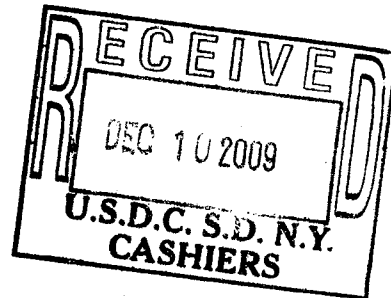


D. Maimon Kirschenbaum
Matthew Kadushin
JOSEPH, HERZFELD, HESTER &
KIRSCHENBAUM LLP
757 Third Avenue
25th Floor
New York, NY 10017
(212) 688-5640
(212) 688-2548 (fax)

09 CIV 10086

*Attorneys for Named Plaintiff and the FLSA
Collective Plaintiffs*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
JANIELA JOHNSON, XIOMARA
FERNANDEZ, TELIZA ADAMS, AND
MONICA MATEO

COMPLAINT

Plaintiffs,

FLSA COLLECTIVE ACTION

v.

229 ELIZABETH CORP. D/B/A CAFÉ
HABANA, HABANA BROOKLYN LLC,
D/B/A HABANA OUTPOST, AND SEAN
MEENAN

DEMAND FOR JURY TRIAL

Defendants.
-----X

Plaintiffs, on behalf of themselves and all others similarly situated, alleges as follows:

JURISDICTION AND VENUE

1. This Court has original federal question jurisdiction under 28 U.S.C. § 1331 because this case is brought under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*

("FLSA"). This Court has supplemental jurisdiction over the claims brought under the New York Human Rights Law ("NYSHRL"), N.Y Exec. Law § 296, New York City Human Rights Law, Administrative Code of the City of New York § 8-107 *et seq.* ("NYCHRL"), and New York Labor Law § 215 (NYLL) as they are so related in this action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

2. Venue is proper in this District because Defendants conduct business in this District, and the acts and/or omissions giving rise to the claims herein alleged took place in this District.

THE PARTIES

3. All Defendants are hereinafter collectively referred to as "Defendants."
4. Defendant 229 Elizabeth Corp. is a New York corporation. Defendant 229 Elizabeth Corp. operates Café Habana located in Soho, Manhattan.
5. Defendant Habana Brooklyn LLC is a New York corporation. Defendant Habana Brooklyn LLC operates Habana Outpost located in Brooklyn, New York.
6. Defendant 229 Elizabeth Corp. and Defendant Habana Brooklyn LLC share the same general management and operate under a similar trade name, "Habana."
7. Defendant Sean Meenan is the Owner and Chief Executive Officer of 229 Elizabeth Corp. and Habana Brooklyn LLC and exercises sufficient control of its day to day operations to be considered Plaintiffs' employers under the Fair Labor Standards Act and New York state law.
8. Plaintiff Janiela Johnson was employed by Defendants as a server at Café Habana, and as a bartender and manager Habana Outpost within the last three years.

9. Plaintiff Xiomara Fernandez was employed by Defendants as a server at Café Habana within the last three years.
10. Plaintiff Teliza Adams was employed by Defendants as a server at Café Habana within the last three years.
11. Plaintiff Monica Mateo was employed by Defendants as a server at Café Habana within the last three years.

FLSA COLLECTIVE ACTION ALLEGATIONS

12. Plaintiffs bring the First and Second Claims for Relief as a collective action pursuant to FLSA Section 16(b), 29 U.S.C. § 216(b), on behalf of all non exempt persons employed by Defendants at any New York location in any tipped position on or after the date that is three years before the filing of the Complaint in this case as defined herein ("FLSA Collective Plaintiffs").
13. At all relevant times, Plaintiffs and the other FLSA Collective Plaintiffs are and have been similarly situated, have had substantially similar job requirements and pay provisions, and are and have been subject to Defendants' decision, policy, plan and common policies, programs, practices, procedures, protocols, routines, and rules willfully failing and refusing to pay them at the legally required minimum wage for all hours worked and one and one half times this rate for work in excess of forty (40) hours per workweek, and allowing non-tipped employees to share in their tips. Specifically, Defendants imposed an involuntary tip pool among waiters and retained a portion of the tips to pay the salaries of the hostesses. The claims of the Plaintiffs stated herein are essentially the same as those of the other FLSA Collective Plaintiffs.

