



CUSTOMERS, TIPS, AND LAW: GENDER AND THE PRECARIOUSNESS OF WORK IN BC RESTAURANTS

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Abstract :

“Rarely does the law see consumer involvement as affecting employment relations” (Albin 2010: 980). Yet with tipping, an institutionalized practice in restaurants, the role of the customer in employment relations is unavoidable because the customer directly impacts how much money employees earn. Tips influence the level at which minimum wages, in certain provinces in Canada, are set. Tips also influence the construction of “insurable earning” and a worker’s level of income replacement under the Employment Insurance (EI) system. The paper explores the legal treatment of gratuities in BC under the *Employment Standards Act* and for the purpose of calculating insurable earnings for EI premiums paid by employers and employees. The paper also draws on my ongoing doctoral research and interviews with former and current restaurant workers to describe how the presence of customers in restaurants impacts the income and work of women restaurant workers. The need to earn a good tip— which is reinforced by a lower minimum wage rate for alcohol servers—makes women particularly vulnerable to harassment at work from customers, contributing to precariousness in restaurant work. The institutionalized practice of tip giving (customer to employee) combined with the focus in restaurants on providing good “customer service” is influencing how unwanted sexual experiences of restaurant workers are happening, and how these experiences are being taken up by workers, and also managers.

Customers, tips, and law: gender and the precariousness of work in BC restaurants

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In the quotations below, two servers describe their work:

The first thing you would do, if you were doing an opening shift, is you get the condiments from the fridge and put them on the table—flies get in them if you leave them on the table so don't do that [*she laughs*]. And then go around and wipe off all of the tables, pick up salt and vinegars and stuff that need to be refilled— refill those. Make sure those are all clean because malt vinegar gets everywhere, and it stains everything, it's disgusting [*we both laugh*]. Turn the coffee machine on, turn the ice machine on—usually someone in the kitchen will do that but... sometimes they don't. Turn the teakettle on. Make sure all your ketchup and tarter sauces are filled up in the fridge. Make sure the cutlery is wrapped—we usually try to do it the night before, for closing, but sometimes it doesn't get done so we just do it in the morning...It's usually pretty slow in the morning so, [*she laughs*] if someone was just starting [a new employee] I would say just go around and maybe clean the windows and stuff, but in my case I just go talk to the cook in the back. And then we just wait for someone to come in. Sometimes it can be awhile. And then you seat them, bring them over the menus, pick up the extra cutlery on a table—if there's more cutlery than they need—ask if they want any drinks, go and get said drinks, bring them back, see if they are ready to order, or if they have any questions, then take their order, take the menus, go type [their order] into the machine....Then you wait for the food, bring it out...ask if there's anything else that they need, leave them alone for a few minutes, go back over and say: 'How's everything going?' Go away again, walk around, casually see if they need anything else, any more water, or drinks, or anything. And then wait until their plates are empty and take them away. And then once they're done, print out the bill, give them their little mint on top, bring it over, wait for them to come up and then ring them through. And yeah, that is serving a customer. (Janet)

Interacting with customers is 90 per cent of it. Especially cause that's—customers are the main focus. You gotta make sure that they're happy cause everything else doesn't really matter. No one is going to see my open or close, except for my manager, but everything that benefits customers is basically what we do. (Jenna)

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“Rarely does the law see consumer involvement as affecting employment relations” (Albin 2010: 980). Yet in restaurants, the role of the customer in employment relations is unavoidable, especially because of the practice of tipping. By tipping restaurant workers, customers directly impact how much money employees earn. In some provinces in Canada, tips given by customers influence the level at which minimum wages are calculated; for instance, in British Columbia, Alberta, Québec, and Ontario there is a

¹ This research would not be possible without the restaurant workers who generously give their time to me to share a part of their lives, thank you. This research is for them and for all restaurant workers. Thank you to Professor Judy Fudge for the guidance and encouragement you provide me with, and for reading an earlier version of this paper. Thank you also to Professors Hester Lessard and Dorothy Smith for your advice and support with this project. This research is supported by the Social Sciences and Humanities Research Council, the University of Victoria, and CRIMT (the Interuniversity Research Centre on Work and Globalization).

lower minimum wage for people who server alcohol.² In addition, tips can influence a person's benefits under the employment insurance (EI) system in Canada: with the exception of Québec, not all tips constitute "insurable earnings" for the purpose of calculating EI premiums and benefits, leading to some tipped employees receiving a lower income replacement level under the EI system. The insertion of customers in employment relations in the restaurant sector disturbs law's understanding of employment as a relationship between an employer and employee, and this is not a trivial problem.

In Canada, restaurants are the fourth largest source of private sector employment and provide the greatest proportion of entry-level jobs in the country (Canadian Restaurants and Foodservices Association 2010: 1-2). Twenty-two per cent of Canadians find their first job in restaurants, which employ one of every five young workers under the age of twenty-five (ibid.). When we eat out in restaurants, the people greeting us with friendly smiles at the door, taking our food orders and accommodating our special requests, mixing and pouring our drinks, preparing, cooking and delivering our meals, and washing our dishes are largely youth workers. Across Canada, 43 per cent of restaurant workers are between the ages of fifteen and twenty-four years old (Statistics Canada 2006b).³ Occupations within restaurants are also organized by gender and ethnicity. The "back of the house" (BOH), the area of a restaurant generally concealed from customers, including the kitchen, food preparation areas, and the manager's office is filled primarily by men: 67 per cent of cooks and chefs, 58 per cent of management, and 75 per cent of senior management positions are held by men (ibid.). Moreover, research reports published by the Restaurant Opportunities Centers United (2005) from the United States suggest that occupations in restaurants are segregated on the basis of ethnicity, with ethnic minorities and immigrants more likely to be found working "behind the kitchen door" (see also Jayaraman 2013). Meanwhile, the workers we interact with in the space we occupy as customers in restaurants, the space the restaurant industry calls the "front of the house" (FOH), are likely to be women: 80 per cent of hosts/hostesses, bartenders, and food and beverage servers are women (Statistics Canada 2006b).

The reliance an employee has on a customer for earnings can contribute to precariousness in work (Albin 2011: 184). This paper uses a multi-dimensional concept of precarious employment, which captures:

forms of work involving limited social benefits and statutory entitlements, job insecurity, low wages, and high risks of ill-health. It is shaped by employment status (i.e., self-employment or wage work), form of employment (i.e., temporary or permanent, part-time or full-time), and dimension of labour market insecurity as well as social context (such as occupation, industry, and

² In Québec the lower minimum wage extends beyond just alcohol servers to employees who receive tips more generally.

³ The data refer to workers in "full-service restaurants." Full-service restaurants are defined by Statistics Canada as "establishments primarily engaged in providing food services to patrons who order and are served while seated and pay after eating. These establishments may sell alcoholic beverages, provide take-out services, operate a bar or present live entertainment, in addition to serving food and beverages." While the statistics describe who tends to work in full-service restaurants, they are limited in doing so. For instance, Statistics Canada only collects data on persons who are fifteen years of age and older; and in British Columbia, for example, the legal age limit to work is twelve-years old.

geography), and social location (the interaction between social relations, such as gender and 'race,' and political and economic conditions). (Vosko 2006: 3-4)

“Precarious employment,” as a conceptual tool can draw attention to how restaurant work is being put together in a way that precariousness in work constructed, especially through law and policy. The tipping system, as an institutionalized practice in the restaurant industry, constructs precariousness in restaurant work in that income from tips is insecure. Moreover, a minimum wage rate that is lower for some restaurant employees who earn tips exacerbates a workers reliance on tips, intensifying the relationship between customers and employees, a relationship that exists beyond the boundaries of labour law. Importantly, restaurant work is also made precarious in that the need to receive a good tip makes women particularly vulnerable to enduring harassment at work by customers, and also coworkers.

