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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

KENNETH LAMAR SMITH,

Plaintiff,

vs.

BAY CITIES FURNACE & AIR CONDITIONING CO.; and DOES 1 to 25, inclusive,

Defendants.

CASE NO.: 24STCV03702

COMPLAINT FOR DAMAGES FOR:

1) PRIVATE ATTORNEYS GENERAL ACT ("PAGA");

COMES NOW Plaintiff, KENNETH LAMAR SMITH (hereinafter "Plaintiff"), and alleges as follows:

PARTIES, JURISDICTION, VENUE

1. Jurisdiction and Venue are proper in this Court and this action is properly filed in the County of Los Angeles in this judicial district because Defendants BAY CITIES FURNACE & AIR CONDITIONING CO., and DOES 1 to 25, inclusive, do business in the County of Los Angeles and because Defendant's obligations and liabilities arise therein. Moreover, Plaintiff's damages sought herein exceeds 35,000.

2. Plaintiff is a male resident of the County of Los Angeles, State of California.

3. Plaintiff is informed and believes that at all times herein mentioned, Defendant BAY CITIES FURNACE & AIR CONDITIONING CO. is a California Corporation, doing business in Los Angeles County, California, and which employed Plaintiff. Defendants BAY CITIES FURNACE & AIR CONDITIONING CO. and DOES 1 to 25 are collectively referred to herein as "BAY CITIES" or "Defendant(s)".

4. Plaintiff is ignorant of the true names and capacities, whether individual, corporate, or associate of those defendants fictitiously sued as DOES 1 to 25, inclusive, and so Plaintiff sues them by these fictitious names. Plaintiff is informed and believes that each of the DOE defendants, numbers 1 to 25, reside in the State of California and are in some manner responsible for the conduct alleged herein. Upon discovering the true names and capacities of these fictitiously named defendants, Plaintiff will amend this complaint to show the true names and capacities of these fictitiously named defendants.

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5. Unless otherwise alleged in this complaint, Plaintiff is informed, and on the basis of that information and belief, alleges that at all times herein mentioned, each of the remaining codefendants, in doing the things hereinafter alleged, were acting within the course, scope, and under the authority of their agency, employment, or representative capacity, with the consent of his/her codefendants.

GENERAL ALLEGATIONS

6. Plaintiff was employed by BAY CITIES as lead drywall technician and had worked there for over 20 years. Plaintiff was classified as an hourly, non-exempt employee and was paid $27.50 per hour. Plaintiff's employment was wrongfully terminated on or around November 2023.

7. In the case of <u>Huff v. Securitas Sec. Servs. USA, Inc.</u>, 23 Cal. App. 5th 745 (2018), Plaintiff, Huff, was employed as a security guard for the Defendant Employer, Securitas Security Services USA, Inc., an onsite security provider. After about a year of employment, Huff resigned. Huff then filed suit against Securitas under PAGA. In his claim, Huff specifically alleged violations to the Labor Code requiring immediate payment of wages upon termination of employment and weekly payment of wages to temporary employees. The trial court determined Huff was not a temporary employee, and therefore, lacked standing to bring the claim. Thus, Securitas was granted a motion for summary judgement. Later, the trial court granted Huff a new trial. Securitas then appealed the grant of a new trial. On appeal, the issue was whether Huff could bring a PAGA claim and sue for Labor Code violations that did not directly affect him. Securitas unsuccessfully argued that the PAGA statute only allows the PAGA representative to sue for violations that the representative has personally suffered. The PAGA statute states that an "aggrieved employee" is able to file suit on behalf of themselves and others. The statute also states that an "aggrieved employee" is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." Because at least one of the violations that Huff had alleged had affected him personally, the Court of Appeal denied Securitas' motion.

8. In sum, since PAGA allows Plaintiffs to bring suit on behalf of both themselves and other employees, it allows for suits broader than the specific violations the named employee experienced. Therefore, even if the employee did not personally experience the Labor Code violations, the employer may still be liable to under PAGA. Consequently, it is Plaintiff's position that Plaintiff can equivocally bring the following labor code violations on behalf of all other employees, including ALL hourly, non-exempt employees, irrespective of job title or job duties, who worked for BAY CITIES at any time during the relevant PAGA period.

9. It is Plaintiff's position that BAY CITIES has violated the following Labor Code Sections against Plaintiff and other aggrieved employees, who include all non-exempt, hourly employees, who worked for BAY CITIES at their various locations in the State of California during the relevant PAGA period.

