

JS 44 (Rev. 12/07)

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 THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Christopher Walter, individually and on behalf of all others similarly situated

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

(c) Attorney's (Firm Name, Address, and Telephone Number)

Kalikhman & Rayz, LLC 1051 County Line Road, Suite "A"
Huntingdon Valley, PA 19006 (215) 364-5030

DEFENDANTS

Friendly's Ice Cream, LLC, et al.

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

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE 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)

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 (Excl. 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	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 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"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input checked="" type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<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 checked="" type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<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"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<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"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition			

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
- 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
29 U.S.C. § 201 et seq.

Brief description of cause:
Violation of the Fair Labor Standards Act

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

1/4/17

FOR OFFICE USE ONLY

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

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA — DESIGNATION FORM to be used by counsel to indicate the category of the case for the purpose of assignment to appropriate calendar.

Address of Plaintiff: c/o Kalikhman & Rayz, LLC 1051 County Line Rd., Suite "A" Huntingdon Valley, PA

Address of Defendant: 1855 Boston Road, Suite 200 Wilbraham, Massachusetts 01095

Place of Accident, Incident or Transaction: Montgomery County
(Use Reverse Side For Additional Space)

Does this civil action involve a nongovernmental corporate party with any parent corporation and any publicly held corporation owning 10% or more of its stock?
 (Attach two copies of the Disclosure Statement Form in accordance with Fed.R.Civ.P. 7.1(a)) Yes No

Does this case involve multidistrict litigation possibilities? Yes No

RELATED CASE, IF ANY:

Case Number: _____ Judge _____ Date Terminated: _____

Civil cases are deemed related when yes is answered to any of the following questions:

1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court?
 Yes No
2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court?
 Yes No
3. Does this case involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action in this court?
 Yes No
4. Is this case a second or successive habeas corpus, social security appeal, or pro se civil rights case filed by the same individual?
 Yes No

CIVIL: (Place in ONE CATEGORY ONLY)

A. Federal Question Cases:

1. Indemnity Contract, Marine Contract, and All Other Contracts
2. FELA
3. Jones Act-Personal Injury
4. Antitrust
5. Patent
6. Labor-Management Relations
7. Civil Rights
8. Habeas Corpus
9. Securities Act(s) Cases
10. Social Security Review Cases
11. All other Federal Question Cases
 (Please specify) Fair Labor Standards Act, 29 U.S.C. § 201, et seq.

B. Diversity Jurisdiction Cases:

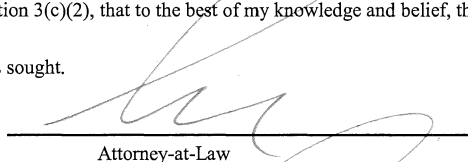
1. Insurance Contract and Other Contracts
2. Airplane Personal Injury
3. Assault, Defamation
4. Marine Personal Injury
5. Motor Vehicle Personal Injury
6. Other Personal Injury (Please specify)
7. Products Liability
8. Products Liability — Asbestos
9. All other Diversity Cases
 (Please specify)

ARBITRATION CERTIFICATION

(Check Appropriate Category)

I, Arkady "Eric" Rayz, Esq., counsel of record do hereby certify:
 Pursuant to Local Civil Rule 53.2, Section 3(c)(2), that to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of \$150,000.00 exclusive of interest and costs;
 Relief other than monetary damages is sought.

DATE: 1/4/2017



 Attorney-at-Law

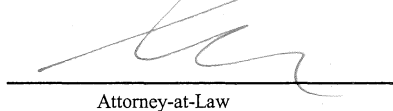
87976

 Attorney I.D.#

NOTE: A trial de novo will be a trial by jury only if there has been compliance with F.R.C.P. 38.

I certify that, to my knowledge, the within case is not related to any case now pending or within one year previously terminated action in this court except as noted above.

DATE: 1/4/2017



 Attorney-at-Law

87976

 Attorney I.D.#

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CASE MANAGEMENT TRACK DESIGNATION FORM

WALTER

CIVIL ACTION

v.

FRIENDLY'S ICE CREAM, LLC, ET AL.

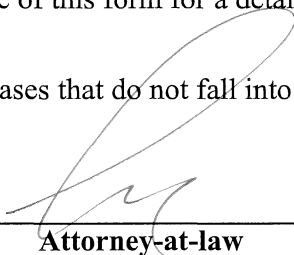
NO.

In accordance with the Civil Justice Expense and Delay Reduction Plan of this court, counsel for plaintiff shall complete a Case Management Track Designation Form in all civil cases at the time of filing the complaint and serve a copy on all defendants. (See § 1:03 of the plan set forth on the reverse side of this form.) In the event that a defendant does not agree with the plaintiff regarding said designation, that defendant shall, with its first appearance, submit to the clerk of court and serve on the plaintiff and all other parties, a Case Management Track Designation Form specifying the track to which that defendant believes the case should be assigned.

