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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

NOV 18 2002

ALAN SLATER, Clerk of the Court
E. Gamboa
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

11 CONSTRUCTION PROTECTIVE SERVICES,)
12 INC.)
13 Plaintiff,)
14 v.)
15 ARTHUR LUJAN, STATE LABOR)
16 COMMISSIONER, AND DOES 1 - 10,)
17 Defendants.)
18)
19)

CASE NO. **02CC17330**
Assigned for All Purposes to
VERIFIED COMPLAINT FOR
DECLARATORY RELIEF [CALIFORNIA
CODE OF CIVIL PROCEDURE §1060]
JUDGE KIM G. DUNNING
DEPT. C26

20 Plaintiff Construction Protective Services, Inc. ("CPS") alleges as follows against defendants
21 Arthur Lujan, State Labor Commissioner for the State of California, and Does 1 through 10
22 (collectively, "Defendants"):

PARTIES AND VENUE

- 24 1. CPS is, and at all times mentioned herein was, a corporation. CPS was incorporated
25 in California in 1992 and has its principal place of business in Los Angeles County.
- 26 2. Defendant Arthur Lujan is the State Labor Commissioner for the State of California,
27 and the Chief of the Division of Labor Standards Enforcement, a division of the Department of
28

1 Industrial Relations. The State Labor Commissioner and the Division of Labor Standards
2 Enforcement are charged with enforcing laws, regulations, and standards concerning the wages and
3 hours of employees in the state. The regulations they enforce include, for example, Wage Orders
4 promulgated by the Industrial Welfare Commission.

5 3. CPS is ignorant of the true names and capacities of defendants sued herein as Does 1-
6 10, inclusive, and therefore sues those defendants by fictitious names. CPS will amend this
7 Complaint to allege their true names and capacities once they are ascertained. CPS is informed and
8 believes, and on that basis alleges, that at all times mentioned in this Complaint each defendant was
9 the agent and employee of every other defendant, that each acted in the course and scope of his, her,
10 or its authority as an agent, that each acted with the permission and consent of every other defendant,
11 and that each ratified the conduct of every other defendant.

12 4. Venue is proper in Orange County because the parties are doing, and at all times
13 relevant to this Complaint have done, business in that county and some portion of CPS's claim arose
14 in that county.

15 FACTUAL BACKGROUND

16 5. CPS employs guards to provide security at construction sites. CPS has operations in
17 California, Texas, Arizona, Nevada, and Florida. It employs about 1300 people, approximately 800
18 of whom work in California.

19 6. CPS's guards fall into two categories, hourly guards and in-residence guards. This
20 Complaint concerns the approximately 400 in-residence guards whom CPS employs in California.
21 In-residence guards sign employment agreements that require them to live at the job site for the
22 duration of the construction project, often at least six months, and in some cases up to two years or
23 more. The in-residence guards live in fully equipped trailer homes that CPS provides to them at a
24 low monthly rent. Each trailer home has a kitchen, a bathroom with shower, eating and sleeping
25 areas, and telephone access to corporate headquarters. Each in-residence guard has exclusive access
26 to his trailer, and uses it as his primary residence. The guards keep their clothes and other personal
27 belongings at their trailer homes during the time they live there, and most outfit their homes with
28 televisions, radios, and other personal items.

1 7. Because, as CPS has learned, most thefts from construction sites occur when people
2 are coming to and going from the site, the in-residence guards work during those times. While exact
3 schedules may vary from site to site, in-residence guards typically work a split shift from 3:00 p.m.
4 to 9:00 p.m. and from 5:00 a.m. to 7:00 a.m. on weekdays. During those working hours, the in-
5 residence guards are required to be in uniform and to patrol the construction premises, watch
6 tradesmen and workers enter and leave the site, and generally provide a highly visible security
7 presence. For the eight nighttime hours between 9:00 p.m. and 5:00 a.m., the guards are free to sleep
8 in their trailers, watch television, and engage in other private pursuits. They are not required to
9 patrol the premises or to perform any work duties during those hours except in the rare instances
10 when a security problem arises at night.

11 8. On weekends, in-residence guards typically are on duty from 5:00 a.m. to 9:00 p.m.,
12 and then sleep or engage in other personal pursuits during the nighttime hours of 9:00 p.m. to 5:00
13 a.m.

