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# Florida's Contradiction and the Tipped Employees' Plight: Why the Florida Civil Rights Act of 1992 Mandates that Florida Raise the Tipped Minimum Wage and the Necessary Standard of Review

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**FLORIDA'S CONTRADICTION AND THE TIPPED EMPLOYEES'  
PLIGHT: WHY THE FLORIDA CIVIL RIGHTS ACT OF 1992  
MANDATES THAT FLORIDA RAISE THE TIPPED MINIMUM WAGE  
AND THE NECESSARY STANDARD OF REVIEW**

Jamy E. Barreau\*

**I. INTRODUCTION**

The minimum wage has been a part of the nation's norm since Saturday, June 25, 1938, with the signing of the Fair Labor Standards Act of 1938 ("FLSA").<sup>1</sup> The Fair Labor Standards Act of 1938 took on a role to combat unsavory child labor practices, set the maximum work week to forty-four hours, and set the first minimum wage in our nation at twenty-five cents per hour.<sup>2</sup> Since then, as inflation occurred, the law has kept its stride with the times, increasing by seven dollars since its inception.<sup>3</sup> Meanwhile, according to the Florida Constitution:

All working Floridians are entitled to be paid a minimum wage that is sufficient to provide a decent and healthy life for them and their families, that protects their employers from unfair low-wage competition, and that does not force them to rely on taxpayer-funded public services in order to avoid economic hardship.<sup>4</sup>

However, a caveat exists regarding Florida's Constitution regarding minimum wage. "For tipped Employees meeting eligibility requirements for the tip credit under the FLSA, Employers may credit towards satisfaction of the Minimum Wage tips up to the amount of the allowable FLSA tip credit in 2003."<sup>5</sup> Also, the "required cash wage" of a tipped employee "must be at least \$2.13."<sup>6</sup> Meanwhile, Florida has mandated that "[i]t is an unlawful employment practice for an employer . . . to discriminate against any individual with respect to compensation . . . because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status."<sup>7</sup>

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1. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T OF LABOR, <https://www.dol.gov/oasam/programs/history/flsa1938.htm> (last visited May 26, 2016)

2. *Id.*

3. See 29 U.S.C. § 206(a)(1)(c) (2016).

4. FLA. CONST. art. X, § 24(a).

5. *Id.* § 24(c).

6. Wage and Hour Division, *Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA)* 1, U.S. DEP'T OF LABOR, <https://www.dol.gov/whd/regs/compliance/whdfs15.pdf> (last visited Sept. 12, 2016).

7. FLA. STAT. § 760.10(1)(a) (2016).

Tipped employees are scavenging for tips to supplement their minimum wage while the other working population of Florida is guaranteed a “healthy life for them and their families . . . and [a wage] that does not force them to rely on taxpayer-funded public services . . . .”<sup>8</sup> Meanwhile, it is up to the Floridian public to determine just how hard tipped employees should work in order to earn their minimum wage.

An issue with the tipping system as it stands is that it creates situations where an employer’s good intentions may backfire on the tipped employee.<sup>9</sup> For example, suppose an owner of a restaurant establishes a rule where patrons must pay “[a] compulsory charge for service, for example, 15 percent of the bill.”<sup>10</sup> “Such charges are part of the employer’s gross receipts.”<sup>11</sup> “Sums distributed to employees from service charges cannot be counted as tips received, but may be used to satisfy the employer’s minimum wage and overtime obligations under the FLSA.”<sup>12</sup> Such a system does not go to aid tipped employees, but to benefit their employers by satisfying tip credit requirements. Therefore, the tipped employee under a compulsory charge situation is not afforded the same tax benefits attached to being able to count said compulsory charges as tips received.

Another issue with the current tipped-employee system is that tipped employees do not have a legal recourse against these consumers that would discriminate against them and provide them with a smaller tip than they otherwise would have earned.<sup>13</sup> Under a normal employee discrimination context, an employee would be able to find recourse from the courts,<sup>14</sup> but the case is not the same in the tipped-employee context. Presently, no standard of review exists to combat this specific issue plaguing the Floridian public. This Note discusses why the caveat imposed on employees in tipped positions should be abolished and proposes a standard of review for the courts to follow in rectifying these situations. This Note further discusses the lingering social biases attached to the tipping system; a proposed standard of review to allow legal recourse; and how based on this socially-sanctioned discrimination, the tipping system must be altered in the State of Florida.

## II. EVOLUTION OF WAGES

### A. Wages in the Colonies

In order to properly analyze Florida’s tipped employees’ plight, it is important to first assess the origins of wages in the United States. Also, it is important to discuss the consequences involved with improper wage considerations within a particular jurisdiction. Wage is defined as “[p]ayment for labor or services . . . based on time worked or quantity produced; [specifically], compensation of an employee based on

8. FLA. CONST. art. X, § 24(a).

9. See Wage and Hour Division, *supra* note 6, at 3.

10. *Id.*

11. *Id.*

12. *Id.*

13. Lu-in Wang, *At the Tipping Point: Race and Gender Discrimination in a Common Economic Transaction*, 21 VA. J. SOC. POL’Y & L. 101 (2014).

