

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

AISHA PHILLIPS on behalf of herself and all)
others similarly situated,)

Plaintiffs,)

v.)

SMITHFIELD PACKING COMPANY, INC.,)

Defendant)

Case No.: _____

**Collective and Class Action
COMPLAINT**

COMES NOW, Plaintiff Aisha Phillips on behalf of herself 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. Plaintiff, on behalf of herself and all others similarly situated, brings this action against Smithfield Packing Company Inc. (“Defendant Smithfield”), for unpaid overtime compensation, and related penalties and damages. It is Defendant Smithfield’s practice and policy to willfully fail and refuse to properly pay all overtime compensation due and owing to Plaintiff, and all other similarly situated employees, and doing so is in direct violation of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.* Defendant Smithfield has a policy, pattern or practice of improperly calculating overtime for all hours worked over forty (40) in a

particular workweek. In short, Defendant Smithfield violates the FLSA by failing to pay the proper regular-rate for hours worked and not paying time-and-one-half the regular rate of pay for time worked in excess of 40 hours per week.

2. Plaintiff also brings this action against Defendant Smithfield for failure to pay Plaintiff and those similarly situated all of their promised wages on their regular payday, and related penalties and damages for Defendant Smithfield's practices and policies of willfully failing and refusing to properly pay Plaintiff, opt-in, and putative Plaintiffs' promised wages in direct contravention of the North Carolina Wage and Hour Act ("NCWHA"), N.C. Gen. Stat. §§ 95-25.1, *et seq.*

3. Defendant Smithfield's pay practices and policies are in direct violation of the FLSA and the NCWHA; and therefore Plaintiff, on behalf of herself, and all others similarly situated, seeks promised wages and overtime premiums for all regular-rate and overtime work required, suffered, or permitted by Defendant Smithfield, liquidated damages and/or other damages as permitted by applicable law; attorneys' fees, costs and expenses incurred in this action.

PARTIES

4. Plaintiff Aisha Phillips resides at 1218 Scythia St. SW, Wilson, North Carolina 27893.

5. Plaintiff is an employee of Defendant Smithfield's pork processing plant in Wilson, North Carolina. Plaintiff has held a non-exempt position since August, 18, 2013, and her employment has been over three years prior to the commencement of this action. Plaintiff Aisha Phillips' written consent to join is attached hereto as Ex A.

6. Plaintiff brings this action on her own behalf and, pursuant to 29 U.S.C. § 216(b), as a representative of a proposed collective action of similarly situated employees.

JURISDICTION AND VENUE

7. This Court has original federal question jurisdiction under 28 U.S.C. § 1331 for the claims brought under the FLSA, 29 U.S.C. § 201, *et seq.*

8. The United States District Court for the Eastern District of North Carolina has personal jurisdiction because Defendant Smithfield conducts business in Wilson County, North Carolina which is located within this District.

9. Venue is proper in this judicial district because Defendant Smithfield has substantial business contacts in this district, because the named Plaintiff resides in Wilson, North Carolina, and because the unlawful acts alleged herein occurred in Wilson County, North Carolina.

10. The claims for violations of the NCWHA are based upon the statutory law of the State of North Carolina.

11. 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 facts as the FLSA claim.

12. 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.

COVERAGE ALLEGATIONS

13. At all times relevant herein, Plaintiff has been a citizen of the United States and resident of North Carolina.

14. At all times relevant herein, Plaintiff has been employed by Defendant

Smithfield as a non-exempt, hourly employee, and was an employee within the meaning of 29 U.S.C. § 203(e)(1).

15. At all times relevant herein, Defendant Smithfield, has been a Virginia corporation, conducting business in the State of North Carolina.

16. At all times relevant herein, Defendant Smithfield was an employer within the meaning of 29 U.S.C. § 203(d).

17. At all times relevant herein, Defendant Smithfield was an enterprise within the meaning of 29 U.S.C. § 203(r)(1).

18. At all times relevant herein, Defendant Smithfield was an enterprise engaged in commerce or in the production of goods for commerce within the meaning of 29 U.S.C. § 203(s)(1).

19. At all times relevant herein, Plaintiff was an employee engaged in commerce or in the production of goods for commerce within the meaning of 29 U.S.C. §§ 206-207.

