IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-35718

MISTY CUMBIE,

Plaintiff-Appellant,

v.

WOODY WOO, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFF-APPELLANT

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as amicus curiae in support of plaintiff-appellant Misty Cumbie. The district court in the above-captioned case committed legal error when it concluded that Cumbie, a tipped employee, was precluded from challenging her employer's (defendant-appellee Woody Woo, Inc.) invalid tip pool under section 3(m) of the Fair Labor Standards Act ("FLSA" or "Act"), because Woody Woo had not elected to use the tip credit provided in that section of the Act to pay its employees a reduced cash wage. See 29 U.S.C. 203(m) (allowing an employer to take a tip credit against the

required cash wage paid to its tipped employees, and permitting a mandatory tip pool if limited to employees who "customarily and regularly receive tips"). The district court's conclusion is contrary to the Department of Labor's ("Department") Wage and Hour Division's ("Wage and Hour") longstanding position that section 3(m) of the Act (as amended in 1974) governs tipped employees' wages generally, and therefore applies irrespective whether an employer elects a tip credit. By declining to defer to Wage and Hour's interpretation of the statutory provision, particularly as set forth in a 1989 opinion letter issued by the Wage and Hour Administrator and as supported by the relevant legislative history and caselaw, the district court incorrectly construed the statutory provision, to the detriment of low-wage tipped employees.

STATEMENT OF INTEREST OF THE SECRETARY OF LABOR

The Secretary, who is responsible for the administration and enforcement of the FLSA, _see_ 29 U.S.C. 204(a), (b), 216(c), 217, has compelling reasons to participate as _amicus curiae_ in this appeal in support of the employee, because the application of section 3(m) of the Act is central to achieving FLSA compliance with respect to tipped occupations. In this case, even though the tipped employees were paid the minimum wage, they then were required by the employer, in contravention of section 3(m) of the Act, to contribute their tips to an invalid

tip pool, which redistributed the majority of those tips to non-tipped employees. Thus, an affirmance by this Court of the district court's decision will almost assuredly result in the tipped employees receiving less than they are entitled to under the Act -- the minimum wage free and clear plus all of their tips. Moreover, the decision on appeal is contrary not only to dispositive legislative history and to appellate and other district court precedent, but to Department opinion letters construing section 3(m) of the Act to apply irrespective whether the employer has elected to take a tip credit under that section.

STATEMENT OF THE ISSUE

Section 3(m) of the FLSA, 29 U.S.C. 203(m), sets forth the requirements for the payment of tipped employees. It permits an employer to take a "tip credit" against the cash wage it is required to pay its tipped employees, and permits the imposition of a mandatory tip pool, provided the tip pool is limited to employees who "customarily and regularly receive tips." Woody Woo did not use the tip credit to pay its employees a reduced cash wage, but did require its tipped employees, including Cumbie, to turn over all the money they received as tips to the employer for a tip pool, which redistributed the majority of that money to employees who do not "customarily and regularly" receive tips. The issue presented is whether the district court

erred in its conclusion that the tipped employees were precluded from challenging Woody Woo's invalid tip pool under the FLSA because the employer had not elected to use the FLSA's tip credit provision.

STATEMENT OF THE CASE

A. Statement of Facts and Course of Proceedings

1. Misty Cumbie was employed as a server at a restaurant owned by Woody Woo, where she received cash wages from the employer and tips from restaurant patrons. See Cumbie et al. v. Woody Woo, Inc., 2008 WL 2884484, at *1 (D. Or. 2008). Woody Woo paid its tipped employees the full state minimum wage, which was in excess of the federal minimum wage. Id.[1] In accordance with Oregon state law, which prohibits employers from "'includ[ing] any amount received by employees as tips in determining the amount of the minimum wage required to be paid,'" Woody Woo did not take a tip credit against its minimum

[1] As the magistrate judge noted in his opinion, although the complaint did not specify the wages paid, Cumbie clarified at argument that she was paid at or above the Oregon minimum wage at all times relative to the complaint. See Woody Woo, Inc., 2008 WL 2884484, at *1. For the three years prior to the filing of the complaint on April 25, 2008, the Oregon minimum wage ranged from $7.25 to $7.95 per hour. The federal minimum wage over this same period of time ranged from $5.15 to $5.85 per hour. See, e.g., State of Oregon's Technical Assistance for Employers, http://www.oregon.gov/BOLI/TA/T_FAQ_Min-wage2008.shtml. Therefore, for the period covered by the complaint, Woody Woo paid Cumbie close to $2.00 an hour above the federal minimum wage.

