DOCKET NO.: X07-CV-20-6133127-S	:	SUPERIOR COURT
GEORGE GRANGER & NICOLE WARFIELD, for themselves and other similarly situated employees	:	COMPLEX LITIGATION DOCKET
v.	:	AT HARTFORD
CRAVEABLE HOSPITALITY GROUP, 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, George Granger and Nicole Warfield, 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 both former servers in the defendants'[4] restaurant in the Foxwood Casino located in

[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[3] E4 was repealed as of September 24, 2020.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."

[4] The defendants, Craveable Hospitality Group, LLC, Root 2, LLC, and KNC Hospitality, LLC (collectively referred to herein as "the defendants"), are limited liability companies and corporations which together own and operate

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Ledyard, Connecticut. The plaintiffs allege, and the defendants concede, that the defendants are employers of the purported class within the meaning of the Connecticut Minimum Fair Wage Act (CMWA), General Statutes § 31-58 et seq.[5]

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, in effect paying them a lower hourly rate. Until September 23, 2020, E4 provided that employers were obliged to segregate time worked by service employees in nonservice duties from service work.[6] 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 12, 2021 complaint that they were assigned both service and nonservice duties on each shift, 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.

In support of their motion for class certification, the plaintiffs have offered, inter alia, their own affidavits, as well as affidavits of another server, Jennifer Hozie, affidavits of their

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David Burke Prime Steakhouse (Prime) in Ledyard, Connecticut. KNC Hospitality, LLC owns Prime, Craveable Hospitality Group, LLC manages Prime, and Root 2, LLC employs the servers at Prime.

[5] See # 138, p. 11.

[6] The phrases "nonservice work" and "service work" are examined below.

counsel, Richard Hayber, and the deposition transcripts of Stephen Goglia, the chief executive officer of Craveable Hospitality Group, LLC, and Spencer Relitz, the general manager of Prime. The testimony addresses primarily the nature and duration of what the defendants consider "side work," as contained in a chart made available to their employees, as well as other server duties, all of which is described in greater detail below. The term "side work" is used by the parties with different connotations but congruently as work that is neither service work nor immediately incident to service work.

The court treats the defendants' argument, raised in their supplemental brief; #167; 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 allegation of violations of E4, which was legislatively repealed in January of 2020 and effective September 24, 2020.[7] The plaintiffs seek E4 class action for themselves and all current and former servers at Prime during the period of the claim, March 19, 2018 through September 23, 2020. See Pls.' Mem. of Law in Supp. of Mot. for Class Certification, p. 5 n.4.

"The modern class action is . . . a procedural device that serves three primary purposes. First, class actions promote the efficient and economical administration of justice by avoiding multiple suits that would involve duplicative evidence on the same subject matter. . . . Second, class actions provide a method of protecting the rights of those who would not realistically bring individual claims for practical reasons, such as cost of prosecution or ignorance of their rights. . . . Finally, the class action avoids inconsistent results by offering the efficiency and predictability of a unitary adjudication or settlement of the claims of all persons to whom the defendant may be liable based on similar facts." (Footnotes omitted; internal quotation marks omitted.) 1 J. McLaughlin, McLaughlin on Class Actions (20th Ed, 2023) § 1:1.

The general principles applicable to class action certification are embodied in Practice Book §§ 9-7[8] and 9-8.[9] Our Supreme Court recently provided a detailed articulation of the

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

[8] Practice Book § 9-7, entitled "Class Actions; Prerequisites to Class Actions," provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all 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."

[9] Practice Book § 9-8, entitled "Class Actions Maintainable," provides that "[a]n action may be maintained as a class action if the prerequisites of Section 9-7 are satisfied, and in addition:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of: (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members who are not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

required standard for class certification that involves "a two step process for trial courts to follow in determining whether an action or claim qualifies for class action status. First, a court must ascertain whether the four prerequisites to a class action, as specified in Practice Book § 9-7, are satisfied. These prerequisites are: (1) numerosity—that the class is too numerous to make joinder of all members feasible; (2) commonality—that the members have similar claims of law and fact; (3) typicality—that the [representative] plaintiffs' claims are typical of the claims of the class; and (4) adequacy of representation—that the interests of the class are protected adequately. . . .[10]

"Second, if the foregoing criteria are satisfied, the court then must evaluate whether the certification requirements of Practice Book § 9-8 [3] are satisfied. These requirements are: (1) predominance—that questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) superiority—that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

"It is the class action proponent's burden to prove that all of the requirements have been met. . . . To determine whether that burden has been met, we have followed the lead of the federal courts, . . . directing our trial courts to undertake a rigorous analysis. . . .

