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February 22, 2022

Via Email:

City of Santa Clara
Attention: Legal Department
CityAttorney@santaclaraca.gov

Re: Leo Valdez v. City of Santa Clara

This correspondence is protected by California Evidence Code § 1154 regarding settlement discussions.

Legal Department:

Abramson Labor Group has been retained to represent Leo Valdez ("Plaintiff") in his claims against City of Santa Clara ("Defendant") for (1) Employer Liability for Harassment and Hostile Work Environment; (2) Liability for Unsafe Working Conditions; (3) Failure to Provide Overtime Wages; and (4) Failure to Issue Accurate and Itemized Wage Statements.

Our office conducted a thorough and extensive interview with Mr. Valdez and determined that the facts provided below clearly support these causes of action. After conferring with our client, we are committed to moving forward with the following claims. However, in the interest of efficient resolution for all parties, this letter includes an offer for settlement of the above-referenced claims before incurring the costs of litigation.

Factual Background

Defendant hired Mr. Valdez on or around December 4, 2015 as a Water Pump Technician. Primarily, Mr. Valdez was responsible for working with water operations and maintenance. Mr. Valdez was compensated \$47.00 an hour and is currently employed with Defendant.

Mr. Valdez is Hispanic and throughout the course of his employment, Defendant subjected Mr. Valdez to disparate and discriminatory treatment on the basis of his race. Specifically, Defendant assigned Mr. Valdez a heavier workload than Caucasian employees. Additionally, Defendant's employees made discriminatory comments regarding Mr. Valdez's race. Defendant also failed to provide a safe working environment as Defendant required employees to perform job duties without fall protection.

As detailed below, Defendant is clearly liable to Mr. Valdez for the following violations of California law.

Employer Liability for Harassment and Hostile Work Environment

In order to prevail on a hostile work environment claim, plaintiff must show that his “workplace was permeated with discriminatory intimidation . . . that was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment.” Harris, 510 U.S. at 21, 114 S.Ct. 367 (internal quotation marks and citations omitted). “The working environment must both be subjectively and objectively be perceived as abusive.” Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995).

Furthermore, courts evaluate the totality of the circumstances test to determine whether a plaintiff’s allegations make out a colorable claim of hostile work environment. In Harris, the court listed frequency, severity and the level of interference with work performance among the factors particularly relevant to the inquiry. When assessing the objective portion of a plaintiff’s claim, courts assume the perspective of the reasonable victim. See Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).

Every individual is entitled to work in a harassment-free environment and an employer’s failure or refusal to provide this, in and of itself, is the denial of “terms, conditions, privileges of employment” and is a violation of the law. (Government Code Sections 12940, et seq.; 2 Cal. Admin. Code 7287.6; DFEH v. Fresno Hilton Hotel, (1984) FEHC Dec. No. 84-03, p. 29; and see also Harris v. Forklift Systems, Inc. (1993) 114 S.Ct. 367.

Although FEHA Section 12940(j)(1) prohibits any “person” from harassing an employee, FEHA Section 12940(k) imposes on the employer the duty to take all reasonable steps to prevent this harassment (as well as discrimination) from occurring in the first place and to take immediate and appropriate action when it is or it should be aware of the unlawful conduct. Carrisales v. Department of Corrections (1999) 21 Cal.4th 1132, 1140. As discussed above, not only did Defendant not prevent harassment from occurring, they committed and perpetuated the harassment.

To establish harassment under FEHA, an employee must demonstrate: (1) membership in a protected group, (2) that she was subjected to harassment because she belonged to this group, and (3) the alleged harassment was so severe that it created a hostile work environment.

Here, Mr. Valdez satisfies the prima facie case because: (1) Mr. Valdez is a member of a protected class because he is Hispanic; (2) he was subjected to harassment specifically because he is Hispanic; and (3) the harassment was both severe and pervasive that it created a hostile work environment for our client. The harassment was severe in nature as Defendant’s employees made discriminatory comments and assigned Mr. Valdez a heavier workload. Furthermore, the harassment was pervasive because it occurred throughout his employment. Thus, Mr. Valdez has a prima facie case for a hostile work environment.

Liability for Unsafe Working Conditions

Employers have a general duty under the Occupational Safety and Health Act (OSHA) to provide a workplace free from "recognized" hazards. To protect workers from unsafe conditions,

California Labor Code Section 6400 provides, "[e]very employer shall furnish employment and a place of employment that is safe and healthful for the employees therein."

California Labor Code Section 6311 provides that, "[n]o employee shall be laid off or discharged for refusing to perform work in the performance of which this code, including Section 6400, any occupational safety or health standard or any safety order of the division or standards board will be violated, where the violation would create a real and apparent hazard to the employee or his or her fellow employees".

Furthermore, "[a]ny employee who is laid off or discharged in violation of this section or is otherwise not paid because he or she refused to perform work in the performance of which this code, any occupational safety or health standard or any safety order of the division or standards board will be violated and where the violation would create a real and apparent hazard to the employee or his or her fellow employees shall have a right of action for wages for the time the employee is without work as a result of the layoff or discharge."

Here, Defendant required employees to perform jobs without proper safety equipment such as fall protection.

