COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

STACY NORRELL, on behalf of herself and all others similarly situated,
Plaintiff-Appellant,

v.

SPRING VALLEY COUNTRY CLUB, INC., ALAN ANTOKAL, and STEVEN ROBINSON,
Defendant-Appellees.

APPEALS COURT
No. 2019-P-0594

APPLICATION OF PLAINTIFF-APPELLANT FOR FURTHER APPELLATE REVIEW BY THE SUPREME JUDICIAL COURT

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REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Plaintiff-Appellant Stacy Norrell, lead plaintiff in this certified class action, requests further appellate review by the full Supreme Judicial Court of the above-captioned case, which the Appeals Court decided on July 16, 2020.[1]

Massachusetts has long been known for its particularly stringent Tips Act, M.G.L. ch. 149, § 152A. This strict liability statute protects waitstaff and service employees by requiring that *any* charge that a restaurant or event venue labels as a "service charge" must be remitted to the waitstaff. In a seminal and now-longstanding decision, Cooney v. Compass Grp. Foodservice, 69 Mass. App. Ct. 632 (2007), the Appeals Court explicitly recognized the strict liability nature of the Act, finding that the Massachusetts legislature's intent in enacting the Act was to ensure that *any charge* called a "service charge" be paid to the waitstaff, *regardless of whether the employer, customers, or the waitstaff themselves understood it to be a gratuity*. The Appeals Court held, in no uncertain terms, that the

[1] A copy of the Appeals Court decision is attached as Exhibit A.

Tips Act applies to tips, gratuities, and fees that are called “service charges” in aid of a clear purpose: letting employees keep these payments.

The Cooney Court rejected the argument that an employer’s intent had any relevance to the inquiry as to whether a “service charge” was required to be remitted to employees, concluding that:

> Doing so would surely have accorded greater protection to the innocent “employer or other person” and would have made recovery under the statute more onerous a task. But the Legislature did not strike the balance that way, instead taking the uncomplicated approach of imposing liability whenever the invoicing entity, for whatever reason, chooses to call a fee a “service charge” and then keeps the proceeds.

Id. at 638-39.

This Court subsequently recognized the strict liability nature of the Tips Act in DiFiore v. American Airlines, 454 Mass. 486 (2009), that “[t]he Legislature's intent in enacting the Act can be plainly discerned from its language and history - to ensure that service employees receive the tips, gratuities, and service charges that customers intend them to receive," and held in a sharply worded decision that employers must not be permitted to make an '"end run' around the Act." Id. at 491, 496. See also Somers v. Converged Access, Inc., 454 Mass. 582

(2009) (noting that the "Legislature could have written § 152A to accord greater protection to the 'innocent' employer, but 'Legislature did not strike the balance that way"')(quoting Cooney, 69 Mass. App. Ct. at 638-39).

The Appeals Court re-affirmed and expanded on Cooney in Bednark v. Catania Hospitality Grp., Inc., 78 Mass. App. Ct. 806, 808 (2011), holding that in order for an establishment not to distribute a fee that is added to a food and beverage bill and is given a more ambiguous label such as “house fee” or “administrative fee”, it must make clear to customers that the fee is not a gratuity for waitstaff. This was because:

> The Massachusetts Tips Law essentially imposes strict civil liability upon the employer, which, irrespective of its intent, will suffer the consequences if, as the result of its statutory noncompliance, protected employees do not receive the tips, gratuities, and service charges to which they are entitled. In addition to defining key terms and setting forth what employers may and may not do with respect to tips and service charges, the Legislature enacted § 152A(g) of the Tips Act, demonstrat[ing] that the Legislature was cognizant, in general, of the risk that employers or other persons may seek to find ways ... to attempt to avoid compliance with the Act, and intended to thwart such schemes.

Id. at 809-10 (internal footnotes, quotations, and citations omitted).

Yet, in its decision in this matter, the Appeals Court overlooks the Massachusetts legislature's particularly strong intent in enacting the Tips Act – to protect employee tips – and upends more than a decade of Tips Act jurisprudence that has followed Cooney and recognized the stringent, strict liability nature of the statute.

The Appeals Court found that the trial judge in this case properly allowed a jury to decide the question of whether charges that Defendant-Appellee Spring Valley Country Club ("Spring Valley") that were called "service charges" in its brochures and other communications with customers fell under the Tips Act and thus was required to be remitted to the waitstaff. The Appeals Court held that, because the words "service charge" were on some documents, but the words "house charge" were on other documents, it was acceptable for the trial judge to allow the jury to decide whether the charge was a "service charge" that was required to be remitted to the staff.

This decision flies in the face of Cooney and its progeny, essentially constructing a giant escape hatch

from the statute's strict liability for defendants who sow confusion as to the nature of their charges by using the word "service charge" throughout their written materials and communications with customers but then bury the words "house charge" or "administrative charge" elsewhere in fine print. The SJC should not allow this evisceration of the strict liability nature of the Tips Act to stand.[2]

The Appeals Court also affirmed the trial judge's decision to permit Spring Valley to introduce evidence that its managers orally informed customers that the 22% charges were not gratuities for the wait staff. This holding, too, undercuts Cooney and the strong protection afforded to employees under the Tips Act. Indeed, allowing employers to escape liability under the Tips Act by introducing evidence of what customers are told *orally* would render enforcement of the Act all but impossible; this holding would allow a

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[2] Notably, in Cooney itself, the defendant argued that the service charges should not fall under the Tips Act because customers were informed on other documents that the service charge was not a gratuity. See Excerpts of Cooney Record (attached as Exhibit B). Nevertheless, the court in Cooney held that the fact that the charges were called "service charges" on some documents rendered them automatically covered by the Tips Act. The Appeals Court in this case did not acknowledge or grapple with this fact, thus disregarding directly on point precedent.

restaurant to use the ambiguous words “house charge”, or even the strict liability words “service charge”, throughout its documents (including on the menu or on the customer’s bill), and could then simply claim after the fact that customers were orally told that the charge was not a gratuity. Such an outcome plainly contravenes Cooney[3] and it contravenes Bednark’s mandate that an ambiguous term like “house fee” must be disclaimed as not a gratuity, in order to be taken outside the Tips Act. The intent of the statute is undermined unless a defendant’s representations about the charge are clear and consistent, and that will never happen if oral representations, rather than written documents, are relied upon.[4]

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[3] In Cooney as well, the defendant also presented evidence that its manager *orally informed* customers that the charge was not a gratuity. The court nevertheless held that all that mattered was that the charge was described in writing as a “service charge”. See supra note 2.

[4] Bednark contains a long footnote that has created great confusion about whether oral disclosures are adequate to disclaim that a contested charge does not fall under the Tips Act. See 78 Mass. App. Ct. at 814 n.18. Plaintiff argued below that this footnote was not only incorrect - and dicta - but that, even under the footnote, only oral “designations” (meaning a title or a name) could be admissible, not oral “descriptions” of the charge. Although the Appeals

The SJC should grant further appellate review to correct the flawed and illogical interpretation of the Tips Act that the Appeals Court rendered in this case.[5]

Court sidestepped in its decision the issue of whether oral disclosures are admissible in such a case, it would be extremely helpful for this Court to take up this issue, which has been a repeated question that has arisen in Tips Act litigation over the last decade.

[5] Many cases over the years since Cooney have addressed the question of what happens when certain documents label a charge as a "service charge" and other documents label the charge as something else. The Appeals Court decision in this case does not provide the correct answer to this significant question, which merits review and a final resolution from this Court. Indeed, in another decision issued on the same date, Hovagimian v. Concert Blue Hill, LLC, 98 Mass. App. Ct. 69 (2020), the Appeals Court likewise backtracked from the strong precedent of Cooney and allowed an establishment to escape liability where it used both the term "service charge" and other terms; as Justice Milkey decried in his dissent, "the club's subsequent communications with its patrons were 'haphazard' and 'can be seen as inviting the type of confusion the Tips Act was designed to avoid'. . . . This [decision] is starkly at odds with the act and our cases interpreting it." Id. at *5 (Milkey, J., dissenting). For cases that found liability where defendants used both the term "service charge" and another term, see, e.g., Benoit v. The Federalist, Inc., Case No. 04-3516B (Mass. Super. April 7, 2009), at *14 (attached as Exhibit C)(trebling damages following jury verdict for waitstaff, where "the defendant … played fast and loose with the service charge designations", describing portion of charge as "service charge" in some places and "administrative fee" in others); Banks v. SBH Corp., Case No. 04-3515A (Mass. Super. June 27, 2007)(attached as Exhibit D)(granting summary judgment to plaintiff servers under Tips Act, where defendant charged both a "service charge" and "gratuity",

STATEMENT OF FACTS RELEVANT TO APPEAL

The facts relevant to the appeal are correctly stated in the opinion of the Appeals Court.

STATEMENT OF PRIOR PROCEEDINGS

Plaintiff Stacy Norrell, a former server at Spring Valley, filed her complaint against Spring Valley on February 24, 2014, challenging the club's retention of charges that she contended fell within the Tips Act and thus were required to be distributed to the waitstaff. In October 2016, the Superior Court granted Plaintiff's motion for class certification. After discovery, the case was set for trial.

A jury trial was held in the Superior Court from January 29, 2018, to February 9, 2018. At trial, Plaintiff introduced evidence that Spring Valley charged all customers who held events at the club a 22% charge on the cost of food and beverage and that no portion of that charge was remitted to the waitstaff (who were all paid a flat hourly rate); that from 2011 until 2013 or 2014, Spring Valley provided customers with brochures, sample menus, and communications that referred to the 22% charge as a

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holding that proceeds of "service charge" must be distributed in addition to "gratuity").

"service charge"; and that there were events for which Spring Valley referred to the 22% charge as a "house fee" but did not provide any written disclosure that the charge was not a gratuity. Spring Valley presented evidence that written disclosures were provided to customers for some events indicating that the charge was not a gratuity, but there were other events for which Spring Valley was not able to produce evidence that such written disclaimers were provided. Spring Valley also presented evidence that some customers were told orally that the house charge was not a gratuity.[6]

At the close of her case, Plaintiff moved for a directed verdict with respect to the charges that were labeled as "service charges", as well as those charges that were labeled a "house fee" but for which there was no evidence of any written disclosure provided to customers that the charges were not gratuities. The Superior Court denied the motion.

