

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

YUVONNIA BOWE,

Plaintiff,

v.

Case No. 6:16-cv-1844-Orl-37KRS

HHJJ, LLC,

Defendant.

ORDER

This cause is before the Court on the following:

1. Defendant's Motion to Dismiss and Incorporated Memorandum of Law (Doc. 10), filed October 31, 2016; and
2. U.S. Magistrate Judge Karla R. Spaulding's Report and Recommendation (Doc. 15), filed December 13, 2016.

BACKGROUND

On September 27, 2016, Plaintiff initiated this state court action against Defendant for, *inter alia*: (1) failing to pay her a minimum wage in violation of the Florida Minimum Wage Act ("**FMWA**") (Counts I and II); and (2) failing to pay her overtime wages in violation of the Fair Labor Standards Act ("**FLSA**") and the Florida Constitution (Counts IV and V). (Doc. 2.) Defendant removed the action to this Court (Doc. 1), and moved for dismissal of Counts I, II, and V (Doc. 10 ("**MTD**")). After Plaintiff responded (Doc. 13), the MTD was referred to U.S. Magistrate Judge Karla R. Spaulding, who issued a detailed Report recommending that the Court deny the MTD. (Doc. 15 ("**R&R**").) No objections were filed and the time for doing so has now passed.

DISCUSSION

The parties' dispute centers on whether Defendant properly applied a provision of the FLSA known as the "tip credit." (Doc. 15, p. 5.) Generally, employees receive a minimum wage under the FLSA, see 29 U.S.C. § 206(a)(1)(c); however, an exception exists for "tipped employees," 29 U.S.C. § 203(m) ("**Tipped Employee Exception**"). The Tipped Employee Exception permits an employer to pay a tipped employee¹ a lower wage than the full minimum wage in certain circumstances. See 29 U.S.C. § 203(m). Whether Defendant is entitled to reduce Plaintiff's wages, depends on whether Defendant may apply the Tipped Employee Exception to Plaintiff.²

To implement the Tipped Employee Exception, the Department of Labor ("**DOL**") has issued regulations, recognizing that employees may be engaged in dual jobs for the same employer—that is, an employee may perform both tipped and non-tipped activities ("**Regulation**"). See 29 C.F.R. § 531.56(e). Further, the DOL prohibits employers from applying the Tipped Employee Exception where a tipped employee spends more than 20% of his time performing general preparation work or maintenance ("**20% Rule**"). Dep't of Labor, *Records, Minimum Wage, and Payment of Wages*, FIELD OPERATIONS HANDBOOK, ch. 30, § 30dd00(e) (2016), https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

I. **Counts I and V**

With this background, the R&R recommends that the Court apply the 20% Rule to determine whether Plaintiff's allegations in Counts I and V are sufficient because: (1) the

¹ A "tipped employee" is one who is engaged in an occupation in which he customarily and regularly received more than \$30 per month in tips. 29 U.S.C. § 203(t).

² The Florida Constitution incorporate the FLSA's Tipped Employee Exception. See Fla. Const. art. X, § 24(c). The FMWA implements Article X, § 24(c) of the Florida Constitution. See Fla. Stat. 448.110(2).

Regulation is ambiguous on its face; and (2) as a result of the ambiguity, the DOL's 20% Rule is a reasonable interpretation of the Regulation and is, therefore, controlling. (Doc. 15, pp. 8–14 (citing *Auer v. Robbins*, 519 U.S. 452 (1997)).) In so finding, the R&R recommends that the Court deny the MTD as to Counts I and V because Plaintiff has adequately alleged that she spent more than 20% of her time engaged in non-tipped activities, which is all that is required at this stage. (*Id.* at 14.)

II. Count II

As to Count II, the crux of the parties' dispute is whether Plaintiff's non-tipped activities, such as janitorial services, were "related" to her job as a server. (*Id.*) This relationship is pivotal in determining whether Defendant was entitled to apply the Tipped Employee Exception to Plaintiff's non-tipped activities. (*Id.*) The R&R concludes that the relatedness determination is "fact-sensitive and case-specific" and is, therefore, inappropriate at the motion to dismiss stage. (*Id.* at 15.) Hence the R&R recommends that the Court deny the MTD as to Count II. (*Id.*)

CONCLUSION

Absent objections, the Court has independently reviewed the R&R and agrees with Magistrate Judge Spaulding. See 28 U.S.C. § 636(b)(1) (suggesting that a de novo review is only required when a party objects to the proposed findings and recommendations). As such, the Court finds that the R&R is due to be adopted in its entirety and that Defendant's MTD is due to be denied.

Accordingly, it is hereby **ORDERED AND ADJUDGED**:

1. U.S. Magistrate Judge Karla R. Spaulding's Report and Recommendation (Doc. 15) is **ADOPTED, CONFIRMED**, and made a part of this Order.

2. Defendant's Motion to Dismiss and Incorporated Memorandum of Law (Doc. 10) is **DENIED**.

DONE AND ORDERED in Chambers in Orlando, Florida, on January 4, 2017.




ROY B. DALTON JR.
United States District Judge

Copies:

Counsel of Record