

CERTIFIED FOR PUBLICATION
COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

JOU CHAU et al.,

Plaintiffs and Respondents,

v.

STARBUCKS CORPORATION,

Defendant and Appellant.

D053491

(Super. Ct. No. GIC836925)

ORDER MODIFYING OPINION
AND DENYING PETITIONS
FOR REHEARING

NO CHANGE IN JUDGMENT

THE COURT:

The petition for rehearing filed by Jou Chau, et al. on June 17, 2009, and the petition for rehearing filed by Starbucks Corporation on June 18, 2009, are denied.

I. On its own motion, the court deletes references to *Grodensky v. Artichoke Joe's Casino* (2009) 171 Cal.App.4th 1399 because the California Supreme Court granted a petition for review in the *Grodensky* case after this court filed the instant opinion. (See Cal. Rules of Court, rule 8.1115(a).) These modifications are as follows:

1. In the first complete paragraph on page 15, the reference to *Grodensky v. Artichoke Joe's Casino* (2009) 171 Cal.App.4th 1399 is deleted.

2. On page 15, footnote number 4 is deleted, and is replaced with the following footnote number 4:

In supplemental briefing, plaintiffs cited to two additional decisions, but the California Supreme Court has since granted a review petition in those cases. (*Lu v. Hawaiian Gardens Casino, Inc.* (2009) 170 Cal.App.4th 466, review granted April 29, 2009, S171442; *Grodensky v. Artichoke Joe's Casino* (2009) 171 Cal.App.4th 1399, review granted June 24, 2009, S172237.)

3. In the paragraph beginning on page 19, the first sentence is deleted. The first word of the second sentence is deleted and the word "thereafter" is added to the beginning of the sentence, so the sentence reads:

Thereafter, three courts extended *Leighton* to the situation where the employer requires waitresses/waiters to share their tips with other restaurant employees who do not provide services directly to the customer's table (e.g., bartenders, dishwashers).

4. On page 20, the first complete paragraph is deleted.

5. In the paragraph beginning on page 22 and continuing on page 23, the last sentence and the subsequent citation are deleted, so the paragraph reads:

Jameson agreed with this reasoning, but qualified it by noting that it would be improper to presume a customer's intent that an employee share his or her tips with an employer's agent because the statute expressly prohibits an agent from collecting, taking, or receiving a tip *given to an employee*. (*Jameson, supra*, 107 Cal.App.4th at p. 140.) Thus, the *Jameson* court concluded that agents may not share in a "tip pool." (*Id.* at p. 145.) The *Louie*, *Budrow*, and *Etheridge* courts agreed with *Leighton*'s implied "collective" intent rationale and applied it to include all nonagent employees who are in

the chain of service, even if they do not come to the customer's table. (*Etheridge, supra*, 172 Cal.App.4th at pp. 921-923; *Budrow, supra*, 171 Cal.App.4th at pp. 878-884; *Louie, supra*, 460 F.Supp. at pp. 1159-1161.)

II. We also modify the opinion as follows:

1. In the fifth sentence of the first complete paragraph on page 4, the word "generally" is added between the words "supervisors" and "spend," so the sentence reads:

Shift supervisors generally spend more than 90 percent of their time performing the same service tasks as do the baristas.

2. In the fourth sentence of the first complete paragraph on page 5, enumeration (3), the word "by" between the word "hours" and "the" is deleted and replaced with the word "into," so the sentence reads:

Additionally, only baristas and shift supervisors are eligible to count and distribute the tips. To calculate the weekly tip distribution, the selected counting employee must: (1) determine the total monetary amount from the tip container; (2) calculate the total number of hours worked by all baristas and shift supervisors in the particular store; (3) divide the total amount of hours into the store's total earned tips for the week to obtain the tip hourly rate; (4) multiply each of the barista and shift supervisor hours by the tip hourly rate to determine each employee's tip income; and (5) place each employee's tip income in a sealed envelope, label the envelope with the employee's name, and store the envelope in the safe until the employee is available to take possession of it.

3. The following footnote is added at the end of the first complete paragraph on page 11. The addition of this footnote requires renumbering of all subsequent footnotes.

Because our holding is based on an argument repeatedly raised by Starbucks in the trial below and in its appellate briefs, we reject plaintiffs' contention in their petition for rehearing that Starbucks waived the argument and/or that our decision violates Government Code section 68081.

4. The following paragraphs are added at the end of Section II on page 25, immediately preceding Section III:

In a petition for rehearing, plaintiffs challenge statements in our opinion that it was "undisputed" that customers who leave money in a collective tip box intend the tip for employees who provide customer service. They assert that customer intent was not an issue at trial, and note that neither party presented any testimony from a customer as to the customer's subjective intent in placing a tip in a collective tip box or how the customer intended to allocate a tip for more than one employee. Based on this lack of customer intent testimony, plaintiffs argue that we cannot properly refer to the "undisputed" fact that individuals place tip money in a collective tip box intending that the tip proceeds will be shared among service personnel.

The argument is unsupported on factual and legal grounds. Plaintiffs had the burden of proving their claim, and they presented no evidence or argument that customers placed tips in a collective tip box with the understanding or intent to benefit only the barista class of employees. To the contrary, the testimony by baristas and shift supervisors was undisputed that customers leave tips in the collective tip boxes for the

service team, which includes both shift supervisors and baristas, and that customers could not distinguish between these employees.

Moreover, it was not necessary for either party to present direct evidence from customers to establish the fact that persons who place tips in a *collective* tip box understand that tips will be divided by the service personnel. Clearly, the tips were left for someone. Whether one presents specific evidence on the issue, considers a dictionary definition, references case law authority, or applies established social mores, it is well established tips are given in return for service. Our statements about undisputed customer intent in leaving a tip in a collective tip box reflect this simple proposition. There is nothing remarkable in concluding, and it follows logically, that the tips were intended for those who provided service. To suggest otherwise ignores reality, something the law does not require.

Additionally, until their petition for rehearing, plaintiffs have never concerned themselves with, or challenged, the manner in which tips are divided among the employees who they claim are legally entitled to share the tips. This case has always been about determining whether California law prohibits a category of Starbucks service employees from sharing in a collective tip; it has never been about determining the manner in which eligible employees share the tip. Nothing in our decision depends on

any presumed customer intent with respect to a particular allocation of a tip.

There is no change in the judgment.

HALLER, Acting P. J.

Copies to: All counsel