

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

AMANDA L. OTT, individually, and on behalf of  
all others similarly situated,

Plaintiff,

v.

PUBLIX SUPER MARKETS, INC.,

Defendant.

**Civil Action No. 3:12-cv-00486**

**District Judge Todd J. Campbell**

**Magistrate Judge Joe Brown**

**JURY DEMAND**

**AMENDED COMPLAINT**

COMES NOW the Plaintiff Amanda L. Ott (“Plaintiff”), by and through undersigned counsel, and files this Amended Complaint as follows:

1.

Plaintiff brings this lawsuit on their own behalf, and on behalf of all those similarly situated, against Defendant Publix Super Markets, Inc. (“Publix” or “Defendant”) to recover overtime pay, liquidated damages, prejudgment interest, costs, and attorney’s fees under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.* Plaintiff incorporates by reference herein her previously filed “Opt-in Consent” to join this collective action under 29 U.S.C. § 216(b) [Doc. 1-1].

**Parties**

2.

Plaintiff Ott is a resident of Davidson County, Tennessee and has worked for Publix in a department of a Publix grocery store within this judicial district throughout the period beginning three years prior to the filing date of Plaintiff’s Complaint in this case through on or about

December 28, 2010 under the job title of “Assistant Department Manager” which is considered by Publix to be a “Fluctuating Work Week Associate” position (“FWW Associate”), and is therefore similarly situated to employees who held the position of FWW Associate within the period beginning three years prior to the filing date of this Complaint and continuing through the date of judgment in this lawsuit (the “relevant period”).

3.

Plaintiff brings this action both individually, and as a collective action under 29 U.S.C. § 216(b) on behalf of Publix’s current and former FWW Associates who work or worked in a Publix department (bakery, deli, grocery, meat, produce, and customer service) within the Publix grocery stores during the relevant period and who worked over forty hours in one or more work weeks during the relevant period (collectively, the “Similarly Situated Employees”).

4.

Publix is a Florida corporation registered to do business in the State of Tennessee, and was properly served with process in this case by service upon its registered agent, CT Corporation System, 800 S. Gay St., Suite 2021, Knoxville, TN 37929-9710.

### **Jurisdiction and Venue**

5.

Pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 216(b), this Court has original jurisdiction over the claims set forth in this Complaint arising under the FLSA.

6.

Publix employed Plaintiff and employed/employs others in this judicial district, owns and operates grocery stores transacting business in this judicial district, and is registered to transact business in the State of Tennessee.

7.

Publix is, and has been at all times during the relevant period, an “enterprise” having two or more employees directly engaged in commerce, and/or engaged in the production of goods for commerce, and/or handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce (including but not limited to the handling and sale of groceries and products that are produced in and delivered from other states or foreign countries), as those terms are defined under the FLSA, with annual gross revenues in excess of \$500,000.00, and is also an “employer” as that term is defined under the FLSA.

8.

Publix is subject to the jurisdiction of this court.

9.

Venue is proper in this court under 28 U.S.C. § 1391, because Plaintiff Ott worked for and received payment from Publix in this judicial district, and a substantial portion of the events giving rise to this lawsuit occurred in this judicial district.

**Facts Related To All Counts**

10.

Publix owns and operates a chain of grocery stores in Alabama, Florida, Georgia, South Carolina, and Tennessee.

11.

Plaintiff and the Similarly Situated Employees performed similar job duties, were compensated pursuant to centralized pay policies, and were subjected to similar pay practices while employed as FWW Associates, and are “employees” entitled to the protections of the FLSA pursuant to 29 U.S.C. §§ 203(e) & 207(a).

12.

Publix paid and continues to pay all FWW Associates in all of the six Publix departments in its grocery stores under the same centralized and uniformly applied compensation structure, in accordance with the compensation and benefit terms set forth in the document entitled “Your Associate Handbook” (“Associate Handbook”) during the relevant period, including the Associate Handbooks having a publication date of May 1, 2009, June 12, 2010, and January 1, 2011.

