UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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EUGENE SCALIA, Secretary of Labor, United States Department of Labor, Plaintiff, v. UNFORGETTABLE COATINGS, INC., a Nevada Corporation, *et al.*, Defendants.	Case No. 2:20-cv-510-KJD-BNW **ORDER on Motion for Preliminary Injunction and** **PRELIMINARY INJUNCTION**

This matter came before the Court on the Application (#5) of the United States Secretary of Labor for a preliminary injunction under Federal Rule of Civil Procedure 65 and Section 17 of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 217, enjoining Defendants from violating the investigative and anti-retaliation provisions of the FLSA, 29 U.S.C.§§ 211(a), 215(a)(3). Defendants filed a response in opposition (#13) to which Plaintiff replied (#14). The Court then held an evidentiary hearing on the allegations on April 21, 2020. Plaintiffs have since supplemented their motion (#15/17). Defendants filed a Second Declaration of Cory Summerhays (#20).

I. Facts

Defendant Cory Summerhays runs Unforgettable Coatings, a multi-state network of residential painting companies, one of which was investigated by the U.S. Department of Labor ("DOL") in 2013. The DOL's 2013 investigation disclosed that Defendants failed to pay overtime when their employees worked in excess of 40 hours in a workweek.

Instead of coming into compliance, it appears that Defendants then devised a new set of procedures to obscure its continued failure to pay overtime and then commenced a campaign to deter their workers from speaking truthfully to government investigators. The current DOL

investigation began in September 2019 when investigators visited several of Defendants' worksites and interviewed employees confidentially. Within an hour, Defendant Summerhays went to those worksites and warned his employees they should be wary of immigration consequences if they talked about their work to strangers. Defendants have since repeated those references to "immigration" with the obvious intent to intimidate their workers into silence.[1] Despite Defendant's argument that statements about immigration were made to be helpful, confidential worker informants reported that these veiled threats scared them and entirely deterred many of their colleagues from speaking with the Secretary's investigators.

Defendants have tried not only to silence their workers, but also to actively manipulate them to provide false information to the government's investigators. When workers are first hired, Defendants advise them that they will not be paid overtime premiums, but they will make a flat $12 to $25 per hour—not minimum wage. DOL investigators showed Defendants' pay stubs demonstrating how an individual worker's gross pay, when divided by the number of hours worked, always showed the worker being paid the workers' straight time regular rate for all his hours worked—regardless of the number of overtime hours worked.

Defendants then held meetings in December 2019 and January 2020 with the employees. They were informed that Defendants knew of the investigation and that "big changes" were coming. Defendants also informed the workers that those employees who supported the company were going to be okay. At the January meeting, cell phones had to be handed in before employees entered the meeting. Again, they were told the company was being investigated and that they should not cooperate with investigators. Coincidentally, or not, employees' passwords to their paycheck information were reset and they had to ask for new passwords. Some workers were scared to ask for the information.

At the meetings, employees were also reminded that they had signed a contract stating that they were being paid minimum wage and were told to report that to investigators. This was

[1] The Court rejects the argument that the October 2019 letter is not germane to the present issues. Combined with the closed-door meetings, in which cell phones were collected so that no record could be made of what was said, the totality of the circumstances shows a concerted attempt to control the flow of information to and from the employees. While Defendants wish to have the Court look at each event separately, the Court must look at the totality of the circumstances to form a clear picture of what the employees were experiencing.

repeated at a meeting on March 6, 2020. The employees were told that their pay records were confidential and that they could be asked about their immigration status if they talked to investigators. On March 12, 2020, the Secretary filed the present complaint alleging underpayment of wages by a repeat violator of the FLSA.

On March 18, employees were informed that their wages would be reduced by thirty percent (30%). Employees were expected to work the same hours, but at a lower rate. Some workers complained to their foremen, who informed them of the pay cut, and then directly to Defendant Summerhays. They later received text messages telling them that there was no more work for them. In particular, Rafael Castillo Dubon was told that he was terminated, and he repeated these statements to investigators. At the hearing, Defendants asserted that Dubon was, in fact, still employed and currently working on a company site in Utah. The Secretary supplemented Dubon's affidavit with a statement that he was working in Utah for a subcontractor of Unforgettable Coatings (which he did not know until he was informed that day). This only emphasizes his belief that he had been terminated by Defendants.