14. See generally FLA. STAT. § 760.07 (providing legal recourse for unlawful discrimination).

time worked or output of production.”<sup>15</sup> Since before our country's inception, even the American Colonies had a serious discussion about wages.<sup>16</sup> For employers, it was proving to be a problem to employ people in the colonies in 1625.<sup>17</sup> In fact, in 1625, wages in the American Colonies were considered “excessive” compared to those wages being earned in England.<sup>18</sup> Workers in the American Colonies could earn “three times the wages for their [labor] they [could] in England or Wales . . . .”<sup>19</sup>

Despite the difference in rate of pay between English workers and workers in the American Colonies, the Colonies were faced with a scarce supply of workers.<sup>20</sup> More specifically, skilled craftsmen were a scarcity in the Colonies, causing employers in the budding country to make the decision to “raise their wages to an excessive rate . . . .”<sup>21</sup> These pressures led to two employment reforms in the Northern and Southern Colonies: indentured servitude and slavery, respectively.<sup>22</sup>

“An indentured servant was one who came to the New World under a contract either with a planter who imported him to the colony, or with the ship owner or merchant who transported him for the purpose of disposing of his services upon arrival.”<sup>23</sup> The key distinction between slavery and indentured servitude lies in the fact that slavery involved the lifelong ownership of a person, while indentured servitude involved the “ownership of a person's labor for a fixed period.”<sup>24</sup> More specifically, indentured servitude carried with it a voluntary aura, unlike with slavery.<sup>25</sup> For instance, “[s]ervants used two types of contracts to finance their immigration . . . indenture and redemption contracts.”<sup>26</sup>

An indenture contract involved a person signing a document before seeking passage to the Colonies.<sup>27</sup> Such a document would specify the terms of the servant's services to be performed in the New World “in exchange for their passage.”<sup>28</sup> Meanwhile, a redemption contract involved a person agreeing to pay for passage to the New World after the voyage was completed.<sup>29</sup> Indentured servants, who could consist of men, women, or children, would serve their masters for four to seven years.<sup>30</sup> In exchange, as opposed to a traditional wage, these indentured servants would be

15. *Wage*, BLACK'S LAW DICTIONARY (10th ed. 2014).

16. *History of Wages in the United States from Colonial Times to 1928: Bulletin of the United States Bureau of Labor Statistics, No. 604*, FRASER 7 (1934), [https://fraser.stlouisfed.org/scribd/?title\\_id=4126&filepath=/files/docs/publications/bls/bls\\_0604\\_1934.pdf](https://fraser.stlouisfed.org/scribd/?title_id=4126&filepath=/files/docs/publications/bls/bls_0604_1934.pdf) [hereinafter *History of Wages*].

17. *See id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 8.

22. *History of Wages, supra* note 16, at 8.

23. *Id.* at 27.

24. Alfred L. Brophy, *Law and Indentured Servitude in Mid-Eighteenth Century Pennsylvania*, 28 WILLAMETTE L. REV. 69, 76 (1991).

25. *See id.* at 85.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Indentured Servants*, STRATFORD HALL, <http://www.stratfordhall.org/educational-resources/teacher-resources/indentured-servants/> (last visited Sept. 3, 2016).

housed and fed by their masters for the term of their contracts.<sup>31</sup> As an ultimate payment on the indenture contract, the servants were compensated with “freedom dues of corn, tools, and clothing, and [were] allowed to leave [their master’s] plantation” after their contract terms were satisfied.<sup>32</sup>

Indentured servants sacrificed important life goals, such as getting married or having children, in pursuit of their wages.<sup>33</sup> Indentured servants were not even permitted to leave their master’s plantation without permission.<sup>34</sup> Furthermore, “[a]n unruly indentured servant was whipped or punished for improper behavior.”<sup>35</sup>

Our nation’s early employment practices and those practiced today are indeed worlds apart. Today, the people of our nation are at least afforded protections by the law regarding wages.<sup>36</sup> But the stark reality is that if the people of Florida are to learn any lesson from the past, it is to recognize the importance of proper regulation of wages. As noted above, all of the labor and strict rules that the indentured servants endured were in the name of obtaining what they contracted for. More simply put, the indentured servants sought their wages owed.

As will be further discussed, the need for the government to regulate how employers pay their employees is dire. After all, it took an act of government to end slavery in this country for that method of labor to end. The same would ring true for the current state of wage affairs in Florida. At the inception of our nation, our forefathers created a path that legalized more unsavory forms of wage earning.<sup>37</sup> Florida’s government could have legislated in a way that would afford tipped employees equal protection, but instead of regulating wages in a way that would allow our state to prosper, the Floridian government opted to legislate in a way that would allow tipped employees to be treated in a different manner than non-tipped employees.<sup>38</sup> Such a distinction allows tipped employees to have their wages supplemented by the discretion of citizens and allows that discretion to be used to place tipped minority workers at a disadvantage.

History is beginning to repeat itself. Just as employers sought unique ways of handling paying too much in wages to their employees by finding indentured servants and slaves, a similar trend can be seen in the tipped employee context. For instance, employers of tipped employees have enjoyed a tip credit regarding their employees, without which, these employers would have had no choice but to pay their employees the full minimum wage mandated by the law.<sup>39</sup> Such a system is reminiscent of the indentured servant system in that it resulted in an economic system consisting of uncompensated or poorly compensated workers.<sup>40</sup> The only difference that

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31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. See 29 U.S.C. § 206 (2016); see also FLA. CONST. art. X, § 24(a).

37. See *History of Wages*, *supra* note 16, at 8.

38. See, e.g., FLA. CONST. art. X, §§ 24(a)–(c).

39. *Id.*

40. See Brophy, *supra* note 24, at 76.

exists today is that we are now in a new situation consisting of employer- and state-sanctioned discrimination, as will be further outlined below.

### **B. United States Federal Minimum Wage**

It is clear that the federal government has learned a lesson from the tribulations involved with indentured servitude.<sup>41</sup> Today, it is mandated that in the United States

[e]very employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rate . . . \$7.25 an hour.<sup>42</sup>

Here, the federal government has clearly taken steps to secure a minimum wage for its employees. However, Congress has drawn a distinction between regular employees and tipped employees.<sup>43</sup>

In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to

(1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on . . . August 20, 1996; and

(2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title.<sup>44</sup>

The distinction between the required pay of tipped employees and the rate of pay of non-tipped employees lies in an "understanding . . . that tips will make up for the difference between the tipped and regular pay floor."<sup>45</sup>

The United States Department of Labor ("USDOL") describes a tipped employee as an employee "who customarily and regularly receive[s] more than \$30 per month in tips."<sup>46</sup> In order to legally avoid paying their employees the \$7.25 minimum

41. See 29 U.S.C. § 206 (2016).

42. *Id.* § 206(a)(1)(C).

