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Assigned for all Purposes
Judge Peter Wilson

Attorneys for Plaintiffs, THOMAS GARCIA
and DIANA ROMAN

CX-102

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE – UNLIMITED JURISDICTION

THOMAS GARCIA and DIANA ROMAN,
individually, on behalf of the State of
California, and as representatives of employees
similarly situated,

Plaintiffs,

vs.

MACY’S WEST STORES, INC., an Ohio
Corporation; and DOES 1 through 50, inclusive,
Defendants.

Case No. 30-2021-01238239-CU-OE-CXC

COMPLAINT

**Labor Code §2699 (Representative
Action)**

**(1) FAILURE TO PROVIDE
REST BREAKS IN VIOLATION
OF LABOR CODE;**

**(2) FALIURE TOPROVIDE
ITEMIZED WAGE
STATEMENTS IN VIOLATION
OF LABOR CODE**

Plaintiffs THOMAS GARCIA and DIANA ROMAN as representatives of the State of
California complain against Defendants, and each of them, demand a jury trial of all issues and
causes of action, and allege:

PRELIMINARY STATEMENT

1. Pursuant to California Labor Code §2699, Plaintiff THOMAS GARCIA, on
behalf of himself, the State of California, and other current and/or former employees in
California, brings this representative PAGA action against Defendants MACY’S WEST
STORES, INC. (hereinafter referred to as “MACY’S”) and DOES 1 to 50 (hereinafter

collectively referred to as “Defendants”). Thus, Plaintiff THOMAS GARCIA does not seek certification of a class action.

Plaintiff THOMAS GARCIA was employed by Defendants as a salesperson from January 13, 2018 to January 5, 2021 and was paid by Defendants as a DVC employee.

2. Pursuant to California Labor Code § 2699, Plaintiff DIANA ROMAN, on behalf of herself, the State of California, and other current and/or former employees in California, brings this representative PAGA action against Defendants. Thus, Plaintiff DIANA ROMAN does not seek certification of a class action.

Plaintiff DIANA ROMAN was employed by Defendants as a salesperson from September 27, 2020 to April 15, 2021 and was paid by MACY’S as a DVC employee.

3. Defendants have a uniform practice of failing to properly compensate its DVC employees for their required rest periods in violation of California Labor Code §§ 226.3, 226.7, and 558 and Wage Order No. 7. Defendants’ practices are in direct violation of the California Labor Code. Plaintiffs, as representatives employees and the State of California, seek penalties and attorneys’ fees pursuant to the Private Attorney General Act (“PAGA”).

PARTIES

4. At all material times, Plaintiffs THOMAS GARCIA and DIANA ROMAN (hereinafter referred to collectively as “Plaintiffs”) were and are residents of the State of California, County of Riverside, and County of Orange, respectively. Plaintiff THOMAS GARCIA’s employment for which he sues herein was in and performed in the County of Riverside, State of California. Plaintiff DIANA ROMAN’s employment for which she sues herein was in and performed in the County of Orange, State of California. At all material times, Plaintiffs were employed by Defendants in the State of California. During their employment with Defendants, Defendants improperly deducted the time allocated for Plaintiffs’ statutory rest periods from their commission pay regardless of if Plaintiffs took their rest periods or not, which in discourages and penalizes Plaintiffs for taking their rest periods. This compensation plan resulted in Plaintiffs frequently not taking their statutory rest periods.

1 5. Plaintiffs as representatives for themselves and of other employees and the State
2 of California are informed and believe that MACY'S is a Corporation established under the laws
3 of Ohio and doing business within Riverside County and Orange County, which are within the
4 State of California.

5 6. Defendants DOES 1 through 50 inclusive are sued herein under such fictitious
6 names. The true names and capacities of these DOE defendants, whether individual, corporate
7 associate, or otherwise, are presently unknown to Plaintiffs, they therefore sue such DOE
8 defendants by fictitious names under CCP §474. Plaintiffs are informed and believe that DOE
9 defendants are California residents. Plaintiffs will amend this Complaint to show such true
10 names and capacities when they are determined. Plaintiffs are informed and believe and allege
11 that each DOE defendant fictitiously named is responsible in some manner for the occurrences
12 herein alleged.

13 7. Plaintiffs, on behalf of the State of California and as a representative of other
14 DVC employees employed by Defendants, are informed and believe that each of Defendants
15 herein, were at all times relevant to this action, the agent, employee, attorney, partner, and/or
16 joint venture of the remaining defendants who acted within the course and scope of the
17 relationship. Plaintiffs, on behalf of the State of California and as representatives of other DVC
18 employees employed by Defendants, are informed and believe that each defendant herein gave
19 consent to and ratified and authorized the acts alleged herein to the remaining defendants.

