

ELECTRONICALLY FILED
Superior Court of California,
County of Imperial
09/11/2023 at 03:38:13 PM
By: Lizette Hendry, Deputy Clerk

DANIEL F. GAINES, ESQ. SBN 251488
daniel@gaineslawfirm.com
ALEX P. KATOFISKY, ESQ. SBN 202754
alex@gaineslawfirm.com
EVAN S. GAINES, ESQ. SBN 287668
evan@gaineslawfirm.com
GAINES & GAINES, APLC
4550 East Thousand Oaks Boulevard, Suite 100
Westlake Village, CA 91362
Telephone: (818) 703-8985
Facsimile: (818) 703-8984

Attorneys for Plaintiff Marissa Silva, on behalf of herself and all “aggrieved employees” pursuant to Labor Code § 2698 *et seq.*

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF IMPERIAL

MARISSA SILVA, on behalf of herself and all
“aggrieved employees” pursuant to Labor
Code § 2698 *et seq.*,

Plaintiff,

v.

DRIVELINE RETAIL MERCHANDISING,
INC., a New Jersey corporation, and DOES 1
through 10, inclusive,

Defendants.

CASE NO: ECU003111

**REPRESENTATIVE ACTION
COMPLAINT FOR PENALTIES
PURSUANT TO LABOR CODE § 2699(f)
FOR VIOLATIONS OF LABOR CODE
§§ 201, 202, 226(a), 226.7, 227.3, 246, 510,
512, 1174, 1174.5, 1194, AND 2802 AND
PURSUANT TO LABOR CODE § 2699(a)
FOR VIOLATIONS OF LABOR CODE §§
226.3 AND 558**

1 Plaintiff MARISSA SILVA (“Plaintiff”), on behalf of herself and others as an “aggrieved
2 employee” under the Labor Code Private Attorneys General Act of 2004, complains of DRIVELINE
3 RETAIL MERCHANDISING, INC., a New Jersey corporation, and any subsidiaries or affiliated
4 companies (hereinafter referred to as “Defendants”) as follows:

5 **I.**

6 **INTRODUCTION AND FACTUAL BACKGROUND**

7 1. This is a Representative Action, pursuant to Labor Code § 2698 *et seq.*, on behalf of
8 Plaintiff and other non-exempt California employees who currently work or formerly worked for
9 Defendants (“Aggrieved Employees”).

10 2. For at least one (1) year prior to the filing of this action and at least one (1) year prior
11 to the date Plaintiff began the process of exhausting the administrative requirements, pursuant to
12 Labor Code § 2698 *et seq.*, and continuing to the present (the “liability period”), Defendants have had
13 consistent policies of:

14 a. Failing to pay Plaintiff and other Aggrieved Employees all minimum and
15 overtime wages earned during the course of employment, in violation of Labor Code §§ 510,
16 558, and 1194 and IWC Wage Order 7-2001, section 4. Plaintiff and other Aggrieved
17 Employees were paid \$10.00 per hour – less than the applicable minimum wage. This resulted
18 in Plaintiff and other Aggrieved Employees being paid significantly less than what is required
19 by law. Defendants also failed to retain accurate records in accordance with Labor Code §§
20 1174 and 1174.5, including for employees’ start and end times for every shift. These instances
21 violate Labor Code §§ 510, 558, 1174, 1174.5, and 1194 and IWC Wage Order No. 7-2001;

22 b. Requiring Plaintiff and other Aggrieved Employees to be on-call, under
23 Defendants’ control, with substantial restrictions, without pay. Defendants did not compensate
24 them for time spent on-call, notwithstanding the fact they were subject to Defendants’ control
25 during this on-call time. Defendants also required Plaintiff and other Aggrieved Employees
26 to drive to multiple jobsites in a day, but did not compensate them for time spent driving
27 between stores, notwithstanding the fact they were subject to Defendants’ control during this
28

1 time. An employer is obligated to pay the wages of an hourly employee for all time that the
2 employee is under the control of her employer, and this includes all the time the employee is
3 suffered or permitted to work, whether or not required to do so. When Plaintiff and other
4 Aggrieved Employees were on-call or driving between jobsites, they were under the control
5 of Defendants and required to be compensated for all hours worked. Defendants, however,
6 failed to do so. These instances deprived Plaintiff and other Aggrieved Employees of
7 significant hours worked and minimum and overtime wages due. Defendants also failed to
8 retain accurate records in accordance with Labor Code §§ 1174 and 1174.5, including for
9 employees' start and end times for every shift, including, but not limited to, standby/on-call
10 shifts. These constitute violations of Labor Code §§ 510, 558, 1174, 1174.5, and 1194 and
11 IWC Wage Order 7-2001;
12

