

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARLENE McDONNELL,

Plaintiff,

v.

KRG KINGS LLC and KELLY OPERATIONS  
GROUP, LLC,

Defendants.

)  
) No. 2:20-cv-1060  
)  
) JUDGE CHRISTY CRISWELL  
) WEIGAND  
)  
)  
)  
)  
)  
)

**DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT**

For their Answer to Darlene McDonnell's Complaint, Defendants KRG Kings, LLC ("KRG") and Kelly Operations Group, LLC ("Kelly Operations") (collectively, "Defendants"), state as follows:

**JURISDICTION AND VENUE**

1. This Court has subject matter jurisdiction over the FLSA claim pursuant to 29 U.S.C. § 216(b) and 28 U.S.C. § 1331.

**ANSWER:** The allegations in Paragraph 1 of the Complaint purport to state a legal conclusion, to which no affirmative response is required. To the extent a response is required, Defendants deny the allegations.

2. This Court has subject matter jurisdiction over the PMWA claim pursuant to 28 U.S.C. § 1367.

**ANSWER:** The allegations in Paragraph 2 of the Complaint purport to state a legal conclusion, to which no affirmative response is required. To the extent a response is required, Defendants deny the allegations.

3. Venue is proper pursuant to 28 U.S.C. § 1391.

**ANSWER:** The allegations in Paragraph 3 of the Complaint purport to state a legal conclusion, to which no affirmative response is required. To the extent a response is required, Defendants deny the allegations.

#### **PARTIES**

4. Plaintiff resides in New Kensington, PA (Westmoreland County).

**ANSWER:** Defendants lack information sufficient to form a belief as to the truth of the allegations in Paragraph 4 of the Complaint and therefore deny them.

5. KRG is a corporate entity registered with the Commonwealth and maintaining a principal place of business in North Versailles, PA (Allegheny County).

**ANSWER:** The allegations in Paragraph 5 of the Complaint are vague as to what is meant by “corporate entity.” To the extent the Court requires a response, Defendants state that KRG is a limited liability company organized under Pennsylvania law with its principal place of business in San Diego, California. Defendants deny any remaining allegations in Paragraph 5 of the Complaint.

6. Kelly is a corporate entity registered with the Commonwealth and maintaining a principal place of business in Pittsburgh, PA (Allegheny County).

**ANSWER:** The allegations in Paragraph 6 of the Complaint are vague as to what is meant by “corporate entity.” To the extent this Court requires a response, Defendants state that Kelly is a limited liability company organized under Pennsylvania law with its principal place of business in San Diego, California. Defendants deny any remaining allegations in Paragraph 6 of the Complaint.

7. Defendants jointly employ individuals, including Plaintiff, engaged in commerce or in the production of goods for commerce and/or handling, selling, or otherwise working on goods or materials that have been moved in or produced in commerce by any person.

**ANSWER:** The allegations in Paragraph 7 of the Complaint purport to state a legal conclusion, to which no affirmative response is required. To the extent this Court requires a response, Defendants deny the allegations in Paragraph 7 of the Complaint.

### **FACTS**

8. During the relevant three-year period, Defendants have owned and operated between 16 and 23 restaurants in Pennsylvania under the “Kings Family Restaurant” brand.

**ANSWER:** The allegations in Paragraph 8 of the Complaint are vague as to what is meant by “[d]uring the relevant three-year period...” To the extent this Court requires a response, Defendants deny the allegations in Paragraph 8 of the Complaint.

9. Defendants employed between 10 and 30 servers (a.k.a. waitresses/waiters) at each Kings Family Restaurant location.

**ANSWER:** Defendants deny the allegations in Paragraph 9 of the Complaint.

10. Up until approximately June 26, 2020, Defendants owned and operated the Kings Family Restaurant located at 2400 Leechburg Road, New Kensington, PA 15068 (the “New Kensington Restaurant”).

**ANSWER:** Defendants deny the allegations in Paragraph 10 of the Complaint.

11. From approximately 1991 until September 2019, Plaintiff worked as a server at the New Kensington Restaurant.

**ANSWER:** The allegations in Paragraph 11 of the Complaint are vague as to what is meant by “the New Kensington Restaurant.” To the extent this Court requires a response, Defendants admit the remaining allegations in Paragraph 11 of the Complaint.

12. During the relevant period, Defendants paid Plaintiff and other servers an hourly wage of approximately \$3.45 plus tips from customers.

