

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ANDREW BROWDER, on behalf of
himself and all others similarly situated,

Plaintiff,

v.

PENINSULA GRILL, LLC d/b/a
HANK'S SEAFOOD RESTAURANT and
HENRY "HANK" L. HOLLIDAY, III,
individually,

Defendants.

C/A: 2:14-cv-4135-PMD

**FLSA COLLECTIVE ACTION
AND
RULE 23 CLASS ACTION**

JURY TRIAL DEMANDED

Plaintiff, Andrew Browder ("Browder"), on behalf of himself and all others similarly situated, complaining of the acts of Defendants Peninsula Grill, LLC d/b/a Hank's Seafood Restaurant ("Hank's") and Henry "Hank" L. Holliday, III ("Holliday"), (Hank's and Holliday collectively "Defendants"), alleges as follows:

NATURE OF CLAIM

1. This action is brought individually and as a collective action for unpaid minimum wages and unpaid overtime wages, for liquidated damages, and for other relief under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, et seq. ("FLSA"). The collective action provisions under the FLSA provide for opt-in class participation.

2. This action is also brought individually and as a class action for unauthorized deductions from wages, and for other relief under the South Carolina Payment of Wages Act, South Carolina Code Ann. § 41-10-10, et. seq. ("SCPWA"). These claims are proposed as opt-out class claims under Rule 23 of the Federal Rules of Civil Procedure.

PARTIES, JURISDICTION, and VENUE

3. Plaintiffs reallege each and every allegation contained in Paragraphs 1 through 2 as if repeated here verbatim.

4. Browder is a citizen and resident of the Commonwealth of Massachusetts.

5. Upon information and belief, Hank's is a South Carolina corporation maintaining offices and agents and otherwise doing business in the County of Charleston, State of South Carolina.

6. Upon information and belief, Holliday is a citizen and resident of the County of Charleston, State of South Carolina, and an owner of Hank's.

7. This court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 based upon Plaintiffs' claims under the FLSA.

8. Plaintiffs bring this action, as an opt-in Collective Action pursuant to 29 U.S.C. § 216(b), on behalf of a class of individuals who were employed by Hank's at any time within the three (3) years prior to joining this lawsuit, who were nonexempt employees paid an hourly rate less than the minimum wage of Seven and 25/100 dollars (\$7.25) per hour and either received tips or shared in the tip pool ("Tip Pool") created by Hank's.

9. Plaintiffs also bring this action as an opt-out class action under Rule 23 of the Federal Rules of Civil Procedure, on behalf of a class of all individuals employed by Hank's, at any time within the three (3) years prior to the commencement of this lawsuit, who received "wages" in the form either of tips or funds from a tip pool, and Hank's deducted amounts from these wages without written or legal authorization.

10. Upon information and belief, this action satisfies the requirements of Fed. R. Civ. P. 23(a), as alleged in the following particulars:

a. The proposed Plaintiff class is so numerous that joinder of all individual members in this action is impracticable;

b. There are questions of law and/or fact common to the members of the proposed Plaintiff class;

c. The claims of Plaintiffs are typical of the claims of the proposed Plaintiff class; and

d. Plaintiffs will fairly and adequately protect the interests of the class.

11. In addition, upon information and belief, this action satisfies one or more of the requirements of Fed. R. Civ. P. 23(b), because the questions of law and/or fact common to the members of the proposed Plaintiff class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

12. In addition, this Court has supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over Plaintiffs' pendent claims, which are brought pursuant to the statutory and common law of the State of South Carolina, because those claims arise out of the same transaction or occurrence as the federal claims alleged herein.

13. Based upon the above, jurisdiction and venue are proper in this court and division.

FACTS

14. Plaintiffs reallege each and every allegation contained in Paragraphs 1 through 13 as if repeated here verbatim.

15. Hank's owns and operates a restaurant in downtown Charleston.

16. Holliday exercises operational control over Hank's; he has the authority to hire, discipline, and fire employees of Hank's; he was involved in the decisions to set the wages and

pay for Plaintiffs, and, therefore, Holliday is individually liable to Plaintiffs.

17. Hank's paid Plaintiffs an hourly wage less than the statutory minimum wage by taking the "Tip Credit" under the FLSA, 29 U.S.C. § 203(m):

18. Hank's required its servers to remit a portion of their tips at the end of each shift into a mandatory tip pool ("Tip Pool").

19. From the Tip Pool, Hank's paid an amount of Five and 00/100 dollars (\$5.00) per shift to the expeditor.

20. The expeditor wore kitchen attire and did not leave the kitchen at any time, therefore, this employee was not one who "regularly and customarily received tips."

21. Employees questioned management of Hank's on the practices of the Tip Pool.

FOR A FIRST CAUSE OF ACTION
Violation of Fair Labor Standards Act
29 U.S.C. § 203(m), 206
(Violation of Tip Credit / Failure to Pay Proper Minimum Wage)

22. Plaintiffs reallege each and every allegation contained in Paragraphs 1 through 21 as if repeated here verbatim.

23. At all times pertinent to this Complaint, Hank's engaged in interstate commerce or in the production of goods for commerce as defined by 29 U.S.C. § 203(r) and 203(s).

24. At all times relevant to this Complaint, Hank's' annual gross volume of sales made or business done was not less than Five Hundred Thousand and 00/100 dollars (\$500,000.00). Alternatively, Plaintiffs worked in interstate commerce so as to fall within the protection of the FLSA.

