

**California Attorneys Mull Whether Starbucks Could Prompt Tip-Based Pay for Supervisors**

LOS ANGELES—A California appeals court decision validating a Starbucks Corp. policy that allows certain supervisory workers to share in the apportionment of pooled tips could embolden employers to subsidize management compensation with customer gratuities, according to several attorneys interviewed by BNA for this article.

Starbucks's attorney, however, counters that the June 2 ruling is limited, focusing on a situation where there is a collective tip box and where gratuities are to be shared among those providing the service that prompted the tips. The "shift supervisors" at Starbucks who shared in the tips were hourly workers whose duties closely matched those of the "baristas," he contended.

In the case arising under state law, the California Court of Appeal overturned a lower court order that Starbucks pay baristas required to pool tips with the shift supervisors \$105 million in restitution (*Chau v. Starbucks*, Cal. Ct. App., No. D053491, 6/2/09; 104 DLR AA-1, 6/3/09).

"My concern is that this opinion would embolden employers into relying on tip pools instead of their own resources to compensate managerial employees," David Lowe, plaintiffs' attorney, told BNA.

According to the court, "baristas" are part-time hourly employees responsible for customer service-related tasks, such as working the cash register and making coffee drinks. Shift supervisors are also part-time hourly employees who perform all the duties of a barista, but also are responsible for some additional tasks, including supervising and coordinating employees within the store, opening and closing the store, and depositing money into the safe.

Starbucks's policy permitted the shift supervisors a share of gratuities placed by customers into a collective tip box. The court ruled that nothing in the California Labor Code prevented an employee from a share of the tips just because he or she exercised limited supervisory functions.

According to the appeals court, "Section 351 [of the labor code] precludes an 'employer or agent' from taking a tip that is 'paid, given to, or left for an employee.'"

"Viewed according to its placement within the sentence, the reference to an 'agent' obviously means a person different from the employee whose tip may not be taken," Justice Judith Haller wrote. "[S]ection 351 does not say that an employee (who is also an agent) cannot keep his or her own tip."

"Because a shift supervisor performs virtually the same service work as a barista and the employees work as a 'team,'" the court said, "Starbucks did not violate section 351 by requiring an equitable distribution of tips specifically left in a collective tip box for all of these employees."

David Lowe, plaintiffs' attorney in the case, June 3 said, "My concern is that this opinion would embolden employers into relying on tip pools instead of their own resources to compensate managerial employees." Lowe is with Rudy, Exelrod and Zieff in San Francisco.

"Hopefully this gets flipped at the Supreme Court," employee-side attorney Bryan Schwartz of Oakland-based Bryan Schwartz Law said June 3. "If employers can now go splitting tips with agents, they're going to save a lot on salaries and wages by using customers' money to subsidize what they should be paying in competitive wages."

Muddied Waters

Marguerite Meade, an attorney with San Francisco-based Davis Law Firm, which primarily represents employers, concurred. "For those of us who advise employers trying hard to comply with a complex labor code, this just muddies the waters," she said June 3. "Now you have shift supervisors in the mix. I'm not going to advise my clients to change their policies because I don't know if the decision is going to stand."

But Brian Van Vleck, an attorney who represents employers with Los Angeles-based Van Vleck Turner & Zaller, was less alarmed.

He said the ruling represented "a victory of common sense over an overly strained interpretation of the state labor code," but he added that employers shouldn't assume managers can start freely availing themselves of hourly workers' gratuities.

"It has to be a situation where the customer understands the tips will be shared," Van Vleck explained in a June 4 interview.

Plaintiffs' Attorney Cites Legal, Factual Errors

According to plaintiffs' attorney Lowe, Justice Haller's decision was "riddled with factual and legal errors," and complainants will seek a rehearing based on them.

Failing that, a petition to the state supreme court would follow, he said.

Those factual errors include the court's statements that it was undisputed that customers leave tips for all employees, that the company's definition of a "service team" (those eligible to share in the tips) excludes store managers and their assistants, and that shift supervisors and baristas perform the same work 90 percent of the time.

In its decision, the appellate panel wrote, "[P]laintiffs do not dispute that Starbucks customers leave money in the tip boxes for all [court's emphasis] of the employees who provide service to the customer."

Lowe said the assertion was "pulled from thin air and not supported by the evidence presented at trial."

