaintiff Margarita Villegas an individual residing in Travis County, Texas.

3.3 Plaintiff Oscar Murillo is an individual residing in Harris County, Texas.

3.4 Plaintiff Maria Garcia is an individual residing in Hidalgo County, Texas.

3.5 Plaintiff Josefa Yanez is an individual residing in Cameron County, Texas.

3.6 The collective action members are those similarly situated to the named Plaintiffs as set forth above.

B. DEFENDANTS

3.7 Defendant HEB Grocery Company, LP is a Texas limited partnership that may be served with process through its registered agent for service of process: Abel Martinez, 646 South Main Avenue, San Antonio, Texas 78204.

3.8 Defendant Pastranas Produce, Inc. is a Texas corporation that may be served with process through its registered agent for service of process: Humberto Yzaguirre, Jr., 5 Old Alice Road, Brownsville, Texas 78520.

3.9 Defendants are each engaged in interstate commerce with an annual volume of sales of not less than \$500,000.

3.10 At all relevant times to this action, Defendants were the joint employers of Plaintiffs and all others similarly situated within the meaning of 29 U.S.C. § 203(d). Defendants are jointly and severally liable for the damages herein.

3.11 Each of the Defendants is an "enterprise" engaged in commerce as defined in 29 U.S.C. §§ 203(r), 203(s).

3.12 At all times relevant to this action, Defendants have been subject to the requirements of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*

IV. FACTUAL ALLEGATIONS

4.1 Defendant HEB owns and/or operates more than 300 grocery stores across Texas. HEB uses Pastranas Produce to provide cutting, preparation and/or packaging of HEB's produce, fruit and "*aguas frescas*" in HEB's grocery stores.

4.2 Defendants employ laborers to perform this work who will be referred to as "Produce Workers." The primary job of the Produce Workers is to cut, prepare and/or package HEB's fresh produce and fruit within HEB's stores in order to sell such produce, fruit and "*aguas frescas*" to HEB's grocery customers. Upon information and belief, Defendants have employed over 1,000 Produce Workers in the last three years.

4.3 Plaintiffs were assigned to various HEB stores to go from store to store to inspect the work of the Produce Workers, to report to HEB in store supervisors to provide them with information and receive instructions, to schedule and gather paperwork relating to the work of the Produce Workers in HEB stores, and to perform various miscellaneous duties as required by Defendants.

4.4 Plaintiffs were required to comply with HEB's policies and procedures in performing their work.

4.5 HEB maintained and exercised the power to hire, fire and/or discipline Plaintiffs.

4.6 HEB controlled access to and from the HEB stores by Plaintiffs.

4.7 Plaintiffs' work at the HEB stores was necessary, routine and an integral part of the daily business of HEB's daily business.

4.8 Plaintiffs worked under the control and direction of HEB.

4.9 Plaintiffs performed their work on HEB's premises.

4.10 HEB directed the work of Plaintiffs.

4.11 Plaintiffs were full time, non-exempt employees of the Defendants who worked in excess of 40 hours per week.

4.12 Plaintiffs were misclassified as exempt employees.

4.13 Plaintiffs were not paid overtime wages at a rate of 1 ½ times their regular rate for hours worked in excess of 40 hours per week.

4.14 Plaintiffs complained to Defendants about Defendants' failure to pay the Produce Workers minimum wages and/or overtime wages. Plaintiffs further complained to Defendants about their own compensation, including improper deductions and failure to pay wages.

4.15 As a result of Plaintiffs' complaints, Defendants retaliated against Plaintiffs and ultimately terminated them.

4.16 Plaintiffs were paid a salary plus a formula-based bonus.

4.17 Defendants made improper deductions from Plaintiffs' wages, including but not limited, to deductions when Plaintiffs reported overtime hours by the Produce Workers, when Plaintiffs purportedly filed reports late, and when the company was forced to settle claims for unpaid wages of Produce Workers, among other things.

V. COUNT 1: VIOLATIONS OF FLSA-RETALIATION

5.1 Each and every allegation contained in the foregoing paragraphs is re-alleged as if fully rewritten herein.

5.2 Defendants violated 29 U.S.C. § 215(a)(3) by unlawfully retaliating against Plaintiffs for engaging in activity protected under the FLSA.

5.3 After engaging in protected activity under the FLSA as described herein—including but not limited to complaining about Defendants' failure to pay lawful wages—Plaintiffs were subjected to harassment, intimidation, and a hostile work environment and were ultimately fired. Such adverse employment actions were causally connected to and because Plaintiffs engaged in protected activity under the FLSA.

5.4 Defendants have failed to make a good faith effort to comply with the FLSA. Instead, Defendants knowingly, willfully, or with reckless disregard carried out their illegal pattern or practice regarding minimum wages and overtime compensation and retaliation under the FLSA. Plaintiffs are entitled to liquidated damages for such conduct.