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[6] Prior to trial, Plaintiff filed a Motion in Limine, asking the Court to preclude Spring Valley from introducing any evidence related to oral statements purportedly made by Spring Valley event managers to customers that the 22% charge was not a service charge. The Superior Court denied Plaintiff's request to exclude such testimony.

The jury returned a verdict in favor of the plaintiff class, but it awarded damages only in the amount of $18,340.32, far less than the total sum of the charges for which Plaintiff contended the class was entitled to receive. Following the trial, Plaintiff filed a Motion for Judgment Notwithstanding the Verdict or in the Alternative to Amend the Verdict or for a New Trial, pursuant to Mass. R. Civ. P. 50(b) and 59(e). Plaintiff argued that the evidence was undisputed that Spring Valley had violated the Tips Act (as reflected by the jury's verdict) but that the jury failed to award the plaintiff class the total damages to which it was entitled. The Superior Court denied Plaintiff's Motion. Plaintiff appealed the judgment, including the Court's denial of Plaintiff's post-trial motion.

The Appeals Court affirmed the judgment and the Superior Court's denial of Plaintiff's post-trial motion. The Appeals Court concluded that the question of whether the "service charge" that Spring Valley referred to throughout its communications with customers was, in fact, a service charge that should have been paid to the waitstaff was a proper question for the jury. The Appeals Court also held that the

Tips Act's safe harbor provision did not require Spring Valley to introduce evidence that it had provided a written disclaimer that the "house" charge was not a gratuity. The Appeals Court also determined that the judge properly allowed Spring Valley to introduce evidence of oral statements made to customers about the nature of the charge. No party is seeking reconsideration or modification in the Appeals Court.

STATEMENT OF THE POINTS WITH RESPECT TO WHICH PLAINTIFF SEEKS FURTHER APPELLATE REVIEW

1. Whether, under the Tips Act, an employer must remit to waitstaff the proceeds of a charge that is described to customers as a "service charge" on some documents, although it is given another name (or a disclaimer is included) on other documents.
2. Whether, under the Tips Act's so-called "safe harbor provision", an employer is required to introduce evidence of a written disclaimer that a "house charge" is not a gratuity, if it is not to be distributed to the waitstaff.
3. Whether, in assessing liability under the Tips Act, the factfinder may consider evidence that

customers were orally informed that a "service charge" or "house charge" was not a gratuity.

STATEMENT OF REASONS THAT FURTHER APPELLATE REVIEW IS APPROPRIATE

I. Strict Liability Attaches to Any Fee that Is Labeled "Service Charge" in a Defendant's Communication With Customers

The Massachusetts Tips Act defines a "service charge" as:

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

Mass. Gen. Laws ch. 149, § 152A (a). The Act requires employers to distribute any charge called a "service charge" to service employees. Id. § 152A(b).

In Cooney, the Appeals Court confirmed that such a charge must be distributed in full to the waitstaff, regardless of what the customer actually understood about the charge and regardless of whether other oral or written communications were given to customers to attempt to notify customers that the charge was not a gratuity. 69 Mass. App. Ct. at 638-39. Cooney established an important bright-line rule that *any*

charge labeled a "service charge" falls under the Tips Act and is required to be distributed to the waitstaff. Cooney, 69 Mass. App. Ct. Thus, under the Tips Act and Cooney, Spring Valley was required to remit the proceeds of all charges labeled "service charges" to its waitstaff, regardless of what customers believed and regardless of whether disclosures were also made that the "service charge" was not a gratuity.

In light of the Tips Act's strict liability, the Appeals Court erred in finding that it was appropriate for the trial court to submit to the jury the question of whether charges that were repeatedly referred to as "service charges" in Spring Valley's communications with its customers were required to be remitted to the service staff. If it is permitted to stand, the Appeals Court's ruling would mean that a defendant could permissibly use the phrase "service charge" all over its marketing materials, brochures, sample menus, and communications with a customer planning an event, and then bury the phrase "house fee" or "administrative fee", or a fine print disclaimer, on other documents, and not remit the proceeds of the fee to its waitstaff (who the Legislature has determined

customers would presume would receive it as a gratuity based on its description as a "service charge"). To allow a jury inquiry into whether such a charge is in fact a "service charge" under the Tips Act patently upends the strict liability imposed by the statute and Cooney. The SJC should grant further appellate review to correct this error.

II. A Defendant Employer Cannot Evade Liability Under the Tips Act Without Evidence of a Written Disclaimer that a "House" Fee Is Not a Gratuity

As a defense to liability, the Tips Act provides that an employer can impose a "house or administrative fee" in addition to or instead of a service charge or tip, "if the employer provides a designation or written description" informing the patron that the fee is not a gratuity or service charge. M.G.L. ch. 149, § 152A(d). In Bednark, 78 Mass. App. Ct. at 808, the Appeals Court held that it is not enough for an establishment to simply label a fee added to food and beverage bills as an ambiguous "administrative fee" or "house fee", without providing any additional disclosure that the charge is not a gratuity, if it does not distribute the proceeds of the charge to the waitstaff. Id. at 815. The Bednark court concluded that the purpose of the safe harbor provision of the

Tips Act is to ensure that an establishment intending to retain the proceeds of a "house" or "administrative" charge makes that intention clear to customers, so that they know that they need to leave an additional gratuity if they wish to tip the waitstaff, because it could appear to the customers that a gratuity is already included, as the terms "house fee" or "administrative fee" are not self-explanatory. The Tips Act requires that establishments provide customers with unambiguous information about its charges in a manner "that informs the patron that the fee so designated or described does not represent a tip or service charge for the protected employees." Id. at 811.

Yet notwithstanding its ruling in Bednark, the Appeals Court determined here that an employer who is alleged to have violated the Tips Act by failing to sufficiently inform patrons that a "house fee" was not a gratuity does not need to introduce evidence of a written disclaimer stating as such. Instead, the Appeals Court held that it was proper for the jury to determine whether Spring Valley was obligated to remit to employees the proceeds of any "house fee" for which it could not produce evidence of a written disclaimer

that was provided to patrons. The Appeals Court also affirmed the Superior Court's decision to allow evidence of oral statements made to patrons that its "house fee" was not a gratuity.

This holding, too, completely undermines prior jurisprudence under the Tips Act, which emphasized the strict liability nature of the Tips Act. First, as Plaintiff argued below, under the plain language of the Tips Act, an "oral disclaimer" is insufficient to meet the safe harbor defense under the Act, as it is plainly not a "designation or written description" informing customers that the fee is not a gratuity. The evidence Spring Valley presented was that managers explained to customers that the charge was not a gratuity; while such explanation may constitute a "description", it does not constitute a "designation". A "designation" is essentially a title or name.[7] If the legislature had intended to allow establishments to defend against Tips Act liability through use of an "oral description", it would not have used the words

[7] Black's Law Dictionary defines the word "designate" as "[t]o represent or refer to (something) using a particular symbol, sign, name, etc. <lakes are designated by blue spaces on the map>." Black's Law Dictionary (11th ed. 2019).

"designation or written description" in the safe harbor provision.[8]

More broadly, allowing establishments to defend against Tips Act liability based on alleged oral disclosures would frustrate the purpose of the statute in providing strong protection to service employees. The Appeals Court in Cooney and Bednark, as well as this Court in Somers and DiFiore, have recognized and repeatedly reaffirmed the importance and strictness of the Tips Act and have interpreted the Act so as to provide maximum protection to tipped workers to receive the total proceeds of charges that are called tips, gratuities, or service charges or that customers may reasonably believe are gratuities intended to be paid to them.

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[8] The Appeals Court noted that the Bednark Court observed in a footnote that the Tips Act does not explicitly require a "designation" to be written, see Bednark, 78 Mass. App. Ct. at 814 n.18. But that footnote did not specifically rule that oral designations are allowed as a defense, nor was the Bednark Court presented with the specific argument raised here. This aspect of that footnote was also dicta because that case did not turn on the question of whether oral disclosures would be permitted to suffice as notice to customers that a charge was not a gratuity.

While the Appeals Court sidestepped the issue of whether an oral explanation would constitute a "designation", this is an important question that requires clarification from the SJC.

It is only through written disclosures that there can be any possibility of truly (and provable) consistent communications to customers. If establishments are allowed to contend, after the fact, that customers were simply told that ambiguously labeled charges were not gratuities or service charges for the service staff, such a rule would clearly invite mischief. Moreover, such a rule would make it very difficult for waitstaff employees to enforce their rights under the Tips Act by requiring them to prove, perhaps in a lengthy trial (such as the one that occurred here), what customers may have actually believed the charge to be.

By declining to interpret the Tips Act to require establishments to provide a written disclosure that a "house" or "administrative" charge is not a gratuity or service charge for the waitstaff (if the proceeds of the charge are not distributed to the service staff), the Appeals Court failed to implement not only the statutory language of the Act, as described above, but also the spirit and purpose of the Act, which was plainly intended to protect the tips earned by service employees. Indeed, the preamble to the 2004 version of the Act describes the bill as "AN ACT protecting

the wages and tips of certain employees." 2004 Mass. Legis. Serv. Ch. 125 (H.B. 4431).

Yet the Appeals Court's decision in this matter protects not "certain employees", but rather their employers. Oral disclosures simply cannot provide a consistent explanation that a charge is not a gratuity; the nature of such disclosures would inevitably vary and would be all but impossible to verify after the fact.[9] Strict interpretation of the Tips Act requires that defendants be able to prove

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[9] Indeed, a federal court in Hawaii, interpreting a similar state statute requiring service charges to be distributed to waitstaff, did not allow a defendant hotel to defend on the ground that its management orally disclosed to customers that the charge was not a gratuity. The court explained that:

> The question is really, What did the legislature intend to do? And I think it is clear that the legislature intended that consumers be notified as to what was going to happen to the service charge. **And to the extent that it is on a bill after the fact or relying on word of mouth, the word of mouth argument does not work for me....** And the idea that something having to do with something the legislature has spent so much time on being taken care of by knowledge in the industry, when in fact it would be imperfect knowledge with respect to the various manners in which the different hotels and even the same hotels handle this question at different times.

Davis v. Four Seasons Hotel Ltd. d/b/a Four Seasons Resort. Maui, Civ. A. No. 08-00525HG-BMK (D. Haw. June 21, 2011) (emphasis added).

that disclosures sufficient to satisfy the safe harbor provision were provided in writing; this is the only way to ensure consistent explanations are given to all customers.

