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Joining Ninth Circuit, Fourth Circuit Rejects Cause of Action to Recover Gratuities Under FLSA When No Tip Credit Taken

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In accordance with the Ninth Circuit and several other federal court rulings, the Court of Appeals for the Fourth Circuit yesterday held that an employee cannot bring a claim for wages based on allegedly misappropriated gratuities under the FLSA unless the employer used the tip credit set forth in 29 U.S.C. § 203(m). ***Trejo v. Ryman Hospitality Props***., 2015 U.S. App. LEXIS 13204 (4th Cir. July 29, 2015).

In *Trejo*, the plaintiffs were servers for hotels and restaurants at a complex in Prince George's County, Maryland. The businesses required the plaintiffs to take part in a tip-pooling agreement, which redistributed tips received by the servers to bartenders, server assistants, busboys, and food runners. The plaintiffs alleged that the employers violated the FLSA by "not paying Plaintiffs all their earned tips," and limited their requested relief to, among other things, the amount of "tip wages" allegedly taken by their employers. They did not allege that the employers paid them below the minimum wage or that they were forced to work overtime without proper pay. Rather, the servers conceded their "base salary" always remained above the minimum wage, even absent tips. The district court dismissed the plaintiffs' FLSA claims, concluding that because the servers were paid above the minimum wage, the FLSA's tip credit provision, 29 U.S.C. § 203(m), had no bearing on the case.

The Fourth Circuit affirmed, holding that the servers had no private right of action under 29 U.S.C. § 216(b) because they conceded that they were not seeking damages for unpaid minimum wages, and the tip-credit provision of 29 U.S.C. § 203(m) do not create a free-standing right to bring a claim for lost "tip" wages. Thus, as a matter of law, the inclusion of improper employees within a tip pool and/or failure to notify employees of a tip-pooling policy does not give rise to a private cause of action under the FLSA when employees seek only the recovery of the tips, unrelated to a minimum wage or overtime claim. The Court explained that Section 203(m), when read in context of the minimum wage and overtime provisions of the FLSA as a whole, could give rise to a cause of action "only if the employer was using tips to satisfy the minimum wage requirements." Though the court touched upon the issue in a footnote and a separate concurrence from Judge Pamela Harris, the opinion did not squarely address whether the DOL's 2011 regulations regulating the disposition of tips, which provide that such claims are not limited to employees for whom a tip credit is taken, potentially could impact its analysis of the statutory provisions, which the Court found clear.

Litigation challenges to tip practices remain frequent, and legislation regulating wage practices in the hospitality industry continues. Industry employers must stay abreast of changes to the law in their jurisdictions.

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