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DiFiore v. American Airlines: A Lesson for Employers About The Potential Traps of the Massachusetts Tips Statute

In this month's newsletter, the author describes a recent verdict in the Federal District Court in Boston in favor of a group of skycaps against American Airlines arising out of its policy of charging a $2.00 fee to check curbside luggage.

BY CHRISTOPHER A. CALLANAN
CAMPBELL CAMPBELL EDWARDS & CONROY

On April 16, 2008, a jury in the United States District Court in Boston found in favor of nine of ten skycaps against American Airlines on their claims that American's policy of charging customers $2.00 per bag for curbside check-in services violated the Massachusetts "Tips Statute" and common law by improperly diverting service employee tip income to the company. The case, *DiFiore v. American Airlines*, was well publicized in Boston and beyond for the novelty of its allegations and for its potential impact on the airline industry. Although the plaintiffs prevailed at trial, the Court subsequently allowed a motion for new trial and certified a question of law to the Massachusetts Supreme Judicial Court leaving open questions about the case's future impact.

The plaintiffs sued American Airlines and G2 Secure Staff, LLC, a subcontractor staffing firm that employed nine of the ten named plaintiffs,[1] in the Massachusetts Superior Court. The complaint sought to certify separate classes of Massachusetts skycaps and nationwide skycaps in an effort to capitalize on the unique provisions of the Massachusetts "Tips Statute," Mass.Gen. L. c. 149 §152A, which prohibits an employer from distributing the proceeds of tips or service charges to non-service employees. After the defendants removed the case to Federal Court, the parties agreed to dismiss the claims against G2 because of a pre-existing agreement to arbitrate.

The skycaps alleged that customer tips historically constituted a substantial part of their income. After American instituted the mandatory, cash only charge, their tip income

[1] The first named plaintiff, Don DiFiore, was the only skycap employed directly by American Airlines.

plummeted. They alleged that customers mistakenly perceived the bag charge as a charge for skycap service, so few customers tipped skycaps in addition to paying the charge. Since the charge in fact usurped customer gratuities, they claimed it violated the Tips Statute's fundamental prohibition:

> No employer or other person shall demand, request or accept from any wait staff employee, service employee, or service bartender any payment or deduction from a tip or service charge given to such wait staff employee, service employee, or service bartender by a patron.

The skycaps also made claims for tortious interference with contractual and/or advantageous relations, quantum meruit and conversion.

Prior to trial, the Court granted American summary judgment on the plaintiffs' quantum meruit and conversion claims, reasoning that since a tip is, by definition, a gratuity that is never guaranteed, it cannot be considered property in the plaintiffs possession necessary to establish conversion, nor can it be considered compensation reasonably expected necessary to establish quantum meruit. The Court also denied American's motion for summary judgment based on pre-emption by the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended at 49 U.S.C. §40101 et seq.) finding that the policy at issue dealt with wages, a traditional area of state regulation, not prices, routes or services of an air carrier, to which the Deregulation Act properly applies.

The jury therefore considered two claims: that the bag charge policy violated the Tips Statute and that it constituted tortious interference with advantageous relations. The crux of the plaintiffs' case was that the bag charge was in fact a "service fee" as defined by

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The Vice Chair of the *Aviation and Space Law Committee Newsletter* is:

Alan D. Reitzfeld
Holland & Knight, LLP
New York, NY, USA
Phone: 212.513.3200
E-mail: *alan.reitzfeld@hklaw.com*

the statute:

> A fee charged by an employer to a patron in lieu of a tip to any wait staff employee, service employee, or service bartender, including any fee designated as a service charge, tip gratuity, or a fee that a patron or other consumer would reasonably expect to be given to a wait staff employee, service employee, or service bartender in lieu of, or in addition to, a tip.

American argued that because it did not employ the plaintiffs (other than DiFiore), it had no liability under the statute since "service charge" is defined as a "fee charged by an employer." American also argued that the bag charge was an "administrative fee" as defined by the statute, imposed to defray the costs associated with luggage checked at the curb, not the service provided. The Tips Statute recognizes "administrative fee[s]" in addition to or instead of service charges or tips where the employer provides a written description informing patrons that the fee does not represent a tip or service charge. American had posted signs indicating that the charge was not a tip, although the plaintiffs took issue with the timing of the notices, the language chosen and the method of communication.

