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12  
13 **UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
14 **OAKLAND DIVISION**

15 ONE FAIR WAGE, INC.,

16 Plaintiff,

17 vs.

18 DARDEN RESTAURANTS, INC.,

19 Defendant.

Case No. 3:21-cv-2695-EMC

**FIRST AMENDED COMPLAINT**

**Date: May 4, 2023**

**Before The Hon. Edward Chen**

**Action filed: April 15, 2021**

20  
21 **Preliminary Statement**

22 1. The lowest legal cash wage in the United States is \$2.13 per hour.  
23 It is legal to pay employees this wage only if they are within a narrow class of  
24 service employees who receive tips, like restaurant servers and bartenders,  
25 and if paying this wage does not violate any other laws. But paying such a low  
26 cash wage increases sexual harassment in the workplace, and encouraging or  
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28

1 facilitating tipping without mediating that process creates a clear and  
2 significant tipped wage gap between employees of color and white employees.  
3 When a company adopts wage policies or practices like these that result in  
4 disparate, negative impacts on the basis of sex and race, and there is no  
5 business necessity for doing so, it engages in illegal employment discrimination  
6 under federal law.

7         2. Defendant Darden Restaurants, Inc., has done just that. Darden  
8 maintains a national, corporate-level policy or practice that local managers  
9 must pay the lowest possible cash wage to all tipped employees. As a result,  
10 Darden pays tens of thousands of its roughly 180,000 employees the lowest  
11 legally-permissible cash wage and encourages and facilitates tipping on top of  
12 that without any mediation of its tipping process. In 43 states, this cash wage  
13 is called the “subminimum wage” because it is well below the minimum wage  
14 for non-tipped employees (which, at the federal level, is \$7.25 per hour). Under  
15 federal law, only tipped employees are permitted to be paid a cash wage this  
16 low, and only then on the condition that, if the combined total of the employee’s  
17 cash wages plus tips do not result in a total of \$7.25 per hour, then the  
18 employer must make up the difference with an increased payment to bring that  
19 employee up to \$7.25 per hour. Nothing in federal law requires tipped workers  
20 to be paid a subminimum wage or compels tipping in this manner, and nothing  
21 in federal law permits employers to pay a subminimum wage or compel tipping  
22 in this manner if doing either violates federal law.

23         3. Darden’s wage policies result in increased sexual harassment of  
24 workers and disparate wages for workers across racial groups. These effects  
25 violate the prohibitions on workplace discrimination in Title VII of the Civil  
26 Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e-2.

1           4.       According to empirical and anecdotal data from current and  
2 former Darden employees, and supported by studies measuring the impact of  
3 wage policies like Darden's, the subminimum wage is the direct cause of, or at  
4 least a motivating factor in, a documented increase in sexual harassment. A  
5 key reason for this is that the subminimum wage puts great pressure on tipped  
6 employees to have the customers, rather than Darden, pay employees their  
7 legally-required wages. This, in turn, means that managers have an incentive  
8 to ignore, indulge, or even encourage sexual harassment, including requiring  
9 or encouraging employees to flirt or dress suggestively. Without Darden's cash  
10 wage policy, these illegal effects would be substantially lessened.

11           5.       Separately, Darden's tipping policy has led directly to, or was at  
12 least a motivating factor in, tipped employees of color being paid less in tips  
13 than tipped white employees. The reason is clear: it is Darden's corporate  
14 policy or practice to encourage and facilitate tipping for positions like servers  
15 and bartenders without mediation, which means that Darden, as a corporation,  
16 requires its customers to directly set the wage levels for tens of thousands of  
17 its employees without any oversight. But customers are often capricious, not  
18 systematic; they are often emotional, not rational; and they often bring  
19 conscious and unconscious racial and other biases with them when they eat  
20 out. Thus, whether intentional or not, and whether made by customers who  
21 have had two bottles of wine or none at all, customer decisions about whether  
22 and how much to tip have resulted in employees of color being paid  
23 meaningfully less than white employees because of their race. To be clear,  
24 tipping itself is not the problem. Rather, Darden's tipping policy, which does  
25 nothing to mitigate customers' tip choices, is the problem.



1 told, Darden had sales of \$9.63 billion dollars in fiscal year 2022, which  
2 included the first few months of the pandemic. Darden operates restaurants in  
3 all 50 states, including approximately 78 Olive Gardens and 24 Yard Houses  
4 in California with several thousand Darden employees working in California.

5 10. Darden is an “employer” under Title VII, it has had more than 15  
6 employees at all relevant times, and the policies that caused One Fair Wage  
7 harm applied to “employee[s]” of Darden, as that term is used under Title VII.

8 **Jurisdiction**

9 11. This Court has jurisdiction over this action under 28 U.S.C.  
10 § 1331 because this action arises under the laws of the United States.

11 **Venue**

12 12. Venue is proper in this judicial district under 42 U.S.C. § 2000e-  
13 5(f)(3) because Darden’s unlawful employment practices were committed in  
14 California, implemented in California, and had their effects felt in California,  
15 and because the employment records relevant to those unlawful employment  
16 practices are maintained and administered in this judicial district.

17 13. Venue is proper in this judicial district under 28 U.S.C. § 1391  
18 because a substantial part of the events or omissions giving rise to the claims  
19 occurred in this judicial district and because Darden is subject to the court’s  
20 personal jurisdiction with respect to this action in this judicial district.

21 **Intradistrict Assignment**

22 14. Assignment to this division is proper because a substantial part  
23 of the events or omissions which give rise to the claims occurred in Alameda  
24 County, California.



1           19. In February and March 2021, One Fair Wage conducted an  
2 informal poll of Darden employees. Hundreds of current and former Darden  
3 employees responded. Of those respondents who reported working only as a  
4 server for Darden, most told One Fair Wage that they were paid at or below  
5 the lowest legally-permissible cash wage. Many more told One Fair Wage that  
6 they were paid within a few cents of that. (Shockingly, roughly a quarter of  
7 servers reported being paid cash wages below what state law required.) This  
8 Darden-specific empirical data demonstrates the existence of a corporate-level  
9 cash wage policy or practice requiring local managers to pay tipped employees  
10 at Darden the lowest permissible cash wage which, in 43 states, is a  
11 subminimum wage as low as \$2.13 per hour.

12           20. Darden's cash wage policy dictates a common restriction on how  
13 local managers are prohibited from exercising their discretion over tipped  
14 employees' cash wage rates, and that directive pervades the entire company.  
15 Darden's policy is a corporate-level instruction to local managers that they  
16 must pay tipped employees a cash wage as low as applicable law allows.

17           21. Darden enforces its policy by training local managers not to pay  
18 tipped employees a cash wage greater than legally permitted, prohibiting  
19 managers from doing the same (e.g., in its handbook), auditing tipped  
20 employees' cash wage rates, and investigating and potentially disciplining  
21 managers who violate the corporate policy and pay tipped employees more than  
22 the company-imposed cash wage ceiling.

23           22. Although in 35 states the wage floor for tipped employees is  
24 higher than \$2.13 per hour, and in 7 states there is no distinction for large  
25 employers between the minimum wage for tipped employees and non-tipped  
26 employees, Darden's policy of paying the lowest legally-permissible cash wage  
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1 to tipped employees is applicable nationally to all tipped employees at Darden  
2 restaurants across the United States.

3 23. For example, from July 2020 to December 2020, and absent any  
4 deviations applicable to local jurisdictions, the policy caused Darden to pay  
5 tipped employees working in South Carolina a cash wage of \$2.13 per hour and  
6 those working in New York City a cash wage of \$10.00 per hour. In South  
7 Carolina, Darden thus took the maximum tip credit of \$5.12 per hour (i.e., the  
8 difference between the federal minimum wage of \$7.25 per hour and \$2.13 per  
9 hour in cash wages), and Darden was required to pay additional cash wages to  
10 its employees if their tips were insufficient to make up that difference. In New  
11 York City, the legally-imposed wage floor is higher, but the calculation is the  
12 same: Darden paid employees a cash wage of \$10.00 per hour and took the  
13 maximum tip credit of \$5.00 per hour (i.e., the difference between the statewide  
14 minimum wage of \$15.00 per hour and \$10.00 per hour in cash wages). As in  
15 South Carolina, Darden was required to directly pay its employees additional  
16 wages if their cash wages and tips did not sum to \$15.00 per hour.

17 24. In total, Darden pays roughly 20% of its entire workforce a cash  
18 wage of \$2.13 per hour. That is the lowest legally-permissible cash wage  
19 nationwide, and it applies in 15 states.

20 25. The majority of Darden's tipped employees are paid a  
21 subminimum wage that is lower than \$7.25 per hour.

22 26. Darden encourages employees who are paid a subminimum wage  
23 to try to earn enough tips to make up the difference between the tipped  
24 minimum wage and the minimum wage, and it facilitates this through tracking  
25 and reporting tips, so Darden will not need to make up this difference in  
26 additional cash wages.





1 IRS, and by disciplining employees who fail to accurately track and report tips  
2 to Darden and managers who acquiesce in the same.

3 30. In the employee handbook described above, Darden acknowledges  
4 that it encourages and facilitates customers directly making compensation  
5 decisions for tipped employees and that Darden does not mediate that process.  
6 The handbook, which applies across all of Darden restaurants nationwide,  
7 states that, “[i]f you are a tipped team member, tips will account for a large  
8 portion of your earnings. The Internal Revenue Service requires that you  
9 accurately report the amount of tips you receive and keep. Under federal law,  
10 YOU MUST REPORT AND PAY INCOME TAXES ON 100% OF YOUR TIP  
11 INCOME.” The handbook also advises Darden’s tipped employees that “you  
12 should keep a daily record of the cash and charge tips you receive (many of the  
13 restaurants have tip logs available for you—ask a manager).” Hence, Darden’s  
14 corporate-level tipping policy encourages and facilitates tipping for all tipped  
15 employees at all of its restaurants, even those employees who are paid a cash  
16 wage greater than a subminimum wage (e.g., tipped employees who work in  
17 states that require a cash wage for tipped employees equal to the minimum  
18 wage for non-tipped employees), without mediating that process.

19 31. The poll referenced above confirms the existence of Darden’s  
20 tipping policy. The overwhelming majority of respondents who identified their  
21 job as server or bartender reported receiving at least some tips in connection  
22 with working for Darden. This Darden-specific empirical data demonstrates  
23 the existence of a national, corporate-level tipping policy.

24 32. Darden’s tipping policy is a corporate-level restriction on local  
25 manager discretion that requires local managers to allow customers to tip  
26 employees without any mediation of that process and to help facilitate that  
27 tipping. At the same time, the corporate policy does not permit local managers  
28

1 the discretion to use alternative systems, even if local managers know or  
2 suspect that those alternatives would better match employees' wages to  
3 employees' performance and would minimize any consideration of  
4 discriminatory factors (e.g., employee race) in pay received.

5 **Darden's Cash Wage Policy Increases Sexual Harassment**

6 33. Darden employees paid a subminimum wage pursuant to the cash  
7 wage policy suffered more and worse sexual harassment than Darden  
8 employees paid at least the minimum wage. The cash wage policy is the direct  
9 cause, or at least a motivating cause, of this disparate impact. That is, Darden's  
10 cash wage policy caused sex to play more of a role in the jobs of all employees  
11 subject to the policy, regardless of the employees' sexes.

12 34. The poll referenced above showed that Darden employees paid a  
13 subminimum wage pursuant to the policy suffered more and worse sexual  
14 harassment than Darden employees paid the minimum wage. For example,  
15 Darden employees working where Darden's policy causes servers and  
16 bartenders to be paid a subminimum wage reported the following sexual  
17 harassment (emphasis added to highlight the significant frequency and  
18 severity of the sexual harassment):<sup>2</sup>

19 35. "Manage[r]s . . . would *typically* make comments on female  
20 workers bodies and their looks, weight, or how f\*\*kable they were";

21 36. "A married kitchen manager described *almost daily*, in great  
22 detail, what he'd like to do to me if we were ever alone";

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25  
26 <sup>2</sup> Not included in this list is one report of sexual harassment against a line  
27 cook. Although this was reported by an employee working where servers and  
28 bartenders are paid a subminimum wage, line cooks are entitled to the minimum  
wage.

1           37.    “The head cook would *always* make very suggestive comments to  
2 me about my body and a manager would openly talk abo[u]t women working  
3 for Darden as well as customers”;

4           38.    “I *often* hear male team members talking sexually about other  
5 team members and guests as well. It[']s just dis[g]usting. About their fantasies  
6 or specific body parts.”;

7           39.    “As a woman, I got hit on *plenty*, and sexually harassed by  
8 *everybody* from coworkers to patrons/guests”;

9           40.    “There were *frequent* incidents of men sexually harassing me”;

10          41.    “Sexual jokes are *too common*, [and] people are too touchy”;

11          42.    “I’m a homosexual and I [got] sexually harassed *a lot*”;

12          43.    “There was *a lot* of sexual harassment going on in my store”;

13          44.    “[There] was a ma[l]e server that *always* made *very* personal,  
14 sexual remarks”;

15          45.    “Male [employees] *pretty regularly* made females feel  
16 uncomfortable and management did not do a whole lot about it”;

17          46.    “As a bartender it’s just part of the job, *many* customers make  
18 sexualized comments”;

19          47.    “*Always* making fun of the way I talked, that it was typically how  
20 a homosexual sounds”;

21          48.    “Unwanted remarks and touching from cooks”;

22          49.    “Being sexually objectified by male coworkers”;

23          50.    “A manager got my address without permission and called me  
24 drunk at 2 am trying to come see me as he was drunk”;

25          51.    “[M]ale manager likes to hug but only female employees”;

26          52.    “During training I was ‘fought’ over by male trainers[,] both of  
27 whom made sexual advances to me that same day after the shift off site”;

28

1           53. “Sexual harassment”; and

2           54. “[S]exist jokes.”