14. The First and Second Claims for Relief are properly brought under and maintained as an opt-in collective action pursuant to § 16(b) of the FLSA, 29 U.S.C. 216(b). The FLSA Collective Plaintiffs are readily ascertainable.
15. For purpose of notice and other purposes related to this action, their names and addresses are readily available from Defendants.
16. Notice can be provided to the FLSA Collective Plaintiffs via first class mail to the last address known to Defendants.

FACTS

Wage and Hour Claims Applicable to all Plaintiffs

17. Defendants committed the following alleged acts knowingly, intentionally and willfully.
18. Defendants knew that nonpayment of minimum wage, nonpayment of overtime, and improperly forcing and/or the Plaintiffs and the FLSA Collective Plaintiffs to share their tips with Defendants' agents would economically injure Plaintiffs and violated federal and state laws.
19. Defendants failed to pay the Plaintiffs the minimum wage for all hours worked. In fact, for much of Plaintiffs' tenure with Defendants, they were paid no direct wage at all.
20. Defendants did not pay Plaintiffs for one and a half times their regular rate for all hours worked in excess of forty per workweek.
21. Defendants illegally retained Plaintiffs' tips. Specifically, Defendants imposed an involuntary tip pool among waiters and retained a portion of the tips, allegedly to pay the salaries of the hostesses.

22. Defendants failed to provide Plaintiffs and other hourly employees a “spread of hours” premium for every day in which their workday lasted longer than ten hours.
23. Defendants committed the foregoing acts against the Plaintiffs and the FLSA Collective Plaintiffs.

Discrimination/Retaliation Claims

General

24. Café Habana and Habana Outpost purport to be “eateries [that] were built on the principles of great food, great fun, and social responsibility.”
25. Plaintiffs all accepted employment with Defendants expecting a family friendly and socially responsible environment. Unfortunately for Plaintiffs, they were subjected to heavily sexually charged environment, in which they were required to dress in a sexually provocative manner, asked to pose for pictures scantily clad, and subject to degrading sexual harassment.

Xiomara Fernandez

26. Plaintiff Xiomara Fernandez was hired as a server at Café Habana in May 2009.
27. Throughout her employment at Café Habana, Ms. Fernandez was instructed to wear clothing that was sexually provocative. It was made clear several times to Ms. Hernandez by Café Habana management that she would be sent home if her clothing to work was not sufficiently “sexy.”
28. Plaintiff Fernandez was egregiously harassed by a male chef at Café Habana, “David” (last name unknown.) Throughout Plaintiff Fernandez’s employment with Defendants, David was sexually inappropriate with Ms. Fernandez. For example,

David several times kissed her on the neck and hand, and consistently commented on Plaintiff Fernandez's appearance.

29. David's actions and behavior made Ms. Fernandez extremely uncomfortable and humiliated.

30. On or about June 6, 2009 at approximately 7:30 am, David approached Ms. Fernandez and kissed her neck while looking down her shirt.

31. Plaintiff Fernandez was understandably disturbed and shaken by this inappropriate behavior.

32. Plaintiff Fernandez made a complaint about David's behavior to the manager on duty, Rachel Pena, on or about June 6, 2009 at approximately 8 am.

33. Ms. Pena did nothing to rectify this blatant sexual assault against Plaintiff Fernandez. Instead, several hours later that day, Ms. Pena terminated Fernandez.

34. Ms. Pena later indicated to other Café Habana employees that she was upset with Plaintiff Fernandez for complaining about the harassment.

Teliza Adams

35. Plaintiff Teliza Adams was hired as a server at Café Habana in March 2009.

36. Throughout her employment at Café Habana, Ms. Adams was instructed to wear clothing that was sexually provocative. It was made clear several times to Ms. Adams that she would be sent home if her clothing to work was not sufficiently "sexy."

