UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHAD MCFARLIN, Individually and on behalf of similarly situated persons, Plaintiff, v. THE WORD ENTERPRISES, LLC, THE WORD ENTERPRISES HASLETT, LLC, THE WORD ENTERPRISES LANSING, LLC, THE WORD ENTERPRISES OWOSSO, LLC, THE WORD ENTERPRISES PERRY, LLC, THE WORD ENTERPRISES ST. JOHNS, LLC, DITTRICH INVESTMENTS II, INC., and KEVIN DITTRICH, Defendants.	)	No. 5:16-cv-12536 **JURY TRIAL DEMANDED**

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

FIRST AMENDED COLLECTIVE AND CLASS ACTION COMPLAINT

Plaintiff Chad McFarlin, individually and on behalf of all other similarly situated delivery drivers, for his First Amended Collective and Class Action Complaint against Defendants, alleges as follows:

1. Defendants operate a chain of Hungry Howie's pizza franchise stores in and around central Michigan.

2. Defendants' delivery drivers drive their own automobiles to deliver pizza and other food items to Defendants' customers. Defendants do not reimburse their drivers for the reasonable cost of driving their vehicles in defendants' employ; and, as a result of defendants' reimbursement practices, the drivers' wages fall below the federal and Michigan minimum wages during some or all work weeks (nominal wages – unreimbursed vehicle expenses = sub-minimum net wages).

3. Plaintiff Chad McFarlin brings this lawsuit as a collective action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 *et seq*., and as a class under the Michigan Minimum Wage Law ("MWL"), MCL § 408.381 *et seq.,* and the Michigan Workforce Opportunity Wage Act ("WOWA"), MCL § 408.411 *et seq.,* to recover unpaid minimum wages owed to him and similarly situated delivery drivers employed by Defendants at their Hungry Howie's stores.

Jurisdiction and Venue

4. The FLSA authorizes court actions by private parties to recover damages for violation of its wage and hour provisions. Jurisdiction over Plaintiff's FLSA claim is based on 29 U.S.C. §216(b) and 28 U.S.C. §1331 (federal question jurisdiction). This Court maintains jurisdiction over Plaintiff's MWL and WOWA claim pursuant to 28 U.S.C. § 1367 (pendant claims) and MCL §§ 409.383 & 408.419(1)(a).

5. Venue in this district is proper under 28 U.S.C. §1391 because Defendants operate Hungry Howie's franchise stores in this district, Defendants employed Plaintiff in this District, and a substantial part of the events giving rise to the claim herein occurred in this District.

Parties

6. Defendants The Word Enterprises, LLC, The Word Enterprises, Haslett, LLC, The Word Enterprises Lansing, LLC, The Word Enterprises Owosso, LLC, The Word Enterprises Perry, LLC, and The Word Enterprises St. Johns, LLC are Michigan limited liability companies maintaining their principal place of business in Owosso, Michigan, which is located within the Eastern District of Michigan. Defendant Dittrich Investments II, Inc. is a Michigan corporation that maintains its principal place of business in Owosso, Michigan.

7. Defendant Kevin Dittrich is a *sui juris* individual residing in the Eastern District of Michigan, and is the owner or co-owner and operator of the Defendant entities.

8. Defendants comprise a "single integrated employer" as they share interrelation of operations, common management, centralized control of labor relations and common ownership.

9. Alternatively and cumulatively, Defendants constitute "joint employers" because the delivery drivers' work simultaneously benefits all

Defendants and each Defendants acts directly or indirectly in the interest of all other Defendants in relation to the delivery drivers and / or Defendants are not completely disassociated with respect to the employment of the delivery drivers and may be deemed to share control of the delivery drivers, directly or indirectly, by reason of the fact that all Defendants are under common control with the other employer. 29 C.F.R. § 791.2(b).

10. Defendant Dittrich is individually liable under the FLSA, MWL and WOWA's broad definitions of "employer" because he owns the Defendant business entities, has operational control of the Defendant entities, ultimately controls significant aspects of the Defendant entities' day-to-day functions, ultimately controls the manner and methods of employees' work, and ultimately controls compensation of employees. 29 U.S.C. §203(d); MCL §§ 408.382(c) & 408.412(d)

11. Plaintiff Chad McFarlin is an individual who was employed by Defendants from approximately July 2015 to September 1, 2016 as a delivery driver at their Hungry Howie's store located at 3058 Britton Road, Perry, Michigan, 48872, which is located within the Eastern District of Michigan. Mr. McFarlin's consent to bring this action pursuant to 29 U.S.C. §216(b) was previously filed with the Court.

