

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LIMECCA CORBIN, on behalf of herself and)
similarly situated employees,)
)
Plaintiff,)
)
v.) CA No. 1:15-cv-00405
)
CFRA, LLC,)
)
Defendant.)

ANSWER TO COMPLAINT-COLLECTIVE ACTION

COMES NOW Defendant CFRA, LLC (hereinafter “CFRA” or “Defendant”), and responds to the Complaint as follows.

FOR A FIRST DEFENSE
(Response to Allegations)

Defendant responds to the Complaint below. Defendant’s numbered responses correspond with the enumerated paragraphs of the Complaint. Any allegations not specifically admitted, modified, or explained herein are expressly denied.

In response to the introductory paragraph, Defendant admits Plaintiff purports to bring the claims stated on her own behalf and on behalf of individuals with whom she is allegedly “similarly situated.” Defendant denies it violated any law relating to Plaintiff and/or those on whose behalf she purports to complain, and denies that Plaintiff and/or those on whose behalf she purports to complain are entitled to any recovery whatsoever in this lawsuit.

JURISDICTION AND VENUE

1. The allegation of Paragraph 1 states a legal conclusion, but Defendant does not dispute the Court's jurisdiction.

2. The allegation of Paragraph 2 states a legal conclusion, but Defendant does not challenge the current venue.

PARTIES

3. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation of Paragraph 3 and, therefore, denies the same.

4. Defendant admits it is a corporation registered to do business and with a principal place of business in Concord, North Carolina. Defendant otherwise denies the allegations of Paragraph 4.

5. Defendant admits it is an IHOP franchise operating over a dozen independently-operated restaurants, collectively, in the states of North Carolina, South Carolina and Tennessee. Defendant otherwise denies the allegations of Paragraph 5.

6. Defendant admits that it employs individuals who are engaged in commerce. Defendant otherwise denies the allegations of Paragraph 6.

7. Defendant admits that it is covered by the record-keeping, minimum wage and overtime provisions of the FLSA. Defendant otherwise denies the allegations of Paragraph 7.

FACTS

8. Defendant admits it employs individuals it calls Servers at its Restaurants. Defendant otherwise denies the allegations of Paragraph 8.

9. Defendant admits it employed Plaintiff as a Server in Gastonia, North Carolina and in Shelby, North Carolina. Defendant otherwise denies the allegations of Paragraph 9.

10. Defendant denies the allegations of Paragraph 10.

11. Defendant admits it utilizes the FLSA tip credit and that it ensures employees receive at least \$7.25 an hour. Defendant otherwise denies the allegations of Paragraph 11.

12. Defendant denies the allegations of Paragraph 12.

13. Defendant denies the allegations of Paragraph 13.

14. Defendant denies the allegations of Paragraph 14.

15. Defendant denies the allegations of Paragraph 15.

16. Defendant denies the allegations of Paragraph 16.

17. Defendant denies the allegations of Paragraph 17.

COLLECTIVE ALLEGATIONS

18. Paragraph 18 contains no factual allegations. To the extent any factual allegations can be implied, Defendant denies them as well as any implications of unlawful conduct.

19. Paragraph 19 contains no factual allegations. To the extent any factual allegations can be implied, Defendant denies them as well as any implications of unlawful conduct or implications that Plaintiff and the putative Collective Action Members are similarly situated under 29 U.S.C. § 216(b).

20. Defendant denies the allegations of Paragraph 20.

COUNT I
(Alleging Violations of the FLSA)

21. Defendant incorporates its responses to Paragraphs 1-20 as if repeated verbatim herein.

22. Defendant admits that its Servers are covered by portions of the FLSA. Defendant otherwise denies the allegations of Paragraph 22.

23. Defendant admits that, as an employer, it is covered by portions of the FLSA. Defendant otherwise denies the allegations of Paragraph 23.

24. The FLSA speaks for itself. To the extent any factual allegations can be implied from Paragraph 24, Defendant denies them as well as any implications of unlawful conduct.

25. The FLSA speaks for itself. To the extent any factual allegations can be implied from Paragraph 25, Defendant denies them as well as any implications of unlawful conduct.

26. Defendant denies the allegations of Paragraph 26.

27. Defendant denies the allegations of Paragraph 27.

28. Paragraph 28 contains no factual allegations. To the extent any factual allegations can be implied, Defendant denies them as well as any implications of unlawful conduct.

JURY TRIAL DEMAND

Plaintiff demands a jury trial as to all claims so triable.

PRAYER FOR RELIEF

Regarding Plaintiff's "Jury Trial Demand" and "Prayer For Relief" sections, Defendant acknowledges that Plaintiff has requested a jury trial but denies the Plaintiff or anyone else is entitled to the relief requested herein or any relief whatsoever.

AFFIRMATIVE AND OTHER DEFENSES

FIRST DEFENSE

The complaint fails to state a claim, in whole or in part, upon which relief may be granted.

