

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

_____)	
ERNESTO CARRILGRAMIREZ, JOSE)	
DELGADO-PALOMERA, NESTOR DELGADO)	
ZAMORANO, OSCAR PACHECO SANTANA,)	
VICTOR SANCHEZ-JAIMES, JOEL)	
TAPIA-RUIZ, and ADAN ESPARZAHARO)	
)	
Plaintiffs,)	CIVIL ACTION
)	NO. 3:15-CV-00409CWR-FKB
v.)	
)	
CULPEPPER ENTERPRISES, INC., KATHY)	
CULPEPPER, NORTH AMERICAN)	
LABOR SERVICES, INC. JON CLANCY,)	
and CHERI CLANCY,)	
)	
Defendants.)	
_____)	

FIRST AMENDED COMPLAINT

PRELIMINARY STATEMENT

1. Plaintiffs are Mexican workers who were admitted to the United States under the H-2B temporary foreign worker visa program. Plaintiffs were employed by Defendants Kathy Culpepper, doing business as Culpepper Enterprises, Inc., ("Culpepper Enterprises") and by Jon

Organizations Act, 18 U.S.C. §§ 1960, *seq.* (“RICO”); and for all Defendants’ violations of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* (“FLSA”) and Mississippi contract law.

2. Plaintiffs are low-wage temporary workers brought by Defendants to the United States on time-limited work visas because of a claimed shortage of U.S. workers to fill Defendants’ available jobs. For years, Plaintiffs have left their homes and families in Mexico and spent considerable money and effort to come to the United States to work for Defendants.

3. Defendants Kathy Culpepper, Jon Clancy, and Cheri Clancy, through their enterprise, defrauded the U.S. government and the plaintiffs by promising year-after-year wages they had no intention of paying. Defendants not only failed to pay the promised wages they also did not properly pay Plaintiffs even the federal minimum wage as required by the FLSA. Defendants also charged Plaintiffs an excessive amount for employee-arranged and controlled housing, far in excess of the reasonable cost of that housing, and charged Plaintiffs for tools, protective gear, and uniforms. In addition, Defendants failed to pay Plaintiffs the proper FLSA overtime wage rate.

4. Defendants breached employment contracts with Plaintiffs. Furthermore, Defendants breached their contracts with the U.S. Department of Labor (“DOL”), which were entered into for the benefit of Plaintiffs and/or such benefit was the direct result of the performance within the contemplation of Defendants and DOL, including guaranteeing the wages Plaintiffs would be paid.

5. Plaintiffs seek an award of money damages, declaratory and injunctive relief, statutory and/or actual damages, liquidated damages for FLSA claims, trebled damages for RICO claims, punitive damages, and pre and post-judgment interest for the injuries each of them

suffered due to Defendants' violations of the law. Plaintiffs seek declaratory and injunctive relief to ensure that they and others are not subjected to similar practices in the future.

JURISDICTION

6. Jurisdiction is conferred upon this Court by 18 U.S.C. § 1964(c), this action arising under the RICO; 29 U.S.C. § 216(b), this action arising under the FLSA; and by 28 U.S.C. § 1331, this action arising under the laws of the United States. Jurisdiction over the contract claims is conferred by 2

12. Plaintiff Nestor Delgado Zamorano is an individual who maintains his permanent residence in Mexico. Mr. Delgado Zamorano was employed by Defendants pursuant to a B-2 H visa during the 2014 season.

13. Plaintiff Oscar Pacheco Santana is an individual who maintains his permanent residence in Mexico. Mr. Pacheco Santana was employed by Defendants pursuant to a B-2 H visa during the 2012, 2013, and 2014 seasons.

14. Plaintiff Victor Sanchez Jaimes is an individual who maintains his permanent residence in Mexico. Mr. Sanchez Jaimes was employed by Defendants pursuant to a B-2 H visa during the 2011, 2012, 2013 and 2014 seasons.

15. Plaintiff Joel Tapia Ruiz is an individual who maintains his permanent residence in Mexico. Mr. Tapia Ruiz was employed by Defendants pursuant to a B-2 H visa during the 2014 season.

16. Plaintiff Adan Esparza Haro is an individual who maintains his permanent residence in Mexico. Mr. Esparza Haro was employed by Defendants pursuant to a B-2 H visa during the 2014 season.

17. Defendant Culpepper Enterprises, Inc. is an administratively dissolved Mississippi corporation that conducts business in this district. Defendant Culpepper Enterprises

18. Defendant Kathy Culpepper is an individual who does business as and is the President, Vice President, and Registered Agent of Defendant Culpepper Enterprises. Kathy Culpepper also serves as a Director of Defendant Culpepper Enterprises.

