

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

VIRGINIA BARRERA, Individually §
And on Behalf of Similarly Situated §
Employees, §

Plaintiff §

v. §

CIVIL ACTION NO. 5:10-cv-665

MTC, INC. d/b/a MI TIERRA CAFÉ §
AND BAKERY, and d/b/a §
LA MARGARITA RESTAURANT §
& OYSTER BAR, and d/b/a §
RESTAURANTE PICO DE GALLO, §

Defendant §

FIRST AMENDED COMPLAINT – COLLECTIVE ACTION

SUMMARY

1. Defendant relies on the “tip pooling” exception to the Fair Labor Standards Act, 19 U.S.C. § 203(m) to avoid paying Virginia Barrera and other similarly situated employees the minimum wage mandated by Federal law.

2. However, because Defendant distributes pooled tips to employees who do not customarily and regularly receive them, including non-service bartenders, the tip pooling practice is invalid and Defendant is prohibited from crediting tips toward payment of the minimum wage.

Jurisdiction & Venue

3. This Court has jurisdiction over this action pursuant to 29 U.S.C. § 216(b) and 28 U.S.C. §1331.

4. This Court is a proper venue for this action because a substantial part of the relevant conduct occurred here. Further, Defendant is a resident of this district.

PARTIES

5. Plaintiff Virginia Barrera is a resident of San Antonio, Texas and has been employed as a server for Defendants since October of 2006. Her written consent to participate in this action has been filed with the Court.

6. MTC, Inc. d/b/a Mi Tierra Café and Bakery, and d/b/a La Margarita Mexican Restaurant & Oyster Bar, and d/b/a Restaurante Pico de Gallo is a Texas corporation with its principal place of business in San Antonio, Texas. Defendant has entered an appearance.

COVERAGE

7. Defendant's gross volume of sales exceeds \$500,000 per year, exclusive of excise taxes.

8. During the relevant time period, Defendant has been an employer engaged in commerce within the meaning of the FLSA.

FACTS

9. Defendant employs Plaintiff Barrera as a server.

10. Defendants pay Plaintiff and other employees less than the federal minimum wage, taking advantage of a tip credit, which allows Defendant to include in its calculation of wages a portion of the amounts employees receive in tips.

11. Defendant required Barrera and the other employees to contribute a portion of their total gross sales during each shift to a tip pool controlled by Defendant.

12. Defendant then distributes the entire tip pool among, servers, hostesses, bus boys, non-service bartenders, bakery clerks, and other employees including some who do not customarily receive tips, including on certain occasions, cooks and/or other kitchen workers.

13. Defendant fails to properly inform those employees required to participate in the tip pool of the requirements of 19 U.S.C. § 203(m).

14. Defendant improperly deducts from the wages of its employees the costs of some, though not all, uniforms and more than \$3.00 for each day the employee is scheduled to work for meals. The meal deduction is often taken even when the employee does not eat the Defendant's food.

15. When Defendant's employees work more than forty hours in a workweek, Defendant improperly calculates the overtime rate of pay.

16. Defendant requires employees to arrive prior to their scheduled shifts to participate in staff meetings, but employees are prohibited from clocking in and are therefore denied compensation, including minimum wage and overtime compensation, for that time. Similarly, Defendant deducts 30 minutes from employees' hours of work for a meal break, even though employees often work through all or a part of these breaks.

17. Defendant fails to keep accurate records of all hours worked by employees.

COLLECTIVE ACTION ALLEGATIONS

18. Plaintiff Barrera brings this case as an "opt-in" collective action on behalf of similarly situated employees of Defendant (the "Class") pursuant to 29 U.S.C. § 216(b).

19. Plaintiff Barrera, on behalf of herself and the Class, seeks relief on a collective basis challenging Defendant's illegal tip pooling and overtime payment policy and practice.

20. The total number and identities of the Class members may be determined from the records of Defendant and the Class may easily and quickly be notified of the pendency of this action.

