

1964

# Vickie J. Pierce v. George Anagnostakis : Brief of Appellant

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

~~FILED~~

VICKIE J. PIERCE,

*Plaintiff-Respondent,*

— vs. —

GEORGE ANAGNOSTAKIS,  
dba The Shah and Shah, Inc.,

*Defendant-Appellant.*

MAY 12 1964

Clerk, Supreme Court,

Case

No. 10081

UNIVERSITY OF UTAH

JUN 30 1964

## APPELLANT'S BRIEF

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Appeal From the Judgment of the  
Third District Court for Salt Lake County  
HON. JOSEPH G. JEPSON, *Judge*

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VICKIE J. PIERCE,  
*Plaintiff-Respondent.*

— vs. —

GEORGE ANAGNOSTAKIS,  
dba The Shah and Shah, Inc.,  
*Defendant-Appellant.*

} Case  
No. 10081

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## APPELLANT'S BRIEF

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### STATEMENT OF THE CASE

This is an action for minimum wages under Section 34-4-9 UCA, 1953, as established by regulation of the Industrial Commission and for the value of meals not furnished by the employer under the regulation.

### DISPOSITION IN THE LOWER COURT

The case was tried in part to a jury and in part to the Court. The Special Verdict of the jury found the number of hours worked by the plaintiff and the value of meals not furnished by the defendants and against the defendants on their affirmative defenses. The Court

held the defense of *in pari delicto* was not sufficiently established to be submitted to the jury. The Court entered judgment for the plaintiff.

## RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks reversal of the Judgment on the defense of *in pari delicto*, a modification of the Judgment in the matter of meals furnished and a new trial for error of the Court in ruling on evidence.

## STATEMENT OF FACTS

Plaintiff worked for the defendant from New Year's Eve, 1960 to June 17, 1961, as a waitress at a supper club known as The Shah in Salt Lake City, Utah. The Shah was a tavern licensed to sell beer in which food service was rendered and meals served by Johnny Quong as a separate operation from the defendant's. By stipulation, the action against the corporation The Shah was merged with the action against the defendant Anagnostakis individually. (Tr. 349-350)

The defendant defended on the grounds that the plaintiff was *in pari delicto* in any violation of the minimum wage law of the State of Utah which is Section 34-4-9 UCA, 1953; that the cause of action was compromised and settled by a release in writing which was Exhibit D4; that no cause of action lay for meals not furnished except upon a showing that they were paid for by the plaintiff who was entitled only to reimbursement;

and certain counter-claims were urged against the plaintiff.

The evidence at the trial was extensive, most of which went to the issues of hours worked and the alleged release resolved by the jury against the defendant. Evidence material to the appeal of the defendants includes the following:

Exhibit 1 is a regulation issued for minimum wages for women which includes in Article 9 a provision that an interval of not less than 30 minutes and not longer than one hour may be allowed for each regular meal period during a shift and that "in the restaurant occupation, one substantial meal per shift must be furnished by the employer at no cost to the employee."

#### *PLAINTIFF VICKI PIERCE:*

Plaintiff worked for the defendant from New Year's Eve 1960 until June 17, 1961. (Tr. 71, L. 17-21)

The service of food did not start for about six weeks after the opening. (Tr. 70, L. 46)

Plaintiff helped serve food when it really got busy—such things as coffee, butter and cream. (Tr. 73, L. 28-29)

After the food service started, plaintiff worked from six in the evening until one-thirty. (Tr. 74, L. 1-7)

Before the food concession opened as a supper club, the defendant furnished no meals to the plaintiff. (Tr.

77, L. 6-8) When the plaintiff worked the late shift, she had already had dinner but when she came earlier, she would bring a sandwich and have a sandwich and coke. (Tr. 77, L. 10-14)

The defendant told plaintiff before she was hired that all kinds of food would be served and she would have a chance to eat. The food was available but employees were required to pay half price if they wanted to eat. (Tr. 77, L. 20-30)

The only thing plaintiff ever ate was a steak sandwich which cost her a dollar. (Tr. 78, L. 3-5) She was not reimbursed for the money she spent for meals. (Tr. 78, L. 13-14)

Defendant objected to testimony about shifts worked for the reason that she testified she brought sandwiches on some days and on some days she purchased a meal and the only evidence material to the issue would be days on which a meal was purchased. (Tr. 95, L. 24-28)

The testimony then given included all long-shift days worked without any specification of whether the plaintiff brought sandwiches, ate other food without charge, chose to eat no meals, or ate meals for which she paid. (Tr. 96)

No record was made and agreed on by plaintiff and defendant as to the number of hours worked. (Tr. 105, L. 22-27)

Plaintiff never asked defendant for wages. (Tr. 102,

L. 16-30 and 103, L. 1-2)

Plaintiff objected to evidence as to the amount of tips made by the plaintiff and the court ruled "it has a bearing on the veracity; I cannot admit part without all, even though we have no issue on the amount of tips." (Tr. 104, L. 8-10) Plaintiff never discussed with defendant the number of hours worked and for which she claims to be entitled to wages. (Tr. 110, L. 19-30; Tr. 111, L. 1-5)

The food at the Shah was supplied by Johnny Quong. The kitchen was operated separately from the bar. (Tr. 114, L. 3-19) Plaintiff had no record of the number of meals purchased or the number of sandwiches she brought. (Tr. 114, L. 27-30; 115 L. 1-9)

After the kitchen was opened, defendant told plaintiff the best he could do was to arrange with Johnny Quong for the girls to have meals at half price. Plaintiff made no different request of defendant. (Tr. 115, L. 19-30; Tr. 116, L. 1-14)

Lots of times plaintiff didn't have time to eat. Sometimes when she was hungry, she asked the cook for something he had left and ate it between waiting on tables. (Tr. 116, L. 20-30) which she did frequently. (Tr. 117, L. 2-3) By not stopping to eat, plaintiff's tips were not interrupted. (Tr. 117, L. 4-7)

Plaintiff objected to references to tips on the ground that it was impeaching the witness on a collateral matter which the Court over-ruled. (Tr. 118, L. 21-29)

*DELANE McBRIDE, Food Waitress:*

Food waitresses served food to the cocktail waitresses at half price. (Tr. 124, L. 27-30) After the staff got acquainted, if there was food left over, the cocktail waitresses went into the kitchen and ate food that was left over. (Tr. 125, L. 9-22)

Defendants moved to dismiss at the end of plaintiff's case on the ground that a tavern was not covered by the restaurant regulation where the tavern was not serving food and as to the item of meals for the reason that there was no evidence that plaintiff demanded any meals and no evidence to support recovery for the meals purchased by the plaintiff for which she was entitled to reimbursement, on the ground that plaintiff should not be allowed to recover for meals not eaten at her own choice. (Tr. 128)

The last day she worked was one of the few days Jim Pappas saw plaintiff take a drink on the job (Tr. 127, L. 4-6)

*SAMUEL D. OAKDEN:*

The bartender Oakden saw the plaintiff eating or nibbling in the kitchen and eating sandwiches and knew no way of determining the number of times she ordered food that was served to her. (Tr. 163, L. 23-30; 190, L. 9-15)

Oakden testified that the plaintiff said "she would rather be paid by tips, and that way there wouldn't be

any Internal Revenue on her or anybody else.” This statement was stricken by the Court. (Tr. 161 L. 8-13) Oakden later testified with reference to the Internal Revenue and the statement of the plaintiff that she didn’t want any trouble with the Internal Revenue and that is why she was signing the release, objection to which by the plaintiff was over-ruled. (Tr. 183, 184, L. 1-15)

Oakden denied that he had made a telephone call to the plaintiff at Tooele the night before. (Tr. 207, L. 5-16)

The Court instructed the jury that some matters would be put on without the presence of the jury to determine whether the Court’s ruling was right. Tr. 209, L. 1-7)

*DEFENDANT ANAGNOSTAKIS (GEORGE AGGIE):*

Operation of The Shah was defendant’s first venture in a night club. (Tr. 212, L. 22-26)

