IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL BALDONADO and JOSEPH CESARZ,

Appellants,

vs.

WYNN LAS VEGAS, LLC.,

Respondent.

No.: 48831

Appeal From the Eighth District Court, Clark County, No. 06-A-528138-C

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES PRESENTED

This appeal presents the following issues:

Whether the tip distribution plan forced by respondent upon the appellants in September of 2006 violates Nevada's labor laws, N.R.S. § 608.160, § 608.100 and/or § 613.120?

Whether the tip distribution plan forced by respondent upon the appellants in September of 2006 violates the appellants' contract rights or the public policy of Nevada?

Whether the appellants have standing under Nevada's labor laws or pursuant to N.R.S. § 30.040 or on any other basis?

STATEMENT OF THE CASE

This case was commenced on September 13, 2006, in the Eighth Judicial District Court. The appellants sought equitable relief and damages on a class action basis as a result of the tip distribution plan imposed by the respondent in September of 2006. The appellants alleged the respondent violated the appellants' contract rights and the statutes and public policy of Nevada. On December 11, 2006, the court below certified this case as a class action on behalf of the respondent's non-poker room table game dealers. Appellants moved in the court below for partial summary judgment and an injunction and the respondent moved to dismiss the appellants' complaint. Those motions were argued before the court below on December 6, 2006. The Court below, by Order of January 5, 2007, denied appellants' motion and granted respondent's motion and dismissed this case.

STATEMENT OF FACTS

The appellants are table game dealers employed in the respondent's casino, the Wynn Las Vegas (the "Wynn"). The Wynn pays its dealers the legal minimum wage (which was $5.15 an hour in Nevada prior to November 28, 2006) or $1.00 an hour over the minimum

wage. R. 28[1]. The dealers' full time earnings from the wages paid to them by the Wynn is less than $13,000 a year ($6.15 an hour x 40 hours x 52 weeks = $12,792). The wages paid by the Wynn constitute 20% or less of the dealers' typical compensation, the vast majority of their compensation coming from customer gratuities. R. 53, 56.

On March 28, 2005, prior to the Wynn's opening, it issued a toke distribution policy (the "March 28th policy") defining tokes as "any money, whether coin or cash extended to an employee in recognition of, or appreciation for, a job well done." R. 17. That policy was consistent with industry customs and provided for all table game customer tokes to be placed in toke boxes and counted by the dealers' elected toke committee. R. 28-29. The tokes were then deposited with the Wynn's payroll department and distributed to each table game dealer based the number of hours they worked and their accrued vacation and sick time. R. 16-19, 28-29. Only the table game dealers shared in the tokes, dealers temporarily working as supervisors were denied any toke share. R. 18.

The March 28th policy prohibited Wynn managers and supervisors from accepting tokes and they could only accept gifts valued at less than $100.00 and only if the gift would not pose "a potential for a conflict of interest or personal obligation". R. 15. Two of the primary duties of casino floor supervisors are to rule on disputes involving players and "game protection" (guarding against players trying to cheat the casino). R. 50. Banning floor supervisors from accepting tokes deters them from favoring toking casino players.

The toke committee established under the March 28th policy was

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[1] "R" references are to page numbers of record in the appendix.

composed of, and elected by, the full time dealers. The March 28th policy also provided that there would be no amendments to the Wynn's toke distribution policies unless such changes were approved by a majority of the dealers. R. 23.

On August 21, 2006 the Wynn unilaterally eliminated the dealers' toke committee and re-labeled the dealers' managers (previously called floor supervisors, pit managers, and craps boxmen) as service team or craps team "leads". R. 11. On September 1, 2006, it instituted a policy (the "September 1st policy") of distributing to the service team leads and craps team leads a daily toke share equal to 40% and 20%, respectively, of what a table games dealer would receive. Under the March 28th policy these tokes would have gone to the dealers and the September 1st policy has reduced each dealer's tokes by about $17,000 a year. R. 31-32, 37-38.

The Wynn acknowledges the purpose of the September 1st policy is to use the dealers' tokes to increase their supervisors' compensation. R. 11-13. Under the March 28th policy the dealers, with their tips, often made more than their supervisors. Steve Wynn denounced this situation as wrong and "upside down" and declared the Wynn's intent to increase its supervisors' compensation at no cost to itself by re-distributing the dealers' tokes. R. 53-54, 60.

Under the September 1st policy the Wynn reduced its pit supervisors' salary by $30,000 a year and made up that salary reduction by giving each pit supervisor a $30,000 a year share of the dealers' tokes. Prior to September 1, 2006, Wynn pit managers earned approximately $90,000 a year (plus a bonus), paid entirely by the Wynn. R. 60. After September 1, 2006, those pit supervisors,

now called "service team leads" and performing the same duties, are paid $60,000 a year by the Wynn and approximately $30,000 a year from the dealers' tokes, saving the Wynn $30,000 per year for each pit supervisor. R. 30-31, 60.

The Wynn also intends to benefit from the September 1st policy by more easily hiring and retaining managers (most of whom are now compensated at a much higher level) and by encouraging Wynn dealers to seek advancement into management. R., 12-14, 53-56. About 80% of the dealers' supervisors received a 50% increase in their total compensation as a result of the September 1st policy[2]. R. 53-54.

The Wynn, having abolished the dealers' toke committee, now seizes all of the dealers' tokes and counts them without any dealer participation or contemporaneous observance by the dealers. R. 31. The Wynn handles and distributes the tokes exactly as if the tokes were solely its property.

The Wynn admits that its floor managers, pit supervisors, and boxmen (now denominated by the respondent as team leads) are managers. R. 50-52. These managers control the dealers' work areas, recommend and initiate discipline against the dealers, give dealers their breaks and table assignments, approve or deny early shift leave for dealers, and control the dealers' working environment. R. 30-31, 35-36.

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[2] Respondent's analysis ignores its claimed abolishment of its "pit supervisor" position. Those employees (the exact number is not stated in the record but is believed by appellants' counsel to be approximately 25) received no actual increase in compensation, just a shifting of $30,000 in compensation from the respondent to the dealers' toke pool. R. 59-60.

ARGUMENT

POINT I

THE COURT BELOW ERRED IN HOLDING THAT THE APPELLANTS LACKED STANDING

A. The Nevada Supreme Court Has Previously Ruled That Nevada's Labor Laws Can be Enforced by Private Parties

The District Court's holding that appellants lack standing under N.R.S. §§ 608.100, 608.160 and 613.120 (collectively "Nevada's labor laws") conflicts with U.S. Design & Construction Corp. v. International Brotherhood of Electrical Workers,118 Nev. 458, 50 P.3d 170 (2002). That case arose under N.R.S. § 608.150 ("608.150") which imposes liability on superior contractors for their subcontractors' unpaid wages and benefits. It was claimed that 608.150 conferred no private right of action because it authorized civil actions by the District Attorney and did not mention any enforcement by private parties. U.S. Design held it was "readily apparent" that private parties could enforce 608.150. 50 P.3d at 172.