14 9. Each construction site houses numerous security sensors. Wires from the sensors are
15 attached to an alarm panel in the guard's trailer home. If a wire is tripped somewhere on the site, the
16 tripping of the wire causes an alarm buzzer to sound in the guard's trailer home. The guard must
17 investigate and secure the area where the sensor detected a problem. After he has done so, he
18 records on CPS tracking forms the amount of time he spent responding to the call and informs CPS
19 corporate headquarters. He then is again free from duties and can sleep or relax in his trailer home.

20 10. CPS pays each in-residence guard an hourly amount for each of the hours the guard
21 works during the day, typically between 3:00 p.m. and 9:00 p.m. and between 5:00 a.m. and 7:00
22 a.m. on weekdays and between 5:00 a.m. and 9:00 p.m. on weekends. For any overtime hours during
23 the work week, CPS pays the guards either one and one-half times or two times their regular hourly
24 rate, as applicable overtime law may require.

25 11. CPS does not pay in-residence guards for the hours they spend sleeping or engaging
26 in personal activities during the night. If a guard has responded to a security problem during the
27 night, however, CPS will pay him at an overtime rate for all of the time he spent doing that. That
28 time is reflected on the CPS tracking forms that the guard completed during the night he was

1 awakened by the alarm buzzer. In addition, if the tracking forms show, for any particular night, that
2 interruptions consumed more than a total of three hours, CPS assumes that the guard will not have
3 been able effectively to make personal use of the nighttime hours during that night, and therefore
4 will pay him for all eight of the hours between 9:00 p.m. and 5:00 a.m.

5 12. If on any night an in-residence guard wishes to leave his trailer home during the 9:00
6 p.m. to 5:00 a.m. period, he can easily arrange to do so. He is requested to call the CPS central
7 office sometime during the day and tell them that he will be gone that night. CPS then arranges for
8 another guard to cover the time the in-residence guard is away from the site. The substitute guard is
9 not given access to the in-residence guard's trailer home during that period, as CPS considers that
10 trailer home the in-residence guard's private apartment. Unlike the in-residence guard, the substitute
11 guard must observe and patrol the premises throughout his nighttime shift. Therefore, CPS treats all
12 of the substitute guard's nighttime hours as active duty time, and pays him for those hours.

13 13. Recognizing that they were the first company in California to provide live-in security
14 to construction sites, CPS consulted with the Division of Labor Standards Enforcement (DLSE)
15 before starting up the business. The DLSE told CPS at that time that a designated nighttime sleeping
16 period of not more than eight hours was non-compensable, except for any time spent on calls to duty
17 that interrupted the sleeping period. The DLSE recommended that the in-residence guards sign a
18 written agreement that demonstrated they understood and agreed to CPS's scheduling and pay plan.
19 CPS has at all times required in-residence guards to sign written agreements that set forth in detail
20 the hours of work and the pay arrangement for each part of the day. (If an applicant is not willing to
21 sign such an agreement, he or she may still be able to work for CPS in an hourly, non-resident
22 position.)

23 14. Since its inception, CPS on occasion repeatedly faced wage claims from terminated
24 in-residence guards who asserted that they should have been paid for all of their sleep time,
25 regardless of whether the hours were spent sleeping or performing work tasks. Deputy Labor
26 Commissioners in various offices of the DLSE handled those claims. In every instance, the Deputy
27 Labor Commissioner dismissed the guards' claims.

1 15. During the late 1980's and the 1990's, the DLSE's Operations and Procedures
2 Manual contained detailed rules concerning payment for employees' sleeping time. Section 10.75 of
3 the Manual, which is attached here as Exhibit A and is incorporated herein, initially noted that the
4 DLSE has "historically taken a . . . realistic and reasonable approach [to this issue], in that sleep
5 time/meal time, and other non-active times which the employee can use for private pursuits or during
6 which the employee is free to leave the premises have not been considered work time." The Manual
7 then set forth a three-part approach:

- 8 a. If employees do not reside at the employer's premises, work less than a twenty-four-
9 hour shift, and are permitted to sleep during the shift, all hours of the shift – including
10 the sleeping time – are considered work time, and must be paid.
11 b. If employees do not reside at the employer's premises, work a twenty-four-hour shift,
12 and are permitted to sleep during the shift, then up to eight hours of sleeping time per
13 shift may be counted as non-working time and need not be paid. If the employee does
14 not have the opportunity to get at least five hours of sleep, however, the entire time
15 scheduled for sleeping must be considered hours worked and must be paid.
16 c. If employees are required to reside at the employer's premises, then sleeping time, up
17 to eight hours per day, is not considered time worked and need not be paid. If the
18 sleeping period is interrupted by a call to duty, the interruption must be counted as
19 time worked. If because of interruptions the employee cannot get at least five hours
20 of sleep, the entire eight-hour sleeping period will count as hours worked, and must
21 be paid.