Defendant told the plaintiff before hiring her that he was considering a salary basis that would be fair to both management and employee and plaintiff “emphatically told me she did not want to work for a salary, because she knows what a cocktail waitress can make in a night club, particularly a new one. Furthermore, it was much easier, she said as far as income tax was concerned, to work for tips. She did not want to work for a salary. I told her, had a salary been arranged, no tipping would be allowed in my establishment. Mrs. Pierce told me she did not want to work for a salary.” (Tr. 213,

L. 13-30). This was objected and sustained as not involving a jury problem. (Tr. 214, L. 7-8)

There was no set time when the girls could eat or could not eat. (Tr. 222-223) When business was good, plaintiff worked hard and when it slacked off, she would spend time in a booth chatting with the girls. (Tr. 223, L. 11-30) There was time to eat if they wanted to and no reduction was made for time of eating in the defendant's calculation. (Tr. 224, L. 2-13)

Under the defendant's employment plan, if a girl was eating she was not earning because she couldn't earn tips and this was left to the girls. (Tr. 224, L. 16-30)

The girls could have all the beverages they wanted including beer without charge. The drinking of beer was highly abused. (Tr. 226, L. 8-21) After the girls got acquainted with the kitchen help, they got free food and were never charged unless they sat down in the evening and ordered a steak. (Tr. 226, L. 227, L. 26)

The menu of the Don Carlos Bar-be-que near the Shah was refused in evidence although the prices on it were the same as they had been in 1961. (Tr. 235 and 236). Defendant testified that if the girls had asked him to reimburse them for meals purchased, he might have done so. (Tr. 275, L. 27-29) (Tr. 276, L. 5-11).

#### *PLAINTIFF VICKI PIERCE:*

Plaintiff's testimony that she did not drink beer or intoxicating beverages was allowed to stand over defend-

ant's objection it was not proper re-direct. (Tr. 295, L. 12-17)

Plaintiff's mother, Mrs. Baker, was allowed to testify to a telephone call received by her in Tooele the night before her testimony, over objection that it was hearsay and that it was not connected in any way with anybody in the action, in which said witness stated that the man on the telephone said "Vickie, this is Sam Oakden. I want to talk to you about your testimony." (Tr. 301)

Plaintiff also testified that Jim Pappas told her he would lie on the witness stand (Tr. 309) which was denied by Mr. Pappas. (Tr. 151 L. 1-3)

Plaintiff testified on direct examination that she drinks one cup of coffee in the morning, "not as a habit" and "I don't drink beer" and doesn't drink alcoholic beverages. (Tr. 319, L. 16-23)

Plaintiff did not complain about the food. (Tr. 335, L. 7) She asked defendant once about a meal and defendant answered she was welcome to coffee or tea but if she wanted a meal, "The best we could do would be half price" and she had no further conversation with defendant about it. (L. 11-20)

Plaintiff testified that she did not drink in 1961 and does not now drink alcoholic beverages and did not drink with customers while at the Shah. (Tr. 336) Plaintiff denied drinking alcoholic beverages on the day she quit. (Tr. 337, L. 16-19) And she then testified, "I don't drink — I don't drink." (Line 26)

## *DEFENDENT AGGIE:*

The girls were encouraged to eat left-overs in the kitchen. (Tr. 339, L. 13-17)

The Court sustained an objection to efforts of the defendant to discredit the testimony of Mrs. Pierce by showing that she drinks. (Tr. 346, L. 9-21)

George Aggie testified that he loaned plaintiff \$100.00 for a trip to Las Vegas. (Tr. 239) Jim Pappas testified that he loaned her \$250.00 of which \$50.00 was paid back. (Tr. 134) (151-152) The making of these loans was denied by the plaintiff. (As to George Aggie's loan see transcript 83 L. 26, transcript 310, L. 24-28, transcript 320-231 and as to the Pappas loan, transcript 307 and 310.)

