

Summary Judgment Review

Case Name: *Crittendon et al v. International Follies, Inc. et al*

Nature of the Order: Summary Judgment Order

Magistrate Judge: N/A

District Judge: Eleanor L. Ross

Claims & Outcomes:

1. **Claim:** Minimum Wage Violation (FLSA)
 - a. **Outcome:** Summary Judgment Granted in Part & Denied in Part
2. **Claim:** Overtime Wage Violation (FLSA)
 - a. **Outcome:** Summary Judgment Granted
3. **Claim:** Unlawful Taking of Tips/Kickbacks (FLSA)
 - a. **Outcome:** Summary Judgment Granted

Whether R&R Followed: N/A

For Race/Gender Discrimination Cases:

Race of Plaintiff: N/A

Gender of Plaintiff: N/A

Summary

Plaintiffs were adult entertainers/dancers for Defendants, an adult entertainment club and its general manager. Plaintiffs alleged a variety of violations of their rights under the Fair Labor Standards Act (“FLSA”). Defendants moved for summary judgment on all claims. District Judge Eleanor L. Ross addressed each claim in turn.

First, for the minimum wage claim, Plaintiffs – who were tipped workers – alleged they were forced to share their tips in an unlawful tip pool. Employers of tipped employees may pay their employees only \$2.13/hour and have them make up the rest of the \$7.25/hour minimum wage via tips. Employers may still use this “tip credit” even if they require tipped employees to “pool” and share their tips – unless the tips must be shared with the employer, managers, or supervisors. (“Managers and supervisors” were added by Congress to the people who may not be included in the tip pool in 2018.)

Judge Ross first addressed Plaintiffs’ claims that they were forced to pool their tips with day manager Samantha Kim and the “house moms.” Judge Ross found that the evidence demonstrated that Kim and the “house moms” were not included in the mandatory tip pool – over the vocal protest of the house moms – and that any tip sharing with those individuals was

voluntary. Thus, she **granted** summary judgment with respect to the tip pooling claim regarding Kim and house moms. In contrast, Judge Ross found that tip sharing with night manager Bob Johnson was mandatory. She further found that there was a genuine dispute of fact whether Johnson was actually a “manager” (and thus not entitled to be part of the tip pool) or just a floorman. Therefore, Judge Ross **denied** summary judgment with respect to the tip pooling claim regarding Johnson.

Second, for the overtime claim, Plaintiffs alleged that they were not compensated for time preparing for work and waiting after work (under Defendants’ “waiting policy” that required them to wait until all customers had left before they left). Defendant argued that these activities were non-compensable preliminary and postliminary activities. Such activities are only compensable if they are an “integral and indispensable part of the principal activities” for which employees were hired. That is, a preliminary or postliminary activity is only compensable if it is “an intrinsic element” of the principal activities and “one with which the employee cannot dispense if she is to perform the activities.” Judge Ross concluded that getting ready, completing check-out procedures, and waiting for customers to vacate the premises before leaving work were not “integral and indispensable” to the principal adult entertainment activities the Plaintiffs were employed to perform. Therefore, she **granted** summary judgment with respect to the overtime claim.

Third, Plaintiffs alleged Defendants unlawfully required them to “kickback” part of their wages/tips to the company or to expenses for the company’s benefit. Payments to employees must be “unconditional” and “free and clear” of any requirement to kickback part of the payment to the employer or for the employer’s benefit. Plaintiffs alleged that certain expenses they were required to pay (i.e. parking fees, tips to house moms, etc.) were unlawful kickbacks. However, Judge Ross found that some of the disputed expenses were not mentioned in Plaintiffs’ Amended Complaint and, thus, not part of the lawsuit. As to the other expenses, Judge Ross found there was no evidence they were mandatory or “required” by Defendants. Thus, Judge Ross **granted** summary judgment as to the unlawful taking of tips/“kickbacks” claim.

Finally, Defendants moved for summary judgment for a finding that any violation was not “willful” (which would have extended the statute of limitations from 2 years to 3 years). Since all the violations were over 2 years before the Plaintiffs filed suit, this would have made all their claims time barred. However, Judge Ross cited Eleventh Circuit case law that it is inappropriate to rule on whether a violation is “willful” before there has even been a finding that there was a violation. Since there remained triable issues regarding the minimum wage claim, Judge Ross **denied** Defendant’s summary judgment motion with respect to the willfulness issue.

Judge Ross, therefore, GRANTED summary judgment as to the overtime and unlawful taking of tips/“kickbacks” claim and GRANTED in part/DENIED in part summary judgment on the minimum wage/“tip pooling” claim.