wage obligation. Id. at *1-2, (quoting O.R.S. 653.035(3)). Woody Woo did require its servers, however, to turn over all their tips to a tip pool. Id. at *1; see appellant's brief at 47 (alleging that "[i]n order for Plaintiff to receive a check for the minimum wage, she was required to turn over all of her tips to her employer").[2] The tip pool was used to distribute 55 to 70 percent of the tips contributed by servers to kitchen staff. Woody Woo, 2008 WL 2884484, at *1. The remaining pooled tips were redistributed to the tipped employees according to a percentage calculated by comparing the hours worked by an individual server to the hours worked by all servers. Id.

2. Cumbie and other tipped employees brought collective and class actions against Woody Woo in federal district court alleging that the employer's mandatory tip pool that redistributed tips to non-tipped employees violated section 3(m) of the FLSA and Oregon's wage and hour laws. Woody Woo filed a motion to dismiss, arguing that section 3(m)'s provision restricting mandatory tip pools to those employees who "customarily and regularly receive tips" applies only when an employer has elected to take a "tip credit" provided under that section.

[2] "[U]nder [Federal] Rule [of Civil Procedure] 12(b)(6), allegations of material fact are taken as true and construed in the light most favorable to the plaintiff." William O. Gilley Enterprises, Inc. v. Atlantic Richfield Co., -- F.3d --, 2009 WL 878979, at *8 (9th Cir. 2009).

B. The District Court's Decision

In a July 25, 2008 opinion and order, Magistrate Judge Paul Papak granted defendants' motion to dismiss, holding that the tipped employees had not stated a claim for which relief could be granted under the FLSA or state law. Woody Woo, Inc., 2008 WL 2884484, at *6. Judge Papak rejected plaintiffs' argument that section 3(m)'s provision limiting mandatory tip pools to employees who "customarily and regularly receive tips" applies even when an employer has not elected to use the Act's tip credit, and declined to defer to a Wage and Hour opinion letter that supported that position, on the ground that the letter's interpretation conflicted with the plain language of the Act. Id. at *4-5. Instead, he interpreted section 3(m)'s tip pooling provision as "only modif[ying] the tip credit provision; the comment on tip pooling does not function as an independent provision. Apart from the tip credit context, the FLSA remains silent regarding tip pooling." Id. at *3. Since Woody Woo, in accordance with state law, did not elect to take the tip credit and thereby did not use the tipped employees' tips to pay a portion of their minimum wage, Judge Papak concluded that the FLSA's tip pooling restrictions were not implicated, and Cumbie consequently could not state a claim for relief under the statute. Id. at *5.

SUMMARY OF ARGUMENT

Section 3(m) of the FLSA (as amended in 1974), which governs the pay of tipped employees, states that an employer may use a portion of its employees' tips to take a limited credit against its minimum wage obligation. Absent such a credit, the employer must pay the full minimum wage in cash. Section 3(m) also permits employers to impose mandatory tip pools by which tips are shared among employees who customarily and regularly receive them. As a general matter, however, tips, as sums presented to tipped employees by a customer "as a gift or gratuity in recognition of some service performed," 29 C.F.R. 531.52, are the property of the employee. See S. Rep. No. 93-690, at p. 42 (1974).

A few courts, including the district court in this case, have nevertheless concluded that section 3(m)'s restrictions on an employer's ability to appropriate its employees' tips (e.g., limiting mandatory tip pools to those employees who customarily and regularly receive tips) are applicable only when an employer elects to take a tip credit. As the Department publicly stated immediately after the 1974 amendments to the FLSA, and as the majority of courts have recognized, however, such an interpretation of the Act is contrary to the legislative history of the 1974 amendments and would lead to absurd results. It would permit an employer who did not choose to utilize the tip

credit to use its employees' tips in excess of the limited use authorized in section 3(m) in order to meet its minimum wage obligations.

In the present case, Woody Woo did not utilize section 3(m)'s "credit" against its minimum wage obligations, but paid its tipped employees the full state minimum wage, which exceeded the federal minimum wage. Woody Woo, however, also required its tipped employees to turn over all their tips to an invalid tip pool, i.e., one that indisputably included employees who did not "customarily and regularly receive tips." Therefore, even though Woody Woo was paying its tipped employees cash wages in excess of the federal minimum wage, it deprived these employees of their statutory right to receive the full minimum wage plus all tips they received. Therefore, the amounts employees were required to contribute to the invalid tip pool must be subtracted from the cash wages paid by the employer; if this calculation ultimately shows that Cumbie and the other tipped employees received a sum that does not equal the full federal minimum wage plus all tips received, Woody Woo did not pay its tipped employees the minimum wage free and clear, in violation of the FLSA. See 29 C.F.R. 531.35.

ARGUMENT

THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT A TIPPED EMPLOYEE WAS PRECLUDED FROM CHALLENGING HER EMPLOYER'S INVALID TIP POOL BECAUSE THE EMPLOYER HAD NOT ELECTED TO TAKE A TIP CREDIT UNDER SECTION 3(m) OF THE FLSA

1. The FLSA is a statute of broad remedial purpose. See Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947). Congress enacted the FLSA to protect workers from "substandard wages and oppressive working hours." Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981); see 29 U.S.C. 202(a), (b) (congressional finding that "the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" adversely affects commerce, and thus it is the policy, "through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power"). The provisions of the Act are broadly construed "to apply to the furthest reaches consistent with Congressional direction." Klem v. County of Santa Clara, Cal., 208 F.3d 1085, 1089 (9th Cir. 2000) (internal quotation marks omitted); see Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979)

(courts define "employer" and "employee" under the FLSA broadly "to effectuate the broad remedial purposes of the Act").

2. Prior to 1966, the compensation of tipped employees was often determined by an agreement between the employer and employees. See Usery v. Emersons Ltd., 1976 WL 1668, *2 (E.D. Va. 1976) (citing, inter alia, Williams v. Jacksonville Terminal Co., 315 U.S. 386 (1942)), vacated and remanded on other grounds sub. nom. Marshall v. Emersons Ltd., 593 F.2d 565 (4th Cir. 1979); Opinion Letter WH-321, 1975 WL 40945 (Apr. 30, 1975). Tipped employees could agree, for example, that an employer was only obligated to pay cash wages when an employee's tips were less than the minimum wage, or that the employee's tips would be turned over to the employer, who would then use the tips to pay the minimum wage. See Emersons, 1976 WL 1668, at *2.

The 1966 amendments to the FLSA expanded the coverage of the Act to include restaurants and hotels, thereby extending minimum wage and overtime protections to a large number of tipped employees. See Emersons, 1976 WL 1668, at *2. Congress that same year created a "tip credit" provision in section 3(m) of the Act, which permitted these newly covered employers to use a limited portion of their employees' tips as a credit against their minimum wage obligations. See id.[3]

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[3] After the 1966 amendments, section 3(m) of the FLSA read as follows:

There is some question, reflected in the legislative history to the 1966 amendments, as to whether Congress intended the tip credit provision to abolish all tip-sharing agreements between employers and employees. Compare S. Rep. No. 1487 (1966), as reprinted in 1966 U.S.C.C.A.N. 3002, 3014 (suggesting that such agreements could continue) with 112 Cong. Rec. 11362-63 (May 25, 1966) (statement of Congressman Dent) ("[L]et us not say from now on when you go into a restaurant that it is your job or your duty not just alone to pay for your meal but to pay the full wages of the employees of that institution. I do not believe any Member of Congress can really seriously consider this kind of amendment."). The Department's tip credit regulations promulgated in 1967 indicate that the Department believed that Congress intended in 1966 to retain such

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> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that in the case of an employee who (either himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased under this sentence, the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount.

Pub. L. No. 89-601, § 101(a), 80 Stat. 830 (1966).

agreements. Thus, the tip credit regulations, which are still in place today, refer in several instances to employment agreements providing that tips are to be treated as the property of the employer, see, e.g., 29 C.F.R. 531.59, and imply that such agreements are valid. See 29 C.F.R. 531.52 ("In the absence of an agreement to the contrary between the recipient and a third party, a tip becomes the property of the person in recognition of whose service it is presented by the customer."); 29 C.F.R. 531.55(a) ("[W]here the employment agreement is such that amounts presented by customers as tips belong to the employer and must be credited or turned over to him, the employee is in effect collecting for his employer additional income from the operations of the latter's establishment."); see also 29 C.F.R. 531.55(b); 29 C.F.R. 531.59.

