

Class Action Defense Strategy Blog

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Ninth Circuit Clarifies When Non-Tipped Employees May Participate In Tip Pools

In case of first impression for it, the Ninth Circuit clarified the validity of tip pools under the Fair Labor Standards Act ("FLSA") where the tip pool includes employees who are not customarily and regularly tipped. In *Cumbie v. Woody Woo, Inc.*, the Court of Appeals held that where workers make more than the minimum wage and the employer takes no tip credit, tip pools including non-tipped employees do not violate the FLSA.

Plaintiff Misty Cumbie was a server at the Vita Café in Portland, Oregon, which is owned and operated by Defendants Woody Woo, Inc., Woody Woo II, Inc., and Aaron Woo (collectively "Woo"). Woo's servers were paid a wage at or exceeding the Oregon minimum wage, which at the time was higher than the federal minimum wage, and also received a portion of their daily tips. The servers were required to contribute their tips to a "tip pool" that was redistributed to all restaurant employees, except managers. Between 55% and 70% of the tip pool went to the kitchen staff (e.g. dishwashers and cooks), who are not customarily tipped in the restaurant industry. The remainder of the tip pool (between 30% and 45%) was returned to the servers in proportion to their hours worked.

Cumbie alleged that Woo's tip pooling policy violated the FLSA's minimum wage provisions. She argued that the FLSA requires employers to allow employees to keep all of their tips, except where the employee participates in a tip pool with other customarily tipped employees. Because Woo's tip pooling policy included employees who are not customarily and regularly tipped, Cumbie argued it was invalid under the FLSA and Woo was required to pay her the minimum wage plus all of her tips.

The Court of Appeal held that Woo's tip pooling policy did not violate the FLSA because the FLSA only restricts tip pools to employees who are customarily tipped when the employer takes a tip credit. The Court began with the principle that tip pools are valid where there is an explicit arrangement to turn over or redistribute tips and there is no "statutory interference" that would

invalidate the arrangement. In its analysis the Court found that the language of the statute limiting tip pools to customarily tipped employees imposes a condition on taking a tip credit and does not state a freestanding requirement. A "tip credit" is where an employer is allowed to take credit for a certain amount of tips earned by their employees toward the employer's payment of the minimum wage. Tip credits are not allowed under Oregon law, and so Woo was not allowed to, and did not, take one. Because Woo did not take a tip credit, its tip pooling requirement was not subject to this limitation. Therefore, the Court found that there was no "statutory interference" and Woo's tip pooling requirement was valid.

The Court also rejected Cumbie's arguments that Woo's tip pooling policy violated the FLSA's requirement that the minimum wage be paid "free and clear" and that allowing Woo's tip pooling policy would violate the purpose of the FLSA. The Court found that the "free and clear" regulation hinges on whether the tips belong to the servers to whom they are given. Because Woo had a valid tip pooling policy, only the tips redistributed to Cumbie out of the pool belonged to her. Because Woo's tip pooling policy did not take tips belonging to Cumbie away from her, the Court found that Woo did not violate the "free and clear" regulation. Finally, the Court found that its conclusion that the FLSA does not prohibit Woo's tip pooling policy did not thwart the purpose of the FLSA. The purpose of the FLSA is to protect workers from substandard wages and oppressive working hours. Under Woo's tip pooling policy, Cumbie did not experience such conditions because she received a wage that was greater than the federal minimum wage, plus a substantial portion of her tips.

Cumbie provides employers with greater clarity under federal law regarding which employees can be included in a tip pool when their employees make at least the minimum wage and the employer does not take a tip credit. However, employers are cautioned to ensure that any tip pooling policy complies with both the law in their respective state as well as federal law. Simply because a tip pooling policy may be valid under federal law does not necessarily mean that it is legal under state law.