

**UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION**

TRINA CREECH, individually and  
on behalf of similarly situated persons,

Plaintiff,

V.

JEM PIZZA GROUP, LLC,  
JEM RESTAURANT GROUP  
OF FLORIDA, INC., AND  
DOES 1-25,

Defendants.

Case No. 2:16-cv-03087-PMD

**JURY TRIAL DEMANDED**

## COMPLAINT

Plaintiff Trina Creech, individually and on behalf of all other similarly situated delivery drivers, for her Complaint against Defendants, alleges as follows:

1. Defendants JEM Pizza Group, LLC, JEM Restaurant Group of Florida, Inc. and Does 1-25 (collectively, “JEM”) together operate approximately 60 Pizza Hut franchise stores in states including South Carolina, Alabama, Florida and Georgia. JEM employs delivery drivers who use their own automobiles to deliver pizza and other food items to its customers. Instead of reimbursing drivers for the reasonable approximate costs of the business use of their vehicles, JEM uses a flawed method to determine reimbursement rates that provides such an unreasonably low rate beneath any reasonable approximation of the expenses they incur that the drivers’ unreimbursed expenses cause their wages to fall below the federal minimum wage during some or all workweeks.

2. Plaintiff Tina Creech brings this lawsuit as a collective action under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.*, to recover unpaid minimum wages owed to her and similarly situated delivery drivers employed by JEM at its Pizza Hut stores.

### **Jurisdiction and Venue**

3. The FLSA authorizes court actions by private parties to recover damages for violation of its wage and hour provisions. Jurisdiction over Plaintiff’s FLSA claim is based on 29 U.S.C. § 216(b) and 28 U.S.C. § 1331 (federal question).

4. Venue in this District is proper under 28 U.S.C. § 1391 because JEM maintains its principal place of business in this District, JEM operates Pizza Hut franchise stores in this District, and a substantial part of the events giving rise to the claim herein occurred in this District.

5. Pursuant to the standard practice of Pizza Hut franchisees of requiring applicants to agree to arbitrate employment-related claims, on May 23, 2016, Plaintiff filed an arbitration claim, encompassing a Demand to Arbitrate and Statement of Claim, with the American Arbitration Association (“AAA”) on May 17, 2016.

6. The AAA accepted those filings and designated the parties’ arbitration as “Case No. 01-16-0001-8101.”

7. In accordance with AAA rules, Plaintiff served her AAA Demand for Arbitration and Statement of Claim on Defendants.

8. On August 5, 2016, the AAA informed Plaintiff’s counsel that it closed the arbitration case because Defendants failed to pay the AAA’s filing fee.

9. Defendants have thereby breached and violated the parties’ arbitration agreement by failing to fulfill their material contractual duty to pay arbitration fees.

10. Plaintiff's duty to arbitrate was, and is, dependent upon Defendants' payment of its arbitration fees.

11. Defendants have prejudiced Plaintiff through delay and requiring her counsel to expend additional efforts.

12. Because of this breach, Defendants have waived their rights under the arbitration agreement, Defendants cannot enforce the terms of the parties' arbitration agreement, and Plaintiff is discharged from her duty to arbitrate and all other duties set forth within the parties' arbitration agreement.

13. Alternatively and cumulatively, Defendants' failure to pay its arbitration fees constitutes a prior material breach of the parties' arbitration agreement, thereby excusing Plaintiff from any contractual duty to arbitrate.

### **Parties**

14. Defendant JEM Pizza Group, LLC is a South Carolina limited liability company maintaining its principal place of business at 2 Wharfside St., Ste. 2, Charleston, South Carolina, which is located within the Charleston Division of the District of South Carolina, which, together with Defendant JEM Restaurant Group of Florida, Inc. and all other Defendants, operates a chain of Pizza Hut franchise stores, including stores located within this District during times relevant.

15. Defendant JEM Restaurant Group of Florida, Inc. is a Florida corporation which has, together with JEM Pizza Group, LLC and all the other Defendants, operated a chain of Pizza Hut franchise stores, including stores located within this District during times relevant.

16. Does 1 through 25 inclusive are to be identified later through discovery as entities which, together with the other Defendants, form a single enterprise and / or constitute joint employers under the FLSA.

17. Defendants constitute a single employer or single integrated enterprise because they share common ownership, financial control and management, conduct interrelated operations, and maintain centralized control of labor relations.