3. In 1974, Congress again amended section 3(m) of the Act to require (1) that an employer notify its employees if it takes the tip credit; (2) that the employees retain all tips; and (3) authorizing tip pools among employees who "customarily and regularly receive tips." See Pub. L. No. 93-259, §13, 88 Stat. 55 (1974).[4] The legislative history to the 1974 amendments

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[4] After the 1974 amendments, the tip credit provisions of section 3(m) read as follows:

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by

indicates that Congress intended these changes to section 3(m) to make clear its original intent (in 1966) to prohibit all agreements whereby an employer and employee could agree that the tips were the property of the employer, or to use the employees' tips toward the employer's minimum wage obligation except as explicitly allowed under section 3(m). See S. Rep. No. 93-690, at 43 (1974). In other words, the 1974 amendments were intended to clarify that tips are a gratuity offered by customers for services rendered, and that section 3(m)'s tip provision

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> an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Pub. L. No. 93-259, § 13, 88 Stat. 55 (1974) (emphasis added). This underlined language from the 1974 amendments to section 3(m) is essentially the same as the current version of the law. Although section 3(m)'s tip credit provision has been amended since 1974 on several occasions -- in 1977 (Pub. L. No. 95-151, § 3(b), 91 Stat. 1245); 1989 (Pub. L. No. 101-157, § 5, 103 Stat. 938); and 1996 (Pub. L. No. 104-188, § 2105(b), 110 Stat. 1755) -- these amendments changed only the applicable percentage of employees' tips that could be taken as a tip credit against an employer's cash wage obligations. The cash wage required to be paid by an employer electing the tip credit was "frozen" by the 1996 amendments to section 3(m) at $2.13 an hour.

provided the only permissible uses of an employees' tips. See id.

Significantly, in considering the 1974 amendments, Congress referred to the Department's definition of a tip as "a sum presented by a customer as a gift or gratuity" (29 C.F.R. 531.52). S. Rep. No. 96-690, at 42-43 (1974). Congress noted that because tips belong to the employee, there is "a serious legal question as to whether the employer should benefit from tips to the extent that employees are paid less than the basic minimum wage because the employees are able to supplement their wages by special services which bring them tips." Id. The legislative history to the 1974 amendments further notes that the tip retention clause, in particular, was "added to make clear the original Congressional intent that an employer could not use the tips of a 'tipped employee' to satisfy more than 50 percent of the Act's applicable minimum wage." S. Rep. No. 93-690, at 43 (1974). Implicit in the 50 percent limitation on an employer's tip credit is the understanding that the starting point must be that tips are the property of the employee. If tips are not the property of the employee, Congress would not have needed to specify that an employer is permitted to credit its employees' tips only in certain prescribed circumstances. Thus, the clear intent of Congress in 1974 was to require an employer under section 3(m) either to take a credit against an

employee's tips of up to the prescribed statutory differential, or to pay the entire minimum wage directly; under either scenario, the employee is required to retain all tips (except for contributions to a valid tip pool).

4. Immediately after the 1974 amendments, the Department acknowledged that Congress had strictly curtailed an employer's ability to take control of its employees' tips, stating that "[t]he amendments to section 3(m) of the Act would have no meaning or effect unless they prohibit agreements under which tips are credited or turned over to the employer for use by the employer in satisfying the monetary requirements of the Act." Opinion Letter, June 21, 1974 (see Addendum); see Opinion Letter WH-310, 1975 WL 40934 (Feb. 18, 1975) (same).[5] The Department

