

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION**

JASON GUAJARDO, Individually and	§	
On Behalf of All Others Similarly	§	
Situated,	§	
	§	Civil Action No.
Plaintiff,	§	
	§	7:18-CV-00025-DC
v.	§	
	§	
BIRD ELECTRIC ENTERPRISES, LLC	§	
	§	
Defendant.	§	

PLAINTIFF’S MOTION TO COMPEL DISCOVERY

Plaintiff Jason Guajardo (“Named Plaintiff” or “Plaintiff”) on behalf of himself and all others similarly situated (“Class Members”) files this Motion to Compel Discovery

I. INTRODUCTION

This is a conditionally certified FLSA collective action consisting of one named plaintiff and 29 additional opt-in plaintiffs, all electricians in Defendant’s Department 16. The plaintiffs claim they worked off-the-clock during overtime hours and were not paid for any of their time worked except for time at a customer’s jobsite. Plaintiffs claim Defendant did not compensate them for this time because Defendant told them its customers did not pay it for anything other than the plaintiff’s time spent on a customer’s jobsite.

Plaintiff moves to compel three categories of documents:

1. Invoices relating to work performed by Plaintiffs during the actionable period;¹

¹ The “actionable period” for purposes of this motion is three years predating the filing of this lawsuit, from February 15, 2015 to the present..

2. Master Service Agreements between Defendant and its customers that cover work performed by Plaintiffs during the actionable period; and
3. Communications during the actionable period involving plaintiffs, their supervisors or management, or the class members relating to hours worked, unpaid work time, unpaid overtime, off-the-clock work at the yard, unpaid driving time, and off-the-clock work at jobsites.

The Court has previously compelled production of these types of records in similar FLSA cases. *Kilmon v. Saulsbury Industries, Inc.*, MO:17-CV-99, 2018 WL 5800757, at *7 (W.D. Tex. Feb. 28, 2018) (Counts, J.); *Crow v. ProPetro Services, Inc.*, No. MO:15-CV-00149-RAJ-DC, 2016 WL 9776368 (W.D. Tex. June 6, 2016) (Counts, M.J.). Plaintiff asks that it do so again here.

II. BACKGROUND

Plaintiff filed this FLSA suit on February 15, 2015. Dkt. 1. In the Complaint, Plaintiff claims that he and other electricians for Defendant were not compensated for overtime hours spent conducting preparatory and concluding work and driving to and from Defendant's customer's jobsites. *Id.* ¶¶ 2, 23-32. Plaintiff and the electrician class members were repeatedly told that Defendant would not pay for their drive time or preparatory and concluding work because Defendant's customers did not pay for such work. *Id.* ¶ 31.

On April 16, 2016, the Court conditionally certified a class of "[a]ll current and former Electricians who worked for Defendant in Department 16 at any time since April 10, 2015 to the present." Dkt. 12.

On April 23, 2018, Plaintiff served his First Requests for Admission, First Set of Interrogatories, and First Set of Requests for Production. The First Set of Requests for Production are attached as **Exhibit A**. Defendant timely responded to the first set of discovery requests on

June 22, 2018. Defendants' Objections and Responses to Plaintiffs First Set of Requests for Production are attached as **Exhibit B**.

On September 14, 2018, Plaintiff served his Second Set of Interrogatories and Second Set of Requests for Production. The Second Set of Requests for Production are attached as **Exhibit C**. Defendant timely responded to the second set of discovery requests on November 5, 2018. Defendants' Objections and Responses to Plaintiffs Second Set of Requests for Production are attached as **Exhibit D**.

On November 7, 2018, the Court entered an Agreed Order (1) clarifying that the conditionally certified class includes all electricians, foremen, and general foremen in Defendant's Department 16; (2) ordering notice to all individuals in the class who were previously undisclosed; and (3) tolling limitations for all previously undisclosed class members. Dkt. 38. Plaintiff delivered notice to these individuals and the supplemental notice period is now closed. Twenty-nine total opt-in plaintiffs joined the case.

On February 20, 2019, Defendant served Supplemental Responses to Plaintiff's First and Second Interrogatories and Plaintiff's First and Second Requests for Production. Defendant's Supplemental Responses to Plaintiff's First Requests for Production are attached as **Exhibit E**.²

The parties have engaged in extensive—and mostly successful—efforts to meet and confer regarding discovery disputes. A chronological collection of those communications is attached as **Exhibit F**.

