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U.S. DISTRICT COURT E.D.N.Y.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

★ DEC 28 2010 ★

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BIENVENIDO ORTIZ, both individually and on
behalf of all other similarly situated persons,

LONG ISLAND OFFICE
(SI)

Plaintiff,

COMPLAINT

CV-10 5728

-against-

JURY TRIAL DEMANDED

PRESTIGE KITCHEN DESIGN, INC., and
MICHAEL AMAR, an individual,

WEXLER, J.
WALL, M.J.

Defendants.
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Plaintiff, BIENVENIDO ORTIZ ("Plaintiff"), on behalf of himself and all others similarly situated, by and through his attorneys The Law Office of BORRELLI & ASSOCIATES, P.L.L.C. and VALLI KANE & VAGNINI, LLP brings this action for damages and other legal and equitable relief from the Defendants, PRESTIGE KITCHEN DESIGN, INC. ("PKD") and MICHAEL AMAR ("Amar"), an individual, (collectively "Defendants") for violations of the Fair Labor Standards Act, as amended, 29 U.S.C. §§ 201 *et seq.* ("FLSA"), the New York State Labor Law ("Labor Law"), and any other cause(s) of action that can be inferred from the facts set forth herein.

INTRODUCTION

1. This is a collective action brought by Plaintiff challenging acts committed by Defendants against Plaintiff and those similarly-situated amounting to violations of Federal and State wage and hour laws.

2. Plaintiff also brings this collective action on his own behalf and those similarly-situated pursuant to the Federal and State laws requiring overtime pay.
3. Defendants committed violations of these laws by engaging in a systematic scheme of failing to compensate Plaintiff and similarly-situated employees their statutorily required overtime pay.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, which confers original jurisdiction upon this Court for actions arising under the laws of the United States, and pursuant to 28 U.S.C. §§ 1343(3) and 1343(4), which confer original jurisdiction upon this Court in a civil action to recover damages or to secure equitable relief (i) under any Act of Congress providing for the protection of civil rights; (ii) under the Declaratory Judgment Statute, 28 U.S.C. § 2201; (iii) under 29 U.S.C. § 201 et. seq.
5. The Court's supplemental jurisdiction is invoked pursuant to 28 U.S.C. § 1367(a), which confers supplemental jurisdiction over all non-federal claims arising from a common nucleus of operative facts such that they form part of the same case or controversy under Article III of the United States Constitution.
6. Venue is proper in this Court pursuant to 29 U.S.C. §§ 201-219, in as much as this judicial district lies in a State in which the unlawful employment practices occurred. Venue is also proper in this Court pursuant to 28 U.S.C. § 1391(b)(1) and (c), in that Defendants maintain offices, conduct business and reside in this district.

PARTIES

7. Plaintiff resides in Kings County, New York.

8. Upon information and belief, Defendant PKD is a corporation organized under the laws of the State of New York and has a principal place of business within Nassau County, New York. Upon information and belief, the amount of qualifying annual volume of business for Defendant PKD exceeds \$500,000.00 and thus subjects the business to the FLSA's overtime requirements. Additionally, all of Defendant PKD's employees are engaged in interstate commerce as they all handle goods that have been moved in interstate commerce. This independently subjects Defendant PKD to the overtime requirements of the FLSA.
9. Upon information and belief, Defendant Amar is a citizen of Israel and resides in Great Neck, New York. Defendant Amar has an ownership stake in Defendant PKD and is thus personally liable for unpaid wages. Further, Defendant Amar qualifies as an employer for employees of Defendant PKD under the FLSA and Labor Law.

COLLECTIVE ACTION ALLEGATIONS

10. Plaintiff seeks to bring this suit pursuant to 29 U.S.C. § 216(b) on his own behalf as well as those in the following class:

Current and former employees of Defendants who perform any work in any of Defendants' locations as non-managerial employees who give consent to file a cause of action to recover overtime compensation which is legally due them for the time worked in excess of forty (40) hours in a given work week as well as to recover the difference between the amount of wages actually paid to them and the statutorily minimum amount due ("FLSA Plaintiffs").

11. Plaintiff is similarly situated to all such individuals because while employed by Defendants he and all FLSA Plaintiffs performed similar tasks, were subject to the same laws and regulations, were paid in the same or similar manner, were paid the same or

similar rate, were required to work in excess of forty (40) hours per work-week, and were not paid the required one and a half (1 ½) times their respective regular rates of pay for overtime worked.

12. Defendants treated all FLSA Plaintiffs similarly in requiring them to work in excess of forty (40) hours per work week without adequate overtime compensation. Plaintiff and FLSA Plaintiffs work and/or worked for Defendants in their place of business five (5) or six (6) days per week for an average total of fifty (50) hours per week. They were regularly and specifically scheduled to work more than forty (40) hours per work week, yet Defendants did not pay them the statutorily required overtime compensation. This practice was enforced against all employees in similar or identical fashion.
13. All FLSA Plaintiffs are engaged in interstate commerce as they are required to handle goods that have been moved in interstate commerce.
14. Defendants are and have been aware of the requirement to pay Plaintiff and FLSA Plaintiffs for overtime work, yet purposefully chose not to.

