

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

James Leslie and Jason Klumb, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

Cunningham Restaurant Group LLC, an
Indiana corporation,

Defendant.

CASE NO. 1:19-cv-221

JUDGE TIMOTHY S. BLACK

**FIRST AMENDED COLLECTIVE
ACTION COMPLAINT**

Demand for Jury Trial

Plaintiffs James Leslie and Jason Klumb (“Plaintiffs”), individually and on behalf of all others similarly situated who are or were current or former employees paid by salary for work performed during and/or while completing their salaried “management” training period sometimes referred to as “Manager In Training” period (“MIT”) to become a salaried Sous Chef, Executive Chef, Restaurant Manager, or other position referred to by Defendant’s Careers website page as “Restaurant Management”¹ however variously titled below the level of restaurant General Manager (collectively “MITs”), and/or all others similarly situated who are or were current or former Sous Chefs or equivalent reporting level back of house position, however variously titled, referred to by Defendant’s Careers website page as “Restaurant Management” (collectively “Sous Chefs”), by and through undersigned counsel, hereby bring suit against Defendant alleging as follows:

¹ See <https://apply.jobappnetwork.com/cunningham-restaurant-group?keywordsFilter=&city=&state=&category=Restaurant%20Management%20-%20Cunningham>.

NATURE OF THE ACTION

1. This action seeks to recover unpaid overtime wages and all allowable damages, interest, and attorney's fees and costs under the Fair Labor Standards Act ("FLSA") for Plaintiffs individually, and as a collective action (the "Collective Action") for Plaintiffs and all MITs and/or Sous Chefs who worked more than 40 hours in one or more workweeks as a MIT or Sous Chef at any of Defendant's locations, for which workweek the individual was paid on a pay date within the period beginning three years preceding the filing date of this Complaint and ending on the date of judgment in this matter (the "FLSA relevant period") (each a "Putative Collective Member" and collectively "Putative Collective Members"), who elect to opt into this action pursuant to 29 U.S.C. § 216(b) of the FLSA (each a "Collective Member" and collectively "Collective Members"). Plaintiffs, individually and collectively, also seek to recover unpaid overtime wages and allowable damages, interest, and attorney's fees and costs under the Ohio Minimum Fair Wage Standards Act, O.R.C. 4111.03, and 4111.08 ("the Ohio Wage Act" or "OMFWSA"), and the Ohio Prompt Pay Act ("OPPA"), Ohio Rev. Code § 4113.15 (the Ohio Wage Act and the OPPA will be referred to collectively as "the Ohio Acts") for MIT or Sous Chef workweeks paid salary as exempt during the applicable state law limitations period.

THE PARTIES

2. Plaintiff James Leslie ("Plaintiff Leslie") is a current resident of Dublin, Ohio, but as outlined below, worked within the Cincinnati forum of this judicial district during the relevant time period.

3. During the relevant time period, Plaintiff Leslie worked as a salary-paid MIT training to become validated as a front of house manager at the Bru Burger Bar location at 41 E. 6th St., Cincinnati, Ohio 45202.

4. Plaintiff Leslie worked as a salary-paid MIT from approximately April 2018 to May 2018 (Plaintiff Leslie's "period of MIT employment").

5. Plaintiff Jason Klumb ("Plaintiff Klumb") is a resident of Bowling Green, Kentucky.

6. During the relevant time period, for a period of several weeks beginning approximately July 5, 2016, Plaintiff Klumb worked as a salary-paid MIT at the Mesh location in Indianapolis, Indiana, training to become validated for a Sous Chef position at the Mesh location in Louisville, Kentucky (Plaintiff Klumb's "period of MIT employment").

7. During the relevant period, upon completing his salary-paid MIT period at the Indianapolis Mesh location, Plaintiff Klumb then worked as a salary-paid Sous Chef until approximately March 10, 2017 (Plaintiff Klumb's "period of Sous Chef employment").

8. According to its corporate filings with the Ohio Secretary of State, Defendant is a foreign limited liability company or "LLC" and may be served with process on its registered agent, Legalinc Corporate Services Inc. at 1991 Crocker Road, Suite 600A, Westlake, Ohio 44145.

9. Defendant owned and operated approximately 30 restaurant locations in Ohio, Indiana, and Kentucky during the FLSA relevant period under the various brand names of Bru Burger Bar, Tavern at the Point, Nesso Coastal Italia, Vida, Stone Creek Dining Company, Provision, Livery, Rize, Mesh, Union 50, Boulder Creek Dining Company, Charbonos, Moerlein Lager House, and Café 251.

10. Plaintiff Leslie frequently worked over 40 hours in a workweek during his period of MIT employment, and received one or more paychecks on the regularly scheduled pay dates for such workweeks within the FLSA relevant period that did not contain overtime premiums.

11. Plaintiff Klumb frequently worked over 40 hours in a workweek during his periods of MIT and Sous Chef employment, and received one or more paychecks on the regularly scheduled pay dates for such workweeks within the FLSA relevant period that did not contain overtime premiums.

12. At all material times, Plaintiffs were employees as defined in 29 U.S.C. § 203(e)(1).

13. Defendant is Plaintiffs' "employer" as defined by the FLSA, 29 U.S.C. § 203(d) and the Ohio Acts.

14. Defendant is and was an enterprise engaged in commerce that had annual gross sales of at least \$500,000 during each calendar year of the relevant period.

JURISDICTION & VENUE

15. This Court has jurisdiction over Plaintiffs' FLSA claims pursuant to 29 U.S.C. § 216(b) and 28 U.S.C. § 1331.

16. Venue is proper in the Cincinnati forum of this judicial district under 28 U.S.C. § 1391 because Plaintiff Leslie worked for and received paychecks from the Defendant in the Cincinnati forum of this judicial district; Defendant operates restaurants in the Cincinnati forum of this judicial district, including the location where Plaintiff Leslie worked; and a substantial part of the events giving rise to the claim herein occurred in the Cincinnati forum of this judicial district, including but not limited to Plaintiff Leslie's employment at issue and that of others similarly situated in the Cincinnati forum of this judicial district.

17. Defendant is subject to personal jurisdiction in this judicial district.

FLSA COLLECTIVE ACTION ALLEGATIONS

18. Pursuant to 29 U.S.C. § 216(b), Plaintiffs seek to prosecute their FLSA claims individually and as a collective action on behalf of all Putative Collective Members as defined above.

19. Defendant is liable under the FLSA for, *inter alia*, failing to properly compensate Plaintiffs and the other Putative Collective Members.

20. There are other similarly situated current and former Putative Collective Members who have not been paid overtime premiums for hours worked over 40 in a workweek as MITs or Sous Chefs, which Plaintiffs allege to be in violation of the FLSA.

21. The other similarly situated current and former Putative Collective Members who would benefit from the issuance of a court-supervised notice of this lawsuit and the opportunity to join it; thus, notice should be sent to the Putative Collective Members pursuant to 29 U.S.C. § 216(b).

22. The Putative Collective Members are known to Defendant, are readily-identifiable, and can be located through Defendant's records.

STATEMENT OF FACTS

23. Defendant employed Plaintiffs and Putative Collective Members as MITs and/or Sous Chefs during the FLSA relevant period.

24. Defendant maintained control, oversight, and discretion over the operation of all of its locations, including its employment practices with respect to the Putative Collective Members.

25. Plaintiffs' and the Putative Collective Members' work was performed in the

normal course of Defendant's business and was integrated into it.

26. During the relevant period, Defendant has had a training program for its salaried positions referenced as "Restaurant Management" on Defendant's Careers website page ("salaried 'managers'").

27. For approximately one year during the relevant period, Defendant employed Kathleen Duell to, among other things: create, develop, and implement training programs for salaried "managers"; evaluate current and proposed training programs for effectiveness and engagement; and maintain HRIS and personnel systems regarding training, completion of competencies, exams, licensing, and certifications.

28. Defendant required certain competencies and required successful completion of certain examinations during, as part of, and as required for completion of the training period for salaried "managers."

29. Consistent with the Defendant's policy, pattern and/or practice, Plaintiffs and the Putative Collective Members worked over 40 hours as MITs and/or Sous Chefs in one or more workweeks, but Plaintiffs and the Putative Collective Members did not receive overtime premiums on one or more regularly scheduled pay dates within the relevant period for hours worked as MITs and/or Sous Chefs in excess of 40 in those workweeks.

30. The work that the Plaintiffs and the Putative Collective Members performed was assigned by Defendant and/or Defendant was aware of the work that they have performed.

31. The work that Plaintiffs and the Putative Collective Members performed as part of their primary duty did not include managerial responsibilities or the exercise of meaningful independent judgment and discretion.

32. Regardless of the restaurant location at which they worked, the work that Plaintiffs, the Sous Chefs, and the MITs performed as part of their primary duty included the same work performed by the restaurant's hourly employees.

33. Regardless of the restaurant location at which they worked, the work that Plaintiffs, the Sous Chefs, and the MITs performed as part of their primary duty did not include:

- a. hiring;
- b. firing;
- c. disciplining other employees;
- d. scheduling;
- e. supervising and delegating; or
- f. exercising meaningful independent judgment and discretion.

34. Plaintiffs', the Sous Chefs', and the MITs' primary duties were manual in nature and were not performed in an office.

35. The performance of manual labor and food, beverage, and customer service restaurant duties occupied the majority of Plaintiffs', the Sous Chefs', and the MITs' working hours.

36. Defendant, pursuant to a centralized, company-wide policy, pattern and/or practice, internally classified, and paid, all of its employees during their MIT periods for a salaried "manager" position, and all of its Sous Chef positions, including Plaintiffs', the Sous Chefs', and the MITs' positions, as exempt from the maximum hour overtime compensation requirements of the FLSA throughout the statutory relevant period.

37. Upon information and belief, Defendant did not perform a person-by-person analysis of the job duties performed by Plaintiff Leslie and Plaintiff Klumb during their MIT training periods when making the decision to classify their MIT work as exempt from the overtime provisions of the FLSA.

38. Upon information and belief, Defendant did not perform a person-by-person analysis of the job duties performed by Plaintiff Klumb during his employment as a Sous Chef when making the decision to classify his Sous Chef work as exempt from the overtime provisions of the FLSA.

39. Upon information and belief, Defendant did not perform a person-by-person analysis of the job duties performed during MIT training periods when making the decision to classify and pay employees during MIT training periods as exempt from the overtime provisions of the FLSA.

40. Upon information and belief, Defendant did not perform a person-by-person analysis of the job duties performed by Sous Chefs when making the decision to classify the Sous Chefs as exempt from the overtime provisions of the FLSA.

41. Defendant's conduct alleged herein was willful and/or in reckless disregard of the applicable wage and hour laws and was undertaken pursuant to Defendant's centralized, company-wide policy, pattern, and/or practice of attempting to minimize labor costs by not paying overtime premiums to its MITs or Sous Chefs. Defendant knew that MITs and Sous Chefs were not performing work that plainly and unmistakably complied with any FLSA exemption and it acted willfully or recklessly in failing to classify Plaintiff Leslie during his MIT work, and Plaintiff Klumb during his MIT and Sous Chef work, and all other MITs and Sous Chefs as non-exempt employees.

42. During the relevant period, Defendant was aware or should have been aware, through its management-level employees, that Plaintiff Leslie while performing work during his MIT training period, Plaintiff Klumb while performing work during his MIT training period and

in his Sous Chef position, and other MITs and Sous Chefs were primarily performing non-exempt duties.

43. During the relevant period, Defendant was aware that Plaintiffs and one or more MITs and Sous Chefs worked in excess of 40 hours per workweek on one or more occasion.

44. Defendant's policy required scheduling employees to work at least 50-hours per work week during their salary-paid MIT training periods.

45. Defendant's policy required scheduling Sous Chefs to work at least 50 hours per work week.

46. During the relevant periods, Defendant was aware that when Plaintiffs and any employee performing work during their salary-paid MIT training periods or any Sous Chef worked in excess of 40 hours per workweek, Plaintiffs and each such employees did not receive overtime pay under the FLSA on the regular pay dates for those workweeks.

47. During the relevant period, Defendant knew or recklessly disregarded the fact that the FLSA required it to pay Plaintiffs and the Putative Collective Members primarily performing non-exempt duties an overtime premium for hours worked in excess of 40 per workweek.

48. Defendant knew or should have known that under 29 C.F.R. § 541.705, none of the bona fide exemptions under the FLSA could apply to Plaintiffs', the Sous Chefs', and the MITs' work during their period of training as a MIT.

49. Defendant's unlawful conduct was therefore willful and/or in reckless disregard of the applicable wage and hour laws and undertaken pursuant to Defendant's centralized, company-wide policy, pattern, and/or practice of attempting to minimize labor costs by not paying overtime premiums to MITs or Sous Chefs.

50. As part of its regular business practice, Defendant has intentionally, willfully, and repeatedly engaged in a pattern, practice and/or policy of violating the FLSA with respect to Plaintiffs and the Putative Collective Members. This policy and pattern or practice includes but it is not limited to:

- a. willfully misclassifying Plaintiffs and the Putative Collective Members as exempt from the requirements of the FLSA during their training periods as MITs to become validated for a salaried “manager” position;
- b. willfully misclassifying Plaintiff Klumb and the Sous Chef Putative Collective Members as exempt from the requirements of the FLSA;
- c. willfully failing to pay Plaintiffs and the Putative Collective Members overtime wages for hours that they worked in excess of 40 hours per week;
- d. requiring Plaintiffs and the Putative Collective Members to perform non-exempt tasks as their primary duties; and
- e. willfully failing to provide enough money in its restaurant-level labor budgets for its non-exempt employees to perform their duties and responsibilities.

FIRST CAUSE OF ACTION
(Fair Labor Standard Act – Unpaid Overtime Wages
On Behalf of Plaintiffs and the FLSA Collective)

51. Plaintiffs, on behalf of themselves and all Putative Collective Members, re-alleges and incorporates by reference the preceding paragraphs as if they were set forth again herein.

52. At all relevant times, Defendant has been, and continues to be, an employer engaged in interstate commerce and/or the production of goods for commerce, within the

meaning of the FLSA, 29 U.S.C. §§ 206(a) and 207(a).

53. Defendant is subject to the coverage of the maximum hours and overtime compensation provisions of the FLSA.

54. At all relevant times, Defendant employed Plaintiffs, and employed or continues to employ each of the Putative Collective Members, within the meaning of the FLSA.

55. Defendant has engaged in a widespread pattern and practice of violating the FLSA, as detailed above in this Complaint.

56. Plaintiff Leslie consented in writing to be a party to this action, pursuant to 29 U.S.C. § 216(b), as reflected in his consent filed as Exhibit A to the original Complaint.

57. Plaintiff Klumb consented in writing to be a party to this action, pursuant to 29 U.S.C. § 216(b), as reflected in the attached consent contemporaneously herewith as **Exhibit A**.

58. The overtime wage provisions set forth in 29 U.S.C. § 201 *et seq.*, applies to Defendant.

59. During the relevant period and continuing to the present time, Defendant had a policy and practice of not paying overtime premiums to Plaintiffs and the Putative Collective Members for hours worked in excess of 40 hours per workweek.