13.

Publix uniformly classified its FWW Associates as non-exempt under the FLSA at all times during the relevant period and acknowledged their entitlement to overtime for hours worked over forty in a work week.

14.

Publix published its compensation plan for all FWW Associates in the document entitled “Your Associate Handbook” (“Associate Handbook”) during the relevant period, including the Associate Handbooks having a publication date of May 1, 2009, June 12, 2010, and January 1, 2011.

15.

According to the compensation plan set forth in the Associate Handbook, a FWW Associate’s “total compensation includes the pay you receive for hours worked, bonuses (if applicable) and all the benefits Publix provides or contributes towards the cost of (for example, sick pay, holiday pay, retirement, health and dental benefits, etc.).”

16.

According to the compensation plan set forth in the Associate Handbook, FWW Associates are paid a weekly amount that Publix calls a “base salary,” and are also eligible to

receive (and were in fact paid in accordance with the Associate Handbook during the relevant period) other compensation in addition to the amount that Publix calls a “base salary” including but not limited to a quarterly retail bonus (“retail bonus”), a contractual bonus that accrues at a fixed amount each month and is paid in or about the first week of December each year and is subject to recoupment if paid in advance (“Holiday Bonus”), and holiday pay that is conditioned upon the employee working at least 50% of the scheduled day before, of, and after the Publix-recognized holiday if scheduled (“Holiday Pay”) in the amount of 1/5<sup>th</sup> their “base salary”.

17.

According to the compensation plan set forth in the Associate Handbook, FWW Associates are paid a “base salary for all hours worked during the week, plus half-time pay for hours worked over 40,” subject to prorating for certain absences (“Fluctuating Work Week” or “FWW”), in addition to other compensation including but not limited to a retail bonus, Holiday Bonus, and Holiday Pay in the amount of 1/5<sup>th</sup> their base weekly salary.

18.

The retail bonus and Holiday Bonus are non-discretionary bonuses as that term is defined under the FLSA, and must therefore be included in the calculation of the regular rate for the work weeks covered by the bonus.

19.

Publix did not include the Holiday Bonus in the calculation of the regular rate in calculating the overtime compensation paid to its FWW Associates during the relevant period, including but not limited to Plaintiff.

20.

If a Publix FWW Associate fails to work at least 50% of the scheduled day the day before, of, and after the Publix-recognized holiday if scheduled, that employee does not receive Holiday Pay.

21.

Holiday Pay is paid as a lump sum amount (1/5<sup>th</sup> base salary for FWW Associates) without regard to whether the employee worked overtime hours, and/or the number of overtime hours worked.

22.

Holiday Pay is also not paid at a rate of at least time-and-a-half the rate established in good faith for like work performed in non-overtime hours on other days.

23.

Holiday Pay is contingent upon working at least 50% of scheduled hours on the days immediately preceding and following a Publix-recognized holiday, and is therefore not paid exclusively for work by the employee on days exclusively limited to “Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek” under 29 C.F.R. § 778.203(c), the regulation interpreting 29 U.S.C. § 207(e)(6) of the FLSA.

24.

Holiday Pay is separate from, and earned in addition to, Holiday Premium pay earned for hours actually worked on the Publix-recognized holiday itself.

25.

Holiday Pay does not fall within any of the exclusions from the FLSA’s regular rate requirements, and must therefore be included in the calculation of the regular rate for the work weeks in which the employee worked the hours required to earn the Holiday Pay.

26.

Publix did not include Holiday Pay in the calculation of the regular rate in calculating the overtime compensation paid to its FWW Associates during the relevant period, including but not limited to Plaintiff.

27.

