

MESSRELIAN LAW INC.

Harout Messrelian, Esq. (272020)
500 N. Central Ave., Suite 840
Glendale, California 91203
Telephone: (818) 484-6531
Facsimile: (818) 956-1983

Attorneys for Plaintiff Orlando Suarez Serrano

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ORLANDO SUAREZ SERRANO,

Plaintiff,

vs.

HERBERT MALARKEY ROOFING
COMPANY; and DOES 1 to 25, inclusive,

Defendants.

CASE NO.: **24STCV22423**

COMPLAINT FOR DAMAGES FOR:

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

COMES NOW Plaintiff, ORLANDO SUAREZ SERRANO (hereinafter “Plaintiff”),
and alleges as follows:

PARTIES, JURISDICTION, and 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 HERBERT MALARKEY ROOFING COMPANY and DOES 1 to 25, inclusive (hereinafter collectively “HERBERT MALARKEY” or “Defendant(s)”) do business in the County of Los Angeles, and because Defendants’ obligations and liabilities arise therein, and because the work that was performed by Plaintiff in the County of Los Angeles is the subject of this action. Moreover, Plaintiff’s damages sought herein exceed \$35,000.

2. Plaintiff is a male resident of the State of California.

3. Plaintiff is informed and believes that at all times herein mentioned, Defendant HERBERT MALARKEY ROOFING COMPANY is an Oregon corporation, doing business in the County of Los Angeles, State of California, and which employed Plaintiff.

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.

5. Unless otherwise alleged in this complaint, Plaintiff is informed, and on the basis of

1 that information and belief, alleges that at all times herein mentioned, each of the remaining
2 codefendants, in doing the things hereinafter alleged, were acting within the course, scope, and
3 under the authority of their agency, employment, or representative capacity, with the consent of
4 his/her codefendants.

5 **GENERAL ALLEGATIONS**

6 6. Plaintiff was employed by HERBERT MALARKEY as a laborer back in 2017.
7 Plaintiff is currently a machine operator and is classified as an hourly, non-exempt employee.
8 Plaintiff's current rate of pay is approximately \$26.17 per hour.
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10 7. In the case of Huff v. Securitas Sec. Servs. USA, Inc., 23 Cal. App. 5th 745 (2018),
11 Plaintiff, Huff, was employed as a security guard for the Defendant Employer, Securitas
12 Security Services USA, Inc., an onsite security provider. After about a year of employment,
13 Huff resigned. Huff then filed suit against Securitas under PAGA. In his claim, Huff
14 specifically alleged violations to the Labor Code requiring immediate payment of wages upon
15 termination of employment and weekly payment of wages to temporary employees. The trial
16 court determined Huff was not a temporary employee, and therefore, lacked standing to bring
17 the claim. Thus, Securitas was granted a motion for summary judgement. Later, the trial court
18 granted Huff a new trial. Securitas then appealed the grant of a new trial. On appeal, the issue
19 was whether Huff could bring a PAGA claim and sue for Labor Code violations that did not
20 directly affect him. Securitas unsuccessfully argued that the PAGA statute only allows the
21 PAGA representative to sue for violations that the representative has personally suffered. The
22 PAGA statute states that an "aggrieved employee" is able to file suit on behalf of others. The
23 statute also states that an "aggrieved employee" is "any person who was employed by the
24 alleged violator and against whom one or more of the alleged violations was committed."
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1 Because at least one of the violations that Huff had alleged had affected him personally, the
2 Court of Appeal denied Securitas' motion.