General Allegations

Defendants' Business

12. Defendants together own and operate a chain of Hungry Howie's pizza franchises in the central Michigan area. These restaurants include Hungry Howie's Store No. 1000 in Haslett, Michigan, Hungry Howie's Store No. 1031 in Durand, Michigan, Hungry Howie's Store No. 1096 in Perry, Michigan, and a Hungry Howie's Store previously located in St. John's Michigan.

13. Defendants employ delivery drivers who all have the same primary job duty: to deliver pizzas and other food items to customers' homes or workplaces.

Defendants' Pay Practices

14. Defendants paid Plaintiff and other delivery drivers the exact Michigan minimum wage, or at least very close to the exact Michigan minimum wage, either with or without a tip credit applied to the time they spend delivering pizzas.

15. Michigan's minimum wage was $7.40 per hour from the beginning of the longest limitations period through August 31, 2014, was $8.15 per hour from September 1, 2014 through December 31, 2015, was $8.50 per hour in 2016, and is $8.90 per hour in 2017.

Defendants' Failure to Reasonably Reimburse Automobile Expenses Causes Minimum Wage Violations

16. Defendants require their delivery drivers to maintain and pay for safe, legally-operable, and insured automobiles when delivering pizza and other food items.

17. Defendants' delivery drivers incur costs for gasoline, vehicle parts and fluids, repair and maintenance services, insurance, depreciation, and other expenses ("automobile expenses") while delivering pizzas for the benefit of Defendants.

18. Defendants reimburse their delivery drivers $.75 cents per delivery for deliveries to most locations. However, at Plaintiff's store in Perry, Michigan, Defendants reimburse delivery drivers $1.75 for deliveries to Langsburg, Michigan, but fewer than 10% of Plaintiff's deliveries were to Langsburg. Thus, Plaintiff's overall average reimbursement per delivery is approximately $.85 ((90% x $.75) + (10% x $1.75))

19. Plaintiffs' average delivery distance was approximately 8.5 miles.

20. Given the distance of the average delivery is approximately 8.5 miles, the per-delivery reimbursement equates to approximately $.10 per mile ($.85 / 8.5 miles).

21. Defendants' reimbursement rate falls far below the IRS business mileage reimbursement rate during the longest FLSA limitations period of

$.535 - $.575 or any other reasonable approximation of the cost to own and operate a motor vehicle, such as the American Automobile Association's ("AAA's") determination that the average cost of owning and operating a vehicle ranged between $.571 and $.608 per mile during the longest FLSA limitations period for drivers who drive a sedan 15,000 miles per year.

22. Furthermore, the driving conditions associated with the pizza delivery business cause more frequent maintenance costs, higher costs due to repairs associated with driving, and more rapid depreciation from driving as much as and in the manner of a delivery driver. Defendants' delivery drivers further experience lower gas mileage and higher repair costs than the average driver used to determine the average cost of owning and operating a vehicle described above due to the nature of the delivery business, including frequent starting and stopping of the engine, frequent braking, short routes as opposed to highway driving, and driving under time pressures. The result of Defendants' delivery driver reimbursement policy is a reimbursement of much less than a reasonable approximation of their drivers' automobile expenses.

23. Defendants' systematic failure to adequately reimburse automobile expenses constitutes a "kickback" to Defendants such that the hourly wages they pay to Plaintiff and Defendants' other delivery drivers are not paid free and clear of all outstanding obligations to Defendants.

24. Using the lowest IRS standard business mileage rate in effect during Plaintiff's employment as a reasonable estimate of his per-mile vehicle costs, every mile driven on the job decreased his net wages by approximately $.44 ($.54 - $.10) per mile.

25. Considering Plaintiff's estimate of approximately 8.5 round-trip miles per delivery, Defendants under-reimbursed him about $3.74 per delivery ($.44 x 8.5 miles).

26. During his employment by Defendant as a delivery driver, Plaintiff typically averaged approximately 1.5 deliveries per hour.

27. Thus, Plaintiff consistently "kicked back" to Defendant approximately $5.61 per hour ($3.74 per delivery x 1.5 average deliveries per hour), for an effective hourly wage rate of about $2.54 ($8.15 per hour - $5.61 kickback) in 2015 and an effectively hourly wage rate of about $2.89 ($8.50 per hour - $5.61 kickback) in 2016.

