BEFORE THE NEVADA STATE LABOR COMMISSIONER

CARSON CITY, NEVADA

IN THE MATTER OF: MEGAN SMITH, Claimant vs. THE WYNN, Respondent _____ DANIEL BALDONADO, JOSEPH CESARZ, and QUYNGOC TANG, Claimants vs. WYNN LAS VEGAS, LLC, Respondent	OPINION AND ORDER

INTRODUCTION

On August 23, 2006, Wynn Las Vegas issued a memorandum to its table games employees announcing a change in the tip pooling policy that would go into effect on September 1, 2006. As a result of the change in that policy, Daniel Baldonado and others filed a class action suit in Clark County District Court alleging that Wynn illegally took tips to which they were entitled in violation of Nevada Revised Statutes 608.160, 608.100, and 613.120.

By order dated January 5, 2007, the District Court granted the Wynn's Motion to Dismiss, stating

> The Court finds that under the Nevada statutes, the Nevada Labor Commissioner is the proper authority for enforcing Nevada's Labor Statutes, and Plaintiffs must therefore pursue appropriate appellate remedies through the administrative process before obtaining judicial review.

The dealers appealed the District Court's decision to the Supreme Court.

On September 12, 2007, Meghan Smith, another dealer, filed an individual claim for wages with the Labor Commissioner alleging that the Wynn illegally took tips to which she was entitled in violation of NRS 608.160. The Wynn responded to the wage claim on September 23, 2007 generally denying the allegations and requesting that the complaint be dismissed. Because

the Baldonado case was pending before the Supreme Court, further action on Smith's claim was stayed.

On October 9, 2008, the Supreme Court issued it's decision sustaining the District Court in Baldonado v. Wynn Las Vegas, 124 Nev. Adv. Op. 81, 194 P.3d 96, 105 (2008). As a result of the Supreme Court's order, the case was referred to the Labor Commissioner. Since both the Smith claim and Baldonado case dealt with the same issue and would impact the same workers, the cases were consolidated for hearing before the Labor Commissioner. The hearing commenced on July 7, 2009 and concluded on October 8, 2009.

FINDINGS OF FACT

This case concerns a dispute between a group of table games dealers and their employer, Wynn Resorts ("Wynn") over the manner in which tips left by patrons of the Wynn's table games are distributed among the employees.

The Wynn employs more than 12,000 people, with more than 500 employed in the table games department. In addition to the table games dealers, employees in the slot department, bellmen, dealers in the poker rooms, finance department employees working in the casino cages, hair stylists and manicurists, valet parking attendants, cocktail waitresses, restaurant employees, and employees in housekeeping also receive tips. Each department has its own tip policy and the policies vary from department to department.

All of the tip policies are subject to "compliance agreements" with the Internal Revenue Service. The tips in the table games department are reported as actual amounts received, while the tips in all of the other departments are reported based on a formula agreed upon by the Wynn and the IRS which estimates tip amounts. This information is used to determine the withholdings from the employees for federal tax purposes and the additional amounts the Wynn must pay as the employer's contribution to FICA.

The Wynn opened for business on April 28, 2005. The employees working inside the table games pits included dealers, boxpersons, and floor supervisors. Pit bosses were responsible for multiple pits, but were not confined to particular pits and would move from place to place. While their job duties and levels of responsibility and authority vary, all of these people are employees of the Wynn.

When the Wynn opened for business, it had a tip pooling policy in place that governed the collection and distribution of tips received by employees in the table games department, referred to as the "initial policy." Participation in the agreement was a mandatory term and condition of employment. Furthermore, refusal to participate could result in termination. The Wynn's initial policy was adopted and in place before any dealers were hired. None of the dealers were involved in drafting the policy nor did they vote or otherwise participate in its adoption.

The initial policy applied to all of the employees in the table games department. Generally, only dealers were allowed to share in the tip pool. However, the Wynn's initial policy also directed that $50.00 would be paid to the cashier's cage and $25.00 to the members of the toke committee. At the same time, boxpersons, floor supervisors and pit managers, assistant shift managers and shift managers were prohibited from receiving a share of the tips and required to put any tips bestowed upon them into the tip pool for the sole benefit of the dealers.

Under the terms of the initial policy, dealers could propose and vote for changes to the tip policy. However, suggestions for amending the policies had to be approved by "table games management" before being placed on the ballot. Table games management could veto the proposals if they did not feel that the change was in the best interests of the Wynn or the table games department.

