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NICOLE CUNNINGHAM

CLERK OF THE SUPERIOR COURT
BY: B. PACKHAM, DEPUTY CLERK

**SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SHASTA**

NICOLE CUNNINGHAM,

Plaintiff,

vs.

ORTHOPAEDIC AND
NEUROLOGICAL REHABILITATION,
INC.; ~~DOES 1 to 20, inclusive,~~

Does 1 to 20, inclusive, A.U.
Defendants

Case No. 194215

**FIRST AMENDED COMPLAINT FOR
DAMAGES:**

1. Failure to Pay Minimum Wage for All Hours Worked;
2. Failure to Provide Meal and Rest Periods;
3. Failure to Provide Accurate Wage Statements;
4. Waiting Time Penalties;
5. Failure to Pay Overtime Wages;
6. Failure to Keep Requisite Payroll Records;
7. Pregnancy and Gender Discrimination in Violation of Cal. Fair Employment and Housing Act; Cal. Gov't Code § 12900 et seq. ;
8. Violation of Pregnancy Disability Leave Law; Cal Gov't Code § 12945;
9. Wrongful Termination in Violation of Public Policy;
10. Unfair Competition (Business & Professions Code § 17200 et seq.)
11. Civil Penalties Pursuant to Private Attorney General Act, Labor Code § 2698 et seq

JURY TRIAL DEMANDED

1 Plaintiff NICOLE CUNNINGHAM hereby files this First Amended Complaint against
2 Defendants ORTHOPAEDIC AND NEUROLOGICAL REHABILITATION, INC., and DOES 1
3 to 20, inclusive, (hereinafter collectively referred to as “Defendants”). Plaintiff alleges the
4 following:

5 **PARTIES AND JURISDICTION**

6 1. NICOLE CUNNINGHAM (“Plaintiff”) was an employee of Defendants, where she
7 worked as an Occupational Therapist.

8 2. Plaintiff is informed and believes, and thereon alleges, that ORTHOPAEDIC AND
9 NEUROLOGICAL REHABILITATION, INC. (“ONR”), is a Texas corporation with its principal
10 place of business in Texas, and that it is engaged as a for profit corporation in California in the
11 business of providing rehabilitation services.

12 3. Plaintiff is further informed and believes, and thereon alleges, that each of the Defendants
13 herein was, at all times relevant to this action, the agent, employee, or joint employer or joint
14 venturer of the remaining defendants and was acting within the course and scope of that relationship.
15 Plaintiff is further informed and believes, and thereon alleges, that each of the Defendants herein
16 gave consent to, ratified and authorized the acts alleged herein to each of the remaining defendants.
17 The true names and capacities of the defendants named herein Does 1 through 20, inclusive, whether
18 individual, corporate, associate, or otherwise are unknown to Plaintiff, who therefore sues such
19 defendants by fictitious names pursuant to California Code of Civil Procedure section 474. Plaintiff
20 will amend this complaint to show such true names and capacities of Does 1 through 20, inclusive,
21 when they have been determined.

22 4. The Shasta County Superior Court has jurisdiction in this matter due to alleged violations
23 of California Labor Code §§ 201, 203, 226, 226.7, 510, 512, 1194, 2802, Business and Professions
24 Code § 17200 *et seq.*, the applicable Wage Order, and Govt Code §§ 12940 and 12945.

25 5. Plaintiff has filed a complaint of discrimination with the State of California Department
26 of Fair Employment and Housing against ORTHOPAEDIC & NEUROLOGICAL
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1 REHABILITATION, INC. within the applicable statutory period and received a Notice of Right to
2 Sue on January 2, 2020.

3 6. Venue is proper pursuant to Civil Procedure Code §§ 395(a) and 395.5, in that some of
4 the wrongful acts and violations of law asserted herein occurred within Shasta County.

5 7. On January 2, 2020, Plaintiff filed her Labor Code § 2699.3 Private Attorney General Act
6 (“PAGA”) notice with the California Labor & Workforce Development Agency (“LWDA”). The
7 LWDA did not respond within 65 days of filing of the PAGA notice.

8 **BACKGROUND**

9 8. Plaintiff was hired by Defendants on or about October 25, 2018, as an hourly employee,
10 making \$60.00 per hour.

11 9. After she began work, Plaintiff learned that she was pregnant, and she informed her
12 supervisor and management at ONR that she was expecting.

13 10. On or around June 2019, Plaintiff was informed by Leanne Noskey, ONR’s head of
14 Human Resources, that Plaintiff would not be eligible for leave and that ONR would not be able to
15 hold Plaintiff’s job when she had her baby.