37. In July 2009, Plaintiff Adams was first approached by Defendant Sean Meenan about participating in a risqué "Habana Girls" calendar for the 2009 holiday season.

38. The calendar in previous years showed photographs of Café Habana waitresses scantily clad and in sexually provocative positions. According to Mr. Meenan, the proceeds generated by sales of the calendar were intended to benefit a children's charity owned by Defendant Meenan.
39. Defendants insisted that servers further degrade themselves by requiring the waitresses to sell these calendars to customers they were serving.
40. Defendant Meenan approached and harrassed Plaintiff Adams repeatedly, both at work, taking her outside during her busy shifts for thirty minutes at a time, and calling her on her days off to plead with her to pose in the risqué calendar.
41. Plaintiff Adams made clear that she did not want to participate in the calendar in which waitresses were posed suggestively in short skirts, tight shirts which accentuated their cleavage, and where the waitresses' photos were accompanied by suggestive captions contributing to a sexually demeaning portrayal of the women.
42. Defendant Meenan did not respect Plaintiff Adams' answer. He commented that Plaintiff Adams was like so many women "who were beautiful on the outside but bitter on the inside." He questioned her commitment to the restaurant if she would not demean herself to pose suggestively by asking her "how are you going to prove yourself to the restaurant family?"
43. Defendant Meenan told Plaintiff Adams that "It is not about who is the hardest worker or who comes in on time...It's about more than that...The best shifts will go to the girls that will be in the calendar. Your schedule can look like whatever you want if you're in the calendar."
44. On or about August 23, 2009 the photo shoot for the Habana Girls occurred.

45. On or about August 25, 2009, Plaintiff Adams was approached by Defendant Meenan again and demanded that she be on the cover of the calendar, and to give the photographer and the hair and make up artists a date to schedule the photo shoot.
46. On or about August 26, 2009 Plaintiff Adams called Sean and once again declined to be in the calendar.
47. Defendants wasted no time in retaliating against Ms. Adams.
48. On or about August 26, 2009, the general manager at Café Habana, Rachel Pena, called Plaintiff Adams twenty minutes after she spoke with Defendant Meenan about her declining to pose in the calendar.
49. Ms. Pena told Plaintiff Adams that there was a problem with her work and that her declining to be in the calendar had “raped” the restaurant.
50. At her next shift, Plaintiff Adams was suspended.
51. Plaintiff Adams was told her schedule would be cut if she did not do the calendar.
52. Plaintiff Adams wrote a letter to the Defendants on October 10, 2009 expressing her distress at being in a hostile work environment and being asked to pose in a sexually risqué calendar.
53. On or about November 4, 2009, Plaintiff Adams was fired in direct retaliation for not participating in the calendar. Defendant Meenan also added that her “letter writing campaign,” *i.e.*, her complaints of sexual harassment, left them no choice but to fire her.

Monica Mateo

54. Plaintiff Monica Mateo was hired as a server at Café Habana in October 2007.

55. Plaintiff Mateo experienced many instances where servers' shifts were reduced if they did not dress "sexy enough."
56. Plaintiff Mateo was forced to sell the risqué "Habana Girls" calendar during her shifts. This practice made her very uncomfortable because customers would rifle through the pages trying to find her.
57. When customers did not find her, they would make lewd, inappropriate, and sexual comments about how she should pose.
58. Plaintiff Mateo regularly served Hollywood actor Owen Wilson during her shifts at Café Habana.
59. Mr. Wilson expressed an interest in Ms. Mateo and asked her out on a date for coffee.
60. Ms. Mateo declined the date, but was soon after approached by Leslie Meenan, a Defendant Meenan's sister and a member of management, who told Ms. Mateo "You know what coffee means in Hollywood, right?," insinuating that she Mr. Owen was pursuing her sexually. Ms. Meenan continued, "Don't screw this up. Owen's a good customer."
61. Plaintiff Mateo was told that if she did not pose in the "Habana Girls" calendar she would have to "pimp out" the other servers.
62. On or about August 8, 2009 Plaintiff Mateo was shown her schedule which reflected Defendants anger at her declining to pose in the calendar: her shifts had been reduced from five night shifts per week to no nights, and only a couple of days per week.
63. Ms. Pena told Plaintiff Mateo that she should "put up with it for a few weeks....what happened to you was personal," directly referring to her not being in the calendar.

