

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

GERALD A FAST,)
)
 Plaintiff,)
)
 v.) Case No. 06-04146-CV-C-NKL
)
 APPLEBEE'S INTERNATIONAL, INC.,)
)
 Defendant.)

ORDER

Pending before the Court is Applebee's International, Inc.'s (Applebee), Motion to Certify Order for Interlocutory Appeal and Stay Proceedings [Doc. 84]. In its motion, Applebee asks the Court to certify for appeal the Court's Order [Doc. 73] denying Applebee's Motion for Summary Judgment. Applebee contends that the Court's definition of "tipped employees" for purposes of the Fair Labor Standards Act (FLSA) is wrong.

In short, Applebee argues that the Court should not follow the Department of Labor's analytical framework for determining the FLSA's tip credit because the Department of Labor has incorrectly interpreted the FLSA. This is so even though the Department of Labor's interpretation has allegedly been implemented at Applebee's restaurants. Rhonda Burry, the manager at one of Applebee's restaurants, testified: "What I know is that some tip employees feel that they're working beyond *our* 20 percent

rule.” *See* Burry Depo. at 12, lines 22-23 (emphasis added). In response to the

Department of Labor’s investigation of Applebee’s restaurants, Applebee stated:

Finally, you have indicated that your investigation suggested that as much as 45% of the time worked by tipped employees at the Osage Beach Applebee’s is being spent performing “nontipped” work such as pre-shift “prep work” and dishwashing. This, you believe, is a result of high turnover in the restaurant and exceeds the 20% tolerance of non-tipped work allowed by law. . . . It is G.I.’s [Applebee’s corporate subsidiary] policy that these duties should not exceed 20% of the shift and should be performed only as necessary on a de minimi basis.

See Correspondence to the U.S. Department of Labor, p. Ap000399-400.

Given the absence of any case law to the contrary, and given the fact that the Department of Labor’s interpretation of the FLSA is consistent with the Court’s interpretation, and given the fact that Applebee has indicated it is complying with the 20% rule, the Court cannot say that there is a substantial ground for difference of opinion on this issue.¹

None of the cases cited by Applebee actually address the question before the Court, which is whether the Department of Labor’s own handbook incorrectly defines tipped employees for purposes of the FLSA. Furthermore, while Applebee lists numerous examples of how a 20% rule is unworkable, the fact is that the Department of Labor’s rule has been in place since 1988 and Applebee has indicated that they follow the rule.

Therefore, the Court does not believe that the Court’s denial of summary judgment

¹Applebee explains that they have now gone to the Department of Labor and sought a change in the Department’s interpretation of the FLSA. While the Department of Labor has indicated it will consider the request, it has not modified its handbook.

[PDF to Word](#)
in this case will change the industry as Applebee has alleged. *See* Applebee's Suggestions in Support of Motion to Certify Interlocutory Appeal at p.11.

The Court is also not convinced that an interlocutory appeal will materially advance the ultimate termination of this litigation. Applebee contends that it is necessary to resolve the definition of tipped employee so that discovery can be properly narrowed. However, the Court is not aware of an interlocutory appeal being granted to resolve a legal issue so that discovery can be properly narrowed. If Applebee believes that this case is not properly managed as a class action, it has the opportunity to move for decertification of the class. Applebee, in fact has indicated that it intends to file such a motion and such motions are common in FLSA cases.

Moreover, even if Applebee's definition of tipped employee is adopted, the Court cannot say at this early stage of litigation that discovery on Fast's remaining claim will be substantially abbreviated.

Accordingly, it is hereby

ORDERED that Defendant's Motion to Certify Order for Interlocutory Appeal and Stay Proceedings [Doc. 84] is DENIED.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: August 17, 2007
Jefferson City, Missouri