UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Zak Hood, *On behalf of himself and those similarly situated*, Plaintiff, v. Jordan Restaurant Group HQ LLC d/b/a Hen Quarter, *et al*., Defendants.	Case No. 2:22-cv-00486 Judge Edmund A. Sargus, Jr. Magistrate Judge Kimberly A. Jolson

PLAINTIFF'S COMBINED MOTION FOR CONDITIONAL FLSA COLLECTIVE ACTION CERTIFICATION AND CLASS CERTIFICATION UNDER RULE 23

This case involves a restaurant that closed without warning and did not pay its employees for their last weeks of work. Plaintiff seeks to adjudicate the worker's claims in a combined class and collective action under Rule 23 and the Fair Labor Standards Act.

Plaintiff asks that the Court grant the following relief:

(1) Certify a class under Rule 23 for Plaintiff's state law claims (Count 2: Failure to Pay Minimum Wages under Ohio Const. Art. II, Sec. 34a; Count 3: Untimely Payment of Wages under O.R.C. § 4113.15; Count 4: Damages under O.R.C. § 2307.60; Count 5: Unjust Enrichment).

(2) Conditionally certify a collective action under the FLSA.

(3) Order Defendants to provide a class list containing each class member's name, home address, and email address within 14 days.

(4) Appoint Plaintiff and his Counsel as the class's representatives.

(5) Approve the proposed form of notice, attached as Exhibit 13.

(6) Authorize Plaintiff to send the proposed notice to the class members via both U.S. mail and email.

(7) Allow a 60-day period in which class members may opt-out or exclude themselves.

(8) Set a status/scheduling conference for approximately 30 days following the close of the notice period to inform the Court as to the results of the notice process and set a schedule for the remainder of the case.

Plaintiff details further the relief requested in the basis thereof in the attached memorandum in support.

Respectfully submitted,

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PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S COMBINED MOTION FOR CONDITIONAL FLSA COLLECTIVE ACTION CERTIFICATION AND CLASS CERTIFICATION UNDER RULE 23

Without warning, the defendants closed the doors to their restaurant and then did not pay the employees for their last weeks of work. Although the defendants could not bother to pay their workers, the defendants apparently had no problem receiving accolades from the Columbus Dispatch for, at about the same time, buying 21 Donatos Pizza stores.[1]

This unjust situation warrants swift adjudication. Accordingly, Plaintiff moves to certify classes under the relevant wage-related laws so that this case can quickly progress to the judgement phase.

1. Background

Collectively, Defendants own and operate a Dublin, Ohio restaurant called Hen Quarter. Doc. 1 (Complaint) at ¶ 2. At 11:27 PM on January 11, 2022, Defendants called it quits and closed the restaurant.[2]

To the public, Defendants claimed that a tight labor market and COVID forced the closure. *See* Exs. 2; 4. Perhaps that is true. Or, perhaps Defendants closed the restaurant to focus on the 21 Donatos franchises they recently purchased. *See* Ex. 1.

[1] Exhibit 1, Erica Thompson, *Donatos' largest traditional franchisee is now minority-owned. Michael Redd partners on deal*, COLUMBUS DISPATCH (Jan. 12, 2022), https://www.dispatch.com/story/business/2022/01/12/minority-owned-columbus-firm-now-donatos-largest-franchisee/8800612002/ (last accessed February 9, 2022).

[2] Exhibit 8, Declaration of Zak Hood ("Hood Decl."), ¶ 9; Exhibit 9, Declaration of Lindsay Scribner ("Scribner Decl."), ¶ 8; Exhibit 10, Declaration of Perla Delgado ("Delgado Decl."), ¶ 9; Exhibit 11, Declaration of Dakota Navarro ("Navarro Decl."), ¶ 8; Exhibit 12, Declaration Ada Nichols ("Nichols Decl."), ¶ 9; Exhibit 3, Prisca Medrano to Hen Quarter Employees (Email of January 11, 2022); Exhibit 4, Hen Quarter Closure Attachment; Gary Seman Jr., *Hen Quarter Dublin closes temporarily, citing outbreak*, COLUMBUS DISPATCH (January 12, 2022), https://www.dispatch.com/story/news/local/communities/dublin/2022/01/12/hen-quarter-dublin-closes-temporarily-citing-outbreak/9190104002/ (last accessed February 24, 2022).

