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Firm File No. H18-0033

Attorney for Defendant, Haute Restaurant & Lounge Inc.

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

AARON ACOFF	)	CIVIL ACTION
	)	
Plaintiff,	)	
	)	
vs.	)	C.A. No. 2018-1562
	)	
HAUTE RESTAURANT	)	
& LOUNGE INC.	)	
	)	
Defendant.	)	

DEFENDANT HAUTE RESTAURANT & LOUNGE, INC.'S ANSWER TO THE COMPLAINT WITH AFFIRMATIVE DEFENSES

Defendant, Haute Restaurant & Lounge, Inc. (hereafter "Haute" or the "Restaurant") by and through its undersigned attorney(s), hereby responds way of Answer and Affirmative Defenses to the Complaint filed by Plaintiff, Aaron Acoff ("Mr. Acoff"):

ANSWER TO THE COMPLAINT-CLASS/COLLECTIVE ACTION

Denied, as a conclusion of law. This first (unnumbered) averment contains conclusions of law to which no response is required.

JURISDICTION AND VENUE

1. Denied in part, admitted in part. This averment contains conclusions of law to which no response is required and, to that extent, it is denied. Defendant admits that this Court has jurisdiction over the subject matter of this Complaint.

2. Denied in part, admitted in part. This averment contains conclusions of law to which no response is required and, to that extent, it is denied. Defendant admits that this Court has jurisdiction over the subject matter of this Complaint.

3. Denied in part, admitted in part. This averment contains conclusions of law to which no response is required and, to that extent, it is denied. Defendant admits that this Court has jurisdiction over the subject matter of this Complaint.

PARTIES

4. Admitted in part, denied in part. Defendant company is incorporated in the State of Delaware (and therefore resides in Delaware, not Philadelphia). Defendant company operates a principal place of business in the City of Philadelphia.

5. Admitted in part denied in part. The zip code is of the Philadelphia location is 19102, the remainder of allegations are admitted.

6. Admitted in part, denied in part. It is admitted that the named plaintiff worked occasionally at the restaurant as a bartender; the named plaintiff no longer works for defendant. It is also admitted that other individuals are currently employed at the restaurant. With respect to the averment concerning the business engaging in commerce, that averment is denied as a conclusion of law.

7. Admitted in part denied in part. It is admitted that Haute is an employer, the remainder of this averment is denied as a conclusion of law.

FACTS

8. Admitted in part, denied in part. It is admitted that the named plaintiff worked occasionally at the restaurant as a bartender; the named plaintiff no longer works for defendant. Although the dates of employment appear to be correct, it is unclear at this juncture, without a completed review of all employment records for the named plaintiff; the precise dates of employment might be different, in that respect, the dates averred are denied. Those records are presently being gathered.

9. Admitted.

10. Admitted in part, denied in part. It is admitted that plaintiff's training period concluded after approximately two weeks. On those occasions when plaintiff worked, he was compensated similar to other bartenders (i.e. the restaurant tip credit was utilized to satisfy minimum wages i.e. plaintiff was paid at least $2.83 per hour by Haute). It is admitted that Plaintiff was paid on occasion without a pay stub due unforeseen problems with the third party payroll processor; on these occasions he was paid directly in cash. It is denied that Plaintiff was paid "exclusively" through tips; the next averment in the compliant would admit that fact to be incorrect. It is denied that the amount paid to Plaintiff during the time period alleged was only $180.

11. It is denied that the hours worked by plaintiff (during the time alleged) was between 190-200. Documents of the scheduling and time records are still being gathered and have not been reviewed. In general the restaurant staffed plaintiff only on slower days as he was not a strong bartender and had other issues.

12. Denied as stated. Although Haute did not reference the specific statutory authority language (or engage in a review of the relevant case law) when hiring plaintiff, Haute did inform each bartender and server (including plaintiff) that the base salary paid by Haute would be the restaurant minimum wage of at least $2.83 per hour; the

rest of the earnings were tip based. To the extent that this averment is a conclusion of law, it is denied

COLLECTIVE AND CLASS ALLEGATIONS

13. Denied. This averment contains conclusions of law to which no response is required and, to that extent, it is denied. Further, the Restaurant has only been in operation for seven or eight months, not three years.

14. Denied. This averment contains conclusions of law to which no response is required and, to that extent, it is denied. Further, the Restaurant has only been in operation for seven or eight months, not three years.

15. Denied. This averment contains conclusions of law to which no response is required and, to that extent, it is denied. Further, plaintiff is not similarly situated to the other servers and bartenders for several reasons: 1) he is no longer employed by the restaurant; 2) Plaintiff's disciplinary and socialization troubles clearly distinguished him from other employees; 3) Plaintiff was not a strong bartender necessitating him being staffed on slower occasions.

16. Denied. This averment contains conclusions of law to which no response is required and, to that extent, it is denied. Further, the Restaurant has only been in operation for seven or eight months, not three years.