28. Defendants failed to pay a reasonably approximation of the amount of their drivers' automobile expenses to such an extent that their drivers' net wages are diminished beneath the federal minimum wage requirements.

29. All of Defendants' delivery drivers had similar experiences to those of Plaintiff. They were subject to the same reimbursement policy; received similar reimbursements; incurred similar automobile expenses; completed deliveries of

similar distances and at similar frequencies; and were paid at or near the applicable Michigan minimum wage before deducting unreimbursed business expenses (assuming, for this purpose only, that defendants lawfully invoked and administered their purported tip credit).

30. While the amount of Defendants' actual reimbursements per mile may vary over time, Defendants relied on the same flawed policy and methodology with respect to all delivery drivers at all of their Hungry Howie's stores. Thus, although reimbursement amounts may differ somewhat over time, the amounts of under-reimbursements relative to automobile costs incurred are relatively consistent between time and region.

31. Defendants' low reimbursement rates were a frequent complaint of at least some of Defendants' delivery drivers, including Plaintiff, yet Defendants continued to reimburse at a rate much less than any reasonable approximation of delivery drivers' automobile expenses.

32. The net effect of Defendants' flawed pay and reimbursement policies is that they willfully fail to pay the state and federal minimum wage and overtime to their delivery drivers.

Class and Collective Action Allegations

33. Plaintiff brings Count I under the FLSA as an "opt-in" collective action on behalf of similarly situated delivery drivers pursuant to 29 U.S.C. §216(b).

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

35. Plaintiff, individually and on behalf of other similarly situated employees, seeks relief on a collective basis challenging Defendants' practice of failing to pay employees federal minimum wage. The number and identity of other plaintiffs yet to opt-in may be ascertained from Defendants' records, and potential class members may be notified of the pendency of this action via mail or email.

36. Plaintiff and all of Defendants' delivery drivers are similarly situated in that:

a. They have worked as delivery drivers for Defendants delivering pizza and other food items to Defendants' customers;

b. They have delivered pizza and food items using automobiles not owned or maintained by Defendants;

c. Defendants required them to maintain these automobiles in a safe, legally-operable, and insured condition;

d. They incurred costs for automobile expenses while delivering pizzas and food items for the primary benefit of Defendants;

e. They were subject to similar driving conditions, automobile expenses, delivery distances, and delivery frequencies;

f. They were subject to the same pay policies and practices of Defendants;

g. They were subject to the same delivery driver reimbursement policy that underestimates automobile expenses per mile, and thereby systematically deprived of reasonably approximate reimbursements, resulting in wages below the federal minimum wage in some or all workweeks;

h. They were reimbursed similar set amounts of automobile expenses per delivery; and

i. They were paid similar wage rates.

37. Plaintiff brings Count II as a class action pursuant to Fed. R. Civ. P. 23, on behalf of himself and as the Class Representative of the following persons ("the Class"):

> All current and former delivery drivers employed by Defendants in the State of Michigan since the date three years preceding the filing of his original Complaint.

38. Count II, if certified for class-wide treatment, is brought on behalf of all similarly situated persons who do not opt-out of the Class.

39. Plaintiff's state law claims asserted in Count II satisfy the numerosity, commonality, typicality, adequacy, predominance and superiority requirements of a class action pursuant to Fed. R. Civ. P. 23.

40. The Class sought in Count II satisfies the numerosity standard as it consists of at least hundreds of persons who are geographically dispersed and, therefore, joinder of all Class members in a single action is impracticable.

41. Questions of fact and law common to the Class sought in Count II predominate over any questions affecting only individual members. The questions of law and fact common to the Class arising from Defendants' actions include, without limitation:

a. Whether they have worked as delivery drivers for Defendants delivering pizza and other food items to Defendants' customers;
b. Whether they have delivered pizza and food items using automobiles not owned or maintained by Defendants;
c. Whether Defendants required them to maintain these automobiles in a safe, legally-operable, and insured condition;
d. Whether they incurred costs for automobile expenses while delivering pizzas and food items for the primary benefit of Defendants;
e. Whether they were subject to similar driving conditions, automobile expenses, delivery distances, and delivery frequencies;
f. Whether they were subject to the same pay policies and practices of Defendants;

g. Whether they were subject to the same Delivery Driver reimbursement policy that underestimates automobile expenses, and thereby systematically deprived them of reasonably approximate reimbursements, resulting in wages below the Michigan minimum wage in some or all workweeks;

h. Whether they were reimbursed similar set amounts of automobile expenses per delivery; and

i. Whether they were paid near the federal and state minimum wage before deducting unreimbursed business expenses.

42. The questions set forth above predominate over any questions affecting only individual persons, and a class action is superior with respect to considerations of consistency, economy, efficiency, fairness, and equity to other available methods for the fair and efficient adjudication of the state law claim.

43. Plaintiff's claim is typical of those of the Class sought in Count II in that:

a. Plaintiff and the Class have worked as delivery drivers for Defendants delivering pizza and other food items to Defendants' customers;

b. Plaintiff and the Class delivered pizza and food items using automobiles not owned or maintained by Defendants;

c. Defendants required Plaintiff and the Class to maintain these automobiles in a safe, legally-operable, and insured condition;

d. Plaintiff and the Class incurred costs for automobile expenses while delivering pizzas and other food items for the primary benefit of Defendants;

e. Plaintiff and the Class were subject to similar driving conditions, automobile expenses, delivery distances, and delivery frequencies;

f. Plaintiff and the Class were subject to the same pay policies and practices of Defendants;

g. Plaintiff and the Class were subject to the same delivery driver reimbursement policy that underestimates automobile expenses, and thereby systematically deprived of reasonably approximate reimbursements, resulting in wages below the Michigan minimum wage in some or all workweeks;

h. Plaintiff and the Class were reimbursed similar set amounts of automobile expenses per delivery; and

i. Plaintiff and the Class were paid at similar wage rates before deducting unreimbursed vehicle expenses.

44. Plaintiff is an adequate representative of the Class sought in Count II because he is a member of the Class and his interest does not conflict with the

interest of the members of the Class he seeks to represent. The interests of the members of the Class sought in Count II will be fairly and adequately protected by Plaintiff and the undersigned counsel, who have extensive experience prosecuting complex wage and hour, employment, and class action litigation.

45. Maintenance of the claim asserted in Count II as a class action is superior to other available methods for fairly and efficiently adjudicating the controversy as members of the Class have little interest in individually controlling the prosecution of separate class actions, no other litigation is pending over the same controversy, it is desirable to concentrate the litigation in this Court due to the relatively small recoveries per member of the Class, and there are no material difficulties impairing the management of a class action.

46. It would be impracticable and undesirable for each member of the Class sought in Count II who suffered harm to bring a separate action. In addition, the maintenance of separate actions would place a substantial and unnecessary burden on the courts and could result in inconsistent adjudications, while a single class action can determine, with judicial economy, the rights of all Class members.

COUNT I
Violation of the Fair Labor Standards Act of 1938 by Paying Sub-Minimum Net Wages After Deducting Un-Reimbursed Vehicle Expenses

47. Plaintiff reasserts and re-alleges the allegations set forth above.

48. Defendants are subject to the FLSA's minimum wage requirements because they form an enterprise engaged in interstate commerce, and their employees are engaged in commerce.

49. At all relevant times herein, Plaintiff and all other similarly situated delivery drivers have been entitled to the rights, protections, and benefits provided under the FLSA, 29 U.S.C. §§201, *et seq*.

50. Section 13 of the FLSA, codified at 29 U.S.C. §213, exempts certain categories of employees from federal minimum wage obligations. None of the FLSA exemptions apply to Plaintiff or other similarly situated delivery drivers.

51. The FLSA regulates, among other things, the payment of minimum wage by employers whose employees are engaged in interstate commerce, or engaged in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce. 29 U.S.C. §206(a).

52. Under Section 6 of the FLSA, codified at 29 U.S.C. §206, employees have been entitled to be compensated at a rate of at least $7.25 per hour since July 24, 2009.

53. As alleged herein, Defendants have reimbursed delivery drivers less than the reasonably approximate amount of their automobile expenses to such an

extent that it diminishes these employees' wages beneath the federal minimum wage.

54. Defendants knew or should have known that their pay and reimbursement policies, practices and methodology result in failure to compensate delivery drivers at the federal minimum wage.

55. Defendants, pursuant to their policy and practice, violated the FLSA by refusing and failing to pay federal minimum wage to Plaintiff and other similarly situated employees.

56. Plaintiff and all similarly situated delivery drivers have been subjected to a uniform and employer-based compensation and reimbursement policy. This uniform policy, in violation of the FLSA, has been applied, and continues to be applied, to all delivery driver employees in Defendants' stores.

57. Plaintiff and all similarly situated employees are entitled to damages equal to the minimum wage minus actual wages received after deducting reasonably approximated automobile expenses within three years from the date each Plaintiff joins this case, plus periods of equitable tolling, because Defendants acted willfully and knew, or showed reckless disregard for whether their conduct was unlawful.

58. Defendants have acted neither in good faith nor with reasonable grounds to believe that their actions and omissions were not a violation of the FLSA, and as a result, Plaintiff and other similarly situated employees are entitled to

recover an award of liquidated damages in an amount equal to the amount of unpaid minimum wages under 29 U.S.C. §216(b). Alternatively, should the Court find Defendants are not liable for liquidated damages, Plaintiff and all similarly situated employees are entitled to an award of prejudgment interest at the applicable legal rate.

59. As a result of the aforesaid willful violations of the FLSA's minimum wage provisions, minimum wage compensation has been unlawfully withheld by Defendants from Plaintiff and all similarly situated employees. Accordingly, Defendants are liable under 29 U.S.C. §216(b), together with an additional amount as liquidated damages, pre-judgment and post-judgment interest, reasonable attorneys' fees, and costs of this action.

WHEREFORE, on Count I Plaintiff and all similarly situated delivery drivers demand judgment against Defendants and request: (1) compensatory damages; (2) liquidated damages; (3) attorneys' fees and costs as allowed by Section 16(b) of the FLSA; (4) pre-judgment and post-judgment interest as provided by law; and (5) such other relief as the Court deems fair and equitable.

COUNT II
VIOLATION OF MICHIGAN STATE MINIMUM WAGE LAW

60. Plaintiffs incorporate here all stated allegations.

61. Prior to May 27, 2014, the MWL, MCL § 408.381 *et seq*., provided for

a state minimum hourly wage of $7.40 for all times after July 1, 2008.

62. Effective May 27, 2014, Public Act 138 of 2014, the Michigan Workforce Opportunity Wage Act (the "WOWA"), MCL § 408.411 *et seq.*, replaced the MWL.

63. The MCL and WOWA provide that "[a]n employer shall not pay any employee at a rate that is less than prescribed." MCL §§ 408.383 & 408.413.

64. WOWA required employers to pay employees a minimum hourly wage of $7.40 per hour beginning May 27, 2014 through August 31, 2014; $8.15 beginning September 1, 2014 through December 31, 2015; and $8.50 beginning January 1, 2016. MCL §§ 408.384(d) & 408.414(1).

65. At all relevant times the minimum wage in Michigan was more than the federal minimum wage of $7.25 per hour. Therefore, the minimum hourly wage provided by the MWL and WOWA apply. *Id.*

66. At all times relevant to this action, Plaintiffs were "employees" of Defendant within the meaning of MWL and WOWA. MCL §§ 408.382(b) & 408.412(c).

67. At all times relevant to this action, Defendants were an "employer" within the meaning of MWL and WOWA. MCL §§ 408.382(c) & 408.412(d).

68. At all relevant times herein, Plaintiff and members of the proposed Rule 23 Class have been entitled to the rights, protections, and benefits provided by

MWL and WOWA.

69. As described in the preceding paragraphs, Defendants have reimbursed delivery drivers less than the reasonably approximate amount of their automobile expenses to such an extent that it diminishes these employees' wages beneath the state minimum wage.

70. Defendants, pursuant to their policy and practice, violated the MWL and the WOWA by refusing and failing to pay state minimum wage for all hours worked to Plaintiff and members of the proposed Rule 23 Class.

71. Plaintiff and members of the proposed Rule 23 Class have been subjected to a uniform and employer—based compensation and reimbursement policy. This uniform policy, in violation of the MWL and the WOWA, has been applied, and continues to be applied, to all delivery driver employees in Defendants' stores.

WHEREFORE, Plaintiff and members of the proposed Rule 23 Class are entitled to damages equal to the state minimum wage minus actual wages received after deducting reasonably approximated automobile expenses within three years from the date of filing, an award of liquidated damages in an amount equal to the amount of unpaid minimum wages under MCL §§ 408.393(1)(a) and 408.419(1)(a), as well as reasonable attorneys' fees incurred in the prosecution of this action.

Demand for Jury Trial

Plaintiff hereby demands a trial by jury of all issues triable by jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ David M. Blanchard
Attorney for Plaintiffs