Overtime and Wage Violations

15. Plaintiff, throughout his tenure of employment, was a full-time employee of Defendants who was paid in cash on a weekly basis. From the commencement of his employment in March or April 2003 until 2004, for about 12 months, Plaintiff was paid \$10 per hour for each hour worked. In 2004, Plaintiff earned \$11 per hour for each hour worked. Plaintiff was paid \$11 per hour from 2004 until 2005 each hour worked, for about 12 months. In or about 2005, Plaintiff earned \$12 per hour for each hour worked. Plaintiff was paid at the rate of \$12 per hour for each hour worked from 2005 until 2006, for about 12 months. In 2006, Plaintiff earned \$13 per hour for each hour worked. Plaintiff was paid at the rate

of \$13 per hour for each hour worked from 2006 until early 2007, for about 12 months. In early 2007, Plaintiff earned \$14 per hour for each hour worked. Plaintiff was paid at the rate of \$14 per hour for each hour worked from early 2007 until late 2007. In early 2007, Plaintiff received a raise to \$15 per hour for each hour worked. As of the date of the filing of this complaint, Plaintiff continues to be paid at the rate of \$15 per hour for each hour worked.

16. Throughout Plaintiff's entire tenure of employment with Defendants, Plaintiff was required to work, and did in fact work five (5) or six (6) days per week, Monday through Saturday, and sometimes Sunday, from 8:00 a.m. until 4:30 p.m. Throughout his tenure of employment with Defendants, Plaintiff has worked an average of 50 hours per week.
17. Defendant PKD's shop opened and closed based on the whims of Defendant Amar, and so Defendant PKD did not have regular business hours of operation, and so Plaintiff's would sometimes work longer hours.
18. Plaintiff, when working in excess of forty (40) hours per week, was compensated at his straight rate of pay for those hours.
19. Plaintiff, during his period of employment, was not compensated in accordance with the statutorily required overtime rate of pay for any hour worked per work week in excess of forty (40). Plaintiff was only compensated at his regular rate of pay for any hours worked per week in excess of forty (40), which was clearly less than the statutorily mandated rate of one and one-half (1 ½) times his normal rate of pay.
20. All of Defendants' employees worked similar hours to Plaintiff and they were not compensated at the legally mandated overtime rate for hours worked per week in excess of forty (40). Additionally, Plaintiff and all similarly situated employees were required to

work in excess of ten (10) hours per day and were not compensated under New York's spread of hours law.

FACTS

21. Plaintiff commenced his employment with Defendants in March or April 2003 in the position of Carpenter. Plaintiff was originally hired by Amar.
22. Plaintiff's work duties at PKD included building and installing furniture.
23. Plaintiff worked at the Defendants' shop located at 60 Hempstead Gardens Drive, West Hempstead, New York 11552.
24. During the tenure of his employment, Plaintiff was compensated in the manner described above.
25. On October 25, 2010, Plaintiff's counsel sent a letter to Defendants advising them of Plaintiff's potential claims for violations of the FLSA and Labor Law.
26. On October 29, 2010, Plaintiff arrived at work approximately 8:00 a.m. Upon his arrival at the workplace, Defendant Amar confronted Plaintiff in front of about nine (9) of Plaintiff's coworkers.
27. Defendant Amar, screaming and cursing at Plaintiff, demanded to know why Plaintiff had obtained counsel and raised claims against him. Defendant Amar became increasingly aggressive and began to look for an object with which to strike Plaintiff.
28. Plaintiff began to walk away from Amar. Defendant Amar swung his fist at Plaintiff and attempted to strike Plaintiff's head. Plaintiff, seeing Defendant Amar swinging at him, managed to dodge Defendant Amar's blow.
29. Plaintiff and Defendant Amar continued to argue, but Defendant Amar began to calm down. Plaintiff accompanied Defendant Amar to Defendant Amar's office. Defendant Amar accused Plaintiff of stealing his tools, and threatened to call the police. Defendant Amar told Plaintiff that he was fired, and demanded that Plaintiff leave immediately.

30. Plaintiff told Defendant Amar that he needed his timecard in order to punch out for the day. Around 9:30 a.m., Defendant Amar forcibly pushed Plaintiff out of the office without allowing him to punch out.

31. Subsequently, Defendant Amar called Plaintiff's counsel and told Plaintiff's counsel that Plaintiff did not want to go forward with the lawsuit and to drop the suit (there was no active lawsuit by Plaintiff against Defendant Amar at that time). Defendant Amar threatened that Plaintiff would be fired if he persisted with his claims.

32. Later that same day, Defendant Amar called Plaintiff and told him to go back to work.

33. Plaintiff arrived back at the workplace around 12:00 p.m.

34. As of the date of the filing of this complaint, Plaintiff continues to work for Defendants.

**AND AS FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS ON BEHALF
OF PLAINTIFF AND ALL COLLECTIVE PLAINTIFFS**

For Violation of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219

35. Plaintiff re-alleges and incorporates by reference all allegations in all preceding paragraphs.

36. Plaintiff and all FLSA Plaintiffs were required to work in excess of forty (40) hours a week without being compensated for those hours at the statutorily required time and a half pay. This practice was willful and lasted for the duration of the relevant time periods.