43. 29 U.S.C. § 203(m) (2016).

44. *Id.* §§ 203(m)(1), (2).

45. Roberto A. Ferdman, *The Problem that's Tearing Restaurants Apart*, WASH. POST (Aug. 20, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/08/20/theres-a-serious-problem-with-how-restaurants-pay-their-staff/>.

46. Wage and Hour Division, *supra* note 6.

wage mandated to regular employees, employers must take a “tip credit.”<sup>47</sup> “[T]he maximum tip credit that an employer can currently claim under the FLSA... is \$5.12... (the minimum wage of \$7.25 minus the minimum required cash wage of \$2.13).”<sup>48</sup> The USDOL specifies that

[e]mployers electing to use the tip credit provision must be able to show that tipped employees receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined. If an employee’s tips combined with the employer’s direct (or cash) wages of at least \$2.13 per hour do not equal the minimum hourly wage of \$7.25 per hour, the employer must make up the difference.<sup>49</sup>

Admittedly, “[w]here an employee does not receive sufficient tips to make up the difference between the direct (or cash) wage payment (which must be at least \$2.13 per hour) and the minimum wage, the employer must make up the difference.”<sup>50</sup> However, trusting employers to abide by this rule has caused issues in Florida in the past.<sup>51</sup> For instance, in *Martins v. MRG of South Florida, Inc.*, Brunna Martins worked as a cocktail waitress for MRG of South Florida, Inc.<sup>52</sup> “Martins alleged that she was paid less than the legal minimum wage by virtue of the fact that MRG took a ‘tip credit’ for hours Martins was in training and not earning tips.”<sup>53</sup> During her tenure with MRG, Martins’s hourly wage fell below the minimum wage when she was “charged for customer walk-outs and breakages.”<sup>54</sup>

MRG “argued that even if Martins was paid a reduced wage for training . . . and [] for breakage and walkout expenses, Martins’[s] employment records and tax returns showed that she never earned less than \$4.23 per hour, the allowable minimum wage in Florida for tipped employees.”<sup>55</sup> Therefore, MRG stood by its motion for summary judgment.<sup>56</sup> However, the court in *Martins* explained that “the federal minimum wage was \$7.25 an hour.”<sup>57</sup> The court in *Martins* further stated that the “FLSA contains a provision which allows an employer to pay its tipped employees less by taking a ‘tip credit’ for the difference between the reduced wage and the regular minimum wage.”<sup>58</sup> Therefore, “[u]nder Florida law, the highest tip credit an employer can take is \$3.02 per hour . . . [and] pay a tipped employee direct wages as low as \$4.23 an hour.”<sup>59</sup> The court in *Martins* ruled that an issue of fact still remained

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47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *See generally* *Martins v. MRG of South Fla., Inc.*, 112 So. 3d 705 (Fla. Dist. Ct. App. 2013) (where an employee sued her employer for violating the Fair Labor Standards Act by failing to pay her the minimum wage).

52. *See id.* at 706.

53. *Id.*

54. *Id.*

55. *Id.* at 706–07.

56. *Id.* at 706.

57. *Martins*, 112 So. 3d at 707.

58. *Id.*

59. *Id.*

“[w]hether [MRG] [could] take [a] tip credit against training;”<sup>60</sup> so the appellate court reversed the lower court’s ruling granting MRG’s motion for summary judgment.<sup>61</sup>

Furthermore, employers have demonstrated their lack of knowledge of the basic requirements of informing their employees of this separate minimum wage requirement. For example, in *Hermoza v. Aroma Restaurant, LLC*, the plaintiff, Hermoza, was an employee of Aroma Restaurant, LLC from April 22, 2008 through April 22, 2011.<sup>62</sup> While working for Aroma, Hermoza “did not have a clear understanding as to how he was to be compensated for his work.”<sup>63</sup> Hermoza brought suit against Aroma, alleging that Aroma “fail[ed] to pay [Hermoza] minimum wage.”<sup>64</sup>

Aroma “argue[d] that the [suit] should be dismissed because [Hermoza] was a tipped employee who was paid the required minimum wage for tipped employees [of \$3.50] . . . .”<sup>65</sup> However, the court in *Hermoza* found that “the employer may only utilize [a tip credit] if ‘such employee has been informed by the employer of the provisions of [29 U.S.C. § 203(m)].”<sup>66</sup> The court ruled that because Hermoza was not informed “of the provisions of the FLSA regarding compensation for tipped employees,” that Hermoza “was not paid minimum wage for the hours he worked.”<sup>67</sup>

*Martins* and *Hermoza* are cases that stand to prove a powerful issue within the realm of minimum wage standards in our country. No matter what regulations are in place and no matter what standards are imposed on employers to ensure that employees will be paid a lawful amount in wages, it is still not a fool-proof protection that all employees will be given the compensation afforded to them by the law. The same rings true for tipped-employee situations. If the employers in *Martins* and *Hermoza* were able to confuse the subtleties of tipped wages, any employer can do so in the tipped employee context.

However, a bigger issue arises when consumers are taken into the mix. In the tipped employee context, the burden of bringing an employee to the federal minimum wage initially lies on the consumers.<sup>68</sup> What is shocking about this revelation is that consumers are not regulated by the law regarding tipping, payment of employees, or wage discrimination.<sup>69</sup> Consumers not being regulated by anti-discrimination or wage laws allows for whatever discrimination facilitated by this process to flourish, unchecked. For instance, in *Martins* and *Hermoza*, both claimants were able to

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60. *Id.* at 708.

61. *Id.* at 708–09.

62. *Hermoza v. Aroma Rest., LLC*, No. 11-23026-CIV, 2012 WL 273086, at \*1 (S.D. Fla. Jan. 30, 2012).