What does the involvement of customers and the practice of tipping mean for the work⁴ and working environment in restaurants? This paper will explore the answers to this question by drawing on my on going doctoral research. My research explores restaurant work with a focus on the wide variety of unwanted sexual experiences of women working in restaurants. I employ a mode of inquiry developed by sociologist Dorothy Smith (1987, 2005, 2006) called institutional ethnography. Institutional ethnography is an approach to research concerned with explicating how our world is being put together so that we experience it as we do. The analytic goal of my research is to explicate and document how women’s diverse unwanted sexual experiences are happening, under material conditions of restaurant work, how the experiences are talked about, and how they are handled within the unique work environment of restaurants. In the course of my research, I am learning from women working as bartenders, bussers, and servers how the involvement of customers in their work relates to uncomfortable sexual experiences they encounter of the job.

This paper has two parts. In the first part, I will begin by discussing the liquor server minimum wage in BC, which allows for employers to pay alcohol servers below the regular minimum wage rate. I will then move into a discussion on how the practice of customers paying tips to workers in restaurants, and the redistribution of tips through “tip pool” practices have been interpreted under the *Employment Standards Act* (ESA)⁵ in BC, and also for the purpose of receiving benefits under the employment insurance (EI) program in Canada. Part two of this paper the draws on interviews I have conducted thus far with people who work or have worked in restaurants.⁶ In part two I will discuss the practice of tipping as a form of insecure income. I will also describe how the practice of customers tipping employees and customer service ideology relate to some of the unwanted sexual experiences faced by informants. The story this paper tells is as follows:

⁴ In my research I approach “restaurant work” with a generous conception of the term work. The purpose of doing so is to make visible what people do that may not be considered part of their job. For instance, while job advertisements for the position of a server may list “customer service” or “customer relations” as a list of job responsibilities, what this entails is absent from the job description. Part two of this paper will show that as part of their work in restaurants, women navigate between providing “good customer service” and dealing with harassment from customers; these navigations, or forms of managing one’s self, take effort and are work.

⁵ RSBC 1996, c 113.

⁶ So far I have conducted eleven interviews (with nine female and two male participants). All names used in this paper are pseudonyms.

in neglecting the involvement of customers in employment relations in restaurants, especially the practice of customers tipping employees, restaurant workers who rely on tips as a substantial portion of their income are left outside of the scope of labour law. These employees, who are mainly women, receive a lesser degree of protection. The tipping system is an insecure form of income and contributes to precariousness in restaurant work. Largely unregulated, the practice of tip giving (customer to employee) combined with the focus in restaurants on providing good “customer service” is influencing how unwanted sexual experiences in restaurants are happening, and how these experiences are being taken up by some workers, and also managers.

Part I

The liquor server minimum wage

The average weekly earnings of employees in “food services and drinking places” is \$337.76 (Statistics Canada 2012). Categorized as part of the broader “accommodation and foodservices” industry,⁷ these wages are the lowest among industries. Importantly, however, this figure is based on payroll surveys, and therefore may not include gratuities unless they are integrated into a payroll system. On May 1, 2011, when the minimum wage in British Columbia was raised from \$8.00 to \$8.75 per hour, the government introduced the liquor server minimum wage of \$8.50 per hour. In theory, the liquor server minimum wage applies to an employee “whose primary duties are as a server of food or drink or both,” and “who, as a regular part of his or her employment, serves liquor directly to customers, guests, members or patrons in premises for which a licence to sell liquor has been issued under the Liquor Control and Licensing Act” (Employment Standards Regulation 18.1).⁸ However, as I will discuss in part two of this paper, some employers, whether knowingly or not, take advantage of the lower minimum wage rate by paying employees the liquor server minimum wage when they should be paid the general minimum wage. Since the liquor server minimum wage was introduced, the general minimum wage, which is currently \$10.25 per hour, has been raised twice, by 75 cents each time. The liquor server minimum wage has also been raised twice, but only by 25 cents each time, bringing the wage to a current rate of \$9.00 per hour. Although the lower minimum wage appears to be a neutral regulation, because women make 81 per cent of food and beverage servers in BC (Statistics Canada 2006a) they are far more likely than men to be paid the lower minimum wage assigned to alcohol servers.

Prior to introducing the alcohol servers minimum wage, staff from the BC Ministry of Labour held meetings attended by “labour and business stakeholders” from December 2010 to February 2011 (British Columbia 2011a). Employer groups in attendance included the B.C. Restaurant and Food Services Association and the Coalition of B.C. Business. In the *Summary Report on Employment Standards Stakeholder Engagement Process*, a report that provides an overview of the key themes from the meetings, the position held by employer groups on a “separate gratuity rate” is described as follows:

⁷ Employees in the broader category including accommodation earn an average of \$366.98 per week.

⁸ BC Reg 396/95

Employer groups expressed very strong support for establishing a lower minimum wage for workers who receive gratuities, modeled along the lines of Ontario’s ‘liquor server rate’. In their view, this would provide cost relief to the food and restaurant industry that has been very hard hit by the implementation of the HST, recent changes to the laws governing drinking and driving, and the generally weak condition of the industry. They noted that in many licensed restaurants and bars, the servers earn more in wages and gratuities than anyone else, and that exempting these servers from the general minimum wage increase would make it easier for restaurant and bar owners to pay wage increases to employees who do not receive tips. (British Columbia 2011a: 5)

What the argument by the employer groups in favour of the lower minimum wage for alcohol servers did not mention, however, is the presence of “tip pools.” Tip pools are a tip-redistribution practice common in restaurants. Tip pools divide tips between workers, including those who would not be tipped directly by customers, for instance cooks, hosts, or bussers. Worker groups who attended the meetings held by the Ministry of Labour—including Employment Standards Advocates Coalition of B.C., and representatives from United Food and Commercial Workers—who opposed the liquor server minimum wage, pointed out the presence of tip pool practices in restaurants. The groups noted that tips are largely unregulated under the BC *Employment Standards Act*. According to the summary report, the worker groups argued: “if servers are required to rely upon gratuities for a larger portion of their earnings, then it would become necessary to enact regulations either to ensure that servers are allowed to keep all that they receive in tips or to set rules on how tips should be allocated within the tip pool” (British Columbia 2011a: 5). Unfortunately, however, no changes to the regulation of tips accompanied the introduction of the liquor server minimum wage.

The legal treatment of gratuities under employment standards legislation in BC

Paycheques don’t mean anything to me. I honestly forget when I get paid. It’s so funny the dynamic between the kitchen and the servers. We’ll be like, ‘is it, when’s payday?’ and they [the kitchen staff] know exactly when payday is because they rely on—that’s their income, whereas I’ll forget to cash a cheque for weeks. (Emily, a server and bartender)

In restaurants, tips can be earned in a variety of ways. A person working as a server or a bartender, may receive tips directly from a customer in an amount left at the discretion of the customer. Alternatively, a restaurant may use an auto-gratuity system, where an automatic service charge, which can vary in percentage, is added to a bill (e.g. when there is over a certain number of customers in a party). In other instances, workers other than servers, including cooks, dishwashers, and bussers may earn tips through a tip pool system, a practice that redistributes tips among employees. Tip pools are common in the restaurant industry, but the manner through which tips are collected and redistributed varies. Sometimes tips are pooled based on a percentage of sales, and sometimes tips are pooled based on a percentage of total tips a worker has earned. Employers or employees can manage tip pools. For example, tip pools might be formally collected from servers and bartenders by an employer, who later redistributes tips to employees who may not be paid tips from customers directly—for instance, hosts/hostesses, dishwashers, cooks, bussers, etc. In this case, tips are usually redistributed based on the number of hours one works, the position they work in, or “merit.” Alternatively, tips may be shared among employees without being physically passed through the employer. For instance, a server

may pay “tip-out” a bartender directly for pouring and making their drinks during a shift. As the quotation by Emily, which opened this section of the paper, suggests, tips can constitute the bulk of a server’s income. The significance of tips as income for restaurant workers combined with a lower minimum wage for alcohol servers raises an important question: how are tips treated under employment standards laws in BC?

