



**Issue Date: 30 November 2018**

**Case No.: 2017-FLS-00004**

*In the Matter of:*

**RAMIREZ PLASTERING, LLC** and  
**ISMAEL RAMIREZ**, an individual,  
*Respondents.*

**DECISION AND ORDER OF DEFAULT JUDGMENT**

This case arises under the Fair Labor Standards Act of 1938 (“FLSA” or the “Act”), 29 U.S.C. §§ 201-219, and the implementing regulations at 29 C.F.R. Parts 578 and 580.

Background and Procedural History

The U.S. Department of Labor, Wage and Hour Division (“Plaintiff”), investigated the above-named Respondents for the time period December 1, 2012 to September 27, 2015, and concluded that they failed to pay 44 of their employees the applicable minimum wage under Section 6 and statutory overtime pay under Section 7 of the FLSA, totaling \$73,930.94 in back wages. By notice dated February 18, 2016, Plaintiff also assessed \$16,940.00 in civil money penalties. Respondents, through their then retained counsel, filed an exception and request for hearing dated March 3, 2016, contending that “[t]he finding of underpayments to employees in the amount of \$73,930.94 is incorrect” and the civil money penalty is inappropriate. The case was docketed by the Office of Administrative Law Judges on March 9, 2017, upon receipt of *Orders of Reference* from Plaintiff’s counsel.

On March 24, 2017, Plaintiff filed an *Unopposed Motion to Stay Proceedings* and, on March 31, 2017, I issued a *Notice of Docketing and Order Staying Proceedings*, which stayed proceedings pending resolution of a parallel case filed in the United States District Court for the District of Nebraska based upon the same alleged FLSA violations at issue in this case,<sup>1</sup> and ordered the parties to provide the Court with a status report every six months. On November 9, 2017, Plaintiff filed a *Case Status Update*, notifying the Court that the parties were engaging in discovery and that the case was unlikely to be resolved before March or April 2018. At the time, Respondents were represented by Alton E. Mitchell, Esq.

On June 25, 2018, Plaintiff filed with this Court a *Motion to Lift Stay and for Summary Decision* (“Mot.”), which advised that the District Court had entered judgment in the Secretary of Labor’s favor in the related federal court litigation. In its Motion, Plaintiff argued that based on the District Court’s orders granting partial summary judgment and default judgment, “no genuine issues of material fact exist as to either the ‘willful’ nature of Respondents’ violations or Respondents’ liability herein.” (Mot. at 4).

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<sup>1</sup> *Hugler v. Ramirez Plastering, LLC et al* (8:17-cv-37-CRZ).

On July 25, 2018, I issued an *Order Lifting Stay, Approving Withdrawal of Counsel and Order to Show Cause*. I granted Plaintiff's motion to lift the stay because the related federal court litigation had concluded, obviating the need to continue holding these matters in abeyance.

Additionally, Attorney Mitchell informed a member of my staff that he was permitted to withdraw from the District Court proceeding and is no longer representing Respondents. Accordingly, I approved Mr. Mitchell's request to withdraw as counsel of record in this proceeding and advised Respondents they had until August 25, 2018 to notify this Court whether they are now representing themselves or if they have secured or will secure new counsel. As of the date of this Order, Respondents have not responded and no counsel has entered an appearance on their behalf.

Finally, my July 25, 2018, and October 4, 2018,<sup>2</sup> Orders advised Respondents they had forty-five (45) days from the date of the Order to file a response to Plaintiff's *Motion for Summary Decision*. Respondents were specifically warned that failure to file a response may result in the Plaintiff's requested relief being granted. 29 C.F.R. § 18.33(d). Respondents have not filed a response.

#### Essential Findings of Fact

Ramirez Plastering, LLC is a Nebraska construction company specializing in plaster, drywall, stucco and scaffolding. Ismael Ramirez is owner and operator of Ramirez Plastering. A Wage and Hour Division ("WHD") investigation covering the period June 13, 2009 to June 11, 2011 concluded that Respondents had failed to pay statutory overtime to its employees in the amount of \$1,121.38, in violation of Section 7 of the Act.

A second WHD investigation covering the December 1, 2012 to September 27, 2015 period concluded that Respondents again failed to pay statutory overtime to their employees, in violation of Section 7 of the FLSA, and assessed a civil money penalty in the amount of \$16,940.00.<sup>3</sup>

On February 8, 2017, the Secretary of Labor filed a complaint in United States District Court for the District of Nebraska seeking recovery of unpaid overtime covering the period December 1, 2012 to September 27, 2015 and an equal amount of liquidated damages for Respondent's repeated and willful violations of the Act. On March 9, 2017, the Secretary of Labor filed an Order of Reference with the

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<sup>2</sup> The July 25, 2018 Order was sent to Ismael Ramirez and Ramirez Plastering, LLC at 9625 Redick Avenue, Omaha, Nebraska 68122. However, this Office received Respondents' copy as returned mail marked "not deliverable as addressed." As Plaintiff served its June 25, 2018 motion to Respondents at 1205 Monroe Street, Fort Calhoun, Nebraska 68023, I reissued my July 25, 2018 Order on October 4, 2018 and served it by certified mail on Respondents at 1205 Monroe Street, Fort Calhoun, Nebraska 68023. However, the October 4, 2018 Reissued Order was also returned to this Office marked by the USPS as "unclaimed unable to forward." Respondents have not provided a forwarding or new mailing address and a website search by a member of my staff on November 30, 2018 for Respondent still reflects a contact address of 1205 Monroe Street, Fort Calhoun, NE 68023. <http://www.ramirezplaster.com/contact/>

