

ORIGINAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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JOSEFINA A. TOLEDO MONTERO,)
individually and on behalf of all others)
similarly situated,)
Plaintiff,)

109779/10
Index No. 04779-2010

-against -

FILED

MC MILLAN'S HOME CARE AGENCY,)
INC., and YVONNE MC MILLAN)
Defendants.)

OCT 20 2010

ANSWER

NEW YORK
COUNTY CLERK'S OFFICE

Defendants Mc Millan's Home Care Agency Inc., ("Mc Millan's") and Yvonne Mc Millan ("Ms. Mc Millan"), by their attorneys, Pepper Hamilton LLP, as and for their Answer, state as follows:

1. Defendants deny the allegations asserted in paragraph 1 of the Complaint, except admit that Plaintiff purports to bring this action on behalf of herself and a proposed class.
2. Defendants deny the allegations asserted in paragraph 2 of the Complaint.
3. Defendants deny the allegations asserted in paragraph 3 of the Complaint.
4. Defendants deny the allegations asserted in paragraph 4 of the Complaint, except admit that Plaintiff purports to seek the relief stated therein on behalf of herself and a proposed class.

JURISDICTION AND VENUE

5. Defendants admit the allegations asserted in paragraph 5 of the Complaint that Mc Millan's operates its business in the state of New York and conducts business in New York County.

6. Defendants admit the allegations asserted in paragraph 6 of the Complaint regarding Mc Millan's conducting business in New York County, except aver that its principal

place of business is located at 1430 Pitkin Avenue, Brooklyn, New York 11233, not 165 West 46th Street.

7. Defendants deny the allegations asserted in paragraph 7 of the Complaint, except admit that Plaintiff purports to bring claims on behalf of herself and a proposed class solely under New York law.

THE PARTIES

8. Defendants admit the allegations asserted in paragraph 8 of the Complaint regarding Ms. Montero's residency and employment as a home health care worker for Mc Millan's.

9. Defendants deny the allegations asserted in paragraph 9 of the Complaint regarding Mc Millan's regular place of business at 165 West 46th Street and admit the allegations regarding Mc Millan's corporate status and the services it provides.

10. Defendants admit the allegations asserted in paragraph 10 of the Complaint regarding Ms. Mc Millan's role as President of Mc Millan's and that Ms. Mc Millan is a substantial shareholder of Mc Millan's, except deny that Mc Millan's office or usual place of business is located at 165 West 46th Street, New York, New York.

11. Defendants admit the allegations asserted in paragraph 11 of the Complaint regarding the "employee" status of Plaintiff and the proposed class members as employees of Mc Millan's, and deny that Ms. Mc Millan was or is an "employer."

12. Defendants deny the allegations asserted in paragraph 12 of the Complaint.

CLASS ACTION ALLEGATIONS

13. Defendants admit the allegations asserted in paragraph 13 of the Complaint that Plaintiff purports to bring the action on behalf of a proposed class.

14. Defendants deny the allegations asserted in paragraph 14 of the Complaint to the extent it makes legal conclusions regarding numerosity for purposes of class certification, but admits that the proposed class includes hundreds of individuals.

15. Defendants deny the allegations asserted in paragraph 15 of the Complaint.

16. Defendants deny the allegations asserted in paragraph 16 of the Complaint.

17. Defendants deny the allegations asserted in paragraph 17 of the Complaint.

18. Defendants deny the allegations asserted in paragraph 18 of the Complaint, except admit that the proposed class members are identifiable based on records maintained by Mc Millan's.

19. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations asserted in paragraph 19 of the Complaint regarding her interest and deny the allegations regarding the practicality or efficiency of a class action.

20. Defendants deny the allegations asserted in paragraph 20 of the Complaint.

21. Defendants deny the allegations asserted in paragraph 21 of the Complaint.

22. Defendants deny the allegations asserted in paragraph 22 of the Complaint.

STATEMENT OF FACTS

23. Defendants admit the allegations asserted in paragraph 23 of the Complaint regarding Plaintiff's employment with Mc Millan's, except deny that Ms. Montero's schedule was "set and dictated" by Defendants.

24. Defendants admit the allegations asserted in paragraph 24 of the Complaint that Plaintiff did not live in the homes of the patients to whom she provided care, but Defendants neither admit nor deny the legal conclusions stated therein.

