

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

CASE NO. _____ - CIV- _____ / _____

MARIA RIVERA,
on her own behalf and others similarly situated,

Plaintiff,

v.

EL TAMARINDO CAFÉ, LLC,
a Florida Limited Liability Company, and
NESTOR A. AMAYA, an individual,

Defendants.
_____ /

COMPLAINT

Introduction

Plaintiff, MARIA RIVERA (“Plaintiff”), on her own behalf and the employees similarly situated to her, hereby sues Defendants, EL TAMARINDO CAFÉ, LLC (hereinafter, “EL TAMARINDO”), a Florida Limited Liability Company, and NESTOR A. AMAYA, individually (collectively referred to as “Defendants”), for failing to pay minimum wages to all servers/waitpersons, however variously titled (hereinafter referred to as “servers”) pursuant to 29 U.S.C. §201 *et seq.* (hereinafter the “FLSA”) and the Florida Minimum Wage Act, Florida Statutes §448.110, and Fla. Const. Art. X §24. As a separate causes of action pertaining to MARIA RIVERA only, Plaintiff sues Defendant, EL TAMARINDO, for gender discrimination and retaliation, in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended, and Florida Civil Rights Act, §§ 760.01, *et seq.*, Fla. Stat. (2011) (“FCRA”), and for unlawful termination pursuant to Florida’s Whistleblower Act, F.S. §448.102.

1. At all times material to this Complaint, Defendants have owned and operated a restaurant since its opening for at least five years prior to the filing of this Complaint, in Fort Lauderdale, Broward County, Florida within the jurisdiction of this Court.

2. Plaintiff, MARIA RIVERA, is an individual residing in Broward County, Florida.

3. At all times material to this Complaint, Defendants orchestrated a common policy and practice of requiring servers to pool their tips with the Defendants' managers, who do not customarily and regularly receive tips from customers while paying servers the minimum wage minus the tip credit, while requiring servers to tip out managers.

4. At all times material to this Complaint, Defendants failed to timely pay its servers their weekly pay checks. To wit, during several workweeks spanning over the last five years or more, Defendants failed to timely pay its employees, including the Plaintiff, wages on its designated pay days. Accordingly, each time Defendants failed to pay the Plaintiff on the regular pay day, a minimum wage violation occurred whereby the Plaintiff, and others similarly situated, became entitled to an award of minimum wage liquidated damages.

5. Defendants conduct, as described above, shows that they engaged in a pattern and practice of avoiding their obligation to pay employees in a timely manner as required by law, thus creating a minimum wage violation for each week in which late payments occurred. An untimely paycheck is a violation of the Fair Labor Standards Act. See Yuetter-Beacham v. Med. Career Inst. of S. Fla., No. 9:15-CV-80226-ROSENBERG/BRANNON, 2015 U.S. Dist. LEXIS 96039, at *3 (S.D. Fla. July 23, 2015) relying on Biggs v. Wilson, 1 F.3d 1537, 1544 (9th Cir. 1993).

6. At all times material, Defendants systemically shaved time from Plaintiff, and other similarly situated servers, so that the amount of wages paid to its employees was less than what the employees actually worked, thus illegally reducing labor costs.

7. Defendants violated the FLSA and Florida Constitution by failing to pay class members within the past five (5) years at least the full minimum wage for all hours worked pursuant to the FLSA, the Florida Minimum Wage Act, and Fla. Const. Art X §24(c) (“Employers *shall* pay Employees Wages no less than the Minimum Wage for *all* hours worked in Florida.”) (emphasis added).

8. Plaintiff and proposed class members were/are hourly paid servers who have worked for Defendants within the last five (5) years at Defendants’ restaurants in Fort Lauderdale, Florida.

9. Plaintiff and the proposed class members were subjected to the same violations of the Florida Minimum Wage Act, Florida Statutes §448.110, and Fla. Const. Art. X §24. More specifically: (a) all servers were unlawfully required to pool their tips, which tips were shared with management; (b) all servers were not paid their weekly pay checks on time, many times as much as five to six weeks late; and (c) all servers were not paid for all hours worked.

