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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x	:	
CLAUDIA GAYLE, Individually, On Behalf	:	
of All Others Similarly Situated and as Class	:	
Representative,	:	07 Civ. 4672 (CPS) (MDG)
	:	
Plaintiff,	:	
	:	
- against -	:	NOTICE OF
	:	<u>CROSS-MOTION</u>
HARRY'S NURSES REGISTRY, INC., and	:	
HARRY DORVILIER a/k/a HARRY	:	
DORVILIEN,	:	
	:	
Defendants.	:	
----- x		

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Jonathan A. Bernstein, Esq., the exhibits annexed thereto, the accompanying Memorandum of Law, and all of the pleadings and proceedings heretofore had herein, the undersigned will move this Court, before the Honorable Charles P. Sifton, at the United States Court House, 225 Cadman Plaza East, Brooklyn, New York, on September 17, 2008, at 4:30 p.m., for an order pursuant to Fed. R. Civ. Pro. 56(d), granting partial summary judgment, and 29 U.S.C. § 216(b), authorizing notification to persons similarly situated and granting to plaintiffs such other and further relief as the Court may deem just and proper. Plaintiff intends to serve and file reply papers.

Dated: New York, New York
August 13, 2008

LEVY DAVIS & MAHER, LLP

By: _____/s/_____

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Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CLAUDIA GAYLE, Individually, On Behalf
of All Others Similarly Situated and as Class
Representative,

Plaintiff,

- against -

HARRY'S NURSES REGISTRY, INC., and
HARRY DORVILIER a/k/a HARRY
DORVILIEN,

Defendants.
----- X

07 Civ. 4672 (CPS) (MDG)

**PLAINTIFF'S RESPONSE TO
DEFENDANTS' STATEMENT
OF MATERIAL FACTS NOT IN
DISPUTE PURSUANT TO
LOCAL CIVIL RULE 56.1**

Plaintiff Claudia Gayle, pursuant to Rule 56.1 of the Local Civil Rules of the United States District Court for the Southern and Eastern Districts of New York, submits the following response to defendants' Statement of Material Facts Not in Dispute:

1. Admit.

2. Admit.

3. Admit, but dispute defendant's characterization of RNs and LPNs as independent contractors. The employee/independent contractor determination is a mixed question of fact and law. Brock v. Superior Care, 840 F.2d 1054, 1059 (2d Cir. 1988). Facts supporting employee status are set forth at ¶¶ 93- 141.

4. Admit.

A-556

5. Admit.

6. Admit.

7. Admit.

8. Admit.

9. Admit.

10. Admit.

11. Admit.

12. Admit.

13. Admit.

14. Admit, except deny that Harry's Nurses does not predetermine work schedules to the extent that the RNs and LPNs must work a prescribed shift, rather than a portion thereof. Ex. C 74:3-75:12.

15. Admit.

16. Admit.

17. Admit, except deny that Harry's permits RNs and LPNs to accept assignments that conflict with Harry's assignments. Ex. C 111:13-111:12.

18. Admit.

19. Admit.

20. Admit.

21. Admit.

22. Deny. Plaintiff's relationship with defendants is governed by defendants' policies and procedures, Ex. E, M, P, N.

23. Admit.

24. Admit.

25. Admit.

26. Admit.

27. Admit.

28. Deny. Defendant may unilaterally end its association with a field nurse. If it does so, it will owe the nurse for hours actually worked, but will not owe contract damages (e.g. expectation damages, liquidated damages). Ex. C 109:22-110:12. The “Confidentiality of Patient” form generated by Defendant says that “[f]ailure to maintain patient confidentiality may lead to discharge ...” Id. 108:14-25; Ex. P. Harry’s nurses acknowledge by their signatures on the “application for employment” their understanding that false information may result in discharge. Ex. D at 4. Harry’s removes a nurse from a patient’s home if the patient requests or the nurse does not report to work punctually. Ex. C 23:19-24:1.

29. Admit.

30. Admit.

31. Admit.

32. Admit.

33. Admit, except deny to the extent that defendant asserts a conclusion of law that plaintiff was a “professional” within the meaning of the Fair Labor Standards Act.

34. Deny. Each month, Harry’s nursing supervisor spends 4-5 hours in the field with each nurse placed in service by Harry’s. Williams-West Aff. ¶ 3. Once the parameters of patient care set are set by the patient’s doctor, the nursing supervisor’s job is to speak to the doctors and

occasionally with patients to see if the doctors orders are being carried out by the nurse placed by Harry's. Ex. C 22:5-25. Defendants' nursing director created a progress notes form, which must be completed by the nurse with respect to patients cared for in their homes, and submitted with the nurse's time sheet. If the progress notes are not completed, the nurse does not receive a paycheck. If any note is "not in compliance," the nursing supervisor, who reports to the nursing director, directs the nurse to rewrite the note or attend an in-service, i.e., continuing education.