20 **JURISDICTION AND VENUE**

21 8. This Court has jurisdiction over all causes of action asserted herein pursuant to
22 the California Constitution; article VI, section 10, which grants the Superior Court original
23 jurisdiction.

24 9. MACY'S is an active corporation established under the laws of the State of Ohio
25 and one of its offices or places of business is located in Orange County, California.

26 10. Venue in this county is proper because several of Defendants stores are located in
27 this county, it performs a substantial amount of business in this county, and numerous of the
28 unlawful actions alleged herein occurred in this county.

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12. Plaintiffs' notices informed LWDA and Defendants of the specific provisions of the Labor Code alleged to have been violated and included facts and theories to support the alleged violations.

14. Defendants have not provided any notification that it cured any of the alleged violations described in Plaintiffs' PAGA notices.

GENERAL ALLEGATIONS

17. Plaintiffs are informed and believe and thereon allege that Defendants' compensation plan discourages and penalizes its employees that it classified as DVC employees for taking their statutory rest breaks by deducting the DVC employee's rest breaks from their commission pay in violation of California Labor Code § 226.7 and the Industrial Welfare Commission Wage Order No. 7.

1 18. Further, Plaintiffs are informed and believe and thereon allege that as a direct
2 consequence of Defendants wrongfully deducting the rest breaks from its DVC employees'
3 commission pay, Defendants failed to provide its DVC employees with accurate itemized wage
4 statements in violation of California Labor Code § 226.

5 19. More specifically, while Plaintiffs worked for Defendants as DVC employees,
6 Defendants' compensation plan paid its DVC employees, including Plaintiffs, a standard hourly
7 pay, draw hourly pay, and a premium/commission over and above the standard hourly pay.

8 20. The standard hourly pay was equal to the greater of the local, state, and federal
9 minimum wage. The draw hourly pay was based on an hourly draw rate set by Defendants and
10 was considered an advance on future commission pay. A DVC employee's commission pay was
11 based on his or her weekly net sales multiplied by the applicable commission rates.

12 21. To calculate a DVC employee's commission, Defendants first calculated the
13 employee's gross commission, which equaled their weekly net sales multiplied by the
14 commission rate minus the employee's standard hourly pay. If the employee's standard hourly
15 pay was more than the product of his or her weekly net sales and commission rates, Defendants
16 would record his or her "gross commission" as "zero." If the employee's standard hourly pay
17 was less than the product of his or her weekly net sales and commission rates, Defendants then
18 calculated the employee's premium or commission pay (sometimes referred to as "net
19 commission"), as follows: Commission Pay = gross commission – hourly draw pay – any deficit
20 (e.g., previously advanced hourly draw pay not "covered" by earlier commission pay). If a DVC
21 employee's hourly draw pay and existing deficit were more than his or her gross commission, the
22 amount of the excess would be carried forward as a "deficit" and applied against his or her future
23 commission pay.

24 22. Further, Defendants required its DVC employees, including Plaintiffs, to perform
25 tasks that did not involve selling and that related to the general operation of their department. A
26 DVC employee's standard hourly pay—which Defendants paid "separate and apart from" the
27 DVC employee's commission pay—compensated him or her for "time spent on these tasks and
28 time spent on paid breaks." DVC employees were also occasionally required to perform "non-

1 productive” tasks.” Defendants paid its DVC employees their standard hourly rate and their draw
2 hourly rate for “non-productive” tasks. Defendants did not take a DVC employee’s “non-
3 productive” pay into account in calculating a DVC employee’s commission pay.

4 23. Defendants’ policy did in fact state that all DVC employees were entitled to take
5 their statutory rest breaks and were not to perform any work during those breaks.

6 24. Despite not being able to perform any sales during their statutory rest breaks,
7 Defendants categorized an employees’ rest breaks as “productive time.”

8 25. Thus, Defendants DVC employees’ commission pay, including Plaintiffs’
9 commission pay, was reduced by the time they took, or should have taken, for their statutory rest
10 periods. By labeling rest breaks as “productive time” instead of “unproductive time” and by
11 reducing a DVC employee’s commission pay for the time he or she spent during their statutory
12 rest breaks essentially left the DVC employee with two bad choices, (1) they could take their rest
13 breaks and not sell during that time and have that time reduce their commission pay or (2) they
14 could not take their rest break so they could continue to potentially make sales during that time
15 but still have their commission pay reduced by the time for rest breaks he or she should have
16 taken. Thus, Defendants’ compensation plan discouraged its DVC employees from taking their
17 rest breaks and penalized them whether they took their rest breaks or not by reducing their
18 commission pay by their rest period time.

19 26. As a result of Defendants’ commission plan for its DVC employees, its DVC
20 employees’ commission pay, including Plaintiffs’ commission pay, were always reduced by the
21 time allocated for her rest breaks whether they took them or not.