25. Defendants deny the allegations asserted in paragraph 25 of the Complaint with respect to her being “assigned” work, her hours of work, and whether she was paid any overtime premium by Defendant(s), and whether she was paid for all hours worked at her regular straight-time rate.

26. Defendants admit the allegations asserted in paragraph 26 of the Complaint regarding the requirement that home health aides attend in-service training and that they were not paid for time spent in in-service training except deny that trainings were required to take place at Mc Millan’s office location and Defendants aver that time spent in in-service training is not deemed compensable time by the Department of Labor.

27. Defendants deny the allegations asserted in paragraph 27 of the Complaint.

28. Defendants admit the allegations asserted in paragraph 28 of the Complaint that employees were required to wear latex gloves in the performance of some of their duties, but deny that employees were required to purchase gloves from Mc Millan’s and aver that employees were provided latex gloves for free or reimbursed for their purchases of latex gloves.

29. Defendants admit the allegations asserted in paragraph 29 of the Complaint regarding Mc Millan’s recordkeeping obligations and deny all other allegations asserted in paragraph 29 of the Complaint.

30. Defendants deny the allegations asserted in paragraph 30 of the Complaint.

31. Defendants deny the allegations asserted in paragraph 31 of the Complaint.

32. Defendants admit the allegations asserted in paragraph 32 of the Complaint regarding Ms. Montero's duties which were performed for and on behalf of the client.

33. Defendants admit the allegations asserted in paragraph 33 of the Complaint regarding Mc Millan's services.

34. Defendants deny the allegations asserted in paragraph 34 of the Complaint.

35. Defendants deny the allegations asserted in paragraph 35 of the Complaint, except admit that Mc Millan's requires that Plaintiff and other proposed class members are required to complete and submit records to Mc Millan's regarding clients.

36. Defendants deny the allegations asserted in paragraph 36 of the Complaint.

37. Defendants deny the allegations asserted in paragraph 37 of the Complaint.

38. Defendants deny the allegations asserted in paragraph 38 of the Complaint.

COUNT I

39. Defendants repeat and reallege their responses to paragraphs 1 through 38 of the Complaint as though fully set forth herein.

40. Defendants deny the allegations asserted in paragraph 40 of the Complaint regarding the employee status of Plaintiff during the proposed Class Period.

41. Defendants deny the allegations asserted in paragraph 41 of the Complaint regarding Ms. Mc Millan's status as an "employer."

42. Defendants deny the allegations asserted in paragraph 42 of the Complaint.

43. Defendants deny the allegations asserted in paragraph 43 of the Complaint and aver that time spent in in-service training is not compensable.

44. Defendants deny the allegations asserted in paragraph 44 of the Complaint.

45. Defendants deny the allegations asserted in paragraph 45 of the Complaint.

COUNT II

46. Defendants repeat and reallege their responses to paragraphs 1 through 45 of the Complaint as though fully set forth herein.

47. Defendants deny the allegations asserted in paragraph 47 of the Complaint.

48. Defendants deny the allegations asserted in paragraph 48 of the Complaint.

COUNT III

49. Defendants repeat and reallege their responses to paragraphs 1 through 48 of the Complaint as though fully set forth herein.

50. Defendants deny the allegations asserted in paragraph 50 of the Complaint.

51. Defendants deny the allegations asserted in paragraph 51 of the Complaint.

COUNT IV

52. Defendants repeat and reallege their responses to paragraphs 1 through 51 of the Complaint as though fully set forth herein.

53. Defendants admit the allegations asserted in paragraph 53 of the Complaint that Department of Labor promulgates regulations concerning laundering of uniforms.

54. Defendants deny the allegations asserted in paragraph 54 of the Complaint.

55. Defendants deny the allegations asserted in paragraph 55 of the Complaint.

56. Defendants deny the allegations asserted in paragraph 56 of the Complaint.

COUNT V

57. Defendants repeat and reallege their responses to paragraphs 1 through 56 of the Complaint as though fully set forth herein.

58. Defendants deny the allegations asserted in paragraph 58 of the Complaint.

59. Defendants deny the allegations asserted in paragraph 59 of the Complaint.

60. Defendants deny the allegations asserted in paragraph 60 of the Complaint.

COUNT VI

61. Defendants repeat and reallege their responses to paragraphs 1 through 60 of the Complaint as though fully set forth herein.

