

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

LAUREN ZAJAC, on behalf of herself and)
all others similarly situated,)

Plaintiff,)

v.)

RED WING, LLC d/b/a RED'S ICE)
HOUSE; CECIL CROWLEY, individually;)
DIANNE CROWLEY, individually; and)
JOHN DOE 1-10, individually,)

Defendants.)

C/A: 2:16-cv-1856-PMD

**FLSA
COLLECTIVE ACTION
AND
RULE 23 CLASS ACTION
JURY TRIAL DEMANDED**

Plaintiff, Lauren Zajac (“Zajac”), on behalf of herself and all others similarly situated, (all jointly “Plaintiffs”), complaining of the acts of Defendants Red Wing, LLC d/b/a Red’s Ice House (“Red’s”); Cecil Crowley (“C. Crowley”); Dianne Crowley (“D. Crowley”); and John Does 1-10 (“Does”) (Red’s; C. Crowley; D. Crowley; and Does collectively “Defendants”) alleges as follows:

NATURE OF CLAIM

1. This action is brought individually and as a collective action for actual damages, liquidated damages, attorneys’ fees and costs, 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, § 216(b), provide for opt-in class participation.

2. This action is also brought individually and as a class action for payment of wages, which exceed the minimum wage and overtime wage required by the FLSA, 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 the above paragraphs as if repeated here verbatim.

4. Zajac is a citizen and resident of the State of South Carolina, County of Charleston.

5. Red’s is a South Carolina limited liability company maintaining offices and agents in the county of Charleston, state of South Carolina. Red’s is an employer of individuals and operates at least one (1) restaurant doing business as **Red’s Ice House**.

6. Upon information and belief, C. Crowley is a citizen and resident of the County of Charleston, State of South Carolina, and an owner and officer of Red’s, doing business as **Red’s Ice House**.

7. Upon information and belief, D. Crowley is a citizen and resident of the County of Charleston, State of South Carolina, and an owner and officer of Red’s, doing business as **Red’s Ice House**.

8. Upon information and belief, Does are citizens and residents of South Carolina, and owners and / or officers of Red’s, doing business as **Red’s Ice House**.

9. Zajac is employed at Red’s, doing business as **Red’s Ice House**, in the County of Charleston, State of South Carolina. A substantial part of the events giving rise to these claims occurred in Charleston County.

10. This court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 based upon Zajac’s claims under the FLSA.

11. Zajac brings 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 Defendants at any time within the three (3) years prior to joining this lawsuit, who were nonexempt employees paid a direct, or hourly, rate less than the minimum wage of Seven and 25/100 dollars (\$7.25) per hour, received tips, and Red's deducted a portion of those tips to place in the mandatory tip pool created by Red's ("Tip Pool").

12. Venue in this District and in this Division is appropriate pursuant to 28 U.S.C. 1391(b)(2) and 1391(c), as a substantial part of the events giving rise to the claims herein occurred in this Division, the Defendants have extensive and deliberate contacts in this Division, and one of the individual Defendants is a resident of this Division.

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

14. The work and pay records, including the "tip-out" reports, of Zajac 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.

FACTS

15. Plaintiffs reallege each and every allegation contained in the above paragraphs as if repeated here verbatim.

16. Defendants own and operate Red's.

17. C. Crowley exercises operational control over Red's. On information and belief,

C. Crowley was involved in the decisions to set the wages and pay, including the Tip Pool, for Plaintiffs, or he hired the individuals to whom he delegated this authority, therefore, C. Crowley is individually liable to Plaintiffs.

18. D. Crowley exercises operational control over Red's. On information and belief, D. Crowley was involved in the decisions to set the wages and pay, including the Tip Pool, for Plaintiffs, or she hired the individuals to whom she delegated this authority, therefore, D. Crowley is individually liable to Plaintiffs.

19. Doe exercises operational control over Red's. On information and belief, Doe was involved in the decisions to set the wages and pay, including the Tip Pool, for Plaintiffs, or he hired the individuals to whom he delegated this authority, therefore, Doe is individually liable to Plaintiffs.