Defendant testified that these loans were forgiven in connection with the execution of the release, Exhibit D4. (Tr. 244)

At the trial after the verdict of the jury and outside the presence of the jury, the following matters were testified to:

## ROBERT J. SHAUGHNESSY:

The plaintiff filed several claims with the Industrial Commission for wages against a safe-driving club, against Mike Archulletta, a restaurant operator, for wages, neither of which involved minimum wages, and against Ed Green of Provo, Utah, on December 19, 1961. (Tr. 370-371)

## **PLAINTIFF VICKI PIERCE:**

Plaintiff produced her income tax return for 1961 which shows no income from The Shah. Her testimony was that her income at The Shah was around \$900.00. (Tr. 375, L. 14-18 and 30)

Only part of her tip money was deposited in her bank account. (Tr. 376, L. 2-7)

The Court ruled that to support the defense of *pari delicto* would "imply a conspiracy, or agreement between them to cheat the Government," and that testimony about it being in the mind of one person was not sufficient. This would be true even if the plaintiff knew there was a minimum wage and she could not lawfully be required to work for tips only. (Tr. 379, 380) The offer of further testimony on the subject was denied on the ground that there was already enough in the record for the Supreme Court. (Tr. 381, L. 24-29)

Before working at The Shah, plaintiff worked at the Esquire Lounge for \$1.00 an hour where she tended bar on Friday and Saturday and on other nights. They guaranteed \$5.00 a night and if she didn't make \$5.00 in tips, they would make it up. (Tr. 383, L. 3-20) If she didn't make \$5.00 in tips, the Esquire made it up. (Tr. 384, L. 1-6)

She worked at the Starlight Club in 1960 and for the American Legion Post. (Tr. 384) At one of these places she was guaranteed \$10.00 a night. (Tr. 385) At Post

133 she worked for \$1.00. (Tr. 385, L. 24-28) She worked for Leonard and Ross Feraco for \$1.00 an hour. (Tr. 386, L. 1-3)

She worked at the Purple Garter before going to The Shah for \$1.00 an hour and had to go to the Industrial Commission to get it. (Tr. 386, L. 10-17)

She operated the kitchen in the Drifter's Club in Park City the last three months of 1960. (Tr. 387, L. 11-12)

Before coming to Utah, she worked in California and saw the minimum wage law posted there. (Tr. 390, L. 4-9) Her mother had owned a bar in California and she was aware that there were minimum wage laws for women. (Tr. 390, L. 17-29)

When she went to work at the Esquire, the manager talked to her about the hourly wage and about the guarantee of \$5.00 a night. (Tr. 391, L. 7-24)

Before going to work at The Shah, she had talked to Mrs. Maas at the Industrial Commission and learned what her rights were. (Tr. 393, L. 20-23)

#### *DEFENDANT AGGIE:*

Defendant testified that when he employed the plaintiff she stated that she didn't want to work for salary, "she preferred working for tips, because she knew what

a girl could make as a cocktail waitress by working for tips." He relied on her preference in establishing the policy at The Shah and if he had known of the minimum wage law, he believes he would have made his compensation basis different than he did. (Tr. 396, L. 11-28)

After learning of the minimum wage law on August 17, 1961, defendant established the policy of paying the girls \$1.00 an hour and letting them keep their tips. (Tr. 397, L. 4-18) He first learned of the minimum wage law and its application to The Shah in August, 1961. (Tr. 397, L. 23-25).

Prior to his opening The Shah, he talked to the managers of several taverns and learned that none of them was paying a minimum wage. A lot of them were paying a guarantee. (Tr. 398, L. 1-9)

### POINTS RELIED ON

1. The defense of *in pari delicto* should have been submitted to the jury.

2. The holding of the Court and the Instructions to the jury on the matter of furnishing meals were erroneous.

3. Exclusion of evidence of plaintiff's drinking was erroneous and prejudicial.

4. A purported telephone statement of Sam Oakden was erroneously admitted.

## ARGUMENT

### POINT I. THE DEFENSE OF *IN PARI DELICTO* SHOULD HAVE BEEN SUBMITTED TO THE JURY.

The Court ruled that there would have to be evidence of conspiracy or agreement to cheat the Government and that knowing of a violation by the plaintiff was insufficient.

