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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

<hr/>) Civil No.:
DANIEL PENCE)
	Plaintiff,) COMPLAINT FOR
) DECLARATORY RELIEF AND
	-against-) DAMAGES FOR:
) VIOLATIONS OF THE FAIR
) LABOR STANDARDS ACT
KO'OLAU SPIRITS LLC, A HAWAII) (FLSA); HAWAII WAGE AND
LIMITED LIABILITY COMPANY;) HOUR LAW; HAW. REV.
GINGER DILL, AN INDIVIDUAL; ERIC) STAT. §§ 387-2 AND 387-3;
DILL, AN INDIVIDUAL; AND IAN) AND RETALIATION IN
BROOKS, AN INDIVIDUAL,) VIOLATION OF THE FLSA
)
	Defendants.) DEMAND FOR JURY TRIAL
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INTRODUCTION

1. This is an action for relief from Defendants' violations of Plaintiff's workplace rights. Defendants blatantly violated both federal and state wage and hour laws, and then unlawfully retaliated against Plaintiff DANIEL PENCE ("Plaintiff") for asserting his protected rights under these laws.

2. Plaintiff worked for Defendants for nearly three years as the Director of Retail Sales for the DEFENDANT KO'OLAU SPIRITS LLC d/b/a Ko'olau Distillery (the "Company"). Plaintiff was a hard-working, reliable employee who dependably advanced his employer's business interests. Despite this, the Plaintiff has never been paid for the hours he has worked, including overtime hours.

3. Moreover, recently the Company applied for and received a Paycheck Protection Loan from the Small Business Administration stemming from the COVID-19 pandemic. When Plaintiff insisted that proceeds from loan be used to partially compensate him for his owed back-pay, Defendants terminated his employment. Defendants unlawfully retaliated against Plaintiff for asserting his legally protected workplace rights, in violation of federal and state law.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337, and Section 16(b) of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201, et seq.

5. This Court has supplemental jurisdiction over the related state law claims pursuant to 28 U.S.C. § 1367(a) because Plaintiff's claims under the Hawaii Wage and Hour Law, and Hawaii common law form part of the same case or controversy under Article III of 1 the United States Constitution. Plaintiff's state law claims share all common operative facts with his federal law claims, and the parties are identical.

Resolving all state and federal claims in single action serves the interests of judicial economy, convenience, and fairness to the parties.

6. Pursuant to 28 U.S.C. § 1391(b) venue is proper in the District of Hawaii because Plaintiff resides in this District, the Company is a Hawaii Limited Liability Company, the individual Defendants all reside in Hawaii, the Defendants employed Plaintiff in this District, and the unlawful employment practices alleged herein giving rise to Plaintiff's claims occurred in this District.

NATURE OF THIS ACTION

7. This is an action brought pursuant to the FLSA, the Hawaii Wage and Hour Law, and state common law to obtain relief for Plaintiff.

8. This action is brought by Plaintiff to secure declaratory relief and damages to remedy Defendants' violations of federal, state, and local employment laws by failing to adequately compensate Plaintiff for the hours he worked, and to secure declaratory, compensatory, and punitive damages to remedy Defendants' commission of unlawful retaliation for Plaintiff's assertion of his protected rights under federal and state employment laws.

PARTIES

9. Plaintiff is a citizen of the State of Hawaii and resident of the Town of Kaneohe, HI, Honolulu County Honolulu County.

10. Defendant KO'OLAU SPIRITS LLC is a Domestic Limited Liability

Company organized and existing under and by virtue of the laws of the State of Hawaii with its principal place of business in Kaneohe, HI, Honolulu County.

11. Defendant GINGER DILL is a citizen of the State of Hawaii and upon information and belief, is domiciled in the Town of Kaneohe, HI, Honolulu County.

12. Upon information and belief, GINGER DILL is the manager of KO'OLAU SPIRITS LLC.

13. Defendant ERIC DILL is a citizen of the State of Hawaii and upon information and belief, is domiciled in the Town of Kaneohe, HI, Honolulu County.

14. Upon information and belief, ERIC DILL is a managing member of KO'OLAU SPIRITS LLC.

15. Defendant IAN BROOKS is a citizen of the State of Hawaii and upon information and belief, is domiciled in the Town of Kaneohe, HI, Honolulu County.

16. Upon information and belief, IAN BROOKS is a managing member of KO'OLAU SPIRITS LLC.

STATEMENT OF FACTS

17. In the early summer of 2017, the individual Defendants hired Plaintiff to act as their Retail Sales Director for a new whiskey distillery (Ko'olau Distillery) that they were in the process of building, though KO'OLAU SPIRITS LLC, was not formally organized within the State of Hawaii until January 24, 2018.

