

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

Dr. Shanele McGowan	)	
	)	
Plaintiff,	)	Case No. 20 CV 1145
	)	
v.	)	Honorable Robert M. Dow, Jr.
	)	
Integrated Pain Management, S.C. and Tian Xia, individually and in his official capacity.	)	
Defendants.	)	Jury Demand
	)	

**FIRST AMENDED COMPLAINT  
FILED IN ACCORDANCE WITH RULE 15(a) (1)(A)**

NOW COMES the Plaintiff, Dr. Shanele McGowan, by and through her attorneys, LAW OFFICES OF JEROME F. MARCONI and LAW OFFICES OF JOHN C. IRELAND, and complains against the Defendant, Integrated Pain Management, S.C., and Tian Xia, individually and in his official capacity as an “employer” as defined under Illinois law and under the FLSA, as follows:

**INTRODUCTION**

1. This lawsuit is brought based on Defendant’s violation of the Fair Labor Standards Act (hereinafter “FLSA”), the Illinois Minimum Wage Law (hereinafter “IMWL”), common law breach of contract, the Illinois Wage Payment and Collection Act (Hereinafter “IWPCA”) and Section 7434 of the Internal Revenue Code.

2. This case is filed under the Fair Labor Standards Act (“FLSA”), to recover unpaid wages for unpaid minimum wage and/or overtime work performed

for which McGowan was not paid, liquidated damages, interest and attorney fees and costs and all other relief due and just.

3. McGowan performed as an employee of Defendants until November 13, 2018.

4. Throughout McGowan's employment, the McGowan performed work for the benefit of the employer and the employer failed to compensate the McGowan for her labors and benefits provided to the Defendants.

5. McGowan's request includes payment of compensation and credit for all uncompensated work required, suffered, and/or permitted by Defendants, liquidated and/or other damages as permitted by applicable law, restitution and payment of all benefits Defendants obtained from their unlawful business practices, and attorneys' fees and costs.

6. Plaintiff also presents claims of misclassification pursuant to the FLSA, IMWL and IWPCA.

### **PARTIES**

7. The Plaintiff, Dr. Shanele McGowan ("McGowan"), is a resident of the State of Illinois who performed work for the Defendant.

8. The Defendant, Integrated Pain Management, S.C. ("Integrated"), is an Illinois corporation which at all relevant times conducted business in the State of Illinois.

9. The Defendant, Tian Xia (Xia), was McGowan's direct supervisor and owner of Integrated and is named individually and in his official capacity as an "employer" as defined under Illinois wage law and/or the FLSA.

### **JURISDICTION AND VENUE**

10. Jurisdiction over the causes of action contained in this Complaint is conferred by 28 U.S.C. § 1331, as same arises under the laws of the United States. This action is brought pursuant to the Fair Labor Standards Act (FLSA).

11. Venue is proper in this judicial district under 28 U.S.C. § 1391(b), in that Defendants employed McGowan in this judicial district, Defendants do business in this judicial district, and all or a substantial part of the events or omissions giving rise to the claims occurred within this judicial district.

### **FACTS APPLICABLE TO ALL COUNTS**

12. McGowan is a licensed physician who is trained in neurology and concentrates her practice in the area of pain management.

13. Integrated is a medical practice which provides medical services, including pain management, to patients.

14. Integrated hired McGowan as a physician to provide pain management services to its existing and new patients.

15. Integrated provided medical malpractice insurance and health insurance to McGowan during her employment with Integrated.

16. Integrated directed McGowan to limit her services to provide medical care to Integrated's patients. If McGowan provided care to patients outside of

Integrated's practice, McGowan was obligated to remit a percentage of revenue generated for any non-Integrated patient.

17. According to the terms of employment, any professional fees generated by McGowan belonged to Integrated. Further, the employment agreement specified McGowan must contract for and receive all professional fees through Integrated. Integrated directed that fees generated by McGowan must be accepted on behalf of, and in trust for, Integrated.

