

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

2018 FEB -2 PM 12: 27

CLERK, US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DISTRICT

TITO ALLEN, on behalf of)
himself and those similarly situated,)
)
Plaintiff,)
)
v.)
)
SAILORMEN, INC.,)
)
Defendant.)
_____)

Civil Action No.: 3:18-cv-199-J-39PDB

COMPLAINT

COMES NOW the Plaintiff, TITO ALLEN, on behalf of himself and those similarly situated (“PLAINTIFF”), and files this Complaint against Defendant, SAILORMEN, INC. (“DEFENDANT”) respectfully stating unto the Court the following:

GENERAL ALLEGATIONS

1. This is a cause of action to recover compensatory and liquidated damages, attorney fees, and other relief from DEFENDANT for violations of the Fair Labor Standards Act (“FLSA”) and Family and Medical Leave Act (“FMLA”).
2. At all material times, PLAINTIFF was a citizen and resident of Duval County, Florida.
3. At all material times, DEFENDANT was a Florida corporation, with its principal place of business in Dade County, Florida. DEFENDANT is a franchisee of Popeye’s restaurants and operates Popeye’s restaurants in Jacksonville, Florida, among other locations.

BACKGROUND

4. PLAINTIFF brings this action to require DEFENDANT to pay back wages owed to PLAINTIFF, which DEFENDANT failed to pay in violation of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201, *et seq.* PLAINTIFF seeks permanent injunctive relief and damages suffered as the result of that violation.
5. At all relevant times, DEFENDANT acted through its officers, agents, servants and employees.
6. At all relevant times, DEFENDANT had annual gross sales in excess of \$500,000.00 and two or more employees who regularly handled goods that moved in or were produced for interstate commerce.
7. At all relevant times, DEFENDANT was an enterprise engaged in commerce as defined at 29 U.S.C. § 203.
8. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1337 and by 29 U.S.C. § 216(b).
9. In or around 2010, PLAINTIFF was hired as a back of the house worker in DEFENDANT'S store in Jacksonville, Florida.
10. The additional persons who may become Plaintiffs in this action are DEFENDANT'S current and former employees, who worked hours for DEFENDANT, but were not compensated for those hours worked because DEFENDANT required them to perform work "off the clock" in violation of the minimum wage provisions of the FLSA and frequently the overtime provisions of the FLSA. This occurred in DEFENDANT'S Jacksonville, Florida store and was done at the direction of DEFENDANT'S store managers.

11. At all relevant times, PLAINTIFF was supposed to work 30 or 40 hours per week for DEFENDANT. When PLAINTIFF was first hired, he worked more hours, but after the Affordable Care Act was passed, DEFENDANT capped the hours of PLAINTIFF and those similarly situated so they would not work in excess of 30 hours per week on the clock.
12. DEFENDANT failed to pay PLAINTIFF and those similarly situated for all the time they worked. Instead, DEFENDANT frequently required PLAINTIFF and those similarly situated to work off the clock. This included work performed by PLAINTIFF, and those similarly situated, off-the clock, including at the beginning and end of their shifts and working through lunch breaks after DEFENDANT instructed them to clock out but continue to work.
13. During his time as DEFENDANT'S employee, PLAINTIFF routinely performed work before and after his shift off the clock, worked through lunch, and stayed late, causing him to routinely work more than 40 hours per week.
14. The FLSA requires an employer to pay its employees at a rate of at least one and one-half their regular rate for time worked in one work week over 40 hours. This is commonly known as "time-and-a-half pay for overtime work."
15. Despite working overtime, PLAINTIFF was frequently not paid time and one-half pay from DEFENDANT for overtime worked. In fact, sometimes PLAINTIFF was not paid at all for any hours he worked beyond 30 hours per week, despite routinely being required to work more than 30 hours per week.
16. Upon information and belief, DEFENDANT has, since the beginning of PLAINTIFF'S employment, willingly, deliberately and intentionally refused to pay PLAINTIFF and

the similarly situated employees for time actually worked, and for time and one-half pay for overtime worked when she worked over forty hours per week.

17. PLAINTIFF and the similarly situated employees are, therefore, owed compensation for time actually worked but not paid, and time and one-half overtime wages and back wages by DEFENDANT, who willingly and knowingly withheld those wages.

COUNT I
VIOLATION OF THE FAIR LABOR STANDARDS ACT

18. The General Allegations and Background above are hereby incorporated by reference as though fully set forth herein.
19. DEFENDANT regularly engages in commerce and its employees, including PLAINTIFF, and the similarly situated employees, handled and used materials, which have moved in interstate commerce.
20. At all relevant times, DEFENDANT was an employer within the meaning of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201, *et seq.* and is subject to the provisions of the Act.
21. PLAINTIFF and the similarly situated employees at all relevant times were non-exempt employees of DEFENDANT, as defined by the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201, *et seq.*
22. During PLAINTIFF'S employment with DEFENDANT, PLAINTIFF performed work for which he was not compensated and in addition, overtime work for which no additional compensation was paid to him by DEFENDANT in violation of the provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201, *et seq.* More specifically, DEFENDANT violated §7 of the FLSA by failing to pay time and one-half overtime wages to PLAINTIFF and the similarly situated employees when

