

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

JOSEPH FIUMANO, on behalf of	:	
himself and all others similarly situated,	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 17-465
	:	
METRO DINER MANAGEMENT	:	
LLC, et al.,	:	
Defendants.	:	

March 12, 2018

Anita B. Brody, J.

EXPLANATION AND ORDER

Plaintiff Joseph Fiumano, on behalf of himself and all others similarly situated, brings this collective action and class action lawsuit against Metro Diner Management LLC, Metro Services LLC, MD Original LLC, Consul Hospitality Group LLC, John Davoli Sr. and Mark Davoli (collectively, “Defendants”) for violations of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* (“FLSA”) (Counts I & II), the Pennsylvania Minimum Wage Act of 1968, 43 P.S. § 333.101 *et seq.* (Count III) and the Pennsylvania Wage Payment and Collection Law, 43 P.S. § 260.1 *et seq.* (Count IV). I exercise subject matter jurisdiction over Mr. Fiumano’s FLSA claims pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over Mr. Fiumano’s state law claims pursuant to 28 U.S.C. § 1367. Defendants move for judgment on the pleadings on Mr. Fiumano’s claims for violations of the FLSA (Counts I & II). For the reasons that follow, I will deny Defendants’ motion.

I. BACKGROUND¹

Defendants own and operate, or previously owned and operated, Metro Diner restaurants in various states. Am. Compl. ¶¶ 8-13. At the time of the filing of the Amended Complaint, Mr. Fiumano was a server in Defendants' Bensalem, Pennsylvania restaurant, having previously worked as a server in Defendants' restaurant in Orlando, Florida. *Id.* ¶ 7. Servers are employed to wait on customers, answer customers' questions about the menu, take food and drink orders from customers, place food and drink orders, collect food and drink orders from service areas, deliver food and drinks to customers and provide excellent customer service. *Id.* ¶ 15.

Defendants require or allow Servers to perform non-tipped tasks, both related and unrelated to these duties. *Id.* ¶¶ 46-47. Tasks include: breaking down the ice machine; filling the soda machine with ice; brewing coffee and tea; filling the outside coffee station; cleaning coffee pots and tea urns; turning on the syrup warmer; refilling syrups; filling salt, pepper and sugar shakers; cutting lemons; filling creamers, butters and sauces; breaking down creamers, lemons and butters; re-stocking cups, coffee filters and tea bags; checking stock and re-stocking if needed; setting and rolling up floor mats; lining up, wiping down and cleaning under tables; putting up and taking down chairs; setting tables; clearing tables of silverware and menus; rolling silverware into napkins; checking and cleaning bathrooms as needed; cleaning the sneeze guard and window glass; filling Sanibuckets; sweeping debris from outside areas and sweeping the restaurant; wiping down outside surfaces; updating the blackboard and dinner boards; running food; bussing tables when there is no Busser; and seating guests when there is no Host. *Id.* ¶ 16.

¹ All facts are taken from the Amended Collective and Class Action Complaint (ECF No. 24) ("Am. Compl." or "Amended Complaint").

Servers spend over 20% of their work hours in any workweek performing related non-tipped tasks. *Id.* ¶ 47. Defendants pay Servers the “tip credit” minimum wage rate for all hours that they work. *Id.* ¶ 17.

Defendants require all of their Servers to participate in a “tip pool” as a condition of their employment. *Id.* ¶ 50. Defendants distribute funds from the tip pool to Bussers and Hosts who do not customarily and regularly receive tips. *Id.* ¶ 20. Mr. Fiumano claims that Hosts do not customarily and regularly receive tips because they are scheduled to work only half the hours the restaurant is open each day and Bussers do not customarily and regularly receive tips or interact with customers because they are scheduled to work only three days per week and are instructed to clear tables only after customers have departed. *Id.* ¶¶ 51-52. When a large tip pool is collected or no Bussers or Hosts are working during a particular shift, Defendants also distribute tip pool proceeds to non-tipped kitchen staff (including cooks and dishwashers), managers and supervisors or may retain some part of the tip pool for the “house.” *Id.* ¶¶ 21; 53. Kitchen staff, managers and supervisors do not customarily and regularly receive tips from customers and by virtue of their power, duties and authority in the restaurant are not permitted to participate in a tip pool. *Id.*

