

RESTAURANT WAITERS CANNOT CHALLENGE HOUSE RULE REQUIRING THEM TO POOL TIPS AND TO SHARE WITH DISHWASHING AND OTHER EMPLOYEES WHO DO NOT PROVIDE DIRECT TABLE SERVICE

By Paul Lipman

Many restaurants and other establishments have a pooled-tip system requiring workers to share tips. In *Etheridge v. Reins Intern. California, Inc.*, the defendant operated some restaurants in California. They had a mandatory tip-pooling policy under which its servers were required to “tip out” certain categories of their employees who did not provide direct table service, such as to kitchen staff, bartenders and dishwashers. The house rules required servers to tip out seven percent of their drink sales to the bartender, seven percent of their food sales to the kitchen, and \$5 out of every thousand to the dishwasher. Two servers brought a class action suit challenging the legality of this mandatory tip-pooling arrangement. The defendant filed a demurrer, which was sustained, and on appeal the ruling was upheld in favor of the restaurant.

Plaintiffs contended that requiring them to share tips with employees who do not provide direct table service violates the Labor Code, and believing that this practice was illegal, pled a cause of action for unfair business practices under Business and Professions Code §17200. Plaintiffs contended that the defendants violated Labor Code §351, governing tips. Some courts hold that there is no private right of action under §351 directly (though some courts do), but by arguing that the defendants’ behavior violated §351, the plaintiffs stated that this allegedly illegal practice, therefore, was an unfair business practice, allowing them to sue for unfair business practices in general. Section 17200 is somewhat like a class action mechanism. It allows anybody who has been harmed by an allegedly unfair business practice to sue the defendant with respect to all of its acts, not just the one toward the individual plaintiff, and to recover attorney’s fees. Thus it has become a very popular means of suing large defendants in recent years. Under §17200, a defendant can be sued for any “unfair business practice” as long as the plaintiff was personally among those harmed, even if the underlying behavior would not itself permit a private lawsuit.

For instance, in this case, the §17200 “hook” was Labor Code §351 which governs tips, but which some courts say does not ordinarily provide a private right of action. There is a split of authority on this, with some courts holding that the government can enforce Labor Code §351 but that people cannot directly sue under it. Therefore, plaintiffs played it safe and sued both under §351 directly, and under §17200.

Labor Code §351 provides in part that tips are the private property of the servers or other people who receive the tips, and that the employer cannot deduct the tips from wages or run a credit system. “Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for” (Labor Code §351). As a result, the courts have declared that an employer may not obtain the benefit of such tips by paying a tipped employee a wage lower than he would be obligated to pay if the employee did not receive tips.

Labor Code §351 is silent about tip-pooling. A prior case, *Leighton v. Old Heidelberg, Ltd.* held that Labor

Code §351 did not prohibit tip-pooling and Etheridge confirms that. In Leighton, the servers were required to tip-out bussers and bartenders. Leighton's rationale, adopted by Etheridge, was that when a patron leaves a tip, he is not necessarily leaving it just for the server, i.e., the tip is not yet the server's private property; he is leaving it for the house's service staff as a whole. "We dare say that the average diner has little or no idea and does not really care who benefits from the gratuity he leaves, as long as the employer does not pocket it, because he rewards for good service no matter which one of the employees directly servicing the table renders it" (Leighton, supra). The point of Labor Code §351 is simply that management cannot deduct or condition pay on the tips; it does not say or assume that when diners leave tips, they do so for the benefit of the servers only, nor does it state that the amount left by the diner is 100 percent automatically the private property of the table server. It only states that the amount which the table server does ultimately get out of the tip cannot be deducted from his pay. Thus, in Leighton, the court held that it was not illegal for the restaurant to require tips to be divided under a tip-pooling arrangement.

But the plaintiffs in Etheridge argued that they had a different situation than Leighton, because in Leighton, the tip-pooling arrangement only applied to people who directly provided service to the tables. Surely, the Etheridge plaintiffs argued, patrons who leave tips did not intend for that money to go to dishwashers or other people who did not provide direct table service. Etheridge held that this was too narrow a reading of the Leighton case. Etheridge holds that under the Leighton rule, all "employees who participate in the chain of service may participate in tip pools." The "chain of service," of course, reaches back to anybody who is part of the overall team and this would include even dishwashers.