63. *Id.*

64. *Id.*

65. *Id.* at \*2.

66. *Id.*

67. *Id.*

68. See *Questions and Answers About the Minimum Wage*, U.S. DEP’T OF LABOR, [www.dol.gov/whd/minimum-wage/q-a.htm](http://www.dol.gov/whd/minimum-wage/q-a.htm) (last visited Feb. 22, 2017) (stating the minimum wage an employer must pay “tipped employees,” as long as the tips from consumers equal at least \$7.25 per hour).

69. See *United States: Tipping & Etiquette*, [www.tripadvisor.com/Travel-g191-s606/United-States:Tipping.And.Etiquette.html](http://www.tripadvisor.com/Travel-g191-s606/United-States:Tipping.And.Etiquette.html) (last visited Feb. 22, 2017) (stating that while tipping is not mandatory in most states within the United States, it is customary).



seek redress from the courts.<sup>70</sup> But, with no cause of action to do so, tipped employees have no say in the discrimination presented by consumers.

### C. Florida Minimum Wage

Florida has enacted a constitutional amendment which may help to alleviate some of these issues presented:

Persons aggrieved by a violation of this amendment may bring a civil action in a court of competent jurisdiction against an Employer or person violating this amendment and, upon prevailing, shall recover the full amount of any back wages unlawfully withheld plus the same amount as liquidated damages, and shall be awarded reasonable attorney's fees and costs.<sup>71</sup>

However, nothing in this constitutional amendment addresses the direct issue plaguing tipped employees in our fair state. The constitutional provision applies to an “employer or person violating” it.<sup>72</sup> Nowhere does the state constitution impose a standard of liability toward consumers that may discriminate against a tipped employee due to any constitutionally-protected classification. For instance, the Florida Statutes have outlined that “employers shall pay employees a minimum wage at an hourly rate of \$6.15 for all hours worked in Florida.”<sup>73</sup> The statute clearly outlines and specifies that it is the *employer's* duty to ensure that an employee reaches a certain minimum wage, not the duty of a consumer. The distinction is subtle, but Florida has left a means for workers to be discriminated against without a recourse.

### III. THE TIPPED EMPLOYEE'S PLIGHT: THE RACIAL STANDARD

“[T]here are over 1.3 million African Americans, Asians, Hispanics, or Latinos working as restaurant servers, bartenders, barbers, hairstylists, cosmetologists, or taxicab drivers in the United States.”<sup>74</sup> “[A]ll of these individuals are economically dependent on gratuities . . . in tipping.”<sup>75</sup> “[T]ipping service providers is discretionary and the sole actor involved is the consumer, thus allowing for direct tests for consumer discrimination.”<sup>76</sup> Disparate racial motivations in the tipping of service providers was highlighted in a 2005 study of “taxicab drivers in New Haven, Connecticut, Ayres, Vars, and Zakariya . . .”<sup>77</sup> In said study, it was “found that black drivers

70. See *Martins v. MRG of South Fla., Inc.*, 112 So. 3d 705 (Fla. Dist. Ct. App. 2013); see also *Hermoza*, 2012 WL 273086.

71. FLA. CONST. art. X, § 24(e).

72. *Id.*

73. FLA. STAT. § 448.110(3) (2016).

74. Zachary W. Brewster & Michael Lynn, *Black—White Earnings Gap Among Restaurant Servers: A Replication, Extension, and Exploration of Consumer Racial Discrimination in Tipping*, 84 SOC. INQUIRY 545, 547 (2014).

75. *Id.*

76. *Id.*

77. *Id.* at 548.

were given significantly smaller tips than were white drivers and this was true for both white and black customers.”<sup>78</sup>

In another study, “servers working in a full-service restaurant” were observed “in an attempt to replicate the previously documented seller race effects on tipping taxicab drivers.”<sup>79</sup> In this second study, “the authors included a composite index measuring restaurant servers’ skills constructed from customers’ ratings of their servers’ appearance, friendliness, attentiveness, and promptness.”<sup>80</sup> “Net of the effects of service skills on customers’ tipping decisions both black and white restaurant patrons were found to tip black servers less than they did white servers.”<sup>81</sup> This study helped to support the case that “an unconscious bias for whites over African Americans” exists among African-Americans and Caucasian-Americans.<sup>82</sup> It was even determined that customers rated their servers more favorably when it came to being waited on by someone of the same race.<sup>83</sup>

In another study, African-American servers were determined to provide “better service relative to that provided by their white co-workers,” and it was still found that the African-American servers received a disparate amount of tips compared to their white co-workers.<sup>84</sup> The studies presented highlight and outline the blatant biases that Americans can possess with regard to providing tips. The unfortunate reality about these facts is that they mesh well with the issues regarding the tipped-employee minimum wage. Simply put, the necessity of a standard minimum wage is taken out of the hands of the employer and put into the hands of the public. With such a responsibility in the hands of the public, there are no safeguards in place to protect the classes of people the Florida Civil Rights Act of 1992 was made to protect.

For instance, if an employer—under a normal wage scenario—wanted to discriminate against an employee by paying him or her lower wages based off the employee’s “race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status,”<sup>85</sup> the Florida Civil Rights Act of 1992 would protect the employee. However, under the stark realities pointed out in the above-referenced studies, there is no provision within the Florida Civil Rights Act of 1992, or any of Florida’s laws, that would prevent a consumer from blatantly discriminating against a protected citizen by providing a minimal or non-existent tip.<sup>86</sup> Such actions would lead to the discriminated, tipped employees being required to work even harder than their co-workers who are not being discriminated against to meet the minimum wage.

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78. *Id.*

79. *Id.*

80. Brewster & Lynn, *supra* note 74, at 548.

81. *Id.*

82. *Id.*

83. *Id.* at 549.

84. *Id.* at 557–59.