10. BAY CITIES violated Labor Code § 1194, 1194.2, 1197, and 1197.1 because it failed to pay Plaintiff and other similarly situated aggrieved employees for all hours worked, including the statutory minimum wage for all hours worked and for "off the clock" work. This is so because BAY CITIES had a company policy wherein they would disproportionately round down the number of hours worked, resulting in "time shaving" and further resulting in aggrieved employees not being paid for all hours worked. Furthermore, and to the extent that Plaintiff and others worked through their meal periods while "off the clock", the latter would be considered a minimum wage violation as well. Moreover, Plaintiff and others would not be compensated for travel time and would perform tasks prior to clocking out or after clocking out for which they were not compensated.

11. Pursuant to California Industrial Welfare Commission Order No. 4/16-2001, Section 8(B), "When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage provided herein may be required to provide and maintain hand tools and equipment customarily required by the trade or craft." BAY CITIES unequivocally required its employees, including

laborers like Plaintiff, to provide their own hand tools for the performance of their job duties. As such, BAY CITIES violated the aforementioned IWC Wage Order in that BAY CITIES required its laborers including Plaintiff, to provide and maintain hand tools and equipment customarily required by the trade but did NOT compensate these employees at least two (2) times the minimum wage at all times.

12. Furthermore, BAY CITIES was subject to the prevailing wage laws of the State of California pursuant to Labor Code § 1771, regarding work undertaken on public construction projects. Under Labor Code § 1771, the only legal wage which may be paid to workers on public works projects is the prevailing wage. BAY CITIES compensated Plaintiff and other similarly situated aggrieved employees for their labor on public improvement, or public works construction projects, at a rate of pay below the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and less than the general prevailing rate of per diem wages for holiday and overtime work.

13. BAY CITIES was subject to the prevailing wage laws of the State of California pursuant to Labor Code § 1774, regarding work undertaken on public construction projects. BAY CITIES violated Labor Code § 1774, because it paid its employees, including Plaintiff, less than the specific prevailing rates of wages to all workmen employed in the execution of the contract of the projects. Plaintiff and others similarly situated worked on public works projects, especially for the State of California.

14. Due to the above "off the clock" violations, BAY CITIES also violated Labor Code §510 because it failed to pay Plaintiff and other aggrieved employees overtime compensation, even though they worked more than 8 hours per day, 12 hours per day, and/or 40 hours per week throughout their employment. Plaintiff's and other aggrieved employees' actual work hours entitled them to overtime compensation, however, BAY CITIES did not compensate its hourly, non-exempt employees with the correct and accurate amount of overtime, due to the "off the clock" work and time shaving as described above. Furthermore, BAY CITIES failed to include bonuses/incentive payments in calculating employees' regular rate of pay for use in deciphering the correct overtime rate of pay. Additionally, the incentive and bonus payments were also not

factored into employees' regular rate for purposes of receiving meal and rest break premiums per the Ferra v. Loews case.

15. BAY CITIES also violated Labor Code § 226.7 and the appropriate Industrial Welfare Commission Wage Order no. 4/16 because it failed to provide Plaintiff and other similarly situated aggrieved employees with timely 10-minute rest periods for every four hours of work, or majority portion thereof, throughout their employment. BAY CITIES did not completely relieve Plaintiff and others of all duty during said rest periods. BAY CITIES did not pay to Plaintiff and others one additional hour of pay at Plaintiff's regular rate of compensation for each workday that one or more statutory rest periods was not provided or was interrupted. Rest periods were also simply not part of the company policy and were not enforced at all, especially in a fast-paced work environment with strict deadlines for completion of work.

16. BAY CITIES violated Labor Code §§ 512 and 226.7 and the appropriate Industrial Welfare Commission Wage Order no. 4/16 because it failed to provide hourly, non-exempt employees, including Plaintiff and others, the requisite 30-minute, uninterrupted meal periods for every five (5) hours of work throughout their employment. BAY CITIES did not completely relieve Plaintiff and other employees of all duty during said meal periods. BAY CITIES did not pay to Plaintiff and its hourly, non-exempt employees one additional hour of pay at their regular rate of compensation for each workday that one or more statutory meal periods was not provided. Plaintiff and the hourly, non-exempt employees would not always receive timely, uninterrupted meal periods that were before the 5th hour worked. The latter was due to the workload and due to being in a fast-paced work environment and in having to finish the installation jobs.