16 11. During her employment, Plaintiff, and other aggrieved employees, were made to suffer
17 numerous violations of the California Labor Code.

18 12. Defendants did not allow Plaintiff and similarly situated employees to take their
19 statutorily required meal and rest periods. Plaintiff and similarly situated employees were required
20 to maintain a 90% productivity level during their work time. Due to the heavy workloads, and the
21 fact that statutorily-required rest periods were not factored into productive time, Plaintiff and
22 similarly situated employees were unable to take paid rest periods as required by law, and instead
23 were forced to clock out for their rest periods in order to maintain the required productivity levels set
24 by Defendants. As a result, Defendants failed to provide paid rest periods to Plaintiff and similarly
25 situated employees for every 4 hours worked or major fraction thereof, and Plaintiff and similarly
26 situated employees were not paid for all hours worked.
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1 13. Moreover, Defendants did not maintain a compliant meal period policy and failed to
2 provide Plaintiff and other similarly situated employees a 30-minute, duty-free meal period before
3 the end of the fifth hour of work as required under the law. Defendants' policy and practice failed to
4 meet the legal requirements because, among other things, Defendants' policy only allowed for a
5 meal period after six hours of work. Plaintiff and similarly situated employees did not waive the
6 meal period if working more than five but less than six hours, and Defendant's records show meal
7 periods were provided only when an employee worked six hours or more.

8 14. Defendants' management staff were aware of these policies and that meal and/ or rest
9 periods were not provided to Plaintiff and similarly situated employees in compliance with
10 California law.

11 15. In addition, Defendants failed to pay Plaintiff and similarly situated employees the
12 missed meal and/ or rest period premiums.

13 16. Defendants also did not provide Plaintiff and similarly aggrieved employees all wages
14 owed upon their termination or within seventy-two (72) hours of their separation from employment.

15 17. Defendants did not provide Plaintiff and similarly situated employees legally compliant
16 wage statements noting, among other things, total hours worked, gross wages earned, the applicable
17 hourly rates in effect during the pay period and the corresponding number of hours worked at each
18 hourly rate.

19 18. On or around August 9, 2019, Plaintiff went into labor and notified her supervisor that
20 she could not work because she was having her baby. Prior to this date, Plaintiff had been in
21 communication with her supervisor informing him that her due date was approaching.

22 19. On August 12 and 13, 2019, Plaintiff received phone messages from Leanne Noskey
23 indicating that because she was off work due to childbirth, this was considered an unapproved leave
24 of absence, that ONR would not hold Plaintiff's job for her, and that ONR would move forward with
25 Plaintiff's termination. Ms. Noskey informed Plaintiff that she could not use her accrued but unused
26 vacation time, that termination was her only option and that Plaintiff would have to reapply for a job
27 after she had her baby.
28

1 20. Plaintiff was never provided paperwork to apply for FMLA, CFRA, or Pregnancy
2 Disability Leave.

3 21. ONR terminated Plaintiff's employment on August 14, 2019.

4 **FIRST CAUSE OF ACTION**
5 **(Failure to Pay Minimum Wage for All Hours Worked)**

6 22. Plaintiff hereby incorporates by reference Paragraphs 1 through 21 of this Complaint as if
7 fully set forth herein and for a cause of action alleges as follows:

8 23. Defendants were required to compensate Plaintiff with at least the State's minimum wage
9 for all hours worked. See Cal. Labor Code § 1194; MW Order-2014; MW Order-2017.

10 24. Defendants were aware of their obligation to pay the minimum wages but failed to do so.

11 25. Defendants' conduct described herein violates California Labor Code section 1194, and
12 Wage Orders. As a proximate result of Defendants' conduct, Plaintiff has been damaged and
13 deprived of minimum wages, in an amount to be established at trial. Plaintiff now seeks these
14 wages, liquidated damages pursuant to California Labor Code section 1194.2, attorney's fees and
15 costs, and interest pursuant to California Labor Code sections 1194.
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17 **SECOND CAUSE OF ACTION**
18 **(Failure to Provide Meal and Rest Periods)**

19 26. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 25 as though fully
20 set forth herein.

21 27. An employer must provide an employee a meal period and/or rest period in accordance
22 with the applicable Wage Order and Labor Code sections 226.7 and 512.

23 28. Labor Code section 510 and Wage Order 2-2001, section 11(A) require an employer to
24 provide a meal period of not less than thirty (30) minutes for each work period of more than five (5)
25 hours. If an employee works longer than ten (10) hours in a workday, the employer must provide a
26 second meal period.
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1 29. Labor Code section 510 and Wage Order 2-2001 section 12(A) require an employer to
2 provide a paid rest period of not less than ten (10) minutes for each work period of more than four
3 (4) hours or a major fraction thereof.