SECOND DEFENSE

All action taken by Defendant with respect to Plaintiff and those on whose behalf she purports to complain was justified, privileged, reasonable, and in good faith; without any improper motive, purpose, or means; and without any hatred, ill will, malice, or intent to injure Plaintiff or any individuals with whom she is allegedly "similarly situated."

THIRD DEFENSE

Plaintiff and those on whose behalf she purports to complain were paid all compensation due and owing in accordance with all applicable federal law.

FOURTH DEFENSE

Plaintiff lacks standing to raise some of or all of the claims of those on whose behalf she purports to complain.

FIFTH DEFENSE

Those on whose behalf Plaintiff purports to complain lack standing to assert claims against Defendant.

SIXTH DEFENSE

Defendant affirmatively pleads that any acts or omissions which may be found to be in violation of the rights afforded by the FLSA were not willful but occurred with reasonable grounds for believing that Defendant was in full compliance with the FLSA. As such, the statute of limitations can be no longer than two (2) years under the FLSA, 29 U.S.C. § 255(a).

SEVENTH DEFENSE

Plaintiff and those on whose behalf she purports to complain may not recover liquidated damages because: (i) Defendant (including its officers, managers, and agents) acted with reasonable grounds for believing their alleged acts or omissions did not violate the FLSA, and otherwise acted in good faith; (ii) Defendant (including their officers, managers, and agents) did not authorize, or ratify any violation with respect to Plaintiff or those on whose behalf she purports to complain; and (iii) Plaintiff has failed to plead facts sufficient to support recovery of such damages.

EIGHTH DEFENSE

Plaintiff and those on whose behalf she purports to complain are not entitled to an award of prejudgment interest if they prevail on any or all of their stated claims.

NINTH DEFENSE

Plaintiff and those on whose behalf she purports to complain are estopped from asserting any challenge to information and data they provided to Defendant concerning time worked and pay received, and method of payment.

TENTH DEFENSE

Plaintiff's claims, and the claims of those on whose behalf she purports to complain are barred to the extent Plaintiff and such individuals failed, refused, and/or neglected to mitigate or avoid their damages by reason of their own acts, omissions, or course of conduct.

ELEVENTH DEFENSE

Plaintiff and those on whose behalf she purports to complain are barred from pursuing some, or all, of their claims or remedies by the doctrine of unclean hands.

TWELFTH DEFENSE

Plaintiff's claims and the claims of those on whose behalf she purports to complain are barred by the doctrine of laches.

THIRTEENTH DEFENSE

Plaintiff's claims and the claims of those on whose behalf she purports to complain are barred to the extent they have executed or, in the future execute, releases of claims.

FOURTEENTH DEFENSE

Some or all of Plaintiff's claims and the claims of any individuals with whom she is allegedly "similarly situated" are barred to the extent they are based on an alleged failure to pay wages, because they did not timely advise Defendant of any alleged mistakes in payment, underpayments, or failure by Defendant to adhere to the agreed upon compensation, or because they have already received all the compensation to which they are entitled and legally due under the FLSA, and have effectuated an accord and satisfaction of their claims.

FIFTEENTH DEFENSE

Any sums which may have been advanced to or loaned to Plaintiff and/or those on whose behalf she purports to complain must be set off against any amounts allegedly due to Plaintiff and/or those on whose behalf she purports to complain.

SIXTEENTH DEFENSE

In the event that Plaintiff and those on whose behalf she purports to complain were paid monies for times when no work or services were performed, Defendant should, therefore, be entitled to a set-off of wages, if any, found due to Plaintiff and/or those on whose behalf she purports to complain.

SEVENTEENTH DEFENSE

To the extent Plaintiff and/or those on whose behalf she purports to complain are entitled to damages, Defendant is entitled to a credit for or set off against certain amounts overpaid to them in the course of their employment and to a credit for overtime already made to them or received by them.

EIGHTEENTH DEFENSE

This action is barred by section 4 of the Portal to Portal Act, 29 U.S.C. § 254(a), to the extent that Plaintiff and any individuals with whom she is allegedly “similarly situated” seek relief for non-compensable activities and/or for time not considered hours worked under that Act.

NINETEENTH DEFENSE

This action is barred to the extent that Plaintiff and/or those on whose behalf she purports to complain seek to recover for time which is *de minimis* work time and/or time which is not a “principal activity,” and thus not compensable under the Act.

TWENTIETH DEFENSE

To the extent Defendant is determined to be an employer of Plaintiff, Plaintiff’s claims are barred, in whole or in part, because any actions taken in connection with Plaintiff’s compensation were done in good faith, in conformity with and reliance upon written administrative regulations, orders, rulings, approvals, interpretations, and written and unwritten administrative practices or enforcement policies of the Administrator of the Wage and Hour Division of the United States Department of Labor.

TWENTY-FIRST DEFENSE

Plaintiff’s claims are barred, in whole or in part, as to all hours during which Plaintiff was engaged in activities that were preliminary or postliminary to her principal activities or incidental to her preliminary or postliminary activities. This defense may also apply to the claims of some or all of the allegedly “similarly situated” individuals.