Employment standards laws are enacted by the provincial, territorial, and federal governments in Canada and are designed to provide a base level of protection to workers who are not unionized. These laws are particularly important for restaurant workers, since in Canada, 93 per cent of food and beverage service workers⁹ and 88 per cent of chefs and cooks are not members of a union or covered by a collective agreement (Labour Force Survey 2013). In BC, under the *Employment Standards Act* (ESA), “wages” includes “salaries, commissions or money, paid or payable by an employer to an employee for work” and also “money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency” (Part 1 s.1). The definition of wages excludes “gratuities,” and “money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency” (Part 1 s.1 “wages” f and g). However, if gratuities are used by an employer to pay any business costs, this practice is an unlawful deduction and violates of s. 21 of the ESA.¹⁰ Furthermore, money required to be paid by employees for business costs “is deemed to be wages, whether or not the money is paid out of an employee’s gratuities” (s.21 (3)), and the money can be recovered under the ESA. For example, an employer cannot require an employee to pay for glass or plate breakages, instances when customers do not pay (e.g. a “dine and dash”), or till shortages. An employer who violates the ESA can be subject to a fine from \$500 to \$10,000.

In addition, the term “require” in section 21 of the ESA—“an employer must not require an employee to pay any of the employer’s business costs”—is supposed to be interpreted broadly and does not exclude a “request,” for the “Tribunal must be conscious of the fact of employee dependence on the employer and the opportunity this gives the employer to unduly influence an employee,” since “[w]hat might seem like an innocuous request in most situations may, in an employer/employee context, take on a very different hue.”¹¹ Requiring an employee to pay business costs violates the ESA, “regardless of whether an employee consented to those deductions or not.”¹² In determining whether money required to be paid to an employer constitutes a business cost, both the purpose of the payment and the question of who benefits from the payment should be considered.¹³ With this approach in mind, does the practice of pooling tips and redistributing them to

⁹ Defined as workers who greet and seat customers, mix drinks and serve food and beverages.

¹⁰ Section 21 “Deductions” reads: (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee’s wages for any purpose. (2) An employer must not require an employee to pay any of the employer’s business costs except as permitted by the regulations. (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee’s gratuities, and this Act applies to the recovery of those wages.

¹¹ Re Park Hotel (Edmonton) Ltd., (c.on.c. Dominion Hotel), [1999] B.C.E.S.T.D. No. 628 (QL), (29 June 1999), BCEST #D257/99 (Stevenson, Roberts, and McConchie), page 7.

¹² Re Amiri (c.o.b. Visio Hair and Skin Care), [2007] B.C.E.S.T.D No. 15, (QL), (2 February 2007), BCEST #D015/07 (Matsuno), page 3 para. 8.

¹³ Re GBC Banking Software Corp., [2007] B.C.E.S.T.D. No. 66 (QL), (10 August 2007), BCEST #D066/07 (Savage).

other employees violate the ESA as an unlawful deduction? The answer to this question is complex and conflicting.

In *Faux*,¹⁴ a case from the year 2000 and the Employment Standards Tribunal's "noteworthy"¹⁵ decision on the issue of tip pools, Gerry Faux worked as a server at Humpty's Family Restaurant. Faux was required to pay 2 per cent of her total daily sales into a tip pool that went to kitchen staff. The Employment Standards Tribunal confirmed a determination by the Director of Employment Standards who found that requiring employees to pay into a tip pool that would be shared with employees, who did not receive gratuities, was not an unlawful deduction and did not contravene section 21 of the ESA. In confirming the determination made by the Director, the adjudicator wrote:

Section 21 of the Act prohibits an employer from withholding, deducting or requiring payment of all or part of an employee's wages for any purpose. The Determination concludes that tip pool sharing, a common practice in the service industry, does not contravene Section 21. In light of the definition of 'wages' in the Act, which does not include gratuities or tips, as wages under the Act, I can see no error in that conclusion.¹⁶

However, there was no discussion in the adjudicator's decision on how "gratuities" differ from "wages" under the ESA, or whether or not tip pools constitute an employer's business cost. Instead, tip pools were not considered a violation of the ESA for the simple reason that gratuities are not "wages" under the Act. But if wages under the ESA include "money, paid or payable by an employer to an employee for work," and also "money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency" (Part 1 s.1), then how are gratuities that are initially paid by customers, but collected by employers to be redistributed to employees to be categorized? The illogical answers to this question, provided in the *Faux* decision and in case decisions that followed, illustrate the challenges of fitting tipping practices, that originate from customers, into a law intended to govern relations between employers and employees.

In *Pfeffer*,¹⁷ a decision from 2002, an adjudicator considered the difference between wages and gratuities. The case dealt with the issue of whether gratuities received by an employee of a catering company were wages for the purpose of calculating vacation pay. What the employer called "gratuities" that were paid to the employee by the employer, originated from an automatic service charge added to a customer's bill for food and services. The employer determined the amount of the service charge that a customer would pay—10 to 15 per cent of the bill—and divided this amount among the catering manager, chef, and servers. The employer determined the amount paid to each employee to "reflect the amount of work by each person relative to his or her fellow workers."¹⁸ The adjudicator's decision reads:

¹⁴ *Faux* [2000] B.C.E.S.T.D. No. 04 (QL), (19 April 2000), BCEST #D150/00 (Stevenson).

¹⁵ The Employment Standards Tribunal identifies "Noteworthy Decisions of the Tribunal" on its website. The decisions are not legally binding precedents but are "a guide to the Tribunal's interpretation of the *Employment Standards Act*" to "ensure that similar cases are treated consistently" (see: <http://www.bcest.bc.ca/leading/welcome.htm>).

¹⁶ *Faux*, p.3.

¹⁷ *Compass Group Canada (Beaver) Ltd. and Pfeffer* [2002] B.C.E.S.T.D. No. 376 and 398 (QL), (13 November 2002), BCEST #D504/02 (Collingwood).

¹⁸ *Compass Group Canada (Beaver) Ltd. and Pfeffer*, p. 3.

Unlike the term ‘wages’, the term ‘gratuities’ is not defined in the Act. It can be concluded from the definition of the term ‘wages’, however, that gratuities are to be distinguished from money which is paid or payable for work and also money which is paid or payable as an incentive and relates to hours of work, production or efficiency. It follows *that it is unimportant that an employer may call a payment ‘a gratuity’*. *If what is said to be a gratuity is money paid or payable for work, or money paid or payable as an incentive to work and relates to hours of work, production or efficiency, the amount paid or payable is to be treated as wages.*¹⁹ (emphasis added)

The adjudicator found the money paid to employees by the employer, which originated from an automatic service charge added to a customer bill to be wages, not tips. In defining gratuities the adjudicator wrote: “I find that gratuities are payments for service that are discretionary and not related to an employee’s hours of work, production or efficiency but qualitative or intangible aspects of the service. My reading of the definition of wages is that a payment that is by the employer and discretionary is to be considered wages unless it is not related to hours of work, production or efficiency in any way.”²⁰ Thus the adjudicator differentiated between money paid by a customer at his or her discretion (gratuities), and money paid by a customer at the discretion of the employer through a mandatory service charge that is, in turn, is paid to employees based on the amount of work performed (wages).