22 16. The federal regulations concerning sleep time under the Fair Labor Standards Act,
23 which appear at 29 C.F.R. § § 785.20 – 785.23 and which are attached here as Exhibit B and
24 incorporated herein, use the same three-part approach as did the DLSE's Manual section 10.75.
25 Thus, under the federal regulations, an employee who does not reside at the premises and who works
26 less than twenty-four-hour shifts must be paid for all scheduled hours, even if he or she can sleep for
27 some of those hours (29 C.F.R. § 785.21). If an employee works twenty-four-hour shifts, the
28 employee and employer may agree to exclude from working hours all scheduled sleeping periods, up

1 to eight hours in the twenty-four; thus, the employer will not need to pay for sleeping time (29 C.F.R.
2 § 785.22). Finally, if an employee resides on the employer's premises, the employee and employer
3 may agree that the employee will be paid only for hours of actual duty. The employer need not pay
4 for time the employee "engage[s] in normal private pursuits" such as "eating, sleeping, entertaining,"
5 and the like. "An employee who resides on his employer's premises . . . for extended periods of
6 time is not considered as working all the time he is on the premises"; rather, he is considered as
7 working only during his active duty time. 29 C.F.R. § 785.23.

8 17. In 1997 the United States Department of Labor specifically approved CPS's sleep
9 time pay plan. That approval was set forth in a March 24, 1997, letter to CPS's attorneys from
10 Charles Striegel, then an Assistant District Director of the U.S. Department of Labor. The letter is
11 attached here as Exhibit C and is incorporated herein. Very recently, the Department of Labor, after
12 an exhaustive audit of CPS's operations in Los Angeles (which are typical of all of its California
13 operations), again found that the sleep time pay arrangements comply fully with federal wage laws.

14 18. A few weeks after the federal agency's March 1997 letter issued, the state Department
15 of Industrial Relations also issued a letter that approved CPS's sleep time pay plan. The April 24,
16 1997, letter to CPS's attorneys from John C. Duncan, then the Chief Deputy Director of the
17 Department of Industrial Relations, which oversees the DLSE, is attached here as Exhibit D and is
18 incorporated herein. Mr. Duncan's letter ruled in favor of "allowing . . . excludability of non-active
19 duty times from compensation requirements for the live-in guards" (page 2). The DLSE's longtime
20 "enforcement policy excluding sleep time and other non-active duty time hours" from the
21 compensable time of resident employees extended to CPS's in-residence guards (page 2).

22 19. Two years later, however, in an August 12, 1999, letter to CPS's attorneys from then-
23 State Labor Commissioner Marcy V. Saunders (attached here as Exhibit E and incorporated herein),
24 the DLSE abruptly changed its course. CPS later learned that one of its direct competitors had
25 supplied information – much of it false – to the DLSE, and that the DLSE had based its sudden
26 change of direction on that distorted information. (CPS also later obtained a copy of the August 12
27 letter that showed that Ms. Saunders had sent a blind copy of that letter to the same competitor.) The
28 letter stated that all of the in-resident guards' hours, "including sleep and meal time, . . . constitute

1 'hours worked'" and thus must be paid (page 2). The agency intended to "rapidly proceed with our
2 investigation, and any necessary litigation, in order to secure the reimbursement of all amounts owed
3 as unpaid wages to CPS's employees for the past three years" (page 3).

4 20. Immediately after receiving the letter from Ms. Saunders, and particularly upon
5 identifying in it a large number of factual inaccuracies that seemed to have influenced Ms.
6 Saunders's conclusions, CPS's representatives wrote to Ms. Saunders to explain the correct facts and
7 to seek a meeting with her to discuss the agency's sudden about-face on the sleep time pay plan.
8 Despite CPS's repeated efforts to arrange such a meeting, however, no meeting took place until
9 February 2002.

