

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ESCOLASTICO DE LEON-
GRANADOS, ISAIS PROFETA
DE LEON-GRANADOS, and
ARMENIO PABLO-CALMO
on behalf of themselves and all
others similarly situated,

Plaintiffs,

vs.

ELLER & SONS TREES, INC. and
JERRY ELLER,

Defendants.

CIVIL ACTION NO.

1:05-CV-1473-CC

ORDER

This matter is before the Court on Plaintiffs' Motion to Award Statutory Damages [Doc. No. 393], Defendants' Response to Plaintiffs' Motion to Award Statutory Damages [Doc. No. 395], and the Reply in Support of Plaintiffs' Motion to Award Statutory Damages [Doc. No. 396]. For the reasons stated below, the Court grants Plaintiffs' Motion to Award Statutory Damages and awards statutory damages in the total amount of \$499,858.74.

This class action lawsuit was brought by three migrant farmworkers employed by Defendants Eller & Sons Trees, Inc. and Jerry Eller (collectively referred to herein as "Defendants") as forestry workers at various times beginning on June 1, 1999. Plaintiffs alleged violations of the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 ("FLSA"), and of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-71 ("AWPA"). Relevant to the instant Motion, the Court certified Plaintiffs' Count I AWPA claims as a Rule 23(b)(3) class action on September 28, 2006. (Doc. No. 100.) The certified class includes Defendants' non-supervisory H-2B guestworkers employed during the eight forestry seasons running

from 1999-2000 through the 2006-2007 forestry season.

The Court previously has found multiple distinct violations of the AWP. In two separate Orders [Doc. Nos. 335 and 366], this Court granted partial summary judgment to Plaintiffs and found class-wide violations of the AWP. Plaintiffs do not seek statutory damages for the violations of the AWP found in the Court's Order entered on October 7, 2008 (the "October 2008 Summary Judgment Order"). Instead, Plaintiffs seek an award of actual damages for those violations and have filed a Stipulation Regarding Actual Damages Related to Claims Determined on Summary Judgment [Doc. No. 394]. The instant Motion to Award Statutory Damages is limited to the intentional violations found by the Court in its Order entered on September 29, 2009 (the "September 2009 Summary Judgment Order").

The Court previously found in its September 2009 Summary Judgment Order that Defendants violated the AWP's recordkeeping requirements under 29 U.S.C. § 1821(d). Specifically, the Court found that "Defendants failed to make, keep and preserve complete and accurate records of the Plaintiffs' work hours and piece rate production as a normal part of their business practices," as required by 29 U.S.C. § 1821(d)(1). (Doc. No. 366 at 14.) The Court further found that Defendants' violation was "'intentional' within the meaning of the AWP." (*Id.*)

Plaintiffs maintain that the Court likewise found that Defendants failed to provide accurate work records to the workers, but the Court made no such finding in the September 2009 Summary Judgment Order. While logic dictates that Defendants could not have consistently provided the workers accurate work records, since Defendants did not always make, keep, and preserve accurate records, Plaintiffs never moved for summary judgment on their claim pursuant to 29 U.S.C. § 1821(d)(2) that Defendants failed to provide the workers accurate work records. (See generally Pls.' Mot. for Partial Summ. J. Finding Violations of AWP Recordkeeping Requirements [Doc. No. 208].) The Court did deny Defendants' cross-motion for summary judgment with respect to Plaintiffs' claim under 29 U.S.C.

§ 1821(d)(2). However, insofar as the Court never granted judgment in favor of Plaintiffs based on a failure by Defendants to provide records under § 1821(d)(2), Plaintiffs, at this time, may recover statutory damages only for Defendants' violations of 29 U.S.C. § 1821(d)(1).

The AWPAs authorize an election of remedies for AWPAs violations as follows:

If the court finds that the respondent has intentionally violated any provision of this [Act] or any regulation under this [Act], it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to \$500 per plaintiff per violation, or other equitable relief, except that (A) multiple infractions of a single provision of this [Act] or of regulations under this [Act] shall constitute only one violation for purposes of determining the amount of statutory damages due a plaintiff; and (B) if such complaint is certified as a class action, the court shall award no more than the lesser of up to \$500 per plaintiff per violation, or up to \$500,000 or other equitable relief.

29 U.S.C. § 1854(c)(1). Plaintiffs who prevail on multiple AWPAs claims may seek statutory damages for some violations and actual damages on others. See, e.g., Saintida v. Tyre, 783 F. Supp. 1368, 1377 (S.D. Fla. 1992) (citing Salazar-Calderon v. Presidio Valley Farmers Ass'n, 863 F.2d 384 (5th Cir. 1989)).

The same AWPAs violation suffered by different individual workers constitute separate violations for the purposes of calculating statutory damages pursuant to § 29 U.S.C. § 1854(c)(1). Elizondo v. Podgorniak, 100 F. Supp. 2d 459, 462 (E.D. Mich. 2000); Bertrand v. Jorden, 672 F. Supp. 1417, 1426 (M.D. Fla. 1987); Sanchez v. Overmyer, 891 F. Supp. 1253, 1261 (N.D. Ohio 1995). Moreover, a given violation is counted as multiple, distinct violations for the purposes of AWPAs statutory damages, when suffered by the same worker in successive seasons. Rivera v. Adams Packing Ass'n, 707 F.2d 1278, 1283 (11th Cir. 1983); Elizondo, 100 F. Supp. 2d at 461; Leach v. Johnston, 812 F. Supp. 1198, 1211 (M.D. Fla. 1992). Where class-wide violations of the AWPAs are found on representative evidence, as presented in this case, the number of violations present for assessment of damages is derived mechanically from the number of seasons worked by all class members included in

the action. Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1304-05 (9th Cir. 1990) (FLCRA); Alvarez v. Joan of Arc, Inc., 658 F.2d 1217, 1219 n.1-2 (7th Cir. 1981); Haywood v. Barnes, 109 F.R.D. 568, 584 (E.D.N.C. 1986).

