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Seventh Circuit: Tipped Employees Can Perform Limited Non-Tipped Work At Tip Credit Rate Of Pay

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The U.S. Court of Appeals for the ***Seventh Circuit*** issued a significant decision last week addressing the compensation of tipped employees who perform non-tipped work. In ***Schaefer v. Walker Bros. Enterprises*****,** 2016 WL 3874171 (7th Cir. July 15, 2016), a restaurant server in Illinois pursued a class and collective action alleging, among other things, that his employer violated state and federal wage and hour laws by failing to pay servers minimum wage for the time they spent on non-tipped duties. The Seventh Circuit affirmed summary judgment dismissal of the lawsuit. The Court held that an employer may compensate a tipped employee at the reduced "tip credit rate" of pay for: (1) limited non-tipped work incidental or related to tipped work; and (2) other negligible non-tipped work. The decision provides helpful guidance to restaurant employers regarding the types of duties that tipped employees may perform at a reduced rate of pay.

The Facts

Robert Schaefer worked as a server at three Original Pancake House restaurants in Illinois. Schaefer and other servers spent most of their time performing tipped work, such as "taking customers' orders and delivering food." However, they also "spent some of their time doing non-tipped duties." In this regard, "[t]hey were required to wash and cut strawberries, mushrooms, and lemons; prepare applesauce and jams by mixing them with other ingredients; prepare jellies, salsas, and blueberry compote for use; restock bread bins and replenish dispensers of milk, whipped cream, syrup,

hot chocolate, and straws; fill ice buckets; brew tea and coffee; wipe toasters and tables; wipe down burners and woodwork; and dust picture frames."

According to Schaefer, these non-tipped tasks rotated among the servers. Overall, servers estimated spending between 10 and 45 minutes daily on these tasks, depending on which tasks were assigned on a given day and the server's "experience and aptitude" at performing them. Because Schaefer and other servers were tipped employees, the restaurants paid them below the standard minimum wage. Schaefer argued that the restaurants were required to pay the servers at least the standard minimum wage for the time they spent performing non-tipped work.

The Lawsuit

Schaefer filed a lawsuit in the U.S. District Court for the Northern District of Illinois, asserting claims under the Fair Labor Standards Act ("FLSA") and the Illinois Minimum Wage Law. He sought to pursue the FLSA claims as a collective action and the state law claims as a class action under Rule 23 of the Federal Rules of Civil Procedure. The District Court certified the lawsuit as a class action on behalf of about 500 servers and conditionally certified the collective action. However, the District Court ultimately granted the defendants summary judgment and dismissed the lawsuit. Schaefer appealed.

The Law

Employers must generally pay non-exempt employees at least the standard minimum wage. However, both Illinois and federal law allow employers to pay employees who customarily receive tips a reduced minimum wage (known as the "tip credit rate") with the expectation that tips will make up the difference. Under Illinois law, an employer must pay tipped employees at least 60% of the regular minimum wage. (The current tip credit rate in Illinois is $4.95 per hour. The current tip credit rate under federal law is $2.13 per hour.)

With respect to the work that tipped employees perform, U.S. Department of Labor regulations distinguish between "dual jobs" and "related duties." *See* 29 C.F.R. §531.56. According to the regulations, an employee who is dual-employed in a tipped occupation and a non-tipped occupation is entitled to receive the regular minimum wage when performing the non-tipped occupation but is only entitled to the reduced minimum wage – or "tip credit rate" – when performing the tipped occupation. In contrast, an employee who performs non-tipped duties incidental to his or her tipped occupation is not deemed to have "dual jobs" and, as long as the non-tipped duties do not exceed 20% of his or her total work time, is only entitled to receive the tip credit rate.

The Department of Labor's Field Operations Handbook states that an employer may pay the tip credit rate for time that tipped employees spend on duties related to their tipped occupation, even if that time is not spent on work that produces tips. For example, a server who occasionally spends time washing dishes may be compensated at the reduced minimum wage, as long as that duty is incidental to the regular duties of the employee and the employee spends no more than 20% of his or her time performing that work.

The Decision

The *Schaefer* Court observed that the 10 to 45 minutes that servers spent on work other than serving customers amounted to between 2% and 9.4% of their time, far less than the 20% maximum permitted for non-tipped work incidental or related to tipped work. Schaefer argued that the time he and other servers spent on work other than serving customers was not incidental or related to the tipped worked. In support of this argument, Schaefer asserted that, at other restaurants, untipped personnel perform this work. The Seventh Circuit rejected this argument.

According to the Seventh Circuit, "making coffee, cleaning tables," "ensuring that hot cocoa is ready to serve and that strawberries are spread on the waffles" are generally the type of activities that both the regulations and the Department of Labor handbook deem to be related to a tipped server's work. The Seventh Circuit further stated that the fact that untipped employees at other restaurants perform some of these tasks does not necessarily render them unrelated to tipped work.

Nonetheless, the Seventh Circuit characterized certain duties that Schaefer and other servers performed as "problematic." In this regard, the Court focused on "wiping down burners and woodwork and dusting picture frames." The Court explained that "cleanup tasks cannot be categorically excluded" from tipped work, but acknowledged that these particular tasks "do not seem closely related to tipped duties." In any event, the Court quoted the U.S. Supreme Court's assertion that the FLSA does not convert judges into "time-study professionals." The Seventh Circuit explained that Schaefer and other servers spent "negligible" time on these duties. According to the Court, "the possibility that a few minutes a day were devoted to keeping the restaurant tidy does not require the restaurants to pay the normal minimum wage rather than the tip-credit rate for those minutes."[1]

Thus, the Court affirmed summary judgment in favor of the defendants.

Conclusion

Restaurant employers often face lawsuits alleging wage and hour violations, frequently involving the compensation of tipped employees. Although potential exposure in this area is usually small on an individual employee basis, plaintiffs typically pursue these lawsuits as class and collective actions, driving potential exposure vastly higher. The *Schaefer* decision demonstrates that employers can minimize their risk by limiting the non-tipped duties that tipped employees perform.

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[1] Schaefer also challenged the notice that the restaurants provided to tipped employees regarding their compensation, but that challenge, which the Court rejected, offers little guidance to employers today because it focused on the law before the Department of Labor issued a May 2011 regulation clarifying the requirements. *See* 29 C.F.R. §531.59(b).

employees-can-perform-limited-non-tipped-work-tip-credit-rate