The discovery deadline is June 28, 2019. Dkt. 13.

² Defendant's Supplemental Responses to Plaintiff's First Requests for Production are not properly numbered. From those, only Defendant's supplemental response to Request for Production No. 8 is pertinent to this motion—that related to Plaintiff's First Set of Requests for Production No. 35. *Cf.* Exhibit B at 11-12 with Exhibit E at 5.

III. DISCOVERY STANDARD

“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” FED. R. CIV. P. 26(b)(1). “Information within this scope of discovery need not be admissible in evidence to be discoverable.” FED. R. CIV. P. 26(b)(1). “In assessing the relevancy and proportionality of requested discovery, the Court considers ‘the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.’” *Kilmon*, 2018 WL 5800757 at *1 (quoting FED. R. CIV. P. 26(b)(1)). “The party resisting discovery must show specifically how each discovery request is not relevant or otherwise objectionable.” *Kilmon*, 2018 WL 5800757 at *2 (citing *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990)).

IV. DEFENDANT’S DEFICIENT DISCOVERY RESPONSES

Plaintiff moves to compel the production of three categories of documents. Each of these categories of documents is limited to documents dating back to February 16, 2015, which is three years prior to the filing of this lawsuit and coincides with the three-year statute of limitations for willful violations of the FLSA. *See* 29 U.S.C. 255(a); Dkt. 1 ¶ 37 (claiming a willful violation of the FLSA).

1. Invoices covering work performed by Plaintiffs are discoverable.

Request for Production (“RFP”) No. 35 requests documents showing the locations where services were rendered by Plaintiffs and RFP No. 57 requests the invoices exchanged between Defendant and any person related to any work performed by a Plaintiff during the actionable period. Exhibit A at 9-10. With these requests, Plaintiff is attempting to obtain the invoices for work performed by the plaintiffs in this case during the actionable period. Defendants did not

object to RFP No. 35 but did object to RFP No. 57, claiming the request is overbroad, requests irrelevant information, is not proportional to the needs of the case, and seeks confidential and proprietary documents. Exhibit B at 11-12, 18. These documents are discoverable as they are relevant to the hours worked by Plaintiffs and the location of the work (and thus the drive to and from the location). Defendant's objection that the request is overbroad misses the mark—the request is limited to invoices for work performed by Plaintiff's during the actionable time period. And to the extent there is a legitimate concern about confidentiality, Defendant should utilize the Confidentiality and Protective Order entered in this case. Dkt. 29. This Court has on at least two occasions compelled the production of identical records, labeling them “[r]outine FLSA [d]iscovery.” See *Kilmon*, 2018 WL 5800757, at *7; *Crow*, 2016 WL 9776368, at *7; see also 29 CFR § 216.6(b) (requiring employers to retain “all customer orders or invoices received”).

2. Master Service Agreements between Defendant and its customers that cover work performed by Plaintiffs are discoverable.

With RFP No. 59, Plaintiff seeks the Master Services Agreements between Defendant and its customers that cover work performed by Plaintiffs during the actionable period. Exhibit A at 10. Defendant has objected to the request and refused to produce documents, again claiming the request is overbroad, requests irrelevant information, is not proportional to the needs of the case, and seeks confidential and proprietary documents. Exhibit B at 19.

The Master Service Agreements are discoverable. Plaintiff claims that, in response to complaints about the off-the-clock work, Defendant's managers repeatedly told him and other electricians the Defendant would not pay for drive time or preparatory and concluding work because Defendant's customers did not pay for such work. Dkt. 1 ¶ 31. The Master Service Agreements are relevant to whether this allegation is true. Defendant's objection that the request is misplaced—the request is limited to documents covering work performed by Plaintiff's during

the actionable time period. Finally, the Confidentiality and Protective Order provides an effectivemeans to protect the confidential or proprietary nature of the Master Service Agreements.