10. Plaintiff and the proposed class members were subjected to the same violation of the FLSA. Specifically, all servers were unlawfully required to share tips with non-tipped employees. The class of similarly situated employees, potential class members sought to be certified, under 29 U.S.C. §216(b) is defined as:

“All persons who worked for Defendants as servers during the three (3) years preceding this lawsuit and who were not paid at least the full minimum wage pursuant to the FLSA for each hour worked,”

with the precise size and the identity of the FLSA Class should be ascertainable from the business records, tax records, and/or employee or personnel records of Defendants.

11. Plaintiff also seeks class certification under Fed. R. Civ. P. 23 of the following state law class under Florida state law:

“All persons who worked for Defendants as servers during the five (5) years preceding this lawsuit, and who were not paid at least the full minimum wage pursuant to Fla. Const. Art. X § 24(c) for each hour worked.”

12. At all times material to this Complaint, NESTOR A. AMAYA has managed and/or operated and regularly exercised the authority to hire and fire employees, determined the work schedules of Plaintiff and Defendants' other employees, set the rate pay of employees, and/or controlled the finances and operations of EL TAMARINDO. By virtue of such control and authority, NESTOR A. AMAYA was an employer of Plaintiff and the other similarly situated servers as such term is defined by the Florida Minimum Wage Act and the FLSA, 29 U.S.C. §203(d).

Jurisdiction & Venue

13. This action is brought under the FLSA and Florida law to recover from Defendants minimum wages, liquidated damages, and reasonable attorneys' fees and costs. This action is intended to include each and every hourly paid server who worked for Defendants at any time within the past five (5) years. RIVERA brings separate claims for gender discrimination and retaliatory discharge predicated on both federal and Florida law.

14. This Court has jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. §1331 and the FLSA and Title VII of the Civil Rights Act of 1964, and supplemental jurisdiction over Plaintiff's Florida Constitution claim, gender discrimination claim and retaliatory discharge claims pursuant to 28 U.S.C. §1367 because the acts and omissions that give rise to Plaintiff's state law claims are so related to claims in the federal causes of action that they form part of the same case or controversy under Article III of the United States Constitution.

15. This Court has jurisdiction and venue over this complaint as Plaintiff resides in this District, and each of Defendants' violations of the FLSA, Title VII, the Florida Constitution, the Florida Civil Rights Act and Florida' Whistleblower Act took place in Broward County, Florida.

General Factual Allegations

16. At all times material to this Complaint, Plaintiff worked for Defendants at their

restaurants located in Fort Lauderdale, Broward County, Florida.

17. Plaintiff, MARIA RIVERA, worked for Defendants as a server and cashier between approximately December 5, 2009, and September 2014.

18. At all times material to this Complaint, Defendants paid Plaintiff and the other similarly situated servers pursuant to a “tip credit” method, meaning at an hourly rate of the minimum wage minus a tip credit.

19. At all material times material to this Complaint within the last five (5) years: (a) Defendants deducted a tip credit of, *inter alia*, \$3.02/hour [$\$8.05/\text{hour} - \$5.03/\text{hour} = \$3.02/\text{hour}$] and required Servers to pool their tips and share them with management; (b) failed to pay servers their weekly pay checks on time, many times as much as five to six weeks late; and (c) failed to pay servers for all hours worked.

20. At all times material to this Complaint, EL TAMARINDO has had two (2) or more employees who have regularly sold, handled, or otherwise worked on goods and/or materials that have been moved in or produced for commerce. In this regard, Plaintiff alleges based upon information and belief and subject to discovery, that at all times material to this Complaint, EL TAMARINDO has employed two (2) or more employees who, *inter alia*: (a) regularly handled and worked on kitchen and commercial equipment—including but not limited to refrigerators and freezers, ovens, grills, fryers, blenders, coffee machines, stoves—that were goods and/or materials moved in or produced for commerce; (b) regularly handled and worked with food, beverages, and alcohol—including but not limited to cheese, meats, fish, vegetables, imported wines and beers, — that were goods and/or materials moved in or produced for commerce; and (c) regularly processed credit card transactions for payments by and for Defendants’ customers through banks and merchant services for credit card companies such as Visa, Mastercard, and American Express.

21. Based upon information and belief, the annual gross sales volume of EL TAMARINDO has been in excess of \$500,000.00 per annum at all times material to this Complaint.