10 21. During the period between 1999 and 2002, the agency did not in fact "rapidly
11 proceed" with investigation or with litigation against CPS. Rather, the matter was left to the
12 consideration of a few scattered wage claims that individual guards filed during that time. The
13 agency dismissed the sleep time portion of every such claim.

14 22. In February 2002, at CPS's insistence, representatives from the DLSE's general
15 counsel's office finally met with CPS concerning the 1999 letter. CPS left the meeting with the
16 impression that sending a legal memorandum to the DLSE about the sleep time issue might help
17 fully convince the general counsel's office staff and others that the agency's longtime rule allowing
18 employers of resident employees to exclude sleep time from compensable hours worked (rather than
19 the agency's recent reversal of that rule) correctly embodied California law. Accordingly, on August
20 21, 2002, CPS's attorneys sent Ann Stevason, then Senior Trial Counsel of the DLSE, a lengthy
21 letter analyzing case law and agency materials and demonstrating that CPS's sleep time
22 compensation plan was lawful.

23 23. Ms. Stevason responded to CPS's attorneys' letter with a letter dated September 16,
24 2002. Her letter completely rejected the approach to sleep time issues that the agency had taken
25 throughout the 1990's. The letter labeled as "incorrect" John Duncan's April 1997 letter (Exhibit
26 D), saying that Mr. Duncan had misstated both the law and the enforcement posture taken by the
27 DLSE in the past. The September 2002 letter then rejected every aspect of the analysis CPS had
28 presented in its August letter.

1 24. The 2002 letter from the DLSE concluded with a threat of prompt and aggressive
2 enforcement against CPS. The letter stated flatly that the agency views CPS's sleep time
3 compensation plan as illegal and that, accordingly, the DLSE now will enforce its view of the law.

4 25. By letter dated October 17, 2002, from CPS's attorneys to Ms. Stevason at the DLSE,
5 CPS presented a new argument establishing that the in-residence guards' sleep time was not
6 compensable working time. In previous correspondence, both CPS and the DLSE had been
7 assuming that CPS's employees were subject to the provisions of Wage Order 4, 8 Cal. Code Regs. §
8 11040, the Industrial Welfare Commission Order that sets wages and hours for clerical and other
9 white-collar occupations, including, in some instances, security guards. In the October 17 letter,
10 however, CPS explained that it had realized that in fact its employees are subject to Wage Order 5, 8
11 Cal. Code Regs. § 11050, the Order that applies to all employers that provide rental lodging to their
12 employees. Under Wage Order 5's express provisions, resident employees' sleeping time is not
13 compensable working time. See 8 Cal. Code Regs. § 11050 (2) (K).

14 26. The DLSE rejected CPS's new argument as decisively as it had rejected all prior
15 arguments. In a telephone message on November 13, 2002, Ms. Ann Stevason told CPS's counsel
16 that Wage Order 5 simply did not cover CPS's employees. Ms. Stevason's reasoning was
17 conclusory, and did not address any of the analysis set forth in the October 17, 2002 letter.

18 27. CPS now faces immediate prosecution of wage claims filed by guards who believe
19 that they should have been paid for all eight of their nighttime sleeping hours. A proceeding pending
20 in Oakland was briefly stayed to enable CPS to file this Complaint. Other proceedings are pending
21 in Long Beach (3 proceedings), San Bernardino (2 proceedings) and San Jose. In addition, the DLSE
22 has begun an audit of CPS's pay practices, including the sleep time compensation plan. If CPS's
23 sleep time payment practices are found to be unlawful, CPS could be liable for millions (if not tens
24 of millions) of dollars in back pay, extending back over a period of three years. Indeed, CPS will be
25 unable to afford to continue employing its in-residence guards and thus will be forced to lay them off
26 and to close part or all of its operations in the state.

27 ///

28 ///

1 **CAUSE OF ACTION**

2 **Declaratory Relief Against All Defendants**

3 28. CPS realleges and incorporates by reference paragraphs 1 through 27 as though set
4 forth here in full.

5 29. As alleged herein, the DLSE has stated its intention to enforce immediately its view
6 of state law concerning the compensability of sleep time. CPS believes that the DLSE's view of the
7 law is erroneous. Enforcement of the DLSE's view will gravely injure CPS's interests.

8 30. Through all the steps taken as described above, CPS has made every attempt to
9 convince Defendants of the validity of its sleep time pay practices. All such attempts have failed.