On August 23, 2006, the Wynn notified the dealers in writing that the tip pooling policy would be changed effective on September 1, 2006. This was a unilateral decision made by the

Wynn. The dealers were neither consulted beforehand nor did they vote on whether to adopt the new pooling policy. The change in the tip pooling policy was part of a larger significant restructuring of the table games department. The floor supervisor and pit manager positions were eliminated. A new position, called a Casino Service Team Lead or "CSTL" was created.

The Wynn also changed the compensation scheme. Prior to the change, the basic pay rate for floor supervisors was $58,700 per year. When the CSTL positions were created, the basic pay rate was raised to $65,000 per year and the CSTLs were included in the tip pool. The CSTLs' compensation from the tip pool was estimated to be about $25,000 per year. In addition to their base wage, boxpersons were also allocated a share of the tips. The dealers received minimum wage plus a share of the tips under both the initial and new policies. The tips are allocated with the dealers receiving one share, CSTLs two-fifths of a share, and boxpersons receiving one-fifth of a share. The Wynn also employs "Dual Rate Dealers/Casino Service Team Leads" who work some shifts as dealers and some shifts as CSTLs. Their shares are based on the amount of time they work in those respective positions. As a result of the expansion of the tip pool to include CSTLs and boxpersons, the share of the total tips previously enjoyed solely by the dealers decreased by an estimated 10 to 15 percent, reducing the overall compensation received by the dealers.

The new policy eliminated the dealers' ability to propose and vote on changes to the tip pool policy.

The parties disagreed on the Wynn's reasons for making the change in the table games department. Prior to the change, there was a clear disparity in the compensation between the floor supervisors and boxpersons and the dealers. Floor supervisors were being compensated at a rate that was roughly one third less than the dealers were making. Both sides agreed that this disparity made it difficult for the Wynn to recruit floor supervisors from the ranks of the experienced dealers who were already working at the Wynn.

The Wynn's rationale for making the change was to increase the level of service provided to the table games players. In order to accomplish this, the Wynn made several changes. They eliminated two levels in their hierarchy, i.e., the pit bosses and floor supervisors. The position of CSTL was created.

Some of the job duties associated with the pit bosses were transferred to the Assistant Casino Managers while others were transferred to the CSTLs. Some of the CSTLs' duties are supervisory, such as providing coaching, and ensuring that the dealers are following proper procedures. Some of their duties are administrative, such as changing out the cards at the tables, verifying the amount of chips in the racks at the end of the shift and determining whether the volume of play justified opening or closing tables. The CSTLs also have customer service responsibilities such as rating the players and providing comps, assisting with players' lines of credit, resolving certain disputes, and providing concierge type services like making restaurant reservations, orderings, and so forth. The Wynn gave the CSTLs authority to resolve problems and provide benefits to the players that was greater than that previously allowed the floor supervisors and made the position more interactive in terms of guest services.

The dealers, on the other hand, viewed the move as just a ploy to take their tips away for them. They believed that the only reason the Wynn made the changes was to give pay raises to the floor supervisors at their expense.

Regardless of the underlying rationale for the change, both sides agree that the change has made it easier for the Wynn to recruit CSTLs.

ANALYSIS AND CONCLUSIONS OF LAW

Statutes

The dealers have alleged violations of three statutes, NRS 608.160, 608.100, and 613.120.

NRS 608.160 states:

1. It is unlawful for any person to:
(a) Take all or part of any tips or gratuities bestowed upon his employees.
(b) Apply as a credit toward the payment of the statutory minimum hourly wage established by any law of this State any tips or gratuities bestowed upon his employees.
2. Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities among themselves.

Nevada Revised Statutes 608.100 states:

1. It is unlawful for any employer to:
(a) Pay a lower wage, salary or compensation to an employee than the amount agreed upon through a collective bargaining agreement, if any;
(b) Pay a lower wage, salary or compensation to an employee than the amount that the employer is required to pay to the employee by virtue of any statute or regulation or by contract between the employer and the employee; or
(c) Pay a lower wage, salary or compensation to an employee than the amount earned by the employee when the work was performed.
2. It is unlawful for any employer to require an employee to rebate, refund or return any part of the wage, salary or compensation earned by and paid to the employee.
3. It is unlawful for any employer who has the legal authority to decrease the wage, salary or compensation of an employee to implement such a decrease unless:
(a) Not less than 7 days before the employee performs any work at the decreased wage, salary or compensation, the employer provides the employee with written notice of the decrease; or
(b) The employer complies with the requirements relating to the decrease that are imposed on the employer pursuant to the provisions of any collective bargaining agreement or any contract between the employer and the employee.