SELECT ONE OF THE FOLLOWING CASE MANAGEMENT TRACKS:

- (a) Habeas Corpus – Cases brought under 28 U.S.C. § 2241 through § 2255. ()
- (b) Social Security – Cases requesting review of a decision of the Secretary of Health and Human Services denying plaintiff Social Security Benefits. ()
- (c) Arbitration – Cases required to be designated for arbitration under Local Civil Rule 53.2. ()
- (d) Asbestos – Cases involving claims for personal injury or property damage from exposure to asbestos. ()
- (e) Special Management – Cases that do not fall into tracks (a) through (d) that are commonly referred to as complex and that need special or intense management by the court. (See reverse side of this form for a detailed explanation of special management cases.) (x)
- (f) Standard Management – Cases that do not fall into any one of the other tracks. ()

1/4/2017
Date


Attorney-at-law

Plaintiff
Attorney for

(215) 364-5030
Telephone

(215) 364-5029
FAX Number

erayz@kalraylaw.com
E-Mail Address

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

<p>CHRISTOPHER WALTER, on behalf of himself and all others similarly situated,</p> <p style="text-align: center;">Plaintiff(s)</p> <p style="text-align: center;">v.</p> <p>FRIENDLY’S ICE CREAM, LLC; FORT WASHINGTON PA 693 LLC; FRIENDLY’S RESTAURANT – NORRISTOWN, PA (#897), LLC; KHALED KEZBARI; and DOE DEFENDANTS 1-10,</p> <p style="text-align: center;">Defendant(s)</p>	<p>Civil Action No.:</p> <p>CLASS AND COLLECTIVE ACTION COMPLAINT</p> <p><u>JURY TRIAL DEMANDED</u></p>
---	---

Plaintiff Christopher Walter (“Walter” or “Plaintiff”), on behalf of himself and all others similarly situated, alleges as follows:

INTRODUCTION

1. This is class and collective action brought on behalf of “Tipped Employees” (defined below), who work or have worked at certain restaurants operating as of “Friendly’s.”

2. “Friendly’s” is a tradename for the restaurants that are either corporate-owned or franchises offered by Friendly’s Ice Cream, LLC (“Friendly’s LLC”). Two such franchises are Fort Washington PA 693 LLC (“Fort Washington”) and Friendly’s Restaurant – Norristown, PA (#897), LLC (“Norristown”). Both are owned and/or operated by Defendant Khaled Kezbari (collectively, “the Subject Friendly’s Restaurants”).

3. Upon information and belief, the Subject Friendly’s Restaurants operate under policies and procedures, including compensation policies/procedures, approved and disseminated by Friendly’s LLC.

4. The Subject Friendly’s Restaurants employ individuals as “servers” (“waiters”

and “waitresses”) and “runners” (collectively, “Tipped Employees”), who are and/or were subjected to Defendants’ unlawful pay practices.

5. As explained in detail below, Defendants systematically and willfully violated the Fair Labor Standards Act (“FLSA” or “the Act”), 29 U.S.C. § 201 *et seq.*, and the Pennsylvania Minimum Wage Act (“PMWA”), 43 P.S. § 333.101 *et seq.*, by failing to satisfy the notice requirements of the tip credit provisions of the FLSA and PMWA.

6. Due to Defendants’ unlawful failure to properly inform Tipped Employees of its intention to utilize a “tip credit,” Defendants have improperly applied a “tip credit” against the wages paid to Plaintiff and current and former Tipped Employees, thus paying them less than the mandated minimum wage.

7. As a result of the aforementioned pay practices, Plaintiff and the members of the Classes (defined below) were illegally under-compensated for their work.

SUMMARY OF CLAIMS

8. Plaintiff brings this action as a collective action to recover unpaid wages, pursuant to the FLSA.

9. In particular, Plaintiff brings this suit on behalf of the following similarly situated persons:

All current and former Tipped Employees who have worked for Defendants in the Commonwealth of Pennsylvania at one or more of the Subject Friendly’s Restaurants within the statutory period covered by this Complaint, and elect to opt-in to this action pursuant to the FLSA, 29 U.S.C. § 216(b) (“Collective Class”).

10. In addition, Plaintiff also brings this action as a state-wide class action to recover unpaid wages, and failing to pay the applicable minimum wage, pursuant to the PMWA.

11. Specifically, Plaintiff brings this suit on behalf of a class of similarly situated

persons composed of:

All current and former Tipped Employees who have worked for Defendants in the Commonwealth of Pennsylvania at one or more of the Subject Friendly's Restaurants during the statutory period covered by this Complaint (the "PA Class").

12. The Collective Class and the PA Class are hereafter collectively referred to as the "Classes."

13. Plaintiff alleges on behalf of the Collective Class that they are: (a) entitled to unpaid minimum wages from Defendants for hours worked for which Defendants failed to comply with the notice provisions of the tip credit and pay the mandatory minimum wage, as required by law and (b) entitled to liquidated damages pursuant to the FLSA.

14. Plaintiff alleges on behalf of the PA Class that Defendants violated the PMWA by failing to comply with the tip credit provisions, as required by law, consequently failing to pay them the appropriate minimum wages for all hours worked.

PARTIES

15. Plaintiff Christopher Walter ("Plaintiff") is a resident of the Commonwealth of Pennsylvania, who was employed by Defendants as a "server" in their Fort Washington and East Norriton locations in the Commonwealth of Pennsylvania. While employed as a server, Defendants failed to compensate Plaintiff properly for all hours worked.

16. Pursuant to Section 216(b) of the FLSA, Plaintiff has consented in writing to be a plaintiff in this action. His executed Consent To Sue form is attached hereto as Exhibit "A."

17. Defendant Friendly's Ice Cream, LLC (the "Company" or "Defendant Friendly's LLC"), headquartered in Wilbraham, Massachusetts, owns and operates a string of full-service restaurants located across the United States. In addition, the Company also offers franchise opportunities, including multiple locations in Pennsylvania.

18. The Company maintains the website www.friendlys.com. As detailed further below, Friendly's is responsible, both directly and jointly, for the operation of all Friendly's restaurants, and for the policies, practices, and conduct at issue in this case. At all relevant times during the statutory period covered by this Complaint, the Company has transacted business within the Commonwealth of Pennsylvania, including within this district.

19. Defendant Fort Washington PA 693 LLC ("Defendant FW Friendly's" or "Fort Washington") is a franchisee of the Company that operates the restaurant operating under the "Friendly's" trade name at 325 Pennsylvania Avenue, Fort Washington, Pennsylvania.

20. As set forth more fully below, Defendant FW Friendly's was the entity that paid Plaintiff for a portion of the Class Period. As such, Defendant FW Friendly's has transacted business within the Commonwealth of Pennsylvania, including within this district, during the statutory period covered by this Complaint.

21. Defendant Friendly's Restaurant – Norristown, PA (#897), LLC ("Defendant Norristown Friendly's" or "Norristown") is a franchisee of the Company that operates the restaurant operating under the "Friendly's" trade name at 150 W. Germantown Pike, East Norriton, Pennsylvania.

22. As set forth more fully below, Defendant Norristown Friendly's was the entity that paid Plaintiff for a portion of the Class Period. As such, Defendant Norristown Friendly's has transacted business within the Commonwealth of Pennsylvania, including within this district, during the statutory period covered by this Complaint.

23. Defendant FW Friendly's and Defendant Norristown Friendly's share common ownership and control. Indeed, a review of health inspection reports during the applicable statutory period reveals that both Defendant FW Friendly's and Defendant Norristown Friendly's

are both owned by Defendant Khaled Kezbari.

24. Defendant Khaled Kezbari (“Kezbari”) is a natural person residing in the State of New Jersey. In certain health inspection reports for both Defendant FW Friendly’s and Defendant Norristown Friendly’s, Defendant Kezbari is identified as the corporate entities “Owner.” See <http://webapp02.montcopa.org/health/Inspections/default.asp>, last visited on January 3, 2017.

25. In these corporate capacities, upon information and belief, Defendant Kezbari exercises sufficient control over the labor policies and practices complained of herein to be considered the employer of Plaintiff and the Classes for the purposes of the FLSA and PA State Laws.

26. Together, Defendants Friendly’s LLC, Defendant FW Friendly’s, Defendant Norristown Friendly’s, and Defendant Khaled Kezbari are employers of Tipped Employees and are responsible for the employment practices complained of herein.

27. Upon information and belief, Defendants are a single and joint employer with a high degree of interrelated and unified operations, sharing common officers, with a common address. Further, each of these Defendants share the common labor policies and practices complained of herein.

28. Plaintiff is unaware of the names and the capacities of those defendants sued as DOES 1 through 10 but will seek leave to amend this Complaint once their identities become known to Plaintiff. Upon information and belief, Plaintiff alleges that at all relevant times each defendant was the officer, director, employee, agent, representative, alter ego, or co-conspirator of each of the Defendant. In engaging in the alleged conduct herein, defendants acted in the course, scope of, and in furtherance of the aforementioned relationship. Accordingly, unless

otherwise specified herein, Plaintiff will refer to all defendants collectively as “Defendants” and each allegation pertains to each of the defendants.

JURISDICTION AND VENUE

29. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 201 *et seq.*

30. Further, this Court also has supplemental jurisdiction over Plaintiff’s state law claims pursuant to 28 U.S.C. § 1367, because those claims derive from a common nucleus of operative facts.

31. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(ii), as a substantial part of the acts or omissions giving rise to the claims alleged herein occurred within this judicial district, and Defendants are subject to personal jurisdiction in this district.

32. This Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

FACTUAL ALLEGATIONS

33. The crux of the FLSA and PA State Laws is, *inter alia*, that all employees are entitled to be paid mandated minimum wages for all hours worked.

34. Contrary to these basic protections, Plaintiff and the members of the Classes were deprived of the mandated minimum wage for all hours they worked.