3           55. In contrast, Darden employees working where Darden’s policy  
4 causes servers and bartenders to be paid at least the minimum wage still  
5 reported sexual harassment in response to the poll, but not nearly the same  
6 amount or severity (emphasis added to highlight the limited frequency and  
7 severity compared to the sexual harassment reported above):

8           56. “I’ve had couples give me their hotel room keys, men try to coerce  
9 me to drink with them on the job, also *constantly* being called ‘sweetie’ or  
10 ‘honey’ and putting their hands on me while serving them”;

11           57. “*Lots* of sexual harassment”;

12           58. “Had a manager pull me aside and ask me the sexual orientation  
13 of a fellow server”; and

14           59. “Witness [s]exual harassment.”

15           60. Another specific example demonstrates how Darden’s policy  
16 causes Darden employees paid a subminimum wage to suffer more and worse  
17 sexual harassment than Darden employees paid a minimum wage. In her  
18 recent Charge of Discrimination filed against Darden with the U.S. Equal  
19 Employment Opportunity Commission (“EEOC”), Brooklynn Brunner (who  
20 was paid a subminimum wage pursuant to Darden’s cash wage policy when  
21 she worked for Darden in New York City from roughly March 2018 to roughly  
22 March 2020) stated that she “and other similarly situated servers are put in a  
23 position to be compliant and allow sexual harassment by customers, based on  
24 our sex as female servers, because we are dependent on customers for tips”  
25 and, “[b]ecause of my increased vulnerability to sexual harassment due to my  
26 sex and reliance on tips for my livelihood, Darden’s policy of paying the  
27 subminimum tipped wage has a disparate impact on me and similarly situated  
28

1 servers.” Brunner also stated that she suffered “frequent sexual harassment  
2 by customers while working as a server. This includes inappropriate  
3 comments, being hit on, and more,” including being “screamed and yelled at”  
4 by a male customer. She also gives examples of coworkers sexually harassing  
5 her, including one who was “grabbing my butt, telling me his genital size and  
6 asking me to grab it, saying sexually charged statements to me in passing, and  
7 more” and a second who was “forcibly unzipping my pants, grabbing my butt,  
8 and more.”

9 61. Empirical evidence confirms that paying a subminimum wage  
10 increases sexual harassment. For example, in Restaurant Opportunities  
11 Centers United & Forward Together, *The Glass Floor: Sexual Harassment in*  
12 *the Restaurant Industry* 14, 16 (2017),<sup>3</sup> Figures 3.4, 3.5, & 3.6 show an increase  
13 in the amount of sexual harassment that employees suffer because they are  
14 paid a subminimum wage (as per Figure 3.4, increasing the mean total sexual  
15 harassment from roughly 9% for employees in states prohibiting subminimum  
16 wages to over 16% for employees in states allowing a subminimum wage).  
17 Another report similarly found that “[w]omen workers earning their state’s full  
18 minimum wage before tips reported half the rate of sexual harassment as  
19 women in the states that pay \$2.13 per hour.” Lisa Baertlein, *U.S. Restaurant*  
20 *Workers Target Low Wages in Campaign Against Sexual Harassment*, Reuters  
21 (Feb. 13, 2018). Finally, a recent empirical study by One Fair Wage itself shows  
22 that “[t]ipped workers who receive a subminimum wage . . . experience sexual  
23 harassment at a rate far higher than their non-tipped counterparts”; “[t]ipped  
24 workers were sexually harassed significantly more frequently, in every way  
25 measured, than their non-tipped counterparts”; “[t]hese experiences  
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27 <sup>3</sup> [https://chapters.rocunited.org/wp-content/uploads/2014/10/REPORT\\_The-](https://chapters.rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf)  
28 [Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf](https://chapters.rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf).

1 represented not one-time harassment, but often persisted over days, weeks,  
2 and in some cases, months”; and “[w]hen workers reported the sexual  
3 harassment, tipped workers were less likely to say that the situation was  
4 corrected than their non-tipped counterparts.” One Fair Wage, *The Tipping*  
5 *Point: How the Subminimum Wage Keeps Incomes Low and Harassment High*  
6 2–3 (2021).<sup>4</sup> As explained in the following paragraphs, this increased sexual  
7 harassment is attributable to managers, customers, and coworkers.

8 62. First, empirical data shows that employees paid a subminimum  
9 wage see an increase in management sexually harassing employees. To that  
10 end, *The Glass Floor* report found that female employees paid a subminimum  
11 wage were “three times more likely to be told by management to alter their  
12 appearance and to wear sexier, more revealing clothing” than female  
13 employees paid at least the minimum wage. *The Glass Floor, supra*, at 2–4.  
14 This is due, at least in part, to the perverse incentives created by the policy.  
15 Employers have a legal obligation to pay more cash wages if the tips received  
16 by an employee do not sum to the full tip credit, so managers are incentivized  
17 to encourage tipped employees to try to earn more in tips. Furthermore, “[d]ue  
18 to [management’s] desire to keep customers happy, management can be  
19 unresponsive to, or even indulgent of customer misbehavior,” including by  
20 “encourag[ing] sexual harassment from customers and co-workers by requiring  
21 employees to flirt and dress suggestively.” *Id.* at 8. Once a worker is objectified  
22 in this way, the worker is much more vulnerable to being sexually harassed by  
23 everyone at work, not just customers. For example, managers sexually harass  
24 subminimum wage workers more than other workers because subminimum  
25 wage workers protest less out of a well-founded fear that managers will

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27 <sup>4</sup> [https://onefairwage.site/wp-](https://onefairwage.site/wp-content/uploads/2021/03/OFW_TheTippingPoint_3-1.pdf)  
28 [content/uploads/2021/03/OFW\\_TheTippingPoint\\_3-1.pdf](https://onefairwage.site/wp-content/uploads/2021/03/OFW_TheTippingPoint_3-1.pdf).

1       retaliate by assigning them worse shifts or less-desirable sections of the  
2       restaurant, thereby leading to less tips. Similarly, cooks and other “back-of-  
3       the-house” workers sexually harass subminimum wage workers more than  
4       other workers because subminimum wage workers protest less out of a well-  
5       founded fear that these coworkers will retaliate by preparing food in a way that  
6       doesn’t match customers’ demands, again leading to less tips. One Fair Wage  
7       has confirmed from many discussions with Darden employees that this  
8       incentive exists at Darden and plays out in Darden restaurants in precisely  
9       this way.

10       63.     Second, empirical data also shows that another repercussion of  
11       subminimum wages is an increase in customers sexually harassing employees.  
12       For example, *The Glass Floor* report found that, because employees depend on  
13       receiving enough tips to survive, “customers can feel entitled to treat servers  
14       inappropriately.” *Id.* at 8. In another empirical study proving this point,  
15       customers viewed sexual harassment against a female employee as “more  
16       legitimate when she received tips.” Oliver Klein et al., *Does Tipping Facilitate*  
17       *Sexual Objectification? The Effect of Tips on Sexual Harassment of Bar and*  
18       *Restaurant Servers*, Equality, Diversity & Inclusion (2020).<sup>5</sup> Moreover, once a  
19       subminimum wage worker is objectified by managers and customers alike by  
20       being forced or encouraged to dress suggestively or flirt to get more tips, that  
21       worker is more vulnerable to sexual harassment from customers.

22       64.     Third, empirical data further shows that another repercussion of  
23       employees being paid a subminimum wage, and thus being pressured by  
24       management to flirt with customers and dress suggestively to try to earn  
25       enough tips to survive, is an increase in coworkers sexually harassing

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27       <sup>5</sup> <https://www.emerald.com/insight/content/doi/10.1108/EDI-04-2019-0127/full/html>.



1 employees who are now flirting more and dressing more suggestively at work  
2 and holding subminimum wage workers' tips over their heads (e.g., refusing to  
3 prepare food in the way the customer wants it unless the server acquiesces to  
4 sexual harassment). For example, *The Glass Floor* report found that "[t]ipped  
5 workers experienced higher rates of sexual harassment from co-workers in  
6 nearly every category than non-tipped workers." *The Glass Floor, supra*, at 18.

7 65. Finally, empirical data also shows that another repercussion of  
8 employees being paid a subminimum wage is an increase in those employees  
9 begrudgingly allowing sexual harassment to persist. Employees may acquiesce  
10 in, or even reluctantly espouse consent to, such unwelcome conduct under the  
11 threat of receiving less in tips, suffering retaliation by managers by being  
12 assigned unfavorable shifts or tables, being humiliated publicly or privately by  
13 their managers or coworkers, or even being fired. Dana Yagil, *When the*  
14 *Customer Is Wrong: A Review of Research on Aggression and Sexual*  
15 *Harassment in Service Encounters*, 13(2) *Aggression & Violent Behavior* 141,  
16 144 (2008) ("Managers tend to exclude waitresses who complain about  
17 harassment from the best tipping shifts and service stations."). To that end, "it  
18 becomes difficult for workers to effectively draw lines between providing good  
19 service and tolerating inappropriate behavior from customers," "[w]omen  
20 workers are often required or feel the need to dress or act in a sexualized  
21 manner in order to secure larger checks and tips from customers," and  
22 "[w]omen restaurant workers often have to tolerate inappropriate comments  
23 and sexual harassment while at work in order to ensure their earnings are not  
24 impacted negatively and to maintain job security." Indeed, "over 50% of tipped  
25 women workers agreed that depending on tips had led them to tolerate  
26 inappropriate behaviors that made them nervous or uncomfortable." *The Glass*  
27 *Floor, supra*, at 8.

1           66. Anecdotal evidence confirms that employees paid a subminimum  
2 wage suffer more and worse sexual harassment than employees paid at least  
3 the minimum wage. Michelle Alexander, *Tipping Is a Legacy of Slavery*, N.Y.  
4 Times (Feb. 5, 2021); Catrin Einhorn & Rachel Abrams, *The Tipping Equation*,  
5 N.Y. Times (Mar. 12, 2018); Fatima Hussein, *How Low Wages for Tipped*  
6 *Workers May Invite Sexual Harassment*, Indystar (Feb. 23, 2018).

7           67. Because of the disproportionate quantity and quality of sexual  
8 harassment suffered by the Darden employees subject to the policy, those  
9 employees report and complain about sexual harassment to management and  
10 rebuff sexual harassment from customers more than Darden employees who  
11 are not subject to the policy, causing employees subject to the policy to suffer  
12 more financial retaliation from managers and customers. For example, Darden  
13 employees subject to the policy receive less in tips from rebuffed sexual  
14 harassers and are assigned worse tables or sections of the restaurant by the  
15 managers that they accused of sexual harassment.

16           68. Darden's cash wage policy perpetuates a cycle of systemic sexual  
17 harassment. Darden imposes a subminimum wage ceiling on tipped employees  
18 in 43 states. That leads to employees paid pursuant to the policy suffering more  
19 and worse sexual harassment than their coworkers who are not subject to the  
20 policy, which causes them to receive less pay because of the increased levels  
21 and severity of sexual harassment, forcing them to rely even more on tips and  
22 keeping their job just to make ends meet, which leads them to suffer even more  
23 and worse sexual harassment, and so on.

24           **Darden's Tipping Policy Causes Darden's Employees of Color to Earn**  
25           **Less in Tips Than Darden's White Employees**

26           69. Because of Darden's tipping policy, Darden's employees of color  
27 receive less in tips, all else being equal, than Darden's white employees  
28

1 because of employees' races. That, in turn, means that Darden causes  
2 employees of color to be paid substantially less than white employees because  
3 of their race.

4 70. In particular, Darden has adopted a corporate policy or practice  
5 of encouraging and facilitating tipping for jobs like servers and bartenders,  
6 which results in customers directly determining a substantial part of these  
7 tipped employees' total wages. But Darden has failed to mediate that process  
8 (e.g., ensure that customers do not consider race or any other prohibited  
9 characteristic in deciding what amount to tip, ensure that employees' take-  
10 home pay is untainted by such considerations). It is thus unsurprising that  
11 Darden's customers regularly consider race in setting compensation for Darden  
12 employees and that tipped employees see the impact of those considerations on  
13 their paychecks. Darden does nothing to stop the practice of customers setting  
14 wages by caprice rather than merit; rather, it affirmatively encourages and  
15 facilitates such disparities to thrive.

16 71. The facts are stark. One Fair Wage's poll of Darden workers  
17 mentioned above demonstrated that Darden's servers of color who received any  
18 tips in 2020 received roughly 82.04% of the tips per hour that Darden's white  
19 servers who received any tips in 2020 received. Specifically, Darden's servers  
20 of color who reported receiving any tips in 2020 received a median of roughly  
21 \$7.31 in tips per hour, whereas Darden's white servers who reported receiving  
22 any tips in 2020 reported receiving a median of roughly \$8.91 in tips per hour.  
23 This Darden-specific, empirical evidence demonstrates that Darden's tipping  
24 policy causes race to be at least a motivating factor in how much money Darden  
25 employees receive and significantly harms servers of color. To that end, one  
26 Darden employee told One Fair Wage that "black servers are tipped lower"  
27 than servers of other races/ethnicities, and another told One Fair Wage,  
28

1 “[b]ecause I was black I would mainly [g]et all the black people. I over heard  
2 guest not liking Mexican and black people. My white co workers made more  
3 money than me.”

