UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

KRYSTAL GREEN, ET AL.	***CIVIL NO. 2: 10-0364**
VERSUS	***JUDGE TRIMBLE**
PLANTATION OF LOUISIANA, LLC., ET AL.	***MAGISTRATE JUDGE HILL**

REPORT AND RECOMMENDATION

Before the court for Report and Recommendation is the plaintiffs' Motion to Certify a Collective Action Pursuant to § 216(b) of the Fair Labor Standards Act, and to Approve a Proposed Notification to all Putative Collection Action Class Members. [rec. doc. 27]. The defendants have filed Opposition to which the plaintiffs have filed a Reply. [rec. docs. 31 and 34]. Oral Argument on the Motion was held and the Motion was taken under advisement. [rec. doc. 38].

For the following reasons, it is recommended that the plaintiffs' Motion to Certify a Collective Action Pursuant to § 216(b) of the Fair Labor Standards Act, and to Approve a Proposed Notification to all Putative Collection Action Class Members be **GRANTED in part and DENIED in part.** Accordingly, a class consisting of exotic dancers should be conditionally certified, reserving the plaintiffs' right to request conditional certification of other classes of employees holding other positions after preliminary discovery and further clarification of the pleadings.

BACKGROUND

This case involves claims arising under the Fair Labor Standards Act ("FLSA") and Louisiana state law. The plaintiffs are former exotic dancers, waitresses, shot girls, door girls, bar tenders and bouncers (floormen) of The Plantation Gentlemen's Club ("Plantation Club"), an establishment which sells alcoholic beverages and provides adult entertainment. The crux of the plaintiffs' claims under the FSLA, are the plaintiffs' allegations that The Plantation Club violated the minimum wage and overtime wage provisions of the FLSA. [rec. doc. 37, ¶ 69-79, ¶ 80-87 and ¶ 88-95]. The plaintiffs also assert that the defendants violated the FLSA by requiring an invalid tip pooling or sharing agreement, requiring tips to be split with the Plantation Club, which is not a co-employee who customarily receives tips, and co-employees (bartenders and disc jockeys) regardless of the amount of tips received. [1] [rec. doc. 37, ¶ 88-95].

The lawsuit was filed in a Louisiana state court[2] by Krystal Green, a former exotic dancer and waitress, on February 12, 2010, individually and on behalf of all others similarly

[1] Although unclear, it appears that this claim is related to the tip credit provisions of the FLSA, which under certain conditions allows a tip credit against the employer's minimum wage and overtime compensation obligations. *See* 29 U.S.C. § 203(m). The FLSA expressly prohibits employers from participating in employee tip pools. "Congress, in crafting the tip credit provision of [Section 203(m)] of the FLSA, did not create a middle ground allowing an employer both to take the tip credit and share employees' tips." *Rudy v. Consolidated Restuarant Companies, Inc.,* 2010 WL 3565418, *3 (N.D. Tex. 2010) *citing Morgan v. SpeakEasy, LLC*, 625 F.Supp.2d 632, 652 (N.D. Ill. 2007) *quoting Chung v. New Silver Palace Rest., Inc*., 246 F.Supp.2d 220, 230 (S.D. N.Y. 2002). Moreover, "[i]f tipped employees are required to participate in a tip pool with other employees who do not customarily receive tips, then the tip pool is invalid and the employer is not permitted to take a 'tip credit.' " *Id. citing Wajcman v. Inv. Corp. of Palm Beach*, 620 F.Supp.2d 1353, 1356 n. 3 (S.D. Fla. 2009) *citing* 29 U.S.C. § 203(m).

[2] The Fourteenth Judicial District Court.

situated, against the Plantation Club, and its alleged owners, Al Dicicco, Jechake, Inc., Golding Enterprises, LLC and Jerry Golding (collectively "Plantation Club"). Thereafter, by Amending Petitions and Complaints, Sarah Manuel (a former shot girl), Rebecca McKinney (a former dancer, shot girl and door girl), Ashley Nicole Spell (a former dancer and waitress), Matt Heinen (a former bartender and bouncer), Ebony Murreld (a former dancer), Kathleen Becker (a former dancer and shot girl), Ashley Broussard (a former dancer, shot girl and waitress), Abbra Tullos (a former dancer) and Florita Noelle Lee (a former dancer) were added as additional plaintiffs.[3] [rec. docs. 1-2, 17, 21 and 37]. The action was removed to this court on March 4, 2010.