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(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds 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. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of class action."

[10] "These four elements are referred to by the shorthand terms 'numerosity,' 'commonality,' 'typicality' and 'adequacy of representation.'" *Diaz v. Griffin Health Services Corp.*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X01-CV-15-6029965-S, 2020 WL 8130207, *1 (November 23, 2020, *Lager, J.*).

"[A] rigorous analysis ordinarily involves looking beyond the allegations of the plaintiff's complaint. The [rigorous analysis] requirement means that a class is not maintainable merely because the complaint parrots the legal requirements of the [class action] rule. . . .

"In applying the criteria for certification of a class action, the [trial] court must take the substantive allegations in the complaint as true, and consider the remaining pleadings, discovery, including interrogatory answers, relevant documents, and depositions, and any other pertinent evidence in a light favorable to the plaintiff. However, a trial court is not required to accept as true bare assertions in the complaint that [class certification] prerequisites were met. . . . Class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. . . .

"Consequently, a rigorous analysis frequently entail[s] overlap with the merits of the plaintiff's underlying claim. . . . In determining the propriety of a class action, [however] *the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of [the class action rules] are met.*" (Citations omitted; emphasis added; footnote added; internal quotation marks omitted.) *Rodriguez v. Kaiaffa, LLC*, 337 Conn. 248, 255-57, 253 A.3d 13 (2020). The tension between the fact finding required by the court related to examining the factors required for class certification and the prohibited determination of whether the plaintiff will prevail at trial is resolved by the principle that while the plaintiff must prove, and a judge must find by a preponderance of the evidence, that the class factors are present, merits issues are off-limits if unrelated to class action requirements.[11] See 1 J. McLaughlin, supra, § 3:12. The burden of proof required of the plaintiff

[11] The factual findings for purpose of class certification are not binding on the trier of fact at trial. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 n.6, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004).

is by a preponderance of the evidence. Id. Because the requirements for certification under the Connecticut Practice Book are similar to the requirements under the Federal Rules of Civil Procedure, Connecticut courts will look to federal law for guidance in construing class certification requirements. *Collins v. Anthem Health Plans, Inc.*, 266 Conn. 12, 32-33, 836 A.2d 1124 (2003) (*Collins I*).

The first factor to be considered, pursuant to Practice Book § 9-7, is numerosity. Practice Book § 9-7 (1) permits certification of a class if it is "so numerous that joinder of all members is impracticable . . . ." In the context of class action certification, numerosity "does not mandate that joinder of all parties be impossible—only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate." (Internal quotation marks omitted.) *New Hartford v. Connecticut Resources Recovery Authority*, 291 Conn. 433, 476, 970 A.2d 592 (2009). To the extent that there are common issues affecting the defendants, individual adjudications of every potential plaintiff's claims would be unnecessarily expensive, time-consuming, and burdensome on the courts. While there is no magic number of potential members required for numerosity, the Second Circuit has held that "numerosity is presumed at a level of 40 members." *Consolidated Rail Corp. v. Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995), cert. denied sub nom *Board of Equalization & Assessment v. Consolidated Rail Corp.*, 515 U.S. 1122, 115 S. Ct. 2277, 132 L. Ed. 2d 281 (1995), cert. denied sub nom *North Rockland Central School District v. Consolidated Rail Corp.*, 515 U.S. 1122, 115 S. Ct. 2277, 132 L. Ed. 2d 281 (1995), cert. denied sub nom *Erie County v. Consolidated Rail Corp*, 515 U.S. 1122, 115 S. Ct. 2277, 132 L. Ed. 2d 281 (1995).