4 72. Darden’s corporate-level tipping policy also allows local manager  
5 biases to affect employees’ wages. Forcing employees to be paid in tips without  
6 mediating that process places great importance on the shifts worked and  
7 sections covered for at least two reasons: dinner shifts and shifts on prime  
8 nights like weekends generally result in higher tips than lunch shifts and  
9 shifts on weekdays; and prime seating sections within each restaurant  
10 generally result in higher tips than non-prime sections because customers in  
11 prime sections may be wealthier, spend more money, or be used to paying  
12 higher tips. But Darden’s tipping policy has the effect of local managers  
13 relegating servers of color and bartenders of color to less-lucrative shifts and  
14 less-prime sections, which results in them receiving less in tips based on their  
15 race.

16 73. Specific examples highlight the effects of Darden’s tipping policy.  
17 For example, in their recent charges filed with the EEOC, Chanta Hunter (a  
18 Black employee who has worked for Darden in New York City since roughly  
19 October 2006), Luna St Furcy (a Caribbean-American employee who worked  
20 for Darden in the same location from roughly June 2018 to roughly March  
21 2020), and Adam Jones (a Black employee who has worked for Darden at the  
22 same location since roughly September 2008) stated that they, as well as other  
23 servers of color and bartenders or color, received less in tips based on their race  
24 because of this policy. Moreover, in her recent charge filed with the EEOC,  
25 Pam Araiza (a Latina employee who worked for Darden in Naples, FL from  
26 roughly 2007 until roughly May 2017 and Washington, DC from roughly May  
27 2017 until roughly 2020) alleged that she was “consistently assigned to  
28

1 sections of the restaurant known to generate less in tips, which management  
2 referred to as ‘Section 8’ or ‘my low-income world.’”

3 74. Darden’s employees of color have suffered, and continue to suffer,  
4 significant harm because of Darden’s tipping policy. Using the median tips per  
5 hour data from the poll referenced above, if all tipped Darden employees were  
6 to work full-time (i.e., 2,080 hours per year), tipped white Darden employees  
7 would each receive roughly \$18,536.70 in tips annually, whereas tipped  
8 Darden employees of color would each receive roughly \$15,206.59 in tips  
9 annually—a race-based difference of \$3,330.11 in tips per year per worker. For  
10 essential workers already receiving a subminimum wage and living paycheck  
11 to paycheck just to try to make ends meet, that difference is significant. To  
12 put into context how significant this Darden-imposed pay differential is, one  
13 African American server told One Fair Wage that he “had to get a therapist  
14 because of the lack of money I was receiving at the job,” that he “would make  
15 half the amount of coworkers” because of race, and that he has “depression and  
16 ptsd and suffer[s] from anxiety/ panic attacks” because of his job at Darden.

17 75. Darden employs roughly 169,000 hourly employees, roughly 54%  
18 of whom identify as racial or ethnic minorities. The majority of Darden’s hourly  
19 employees are tipped employees. Thus, Darden employs tens of thousands of  
20 tipped employees of color, upon each of whom it is inflicting at least several  
21 thousands of dollars of entirely-preventable, race-based pay discrimination  
22 every year due to its tipping policy. That adds up to hundreds of millions of  
23 dollars that Darden’s tipping policy illegally wrests from its employees of color.

24 76. Empirical research confirms these Darden-specific results and  
25 shows that this disparity is a predictable consequence of maintaining a policy  
26 or practice of encouraging and facilitating tips without any mediation. Zachary  
27 W. Brewster & Michael Lynn, *Black–White Earnings Gap Among Restaurant*  
28

1 *Servers: A Replication, Extension, and Exploration of Consumer Racial*  
2 *Discrimination in Tipping*, 84 *Sociological Inquiry* 545, 557 (2014); Michael  
3 Lynn et al., *Consumer Racial Discrimination in Tipping: A Replication and*  
4 *Extension*, 38 *J. Applied Soc. Psych.* 1045, 1055–56 (2008); Gabriela Quintana,  
5 *I’m Going to Tip Minority Servers More – and Whites Less*, *Econ. Opportunity*  
6 *Inst.* (Oct. 16, 2018), [http://www.opportunityinstitute.org/blog/post/im-going-](http://www.opportunityinstitute.org/blog/post/im-going-to-tip-minority-servers-more-and-white-servers-less/)  
7 [to-tip-minority-servers-more-and-white-servers-less/](http://www.opportunityinstitute.org/blog/post/im-going-to-tip-minority-servers-more-and-white-servers-less/).

8 77. Anecdotal evidence also confirms that customers generally tip  
9 white servers more than servers of color. Alexander, *supra*; Casey Quinlan,  
10 *D.C. Servers and Bartenders Say the Tipped Wage System Isn’t Working for*  
11 *Them*, *Think Progress* (June 12, 2018),  
12 [https://archive.thinkprogress.org/should-dc-restaurants-pay-minimum-wage-](https://archive.thinkprogress.org/should-dc-restaurants-pay-minimum-wage-these-servers-and-bartenders-think-so-c560d2269e7f/)  
13 [these-servers-and-bartenders-think-so-c560d2269e7f/](https://archive.thinkprogress.org/should-dc-restaurants-pay-minimum-wage-these-servers-and-bartenders-think-so-c560d2269e7f/); Restaurant  
14 Opportunities Centers United, *Ending Jim Crow in America’s Restaurants:*  
15 *Racial and Gender Occupational Segregation in the Restaurant Industry* 26  
16 (2015), [https://chapters.rocunited.org/wp-](https://chapters.rocunited.org/wp-content/uploads/2015/10/RaceGender_Report_LR.pdf)  
17 [content/uploads/2015/10/RaceGender\\_Report\\_LR.pdf](https://chapters.rocunited.org/wp-content/uploads/2015/10/RaceGender_Report_LR.pdf); Kimberly Freeman  
18 Brown & Marc Bayardon, *When Tipping Doesn’t Make the Difference*, *Ebony*  
19 (Feb. 15, 2016), [https://www.ebony.com/news/restaurant-women-tipping-](https://www.ebony.com/news/restaurant-women-tipping-wage/)  
20 [wage/](https://www.ebony.com/news/restaurant-women-tipping-wage/).

21 78. Anecdotal evidence confirms that restaurant managers (or those  
22 with similar authority) assign customers to servers based on servers’ races,  
23 assigning black customers who the manager suspects will not tip well to  
24 servers of color and assigning white customers who the manager suspects will  
25 tip well to white servers. Alexander, *supra*; Vince Dixon, *The Case Against*  
26 *Tipping in America*, <https://www.eater.com/a/case-against-tipping> (citing  
27 Zachary Brewster et al., *Consumer Racial Profiling in U.S. Restaurants:*  
28

1 *Exploring Subtle Forms of Service Discrimination Against Black Diners*, 29  
2 Sociological Forum 476 (2014)).

3 79. Darden has tacitly admitted that its managers have assigned  
4 customers to servers based on servers' races when it fired a manager who did  
5 so. Meryl Kornfield, *An Olive Garden Customer Demanded a Non-Black Server.*  
6 *The Manager Who Complied Has Been Fired.*, Wash. Post (Mar. 5, 2020),  
7 [https://www.washingtonpost.com/food/2020/03/05/olive-garden-manager-](https://www.washingtonpost.com/food/2020/03/05/olive-garden-manager-black-server/)  
8 [black-server/](https://www.washingtonpost.com/food/2020/03/05/olive-garden-manager-black-server/).

9 80. The race-based wage gap in tips received by Darden employees of  
10 color and their similarly-situated white coworkers is exacerbated by Darden's  
11 cash wage policy which causes the overwhelming majority of tipped Darden  
12 workers to be paid a subminimum wage. To that end, Darden employees of  
13 color, to whom Darden already pays the lowest legally-permissible cash wages  
14 in most cases, are subjected to even-greater poverty by being denied more in  
15 tips because of their race, causing employees of color subject to the policy to  
16 receive less total pay (i.e., cash wages and tips) than their similarly-situated  
17 white coworkers because of their race.

18 81. Darden's tipping policy perpetuates a cycle of systemic race  
19 discrimination against people of color: Darden encourages customers to tip and  
20 facilitates tipping without any mediation, which leads to Darden's employees  
21 of color receiving less in tips than their white coworkers because of their race,  
22 which forces Darden's employees of color to rely even more on tips just to make  
23 ends meet, which causes those employees of color to receive even less in tips  
24 than their white coworkers because of their race, and so forth.

1                   **Darden’s Cash Wage Policy Is Neither Consistent with Business**  
2                   **Necessity nor Related to Darden Employees’ Jobs**

3           82.     Many of Darden’s competitors, such as other restaurants and food  
4 service and hospitality businesses, profitably operate restaurants and other  
5 similar businesses without maintaining a cash wage policy like Darden’s and  
6 without forcing their local managers to pay employees a subminimum wage,  
7 showing that the cash wage policy is not consistent with business necessity.

8           83.     Darden would continue to remain profitable if it rescinded the  
9 policy and maintained a cash wage ceiling equal to the non-tipped minimum  
10 wage or allowed local management the discretion to do the same, proving again  
11 that the policy is not consistent with business necessity.

12           84.     Nothing about positions like servers and bartenders at Darden  
13 suggests that those positions must receive the lowest legally-permissible pay,  
14 whereas other positions at Darden can be paid a higher cash wage rate at the  
15 discretion of local managers. As such, the policy is not a legitimate measure or  
16 qualification of the specific jobs that it applies to, demonstrating that the policy  
17 is not job related.

18  
19                   **There Are Less Discriminatory Alternatives to the Cash Wage Policy**

20           85.     Darden could reduce or eliminate the more severe and pervasive  
21 sexual harassment suffered by its employees who are paid a subminimum  
22 wage pursuant to the policy by adopting a less-discriminatory alternative. For  
23 example, Darden could adopt a practice that sets and enforces a cash wage  
24 ceiling equal to the non-tipped minimum wage, and doing so would not cause  
25 Darden to become unprofitable.



1                   **Darden’s Tipping Policy Is Neither Consistent with Business**  
2                   **Necessity nor Related to Darden Employees’ Jobs**

3           86.     Many of Darden’s competitors, such as other restaurants and food  
4 service and hospitality businesses, profitably operate restaurants and similar  
5 businesses without maintaining a tipping policy like Darden’s—for example,  
6 requiring employees to pool their tips to mitigate against any race-based  
7 disparities in tips received; providing effective rules or standards for customers  
8 that minimize race-based differences in tips received; or minimizing the effects  
9 of tipping by adding a standard service charge to all bills to be paid to  
10 employees and letting customers tip on top (which very few do, thereby  
11 bypassing most customers’ tip choices)—proving that Darden’s tipping policy  
12 is not consistent with business necessity.

13           87.     Darden would continue to remain profitable if it rescinded the  
14 tipping policy and adopted any of these less-discriminatory alternatives,  
15 demonstrating that its tipping policy is not consistent with business necessity.

16           88.     The tipping policy is not a legitimate measure or qualification of  
17 the specific jobs that it applies to (e.g., servers, bartenders), proving that it is  
18 not job related. Indeed, the tipping policy encourages customers to directly  
19 compensate employees based on factors whose consideration is illegal and  
20 irrelevant (e.g., race), and nothing about positions like servers and bartenders  
21 suggests that they must be subjected to the policy whereas other positions are  
22 not. Thus, Darden’s tipping policy actively untethers pay from legitimate job  
23 performance metrics.

24                   **There Are Less Discriminatory Alternatives to the Tipping Policy**

25           89.     Darden could ensure that its employees of color receiving tips do  
26 not receive less in tips than white employees receiving tips by adopting any of  
27 the less-discriminatory alternatives referenced above. These alternatives  
28

1 would not cause Darden to become unprofitable, but Darden chooses instead  
2 to maintain its tipping policy.

3 **Darden's Policies Have Injured One Fair Wage**

4 90. Darden's maintenance of the policies has caused monetary and  
5 non-monetary harm to One Fair Wage. One Fair Wage is not filing this action  
6 on behalf of any Darden employees or representing any Darden employees  
7 here; rather, One Fair Wage is seeking redress only for the harm that Darden's  
8 policies have caused to One Fair Wage as an organization.

9 91. The policies have caused, and continue to cause, One Fair Wage  
10 to divert its resources. If Darden did not maintain these policies, many Darden  
11 employees would be ready, willing, and able to aid One Fair Wage in lobbying  
12 against subminimum cash wage policies and unmitigated tipping policies  
13 during their non-work hours by sharing first-hand at lobbying events how such  
14 policies subject them to poverty wages and other horrific terms and conditions  
15 of employment. Indeed, One Fair Wage's interest in requiring all employers to  
16 pay the full minimum wage as a cash wage with fair, non-discriminatory tips  
17 on top aligns with the interest of Darden employees in being paid a reasonable  
18 cash wage, working without being subjected to preventable sexual harassment,  
19 and not being discriminated against in the tips they receive based on their race.