35. Plaintiff and the members of the Classes are, or were, Tipped Employees employed by Defendants.

36. According to the Company’s website, there are at least 24 restaurants operating under the Friendly’s brand in the Commonwealth of Pennsylvania. *See* <http://www.friendlys.com/locate/>, last visited August 2, 2016.

37. The Fort Washington and Norristown locations are two of these locations.

38. Upon information and belief, the Subject Friendly's Restaurants are/were operated under uniform policies/procedures applicable to all members of the Classes.

39. Evidencing this fact, on the Company's website regarding a server application for a franchise location, it states that servers "[m]ust participate in company orientation and training." See <http://jobs.friendlys.com/jobsearch/job-details/server-franchise/250211/>, last visited August 2, 2016.

Plaintiff's Experience Working For Defendants

40. As set forth above, Plaintiff was employed by Defendants as a "server" at the Subject Friendly's Restaurants.

41. Plaintiff worked at the Fort Washington location from in or about June 2015 through February 2016.

42. Prior to his employment at the Fort Washington location, Plaintiff worked at the Norristown location from May 2014 through December 2014.

43. Plaintiff was paid an hourly cash wage rate from Defendants and earned tips from customers, who chose to leave him a gratuity.

44. Plaintiff's hourly wage rate from Defendants was \$2.83. Plaintiff does not ever recall his hourly wage being raised above \$2.83 for any day he worked for Defendants, irrespective of how little tips he earned.

45. Unless he worked a double shift, Plaintiff's typical shift lasted approximately six (6) to seven (7) hours. If Plaintiff worked a double shift, his typical shift time was approximately thirteen (13) hours.

46. Plaintiff typically worked anywhere from four (4) to six (6) shifts per week and worked, on average, approximately thirty (30) to thirty-five (35) hours or more per week.

47. Occasionally (typically once or twice per month), Plaintiff would work in excess of forty (40) hours in a given work week.

48. To minimize the amount of overtime he recorded, Defendants would have Plaintiff work “off-the-clock” (“OTC work”). Such OTC work included having Plaintiff work as the host, when he worked on weekends and, thus, not clock in until the scheduled host arrived and the restaurant was sufficiently busy for him to begin waiting on tables.

49. In addition, Plaintiff would also perform closing duties through OTC work as the manager would clock him and the other servers out, so that the manager could finalize and tally the receipts for the day, while the servers performed their end of shift “break down” work (e.g., cleaning and restocking the restaurant for the following day).

50. Plaintiff was not paid or credited for this OTC work. Accordingly, when this OTC work is added to his weekly hours, Plaintiff regularly worked hours in excess of 40 in a workweek, for which he did not receive “time and half” pay at his regular rate.

51. Plaintiff also recalls spending a significant amount of his shift (in excess of 20%) performing non-tip generating work. This work included cleaning tables after a dining party left, stocking supplies and toiletries, and ensuring that all condiments were filled.

52. Although Plaintiff worked at two different Friendly’s restaurants, Plaintiff does not recall any material differences between: (a) the way the Defendant FW Friendly’s and Defendant Norristown Friendly’s operated; or (b) his work experiences at the two locations.

The Tip Credit Provision & Requirements

FLSA Requirements

53. Rather than pay its Tipped Employees the applicable minimum wage (either the applicable state minimum wage or the federal minimum wage, whichever is higher), Defendants

chose to take a tip credit and pay these employees less than the applicable minimum wage.

54. Under applicable law, in certain circumstances, it is permissible for an employer to take a tip credit and pay its employees less than the mandated minimum wage, provided that the employee's tips received from customers plus the tip credit wage paid by the employer equals at least the applicable minimum wage.¹

55. According to the Department of Labor's ("DOL") Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA) ("Fact Sheet #15"):

the maximum tip credit that an employer can currently claim under the FLSA is \$5.12 per hour (the minimum wage of \$7.25 minus the minimum required cash wage of \$2.13).

56. As is made plain in Fact Sheet #15, in order to claim a tip credit, the employer must comply with five strict notification requirements.

57. First, the employer must notify the employee of the amount of the cash wage the employer is paying the Tipped Employee and that amount must equal at least \$2.13 per hour.

58. Second, the employer must notify the Tipped Employee of the amount the employer is claiming as a tip credit. In accordance with the FLSA, the tip credit claimed cannot exceed \$5.13 per hour.

59. Third, the employer must inform the Tipped Employee that the tip credit claimed cannot exceed the actual amount of tips received by the employee. In effect, the employer must inform the employee that the employee must still earn the mandated minimum of \$7.25 per hour

¹ An employer is not relieved of their duty to pay an employee wages at least equal to the minimum wage by virtue of taking a tip credit or by virtue of the employee receiving tips from customers in an amount in excess of the applicable minimum wage. That is, an employer in the restaurant industry must pay the employee wages at least equal to the minimum wage or equal to the minimum wage less the tip credit, provided the tips claimed exceed the tip credit. Under no circumstances is the employer relieved of paying at least the minimum wage for all hours worked, regardless of how much an employee earns in tips.

between the amount of the tip credit taken by the employer and the amount of tips earned by the employee.