U.S. Design found that 608.150 was intended to provide additional protections and civil remedies for workers. Id. Providing additional protections for Nevada's workers is also the purpose of N.R.S. §§ 608.160, 608.100 and 613.120. While 608.150 grants enforcement powers to the District Attorneys, and the Nevada Labor Commissioner (the "NLC") also has the power to enforce 608.150 pursuant to N.R.S. § 607.160, private enforcement of 608.150 was not specifically precluded and was consistent with the legislature's intent. Id. As U.S. Design observed, the NLC is only authorized to civilly enforce Nevada's labor laws for workers unable to retain

1 private counsel. 50 P.3d at 172 n. 5. See, N.R.S. §§ 607.160(7) and
2 § 607.170(1). Workers able to retain private counsel cannot have
3 the NLC enforce their rights under Nevada's labor laws. Id.
4 Presumably respondent will argue that U.S. Design's holding was
5 based upon an "entire statutory scheme" that is unique to 608.150.
6 It may argue that a private cause of action under 608.150 was
7 established by N.R.S. § 11.209. That statute, entitled "Actions
8 against principal contractors by employees of subcontractors for
9 wages or benefits", sets forth, without mentioning 608.150, a
10 statute of limitations applicable to actions under 608.150.
11 Although U.S. Design mentions 11.209, its holding does not rely
12 on it because 11.209, just like 608.150, *does not contain any*
13 *language establishing or prohibiting a private cause of action under*
14 *608.150.* While the title of 11.209 speaks of actions "*by* employees"
15 for wages or benefits, the language of the statute itself imposes a
16 limit on actions "*for* the recovery of wages (or benefits) due an
17 employee." It is completely silent on *who* may bring such actions.
18 It has also been held that compensation owed to an employee
19 under a municipal ordinance can be recovered in a private lawsuit
20 even when no ordinance or statute authorizes the bringing of such an
21 action. See, Dunn v. Carson City, 88 Nev. 451, 499 P.2d 653 (1972)
22 and Mullen v. Clark County,89 Nev. 308, 511 P.2d 1036 (1973).
23 The only decision supporting a conclusion that the appellants
24 lack standing is Moen v. Las Vegas Int'l Hotel, Inc., 402 F. Supp
25 157 (D. Nev. 1975), *aff'd mem.*, 554 F.2d 1069 (9th Cir. 1977). It
26 held that 608.160, by making its violation subject to prosecution by
27 the District Attorney, did not confer any private rights. 402 F.
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Supp 160-61. This reasoning was rejected by U.S. Design.

Moen also based its holding upon the preamble to 608.160 as originally enacted in 1939 and ignored the purpose of the statute's 1971 amendment. As originally enacted 608.160 did not prevent an employer from seizing his employee's tip. It only required the prominent display of a notice of such practice so that customers would not be mislead into believing tips went solely to employees.

The 1971 amendment to 608.160, by banning any tip sharing between employees and employers, created a new, and significant, protection for tipped employees. Yet Moen concluded that the 1971 amendment's purpose was to strengthen the "anti-fraud" intent of the 1939 statute, which it found without explanation to have been "ineffective. 402 F. Supp at 159-160. If the 1939 public disclosure provisions were ineffective the legislature could have increased their effectiveness by heightening the criminal or civil penalties for violations. The most reasonable explanation for the 1971 amendment is that the legislature intended to grant additional protections to tipped employees, the only persons benefitted by the 1971 amendment.

B. Nevada's Labor Laws Envision Private Enforcement

Nevada's labor laws, and their history, supports the conclusion of U.S. Design that Nevada's "entire statutory scheme" creates a "readily apparent" private right to enforce Nevada's Labor Laws. The NLC was created in 1915. See, N.R.S. § 607.010. The NLC may only refer labor law claims to the attorney general for collection, or bring suit itself, when it determines "a person financially unable to employ counsel has a valid and enforceable claim for

1 wages, commissions or other demands." See, N.R.S. §§ 607.160(7) and
2 607.170(1). These provisions have existed since at least 1941.
3 Nevada's legislature enunciated a preference for private
4 enforcement of Nevada's labor laws by barring the NLC from assisting
5 workers able to hire private counsel. The legislature directed that
6 not just wage claims but *other demands* arising under the labor laws,
7 such as claims for the misappropriation of tips under 608.160, be
8 prosecuted by workers financially able to afford counsel. See,
9 N.R.S. §§ 607.160(7) and 607.170(1) The right of workers to civilly
10 enforce Nevada's labor laws by private suit is also pre-supposed by
11 two Attorney General opinion letters. See, Op. Att'y Gen. 867 (2-9-
12 1950) and Op. Att'y Gen. 190 (12-18-1964).
13 The existence of a private cause of action to enforce Nevada's
14 Labor Laws is acknowledged by the NLC who requires workers seeking
15 its assistance to certify that they cannot afford an attorney. R.,
16 at 76. Complainants failing to do so, in compliance with 607.160(7)
17 and 607.170(1), cannot receive assistance from the NLC and must
18 enforce their rights through private counsel.
19 Nevada's legislature also recognized its policy of encouraging
20 private enforcement of Nevada's labor laws through its enactment of
21 N.R.S. § 607.175. That statute allows an employee to receive
22 assignments of wage or commission claims on behalf of an unlimited
23 number of employees and bring a single action on such claims. The
24 definition of "commissions" for the purpose of that statute is quite
25 broad: "a fee paid for transacting a piece of business or performing
26 a service..." N.R.S. § 607.005. There is no requirement that such
27 "fee" (monies) be paid *by the employer*, merely that they be paid for
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"performing a service." Id. This definition covers the tokes at issue in this case (they were paid by respondent's customers in exchange for the appellants' performance of services) and 607.175 grants the appellants explicit standing to pursue their claims.

C. The Court Below's Determination That Appellants Must Pursue "Appellate Remedies Through the Administrative Process" is in Error Because No Such Process Exist

The court below ruled that the Nevada labor statutes at issue are "criminal statutes that can only be enforced by the District Attorney's office, the Nevada Labor Commissioner, or the Attorney General." In the same paragraph it also held that "the Nevada Labor Commissioner is the proper authority for enforcing Nevada's Labor Statutes and Plaintiffs must therefor pursue appropriate appellate remedies through the administrative process before obtaining judicial review." The Court below made no attempt to reconcile the glaring conflict that these conclusions present.

The enforcement of criminal statutes is subject to almost unlimited prosecutorial discretion. See, Salaiscooper v. Eighth Judicial Dist. Court, 117 Nev. 892, 903, 34 P.3d 509, 516 n 17 (2001). There is no statutory or common law right to compel enforcement of a criminal statute. Cairns v. Sheriff of Clark County, 89 Nev. 113, 115, 508 P.2d 1015, 1017 (1973) and Lane v. Second Judicial District Court, 104 Nev. 427, 456, 760 P.2d 1245, 1264 (1988). If the statutes at issue are purely criminal in nature the dealers possess no right to compel their enforcement through any administrative proceedings.