Moreover, to interpret the Tips Act's safe harbor provision to allow oral disclosures would constitute an end run around the Act, which this Court held in DiFiore was impermissible. 454 Mass. at 496. The goal of the Act is to protect employees' tips. By requiring that establishments who do not intend to remit the proceeds of a charge to the waitstaff make that explicitly clear to customers, the safe harbor provision plays a key role in providing that protection, thereby ensuring that customers know they should leave a gratuity if they wish to tip the waitstaff – and ensuring that customers are not deceived into paying a charge under the misunderstanding that the charge is a gratuity for the waitstaff. If an establishment were permitted only to make oral, rather than written, disclosures that "house" or "administrative" fees were not gratuities, there would be a significant risk of miscommunication or misunderstanding. It would defy the legislature's intent in enacting the Tips Act for such oral

communications to qualify as a “designation or written description” under the safe harbor provision.

CONCLUSION

For the reasons set forth above, this Court should grant further appellate review, reverse the Appeals Court’s order, and remand this case to the Superior Court with instructions consistent therewith.

Indeed, in signing an earlier version of the Tips Act (which has been strengthened several times through the years), Governor Michael Dukakis was informed that “[a] combination of law, interpretive regulation, and enforcement practices have made the issue more complicated than it needs to be.” See Letter from Timothy Bassett to Governor Michael S. Dukakis, July 28, 1983 (attached as Exhibit E). The Chairman of the Legislature’s Labor and Workforce Committee urged the governor to sign the act as it “eliminates any confusion by clearly reserving the proceeds of service charges for employees.” Plaintiff submits that, after years of clarity surrounding the Tips Act following the Cooney decision, the decision below reinjects uncertainty and has “made the issue more complicated than it needs to be”. Plaintiff urges this Court to

take up this case to reinject certainty into the Act's enforcement.

Respectfully submitted,

Plaintiff-Appellant STACY NORRELL, individually and on behalf of a class of similarly situated individuals,

By her attorneys,

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CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. Pro. 13(d), Plaintiff-Appellant, through her counsel, hereby certifies that on August 6, 2020, a copy of this document was served on counsel for Defendants by electronic service through eFileMA.

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan, Esq.

CERTIFICATE OF RULE 16(k) COMPLIANCE

Pursuant to M.R.A.P. 16(k), Plaintiff-Appellant, through her counsel, hereby certifies that she has complied with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs, including but not limited to M.R.A.P. 16(a)(6), 16(e), 16(f), 16(h), 18, and 20. This brief was prepared using Courier New, a monospaced font, in size 12. Pursuant to M.R.A.P. 27.1(b), the Statement of Why Further Appellate Review Is Appropriate is not more than 10 pages in length.

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan, Esq.

EXHIBIT A

19-P-594 Appeals Court

STACY NORRELL[1] vs. SPRING VALLEY COUNTRY CLUB, INC., & others.[2]

No. 19-P-594.

Norfolk. February 4, 2020. - July 16, 2020.

Present: Meade, Milkey, & Desmond, JJ.

Tips. Labor, Wages. Practice, Civil, Motion in limine, Judgment notwithstanding verdict. Words, "Service charge."

Civil action commenced in the Superior Court Department on February 26, 2014.

The case was tried before William F. Sullivan, J., and a motion for judgment notwithstanding the verdict was heard by him.

Shannon Liss-Riordan for the plaintiff.
Donald W. Schroeder for the defendants.

MILKEY, J. The Spring Valley Country Club hosts wedding receptions, golf outings, and other private events at its facility in Sharon. During the 2011-2016 time frame, the club

[1] On behalf of herself and others similarly situated.

[2] Alan Antokal and Steven Robinson.

charged the sponsors of such events (patrons) specified prices for the food and beverages it served to guests at the events, and then added a twenty-two percent supplemental charge that was listed on invoices as a "house charge." The club did not distribute the monies collected for the house charge to those who served the food and drinks, but kept the money itself. The named plaintiff, Stacy Norrell, worked as a server at some of the events. She brought a class action -- on behalf of herself and others similarly situated -- alleging that the house charge amounted to a "service charge" that, pursuant to the so-called Tips Act, G. L. c. 149, § 152A, the club was required to distribute to wait staff. Named as defendants were the club itself, and the two individuals who had served as the club's presidents during the relevant period (collectively, the club).

Following a nine-day trial, a Superior Court jury found that the club indeed had violated the Tips Act (act), but awarded the plaintiffs far less in damages than they had sought.[3] Claiming that they were owed additional damages as a matter of law, the plaintiffs filed a motion entitled "Plaintiff's Motion for Judgment Notwithstanding Verdict or In the Alternative to Amend the Verdict or for a New Trial" (posttrial motion). On appeal, the plaintiffs principally challenge the denial of that

[3] Because the putative class was certified, we refer to the plaintiffs in the plural.

motion. They additionally claim error in one of the judge's evidentiary rulings. For the reasons that follow, we affirm.

Background. 1. The act. a. The pre-2004 act. The Legislature enacted the act in 1952. As originally enacted, the act consisted of a single sentence that simply prohibited employers in the food and beverage industry from appropriating tips that patrons had given to service employees. St. 1952, c. 490. The Legislature amended the act many times, including by adding language to address the type of scenario presented here: where supplemental charges that might be considered tips were collected by the employer instead of being given directly to service employees. In the version of the act that was effective between 1983 and 2004, the relevant language stated as follows: "If an employer or other person submits a bill or invoice indicating a service charge, the total proceeds of such charge shall be remitted to the employees in proportion to the service provided by them." G. L. c. 149, § 152A, as amended through St. 1983, c. 343, prior to enactment of St. 2004, c. 125, § 13. The pre-2004 version did not define the term "service charge."

We addressed the meaning of the pre-2004 version of this language in Cooney v. Compass Group Foodserv., 69 Mass. App. Ct. 632 (2007). That case involved Northeastern University's Henderson House conference facility. The school sent invoices

that billed customers for a supplemental charge calculated as a percentage of food and drink charges. Id. at 633. Even though Northeastern expressly labeled that charge a "service charge," the school argued that the charge was not subject to the act because it never had intended it to be a tip or gratuity, nor had the school made "other representations to that effect." Id. at 636. Northeastern also maintained that it orally had informed patrons who inquired about the charge that it "was not in the nature of a gratuity," and that the wait staff themselves did not understand it as such. Id. at 634. On cross motions for summary judgment, a Superior Court judge "concluded that material issues of fact were in dispute concerning whether Henderson House customers reasonably believed that the 'service charge' appearing on their invoices was a gratuity." Id. at 634-635. The parties filed renewed cross motions for summary judgment, which were, in relevant part, again denied. Id. at 635. Both decisions were subsequently reported to us pursuant to Mass. R. Civ. P. 64, as amended, 423 Mass. 1410 (1996). Id.

We held that in those instances where Northeastern had billed customers for a charge that it expressly had listed as a "service charge" on its invoices, the act applied as a matter of law, and the plaintiffs therefore were entitled to summary

judgment.[4] Characterizing the act as imposing a form of "strict liability," we held that in the circumstances presented, any factual dispute over whether or not patrons reasonably understood the charge to be in the nature of a gratuity was not material. Id. at 637-639 & n.6.

b. The 2004 amendments. The Legislature rewrote the act in 2004. Among other changes, the 2004 amendments expanded the scope of the act so that it applied not just to servers in the food and beverage industry, but to "all service employees who . . . 'work[] in an occupation in which employees customarily receive tips or gratuities, and who provide[] service directly to customers or consumers . . . and who [have] no managerial responsibility.'" DiFiore v. American Airlines, Inc., 454 Mass. 486, 492 (2009), quoting G. L. c. 149, § 152A (a), as inserted by St. 2004, c. 125, § 13 (applying act to skycaps). Unchanged was the overall purpose of the act, which was "to ensure that service employees receive the tips, gratuities, and service charges that customers intend them to receive." DiFiore, supra

[4] In March of 2002, after Northeastern focused on its compliance with the act, it stopped calling the supplemental charge a "service charge" and began calling it a "facilities surcharge." Cooney, 69 Mass. App. Ct. at 636. Northeastern's renewed motion for summary judgment was allowed in part as to the time period during which the fee appeared under this new name. Id. at 635. The propriety of that order was not before us in the appeal. Id. at 641 n.11.

at 491. See Bednark v. Catania Hospitality Group, Inc., 78 Mass. App. Ct. 806, 809 (2011).

In rewriting the act, the Legislature for the first time added a definition of "service charge," defining it as:

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

G. L. c. 149, § 152A (a). Under this definition, a charge can amount to a service charge in one of two ways. See DiFiore, 454 Mass. at 489 n.7, 497.[5] First, those charges that the employer itself has labeled "a service charge, tip [or] gratuity" are

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[5] In DiFiore, the court ruled that the following instructions that the trial judge had given to the jury were proper:

> "Under the [Act], a service charge is a fee charged to a patron in lieu of or in addition to a tip and includes any fee designated as a service charge, tip, gratuity as well as fees . . . charged that a patron or other consumer would reasonably expect to be given to a service employee in lieu of or in addition to a tip. . . .
>
> "[T]he [plaintiff service employees] can recover against [the defendant] under the [Act] by proving either that the [applicable] fee was designated by [the defendant] as a service charge, tip, or gratuity, or that patrons or other consumers would reasonably expect that the [applicable] fee was a tip being collected on behalf of the [service employees] and would be given to [them] instead of or in addition to a tip."

DiFiore, 454 Mass. at 489 n.7, 497.

automatically deemed service charges. This is the type of per se service charge that we considered in Cooney, 69 Mass. App. Ct. at 639, albeit under the earlier version of the act.[6] Second, even if the employer calls the charge something else, it still can be a service charge where the employee demonstrates that "a patron or other consumer would reasonably expect [it] to be given to a wait staff employee, service employee, or service bartender in lieu of, or in addition to, a tip." G. L. c. 149, § 152A (a) (defining "service charge"). In other words, where the employer itself does not label the supplemental charge a service charge, tip, or gratuity, the question is whether a reasonable patron would have understood it as such.

The 2004 amendments also rewrote the language governing employer-collected charges so that it read, and continues to read, as follows:

> "If an employer or person submits a bill, invoice or charge to a patron or other person that imposes a service charge or tip, the total proceeds of that service charge or tip shall be remitted only to the wait staff employees, service employees, or service bartenders in proportion to the service provided by those employees."

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[6] The 2004 amendments predated our decision in Cooney by three years. However, the controversy at issue in Cooney involved events that occurred prior to 2004. Nevertheless, we addressed the language of the 2004 amendments in passing, noting that we saw nothing there that supported Northeastern's interpretation. Cooney, 69 Mass. App. Ct. at 640.