22. At all times material to this Complaint, EL TAMARINDO's employees ran credit card transactions which transacted business in interstate commerce on a daily basis and also handled such goods as napkins, silverware, appliances, food items, and restaurant equipment which had travelled in interstate commerce on a daily basis.

23. At all times material to this Complaint, EL TAMARINDO has been an enterprise engaged in interstate commerce or in the production of goods for commerce as defined by the FLSA, 29 U.S.C. §203(s), and within the meaning of the Florida Minimum Wage Act.

24. Defendants are in the business of providing food and drinks to the general public.

25. Defendants have jointly employed Plaintiff and other servers ("class members" or the "class") at Defendants' restaurants since inception within the last five (5) years.

26. Plaintiff and the class members have worked for Defendants in Florida without being paid at least the full minimum wage for all hours worked due to Defendants' illegal policy and practice of requiring Plaintiff and class members to share tips with non-tipped employees who do not customarily and regularly receive tips from customers, not paying Plaintiff and class members on time, and not paying Plaintiff and class members for all hours worked.

27. Plaintiff and all similarly situated employees have regularly performed a specific job for Defendants, i.e. serving food and/or and drinks, which is an integral part of the restaurant business of Defendants.

28. Defendants utilized the tip credit and paid Plaintiff and all similarly situated servers below the applicable tipped minimum wage.

29. Notwithstanding Defendants' preference to pay Plaintiff and the class members through the tip credit, Defendants chose to require Plaintiff and other servers to participate in a tip

pool contribution plan that includes traditionally non-tipped employees.

30. Likewise, Defendants have not paid the Plaintiff, and others similarly situated, timely and for all hours worked.

31. Based upon the foregoing practices, Defendants violated and continue to violate the terms of the tip-credit and the FLSA's and Florida Constitution's provision on minimum wages.

32. As a result of Defendants' common policies, Plaintiff and each similarly situated server is entitled to receive \$3.02/hour for each hour worked as repayment for the tip credit improperly deducted from their wages, as well as the amount of their tips improperly shared with traditionally non-tipped employees.

33. More specifically, as a result of Defendants' tip credit violations, Plaintiff, MARIA RIVERA, alleges she is entitled to an additional \$3.02 per hour for her regular hours worked as repayment for the tip credit improperly deducted from her wages, as well as the amount of her tips improperly shared with traditionally non-tipped employees, along with liquidated damages in an amount equal to her unpaid minimum wages.

34. The additional persons who may become plaintiffs in this action are employees who are similarly situated to Plaintiffs (i.e. servers, waitpersons, however variously titled) in that they customarily and regularly received tips from and interacted with Defendants' customers and who suffered from the same pay practice of being paid only the tipped minimum wage while improperly being required to share tips with traditionally non-tipped employees, specifically managers, who do/did not customarily and regularly receive tips from customers or regularly interact with customers.

35. Based upon information and belief, the records, to the extent any exist, concerning the number of hours worked and amounts paid to Plaintiffs and other similarly situated servers are in the possession and custody of Defendants.

Collective/Class Factual Allegations

36. Class members are treated equally by Defendants. Plaintiff sues on her own behalf and on behalf of a class of persons under Rules 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure.

37. Defendants subjected class members to the same illegal practice and policy by forcing the class members to participate in a tip pool contribution plan that includes traditionally non-tipped employees, not paying their servers their weekly pay checks on time, and not paying their servers for all hours worked.

38. Based upon information and belief, Defendants have employed over twenty (20) class members who were paid pursuant to a tip credit within the past five (5) years. The exact number of members of each class can be determined by reviewing Defendants' records.

39. Defendants pay class members in the same manner as Plaintiff, deducting a tip credit of, *inter alia*, \$3.02/hour and requiring Servers to share tips with non-tipped employees who do not customarily and regularly receive tips from customers, not paying Plaintiff and class members on time, and not paying Plaintiff and class members for all hours worked

40. Additionally, Defendants have failed to keep accurate time and pay records for Plaintiffs and all class members pursuant to 29 U.S.C. §211(c) and 29 C.F.R. Part 516.

41. Defendants' failure to keep accurate time and pay records casts the burden on Defendants to disprove the testimony of Plaintiff and all class members regarding the illegal deductions which they were subjected to by Defendants.

