IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ANTOINETTE GONZALES, et al.,

Plaintiffs,

vs. **Case No. CIV-2009-0520 JB/RLP**

CITY OF ALBUQUERQUE, et al.,

Defendants.

and

J. MICHAEL BARNES,
CELIA LOVELAND,
CAROL McCOY, and
DONNA SAYA,

Intervenors,

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Intervenors have moved to intervene as a matter of right pursuant to Rule 24(a), Fed. R. Civ. Proc., and, in the alternative, for permissive intervention pursuant to Fed. R. Civ. Proc. 24(b). In its ruling denying Plaintiffs' motion for class action certification, the Court noted that:

> Because the Court finds that a class is inappropriate, and that it is not impracticable to join the other potential plaintiffs, the Court believes it is appropriate to grant the Plaintiffs time to join additional terminated employees. . . . The leave to amend is limited to adding new plaintiffs and claims for the new plaintiffs. The Court is not granting leave for the current plaintiffs to add additional claims. . . .

(Doc. 69, at p. 34)

Intervenors are 311-CCC supervisors who are currently employed by the City. Their interest in joining this case apparently arose after the Court's denial of class action certification. Their interest is twofold: first, Intervenors are, like Plaintiff Antoinette Gonzales, deemed "exempt" from the provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207, et seq., even though they are not allowed to exercise the discretion and judgment that qualifies for the exemption. Second, although they are still employed at the contact center, Intervenors share with the terminated Plaintiffs an interest in being "classified" employees.

1. Intervention of Right

Intervenors work under the same conditions and have the same job duties Ms. Gonzales had before her termination. They are undeniably knowledgeable about the policies, practices, and rules relating to their work and the work of the contact agents they supervise. Intervenors' claims arise from the same set of facts, occurrences, circumstances and transactions as the Plaintiffs' claims in this case. Intervenors' claims are neither new or different from the claims already asserted in the lawsuit.

> Under Rule 24(a), an applicant may intervene as a matter of right if the applicant claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Rule 24(a)(2). *Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 840 (10th Cir. 1996). The Tenth Circuit generally follows a liberal

view in allowing intervention under Rule 24(a). *National Farm Lines v. ICC*, 564 F.2d 381, 384 (10th Cir. 1977).

The primary issue in this case is whether or not the employees at the 311-CCC have a protected property interest in their employment. Despite their status as current employees Intervenors have concluded that they can enthusiastically share Plaintiffs' claim to a property interest in their employment; they have asked Plaintiffs' counsel to represent them in intervening as Plaintiffs in the case.

The Court has noted that "the record is silent about what the current employees want and the Plaintiffs bear the burden of showing lack of conflict." (Doc. 69, at p. 28). With these four employees, that burden is easily met by showing their interest in intervention. The issue in this case that directly impacts Intervenors is their misclassification as "exempt" from the provisions of the Fair Labor Standards Act (FLSA). Intervenors are current employees who do *not* agree that they have traded away their property interest in their employment for higher wages. To the contrary, intervenors are entitled to relief, including respect for their abilities and competence and overtime pay calculated at the rate of time-and-a-half of their regular rate of pay, liquidated damages, and costs and attorney's fees.

Intervenors' interest and enthusiastic agreement to join Plaintiffs in this lawsuit attest to what these four "current employees want." They, like all of the Plaintiffs, want to vindicate and enforce their entitlement to the respect and dignity and recognition of

their skills and abilities that is notably missing from their treatment as unclassified and "at will" employees.

Moreover, because relief under the provisions of the FLSA requires employees or former employee to individually and expressly "opt in" to the lawsuit pursuant to 29 U.S.C. §216, Intervenors individual and personal interests in securing their overtime pay will not be represented in this case unless intervention is allowed.

2. Permissive Intervention

Rule 24(b)(1) provides that: "In General. On timely motion, the court may permit anyone to intervene who. . . . (B) has a claim or defense that shares with the main action a common question of law or fact." As stated above, Intervenors have a specific statutory claim under the FLSA that is the same as the claim already asserted by Plaintiff Antoinette Gonzales. Additionally, Intervenors share with the Plaintiffs an interest in being properly considered "classified" employees.

The second condition for permissive intervention is "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights?" Rule 24(b)(3). Concurrently, in accordance with the Court's Order denying class action certification and granting leave to join additional plaintiffs (doc. 69), Plaintiffs have given Notice of Joinder of two additional Plaintiffs as of September 20, 2010. (Doc. 72).

The Court has temporarily set aside the previous trial deadlines, and a new schedule has not yet been set. Accordingly, allowance of intervention at this time will not

cause any additional delay or prejudice to Defendants. Moreover, if intervention is *not* allowed then Intervenors will have to file a separate lawsuit to assert their claims for relief under the Fair Labor Standards Act as well as to vindicate a claim to a protected property interest in their employment.

Filing a separate lawsuit would entail additional and unnecessary delay and expense of time, effort, and judicial and other resources. Duplication of judicial effort is one of the vices which Rule 24 was intended to eliminate. *TPI C orp. v. Merchandise Mart of South Carolina, Inc.*, 61 FRD 684 (DC SC, 1974).

3. Notice and Pleading

Finally, both intervention of right and permissive intervention require a statement of the grounds for intervention and an accompanying "pleading that sets out the claim or defense for which intervention is sought." A "Complaint in Intervention" accompanies Intervenors' Motion to Intervene."

4. Conclusion

Proper grounds for denying intervention are unreasonable delay, prejudice, impairment of the rights of existing parties and altering the status of the litigation. None of those are present in this case. When intervention would advance both efficiency and consistency, considering equity and judicial economy as important factors, intervention should be allowed. Rule 24 Commentary; David A. Sonenshein, National Institute for Trial Advocacy.

The three factors favoring intervention of right are 1) a timely application, 2) a direct, substantial, and legally protected interest in the subject matter, and 3) impairment absent intervention and the inability of the existing Plaintiffs to represent the Intervenors' interest. Here, Intervenors satisfy all three factors. Permissive intervention will be allowed when there is a common question of law or fact. The Intervenors and Plaintiffs in this case share both questions of law and fact.

For the reasons set out above, the Court is requested to grant Intervenors' Motion to Intervene.

Respectfully submitted,

s/ Paul Livingston
____
Paul Livingston
P.O. Box 250
Placitas, NM 87043
(505) 771-4000

I hereby certify that this Motion is being filed electronically through the Court's CM/ECF system and that opposing counsel will receive copies electronically on or before September 22, 2010.

s/ Paul Livingston
____
Paul Livingston