3 8. In sum, since PAGA allows Plaintiffs to bring suit on behalf of other employees,
4 it allows for suits broader than the specific violations the named employee experienced.
5 Therefore, even if the employee did not personally experience the Labor Code violations, the
6 employer may still be liable to under PAGA. Consequently, it is Plaintiff's position that
7 Plaintiff can equivocally bring the following labor code violations on behalf of all other
8 employees, including ALL hourly, non-exempt employees, irrespective of job title or job
9 duties, who worked for HERBERT MALARKEY at any time during the relevant PAGA
10 period.
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12 9. It is Plaintiff's position that HERBERT MALARKEY has violated the following Labor
13 Code Sections against Plaintiff and other aggrieved employees, who include all non-exempt,
14 hourly employees, who worked for HERBERT MALARKEY at their various locations in the
15 State of California during the relevant PAGA period.
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17 10. HERBERT MALARKEY violated Labor Code § 1194, 1194.2, 1197, and 1197.1
18 because it failed to pay Plaintiff and other similarly situated aggrieved employees for all hours
19 worked, including the statutory minimum wage for all hours worked and for "off the clock"
20 work. This is so because HERBERT MALARKEY had a company policy wherein they would
21 disproportionately round down the number of hours worked, resulting in "time shaving" and
22 further resulting in aggrieved employees not being paid for all hours worked. Furthermore, one
23 look at Plaintiff's paystubs indicate that his work hours were rounded, i.e. 56.0 hours worked,
24 which is not in line with reality. Moreover, Plaintiff and others were not paid for travel time in
25 traveling to different locations. Additionally, and to the extent that Plaintiff's and others' meal
26 breaks were interrupted by work obligations, this would amount to a minimum wage violation.
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1 In addition, HERBERT MALARKEY failed to pay its employees proper and accurate
2 reporting time pay.

3 11. Pursuant to California Industrial Welfare Commission Order No. 16-2001, Section
4 8(B), "When tools or equipment are required by the employer or are necessary to the
5 performance of a job, such tools and equipment shall be provided and maintained by the
6 employer, except that an employee whose wages are at least two (2) times the minimum wage
7 provided herein may be required to provide and maintain hand tools and equipment
8 customarily required by the trade or craft." HERBERT MALARKEY unequivocally required
9 its employees to provide their own hand tools for the performance of their job duties. As such,
10 HERBERT MALARKEY violated the aforementioned IWC Wage Order in that HERBERT
11 MALARKEY required its laborers to provide and maintain hand tools and equipment
12 customarily required by the trade but did NOT compensate these employees at least two (2)
13 times the minimum wage at all times.
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15 12. Furthermore, HERBERT MALARKEY was subject to the prevailing wage laws of the
16 State of California pursuant to Labor Code § 1771, regarding work undertaken on public
17 construction projects. Under Labor Code § 1771, the only legal wage which may be paid to
18 workers on public works projects is the prevailing wage. HERBERT MALARKEY
19 compensated Plaintiff and other similarly situated aggrieved employees for their labor on
20 public improvement, or public works construction projects, at a rate of pay below the general
21 prevailing rate of per diem wages for work of a similar character in the locality in which the
22 public work is performed, and less than the general prevailing rate of per diem wages for
23 holiday and overtime work.
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25 13. HERBERT MALARKEY was subject to the prevailing wage laws of the State of
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1 California pursuant to Labor Code § 1774, regarding work undertaken on public construction
2 projects. HERBERT MALARKEY violated Labor Code § 1774, because it paid its employees,
3 including Plaintiff, less than the specific prevailing rates of wages to all workmen employed in
4 the execution of the contract of the projects. Plaintiff and others similarly situated worked on
5 public works projects, especially for the State of California.

6 14. Due to the above “off the clock” violations, HERBERT MALARKEY also violated
7 Labor Code §510 because it failed to pay Plaintiff and other aggrieved employees overtime
8 compensation, even though they worked more than 8 hours per day, 12 hours per day, and/or
9 40 hours per week throughout their employment. Plaintiff’s and other aggrieved employees’
10 actual work hours entitled them to overtime compensation and double time compensation,
11 however, HERBERT MALARKEY did not compensate its hourly, non-exempt employees
12 with the proper and correct amount of overtime, despite the “off the clock” work and time
13 shaving as described above. Furthermore, HERBERT MALARKEY failed to include
14 bonuses/incentive payments/sick pay/vacation pay in calculating employees’ regular rate of
15 pay for use in deciphering the correct overtime rate of pay. Additionally, the incentive and
16 bonus payments were also not factored into employees’ regular rate for purposes of receiving
17 meal and rest break premiums per the Ferra v. Loews case. In fact, it was clear that Plaintiff
18 and others received “production bonuses” which were not factored into the regular rate of pay
19 for purposes of paying the proper overtime and neither was sick pay.