In *Marcello Pizzeria and Restaurant*,²¹ a decision on tip pools from the year 2010, an adjudicator confirmed the decision from *Faux* (tip pools do not violate the ESA), however, added that “if an employer used gratuities to cover its business costs, such would constitute a contravention of sections 21(2) and 21(3) of the Act.”²² At the end of each shift Mr. Christellar, a server, paid into two tip pools. For the purpose of this analysis, I will label the two tips pools tip pool (a) and tip pool (b). Tip pool (a) was a required tip pool that was based on a percentage of tips and the was divided among the busser, bartender, hostess, food runner, and drink runner. Tip pool (b) was also a required tip pool, but it was equal to 2 per cent of the server’s gross sales (rather than a percentage of tips) and was paid to the employer (“the house”) who then paid the kitchen staff. Only tip pool arrangement (b), the house tip, was at issue in the case. In agreeing with the determination by the director, tip pool arrangement (a) was not considered an unlawful deduction. With tip pool (b) the kitchen staff was paid in a form the employer referred to as a “bonus,” but the payment came from the house tip pool collected from servers. The delegate found that the employer was “intimately involved with the tip pool business given that the house tip was based on total sales rather than gratuities and that it was a policy that servers contribute to the house tip.”²³ In referring to the Delegate’s determination, the adjudicator’s decision reads:

[The employer’s] payment of a bonus to the kitchen staff from the house tip did contravene the Act on the basis that such a policy ‘had the effect of increasing the wages of the kitchen staff through the payment of discretionary bonuses which come not from gratuities received directly through a tip sharing scheme, but rather are paid by the restaurant as wages’...the mandated

¹⁹ Compass Group Canada (Beaver) Ltd. and Pfeffer, pp. 5-7.

²⁰ Compass Group Canada (Beaver) Ltd. and Pfeffer, p. 6.

²¹ Re *Marcello Ristorante & Pizzeria Ltd.* [2010] B.C.E.S.T.D. No. 42 (QL), (20 April 2010), BCEST #D042/10 (Roberts).

²² Re *Marcello Ristorante & Pizzeria Ltd.*, p. 3 at 12.

²³ Re *Marcello Ristorante & Pizzeria Ltd.*, p. 3 at 14.

contribution to the house tip was simply a way of passing on some of the payroll costs to the servers. (emphasis added)²⁴

The case differentiates between (a) required tip pool payments based on a percentage of *tips* that redistribute gratuities to staff, and (b) required tip pool payments that are based on a percentage of *sales* that redistribute gratuities to staff. In tip pool arrangement (a), the money paid to staff is not considered “wages” and does not violate section 21 of the ESA. In tip pool arrangement (b), the money paid to the staff is considered “wages” and does violate section 21(2) and 21(3) of the ESA. The adjudicator’s decision, which draws on the *Pfeffer* case, reads “Gratuities are payments for service that are discretionary and not related to an employee’s hours of work, production or efficiency and are not considered wages. (*Pfeffer*, BC EST #D504/02) *If the payments are guaranteed, or are related to hours worked and efficiency, they will be considered wages* [emphasis added].”²⁵ Given this definition of a gratuity, it is unclear why payments received by employees through tip pool arrangement (a) would not be considered wages.

The adjudicator’s decision did not get into the details of how tip pool arrangement (a) was collected and redistributed to staff, other than the fact that the tip pool was based on a percentage of tips, rather than sales, and the employees in the tip pool (the bartender, hostess, food runner and drink runner) received their tips in cash. Although the money for tip pool arrangement (a) may not have physically gone through the employer’s hands (the decision did not provide this information), similar to tip pool (b), servers were required to pay into tip pool (a) and the effect of the tip pool increased the amount of money paid to staff (bussers, hostesses, and bartenders), and decreased the amount of money earned by servers.

To summarize the three decisions analyzed above, tip pools do not violate the ESA because gratuities are not wages (*Faux*), but tip pools can, however, violate the ESA if the payments from an employer are guaranteed or related to hours worked and efficiency (*Marcello Pizzeria and Restaurant*). In addition, gratuities that are paid to employees after they are collected by an employer from a customer via an automatic service charge are “wages” under the ESA, and therefore must be included in calculating vacation pay. Since *Faux*, *Pfeffer*, and the *Marcello Pizzeria and Restaurant* decisions, the liquor server minimum wage was introduced. Although the lower minimum wage rate for liquor servers is premised on the assumption that these workers earn tips, the use of gratuities for tip pools is a practice that remains tangled in complicated legal terrain.

Moreover, information regarding lawful and unlawful tip pools is not adequately being shared with restaurant employees or employers. Although the Employment Standards Branch in BC publishes educational materials such as “factsheets,” and one in particular for restaurant employees (British Columbia 2011b), there is no information on the factsheet pertaining to tip pools. Moreover, information on tip pools that is being passed to the restaurant industry from organizations such as “go2”—an organization that serves the tourism and hospitality industry in BC with members including the BC Restaurant and Foodservices Association—is incomplete and misleading. On go2’s website, in a section on legal resources pertaining to the ESA, the website reads: “an employer is permitted to require employees to pool their tips and to make arrangements

²⁴ Re *Marcello Ristorante & Pizzeria Ltd.*, *ibid.*

²⁵ Re *Marcello Ristorante & Pizzeria Ltd.*, p. 7 at 39.

for this pool to be shared with those employees who work in positions that otherwise have no access to tips” (go2 2013). While this statement may be an accurate reflection of *Faux*, it does not reflect the more complicated and restrictive legal treatment of tip pools from *Marcello Pizzeria and Restaurant*.

Tips, the *Employment Insurance Act (EIA)*,²⁶ and the construction of “insurable earnings”

The employment insurance (EI) system, formally the unemployment insurance system, provides some form of income security to people who are absent from paid work. Employers and employees fund the EI system by paying EI premiums.²⁷ EI includes regular benefits (for people who lose their job), benefits for unemployed fishers, and special benefits (maternity, parental, sickness, or compassionate care benefits). In the EI system there are different modes of coverage: those based on eligibility which determine who can/who must contribute to EI and who qualifies for EI benefits; and forms of coverage related to the “adequacy of coverage” which determine the duration and level of benefits (Vosko 2012: 61). However, as Vosko (2012: 59) has argued, there is a disjuncture between the EI system and labour market realities, and “distinctions between different types of work for remuneration (self or paid employment) and among forms of paid employment (part-time or full-time, temporary or permanent) operate to fully or partially exclude certain categories of workers.” For instance, solo self-employed persons are not eligible for regular benefits. This exclusion burdens immigrants and older persons who are overrepresented as solo self-employed workers, and women and young people who are overrepresented among the solo self-employed who are earning \$20,000, or less, annually (Vosko 2012: 62-63). In addition to distinctions between different types of work, distinctions made between different types of *remuneration*, exclude specific forms of remuneration, leading to lower levels of income replacement. The consequences of such an exclusion particularly impact servers in restaurants, the majority of whom are women.

Under the *Income Tax Act*,²⁸ all tips constitute taxable income earned in respect of employment. But how are tips treated for the purpose of EI? Benefits under EI are calculated based on an employee’s “insurable earnings.” According to Canada Revenue Agency (2012) (CRA)—responsible for administering federal tax laws and most provincial and territorial tax laws, and for delivering economic and social benefit programs through the tax system—the answer to whether tips received in the course of employment constitute insurable earnings under the *Employment Insurance Act* depends

²⁶ S.C. 1996, c.23 [*EIA*].

²⁷ The obligation to pay premiums is set out in sections 67 (employee’s premium) and 68 (employer’s premium) of the *Employment Insurance Act*. The premiums are calculated by multiplying the employee’s “insurable earnings” by the premium rate. The employer pays a premium equal to 1.4 times the employee’s premium. The 2013 premium rate for an employee is 1.88 % (this means that an employee pays \$1.88 in EI premiums for every \$100 of insurable earnings). An employer pays 1.4 times this amount, so \$2.63 per \$100 of an employee’s insurable earnings. Québec has a different premium rate (of 1.52%) because the province administers its own maternity, parental, and paternity benefits under the Québec Parental Insurance Plan. The maximum annual insurable earnings for 2013 is \$47,400, meaning that employer’s and employees will pay EI premiums on insured earnings up to \$47,400 (see Government of Canada 2012, 2013).