18. According to the employment agreement, McGowan "...shall devote all of [McGowan's] professional clinical time and efforts to [Integrated]"

19. McGowan's compensation was based on a percentage of her gross generated revenue. McGowan was compensated on a monthly basis which was "paid in a manner consistent with [Integrated's] customary payroll policies and procedures..."

20. Integrated employed McGowan from August 1, 2016 to November 13, 2018.

21. Upon terminating her employment with Integrated, McGowan demanded Integrated pay her for her services for up to and including November 13, 2018.

22. Integrated refused to pay McGowan for any worked performed in October and November, 2018 despite several demands for payment.

23. Despite not being paid for her last two months of employment, Integrated filed an IRS Form 1099 with the Internal Revenue Service for 2018

declaring Integrated paid McGowan \$33,282.48 in compensation. In fact, Integrated overstated McGowan's compensation for 2018 by \$33,282.48.

24. After receiving the Form 1099, McGowan's accountant contacted Integrated to advise Integrated of the false Form 1099. McGowan's accountant requested Integrated to correct the overstatement of income and to issue a corrected Form 1099.

25. Despite McGowan's attempts to correct the false report of income, Integrated refused to respond to McGowan or issue a corrected Form 1099. Consequently, McGowan's Year 2018 income was overstated by \$33,282.48.

**CONTRACTOR/EMPLOYEE MISCLASSIFICATION CLAIMS/FACTS**

26. McGowan also alleges that Defendants failed to properly classify McGowan as an Employee, filed pursuant to the FLSA, IMWL and IWPCA.

27. McGowan was paid via a 1099 and received at the end of the year a 1099 tax form as alleged above.

28. McGowan alleges that she should have been classified as an employee, not as a contractor under the FLSA, IMWL and IWPCA.

29. McGowan had little control over her work environment.

30. Defendants set the rules and had complete control over the venue, and McGowan had to obey these rules or risk everything, including loss of her job. This is the very hallmark of the economic dependence and control of an employer-employee relationship.

31. Evaluation of proper classification is a multiple part test, which the Defendants have not properly applied to McGowan in determination of her status, rather Defendants simply assumed incorrectly that the McGowan was an independent contractor, simply because the Defendants declared her to be.

32. The test for Employee/contractor is found in a US DOL Fact Sheet #13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA) (revised May 2014).

33. The elements of this test demonstrate that McGowan and the class are not properly classified. The elements are as follows:

- 1) the extent to which the work performed is an integral part of the employer's business.
- 2) Whether the worker's managerial skills affect his or her opportunity for profit and loss.
- 3) The relative investments in facilities and equipment by the worker and the employer
- 4) The worker's skill and initiative.
- 5) The permanency of the worker's relationship with the employer.
- 6) The nature and degree of control by the employer

34. Almost none of these factors are in Defendants' favor as alleged as follows:

- 1) the extent to which the work performed is an integral part of the employer's business.

The work of the Plaintiff is integral part of the employers' business. Defendants' business is medical services and the Plaintiff's work is solely related to that business: the Plaintiff provided medical services to the Defendants patients/customers which is the key of the Defendants' business model.

35. Whether the worker's managerial skills affect his or her opportunity for profit and loss. :

For the Plaintiff there was no opportunity for profit or loss, the Plaintiff was paid the same baseline pay, however none of the pay was classified as wages. While Plaintiff might have been able to earn commissions or bonuses, she did not have the opportunity to have a loss, thus showing she was not an independent contractor.

36. The relative investments in facilities and equipment by the worker and the employer

Here Plaintiff made no investment other than her time and efforts, while Defendant has made large investments.

37. The worker's skill and initiative:

Here, while Plaintiff was skilled in her work, this part of the test also favors Plaintiff.

38. The permanency of the worker's relationship with the employer.

Plaintiff worked for Defendants for 26 months.

39. The nature and degree of control by the employer

Here Defendants have exerted strong and consistent control of Plaintiff, including requiring particular hours of work and scheduling hours of work.