22 27. Thus, Defendants’ DVC employees, including Plaintiffs, were frequently forced
23 not to take their statutory rest break so they could potentially make more sales and make up for
24 the time by which their rest breaks were factored into reducing their commission pay.

25 28. The representative period is designated as running from one year from the date of
26 the filing of the aforementioned PAGA notices, through the trial date based upon the allegations
27 that violations of the California Wage and Hour Laws described herein have been ongoing for at
28 least one year prior to the filing of the PAGA notice.

29. As a further direct result of Defendants improperly deducting its DVC employees' rest break time from their commission pay, Defendants failed to provide accurate itemized statements of hours/wages to Plaintiffs and its other DVC employees employed within the State of California.

30. Further, Plaintiffs are informed and believe and thereon allege that Defendants' failure to properly provide and/or properly compensate its DVC employees, including Plaintiffs, for their mandatory rest breaks and to provide to Plaintiffs and other DVC employees employed within the State of California with properly itemized wage statements showing all hours actually worked was willful.

FIRST CAUSE OF ACTION

(Failure to Provide Rest Breaks)

31. Plaintiffs re-allege and incorporate herein by reference the allegations of paragraphs 1 through 30, inclusive, as though fully set forth herein.

32. During the one year preceding the filing of the PAGA notices for each named plaintiff, Plaintiffs and other DVC employees regularly worked more than three and one-half hours in a workday. Defendants failed to properly compensate Plaintiffs and other DVC employees who worked more than three and one-half hours in a workday, for rest periods of ten minutes or more per four hours worked or major fraction thereof, in violation of California Labor Code § 226.7.

33. More specifically, Defendants' compensation plan for its DVC employees improperly deducted its DVC employees' commission pay, including Plaintiffs' commission pay, by the time allocated for their statutory rest periods whether they took those rest periods or not. Thus, Defendants' compensation plan discouraged Plaintiffs and other DVC employees from taking their statutory rest periods in violation of California Labor Code § 226.7. As a result, Defendants' DVC employees, including Plaintiffs, frequently were forced not to take their statutory rest break so they could try to make more sales and make up for the time by which their rest breaks were factored into reducing their commission pay.

1 34. As a proximate result of the conduct of Defendants, Plaintiffs and other DVC
2 employees are entitled to collect penalties from Defendants in an amount to be proven at trial on
3 behalf of the LWDA.

4 35. Plaintiffs and other DVC employees also request an award of attorneys' fees,
5 costs and expenses.

6 **SECOND CAUSE OF ACTION**

7 **(Failure to Provide Itemized Statements of Hours/Wages)**

8 36. Plaintiffs re-allege and incorporate by reference in this cause of action paragraphs
9 1 through 35, inclusive, as though fully set forth herein.

10 37. During the one year preceding the filing of the PAGA notices, Defendants failed
11 to provide Plaintiffs and other DVC employees, at the time of payment of their wages, proper
12 and accurate itemized statements that show all hours actually worked, in violation of California
13 Labor Code §226.

14 38. Plaintiffs and other DVC employees are entitled to recover penalties for the
15 LWDA of \$50.00 for the initial pay period in which the violation occurred and \$100.00 for each
16 violation in a subsequent pay period, and any additional penalties permitted by the California
17 Labor Code for such violations in amounts to be proven at trial.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiffs, on behalf of the State of California and as a representative of
20 all DVC employees employed by Defendants, demand a trial by jury and request judgment and
21 the following specific relief against Defendants, and each of them, jointly and separately, as
22 follows:

23 (a) That Defendants be found to have willfully violated the wage provisions of the
24 California Labor Code as to Plaintiffs and other DVC employees;

25 (b) An award of penalties pursuant to the California Labor Code and recoverable
26 pursuant to PAGA, including, but not limited to, all civil penalties and other
27 remedies recoverable pursuant to Labor Code §§ 226.3, 558, and 2699 and Wage
28 Order No. 7;

- 1 (c) For violation of the California Labor Code, except those for which a civil penalty
2 is otherwise specifically provided, civil penalties assessed in accordance with
3 Labor Code § 2699(f)(2)- a civil penalty of one hundred dollars (\$100) for each
4 DVC employee per pay period for the initial violation and two hundred dollars
5 (\$200) for each DVC employee per pay period for each subsequent violation;
6 (d) An award of reasonable attorney's fees pursuant to Labor Code § 2699(g) or other
7 applicable law or authority;
8 (e) An award of costs of suit;
9 (f) For post-judgment interest on all penalties awarded; and
10 (g) Such other and further relief as the Court may deem appropriate.
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12 DATED: December 23, 2021

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16 Attorneys for Plaintiffs, THOMAS
17 GARCIA and DIANA ROMAN
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