²⁸ R.S.C., 1985, c. 1 (5th Supp.).

on “whether the tips are considered to have been paid by the employer (controlled tips), whether they are considered to have been paid by the client (direct tips) or whether they are declared tips in the province of Québec.” Controlled tips are defined by the CRA as gratuities that are controlled by the employer, and are considered to have been paid by the employer. Whereas tips that are paid directly by a customer and are not at all controlled by an employer, are called direct tips (Canada Revenue Agency 2012). The CRA gives the following five examples of **direct tips**:

- 1) A client leaves money on the table at the end of the meal and the server keeps the whole amount;
- 2) A client gives a tip directly to a bellhop, door person, car attendant, porter; etc.
- 3) Tips pooled and/or shared among employees in a manner determined by the employees (as opposed to the employer);
- 4) When paying the bill by credit card, a client includes an amount for a tip on the credit card and the employer returns the tip amount in cash to the employee;
- 5) When paying the bill by debit card, a client includes an amount for a tip and the employer returns the tip amount in cash to the employee;

The category of “direct tips” applies when the employer does not control the tip amount and has no control over the tip distribution. “In these situations, the employer is merely a conduit for the tip from the client to the worker” (Canada Revenue Agency 2012). In contrast, the CRA gives the following six examples of **controlled tips**:

- 1) The employer adds a mandatory service charge to a client's bill to cover tips;
- 2) The employer adds a percentage to a client's bill to cover tips;
- 3) Tips allocated to employees using a tip sharing formula determined by the employer;
- 4) Tips that an employer includes in his business income, later expenses and redistributes to employees in the form of pay;
- 5) Tips that the employees are required to turn over to their employer and are later distributed to the employees;
- 6) Cash tips that are deposited in the employer's bank account and become the property of (or even commingled with the property of) the employer and subsequently paid out to the employees.

The category “controlled tips” indicates “employer control/employer possession over the tips” (Canada Revenue Agency 2012). Controlled tips constitute insurable earnings and, in theory, are subject to EI premiums paid by the employer and employee. On the other hand, direct tips do not constitute insurable earnings and so EI deductions cannot be made from direct tips. This in turn, impacts the adequacy of benefits from the EI system a person is eligible for, since a person’s level of benefit is calculated using their “insurable earnings.”

For instance, the insurable earnings of a server who only makes direct tips is constructed using her wages, and if she is an alcohol server in British Columbia, her wage is \$9.00 an hour. If, for example, she takes a maternity leave, the amount she will be eligible to receive from the EI system is calculated at a rate of 55 per cent of “average insurable weekly earnings” (her wage of \$9.00 per hour). Moreover, even though there is an EI Family Supplement for low-income earners,²⁹ which increases the benefit rate from 55 per cent to a maximum of 80 per cent, the rate still applies only to insurable earnings (Service Canada 2012). Given that the level of benefits for restaurant workers receiving direct tips is based on their weekly earnings (from their hourly wage), it is important to

²⁹ A net family income of \$25,921 per year or less.

point out the prevalence of part-time work in restaurants. According to 2006 census data, 68 per cent of full-service restaurant workers in BC worked part time or part year.³⁰ Moreover, 61 per cent of part time/part year workers were women, compared to 45 per cent of full year full time workers³¹ who are women (Statistics Canada 2006a). Importantly, the disadvantaged position that tipped workers, such as servers, are put in by excluding direct tips from insurable earnings is not an insurmountable problem.

In the province of Québec, there is no direct/controlled tip distinction in determining whether or not tips are insurable earnings for the purpose of EI. In the 1997-1998 Québec budget speech, under the heading “Rectify the situation of tip employees and improve their social protection,” the budget speech read: “we will ensure that restaurant and hotel workers enjoy the same fringe benefits as other workers. To this end, our government will require that a written agreement, negotiated between the employer and employees in each establishment, be an integral part of the employees’ work contract” (Québec 1997: 34-35). Since January 1, 1998, under the Québec *Taxation Act* employees in regulated establishments³² have been required to declare to their employer: tips received directly from customers, tips received from both employee and employer run tip pools, and tips paid into tip pools (s. 42.8). Employment insurance premiums are paid on the amount of declared tips, and therefore the tips are included as insurable earnings for the purpose of calculating the EI premiums paid by employers and employees. Without eliminating the direct/controlled tip distinction, workers who receive direct tips will continue to have a lesser level of protection under the EI program than other workers.

Part II

The insertion of customers into work relations troubles our understanding of the employment relationship and makes it difficult to regulate their involvement. Part one of this paper described the introduction of the liquor server minimum wage, a rate that pays alcohol servers below the regular minimum wage because of the assumption that these workers are earning tips. Part one also documented the complicated treatment of gratuities and tip pools under the ESA. Trying to fit tips and tip pool practices into a law that governs relations between employers and employees is messy because essentially, gratuities are paid by customers. Similarly, determining whether or not tips are insurable earnings for the purpose of paying EI premiums (an obligation of the employee and the “employer,”) is difficult because gratuities originate from customers. And, with the exception of Québec, workers who earn direct tips are provided with a lower income replacement rate under EI than other workers. Overall, customers are actively involved in employment relations in restaurants through the tipping system and their involvement challenges the current legal paradigm.

This part of the paper will describe how customers involvement in restaurant work shapes the income and the work of employees and impacts the work environment in restaurants. I focus on the work of front of house employees who interact with customers. I will begin by discussing the precarious income of restaurant workers. From there I will

³⁰ People in this category “worked less than 49 weeks or worked mostly part time.”

³¹ Full year full time workers “worked 49-52 weeks in 2005, mostly full time.”

³² Including for example, hotels, restaurants, bars and lounges, 1997, c. 85, s. 44, s. 42.6.

describe the tipping of workers by customers and the customer service focus of restaurant work and how these two elements relate to unwanted sexual experiences that some women in restaurants are experiencing.

Precarious Income

The liquor server minimum wage, a wage that is lower than the regular minimum wage, reduces restaurant employers' minimum wage obligations to liquor servers. This approach to setting minimum wages legitimizes the practice of customers tipping employees in restaurants and reinforces a worker's reliance on tips received from customers; thus, the relationship between liquor servers and customers is reinforced. The income of restaurant workers is precarious, or unstable, for a number of reasons, including: employers may be paying workers the lower, liquor server minimum wage when they should be paying workers the regular minimum wage; tip pool practices may not be transparent, and in some instances employers may keep all tips from employees; some tip pool practices, such as those based on a percentage on sales rather than a percentage of gratuities, can lead to servers paying money out of their own pockets; and, overall, tips, which are dependent on customers, are not a reliable source of income.

The worker groups who voiced their arguments to the Ministry of Labour, prior to the introduction of the 2011 minimum wage regulation for alcohol servers, argued: "any regulatory structure that provides a lower gratuity rate for liquor servers is likely to be very complex and open to abuse" (British Columbia 2011b). Unfortunately, the worker groups were right. With the introduction of the liquor server minimum wage, some employers are taking advantage of the lower minimum wage rate by paying employees the lower rate when they should be paying them the regular minimum wage.