Nevada Revised Statutes 613.120 states:

1. It shall be unlawful for any manager, superintendent, officer, agent, servant, foreman, shift boss or other employee of any person or corporation, charged or entrusted with the employment of any workmen or laborers, or with the continuance of workmen or laborers in employment, to demand or receive, either directly or indirectly, from any workman or laborer, employed through his agency or worked or continued in employment under his direction or control, any fee, commission or gratuity of any kind or nature as the price or condition of the employment of any such workman or laborer, or as the price or condition of his continuance in such employment.
2. Any such manager, superintendent, officer, agent, servant, foreman, shift boss or other employee of any person or corporation, charged or entrusted with the employment of laborers or workmen for his principal, or under whose direction or control such workmen and laborers are engaged in work and labor for such principal, who shall demand or receive, either directly or indirectly, any fee, commission or gratuity of any kind or nature from any workman or laborer employed by him or through his agency or worked under his direction and control, either as the price and condition of the employment of such workman or laborer or as the price and condition of the continuance of such workman or laborer in such employment, shall be guilty of a misdemeanor.

Prior Court Decisions

The issue of mandatory tip pooling in Nevada has been litigated in several courts, including state and federal District Courts in Nevada, the Ninth Circuit Court of Appeals, and the Nevada Supreme Court. The seminal case was Moen v. Las Vegas International Hotel, 402 F.Supp. 157 (D.Nev. 1975), aff'd, 554 F.2d 1069 (9th Cir. 1977). The Nevada Supreme Court adopted the analysis in Moen in its decision in Alford v. Harold's Club, 99 Nev.670, 669 P.2d 721 (1983), stating

> Although this court is not bound by a federal district court's interpretation of a Nevada statute, we believe that the interpretation advanced in Moen is, in light of the legislative history and well established and commonly known Nevada employment practices, the correct one.
> Alford v. Harold's Club, 99 Nev.670, 669 P.2d 721 (1983).

Thus, while Moen may not be controlling, the analysis must be given serious consideration. Both Moen and Alford were relied on by the Ninth Circuit Court of Appeals in their decision in Cotter v. Desert Palace, 880 F.2d 1142 (9th Cir. 1989).

Similarly, elements of the Baldonado claim have already been directly reviewed by the Nevada Supreme Court in Baldonado v. Wynn Las Vegas, 124 Nev. Adv. Op. 81, 194 P.3d 96 (2008). However, this is the first time the matter has been heard by Nevada's Labor Commissioner.

Factually, there is very little, if anything, that is in dispute in this case. There was extensive testimony from both the Wynn and the dealers during the hearing, but the testimony did very little to change the facts of the case from those described by the Supreme Court in Baldonado.

The Wynn can unilaterally establish and change the tip pooling agreement

It is undisputed that the dealers are "at-will employees generally subject to termination any time for any reason." Baldonado, 194 P.3d 96, 105. The tip pooling agreement is merely one

of many terms and conditions of the at-will employment agreement between the Wynn and each dealer. This is substantiated in Moen where the Court said

> Plaintiff here complains his employer, as a condition of employment, required him to divide tips or gratuities among other employees. We find nothing in subdivision 2 of NRS 608.160 to prohibit this. The subsection doesn't not specify with whom such an agreement may be made. It does specify that only the employees can benefit. Plaintiff would have us read the statute as follows: 'Nothing contained in this section shall be construed to prevent such employees from entering into an agreement with other employees to divide such tips or gratuities among themselves.' *An equally reasonable interpretation of the statute, which we think is the proper one in the light of well-known employment practices, is as follows: 'Nothing contained in this section shall be construed to prevent such employees from entering into an agreement with the employer* or with other employees to divide such tips or gratuities among the employees.'
> Moen, 402 F. Supp. 157, 160. (emphasis added)

The Court went on to say

> NRS Sec. 608.160, as properly interpreted, does not prohibit an employer from requiring an employee to pool tips with other employees as a condition of employment.
> Moen, 402 F. Supp. 157, 162