20 92. However, because Darden maintains these policies, Darden has  
21 forced these employees to instead spend their non-work hours recovering from  
22 and dealing with the increased sexual harassment they suffered at work (e.g.,  
23 getting therapy from mental healthcare professionals, seeking support from  
24 and brainstorming harassment avoidance and mitigation techniques with  
25 their family and friends, working extra hours and other jobs to make up for the  
26 decreased pay they receive due to the increased sexual harassment, or working  
27 with an attorney to pursue sexual harassment dispute resolution against  
28

1 Darden) or recovering from and dealing with the race-based earnings deficit  
2 they suffered at work (e.g., seeing a therapist to deal with the negative effects  
3 of taking home such paltry and lesser tips because of their race, working extra  
4 hours and other jobs to make up for the paltry and lesser tips they received  
5 due to their race; working with an attorney to pursue race discrimination  
6 dispute resolution against Darden).

7 93. As a result of Darden’s policies eating up its employees’ precious  
8 non-work time—time that otherwise could have and would have been spent  
9 helping One Fair Wage pursue their shared interest—One Fair Wage has been  
10 forced to work harder and expend more of its time, energy, focus, and resources  
11 to secure as advocates workers who have experienced the harms wrought by  
12 subminimum cash wage policies and unmitigated tipping policies and are  
13 ready, willing, and able to speak out against those policies in lobbying efforts.

14 94. To that end, One Fair Wage has expended its resources to help  
15 Darden employees who have suffered disparate impact because of either or  
16 both of these policies in an effort to free up those employees’ non-work time—  
17 non-work time taken by Darden because it maintains these illegal policies—  
18 and enable such employees to help One Fair Wage advocate against such  
19 policies. For example, One Fair Wage has spent its resources connecting  
20 complaining Darden workers with attorneys to represent them in dispute  
21 resolution against Darden, connecting sexual harassment survivors at Darden  
22 with therapists and other social services providers, and offering job  
23 opportunities and administering payments from a Coronavirus Emergency  
24 Relief Fund to Darden workers who complained of increased sexual  
25 harassment and/or race-based tip differentials. One Fair Wage’s mission  
26 hinges on legislators, employers, restaurant industry groups, and voters  
27 hearing first-hand from workers who suffer from subminimum cash wage  
28

1 policies and unmitigated tipping policies; Darden's maintenance of the policies  
2 has frustrated and continues to frustrate that purpose by taking up those  
3 workers' non-work time and forcing One Fair Wage to try to reclaim workers'  
4 non-work time to further their mutual interest.

5 95. For example, instead of spending its time lobbying or advocating,  
6 One Fair Wage has been forced to spend its time addressing complaints from  
7 Darden employees subject to the cash wage policy that they have suffered more  
8 and worse sexual harassment because of their sex than Darden employees not  
9 subject to that policy, as well as complaints from Darden tipped employees of  
10 color that they have received less in tips than Darden tipped white employees  
11 because of their race (the vast majority of whom suffer substantially because  
12 Darden already pays them a subminimum wage)—all in an effort to free up  
13 these employees' non-work time so they can help One Fair Wage further their  
14 shared purpose of requiring all employers to pay the full minimum wage as a  
15 cash wage with fair, non-discriminatory tips on top.

16 96. As another example, Saru Jayaraman, One Fair Wage's President  
17 who works for One Fair Wage in, and directs One Fair Wage's actions from,  
18 Oakland, California, spends a significant amount of her time not furthering  
19 One Fair Wage's core purpose, but dealing with complaints from Darden  
20 employees who would prefer to be spending their non-work time lobbying  
21 against subminimum cash wages and unmitigated tipping policies, but cannot  
22 due to the effects of Darden's policies. Julia Sebastian, One Fair Wage's  
23 Research Director who works in Oakland, California, spends roughly one-  
24 fourth of her time working for One Fair Wage dealing with such complaints  
25 from Darden employees and otherwise responding to the effects of the policies  
26 on those employees instead of directing her efforts towards lobbying.

1           97. Many other One Fair Wage employees and consultants have  
2 spent at least a portion of their work time dealing with such complaints and  
3 otherwise responding to the effects of the policies on Darden employees instead  
4 of organizing and hosting lobbying or advocacy events, costing One Fair Wage  
5 significant financial resources and time, focus, and energy it would not have  
6 expended otherwise and which it can no longer spend on pursuing its core  
7 mission of lobbying and advocating to end subminimum cash wage policies and  
8 unmitigated tipping policies. As such, because of Darden's policies, One Fair  
9 Wage spends tens of thousands of dollars annually in salary and consultant  
10 payments, employees' benefits, office supplies, digital engagement fees, and  
11 other expenses, as well as hundreds of hours of staff and consultant time, all  
12 of which could have been and would have been spent on furthering One Fair  
13 Wage's purpose but for Darden maintaining its unlawful policies.

14           98. Because Darden maintains the policies, One Fair Wage has  
15 diverted significant staff time to conducting the Survey to determine whether  
16 Darden employees suffered more and worse sexual harassment because of  
17 their sex because of the cash wage policy or received less in tips due to their  
18 race because of the tipping policy. Again, but for Darden maintaining its illegal  
19 policies, many more Darden employees would have been ready, willing, and  
20 able to assist One Fair Wage in its lobbying and advocacy efforts, but Darden's  
21 maintenance of these policies has deprived One Fair Wage of its most valuable  
22 resource—employee voices—forcing One Fair Wage to conduct this Survey out  
23 of self-preservation: survey Darden employees to expose the effects of Darden's  
24 illegal policies and use that data to force Darden to stop maintaining those  
25 policies.

26           99. All of these adverse effects on One Fair Wage were foreseeable  
27 repercussions of Darden maintaining the policies. Darden's maintenance of the  
28

1 policies was a proximate cause and the but-for cause of all of these adverse  
2 effects on One Fair Wage.

3 **Timeliness and Administrative Exhaustion**

4 100. Darden has maintained the policies at all times relevant to this  
5 action and continues to maintain the policies today.

6 101. On or about September 29, 2020, One Fair Wage filed a Charge  
7 of Discrimination with the EEOC Oakland Local Office alleging race- and sex-  
8 based disparate impact that materially tracks the allegations in this  
9 Complaint.

10 102. On March 4, 2021 the EEOC dismissed that charge at One Fair  
11 Wage's request and issued One Fair Wage a right to sue notice.

12 103. One Fair Wage has filed this action within the 90-day timeframe  
13 permitted pursuant to that right to sue notice.

14 **COUNT ONE: SEXUAL HARASSMENT**

15 ***Darden's Policies Disparately Impact Employees Paid a Subminimum Wage***  
16 ***by Causing Them to Suffer More and Worse Sexual Harassment, Thereby***  
***Injuring One Fair Wage in Violation of Title VII, 42 U.S.C. § 2000e-2(a)***

17 104. One Fair Wage incorporates the preceding paragraphs by  
18 reference.

19 105. With respect to employees paid a subminimum wage, the policies  
20 are not capable of separation for the purpose of disparate impact analysis, so  
21 they constitute a particular employment policy or practice under Title VII.

22 106. Darden's policies cause a disparate impact against all Darden  
23 employees—regardless of whether their sex is male, female, intersex, non-  
24 binary, or anything else—by causing them to suffer more and worse sexual  
25 harassment than Darden employees of their same sex who are not subject to  
26 the policies due to their sex. The policies cause sex to be a motivating factor in  
27  
28

1 the quantity and quality of sexual harassment suffered by Darden employees.  
2 In other words, because of the policies, sex plays more of a role in all Darden  
3 employees' work.

4 107. In the alternative, Darden's cash wage policy alone causes  
5 disparate impact against Darden employees by causing them to suffer more  
6 and worse sexual harassment than Darden employees of their same sex who  
7 are not subject to the cash wage policy due to their sex, and the cash wage  
8 policy alone causes sex to be a motivating factor in the quantity and quality of  
9 sexual harassment suffered by Darden employees.

10 108. Neither of the policies is job related.

11 109. Neither of the policies is consistent with business necessity.

12 110. At least one alternative, less-discriminatory employment practice  
13 would be as effective as the policies at achieving Darden's lawful aims, but  
14 Darden refuses to adopt such an alternative employment practice.

15 111. Accordingly, Darden's policies constitute an unlawful  
16 employment practice.

17 112. In the alternative, Darden's cash wage policy alone constitutes an  
18 unlawful employment practice.

19 113. Darden's maintenance of the policies or, in the alternative, the  
20 cash wage policy alone, has damaged One Fair Wage and forced it to divert  
21 resources.

22 114. One Fair Wage is a person aggrieved by Darden's unlawful  
23 employment practice.

24 115. The foregoing constitutes unlawful disparate impact because of  
25 sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-  
26 2(a).





- 1 a. Declaratory relief that the policies are unlawful and violate  
2 42 U.S.C. § 2000e-2(a);  
3 b. An injunction prohibiting Darden from maintaining the  
4 policies and any related employment policies or practices  
5 that also constitute unlawful employment practices;  
6 c. Equitable or monetary relief redressing the resources that  
7 One Fair Wage has been forced to divert and the harm that  
8 One Fair Wage has suffered because of the policies;  
9 d. Reasonable attorneys' fees and costs; and  
10 e. Any other relief that this Court deems proper.  
11

12 Respectfully submitted,

13 /s/ Jason Harrow

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## **Exhibit A**

### **Redline of First Amended Complaint against Complaint**

*Note: One Fair Wage provides this redline of substantive changes from the Complaint to the First Amended Complaint for the convenience of the Court and parties. It has been generated by Microsoft Word's comparison tool and not verified. Thus, One Fair Wage does not represent that all changes, including formatting changes, are captured here. In the event there is any discrepancy between this Exhibit and the non-redlined First Amended Complaint, One Fair Wage's allegations and statements in the non-redlined First Amended Complaint are controlling.*

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18 **UNITED STATES DISTRICT COURT**  
19 **NORTHERN DISTRICT OF CALIFORNIA**  
20 **OAKLAND DIVISION**

21 ONE FAIR WAGE, INC.,

22 Plaintiff,

23 vs.

24 DARDEN RESTAURANTS, INC.,

25 Defendant.

Case No. [3:21-cv-2695-EMC](#)

[FIRST AMENDED COMPLAINT](#)

**Date:** [May 4, 2023](#)

[Before The Hon. Edward Chen](#)

[Action filed: April 15, 2021](#)

26 **Preliminary Statement**

27 1. The lowest legal cash wage in the United States is \$2.13 per hour.  
28 It is legal to pay employees this wage only if they are within a narrow class of  
service employees who receive tips, like restaurant servers and bartenders,  
and if paying this wage does not violate any other laws. But paying such a low  
cash wage increases sexual harassment in the workplace, and encouraging or

1 facilitating tipping without mediating that process creates a clear and  
2 significant tipped wage gap between employees of color and white employees.  
3 When a company adopts wage policies or practices like these that result in  
4 disparate, negative impacts on the basis of sex and race, and there is no  
5 business necessity for doing so, it engages in illegal employment discrimination  
6 under federal law.

7 2. Defendant Darden Restaurants, Inc., has done just that. Darden  
8 maintains a national, corporate-level policy or practice that local managers  
9 must pay the lowest possible cash wage to all tipped employees. As a result,  
10 Darden pays tens of thousands of its roughly 180,000 employees the lowest  
11 legally-permissible cash wage and encourages and facilitates tipping on top of  
12 that without any mediation of its tipping process. In 43 states, this cash wage  
13 is called the “subminimum wage” because it is well below the minimum wage  
14 for non-tipped employees (which, at the federal level, is \$7.25 per hour). Under  
15 federal law, only tipped employees are permitted to be paid a cash wage this  
16 low, and only then on the condition that, if the combined total of the employee’s  
17 cash wages plus tips do not result in a total of \$7.25 per hour, then the  
18 employer must make up the difference with an increased payment to bring that  
19 employee up to \$7.25 per hour. Nothing in federal law requires tipped workers  
20 to be paid a subminimum wage or compels tipping in this manner, and nothing  
21 in federal law permits employers to pay a subminimum wage or compel tipping  
22 in this manner if doing either violates federal law.

23 3. Darden’s wage policies result in increased sexual harassment of  
24 workers and disparate wages for workers across racial groups. These effects  
25 violate the prohibitions on workplace discrimination in Title VII of the Civil  
26 Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e-2.

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1           4.     According to empirical and anecdotal data from current and  
2 former Darden employees, and supported by studies measuring the impact of  
3 wage policies like Darden's, the subminimum wage is the direct cause of, or at  
4 least a motivating factor in, a documented increase in sexual harassment. A  
5 key reason for this is that the subminimum wage puts great pressure on tipped  
6 employees to have the customers, rather than Darden, pay employees their  
7 legally-required wages. This, in turn, means that managers have an incentive  
8 to ignore, indulge, or even encourage sexual harassment, including requiring  
9 or encouraging employees to flirt or dress suggestively. Without Darden's cash  
10 wage policy, these illegal effects would be substantially lessened.

11           5.     Separately, Darden's tipping policy has led directly to, or was at  
12 least a motivating factor in, tipped employees of color being paid less in tips  
13 than tipped white employees. The reason is clear: it is Darden's corporate  
14 policy or practice to encourage and facilitate tipping for positions like servers  
15 and bartenders without mediation, which means that Darden, as a corporation,  
16 requires its customers to directly set the wage levels for tens of thousands of  
17 its employees without any oversight. But customers are often capricious, not  
18 systematic; they are often emotional, not rational; and they often bring  
19 conscious and unconscious racial and other biases with them when they eat  
20 out. Thus, whether intentional or not, and whether made by customers who  
21 have had two bottles of wine or none at all, customer decisions about whether  
22 and how much to tip have resulted in employees of color being paid  
23 meaningfully less than white employees because of their race. To be clear,  
24 tipping itself is not the problem. Rather, Darden's tipping policy, which does  
25 nothing to mitigate customers' tip choices, is the problem.

