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COURT OF APPEALS

STATE OF NEW YORK

BARENBOIM, ET AL.,

Appellants,

-against-

No. 122

STARBUCKS CORPORATION,

Respondent.

WINANS, ET AL.,

Appellants,

-against-

No. 122

STARBUCKS CORPORATION,

Respondent.

20 Eagle Street
Albany, New York 12207
May 28, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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1
2 CHIEF JUDGE LIPPMAN: And we're going to
3 take number 122. And counsel, would you like some
4 rebuttal time?

5 MS. LISS-RIORDAN: Yes, please, Your Honor.
6 I'd like to reserve two minutes.

7 CHIEF JUDGE LIPPMAN: Two minutes. Go
8 ahead. You're on.

9 MS. LISS-RIORDAN: Okay. Thank you. I'm
10 honored to be here today. Good afternoon, justices,
11 Chief Justice. My name is Shannon Liss-Riordan. I
12 represent the Barenboim plaintiffs in this matter.

13 Now, Your Honors, we requested
14 certification of this case to this court because the
15 federal courts have repeatedly conflated federal law
16 regarding tipping with the more protective New York
17 statute, just as the federal courts did regarding
18 whether services - - - service charges could be
19 gratuities until this - - -

20 CHIEF JUDGE LIPPMAN: Counselor, what - - -

21 MS. LISS-RIORDAN: - - - court corrected
22 them.

23 CHIEF JUDGE LIPPMAN: - - - what's the - -
24 - what's the role of the shift supervisors?

25 MS. LISS-RIORDAN: The shift supervisors,

1 in the words of Starbucks designee, runs the shift.
2 As described in their job description, they directly
3 manage three to six baristas - - -

4 CHIEF JUDGE LIPPMAN: Do they also serve
5 along with the baristas?

6 MS. LISS-RIORDAN: Yes, they also serve, as
7 do the assistant managers, as do the general
8 managers, as do owners of restaurants.

9 CHIEF JUDGE LIPPMAN: If we put aside the
10 technicalities, and we look at what they do, let's
11 look at duties as opposed to titles, why shouldn't
12 they share in the tips if they serve the public, if -
13 - - if a very significant part of their
14 responsibilities is to serve the public? Why
15 shouldn't they be able to share in the tips? What's
16 wrong with that from a policy perspective?

17 MS. LISS-RIORDAN: Your Honor, from a
18 policy perspective, that is a rational policy
19 decision that could have been made by the legislature
20 that those who serve customers get to share in the
21 tips. That is simply not the policy the legislature
22 chose when it enacted the statute as written.

23 JUDGE GRAFFEO: Was - - - was it the
24 interpretation of the Department of Labor Wage Order?

25 MS. LISS-RIORDAN: That is the - - -

1 JUDGE GRAFFEO: The cover?

2 MS. LISS-RIORDAN: - - - the Department of
3 Labor has issued that wage order which enacted a
4 policy which is not from the statute. It's from its
5 own decision-making regarding - - -

6 JUDGE GRAFFEO: Do we owe any deference to
7 the agency?

8 MS. LISS-RIORDAN: You owe deference to the
9 agency if it is interpreting the statute.

10 CHIEF JUDGE LIPPMAN: Isn't there some
11 ambiguity that would - - - that would really promote
12 what they're doing to try and clear up that - - -
13 that ambiguity and make it a little clearer? What's
14 wrong with that?

15 MS. LISS-RIORDAN: Well, because there's
16 not ambiguity in the law in that the law talks about
17 agents. And then the law - - - New York law
18 specifically defines agents to include managers,
19 supervisors, foremen - - -

20 CHIEF JUDGE LIPPMAN: Any - - - any mana -
21 - - any managerial responsibility?

22 MS. LISS-RIORDAN: That is what the law
23 says. Yes.

24 CHIEF JUDGE LIPPMAN: The law says that you
25 have the smallest bit of managerial responsibility,

1 then you're an agent?

2 MS. LISS-RIORDAN: Yes, yes. The law
3 defines agents to include - - -

4 CHIEF JUDGE LIPPMAN: Where does it - - -

5 MS. LISS-RIORDAN: - - - supervisors.

6 CHIEF JUDGE LIPPMAN: - - - say that?

7 Where does it say that?

8 MS. LISS-RIORDAN: In the definition of
9 agent. An agent is - - -

10 CHIEF JUDGE LIPPMAN: Go ahead - - -

11 MS. LISS-RIORDAN: - - - defined - - -

12 CHIEF JUDGE LIPPMAN: - - - tell us - - -
13 tell us what the definition is.

14 MS. LISS-RIORDAN: The definition of agent
15 is a manager, a supervisor, a foreman, or other
16 person acting in such capacity. This is a strict
17 liability statute which was enacted for a reason, and
18 that was to protect - - -

19 CHIEF JUDGE LIPPMAN: So a shift - - -

20 MS. LISS-RIORDAN: - - - the lowest rung -
21 - -

22 CHIEF JUDGE LIPPMAN: - - - let me - - -

23 let me understand what you're saying. So a shift

24 supervisor is a manager if they have - - - let's say

25 they spend five percent of their time managing - - -

1 no tips?

2 MS. LISS-RIORDAN: That - - - that is
3 correct. That is what the First Circuit held in the
4 Matamoros v. Starbucks case. In the California case
5 involving this issue with Starbucks - - -

6 CHIEF JUDGE LIPPMAN: There's no ambiguity
7 on this - - - that issue that would require the Labor
8 Department to make it a little clearer?

9 MS. LISS-RIORDAN: If there are cases
10 involving ambiguity, this is simply not one of them.
11 Here, Starbucks itself has decided to call these
12 employees supervisors. And as the Seventh Circuit -
13 - -

14 JUDGE GRAFFEO: What about from the
15 standpoint of a customer? If I walk in and I order a
16 latte, do I know the person is a shift supervisor, if
17 I put a dollar in the - - - in the tip can?

18 MS. LISS-RIORDAN: You probably don't.
19 And, Your Honor, you probably don't know if the owner
20 of a restaurant is serving you at your table, either.
21 The legislature simply - - -

22 JUDGE SMITH: And if you - - - if you hand
23 a dollar to that person, can the person keep it, even
24 if he's the owner?

25 MS. LISS-RIORDAN: If you hand it directly

1 to them and they're not pooling with others, there's
2 nothing in the law that prohibits that.

3 JUDGE SMITH: Then - - - then why - - -
4 then why - - - what - - - why - - - what's wrong with
5 putting it in a - - - with having a box that you can
6 put in that everyone will share?

7 MS. LISS-RIORDAN: Because the legislature
8 said that can't happen. Just like the First Circuit
9 said in the Matamoros case - - -

10 JUDGE SMITH: And doesn't - - - didn't - -
11 - didn't the legislature say that people can't take
12 other people's tips?

13 MS. LISS-RIORDAN: Yes.

14 JUDGE SMITH: Isn't that what the statute
15 says?

16 MS. LISS-RIORDAN: Yes, Your Honor. Just
17 as the First Circuit explained in the Matamoros case,
18 when you pool tips, inevitably, you don't know whose
19 tips were meant for whom, so inevitably, some people
20 are taking tips that were given - - -

21 JUDGE SMITH: Well, so all tip pools are
22 illegal, then?

23 MS. LISS-RIORDAN: No, it's not. Because
24 the legislature specifically said it does not
25 prohibit the pooling of tips with busboys and other

1 similar employees. And this court in the Samiento
2 case, said that that language meant that waiters
3 could share tips with each other.

4 JUDGE PIGOTT: Can they change the name,
5 then? I mean, would - - - let's assume you prevail.
6 Should Starbucks just stop calling shift supervisors,
7 shift supervisors, and just say we've got an extra
8 barista, only you're the one that's going to make
9 sure that everybody's doing whatever they're doing?

10 MS. LISS-RIORDAN: Well, the fact of the
11 matter is, is we have a fact record. We have a
12 record in which Starbucks has called these employees
13 supervisors, and they've done so for a reason;
14 because they run the shift, in Starbucks' own words.
15 They directly manage three to six employees. They
16 decide who's going to work the register - - -

17 JUDGE PIGOTT: Does it sound - - -

18 MS. LISS-RIORDAN: - - - who's going to
19 work - - -

20 JUDGE PIGOTT: - - - does it sound fair to
21 you, if, for example, if you have a shift supervisor
22 who for all intents and purposes - - - and I'm not a
23 Starbucks person, so I don't know - - - but is doing
24 the exactly the same as everybody else, and somebody
25 doesn't show up for work that day, because of

1 duties?

