SUPERIOR COURT OF CALIFORNIA. COUNTY OF ORANGE CIVIL COMPLEX CENTER

MINUTE ORDER

Date: 05/01/2008

Time: 01:30:00 PM

Lept: CX101

Judicial Officer Presiding: Judge David C. Velasquez

Clerk: Christine D Carr

Bailiff/Court Attendant: Kim Samra

Reporter: , LISA AUGUSTINE CSR#10419

Case Init. Date: 02/06/2008

Case No: 30-2008-00180008-CU-OE-CXC Case Title: Ybarra vs. Ara mark Corporation

Case Category: Civil - Unlimited

Case Type: Other employment

Event Type: Demurrer to Complaint; Motion to Strike Portions Of Complaint

Moving Party: Aramark Corporation

Causal Document & Date Filed: Demurrer to Complaint; Motion to Stril:e, 02/05/2008

Appearances:

Plaintiff represented by counsel Gregory Karasik from the Law Offices of Spiro, Moss Barness, LLP. Defendant represented by counsel Jennifer White-Sperling from the Law Offices of Morgan Lewis.

The Court having issued its tentative ruling on the record overruling the demurrer and denying the Motion to Strike hereby issues its final order:

Demurrer to the second cause of action (violation of the UCL) and motion to strike portions of the complaint

The motion to strike is denied. The demurrer is overruled.

In essence, the defendant seeks to strike from the complaint references to (1) the four-year statute of limitations; (2) restitution under the UCL in general; and (3) the request "to recover as restitution under the UCL continuation wages." None of the requests is well taken. In its demurrer, defendant argues that the penalties provided by Labor Code §203 are not recoverable under the UCL. None of defendant's arguments have merit.

References to the four-year limitations period and restitution are nei her irrelevant nor improper. Such references relate to proper remedies under the UCL, i.e., restitution of money or property to which the employee has an immediate right to possession.

Labor Code §§ 202 and 203 provides in pertinent part:

"If an employer willfully fails to pay [within 72 hours of the employee's termination from employment] . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date . . . but the wages shall not continue for more than 30 days."

The "waiting time" or "continuing wage" penalty under Labor Code §203 does not operate as a traditional penalty. Rather, the statute creates in the employee the immediate right to the penalty as soon as the employer is late in the payment of wages due when the amployee is terminated from work.

MINUTE ORDER

Date: 05/01/2008

Page: 1

Dept: CX101

Calendar No.:

The purpose of section of Labor Code § 293 providing for a waiting time penalty is to induce employers to pay its employees' wages promptly. (McCoy v. Superior Court (2001) 157 Cal.App.4th 225, 229.) The purpose of the penalty is not to provide for a penalty independent of the wage claim. (id. at 230.)

"The primary intent of [section 203] is not to secure the payment of a penalty. That the overarching purpose of the statute is not to provide for a penalty is emphasized by the limit on the penalty itself. Wages continue as a penalty only until the date the back wages are paid or an action to recover them is filed, but not for more than 30 days, regardless of how long the employer waits to pay the back wages. Had the Legislature sought to impose a penalty qua penalty, it would not have capped it after such a short period of time." (Id., internal quotes and parentheses omitted.) [Note: The term "qua" is Latin meaning "in the character or capacity of." (Black's Law Dictionary [Revised 4th ed., 1968].)]

In analyzing the difference between an employee's right to wages and his or her right to a penalty in the analogous situation pertaining to the "additional hour of pay" (Latior Code §226.7), the California Supreme Court said:

"Under the amended version of section 226.7, an employee is entitled to the additional hour of pay immediately upon being forced to miss a rest or meal period. In that vay, a payment owed pursuant to section 226.7 is akin to an employee's immediate entitlement to payment of wages or for overtime. (Citation omitted.) By contrast, Labor Code provisions imposing panalties state that employers are "subject to" penalties and the employee or Labor Commissioner must first take some action to enforce them. The right to a penalty, unlike section 226.7 pay, does not vest until someone has taken action to enforce it." (Murphy v. Kenneth Cole Productions, Inc. (2007) 40 Cal.4th 1094, 1108.)

In similar fashion to the "additional hour of pay", the instant court observes that Labor Code §203 does not provide that the employer is "subject to" the imposition of the waiting time penalty. Rather that section states "the wages of the employee shall continue" if the employer does not pay separation wages within 72 hours of the employee's termination. The employee is not required to do anything affirmative — "take action" — in order to be entitled to the continuing right to wages. The right to the waiting time penalty is self-executing, i.e., the employee's right to payment of the waiting time penalty arises immediately upon the satisfaction of the condition precedent, is te payment of the last wages due to the employee at the time of termination from employment. In that respect, because the waiting time penalty becomes immediately due and payable to the employee, the right to receive the penalty becomes a vested property right of the employee and the proper subject of restitution. (Cf. Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163, 178 [wage: which are due but unpaid are the proper subject of restitution].)

Further, the waiting time penalty under Labor Code §203 is recoverable in an UCL action because it is a penalty available under other laws of this state. Business & Profession; Code §17205, provides:

"Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state."

Under Business & Professions Code §17203, a plaintiff may seek "circlers or judgments, including the appointment of a receiver... to prevent the use or employment by any person of any practice which constitutes unfair competition... or... to restore to any person in interest any money or property, real or personal." The provisions of the UCL do not otherwise "expressly prohibit" recovery of the penalties afforded under Labor Code §203. Therefore, the continuation wage penalties under Labor Code §203 are cumulative of the remedies stated in Business & Professions Code §17203.

The complaint is not so uncertain, ambiguous or unintelligible so as to deprive the defendant of the ability to reasonably answer the allegations of the second cause of action. It is fairly clear to the court that plaintiff seeks penalties under Labor Code §203 for the late payment of wages after the employee has separated from the company. (¶¶1, 3 and 23-25.)

Date: 05/01/2008

MINUTE ORDER

Page: 2

Dept: CX101

Calendar No.:

Defendant shall answer the complaint within 20 days of the service of his minute order.

The clerk of the clerk is hereby ordered to serve this order.

Date: 05/01/2008

Dept: CX101

MINUTE ORDER

Calendar No.:

Page: 3

02/04/5008 II:37 7145434223