[5] The Department's interpretation of section 3(m), as reflected in its opinion letters, the FOH, and this amicus brief, is entitled to deference under Skidmore v. Swift, 323 U.S. 134 (1944). See Federal Exp. Corp. v. Holowecki, 128 S. Ct. 1147, 1151 (2008) (deference for EEOC's statutory interpretation embodied in policy statements contained in compliance manual and internal directives). Indeed, in Donovan v. Tavern Talent and Placements, Inc., 1986 WL 32746, at *5 (D. Colo. 1986), the court rejected the defendant's position that the Department's tip credit regulations permitted employers and employees to agree that tips were the property of the employer on the ground that a number of opinion letters issued by the Wage and Hour Administrator immediately after the 1974 FLSA amendments clearly "repudiated earlier opinions that sanctioned agreements between employers and employees to accept tips in lieu of wages," and put employers on notice that "tips had to be retained by employees as required by the Act and henceforth any agreements remitting tips to employers were invalid." Since the Department had "maintained this interpretation of the statute for over ten

indicated that the 1974 amendments invalidated the broader appropriation of employees' tips allowed by the Department's regulations. See id. It stated publicly immediately after the 1974 amendments that its tip credit regulations were outdated, and indicated that new regulations were forthcoming. See Opinion Letter WH-310, 1975 WL 40934, at *1 (Feb. 18, 1975) ("The [tip credit regulations] were issued pursuant to the Act as it was before the 1974 amendments, and have no effect to the extent that they are in conflict with the amended Act."); Opinion Letter WH-321, 1975 WL 40945 (April 30, 1975); see also Opinion Letter FLSA 2005-31, 2005 WL 3308602, at *3 n.1 (Sept. 2, 2005); Davis v. B & S, Inc., 38 F. Supp. 2d 707, 714 n.10 (N.D. Ind. 1998) (recognizing that the Department's tip credit regulations do not reflect 1974 amendments).

The Department has not promulgated a revision to these outdated regulations. Although the Department indicated its intent to update its tip regulations to reflect the 1974 amendments to section 3(m) again last year in a Notice of Proposed Rulemaking, a Final Rule was not published. See 73 Fed. Reg. 43654 (July 28, 2008). Nevertheless, Wage and Hour's longstanding position, as stated in a number of opinion letters and in its Field Operations Handbook ("FOH"), is that the 1974

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years," the court concluded, it was "obligated to give great weight" to the position articulated in the opinion letters. Id.

Amendments, by setting forth specific limitations on an employer's ability to credit its employees' tips, establish that tips otherwise remain the property of the employee. See, e.g., Opinion Letter, 2001 WL 1558958, at *1 (April 19, 2001) ("Since the passage of the 1974 Amendments to the FLSA, it has been clear that tips are the property of the employee . . . ."). Accordingly, Wage and Hour has stated that an employer is prohibited from requiring his tipped employees (by agreement or otherwise) to turn over all their tips and then use a portion of the tips to pay the required minimum wage. See, e.g., Opinion Letter, June 21, 1974 ("[W]here an employer acquires the tips of a tipped employee in contravention of section 3(m) and uses such tips to pay the employee, the employee has in effect waived his rights to the minimum wage."); Opinion Letter WH-386, 1976 WL 41739, at *4 (July 12, 1976) ("[T]he law forbids any arrangement whereby any part of the tips of a tipped employee belong to the employer or are retained by the employer."); FOH, ¶30d01(a) ("[T]he specific language added to Sec. 3(m) reinforces the intent of Congress that . . . the employer and employee cannot agree to . . . waive [a tipped] employee's right to retain all tips received."). Similarly, Wage and Hour has viewed a "tip back" agreement, where the employee gives all his or her tips to the employer for application toward the employee's minimum wage, as a violation of the requirement in 29 C.F.R. 531.35 that

employees receive the full minimum wage "free and clear." See, e.g., Opinion Letter WH-536, 1989 WL 610348 (Oct. 26, 1989). Therefore, any references in the regulations to employer-employee agreements under which tips are considered to be the property of the employer are not valid after the 1974 amendments.

5. The Department's interpretation that the 1974 tip credit amendments strictly limit an employer's ability to appropriate its employees' tips is supported by several decisions, including in cases brought by the Department. Those decisions hold that, pursuant to the 1974 amendments to section 3(m), agreements to pay an employee's "cash wage" (after taking a permissible tip credit) out of all or part of his or her tips are invalid because tips are the property of the employee, and an employer's use of those tips is restricted to the permitted uses specifically enumerated in section 3(m). Thus, in Martin v. Tango's Restaurant, Inc., 969 F.2d 1319, 1322 (1992), the First Circuit stated that "[a] stranger to the FLSA might suppose that, in determining an employer's minimum wage obligations, the tips regularly received and retained by an employee either would be treated as wages paid by the employer or, in the alternative, would be wholly ignored. Instead, in a legislative compromise, Congress chose to allow employers a partial tip credit if, but only if, certain conditions are met."

