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## Judge allows class action in Applebee's wage case

**Servers claim franchisee failed to properly notify them of pay regulations**

By WILL ASTOR

Wait staff of Applebee's Neighborhood Bar & Grill restaurants in Upstate New York can sue the franchisee as a class, a Rochester judge has ruled.

In a decision handed down Aug. 5, U.S. District Judge Elizabeth Wolford found that Florida-based T.L. Cannon Corp. had skirted some New York labor law provisions and allowed Applebee's servers to press the case as a class action.

In a complaint filed in U.S. District Court here in 2012, Applebee's servers claimed T.L. Cannon violated state minimum-wage provisions by failing to properly notify servers of regulations governing pay for tipped workers.

Currently, 750 current and former Applebee's servers have signed on to the lawsuit as collective plaintiffs. As many as 20,000 ultimately could join the action, which might be worth as much as \$100 million, predicted the servers' lawyer, Nelson Thomas of Thomas and Solomon LLP.

**The case is seen by some as a legal watershed, with implications for other pending suits.**

T.L. Cannon has sole franchise rights to run Applebee's restaurants in Upstate New York and part of Connecticut. Starting with a single Rochester-area restaurant in 1991, it has built a chain of 54 New York and six Connecticut Applebee's.

The Applebee's franchisee is privately owned and closely held by two principals, Chairman David Stein and President Matthew Fairbairn. Along with T.L. Cannon director of operations John Perry, Stein and Fairbairn are individually named in the class action as defendants.

A call to T.L. Cannon's Florida headquarters for comment was not returned.

Coming after two Supreme Court rulings that were cheered by opponents of class actions and lamented by class-action fans, the Applebee's case is seen by some as a legal watershed.

Opponents see class actions as nuisances that win big payouts for lawyers while doling out pittance that provide scant relief to plaintiffs.

Proponents view such suits as one of the few weapons in a scant arsenal available to consumers and low-wage workers seeking to fight exploitation by big corporations.

"The outcome of the (Applebee's) case has national implications for a wide array of pending class-action cases across the country," wrote Public Citizen attorneys in a 2013 statement after the organization weighed in on the plaintiffs' side.

Public Citizen, a non-profit based in Washington, D.C., describes its mission as guarding the rights of ordinary citizens against moneyed and politically connected interests. It joined the case last year, urging a federal appeals court to keep the Applebee's servers' class-action complaint alive.

In June 2013, T.L. Cannon won a bid to have the servers' action moved from Rochester to Albany. In the Albany court, feder-

al District Judge Thomas McAvoy denied the servers' bid for class-action status despite a magistrate judge's recommendation to grant it. Had it not been reversed, that ruling could have ended the case.

In deciding against the servers, McAvoy had cited a U.S. Supreme Court ruling, then 2 days old, that had quashed a class-action claim by a group of Philadelphia-area subscribers against Comcast Corp., cable TV and broadband provider.

The Comcast ruling required a similar rejection of the Applebee's servers' request for a class action, McAvoy wrote.

A 2nd Circuit U.S. Court of Appeals panel reversed McAvoy's decision, however. And in August 2013, he sent the case back to Rochester.

In the Comcast case, some 2 million current and former subscribers had won class certification. But in a 5-4 vote, the Supreme Court reversed the lower court. The cable subscribers' advancement of different theories of liability and damages prevented them from suing as a class, the high court majority said.

The Comcast ruling followed an earlier Supreme Court decision that had blocked a class action by female employees of Wal-Mart Stores Inc.

In a case that could have cost the discount retailer hundreds of millions of dollars, if not billions, the workers accused Wal-Mart of systematically discriminating against female employees. As in the Comcast case, the same 5-4 majority found that the Wal-Mart plaintiffs' individual situations were too different to allow them to sue as a class.

If McAvoy's decision denying the Applebee's workers' class action were allowed to stand, said Public Citizen lawyer Scott Michelman in 2013, "wage-and-hour laws and other protections for workers and consumers could become prohibitively difficult to enforce (because) individuals wrongly underpaid in relatively small amounts generally don't have the resources to sue their employers individually."

In her recent ruling, Wolford found that T.L. Cannon actually paid its servers minimum wages.

However, she added, even though the workers do not dispute that fact and stipulated that they were not confused as to their employer's pay policies, T.L. Cannon did not follow state rules for notifying tipped employees and did not keep adequate records.

Regardless of what pay the workers got, the Applebee's franchisee's oversights constitute violations that cannot be "properly deemed a trifle," Wolford concluded.

How much servers might collect in damages remains to be seen. State law calls for fines of \$2,500 for the notice violations Wolford cited, but more information is needed to say what further damages, if any, workers could be entitled to, she wrote.

The case is slated for mandatory mediation. If the parties do not reach an agreement, it will go to trial.

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