

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

PATRICK CHAVEZ,
on behalf of himself and all other
City employees who have been paid overtime
that was improperly determined under
29 U.S.C.A. § 207(a)(1) (Section 7(a)(1)
of the Fair Labor Standards Act),

Plaintiff,

v.

Civ. No. 02-562 JH/ACT

CITY OF ALBUQUERQUE,

Defendant.

ORDER

This matter is before the Court on the motion of the minority Plaintiffs, represented by Paul Livingston, to file a second amended complaint [Doc. No. 139]. The majority Plaintiffs do not oppose the motion. However, the Defendant City of Albuquerque opposes the motion in part; specifically, Defendant opposes any amendment which would add a claim by the Plaintiffs that the City of Albuquerque has improperly classified some employees as “exempt” under the Fair Labor Standards Act (“FLSA”). On the other hand, Defendant does not oppose the proposed amendment to the extent it adds three additional plaintiffs and “seek[s] to clarify and restate the allegations of the current Amended Complaint in a manner consistent with that document and with the legal theories adopted by Plaintiffs in this litigation to date.” Defendant’s Response Br. at p. 1.

The Court will deny Plaintiffs’ motion to amend to the extent that it seeks to add allegations that the Defendant has misclassified certain unspecified employees as exempt under the FLSA. After reviewing the original and first amended complaints, the Court finds that neither document contains

any allegation that the Defendant has engaged in such misclassification. Rather, both of those pleadings assert that the City has improperly calculated Plaintiffs' regular rate of pay under the FLSA, which in turn affects the amount of overtime pay owed to exempt employees. Implicit in these allegations is that Plaintiffs are properly classified non-exempt employees who are entitled to overtime pay under the statute.


The Court concludes that the motion to amend, which essentially adds a new claim and a new layer of complexity to the case, is untimely. The original complaint was filed May 17, 2002. Mr. Livingston filed his notice of appearance on behalf of certain plaintiffs on June 14, 2002. On May 7, 2003, United Magistrate Judge Alan Torgerson granted in part and denied in part the majority Plaintiffs' motion to strike Mr. Livingston's appearance, at which time he was formally recognized as counsel for Johnny Gonzales and Michael Toya.¹ On December 7, 2004, more than a year and half later, the Plaintiffs filed their first amended complaint. That document contains no allegation that the Defendant improperly classified non-exempt employees as exempt. In the meantime, the parties began the process of discovery in a large, complex case. Then, on November 6, 2005, approximately three years after the original complaint was filed, the minority Plaintiffs filed the present motion for leave to their proposed second amended complaint, in which they seek to add the claim that the Defendant misclassified its employees.

Untimeliness alone is a sufficient reason to deny a motion to amend. *Panis v. Mission Hills Bank N.A.*, 60 F.3d 1486, 1495 (10th Cir. 1995); *Pallottino v. City of Rio Rancho*, 31 F.3d 1023, 1027 (10th Cir. 1994). This is particularly true when the proposed amendments are based on information that was available at the time of the filing of the original complaint (or at the time of prior

¹Mr. Livingston has entered his appearance on behalf of other plaintiffs as well.

amendments). *Pallottino*, 31 F.3d at 1027; *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1366 (10th Cir. 1993). Plaintiffs have failed to offer any explanation for their delay in moving to amend their complaint. Furthermore, there is nothing in the record to suggest that the Plaintiffs did not know that they had been misclassified prior to November of 2005. To the contrary, Plaintiffs were well-armed with information relating to their job duties, which information governs a determination of whether an employee is exempt under the FLSA. Accordingly, the Court concludes that the motion to amend is untimely, and will deny it as such.

IT IS THEREFORE ORDERED that the motion to file a second amended complaint [Doc. No. 139] is **GRANTED IN PART AND DENIED IN PART**. Plaintiffs may file a second amended complaint to add new plaintiffs and to clarify allegations previously set forth in the pleadings. However, Plaintiffs may not amend their complaint to add a claim that the Defendant has improperly classified employees under the FLSA. In the event the Plaintiffs choose to file a second amended complaint, they must do so no later than May 10, 2006.



UNITED STATES DISTRICT JUDGE