Janiela Johnson

64. Plaintiff Janiela Johnson was hired in June 2006 as a bartender at Habana Outpost in Brooklyn, New York.
65. Plaintiff Johnson was promoted to manager in March 2008 at Habana Outpost.
66. Plaintiff Johnson began working as a server at Café Habana in New York City in October 2007.
67. In 2008, Defendants requested that Ms. Johnson participate in a risqué “Habana Girls” calendar.
68. Although Plaintiff Johnson had participated in the previous year’s calendar, she longer desired to participate in the calendar due to the fact that Mr. Meenan had made the process of selling the calendars uncomfortable.
69. Plaintiff Johnson felt that she would lose her job if she were to decline posing for the calendar.
70. Defendant Meenan implied that waitresses would suffer if they did not participate in the calendar by threatening “you have to do the calendar or you’ll lose shifts and hours.”
71. Plaintiff Johnson suffered emotional distress due to her participation in the calendar and the consequential selling of herself through the calendars to customers.
72. In December 2008, Plaintiff Johnson reported that the bartender on duty was doing cocaine and one hundred dollars of her tips were missing every shift she worked with him.
73. Plaintiff Johnson was fired on December 31, 2008 in retaliation for her complaint about tip retention.

FIRST CLAIM FOR RELIEF
(FLSA Claims, 29 U.S.C. §§ 201, *et seq.*,

**Brought by Plaintiffs on Behalf of
Themselves and the FLSA Collective Plaintiffs)**

74. Plaintiffs, on behalf of herself and the FLSA Collective Plaintiffs, reallege and incorporate by reference all preceding paragraphs as if they were set forth again herein.
75. At all relevant times, the Defendants have been, and continues to be, an “employer” engaged in interstate “commerce” and/or in the production of “goods” for “commerce,” within the meaning of FLSA, 29 U.S.C. § 203. At all relevant times, the Defendants have employed, “employee[s],” including Plaintiffs and each of the FLSA Collective Plaintiffs.
76. Throughout the statute of limitations period covered by these claims, Defendants knowingly failed to pay Plaintiffs the federal minimum wage for each hour worked.
77. The Plaintiffs, on behalf of themselves and the FLSA Collective Plaintiffs, seek damages in the amount of their respective unpaid compensation, liquidated (double) damages as provided by the FLSA for minimum wage violations, attorneys’ fees and costs, and such other legal and equitable relief as this Court deems just and proper.

SECOND CLAIM FOR RELIEF
(FLSA Overtime Violations, 29 U.S.C. §§ 201 *et seq.*
Brought by Plaintiffs on Behalf of Themselves
and the FLSA Collective Plaintiffs)

78. Plaintiffs, on behalf of themselves and other FLSA Collective Plaintiffs, reallege and incorporate, by reference all previous paragraphs.
79. Throughout the statute of limitations period covered by these claims, Plaintiffs and the other FLSA Collective Plaintiffs regularly worked in excess of forty (40) hours per workweek and continue to do so.

80. At all relevant times, Defendants willfully, regularly and repeatedly failed to pay Plaintiffs and the FLSA Collective Plaintiffs at the required overtime rates, one and a half times the federal minimum wage for hours worked in excess of forty (40) hours per workweek.

81. The Plaintiffs, on behalf of themselves and the FLSA Collective Plaintiffs, seek damages in the amount of their respective unpaid overtime compensation, liquidated (double) damages as provided by the FLSA for overtime violations, attorneys' fees and costs, and such other legal and equitable relief as this Court deems just and proper.

