

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

DIEGO PERALTA , individually, and on behalf of others similarly situated,	§	
	§	
Plaintiff,	§	Case No.
vs.	§	
	§	
OS RESTAURANT SERVICES, LLC , <i>doing business as “Fleming's Prime Steakhouse and Wine Bar”</i>	§	
	§	
Defendant.	§	

COLLECTIVE ACTION COMPLAINT WITH JURY DEMAND

Plaintiff, DIEGO PERALTA, individually and on behalf of all others similarly situated, by and through his attorneys BROWN, LLC and DEAN OMAR BRANHAM SHIRLEY, LLP hereby brings this Collective Action Complaint against Defendant, OS RESTAURANT SERVICES, LLC, doing business as “Fleming's Prime Steakhouse and Wine Bar,” and states as follows:

INTRODUCTION

1. This is a collective action brought pursuant to 29 U.S.C. § 216(b) by Plaintiff, DIEGO PERALTA (hereinafter referred to as “Plaintiff”), individually and on behalf of all similarly situated persons employed by Defendant, OS RESTAURANT SERVICES, LLC, doing business as “Fleming's Prime Steakhouse and Wine Bar”, arising from Defendant’s willful violations of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.*

2. Defendant is operates Fleming's Prime Steakhouse and Wine Bar, a nationwide steakhouse restaurant chain.

3. Plaintiff and similarly situated Servers and other Hourly-Paid Restaurant Employees (e.g. Bartenders, Bussers, and Food Runners) employed by Defendant were victims of

Defendant's common unlawful policy of suffering and permitting employees to perform work "off the clock" and without compensation before, during, and after their shifts, in violation of the FLSA's minimum-wage and overtime requirements.

4. As a result, there were many weeks in which Plaintiff and other putative FLSA Collective members did not receive the federally mandated minimum wage, as well as many weeks in which Plaintiff and other putative Collective members did not receive compensation calculated at time-and-a-half (1.5) of their regular rate of pay for all hours worked in excess of forty (40) in a workweek, in violation of the FLSA.

5. Plaintiff brings this collective action pursuant to 29 U.S.C. § 216(b) on behalf of himself and all other similarly situated Servers and other Hourly-Paid Restaurant Employees employed by Defendant in the applicable time period, and seek unpaid minimum, overtime, in addition to liquidated damages, fees and costs, and any other remedies to which they may be entitled.

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction over Plaintiff's FLSA claims pursuant to 28 U.S.C. § 1331 because Plaintiff's claims raise a federal question under 29 U.S.C. § 201, *et seq.*

7. The Court has personal jurisdiction over Defendant because it is conducted business in Texas, and has significant contacts with Texas that are related to Plaintiff's claims as well as the claims of the putative Collective, including employing Texas residents, including Plaintiff, to work in Texas.

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) and (3) because Defendant employed Plaintiff in this district and because a substantial portion of the events that give rise to the Plaintiff's claims occurred in this district.

PARTIES

9. Plaintiff DIEGO PERALTA an adult resident of Collin County, Texas.

10. Plaintiff was employed by Defendant as a Server from approximately April 2017 through October 2019. Plaintiff signed a consent form to join this lawsuit, which is attached as *Exhibit 1*.

11. Plaintiff worked in Defendant's restaurant in Plano, Texas and was paid \$2.13 per hour.

12. Defendant is a Florida Limited Liability Company with a principal business address located at 2202 North West Shore Boulevard, 5th Floor, Tampa, Florida 33607. Defendant may be served on its statutory agent Kelly Lefferts at 2202 North West Shore Boulevard, 5th Floor, Tampa, Florida 33607.

FACTUAL ALLEGATIONS

13. The FLSA applies in this case on an enterprise basis.

14. Defendant is an enterprise whose annual gross volume of sales made or business done exceeds \$500,000.

15. Defendant is an enterprise that has had employees engaged in commerce or in the production of goods for commerce, and handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

16. Defendant has employed and continues to employ Servers and other Hourly-Paid Restaurant Employees.

17. Servers and other Hourly-Paid Restaurant Employees were classified as hourly-paid, non-exempt employees.

18. Defendant maintained a common policy of requiring Servers and other Hourly-Paid Restaurant Employees to perform work off the clock at the beginning and continuing through substantial portions of their shifts.

19. Defendant maintained a common policy of requiring Servers and other Hourly-Paid Restaurant Employees to perform work off the clock towards the end of and after their scheduled shifts.

