

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

Austin Rife, Darryn Himes and Brian Saber,
On Behalf of themselves and Others
Similarly Situated,

Plaintiffs,

v.

Momma Rosa, LLC, d/b/a Baroni's Pizza,
Rose M Baker and Jason Michael Baker
individually,

Defendants.

CIVIL ACTION NO.: 2:15-cv-02673-DCN

COLLECTIVE ACTION COMPLAINT
(Jury Trial Requested)

Plaintiff Austin Rife, Darryn Himes and Brian Saber, individually and on behalf of all others similarly situated, by way of their Complaint in the above-captioned matter, alleges and shows unto this Honorable Court the following:

NATURE OF CLAIMS

1. This is an action for violations of the minimum wage and unpaid overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.* (FLSA). Plaintiffs are former employees of Defendants. Defendants engaged in a practice of wage theft whereby they illegally claimed a tipped credit to reduce the hourly wages below the Federal Minimum Wage of \$7.25 and by failing to pay time and half when employees worked over 40 hours in a workweek.

2. The Plaintiffs bring this action as a collective action pursuant to 29 U.S.C. §216(b) on behalf of themselves other similarly situated employees of the Defendants who

worked as “drivers” and “pizza makers” who suffered damages as a result of Defendants’ violations of the FLSA.

3. Plaintiffs also bring individual and class claims for unpaid wages under the South Carolina Payment of Wages Act, S.C. Code Ann § 41-10-10, *et seq.* (SCPWA).

4. Plaintiff Rife also brings this action for unlawful retaliation pursuant to Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) *et seq.*

PARTIES, JURISDICTION AND VENUE

5. Plaintiff Austin Rife is over the age of nineteen (19) and is a resident of Charleston County, South Carolina.

6. Plaintiff Darryn Himes is over the age of nineteen (19) and is a resident of Charleston County, South Carolina.

7. Plaintiff Brian Saber is over the age of nineteen (19) and is a resident of Charleston County, South Carolina.

8. Defendant Momma Rosa LLC is for-profit limited liability company, organized and existing under the laws of the State of South Carolina, doing business under the trade name “Baroni’s Pizza”.

9. Defendant Rose M Baker is a citizen and resident of the State of South Carolina who owns and/or operates Momma Rosa LLC doing business under the trade name “Baroni’s Pizza” for profit. Defendant Rose M Baker employs persons such as Plaintiffs and other similarly situated employees to work on her behalf in providing labor for her benefit. Defendant is within the personal jurisdiction and venue of this Court.

10. Defendant Jason Michael Baker is a citizen and resident of the State of South Carolina who owns and/or operates Momma Rosa LLC doing business under the trade name

“Baroni’s Pizza” for profit. Defendant Jason Michael Baker employs persons such as Plaintiffs and other similarly situated employees to work on his behalf in providing labor for his benefit. Defendant is within the personal jurisdiction and venue of this Court.

11. Venue is proper in this District because the Defendants have conducted substantial, continuous and systematic commercial activities in the Charleston Division of this Court. Additionally, the Defendants committed the unlawful labor practices and policies giving rise to Plaintiffs’ claims in the Charleston Division of this Court.

12. This Court has jurisdiction of the Plaintiffs claims brought under the FLSA pursuant to 28 U.S.C. § 1331, and 29 U.S.C. § 216 (b).

13. This Court has supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over Plaintiff’s 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.

FACTS AND ALLEGATIONS

14. At all times relevant herein, the Defendants own and operate restaurants under the name Baroni’s Pizza located at 1975P Magwood Drive Charleston, SC and 1220 Ben Sawyer Blvd. Mount Pleasant, SC. The Defendants serve pizza, strombolis, calzones, pasta, grinders as well as various beverages. <http://www.baronispizza.com/>

15. At all times relevant herein, Defendant Rose M Baker and Defendant Jason Michael Baker regularly exercised the authority to hire and fire employees, determine the work schedules of employees, set the rate of pay of employees, and control the finances and operations of the business.

16. Plaintiffs and other similarly situated employees worked for the Defendants as “pizza makers” and “delivery drivers”. The primary job duties of a pizza maker were to prepare the menu items. The primary duties of a “delivery driver” included using their personal vehicle to deliver food to customers as well as cleaning the restaurant and kitchen.