The Court below, when it spoke of an "administrative process", may have been referring to the NLC's authority to administratively

prosecute labor law violations. See, N.R.S. §§ 607.150, 607.160 and 607.170. These statutes provide an *exclusively discretionary* power to the NLC who "may enter" a workplace to investigate violations (607.150(1)); "may take" action against, and "may seek" an administrative penalty from, violators (607.160(2) and 607.160(6)); and "may prosecute" an action for a worker when he determines that the worker is unable to afford counsel (607.170(1)), and so forth.

The NLC, like a traditional prosecutor, prosecutes labor law violations at his discretion. See, N.R.S. § 607.050 (The NLC may appoint a deputy having the same labor law enforcement powers as the county district attorneys or the attorney general) and N.R.S. § 607.065 (The NLC may contract with attorneys and grant them the same powers, except the power to institute criminal prosecutions).

Nevada's labor laws do not give the appellants a right to an administrative hearing. The NLC "may" hold such an administrative hearing, N.R.S. § 607.207, and if it chooses to do so the decision from that hearing is subject to judicial review, N.R.S. § 607.215, but it cannot be compelled to do so. The legislature, when it deems it appropriate, requires the NLC to hold administrative hearings at the request of a complainant. See, N.R.S. § 338.030(3) (Party aggrieved by NLC's prevailing wage determination has right to demand administrative hearing by NLC). The dealers also have no ability to compel the NLC to conduct an administrative hearing on their claims through a mandamus proceeding. State Bar of Nevada v. List, 97 Nev. 367, 632 P.2d 341 (2001)(Mandamus only proper when "the law especially enjoins" a public official to perform a non-discretionary duty, the use of "shall", and not "may", establishing such a duty).

D. Appellants Also Have Standing Under N.R.S. § 30.040

Appellants sought declaratory relief under N.R.S. § 30.040 which provides that "any person" whose rights are affected by a statute may seek a declaration of their rights under such statute. Standing under 30.040 is broadly conferred. See, Prudential Ins. Co. v. Insurance Commissioner, 82 Nev. 1, 409 P.2d 248 (1966). A party seeking a ruling on the *meaning* of a statute may properly bring a direct case under N.R.S. § 30.040, while a party aggrieved by *an action* of a governmental agency can seek administrative relief and subsequent judicial review. *Id.* 409 P.2d at 249. It is the court's, and not the agency's, responsibility to determine the statute's meaning. *Id.* This is precisely the situation with appellants, who are not aggrieved by any action of the NLC (who has declined to take any action) and seek a ruling on the meaning of the involved Nevada statutes.

POINT II

THE COURT BELOW ERRED IN HOLDING THAT THE DEFENDANT HAS NOT VIOLATED N.R.S. §§ 608.100, 608.160 AND 613.120

Although the Court below found that the dealers lacked standing to bring their claim, it also ruled that the respondent's tip distribution policy was legal. This holding was in error.

A. The Wynn's Toke Distribution Policy Violates NRS 608.160 By Appropriating the Dealers' Tokes for the Benefit of Their Employer and also Constitutes an Illegal "Taking" of Such Tokes

Section 608.160 provides in relevant part that:

1. It is unlawful for any person to:

(a) Take all or part of any tips or gratuities bestowed upon his employees.

and

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.

The Wynn has violated both of these provisions of 608.160 by taking a part of their employees' tips and instituting an improper tip sharing (pooling) policy.

1. The Wynn is Violating NRS § 608.160 (1)(a) by Requiring The Dealers to Give Some of Their Tips to Their Employers

Section 608.160(1)(a) prevents an employer from "taking" any tips bestowed upon his "employees." The definition of "employer" under Chapter 608 and 608.160 is set forth at § 608.011: "'Employer' includes every person having control or custody of any employment, place of employment or any employee."

By specifying that *every* person having "custody or control" of *any* employee or *any* employment or place of employment 608.011 incorporates into 608.160(1)(a) a broad definition of "employer" that supersedes the much narrower common law definition of "employer" as: "One who employs the services of others; one for whom employees work *and who pays their wages or salaries.*" (Black's Law Dictionary Abridged 5th Ed., emphasis provided). "Employer" under Chapter 608 is not just the employing business. The broad employer definition of 608.011 is similar to that of the Federal Fair Labor Standards Act (the "FLSA") and other state wage and hour statutes[3]

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[3] See, 29 U.S.C. § 203(d), a FLSA employer is "any person acting directly or indirectly in the interest of an employer in relation to an employee"; Lambert v. Ackerly, 180 F.3d 997, 1012 (9th Cir. 1999) ("employer" under FLSA includes persons who exercise control over employees) and Riordan v. Kempiners, 831 F.2d 690, 694 (7th Cir. 1987)(FLSA employer is any responsible person with "supervisory authority" over the employee). California reaches the same result as 608.160 and 608.011 by more narrowly defining "employer" and prohibiting any "agent of an employer" from taking an employee's tips. See, Cal. Labor Code §§ 350-351.

and demonstrates the Nevada's Legislature's intent to give broad coverage to Chapter 608's provisions.

The Wynn concedes that its team lead employees are managers. R. 51. These managers are Chapter 608 "employers" having "control" or "custody" of the dealers, of their place of employment, and their very employment. Dealers work under the "control" of these managers who tell them where to work and what to do, and under the "custody" of such managers who also control their break time and otherwise supervise and direct when they can cease their work. R. 30-31, 36-37, 49-52. The dealers also work at the sufferance of such managers who can discipline them (and have the responsibility of initiating disciplinary action against them) and influence or cause their discharge from their employment. Id. The respondent's job description of "floor supervisor" (the title previously used for most of the team leaders) states such persons are responsible for "employee direction" and "continually monitor and direct Dealers to maintain conformity of established policies and procedures." R. 51.

In a highly analogous case, involving Cal. Labor Code § 351 which is effectively identical to 608.160[4], it was held that tip pooling cannot be required between a waiter and a restaurant floor manager who supervises, directs or controls the waiter. See, Jameson v. Five Feet Restaurant Inc., 107 Cal. App. 4th 138, 144-45, 131 Cal. Rept. 2d 771 (Cal. Ct. App. 2003). This was so even if the manager did not spend the majority of their time managing the waiter

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[4] The California statute bars tip pooling with "employers" and "agents of employers", which collectively are defined the same as "employers" under 608.011.

and the manager directly provided table service to the diners. *Id.*

2. The Wynn is Violating N.R.S. § 608.160 (1)(a) and N.R.S. § 608.160(2) By Using the Dealers' Tips As a Salary Substitute for the Wynn's Managers

The Nevada Supreme Court reviewed 608.160 in Alford v. Harrold's Club, 99 Nev. 670, 669 P.2d 721 (1983). In upholding an employer's right under 608.160 to impose a tip pooling agreement upon its employees, the Court made clear that such right existed only when "…the employer does not retain any part of the tips for his own use or reap any direct benefit from the pooling." Alford, 669 P.2d at 724. The Court also reviewed the holding of Moen, 402 F.Supp. at 160, that "The evident purpose and proper interpretation of the statute [608.160] is that it was enacted to prevent the taking of tips by an employer for the benefit of the employer" and found that this interpretation of 608.160 was correct. Alford, 99 Nev. at 674, 669 P.2d at 725. Alford's approval of Moen *was limited to this one point*, it did *not* approve of Moen's "service line" analysis, discussed *infra*.

Alford was a short and circumscribed decision (unlike the expansive and much longer opinion in Moen). Alford explicitly stated that the decision in Moen was not controlling. 669 P.2d at 724. It also stated *twice* it was only approving of the tip pooling policy in the case before it. 669 P.2d at 722, 724. That tip pooling policy, unlike the one in Moen, required dealers, and dealers alone, to pool and share their tips. It did not involve dealers being forced to share tips with their supervisors or any different class of employees. Compare,

Alford, 669 P.2d at 722-23 and Moen, 402 F. Supp. at 158. The Court below erred by holding that Alford embraced Moen's "service line" reasoning allowing employers to redistribute workers' tips to their supervisors.

Alford characterized 608.160 as a statute "restricting an employer's *access* to employees' tips and gratuities" and not just one preventing employers from *taking* employee tips. 669 P.2d at 722. This broad purpose of "restricting access" to employee tips is reiterated by Alford when it asks whether the tip pooling plan before it improperly allows an employer to make *use* of employee tips or directly benefit from the tip pool. Alford, 669 P.2d at 724.

Alford, by prohibiting an employer's improper *access to* and *use of* employee tips, adopted a considerably broader interpretation of 608.160 than Moen. Moen only held that an employer may not "take" employee tips for its own benefit. 402 F. Supp. at 160. It did not discuss whether 608.160 prevented an employer from *using* tips for its own benefit. Based upon its finding that all employees in the "service line" were properly entitled to share in customer tips, Moen held there was no "taking" of tips by the employer. Assuming, *arguendo,* that such a conclusion was justified, Moen was endorsing an employer's *use* of employee tips for its own benefit in violation of Alford (in Moen the employer was *accessing* and *using* employee tips to give its non-tipped workers a raise).

The respondent freely admits that its tip distribution policy was implemented so that it could access and take

appellants' tips for its own use and direct economic benefit:

"Over the years the casino industry has allowed an anomaly to occur with regard to the compensation earned by dealers and floor supervisors. As a result of tip income, it has become common for floor supervisor to earn less than the dealers they supervise…. We have therefore decided to modify our Table Games Department and tip pool procedures to eliminate this discrepancy.... ...Supervisors make substantially less than the people they supervise", and when stating the objective of the new policy that it was to "Establish a compensation program that attracts the most qualified candidates and motivates them to advance [into management]." R., at 11.

Wynn manager Andrew Pascal publicly stated that:

"...[A] widening disparity between the wages earned by dealers and casino floor supervisors caused [the September 1st policy]... ...Wynn Las Vegas dealers are the highest paid dealers in the city, averaging about $100,000 per year in salary and tip earnings. But the employees supervising dealers average about $60,000 a year... ...[The September 1st policy] will have dealers earning an average of $90,000 a year while supervisors will be paid $95,000... ...[and it] "rebalances the structure of our table games division and gives a person an incentive to take on more responsibility." Las Vegas Review Journal, p. 1A, August 23, 2006, "Wynn Alters Rules on Tips."

Commenting on dealers, after tips, earning more than the managers who supervise them, Steven Wynn stated:

"This is upside down. It's inverted. It's just outrageous... ...The current system makes the (200 supervisors and 38 craps boxmen) feel cheated," and that respondents' new policy would result in front line managers (floormen), via a taking of tips from dealers, boosting their total compensation to about $96,000. R., at 65.

Pascal also stated that:

...Wynn Las Vegas dealers are the highest paid in the city, averaging about $100,000 per year in salary and tip earnings. But the employees supervising dealers average about $60,000 a year in salary Pascal said. "Because of our property, that disparity has gotten wider," Pascal said, citing Wynn's emphasis on high end play as one reason its dealers' tokes are larger than most Strip properties. "There was no incentive in the division to advance and grow. Everybody wanted to become dealers," he added. R., at 68.

The Wynn can secure higher compensation for its managers by paying them higher salaries. The diversion of tips from

casino dealers benefits no one except the Wynn[5] which secures higher compensation for its managers *without having to pay for it*. This use of employee tips by an employer for its own purposes and direct economic benefit (as a substitute for salaries that the employer would otherwise have to pay itself) is prohibited by § 608.160.

The most glaring example of the improper use by the respondent of the appellants' tips involves the Wynn's pit supervisors. The Wynn cut these employees' salaries by $30,000 a year but kept their total compensation the same by giving them a $30,000 per year share of the dealers' toke pool. R. 59-60. Their duties remained the same. R. 30-31.

3. The Court Below's Order Contradicts the Proper Construction of NRS § 608.160(2)

The Court below's Order is premised upon Moen's flawed construction of 608.160(2)'s statement that 608.160(1)(a) shall not "be construed to prevent *such* employees from entering into an agreement to divide *such* tips or gratuities among *themselves*." (emphasis provided). This language makes permissible tip pools among "such employees", i.e., those employees in 608.160(1)(a) upon whom "tips or gratuities" have been "bestowed." Such employees can have an agreement among *themselves* (not all or any other employees) to divide *such* tips (the tips "bestowed" upon *such* employees).

In Alford it was held that this language allowed an

[5] Any claim that the September 1st policy only benefits the managers receiving a tip pool share is specious. Their receipt of higher compensation is a just a byproduct of the Wynn's decision to use dealers' tokes to fund its managers' raises.

employer to require, as a condition of employment, a tip pooling agreement among *such* employees (in that case casino dealers). That holding was also consistent with 608.160(2)'s use of the term *themselves*. Under Alford, and any sensible reading of 608.160(2), tipped employees (the "such employees" of 608.160(2)) can only be forced to agree to a tip pool amongst *themselves* and not with any other employees.

Moen improperly held that 608.160(2) should be read to mean "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." 402 F. Supp. at 160. This interpretation pivotally changes the meaning of 608.160(2) by using the term "other employees" and not "such employees" and by excising the word *themselves* and substituting it at the end of the sentence with "the employees" and *not* "such employees." This interpretation goes far beyond permitting, as in Alford, a mandatory tip pool for a specific class of employees (such as dealers). In violation of 608.160(2) and Alford, it improperly allows such tip pools to include "other employees" (not just "such employees" who receive tips, as specified by 608.160(2)) and to distribute tips to "the employees" without limitation, (not just to "such employees" who receive tips "themselves").

B. The Wynn's Toke Distribution Policy Violates NRS § 608.100(2) by Requiring the Dealers to Rebate A Portion of their Compensation to their Employers

N.R.S. § 608.100(2) states: "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." It prohibits "any employer" (using the broad definition of "employer" set forth in 608.011) from requiring that an employee "rebate refund or return" not only his wages or salary but any *compensation* that he earns.

The tips received by dealers are compensation earned at the time the customer gives the tip to the dealer. The customer is not giving the tip to the Wynn casino, but to the dealer who provides the service to the customer. The tips are recognized by the Internal Revenue Service as taxable employee income ("compensation"). The legislature's extension of 608.100 to all employee "compensation", and not just "wages", evidences an intent to also include tips within its coverage. The definition of "wages" set forth in Chapter 608, at 608.012, does *not* include tips but only amounts paid by an employer to an employee. If 608.100 was intended to exclude employee tips from its coverage it would have limited its applicability to "wages" and not all employee "compensation."

Rebate is defined as an act "to reduce the force, effect, intensity, or activity of; DIMINISH, LESSEN"[6] The respondent's plan requires that the dealers "rebate", or reduce, their earned, and paid, compensation in violation of 608.100.

C. The Wynn's Tip Distribution Policy Violates N.R.S. § 613.120 (1) by Requiring the Dealers To Pay a Fee, Gratuity or Commission to their Supervisors

N.R.S. § 613.120(1) provides that:

[6] Webster's Third New International Dictionary, Unabridged. Merriam-Webster, 2002. http://unabridged.merriam-webster.com

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.

This statute prohibits any "agent" of an employer who is "entrusted" with employees (i.e., who supervises or directs employees or can continue their employment) from "directly or indirectly" receiving any "fee, commission or gratuity" from such employee as a "price or condition" of their employment. Respondent is violating 613.120(1) by requiring its dealers to make payments (from their tokes) to their supervisors.

The broad scope of 613.120's prohibition is made even clearer in its penalty provision, Section 2, which states:

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. (emphasis provided)

Under 613.120(2) employees who are "charged or entrusted" with the employment of others, or who "direct or control" such persons' employment, on behalf of their "principal", cannot "directly or indirectly" receive any "fee, commission or gratuity" from such workers. The Wynn's team leads are

"entrusted" or "charged" by the Wynn with the dealers' employment and overseeing the dealers' conduct. The Wynn admits this by giving its casino service team leads the primary duties of "ensuring proper procedures are followed by dealers in games within their team" and "protecting the integrity of all games within the team." R. 66.

POINT III

THE COURT BELOW'S "SERVICE LINE" STANDARD IS INCORRECT, BUT EVEN IF IT WERE TO BE APPLIED THE COURT BELOW'S ORDER MUST BE REVERSED BECAUSE THE DEALERS DO NOT "DEAL WITH CUSTOMERS" IN THE SAME FASHION AS THE WYNN'S MANAGERS

A. The Court Below's "Service Line" Standard Is Incorrect and Without Any Legal Basis

The Court below, drawing upon Moen, held that the Wynn's managers, as part of the casino "service line in terms of how they deal with customers" can properly share in tips given to the dealers. "It is ridiculous to assume that a satisfied player who hands over a tip intends it only for the particular person to whom the tip is given." Moen, 402 F. Supp. at 160. Neither Moen nor the court below bothered to inquire into what intent should be presumed by a tipper as a matter of law. Despite Moen's labeling of such a proposition as "ridiculous", at least one appellate Court has adopted a presumption that tips belong solely to the tipped employee. See, Richard v. Marriott Corp., 549 F.2d 303, 305 (4th Cir. 1977)("tips belong to the employee to whom they are left").

By granting employers the power, mentioned nowhere in 608.160, to dictate a broad "service line" distribution of tips Moen rejects, or at least ignores, the presumption that a

customer is not giving a tip to the employer to use or distribute however it pleases. See, Herbert's Laurel-Ventura, Inc. v. Laurel Ventura Holding Corp., 58 Cal. App. 2d 684, 694, 138 P.2d 43, 48 (1943)("A tip is not intended for the proprietor of a restaurant") and Leighton v. Old Heidelberg, Ltd., 219 Cal. App. 3d 1062, 1069, 268 Cal. Rptr. 647 (Cal. Ct. App. 1990) (A restaurant customer does not intend a tip to go to the employer but to the employee(s) who directly service the customer's table). Certainly the tipping customer has the right to prevent an employer from taking the tips that they give and determining their distribution. See, Winans v. W.A.S. Inc., 772 P.2d 1001, 1004 (Sup. Ct. Wa. 1989) ("Whether a tip is to be given, and its amount, are matters determined solely by the customer, *and generally he has the right to determine who shall be the recipient of the gratuity*" [emphasis in original], citing legislative history of the FLSA). Yet Moen strips the customer of that right by allowing the employer to dictate who should receive the customer's tip.

The court below made no attempt to determine whether the Wynn's customers intend for their tip to be distributed in whatever fashion the respondent dictates, including to the Wynn floor managers whom the respondent pays wages five times higher ($60,000 per annum) than it pays its dealers ($12,000 per annum). The custom of tipping, whether in casinos or elsewhere, overwhelmingly supports a presumption that the Wynn's customers intend their tips solely for the dealers. A cardinal rule of tipping is that one does not tip the

establishment but the particular employee providing the service[7]. Tipping guides either admonish against tipping casino pit bosses[8] (unless special services are provided) or exclude casino managers as employees who should be tipped by not mentioning them and noting that winning players should tip the casino dealer[9]. Etiquette books uniformly advise that one should tip low paid service workers and not managers or similar personnel such as cruise ship officers[10].

The sole basis cited by Moen for its "service line" analysis was that a waitress and a busboy customarily share tips. This observation confuses the almost identical nature of such employees' *service functions* with what Moen calls the "service line." Both the waitress and the busboy work together performing overwhelmingly identical and interchangeable service functions. They both bring food and beverages, set and clear the table, take directions from the customer, and serve the meal. They both provide the *same services*, with the exception that the waitress is typically the person who solely takes the customer's food order. Other restaurant employees who are

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[7] J. Schein, The Art of Tipping, p. 6-7 (1984)

[8] S. Krajchia, The Itty Bitty Guide to Tipping, p. 83 (2004)

[9] Fodor's How to Tip (K. Cure ed.) p. 70-75 (2002), N. Star, The International Guide to Tipping, p. 23 (1988)

[10] N. Tuckerman, The Amy Vanderbilt Complete Book of Etiquette Entirely Rewritten and Updated, p. 106, 114 (1995); P. Post, Emily Post's Etiquette, 17th Ed., p. 801, 807 (2004); C. Ford, Etiquette Guide to Modern Manners, p. 23 (1988); J. Martin, Miss Manners Guide for the Turn-of-the-Millennium, p. 379 (1989)

higher up in the service line (the superiors of the waitress and busboy, such as the assistant manager or maitre d') do not predominately perform the same *service functions*.