19. Defendants Culpepper Enterprises and Kathy Culpepper collectively will be

27. At all times relevant to this action, the NAID Defendants acted as agents for the Culpepper Defendants and acted within the scope of their agency.

28. At all times relevant to this action, Plaintiffs were employees of Defendants within the meaning of the FLSA, 29 U.S.C. § 203(e)(1).

29. At all times relevant to this action, Plaintiffs were employed by Defendants within the meaning of the FLSA, 29 U.S.C. § 203(g).

30. At all relevant times, Plaintiffs were “persons” within the meaning of that term as defined by RICO, 18 U.S.C. § 1961(3).

31. At all relevant times, Defendants Kathy Culpepper, Jon Clancy, and Cheri Clancy (collectively, “the Individual Defendants”) were “persons” within the meaning of that term as defined by RICO, 18 U.S.C. § 1961(3).

32. At all relevant times, Defendants Kathy Culpepper, Jon Clancy, and Cheri Clancy were an association-in-fact, and therefore an enterprise (“the RICO enterprise”) within the meaning of 18 U.S.C. § 1961(4).

FACTS

Defendants’ Participation in the H-2B Visa Program

- b. March 1 to December 15, 2013 (“2013 Culpepper 9142B Form”) and
- c. March 15 to December 15, 2014 (“2014 Culpepper 9142B Form”).

36. Each of these temporary labor certification applications contained an attestation pursuant to 20 C.F.R. § 655.20 that Defendant Culpepper Enterprises would abide by applicable regulatory requirements pertaining to the temporary work program and federal and state laws, including the requirement that Defendant Culpepper Enterprises pay Plaintiffs at least the H-2B prevailing wage.

37. The 2012 Culpepper 9142B Form indicated that Defendant Culpepper Enterprises’s offered basic rate of pay to the H-2B workers was \$10.26 per hour, and the overtime rate of pay was \$15.39 per hour.

38. The 2013 Culpepper 9142B Form indicated that Defendant Culpepper Enterprises’s offered basic rate of pay to the H-2B workers was \$8.25 per hour, and the overtime rate of pay was \$12.38 per hour.

39. The 2014 Culpepper 9142B Form indicated that Defendant Culpepper Enterprises’s offered basic rate of pay to the H-2B workers was \$11.11 per hour, and the overtime rate of pay was \$16.67 per hour.

40. Each of these temporary labor certifications listed Defendant Jon Clancy and NALS as Defendant Culpepper Enterprises’s agent. *See* Ex. B (2012 Culpepper 9142B Form); Ex. C (2013 Culpepper 9142B Form); Ex. D (2014 Culpepper 9142B Form).

³ In 2013, Culpepper Enterprises, Inc. requested and was granted certification to import 28 H-2B workers. *See* Ex. C (2013 Culpepper 9142B Form).

⁴ In 2014, Culpepper Enterprises requested and was granted certification to import 238 H-2B workers. *See* Ex. D (2014 Culpepper 9142B Form).

41. Defendant Kathy Culpepper signed each of these temporary labor certification applications as the "Owner/President" of Culpepper Enterprises. ~~Ex. B~~ (2012 Culpepper 9142B Form); Ex. C (2013 Culpepper 9142B Form); Ex. D (2014 Culpepper 9142B Form).

42. Defendant Jon Clancy signed each of these temporary labor certification applications as the agent of Culpepper Enterprises. ~~Ex. B~~ (2012 Culpepper 9142B Form); Ex. C (2013 Culpepper 9142B Form); Ex. D (2014 Culpepper 9142B Form).

43. Defendants Kathy Culpepper and Jon Clancy used the mail and/or wires to

conditions of employment, including an enforceable guarantee of wages no less than the federal minimum and H2B prevailing wages.

48. The DOL-approved labor certifications ~~is~~ formed valid and enforceable contracts between Defendants and DOL, which were entered into for the benefit of Plaintiffs and/or such benefit was the direct result of the performance within the contemplation of the Culpepper Defendants, operating as Culpepper Enterprises, and DOL including the guarantee that Plaintiffs would not be paid less than the federal minimum ~~and~~ H2B prevailing wages.

49. Defendants and DOL both owed Plaintiffs a legal obligation and/or duty.

50. Defendant Culpepper Enterprises and DOL's legal obligation and/or duty to Plaintiffs connect Plaintiffs with the contracts between Defendant Culpepper Enterprises and DOL.