2 JUDGE RIVERA: So where's the line then?

3 JUDGE READ: You have to look at the
4 duties? And if there's - - -

5 MS. LISS-RIORDAN: You have to look at the
6 duties. And the duties are admitted by Starbucks.
7 And if they're managing - - -

8 JUDGE READ: And if there's any duty that -
9 - - if there's any duty that seems supervisory,
10 that's enough?

11 MS. LISS-RIORDAN: In this case, Starbucks
12 has admitted that they managed baristas, that they -
13 - -

14 JUDGE SMITH: If - - -

15 JUDGE RIVERA: But where do you draw the
16 line?

17 JUDGE GRAFFEO: But they don't hire and
18 fire though, do they? They can't hire and fire
19 employees?

20 MS. LISS-RIORDAN: That's the line the
21 federal courts have drawn under a different statute.
22 It's not the line the New York legislature has - - -

23 JUDGE RIVERA: Well, where's the line,
24 then, in the New York statute?

25 MS. LISS-RIORDAN: The New York statute is

1 whether someone is a supervisor, a foreman, a
2 manager. And you can look to the dictionary for what
3 supervisor - - -

4 JUDGE SMITH: But - - -

5 JUDGE RIVERA: But we're looking to the
6 duties to understand that. So at what point - - -
7 where do you draw the line on the duties? Where does
8 it - - - excuse the term here - - - tip towards being
9 a barista as opposed to the supervisor?

10 MS. LISS-RIORDAN: It depends on whether
11 you have supervisory authority over other employees.
12 Baristas don't have that - - -

13 JUDGE SMITH: Don't baristas - - -

14 MS. LISS-RIORDAN: - - - authority over
15 other employees.

16 JUDGE SMITH: - - - don't baristas
17 sometimes supervise each other?

18 MS. LISS-RIORDAN: Not as part of their job
19 responsibilities.

20 JUDGE SMITH: But no, isn't it your job
21 responsibility, if you're a more experienced barista,
22 and you see someone making the Frappuccino wrong, you
23 say don't do it that way?

24 MS. LISS-RIORDAN: You don't have to do
25 that. You don't extra pay for doing that like

1 supervisors do. It's not your responsibility that
2 Starbucks has given you an enhanced title and
3 enhanced pay in order to do. This is simply a
4 legislative policy choice - - -

5 CHIEF JUDGE LIPPMAN: Okay, counsel.
6 You'll have your rebuttal; thank you.

7 MS. LISS-RIORDAN: Thank you.

8 MR. KLEIN: Good afternoon, Your Honors.
9 Adam Klein for the Winans plaintiffs. I would like
10 two minutes to reply - - -

11 CHIEF JUDGE LIPPMAN: Sure. So now we're
12 talking about the assistant managers?

13 MR. KLEIN: Yes. It's essentially the flip
14 side of the same coin. And let me just make a few
15 very fundamental points about the New York State
16 Labor Law. And - - -

17 JUDGE PIGOTT: Do you get paid more?

18 MR. KLEIN: They do get paid more. It's
19 not a lot more. But they do get paid more.

20 JUDGE GRAFFEO: What do they do in addition
21 to what the shift supervisors do?

22 MR. KLEIN: So the fact record below
23 reflected that ASMs, assistant store managers, spent
24 between seventy-five percent to ninety percent of
25 their time providing direct customer service work,

1 serving coffee - - -

2 JUDGE PIGOTT: Can you - - - can you say to
3 somebody, unless you give me more of your tips, I'm
4 going to have you working every Sunday until your - -
5 - until your fingers fall off?

6 MR. KLEIN: Starbucks itself has a system
7 by which it decides - - -

8 JUDGE PIGOTT: Is that a no?

9 MR. KLEIN: No. The answer is no. They
10 had no authority to regulate the amounts owed to
11 employees in terms of tips.

12 JUDGE PIGOTT: They - - - they don't set
13 the schedules?

14 MR. KLEIN: They set schedules, but not who
15 receives tips.

16 JUDGE PIGOTT: Can they say unless you give
17 me more of your tips, I'm going to schedule it so
18 that you'll hate working here?

19 MR. KLEIN: I don't know the answer - - -

20 JUDGE PIGOTT: In theory? I mean, isn't
21 that part of the problem, that if you have that kind
22 of authority over someone, trouble starts - - -

23 MR. KLEIN: You - - -

24 JUDGE PIGOTT: - - - but if you're a
25 manager, manage. If you're not a manager, let the

1 kids have the tips. Does that make sense?

2 MR. KLEIN: I understand the question. And
3 there's an answer to it. The New York State Labor
4 Law and the implementing regulations, since 1972, has
5 explained precisely how this works. It says that if
6 the supervisor has hire-fire authority, stands in the
7 shoes of the employer, then they may not participate
8 in a tip pool - - -

9 CHIEF JUDGE LIPPMAN: Do these - - - do
10 these assistant store managers have hire and fire - -
11 -

12 MR. KLEIN: They do not, Your Honor. They
13 obviously, categorically do not. They're non-exempt
14 employees. They're considered customer service
15 workers, not managers, according to Starbucks policy
16 - - -

17 JUDGE ABDUS-SALAAM: If their title is
18 supervisor, and according to her - - - counsel - - -
19 the other counsel, as long as they're supervisors, no
20 matter what their duties are, they shouldn't be able
21 to share in the tip pool.

22 MR. KLEIN: That may be true in
23 Massachusetts. Here in New York, since 1972, that
24 has not been the rule. And you'll hear from the
25 Department of Labor on this. The New York State

1 Department of Labor defines an agent, a person not
2 entitled to share in tips, as a person who - - - a
3 mere supervisory employee may participate. They must
4 have hire-fire authority in order to elevate them to
5 agent status.

6 JUDGE SMITH: Suppose it was - - - suppose
7 tips are not pooled. Suppose you tip individually.
8 Can Starbucks institute a no-tipping policy for
9 assistant managers?

10 MR. KLEIN: They could prohibit customers
11 from tipping generally. But if it's - - - the focal
12 point is - - -

13 JUDGE SMITH: Can - - -

14 MR. KLEIN: - - - on customer - - -

15 JUDGE SMITH: - - - can't they - - - can't
16 they say the more senior people can't accept tips?

17 MR. KLEIN: It's a - - - no. If they meet
18 the definition of who is a tip-eligible customer
19 service worker.

20 CHIEF JUDGE LIPPMAN: So if they're
21 eligible - - -

22 JUDGE SMITH: What prohibits that?

23 MR. KLEIN: Well, in Samiento - - - this
24 court in Samiento v. World Yacht focused on customer
25 intent. So if you walk into a Starbucks, you're a

1 customer, and you leave a tip - - -

2 JUDGE SMITH: But my question, what statute
3 says that Starbucks can't say assistant managers
4 aren't tip-eligible? Forget about pooling. Just - -
5 -

6 MR. KLEIN: Well, because the New York
7 Labor Law and the implementing regulations have
8 defined who is or who is not tip-eligible.

9 CHIEF JUDGE LIPPMAN: So let me - - - let
10 me ask you a question. If you're eligible, that's
11 the end of the story?

12 MR. KLEIN: If - - -

13 CHIEF JUDGE LIPPMAN: The employer has no
14 say, then, over who shares or who doesn't share?

15 MR. KLEIN: So there are two prongs to
16 that, whether they're customer-eligible, what the
17 intent of the customer was - - - tip-eligible and
18 intent of the customer, and then a rational tip pool,
19 based on the relative customer service work.

20 CHIEF JUDGE LIPPMAN: Why isn't it rational
21 what Starbucks did here?

22 MR. KLEIN: Why - - -

23 CHIEF JUDGE LIPPMAN: Starbucks, the only
24 thing is, they can't steal the tips from the employee
25 - - - employees. That we understand. But why isn't

1 it rational - - - why shouldn't they decide, given
2 this kind of mix of responsibilities, whether or not
3 they - - - they share in the tips? What's wrong with
4 that?

