DOCKET NO.: X07-CV-20-6133189-S	:	SUPERIOR COURT
DENISE MCCANTS & BRITTANY VAZQUEZ, for themselves and other similarly situated employees	:	COMPLEX LITIGATION DOCKET
v.	:	AT HARTFORD
OUTBACK STEAKHOUSE OF FLORIDA, LLC, ET AL.	:	MAY 17, 2024

MEMORANDUM OF DECISION RE CLASS CERTIFICATION (#137)

Before the court is the motion for class certification of the plaintiffs, Denise McCants and Brittany Vazquez, for themselves and other similarly situated employees. The plaintiffs' claims are based on allegations that the defendants violated § 31-62-E3 (b) of the Regulations of Connecticut State Agencies (hereinafter referred to as "E3 (b)");[1] § 31-62-E3 (c) of the Regulations of Connecticut State Agencies (hereinafter referred to as "E3 (c)");[2] and § 31-62-E4 the Regulations of Connecticut State Agencies (hereinafter referred to as "E4"),[3] as all three existed prior to September 23, 2020.

The following facts and procedural history are relevant to the court's decision. The plaintiffs are former servers at the New London and Shelton Outback Steakhouse restaurant

[1] E3 (b) was amended as of September 24, 2020. Prior to this date, E3 (b) provided that employers of restaurant servers were required to record "the amount received in gratuities claimed as credit for part of the minimum fair wage . . . as a separate item in the wage record."

[2] E3 (c) was amended as of September 24, 2020. Prior to this date, E3 (c) provided that employers were required to obtain weekly statements signed by service employees attesting to the amount received in gratuities claimed as credit for part of the minimum fair wage which statement included the week ending date.

[3] E4 was repealed as of September 24, 2020. Prior to this date, E4 provided that "[i]f an employee performs both service and nonservice duties, and the time spent on each is definitely segregated and so recorded, the allowance for gratuities as permitted as part of the minimum fair wage may be applied to the hours worked in the service category. If an employee performs both service and non-service duties and the time spent on each cannot be definitely segregated and so recorded, or is not definitely segregated and so recorded. No allowances for gratuities may be applied as part of the minimum fair wage."

#168.00

locations. The plaintiffs allege that the defendants[4] own and operate nine Outback Steakhouse restaurants in Connecticut and are suing the defendants in their alleged capacity as employers as defined by the Connecticut Minimum Wage Act, General Statutes § 31-58, et seq. (CMWA).

The CMWA mandates that all employers, such as the defendants, pay their employees a delineated minimum wage. General Statutes § 31-60 (b) authorizes the labor commissioner to issue regulations that permit employers to receive a "tip credit" against the minimum hourly wage for service employees. Until September 23, 2020, E4 provided that employers were obliged to segregate time worked by service employees in nonservice duties. In the event that no segregation of time was recorded, the employer was obliged to pay the employee the full minimum wage.

The plaintiffs allege in the operative April 26, 2021 complaint (#128) that they were assigned both service and nonservice duties in each shift and that the defendants did not segregate, nor in any manner, record their service versus nonservice time, and they were paid the lower server rate for all time worked. The plaintiffs further allege that the defendants failed to record the amount claimed as credit each week, failed to obtain weekly tip statements and assigned nonservice "side work" to every server every shift that is in excess of what any court could conclude is de minimis. As a consequence, the plaintiffs allege that they were underpaid for the time they worked at their respective restaurants. The plaintiffs seek class action for themselves and all current and former servers at the defendants' Connecticut restaurants during the two-and-a-half-year period of the claim, i.e., from March of 2018 to September 2020. In

[4] The defendants, Outback Steakhouse of Florida, LLC, Bloomin' Brands, Inc., OSI Restaurant Partners, LLC, and OS Restaurant Services, LLC, are limited liability companies and corporations who own and operate Outback Steakhouse locations in Newington, Southington, Manchester, North Haven, Enfield, Orange, New London, Shelton, and Danbury. The defendants allegedly operate together as one common enterprise and share a common human resources department, a common director of operations, operate out of the same location and share a website. They will collectively be referred to herein as the defendants.

support of their motion for class certification, the plaintiffs have offered, inter alia, the affidavit of the plaintiff McCants, as well as affidavits of other servers, affidavits of their counsel, Richard Hayber, and the deposition transcript of Lynn Yazji, a Bloomin' Brands employee holding the title of Joint Venture Partner who has overseen eight of the nine Connecticut restaurants that were open during the period of the claim.

