2014

Amici Brief of Labor Relations and Research Center, U. Mass., Amherst and Massachusetts Wage Campaign, in Meshna v. Scrivanos, SJC 11618

Harris Freeman
Western New England University School of Law, hfreeman@law.wne.edu

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SJC 11618

RON MESHNA, ET AL.,

PLAINTIFF-APPELLANTS

v.

CONSTANTINE SCRIVANOS, ET AL.,

DEFENDANT-APPELLEES

AMICI CURIAE BRIEF OF THE LABOR RELATIONS AND RESEARCH CENTER, UNIVERSITY OF MASSACHUSETTS, AMHERST, AND THE MASSACHUSETTS FAIR WAGE CAMPAIGN

Harris Freeman
BBO # 564353
Western New England
University Law School
1215 Wilbraham Rd.
Springfield, MA 01119
Tel: 413-221-3746
HFreeman@law.wne.edu

Audrey R. Richardson
BBO # 630782
Greater Boston Legal
Services
197 Friend Street
Boston, MA 02114
(617) 603-1662
Arichardson@gbls.org

Dated: October 20, 2014

TABLE OF CONTENTS

ISSUE PRESENTED FOR REVIEW

The Court has requested that briefs of *amici curiae* address whether an employer may, consistent with Section 152A of Chapter 149 of the General Laws, impose a no-tipping policy at his establishment, not only effectively discouraging patrons from leaving tips for his wait staff employees but also actually prohibiting employees from accepting tips.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case and Statement of Facts as presented by Mr. Ron Meshna and the other Plaintiff-Appellants.

SUMMARY OF THE ARGUMENT

No-tipping policies are prohibited by the Massachusetts Tips Act, Mass. Gen. ch. 149, §152A (hereinafter "Tips Act"). No provision of the Tips Act can be construed to permit employers to enact workplace rules that place covered workers beyond the reach of a law intended to protect their right to receive tips customarily offered to them by patrons. *See* Mass. Gen. Laws ch. 149, §152A(a) (establishing that tips are "given [by patrons] as an acknowledgment

of any service performed by a wait staff employee, service employee, or service bartender"). Pp. 9-11

No-tipping policies are inconsistent with the Tips Act's definition of tips, which indicates that tips are a portion of covered employees' wages that are determined by a voluntary social norm, to wit, the custom of tipping. *See* Mass. Gen. Laws ch. 149, §152A(a) (tips are "given [by patrons] as an acknowledgment of any service performed by a wait staff employee. . ."). A construction of the Tips Act that makes the receipt of patron tips covered workers "employer-optional" would impermissibly require this Court to add words to the statute that the Legislature did not include and to disregard the Legislature's considered judgment that this law be interpreted sensibly. Pp. 11-16.

Employer-imposed no-tipping policies cannot be squared with the express terms of §152A(g), which states that "[n]o employer or person shall by a special contract with an employee or by any other means exempt itself from this section." Scrivanos' tipping-ban is a special contract that unlawfully exempts its establishments from complying with the Tips Act. Neither the Defendants nor the Superior

Court below referenced or attempted to reconcile employer no-tipping policies with §152A(g), which was designed by the Legislature to thwart a wide range of employer schemes that are put in place to avoid compliance with or to create an "end run" around the Tips Act. Defendants are asking this Court, in effect, to amend the Tips Act. That is clearly a prerogative of the Legislature. Pp. 18-23.

This Court should reject the argument that no-tipping policies are a rational business response to some customers who find tipping contrary to their personal viewpoint. First, this rationale for instituting a no-tipping policy ignores record facts showing that many customers at Defendants' Dunkin' Donuts stores favored tipping and exercised their right to tip workers even when no-tipping signs were prominent. Second, Defendants' contention that it is not customary to offer gratuities to coffee servers is contrary to the record, historical practice, and current data showing that many patrons favor tipping in quick service coffee establishments. Scrivanos' no-tipping policy should therefore be rejected as an effort to repurpose the Tips Act to serve private employer interests that are contrary to the

Legislature's public policy objective - ensuring that wait staff receive tips and gratuities intended for them by customers they serve. Pp. 23-28.

Third, allowing employers covered by the Tips Act the unfettered right to create no-tipping zones will have adverse consequences for low-wage workers and the Commonwealth. Banning tipping will depress the already meager income of thousands of low-wage front-line food service workers. Legitimating Defendants' policy would also increase the number of low-wage workers who are compelled to rely on federal and state public assistance programs to meet basic food and housing needs, placing unnecessary burdens on Massachusetts taxpayers. P. 29.

Plaintiffs are representative of a sub-set of workers who hold jobs at the bottom of the 21st century labor market. The fast-food sector, with profits of more than $7.4 billion in 2013, operates on a high-profit/low-wage business model that employs over 2.2 million low-wage workers. These employees experience high rates of under-employment and earn incomes that cannot provide a family with a living wage in major urban areas like Boston.

Because tips make a real difference in income for these workers - raising wages by 15% or more - no-tipping policies will tend to push more working people into poverty and burden taxpayers who underwrite the cost of social safety net programs. Almost $7 billion is spent yearly to underwrite the cost of federal public assistance programs for fast-food workers. P. 29-38.

This disproportionate reliance on public assistance is accompanied by an inordinately high-rate of non-compliance with wage and hour law in the fast-food sector. Indeed, the Defendants' practices of throwing tips into the garbage and using tips to cover purported cash register shortages is part and parcel of the low-road practices that the Tips Act and other wage and hour laws are designed to combat. P. 39-41.

Finally, Defendants' no-tipping policy is irrational from an economic standpoint. The Superior Court judge indicated that the no-tipping policy prevented Defendants from remaining competitive with other quick-service coffee establishments that permit tipping and comply with the Tips Act. What's more, there is no record evidence or social science literature indicating that that economic realities or

competitive pressures 'push' employers like Defendants to engage in the illegal behavior at issue. Pp. 41-42

No-tipping policies serve no rational public purpose and conflict with the language and public purpose underlying the Tips Act. The Court should therefore find that Defendants' no-tipping policies are impermissible under the Tips Act. Pp. 42-44.