42. At all times material to this Complaint, Defendants violated the FLSA and Fla. Const. Art. X § 24 by improperly taking the tip credit. Defendants have acted willfully in failing to pay Plaintiff and the class members in accordance with the law.

43. Plaintiff has retained the undersigned counsel to represent her in this action, and

pursuant to 29 U.S.C. §216(b) and Florida law, Plaintiff is entitled to recover all reasonable attorneys' fees and costs from Defendants.

44. The claims under the FLSA may be pursued by those who opt-in to this case pursuant to 29 U.S.C. § 216(b).

45. The claims under the Florida Constitution may be pursued by all similarly situated persons who choose not to opt-out of the state law sub-class pursuant to Fed. R. Civ. P. 23.

46. The exact number of members of each class can be determined by reviewing Defendants' records. However, Plaintiff reasonably believes that there are over 20 eligible individuals in the defined class.

47. Plaintiff will fairly and adequately protect the interests of the class and has retained counsel that is experienced and competent in class action and employment litigation.

48. Plaintiff has no interests that are contrary to, or in conflict with, the members of the class.

49. A collective/class action suit, such as the instant one, is superior to other available means for fair and efficient adjudication of the lawsuit. The damages suffered by individual members of the class may be relatively small when compared to the expense and burden of litigation, making it virtually impossible for members of the class to individually seek redress for the wrongs done to them.

50. A collective and class action is, therefore, superior to other available methods for the fair and efficient adjudication of the controversy. Absent these actions, many members of the class likely will not obtain redress of their injuries and Defendants will retain the proceeds of their violations of the FLSA and the Florida Constitution.

51. Further, even if every member of the class could afford individual litigation against Defendants, it would be unduly burdensome to the judicial system. Concentrating the litigation in

one forum will promote judicial economy and parity among the claims of individual members of the class and provide for judicial consistency.

52. There is a well-defined community of interest in the questions of law and fact affecting the class as a whole. The questions of law and fact common to the class predominate over any questions affecting solely the individual members. Among the common questions of law and fact are:

- a) Whether Defendants' employed servers within the meaning of the applicable statutes, including the FLSA;
- b) Whether servers were uniformly, willfully and wrongfully paid the tipped minimum wage;
- c) Whether Defendants failed to pay Plaintiff and members of the class all minimum wages owed to them, including all hours worked;
- d) Whether Defendants' late payment of pay checks to Plaintiff and members of the class constitutes a minimum wage violation for each occurrence.
- e) Whether Plaintiff and the class members were required to participate in an illegal tip pool plan;
- f) What remedies are appropriate compensation for the damages caused to Plaintiff and each member of the class; and
- g) Whether Defendants' failure to compensate Plaintiff and the Class Members at the applicable minimum wage rates was willful, intentional or done with reckless disregard.

53. The relief sought is common to the entire class including, *inter alia*:

- a) payment by the Defendants of actual damages caused by their failure to pay minimum wages pursuant to the FLSA and Florida Constitution;

b) payment by the Defendants of liquidated damages caused by their failure to pay minimum wages pursuant to the FLSA and Florida Constitution;

c) payment by the Defendants of the costs and expenses of this action, including the attorneys' fees of Plaintiff's counsel.

d) that Defendants cease and desist from their illegal practices of: (i) forcing servers to share tips with employees who do not regularly and customarily receive tips; (ii) paying its servers late; and (iii) not paying its servers for all hours worked.

54. Plaintiff's claims are typical of the claims of members of the class. Plaintiff and members of the class have sustained damages arising out of the same wrongful and uniform employment policy of Defendants – to wit, the policy requiring servers to share tips with managers– in violation of the FLSA and the Florida Constitution, failure to pay its servers on time – to wit, a minimum wage violation for each occurrence; and failing to pay its servers the tip credit wage for all hours worked.

55. At the time of the filing of this Complaint, Plaintiff knows of no difficulty that will be encountered in the management of this litigation that would preclude its continued maintenance.

FIRST CAUSE OF ACTION
MINIMUM WAGE VIOLATIONS OF THE FAIR LABOR STANDARDS ACT,
29 U.S.C. §216(b)

56. Plaintiff realleges and reincorporates all allegations contained in Paragraphs 1 through 55 as though fully stated herein.

57. At all times material to this Complaint, Defendants have been, and continue to be, employers engaged in interstate commerce and/or the production of goods for commerce, under the FLSA.

