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9 HERMINIA MARTINEZ DE VARGAS

10 **ELECTRONICALLY FILED**
11 Superior Court of California,
12 County of Orange
13 **01/21/2015 at 07:58:48 PM**
14 Clerk of the Superior Court
15 By Fidel Ibarra, Deputy Clerk

16 **SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE**
17 **700 CIVIC CENTER DRIVE WEST, SANTA ANA, CALIFORNIA 92701**

18 HERMINIA MARTINEZ DE VARGAS, }
19 Plaintiff, }
20 vs. }
21 SAN CLEMENTE VILLAS BY THE SEA, }
22 INC., }
23 Defendant. }

24 Case No.: 30-2015-00767304-CU-WT-CJC

25 **COMPLAINT FOR:**

1. RACE DISCRIMINATION (FEHA)
2. RETALIATION
3. WRONGFUL TERMINATION IN
VIOLATION OF PUBLIC POLICY
4. UNFAIR COMPETITION (CAL. BUS.
& PROF. CODE § 17200)

26 Judge Kirk Nakamura

27 Plaintiff alleges:

28 1. Plaintiff HERMINIA MARTINEZ DE VARGAS ("Plaintiff") is, and at all relevant times
was, an adult female residing in San Bernardino County, California. Plaintiff is a Mexican immigrant
and carries a heavy accent. She was born in 1969.

2. Plaintiff is informed and believes and on that basis alleges that defendant SAN
CLEMENTE VILLAS BY THE SEA, INC. ("Defendant"), is and at all relevant times was, an assisted
living facility organized and existing under the laws of the State of California, that its principal place of
business was in Orange County, California, and that it employed more than 50 persons and was an
employer as defined in the California Fair Employment and Housing Act (FEHA).

3. Plaintiff was employed by Defendant in Orange County, California, and the Defendant's conduct hereinafter alleged occurred in said County and State.

FIRST CAUSE OF ACTION

(Racial Discrimination)

4. Plaintiff incorporates each allegation set forth above.

5. In July 5, 2007, Defendant hired Plaintiff to work in the position of caregiver. Plaintiff worked as a caregiver until October 2007 when she was promoted to care manager and worked in that position up until August 26, 2014, when Defendant terminated Plaintiff. During her employment, Plaintiff performed her job duties in an exemplary manner.

6. Plaintiff's race, ethnicity, and national origin were substantial motivating reasons for Plaintiff's termination, as more set forth below.

7. During the course of Plaintiff's employment, Defendant's supervisor, Karen Milroy, regularly exhibited favoritism to certain employees, an action the defendant suspected to be partially motivated by racial and ethnicity animosity towards Hispanics. Ms. Milroy supervised Defendant's operation and worked directly under the direction principals of Defendant, Paul and Aileen Brazeau, husband and wife.

8. For example, during a meeting of managers that Ms. Milroy attended and supervised, Jan McCalister, a licensed vocational nurse employed by Defendant, made fun of Plaintiff's accent in front of other coworkers of Plaintiff in Ms. Milroy's presence. Ms. Milroy failed to rebuke Ms. McCalister and in fact ratified her conduct by joining others in ridiculing Plaintiff. Plaintiff felt humiliated and embarrassed.

9. Further, Ms. Milroy created and posted a sign by the time clock machine that prohibited employees from speaking Spanish at work. When a male employee protested to Ms. Milroy that the sign is discriminatory, she terminated him.

10. In another instance, a male employee named Eric who worked under Ms. Milroy, during Ms. Milroy's presence, started screaming at Plaintiff and cursed her out. Ms. Milroy simply watched the altercation with an approving demeanor and did not thing.

11. In another instance, Aileen Brazea told a Hispanic immigrant employee named Eva Dena: "Why are you working in this area, you don't even speak English." At that time, Eva had worked for Defendant for seven years.

1 12. Further, during her employment, Plaintiff and other staff communicated with Ms. Milroy
2 via text messages. Ms. Milroy would respond to text messages sent by non-Hispanic employees
3 immediately, with a tone of concern for their well-being and an “everything is going to be OK” attitude.
4 However, Ms. Milroy would rarely respond to texts sent by Hispanic employees, and when she did, the
5 messages were cutting, short, and cold with a “why are you bothering me” undertone.

6 13. When Ms. Milroy walked pass Hispanic employees in the halls at Defendant’s place of
7 business, she would not even acknowledge them. However, if she passed a non-Hispanic employee, she
8 would look them in the eyes, smile, and greet them enthusiastically with an “I am soooo happy to see
9 you” posture.

10 14. Plaintiff recounts an incident where a favored employee made a mistake and Karen
11 attempted to cover up the incident. In another incident, plaintiff was reprimanded by Karen for filing a
12 complaint against another employee for failing to properly carry out his responsibilities.