The court treats the defendants' argument, raised in their supplemental brief; #165; that E3 does not provide a private cause of action, as a challenge to the court's jurisdiction that must be addressed first. This is so for two reasons. Where a statute does not provide a private cause of action, the court lacks subject matter jurisdiction over the plaintiffs' claims pursuant to that statute. *Perez-Dickson v. Bridgeport*, 304 Conn. 483, 508, 43 A.3d 69 (2012). "[O]nce the issue regarding the lack of subject matter jurisdiction is brought to the court's attention, the court must address and resolve it. . . . It is axiomatic that once the issue of subject matter jurisdiction is raised, it must be *immediately* acted upon by the court." (Emphasis in original; internal quotation marks omitted.) *Marshall v. Commissioner of Correction*, 206 Conn. App. 461, 471, 261 A.3d 49, cert. denied, 338 Conn. 916, 259 A.3d 1180 (2021).

The issue of whether E3 does not provide for a private cause of action has been addressed by our Appellate Court in *Nettleton v. C & L Diners, LLC*, 219 Conn. App. 648, 678, 296 A.3d 173 (2023). In that case, the court held "that the recordkeeping requirements in § 31-62-E3 (b) and (c) of the regulations are directory and, therefore, that the defendant's noncompliance with those requirements does not invalidate the tip credit and does not give rise to a private cause of action." Id., 678. This court is bound by this precedent and accordingly dismisses any claims

related to E3. This leaves the plaintiffs with their allegations of violations of E4, which was legislatively repealed in January of 2020, effective September 24, 2020.[5]

A case may proceed as a class action "only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Practice Book § 9-7. Practice Book § 9-8 (3), applicable to the present case, additionally requires "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy . . . ." In the specific context of an action seeking recovery under the CMWA in which a violation of E4 is alleged, General Statutes § 31-68 (a) (3)[6] additionally requires that the party seeking class certification must prove that the defendant is liable to all individual proposed class members because the plaintiff/class (1) performed nonservice work not incidental to service; (2) for more than a de minimis amount of time; and (3) that they were not properly compensated for some portion of that work. This court has recently detailed the Practice Book §§ 9-7 & 9-8 factors as well as the implications of § 31-68 (a) (3) in cases involving E4 violations. See *Granger v. Craveable Hospitality*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X07-CV-20-

[5] See Public Acts 2019, No. 19-1, § 5.

[6] General Statutes § 31-68 (a) (3) provides that "[n]otwithstanding the provisions of section 52-105, no person may be authorized by a court to sue for the benefit of other alleged similarly situated persons in a case brought for violations of section 31-62-E4 of the regulations of Connecticut state agencies, unless such person, in addition to satisfying any judicial rules of practice governing class action certifications, demonstrates to the court, under the appropriate burden of proof, that the defendant is liable to all individual proposed class members because all such members (A) performed nonservice duties while employed by the defendant, for more than a de minimis amount of time, that were not incidental to service duties, and (B) were not properly compensated by the defendant for some portion of their nonservice duties in accordance with section 31-62-E4 of the regulations of Connecticut state agencies."

6133127-S, # 171 (May 17, 2024, *Noble, J.*). The discussion and analysis of the legal landscape for such claims is incorporated herein.[7]

In the present case, the plaintiffs assert that they have met each of the statutory and Practice Book requirements through generalized evidence in the form of excerpts from Yazji's deposition, various documents related to the plaintiffs' employment with the defendants and the affidavits of McCants, Brian Earley and Rebecca Boulet, the latter two of which had also worked at the defendants' restaurants as servers. The defendants submitted deposition excerpts from McCants and Yazji, as well as excerpts from Vazquez' deposition. The plaintiffs supplemented their motion with additional excerpts from Vazquez and McCants. The defendants object to class certification on the grounds that, inter alia, the plaintiffs incorrectly presume that the "side work" the defendants' servers were required to perform was nonservice work and that the plaintiffs did not work for the defendants during the entirety of the class period. The court agrees with the defendants.

