

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

AMANDA L. OTT, individually, and on behalf of
all others similarly situated,

Plaintiff,

v.

PUBLIX SUPER MARKETS, INC.,

Defendant.

Civil Action No. 3:12-cv-00486

District Judge Todd J. Campbell

Magistrate Judge Joe Brown

JURY DEMAND

ANSWER TO AMENDED COMPLAINT

Publix Super Markets, Inc. (“Publix”) for its Answer to the Amended Complaint of Plaintiff Amanda L. Ott (“Plaintiff”), states as follows:

1. Publix admits that Plaintiff purports to bring a Fair Labor Standards Act (“FLSA”) claim, and that Plaintiff purports to bring this claim as a collective action. Publix admits that the written consent of Plaintiff was attached to the Complaint and previously filed. Publix denies the remaining allegations in Paragraph 1 of the Amended Complaint.

Parties

2. Publix lacks information or knowledge sufficient to form a belief as to the truth of the allegation concerning Plaintiff’s residence, and it therefore denies that allegation. Publix admits that Plaintiff was employed by Publix from August 26, 2006 to December 28, 2010 in the bakery department of certain of its supermarkets located within this judicial district. Publix further admits that, from August 26, 2006 to May 8, 2009, Plaintiff at various times held the positions of PT Bakery Utility, PT Bakery Clerk, Baker Clerk, Baker Apprentice, and Baker, all of which are hourly paid positions and considered Hourly Associate positions. Publix further

admits that, on May 9, 2009, Plaintiff was promoted to the position of Assistant Bakery Manager, which is considered a Fluctuating Workweek Associate (“FWW Associate”) position. Publix also admits that Plaintiff held the Assistant Baker Manager position until she voluntarily resigned on or about December 28, 2010. Publix denies the remaining allegations contained in Paragraph 2 of the Amended Complaint.

3. Publix admits that Plaintiffs purport to bring their FLSA claim as a collective action. Publix denies that this matter may be maintained as a collective action, and it denies the remaining allegations contained in Paragraph 3 of the Amended Complaint.

4. Publix admits the allegations contained in Paragraph 4 of the Amended Complaint.

Jurisdiction and Venue

5. Publix admits the allegations contained in Paragraph 5 of the Amended Complaint.

6. Publix admits the allegations contained in Paragraph 6 of the Amended Complaint.

7. Publix admits the allegations contained in Paragraph 7 of the Amended Complaint.

8. Publix admits that the Court has jurisdiction over the subject matter of this action. Publix further admits that the Court has personal jurisdiction over Publix in this action. Publix denies the remaining allegations contained in Paragraph 8 of the Amended Complaint.

9. Publix admits that venue is proper in this Court and that Plaintiff worked for Publix within this judicial district. Publix denies the remaining allegations contained in Paragraph 9 of the Amended Complaint.

Facts Related To All Counts

10. Publix admits the allegations contained in Paragraph 10 of the Amended Complaint.

11. Publix admits that Plaintiff, and her proposed collective action members, are or were “employees” as that term is defined in the FLSA. Publix denies that Plaintiff is “similarly situated” to any proposed collective action members, and further denies that this matter may be maintained as a collective action. Publix denies the remaining allegations contained in Paragraph 11 of the Amended Complaint.

12. Publix admits that it provides information regarding compensation of FWW Associates in the document entitled "Your Associate Handbook." Publix further admits that editions of "Your Associate Handbook" were published on May 1, 2009, June 12, 2010, and January 1, 2011. Publix denies the remaining allegations contained in Paragraph 12 of the Amended Complaint.

13. Publix denies the allegations contained in Paragraph 13 of the Amended Complaint.

14. Publix admits that it provides information regarding compensation of FWW Associates in the document entitled “Your Associate Handbook.” Publix further admits that editions of “Your Associate Handbook” were published on May 1, 2009, June 12, 2010, January 1, 2011. Publix denies the remaining allegations contained in Paragraph 14 of the Amended Complaint.

15. Publix admits that the May 1, 2009, June 12, 2010, January 1, 2011 editions of “Your Associate Handbook” contain information regarding compensation of FWW Associates and, further, Publix refers to those documents for their content. Publix denies the remaining allegations contained in Paragraph 15 of the Amended Complaint.

16. Publix admits that the May 1, 2009, June 12, 2010, January 1, 2011 editions of “Your Associate Handbook” contain information regarding compensation of FWW Associates and, further, Publix refers to those documents for their content. Publix further admits that, during the time period relevant to this action, FWW Associates were eligible for a quarterly retail bonus, the Holiday Bonus, as well as Holiday Pay. Publix denies the remaining allegations contained in Paragraph 16 of the Amended Complaint.