The commonality standard is established where there are common questions of law or fact. Practice Book § 9-7 (2). The commonality requirement is "liberally construed;" *Damassia*

v. Duane Reade, Inc., 250 F.R.D. 152, 156 (S.D.N.Y. 2008); and is a "minimal burden." *Padilla v. Maersk Line, Ltd.*, 271 F.R.D. 444, 448 (S.D.N.Y. 2010). "[C]ommonality is easily satisfied because there need only be one question common to the class . . . the resolution of which will advance the litigation." (Internal quotation marks omitted.) *Standard Petroleum Co. v. Faugno Acquisition, LLC*, 330 Conn. 40, 54, 191 A.3d 147 (2018). See also *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 86 (S.D.N.Y. 2001) (a single common question can satisfy commonality). Commonality exists if the plaintiffs have been affected by a "general policy" of the defendant that is the focus of the litigation. *Thompson v. Community Ins. Co.*, 213 F.R.D. 284, 292 (S.D. Ohio 2002). Commonality does not require that each issue be "identical as to each member," but does require "some unifying thread among the members' claims that warrant[s] class treatment." (Internal quotation marks omitted.) *Damassia v. Duane Reade, Inc.*, supra, 156.

Moreover, "most courts have held that factual variations among class members will not prevent a finding of commonality." (Internal quotation marks omitted.) *Rodriguez v. Kaiaffa, LLC*, supra, 337 Conn. 270. "[I]f *even one* of the thirty-five tasks identified as side work qualified as a nonservice task under the trial court's definition, the defendants' liability as to that task is still a common question as to all servers who performed side work." (Emphasis added.) Id., 265.

"Typicality . . . requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability. . . . The typicality criterion does not require that the factual background of each named plaintiff's claim be identical to that of all class members; rather, it 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." (Citation omitted; internal quotation marks omitted.) *Collins I,* supra, 266 Conn. 34. See also *Standard Petroleum Co. v. Faugno Acquisition, LLC*, supra, 330 Conn. 55 ("[t]ypicality 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" [internal quotation marks omitted]).

The remaining factor required by Practice Book § 9-7 is adequacy of representation. "The adequacy-of-representation requirement addresses concerns about the competency of class counsel and conflicts of interest. . . . The two factors that are . . . recognized as the basic guidelines for the [adequacy-of-representation] prerequisite are . . . (1) absence of conflict and (2) assurance of vigorous prosecution. The adequacy requirement is met [when] the representatives: (1) have common interests with the unnamed class members; and (2) will vigorously prosecute the class action through qualified counsel." (Citations omitted; internal quotation marks omitted.) *Collins v. Anthem Health Plans, Inc.*, 275 Conn. 309, 326, 880 A.2d 106 (2005) (*Collins II*).

Upon a finding of the factors contained in Practice Book § 9-7, the plaintiff must still meet the two additional factors required by Practice Book § 9-8, predominance and superiority. Predominance shares important characteristics with the commonality query, i.e. the commonality of questions of law or fact, but requires a more stringent analysis. "[T]he commonality prerequisite simply requires the existence of a question of law or fact that is common to the class. . . . [T]he predominance criterion is far more demanding in that it requires a probing inquiry to determine whether the common issues that are subject to generalized proof are more substantial than the issues subject only to individualized proof." (Internal quotation marks omitted.) *Ahmad v. Yale-New Haven Hospital, Inc.*, 104 Conn. App. 380, 390-91, 933 A.2d 1208 (2007).

A determination of predominance requires the court to "[first] review the elements of the causes of action that the plaintiffs seek to assert on behalf of the putative class. . . . Second, the court should determine whether generalized evidence could be offered to prove those elements on a class-wide basis or whether individualized proof will be needed to establish each class member's entitlement to monetary or injunctive relief. . . . Third, the court should weigh the common issues that are subject to generalized proof against the issues requiring individualized proof in order to determine which predominate. . . . Only when common questions of law or fact will be the object of most of the efforts of the litigants and the court will the predominance test be satisfied." (Internal quotation marks omitted.) *Rodriguez v. Kaiaffa, LLC*, supra, 337 Conn. 265-66. "Common issues of fact and law and predominate if they ha[ve] a direct impact on every class member's efforts to establish liability and . . . entitlement . . . to relief. . . ." (Internal quotation marks omitted.) *Standard Petroleum Co. v. Faugno Acquisition, LLC*, supra, 330 Conn. 60.