58. At all times material to this Complaint, Defendants employed Plaintiff and continued to employ similarly situated servers.

59. As set forth above, Defendants have at all times material to this Complaint, utilized a policy and practice of forcing their servers to share tips with managers, who are traditionally non-tipped employees, failed to pay their servers weekly pay checks, on time, and failed to pay their servers for all hours worked.

60. Defendants' policy and practice violates the FLSA's tip credit and minimum wage provisions.

61. Defendants' failure to pay Plaintiff and other servers the full minimum wage is a violation of 29 U.S.C. §206.

62. Because any notice provided to Plaintiff and Class Members regarding Defendants' intention to utilize the tip-credit included a notice that tips would be shared with managers, who did not regularly or customarily receive tips or interact with the public, Defendants never provided Plaintiff or her co-workers with proper notice required by the 29 U.S.C. §203(m), and its implementing regulations, and thus was not entitled to count any amount of Plaintiff's and other class members' tips toward satisfying Defendants' minimum wage obligation.

63. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. §255(a).

WHEREFORE, Plaintiff, MARIA RIVERA, on her own behalf and other similarly situated servers, demands judgment against Defendants, jointly and severally, EL TAMARINDO and NESTOR A. AMAYA, for unpaid minimum wages, an additional and equal amount of liquidated damages, reasonable attorneys' fees and costs incurred in this action, and any and all further relief that this Court determines to be just and appropriate.

SECOND CAUSE OF ACTION
VIOLATION OF THE FLORIDA CONSTITUTION, ART. X, § 24

64. Plaintiff realleges and reincorporates all allegations contained within Paragraphs 1 through 55 above as though fully stated herein.

65. Plaintiff and the other similarly situated servers are/were entitled to be paid the full minimum wage for each hour worked during their employment with Defendants within the last five (5) years.

66. During her employment with Defendants, Plaintiff and those similarly situated servers were forced to share their tips with managers, traditionally non-tipped employees.

67. Defendants willfully failed to pay Plaintiff and those similarly situated servers the full minimum wage for one or more weeks of work contrary to Article X, Section 24 of the Florida Constitution.

68. As a direct and proximate result of Defendants' deliberate underpayment of wages, Plaintiff and the other similarly situated servers have been damaged in the loss of minimum wages and the loss of amounts improperly taken from their tips and shared with managers for one or more weeks of work with Defendants within the past five (5) years, have been subject to a untimely payment of wages, and have not been paid for all hours worked.

WHEREFORE, Plaintiff, MARIA RIVERA, on her own behalf and other similarly situated servers, demands judgment against Defendants, jointly and severally, EL TAMARINDO and NESTOR A. AMAYA, for unpaid minimum wages, tips improperly shared with traditionally non-tipped employees (managers), late payment damages, unpaid minimum wages for hours shaved from their pay checks, an additional and equal amount of liquidated damages, reasonable attorneys' fees and costs incurred in this action, an Order requiring Defendants to cease and desist from its unlawful practices and any and all further relief that this Court determines to be just and appropriate.

THIRD CAUSE OF ACTION
UNLAWFUL GENDER BASED HARASSMENT, DISAPARATE TREATMENT, AND
RETALIATION IN VIOLATION OF 42 U.S.C. §2000e – TITLE VII OF THE CIVIL
RIGHTS ACT OF 1964

69. This is a gender discrimination claim brought pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, by MARIA RIVERA, a female server who was

employed by EL TAMARINDO CAFÉ. EL TAMARINDO CAFÉ favored its male employees and treated RIVERA differently because of her gender. Plaintiff seeks all legal and equitable relief available under Title VII, costs, and reasonable attorney's fees.

70. At all material times, RIVERA was protected by Title VII because she is a female and because she was treated adversely because of her gender. She was at all material times an "employee" as contemplated by Title VII as well as the Florida Civil Rights Act.

71. At all material times, EL TAMARINDO CAFÉ was RIVERA's "employer" as contemplated by Title VII as well as the Florida Civil Rights Act.

72. RIVERA, on or about September 11, 2014, filed a Charge of Discrimination with the Equal Employment Opportunity Commission, which assigned it the Case Number 510-2014-05168, which filing also perfected Plaintiff's rights under the Florida Civil Rights Act.

