

AMERICAN ARBITRATION ASSOCIATION
Employment Arbitration Tribunal

In the Matter of the Arbitration between

Case Number: 01-20-0015-6701

Charles Jones (Claimant)

-vs-

PJ Cheese, Inc. (Respondent)

FINAL AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered between the above-named parties and executed in or around February 20, 2017, and having been duly sworn, and having heard the proofs and allegations of the Parties, hereby AWARD as follows:

FINAL HEARING

The hearing opened on January 24, 2022, at 9:00 a.m., via videoconferencing. Present was attorney Mark Potashnick of Weinhaus & Potashnick, and Gregory A. Rich, Esq. of Dobson, Berns & Rich, LLP for the Claimant, Charles Jones, and attorney William K. Hancock, Esq. for the Respondent, PJ Cheese, Inc. The Hearing concluded on January 24, 2022, before the undersigned Arbitrator. The Parties stipulated to keep the hearing open until the post-arbitration briefing was complete. An Interim Award was rendered on March 16, 2022 which is hereby incorporated by reference. The arbitrator has reviewed the post-hearing briefs, the hearing exhibits, and other documents and rules as follows:

FACTS

Respondent owns and operates Papa John's (hereinafter, "PJ Cheese, Inc.") franchise stores and employed Claimant, Charles Jones as a pizza delivery driver at the Merritt Island and Titusville stores located in Florida from February 2017 until Claimant resigned in August 2021. PJ Cheese required the Claimant to provide, maintain, and pay for delivery vehicles that are safe and insured. Trans. 52:12-18; Ex. 19, 46:4-011. Respondent, PJ Cheese inspected Claimants' vehicles to ensure they met its standards, and the company checked his proof of insurance. Trans. 52:19-53:8; Ex. 19, 50:16-19. The claimant contends the vehicle expenses he incurred while making deliveries were not adequately compensated for in violation of the Fair Labor Standards Act (the "FLSA"). Respondent denies the allegation, and Claimant seeks damages on three specific issues.

CLAIMANT'S POSITION

First, the Claimant asserts he may estimate or reasonably approximate his vehicle costs without the need to prove actual costs. In support of his position, the Claimant cites numerous case law

decisions. Second, the Claimant asserts he must be reimbursed for a portion of his fixed costs of driving his vehicle. Respondent requires Claimant to supply his own vehicle for making deliveries, which requires Claimant to pay certain fixed costs to drive. For example, Claimant argues that he must be reimbursed for a portion of his fixed costs of driving to the extent these costs reduce net wages below the minimum federal wage. Claimant cites controlling Eleventh Circuit law, the U.S. Department of Labor's ("DOL's") "anti-kickback regulation," the DOL's interpretative guidance, and other authority applicable to minimum wage claims based on under-reimbursed vehicle costs. Third, the Claimant asserts the tips he receives more than the tip credit cannot be used in determining net wages. The Claimant voluntarily resigned from his employment with PJ Cheese in early August 2021 and stopped delivering for PJ Cheese in early July 2021 due to a prior medical condition (i.e., post-traumatic stress disorder).

The Claimant owned and operated the following vehicles in the following general timeframes:

- February 2017 to August 2017 2001 Mazda 626
- April 2018 to July 2018 2001 Saturn SC
- July 2018 to November 2018 1999 Honda Civic
- October 2018 to August 2021 2016 Ford Fusion
- March 2021 to the present 2007 Chevrolet Impala

The Claimant's evidence shows that the total difference between Mr. Jones' vehicle costs attributable to recorded delivery trips and his reimbursements was \$13,583.88 based on the IRS rate and \$10,759.48 based on Mr. Jones' estimated vehicle costs. Subtracting the \$233.62 that PJ Cheese paid Mr. Jones more than the minimum wage (Covid bonuses), he alleges he was deprived of minimum wages totaling \$13,350.26 based on the IRS rate and \$10,525.86 based on his estimated vehicle costs. Additionally, Claimant testified that he performed unrecorded return drives to delivery addresses to correct orders and satisfy customers, for which he was not reimbursed. The reimbursements due for those repeat drives total \$2,958.76 based on the IRS rate and \$2,535.16 based on Mr. Jones' estimated vehicle costs.