5 MR. KLEIN: Because the assistant store
6 managers earn the tips that the customers provided in
7 the tip jar.

8 JUDGE PIGOTT: Let me ask you about that.
9 Do they earn the tips for the whole time that the
10 store is open? I mean, they're assistant manager
11 from - - -from daylight to sundown, seven days a
12 week. Do they get - - - do they get to share in
13 every single tip that's received at that store?

14 MR. KLEIN: No. And in fact, no customer
15 service worker at a Starbucks earns tips for every
16 hour's work - - - every hour worked. They have a
17 system by which they're either on duty or doing other
18 work that is not tip-eligible. So - - - and in fact,
19 ASMs, assistant store managers, clock in and out
20 based on whether they're providing customer service
21 work or doing other kinds of administrative work like
22 scheduling shifts or - - -

23 JUDGE GRAFFEO: So when they do the weekly
24 calculation of tips, only those hours that they're
25 serving customers, you're asking for them to be

1 eligible for tips?

2 MR. KLEIN: Yes. That's the time where
3 customers actually pay a tip to the person handing
4 them the coffee. Oftentimes, the assistant store
5 managers are indistinguishable - - -

6 JUDGE PIGOTT: Does all - - - do all the
7 tips go into one - - - in other words - - -

8 MR. KLEIN: Yes.

9 JUDGE PIGOTT: - - - if the store - - - I'm
10 almost done. If the store - - -

11 MR. KLEIN: Sorry.

12 JUDGE PIGOTT: - - - if the store is open
13 at 6 and closes at 6 - - - I don't know - - - six
14 days, all right, that's seventy two hours, does
15 everybody that worked on Monday get their - - - get
16 tips even if they were - - - if the tips came on
17 Friday?

18 MR. KLEIN: There's a rational system.
19 Starbucks has a system where they track employees'
20 hours, and they decide how much - - -

21 JUDGE PIGOTT: I know that. But I mean,
22 when we talk about a pool - - -

23 MR. KLEIN: Right.

24 JUDGE PIGOTT: - - - is it all the tips for
25 the whole week go into the pool?

1 MR. KLEIN: There's a tip jar. It's
2 indistinguishable. And - - -

3 JUDGE PIGOTT: But does the tip jar apply
4 to the eight hours? In other words, do you empty it
5 at the end of eight hours, and start it over again
6 for the next shift?

7 JUDGE SMITH: In other words, is it shared
8 weekly or daily?

9 MR. KLEIN: It's based on hours worked. I
10 don't know if it's shared weekly or hourly. I don't
11 know the answer, sorry.

12 CHIEF JUDGE LIPPMAN: So what leads to your
13 basic conclusion as to why they're eligible?

14 MR. KLEIN: Well, basically, the idea is
15 that they're - - - they're receiving tips from
16 customers. Customer intent controls the analysis.
17 They lack hire-fire authority. They're
18 indistinguishable from the baristas and shift
19 supervisors. They spend seventy-five to ninety
20 percent of their time - - -

21 CHIEF JUDGE LIPPMAN: Wait, wait, wait.
22 But say that again. They're indistinguishable - - -

23 MR. KLEIN: Indistinguishable - - -

24 CHIEF JUDGE LIPPMAN: - - - from the other
25 two?

1 MR. KLEIN: If you walk in - - -

2 CHIEF JUDGE LIPPMAN: You think all their
3 duties are basically the same?

4 MR. KLEIN: They're literally
5 indistinguishable. I mean - - -

6 CHIEF JUDGE LIPPMAN: Can't they - - -

7 MR. KLEIN: - - - if a customer walks in,
8 Your Honor, and is handed a coffee from an assistant
9 store manager, that customer doesn't know that that
10 person is an ASM.

11 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
12 the shift supervisor and the barista can't recommend
13 termination or hiring or anything like that. Isn't
14 that a - - - a pretty big distinction?

15 MR. KLEIN: It's a distinction with a - - -
16 a difference in this context, because the primary or
17 principal duty of an assistant store manager is
18 direct customer service work. That's literally what
19 they're there to do.

20 CHIEF JUDGE LIPPMAN: To direct customer
21 service?

22 MR. KLEIN: No, no, no. To actually
23 provide the service to the customer, meaning, work
24 the cash register - - -

25 CHIEF JUDGE LIPPMAN: So - - -

1 MR. KLEIN: - - - make the coffee - - -

2 CHIEF JUDGE LIPPMAN: - - - so aren't you
3 really raising a factual issue? You're saying
4 there's no difference between their responsibilities
5 rather than that their responsibilities are
6 different, but you know, we draw the conclusion
7 eligible/non-eligible.

8 MR. KLEIN: That's a factual dispute. I
9 think - - - the district court judge found that there
10 was a dispute on that and decided not to rule on that
11 issue. But we think that the - - - the state law
12 since 1972 has made it clear who is tip-eligible,
13 that customer intent controls, and that that - - -
14 that result drives this analysis.

15 JUDGE PIGOTT: But are you saying - - - are
16 you saying that - - - I thought you said earlier that
17 an assistant store manager divides his time?

18 MR. KLEIN: The assistant store manager
19 spends seventy-five percent to ninety percent of
20 their time serving coffee, working the cash register.
21 The other hours that they spend are scheduling
22 shifts, engaging in training exercises with the
23 manager - - -

24 JUDGE PIGOTT: Or those off the clock time?

25 MR. KLEIN: They are off the clock. Off

1 the clock relative to tip-eligibility.

2 CHIEF JUDGE LIPPMAN: Okay counsel, thanks.

3 MR. KLEIN: Thank you.

4 CHIEF JUDGE LIPPMAN: Counselor?

5 MR. WU: May it please the court, Steven Wu
6 for the Department of Labor.

7 The relevant statutory language in this
8 case is the authorization in 196-d for the sharing of
9 tips between waiters, busboys, and similar employees.
10 And the Department of Labor has interpreted that
11 language to mean that somebody is eligible to share
12 in tips so long as personal service to customers - -
13 -

14 JUDGE SMITH: As I read what the Department
15 of Labor promulgated, they don't actually say they're
16 interpreting that language. But you - - - but that
17 is - - - that is what they're doing? That's the
18 source of it?

19 MR. WU: That is the source of it. And the
20 Department has said that's the language. Starting in
21 19 - - -

22 JUDGE SMITH: But the regulation itself
23 doesn't seem to say it?

24 MR. WU: This regulation does not. But in
25 1972, when the Department first issued policy

1 guidelines, it said expressly the definition of
2 "similar employee" would be those who - - -

3 JUDGE SMITH: But so - - -

4 MR. WU: - - - principally - - -

5 JUDGE SMITH: - - - they're defining
6 "similar employee", they're not defining "agent"?

7 MR. WU: They're - - - they are not
8 defining "agent". And the reason is this. The broad
9 prohibition in the first sentence is directly said to
10 not affect the sharing of tips between - - -

11 CHIEF JUDGE LIPPMAN: But let me - - -

12 JUDGE GRAFFEO: How is - - -

13 CHIEF JUDGE LIPPMAN: - - - let me ask you
14 a question - - -

15 MR. WU: - - - similar responsibilities and
16 similar - - -

17 CHIEF JUDGE LIPPMAN: - - - but eligible
18 doesn't end the story, right?

19 MR. WU: That - - - that's correct.

20 CHIEF JUDGE LIPPMAN: Why do - - - why
21 doesn't eligible end the story?

22 MR. WU: Well, there are two questions
23 here. One is whether they're eligible. And the
24 second question is, once you determine eligibility,
25 what power an employer has to nonetheless exclude

1 those employees.

