

EMPLOYERS: DON'T LET TIPS TRIP YOU

Employers in service industries are well advised to pay close attention to their practices and policies affecting customers' tips for their employees. There are a variety of ways in which missteps can run afoul of federal or state laws, including the federal Fair Labor Standards Act (FLSA).

Employees might contend, for example, that the employer is effectively reducing their tip income by imposing various fees or other charges on customers. Or, contrary to a requirement in the FLSA, employees who are paid less than the minimum wage might not be getting enough in tip income to make up the difference between their hourly rate and the minimum wage. Recent cases in the news involved yet another alleged violation, sometimes taking place on a very large scale, where employees are made to share tip income with fellow employees who supervise them.

In one of the tip-sharing cases, a state court ruled in favor of a class of plaintiffs consisting of baristas, or coffee counter servers, whose tips were required to be shared with their shift supervisors, in violation of state law. Change left for tips apparently adds up, as the judgment for the tens of thousands of servers, for about an eight-year period, topped \$100 million, including interest.

The case was not cut-and-dried, as the supervisors were themselves hourly workers who had customer service duties in addition to the responsibility of scheduling workers and giving directions to the baristas. It was not a case of highly paid bosses dipping into the tip jars filled by customers they never saw in person.



When a shift supervisor hands a customer his latte and muffin, and the customer responds with a tip, the customer may assume that the money, or at least part of it, goes to the supervisor. Instead, under the ruling, the supervisors must now keep their hands off the tips, and the employers must ensure such an outcome.

In the wake of this case, similar lawsuits have been filed against the same employer, a national chain, and against other employers in other states. Companies in the restaurant, hotel, gaming, transportation, and delivery businesses face the largest risks for mishandling the treatment of tips. There is another pending case in which

casino dealers have complained that an employer's new policy illegally requires them to share tips with floor supervisors.

The legal issues surrounding the treatment of tips are murky enough in any one state, but further complicating the matter is the fact that there are variations among the states and between the statutes for a state and for the federal government. This makes it especially risky for national employers to assume that a one-size-fits-all policy on tips will be sufficient for all of their locations.

"Back-room" personnel, shift supervisors, hostesses, greeters, drink servers, and other similar positions could be treated differently depending on what state you are in. Employers should regularly assess their job descriptions and tip-sharing policies against applicable state and federal laws. This kind of audit is useful not only for detecting or avoiding possible violations, but for laying the groundwork for a potential "good-faith" defense under the FLSA if litigation ensues. ■

PRSR STD
U.S. POSTAGE
PAID
Las Vegas, NV
Permit No. 2470

HUTCHISON & STEFFEN

ATTORNEYS

A FULL-SERVICE, AV-RATED LAW FIRM

PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NEVADA 89145

702-385-2500 • FAX 702-385-2086
HUTCHLEGAL.COM

LAS VEGAS • RENO • SALT LAKE CITY • PHOENIX

©2008 HUTCHISON & STEFFEN

ADMINISTRATIVE LAW
ALTERNATIVE DISPUTE RESOLUTION
APPELLATE LITIGATION
ASSET PROTECTION & BUSINESS PLANNING
BUSINESS & COMMERCIAL LITIGATION
CONSTRUCTION LAW
CORPORATE & TRANSACTIONS
CREDITOR'S RIGHTS & BANKRUPTCY
EMPLOYMENT LAW
ESTATE PLANNING
FAMILY LAW
HEALTHCARE PROFESSIONALS ADVOCACY
INSURANCE DEFENSE
LANDLORD/TENANT
PERSONAL INJURY
REAL ESTATE LAW
TRUST & PROBATE LITIGATION



Summerlin
Patriotic Parade
Sponsorship



Don't Let Tips
Trip You



Landowner Gets
Settlement

HUTCHISON & STEFFEN
ATTORNEYS

Legal Matters

Fall 2008

HUTCHISON & STEFFEN OBTAINS HISTORIC \$388 MILLION JURY VERDICT AGAINST CALIFORNIA'S TAXING AGENCY

Verdict will make governmental agencies accountable for abusive conduct

Mark A. Hutchison, lead counsel for Gilbert P. Hyatt, recently obtained a jury verdict in his client's favor for \$388 million against the California Franchise Tax Board. The jury returned its verdict following approximately four months of intense trial testimony and argument and over 10 years of litigation. Hyatt, who received a key microprocessor patent in 1990, sued California's tax assessment and collection agency, alleging the agency audited him in bad faith and committed fraud and other intentional torts during its audit. The Franchise Tax Board claimed he was a California resident in 1991 and part of 1992, assessing Hyatt millions of dollars in income taxes for those years, including fraud penalties.



"The entire case, from start to finish, is unprecedented."

- Mark A. Hutchison, Lead Counsel for Gilbert Hyatt

Hutchison & Steffen has handled the lawsuit since the firm filed the complaint in January of 1998. "Many of the Firm's attorneys played key roles in securing

this historic victory for the client," said Hutchison. After the case was filed in Nevada, California took the case to the Nevada Supreme Court and then to the United States Supreme Court, arguing that Nevada courts could not adjudicate in Nevada Mr. Hyatt's claims against the California Franchise Tax Board. The United States Supreme Court disagreed and unanimously upheld the Nevada Supreme Court's ruling that Mr. Hyatt's intentional tort claims could proceed to trial in Nevada. Jury selection began on April 14, 2008.

The jury returned a unanimous liability and compensatory damage verdict on August 6, 2008, for \$138.1 million for fraud, intentional infliction of emotional distress, abuse of process, breach of confidential relationship, and invasions of privacy. On August 12, the jury unanimously determined that the Franchise Tax Board's

(continued inside)

HUTCHISON & STEFFEN SPONSORS EAGLE BALLOON IN THE 2008 SUMMERLIN PATRIOTIC PARADE



In honor of our country's celebration of Independence Day, the Firm's partners, associates, and vital staff members came together to provide an amazing display of the American Bald Eagle. This symbol of our freedom has a wingspan of 33 feet, is 25 feet tall and takes twelve balloon handlers to navigate it through the parade route.