Either way, Defendants did not warn their employees that Defendants planned to close the restaurant and leave the workers in the cold.[3] To make matters worse—and illegal—Defendants chose not to pay the employees for their last weeks of work.[4] Given that Defendants paid out tip money on pay checks, Defendants even kept the tipped worker's earned tips.[5]

On January 20, 2022, Defendants still had not paid they employees, but contacted them promising payments within a week. Those payments never came.[6]

Unsurprisingly, Defendants' actions prompted employees to complain both publicly and privately. In response to those complaints, on February 7, 2022, Defendants' counsel sent an email to the employees.[7] The email acknowledged that Defendants have neither paid the employees nor, apparently, had any real plan to do so:

> We can make no promises regarding the eventual outcome as there are many issues aside from just payroll which must be resolved. Again all we can say is that the effort is underway to find some resolution and although we appreciate this may be cold comfort, there remains the absolute desire to find a way through this situation.

Ex. 7.

It appears that Defendants think this situation is more complicated than it is. It isn't. Defendants need to pay their workers. To help Defendants arrive at the same conclusion, Plaintiff Zak Hood filed this lawsuit.

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[3] Ex. 8, Hood Decl., ¶ 9; Ex. 8, Scribner Decl., ¶ 8; Ex. 10, Delgado Decl., ¶ 9; Ex. 11, Navarro Decl., ¶ 8; Ex. 12, Nichols Decl., ¶ 9.

[4] Ex. 8, Hood Decl., ¶¶ 6–7, 15; Ex. 9, Scribner Decl., ¶¶ 6–7, 14; Ex. 10, Delgado Decl., ¶¶ 6–7, 15; Ex. 11, Navarro Decl., ¶¶ 5–6, 15; Ex. 12, Nichols Decl., ¶¶ 6–7, 15.

[5] *See* Ex. 8, Hood Decl., ¶¶ 5, 13, 15; Ex. 9, Scribner Decl., ¶¶ 12, 14; Ex. 10, Delgado Decl., ¶¶ 5, 13, 15; Ex. 11, Navarro Decl., ¶¶ 4, 12, 15; Ex. 12, Nichols Decl., ¶¶ 5, 13, 15.

[6] *See* Exhibit 5, Prisca Medrano to Hen Quarter Employees (Email, January 20, 2022); Exhibit 6, Thread of email responses to Medrano's Email of January 20, 2022 (Emails January 20, 2022, to February 4, 2022); Ex. 8, Hood Decl., ¶¶ 10–11; Ex. 9, Scribner Decl., ¶ 9–10; Ex. 10, Delgado Decl., ¶¶ 10–11; Ex. 11, Navarro Decl., ¶¶ 9–10; Ex. 12, Nichols Decl., ¶¶ 10–11.

[7] *See* Exhibit 7, Scott Birrer to Hen Quarter Employees (Email, February 7, 2022); Ex. 8, Hood Decl., ¶ 12; Ex. 9, Scribner Decl., ¶ 11; Ex. 10, Delgado Decl., ¶ 12; Ex. 11, Navarro Decl., ¶ 11; Ex. 12, Nichols Decl., ¶ 12.

2. Argument

Wage laws and class certification are well-suited to efficiently address what happened here: the same defendants did not pay a sizeable group of workers under the same circumstances.

To address Defendants' refusal to pay wages, Plaintiff asks the Court to promptly certify three overlapping classes, all with the same class definition:

> Any employee who worked at Hen Quarter from December 26, 2021 to present.

The definition is meant to encompass all of Defendants' workers who were not paid for their last weeks of work.

Plaintiff also asks that the Court authorize him to send notice to the class members, in accordance with the FLSA's notice/opt-in procedure and Rule 23's notice requirements. Plaintiff asks the Court to approve the proposed notice, attached as Exhibit 13.

2.1. Relevant Legal Standards

2.1.1. The Legal Standard for Rule 23 Class Certification

The requirements to certify a class are set forth in Federal Rule of Procedure 23. Plaintiff bears the burden of demonstrating that this case meets those requirements. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

Plaintiff must show that (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims and defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P.

23(a). If the case meets those prerequisites, then the class action can be maintained if common questions of fact or law predominate over individual questions, and the class mechanism is superior to other methods of adjudication. *Id.* at 23(b)(3).

Should the Court find that this case meets Rule 23's requirements, then the Court must direct appropriate notice to the class. *Id.* at 23(b)(c)(2). From there, a class member can exclude him or herself from the case, if he or she so chooses.

2.1.2. The Legal Standard for Conditional Certification under the Fair Labor Standards Act

The Fair Labor Standards Act specifies how parties join an action to assert FLSA claims. 29 U.S.C. 216(b). First, the FLSA authorizes employees to bring actions on behalf of themselves "and other employees similarly situated." *Id.* Second, the FLSA prevents any employee from joining the case unless "he gives his consent in writing to become such a party and such consent is filed in the court in which the action is brought." *Id.*

The first provision—that employees may bring actions on behalf of "similarly situated" employees—lowers the burden for representative actions compared to those brought under Rule 23. *Myers v. Marietta Mem. Hosp.*, 201 F. Supp. 3d 884, 890 (S.D. Ohio Aug. 17, 2016) (citing *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567 (6th Cir. 2009), *abrogated on other grounds by Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016)).