G. L. c. 149, § 152A (d), first par. Overall, the language used in this rewritten provision is similar to what came before.[7] However, immediately following the just quoted text, the Legislature added the following:

> "Nothing in this section shall prohibit an employer from imposing on a patron any house or administrative fee in addition to or instead of a service charge or tip, if the employer provides a designation or written description of that house or administrative fee, which informs the patron that the fee does not represent a tip or service charge for wait staff employees, service employees, or service bartenders."

G. L. c. 149, § 152A (d), second par. The addition of this language clarifies that an employer in the service industry who charges a supplemental fee will not be subject to the act if it both calls the charge a "house fee" or "administrative fee," and provides its patrons a "designation or written description" informing them that the charge is not a "tip or service charge" intended to go to the service employees. Because the new language charted a course as to how employers could impose a supplemental charge without running afoul of the act, we termed it a "safe harbor provision." Bednark, 78 Mass. App. Ct. at 808 n.8.

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[7] For completeness, we do note one subtle wording change. The pre-2004 version of the act made employers liable when they sent bills or invoices "indicating" a service charge, while the current version applies to bills or invoices (or "charge[s]") that "impose[]" a service charge. Compare St. 1983, c. 343, with St. 2004, c. 125, § 13. Nothing in the case before us turns on that difference in phrasing.

In Bednark, 78 Mass. App. Ct. at 807, the defendant was a hotel that had added a percentage-based "administrative fee" to its food and beverage charges. No written explanation of the fee was offered to patrons, and there was conflicting evidence in the summary judgment record about the extent to which the hotel orally explained that the administrative fee was not a gratuity intended for the wait staff. Id. at 807-808 & n.9. We rejected the hotel's argument that -- as a matter of law -- merely calling the charge an "administrative fee" entitled the hotel to protection under the safe harbor provision.[8] Id. at 810-811. We therefore held that summary judgment had been improperly entered in the hotel's favor; whether the administrative fee was a "service charge" that had to be distributed to wait staff was a question appropriately left to the jury. Id. at 816. With this background in place, we turn to the facts before us.

2. Factual background. During the relevant time period, the club paid its wait staff an hourly wage at a fixed rate that varied from $12 to $15 per hour. It was uncontested that the

[8] The hotel had argued that labeling the charge an "administrative fee" satisfied the language in the safe harbor provision requiring that employers provide customers a "designation or written explanation" that the charge was not a "tip or service charge." We rejected that argument, albeit while suggesting, in dicta, that a "designation" satisfying the safe harbor provision could be oral as well as written. Bednark, 78 Mass. App. Ct. at 810-811, 814 n.18.

club collected the twenty-two percent house charge from patrons and retained the money for itself. The dispute at trial was whether the charge amounted to a "service charge" that, pursuant to the act, the club was required to turn over to the wait staff. As set forth above, that question turns in great part on how the club characterized the charges to its patrons. We therefore turn to reviewing the evidence of that in some detail.

According to the trial exhibits, the club generally was consistent in referring to the supplemental charge as a "house charge" on the invoices it sent to its patrons.[9] Beyond the invoices themselves, the club's practice as to how it referred to the charge varied. As the plaintiffs highlight, there was evidence that from 2011 to sometime in 2013 or 2014, the club regularly referred to the twenty-two percent charge as a "service fee" or "service charge" in brochures and sample menus that the club used to market the use of its facility as an event venue. During roughly that same time frame, the event planner at the club occasionally referred to the fee in the same terms in e-mails and at least one cover letter.

There was evidence that the club included standardized disclaimer language in some of its contracts to try to ensure

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[9] In some instances, the club used the term "house fee" instead of "house charge." In our view, there is no material difference between these terms, and we will use the term "house charge" for simplicity.

that patrons would understand that the house charge was not intended to be a gratuity that would go to the wait staff. That language was inserted into the form pre-event contract that patrons were required to sign (specifically in the "prices" section of a standard attachment captioned "Exhibit A: Additional Terms and Conditions"). It stated as follows:

> "A 22% house charge will be added to all food and beverage items. (Our house charge does not represent a tip or service charge for wait staff employees, service employees or service bartenders). Spring Valley is a non tipping facility; no tip is expected or accepted by the service staff."

Club employees testified that the club included Exhibit A as an addendum to all non-golf private events by 2008, and included similar language on the golf side of the club's operations by 2015. At trial the parties disputed how often patrons received or reviewed the disclaimer language.[10] There also was testimony that the club would explain this policy to patrons orally. Moreover, because many of the club's patrons were also members, the club maintained that they separately would be aware of the club's no tipping policy through the club's by-laws.

3. The course of the trial proceedings. The plaintiffs filed a motion in limine seeking to exclude two categories of

[10] In some instances, the club produced copies of Exhibit A found in its event-specific files. In others, no copies appeared, because -- according to the club -- patrons sometimes would not return Exhibit A when they signed the event contract.

evidence. The first was testimony by patrons as to their subjective belief whether the supplemental charge was to go to the wait staff. The judge agreed with the plaintiffs that such evidence was irrelevant, and the judge's ruling on this point is not at issue before us.[11] The second category of evidence the plaintiffs sought to exclude involved oral statements that the club had made to patrons about the nature of the house charge. The judge denied the motion in limine with regard to such evidence, and various patrons were allowed to testify as to what the club orally had told them.

At the close of evidence, the plaintiffs requested entry of a directed verdict in their favor as to two categories of events: (1) those that were held during the period in which the club had characterized the house fee as a "service charge" in promotional materials and pre-event communications, and (2) subsequent events for which the club had not provided patrons

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[11] In a footnote in Cooney, there is a suggestion that we agreed with the parties there that such evidence was not "relevant." 69 Mass. App. Ct. at 638 n.6. However, in that same footnote, we characterized our view as being that such evidence was not "dispositive." In any event, in cases that arise under the act that do not involve per se liability, the test is an objective one: whether a reasonable patron would view the supplemental charge as a tip, gratuity, or service charge. Whether an actual patron's subjective views might bear on what a reasonable patron would believe was not presented in Cooney; nor is it before us. Cf. Conopco, Inc. v. May Dep't Stores Co., 46 F.3d 1556, 1565 (Fed. Cir. 1994) (considering "instances of actual confusion" in assessing likelihood of confusion in trademark infringement case).

the disclaimer language set forth in Exhibit A. After cross motions for directed verdict were denied, the case went to the jury.

Through a verdict slip to which both parties assented, the jury were asked to answer only two questions. The first asked the following: "Between February 2011 and October 2016, did Defendants violate Mass. Gen. L. c. 149 § 152A (the Massachusetts 'Tip Law') by failing to pay the 22% fee on food and beverages at special events to the waitstaff?" The jury answered this question "yes." The second question asked, "How much money would compensate the class of Spring Valley waitstaff for the lost amount of service charges that they were not paid as a result of the Defendants' violation of Mass. Gen. L. c. 149 § 152A (the Massachusetts 'Tip Law')?" The jury responded with the figure $18,340.32.

Because the amount of damages was far less than the amount to which the plaintiffs believed they were entitled, they filed their posttrial motion. In that motion, the plaintiffs argued that they were entitled to far higher damages as a matter of law based on "undisputed evidence." The trial judge denied the motion but proceeded to treble the damages and to award attorney's fees pursuant to the Wage Act, G. L. c. 149, § 150. Together with prejudgment interest, this resulted in a judgment

in the plaintiffs' favor of $176,307. The plaintiffs appealed; the club did not.

Discussion. 1. Denial of the posttrial motion.

a. Framing the question. We begin with some preliminary observations. As a general matter, a party seeking to undo a jury verdict based on a claim that the jury were required as a matter of law to come to a particular result faces a very formidable burden. In reviewing the denial of a motion for judgment notwithstanding the verdict (JNOV motion), we ask "whether anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the nonmoving party" (citation omitted). Esler v. Sylvia-Reardon, 473 Mass. 775, 780 (2016). Moreover, the obstacles that such parties face are particularly daunting where, as here, they are the ones bearing the burden of proof.[12] See Brunelle v. W.E. Aubuchon

[12] To the extent that the plaintiffs seek to frame their posttrial motion as one seeking a new trial based on the jury awarding inadequate damages, their arguments fare no better. The case law reflects particular reticence about interfering with jury verdicts in this manner. As we have said, "[T]he allowance of a motion for a new trial based upon an inadequate or excessive award of damages, and the direction of an addition or remittitur, rests in the sound discretion of the judge." Baudanza v. Comcast of Mass. I, Inc., 454 Mass. 622, 630 (2009), quoting Blake v. Commissioner of Correction, 403 Mass. 764, 771 (1989). "[M]otions for a new trial on the theory that the damages were inadequate or excessive 'ought not to be granted unless on a survey of the whole case it appears to the judicial conscience and judgment that otherwise a miscarriage of justice

Co., 60 Mass. App. Ct. 626, 630 (2004), citing J. Edmund & Co. v. Rosen, 412 Mass. 572, 575 (1992) ("When a party has the burden of proof, it can rarely be ruled as matter of law that the burden has been sustained, especially when the burden-carrying party has relied upon oral testimony or inferences from circumstances"). That is because it may well be that the jury simply did not credit the evidence that the plaintiffs mustered to try to prove their case.[13] Nevertheless, the case law recognizes that there may be "exceptional situations -- where the parties agree on all material facts and the reasonable inferences to be drawn therefrom and disagree only as to the legal effect of the controlling principles, or where the defendant's own binding testimony precludes a verdict in his favor -- that the burden-carrying party may obtain a directed verdict." Brunelle, supra at 630-631. See Hanover Ins. Co. v. Sutton, 46 Mass. App. Ct. 153, 171 (1999) (upholding allowance

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will result.'" Walsh v. Chestnut Hill Bank & Trust Co., 414 Mass. 283, 292 (1993) quoting Bartley v. Phillips, 317 Mass. 35, 41 (1944). See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 825 (1997) (jury award may be disrupted only where "the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption" [citation omitted]).

[13] In this regard, it bears remembering that the fact that one party does not actively contest particular evidence does not mean that such evidence is "uncontested" in the sense that the jury were required to credit it.

of plaintiff's JNOV motion).[14] Without acknowledging the difficulty of the burden they face, the plaintiffs essentially argue that this is one of the "exceptional situations" recognized by the cases.

In the end, we need not resolve whether the plaintiffs could establish that this is one of those rarest of circumstances in which the jury were required to accept certain facts in the plaintiffs' favor absent a stipulation. As explained below, the plaintiffs' claim that based on "undisputed evidence" they necessarily prevail as a matter of law fails on its own terms. We turn then to examining the plaintiffs' legal arguments.[15]

b. Analysis. In those instances where the club unambiguously notified its patrons in writing that the house charge was not intended as a tip or gratuity for the wait staff, the club could claim protection under the safe harbor provision. Given the clarity of the Exhibit A disclaimer language, the

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[14] We recognize the possibility of such exceptional circumstances, despite the cases that speak in shorthand that appellate courts are to "disregard the evidence favorable to the [moving party]" when reviewing the denial of a JNOV motion. Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290, 295 n.11 (2016).

[15] The club has not argued that the plaintiffs one way or another may have waived substantive challenges to the jury's verdict. We pass over such questions.

plaintiffs unsurprisingly make no claim on appeal that they were entitled -- as a matter of law -- to funds from events where the patrons had been sent a form contract that included Exhibit A. Rather, the plaintiffs focus their arguments, as they did in the trial court, on two categories of events: those events held during the period in which the club regularly had referred to the charge as a "service fee" in promotional materials or other pre-event communications, and those subsequent events where the club had not sent the Exhibit A disclaimer language to its patrons.[16] We address these scenarios in order.

Relying principally on our decision in Cooney, the plaintiffs argue that in instances where the club itself had referred to the house charge as a service fee, it is per se liable under the act as a matter of law, regardless of whether there was evidence on which the jury could conclude that reasonable patrons would have understood that the funds

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[16] The plaintiffs also appear to be arguing that they are entitled to payment for every event where the club could not definitively prove that it had sent Exhibit A to the patron by producing a copy of it from that patron's event-specific file. To the extent the plaintiffs are making that argument, it plainly fails. As noted, a club witness explained that after the club implemented its policy of including Exhibit A in the contractual papers, patrons sometimes did not return a copy of the attachment in the signed contract. See note 10, supra. The jury were entitled to credit that explanation. There is nothing in the statute or case law precluding a facility from proving that it supplied written materials to patrons unless it can produce copies of such materials.

collected would not go to the wait staff. This claim misperceives the reach of Cooney. There, the facility owner expressly had billed patrons for a "service charge." Cooney, 69 Mass. App. Ct. at 633. Here, by contrast, any actual invoices were for what was labeled a "house charge." To be sure, the club's use of the term "house charge" did not preclude the plaintiffs from arguing to the jury -- based on the club's use of the term "service charge" in its promotional materials or otherwise -- that patrons would have understood the house charge to be a service charge. See Bednark, 78 Mass. App. Ct. at 807. However, we discern nothing in the act itself, or in the case law interpreting it, that imposes per se liability on an employer merely because there was passing reference to a "service charge" during communications with patrons without the term otherwise appearing in any invoices. Under the facts presented, whether the house charge imposed by the club amounted to a service charge in a given circumstance was a question properly left to the jury to decide.

The plaintiffs' argument that the club was liable as a matter of law unless it provided patrons with the Exhibit A disclaimer language in writing also fails. The plaintiffs seek to frame the issue as whether the club proved its entitlement to relying on the safe harbor provision. In doing so, they mischaracterize the role of that provision. By enacting the

safe harbor language, the Legislature did not thereby impose strict liability on employers unless they affirmatively proved full compliance with its terms. Put otherwise, even if employers had not quite reached the shelter offered by the statutory safe harbor, that would not mean that they necessarily would be shipwrecked on the shoals of the act. In circumstances where, as here, the plaintiffs are unable to make out a case of per se liability, it remains the plaintiffs' burden to demonstrate that the charge at issue is one "that a patron or other consumer would reasonably expect to be given to a wait staff employee, service employee, or service bartender in lieu of, or in addition to, a tip." G. L. c. 149, § 152A (a). Quite apart from the Exhibit A disclaimer language, there was ample evidence in the trial record on which the jury could conclude that reasonable patrons would have understood that the club intended to retain the house charge for itself.[17]

In sum, the plaintiffs are unable to make out a claim that they were entitled to judgment as a matter of law as to the two

[17] Because our decision does not turn on whether the club had fully complied with the safe harbor provision, we need not decide the questions -- hotly debated by the parties -- whether a "designation" under the safe harbor provision can be oral, what an oral designation would look like, and how a designation differs from a "description." See G. L. c. 149, § 152A (d), second par.

categories of events on which they focus. The judge properly denied their posttrial motion.

2. Evidence of oral communications. The plaintiffs separately claim that the judge improperly admitted evidence of what the club orally had communicated to patrons regarding the house charge. This argument requires little discussion. Granted, such communications may be beside the point in circumstances where a plaintiff is able to make out a case of per se liability. See Cooney, 69 Mass. App. Ct. at 638 n.6. However, where a plaintiff has not made out a case of per se liability and therefore has been left to prove what a reasonable patron would have understood, what the patron in fact had been told about the fee would be a critical consideration for the jury to weigh. Indeed, Bednark at least implicitly recognizes this. See Bednark, 78 Mass. App. Ct. at 815-816.

Disposition. We affirm both the judgment and the order denying the plaintiffs' postjudgment motion.

So ordered.

EXHIBIT B

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 2005-P-1657

BEVERLY COONEY, et al.,
PLAINTIFFS-APPELLANTS, CROSS-APPELLEES

v.

COMPASS GROUP FOODSERVICE, et al.,
DEFENDANTS-APPELLEES, CROSS-APPELLANTS.

ON REPORT TO THE APPEALS COURT BY THE MIDDLESEX SUPERIOR COURT

Brief for the Defendant-Appellee, Cross-Appellant Northeastern University

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Issue Presented.

1. Whether Plaintiffs, foodservice workers who were not employees of Northeastern University, may bring a claim against Northeastern University under the Massachusetts Tip Statute, G.L. c. 149, § 152A, merely because Northeastern University used the label "service charge" to describe a facilities fee added to certain customer invoices, even though the "service charge" never was intended to be, and never was represented as being, in the nature of a tip or gratuity.

compensation or payment of wages. Consequently, Plaintiffs' statutory claim against Northeastern is nothing more than an overreaching effort to obtain money that they are not entitled to and should be dismissed in its entirety.

C. The undisputed record evidence establishes that Henderson House customers knew that the "service charge" was not in the nature of a tip or gratuity.

To the extent that customers' intent is deemed relevant for purposes of Plaintiffs' claims, which it should not be,[6] the entirety of the record evidence shows that Henderson House customers were aware that the "service charge" assessed by Northeastern was not

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[6] The California Appeals Court has decided that customers have no legitimate interest in knowing how much service employees are paid by their employers. Searle v. Wyndham Int'l, Inc., 102 Cal. App. 4th 1327 (2002). In Searle, the court held that a hotel was not obliged to inform a patron that the proceeds of a mandatory "service charge" added to a room service bill were paid over to the servers, even though the patron argued that such knowledge would impact whether the patron would leave a voluntary tip to the server. Id. at 1334. The court held that "the patron has no legitimate interest in what the hotel does with the service charge. . . . [W]e are not willing to indulge the notion that the custom of tipping somehow gives patrons the right to know how much a server is being paid by his or her employer." Id. at 1334-35. Rather, the court acknowledged that "tipping is solely a matter between patron and server," and thus not affected in any way by an employer's imposition of a mandatory "service charge." Id. at 1335 (emphasis added).

intended to be a tip or gratuity for the waitstaff. Neither Northeastern nor Chartwells ever made any representation to any customer that the "service charge" was in the nature of a tip or gratuity, and neither hid the intent of the "service charge." R.A. at 267-68. To the contrary, representatives from Chartwells and Northeastern informed Henderson House customers about the nature of the "service charge" whenever asked. Upon booking an event at Henderson House, customers were asked whether they would permit a "tip jar" to be placed at the bar. R.A. at 268. In addition, Chartwells provided paperwork emphasizing that "[t]he Service Charge goes to Northeastern University and not the foodservice staff. ALL GRATUITIES ARE OPTIONAL AND AT YOUR DISCRETION!!!" R.A. At 268, 315 (emphasis in original). Even Plaintiffs have submitted evidence that the "service charge" was identified as a "NORTHEASTERN UNIV. CHARGE." R.A. at 375 (emphasis in original).

Indeed, customers' understanding that Northeastern's "service charge" was not intended as a tip or gratuity is borne out by their actual, undisputed tipping practices. Despite receiving the invoices Plaintiffs now challenge, many customers

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2005-P-1657

BEVERLY COONEY et al.,

Plaintiffs-Appellants

v.

COMPASS FOODSERVICE, INC.,
CHARTWELLS FOODSERVICE, DAKA, INC.,
and NORTHEASTERN UNIVERSITY,

Defendants-Appellees

On a Report to the Appeals Court by the
Middlesex Superior Court

APPENDIX

Shannon Liss-Riordan, BBO #640716
Hillary Schwab, BBO pending
PYLE, ROME, LICHTEN, EHRENBERG
& LISS-RIORDAN, P.C.
18 Tremont Street, Suite 500
Boston, MA 02108

May 12, 2006

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. Superior Court
Civil Action No. 02-3159

BEVERLY COONEY, et al.,
Plaintiffs,

v.

COMPASS GROUP FOODSERVICE, et al.,
Defendants.

AFFIDAVIT OF JESSE WOLKIEWICZ

I, Jesse Wolkiewicz, do hereby depose and state the following on personal knowledge:

1. Between approximately July 1995 and March 2000, I was employed by Compass Group USA, Inc. ("Compass") d/b/a Chartwells, or its predecessor, as the General Manager for Compass' Henderson House operations.

2. In that capacity, I had oversight responsibility for providing the food and beverage service for various events held at the Henderson House. The Henderson House is a conference and function center in Weston, Massachusetts that is owned by Northeastern University ("Northeastern").

3. While I was General Manager, Henderson House invoices included a "service charge" that was assessed in order to provide funds for the operation, maintenance and upkeep of Henderson House.

4. When planning events for the customers who used the Henderson House facilities, it was my practice to inform them that the "service charge" included on the invoices went to Northeastern, and not the food service staff. The attached "Cost Estimate Sheet" is a true and accurate copy of a type of estimate that I provided Henderson House customers.

