

**DISTRICT OF MINNESOTA
UNITED STATES DISTRICT COURT**

Marco A. Alvarez, Moises R. Perez,
Maria I. Cruz Lingres, Emmanuel Patino Cruz,
Honorio O. Hernandez, Rosa Rendon,
Jose Rosales, Guadencio Reyez,
Ezequiel Xochihua, Letisia Baesa Morgado,
Eleuterio Toledo, and Elizabeth
Dominquez Perez,

Civil File No.

Plaintiffs,

PLAINTIFFS' COMPLAINT

-vs-

Diversified Maintenance Systems, LLC,
Alan Butcher, in his official
capacity as President, Jay Garcia,
Vice President of Operations, in his
official capacity, Carlos Soto, Human
Resources Director in his official capacity,
Tim Potvian, National Account Director,
in his official capacity, and
Carlos Medina, District Manager,
in his official capacity.

Defendants.

PRELIMINARY STATEMENT

1. Plaintiffs bring this action on behalf of themselves and a class of others similarly situated to require Defendants to pay back wages owed to Plaintiffs, which Defendants failed to pay in violation of § 7 of the Fair Labor Standards Act of 1938, as amended (FLSA), 29 U.S.C. § 201 *et seq.* and Minnesota Fair Labor Standards Act, as amended, Minn. Stat. Chapter 177, (MFLSA). Plaintiffs seek temporary and permanent injunctive relief and damages for themselves and all class members.

JURISDICTION AND VENUE

2. This Court has jurisdiction over Plaintiffs' claims pursuant to 29 U.S.C. § 201, *et seq.*; 29 U.S.C. § 216, 28 U.S.C. § 1331 and 28 U.S.C. § 1337(a).
3. Venue is proper pursuant to 28 U.S.C. § 1391(b)(iii) because the Defendants transact business in this district and Plaintiffs were employed by the Defendant in this district.

PARTIES

4. Plaintiff Marco A. Alvarez was a salaried, non-exempt employee of DMS and resides in the City of Saint Paul, County of Ramsey, State of Minnesota.
5. Plaintiff Moises R. Perez is an hourly non-exempt employee of DMS and resides in the City of Minneapolis, County of Hennepin, State of Minnesota.
6. Plaintiff Maria I. Cruz Lingres is an hourly non-exempt employee of DMS and resides in the City of Saint Paul, County of Ramsey, State of Minnesota.
7. Plaintiff Emmanuel Patino Cruz is an hourly non-exempt employee of DMS and resides in the City of Minneapolis, County of Hennepin, State of Minnesota.
8. Plaintiff Honori O. Hernandez is an hourly non-exempt employee of DMS and resides in the City of Minneapolis, County of Hennepin, State of Minnesota.
9. Plaintiff Rosa Rendon is an hourly non-exempt employee of DMS and resides in the City of Minneapolis, County of Hennepin, State of Minnesota.
10. Plaintiff Jose Rosales is an hourly non-exempt employee of DMS and resides in the City of Minneapolis, County of Hennepin, State of Minnesota.
11. Plaintiff Guadencio Reyez is an hourly non-exempt employee of DMS and resides in the City of Rochester, County of Olmstead, State of Minnesota.

12. Plaintiff Ezequiel Xochihua is an hourly non-exempt employee of DMS and resides in the City of Rochester, County of Olmstead, State of Minnesota.

13. Plaintiff Letisia Baesa Morgado is an hourly non-exempt employee of DMS and resides in the City of Minneapolis, County of Hennepin, State of Minnesota.

14. Plaintiff Eleuterio Toledo is an hourly non-exempt employee of DMS and resides in the City of Minneapolis, County of Hennepin, State of Minnesota.

15. Plaintiff Velentin Palacios is an hourly non-exempt employee of DMS and resides in the City of Minneapolis, County of Hennepin, State of Minnesota.

16. Plaintiff Elizabeth Dominquez Perez is an hourly non-exempt employee of DMS and resides in the City of Rochester, County of Olmstead, State of Minnesota.