II. Standard of Law

Under Federal Rule of Civil Procedure 65, a court may issue a Preliminary Injunction upon notice to the adverse party. Injunctive relief is an extraordinary remedy and it will not be granted absent a showing of probable success on the merits and the possibility of irreparable injury should it not be granted." Shelton v. Nat'l Collegiate Athletic Ass'n, 539 F.2d 1197, 1199 (9th Cir. 1976).

This Court must consider the following elements in determining whether to issue a preliminary injunction: (1) likelihood of success on the merits; (2) likelihood of irreparable injury if preliminary relief is not granted; (3) balance of hardships; (4) advancement of the public interest. Winter v. N.R.D.C., 555 U.S. 7, 20 (2008); Stanley v. Univ. of S. California, 13 F.3d 1313, 1319 (9th Cir. 1994); Fed. R. Civ. P. 65 (governing both temporary restraining orders and preliminary injunctions).

The party seeking the injunction must satisfy each element; however, "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a

weaker showing of another." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011). "Serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Id. at 1135 (internal quotations marks omitted).

Finally, to obtain injunctive relief, plaintiff must show it is "under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." Ctr. for Food Safety v. Vilsack, 636 F.3d 1166, 1171 (9th Cir. 2011) (quoting Summers v. Earth Island Inst., 555 U.S. 488 (2009)).

III. Analysis

A. Issuance of Preliminary Injunction

The Court, having considered Plaintiff's Complaint, Plaintiff's Motion along with the supporting declarations and exhibits, Defendants' Opposition to the Motion ("Opposition"), and Plaintiff's Reply as well as arguments of counsel at the hearing, and both parties supplemental affidavits finds that the issuance of a preliminary injunction is appropriate for the following reasons:

1. Likelihood of success on the merits

First, Plaintiff is likely to succeed in showing that Defendants improperly retaliated against employees for cooperating with investigators in this action.[2] The FLSA expressly prohibits retaliation against any employee for cooperating with an investigation under the FLSA. 29 U.S.C §§ 207(a); 211(a), 215(a)(3). Injunctive relief for these violations is authorized under 29 U.S.C § 217. Plaintiff has presented evidence that Defendants failed to pay overtime wages and retaliated against employees that Defendants perceived as cooperating with

[2] The Court does not, at this time, make any findings on whether Plaintiff is likely to prevail on its claim for failure to pay overtime wages. However, the Court does take into consideration, as reflecting on Defendants' credibility and motive, evidence of Defendants' denials and failure to provide a reasonable explanation for their employee wage calculations.

investigators. Plaintiffs have also presented evidence that Defendants retaliated against employees by cutting their wages and hours or by terminating their employment. Further, evidence suggests that it is more likely than not that Defendants made statements intending to quash cooperation with Plaintiff by employees who feared immigration investigations. Based on this evidence, the Court finds that Plaintiff is likely to succeed on the merits of its claims.

2. Likelihood of irreparable injury

Second, allowing Defendants to continue to flout the requirements of the FLSA will likely result in immediate and irreparable injury to Plaintiff, employees, and the public interest. Defendants' threats appear to have chilled employees from speaking to Plaintiff. Further, employees have had wages slashed, hours cut and employment terminated.[3] Should Defendants' threats, intimidation tactics, and retaliatory conduct continue, Plaintiff will not be able to adequately investigate the alleged misconduct and will likely suffer irreparable injury as a result. Employees will likely be irreparably harmed by the chilling and deterrent effect that results from retaliation against those who seek to enforce their rights. See Holt v. Continental Group, Inc., 708 F.2d 87, 91 (2d Cir. 1983) (noting that retaliation may deter other employees from protecting their rights under the FLSA and that this risk may constitute irreparable injury). Further, there is a strong public interest in favor of enforcement of the FLSA, which seeks to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living" of workers. 29 U.S.C. § 202(a). The Court therefore finds that Plaintiff has satisfied the irreparable harm requirement.

3. Balance of hardships

Third, the balance of hardships weighs in Plaintiff's favor. Without a preliminary injunction, Plaintiff and employees will likely suffer significant hardship due to the irreparable harm that will likely result from Defendants' continued violation of the FLSA. Further, Defendants have no legitimate interest in threatening, intimidating, or otherwise retaliating against Plaintiffs in direct contravention of their rights under the FLSA. Finally, the limitations

[3] The Court has considered the economic impact of the Covid-19 restrictions on Defendant. However, the timing of the filing of the complaint, the reduction in wages and termination of employment, and the credibility of those offering affidavits weigh on the side of finding retaliation.

of the injunctive relief ordered by the Court will soften any long-term hardships. The Court finds that the balance of hardships weighs in favor of issuing a preliminary injunction order.

4. Public policy

Fourth, for the reasons discussed above and the reasons cited by the Court at the hearing in favor of protecting the employee who is saddled with grossly unequal bargaining power, there is a strong public interest in favor of enforcement of the FLSA. See 29 U.S.C. § 202(a). Accordingly, the Court finds that this factor weighs in favor of issuing a preliminary injunction order.

IV. Summary

The Secretary presented evidence that Defendants engaged in retaliatory and intimidating conduct that they knew or should have known was likely to intimidate, improperly influence, and/or threaten employees in violation of Sections 11 and 15(a)(3) of the FLSA. Primarily, the Secretary has relied on the affidavits of his investigators and those employees, or former employees, willing to be named. The Court has weighed the credibility of the witnesses and has found the credibility of the investigators and named individuals to outweigh the credibility of Defendants.

The Declarations of Summerhays with attached exhibits, including the earnings statements, raise more questions than they answer. For example, the attached wage statement for Rafael Castillo Dubon in the initial opposition asserts that he was paid minimum wage of $8.75 per hour for 19.81 hours, with a bonus, and paid time off ("PTO") at an indeterminate rate for an indeterminate number of hours. The pay stub does support Dubon's statement that he had been told there was no more work for him on March 18, 2020. See Doc. No. 10-5, p.7. Summerhays' Second Declaration, Doc. No. 20-2 p.2, supports Summerhays' contention that he has continued to pay employees, but shows a rate of 14.35 per hour for Dubon for PTO. The Court finds no reason to alter its determination that the credibility of the Plaintiff outweighs Defendants' credibility. Dubon's confusion, if it exists, is understandable.

Further, Defendants have objected asserting that the employee's conduct—speaking out against lowering their wages by thirty percent (30%)—is not protected activity under the FLSA,

citing Alvarado v. I.G.W.T. Delivery Sys., Inc., 410 F. Supp. 2d 1272 (S.D. Fla. 2006) and Morke v. Archer Daniels Midland Co., 2010 WL 2403776 (W.D. Wisc. June 10, 2010). However, these cases do not stand for the proposition suggested by Defendants. First, Alvarado concerned plaintiffs that failed to invoke FLSA or overtime complaints. Id. at 1279. The employees in this action clearly complained about their wages being cut by 30%. In Morke, the court found that plaintiff's oral complaints, rather than written complaints, were not protected under the FLSA citing Kasten v. Saint-Gobain Perf. Plastics Corp., 570 F.3d 834 (7th Cir. 2009). Unfortunately for Defendants, Kasten was reversed by the United States Supreme Court. Kasten v. Saint-Gobain Perf. Plastics Corp., 563 U.S. 1, 17 (2011) ("the Seventh Circuit erred in determining that oral complaints cannot fall within the scope of the . . . Act's anti-retaliation provision"). The concerned employees, in the present action, engaged in protected activity.

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Defendants have violated and are likely to continue violating Sections 11(a) and 15(a)(3) of the FLSA. Further, if Defendants' conduct is not immediately rectified, Defendants' vulnerable employees, the Secretary, and the public will be irreparably harmed. The Secretary has presented evidence in support of the preliminary injunction and has shown that good cause exists for issuing a preliminary injunction. Thus, the Court **GRANTS** the application for a Preliminary injunction as follows:

1. Defendants, their agents, and their attorneys are enjoined from retaliating, intimidating or discriminating in any way against any current or former employees of the Defendants at issue in this litigation, or any witness who might seek to participate in this litigation;

2. Defendants shall send to each employee by immediate electronic means, i.e., text message or slack, the written notice attached hereto as Exhibit A, explaining that Defendants have not terminated any employee since March 12, 2020 and that employees will be scheduled for all available work on a non-discriminatory basis, without bias or prejudice against any employee for engaging in activities protected by federal law, including providing testimony to this Court and the Secretary of

Labor or protesting announced pay cuts employees reasonably believed to be taken in violation of federal or state law;

3. Defendants shall post the written notice attached hereto as Exhibit A prominently in the workplace and distribute a copy of that written notice to each employee at the beginning of the next shift;

4. Defendants are enjoined from instructing employees not to speak to representatives of the DOL or to provide false information to the DOL regarding the terms and conditions of their employment;

5. Defendants are enjoined from implementing any and all adverse actions announced since March 12, 2020, including any denial of work opportunities, terminations, or the 30% wage cut previously announced by Defendants;

6. Defendants are enjoined from terminating or taking any adverse action against its employees, including any reduction of wage rates without providing the Secretary of Labor and the worker five days' written notice as to the non-retaliatory business justification for the termination and/or adverse action;

7. Defendants shall provide the Secretary with access to its time and payroll records each pay period as they are completed; and

8. Defendants shall comply with the FLSA.

IT IS SO ORDERED.

Dated this 23rd day of April, 2020.

Kent J. Dawson
United States District Judge

EXHIBIT A

Aviso a Empleados

El Departamento de Trabajo [Department of Labor ("DOL" en sus siglas en inglés)] solicitó una orden judicial preliminar en el Distrito de Nevada contra Unforgettable Coatings bajo la Ley de Normas Razonables de Trabajo [Fair Labor Standards Act, ("FLSA" en sus siglas en inglés)], 29 USC § 201, y siguientes. La Corte emitió un mandato preliminar que establece que:

- Independientemente de cualquier comunicación enviada a un empleado por Unforgettable Coatings, Unforgettable Coatings no ha terminado el empleo de ningún empleado desde el 12 de marzo de 2020.

- Unforgettable Coatings no ha despedido y no puede despedir ni reducir las horas de trabajo de ningún empleado porque protestaron por el recorte salarial que el empleador anunció en marzo. Unforgettable Coatings canceló el recorte salarial anunciado de acuerdo en conformidad con la Orden de la Corte que prohíbe que Unforgettable Coatings participe en represalias en violación de la ley federal.

- Todos los empleados que deseen trabajar pueden regresar a trabajar. El empleador programará el trabajo disponible de manera no discriminatoria, asegurando que los empleados que participaron en actividades protegidas por ley federal, incluyendo la protesta por el recorte salarial anunciado por el empleador y hablando con oficiales de la ley, sean tratados por igual a los empleados que no participaron en tales actividades protegidas.

- Actividades protegidas incluyen quejándose de pago o de las condiciones de trabajo que cree que está en violación de la ley federal, hablar o cooperar con el Departamento de Trabajo, y proporcionando información al Secretarío de Trabajo o la Corte ;

Si desea hablar con el DOL, puede comunicarse con ellos al (702) 928-1260 o (602) 733-7412 .

Fecha: _____

_____
Cory Summerhays

NOTICE TO EMPLOYEES

The Department of Labor ("DOL") applied for a preliminary injunction in the District of Nevada against Unforgettable Coatings under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq. The Court issued a preliminary injunction which provides that:

- Regardless of any communication sent to any employee by Unforgettable Coatings, Unforgettable Coatings has not terminated the employment of any employee since March 12, 2020

- Unforgettable Coatings has not fired and cannot fire or reduce the work hours of any employee because they protested the pay cut the employer announced in March. Unforgettable Coatings cancelled the announced pay cut consistent with the Court's Order prohibiting Unforgettable Coatings from engaging in retaliatory conduct in violation federal law

- All employees who wish to work may return to work. The employer will schedule available work on an nondiscriminatory basis, ensuring that employees who participated in activities protected by federal law, including protesting the employer's announced pay cut and talking to law enforcement, are treated equally to employees who did not engage in such protected activities

- Protected activities include complaining about pay or working conditions believed to be in violation of federal law, speaking or cooperating with the DOL, and providing information to the Secretary of Labor or the Court;

If you wish to speak to the DOL, you may contact them at (702) 928-1260 or (602) 733-7412.

Dated:

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Cory Summerhays