

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

MOISES VELASQUEZ, on behalf of
himself and all others similarly
situated,

Plaintiff,

v.

SALSA AND BEER RESTAURANT,
INC; NOE PATINO; PATRICIA
PATINO; DIONISIO PATINO; and
ISMAEL PATINO,

Defendants.

Collective and Class Action
COMPLAINT

COMES NOW, Plaintiff Moises Velasquez (“Plaintiff”), on behalf of himself and all others similarly situated, by and through undersigned counsel, and hereby sets forth this collective action for violation of the Fair Labor Standards Act under § 216(b), and a representative action under the North Carolina Wage and Hour Act pursuant to Fed. R. Civ. P. 23, and alleges as follows:

PRELIMINARY STATEMENT

1. Named Plaintiff is a former employee of Defendants with approximately three (3) locations around Fayetteville and Spring Lake, North Carolina. Plaintiff, on behalf of himself and all others similarly situated, brings this action against Salsa and Beer Restaurant, Inc.

(“corporate Defendant”) and owners Noe Patino, Patricia Patino, Dionisio Patino, and Ismael Patino (“Patino Defendants”), collectively (“Defendants”), for unpaid overtime compensation, and related penalties and damages.

2. It is Defendants’ systemic company-wide policy and practice to willfully fail and refuse to compensate employees for all straight-time hours worked, and to pay all overtime compensation at time and one-half for all hours worked in excess of 40 in a week, due and owing to Plaintiffs and all other similarly situated employees, in direct violation of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.*

3. Plaintiff also brings this action against Defendants for unpaid straight time, overtime compensation, and related penalties and damages for Defendants’ practice and policy of willfully failing and refusing to properly pay all earned and accrued straight-time and overtime wages on employees’ regular pay date in direct contravention of the North Carolina Wage and Hour Act (“NCWHA”), N.C. Gen. Stat. §§ 95-25.1 *et seq.*, and for misappropriation of tips in violation of 13 N.C.A.C. 12. 0303(c).

4. Defendants’ pay practices and policies are in direct violation of the FLSA and the NCWHA; therefore, Plaintiff, on behalf of himself and all others similarly situated, seeks unpaid straight time compensation, overtime premiums for all overtime work required, suffered, or permitted by Defendants, liquidated damages and/or other damages as permitted by applicable law, and attorney’s fees, costs, and expenses incurred in this action.

JURISDICTION AND VENUE

5. This Court has original federal question jurisdiction under 29 U.S.C. § 1331 for the claims brought under the FLSA, 29 U.S.C. § 201, *et seq.*

6. The United States District Court for the Eastern District of North Carolina has personal jurisdiction because Defendants conduct business in Cumberland County, North Carolina which is located within this District.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), inasmuch as Defendants conduct business in the Eastern District of North Carolina, and the cause of action set forth herein has arisen, in part, and occurred, in part, in the Eastern District of North Carolina.

8. The claims for the violations of the NCWhA are based upon the statutory law of the State of North Carolina.

9. Supplemental jurisdiction exists pursuant to 28 U.S.C. § 1367 for the pendent state claims because they arise out of the same nucleus of operative fact as the FLSA claim.

10. All of the alleged causes of action can be determined in this judicial proceeding and will provide judicial economy, fairness, and convenience for the parties.

11. The evidence establishing liability for both causes of action will be similar and neither issue will predominate nor create confusion to a jury.

PARTIES

12. Plaintiff Velasquez resides at 2808 Varnish Place, Raleigh, NC 27610.

13. Plaintiff was employed by Defendants as a non-exempt waiter at Salsa and Beer Inc. Restaurant in Spring Lake, NC during the applicable time period.

14. The putative/potential class members are: All current and/or former employees of Defendants whose primary duty was non-exempt work, and who were not compensated any wages for hours worked less than forty (40) or above forty (40) in a workweek, and/or who have had deductions taken from their tips to compensate other employees ("Putative Plaintiffs").