4 30. Plaintiff alleges that Defendants failed to provide Plaintiff with meal breaks of at least
5 thirty (30) minutes for several work periods that Plaintiff worked more than five (5) hours in a day.

6 31. Plaintiff further alleges that Defendants failed to provide paid rest breaks of at least ten
7 (10) minutes for each work period that she worked four (4) hours or a major fraction thereof.

8 32. As a proximate cause of Defendants' failure to provide meal and rest periods, Plaintiff is
9 entitled to one (1) hour of pay at the regular rate of compensation for each meal period or rest period
10 not provided, as a wage, from three (3) years of the filing of this action, in an amount to be
11 established at trial. See Labor Code § 226.7 and Wage Order 2-2001 §§ 11(B), 12(B).
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13 **THIRD CAUSE OF ACTION**
14 **(Failure to Provide Accurate Itemized Wage Statements)**

15 33. Plaintiff hereby incorporates by reference Paragraphs 1 through 32 of this Complaint as if
16 fully set forth herein and for a cause of action alleges as follows:

17 34. According to California Labor Code section 226(a), an employer must provide an
18 itemized statement to an employee, semi-monthly or at the time of each payment of wages, showing:
19

20 *(1) gross wages earned, (2) total hours worked by the employee,*
21 *except for any employee whose compensation is solely based on a*
22 *salary and who is exempt from payment of overtime under*
23 *subdivision (a) of Section 515 or any applicable order of the*
24 *Industrial Welfare Commission, (3) the number of piece-rate units*
25 *earned and any applicable piece rate if the employee is paid on a*
26 *piece-rate basis, (4) all deductions, provided that all deductions*
27 *made on written orders of the employee may be aggregated and*
28 *shown as one item, (5) net wages earned, (6) the inclusive dates of*
the period for which the employee is paid, (7) the name of the
employee and the last four digits of his or her social security number
or an employee identification number other than a social security
number, (8) the name and address of the legal entity that is the
employer and, if the employer is a farm labor contractor, as defined
in subdivision (b) of Section 1682, the name and address of the legal

entity that secured the services of the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. The deductions made from payment of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement and the record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California.

35. Plaintiff alleges that Defendants intentionally and knowingly failed to provide an itemized statement or failed to provide an accurate and complete itemized statement showing the requirements set forth in California Labor Code section 226(a).

36. Additionally, Plaintiff alleges she suffered injury as a result of Defendants' failure to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of California Labor Code section 226, subdivision (a), and Plaintiff cannot promptly and easily determine (*i.e.* a reasonable person in each Plaintiff's position would not be able to readily ascertain the information without reference to other documents or information) from the wage statement alone.

37. As a proximate result of Defendants' conduct, Plaintiff has been damaged in an amount to be proven at trial.

FOURTH CAUSE OF ACTION **(Waiting Time Penalties)**

38. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 37 as though fully set forth herein.

39. An employer must pay an employee who is terminated all unpaid wages immediately upon termination. California Labor Code § 201.

40. An employer who willfully fails to pay an employee wages in accordance with California Labor Code sections 201 and/or 202 must pay the employee a waiting time penalty of up to thirty (30) days. California Labor Code § 203.

1 41. Plaintiff did not receive all wages at her termination or separation from employment,
2 including, but not limited to, unpaid overtime and minimum wages, and unpaid meal and rest period
3 penalties.

4 42. Defendants knew of their obligation to pay Plaintiff and Defendants' failure to pay all
5 wages was in complete disregard of their obligations. Such conduct shows Defendants' knowledge
6 of their obligation to pay all wages owed upon termination and willful refusal.

7 43. As a proximate result of the Defendants' conduct, Plaintiff has been damaged and
8 deprived of her wages and thereby seeks her daily rate of pay multiplied by thirty (30) days for
9 Defendants' failure to pay all wages due.

10
11 **FIFTH CAUSE OF ACTION**
12 **(Failure to Pay Overtime Wages)**

13 44. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 43 as though fully
14 set forth herein.

15 45. During the period Plaintiff was employed by Defendants, Defendants were required to
16 compensate her one and one-half (1½) times the regular rate of pay for hours worked in excess of
17 eight (8) hours per day and/or forty (40) hours per week, and two (2) times the regular rate of pay for
18 hours worked in excess of twelve (12) hours per day. See California Labor Code §§ 510, 1194.
19 Although Plaintiff regularly worked in excess of eight (8) hours a day and/or forty (40) hours per
20 week, Defendants failed to pay all overtime wages owed to her.

