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U.S. DISTRICT COURT
DISTRICT OF COLORADO

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GREGORY C. LANGHAM
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BY _____ DEP. CLK

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

MARK SMITH, individually and on behalf of other similarly situated persons,	)	
Plaintiff,	)	09CV01632 WDM-BNB
vs.	)	CASE No. _____
PIZZA HUT, INC.,	)	JURY TRIAL DEMANDED
Serve: The Corporation Company 1675 Broadway, Suite 1200 Denver, CO 80202	)	
Defendant.	)	

COMPLAINT

Plaintiff Mark Smith, individually and on behalf of all others similarly situated, for his Complaint against Pizza Hut, Inc. ("Pizza Hut"), hereby states and alleges as follows:

1. Pizza Hut, Inc. operates approximately 1,059 Pizza Hut corporate stores in the United States. Pizza Hut policy and practice is not to reimburse its delivery drivers for automobile costs, uniform purchase and maintenance, and other job-related expenses, resulting in delivery drivers being paid less than both the federal and Colorado minimum wage. Pizza Hut also does not pay the cost of purchases, maintenance and cleaning of uniforms and special apparel worn by Plaintiff and other similarly situated employees as required by Colorado law.

2. Pizza Hut's deliberate failure to pay its employees their earned wages violates the Fair Labor Standards Act ("FLSA") and the Colorado Minimum Wage of Workers Act ("CMWWA"). Pizza Hut's failure to pay the cost of purchases,

maintenance and cleaning of uniforms and special apparel worn by Plaintiff and other similarly situated employees violates the CMWWA and 7 CCR § 1103-1.

3. Plaintiff and all other similarly situated employees work or previously worked as delivery drivers at various stores operated by Pizza Hut, including stores located in Colorado. This lawsuit is brought as (a) a collective action under the FLSA to recover unpaid wages and excessive deductions owed to Plaintiff and all other similarly situated workers employed by Pizza Hut; and (b) a class action under Colarado law to recover unpaid wages and excessive deductions owed to, and the cost of purchases, maintenance and cleaning of uniforms and special apparel worn by, Plaintiff and all other similarly situated workers employed by Pizza Hut in Colorado.

JURISDICTION AND VENUE

4. The FLSA authorizes court actions by private parties to recover damages for violation of the FLSA's wage and hour provisions. Jurisdiction over Plaintiff's FLSA claims is based on 29 U.S.C. § 216(b) and 28 U.S.C. § 1331.

5. The CMWWA authorizes court actions by private parties to recover damages for violation of the wage, hour, deduction, and reimbursement provisions of the CMWWA. Jurisdiction over Plaintiff's CMWWA claims is based on 28 U.S.C. §§ 1332(d)(2) and 1367, and C.R.S.A. § 8-6-118.

6. Venue in this district is proper under 28 U.S.C. § 1391(b) and (c) because Plaintiff resides in this jurisdiction and a substantial part of the events giving rise to the claims occurred in this jurisdiction.

PARTIES

7. Defendant Pizza Hut, Inc. is a California corporation that operates approximately 1,059 Pizza Hut corporate stores in the United States, including Colorado.

8. Plaintiff Mark Smith was employed by Pizza Hut from approximately October 2005 to August 2006 and May 2008 to January 2009 as a delivery driver at the Pizza Hut store in Greenwood Village, Colorado. Plaintiff Smith's Consent to Become a Party Plaintiff pursuant to 29 U.S.C. § 216(b) is attached hereto as Exhibit A.

FACTS

9. The primary function of Pizza Hut's stores is to sell pizza and other food items to customers, whether they dine in, carry out the food or have it delivered.

10. Each of Pizza Hut's stores employs delivery drivers who are primarily responsible for delivering pizzas and other food items to customers' homes and workplaces.

11. Plaintiff and all other similarly situated persons are current and former delivery drivers employed by Pizza Hut.

12. All delivery drivers employed by Pizza Hut over the last three (3) years had essentially the same job duties – to deliver pizza and other food items to customers' homes and workplaces.

13. Pizza Hut requires its delivery drivers to maintain and pay for operable, safe and legally-compliant automobiles to use in delivering Pizza Hut's pizza and other food items.

14. In addition, Pizza Hut requires its delivery drivers to incur other job-related expenses in delivering pizza and other food items including, but not limited to, uniform and special apparel purchases, laundering, cleaning and maintenance, cellular telephone charges, and purchases of flashlights, batteries and maps.

15. Pursuant to such requirements, Plaintiff and other similarly situated employees purchased gasoline, vehicle parts and fluids, automobile repair and maintenance services, and automobile insurance, and suffered automobile depreciation (collectively "automobile expenses"), all for the primary benefit of Pizza Hut. Additionally, Plaintiff and other similarly situated employees purchased other items such as, but not limited to, cellular telephone services, uniform and special apparel items including pants and shoes, laundering services, and maps, flashlights and batteries ("job-related expenses), again all for the primary benefit of Pizza Hut.

16. Pizza Hut paid Plaintiff and others similarly situated an hourly wage at or around the federal and/or Colorado minimum wage plus a set amount for each delivery as a partial reimbursement for their automobile expenses.

17. Pizza Hut has not relied on any tip credit to satisfy federal or Colorado minimum wage requirements.

18. The amount paid by Pizza Hut to Plaintiff and others similarly situated per delivery for automobile expenses was insufficient to adequately reimburse them for their automobile expenses incurred in delivering Pizza Hut's pizza and other food items. Further, Pizza Hut wholly failed to reimburse Plaintiff and others similarly situated for the other job-related expenses incurred by them for the purpose of delivering pizza and

other food items including, but not limited to, uniform and special apparel purchases, laundering, cleaning and maintenance, cellular telephone charges, and purchases of flashlights, batteries and maps.

19. As a result of the automobile and other job-related expenses incurred by Plaintiff and others similarly situated, they were deprived of the minimum wage guaranteed to them by the FLSA and Colorado law.

20. Plaintiff and other similarly situated employees were not required to record their automobile and other job-related expenses and Pizza Hut failed to maintain accurate records of job-related expenses and deductions from wages, as required by the FLSA and the CMWWA. 29 U.S.C. § 211(c); 7 CCR § 1103-1.

21. Pizza Hut's failure to pay the cost of purchases, maintenance and cleaning of uniforms and special apparel worn by Plaintiff and other similarly situated employees violates the CMWWA and 7 CCR § 1103-1.

22. On information and belief, Pizza Hut is adhering to the same policies and practices with respect to all similarly situated employees at all of its Pizza Hut corporate stores in the United States, including Colorado.

23. The net effect of Pizza Hut's policies and practices, instituted and approved by company managers, is that Pizza Hut willfully fails to pay federal and Colorado minimum wage and fails to pay or reimburse for uniform and special apparel purchases, maintenance and cleaning in violation of Colorado law.

COLLECTIVE AND CLASS ACTION ALLEGATIONS

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

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

26. Plaintiff, individually and on behalf of other similarly situated employees, brings Count I seeking relief on a collective basis challenging, among other FLSA violations, Pizza Hut's practice of failing to pay employees minimum wage and failing to accurately record all expenses incurred by their employees. The number and identity of other plaintiffs yet to opt-in and consent to be party plaintiffs may be determined from the records of Pizza Hut, and potential class members may easily and quickly be notified of the pendency of this action.

27. Plaintiff brings Counts II and III as a class action under Fed. R. Civ. P. 23, on behalf of himself and as Class Representative of the following persons (the "Class"):

> All current and former delivery drivers employed by Pizza Hut in the State of Colorado within the applicable statute of limitations.

28. The state law claims, if certified for class-wide treatment, are brought on behalf of all similarly situated persons who do not opt-out of the class.

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

30. The Class satisfies the numerosity standards. The Class consists of hundreds of persons who are geographically dispersed. As a result, joinder of all Class

members in a single action is impracticable. Class members may be informed of the pendency of this class action through direct mail.

31. Questions of fact and law common to the Class predominate over any questions affecting only individual members. The questions of law and fact common to the Class arising from Pizza Hut's actions include, without imitation, the following:

(i) Whether Pizza Hut failed to pay Class members the minimum wage required under the CMWWA and 7 CCR § 1103-1.

(ii) Whether Pizza Hut assessed charges against Class members' wages and/or required them to make payments by separate transaction when such charges or payments are not permitted as deductions from wages under the CMWWA.

(iii) Whether Pizza Hut failed to pay or reimburse Class members for the purchase, maintenance and cleaning of uniforms and special apparel items as required under the CMWWA and 7 CCR § 1103-1.

(iv) Whether Pizza Hut failed to keep accurate records of deductions from Class members' wages in violation of the CMWWA and 7 CCR § 1103-1.

32. 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 claims.

33. Plaintiff's claims are typical of those of the Class in that Class members have been employed in the same delivery driver position as Plaintiff and the Class was subject to the same unlawful practices as Plaintiff.

34. A class action is the appropriate method for the fair and efficient adjudication of this controversy. Pizza Hut has acted or refused to act on grounds generally applicable to the Class. The presentation of separate actions by individual Class members creates a risk of inconsistent and varying adjudications, establishing incompatible standards of conduct for Pizza Hut, and/or substantially impairing or impeding the ability of Class members to protect their interests.

35. Plaintiff is an adequate representative of the Class because he is a member of the Class and his interests do not conflict with the interest of the members of the Class he seeks to represent. The interests of the members of the Class 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.

36. Maintenance of this action as a class action is a fair and efficient method for adjudicating this controversy. It would be impracticable and undesirable for each member of the Class 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

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

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

39. The FLSA regulates, among other things, the payment of minimum wage by employers whose employees are engaged in interstate commerce, 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); 29 U.S.C. § 207(a)(1).

40. Pizza Hut is subject to the minimum wage requirements of the FLSA because it constitutes an enterprise engaged in interstate commerce during times relevant and its employees have been engaged in commerce during such times.

41. Pursuant to Section 6 of the FLSA, codified at 29 U.S.C. § 206, employees are entitled to be compensated at a rate of $5.15 per hour before July 24, 2007, $5.85 per hour from July 24, 2007 through July 24, 2008, and $6.55 per hour since July 24, 2008.

42. Pizza Hut is not allowed to avail itself of the federal tipped minimum wage rate under the FLSA nor did Pizza Hut attempt to avail itself of the federal tipped minimum wage rate.

43. Pizza Hut knew or should have known that its reimbursement policy and practice failed to compensate delivery drivers at the federal minimum wage.

44. Pursuant to this policy and practice, Pizza Hut willfully violated the FLSA by refusing and failing to pay Plaintiff and other similarly situated employees the federal minimum wage. In the course of perpetrating these unlawful practices, Pizza Hut willfully failed to keep accurate records of all expenses incurred by their employees.

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

46. Plaintiff and all similarly situated employees are victims of a uniform and employer-based compensation policy. On information and belief, this uniform policy, in violation of the FLSA, has been applied, and continues to be applied, to all delivery driver employees in Pizza Hut's other stores nationwide.

47. Plaintiff and all similarly situated employees are entitled to damages equal to the difference between the minimum wage and actual wages received after deduction for job-related expenses within the three (3) years preceding the filing of this Complaint, plus periods of equitable tolling, because Pizza Hut acted willfully and knew, or showed reckless disregard of whether its conduct was prohibited by the FLSA.

48. Pizza Hut has acted neither in good faith nor with reasonable grounds to believe that its 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 unpaid minimum wages under Section 16(b) of the FLSA, codified at 29 U.S.C. § 216(b). Alternatively, should the Court find Pizza Hut did not act willfully in failing to pay minimum wage, Plaintiff and all similarly

situated employees are entitled to an award of prejudgment interest at the applicable legal rate.

49. As a result of the aforesaid willful violations of the FLSA's minimum wage provisions, minimum wage compensation has been unlawfully withheld by Pizza Hut from Plaintiff and all similarly situated employees. Accordingly, Pizza Hut is 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 of this Complaint, Plaintiff and all similarly situated employees demand judgment against Pizza Hut 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
FAILURE TO PAY MINIMUM WAGE IN VIOLATION OF THE COLORADO MINIMUM WAGE OF WORKERS ACT

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

51. At all relevant times herein, Plaintiff and the Class have been entitled to the rights, protections, and benefits provided under the CMWWA, C.R.S.A. § 8-6-101, *et seq.* and the wage orders incorporated therein, 7 CCR § 1103-1.

52. The CMWWA regulates, among other things, the payment of minimum wage by employers who employ any person in Colorado, subject to limited exemptions not applicable herein. C.R.S.A. § 8-6-108.5, *et seq.*; 7 CCR 1103-1.

53. During all times relevant to this action, Pizza Hut was the "employer" of Plaintiff and the Class within the meaning of the CMWWA. Id.

54. During all times relevant to this action, Plaintiff and the Class were Pizza Hut's "employees" within the meaning of the CMWWA. Id.