Labor Code Violations

A) Unpaid Wages/Overtime Wages

An employer is required to pay an employee for all hours worked. "Hours worked" means the time during which an employee is subject to the control of an employer and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

Pursuant to the applicable IWC Wage Orders, and California Code of Regulations, Title 8, Section 11010 no employee shall be employed for more than eight hours in any workday or forty hours in any workweek unless the employee receives overtime wages. Employment beyond eight hours in any workday or more than six days in any workweek is permissible provided the employee is compensated for such overtime at not less than: 1) One and one-half times the hourly rate of pay for all hours worked in excess of eight (8) hours per day, forty (40) hours per week, and/or the first eight (8) hours of the seventh consecutive workday; and twice times the rate of pay for all hours worked in excess of twelve (12) hours per day and/or eight (8) hours on the seventh consecutive workday; and 2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh consecutive day of work in a workweek. Labor Code § 510.

Mr. Valdez was required to work after Mr. Valdez had clocked out for the day and was never paid for those hours worked.

Labor Code § 1194.2 provides that in an action "to recover wages because of the payment of a wage less than the minimum wage fixed by an order of the commission or by statute, an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully paid and interest thereon."

Though § 1194.2 states liquidated damages may not be recovered for failure to pay overtime, in *Sillah v. Command Int'l Sec. Servs.*, 154 F.Supp.3d 891 (N.D. Cal. 2015), the court found plaintiffs suing for failure to pay overtime could recover liquidated damages under § 1194.2 if they also showed they were paid less than minimum wage. Citing *Cruz v. Quang*, No. 13-cv-00181 VC, 2015 WL 348869, at *6 (N.D. Cal. Jan. 23, 2015). Under federal law, an employer violating 29 U.S.C. § 207 is liable to the affected employee not only for the unpaid minimum wages or overtime, but also "in an additional equal amount" in liquidated damages. 29 U.S.C. § 216(b).

Defendant failed to pay overtime wages when Mr. Valdez worked over 8 hours in a day or over 40 hours in a week. These hours were not paid at all. Defendant owes Mr. Valdez Mr. Valdez' overtime rate of pay for those hours worked.

B) Noncompliant Wage Statements

California Labor Code § 226(a) requires that employers, when paying their non-exempt employees' wages, include an "itemized statement in writing showing" the "total hours worked by the employee," and "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate."

California wage orders require that every employer must keep accurate records for each non-exempt employee for at least two years identifying: (1) when he/she begins and ends work each period; (2) when he/she takes a meal period, unless all work at the location ceases; (3) his/her total daily hours worked; and (4) the total hours he/she worked in the payroll period and all applicable rates of pay.

Defendant failed to maintain an itemized wage statement that accurately reports total hours worked, which includes Plaintiff's work off-the-clock during lunch and before and after clock-in and out. Defendant failed to accurately account for all overtime hours worked and instead inaccurately recorded them or did not record them at all.

Violation of Labor Code § 226 entitles Mr. Valdez to an award of penalties amounting to \$50 for the initial violation and \$100 for each subsequent pay period that Defendant failed to provide accurate records, not to exceed \$4,000. Here, Defendant failed to correctly itemize our clients accrued work hours. Defendant's liability is outlined below.

Punitive Damages

California Civil Code §3294 provides, in part, "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds." *College Hospital, Inc. v. Superior Court* (1994) 8 Ca1.4th 704, 712.

For corporate punitive damages liability, §3294(b) requires that the wrongful act giving rise to the exemplary damages be committed by an "officer, director, or managing agent." *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572. Importantly, "malice does not require actual intent to harm." *Angie M v. Sup. Ct.* (1995) 37 Cal.App.4th 1217, 1228.

Even "[n]onintentional conduct comes within the definition of malicious acts punishable by the assessment of punitive damages when a party intentionally performs an act from which he knows, or should know, it is highly probable that harm will result." *Ford Motor Co. v. Homes Ins. Co.* (1981) 116 Cal.App.3d 374,381; *Angie M*, 37 Cal.App.4th at 1228.

California Attorney's Fees Provisions

In a wage and hour employment law claim, specifically for claims brought under Labor Code §226, §203 and §2802, Plaintiffs are entitled to mandatory attorneys' fees. In claims for discrimination and retaliation under California law, specifically for claims brought under FEHA, attorney's fees are generally awarded to prevailing plaintiffs (Gov. Code, § 12965, subd. (b)). In whistleblower actions, prevailing plaintiffs are also entitled to attorneys' fees. As such, please note that my hourly rate for this employment-related action has been court approved at \$650 per hour.

Defendant's full liability is calculated below.

Damages

Harassment/Hostile Work Environment

\$60,000.00 = Emotional distress damages

Unpaid Wages/Overtime

\$1,410.00 = (20 hours) x (\$70.50 overtime rate)

\$1,410.00 = Liquidated damages

Noncompliant Wage Statements

\$4,000.00 = (\$50 for first violation) + (\$100 penalty x 39.5 additional pay periods)

Attorney fees/costs

\$8,000.00

Punitive Damages, to be determined

TOTAL: \$74,820.00

Conclusion

At this stage of the case, and in the interest of trying to resolve prior to costly and timely litigation, Mr. Valdez has authorized our office to offer the settlement of his claims for **a one-time payment of \$74,820.00**. As liability becomes clarified and witnesses' testimony solidifies, this case's value will inevitably increase significantly with associated attorneys' fees and liability paving the way to larger demands as time progresses.

If I do not hear from your office by **March 8, 2022** with a serious proposal of settlement, our demand is off the table permanently.

I hope we can have a productive conversation before this case goes into active litigation and look forward in resolving this matter together.

Sincerely,



W. Zev Abramson, Esq.
ABRAMSON LABOR GROUP