5. The message on that sheet – that the "Service Charge [went] to Northeastern University and not the foodservice staff" and that "all gratuities are optional and at your discretion" -- is consistent with the message that I regularly communicated to Henderson House's customers.

6. I never represented to any Henderson House customer that the "service charge" on the invoices was intended to be a tip or gratuity.

Signed under the pains and penalties of perjury, this ___ day of May.

Jesse Wolkiewicz

COST ESTIMATE SHEET FOR KOMER / RAO WEDDING
JULY 31, 1999

(ESTIMATED COSTS BASED ON 75 GUESTS)

SPECIALTY MENU @ $42.00 PER PERSON	$3,150.00
BARTENDERS (1 PER 50 GUESTS = 1 @ $75.00 EACH)	$75.00
STATION ATTENDANTS (3 @ $75.00 EACH)	$225.00
ESTIMATED BAR COST (BASED ON $12.00 PER PERSON)	$900.00
PHOTOGRAPHER / PIANIST (BASED ON 2 PEOPLE @ $11.95 EA.)	$23.90
CHAMPAGNE TOAST (ESTIMATE)	$150.00
SUB TOTAL=	$4,523.90
5% MEAL TAX	$226.20
15% SERVICE CHARGE	$678.59
ESTIMATED TOTAL	$5,428.69

$60.32 per person w/o tax & service charge***
$72.38 per person w/ tax & service charge***

*** The Service Charge goes to Northeastern University and not the foodservice staff.
ALL GRATUITIES ARE OPTIONAL & AT YOUR DISCRETION!!!

NOT INCLUDING HOUSE CHARGES

NU 3199

EXHIBIT C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT
CIVIL ACTION
NO. 04-3516B

Notice sent
4/07/2009
H. S.
S. E. L. R.
P. R. L.
& E.
A. D. C.
K. G. P.
S. S.

DONALD BENOIT,
and all others similarly situated[1],
Plaintiff,

vs.

THE FEDERALIST, INC.,
Defendant,

(sc)

MEMORANDUM OF DECISION
ON MULTIPLE DAMAGES PURSUANT TO G. L. c. 149, § 150

The plaintiff ("Benoit") brought an action against the defendant, The Federalist, Inc. ("The Federalist"), who was his former employer. Benoit alleged that The Federalist violated the Massachusetts Tips Statute G. L. c. 149, § 152A, by not remitting the full amount of tips or gratuities collected from clients to waitstaff. After a six-day trial, a jury returned a verdict for the plaintiffs on December 7, 2007. The matter is now before the court to decide the issue of treble damages under G. L. c. 149, § 150.

For the reasons stated below, the court finds that the defendant acted willfully, in reckless disregard for its employees' rights, when it did not make the appropriate disbursement of tips or gratuities from August, 2001 through July, 2004.

FINDINGS OF FACT

The Federalist was a restaurant located at 15 Beacon Street. It had a public dining room, a private dining room, and serviced XV Beacon, the hotel located at the same

[1] On November 5, 2007, the court certified a class action consisting of the plaintiff and those similarly situated pursuant to G. L. c. 149, § 150 and Mass. R. Civ. P. 23.

address. The restaurant was particularly known for its collection of wine and its wine cellar. This matter regards the service charge for the service of food and beverage for events held in the private dining room between August, 2001 and July, 2004. The service charge paid by clients from their bill for food and beverage service in the private dining room was 21%.

The plaintiff was a server for events in the private dining room. Servers and commis (otherwise known as "busers"), were responsible for the service of food and beverage in the private dining room and are designated as the class in this action. Servers and commis will be referred to as "waitstaff."

The waitstaff received an hourly base pay that was less than minimum wage. The waitstaff base pay was $2.63 per hour. The waitstaff relied on tips and gratuities for additional compensation. For purposes of this discussion, tips, gratuities and service charge are interchangeable terms and will be referred to as a service charge ("service charge"). The service charge paid by clients of the private dining room was 21%. The defendant compensated waitstaff with only 15% of the service charge.

The defendant used portions of the remaining 6% of the service charge to pay a private dining coordinator ("coordinator"). All events in the private dining room were scheduled through the coordinator. The coordinator met with clients to make all the arrangements for the event including, without limitation, reviewing menus, making wine selections, selecting flowers and music and negotiating the private dining room contract ("PDR contract"). On the day of the event, the coordinator would oversee the set-up of the dining room and greet the host of the event. The coordinator would introduce the waitstaff captain, and the waitstaff would serve the food and beverage. On occasion, the

coordinator would help with the pouring of a beverage or ensure that all food was served appropriately. However, the coordinator was not required to stay at an event after the guests arrived and had no assigned duties regarding the service of food and beverage. Indeed, the defendant's Handbook for Private Dining Room Events ("handbook") specifically designated all the duties for food and beverage service to the waitstaff captain and waitstaff. The handbook also anticipated that the coordinator would not be present at the end of an event, because it provides that any issues with closing a check ("bill" or "invoice") will be held for payment until the next day for the coordinator to review and resolve. The testimony from waitstaff witnesses regarding their participation in food and beverage service is credible and consistent with the defendant's written policies. The testimony of the coordinator witnesses regarding the regularity of their participation in the service of food and beverage is not consistent with the defendant's written policies and did not substantiate their role in the service of food or beverage.

The coordinator's annual gross salary was taken directly from the private dining room service charges for food and beverage. This was reflected in employment confirmation letters of offer and acceptance to Sandra Glynn ("Glynn"), who was the dining room coordinator, from August 1, 2002 to July, 2004. Glynn was paid $50,000.00 as a salaried employee and labeled as an events manager for payroll authorization. Bruno Marini ("Marini"), the restaurant manager, confirmed that the coordinator salary came from 3% of the service charge that was over and above the 15% service charge disbursed to waitstaff from August, 2002 through February, 2003. Additionally, Glynn's salary was raised in March, 2003, to $60,000.00 and was designated in the confirmation letter to come from 4% of the service charge. Again, this was over and above the 15% disbursed

to waitstaff. The letter was signed by Marini. The coordinator's salary was paid from the service charge without regard to participation in food and beverage service. The service charge was used to pay salaried employees, instead of disbursing that portion to, waitstaff.

From August, 2001 through July, 2004 the defendant negotiated a PDR contract with clients that reflected a service charge for 18% and an administrative fee of 3%. The administrative fee was used by the defendant for operational expenses. However, the contract was inconsistent with the ultimate bill to customers that designated a 21% service charge.

From August, 2001 to mid-September, 2003 the bill or invoice ("bill") reflected a 21% service charge and 21% was listed on the "tip" line for credit card receipts. William Sander ("Sander"), the general manager for the hotel XV Beacon, and Marini, testified that only 15% of the service fee was distributed to waitstaff.

From August, 2001 to July, 2003 the defendant had a computer system that produced itemized bills that did not reflect the terms of the PDR contract on the bill. Management made no effort to reconcile or clarify the PDR contract charges with the 21% charged to clients on the bill. Instead, the bill reflected that clients paid a service charge of 21%, yet the defendant used 6% of it for operational costs instead of waitstaff.

On July 9, 2003 the defendant updated their billing capacity with a new system. This was done only after their "old" system broke down. The acquisition of a new system was not motivated by irreconcilable business records. The accuracy of the new bill format relied solely on the defendant supplying the appropriate information to the software program called Micros. However, the defendant did nothing to provide the

necessary information to reflect a client bill that was consistent with the PDR contract terms. The bill generated by the new system continued to reflect a 21% service charge (gratuity). Management for the defendant chose not to conform the bill to the PDR contract charges and collected a 21% service charge and applied 6% to operational costs rather than waitstaff.

On October 1, 2003 a client responsible for paying the bill questioned the plaintiff about the distribution of the 21% service charge. As a result of this inquiry, the client became aware that the entire 21% was not distributed to the waitstaff and he left an extra gratuity for the waitstaff. The plaintiff and Glynn discussed this incident and the plaintiff questioned the amount of the distribution to waitstaff from the service charge. Glynn memorialized this discussion with the plaintiff in a memo to management dated October 3, 2003. It was only after an encounter with a client and a challenge to the fair distribution of the service charge by a member of the waitstaff, did the defendant give information to the Micros system to have the bill itemize a service charge and administrative fee.

On October 10, 2003 the bill format was changed to itemize a 15% private dining room service charge and a 6% private dining room administrative fee. However, the bill continued to total and label these items as a 21% service charge. The defendant also continued to have the bill conflict with the terms of the PDR contract that reflected an 18% service charge and 3% administrative fee.

Additionally, the coordinator's salary continued to be designated as coming from the "private dining service charge of total food and beverage revenues." Purportedly, the coordinator's salary was paid from the service charge on management's theory that the

coordinator was engaged in the service of food and beverage. However, the defendant never amended the PDR contract from 18% to a 19% service charge to reflect the coordinator's 1% raise in March, 2003. The defendant's business practices reflect that , the "administrative fee" was actually a private dining service charge of total food and beverage revenue that was used to compensate the coordinator, based on the theory that she was engaged in the service of food and beverage. The intent and practice of the defendant was to collect a 21% service fee, and not an administrative fee.

There is no need to determine if the coordinator is a salaried manager - and therefore prohibited from payment through service charges - because the coordinator was not engaged in the service of food or beverage and is therefore not entitled to the proceeds of a service charge. The coordinator was paid from the service charge under the theory that she was involved with the service of food and beverage, without any accountability as to the coordinator's proportional (or even actual) involvement. In fact, the presence of a coordinator at an event was only required when the guests arrived, and was not present for the service of food and beverage.

On December 7, 2007 a jury found the defendant liable for the payment of the total 21% of the service charge to employees engaged in serving food or beverage between August, 2001 and July, 2004. The jury further found that the private dining room coordinator did not have a primary duty of serving food or beverage and was not sufficiently engaged in the serving of food or beverage to receive a portion of the service charge.

The parties stipulated to the value of food and beverage sales in the private dining room, for valuation only, as follows: from August, 2001 through September, 2003, 3% of

sale equaled $66,073.13 and 6% of sales equaled $132,146.26; from October, 2003 through July, 2004, 3% of sales equaled $25,865.85.

The defendant is an employer who submitted a bill to customers indicating a 21% service charge. There was no transparency in the private dining room charges and there was a willful absence of good faith in fair dealing throughout the period of time in question. The business policies and practices of the defendant were contradictory and misleading. The charge that is clear and consistent is a final total tabulation of a 21% service charge at the end of every client's bill.

