SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** **PART** **41M**

Justice

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DYNASTY T LOEMAN

Plaintiff,

- v -

PEJ XVI, INC.,

Defendant.

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INDEX NO. 151195/2024

MOTION DATE 04/15/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Plaintiff, Dynasty T. Loeman, on behalf of herself and all others similarly situated, commenced the underlying action against defendant, PEJ XVI, Inc. ("PEJ"), to recover for damages sustained as a result of defendant's alleged violations of the New York City Administrative Code, and New York State Labor Law and supporting regulations. In her complaint, plaintiff, a former fast-food employee of PEJ bringing or maintaining this class action under CPLR Article 9, is asserting causes of action based on violations of: (1) New York City Fair Workweek Law, New York City Administrative Code § 20-1221(a); (2) New York City Fair Workweek Law, New York City Administrative Code §§ 20-1221(b) and 20-1222; and (3) New York Labor Law and supporting regulations, including New York Hospitality Industry Wage Order, 12 N.Y.C.R.R. Part 146, and/or the former New York Minimum Wage Order for the Restaurant Industry, 12 N.Y.C.R.R. Part 137.

Now, in Motion Sequence 001, PEJ has moved for an order, pursuant to CPLR § 3211 (a)(7), dismissing the complaint in its entirety on the grounds that it fails to state a cause of

action. More specifically, PEJ contends that the plaintiff's claim under New York Labor Law based on a failure to pay uniform maintenance pay must be dismissed because the complaint does not offer necessary allegations as to the applicability of the "wash and wear" exception and both the Fair Workweek Law and NYLL claims must be dismissed as they may not be maintained as class claims under CPLR § 901(b), which prohibits the recovery of statutory penalties. For the reasons set forth below, the motion is denied.

CPLR § 3211(a)(7):

When reviewing a CPLR § 3211(a)(7) motion to dismiss for failure to state a claim, "a court must give the complaint a liberal construction, accept the allegations as true, and, providing plaintiffs with the benefit of every favorable inference, examine the adequacy of the pleadings" (*Moore Charitable Found. v PJT Partners, Inc.*, 40 NY3d 150, 153 [2023]). The inquiry is limited to the legal sufficiency of the plaintiff's claims (*Silsdorf v Levine*, 59 NY2d 8, 12 [1983]), and, in making this determination, a court is "not authorized to assess the merits of the complaint or any of its factual allegations" (*Bangladesh Bank v Rizal Commercial Banking Corp.*, 226 AD3d 60, 86 [1st Dept 2024]). "At the same time, however, allegations consisting of bare legal conclusions…are not entitled to any such consideration" (*Simkin v Blank*, 19 NY3d 46, 52 [2012], quoting *Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

Discussion:

In the complaint, plaintiff is asserting claim(s) arising under the New York Labor Law ("NYLL"), including alleged violations of New York Hospitality Industry Wage Order, Part 146

of Title 12 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (12 NYCRR Part 146) ("Hospitality Industry Wage Order"). Plaintiff is also alleging claims arising under New York City Administrative Code, Title 20, Chapter 12, known as the "Fair Workweek Law", which was designed to address scheduling practices within the fast food industry and provide protection for fast food workers (DCWP - Fair Workweek Law). Although not raised in the motion papers, the court notes that it is unclear from the allegations in the complaint whether the plaintiff is entitled to coverage under the Hospitality Industry Wage Order or the subject Fair Workweek Law provisions.

Subpart 146-3.13 of the Hospitality Industry Wage Order provides the relevant definitions, defining a "Fast Food Employee" as "any person employed or permitted to work at or for a Fast Food Establishment by any employer where such person's job duties include at least one of the following: customer service, cooking, food or drink preparation, delivery, security, stocking supplies or equipment, cleaning, or routine maintenance"; and a "Fast Food Establishment" as "any establishment in the state of New York: (a) which has as its primary purpose serving food or drink items; (b) where patrons order or select items and pay before eating and such items may be consumed on the premises, taken out, or delivered to the customer's location; (c) which offers limited service; (d) which is part of a chain; and (e) which is one of thirty (30) or more establishments nationally, including: (i) an integrated enterprise which owns or operates thirty (30) or more such establishments in the aggregate nationally; or (ii) an establishment operated pursuant to a Franchise where the Franchisor and the Franchisee(s) of such Franchisor owns or operate thirty (30) or more such establishments in the aggregate nationally" (12 NYCRR 146-3.13 [a]; [b]; *see also* NYS DOL Website, *Minimum Wage for Fast Food Workers Frequently Asked Questions*, https://dol.ny.gov/minimum-wage-fast-food-

workers-frequently-asked-questions). As provided under Administrative Code 20-1021, the Fair Workweek Law utilizes the same definitions for "Fast Food Employee" and "Fast Food Establishment" as those in Subpart 146-3.13 of the Hospitality Industry Wage Order.