For instance, Erin—a woman I interviewed—is not a server. She is a member of a restaurant's "support staff." Erin sets tables with cutlery, pours water, clears dirty dishes, and supports the servers by responding to their requests for extra help. Erin is being paid the liquor server minimum wage, even though she has tried telling her employer that she is supposed to be paid the regular minimum wage: "I talked to them, 'Hey listen, serving alcohol is not part of my primary duties, may I please be paid what I'm due.' And to this day I'm getting paid \$9.00 an hour, so that went well." At a different establishment Erin worked in, where she also received the lower minimum wage rate but was not a liquor server, she spoke to her employer and her pay was adjusted. Similarly, a server, Janet, has also been paid the liquor server minimum wage when she should have been paid the regular minimum wage. Janet was paid the liquor server minimum wage, even though the restaurant where she worked did not have a liquor licence, she recalled:

There was a period of about 6/7 months or something where he [the employer] didn't have a liquor licence so we couldn't sell liquor, but we were still getting paid \$9.00 an hour, even though we weren't a liquor selling establishment at the time. And some people were kind of mad about that, I didn't really care cause, it doesn't really make that much of a difference to me. We're making tips anyways, and we don't really sell that much liquor. So, but yeah, there was that little bit of time when we were getting just \$9 an hour, even though we didn't have liquor.

Janet was not too bothered by her employer paying her the wrong wage because even with a liquor licence, the restaurant did not sell that much liquor—meaning liquor did not

drastically increase her sales, and in turn, her tips. In addition, Janet does not keep all of her tips, and unlike other servers, her income from tips does not seem to fluctuate. Her employer pays her a flat six dollars an hour in tips. Janet described the tip pool system where she works:

So we take all the tips and everything and put it into the cash register, and then we get tipped out every Friday. It's tip pool, and it's split up by how many hours you did. He [the restaurant owner] does it so that, we get paid \$9 an hour, and then on top of that he bumps it up to be \$15 an hour...\$6 an hour worth of tips. And then, whatever is left he divvies out evenly between everyone, but um, he doesn't actually do that because he's lazy. So he just pretty much does the fifteen even.

Janet elaborated on how she receives her tips: “You either get them in a sandwich bag with your name written on it, or you go in and say [to the manager], ‘Bob, can I have my tips?’ And then he pulls out his wallet and grabs out the money and gives it to you.” Karen, who worked as a server and bartender for a restaurant that also held banquets, experienced an employer keeping all of the tips paid by customers through an automatic gratuity system. As Karen explained:

Gratuities from the banquets would be built into our paycheque, which was minimum wage at the time plus the gratuities. And then you would earn tips on top of that, sort of from individual people. Um, and for that—unfortunately, the restaurant I was working at went under and so instead of saving the gratuities for the wait staff they would spend them right away and then we wouldn't get that on our paycheque.

She recalled this practice going on for about two months, and then she quit.

While all forms of tip pooling will impact the amount of income from tips a worker earns, some can be more disadvantageous than others. For instance, tip pool arrangements based on a percentage of sales, rather than a percentage of tips, can disadvantage a server who, for a number of reasons, earns low tips during a shift. And some reasons, including cultural differences in tipping patterns that vary between countries, are entirely out of a server's control. With tip sharing arrangements that are based on a percentage of sales, in the worst instances, servers may have to pay out of their own pockets when they do not make enough tips during a shift to cover the required tip-pool payment. In the following paragraph, Erin, who worked as a busser, clearing and setting tables, discusses the drawbacks of the tip-pool system that is based on a percentage of sales:

It really sucks on nights that people don't tip well because I mean, I've seen tables where they have like a \$400 bill and the guy left the server—who did an amazing job—he left her like twenty bucks, which is kind of ridiculous... I've seen servers have to tip out the kitchen and bar out of their own pockets. And then to the bussers they are kind of like, ‘Oh here's \$10. I'm sorry, I didn't do good that night.’ And you're sort of like, ‘Yeah don't worry about it.’ Cause you know, you kind of get into feedback where it's like ok, that's my friend, they didn't make any money, their currently loosing money on a shift, so there is kind of like that understanding.

The lower minimum wage rate for alcohol servers, combined with the lack of protection servers have regarding tip pool arrangements run by employers, is concerning, especially because tips in general are an insecure form of income.

Tips are a form of precarious income because—with the exception of automatic gratuity or service charges—tips are paid at the discretion of customers. The amount a server earns through tips depends on a number of factors. To begin with, customers must be present in a restaurant. The volume of customers can depend on the day of the week, the time of the day, the popularity of the restaurant, the restaurant's location, a customer's attitude towards tipping, and so on. I asked Jill, a woman with eight years of experience working in different establishments from a family diner to a restaurant/pub, about the highs and lows of the tips she earned. Jill recalled making over \$600 dollars in one night working as a cocktail waitress in a liquor-primary pub during a shift from 9 pm to 1 am. However, Jill went on to discuss much lower amounts of tips earned, and, in her own words, described tips as “not very reliable”:

But then there's other times...we get a lot of tourists...so especially depending on where they come from, they may or may not tip. Or, if they do, they don't tip like the Canadian, or the BC I guess, 15 per cent kind of standard as in that's where you start and go above and beyond that. So that's when you notice, you're like 'This sucks. I'm tipping out all of my tips, pretty much. I'm going home with twenty bucks and I sold nine hundred.' It's just so—it's not very reliable.

In addition to the particular tipping practices of a customer, the amount a server earns through tips can also depend on the section of a restaurant a server is working in.

Just inside the entrance to almost all restaurants—usually located on a small desk or a podium—is a map of the restaurant. The map resembles the layout of the restaurant and assigns numbers to tables. Sections of the restaurant are divided, assigning tables to the wait staff. The manager or supervisor on shift assigns the sections, and because some sections are better for making money than others, the assignment of sections to servers can be political. Emily discussed the topic of restaurant sections:

When you walk into work you look at the map and you, you have your section and they're always different. Some sections—it's interesting the dynamic of one section—you'll walk out with a guaranteed \$200 and in another section it's like, same time, you walk out with \$60. So sections are, I think in the restaurant industry, really important. I've seen a lot of people, like a lot of servers fight over sections and get mad and think it's unfair.

When asked what can make a \$60 section different from a \$200 section, Emily offered the following:

People like to sit where the most lively part of the restaurant is, so a section by the bar. A \$60 section is going to be like the back of the restaurant where families and young kids are going to sit. But yeah, it's really—it's unbelievable to me how even a section right beside another section can—people like to sit in booths, right. So if you have a section with tables and then seats, and a section with booths, you'll have such high turnover with the booths, so that can make a huge difference.

As Emily explains, a section of a restaurant that includes tables where customers prefer to sit, such as booths or tables near the bar, increases the volume of customers a restaurant worker serves, in turn, increasing their sales and the potential to earn tips. The assignment of sections in a restaurant, which can vary with each shift, is another reason why the income a server makes from day to day through tips is uncertain.

As discussed in part one of this paper, all tip pools influence the amount of money a server walks away with at the end of a shift. In addition, a server's *ability* to earn tips

can be influenced through the practice of tip pooling, in a subtle way. The labour performed in a restaurant is integrated. Providing a meal and an enjoyable service experience to a customer requires collaboration among a number of employees including, hosts, servers, bartenders, food runners, kitchen staff, and managers. If a customer is disappointed at any point during their dining experience, this could lead to a lower tip when they pay their bill. Emily describes a tip-pool system in a former place of work: “they had a really weird system where people tipped out the bartenders directly. And the bartender—there was kind of this unspoken policy, that you always gave them like five or ten extra dollars. . . . and new people that didn’t know that, they’d get their drinks made last.” In this example, Emily believes that the practice of sharing tips, combined with an unspoken rule about how much bartenders should be tipped out by employees, impacted the work practices of the bartender. The tipping system gave the bartender power over other employees, for the bartender slowed down the production of drinks for servers who did not tip out the bar the extra five or ten dollars. However, the power that the bartender has depends on the uncertainty of the tip from a customer, and ultimately, the power that a customer has in determining a server’s income through the provision of tips.