The Nevada Supreme Court concurred with that analysis when it stated

> We hold that the district court correctly concluded that NRS 608.160 does not prohibit an employer from requiring employees to enter into a tip pooling arrangement such as that imposed in the instant case.
> Alford v. Harold's Club, 99 Nev.670, 669 P.2d 721 (1983)

Furthermore, the Nevada Supreme Court clearly and specifically established that the Wynn could unilaterally change the terms and conditions of the at-will agreement, stating

> we have also established that employers may unilaterally modify the terms of an at-will employment arrangement in prospective fashion; the employee's continued employment constitutes sufficient consideration for the modification.
> Baldonado, 194 P. 2d 96, 105.

There are sound policy reasons to support the Courts' position because the employer has a legitimate business interest in the conduct of the tip pool. For example, a busboy in a restaurant could prioritize which tables get cleared by "selling" his services to the waitress who "pools" the greatest share of her tips with him. A doorman at a nightclub could decide who will

or will not be a customer of the business by "selling" entry based on the gratuity bestowed upon him by the patron. In the case of the gaming industry where a large number of cash transactions take place, the employer is subject to strict oversight by the Nevada Gaming Control Board and federal reporting requirements governing large cash transactions. In addition, the employer must match the employees' FICA contribution, giving the employer a direct and substantial interest in the tips themselves.

The California Court of Appeals recently discussed the basis of this policy in a case involving the participation of low level management employees in a tip pool.

> An established tip-pooling policy encourages employees to give the best possible service.... To permit a waitress to determine what if anything she should share with the busboy ... can only lead to the surrender of the employer's prerogative to run his own business, dissension among employees, friction and quarreling, loss of good employees who cannot work in such an environment and a disruption in the kind of service the public has a right to expect. An employer must be able to exercise control over his business to ensure an equitable sharing of gratuities in order to promote peace and harmony among employees and provide good service to the public. To deprive a restauranteur of the ability to regulate and control the conduct of his own business, leaves the door open to anarchy in the restaurant industry.
> Chau v. Starbucks Corp., 174 Cal. App. 4th 688, 94 Cal. Rptr. 3d 593 (2009), citing Leighton v. Old Heidelberg, Ltd., 219 Cal. App. #d 1062 (1990).

While the Starbucks case is not controlling and clearly distinguishable from the Nevada statutes dealing with the same issue, the Court did provide a well-reasoned and clearly articulated discussion of the public policy involved in the employer's reasons for establishing the terms and conditions of tipping in his place of business.

Based upon substantial evidence in the record, the plain language of the statutes, and prior case law, the Wynn may unilaterally establish and change a tip pooling agreement that is a term and condition of an underlying at-will employment agreement.

The Wynn is not prohibited from including boxmen and CSTLs in the tip pooling agreement

Even though the Wynn has the right to unilaterally change the tip pooling policy as a term and condition of continued employment, the inquiry cannot end there. The issue then

becomes whether the terms and conditions of the tip pooling agreement, in and of themselves, are permissible.

Nevada recognizes the central role that compensation plays in any employment agreement. To that end, NRS 608.100(3)(a) states that

> [I]t is unlawful for any employer who has the legal authority to decrease the wage, salary or compensation of an employee to implement such a decrease unless [N]ot less than 7 days before the employee performs any work at the decreased wage, salary or compensation, the employer provides the employee with written notice of the decrease.

Because the proposed change to the policy would result in a decrease in the compensation paid to the dealers, the Wynn was required to notify them in writing seven days before the decrease would go into effect. By virtue of the memo to the employees in the table games department dated August 23, 2006, the Wynn met the statutory notice requirement. Even though it is a "take it or leave it" proposition, when such a notice is given, it is a proposal to amend the employment agreement with a seven-day window for a response to the offer. The Nevada Supreme Court touched briefly on this issue in stating that

> we have also established that employers may unilaterally modify the terms of an at-will employment arrangement in prospective fashion; the employee's continued employment constitutes sufficient consideration for the modification.
> Baldonado, 194 P. 2d 96, 105.

At this point, the dealers had several options. They could accept the offer and continue employment under the new terms and conditions; they could reject the offer, resign their employment and seek employment with a different employer; they could make a counter-offer; or as was the case here, they can challenge the underlying legality of the proposal.