73. The EEOC issued a Notice of Right to Sue dated September 8, 2016, within 90 days of receipt of which RIVERA has filed this action. Accordingly, RIVERA has exhausted all required administrative-remedies, entitling her to maintain a civil action.

74. All other conditions precedent to the filing of this claim have been performed or waived.

75. Between approximately June 2014 and late August 2014, EL TAMARINDO subjected Plaintiff to harassment and disparate treatment because of her gender, female, and retaliated against Plaintiff because she complained about and objected to Defendants' unlawful gender discrimination.

76. From December 2009 through May 2014, approximately four and a half years, Plaintiff worked for Defendant as a tipped server, which was a rewarding and well-paying position. During this time, Plaintiff performed the job of server satisfactorily and was known to be one of Defendant's best and most experienced server. Accordingly Plaintiff was qualified to perform the

job of a server.

77. Sometime in June 2014, after a female server had filed a lawsuit against the Defendant alleging unpaid wages, Defendant made the decision to replace all of the female servers with males.

78. Rather than immediately terminating its female servers, Defendant demoted all of the female servers to positions of cashiers and hostesses, which are less desirable positions because servers earn substantially more money.

79. After Plaintiff complained, she was subjected to a hostile work environment that was permeated with derogatory and sexist remarks, such as—“men are stronger” and “men can work longer”.

80. Plaintiff continued to complain to EL TAMARINDO’s managers about the gender discrimination ongoing in Defendants’ workplace but management failed to take prompt, remedial action to the prevent the discrimination from continuing and instead reduced Plaintiff’s hours and would only allow her to work as a cashier, thus refusing to allow Plaintiff to work as a server.

81. Finally, in September 2014, after Plaintiff took a pre-approved vacation, Defendant notified Plaintiff upon her return to work that Defendants were terminating Plaintiff’s employment for purportedly abandoning her job, which allegation Plaintiff expressly denied.

82. The reason asserted by Defendants for Plaintiff’s termination in September 2014 was false and known to be false by Defendants, as it was a pretext for unlawful gender discrimination and retaliation in violation of 42 U.S.C. §2000e-2 and F.S. §448.102 *et seq.*

83. 42 U.S.C. §2000e-2 provides:

(a) **Employer practices**

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

84. Defendant's actions, as described above, subjected Plaintiff to disparate treatment, which was motivated by Plaintiff's gender, female, in violation of 42 U.S.C. §2000e-2.

85. Defendant's actions, as described above, subjected Plaintiff to unlawful retaliation, which was motivated by Plaintiff's complaints of illegal gender discrimination, in violation of 42 U.S.C. §2000e-2.

86. Plaintiff has suffered and continues to suffer loss of earnings, emotional distress, loss of self-esteem, and other injuries and damages as a direct result of EL TAMARINDO's violations of 42 U.S.C. §2000e-2.

87. Pursuant to 42 U.S. Code § 2000e-5(g), Plaintiff is entitled to recover her reasonable attorneys' fees and costs from EL TAMARINDO.

WHEREFORE, Plaintiff, MARIA RIVERA demands judgment against Defendant, EL TAMARINDO, for back pay, employment benefits, other compensation including bonuses, compensatory damages, equitable relief including but not limited to front pay, injunctive relief, interest, attorneys' fees, costs, expert fees and such other and further relief as this Honorable Court deems proper.

FOURTH CAUSE OF ACTION
UNLAWFUL GENDER BASED HARASSMENT, DISAPARATE TREATMENT, AND
RETALIATION IN VIOLATION OF THE FLORIDA CIVIL RIGHTS ACT,
F.S. § 760.01, ET SEQ (FCRA)

88. Plaintiff, MARIA RIVERA, reasserts and reaffirms the allegations of Paragraphs 70 through 82 and further states that this is an action against EL TAMARINDO for violations of the Florida Civil Rights Act, F.S. §760.01, *et seq.*

89. F.S. §760.10 provides:

Unlawful employment practices.—

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

(2) It is an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status or to classify or refer for employment any individual on the basis of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

90. Defendant's actions, as described above, subjected Plaintiff to disparate treatment, which was motivated by Plaintiff's gender, female, in violation of Florida Statute §760.10.