2 CHIEF JUDGE LIPPMAN: What power does the
3 employer have to nonetheless exclude?

4 MR. WU: Well, here the Department's
5 primary objection is the district court's holding
6 that employers have complete discretion to exclude
7 employees. And that is clearly incorrect. I mean,
8 there are prohibited factors employers can't rely on,
9 such as race or gender. They can't deny, for
10 instance, tips to somebody for - - -

11 JUDGE SMITH: Well, but - - -

12 MR. WU: - - - whom they claim - - -

13 JUDGE SMITH: - - - but then we're talking
14 about it's prohibited by this statute. And
15 obviously, they can't rely on race or gender - - -

16 MR. WU: Yes.

17 JUDGE SMITH: - - - but that's a - - -
18 that's a different law. But you - - - the statute,
19 as I remember, says agen - - - no employer or his
20 agent shall do such and such. And then it says, this
21 shall not prevent the sharing with a - - - with a
22 busboy or similar employee. I find it hard to read
23 that as you seem to, to say agent is irrelevant,
24 forget about agent; the only relevant language is
25 "similar employee". Isn't the second sentence merely

1 a qualification of the first?

2 MR. WU: It is a qualification. But it is
3 the controlling qualification here. And to be clear,
4 the Department's interpretation of principal and
5 regular duties here, is meant to encompass both of
6 those, somebody - - -

7 JUDGE SMITH: So you are interpreting
8 "agent"?

9 MR. WU: No. It is - - - it is
10 encompassing both of those. The main - - - the main
11 reason - - -

12 JUDGE GRAFFEO: Because it sounds like the
13 Dep - - - the agency's interpretation is a bit
14 broader than the statute. Because how do you get an
15 assistant store manager is similar to a busboy?
16 There seems to be quite a distinction in duties
17 there.

18 MR. WU: Well, it's a question of whether
19 the interpretation is reasonable. And the way the
20 Department has read that language is people who are
21 primarily and regularly engaged in direct customer
22 service.

23 There remains a fact question in this case
24 about whether assistant store managers - - -

25 JUDGE GRAFFEO: It would be nice if the

1 statute said that, but it doesn't quite say that,
2 does it?

3 MR. WU: But a statute has said, waiters,
4 busboys, similar employees. And for fifty years, the
5 Department has said - - -

6 JUDGE SMITH: It says nothing shall prevent
7 the sharing by waiters, busboys, similar employees.

8 MR. WU: And this says "nothing shall be
9 construed as affecting the sharing of" - - -

10 JUDGE PIGOTT: So you're saying an
11 assistant store manager should be allowed to get
12 tips?

13 MR. WU: There remains a fact question in
14 this case, which has not been resolved by the federal
15 courts, about whether their managerial and
16 supervisory authorities are so significant as to be
17 their primary and regular responsibilities.

18 JUDGE PIGOTT: But - - -

19 MR. WU: And if that is the case, then they
20 would be ineligible - - -

21 JUDGE RIVERA: So what - - -

22 MR. WU: - - - and Starbucks would be
23 precluded - - -

24 JUDGE READ: So what does - - -

25 JUDGE RIVERA: - - - makes it so

1 significant? What's the amount of work or what's the
2 type of work? Where do you draw that line?

3 MR. WU: It's a judgment call here. And
4 there's a couple of components to it. The "regular"
5 language means that it has to be something that's not
6 done just on an as-needed basis, but instead is part
7 of their regular shift. They're not just filling in
8 when people don't show up.

9 JUDGE PIGOTT: But doesn't it bother you,
10 if you've got an assistant store manager who has
11 authority to set schedules, let's say, and he or she
12 would like a little bit more of the tip jar than
13 maybe he or she is entitled to. And don't you see a
14 possible tension there where if someone says, you
15 know, I'd really like to help you out with your - - -
16 you know, with the tips here, and by the way I don't
17 like working Friday nights.

18 MR. WU: Well, if somebody actually did
19 that, that might raise a serious concern, but - - -

20 JUDGE PIGOTT: Well, I mean, but we've got
21 to come up with a law that, you know, that everybody
22 can with. And your interpretations make it awfully
23 dicey, doesn't it? I mean, what is - - - what is an
24 employer supposed to do? I mean, if you're saying
25 well, it kind of depends on, you know, this

1 particular situation.

2 MR. WU: Well, it depends just because
3 there's such a wide variety of employment situations
4 that - - -

5 JUDGE PIGOTT: Okay. How do we define - -
6 - how would you prefer us to define - - -

7 MR. WU: But to be clear, I mean, as I was
8 saying "regular" connotes this time limitation. It
9 has to be something that you do on a regular basis
10 and "principal" has an element of priority or
11 importance to it.

12 And if it turns out that somebody's
13 principal, important, most prioritized duty is to
14 personally serve customers, that will meet this
15 definition.

16 JUDGE SMITH: Couldn't it - - - couldn't it
17 be simpler? I mean the - - - as I read the Jou Chau
18 case in California, under a rather similar statute,
19 they're saying none of this applies at all when the
20 customer knows he's putting the dollar in a common
21 pool. You - - - the tips have to be somebody's tips
22 before the statute even kicks in. What's wrong with
23 that reasoning?

24 MR. WU: Well, part of it is because the
25 customer is putting it in a common tip jar that's

1 distributed weekly in this case. And it's not having
2 it directly - - -

3 JUDGE SMITH: Well, you have - - - you have
4 a statute - - - you have a statute that says - - -
5 you have a statute that says "no employer or his
6 agent shall take somebody else's tips." Why is that
7 just not on its face inapplicable to a - - - to a jar
8 the customer knows goes to everybody?

9 MR. WU: Because it is still necessary to
10 interpret what the customer's intent is in this case,
11 and what the Department - - -

12 JUDGE SMITH: Where does the statute say
13 that?

14 MR. WU: - - - and what the Department has
15 said here is that the way to interpret customer
16 intent when they leave it in a tip jar and don't hand
17 it directly to a particular employee, is to assume
18 the customer means it to be distributed to those who
19 are principally and regularly engaged in customer
20 service.

21 JUDGE ABDUS-SALAAM: Counsel, you mentioned
22 there was a question of fact about what the ASMs do.

23 MR. WU: Right.

24 JUDGE ABDUS-SALAAM: But why is that
25 important to the legal question about whether

1 Starbucks can exclude ASMs or other managers from the
2 tip pool?

3 MR. WU: Well, for one thing, that could
4 entirely obviate that question. If the assistant
5 store managers turn out to be ineligible, then it
6 doesn't even raise the question of what Starbucks can
7 do - - -

8 JUDGE PIGOTT: Well, that goes back to - -
9 -

10 MR. WU: - - - at this point - - -

11 JUDGE PIGOTT: - - - Judge Smith's
12 question, does it not - - - that - - - I mean, they
13 can exclude people?

14 MR. WU: The Department's position is under
15 circumstances, they may be able to. And this is part
16 of the general authority that employers have - - -

17 CHIEF JUDGE LIPPMAN: Your position is - -
18 -

19 MR. WU: - - - to adjust the percentage
20 shares.

21 CHIEF JUDGE LIPPMAN: - - - that - - - your
22 position is that generally they can exclude?

23 MR. WU: They - - - it's not that they
24 generally can exclude it. It's as part of the
25 employer's power to set percentage shares of

1 collective tips to be distributed; there may be
2 circumstances where that goes down to zero. But
3 there are - - -

4 CHIEF JUDGE LIPPMAN: Why should - - - why
5 should the employer have that power? They're kind of
6 the trustee of these tips. Why should they be - - -
7 they be able to have that authority. Why - - -

8 MR. WU: Well, this was raised - - -

9 CHIEF JUDGE LIPPMAN: - - - does that make
10 sense?

11 MR. WU: - - - this was raised during the
12 administrative process when this rule was being
13 promulgated. And the response is that it reflects
14 business reality. Employers are the ones who know
15 their employees. They suggest - - -

16 CHIEF JUDGE LIPPMAN: So from a practical
17 perspective, that's why they should have this power?

18 MR. WU: It's a practical perspective.
19 It's one that the industry needs. However, in this
20 case, what the Department has identified is - - - is
21 the crucial question is whether Starbucks is doing so
22 with respect to different occupations, or - - -

23 JUDGE PIGOTT: Let - - - but let - - -

24 MR. WU: - - - as the statutory - - -

25 JUDGE PIGOTT: - - - let me give you

1 another hypothetical - - -

2 MR. WU: - - - within an application.

3 JUDGE PIGOTT: - - - I'm sorry. I'll let -

4 - -

5 MR. WU: Sure.

6 JUDGE PIGOTT: Are you done? If you've got
7 an assistant manager, or you decide to make someone
8 assistant manager. He says, good news; assistant
9 manager, we're paying you a salary now.

