

WINEBRAKE & SANTILLO, LLC
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

	:	
WAYLON UNDERWOOD, on behalf of	:	CIVIL ACTION
himself and similarly situated employees,	:	
	:	NO. _____
Plaintiff,	:	
v.	:	JURY TRIAL DEMANDED
	:	
KMC ENTERPRISES, INC.,	:	(Document Filed Electronically)
	:	
Defendant.	:	
	:	

COMPLAINT - CLASS/COLLECTIVE ACTION

Waylon Underwood (“Plaintiff”), on behalf of himself and similarly situated employees, brings this class/collective action lawsuit against KMC Enterprises, Inc. (“Defendant”), seeking all available relief under the Fair Labor Standards Act of 1938 (“FLSA”), 29 U.S.C. §§ 201, *et seq.*, and the New Jersey State Wage and Hour Law (“NJWHL”), N.J.S.A. 34:11-56A, *et seq.* Plaintiff asserts his FLSA claim as a collective action under 29 U.S.C. § 216(b) and asserts his NJWHL claim as a class action under Federal Rule of Civil Procedure 23.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over the FLSA claim pursuant to 29 U.S.C. § 216(b) and 28 U.S.C. § 1331.
2. This Court has subject matter jurisdiction over the NJWHL claim pursuant to 28 U.S.C. § 1367.

3. Venue is proper pursuant to 28 U.S.C. § 1391.

PARTIES

4. Plaintiff is an individual residing in Cherry Hill, New Jersey (Camden County).

5. Defendant is a corporate entity headquartered in Mount Laurel, New Jersey (Burlington County).

6. Defendant employs individuals, including Plaintiff, engaged in commerce or in the production of goods for commerce and/or handling, selling, or otherwise working on goods or materials that have been moved in or produced in commerce by any person.

7. Defendant is an employer covered by the FLSA and the NJWHL.

FACTS

8. Defendant owns and operates a restaurant called Prospectors Steakhouse & Saloon located in Mount Laurel, New Jersey (“the Restaurant”).

9. During the past three years, Defendant, upon information and belief, has employed well over 50 servers and bartenders at the Restaurant.

10. Servers and bartenders are primarily responsible for taking customers’ food and drink orders, serving food and drinks to customers, and otherwise waiting on customers at the restaurant tables.

11. Plaintiff was employed by Defendant as a server and bartender at the Restaurant from approximately February 2016 until approximately May 2016.

12. Defendant paid Plaintiff and other servers and bartenders at the Restaurant an hourly wage below \$7.25/hour.

13. Defendant paid its servers \$2.13/hour and paid its bartenders approximately \$4.00/hour.

14. In seeking to comply with the FLSA's mandate that employees receive a minimum wage of \$7.25/hour and the NJWHL's mandate that employees receive a minimum wage of \$8.38/hour, Defendant has utilized a "tip credit" for each hour worked by Plaintiff and other servers and bartenders. Thus, under the FLSA, Defendant has enjoyed the benefit of a \$5.12/hour tip credit (\$7.25 minus \$2.13) for servers and a tip credit of approximately \$3.25/hour (\$7.25 minus \$4.00) for bartenders. Meanwhile, under the NJWHL, Defendant has enjoyed the benefit of a \$6.25/hour tip credit (\$8.38 minus \$2.13) for servers and a tip credit of approximately \$4.38/hour (\$8.38 minus \$4.00) for bartenders.

15. Defendant has maintained a common policy of requiring Plaintiff and other servers and bartenders to contribute a portion of their tips to "Expediters" (a.k.a. "Expos").

16. Expediters' duties primarily consist of readying food orders for pick-up by the servers.

17. Expediters do not receive tips directly from customers.

18. This is because Expediters are required by Defendant to physically work in the Restaurant's kitchen and do not interact with restaurant customers.

COLLECTIVE AND CLASS ALLEGATIONS

19. Plaintiff brings his FLSA claim pursuant to 29 U.S.C. § 216(b) on behalf of all individuals who, during any time within the past three years, have been employed as servers and/or bartenders at the Restaurant.

20. Plaintiff's FLSA claim should proceed as a collective action because Plaintiff and other potential members of the collective, having worked pursuant to the common policies described herein, are "similarly situated" as that term is defined in 29 U.S.C. § 216(b) and the associated decisional law.

21. Plaintiff brings his NJWHL claim pursuant to Federal Rule of Civil Procedure 23 on behalf of all individuals who, during any time within the past two years, have been employed as servers and/or bartenders at the Restaurant.

22. The putative class, upon information and belief, includes over 50 individuals, all of whom are readily ascertainable based on Defendant's standard timekeeping and payroll records, and, as such, is so numerous that joinder of all class members is impracticable.

23. Plaintiff is a class member, his claims are typical of the claims of other class members, and he has no interests that are antagonistic to or in conflict with the interests of other class members.

24. Plaintiff will fairly and adequately represent the class members and their interests, and he has retained competent and experienced counsel who will effectively represent the class members' interests.

25. Questions of law and fact are common to all class members, since, *inter alia*, this action concerns the legality of Defendant's standardized compensation practices, including Defendant's practices of using the tip credit to satisfy its minimum wage obligations and requiring class members to share tips with Expeditors.

26. Class certification is appropriate under Federal Rule of Civil Procedure 23(b)(3) because common questions of law and fact predominate over any questions affecting only Plaintiff and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation.