The FLSA does not define the phrase "similarly situated," nor does the Sixth Circuit. *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 584–85 (6th Cir. 2009). Case law, however, provides guidance. *Smith v. Generations Healthcare Servs. LLC*, No. 2:16-cv-907, 2017 U.S. Dist. LEXIS 106583, at *6–7 (S.D. Ohio Jul. 11, 2017) (citing *O'Brien*) (observing that while the Sixth Circuit "has declined to 'create comprehensive criteria for informing the similarly situated

analysis,' it has held that FLSA plaintiffs may proceed collectively in cases where 'their claims [are] unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct.").

"[T]he FLSA's 'similarly situated' standard is less demanding than Rule 23's standard. *Monroe v. FTS USA, LLC*, 860 F.3d 389, 397 (6th Cir. 2017). Thus, as here, a case that meet's Rule 23's requirements also meets the FLSA's requirements.

The second provision—the written consent requirement—means that workers must affirmatively "opt in" to the case. Courts have interpreted this requirement to mean that the FLSA requires prompt notice to employees and a low threshold to send that notice. *See Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 170 (1989).

2.2. This case meets all of Rule 23's requirements for class certification.

This case addresses a discrete situation affecting a group of people—precisely the situation for which Rule 23 is built. Plaintiff raises four state law claims arising from Defendants' refusal to pay their workers, briefly described below:

First, Plaintiff alleges that Defendants' failure to pay employees for their last weeks of work violates Ohio's Prompt Pay Act, O.R.C. § 4113.15. The Prompt Pay Act requires employers to pay their employees when the wages are due and, the failure to do so gives rise to a claim for the unpaid wages and, under certain circumstances, additional damages.

Second, Plaintiff alleges that Defendants' failure to pay anything necessarily violates Ohio's Minimum Wage Amendment, Ohio Const. Art. II, Sec. 34a.

Third, Plaintiff alleges that Defendants' refusal to pay minimum wages was a willful violation of the Fair Labor Standards Act. A willful FLSA violation is a criminal act. 29 U.S.C.

§ 216(a). Accordingly, Plaintiff alleges that he may seek damages under Ohio's statute allowing recovery of civil damages for criminal acts. *See* O.R.C. 2307.60.

Fourth, Plaintiff alleges that Defendants' failure to pay wages unjustly enriched Defendants. Unjust enrichment, unlike the claim for unpaid wages, focuses not on what was not paid to Plaintiff, but, instead, the benefits Defendants received from their failure to pay. Such damages will not be limited to unpaid wages, but, instead, the profits derived from Plaintiff's uncompensated labor.

All of these claims arise from the same set of facts, affecting the same group of workers. As detailed below, this case meets Rule 23's requirements for class certification.

Numerosity

Numerosity is met when joinder is "difficult or inconvenient." *Swigart v. Fifth Third Bank*, 288 F.R.D. 177, 183 (S.D. Ohio 2012). "When a class numbers in the hundreds or thousands, the impracticability of joinder is obvious." *Miller v. Univ. of Cincinnati*, 241 F.R.D. 285, 288 (S.D. Ohio 2006). But, smaller classes are also found appropriate—even an 18-member class. *Id.* (citing *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984)); *see also id.* (quoting *Appolini v. United States*, 218 F.R.D. 556, 561 (W.D. Mich. 2003)) (stating "a class of 40 or more members is sufficient to establish numerosity"); *Matthews v. Buel, Inc.*, No. 7:11-162-TMC, 2012 U.S. Dist. LEXIS 69461, at *5 (D.S.C. May 18, 2012) ("A class consisting of as few as 25 to 30 members raises the presumption that joinder would be impractical.").

Defendants' records will show the precise number of class members. At this stage, Plaintiff contends that there are approximately 50 workers that are part of the class. *See* Ex. 8, Hood Decl., ¶ 16 (estimating 50–75 employees); Ex. 9, Scribner Decl., ¶ 15 (estimating 45–50 employees); Ex.