17. The Plaintiffs and the class were at all times relevant herein “employees” as that term is defined by 29 U.S.C. § 203(e); Minn. Stat. § 177.23, subd. 7.

18. The Defendants were at all times relevant herein an “employer” as that term is defined by 29 U.S.C. § 203(d); Minn. Stat. § 177.23, subd. 6.

19. Defendants Alan Butcher, President, Jay Garcia, Vice President of Operations, Carlos Soto, Human Resources Director, Tim Potvian, National Account Director, and Carlos Medina, District Manager are in managerial or supervisory position with Defendant DMS and are sued in their official capacity as the employer of the Plaintiffs.

CLASS ACTION ALLEGATIONS

20. Pursuant to 29 U.S.C. § 216(b), the Plaintiffs bring this cause of action on behalf of themselves and an opt-in class of all persons who were, are or will be hourly non-exempt janitorial and facility maintenance services who earned, but did not receive compensation for

time worked, including but not limited to overtime pay from Defendants, and only recently became aware of their right to such compensation and overtime pay.

- a) The size of the class is so numerous (over 100 persons) that joinder of the individual members would be impracticable.
- b) The named Plaintiffs are an adequate class representative because they are directly impacted by Defendants' actions. The interests of the named Plaintiffs are not antagonistic to, or in conflict with, the interests of the class as a whole. The attorney representing the class is experienced in representing clients in federal litigation.
- c) Common questions of law and fact are involved, including questions posed by Plaintiffs' allegations that Defendants failed to pay in violation of § 7 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.* (Act) present present and former hourly non-exempt employees of DMS, who earned but did not receive, overtime pay from Defendants.
- d) Claims of the named Plaintiffs are typical of the claims of the class because all class members and the named Plaintiffs are affected by the Defendants' conduct.
- e) Defendants have acted on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole.
- f) Common questions of law or fact predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
- g) The named Plaintiffs are similarly situated to the class members in terms of job responsibilities, title, and employment dates as they are all janitorial and facility maintenance employees who provided services for DMS and who were denied

compensation for all the time that they worked and time and one-half overtime wages by Defendants.

FACTS

21. DMS hired the Plaintiffs and class members as employees.
22. DMS provides janitorial and facility maintenance services to retail, education, industry, managed services, transportation, commercial, and medical facilities.
23. Plaintiffs provided janitorial and facility maintenance services to retail, education, industry, managed services, transportation, commercial, and medical facilities as employees of DMS.
24. DMS paid Plaintiffs an hourly wage, but failed to pay for all time worked, including for actual time for janitorial and facility maintenance services.
25. Plaintiffs were required to pay out-of-pocket maintenance costs associated with the upkeep of equipment necessary to complete their employment. The Defendants asserted that each Plaintiff was to be reimbursed for such costs but DMS has failed to provide such reimbursement.
26. Plaintiff Alvarez began his employment with Defendant DMS in 2011 and worked approximately 80 - 90 hours per week. He was not paid overtime for those hours in excess of 40 hours worked per week. Plaintiff Alvarez also worked for the Defendants in Arizona prior to being transferred, at his request, to Minnesota to work for DMS. He is aware that the same practices of refusing to pay overtime pay and pay for time worked took place with DMS employees in Arizona. He resigned his position as Area Manager after he brought to the Defendants attention the significant fraud that was taking place in terms of paying DMS employees, DMS supervisors asked him to participate in the illegal acts and the DMS

Defendants began to harass and intimidate him to such a degree that he was placed on medical leave and required medical attention and medications.

27. Plaintiff Moises R. Perez began his employment with Defendant DMS in 1994 through to the present and was required to work 56 hours per week with no overtime pay.

28. Plaintiff Maria I. Cruz Lingres began her employment with Defendant DMS in 2008 through to the present and was required to work 56 hours per week with no overtime pay.

29. Plaintiff Emmanuel Patino Cruz began his employment with Defendant DMS in 2008 through to the present and was required to work 56 hours per week with no overtime pay.

30. Plaintiff Honori O. Hernandez began his employment with Defendant DMS in 2009 through to the present and was required to work 60 hours per week with no overtime pay.