5.5 As a result of Defendants' unlawful and retaliatory conduct as described above, Plaintiffs have suffered substantial damages. Plaintiffs are entitled to recover overtime wages, compensatory damages, lost wages in the past and future (back pay and front pay) and loss of benefits, mental anguish damages, liquidated damages, punitive damages, and other legal and equitable damages as may be appropriate to effectuate the purposes of section 215(a)(3). Defendants' conduct was knowing, willful and/or in reckless disregard for the rights of Plaintiffs.

**VI. COUNT 2—VIOLATIONS OF THE FLSA:
COLLECTIVE ACTION FOR FAILURE TO PAY OVERTIME WAGES**

6.1 Each and every allegation contained in the foregoing paragraphs is re-alleged as if fully rewritten herein.

6.2 Other employees have been victimized by this pattern, practice, and policy of the Defendants that is in violation of the FLSA. Plaintiffs are aware that the illegal practices and policies of Defendants have been imposed on other workers.

6.3 The collective action, or those who are similarly situated, consists of individuals with the job title of “supervisor” or “inspector” or a similar title who worked for Defendants or their subsidiaries or divisions, who in the three years preceding the filing of this suit were misclassified as exempt and were not paid overtime compensation at time and one half for hours they worked over 40 in a week in violation of the FLSA and whose job duties are similar to those of the Plaintiffs.

6.4 Plaintiffs and all others similarly situated shared common job duties and responsibilities. Thus, Plaintiffs’ experiences are typical of the experience members of the collective action.

6.5 Plaintiffs file this case as an “opt-in” collective action as specifically allowed by 29 U.S.C. §216(b).

6.6 Plaintiffs bring these claims on their own behalf and on behalf of all others similarly situated who have not been fully compensated for all work performed, time spent, and activities conducted for the benefit of Defendants.

6.7 Plaintiffs request that Defendants fully identify all others similarly situated in order that proper notice of their right to consent to participation in this collective action may be distributed.

6.8 Plaintiffs seek to represent those similarly situated who have provided consent in writing to join this action as required by 29 U.S.C. § 216(b).

6.9 Those individuals who choose to opt in will be listed on subsequent pleadings and copies of the written consents to sue will be incorporated herein by reference.

6.10 Plaintiffs will fairly and adequately represent and protect the interests of those who are similarly situated.

6.11 Defendants have violated the FLSA by failing to pay Plaintiffs and all others similarly situated overtime compensation at a rate of one and one half times their regular rate for all hours worked in excess of 40 hours per week.

6.12 Defendants have not made a good faith effort to comply with the FLSA.

6.13 Each Defendant's conduct was willful within the meaning of 29 U.S.C. § 255(a).

6.14 In further violation of the FLSA, Defendants have failed to maintain accurate employee pay records, including the number of hours worked per work week, by Plaintiffs and by all others similarly situated.

6.15 Defendants deliberately misclassified Plaintiffs and all others similarly situated as exempt employees to avoid paying them overtime compensation.

6.16 No exemption excused the Defendants from paying Plaintiffs and all others similarly situated minimum wages and/or overtime compensation.

6.17 Defendants knowingly, willfully, or with reckless disregard carried out their illegal pattern or practice regarding overtime compensation owed to Plaintiffs and to all others similarly situated.

VII. JUREMAND

7.1 Plaintiffs hereby demand a trial by jury.

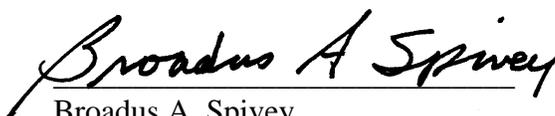
PRAYER

WHEREFORE Plaintiffs respectfully pray that they recover the following in this action:

- a. actual damages, including overtime wages, back pay, front pay, lost benefits, mental anguish damages, and other compensatory damage;
- b. liquidated damages, as provided by the FLSA;
- c. punitive damages;
- d. an award of reasonable attorney's fees, expenses, expert fees and costs incurred in

- vindicating the rights of Plaintiffs;
- e. an award of pre-judgment and post-judgment interest at the highest rate permitted by law;
 - f. equitable relief, including reinstatement and reinstatement plus promotion caused by Defendants' retaliatory conduct against Plaintiffs; and
 - g. such other and further relief, at law or in equity, as this Court deems just and appropriate.

Respectfully submitted,



Broadus A. Spivey
Attorney-in-Charge
State Bar No. 00000076
48 East Avenue
Austin, Texas 78701
o: 512+474-6061 f: 512+474-1605
Email: bas@spivey-law.com

Rhonda H. Wills
Wills Law Firm
State Bar No. 00791943
2700 Post Oak Blvd., Suite 1350
Houston, Texas 77056
o: 713.528.4455 f: 713.528.2047
Email: rwills@rwillslawfirm.com

Arturo Villarreal, Jr.
Law Offices of Arturo Villarreal, Jr., PLLC
State Bar No. 24061908
48 East Avenue
Austin, Texas 78701
o: 512+474-6061 f: 512+474-1605
Email: art@rreal-law.com

Attorneys for Plaintiffs