3. Communications related to the subject matter of this dispute are discoverable.

RFP No. 14 seeks communications, including e-mails, related to the subject matter of this litigation. Exhibit A at 7. Plaintiff limits the relevant time period to the actionable period and the scope to communications with Plaintiffs, class members (Department 16 electricians), and supervisors and managers of Department 16 related to “hours worked, unpaid work time, unpaid overtime, off-the-clock work at the yard, unpaid driving time, and off-the-clock work at jobsites.” Exhibit F at 19. Initially, Defendant refused to produce anything other than communications related to the “pay methods” of Department 16 electricians. Exhibit B at 5. In later efforts to resolve this issue, Defendant clarified it does not have any qualms over the requested subjects of communications, but objects only to the scope insofar as the positions of the individuals involved in the communications are concerned. Exhibit F at 19. Defendant indicated it would agree to produce communications related to Plaintiffs’ “hours worked, unpaid work time, unpaid overtime, off-the-clock work at the yard, unpaid driving time, and off-the-clock work at jobsites” but refuses to produce the same communications related to either non-plaintiff Department 16 electricians or Department 16 supervisors and managers. *Id.*

RFP Nos. 77-85 request written and oral communications, including e-mail communications pertinent to this case—regarding “the payment of wages for travel time” RFP Nos. 77-79); “the payment of wages for time worked in [Defendant’s] Midland Yard” (RFP Nos. 80-82); and “the payment of wages for uncompensated time” (RFP Nos. 83-85). Exhibit C at 6. Again, Defendant has no complaint with the subjects of the requested communications. For requests that relate to communications directly with Plaintiffs (RFP Nos. 78, 81, and 84), Defendant has agreed to produce responsive documents. Exhibit D at 1-3. But again, Defendant

refuses to produce relevant communications with Department 16 electricians (RFP Nos. 77, 80, and 83) or the supervisors or managers over Department 16 (RFP Nos. 79, 82, and 85). *Id.*

Thus, the only area of dispute is whether the communications involving or related to similarly situated class members (Department 16 electricians) or their supervisors and managers are discoverable. They are discoverable. Those communications are relevant to whether Defendant failed to compensate its Department 16 electricians for all hours worked and whether it did so willfully. This Court has permitted discovery designed to uncover similar violations of similarly situated employees because such violations are relevant to whether the alleged FLSA violation was willful. *Crow*, 2016 WL 9776368, at *6- 7 (permitting discovery of other lawsuits and complaints of similarly situated employees during the actionable period). Likewise, in *Kilmon*, the Court ordered the defendant produce “documents containing written or oral communications concerning Defendant’s failure to pay overtime to similarly situated employees as Plaintiff within the limitations period defined by Plaintiff.” *Kilmon*, 2018 WL 5800757 at *8. Just as the Court held in *Crow* and *Kilmon*, communications (1) during the actionable period, (2) involving similarly situated class members (Department 16 electricians) or their supervisors and managers, and (3) related to “hours worked, unpaid work time, unpaid overtime, off-the-clock work at the yard, unpaid driving time, and off-the-clock work at jobsites,” “the payment of wages for travel time,” “the payment of wages for time worked in [Defendant’s] Midland Yard,” or “the payment of wages for uncompensated time” are discoverable and must be produced.

V. CONCLUSION AND PRAYER

Plaintiff respectfully requests that the Court order that Defendant produce

1. Invoices relating to work performed by Plaintiffs during the actionable period;
2. Master Service Agreements between Defendant and its customers that cover work performed by Plaintiffs during the actionable period; and

3. Communications during the actionable period involving plaintiffs, their supervisors or management, or the class members relating to hours worked, unpaid work time, unpaid overtime, off-the-clock work at the yard, unpaid driving time, off-the-clock work at jobsites, the payment of wages for travel time, the payment of wages for time worked in Defendant's Midland Yard, or the payment of wages for uncompensated time.

Plaintiff respectfully requests that the Court award the relief outlined in the proposed Order submitted with this Motion. Plaintiff requests any other relief he is entitled.

Respectfully submitted,

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By: /s/ Daniel A. Verrett

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF CONFERENCE

I certify that I communicated with counsel for Defendant regarding the relief requested in this motion. Defendant is opposed to this motion.

/s/ Daniel A. Verrett _____

Daniel A. Verrett

CERTIFICATE OF SERVICE

I hereby certify that on this the 14th day of March, 2019, I electronically submitted the foregoing document for filing using the Court's CM/ECF system, which will serve a true and correct copy of the foregoing document upon counsel of record.

/s/ Daniel A. Verrett _____

Daniel A. Verrett