60. As a result of Defendant's willful failure to compensate Plaintiffs and the Putative Collective Members at a rate not less than one and one-half times the regular rate of pay for work performed in excess of 40 hours in a workweek, Defendant has violated and continues to violate the FLSA, 29 U.S.C. § 201 *et seq.*, including 29 U.S.C. §§ 207(a)(1) and 215(a).

61. As a result of Defendant's policy and practice of minimizing labor costs by underfunding the labor budgets for its locations, Defendant knew or recklessly disregarded the fact that Plaintiffs and the Putative Collective Members were performing non-exempt tasks as

their primary duty.

62. Due to Defendant's failure to provide enough labor budget funds, failure to take into account the impact of the underfunded labor budgets on the job duties of Plaintiffs and the Putative Collective Members, Defendant's actual knowledge through its managerial employees/agents that the primary duties of the Plaintiffs and the Putative Collective Members were manual labor and food, beverage, and customer service restaurant work (not in an office) and included other non-exempt tasks, Defendant's failure to perform a person-by-person analysis of Plaintiffs' and the Putative Collective Members' job duties to ensure that they were performing exempt job duties, and Defendant's knowledge that Plaintiffs and the Putative Collective Members worked overtime hours without receiving overtime compensation, Defendant knew and/or showed reckless disregard that their conduct was prohibited by the FLSA, 29 U.S.C. § 255(a).

63. As a result of Defendant's FLSA violations, Plaintiffs, on behalf of themselves and the Putative Collective Members, are entitled (a) to recover from Defendant unpaid overtime wages, (b) to recover an additional, equal amount as liquidated damages, and (c) to recover their unreasonably delayed payment of wages, reasonable attorneys' fees, costs and disbursements of this action, and all allowable interest, pursuant to 29 U.S.C. § 216(b) and the federal rules.

64. Because Defendant's violations of the FLSA have been willful, a three-year statute of limitations applies pursuant to 29 U.S.C. § 255.

SECOND CAUSE OF ACTION
(Unpaid Overtime Pursuant to the OMFWSA – Ohio Revised Code § 4111.03)
(By Plaintiff Leslie, individually and collectively)

65. Plaintiff Leslie re-alleges and incorporates by reference paragraphs 1 through 43

as if they were set forth again herein.

66. This claim is brought under Ohio law, which incorporates the FLSA without limitation, on behalf of himself and all other similarly situated Ohioans who opt into this lawsuit.

67. The Ohio Wage Act requires that covered employees be compensated for every hour worked in a workweek. *See* O.R.C. §§ 4111 et seq.; *See also* 29 U.S.C §206(b).

68. The Ohio Wage Act requires that employees receive overtime compensation “not less than one and one-half times” the employee’s regular rate of pay for all hours worked over 40 in one workweek, “in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the "Fair Labor Standards Act of 1938. *See* O.R. C. § 4111.03 (A), *See also* 29 U.S.C. § 207 (a)(1).

69. Plaintiff Leslie and those similarly situated from Ohio were each a covered employee entitled to the Ohio Wage Act’s protections because they were misclassified as overtime exempt for work performed during their MIT training period primarily performing hourly, non-exempt job duties as alleged herein.

70. Plaintiff Leslie and similarly situated Ohioans worked in excess of the maximum weekly hours permitted under O.R.C. § 4111.03, but were not paid one and one-half times their regular rates of pay for all hours worked over 40 in one or more workweeks.

71. Plaintiff Leslie and similarly situated Ohioans were not exempt from receiving Ohio Wage Act overtime benefits because they were not exempt “executive,” “administrative,” or “professional” employees, as those terms are defined under the FLSA. *See* O.R.C. 4111.03(A); *see also* 29 C.F.R. §§ 541.0, *et seq.*

72. Defendant was at all times relevant required to comply with the Ohio Wage Act’s

mandates.

73. Defendant violated the Ohio Wage Act with respect to Plaintiff Leslie and similarly situated Ohioans by failing to compensate them at the rate of one and one-half times their regular rate of pay for all hours worked in excess of 40 hours in one or more workweeks as described above.

