

## Chipotle OT Collective Action Gets Green Light

A New York federal judge granted collective action certification Thursday in a lawsuit accusing Chipotle Mexican Grill Inc. of misclassifying workers as overtime-exempt executives, rejecting Chipotle's argument that the plaintiffs couldn't identify an illegal policy or plan with classwide impact.

U.S. District Judge Andrew L. Carter Jr. signed off on an order granting a bid by former Chipotle "apprentices," or assistant managers, Maxcimo Scott and Jay Ensor for conditional certification, giving them a green light to send notice of their lawsuit to a nationwide class - with the exception of California - of potential plaintiffs who worked as Chipotle apprentices going back three years.

Justin Swartz of Outten & Golden LLP, an attorney for the plaintiffs, said Friday that he was pleased with the decision, which came after a hearing on Thursday, and added that Chipotle has "closed its eyes" to substantial evidence supporting the certification motion.

"The theme throughout Chipotle's argument was that there's been some sort of jurisprudential shift against conditional certification, but Judge Carter wasn't persuaded that there was such a shift," said Swartz. "The fact is that a few judges have refused to conditionally certify cases where there was almost no evidence supporting certification, and that's not a shift. That's always been the proper thing to do."

Scott, a former apprentice who now works as a Chipotle general manager, sued in November 2012, accusing the Mexican restaurant chain of illegally denying apprentices overtime, and classifying them as managerial workers even though they spent most of their time on tasks like filling orders and operating cash registers.

Scott and Ensor - who was added in a Feb. 13 amended complaint - moved for conditional collective action certification in March, arguing that they easily met the burden for notice-stage certification and taking aim at Chipotle's "uniform" policy of classifying workers like the plaintiffs as exempt from the Fair Labor Standards Act's overtime requirements.

Chipotle said in a May 9 memorandum that the plaintiffs were ignoring a fatal flaw in their certification motion, which was the failure to identify a common policy or plan that violates the law.

Though the plaintiffs characterized their own duties as nonexempt, they offered no evidence that the apprentices they sought to represent primarily performed nonexempt duties, the company argued, adding that the plaintiffs had conceded that the company expected apprentices to perform exempt duties in a way that's consistent with their exempt classification.

The plaintiffs weren't similarly situated to other apprentices, so their motion should be denied, the May 9 filing said.

Judge Carter's order gave Chipotle and the plaintiffs until June 24 to file a revised version of the notice that will go out to potential opt-in plaintiff that incorporates modifications made by the court.

Richard Simmons, an attorney for Chipotle, said in an email Friday that Chipotle apprentices are correctly classified and that the Scott lawsuit lacked merit.

"Because Chipotle's employees are part of management, enjoy the salaries and benefits they receive in their positions and meet the legal standards, Chipotle will vigorously defend this lawsuit," Simmons said.

Chipotle is represented by Lisa Lewis, Richard Simmons and Brian Murphy of Sheppard Mullin Richter & Hampton LLP and Bruce Montoya, John Karl Shunk and Andrew Smith of Messner & Reeves LLC.

The plaintiffs are represented by Gregg Shavitz and Keith Stern of the Shavitz Law Group PA, Joseph Fitapelli, Brian Schaffer, Eric Gitig and Frank Mazzafero of Fitapelli & Schaffer LLP, and Justin Swartz, Ossai Miazad and Naomi Sunshine of Outten & Golden.

The case is Scott v. Chipotle Mexican Grill Inc., case number 1:12-cv-08333, in the U.S. District Court for the Southern District of New York.

--Editing by John Quinn.