

HOSPITALITY

ALERT

SECOND CIRCUIT PERMITS LOW LEVEL SUPERVISORS TO PARTICIPATE IN TIP SHARING

By Glenn S. Grindlinger

On November 21, 2013, in *Barenboim v. Starbucks Corp.*, No. 10-4912 (2d. Cir. Nov. 21, 2013), the United States Court of Appeals for the Second Circuit upheld the practice of requiring rank and file employees to share their tips with low level supervisors. The Court's decision, which was widely expected in this closely-followed case, should bring some relief to New York employers in the hospitality industry.

In *Barenboim*, a class of baristas who worked at Starbucks locations throughout New York alleged that Starbucks' practice of requiring baristas to share their tips with employees classified as "shift supervisors" violated New York Labor Law § 196-d (Section 196-d). Both baristas and shift supervisors are hourly wage employees who have a primary responsibility of serving food and beverages to customers. However, shift supervisors – as their job title implies – also have some supervisory responsibilities. They assign baristas to particular positions during their shifts, direct the flow of customers, provide feedback to baristas about their performance, coordinate breaks and schedules, open and close stores, change the cash register tills and on occasion make bank deposits. Notably, shift supervisors do not participate in the process of hiring and firing employees.

After discovery, Starbucks moved for summary judgment on the grounds that shift supervisors have the primary responsibility of serving customers; as such,

they are not managerial employees and therefore under Section 196-d, Starbucks can compel baristas to share tips with shift supervisors. The district court granted Starbucks' motion and rejected Barenboim's assertion that Section 196-d expressly prohibits employers from requiring service employees to share tips with anyone who has any supervisory authority no matter how small or minor.

Barenboim appealed the district court's decision to the Second Circuit. The Second Circuit, in turn, certified the issue to the New York Court of Appeals. On May 26, 2013, the New York Court of Appeals issued its decision finding that employees could be compelled to share their tips with an individual who has a modicum degree of supervisory authority provided that individual's primary duty was the servicing of customers. However, the New York Court of Appeals recognized that "there comes a point at which the degree of managerial responsibility becomes so substantial that the individual can no longer be fairly characterized as an employee similar to the general wait staff within the meaning of [Section 196-d]."

With the guidance of the New York Court of Appeal's decision, the Second Circuit reviewed the actual duties of the shift supervisors to determine if the shift supervisors had such substantial managerial responsibility over the baristas. The Second Circuit easily found that they did not and therefore it upheld

the award of summary judgment to Starbucks.

This case is welcome news for New York hospitality employers. The decision makes it clear that supervisors who direct workflow, assign positions, provide feedback to employees, coordinate breaks and schedules, open and close stores, and handle bank transactions may still participate in a tip pool and employees can be compelled to share their tips with such individuals provided the supervisors have a primary role of servicing customers and they do not have a role in hiring, firing or setting wage rates. However, the decision is not a panacea. Oddly, the Second Circuit issued the decision as a “Summary Order,” which means it does not have precedential

effect. As such, it may be cited by parties in court proceedings, but lower courts (and subsequent Second Circuit panels) are not required to follow it. Nevertheless, the decision is still good news for hospitality employers and it provided additional guidance for employers on which employees can participate in tip pools and share gratuities.

For more information about this Alert, please contact Glenn Grindlinger at ggrindlinger@foxrothschild.com, or another member of the Fox Rothschild New York Labor & Employment Department. Visit us on the web at www.foxrothschild.com.



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