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(c) provides that “[a]fter the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). “Judgment will only be granted where the moving party clearly establishes there are no material issues of fact, and that he or she is entitled to judgment as a matter of law.” *DiCarlo v. St. Mary Hosp.*, 530 F.3d 255, 259 (3d Cir. 2008). There is “no material difference in the

applicable legal standards” for a motion for judgment on the pleadings under Rule 12(c) and a motion to dismiss under Rule 12(b)(6). *Spruill v. Gillis*, 372 F.3d 218, 223 n.2 (3d Cir. 2004).

In deciding a motion to dismiss under Rule 12(b)(6), a court must “accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.” *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (quoting *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)).

To survive dismissal, a complaint must allege facts sufficient to “raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In order to determine the sufficiency of a complaint under *Twombly* and *Iqbal*, a court must engage in the following analysis:

First, the court must take note of the elements a plaintiff must plead to state a claim. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.

Connelly v. Steel Valley Sch. Dist., 706 F.3d 209, 212 (3d Cir. 2013) (quoting *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 (3d Cir. 2011)).

“As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings. However, an exception to the general rule is that a ‘document *integral to or explicitly relied upon* in the complaint’ may be considered” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (citation omitted) (quoting *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996)). Thus, a court may

consider “the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant’s claims are based upon these documents.”

Mayer v. Belichick, 605 F.3d 223, 230 (3d Cir. 2010).

III. DISCUSSION

Defendants move for judgment on the pleadings on Mr. Fiumano’s FLSA claims (Counts I & II). I will deny Defendants’ motion because the facts alleged in the Amended Complaint raise a right to relief. Each count will be addressed in turn.²

A. Count I

In Count I, Mr. Fiumano claims that Defendants violate the FLSA by paying their Servers the “tip credit” minimum wage for all hours that they worked while requiring or allowing Servers to perform: (1) non-tipped tasks unrelated to their tipped occupation, and (2) non-tipped tasks that although related to their tipped occupation, exceeded 20% of their work hours in any workweek. Am. Compl. ¶¶ 46-47.

The FLSA requires employers to pay a minimum hourly wage, which is currently \$7.25 per hour. 29 U.S.C. § 206(a)(1)(C). The FLSA contains a specific provision allowing an employer, under certain circumstances, to utilize the tips of a “tipped employee” to meet its minimum wage obligations. The FLSA provides:

² In their reply, Defendants argue that Mr. Fiumano’s response to Defendants’ motion was filed a day late and therefore should not be considered by the Court. The Third Circuit has held that “a district court can depart from the strictures of its own local procedural rules where (1) it has a sound rationale for doing so, and (2) so doing does not unfairly prejudice a party who has relied on the local rule to his detriment.” *U.S. v. Eleven Vehicles, Their Equipment & Accessories*, 200 F.3d 203, 215 (3d Cir. 2000). Here, it is appropriate to depart from the strictures of the fourteen-day response period because Mr. Fiumano’s response was filed only one day late and consideration of Mr. Fiumano’s response will not unfairly prejudice any party. Therefore, Mr. Fiumano’s response will be considered.

In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employer shall be an amount equal to--

- (1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996 [\$2.13]; and
- (2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title [\$7.25].

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

29 U.S.C. § 203(m).³

The FLSA therefore allows employers to pay a “tipped employee” a cash wage of \$2.13 per hour provided that the employee’s tips make up the difference between the \$2.13 cash wage and the current federal minimum wage.⁴ *See* 29 U.S.C. § 203(m). The difference between the cash wage and the federal minimum wage is known as the “tip credit.” *See* 29 C.F.R. § 531.56(d). A “tipped employee” is defined as “any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.” 29 U.S.C. § 203(t).