17. The Defendants employed Plaintiff Rife as a delivery driver at the Ben Sawyer location from approximately August 2014 until January 2015.

18. The Defendants employed Plaintiff Himes as a pizza maker at both locations “off and on” from approximately April 2012 until December 2015.

19. The Defendants employed Plaintiff Brian Saber as a delivery driver at the Ben Sawyer location on two separate occasions from approximately June of 2013 to September of 2013 and May of 2015 to June of 2015.

20. Plaintiffs and other similarly situated employees had an employment agreement with the Defendants, whereby the Defendants agreed to pay an hourly rate for all hours worked.

21. Defendants paid the delivery drivers, less than the statutory minimum wage by taking a “tip credit” under the FLSA, 29 U.S.C. § 203(m).

i. The delivery drivers were paid four dollars (\$4.00) an hour plus tips when they worked “out” of the restaurant delivering food to customers.

ii. The delivery drivers were paid six dollars (\$6.00) an hour when they worked “in” the restaurant, cleaning and doing food prep.

22. Defendants required the delivery drivers to perform non-tipped producing duties that were unrelated to their tipped producing work for periods in excess of twenty percent (20%) of their time at work.

23. Defendants violated the FLSA by requiring the delivery drivers to perform non-tipped unrelated duties and not paying them the Federal Minimum Wage of \$7.25 for time they spent working in the restaurant.

24. Examples of non-tipped work which the delivery drivers were required to perform at the reduced tip credit rate include, but was not limited to: (i) washing dishes and pans, (ii) sweeping and mopping the dinning area and kitchen, (iii) cleaning the dough machine, (iv) food prep for the pizza makers, (v) taking out the trash, (vi) cleaning the bathrooms, (vii) cleaning the drains.

25. The Defendants did not satisfy the notice requirements set forth in 29 CFR 531.59 in advance of their use of the tip credit.

26. The Plaintiffs regularly worked over forty (40) hours in a workweek without receiving time and half of their hourly wage.

27. Plaintiffs were not exempt from the minimum wage and overtime compensation provisions of the FLSA.

28. The Defendants engaged in the practice of “time shaving” whereby they reduced their labor costs by deleting some of the time Plaintiffs worked in violation of the FLSA and SCWPA. These reductions resulted in Plaintiffs as well as similarly situated employees being shorted on straight time pay and overtime pay.

29. During some workweeks Plaintiffs time was shaved by as much as three (3) hours. For instance, Defendants expected Plaintiffs to complete their duties at closing within a set amount of time. If the Plaintiffs did not complete these duties within the set time then Defendants would not pay the Plaintiffs for the work they performed after the set time.

30. Plaintiff Rife complained on multiple occasions to Defendant Baker about the Defendants' not paying him for the time he spent working at closing and on other occasions. Plaintiff Rife complained to the Defendants that his paycheck did not reflect the number of hours he actually worked. Despite his complaints, the Defendants continued to not pay Plaintiff Rife for all the time that he, as well as other similarly situated employees, worked.

31. Plaintiff Rife told the Defendants that if they did not stop shaving his time as well as other employees' time that he would report the Defendants to the Department of Labor. As a result of making this complaint to the Defendants, Defendant Baker retaliated against Plaintiff Rife by first reducing his scheduled hours and then by terminated him approximately three weeks after he threatened to report Defendants to the Department of Labor for engaging time shaving.

32. Plaintiff Rife's complaint to the Defendants was sufficiently clear and detailed for the Defendants to understand the nature of the complaint and that it constituted protected activity under the FLSA's anti-retaliation provision.

33. The Defendants had fair notice that Plaintiff Rife's complaint was protected activity. Plaintiff Rife was terminated because he complained to the Defendants about wage theft.

34. At all times relevant to this Complaint, Plaintiffs were good and faithful employees of Defendants and they performed the essential functions of the job in an exceptional and competent manner.

FOR A FIRST CAUSE OF ACTION
(FLSA Minimum Wage Claim)
(Individual and Collective Action)

35. Plaintiffs, on behalf of themselves and all other similarly situated employees, re-allege and incorporate by reference all preceding paragraphs as if specifically set forth herein.