18. Specifically, Defendants wanted Plaintiff to work for them because of his

employment history with Hawaii Volcanic Water, his connections in the beverage industry, and his knowledge of the water purification process that is essential in distilling.

19. The Defendants advised Plaintiff that he would be compensated for his services once certain minimal targets were hit, with an understanding that he would be paid no less than \$100,000 for his first full year of service to the Company. It was also represented to the Plaintiff that equity in the Company would eventually be offered, although such equity and compensation were never realized.

20. During the first year of his employment, both for the individual Defendants and thereafter the Company once it was officially organized, the Plaintiff spent his time researching and developing the initial product offering, a locally bottled spirit to be sold in supermarkets and liquor stores, and he was responsible to establish the retail area, including procurement and ordering of all general merchandise such as glasses, t-shirts, coasters and the like.

21. During the first year of his employment, Plaintiff worked approximately 20 to 25 hours per week for the Company, while also maintaining gainful employment elsewhere. Shortly into his second year of employment and continuing until the time when he was terminated on May 29, 2020, Plaintiff was working in-excess of 40 hours per week, including nights and weekends preparing the distillery and retail space, including but not limited to; painting, forklift operation, installing industrial

racking/shelving, operation of a scissor lift, procuring inventory for the holiday season, bottling and distilling product, and procuring and husking corn for processing, all of which was in addition to his services as the Director of Retail Sales. Additionally, at the insistence of the Defendants, Plaintiff attended classes with the Department of Health and hearings before the Honolulu Liquor Commission.

22. When the COVID-19 health pandemic resulted in the mandatory closure of all non-essential businesses, Defendants had Plaintiff shift production to hand sanitizer, requiring that he continue working no less than 40 hours per week procuring ingredients and supplies as well as organizing donations.

23. In early May 2020, Plaintiff was advised that the Company had secured a funding through the Paycheck Protection Loan Program, the legislative intent of which was, in-part, to allow employers to retain their staff. When Plaintiff insisted that he be compensated, at-least partially, for his nearly three years of employment, Defendants argued that they were unable to use the loan to pay him because they viewed the Plaintiff as a 1099 independent contractor, and not as an employee.

24. Thereafter, on May 29, 2020, Defendants through their attorney terminated Plaintiff's employment as a direct and proximate result of the assertion of his legal rights.

FIRST CLAIM FOR RELIEF

Failure to Pay Minimum Wage in Violation of FLSA

25. The allegations of each of the preceding paragraphs are realleged and incorporated herein by reference.

26. The Fair Labor Standards Act of 1938 (“FLSA”), 29 U.S.C. § 201, et seq., applied to Plaintiff’s employment with Defendants at all times relevant herein.

27. Section 206 of the FLSA, 29 U.S.C. § 206(a)(1)(C), mandates that employers pay all employees engaged in commerce or in the production of goods for commerce, minimum wages for their work in an amount set by Federal law. Section 218 of the FLSA, 29 U.S.C. § 218(a), provides that employers pay such minimum wages as established by state law, should it be higher than the federal minimum. During the relevant time period the federal minimum wage was \$7.25.

28. Furthermore, the FLSA, at 29 U.S.C. § 203(a)(1), states that employees must be paid an overtime rate, equal to at least 1 1/2 times their regular rate of pay, for all hours worked in excess of 40 hours per week.

29. Despite having been employed by Defendants for nearly three years, Plaintiff has never been paid wages or otherwise compensated by the Defendants for his hours worked, including those hours which Plaintiff routinely worked in excess of 40 hours per week.

30. Throughout the relevant period, Defendants violated the FLSA by failing to

maintain proper, contemporaneous and accurate records of the hours actually worked by Plaintiff each week.

31. Defendants willfully, intentionally, and with reckless disregard failed to pay Plaintiff the minimum wage for all his hours worked in violation of the FLSA. While, under the circumstances, Defendants' time records will not fully demonstrate Plaintiff's hours or overtime work, other records and data points exist that will confirm the nature and extent of Plaintiff's work.

32. Because Defendants' violations of the FLSA have been willful, a three-year statute of limitations applies, pursuant to 29 U.S.C. § 255.

33. Furthermore, because of Defendants' unlawful failure and refusal to pay Plaintiff minimum wages, Plaintiff is entitled, pursuant to § 216(b) of the FLSA, 29 U.S.C. § 216(b), to recover his unpaid minimum wages, including interest and liquidated damages thereon, in amounts to be proven at trial, as well as reasonable attorney's fees and costs.