In summary, from August, 2001 through July, 2004 the defendant willfully assigned and used arbitrary percentages from the service charge of clients' bills for food and beverage service in: the PDR contract; in the offer and acceptance employment letters to the coordinator; and in itemized charges on clients' bills. The defendant knowingly collected a 21% service charge for the service of food and beverage from its clients, and only disbursed 15% to the waitstaff. The defendant knowingly used the service charge to pay a salaried employee and to cover other operational expenses.

The operative statute requires the total service charge from the bill or invoice to be distributed to employees in proportion to the food and beverage service they provide. The defendant is required to remit the full 21% service charge, as reflected by the jury decision. Additionally, inasmuch as the defendant billed a 21% service charge under the circumstances as outlined above, the defendant acted in reckless disregard for the employees' rights and is responsible for treble damages to the plaintiff class.

RULINGS OF LAW

General Laws c. 149, § 150, states in relevant part, "[a]ny employee claiming to be aggrieved by a violation of section . . . 152A . . . may . . . institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief and any damages incurred, including treble damages for any loss of wages and other benefits." An award of treble damages is punitive in nature and allowed only where authorized by statute. See Wiedmann v. The Bradford Group, Inc., 444 Mass. 698, 710 (2005) (explicating the standard for treble damages under G. L. c. 149, § 150), citing Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 178 (2000). Treble damages are appropriate where "'conduct is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.'" Id., quoting Dartt v. Browning-Ferris Indus., Inc., 427 Mass. 1, 17a (1998). Where no evidence in the record supports an award of treble damages, such an award is improper. See Goodrow, 432 Mass. at 179; see also Killeen v. Westban Hotel Venture, LP, 69 Mass. App. Ct. 784, 788 (2007) (vacating award of treble damages because judge failed to make any finding on whether defendant's conduct was outrageous or showed a reckless indifference to the rights of others and remanding for reconsideration of this issue).

After a jury verdict finding the defendant liable for violating G. L. c. 149, § 152A, this court must now determine whether an award of treble damages is justified.[2] The

[2] At the time relevant to this action, § 152A provided: "No employer or other person shall solicit, demand, request or accept from any employee engaged in the serving of food or beverage any payment of any nature from tips or gratuities received by such employee during the course of his employment, or from wages earned by such employee or retain for himself any tips or gratuities given directly to the employer for the benefit of the employee, as a condition of employment; and no contract or agreement between an employer or other person and an employee providing for either of such payments shall afford any basis for the granting of legal or equitable relief by any court against a party to such contract or agreement. If an employer or other person submits a bill or invoice indicating a service charge, the total proceeds of such charge shall be remitted to the employees in proportion to the service provided by them. . . ."

plaintiff argues that the imposition of treble damages is not only merited, since the defendant willfully and knowingly violated G. L. c. 149, § 152A by improperly disbursing money billed and collected as a service charge to the coordinator, but also statutorily mandated. In direct counterpoint, the defendant contends that treble damages are discretionary and in this case unwarranted, since there could have been no willful or knowing violation of G. L. c. 149, § 152A as the law at the time relevant to these events was unsettled. This court finds that an award of treble damages is merited.

I. The Law Regarding G. L. c. 149, § 152A Was Not Unsettled

The defendant argues that an award of treble damage for the plaintiffs would be inappropriate as the defendant could not have violated G. L. c. 149, § 152A in an intentional, willful, or reckless manner because the law was unsettled at the time of the events at issue. Furthermore, the defendant argues that the caselaw then available, if anything, supported an interpretation of the statute allowing a portion of the service charge to be distributed to the coordinator, not just waitstaff. This court disagrees.

During the time of the defendant's actions, there were at least four out of five Superior Court cases interpreting G. L. c. 149, § 152A: Smith v. Locke-Ober Co., SUCV No. 2002-1036H (Mass. Super. Ct. November 5, 2004) (Holtz, J.); Williamson v. DT Mgt., Inc., d/b/a/ Boston Harbor Hotel, Inc., 17 Mass. L. Rptr. 606 (Mass. Super. Ct. March 10, 2004) (Haggarty, J.); Nedved v. 1760 Society, Inc., d/b/a/ The Sherborn Inn, and the 1760 Eating and Dining Society, Inc., 17 Mass. L. Rptr. 350 (Mass. Super. Ct. February 18, 2004) (McCann, J.); Fraser v. Pears Co., Inc., 16 Mass. L. Rptr. 255 (Mass.

Super. Ct. May 5, 2003) (Brady, J.); and Chance v. Westban Hotel Venture, LP, SUCV No. 97-4947A (Mass. Super. Ct. November 22, 2000) (Volterra, J.).[3]

A careful reading of these cases shows that the weight of authority favored an interpretation of the statute approving disbursement of service charges to those employees whose express duty it was to provide food and beverage service. Even under a generously expansive reading, these decisions demonstrate that the law then in force limited distribution of gratuities to only those employees who were substantially involved in serving patrons, either by actually engaging in the service of food and beverage to patrons, or by their oversight or other significant participation in support of such service at the time of the event during which patrons were served. Thus, it cannot be said that the defendant was not on notice that its practices would violate § 152A. Indeed, the cases relied on by the defendant should have put it on notice that any distribution to the coordinator would violate § 152A, since the coordinator had no assigned duty to serve food and beverage, had no meaningful involvement in any food and beverage service, and played no significant role in ensuring the smooth functioning of the private dining events during those events.

The defendant cites Chance and Nedved as the strongest cases supporting its contention that § 152A should be broadly read as allowing distribution of a service charge to its coordinator. In Chance, the court determined that § 152A allowed banquet captains to receive a proportionate share from a tip pool. Chance, at *13-17. Although the plaintiff-servers there argued that only individuals who actually served food and drink could share in the tip pool, the court determined that banquet captains, who only

[3] There was no appellate authority on § 152A at the time relevant to this action.

occasionally served food and drink, could nevertheless receive a proportionate share of tips, since their "main duties and responsibilities [were] to do what [was] necessary to make sure that a banquet runs smoothly." Id. at *5. In describing exactly what this entailed, the court detailed in exhaustive fashion the multitude of responsibilities of the banquet captain prior to, during, and following a banquet, including but not limited to preparation leading to the banquet, oversight of the server's food and beverage provision to patrons, the actual service of food and beverage when necessary, and filling in for any absent servers. Id. at *6-7. Similarly, in Nedved, where the dispute centered on whether employees who did not serve food and drink could receive a share of gratuities, the court held that banquet coordinators, who oversaw events, coordinated the servers in the kitchen, and acted as a liaison between the inn and banquet guests but did not serve any food or beverage, could receive gratuities. Nedved, at *1-2.

Because Chance and Nedved involve employees who play a substantial role in serving patrons during the course of dining events, altogether unlike the coordinator here, they fail to support the defendant's contention that § 152A allows the coordinator to share in the service charge. Furthermore, Chance and Nedved, if anything, clearly support the proposition that only employees who have a substantial role to play in ensuring the smooth functioning of events during those events may receive a share of the service charge. Accordingly, since the coordinator here had no significant role in ensuring the smooth functioning of events in the private dining room as they occurred, the defendant's reliance on Chance and Nedved is unavailing.

The remaining cases – Williamson, Smith, and Fraser – construe § 152A more narrowly than Chance and Nedved and fail to provide any support for the defendant's

contention. First, these cases hold, either explicitly or implicitly, that employees, who are substantially responsible for the service of food and beverage, may share tips under the statute. In Smith, the court determined that tips could be distributed to a maitre'd because, in addition to certain managerial duties, he was responsible for seating and greeting customers, reciting daily specials to customers, taking food and beverage orders, preparing food tableside, and carving meat tableside. Smith, at *2, 9. Fraser also involved the distribution of tips to a maitre'd. There, it was determined that the maitre'd, who was responsible for meeting and greeting guests, serving drinks and food when necessary, answering questions about food and wine menus, and doing whatever was necessary to ensure the smooth and happy running of the restaurant, could share in a mandatory tip pool, since the court found that the maitre'd, through these responsibilities, provided "service" under § 152A. Fraser, at *1, 3 n.4. Finally, in Williamson, the case with the narrowest holding, the court concluded that only employees whose primary duty was the service of food and beverage could lawfully share tips under § 152A. Williamson, at *11.

As shown, none of the cases cited is analogous to the situation at hand – the payment of service charges to a coordinator with no duty to serve food or beverage to private dining patrons, and with no significant role, if any, in ensuring those patrons receive proper service during private dining events. Accordingly, the cases provide no support to the defendant. Moreover, this court's reading of these rulings illustrates that the law was not as unsettled as the defendants contend. Rather, the caselaw cited by the defendant plainly indicated that in order to lawfully receive tips under § 152A the coordinator must, at the very least, have played a significant role in servicing patrons

during private dining events, if she had not actual food and beverage service responsibilities. Because the coordinator played no such role and had no such duty, the defendant should have realized that any distribution of the service charge to her would have violated the rights of its waitstaff under § 152A.

II. The Award of Treble Damages under G. L. c. 149, § 150 is Justified

There is ample evidence showing that the defendants were recklessly indifferent to the rights of its waitstaff by willfully and intentionally distributing service charges to the coordinator in violation of G. L. c. 149, § 152A. As shown, for purposes of service charge distribution here, the caselaw interpreting § 152A was settled as to which employees could and could not properly share in the distribution of gratuities. In addition, § 152A clearly stated which service charge was due to the service employees – the service charge on the invoice. Nevertheless, the defendant blatantly disregarded the waitstaff's rights in these respects, and there is no evidence that the defendant made any good faith attempt to comply with the statute.

As this court's analysis makes clear, § 152A required distribution of a service charge to service employees. The coordinator, however, was not such an employee. While the waitstaff were primarily responsible for serving food and beverage in the private dining room, the coordinator, essentially acting as an events manager for the defendant, had no duty to serve food and beverage to the private dining clients and was not required or expected to stay for the duration of private dining events. At most, the coordinator would oversee the set-up of the dining room and greet the host of the event on the day of a scheduled event; only seldom would the coordinator assist in the pouring of a beverage or ensure that food was served appropriately. Further enforcing the

distinction between the coordinator and waitstaff, the defendant's employee handbook illuminates the clear demarcation between food service and event coordination responsibilities: all food and beverage service duties were expressly reserved to the waitstaff, while the coordinator had no such assigned obligations. Although she clearly lacked any assigned responsibilities for food and beverage service and played no meaningful or significant role in the smooth functioning of private dining events, the coordinator's salary was nevertheless funded from the service charge without regard to her participation in food and beverage service, which was found to be virtually nil. The defendant's distribution of a portion of the service charge to the coordinator was, therefore, in blatant disregard of the rights of the waitstaff under the statute.

