

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION**

ELECTRONICALLY
FILED
1/7/2022
U.S. DISTRICT COURT
Northern District of WV

CHASITY D. ADKINS,
Individually and on behalf
of all others similarly situated

Plaintiffs,

v.

MT. NEBO FOODS, LLC
d/b/a DEE JAY’S BBQ RIBS & GRILLE

-&-

DEWEY J. GUIDA ENTERPRISES,
INC. d/b/a DEE JAY’S BBQ RIBS AND
GRILLE,

-&-

DEWEY J. GUIDA

-&-

MICHAEL MCMULLEN

Defendants.

CASE NO. 5:22-cv-6

JUDGE Bailey

JURY DEMANDED

COLLECTIVE AND CLASS ACTION COMPLAINT

Plaintiff Chasity D. Adkins (“Plaintiff Adkins”, “Named Plaintiff”), on behalf of herself and all current and former non-exempt employees (hereinafter “Named Plaintiff and the Putative Class Members”) who worked for Mt. Nebo Foods, LLC *dba* Dee Jay’s BBQ Ribs & Grille (“Defendant Mt. Nebo”), Dewey J. Guida Enterprises, Inc. *dba* Dee Jay’s BBQ Ribs And Grille (“Defendant Guida Ent.”), Dewey J. Guida (“Defendant Guida”) and Michael McMullen (“Defendant McMullen”) (collectively, “Defendants”) at any time from approximately January 6, 2019 through the final disposition of this matter, to recover compensation, liquidated damages, and attorneys’ fees and costs pursuant to Sections 203, 207, and 216(b) of the Fair Labor Standards

Members seek all available relief under the applicable West Virginia Minimum Wage and Maximum Hours Law; W. Va. Code §§ 21-5c-1, *et seq.*, the West Virginia Payment and Collection Act, W. Va. C.S.R. 42-5-1, *et seq.*, and § 21-3-10A (“West Virginia Wage Acts”).

Named Plaintiff’s and the Putative Class Members’ FLSA claims are asserted as a collective action under Section 16(b) of the FLSA, 29 U.S.C. § 216(b), while their additional state-law claims are asserted as a class action under Fed. R. Civ. P. 23. The following allegations are based on personal knowledge as to Named Plaintiff’s own conduct and are made on information and belief as to the acts of others.

I. INTRODUCTION

1. Named Plaintiff and the Putative Class Members seek to recover minimum wages that Defendants jointly owe them and have failed to pay, in violation of 29 U.S.C. § 206(a) of the FLSA. Named Plaintiff and the Putative Class Members also allege that Defendants jointly violated 29 U.S.C. § 203(m) of the FLSA which only allows employers to pay less than minimum wage to employees who receive tips under very specific conditions. Defendants are not entitled to apply a tip credit toward the Named Plaintiff’s and the Putative Class Members’ minimum wages, as Defendants failed to (1) ensure that Named Plaintiff and the Putative Class Members retained all the tips they received and (2) establish a valid tipping pool among employees who customarily and regularly receive tips.

2. In addition, Named Plaintiff and the Putative Class Members seek to recover minimum wages Defendants jointly owe to them and have failed to pay, in violation of the West Virginia Wage Acts.

3. Accordingly, Plaintiff Adkins brings this action, individually and on behalf of all current and former non-exempt employees who worked for Defendants at any time from January 6, 2019 through the final disposition of this matter, to recover unpaid wages and related damages.

4. Named Plaintiff also prays that all similarly situated workers (Putative Class Members) be notified of the pendency of this action to apprise them of their rights and provide them an opportunity to opt-in to this lawsuit.

5. Named Plaintiff also prays that the Collective and Class Actions are certified pursuant to Section 216(b) of the FLSA and Fed. R. Civ. P. 23.

II. JURISDICTION AND VENUE

6. The jurisdiction of this Court is invoked pursuant to federal question jurisdiction under 28 U.S.C. § 1331, in that this case arises under a federal law of the United States.

7. This Court has supplemental jurisdiction over Named Plaintiff's and the Putative Class Members' West Virginia Acts claims pursuant to 28 U.S.C. § 1367 because these claims are so related to Plaintiff's and the Putative Class Members' claims under the FLSA that they form part of the same controversy.

