Ninth Circuit Revives DOL Rule Limiting Tip Pooling To Tipped Employees

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In Oregon Restaurant & Lodging Association v. Perez, No. 13-35765, 2016 WL 706678 (9th Cir. Feb. 23, 2016), in a split ruling, the Ninth Circuit Court of Appeals ("Ninth Circuit") ruled last week that its own prior ruling in Cumbie v. Woody Woo, Inc., 596 F.3d 577 (9th Cir. 2010) – holding that employers who did not take tip credit could use tip pools that included non-tipped employees – did not preclude the United States Department of Labor ("DOL") from promulgating a contrary regulation. The decision reversed two lower court victories for employers and trade groups, and found that the DOL's subsequent regulation was a reasonable interpretation of the Fair Labor Standards Act ("FLSA") and warranted Chevron deference.

The FLSA permits an employer to pay certain categories of employees less than the statutory minimum wage through the use of a "tip credit." 29 U.S.C. § 203(m). Use of a tip credit for such employees is permitted so long as two primary conditions are satisfied: the employer must give notice to its employees, and tips must be completely retained by employees. Id. Employees can, however, participate in tip pools, as long as tips are distributed exclusively to those employees that "customarily and regularly" receive tips. Id.

In its 2010 decision, Cumbie v. Woody Woo, Inc., the Ninth Circuit had previously found that the FLSA is silent as to whether employers who did not take the tip credit – i.e., who paid their employees at or above the full statutory minimum wage – could use tip pools that included both tipped and non-tipped employees. 596 F.3d 577, 581. Because the statute does not expressly prohibit the practice, the Court reasoned, it was permissible. Id. at 583 (citing Christensen v. Harris County, 529 U.S. 576, 588 (2000)). Therefore, the Court rejected the plaintiff's argument that she was owed her waitressing tips in their entirety in addition to her above-minimum wage hourly rate.

In 2011, shortly after the Cumbie decision, the DOL, after full notice-and-comment, promulgated new regulations interpreting § 203(m). See 29 C.F.R. §§ 531.52, 531.55, 531.59. These regulations explicitly prohibit the employer from taking an employee's tips for any purpose other than use toward a tip credit or a valid tip pool. 29 C.F.R. § 531.52 *("The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section [203(m)]: As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.")* (emphasis added).

Following the revision, a restaurant group sued the DOL to enjoin enforcement of the rule, while a group of casino dealers sued their employer for using an invalid tip pool, based on the new rule. See Oregon Rest. & Lodging v. Solis, 948 F. Supp. 2d 1217 (D. Or. 2013) and Cesarz v. Wynn Las Vegas, LLC, No. 2:13-CV-00109-RCJ, 2014 WL 117579 (D. Nev. Jan. 10, 2014). In both instances, like in Cumbie, the employers paid their employees at or above the statutory minimum wage, but included non-tipped

employees in their tip pools. After both district courts, relying in large part on Cumbie, held in favor of the employers, the cases were consolidated on appeal to the Ninth Circuit.

The Ninth Circuit reversed the lower courts, finding that Cumbie had simply held that the FLSA was silent on the issue, and therefore did not preclude the DOL's regulation clarifying the statute. Oregon Rest., 2016 WL 706678, *5-6. Applying the Chevron doctrine, the Court held that because the FLSA is silent and therefore not unambiguous, the DOL was permitted to regulate the use of tip pooling even where employers do not take a tip credit. Id. at *7. Reasoning that §203(m) needed clarification and that the regulation was consistent with the broad, remedial purpose of the FLSA, the Court held that the DOL's regulation was reasonable such that it must be afforded Chevron deference. Id. at *7-8.

The dissenting judge wrote that Cumbie should have been binding because the Court in that case had found the FLSA was "clear and unambiguous" with regard to tip-pooling for employers who do not take the tip credit. Id. at *10-11. That being the case – the dissent posits – the DOL was not permitted to use a "backdoor" by creating a new rule after the fact simply because the DOL did not agree with the Court's interpretation of the statute. Id. at *12. The DOL, the dissent reads, is "not a legislative body unto itself, but instead must carry out Congress' intent," which in this case would have left the issue untouched by the FLSA. Id.

While this is a Ninth Circuit opinion, all employers throughout the country will likely be very cautious about using tips to supplement the wages of non-tipped employees. The DOL regulations upheld by the Court make clear that tips belong entirely to those employees who "customarily and regularly" receive them, and this clarity should come as a relief to employees.

David E. Gottlieb
Partner
WIGDOR LLP
85 Fifth Avenue, New York, NY 10003
T: (212) 257-6800 | F: (212) 257-6845
dgottlieb@wigdorlaw.com
www.wigdorlaw.com
Rita M. Lenane
Associate
WIGDOR LLP
85 Fifth Avenue, New York, NY 10003
T: (212) 257-6800 | F: (212) 257-6845
rlenane@wigdorlaw.com
www.wigdorlaw.com