10, Delgado Decl., ¶ 16 (estimating 53 employees); Ex. 11, Navarro Decl., ¶ 16 (estimating more than 50 employees); Ex. 12, Nichols Decl., ¶ 16 (estimating 40–50 employees). Defendants' emails show 35–40 email addresses which appear to be associated with employees. *See* Ex. 3 (showing approximately 40 email addresses); Ex. 7 (showing approximately 35 email addresses, not including Ron Jordan and Keith Warren's emails). Some of those addresses may include non-employees, but, even so, the number of emails suggests that there are at least 25–30 workers (not to mention that it is equally possible that employees were left off those emails). Regardless of the final, exact number, the numbers show that the numerosity requirement will be met. *See Matthews*, 2012 U.S. Dist. LEXIS 69461, at *5.

Commonality

Commonality exists when a case presents "questions of law or fact common to the class." Rule 23(a)(2). "The commonality requirement is satisfied 'as long as the members of the class have allegedly been affected by a general policy of the defendant and the *general* policy is the focus of the litigation.'" *Salvagne v. Fairfield Ford, Inc.*, 264 F.R.D. 321, 326 (S.D. Ohio 2009) (emphasis in original) (quoting *Day v. NLO, Inc.*, 144 F.R.D. 330, 333 (S.D. Ohio 1992); *Sweet v. Gen. Tire & Rubber Co.*, 74 F.R.D. 333, 335 (N.D. Ohio 1976)).

In this case, the class members are affected by a fact in common: Defendants did not pay them for their last weeks of work. This fact is the lawsuit's focus. A single common fact (or question of law) is sufficient to certify a class. *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 458 (6th Cir. 2020). Accordingly, Defendants' failure to pay wages is enough to meet the commonality requirement.

The questions of law surrounding Defendants' failure to pay also justify class certification. Each state law claim will apply to the common fact in the same way, across the class members (*i.e.*, the questions of law are common to all class members). For example, was Defendants' failure to pay willful under the FLSA and, if so, is that a criminal act and, if so, does O.R.C. § 2307.60 apply and allow the class members to recover damages?

Typicality

The typicality requirement is met when the class representative's claims are typical of the class members' claims. There is little that needs to be said here. Plaintiff alleges that Defendants failed to pay him and a group of workers when Defendants closed their restaurant. Plaintiff has the same claim, for the same reason, and under the same circumstances as the rest of the class members. *See* Ex. 8, Hood Decl., ¶¶ 13–15; Ex. 9, Scribner Decl., ¶¶ 13–15; Ex. 10, Delgado Decl., ¶¶ 13–15; Ex. 11, Navarro Decl., ¶¶ 12–15; Ex. 12, Nichols Decl., ¶¶ 13–15.

Adequacy

The adequacy requirement tests whether the class representative and his counsel will adequately protect the class's interest. Courts typically consider two questions: (1) Do the representatives have common interests with the unnamed class members? (2) Will the representatives vigorously prosecute the interests of the class through qualified counsel? *See In re Am. Med. Sys., Inc.*, 75 F. 3d 1069, 1083 (6th Cir. 1996).

With respect to the first inquiry, "because Plaintiff is challenging the same unlawful conduct and seeking the same relief as would the rest of the class members, Plaintiff's interests are aligned with those of the class members sufficient to satisfy the first prong of the adequacy

requirement." *Waters v. Pizza to You*, No. 3:19-cv-372, 2021 U.S. Dist. LEXIS 11743, at *22 (S.D. Ohio Jan. 22, 2021) (collecting cases).

With respect to the second inquiry, Plaintiff promptly retained experienced counsel and started the process of pursuing the class members' claims. This evidences that Plaintiff is prepared to vigorously prosecute the class members' claims.

Plaintiff's counsel, Biller & Kimble, LLC, is well-qualified to handle this matter. Biller & Kimble are established experts in the wage and hour field. *See, e.g.*, *Waters*, 2021 U.S. Dist. LEXIS 11743, at *23 (citing cases discussing counsel's wage and hour experience).

Predominance

If the first four requirements are met, then the Court must determine whether the common questions of law and fact predominate over any individualized issues. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Because this case focuses on a single event—the failure to pay all employees at the same time and for the same reason—predominance is easily met. The case will revolve around proving that this unlawful action occurred and then adjudicating the action's legal ramifications. Those ramifications will apply class-wide.

Superiority

The final requirement is whether a class action is a superior method of adjudicating the case, compared to other methods. Rule 23(b)(3) lists four factors for the Court to consider: (1) the interests of class members in individually controlling the prosecution of separate actions; (2) the extent and nature of other pending litigation about the controversy; (3) the desirability of concentrating litigation in this forum; and (4) the likely difficulties in managing the class action.

Here, there is no evidence that the class members either have an interest in pursuing separate actions or that they have done so (*i.e.*, there is no other pending litigation). In any case, the amount in controversy will be relatively limited on a per-person basis, adjudicating the claims together will be far more efficient than individual cases.