1 6. Neither of these policies are job related or consistent with  
2 business necessity. Accordingly, Darden's cash wage policy and its tipping  
3 policy violate federal anti-discrimination law.

4 **Parties**

5 7. Plaintiff One Fair Wage, Inc. is a New York not-for-profit  
6 corporation with its principal place of business in Oakland, California. One  
7 Fair Wage is the leading organization seeking to lift millions of tipped and  
8 subminimum-wage-earning employees nationally out of poverty by requiring  
9 all employers to pay the full minimum wage as a cash wage with fair, non-  
10 discriminatory tips on top. One Fair Wage focuses specifically on helping  
11 employees in the restaurant industry.

12 8. One Fair Wage, as an organization, has been injured by Darden's  
13 policies. Because Darden maintains the policies complained of here, One Fair  
14 Wage has been forced to divert its resources to address Darden employees'  
15 complaints that they have suffered more and worse sexual harassment than  
16 their coworkers of the same sex who are not subject to the policies, as well as  
17 complaints from Darden employees of color that they have received less in tips  
18 than their white coworkers, [depriving One Fair Wage of time, focus, and money](#)  
19 [that it would have spent on achieving its purpose](#).

20 9. Defendant Darden Restaurants, Inc. is a Florida corporation with  
21 its principal place of business in Florida. Darden is the largest operator of full-  
22 service restaurants in the world. It operates eight prominent restaurant chain  
23 brands, including The Olive Garden, LongHorn Steakhouse, and the Capital  
24 Grille. As of Darden's most recent annual report, there were 861 company-  
25 owned Olive Gardens in the United States, which makes the Olive Garden the  
26 largest full-service-dining Italian restaurant chain in the country. The other  
27 seven brands that Darden owns operate another 1,000 or so restaurants. All  
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1 told, Darden had sales of \$9.63 billion dollars in fiscal year 2022, which  
2 included the first few months of the pandemic. Darden operates restaurants in  
3 all 50 states, including approximately 78 Olive Gardens and 24 Yard Houses  
4 in California with several thousand Darden employees working in California.

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5 10. Darden is an “employer” under Title VII, it has had more than 15  
6 employees at all relevant times, and the policies that caused One Fair Wage  
7 harm applied to “employee[s]” of Darden, as that term is used under Title VII.

8 **Jurisdiction**

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9 11. This Court has jurisdiction over this action under 28 U.S.C.  
10 § 1331 because this action arises under the laws of the United States.

11 **Venue**

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12 12. Venue is proper in this judicial district under 42 U.S.C. § 2000e-  
13 5(f)(3) because Darden’s unlawful employment practices were committed in  
14 California, implemented in California, and had their effects felt in California,  
15 and because the employment records relevant to those unlawful employment  
16 practices are maintained and administered in this judicial district.

17 13. Venue is proper in this judicial district under 28 U.S.C. § 1391  
18 because a substantial part of the events or omissions giving rise to the claims  
19 occurred in this judicial district and because Darden is subject to the court’s  
20 personal jurisdiction with respect to this action in this judicial district.

21 **Intradistrict Assignment**

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22 14. Assignment to this division is proper because a substantial part  
23 of the events or omissions which give rise to the claims occurred in Alameda  
24 County, California.

**Darden's Wage Policies**

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15. Darden maintains two corporate wage policies or practices that have caused and continue to cause the disparate impacts explained further below: the cash wage policy and the tipping policy.

16. Darden has maintained both of its wage policies for at least the twenty years preceding this action, continues to maintain these policies today, and has maintained these policies at all times relevant to this action.

**Darden's Cash Wage Policy**

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17. Darden maintains a policy or practice of setting and enforcing a cash wage for all “tipped employees,” as that phrase is defined within the Fair Labor Standards Act of 1938, 29 U.S.C. § 203(t), that is equal to the lowest possible cash wage in the state or municipality in which that employee works. That is, in 43 states (and the 7 other states before state law eventually forbade it), Darden’s policy or practice is to pay its tipped employees a subminimum wage, which is the lowest legally-permissible cash wage permitted and less than the minimum wage for non-tipped employees.

18. For example, in the Team Member Handbook for one of Darden’s brands, Darden states that “[t]his handbook briefly summarizes the policies and procedures of the family of Darden Restaurants” and that “[t]he goal of this handbook is to present policies and procedures that apply to all of Darden’s restaurants.” The handbook then states that, for “tipped team members,” Darden “takes the maximum permissible ‘tip credit’—i.e., the difference between the cash wage and the minimum wage. Accordingly, Darden’s cash wage policy requires local managers to pay all tipped employees at all restaurants nationwide the lowest, legally-permissible cash wage permitted.

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1           19. In February and March 2021, One Fair Wage conducted an  
2 informal poll of Darden employees. Hundreds of current and former Darden  
3 employees responded. Of those respondents who reported working only as a  
4 server for Darden, most told One Fair Wage that they were paid at or below  
5 the lowest legally-permissible cash wage. Many more told One Fair Wage that  
6 they were paid within a few cents of that. (Shockingly, roughly a quarter of  
7 servers reported being paid cash wages below what state law required.) This  
8 Darden-specific empirical data demonstrates the existence of a corporate-level  
9 cash wage policy or practice requiring local managers to pay tipped employees  
10 at Darden the lowest permissible cash wage which, in 43 states, is a  
11 subminimum wage as low as \$2.13 per hour.

12           20. Darden's cash wage policy dictates a common restriction on how  
13 local managers are prohibited from exercising their discretion over tipped  
14 employees' cash wage rates, and that directive pervades the entire company.  
15 Darden's policy is a corporate-level instruction to local managers that they  
16 must pay tipped employees a cash wage as low as applicable law allows.

17           21. Darden enforces its policy by training local managers not to pay  
18 tipped employees a cash wage greater than legally permitted, prohibiting  
19 managers from doing the same (e.g., in its handbook), auditing tipped  
20 employees' cash wage rates, and investigating and potentially disciplining  
21 managers who violate the corporate policy and pay tipped employees more than  
22 the company-imposed cash wage ceiling.

23           22. Although in 35 states the wage floor for tipped employees is  
24 higher than \$2.13 per hour, and in 7 states there is no distinction for large  
25 employers between the minimum wage for tipped employees and non-tipped  
26 employees, Darden's policy of paying the lowest legally-permissible cash wage  
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1 to tipped employees is applicable nationally to all tipped employees at Darden  
2 restaurants across the United States.

3 23. For example, from July 2020 to December 2020, and absent any  
4 deviations applicable to local jurisdictions, the policy caused Darden to pay  
5 tipped employees working in South Carolina a cash wage of \$2.13 per hour and  
6 those working in New York City a cash wage of \$10.00 per hour. In South  
7 Carolina, Darden thus took the maximum tip credit of \$5.12 per hour (i.e., the  
8 difference between the federal minimum wage of \$7.25 per hour and \$2.13 per  
9 hour in cash wages), and Darden was required to pay additional cash wages to  
10 its employees if their tips were insufficient to make up that difference. In New  
11 York City, the legally-imposed wage floor is higher, but the calculation is the  
12 same: Darden paid employees a cash wage of \$10.00 per hour and took the  
13 maximum tip credit of \$5.00 per hour (i.e., the difference between the statewide  
14 minimum wage of \$15.00 per hour and \$10.00 per hour in cash wages). As in  
15 South Carolina, Darden was required to directly pay its employees additional  
16 wages if their cash wages and tips did not sum to \$15.00 per hour.

17 24. In total, Darden pays roughly 20% of its entire workforce a cash  
18 wage of \$2.13 per hour. That is the lowest legally-permissible cash wage  
19 nationwide, and it applies in 15 states.

20 25. The majority of Darden's tipped employees are paid a  
21 subminimum wage that is lower than \$7.25 per hour.

22 26. Darden encourages employees who are paid a subminimum wage  
23 to try to earn enough tips to make up the difference between the tipped  
24 minimum wage and the minimum wage, and it facilitates this through tracking  
25 and reporting tips, so Darden will not need to make up this difference in  
26 additional cash wages.

1 27. Darden has fought to preserve its alleged right to maintain its  
2 cash wage policy by lobbying to preserve the subminimum wage of \$2.13 per  
3 hour under federal law. Restaurant Opportunities Centers United, *Darden: At*  
4 *the Drop of a Dime* 1 (2020).<sup>1</sup>

5 ***Darden’s Tipping Policy***

6 28. Darden maintains a policy or practice of actively encouraging and  
7 facilitating, and essentially tacitly requiring, its customers to tip its tipped  
8 employees, including all servers and bartenders at all of its restaurants,  
9 without mediating that process in any way. In other words, Darden’s policy  
10 requires local managers to encourage and facilitate tipping without allowing  
11 those managers to interpose between customers tipping and employees taking  
12 those tips home as wages. The intent and effect of Darden’s policy is that  
13 Darden’s customers directly determine a large portion of the wages paid to  
14 Darden’s tipped employees.

15 29. Darden’s active encouragement and facilitation of customer  
16 tipping as a form of employee compensation takes several forms. For instance,  
17 it is corporate policy that restaurants print a “tip” line on customers’ bills; that  
18 restaurants recommend tip percentages on bills for perceived good service  
19 (although Darden does not audit this recommendation to confirm whether  
20 customers actually tip based on employee merit); and that restaurants post  
21 signage on menus, bills, and elsewhere encouraging customers to tip. Darden  
22 also actively facilitates its tipping policy by, for instance, maintaining the Tip  
23 Reporting Alternative Commitment with the IRS, which is a voluntary  
24 agreement that requires employees to track and report tips to Darden and the  
25  
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27 <sup>1</sup> <https://rocunited.org/wp-content/uploads/sites/7/2020/02/DardenAtTheDropOfADime.pdf>.  
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1 IRS, and by disciplining employees who fail to accurately track and report tips  
2 to Darden and managers who acquiesce in the same.

3 30. In the employee handbook described above, Darden acknowledges  
4 that it encourages and facilitates customers directly making compensation  
5 decisions for tipped employees and that Darden does not mediate that process.  
6 The handbook, which applies across all of Darden restaurants nationwide,  
7 states that, “[i]f you are a tipped team member, tips will account for a large  
8 portion of your earnings. The Internal Revenue Service requires that you  
9 accurately report the amount of tips you receive and keep. Under federal law,  
10 YOU MUST REPORT AND PAY INCOME TAXES ON 100% OF YOUR TIP  
11 INCOME.” The handbook also advises Darden’s tipped employees that “you  
12 should keep a daily record of the cash and charge tips you receive (many of the  
13 restaurants have tip logs available for you—ask a manager).” Hence, Darden’s  
14 corporate-level tipping policy encourages and facilitates tipping for all tipped  
15 employees at all of its restaurants, even those employees who are paid a cash  
16 wage greater than a subminimum wage (e.g., tipped employees who work in  
17 states that require a cash wage for tipped employees equal to the minimum  
18 wage for non-tipped employees), without mediating that process.

19 31. The poll referenced above confirms the existence of Darden’s  
20 tipping policy. The overwhelming majority of respondents who identified their  
21 job as server or bartender reported receiving at least some tips in connection  
22 with working for Darden. This Darden-specific empirical data demonstrates  
23 the existence of a national, corporate-level tipping policy.

24 32. Darden’s tipping policy is a corporate-level restriction on local  
25 manager discretion that requires local managers to allow customers to tip  
26 employees without any mediation of that process and to help facilitate that  
27 tipping. At the same time, the corporate policy does not permit local managers  
28

1 the discretion to use alternative systems, even if local managers know or  
2 suspect that those alternatives would better match employees' wages to  
3 employees' performance and would minimize any consideration of  
4 discriminatory factors (e.g., employee race) in pay received.

5 **Darden's Cash Wage Policy Increases Sexual Harassment**

6 33. Darden employees paid a subminimum wage pursuant to the cash  
7 wage policy suffered more and worse sexual harassment than Darden  
8 employees paid at least the minimum wage. The cash wage policy is the direct  
9 cause, or at least a motivating cause, of this disparate impact. That is, Darden's  
10 cash wage policy caused sex to play more of a role in the jobs of all employees  
11 subject to the policy, regardless of the employees' sexes.

12 34. The poll referenced above showed that Darden employees paid a  
13 subminimum wage pursuant to the policy suffered more and worse sexual  
14 harassment than Darden employees paid the minimum wage. For example,  
15 Darden employees working where Darden's policy causes servers and  
16 bartenders to be paid a subminimum wage reported the following sexual  
17 harassment (emphasis added to highlight the significant frequency and  
18 severity of the sexual harassment):<sup>2</sup>

19 35. "Manage[r]s . . . would *typically* make comments on female  
20 workers bodies and their looks, weight, or how f\*\*kable they were";

21 36. "A married kitchen manager described *almost daily*, in great  
22 detail, what he'd like to do to me if we were ever alone";

23  
24  
25 \_\_\_\_\_  
26 <sup>2</sup> Not included in this list is one report of sexual harassment against a line  
27 cook. Although this was reported by an employee working where servers and  
28 bartenders are paid a subminimum wage, line cooks are entitled to the minimum  
wage.