85. FLA. STAT. § 760.10(1)(a) (2016).

86. *See* FLA. STAT. § 760.10 (2016) (including only violations in the context of employer, employment agency, labor organization, and joint-labor management committees, but not including an individual consumer in the coverage of the law).

#### IV. THE LEGAL STANDARD FOR PROVING A DISCRIMINATION CASE

As outlined above, tipped employees stand to make an argument that they face an employer and state-sanctioned form of discrimination via the current tipped minimum wage standards. That evidence alone is not enough for a tipped employee to make a successful legal claim in the court of law to rectify this situation because such a specific claim does not exist in Florida law.<sup>87</sup> Rather, a problem lies in the fact that the recourse that a tipped employee would seek is not the norm in the state of Florida. Case law and legislative acts have circulated primarily around remedies for employment discrimination in the form of refusing to hire someone, or refusing to promote someone.<sup>88</sup> However, this wage discrimination issue is different from other wage concerns in Florida in that it does not involve an employer actively participating in discriminatory practices, only an employer merely acquiescing to them.<sup>89</sup> Therefore, in order to rectify a tipped employee's grievance against this system, the basic premises of anti-discrimination laws should be combined with the situation at hand to create a line of recourse for these tipped employees.

For example, in order to establish a claim for racial employment discrimination under the Florida Civil Rights Act of 1992, an employee must establish that "[t]he employee is a member of a particular race or ethnicity . . . [that the employee] is a 'qualified' individual . . . [and that the employee] suffered the impacts of discrimination because of his race or ethnicity."<sup>90</sup> It is also important to note that "decisions construing Title VII guide the analysis of claims under the Florida Civil Rights Act [of 1992]."<sup>91</sup> According to Title VII, "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin . . ."<sup>92</sup> Analyzation of these elements is the key to finding recourse for the tipped employee's indirect discrimination through the combined actions of consumers, employers, and the legislature.

##### A. The Employee Is a Member of a Particular Race or Ethnicity<sup>93</sup>

In the grand scheme of things, it is not difficult to discern whether someone is a member of a particular race or ethnicity. This element of making a potential claim against employers engaging in the discrimination practice of making their employees

87. *See id.* (a violation of the statute by an individual consumer is not covered by the statute, so no claim can be brought against an individual consumer for a violation of the law).

88. *See generally* Patrick John McGinley, *Elements of an Action*, 21 Fla. Prac. § 903:1 (2015-2016 ed.) (Florida citizens are protected from job termination and job discrimination).

89. *See id.*

90. *Id.*

91. *Harper v. Blockbuster Ent. Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998).

92. 42 U.S.C. § 2000e-2(a)(1) (2016).

93. McGinley, *supra* note 88.

scavenge for tips is simple to prove generally by a physical observation of the claimant. However, there have still been instances where an employee's membership to a particular protected race or class has been an area of analyzation by the courts.<sup>94</sup>

For example, in *Tippie v. Spacelabs Medical, Inc.*, Stephanie Tippie brought suit against Spacelabs Medical, Inc. in a "complaint alleging national origin and gender discrimination in violation of Title VII of the Civil Rights Act of 1964 . . . 42 U.S.C. § 2000e, *et seq.*, and the Florida Civil Rights Act . . . and race discrimination in violation of 42 U.S.C. § 1981."<sup>95</sup> In *Tippie*, Tippie was employed by Spacelabs and had applied for a "'Product Line Manager' or 'Senior Product Management'" position with the company.<sup>96</sup> Tippie argued that "Jukka Turtola, the decision-maker in [*Tippie*],"<sup>97</sup> decided against hiring Tippie as a Product Line Manager on the grounds that she "sp[oke] some basic Spanish but [was] not native."<sup>98</sup> Meanwhile, Tippie argued that the position of Product Line Manager was given to an individual named Facundo Carrillo, who was "native in Spanish."<sup>99</sup>

The trial court in *Tippie* ruled that "Tippie did not present direct evidence of discrimination."<sup>100</sup> The evidence that Tippie presented was not enough to establish that she had been discriminated against for the purposes she presented she was discriminated on.<sup>101</sup> The United States Court of Appeals for the Eleventh Circuit Court agreed with the ruling at the trial level in *Tippie*.<sup>102</sup> The Eleventh Circuit concluded that "[t]he district court did not err in dismissing Tippie's § 1981 race discrimination claim because her only alleged evidence of discrimination was based on the fact that she was not a native of Latin America."<sup>103</sup> The court drew a distinction between claims derived from discrimination against natural origin and claims against an employee's race.<sup>104</sup>

Also, more examples exist as to whether someone fits into a particular race or ethnicity for purposes of making a successful Florida Civil Rights Act of 1992 claim. For example, sex discrimination claims have their limitations, as outlined in *Harper v. Blockbuster Entertainment Corp.*<sup>105</sup> In *Harper*, four males worked for Blockbuster Entertainment Corp.<sup>106</sup> "In May of 1994, Blockbuster implemented a new grooming policy that prohibited men, but not women, from wearing long hair."<sup>107</sup> Following the implementation of the new grooming policy, Harper protested the new policy as

94. See generally *Tippie v. Spacelabs Med., Inc.*, 180 F. App'x 51, 53 (11th Cir. 2006) (discussing whether national origin was a member of a particular race or ethnicity).

95. *Id.*

96. See *id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Tippie*, 180 F. App'x at 54.

101. See *id.*

102. *Id.* at 56.

103. *Id.*

104. *Id.*

105. See generally *Harper v. Blockbuster Ent. Corp.*, 139 F.3d 1385 (11th Cir. 1998) (discussing the requirements and limitations of sex discrimination claims).

106. *Id.* at 1386.