In the complaint, plaintiff has not provided any specific factual allegations sufficient to identify the defendant's business or otherwise indicate that the defendant "PEJ XVI, INC" qualifies as a fast food employer or establishment, as defined by the statute. There are no allegations in the complaint, for example, which include the actual name of the establishment/business/restaurant PEJ operates or location where plaintiff was employed, the type of position plaintiff held or applicable job duties, and/or the nature of the defendant's business or type of shifts worked, to name a few (*see generally* 12 NYCRR § 146-3). Instead, the complaint merely recites in boilerplate fashion that "[d]efendant employed [p]laintiff as a non-exempt hourly employee", "[d]efendant employed [p]laintiff as a fast food employee[]", [d]efendant operated restaurants that prepare and offer food and beverages for customer consumption", "[d]efendant is an employer in the hospitality industry", and "[d]efendant is considered a Fast Food Establishment as defined in the Hospitality Industry Wage Order" (NYSCEF Doc. No. 2 ¶¶ 5-10; 23-25). Based on these vague allegations alone, it cannot be determined whether the Hospitality Industry Wage Order or the Fair Workweek Law apply to the claims alleged in the complaint herein.

New York State Labor Law:

Notwithstanding the above, the court now considers the arguments set forth in the parties' motion papers. The third cause of action in the complaint is the plaintiff's claim under the NYLL alleging a violation of the Hospitality Industry Wage Order. More specifically, plaintiff contends

that PEJ violated Section 146-1.7(a) of the Hospitality Wage Order (12 NYCRR § 146-1.7[a]), by failing to furnish any uniform maintenance pay or provide reimbursement for the cost of maintaining uniforms.

Under New York law, when an employer requires employees to wear a uniform but does not maintain them, employers are typically required to pay "uniform maintenance pay" for the maintenance of their employees' required uniforms (12 NYCRR § 146-1.7; *Camara v Kenner*, 16-CV-7078 [JGK], 2018 WL 1596195, at *13 [SDNY Mar. 29, 2018]). However, under the "wash and wear" exception, set forth in 12 NYCRR § 146-1.7(b), an employer is not required to pay for uniform maintenance pay where the uniforms: (1) are made of "wash and wear" materials; (2) may be routinely washed and dried with other personal garments; (3) do not require ironing, dry cleaning, daily washing, commercial laundering, or other special treatment; and (4) are furnished to the employee in sufficient number, or the employee is reimbursed by the employer for the purchase of a sufficient number of uniforms, consistent with the average number of days per week worked by the employee.

In its motion, PEJ asserts that the plaintiff's claim for uniform maintenance pay must be dismissed because the plaintiff has failed to address and/or include necessary allegations relating to the statutory "wash and wear" exception. PEJ contends that the plaintiff merely asserts in conclusory terms that the "wash and wear" exception does not apply and fails to provide allegations that would be required to determine whether the exception would or could apply. Specifically, PEJ claims that the complaint does not include whether the uniforms were made of wash and wear material or were incapable of being routinely washed and dried with other personal garments; allegations that would be required to determine whether the exception is applicable. Therefore, PEJ alleges that as the complaint does not include the necessary factual

allegations in support of the claim, the plaintiff has failed to adequately state a claim for an alleged violation based on uniform maintenance pay.

In opposition, plaintiff asserts that the complaint has stated a cause of action for uniform maintenance pay under 12 NYCRR § 146-1.7(a) as it includes allegations that plaintiff (along with the putative class) was: (1) required to wear a uniform consisting of a logoed shirt for each shift worked; (2) the defendant did not maintain or offer to launder the uniforms; and (3) the defendant did not pay or reimburse for the costs of maintaining the uniform (*see* NYSCEF Doc. No. 2 ¶¶ 62-72). Plaintiff contends that these allegations are sufficient to put the defendant on notice of the cause of action for uniform maintenance pay and meets the burden necessary to adequately articulate a claim.

Plaintiff also asserts that the "wash and wear" exception is an affirmative defense, not a pleading requirement, and the burden of demonstrating that such an exception applies and/or the relevant elements are satisfied falls to the employer. Plaintiff alleges that notwithstanding, the complaint for this action "adds numerous more details to provide flavor and context, including allegations that speak to [d]efendant's affirmative defense of the 'wash and wear' exception" (NYSCEF Doc. No. 11 at 2).