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1 37. "The head cook would *always* make very suggestive comments to  
2 me about my body and a manager would openly talk abo[u]t women working  
3 for Darden as well as customers";

4 38. "I *often* hear male team members talking sexually about other  
5 team members and guests as well. It[']s just dis[g]usting. About their fantasies  
6 or specific body parts.";

7 39. "As a woman, I got hit on *plenty*, and sexually harassed by  
8 *everybody* from coworkers to patrons/guests";

9 40. "There were *frequent* incidents of men sexually harassing me";

10 41. "Sexual jokes are *too common*, [and] people are too touchy";

11 42. "I'm a homosexual and I [got] sexually harassed *a lot*";

12 43. "There was *a lot* of sexual harassment going on in my store";

13 44. "[There] was a ma[l]e server that *always* made *very* personal,  
14 sexual remarks";

15 45. "Male [employees] *pretty regularly* made females feel  
16 uncomfortable and management did not do a whole lot about it";

17 46. "As a bartender it's just part of the job, *many* customers make  
18 sexualized comments";

19 47. "*Always* making fun of the way I talked, that it was typically how  
20 a homosexual sounds";

21 48. "Unwanted remarks and touching from cooks";

22 49. "Being sexually objectified by male coworkers";

23 50. "A manager got my address without permission and called me  
24 drunk at 2 am trying to come see me as he was drunk";

25 51. "[M]ale manager likes to hug but only female employees";

26 52. "During training I was 'fought' over by male trainers[,] both of  
27 whom made sexual advances to me that same day after the shift off site";  
28

1 53. "Sexual harassment"; and

2 54. "[S]exist jokes."

3 55. In contrast, Darden employees working where Darden's policy  
4 causes servers and bartenders to be paid at least the minimum wage still  
5 reported sexual harassment in response to the poll, but not nearly the same  
6 amount or severity (emphasis added to highlight the limited frequency and  
7 severity compared to the sexual harassment reported above):

8 56. "I've had couples give me their hotel room keys, men try to coerce  
9 me to drink with them on the job, also *constantly* being called 'sweetie' or  
10 'honey' and putting their hands on me while serving them";

11 57. "*Lots of sexual harassment*";

12 58. "Had a manager pull me aside and ask me the sexual orientation  
13 of a fellow server"; and

14 59. "Witness [s]exual harassment."

15 60. Another specific example demonstrates how Darden's policy  
16 causes Darden employees paid a subminimum wage to suffer more and worse  
17 sexual harassment than Darden employees paid a minimum wage. In her  
18 recent Charge of Discrimination filed against Darden with the U.S. Equal  
19 Employment Opportunity Commission ("EEOC"), Brooklynn Brunner (who  
20 was paid a subminimum wage pursuant to Darden's cash wage policy when  
21 she worked for Darden in New York City from roughly March 2018 to roughly  
22 March 2020) stated that she "and other similarly situated servers are put in a  
23 position to be compliant and allow sexual harassment by customers, based on  
24 our sex as female servers, because we are dependent on customers for tips"  
25 and, "[b]ecause of my increased vulnerability to sexual harassment due to my  
26 sex and reliance on tips for my livelihood, Darden's policy of paying the  
27 subminimum tipped wage has a disparate impact on me and similarly situated  
28

1 servers.” Brunner also stated that she suffered “frequent sexual harassment  
2 by customers while working as a server. This includes inappropriate  
3 comments, being hit on, and more,” including being “screamed and yelled at”  
4 by a male customer. She also gives examples of coworkers sexually harassing  
5 her, including one who was “grabbing my butt, telling me his genital size and  
6 asking me to grab it, saying sexually charged statements to me in passing, and  
7 more” and a second who was “forcibly unzipping my pants, grabbing my butt,  
8 and more.”

9 61. Empirical evidence confirms that paying a subminimum wage  
10 increases sexual harassment. For example, in Restaurant Opportunities  
11 Centers United & Forward Together, *The Glass Floor: Sexual Harassment in*  
12 *the Restaurant Industry* 14, 16 (2017),<sup>3</sup> Figures 3.4, 3.5, & 3.6 show an increase  
13 in the amount of sexual harassment that employees suffer because they are  
14 paid a subminimum wage (as per Figure 3.4, increasing the mean total sexual  
15 harassment from roughly 9% for employees in states prohibiting subminimum  
16 wages to over 16% for employees in states allowing a subminimum wage).  
17 Another report similarly found that “[w]omen workers earning their state’s full  
18 minimum wage before tips reported half the rate of sexual harassment as  
19 women in the states that pay \$2.13 per hour.” Lisa Baertlein, *U.S. Restaurant*  
20 *Workers Target Low Wages in Campaign Against Sexual Harassment*, Reuters  
21 (Feb. 13, 2018). Finally, a recent empirical study by One Fair Wage itself shows  
22 that “[t]ipped workers who receive a subminimum wage . . . experience sexual  
23 harassment at a rate far higher than their non-tipped counterparts”; “[t]ipped  
24 workers were sexually harassed significantly more frequently, in every way  
25 measured, than their non-tipped counterparts”; “[t]hese experiences

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27 <sup>3</sup> [https://chapters.rocunited.org/wp-content/uploads/2014/10/REPORT\\_The-](https://chapters.rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf)  
28 [Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf](https://chapters.rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf).



1 represented not one-time harassment, but often persisted over days, weeks,  
 2 and in some cases, months”; and “[w]hen workers reported the sexual  
 3 harassment, tipped workers were less likely to say that the situation was  
 4 corrected than their non-tipped counterparts.” One Fair Wage, *The Tipping*  
 5 *Point: How the Subminimum Wage Keeps Incomes Low and Harassment High*  
 6 2–3 (2021).<sup>4</sup> As explained in the following paragraphs, this increased sexual  
 7 harassment is attributable to managers, customers, and coworkers.

8 62. First, empirical data shows that employees paid a subminimum  
 9 wage see an increase in management sexually harassing employees. To that  
 10 end, *The Glass Floor* report found that female employees paid a subminimum  
 11 wage were “three times more likely to be told by management to alter their  
 12 appearance and to wear sexier, more revealing clothing” than female  
 13 employees paid at least the minimum wage. *The Glass Floor, supra*, at 2–4.  
 14 This is due, at least in part, to the perverse incentives created by the policy.  
 15 Employers have a legal obligation to pay more cash wages if the tips received  
 16 by an employee do not sum to the full tip credit, so managers are incentivized  
 17 to encourage tipped employees to try to earn more in tips. Furthermore, “[d]ue  
 18 to [management’s] desire to keep customers happy, management can be  
 19 unresponsive to, or even indulgent of customer misbehavior,” including by  
 20 “encourag[ing] sexual harassment from customers and co-workers by requiring  
 21 employees to flirt and dress suggestively.” *Id.* at 8. Once a worker is objectified  
 22 in this way, the worker is much more vulnerable to being sexually harassed by  
 23 everyone at work, not just customers. For example, managers sexually harass  
 24 subminimum wage workers more than other workers because subminimum  
 25 wage workers protest less out of a well-founded fear that managers will

26  
 27 <sup>4</sup> [https://onefairwage.site/wp-](https://onefairwage.site/wp-content/uploads/2021/03/OFW_TheTippingPoint_3-1.pdf)  
 28 [content/uploads/2021/03/OFW\\_TheTippingPoint\\_3-1.pdf](https://onefairwage.site/wp-content/uploads/2021/03/OFW_TheTippingPoint_3-1.pdf).

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1     retaliate by assigning them worse shifts or less-desirable sections of the  
2     restaurant, thereby leading to less tips. Similarly, cooks and other “back-of-  
3     the-house” workers sexually harass subminimum wage workers more than  
4     other workers because subminimum wage workers protest less out of a well-  
5     founded fear that these coworkers will retaliate by preparing food in a way that  
6     doesn’t match customers’ demands, again leading to less tips. One Fair Wage  
7     has confirmed from many discussions with Darden employees that this  
8     incentive exists at Darden and plays out in Darden restaurants in precisely  
9     this way.

10     63.     Second, empirical data also shows that another repercussion of  
11     subminimum wages is an increase in customers sexually harassing employees.  
12     For example, *The Glass Floor* report found that, because employees depend on  
13     receiving enough tips to survive, “customers can feel entitled to treat servers  
14     inappropriately.” *Id.* at 8. In another empirical study proving this point,  
15     customers viewed sexual harassment against a female employee as “more  
16     legitimate when she received tips.” Oliver Klein et al., *Does Tipping Facilitate*  
17     *Sexual Objectification? The Effect of Tips on Sexual Harassment of Bar and*  
18     *Restaurant Servers*, Equality, Diversity & Inclusion (2020).<sup>5</sup> Moreover, once a  
19     subminimum wage worker is objectified by managers and customers alike by  
20     being forced or encouraged to dress suggestively or flirt to get more tips, that  
21     worker is more vulnerable to sexual harassment from customers.

22     64.     Third, empirical data further shows that another repercussion of  
23     employees being paid a subminimum wage, and thus being pressured by  
24     management to flirt with customers and dress suggestively to try to earn  
25     enough tips to survive, is an increase in coworkers sexually harassing

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27     <sup>5</sup> <https://www.emerald.com/insight/content/doi/10.1108/EDI-04-2019-0127/full/html>.

1 employees who are now flirting more and dressing more suggestively at work  
2 and holding subminimum wage workers' tips over their heads (e.g., refusing to  
3 prepare food in the way the customer wants it unless the server acquiesces to  
4 sexual harassment). For example, *The Glass Floor* report found that "[t]ipped  
5 workers experienced higher rates of sexual harassment from co-workers in  
6 nearly every category than non-tipped workers." *The Glass Floor, supra*, at 18.

7 65. Finally, empirical data also shows that another repercussion of  
8 employees being paid a subminimum wage is an increase in those employees  
9 begrudgingly allowing sexual harassment to persist. Employees may acquiesce  
10 in, or even reluctantly espouse consent to, such unwelcome conduct under the  
11 threat of receiving less in tips, suffering retaliation by managers by being  
12 assigned unfavorable shifts or tables, being humiliated publicly or privately by  
13 their managers or coworkers, or even being fired. Dana Yagil, *When the*  
14 *Customer Is Wrong: A Review of Research on Aggression and Sexual*  
15 *Harassment in Service Encounters*, 13(2) *Aggression & Violent Behavior* 141,  
16 144 (2008) ("Managers tend to exclude waitresses who complain about  
17 harassment from the best tipping shifts and service stations."). To that end, "it  
18 becomes difficult for workers to effectively draw lines between providing good  
19 service and tolerating inappropriate behavior from customers," "[w]omen  
20 workers are often required or feel the need to dress or act in a sexualized  
21 manner in order to secure larger checks and tips from customers," and  
22 "[w]omen restaurant workers often have to tolerate inappropriate comments  
23 and sexual harassment while at work in order to ensure their earnings are not  
24 impacted negatively and to maintain job security." Indeed, "over 50% of tipped  
25 women workers agreed that depending on tips had led them to tolerate  
26 inappropriate behaviors that made them nervous or uncomfortable." *The Glass*  
27 *Floor, supra*, at 8.  
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1           66. Anecdotal evidence confirms that employees paid a subminimum  
 2 wage suffer more and worse sexual harassment than employees paid at least  
 3 the minimum wage. Michelle Alexander, *Tipping Is a Legacy of Slavery*, N.Y.  
 4 Times (Feb. 5, 2021); Catrin Einhorn & Rachel Abrams, *The Tipping Equation*,  
 5 N.Y. Times (Mar. 12, 2018); Fatima Hussein, *How Low Wages for Tipped*  
 6 *Workers May Invite Sexual Harassment*, Indystar (Feb. 23, 2018).

7           67. Because of the disproportionate quantity and quality of sexual  
 8 harassment suffered by the Darden employees subject to the policy, those  
 9 employees report and complain about sexual harassment to management and  
 10 rebuff sexual harassment from customers more than Darden employees who  
 11 are not subject to the policy, causing employees subject to the policy to suffer  
 12 more financial retaliation from managers and customers. For example, Darden  
 13 employees subject to the policy receive less in tips from rebuffed sexual  
 14 harassers and are assigned worse tables or sections of the restaurant by the  
 15 managers that they accused of sexual harassment.

16           68. Darden's cash wage policy perpetuates a cycle of systemic sexual  
 17 harassment. Darden imposes a subminimum wage ceiling on tipped employees  
 18 in 43 states. That leads to employees paid pursuant to the policy suffering more  
 19 and worse sexual harassment than their coworkers who are not subject to the  
 20 policy, which causes them to receive less pay because of the increased levels  
 21 and severity of sexual harassment, forcing them to rely even more on tips and  
 22 keeping their job just to make ends meet, which leads them to suffer even more  
 23 and worse sexual harassment, and so on.

24 **Darden's Tipping Policy Causes Darden's Employees of Color to Earn**  
 25 **Less in Tips Than Darden's White Employees**

26           69. Because of Darden's tipping policy, Darden's employees of color  
 27 receive less in tips, all else being equal, than Darden's white employees  
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1 because of employees' races. That, in turn, means that Darden causes  
 2 employees of color to be paid substantially less than white employees because  
 3 of their race.