40. Under the IWPCA the determination of employee status is different from the FLSA/IWML. Plaintiff was clearly an employee under the Illinois Wage Payment and Collection Act ("IWPCA"), 820 Ill. Com. Stat. 115/2.

41. The IWPCA creates a presumption that the Plaintiff is an employee, and to rebut that presumption Defendant bears the burden of establishing each of three specific criteria set forth in the IWPCA to rebut that presumption.

42. Specifically, Defendants must establish that 1) Plaintiff was free from Defendant's control; 2) the Plaintiff perform work outside of Defendants' usual course of business or outside all the places of the business of Defendants; and 3) Plaintiff was engaged in an independently established business. 820 Ill. Comp. Stat. 115/2.

43. The IWPCA defines an "employee" broadly to include "any individual permitted to work by an employer in an occupation," and excludes only an individual:

44. (1) who has been and will continue to be free from control and direction over the performance of his/her work.

45. (2) who performs work which is either outside the usual course of business or is performed outside of all of the places of business of the employer unless the employer is in the business of contracting with third parties for the placement of employees; and

46. (3) who is in an independently established trade, occupation, profession, or business

47. In this case, none of these three support Defendant's burdens of proof to demonstrate the Plaintiff was an Independent Contractor.

**COUNT I – Violation of the Fair Labor Standards Act ("FSLA")**

48. McGowan restates and realleges Paragraphs 1 through 47 as though fully set forth in Paragraph 48 of Count I of this Complaint.

49. At all relevant times, Defendant has been, and continues to be, an “employer” engaged in interstate commerce and/or in the production of goods for commerce within the meaning of the FLSA, 29 U.S.C. § 203.

50. At all relevant times, Defendant has employed, and continues to employ, “employee[s],” including the McGowan, that have been, and continue to be, engaged in interstate “commerce” within the meaning of the FLSA, 29 U.S.C. § 203.

51. At all relevant times, Defendant has engaged, and continue to engage, in a willful policy, pattern, or practice of failing to pay owed salary compensation to McGowan.

52. McGowan makes a claim for all “Compensable Time” including all work suffered or permitted by employer, including all work allowed to occur or Defendants failed to prevent.

53. At all relevant times, the work performed by McGowan as for service to Defendants and were required or permitted by Defendants, for the benefit of Defendants, directly related to such employee’s principal employment with Defendants, and as an integral and indispensable part of such employees’ employment of Defendants.

54. As a result of the Defendants willful failure to record or compensate its employees, including McGowan, for all hours worked, Defendants have violated, and continue to violate, the records hours provision of the FLSA.

55. As a result of the Defendants’ willful failure to record, report, credit, and/or compensate its employees employed at Defendant, including McGowan,

Defendants have failed to make, keep and preserve records with respect to each of their employees sufficient to determine the wages, hours and other conditions and practices of employment in violation of the FLSA, including 29 U.S.C. §§211(c) and §§ 215(a).

56. The foregoing conduct, as alleged, violates the FLSA, 29 U.S.C. §§ 201 *et. seq.* McGowan seeks damages in the amount of her respective unpaid compensation, plus liquidated damages, as provided by the FLSA, 29 U.S.C. § 216(b), and such other legal and equitable relief as the Court deems just and proper.

57. McGowan seeks recovery of attorneys' fees and costs of action to be paid by Defendant, as provided by the FLSA, 29 U.S.C. § 216(b).

58. McGowan has consented to be a party to this action, pursuant to 29 U.S.C. § 216(b).

59. At all times relevant to this action McGowan was employed by Defendants within the meaning of the FLSA.

60. At all times relevant to this action, Integrated was engaged in commerce and/or the production of goods for commerce and/or Integrated was an enterprise engaged in commerce or in the production of goods for commerce within the meaning of 29 U.S.C. §§ 206(a) and 207(a).