107. *Id.*

being discriminatory against men by “refus[ing] to cut [his] hair.”<sup>108</sup> Consequently, Blockbuster “terminated” Harper for refusing to cut his hair and protesting the grooming policy.<sup>109</sup> Harper filed suit against Blockbuster alleging:

(1) sex discrimination under Title VII, 42 U.S.C. §§ 2000e *et seq.* (“Title VII”); (2) sex discrimination under the Florida Civil Rights Acts of 1992, Fla. Stat. §§ 760.01 [sic] *et seq.* (“Florida Civil Rights Act”); (3) unlawful retaliation under Title VII; and (4) unlawful retaliation under the Florida Civil Rights Acts.<sup>110</sup>

The trial court granted Blockbuster’s motion to dismiss, which incited Harper’s appeal to the Eleventh Circuit.<sup>111</sup> The court discussed how Harper’s claim was barred by precedent stating “that differing hair length standards for men and women do not violate Title VII . . . .”<sup>112</sup> Therefore, the court in *Harper* affirmed the decision of the trial court in that Harper’s argument was too attenuated from the actual standard for discrimination.<sup>113</sup>

Meanwhile, the history of employment discrimination actions has actually provided case law as guidance for situations that may satisfy this prong of a discrimination suit. For example, in *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, Newport News Shipbuilding and Dry Dock Company successfully sued the Equal Employment Opportunity Commission (“EEOC”) on the grounds of sex discrimination.<sup>114</sup> In *Newport*, after Congress “amend[ed] Title VII of the Civil Rights Act of 1964 ‘to prohibit sex discrimination on the basis of pregnancy,’”<sup>115</sup> Newport “amended its health insurance plan to provide its female employees with hospitalization benefits for pregnancy-related conditions to the same extent as for other medical conditions.”<sup>116</sup>

However, Newport’s new pregnancy plan provided “less favorable pregnancy benefits for spouses of male employees.”<sup>117</sup> Before the changes to Newport’s policy, all covered men and women, whether they were employees or dependents, were treated similarly.<sup>118</sup> However, after the changes took effect, Newport “provided the same hospitalization coverage for male and female employees themselves for all medical conditions, but [Newport] differentiated between female employees and spouses of male employees in its provision of pregnancy-related benefits.”<sup>119</sup> One of

108. *Id.* at 1387.

109. *Id.*

110. *Id.*

111. *Harper*, 139 F.3d at 1387.

112. *Id.*

113. *See id.*

114. *See Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 685 (1983).

115. *Id.* at 670.

116. *Id.* at 671.

117. *Id.*

118. *Id.* at 671–72.

119. *Id.* at 672.

Newport's male employees brought a charge through the EEOC, asserting that Newport "had unlawfully refused to provide full insurance coverage for his wife's hospitalization caused by pregnancy."<sup>120</sup>

In *Newport*, the Supreme Court of the United States determined that Newport had participated in sex discrimination through its new "pregnancy-related benefits."<sup>121</sup> The Court determined that Newport's "practice [was] . . . unlawful"<sup>122</sup> because it "provide[d] limited pregnancy-related benefits for employees' wives, and afford[ed] more extensive coverage for employees' spouses for all other medical conditions requiring hospitalization."<sup>123</sup> "Thus the husbands of female employees receive a specified level of hospitalization coverage for all conditions; the wives of male employees receive such coverage except for pregnancy-related conditions."<sup>124</sup> The Court went on to say that "[t]he 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions."<sup>125</sup>

Although *Tippie*, *Harper*, and *Newport* do not deal with the issue of race directly, they illustrate the necessity of anti-discrimination protection from the government and the need for court intervention where the law is unclear on discrimination matters. Without the Florida Civil Rights Act of 1992 and Title VII, employers could blatantly invade the lives of their employees with discriminatory agendas by withholding certain benefits and rights afforded to other employees. For instance, as discussed *supra*, it would be relatively easy to ascertain that an African-American or Asian-American tipped employee belonged to a certain class of protected persons by observing his or her outward appearance. However, suppose that a tipped employee's association with a particular protected class was not so readily observable?

Just as in *Tippie* and *Newport*, the claimants in those cases did not belong to a class of protected people that were so readily observable. Such an observation is important for a tipped employee that could possibly bring forth a claim of discrimination based on unequal compensation.<sup>126</sup> The fact remains that it is possible for a tipped employee to meet this element of proving a discrimination claim against an employer when that tipped employee belongs to a protected class and is forced to work harder for tips than his or her counter-parts that do not belong to such a class of persons.<sup>127</sup> Coupled with the discriminatory tipping practice studies, this proposed element for the tipped employee's plight should be enough to abolish the tipped minimum wage altogether.

120. *Newport*, 462 U.S. at 674.

121. *Id.* at 683.

122. *Id.*

123. *Id.*

124. *Id.* at 683–84.

125. *Id.* at 684.

126. See Tom Jacobs, *Black Restaurant Servers Get Smaller Tips*, THE PACIFIC STANDARD (Sept. 4, 2014), <https://psmag.com/black-restaurant-servers-get-smaller-tips-59216a5c4e77#.24a1kn67l>.

127. See *id.*

### B. The Employee Is a Qualified Individual<sup>128</sup>

In a standard employment discrimination context, the person asserting the claim of discrimination would also need to prove that he or she was “qualified for, and applied for, a job.”<sup>129</sup> For example, in *Samedi v. Miami-Dade County*, a woman named Francoise Samedi brought suit against Miami-Dade County on the grounds of discrimination “on the basis of sex and of national origin.”<sup>130</sup> Samedi immigrated to the United States from Haiti in 1992.<sup>131</sup> Upon arriving, Samedi was able to secure employment “through various temporary agencies.”<sup>132</sup> “These agencies secured work for [Samedi] as a temporary employee in the Trash Division of the Solid Waste Management Department of Metro Dade County.”<sup>133</sup>

