IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CYNTHIA LONG, LADORCAS EVANS, Plaintiffs, v. LOVING ARMS, LLC, Defendant.	)))))))))	No. 2:17-cv-02388-TLP-dkv JURY DEMAND

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO PARTIALLY DISMISS PLAINTIFFS' COMPLAINT

Before the Court is Defendant's Motion to Partially Dismiss Plaintiff's Complaint filed on July 28, 2017. (ECF No. 13.) For the following reasons, the Court grants in part and denies in part Defendant's Motion.

BACKGROUND

Plaintiff Cynthia Long works for Defendant Loving Arms, LLC as a Direct Support Professional. (ECF No. 1 at PageID 2.) Her job requires her to provide direct care and in-home companionship services to individuals in the Memphis area. Plaintiff DeLorcas Evans worked for Defendant as a House Manager. (ECF No. 1 at PageID 2–3.) Her job duties mirrored those of Ms. Long, with the addition of supervisory duties over similar employees. Both Plaintiffs were employed in 2015 and worked in excess of forty hours a week.

On June 7, 2017, Plaintiffs filed an action against Defendant for overtime wages. (ECF No. 1.) Specifically, they allege that Defendant failed to pay them overtime wages, as required

by the Fair Labor Standards Act ("FLSA") from the beginning of their employments until October 13, 2015. (ECF No. 1 at PageID 5–6.)

The primary grounds for Plaintiffs' Complaint stems from administrative regulation § 522.109, promulgated by the Department of Labor ("DOL"). *See* 18 U.S.C. § 522.109(a) (2013). Section 522.109(a) required "third party employers of employees engaged in companionship services" to pay those employees overtime wages. *Id*. Prior to § 522.109, these employees were exempt from receiving overtime wages under the FLSA.

Before the new regulation was scheduled to take effect, a group of employers brought suit in the U.S. District Court for the District of D.C. alleging that § 522.109(a) unconstitutionally exceeded the DOL's rulemaking authority. *See Home Care Ass'n of America v. Weil*, 76 F. Supp. 3d 138, 139–40 (D.D.C. 2014). The District of D.C. held for the employers and vacated § 522.109(a). But the DOL appealed. The U.S. Court of Appeals for the D.C. Circuit reversed. *See Home Care Ass'n of America v. Weil*, 799 F.2d 1084, 1087 (D.C. Cir. 2015).

On July 28, 2017, Defendant filed a Motion to Partially Dismiss Plaintiffs' Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure on two grounds. First, Defendant argued that § 522.109(a) only took effect after the D.C. Circuit's reversal. Thus, Plaintiff's claims prior to October 13, 2015 are barred. Second, Defendant argued that Plaintiffs' claims are barred by the FLSA's statute of limitations.

STANDARD OF REVIEW

To survive a motion under 12(b)(6), a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 566

U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see Engler v. Arnold*, 862 F.3d 571, 575 (6th Cir. 2017).

Though a court will certainly grant a motion to dismiss if a plaintiff has no plausible claim for relief, a court must also review the complaint in a light most favorable to the plaintiff. *See Herhold v. Green Tree Serv., LLC*, 608 F. App'x 328, 331 (6th Cir. 2015). "A complaint should only be dismissed if it is clear to the court that 'no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Id*. (quoting *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 855 (6th Cir. 2003)).

DISCUSSION

A. Section 522.109(a) Retroactively Applies to January 1, 2015.

The central question to Defendant's Motion to Dismiss is whether § 522.109(a) retroactively applies to January 1, 2015—the date that it was originally set to take effect. Neither the Sixth Circuit, nor the Western District of Tennessee, have spoken on this issue. Thus, this question is a matter of first impression for the Court. But, Supreme Court precedent exists for the underlying principle at issue—whether court rulings may result in retroactive application of civil statutes. Plus, other district courts have addressed the precise issue before this Court.

The Court is guided by the principles laid out in *Harper v. Virginia Dept. of Taxation*. *See Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993). In *Harper*, retired federal employees sought retroactive tax refunds on their retirement benefits in light of a Court decision that prohibited states from taxing federal retirement benefits. *See id*. at 89 (discussing *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 818 (1989)). *Harper* held that "a controlling interpretation of federal law [ ] must be given full retroactive effect in all cases still open and

on direct review and as to all events, regardless of whether such events predate or postdate . . . the rule." *Id*. at 96 (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991)). By doing so, the Court held to the axiom that courts should not treat "similarly situated litigants differently." *Id*.

