8th Circuit: Employees Were Ineligible for FLSA Tip Credit

5/6/2011 By Michael B. Leahy

Employees who spend more than 20 percent of a shift doing nontipped work are ineligible for the Fair Labor Standards Act (FLSA) tip credit, according to the 8th U.S. Circuit Court of Appeals.

The FLSA permits employers to pay tipped employees a minimum wage of $2.13 if the employees work in a "tipped occupation" and their tips make up the difference between $2.13 and the current federal minimum wage, $7.25 an hour. Many restaurants, bars, and other service establishments take advantage of this tip credit. It is not uncommon for service establishments to control labor costs by scheduling a large number of tipped employees to work a shift. Tipped employees are often assigned duties such as washing dishes, stocking serving areas, rolling silverware, and cleaning the kitchen as "side work." In the service industry, servers and bartenders often arrive to work well before any customers come through the door and stay after their last customers leave due to side work requirements. Servers and bartenders who work on an opening or closing shift often have significant stocking, preparation or cleaning responsibilities they must complete before and after the guests leave.

A group of employees of Applebee's International, which operates the popular Applebee's restaurant chain, brought a lawsuit for underpayment of wages. Their theory was that they should have been paid at $7.25 an hour rather than $2.13 an hour because they spent so much time performing side work.

Applebee's argued that, because the servers and bartenders worked in tipped occupations, any time they spent performing side work was incidental to their primary function of performing tipped work. Therefore, Applebee's claimed that the employees could be paid at the $2.13 hourly rate, regardless of the amount of time performing side work, as long as each employee's tips made up the difference between $2.13 per hour and the full minimum wage for the hours worked on the shift.

The district court disagreed, and Applebee's filed an appeal to the 8th U.S. Circuit Court of Appeals. The court of appeals found that the term "tipped occupation" was unclear, and deferred to the Department of Labor's (DOL) regulations on the subject.

The DOL's regulations recognize that it is possible for an employee to be engaged in dual jobs, and states that if one of the dual jobs regularly produces tips while the other does not, the tip credit cannot be taken for hours spent performing untipped work. The regulations actually use a "waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses" as an illustrative example of a scenario where an employer may take advantage of the tip credit, even if "[s]uch related duties" are not "directed towards producing tips." Given this regulatory language, Applebee's thought it should be in the clear.

However, the appeals court found this example to be ambiguous, because the terms "part of the time," "occasionally," and "related duties" were not defined by the regulations.

Therefore, the court turned to other sources of DOL guidance, namely the Wage and Hour Division's *Field Operations Handbook* and the amicus brief the DOL filed in this case.

The handbook concludes that "where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties." Applebee's cried foul, since neither the statute nor any regulation places a quantitative limit on the amount of time a tipped employee can spend performing nontipped side work. However, the appeals court found that a quantitative limit is consistent with the regulation's use of the term "occasional," and was also consistent with the majority of cases that address duties related to tipped occupations.

Therefore, the 8th Circuit deferred to the DOL's handbook interpretation, finding that the 20 percent test is a reasonable interpretation of the DOL's regulations. As for which activities the 20 percent rule applies to, the appeals court declined to weigh in, and limited its holding to approving the 20 percent rule.

The court also considered the plaintiff's cross appeal, which argued that the district court applied the incorrect burden of proof by placing the initial burden of proof on the plaintiffs. However, the 8th Circuit concluded that the district court got it right. Since the tip credit is not contained within the exemptions to the FLSA, the plaintiff bears the initial burden. However, under the burden-shifting framework applied here, if Applebee's did not keep business records from which the employees could differentiate between hours spent performing tipped duties and hours spent performing nontipped side work, then plaintiffs would have a chance to make their case under a relaxed standard of "produc[ing] sufficient evidence."

Fast v. Applebee's International Inc., 8th Cir., No. 10-1725/10-1726 (April 21, 2011).

Professional Pointer: This employer learned the hard way that wage and hour matters can be tricky, even when the DOL's regulations seem clear. Given the current regulatory environment and active plaintiff's bar, it is crucial that all employers, not just those who serve riblets, carefully audit their wage and hour practices.

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Editor's Note: This article should not be construed as legal advice.

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