8. Venue in the Northern District of West Virginia is proper pursuant to 28 U.S.C. § 1391(b) because a substantial part of the unlawful conduct described herein occurred within Hancock County, West Virginia, and Defendants' respective joint places of business reside in this district.

III. THE PARTIES

9. Plaintiff Adkins is an adult resident of West Virginia residing at 118 Wall Street, Weirton, West Virginia 26062 (Hancock County). From approximately February 1, 2020 through present, Named Plaintiff has worked jointly for Defendants. Named Plaintiff worked for Defendants jointly in the State of West Virginia as Server and performed work out of its facility in Hancock County, West Virginia. Named Plaintiff attaches her Notice of Consent pursuant to Section 216 (b) of the FLSA as **Exhibit 1**.

10. As a server, Named Plaintiff was an hourly, non-exempt joint employee of

11. During the course of her respective joint employment with Defendants, Named Plaintiff was not being fully and properly paid for all of her compensable hours worked because, respectively, Defendants did not properly calculate her regular rate of pay as a consequence of improper tip pooling, resulting in unpaid wages.

12. The Putative Class Members are those current and former employees respectively jointly employed by Defendants as servers at any time from January 6, 2019, through the final disposition of this matter and have been subjected to the same illegal pay system under which Plaintiff Adkins worked and was paid.

13. Defendant Mt. Nebo Foods, LLC *dba* Dee Jay's BBQ Ribs & Grille ("Defendant Mt. Nebo") is a foreign for-profit limited liability company registered in the State of Pennsylvania and is currently doing business as Dee Jay's BBQ Ribs & Grille at 380 Three Springs Dr., Weirton, West Virginia 26062 (Hancock County). Process may be served upon its registered agent and owner, Michael McMullen, at 505 Spanish Tract Road, Sewickley, Pennsylvania 15143.

14. Defendant Dewey J. Guida Enterprises, Inc. *dba* Dee Jay's BBQ Ribs and Grille ("Defendant Guida Ent.") is a domestic for-profit corporation registered in the State of West Virginia and was doing business as Dee Jay's BBQ Ribs and Grille from—in pertinent part—January 6, 2019, until approximately October of 2021, when Defendant Guida Ent. Sold Dee Jay's BBQ Ribs and Grille to Defendant Mt. Nebo, wherein the tradename Dee Jay's BBQ Ribs & Grille was created. Process may be served upon Defendant Guida Ent.'s registered agent and president, Dewey J. Guida, at 380 Three Springs Drive, Weirton, West Virginia 26062.

15. Defendant Dewey J. Guida ("Defendant Guida") is the president and registered agent of Defendant Guida Ent. Process may be served upon him at 380 Three Springs Drive, Weirton, West Virginia 26062.

16. Defendant Michael McMullen (“Defendant McMullen”) is the owner and registered agent of Defendant Mt. Nebo. Process may be served upon him at 505 Spanish Tract Road, Sewickley, Pennsylvania 15143.

IV. STATEMENT OF FACTS

17. During all times material to this complaint, Defendants jointly acted directly or indirectly, in the interest of an employer with respect to the Named Plaintiff and the Putative Class Members.

18. During all times material to this complaint, Defendants were respective joint “employers” within the meaning of the FLSA and the West Virginia Wage Acts.

19. During all times material to this complaint, Defendants were respective joint enterprises engaged in commerce or in the production of goods for commerce within the meaning of Section 3(s)(1) of the FLSA, 29 U.S.C. § 203(s)(1), in that said joint enterprises had employees engaged in commerce or in the production of goods for commerce, or had employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and in that said enterprise has had and has an annual gross volume of sales made or business done of not less than \$500,000 per year (exclusive of excise taxes at the retail level).

20. During all times material to this complaint, Named Plaintiff and the Putative Class Members have been Defendants’ joint employees pursuant the West Virginia Wage Acts and have been individual employees who were engaged in commerce or in the production of goods for commerce, or were individual employees who were handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person as required by 29 U.S.C. §§ 206-207.

21. Defendant Guida Ent. and Defendant Guida jointly employed the Named Plaintiff

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