15. Corporate Defendant is a business registered with the Secretary of State and operating in the State of North Carolina.

16. Corporate Defendant's physical address is 231 Skyland Shopping Center, Spring Lake, NC 28390.

17. Defendant Noe Patino is a resident of Fayetteville, NC. Upon information and belief, Defendant Noe Patino is part-owner of all Salsa and Beer restaurant locations located in the Fayetteville area.

18. Defendant Patricia Patino is a resident of Fayetteville, NC. Upon information and belief, Defendant Patricia Patino is part-owner of all Salsa and Beer restaurant locations located in the Fayetteville area.

19. Defendant Dionisio Patino is a resident of Fayetteville, NC. Upon information and belief, Defendant Dionisio Patino is part-owner of all Salsa and Beer restaurant locations located in the Fayetteville area.

20. Defendant Ismael Patino is a resident of Fayetteville, NC. Upon information and belief, Defendant Ismael Patino is part-owner of all Salsa and Beer restaurant locations located in the Fayetteville area.

21. Defendants maintain uniform pay practices and policies at all of their other restaurants in North Carolina.

22. At all times material to this action, Defendants were the employers of Plaintiff, and thus are liable to Plaintiff, as an employer, joint employers, single employers, and/or otherwise according to statutory law.

COVERAGE

23. At all times material to this action, Defendants have acted, directly or indirectly, in the interest of an employer with respect to Plaintiff and all those similarly situated.

24. At all times material to this action, Defendants were “employers” within the meaning of Section 3(d) of the FLSA, 29 U.S.C. § 203(d).

25. At all times material to this action, Defendants were an enterprise engaged in related activities performed through a unified operation or common control for a common business purpose as defined by Section 3(r) of 29 U.S.C. 203(r) of the FLSA.

26. At all times material to this action, Defendants were an enterprise engaged in commerce or the production of goods for commerce as defined by Section 3(s) of the FLSA, 29 U.S.C. § 203(s)(1), in that said enterprise has had employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person and in that said enterprise has had and has an annual gross volume of sales made or business done of not less than \$500,000.

FACTUAL ALLEGATIONS

27. Defendants operate restaurants whose mission is to provide food and service to the public. There are a minimum of three (3) restaurant locations throughout North Carolina, including Fayetteville and Spring Lake, NC.

28. Plaintiff Velasquez was employed by Defendants from approximately February 14, 2014 through May 21, 2015. During the relevant time period, from February 14, 2014 until the end of his employment on May 21, 2015, Plaintiff worked as a non-exempt waiter at Defendants’ 231 Skyland Shopping Center, Spring Lake, NC location.

29. As a waiter, Plaintiff Velasquez was responsible for serving food and drink to Defendants' customers, as well as doing occasional cleaning tasks in the restaurant. Plaintiff Velasquez did not have authority over the hiring and firing of other employees, nor could he effectively recommend the hiring, firing, advancement, promotion, or other change of status of other employees.

30. Plaintiff's primary duties did not include management of the business or a subdivision thereof. He did not evaluate or discipline other employees, set their hours of work or rates of pay, or direct their work. He did not have the authority to discipline anyone for coming in late, leaving early, or for misbehavior while on the job. Further, Plaintiff did not direct the work of two or more full-time employees and always reported directly to one of the Patino Defendants or their agents, many of whom were also members of the Patino family, who had supervising authority over everyone, including Plaintiff Velasquez.

31. From February 14, 2014 to approximately February 2015, Plaintiff Velasquez routinely worked from 10:00am to 10:00pm Monday through Thursday and from 10:00am to 11:00pm on Fridays, with a 2-hour unpaid lunch break. During this time, Plaintiff worked approximately fifty-one (51) hours per week.