SECOND CLAIM FOR RELIEF

Failure to Pay Minimum Wage and Overtime Wages in Violation of Hawaii Wage and Hour Law, Haw. Rev. Stat. §§ 387-2 and 387-3

34. The allegations of each of the preceding paragraphs are realleged and incorporated herein by reference.

35. The Hawaii Wage and Hour Law, Haw. Rev. Stat. § 387-2 applied to

Plaintiff's employment with Defendants at all times relevant herein.

36. Haw. Rev. Stat. § 387-2 requires every employer to pay each employee “wages at the rate of not less than: \$9.25 per hour beginning January 1, 2017; and \$10.10 per hour beginning January 1, 2018.

37. Despite having been employed by Defendants for nearly three years, Plaintiff has never been paid wages or otherwise compensated by the Defendants for his hours worked.

38. Haw. Rev. Stat. § 387-3 prohibits employers from employing “an employee for a workweek longer than forty hours unless the employee receives overtime compensation for the employee's employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which the employee is employed.”

39. Plaintiff was regularly expected by the Defendants to work more than 40 hours per week.

40. Under Haw. Rev. Stat. § 387-12 and in addition to the criminal penalties set forth therein, “[a]ny employer who violates any provision of sections 387-2 and 387-3 shall be liable to the employee or employees affected in the amount of their unpaid minimum wages or unpaid overtime compensation, and in case of wilful violation in an additional equal amount as liquidated damages.”

41. Furthermore, under Haw. Rev. Stat. § 387-12 a prevailing plaintiff is

entitled to an award of reasonable attorney fees and costs of the action from a non-prevailing defendant.

42. Haw. Rev. Stat. § 387-12 defines an Employer as "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons, acting directly or indirectly in the interest of an employer in relation to an employee..."

43. On information and belief, Defendants Ginger Dill, Eric Dill and Ian Brooks are and were, at all relevant times, owners, members, officers, managers and managing agents of the Company, and in such roles, did knowingly and intentionally violate or cause to be violated Haw. Rev. Stat. §§ 387-2 and 387-3.

44. As a result of Defendants' conduct, Plaintiff was deprived of minimum wage in an amount to be determined at trial, and is entitled to recovery of the unpaid balance of the full amount of this minimum wage, including interest thereon, reasonable attorney's fees, and costs of suit pursuant Haw. Rev. Stat. §§ 387-2 and 387-3.

THIRD CLAIM FOR RELIEF

Unlawful Retaliation in Violation of FLSA

45. The allegations of each of the preceding paragraphs are realleged and incorporated herein by reference.

46. The FLSA applied to Plaintiff's employment with Defendants at all times relevant herein.

47. Section 215(a)(3) of the FLSA, 29 U.S.C. § 215(a)(3), prohibits retaliation against an employee because he “has filed any complaint or instituted or caused to be instituted any proceeding under or related to” the rights contained in the FLSA.

48. In early May, 2020, Plaintiff learned of Defendants’ receipt of funds from the Paycheck Protection Loan program and he communicated to the Defendants his desire to be compensated, at-least partially, for his unpaid wages.

49. Plaintiff’s request constituted “a complaint” and was protected activity under the FLSA. *See Lambert v. Ackerley*, 180 F.3d 997, 1007 (9th Cir. 1999); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011).

50. On or about May 29, 2020, as a direct and proximate result of receiving Plaintiff’s request for owed wages in early May, Defendants, through their attorney, terminated Plaintiff’s employment and ordered him to “cease all activity [in his role as Retail Sales Director] and otherwise acting on behalf of the Company in any agency, managerial or operational capacity.”

51. Defendants’ action of terminating Plaintiff’s employment constituted a retaliatory action, undertaken in direct response to Plaintiff’s assertion of workplace rights protected by the FLSA.

52. As a direct, foreseeable, and proximate result of Defendants’ actions, Plaintiff has suffered a loss of earnings, and job benefits; he has suffered and continues to suffer emotional distress; and he has incurred and continues to incur expenses.

53. Defendants committed the acts herein alleged maliciously, fraudulently, and oppressively with the wrongful intent to injure Plaintiff. Defendants acted with an improper and evil motive amounting to malice and a conscious disregard for Plaintiff's rights. The acts taken towards the Plaintiff were carried out by Defendants acting in deliberate, callous and intentional manner with a desire to injure and damage.

