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In a unanimous decision, the California Supreme Court, in *Lu v. Hawaiian Gardens Casino*, has decided that employees do not have a private right of action under California Labor Code section 351 to pursue remedies for misappropriated tips. However, the California Supreme Court did not decide nor prevent an unfair competition law (UCL) cause of action predicated on Labor Code section 351. The exposure of a UCL cause of action against employers for providing tips to "agents" of the employer remains.

California Supreme Court Rejects Employees Right to Sue for Misappropriated Tips But An Unfair Competition Law Cause of Action Remains

By Matthew Marca and Guissu Raafat

Introduction

On August 8, 2010, the California Supreme Court, in *Lu v. Hawaiian Gardens Casino*, No. S171442, decided that employees do not have a private right of action under Labor Code section 351 to pursue remedies for misappropriated tips. However, the California Supreme Court did not decide nor prevent an unfair competition law (UCL) cause of action predicated on Labor Code section 351. The exposure of a UCL cause of action against employers for providing tips to "agents" of the employer remains. As stated in our April 2009 ASAP, *California Appellate Court Protects Employers Who Allow Tips for Dishwashers*, California restaurant and service employers whose employees receive tips should review and maintain proper tip-pooling policies.

Factual & Procedural Background

California Labor Code section 351 provides that a tip is the sole property of the employee to whom it was paid and not the employer or manager.

Plaintiff Louie Hung Kwei Lu (Lu) was employed as a card dealer at defendant Hawaiian Gardens Casino, Inc. (the Casino), from 1997 to 2003. The casino had a written tip-pooling policy that required dealers to set aside 15 to 20 percent of the tips they received on each shift. The dealers kept the remaining 80 to 85 percent of the tips received; the casino did not deduct these sums from the minimum hourly wages the dealers earned. The casino deposited the pooled tips into a "tip pool bank account" and later distributed the money to designated employees who provided service to casino customers. These employees included chip service people, poker tournament coordinators, poker rotation coordinators, hosts, customer service representatives or "floormen," and concierges. The tip pool policy specifically prohibited employers, managers, and supervisors from receiving any money from the tip pool.

The plaintiff brought a class action against the casino and its general manager. The complaint alleged that the casino's tip-pooling policy amounted to a conversion of his tips, and violated Labor Code section 351 among other statutes. The complaint also alleged that the casino's conduct that gave rise to each statutory violation constituted an unfair business practice under the state unfair competition law (UCL).[1]

The trial court ruled in favor of the casino based on the theory that section 351 did not provide for a private right of action. It also granted summary adjudication of the UCL cause of action based on section 351. The court of appeal affirmed the trial court's ruling that section 351 does not provide for a private right of action. However, it reversed the trial court's order granting summary adjudication of the UCL claim based on section 351.

Rejection of a Private Cause of Action Under Labor Code Section 351

The California Supreme Court granted review and decided the pure legal question as to whether Labor Code section 351 creates a private right of action for employees.

On appeal, the plaintiff argued that it would be "absurd" to conclude that the legislature would declare that gratuities belong to employees and yet deny them access to the courts to enforce these property rights. The plaintiff maintained, therefore, that the legislature must have "implicitly created" such an action. He also argued that the only way an employee could recover any misappropriated gratuities would be through a civil action under section 351. In support of this argument, the plaintiff contended that the Department of Industrial Relations, which is charged with enforcing section 351, may only prosecute employers for misdemeanor violations and does not have the authority to bring an action to recover any misappropriated gratuities.

After analyzing the legislative history and various amendments, including the addition of "sole property" language in section 351, the California Supreme Court "affirmed what courts had 'long held': that gratuities ordinarily belonged to the waiter or waitress absent a contrary agreement."[2] The court further stated that section 351 "did not reflect a legislative intent to give employees a new statutory remedy to recover any misappropriated gratuities. Indeed, the fact that neither the Legislative Analyst nor the Legislative Counsel acknowledged that a private right of action exists under section 351 at the time the Legislature included the 'sole property' language or thereafter 'is a strong indication the Legislature never intended to create such a right of action.'"[3] Given this analysis, the California Supreme Court rejected the plaintiff's argument that the legislature implicitly created a private cause of action.

Finally, in rejecting the plaintiff's argument that an action under Labor Code section 351 was his only remedy, the supreme court reasoned that other common law causes of action remain viable. The fact that a private right of action was not created under section 351 does not prevent an employee from bringing a cause of action for conversion. It is important to point out that the court did not use the example of a UCL claim as the type of action an employee could pursue based on Labor Code section 351.

Practical Implications

Although the California Supreme Court has finally put to rest the issue of whether the legislature created a private cause of action under Labor Code section 351, employers should still take care to review their tip-pooling policies. As a practical matter, this case does not change the fact that employers could still face a lawsuit asserting a UCL cause of action predicated upon section 351. Thus, while it is now clear that no private cause of action exists, the exposure of a UCL cause of action against employers for providing tips to "agents" of the employer remains. As stated in our April 2009 ASAP, *California Appellate Court Protects Employers Who Allow Tips for Dishwashers*, California restaurant and service employers whose employees receive tips should review and maintain proper tip-pooling policies.

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[1] CAL. BUS. & PROF. CODE §§ 17200 *et seq*.

[2] *Lu v. Hawaiian Gardens Casino, Inc.*, 2010 Cal. LEXIS 7623 at **10-11 (Aug. 8, 2010), citing Ops. Cal. Legis. Counsel, No. 20547 (Nov. 4, 1971) and Waiters and Waitresses: Tips and Gratuities, at 1.

[3] *Id.* at * 11, citing *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal. 3d 287, 300 (1988).