20. As a result of Defendant's failure to pay his for all hours worked, there were many weeks in which Servers' and other Hourly-Paid Restaurant Employees' total hourly wages amounted to less than \$2.13 per hour, the minimum wage applicable to tipped employees.

21. As a result of Defendant's failure to pay for all hours worked, there were many weeks in which Servers and other Hourly-Paid Restaurant Employees did not receive time-and-a-half of their regular rate of pay for all hours worked in excess of forty (40) in a workweek.

22. Defendant knew about the foregoing violations, but has willfully failed to provide Servers and other Hourly-Paid Restaurant Employees with the wages they are owed pursuant to the FLSA.

COLLECTIVE ACTION ALLEGATIONS

23. Plaintiff brings this action pursuant to 29 U.S.C. § 216(b) of the FLSA on his own behalf and on behalf of:

All persons who worked as Servers or other Hourly-Paid Restaurant Employees at any Fleming's Prime Steakhouse and Wine Bar located in the United States at any time within the period of the three (3) years prior to the commencement of this action prior to the commencement of this action through the date of judgment.

(hereinafter referred to as the “FLSA Collective”). Plaintiff reserves the right to amend this definition as necessary.

24. With respect to the claims set herein, a collective action under the FLSA is appropriate because the employees described above are “similarly situated” to Plaintiff under 29 U.S.C. § 216(b). The class of employees on behalf of whom Plaintiff brings this collective action are similarly situated because: (a) they have been or are employed in the same or similar positions; (b) they were or are subject to the same or similar unlawful practices, policy, or plan; and (c) their claims are based upon the same factual and legal theories.

25. The employment relationships between Defendant and every FLSA Collective member are the same and differ only by name, location, and rate of pay. The key legal issues are the same for every FLSA Collective member, to wit:

- a. Whether FLSA Collective members were required to perform work off the clock;
- b. Whether FLSA Collective members’ off-the-clock work resulted in a violation of the FLSA;
- c. Whether Defendant’s violations of the FLSA were willful and/or done in good faith.

26. Plaintiff estimates the FLSA Collective, including both current and former employees over the relevant period, will include over 1,000 members. The precise number of FLSA Collective members should be readily available from a review of Defendant’s personnel and payroll records.

COUNT I
(Brought Individually and as a 29 U.S.C. § 216(b) Collective Action)
Violation of the Fair Labor Standards Act, 29 U.S.C. § 201, et seq.
FAILURE TO PAY MINIMUM WAGE

27. Plaintiff re-alleges and incorporates all previous paragraphs herein.

28. 29 U.S.C. § 206(a) provides: “Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at ... not less than ... \$7.25 an hour....”

29. At all relevant times alleged herein, the minimum wage applicable to tipped employees has been \$2.13 per hour.

30. At all times relevant to this action, Defendant was an employer under 29 U.S.C. § 203(d) of the FLSA, subject to the provisions of 29 U.S.C. § 201, *et seq.*

31. Defendant is engaged in interstate commerce, or in the production of goods for commerce, as defined by the FLSA.

32. At all times relevant to this action, Plaintiff and other FLSA Collective members were “employees” of Defendant within the meaning of 29 U.S.C. § 203(e)(1) of the FLSA.

33. At all times relevant to this action, Defendant “suffered or permitted” Plaintiff and other FLSA Collective members to work and thus “employed” them within the meaning of 29 U.S.C. § 203(g) of the FLSA.

34. At all times relevant to this action, Plaintiff and other FLSA Collective members were not exempt from the protections of the FLSA.

35. At all times relevant to this action, Defendant failed to pay Plaintiff and other FLSA Collective members for all hours worked.

36. As a result of Defendant’s policy of failing to pay Plaintiff and other FLSA Collective members for all hours worked, there were many weeks in which Plaintiff and other FLSA Collective members’ hourly wages averaged out to less than \$2.13 per hour.

37. Defendant’s failure to pay Plaintiff and other FLSA Collective members minimum

wage was knowing and willful. Defendant knew that its policies resulting in Plaintiff and FLSA Collective members not being paid for time worked, and Defendant could have properly compensated Plaintiff and other FLSA Collective members for such work, but did not. *See* 29 U.S.C. § 255(a) (“[A] cause of action arising out of a willful violation [of the FLSA] may be commenced within three years....”).

38. Defendant’s failure to pay Plaintiff and other FLSA Collective members minimum wage was not done in good faith, or in conformity with or in reliance on any written administrative regulation, order, ruling, approval, or interpretation by the U.S. Department of Labor and/or any state department of labor, or any administrative practice or enforcement policy of such departments.