60. Fourth, the employer must notify the Tipped Employee that all tips received are to be retained by the employee except for a valid tip pooling arrangement.

61. Finally, the Tipped Employee must be informed by the employer that the tip credit will not apply unless the employee has been informed of these provisions.

62. An employer bears the burden of showing that it has satisfied all of the notification requirements before any tips can be credited against the employee's hourly wage.² If an employer cannot demonstrate its compliance with this notification requirement, no credit can be taken and the employer is liable for the full minimum wage.

63. Further, where a tipped employee earns less in tips than the tip credit claimed, the employer is required to make up the difference. Stated another way, if a tipped employee earns less than \$5.12 per hour in tips (the maximum tip credit permissible where the employer pays the employee \$2.13 per hour), the employer must raise that tipped employee's hourly cash component the necessary amount above \$2.13 per hour so as to ensure that the employee earns at least \$7.25 per hour – the mandated minimum wage.

64. As set forth herein, Defendants failed to comply with certain of the FLSA's provisions regarding the claiming of a tip credit.

Pennsylvania's Requirements

65. Pennsylvania state law has a substantially similar requirement to the FLSA's tip notification requirements. *See* 43 P.S. § 333.103(d).

² Courts have strictly construed this notification requirement. Accordingly, some courts have held that a generic governmental poster (which is required by the DOL) does not satisfy the tip credit notification requirement.

66. Importantly, however, Pennsylvania mandates a higher minimum cash wage and requires employers to pay at least \$2.83 per hour. Thus, under Pennsylvania law, the maximum tip credit is \$4.42 per hour.³

67. As such, an employer cannot be said to have complied with Pennsylvania's tip credit notification requirements where the employer simply relies on Department of Labor mandated posters as said posters do not explicitly identify the tip credit amount in Pennsylvania (as it differs from the FLSA tip credit amount).

68. In addition, 34 Pa. Code § 231.34 also requires employers to maintain payroll records that contain the following information:

- (a) A symbol or letter placed on the pay records identifying each employee whose wage is determined in part by tips.
- (b) Weekly or monthly amount reported by the employee, to the employer, of tips received. This may consist of reports made by the employees to the employer on IRS Form 4070.
- (c) Amount by which the wages of each tipped employee have been deemed to be increased by tips, as determined by the employer, not in excess of 45% of the applicable statutory minimum wage until January 1, 1980 and thereafter 40% of the applicable statutory minimum wage.
- (d) Amount per hour, which the employer takes as a tip credit shall be reported to the employee in writing each time it is changed from the amount per hour taken in the preceding week.
- (e) Hours worked each workday in any occupation in which the tipped

³ Like the FLSA, Pennsylvania law states that the tip credit claimed by the employer cannot exceed the amount of tips actually received by the employee. *See* 43 P.S. § 333.103(d).

employee does not receive tips and total daily or weekly straight-time payment made by the employer for such hours.

- (f) Hours worked each workday in occupations in which the employee received tips and total daily or weekly straight-time earnings for the hours.

Defendants' Failure to Notify Tipped Employees

69. As explained above, the DOL has very specific requirements regarding how an employer must notify his/her employee that employer intends to claim a tip credit.

70. Rather than comply with the notification requirements set forth in Fact Sheet #15, Defendants chose to simply pay its Tipped Employees \$2.83 per hour. In short, Defendants failed to inform its Tipped Employees of (a) their intention to take the tip credit, and (b) the amount Defendants intended to claim as a tip credit.

71. The Third Circuit and district courts across the country have held that where an employer fails to satisfy any one of the notification requirements, that employer forfeits the tip credit and must pay the employee the full minimum wage.

72. Indeed, Plaintiff does not ever recall being notified by Defendants that they intended to take a "tip credit" or how much that amount would be. Evincing the magnitude of Defendants' abject failure to notify Tipped Employees of their intention to take a tip credit, until recently, Plaintiff never heard the term "tip credit."

73. Defendants also failed to comply with 43 P.S. § 231.34, insofar as they failed to notify employees in writing whenever the tip credit claimed by Defendants changed. Rather, Defendants took the maximum tip credit permissible irrespective of whether its Tipped Employee actually earned sufficient tips to substantiate the tip credit claimed.

74. Defendants also failed to comply with 43 P.S. § 231.34, insofar as they failed to

notify employees in writing of the hours worked where the Tipped Employee did not receive tips. Rather, Defendants took the maximum tip credit permissible for every hour worked by its Tipped Employees, including Plaintiff, irrespective of whether its Tipped Employee: (a) actually earned sufficient tips to substantiate the tip credit claimed; or (b) whether the employee was engaged in tip generating work.

Additional Evidence of Defendants' Failure To Comply With The Tip Credit Provisions

75. Due to Defendants' requiring Plaintiff and other Tipped Employees to perform OTC work (including, for example, clocking Tipped Employees out but requiring them to continue working), Defendants cannot claim any tip credit as they did not pay their employees at least \$2.83 for every hour worked.

