On March 18, 2022, the Eleventh Circuit Court of Appeals ruled in *Compere v. Nusret Miami, LLC*, a collective action under the Fair Labor Standards Act (FLSA), that Nusr-et Steakhouse properly used automatically charged fees on bills to pay its employees’ wages because the fees were service charges. The plaintiffs, a group of tipped employees, had argued these fees were not service charges but instead were tips. The distinction is critical because service charges and tips are treated very differently under federal laws and regulations. Tips are voluntary, given at the
discretion of customers, and must be entirely distributed to eligible employees. Bona fide service charges, on the other hand, are not discretionary and need not even go directly to employees. The Eleventh Circuit’s sole focus was whether Nusr-et Steakhouse properly treated the automatic fees added to bills as service charges instead of tips.

**Background**

For most of the time in dispute, the restaurant classified its service staff as exempt from overtime pay under the FLSA’s 7(i) exemption, applicable to commissioned employees of retail sales or service establishments. Section 7(i) requires, among other things, that employees be paid more than one-and-one-half times the applicable minimum wage under the FLSA for each hour worked and that the majority of their wages be paid from commissions. The restaurant assessed customers a mandatory 18 percent “service charge” on checks, and those service charges were distributed among restaurant employees according to a predetermined point system. The evidence showed the employees’ earnings, including these service charges, were far more than one-and-one-half times the applicable minimum wage for each hour worked. If the service charges had been found to be tips and not wages, the employer would have been prohibited from using the service charges to satisfy the 7(i) exemption.

**The Court’s Analysis**

The court found that the service charge was part of the employees’ “regular rate of pay” and not a tip. The court reasoned that it was the restaurant, not the customer, that decided that the service charge would be paid. Relying on U.S. Department of Labor (DOL) regulations and guidance, the court found that, to qualify as a tip, whether and how much to pay must be “determined solely by the customer.” The service charge imposed by the restaurant was not solely determined by the customer, and thus when the restaurant distributed the service charge payments to the employees, they were paid as wages. The court explained that it did not matter that management sometimes would waive the service charge when a customer expressed issues with the food or service because, even then, it was not solely the decision of the customer to pay the charge or how much to pay. Furthermore, the court was not persuaded by the plaintiffs’ line of cases that held that fees should have been treated as tips. Those cases were distinguishable because fees were paid directly to cabaret dancers in exchange for performances.

The court also explained that whether the restaurant included the service charges in its gross receipts on its tax returns or paid sales taxes on the amounts was “irrelevant” to determining whether the service charges were wages or tips. The court did not express a view on whether the restaurant was complying with its tax obligations.

**Key Takeaways**

The Eleventh Circuit has joined the Fourth Circuit Court of Appeals in holding that mandatory service charges like the ones charged by Nusr-et Steakhouse are wages and not tips under the FLSA.
Hospitality employers that classify service staff as exempt under the 7(i) commissioned retail employee exemption may want to ensure that they are properly imposing service charges so that those payments may be counted as wages in order to satisfy the FLSA's pay requirements. In addition, some state laws may require specific notice or language to customers when a service charge is added to a bill.


National Law Review, Volume XII, Number 84

Source URL: https://www.natlawreview.com/article/eleventh-circuit-service-charges-are-wages-not-tips-under-flsa