INTEREST OF THE *AMICI*

The **University of Massachusetts Labor Relations and Research Center ("Center")**, founded in 1964, as an integrated program of graduate education, research, and direct service to workers and the labor movement. A primary concern addressed by the Labor Center's research and educational missions is the decline of collective bargaining and the rise of inequality that has accompanied the rapid growth of precarious forms of non-standard and contingent employment. To this end, the Center initiated a Future of Work Project in 2004 to provide labor and government policy-makers with fact-driven research that examines the growth of the low-wage, contingent labor force as well as the

economic and technological forces that are driving this development.

The Labor Center, along with labor centers at other University of Massachusetts campuses, has funded research and published a series of books and reports on the future of work. The Center also sponsored numerous conferences attended by hundreds of labor advocates and government officials where these issues were discussed and debated.

The Future of Work Project complements two other of the Center's research areas. A Labor-Community Research Project explores how unions and community-based groups can mobilize in partnership to address labor market shifts, plant-closings, subcontracting, with particular emphasis on how these problems impact low-wage workers, persons of color, women and immigrants. The Center has also developed a strategic corporate research program allows unions and their allies to efficiently access and analyze comprehensive corporate business data to facilitate their responses the shifting terrain in which labor union organizing and collective bargaining are taking place.

The **Massachusetts Fair Wage Campaign ("FWC")** is a coalition of non-profit immigrants' and workers'

rights organizations that engage in a range of legal and policy advocacy, community organizing, and support and referrals for legal action for low-wage immigrant workers in Massachusetts. Most of the FWC organizations are community-based groups that work closely with low-wage immigrant workers who are victims of exploitative and abusive employment practices, including nonpayment of wages and violation of state and federal minimum wage and overtime laws, as well as the Massachusetts tips law. Greater Boston Legal Services ("GBLS"), counsel to these organizations, provides legal representation and assistance to the organizations in their ongoing efforts to advise and support workers in the enforcement of their workplace rights. GBLS also brings to its representation of the FWC organizations its own extensive experience representing low-wage workers in a wide range of cases under the Massachusetts wage laws.

The participating FWC organizations are the Brazilian Immigrant Center, Brazilian Women's Group, Centro Presente, Chelsea Collaborative, Chinese Progressive Association, Justice at Work, Massachusetts Coalition for Occupational Safety and

Health (MassCOSH), Massachusetts Immigrant and Refugee Advocacy Coalition (MIRA), Massachusetts Jobs with Justice, and Metrowest Worker Center.

ARGUMENT

Employer-imposed no-tipping policies that prevent wait staff and covered service employees from receiving tips or gratuities from patrons are at odds with the Massachusetts Tips Act, Mass. Gen. Laws ch. 149, §152A, and undermine its legislative purpose. Employer-mandated no-tipping rules also have hidden social costs that contribute to fast-food workers and over-the-counter wait staff like the Plaintiffs relying on taxpayer-funded public benefit programs at twice the rate of other employed workers.

I. EMPLOYER NO-TIPPING POLICIES ARE PROHIBITED BY THE PROVISIONS OF THE TIPS ACT AND ARE INCONSISTENT WITH THE PUBLIC POLICIES THAT GUIDE THE LEGISLATURE'S ENACTMENT OF WAGE AND HOUR LAWS

The Tips Act expressly protects the wages and tips of three groups of non-supervisory employees: 1) "wait staff" who work in restaurants, banquet facilities or "other places where food or beverages are served;" 2) "service bartenders" who prepare beverages served by wait staff, as well as; 3) other

"service employees" who provide services directly to customers and customarily receive tips or gratuities. Mass. Gen. Laws ch. 149, §152A(a); *DiFiore v. American Airlines, Inc.*, 454 Mass. 486, 492 (2009).

There is no dispute as to Plaintiffs' status as protected employees under §152A(a) of the Tips Act. Defendants nevertheless argue that an employer can lawfully prevent the Plaintiffs and other covered employees from receiving tips from patrons by enacting a no-tipping policy at its Dunkin' Donuts outlets. Scrivanos Brief at 19-20. Defendants' illogical construction of the Tips Act cannot be squared with the salient provisions of this law, the rules of statutory construction this Court has adopted to determine the meaning of remedial statutory schemes, or the legislative purpose of the Tips Act.

A. Employer-Imposed Tipping Bans Are in Conflict with the Tips Act's Definitions of Protected Employees and Tips Voluntarily Offered Patrons

Nothing in the text of §152A(a) of the Tips Act allows employees who fall within the ambit of this statute to be removed from its protections by employers who proclaim that their food service establishment is a no-tipping zone. Yet, Scrivanos

contends otherwise, asserting that "in those contexts in which employers choose to prohibit tipping, the employees do not customarily receive tips and, therefore, do not fall within the protection of the statute." Scrivanos Brief at 19-20.

The purported legality of employer-imposed no-tipping policies hinge on the illogical proposition that the Tips Act's statutory mandates are employer-optional and may be completely disregarded whenever an employer imposes a no-tipping rule on its protected workforce. Such a reading of the Tips Act, however, disregards the "Legislature's considered judgment" that the Tips Act be interpreted sensibly. *See DiFiore*, 486 Mass. at 490) (further citations omitted) ("rejecting unreasonable interpretations unless clear meaning of the statutory language requires such an interpretation").

Section 152A(a), which defines who is a covered employee and employer, does not cede to employers the right to determine whether a covered employee is entitled to receive tips customarily offered by patrons. Scrivanos' argument - that tipping bans are consistent with the Act - disregards this definition, which explains that tips are a portion of a covered

employee's wage determined by a voluntary social norm, i.e., by custom, not employer policy.[1] This is clear from the text of §152A(a), which provides that tips are "given [by patrons] as an acknowledgment of any service performed by a wait staff employee, service employee, or service bartender."