21. Plaintiff Barrera is similar to the Class because she and the Class have been required to participate in an illegal tip pooling scheme and have been unlawfully denied payment of the Federal minimum wage and overtime.

22. Plaintiff Barrera's experience is typical of the experiences of the Class.

23. Defendant's failure to pay minimum and overtime wages at the rates required by the FLSA results from generally applicable policies or practices and does not depend on the personal circumstances of Plaintiff Barrera or the Class.

24. Plaintiff Barrera's experience is typical of that of the Class.

25. Specific job titles or job duties of the Class do not prevent collective treatment.

26. All potential members of the Class, irrespective of their particular job duties, are entitled to the difference between their hourly rate and the applicable minimum wage for all hours worked.

27. All potential members of the Class, irrespective of their particular job duties, are entitled to the difference between the overtime rate of pay they received and the overtime rate of pay they should have received for all overtime hours worked.

28. Although the issue of damages can be individual in character, there remains a common nucleus of liability facts.

CAUSES OF ACTION

29. Plaintiff re-alleges and incorporates by reference the facts set forth above.

30. Defendant's policy and practice of requiring its tipped employees to pay a percentage of their tips to non-tipped employees, including employees who do not customarily and regularly receive tips, violates the FLSA. 29 U.S.C. § 203(m).

31. Defendant's policy and practice by which it fails to inform tipped employees of the provisions of 19 U.S.C. § 203(m) violates the FLSA.

32. Defendant's policy and practice of failing to properly pay overtime wages violates the FLSA.

33. Defendant knew or should have known that its policies and practices relating to tip pooling violate and overtime compensation the FLSA.

34. Defendant has not made a good faith effort to comply with the FLSA.

35. Rather, Defendant has knowingly, willfully, and/or with reckless disregard, carried out, and continues to carry out its illegal tip-pooling and overtime payment practices.

36. Plaintiff Barrera and the Class are entitled to the difference between their hourly rate and the applicable minimum wage for all hours worked, in addition to the amount they were required to tip-out to Defendant's employees who are not customarily tipped.

37. Plaintiff Barrera and the Class are entitled to the difference between the overtime rate of pay they received and the overtime rate of pay they should have received for all overtime hours worked

38. In addition, Plaintiff Barrera and the Class are entitled to an amount equal to their unpaid wages as liquidated damages, as well as reasonable attorney's fees and costs of this action. 29 U.S.C. § 216(b).

JURY DEMAND

39. Plaintiff demands a trial by jury of this action.

PRAYER

WHEREFORE, Plaintiff respectfully requests judgment be entered in her favor awarding Plaintiff and the Class:

- A. the difference between their hourly rate and the applicable minimum wage for all hours worked;
- B. the difference between their overtime rate and the properly calculated overtime rate for all overtime hours worked;
- C. the amount they were required to tip-out to Defendant's employees who are not customarily tipped;
- D. an equal amount as liquidated damages as allowed under the FLSA;
- E. reasonable attorney's fees, costs, and expenses of this action as provided by the FLSA;
- F. pre-judgment and post judgment interest at the highest rates allowed by law; and
- G. such other relief as to which Plaintiff and the Class Members may be entitled.

Respectfully submitted,

THE YOUNG LAW FIRM, PC

By: /s/ Jeremi K. Young

Jeremi K. Young

State Bar No. 24013793

112 W. 8th Avenue, Suite 900-D

Amarillo, Texas 79101

(806) 331-1800

(806) 398-9095 (fax)

jyoung@youngfirm.com

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 2011, the foregoing document was electronically transmitted to the Clerk of the Court for filing via the Court's ECF System, and service of Notice of Electronic Filing was made to the ECF registrants shown below:

By: /s/ Jeremi K. Young

Jeremi K. Young

Ramon Bissmeyer: rbissmeyer@coxsmith.com

Cally McGowan: cmcgowan@coxsmith.com

Ricardo Cedillo: rcedillo@lawdcm.com

Mark Kiehne: mkiehne@lawdcm.com