4 70. In particular, Darden has adopted a corporate policy or practice  
 5 of encouraging and facilitating tipping for jobs like servers and bartenders,  
 6 which results in customers directly determining a substantial part of these  
 7 tipped employees' total wages. But Darden has failed to mediate that process  
 8 (e.g., ensure that customers do not consider race or any other prohibited  
 9 characteristic in deciding what amount to tip, ensure that employees' take-  
 10 home pay is untainted by such considerations). It is thus unsurprising that  
 11 Darden's customers regularly consider race in setting compensation for Darden  
 12 employees and that tipped employees see the impact of those considerations on  
 13 their paychecks. Darden does nothing to stop the practice of customers setting  
 14 wages by caprice rather than merit; rather, it affirmatively encourages and  
 15 facilitates such disparities to thrive.

16 71. The facts are stark. One Fair Wage's poll of Darden workers  
 17 mentioned above demonstrated that Darden's servers of color who received any  
 18 tips in 2020 received roughly 82.04% of the tips per hour that Darden's white  
 19 servers who received any tips in 2020 received. Specifically, Darden's servers  
 20 of color who reported receiving any tips in 2020 received a median of roughly  
 21 \$7.31 in tips per hour, whereas Darden's white servers who reported receiving  
 22 any tips in 2020 reported receiving a median of roughly \$8.91 in tips per hour.  
 23 This Darden-specific, empirical evidence demonstrates that Darden's tipping  
 24 policy causes race to be at least a motivating factor in how much money Darden  
 25 employees receive and significantly harms servers of color. To that end, one  
 26 Darden employee told One Fair Wage that "black servers are tipped lower"  
 27 than servers of other races/ethnicities, and another told One Fair Wage,  
 28

**Deleted:** (this Darden-specific sample data approximates the empirical data discussed below, *infra* ¶ 52, suggesting that Darden-wide population data would likewise demonstrate a similar, race-based tip disparity).

1 “[b]ecause I was black I would mainly [g]et all the black people. I over heard  
2 guest not liking Mexican and black people. My white co workers made more  
3 money than me.”

4 72. Darden’s corporate-level tipping policy also allows local manager  
5 biases to affect employees’ wages. Forcing employees to be paid in tips without  
6 mediating that process places great importance on the shifts worked and  
7 sections covered for at least two reasons: dinner shifts and shifts on prime  
8 nights like weekends generally result in higher tips than lunch shifts and  
9 shifts on weekdays; and prime seating sections within each restaurant  
10 generally result in higher tips than non-prime sections because customers in  
11 prime sections may be wealthier, spend more money, or be used to paying  
12 higher tips. But Darden’s tipping policy has the effect of local managers  
13 relegating servers of color and bartenders of color to less-lucrative shifts and  
14 less-prime sections, which results in them receiving less in tips based on their  
15 race.

16 73. Specific examples highlight the effects of Darden’s tipping policy.  
17 For example, in their recent charges filed with the EEOC, Chanta Hunter (a  
18 Black employee who has worked for Darden in New York City since [roughly](#)  
19 October 2006), Luna St Furcy (a Caribbean-American employee who worked  
20 for Darden in the same location from [roughly](#) June 2018 to [roughly](#) March  
21 2020), and Adam Jones (a Black employee who has worked for Darden at the  
22 same location since [roughly](#) September 2008) stated that they, as well as other  
23 servers of color and bartenders or color, received less in tips based on their race  
24 because of this policy. Moreover, in her recent charge filed with the EEOC,  
25 Pam Araiza (a Latina employee who worked for Darden in Naples, FL from  
26 [roughly](#) 2007 until [roughly](#) May 2017 and Washington, DC from [roughly](#) May  
27 2017 until [roughly](#) 2020) alleged that she was “consistently assigned to  
28

1 sections of the restaurant known to generate less in tips, which management  
 2 referred to as ‘Section 8’ or ‘my low-income world.’”

3 74. Darden’s employees of color have suffered, and continue to suffer,  
 4 significant harm because of Darden’s tipping policy. Using the median tips per  
 5 hour data from the poll referenced above, if all tipped Darden employees were  
 6 to work full-time (i.e., 2,080 hours per year), tipped white Darden employees  
 7 would each receive roughly \$18,536.70 in tips annually, whereas tipped  
 8 Darden employees of color would each receive roughly \$15,206.59 in tips  
 9 annually—a race-based difference of \$3,330.11 in tips per year per worker. For  
 10 essential workers already receiving a subminimum wage and living paycheck  
 11 to paycheck just to try to make ends meet, that difference is significant. To  
 12 put into context how significant this Darden-imposed pay differential is, one  
 13 African American server told One Fair Wage that he “had to get a therapist  
 14 because of the lack of money I was receiving at the job,” that he “would make  
 15 half the amount of coworkers” because of race, and that he has “depression and  
 16 ptsd and suffer[s] from anxiety/ panic attacks” because of his job at Darden.

17 75. Darden employs roughly 169,000 hourly employees, roughly 54%  
 18 of whom identify as racial or ethnic minorities. The majority of Darden’s hourly  
 19 employees are tipped employees. Thus, Darden employs tens of thousands of  
 20 tipped employees of color, upon each of whom it is inflicting at least several  
 21 thousands of dollars of entirely-preventable, race-based pay discrimination  
 22 every year due to its tipping policy. That adds up to hundreds of millions of  
 23 dollars that Darden’s tipping policy illegally wrests from its employees of color.

24 76. Empirical research confirms these Darden-specific results and  
 25 shows that this disparity is a predictable consequence of maintaining a policy  
 26 or practice of encouraging and facilitating tips without any mediation. [Zachary](#)  
 27 [W. Brewster & Michael Lynn, Black–White Earnings Gap Among Restaurant](#)  
 28

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Deleted: For example, one empirical study found that black servers receive about 78% of the tips that white servers receive. Zachary W. Brewster & Gerald Roman Nowak III, *Racial Prejudices, Racialized Workplaces, and Restaurant Servers’ Hyperbolic Perceptions of Black–White Tipping Differences*, 60(2) *Cornell Hospitality Quarterly* 159, 163 tbl. 1 (2019) (the average tip percent for black servers was 14.05%; the average tip percent for white servers was 18.00%); see also Zachary W.

1 *Servers: A Replication, Extension, and Exploration of Consumer Racial*  
 2 *Discrimination in Tipping*, 84 *Sociological Inquiry* 545, 557 (2014); Michael  
 3 Lynn et al., *Consumer Racial Discrimination in Tipping: A Replication and*  
 4 *Extension*, 38 *J. Applied Soc. Psych.* 1045, 1055–56 (2008); Gabriela Quintana,  
 5 *I'm Going to Tip Minority Servers More – and Whites Less*, *Econ. Opportunity*  
 6 *Inst.* (Oct. 16, 2018), [http://www.opportunityinstitute.org/blog/post/im-going-](http://www.opportunityinstitute.org/blog/post/im-going-to-tip-minority-servers-more-and-white-servers-less/)  
 7 [to-tip-minority-servers-more-and-white-servers-less/](http://www.opportunityinstitute.org/blog/post/im-going-to-tip-minority-servers-more-and-white-servers-less/).

8 77. Anecdotal evidence also confirms that customers generally tip  
 9 white servers more than servers of color. Alexander, *supra*; Casey Quinlan,  
 10 *D.C. Servers and Bartenders Say the Tipped Wage System Isn't Working for*  
 11 *Them*, *Think Progress* (June 12, 2018),  
 12 [https://archive.thinkprogress.org/should-dc-restaurants-pay-minimum-wage-](https://archive.thinkprogress.org/should-dc-restaurants-pay-minimum-wage-these-servers-and-bartenders-think-so-c560d2269e7f/)  
 13 [these-servers-and-bartenders-think-so-c560d2269e7f/](https://archive.thinkprogress.org/should-dc-restaurants-pay-minimum-wage-these-servers-and-bartenders-think-so-c560d2269e7f/); Restaurant  
 14 Opportunities Centers United, *Ending Jim Crow in America's Restaurants:*  
 15 *Racial and Gender Occupational Segregation in the Restaurant Industry* 26  
 16 (2015), [https://chapters.rocunited.org/wp-](https://chapters.rocunited.org/wp-content/uploads/2015/10/RaceGender_Report_LR.pdf)  
 17 [content/uploads/2015/10/RaceGender\\_Report\\_LR.pdf](https://chapters.rocunited.org/wp-content/uploads/2015/10/RaceGender_Report_LR.pdf); Kimberly Freeman  
 18 Brown & Marc Bayardon, *When Tipping Doesn't Make the Difference*, *Ebony*  
 19 (Feb. 15, 2016), [https://www.ebony.com/news/restaurant-women-tipping-](https://www.ebony.com/news/restaurant-women-tipping-wage/)  
 20 [wage/](https://www.ebony.com/news/restaurant-women-tipping-wage/).

21 78. Anecdotal evidence confirms that restaurant managers (or those  
 22 with similar authority) assign customers to servers based on servers' races,  
 23 assigning black customers who the manager suspects will not tip well to  
 24 servers of color and assigning white customers who the manager suspects will  
 25 tip well to white servers. Alexander, *supra*; Vince Dixon, *The Case Against*  
 26 *Tipping in America*, <https://www.eater.com/a/case-against-tipping> (citing  
 27 Zachary Brewster et al., *Consumer Racial Profiling in U.S. Restaurants:*  
 28

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1 *Exploring Subtle Forms of Service Discrimination Against Black Diners*, 29  
2 Sociological Forum 476 (2014)).

3 79. Darden has tacitly admitted that its managers have assigned  
4 customers to servers based on servers' races when it fired a manager who did  
5 so. Meryl Kornfield, *An Olive Garden Customer Demanded a Non-Black Server.*  
6 *The Manager Who Complied Has Been Fired.*, Wash. Post (Mar. 5, 2020),  
7 [https://www.washingtonpost.com/food/2020/03/05/olive-garden-manager-](https://www.washingtonpost.com/food/2020/03/05/olive-garden-manager-black-server/)  
8 [black-server/](https://www.washingtonpost.com/food/2020/03/05/olive-garden-manager-black-server/).

9 80. The race-based wage gap in tips received by Darden employees of  
10 color and their similarly-situated white coworkers is exacerbated by Darden's  
11 cash wage policy which causes the overwhelming majority of tipped Darden  
12 workers to be paid a subminimum wage. To that end, Darden employees of  
13 color, to whom Darden already pays the lowest legally-permissible cash wages  
14 in most cases, are subjected to even-greater poverty by being denied more in  
15 tips because of their race, causing employees of color subject to the policy to  
16 receive less total pay (i.e., cash wages and tips) than their similarly-situated  
17 white coworkers because of their race.

18 81. Darden's tipping policy perpetuates a cycle of systemic race  
19 discrimination against people of color: Darden encourages customers to tip and  
20 facilitates tipping without any mediation, which leads to Darden's employees  
21 of color receiving less in tips than their white coworkers because of their race,  
22 which forces Darden's employees of color to rely even more on tips just to make  
23 ends meet, which causes those employees of color to receive even less in tips  
24 than their white coworkers because of their race, and so forth.

1 **Darden's Cash Wage Policy Is Neither Consistent with Business**  
2 **Necessity nor Related to Darden Employees' Jobs**

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3 82. Many of Darden's competitors, such as other restaurants and food  
4 service and hospitality businesses, profitably operate restaurants and other  
5 similar businesses without maintaining a cash wage policy like Darden's and  
6 without forcing their local managers to pay employees a subminimum wage,  
7 showing that the cash wage policy is not consistent with business necessity.

8 83. Darden would continue to remain profitable if it rescinded the  
9 policy and maintained a cash wage ceiling equal to the non-tipped minimum  
10 wage or allowed local management the discretion to do the same, proving again  
11 that the policy is not consistent with business necessity.

12 84. Nothing about positions like servers and bartenders at Darden  
13 suggests that those positions must receive the lowest legally-permissible pay,  
14 whereas other positions at Darden can be paid a higher cash wage rate at the  
15 discretion of local managers. As such, the policy is not a legitimate measure or  
16 qualification of the specific jobs that it applies to, demonstrating that the policy  
17 is not job related.

18  
19 **There Are Less Discriminatory Alternatives to the Cash Wage Policy**

20 85. Darden could reduce or eliminate the more severe and pervasive  
21 sexual harassment suffered by its employees who are paid a subminimum  
22 wage pursuant to the policy by adopting a less-discriminatory alternative. For  
23 example, Darden could adopt a practice that sets and enforces a cash wage  
24 ceiling equal to the non-tipped minimum wage, and doing so would not cause  
25 Darden to become unprofitable.

**Darden’s Tipping Policy Is Neither Consistent with Business Necessity nor Related to Darden Employees’ Jobs**

86. Many of Darden’s competitors, such as other restaurants and food service and hospitality businesses, profitably operate restaurants and similar businesses without maintaining a tipping policy like Darden’s—for example, requiring employees to pool their tips to mitigate against any race-based disparities in tips received; providing effective rules or standards for customers that minimize race-based differences in tips received; or minimizing the effects of tipping by adding a standard service charge to all bills to be paid to employees and letting customers tip on top (which very few do, thereby bypassing most customers’ tip choices)—proving that Darden’s tipping policy is not consistent with business necessity.

87. Darden would continue to remain profitable if it rescinded the tipping policy and adopted any of these less-discriminatory alternatives, demonstrating that its tipping policy is not consistent with business necessity.