20. A written consent to join this action, as and when executed by other individual Plaintiffs, will be filed pursuant to 29 U.S.C. § 216(b).

FACTUAL ALLEGATIONS

21. Plaintiff and members of the proposed class have engaged in processing pork at Defendant Smithfield's pork processing plant in Wilson, North Carolina. Their work duties include, but are not limited to, keeping pace with a fast-moving conveyor belt or production line, known as a "pork processing line," while they perform assigned tasks on the assembly line, such as working on the "ready to eat" or "raw" side, mixing ingredients for ham, handling various machines, labeling, sealing, and packaging hams or otherwise

preparing the pork for human consumption. Plaintiff and members of the proposed class work on or near this processing line, often moving between different positions within the factory.

22. Defendant Smithfield required Plaintiff and members of the proposed class to perform the job duties of other, more highly paid employees. Certain job categories were also eliminated from the line, requiring other employees, such as Plaintiff, to fill in the gaps.

23. There is a company-wide policy that each employee will be paid the rate associated with the job tasks they are performing. For example, even though Plaintiff Phillips is an “arranger” at a rate of \$13.80 per hour, she may be required by her employer to perform the job tasks of a “packager,” who is paid at a higher hourly rate. It is the company’s policy to compensate employees for the rate that is associated with their job tasks as part of their promised wages for all hours worked.

24. Plaintiff was not paid her promised wage based on the job tasks she performed consistent with company policy and/or practice. Rather, she was only paid her lower, original hourly rate for the job in which she was hired.

25. Plaintiff claims that these rates are not taken into consideration when calculating overtime pay as well. For example, Plaintiff Phillips’ overtime pay is only calculated based on her “arranger” rate of \$13.80 instead of a weighted average to reflect the multiple rates, pursuant to different job tasks, contrary to company policy and 29 C.F.R. § 778.115.

26. As a result, Defendant Smithfield has not properly calculated Plaintiff and members of the proposed class’ overtime compensation along with not properly paying

her the agreed promised rate per job task.

27. Defendant Smithfield suffered or permitted Plaintiff and members of the proposed class to perform this work and has denied them the proper compensation for this work pursuant to an established policy or practice. As Plaintiff and members of the proposed class worked more than 40 hours per week on a regular basis, Defendant Smithfield is required by law to compensate them at the promised rate and for all time worked over 40 hours per week at one and one-half times their regular hourly rate of pay.

FLSA COLLECTIVE ACTION ALLEGATIONS

28. This action is maintainable as an “opt-in” collective action pursuant to the FLSA, 29 U.S.C. § 216(b), as to claims for unpaid overtime compensation, liquidated damages, and attorneys’ fees and costs.

29. Pursuant to 29 U.S.C. § 216(b), Plaintiff brings this action on behalf of herself and the following similarly situated employees: all current and former employees of Defendant Smithfield, who have held non-exempt hourly positions working on or near the pork processing line in Defendant Smithfield’s pork processing plant in Wilson, North Carolina, at any time since October 4, 2013 and who were paid using an improper rate of pay or calculation of overtime for the various jobs performed.

30. Members of the proposed class are current and/or former Smithfield Packing Company employees who have been subjected to the same unlawful practices alleged herein and, therefore, are similarly situated to Plaintiff named in this Complaint. The members of the proposed class, like Plaintiff, work in jobs on or near the pork processing line, and are

subject to the same or similar pay practices. All proposed class members, similar to the Plaintiff, are compensated by the same improper rate for the various jobs performed or improper calculation of overtime compensation given the various applicable rates. Members of the proposed class and Plaintiff, therefore, should be permitted to pursue their claims collectively, pursuant to 29 U.S.C. § 216(b).

31. These putative plaintiffs or similarly situated employees are known to Defendant Smithfield, are readily identifiable, and may be located through Defendant Smithfield's records. They may be readily notified of this action, and allowed to opt-in to this action pursuant to 29 U.S.C. 216(b), for the purpose of collectively adjudicating their claims for unpaid wages.

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

33. Plaintiff Aisha Phillips, requests that she be permitted to serve as representative of those who consent to participate in this action and that this action be granted collective action status pursuant to 29 U.S.C. § 216(b).