At the beginning of her tenure with the Trash Division of the Solid Waste Management Department of the county, Samedi “spoke only Creole” and “spoke and understood very little English.”<sup>134</sup> “[Samedi’s] lawsuit stems from numerous incidents of heinous sexual assaults that two [Miami] employees, Lem Jones and Donald Godwin, allegedly committed against [Samedi] at various times . . . .”<sup>135</sup> Despite the sexual assaults, Samedi forewent disclosing them to Miami “for fear that she would lose her job.”<sup>136</sup> However, Samedi eventually “interviewed for a permanent job with [Miami] in March 1997, and on two other occasions.”<sup>137</sup> “That position required communication skills such that the employee can both ‘instruct[] citizens in backing their vehicles in order to dump their trash’ and orally ‘inform[] the public as to the procedures for dumping.’”<sup>138</sup> Also, the position “require[d] an eighth grade education.”<sup>139</sup> Although she continued to work for Miami, Samedi “did not receive an offer for this position.”<sup>140</sup>

On August 25, 1997, Samedi, along with “other temporary workers,”<sup>141</sup> began seeing a reduction in work hours.<sup>142</sup> Samedi “and the other workers went to see [Miami] about the reduction in their work hours” and were “directed to the office of Pamela Payne, Chief of the Human Resources Division for [Miami’s] Department of Solid Waste Management.”<sup>143</sup> It was then that Samedi reported her “allegations

128. McGinley, *supra* note 88.

129. *Samedi v. Miami-Dade Cty.*, 134 F. Supp. 2d 1320, 1344 (S.D. Fla. 2001).

130. *Id.* at 1327.

131. *Id.* at 1324.

132. *Id.*

133. *Id.*

134. *Id.* at 1324–25.

135. *Samedi*, 134 F. Supp. 2d at 1325.

136. *Id.* at 1326.

137. *Id.* at 1326–27.

138. *Id.* at 1327.

139. *Id.*

140. *Id.*

141. *Samedi*, 134 F. Supp. 2d at 1327.

142. *Id.*

143. *Id.*

of sexual assault and sexual harassment against Jones and Godwin.”<sup>144</sup> “On September 8, 1997, [Samedi] lodged a County Affirmative Action Complaint and an EEOC Charge of Discrimination on the basis of sex and national origin discrimination.”<sup>145</sup>

At trial, three concerns existed over Samedi's qualifications for the permanent job she had interviewed for.<sup>146</sup> The concerns brought forth by Miami are as follows:

First, the job description for Waste Attendant I describes “completion of the eighth school grade” as part of the “desirable experience and training” for the position.

....

Second . . . the Waste Attendant I job description lists among “illustrative tasks” for the position [as] . . . “[i]nstructs citizens in backing up their vehicles in order to dump their trash;” and “[i]nforms the public as to the procedures for dumping at the trash transfer stations both orally and through the use of instruction pamphlets.”

....

Third . . . [Samedi] did not come across well during her Waste Attendant I interview . . . .<sup>147</sup>

The court in *Samedi* sided with Miami, finding that Samedi could not speak English, and the court even noted that those interviewing Samedi were not interested in providing Samedi with the position partly because she could not speak English with the proficiency needed for the job.<sup>148</sup> Therefore, the United States District Court for the Southern District of Florida ruled that Samedi failed to prove her prima facie case because “[Samedi] did not show that she was qualified for the job for which [Miami] did not hire her.”<sup>149</sup>

The *Samedi* case illustrates the application of the second element to a traditional Title VII claim in action. Although it was not a favorable outcome for Samedi, it provides enough analysis to allow future courts to apply to similar discriminatory situations. Also, it provides a basis for a proposal of a different element to be applied to the instance where a tipped employee is being made to work harder for tips than his or her co-workers that are not being discriminated against for reasons of race.

As applied in *Samedi*, the requirement to prove that the claimant was qualified for the position is important to a claim for race discrimination in that, without being qualified for the job one is fighting for, one cannot be surprised when an employer does not hire one for the position. The same line of logic should hold true for this

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144. *Id.*

145. *Id.*

146. *Id.* at 1344.

147. *Samedi*, 134 F. Supp. 2d at 1344–45.

148. *Id.* at 1345.

149. *Id.*



standard for the type of wage discrimination that impacts the tipped employee community. But, seeing as in a tipped employee's position the tipped employee is not being denied a promotion or a position based on his or her race, such a standard would not be applicable. Therefore, to make a prima facie case for compensation discrimination of tipped employees, a tipped employee would have to prove that he or she works as well as any other employee that is not being discriminated against.

Such a standard would be difficult to prove, but so long as the tipped employee is able to provide objective proof of his or her diligence to the job, he or she should be able to satisfy this requirement. This standard would coincide with the same qualification standard imposed in *Samedi* in that the standard in *Samedi* went to prove an objective capability of the allegedly aggrieved individual, the absence of which would render discrimination impossible. The same would ring true for a tipped employee in this precarious situation. A tipped employee could bring evidence of performance evaluations and co-worker testimony in order to prove that this employee had worked enough to objectively receive a certain amount of tips per shift. This would be the only means in which a tipped employee could fight for a fair wage because there is no recourse against the consumers.

### C. The Employee Has Suffered the Impacts of Discrimination Because of His Race or Ethnicity<sup>150</sup>

This final element of a prima facie case of discrimination is not traditionally difficult to prove.<sup>151</sup> Even when an employer is discriminating against an employee's age, this element can be met with ease.<sup>152</sup> For instance, in *Sheppard v. Sears, Roebuck & Co.*, Diana Sheppard worked for Sears "as a service technician" when she was about thirty years of age.<sup>153</sup> Sheppard had been described by supervisors as being a "good technician" and "an excellent technician, good associate."<sup>154</sup> In her capacity as a service technician, "Sheppard would visit customers' homes to repair washers and dryers."<sup>155</sup> Therefore, "[d]riving is an important part of the service technician's job."<sup>156</sup> Because of this, Sears implemented a "program, called 'fleet safe,' that provides a means for the public to provide feedback regarding Sears' drivers using a toll-free number."<sup>157</sup> A report for unsafe driving, per Sears' policy, could result in "disciplinary action, up to and including termination."<sup>158</sup>

150. McGinley, *supra* note 88.

151. See *Sheppard v. Sears, Roebuck & Co.*, 391 F. Supp. 2d 1168, 1177 (S.D. Fla. 2005); see also *Maynard v. Bd. of Regents of Div. of Univs. of Fla. Dep't of Educ. ex rel. Univ. of S. Fla.*, 342 F.3d 1281, 1289 (11th Cir. 2003).