The court next turns to the superiority requirement. Practice Book § 9-8 (3) requires that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." The superiority question asks whether "the class action device . . . [is] superior to other methods available for a fair and efficient adjudication of the controversy." *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968), cert. denied, 395 U.S. 977, 89 S. Ct. 2131, 23 L. Ed. 2d 766 (1969). If plaintiffs satisfy predominance, courts typically hold that they established superiority. *Gold v. Rowland*, Superior Court, judicial district of Hartford, Docket No. CV-02-0813759-S, 2011 WL 6976499, *11 (December 13, 2011, *Sheldon, J.*).

There remains one last hurdle that plaintiffs must overcome in order to obtain class certification for an E4 claim. General Statutes § 31-68 (a) (3) requires the plaintiffs to

demonstrate that the defendants are liable to each class member under the appropriate burden of proof. General Statutes § 31-68 (a) (3) provides in relevant part that:

> [N]o 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.[12]

Thus, the plaintiffs must prove that the defendants are liable to all individual proposed class members who (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. Section 31-68 (a) (3) modifies Connecticut's class action procedure in three important respects. General class action principles related to class certification eschew a determination of whether the plaintiff will prevail on the merits. See *Rodriguez v. Kaiaffa, LLC*, supra, 337 Conn. 257. "A merits issue is off-limits at the class certification stage . . . if it is unrelated to a Rule 23 [of the Federal Rules of Civil Procedure] requirement." (Footnote omitted.) 1 J. McLaughlin, supra, § 3:12.

Section 31-68 (a), however, requires, for purposes of class certification, that the court find proven the merits of the plaintiffs' case, to wit, that the defendant is liable to all class members because all individual proposed class members performed non-de minimis nonservice duties for which they were not properly compensated for some portion of the nonservice duties.[13]

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[12] This statute was enacted by Public Act No. 19-1, § 6, on January 6, 2020, and was effective from passage.

[13] But see footnote 11 above.

Moreover, *at least at the class certification stage*,[14] § 31-68 (a) (3) places the burden on the employee to establish entitlement to the minimum wage. Heretofore, it was "the employer's burden to establish the employees qualified for the tip credit." *Rodriguez v. Kaiaffa, LLC*, supra, 337 Conn. 284. Thus, while general principles of class certification in the restaurant service industry do not mandate the determination of whether certain tasks relate to a server's tipped duties; see id, 268; General Statutes § 31-68 (a) (3) necessitates this inquiry by requiring proof of liability.

Lastly, by requiring the plaintiffs to prove that the nonservice duties occupied more than a de minimis amount of time, § 31-68 (a) (3) obligates the claimant to establish the amount of improperly paid work, or at least that it is more than a de minimis amount. In order to qualify for class status, the claimant must "in addition to satisfying any judicial rules of practice governing class action certifications, demonstrate[] . . . 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 . . . ." (Emphasis added.) General Statutes § 31-68 (a) (3).

In *Schoonmaker v. Lawrence Brunoli, Inc.*, 265 Conn. 210, 828 A.2d 64 (2003), an action by employees to collect unpaid wages including overtime and fringe benefits, our Supreme Court adopted the burden shifting analysis propounded by the United States Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88, 66 S. Ct. 1187, 90 L. Ed. 1515

[14] Because the issue is not before it, the court need not address whether the class certification requirements present in § 38a-61 (a) (3) are greater than the elements needed to establish liability at trial. See e.g. *Bennett v. New Milford Hospital, Inc.*, 300 Conn. 1, 12, 12 A.3d 865 (2011) (qualifications of expert author of medical malpractice opinion letter required by General Statutes § 52-190 (a) differed from those required of trial expert).

