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LABOR LAW - FAIR LABOR STANDARDS ACT - TIPS NOT CONSIDERED WAGES IN COMPUTING STATUTORY MINIMUM

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LABOR LAW — FAIR LABOR STANDARDS ACT — TIPS NOT CONSIDERED WAGES IN COMPUTING STATUTORY MINIMUM — After the enactment of the Fair Labor Standards Act, defendant terminal company adopted the so-called "make up" plan towards its redcap station porters.[1] Under the plan, tips received by redcaps could, as formerly, be retained by them; in addition the redcap would report to the defendant the amounts received in tips, and the defendant would make up the deficiency if the tips did not aggregate the minimum legal wage. After the plan had been in operation for a time, plaintiff, agent and representative of the redcaps, brought suit for the difference between the amounts paid by the defendant and the required minimum wage, on the theory that the tips received should not have been included in determining the weekly wage under the Fair Labor Standards Act.[2] *Held*, that since the definition of wages in the Fair Labor Standards Act [3] did not include tips either expressly or constructively,[4] an employer was not permitted to deduct tips from the minimum wages he was bound to pay. *Pickett v. Union Terminal Co.*, (D. C. Tex. 1940) 33 F. Supp. 244[5].

[1] It seems fairly clear that redcap station porters are employees under the Fair Labor Standards Act. See the discussion in the principal case, 33 F. Supp. 244 at 246-247, and 4 FED. REG. 1580 (1939).

[2] To eliminate the friction, some railroads have adopted the "flat fee" plan, under which persons using redcap service pay the porter ten cents for each bag carried, the porter turning this amount over to his employer, who pays him a fixed wage. The porter may keep anything he receives over the flat fee. 3 W. H. R. 45 (1940); N. Y. TIMES 17:3 (April 17, 1940); id., § X, p. 15:4 (April 28, 1940).

[3] " 'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees." 52 Stat. L. 1061, § 3 (m) (1938), 29 U. S. C. (Supp. 1939), § 203 (m).

[4] The court reasoned that absent a contract to the contrary, a tip given a redcap is a gift to the employee and does not become the property of the employer and, being a gift from an outsider to a servant, does not discharge the debt of the master to the servant; also that since Congress failed to include tips in the definition of wages in the Fair Labor Standards Act, there is no justification for construing the definition as including tips.

[5] Seeking an early appellate court decision, the government has petitioned for leave to intervene in this case, now before a circuit court of appeals. 3 W. H. R. 480 (1940).

Under most state unemployment compensation rulings, tips, if customarily received, are included in computing taxable wages. The federal payroll tax regulations include tips in the term wages when accounted for by the employee to the employer.[6] Furthermore, under the federal income tax regulations in the Internal Revenue Code, interpreting the statute, which draws a distinction between benefits received as salaries, wages, or compensation, and benefits received as gifts,[7] tips commonly received are considered in the former category.[8] Since these are predominantly tax measures, however, the regulations are not completely persuasive in determining the status of tips under programs which, like that under the wage and hour provisions of the Fair Labor Standards Act, attempt to measure or determine remunerative benefit to employees. Another program of the latter type is that under the workmen's compensation statutes, where compensation to injured employees is generally computed according to the amount of earnings or wages.[9] The courts have held that, for the purpose of determining the amount of employees' earnings or wages under such statutes, tips commonly received and retained by them are included, absent anything to the contrary in the statutes.[10] The analysis of these courts is illuminating. In certain industries, tipping is a universal custom, having a vital effect on the terms and conditions of employment. So customary and uniform are tips that the aggregate is calculable, enabling the employer to determine what additional wages he should pay. The additional direct wage of itself is inadequate. Furthermore, the employee receives tips with the approval of the employer and as a result of the position in which the employer has placed him. It is therefore argued that, in the contemplation of the employer and employee, the tips form a part of the consideration of the employment contract, being a benefit from the employer similar to board, lodging, or rent furnished in addition to wages paid. Since tips save the employer in wage costs, he as well as the employee is benefited. The employee himself considers the tip as a payment due him rather than as a favor, while the person served feels compelled to tip, both by social custom and the reaction of the employee on failure to pay. In the eyes of the employee, the employer, and the person served, the tip is a part of the cost of service.[11] By reasoning along these lines, courts have construed tips commonly