**ANSWER:** The allegations in Paragraph 12 of the Complaint are vague as to what is meant by “[d]uring the relevant time period” and “Plaintiff and other servers...” To the extent this Court requires a response, Defendants deny the allegations in Paragraph 12 of the Complaint.

13. In seeking to comply with the FLSA and PMWA mandate that employees receive a minimum wage of \$7.25/hour, Defendants purport to utilize a “tip credit” in the amount of \$3.80 (\$7.25 - \$3.45) for each hour worked by Plaintiff and other servers at their Kings Family Restaurants. *See* 29 U.S.C. § 203(m); 43 P.S. § 333.103(d).

**ANSWER:** The allegations in Paragraph 13 of the Complaint purport to state a legal conclusion, to which no affirmative response is required. Further answering, Defendants state that the FLSA and PMWA speak for themselves but deny any violations of the same. Defendants deny any remaining allegations in Paragraph 13 of the Complaint.

14. As part of their work at Defendants’ Kings Family Restaurants, Plaintiff and other servers have been required to perform non-tip-producing work. Such work included, but was not limited to: rolling silverware; washing dishes, cleaning the ice cream bar, taking used dishes from the dining room to the back of the Restaurant, bringing clean dishes from the back of the restaurant to the dining room, cutting fruit, and cleaning the restaurant.

**ANSWER:** Defendants deny the allegations in Paragraph 14 of the Complaint.

15. Plaintiff estimates that she and other servers spent at least 30% of their working hours performing the types of tasks identified in paragraph 14, supra. This includes being required by Defendants to perform non-tip-producing work for approximately 15-30 minutes at the end of the day when restaurant managers relieve (or “cut”) servers of their customer service duties to focus exclusively on performing non-tip producing work.

**ANSWER:** Defendants deny the allegations in Paragraph 15 of the Complaint.

16. Kelly and KRG each exercise significant control over the working conditions of their servers making them joint employers under the FLSA and PMWA. For example, both entities share the same “Vice President of Human Resources” named James Covelli according to his individual LinkedIn page. Defendants announced the permanent closure of the New Kensington Restaurant to employees via a June 26, 2020 email from Mr. Covelli. In this June 26th correspondence, Mr. Covelli informed Plaintiff and other servers that “New Kensington location employees are being laid off (terminated) effective today, 6/26/2020” and “[u]nfortunately, we will not be accepting transfers to other locations.” Mr. Covelli then provided additional details to the New Kensington Restaurant employees regarding, inter alia, medical benefits, unemployment benefits, and year-end IRS W-2 form documents.

**ANSWER:** Some of the allegations in Paragraph 16 of the Complaint purport to state a legal conclusion, to which no affirmative response is required. Further answering, Defendants

state that the FLSA and PMWA speak for themselves but deny any violations of the same. Defendants deny any remaining allegations in Paragraph 16 of the Complaint.

### **COLLECTIVE AND CLASS ALLEGATIONS**

17. Plaintiff brings this lawsuit against Defendants as an FLSA collective on behalf of herself and all individuals who, during anytime within the past three years, have been employed as servers at one of Defendants' Kings Family Restaurants.

**ANSWER:** Defendants admit that Plaintiff purports to bring this lawsuit as a collective action under the FLSA. Defendants deny that Plaintiff and the group she seeks to represent are similarly situated. Defendants deny the remaining allegations in Paragraph 17 of the Complaint.

18. Plaintiff's FLSA claim should proceed as a collective action because Plaintiff and other potential members of the collective, having worked pursuant to the common policies described herein, are "similarly situated" as that term is defined in 29 U.S.C. § 216(b) and the associated decisional law.

**ANSWER:** The allegations in Paragraph 18 of the Complaint state a legal conclusion to which no affirmative response is required. To the extent this Court requires a response, Defendants deny that Plaintiff and the group she seeks to represent are similarly situated and further specifically deny that a putative collective action may be certified for the purpose of facilitation of notice or otherwise. Defendants deny the remaining allegations in Paragraph 18 of the Complaint.

19. Plaintiff brings this lawsuit against Defendants as a PMWA class action on behalf of herself and all individuals who, during anytime within the past three years, have been employed as servers at one of Defendants' Kings Family Restaurants in Pennsylvania.

**ANSWER:** Defendants admit that Plaintiff purports to bring this lawsuit as a class action under the PMWA. Defendants deny that Plaintiff and the group she seeks to represent are similarly situated and further specifically deny that a putative collective action may be certified for the purpose of facilitation of notice or otherwise. Defendants deny the remaining allegations in Paragraph 19 of the Complaint.