32. From February 2015 to April 2015, however, Plaintiff Velasquez only worked from Wednesday to Thursday from 3:30pm to 10:00pm, and on Fridays from 3:30pm to 11:00pm. During this time, Plaintiff worked approximately twenty and one-half (20.5) hours per week. Also beginning during this period, Plaintiff began receiving checks from Defendants for the amount of \$45.00 every 15 days, still not reflective of Plaintiff's actual earned wages.

33. From May 1, 2015 to May 21, 2015, Plaintiff Velasquez worked Wednesday to Friday from 5:00pm to 10:00pm. On May 15, May 20, and May 21, Plaintiff worked two shifts; the first from 11:00am to 1:30pm and the second 5:00pm to 10:00pm.

34. Plaintiff's last day of employment was May 21, 2015. Until this day, starting May 1, 2015, Defendants required employees to record time by punching in/out in a time clock. Despite this, Plaintiff and Putative Plaintiffs were not paid for their actual hours worked.

35. Defendants controlled Plaintiff's work schedule.

36. For the vast majority of Plaintiff's employment with the Defendants, Plaintiff Velasquez received no wages from Defendants whatsoever while working as a waiter apart from the small payment of \$45.00 which he received bi-weekly only for a duration of four months. Plaintiff, otherwise, worked exclusively for tips with no wages paid for actual hours worked.

37. Defendants also had a practice that provided for a share of the tips earned by Plaintiff Velasquez and other similarly situated employees who worked as servers to be set aside for the restaurant's "chip runner," whose responsibilities primarily consisted of dropping off chips and salsa at patrons' tables. Plaintiff Velasquez was required to surrender five (\$5) dollars from his earned tips from each shift to the chip runner, such that he not only received no pay from Defendants, but was in fact, required to pay Defendants five dollars per shift to work. Upon information and belief, other similarly-situated employees were also required to surrender a portion of their earned tips to Defendants.

38. As a result, while Plaintiff and those employees who are similarly situated received zero dollars per hour in wages from Defendants, some similarly situated employees who worked as servers, including Plaintiff, are owed an additional amount from Defendants for each

shift worked in which Defendants improperly took money from their earned tips to defray Defendants' costs for other employees' compensation.

39. Upon information and belief, such misappropriated tips were the only income those employees designated as "chip runners" received for their work. Defendants routinely defrayed their compensation obligations to these employees by appropriating the tips of other employees for that purpose, rather than paying such employees the required minimum wage. The misappropriated tips given to "chip runners" did not comprise sufficient compensation to raise those employees to the minimum wage.

40. As a result of their willful failure to pay Plaintiff Velasquez and those similarly situated any wages whatsoever, Defendants may not properly claim to be eligible for the "tip credit" authorized by the FLSA. Similarly, they cannot claim to have complied with the requirements found within the FLSA and NCWhA concerning "tip pooling."

41. By misappropriating a portion of the tips which properly belonged to Plaintiff Velasquez and those similarly situated to offset Defendants' own obligations to chip runners, as previously described, Defendants also improperly imposed an illegal tip pool, in which Plaintiff and other similarly situated employees were required to participate with Defendants.

42. Defendants have violated the statutory rights of Plaintiff, and those similarly situated, under both the FLSA and the NCWhA which resulted in damages to Plaintiff in the form of unpaid straight-time wages and unpaid overtime wages on their regular payday, upon which they have incurred and are incurring costs and reasonable attorney's fees.

43. Defendants have violated the statutory rights of Plaintiff and those similarly situated, under the FLSA and NCWhA which were willful, which entitles Plaintiff and those

similarly situated to an additional amount as liquidated damages pursuant to 29 U.S.C. § 216(b) and §§ 95-25.22(a)(1) and (d), for pre-judgment interest and an award of attorney's fees.

44. Defendants knowingly, willfully, or with reckless disregard carried out an illegal pattern or practice of failing to pay Plaintiff and those similarly situated straight time wages, overtime compensation, and failing to pay Plaintiff and those similarly situated for all hours worked pursuant to the FLSA and the NCWHA. Defendants were aware Plaintiff was working more than forty (40) hours per week.