[6] The "make up" plan seems to satisfy the definition of such an accounting: 1 C. C. H. UNEMPLOYMENT INSURANCE SERVICE, ¶¶ 1230, 5704.015, 5130.611, 5130.641 (1940); KIXMILLER AND JANUS, FOUNDATION GUIDE FOR PAYROLL TAXES, 3d ed., 204 (1939).

[7] 53 Stat. L. 9, §§ 22 (a) and 22 (b) (3) (1939), 26 U. S. C. (Supp. 1939), §§ 22 (a) and 22 (b) (3).

[8] 1940-1 C. C. H. FED. TAX SERVICE, ¶ 52.465.

[9] 71 C. J. 793 (1935).

[10] 75 A. L. R. 1223 (1931). The workmen's compensation cases and the prinpal case are practically the only judicial decisions on the consideration of tips as wages. But see Manubens v. Leon, [1919] 1 K. B. 208.

[11] This analysis is drawn largely from the two leading American cases, Sloat v. Rochester Taxicab Co., 177 App. Div. 57, 163 N. Y. S. 904 (1917), aff'd. without opinion, 221 N. Y. 491, 116 N. E. 1076 (1917), and Powers' Case, 275 Mass. 515, 176 N. E. 621 (1931). See also Coates v. Warren Hotel, 18 N. J. Misc. 122, 11 A. (2d) 436 (1940); Gross' Case, 132 Me. 59, 166 A. 55 (1933).

received as included in the definitions of wages contained in workmen's compensation statutes.[12] The definitions are similar in language to that contained in the Fair Labor Standards Act,[13] which, however, in the principal case was construed as not including tips, the court specifically saying that treatment of tips under social security acts and workmen's compensation acts was not material. An argument to support the conclusion reached by the principal case might be one of policy, resting on administrative shortcomings. There is usually a separate award for compensation for each injury, preceded customarily (especially if there be a dispute) by investigation and hearing by the board or administrative officer.[14] The minimum wage program cannot conceivably provide a continuous investigation and hearing as to the amount of tips received by each employee. This administrative difficulty begets an increase in the possibility of employer pressure on employees to secure falsification of reports of tips received.[15] Furthermore, under the "make up" plan, if the aggregate of weekly tips does not exceed the legal minimum wage, compensation received by the employee is tied to the legal minimum. Neither of these arguments, nor that advanced by the court in the principal case, is sufficiently convincing to overcome the precedent of the workmen's compensation cases which find, from the nature of tips, a "close analogy" [16] between wages and tips commonly received and retained.[17]

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[12] For example, " 'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer. . . ." 64 N. Y. Consol. Laws (McKinney, 1938), § 2 (9). " 'Average weekly wages,' the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two. . . ." 4 Mass. Ann. Laws (1933), c. 152, § 1 (1).

[13] Supra, note 3. Compare note 12, supra. Compare also the construction of the Maine and New Jersey statutes in Gross' Case, 132 Me. 59, 166 A. 55 (1933), and Coates v. Warren Hotel, 18 N. J. Misc. 122, 11 A. (2d) 436 (1940). But see Industrial Comm. v. Lindvay, 94 Colo. 531, 31 P. (2d) 495 (1934).

[14] For example, see 64 N. Y. Consol. Laws (McKinney, 1938), § 20.

[15] See 2 W. H. R. 315 (1939).

[16] Powers' Case, 275 Mass. 515 at 519, 176 N. E. 621 (1931).

[17] The principal case has been noted and discussed in 40 COL. L. REV. 1262 (1940).