California Employees Can't Sue For Tip Violations

California Labor Code Section 351 prohibits employers from taking "any gratuity or a part thereof that is paid, given to, or left for an employee by a patron." Section 354 further provides that, if an employer improperly takes tips designated for its employees, the employer is guilty of a misdemeanor and liable for a fine of up to $1,000.00.

While Section 351 is clear that gratuities are "the sole property of the employee or employees to whom it was paid," the section is silent regarding whether an aggrieved employee may bring a private cause of action for violation of that section. Section 355 simply states that enforcement of Section 351 is left to the California Department of Industrial Relations ("DIR"), and that "all fines collected under this Article shall be paid into the State treasury."

On August 9, 2010, in *Lu v. Hawaiian Gardens Casino, Inc.,* the California Supreme Court ruled that Section 351 and its related sections do not permit an employee to bring a private cause of action claiming that the employer violated the California rules regarding tips.

The Facts and Procedural History

Hawaiian Gardens Casino, Inc. ("the Casino") operates a casino that employs more than 650 dealers for games such as poker, pai gow, and blackjack. The Casino has a written mandatory tip pool policy that requires those dealers to segregate 15 to 20 percent of the tips they receive each shift. That percentage of the dealers' tips is then deposited into a "tip pool bank account" for redistribution to other non-dealer, non-supervisory, employees such as chip runners, customer service representatives, and hosts. The policy specifically prohibited employers, managers, and supervisors from receiving any money from the tip pool.

Plaintiff Louie Hung Kwei Lu, a dealer at the Casino, filed a class action lawsuit alleging that the Casino's tip pool policy violated California law, including Labor Code Section 351. Lu argued that the Casino's policy of requiring dealers to contribute a portion of their tips to a bank for the benefit of other employees amounted to a conversion of Lu's property. The trial court disagreed and granted the Casino's motion for judgment on the pleadings on Lu's claim under Section 351, concluding that the Section provides no private cause of action.

The California Court of Appeal affirmed the trial court's ruling, holding that Section 351 does not provide for a private right of action. Moreover, the Court of Appeal found that the Casino's tip pooling policy did not violate Section 351 because the policy was consistent with the court's decision in *Leighton v. Old Heidelberg, Ltd.,* 219 Cal. App. 3d 1062 (1990), which held that tip pooling policies in restaurants do not violate Section 351. The court reasoned that tip pooling in casinos, as in restaurants, allows the employer to "exercise control over its business and ensure equitable sharing of gratuities among the employees who provide service to casino patrons."

The Supreme Court Decision

The California Supreme Court granted review on the issue of whether Section 351 gives employees a private right to sue for violations of that section. The Supreme Court held that Section 351 does not create a private right of action because both the language of the statute, and the pertinent legislative history reveal that the California Legislature did not intend to create a private cause of action. The Supreme Court also noted, however, that the absence of a private cause of action "does not provide a private cause of action does not necessarily foreclose the availability of other remedies."

What *Lu* Means For Employers

Lu will not prevent the filing of actions alleging violations involving tip pooling and gratuities. Rather, because no private right of action exists under Section 351, employees who believe their employers have violated the Section will most likely have to address their claims to the DIR, which might pursue the claims.

For more information, please contact the Seyfarth attorney with whom you work, or any Labor and Employment attorney on our website.

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