The affidavits of McCants, Earley and Boulet are, as is common in the server CMWA cases before the court, nearly identical. In their affidavits, they assert that the defendants did not comply with the E4 requirements because, while being paid the lower tips rate their service and nonservice time was not segregated although they were assigned either opening duties, running duties or closing duties side work that were not related to serving customers and which did not occur at tables or booths. In support of their motion, the plaintiffs provided a list of tasks, identified in a document entitled "Server Sidework," that were required by the defendants. None

[7] The court has on its docket approximately sixteen "tips cases" against different defendants, many of which have reached the class certification stage. In the interest of economy and efficiency, the court incorporates the detailed discussion and analysis of the law relevant to each of the cases found in *Granger v. Craveable Hospitality*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X07-CV-20-6133127-S, # 171 (May 17, 2024, *Noble, J.*).

of the affidavits provided by the plaintiff, nor the deposition excerpts from Yazji, provide any analysis or discussion as to how the tasks delineated in the "Server Sidework" are nonservice in nature.

This court concluded in *Granger v. Craveable Hospitality*, supra, Superior Court, Docket No. X07-CV-20-6133127-S, #171, p. 14. that the determination - which is likely to require a "fact intensive inquiry as to the nature of the task [and] where it is performed;" *Nettleton v. C & L Diners, LLC*, 219 Conn. App. 648, 696, 296 A.3d 173 (2023); - of whether a task is nonservice or service in nature is not limited to whether the task is at the table or its immediate environs. While the tasks listed under "Opening Duties" in the "Server Sidework" list, might be found by the court to be nonservice in nature as a matter of law,[8] Yazji testified, without contradiction by the plaintiffs, that these duties were performed by servers who came to the restaurant before it was open to the public who clocked in under "an opener job code," as distinct from a "server code," and were paid the full minimum wage for this time. Yazji Depo., p. 30:23-31:3. As to the remaining tasks, the lack of analysis of the nature of each task renders the court incapable of characterizing each, as a matter of law, as nonservice in nature. In all, the plaintiffs have failed to prove by the preponderance of the evidence that the defendants are liable to the class because the servers "performed *nonservice* duties . . . for more than a de minimis amount of time, that were not incidental to service duties." (Emphasis added.) General Statutes § 31-68 (a) (3).

Moreover, the service duties were changed as a consequence of the pandemic in May of 2020, such that the amount of side work duties was reduced. Yasji Depo., p. 119:01; Boulet Aff., ¶ 17. For example, beginning in May of 2020, closing side work no longer included perfecting table setup and refilling/restocking/breaking down and cleaning the running side work area. See

[8] "[I]n many cases, whether the tasks performed by a server are service duties or incidental to such service cannot be determined as a matter of law." (Footnote omitted.) *Nettleton v. C & L Diners, LLC*, supra, 219 Conn. App. 696.

Exh. J & K. Moreover, running side work duties no longer included the citrus station and sugar caddies, restocking butter or ice wells, handling ice, trash cans, silverware, glassware or the alley line, refilling ramekins, condiments and oil and vinegar, or restocking the potato bar and wiping down the warmers. Id. The plaintiffs failed to account for how much time these reduced duties required for completion.

Finally, none of the plaintiffs worked for the defendants after May of 2019. McCants worked for the defendants from October 2018 until February 2019; McCants Aff. ¶ 4; and Vazquez from February 2018 until May 2019. Compl., ¶ 9. In the present case, there may be servers who worked for the defendants during the class claim proposed by the plaintiffs, March 19, 2018 to September 23, 2020, who only worked before May 2020,[9] those who worked before and after May of 2020, and those who only worked after May of 2020. Claimants whose employment preceded May of 2020, may potentially claim a greater injury involving a greater number of potentially nonservice side work tasks than those whose interest arose only in the subsequent period. More importantly, factual defenses based on insufficient nonservice side work to meet the de minimis standard may be interposed by the defendants for those claimants employed after the May 2020 period. The different requirements for side work implicate commonality, typicality, predominance and adequacy of representation.