The dealers argue that it is improper for the Wynn to expand the group of employees who participate in the table games tip pool to include boxmen and CSTLs. Expanding the participants in a tip pool is not unusual. For example, the dealers testified about instances where agreements were changed from a shift basis, where the tips were divided among the dealers working on each individual shift, to a twenty-four hour basis where the tips were pooled

and divided among the dealers working on all of the shifts. Such a change would have the effect of increasing the share of the tips realized by the dealers on a slow shift, such as mid-week graveyard, at the expense of the dealers working the more active shifts such as Friday or Saturday evening.

The same effect can be seen when the pool is expanded to include both high limit and low limit tables, with the low limit dealers gaining at the expense of the high limit dealers. This was the very issue at the heart of the Moen, Alford, and Cotter cases where dealers objected to policies that redistributed the tips they had been receiving to other employees at the Las Vegas Hilton, Harold's Club, and Caesar's Palace, respectively. Therefore, there does not appear to be any prohibition against redistributing tips to other employees per se.

Given that tip pools can be changed to expand the range of employees included in the pool, there is a question as to whether there are limitations on the employees who can be included. In the Alford case, dealers initially kept whatever tips were left on their tables without sharing with any other dealers. When the tip pool was expanded, it only expanded to other dealers on a shift-by-shift basis. In Cotter, dice dealers initially divided their tips on a table-by-table basis at the end of the shift. That policy was changed to include all dice dealers on a twenty-four basis. In both cases, only other dealers were included in the expanded pool.

In Moen, however, the tip pool was expanded to a wider range of employees "including *boxmen*, casino cashiers and *floormen*." Moen, 402 F.Supp. 157, 158 (emphasis added). The Court did not disapprove of that distribution. The Court formulated what has come to be described as the "line of service," stating

> There is no reason to suppose that the last person in a service line in an establishment serving the public is the only one entitled to share in the customer's bounty. For example, a busboy as well as a waitress contributes to the good service and well-being of a customer in a restaurant. Similarly, in a casino, the floormen, boxmen and cashiers all contribute to the service rendered to the player.
> Moen, 402 F.Supp. 157, 160

While not necessarily linear in its application, the line of service idea recognizes that customer satisfaction and, therefore, tips are frequently the result of the contributions of many employees, not necessarily the employee who first lays his or her hands on the tip. There was considerable testimony about what motivates customers to leave tips. People tip in a variety of ways and for a variety of reasons. Some tip because they had a wonderful experience with a particular employee and want to reward that employee. Some tip because they had a good time due to the collective effort of many employees. Some tip out of a sense of obligation and would leave a tip regardless of the how enjoyable the experience. Some tip just because they won and want to share the wealth. Some don't tip at all. There are literally millions of customers playing table games in Las Vegas every year and to presume that their sole motivation for tipping was due only to the service provided by the dealer is not a reasonable conclusion.

There seems to be an inherent limitation in the line of service reasoning in that there needs to be some sort of a nexus between the services provided to the customer and the employee providing that service. That the dealers are the employees who interact most directly with the customers in table games is beyond dispute. By the same token, CSTLs do not have the same degree of direct contact with customers as the dealers because they have additional duties that occupy a portion of their time. However, the CSTLs' contribution to customer service in the table games pits cannot be completely discounted. Some things are subtle, such as opening and closing tables to accommodate the number of players looking to play, changing out the cards, or rating play. Others are more direct, such as answering questions from customers, handling lines of credit, changing the limits on the tables as requested, resolving disputes, and providing concierge type services such as ordering drinks or making dinner reservations. Each of those things contributes to the customer's experience.

Considerable conflicting testimony was provided regarding tips received by pit bosses, floor supervisors, and, now, CSTLs. There is substantial testimony in the record establishing

that these employees did, in fact, receive tips. The disagreement centered on the frequency and magnitude of the tips. More convincing than the testimony, however, was the fact that the Wynn addressed the disposition of tips received by pit bosses and floor supervisors in the initial tip policy. It seems reasonable that, regardless of the actual magnitude or frequency, the practice was common or customary enough that the Wynn felt the need to addressed the matter in the policy.