17. Publix admits that the May 1, 2009, June 12, 2010, January 1, 2011 editions of “Your Associate Handbook” contain information regarding compensation of FWW Associates and, further, Publix refers to those documents for their content. Publix further admits that FWW Associates are paid a base salary for all hours worked during the week, plus half-time pay for hours worked over 40 in a workweek. Publix further admits that FWW Associates are eligible for a quarterly retail bonus, the Holiday Bonus, and Holiday Pay in the amount of one-fifth of their base weekly salary. Publix denies the remaining allegations contained in Paragraph 17 of the Amended Complaint.

18. Publix denies the allegations contained in Paragraph 18 of the Amended Complaint.

19. Publix admits that the Holiday Bonus is properly excluded from regular rate calculations and, therefore, Publix admits the allegations contained in Paragraph 19 of the Amended Complaint.

20. Publix admits that, to be eligible for Holiday Pay, a FWW Associate must work at least 50% of the scheduled day before and after the holiday, as well as 50% of the holiday, if scheduled to work on the day of the holiday. Publix denies the remaining allegations contained in Paragraph 20 of the Amended Complaint.

21. Publix admits that FWW Associates who are eligible for Holiday Pay receive one-fifth of their base salary. Publix denies the remaining allegations contained in Paragraph 21 of the Amended Complaint.

22. Publix admits that Holiday Pay is properly excluded from regular rate calculations because, among other reasons, it is not compensation for working. Publix admits that Holiday Pay is not paid at a rate of at least time-and-a-half the employee's regular rate. Publix denies the remaining allegations contained in Paragraph 22 of the Amended Complaint.

23. Publix admits that Holiday Pay is properly excluded from regular rate calculations because, among other reasons, it is not compensation for working. Publix admits that, to be eligible for Holiday Pay, a FWW Associate must work at least 50% of the scheduled day before and after the holiday, as well as 50% of the holiday, if scheduled to work on the day of the holiday. Publix denies the remaining allegations contained in Paragraph 23 of the Amended Complaint.

24. Publix admits the allegations contained in Paragraph 24 of the Amended Complaint.

25. Publix denies the allegations contained in Paragraph 25 of the Amended Complaint.

26. Publix admits that, during the time period relevant to this action, Holiday Pay was properly excluded from regular rate calculations for FWW Associates, including Plaintiff, because, among other reasons, Holiday Pay is not compensation for working. Publix denies the remaining allegations contained in Paragraph 26 of the Amended Complaint.

27. Publix denies the allegations contained in Paragraph 27 of the Amended Complaint.

28. Publix denies the allegations contained in Paragraph 28 of the Amended Complaint.

29. Publix admits that Plaintiff purports to bring her FLSA claim as a collective action. Publix further denies that this matter may be maintained as a collective action, or that Plaintiff is “similarly situated,” *see* 29 U.S.C. § 216(b), to her proposed collective action members. Publix denies the remaining allegations contained in Paragraph 29 of the Amended Complaint.

COUNT ONE—FLSA VIOLATIONS

30. In response to Paragraph 30 of the Amended Complaint, Publix states that its responses to the allegations in Paragraphs 1 through 29 are incorporated herein as if fully set forth.

31. Publix admits that its pay practices comply with the FLSA and its implementing regulations and, therefore, to the extent the allegations in Paragraph 31 imply or infer that Publix did not comply with the FLSA, Publix denies the allegations contained in Paragraph 31 of the Amended Complaint.

32. Publix admits that it is “aware that the FLSA applied to its employees.” Publix denies that Plaintiffs are entitled to the relief sought in Paragraph 32 of the Amended Complaint. Publix denies the remaining allegations contained in Paragraph 32 of the Amended Complaint.

33. Publix denies the allegations contained in Paragraph 33 of the Amended Complaint.

34. Publix denies the allegations contained in Paragraph 34 of the Amended Complaint.

35. Publix denies the allegations contained in Paragraph 35 of the Amended Complaint.

PRAYER FOR RELIEF

36. Publix denies that Plaintiffs are entitled to the relief requested in the Amended Complaint's Prayer for Relief or any other relief. In response to the demand for jury trial in the Prayer for Relief, Publix states that whether Plaintiff's claims entitle her to a trial by jury involves a legal determination that is not subject to admittance or denial.

FIRST DEFENSE.