NCWHA CLASS ACTION ALLEGATIONS

Fed. R. Civ. P. R. 23(b)(3) Class Action – 95-25.6

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

35. Pursuant to Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure, Plaintiff brings her second claim for relief to redress and remedy Defendant Smithfield's violations of the NCWHA, N.C. Gen. Stat. § 95-25.1, *et seq.*, on behalf of herself and all similarly situated individuals who currently or formerly performed work for Defendant

Smithfield, who have held non-exempt hourly positions working on or near the pork processing line in Defendant Smithfield's pork processing plant in Wilson, North Carolina, and who were not paid their promised wages, pursuant to their job duty and company policy.

36. Plaintiff and members of the proposed class assert that Defendant Smithfield, as a direct employer, violated the NCWHA by failing to pay its employees their promised hourly rate which is a part of the employees' accrued, earned and promised wages and should have been paid when due on the employee's regular payday; these requirements are neither covered by the minimum wage nor the overtime provisions under the FLSA.

37. The Class: 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 Defendant Smithfield's payroll records or records over which they have control, as are the hours assigned and worked, the positions held, and the rates of pay for each class member.

38. 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 Plaintiff at this time, upon information and belief, the class comprises of at least 350 persons.

39. 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 Defendant Smithfield's failure to pay earned wages as an employer. The common questions of law and fact include, but are not limited to the following:

(1) Whether Defendant Smithfield refused to pay Plaintiff and members of the proposed class promised and earned regular and overtime wages for all hours worked on their regular pay day in violation of NCWHA §§ 95-25.6, 95-25.7, and 95-25.13; and

(2) Whether Defendant Smithfield's refusal to pay such compensation is in violation of the NCWHA.

40. Typicality: The claims of Plaintiff herein is typical of those claims which could be alleged by any 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 compensation practices of Defendant Smithfield, as alleged herein, of refusing to pay promised and earned wages. The compensation policies and practices of Defendant Smithfield affected all class members similarly, and Defendant Smithfield 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.

41. 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.

42. 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.

43. 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 Defendant Smithfield and resulting in the impairment of class members' rights and the disposition of their interests through actions to which they were not parties. The issues 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.

44. Public Policy Considerations: Defendant Smithfield violated the NCWHA as direct employers. Just as 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
(All Opt-In Plaintiffs)

(Failure to Pay Overtime in Violation of the Fair Labor Standards Act)

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

46. Plaintiff, opt-ins, and putative plaintiffs or members of the proposed class are or were employed directly by Defendant Smithfield and were paid on an hourly basis to perform manual labor and/or other duties that do not satisfy the tests for exempt positions under the FLSA.

47. Defendant Smithfield has willfully failed to pay Plaintiff, opt-ins, and putative plaintiffs or and members of the proposed class at one and one-half times their regular rate for all hours worked in excess of forty (40) hours per week, in violation of 29 U.S.C. § 207(g) et seq.

48. Since Plaintiff, opt-ins, and putative plaintiffs or members of the proposed class are employees working at two or more rates within a single workweek, then their regular rate for that workweek is the weighted average of such rates, pursuant to 29 C.F.R. § 778.115.

49. As a result of Defendant Smithfield's willful failure to pay Plaintiff, opt-ins, and putative plaintiffs or members of the proposed class the proper weighted average regular rate as required by 29 C.F.R. § 778.115, they owe Plaintiff, opt-ins, or and members of the proposed class overtime wages as well as liquidated damages in an amount equal to the amount of unpaid wages.

50. Defendant Smithfield, as direct employer, has 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 overtime rate for all hours worked over forty (40) per week.

51. Plaintiff, opt-ins, and putative plaintiffs or members of the proposed class each worked more than forty (40) hours in one or more workweeks within the applicable statutory period.

52. The foregoing conduct, as alleged above, constitutes willful violations of the FLSA within the meaning of 29 U.S.C. § 255(a).

53. As set forth above, Plaintiff, opt-ins, putative plaintiffs or members of the proposed class have sustained losses in their compensation, a proximate result of Defendant Smithfield's violations. Accordingly, Plaintiff, on behalf of herself and other current and/or former employees similarly situated, seek damages in the amount of their respective unpaid 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.