COUNT I
(Alleging Violations of the FLSA)

27. All previous paragraphs are incorporated as though fully set forth herein.

28. The FLSA entitles employees to a minimum hourly wage of \$7.25.

29. While restaurants may utilize a tip credit to satisfy their minimum wage obligations to servers and bartenders, they forfeit the right to do so when they require servers and bartenders to share tips with other restaurant employees who do not “customarily and regularly receive tips.” *See* 29 U.S.C. § 203(m). Federal courts interpreting this statutory language hold that restaurants lose their right to utilize a tip credit when tips are shared with employees – such as Defendant’s Expediters – whose direct customer interaction is minimal. *See, e.g., Montano v. Montrose Restaurant Associates, Inc.*, 800 F.3d 186 (5th Cir. 2015); *Ford v. Lehigh Valley Restaurant Group, Inc.*, 2014 U.S. Dist. LEXIS 92801 (M.D. Pa. July 9, 2014).

30. By requiring Plaintiff and other servers and bartenders to share tips with Expediters, Defendant has forfeited its right to utilize the tip credit in satisfying its minimum wage obligations to Plaintiff and other servers and bartenders. As such, Defendant has violated the FLSA’s minimum wage mandate by paying Plaintiff and other servers and bartenders an hourly wage below \$7.25.

31. In violating the FLSA, Defendant acted willfully and with reckless disregard of clearly applicable FLSA provisions.

COUNT II
(Alleging Violations of the NJWHL)

32. All previous paragraphs are incorporated as though fully set forth herein.

33. The NJWHL entitles employees to a minimum hourly wage of \$8.38.

34. While restaurants may utilize a tip credit to satisfy their minimum wage obligations to servers and bartenders, they forfeit the right to do so when they require servers and bartenders to share tips with other restaurant employees who do not customarily and regularly receive tips.

35. By requiring Plaintiff and other servers and bartenders to share tips with individuals performing the work of Expeditors, Defendant has forfeited its right to utilize the tip credit in satisfying its minimum wage obligations to Plaintiff and other servers and bartenders. As such, Defendant has violated the NJWHL's minimum wage mandate by paying Plaintiff and other servers and bartenders an hourly wage below \$8.38.

36. In violating the NJWHL, Defendant has acted willfully and with reckless disregard of clearly applicable NJWHL provisions.

JURY TRIAL DEMAND

Plaintiff demands a jury trial as to all claims so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and other members of the class and collective, seeks the following relief:

- A. Unpaid minimum wages equaling the value of the tip credit for every hour worked;
- B. Prejudgment interest;
- C. Liquidated damages;
- D. Litigation costs, expenses, and attorneys' fees; and
- E. Such other and further relief as this Court deems just and proper.

Date: April 17, 2017

s/ R. Andrew Santillo
Peter Winebrake*
R. Andrew Santillo, Esq. (NJ ID #025512004)
Mark J. Gottesfeld, Esq. (NJ ID #027652009)
WINEBRAKE & SANTILLO, LLC
715 Twining Road, Suite 211
Dresher, PA 19025
(215) 884-2491

**Pro Hac Vice* admission anticipated

Attorneys for Plaintiff

JS 44 (Rev. 08/16)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

WAYLON UNDERWOOD

(b) County of Residence of First Listed Plaintiff Camden, NJ
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

R. Andrew Santillo, Esq./Mark J. Gottesfeld, Esq., Winebrake & Santillo, LLC, 715 Twining Road, Suite 211, Dresher, PA 19025: (215) 884-2491.

DEFENDANTS

KMC ENTERPRISES, INC.

County of Residence of First Listed Defendant Burlington, NJ
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <input checked="" type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	IMMIGRATION		
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions		

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation - Transfer
- 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Fair Labor Standards Act, 29 U.S.C. sec. 201, et seq.

Brief description of cause:

Failure to pay the minimum wage under federal and state law.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE
04/17/2017

SIGNATURE OF ATTORNEY OF RECORD
s/ R. Andrew Santillo

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

CERTIFICATION OF PRIOR PAYMENT OF FILING FEE

I HEREBY CERTIFY that on the 7th day of April, 2017, I paid the \$400.00 filing fee associated with the attached Complaint. A copy of the receipt for this payment is attached.

Date: April 17, 2017

Respectfully submitted,

s/ R. Andrew Santillo
R. Andrew Santillo
WINEBRAKE & SANTILLO, LLC
715 Twining Road, Suite 211
Dresher, PA 19025
Phone: (215) 884-2491
Attorneys for Plaintiffs

Andy Santillo

From: paygovadmin@mail.doc.twai.gov
Sent: Friday, April 07, 2017 3:44 PM
To: Andy Santillo
Subject: Pay.gov Payment Confirmation: NJD CM ECF

Your payment has been submitted to Pay.gov and the details are below. If you have any questions or you wish to cancel this payment, please contact NJD Finance Dept at 609-989-0468.

Application Name: NJD CM ECF
Pay.gov Tracking ID: 26109UQ0
Agency Tracking ID: 0312-7761434
Transaction Type: Sale
Transaction Date: Apr 7, 2017 3:43:55 PM

Account Holder Name: ANDREW SANTILLO
Transaction Amount: \$400.00
Card Type: AmericanExpress
Card Number: ***** [REDACTED]

THIS IS AN AUTOMATED MESSAGE. PLEASE DO NOT REPLY.

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Lawsuit Claims Mount Laurel Steakhouse Refuses to Pay Proper Wages](#)