61. Due to Defendants' FLSA violations, McGowan is entitled to recover from Defendants her unpaid compensation, an additional equal amount as liquidated damages, additional liquidated damages for unreasonably delayed payment of wages, reasonable attorneys' fees, and costs of the action, pursuant to 29 U.S.C. § 216(b).

62. And Plaintiff was misclassified as a Contractor, as alleged above.

WHEREFORE, McGowan prays for the following relief:

- A. Payment of unpaid wages and liquidated damages pursuant to the FLSA, 29 U.S.C. § 201 *et seq.* and the supporting United States Department of Labor regulations.
- B. Unpaid salary, and/or regular wages, and overtime wages pursuant to the IMWL and other state wage laws;
- C. Compensation originating from Integrated's company policies, contractual obligations requirements owed as a result of unpaid wages;
- D. An injunction requiring Defendants to pay all statutorily-required wages pursuant to Illinois Law;
- E. A legal determination if Plaintiff was misclassified, and/or should have been classified as an Employee.
- F. Attorneys' fees and costs of this action and such other relief as this Court shall deem just and proper.

**COUNT II – Violation of the Illinois Wage Payment and Collections Act**

63. McGowan restates and realleges Paragraphs 1 through 47 as though fully set forth in Paragraph 63 of Count II of this Complaint.

64. This cause of action arises out of employment contracts and/or IWPCA Agreements, written and oral.

65. McGowan worked for and was employed by Defendants.

66. McGowan was hired and employed under an oral and/or written contract.

67. McGowan worked for Defendants for approximately 26 months.

68. Defendants failed to pay any owed compensation and benefits as alleged in this Complaint.

69. For public policy reasons, ‘an employee shall receive all benefits upon leaving his/her employer’.

70. The Illinois Wage Act 820 ILCS 115/1 et seq. (West 2002), section 5 states: “Every Employer shall pay the final compensation of separated employees in full, at the time of separation, if possible, but in no case later than the next regularly scheduled payday for such employee.”

71. McGowan was under the control and direction of Individual Defendant Xia and Corporate Defendant Integrated and/or its agents during the period of the McGowan’s employment under his contracts of service and in fact.

72. McGowan was not an independent contractor, rather was an employee of the Defendants by oral agreement and/or written contract.

73. McGowan’s employment was in the usual course of business for which such service is performed.

74. McGowan did not have a proprietary interest in the Defendants.

75. The Defendants are “employers” under the terms of the IWPCA.

76. In accordance with IWPCA, an employer is also defined as: “any officer of a corporation or agents of an employer who knowingly permit such employer to violate the provisions of this Act shall be deemed to be the employers of the employees of the corporation.” Therefore, Individual Defendant Xia is an employer under the definition of employer in the IWPCA, because Individual Defendant Xia knowingly permitted and directed the violation of the Act (IWPCA).

77. Individual Defendant Xia is an officer and agent of the Integrated who

knowingly permitted such employer to violate the provisions of this Act, therefore should be deemed to be the employers of the employee of the corporation.

78. McGowan's demand's for compensation is for a sum not exceeding the amount due and owed.

79. And Plaintiff was misclassified as a Contractor, as alleged above.

WHEREFORE, McGowan prays for the following relief:

- A. Unpaid wages and liquidated damages pursuant to IWPCA and IMWL and the supporting Illinois Department of Labor regulations; Unpaid salary, and/or regular wages, and overtime wages pursuant to the IMWL and other state wage laws;
- B. Liquidated damages in accordance with the IWPCA and IMWL.
- C. Unpaid salary, and/or regular wages, and overtime wages pursuant to the IWPCA;
- D. Consequential damages;
- E. An injunction requiring Defendants to pay all statutorily-required wages pursuant to Illinois Law;
- F. Additional compensation/penalty due to the McGowan in accordance with Section 14(b) of the IWPCA in the amount of 2% per month;
- G. Issuance of a Declaratory Judgment that the practices complained of in this Complaint are unlawful under Illinois Law, 820 ILCS 105/1 *et seq* and supporting Illinois Department of Labor regulations;
- H. A legal determination if Plaintiff was misclassified, and/or should have been classified as an Employee.
- I. Attorneys' fees in accordance with the IWPCA and costs of this action; and
- J. Such other relief as this Court deems just and proper.