21 46. Plaintiff was a non-exempt employee under the administrative, executive, or professional
22 exemptions of the applicable Wage Order and California Labor Code section 510.

23 47. Defendants' conduct described herein violates California Labor Code sections 510 and
24 1194, and Wage Orders. As a proximate result of Defendants' conduct, Plaintiff has been damaged
25 and deprived of overtime wages, in an amount to be established at trial. Plaintiff now seeks these
26 wages, attorney's fees and costs, and interest pursuant to California Labor Code sections 1194.

SIXTH CAUSE OF ACTION
(Failure to Keep Requisite Payroll Records)

48. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 47 as though fully set forth herein.

49. California Labor Code section 1174(d) provides that an employer shall keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established by the commission, but in any case, shall be kept on file for not less than two years.

50. Defendants have intentionally and willfully failed to keep accurate and complete payroll records showing the hours worked daily and the wages paid to Plaintiff.

51. As a result of Defendants' violation of California Labor Code section 1174(d), Plaintiff has suffered injury and damage to her statutorily protected rights, because Plaintiff was denied her legal right and protected interest in having available, accurate, and complete payroll records.

SEVENTH CAUSE OF ACTION
(Pregnancy and Gender Discrimination in Violation of Cal. Fair Employment and Housing Act; Cal. Gov't Code § 12900 et seq.)

52. Plaintiff hereby incorporates by reference Paragraphs 1 through 51 of this Complaint as if fully set forth herein, and for a cause of action alleges as follows:

53. At all times herein mentioned, California's Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code §§ 12900, et seq., was in full force and effect and was fully binding upon Defendants. Specifically, § 12940(a) prohibits an employer from discriminating against an employee on the basis of her sex.

54. Defendants terminated Plaintiff on the basis of her sex, which includes pregnancy and disability due to childbirth, in violation of the law.

55. As a direct, foreseeable and proximate result of Defendants' unlawful actions, Plaintiff has suffered economic damages including loss of back pay, front pay, benefits and other compensation.

56. As a direct, foreseeable, and proximate result of Defendants' unlawful actions, Plaintiff has suffered emotional distress, humiliation, shame, and embarrassment, all to the Plaintiff's damage in an amount to be proven at the time of trial.

57. Defendants committed the acts herein despicably, maliciously, fraudulently, and oppressively, with the wrongful intention of injuring Plaintiff, from an improper and evil motive amounting to malice, and in conscious disregard of the rights and safety of plaintiff and others. Plaintiff is thus entitled to recover punitive damages from Defendants in an amount according to proof.

EIGHTH CAUSE OF ACTION
(Violation of Pregnancy Disability Leave Law; Cal Gov't Code § 12945)

58. Plaintiff hereby incorporates by reference Paragraphs 1 through 57 of this Complaint as if fully set forth herein, and for a cause of action alleges as follows:

59. Cal. Gov't Code § 12945 requires an employer to provide a leave of absence for a reasonable period of time not to exceed four months during which the employee is disabled on account of pregnancy, childbirth, or a related medical condition.

60. Defendants terminated Plaintiff after she informed them she was having her baby and would need to be off of work.

61. As a direct, foreseeable and proximate result of Defendants' unlawful actions, Plaintiff has suffered economic damages including loss of back pay, front pay, benefits and other compensation.

62. As a direct, foreseeable, and proximate result of Defendants' unlawful actions, Plaintiff has suffered emotional distress, humiliation, shame, and embarrassment, all to the Plaintiff's damage in an amount to be proven at the time of trial.

63. Defendants committed the acts herein despicably, maliciously, fraudulently, and oppressively, with the wrongful intention of injuring Plaintiff, from an improper and evil motive amounting to malice, and in conscious disregard of the rights and safety of plaintiff and others. Plaintiff is thus entitled to recover punitive damages from Defendants in an amount according to proof.

NINTH CAUSE OF ACTION

(Wrongful Termination in Violation of Public Policy)

64. Plaintiff hereby incorporates by reference Paragraphs 1 through 63 of this Complaint as if fully set forth herein and for a cause of action alleges as follows:

65. Terminating an employee because of her pregnancy and childbirth is illegal. See Cal. Gov't Code § 12940(a).

66. It is, and at all times relevant to this action it has been, the law and fundamental public policy of the state of California to prevent discrimination in employment. *See City of Moorpark v. Sup. Ct. (Dillon)*, 18 Cal. 4th 1143 (1998).

67. The termination of Plaintiff's employment was a violation of public policy (a "nexus" exists between the termination and Plaintiff's protected activity). Accordingly, Plaintiff was unlawfully terminated in violation of the fundamental public policies of the state of California.