20. Plaintiff's PMWA claim should proceed as a class action because, as summarized in paragraphs 8-16, all of Federal Rule of Civil Procedure 23's requisites are satisfied.

**ANSWER:** The allegations in Paragraph 20 of the Complaint purport to state a legal conclusion, to which no affirmative response is required. To the extent this Court requires a response, Defendants deny the allegations in Paragraph 20 of the Complaint.

21. The putative class, upon information and belief, includes at least 40 individuals, all of whom are readily ascertainable based on Defendants' standard timekeeping and payroll records, and, as such, is so numerous that joinder of all class members is impracticable.

**ANSWER:** Defendants deny that there is a "putative class" and further deny the remaining allegations in Paragraph 21 of the Complaint.

22. Plaintiff is a class member, her claims are typical of the claims of other class members, and she has no interests that are antagonistic to or in conflict with the interests of other class members.

**ANSWER:** Defendants deny the allegations in Paragraph 22 of the Complaint.

23. Plaintiff will fairly and adequately represent the class members and their interests, and she has retained competent and experienced counsel who will effectively represent the class members' interests.

**ANSWER:** Defendants deny the allegations in Paragraph 23 of the Complaint.

24. Questions of law and fact are common to all class members, since, inter alia, this action concerns the legality of Defendant's standardized compensation practices.

**ANSWER:** Defendants deny the allegations in Paragraph 24 of the Complaint.

25. Class certification is appropriate under Federal Rule of Civil Procedure 23(b)(3) because common questions of law and fact predominate over any questions affecting only Plaintiff and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation.

**ANSWER:** Defendants deny the allegations in Paragraph 25 of the Complaint.

**COUNT I**  
**(Alleging Violations of the FLSA)**

26. All previous paragraphs are incorporated as though fully set forth herein.

**ANSWER:** In reference to Paragraph 26 of the Complaint, Defendants incorporate as if fully restated herein Paragraph 1 through 25 of their Answer.

27. The FLSA entitles employees to a minimum hourly wage of \$7.25.

**ANSWER:** The allegations in Paragraph 27 of the Complaint purport to state a legal conclusion, to which no affirmative response is required.

28. While restaurants may utilize a tip credit to satisfy their minimum wage obligations to servers, they forfeit the right to do so with respect to hours in which the servers perform non-tip-generating tasks (such as those identified in paragraph 14, supra) that are either: (a) unrelated to the servers' tip-generating duties, see 29 C.F.R. § 531.56(e); or (b) related to the employee's tipped occupation but exceed 20% of the employees' work hours, see *Belt v. P.F. Chang's China Bistro, Inc.*, 401 F. Supp. 3d 512 (E.D. Pa. 2019).

**ANSWER:** Defendants deny the allegations in Paragraph 28 of the Complaint.

29. By utilizing the tip credit to pay Plaintiff and other servers for time associated with non-tip-generating tasks, Defendant has willfully violated the FLSA.

**ANSWER:** Defendants deny the allegations in Paragraph 29 of the Complaint.

**COUNT II**  
**(Alleging Violations of the PMWA)**

30. All previous paragraphs are incorporated as though fully set forth herein.

**ANSWER:** In reference to Paragraph 30 of the Complaint, Defendants incorporate as if fully restated herein Paragraph 1 through 29 of their Answer.

31. The PMWA entitles employees to a minimum hourly wage of \$7.25.

**ANSWER:** The allegations in Paragraph 31 of the Complaint purport to state a legal conclusion, to which no affirmative response is required.

32. While restaurants may utilize a tip credit to satisfy their minimum wage obligations to servers, they forfeit the right to do so with respect to hours in which the servers perform non-tip-generating tasks such as those identified in paragraph 14, supra. See Zellagui v. MCD Pizza, Inc., 59 F. Supp. 3d 712, 715 (E.D. Pa. 2014) (Under the PMWA "[w]hen employees perform both tipped and non-tipped work, employers must pay the full minimum wage for all hours that their employees spend performing non-tipped tasks").

**ANSWER:** Defendants deny the allegations in Paragraph 32 of the Complaint.

33. By utilizing the tip credit to pay Plaintiff and other servers for time associated with non-tip-generating tasks, Defendant has violated the PMWA.

**ANSWER:** Defendants deny the allegations in Paragraph 33 of the Complaint.

### **AFFIRMATIVE DEFENSES**

1. Plaintiff and others with whom she is allegedly “similarly situated” are estopped from pursuing the claims set forth in the Complaint by reason of their own acts, omissions, and course of conduct.