Plaintiff and the Similarly Situated Employees received weekly pay that varied in amount (separate from any overtime premiums paid) due to the additional payment of a quarterly retail bonus (received in one week but attributable to all work weeks in the preceding quarter) that varied in amount from quarter to quarter, Holiday Bonus, and Holiday Pay, and therefore because the FWW Associates did not receive a fixed weekly amount (“fixed salary”) for all hours worked whether few or many in a work week, and instead received weekly pay in varying amounts due to the additional payment of a retail bonus (received in one week but attributable to all hours worked in the preceding quarter) that varied in amount from quarter to quarter, Holiday Bonus, and Holiday Pay, Publix failed to pay its FWW Associates including Plaintiff in accordance with the requirements of the FWW regulations under the FLSA, and the FWW Associates were therefore denied all overtime compensation owed to them under the FLSA.

28.

In addition, Publix failed to pay its FWW Associates including Plaintiff in accordance with the requirements of the FWW regulations under the FLSA because Publix has a policy of deducting, and upon information and belief does in fact as a matter of practice deduct, pay from a FWW Associate’s weekly salary if the employee takes an “unpaid absence” after exhausting his or her vacation or other paid leave allotment.

29.

Plaintiff therefore brings this collective action seeking to represent the following class of similarly situated individuals:

Publix's current and former FWW Associates who work or worked in a Publix department (bakery, deli, grocery, meat, produce, and customer service) within any Publix grocery stores and who worked over forty hours in one or more work weeks at any time during the period beginning three years prior to the Complaint date.

**COUNT ONE – FLSA VIOLATIONS**

30.

Plaintiff reasserts and incorporates herein the allegations contained in the preceding paragraphs.

31.

On numerous occasions during the relevant period, Publix suffered or permitted Plaintiff and the Similarly Situated Employees to work more than 40 hours in a work week without receiving overtime compensation at time-and-a-half their properly calculated regular rate for hours worked over 40 under the FLSA -- i.e., their regular rate inclusive of their base rate and all other compensation not otherwise excludable under 29 U.S.C. § 207(e) ("regular rate").

32.

Despite being aware that the FLSA applied to its employees, and despite having received complaints within the relevant period from certain Similarly Situated Employees regarding failure to pay the required overtime compensation under the FLSA, Publix violated and continues to violate the FLSA by not paying Plaintiff or the Similarly Situated Employees overtime compensation at the required rate, in addition to liquidated damages and interest for overtime not promptly paid in each paycheck for the applicable pay period.

33.

Publix knew or acted with reckless disregard that its compensation practices alleged above violated the FLSA.

34.

Publix's failure to pay the overtime compensation required by the FLSA to Plaintiff and the Similarly Situated Employees was willful.

35.

Plaintiff and the Similarly Situated Employees are entitled to recover their back overtime pay at the rate of one and a half times their applicable regular rate, in addition to an equivalent amount as liquidated damages, prejudgment interest, attorney's fees, and costs pursuant to 28 U.S.C. § 216(b).

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff requests that this Court:

1. Award Plaintiff and the Similarly Situated Employees their back overtime pay at one and a half times their properly calculated regular rate, an equivalent amount as liquidated damages, and prejudgment interest, for all hours worked over 40 in a work week during the time period beginning three years prior to the filing date of this Complaint through the date of judgment;
2. Award Plaintiff and the Similarly Situated Employees their costs and attorney's fees; and
3. Grant such further other and further relief as the Court finds just and proper in this action.

PLAINTIFF DEMANDS A TRIAL BY JURY.

Respectfully submitted this 5<sup>th</sup> day of July, 2012.

*/s/ Charles Yezbak, III*

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**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that I electronically filed a true and correct copy of the foregoing using the CM/ECF filing system, which will send a notice of electronic filing to the following attorneys of record for Defendant:

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I hereby certify that I have this day served a copy of the foregoing by U.S. Mail, postage prepaid, on the following counsel of record for Defendant who is not registered to receive electronic service:

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*/s/ Charles Yezbak, III*  
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