17. At least several times a week, Plaintiff would be told to clock out but to keep working and performing work duties. The latter would be a minimum wage violation as well as a meal break violation. Plaintiff would get orders to make corrections to his clock in and clock out records so that it "makes sense" and looks like it is compliant with California law even though it was not. The company was only concerned about looking compliant on paper and did not care whether employees such as Plaintiff actually received their 30-minute, uninterrupted meal period before the 5th hour worked.

18. Consequently, it was the normal practice and custom of BAY CITIES not to authorize, permit, and enforce timely, uninterrupted, statutory meal periods. If BAY CITIES had Plaintiff sign a meal period waiver, it would not be valid and enforceable since Plaintiff and others generally worked more than a 6-hour shift. If BAY CITIES had Plaintiff sign an on-duty meal period agreement wherein Plaintiff agreed to work through the meal periods, it would be invalid and unenforceable because the nature of Plaintiff's job does not and did not prevent him from taking a meal period and the company could have hired "breakers" to relieve Plaintiff of his job duties so that he can actually take a timely, uninterrupted meal period. Moreover, any such "on duty" meal period agreement did not allow for Plaintiff to revoke such an agreement even if it was signed. As such, Plaintiff and others did not always receive statutory, timely meal periods during their employment. To the extent that BAY CITIES argues that employees receive meal break premium pay for missed meal periods, that argument is inconsequential for PAGA penalty purposes since the PAGA penalties are for the violations themselves, irrespective of whether an employee received the premium payment for a missed, short, or interrupted meal period. In *Kirby v. Immoos Fire Protection, Inc.*, the Court stated, "section 226.7 does not give employers a lawful choice between providing *either* meal and rest breaks *or* an additional hour of pay." *See Kirby v. Immoos Fire Protection, Inc.*, (2012) 53 Cal.4th 1244, 1256 (emphasis in original). Thus, the extra hour of pay does not excuse the violation; the employer has still committed a violation even if the remedy for the violation has been paid. *See Wert v. U.S. Bancorp*, (S.D. Cal. Mar. 22, 2016, 2016 WL 1110302 at *4). As such, the work environment and culture at BAY CITIES was not conducive to receiving consistent, timely, statutory meal breaks under California law. Moreover, any meal or rest break premiums paid were not compensated at the weighted average regular rate, inclusive of bonuses and/or incentive payments as well as overtime compensation.

19. Furthermore, during the relevant time period, and due to the above labor code violations, BAY CITIES failed to pay Plaintiff and other similarly situated aggrieved employees all wages due to them within any time period specified by California Labor Code section 204. BAY CITIES was also in violation of California Labor Code section 226(a) by failing to include pertinent information on the wage statements, including but not limited to, the correct hourly

rate, all hours worked, overtime hours worked, correct overtime pay, gross wages earned, net wages earned, premium pay for missed meal and rest breaks, all deductions, the correct start and end of the pay period, all employee identifying information, the correct and complete name and address of the legal employer, and reimbursement for business expenses, among others. As such, BAY CITIES did not provide Plaintiff and other similarly situated aggrieved employees with complete, accurate itemized wage statements.

20. During the relevant time period, BAY CITIES also failed to keep accurate and complete payroll records showing the actual hours worked per day and the wages paid to Plaintiff and others pursuant to California Labor Code sections 1174(d).

21. BAY CITIES also violated Labor Code § 203 because it willfully failed to pay Plaintiff and other similarly situated aggrieved employees earned and due wages upon separation of employment, either immediately upon involuntary termination, or within 72 hours of resignation. These earned but unpaid wages include compensation for all hours worked, including minimum wages, overtime compensation, and premium pay for missed meal and rest breaks.

22. During the relevant time period, Plaintiff and other aggrieved employees incurred necessary, business-related expenses and costs that were not reimbursed by BAY CITIES. These costs include, but are not limited to, uniforms, use of personal cell phones for work purposes, use of personal vehicles without any mileage reimbursement, and use of personal hand tools for work purposes. Accordingly, BAY CITIES was in violation of California Labor Code sections 2800 and 2802.

23. Moreover, BAY CITIES failed to provide sick pay pursuant to Labor Code section 246 and also failed to provide Worker's Compensation coverage for Plaintiff and other aggrieved employees in violation of Labor Code Section 3700.5.