FLSA COLLECTIVE ACTION ALLEGATIONS

45. Pursuant to 29 U.S.C. § 216(b), Plaintiff Velasquez brings this action on behalf of himself and all of the following similarly situated employees:

All current and/or former employees of Defendants who were tipped employees whose primary duties were non-exempt work, and who were not compensated with any wages for hours worked less than forty (40) and/or at the rate of time and one-half for hours worked above forty (40) per week ("Putative Plaintiffs")

and/or

All current and/or former employees who were improperly required to surrender to Defendants an additional portion of their tips for each shift worked at Defendants' restaurants.

46. Putative plaintiffs are current and/or former employees of Defendants who have been subjected to the same unlawful practices alleged herein, and therefore, are similarly situated to Plaintiff. The members of the putative plaintiff collective action, like Plaintiff, were employed as servers were subject to the same or similar pay practices. These putative plaintiffs, like Plaintiff, were not paid the required minimum wage for all of their hours worked. Putative plaintiffs, like Plaintiff, were also required to work more than forty (40) hours each workweek without being paid at the legally required overtime rate of time and one-half the higher of either federal minimum wage or their regular rate of pay pursuant to the NCWHA. In addition, like

Plaintiff Velasquez, many putative plaintiffs were required to surrender an additional portion of their tips from each shift worked to Defendants. Putative plaintiffs and Plaintiff should therefore be permitted to pursue their claims collectively, pursuant to 29 U.S.C. § 216(b).

47. Pursuant to 29 U.S.C. § 216(b), attached to and filed with the instant Complaint as Exhibit A is a Consent to File Suit as Plaintiff executed by Plaintiff.

NCWHA CLASS ACTION ALLEGATIONS

48. Pursuit of this action collectively will provide the most efficient mechanism for adjudicating the claims of Plaintiff Velasquez and members of this proposed class.

49. Pursuant to Rule 23(b) and 23(b)(3) of the Federal Rules of Civil Procedure, Plaintiff, brings his second claim for relief to redress and remedy Defendants' violations of the NCWHA, N.C. Gen. Stat. § 95-25.1, *et seq.*, on behalf of himself and all of the following similarly situated current and/or former employees of Defendants who have held tipped non-exempt positions working for Defendants who were not paid any wages owed to them and/or who worked more than forty (40) hours during any given workweek of their employment without receiving time and one-half for their hours worked over forty (40) in any given workweek.

50. The Plaintiff and members of the proposed class assert that Defendants violated the NCWHA by failing to pay their employees straight-time wages at the applicable minimum wage, as well as overtime wages of one and one-half times their regular rate of pay, which is part of the employees' accrued, earned, and promised wages and should have been paid when due on the employees' regular payday; this requirement is not covered by the overtime provisions of the FLSA.

51. The Proposed Class: Named Plaintiff proposes the same class for purposes of certification under Rule 23 as under § 216(b) of the FLSA. The proposed class is easily

ascertainable. The number and identity of NCWHA class members are determinable from a list of Defendants' employees and any other payroll records.

52. Numerosity: The proposed class is so numerous that the joinder of all such persons is impracticable, and the disposition of their claims as a class will benefit the parties and the Court. While the exact number of class members is unknown to Plaintiffs at this time, upon information and belief, the class comprises of at least twenty (20) persons.

53. Common Questions Predominate: There is a well-defined commonality of interest in the questions of law and fact involving and affecting the proposed class in that Plaintiff and all members of the proposed class have been harmed by Defendants' failure to pay earned wages. The common questions of law and fact include, but are not limited to the following:

- a. Whether Defendants' failure to pay Plaintiff and members of the proposed class any wages, including overtime wages for all hours worked over forty (40) per week on their regular payday constitutes a violation of NCWHA § 95-25.6; and
- b. Whether Defendants' practice of requiring employees to surrender tips to Defendants for the purpose of defraying Defendants' payroll obligations to other putative is in violation of N.C. Gen. Stat. § 95-25.8.