Plaintiff's mother had operated a tavern in California where plaintiff learned there was a minimum wage law. (Tr. 390) Plaintiff had worked at the Esquire Lounge, the Starlight Club, the American Legion Post, for Leonard and Ross Ferraco and at the Purple Garter before going to work at The Shah. Tr. 383-386) She had also operated the kitchen in the Drifter's Club in Park City before coming to The Shah. (Tr. 387) At the Esquire and at the Starlight Club, she had worked for tips with a minimum guarantee. (Tr. 383-385)

Before working at The Shah, plaintiff had talked to the Industrial Commission about her rights (Tr. 393) and had filed several claims with the Industrial Commission for wages. (Tr. 370-371)

The evidence of the defendant was that this was his first venture in the night club business (Tr. 212) and that he did not know that the minimum wage law applied in taverns (Tr. 396) as the taverns he knew of were paying tips only to waitresses (Tr. 398) As soon as he learned that the Industrial Commission claimed The Shah was

subject to the minimum wage law, he established minimum wages plus tips for his employees. (Tr. 397)

At the time of employing the plaintiff, defendant was uncertain whether to pay a substantial wage or to let the girls work for tips only. (Tr. 213) The plaintiff was definite that she wanted tips only as it was a new place and she knew what she could make. (Tr. 213 and 296) She also preferred tips only as that enabled her to handle her internal revenue problems more satisfactorily. (Tr. 213, 161 and 379) And, in fact, she reported no income from The Shah on her 1961 tax return. (Tr. 375)

Defendant's theory of *in pari delicto*, therefore, included evidence that the plaintiff knew of the minimum wage law and made the decision that the employment should be for tips only, that she would make more money that way and would be able to conceal her income from the Internal Revenue Service.

Defendant admits that ordinarily an employee who works knowingly for less than the minimum wage may maintain an action for the minimum wage under Section 34-4-17. But defendant contends that where the employee makes the decision to work for tips because she will make more money that way, the employer gives her a choice and the employer does not know that he is violating the minimum wage law, the employee is precluded from maintaining the action under the doctrine of *in pari delicto*.

Furthermore, the plaintiff's intent to cheat on income taxes with the acquiescence of the employer also supports the defense of *in pari delicto*.

In an early Utah case, the defense of *in pari delicto* was applied against an employee who brought an action for overtime wages and it appeared that both plaintiff and defendant knew of the violation. *Short v. Bullion-Beck and Champion Mining Company*, 20 Utah 20, 57 Pac. 720. Also, where the parties agreed to keep a false record of time worked knowing that it was in violation of the minimum wage law, an action by the employee was denied because he was *in pari delicto*. *Lewis v. Ferrari* (Calif., 1939), 90 P. 2d 284. This California case was distinguished in *Bartholomew v. Haymen Properties* (Calif., 1955), 281 Pac. 2d 921 at 925, where the employer had required that the excessive work be done and the Court held that the employee had the remedy.

There may be cases “where both parties are *in delicto*, concurring in an illegal act” but where they are not “*in pari delicto*.” “One party may act under circumstances of opposition, oppression, hardship, undue influence, or great inequality of condition or age, so that his guilt may be far less in degree than that of his associates in the offense.” *Rozell v. Vansyckle*, 11 Wash. 79, 39 P. 270 at 272. The defense applies where the parties are in equal guilt or where the guilt of the defendant is less. *Van Antwerp v. Van Antwerp*, 5 Southern 2d 79, 242 Ala. 92; *McGhee’s Administrator v. Elcomb Coal Company*, 288 Kent. 540, 156 S.W. 2d 868 at 869; *Byers v. Byers*, 223 N.C. 85, 25 S.E. 2d 466 at 470.

The defense of *in pari delicto* was held to defeat two actions by the plaintiff under the O. P. A. regulations of

prices and rent. *Young v. Wierenga* 314 Mich. 287, 23 NW 2d 92; *Twichaus v. Rosner* (Mo. 1952) 245 S.W. 2d 107, 28 A.L.R. 2d 1192.

