



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Supermarket Assistant Managers Get Cert. In Colo. OT Suit

By **Michael Angell**

Law360 (November 9, 2020, 9:17 PM EST) -- Assistant managers of a national grocery chain secured preliminary certification of their wage and hour collective action in a Colorado federal court after a judge found there was enough testimony about the nature of their work that they could bring a lawsuit on behalf of others.

U.S. Magistrate Judge Scott T. Varholak's Friday order gave conditional certification to a group of assistant managers alleging Vitamin Cottage Natural Food Markets violated federal law by classifying them as exempt from overtime. Judge Varholak said the testimony from six other assistant managers undergirds Michael Levine's allegations that he and others were required to work unpaid overtime.

"A ... collective action may only be maintained by and among 'similarly situated' employees," Judge Varholak's decision said. "The court finds that Levine has made substantial allegations that the putative class is similarly situated."

A former assistant manager for the chain, which does business as Natural Grocers in 19 states, Levine alleges in his lawsuit that he and other assistant managers regularly worked beyond 40 hours per week "standing in as cashiers, stockers, or other hourly workers."

Levine, along with five opt-in plaintiffs, asked the court in April to conditionally certify the collective action under the Fair Labor Standards Act.

As part of his motion to conditionally certify the group, Levine submitted six affidavits from other assistant managers asserting they spent up to 90% of their workday on tasks such as performing customer service, moving goods, setting up displays and cleaning the store.

Levine and the other assistant managers allege that these tasks were part of Natural Grocers' official policy across its 150 stores. As a result, Levine seeks to represent "dozens" of assistant managers who worked at Natural Grocers, according to his motion.

Natural Grocers argued the six affidavits were not enough to show that assistant managers across all stores did the work of hourly, nonexempt employees. But Judge Varholak said Friday that other district courts have required only one affidavit to back up claims in the original complaint to receive conditional certification.

Natural Grocers' assertion that some of testimony in the affidavits points to the assistant managers not having roles and responsibilities in common isn't enough to derail conditional certification either, Judge Varholak said. That argument will have to be heard during the trial, he said.

"The court thus declines Natural Grocers' invitation to weigh the competing deposition testimony at the conditional certification stage," Judge Varholak said.

Now with conditional certification in place, Levine will be able to issue a notice about the collective action, which seeks to represent assistant managers who worked at Natural Grocers since Jan. 31, 2017, the judge's decision said.

Judge Varholak declined requests from Natural Grocers to include in that notice its attorney information and a disclaimer about the "burdens" of the lawsuit in terms of fees and costs. Judge Varholak said including those in the notice might confuse potential members or dissuade them from joining.

He also declined a request to keep the notices out of their stores, saying other courts have routinely allowed such notices to be placed on employees bulletin boards and other common areas at work.

Attorneys for the parties did not respond immediately to requests for comment.

Levine is represented by Jason J. Conway of Conway Legal LLC, and Brian David Gonzales of Brian D. Gonzales PLLC.

Vitamin Cottage Natural Food Markets is represented by Jeremy Ben Merkelson and Steven M. Gutierrez of Holland & Hart LLP.

The case is Levine v. Vitamin Cottage Natural Food Markets Inc., case number 1:20-cv-00261, in the U.S. District Court District of Colorado.

--Editing by Abbie Sarfo.

All Content © 2003-2020, Portfolio Media, Inc.