54. Plaintiff, on behalf of herself, and all other current and/or former employees similarly situated, seeks recovery of their attorneys' fees and costs to be paid by Defendant Smithfield, as provided by the FLSA, 29 U.S.C. § 216(b).

COUNT TWO

(Plaintiff Phillips)

(Retaliation in Violation of the Fair Labor Standards Act)

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

56. Plaintiff Phillips had contacted Defendant Smithfield's corporate officers concerning unpaid wages and improper calculation of overtime compensation in early June, 2016. She was then instructed by the head of Defendant Smithfield's Human Resource

Department, Cary McKeithan, to not contact corporate officers further. Plaintiff Phillips had addressed her concerns to Human Resources and her supervisor Tierra Davis.

57. Defendant Smithfield Phillips was suspended from working without pay on July 27, 2016. The reason for the suspension given by Defendant Smithfield is that she caused a “disturbance.” Defendant Smithfield Phillips believes that this suspension resulted from her complaint and contact with Human Resources and supervisor regarding the different rates of pay and overtime calculation. The suspension was originally issued as indefinite, but she has since been put back to work while the company conducts internal investigations into her retaliation claim.

58. By the acts described in preceding paragraphs, Defendant Smithfield did intentionally discriminate against Plaintiff Phillips because of her attempt to exercise of rights secured by the FLSA and NCWhA, including, but not limited to complaining of her wages, or instituting or causing to be instituted any proceeding under or related to the FLSA, and thereby did engage in conduct which violates Section 15(a)(3) of the FLSA, 29 U.S.C. § 215(a)(3).

COUNT THREE

(All R.23 Putative Class Members)

(Violations of the North Carolina Wage and Hour Act)]

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

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

61. 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 in violation of N.C. Gen. Stat. §§ 95-25.6, 95-25.7 and 95-25.13.

62. Pursuant to the NCWHA, N.C. Gen. Stat. § 95-25.6, Defendant Smithfield was required to pay Plaintiff and members of the proposed class all wages, when due, for all hours of work at their regular hourly rate (which exceeded the minimum wage rate under the FLSA) on their regular pay date.

63. Pursuant to the North Carolina Wage & Hour Act, N.C. Gen. Stat. § 95-25.6, Defendant Smithfield was required to pay Plaintiff and members of the proposed class all promised wages, when due, which is a part of all of the employees’ accrued and earned wages, and which should have been paid when due on the employees’ regular payday; this requirement is not covered by the overtime provision under the FLSA.

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

65. The foregoing conduct, as alleged, constitutes willful violations of the NCWHA, N.C. Gen. Stat. §§ 95-25.6 and 95-25.13.

66. As set forth above, Plaintiff and members of the proposed class have sustained losses and lost compensation as a proximate result of Defendant Smithfield’s violations. Accordingly, Plaintiff, on behalf of herself and all those similarly situated, seek damages in the amount of their unpaid earned compensation, liquidated damages, plus interest at the legal rate

set forth in N.C. Gen. Stat. § 24-1 from the date each amount came due as provided by the NCWHA, N.C. Gen. Stat. § 95-25.22(a) and (al).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and all those similarly situated, collectively prays that this Honorable Court:

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

B. Authorize Plaintiff's counsel to issue notice via U.S. mail and email at the earliest possible time to all putative members of the collective class who have worked for the Defendant within the last three years, informing them that this action has been filed, of the nature of the action, and of their right to opt-in to this lawsuit if they were deprived of regular wages and overtime compensation, as required by the FLSA

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

D. Appointing Plaintiffs' counsel and as counsel for the class.

E. Issue an Order pursuant to Section 16(b) of the FLSA and N.C. Gen. Stat. § 95-25.22(a1) finding Defendant Smithfield liable for unpaid wages due to Plaintiff and for liquidated damages equal in amount to the unpaid compensation found due to Plaintiff, and for appropriate legal and equitable relief, including punitive damages, based on their retaliation and/or discrimination;

F. 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) and pursuant to the FLSA, U.S.C. § 216(b);

G. 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, U.S.C. § 216(b);

H. Award Plaintiff and all those similarly situated attorneys' 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

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

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

Respectfully submitted October 4, 2016

By: /s/ Gilda Adriana Hernandez
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