

Misty Cumbie worked as a waitress at the Vita Café in Portland, Oregon, which is owned and operated by Woody Woo, Inc. Woo paid its waiters and waitresses a cash wage (if an employee's tip combined with the employer's direct (or cash) wages at least \$2.13 per hour do not equal the minimum hourly wage of \$7.25 per hour, the employees must make up the difference) at or exceeding. In addition to this cash wage, the servers received a cut of their daily tips. Woo required its servers to contribute their tips to a "tip pool" that was then readjusted to all restaurant employees. The largest share of the tip pool (between 55% and 70%) went to kitchen staff (dishwashers and cooks), who are not normally get tipped while working. The remaining balance (between 30% and 45%) was returned to the servers in portion to their hours worked.

Cumbie filed a putative collective and class action against Woo, alleging that its arrangement of tip-pooling violated the minimum-wage provisions of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 et seq. The district court dismissed Cumbie's complaint for failure to state a claim under Federal rule of Civil Procedure 12(b) (6), and Cumbie timely appealed.

On the appeal, Cumbie argues that because Woo's tip pool included employees who are not "regularly tipped employees," it was not invalid under the FLSA, and Woo was then required to pay her the minimum wage plus *all* of her tips. Woo argues that Cumbie's reading of the FLSA is correct only concerning employers who take a "tip credit" toward their minimum-wage obligation. Because Woo did not claim a "tip credit," it argues that the tippooling arrangement was allowable so long as it paid her the minimum wage, which it did.

We usually begin our analysis with a similar statue, but we will pause to explain the background that leads our inquiry: "In businesses where tipping is traditional, the tips, leaves no room for confusion and a mere understanding that it belongs to the recipient. Where, however, [such] an arrangement is made...., leaves no room of an allege involvement, no reason has become aware for its restriction." *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 397, 62 S.Ct. 659, 86 L.Ed. 914 (1942)

William establishes that the main rule is to turn over or to redistribute tips is probably correct. Our task is then to determine whether the FLSA sets any "alleged involvement" that would void Woo's tip-pooling arrangement. The question presented is one of the first in this court.

Under the FLSA, employers must pay their employees a minimum wage. (See 29 580* U.S.C. 206 (a). The FLSA's defines a "wage" that under certain circumstances, employers of "tipped employees" may include part of such employees' tips as a wage payments, (See id. 203 (m). The FLSA provides an appropriate part: in deciding the wage an employer is required to pay a tipped employee, the amount paid to the employee by the employee's employer will be an amount equal to (1) the cash wage paid to the employee should not be less that the cash wage required to be paid to the employee on August 1996; and (2) the additional amount on account of the tips received by the employee will be equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206 (a)(1) of this title.

The additional amount on the account of tips may not beat the value of the tips actually received by an employee. The above mentioned 2 sentences should not be applied to any tipped employees unless the employees has been informed by the employer of the allowance of this classification, an all tips received by the employee have been kept by the employee, except the classification will not be define to prohibit the pooling of tips among the employees who usually receive tips.

The first sentence states that an employer must pay a tipped employees an amount equal to:

- (1) A cash wage of at least \$2.13, plus
- (2) An additional amount in tips equal to the federal minimum wage minus cash wage, the employer can make up the difference with the employee's tips (known as tip credit).

The second sentence clears that the difference may not be more than the tips received. So, the cash wage plus tips are not enough to meet the minimum wage, the employer must add more to the cash wage. So these two sentences gives out an explanation that an employer may take a partial tip credit towards its minimum wage obligation.

The third sentence states that the above mentioned two sentences do not apply unless two conditions are met.

First, the employer must let the employee know of the tip-credit supplied in sections 203(m).

Second, the employer must allow the employee to keep all of his/her tips, except when the employees participate in a tip pool with other regular tipped employees.

Cumbie argues that under section 203 (m), an employee must be allowed to keep all of her tips except in the case of a "valid" tip pool involving regularly tipped employees even though her employer clams a tip credit. Basically, she argues that section 203 (m) has ruled against Williams, rendering tip-distribution agreements are probably invalid. But, we cannot adjust this interpretation with basic text of the third sentence, which sets conditions on taking a tip credit and the requirements do not stand alone which includes all tipped employees.

A statute that provides that a person must do "X" in order to achieve "Y" does not order that a person must do "X".

If Congress wanted to give a clear general principle that tips are the property of the employee not present "valid" tip pool, it could have been done without a tip credit. "it is our duty to give effect, if possible, to every clause and word of a statue."

<u>United States v. Menasche, 348 U.S. 528, 538-39, 75 S.Ct. 513, 99 L.Ed. 615</u> (1955)

So, we will not read the third sentence in a way to contribute its remark to the tip credit as well as its certain terms and structure.

The Supreme Court has made it clear that the employment practice does not violate the FLSA unless the FLSA says so.

<u>Christensen v. Harris County, 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000)</u>.

With that said, that nothing in the text of the FLSA meant to restrict employee tip-pool arrangements when no tip credit is taken, we noticed that no allege obstacle to Woo's practice.

Accordingly, the judgment of the district court ruled in favor of Woody Woo, Inc. Cumbie actually received a wage that was "far greater than the federally prescribed minimum, plus an abundant portion of her tips."

Woo did not take a tip credit, and So Woo's tip-pooling arrangement did not violate Section 203(m), the 9th Circuit held. And as well District court did not find any laws that violated the Fair Labor Standards Act of 1938.