

## Celebrity Chef Can't Dodge FLSA Suit Over 'Side Work' Pay

Law360, New York (April 26, 2013, 3:18 PM ET) -- A New York federal judge on Thursday denied a bid by celebrity chef Daniel Boulud to escape a claim alleging tipped restaurant employees are being underpaid for performing nontipped tasks, finding the issues were “too complicated” to be resolved early in the litigation.

Boulud and his Dinex Group LLC had urged U.S. District Judge Alvin K. Hellerstein to throw out the Fair Labor Standards Act claim, which is part of a [proposed class action](#) filed in August. Named plaintiff Graciela Roman, a former busser at two Boulud restaurants, alleged she spent as much as 20 percent of her shift doing “side work,” for which she was wrongfully paid the lower, tipped-credit minimum wage rate, rather than the nontipped minimum wage.

New York employers are allowed to deduct a so-called tip credit, currently \$2.25, from the minimum wage for food service employees, according to the U.S. [Department of Labor](#).

“The issues raised by the pleadings are too complicated, and too fact-intensive, to be resolved” by a motion for judgment on the pleadings, Judge Hellerstein said in a brief order.

He declined to address Boulud's argument that there is no 20 percent rule for determining whether Roman should have been paid at the tipped-credit rate.

“The proper standard ... is whether plaintiff worked in a tipped 'occupation,' which occupation can have some duties that may directly generate tips and some that may not,” Boulud said in his motion.

That standard, he continued, “is congruent with the clear text of the FLSA” and courts should not “undertake the untenable analysis of parsing out which service employee duties produce tips and which do not, and, that determination having been made, how much time a given plaintiff spends performing each set of duties.”

Roman, who bussed tables for Bar Boulud and Boulud Sud from December 2007 to July 2009 and from October 2009 to July 2012, alleges in her suit that the restaurants had a pattern of undercompensating tipped workers for “side work” such as preparing bread stations, taking out garbage, sweeping floors or setting up dining tables.

The Boulud restaurants have “a corporate policy or practice of minimizing labor costs by unlawfully taking a tip credit against the minimum wage rate,” according to the complaint, which proposes a class covering employees at seven restaurants — Bar Boulud, Boulud Sud, Daniel, Cafe Boulud & Bar Pleiades, Bistro Moderne, Epicerie Boulud and DBGB Kitchen and Bar.

Boulud said in his motion for judgment that the claim was “not founded on any language in the FLSA or its regulations” but on a sentence in a U.S. Department of Labor handbook and a guideline the department “expressly abandoned” in a 2009 opinion letter.

The FLSA, the restaurateur argued, clearly provides the tip credit so long as the employee “is engaged in an 'occupation' where she customarily and regularly receives \$30 a month in tips.”

“A bartender does not cease to be employed in the occupation of a bartender simply because she is cutting a lemon or cleaning a glass — these are the duties of a bartender,” the motion said, and, similarly, a busser does not cease to be a busser when “carrying ice to the bar” or “preparing the bread station.”

The plaintiffs are represented by Joseph A. Fitapelli, Brian S. Schaffer and Eric J. Gitig of Fitapelli & Schaffer LLP.

Boulud is represented by Felice B. Ekelman, Noel P. Tripp and Tara L. Touloumis of [Jackson Lewis LLP](#).

The case is Graciela Roman v. The Dinex Group LLC, et al., case number [1:12-cv-06156](#), in the U.S. District Court for the Southern District of New York.

--Editing by Jeremy Barker.