18. Alternatively, Defendants constitute joint employers of Plaintiff and other similarly situated employees as Defendants exercise some control over those employees' work or working conditions, Defendants maintain an arrangement to share employees' services, Defendants act directly or indirectly in the interest of each other in relation to the employees, and / or Defendants are not completely disassociated with respect to the employees' employment and may be deemed to share control of the employees, directly or indirectly, because they are under common control.

19. Plaintiff Trina Creech was employed by JEM from about 2006 to October 2013 and again from about August 2015 to November 2015 as a delivery driver at its Pizza Hut store located at 142 St. James Ave. in Goose Creek, South Carolina. Plaintiff Creech's consent to pursue this claim under the FLSA is attached hereto as "Exhibit 1."

### **General Allegations**

#### ***JEM's Business***

20. JEM owns and operates approximately 60 Pizza Hut franchise stores in states including South Carolina, Alabama, Florida and Georgia.

21. JEM's Pizza Hut stores employ delivery drivers who all have the same primary job duty: to deliver pizzas and other food items to customers' homes and workplaces.

#### ***JEM's Flawed Automobile Reimbursement Policy***

22. JEM requires its delivery drivers to maintain and pay for safe, legally-operable, and insured automobiles when delivering pizza and other food items.

23. JEM's delivery drivers incur costs for gasoline, vehicle parts and fluids, repair and maintenance services, insurance, depreciation, and other expenses ("automobile expenses") while delivering pizza and other food items for the primary benefit of JEM.

24. JEM's delivery driver reimbursement policy reimburses drivers on a per-delivery basis, but the per-delivery reimbursement equates to far below the IRS business mileage reimbursement rate or any other reasonable approximation of the cost to own and operate a motor vehicle. This policy applies to all of JEM's delivery drivers.

25. The result of JEM's delivery driver reimbursement policy is a reimbursement of much less than a reasonable approximation of its drivers' automobile expenses.

26. During the applicable FLSA limitations period, the IRS business mileage reimbursement rate ranged between \$0.54 and \$0.575 per mile. Likewise, reputable companies that study the cost of owning and operating a motor vehicle and/or reasonable reimbursement rates, including the AAA, have determined that the average cost of owning and operating a sedan was between \$0.574 and \$0.608 per mile between 2011 and 2016 for drivers who drive a sedan approximately 15,000 miles per year. These figures represent a reasonable approximation of the average cost of owning and operating a vehicle for use in delivering pizzas.

27. The driving conditions associated with the pizza delivery business cause more frequent maintenance costs, higher costs due to repairs associated with driving, and more rapid depreciation from driving as much as, and in the manner of, a delivery driver. JEM's delivery drivers further experience lower gas mileage and higher repair costs than the average driver used to determine the average cost of owning and operating a vehicle described above due to the nature of the delivery business, including frequent starting and stopping of the engine, frequent braking, short routes as opposed to highway driving, and driving under time pressures.

28. JEM's reimbursement policy does not reimburse delivery drivers for even their ongoing out-of-pocket expenses, much less other costs they incur to own and operate their vehicles, and thus JEM uniformly fails to reimburse its delivery drivers at any reasonable approximation of the cost of owning and operating their vehicles for JEM's benefit.

29. JEM's systematic failure to adequately reimburse automobile expenses constitutes a "kickback" to JEM such that the hourly wages it pays to Plaintiff and JEM's other delivery drivers are not paid free and clear of all outstanding obligations to JEM.

30. JEM fails to reasonably approximate the amount of its drivers' automobile expenses to such an extent that its drivers' net wages are diminished beneath the federal minimum wage requirements.

31. In sum, JEM's reimbursement policy and methodology fail to reflect the realities of delivery drivers' automobile expenses.

***JEM's Failure to Reasonably Reimburse Automobile Expenses Causes Minimum Wage Violations***

32. Regardless of the precise amount of the per-delivery reimbursement at any given point in time, JEM's reimbursement formula has resulted in an unreasonable underestimation of delivery drivers' automobile expenses throughout the recovery period, causing systematic violations of the federal minimum wage.

33. Plaintiff Creech was paid \$7.25 per hour during her employment with JEM, including a tip credit applied to the time she spent delivering pizzas.

34. The federal minimum wage has been \$7.25 per hour since July 24, 2009. <http://www.dol.gov/whd/minwage/chart.htm>.

35. In 2013, Defendant's per-delivery reimbursement rate at the store where Plaintiff Creech worked was approximately \$1.25 per delivery.