The Code of Federal Regulations recognizes that an employee may be engaged in two occupations for the same employer but may only qualify as a “tipped employee” in one of those occupations. *See* 29 C.F.R. § 531.56(e) (“Dual Jobs Regulation”). In this situation, the tip credit may only be taken for the employee’s hours spent in the occupation for which he qualifies as a “tipped employee.” *Id.* The Dual Jobs Regulation states:

³ *See* 29 U.S.C. § 206(a)(1)(C) (setting federal minimum wage at \$7.25 an hour); 29 C.F.R. § 531.50 (providing that the cash wage in subsection (1) is \$2.13).

⁴ Here, Mr. Fiumano, as a server in Pennsylvania, was paid a wage of \$2.83 per hour, in accordance with Pennsylvania law. *See* Am. Compl. ¶ 17; 34 PA. CODE § 231.101(b).

In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least \$30 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.

Id.

Further explanation of this regulation is found in the Department of Labor's Field Operations Handbook, which states:

[W]here the facts indicate that tipped employees spend a substantial amount of time (*i.e.*, in excess of 20 percent of the hours worked in the tipped occupation in the workweek) performing such related duties, no tip credit may be taken for the time spent in those duties. All related duties count toward the 20 percent tolerance. Likewise, an employer may not take a tip credit for the time that a tipped employee spends on work that is not related to the tipped occupation.

U.S. Dep't of Labor, Field Operations Handbook, § 30d00(f)(3)-(4) (rev. Dec. 15, 2016) ("Handbook").

Defendants move for judgment on the pleadings on Count I. Defendants argue that the only basis for Mr. Fiumano's claim in Count I is section 30d00(f) of the Handbook. Defendants assert that this section is not entitled to deference, cannot be relied upon to state an FLSA minimum wage claim and therefore judgment on the pleadings is warranted. However, I need not decide now whether to accord deference to section 30d00(f) of the Handbook because I find that Count I raises a right to relief under the Dual Jobs Regulation.⁵

The Dual Jobs Regulation, through the use of examples, distinguishes between a tipped employee engaged in a single occupation from an employee who is engaged in two occupations

⁵ Neither side contends that the Dual Jobs Regulation is not entitled to deference.

and only qualifies as a tipped employee in one of the occupations. In one such example, the Dual Jobs Regulation states that a maintenance man in a hotel who also serves as a waiter is employed in two occupations, and may only qualify as a tipped employee with respect to his employment as a waiter. *See* 29 C.F.R. § 531.56(e). The situation of the maintenance man is contrasted with the example of a waitress who performs related duties “occasionally” and “part of [the] time,” and is therefore engaged in a single tipped occupation.⁶ *Id.*

Here, by alleging that Servers are required or allowed to perform non-tipped tasks that are unrelated to their tipped occupation, Mr. Fiumano plausibly alleges that Servers are engaged in two occupations and do not qualify as tipped employees in one such occupation, as in the Dual Jobs Regulation’s example of the maintenance man. Likewise, by alleging that Servers spend over 20% of their hours in any workweek performing non-tipped tasks related to their tipped occupation, Mr. Fiumano alleges that Servers performed these tasks greater than “occasionally” and “part of [the] time.” These allegations regarding Servers’ performance of related tasks distinguishes the Metro Diner Servers from the Dual Jobs Regulation’s example of the waitress, and Mr. Fiumano therefore alleges that the Servers are also engaged in two occupations, and do not qualify as tipped employees in performing non-tipped related tasks. Because Servers are paid the “tip credit” minimum wage for all hours worked and a tip credit may only be taken for the hours spent in the occupation in which they qualify as tipped employees, Count I raises a right to relief.⁷ Therefore, I will deny the motion for judgment on the pleadings on Count I.