55. The CMWWA exempts certain categories of employees from Colorado's minimum wage and other obligations, none of which apply to Plaintiff or the Class. C.R.S.A. § 8-6-108.5, *et seq.*; 7 CCR 1103-1.

56. Pursuant to the CMWWA, employees are entitled to be compensated at a rate of $5.15 per hour before January 1, 2007, $6.85 per hour from January 1, 2007 through December 31, 2007, $7.02 per hour from January 1, 2008 through December 31, 2008, and $7.28 since January 1, 2009. Id.

57. Pizza Hut has not relied on any tip credit to satisfy Colorado minimum wage requirements.

58. Pizza Hut, pursuant to its policy and practice, violated the CMWWA by refusing and failing to pay Plaintiff and other similarly situated employees Colorado minimum wage. In the course of perpetrating these unlawful practices, Pizza Hut has also failed to keep accurate records of all expenses incurred by their employees.

59. Plaintiff and the Class are victims of a uniform and employer-based compensation policy. On information and belief, this uniform policy, in violation of the CMWWA, has been applied, and continues to be applied, to all Class members in Pizza Hut's other stores in Colorado.

60. Plaintiff and all similarly situated employees are entitled to damages equal to the difference between the minimum wage and actual wages received after deduction for job-related expenses within the applicable statute of limitations, plus periods of equitable tolling.

61. Plaintiff and the Class are entitled to an award of pre-judgment and post-judgment interest at the applicable legal rate.

62. Pizza Hut is liable under C.R.S.A. § 8-6-118 for Plaintiff's costs incurred in this action.

WHEREFORE, on Count II of this Complaint, Plaintiff and the Class demand judgment against Pizza Hut and request: (1) compensatory damages; (2) costs of litigation as allowed by C.R.S.A. § 8-6-118; (3) pre-judgment and post judgment interest as provided by law; and (4) such other relief as the Court deems fair and equitable.

COUNT III
FAILURE TO PAY THE COST OF PURCHASES, MAINTENANCE AND CLEANING OF UNIFORMS AND SPECIAL APPAREL IN VIOLATION OF THE COLORADO MINIMUM WAGE OF WORKERS ACT

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

64. At all relevant times herein, Plaintiff and the Class have been entitled to the rights, protections, and benefits provided under the CMWWA, C.R.S.A. § 8-6-101, *et seq.*, and the wage orders incorporated therein, 7 CCR § 1103-1.

65. The CMWWA requires, among other things, "Where the wearing of a particular uniform or special apparel is a condition of employment, the employer shall

pay the cost of purchases, maintenance, and cleaning of the uniforms or special apparel." C.R.S.A. § 8-6-101, *et* seq.; 7 CCR § 1103-1.

66. During times relevant, Pizza Hut required Plaintiff and other similarly situated employees to purchase, maintain, clean and wear uniforms and/or special apparel items including black dress pants and restaurant-quality non-slip shoes as conditions of their employments.

67. During times relevant, Pizza Hut failed and refused to pay the cost of purchase, maintenance and cleaning of these uniforms and special apparel items.

68. Pizza Hut, pursuant to its policy and practice, violated the CMWWA by failing and refusing to pay the cost of purchase, maintenance and cleaning of these uniforms and special apparel items. C.R.S.A. § 8-6-101, *et* seq.; 7 CCR § 1103-1.

69. Plaintiff and the Class are victims of a uniform and employer-based payment policy. On information and belief, this uniform policy, in violation of the CMWWA, has been applied, and continues to be applied, to all Class members in Pizza Hut's other stores in Colorado.

70. Plaintiff and all similarly situated employees are entitled to damages equal to the amount of expenses incurred by them to purchase, maintain and clean the uniforms and special apparel items required by Pizza Hut.

71. Plaintiff and the Class are entitled to an award of pre-judgment and post-judgment interest at the applicable legal rate.

72. Pizza Hut is liable pursuant to C.R.S.A. § 8-6-118 for Plaintiff's costs incurred in this action.

WHEREFORE, on Count III of this Complaint, Plaintiff and the Class demand judgment against Pizza Hut and requests: (1) compensatory damages; (2) costs of litigation as allowed by C.R.S.A. § 8-6-118; (3) pre-judgment and post judgment interest as provided by law; and (4) such other relief as the Court deems fair and equitable.

DEMAND FOR JURY TRIAL

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

Dated: July 9, 2009

Respectfully submitted,

STUEVE SIEGEL HANSON LLP

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