88. The tipping policy is not a legitimate measure or qualification of the specific jobs that it applies to (e.g., servers, bartenders), proving that it is not job related. Indeed, the tipping policy encourages customers to directly compensate employees based on factors whose consideration is illegal and irrelevant (e.g., race), and nothing about positions like servers and bartenders suggests that they must be subjected to the policy whereas other positions are not. Thus, Darden’s tipping policy actively untethers pay from legitimate job performance metrics.

**There Are Less Discriminatory Alternatives to the Tipping Policy**

89. Darden could ensure that its employees of color receiving tips do not receive less in tips than white employees receiving tips by adopting any of the less-discriminatory alternatives referenced above. These alternatives

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1 would not cause Darden to become unprofitable, but Darden chooses instead  
2 to maintain its tipping policy.

3 **Darden's Policies Have Injured One Fair Wage**

4 90. Darden's maintenance of the policies has caused monetary and  
5 non-monetary harm to One Fair Wage. One Fair Wage is not filing this action  
6 on behalf of any Darden employees or representing any Darden employees  
7 here; rather, One Fair Wage is seeking redress only for the harm that Darden's  
8 policies have caused to One Fair Wage as an organization.

9 91. The policies have caused, and continue to cause, One Fair Wage  
10 to divert its resources. If Darden did not maintain these policies, many Darden  
11 employees would be ready, willing, and able to aid One Fair Wage in lobbying  
12 against subminimum cash wage policies and unmitigated tipping policies  
13 during their non-work hours by sharing first-hand at lobbying events how such  
14 policies subject them to poverty wages and other horrific terms and conditions  
15 of employment. Indeed, One Fair Wage's interest in requiring all employers to  
16 pay the full minimum wage as a cash wage with fair, non-discriminatory tips  
17 on top aligns with the interest of Darden employees in being paid a reasonable  
18 cash wage, working without being subjected to preventable sexual harassment,  
19 and not being discriminated against in the tips they receive based on their race.

20 92. However, because Darden maintains these policies, Darden has  
21 forced these employees to instead spend their non-work hours recovering from  
22 and dealing with the increased sexual harassment they suffered at work (e.g.,  
23 getting therapy from mental healthcare professionals, seeking support from  
24 and brainstorming harassment avoidance and mitigation techniques with  
25 their family and friends, working extra hours and other jobs to make up for the  
26 decreased pay they receive due to the increased sexual harassment, or working  
27 with an attorney to pursue sexual harassment dispute resolution against  
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Deleted: For example, One Fair Wage has been forced to address...

1 Darden) or recovering from and dealing with the race-based earnings deficit  
2 they suffered at work (e.g., seeing a therapist to deal with the negative effects  
3 of taking home such paltry and lesser tips because of their race, working extra  
4 hours and other jobs to make up for the paltry and lesser tips they received  
5 due to their race; working with an attorney to pursue race discrimination  
6 dispute resolution against Darden).

7 93. As a result of Darden's policies eating up its employees' precious  
8 non-work time—time that otherwise could have and would have been spent  
9 helping One Fair Wage pursue their shared interest—One Fair Wage has been  
10 forced to work harder and expend more of its time, energy, focus, and resources  
11 to secure as advocates workers who have experienced the harms wrought by  
12 subminimum cash wage policies and unmitigated tipping policies and are  
13 ready, willing, and able to speak out against those policies in lobbying efforts.

14 94. To that end, One Fair Wage has expended its resources to help  
15 Darden employees who have suffered disparate impact because of either or  
16 both of these policies in an effort to free up those employees' non-work time—  
17 non-work time taken by Darden because it maintains these illegal policies—  
18 and enable such employees to help One Fair Wage advocate against such  
19 policies. For example, One Fair Wage has spent its resources connecting  
20 complaining Darden workers with attorneys to represent them in dispute  
21 resolution against Darden, connecting sexual harassment survivors at Darden  
22 with therapists and other social services providers, and offering job  
23 opportunities and administering payments from a Coronavirus Emergency  
24 Relief Fund to Darden workers who complained of increased sexual  
25 harassment and/or race-based tip differentials. One Fair Wage's mission  
26 hinges on legislators, employers, restaurant industry groups, and voters  
27 hearing first-hand from workers who suffer from subminimum cash wage  
28

policies and unmitigated tipping policies; Darden’s maintenance of the policies has frustrated and continues to frustrate that purpose by taking up those workers’ non-work time and forcing One Fair Wage to try to reclaim workers’ non-work time to further their mutual interest.

95. For example, instead of spending its time lobbying or advocating, One Fair Wage has been forced to spend its time addressing complaints from Darden employees subject to the cash wage policy that they have suffered more and worse sexual harassment because of their sex than Darden employees not subject to that policy, as well as complaints from Darden tipped employees of color that they have received less in tips than Darden tipped white employees because of their race (the vast majority of whom suffer substantially because Darden already pays them a subminimum wage)—all in an effort to free up these employees’ non-work time so they can help One Fair Wage further their shared purpose of requiring all employers to pay the full minimum wage as a cash wage with fair, non-discriminatory tips on top.

96. As another example, Saru Jayaraman, One Fair Wage’s President who works for One Fair Wage in, and directs One Fair Wage’s actions from, Oakland, California, spends a significant amount of her time not furthering One Fair Wage’s core purpose, but dealing with complaints from Darden employees who would prefer to be spending their non-work time lobbying against subminimum cash wages and unmitigated tipping policies, but cannot due to the effects of Darden’s policies. Julia Sebastian, One Fair Wage’s Research Director who works in Oakland, California, spends roughly one-fourth of her time working for One Fair Wage dealing with such complaints from Darden employees and otherwise responding to the effects of the policies on those employees instead of directing her efforts towards lobbying.

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1 97. Many other One Fair Wage employees and consultants have  
 2 spent at least a portion of their work time dealing with such complaints and  
 3 otherwise responding to the effects of the policies on Darden employees instead  
 4 of organizing and hosting lobbying or advocacy events, costing One Fair Wage  
 5 significant financial resources and time. focus, and energy it would not have  
 6 expended otherwise and which it can no longer spend on pursuing its core  
 7 mission of lobbying and advocating to end subminimum cash wage policies and  
 8 unmitigated tipping policies. As such, because of Darden’s policies, One Fair  
 9 Wage spends tens of thousands of dollars annually in salary and consultant  
 10 payments, employees’ benefits, office supplies, digital engagement fees, and  
 11 other expenses, as well as hundreds of hours of staff and consultant time, all  
 12 of which could have been and would have been spent on furthering One Fair  
 13 Wage’s purpose but for Darden maintaining its unlawful policies.

14 98. Because Darden maintains the policies, One Fair Wage has  
 15 diverted significant staff time to conducting the Survey to determine whether  
 16 Darden employees suffered more and worse sexual harassment because of  
 17 their sex because of the cash wage policy or received less in tips due to their  
 18 race because of the tipping policy. Again, but for Darden maintaining its illegal  
 19 policies, many more Darden employees would have been ready, willing, and  
 20 able to assist One Fair Wage in its lobbying and advocacy efforts, but Darden’s  
 21 maintenance of these policies has deprived One Fair Wage of its most valuabe  
 22 resource—employee voices—forcing One Fair Wage to conduct this Survey out  
 23 of self-preservation: survey Darden employees to expose the effects of Darden’s  
 24 illegal policies and use that data to force Darden to stop maintaining those  
 25 policies.

26 99. All of these adverse effects on One Fair Wage were foreseeable  
 27 repercussions of Darden maintaining the policies. Darden’s maintenance of the  
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**Deleted:** <#>In response to the coronavirus pandemic, One Fair Wage established the Emergency Coronavirus Relief Fund, which provides cash assistance to restaurant workers who have had their hours reduced or have been furloughed or laid off and apply for cash relief from One Fair Wage.<sup>¶</sup>  
 To date, One Fair Wage has paid cash relief from the fund of \$500 per employee to more than 350 Darden employees nationwide (including more than 30 Darden employees in California), for a total of over \$175,000 in cash assistance paid to Darden employees affected by the coronavirus pandemic (over \$15,000 of which was paid to Darden employees in California). One Fair Wage paid essentially all of that cash relief to Darden’s tipped employees who are (or were, prior to being laid off or furloughed) paid a subminimum wage.<sup>¶</sup>  
 Because of the policies, Darden’s employees have suffered more financially during the pandemic than their similarly situated coworkers who are not subject to the policies. As such, more Darden employees subject to the policies requested and received cash assistance payments from One Fair Wage’s Emergency Coronavirus Relief Fund than would have requested and received such cash assistance payments but for the policies, depleting One Fair Wage’s funds more than they would have been depleted but for the policies and denying One Fair Wage the opportunity to pay more cash assistance to other restaurant workers during the pandemic.<sup>¶</sup>

1 policies was a proximate cause and the but-for cause of all of these adverse  
2 effects on One Fair Wage.

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3 **Timeliness and Administrative Exhaustion**

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4 100. Darden has maintained the policies at all times relevant to this  
5 action and continues to maintain the policies today.

6 101. On or about September 29, 2020, One Fair Wage filed a Charge  
7 of Discrimination with the EEOC Oakland Local Office alleging race- and sex-  
8 based disparate impact that materially tracks the allegations in this  
9 Complaint.

10 102. On March 4, 2021 the EEOC dismissed that charge at One Fair  
11 Wage’s request and issued One Fair Wage a right to sue notice.

12 103. One Fair Wage has filed this action within the 90-day timeframe  
13 permitted pursuant to that right to sue notice.

14 **COUNT ONE: SEXUAL HARASSMENT**

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15 ***Darden’s Policies Disparately Impact Employees Paid a Subminimum Wage***  
16 ***by Causing Them to Suffer More and Worse Sexual Harassment, Thereby***  
17 ***Injuring One Fair Wage in Violation of Title VII, 42 U.S.C. § 2000e-2(a)***

18 104. One Fair Wage incorporates the preceding paragraphs by  
19 reference.

20 105. With respect to employees paid a subminimum wage, the policies  
21 are not capable of separation for the purpose of disparate impact analysis, so  
22 they constitute a particular employment policy or practice under Title VII.

23 106. Darden’s policies cause a disparate impact against all Darden  
24 employees—regardless of whether their sex is male, female, intersex, non-  
25 binary, or anything else—by causing them to suffer more and worse sexual  
26 harassment than Darden employees of their same sex who are not subject to  
27 the policies due to their sex. The policies cause sex to be a motivating factor in  
28



1 the quantity and quality of sexual harassment suffered by Darden employees.  
2 In other words, because of the policies, sex plays more of a role in all Darden  
3 employees' work.

4 107. In the alternative, Darden's cash wage policy alone causes  
5 disparate impact against Darden employees by causing them to suffer more  
6 and worse sexual harassment than Darden employees of their same sex who  
7 are not subject to the cash wage policy due to their sex, and the cash wage  
8 policy alone causes sex to be a motivating factor in the quantity and quality of  
9 sexual harassment suffered by Darden employees.

10 108. Neither of the policies is job related.

11 109. Neither of the policies is consistent with business necessity.

12 110. At least one alternative, less-discriminatory employment practice  
13 would be as effective as the policies at achieving Darden's lawful aims, but  
14 Darden refuses to adopt such an alternative employment practice.

15 111. Accordingly, Darden's policies constitute an unlawful  
16 employment practice.

17 112. In the alternative, Darden's cash wage policy alone constitutes an  
18 unlawful employment practice.

19 113. Darden's maintenance of the policies or, in the alternative, the  
20 cash wage policy alone, has damaged One Fair Wage and forced it to divert  
21 resources.

22 114. One Fair Wage is a person aggrieved by Darden's unlawful  
23 employment practice.

24 115. The foregoing constitutes unlawful disparate impact because of  
25 sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-  
26 2(a).

**COUNT TWO: RACE DISCRIMINATION**

***Darden’s Tipping Policy Disparately Impacts Tipped Employees of Color Based on Race with Respect to the Total Pay they Receive, Thereby Injuring One Fair Wage in Violation of Title VII, 42 U.S.C. § 2000e-2(a)***

116. One Fair Wage incorporates the preceding paragraphs by reference.

117. Darden’s tipping policy causes disparate impact against Darden employees of color who receive tips based on their race by causing them to receive less in tips than white Darden employees who receive tips. The tipping policy causes race to be a motivating factor in the dollar amount of tips received by Darden employees of color.

118. Darden’s tipping policy is not job related.

119. Darden’s tipping policy is not consistent with business necessity.

120. At least one alternative, less-discriminatory employment practice would be as effective as Darden’s tipping policy at achieving Darden’s lawful aims, but Darden refuses to adopt such an alternative employment practice.

121. Accordingly, Darden’s tipping policy constitutes an unlawful employment practice.

122. Darden’s maintenance of its tipping policy has damaged One Fair Wage and forced it to divert resources.

123. One Fair Wage is a person aggrieved by Darden’s unlawful employment practice.

124. The foregoing constitutes unlawful disparate impact because of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

**Prayer for Relief**

125. Plaintiff One Fair Wage respectfully requests:

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- a. Declaratory relief that the policies are unlawful and violate 42 U.S.C. § 2000e-2(a);
- b. An injunction prohibiting Darden from maintaining the policies and any related employment policies or practices that also constitute unlawful employment practices;
- c. Equitable or monetary relief redressing the resources that One Fair Wage has been forced to divert and the harm that One Fair Wage has suffered because of the policies;
- d. Reasonable attorneys' fees and costs; and
- e. Any other relief that this Court deems proper.

Respectfully submitted,

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