Power, tips, and customer harassment at work

It’s sad to say that a lot of times, like for example this weekend, there was a huge hockey tournament in town. . . [*she described where the teams were from*]. They’re all men, they’re all like in their 40s. And I think that they’re away from their partners and wives and stuff and they’re there to drink and play hockey with their friends. And so this weekend—it’s interesting, they come in, and this is awful but this is how I make money. I served a large party of men and they were being really inappropriate, but their bill was a \$1000. And, I almost allowed things to be said where I feel if it was another situation where that guy’s bill’s \$25 I would probably be like, ‘You are being really inappropriate.’ So it’s— I think I allow inappropriate things to happen when I know I’m going to make a lot of money. It’s pretty awful but that’s the truth, right. I know that these are all professional men who are going to tip well and they’re making jokes and I’m like ‘Oh that’s funny’ [*she raises the tone of her voice*]. Where I think if there was a single guy sitting by himself and making those jokes I would be like ‘That’s not ok.’ (Emily)

The term “server,” a more contemporary name for waiters and waitresses, expresses the implied power of a customer (Paules 1991: 18). The power of a customer materializes with the remuneration of servers in tips. The practice of tipping distributes employing functions to the customer (Albin 2011: 184). As Albin argues, “As soon as customers contribute to the worker’s earnings, they become involved in the management of the employment relationship. Workers adopt specific behaviours to please customers and fulfill their wishes, not only for the benefit of the establishment owner but also in the hope that, by responding to customer wishes, their earnings will rise, a good word will be said to the employer, etc.” (Albin 2011: 184). In the quotation above, Emily provides insight into how the tipping system can impact the interactions between customers and servers. With the hope of earning a large tip, the tipping system can lead a server to put up with inappropriate behavior from customers, behaviour that she would not otherwise tolerate.

Employers are not oblivious to exchanges between employees and customers that involve responding to a customer’s sexual comments or “jokes” in a way that is pleasing to the customer. Sometimes employers encourage such interactions. I asked Karen, who worked as a banquet server, to describe how she would handle inappropriate customers at

work. With her reply, Karen provided a story of how her employer encouraged her to submit to a customer's harassment:

I just kind of try to shrug them off politely, unless they were really persistent. There was one time, I had to pour wine and there was a particular man who was already intoxicated um, saying like 'Oh, I like your smile' and 'come here and give me a smile' and I kind of left. But his table was where I had to serve continually. And then he'd be like, 'I'm going to dance with you, I will dance with you,' and like 'I'm ready for my dance now.' So to deal with that I had said, 'Oh, I don't think my boss would appreciate that and I'm working.' And then, um, he asked her [the boss] if I could dance with him and she told him yes and then told me: 'Why aren't you doing this? You could get tips,' and like 'it's poor manners.' So then I had to—I was put in an awkward situation where I had to tell the customer like, 'I'm not really okay with this.'

The boss's response left Karen to manage the customer's behaviour on her own.

In addition, sometimes women restaurant workers feel pressured, or might be required, to dress in a "sexy" or "provocative" manner. When asked what she liked or found challenging about her work as a banquet server Karen responded:

It was really nice cause everyone is usually happy in that sort of environment and it's a nice social atmosphere, and you make a lot of money, which is nice too as a student. But there is definitely that pressure to like, wear shorter skirts lower tops and like be flirtatious—although that's not really my personality type—and all the time, by customers, or employers and other employees. [*I asked her for an example of how she felt pressured*]... The manager would comment or like make flirtatious comments towards some of the employees that did dress a little more risqué, I guess. He would be like, 'Oh, you'll make lots of money da, da, da, da, da.' Or even just being in an environment where you are the only one who is trying to dress modestly is like, a little uncomfortable.

As Karen's example highlights, there is an assumed and even advocated connection between dressing in a "sexy" way and increasing the amount of tips a woman restaurant worker can earn from customers. In some restaurants, waitresses are required to dress "sexy" as part of her job. The degree of "sexiness," exhibited in a waitresses dress might also change depending on the section she is working in. Below, Melisa details the dress requirements for servers who work in the area surrounding the bar, the "lounge," in a particular restaurant. All of the servers in the lounge are women and some of the bartenders are men. Melisa described:

The dress code for the lounge is basically more provocative clothing. You have to wear skirts. You're not allowed to wear tights in the summer time... so you have to have bare legs ... every season the dress code changes a bit and they have samples of what you should look like...you have to have accent colours...so you have to have jewelry that's for that season... I remember one time I wore a silver bracelet and our accent colour was silver or green or something. So you had to have two pieces, with one silver and one green. And they told me my silver bracelet wasn't good enough and I had to go out and buy a new one.

The restaurant also required Melisa to wear high-heeled shoes, a painful dress requirement, especially because she worked on her feet without sitting for shifts that lasted up to nine hours. Melisa recalled: "Sometimes I would be like, 'No, I actually can't walk anymore,' and they'd [the managers] be like, 'Oh, that's too bad,' and I would just continue working. They would not let you change into flats."

Providing good “customer service”

With the presence of customers in restaurants, comes the requirement that employees provide good “customer service.” In some instances, though, the need to give customers good service can restrict how a worker acts in response to an unwanted experience at work. Recall the comment made by Karen that was quote on page 18. Karen said that she tries to “politely” shrug off customers who are inappropriate. When queried as to why she reacts in a polite manner, Karen answered:

I don’t know. I have a—just my own personality. I’m not very standoffish, so I try to be polite in most situations and I feel that because it’s customer service that you want to make their evening/day enjoyable. So if you like, punish them, I feel like that would look poorly as a waitress...and everybody else just kind of deals with it, so it’s like, laugh it off and keep going.

Another restaurant worker, Melisa believes that dealing with rude or inappropriate customers can be blurred by the requirement of providing customer service. This problem, Melisa believes, is a unique feature of restaurant work. Making a comparison with her previous experience working in a nightclub, Melisa explained:

I think that restaurants are unique, compared to nightclubs because there’s this kind of— in nightclubs you can tell everyone—if someone’s being rude, if someone’s inappropriate they’re kicked out. That’s just the way it operates. Whereas [in restaurants] there’s like this mentality that you have to continue to give people good service, even if they’re being inappropriate...[In a club] people aren’t allowed to say things about you or your body, or your level of attractiveness, you would just get a bouncer and that person would be automatically kicked out. Where because restaurants are so focused on giving [good service], they can’t see the difference between—yes, it’s important to give someone good service but there’s a point where the safety of your staff is more important. I think that’s a huge thing in restaurants that’s very blurred.

Melisa went on further to express her belief that with the need to provide good service, and the blurring of boundaries between acceptable and unacceptable behavior, things happen that would not be tolerated in other workplaces. She provided the following comparison as an example:

In a restaurant, particularly when I’m bartending, there’s a lot of bending over, just bending down like this [*she reaches forward towards the ground*], picking up something. And that’s honestly probably the most common [comment is] ‘Oh, I like it when you bend over.’...I have heard that so much! I just could imagine myself working in a coffee shop, like if a man was in line at you know Starbucks and the person working there bent over and he said ‘Oh, I like when you bend over’ [*she laughs*]. That’s a completely different—people would be appalled. Where we just are like ‘Oh yeah’ [*she laughs*] and just continue on. That doesn’t even—that’s nothing to me.

In the restaurant and food service industry—as an institution that functions to provide food for consumption outside of the household—“customer service” is an institutional ideology that organizes work processes. Customer service becomes an abstracted system that exists independent of individuals, over and against them, organizing the work done in restaurants and potentially influencing how unwanted sexual experiences are taken up—responding to harassment in a polite way or laughing it off, ignoring a customer’s comment or pretending not to hear it, or avoiding a customer so as to not impede on providing good customer service.