13 15. As a pretext to her true motive for firing Plaintiff, Ms. Milroy pointed to two main
14 reasons for firing Plaintiff.

15 16. First, Ms. Milroy cited Plaintiff’s running a gaming pool at work as a reason for a
16 termination. However, Plaintiff had been running the pool for over six months with Ms. Milroy’s
17 knowledge and consent.

18 17. Second, Defendant cited that Plaintiff violated Defendant’s policy by failing to report a
19 category three wound. However, Plaintiff did report the wound to the treating nurse contracted by
20 Defendant and, regardless, it was not Plaintiff’s duty to report such wounds because she was not trained
21 to detect the different categories of the wound. In fact, Paul Brazeau afterwards told Plaintiff: “Ermi,
22 this was my fault...I never give you any help.”

23 18. In September 2014, about two weeks after the Plaintiff was terminated, Ms. Milroy, held
24 a meeting in which she stated that “Everyone knows that Ermy [Plaintiff] is not here with us anymore.
25 And she’s not dead. And it’s not because she’s Mexican, because I’m racist. It’s just because she’s not
26 here anymore.”

27 19. On January 21, 2015, plaintiff filed with the California Department of Fair Employment
28 and Housing (DFEH) a complaint charging defendants with discrimination in violation of the California
Fair Employment and Housing Act (FEHA). On January 21, 2015, DFEH issued to plaintiff a right-to-
sue letter.

20. As a result of Defendants' discriminatory actions against her, plaintiff has suffered and continues to suffer damages, in the form of lost wages and other employment benefits, and severe emotional and physical distress, the exact amount of which will be proven at trial.

SECOND CAUSE OF ACTION

(Retaliation)

21. Plaintiff incorporates each allegation set forth in paragraphs set forth above.

22. Plaintiff opposed Ms. Milroy discriminatory acts by pointing out her obvious exhibition of favoritism for some employees and her attitude toward employees, which the Plaintiff believes was motivated by race. Ms. Milroy exhibited a negative reaction to the Plaintiff's complaint. Plaintiff believes that a motivating factor that led to her termination was her observation of an administrator exhibiting preferential treatment to favored employees and covering up mistakes made by these employees.

23. Contrary to the claim made by the Defendant that the Plaintiff did not report the patient's wound, Plaintiff did initially report the patient's wound to the doctor and the doctor sent her an order for home health. When home health came to take care of the patient, the nurse said that the wound would be difficult to heal because the patient was very weak and had bladder cancer. One of the nurses came on Wednesday, August 13, 2014 and told Plaintiff that the wound was worse and a specialist would be coming to see the patient on Friday, August 15, 2014. When Plaintiff asked the nurse what Plaintiff should do, the nurse told her that no further action on her part was required as she had cleaned and covered the wound. Plaintiff followed the nurse's orders and recommendation to wait for the specialist. When the specialist came to see the patient and examined the wound, he stated that the patient has Stage 3 wound. Plaintiff told the nurse and the nurse notified Ms. Milroy. Plaintiff was terminated because of the Defendant's claims that she failed to report the wound but Defendant has neglected to consider that she did report the wound initially and only upon the home health nurse's order didn't report that the wound had gotten worse because a specialist was already scheduled to come examine the patient. Plaintiff believes that, as mentioned above, the Defendant terminated her employment in retaliation for her efforts to combat Ms. Milroy's discriminatory behavior.

24. As a result of defendants' retaliatory actions against her, plaintiff has suffered and continues to suffer damages, in the form of lost wages and other employment benefits, and severe emotional and physical distress, the exact amount of which will be proven at trial.

THIRD CAUSE OF ACTION

(Wrongful Termination)

25. Plaintiff incorporates each allegation set forth above.

26. The above-described conduct of defendant constitutes racial discrimination, retaliation and wrongful termination of plaintiff in violation of public policy.

27. As a result of defendants' wrongful termination of her, plaintiff has suffered and continues to suffer damages, in the form of lost wages and other employment benefits and severe emotional and physical distress, the exact amount of which will be proven at trial.

28. Defendant acted for the purpose of silencing the plaintiff and causing her severe emotional distress and is guilty of malice, justifying an award of exemplary and punitive damages.

FOURTH CAUSE OF ACTION (UNFAIR COMPETITION)

29. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

30. Plaintiff has often worked in excess of 5 hours a day without being afforded full and uninterrupted off-duty meal period of at least a one-half hour in which she was relieved of all duties. She has also often worked at least 10 hours a day without receiving a second full and uninterrupted off-duty meal period of at least one-half hour in which they were relieved of all duties. Defendants have known these facts and permitted, encouraged, or required Plaintiff to forego these meal periods without compensating them for the missed meal periods. Labor Code §§ 226.7, 512, 1198, and Industrial Welfare Commission wage order No. 5-2001 (Cal. Code Regs., tit. 8, § 11050) ("Wage Order No. 5-2001").