The Tips Act cannot be sensibly construed to allow employer no-tipping policies without ignoring the fact that the Legislature designed the Act to "ensure that" protected employees "receive the tips, gratuities, and service charges that customers *intend* for them to receive." *DiFiore*, 454 Mass. at 491 (emphasis added). The Legislature enacted the Tips Act not only to prevent employers from "demanding, accepting or requesting tips" [. . .] "given to" wait staff by patrons, Mass. Gen. Laws ch. 149, §152A(a), but also to preclude employers from enacting policies that preemptively interfere with a patron's *intended*

[1] The Act is intended to protect the customary practice of patron tipping for all non-supervisory wait staff employees, service bartenders and also for service employees who "provide services directly to customers or consumers" but work in occupations "other than in food or beverage service where "employees customarily receive tips or gratuities." Mass. Gen. Laws ch. 149, §152A(a).

offer of a tip or gratuity to a protected employee. *See DiFiore,* 454 Mass. at 491.

Remedial statutes such as the Tips Act and the other fair labor standards codified in Chapter 149 of the General Laws, are to be liberally construed "with some imagination as to the purposes which lie behind them." *DePianti v. Jan-Pro Franchising Int'l., Inc.*, 465 Mass. 607, 620 (2013) (quoting *Lehigh Valley Coal Co. v. Yensavage*, 218 F.547, 553 (2d Cir. 1914), *cert. denied*, 235 U.S. 705 (1915)). It is therefore unimaginable that the Legislature enacted a law that is designed to ensure that protected workers receive the tips and gratuities intended for them, but also allowed for a silent, unwritten provision that permits employers to opt-out of the law simply by posting a sign in their establishment that proclaims, "Thank You For Not Tipping." *See Memorandum of Decision and Order on Defendants' Motion for Summary Judgment*, SUCV2011-01849-BLS1 at 11 (J. Billings Sept. 11, 2013).

Given that the Defendants have not identified any provision of the Tips Act that expressly or impliedly allows employers to ban tipping, their contention that the Tips Act permits tipping bans poses another troubling problem: "[I]t requires [this Court] to add

words to the statute that the Legislature did not see fit to put there." *Cooney v. Compass Group Foodservice,* 69 Mass. App. Ct. 632, 638 (2007) (interpreting ch.149, §152A prior to a 2004 Legislative amendment).

There is, of course, language in the Tips Act that shields *certain* tip-related employer practices from sanction. In 2004, the Legislature amended the Tips Act by adding §152A(d) to expressly permit employers to impose a "house or administrative fee in addition to or instead of a service charge or tip" as long as "the employer provides a designation or written description of that house or administrative fee, which informs the patron that the fee does not represent a tip or service charge intended" for protected employees. *See Bednark v. Catania Hospitality Group, Inc.*, 78 Mass. App. Ct. 806, 808 n. 8 and 812 (2011).

By creating §152A(d), which the Appeals Court labeled as a "safe harbor provision," the Legislature indicated that it knew how to craft provisions to protect certain employer business practices that operate in the sphere of conduct that the Tips Act regulates. *See Bednark,* 78 Mass. App. Ct. at 808 n. 8

and 812. However, unlike the express safe harbor provision in §152A(d), no section of the Tips Act contains any language condoning, permitting or creating safe harbor for employer policies that would punish a protected employee who accepted a patron's tip or permit an employer to post signs banning voluntary tipping of employees by patrons. For this reason, and contrary to the Superior Court's view, "clearly and conspicuously announced" no-tipping policies are in no way consistent with the Tips Act. *See Meshna v. Scrivanos, Memorandum of Decision and Order on Defendant's Motion for Judgment on the Pleadings*, 29 Mass. L. Rptr. 313, at *2, C.A. No. 2011-01849-BLS1 (J. Fabricant Dec. 21, 2011).

In short, no part of §152A(a), which defines who is a covered employee and what constitutes a tip, provides support for the argument that an employer can take it upon itself to decide whether covered employees are entitled to receive tips voluntarily offered by patrons. *See Bednark*, 78 Mass. App. Ct. at 809 (quoting *DiFiore*, 454 Mass. at 486) (language and history of Tips Act indicate Legislature's intent: "to ensure that service employees receive the tips,

gratuities, and service charges that *customers intend* them to receive") (emphasis in original).

B. Employer-Imposed No-Tipping Policies Conflict with the Tip Act's Prohibition of Employers' Efforts to Exempt Themselves from the Law.

Scrivanos' no-tipping policy is also at odds with §152A(g) of the Tips Act, which was added by the Legislature in 2004 to strengthen the statutory provision in the original Tips Act that "rendered unenforceable" employer-initiated agreements that required employees to turn their tips over to the employer. *DiFiore,* 454 Mass. at 493. Section 152A(g) now provides even broader protections, stating that "[n]o employer or person shall by a special contract with an employee or by any other means exempt itself from this section."

This Court has repeatedly explained that by enacting §152A(g) "the Legislature was cognizant, in general, of the risk that employers or other persons may seek to find ways […] to attempt to avoid compliance with the Act, and intended to thwart such schemes." *DeFiore,* 454 Mass. at 497; *see also DePianti,* 465 Mass. at 623 (2013). More specifically, *DeFiore* held that 152A(g) banned a subcontracting

scheme that restaurants and airlines used "to avoid the mandates of the statute by outsourcing the services of wait staff and service employees, and contractually requiring the outsource employer to remit to the restaurant or airlines all or part of the service charges." 454 Mass. at 496. This practice was found to be an unlawful "end-run" around the Tips Act. *Id.*

Scrivanos' no-tipping policy is yet another "end run" around the Tips Act that cannot be squared with §152A(g)'s ban on the use of "special contracts" or "any other means" to exempt employers from the requirements of the Tips Act. Whether termed a "special contract" or some "other means" of thwarting the Act's goal, Scrivanos' ban on tipping cannot be squared with a sensible reading of §152A(g), a provision intended to ensure that covered employees receive tips intended for them by patrons. *See DiFiore,* 454 Mass. at 490-491 (further citations omitted) (rejecting interpretations of the Tips Act that ignore judicially-approved use of language, statutory purpose and the employer mischief to be remedied).