Plaintiff's claims, and the claims of any opt-ins are barred, in whole or in part, by statutory exemptions, exclusions, exceptions, or credits under the FLSA. As to Plaintiff and any opt-in who held a FWW Associate position, this includes, but is not limited to, the FLSA's executive and administrative exemptions. An employee qualifies for the FLSA's executive exemption if he/she (i) receives a salary of \$455 per week, (ii) has a primary duty that is the performance of management duties, (iii) customarily and regularly directs the work of two or more employees, and (iv) has the authority to hire or fire employees, or at least has the ability to offer suggestions and recommendations as to hiring and firing. 29 C.F.R. § 541.100. Plaintiff, and any opt-ins who held a FWW Associate position, satisfy the salary test because he or she was paid a salary of at least \$455 per week, and he/she satisfies the duties test of this exemption because they these individuals were responsible for tasks such as selecting, training, directing, disciplining and appraising employees. *See* 29 C.F.R. § 541.102. They were also responsible for acting as the highest ranking employee on the shift, scheduling employees, keeping track of inventory, assigning employees to particular jobs, and moving employees from task to task. *See Donovan v. Burger King Corp.*, 675 F.2d 516, 521-22 (2d Cir. 1982); *see also Thomas v. Speedway SuperAmerica LLC*, 506 F.3d 496 (6th Cir. 2007).

An employee satisfies the FLSA's administrative exemption where he/she (i) is paid at least \$455 a week; (ii) has a primary duty that is the performance of office or other non-manual work directly related to the management or general business operations of the employer or its customers; and (iii) has a primary duty that includes the exercise of discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200(a). Plaintiff, and any opt-in who held a FWW Associate position, satisfy the salary test of this exemption because he or she was paid a salary of at least \$455 per week, and he/she satisfies the duties test of this exemption because such individuals were responsible for tasks such as supervisory and human resources-related activities, representing the company, promoting sales, and legal compliance. 29 C.F.R. § 541.201(a), (b).

SECOND DEFENSE.

Publix acted in good faith and had reasonable grounds for believing that it acted properly in its pay and classification practices with respect to Plaintiff and any opt-ins. For example, in designing its quarterly retail bonus applicable to FWW Associates, Publix acted consistently with applicable case law, *see, e.g., Brock v. Two 'R' Drilling Co., Inc.*, 789 F.2d 1711 (5th Cir. 1986), as well as opinion letters and enforcement policies of the Administrator of the Wage and Hour Division of the United States Department of Labor. *See, e.g.,* Feb. 17, 2006 Wage & Hour Opinion Letter; Aug. 26, 2005 Wage & Hour Opinion Letter; Feb. 5, 2005 Wage & Hour Opinion Letter. Indeed, two separate United States Department of Labor investigations concluded that Publix' quarterly retail bonus was properly excluded from the regular rate under the FLSA.

THIRD DEFENSE.

Plaintiff is not entitled to conditional or final certification, or to Court-facilitated notice, under 29 U.S.C. § 216(b) because, among other reasons, Plaintiff is not similarly situated to any opt-ins and Plaintiff cannot adequately represent the interests of the potential opt-ins. In addition, Plaintiff's attempt to pursue her claims as a collective action fails because an independent and individual analysis of Plaintiff's claims, and the claims of any opt-in plaintiff, is required. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). In particular, the determination of whether Plaintiff, and any opt-ins who held a FWW Associate position, satisfy the FLSA's executive and administrative exemptions requires an individual analysis of each Plaintiff's and opt-in's duties and working conditions given that Plaintiff and opt-ins worked in a variety of different jobs, in different departments, at many different Publix supermarkets, at various times, with the exact duties of each Plaintiff and opt-in, and the amount of time spent performing each of those duties, differing person-by-person.

FOURTH DEFENSE.

Plaintiff's attempt to pursue this claim as a collective action violates Publix's constitutional right to a jury trial and to due process. Publix has a due process right to raise every defense applicable to Plaintiff and every opt-in at every stage of trial. *See Dukes*, 131 S.Ct. at 2541.

FIFTH DEFENSE.

Some or all of the purported claims in the Amended Complaint are barred to the extent they are being asserted on behalf of "similarly situated" individuals, if any, who do not give their consent in writing to become party plaintiffs and/or whose express written consent is not filed with the Court. *See* 29 U.S.C. § 216(b).

SIXTH DEFENSE.

Plaintiff's claims, and the claims of any opt-ins who held a FWW Associate position, are barred or subject to offset or reduction because their salaries were intended to compensate them for all hours worked each week, regardless of the number of hours worked in a particular workweek. Under these circumstances, even if Publix is found liable for overtime pay, which Publix expressly denies, Plaintiff and any opt-ins would be entitled to no more than one-half their regular rate of pay in that workweek for any overtime hours worked in that workweek. *See, e.g., Urnikis-Negro v. Am. Family Prop. Servs.*, 616 F.3d 665 (7th Cir. 2010) (collecting cases).

SEVENTH DEFENSE.

Bonuses and Holiday Pay paid to Plaintiff and any opt-ins were properly excluded from the calculation of the regular rate. *See, e.g., 29 C.F.R. § 778.210; 29 C.F.R. § 778.212; 29 C.F.R. § 778.219.*

EIGHTH DEFENSE.

Plaintiff's claims and the claims of any opt-ins are barred, in whole or in part, because the time periods for which they are claiming entitlement to overtime pay fall within the *de minimis* exception. *See, e.g., 29 C.F.R. § 785.47* (specifically recognizing that “[i]n recording working time under the [FLSA], insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are *de minimis*.”).

NINTH DEFENSE.

Plaintiff's claims and the claims of any opt-ins are barred as to all hours alleged worked of which Publix lacked actual or constructive knowledge. Under the FLSA, in order for a plaintiff to recover allegedly uncompensated overtime, he must prove: (1) that he worked overtime hours without compensation, and (2) that his employer knew, or should have known, of

his overtime work. *See Wood v. Mid-America Mgmt. Corp.*, 192 Fed. App'x 378 (6th Cir. 2006); *see also* 29 C.F.R. § 785.11. “[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer’s failure to pay for the overtime hours is not a violation of” the FLSA.” *Forrester v. Roth’s I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981).

TENTH DEFENSE.

Plaintiff’s claims and the claims of any opt-ins are barred as to all hours during which Plaintiffs were engaged in activities that were preliminary or postliminary to their principal activities. Activities that are preliminary to or postliminary to principal activity or activities are exempt from compensation.

ELEVENTH DEFENSE.

Plaintiff’s claims and the claims of any opt-ins are barred, in whole or in part, based upon the equitable doctrine of unclean hands to the extent that they violated Publix’s practices and guidelines or violated direct orders of their supervisors.

TWELFTH DEFENSE.

Plaintiff’s claims and the claims of any opt-ins are barred, in whole or in part, because some or all of these individuals lack standing to seek some or all of the requested relief. For example, any such individual who filed for personal bankruptcy, but failed to disclose his/her claims against Publix, lacks standing to bring such claims in this action. *See, e.g., In re Rankin*, 438 Fed. App'x 420 (6th Cir. 2011).

THIRTEENTH DEFENSE.

Plaintiff's claims and the claims of any opt-ins are barred, in whole or in part, by applicable statutes of limitations to the extent Plaintiff or any opt-in brings claims for any time period greater than two years for non-willful violation, or three years for a willful violation, from the date the individual files his or her consent form with the Court.

FOURTEENTH DEFENSE.

The claims of Plaintiff and opt-ins, to the extent they seek injunctive relief, are barred because they have an adequate remedy at law and/or lack standing and/or cannot make the requisite showing to obtain injunctive relief.

FIFTEENTH DEFENSE.

Plaintiff's and any opt-ins' claims are barred, in whole or in part, by the doctrine of judicial estoppel to the extent such individual filed a personal bankruptcy without disclosing their claims against Publix. *See, e.g., Swanigan v. Northwest Airlines, Inc.*, 718 F. Supp. 2d 917 (W.D. Tenn. 2010).

SIXTEENTH DEFENSE.

For the convenience of the parties and witnesses, and in the interests of justice, this action should be transferred to the United States District Court for the Middle District of Florida. *See* 28 U.S.C. § 1404(a). Specifically, the Middle District of Florida is the more convenient forum because Publix' corporate headquarters is in the Middle District of Florida, the Middle District of Florida is the most convenient forum for the key witnesses, and key documents are located within the Middle District of Florida.

SEVENTEENTH DEFENSE.

Plaintiff's and any opt-ins' claims are barred, in whole or in part, by the doctrines of accord and satisfaction, settlement, and/or payment and release to the extent their claims were previously released. For example, to the extent Plaintiff or opt-ins released claims through settlement of a workers' compensation proceeding, Plaintiff or such opt-ins may be barred from asserting claims in the instant action.

Publix reserves the right to amend this Answer and add additional defenses as discovery may warrant.

WHEREFORE, Publix respectfully requests that this Court dismiss the Complaint with prejudice and award Publix its costs and attorneys' fees.

Dated: July 19, 2012

Respectfully submitted,

/s/ Wendy V. Miller

Wendy V. Miller

Tennessee Bar No. 023500

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed a true and correct copy of the foregoing using the CM/ECF filing system, which will send a notice of electronic filing to the following

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on this 19th day of July, 2012.

/s/ Wendy V. Miller

Wendy V. Miller