In addition to improperly disbursing a portion of the service charge to the coordinator, the defendant also played fast and loose with the service charge designations between the PDR contract and client invoices. From August, 2001 to July, 2004, the defendant's PDR contract provided for an 18% service charge and a 3% administrative fee. However, from August, 2001 to September, 2003, the invoice issued to private dining room clients designated a 21% service charge, which clearly conflicted with 18% service charge of the PDR contract. Furthermore, the 21% service charge on the invoice was also listed on the "tip" line for credit card receipts. Despite the fact that the service charge was variously represented as 18% and 21%, the defendant never distributed more than 15% of the service charge to the waitstaff. The defendant's failure to distribute the full 21% of the service charge on the invoice was in flagrant disregard of the clear mandate of § 152A that, "[i]f an employer or other person submits a bill or invoice

indicating a service charge, the total proceeds of such charge shall be remitted to the employees in proportion to the service provided by them. . . ."

Although managers for the defendant blamed the old computer system for these, misleading and conflicting charges, no effort was made by the defendant to reconcile the service charge specified within the PDR contract with the service charge on the client invoices. Even when a new billing system was implemented in July, 2003, the billing system continued to reflect a 21% service charge.[4] In fact, no effort was made to conform the invoice to the contract until October, 2003, when a customer, learning that the waitstaff did not receive the entire 21% service charge on the invoice, questioned the distribution of that service charge. Yet, even though the new computer system itemized the invoice to reflect a 15% service charge and 6% private dining room administrative fee, the invoice also totaled these costs and labeled them as a 21% service charge, of which only 15% was distributed to the waitstaff in reckless disregard of their rights under § 152A.

Also demonstrating the reckless and willful nature of the defendant's actions is the documentary and testimonial evidence showing that the defendant consistently intended to collect a service charge, not an administrative fee, to cover the cost of the coordinator's salary. Not only was the coordinator's salary intended to be taken from the "private dining service charge of total food and beverage revenues," the coordinator's salary was in fact paid from 3% of the service charge due to the waitstaff. This was done on the untenable belief that the coordinator was engaged in the service of food and beverage, despite the fact that she had no such responsibility, played no meaningful role

[4] To be clear, the old billing system was replaced because it broke down, not because the defendant perceived any need to install a new billing system to correct the inaccuracies on the invoice.

during the private dining events, and was not even required to be present during those events. Further, when her salary was increased, the 1% applied to her salary increase was designated as coming from "private dining service charge of total food and beverage revenues", despite the fact that this increase exceeded the 18% service charge designated in the PDR contract. The defendant intended to pay the coordinator from the invoice service charge, regardless of what the defendant represented to clients on the PDR contract and regardless of the coordinator's lack of participation in food and beverage service. That the defendant intended to collect a 21% service charge without distributing the entire amount to the waitstaff amounts to willful and intentional conduct in violation of the rights granted to the waitstaff under § 152A.

Finally, the absence of any good faith attempt by the defendant to comply with § 152A by the defendant favors the award of treble damages. In Goodrow, the Appeals Court affirmed the trial judge's refusal to impose multiple damages "in light of the uncertainty of the state of the law in Massachusetts and the fact that [the defendant-employer] relied on the advice of counsel and followed law and procedures apparently sanctioned elsewhere." 432 Mass. at 179. Even assuming that the state of the law was unsettled for the purpose of discerning whether the distribution of the service charge to the coordinator was unlawful, there is no evidence showing that the defendant attempted to ensure the distribution was permissible. Unlike Goodrow where the defendant-employer sought the advice of counsel and followed law sanctioned elsewhere, the defendant here made no such efforts, and if anything, its willful conduct with business records belies any claims to the contrary.

As demonstrated, the record is replete with evidence of the defendant's blatantly reckless disregard for the rights of the plaintiffs under § 152A. Despite the fact that the coordinator had no formal responsibility for serving food and beverage to patrons and was not required to play any significant role in private dining events as they occurred, the defendant distributed a 3% share and a 4% share of the service charge toward her salary. Moreover, the distribution was willfully made with no regard whatsoever to proportionality – the coordinator was paid 3 to 4% of the service charge, despite customarily playing no role at all. What's more, the defendant failed to make any meaningful effort to clearly and accurately represent the actual service charge to its patrons so that they were aware of the actual amount of service charge paid to the waitstaff.

The defendant's conflicting administrative records reflect its willful intent to divert 6% of the service fee to its own use in reckless disregard of waitstaff. The defendant's business records show a reckless disregard toward the purpose and collection of a service charge. The statute clearly states that the service charge on a bill or invoice is designated for employees serving food and beverage.

Altogether, various factors – the misleading and contradictory terms within the PDR contracts and invoices, the absence of good faith and fair dealing by the defendant in failing to correct these service charge discrepancies, the defendant's consistent intention to charge a service fee and not an administrative fee for the coordinator's salary, the knowing and willful collection of a 21% service charge with only 15% distributed among waitstaff, and the intentional payment of the salary of the coordinator who provided no food and beverage service and had no significant role in servicing patrons

during events from the service charge reserved expressly for those providing such service – demonstrate the defendant's willful and knowing violation of G. L. c. 149, § 152A in reckless disregard of the rights of the waitstaff. Accordingly, an award of treble damages is warranted.

CONCLUSION

For all of the above reasons, the defendant acted willfully and in reckless disregard to the rights of employees as designated in this class action. The jury awarded 21% of the service charge to the plaintiffs, which is an award of damages for $183,877.96. Judgment shall enter by trebling the damages awarded by a jury verdict to $471,633.88.

By Order of the Court,

Dated: April 3, 2009

Merita A. Hopkins
Associate Justice

EXHIBIT D

6 95

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO: 04-3515 A

JUN 27 2007

ALAN BANKS, JAMES BROUSSARD AND ALL OTHERS SIMILARLY SITUATED,
Plaintiffs

vs.

SBH CORP and KENNETH HIMMEL,
Defendants

notice sent 6/26/07
R.S.
N.L.P.
P M L
S.E.L-R
H S
P R L E L-R
(mm)

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Given the affidavits supplied by defendants, a genuine issue of material fact is raised as to the intent and knowledge of the customers who paid the 2-5% "service charge" on private parties' bills. However, the plain and unambiguous language on which plaintiffs rely states: "If an employer or other person submits a bill or invoice indicating a service charge, the total proceeds of such charge shall be remitted to the employees in proportion to the service provided by them." Given this clear language, consideration of the customers' intent in paying the 2-5% "service charge" is irrelevant.

The defendants have failed to raise any genuine issue of material fact as to whether they issued bills or invoices indicating a "service charge." The defendants concede that they did, but claim that, because those "service charges" are in addition to the gratuity which was paid to the waitstaff, the statute does not apply. This court fails to appreciate how the plain language does not apply. Accordingly, plaintiffs' motion, limited only to the named plaintiffs, Alan Banks and James Broussard, is allowed.

ORDER

Plaintiffs' Motion for Partial Summary Judgment is ALLOWED.

By the Court,

Elizabeth M. Fahey
Justice of the Superior Court

Dated: June 7, 2007

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JUN 27 2007

NOTICE

17

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Superior Court
Civil Action No. 04-3515A

2006 DEC 11 PM 3:23
MICHAEL DONOVAN
CLERK/MAGISTRATE
SUFFOLK SUPERIOR COURT
CIVIL SESSION

ALAN BANKS, JAMES BROUSSARD, and all others similarly situated,

Plaintiffs,

v.

SBH CORP., and KENNETH HIMMEL,

Defendants.

Notice sent 6-26-07 RS ZP PB+L SLR HH RLE+LR

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF

This is an action brought by Plaintiffs Alan Banks and James Broussard on behalf of themselves and all others similarly situated under the Massachusetts Tip Statute against their employers, owners of Grill 23 & Bar, a Boston restaurant. Grill 23 & Bar's practice of including a service charge on customers' bills for private parties and retaining the service charge for the restaurant instead of distributing it to the servers violates Mass. Gen. L. c. 149 § 152A. Plaintiffs submit that there are no material facts in dispute with respect to this practice, and, accordingly, Plaintiffs are entitled to summary judgment on this claim under Mass. Gen. L. c. 149 § 152A.[1]

allowed, see memorandum of decision. Ely Tilney QSC 6/7/07

[1] Plaintiffs have also included in their complaint other claims under Mass. Gen. L. c. 149 § 152A relating to Defendants' tipping policies in the main dining room as well as a claim for improper claiming of the "tip credit" in violation of Mass. Gen. L. c. 151 § 1 and 7 and a number of common law claims. Plaintiffs are not moving for summary judgment on these other claims.

EXHIBIT E

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES
STATE HOUSE, BOSTON 02133

TIMOTHY A. BASSETT
10TH ESSEX DISTRICT
65 COOLIDGE ROAD
LYNN, MA 01902
TEL. 593-8732

Committee on Commerce
& Labor - Chairman
ROOM 43, STATE HOUSE
TEL. 727-7676
DISTRICT OFFICE
330 CHATHAM STREET
LYNN, MA 01902
TEL. 593-8732

July 28, 1983

His Excellency Michael S. Dukakis
Executive Office
State House, Room 360
Boston, Massachusetts 02133

Dear Governor Dukakis:

On July 25, 1983 the General Court placed before you House Bill 6370, An Act Requiring That Certain Service Charges Be Paid To Employees, for your consideration.

The Committee on Commerce and Labor has heard testimony for several years regarding the practice of certain restaurants and caterers of misrepresenting the purpose of service charges. Employees, particularly waiters and waitresses, have suggested that in many cases customers are given the mistaken impression that the proceeds of any service charge are given to employees. As a result, no tips are given to employees by misinformed customers.

A combination of law, interpretive regulation, and enforcement practices have made the issue more complicated than it needs to be. House Bill 6370 eliminates any confusion by clearly reserving the proceeds of service charges for employees.

I urge you to sign House Bill 6370. Furthermore, I would respectfully, suggest a signing ceremony involving myself, Representative Robert McNeill, the Massachusetts AFL-CIO and representatives of Local 26 of the Hotel and Restaurant Employees Union, AFL-CIO, on August 16th.

Very truly yours,

TIMOTHY A. BASSETT
Chairman
Commerce and Labor Committee

TAB:rrc