10 MR. WU: Correct.

11 JUDGE PIGOTT: You don't get tips. Is that
12 okay?

13 MR. WU: No. I mean, the basis for
14 excluding someone from tips has to be based on their
15 practical duties. It's roughly the same thing you
16 look at to determine whether they're eligible.

17 JUDGE PIGOTT: You're paying them more,
18 because - - - because they're an assistant manager.
19 And you're saying you have duties that have - - -
20 that are discretionary in nature, to some extent.
21 And in order to - - - in order to run our shop right,
22 you know, we're going to give you a salary. So with
23 - - - if this business goes in the tank, you still
24 get paid. If it goes high and there's a lot of tips,
25 you still get paid. But we're not - - - you don't -

1 - - you don't take tips from your - - - from your
2 workers. You think that's wrong?

3 MR. WU: Well, paying them more, giving
4 them benefits, are not the factors that can support -
5 - -

6 JUDGE SMITH: Suppose you give them - - -
7 suppose you give them a percentage of the business.
8 You say you're a ten-percent partner in the business,
9 but - - - and you're still going to wait tables, just
10 like I wait tables. But you're not going to take any
11 tips. Just don't - - - like I don't take tips. Is
12 that okay?

13 MR. WU: No. I mean, if that person is
14 still principally and regularly engaged in customer
15 service - - -

16 CHIEF JUDGE LIPPMAN: Even if they own - -
17 -

18 MR. WU: - - - then it's reasonable - - -

19 CHIEF JUDGE LIPPMAN: - - - but counselor,
20 does that make any sense? If they own part of the
21 business?

22 MR. WU: I will be honest with you, and I
23 will say as a practical matter, there is not that
24 kind of an overlap. I mean, the point of the
25 principal and regular definition for eligibility is

1 to draw that distinction. Somebody who's principally
2 involved in bussing tables - - -

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 MR. WU: - - - cleaning them, is not going
5 to be an owner - - -

6 CHIEF JUDGE LIPPMAN: Okay.

7 MR. WU: - - - and employer.

8 CHIEF JUDGE LIPPMAN: Thanks, counselor.
9 Appreciate it.

10 Counselor?

11 MR. HEINKE: Good afternoon. May it please
12 the court, my name is Rex Heinke, excuse me, and I'm
13 here on behalf of Starbucks.

14 I guess I would like to start with the
15 assistant store - - -

16 CHIEF JUDGE LIPPMAN: Start with your role.
17 What's your role in all of this, as the employer?

18 MR. HEINKE: Well, I think Starbucks' role
19 is to come up with a reasonable, fair system to
20 allocate the tips. And that's what Starbucks has
21 tried very earnestly to do here.

22 JUDGE GRAFFEO: And how do you do that on a
23 weekly basis? What's it based on?

24 MR. HEINKE: It's based on the number of
25 hours worked. So that - - -

1 JUDGE GRAFFEO: Number of hours in customer
2 service, or just - - -

3 MR. HEINKE: No, number of hours.

4 JUDGE GRAFFEO: - - - number of total hours
5 somebody works?

6 MR. HEINKE: Number of hours worked.

7 JUDGE GRAFFEO: For all - - - for all three
8 categories?

9 MR. HEINKE: Well, no.

10 JUDGE GRAFFEO: Barista, shift and
11 assistant store managers?

12 MR. HEINKE: No, the assistant store
13 managers don't get tips, so they're not part of that
14 calculation. It's only the hours worked by the
15 baristas and the shift supervisors.

16 CHIEF JUDGE LIPPMAN: Well, they don't get
17 because you say they can't get, right?

18 MR. HEINKE: Correct.

19 CHIEF JUDGE LIPPMAN: But they're - - -
20 why, if they're eligible, do you have the authority
21 to say that they don't get it? What you're - - - you
22 protect those monies. You can't take that tip money.
23 You're kind of - - -

24 MR. HEINKE: Correct.

25 CHIEF JUDGE LIPPMAN: - - - a trustee of

1 that tip money. Why should you have that authority?

2 MR. HEINKE: Well, I think there are two
3 things. First - - -

4 CHIEF JUDGE LIPPMAN: For practical reasons
5 or for a - - - a conceptual reason?

6 MR. HEINKE: Well, I think they're both.
7 First, the practical reality here - - - and this is
8 what the Department of Labor realized when it
9 promulgated the most recent round of amendments to
10 the regulation - - - is that someone has to decide
11 this allocation. There's got to be somebody who says
12 this is how we're going to allocate this.

13 CHIEF JUDGE LIPPMAN: Well, maybe the rules
14 of the Labor Department - - -

15 MR. HEINKE: Well, but they don't have any
16 rules. There aren't any rules there to allocate it.

17 CHIEF JUDGE LIPPMAN: So the rules are not
18 clear enough - - -

19 MR. HEINKE: Well, I don't - - -

20 CHIEF JUDGE LIPPMAN: - - - to decide who
21 gets tips and who doesn't?

22 MR. HEINKE: No, I don't think they have
23 the power to decide that. There's nothing in the
24 statute that gives them the power to decide the
25 allocation of the tips. That's left to the

1 employers. It's left to the employers first because
2 there's no law or regulation that says the employers
3 can't do it.

4 JUDGE PIGOTT: It - - - it sounds like, the
5 way this has come to us, is that - - - at least up
6 until now, the suggestion is that if you have some
7 type of authority over the employee, such that you
8 can decide things - - -

9 MR. HEINKE: Right.

10 JUDGE PIGOTT: - - - you don't get tips.
11 If you don't - - -

12 MR. HEINKE: Exactly.

13 JUDGE PIGOTT: - - - if you just - - - if
14 you - - - if your job is purely administration, I'll
15 say, then you can have the tips.

16 MR. HEINKE: Exactly. That is exactly the
17 line Starbucks is trying to draw here between the
18 people who have power and could coerce lower-level
19 employees to give up the tips to upper-level
20 employees.

21 JUDGE ABDUS-SALAAM: But those employees,
22 the ASMs, if a customer comes in and hands that
23 person a tip, they can keep that?

24 MR. HEINKE: Right. But that - - -

25 JUDGE ABDUS-SALAAM: Right? But they just

1 can't - - -

2 MR. HEINKE: In the real world, that just
3 do - - - you know - - -

4 JUDGE ABDUS-SALAAM: That doesn't happen?

5 MR. HEINKE: It doesn't happen. It must
6 have happened sometime. But we're talking one-
7 hundredth of a millionth of a percent of the time.
8 People are going - - -

9 JUDGE SMITH: Is it - - - is it clear from
10 the record that there's no - - - that there's no
11 requirement that employees put their tips in the tip
12 jar, if they - - - on those rare occasions when
13 someone does hand you a dollar bill?

14 MR. HEINKE: Yes. Yes. That's - - - I
15 think there may be little we dis - - - or agree on,
16 but I think that's one of the things we all agree on
17 here. That is not the issue. The issue here is, if
18 you're providing the customer service, like the
19 baristas are, and like the shift supervisors are,
20 shouldn't you share in those tips?

21 But if you're somebody like an assistant
22 store manager, or a store manager, who has power over
23 other employees - - -

24 CHIEF JUDGE LIPPMAN: Even if you spend a
25 good part of your time serving?

1 MR. HEINKE: Yes. Because you have this
2 power.

3 JUDGE GRAFFEO: What's - - - what's the
4 power that they have that you think makes - - -

5 MR. HEINKE: They have the power - - -

6 JUDGE GRAFFEO: - - - them ineligible?

7 MR. HEINKE: - - - I think, as was
8 suggested in one of your questions, Mr. Chief
9 Justice, set schedules and say, you know, if you
10 don't give me some tips, you're not going to get a
11 schedule you like. That's what I think the - - -

12 JUDGE SMITH: Is that - - -

13 JUDGE RIVERA: They can complain to the
14 store manager? Isn't there someone over them - - -

15 MR. HEINKE: Oh, sure.

16 JUDGE READ: - - - who can change that?

17 MR. HEINKE: Sure. And look, that - - -
18 that's true throughout this. You could always
19 complain to somebody above them. But it doesn't mean
20 they're going to do anything for you - - -

21 JUDGE SMITH: I think - - - are you
22 explaining why Starbucks excludes the assistant store
23 managers, or are you saying the assistant store
24 managers are ineligible under the statute?