39. The FLSA, 29 U.S.C. § 216(b), provides that as a remedy for a violation of the Act, an employee is entitled to his or his unpaid wages (and unpaid overtime if applicable) plus an additional equal amount in liquidated damages (double damages), plus costs and reasonable attorneys’ fees.

40. Defendant is in possession and control of necessary documents and information from which Plaintiff would be able to precisely calculate damages.

COUNT II
(Brought Individually and as a 29 U.S.C. § 216(b) Collective Action)
Violation of the Fair Labor Standards Act, 29 U.S.C. § 201, et seq.
FAILURE TO PAY OVERTIME

41. Plaintiff re-alleges and incorporates all previous paragraphs herein.

42. 29 U.S.C. § 207(a)(1) provides:

[N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his

employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

43. Plaintiff and other FLSA Collective Members worked many workweeks in excess of 40 hours within the last three years.

44. At all times relevant to this action, Defendant failed to pay Plaintiff and other FLSA Collective members for all hours worked in excess of 40 in a workweek.

45. In workweeks where Plaintiff and other FLSA Collective members worked 40 hours or more, the time spent working off the clock should have been paid at the federally mandated rate of time-and-a-half (1.5) of each employee's regularly hourly wage, but Plaintiff and FLSA Collective members received no pay for such hours.

46. Defendant's failure to pay Plaintiff and other FLSA Collective members overtime wages was knowing and willful. Defendant knew that its policies resulting in Plaintiff and FLSA Collective members not being paid for time spent working, and Defendant could have properly compensated them for such work, but did not. *See* 29 U.S.C. § 255(a) (“[A] cause of action arising out of a willful violation [of the FLSA] may be commenced within three years....”).

47. Defendant's failure to pay Plaintiff and other FLSA Collective members overtime was not done in good faith, or in conformity with or in reliance on any written administrative regulation, order, ruling, approval, or interpretation by the U.S. Department of Labor and/or any state department of labor, or any administrative practice or enforcement policy of such departments.

48. The FLSA, 29 U.S.C. § 216(b), provides that as a remedy for a violation of the Act, an employee is entitled to his or his unpaid wages (and unpaid overtime if applicable) plus an additional equal amount in liquidated damages (double damages), plus costs and reasonable attorneys' fees.

49. Defendant is in possession and control of necessary documents and information from which Plaintiff would be able to precisely calculate damages.

RELIEF REQUESTED

WHEREFORE, Plaintiff, DIEGO PERALTA, requests an entry of an Order the following relief:

- a. Certifying this case as a collective action in accordance with 29 U.S.C. § 216(b) with respect to the FLSA claims set forth herein (Counts I and II);
- b. Ordering Defendant to disclose in computer format, or in print if no computer readable format is available, the names and addresses of all FLSA Collective members, and permitting Plaintiff to send notice of this action to all those similarly situated individuals, including the publishing of notice in a manner that is reasonably calculated to apprise the class members of their rights by law to join and participate in this lawsuit;
- c. Declaring Defendant willfully violated the FLSA and the Department of Labor's attendant regulations as cited herein;
- d. Granting judgment in favor of Plaintiff and against Defendant and awarding Plaintiff and the FLSA Collective the full amount of damages and liquidated damages available by law;
- e. Awarding reasonable attorneys' fees and costs incurred by Plaintiff in this action as provided by statute;
- f. Awarding pre- and post-judgment interest to Plaintiff on these damages; and
- g. Awarding such other and further relief as this Court deems appropriate.

JURY DEMAND

Plaintiff, DIEGO PERALTA, individually and on behalf of all others similarly situated, by and through his attorneys, hereby demands a trial by jury pursuant to Rule 38 of the Federal Rules of Civil Procedure and the court rules and statutes made and provided with respect to the foregoing claims.

Dated: July 31, 2020

RESPECTFULLY SUBMITTED,

By: /s/ Charles W. Branham, III

Charles W. Branham, III
Texas State Bar No. 24012323
DEAN OMAR BRANHAM SHIRLEY, LLP
302 N Market Street, Suite 300
Dallas, Texas 75202
T: (214) 722-5990
F: (214) 722-5991
tbranham@dobslegal.com
Local Counsel for Plaintiff

Jason T. Brown*
Nicholas Conlon*
BROWN, LLC
111 Town Square Place, Suite 400
Jersey City, NJ 07310
T: (877) 561-0000
F: (855) 582-5297
jtb@jtblawgroup.com
nicholasconlon@jtblawgroup.com

* to be admitted *Pro Hac Vice*

Lead Counsel for Plaintiff