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TIPPED OVER

How Akin Gump managed to grind out a win in a critical case for longtime client Starbucks.

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Like millions of people, Daniel Nash heads to his nearest Starbucks every morning and orders a grande cup. "I don't really go for the cappuccinos or lattes," says the Akin Gump Strauss Hauer & Feld labor and employment partner and longtime Starbucks Corporation attorney. "The drip coffee, Gold Coast blend, is my favorite."

As a Starbucks regular, Nash is well acquainted with how the chain serves its coffee. Behind every successful caramel macchiato or cinnamon dolce frappuccino is a team of green apron–clad employees—one takes the order, another works the gleaming espresso machine, yet another may finish off the drink by tapping in just the right amount of sugar. And if Nash wants to say an extra "thank you" for his personalized caffeine fix, he does what many Starbucks customers do: He drops some change into the 4-inch Plexiglas cube that sits by the register at every store—a tip to be divided among all those helping hands.

As familiar as Nash is with Starbucks's operations, he wasn't feeling particularly confident when he stepped into a San Diego courtroom two years ago to defend the company's long-standing policy for dispersing the tips collected from those plastic containers. At issue in the $100 million California superior court class action case: the claim by 120,000 Starbucks baristas that the company violates state labor laws by letting shift supervisors take some of those tips. In its defense, Starbucks maintains that the supervisors and the baristas essentially do the same job and should therefore share the tip proceeds.

For Starbucks there was more than money at stake. A loss would deal a serious blow to the company's unique style of selling coffee. Nash says Starbucks considers its teamwork approach a "core principle" of the "legendary customer service" that has helped it build itself from a single small Seattle café into an internationally recognized brand with thousands of stores around the world. From the start, Nash and his Akin Gump team were sure of three things: Settlement wasn't an option, Starbucks's policy was fundamentally right, and the company was likely to lose at the trial court level.

Jou Chau, who worked as a barista at two Southern California Starbucks stores between the summer of 2003 and January 2005, sued over the tip policy in October 2004. In his complaint, Chau alleged that the company "had a consistent policy of requiring its baristas within the state of California . . . to pool their tips with supervisors in violation of Labor Code section 351." He sought "tip reimbursements, waiting time penalties, injunctive and other equitable relief."

Section 351 says an employer or agent can't take or receive tips left for employees. The law defines an agent as anyone who has the authority to supervise, direct, or control workers. Chau's position was that the Starbucks shift supervisors are agents under section 351. And if they're agents, they should not be allowed to share in the tips left at the register.

Starbucks's position was straightforward enough: The tip policy was proper because the primary role of the shift supervisors (also known as "shifts" or "shift leads") was to serve customers, just like the baristas. While they do have some additional duties, such as opening and closing stores, supervisors don't have any real authority, the company argued. To Starbucks, the supervisors are basically senior baristas.

The Akin Gump trial team felt that its arguments to defend Starbucks's position were solid, and that it had the evidence to back them up. From the beginning, though, as Nash and his colleagues sought to have the case dismissed and then fought against class certification, they knew they faced an uphill battle. The reason: Superior court judge Patricia Cowett's early rulings made it clear that the case—at least at trial—would turn on her belief that the shift supervisors fit section 351's definition of "agent," regardless of their main job functions. Cowett, says Catherine Conway, an Akin Gump labor and employment partner, "viewed the labor code statute very differently than we did."

The judge's tentative ruling on class certification in April 2006 offered one big clue in that regard: "Defendant argues that shift supervisors sometime work as baristas, thus making them

indistinguishable," she wrote. "Contrary to defendant's argument, it is irrelevant that the shift supervisors also serve drinks, clean, and perform other barista duties." In issuing her opinion, Cowett cited a 2003 California tip-pooling case, *Jameson v. Five Feet Restaurant Inc* ., that centered on a restaurant's policy of requiring servers to share 10 percent of their tips with floor managers. The judge in *Jameson* had ruled, in part, that if floor managers are agents, their other duties don't matter. Cowett's interpretation of *Jameson*, the Akin Gump team realized, might well be insurmountable at trial.

The suit grew more challenging still later in 2006, when two of California's top plaintiffs firms got involved. Chau was originally represented by solo practitioner Terry Chapko and Eric Aguilera of plaintiffs firm Bohm, Matsen, Kegel & Aguilera. But after Cowett certified the 120,000-barista class, Chapko and Aquilera called in David Lowe of Rudy, Exelrod, Zieff & Lowe and Laura Ho from Goldstein, Demchak, Baller, Borgen & Dardian. Both firms are known in California as formidable foes in labor and employment cases, with Rudy, Exelrod having scored a $96 million jury award in a class action overtime case against Farm Insurance Exchange, and Ho's firm extracting multimillion-dollar class action settlements from such companies as Wal-Mart Stores, Inc., and Sprint Nextel Corporation.

"Our argument was clear," says Lowe. "Agents can't participate in a tip pool, and shift supervisors, who have the authority to direct, supervise, and control, are agents." If Starbucks wants to pay supervisors more for serving customers, he adds, it "should do so with higher wages."

It took two years from class certification for the case to make it to trial. As discovery proceeded, both sides filed summary judgment motions, and Starbucks also moved to have the class decertified. (Cowett denied all the motions.) The defense team's job got even tougher two weeks before trial: The plaintiffs amended their complaint, dropping their claim under the California labor code in favor of proceeding with just an accompanying claim under California's unfair competition law—guaranteeing that Cowett, not a jury, would decide the case. On the first day of trial, things got worse when the judge granted the plaintiffs' motions *in limine*, effectively barring Starbucks from presenting any testimony or evidence about shift supervisors serving customers or whom tips are left for. The ruling meant that the key defense argument—that supervisors were basically indistinguishable from baristas—was off-limits. The trial would now focus almost entirely on whether the supervisors qualified as agents under section 351. Says Conway: "We were disappointed, to say the least."

They decided to keep their eyes on the almost certain appeal. Akin Gump appellate lawyer Rex Heinke got involved, working to develop a trial record that could provide the basis for reversal. Even if it was over an objection, or as an offer of proof, the Akin Gump lawyers were intent on having their argument heard.

Within the first few minutes of his opening statement, Nash got right to the heart of that argument: Shift supervisors work side by side with baristas and spend 95 percent of their time performing the same job—preparing drinks, cleaning countertops, working the register. Their duties are so similar, Nash argued, that to patrons there's no difference between supervisors and baristas. And since they all serve customers in the same ways, Nash continued, it's only fair that they all share in the tips. Having a single tip jar for baristas and shift supervisors "is not some sort of scheme to divert compensation or avoid paying compensation," Nash told Judge Cowett. "This is a policy that has been developed to deal with the undeniable fact that customers leave tips, and a team of hourly part-time [employees] do the work that generates the tips."

Over the next two weeks, seven Starbucks executives, as well as 13 baristas and shift supervisors, were called to testify.

On the trial's third day, Chau, the lone named plaintiff in the case, took the stand. When it came time to cross-examine him, Nash used the occasion to poke holes in the argument that shift leads are agents. He got Chau to acknowledge that he wasn't micromanaged by the supervisors; that it was a store manager, not a supervisor, who listed his tasks on a duty roster; and that if things got busy, a shift supervisor would merely "suggest" he help others on the team and check in to see that he was completing his designated jobs. Nash also made the point during the cross-examination that—especially as Chau gained experience—he moved around the store to help others based on his own instincts, not at the direction of someone else. Under cross-examination, Chau also testified that he would help out less-experienced baristas and "point them in the right direction and give them tips here and there." Nash was trying to prove that senior baristas were no different than supervisors. Because of their experience, they could offer advice to keep operations running smoothly, but that didn't make them agents of the company.

Essentially ignoring Cowett's ruling on the plaintiffs' motions *in limine*, Nash pushed ahead with questions about shift supervisors' customer service responsibilities. While many of the questions drew objections from the plaintiffs' side, in the final moments of his cross-examination, Nash got Chau to confirm the crux of the Starbucks argument: that shift supervisors and baristas work in tandem to provide the service that generates the tips.

"You understood that the tips that were left in the store were left [by] customers who were receiving the beverages the way they liked them?" Nash asked.

"Yes," Chau responded.