The custom of tip sharing among restaurant wait staff performing predominately the same *service functions* does not justify Moen's conclusion that tips can properly be taken from minimum wage employees and given to their much higher salaried superiors who are up the "service line." See, Leighton, 219 Cal. App. 3d at 1067 (Approving of mandatory tip pooling in the restaurant industry based upon its long and established custom). There is no tradition in the casino industry of dealers and their managers sharing tips (the Wynn, prior to September 1, 2006, banning the dealers' managers from receiving any customer tips). No sensible analogy can be drawn between the dealers and their managers, who have totally different service functions, and the customs of restaurant table service workers who share many or most service functions.

B. The Court Below's Decision, to the Extent it is Based on a "Service Function" Standard, is in Error Because the Wynn's Managers do not Perform the Same Functions as the Dealers

The court below, while approving of Moen's service line analysis, modifies that analysis by finding that the Wynn's managers work with the dealers in the "same service line in terms of how they deal with customers." Moen did not explain how an employer's service line should be determined. Its broad language would allow very high level managers to be part of the service line because they "contribute to the service rendered the [casino] player." *Id.* By stepping away from Moen's open

ended and undefined service line, and proposing a more specific "service line in terms of how they deal with customers" standard, the court below uses a *service function* analysis.

The court below, having adopted a *service function* standard (unlike Moen's virtually limitless "service line" approach), then fails to apply that standard. The standard embraced by the court below requires a uniformity "in terms of how they [the dealers and the Wynn's managers] deal with customers." Yet the court below makes no findings that any such uniformity exists. It is also clear from the record, and undisputed by the respondent, that the dealers and the Wynn's managers do not "deal with customers" in a common manner.

The dealers and their managers perform no common functions. The dealers run the casino's games. They exchange the customer's money for casino chips, initiate the game (deal the cards, spin the roulette wheel, etc.) and advise the customer if they have won or lost. The Wynn's managers never deal casino games. They assist customers with markers, rate players for complimentary treatment by the casino, protect the integrity of the casino's games and rule on disputes between players and dealers. Unlike a waitress and a busboy, the dealers and the Wynn's managers perform no common service functions and do not "deal with customers" in the same fashion or even in respect to the same subject matter[11].

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[11] The only arguably similar functions performed by dealers and their supervisors are "game protection" but that duty (to prevent theft of their employer) is shared by all casino employees and all employees in all industries generally. Dealers, being pre-occupied with dealing their games, are also unable to solely observe players

POINT IV

THE COURT BELOW ERRED IN HOLDING THAT THE RESPONDENT DID NOT BREACH ITS CONTRACT WITH THE DEALERS AND THE WYNN'S UNILATERALLY IMPOSED CONTRACT DOES NOT VIOLATE THE PUBLIC POLICY OF NEVADA

Citing Cotter v. Desert Palace, Inc., 880 F.2d 1142 (9th Cir. 1989) the court below held that because the dealers are at-will employees without written contracts of employment the Wynn "may change its tip pooling policy as long as the policy does not violate any statutory provisions or public policy." This holding was in error. The dealers had written contracts of employment in respect to their payment of tips. R. 15-26. They were never terminated from their employment making their at-will status irrelevant. The respondent's unilaterally imposed tip distribution policy violated the appellants' written contracts and the statutes and public policy of Nevada.

A. Respondent Breached its Written Contracts With Appellants by Unilaterally Changing The Distribution of Appellants' Tips

The dealers and the Wynn had a written contract regarding the handling and distribution of the dealers' tokes. R. 15-26. That contract, consistent with industry customs, provided that dealers would count the tokes and share them among themselves, only, and such toke distribution policies *could not be changed except by majority vote of the dealers themselves.* R. 23.

The Wynn breached its written contract with the dealers by unilaterally, and without any vote from the dealers, ending the dealers' rights to count, receive, and exclusively share in the

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and root out cheats, the function of their supervisors.

tokes. The Wynn never terminated the dealers' employment and its written pledge to not change the dealers' tip pool without the approval of the dealers should be enforced.

B. <u>Respondent's Tip Distribution Policy Violates the Public Policy of Nevada</u>

Tipping originated centuries ago and is well established in the modern service economy.[12] Businesses utilizing tipped workers lower their operating costs by decreasing the wages they must pay. This was decried over 100 years ago by the *New York Times* which editorialized that the tip system was a deplorable subsidy paid by the public to certain employers:

> "The real takers of tips are the hotel and restaurant proprietors, the owners of steamships, the officers and stockholders of railways, and a dozen other classes of employers... ...every tip saves the payment of wages to an equal amount" Id.

The casino industry has warmly embraced the tipped employee business model and pays dealers at or close to the legal minimum hourly wage. The United States Bureau of Labor Statistics reports that the average annual wage earnings of casino dealers are $14,340 and notes that dealers generally receive a large portion of their earnings from tips. Gaming supervisors earn an average of $40,840 per year in wages.[13]

An hourly wage of $6.15, without the receipt of significant tips, would be grossly inadequate to entice qualified table game dealers to work for the Wynn. Potential

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[12] Azar, The History of Tipping – From Sixteenth Century England to United States in the 1910s, Journal of Socio-Economics, Vol. 33, Issue 6, p. 745-764

[13] http://www.bls.gov/oco/ocos275.htm#earnings

table game dealers would readily find better paying employment in other industries, as the current average hourly wage in the United States for private non-farm and non-managerial workers is $16.70 an hour.[14] The Wynn could, if it wished, generate additional revenue to adequately compensate its dealers by imposing a service charge on its customers (similar to the practice of some restaurants) or by adjusting its table games to more sharply favor the house. The Wynn has decided not to do so and prefers to rely on the "voluntary" tip system.

Motivations for tipping are individualized and certainly social customs play a strong role in encouraging tipping[15]. Research also shows that many customers give tips because tipped service workers receive inadequate wages from their employers. One study found that while 53% of customers were motivated to tip to show gratitude for good service, 19% of customers were also motivated to tip because the employees "need the extra income from tips."[16]

By not imposing a direct or involuntary charge on its patrons to adequately compensate the dealers, the respondent maintains a façade of providing services at a lower cost to its customers (and that is not just a façade but a reality for

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[14] As of August 2006, as per the United Stated Department of Labor, http://www.bls.gov/news.release/empsit.t16.htm

[15] A significant body of academic literature has examined this issue which is of great interest to economists. Much of this literature, and its findings, are reviewed by Azar, n. 11

[16] *Id.* Summarizing findings of The Economic Development Committee for the Hotel and Catering Industry (1970)

patrons who decline to tip or tip inadequately). As a matter of equity, fundamental fairness, and public policy, the tips given under the Wynn's voluntary tip system must inure solely to the benefit of the dealers, who assume the risks of that system and provide the services for which such tips are given.