- they were hourly, non-exempt employees who earned overtime pay.
23. Upon information and belief, DEFENDANT'S pay system was unilaterally imposed upon PLAINTIFF and the similarly situated employees.
 24. DEFENDANT'S failure to compensate PLAINTIFF and the similarly situated employees for all compensable hours violates the minimum wage provisions of the FLSA and the regulations thereunder.
 25. DEFENDANT'S failure to properly administer a scheme of compensation, including, but not limited to, actual time, overtime and/or comp time compensation violates the overtime provisions of the FLSA and the regulations thereunder.
 26. DEFENDANT'S failure to compensate PLAINTIFF and the similarly situated employees for all compensable hours was a willful and knowing violation of the FLSA.
 27. As a result of DEFENDANT'S willful and knowing failure to properly compensate PLAINTIFF and the similarly situated employees, PLAINTIFF and the similarly situated employees have suffered substantial delays in receipt of wages owed and damages.
 28. DEFENDANT'S failure to properly administer a compensation scheme for overtime was a willful and knowing violation of the FLSA.
 29. Pursuant to 29 U.S.C. §§207 and 216, DEFENDANTS owe PLAINTIFF and the similarly situated employees compensation for unpaid work, compensation for overtime work, and an additional equal amount as liquidated damages, together with an additional sum for attorney's fees and costs.
 30. All conditions precedent to maintaining this action have occurred or otherwise been waived.

WHEREFORE, PLAINTIFF and the similarly situated employees demand judgment against DEFENDANT and respectfully pray the Court that PLAINTIFF and those similarly situated will recover nominal damages, unpaid overtime wages, liquidated damages, pre- and post-judgment interest, attorney fees, and other relief by reason of DEFENDANT'S violations of the FLSA; for a trial by jury on all issues so triable; for an Order enjoining DEFENDANT from continuing its practice of having employees perform work "off the clock", and, for such other and further relief as the Court may deem just and proper.

COUNT II
BREACH OF CONTRACT

31. The General Allegations and Background above are hereby incorporated by reference as though fully set forth herein.
32. DEFENDANT agreed to pay PLAINTIFF an hourly rate of minimum wage or slightly above minimum wage for each hour he worked.
33. DEFENDANT breached its agreement with PLAINTIFF by requiring him to perform work off the clock and not compensating him for all the hours he worked.
34. PLAINTIFF estimates that he worked ten or more hours off the clock each week throughout his employment.
35. Pursuant to Florida Statute 448.01, *et seq.*, PLAINTIFF is entitled to attorney's fees if he is successful in this breach of contract claim.

WHEREFORE, PLAINTIFF demands judgment against DEFENDANT and respectfully prays the Court that PLAINTIFF will recover unpaid wages, benefits and other economic relief, pre- and post-judgment interest, attorney fees and costs of litigation, and other relief by reason of

DEFENDANT'S breach of contract; for a trial by jury on all issues so triable; and, for such other and further relief as the Court may deem just and proper.

Dated: January 31, 2018

Respectfully submitted,

THE LAW OFFICE OF MATTHEW BIRK

/s/ Matthew W. Birk

Matthew W. Birk

Florida Bar No.: 92265

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Gainesville, FL 32601

(352) 244-2069

(352) 372-3464 FAX

mbirk@gainesvilleemploymentlaw.com

ATTORNEYS FOR PLAINTIFF

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM)

<p>I. (a) PLAINTIFFS TITO ALLEN, on behalf of himself and others similarly situated.</p> <p>(b) County of Residence of First Listed Plaintiff <u>Duval</u> <i>(EXCEPT IN U.S. PLAINTIFF CASES)</i></p> <p>(c) Attorneys (Firm Name, Address, and Telephone Number) The Law Office of Matthew Birk, LLC, 309 NE 1st St., Gainesville, FL 32601 (352) 244-2069</p>	<p>DEFENDANTS SAILORMEN, INC.</p> <p>County of Residence of First Listed Defendant _____ <i>(IN U.S. PLAINTIFF CASES ONLY)</i></p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
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<p>II. BASIS OF JURISDICTION <i>(Place an "X" in One Box Only)</i></p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="checkbox"/> 3 Federal Question <i>(U.S. Government Not a Party)</i></p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 4 Diversity <i>(Indicate Citizenship of Parties in Item III)</i></p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES <i>(Place an "X" in One Box for Plaintiff and One Box for Defendant)</i></p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;"></td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> <td style="width:33%;"></td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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IV. NATURE OF SUIT *(Place an "X" in One Box Only)* Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<p>PERSONAL INJURY</p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<p>PERSONAL INJURY</p> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/ Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <p>PERSONAL PROPERTY</p> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 425 Withdrawal 28 USC 157 <p style="text-align: center;">PROPERTY RIGHTS</p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <p style="text-align: center;">SOCIAL SECURITY</p> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 865 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/ Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	FEDERAL TAX SUITS	
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/ Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<p>Habeas Corpus:</p> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <p>Other:</p> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<input checked="" type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS--Third Party 26 USC 7609	
IMMIGRATION					
<input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions					

V. ORIGIN *(Place an "X" in One Box Only)*

1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from Another District (specify)
 6 Multidistrict Litigation - Transfer
 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity):*
29 U.S.C. 216

Brief description of cause:
Unpaid wages for work performed off the clock

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMANDS

CHECK YES only if demanded in complaint:
 JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY *(See instructions):*

JUDGE _____ DOCKET NUMBER _____

DATE: 01/31/2018 SIGNATURE OF ATTORNEY OF RECORD: s/Matthew W. Birk

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP JUDGE 39 MAG. JUDGE PDB

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Lawsuit Against Popeye's Seeks to Sink Allegedly Unlawful Pay Practices](#)