"For legendary customer service, correct?"

"Correct."

"And the people who gave the legendary customer service were the baristas and the shifts when you worked, correct?"

"Correct."

"Thank you. No further questions."

A few days later, Starbucks called regional vice-president Nancy Bennett to the stand. The point of her testimony was to flesh out the duties of shift supervisors and baristas—a tricky proposition, given Cowett's motions *in limine* ruling. With Nash once again doing the questioning, Bennett testified that shift leads' responsibilities were to "provide great customer service, make great drinks, to keep the store clean," along with opening and closing stores, putting money into or removing from store safes, and coaching baristas. She explained that the supervisors "are basically responsible for that shift running as smoothly as possible and ensuring customer satisfaction," but that they have no authority to discipline, hire, or fire baristas. Their primary role, she said, is not to tell people what to do, but to provide customer service.

A critical moment came when Nash asked Bennett what portion of shift time a supervisor spends on serving customers; Lowe objected, and, with the anticipated appeal in mind, Nash made an offer of proof. "This witness," he said, "would testify that the shift supervisor, even while leading a shift, spends as much as and perhaps more than 98 percent of their time performing the very same customer service tasks and tasks on the duty roster that the barista performs." Throughout the trial, such offers of proof were often the only way Nash had of hammering his argument into the trial record.

As the Akin Gump lawyers expected, Cowett ultimately ruled against Starbucks. In a two-page opinion issued in February 2008, the judge wrote that the shift supervisors did indeed qualify as agents under section 351 because they possessed "sufficient authority to 'supervise' and 'direct' the acts of other employees."

The parties headed back to court for two more weeks, continuing their fight in the trial's "remedies" phase. The plaintiffs argued that Starbucks used its tip policy to avoid paying shift supervisors higher wages. Lowe and Ho called as witnesses expert statisticians and forensic accountants who had analyzed Starbucks's payroll and tip records to estimate what the baristas' hourly tip rate should have been. Starbucks countered by arguing that any award should exclude all class members who had become shift supervisors during the designated class period—from October 2000 through March 2008. The judge rejected that view completely and ruled that Starbucks owed the baristas roughly $87 million in misappropriated tips, plus 7 percent interest, for a total of more than $100 million. Cowett also granted the plaintiffs a permanent injunction barring Starbucks from continuing the tip policy at its California stores. The award touched off a torrent of bad press, and the company soon faced similar suits in New York, Minnesota, Massachusetts, and Pennsylvania.

"We obviously weren't happy, but we knew it was coming," Conway says. "We just kept plowing forward to the appeal."

Following that strategy ultimately paid off. A year after Cowett delivered her decision, Akin Gump's lawyers got to make their long-awaited argument before a three-judge panel of California's Court of Appeal for the Fourth District. The basis of that argument was the one the defense team had relied on from the start: that supervisors deserved a cut of the tips, because they did largely the same work as baristas. Then, on June 2, 2009, after nearly five years of legal wrangling, Starbucks and Akin Gump finally achieved vindication. The appellate court panel unanimously reversed the lower court's decision, ruling that even if shift supervisors were agents, the customer service nature of their work still entitled them to a share of tips under California law.

"Because a shift supervisor performs virtually the same service work as a barista, and the employees work as a 'team,'" the panel wrote, "Starbucks did not violate section 351 by requiring an equitable distribution of tips specifically left in a collective tip box for all of these employees."

Lowe, who says he believes Cowett "got it right," claims the appellate panel based its opinion on a "version of reality that didn't exist."

The Akin Gump lawyers obviously disagree. And as it turned out, their strategy—to cram as much testimony and evidence about how shift supervisors serve customers into the trial record—worked.

The plaintiffs petitioned the California Supreme Court to review the case, but that petition was denied. Meanwhile, most of the other tip-pooling suits were killed via summary judgment motions. One case is pending in Massachusetts, but Starbucks's lawyers don't view it as much of a threat.

Heinke, who argued the appeal, says the appellate court's decision "demonstrates that courts are going to be reluctant to take tips away from people who spend most of their time providing customer service." Something to keep in mind the next time you stop in at a Starbucks for a pick-me-up and drop a little something into that clear plastic cube. •