2. Some, or all, of Plaintiff’s claims fail to state a claim upon which relief may be granted.

3. Plaintiff and others with whom she is allegedly “similarly situated” have failed to mitigate, or reasonably attempt to mitigate, their alleged damages, if any, as required by law.

4. The Complaint is barred in whole, or in part, by all applicable statutes of limitation, including, but not limited to, 29 U.S.C. § 255.

5. Some or all of the claims of Plaintiff, and others with whom she is allegedly “similarly situated,” under the PMWA are barred by the three-year statute of limitations

6. With respect to some or all claims brought by Plaintiff and others with whom she is allegedly “similarly situated,” Defendants affirmatively plead that any acts or omissions that may be found to be in violation of the rights afforded by the FLSA and the PMWA Defendants were in full compliance with the FLSA and PMWA.

7. Some or all, of the disputed time for which Plaintiff and others with whom she is allegedly “similarly situated” may involve wages purportedly owed for time that is not compensable under the *de minimis* doctrine.

8. Plaintiff and others with whom she is allegedly “similarly situated” may not recover liquidated damages because (i) Defendants acted reasonably and in good faith and did not commit any willful violation of any of the provisions of the FLSA; (ii) Defendants did not authorize or ratify any willful violation with respect to Plaintiff and others with whom she is allegedly “similarly situated;” and (iii) Plaintiff and others with whom she is allegedly “similarly situated” have failed to plead facts sufficient to support recovery of such damages.

9. Plaintiff may not maintain this action as a collective action under 29 U.S.C. § 216 because she is not similarly situated to any other employee for purposes of the allegations and claims made in this lawsuit.

10. The claims set forth in the Complaint are barred, in whole, or in part, by the doctrine of payment because (i) Defendants properly compensated Plaintiff and others with whom she is allegedly “similarly situated” for all time worked in accordance with the FLSA and PMWA, and (ii) Defendants paid Plaintiff and others with whom she is allegedly “similarly situated” for additional time including, without limitation, premium payments as recognized under 29 U.S.C. § 207(e) and for time paid but not worked by Plaintiff and others with whom she is allegedly “similarly situated.”

11. Plaintiff and others with whom she is allegedly “similarly situated” may not pursue any claims in this action on behalf of anyone who has not joined this action, or consented to join this action under 29 U.S.C. §216(b).

12. Plaintiff and others with whom she is allegedly “similarly situated” are not entitled to compensation for hours and tasks they purportedly worked and/or performed without Defendants’ actual or constructive knowledge.

13. The Seventh and Fourteenth Amendments to the United States Constitution prohibit a jury from determining Defendants’ liability for liquidated damages, attorney’s fees and costs, if any, to Plaintiff and others with whom she is allegedly “similarly situated” on a group or aggregated basis.

14. This Court lacks subject matter and supplemental jurisdiction over Plaintiff’s state laws claim because Plaintiff has no claim under the FLSA.

15. Plaintiff’s proposed class action under Fed. Rule 23 is inherently incompatible with a collective action under 29 U.S.C. § 216(b).

16. Plaintiff was an at-will employee who could be terminated at any time for any reason.

17. Plaintiff’s claims are barred by the doctrine of consent/acquiescence.

18. Defendants presently have insufficient knowledge or information on which to form a belief as to whether they may have additional, as yet unstated, affirmative or other defenses available. Defendants reserve the right to assert additional defenses in the event that discovery indicates they would be appropriate.

19. Defendants deny that Plaintiff is entitled to any relief requested.

20. Defendants deny all allegations of fact contained in the Complaint unless they are expressly admitted to be true herein.

21. Plaintiff’s claims are barred, in whole or in part, because Defendants applied their business judgment and acted at all times in good faith with respect to Plaintiff.

WHEREFORE, Defendants demand that the claims against them raised in the Complaint be dismissed in their entirety with prejudice, that judgment be entered in their favor, and that they recover their costs and expenses, including reasonable attorney's fees, and such other and further relief to which it may be entitled at law or in equity or as this Court deems just and appropriate.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,  
SMOAK & STEWART, P.C.

/s/ Jennifer G. Betts

Jennifer G. Betts

PA 209699

One PPG Place, Suite 1900

Pittsburgh, PA 15222

Telephone: 412-394-3333

Fax: 412-232-1799

jennifer.betts@ogletree.com

*Attorney for Defendant KRG Kings, LLC  
and Kelly Operations Group, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (“NEF”) and paper copies will be sent to those indicated as non-registered participants on November 13, 2020.

/s/ Jennifer G. Betts

Jennifer G. Betts

44964941.1