

United States District Court
For the Northern District of California

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

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JUAN BONIFACIO ULIN,
Plaintiff,
v.
ALAEA-72, INC. et al.,
Defendant.

No. C-09-3160-EDL

**ORDER FOLLOWING PRETRIAL
CONFERENCE**

At the Pretrial Conference on November 22, 2010, the Court ordered as follows:

1. Defendant’s Motion in Limine No. 1, requesting that the Court apply two different wage orders to the facts of this case, is DENIED. Industrial Welfare Commission Order No. 7-2001 Regulating Wages, Hours and Working Conditions in the Mercantile Industry defines “Mercantile industry” as “any industry, business, or establishment operated for the purpose of purchasing, selling, or distributing goods or commodities at wholesale or retail . . .” Wage Order No. 7-2001 at 2(H). Defendants admit that they own and operate a furniture and antique store and that Plaintiff was employed by them to perform warehouse and delivery services for this store, and thus they falls squarely within the wage order governing the Mercantile industry. If a business is covered by an industry order, then all employees of the business fall under that order. See DLSE Enforcement Manual §§ 43.6.13, 43.7. Thus, only Wage Order No. 7-2001 applies to this case.
2. Plaintiff concedes that the immigration documents provided to Defendants and referenced on his I-9 form in March 2008 were not his own.
3. The Court will hear evidence on the factual circumstances surrounding when and why

1 Plaintiff presented false documents to Defendants, and whether Defendants were actually deceived
2 by Plaintiff or were complicit in hiring or retaining an undocumented or falsely documented
3 employee. The parties and the Court are in agreement that Defendants bear the burden of proof on
4 this issue.

5 4. Defendants' Motion in Limine No. 2 for an Order that Plaintiff's alleged immigration
6 violation precludes his claim for restitution dating back four years under California Business &
7 Professions Code § 17200 is DENIED as premature. Until the Court hears evidence relating to the
8 false document issue, the Court will not rule on the legal impact that either parties' alleged
9 violations of the Immigration Reform and Control Act ("IRCA") may have on their respective
10 positions. However, the Court notes that the caselaw does not appear to support Defendants'
11 position that Plaintiff's § 17200 claim would be entirely barred based on equitable considerations,
12 though any award to Plaintiff could be affected. See Cortez v. Purcolator Air Filtration Products
13 Co., 23 Cal. 4th 163, 179-81 (2003). Additionally, if the evidence establishes that Defendants did
14 not ask Plaintiff for the required documentation from the time of his hire in July 2005 until March
15 2008, then there would likely be no basis on which to foreclose Plaintiff's recovery from July 13,
16 2005 to July 13, 2006 (the time period sought by Defendants) because Defendants were also in
17 violation of IRCA during this period.

18 5. Defendants' Motion In Limine No. 3 seeking an Order that the applicable overtime rate of
19 pay for all claims in this case will be determined by "dividing average earnings for a work day by
20 the number of hours actually worked" is DENIED. First, Defendants do not distinguish between the
21 differing standards for determining "regular rate of pay" under California and federal law. See
22 California Dairies Inc. v. RSUI Indem. Co., 617 F.Supp.2d 1023, 1043, n.9 (E.D.Cal. 2009) (noting
23 that differences in calculation methods between California and FLSA can cause a non-exempt
24 salaried employee whose "regular rate of pay" is calculated pursuant to California Labor Code § 510
25 to earn 37% more than a non exempt salaried employee earning the same weekly pay and working
26 the same amount of overtime whose "regular rate" is calculated by the FSLA method); Cal. Prac.
27 Guide Employment Litigation § 11:933-935 (discussing differences in methods of calculation under
28 state and federal law). Second, Defendants have not pointed the Court to any caselaw supporting

1 their interpretation of 29 C.F.R. § 778.112, and their interpretation would effectively read out a
2 portion of the regulation’s language. 29 C.F.R. § 778.112 provides that:

3 If the employee is paid a flat sum for a day’s work or for doing a particular job,
4 without regard to the number of hours worked in the day or at the job, and if he
5 receives no other form of compensation for services, his regular rate is determined
6 by totaling all the sums received at such day rates or job rates in the workweek
and dividing by the total hours actually worked. He is then entitled to extra half-
time pay at this rate for all hours worked in excess of 40 in the workweek.

7 Thus, under federal law, the proper method of regular rate of pay for Plaintiff’s federal claims is to
8 multiply his daily rate of pay by the number of days he worked during the workweek and divide by
9 the total hours he actually worked. He is then entitled to extra half-time pay at this rate for all hours
10 worked in excess of 40 in the workweek. Under California law, in contrast, Plaintiff’s rate of pay
11 should be calculated by multiplying his daily rate of pay by the number of days he worked during
12 the workweek and dividing by 40. See Espinoza v. Classic Pizza, Inc., 114 Cal.App.4th 968, 973
13 (2003) (under wage order mandating overtime pay for a workweek exceeding 40 hours *or* a workday
14 exceeding eight hours, “the method for computing the ‘regular rate of pay’ for an employee who
15 receives a fixed weekly salary for a fluctuating workweek is to divide that salary by no more than 40
16 hours”).

17 6. Defendants’ Motion In Limine No. 4 requests an Order precluding evidence or argument by
18 Plaintiff that he was not permitted to take rest breaks and that he not be awarded any damages for
19 allegedly missing rest breaks. Plaintiff does not oppose this motion and it is hereby GRANTED.

20 7. The parties shall meet and confer regarding the additional phone records recently produced
21 by AT&T, and should exchange and cooperate in the production of any voluminous record
22 summaries of the documents on an ongoing basis. The parties should further work together to
23 stipulate to the facts contained in the phone records, and limit their trial presentation to the
24 inferences to be drawn from the documents as opposed to the facts contained therein.

25 8. The parties shall exchange demonstrative exhibits no later than one business day before
26 using the exhibits at trial.

27 9. The court day will be from 9:00 a.m. until 3:15 p.m. The Court will take two fifteen-minute
28 breaks and one forty-five minute lunch each day. Plaintiff shall have no more than nine hours and

1 Defendants shall have no more than six hours to present their evidence.

2 22. Following trial and a determination of the number of overtime hours that Mr. Ulin should be
3 compensated for, if any, the Court may require the parties to provide the Court with additional
4 briefing regarding the appropriate calculation of damages to be awarded in light of the Court's ruling
5 on Defendants' Motion In Limine No. 3.

6
7 **IT IS SO ORDERED.**

8 Dated: November 24, 2010


ELIZABETH D. LAPORTE
United States Magistrate Judge

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28