68. As a direct, foreseeable, and proximate result of Defendants' unlawful actions, Plaintiff has suffered substantial losses in earnings and other employment benefits and has incurred other economic losses.

69. As a further direct, foreseeable, and proximate result of Defendants' unlawful actions, Plaintiff has suffered emotional distress, humiliation, shame, anxiety, and embarrassment, all to her damage in an amount to be proven at time of trial.

70. Defendants committed the acts herein despicably, maliciously, fraudulently, and oppressively, with the wrongful intention of injuring Plaintiff, from an improper and evil motive amounting to malice, and in conscious disregard of her rights. Plaintiff is thus entitled to recover punitive damages from Defendants in an amount according to proof.

1 **TENTH CAUSE OF ACTION**

2 **Unfair Competition**

3 71. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 70 as though fully
4 set forth herein.

5 72. Unfair competition shall mean and include any unlawful, unfair or fraudulent business act
6 or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter
7 1 (commencing with Section 17500) of Part 3 of Division 7 of the California Business and
8 Professions Code. See California Business and Professions ("B&P") Code § 17200.

9 73. Plaintiff was not paid all wages owed during her employment. Defendants also failed to
10 provide legally compliant paystubs to Plaintiff throughout the employment relationship.

11 74. Plaintiff is also informed and believes and thereon alleges that such actions and/or
12 conduct constitute a violation of the California Unfair Competition Law ("UCL") (California
13 Business and Professions Code 17200 *et seq.*) pursuant to *Cortez v. Purolator Air Filtration Prods.*
14 *Co.*, 23 Cal. 4th 163 (2000).

15 75. As a direct and legal result of the Defendants' conduct, as alleged herein, pursuant to the
16 UCL (including B&P Code §17203), Plaintiff is entitled to restitution as a result of Defendants'
17 unfair business practices, including, but not limited to, public injunctive relief, pursuant to B&P
18 Code § 17203, and interest and penalties pursuant to B&P §§ 17203, 17208, violations of Labor
19 Code §§ 1194, 226, and 226.7, all in an amount as yet unascertained but subject to proof at trial, for
20 up to four (4) years from the filing of this Action.

21 **ELEVENTH CAUSE OF ACTION**

22 **CIVIL PENALTIES PURSUANT TO PAGA § 2698 ET SEQ.**

23 76. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 75 as though fully
24 set forth herein.

25 77. Plaintiff brings this cause of action as a proxy for the State of California and in this
26 capacity, seeks penalties on behalf of all Aggrieved Employees for Defendants' violations of the
27 California Labor Code, including but not necessarily limited to, those Labor Code violations
28 identified above.

1 78. On or about January 2, 2020, Plaintiff sent written notice to the LWDA regarding
2 Defendant's violations of the California Labor Code, pursuant to Labor Code section 2698, *et seq.*,
3 PAGA. As of the date of the filing of this First Amended Complaint, the LWDA has not informed
4 Plaintiff whether the LWDA intends to investigate Plaintiff's PAGA claims. As such, Plaintiff has
5 exhausted her administrative remedies under PAGA and may proceed in this Court.

6 79. Plaintiff is thus entitled to recover civil penalties on behalf of the State of California and
7 all Aggrieved Employees for all violations of the Labor Code from January 2, 2019, through trial on
8 this matter.

9 **DAMAGES**

10 WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

- 11 1. A jury trial;
- 12 2. For penalties and liquidated damages under the California Labor Code according to
- 13 proof allowed by law;
- 14 3. For compensatory damages, including, but not limited to, losses for lost back pay, plus
- 15 interest, lost fringe benefits and future lost earnings and fringe benefits, damages for
- 16 emotional distress and pain and suffering, according to proof allowed by law;
- 17 4. For penalties and liquidated damages under the California Labor Code according to
- 18 proof allowed by law;
- 19 5. For punitive damages allowed by law;
- 20 6. For an award to Plaintiff of costs of suit incurred herein and reasonable attorney's
- 21 fees;
- 22 7. For injunctive relief;
- 23 8. For an award of prejudgment and post-judgment interest; and
- 24 9. For an award to Plaintiff of such other and further relief as the Court deems just and
- 25 proper.
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1 Dated: March 5, 2020

2 **Castle Law: California Employment Counsel**

3 By: _____

4 Timothy B. Del Castillo

5 Kent L. Bradbury

6 Attorneys for Plaintiff

7 NICOLE CUNNINGHAM

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Dated: March 5, 2020

By:

NICOLE CUNNINGHAM