36. Throughout her two terms of employment with JEM, Plaintiff Creech experienced an average round-trip delivery distance of about 5 miles per delivery.

37. Thus, in 2013, JEM's average effective reimbursement rate for Plaintiff Creech was approximately \$0.25 per mile (\$1.25 per delivery / 5 average miles per delivery).

38. During this same time period, the lowest IRS business mileage reimbursement rate was \$0.565 per mile, which reasonably approximates the automobile expenses incurred delivering pizzas. <http://www.irs.gov/Tax-Professionals/Standard-Mileage-Rates>. Using the 2013 IRS rate as a reasonable approximation of Plaintiff Creech's automobile expenses, every mile driven on the job decreased her net wages by approximately \$0.315 (\$0.565 - \$0.25) per mile. Considering Plaintiff Creech's estimate of about 5 average miles per delivery, JEM under-reimbursed her about \$1.575 per delivery (\$0.315 x 5 miles).

39. During her two terms of employment by JEM, Plaintiff Creech typically averaged about 2 deliveries per hour.

40. Thus, based on the IRS rate, Plaintiff Creech consistently "kicked back" to JEM approximately \$3.15 per hour (\$1.575 per delivery x 2 deliveries per hour), for an effective hourly wage rate of about \$4.10 (\$7.25 per hour - \$3.15 kickback) or less.

41. At the time of her 2015 re-hire, the per-delivery reimbursement rate at the store where Plaintiff Creech worked was also approximately \$1.25 per delivery.

42. Thus, during the applicable limitations period, JEM's average effective reimbursement rate for Plaintiff Creech was approximately \$0.25 per mile (\$1.25 per delivery / 5 average miles per delivery).

43. During this same time period, the IRS business mileage reimbursement rate was \$0.575 per mile, which reasonably approximates the automobile expenses incurred delivering pizzas.

<http://www.irs.gov/Tax-Professionals/Standard-Mileage-Rates>. Using the 2015 IRS rate as a reasonable approximation of Plaintiff Creech's automobile expenses, every mile driven on the job decreased her net wages by approximately \$0.325 (\$0.575 - \$0.25) per mile. Considering Plaintiff Creech's estimate of about 5 average miles per delivery, JEM under-reimbursed her about \$1.625 per delivery (\$0.325 x 5 miles).

44. Thus, based on the IRS rate, Plaintiff Creech consistently "kicked back" to JEM approximately \$3.25 per hour (\$1.625 per delivery x 2 deliveries per hour), for an effective hourly wage rate of about \$4.00 (\$7.25 per hour - \$3.25 kickback) or less.

45. All of JEM's delivery drivers have had similar experiences to those of Plaintiff. They have been subject to the same reimbursement policy; have received similar reimbursements; have incurred similar automobile expenses; have completed deliveries of similar distances and at similar frequencies; and have been paid at or near the federal minimum wage before deducting unreimbursed business expenses.

46. Because JEM has paid its drivers a gross hourly wage at precisely, or at least close to, the federal minimum wage, and because the delivery drivers have incurred unreimbursed automobile expenses, the delivery drivers have "kicked back" to JEM an amount sufficient to cause minimum wage violations.

47. While the amount of JEM's actual reimbursements per delivery may vary over time, JEM relies on the same flawed policy and methodology with respect to all delivery drivers at all of its other Pizza Hut stores. Thus, although reimbursement amounts may differ somewhat by time or region, the amounts of under-reimbursements relative to automobile costs incurred are relatively consistent between time and region.

48. JEM's low reimbursement rates have been a frequent complaint of at least some of JEM's delivery drivers, including Plaintiff, yet JEM has continued to reimburse at a rate much less than any reasonable approximation of delivery drivers' automobile expenses.

49. The net effect of JEM's flawed reimbursement policy is that it willfully fails to pay the federal minimum wage to its delivery drivers. JEM thereby enjoys ill-gained profits at the expense of its employees.

### **Collective Action Allegations**

50. Plaintiff brings this FLSA claim as an "opt-in" collective action on behalf of similarly situated delivery drivers pursuant to 29 U.S.C. § 216(b).

51. The FLSA claims may be pursued by those who opt-in to this case pursuant to 29 U.S.C. § 216(b).

52. Plaintiff, individually and on behalf of other similarly situated employees, seeks relief on a collective basis challenging JEM's practice of failing to pay employees federal minimum wage. The number and identity of other plaintiffs yet to opt-in may be ascertained from JEM's records, and potential class members may be notified of the pendency of this action via mail.