Multiple district courts have addressed the retroactive applicability of § 522.109(a). For example, the District of Colorado applied § 522.109(a) retroactively, noting that:

> [A]s to parties . . . who may have actually relied on the old rule and [ ] would suffer from retroactive application of the new . . . It is simply in the nature of precedent, as a necessary component of any system that aspire to fairness and equality, that the substantive law will not shift and spring on the articular equities of any given case. Doing so would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of new rules.

Collins v. DKL Ventures, LLC, 215 F. Supp.3d 1059, 1065 (D. Colo. 2016) (internal citations and quotations omitted).

Furthermore, many of the district courts that addressed § 522.109(a)'s retroactive application, like the Court here, tie their reasoning to *Harper*. *See Kinkead v. Humana*, 206 F. Supp.3d 751, 754–55 (D. Conn. 2016) (further noting only two instances in which *Harper* does not apply—qualified immunity and *habeas corpus* cases.); *Brittmon v. Upreach, LLC*, 285 F. Supp.3d 1033 (S.D. Ohio 2018); *Evans v. Caregivers, Inc.*, 2017 WL 2212977 at *2–3 (M.D. Tenn. 2017).

Defendant, conversely would have the Court follow the Southern District of Ohio's approach in *Bangoy v. Total Homecare Solutions*. *See Bangoy v. Total Homecare Solutions, LLC*, 2015 WL 12672727 (S.D. Ohio 2015). *Bangoy*, the first case to address § 522.109(a)'s retroactive applicability, held that "permitting [p]laintiffs to recover for a violation of a rule

while the vacatur was in effect would give the rule an impermissible retroactive effect." *Id*. at *3 (citing *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2000)). But, since *Bangoy*, the majority of other district courts have held that § 522.109(a) retroactively applies to its original effective date, January 1, 2015. *See Evan*, 2017 WL at *3. Even the Southern District of Ohio in a more recent opinion on this issue, while not overruling *Bangoy*, does not give *Bangoy* the precedential value that it would generally command. *See Brittmon*, 285 F. Supp.3d at (holding that § 522.109(a) retroactively applies). Given the overwhelming bulk of cases eschewing *Bangoy*, and given *Harper*, the Court does not find the holding in *Bangoy* convincing. Instead, this Court is persuaded by the majority view that § 522.109(a) should be applied retroactively to January 1, 2015.

B. Plaintiffs' Claims are Partially Barred by the FLSA's Statute of Limitations.

1. The FLSA's Two-Year Statute of Limitations Applies.

Defendant asserts correctly that Plaintiffs' claims are partially barred by the FLSA's statute of limitations as to any potential overtime pay prior to June 7, 2015. (ECF No. 13-1 at PageID 42.) FLSA claims "may be commenced within two years after the cause of action accrued" barring certain exceptions extending the statute. *See* 29 U.S.C. § 255(a). The question is thus when Plaintiffs' claim for overtime wages under § 522.109(a) actually *accrued*.

Under § 255(a), an action "commence[s]" on the date the complaint is filed, subject to certain exceptions. *Archer v. Sullivan Cty., Tennessee*, 1997 WL 720406 at *2 (6th Cir. 1997). According to *Archer*, "[a] cause of action is deemed to accrue, as a general rule, at each regular payday immediately following the work period during which the services were rendered for which the wage or overtime compensation is claimed." *Id*. (citations and quotations omitted).

Plaintiffs argue that the Court should apply a three-year statute of limitations to their claim. According to 29 U.S.C. § 255(a), the FLSA's statute of limitations may be extended to three years if the claim arises from a "willful violation" of the FLSA. *Id*. An employer's actions are willful if the employer knew or recklessly disregarded a legal obligation under the FLSA. *See Elwell v. Univ. Hospital Home Care Servs.*, 276 F.3d 832, 842 (6th Cir. 2002). The Court, however, finds no willful violation in this action. Defendant's refusal to pay overtime stemmed from a legal decision striking down § 552.109(a). *See Home Care Ass'n of America*, 76 F. Supp. 3d at 139–40. Defendant's only willful activity, then, appears to be an attempt willfully following the law.

But, Plaintiffs argue that the Court should follow the reasoning in *Kutzback v. LMS Intellibound, LLC* and extend the FLSA's statute of limitations to three years. *See* Order Denying Defendant's Motion to Dismiss, Kutzback v. LMS Intellibound, LLC, No. 2:13-cv-02767-JTF-cgc (W.D. Tenn. Sept. 5, 2014), ECF No. 62. *Kutzback* is not applicable though. The plaintiff in *Kutzback* alleged that his employer knew that it had to pay him for overtime hours and essentially refused to do so. *See* Complaint, Kutzback v. LMS Intellibound, LLC, No. 2:13-cv-02767-JTF-cgc (W.D. Tenn. Oct. 2, 2013), ECF No. 1. This action's facts and circumstances are quite different from *Kutzback*.

