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New Lawsuit Argues Tipped Minimum Wage Violates Workers' Civil Rights

Advocates continue to fight against the tipped minimum wage, which perpetuates discrimination

by Greta Moran | Jan 28, 2022, 10:52am EST



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Jillian Melton was paid just \$2.13 per hour — the lowest legal cash wage in the U.S. — during her six years at Seasons 52 Wine Bar and Grill in Memphis, Tennessee. The rest of her income came from tips, which could vary widely depending on the day of the week or the whim of the customer.

Melton also says she witnessed discrimination on the job — not only from customers but also from the store's management. As a young, lighter-skinned Black woman of mixed heritage, Melton says she was often assigned by her managers to the busiest, most front-facing sections of the restaurant along with her white and young coworkers. But her older and darker-skinned Black coworkers were given emptier sections where tips would only slowly trickle in — a pattern of discrimination based on colorism, racism, and ageism that resulted in her bringing home vastly more tips.

“There would be nights where I made \$300 to \$400 and my coworker would go home with \$60 or \$80. And that was normal,” said Melton.

Even though Melton benefited financially from this practice, she spoke out about the inequity to the management. But she says they weren't receptive. She doesn't believe her managers were intentionally discriminating, but “their idea of professionalism was based off of colorism and ageism.”

Practices like this are part of a wider pattern of discriminatory wage practices across the restaurant industry, which leads to unequal pay based on race and gender, and increased sexual harassment, according to the advocacy group One Fair Wage. Last year, the group sued Darden Restaurants, the owner of Seasons 52, for violating Title VII of the Civil Rights Act, which protects workers from discrimination, including from practices that unintentionally result in a “disparate impact.”

Today, One Fair Wage, which represents over 200,000 service workers and 800 restaurant workers, is filing an appeal to the U.S. Court of Appeals for the Ninth Circuit, to a lawsuit that was dismissed last year. The group alleges that Darden pays the lowest legal cash wage in every state and lacks policies to redistribute tips between workers, facilitating a discriminatory system where the civil rights of people of color and women are violated.

“Intentionally or not, these policies conspire to create both a work environment that is rife with discrimination with sexual harassment,” said Jason Harrow, a constitutional lawyer at Gerstein Harrow representing One Fair Wage.

The case was previously dismissed by a U.S. District Judge who determined that One Fair Wage could not sue another person's employer under Title VII. If this is the case, however, it would effectively render Darden immune from Title VII lawsuits, given that its employees are barred from participating in lawsuits in the company's contracts. If the appeal is denied, “then Darden has written itself out of federal law, basically,” said Harrow.

Darden did not respond to a request from Civil Eats for comment by press time.

The lawsuit is part of One Fair Wage's national fight to end what it calls the subminimum wage — the lower tier of federal and state minimum wages for tipped workers — and replace it with a full minimum wage and shared tips.

Today, there are 43 states that allow tipped workers to be paid a fraction of the state's minimum wage for other workers, including 15 states where workers can be paid the federal minimum, which is just \$2.13 per hour plus tips.

As restaurants workers leave the industry in droves, One Fair Wage and the Restaurants Opportunities Centers (ROC) United, the other national group founded by advocate Saru Jayaraman, are hopeful that they may be turning a corner in the fight for fair wages among restaurant workers.

"People are calling this era 'the end of low wage work,'" said Jayaraman, who directs of the Food Labor Research Center at the University of California, Berkeley, in addition to One Fair Wage. "People aren't willing to work for these wages and people are overwhelmingly supportive of workers not willing to work for these wages. This is the future of the industry."

In a recent survey by One Fair Wage, tipped workers commonly cite a decline in tips and uptick of harassment during the pandemic as their reason for quitting. The group has also tracked nearly 3,000 restaurants across the country that have raised wages to the full minimum wage and beyond, in response to worker pressure and shortages. Even major fast-food chains like Chipotle and McDonald's now pay nearly double the federal minimum wage of \$7.25 in some states.