(1946). When an employer fails to comply with the record keeping provisions of the Fair Labor Standards Act, the employee meets his burden if he proves that he has in fact performed work for which he was improperly compensated and the amount and extent of that work as a matter of reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work to rebut that inference. The court in *Rodriguez* applied the burden shifting analysis to tips cases and held that "[u]nder § 31-62-E4 of the Regulations of Connecticut State Agencies, the plaintiff has to establish only that she performed nonservice and service work together, not that she performed nonservice work for any specific length of time; *Schoonmaker* does not require plaintiffs to establish with certainty the amount of uncompensated work performed." *Rodriguez v. Kaiaffa, LLC*, supra, 337 Conn. 283. Under § 31-68 (a) (3), the burden to establish nonservice work for more than a de minimis amount of time remains firmly in the realm of the employee/claimant's burden of proof.

The court turns to the interpretation of the relevant phrases present in § 31-68 (a) (3). The court interprets the terms "nonservice duties," "incidental to service duties" and "de minimis" in accordance with General Statutes § 1-2z and familiar principles of statutory construction, by examining the text of the statute and its relation to other statutes. If "the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." General Statutes § 1-2z.

The court's interpretation of the phrases "service work" and "incidental to service duties" is informed by the decision of our Appellate Court in *Nettleton v. C & L Diners, LLC*, 219 Conn. App. 648, 296 A.3d 173 (2023). "[A] service duty is any duty that either 'relates solely to' or is 'incidental to' the serving of food or drinks to customers 'seated at tables or booths.'" Id., 688. Finding that the phrase "the serving of food or drinks to customers" is ambiguous, the Appellate

Court concluded that whether "nonservice duties" are "incidental to the serving of food or drinks to customers seated at tables and booths" is "a fact intensive inquiry as to the nature of the task, where it is performed, and its relation to the service of patrons at tables and booths. Thus, *in 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." (Emphasis added.) Id., 696. There are some tasks, however, that may be appreciated properly as nonservice work, such as preparing food or waiting on take-out customers. Id., 697.

In the view of the plaintiffs, tasks that are not at the patron's table and its immediate environs are neither services duties nor incidental to service and therefore are considered nonservice duties. This view misapprehends the definition of service work contained in the version of service work found in E2 prior to September 24, 2020, which defined a service employee as one "whose duties relate solely to the serving of food or beverage to *patrons seated at tables or booths*, and to the performance of duties incidental to such service." Regs., Conn. State Agencies § 31-62-E2 (c). The phrase "seated at tables or booths" modifies patrons, not the duties. It is conceivable that a server may perform service work not at a table or its immediate environs, such as, most obviously, retrieving meals from the kitchen or retrieving drinks from the bar in order to serve them to the customer. Accordingly, the court declines to adopt the plaintiffs' suggested definition. In the absence of a bright line rule, most, but not all, duties will require the "fact intensive inquiry as to the nature of the task" articulated in *Nettleton*.

Section 31-68 (a) (3) does not define the phrase de minimis. In general, the de minimis doctrine allows employers to disregard otherwise compensable work "[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours." (Emphasis omitted; internal quotation marks omitted.) *Singh v. New York*, 524 F.3d 361, 370-71

(2d Cir. 2008). The plaintiff relies on § 31-62-E11 of the Regulations of Connecticut State Agencies as a general index. This regulation provides that "[a]ll time shall be reckoned to the nearest unit of fifteen minutes." Regs., Conn. State Agencies § 31-62-E11.

The Second Circuit has adopted a three-part test to determine whether work related duties occupy a de minimis amount of time and thus should not be compensated. These are "(1) the practical administrative difficulty of recording the additional time;[15] (2) the size of the claim in the aggregate; and (3) whether the claimants performed the work on a regular basis." (Footnote added; internal quotation marks omitted.) *Singh v. New York*, 524 F.3d 361, 371 (2d Cir. 2008).