36. The FLSA mandates that employers compensate non-exempt employees at a minimum wage rate of \$7.25 per hour.

37. The FLSA, 29 U.S.C. § 203(m), provides an exception allowing employers to pay less than the statutory minimum wage to tipped employees.

38. Without the benefit of the tip credit provision, Defendants must pay each nonexempt employee the statutory minimum wage of Seven and 25/100 dollars (\$7.25) per hour.

39. Defendants paid Plaintiffs and other delivery drivers an hourly rate of \$4.00 and \$6.00; they were not paid the minimum wage of \$7.25.

40. Defendants compensation of Plaintiffs and other drivers violated the minimum wage provisions of the FLSA including but not limited to:

- a. Defendant violated the FLSA by requiring the delivery drivers to spend over twenty percent (20%) of their time performing non-tipped unrelated duties and not paying them the Federal Minimum Wage of \$7.25 for time they spent performing these duties.
- b. Defendants failed to provide oral or written notice of the FLSA's requirements for a valid tip credit.

41. At all times relevant herein, Defendants have been regularly engaged in interstate commerce.

42. At all times relevant herein, Defendants have been an enterprise within the meaning of § 3(r) and § 3(s)(1) of the FLSA, 29 U.S.C. §§ 203(r) & (s).

43. At all times relevant herein, Defendants have been an employer within the meaning of the FLSA, 29 U.S.C. §§ 203.

44. At all times relevant herein, Defendants owned an operation and were an enterprise engaged in interstate commerce or in the production of interstate commerce as defined by the Act, 29 U.S.C. §203(r) and 203(s).

45. At all times relevant herein, the annual gross sales volume of the Defendants' business was in excess of \$500,000.00. Additionally, the Plaintiffs and other delivery drivers worked in interstate commerce so as to fall within the protections of the FLSA.

46. Plaintiffs, on behalf of themselves and other delivery drivers, are entitled to recover their damages as a result of the Defendants' violations of the minimum wage provisions of the FLSA, liquidated damages in an equal amount, and their reasonable attorneys' fees and costs incurred in bringing this action.

47. Defendants' violation of the tip pool credit was willful, knowing, intentional, and reckless, therefore, Plaintiffs on behalf of themselves and all other similarly situated employees are entitled to recover liquidated damages from Defendants

FOR A SECOND CAUSE OF ACTION
(FLSA Failure to Pay Overtime Wages)
(Individual and Collective Action)

48. Plaintiffs, on behalf of themselves and all other similarly situated employees, re-allege and incorporate by reference all preceding paragraphs as if specifically set forth herein.

49. Plaintiffs as well as other pizza makers and delivery drivers worked for more than forty (40) hours during a workweek during their employment with Defendants.

50. Defendants failed to pay Plaintiffs and other pizza makers and delivery drivers at the rate of one-and-a-half times their normal rate of pay for all hours worked in excess of forty (40) hours in a workweek as required by section 7(a) of the FLSA, 29 U.S.C. § 207(a).

51. Defendants also failed to pay Plaintiffs and the members of the Plaintiffs' class for all compensable time for which Plaintiffs provided work for the benefit of Defendants.

52. Plaintiffs and the members of the Plaintiffs' class are entitled to back wages at the rate of one-and-a-half times their regular rate of pay for all overtime hours worked in excess of forty (40) hours per week, pursuant to section 16(b) of the FLSA, 29 U.S.C. § 216(b).

53. Plaintiffs and the members of the Plaintiffs' class are also entitled to an award of back pay at their regular hourly rate or their overtime rate, as appropriate, as compensation for all time spent in working for Defendants, which was wrongfully excluded by Defendants in calculating their compensable time.

54. The failure of Defendants to compensate Plaintiffs for overtime work and for as required by the FLSA was knowing, willful, intentional, and done in bad faith.

55. Plaintiffs and the members of the Plaintiffs' class are also entitled to liquidated damages equal to the amount of overtime compensation and unpaid compensation due to them under the FLSA, pursuant to section 16(b) of the FLSA, 29 U.S.C. § 216(b).

56. Plaintiffs are also entitled to an award of reasonable attorneys' fees and costs incurred in prosecuting this action, pursuant to 29 U.S.C. § 216(b).