And, in Richard v. Marriott Corp., 549 F.2d 303, 304-05 (4th Cir.), cert. denied, 433 U.S. 915 (1977), the court invalidated a scheme where a cash wage was paid by the employer only when the employees' tips did not equal the minimum wage. See Wright v. U-Let-Us Skycap Services, Inc., 648 F. Supp. 1216, 1217-18 (D. Colo. 1986) (invalidates scheme where employees were paid minimum wage after turning all tips over to the employer); Tavern Talent, 1986 WL 32746, at *5 (citing S. Rep. 93-690, at 43 (1974), court invalidates "tip-back" scheme where employees paid cash wage out of their own tips); Emersons, 1976 WL 1668, at *4 (the 1974 amendments make clear that employees cannot agree to permit an employer to satisfy its full minimum wage obligation from the employees' tips); cf. Chao v. FOSSCO, Inc., 2006 WL 1041353 (W.D. Mo. 2006) (holding that since tips are the property of the employee, they cannot be added to salary computations for purposes of determining whether the employees are exempt from the FLSA's overtime requirements); but see Cooper v. Thomason, 2007 WL 306311, at *2 (D. Or. 2007) ("Tips are only the property of the employee if there is no agreement to the contrary."); Platek v. Duquesne Club, 961 F. Supp. 835, 839 (W.D. Pa. 1995) ("[T]ips are only the property of an employee absent an agreement to the contrary."), aff'd without opinion, 107 F.3d 863 (3d Cir.) (Table), cert. denied, 522 U.S. 934 (1997). Thus, the clear intent of Congress, reflected in the

Department's consistent position dating from the enactment of the 1974 amendments and the weight of judicial authority, is that tips belong to the employee, and that no agreement between the employer and its employees may override this fundamental entitlement.

6. Despite the fact that section 3(m) provides the only method by which an employer may use tips received by an employee to satisfy the employer's minimum wage obligation, several district courts, including the court in Woody Woo, have concluded that the section 3(m) requirement that an employee retain his tips and the related limitation on the distribution of money from tip pools to employees who "customarily and regularly receive tips" are applicable only when an employer "claims" a tip credit. See Woody Woo, 2008 WL 2884484, at *5 (citing Cooper, 2007 WL 306311, and Platek, 961 F. Supp. at 834);[6] see also Chan v. Triple 8 Palace, Inc., 2006 WL 851749, at *15 (S.D.N.Y. 2006) (stating in dictum that plaintiffs could prevail under the FLSA for tip violations "only if defendants have relied on the tip credit"). This cramped reading of section 3(m), however, is contrary to a more sensible reading of

[6] The magistrate judge accepted both plaintiff's contention that under section 3(m), mandatory tip pools can include only those employees who "customarily and regularly receive tips," and the Department's guidance on this subject that specifically excludes from tip pools employees such as cooks and dishwashers. Woody Woo, 1989 WL 2884484, at *3 (citing, inter alia, FOH ¶30d04(c)).

the provision that accords with congressional intent and the Department's longstanding interpretation of the 1974 amendments.

Thus, while section 3(m) sets out certain prerequisites for the use of the tip credit (like notice to the employee), it does not state that tips no longer are the property of the employee if the employer disclaims the tip credit. In fact, it makes no sense to allow an employer to disclaim the tip credit, yet require the employee to forfeit all of his tips, through an invalid tip pool or otherwise. In such a situation, the reasoning of the district court would allow the employer to use the employee's tips to meet its entire minimum wage obligation or supplement the wages of non-tipped employees. Indeed, if an employer is able to take its employees' tips to pay the full minimum wage, it would have no reason to elect the tip credit. See generally Nixon v. Missouri Municipal League, 541 U.S. 125, 128 (2004) (a statute should not be construed in a manner that leads to absurd results); Whirlpool Corp. v. Marshall, 445 U.S. 1, 11-13 (1980) (upholding the Secretary's regulation interpreting the Occupational Safety and Health Act because that regulation is consonant with the purposes of the statute and "complement[s] its remedial scheme").

