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OF ORIGINAL FILED
Los Angeles Superior Court

FEB 22 2006

John A. Clarke, Executive Officer/Clerk
By _____, Deputy
L. ZULUETA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

IRENE MUTUC, MARIA HUSSER MEJIA, RHONDA MAURER and JANET CARNES on behalf of themselves and all persons similarly situated,

Plaintiffs,

v.

HUNTINGTON MEMORIAL HOSPITAL, an affiliate of SOUTHERN CALIFORNIA HEALTHCARE SYSTEMS, a California Corporation and DOES 1 to 100, inclusive,

Defendants.

Case No. BC288727

ASSIGNED FOR ALL PURPOSES TO JUDGE TRICIA ANN BIGELOW

DECLARATION OF DONNA M. DELL IN SUPPORT OF PLAINTIFFS' REPLY RE: MSJ/SAI

Hearing Date: February 27, 2006
Hearing Time: 8:30 a.m.
Department: 23

Complaint Filed: January 17, 2003
Trial Date: April 17, 2006

I, Donna M. Dell, declare:

1. I am an attorney licensed to practice law in the State of California and have been retained as an expert witness in the above captioned case. I have been providing consultant advice to California employers since my retirement as the California State Labor Commissioner from the Division of Labor Standards Enforcement (the "DLSE"). I am

intimately familiar with the regulation of wages, hours and working conditions, in the State of California, as presented in the case at bar. I know the following facts of my own personal knowledge and if called as a witness, I could testify thereto under oath.

QUALIFICATIONS

2. I was appointed by Governor Arnold Schwarzenegger to the position of State Labor Commissioner on November 15th, 2004 and served in this capacity until my retirement in December of 2005 (there is no State Labor Commissioner currently appointed). As the state's top labor law enforcement officer, California's labor commissioner is responsible for resolving wage claims between workers and employers; investigating complaints alleging discriminatory retaliation in the workplace; inspecting job sites to ensure compliance with workers compensation, child labor, minimum wage and overtime laws; enforcing prevailing wages on public works construction projects; qualifying, registering and licensing employers in regulated industries; promulgating regulations and issuing decisions interpreting California's labor and employment laws.

3. Prior to my appointment as the State Labor Commissioner, since 1994, I served as the senior vice president of human resources and chief employment counsel for ABM Industries, Inc., the largest facility services contractor listed on the New York Stock Exchange, and consisting of both union and non-union employees. At ABM Industries I was responsible for development and implementation of all aspects of administrative services, employee benefits and human resource policy and procedure for ABM's 70,000+ employees operating in 46 states and Canada.

4. From 1990 to 1994, I served as the vice president of employee relations and counsel for Wells Fargo Bank in San Francisco. At Wells Fargo, I had direct management responsibility for 10 departments including employee relations, workers' compensation, health and safety, disability management, unemployment insurance, equal employment opportunity and workplace diversity.

5. Between 1986 and 1989, I worked in private practice and as the associate general counsel for Hexcel Corporation in Dublin, California. From 1973 to 1984 I was the sales and marketing coordinator for Trans World Airlines, operating in San Francisco and New York.

6. I received my Juris Doctorate degree from the University of California, Hastings College of Law in San Francisco and my bachelor's degree in human relations and organizational behavior from the University of San Francisco, with specialized training in negotiations, dispute resolution and mediation. I am a member of the American Bar Association, the State Bar of California and the Bar Association of San Francisco, and past member of the Society for Human Resource Management, California Employment Law Council and the Northern California Employers' Roundtable. I served on the State Bar Advisory Committee on Continuing Legal Education, the Contra Costa County Advisory Committee on Equal Employment Opportunity, the County Advisory Committee on the Status of Women and as a Commissioner on California's Commission on the Status of Women. I was the preliminary drafter of California's sexual harassment legislation. I possess a lifetime California community college and adult education teaching credential in business law. Attached hereto as Exhibit 1 is a copy of my Curriculum Vitae.

RETENTION PURPOSE

7. I was retained by plaintiffs' counsel, Joseph Antonelli, to provide an expert opinion in the above captioned case. I have been asked by plaintiff's counsel to apply my expertise and provide an opinion via this declaration as to the underlying facts and the legality under California and federal law of the hourly pay plan implemented by defendant for its hourly employees. I have also been asked to provide my opinion as to the legality of the defendant's itemized statement ("pay stub") under California Lab. C. § 226. The compensation for my work in this capacity is based on an hourly rate and is not dependent on the opinions I reach, the outcome of the motion or the outcome of the litigation.

DOCUMENTS REVIEWED

8. In reaching an opinion as to the facts and law in this case, I have reviewed the briefs that were filed in the Court of Appeal by the parties to this litigation and the Phillips v. Huntington Memorial Hospital Case No. BC253767. Furthermore, I have read and reviewed the parties moving and opposition papers in conjunction with the cross motions for summary judgment in this matter. I have also read and reviewed the evidence submitted by the parties in conjunction with the cross motions.