91. Defendant's actions, as described above, subjected Plaintiff to unlawful retaliation, which was motivated by Plaintiff's complaints of illegal gender discrimination, in violation of Florida Statute §760.10.

92. Plaintiff has suffered and continues to suffer loss of earnings, emotional distress, loss of self-esteem, and other injuries and damages as a direct result of EL TAMARINDO's violations of Florida Statute §760.10.

93. Pursuant to Florida Statute §760.11(5), Plaintiff is entitled to recover her reasonable attorneys' fees and costs from EL TAMARINDO.

WHEREFORE, Plaintiff, MARIA RIVERA demands judgment against Defendant, EL TAMARINDO, for back pay, employment benefits, other compensation, compensatory damages,

equitable relief including but not limited to front pay, injunctive relief, interest, attorneys' fees, costs, expert fees and such other and further relief as this Honorable Court deems proper.

FIFTH COUNT
VIOLATION OF FLORIDA'S WHISTLEBLOWER ACT, F.S. §448.102

94. Plaintiff, MARIA RIVERA, reasserts and reaffirms the allegations of Paragraphs 70 through 82 and further states that this is an action against EL TAMARINDO for violations of the Florida Whistleblower Act, F.S. §448.102 *et seq.*

95. At all times material to this Complaint, Plaintiff was an employee of EL TAMARINDO within the meaning of F.S. §448.101(2).

96. At all times material to this Complaint, EL TAMARINDO has been engaged in an industry affecting commerce and has had Ten (10) or more employees for each working day in each of Twenty (20) or more weeks in the current or preceding calendar year.

97. At all times material to this Complaint, EL TAMARINDO was an employer of Plaintiff within the meaning of F.S. §448.101(3), Florida's Whistleblower Act.

98. Under Florida's Whistleblower Act, F.S. §448.102, an employer **may not** take any **retaliatory personnel action** against an employee because the employee has:

(1) Disclosed, or threatened to disclose, to any appropriate governmental agency, under oath, in writing, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation. However, this subsection does not apply unless the employee has, in writing, brought the activity, policy, or practice to the attention of a supervisor or the employer and has afforded the employer a reasonable opportunity to correct the activity, policy, or practice.

(2) Provided information to, or testified before, any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer.

(3) Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.

[Emphasis added]

99. When Plaintiff objected to what she reasonably and in good faith believed was unlawful gender discrimination on multiple occasions between approximately June 2014 and August 2014, Plaintiff engaged in protected activity within the meaning of Florida's Whistleblower Act, F.S. §448.102(3).

100. EL TAMARINDO began subjecting Plaintiff to "retaliatory personnel action" within the meaning of Florida's Whistleblower Act, F.S. §448.101(5), in or around June 2014 to August 2014, which personnel action affected the terms and conditions of Plaintiff's employment with EL TAMARINDO including but not limited the number of hours she worked, the type of position she worked, and ultimately the amount of compensation that she was paid.

101. Finally, EL TAMARINDO's termination of Plaintiff's employment in September 2014 also constitutes "retaliatory personnel action" within the meaning of Florida's Whistleblower Act, F.S. §448.101(5), as the termination was motivated by Plaintiff's complaints about and objections to Defendant's gender discrimination, all in violation of F.S. §448.102(3).

102. Plaintiff reasonably and in good faith believed that EL TAMARINDO's gender discrimination and disparate treatment against herself and other female employees were violations of one or more "laws, rules, or regulations" within the meaning of Florida's Whistleblower Act, F.S. §448.101(4).

103. More specifically, one or more "laws, rules, or regulations" within the meaning of Florida's Whistleblower Act, F.S. §448.101(4) which were applicable to EL TAMARINDO and pertained to EL TAMARINDO's business which Plaintiff reasonably and in good faith belief believed EL TAMARINDO was violating include but were not necessarily limited to, 42 U.S.C. §2000e which prohibits discrimination on the basis of an employee's gender.

104. The fact that Plaintiff engaged in activity protected by Florida's Whistleblower Act was a motivating factor in EL TAMARINDO's "retaliatory personnel action" against Plaintiff, including the termination of Plaintiff's employment, in violation of F.S. §448.102(3).

105. EL TAMARINDO's violations of F.S. §448.102 were willful, egregious and in direct violation of the statutory protections expressly set forth in Florida's Whistleblower Act.