25 MR. HEINKE: We think they're inel - - -

1 that's why Starbucks does it. We think they're
2 ineligible under the statute, also, Your Honor.

3 JUDGE SMITH: So if you change your mind
4 tomorrow, then you're - - - then you can get sued?
5 If you think it would be a good idea for the
6 assistant store managers to - - - to share in the
7 tips, you could - - - you would have serious
8 liability?

9 MR. HEINKE: Well, Your Honor, I think it
10 doesn't matter what we do, we get sued.

11 JUDGE GRAFFEO: But do you agree - - -

12 JUDGE SMITH: But you're not going to - - -

13 JUDGE GRAFFEO: - - - do you agree they
14 spend seventy-five to ninety percent of their time on
15 customer service?

16 MR. HEINKE: Well, I think there's a
17 dispute about what the percentage is. But we
18 acknowledge it's more than fifty percent of their
19 time. But what is their main job? I'm an assistant
20 store - - -

21 JUDGE GRAFFEO: But you think - - -

22 MR. HEINKE: - - - manager.

23 JUDGE GRAFFEO: - - - that's not what
24 determines the outcome of whether they're eligible or
25 not.

1 MR. HEINKE: Right, I think it is - - -

2 JUDGE GRAFFEO: It's their - - - it's the
3 nature of their supervisory duties that - - - where
4 you draw the line?

5 MR. HEINKE: Yes. And what is their real,
6 principal job here? What is the main thing they're
7 doing? And assistant store managers are helping run
8 the operation. They get paid based, in part, on how
9 well that store does. They are evaluated by whether
10 or not they help manage that store.

11 CHIEF JUDGE LIPPMAN: Is that the main
12 distinction, that they get benefits like someone as a
13 full-time employee, rather than the other two
14 categories?

15 MR. HEINKE: No, I think it's the
16 combination - - - the benefits simply reflect their
17 management role. Right? Shift supervisors and
18 baristas are hourly employees.

19 CHIEF JUDGE LIPPMAN: Right. But they're
20 full-time employees. Is that - - -

21 MR. HEINKE: No, they're not full-time.
22 I'm sorry. The baristas - - -

23 CHIEF JUDGE LIPPMAN: The assistant
24 managers are not - - -

25 MR. HEINKE: - - - and shift supervisors -

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CHIEF JUDGE LIPPMAN: Yes. That - - -
could that be an easy way to distinguish between the
two groups that one is - - - the two - - - the
baristas and the shift supervisors are hourlies - - -

MR. HEINKE: Correct.

CHIEF JUDGE LIPPMAN: - - - and once you
get up to the assistant managers - - -

MR. HEINKE: They're salaried.

CHIEF JUDGE LIPPMAN: - - - you're a - - -
you're a salaried - - -

MR. HEINKE: Right. I think that's the
easiest way to draw the line. Because I think that
that reflects the differing roles. People who are
servicing - - -

JUDGE GRAFFEO: In this particular case.
But it may not apply for other food service
operations.

MR. HEINKE: I understand. And so what I
would suggest the court adopt as a rule here is does
the person who says I should get tips, are they
somebody who has sufficient power over lower-level
employees that they can affect their working
conditions? And if they can do that, they should be
excluded from the tip pool.

1 JUDGE GRAFFEO: And how does that - - -

2 JUDGE SMITH: How - - -

3 JUDGE GRAFFEO: - - - correspond to the
4 Department of Labor regs and their wage order?

5 MR. HEINKE: Well the Department - - -

6 JUDGE GRAFFEO: Because that doesn't appear
7 to be what they've articulated.

8 MR. HEINKE: Right. Frankly, I've read
9 their amicus brief several times. I don't know what
10 test they propose to determine who's - - -

11 JUDGE SMITH: But isn't your test kind of
12 hard to apply? I mean, I could imagine - - - I don't
13 know, but I could imagine that an assistant - - - I'm
14 sorry, that a shift supervisor could, with the right
15 kind of personality, make all - - - make all the
16 baristas' lives living hell. Why should they be
17 allowed to share in the tip pool?

18 MR. HEINKE: Well, it's hard to see how
19 they could do that, because they have no authority,
20 zero authority, to enforce anything. They can say
21 I'm running - - - I'm the shift supervisor. Justice
22 Smith, I'd like you to operate the machine today, the
23 cash register.

24 JUDGE SMITH: It's the easiest thing in the
25 world. If you're the shift supervisor, what you tell

1 the boss about who performed well and who didn't is
2 going to make a big difference, isn't it?

3 MR. HEINKE: They don't do that. That is
4 the role of the assistant store managers. They're
5 the ones who make recommendations to the store
6 manager about - - -

7 JUDGE SMITH: Oh, you're not - - - you're
8 not telling me that the shift supervisor never says,
9 oh, Joe or Sally screwed up today?

10 MR. HEINKE: No. What I am saying is that
11 that is not part of their job. Sure, they may
12 occasionally say in passing, somebody screwed up
13 today. But the people whose job it is to make those
14 kind of recommendations, that's the assistant store -
15 - -

16 CHIEF JUDGE LIPPMAN: So are you saying
17 it's the same - - - that the shift supervisor is the
18 same as the baristas, other than that you whack up
19 the different duties a little bit. But they're the
20 same. They could all be called baristas, for all it
21 mattered?

22 MR. HEINKE: Right, we could call them - -
23 -

24 JUDGE PIGOTT: Let me make you more of an
25 expert - - -

1 JUDGE RIVERA: But do they all see each
2 other that way?

3 MR. HEINKE: Yes.

4 JUDGE RIVERA: The baristas see the shift
5 supervisors that way?

6 JUDGE PIGOTT: Let me make you more of an
7 expert, then. We're going to move you out of
8 Starbucks and into Dunkin' Donuts.

9 MR. HEINKE: Okay.

10 JUDGE PIGOTT: Somebody makes the
11 doughnuts.

12 MR. HEINKE: We make better coffee.

13 JUDGE PIGOTT: Somebody answers - - -
14 somebody does the drive-in window.

15 MR. HEINKE: Yep.

16 JUDGE PIGOTT: Somebody's handling the
17 front.

18 MR. HEINKE: Right.

19 THE COURT: And a shift supervisor decides
20 that. Now, one of those jobs may be better than
21 another. I have no idea. I mean, maybe you don't
22 like making doughnuts. Maybe the drive-through
23 drives you crazy, because you've got all the time
24 stuff. And maybe the front - - - the front counter's
25 the easy part.

1 If the shift supervisor can make those type
2 of decisions, in your view, in your definition of the
3 discretion, would there be - - - would there be an
4 issue with respect to whether the shift supervisor
5 would receive tips?

6 MR. HEINKE: It depends on whether they
7 have the power to enforce that. What can they do if
8 the employee says, no, I'm not going to be at the
9 drive-in window today. And - - -

10 JUDGE PIGOTT: Well, that's true of your
11 supervisors, too. Right? I mean, if your shift
12 supervisor says I need you over here, and he says I'm
13 not going; I'm sitting down here and having my
14 Starbucks, because it's my time - - -

15 MR. HEINKE: Right. But what I'm saying
16 is, the shift supervisor, that is a person who has no
17 authority to enforce any of this, is not someone
18 who's part of management, and it's not someone who
19 should be excluded from the tip pool, especially when
20 overwhelmingly, their job is to do customer service,
21 which generates the tips.

22 JUDGE ABDUS-SALAAM: Well, how much
23 authority should the ASMs have over other employees
24 in order to be excluded from the pool?

25 MR. HEINKE: I think the answer - - -

1 JUDGE ABDUS-SALAAM: Will they have to have
2 full authority, or just meaningful authority, or some
3 authority? How much authority?

4 MR. HEINKE: Okay. The - - - our pundits
5 say it's full authority. We disagree with that. We
6 say it is meaningful authority, significant
7 authority, about - - -

8 CHIEF JUDGE LIPPMAN: What does that mean?

9 JUDGE GRAFFEO: Yeah.

10 MR. HEINKE: It means that when you go to
11 the store manager, the store manager listens to you,
12 pays attention to you and often follows what you
13 recommend.