Yet, Scrivanos' no-tipping rule is indisputably part of his employees' at-will contracts. It is included in the franchises' personnel handbooks and posted in public areas of its Dunkin' Donuts stores. Defendants also reserve the right to punish wait staff employees if they accept a tip intended for them by a patron or if they fail to convey the no-tipping policy to patrons who leave change on the counter, intending it to be a tip. Indeed, Scrivanos has fired employees for violating this contractual term of employment. *Meshna v. Scrivanos, Memorandum of Decision and Order on Defendants' Motion for Summary Judgment*, SUCV2011-01849-BLS1 at 9, 10.

The no-tipping policy is surely a contractual means of banning tipping as it imposes no enforceable rule on patrons, only on Dunkin' Donuts wait staff. Nothing in the record indicates that, pursuant to its no-tipping policy, Scrivanos reserved the right to exclude or remove patrons who intend to or in fact do leave tips for wait staff. As such, the no-tipping signs at Scrivanos' Dunkin' Donuts are no more than a public display of its employment policy that serves the purpose of putting its wait staff on notice that

they may be punished or terminated for receiving a gratuity from a patron.

Notably, neither Scrivanos' brief nor the Superior Court's rulings reference, much less attempt to reconcile, the no-tipping policy at issue wit§152A(g). Rather, the Superior Court decision skirted §152A(g) and adopted Scrivanos' argument that an employer can choose to create a tip-free zone at its restaurant to avoid "the administrative burden of accounting for tips and distributing them among those employees entitled to receive them" or to avoid "the risk of liability" for violations of the Tips Act. *Meshna, Memorandum of Decision and Order on Defendant's Motion for Judgment on the Pleadings*, 29 Mass. L. Rptr. 313 at *3-4 & n. 3. Finding no support for this argument in the statutory text, the Superior Court illogically cites *DiFiore* and *Bednark* to support its assertion that, "conspicuously announced," no-tipping policies preclude any reasonable customer expectations that money offered as tips would "go to employees." *Id.* at *2.

The Superior Court's reasoning should be rejected as it misapprehends the analysis in *DiFiore and Bednark*. The underlying concern in *DiFiore,* 454 Mass.

at 494, and *Bednark*, 78 Mass. App. Ct. at 815, was to outlaw employer mislabeling of service fees that misled customers by suggesting to them that the fees they paid to the employer were gratuities intended for covered employees.

More specifically, *DiFiore* addressed the proper definition of the term "service charge" in §152A(a) in response to a certified question from a Massachusetts Federal District Court. 454 Mass. at 487. This Court explained that the proper starting point in defining this term was to recognize that "the Legislature intended to ensure that service employees receive all the proceeds from service charges." 454 Mass. at 493 (finding that the Legislature wished definitions to be interpreted to serve, not thwart, legislative purpose underlying Tips Act). Accordingly, *DiFiore* rejected definitions of the terms "service charge" and "employer" that would have permitted an airline to use a subcontracting scheme to avoid remitting a service charge to baggage handlers. *Id.* at 494.

In *Bednark*, a hotel employer argued that any charge to patrons designated by the employer as an "administrative fee" is by definition not a gratuity or service charge as defined by §152A(a), which allows

the employer to retain the fee pursuant to §152A(d), the Tip Act's safe harbor provision. 78 Mass. App. Ct. at 815-816. Accordingly, this Court held that the hotel could not take advantage of §152A(d) when it charged customers for certain costs that it blithely labeled as an "administrative fee," without further written explanation or description. *Id.* at 806.

Scrivanos' no-tipping policy receives neither support nor protection from *DiFiore or Bednark,* both of which condemned employer mislabeling schemes and policies that thwarted the ability of patrons to leave gratuities for covered employees if that is their intent. *See* B*ednark*, 78 Mass. App. Ct. at 815-816 (requiring various provisions of Tips Act be interpreted harmoniously to preserve their "patron-centric focus"). The Dunkin' Donuts no-tipping policy - whether or not it is conspicuously announced to patrons or clearly conveyed to employees - has the same unlawful effect on patron behavior and the right of covered employees to receive gratuities as the employer schemes rejected by *DiFiore* and *Bednark*, i.e., it prevents patrons from offering, and covered employees from receiving, tips.

What the trial court's defense of Scrivanos' no-tipping policy fails to recognize is that the Tips Act, like all wage and hour legislation, contains provisions that abrogate certain aspects of the at-will employment contract, to wit, the employer's right to impose on its employees certain terms of the wage bargain that are contrary to statutory enactment and underlying legislative policy. *Parrish v. West Coast Hotel*, 300 U.S. 379, 392 (1937); *Akins Case*, 302 Mass. 562, 566-567 (1939) (contractual terms of employment are subordinate to right of the State to safeguard the public interest). Here, §152A(g) states that employers may not "by special contract [. . .] or other means exempt itself" from the Tips Act. Given this clear language, "it is the function of the judiciary to apply it, not amend it." *Cooney*, 439 Mass. App. Ct. at 638 (quoting *Commissioner of Rev. v. Cargill*, 429 Mass. 79, 82 (1999)).

II. THE TIPS ACT DOES NOT SANCTION EMPLOYER NO-TIPPING POLICIES AS A LAWFUL BUSINESS RESPONSE TO CUSTOMER DEMAND OR PREFERENCE

The argument that the Tips Act permits employer-imposed tipping bans is, in effect, an attempt to repurpose the Tips Act to serve private policy

objectives that are at odds with the legislative goals underlying the Commonwealth's wage and hour laws. Scrivanos contends that employers should be allowed to ban tipping "primarily in response to concerns voiced by [. . .] customers who did not want to feel pressured to leave tips and wanted to receive the same service regardless of their ability or desire to leave a tip." Scrivanos Brief at 6. However, Scrivanos offers slim anecdotal evidence and virtually no case law or any legislative policy to support the view that no-tipping policies may be enacted because some patrons do not like to tip.

A. When Viewed in a Light Most Favorable to the Plaintiffs, the Record Cannot Be Construed to Support the Notion That Tipping Bans Are a Reasoned Business Response to Market Forces.

Defendants' argument conveniently ignores the undisputed fact that over one-third of the Dunkin' Donuts franchises they own permit tipping. Meshna Brief at 7. Notably, there is no claim that these stores suffered any economic disadvantage. What's more, Scrivanos offers no explanation for why it disregards the viewpoint of those customers who choose

to leave tips when patronizing Dunkin Donuts stores, even when they are informed of the no-tipping policy.