In *Kosakow v. New Rochelle Radiology Associates, P.C.,* 274 F.3d 706 (2d Cir. 2001) the court held that fifteen minutes of non-compensated preparatory work each morning may not be characterized properly as de minimis. Id., 719. "An important factor in determining whether a claim is de minimis is the amount of daily time spent on the additional work. There is no precise amount of time that may be denied compensation as de minimis. No rigid rule can be applied with mathematical certainty. . . . Rather, common sense must be applied to the facts of each case. Most courts have found daily periods of approximately [ten] minutes de minimis even though otherwise compensable." (Internal quotation marks omitted.) *Nettleton v. C & L Diners, LLC*, supra, 219 Conn. App. 700-01, quoting *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984). But see *Reich v. Monfort, Inc.*, 144 F.3d 1329, 1333 (10th Cir. 1998) ("we have cited with approval cases finding that 'as little as ten minutes of working time goes beyond the level of de minimis and triggers the FLSA'"); *Metzler v. IBP, Inc.,* 127 F.3d 959 (10th Cir. 1997) (fourteen

[15] The court does not consider the administrative difficulties of segregating nonservice work from service work because E4 provides that "if the time spent on [nonservice work or service work] cannot be definitely segregated and so recorded . . . no allowances for gratuities may be applied as part of the minimum fair wage." Regs., Conn. State Agencies § 31-62-E4.

minutes is not de minimis); *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 231, 616 S.E.2d 722, 736 (2005) (twenty minutes of daily time not de minimis).

The defendants stress that § 31-68 (a) (3) requires the plaintiffs to demonstrate that they will "prevail on the *merits* (i.e., "defendant is liable") as *to every single server* in the class." (Emphasis in original.) Defs.' Opp'n to Mot. for Class Certification, # 149, p. 7. In their view, this requires an individualized inquiry of each and every server's work. The essence of the defendants' position may be found in the decision of the Superior Court in *Orozco v. Darden Restaurants, Inc.*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X03-CV-044022118-S, 2006 WL 2411520, (August 3, 2006, *Langenbach, J.*) (41 Conn. L. Rptr. 717), appeal dismissed, Connecticut Appellate Court, Docket No. AC 27937 (September 26, 2006), aff'd sub nom. *Bucchere v. Brinker International, Inc.*, 287 Conn. 704, 950 A.2d 493 (2008), in which the court denied class certification in a tips case because of the perceived necessity for individualized proof. "Once the court determines what types of duties may be service or non-service duties, it will be necessary to assess the duties each server actually performed to determine whether those duties are service or non-service tasks. With respect to many duties, it will be necessary to consider not only the nature of the duty but the context in which the duty is performed in order to determine if it is a service or non-service duty. Further, it will be necessary to determine whether servers performed the side work duties listed and whether they did so on each shift." Id., *3.

This view ignores the principle that representative or generalized evidence may be used to demonstrate that all individual proposed class members performed nonservice duties that were not incidental to service duties for more than a de minimis amount of time for which they were not properly compensated. This can be done, for example, where "the plaintiffs demonstrate[] a

common policy of similar side work tasks that could be used to show that *all . . . servers* performed nonservice duties." (Emphasis added.) *Rodriguez v. Kaiaffa, LLC*, supra, 337 Conn. 285 (rejecting the argument that the performance of nonservice duties cannot be proven with representative evidence). Even though class members do not share the same tasks, representative proof serves to demonstrate the class's performance of nonservice duties where "the tasks expected of servers are relatively uniform, although certain tasks may have been performed by different servers on different shifts." Id., 285. Had the legislature intended to eliminate explicitly representative or generalized proof by enacting § 31-68 (a) (3), it knew how to, but did not, do so.

The court is mindful of what the legislature did with respect to CMWA class action claims in the context of E4 claims, that is to make the predicate for a class action more stringent but not to eliminate the vehicle in its entirety. "Broadly, each of these requirements [numerosity, commonality, typicality, and adequacy of representation] tests whether, under the facts, a class action is sufficiently cohesive such that all or a substantial part of the claims of the proposed class can be decided fairly based *on the representative proofs* of the named plaintiffs." (Emphasis added; footnote omitted.) 1 J. McLaughlin, supra, § 4:1. "[T]he class action mechanism would be impotent without representative proof and the ability to draw class-wide conclusions based on it." (Internal quotation marks omitted.) *Monroe v. FTS USA, LLC*, 860 F.3d 389, 408 (6th Cir. 2017), cert. denied, 583 U.S. 1115, 138 S. Ct. 980, 200 L. Ed. 2d 248 (2018). Thus, representative or generalized proof may serve to establish "that the defendant is liable to all individual proposed class members . . . ." General Statutes § 31-68 (a) (3).