<sup>3</sup> A civil money penalty assessed for repeated or willful violations of section 6 or 7 must take into consideration "the seriousness of the violations and the size of the employer's business," 29 C.F.R. § 578.4(a), and may take into account other relevant factors. 29 C.F.R. § 578.4(b) contains an illustrative list of factors, such as whether the employer has made good faith efforts to comply with the FLSA, the employer's previous history of violations, the interval between violations, the employer's commitment to future compliance, and the employer's explanation for the violations.

Office of Administrative Law Judges seeking a \$16,940.00 civil money penalty for the same violations of the overtime and recordkeeping provisions of the Act.<sup>4</sup>

On May 14, 2018, the federal district court entered a default judgment against Respondents ordering them to pay \$33,361.88 in back wages to the Ramirez Plastering employees identified in the WHD investigation and liquidated damages in an amount equal to the unpaid compensation, or an additional \$33,361.88, to the same employees. The District Court also authorized the Secretary of Labor to pursue additional damages above those awarded in the May 14, 2018 Order and, on June 14, 2018, the District Court entered a Judgment of Default against Respondents for failing to comply with the court's order and assessed additional unpaid wages in the amount of \$67,854.52 and an equal amount of liquidated damages against Respondents, for a total amount of \$135,709.04. The District Court did not address the civil money penalty assessed by WHD.

In an Order issued on July 25, 2018 and reissued on October 4, 2018, Respondents were advised they had forty-five (45) days to file a response to Plaintiff's *Motion for Summary Decision*. Respondents were also specifically warned that failure to file a response may result in the Plaintiff's requested relief being granted. 29 C.F.R. Part 18.33(d). Respondents did not file a response.

#### Discussion

The regulations at 29 C.F.R. § 18.57(b)<sup>5</sup> provide that:

If a party . . . fails to obey an order to provide or permit discovery . . . the judge may issue further just orders. They may include the following: (i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims; (ii) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) Striking claims or defenses in whole or in part; . . . or (vi) Rendering a default decision and order against the disobedient party.

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<sup>4</sup> The United States District Court for the District of Nebraska found that during the period December 1, 2012 to September 27, 2015, Respondents violated the FLSA's recordkeeping requirements and failed to pay overtime in excess of 40 hours in a work week to its employees for a total of \$16,680.94 in unpaid wages and that these violations were willful. The District Court also imposed liquidated damages of \$16,680.94, an amount equal to the total unpaid compensation.

As the District Court case involved the same employees and alleged FLSA violations at issue in these cases, under the doctrine of res judicata, I find the District Court's judgment resolves the issue of whether Respondents violated section 7 and 15 of the FLSA. The District Court's judgment also resolves the question of whether Respondents' violations were willful. I further find that Respondents' behavior is deemed to be "repeated" under 29 C.F.R. § 578.3(b)(1) and (2) pursuant to the District Court's findings that Respondents violated section 7 in the time period corresponding to the Wage and Hour Division's first investigation in 2011, and Respondents receiving notice of that violation. Additionally, I find that Respondents' behavior was deemed to be "willful" pursuant to 29 C.F.R. § 578.3(c)(2) and (3) pursuant to the District Court's findings that Respondents were informed by the Wage and Hour Division that their conduct was unlawful. I further find that Respondents either knew or were in reckless disregard of the requirements of the FLSA. Accordingly, I find that it was proper to assess a civil money penalty. I further find the District Court's assessment of \$16,680.94 in liquidated damages did not cover the appropriateness of the \$16,940.00 assessed civil money penalties in this matter.

<sup>5</sup> 29 C.F.R. § 580.7 provides that the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges at 29 C.F.R. Part 18 apply to these proceedings "[e]xcept as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart."

Respondent were expressly warned in the June 25, 2018 Order and the October 4, 2018 Reissued Order that failure to respond to, or comply with, the Order could result in Plaintiff's requested relief being granted. 29 C.F.R. § 18.33(d). Respondents have not filed a response nor requested an extension of time to do so or communicated with this Court since March 3, 2016.

Order

Based on the foregoing, I hereby AFFIRM Plaintiff's assessment of civil money penalties. It is hereby ORDERED that:

1. Default judgment is entered against Respondents;
2. Respondents are liable for civil money penalties totaling \$16,940.00;
3. I adopt as my own the facts set forth in paragraph II of Plaintiff Secretary's Memorandum in Support of Motion for Partial Summary Judgment, electronically filed on February 21, 2018 in *Acosta v. Ramirez Plastering, LLC and Ismael Ramirez*, Case No. CV-8-17-37 (Dist. Ct. Neb.).

**SO ORDERED:**

**STEPHEN R. HENLEY**  
Chief Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Administrative Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. § 580.13. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents issued by the Board through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

At the time you file the appeal with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 580.13.

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no appeal is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 580.12(e).