17. Denied. This averment contains conclusions of law to which no response is required and, to that extent, it is denied. Further, the number of servers and bartenders (since the inception of the restaurant) has only been around fifteen or twenty persons (including seven or eight persons who have left for reasons unrelated to the allegations of this complaint). Thus, the putative class is not at all so numerous that joinder is impracticable. Nor is there any allegation that another putative class member has been

so aggrieved (i.e. that plaintiff's beliefs are typical of theirs); to the contrary, all of the other employees seemed to fully understood what was communicated to them during hiring, that the base pay would only be the restaurant minimum wage of at least $2.83 per hour.

18. It is admitted that plaintiff has retained competent and experienced counsel, the remainder of this allegation is denied as a conclusion of law or speculation of fact.

19. Denied as stated and denied as a conclusion of law. This action assumes (incorrectly) that a standardized practice of failing to inform new employees of the restaurant tip credit exists; such an allegation is denied. Moreover, if plaintiff were somehow treated differently from the standardized practices (while everyone else was so informed of the tip credit) then the named plaintiff would not be part of a putative class of aggrieved persons; he would be a solitary grievant.

20. Denied as a conclusion of law. A multiplicity of putative class members does not exist, the number of alleged class members is incorrect as is the suggestion that they too were never noticed and compensated properly; class certification in these circumstances would operate to delay and complicate an otherwise simple contest (i.e. the question of whether or not the named plaintiff was informed of the tip credit).

COUNT I

(Alleging Violations of the FLSA)

21. This paragraph does not contain an averment of fact or law; rather, it incorporates the preceding paragraphs.

22. Denied, this averment contains conclusions of law to which no response is required.

23. Denied, this averment contains conclusions of law to which no response is required.

24. Denied, this averment contains conclusions of law to which no response is required.

25. Denied, this averment contains conclusions of law to which no response is required. It is also denied that defendant failed to comply with the aforementioned laws. It is also denied that the representative plaintiff worked more than 40 hours in any given week; indeed, his own allegations in the complaint support this fact. The plaintiff claims that he worked 200 hours over a ten week period (from December 17, 2017 to February 28, 2017). See also footnote one to the complaint.

COUNT II

(Alleging Violations of the PMWA)

26. This paragraph does not contain an averment of fact or law; rather, it incorporates the preceding paragraphs.

27. Denied, this averment contains conclusions of law to which no response is required.

28. Denied, this averment contains conclusions of law to which no response is required.

29. Denied, this averment contains conclusions of law to which no response is required.

30. Denied, this averment contains conclusions of law to which no response is required. It is also denied that defendant failed to comply with the aforementioned laws. It is also denied that the representative plaintiff worked more than 40 hours in any given week; indeed, his own allegations in the complaint support this fact. The plaintiff

claims that he worked 200 hours over a ten week period (from December 17, 2017 to February 28, 2017). See also footnote one to the complaint.

AFFIRMATIVE DEFENSES

First Affirmative Defense

1. The Complaint filed by Plaintiff fails to state a claim for which relief may be granted.

Second Affirmative Defense

2. Defendant hereby invokes all rights, privileges, and defenses set forth in the Fair Labor Standards Act (i.e. 29 U.S.C. § 201 *et seq*., "FLSA") and those set forth in the Pennsylvania Minimum wage Act (i.e. 43 P.S. § 231.1 *et seq*. "PMWA")

Third Affirmative Defense

3. The FLSA allows for the minimum wage of new employees to be calculated at a base of $4.25 per hour (not $7.25 per hour).

Fourth Affirmative Defense

4. At all times, Defendant acted in good faith and had reasonable grounds for believing its actions were in compliance with the FLSA.

Fifth Affirmative Defense

5. Defendant did not know or show reckless disregard for whether its conduct was prohibited by the FLSA.

Sixth Affirmative Defense

6. To the extent Plaintiff seeks damages not recoverable under either the FLSA or the PMWA, Plaintiff is barred from such recovery.

Seventh Affirmative Defense

7. Without assuming the burden of proof, Plaintiff was properly compensated for all hours worked.

Eighth Affirmative Defense

8. . Without assuming the burden of proof, Plaintiff and members of the purported class or collective action are not similarly situated.

Ninth Affirmative Defense

9. Plaintiff failed to exhaust his administrative remedies.

Tenth Affirmative Defense

10. Plaintiff has failed to mitigate his alleged damages.

Eleventh Affirmative Defense

11. Some or all of Plaintiff's claims are barred by accord and satisfaction, settlement and/or payment and release.

Twelfth Affirmative Defense

12. Defendants' actions were in good faith conformity with and/or reliance on administrative regulation, order, ruling, approval, interpretation, or practice of the Department of Labor. Twenty

Thirteenth Affirmative Defense

13. Defendant reserves the right to assert further affirmative defenses as they become evident through discovery investigation.

Fourteenth Affirmative Defense

14. All actions taken by Defendant with respect to Plaintiff were supported by legitimate business reasons.

WHEREFORE, defendants seek judgment in their favor and an award of the relief as described above including a dismissal with prejudice of this action and ay other relief this Court deems fit.

Dated: July 6, 2018

/s/ Stewart C. Crawford, Jr
Stewart C. Crawford, Jr

Attorney for Defendant