However, while a limitation such as that envisioned in the service line idea may seem reasonable and desirable, NRS 608.160 only speaks to employees generally. Only employers are directly excluded from sharing in the tips. A plain reading of the statute does not appear to place any limitations as to who may or may not be considered an employee for the purposes of tip pooling. The statute does not say, "Nothing contained in this section shall be construed to prevent such employees *except boxmen and CSTLs* from entering into an agreement to divide such tips or gratuities among themselves." Nor does the statute give the Labor Commissioner the authority to create such a limitation by arbitrarily exempting certain employees. Had Nevada's Legislature been inclined to include an exemption that limited the tip pool's participants in the statute they could have done so and could elect to do so in the future. In the meantime, they have not done so and the Labor Commissioner cannot usurp the Legislative prerogative by creating exemptions where none have been provided for in the statute. To do so would be an exercise in ad hoc rulemaking.

In this particular case, the participants in the tip pool are limited by the Wynn and the distribution does not extend to any employees who work outside of the immediate confines of the table games pits. Thus the only employees in dispute are boxmen and CSTLs.

In the Baldonado decision, the employees in question, the boxmen and CSTLs were characterized as occupying "certain lower-level management positions." Baldonado, 194 P.3d

96, 96. Boxmen and CSTLs are distinguishable, just as boxmen are distinguishable from floor supervisors and pit bosses.

Most of the testimony and evidence presented in this case revolved around the CSTLs, rather than the boxmen. Whereas CSTLs have a wider range of duties and responsibilities than either the boxmen or the dealers, boxmen actually sit on a particular dice game as part of the crew running that table. While they may play a different role than a stickman or dealer on a dice game, it is reasonable to conclude that the boxmen are directly involved in the play of the game. Their responsibilities include handling the money on the table, ensuring that the players are following the rules and controlling the pace of the game. Boxmen's management responsibilities are so minimal, that it is difficult to characterize them even as low-level management. It is reasonable to conclude for boxmen that their participation in the tip pools does not violate any of the prohibitions against the taking of tips and that conclusion is hereby adopted.

Unlike boxmen, CSTLs do not sit on a particular game and CSTLs clearly are not dealers. They have a mix of responsibilities, some supervisory, some administrative, and some customer service. As stated above, unlike employees, employers are prohibited from being included in tip pools. Fundamental to the dealers' argument is the idea that CSTLs are not employees permitted to participate in the tip pool, but rather they are employers and thus prohibited.

The Labor Commissioner evaluates whether or not a person is an employer for enforcement purposes under NRS Chapter 608 utilizing the analysis in Nevada Administrative Code 608.150, adopted in 2004. That section states:

> 1. In determining the person to be held liable for a violation of this chapter or chapter 608 of NRS, the Commissioner may investigate the conduct of the business enterprise and the extent of custody or control exercised by a person over the place of employment or any employee.
> 2. The investigation of the conduct of the business enterprise may include, but is not limited to:
> (a) Whether the person had the power to hire or fire employees;
> (b) Whether the person supervised or had control over the schedule of work of employees or the conditions of employment of employees;

(c) Whether the person determined or had control over the method or rate of payment of employees;
(d) Whether the person maintained the records of employment; and
(e) If more than a single business is involved in the business enterprise, whether the person had control of the businesses or operated the businesses for a common purpose.

The evidence in this case clearly sets forth that CSTLs do not have the power to hire and fire other employees, do not have the power to determine or control other employees' method or rate of payment, do not maintain employment records, do not have control over the conditions of employment of other employees, nor do they have control of the business. They do have some supervisory functions and may be involved in scheduling insofar as they are involved in deciding whether tables should be opened or closed, but that does not appear to extend to deciding the underlying work schedules of the other employees. Based on substantial evidence in the record, neither boxmen nor CSTLs are employers and they cannot be prohibited from participating in the tip pool on that basis.

The Wynn received no direct benefit from the change in the tip pool

The Wynn clearly realized certain benefits from changing the tip distribution in the tip pooling agreement. They found it easier to promote dealers from within by eliminating the disincentive to take a "promotion" that would have resulted in a pay cut on the order of 30%. While the Wynn incurred some out of pocket expenses by increasing the CSTLs' base wage, the bulk of the increase came from the redistribution of the tips previously going to the dealers. The dealers argue that the Wynn could have paid the difference from its own funds, but since the Wynn did not do so, the result is a direct benefit to the Wynn and prohibited under the statute and case law. This line of reasoning was not found persuasive in a recent Ninth Circuit tip pooling case. (See Cumbie v. Woody Woo, Inc., 596 F.3d 577 (2010)).

Such was the situation in Alford where the tip pool was imposed and some of the tip income previously retained by the individual dealers was redistributed to other dealers on the shift.

