Minimum Wage for Wait Staff Banquet Service Charge as Tip

Where minimum wage statute did not mandate that all of a nineteen per cent service charge that defendant resort automatically added to a bill for banquet services be treated as a tip; and where defendants' practice of distributing thirteen per cent of service charge to banquet servers, with remainder going to other support staff, resulted in plaintiff's receiving far more than minimum wage for her service to banquet customers, court did not err in entering summary judgment in favor of defendant resort and its owner, nor in denying plaintiff's cross-motion for summary judgment, on plaintiff's class action complaint for violation of tip credit portion of minimum wage law. Plaintiff Allison Hayden-Tidd, a banquet server who worked for defendant The Cliff House & Motels, Inc. (Cliff House), appealed a summary judgment entered in favor of Cliff House and its owner, defendant Kathryn M. Weare, on behalf of herself and others similarly situated.

Pursuant to 26 M.R.S. § 664(2), Maine law requires "that the entirety of a tip paid by a food service customer must be given to the waiter or waitress who waits on that customer." The issue before the court on appeal was "whether a 'service charge' paid directly to a resort as part of the fees charged for a banquet, as distinguished from ordinary, separate seating service, is a 'tip' that must be paid entirely to the wait staff at those banquets."

Cliff House is located in Ogunquit. Among other offerings, it provides banquet services such as for wedding receptions or business meetings.

"Payment is made in advance of, or separate from, the banquet events."

The bill for banquet services includes an automatic nineteen percent service charge, which appears on the bill as a separate line item from the line item designated "gratuity." Banquet customers rarely pay a gratuity but are required to pay the service charge, a customary practice in the banquet industry.

Cliff House also uses the term "service charge" for an automatic gratuity that it levies on all-inclusive packages, including meals, that individual customers purchase from the resort. In those cases, "the service charge is added to the cost of each meal, and the entire amount of the service charge is treated as a 'tip' and is paid to the individual server who waits on the customer."

Cliff House pools the amounts received from the banquet "service charge" on a weekly basis. It allocates thirteen percent of the weekly pool to the banquet servers, who receive amounts proportional to the number of hours each server worked during the week. The remaining six percent is allocated to non-serving banquet staff, such as the dining room manager and kitchen employees. "Cliff House does not keep any portion of the banquet service charge."
The banquet servers also receive 50% of the minimum wage, or $3.75 per hour. The resort does not pay the full minimum wage because it considers the service charge pool to stand in the place of tips.

Hayden-Tidd's share of the service charge pool "far exceeded minimum wage": from June 2009 through October 2009, she received on average $35.09 per hour, and from April 2010 through June 2010, she received an average of $23.92 per hour.

The operative facts were not in dispute and the parties filed cross-motions for summary judgment. Review of the statute was de novo.

Hayden-Tidd's argument rested on the mandated tip credit provision of § 664(2). She contended that under that provision, the entire banquet service charge was a tip that had to be distributed solely to the banquet wait staff and that Cliff House's failure to do this meant that it was required to pay full minimum wage for the hours worked, or an additional $3.75 per hour.

During the time that Hayden-Tidd worked for Cliff House, § 664(2) required employer to pay minimum wage, but allowed tips to serve as a credit toward not more than 50% of the minimum wage. Section 664(2) prohibited employer from retaining any portion of a tip even when the tip was made by credit card. Thus, § 664(2) expressly provided: "Tips that are automatically included in the customer's bill or that are charged to a credit card must be given to the service employee."

Under Hayden-Tidd's interpretation of § 664(2), the banquet service charge was a tip that was automatically included in the bill and therefore had to be wholly preserved for the wait staff. Under the resort's interpretation, the service charge could be considered an aggregate charge, with only a portion considered to be a tip.

"When, as here, the language of the statute is ambiguous, we seek to determine the meaning that will best give effect to the intent of the Legislature." The statutory scheme as a whole was relevant to the issue of intent, as well as the statute's history and underlying policy.

The Legislature has recently amended the tip credit statute to allow explicitly for compensation allocations such as the one that Cliff House uses in its banquet line of business. The definition of "tip" in § 663(15) has also been amended. Thus, § 663(15) now states: " 'Tip' does not include a service charge added to a customer's bill in a banquet or private club setting by agreement between the customer and employer."

The Legislature did not clearly indicate an intent that the amendments apply retroactively, however. "[T]hus, we do not give retroactive effect to the recent changes for the time period complained of here."

The statute must be considered as it existed in 2009 and 2010.

"The minimum wage statute is meant to protect employees from being paid too little." Because of the amount of Hayden-Tidd's actual compensation, she cannot complain of a violation in the amount that she was paid. Rather, she asserts a violation of the tip credit provision.

The language in § 664(2) referring to "tips automatically included in the customer's bill or … charged to a credit card" was added to the tip credit provision without debate in 2007.

Testimony received during legislative hearings on the bill in which this language occurred indicates that "the Legislature's purpose in enacting that portion of the statute was to ensure that employers did not retain tips that were left by individual customers for servers, whether the tips were included automatically in a customer's bill or as part of a credit card transaction."

Nothing in the legislative history "addressed or precluded" the practice employed by Cliff House in allocating the banquet service charge. This practice was "distinct from the practice of calculating a total gratuity on a bill given to customers at the time of service."

§ 664(2) does not require that every charge automatically added to a customer's bill be considered a "tip."

"The statute did not define 'tip'; the service charge was not called a 'tip' in the contract with the customer; and the service charge was not individually paid to the banquet servers by the persons served." The statute did not preclude the practice adopted by Cliff House, and the court did not err in concluding that Cliff House was not required to consider all of the service charge as a "tip." Pursuant to the allocation used by defendant, "Hayden-Tidd earned three to four times the minimum wage and therefore does not have a remedy to collect unpaid minimum wages pursuant to 26 M.R.S. § 670."

Judgment affirmed.

Hayden-Tidd v. The Cliff House & Motels, Inc. (Saufley, C.J.), Dec. No. 2012 ME 111, Yor-11-550, 9-11-12
Appealed from Superior Court (Broderick, J.)
Timothy Belcher, Harold Lichten, and Hillary Schwab for Hayden-Tidd
Robert W. Kline for Cliff House and Weare
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