53. Plaintiff and all of JEM's delivery drivers are similarly situated in that:

- a. They have worked as delivery drivers for JEM delivering pizza and other food items to JEM's customers;
- b. They have delivered pizza and food items using automobiles not owned or maintained by JEM;
- c. JEM has required them to maintain these automobiles in a safe, legally-operable, and insured condition;

- d. They have incurred costs for automobile expenses while delivering pizzas and food items for the primary benefit of JEM;
- e. They have been subject to similar driving conditions, automobile expenses, delivery distances, and delivery frequencies;
- f. They have been subject to the same pay policies and practices of JEM;
- g. They have been subject to the same delivery driver reimbursement policy that under-estimated automobile expenses per mile, and thereby systematically deprived of reasonably approximate reimbursements, resulting in wages below the federal minimum wage in some or all workweeks;
- h. They have been reimbursed similar set amounts of automobile expenses per delivery;
- i. They have been paid at or near the federal minimum wage before deducting unreimbursed business expenses; and
- j. They have been subjected to the same tip credit.

**Count I: Violation of the Fair Labor Standards Act of 1938**

54. Plaintiff reasserts and re-alleges the allegations set forth above.

55. The FLSA regulates, among other things, the payment of minimum wage by employers whose employees are engaged in interstate commerce, or engaged in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce. 29 U.S.C. §206(a).

56. JEM is subject to the FLSA's minimum wage requirements because it is an enterprise engaged in interstate commerce, and its employees are engaged in commerce.

57. At all relevant times herein, Plaintiff and all other similarly situated delivery drivers have been entitled to the rights, protections, and benefits provided under the FLSA, 29 U.S.C. §§ 201, *et seq.*

58. Section 13 of the FLSA, codified at 29 U.S.C. § 213, exempts certain categories of employees from federal minimum wage obligations. None of the FLSA exemptions apply to Plaintiff or other similarly situated delivery drivers.

59. Under Section 6 of the FLSA, codified at 29 U.S.C. § 206, employees have been entitled to be compensated at a rate of at least \$7.25 per hour since July 24, 2009.

60. As alleged herein, JEM has reimbursed delivery drivers less than the reasonably approximate amount of its automobile expenses to such an extent that it diminishes these employees' wages beneath the federal minimum wage.

61. JEM knew or should have known that its pay and reimbursement policies, practices and methodology result in failure to compensate delivery drivers at the federal minimum wage.

62. JEM, pursuant to its policy and practice, violated the FLSA by refusing and failing to pay federal minimum wage to Plaintiff and other similarly situated employees.

63. Plaintiff and all similarly situated delivery drivers are victims of a uniform and employer-based compensation and reimbursement policy. This uniform policy, in violation of the FLSA, has been applied, and continues to be applied, to all delivery driver employees in JEM's stores.

64. Plaintiff and all similarly situated employees are entitled to damages equal to the minimum wage minus actual wages received after deducting reasonably approximated automobile expenses within three years from the date each Plaintiff joins this case, plus periods of equitable tolling, because JEM acted willfully and knew, or showed reckless disregard for, whether its conduct was unlawful.

65. JEM acted neither in good faith nor with reasonable grounds to believe that its actions and omissions were not a violation of the FLSA, and as a result, Plaintiff and other similarly situated employees are entitled to recover an award of liquidated damages in an amount equal to the amount of unpaid minimum wages under 29 U.S.C. § 216(b). Alternatively, should the Court find JEM is not liable for liquidated damages, Plaintiff and all similarly situated employees are entitled to an award of prejudgment interest at the applicable legal rate.

66. As a result of the aforesaid willful violations of the FLSA's minimum wage provisions, minimum wage compensation has been unlawfully withheld by JEM from Plaintiff and all similarly situated employees. Accordingly, JEM is liable under 29 U.S.C. § 216(b), together with an additional amount as liquidated damages, pre-judgment and post-judgment interest, reasonable attorneys' fees, and costs of this action.

WHEREFORE, Plaintiff and all similarly situated delivery drivers demand judgment against JEM and request: (1) compensatory damages; (2) liquidated damages; (3) attorneys' fees and costs as allowed by Section 16(b) of the FLSA; (4) pre-judgment and post-judgment interest as provided by law; and (5) such other relief as the Court deems fair and equitable.

#### **DEMAND FOR JURY TRIAL**

Plaintiff hereby requests a trial by jury of all issues triable by jury.

**RESPECTFULLY SUBMITTED,**




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September 12, 2016