74. In violating the Ohio Wage Act, Defendant acted willfully and with reckless disregard of clearly applicable Ohio Wage Act provisions.

75. For Defendant's violations of the Ohio Wage Act, Plaintiff Leslie and similarly situated Ohioans have suffered damages and are entitled to recover unpaid overtime and other compensation, liquidated damages, interest and attorneys' fees, and all other remedies available.

THIRD CAUSE OF ACTION

(Unpaid Overtime Pursuant to the OPPA – Ohio Revised Code § 4113.15)

(By Plaintiff Leslie individually and collectively)

76. Plaintiff Leslie re-alleges and incorporates by reference paragraphs 1 through 50 and 65 through 75 as if they were set forth again herein.

77. During relevant times, Defendant was covered by the OPPA; and Plaintiff was employed by Defendant within the meaning of the OPPA.

78. The OPPA requires that the Defendant pay Plaintiff all wages, including unpaid overtime, on or before the first day of each month, for wages earned by them during the first half of the preceding month ending with the fifteenth day thereof, and on or before the fifteenth day of each month, for wages earned by them during the last half of the preceding calendar month. *See* O.R.C. § 4113.15(A).

79. During relevant times, there was no bona fide dispute that Plaintiff did not receive his legally required pay for all hours worked *See* O.R.C. §4113.15(B).

80. Plaintiff's unpaid wages as alleged herein remain unpaid for more than thirty (30) days beyond his regularly scheduled payday.

81. Plaintiff has been harmed and continues to be harmed by Defendant's acts or omissions described herein.

82. In violating the OPPA, Defendant acted willfully, without a good faith basis and with reckless disregard of clearly applicable Ohio law, and its actions entitle Plaintiff to liquidated damages in the amount of six percent of the amount of the unpaid overtime compensation owed or two hundred dollars, whichever is greater.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs seek entry of a judgment against Defendant, finding liability under the FLSA and the Ohio Acts and entering the following relief on behalf of himself and all others similarly-situated:

- A. Designation of this action as an FLSA collective action on behalf of the Putative Collective Members and prompt issuance of notice to all similarly-situated persons, apprising them of the pendency of this action, permitting them to join this action pursuant to 29 U.S.C. § 216(b), and tolling of the statute of limitations;
- B. A declaratory judgment that the practices complained of herein are unlawful under the FLSA and the Ohio Acts;
- C. Issuing an injunction prohibiting Defendant from engaging in present, ongoing, and future violations of the FLSA and the Ohio Acts;
- D. An award of unpaid wages under the FLSA and the Ohio Acts for all hours worked as misclassified salary-paid MITs or Sous Chefs in excess of 40 in a workweek at a rate of one and one-half times the regular rate of pay;

- E. Equitable tolling of the FLSA statute of limitations;
- F. An award of liquidated damages as a result of Defendant's willful failure to pay for all hours worked in excess of 40 in a workweek at a rate of time and one-half of the regular rate of pay pursuant to 29 U.S.C. § 216;
- G. An award of unpaid compensation, including overtime wages as to be determined at trial together with any liquidated damages allowed by the Ohio Acts;
- H. Finding that Plaintiffs and the Putative Collective Members are entitled to prove their hours worked and damages with reasonable estimates;
- I. An award of all allowable interest;
- J. An award of costs and expenses of this action together with reasonable attorney's fees and an award of a service payment to the Plaintiffs;
- K. Granting Plaintiffs leave to amend to file additional claims for relief or different causes of action should information become available through investigation and discovery; and
- L. Such other and further relief as this Court deems just and proper.

JURY TRIAL DEMANDED

Plaintiffs, individually and on behalf of the Putative Collective Members, demand a trial by jury for all issues so triable.

Respectfully submitted,

/s/ Bethany A. Hilbert

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 2019, a true and accurate copy of the forgoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's ECF system.

/s/ Bethany A. Hilbert

Bethany Hilbert