ANALYSIS OF THE PAY PLAN

9. In my review of the defendant's pay stubs issued prior to December 20, 1999, I noted that the defendant stamped "8HR. RATE" on the pay stub. This is commonly referred to in labor law as the "regular rate" of pay - the hourly rate that an employee earns when he/she works a non overtime shift. I also noted that the employees were paid this rate of pay when they worked 8-hour non-overtime shifts, attended training classes, took vacation, were paid for sick time and virtually every element of paid compensation except when they worked 10, 11, or 12 hour overtime shifts. Whenever these same employees worked overtime of 10 hours or more, the defendant paid its nurses what is regularly referred to as the "12HR RATE" - 85.714% of the "8HR Rate" for the first 8 hours worked and 1 ½ times that lower rate for the hours worked over eight. It is categorically unlawful, both under California and federal law (California adheres to the overtime standards adopted by the U.S. Department of Labor to the extent that those standards are not inconsistent with California law) to pay a lower wage than the "regular rate" of pay to employees for purposes of calculating overtime pay. (See 29 CFR § 778.308). In my capacity as the Labor Commissioner of the State of California, I have had substantial experience in supervising and overseeing DLSE attorneys and deputy labor commissioners in ensuring that the employers do not circumvent the overtime pay laws by establishing "artificial rates" upon which they base their overtime calculations. As set forth in 29 CFR §778.327 and 29 CFR §778.500, the mathematical manipulation of an employee's "regular rate" is not allowed. The regulations explain that an employer might

adopt a series of different rates for the same work such that an employee would earn no more than his/her straight-time rate-of-pay no matter how many hours an employee worked, and that such a practice "is obviously a book keeping device designed to avoid the payment of overtime compensation and is not in accordance with the law." This is exactly the practice being employed by defendant.

10. I have reviewed the defendant's December 20, 1999 Memorandum re: "Revised Pay Practices." This memorandum confirms that the defendant merely took the "8Hr.RATE" reference off the pay check but continues to pay two rates of pay for the same work to the same employee. This was the same conclusion reached by the Court of Appeal in the published decision of Huntington Memorial Hospital v. Superior Court (2005) 131 Cal App 4th 893. The defendant's plan is a subterfuge in an attempt to avoid paying the proper overtime rate to its hourly employees. I have conducted my analysis consistent with the DLSE enforcement manual, California and federal law.

11. Defendants have vigorously argued that its 12-hour rate cannot be a subterfuge or artifice to avoid payment of overtime because it was "agreed upon" by the employer and the class members. An employer does properly have the right to lower an employee's rate of pay, however an employer may not elicit an agreement from its employees in violation of the law. The subterfuge exists here in that the agreed upon lower rate of pay only applies where it is used to circumvent the proper payment of overtime. That is, the lower hourly rate is only for overtime hours 10, 11, 12, and on.

12. Defendant's reliance on DLSE Opinion Letter 2003.01.29 authored by Tom Cadell, Esq. is misplaced. As the Labor Commissioner I did read and review the facts presented in the January 29, 2003 opinion letter. The letter addressed a situation where employees in a hospital who were scheduled to work a 12-hour shift were "called off" work. The opinion letter envisioned a situation whereby the employer would, in effect, pay a discretionary type of "bonus" to its employees. A discretionary bonus is one that is typically given unexpectedly and at the sole discretion of the employer, with no legal right of conversion

- (e.g., a random incentive bonus). Defendant's pay plan is distinguishable on two fronts. First, Defendant's "bonus" pay is not discretionary - rather the so-called "bonus pay" is guaranteed to employees and it is well-settled in California law that non-discretionary bonuses are calculated into an employee's regular rate of pay for overtime purposes. Secondly, and more importantly, the "bonus pay" is paid not only when the employee is "called off" work, but when the employee is "scheduled" to work a non-overtime shift, takes a day of vacation, calls in sick and is paid for the time-off, etc. It is, in essence paid for everything except when the employee works 10, 11, or 12 hour overtime shifts. This was not the fact pattern presented to the DLSE in Opinion Letter 2003.01.29.

13. My review of the relevant documents, including the defendant's various pay stubs leads me to conclude that the pay stubs do not comply with the simple and plain meaning of Lab. C § 226. The defendant's pay stubs in December 2005 reveal that the hospital is in express violation of the plain meaning of Lab. C § 226. The December 2005 pay stubs reviewed show that nowhere on those pay stubs is there a reference to "Total Hours Worked", nor can an accurate determination of total hours worked be reached by totaling those numerals listed under the heading "Hrs" on the pay stub. I also reviewed the December 9, 2005 declaration of Lisa Reese, HMH's Payroll Manager and exhibits thereto. The evidence shows that the defendant has consistently failed to accurately reflect the total hours worked on its itemized statement to employees in violation of Lab. C. § 226. In my capacity as Labor Commissioner I would oversee DLSE attorneys and deputy labor commissioner's enforcement of Lab. C. § 226 penalties. In my professional opinion based on the facts and evidence presented, this defendant would be liable for penalties of $50 for the initial pay period and $100 for each subsequent pay period in which such violation occurred, up to $4,000 per employee. The penalties are constitutional and in no way violate the defendant's due process rights. It is hard to know how the legislature could protect the rights of all employees in the state of California if defendant were able to avoid such valid statutory penalty assessments.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed this 20th day of February 2006 at Walnut Creek, California.

Donna M. Dell

Donna M. Dell