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Ninth Circuit Disinvites Back-of-the-House Employees from Tip-Pool Party *By Sean Ray*

On 23 February 2016, a panel of judges on the Ninth Circuit overturned the June 2013 Oregon District Court decision allowing employers in Oregon (and other Ninth Circuit states where employers do not claim tip credits) to have tip pools which include employees who are not customarily tipped (the "back-of-the-house" employees like dishwashers and cooks). That 2013 decision invalidated U.S. Department of Labor (DOL) regulations prohibiting employers from collecting and redistributing tips among all employees, including those who do not traditionally receive tips, even when the employer does not claim a tip credit under the Fair Labor Standards Act (FLSA).

How Did We Get Here?

To understand the back-and-forth fight that has been waged over tip-pooling, we need to start by taking a look at the FLSA's requirements for paying tipped employees. For starters, the FLSA requires all employers to pay their employees at least minimum wage. For tipped employees in most states, the FLSA's minimum wage requirement can be met through a tip credit, that is, when the employee is paid at least $2.13 per hour plus earns an additional amount in tips such that his or her total compensation is equal to or exceeds the federal minimum wage. If the hourly wage plus tips does not meet the federal minimum wage amount, the employer must supplement the employee's wage to satisfy the minimum wage law. This same provision provides that all tips received by an employee are to be retained by the employee, except that employees may pool their tips among employees who customarily and regularly receive tips, such as servers, bartenders, and bussers, but not so-called "back-of-the-house employees," such as cooks, dishwashers, and janitors. The tips are then redistributed among those employees based on the written tip-pooling agreement.

However, some states, such as Oregon, forbid tip credits. Even if an employee receives tips in these states, the employee must still be paid minimum wage; the employer cannot use the tips as a "credit" against the hourly wage of the employee. Because the provision restricting tip pools to those employees who are customarily tipped falls within the same section as the tip credit, employers who did not take tip credits (such as in Oregon, where they are forbidden) sometimes elected to pool tips among all employees, whether they customarily received tips (front-of-the-house) or not (back-of-the-house).

A server in Portland, Oregon who apparently grew tired of sharing her tips with cooks and dishwashers filed suit in the District Court of Oregon asserting that tip pools could only include customarily tipped employees, such as her fellow servers, and could not include cooks and dishwashers. In 2010, the Ninth Circuit held in *Cumbie v. Woody Woo, Inc., the first tip-pooling case that found its way to the Ninth Circuit from Oregon District Court,* that the FLSA limitation on tip pooling—"that tips may be pooled only among employees who customarily receive them"—applies *only* if the employer is taking the tip credit toward minimum wage.

The following year, in 2011, the DOL issued updated regulations, noting that it respectfully believed that *Woody Woo* was incorrectly decided, and expressly stating that tip pools can *only* include those employees who customarily and regularly receive tips, even if a tip credit is not taken by the employer.

The Oregon Restaurant and Lodging Association, along with other associations and businesses, and including a server, filed suit in the District of Oregon to challenge the validity of those regulations which expanded the FLSA restrictions on tip pooling to include employers who did not take a tip credit.

In *Oregon Restaurant Lodging Association v. Solis*, the Oregon District Court determined that the FLSA does not impose any restrictions on an employer's use of tips when the

employer is not taking a tip credit. Rather, the FLSA only imposes limitations (namely, that tips belong to the employee who received them absent a valid tip-pooling agreement only among those employees who customarily receive tips) on those employers who take a tip credit. In reaching its decision, the Court determined that the *Woody Woo* holding and the plain language of the FLSA left no room for DOL discretion to unilaterally expand the reach of the FLSA.

The DOL then appealed to the Ninth Circuit. The Ninth Circuit, in a split decision decided 2-1 by the three-judge panel, concluded that the DOL was within its rights to expand the rule because the Act was silent on whether it applied to employers who did not take tip credits, and because the DOL's interpretation was reasonable. The judges (at least two of them) were unpersuaded by the restaurant and lodging associations' argument that, because the Act was silent on that point, the rule was contrary to Congress's intent. Because the Oregon District Court granted summary judgment in favor of the restaurant and lodging associations, the case has been remanded back to the District Court for further proceedings consistent with the Ninth Circuit's decision.

Where Do We Go From Here?

There are several appellate options for the restaurant and lodging associations that believe the DOL rule oversteps the Congressional intent of the FLSA, particularly with regard to employers who do not take tip credits. The restaurant and lodging associations could petition for an *en banc* rehearing by the entire Ninth Circuit. They could also lobby Congress to consider a revision to the FLSA for tip pools when employers do not take tip credits.

Individual employers have decisions to make as well. Employers with tip-pooling agreements will have to ensure that tips are only pooled with those "front-of-the-house employees" who customarily receive tips if the Ninth Circuit's split panel ruling is not overturned. Employers who previously had tip-pooling agreements which included "back-of-the-house employees" may also have to deal with the impending wage discrepancy issues, as servers will see an increase in the amount of tips, while cooks and dishwashers will lose out on any future tips. And as some employers even explore the possibility of doing away with tipping in their establishments, there is still more to come on this issue.

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