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EMPLOYERS IN THE SERVICE INDUSTRY THAT PERMIT COLLECTIVE TIP BOXES MAY WANT TO FOLLOW IN STARBUCKS' FOOTSTEPS

Most Starbucks patrons are aware of the tip box placed near the cash register, but they probably give little thought to how the tips are distributed. Recently, the California Court of Appeal soundly ruled in favor of Starbucks' policy regarding distribution of tips collected in that box. Starbucks' policy requires an equitable distribution (based on hours worked and number of employees) to service team members which include shift supervisors who have limited supervisory authority. The appellate court reversed the trial court decision entered against Starbucks primarily because the trial court erroneously relied on California law that did not apply to the Starbucks case.

The California Labor Code prohibits an employer or agent from collecting, taking, or receiving any gratuity that is paid, given or left for an employee by a patron. A line of decisions, referred to as the Leighton-Jameson Rules, refined statutory interpretation in the specific context of tip pooling. The California Court of Appeal keenly noted significant differences between those cases and the case that challenged Starbucks' policy. Based on the carefully reasoned decision, the Court of Appeal held that Starbucks' policy requiring that tips placed in a collective tip box be shared equitably among service team members is not prohibited under California law merely because the team includes shift supervisors who also have limited supervisory duties.

The Court opinion thoroughly explained how Leighton paved the way for service team tip pooling. Under Leighton, an employer's policy requiring that tips left by patrons be pooled and shared equitably with all employees who served the patron does not violate California law as long as the employer does not take any of the tips. The rationale is that customers do not necessarily care who benefits from the gratuity left. Thus, the Leighton rule is that gratuity left actually belongs to all of the employees who contribute to the service of the patron, *i.e.*, the employees within the customer service chain. On the other hand, the Jameson court prohibited an employer policy that required each server to share 10 percent of nightly tips with a floor manager who directed and controlled servers' acts because it ran afoul of the California Labor code that prohibits an agent from taking any portion of gratuity given to an employee by a patron. That prohibited policy specifically provided for the manager to take 10 percent from service employee tips even though the manager was not within the customer service chain.

Thereafter, the California Court of Appeal expanded the Leighton-Jameson rules to allow tip pooling along the customer service chain in the restaurant industry (*e.g.*, bus service employees and bartenders) and the casino industry (*e.g.*, floor managers). The Court of Appeal was clear that mandatory tip pooling policies are permissible as long as the employer or employer's

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agents do not take any portion of the gratuity given to the employees who contribute to the service of the patron.

In Starbucks, there was no required tip pooling. Rather, the challenged policy provided for division of tips placed in a tip box to benefit a team of employees. Nonetheless, the Starbucks plaintiffs insisted that the Leighton-Jameson rules prohibited the Starbucks policy because shift supervisors were included in that allocation. Plaintiffs argued that shift supervisors were agents and, thus, were prohibited from benefitting from the collective tip box. The Court of Appeal rightfully found that whether shift supervisors qualified as agents was inconsequential despite the fact that shift supervisors have some limited authority to supervise and direct the other service employees (baristas). Most importantly, the Starbucks policy does not permit shift supervisors (and alleged agents) to take tips from other employees.

Consistent with the notion that the patrons intend that gratuity is shared with the employees who contribute to their service, the Court found that Starbucks patrons would conclude that tips left in the collective tip box would be shared with the Starbucks' service team, *i.e.*, baristas and shift supervisors. Under this rationale, the Court noted that patrons could not distinguish between a barista and a shift supervisor because shift supervisors spend 90 to 95 percent of their time performing the same service tasks as baristas. Moreover, Starbucks' policy does not run afoul of California statutory law designed to protect the property of employees and to prevent fraud on the tipping public because if a patron specifically tips one member of the service team, that member is permitted to keep the tip in its entirety.