51. The Culpepper Defendants sponsored Plaintiffs' H2B visas in order to fill their claimed labor shortages. Plaintiffs' H2B visas allowed them to work only for the Culpepper Defendants, operating as Defendant Culpepper Enterprises

Defendants Underpaid Their H2B Employees by Charging Them Recruitment and Travel Fees

52. Plaintiffs spent considerable sums of money to obtain their H2B work visas and travel from their hometowns in Mexico to the United States to work for Defendants in Mississippi. Plaintiffs incurred these costs, which were primarily for the benefit of their employers.

53. Prospective H2B workers must undertake a ~~long~~ process to obtain an H2B visa sponsored by the Culpepper Defendants, operating as Culpepper Enterprises. Prospective workers must interview with Defendant Cheri Clancy in Mexico, pay her hundreds of dollars to be included on the recruitment list, ~~then~~ to the city of Monterrey

56. Upon information and belief, Defendants used the mails and wires in furtherance of the scheme to defraud Plaintiffs about the promised wages.

57. The majority of Plaintiffs maintain their permanent residences in and around the city of Tepic, in the Pacific coast state of Nayarit, Mexico, where they learned of the job opportunity with Defendants. Plaintiff Victor Sanchez maintains his permanent residence in Tijuana, in the state of Baja California, Mexico.

58. The Culpepper Defendants contracted with the NALS Defendants to act as the Culpepper Defendants' agents to assist them in obtaining H-2B workers from Mexico, including the Plaintiffs.

59. The Culpepper Defendants chose to recruit workers in Mexico and secure H-2B visas by utilizing the NALS Defendants as their exclusive representative.

60. The Culpepper Defendants required prospective H-2B workers to go through Defendant Cheri Clancy, their designated representative, to seek employment through the H-2B program with the Culpepper Defendants.

61. Defendant Cheri Clancy, the Culpepper Defendants' designated representative, charged prospective H-2B workers, including the Plaintiffs, a recruitment fee each year of several hundred dollars per worker to have their names included on the list of workers requested by the Culpepper Defendants. This money was never reimbursed to the Plaintiffs.

62. The Plaintiffs paid the recruitment fees described in paragraph 61 in reliance on the false promises Defendant Cheri Clancy made about the wages the Plaintiffs would earn while employed by the Defendants.

63. Plaintiffs were required to travel from in and around Tepic, in the state of Nayarit, Mexico to Monterrey, in the northeastern Mexico state of Coahuila, for the purpose of

the U.S. Consulate. An interview with a visa ~~offi~~ at a U.S. Consulate or Embassy is a prerequisite to a prospective ~~2B~~ worker beginning work for the sponsoring employer. The Plaintiffs paid approximately \$115 per person each year for their trips to Monterrey and for lodging during their stays in Monterrey, which was never reimbursed to them.

64. Following the approval of their ~~H2B~~ visas by the U.S. Consulate, Plaintiffs traveled by bus from Monterrey, Mexico to the Jackson, Mississippi area to begin work for Defendants.

65. Plaintiffs were required to pay for oneway travel from Monterrey, Mexico to the housing complex arranged and controlled by Defendants outside Jackson, Mississippi, and to pay a border crossing fee when they entered the United States. The Plaintiffs paid approximately \$155 per person ~~ea~~ year in travel and border crossing expenses to travel from Monterrey, Mexico to Defendants' chosen housing site outside Jackson. This money was never reimbursed to Plaintiffs.

66. The Plaintiffs paid the travel and border crossing expenses described in paragraphs ~~63~~ and ~~65~~ in reliance on the false promises Defendant Cheri Clancy made about the wages the Plaintiffs would earn while employed by the Defendants.

67. The travel and border crossing expenses Plaintiffs incurred to come work for Defendants, as set out paragraphs 63 and 65, were primarily for the benefit of Defendants within the meaning of the FLSA, 29 C.F.R. §§ 531.32(c) and 778.217.

68. Defendants did not reimburse Plaintiffs for the travel and border crossing expenses they incurred to come to the ~~US~~ work for Defendants, as set out in paragraphs 63 and 65, above.

74. In 2012, in reliance on false attestations made in the temporary labor

81. Plaintiffs shared apartments with other Culpepper Enterprises workers. Two-bedroom apartments were shared by five workers, with one worker sleeping in the living room. Defendants managed specific details of the Plaintiffs' housing, including assigning them to live in specific apartments and distributing keys to those apartments.