Plaintiffs also argued that the Fair Labor Standards Act (FLSA) might somehow help their cause. Ultimately, however, the FLSA, which is Federal, does not preempt California's own laws, and does not apply. The FLSA, for instance, permits a restricted form of tip credit by the employer, the California law prohibits that, and California is permitted to have its own more restrictive laws. Therefore, the FLSA was simply inapplicable to the case and could not be used by the plaintiffs, who had wanted to make a more involved comparison of the two statutes.

Implications:

Tip-pooling is not illegal in California, at least in principle. Etheridge leaves open the question of whether a particular tip-pooling arrangement might be illegal because the arrangement itself is unfair. In his concurring opinion, Justice Croskey notes that there is precedent for requiring servers to tip-out a very high percentage of the tips to other staff, but he also stated that, "It is my view that such a cause of action [for an unfair allocation of pooled tips] may be asserted in a proper case. ... A tip pool, in order to be valid under Labor Code §351, must be fair and equitable..." That issue was not reached in Etheridge, where the mandatory "tip-out" was not clearly excessive. However, Justice Croskey signaled his willingness to listen to such an argument in an appropriate case. The bottom line is that tip-pooling is not automatically illegal in California, and, indeed, courts will generally give tip-pooling arrangements a great deal of latitude, as long as the tips are being divided among workers and not among owners/management. It remains possible, however, for a court to find that a particular tip-pooling arrangement among staff involves an unfair allocation. Therefore, business owners may benefit from consulting an attorney both before and during the implementation of any new tip-pooling arrangement.

IF A FIRED EMPLOYEE'S ATTORNEY APPEALS HER TERMINATION TO THE WRONG AGENCY, SHE IS BARRED FROM LATER FILING WITH THE CORRECT AGENCY ONCE HER TIME HAS ELAPSED

By Jason D. Bettendorf

As a general rule, if a litigant's attorney makes a mistake that amounts to a dismissal or a default, the courts are

required to grant the client relief upon payment of sanctions in order to prevent a miscarriage of justice that was not caused by the client themselves (Code Civ. Proc. 473). There are exceptions to this rule, however. As recently held in *Munroe v. L.A. County Civ. Svc. Comm.*, a fired government employee is barred by her attorney's timely appeal of the termination to the incorrect agency, if the correct agency refuses to grant an extension. For government employees, the appeal of a termination decision and the denial of that appeal is generally a prerequisite to the right to file suit. In *Munroe*, the terminated civil engineer's attorney filed with the Dept. of Public Works' (DPW) attorney rather than with the L.A. County Civil Service Commission. By the time the mistake was caught, more than 60 days had elapsed, making the appeal untimely. Plaintiff asked the correct entity for an extension, arguing that it was just a technicality, since she did file an appeal just with the attorney for her employer the DPW rather than the Commission. She also argued that it was her attorney's mistake not hers, and that the appeal was substantively the same but now served on the correct entity. The County denied the request for extension. This was upheld by the Court of Appeal. The time limit is strict and requires a government employee to appeal termination decisions to the correct entity if the employer (city, county, state, etc) has such a requirement.

In particular, it was held that courts will be very deferential to the government agency that rules on an employees' request for an extension of time to appeal for good cause. The Commission had ruled that plaintiff's reasons did not constitute sufficient "good cause." It was that decision that plaintiff *appealed. Plaintiff was trying to get the courts to force the Commission to reverse their decision that she had not shown good cause for an extension. This procedure, asking a court to tell the government what to do with its administrative process, is called filing for a writ of mandate. There are touchy constitutional concerns here. There are three separate branches of government: executive, legislative and judicial. These branches must be careful not to step on each other's toes more than the Constitution allows. Therefore when the government (executive branch) makes internal administrative decisions through its own departments interpreting its own regulations, the courts as a separate branch of government are hesitant to second guess and reinterpret those decisions. They will only do so if there has been a manifest abuse of discretion. The court here held that it would not substitute its own judgment for that of the Commission when the Commission had decided that plaintiff's reasons did not qualify as good cause for an extension of time to appeal.