62. Defendants deny the allegations asserted in paragraph 62 of the Complaint.

63. Defendants deny the allegations asserted in paragraph 63 of the Complaint.

64. Defendants deny the allegations asserted in paragraph 64 of the Complaint.

65. Defendants deny the allegations asserted in paragraph 65 of the Complaint.

DEFENDANTS' FIRST DEFENSE / AFFIRMATIVE DEFENSE

66. Plaintiff's Complaint fails, in whole or in part, to state a claim for relief.

DEFENDANTS' SECOND DEFENSE / AFFIRMATIVE DEFENSE

67. There is no statutory or other lawful basis for the spread of hours provision in New York State for the home health care industry.

DEFENDANTS' THIRD DEFENSE / AFFIRMATIVE DEFENSE

68. Spread of hours pay, if required, is subject to an offset for any and all periods during which Mc Millan's wages exceeded minimum wage.

DEFENDANTS' FOURTH DEFENSE / AFFIRMATIVE DEFENSE

69. Plaintiff and the proposed class members are not entitled to pay for in-service training.

DEFENDANTS' FIFTH DEFENSE / AFFIRMATIVE DEFENSE

70. Ms. Mc Millan is not an "employer" as defined by applicable law and Ms. Mc Millan is not personally liable in this action.

DEFENDANTS' SIXTH DEFENSE / AFFIRMATIVE DEFENSE

71. Neither Plaintiff nor the proposed class members are obligated to wear uniforms.

DEFENDANTS' SEVENTH DEFENSE / AFFIRMATIVE DEFENSE

72. Plaintiff and the proposed class members are offered latex gloves without charge and/or offered reimbursement for latex gloves they purchase.

DEFENDANTS' EIGHTH DEFENSE / AFFIRMATIVE DEFENSE

73. Plaintiff's claims are not typical of the proposed class.

DEFENDANTS' NINTH DEFENSE / AFFIRMATIVE DEFENSE

74. The claims of law and fact are not common to the proposed class nor predominate over questions affecting individual members of the proposed class.

DEFENDANTS' TENTH DEFENSE / AFFIRMATIVE DEFENSE

75. Plaintiff is not a proper class representative.

DEFENDANTS' ELEVENTH DEFENSE / AFFIRMATIVE DEFENSE

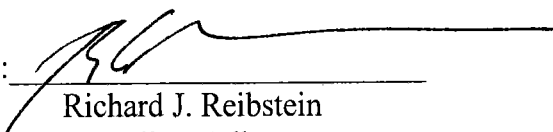
76. A class action is not superior to other methods of adjudication.

WHEREFORE, Defendants respectfully request that:

- (a) the Court decline to permit this action to proceed as a class action pursuant to CPLR Article 9;
- (b) the Complaint be dismissed in its entirety; and
- (c) that the Court grant such other and further relief as it deems just and proper.

Dated: New York, New York
October 20, 2010

PEPPER HAMILTON LLP

By: 

Richard J. Reibstein
Russell E. Adler

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Attorneys for Defendants

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New York, New York 10038

Attorneys for Plaintiff and the Proposed Class

Affidavit of Service

State of New York }
County of New York } ss.:

Donna Wittel, being duly sworn, deposes and says: I am not a party to the action, am over 18 years of age, and reside at 205 East 78th Street, New York, New York.

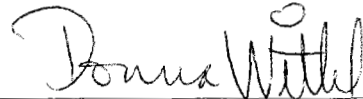
On the 20th day of October, 2010, I served the within Answer upon the parties therein named at the addresses designated by said parties for that purpose, by mailing a true copy of the same via First Class Mail to said parties enclosed in a postpaid properly addressed envelope and depositing the same in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York addressed as follows:

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New York, New York 10038

Attorneys for Plaintiff and the Proposed Class



Donna Wittel

Sworn to before me this 20th day of
October, 2010.


Notary Public

MARIE A. RAMOS
NOTARY PUBLIC, State of New York
No. 01RA5038297
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires Jan. 23, 2011

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MC MILLAN'S HOME CARE AGENCY,
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ANSWER

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