13 c. Failing to properly compute bonuses, shift differential wages, and/or other
14 non-base hourly wages earned by Plaintiff and other Aggrieved Employees into their regular
15 rate of pay for purposes of paying them meal and rest period premiums, overtime wages,
16 vacation wages, and sick pay wages at the correct rates, in violation of Labor Code §§ 226.7,
17 246, 510, 512, 558, and 1194. Defendants paid Plaintiff and other Aggrieved Employees
18 bonuses, shift differential wages, and/or other non-base hourly wages; however, Defendants
19 failed to properly blend these forms of pay, and instead pay Plaintiff and other Aggrieved
20 Employees meal and rest period premiums, overtime wages, vacation wages, and sick pay
21 wages based *only* on the base hourly rate of pay, thus depriving Plaintiff and other Aggrieved
22 Employees of all meal and rest period premiums, overtime wages, vacation wages, and sick
23 pay wages earned. This violates Labor Code §§ 226.7, 246, 510, 512, 558, and 1194;
24

25 d. Failing to reimburse Plaintiff and other Aggrieved Employees for necessary
26 business expenses incurred in direct consequence of the discharge of their duties, in violation
27 of Labor Code § 2802, including, but not limited to, the use of their personal vehicles. Labor
28 Code § 2802 states that an employer must indemnify its employees for all necessary

1 expenditures or losses incurred by the employee in direct consequence of the discharge of
2 their duties. Defendants' failure to do so violates this section;

3 e. Failing to pay correct premium wages to Plaintiff and other Aggrieved
4 Employees who were denied rest periods, in violation of Labor Code § 226.7 and IWC Wage
5 Order No. 7-2001. Plaintiff and other Aggrieved Employees were routinely unable to take a
6 10-minute rest period for every four (4) hours of work or major fraction thereof, but were not
7 paid premium wages of one hour's pay for each missed rest period. Plaintiff and other
8 Aggrieved Employees were frequently too busy to take a rest period. When they were able to
9 take a rest period, they were oftentimes late, cut short, or on-duty. This violates Labor Code
10 § 226.7 and IWC Wage Order No. 7-2001;

12 f. Failing to pay correct premium wages to Plaintiff and other Aggrieved
13 Employees who were denied proper meal periods, in violation of Labor Code §§ 226.7, 512,
14 and 558 and IWC Wage Order 7-2001. Plaintiff and other Aggrieved Employees were
15 routinely denied, and not authorized to take, a proper, timely, uninterrupted, 30-minute meal
16 period for every shift worked that exceeded ten hours, but were not paid premium wages of
17 one hour's pay for each missed first or second meal period. When they were able to take a
18 meal period, they are oftentimes late, cut short, or on-duty. Defendants also failed to retain
19 accurate records in accordance with Labor Code §§ 1174 and 1174.5, including for
20 employees' start and end times for meal periods. This violates Labor Code §§ 226.7, 512, 558,
21 1174, and 1174.5 and IWC Wage Order 7-2001;

23 g. Failing to provide Plaintiff and all other Aggrieved Employees with wage
24 statements that fully and accurately itemized the requirements set forth in Labor Code §
25 226(a). Plaintiff and other Aggrieved Employees were not paid all wages due, as stated above.
26 As such, the wage statements provided by Defendants failed to accurately state all gross wages
27 earned, in violation of Labor Code §§ 226(a)(1) and 226.3, total hours worked, in violation of
28 Labor Code §§ 226(a)(2) and 226.3, net wages earned, in violation of Labor Code §§ 226(a)(5)

1 and 226.3, and all applicable hourly rates in effect during the pay period and the corresponding
2 numbers of hours worked at each rate, in violation of Labor Code §§ 226(a)(9) and 226.3.
3 Moreover, and independent of the above allegations, the wage statements issued to Plaintiff
4 and Aggrieved Employees list various hourly rates of pay, including regular pay and overtime
5 pay, but fail to set forth the correct number of hours worked at each hourly rate and fail to set
6 forth the correct rates of pay associated with each hourly rate, in violation of Labor Code §
7 226(a)(9). For example, when overtime hours are worked, the overtime rate listed is incorrect
8 and the number of regular hours worked listed is incorrect. Additionally, because the number
9 of hours worked at each hourly rate is listed incorrectly, and because duplicate hours worked
10 are frequently listed, adding them together yields an incorrect count of total hours worked.
11 There is no separate entry for total hours worked during the pay period. It is simply impossible
12 to ascertain from the face of the wage statements the number of total hours worked for the pay
13 period. This violates Labor Code § 226(a)(2); and

15 h. Failing to pay Plaintiff and other Aggrieved Employees all wages due,
16 including all accrued, but unused vacation wages, at the separation of their employment based
17 on the time frames required by Labor Code §§ 201-202 and 227.3. As stated above, Plaintiff
18 and other Aggrieved Employees were not paid all wages due during the course of their
19 employment and, as a result of this failure, they were not timely paid all wages due at the
20 separation of their employment. Furthermore, when Plaintiff was terminated, she was not
21 issued her final pay at the time of termination. Instead, Plaintiff was issued her final wages
22 several days later. Plaintiff alleges Defendants have a policy and practice to pay their
23 employees final wages later than permitted by California law. This violates Labor Code §§
24 201-202 and 227.3 and is alleged on behalf of Plaintiff and certain Aggrieved Employees no
25 longer employed by Defendants.