14 JUDGE SMITH: Why - - - I - - - why is
15 Starbucks resisting the suggestion that maybe
16 Starbucks should be allowed to do anything it wants
17 as long as it's not stealing anyone's tips?

18 MR. HEINKE: I'm not resisting that
19 suggestion. We just haven't done it.

20 JUDGE SMITH: But you say - - - you say
21 that by statute you couldn't give tips to assistant
22 store managers. You couldn't let the - - - you
23 couldn't let them share in the tip pool.

24 MR. HEINKE: Oh, no, we - - - no, I'm
25 sorry. We can ex - - - we believe that we have the

1 right to exclude people subject to things like race
2 and - - -

3 JUDGE SMITH: But I thought you told me a
4 few minutes ago that you thought that under the
5 statute the assistant store managers were ineligible
6 as a matter law.

7 MR. HEINKE: No, we - - -

8 JUDGE SMITH: Did I misunderstand?

9 MR. HEINKE: Yes. Or maybe I misspoke,
10 Your Honor. What - - - we believe two things. We
11 believe that we do have the power to exclude a
12 category of employees.

13 JUDGE SMITH: Or to include them?

14 MR. HEINKE: Or to include a category of
15 employees. So that - - - that's one issue. But the
16 other question is, if you set that aside and you
17 don't agree with that, and you're saying okay, I
18 don't agree you have the right to exclude, then
19 you're saying to me, well, where do we draw the line.
20 And that's what I was talking about earlier, where
21 you draw the line.

22 JUDGE RIVERA: I've got to follow up on
23 something I asked before.

24 MR. HEINKE: Sure.

25 JUDGE RIVERA: And you said they do see

1 themselves - - - they do see themselves as all the
2 same. So I'm a little confused. In the reality of
3 this workplace, where the employer, Starbucks, has
4 set up these hierarchies, how is it that those
5 employees who are now, by the employer, given
6 particular titles, given particular responsibilities,
7 salaried or nonsalaried, how is it that they see
8 themselves, these baristas see themselves as the
9 shift supervisor? I'm not clear on how that's
10 possible - - -

11 MR. HEINKE: Certainly.

12 JUDGE RIVERA: - - - when you're the ones
13 calling the shots as to how their work is divided up
14 and who they are and give - - - and you give them
15 these titles?

16 MR. HEINKE: All right. I do think the
17 baristas would see a store manager or the assistant
18 store manager as management and having authority over
19 them, because they can affect their working
20 conditions, whether they're employed, promoted,
21 demoted, fired, and so on.

22 But what I was referring to, or at least I
23 thought your question was about the baristas and the
24 shift supervisors. And there, Starbucks' whole
25 approach is a team approach. Everybody's called a

1 partner. They don't co - - - the shift supervisors
2 don't come in and say, you on the cash register, you
3 are going to make the coffee drinks, you're going to
4 take the orders. They're a team approach. They go
5 in and say, okay, well, yesterday you did the cash
6 register, you want to do that again?

7 JUDGE RIVERA: Yeah, but they're not full
8 partners.

9 MR. HEINKE: I'm sorry?

10 JUDGE RIVERA: They're not equal partners.

11 MR. HEINKE: They're equal to the shift
12 supervisors. They're not equal to the store managers
13 or the assistant store managers.

14 JUDGE SMITH: How - - - well, that - - -
15 how do we know that?

16 MR. HEINKE: How do we know that?

17 JUDGE RIVERA: Yes.

18 MR. HEINKE: I think the record reflects
19 that that's exactly - - -

20 JUDGE SMITH: The shift super - - - the
21 shift supervisor gets paid more, gets more
22 responsible work.

23 MR. HEINKE: Yes, slightly - - - slightly
24 more - - -

25 CHIEF JUDGE LIPPMAN: But why do we call

1 them supervisors, in that case?

2 MR. HEINKE: If we called them head
3 baristas, I've always wondered whether we'd be here.

4 CHIEF JUDGE LIPPMAN: Okay.

5 MR. HEINKE: And I don't think this - - -
6 therefore, this can turn on whether or not it's the
7 word "supervisor" in it. I think it must turn on the
8 - - -

9 CHIEF JUDGE LIPPMAN: No, but it turns on
10 the duties.

11 MR. HEINKE: - - - duties.

12 CHIEF JUDGE LIPPMAN: We understand that.
13 But there is a logical sense of well, gee, why are we
14 calling them shift supervisors if basically they're
15 the same or their duties are whacked up a little
16 differently.

17 MR. HEINKE: No, Your Honor - - -

18 JUDGE RIVERA: I mean, Starbucks has given
19 some meaning to this.

20 MR. HEINKE: Yes, it has. But also realize
21 they're running a nationwide business, and they gave
22 it one title, and it turns out here - - -

23 JUDGE PIGOTT: Call them barristers.

24 You've got baristas and barristers.

25 MR. HEINKE: Right. Or something. Or lead

1 bar - - - lead barista or something like that.

2 JUDGE SMITH: Senior barista.

3 MR. HEINKE: But there is a difference
4 here, a very big difference, between what the shift
5 supervisors are doing and what the assistant store
6 managers are doing. One has pow - - - real power
7 over your destiny as - - -

8 JUDGE READ: So let me make sure I
9 understand it. You're saying that they're - - - the
10 ASMs, they're ineligible?

11 MR. HEINKE: Yes.

12 JUDGE READ: But even if they were
13 eligible, you can exclude them from the pool?

14 MR. HEINKE: Yes.

15 JUDGE READ: Okay.

16 MR. HEINKE: But we think that - - - the
17 distinction here that we've tried to draw between
18 hourly workers and salaried workers, between people
19 who have real power over lower-level employees, and
20 people who spend - - - their real job is customer
21 service. We try and see the people who do customer
22 service, who are subject to the powers of other
23 people, who are hourly employees - - -

24 CHIEF JUDGE LIPPMAN: So your view is,
25 you're doing the best you can, and you're making

1 what, to you at least, is a logical distinction
2 between an hourly worker and a full-time?

3 MR. HEINKE: And we're trying to be fair
4 and reasonable here about who gets the tips.

5 JUDGE SMITH: The - - - would the approach
6 taken by California in the Jou Chau case, would that
7 work for this statute?

8 MR. HEINKE: Well, it's a different
9 statute. We like the result, of course, in that
10 case. I like it particularly since I argued it. But
11 I think that's another way to get to the same result.

12 JUDGE SMITH: What - - - what significant
13 difference do you see between the statutes?

14 MR. HEINKE: I don't think the statutes are
15 overwhelmingly different. There's some language
16 difference. But I think the effect of them, and I
17 think - - - I think what every legislature is out
18 here trying to do, is they're trying to say look, if
19 you're the employer, or you're the guy who's running
20 the place or the woman who's running this place, you
21 can't take tips from the lower-level employees. You
22 can't take them and put them in your pocket. And
23 that's what we're trying to avoid.

24 We don't want the people who have power
25 here to take tips from lower-level employees. We

1 want those people to keep the tips.

2 JUDGE SMITH: Well, I mean, is it implicit
3 in what you're saying is, as long as that's - - - as
4 long as that's not happening, we can close the book
5 and forget about the statute?

6 MR. HEINKE: Yes, I think that's - - -

7 JUDGE SMITH: As long - - - as long as
8 nobody's stealing anybody's tips?

9 MR. HEINKE: - - - I think that's
10 fundamentally what the statute's about. It's to
11 prevent people who have economic power over you from
12 taking your hard-earned tips.