We are honored to participate in this celebration of our American heritage and freedom. The eagle received many cheers and much applause along the parade route.

A big thank you to everyone on our team who participated in the parade and to all of the parade spectators for their support. ■



Actual resolution of legal issues depends upon many factors, including variations of fact and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking any action on matters covered by this newsletter. Nothing herein should be construed to create or offer the existence of an attorney-client relationship.

MICHAEL WALL PREVAILS IN NEVADA SUPREME COURT DECISION

Michael Wall and Kevin Sutehall recently prevailed in a Nevada Supreme Court case involving disputed ownership rights to what had long been a family farm. Hutchison and Steffen represents one of the original owners of the farm, which was involuntarily sold by court order rendered in a partition action some years ago. Wall pursued an appeal to the Nevada Supreme Court and obtained reversal of the sale, but the purchaser at the sale claimed he was still the owner of the farm despite the reversal because he was allegedly a bona fide purchaser for value without notice.

Wall maintained that the original district court lacked jurisdiction to enter its order of sale, but the purchaser argued the order of sale was merely voidable, not void. A new district court judge agreed, and issued a restraining order against the original owners from taking any action to cloud the title of the purchaser. Wall and Sutehall went again to the Nevada Supreme Court, arguing that the five year deadline of NRCP 41(e) is not only mandatory, it is jurisdictional: making



Michael K. Wall

the sale order void and not just voidable. The Nevada Supreme Court agreed. In a published opinion, the Nevada Supreme Court held for the first time that the five-year deadline of NRCP 41(e) is jurisdictional, and that orders entered in violation of the rule are void.

As a result of this important victory, the original owners can now bring the case before the appropriate courts for an ultimate decision about the land's legal ownership. Wall, who practices with the Hutchison & Steffen Appellate Practice Group, is a former supervising staff attorney for the Nevada Supreme Court and has years of experience in appellate law. Sutehall, an associate with Hutchison & Steffen, was a valuable assistant to Wall on all aspects of the case.



Kevin M. Sutehall

Although the legal issues in this case are very complex, Wall believes the decision supports the concepts of due process. His experience and practice with appellate law, a very specialized area of legal practice, enabled him to achieve this important victory for his client. ■

FEDERAL ESTATE TAX

The federal estate tax credit, currently at \$2 million, is set to increase to \$3.5 million in 2009. This means that in 2009 you can leave up to \$3.5 million to your heirs without any federal estate tax liability.

If Congress takes no action, the federal

estate tax will be repealed altogether in 2010. While this is an unlikely scenario, it does underscore the uncertainty involved in estate planning over the next few years. Make sure to meet with a professional to review your plan. ■

HISTORIC \$388 MILLION JURY VERDICT AGAINST CALIFORNIA'S TAXING AGENCY

(continued from cover)

conduct warranted punitive damages. On August 14, the jury rendered its verdict assessing \$250 million in punitive damages. Hutchison stated, "The entire case, from start to finish, is unprecedented." As reported in local and national news media, Hutchison observed that the ruling against the California Franchise Tax Board is like "the shot heard 'round the world at Lexington and Concord" for abusive taxing agencies. He continued that, "Government agencies should pause and

reflect on the significance of this verdict." Jury verdicts have historical significance and Hutchison hopes it will prevent further abuse of law-abiding citizens. "The amount of the verdict will make government agencies realize they are accountable for abusive conduct by employees – especially when the conduct is condoned and encouraged." The jury's \$388 million award makes it one of the largest verdicts in favor of an individual in United States history.

LANDOWNER GETS SETTLEMENT FOR "TAKING"

When the government takes aim at private property to be taken for some public purpose, more often than not any resulting litigation is a contest over how much the property owner should be paid, rather than whether the exercise of the power of eminent domain was appropriate in the first place.

From the landowner's standpoint, it is important to realize that adequate compensation is not determined simply on the basis of the current use of the property. Instead, the landowner is entitled to the value of the property based on its "highest and best" use (whether that use already exists or is only in the eye of a developer), so long as such a potential use is not too speculative or otherwise foreclosed by applicable laws and regulations.

The importance to a property owner of negotiating compensation on the basis of a best-case, but realistic, development scenario for the property is illustrated by a recent case in which the owner of a vacant, 22,000-square-foot lot settled with a town for compensation in an amount that was about 27 times higher than the amount initially offered by the town.

The lot was zoned for residential use, although at the time of the condemnation action the owner had no building or development plans. Appraisers hired by the town offered an opinion that the vacant lot's best use was only as open space, or as a buffer for

an abutting lot. They reasoned that compliance with the town's lot area and frontage requirements, as well as with its road standards for improving the dirt road on which the lot was located, would be so burdensome as to make any development of the property prohibitively expensive. They also indicated that extensive development costs would preclude development even if the lot was considered to have grandfathered status that would protect it from certain town requirements.

For its part, the landowner retained experts who opined that the lot was, in fact, suitable for residential purposes and should be valued as such when arriving at a compensation figure for the taking. As the town's experts had noted, there were various requirements on the books that, in theory, could be costly to comply with. However, an examination of past rulings by the town's zoning and conservation officials showed that the lot was likely to be exempted from some of the requirements. Moreover, improvement of the dirt road, which would have been an especially big-ticket item, was not likely to be required.

Both sides were necessarily looking into the future to some extent, but the landowner was able to depict a scenario for the lot that was optimistic enough to bring about a favorable monetary settlement with the town. ■