**COUNT III – Violation of the Illinois Minimum Wage Act**

80. McGowan restates and realleges Paragraphs 1 through 47 as though fully set forth in Paragraph 80 of Count III of this Complaint.

81. McGowan is an employee of the Defendant pursuant to the IMWL.

82. McGowan is employed by Defendants as an employee.

83. Defendant derived benefits by McGowan's work.

84. As a result of the foregoing, McGowan has been damaged in an amount to be determined at trial.

85. Illinois law contains a three-year statute of limitations regardless of whether the violation was willful. 820 ILCS 105/12(a).

86. And Plaintiff was misclassified as a Contractor, as alleged above.

WHEREFORE, McGowan prays for the following relief:

A. Unpaid wages and liquidated damages; Unpaid salary, and/or regular wages, and overtime wages pursuant to the IMWL and other state wage laws;

B. Liquidated damages in accordance with the IWPCA and IMWL.

C. Consequential damages;

D. An injunction requiring Defendants to pay all statutorily-required wages pursuant to Illinois Law;

E. A legal determination if Plaintiff was misclassified, and/or should have been classified as an Employee.

F. Attorneys' fees and costs of this action; and

G. Such other relief as this Court deems just and proper.

**COUNT IV – Violation of Internal Revenue Code Section 7434**

87. McGowan restates and realleges Paragraphs 1 through 47 as though fully set forth in Paragraph 87 of Count IV of this Complaint.

88. The Internal Revenue Code, Section 7434, 26 U.S. §7434, prohibits a person from willfully filing a fraudulent information return with respect to payments made to another person.

89. A person may bring a civil action for damages against the person who filed a fraudulent return. Upon a finding of liability, the defendant shall pay the greater sum of \$5,000.00 or damages actually incurred by McGowan.

90. Defendants, Xia and Integrated, knowingly filed a fraudulent Form 1099 which grossly overstated McGowan's income. Defendants refused to issue a corrected Form 1099 after being requested on several occasions.

WHEREFORE, McGowan prays for the following relief:

- A. Compensatory damages suffered by McGowan caused by Defendants' issuance of a fraudulent information return; and
- B. The sum of \$5,000.00 as provided for in Section 7434(b); and
- C. The costs of this action; and
- D. Reasonable attorneys' fee and any other relief this Honorable Court deems fair and just.

**COUNT V – Breach of Contract**

91. McGowan restates and realleges Paragraphs 1 through 47 as though fully set forth in Paragraph 91 of Count V of this Complaint.

92. The Defendants tendered a written offer of employment to McGowan to provide services to wit: medical treatment for Integrated's patients.

93. McGowan accepted Integrated's offer of employment and did, in fact, provide medical services to Integrated's patients.

94. Defendants compensated McGowan by paying McGowan a percentage of the income produced by McGowan.

95. Defendants promised to pay McGowan a portion of the revenue produced by McGowan for the duration of the written and oral agreement for the duration of McGowan's employment with Integrated.

96. Defendants breached its contract of employment with McGowan by refusing to pay McGowan a portion of the revenues generated by McGowan.

97. McGowan suffered damages resulting from Integrated's refusal to remit earned income and wages to McGowan.

WHEREFORE, McGowan prays for the following:

- A. Earned income due and owing under the employment agreement; and
- B. Award McGowan reasonable attorney fees, court cost and expenses incurred as a prevailing party under the employment agreement; and
- C. Any other compensatory and punitive damages to which McGowan is entitled under the employment agreement.

**PLAINTIFF DEMANDS TRIAL BY JURY**

Respectfully submitted,

/s/ Jerome F. Marconi

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