76. Further, Defendants also required Tipped Employees to perform non-tip generating work. Such work included stocking the salad area, stocking and cleaning the "rail area" (the area where dressings and condiments were kept), stocking toiletries, cleaning the booths, making coffee, and "bussing" tables after a party left. This non-tip generating work comprised a substantial portion of the Tipped Employees' shift.

77. For example, Plaintiff estimates that he spent anywhere from 90 to 105 minutes of a 7-hour shift doing opening prep work, closing "break down" work, and running "side work." Stated another way, Plaintiff spent, on average, 21-25% of his shift performing non-tip generating work.

78. As Fact Sheet #15 makes clear, "where a tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing" non-tip generating work, "no tip credit may be taken for the time spent in such duties."

79. Further evidencing Defendants' requirement that Tipped Employees perform non-

tip generating work without appropriate compensation, on three occasions, Defendants required Plaintiff and other Tipped Employees to clean and disinfect the Fort Washington location when a sewer line broke.

80. At no time did Defendants have Plaintiff or other Tipped Employees clock in under a different code or pay these individuals the full minimum wage, instead electing to continue to pay them the minimum cash wage and continuing to claim the tip credit despite the fact that these employees could not earn tips during this time.

81. In addition, on certain nights, Defendants would claim more in tips than Plaintiff actually earned from customers. Thus, Defendants did not accurately record the tips earned by Plaintiff and other Tipped Employees.

82. Finally, Defendants required Tipped Employees to cover customer walk-outs, cash shortages, and replacement uniform pieces (such as check holders). To pay for these items, Tipped Employees are required to forfeit a portion of their tips to cover these costs.

83. Plaintiff recalls instances where other Tipped Employees would complain that management would require them to pay for a walkout and/or a cash shortage.

CLASS & COLLECTIVE ACTION ALLEGATIONS

84. Plaintiff brings this action on behalf of the Collective Class as a collective action pursuant to Sections 207 and 216(b) of the FLSA. Plaintiff also brings this action as a class action pursuant to Fed.R.Civ.P. 23 on behalf of himself and the PA Class for claims under the PA State Laws.

85. The claims under the FLSA may be pursued by those who opt-in to this case pursuant to 29 U.S.C. §216(b). The claims brought pursuant to the PA State Laws may be pursued by all similarly-situated persons, who do not opt-out of the PA Class pursuant to Fed.R.Civ.P. 23.

86. Upon information and belief, the members of each of the Classes are so numerous that joinder of all members is impracticable. While the exact number of the members of these Classes is unknown to Plaintiff at this time, and can only be ascertained through appropriate discovery, Plaintiff believes there are over 30 individuals in each of the Classes.

87. Defendants have acted or have refused to act on grounds generally applicable to the Classes, thereby making final injunctive relief or corresponding declaratory relief with respect to the Classes as a whole, appropriate.

88. The claims of Plaintiff are typical of the claims of the Classes he seeks to represent. Plaintiff and the members of the Classes work or have worked for Defendants and were subject to the same compensation policies and practices.

89. Common questions of law and fact exist as to the Classes that predominate over any questions only affecting them individually and include, but are not limited to, the following:

- (a) whether Defendants have failed to pay the full minimum wage for each hour worked;
- (b) whether Defendants satisfied each of the requirements in order to claim a tip credit against each hour worked;
- (c) whether Defendants were precluded from claiming the tip credit during the period encompassed by this Complaint; and
- (d) whether Plaintiffs and members of the Classes are entitled to compensatory damages, and if so, the means of measuring such damages.

90. Plaintiff will fairly and adequately protect the interests of the Classes as his interests are aligned with those of the members of the Classes. Plaintiff has no interests adverse to the Classes she seeks to represent, and has retained competent and experienced counsel.

91. The class action/collective action mechanism is superior to other available methods for a fair and efficient adjudication of the controversy. The damages suffered by individual members of the Classes may be relatively small when compared to the expense and burden of litigation, making it virtually impossible for members of the Classes to individually seek redress for the wrongs done to them.

92. Plaintiff and the Classes he seeks to represent have suffered and will continue to suffer irreparable damage from the illegal policy, practice and custom regarding Defendants' pay practices.

93. Defendants have violated and, continue to violate, the FLSA.

94. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a) and willful violation of the PMWA.

FIRST CLAIM FOR RELIEF
FAIR LABOR STANDARDS ACT MINIMUM WAGE VIOLATIONS
(On Behalf of the Collective Class)

95. Plaintiff, on behalf of himself and the Collective Class, re-alleges and incorporates by reference the paragraphs above as if they were set forth again herein.

96. At all relevant times, Defendants have had gross revenues in excess of \$500,000.00.

97. At all relevant times, Defendants have been and continue to be, an employer engaged in interstate commerce, within the meaning of the FLSA.

