

**IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
NINETEENTH JUDICIAL CIRCUIT**

G.R. RESTAURANT, INC.,)	
d/b/a GRANNY SCHAFFER'S)	
FAMILY RESTAURANT and)	
J.J. GROUP, INC., d/b/a)	
JOHNNY'S BEANERY,)	
)	
Plaintiffs,)	
)	Cause No. 07AC-CC00276
v.)	
)	Division IV
MISSOURI DEPARTMENT OF LABOR))	
AND INDUSTRIAL RELATIONS,)	
)	
Defendant.)	

PROPOSED JUDGMENT AND ORDER OF DISMISSAL

Plaintiffs assert that § 290.512, RSMo, a part of Missouri's Minimum Wage Law, creates a ceiling in the cash wage due to tipped employees of \$3.25, which is 50 % of the current Missouri minimum wage of \$6.50 per hour. Plaintiffs seek a declaratory judgment to this effect. Plaintiffs also seek a declaration that their reliance on the Department's initial position, set out in its website, that § 290.512 permitted employers to pay tipped employees less than \$3.25 per hour in cash wages, so long as the amount of tips received brought the total compensation to such employees up to \$6.50 per hour, bars anyone from requiring them to pay back wages to any tipped employee who has received less than \$3.25 per hour in cash wages.

Under the plain language of § 290.512, however, that statute requires employers to pay tipped employees at least \$3.25 per hour in cash wages, plus any additional amount that may be required to bring their total compensation up to \$6.50 per hour. Further, this

obligation has been effective since January 1, 2007, and any former contrary position of the Department set out in a website does not relieve plaintiffs from their obligation to pay tipped employees at least \$3.25 per hour in cash wages as required by the statute.

FINDINGS OF FACT

The facts material to a decision on the question of statutory interpretation presented here are few, consist largely of a recitation of statutes and a regulation, and have been stipulated to as follows:

1. Missouri's Minimum Wage Law, §§ 290.500 to 290.530, RSMo, was enacted in 1990. Stipulation of Fact (Stip.) ¶ 1.

2. With regard to tipped employees, the Minimum Wage Law has, since enacted, provided that:

No employer of any employee who receives and retains compensation in the form of gratuities in addition to wages is required to pay wages in excess of fifty percent of the minimum wage rate specified in sections 290.500 to 290.530, however, total compensation for such employee shall total at least the minimum wage specified in sections 290.500 to 290.530, the difference being made up by the employer.

§ 290.512.1, RSMo. Stip. ¶ 2.

3. As originally enacted, the Minimum Wage Law excepted from its coverage individuals who received a minimum wage pursuant to the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. § 290.500(3)(d), RSMo 2000. Stip. ¶ 3.

4. Missouri's voters approved Proposition B, which amended the Minimum Wage Law, in November 2006. Stip. ¶ 4.

5. The passage of Proposition B resulted in Missouri's minimum wage being set at \$6.50 per hour, effective January 1, 2007. Stip. ¶ 5.

6. The passage of Proposition B also removed the exemption to the coverage of Missouri's Minimum Wage Law that had formerly exempted employees who were covered by the FLSA. *Compare* § 290.500(3), RSMo 2000, *with* § 290.500(3), RSMo, as currently in effect. Stip. ¶ 6.

7. The section of the Minimum Wage Law governing wages due to tipped employees, § 290.512.1, RSMo, was not changed by Proposition B and remains in effect as originally enacted. *Compare* § 290.512, RSMo 2000, *with* § 290.512, RSMo, as currently in effect. Stip. ¶ 7.

8. Defendant provided advice that employers could lawfully continue to pay tipped employees covered by the FLSA \$2.13 per hour after the effective date of Proposition B until the Governor's Office determined this was not a correct interpretation of the law on about March 14, 2007. Stip. ¶ 8.

9. Defendant's website, www.mominimumwage.com, which provided information regarding Missouri's Minimum Wage Law, contained the following as part of a Question and Answer format ("FAQ" or "Q&A"), posted on December 6, 2006:

Q: I own a restaurant. Do I have to pay my wait staff 50% of the new Missouri minimum wage of \$6.50 per hour if they also receive gratuities?

A: No. However, the total compensation for employees in this capacity must total at least \$6.50 per hour. You are required to make up the difference. For example, if an employee in this capacity receives tips averaging \$4.25 per hour you must pay them \$2.25 per hour to meet the minimum wage of \$6.50 per hour. If they receive tips averaging \$2.50 per hour you must pay them \$4.00 per hour to meet the minimum wage of \$6.50 per hour. If you are

subject to the federal Fair Labor Standards Act you must pay them at least \$2.13 per hour, regardless of the amount of tips they receive, to be in compliance with federal law.

Stip. ¶ 9.

10. On March 14, 2007, Governor Matt Blunt issued a press release which stated as follows:

Blunt Steps in to Protect Workers, Directs Employers to Increase Base Wage for Tipped Employees

JEFFERSON CITY—Gov. Matt Blunt today directed the Department of Labor and Industrial Relations to comply with the minimum wage law passed by voters in November and increase the base wage for tipped employees to \$3.25.

"Missourians voted to increase the minimum wage, and I have directed the Department of Labor and Industrial Relations to immediately clarify that the base wage is not exempt from this mandate," Blunt said. "The department has an obligation to instruct businesses that hire tipped employees to increase salaries in accordance with the law."

The governor issued his directive to the department after reviewing their original interpretation of the law. He disagreed with the department's initial assessment and, after conferring with his General Counsel, directed them to immediately update the information provided to businesses.

The minimum wage law requires employers to pay half of \$6.50 per hour - \$3.25 - as a base wage for all tipped employees.

<http://www.gov.mo.gov/press/Wages031407.htm>. Stip. ¶ 10.

11. On March 14, 2007, or shortly thereafter, the Q&A issued on December 6, 2006 by Defendant's Division of Labor Standards regarding tipped employees was removed from the website www.mominimumwage.com. Stip. ¶ 11.

12. After about March 14, 2007, Defendant began, for a time, advising employers making inquiries that, effective January 1, 2007, Missouri's Minimum Wage Law requires employers to pay tipped employees a cash wage of at least \$3.25 per hour. Stip. ¶ 12.

13. Since March 30, 2007, Defendant has been temporarily restrained, and then preliminarily enjoined, by the Court from taking any position or offering any advice regarding the issue of employer liability under the Missouri Minimum Wage Law for cash wage payments in excess of \$2.13 per hour to tipped employees for work performed during the period of January 1, 2007 through March 14, 2007. Stip. ¶ 13.

14. The Missouri Minimum Wage poster (Attachment A to the Stipulation of Fact) was prepared and issued by the Missouri Department of Labor and Industrial Relations to summarize the requirements of the Missouri Minimum Wage Law as amended by Proposition B. The Department withdrew this poster on or shortly after March 14, 2007. Stip. ¶ 14.

15. A regulation relating to minimum wages to be paid to tipped employees provides:

Tipped employees shall receive at least the applicable minimum wages as set forth in this rule, except that the employer may claim gratuities as a credit toward the payment of the required minimum wage. The maximum amount of gratuities that the employer can claim as a credit is fifty percent (50%) of the applicable minimum wage rate. In no event shall the amount of wages and gratuities equal less than the applicable minimum wage, with the difference between the gratuities and the minimum wage being paid by the employer.

8 C.S.R. 30-4.020. This regulation originally took effect in 1993, and has been in its current form since 2004. Stip. ¶ 15.

CONCLUSIONS OF LAW

No Case or Controversy Exists

Plaintiffs seek a declaratory judgment as to the proper application of Missouri's Minimum Wage Law to tipped employees.

To grant a declaratory judgment, the court must have before it a justiciable controversy. *Farm Bureau Town & Country Ins. v. Angoff*, 909 S.W.2d 348, 352 (Mo. banc 1995). The petition must present a “real, substantial, presently existing controversy admitting of specific relief as distinguished from an advisory or hypothetical situation.” *City of Jackson v. Heritage Savings & Loan Assn.*, 639 S.W.2d 142, 144 (Mo. App. 1982). A mere difference of opinion or disagreement on a legal question is insufficient, but parties must show that their rights and liabilities are affected. *Tietjens v. City of St. Louis*, 359 Mo. 439, 222 S.W.2d 70, 71-72 (1949).

Akin v. Director of Revenue, 934 S.W.2d 295, 298 (Mo. banc 1996). This case presents no justiciable controversy that would permit entry of a declaratory judgment because the Department is not the proper party to this suit in that it has no legally enforceable interest.

The Department has no power to take any action to enforce a remedy with regard to Missouri’s Minimum Wage Law. The law is enforced through private rights of action by private individuals seeking back wages due and through criminal prosecutions that may be filed by prosecutors. §§ 290.525, RSMo (criminal penalties), and 290.527, RSMo (private right of action). The only enforcement related role of the Department is its authority to investigate, to inspect wage records, and to ascertain the wages of persons covered by the Law. §§ 290.510 and 290.520, RSMo. But the Department is not empowered to take steps of its own to enforce any conclusions it may reach from its investigations. Because the Department has no enforcement power, it has no ability to attempt to impose any particular interpretation of the Minimum Wage Law on others. Thus, the Department has no legally enforceable interest in this case. Without a legally enforceable interest, the Department is not a proper party in this case and there is no justiciable case or controversy as it is currently pled. *Priesler v. Dougherty*, 265 S.W.2d 404, 409 (Mo. banc 1954) (where party has no interest in subject matter of suit, there is no justiciable question as to that defendant).

Even if this Court had concluded that the Department is a proper party and that a justiciable controversy is present, plaintiffs' claims fail on their merits.

Wage Rate Due to Tipped Employees

Missouri's voters approved Proposition B in November 2006. Proposition B amended Missouri's Minimum Wage Law, §§ 290.500 to 290.530, RSMo, to increase Missouri's minimum wage to \$6.50 per hour as of its effective date of January 1, 2007.¹ § 290.502.1. The passage of Proposition B also removed the exception to the coverage of Missouri's Minimum Wage Law that had formerly exempted workers who were covered by the federal Fair Labor Standards Act (FLSA). The removal of this exception greatly expanded the number of workers covered by Missouri's Minimum Wage Law. Of relevance to this case, the removal of the exemption brought employees who receive a portion of their compensation in the form of tips within the coverage of the Missouri law (most or all of these tipped employees are also covered by the FLSA, so were not covered by the Missouri law until Proposition B became effective.) *See* Petition ¶ 16.

Proposition B left in place the provision of Missouri's Minimum Wage Law that governs the minimum wage due to tipped employees. Section 290.512.1 provides that:

No employer of any employee who receives and retains compensation in the form of gratuities in addition to wages is required to pay wages in excess of fifty percent of the minimum wage rate specified in sections 290.500 to 290.530, however, total compensation for such employee shall total at least the minimum wage specified in sections 290.500 to 290.530, the difference being made up by the employer.

¹ Under Proposition B, the minimum wage is also to be adjusted once per year based on the change in the cost of living. § 290.502.2, RSMo.

The first clause, providing that no employer of tipped employees is required to pay in excess of the 50 % of the regular minimum wage, is just another way of stating that employers of tipped employees are required to pay at least 50 % of the minimum wage. These two formulations are grammatically and logically equivalent to one another. In other words, employers of tipped employees are, as a general rule permitted a 50 % credit in their minimum wage obligation to account for the tips these employees receive. Thus, § 290.512 sets a floor on the cash wages of tipped employees of half of the regular minimum wage, or \$3.25 currently. There is also the proviso to this general rule contained in the final clause of the statute: the employer must pay more than half of the regular minimum wage if that is necessary to bring the employee's total compensation up to \$6.50 per hour.

If the statute were not plain enough by its own terms, the regulations promulgated to implement the Minimum Wage Law confirm that § 290.512.1 sets a floor in the minimum wage due to tipped employees:

Tipped employees shall receive at least the applicable minimum wages as set forth in this rule, except that the employer may claim gratuities as a credit toward the payment of the required minimum wage. The maximum amount of gratuities that the employer can claim as a credit is fifty percent (50%) of the applicable minimum wage rate. In no event shall the amount of wages and gratuities equal less than the applicable minimum wage, with the difference between the gratuities and the minimum wage being paid by the employer.

8 C.S.R. 30-4.020(4). As the interpretation and construction of a statute by the agency charged with its administration, the Department's regulation relating to tipped employees is entitled to great weight. *Linton v. Missouri Veterinary Medical Bd.*, 988 S.W.2d 513, 517 (Mo. banc 1999) (citing *Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193, 197 (Mo. banc

1972)); *Boone County v. County Employees' Retirement Fund*, 26 S.W.3d 257, 264 (Mo. App. W.D. 2000).

Assessment of Plaintiffs' Contrary Interpretation

Plaintiffs do not agree that § 290.512.1 requires payment of at least \$3.25 per hour to tipped employees and instead contend that § 290.512.1 sets a ceiling of \$3.25 per hour in the cash wages due to tipped employees. Petition ¶ 32. Plaintiffs do, however, agree the total compensation due to tipped employees is currently \$6.50 per hour and that, if the tips received do not amount to \$3.25 per hour, the employer must pay enough more than \$3.25 in cash wages to make the employees' total package equal \$6.50 per hour. Petition ¶ 32. Plaintiffs' contention that § 290.512.1 establishes a ceiling of \$3.25 in cash wages due to tipped employees does not stand up to analysis.

Under plaintiffs' interpretation, there would be no need to set a ceiling in the minimum wage due tipped employees at all, or to otherwise even refer to an amount that is 50 % of the regular minimum wage. According to plaintiffs, all that is required is that tipped employees receive total compensation of at least \$6.50 per hour. Cash wages could be any amount, whether more or less than \$3.25 per hour, that brings the sum of cash wages and tips up to \$6.50 per hour.

But if plaintiffs' view were correct, § 290.512.1 has no need for its first clause (the words from its beginning through "however"), and this statute would be fully effective if it provided only that: "[T]otal compensation for such employee [those who receive and retain compensation in the form of gratuities] shall total at least the minimum wage specified in sections 290.500 to 290.530, the difference being made up by the employer." That first

clause of § 290.512.1 thus becomes surplus language that serves no purpose. Statutes may not be read, however, “so as to render any words as mere surplus.” *BHA Group Holding, Inc. v. Pendergast*, 173 S.W.3d 373, 380 (Mo.App. W.D. 2005). As the Missouri Supreme Court held in *Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993): “It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute.” Plaintiff’s interpretation of § 290.512.1 is untenable because that interpretation results in the first clause of the statute being pointless.

In contrast, interpreting § 290.512 to set a floor in the cash wage due to tipped employees renders no part of the statute superfluous. Employers must pay tipped employees at least \$3.25 per hour regardless of the amount of tips earned, but if tips are less than \$3.25 per hour, then the employer must pay enough more in cash wages for the total compensation to equal at least \$6.50 per hour.

Plaintiffs’ interpretation is also contrary to the structure and purpose of the Minimum Wage Law. By definition, a minimum wage law sets minimum standards for wages. It is simply contradictory to interpret a *minimum* wage law as setting a *ceiling* on wages for a particular group of employees.

Moreover, the Minimum Wage Law is a remedial statute. *See Chester Bros Constr. Co. v. Missouri Dep’t of Labor and Indus. Rels.*, 111 S.W.3d 425, 427 (Mo. App. W.D. 2003) (Missouri’s Prevailing Wage Law, which sets minimum wages for work on public construction projects, is a remedial law); *Tobin v. Johnson*, 198 F.2d 130, 133 (8th Cir.

1952) (FLSA is remedial legislation designed to extend frontiers of social justice and to insure a fair day's pay for a fair day's work), *cert. denied*, 345 U.S. 915 (1953). The tip credit permitted by § 290.512 is an exception to the generally applicable minimum wage. Exceptions to remedial provisions must be construed narrowly and in favor of the law's intended beneficiaries. *Moses v. Carnahan*, 186 S.W.3d 889, 904-05 (Mo. App. W.D. 2006) (exemptions to Missouri Uniform Securities Act to be narrowly construed in favor of investors); *see also Myers v. Copper Cellar Corp*, 192 F.3d 546, 549 n.4 (6th Cir. 1999) ("Because Congress designed the FLSA to remedy disparities in bargaining power favorable to employers, the courts narrowly construe the provisions of that statutory scheme, including its exemptions, in the employee's favor."). Thus, even if this Court had determined that § 290.512 is not plain in its own terms, it would still be required to resolve any ambiguity in favor of wage protection for tipped employees.

Further, plaintiffs' interpretation of § 290.512.1 as setting a ceiling on the minimum wage due to tipped employees is illogical. As noted above, plaintiffs admit that the total compensation due to tipped employees is currently \$6.50 per hour and that, if the tips received do not amount to \$3.25 per hour, the employer must pay enough more than \$3.25 in cash wages to make the employees' total package equal \$6.50 per hour. Petition ¶ 32. Thus, even in plaintiffs' view, the \$3.25 ceiling they assert exists must rise if tipped employees receive less than \$3.25 per hour in tips. But, a ceiling that must rise on occasion is really no ceiling at all. Plaintiffs' argument, essentially that employers are not required to pay tipped employees more than \$3.25 per hour, except when they are required to pay more, does not make sense.

Plaintiffs seek support for their interpretation of § 290.512.1 from a response to a frequently asked question (FAQ) that appeared on the Department's website from about December 6, 2006, until about March 14, 2007. In that FAQ response, the Department set out a position that total compensation for tipped employees must total at least \$6.50 per hour, but that that total could be achieved by any combination of tips and cash wages, so long as the cash wage equaled the federal minimum of \$2.13 per hour applicable to tipped employees. The Department also prepared and publicly provided a poster regarding the impact of the passage of Proposition B that set out the same position as the FAQ response. The poster setting out this position was withdrawn by the Department on or shortly after March 14, 2007.

Although this FAQ response and the poster are consistent with plaintiffs' position here, they are immaterial in this case. Both the FAQ response and the poster have been withdrawn and the position noted in them is no longer the position of the Department. More importantly, the FAQ response and poster are inconsistent with the Department's regulations. As noted above, 8 C.S.R. 30-4.020(4) establishes that tipped employees must be paid a minimum of 50 % of the regular minimum wage, and more if tips do not make up the difference between 50 % of the minimum wage and the full minimum wage. Administrative regulations have independent power as law. In contrast, statements of agency position not promulgated pursuant to formal rulemaking procedures, whether a FAQ response or any other position statement not formulated as a rule under the Administrative Procedure Act, Chapter 536, RSMo, have no legal force or effect. *United Pharmacal Co. v. Missouri Bd. of Pharmacy*, 159 S.W.3d 361, 365 (Mo. banc 2005) ("Not everything that is written or

published by an agency constitutes an administrative rule. In this case, the board made no attempt to comply with the protective procedures required for the promulgation of a rule. . . . [Plaintiff's] claim . . . must fail because the FAQ was not an administrative rule . . .").

The regulation, 8 C.S.R. 30-4.020(4), which is the legally effective statement of the Department's interpretation of the statute directly provides that tipped employees must be paid a minimum of 50 % of the regular minimum wage, and more if tips do not make up the difference between 50 % of the minimum wage and the full minimum wage. Not only is 8 C.S.R. 30-4.020 the Department's interpretation of the statute, that interpretation is the evident meaning of § 290.512.1.

Count II

In Count II, plaintiffs seek a declaration that they were entitled to rely on the Department's FAQ response through at least March 14, when that FAQ response was withdrawn, and that they cannot be required to pay their tipped employees a cash wage of more than \$2.13 per hour retroactive to January 1, 2007, through, presumably, March 14, 2007. Plaintiffs are not entitled to such a declaration for at least two reasons.

First, the FAQ response cannot trump either the evident meaning of the statute itself or the direct terms of 8 C.S.R. 30-4.020(4). Plaintiffs cannot take advantage of initially incorrect advice from the Department, especially in the face of a contrary statute and regulation, to obtain legal sanction for insufficient wages paid to tipped employees who were entitled to the full benefit of the Minimum Wage Law. Plaintiffs seem to be asserting that the Department should be estopped from now taking the position that tipped employees have been due at least \$3.25 per hour since January 1, 2007. But the doctrine of estoppel is not

generally applicable to acts of government bodies. *Bartlett & Co. Grain v. Director of Revenue*, 649 S.W.2d 220, 224 (Mo. 1983). This doctrine is only sparingly applied to governmental bodies when that is necessary to prevent manifest injustice. *Id.* There is no manifest injustice here, even in light of the Department's initial position as set out in the FAQ response and the poster, because those items were contrary to the regulation, which was the legally effective position of the Department and which was available to plaintiffs for review and assessment. Further, the Department is not trying to take advantage of its initially incorrect position as set out in the FAQ response and the poster. It is not the Department that enforces remedies for violations of the Minimum Wage Law. Rather, this Law is enforced through private rights of action by individual workers, § 290.527, and through criminal proceedings brought by prosecutors, § 290.525.

The second reason that plaintiffs are not entitled to a declaration that they are not required to make up any underpayments of the applicable minimum wage to their tipped employees is that the persons directly affected by such a declaration are not parties to this suit. It would be inappropriate for the Court to declare that plaintiffs are not required to pay the full minimum wages due to tipped employees for any time period in a case in which no employee entitled to such wages is a party.

CONCLUSION

The plain language of § 290.512.1 requires employers to pay tipped employees at least \$3.25 per hour in cash wages, plus any additional amount that may be required to bring their total compensation up to \$6.50 per hour. Further, this obligation has been effective since January 1, 2007, and any former contrary interpretation from the Department set out in

a website does not relieve plaintiffs from their obligation to pay tipped employees at least \$3.25 per hour in cash wages as required by the statute.

JUDGMENT

Based upon an assessment of the evidence presented and the relevant legal authorities, this Court concludes that plaintiffs are unable to establish valid claims and that defendants are entitled to judgment in their favor.

Therefore, it is Ordered, Adjudged, and Decreed that Plaintiffs' prayers for declaratory relief are denied.

It is further Ordered, Adjudged, and Decreed that judgment is entered in favor of defendant.

It is further Ordered, Adjudged, and Decreed that this case is dismissed with prejudice.

SO ORDERED:

Date

PATRICIA S. JOYCE, Circuit Judge