FIRST CAUSE OF ACTION

PRIVATE ATTORNEYS GENERAL ACT

Individual and Representative Claim for PAGA penalties under California Labor Code sections 201, 202, 203, 204 and/or 204b, 210, 226, 226.3, 226.7, 246, 510, 512, 558, 1174, 1174.5, 1194, 1194.2, 1197, 1198, 1771, 1774, 2802, 3700.5)

(Against All Named Defendants and all DOE Defendants)

24. Plaintiff re-alleges and incorporates by reference each and every allegation in paragraphs 1 through 23, inclusive, of this Complaint as though fully set forth herein.

25. Pursuant to law, Plaintiff provided the required written notice to the LWDA and Defendants of the specific violations of the California Labor Code that Defendants and DOE defendants have violated and continue to violate.

26. Pursuant to California Labor code section 2699.3, no response was received from the LWDA within 65 days of the postmark date of the above-alleged letter.

27. Plaintiff therefore has exhausted all administrative remedies required of him under California Labor Code sections 2698, 2699, and 2699.3, and, as a result, may prosecute this cause of action and pursue penalties in a representative action for Defendants' violations of the Labor Code.

28. Pursuant to California Labor Code section 2699, any provisions of the Labor Code that provides for a civil penalty to be assessed and collected by the LWDA or any of its departments, divisions, commissions, boards, agencies, or employees for violation of the code may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in California Labor Code section 2699.3.

29. Plaintiff is an "aggrieved employee" because Plaintiff was employed by the alleged violator and had one or more of the alleged violations committed against him, and therefore is properly suited to represent the interests of other current and former employees, including all hourly, non-exempt employees who worked for BAY CITIES at any of their California locations during the relevant and applicable PAGA period.

30. Based on the acts alleged above, Plaintiff, on behalf of others, seeks penalties under California Labor Code sections 2698 and 2699 because of Defendants' violations of numerous provisions of the California Labor Code as alleged in this Complaint.

31. Plaintiff therefore has exhausted all administrative remedies required of him under California Labor Code sections 2698, 2699, and 2699.3, and, as a result, may prosecute this cause of action and pursue penalties in a representative action for Defendants' violations of the Labor Code.

32. California Labor Code section 2699 et seq. imposes penalties upon culpable Defendants for violating the Labor Code.

33. California Labor Code section 558 establishes a civil penalty as follows: Any employer or other person action on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission (including the "Hours and Days of Work" section of the Wage Order) shall be subject to a civil penalty of (1) for any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid ...; (2) for each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid ...;

34. Plaintiff seeks penalties for Defendants' misconduct as alleged herein as permitted by law, <u>but only those penalties that are required to be shared with the LWDA as Plaintiff is not seeking individual/victim specific relief or underpaid wages under this particular cause of action.</u>

35. Plaintiff seeks penalties for Defendants' misconduct as alleged herein as permitted by law. Specifically, Plaintiff seeks penalties under California Labor Code section 2699, for the following:

Violations of California Labor Code sections 201, 202, 203, 204 and/or 204b, 210, 226, 226.3, 226.7, 246, 510, 512, 558, 1174, 1174.5, 1194, 1197, 1198, 1771, 1774, 2802, and 3700.5 via 2698 and 2699, and any other Labor Codes and Industrial Welfare Commission Wage Order (Order Nos. 4/16) violated based on the facts alleged in this Complaint.

36. Pursuant to Labor Code section 2698 et seq., Plaintiff seeks to recover attorney's fees, costs, and civil penalties on behalf of other current and former Aggrieved Employees as alleged herein in an amount to be shown according to proof at trial and within the jurisdictional limits of this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for Judgment against Defendants and each of them, as follows:

1. For the imposition of civil penalties;
2. For maximum civil penalties available under Labor Code Section 2699 against Defendants in a manner and amount authorized by that statute, as described more particularly in the Complaint and representative PAGA claims;
3. For all costs and disbursements incurred in this suit;
4. Reasonable attorney's fees where available by law, including but not limited to, pursuant to Labor Code section 2698 et seq., Code of Civil Procedure section 1021.5, and/or other applicable laws; and
5. For such other and further relief as this Court may deem proper.

DATED: February 13, 2024

MESSRELIAN LAW INC.

By______________________________
Harout Messrelian, Esq.
Attorneys for Kenneth Lamar Smith