27 3. Plaintiff, on behalf of herself and all Aggrieved Employees pursuant to Labor Code §
28 2698 *et seq.*, seeks civil penalties for Defendants' violations of the California Labor Code.

4. Venue is proper in this Court because upon information and belief, Defendants are qualified to do business in the State of California, but failed to designate a principal place of business in the State of California on their Statement of Information filed with the California Secretary of State. Consequently, Defendants are subject to suit in any county in the State of California that Plaintiff chooses. As such, venue is proper in Imperial County.

III.

PARTIES

A. Plaintiff

5. Plaintiff MARISSA SILVA was employed by Defendants from February 2023 through June 2023 as a non-exempt employee and worked for a portion of that time in California.

B. Defendant

6. Defendant DRIVELINE RETAIL MERCHANDISING, INC. is a New Jersey corporation that employed Plaintiff and Aggrieved Employees in California.

7. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants sued herein as DOES 1 to 10, inclusive, are currently unknown to Plaintiff, who therefore sues Defendants by such fictitious names under Code of Civil Procedure § 474. Plaintiff is informed and believes, and based thereon alleges, that each of the Defendants designated herein as a DOE is legally responsible in some manner for the unlawful acts referred to herein. Plaintiff will seek leave of court to amend this Complaint to reflect the true names and capacities of the Defendants designated hereinafter as DOES when such identities become known.

8. Plaintiff is informed and believes, and based thereon alleges, that each Defendant acted in all respects pertinent to this action as the agent of the other Defendant, carried out a joint scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendants is legally attributable to the other Defendants.

9. The Defendants named herein as DOE 1 through DOE 10 are and are persons acting on behalf of, or acting jointly with, Defendants, who violated, or caused to be violated, one or more provisions of the California Labor Code as alleged herein.

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

**PLAINTIFF AND ALL AGGRIEVED EMPLOYEES AGAINST ALL DEFENDANTS
CIVIL PENALTIES PURSUANT TO LABOR CODE § 2699(f) FOR VIOLATIONS OF
LABOR CODE §§ 201, 202, 226(a), 226.7, 227.3, 246, 510, 512, 1174, 1174.5, 1175, 1194, AND
2802 AND PURSUANT TO LABOR CODE § 2699(a) FOR VIOLATIONS OF
LABOR CODE §§ 226.3 AND 558**

10. Plaintiff incorporates paragraphs 1 through 9 of this Complaint as though fully set forth herein.

11. As a result of the acts alleged above, including the Labor Code violations set forth in paragraph 2 above, Plaintiff seeks civil penalties pursuant to Labor Code §§ 2698 *et seq.*

12. For each such violation, Plaintiff and all other Aggrieved Employees are entitled to civil penalties subject to the following formula:

- a. Pursuant to Labor Code § 2699(f), \$100 for each initial violation and \$200 for each subsequent violation of Labor Code §§ 201, 202, 226(a), 226.7, 227.3, 246, 510, 512, 1174, 1174.5, 1194, and 2802; and
- b. Pursuant to Labor Code § 2699(a), the civil penalties as authorized by Labor Code §§ 226.3 and 558.

13. Civil penalties recovered will be allocated 75% to the Labor and Workforce Development Agency, and 25% to the affected employees.

14. On July 5, 2023, Plaintiff sent a letter, by online submission to the LWDA and by certified mail, return receipt requested, to Defendants setting forth the facts and theories of the violations alleged against Defendants, as prescribed by Labor Code § 2698 *et seq.* Pursuant to Labor Code § 2699.3(a)(2)(A), no notice was received by Plaintiff from the LWDA within sixty-five (65) calendar days of July 5, 2023. Plaintiff may therefore commence this action to seek civil penalties pursuant to Labor Code § 2698 *et seq.*

Wherefore, Plaintiff and the Aggrieved Employees she seeks to represent request relief as described below.

V.

RELIEF REQUESTED

WHEREFORE, Plaintiff prays for the following relief:

1. For civil penalties pursuant to Labor Code § 2698 *et seq.* for Plaintiff and all other Aggrieved Employees;

2. An award providing for payment of costs of suit pursuant to Labor Code § 2699(g)(1) and other applicable law;

3. An award of attorneys' fees pursuant to Labor Code §§ 2699(g)(1) and other applicable law; and

4. Such other and further relief as this Court may deem just and proper.

Dated: September 11, 2023

Respectfully submitted,

GAINES & GAINES

A Professional Law Corporation

By: Daniel F. Gaines

DANIEL F. GAINES

EVAN S. GAINES

Attorneys for Plaintiff