However, contrary to the plaintiff's assertion, while the complaint does recite the material elements required for a uniform maintenance pay cause of action, the allegations in the complaint do not contain any sufficiently detailed factual allegations in support of these elements or sufficient to determine the applicability of any statutory exceptions. "Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]).

The defendant's CPLR § 3211(a)(7) motion to dismiss is not premised on the plaintiff's failure to state a claim cognizable at law but is instead premised on the plaintiff's failure to assert a material allegation necessary to support the identified cause of action (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014]).

In the complaint, the plaintiff's factual allegations merely include that: "At her time of hire, [p]laintiff was given only two uniforms despite working five days or more per week. The uniform consisted of a t-shirt emblazoned with [d]efendant's logo, a hat emblazoned with [d]efendant's logo, and an apron"; "This uniform does not fall under the wash and wear exception"; "Plaintiff's uniforms would become dirty, odorous, and soiled after each shift, requiring daily washing, after each shift"; "Defendant does not, and did not offer, to, wash, iron, dry clean, alter, repair, or perform other maintenance necessary for [p]laintiff's required uniform"; "Plaintiff's uniform required daily washing"; "Plaintiff was entitled to uniform maintenance pay"; "Defendant never paid [p]laintiff any uniform maintenance pay or reimbursement"; and "Plaintiff routinely spent time off-the-clock and money to clean and maintain his uniform consistent with the uniform appearance standards [d]efendant required" (NYSCEF Doc. No. 2 ¶¶ 26-39). Here, as the entirety of the allegations in the complaint consist of bare legal conclusions with no additional factual specificity or factual support for the alleged claim (*Barnes v Hodge*, 118 AD3d 633, 633 [1st Dept 2014]), the third cause of action for uniform maintenance pay is insufficient to withstand the motion to dismiss (*Aristy-Farer v State*, 29 NY3d 501, 517 [2017] [complaint lacked specificity and the remaining cause of action, even when read liberally, was too conclusory to survive a motion to dismiss]).

"Moreover, a review of the cases cited and annexed complaints of other matters, highlights the deficiencies in this [] complaint" (*Castillo v Fresh Dining Concepts LLC*, 2025

NY Slip Op 31264[U], 5 [Sup Ct, NY County 2025]). Those complaints, offered by the plaintiff as exhibits, contain either: additional allegations "that uniforms had to be purchased at the plaintiff's own cost, and that they were only provided one shirt or outfit to be worn daily, those are distinguishable from the instant matter" (*Id.*); or factual allegations with sufficiently more detail than those alleged in the complaint here (NYSCEF Doc. No. 15; 16). The allegations are insufficient to establish the uniform maintenance pay statute is applicable, let alone a possible exception thereto (*see generally Herrmann v CohnReznick LLP*, 155 AD3d 419, 420 [1st Dept 2017] ["Compounding the pleading deficiencies, the vagueness of plaintiffs' allegations prevented the IAS Court from ruling on defendants' [] defense"]). Therefore, as the complaint merely restates the elements of the statute without providing supporting factual allegations, dismissal is warranted. However, such dismissal is without prejudice and the court will provide plaintiff with leave to replead (*see generally Nationstar Mtge., LLC v Ocwen Loan Servicing, LLC*, 194 AD3d 490, 492 [1st Dept 2021]).

New York City Administrative Code:

Provided that the Fair Workweek Law even applies herein, in the first and second causes of action in the complaint, plaintiff is alleging claims against PEJ based on violations of Administrative Code §§ 20-1221(a), 20-1221(b), and/or 20-1222, based on defendant's failure to provide a written copy of the employee's expected, regular schedule and failure to provide written notice of work schedules at least 14-days before the first day of any new schedule.

Administrative Code § 20-1221 governs advance scheduling requirements, with subsection (a) providing that: "[a] fast food employer shall have scheduling practices that provide each fast food employee with a regular schedule that is a predictable, regular set of

recurring weekly shifts the employee will work each week" and requiring that "[n]o later than receiving first schedule, a fast food employer shall provide such employee with a written copy of their regular schedule including the number of hours a fast food employee can expect to work per week for the duration of the employee's employment and the expected days, times and locations of those hours." Similarly, Administrative Code § 20-1221(b) provides that "[a] fast food employer shall provide a fast food employee with written notice of a work schedule containing regular shifts and on-call shifts on or before the employee's first day of work. For all subsequent work schedules, the fast food employer shall provide such notice no later than 14 days before the first day of any new schedule." Administrative Code § 20-1222 provides for schedule change premiums, setting forth the criteria or formula(s) for calculating the payment of schedule change premiums and the relevant amounts.