FOR A THIRD CAUSE OF ACTION

(SCPWA)

(Individual and Class Action)

57. Plaintiffs, on behalf of themselves and all similarly situated employees, reallege and incorporate by reference all preceding paragraphs as if they were set forth herein verbatim.

58. Each Defendant is an "employer" as defined by the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10(1).

59. Defendants employed Plaintiffs and the members of the Plaintiffs' class within the State of South Carolina.

60. Defendants owe Plaintiffs and the members of the Plaintiffs' class "wages" as defined in Section 41-10-10(2) of the Act, to compensate them for labor rendered to Defendants, as promised to Plaintiffs and the members of the Plaintiffs' class and as required by law, including overtime pay required by the FLSA.

61. Defendants required Plaintiffs and the members of the Plaintiffs' class to work "off the clock," and did not pay them for all hours worked for the benefit of Defendants.

62. Defendants have failed to pay Plaintiffs and the members of the Plaintiffs' class all wages due, as required by Sections 41-10-40 and -50 of the Act.

63. Pursuant to S.C. Code § 41-10-80(C), Plaintiffs and the members of the Plaintiffs' class are entitled to recover in this action an amount equal to three times the full amount of their unpaid wages, or their wrongfully deducted wages, plus costs and reasonable attorney's fees.

FOR A FOURTH CAUSE OF ACTION

(FLSA-Retaliation)

(Individual Action)

64. Plaintiffs re-allege and incorporate by reference all allegations in all preceding paragraphs.

65. On various occasions throughout Plaintiff Rife employment, he complained about pay practices of Defendants that were unlawful under the FLSA.

66. Plaintiff engaged in "protected conduct" by complaining about the FLSA violations alleged herein and by attempting to secure documentary evidence of Defendants' illegal conduct.

67. Defendants initially responded by reducing Plaintiff Rife's scheduled hours.

68. Defendants knew that Plaintiff Rife was being retaliated against because he spoke up concerning wage hour violations.

69. Defendants did nothing to rectify the wage and hour violations that Plaintiff Rife complained about.

70. In fact, a few weeks after making a complaint, Defendants wrongfully terminated Plaintiff Rife in direct response to his report of wage hour violations.

71. Defendants willfully, intentionally, and unlawfully retaliated against Plaintiff Rife based on his lawful complaints of wage-hour violations.

72. Defendants are liable for the acts of individual supervisors, managerial employees, and/or the acts of their agents.

73. Defendants are subject to individual liability pursuant to 29 U.S. C. §§203(e)(1) and 215(a)(3) for the retaliatory conduct.

74. Defendants have terminated Plaintiff Rife and otherwise discriminated against him as a result of his protected conduct.

75. Defendants have willfully violated the anti-retaliation provisions of the FLSA, which prohibit "any person" from "discharging or in any other manner discriminating against an employee because that employee has engaged in protected conduct." 29 U.S.C. § 215(a)(3).

76. As a result of Defendants' willful violations of the FLSA, Plaintiff Rife is entitled to recover from Defendants for front-pay, back-pay, reasonable attorneys' fees and costs/disbursements of prosecuting this case, plus liquidated damages, and post-judgment interest.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs individually and on behalf of all others similarly situated individuals who join this action demand:

- a. Designation of this action as a collective action on behalf of the FLSA collective class pursuant to 29 U.S.C. § 216 (b);
- b. Judgment against Defendants for an amount equal to Plaintiffs unpaid minimum wages at the applicable hourly rate of \$7.25;
- c. Judgment against Defendants for all overtime worked at one and one half times the regular rate of pay;
- d. Judgment against the Defendants for front-pay, back-pay, for Plaintiff Rife;
- e. Judgment against Defendants that their violation of the FLSA and its implementing regulations were willful;
- f. Liquidated damages in an amount equivalent to the overtime damages, and unpaid minimum wages owed to Plaintiffs;
- g. Attorneys' fees and costs; and
- h. All such further relief as the Court deems just and equitable.

JURY DEMANDED

Plaintiffs Rife, Himes and Saber on their behalf and on behalf of all other similarly situated employees hereby demand a trial by jury.

Respectfully submitted,

/s/ Marybeth Mullaney
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