106. Plaintiff has suffered and continues to suffer lost earnings, emotional distress, loss of self-esteem and other injuries as a direct result of EL TAMARINDO's violations of F.S. §448.102.

107. Pursuant to F.S. §448.104, Plaintiff is entitled to recover her reasonable attorneys' fees and costs from EL TAMARINDO.

WHEREFORE, Plaintiff, MARIA RIVERA, demands judgment against Defendant, EL TAMARIND, for back pay, employment benefits and other compensation, compensatory damages, emotional distress, equitable relief, including, but not limited to, reinstatement or front pay, interest, attorneys' fees, costs and such other and further relief as this Honorable Court deems proper.

Jury Demand

Plaintiff demands a trial by jury on all issues so triable as a matter of right.

Dated: December 7, 2016

Respectfully submitted,

By: **s/Robert S. Norell, Esq.**
Robert S. Norell, Esquire
Florida Bar No. 996777
E-Mail: rob@floridawagelaw.com
ROBERT S. NORELL, P.A.
300 N.W. 70th Avenue
Suite 305
Plantation, Florida 33317
Telephone: (954) 617-6017
Facsimile: (954) 617-6018
Attorney for Plaintiff

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Florida

Maria Rivera)

)

)

)

Plaintiff(s))

v.)

Civil Action No.)

El Tamarindo Cafe, LLC. and Nestor A. Amaya)

)

)

)

Defendant(s))

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Nestor A. Amaya
233 State Road 84
Ft. Lauderdale, FL 33315

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Robert S. Norell, Esq.
Robert S. Norell, P.A.
300 NW 70th Avenue
Suite 305
Plantation, FL 33317

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

JS-44 (Rev. 11/04)

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 THE REVERSE OF THE FORM.)

<p>I. (a) PLAINTIFFS Maria Rivera</p> <p>(b) County of Residence of First Listed Plaintiff <u>Broward</u> (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) Attorney's (Firm Name, Address, and Telephone Number) Robert S. Norell, Esq., Robert S. Norell, P.A., 300 NW 70th Avenue, Suite 305, Plantation, FL 33317; (954) 617-6017</p>	<p>DEFENDANTS El Tamarindo Cafe, LLC, and Nestor Amaya</p> <p>County of Residence of First Listed Defendant <u>Broward</u> (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
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<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input checked="" type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <p>(For Diversity Cases Only)</p> <table style="width:100%;"> <tr> <td>Citizen of This State</td> <td>PTF <input type="checkbox"/> 1</td> <td>DEF <input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td>PTF <input type="checkbox"/> 4</td> <td>DEF <input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td><input type="checkbox"/> 5</td> <td><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>	Citizen of This State	PTF <input type="checkbox"/> 1	DEF <input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	PTF <input type="checkbox"/> 4	DEF <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
Citizen of This State	PTF <input type="checkbox"/> 1	DEF <input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	PTF <input type="checkbox"/> 4	DEF <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														

IV. NATURE OF SUIT (Place an "X" in One Box Only)

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 (Excl. 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	<p>PERSONAL INJURY</p> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 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"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 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"/> 840 Trademark <p style="text-align: center;">LABOR</p> <input checked="" type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <p style="text-align: center;">SOCIAL SECURITY</p> <input type="checkbox"/> 861 HIA (1395(f)) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <p style="text-align: center;">FEDERAL TAX SUITS</p> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<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"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<p>REAL PROPERTY</p> <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	<p>CIVIL RIGHTS</p> <input type="checkbox"/> 441 Voting <input checked="" type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<p>PRISONER PETITIONS</p> <input type="checkbox"/> 510 Motions to Vacate Sentence <p>Habeas Corpus:</p> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition			

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

7 Appeal to District Judge from Magistrate Judgment

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. Sec. 206; 42 U.S.C. 2000e

Brief description of cause:
Minimum Wage Violation, Gender Discrimination, and Retaliation

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ _____

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

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

JUDGE _____ DOCKET NUMBER _____

DATE: 12/07/2016

SIGNATURE OF ATTORNEY OF RECORD:
s/ Robert S. Norell

FOR OFFICE USE ONLY

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

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Former Server Hits FL Café with Unpaid Wage, Gender Discrimination Suit](#)