Instead, Defendants contend that its no-tipping policy is a reasoned business response to some of its customers' 'discomfort' with, and/or viewpoints regarding, customary tipping. Basing one's business practices on customer preferences that compel violation of extant workplace laws is, however, without legal support. *See Brown v. F.L. Roberts Co.*, 452 Mass. 674 (2008) (rejecting employer's undue hardship defense; holding customer preferences for clean-shaven employees does not justify employer engaging in religious discrimination against unshaven Rastafarian).

B. The Facts and Historical Practice Establish that Coffee Servers and Counter Wait Staff Customarily Receive Tips from Patrons.

The record does not support Scrivanos' claim that customary tipping has not taken root at Dunkin' Donuts and other establishments where employees serve beverages from behind the counter (as opposed to waiting on tables). A brief review of the origins and history of the custom of tipping explains why

Scrivanos cannot substantiate the claim that it is not "customary" to offer gratuities to coffee servers.

The centuries-old custom of tipping can be traced to Tudor England where overnight guests provided a sum of money directly to their host's servants as compensation for the extra work of caring for more than the usual number of guests. Kerry Seagrave, TIPPING AN AMERICAN SOCIAL HISTORY OF GRATUITIES, 1-6 (1998). The practice soon made its way to coffeehouses, restaurants and other commercial establishments. *Id.* at 4. In fact, some historians believe that the term "tip" is an acronym for the phrase 'To Insure Promptitude," which English author Samuel Johnson inscribed on a bowl at a coffeehouse he frequented in the 1700's. *Id.*[2]

Wealthier Americans began the custom of tipping after the Civil War, perhaps as a means of demonstrating their familiarity with and approval of European customs. Steve Dublanica, KEEP THE CHANGE: A CLUELESS TIPPERS QUEST TO BECOME THE GURU OF THE GRATUITY, 15-16

---

[2] Other historians consider the Samuel Johnson/tips acronym story to be an early urban myth. Steve Dublanica, author of KEEP THE CHANGE: A CLUELESS TIPPERS QUEST TO BECOME THE GURU OF THE GRATUITY (2010), claims that the term tip has an older origin. "As far back as 1509, Albrecht Dürer, the German painter and printer, wrote a letter asking one of his customers to give his apprentice a trinkgeld, or tip." *Id.* at 14.

(2010). Although tipping was a controversial social practice when introduced to America - as it was thought to be an anathema to a society founded on social equality - by 1926, tipping had become a norm in America's food service industry.[3] Yoram Margailoth, *The Case Against Tipping*, 9 U. PA. J. LAB. & EMP L. 117, 121 (2006).

Even legal scholars who question the social utility of tipping recognize that it is now customary for patrons served by low-wage counter-staff and baristas at the innumerable coffee bars and juice joints that now pepper America's downtowns and shopping areas. *See, e.g., id.* at 121 (2006) ("Tipping has become quintessentially American" and "in today's coffeehouses and juice joints, with their 'tip jars,' [tipping] has become de rigueur").[4] Moreover, the

---

[3] The restaurant industry quickly took advantage of the custom of tipping and generally required wait staff to live on tips alone. In fact, the restaurant industry has a long history of hostility to minimum wage laws, lobbying Congress to deny restaurant employees coverage under FLSA. *Tips and Poverty*, New York Times, Op-ed, Sept. 14,2013 http://www.nytimes.com/2013/09/15/opinion/sunday/tips-and-poverty.html?_r=0. Only in 1966, when the FLSA was amended, did a 'sub-minimum' wage -then set at fifty percent of the minimum wage - become required for wait-staff to supplement tipped earnings. *See* 29 U.S.C. §203(m).

[4] *See also Emily Post*, iconic mainstay of American etiquette, stating on its website: "Tip occasionally if your server or barista provides a little something extra or if you are a regular customer." *Emily Post General Tipping*

ubiquity of tipping in over-the-counter coffee service restaurants is consistent with the record in this case, which is peppered with facts indicating that Dunkin' patrons routinely attempted to tip employees, even in the face of Scrivanos' no-tipping policies. *See infra* at 35-37.

Furthermore, neither the record in this case or social science research supports the view that the practice of customary tipping is on the way out. Rather, new forms of digital commerce are now being shaped by patrons' strong desire to leave tips for low-wage coffee servers and other behind-the-counter wait staff. Most notably, Starbucks has included a mobile-tipping option on the newest version of its smartphone "app," responding to "demand from customers, many of who no longer carry around much cash." Candace Choi, *Tipping Can Be Touchy, But App Will Make it Easy,* BOSTON GLOBE/ASSOCIATED PRESS, March 13,2014, 2014 WLNR 6815972 (mobile-tipping, in amounts of fifty cents, one dollar or two dollars, is an option at 7,000 out of 11,000 Starbucks nationwide as of March 19, 2014).

Guidelines, http://www.emilypost.com/ out-and-about/tipping/89-general-tipping-guidelines (last visited April 12, 2014).

In sum, there is no support in the law, the facts of this dispute or in social science literature for the view that patrons do not customarily tip at Dunkin' Donuts franchise outlets or other similarly situated over-the-counter, quick service, food and beverage restaurants.

III. NO-TIPPING POLICIES CONTRIBUTE TO THE IMPOVERISHMENT OF THE LOW-WAGE WORKFORCE AND FOIST THE SOCIAL AND ECONOMIC COSTS OF TIPPING BANS ONTO THE CITIZEN-TAX PAYERS OF MASSACHUSETTS

Scrivanos' argument that employers of food service wait staff should enjoy the unfettered right to create no-tipping zones in their establishments callously ignores the fact that no-tipping policies will surely depress the already meager income of thousands of low-wage, front-line wait staff and food service workers throughout Massachusetts. Moreover, no-tipping policies that lower the earned income of behind-the-counter wait staff have hidden social costs that increase the number of low-wage workers driven to depend on myriad federal and state public assistance programs.

A. Socio-Economic Data Establishes That Tips Received by Dunkin' Donuts Wait Staff and Other Similarly Situated Workers Are an Important Part of Employee Compensation.

Any inquiry into the real-world impact of no-tipping policies invites close examination of the restaurant industry, which employs over 10 million workers or 9 percent of the total U.S. workforce. According to the National Restaurant Association (NRA), the industry is thriving; total sales revenues for 2013 was $660.5 billion, almost double the industry's revenues in 2000. Rosemary Batt, et al., *A National Study of Human Resource Practices, Turnover and Customer Service in the Restaurant Industry* 5, http://rocunited.org/a-national-study-of-human-resource-practices-turnover-and-customer-service-in-the-restaurant-industry/ (citing National Restaurant Association website 2013; U.S. DOL, Bureau of Labor Standards 2012) (last visited March 17, 2014) [hereinafter "ROC United Restaurant Study"].

Yet, seven of the ten lowest-paid occupations are in restaurant occupations. *Id.* (citing DOL, Bureau of Labor Statistics data). The average yearly income for restaurant workers nationwide in 2009 was $15,092, compared to $45,155 for the total private sector.

Median hourly wage in the industry, including tips, is only $8.89. ROC United, *Behind the Kitchen Door: A Multi-site Study of the Restaurant Industry,* http://rocunited.org/2011-behind-the-kitchen-door-multi-site-study/ (2011) (last visited on October 15, 2014). Moreover, low pay in this industry has had a disparate impact on racial minorities. According to ROC United's survey in eight major urban areas, the disparity in the median wage of whites as compared to workers of color is $13.59 as compared to $9.54. This $3.71 per hour differential is stark evidence of widespread racial inequality in the restaurant industry. *Id.*[5]

The vast majority of restaurant workers, 87 percent, have no sick leave. *Id.* And the large number of low wage jobs in this sector makes the restaurant industry "particularly prone to minimum wage and hours of work violations." David Weil, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO

---

[5] The wages of restaurant workers are also substantially lower than the wages earned by *demographically similar* workers in other industries. Percentage-wise, a typical restaurant worker suffers a 'wage penalty' for working in this industry of 17.2 percent. Heidi Shierholz, *Low wages and few Benefits mean many restaurant workers can't make ends meet*, Economic Policy Institute Briefing Paper #383, 16-17, http://www.epi.org/publication/restaurant-workers/(last visited on August 29, 2014).

IMPROVE IT, 130 (2014) (18.2 percent experience minimum wage violations; 69.7 percent overtime violations; 74.2 percent off-the-clock violations; also non-compliance with wage and hour laws higher in franchised outlets); *see also Behind the Kitchen Door, supra,* at 29 (almost half of restaurant workers surveyed report overtime violations).

The restaurant industry's high-profit/low-wage business model is most pronounced in the fast-food/quick service sector where the ten largest companies employ more than 2.25 million mostly low-wage workers while earning profits of $7.44 billion in 2013. *Super-sizing Public Costs: How Low Wages at Fast-Food Chains Leave Taxpayers Footing the Bill,* National Employment Law Project Data Brief, http://www.nelp.org/page/-/rtmw/uploads/NELP-Super-Sizing-Public-Costs-Fast-Food-Report.pdf?nocdn=1, Oct., 2013 (last visited October 15, 2014) [hereinafter "*Super-sizing Public Costs*"]. Dunkin' Donuts ranks sixth on that list, employing more than 160,000 employees at over 7300 franchise outlets nationwide. *Id.*

Dunkin' Donut employees and other front-line fast-food service workers, comprise the very bottom of

the restaurant industry's low-wage workforce. This is the conclusion of a 2013 national study undertaken by the University of California, Berkeley, Center for Labor Research and Education and the Department of Urban and Regional Planning, University of Illinois (Urbana-Champaign). *See* Sylvia A. Allegretto, PhD, et al., *Fast Food, Poverty Wages: The Public Cost of Low-Wage Jobs in the Fast-Food Industry*, http://laborcenter.berkeley.edu/publiccosts/fast_food_poverty_wages.pdf (last visited March 13, 2014) [hereinafter "*Fast Food, Poverty Wages*"].

Consider that in 2010 the typical fast-food worker lucky enough to work a 40-hour week for an entire year makes only $18,130.[6] *Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, 2014-15 Edition, Food and Beverage Serving and Related Workers*, http://www.bls.gov/ooh/food-preparation-and-serving/food-and-beverage-

---

[6] The Massachusetts Economic Independence Index estimates that an adult in Massachusetts needs to earn about $28,500 annually to remain economically independent, and a single-parent family with one preschooler and one school-age child needs an income of $65,880 a year to meet its day-to-day essential expenses without public assistance. Michael W. Ames, et al., *Massachusetts Economic Independence Index*, Crittenton Women's Union, http://www.liveworkthrive.org/research_and_tools/reports_and_publications/Massachusetts_Economic_Independence_Index_2013 (last visited March 18, 2014).

serving-and-related-workers.htm (visited October 15, 2014). But, for the vast majority of this workforce, full-time work is the exception rather than the rule. Less than a third - just 28 percent - of front-line fast-food workers work a 40-hour week. *Id.* at 8-9. The median workweek is actually far less, only 30 hours, and 12 percent of the fast-food workforce is employed for only 10-20 hours per week, compared to 4 percent of the total workforce. The median wage for Dunkin' Donuts employees and other front-line fast-food workers is $8.69 an hour.[7] Only 13 percent of these workers receive employer-provided health care, compared to 59 percent of the overall workforce. *Id.*

As a consequence of this low-wage, no-benefit and limited, low-hours business model, households that include an employed, front-line fast-food worker are four times as likely to live below the federal poverty level.[8] *See id.* (5 percent of households in poverty compared to 20 percent for households with fast-food workers). Not surprisingly, fast-food and quick

---

[7] This figure is for a front-line fast-food worker employed for at least 27 weeks per year and 10 hours per week. *Fast Food, Poverty Wages* at 8. As discussed, for most fast-food workers, the 40-hour workweek is beyond their reach.