31. Plaintiff Rosa Rendon began her employment with Defendant DMS in 2007 through to the present and was required to work 56 hours per week with no overtime pay.

32. Plaintiff Jose Rosales began his employment with Defendant DMS in January 2011 through to the present and was required to work 60 hours per week with no overtime pay.

33. Plaintiff Guadencio Reyez began his employment with Defendant DMS in February 2011 through to the present and was required to work 56 hours per week with no overtime pay.

34. Plaintiff Ezequiel Xochihua began his employment with Defendant DMS in 2008 through to the present and was required to work 56 hours per week with no overtime pay.

35. Plaintiff Letisia Baesa Morgado began her employment with Defendant DMS in 2006 through to the present and was required to work 60 hours per week with no overtime pay.

36. Plaintiff Eleuterio Toledo began his employment with Defendant DMS in April 2009 through to the present and was required to work 56 hours per week with no overtime pay.

37. Plaintiff Velentin Palacios began his employment with Defendant DMS in 2009 through to the present and was required to work 60 hours per week with no overtime pay.

38. Plaintiff Elizabeth Dominquez Perez began her employment with Defendant DMS in 2009 through to the present and was required to work 60 hours per week with no overtime pay.

39. Each of the Plaintiffs and class members were required to work 7 days per week and daily breaks were not provided.

40. DMS failed to maintain accurate time records. 29 U.S.C. § 211(c); Minn. Stat. § 177.30.

41. Plaintiff Rose Rendon was directed and required to file her application for employment under the name of Veronica Mez-Trabajo by DMS staff and Carlos Medina.

42. Plaintiff Emmanuel Patino Cruz was directed and required to file his application for employment under the name of Jose Guillermo Aristizbal, as well as other names, by DMS staff and Carlos Medina.

43. Plaintiff Jose Rosales Cruz was directed and required to file his application for employment under the name of Josue Rodriges by DMS staff and Carlos Medina and was told to do so because an employment number had already been assigned to that name.

44. Plaintiff Jose Alberto Dominquez was directed and required to file his application for employment under the name of Guedencio Reyez by Carlos Medina and was told to do so because an employment number had already been assigned to that name.

45. Plaintiff Elizabeth Dominquez Perez was originally hired under her own name. When she had an accident while working for Defendants and injured her ankle, she was immediately terminated. Defendants did not offer medical leave or assist in paying her medical expenses associated with the accident. In addition, when Plaintiff Perez was terminated she had regular wages that were to be paid including a pay period of 84 hours. The Defendants never paid the

regular back wages due to her. After six months of recuperating, Plaintiff Perez returned to DMS out of financial necessity. Plaintiff Perez was informed by her previous supervisor, Carlos Medina, that in order to work for Defendant DMS she would be required to receive pay under a different name.

PAYMENT FOR TIME WORKED

46. The Plaintiffs and class members were and are not paid for all the time that they work. Instead, DMS paid the Plaintiffs the same hourly amount without regard to the time actually expended by the Plaintiffs and used ghost employees to make such payments. Defendants consistently required the Plaintiffs to record their overtime hours under the name of a ghost employee. An hourly amount consistent with their regular hourly pay for each Plaintiff would issue under the ghost employees' names and the payment would be split between the Plaintiffs.

47. The Defendants improperly failed to compensate the Plaintiffs and class members for all time they were at work discharging their work-related duties.

OVERTIME COMPENSATION

48. Plaintiffs and class members were consistently required to work over forty hours per week and 7 days per week without meal or rest breaks, vacations, days off or overtime pay.

49. The Fair Labor Standards Act and the Minnesota Fair Labor Standards Act requires an employer to pay its employees at a rate of at least one and one-half their regular rate for time worked in one work week over forty hours. This is commonly known as the time-and-a-half pay for overtime work.

50. Despite consistently working overtime, the Plaintiffs and class members were not paid time and one-half pay from Defendants for overtime worked.