But this momentum has been largely led by independent restaurants and some fast-food chains, while stopping short of publicly-traded, full-service restaurant chains, like Darden.

As the nation's largest full-service restaurant company, Darden wields considerable influence over the industry while impacting the lives of its 175,000 staff. In addition to 52 locations of Seasons 52 across the U.S., the company owns Olive Garden, LongHorn Steakhouse, Cheddar's Scratch Kitchen, Bahama Breeze, The Capital Grille, Eddie V's, and Yard House, for a total of 1,800 locations across the U.S. The company is also a leading member of the National Restaurant Association (NRA), the industry trade group that has gone on record multiple times opposing the \$15 per hour minimum wage.

This makes it so "[Darden] is the natural first target," said Jayaraman "[If a court] says it's illegal for Darden to pay a subminimum wage, then it's going to be illegal for everybody else."

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A System Rooted in Discrimination

Jayaraman sees the tipped wage system as "a direct legacy of slavery" that emerged after Emancipation in 1863. In her new book *One Fair Wage*, she writes about how the practice "spread rapidly as employers in the hospitality sector hired newly freed slaves as servers, porters, and hosts across the country." When that happened, tips shifted from being a bonus to replacing the wages of freed Black workers.

One Fair Wage alleges that discrimination has been perpetuated through the “increased sexual harassment and disparate wages for workers across racial groups.” And it’s a claim that is supported by a growing body of academic research, worker surveys, and on-the-ground stories.

Often this discrimination comes from customers who can leverage the tipping system to claim power over restaurant workers. When working at Seasons 52, for example, Melton said that she put up with routine sexual or verbal harassment from customers, but like many tipped workers in her position, she didn’t feel she like she could push back because her tips — her livelihood — was dependent on their satisfaction.

“There have been plenty of times where I laughed off something extremely inappropriate and offensive because I really didn’t feel like there was anything I could do,” she told Civil Eats. “It leads to women putting up with sexual harassment, inappropriate comments, or an inappropriate hand on the back.”

Other Darden workers reported discriminatory experiences in another survey by One Fair Wage, which found that 20 percent of the nearly 200 workers who responded claim to be tipped less than their coworkers on the basis of race or gender.

Michael Lynn, a professor in food and beverage management in Cornell University, was the first to study the way racial bias influences tipping practices. Lynn found that tipping has the “adverse impact of paying Black servers less than white servers,” which led him to suggest in 2008 that the practice violates the Civil Rights Act.

Sexual harassment also plays an important role in the dynamic, say experts. A 2021 national report and survey by One Fair Wage and Social Science Research Solutions found that “tipped workers who receive a subminimum wage experience sexual harassment at a rate far higher than their non-tipped counterparts.”

Catharine A. MacKinnon, a professor at Michigan Law School and Harvard Law School and an author on the 2021 report, adds that this problem is an “underlying dynamic” in the restaurant industry. In an e-mail to Civil Eats, she described the tipping system as putting workers “at the sexual whim and mercy of whoever provides the tips, or provides the conditions that enhance or make tips possible.”

As a result, this facilitates a workplace where sexual harassment — which MacKinnon has devoted much of her career to studying, as the legal scholar who pioneered the legal claim to sexual harassment — is effectively a stipulation for receiving a wage.

“These are not only the preconditions for sexual harassment; they build sexual harassment into the structure of their employment,” MacKinnon added.

Former Olive Garden employee Carisa Shade says she experienced another a form of gender discrimination due to her pregnancy. Shade was working as a bartender at an Olive Garden in Arden, North Carolina when she was let go due to the widespread shutdowns in early March 2020. In May of that year, Shade she was asked to return to the company in

June, when she was expecting a baby. She filed for a medical leave but was denied leave in a letter shared with Civil Eats. As she recovered from the birth, Shade's manager told her that she had been fired.