Claimant testified that he was subsequently reassigned and/or transferred by Respondent in July 2021 during mediation of the case barred him from his long-time position as the delivery driver to an in-store position, known as an "Insider" (Trans. 74:7-20) to work in the store and was no longer assigned to delivering PJ Cheeses products. As a result of said reassignment, Claimant indicated that he was unable to work around people for lengthy periods of time or around stressful environments due to Post-Traumatic Stress Disorder ("PTSD"), depression, and anxiety resulting from his prior military service. Trans. 74:21- 76:21; Ex. 20, p. 64; Ex. 21, pp. 33, 52, 66. Although Mr. Jones occasionally worked inside the restaurant while he was a delivery driver, he usually did so while the restaurant was not very busy, which allowed him to work on tasks; however, the situation became intolerable, and he had no other choice but to resign his employment. Trans. 82:11- 17; Ex. 21, pp. 78-79; Ex. 21G. Mr. Jones testified that he suffered emotional distress because of the loss of his job with PJ Cheese, including depression and anxiety about being unemployed. Trans. 84:21-85:1. He felt demoralized and upset due to losing his job by trying to enforce his right to earn a living wage. Id., 84:2-10. He has also experienced financial pressures

due to the loss of his job. Id. 85: 11-19. Mr. Jones has consulted with his therapist at the Veterans Administration about this emotional distress. Id. 85 :20-24.

Claimant requests total damages as it relates to estimated vehicle costs other than attorneys' fees and costs, to be as follows damages: Actual Damages (\$10,525.86 under-reimbursement for recorded deliveries+ \$2,535.16 for unrecorded return trips = \$13,061.02) \$13,061.02 Liquidated Damages \$13,061.02 equaling Total Damages of \$26,122.04 and/or other than attorneys' fees and costs, the total damages based on the IRS rate are Actual Damages (\$13,350.26 under-reimbursement for recorded deliveries+ \$2,958.76 for unrecorded trips = \$16,309.02) \$16,309.02 Liquidated Damages \$16,309.02 Total Damages \$32,618.04.)

In addition, Claimant argues the remedies available to an employee who proves retaliation in violation of the FLSA are provided by section 216(b) of the statute, which states, in part:

Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

Thus, the Claimant is asserting damages because of Claimant's constructive discharge by PJ Cheese, claiming Mr. Jones has suffered lost income and emotional distress. As noted previously, through the first 28 weeks of 2021, he earned a total of \$8,035.02 working as a delivery driver for PJ Cheese, or approximately \$286.97 per week. Ex. 20D. From the date of his constructive discharge on August 2, 2021, through February 24, 2022 (29 weeks), Mr. Jones would have earned approximately \$8,035.16 in wages if he had remained employed by PJ Cheese as a delivery driver. The Claimant testified during the arbitration hearing that despite applying for numerous jobs, he has not been able to find another job since his employment with PJ Cheese ended, and he has not received any job offers. Trans. 83:13-84:20. Accordingly, Claimant lost approximately \$8,035.16 in wages because of his constructive discharge, and he requests that the Arbitrator award him that amount as part of his damages, including liquidated damages and an additional \$16,070.04 for emotional distress.

RESPONDENT'S POSITION

Respondent asserts, Claimant, Charles Jones may estimate the actual vehicle expenses he alleges he paid while delivering for PJ Cheese, Inc. Further, the record reflects Claimant's own estimate of vehicle expense payments, not all of which were paid for PJ Cheese's primary benefit, as well as the amount PJ Cheese paid him as vehicle reimbursement during his employment. Respondent further asserts a comparison of Claimant's own expense estimates to his calculation of the expense reimbursement he received establishes that the reimbursement exceeds what he estimates he spent. Because Respondent paid him more than the minimum wage of \$6.15 required by the Florida constitution, more than the minimum wage of \$7.25 per hour under the Fair Labor Standards Act (FLSA), and more than the varying minimum wages under the Florida Minimum Wage Act (FMWA), Claimant's claim that PJ Cheese "under-reimbursed" to such an extent that he did not receive the minimum wage fails under his own testimony,

Respondent stipulates from February 2017, when PJ Cheese first employed Claimant, to August 2, 2021, when he voluntarily resigned from PJ Cheese, Claimant owned and operated the following vehicles in the following general timeframes: February 2017 to August 2017 2001 Mazda 626 April 2018 to July 2018 2001 Saturn SC July 2018 to November 2018 1999 Honda Civic October 2018 to August 2021 2016 Ford Fusion March 2021 to the present 2007 Chevrolet Impala (Ex. 4B, Jones' Interrogatories, pp. 3, 10).

