

The following cases were not handled by Dolin, Thomas & Solomon, LLP, rather they were handled by other law firms.

### **Court Orders California Hospital to Pay \$32.9 Million in Overtime Restitution**

LOS ANGELES--A California Superior Court judge Jan. 25 ordered a Pasadena, Calif., hospital to pay almost \$32.9 million in restitution to a class of employees the court found had been underpaid for both regular and overtime pay, due to the hospital's failure to include a special shift differential in both calculations (*Mutuc v. Huntington Mem'l Hosp.*, Cal. Super. Ct., No. BC288727, 1/25/08).

The restitution ordered by Superior Court Judge William A. MacLaughlin was a supplemental ruling to his decision, issued Sept. 14, 2007, that Huntington Memorial Hospital (HMH) had miscalculated both the regular rate of pay and overtime for employees working 12-hour shifts.

At that time, MacLaughlin also found that the hospital's pay system was "an artifice or subterfuge which evaded and failed to comply with the overtime laws," and that it constituted an unfair business practice under California's Business & Professions Code Section 17200.

The class consists of some 2,117 employees at HMH between Jan. 17, 1999, and Jan. 20, 2004, who worked at least 10 hours of a scheduled 12-hour shift and were paid on an hourly basis.

At the heart of the dispute is a premium the hospital had agreed in previous years to pay in the event that nurses and other nonexempt employees normally scheduled to work 12-hour shifts did not complete those shifts due to low patient census or other reasons.

#### **Hospital Transitioned to 12-Hour Shifts**

Sometime in the early 1980s, HMH began moving to 12-hour shifts, from the standard eight-hour shifts that had been the norm until then, the court wrote in its Sept. 14, 2007, decision.

Because California labor laws require overtime pay for any hours in a day over eight, the hospital, in agreement with its employees, lowered the base rate of pay for the 12-hour shift workers, so that, including the required overtime, pay would be about equal for 8-hour-shift and 12-hour-shift nurses over any 80-hour period.

By the time the transition was completed, more than 80 percent of the hospital's nonexempt nursing staff was working 12-hour shifts, the court noted, adding that evidence indicated that the change to 12-hour shifts was made by employee choice, because it entailed working fewer shifts in a pay period than the traditional eight-hour shifts.

#### **Then, 'The Plot Thickened.'**

Then, however, "the plot thickened," MacLaughlin wrote in his September decision.

In essence, 12-hour shift nurses found that for a number of reasons, including low patient census, they could end up working less than full shifts, thus losing overtime hours. To compensate, HMH introduced the short-shift premium (SSP), "to cure, or at least ameliorate, the disparity that could occur when a 12-hour nurse did not get to work all the scheduled hours," the court explained in its description of the case.

Prior results do not guarantee similar outcomes.

With the introduction of the SSP, the structure changed. Whenever a 12-hour employee worked less than 10 hours, that employee would receive the SSP for each hour worked. That, when added to the (lower) 12-hour base rate, equaled the higher 8-hour rate for the time worked.

The SSP, however, was not included in the hospital's base pay rate for 12-hour shift employees, and thus was also not counted when overtime was calculated.

That omission was the basis for the overtime and unfair business practice claim brought by the class members.

### **Damages Determination Follows Liability Finding**

The court, in its September decision, found the SSP should have been included in the calculation of the regular rate of pay for the affected class members, but it put off until January its ruling on the amount of back pay and overtime the class was owed.

HMH argued that in calculating restitution, the court should not include any 12-hour shift worker who never worked a short shift, and thus never received any SSP. Alternatively, the hospital claimed restitution should be limited to those pay periods in which SSP actually was paid, but the court disagreed with both points.

"For Defendant's 12-hour employees, their non-overtime work day was 8 hours and the non-overtime workweek was 40 hours and, in every instance, they will be paid the SSP for each of those non-overtime hours," MacLaughlin wrote in his supplemental order.

"That pay becomes part of the regular rate and is in effect for all 12-hour employees while that wage agreement exists and becomes the regular rate for all weeks," he added.

"Because the regular rate necessarily includes the SSP at all times, Defendant's argument that an employee who never worked a short shift has not been damaged is incorrect," he concluded.

HMH said in a Jan. 25 statement that it was disappointed with the court's decision on restitution, and was contemplating whether to appeal the decision.

"It is important to note that we have always paid our employees fairly and treated them fairly," the hospital stated. "The 12-hour schedule that is the subject of this litigation was devised and adopted at the request of our employees and with their overwhelming support," it added.

Joseph Antonelli, the West Covina, Calif.-based attorney for the employees, did not return calls seeking comment.

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### **Sutter nurses file suit over missed breaks**

## **They seek back pay; hospital system calls move 'unnecessary.'**

Five nurses are suing Sutter Health to collect back pay for missing meals and rest breaks and working overtime.

The class-action lawsuit, filed late Wednesday in Sacramento Superior Court, accuses Sacramento-based Sutter of having "a consistent policy" of requiring nurses to work through their breaks without compensation and failing to pay appropriate overtime and minimum wages since February 2004.

By law, workers must have a 10-minute rest period every four hours and a 30-minute meal break for every five hours of work. Employers must compensate workers for an hour's pay every day the law is violated. A violation occurs if the rest break isn't taken within the fourth hour and the meal within the fifth – even if the worker takes the break later in the shift.