[8] The federal poverty level for a family of four is $23,850 and $11,670 for a single person. U.S. Dept. of Health and Human Services, http://aspe.hhs.gov /poverty/14poverty.cfm (last visited May 19, 2014).

service restaurants have annual employee turnover rates of 45 percent and the typical tenure is only 3.6 years, creating inordinate levels of churning and wage loss in the low-wage workforce and increased business costs for franchise owners. *See Roc United Restaurant Study* at 2, 17-20.

Contrary to popular wisdom, the fast-food workforce is not primarily comprised of teenagers and 'stay-at-home-moms,' whose earnings are supplemental to their families' primary source of income. Over two-thirds of the front-line fast-food workers are single or married adults. *Id.* at 10. The average age is twenty-four and more than one-third of fast-food this workers over twenty years old are raising children. *Id.* at 9-10.

Given the pervasive poverty-level and near-poverty level incomes of fast-food workers at franchise outlets of Dunkin' Donuts, McDonald's, Subway, Domino's and other franchised quick-service restaurants, it is patent that *any amount* received in tips can make a significant difference in employee earnings. This is evident from the judgment in *Matamoros v. Starbucks Corp.*, 2011 WL 1002740 (D. Mass. March 18, 2011), aff'd. 699 F.3d 129 (1st Cir.

2012), in which Starbucks wait staff received a $14 million judgment to remedy Starbucks violation of §152A(c) of the Tips Act by unlawfully including supervisory employees in tip pools. This sum - premised on Starbucks coffee servers earning an additional $2 per hour in tips - provides a useful comparator to assess the potential income that Dunkin Donuts' workers are losing as a result of Scrivanos' no-tipping policy. *See Matamoros,* Plaintiff's Motion for Summary Judgment on Damages, C.A. No. 1:08-cv-10772, Dkt. No 79.[9] An employee receiving tips amounting to $2 per hour would increase her yearly earnings by $3,000 if that fast-food worker was employed for 30 hours a week. Indeed, this is a 25 percent hourly raise for a fast-food worker making the minimum wage of $8/hour.

The undisputed testimony of the Plaintiffs in this case provides further reason to reject Scrivanos' claim that tips are not "an important part" of

---

[9] Moreover, following the First Circuit's ruling, Starbucks increased the starting wage for shift supervisors in its Massachusetts outlets by almost $3 per hour (from $11.00 to $13.89) in order to make up for the tips that supervisors could no longer earn. Lisa Jennings, *Starbucks restructures 'shift supervisor' position in Mass.*, NATION'S RESTAURANT NEWS, http://nrn.com/latest-headlines/starbucks-restructures - shift-supervisor-position-mass, Jan. 29, 2013 (last visited March 17, 2014).

employee compensation at his Dunkin' Donuts stores. *See Scrivanos Brief* at 23 (Dunkin' Donuts employees do not "rely on tips as part of their compensation"). Ron Meshna indicated that patrons would leave tips ranging from a penny to five dollars at the North Reading Dunkin' store. *Meshna v. Scrivanos, Memorandum of Decision and Order on Defendants' Motion for Summary Judgment,* C.A. No. 2011-01849-BLS1 at 13 (Sept. 11, 2013 Billings, J.)

Ralph Sherrick stated that at the Dunkin' Donuts Peabody location "on many occasions" patrons left money on the counter and told him to "keep the change." *Id.* at 14. In the Lynnfield Dunkin' Donuts store, Ileana Ortiz reported that customers would insist on leaving change at the drive-in window and on the counter even when told that tips were "not allowed." *Id.* at 14-15. In Haverhill's Dunkin' Donuts, Karen White indicates that regular customers who live in the neighborhood and frequent the store routinely, came in at Christmas time and gave "substantial tips because they knew we had been providing them with good service." *Id.* at 15.

The evolution of Scrivanos' "Abandoned Change Cup" policy underscores just how prevalent and potentially

substantial tip income from Dunkin' Donuts patrons could be. *See generally id.* at 16-18. When so-called "abandoned change" cups were first placed on the counter in the Peabody Dunkin' Donuts store, patrons responded generously as they thought the cups were for leaving tips. *See id.* (Sherrick was instructed "at least once" by management to empty "an overflowing abandoned change cup into the register").

It was only after management put signs on the cups indicating they were not for tips that, "[a]fter a few days [. . .], the problem of overflowing change in the cups ceased." *Id.* at 17. The fact that it took "a few days" to quell the flow of change indicates that, even when management attempted to stop the practice, customers still demonstrated a desire to tip Dunkin' Donuts wait staff.

B. Employer-Imposed Tipping Bans Have Hidden Public Costs That Burden Social Safety Net Programs Administered and Funded by Commonwealth Taxpayers.

The low wages and insufficient work hours of wait staff employees in fast-food restaurants also have hidden social costs that are not reflected in the record of this case. More than half of front-line fast-food workers rely on one or more public

assistance programs to support themselves and their families. *Fast Food, Poverty Wages* at 1, 6-9. Fast-food workers participate in these programs at more than twice the rate of all employed workers. In other words, "public benefits receipt is the rule, rather than the exception for this workforce." *Id.* at 6, 10.

The cost to taxpayers is staggering: almost $7 billion is spent each year to provide federally sponsored public assistance programs to families of workers in the fast-food industry. *Id.* More than 432,000 families of fast-food workers (a 45 percent participation rate) receive $1.04 billion in food stamps. *Id.* at 7. Over 800,000 families of fast-food workers use the Earned Income Tax Credit, costing taxpayers $1.91 billion. Medicaid participation for families of fast-food workers with adult enrollment is 19 percent and for families with children it is 18 percent. The cost for both is almost $4 billion a year.

In fact, U.S. taxpayers underwrite the low-wages paid to Dunkin' Donuts wait staff in the amount of $274 million in annual public assistance benefits. *Super-sizing Public Costs, supra, at 31*. That breaks down to $1704 for each of the more than 7000 employees

at Dunkin' franchise outlets. It takes little imagination to understand that employer-imposed tipping bans can only contribute to raising the hidden public costs that taxpayers assume for the already low wages paid to quick service coffee servers and other fast-food workers.