THIRD CLAIM FOR RELIEF

**(New York State Minimum Wage Act, New York Labor Law §§ 650 *et seq.*
Brought by Plaintiffs on Behalf of Themselves)**

82. Plaintiffs reallege and incorporate by reference all preceding paragraphs as if they were set forth again herein.

83. Defendants knowingly paid the Plaintiffs less than the New York State Minimum Wage § 652 and supporting regulations of the New York State Department of Labor.

84. Defendants did not pay Plaintiffs minimum wage for all hours worked.

85. Defendants' failure to pay Plaintiff the minimum wage was willful within the meaning of N.Y. Lab. Law § 663.

86. As a result of Defendants' willful and unlawful conduct, Plaintiffs are entitled to an award of damages in amount to be determined at trial and attorneys' fees, including liquidated damages, as provided by N.Y. Lab. Law § 663.

FOURTH CLAIM FOR RELIEF

(New York Minimum Wage Act, N.Y. Stat. § 650 *et seq.*,

**Brought by Plaintiffs on Behalf of
Themselves)**

87. Plaintiffs reallege and incorporate by reference all previous paragraphs.
88. It is unlawful under New York law for an employer to suffer or permit a non-exempt employee to work without paying overtime wages for all hours worked in excess of forty (40) hours in any workweek.
89. Defendants willfully, regularly and repeatedly failed to pay Plaintiffs at the required overtime rates, one and a half times the minimum wages for hours worked in excess of forty (40) hours per workweek.
90. As a direct and proximate result of Defendants' unlawful conduct, as set forth herein, Plaintiffs have sustained damages, including loss of earnings, in an amount to be established at trial, including liquidated damages, prejudgment interest, and costs, and attorneys' fees, pursuant to N.Y. Lab. Law § 663.

FIFTH CLAIM FOR RELIEF

**(Illegal Pay Deductions and Deductions from Gratuities, N.Y. Lab. L. § 196-d
Brought by Plaintiffs on Behalf of Themselves)**

91. Plaintiffs reallege and incorporate by reference all previous paragraphs.
92. Defendants retained and/or misappropriated to managers and/or non service employees portions of Plaintiffs' tips.
93. As a result of Defendants' willful and unlawful conduct, Plaintiffs are entitled to an award of damages, including damages, in an amount to be determined at trial and attorneys' fees.

SIXTH CLAIM FOR RELIEF
(New York Spread of Hours Provisions,
N.Y. Lab. L. § 650 *et seq.*, and N.Y. Comp. Code R. & Regs. tit. 12, § 137-1.7
Brought by Plaintiffs on Behalf of Themselves)

94. Plaintiffs reallege and incorporate by reference all previous paragraphs.
95. Plaintiffs members regularly worked more than 10 hours in a workday.
96. Defendants willfully failed and intentionally failed to compensate Plaintiffs and/or Class members one hour's pay at the basic New York minimum hourly wage rate, as required by New York law.
97. As a direct and proximate result of Defendants' unlawful conduct, as set forth herein, Plaintiffs and the Class members have sustained damages, including loss of earnings, in an amount to be established at trial, including liquidated damages, prejudgment interest, and costs, and attorneys' fees, pursuant to N.Y. Lab. Law § 663.

SEVENTH CLAIM FOR RELIEF
NYSHRL- DISCRIMINATION
(Brought by all Plaintiffs)

98. Plaintiffs incorporate by reference each allegation of each preceding paragraph.
99. In violation of NYSHRL, Defendants intentionally discriminated against Plaintiffs on the basis of their gender by subjecting Plaintiffs to a sexually harassing hostile work environment that was severe or pervasive enough to alter the terms and conditions of their employment.
100. As a result of Defendants' discrimination, Plaintiffs are entitled to monetary damage and compensatory damages, including emotional distress.