In its motion, PEJ also asserts that dismissal of the Fair Workweek Law claims is warranted under CPLR § 901(b), as the claims are precluded from adjudication on a class-wide basis. While "[n]othing in the CPLR provides that a class claim cannot be dismissed, even at the pre-answer stage, for failure to state a cause of action" (*Maddicks v Big City Properties, LLC*, 34 NY3d 116, 123 [2019]), in cases involving pre-certification motions to dismiss class claims, generally "it is premature to dismiss class action allegations before an answer is served or pre-certification discovery has been taken" (*Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 91 [1st Dept 2013], *affd sub nom. Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382 [2014]). However, a party may succeed on such motions where "it appears conclusively from the complaint…that there was as a matter of law no basis for class action relief" (*Id.*). CPLR § 901 governs the prerequisites to a class action and subsection (b) provides that, "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the

recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."

Here, PEJ asserts that the plaintiff's Fair Workweek Law claims, seeking schedule change premiums on behalf of the class, is impermissible as these premiums constitute penalties or the minimum measure of statutory recovery, and not actual damages. In the complaint, plaintiff claims that based on the alleged violations, plaintiff and the class are entitled to: (1) an order directing compliance; (2) unpaid schedule change premiums, ranging from $10 to $75 for each violation; (3) compensatory damages and any other relief required to make the employee whole; and (4) reasonable attorney's fees (NYSCEF Doc. No. 2 ¶¶ 51; 57).[1] Notably, the complaint specifically waives all liquidated and punitive damages (*Id*. ¶¶ 53; 59). At this juncture, PEJ has not established that the schedule change premiums constitute either a penalty or a fixed minimum amount as opposed to actual compensatory damages (*Gollman v Wendy's Intern. LLC*, 2023 NY Slip Op 32805[U], 3 [Sup Ct, NY County 2023]).

Importantly, as done here, a plaintiff may avoid application of CPLR § 901(b) by waiving the right to seek penalties (*Cox v Microsoft Corp.*, 8 AD3d 39, 40 [1st Dept 2004]). "Seeking to recover under either an individual or class action theory does not require dismissal of the class action claims at this early stage of the litigation…Once [p]laintiffs have had an opportunity to conduct discovery and develop a factual record, they may then decide whether to pursue class certification and waive certain remedies or to pursue those remedies" (*Chaney v Hermes of*

[1] Although it does not seem to be challenged in the papers, the court notes that the damages and/or relief sought in the complaint is that which is specifically provided for as remedies for a private right of action under the statute. Administrative Code § 20-1211(a) authorizes that any person alleging a violation of §§ 20-1221 and 20-1222 may bring a civil action in a court of competent jurisdiction and includes that such court may order compensatory, injunctive and declaratory relief, including the following remedies for violations of this chapter: (1) Payment of schedule change premiums withheld in violation of section 20-1222; (2) an order directing compliance with the recordkeeping, information, posting and consent requirements set forth in 20-1221; (6) Other compensatory damages and any other relief required to make the employee whole; and (7) reasonable attorney's fees (*see* Administrative Code § 20-1211 [b]).

Paris, Inc., 2018 NY Slip Op 33255[U], 6 [Sup Ct, NY County 2018]). Considering that plaintiff seeks actual damages in addition to the premiums and the complaint specifically waives punitive and liquidated damages, the court need not determine whether the premiums are penalties at this stage (*Castillo v Fresh Dining Concepts LLC*, 2024 NY Slip Op 32657[U], 3 [Sup Ct, NY County 2024]; *Mera v Milos HY, Inc.*, 2022 NY Slip Op 33462[U], 14 [Sup Ct, NY County 2022]). Therefore, as it has not yet been conclusively shown as a matter of law that the plaintiff's Fair Workweek Law claim(s) may not be pursued on a class wide basis, the motion seeking to dismiss the claims on these grounds must be denied.

Conclusion:

Accordingly, it is hereby

ORDERED that the motion to dismiss is GRANTED IN PART to with respect to the third cause of action and is otherwise denied; and it is further

ORDERED that the third cause of action of the complaint is dismissed; and it is further

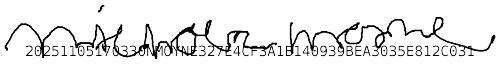
ORDERED that plaintiff is granted leave file an amended complaint in which the allegations and the third cause of action may be replead in accordance with this decision and order; and it is further

ORDERED that the amended complaint shall be filed within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity with the deadline set forth herein, leave to replead shall be deemed denied and the third cause of action shall be dismissed; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 327, 80 Centre Street, New York, New York, on February 5, 2026, at 2:15 PM.

This constitutes the decision and order of the court.



11/3/2025
DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:		**CASE DISPOSED**			**X**	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	**X**	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**