20. Zajac was employed by Red's from 2014 until present as a server and bartender.

21. Defendants paid Zajac, and on information and belief all Plaintiffs, a direct, or hourly, wage less than the statutory minimum wage by taking the "Tip Credit" under the FLSA, 29 U.S.C. § 203(m). Defendants paid Zajac a direct, or hourly, rate of \$2.13 per hour.

22. Red's had a policy that required Zajac, and on information and belief all Plaintiffs, to remit, from the tips they received, a portion of their tips at the end of each shift into the mandatory Tip Pool.

23. From the Tip Pool, Red's redistributed an amount equal to 3% of all server and bartender total food sales to food runners and expeditors.

24. Certain individuals employed as expeditors remained in the kitchen during their entire shifts, therefore, these employees were not employees who "customarily and regularly" receive tips.

25. Zajac questioned management of Defendants on whether the policy of the Tip Pool was legal, but Defendants continued in reckless disregard in violating the FLSA.

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)

26. Plaintiffs reallege each and every allegation contained in the above paragraphs as if repeated here verbatim.

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

28. At all times relevant to this Complaint, Defendants' 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.

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

30. 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.

31. 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 pooling, or sharing, of tips is shared only with other employees who customarily and regularly receive tips.

32. Zajac, and on information and belief all Plaintiffs, were required by Defendants to pool, or share, their tips with employees, who are not employees who customarily and regularly receive tips, therefore, the Tip Pool is invalidated.

33. 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).

34. Defendants have violated the FLSA, 29 U.S.C. § 203(m), 206, in reckless disregard of the rights of Plaintiffs.

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

- a. actual damages;
- b. liquidated damages of an equal amount; and
- c. reasonable attorneys' fees and the costs and disbursements 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)

36. Plaintiffs reallege each and every allegation contained in the above paragraphs as if repeated here verbatim.

37. 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.

38. Plaintiffs routinely worked more than forty (40) hours per week.

39. Without the benefit of the Tip Credit provision, 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.

40. Defendants have violated the FLSA, 29 U.S.C. § 207, in reckless disregard of the rights of Plaintiffs.

41. As such, Plaintiffs seeks to recover from Defendants the following damages:

- a. actual damages;
- 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
(South Carolina Payment of Wages Act)
(Individual and Class Action)

42. 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.

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

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

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

46. Defendants illegally deducted amounts from the wages of the South Carolina Class without providing proper written notice as required by SCPWA § 41-10-30(A).

47. Defendants owe Plaintiffs and the members of the Plaintiffs' class "wages" as required by law, which exceed the minimum wage and overtime wage required by the FLSA.

48. Defendants actions were willful, and Defendants have no good faith reason why they took this action.

49. 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, as outlined above, plus costs and reasonable attorneys' fees.

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 putative members of the collective action, but have yet “opted-in,” under the FLSA;

b. An order prohibiting Defendants from violating the FLSA, particularly the Tip Credit, in the future;

c. For Plaintiffs, under the first and second causes of actions:

i. actual damages in an amount to be determined;

ii. liquidated damages of an equal amount;

d. 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;

e. Actual damages in the amount of wages due under SCPWA;

f. Treble damages pursuant to SCPWA;

g. Reasonable attorneys’ fees and costs;

h. Injunctive relief ordering Defendants to amend their wage and hour policies to comply with applicable federal and state laws; and

i. Such further relief as the Court deems just and proper.

Plaintiffs request a trial by jury.

[SIGNATURE PAGE TO FOLLOW]



Bruce E. Miller (Fed Bar No. 3393)

BRUCE E. MILLER, P.A.

147 Wappoo Creek Drive, Suite 603

Charleston, SC 29412

T: 843.579.7373

F: 843.614.6417

bmill@brucemillerlaw.com

**ATTORNEY FOR LAUREN ZAJAC, on behalf
of herself and all others similarly situated**

CHARLESTON, SC

June 8, 2016