EIGHTH CLAIM FOR RELIEF
NYSHRL- RETALIATION
(Brought by Plaintiffs Mateo, Fernandez and Adams)

101. Plaintiffs Mateo, Fernandez and Adams incorporate by reference each allegation of each preceding paragraph.
102. In violation of NYSHRL, Defendants intentionally retaliated against Plaintiffs for complaining about sexual harassment by drastically reducing their shifts and/or terminating their employment.
103. As a result of Defendants' discrimination, Plaintiffs are entitled to monetary damage, including backpay and frontpay and compensatory damages, including emotional distress.

NINTH CLAIM FOR RELIEF
NYCHRL- DISCRIMINATION
(Brought by all Plaintiffs)

104. Plaintiffs incorporate by reference each allegation of each preceding paragraph.
105. In violation of NYCHRL, Defendants intentionally discriminated against Plaintiffs on the basis of their gender by subjecting Plaintiffs to a sexually harassing hostile work environment that was severe or pervasive enough to alter the terms and conditions of their employment.
106. As a result of Defendants' discrimination, Plaintiffs are entitled to monetary damage and compensatory damages, including emotional distress and punitive damages.

TENTH CLAIM FOR RELIEF
NYCHRL- RETALIATION
(Brought by Plaintiffs Mateo, Fernandez and Adams)

107. Plaintiffs Mateo, Fernandez and Adams incorporate by reference each allegation of each preceding paragraph.
108. In violation of NYCHRL, Defendants intentionally retaliated against Plaintiffs for complaining about sexual harassment by drastically reducing their shifts and/or terminating their employment.
109. As a result of Defendants' discrimination, Plaintiffs are entitled to monetary damage, including backpay and frontpay and compensatory damages, including emotional distress and punitive damages.

ELEVENTH CLAIM FOR RELIEF
NYLL- RETALIATION
(Brought by Plaintiff Johnson)

110. Plaintiff Johnson incorporates by reference each allegation of each preceding paragraph.
111. In violation of New York Labor Law § 215, Defendants intentionally retaliated against Plaintiff Johnson for complaining about sexual harassment by drastically reducing their shifts and/or terminating their employment.
112. As a result of Defendants' discrimination, Plaintiff isentitled to monetary damage, including backpay and frontpay and compensatory damages, including emotional distress and punitive damages.

WHEREFORE, Plaintiffs pray for relief as follows:

- A. Designation of this action as a collective action on behalf of the FLSA Collective Plaintiffs (asserting FLSA claims and state claims) and prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all similarly situated members of the FLSA opt-in class, apprising them of the pendency of this action, and permitting them to assert timely FLSA claims and state claims in this action by filing individual Consent to Sue forms pursuant to 29 U.S.C. § 216(b);
- B. Designation of Plaintiffs as Representatives of the FLSA Collective Plaintiffs;
- C. An award of damages, according to proof, including liquidated damages, to be paid by Defendant;
- D. An award of front pay, back pay, reimbursement for any and all lost benefits, and reimbursement for any and all medical expenses for injuries caused or exacerbated by Defendants;
- E. An award of compensatory damages for the emotional distress caused by Defendant's discrimination and harassment against Plaintiffs;
- F. An award of punitive damages sufficient to punish and deter continuation of Defendants' unlawful employment practices;
- G. Penalties available under applicable laws;
- H. Costs of action incurred herein, including expert fees;
- I. Attorneys' fees, including fees pursuant to applicable statutes;
- J. Pre-Judgment and post-judgment interest, as provided by law; and

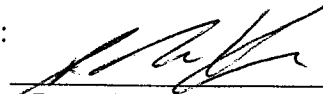
K. Such other and further legal and equitable relief as this Court deems necessary,
just and proper.

Dated: New York, New York
December 21, 2009

Respectfully submitted,

JOSEPH, HERZFELD, HESTER &
KIRSCHENBAUM LLP

By:



D. Maimon Kirschenbaum

Matthew Kadushin
757 Third Avenue
25th Floor
New York, NY 10017
Tel: (212) 688-5640
Fax: (212) 688-2548

*Attorneys for Plaintiff, proposed collective action
members and proposed class*

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial on all causes of action and claims with respect to which they have a right to jury trial.