⁶ The Dual Jobs Regulation also includes an example of a counterperson who prepares his own short orders or who, as part of a group of counterpersons, takes a turn as a short order cook for the group. *See* 29 C.F.R. § 531.56(e). This example is factually distinguishable from the Servers, whose related duties mirror those in the example of the waitress.

⁷ Additionally, although I need not decide whether to accord deference to section 30d00(f) of the Handbook because Count I states a claim under the Dual Jobs Regulation, I note that section 30d00(f) does provide some evidence of the Department of Labor’s thinking on the Dual Jobs Regulation.

B. Count II

In Count II, Mr. Fiumano claims that Defendants violate the FLSA by distributing funds from the mandatory tip pool to Bussers, Hosts, non-tipped kitchen staff, managers and supervisors, all of whom do not customarily and regularly receive tips, and also by allowing the “house” to retain tip pool funds. Am. Compl. ¶¶ 51-53.

As stated above, the FLSA allows for the pooling of tips “among employees who customarily and regularly receive tips.” 29 U.S.C. § 203(m). A valid mandatory tip pool can *only* include employees who customarily and regularly receive tips. *See* 29 C.F.R. § 531.54. The Code of Federal Regulations has interpreted the phrase “customarily and regularly,” as it pertains to the definition of “tipped employee,” to signify “a frequency which must be greater than occasional, but which may be less than constant.” 29 C.F.R. § 531.57.

Defendants assert that judgment on the pleadings on Count II is warranted. Defendants primarily take issue with Mr. Fiumano’s explanation as to why Hosts and Bussers are not qualified to participate in the tip pool. Defendants’ only argument regarding why Mr. Fiumano’s assertions as to the distribution of tip pool proceeds to kitchen staff, management and the “house” should fail is that Mr. Fiumano “speaks nebulously of these things happening to ‘Servers’ – but does not state that they happened to him personally.”⁸ Defs.’ Reply 9 (ECF No. 58).

Even assuming, *arguendo*, that Mr. Fiumano’s explanation as to why Hosts and Bussers are not qualified to participate in the tip pool is not cognizable, Mr. Fiumano’s claim that non-tipped kitchen staff, managers, supervisors and the “house” retained distributions from the tip

⁸ Defendants further state that “if there was any doubt as to whether Plaintiff could amend his complaint to clear up this deficiency, his deposition makes clear that he cannot make any such claim in good faith.” Defs.’ Reply 9 (ECF No. 58). This deposition is not relied upon by Mr. Fiumano in the Amended Complaint, and therefore is not considered here.

pool requires that Count II survive. Mr. Fiumano asserts that that non-tipped kitchen staff, managers and supervisors do not customarily and regularly receive tips and by virtue of their power, duty and authorities are not permitted to participate in the tip pool. Because a valid tip pool can only include employees who customarily and regularly receive tips, Mr. Fiumano has adequately alleged that the tip pool was invalid on the occasions in which these employees and the “house” participated in the tip pool. Defendants’ assertion that Mr. Fiumano has failed to allege that his tips were improperly distributed to these employees and the “house” fails at this stage because Mr. Fiumano attests in the Amended Complaint that he “is personally familiar with, and has been personally affected by, the policies and practices described in this Complaint.” Am. Compl. ¶ 7. Thus, Mr. Fiumano has adequately alleged in the Amended Complaint that his tips were distributed in a tip pool in which kitchen staff, managers, supervisors and/or the “house” participated, and has stated a claim for a violation of the FLSA.

IV. CONCLUSION

For the reasons set forth above, I will deny Defendants’ motion for judgment on the pleadings on Counts I & II of the Amended Complaint.

ORDER

AND NOW, this 12th day of March, 2018, it is **ORDERED** that Defendants' Partial Motion for Judgment on the Pleadings (ECF No. 53) is **DENIED**.

s/Anita B. Brody

ANITA B. BRODY, J.

Copies **VIA ECF** on _____ to: