Fifth Circuit Addresses FLSA Tip Credits Once Again

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The ***Fifth Circui***t has had tipping on its mind, as the decision of ***Steele v. Leasing Enterprises, Ltd.***, represents its second opinion within ten months addressing this pay practice. On the heels of *Montano v. Montrose****,*** the *Steele* decision tackles the question of whether an employer violates 29 U.S.C §203(m) of the ***Fair Labor Standards Act (FLSA)*** when it offsets tip credits to recover costs related to processing credit card transactions – essentially passing on some of those costs to the tipped employee. (No. 15-20139), 2016 WL 3268996, (5th Cir. June 14, 2016).

Under §203(m) of the FLSA, employers may only claim a tip credit toward minimum wage if all tips received by a tipped employee are retained by the employee. In *Steele*, the Fifth Circuit was asked to decide whether a restaurant employer violates this section when it deducts certain fees from tips paid by credit card. The defendant, the restaurant chain Perry's, retained a flat 3.25% of all credit card tips to offset both credit card issuer fees and other costs which it contends it incurred in collecting and distributing tips (including administrative expenses related to converting the tips to cash for payment on a daily basis, as the employees had specifically requested).

Both parties relied on the only previous circuit decision to address this issue, *Myers v. Copper Cellar Corp*., 192 F.3d 546 (6th Cir. 1999). In *Myers,* the Sixth Circuit held that employers had a legal right to deduct the processing costs imposed by the credit card issuer. Perry's argued that, under the reasoning of *Myers*, it also had the right to offset its own cash-delivery expenses. The Fifth Circuit disagreed and stated that Perry's made a "business decision" by responding to employees' demand to be tipped out in cash each night, instead of folding their tips into their bi-weekly pay checks. These costs were found to be "indirect and discretionary" – as opposed to "*direct and unavoidable"* costs such as the credit card company fees. Therefore, Perry's system did not qualify for a tip offset under 29 U.S.C §203(m). However, the Court excused Perry's from paying liquidated damages and applied the shorter two-year of statute of limitations. It found that Perry's impermissible deduction was effectively less than 1% of the amount tipped, and a Department of Labor investigator at least tacitly advised Perry's that its offset conformed with the FLSA. Thus, the violation was held not to be willful, and the good faith defense applied. Employers should nonetheless be aware that, now that this point of law has been settled by the Fifth Circuit, future courts may find that employers should be "on notice" of this provision moving forward.

The *Montano* and *Steele* decisions, both authored by Judge Higginson, reflect the growing interest that both courts and the plaintiffs' bars have taken with respect to tipping practices and the FLSA.

Employers would do well to ensure that their tip system scrupulously complies with the FLSA.

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