54. Pursuant to § 216(b) of the FLSA, 29 U.S.C. § 216(b), Plaintiff is entitled to legal and equitable relief including compensatory and punitive damages, as well as reasonable attorney's fees and costs.

FOURTH CLAIM FOR RELIEF

Unjust Enrichment

55. The allegations of each of the preceding paragraphs are realleged and incorporated herein by reference.

56. To the extent that it is determined that the Plaintiff was a bona-fide independent contractor, a claim which is denied by the Plaintiff, then the Defendants have been unjustly enriched by virtue of receiving Plaintiff's: (a) labor and services over nearly 4,000 hours between mid-2017 and May 2020; and (b) expert consulting services, proprietary information and intellectual property pertaining to the water purification process and local beverage industry.

FIFTH CLAIM FOR RELIEF

Quantum Meruit

57. The allegations of each of the preceding paragraphs are realleged and incorporated herein by reference.

58. Plaintiff provided services supporting the development, marketing, branding, construction and general establishment of the Ko'olau Distillery at Defendants' request.

59. Defendants knew that the Plaintiff was providing services on the Defendants' behalf and as such, the Defendants have become indebted to the Plaintiff for the reasonable value of Plaintiff's services.

60. Defendants accepted, used, enjoyed and continue to enjoy the benefits of those services provided by the Plaintiff.

61. Defendants have failed and refused to compensate the Plaintiff for the full value of Plaintiff's services.

62. The fair and reasonable value of Plaintiff's services is \$275,000.

SIXTH CLAIM FOR RELIEF

Conversion

63. The allegations of each of the preceding paragraphs are realleged and incorporated herein by reference.

64. By engaging in the course of conduct set forth herein, Defendants have

illegally converted valuable proprietary information, labor services and intellectual property of the Plaintiff reasonably valued at \$275,000.

DECLARATORY RELIEF ALLEGATIONS

65. The allegations of each of the preceding paragraphs are realleged and incorporated herein by reference.

66. A present and actual controversy exists between Plaintiff and Defendants concerning their rights and respective duties. Plaintiff contends that Defendants violated his rights under the FLSA and the Hawaii Wage and Hour Law; Haw. Rev. Stat. §§ 387-2 and 387-3. Plaintiff is informed and believes and thereon alleges that Defendants deny any liability to her. Plaintiff seeks a judicial declaration of the rights and duties of the respective parties. Declaratory relief is therefore necessary and appropriate.

67. Plaintiff has suffered injury in fact and has lost money as a result of Defendants' unlawful and unfair business practices and acts, and is therefore authorized to pursue injunctive relief against Defendants that is necessary to prevent further unfair business practices and acts.

68. Defendants acted or failed to act as herein alleged with malice or reckless disregard to the protected rights of Plaintiff, and Plaintiff is thus entitled to recover punitive damages in an amount to be determined according to proof.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that this Court enter judgment against

Defendants as follows:

1. A declaratory judgment that Defendants' actions complained of herein have violated Plaintiff's rights under the FLSA and the Hawaii Wage and Hour Law; Haw. Rev. Stat. §§ 387-2 and 387-3, including the right to be free from retaliation for the assertion of rights protected by the FLSA and the Hawaii Wage and Hour Law;
2. Unpaid minimum wages, unpaid wages at regular hourly rate, overtime premium, and other compensation denied or lost to Plaintiff to date by reason of Defendants' unlawful acts, according to proof;
3. Liquidated damages in an amount equal to minimum wages unlawfully unpaid;
4. Liquidated damages in an amount equal to overtime wages unlawfully unpaid;
5. Waiting time penalties under Haw. Rev. Stat. § 388-10 for failure to pay wages due upon separation, according to proof;
6. General, compensatory, and special damages according to proof;
7. Exemplary and punitive damages according to proof; and
8. Interest accrued on Plaintiff's damages, including pre- and post-judgment interest, and an upward adjustment for inflation;
9. Reasonable attorney's fees and costs of suit pursuant to 29 U.S.C. § 216 (b) and other laws;

10. Such other and further relief as this Court deems just and proper.

Dated: Honolulu, HI
July 13, 2020

Respectfully submitted,

DIPASQUALE & SUMMERS, LLP
Attorneys for Plaintiff

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JURY TRIAL DEMAND

Plaintiff hereby demands a jury trial as provided by Rule 38(a) of the Federal

Rules of Civil Procedure.

Dated: Honolulu, HI
July 13, 2020

Respectfully submitted,

DIPASQUALE & SUMMERS, LLP
Attorneys for Plaintiff

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