The notion of customer service can be made observable by inquiring into customer service work. When discussing her work, Jenna, a server, referred to customers as “the priority.” When asked to elaborate on how customers are the priority, she provided this description of customer service:

You want to make sure that they’re happy; you want them come in and be happy, you want them to leave happy. Even if there’s a little thing wrong you want to fix it. Even if your customer sends something back [to the kitchen], and they refuse to take something else and they want to leave—you have to make sure you’re doing something so that they know that you’re appreciating them...Just making sure the customers are happy because if a customer is not happy they’re not coming back. And if I didn’t do my job to try to make them happy I wouldn’t have that job.

The last line from Jenna’s quotation illustrates the importance of ensuring that the customer is happy, for Jenna believes that if she did not do her job to make customers happy, she would no longer have that job. Similarly, Jill’s explanation of customer service, provided below, shows how restaurant work is centered on customers and making their dining or drinking experience “the best it can be”:

Well to me just because it’s customer service it kind of speaks for itself. My attitude towards it has always kind of been like it doesn’t really matter what they ask for I’m going to do my best to accommodate that. And you know be personable, and be truthful, and be familiar with the menu, and be familiar with the beverages that we have and be able to provide them with any information they need and you know try to tailor their dining experience to whatever they are hoping to have, or their drinking experience, that too. Like if you get a stagette you want to make it fun for them. So you kind of have to be flexible to the different tables that are going on cause you might have a table of like elderly people at one end and a table of rowdy 20 somethings and another end, and you have to be able to balance that and also keep like them in check so that they’re not disturbing other guests as well. But yeah, so just try to make it the best it can be.

The requirement to please customers and be “nice,” while also establishing boundaries can be a challenging aspect of restaurant work:

There’s sort of tables that I’ve had come in and I’m just like, really? You’re actually saying that to me right now. And I can’t even remember exactly what it was, but it was a big group of guys... and they’re like, ‘So, what are you doing afterwards?’ ‘Nothing you’re going to be involved in.’ So there is that interaction as well, which is encouraged by some restaurants and discouraged by others, or ignored by others, rather I think. So yeah, that’s sort of—that’s something I’m kind of like grappling with when I’m serving, cause like, I have to be nice with you, but it doesn’t mean I’m going to sit on your lap. (Erin)

The practice of tipping reinforces customer service ideology. T.I.P.S is an acronym that stands for “to insure prompt service.” And as discussed earlier, the practice of customers tipping restaurant workers is a mechanism through which customers derive their power. Jill, discussed how the tipping of servers by customers and the need to “suck up” to customers impacts how a “girl” might respond to “flirting” from customers:

In an industry that you need to kind of suck up to your customers and stuff like that—a lot of girls, if they get a table of guys they have a couple of drinks and start flirting because that’s what they [guys] do. Then the girl feels like she needs to respond and act flirty, and like act a certain way to get them to tip her, basically. We all know, and they know too, like that’s the thing. You’re table knows that you’re just doing it so that they tip you well. They know you’re not going to join them

after for a drink no matter how many times you say you will, you're not going to. It's almost like a PG rated strip club, is what it is.

But the customer service ideology is not necessarily always followed. As one woman described: "I've worked as a server and in bars well for like six years—since I've been nineteen—and how I've grown in telling people to fuck off would not have happened when I was 19 or 20." Over time, and with experience in the industry, she has learned how to handle rude or inappropriate customers. She elaborated:

I've really understood now that if someone's being rude or inappropriate I can tell them that they are. But when I was 19 or 20 I was, I was nervous. I laughed off everything and um so I'm a little bit better at telling people, 'That's inappropriate.' I've served a group one time, they were like 50-year-old men and they were making jokes about my body and those kinds of things. And I actually said to them, 'Do you guys, do you have daughters?' And they're like 'Yeah, why?' I'm like, 'Yeah, they're probably about my age, I'm about 21.' And they're like 'Yeah.' I'm like, 'Would you want someone talking to your daughter like this?' And they all just—I put it into, into kind of a right framework for them where they were like 'No this is really inappropriate.' But that—I would not have done that when I was 19 or 20. So I think you, you learn to do those things.

Sometimes customer service ideology can be particularly noticeable when the ideology is not adhered to. Emily describes what can happen when a server or bartender cuts off a customer's alcohol consumption when they have drunk to excess:

When you cut someone off you are guaranteed no tip. People get really—that's a really embarrassing thing to get cut off... I've been sworn at, like the most horrible things, 'You fucking bitch.'... It sucks too cause they've probably been drinking there for a long time, their bill's really expensive, and oh yeah, you never get tipped when you cut someone off, which you know sucks for you.

When the idea that *the customer is always right* is deviated from, in addition to deciding to not leave a tip, an angry customer can ask for a different server. This also has economic implications for a server who along with losing the customer loses her tip. Erin described how in the past she has had to step in to serve a table after the customers requested a new server:

I've been the person that kind of took over a table for a girl because she had said something and [the customers] were really unimpressed with it, they were like, 'We want somebody else.' And I was like, 'Alright, I will serve you now.' And it sucks. It sucks for the server. I think if you have a customer and they have a bad experience they're not going to come back. It's a money industry. You're there to make money and I think it's just, no matter how irritating [the customers] are, their dollars are still dollars in the bank.

The presence of customers, and the customer service ideology can also impact how unwanted sexual comments and behavior from coworkers is responded to. Below Erin describes an exchange she had with a male coworker who works in the kitchen. In the past, this coworker has grabbed her buttocks and made comments about her body, for instance, "Oh, your ass looks really great," all while in the kitchen:

He had you know, said something inappropriate to me, I had said something back to him, gone out on the floor and done something, brought more dishes in [to the kitchen] to drop off. And then he sort of—that was when I saw him kind of going off, and I sort of I called him on it, which, I don't

know why I do this sometimes, but I do [*she laughs*]...and I left the room, because at a certain point I'm like, 'Look it's busy. I have a job to do. I can't just stand here you know fighting with you, I need to go get work done.' So I just left. And, it's kind of this compartmentalization, like what happens in the kitchen, anything bad that goes on any like fights between staff, like I'm very—not everybody has it. You know I've seen servers whine to their tables about something that's going on with another server on shift. And I don't know, I think I was just trained to be a little bit more um, just compartmentalized about it, and just not you know—the customer should not have to feel stressed, even if I feel like going home and, you know, crying my eyes out, the customer should not know that.

In dealing with unwanted comments from a coworker, Erin engages in a process of compartmentalization, separating the harassment she experiences in the kitchen from customers, to prevent customers from feeling stressed.

This section of the paper has described tips as an insecure form of income. In some instances the need to earn a good tip can lead a restaurant worker to put up with sexually inappropriate or harassing behaviour or comments from customers, which may not otherwise be tolerated. Moreover, customer service ideology and customer service work, make navigating unwanted experiences with customers challenging, for the line between providing a customer with “good service” and tolerating harassment can be blurred. Additionally, the tipping system, which is legitimized and reinforced by law, strengthens customer service ideology; when the ideology is broken, the consequences can be economically damaging for restaurant workers.

Conclusion

The involvement of customers in paying employees through tips, together with customer service ideology, shapes the work environment in restaurants. In explicating how it is that women restaurant workers' unwanted sexual experiences are happening in restaurants, understanding the customer's impact on working conditions is crucial. Uncovering how customers have the power that they do and how precariousness in restaurant work is constructed though law and policy is required in order to improve working conditions in restaurants. Employment standards laws, “labour law's little sister” (Fudge 1991), require attention. Laws that allow employers to pay workers lower minimum wages when they are tipped by customers, increase workers' reliance of tips and intensifies the relationship between employees and customers, essentially regulating workers out of protection, and the impact, is not gender neutral.

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