Simply put, Starbucks' policy does not permit the taking of tips from service employees for the benefit of the employer or non-service providing agents. Additionally, Starbucks does not allow a shift supervisor to take a tip given specifically to a barista. Rather, Starbucks' policy requires that tips placed in the collective tip box be shared fairly – according to the number of team members and hours worked – among the team of baristas and shift supervisors who serve the patrons. Thus, the Leighton-Jameson rules were inapplicable because Starbucks does not require baristas to share any tips specifically given to him or her with an agent. Ultimately, Starbucks' policy is not a violative mandatory tip pooling requirement – neither the employer nor employer's agents collect, take, or receive any portion of tips from service employees. Starbucks' policy provides for a fair distribution of tips given to the service team – including shift supervisors – by way of a collective tip box.

Starbucks is a fairly narrow decision. As such, California employers who permit collective tip boxes should be careful not to run afoul of California law based on their tip distribution policies. Wesierski & Zurek LLP specializes in defending employers against all types of employment-related claims. As such, we have the expertise to advise and train California employers in connection with tipping policies. Moreover, Wesierski & Zurek LLP was involved in the Jameson case cited above and has specific expertise in the issues outlined in this article.

- Nancy N. Lubrano

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PREMISES LIABILITY DEFENDANTS DO NOT GET PROPOSITION 51 OFFSET WHEN INJURY ARISES FROM A NON-DELEGABLE DUTY

The California Court of Appeals has held in *Koepnick v. Kashiwa Fudosan American, Inc*., that Proposition 51, which makes each defendant only liable for their own share of general damages, is not applicable to an injury that arises out of a non-delegable duty such as safety issues. This decision has serious implications for owners or managers of property because they have a nondelegable duty to maintain reasonably safe conditions on their premises. This duty is not affected by the negligence of independent contractors working on their property. Accordingly, under this holding, if a contractor is insolvent or missing, a landlord can be held liable for an entire award of non-economic damages arising out of an unsafe condition on their property, even if the jury found the landlord to only be partially responsible for the accident. Hence the importance of getting certificates of insurance from all contractors.

The doctrine of joint and several liability, otherwise known as the "deep pocket" rule, makes every defendant in a tort action liable for the entire amount of special damages, regardless of their relative degree of fault or responsibility. That way, if the other defendants were gone or insolvent, plaintiff could collect at least his or her medical specials, LOE, and other "hard" damages, but not general damages against any defendant plaintiff chose. Currently, there is a movement gaining momentum to apportion all liability against joint defendants, which would limit each defendant's liability to the defendant's degree of fault, and this is one of the "hot issues" among proponents of tort reform, such as the American Tort Reform Association (http://www.atra.org/show/7345).

In the meantime, the compromise position is called "Proposition 51," which makes all defendants jointly liable for all economic damages but provides for only severable ("several") liability for non-economic damages (pain and suffering).

So how does all this work when a landowner hires an independent contractor, say to wax the floors, who then causes a slip and fall through his own negligence? Common law provided that a landlord who hired an independent contractor was generally not liable for injuries to other people caused by the contractor's negligence in performing the work. But the modern exception involves nondelegable duties. Some duties do not permit a delegation of responsibility. The prime example is safety duties. The landlord has a duty to maintain land and premises in reasonably safe condition, and that duty cannot be delegated to others. Accordingly, if an independent contractor is employed to perform work on the land, the owner is answerable for harm caused by the negligent failure of the contractor to keep the building reasonably safe. This is true even if the contractor performs his work incompetently and carelessly and with no knowledge or input from the landowner.

Unfortunately, Proposition 51 does not apply to such nondelegable safety duties. Thus, even though the broken hip is in truth 100% the fault of the floor maintenance vendor, the landlord cannot get an automatic Proposition 51 offset for the vendor's fault. The landlord has to cross-complain for indemnity to get an offset. Usually, that's the answer and it solves the whole problem. But if the vendor is a "mom-and-pop" operation that is out of business, or files bankruptcy, the landlord is liable for the entire verdict with no offsets. Therefore, it is imperative that the landlord <u>have a good indemnity clause and require a certificate of insurance</u>.

The Court relied on *Srithong v. Total Investment* (1994), where a restaurant patron was injured when hot roofing tar, which was being applied by an independent contractor, seeped through the ceiling and fell on his arm. The contractor went bankrupt. Ultimately, the landlord was liable for the whole verdict with no Prop. 51 offset. If the landlord had required a certificate of insurance, however, the problem would have been avoided.