98. At all relevant times, Defendants have employed, and/or continue to employ, Plaintiff and each of the Collective Class Members within the meaning of the FLSA.

99. Pursuant to Defendants' compensation policies, rather than pay Tipped Employees the federally-mandated minimum wage, Defendants took a tip credit and paid Tipped Employees only the tip credit wage.

100. Defendants have violated and, continue to violate, the FLSA.

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

102. Due to Defendants' FLSA violations, Plaintiff, on behalf of himself and the members of the Collective Class, are entitled to recover from the Defendants, compensation for unpaid wages; an additional equal amount as liquidated damages; and reasonable attorneys' fees and costs and disbursements of this action, pursuant to 29 U.S.C. § 216(b).

SECOND CLAIM FOR RELIEF
FAIR LABOR STANDARDS ACT OVERTIME WAGE VIOLATIONS
(On Behalf of the Collective Class)

103. Plaintiff, on behalf of himself and the Collective Class, re-alleges and incorporates by reference the paragraphs above as if they were set forth again herein.

104. At all relevant times, Defendants have had gross revenues in excess of \$500,000.00.

105. At all relevant times, Defendants have been and continue to be, an employer engaged in interstate commerce, within the meaning of Sections 29 U.S.C. §§ 206(a) and 207(a) of the FLSA.

106. At all relevant times, Defendants have employed, and/or continue to employ, Plaintiff and each of the Collective Class Members within the meaning of the FLSA.

107. At relevant times in the period encompassed by this Complaint, Defendants have a willful policy and practice of refusing to pay premium overtime compensation for all hours worked in excess of 40 hours per workweek.

108. Defendants have violated and, continues to violate, the FLSA. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a).

109. Due to Defendants' FLSA violations, Plaintiff, on behalf of himself and the members of the Collective Class, are entitled to recover from the Defendants, compensation for unpaid wages; an additional equal amount as liquidated damages; and reasonable attorneys' fees and costs and disbursements of this action, pursuant to 29 U.S.C. § 216(b).

THIRD CLAIM FOR RELIEF
PENNSYLVANIA MINIMUM WAGE ACT- MINIMUM WAGE VIOLATIONS
(On Behalf of the PA Class)

110. Plaintiff, on behalf of himself and the members of the PA Class, re-alleges and incorporates by reference the paragraphs above as if they were set forth again herein.

111. At all relevant times, Defendants have employed, and/or continue to employ, Plaintiff and each of the PA Class Members within the meaning of the PMWA.

112. Pursuant to Defendants' compensation policies, rather than pay Tipped Employees the Pennsylvania mandated minimum wage, Defendants improperly took a tip credit and paid Tipped Employees at a rate well below the Pennsylvania minimum wage.

113. Pursuant to Defendants' compensation policies, rather than pay Tipped Employees the required minimum wage in Pennsylvania, Defendants took a tip credit and paid Tipped Employees only the tip credit wage.

114. At relevant times in the period encompassed by this Complaint, Defendants had a willful policy and practice of failing to satisfy the notification requirements in order for Defendants to claim the tip credit.

115. As a result of Defendants' willful practices, Defendants were not entitled to claim the tip credit and pay Plaintiff and the members of the PA Class less than the Pennsylvania minimum wage for all hours worked.

116. Defendants have violated and, continue to violate, the PMWA.

117. Due to the Defendants' violations, Plaintiff, on behalf of himself and the members of the PA Class, are entitled to recover from Defendants the amount of unpaid minimum wages, attorneys' fees, and costs.

FOURTH CLAIM FOR RELIEF
PENNSYLVANIA MINIMUM WAGE ACT- OVERTIME WAGE VIOLATIONS
(On Behalf of the PA Class)

118. Plaintiff, on behalf of himself and the members of the PA Class, re-alleges and incorporates by reference the paragraphs above as if they were set forth again herein.

119. At all relevant times, Defendants have employed, and/or continue to employ, Plaintiff and each of the PA Class Members within the meaning of the PMWA.

120. At relevant times in the period encompassed by this Complaint, Defendants had a willful policy and practice of refusing to pay premium overtime compensation for all hours worked in excess of 40 hours per workweek.

121. Pursuant to Defendants' policies and procedures, Plaintiff and the members of the PA Class were paid \$2.83 per hour irrespective of whether a Tipped Employee worked in excess of forty hours in a particular week.

122. This did not compensate Tipped Employees premium overtime compensation in an amount at least equal to one and one-half times their regular rate for all hours worked in excess of forty in a workweek.

123. Defendants have violated and, continue to violate, the PMWA.

124. Due to the Defendants' violations, Plaintiff, on behalf of himself and the members of the PA Class, are entitled to recover from Defendants the amount of unpaid overtime wages, attorneys' fees, and costs.

FIFTH CLAIM FOR RELIEF
PENNSYLVANIA WAGE PAYMENT COLLECTION LAW
(On Behalf of the PA Class)

125. Plaintiff, on behalf of himself and the members of the PA Class, re-alleges and incorporates by reference the paragraphs above as if they were set forth again herein.