Equity requires that a wrong should not go without a remedy. See, Seaborn v. District Court, 55 Nev. 206, 222, 29 P.2d 500 (1934); Reno Club v. Investment Co., 64 Nev. 312, 337; 182 P.2d 1011 (1947) (Equity looks to substance, not form); Hart v. City of Las Vegas, 73 Nev. 29, 32, 307 P.2d 612 (1957) (Recognizing "equity's historic power to do full justice") and Carcione v. Clark, 96 Nev. 808, 811, 618 P.2d 346 (1980)(Equity requires "what in good conscience ought to be done", citing Woods v. Bromley, 69 Nev. 96 at 107, 241 P.2d 1103 (1952). The Wynn's unfair and improper conduct should be subject to a remedy, as a matter of equity and public policy. See, Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1994) and Dillard Dept. Stores v. Beckwith, 115 Nev. 372, 378, 989 P.2d 882 (1999) (Public policy considerations create damages remedy for employee subject to retaliation for pursuing worker's compensation claim even though no statute explicitly conferred such a remedy).

POINT V

THIS COURT SHOULD DIRECT THE COURT BELOW TO ENTER SUMMARY JUDGMENT IN FAVOR OF THE APPELLANTS

The court below, in denying appellants' motion for summary judgment, opined that "a fact question exists as to whether certain individuals are defined as employees or employers"

although it held, based upon the record presently before it, that such persons (team leads) were "employees." It made no specific findings to support this conclusion. The record overwhelmingly establishes that these "team leads" were "employers" of the appellants under 608.011 or persons "entrusted" with the appellants' employment under 613.120. Either finding requires a judgment for the appellants.

A finding that respondent's tip distribution plan violates the language of 608.160(2) by requiring tip pooling between different classes of employees (dealers and the team leads) would also mandate a judgment for the appellants. A ruling in favor of the appellants on their breach of contract claims, or a finding that respondent's tip distribution plan violates public policy, would require the same result.

CONCLUSION

Wherefore, for all the foregoing reasons, the Order and Judgement appealed from should be reversed in its entirety.

Dated: May 11, 2007

Respectfully submitted,

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ATTORNEY'S CERTIFICATION IN COMPLIANCE WITH
RULE 28(A) OF THE NEVADA RULES OF APPELLATE PROCEDURE

Leon Greenberg, attorney for the appellants, by signing below hereby certifies in compliance with Rule 28(A) of the Nevada Rules of Appellate Procedure, that:

1. I am an active member of the bar of the State of Nevada.

2. I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 11th day of May, 2007

____
Leon Greenberg, Esq.
Nevada Bar No.: 8094

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NEVADA REVISED STATUTES

11.209. Actions against principal contractors by employees of subcontractors for wages or benefits.

1. No action against a principal contractor for the recovery of wages due an employee of a subcontractor or contributions or premiums required to be made or paid on his account may be commenced more than:

(a) Two years, if the principal contractor is located in Nevada; or

(b) Three years, if the principal contractor is located outside this state,

after the date the employee should have received those wages from or those contributions or premiums should have been made or paid by the subcontractor.

2. No action against a principal contractor for the recovery of benefits due an employee of a subcontractor may be commenced more than:

(a) Three years, if the principal contractor is located in Nevada; or

(b) Four years, if the principal contractor is located outside this state,

after the date the employee should have received those benefits from the subcontractor.

30.040. Questions of construction or validity of instruments, contracts and statutes.

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

338.030. Procedure for determination of prevailing wage in county.

...3. The Labor Commissioner shall hold a hearing in the locality in which the work is to be executed if he:

(a) Is in doubt as to the prevailing wage; or

(b) Receives an objection or information pursuant to subsection 2.

607.005. "Commission" defined.

As used in this chapter, "commission" means a fee paid for transacting a piece of business or performing a service, but excluding bonuses and profit-sharing arrangements.

607.010. Creation of office.

The office of labor commissioner is hereby created.

607.050. Deputy labor commissioner: Employment; powers if attorney; other employment prohibited; exception.

1. The labor commissioner shall employ a deputy, who is in the unclassified service of the state.

2. If admitted to the practice of law in the State of Nevada, the deputy has all the powers of:

(a) The district attorneys of the several counties in this state; and

(b) The attorney general pursuant to *NRS 607.160*,

in the prosecution of all claims and actions originating with the labor commissioner by appropriate action in the courts of this state, when the labor commissioner is charged with the enforcement of those laws.

3. The deputy shall act under the direction of the labor commissioner, and in the performance of his duties he is responsible to the labor commissioner.

4. Except as otherwise provided in *NRS 284.143*, the deputy shall devote his entire time and attention to the business of his office and shall not pursue any other business or occupation or hold any other office of profit.

607.065. Retention of legal counsel; authority of counsel.

1. The labor commissioner may provide for contract services by legal counsel for assistance in administering the labor and industrial relations laws of this state. Any such counsel must be an attorney admitted to practice law in the State of Nevada.

2. In the prosecution of all claims and actions referred to him by the labor commissioner, such counsel has the same power as that vested in:

(a) The district attorneys of the several counties to enforce the labor and industrial relations laws of this state except that such counsel does not have the authority to prosecute for criminal violations of those laws; and

(b) The attorney general pursuant to *NRS 607.160* for prosecution of claims for wages, commissions or other demands.

607.150. Inspection of places of employment; penalty and administrative fine for refusal to allow entry to Labor Commissioner.

1. To carry out the provisions of *NRS 607.160*, the Labor Commissioner or a person designated by the Labor Commissioner may enter any store, foundry, mill, office, workshop, mine or other public or private works or place of employment at any reasonable time to gather facts and statistics and make a record thereof.

2. Any person who refuses such entry to the Labor Commissioner or a person designated by the Labor Commissioner is guilty of a misdemeanor.

3. In addition to any other remedy or penalty, the Labor Commissioner may impose against the person an administrative penalty of not more than $500 for each such violation.

607.160. Enforcement of labor laws; imposition and collection of administrative penalties; cumulative nature of penalties and remedies; claims for wages or commissions; prosecution of claims by Attorney General.

1. The Labor Commissioner:

(a) Shall enforce all labor laws of the State of Nevada:

(1) Without regard to whether an employee or workman is lawfully or unlawfully employed; and

(2) The enforcement of which is not specifically and exclusively vested in any other officer, board or commission.

(b) May adopt regulations to carry out the provisions of paragraph (a).

2. If the Labor Commissioner has reason to believe that a person is violating or has violated a labor law or regulation, the Labor Commissioner may take any appropriate action against the person to enforce the labor law or regulation whether or not a claim or complaint has been made to the Labor Commissioner concerning the violation.

3. Before the Labor Commissioner may enforce an administrative penalty against a person who violates a labor law or regulation, the Labor Commissioner must provide the person with notice and an opportunity for a hearing as set forth in *NRS 607.207*.

4. In determining the amount of any administrative penalty to be imposed against a person who violates a labor law or regulation, the Labor Commissioner shall consider the person's previous record of compliance with the labor laws and regulations and the severity of the violation.