10 31. An actual controversy has arisen and now exists between CPS and Defendants
11 concerning their respective rights and duties, in that CPS contends that the sleep time compensation
12 plan it has had in place since 1989 complies fully with California wage and hour law, and that
13 therefore CPS owes no money in back wages to its in-residence guards and need not revise its sleep
14 time compensation plan in any way. Defendants, however, dispute CPS's contentions in those
15 regards, and contend that CPS's sleep time compensation plan violates California's wage and hour
16 laws, that CPS therefore will need to pay extensive back wages to its current and former in-residence
17 guards, and that CPS must significantly change its pay policies and practices with regard to the
18 guards' sleep time.

19 32. CPS desires a judicial determination of its rights and duties, a declaration as to
20 whether CPS's interpretation or the DLSE's interpretation of California law concerning the
21 compensability of sleep time is correct, and a declaration as to the lawfulness of CPS's sleep time
22 compensation plan. Specifically, CPS desires a declaration and determination that:

- 23 a. Wage Order 5, 8 Cal. Code Regs. § 11050, rather than Wage Order 4, 8 Cal. Code
24 Regs. § 11040, governs CPS's California employees, and that under Wage Order 5
25 CPS and its in-residence guards may agree that CPS will not pay the guards for sleep
26 time and that therefore CPS's sleep time compensation plan is lawful; or
27 b. If Wage Order 4, rather than Wage Order 5, governs CPS's California employees,
28 then California law allows CPS to exclude sleep time from compensable work time

1 for its in-residence guards pursuant to CPS's plan, and therefore CPS's sleep time
2 compensation plan is lawful.

3 33. Such a declaration is necessary and appropriate at this time under the circumstances in
4 order that CPS may ascertain its rights and duties under California law and in order that, if its
5 interpretation of the law is correct, CPS may be spared paying large amounts of unearned back wages
6 and laying off significant numbers of California employees.

7 WHEREFORE, Plaintiff prays for judgment as follows:

8 1. For a declaration that California law permits CPS to continue its existing pay
9 practices with respect to the sleep time period (typically 9:00 p.m. to 5:00 a.m.) of its in-residence
10 guards in California;

11 2. For temporary and preliminary injunctive relief enjoining Defendants from
12 adjudicating the pending proceedings against CPS and from seeking to enforce or enforcing any
13 order, decision or award issued therein during the pendency of this action;

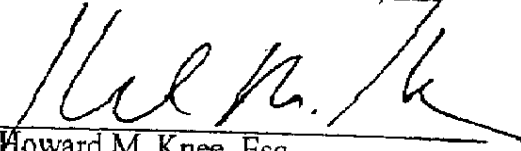
14 3. For reasonable attorney's fees;

15 4. For costs of suit; and

16 5. For such other relief as the Court may deem proper.

17
18 Dated: November 18, 2002

KNEE, ROSS & SILVERMAN, LLP

19
20 By: 

21 Howard M. Knee, Esq.
22 Attorneys for Plaintiff
23 Construction Protective Services, Inc.

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I have read the foregoing VERIFIED COMPLAINT FOR DECLARATORY RELIEF (California Code of Civil Procedure Section 1060) and know its contents.

CHECK APPLICABLE PARAGRAPHS

I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am an Officer a partner of CONSTRUCTION

PROTECTIVE SERVICES, INC.

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason.

I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. The matters stated in the foregoing document are true of my own knowledge, except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am one of the attorneys for a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on November 2002, at Los Angeles, California.

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

CHRIS COFFEY

Type or Print Name

Signature

PROOF OF SERVICE

10134 (3) CCP REVISED 5/1/05

STATE OF CALIFORNIA, COUNTY OF

I am employed in the county of, State of California.

I am over the age of 18 and not a party to the within action; my business address is:

On, I served the foregoing document described as

on in this action

by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list;

by placing the original a true copy thereof enclosed in sealed envelopes addressed as follows:

BY MAIL

I deposited such envelope in the mail at, California. The envelope was mailed with postage thereon fully prepaid.

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on, at, California.

(BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

Executed on, at, California.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Type or Print Name

Signature

(BY MAIL SIGNATURE MUST BE OF PERSON DEPOSITING ENVELOPE IN MAIL SLOT, BOX, OR BAG)

(FOR PERSONAL SERVICE SIGNATURE MUST BE THAT OF MESSENGER)

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