The Davis Law Firm's Meade commented on the same language: "How does the court know what my intention is when I put a tip in the jar at Starbucks?" she asked. "When I put a tip in there, it's for the lowest rank-and-file worker, not the supervisors."

She also pointed to language in the decision that reads: "Starbucks policy ensures that if a customer places money in a collective tip box with the intention that it be shared among baristas and shift supervisors, each employee will retain his or her fair share of the tip proceeds. In this way Starbucks effectuates the customer's intent and does not permit the misappropriation of gratuities intended for a certain employee or employees."

Said Meade, "I have no idea what the court based that idea on. I don't think what my intent is matters."

Hourly or Salaried?

Donn Taketa of Taketa Sullivan in Westlake Village, which is north of Los Angeles, commented June 3 on the lack of weight the decision gave to the shift supervisors' "true" status. "The court's emphasis on customer intent is misplaced," said Taketa, who represents both employers and employees.

He suggested an important test is whether the shift leads are overtime-exempt, salaried workers. "If they are, then they're not entitled to overtime and they have no business putting their hands in the tip jar," Taketa stated.

Rex Heinke of Akin Gump Strauss Hauer and Feld in Los Angeles represented Starbucks in the case. He confirmed June 4 that the shift supervisors are paid on an hourly basis.

"I disagree that the court focused on customer intent," he added. "The court held that people who provide customer service are entitled to a share of the tips their work helps generate."

He repeated the court's assertion that shift supervisors and baristas do the same job 90 percent of the time, something the court said was accepted as fact by all parties.

"Evidence at trial disputes that," said Lowe. "Shift supervisors do grind beans and serve customers, but they are supervising baristas at all times to ensure they're up to Starbucks standards."

The assertion that both classifications do the same thing 90 percent of the time also implies that baristas are supervising the shift leads, he argued.

But Heinke said the panel did not repeat the trial court's exercise of determining whether or not the shift supervisors were agents of Starbucks.

"The appeals court said that, even assuming that shift supervisors are agents of the company, they are entitled to share in the tips in the situation of a collective tip jar where everyone else shares," he stated.

Distribution v. Allocation

The appellate panel said the trial court's decision favoring plaintiffs was incorrectly based on a line of decisions, including *Jameson v. Five Feet Restaurant Inc.* (107 Cal. App. 4th 138, 2003; 56 DLR AA-1, 3/24/03).

Jameson, the court pointed out, invalidated an employer policy requiring a waitress to share 10 percent of her tips with a floor manager.

But Schwartz said the court's effort to distinguish *Jameson* from the case before it was "hollow."

According to Schwartz, "The way the court describes *Jameson* is exactly the situation we have in Starbucks, and they try to fog things up by bouncing from the distribution of tips to their 'allocation,' so that they've found a new doctrine for employers to hang their hats on that isn't there."

The appeals courts said *Jameson*, and other tip-pooling decisions, do not apply in Starbucks because the company "does not have a policy requiring baristas to give their tips to a shift supervisor." Rather, Starbucks's policy concerns the division of tips intended for a "group" of employees.

"They're trying to say it's not a tip-pooling case," Schwartz said. "Of course it is. You have a tip cup with money put there based on work done by baristas behind the counter."

Heinke countered that there is a difference between leaving a tip for a specific person and doing so in a collective tip jar.

"What was fundamentally driving the decision," said Rex Heinke, attorney for Starbucks, "is the idea that it's only fair that people who provide the service to a customer get to share in the tips generated by their work."

The Changing Workplace

That argument, Schwartz returned, "glosses over" the substantial evidence that shift supervisors are agents and the statute's clear prohibition against their sharing in tips.

Mike Walsh, of Walsh & Walsh in Irvine, Calif., June 4 said the case provided an interesting wrinkle on the usual employee/employer legal wrangle.

"Typically, the California Appeals Court is receptive to wage and hour cases filed by employees," said Walsh, who represents employers. "I think they are a bit more reluctant to handle a tip-pooling case because, although the company is named as defendant, it really pits employees against other employees."

Van Vleck said the case represented an example of an evolved workplace dynamic clashing with an "outdated" labor code section addressing a shop floor characterized by more rigid, tradition classifications.

"There's no bright line between management and workers in this case," he explained. "The hybrid position created by the company put it in a tough place. If Starbucks had reserved the tip money for baristas, the shift supervisor might have sued instead."