5. All money collected by the Labor Commissioner as an administrative penalty must be deposited in the State General Fund.

6. The actions and remedies authorized by the labor laws are cumulative. If a person violates a labor law or regulation, the Labor Commissioner may seek a civil remedy, impose an administrative penalty or take other administrative action against the person whether or not the person is prosecuted, convicted or punished for the violation in a criminal proceeding. The imposition of a civil remedy, an administrative penalty or other administrative action against the person does not operate as a defense in any criminal proceeding brought against the person.

7. If, after due inquiry, the Labor Commissioner believes that a person who is financially unable to employ counsel has a valid and enforceable claim for wages, commissions or other demands, the Labor Commissioner may present the facts to the Attorney General. The Attorney General shall prosecute the claim if the Attorney General determines that the claim is valid and enforceable.

607.170. Actions for collection of wages or commissions; subpoena power; compromise and settlement of claims; disposition of money collected for claims.

1. The Labor Commissioner may prosecute a claim for wages and commissions or commence any other action to collect wages, commissions and other demands of any person who is financially unable to employ counsel in a case in which, in the judgment of the Labor Commissioner, the claim for wages or commissions or other action is valid and enforceable in the courts.

2. In all matters relating to wages or commissions, the Labor Commissioner may, in accordance with the provisions of *NRS 607.210*, subpoena any person whose appearance is required to adjust and settle claims or other actions for wages or commissions before bringing suit in those matters, and the Labor Commissioner may effect reasonable compromises of those matters.

3. The Labor Commissioner or his Deputy may maintain a commercial account with any bank or credit union within this state for the deposit of money collected for claims for wages or commissions. The money must be promptly paid to the person entitled thereto. At the end of each calendar year, any unclaimed money in the commercial account which has been a part of the account for 1 year or more is presumed abandoned under *NRS 120A.220*.

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607.175. Assignment and consolidation of claims for wages or commissions.

The labor commissioner or other designated agent of employees may take assignments of wage or commission claims and bring a single action against any one employer on any number of such assigned claims.

607.207. Notice and conduct of hearing.

1. When an enforcement question is presented under any labor law of the State of Nevada, the determination of which is not exclusively vested in another officer, board or commission, the labor commissioner or a person designated by him may conduct a hearing in any place convenient to the parties, if practicable, and otherwise in a place chosen by the labor commissioner.

2. Notice of the hearing must be given by registered or certified mail to each party and to any person who has in writing requested such notice. The hearing must be conducted not less than 15 days after the mailing of the notices. The proceedings must be recorded and one copy must be provided at cost to any party who requests it. The labor commissioner or a person designated by him shall, in any such hearing, make full use of the authority conferred upon him by *NRS 607.210*.

607.215. Decision of labor commissioner or his designee after hearing: Issuance; enforceability; judicial review.

1. Within 30 days after the conclusion of the hearing provided for in *NRS 607.207*, the labor commissioner or a person designated by him shall issue a written decision, setting forth findings of fact and conclusions of law developed at the hearing.

2. The decision, together with the findings of fact and conclusions of law, must be mailed to each of the parties to whom the notice of the hearing was mailed and to any other persons who may have requested notice of the hearing. The decision becomes enforceable 10 days after the mailing.

3. Upon a petition for judicial review, the court may order trial de novo.

4. A decision issued pursuant to this section is binding on all parties and has the force of law.

608.011. "Employer" defined.

"Employer" includes every person having control or custody of any employment, place of employment or any employee.

608.012. "Wages" defined.

"Wages" means:

1. The amount which an employer agrees to pay an employee for the time the employee has worked, computed in proportion to time; and

2. Commissions owed the employee,

but excludes any bonus or arrangement to share profits.

608.100. Unlawful decrease in compensation by employer; unlawful requirement to rebate compensation; prerequisites to lawfully decreasing compensation.

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.

608.150. Original contractor liable for indebtedness for labor incurred by subcontractor or contractor acting under, by or for original contractor; civil action to recover.

1. Every original contractor making or taking any contract in

this state for the erection, construction, alteration or repair of any building or structure, or other work, shall assume and is liable for the indebtedness for labor incurred by any subcontractor or any contractors acting under, by or for the original contractor in performing any labor, construction or other work included in the subject of the original contract, for labor, and for the requirements imposed by chapters 616A to 617, inclusive, of NRS.

2. It is unlawful for any contractor or any other person to fail to comply with the provisions of subsection 1, or to attempt to evade the responsibility imposed thereby, or to do any other act or thing tending to render nugatory the provisions of this section.

3. The district attorney of any county wherein the defendant may reside or be found shall institute civil proceedings against any such original contractor failing to comply with the provisions of this section in a civil action for the amount of all wages and damage that may be owing or have accrued as a result of the failure of any subcontractor acting under the original contractor, and any property of the original contractor, not exempt by law, is subject to attachment and execution for the payment of any judgment that may be recovered in any action under the provisions of this section.

608.160. Taking or making deduction on account of tips or gratuities unlawful; employees may divide tips or gratuities among themselves.

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.

613.120. Unlawful to demand or receive fee or commission as condition to giving or continuing employment to workman; penalty.

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.

U.S. Fair Labor Standards Act, 29 U.S.C. §203

§ 203. Definitions

As used in this Act--

...(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization...

California Labor Code, Sections 350-351

§ 350. Definitions

As used in this article, unless the context indicates otherwise:

(a) "Employer" means every person engaged in any business or enterprise in this state that has one or more persons in service under any appointment, contract of hire, or apprenticeship, express or implied, oral or written, irrespective of whether the person is the owner of the business or is operating on a concessionaire or other basis.

(b) "Employee" means every person, including aliens and minors, rendering actual service in any business for an employer, whether gratuitously or for wages or pay, whether the wages or pay are measured by the standard of time, piece, task, commission, or other method of calculation, and whether the service is rendered on a commission, concessionaire, or other

basis.

(c) "Employing" includes hiring, or in any way contracting for, the services of an employee.

(d) "Agent" means every person other than the employer having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees.

(e) "Gratuity" includes any tip, gratuity, money, or part thereof that has been paid or given to or left for an employee by a patron of a business over and above the actual amount due the business for services rendered or for goods, food, drink, or articles sold or served to the patron. Any amounts paid directly by a patron to a dancer employed by an employer subject to Industrial Welfare Commission Order No. 5 or 10 shall be deemed a gratuity.

(f) "Business" means any business establishment or enterprise, regardless of where conducted.

§ 351. Collecting, taking, or receiving gratuity by employer; Deduction from or credit against wages; Gratuity as sole property of employee; Application of section

No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for. An employer that permits patrons to pay gratuities by credit card shall pay the employees the full amount of the gratuity that the patron indicated on the credit card slip, without any deductions for any credit card payment processing fees or costs that may be charged to the employer by the credit card company. Payment of gratuities made by patrons using credit cards shall be made to the employees not later than the next regular payday following the date the patron authorized the credit card payment.