Moreover, Respondent asserts Claimant's claims of unpaid wages and retaliation under the FMWA fail because he did not comply with the FMWA's statutory precondition to suing under the FMWA, notwithstanding his allegation in his Amended Statement of Claim that did meet the statutory preconditions. Respondent further argues, even if Claimant met the statutory precondition to suing under the FMWA, his retaliation claims under the FMWA alleging his transfer from Driver to Insider was an adverse employment action fails because customers are not required to pay tips, and tips are not guaranteed, and Claimant's receipt of tips was not part of Claimant's employment relationship with Respondent except to the extent that if Claimant received tips Respondent could take a tip credit against its minimum wage obligation.

Respondent argues that based on Claimant's estimates of what he actually paid for vehicle expenses, Respondent's reimbursement was sufficient to cover far more than variable costs attributable to delivery and fixed costs (even those Claimant would have paid - and did pay - as part of his ordinary life expenses) irrespective of his employment with Respondent.

Respondent asserts, that negative kickback (reimbursement in excess of Claimant's own estimates of his actual costs) leaves ample room to address and defeat Claimant's claim for depreciation as well as his "return trip" claim. Respondent further asserts that Respondent's reimbursement exceeds Claimant's estimated expenses because, Respondent reimbursed Claimant in excess of his own estimates of what he actually spent on vehicle expenses; what it would have cost Respondent to own and operate a vehicle is irrelevant to Jones' minimum wage claim. No cost was shifted to Claimant such that he paid a cost that Respondent should have borne if Respondent reimbursed Claimant for costs he actually paid. The FLSA does not require windfall from an employee to avoid windfall to an employer; it requires only the payment of the minimum wage.

Respondent further argues that Respondent may reimburse Claimant's actual expenses or reimburse expenses based on the employer's approximation of expenses and that an employer need not reimburse ordinary-life expenses. Further, there is neither a requirement for Respondent to reimburse depreciation not related to miles driven nor would a return trip result in a minimum wage violation.

Respondent argues an employer need not reimburse at the IRS rate. Not receiving tips cannot be an adverse employment action because tips are not a term or condition of employment. The Claimant has failed to prove that his transfer to an insider position was an adverse employment action, and his voluntary resignation was not constructive discharge.

CONCLUSION

After having heard testimony, reviewing the exhibits, evidence, pleadings, and the arguments of the parties, I hereby AWARD as follows:

1. Respondent shall pay Claimant \$26,122.04 based on the calculated per-mile rate on Claimant's minimum wage claim. (Actual Damages (\$10,525.86 under-reimbursement for recorded deliveries + \$2,535.16 for unrecorded return trips = \$13,061.02) \$13,061.02 Liquidated Damages \$13,061.02 equaling Total Damages of \$26,122.04
2. Respondent shall pay Claimant on the retaliation claim \$8,035.02 for actual damages and \$8,035.02 for liquidated damages.
3. The Claimant's claim for \$16,070.04 for emotional distress is hereby denied.
4. Respondent shall pay Claimant pre-judgment and post-judgment interest as provided by law.
5. The Claimant is entitled to recover Attorney's fees against the Respondent in the amount of \$150,000.00 and costs in the amount of \$7,562.50 as mutually agreed to by the parties.
6. The administrative fees of the American Arbitration Association, totaling \$2,950.00, and the compensation and expenses of the Arbitrator, totaling \$12,400.00, shall be borne as incurred.

The above sums are to be paid on or before thirty (30) days from the date of this Award.

This FINAL AWARD is a full settlement of all claims and counterclaims submitted to this arbitration.

I, Hon. Karimu F. Hill-Harvey (Ret.), Esq., LL.M, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my **final** Award.



Dated: April 21, 2022

Hon. Karimu F. Hill-Harvey (Ret.), Esq., LL.M