Here, Defendant did not pay Plaintiffs under § 522.109(a) because the District of D.C. invalidated the regulation. (ECF No. 13-1 at PageID 41.) After the D.C. Circuit reversed, Defendant notified its employees of its intent to follow the reinstated regulation. (*Id*. at PageID 42.) Thus, Defendant's refusal to retroactively pay Plaintiffs overtime is not due to a "willful" violation of § 522.109(a)—it is because Defendant does not believe that it is legally required to do so. (ECF No. 13-1 at PageID 41–42.) Knowing that the law applies and refusing to follow

it is wholly different than thinking that the law does not apply and refusing to go above and beyond one's statutory duty. As a result, the Court finds that Defendant's refusal to retroactively pay Plaintiffs overtime under § 522.109(a) was not a willful violation. There are thus no grounds on which to extend the FLSA's two-year statute of limitations. *See* § 255(a); *Elwell*, 276 F.3d at 842.

2. Plaintiffs Are Not Entitled to Equitable Tolling.

Plaintiffs are not entitled to the FLSA's three-year statute of limitations for "willful" violations. But, Plaintiffs have one last card that they can play—the doctrine of equitable tolling.

The doctrine of equitable tolling allows a court "to extend the statute of limitations on a case-by-case basis to prevent inequity." *Fenley v. Wood Grp. Mustang, Inc.*, 170 F. Supp.3d 1063, 1076 (S.D. Ohio 2016). This relief is sparingly given. *See Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560–61 (6th Cir. 2000). "Typically, equitable tolling applies one when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond the litigant's control." *Id*. Conversely, "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984). Barring genuinely compelling circumstances, a court should not equitably toll a statute of limitations "by even a single day." *Graham-Humphreys*, 209 F.3d at 560–61; *Hood v. U.S. Postal Serv.*, 2017 WL 6988055 at * 2 (6th Cir. 2017).

The Sixth Circuit lays out five factors to measure the appropriateness of equitable tolling—"(1) lack of notice of the filing requirement: (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the

defendant; and (5) the plaintiffs [sic] reasonableness in remaining ignorant of the particular legal requirement." *Truitt v. Cty. of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998).

Concerning notice, it appears that Plaintiffs were, at minimum, on constructive notice of the FLSA's statute of limitations. Defendant sent multiple memoranda to its employees concerning § 522.109(a). It notified its employees (1) about the incoming regulation (2) that the District of D.C. invalidated the regulation (3) that the D.C. Circuit reinstated the regulation, and (4) that it intended to follow the regulation from that point onwards. (ECF No. 29-2 at PageID 115); (ECF No. 29-3 at PageID 117); (ECF No. 29-4 at PageID 120.) Plaintiffs were thus put on notice of the facts and circumstances surrounding a potential FLSA claim against Defendant by October 2015 at the latest. "Irrespective of whether the plaintiff had the benefit of legal counsel or was proceeding *pro se*, a reasonably cautious and prudent [plaintiff] . . . would, as a modest precaution, assume that limitations began passing on or near the earliest potential date, and would consequently initiate her civil action within [the applicable time period] . . . ." *Graham-Humphreys*, 209 F.3d at 561. Plaintiffs thus had ample to time vindicate their rights in court, having notice of their potential claim within months of their claim accruing. *See Archer*, 1997 WL at *2.

Concerning diligence in pursuing one's rights, Plaintiffs' failure to timely file their claim appears to stem from "garden variety neglect." *Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89, 96 (1990). Plaintiffs do not explain why, exactly, they waited until June 2017 to file their claim. The Court, then, has no real choice but to weigh this factor against Plaintiffs' request for equitable tolling.

Finding that the majority of the Sixth Circuit's equitable-tolling factors weigh against tolling, the Court bars Plaintiffs' claims for overtime pay before June 7, 2017. Plaintiffs had

ample time to file their claim within the two-year statute of limitations. The Court will not equitably toll Plaintiffs' claim simply to give them another bite at the apple.

CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss is GRANTED as to Defendant's statute-of-limitations claim and DENIED as to Defendant's retroactivity claim.

SO ORDERED, this 8th day of May, 2018.

s/ Thomas L. Parker
THOMAS L. PARKER
UNITED STATES DISTRICT JUDGE