No-tipping policies and employer appropriation of employee tips are part and parcel of a pattern of wage and hour law violations that are now endemic in the restaurant industry. Just last fiscal year, the Boston office of the U.S. Department of Labor conducted 165 investigations into the restaurant industry that resulted in more than $1.7 million in back wages. *See For many Restaurant Workers, Fair Conditions Not on Menu,* THE BOSTON GLOBE, op-ed, Feb. 16, 2014, 2014 WLNR 4274642. Consider in this light the patent violations of the Tips Act that accompanied Scrivanos' no-tipping policies: demands that Dunkin' Donuts employees "throw tips into the garbage"; employer use of tips to purportedly cover employee theft and "shortages" in the cash register; and pouring entire cups of money into the cash register that were unquestionably intended as tips for wait staff. *See generally Meshna,*

Memorandum of Decision and Order on Defendants' Motion for Summary Judgment, SUCV2011-01849-BLS1 at 5-19.

The economic realities of this industry lend no support to any meaningful argument that tipping bans are born of business necessity. Competitive pressures do not explain the low-road economic model in the restaurant sector; the industry is expanding and is largely immune from the downward push that international competition creates in other economic sectors. *See For Many Restaurant Workers, Fair Conditions Not on Menu,* THE BOSTON GLOBE, Feb. 16, 2014, 2014 WLNR 4274642.

The record in this dispute underscores the Globe editors' point; low-road employment practices "do not represent an efficient, market-driven distribution of labor." *Id.* As Judge Billings noted, the no-tipping policy actually placed Defendants at a competitive disadvantage in the labor market of the Metro West suburbs. *Meshna,* Memorandum of Decision and Order on Defendants' Motion for Summary Judgment at 5, n. 5. This resulted in the Defendants withdrawing the no-

tipping policy at some of its Dunkin outlets "after receiving pressure from his operations people." *Id.*[10]

In fact, no-tipping policies compromise the well-being of the Commonwealth's low-wage workforce and burden its taxpayers. *See Parrish v. West Coast Hotel*, 300 U.S. at 399-400 (in which the Supreme Court famously stated that "[t]he community is not bound to provide what is in effect a subsidy for unconscionable employers"). It is often forgotten that wage and hour laws were enacted in the first part of the twentieth century as part of an industrial policy to end widespread poverty and cycles of economic decline that accompanied the modern economy. *See* Marc Linder, *The Minimum Wage as Industrial Policy: A Forgotten Role*, 16 J. OF LEGIS. 151, 151-153 (1990). President Franklin Roosevelt, in his advocacy for the minimum wage, made this policy goal very clear by bluntly stating, "No business which depends for existence on paying less than living wages to its workers has any right to

---

[10] The genesis of Scrivanos' withdrawal of his no-tipping policy at some stores is explained by Judge Billings: "The problem was that most of the surrounding Dunkin' Donuts stores in the Metrowest area allowing [sic] tipping, so the defendants could not find any people to work at his stores, notwithstanding that they paid employees above minimum wage and spent over a hundred thousand dollars in advertising. Scrivanos was even forced to close some stores for want of staff." *Id.*

continue to exist in this country." Robert Pollin, et al., A MEASURE OF FAIRNESS: THE ECONOMICS OF LIVING WAGES AND MINIMUM WAGES IN THE UNITED STATES 4 (2008).

Tipped income is a lifeline for many because minimum wage jobs are not lifting workers out of poverty and squalor, much less allowing workers to live adequately in any major U.S. metropolis. The living wage in Boston, which is now calculated at $12.65 per hour for a single individual and $22.40 for a family of four, is almost 60 per cent higher than the Commonwealth's minimum wage.[11] *See Living Wage Calculation for Boston, MA.*, http://livingwage.mit.edu /places/2502507000(prepared by Dr. Amy K. Glasmeier and MIT)(last visited March 18, 2014). However, allowing wait staff to receive patron tips without employer interference, as envisioned by the Tips Act and this Court's precedent, provides -- at no cost to the employer - an immediate, meaningful boost in earnings for these workers.

---

[11] Legislation increasing the Massachusetts minimum wage is scheduled to take effect on January 1, 2015. However, the minimum wage will not reach even $11 per hour until January 2017. An Act Restoring the Minimum Wage and Providing Unemployment Insurance Reforms, Ch. 144, §§ 28-36 of the Acts of the General Court, June 26, 2014.

Given the real impact that tipped income has on earnings, this Court should reject employer no-tipping policies, not only because they conflict with the text and purpose of the Tips Act but also because tipping bans serve no rational public policy goal.

IV. CONCLUSION

This Court should reverse the Superior Court's rulings and find that the Defendants' no-tipping policy violates Section 152A of Chapter 149 of the General Laws, effectively discouraging patrons from leaving tips for protected wait staff employees and prohibiting employees from accepting tips.

Respectfully Submitted,

University of Massachusetts
Labor Relations and Research
Center

By Its Attorney,

Harris Freeman (ARR)

Harris Freeman
BBO # 564353
Western New England
University Law School
1215 Wilbraham Rd.
Springfield, MA 01119
Tel: 413-221-3746
HFreeman@law.wne.edu

Massachusetts Fair Wage
Campaign

By Its Attorney,

Audrey R. Richardson
BBO # 630782
Greater Boston Legal Services
197 Friend St.
Boston, MA 02114
(617) 603-1662
Arichardson@gbls.org

Dated: October 20, 2014

Certification of Compliance

I hereby certify that this brief complies with the rules of this Court pertaining to the filing of briefs.

Harris Freeman (ARR)

Harris Freeman, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2014, I caused a true copy of this document to be sent to counsel for Defendants, Diane Saunders and Andrew Edward Sylvia, Ogletree, Deakins, Nash, Smoak & Stewart, PC, One Boston Place, Suite 3220, Boston, Massachusetts 02108, and counsel for Plaintiffs, Shannon Liss-Riordan, Lichten & Liss-Riordan, 729 Boylston St., Suite 2000 Boston, Massachusetts 02116, by first class mail.

Harris Freeman (ARR)

Harris Freeman, Esq.