> [T]he casino did not retain any part of the pooled tips, although Harold's Club later conceded that as a result of the change it reaped collateral benefits of higher employee morale and lower employee turnovers.
> Alford, 99 Nev.670, 672.

The Alford court identified the question of direct versus indirect benefit stating

> [T]he issue which must be addressed in the resolution of this appeal is whether NRS 608.160 prohibits the employer from unilaterally imposing a tip-pooling agreement on employees as a condition of their employment, even though the employer does not retain any part of the tips for his own use or receive any direct benefit from the pooling.
> Alford, 99 Nev.670, 673. (emphasis added)

Where the employer actually pockets and retains the tips to the exclusion of its employees, such an action can clearly be identified as a taking. Claimants argued that the Wynn put the tips into an interest bearing bank account. While the Wynn did not necessarily keep the tips themselves, the dealers allege that they did use the tips to generate income to their exclusion. The dealers argued that this constituted a taking of their tips. The dealers did not present any direct testimony on this issue, but relied on the testimony of two Wynn employees who's testimony was contradictory and inconclusive.

As was the case with the Las Vegas Hilton, Harold's Club, Caesar's Palace, and Woody Woo's, the various courts have not seen fit to characterize the collateral and indirect benefit the Wynn freely admits to realizing in this case as being the type of benefit that would result in a taking and thus be prohibited by NRS 608.160. Based on the substantial evidence in this case, the Wynn did not retain the tips for its own use nor did it reap a direct benefit due to the increased compensation the CSTLs and boxpersons receive from the tip redistribution.

The Wynn's tip pooling policy does not offend either NRS 613.120 or 608.100(2)

The Labor Commissioner as Hearing Officer in this matter issued an order on February 20, 2009 setting forth that NRS 608.160 was the only statute at issue in this case. However, some of the parties insist on revisiting NRS 613.120 and NRS 608.100(2).

NRS 613.120 is not applicable to this matter. The statute addresses individual misconduct of a business' employees. It is the Wynn, the employer, who made the tip pooling

arrangement a term and condition of employment. It was not a manager, superintendent, officer, agent, servant, foreman, shift boss or other employee. This statute is typically referred to as the "kick-back" statute. For example, this statute would prohibit a foreman from hiring an undocumented worker and then demanding that the worker pay a kick-back for obtaining or continuing employment. Similarly, the statute prevents workers from bribing an individual who may be in such a position of power as to be able to influence hiring or continued employment. In either case, demanding or receiving payment is a case of individual misconduct not a term or condition of employment placed on the employee by the actual employer.

Likewise, NRS 608.100(2) is not applicable to the present matter either. That statute states that

> [I]t is unlawful for any employer to require an employee to rebate, refund or return any part of the wage, salary or compensation earned by and paid to the employee.

Before any part of the wage, salary or compensation can be rebated, refunded or returned, in contravention of the statute, two conditions must be met. First, the employee must earn the amount due. Second, the employee must be paid. In this case, the compensation attributable to the employee's share of the tips is earned when it is placed into the tip pool. However, it is not paid until the paycheck has been issued.

This is similar to the anti-kickback provisions of NRS 613.120. However, rather than proscribing the conduct of co-workers, this statute addresses the conduct of the employer. The provision deals with those situations where a dishonest employer ostensibly pays the employee one amount, but then requires a kickback after it appears, on paper at least, that the transaction has been completed and the employee appropriately paid. Because the conduct at issue in this case takes place before the employee is paid, the second requirement of the test is not satisfied and no violation occurs. The interpretation of the statute will not be stretched so far as to include the tip pooling that is clearly permissible under NRS 608.160.

DECISION

Based on the substantial evidence on the record and applicable statutes and case law, the tip pooling policy imposed by the Wynn on its table games department employees on September 1, 2006 does not violate Nevada law.

THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. The claim of Meghan Smith is hereby DISMISSED.
2. The claims of Daniel Baldonado, Joseph Cesarz, and Quyngoc Tang are hereby DISMISSED.

DATED this _____ day of July 2010.

_____
Michael Tanchek, Labor Commissioner

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this _____ day of July 2010, I deposited into the U.S. Mail, postage prepaid thereon, a copy of the foregoing document to the persons listed below at their last known addresses:

GREG KAMER, ESQ.
BRYAN COHEN, ESQ.
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