In response, the plaintiffs argued that the statute's language contemplates liability for employers and "others" because it provides that "no employer *or other person* shall demand, request or accept …." part or all of a payment designated as a tip or service charge. The plaintiffs argued that "service charge" includes "employer[s]" as expressly stated in the definition and it includes "other person[s]," identified in the statute's description of prohibited conduct. The plaintiffs also argued that American could be liable under the statute because it was "an employer" regardless of the fact the plaintiffs were not its employees. After a trial lasting more than two weeks, the jury found in favor of all but one plaintiff on both tortious interference and violation of the Tips Statute, awarding a total of $325,056.00.

A flurry of post-trial motions culminated in the Court granting American's motion for new trial. The central issue for the Court was the jury instruction, requested by the plaintiffs, that defined "service charge" as applicable to employers and non-employers alike

by reading the phrase "or other person" into the statutory definition. The Court found that a plain reading of the clear and unambiguous statutory language defining "service charge" reveals two distinct scenarios, one involving the conduct of an employer:

> A fee charged by an employer to a patron in lieu of a tip to any wait staff employee, service employee, or service bartender, including any fee designated as a service charge, tip gratuity,

and another not necessarily involving an employer:

> a fee that a patron or other consumer would reasonably expect to be given to a wait staff employee, service employee, or service bartender in lieu of, or in addition to, a tip."

The Court found that a proper instruction on the definition of "service charge" would not read "or other person" into the first phrase, but would instead focus juror inquiry on the second scenario: whether or not "a patron or other consumer would reasonably expect the fee to be given to the service employee." The Court expressed concern that since it had instructed the jury without distinction as to employer or non-employer, the jury could have reached its finding without any consideration of the fact that American was not the skycaps' "employer," and held it responsible only by determining that the charge was "a fee charged to a patron in lieu of a tip, including fees designated as service charges, tips or gratuities." The Court concluded that the instruction impermissibly broadened the "service charge" definition and made it impossible to know if the jury found for the plaintiffs improperly by determining only that the charge was "in lieu of a tip"or whether the jury properly reached its result by determining the charge to be one a customer would reasonably expect to be given to the service employee.

In its order granting a new trial, the Court offered to certify the question to the Massachusetts Supreme Judicial Court. Ultimately, it certified the following question to he SJC:

> Does the Massachusetts Tips Statute's definition of "service charge" encompass two different types of fees, the first of which (a fee charged in lieu of a tip) must be charged by the plaintiff's employer in order to satisfy the definition and the second of which (a fee that patrons reasonably believe will be given to a protected employee) may be charged by anyone?

The SJC's response will have a significant impact on the reach of these claims in the future. Presently, Tips Statute and other wage claims are frequently filed in Massachusetts,

thanks in part to recent legislation clarifying that treble damages are mandatory, not discretionary (without regard to the offending employer's good faith). Mandatory treble damages along with the availability of attorneys fees, costs and twelve percent per annum prejudgment interest will continue to entice plaintiffs' attorneys to file wage claims in Massachusetts. To date, restaurants, caterers, stadia and other food service providers have been the typical target of these claims. Should the SJC interpret the Tips Statute as the *DiFiore* plaintiffs did and eliminate any distinction between employers and non-employers, one can expect more Tips Statute claims against the airline industry and others where outsourcing and subcontracting are commonly used to provide services. Should the SJC maintain the distinction found by the Court in its post-trial decision, the case may become more of a highly publicized footnote than a significant change in Massachusetts law.

ABOUT THE AUTHOR AND HIS FIRM

Christopher A. Callanan is a shareholder with Campbell Campbell Edwards & Conroy in Boston, Massachusetts, where his practice focuses on employment, commercial, premise and product liability litigation and sports law matters. Contact him at *ccallanan@campbell-trial-lawyers.com*.

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