Sutter spokesman Bill Gleeson said Sutter strives for consistent compliance with California's complex labor rules in a setting where patient care must be given top priority.

"Our affiliate health care organizations are committed to doing the right thing," he said. "It is unfortunate that they will have to divert attention and resources to defend this unnecessary lawsuit."

The suit comes as Sutter and state labor regulators conduct a massive audit of payroll and timecard records of about 4,500 workers at five hospitals in the Sacramento region. The review could result in a multimillion-dollar payout.

The Sutter lawsuit was filed by nurses Diane Aymer, Deborah Klacik and Sheryl Wozniewicz of Sacramento County, Montie Frederick of Solano County and Jackie Brown of Placer County.

"Sutter has been aware of the problem for some time. They really haven't take any measures to stem the problem," said H. Wade Sammis, the Sacramento attorney representing the nurses.

Earlier this month, Mercy hospital employees in Sacramento filed a similar class-action lawsuit against Catholic Healthcare West, the San Francisco-based parent of the local facilities.

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## **UPS Settles California Overtime Suit**

By **Amanda Ernst**, amanda.ernst@portfoliomediamedia.com

*Portfolio Media, New York (November 7, 2006)*--**United Parcel Service Inc.** has agreed in principle to settle an ongoing class action lawsuit brought by its package delivery drivers and has offered a settlement of \$87 million, according to a Monday filing with the U.S. Securities and Exchange Commission.

UPS also revealed that the plaintiffs in the case represented 20,000 California drivers who "allege that they were improperly denied wages and/or overtime and meal and rest periods."

The class includes drivers who worked for UPS between February 6, 1999 and September 30, 2003. The settlement is awaiting court approval.

The original complaint was filed in February 2003 in California Superior Court. It was moved to U.S. District Court a few months later.

The original complaint was brought by three UPS delivery drivers: James Conn, Eric Duvoc and Kim Marchant. They claimed that Ohio-based UPS had a system for tracking pay that automatically deducted a lunch break even when employees said they didn't take one.

As a result, overtime hours were not calculated in the right way, and many employees did not get paid money they had earned. UPS also failed to provide its hourly employees with an itemized statement of their pay.

The plaintiffs also claimed UPS didn't let employees know that they could take a second meal break after working ten to twelve hours in one day. They claimed the company's recording systems didn't give them a way to enter in a second meal break.

Furthermore, the employees alleged that UPS' delivery deadlines didn't always allow the proper amount of rest and meal breaks. The suit claimed the company's schedule requirements "force the rest breaks and meal periods to be taken in a manner that violates California statutory and regulatory requirements."

The plaintiffs sought to recoup their lost wages with interest, plus a percentage of the profits UPS earned while operating in an illegal manner. Plaintiffs also sought damages and attorneys fees.

Attorneys for the plaintiffs would not comment on the case.

Although in settling the case UPS neither admits nor denies any wrongdoing, the company has brought itself into compliance with all California regulations brought into question in the case.

"This is a case specific to the state of California," UPS spokesperson Heather Robinson said. "Most of our drivers like to have the flexibility to choose when they take their meal and rest

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periods, but this was a case of the state regulating when the breaks had to be taken.”

Robinson also said that UPS has made strides to comply with all regulating laws in the places where it operates and notes it has been widely recognized as a great place to work.

Regardless, this is not the only time UPS has been in the news because of employee lawsuits. In fact, one such lawsuit was even touched upon in the recent SEC filing.

In that case, *Marlo v. UPS*, a class of employees claiming to represent 1,200 full-time supervisors alleged that they were denied overtime and sought penalties for missed meal and rest periods.

Last year, the court granted summary judgment in that case in favor of UPS, but the plaintiffs are currently appealing.

And in October, a U.S. appeals court panel upheld a lower court ruling that UPS violated the Americans with Disabilities Act by excluding the deaf from truck driver positions, noting that drivers must be judged individually, and that a person’s lack of hearing does not necessarily make him or her dangerous on the road.

In order to drive one of the familiar brown UPS trucks, an employee must first bid for the job. If selected, he or she must then meet certain requirements, including passing a U.S. Department of Transportation hearing test. To pass, a person must perceive a forced whispered voice from five feet away and not have average hearing loss greater than 40 decibels at 500 Hz.

However, the DOT only mandates that drivers of vehicles weighing over 10,000 pounds pass the hearing and vision tests, and UPS has nearly 6,000 vehicles below the 10,000-pound mark, according to court documents.

A federal judge ruled that the parcel delivery service had broken the Americans with Disabilities Act and a pair of California state laws. UPS then appealed, arguing that the class should be decertified, that it did not break any anti-discrimination laws, and that none of the plaintiffs had proven they could drive safely.

Attorneys from **Kershaw Cutter & Ratinoff LLP** and York Law Corp. represented the plaintiffs in the recently settled case.

UPS was represented by attorneys from **Paul, Hastings, Janofsky & Walker**.

The case is *Cornn et al v. United Parcel Service Inc. et al* 3:03-cv-02001 in the Northern District of California.

--Additional reporting by Jesse Greenspan