82. Every two weeks, Defendants deducted approximately \$120 per worker in 2013 and \$130 per worker in 2014 from Plaintiffs' paychecks for housing. The housing deduction was made from each worker's check irrespective of the number of paychecks in a given month.

83.

89. The amounts deducted (or made via *de facto* deductions) from Plaintiffs' paychecks for these tools of the trade, protective gear, and uniforms were primarily for the benefit or convenience of Defendant. 29 C.F.R. § 531.3(d)(2).

90.

97. The RICO enterprise is engaged in interstate commerce in that its activities and transactions related to the international and interstate movement of workers affect interstate commerce and frequently require travel and communications across state and international lines.

98. The members of the RICO enterprise function as a continuing unit.

99. The Individual Defendants conducted or participated in, and/or conspired to conduct or participate in the affairs of the RICO enterprise through a pattern of numerous acts of racketeering activity in violation of 18 U.S.C. § 1962(c) and 18 U.S.C. § 1962(d), by their common goal to recruit, contract, transport, and employ foreign workers to work as landscapers in the United States, and particularly in Mississippi.

100. By conducting or participating in the affairs of the RICO enterprise and/or by conspiring to conduct or participate in the affairs of the RICO enterprise through a pattern of mail and wire fraud and fraud in foreign labor recruitment, namely, by knowingly providing false attestations to DOJ and false statements to Plaintiffs about the payment of the H prevailing wages - Defendants Kathy Culpepper and Jon Clancy violated the RICO, 18 U.S.C. §§ 1962(c) and (d)

101. Specifically, the Individual Defendants conducted or participated in and/or conspir(i)-2(42(n, a)4(nd)-2(or)3(c)4(r)3(t)-2(i)-2(0 Td (0 Td (0- (0 Td -102(l)-22(y).58(a)6(l)s)1(e)6(s)1

Predicate Acts

Mail and Wire Fraud: 18 U.S.C. §§ 1341 and 1343

102. As set forth in the preceding paragraphs, the Individual Defendants, through the RICO Enterprise, made and/or conspired to make material misrepresentations to the Plaintiffs and to the U.S. Department of Labor regarding the hourly and overtime wages Plaintiffs would receive.

103. As set forth in the preceding paragraphs, the Individual Defendants, through the RICO enterprise, used the mails and wire communications, including communications via telephone, fax, internet, and/or email, on numerous occasions to further these fraudulent schemes.

104. These willful, knowing, and intentional acts constitute mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343.

Fraud in Foreign Labor Contracting: 18 U.S.C. § 1351

105. As set forth in the preceding paragraphs, the Individual Defendants, through the RICO enterprise, knowingly and with intent to defraud recruited, solicited, and hired Plaintiffs and/or caused another person to recruit, solicit, and hire Plaintiffs outside the United States, for the purpose of employment in the United States by means of materially false or fraudulent pretenses, representations, or promises regarding the hourly and overtime wages Plaintiffs would receive.

106. These willful, knowing, and intentional acts constitute fraud in foreign labor contracting in violation of 18 U.S.C. § 1351.

Pattern of Related Racketeering Acts

107. The Individual Defendants engaged in the racketeering activity described in this Claim repeatedly starting in 2012 and continuing at least through 2014 with respect to dozens of workers.

108. Upon information and belief, the Individual Defendants have sought H-2B workers for employment at Culpepper who may presently be subjected, through the RICO enterprise to similar racketeering activities.

109. The Individual Defendants, through the RICO enterprise, rely on the racketeering acts described in this Complaint to conduct their regular business activities.

110. The Individual Defendants' racketeering acts have or had similar purposes: to profit from the fraudulent recruitment of Plaintiffs and other H-2B workers for employment on Mississippi Department of Transportation contracts in Mississippi.

111. The Individual Defendants' acts yielded similar results and caused similar injuries to Plaintiffs, including Plaintiffs' payment of recruitment fees and expenses, the difference between the fraudulently promised wages and the wages Plaintiffs were paid, and the exorbitant cost of the employer provided housing.

112. As set forth in the preceding paragraphs, the racketeering acts have or had similar participants: the Individual Defendants and their agents.

113. As set forth in the preceding paragraphs, the Individual Defendants, through the RICO enterprise, directed their racketeering activities at similar individuals and entities: Plaintiffs and other H-2B workers, and federal and state government agencies.

114. The Individual Defendants' acts have or had similar methods of commission, such as common recruitment tactics, relatively consistent practices with respect to collecting payments

from Plaintiffs and other H2B workers, and use of similar employment practices and policies with respect to Plaintiffs and other H2B workers.

Injury

115. As a direct and proximate result of the Individual Defendants' willful, knowing, and intentional acts discussed in this section, Plaintiffs have suffered injuries to their property and/or business, including but not limited to the difference between the fraudulently promised regular and overtime wage rates and the wages Plaintiffs were paid, the recruitment fees and travel and border crossing expenses the Plaintiffs paid in reliance upon the Defendants' misrepresentations about the Plaintiffs' wages, and other pecuniary losses and/or losses to real or personal property

116. Plaintiffs are entitled to an award of damages in an amount to be determined at trial, including but not limited to:

- a. compensation for Plaintiffs' injuries to their property and/or business;
- a. trebling of the damages set forth in subparagraph (a); ~~and~~
- b. attorneys' and experts' fees and costs associated with this action, as authorized by 18 U.S.C. § 1964(c).

COUNT II

FAIR LABOR STANDARDS ACT

117. All the foregoing allegations are incorporated by reference as if set forth fully herein.

118. Pursuant to 29 U.S.C. § 216(b), the Plaintiffs have consented in writing to be Plaintiffs in this FLSA action. Their written consents are ~~attached~~ hereto as Ex. A.

119. This count sets forth a claim for declaratory relief and damages for each Defendant's violation of the minimum wage and overtime provisions of ~~the~~ FLSA

120. Defendants violated the FLSA, 29 U.S.C. § 206(a), by failing to pay Plaintiffs a least \$7.25, the federal minimum wage, for every compensable hour of labor they performed during each workweek they were employed.

121. Defendants' violations of the FLSA resulted, in part, from Defendants' failure to reimburse Plaintiffs for certain pre-employment expenses they incurred which were primarily for Defendants' benefit, reducing Plaintiffs' wages below the minimum wage for the first workweek.

122. Defendants' violations of the FLSA also resulted, in part, from Defendants' unreasonable deductions from Plaintiffs' wages for housing. 29 C.F.R. § 531.3(b).

123. Defendants' violations of the FLSA also resulted, in part, from Defendants' deductions from Plaintiffs' wages for tools, protective gear, and uniforms that were primarily for the benefit or convenience of Defendants. 29 C.F.R. § 531.3(d)(2).

124. Defendants violated the FLSA, 29 U.S.C. § 207(a), by failing to pay Plaintiffs the proper overtime wage rate.

125. Defendants' failure to pay Plaintiffs their federally mandated minimum and overtime wages was a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a).

126. As a consequence of Defendants' violations of the FLSA, Plaintiffs are entitled to recover their unpaid minimum and overtime wages, plus an additional equal amount in liquidated damages, the costs of suit, and reasonable attorneys' fees pursuant to 29 U.S.C. § 216(b).

COUNT III

BREACH OF EMPLOYMENT CONTRACT

127. All the foregoing allegations are incorporated by reference as if fully set forth herein.

128. This count sets forth a claim for damages resulting from Defendants' breaches of their employment contracts with Plaintiffs.

129. The terms and conditions provided in the temporary labor certification (ETA Form 9142B), its accompanying attestations, and the law and regulations applicable to the H program constituted the employment contracts between Plaintiffs and Defendants.

130. Plaintiffs satisfactorily performed all employment duties and responsibilities required of them under the employment contracts with Defendants.

131. Defendants breached the employment contracts with Plaintiffs by compensating the Plaintiffs below the applicable prevailing wages and required overtime premiums for their work.

132. Defendants' breach of the employment contracts caused Plaintiffs substantial

5. Granting judgment in favor of Plaintiffs against each Defendant, jointly and severally, for breach of the employment contracts with Plaintiffs, and awarding each Plaintiffs actual and consequential damages, punitive damages, and prejudgment interest;
6. Granting judgment in favor of thirdparty beneficiary Plaintiffs against Defendants, jointly and severally, for breach of the employment contracts with the U.S. Department of Labor, and awarding each Plaintiffs actual and consequential damages, punitive damages, and prejudgment interest;
7. Awarding Plaintiffs the cost of this action;
8. Awarding Plaintiffs a reasonable attorney's fee; and
9. Granting such relief as this Court deems just and equitable.

Dated this 1st day of September 2015.

Respectfully submitted,

/s/ Daniel Werner

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* Admitted *pro hac vice*.

** A dmission *pro hac vice* pending

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I further certify that the attached has been deposited in a U.S. Mail receptacle for delivery by first class mail, properly addressed and with postage paid:

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North American Labor Services, Inc.
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/s/ Daniel Werner

this 1st day of September, 2015.