In the subject case, plaintiff Dennis Koepnick was injured in an elevator being repaired in a building owned by Kashiwa Fudosan America, Inc. The jury found that the elevator repair company and Kashiwa were both responsible for injury and awarded just over $1 million in economic damages and $4.25 million in non-economic damages. The Trial Court ruled that Kashiwa owed Koepnick a non-delegable duty and, as a consequence, Prop. 51 did not limit Kashiwa's liability for noneconomic damages to several only. Relying on the cases cited above, the Court of Appeals agreed, and affirmed that Kashiwa was jointly liable for the entire $4.25 million verdict for non-economic damages.

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A WIN FOR THE EMPLOYER: US SUPREME COURT DECISION ELIMINATES THE ABILITY OF EMPLOYEES TO BRING A "MIXED MOTIVE" CLAIM UNDER THE ADEA

Recently (in *Gross v. FBL Financial Services, Inc.*) the United States Supreme Court held that a plaintiff asserting a disparate-treatment claim under the Federal Age Discrimination in Employment Act ("ADEA") must prove that age was the "but-for" cause of an adverse employment action, and not just a "motivating factor." "Mixed-motives" claims are claims in which the evidence indicates that the employer was motivated by both unlawful and lawful reasons when taking an adverse employment action. This decision is a win for an employer who must defend against age discrimination claims under the ADEA since it prohibits a plaintiff asserting an age discrimination claim from shifting the burden of persuasion to the employer to prove that it would have made the same decision without considering the plaintiff's age. Essentially the law now requires the employee to prove that the adverse employment action actually occurred because of his or her age and not based on some other factor.

FBL Financial Group, Inc. ("FBL") hired plaintiff Jack Gross, in 1971. In 2003, Gross, who was 54 at the time, was reassigned to a new position. Many of Gross' duties were transferred to a newly created position which was given to a younger employee who Gross had previously supervised. Although his salary was the same as that of the younger employee, Gross considered the reassignment a demotion because his duties were transferred to the younger employee. Gross filed suit under the ADEA asserting that he was demoted because of his age.

At trial, FBL argued that it had reassigned Gross as part of corporate restructuring. Gross argued that his reassignment was due, at least in part, to his age. Over FBL's objections, the district court gave a mixed-motive jury instruction, and further instructed the jury that "plaintiff's age need not have been the only reason for defendant's decision to demote the plaintiff." The jury returned a verdict for Gross and FBL appealed. The Eighth Circuit Court of Appeals reversed the jury's verdict, and the matter went before the Supreme Court of the United States.

The Supreme Court held that the burden of persuasion never shifts to the employer regardless of the evidence produced by a plaintiff. Rather, the plaintiff in an ADEA disparate treatment case is now required to prove that age was the "but-for" cause of the alleged discriminatory adverse action.

The Court explained that in 1991 Congress amended Title VII to allow a plaintiff to establish discrimination by demonstrating that one of the protected characteristics in that statute was a "motivating factor" for an employment decision. However, the Supreme Court noted that the Congress did not add a similar motivating factor provision to the ADEA, even though Congress amended certain portions of the ADEA. As a result the Supreme Court determined that Title VII is materially different from the ADEA.

The Court's decision creates a distinction between disparate-treatment claims brought under Title VII (a federal statute that prohibits discrimination based on various criteria, including race and gender) in which "mixed-motives" claims are still permitted, and the ADEA in which they are not.

- Mary H. Kim

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Implications

A cross-complaint against vendors and other defendants may not always be necessary if they are solvent and already sued by plaintiff. Since the landlord is the one who will ultimately hold the bag if plaintiff wants to collect the whole verdict against the landlord only, however, it is often wise to bring in the independent contractor via cross-complaint. The real cure is at the front end: Demand a certificate of insurance. In terms of evaluating cases, thought should be given to whether the contractor can be collected against if there is no certificate of insurance. If not, plaintiff will be entitled to the whole as against the landlord with no offset for the contractor's negligence. This should be factored into potential exposure.

- John E. Stobart & Paul J. Lipman

Editor

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