Presently, the plaintiffs move to conditionally certify a collective action under 29 U.S.C. § 216(b) consisting of "[a]ll individuals, who at any time during the relevant time period, worked as an exotic dancer and/or shot girl and/or other positions at the Plantation Club, but were designated as an independent contractor and, therefore, not paid any wages. Additionally, the putative class includes all individuals, who at any time during the relevant period, were employed as waitresses, bartenders, bouncers and/or other employees who were not paid the legal minimum wage, who were not paid all of their tips collected by the Plantation Club, and/or who worked overtime and were not compensated for their overtime pay to the fullest extent of the law." [rec. doc. 37, ¶ 59].

[3]The plaintiffs job classifications were taken from the affidavits submitted in support of this Motion. Since oral argument of the instant Motion, plaintiffs have been granted leave to amend to add five more plaintiffs, who are alleged to be former dancers, waitresses, bartenders, door girls and shot girls. [rec. doc. 39-41].

Because the plaintiffs claim that the alleged FLSA violations were willful, the relevant period is alleged to date back three years from the date of filing, February 12, 2007, to the present time.[4] [rec. doc. 37, ¶ 60; rec. doc. 41, ¶ 65]. If granted conditional certification under 29 U.S.C. § 216(b), plaintiffs request that the defendants be required to produce the names and addresses of all potential collective action members, and to allow plaintiffs to send notice to putative class members. The plaintiffs additionally request that the Plantation Club be prohibited from engaging in any retaliatory activity against those who opt in to this action and from attempting to coerce potential collective action members from not opting in to this action.

It is plaintiffs' position that although they held differing job titles and classifications, their job duties, during the course of any night, overlapped. Moreover, they allege that some of the plaintiffs worked in a variety of positions during the course of their employment. They additionally argue that, despite their differing job titles and classifications, they were uniformly subjected to a single or similar set of adverse employment practices, namely, the Plantation Club's failure to pay them the statutorily mandated minimum and/or overtime wages which they claim were due.

Alternatively, they argue that conditional certification should be granted and that the plaintiffs thereafter should be placed in three subclasses based on their job classifications.

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[4]Their Sixth Amending and Supplemental Complaint, the plaintiffs allege that during the relevant period over three hundred women worked as exotic dancers and shot girls, that over one hundred men and women worked as bouncers, bartenders and waitresses, and that numerous others have worked other jobs at the Plantation Club. [rec. doc. 41, ¶ 27]. During oral argument, defense counsel advised that during the relevant time period, the Plantation Club employed three to four hundred different persons.

Plaintiffs argue that these three subclasses be defined by the manner in which each job classification was compensated, that is, no wages, wages plus tips and wages only.[5]

With regard to the challenged employment practices, plaintiffs make four general allegations. First, that the exotic dancers and shot girls were mis-classified as independent contractors as opposed to employees, and, as such, were not paid the statutory minimum wage required by the FLSA.[6] Second, that the Plantation Club failed to pay its other employees the full statutory minimum wage.[7] Third, that the Plantation Club failed to pay the exotic dancers, shot girls and its other employees overtime wages.[8] Fourth, that the exotic dancers were required to pay a portion of their tips to the Plantation Club and that the exotic dancers and waitresses were required to pay a set amount of their tips each night to bartenders and the disc jockey, and bartenders, respectively, regardless of the amount of tips they earned.[9]

The Plantation Club denies the plaintiffs' allegations and opposes collective action certification under 29 U.S.C. § 216(b). It is the Plantation Club's primary position that the

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[5]Plaintiffs propose the following subclasses: Subclass 1 – dancers and shot girls (paid no wages and tips unlawfully split, overtime claimed and wages owed); Subclass 2 – waitresses, bartenders and door girls (not paid full minimum wage and tips unlawfully split, overtime claimed and wages owed; Subclass 3 – bouncers (floormen) (overtime claimed and wages owed).

[6]*See* rec. doc. 37, ¶ ¶ 27, 29, 74, 77; rec. doc. 41, ¶ 32, 34, 79, 82.

[7]*See* rec. doc. 37 and 41, Count I.

[8]*See* rec. doc. 37 and 41, Count II.

[9]*See* rec. doc. 37,Count III, ¶ 89-93; rec. doc. 41, Count III, ¶ 94-98.

The plaintiffs additionally allege that The Plantation Club failed to properly maintain records required by the FLSA (Count IV), as well as unjust enrichment/Quantum Meruit (Count V), intentional tortious conduct of conversion (Count VI), unlawful untimely and failure to pay credit card tips (Count VII) and retaliatory and constructive discharge (Count VIII). In their Sixth Amended Complaint, plaintiff's further allege that the defendants failed to give them proper notice of the tip credit provisions of the FLSA. [rec. doc. 41, Count IX].

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