MANDATORY BREAKS

51. None of the Plaintiffs and class members were provided with the mandatory meal and rest breaks in violation of Minn. Stat. §§ 177.253; 177.254.

PAYROLL CARDS

52. All of the Plaintiffs and class members were paid through payroll card accounts. No notice regarding the use of this system of payment was ever provided to the Plaintiffs and class members. The Plaintiffs and class members were never provided notice in their native language of Spanish and no consents were knowingly signed by the Plaintiffs and class members to such payment arrangements. Fees associated with the payroll card accounts, in the amount of \$2.00 per withdrawal were paid by the Plaintiffs and class members in Minnesota in violation of Minn. Stat. §§ 177.255, subd. 5 and 6.

WILLFUL VIOLATIONS

53. On information and belief, Defendants have for more than six years, willingly, deliberately and intentionally refused to pay its employees, including the Plaintiffs and class members for time actually worked, and for time and one-half pay for overtime worked.

54. On information and belief, and in violation of the FLSA and MFLSA, Defendants did not, during all relevant times, until recently, post the FLSA and MFLSA laws in an area alerting the Plaintiffs and class members of their rights to payment for time worked and to overtime pay under the FLSA and MFLSA.

55. Consequently, Plaintiffs and class members were until very recently, never aware that the FLSA and MFLSA provided for compensation for time actually worked rather than an arbitrary determination and for time and one-half pay for overtime worked or that they were owed

compensation for actual time worked and time and one-half pay for overtime worked as employees.

56. Defendants led the Plaintiffs and class members to believe that their regular pay was paid in conformity with the FLSA and the laws of the State of Minnesota, MFLSA.

57. In fact, not until one of the Plaintiffs contacted a private attorney did the Plaintiffs find that they were owed back wages or learn that Defendants failed to pay in accordance with FLSA and MFLSA and did fail to pay overtime wages in violation of the FLSA and MFLSA.

58. Defendants knew or should have known that Plaintiffs and class members were entitled to compensation for time actually worked and for time and one-half overtime pay under the FLSA and MFLSA, during all relevant times.

59. As proof of this fact, upon information and belief Defendants had previously received publications and advice to pay Plaintiffs and class members the wages actually earned and to pay time and one-half overtime pay, but failed to do so.

60. As further proof of this fact, when the failure to comply was brought to the attention of Defendant Alan Butcher, on the 8th and 10th of August through written correspondence resulting in responsive correspondence from Defendants' attorney, Phillip B. Russell of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. Defendants continued to refuse to pay overtime and began to fire various long-term employees who had complained about the lack of overtime pay.

61. As further proof of this fact, when the failure to comply was brought to the attention of the Defendants asserted that they would "restructure" the payment program and ensure that all employees received overtime pay.

62. As further proof of this fact, Defendants were notified in writing of Plaintiff Alvarez's whistleblower status, that Plaintiff Alvarez was refusing to do the payroll as Defendant Medina

demanded and that wage claims were arising due to violations of FLSA and MFLSA under circumstances similar to the present.

63. As further proof of this fact, Defendants began to harass and intimidate Plaintiff Alvarez by requiring him to work in excess of 80 hours per week to keep his position. Plaintiff Alvarez attempted to comply with Defendants demands but ultimately had to seek medical treatment for Acute Stress Disorder. The physician placed Plaintiff Alvarez on medical leave and started him on medications to manage his stress. At the point that Plaintiff Alvarez sought out medical treatment, he was suffering from sleeplessness, lack of interest in daily activities, depression and anxiety. On the 29th of August 2011, Plaintiff Alvarez was required to resign as a consequence of the Defendants' action which was tantamount to constructive discharge.

64. When Plaintiffs questioned the supervisor about not being paid for hours in excess of 40 per week, the Supervisor threatened the individual Plaintiffs with termination from their employment or be arrested and sent to prison.

65. As further proof of this fact, Defendants agreed to institute a new time record on or about the 1st of August 2011. However, based on information and belief, this new time record keeping has not been instituted.

66. Defendants, however, willfully, deliberately and intentionally failed and continue to fail to pay Plaintiffs and class members for time actually worked and for time and one-half overtime wages for those who work or worked over forty hours per week.

67. Defendants have never claimed that the FLSA and MFLSA laws do not apply to the Plaintiffs and class members or that the Plaintiffs and class members are an exemption from these requirements.

68. The Plaintiffs and class members are, therefore, owed compensation for time actually worked but not paid, and time and one-half overtime wages and back wages by Defendants, who willingly and knowingly withheld those wages.

**FIRST CAUSE OF ACTION
(FAIR LABOR STANDARDS ACT)**

69. The foregoing paragraphs are included herein as though fully set forth herein.

70. Defendants regularly engage in commerce and their employees handle and use goods, which have moved in interstate commerce.

71. At all relevant times, Defendants were and are employers within the meaning of the Fair Labor Standards Act, 29 U.S.C. § 203(d).

72. Plaintiffs and class members at all relevant times were employees of Defendants, as defined by the Fair Labor Standards Act, 29 U.S.C. § 203(d).

73. During the period of time that Plaintiffs and class members were employed by Defendants, the Plaintiffs and class members performed work for which they were not compensated and in addition on consistent overtime work for which no additional compensation was paid to them by Defendants in violation of the provisions of the 29 U.S.C. § 201 *et seq.* More specifically, Defendants violated § 7 of the Fair Labor Standards Act by failing to pay time and one-half overtime wages to hourly non-exempt employees who constitute the Plaintiff Class and earned overtime pay.

74. Upon information and belief, the Defendants' pay system was unilaterally imposed upon Plaintiffs and class members including the use electronic payments for which Plaintiffs class members were charged fees and not provided with the necessary notice to consent to such payments.

75. The Defendants' failure to compensate the Plaintiffs and class members for all compensable hours violates the minimum wage provisions of the FLSA and the regulations thereunder.

76. The Defendants' failure to properly administer a scheme of compensation, including but not limited to actual time, overtime and/or comp time, compensation violates the overtime provisions of the FLSA and the regulations thereunder.

77. The Defendants' failure to compensate the Plaintiffs and class members for all compensable hours was a willful and knowing violation of the FLSA.

78. As a result of Defendants' willful and knowing failure to properly compensate the Plaintiffs, the Plaintiffs and class members suffered substantial delays in receipt of wages owed and damages and in some instances have not been paid at all.

79. The Defendants' failure to properly administer a compensation scheme for overtime was a willful and knowing violation of the FLSA.

80. Pursuant to 29 U.S.C. §§ 207, 216, Defendants owe Plaintiffs and class members compensation for the overtime work, an additional equal amount as liquidated damages, together with an additional sum for attorneys' fees and costs.

SECOND CAUSE OF ACTION
29 U.S.C. 215(a)(3)
(RETALIATION IN VIOLATION OF FLSA)

81. The foregoing paragraphs are included herein as though fully set forth herein.

82. Some of the Plaintiffs who have questioned the time records and the payment practices have been subjected to harassment, increased scrutiny and meetings for which they have not received compensation. The threats include the loss of employment and imprisonment.

83. The Plaintiffs that have complained have been advised that the defendant only has a problem with Plaintiff Alvarez.

84. There is a causal link between the adverse employment actions as described above and the assertion by Plaintiffs and class members of both their rights and the unfulfilled duties of Defendants under the FLSA and MFLSA.

85. Other employees fear retaliation for either reporting their time accurately or for opposing the violations of FLSA and MFLSA by Defendants.

86. The actions of the Defendants are in violation of the anti-retaliation provisions of 29 U.S.C. § 215(a)(3)(1994).

87. § 704(a) of the 1964 Civil Rights Act makes it illegal for an employer to retaliate against any employee who has opposed any unlawful employment practice.

88. Certain of the Plaintiffs opposed the unlawful employment practices of the Defendants and were consequently retaliated against including the loss of their long-standing employment with DMS or with threats of arrest and confinement.

