



One Minute Memo[®]

Tipped Employees Cannot Spend More than Twenty Percent of Their Time Performing Non-Tip Producing Tasks Eighth Circuit Rules

On April 21, 2011, the U.S. Court of Appeals for the Eighth Circuit in *Fast v. Applebee's International, Inc.* (Case No. 10-1725/10-1726) ruled that an employer is not permitted to pay an employee the sub-minimum wage tip credit rate for time spent performing "general preparation and maintenance duties" if the employee spends more than twenty percent of his time performing such duties. In affirming the District Court's opinion, the Eighth Circuit gave "controlling" deference to the DOL Wage and Hour Division's interpretation of its own regulations, as outlined in its Field Operations Handbook.

Background and Procedural History

Plaintiffs are current and former servers and bartenders of Applebee's, who assert that they were not properly paid minimum wage and overtime compensation in violation of the Fair Labor Standards Act ("FLSA"). The basis of Plaintiffs' claims is that Applebee's improperly paid servers and bartenders the tip-credit rate for all hours worked, even though they spent a portion of their time performing non-tip producing duties such as cleaning, stocking serving areas, prepping food, and otherwise preparing the restaurant to open or cleaning up after the restaurant closed. The District Court certified a class consisting of over 43,000 current and former servers and bartenders, and over 5500 current and former employees have opted-in to this lawsuit.

Applebee's moved for summary judgment on Plaintiffs' claims arguing that servers and bartenders are in "tipped occupations" and, therefore, it was entitled to pay them the tip-credit rate for time spent performing any incidental activities. According to Applebee's the servers and bartenders are compensated at or above minimum wage for all hours worked when taking into account both the sub-minimum wage rate paid by Applebee's and the tips received from customers.

The Plaintiffs did not dispute that they received at least minimum wage for all hours they worked, but argued instead that Applebee's improperly paid employees the tip credit rate when they spent more than twenty percent of their time performing non-tip producing duties. In making this argument, Plaintiffs relied upon the DOL Wage and Hour Division's Field Operations Handbook ("FOH"), which outlines the DOL's interpretation of the FLSA regulations. The District Court accepted the Plaintiffs' argument and deferred to the DOL's interpretation.

The Eighth Circuit's Analysis

The Eighth Circuit affirmed the District Court's decision. In doing so, the Eighth Circuit held that the DOL's interpretation of its FLSA regulations, as reflected in the FOH, was entitled to controlling deference. In reaching this decision, the Court first looked at the regulations governing tipped employees performing dual jobs. See 29 U.S.C. § 516.28; 29 C.F.R. § 531.56,

and concluded that the regulations are ambiguous because they do not explicitly define key terms and concepts, such as when an employee is “engaged” in a tipped occupation. The Eighth Circuit explained that the DOL’s interpretation of these regulations was entitled to controlling deference because it provided specificity to the regulations. Thus, the Court held that a tipped employee may not spend more than twenty percent of his time on the performance of “general preparation or maintenance” work if the employer applies the tip credit to that employee’s wages. The Eighth Circuit declined, however, to address which duties would be included within this twenty percent limit.

In the Plaintiffs’ cross appeal, the Eighth Circuit also addressed whether the district court properly placed the burden of proof on the Plaintiffs to demonstrate that they worked hours for which they were not properly paid. In affirming this portion of the decision, the Eighth Circuit explained that the tip credit is not contained within the exemptions of the FLSA, and thus, the Plaintiffs bear the initial burden of establishing that they were not properly compensated for all hours worked.

Implications

This case is significant for employers who pay employees a tip credit rate. Often such employers use the tip credit rate for employees who are employed as servers or bartenders, without regard to the specific amount of time that these employees spend performing preparatory or “side work.” The *Fast* decision requires such employers to engage in a quantitative assessment of the amount of time that employees spend on tip-producing or non-tip producing work. In addition, because the Eighth Circuit has left open the question as to which particular duties are subject to this twenty percent limit, employers should not assume that any duty would not be encompassed within the definition of “general preparation and maintenance duties.”

An employer is not without recourse here, as other courts have reached different conclusions. See *Pellon v. Bus. Representation Int’l, Inc.*, 528 F. Supp. 2d 1306, 1313 (S.D. Fla. 2007) (rejecting the plaintiffs challenge to use of the tip credit where “the tasks that allegedly violate the minimum wage are intertwined with direct tip-producing tasks throughout the day”), *aff’d*, 291 F. Appx. 310 (11th Cir. 2008).

Furthermore, employers facing tip-credit class action litigation can also use the *Fast* decision to support a motion to oppose conditional or class certification. Conducting the quantitative assessment required by the *Fast* court will necessarily require individualized inquiries, thereby making the case unsuitable for collective or class treatment. For example, different employees may spend different amounts of time each shift on non-tip producing work.

The Court’s ruling suggests that further litigation can be expected in this area. As a result, it is important now more than ever, to ensure that tipped employees are spending at least 80% of their time performing tip producing duties.

For more information, please contact the Seyfarth Shaw attorney with whom you work, or any Labor & Employment attorney on our website.

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