

MAINE STATE LEGISLATURE

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Y/ta ✓
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Tips as part of minimum wage.

FACTS:

A restaurant pays its counter waitresses the rate of \$1.05 per hour and allows its waitresses to keep any gratuities or tips which the waitresses receive during their course of employment. The minimum wage rate for the State of Maine is established as \$1.15 per hour until October 15, 1966 and thereafter at a rate of \$1.25 per hour. (26 M.R.S.A. § 664). There is no express provision of our state minimum wage law which states that wages shall include or exclude gratuities.

ISSUE:

) May tips received by counter waitresses during the course of their employment be credited as wages by an employer for purposes of fulfilling the employer's obligation of payment of the duly established minimum hourly wage rate to said waitresses?

ANSWER:

A qualified yes.

Although a counter waitress may, by the receipt of gratuities receive a total economic return which is in excess of, or equal to, the required minimum wage rate, such fact alone does not relieve an employer from payment of the duly established minimum wage to said waitress. A gratuity paid by the public to the employee of an employer cannot, standing alone, be a compliance with a statute which requires an employer to pay the employee a certain sum.

Both the State of Maine minimum wage law, 26 M.R.S.A. § 663 (5), and the federal law, the Fair Labor Standards Act (29 U.S.C.A. § 203 (M)) are silent as to the includability of tips as constituting wages. However, there is substantial case law interpreting the federal statute which holds that tips may be included as wage payments by an employer in fulfilling his obligation of payment of minimum wage rates.

In several early cases arising soon after the enactment of the Fair Labor Standards Act it was decided that tips normally received by red caps or porters could be counted as part of the minimum wage required under the act, where there was an agreement to the effect between them and their employer, and a guaranty that an amount sufficient to equal the minimum wage would in any event be paid by the employer. Williams v. Jacksonville Terminal Co. and Pickett v. Union Terminal Co., consolidated for decision and reported together in 315 U. S. 386, 62 S. Ct. 659, 86 L. Ed. 914 rehearing denied 315 U. S. 830, 62 S. Ct. 909, 86 L. Ed. 1224. In the course of its opinion, the Court said:

"In businesses where tipping is customary, the tips, in the absence of an explicit contrary understanding, belong to the recipient. Where, however, an arrangement is made by which the employee agrees to turn over the tips to the employer, in the absence of statutory interference, no reason is perceived for its invalidity. The employer furnishes the facilities, supervises the work and may take the compensation paid by travelers for the service, whether paid as a fixed charge or as a tip. . . ."

Furthermore, it has been held that an agreement between an employer and his employees that tips should be kept by the employees as compensation for services is sufficient to warrant inclusion of such tips as part of the minimum wage even though the employees involved were not required to account to the employer for tips received. Southern Ry. Co. v. Black, 127 F. 2d 280 (1942).

"Where employee receives for his labor the minimum wage provided by this section, it is immaterial whether he receives it direct from employer, or as tips from employer's patrons with employer's consent.

". . . . That the amount of tips received should apply against liability for minimum wages is justice and common sense."

Southern Ry. Co. supra.

The Williams and Southern Ry. Co. cases quoted supra. have been largely followed by the federal courts and reflect the general conclusions reached by the courts that: (1) tips are not wages, but that (2) the parties have a right to agree that tips will be wages, and that (3) when this is done, an employer may become entitled to have tips credited upon wages paid the employee.

The purpose of the Federal minimum wage law and the State of Maine minimum wage law are synonymous, to wit: to insure a minimum level of economic return from covered employment. This purpose is accomplished when counter waitresses are allowed to keep all gratuities, which together with wage payments paid directly to them by their employer, enable such waitresses to receive an hourly employment payment equal to the statutory minimum hourly wage rate.

We are cognizant of several state decisions which have held that employees who receive gratuities may be entitled to the statutory minimum wage in addition to all tips or gratuities which they might receive in connection with their employment. A leading case in which it was held that tips received by an employee may not be offset against the difference between wages paid and the minimum established wage rate is Padilla v. Henning Hotel Co., 75 Wyo. 144, 319 P. 2d 874, 65 A.L.R. 2d 968 (1958).

"In determining receipt by a bellhop of the minimum wages required by state statute, the tips received from third persons are not to be considered, where an oral contract between the parties merely provides that the employee receive a stipulated monthly salary, plus such tips as the employee might receive from others, such contract being properly construed as a disclaimer by the employer of any right to the tips and not as an agreement by the parties that the tips shall be a part of the salary, in view of the absence of any requirement for an accounting to the employer for tips received by the employee, for the turning of such tips into the custody of the employer, and a failure to specify the number of hours of service to be rendered per month."

The Wyoming Court which rendered the decision in the Padilla case also laid emphasis upon the fact that the contract between the bellhop and the employer did not provide a guaranty to the employee that he would be paid the minimum wage in all events.

CONCLUSION:

There is no doubt that counter waitresses must be paid the minimum wage rate established by the Legislature as set forth in 26 M.R.S.A. § 664.

Where there is an agreement between the employer and counter waitresses that the latter may keep all tips received as a result of their employment and where the employer further agrees to guarantee such waitresses that they shall receive a sum on money at least equal to the statutory minimum wage rate, then all tips received by counter waitresses may be credited toward payment of the minimum wage rate by the employer.

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Where there is no agreement between the employer and employees that tips shall be considered as part of compensation for employment, and no guaranty on behalf of the employer that employees shall receive a sum of money as compensation at least equal to the minimum wage rate imposed by statute, then tips may not be credited toward payment of the minimum wage rate by the employer.

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