# Valet Driver's FLSA Tip Claim Fails (Updated 07 03 17)

Insights
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**UPDATED 07 03 17:** The 10th Circuit U.S. Court of Appeals (with jurisdiction over Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) concluded on June 30 that an employee who was paid at least the FLSA minimum wage, and for whom her employer therefore did not rely upon the FLSA Section 3(m) tip-credit, had no FLSA claim against her employer for retaining her tips. The court noted that the private-cause-of-action point discussed below confirmed its decision, but its main rationale was that the U.S. Department of Labor has no legal authority to regulate the retention of tips by an employer outside of the tip-credit context.

However, the 9th Circuit U.S. Court of Appeals (having jurisdiction over Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) previously reached a contrary result. This suggests that the U.S. Supreme Court might ultimately be called upon to resolve the issue.

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In a welcome decision for employers, the 11th Circuit U.S. Court of Appeals (having jurisdiction over Alabama, Florida, and Georgia) recently ruled that a tipped employee for whom no federal Fair Labor Standards Act "tip credit" had been taken, and to whom all FLSA wages due had been paid, could not sue her employer under that law for allegedly converting some of her tips to the employer's own uses.

The plaintiff in *Malivuk v. Ameripark, LLC* worked as a valet driver and received tips from customers. Her employer apparently paid her at an hourly rate of not less than the FLSA minimum wage and thus did not rely on any portion of her tips to meet that requirement. She did not claim to have received less than either the FLSA's minimum wage or the required FLSA overtime compensation.

Even so, the valet driver sued under the FLSA's Section 16(b), which authorizes private lawsuits for FLSA minimum-wage or overtime violations, contending that her employer ran afoul of that law when it "appropriated" some of her tips for its own purposes. Her assertions were based upon a U.S. Department of Labor regulation at 29 C.F.R. § 531.52, which currently says that "tips are the property of the employee whether or not the employer has taken a tip credit . . . under the FLSA." The lower court dismissed her complaint.

**No Underpayment, No FLSA Claim**

In affirming this dismissal, the 11th Circuit observed that the plain language of Section 16(b) means that an employee may sue under the FLSA *only* for a failure to pay the FLSA-required minimum wages or overtime compensation. The Obama administration's USDOL had, according to the Circuit panel, expressed the same view in a friend-of-the-court brief.

The court ruled that USDOL's regulation does not change this, that is, the provision does not create a freestanding private right of action simply because an employer has chosen to retain a portion of an employee's tips. The regulation is relevant to a private FLSA lawsuit, the court said, only to the extent that it is pertinent to a claim for unpaid minimum wages or overtime.

In taking this position, the 11th Circuit joined the 4th Circuit U.S. Court of Appeals (having jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia). The 4th Circuit's 2015 decision in *Trejo v. Ryman Hospitality Properties, Inc.* concluded that employees had no FLSA claim relating to an allegedly-invalid tip-pool, because they had essentially conceded that they had been paid the required FLSA wages without regard to pooled tips.

The 11th Circuit did note in passing that an employee might be able to "collect unpaid tips through an appropriate state law claim."

**The Bottom Line**

USDOL's Section 531.52 has produced much controversy since it was promulgated by the Obama administration in 2011. The regulation has intensified the debate as to whether USDOL has any FLSA-based authority to regulate an employer's dominion over tips when the employer does not avail itself of the FLSA tip-credit.

Perhaps *Malivuk* represents the next step in a potential employer-favorable trend in the federal courts. On the other hand, it is likely that considerable uncertainty will remain until more federal appellate courts, and perhaps even the U.S. Supreme Court, have weighed-in.

Continued caution is therefore advisable with respect to tip policies. Employers should also take into account the possibility that such policies might be challenged based upon theories raised under state or local legal principles.

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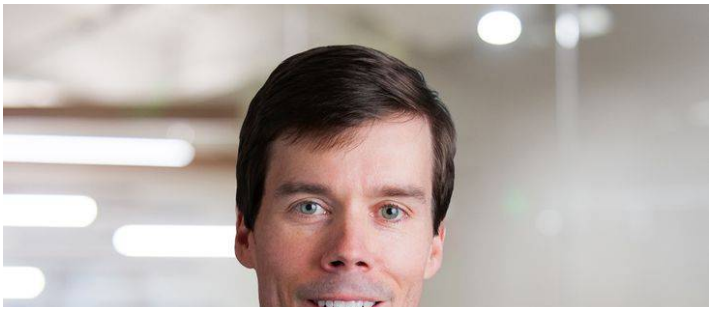

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