



Office Depot Assistant Managers Snag FLSA Cert. In OT Suit

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Law360, New York (September 15, 2016, 9:33 PM EDT) -- A New Jersey judge on Tuesday certified a Fair Labor Standards Act collective action and three state class actions against [Office Depot Inc.](#) brought by assistant store managers claiming they were shorted on wages and overtime, rejecting the retailer's argument the supervisors were not similarly treated.

"The court concludes that [assistant store managers] are similarly situated for purposes of final certification under the FLSA," wrote U.S. District Judge William J. Martini.

The more than 300 plaintiffs in the case worked as assistant store managers for Office Depot between early 2000 to July 2013, according to court filings. Their claims arise from an overtime pay policy called the "fluctuating work week" that the retailer had in place for more than six years and that ended in 2012. Because of the varying number of hours an employee would work on any given week, the calculation of the "regular rate" upon which overtime was based changed every week.

Tuesday's ruling allows the workers' claims to continue as a federal collective action under the FLSA and class actions in the states where they live, Colorado, Maryland and Washington. The judge denied certification for Oregon because the sole plaintiff for that state was dismissed with prejudice for not participating in discovery.

In their complaint, the workers say Office Depot's method for paying overtime violated federal and state wage and hour laws.

"It's unconscionable that big corporations and other major employers are willing to take advantage of their employees, many of whom are struggling every day just to make ends meet," said Michael Galpern of [Locks Law Firm](#), attorney for the plaintiffs.

Representatives for Office Depot did not immediately respond to a request for comment Thursday.

The parties had stipulated to conditional certification of the FLSA collective action in August 2013, although Office Depot retained the right to move for decertification, which it subsequently did. Tuesday's order denied the retailers' decertification motion.

In its arguments for decertification, Office Depot maintained that it did not have to classify the assistant store managers as non-exempt employees and pay them any overtime. The company argued that in order to prevail, the workers had to prove that assistant store managers were non-exempt employees entitled to overtime. Since the answer would depend on each supervisory employee's individual circumstances, the claims couldn't be resolved on a collective basis, Office Depot said.

On Tuesday the judge disagreed, saying the assistant managers were similarly situated.

Office Depot also contended that the workers supervised and managed other employees to different degrees. But the judge said they were actually similar with respect to their supervisory roles; most said that "menial tasks" such as stocking shelves and running the cash register would routinely take precedence over managerial duties. Some assistant managers referred to themselves as "glorified cashiers," the judge noted.

The judge also said that "complete symmetry of job functions is not required for final certification under the FLSA."

In certifying state-law classes for Colorado, Maryland and Washington, the court found the potential class members in each state were sufficiently numerous, there are common questions of law or fact, the claims or defenses were typical and the representative parties "fairly and adequately protect the interests of the class."

The latter factor didn't hold for Oregon, and the court agreed, because the claims of former plaintiff Amanda Nohrenberg has been dismissed with prejudice and the assistant store managers had not come up with a suitable stand-in.

"Without a replacement for Ms. Nohrenberg, the court cannot determine whether typicality and adequacy have been established for the Oregon class," Judge Martini wrote, adding that he would allow the workers an opportunity to find a substitute.

In December, Judge Martini also **trimmed several workers** from the collective action because they failed to disclose their employment claims during bankruptcy proceedings, finding that the workers had taken irreconcilable positions. The judge also tossed the claims of 13 other workers who failed to respond to Office Depot's discovery requests.

The workers are represented by Michael A. Galpern and Andrew P. Bell of Locks Law Firm, Michael Hayden Reed and Seth Richard Lesser of [Klafter Olsen & Lesser LLP](#) and Alexandra Koropey Piazza of [Berger & Montague PC](#).

Office Depot is represented by Ashley Jean Hale, Richard Rosenblatt and August W. Heckman III of [Morgan Lewis & Bockius LLP](#).

The case is Rivet et al. v. Office Depot Inc., case number 2:12-02992, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Martin Bricketto. Editing by Brian Baresch.

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