Insight

IN-DEPTH DISCUSSION

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Fifth Circuit Rules on Tip Pooling

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In Montano v. Montrose Restaurant Associates, Inc., the U.S. Court of Appeals for the Fifth Circuit was presented with what may seem like an easy issue: does including a "coffeeman" in a tip pool invalidate the tip credit? The Fifth Circuit's answer? It depends. While the court attempted to articulate a test that would provide some clarity, it may be such a fact-intensive inquiry that it does not provide employers much guidance.

Case Background

A fine-dining restaurant in Houston required its waiters to participate in a tip pool. At the end of the shift, the tips were divided among the lead waiter (or captain), front waiter, back waiter, busboy, bartender, and coffeeman. Waiters were paid $2.13 per hour, in addition to their tips.

The Fair Labor Standards Act (FLSA) sets the national minimum wage at $7.25 per hour. However, under the FLSA, employers may pay "tipped employees" as low as $2.13 per hour, so long as the employee's tips make up the difference between the sub-minimum wage and the general minimum wage. This "tip credit" may not be used unless "all tips received by [a tipped] employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips." 29 U.S.C. § 203(m). If an employee must share tips with an employee who does not "customarily and regularly receive tips," the employer cannot take the tip credit.

In *Montano,* two waiters alleged that because they had to share their tips with the coffeeman, the tip pool was invalidated and the restaurant should have paid them at least $7.25 per hour. The district court granted summary judgment in favor of the employer, finding that for an employee to be eligible for tip sharing, "his work must be important for direct diner service." The district court held that the coffeeman supported the waiter, and was not an aide or remote worker like a janitor or cook, and the tip credit was proper.

On appeal, the Fifth Circuit addressed whether coffeemen "customarily and regularly" receive tips. The court noted that coffeemen at the restaurant only received tips from the employer-mandated tip pool, thus it would be circular to find that because waiters had to share in their tips, coffeemen customarily and regularly received tips. To give the statute meaning, the question must be whether they would receive tips if waiters were not required to include them in the tip pool.

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Patrons rarely specify a recipient for their tips, which complicates resolving this question.

Opinion letters by the Department of Labor (DOL) have clarified that one's status as an employee who "customarily and regularly receives tips" is "determined on the basis of his or her activities," not by his or her title. U.S. Dep't of Labor, Wage & Hour Div.,Opinion Letter, 1997 WL 9989047, *2 (Nov. 4, 1997). While some argue chefs are the type of employee with whom tipped workers cannot be required to share tips, itamae-sushi and teppanyaki chefs, who prepare and serve meals directly to customers, are tipped employees because they provide customer service. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 2008 WL 5483058, *1 (Dec. 19, 2008). Barbacks, who work in front and around customers are tipped employees, however, a dishwasher who only occasionally responds to customer requests and has a minimal presence in the dining room is not usually a tipped employee. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 2009 WL 649014, *1-2 (Jan. 15, 2009), U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 1997 WL 998047, *1-2 (Nov. 4, 1997).

The Fifth Circuit's Decision

According to Monsanto, previous Fifth Circuit precedent has distinguished front-of-the-house staff (who customarily receive tips) and back-of-the-house staff (who do not), and held direct customer interaction was relevant to tip eligibility. Roussell v. Brinker Int'l., Inc., 441 F. App'x 222 (5th Cir. 2011). The court articulated the presumption that "[a] customer is more likely to tip someone with whom he has contact ..." Thus, the Montano court held that in determining whether coffeemen customarily and regularly received tips, the fact finder must consider (a) the extent of an employee's customer interaction and (b) whether the employee is engaging in customer service functions.

The Fifth Circuit found that the district court erred when it made its determination on the fact that the coffeeman directly aided the waiter and that the job was important – similar jobs such as the chef and dishwasher are clearly important and aid the waiter, but are usually held to be not tipped employees. The court remanded the case because it was unclear from the record whether the coffeeman had any interaction with the diners who left the tips.

In a concurring opinion, Judge Dennis suggested that the majority failed to articulate a clear test that had wide application. For example, hotel housekeeping staff are typically tipped, but they rarely interact with the guests. Conversely, a restaurant manager may be present to the customer and enhance their experience, but diners do not ordinarily tip a manager. A grocery store cashier provides "customer service," but they are rarely tipped. Thus, Judge Dennis lamented that the majority's test failed to provide any real clarity and offered the following test: At the specific business involved in the case, do the customers, as a habitual and usual practice (i.e. customarily), present money with the intent that the employee in question receive it as a gift or gratuity in recognition of a service the employee performed (i.e. as a tip for that employee), and does the employee in fact regularly receive such tips?

Takeaways for Employers

While Judge Dennis may have tried to articulate a better test, it still leaves much to be debated and it remains unclear how an employer would meet its burden in court. How does a factfinder ascertain whether the customer meant for a particular employee to be tipped? Does Judge Dennis suggest that for an employer to prevail, diners must testify as to the intent of their tip? When diners eat, they typically leave a tip, and they may have a general awareness it will be split, but they rarely know how it will be split and which employees participate in the tip pool. The diner may believe the coffeeman is not a tipped employee, and is instead making at least $7.25 per hour. While the diner was satisfied with the service, the diner did not necessarily intend for the coffeeman to be tipped given the assumption he was making $7.25 per hour. However, if the diner had known the employee was eligible to receive tips, their intention may have changed. The concurring opinion offers no explanation as how to determine the intent of the tipper.

In the meantime, after Montano, if an employer in the Fifth Circuit is going to avail itself of a tip credit, the company would be best served if all members of the tip pool engage in customer service functions and interact with customers.

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