126. At all relevant times, Defendants have employed, and/or continue to employ, Plaintiff and each of the PA Class Members within the meaning of the WPCL.

127. Pursuant to the WPCL, Plaintiff and the members of the PA Class were entitled to receive all compensation due and owing to them on their regular payday.

128. As a result of Defendants' unlawful policies, Plaintiff and the members of the PA Class have been deprived of compensation due and owing.

129. Further, due to Defendants' policy of deducting amounts from the tips of Plaintiff and the PA Class to offset business losses/expenses, Plaintiff and the PA Class were subject to improper deductions from their compensation.

130. Plaintiff, on behalf of himself and the members of the PA Class, are entitled to recover from Defendants the amount of unpaid compensation, and an additional amount of 25% of the unpaid compensation as liquidated damages.

SIXTH CLAIM FOR RELIEF
PENNSYLVANIA COMMON LAW – UNJUST ENRICHMENT
(On Behalf of the PA Class)

131. Plaintiff, on behalf of himself and the PA Class Members, re-alleges and incorporates by reference the paragraphs above as if they were set forth again herein.

132. Plaintiff and the members of the PA Class were employed by Defendants within the meaning of the PA State Laws.

133. At all relevant times, Defendants had a willful policy and practice of denying Tipped Employees their full share of gratuities.

134. During the class period covered by this Complaint, Plaintiff and Tipped Employees were subjected to unlawful deductions from their gratuities.

135. Defendants retained the benefits of its unlawful deductions from the gratuities from Plaintiff and Tipped Employees under circumstances which rendered it inequitable and unjust for Defendants to retain such benefits.

136. Defendants were unjustly enriched by subjecting Plaintiff and Tipped Employees to such unlawful deductions.

137. As direct and proximate result of Defendants' unjust enrichment, Plaintiff and the members of the PA Class have suffered injury and are entitled to reimbursement, restitution, and disgorgement from Defendants of the benefits conferred by Plaintiff and the PA Class.

138. Plaintiff, on behalf of himself and the members of the PA Class, are entitled to reimbursement, restitution and disgorgement of monies received by Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and/or on behalf of himself and all other similarly situated members of the Collective Class and members of the PA Class respectfully requests the Court grant the following relief:

A. Designation of this action as a collective action on behalf of the Collective Class, and prompt issuance of notice pursuant to 29 U.S.C. § 216(b), apprising them of the pendency of this action, and permitting them to assert timely FLSA claims in this action by filing individual Consents to Sue pursuant to 29 U.S.C. § 216(b);

B. Designation of the action as a class action under Fed.R.Civ.P. 23 on behalf of the PA Class;

C. Designation of Plaintiff as representative of the Collective Class and the PA Class;

D. Designation of Plaintiff's counsel as class counsel for the Collective Class and the PA Class;

E. A declaratory judgment that the practices complained of herein are unlawful under the FLSA and PMWA;

F. An injunction against Defendants and their officers, agents, successors, employees, representatives and any and all persons acting in concert with it, as provided by law, from engaging in each of the unlawful practices, policies and patterns set forth herein;

G. An award of unpaid minimum wages to Plaintiff and the members of the Classes;

H. An award of unpaid overtime wages to Plaintiff and the members of the Classes;

I. An award of liquidated damages to Plaintiff and members of the Classes;

J. An award of costs and expenses of this action together with reasonable attorneys' and expert fees to Plaintiff and members of the Classes; and

K. Such other and further relief as this Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiff demands a trial by jury as to all issues so triable.

(SIGNATURE ON THE NEXT PAGE)

Date: January 4, 2017

Respectfully submitted,
KALIKHMAN & RAYZ, LLC



Arkady "Eric" Rayz
Demetri A. Braynin
1051 County Line Road, Suite "A"
Huntingdon Valley, PA 19006
Telephone: (215) 364-5030
Facsimile: (215) 364-5029
E-mail: erayz@kalraylaw.com
E-mail: dbaynin@kalraylaw.com

CONNOLLY WELLS & GRAY, LLP
Gerald D. Wells, III
Stephen E. Connolly
2200 Renaissance Boulevard, Suite 308
King of Prussia, Pennsylvania 19046
Telephone: (610) 822-3700
Facsimile: (610) 822-3800
gwells@cwg-law.com
sconnolly@cwg-law.com

Counsel for Plaintiff and the Proposed Class

EXHIBIT “A”

CONSENT TO BECOME A PARTY PLAINTIFF

1. I, Christopher M. Walter, consent to sue as a Plaintiff in this action, pursuant to the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*

2. During the applicable period, I was an employee of Defendants and was not paid properly for all hours worked.

3. By my signature below, I hereby authorize counsel to prosecute the claims in my name and on my behalf, in this action, for Defendants' failure to pay all wages due and owing in accordance with federal law.

22 December 2016
Date

Christopher M. Walter
Print Name


Signature

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Friendly's Ice Cream \(Soft\) Served with Minimum Wage Class Action](#)