Moreover, concentrating litigation in this forum is appropriate. The class members and the restaurant are all located in this judicial district.

Finally, this is a wage and hour case with a class of people from a single restaurant, the identities of whom will be discernable from Defendants' records. Accordingly, there should be no difficulties in managing the class action.

2.3. This case meets the FLSA's standard for conditional certification.

The standard for conditional certification under the FLSA is less burdensome to meet than that under Rule 23. *De Angelis v. Nolan Enters.*, No. 2:17-cv-926, 2019 U.S. Dist. LEXIS 212208, at *4 (S.D. Ohio Dec. 10, 2019) (citing *O'Brien*, 575 F.3d at 584). Because Rule 23 class certification is appropriate, so too is conditional FLSA certification. Plaintiff incorporates all of the arguments made above and asks the Court to conditionally certify a collective action for Plaintiff's FLSA claims.

2.4. Plaintiff asks the Court to approve Plaintiff's proposed notice.

Should the Court certify a class under Rule 23, the Court must also order that notice of the lawsuit be sent to the class members. Fed. R. Civ. P. 23(c)(2)(B). Similarly, the effect of conditional certification of an FLSA case is that notice should be sent to the class members, giving them an opportunity to join the case. *See, e.g.*, *Hughes v. Gulf Interstate Field Servs.*, No. 2:14-cv-000432, 2015 U.S. Dist. LEXIS 88205, at *6 (S.D. Ohio July 7, 2015).

Plaintiff has attached a proposed notice (Exhibit 13). The notice advises the class members of the case's nature, the class members' rights and options, and relevant time periods. Accordingly, Plaintiff respectfully asks that the Court approve the form of the notice.

Plaintiff asks that the Court authorize him to send the notice to the class members by both U.S. Mail and e-mail. "Allowing email delivery in addition to first class mail 'will (i) increase the likelihood that all potential opt-in plaintiffs receive notice of the suit and (ii) likely obviate the need to resend notice if an employee's home address is inaccurate'" *Myres v. Hopebridge, LLC*, No. 2:20-cv-5390, 2021 U.S. Dist. LEXIS 121131, at *15 (S.D. Ohio June 29, 2021) (quoting *Parker v. Breck's Ridge, LLC*, No. 2:17-CV-633, 2018 U.S. Dist. LEXIS 11655 *17–18 (S.D. Ohio Jan. 24, 2018). To facilitate this process, Plaintiff asks the Court to order Defendants to produce a computer-readable list (*i.e.*, an Excel spreadsheet) of all class members. The list should include the class members' names, home addresses, and email addresses.

2.5. Proposed Timeline

Plaintiff asks that the Court to set the following schedule for the notice process:

Within 14 days of the Court's Order granting class/collective action certification	Defendants provide a class list containing each class member's name, home address, and email address.
Within 14 days of the defendants producing the class list	Plaintiff distributes the proposed notice to each class member via U.S. mail and email.
Within 60 days of sending the notice	Class members may opt into the case or exclude themselves.
Approximately 30 days after the notice period ends	The Court will hold a status/scheduling conference to determine the results of the notice and set a schedule for the remainder of the case.

3. Conclusion

Plaintiff asks that the Court grant his Combined Motion and grant the following relief:

(1) Certify a class under Rule 23 for Plaintiff's state law claims (Count 2: Failure to Pay Minimum Wages under Ohio Const. Art. II, Sec. 34a; Count 3: Untimely Payment of Wages under O.R.C. § 4113.15; Count 4: Damages under O.R.C. § 2307.60; Count 5: Unjust Enrichment).

(2) Conditionally certify a collective action under the FLSA.

(3) Order Defendants to provide a class list containing each class member's name, home address, and email address within 14 days.

(4) Appoint Plaintiff and his Counsel as the class's representatives.

(5) Approve the proposed form of notice, attached as Exhibit 13.

(6) Authorize Plaintiff to send the proposed notice to all of the class members via both U.S. mail and email.

(7) Allow a 60-day period in which class members may opt-out or exclude themselves.

(8) Set a status/scheduling conference for approximately 30 days following the close of the notice period to inform the Court as to the results of the notice process and set a schedule for the remainder of the case.

Respectfully submitted,

/s/Riley Kane

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Certificate of Service

The undersigned hereby certifies that a copy of the foregoing was filed in the Court's ECF system on March 2, 2022. A copy will be served upon Defendants in accordance with the Fed. R. Civ. P. 5 and the undersigned will provide notice of service and an updated certificate upon completion of service.

/s/ Riley Kane
Riley E. Kane