54. Typicality: The claims of Plaintiff herein are typical of those claims which could be alleged by a putative class member, and the relief sought is typical of the relief which would be sought by each member of the class in separate actions. All class members were subject to the same or substantially similar compensation practices of Defendants, as alleged herein, of refusing to pay overtime wages on the regular payday of the class members. Defendants' compensation policies and practices affected all class members similarly, and Defendants benefitted from the same type of unfair and/or wrongful acts as to each class member. Plaintiff

and members of the proposed class sustained similar losses, injuries, and damages arising from the same unlawful policies, practices, and procedures.

55. Adequacy of Representation: Plaintiff is able to fairly and adequately protect the interests of all members of the class, and there are no known conflicts of interest between Plaintiff and members of the proposed class. Plaintiff has retained counsel who is experienced and competent in both wage and hour law and complex class action litigation.

56. Superiority: A class action is superior to other available means for the fair and efficient adjudication of this controversy. Individual joinder of all class members is impracticable. Class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of effort and expense that numerous individual actions engender. Because the losses, injuries and damages suffered by each of the individual class members are small in the sense pertinent to the class action analysis, the expenses and burden of individual litigation would make it extremely difficult or impossible for the individual class members to redress the wrongs done to them.

On the other hand, important public interests will be served by addressing the matter as a class action. The cost to the court system and the public for the adjudication of individual litigation and claims would be substantial and substantially more than if the claims are treated as a class action. Prosecution of separate actions by individual members of the proposed class would create a risk of inconsistent and/or varying adjudications with respect to the individual members of the class, establishing incompatible standards of conduct for Defendants and resulting in the impairment of class members' rights and the disposition of their interests through actions to which they were not parties. The issue in this action can be decided by means of

common, class-wide proof. In addition, if appropriate, the Court can and is empowered to fashion methods to efficiently manage this action as a class action.

57. Public Policy Considerations: Defendants violate the NCWHA. Like current employees are often afraid to assert their rights out of fear of direct or indirect retaliation, former employees may also be fearful of bringing claims because doing so can harm their employment, future employment, and future efforts to secure employment. Class actions provide class members who are not named in the Complaint a degree of anonymity that allows for vindication of their rights while eliminating or reducing these risks.

COUNT ONE
(Violations of the Fair Labor Standards Act)

58. Plaintiff incorporates by reference all preceding paragraphs as if the same were set forth again fully at this point.

59. Plaintiff and those similarly situated are or were employed by Defendants on a tipped basis to perform restaurant labor and/or other duties that do not satisfy the tests for exempt positions under the FLSA.

60. As a result of Defendants' willful failure to pay Plaintiff and those similarly situated as required by law, Defendants owe Plaintiff, putative plaintiffs, and members of the proposed class unpaid straight-time hours and overtime wages, as well as liquidated damages in an amount equal to the amount of unpaid wages.

61. Defendants have willfully engaged in such conduct in violation of the FLSA by engaging in a pattern or practice of permitting or requiring Plaintiff and those similarly situated, to work without compensation at the applicable minimum wage and/or overtime rate for all hours worked over forty (40) per week.

62. Plaintiff and those similarly situated each worked more than forty (40) hours in one or more workweeks within the applicable statutory period.

63. The foregoing conduct, as alleged above, constitutes willful violations of the FLSA within the meaning of 29 U.S.C. § 255(a), which permits the recovery of unpaid wages for up to three (3) years rather than two (2) years.

64. As set forth above, Plaintiff, and those similarly situated, have sustained losses in their compensation, a proximate result of Defendants' violations. Accordingly, Plaintiff, on behalf of himself and all other current and/or former employees similarly situated, seeks damages in the amount of their respective unpaid straight-time wages, overtime compensation and liquidated damages, as provided by the FLSA, 29 U.S.C. § 216(b) and such other legal and equitable relief as the Court deems just and proper.

