Perkins v Butter Beans, Inc.
2024 NY Slip Op 32280(U)
June 28, 2024
Supreme Court, Kings County
Docket Number: Index No. 525732/2022
Judge: Carolyn E. Wade
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Trial Term, Part 84 of the Supreme Court of the State of New York, County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, NY on the 28th day of June, 2024.

PRESENT:
HON. CAROLYN E. WADE, JSC

---x

Ziyahni Perkins, on behalf of herself, Ziyahni Perkins, on Behalf of all others similarly situated,

Plaintiffs,

- against -

Butter Beans, Inc.,

Defendant.

---x

ORDER

Index #: 525732/2022

MS #1

Recitation, as required by CPLR § 2219(a) of the papers considered in Defendant BUTTER BEANS, INC's Motion to Dismiss (MS#1)

Papers	**NYSCEF Doc Nos.**
Notice of Motion and affidavits/affirmations annexed	22-27
Answering Affidavits/Affirmations	29
Reply Affidavit/Affirmation	31

Upon the foregoing cited papers, and after oral argument, Defendant BUTTER BEANS, INC. ("Defendant") moves for an Order, dismissing all causes of action in the Complaint with prejudice and without leave to replead for failure to state a claim.

The underlying action was commenced by Plaintiff ZIYAHNI PERKINS ("Plaintiff") against Defendant for the wrongful deprivation of her uniform maintenance pay. Defendant operates a food and drink business in the hospitality industry. Plaintiff was employed by Defendant from August 2018 until March 2020. Her duties included transporting and serving food, as well as cleaning the cafeteria kitchen at the PAVE Academy Charter School on weekdays.

Occasionally, Plaintiff performed the same duties for Defendant on the weekends at the New York Hall of Science, a science museum. At every shift, Plaintiff was required to wear Defendant's uniforms, which consisted of a shirt and an apron with her employer's printed logo. Plaintiff alleges that the time and cost of laundering her mandatory uniform, resulted in her being paid below minimum wage during the week her laundering cost was incurred.

As a preliminary matter, the recent decision by the Appellate Division, Second Department in *Grant v. Global Aircraft Dispatch, Inc.*, 2024 NY App Div LEXIS 180, 2024 NY Slip Op 00183 [2d Dept, January 17, 2024] determined definitively that neither an express nor an implied private right of action exists for employees to sue under NYLL § 191 and § 198 for frequency of pay violations. Consequently, Plaintiff has consented to the withdrawal of her second cause of action for frequency of pay violations in her Memorandum of Law in Opposition to Defendant's Motion to Dismiss (NYSCEF Doc. No. 29).

In support of its motion, Defendant argues that the basis for Plaintiff's uniform maintenance pay claim is Part 146 of Title 12 of the New York Codes, Rules and Regulations, the Hospitality Industry Wage Order ("Hospitality Order"). Under the Hospitality Order, employers who do not maintain or clean their employees' uniforms are required to pay them uniform maintenance pay in addition to their wages (see N.Y. Comp. Codes R. & Regs. Tit. 12, § 146-1.7(a) ["NYCRR"]). However, the Hospitality Order contains a "wash and wear" exception, by which employers are not required to provide maintenance pay for uniforms that "are made of 'wash and wear' materials, may be routinely washed and dried with other personal garments, do not require ironing, dry cleaning, daily washing, commercial laundering, or other special treatment, and are furnished to the employee in sufficient number" (12 NYCRR § 146-1.7(b)). Defendant asserts that pursuant to the "wash and wear" exception, it is not required to give Plaintiff uniform maintenance pay.

In opposition, Plaintiff argues that the Defendant mistakenly cites the Hospitality Order as the basis for her uniform maintenance pay claim. Plaintiff asserts that the Hospitality Order is not the governing statute because it excludes schools from its coverage. Specifically, since Plaintiff worked in the cafeteria at PAVE Academy Charter School, the "wash and wear" exception would not apply to her uniform maintenance pay claim. Instead, Plaintiff asserts that the Minimum Wage Order for Miscellaneous Industries and Occupations ("Minimum Wage Order"), Part 142 of Title 12 of the New York Code, Rules and Regulations, applies to this matter.

The Minimum Wage Order applies to all employees, except employees covered by another minimum wage order or by a nonprofitmaking institution exempt from coverage (see N.Y. Comp. Codes R. & Regs. Tit. 12, § 142-1.1 ["NYCRR"]). The Minimum Wage Order states that "a required uniform [is] clothing worn by an employee, at the request of an employer, while performing job-related duties or to comply with any State, city or local, rule or regulation" (12 NYCRR § 142-3.5[c]). Notably, the Order provides:

> No allowance for supply, maintenance or laundering of required uniforms shall be permitted as part of the minimum wage [...] Where an employer fails to launder or maintain required uniforms for any employee, he shall pay such employee <u>in addition</u> to the minimum wage prescribed herein at the weekly rate set forth below, based on the number of hours worked.

(*Id.* at § 142-3.5[c]).

Whereas, section 146-3.1(d)(1) of the Hospitality Order indicates that the "wash and wear exception" does not apply to "establishments where the service of food or beverage or the provision of lodging is not available to the public or to members or guests of members, but is **incidental to instruction** [emphasis added], medical care, religious observance, or the care of persons with disabilities or those who are impoverished or other public charges" (12 NYCRR § 146-3.1[d][1]). Here, Plaintiff worked in the cafeteria at PAVE Academy Charter School, an instructional establishment. Furthermore, "the exclusions set forth [above] shall not be deemed to exempt such establishments from coverage under another minimum wage order which covers them" (*Id.* at 3.1[d]).

In the instant action, Defendant contends that Plaintiff's uniform, which comprised of three t-shirts and an apron, with the Butter Beans logo, satisfies the elements of the Hospitality Order's "wash and wear" exception. Specifically, Defendant maintains that Plaintiff's uniform was made of "wash and wear" materials, and did not require any special cleaning procedures, such as ironing or dry cleaning. However, as noted above, the Hospitality Order excludes schools from its coverage, such as the PAVE Academy Charter School, where Plaintiff works on the weekdays. Thus, this Court finds that the "wash and wear" exception does not apply to Plaintiff's claim.

Conversely, Plaintiff's uniform maintenance pay claim falls within the ambit of the Minimum Wage Order for miscellaneous industries and occupations. Under the Minimum Wage Order, employers who require employees to wear uniforms are required to pay employees an allowance for the maintaining or laundering their required uniforms, in addition to the employees' minimum wages. Plaintiff was required to wear a t-shirt and an apron bearing Defendant Butter Bean's logo during her weekly shifts. Thus, the Minimum Wage Order applies to Plaintiff's uniform maintenance pay claim.

Accordingly, based upon the above, Defendant's Motion to Dismiss Plaintiff's first cause of action for uniform maintenance pay is **denied**.

This constitutes the Decision and Order of the Court.

Hon. Carolyn E. Wade
Supreme Court Justice

HON. CAROLYN E. WADE, J.S.C.