**THIRD CAUSE OF ACTION
(MINNESOTA FAIR LABOR STANDARDS ACT)**

89. The foregoing paragraphs are included herein as though fully set forth herein.

90. Defendants regularly engage in commerce and their employees handle and use goods, which have moved in interstate commerce.

91. At all relevant times, Defendants were and are employers within the meaning of the Minnesota Fair Labor Standards Act, Chapter 177 and are subject to the provisions of such Act.

92. Plaintiffs and class members within Minnesota at all relevant times were employees of Defendants, as defined by the Minnesota Fair Labor Standards Act, Chapter 177.

93. During the period of time that Plaintiffs and class members within Minnesota were employed by Defendants, the Plaintiffs and class members within Minnesota performed work for which they were not compensated and in addition on consistent overtime work for which no additional compensation was paid to them by Defendants in violation of the provisions of the Minnesota Fair Labor Standards Act, Chapter 177. More specifically, Defendants violated Minn. Stat. §§ 177.25; 177.30; 177.253; 177.254; and 177.255 of the MFLSA by failing to pay time and one-half overtime wages to hourly non-exempt employees who constitute the Plaintiffs and earned overtime pay.

94. Upon information and belief, the Defendants' pay system was unilaterally imposed upon Plaintiffs and class members including the use electronic payments for which Plaintiffs and class members were charged fees and not provided with the necessary notice to consent to such payments.

95. The Defendants' failure to compensate the Plaintiffs and class members for all compensable hours violates the minimum wage provisions of the MFLSA and the rules thereunder.

96. The Defendants' failure to properly administer a scheme of compensation, including but not limited to actual time, overtime and/or comp time compensation violates the overtime provisions of the MFLSA and the rules thereunder.

97. The Defendants' failure to compensate the Plaintiffs and class members for all compensable hours was a willful and knowing violation of the MFLSA.

98. As a result of Defendants' willful and knowing failure to properly compensate the Plaintiffs, the Plaintiffs and class members suffered substantial delays in receipt of wages owed and damages and in some instances have not been paid at all.

99. The Defendants' failure to properly administer a compensation scheme for overtime was a willful and knowing violation of the MFLSA.

100. Pursuant to Minn. Stat. Chapter 177, Defendants owe Plaintiffs and class members within Minnesota compensation for the overtime work, rest and lunch pay, and an additional equal amount as liquidated damages, together with an additional sum for attorneys' fees and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs seek judgment against Defendants as follows:

That the Court declare the rights and duties of the parties consistent with the relief sought by Plaintiffs:

1. The Court will certify the instant suit as a opt-in class action under 29 U.S.C. § 216(b);
2. Issue a declaratory judgment that Defendant's acts, policies, practices and procedures complained of herein violated provisions of the Fair Labor Standards Act and the Minnesota Fair Labor Standards Act;
3. That Defendants be immediately ordered to comply with the Fair Labor Standards Act and the Minnesota Fair Labor Standards Act
4. That Defendants be enjoined from further violations of the Fair Labor Standards Act and the Minnesota Fair Labor Standards Act;
5. That the named Plaintiffs recover compensatory, damages and an equal amount of liquidated damages as provided under the law;
6. That the named Plaintiffs recover costs associated with their employment that were to be reimbursed;
7. That all penalties be assessed against Defendants for failure to accurately keep time records;
8. That the named Plaintiffs recover any medical costs associated with accidents incurred while undertaking their employment activities;
9. That Plaintiff Alvarez be awarded damages for pain and suffering associated with the Defendants' harassment and intimidation necessitating medical treatment;
10. That Plaintiffs recover an award of reasonable attorneys fees, costs, and expenses;
11. Order the Defendants to make whole the Plaintiffs and all of its employees by providing appropriate back pay and other benefits wrongly denied in an amount to be shown at trial and other affirmative relief; and
12. Plaintiffs further pray for such additional relief as the interests of justice may require. Plaintiffs demand a trial by jury of all triable issues.

Respectfully submitted,

KANE EDUCATION LAW, LLC.

Dated: 20 October 2011

/s/ Margaret O'Sullivan Kane

Margaret O'Sullivan Kane /ID # 220243

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