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Starbucks Baristas Fight Toss Of Tip-Sharing Action

By **Allison Grande**

Law360, New York (December 6, 2010) -- Two former Starbucks Corp. baristas in New York are appealing the dismissal and accompanying denial of class certification of their suit accusing the java giant of violating state wage laws by enforcing a policy of splitting the servers' tip pool with shift supervisors.

Plaintiffs Jeana Barenboim and Jose Ortiz filed their notice of appeal in the U.S. District Court for the Southern District of New York on Thursday, asking the U.S. Court of Appeals for the Second Circuit to review the lower court's December 2009 order that granted summary judgment to Starbucks while denying the plaintiffs' motion for class certification.

In the challenged order, Judge Laura Taylor Swain dismissed both baristas' claims related to the companywide collective tip distribution policy, finding that the shift supervisors were entitled to inclusion in the tip pool because they did not act as agents under New York state law.

The Dec. 16 ruling also dismissed Ortiz's claim related to the company's allegedly unlawful denial of tips during his two-week training period, while quashing the plaintiffs' bid for class certification for all baristas who have worked at Starbucks coffee shops in New York in the past six years in light of the summary judgment ruling.

Barenboim resolved her remaining individual accusation that she was denied tips during her two-week training period — an allegation Starbucks did not ask to be dismissed in its summary judgment motion because “genuine issues of material fact” remained — in May by accepting Starbucks' offer to pay her \$240 for her claim. The court closed the entire case on Oct. 8.

Plaintiffs' attorney Shannon Liss-Riordan of Lichten & Liss-Riordan PC told Law360 on Monday that her side opted to appeal the summary judgment ruling because of its belief that the court erred in applying a more stringent standard than New York state law requires in determining that shift supervisors do not have sufficient authority to be deemed agents under state wage laws.

“We feel that New York law should protect baristas in these situations,” Liss-Riordan said. “New York law specifically says that supervisors are agents, but the court's decision relied on federal case law, which is less protective for tipped employees than state law.”

The New York baristas initially lodged their suit in April 2008 on the heels of a \$105 million ruling in favor of 120,000 similarly situated servers in a state court in California in March 2008.

That ruling was overturned by a California appeals court in June 2009 after the court found that the company did not violate state law by allowing shift supervisors to share tips with

baristas, although Liss-Riordan noted that the appeals court did not overturn the determination that the supervisors are agents under California state law in reaching its conclusion that the supervisors were entitled to share in the tips.

The appeals court decision was upheld in September 2009 when California's Supreme Court declined to weigh in on the debate.

Starbucks has vehemently disputed the claims of the suits in California and New York, as well as related suits filed by baristas in Massachusetts and Minnesota. The company has argued that shift supervisors are hourly employees, not managers, who serve customers and are entitled to a share of the tips.

The plaintiffs are represented by Lichten & Liss-Riordan PC and D. Maimon Kirschenbaum of Joseph Herzfeld Hester & Kirschenbaum LLP.

Starbucks is represented by Akin Gump Strauss Hauer & Feld LLP.

The case is In re: Starbucks Employee Gratuity Litigation, case number 08-cv-03318, in the U.S. District Court for the Southern District of New York.

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