Mindful of the applicable principles, the court turns to the evidentiary basis advanced by the plaintiffs for class certification to determine whether the plaintiffs have proven by a

preponderance of the evidence that the conditions of Practice Book §§ 9-7 and 9-8 as well as General Statutes § 31-68 (a) (3) have been met. It concludes that they have been so proven.

The following factual findings are relevant to this decision. Throughout the period of the class claim, the defendants paid their servers the tip rate, a sum less than the mandatory minimum wage, for all work. Root 2, LLC estimated that ninety-six servers were employed for at least one week in the defendants' Connecticut restaurants.

The defendants' servers were assigned side work for each shift and the side work has been primarily the same over the period of the claim. Relitz Depo., pp. 80:07-82:5; Goglia Depo., pp. 36:10-37:02. The side work included general cleaning such as wiping the ledges, windexing partitions, and wiping cabinets. Granger Depo., p. 60:14-17. The side work was delineated in a document entitled "Server Closing Side Work" to which servers were variously assigned. Relitz Depo., pp. 80-83; Goglia Depo., p. 37:11. "Server Closing Side Work," includes twenty-nine discrete activities, all of which are susceptible to characterization as a matter of law as "nonservice duties" not "incidental to the serving of food or drinks to customers seated at tables and booths." Pls.' Exh. S. These include cleaning all server stations including the main station, cleaning trays and tray holders then redistributing them equally, breaking down and cleaning the Cotton Candy machine, cleaning all server stations throughout the restaurant, wiping and dusting parts of the restaurants, emptying all side station garbage bins, restocking straws and napkins at the service bar and soda machine, sanitizing coffee urns, vacuuming the Main Server station, cleaning the soda machine and nozzles, cleaning, organizing and refilling dairy fridge, windexing cabinet doors and partitions, stocking To Go Supplies, washing standard decanters, wiping and sanitizing the coffee station, returning all candles to the charging station and restocking silverware, shell bowls and gloves. Evidence, which the court credits, has been

offered that some of this side work occupied "as short as 15 minutes, upwards to about a half hour." Granger Depo., p. 62:13. The defendants did not segregate the time performed on the side work. Warfield and Hoxie estimated, based on their personal observations, that the defendants' servers spent approximately 30-45 minutes each shift performing side work. Warfield Aff., ¶ 14; Hoxie Aff., ¶ 14. The court credits this evidence.

After a server is "cut," that is, after they have stopped seating new tables for them, every server has to polish silverware and glassware; Relitz Depo., p. 87:09-16; the time for which is not segregated from other work. Id., p. 88:21. The purpose of the polishing is so that the server's station will be ready for the following day. Id., p. 87:12-14. This work was in addition to performing side work and was required of all servers, each shift, before they could leave. Relitz Depo., p. 87:12; Hoxie Aff., ¶ 15; Warfield Aff., ¶ 15. While Relitz estimated that the time can fluctuate between as little as a few minutes or 25 minutes; id, p. 88:01-03; Granger estimated that all servers typically spend one hour polishing silverware and glasses; Granger Depo., pp. 51:16-52:01; and Hoxie and Warfield estimated that this duty consumed 30-45 minutes for each server. Hoxie Aff., ¶¶ 15 & 16; Warfield Aff., ¶¶15 & 16. The polishing would occur both occasionally during the end of the night when there was a lull and after the restaurant was closed. Granger Depo., 52:05-13.

The court credits the evidence offered by Hoxie, Warfield and Granger relative to the time involved in polishing silverware and glass over that of Relitz because they actually performed this duty and observed others doing the same. The court finds that the general polishing of silverware and glassware are nonservice duties not incidental to the serving of food or drinks to customers seated at tables and booths. Performing a cleaning service for another server's benefit the next day does not enhance or implicate the gratuity the server performing the