TWENTY-SECOND DEFENSE

A collective action is not warranted in this case because Defendant has unique defenses to Plaintiff's allegations that preclude a finding that Plaintiff is "similarly situated" to any other individual on whose behalf Plaintiff purports to complain.

TWENTY-THIRD DEFENSE

Plaintiff's claims are barred to the extent she has failed to present sufficient evidence for this case to proceed as a collective action pursuant to 29 U.S.C. § 216(b) and has failed to make a preliminary showing to warrant the authorization of notice to other potential plaintiffs.

TWENTY-FOURTH DEFENSE

Plaintiff's collective action claims are barred because Plaintiff has failed to establish that there are other employees of Defendant who desire to opt-in and who are similarly situated with regard to their job requirements, daily duties, pay, and pay practices to which they were subject, among others.

TWENTY-FIFTH DEFENSE

Plaintiff's request for designation of this case as a collective action should be denied because Plaintiff has not satisfied her burden of making even a modest factual showing that she is "similarly situated" to those individuals on whose behalf she purports to complain or that they were subject to a common policy or plan of Defendant that violated the FLSA.

TWENTY-SIXTH DEFENSE

If Plaintiff seeks to adjudicate the claims of Plaintiff and anyone who opts-in to this lawsuit through purported generalized class wide proof, this would violate Defendant's rights to trial by jury and due process guaranteed by the United States Constitution. Defendant is entitled to individualized determinations of liability as to each Plaintiff and opt-in, as well as an individualized determination of the damages owed if liability is established. Accordingly, this case cannot be tried collectively or on any type of representational basis.

TWENTY-SEVENTH DEFENSE

Plaintiff's collective allegations must be dismissed, and certification and notice under 29 U.S.C. 216(b) must be denied, because an independent and individual analysis of each putative class member's claims and each of the stated defenses to such claims is required.

TWENTY-EIGHTH DEFENSE

Defendant has properly applied the tip credit to those employees who qualify as tipped employees under applicable state and federal laws and regulations.

TWENTY-NINTH DEFENSE

Defendant has not improperly diverted any employee tips.

THIRTIETH DEFENSE

Plaintiff's claims and the claims of those on whose behalf she purports to complain are barred because 29 C.F.R. § 531.56(e) is not ambiguous as it relates to servers performing incidental duties in addition to their normal duties. As such, Plaintiff's

reliance on the Department of Labor’s sub-regulation regarding the “twenty-percent rule” found in Ch. 30d00(e) is inappropriate and unenforceable as a matter of law, absent Congressional action or administrative rule-making which makes this standard a formal regulation under the FLSA. *See Montijo v. Romulus, Inc.* 2015 WL 1470128, at *7-10 (D. Ariz. Mar. 31, 2015) (finding that “Plaintiffs’ allegations regarding the DOL sub-regulations’ 20% rule fails to state a minimum wage claim under the FLSA” and that neither Congress, the Supreme Court, nor the Ninth Circuit “has recognized such a purported cause of action based on the sub-regulation” because the sub-regulation argument is “contrary to the statute’s and the regulations’ clear pronouncement that employers are entitled to utilize the tip credit for employees in tipped occupations”); *Richardson v. Mountain Range Restaurants LLC*, 2015 WL 1279237, at *8-9 (D. Ariz. Mar. 20, 2015) (finding that the plaintiff failed to state a minimum wage claim under the FLSA and rejecting the application of the DOL’s sub-regulations’ 20% rule found in Ch. 30d00(e)); *Schaefer v. P.F. Chang China Bistro, Inc.*, 2014 WL 3809069, at *4-5 (D. Ariz. Aug. 1, 2014) (same).

THIRTY-FIRST DEFENSE

Plaintiff or anyone else who joins or opts into this lawsuit who filed a claim for bankruptcy and failed to list their claims against Defendant as a potential asset is barred from pursuing these claims for lack of standing or under the doctrines of judicial estoppel or res judicata.

THIRTY-SECOND DEFENSE

Should the Court certify this matter as a collective action, Defendant reasserts each of these affirmative defenses with respect to each class member or person filing a consent to join this action.

THIRTY-THIRD DEFENSE

Defendant hereby gives notice that it intends to rely on such other defenses as may be available during discovery in this action and reserves a right to amend its Answer to the Complaint to assert any such defenses.

WHEREFORE, Defendant prays:

- a. That judgment be granted in its favor and that the Complaint be dismissed with prejudice.
- b. That Plaintiff recovers nothing from Defendant.
- c. That the costs and other expenses of litigation be taxed to Plaintiff.
- d. That Defendant be awarded reasonable attorneys' fees in defending this matter.
- e. For such other and further relief as the Court deems just and proper.

Dated this 10th day of July 2015.

Respectfully submitted,

s/Kevin S. Joyner

N.C. Bar No. 25605

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****pro hac vice admission anticipated***

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing **ANSWER TO COMPLAINT-COLLECTIVE ACTION** by filing a copy with the Clerk of Court using the CM/ECF system, which will send notification of the filing to the following persons:

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Dated this 10th day of July 2015.

s/Kevin S. Joyner
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