Here, Plaintiffs seek to recover statutory damages on behalf of 3,878 individuals who worked a combined total of 7,957 forestry seasons during the 1999-2000 through 2006-2007 period covered by this class action.¹ With respect to the AWPAs claims under 29 U.S.C. § 1821(d)(1), Plaintiffs assert that 7,957 violations occurred. Based on the authority cited above and the record in this case, including the Analysis and Report Under the Fair Labor Standards Act and the AWPAs of Jorge J. Rivero (the "Rivero Expert Report") [Doc. No. 194, Pls.' Ex. 144] and the Affidavit of Dwight D. Steward, Ph.D. [Doc. No. 393-2], the Court agrees with Plaintiffs that the Court must assess the propriety of awarding statutory damages and the amount of any such damages for 7,957 violations.

Plaintiffs suggest that a statutory damages award of \$31.41 per violation is appropriate in this case. Plaintiffs originally made this suggestion with the thought that they would be able to recover for two distinct recordkeeping violations in each season, which would have brought the total number of violations to 15,914 and the total amount of statutory damages requested to \$499,858.74. Plaintiffs' goal, obviously, is to recover statutory damages in an amount that is as close as possible to the maximum permitted, \$500,000.00. In fact, Plaintiffs request in their reply brief that, if the Court determines that Defendants violated only one provision of the AWPAs, the Court award Plaintiffs \$62.82 per violation in statutory damages. Therefore, in light of the Court's conclusion that Plaintiffs presently can seek recovery for only the violation of 29 U.S.C. § 1821(d)(1), the Court will evaluate

¹ This number is derived by crediting each of the 1,360 class members who worked in the 1999-2000 season with one season, adding to that total one season for each of the 1,325 class members who worked in the 2000-2001 season and so forth with respect to the eight seasons treated in this case.

whether an award of \$62.82 per violation is appropriate.

Courts use the following factors to assess the appropriateness of statutory damages awarded under the AWP: (1) the amount allowed to each plaintiff for each violation; (2) the total amount of the award; (3) the nature and persistence of the violations; (4) the extent of the defendants' culpability; (5) damage awards in similar cases; (6) the defendants' ability to prevent future violations of the AWP; (7) the substantive or technical nature of the violations; (8) the circumstances of the case; (9) the total number of plaintiffs involved; (10) the total number of violations; and (11) the plaintiffs' recovery on closely related claims in the same suit that will in part compensate the damages caused by violations of the AWP. Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1332-33 (5th Cir. 1985); Saintida v. Tyre, 783 F. Supp. at 1375; Wales v. Jack M. Berry, Inc., 192 F. Supp. 2d 1291, 1308-09 (M.D. Fla. 2000) (citation omitted); Bertrand, 672 F. Supp. at 1422 (M.D. Fla. 1987).

The balance of the foregoing factors weighs in favor of assessing statutory damages and awarding statutory damages in the amount of \$62.82 per violation per plaintiff. As an initial matter, while Defendants argue that Plaintiffs pointed to evidence of only 100 AWP recordkeeping violations in the daily field work records, the Court found in its 2009 Summary Judgment Order that the entire record, including the deposition testimony of 15 crew leaders and the Rivero Expert Report, demonstrated that these violations were class-wide. There were consistent patterns of inaccuracy among all crewleaders and across all seasons covered by this lawsuit. The Court likewise finds that the violations at issue are not mere technical violations but are "core protections offered by the [AWP]". See Sanchez, 891 F. Supp. at 1261; Bertrand, 672 F. Supp. at 1426. Further, cases relied on by Plaintiffs and Defendants indicate that an award of \$62.82 per violation in this case is more than reasonable, as many courts have awarded the statutory maximum of \$500 per plaintiff per violation. See Herrera v. Singh, 103 F. Supp. 2d 1244, 1252 (E.D. Wash. 2000); Avila v. A. Sam & Sons, 856 F. Supp. 763, 774 (W.D.N.Y. 1994); Bertrand, 672 F. Supp. at

1426; Alzalde v. Ocanas, 580 F. Supp. 1394, 1396 (D. Colo. 1984). The Court recognizes that awarding \$62.82 per violation in this case results in a total award closely approaching the \$500,000.00 maximum for the class, but the 3,872 individuals seeking recovery are receiving a relatively small amount for the violations. Additionally, an award of this magnitude is warranted, as Defendants had been cited by the U.S. Department of Labor for past violations of the AWPAs and thus were well aware of the AWPAs and its requirements. Defendant Jerry Eller, who had attended training sessions on the AWPAs, was actively involved in training supervisors in recordkeeping but failed to ensure that the supervisors complied with the AWPAs. Finally, to the extent that there is any overlap between these violations and the other claims for which Plaintiffs are recovering, the overlap is minimal. Plaintiffs' recovery of the statutory damages allowed will not duplicate recovery on other claims in this action.

Based on the foregoing, the Court **GRANTS** Plaintiffs' Motion to Award Statutory Damages [Doc. No. 393] and **AWARDS** Plaintiffs \$499,858.74 in statutory damages pursuant to 29 U.S.C. § 1854(c)(1).

SO ORDERED this 28th day of September, 2012.

s/ CLARENCE COOPER

CLARENCE COOPER
SENIOR UNITED STATES DISTRICT JUDGE