This result would stand the amendment to section 3(m) "on its head" and would mean it has "accomplished nothing." Emersons, 1976 WL 1668, at *4 (court rejected the employer's

argument that by not "using" the tip credit, it was free to meet its entire minimum wage obligation to an employee out of tips). The Tenth Circuit in Doty v. Elias, 733 F.2d 720, 724 (1984), similarly concluded that an interpretation of the FLSA that permits an employer to use all of its employees' tips to pay the minimum wage "does violence" to section 3(m), "would render much of that section superfluous[,]" and is contrary to Congress' intent to permit employers to use only a limited percentage of employees' tips against their minimum wage obligations. And the Fourth Circuit observed, in the context of determining back wages owed when the employer did not take the tip credit but used its employees' tips to pay the entire minimum wage, that the fact that section 3(m) permits an employer to take a 50 percent credit toward an its minimum wage obligation makes "[t]he corollary . . . obvious and unavoidable: if the employer does not follow the command of the statute, he gets no credit." Marriott Corp., 549 F.2d at 305. Finally, in Tavern Talent, 1986 WL 32746, at *4-5, the district court concluded that an employer violated section 3(m) even when it paid its employees the full minimum wage, because it required its tipped employees to "tip back" a portion of their tips; in the words of the court, "[i]f the employer does not choose to pay according to the method described in 3(m) for tipped employees then he must pay the full minimum wage as prescribed by the Act." (Citation

omitted.). The Department's opinion letters also have consistently stated that employees' tips cannot be used to pay the employees' minimum wage if the employer does not choose to use section 3(m). See, e.g., Opinion Letter WH-536, 1989 WL 610348 (Oct. 26, 1989); Opinion Letter WH-321, 1975 WL 40945, at *2 (April 30, 1975).

7. The district court in Woody Woo further erred when it misinterpreted and declined to accord Skidmore deference to a 1989 opinion letter signed by the Wage and Hour Administrator that applies the agency's position on the application of section 3(m) to facts almost identical to those presented in this case. See Opinion Letter WH-536, 1989 WL 610348 (Oct. 26, 1989). The 1989 letter addresses a situation where the employer has not elected to take the tip credit, and has instituted an invalid tip pool that includes employees who do not customarily and regularly receive tips. The district court in Woody Woo understood the opinion letter to say that the Department interprets the FLSA to prohibit tip pooling altogether, and declined to accord the letter deference because such an interpretation would directly conflict with section 3(m)'s specific authorization of tip pooling. See 2008 WL 2884484, at *4 ("Under [the opinion letter's rationale], all tip pooling would be per se invalid because tip pooling by its very nature

entails some deprivation of tips as a result of redistribution.").

The district court's incomplete reading of the 1989 letter is faulty. While there is no question after the 1974 amendments that tips are the property of the employee, see supra, the Department recognizes that an employer can redistribute a portion of its employees' tips through a mandatory tip pool, provided that the tip pool is limited to employees who customarily and regularly receive tips. See, e.g., Opinion Letter, FLSA 2006-21, 2006 WL 1910966, at *1 (June 9, 2006) ("[E]mployees must retain all of their tips, except in the case of valid tip pool arrangements."); FOH ¶30d01(a) ("Pursuant to Sec 3(m), all tips received . . . by a 'tipped employee' must be retained by the employee except to the extent that there is a valid pooling arrangement."); FOH ¶30d04(a) ("The requirement that an employee must retain all tips does not preclude tip-splitting or pooling arrangements among employees who customarily and regularly receive tips."). Thus, employees who contribute to a valid tip pool (comprised of "tipped" employees) are not "considered to have rebated the pooled tips originally received by them" to the employer. Opinion Letter WH 536, 1989 WL 610348, at *3. However, mandatory contributions to an invalid tip pool -- i.e., among employees who do not customarily and regularly receive tips -- effectively require an employee to

"contribute part of his or her property to the employer or to other persons for the benefit of the employer, with the result that the employee [potentially] would not have received the minimum wage 'free and clear,' as required by section 531.35 of [29 C.F.R.]." Id. at *2 (citations omitted). As Wage and Hour has explained, "[a] tip is given to the employee, not the employer. Where an employer acquires the tips of a tipped employee in contravention of section 3(m) [through, for example, an invalid tip pool] and uses such tips to pay the employee, the employee has in effect waived his rights to the minimum wage [in contravention of the Act]." Opinion Letter WH-489, 1978 WL 51435 (Nov. 22, 1978).