65. Plaintiff, on behalf of himself and all current and/or former employees similarly situated, seeks recovery of his attorney's fees and costs to be paid by Defendants, as provided by the FLSA, 29 U.S.C. § 216(b).

COUNT TWO
(Violations of the North Carolina Wage and Hour Act)

66. Plaintiff incorporates by reference all preceding paragraphs as if the same were set forth again fully at this point.

67. The class period for this cause of action is at least two years from the date of the filing of this Complaint.

68. It is unlawful under North Carolina law for an employer to "suffer or permit" an employee to work without paying promised and earned wages for all hours worked pursuant to N.C. Gen. Stat. § 95-25.6.

69. Pursuant to the NCWHA, N.C. Gen. Stat. § 95-25.6, Defendants were required to pay Plaintiff and members of the proposed class all wages, when due, for all hours of work at the state or federal minimum wage rate, whichever is higher, on their regular pay date.

70. Pursuant to the NCWHA, N.C. Gen. Stat. § 95-25.6, Defendants were required to pay Plaintiff and members of the proposed class all wages, when due, for all straight-time minimum wages and overtime wages of one and one-half times the federal minimum wage rate which is a part of all the employees' accrued and earned wages, and which should have been paid when due on the employees' regular pay date; this requirement is not covered by the overtime provision under the FLSA.

71. Defendants were also required, in the absence of a valid tip pool, to allow Plaintiff and members of the proposed class to retain all tips earned, pursuant to 13 N.C.A.C. 12. 0303(c). Defendants improperly required Plaintiff and some members of the proposed class to surrender a portion of their tips to Defendants.

72. Defendants intentionally refused to pay all wages due as set forth in the preceding paragraphs of this Complaint to Plaintiff and proposed class members in violation of the NCWHA.

73. The foregoing conduct, as alleged, constitutes willful violations of the NCWHA, N.C. Gen. Stat. § 95-25.6,

74. As set forth above, the NCWHA Plaintiff and members of the proposed class have sustained losses and lost compensation as a proximate result of Defendants' violations. Accordingly, Plaintiff, on behalf of himself and all those similarly situated, seeks damages in the amount of their unpaid earned compensation, liquidated damages, plus interest at the legal rate set for in N.C. Gen. Stat. § 95-25.22(a) and (a)(1).

75. Plaintiff, on behalf of himself and all those similarly situated, seeks recovery of his attorney's fees as provided by the NCWHA, N.C. Gen. Stat. § 95-25.22(d).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and all those similarly situated, collectively pray that this Honorable Court:

76. Issue an Order certifying this action as a collective action under the FLSA and designate the above Plaintiff as a representative of all those similarly situated under the FLSA collective action;

77. Issue an Order certifying this action as a class action under the NCWHA and designate the above Plaintiff as a representative on behalf of all those similarly situated of the NCWHA classes;

78. Award Plaintiff and all those similarly situated actual damages for unpaid wages and liquidated damages equal in amount to the unpaid compensation found due to Plaintiff and the class as provided by the NCWHA, N.C. Gen. Stat. § 95-25.22(a)(1) and pursuant to the FLSA, 29 U.S.C. § 216(b);

79. Award Plaintiff and all those similarly situated pre- and post- judgment interest at the statutory rate as provided by the NCWHA, N.C. Gen. Stat. § 95-25.22(a) and pursuant to the FLSA, 29 U.S.C. § 216(b);

80. Award Plaintiff and all those similarly situated attorney's fees, costs, and disbursements as provided by the NCWHA, N.C. Gen. Stat. § 95-25.22(d) and pursuant to the FLSA, 29 U.S.C. § 216(b); and

81. Award Plaintiff and all those similarly situated further legal equitable relief as this Court deems necessary, just and proper.

Respectfully submitted this the July 6, 2016.

/s/ Gilda A. Hernandez

Gilda A. Hernandez (NCSB No. 36812)

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