Ex. C 26:25-30-12.

35. Admit.

36. Admit.

37. Admit.

38. Admit.

39. Admit.

40. Admit.

41. Admit.

42. Deny. Defendants' allegation is inconsistent, and is, in fact, an admission that patient progress notes are reviewed by defendants for the purpose of monitoring RNs and LPNs.

Q. "Another person [i.e., a Harry's employee other than the person responsible for payroll] reviews the progress notes for the purpose of monitoring the progress, right?"

A. "Yes."

Ex. C 29:13-22.

43. Admit.

44. Admit.

45. Admit.

46. Admit.

47. Admit.

48. Admit.

49. Admit.

50. Admit.

51. Admit.

52. Admit.

53. Admit.

54. Admit.

55. Admit.

56. Admit.

57. Admit.

58. Deny. Harry's business is the placement of nurses in patients' homes. Ex. C

9:16-10:22. This nursing work was done by field nurses, including plaintiff. Id. 40:6-17.

59. Admit.

60. Admit.

61. Admit.

62. Admit.

63. Admit.

64. Admit.

65. Admit.

66. Admit.

67. Admit.

68. Admit.

69. Admit.

70. Admit.

71. Admit.

72. Deny. Plaintiff's work was supervised by defendants' nursing supervisor.

Williams-West Aff. ¶¶ 2-3. Defendants' nursing director, to whom the nursing supervisor reports, created a progress notes form which must be completed by the nurse and submitted with her time sheet. If the progress notes are not completed, the nurse does not receive a paycheck. If any note is "not in compliance," the nursing supervisor directs the nurse to rewrite the note or attend an in-service, i.e., continuing education. Ex. C 26:25-30:12.

73. Admit.

74. Admit.

75. Admit.

76. Admit.

77. Admit.

78. Admit.

79. Admit.

80. Admit.

81. Admit.

82. Admit.

- 83. Admit.
- 84. Admit.
- 85. Admit.
- 86. Admit.
- 87. Admit.
- 88. Admit.
- 89. Admit.
- 90. Admit.
- 91. Admit.

92. Admit that plaintiff never demanded overtime pay, but aver that the fact is not material. Waivers of FLSA rights are void as a matter of law. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945); Spanos Painting Contractors, Inc. v. Union Bldg. & Constr. Corp., 334 F.2d 457, 459 (2d Cir. 1964) (“[t]o permit a laborer to waive his rights under the act would undermine the very purpose of fair labor legislation”).

Plaintiff's Statement of Material Facts Entitling Her to Partial Summary Judgment

93. Defendants' only business is to place nurses in patients' homes. Ex. C (transcript of the deposition of defendant Harry Dorvilier) 9:16-10:22.

94. Plaintiff was a field nurse, who, having been placed by defendants in patients' homes, performed nursing services. Id. 40:6-17.

95. Patients typically come into contact with defendants via defendants' advertising on radio, in newspapers and to social workers and doctors in hospitals and communities, or

through social service agencies. Harry Dorvilier personally initiates those contacts. Id.

14:9-18:2.

96. Defendants determine what level of care is appropriate for a patient, determine the fee that they are able and willing to pay a nurse, and then tell the nurse what the pay is. Id.

19:6-21:23.

97. Since Medicaid fees are inflexible, Harry's nurses are not able to negotiate their fees with defendants. Id. 90:3-11.

98. The hourly rate Harry's pays the nurses depends on Harry's contract with the individual patient. Id. 19:16-22.

99. Harry's contracted with the patients cared for by plaintiff. Plaintiff had no contractual or economic relationship with her patients. Ex. B at 2.

100. Field nurses have no investment in defendants' business. Ex. C_43:13-15.

101. Nurses are paid by the hour, and cannot possibly lose money providing services to Harry's patients. A nurse cannot profit beyond the hourly fee paid. Id. 43:16-45:13.

102. Harry's takes charge of billing and collections from the field nurses' patients' insurance carriers; Harry's pays its nurses promptly regardless of whether the carriers pay promptly. Id. 118:21-120:9.

103. Field nurses are covered by Harry's commercial liability insurance policy. Id. 118:14-20.

104. Such durable medical equipment as oxygen tanks is provided by a third-party vendor selected by the hospital social worker and not by Harry's. Id. 41:24-42:19.

105. Plaintiff formed no corporation or other business entity. Affidavit of Claudia

Gayle, sworn to August 8, 2008 (the “Gayle Aff.”) ¶ 5.

106. Plaintiff has no business cards, has never advertised, and has never solicited a patient directly. She is entirely dependent upon referrals from Harry’s and similar placement agencies. Id. ¶ 4.

107. A Harry’s nurse may decline a shift or an assignment, but absent special arrangements, must work a prescribed shift rather than a portion thereof. Ex. C 74:3-75:12.

108. Defendants require that field nurses arrange their schedules to avoid conflict with Harry’s assignments. Id. 110:13-111:12.

109. If plaintiff was sick or busy and could not cover a shift, she was not permitted to send another nurse in her place. Id. 40:18-41:13.

110. Defendants may unilaterally end their association with a field nurse. If they do so, they will owe the nurse for hours actually worked, but will not owe contract damages (e.g. expectation damages, liquidated damages). Ex. C109:22-110:12.

111. A discharged nurse is forbidden to seek employment directly from her patient. Ex. H.

112. The “Confidentialty of Patient” form generated by defendants says that “[f]ailure to maintain patient confidentiality may lead to discharge ...” Ex. K; Ex. C 108:14-25.

113. Harry’s removes a nurse from a patient’s home if the patient requests or the nurse does not report to work punctually. Id. 23:19-24:1.

114. Defendants’ nursing supervisor is responsible for monitoring patients and the nurses placed by Harry’s in their homes. Affidavit of Cherriline Williams-West, sworn to August 13, 2008 (“Williams-West Aff.”) ¶ 1.

115. Within 90 days of the time that a nurse was placed in service by Harry's, a Harry's nursing supervisor would go into the field, that is, to the home of the patient. While there, she would observe and assess the nurse's skills, for example, hand washing. She would also check the book of doctor's orders relating to the patient, to make sure the orders with respect to medication and dosage were up-to-date. Nurses who had been in service for extended periods would receive supervision of this kind every 6 months. A Harry's nursing supervisor would also perform an assessment of this kind within 48 hours of the time that Harry's began to care for a patient. Id. ¶ 2.

116. Ms. Williams-West would work with the nurse by teaching her how to do a proper head-to-toe assessment of the patient, including such things as mental capacity, heart rate, condition of tracheotomy, sound of lungs, with a focus on the condition being treated. She would also talk to the nurses about such things as infection control and legal issues in nursing. On occasion, she would be accompanied on these in-service assessments by medical equipment vendors or technicians so that she could better instruct the nurses on the use of equipment. These monthly assessments typically lasted 4-5 hours. That is, each month, Ms. Williams-West (or another nursing supervisor) would spend 4-5 hours in the field with each nurse placed in service by Harry's. Williams-West Aff. ¶ 3.

117. Defendants' nursing supervisor visits the patient's home on occasion to monitor the patient. Ex. C 55:15-57:14.

118. Harry's nursing coordinator phones the patient at least once per day to verify that the nurse reported for duty. Id. 68:19-70:11.

119. The parameters of patient care are set by the patients' doctors. Defendants'

nursing supervisor's job is to speak to the doctors and occasionally with patients to see if the doctors' orders are being carried out by the field nurse. Ex. C 22:5-25.

120. Field nurses communicate with the nursing supervisor contact in case of emergency. Id. 23:2-18.

121. Defendants' nursing supervisor reports to the nursing director. Id. 28:18-20. The current nursing director is Harry's sister. Id. 28:6-13.

122. The nursing director created a progress notes form, which must be completed by the nurse and submitted with her time sheet. Ex. A.

123. If the progress notes are not completed, the nurse does not receive a paycheck. Ex. C 29:6-18.

124. If any progress note is "not in compliance," the nursing supervisor directs the nurse to rewrite the note or attend an in-service, i.e., continuing education. Id. 26:25-30:12.

125. A Harry's employee reviews the progress notes for monitoring purposes. Id. 29:13-22.

126. Defendants generated a 20-page in-service manual, which nurses must certify having read and understood. Id. 85:1-24; Ex. V.

127. Harry's provides the field nurses in-service documents pertaining to HIV confidentiality, ventilators, oxygen, and the like. Harry's does this because the state requires nurses to complete in-service training to maintain their licenses. Ex. C 31:13-32:17.

128. The in-service document has a blank for "employee's signature;" in-service training is given to field nurses. Id. 32:22-25; 34:15-20.

129. Defendants are responsible to the state for monitoring the patient's care in case of

a malpractice lawsuit. Id. 53:11-19. When field nurses care for patients, they are expected, on each tour of duty, to perform 12 categories of assessments, each category being described more particularly in documents issued by defendants (“Neurological Assessment, e.g., Alertness, awareness, consciousness, unconsciousness”) and note it in the chart. Id. 125:23-126:19; Ex. O.

130. Plaintiff worked more than 40 hours per week. Ex. C 75:13-19; 87:8-13.

131. The nurses’ weekly time sheets (Ex. Q) are the most accurate reflection of the hours actually worked (Ex. C 128:11-17) but do not reflect hours spent in in-service training, for which the nurses are not paid (id. 85:2-86-4).

132. Nurses applying for work at Harry’s fill out an “application for employment.” Ex. C 58:6-21; Ex. D. Each page bears the legend “Equal Opportunity Employer.” Id. By their signatures, applicants acknowledge their understanding that false information may result in discharge. Id. at 4.

133. Once the employment application is completed, Harry’s sends the applicant’s former employers a form stating that “the applicant listed below has applied for Temporary Employment with Harry’s Nurses Registry, Inc.” Ex. F; Ex. C 92:5-15.

134. All field nurses sign an agreement stating “Upon accepting employment with Harry’s Nurses Registry, Inc., all agency staff members agree that for a period of one year after his/her employment ends with Harry’s Nurses Registry, Inc., he/she will not directly or indirectly seek independent employment with any Harry’s Nurses Registry, Inc. patients to whom the staff member has been assigned” Ex. H; Ex. C 99:8-102:18.

135. Applicants for placement by Harry’s must execute a form (created by defendants’ consultant) permitting defendants to conduct a “pre-employment screening.” Ex. I; Ex. C

103:22-104:25.

136. Defendants generate in-service forms that say “one copy for the employee’s file.”

The “employee” is the field nurse Ex. J; Ex. C 105:2-106:9.

137. Harry’s issues employee identification cards to field nurses, which they must wear in-service; Ex. L; Ex. C 112:7-113:7.

138. Defendants requires their nurses to complete an “Employee Verification of Orientation” wherein the nurse affirms receiving an “employee orientation” including a “detailed discussion of,” among other things, “job duties and responsibilities,” “conditions of employment,” “employment forms,” “attendance and punctuality policies.” Ex. M.

139. Defendants require their field nurses to sign a “HIPAA Privacy Training Employee Certification Statement” certifying that they “understand my obligation as an employee of Harry’s Nurses Registry, Inc. to abide by the agency’s privacy practices.” Ex. P; Ex. C 125:11-22.

140. Defendants require compliance with their procedures for filling out notes, time sheets and medication sheets, which they describe as “the rules and regulations of the New York State Department of Health and Harry’s Nurses Registry, Inc.” Ex. E.

141. Documents generated by defendants and issued to field nurses as part of their “in-service,” i.e., continuing education, have blanks for “employee signature” Ex. C 32:22-25; Ex. N.

142. Harry Dorvilier is the “principal” of the Harry’s Nurses Registry, Inc. Ex. W¶ 7.

143. Harry Dorvilier is the CEO who “oversee[s] the whole Harry’s operation [who] make[s] sure that the service has been provided” and operates the business. Ex. C 9:8-15; 12:7-

10.

Dated: New York, New York
August 13, 2008

LEVY DAVIS & MAHER, LLP

By: _____ /s/ _____

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(212) 371-0033

Attorneys for Plaintiff

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(212) 385-0066

Attorneys for Defendants

referrals from Harry's and similar placement agencies.

5. Harry's paid me in my own name. That is, I received my compensation from Harry's directly. I did not form a corporation or other business entity for the provision of nursing services, either during the time I worked for Harry's or before or after that time.

6. Harry's required me to obtain malpractice insurance, but none of the nursing jobs I have ever had has required professional liability insurance.

7. I believe that all of the field nurses employed by defendants are paid as described in above, and I am informed that Harry Dorvilier has so testified. I have been informed that this pay practice is unlawful.

8. I believe that most of the field nurses employed by defendants are unaware that the pay practice is unlawful, that many, if not most, of them, lack the resources to hire private counsel to prosecute a lawsuit on their behalf and that, if given the opportunity, they would opt in to the above-captioned lawsuit.

9. Having been informed by counsel that a different legal standard applies to determinations of employee status under the Fair Labor Standards Act and New York Labor Law determinations of whether workers' compensation premiums may lawfully be charged to employees, I now consent to the dismissal of the Fourth Cause of Action set forth in my Complaint.

Claudia Gayle

Sworn to before me
this __ day of August, 2008

Notary Public

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
CLAUDIA GAYLE, Individually, On Behalf
of All Others Similarly Situated and as Class
Representative,

Plaintiff,

- against -

HARRY'S NURSES REGISTRY, INC., and
HARRY DORVILIER a/k/a HARRY
DORVILIEN,

Defendants.
----- x

07 Civ. 4672 (CPS) (KAM)

AFFIDAVIT

STATE OF NEW YORK)
) ss:
COUNTY OF)

PATRICIA ROBINSON, being duly sworn, deposes and says:

1. On or about March 24, 2008, I caused to be filed with this court a consent to join this action for unpaid overtime premium pay. I make and submit this affidavit in opposition to defendant's motion for summary judgment and in support of Claudia Gayle's cross-motion to authorize notice of the action. I have personal knowledge of all facts stated in this affidavit.

2. I was employed by defendants as a licensed practical nurse and registered nurse for approximately 2 ½ years ending in early 2008. I was paid at different hourly rates depending on whether I was doing LPN work or RN work.

3. When I was employed by Harry's as a field nurse, I did not receive time and a half for overtime hours worked. This is because Harry's treated me as an independent contractor. Harry's required me to execute an memorandum of agreement stating that I was an independent contractor.

4. I am not, and never have been, in business for myself. I have no business cards, have never advertised, and have never solicited a patient directly. I am entirely dependent upon referrals from Harry's and similar placement agencies.

5. Harry's paid me in my own name. That is, I received my compensation from Harry's directly. I did not form a corporation or other business entity for the provision of nursing services, either during the time I worked for Harry's or before or after that time.

6. Harry's required me to obtain malpractice insurance, but none of the nursing jobs I have ever had has required professional liability insurance.

7. I believe that all of the field nurses employed by defendants are paid as described in above, and I am informed that Harry Dorvilier has so testified. I have been informed that this pay practice is unlawful.

8. I believe that most of the field nurses employed by defendants are unaware that the pay practice is unlawful, that many, if not most, of them, lack the resources to hire private counsel to prosecute a lawsuit on their behalf and that, if given the opportunity, they would opt in to the above-captioned lawsuit.

Patricia Robinson

Sworn to before me
this __ day of August, 2008

Notary Public

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
CLAUDIA GAYLE, Individually, On Behalf :
of All Others Similarly Situated and as Class :
Representative, :

07 Civ. 4672 (CPS) (KAM)

Plaintiff, :

AFFIDAVIT

- against -

HARRY'S NURSES REGISTRY, INC., and :
HARRY DORVILIER a/k/a HARRY :
DORVILIEN, :

Defendants. :
----- X

STATE OF NEW YORK)
) ss:
COUNTY OF BRONX)

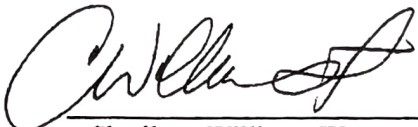
Cherlynn
CHERILYNN WILLIAMS-WEST, being duly sworn, deposes and says:

1. I am a registered nurse. I was employed as a nursing supervisor by Harry's Nurses Registry, Inc. ("Harry's"), for approximately one year ending November 2007. During the period of my employment, my job duties and responsibilities included monitoring the patients and the nurses (both licensed practical nurses and registered nurses) placed by Harry's in their homes.

2. Within 90 days of the time that a nurse was placed in service by Harry's, I (or another of the nursing supervisors employed by Harry's) would go into the field, that is, to the home of the patient. While there, I would observe and assess the nurse's skills, for example, hand washing (because many patients breathe through ventilators and are fed through gastric tubes, the nurse's hand washing is of paramount importance). I would also check the book of doctor's orders relating to the patient, to make sure the orders with respect to medication and dosage were up-to-date. Nurses who had been in service for extended periods would receive

supervision of this kind every 6 months. I, or one of my colleagues, would also perform an assessment of this kind within 48 hours of the time that Harry's began to care for a patient.

3. During my employment at Harry's, I was also responsible for documentation, that is, review of assessments performed by nurses in the field. For example, I would work with the nurse by teaching her how to do a proper head-to-toe assessment of the patient, including such things as mental capacity, heart rate, condition of tracheotomy, sound of lungs, with a focus on the condition being treated. I would also talk to the nurses about such things as infection control and legal issues in nursing. On occasion, I would be accompanied on these in-service assessments by vendors of medical equipment (e.g., ventilators) or their technicians so that I could better instruct the nurses on the use of equipment. These monthly assessments typically lasted 4-5 hours. That is, each month, I (or another nursing supervisor) would spend 4-5 hours in the field with each nurse placed in service by Harry's.


Cherilyn Williams-West
Cherilyn

Sworn to before me
this 10th day of ~~July~~ ^{August}, 2008


Notary Public