"I've never seen someone get fired for having a baby," said Shade, who has worked in restaurants for 20 years. "They were punishing me. They were mad at me [because] I wasn't going to be there."

Darden did not respond to a request for comment about any of the claims of discrimination in this article.

A New Wage Policy, with Negligible Impact

Darden hasn't been entirely unresponsive to worker pressure — at least, in its public messaging and recruitment strategies.

The company recently announced its plan to move tipped workers to \$12 per hour, a change effective this month, after moving to \$10 per hour as of March 2021. The policy originally garnered national attention, referred to as a "sign of hope" by the Associated Press. However, this wage floor is inclusive of tips.

In a conference call with investors last March, Gene Lee, Darden's former CEO, who stepped down this month to serve as a chairman on the company's board, described the change this way: "If you're a tipped employee and your tips and your wage doesn't get you to \$10, we'll bring you to \$10 an hour."

Jayaraman sees this distinction as deceptive. "A lot of workers have told us they've gone to apply to some of these chains that are promising higher wages... [but] then when they find out it's actually still the subminimum wage just with tips, they're like, 'Forget this industry,'" said Jayaraman.

"The amount of people this impacts is small," Lee admitted on the conference call. Many of the company's employees are already earning more than \$12 an hour after tips, but they are rarely given full-time schedules, and as a result their median annual compensation is just \$16,137. In contrast, Lee took home nearly \$8.7 million in the 2020 fiscal year — or over 500 times more than the median Darden worker.

Even though the changes won't raise the actual wages of many Darden workers, the company's new CEO, Rick Cardenas, recently told investors that the policy is a way to draw in new employees. "The one thing we've got is an incredible employment proposition. When we make an offer, people accept it, and that's a great thing," he said, on a conference call in December.

Darden's wage policy is similar to the existing legal requirement that employers bring tipped employees up to their state's minimum wage when they don't earn it in tips. This system often puts the burden on employees who have to request that their employer pay the difference and it is prone to violations, as detailed in a report by the Economic Policy Institute.

A Liability for Investors

If this appeal is successful, the process of discovery will allow One Fair Wage's legal team to uncover private data about Darden's employment practices. This could prove important to researchers like Michael Lynn, who says his studies into

tipping and discrimination are limited by sample pools and publicly available data.

“It would be possible to get a pretty broad database to see whether or not Black servers, Hispanic servers, [and] Asian servers get lower tips than whites,” said Lynn. “In the research I’ve done, we found that’s the case.”

This data would also potentially build a stronger case for advocates working to expose Darden’s employment practices. Jayaraman also sees the lawsuit as a way to alert investors to the liabilities of investing in companies that continue to pay a fraction of the full minimum wage. “As long as you have this system, there’s going to be ongoing litigation,” she said, given its link to racial and sexual discrimination.

Some investors have been quick to acknowledge this liability, including a group of investors that have joined One Fair Wage and Adasina Social Capital in a campaign called “Investors for Livable Wages.” The group is pushing publicly traded companies to transition to paying their employees tips and the full minimum wage, which differs state to state. So far, there have been no publicly traded companies to make this transition, but even Darden has faced recent questions from investors about its wage policy.

“When I see a number like \$12 an hour, when you compare it to other retailers or even some other segments in retail restaurants, it still seems low,” John Glass, an analyst with Morgan Stanley, told Darden executives, in the recent conference call. “Do you think the casual dining industry... is maybe underpaying relative to others in retail, and there’s the need just to continue to advance that?”

Darden’s Gene Lee was quick to disagree, asserting that the industry pays appropriate wages based on “supply and demand.”

However, Jayaraman is holding out hope that One Fair Wage and the broader worker-led restaurant fight will be able to shift this equation, so that the “supply” of workers at a given restaurant depends on its labor practices.

“My hope is that the combined pressure of the staffing crisis, the lawsuit, and the liability of the subminimum wage — the combination of all of those factors — encourages these dinosaurs to see the light,” said Jayaraman. “First Darden, and then others.”

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