8. Although mandatory contributions to invalid tip pools unquestionably violate the principle articulated in section 3(m) that tips are the property of the employee, the Secretary's ability to enforce section 3(m) is limited to instances where violations result in minimum wage or overtime violations. See 29 U.S.C. 216(c) (authorizes actions by the Secretary to enforce the Act's minimum wage and overtime provisions); 29 U.S.C. 217 (authorizing DOL injunctive proceedings to restrain violations of the Act's minimum wage, overtime, recordkeeping and child labor provisions). Thus, the 1989 opinion letter explains that when an employee's required contribution to an invalid tip pool is so great that he or she does not receive all of his or her

tips plus the required minimum wage, the "employee who has originally received tips will be considered to have contributed all such improperly redistributed tips to the employer," resulting in a minimum wage violation. Opinion Letter WH-536, 1989 WL 610348, at *3; compare Opinion Letter FLSA 2006-21, 2006 WL 1910966 (June 9, 2006) (explaining that no FLSA action lies against an employer who makes impermissible deductions from cash wages paid if those wages are in excess of the minimum wage and the deductions do not reduce the employee's pay below the minimum wage).

In the current case, Woody Woo paid its employees the full state Oregon minimum wage, which at all times relevant to this litigation exceeded the federal minimum wage by nearly $2.00 an hour. Therefore, Woody Woo could have made "deductions" (for purposes of this case, mandatory contributions to an invalid tip pool) of approximately $2.00 an hour, since those deductions would not reduce the tipped employees' direct wage payment below the federal minimum wage.[7] Since Woody Woo required its tipped

[7] Under section 3(m), the "wage" of a tipped employee equals the sum of the cash wage paid by the employer and the amount that can permissibly be claimed as a tip credit. The amount of tips the employee receives in excess of the tip credit are not considered "wages" paid by the employer and any "deductions" from the employee's tips made by the employer would result in a violation of the employer's minimum wage obligation. If, as in this case, however, the employer paid the employee a direct wage in excess of the minimum wage, the employer would be able to make deductions so long as they did not reduce the direct wage

employees to contribute all their tips to the tip pool, however, and redistributed 55 to 70 percent of those tips to non-tipped employees, it is likely that Woody Woo's "deduction" exceeded $2.00 an hour, so that the tipped employees did not receive the federal minimum wage plus all tips received. See, e.g., appellant's opening brief at p. 9 ("[N]o server ends up with an amount equal to the federal minimum wage plus all tips given to them by their customers.").

Thus, a Woody Woo employee who received $10.00 an hour in tips, for example, was required to contribute all those tips to an invalid tip pool. Woody Woo redistributed 55 to 70 percent of those tips to employees who did not customarily and regularly receive tips, and returned the remaining 30 to 45 percent to the tipped employees. If a tipped employee received 30 percent, or $3.00, of his or her tips back from the tip pool, plus $7.95 (the Oregon minimum wage in effect when the complaint was filed) in cash wages, he or she would have received $10.95. This amount is less than the total of the employee's tips received ($10.00) plus the federal minimum wage that was in effect for at least one year of the employee's employment ($5.85), $15.85. Therefore, in this circumstance, Woody Woo would be in violation of the federal minimum wage. The employee would be entitled to

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payment below the minimum wage. In such a situation, the deduction would be viewed as coming from the employer's wage payment that exceeds the minimum wage.

recover $4.90 per hour, which is the difference between $15.85, the total of all tips received plus the federal minimum wage, and $10.95, the amount received after the tip pool distribution.

In sum, if the tipped employees did not receive the full federal minimum wage plus all tips received, they cannot be deemed under federal law to have received the minimum wage "free and clear," and the money diverted to the invalid tip pool is an improper deduction from wages that violates section 6 of the Act.

CONCLUSION

For the foregoing reasons, this Court should reverse the magistrate judge's decision dismissing Cumbie's complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO Fed. R. App. P. 29(d) and Circuit Rule 32-1 for Case No. 07-35633

I certify that this amicus brief complies with the type-volume limitations set forth in Federal Rules of Appellate Procedure 29(d) and Ninth Circuit Rule 32-1. This brief was prepared using Microsoft Office Word utilizing Courier New 12 point, a monospaced font, and contains 6,873 words (including footnotes).

s/ Maria Van Buren
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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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