Commonality is found where there are common questions of law or fact. Practice Book § 9-7 (2). "[C]ommonality is easily satisfied because there need only be one question common to the class . . . ." (Internal quotation marks omitted.) *Standard Petroleum Co. v. Faugno Acquisition, LLC*, 330 Conn. 40, 54, 191 A.3d 147 (2018). The issues arising from pre- and post-

[9] This class would include McCants and Vazquez as well as Earley who was employed by the defendants from August 2018 until September 2019; Earley Aff. ¶ 4; and potentially Boulet who variously averred in her affidavit that her employment with the defendants ended in April of 2019; Boulet Aff. ¶ 28; and that she worked for them until "the present;" Boulet Aff. ¶ 4; presumably the date of her affidavit, May 19, 2021.

May 2020 employment relate not just to the amount of damages that each class member suffered, but also to the defendants' liability to each class member due to the different side work requirements. Where "the issues requiring individualized proof do not relate merely to the *amount* of damages that each class member has suffered, but also to the defendant's *liability* to each class member" commonality is not present. (Emphasis in original.) *Collins v. Anthem Health Plans, Inc.*, 275 Conn. 309, 336, 880 A.2d 106 (2005).

"Typicality requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class. . . . A common thread running through the various components of typicality . . . is the interest in ensuring that the class representative's interests and incentives will be generally aligned with those of the class as a whole." (Citations omitted; internal quotation marks omitted.) *Standard Petroleum Co. v. Faugno Acquisition, LLC*, 330 Conn. 40, 55, 191 A.3d 147 (2018). "The typicality requirement helps ensure that . . . in pursuing his own claims, the named plaintiff will also advance the interests of the class members." (Footnote omitted; internal quotation marks omitted.) 1 W. Rubenstein, Newberg and Rubenstein on Class Actions (6th ed. 2023) § 3:29. A claimant whose employment preceded May of 2020 has no intrinsic incentive to advance the interest of those class members hired after that date.

The adequacy of representation requirement requires that the representatives have common interests with the unnamed class members. *Collins v. Anthem Health Plans, Inc.*, 275 Conn. 309, 326, 880 A.2d 106 (2005). For the foregoing reasons, the purported class representatives lack such common interests with the proposed class.

Because "the predominance requirement . . . [not only] parallels the commonality inquiry . . . but goes considerably further;" (footnote omitted) 1 J. McLaughlin, McLaughlin on Class

Actions (20th Ed, 2023) § 5:23; the absence of commonality in the present case mandates a finding that predominance is not met.

For the foregoing reasons, the plaintiffs motion for class certification is denied.[10]

THE COURT

/s/ #435707
Cesar A. Noble
Judge, Superior Court

[10] The court requested supplemental briefing on the issue of whether resolution of a class action motion pursuant to § 31-60 (a) (3) requires any sort of evidentiary hearing. It concludes that it does not. The plaintiffs' response expressed their view not only that such a hearing is required, but that the statute is unconstitutional because the requisite finding of liability violates their right to a jury trial. This was the first time this argument was advanced by plaintiffs and was made at a time when the defendants did not have an opportunity to respond. Arguments may not be raised for the first time in a reply brief. *Reardon v. Zoning Board of Appeals*, 311 Conn. 356, 367, n.10, 87 A.3d 1070 (2014). This is so because "[a]rguments first presented in a reply brief impair the opposing party's opportunity to reply in writing." (Internal quotation marks omitted.) *Mangiafico v. State Board of Education*, 138 Conn. App. 677, 680, n.4, A.3d 1066 (2012). Moreover, because the court's decision in this case is predicated not just on the requirements of § 31-68 (a) (3), but also on the lack of finding of commonality, typicality and predominance, the court does not need to address the constitutional argument.