While the *Munroe* case dealt specifically with a governmental agency regulation requiring a claimant to follow proper procedures for exhausting her administrative remedies in an employment related action, similar requirements exist in the private employment sector. *Wesierski & Zurek* practices labor and employment law throughout Southern California and has extensive experience defending employment claims, including wage and hour disputes, wrongful termination claims, and sexual harassment lawsuits. We offer seminars to employers who want to train their staff on employment related issues, as well as the recommended practices to minimize exposure to various claims and suits.

SPORTING NEWS

Hearsay Exceptions?? I'm Here to Watch Baseball!

By: Matt McConnell

Usually when Barry Bonds hears, "You're Out!" he is playing in a baseball stadium. But on February 19, 2008, he was in a courtroom as his perjury trial was delayed indefinitely after federal prosecutors notified U.S. District Judge Susan Illston that they will appeal her order to exclude key evidence from the jury.

Bonds is charged with ten counts of false statement to a grand jury and one count of obstruction of justice. A grand jury was investigating the distribution of steroids and other performance enhancing drugs by Bay Area Laboratory Co-Operative ("BALCO").

The most crucial evidence being excluded by the district court are lab results seized from BALCO, log sheets which purportedly assign the urine samples to Bonds, and tape recorded statements between Greg Anderson and another associate. Due to the fact Anderson refuses to testify, the government cannot show that Anderson gave BALCO samples from Bonds and therefore cannot authenticate the evidence. The Government hoped to introduce a BALCO employee's testimony that each time Anderson gave him samples he said something to the effect of "this is from Bonds." The problem is these out of court statements offered for the truth of the matter asserted are hearsay and thus inadmissible. The government argued that Anderson's statements should be admissible on one of the many exceptions to the hearsay rule.

The Government argued that Anderson's utterances were statements against penal interest. Under Federal Rule of Evidence 804(b)(3), a statement is admissible if the proponent shows that (1) the declarant is unavailable as a witness and (2) at the time the statement was made, it was so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability...that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. See Fed. R. Evid. 804(b)(3). However, the Court did not allow the evidence under the statement against interests exception finding that "the statements in question did not tend to inculcate Anderson because there is nothing criminal about submitting a urine or blood sample for analysis at a laboratory."

This mess means that Bonds will not see the baseball field for quite some time. If his trial had ended before spring training, there could have been a possibility of him joining a team early this season. However, according to a clerk for Judge Illston, the trial is not going to "proceed until further notice." It looks like Bonds will be warming the (court) bench a bit longer.

NEW AT WESIERSKI & ZUREK

Wayne H. Hammack. Mr. Hammack graduated in 1994 from the University of California, Riverside, where he received his Bachelor of Arts Degree in Political Science. He received his Juris Doctorate degree from Southwestern University School of Law in 1997. Mr. Hammack is admitted to practice before all courts in the state of California as well as the United States District Court, Central District of California.

Mr. Hammack has extensive trial and litigation experience in the defense of professional liability and personal injury actions. Mr. Hammack's professional liability experience includes the defense of doctors, hospitals, lawyers, insurance agents/brokers, land surveyors, and architects. Mr. Hammack's personal injury practice includes negligence, premises liability, public entity, products liability, construction, and automobile actions. Mr. Hammack also has experience drafting appellate briefs, and has litigated insurance coverage actions.

Mr. Hammack enjoys spending time with his wife and two young children, coaching Little League, and playing golf.

John E. Stobart. Mr. Stobart earned his undergraduate degree from the Ohio State University, where he studied interactive communications, public relations and psychology. He graduated from Thomas Jefferson School of Law, in San Diego, cum laude. He was admitted to the California State Bar in 2007.

Mr. Stobart began his legal career working in a small firm that specialized in defending fraudulent personal injury claims. He also has a background in employment law, unfair competition and general business litigation.

Mr. Stobart enjoys spending time with his family, playing hockey and running. He also plays guitar at open mics and other small gigs.

Nancy Lubrano. Nancy Lubrano earned her undergraduate degree from California State University, Fullerton,

with a Bachelor of Arts degree in English Literature. She earned her Juris Doctrate degree from California Western School of Law in 2009. She was admitted to the California State Bar in 2009.

Ms. Lubrano began her legal career working as a legal secretary and then as a Certified Legal Assistant before attending law school. She has experience in defending employers against all types of claims as well as in general civil litigation. Ms. Lubrano is licensed to practice law before all the courts of the State of California.