25. The business of Hank's was and is an enterprise engaged in commerce as defined by 29 U.S.C. § 203(s)(1) and, as such, Hank's is subject to, and covered by, the FLSA.

26. The FLSA, 29 U.S.C. § 206, requires employers to pay its nonexempt employees a

minimum wage of Seven and 25/100 dollars (\$7.25) an hour.

27. The FLSA, 29 U.S.C. § 203(m), provides an exception allowing certain employers to take a “Tip Credit” and pay less than the statutory minimum wage to tipped employees, on the condition that any “Tip Pool” is shared only with other employees who customarily and regularly receive tips.

28. When the employer shares the Tip Pool with back of the house employees, the Tip Pool is invalidated.

29. When the Tip Pool is invalidated, the employer can no longer enjoy the benefits of the Tip Credit provision, 29 U.S.C. § 203(m).

30. Without the benefit of the Tip Credit provision, Defendants must pay Plaintiffs the statutory minimum wage of Seven and 25/100 dollars (\$7.25) per hour for all hours worked.

31. When the employer violates the rules of the Tip Credit, the employer owes the total amount of tips that were deducted from employee’s tips and redistributed illegally.

32. Defendants have violated the FLSA, 29 U.S.C. § 206.

33. As such, Plaintiffs seek to recover from Defendants the following damages:

- a. actual damages in the amount of minimum wages due;
 - b. liquidated damages of an equal amount;
 - c. the amount of tips deducted from their wages and redistributed illegally;
- and
- d. reasonable attorneys’ fees and the costs and disbursements of this action.

34. The work and pay records, including the “tip-out” reports of Plaintiffs and the members of the Plaintiff class are in the possession, custody, and/or control of Defendants, and Defendants are under a duty, pursuant to section 11(c) of the FLSA, 29 U.S.C. § 211(c), and the

regulations of the United States Department of Labor, to maintain and preserve such payroll and other employment records from which the amount of Defendants' liability can be ascertained. Plaintiffs request an order of this Court requiring Defendants to preserve such records during the pendency of this action.

FOR A SECOND CAUSE OF ACTION
Violation of Fair Labor Standards Act
29 U.S.C. § 207
(Failure to Pay Proper Overtime Wage)

35. Plaintiffs reallege each and every allegation contained in Paragraphs 1 through 34 as if repeated here verbatim.

36. Pursuant to the terms of the FLSA, 29 U.S.C. § 207, an employer must pay a nonexempt employee time and a half for all hours worked over forty (40) hours in a workweek.

37. Without the benefit of the Tip Credit provision, Defendants must pay Plaintiffs, and all other similarly situated employees, for all hours worked over forty (40) in a workweek, including any hours worked off the clock, the statutory, minimum, overtime wage of Ten and 88/100 dollars (\$10.88) per hour.

38. Defendants failed to pay Plaintiffs and all other similarly situated employees the proper amount for all hours worked over forty (40) hours in a workweek or overtime hours worked.

39. Defendants have violated the FLSA, 29 U.S.C. § 207.

40. As such, Plaintiffs seek to recover from Defendants the following damages:

- a. actual damages in the amount of overtime wages due;
- b. liquidated damages of an equal amount; and
- c. reasonable attorneys' fees and the costs and disbursements of this action.

FOR A THIRD CAUSE OF ACTION
Violation of South Carolina Payment of Wages Act
S.C. Code § 41-10-10, et. al.
(Unauthorized Deductions from Wages)

41. Plaintiffs reallege each and every allegation contained in Paragraphs 1 through 40 as if repeated here verbatim.

42. Defendants are an “employer” as defined by the SCPWA.

43. Defendants employed Plaintiffs and the members of the Plaintiff class within the State of South Carolina.

44. Money received by Plaintiffs directly as tips, or amounts received from the Tip Pool, were “wages” as defined by SCPWA, § 41-10-10(2).

45. Defendants illegally deducted amounts from the wages of Plaintiffs and the members of the Plaintiff class without providing proper written notice as required by SCPWA § 41-10-30(A).

46. Defendants’ illegal deductions from the wages of Plaintiffs were willful and were made in bad faith.

47. Pursuant to SC PWA § 41-10-80(C), Plaintiffs and the members of the Plaintiff class are entitled to recover in this action an amount equal to three (3) times the full amount of their wages that were illegally deducted from their wages, plus reasonable attorneys’ fees and costs.

WHEREFORE, having fully set forth their allegations against Defendants, Plaintiffs respectfully request that the Court enter judgment for the following relief:

a. An order authorizing the sending of appropriate notice to current and former employees of Defendants who are potential members of the collective action, but have yet “opted-in,” under the FLSA;

- b. Actual damages in the amount of minimum wages due;
- c. Liquidated damages of an equal amount;
- d. The amount of tips deducted from their wages and redistributed illegally;
- e. Actual damages in the amount of overtime wages due;
- f. Liquidated damages of an equal amount;
- g. An order certifying a class action under Rule 23 of the Federal Rules of Civil Procedure to remedy the class-wide violations of the South Carolina Payment of Wages Act;
- h. Actual damages in the amount of wages due under SCPWA;
- i. Treble damages pursuant to SCPWA;
- j. Reasonable attorneys' fees and costs;
- k. Injunctive relief ordering Defendants to amend their wage and hour policies to comply with applicable federal and state laws; and
- l. Such further relief as the Court deems just and proper.

Plaintiffs request a trial by jury.



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CHARLESTON, SC

October 23, 2014