31. Plaintiff has regularly worked over four-hour periods (or major fraction thereof) without Defendants authorizing and permitting him to take a paid 10-minute rest period. Defendants have known these facts and suffered, permitted, encouraged, or required Plaintiff to forego these rest periods. Labor Code §§ 226.7, 1198, and Wage Order No. 5-2001.

32. Defendants have failed to furnish Plaintiff with timely itemized wage statements accurately showing total hours, meal-and-rest break premiums, split-shift premiums, reporting time pay, on call pay, and other information required to be disclosed by California law. Defendants have also failed to keep payroll records showing the actual hours worked daily, meal periods, and split shift intervals worked by Plaintiff. These acts of the Defendants violate of Labor Code §§ 226, 1174, 1174.5, 1198, and Wage Order No. 5-2001.

1 33. Defendants have required, encouraged, permitted or suffered Plaintiff to work but failed
2 to pay Plaintiff minimum wage for those hours worked. These acts of the Defendants violate of Labor
3 Code §§ 1197, 1198, and Wage Order No. 5-2001.

4 34. Defendants have regularly required, encouraged, permitted or suffered Plaintiff to work
5 overtime but failed to pay Plaintiff overtime wage for those hours worked. These acts of the Defendants
6 violate of Labor Code §§ 510, 1198, and Wage Order No. 5-2001.

7 35. Defendant have failed to pay Plaintiff's wages when due. These acts of the Defendants
8 violate of Labor Code §§ 204, 1198, and Wage Order No. 5-2001.

9 36. Defendant has required Plaintiff to use her own car and gas to buy items for working
10 during Plaintiff's time off and Defendant have failed to reimburse Plaintiff for the use of her car and gas,
11 in violation of Labor Code 2802.

12 37. Defendants' aforementioned acts constitute unlawful business acts and practices by
13 violating California law including, but not limited to laws cited above.

14 38. As a result of their unlawful, unfair, and/or fraudulent acts, Defendants have reaped and
15 continue to reap unfair benefits and illegal profits at the expense of Plaintiff. Therefore, Defendants
16 should be enjoined from these activities and should provide restitution to Plaintiff the wrongfully
17 withheld wages and other benefits pursuant to business & Professions Code § 17203, in a sum according
18 to proof.

19 WHEREFORE, plaintiff prays:

20 39. For compensatory damages according to proof but not less than One Million dollars and
21 prejudgment interest thereon to the extent allowable by law;

22 40. For exemplary and punitive damages according to proof;

23 41. For attorney fees on the first, second and third causes of action;

24 42. That the Court find that Defendants have violated California Labor Code §§ 226.7 and
25 512, and Wage Order No. 5-2001 by failing to afford Plaintiff full and uninterrupted off-duty meal and
26 rest periods or compensation in lieu thereof;

27 43. That the Court find that Defendants have violated the record-keeping provisions of Labor
28 Code §§ 226, 1174(d), and Wage Order No. 5-2001 ¶ (7)(A) as to Plaintiff;

29 44. That the Court find that Defendants have violated California Labor Code §§ 204, 1197,
30 1198, and Wage Order No. 5-2001 ¶ 4(C) by failing to compensate Plaintiff for all the work she
31 performed for Defendants;

1 45. That the Court find that Defendants have violated California Labor Code §510, Wage
2 Order No. 5-2001 ¶ 3(A)) by failing to compensate Plaintiff for all overtime hours worked for
3 Defendants;

4 46. That the Court find that Defendants have violated Business & Professions code § 17200
5 by failing to keep proper time records, by failing to afford Plaintiff full and uninterrupted off-duty meal
6 and rest periods, by failing to timely furnish Plaintiff with statements accurately showing total hours
7 worked;

8 47. That the Court find the Defendant failed to reimburse Plaintiff for reasonable expenses
9 incurred in discharge of her employment duties in violation of Labor Code § 2802.

10 48. That the Court find that Defendants' violations as described have been willful;

11 49. That the Court award Plaintiff restitution for all wages earned by Plaintiff including for
12 missed meal and rest period; split shifts, on call shifts; and work performed without compensation.

13 50. That Defendants be ordered and enjoined to pay restitution to Plaintiff due to Defendants'
14 unlawful and/or unfair activities, pursuant to Business & Professions Code §§ 17200-17205;

15 51. That Plaintiff be awarded reasonable attorneys' fees and costs pursuant to Civil
16 Procedure Code § 1021.5, and/or other applicable law; and

17 52. That the Court award such other and further relief as this Court may deem appropriate.

18 Dated: January 21, 2015

19 JAFARI LAW GROUP, INC.



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21 DAVID JAFARI
22 Attorney for plaintiff
23 Hermina Martinez De Vargas
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