20 15. HERBERT MALARKEY also violated Labor Code § 226.7 and the appropriate
21 Industrial Welfare Commission Wage Order no. 1/4/16 because it failed to provide Plaintiff
22 and other similarly situated aggrieved employees with timely 10-minute rest periods for every
23 four hours of work, or majority portion thereof, throughout their employment. HERBERT
24 MALARKEY did not completely relieve Plaintiff and others of all duty during said rest
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1 periods. HERBERT MALARKEY did not pay to Plaintiff and others one additional hour of
2 pay at Plaintiff's regular rate of compensation for each workday that one or more statutory rest
3 periods was not provided or was interrupted. Rest periods were often interrupted by work-
4 related issues and full rest breaks were not able to be taken due to the workload and in having
5 to meet strict construction deadlines.

6 16. HERBERT MALARKEY violated Labor Code §§ 512 and 226.7 and the appropriate
7 Industrial Welfare Commission Wage Order no. 1/4/16 because it failed to provide hourly,
8 non-exempt employees, including Plaintiff and others, the requisite 30-minute, uninterrupted
9 meal periods for every five (5) hours of work throughout their employment. HERBERT
10 MALARKEY did not completely relieve Plaintiff and other employees of all duty during said
11 meal periods. HERBERT MALARKEY did not pay to Plaintiff and its hourly, non-exempt
12 employees one additional hour of pay at their regular rate of compensation for each workday
13 that one or more statutory meal periods was not provided. Plaintiff and the hourly, non-exempt
14 employees would not always receive uninterrupted meal periods that were before the 5th hour
15 worked. Moreover, there were occasions wherein Plaintiff's meal break was interrupted due to
16 training another employee while Plaintiff was "off the clock" which also amounted to a
17 minimum wage violation.
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19 17. Consequently, it was the normal practice and custom of HERBERT MALARKEY not
20 to authorize, permit, and enforce timely, uninterrupted, statutory meal periods. If HERBERT
21 MALARKEY had Plaintiff sign a meal period waiver, it would not be valid and enforceable
22 since Plaintiff and others generally worked more than a 6-hour shift. If HERBERT
23 MALARKEY had Plaintiff sign an on-duty meal period agreement wherein Plaintiff agreed to
24 work through the meal periods, it would be invalid and unenforceable because the nature of
25 Plaintiff's job does not and did not prevent him from taking a meal period and the company
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1 could have hired “breakers” to relieve Plaintiff of his job duties so that he can actually take a
2 timely, uninterrupted meal period. Moreover, any such “on duty” meal period agreement did
3 not allow for Plaintiff to revoke such an agreement even if it was signed. As such, Plaintiff and
4 others did not always receive statutory, timely meal periods during their employment. To the
5 extent that HERBERT MALARKEY argues that employees receive meal break premium pay
6 for missed meal periods, that argument is inconsequential for PAGA penalty purposes since the
7 PAGA penalties are for the violations themselves, irrespective of whether an employee
8 received the premium payment for a missed, short, or interrupted meal period. In *Kirby v.*
9 *Immoos Fire Protection, Inc.*, the Court stated, “section 226.7 does not give employers a lawful
10 choice between providing *either* meal and rest breaks *or* an additional hour of pay.” *See*
11 *Kirby v. Immoos Fire Protection, Inc.*, (2012) 53 Cal.4th 1244, 1256 (emphasis in original).
12 Thus, the extra hour of pay does not excuse the violation; the employer has still committed a
13 violation even if the remedy for the violation has been paid. *See Wert v. U.S. Bancorp.*, (S.D.
14 Cal. Mar. 22, 2016, 2016 WL 1110302 at *4). As such, the work environment and culture at
15 HERBERT MALARKEY was not conducive to receiving consistent, timely, statutory meal
16 breaks under California law. Moreover, any meal or rest break premiums paid were not
17 compensated at the weighted average regular rate, inclusive of bonuses and/or incentive
18 payments/sick pay as well as overtime compensation.

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21 18. Furthermore, during the relevant time period, and due to the above labor code
22 violations, HERBERT MALARKEY failed to pay Plaintiff and other similarly situated
23 aggrieved employees all wages due to them within any time period specified by California
24 Labor Code section 204. Furthermore, Plaintiff and others would unlawfully be paid via
25 personal check as opposed to a business check. HERBERT MALARKEY was also in violation
26 of California Labor Code section 226(a) by failing to include pertinent information on the
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1 wage statements, including but not limited to, the correct hourly rate, all hours worked,
2 overtime hours worked, correct overtime pay, gross wages earned, net wages earned, premium
3 pay for missed meal and rest breaks, all deductions, the correct start and end of the pay period,
4 all employee identifying information, the correct and complete name and address of the legal
5 employer, and reimbursement for business expenses, among others. As such, HERBERT
6 MALARKEY did not provide Plaintiff and other similarly situated aggrieved employees with
7 complete, accurate itemized wage statements.

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9 19. During the relevant time period, HERBERT MALARKEY also failed to keep accurate
10 and complete payroll records showing the actual hours worked per day and the wages paid to
11 Plaintiff and others pursuant to California Labor Code sections 1174(d).

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

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19 21. During the relevant time period, Plaintiff and other aggrieved employees incurred
20 necessary, business-related expenses and costs that were not reimbursed by HERBERT
21 MALARKEY. These costs include, but are not limited to, use of personal cell phones for work
22 purposes, work boots, and use of personal hand tools for work purposes. Accordingly,
23 HERBERT MALARKEY was in violation of California Labor Code sections 2800 and 2802.

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25 22. HERBERT MALARKEY also violated Labor Code section 221 in unlawfully
26 deducting wages from employees such as Plaintiff due to an apparent company error.

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FIRST CAUSE OF ACTION

PRIVATE ATTORNEYS GENERAL ACT

Representative-Only Claim for PAGA penalties under California Labor Code sections 201, 202, 203, 204 and/or 204b, 210, 221, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 1771, 1774, 2800, 2802)

(Plaintiff against All Named Defendants and all DOE defendants)

23. Plaintiff re-alleges and incorporates by reference each and every allegation in paragraphs 1 through 22, inclusive, of this Complaint as though fully set forth herein.

24. Plaintiff has complied with the procedures for bringing suit specified in California Labor Code § 2699.3. By letter dated May 24, 2024, Plaintiff gave written notice by certified mail to the Labor and Workforce Development Agency (“LWDA”) and Defendants of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations.

25. 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.

26. 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.

27. 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 other current or former employees pursuant to the procedures specified in California Labor Code section 2699.3.

28. 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 current and former hourly, non-exempt employees who worked for HERBERT MALARKEY in the State of California during the applicable PAGA Period.

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

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

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

10 32. Plaintiff seeks penalties for Defendants' misconduct as alleged herein as permitted by
11 law, but only those penalties that are required to be shared with the LWDA as Plaintiff is not
12 seeking individual penalties/victim specific relief or underpaid wages for himself or other
13 employees under this specific PAGA cause of action.

14 33. Specifically, Plaintiff seeks penalties under California Labor Code section 2699, for the
15 following:

16 Violations of California Labor Code sections 201, 202, 203, 204, and/or 204b, 210, 221, 226,
17 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 1771, 1774,
18 2800, 2802, and any other Labor Codes/Industrial Welfare Commission Order (No. 1/4/16)
19 violated based on the facts alleged in this Complaint.

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

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

- 26 1. For the imposition of civil penalties;
- 27 2. For maximum civil penalties available under Labor Code Section 2699 against
28 Defendants in a manner and amount authorized by that statute, as described more

1 particularly in the Complaint and representative PAGA claims;

2 3. For all costs and disbursements incurred in this suit;

3 4. Reasonable attorney's fees where available by law, including but not limited to, pursuant
4 to Labor Code section 2698 et seq., Code of Civil Procedure section 1021.5, and/or other
5 applicable laws; and

6 5. For such other and further relief as this Court may deem proper.

7 DATED: September 3, 2024

MESSRELIAN LAW INC.

8
9 By



10 Harout Messrelian, Esq.

11 Attorneys for Plaintiff Orlando Suarez Serrano
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