37. This practice is in violation of the Fair Labor Standards Act.

**AND AS FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS ON
BEHALF OF PLAINTIFF AND ALL CLASS PLAINTIFFS**

For Violation of the New York Labor Law §§ 650 et. seq.

38. Plaintiff re-alleges and incorporates by reference all allegations in all preceding paragraphs.
39. Plaintiff and all FLSA Plaintiffs were required to work in excess of forty (40) hours a week without being compensated for those hours at the statutorily required time and a half pay. This practice was willful and lasted for the duration of the relevant time periods.
40. This practice is in violation of the New York Labor Law §§ 650 et. seq.

**AND AS FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANTS ON BEHALF
OF PLAINTIFFS AND ALL CLASS PLAINTIFFS**

For violation of 12 NYCRR § 142-2.4

41. Plaintiff re-alleges and incorporates by reference all allegations in all preceding paragraphs.
42. Plaintiff and all FLSA Plaintiffs were required to work shifts in excess of ten hours on a regular basis. Plaintiff and FLSA Plaintiffs were not paid the statutorily required “spread of hours” pay, which would have required an additional hour of pay for each day Plaintiff and all FLSA Plaintiffs worked.
43. This practice is in violation of 12 NYCRR § 142.24.

**AND AS FOR A FOURTH CAUSE OF ACTION AGAINST DEFENDANTS ON
BEHALF OF PLAINTIFF**

Retaliation in Violation of the Fair Labor Standards Act

44. Plaintiff re-alleges and incorporates by reference all allegations in all preceding paragraphs.
45. Plaintiff filed a formal complaint to Defendants that Plaintiff was not being compensated in accordance with the New York Labor Law as well as the FLSA.
46. In direct retaliation for Plaintiff's complaint, Defendants threatened to terminate Plaintiff's employment, attempted to strike Plaintiff, and harassed Plaintiff's counsel, as mentioned above.
47. This action was in direct violation of the Fair Labor Standards Act.

**AND AS FOR A FIFTH CAUSE OF ACTION AGAINST DEFENDANTS ON
BEHALF OF PLAINTIFF**

Retaliation in Violation of the New York Labor Law

48. Plaintiff re-alleges and incorporates by reference all allegations in all preceding paragraphs.
49. Plaintiff filed a formal complaint to Defendants that Plaintiff was not being compensated in accordance with the New York Labor Law as well as the FLSA.
50. In direct retaliation for Plaintiff's complaints, Defendants threatened to terminate Plaintiff's employment, attempted to strike Plaintiff, and harassed Plaintiff's counsel, as mentioned above.
51. This action was in direct violation of the New York Labor Law.

**AND AS FOR A SIXTH CAUSE OF ACTION AGAINST DEFENDANTS ON
BEHALF OF PLAINTIFF**

Assault

52. Plaintiff re-alleges and incorporates by reference all allegations in all preceding paragraphs.

53. Shortly after receiving a letter from Plaintiff's counsel, Defendant Amar swung his fist at Plaintiff in an attempt to strike Plaintiff's head.

54. Defendant Amar's attempt to strike Plaintiff placed Plaintiff in imminent apprehension of harmful conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and all FLSA Plaintiffs, demands judgment against Defendants as follows:

1. Demand a jury trial on these issues to determine liability and damages;
2. Preliminary and permanent injunctions against Defendants and their officers, owners, agents, successors, employees, representatives, and any and all persons acting in concert with them, from engaging in each of the unlawful practices, policies, customs, and usages set forth herein;
3. A judgment declaring that the practices complained of herein are unlawful and in violation of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, ("FLSA") and the New York Labor Law, §§ 650 et. seq.; and the New York "spread of hours" pay required under 12 N.Y.C.R.R. § 142-2.4.

4. All damages which Plaintiff and FLSA Plaintiffs have sustained as a result of Defendants' conduct, including back pay, front pay, general and special damages for lost compensation and job benefits they would have received but for Defendants' improper practices;

5. An award to the Plaintiff and FLSA Plaintiffs of compensatory damages, including but not limited to damages for emotional pain and suffering where appropriate;

6. An award to the Plaintiff and FLSA Plaintiffs of pre-judgment interest at the highest level rate, from and after the date of service of the initial complaint in this action on all unpaid wages from the date such wages were earned and due;

7. An award to the Plaintiff and FLSA Plaintiffs for the amount of unpaid wages, including interest thereon, and penalties subject to proof;

8. Exemplary and punitive damages in an amount commensurate with Defendants' ability and so as to deter future malicious, reckless, and/or intentional where permissible under law;

9. Awarding Plaintiff his costs and disbursements incurred in connection with this action, including reasonable attorneys' fees, expert witness fees, and other costs;

10. Pre-judgment and post-judgment interest, as provided by law; and

11. Granting Plaintiff and FLSA Plaintiffs other and further relief as this Court finds necessary and proper.

Dated: December 22, 2010
Carle Place, New York

Respectfully submitted,

**THE LAW OFFICE OF
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