13 CHIEF JUDGE LIPPMAN: Okay, counselor.
14 Thanks, counselor.

15 MR. HEINKE: Thank you so much.

16 CHIEF JUDGE LIPPMAN: Rebuttal, counsel?

17 MS. LISS-RIORDAN: Yes, thank you, Your
18 Honors. Your Honors, the record reflects that shift
19 supervisors do have power over the baristas. By
20 Starbucks' own admission, the shift supervisors are
21 the ones on the floor who, minute by minute, are
22 controlling what the baristas do. They're deciding,
23 in the words of Starbucks, "deploying baristas".
24 They're deciding who's going to work the register,
25 who's going to make the drinks, when people are going

1 to take breaks - - -

2 JUDGE RIVERA: Well, they argue that the
3 barista can say I don't want to do that.

4 MS. LISS-RIORDAN: Well - - -

5 JUDGE RIVERA: Unless I misunderstood him.

6 MS. LISS-RIORDAN: - - - but Starbucks has
7 put the shift supervisors in charge. Shift
8 supervisors can be on site and be the person in
9 charge when there's no one else there, when there's
10 no manager there. Many stores don't even have an
11 assistant manager.

12 JUDGE ABDUS-SALAAM: What if they were
13 called "head baristas" instead of shift supervisors?
14 Would your argument be the same?

15 MS. LISS-RIORDAN: Well, they probably
16 wouldn't call them baristas, unless they had a
17 different job role than what they have. What they -
18 - -

19 JUDGE ABDUS-SALAAM: If they were head
20 baristas, they could still say you could do the cash
21 register and you should do the Frappuccino or
22 whatever is served - - -

23 MS. LISS-RIORDAN: Given the role they
24 have, that they control and supervise, under the
25 dictionary definition of supervise, and given that

1 the agent definition in the New York law includes not
2 just supervisors but foremen, arguably even lower - -
3 -

4 JUDGE PIGOTT: Because Mr. Heinke says - -
5 -

6 MS. LISS-RIORDAN: - - - level - - -

7 JUDGE PIGOTT: - - - that if he called them
8 coordinators instead - - - he had a different word -
9 - - but if they were - - - if they were just called
10 coordinators, you would not have a problem?

11 MS. LISS-RIORDAN: It's not titles. It's
12 the job responsibilities that control. The
13 Massachusetts court, the First Circuit Court of
14 Appeals, looking at this same fact record, found the
15 shift supervisors to be managerial.

16 CHIEF JUDGE LIPPMAN: Is their statute the
17 same, though, in Massachusetts?

18 MS. LISS-RIORDAN: No, Massachusetts goes a
19 step further in saying that no managerial authority.
20 But I argue - - -

21 CHIEF JUDGE LIPPMAN: Is that a big
22 difference?

23 MS. LISS-RIORDAN: Well, "agent" is defined
24 to include supervisors, foremen - - - of all of the
25 parties who are arguing before you, we are the only

1 ones who are trying to hew to the language in the
2 statute. And also, as a policy matter, just as
3 Massachusetts did, what we believe the New York
4 legislature did was create a bright line.

5 JUDGE PIGOTT: But you argue - - -

6 MS. LISS-RIORDAN: Without a bright line -

7 - -

8 JUDGE PIGOTT: Excuse me - - -

9 MS. LISS-RIORDAN: - - - there's more
10 litigation.

11 JUDGE PIGOTT: - - - you argue - - - you
12 argue the plain language of the statute. But then
13 when someone says if instead of supervisor you call
14 them something else, you say well, you've got to
15 think about the meaning behind the words.

16 MS. LISS-RIORDAN: Right. Then you have to
17 see whether the person - - - if they're called
18 coordinator, are they like a supervisor, foreman, or
19 - - -

20 JUDGE PIGOTT: You've got to go beyond the
21 words.

22 MS. LISS-RIORDAN: - - - superintendant.

23 JUDGE PIGOTT: You have to go beyond the
24 words.

25 MS. LISS-RIORDAN: You look at what is

1 impor - - - what is meant by the words supervisor,
2 foreman, superintendant. How could supervisor not be
3 supervisor? It's - - -

4 CHIEF JUDGE LIPPMAN: Okay, counselor,
5 thanks.

6 Counselor, rebuttal?

7 MR. KLEIN: Thank you, Your Honor. Since
8 1972, it's been clear that a supervisor may
9 participate in a tip pool unless they have hire-fire
10 authority. That's been the rule in New York for the
11 last forty-some-odd years. It's an unbroken line of
12 authority and cases that have construed it.

13 To answer your - - -

14 JUDGE ABDUS-SALAAM: So recommending to
15 someone higher, whether to keep or to hire someone,
16 is not enough?

17 MR. KLEIN: That is not enough. That
18 person is not "standing in the shoes" and does not
19 include an officer of the corporation or a general
20 manager. That's who the statute - - -

21 JUDGE PIGOTT: Well, we had a lot of
22 discussion about - - - about scheduling. Do you
23 think that's a factor?

24 MR. KLEIN: It is a factor, but it is not
25 determinative. It may be material, but that's about

1 it. Moreover, in 2011 - - -

2 CHIEF JUDGE LIPPMAN: What's determinative?

3 MR. KLEIN: Hire or fire authority or a
4 similar control authority. An officer of the
5 corporation or a general manager are examples of
6 employees who are not allowed to participate in the
7 tip pools. Neither are supervisory authorities.
8 Saying schedules, for example, does not mean that the
9 employee cannot - - - must receive tips - - -

10 CHIEF JUDGE LIPPMAN: What about their
11 argument that though you could hurt the baristas or
12 the shift supervisors with that authority?

13 MR. KLEIN: It's a policy decision of the
14 State of New York through the Department of Labor
15 since 1972, to hold that supervisor-level employees -
16 - -

17 CHIEF JUDGE LIPPMAN: But looking at the
18 purpose of the statute, I mean - - -

19 MR. KLEIN: Because these are low - - -

20 CHIEF JUDGE LIPPMAN: - - - why is that - -
21 -

22 MR. KLEIN: - - - these are still - - -

23 CHIEF JUDGE LIPPMAN: - - - why is that
24 unreasonable?

25 MR. KLEIN: - - - these are still low-level

1 employees. The assistant store managers are - - - do
2 not have an ownership interest in Starbucks. They
3 can't be agents of the corporation. There are
4 thousands of them, if that's the case. They are not
5 individually liable under the wage and hour statutes.
6 And in 2011, the wage order provisions explicitly
7 provide that captains, who obviously have supervisory
8 authority, may also participate in the tip pool.

9 The touchstones are customer intent and
10 direct and primary duty of providing direct customer
11 service. The exception are employees who are agent -
12 - - general manager, high-level employees, who can
13 bind the corporate entity. That - - - those are the
14 categories of workers that are excluded.

15 And even then, if a customer provided a
16 direct tip to anyone serving them coffee, in this
17 case, at a coffee bar, then that employee's entitled
18 to receive the direct tip. That's the point that
19 Starbucks omits in its discussion. Where a customer
20 provides a direct tip to a person handing them coffee
21 or working the cash register, they should be, and in
22 fact the state law requires, that that tip be paid to
23 that person.

24 JUDGE GRAFFEO: We're not writing just
25 about Starbucks. So what do we do with other types

1 of food service, like restaurants? What do you do
2 with all the kitchen staff in a restaurant under your
3 construct?

4 MR. KLEIN: It's a problem in search - - -
5 I'm sorry - - - a solution in search of a problem.
6 The New York State Labor Department, since 1972 - - -
7 the statute was promulgated in '60 - - - since 1972,
8 has elaborated extensively on this issue. And to
9 answer Chief Justice Lippman's point, the salary
10 distinction is meaningless.

11 JUDGE GRAFFEO: I don't think you answered
12 my question.

13 MR. KLEIN: I'm sorry, Your Honor.

14 JUDGE GRAFFEO: What do we do with chefs
15 and kitchen staff in restaurants under your test?

16 MR. KLEIN: So there are - - - there are
17 opinion letters - - -

18 JUDGE GRAFFEO: Because they're not doing
19 direct customer service.

20 MR. KLEIN: That's correct. And Your
21 Honor, there are opinion letters from the Department
22 of Labor. They're not entitled to tips. If they do
23 not customarily or regularly engage in customer
24 service work, then they may not participate. They're
25 indirectly tipped employees. There's a - - - there's

1 an entire regulatory scheme here that's very
2 elaborate, since 1972, that answers these questions.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.
4 Thank you.

5 MR. KLEIN: Thank you.

6 CHIEF JUDGE LIPPMAN: Thank you all.
7 Appreciate it.

8 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Barenboim v. Starbucks Corporation & Winans v. Starbucks Corporation No. 122 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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