152. See *Sheppard*, 391 F. Supp. 2d at 1177.

153. *Id.* at 1172.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Sheppard*, 391 F. Supp. 2d at 1172.

“On July 29, 1997, Sheppard was involved in an automobile accident while driving a Sears vehicle.”<sup>159</sup> However, “Sheppard was later told by her supervisor, Bennett Woods, that this 1997 accident was not considered as part of her driving record.”<sup>160</sup> “On May 16, 2001, Sheppard was involved in a second automobile accident while driving a Sears vehicle.”<sup>161</sup> Woods “issued a written warning because of the [2001] accident.”<sup>162</sup> At this point, Sheppard was put “on notice that she could lose her driving privileges if she was involved in another accident.”<sup>163</sup> Despite this, “[o]n January 3, 2002, Sheppard was involved in an accident when the wheel of her Sears van rubbed against the door of another driver’s vehicle.”<sup>164</sup> Consequently, “Woods issued another written warning to Sheppard which stated: ‘On 1/04/02 Sheppard while backing her Sears vehicle in [a] customer drive way she was turning her front wheel and [her] tire scratched customer car door.’”<sup>165</sup> In 2002, after several other driving infractions, Sheppard met with Woods “to [be] inform[ed] that Sears was revoking her driving privileges.”<sup>166</sup>

Sheppard eventually brought “four counts of discrimination” against Sears.<sup>167</sup> The counts were as follows:

Count One, for age discrimination under the Age Discrimination in Employment Act (“ADEA”), Count Two, for age discrimination under the Florida Civil Rights Act (“FCRA”), Count Three for sex discrimination under Title VII of the Civil Rights Act (“Title VII”), and Count Four for sex discrimination under FCRA.<sup>168</sup>

The court’s analysis in *Sheppard* led to the elements of a prima facie case for employment discrimination being discussed, notably that “she suffered an adverse employment action.”<sup>169</sup> Regarding this particular element, the United States District Court for the Southern District of Florida found that the issue of whether she had suffered an impact of discrimination was “without dispute.”<sup>170</sup> It was clear to the court that because of this entire situation, Sheppard had suffered adverse treatment in the workplace.

The facts in *Sheppard* illustrate the third, standard prima facie element to a discrimination claim well, and the fact remains that if it were applied to combat the plight of the tipped employee outlined above, it would work nicely. For instance, the third element, as applied in *Sheppard*, went to show that there was an actual harm

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159. *Id.* at 1173.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Sheppard*, 391 F. Supp. 2d at 1173.

165. *Id.*

166. *Id.* at 1174.

167. *Id.* at 1171.

168. *Id.*

169. *Id.* at 1177.

170. *Sheppard*, 391 F. Supp. 2d at 1177.

done to the claimant.<sup>171</sup> Sheppard potentially could feel the sting of discrimination, as she claimed, because she was removed from working as a driver.<sup>172</sup> Sheppard's claim was essentially that, had she not been discriminated against, she would not have been taken off of driving duty.<sup>173</sup> Despite the Southern District of Florida ruling against Sheppard in the end, the court still found that Sheppard had at least met this element.<sup>174</sup>

As applied to the tipped employee minimum wage context, the impact of the discrimination is clear: because a tipped employee is being discriminated against by customers with regard to paying tips, said employee must compensate more than his or her counterparts that are not being discriminated against. Thus, tipped employees who are discriminated against must work harder to earn the legal minimum wage in our state. Therein lies a tipped employee's satisfaction of this element of the proposed standard of review.

## V. CONCLUSION

The largest issue is that even if there were a way for a tipped employee to prove a *prima facie* case of wage discrimination, there would be no recourse for employment discrimination against a consumer because the consumers are not employers in this context. Employers are able to allow such discrimination to continue without any recourse from the government or their employees. After all, when at the end of the day, employers may wipe the entire issue under the carpet by paying whatever difference remains after a minority employee has been unable to make enough to meet the federal minimum wage of \$7.25 through tips alone. Further, in the current system, the responsibility—arguably proportionally—of providing a minimum wage to employees is passed essentially from the employer to the consumers. The issue with this methodology is that the law, as outlined above, imposes a requirement for employers to pay their employees a minimum wage, not for consumers to do it for employers.

The proposal of a new standard of review is a viable option to easing the distress of tipped employees who are unprotected when it comes to their employers sanctioning customer-driven discrimination. However, under the current structure of our laws, such protections for the tipped employees are not in place. The best option is to abolish this standard once and for all. As discussed before, the Florida Constitution promises to its citizens a certain handful of protections with regard to wages.<sup>175</sup> But, further on in the Florida Constitution, the legislature is allowed to impose restrictions on those protections just because an employee is receiving tips.<sup>176</sup>

Such a contradiction would not impose an issue were it not for the fact that discrimination in the tipping industry has been proven to exist. But with no recourse available but the one proposed above, minority tipped employees will still be in a

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171. *Id.* at 1174, 1178.

172. *See id.* at 1182.

173. *Id.* at 1181.

174. *Id.* at 1178.

175. FLA. CONST. art. X, § 24(c).

176. *Id.*

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position to work harder than their co-workers. Florida has let its people down and for the reasons outlined above, Florida must rectify this wrong by abolishing the tipped minimum wage in Florida.