

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**LINDA GIESEKE, et al., individually and
on behalf of other similarly situated persons,**

Plaintiffs,

v.

**FIRST HORIZON HOME LOAN
CORPORATION, et al.,**

Defendants.

CIVIL ACTION

No. 04-2511-CM

MEMORANDUM AND ORDER

This case is before the court on Defendants' Motion for Summary Judgment as to Defendants John McGuire and Peter Cipolla (Doc. 152). Defendants McGuire and Cipolla ask for dismissal because they do not qualify as "employers" under the FLSA. Plaintiffs concede that defendants McGuire and Cipolla are not proper parties to the state law claims or the FLSA claims of retail mortgage loan officers. The court therefore dismisses those claims against defendants McGuire and Cipolla. For the FLSA claims of the employees in the NSS Division, the court finds that a genuine issue of material fact exists as to whether defendants McGuire and Cipolla qualify as "employers" under the FLSA, and denies defendants' motion.

The court has reviewed the record and the relevant case law. The court is mindful that the term "employer" is to be interpreted broadly, and that all factual issues must be resolved in favor of the nonmoving parties at this stage of the proceedings. Defendants' declarations suggest that they are not proper parties to this action. But other evidence before the court, including defendants' statements in deposition, raise enough questions as to defendants' responsibilities and levels of

involvement in decisionmaking that the court cannot find that they must be dismissed as a matter of law. The court does not make this decision lightly and considers it a close question. Ultimately, however, under the “economic reality test” and the totality of the circumstances, a reasonable trier of fact could find that defendants McGuire and Cipolla were acting as “employers” under the FLSA.

IT IS THEREFORE ORDERED that Defendants’ Motion for Summary Judgment as to Defendants John McGuire and Peter Cipolla (Doc. 152) is denied.

Dated this 6th day of February 2007, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge