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OSCAR HERNANDEZ, and all others similarly situated

Electronically
FILED
by Superior Court of California, County of San Mateo
ON 11/8/2024
By /s/ Una Finau
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO
(*UNLIMITED JURISDICTION*)

OSCAR HERNANDEZ, *Plaintiff*, vs. TOWNE MOTOR COMPANY dba TOWNE FORD SALES; TOWNE FORD SALES, INC . dba TOWNE FORD; and DOES 1 to 25, inclusive, *Defendants*.	Case No.: 24-CIV-07032 **COMPLAINT FOR DAMAGES FOR:** **1) PRIVATE ATTORNEYS GENERAL ACT ("PAGA");**

COMES NOW, Plaintiff, OSCAR HERNANDEZ (hereafter "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 San Mateo in this judicial district because Defendants TOWNE MOTOR COMPANY dba TOWNE FORD SALES; TOWNE FORD SALES, INC . dba TOWNE FORD; and DOES 1 to 25, inclusive (hereafter "TOWNE FORD" or "Defendants") do business in the County of San Mateo and because Defendants' obligations and liabilities arise therein, and because the work that was performed by Plaintiff in the County of San Mateo is the subject of this action. Moreover, Plaintiff's damages sought herein exceed $35,000.

2. Plaintiff is a male resident of the county of San Mateo, California.

3. Plaintiff is informed and believes that at all times herein mentioned, Defendant TOWNE MOTOR COMPANY dba TOWNE FORD SALES is and was a California corporation, doing business in San Mateo County, California, and which employed Plaintiff.

4. Plaintiff is informed and believes that at all times herein mentioned, Defendant TOWNE FORD SALES, INC . dba TOWNE FORD is and was a California corporation, doing business in San Mateo County, California, and which employed Plaintiff.

5. The "aggrieved employees" are all current and former non-exempt or hourly paid employees who worked for Defendants at any of their California locations during the relevant time period pursuant to California Labor Code section 2698, et. seq., the Labor Code Private Attorneys General Act of 2004 ("PAGA").

6. 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.

7. 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.

JOINT LIABILITY

8. Under California law, Defendants are jointly and severally liable as employers for the violations alleged herein because they have each exercised sufficient control over the wages, hours, working conditions, and employment status of Plaintiff and the Aggrieved Employees. Plaintiff is informed and believes, and thereon allege that at all relevant times Defendants operated as a single integrated enterprise with common ownership and centralized human resources. As a result, Defendants utilized the same unlawful policies and practices and subjected all aggrieved employees to these same policies and practices. Among other things, Plaintiff is informed and believes that: (1) there is common ownership in, and financial control, in Defendants' companies, (2) Defendants utilize common management, who have control over the day-to-day operations and employment matters, including the power to hire and fire, set schedules, issue employee policies, and determine rates of compensation; (3) Defendants utilize the same policies and procedures for all employees, including issuing the same employee handbooks and other form agreements; (4) Defendants use at least some of the same Human Resources personnel and attorneys to oversee employment matters; and, (6) Defendants share employees.

GENERAL ALLEGATIONS

9. Plaintiff started working for TOWNE FORD on or around February 3, 2020 as a Service-Porter. Plaintiff was classified as an hourly, non-exempt employee. Plaintiff's last rate of pay was $27.85 per hour. Plaintiff and others were paid weekly. Plaintiff stopped working for TOWNE FORD on or around June 17, 2024, and was terminated on or around June 24, 2024.

10. It is Plaintiff's position that due to personally suffering the below violations, Plaintiff can equivocally bring the following labor code violations on behalf of all other

employees, including ALL hourly, non-exempt employees who worked for TOWNE FORD anywhere in the state of California (at all different locations) during the relevant PAGA period.

11. TOWNE FORD 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 TOWNE FORD had a company policy wherein they would disproportionately round down the number of hours worked for Plaintiff and others, resulting in "time shaving" and further resulting in aggrieved employees not being paid for all hours worked. Moreover, TOWNE FORD failed to provide its employees, including Plaintiff and others, with proper and accurate reporting time pay.

12. Pursuant to California Industrial Welfare Commission Order No. 4-2001/7-2001, Section 9(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." TOWNE FORD unequivocally required its employees, their service technicians, including Plaintiff, to provide their own tools. This was especially true because the "toolbox" that TOWNE FORD provided was insufficient and of such low quality that Plaintiff and others would not be able to do decent work. As such, Plaintiff and others bought their own hand tools and toolbox to effectuate their job duties. Consequently, TOWNE FORD violated the aforementioned IWC Wage Order(s) in that TOWNE FORD required its technicians, including Plaintiff, and other employees 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.

13. Additionally, California Labor Code section 226.2, effective January 1, 2016, provides that employees shall be compensated for rest and recovery periods and other non-productive time separate from any piece-rate compensation. Section 226.2 further requires that employees must be compensated for these time periods at a rate no less than the highest federal,

state, or local minimum wage that is applicable to the employment. TOWNE FORD did not fully and accurately compensate Plaintiff, and all similarly situated aggrieved employees for rest and recovery periods and other non-productive time separate from any piece-rate compensation.

14. TOWNE FORD violated Labor Code §510 because it failed to pay the technicians such as Plaintiff the correct amount of overtime (based on a base pay rate of twice the minimum wage), even though they worked more than 8 hours per day, 12 hours per day, and/or 40 hours per week throughout their employment. Moreover, for the commissioned employees, TOWNE FORD failed to pay overtime during pay periods during which salespersons did not meet the inside salesperson exemption in that they did not earn one-and-a-half times the minimum wage during a particular pay period and more than half of their wages for that particular pay period were not from commission/sales. Moreover, during those particular pay periods wherein the inside salesperson exemption did not apply, TOWNE FORD did not factor in the commission payments and any bonuses in deciphering employees regular rate of pay for purposes of figuring out the overtime rate of pay. Moreover, and as alluded to above, TOWNE FORD failed to pay the correct and accurate amount of overtime to Plaintiff and others due to the “off the clock” work mentioned above as a result of the company’s policy in rounding/time shaving. Furthermore, TOWNE FORD failed to include bonuses/incentive payments/shift differentials in calculating Plaintiff’s and other employees’ regular rate of pay for use in deciphering the correct overtime rate of pay. Additionally, the incentive, shift differential, 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. TOWNE FORD violated Labor Code § 226.7 and the appropriate Industrial Welfare Commission Wage Order no. 4/7 because it failed to provide Plaintiff and other similarly situated aggrieved employees with 10-minute rest periods for every four hours of work, or majority portion thereof, throughout their employment. TOWNE FORD did not completely relieve Plaintiff and others of all duty during said rest periods. TOWNE FORD 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. In fact, Plaintiff did not receive

a single rest break during his entire employment with TOWNE FORD. Rest breaks were not enforced and were certainly not part of the company policy. As such, the culture as well as the policies and procedures of TOWNE FORD did not lend itself to the employees receiving consistent statutory rest breaks wherein they were relieved of all work duties. The environment at TOWNE FORD was not conducive to receiving statutory rest breaks under California law and timely, statutory rest breaks were not authorized or enforced.

16. TOWNE FORD violated Labor Code §§ 512 and 226.7 and the appropriate Industrial Welfare Commission Wage Order no. 4/7 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. TOWNE FORD did not completely relieve Plaintiff and other employees of all duty during said meal periods. TOWNE FORD 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. Like the rest breaks, receiving a consistent thirty-minute uninterrupted and timely meal break was not part of the company culture and was not enforced by TOWNE FORD. In fact, there were numerous occasions wherein Plaintiff received his meal break after the 5th hour, even as late as 11:30 a.m. for a shift that started at 6:00 a.m. The same was also true of the other hourly, non-exempt employees. Moreover, there were times wherein Plaintiff's meal breaks were interrupted due to service advisors asking him questions during his meal break (since Plaintiff would usually take his meal period on his toolbox on the premises). Consequently, it was the normal practice and custom of TOWNE FORD not to authorize, permit, and enforce timely statutory meal periods. If TOWNE FORD had Plaintiff sign a meal period waiver, it would not be valid and enforceable since Plaintiff and others generally worked more than a 5-hour shift. Furthermore, under California law, employees must make an affirmative decision every day regarding whether to waive their meal periods. August 13, 2003 DLSE Opinion Letter ("The decision to forego a meal period may not, therefore, be based on a specific requirement of the employer or on a policy or practice which could reasonably be perceived to be a condition of employment. Therefore, blanket "waivers" of meal periods …whether written or oral, will not be

considered valid."). If TOWNE FORD 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.

17. To the extent that TOWNE FORD 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 TOWNE FORD 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.

18. Furthermore, during the relevant time period, and due to the above labor code violations, TOWNE FORD failed to pay our client and other similarly situated aggrieved employees all wages due to them within any time period specified by California Labor Code section 204. Since Plaintiff was not compensated for his "off the clock" work and since Plaintiff did not receive meal and rest break premiums, Plaintiff would still be owed wages pursuant to Labor Code Section 204. TOWNE FORD was also in violation of California Labor Code section 226(a) by failing to include pertinent information on the wage statements provided to Plaintiff

and others, 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, TOWNE FORD did not provide our client and other similarly situated aggrieved employees with complete, accurate itemized wage statements.

19. During the relevant time period, TOWNE FORD 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).

20. TOWNE FORD 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.

21. During the relevant time period, Plaintiff and other aggrieved employees incurred necessary, business-related expenses and costs that were not reimbursed by TOWNE FORD. These costs include, but are not limited to uniforms, including shoes/boots, and use of personal cell phone for work purposes as Plaintiff was contacted on his personal cell phone by service advisors as they would ask Plaintiff about cars he was working on and would ask Plaintiff to send photos of parts of the car that were broken, etc. Plaintiff was also advised to use his personal cell phone to contact management if he needed anything. Accordingly, TOWNE FORD was in violation of California Labor Code sections 2800 and 2802.

22. Furthermore, TOWNE FORD did not provide proper and correct/accurate sick pay (inclusive of all bonuses/shift differentials/incentive payments) to Plaintiff and others that was also delineated on employee pay stubs and also failed to provide proper sick leave in violation of Labor Code sections 233 and 246. Moreover, there were no suitable seating/rest break facilities/break room for Plaintiff and other employees pursuant to Wage Order no. 4-2001/7-

2001.

23. Accordingly, Plaintiff now seeks civil penalties on behalf of himself and the aggrieved employees based on Defendants' alleged violations of the California Labor Code and the Wage Order.

FIRST (AND ONLY) CAUSE OF ACTION

PRIVATE ATTORNEYS GENERAL ACT

Representative Claim for PAGA penalties under California Labor Code sections 201, 202, 203, 204 and/or 204b, 226, 226.2, 226.3, 226.7, 233, 246, 510, 512, 558, 558.1, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 2698, 2699, 2800, 2802, and the applicable Industrial Welfare Commission Wage Order No. 5-2001

(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, on July 12, 2024 and November 4, 2024, Plaintiff provided the required written notice to the California Labor & Workforce Development Agency (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 July 12, 2024 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 himself 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 all current and former non-exempt or hourly paid employees who worked for Defendants at any of their California locations during the relevant time period.

30. Based on the acts alleged above, Plaintiff, on behalf of himself and 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. 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, 226, 226.2, 226.3, 226.7, 233, 246, 510, 512, 558, 558.1, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 2800, and 2802 via 2698 and 2699, and any other Labor Codes and Wage Order no. 4/7 violated 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 Plaintiff and 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.

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.

Respectfully submitted,

MESSRELIAN LAW INC.

Dated: November 7, 2024

By Maralle Messrelian

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