The evidence plainly shows that an important factor in the decision of plaintiff was to enable her to withhold information from taxing authorities which is an obvious illegality. This purpose of the contract that was made was obvious from the testimony of the defendant and Sam Oakden and from the complete failure of the plaintiff to report income from The Shah on her tax return, is, therefore sufficient to defeat the claim of the plaintiff. See 17 *C. J. S. Contracts*, Section 293 c. This principle has been applied where plaintiff sought to recover rent on a house which was used for an unlawful purpose (*Dougherty v. Seymour*, 16 Colo. 289, 26 P. 8 23; *Ernst v. Crosley*, (Ct. App. N. Y. 1893) 35 N. E. 603) and under a contract to furnish refreshments at a racing meet where the ulterior purpose was to attract people and promote gambling. (*St. Louis Fair Association v. Carmody*, 151 Mo. 56, 52 S.W. 365, 74 Am. S. R. 571). Illegality was allowed as a defense where the seller knew or should have known that the liquor being sold would be unlawfully re-sold in another state. *Graves v. Johnson* (Mass. 1892), 30 N.E. 818. A plaintiff cannot force sale of merchandise to be shipped in violation of a presidential proclamation where he knew or should have known it would be involved in such an infraction. *Takahashi v. Pepper Tank & Contracting Co.* (Wyo. 1942), 131 P. 2d 339.

How much defendant knew of the minimum wage law, how much plaintiff knew of the law, and the motives of

plaintiff in making the election that she did make for the purposes about which there was testimony raised an issue under the defense of *in pari delicto* which should have been submitted to the jury in some form. Defendant's requests 1 and 2 were reasonable to submit this issue. (Tr. 39-40) No request was submitted on the matter of the Internal Revenue because it was not known until after the jury verdict that plaintiff had not reported income from The Shah on her tax return. (Tr. 379-381)

POINT II. THE HOLDING OF THE COURT  
AND THE INSTRUCTIONS TO THE JURY  
ON THE MATTER OF FURNISHING  
MEALS WERE ERRONEOUS.

The evidence was that the plaintiff sometimes brought sandwiches (Tr. 77), sometimes ate food given to her by the kitchen (Tr. 116, 117, 125, 226 and 339), sometimes was too busy earning tips to stop for meals (Tr. 116, 223), sometimes just had a drink (Tr. 226) and never ordered and paid for anything except a steak sandwich (Tr. 78). The plaintiff never complained of this condition (Tr. 115, 116 and 335) and stands before the Court as a person who got along very well on the food and drink that were supplied to her, giving no indication of dissatisfaction or of an interest in demanding the supplying of a different or more substantial meal under the regulation or otherwise, who suffered no ill effects from the way she ate, and gave no evidence that she was not completely satisfied with the food and beverage arrangements at The Shah. For the steak sandwiches that she

ate, she kept no record and made no specific demand for reimbursement.

The regulation does not provide a remedy and it is presumably a health and welfare standard which employers should observe, similar to the rest period. An employer commits a crime if he does not observe the health standards. Also, a violator would be subject to action by the Industrial Commission to compel compliance with the regulation, or by the employee if the employee wished to take a stand. There is no suggestion in the regulation or the statute that an employee can eat food from the kitchen or bring her own sandwiches or be satisfied with a drink or a couple of drinks, keeping no records of happenings and then bring an action for the cost of a substantial meal for the entire period of employment.

On this state of the evidence and the law, defendant moved to dismiss as to this aspect of the case at the close of plaintiff's evidence (Tr. 128) which motion should have been granted.

The Court gave no instruction under which the jury could have determined the number of meals purchased by the plaintiff for which she was entitled to reimbursement, or the value of sandwiches which she had supplied herself, or any measure under which the food supplied free of charge by the kitchen at The Shah fell short of a "substantial meal." The Special Verdict simply asked the jury to fix the value of the meal, which was cost to

the defendant of one-half the menu price and which was fixed at 75c. (Tr. 45)

Defendant objected to the failure of the Court to instruct the jury on the intermediate position resulting from the furnishing of some food by the defendant and the value of the sandwiches supplied by the plaintiff herself. (Tr. 352) Requested Instructions No. 6 and 7, (Tr. 43 and 44) are directed to the same error and should have been given.

There was further error against the defendant in the matter of mealtime and meals. Making her calculation of hours on Exhibit 3 and in her testimony (Tr. 94) the plaintiff made no deduction for mealtime in calculating the time worked. The defendant also testified that his calculation of hours was not reduced by allowance for mealtime (Tr. 224), but at the same place defendant testified that girls took time for meals whenever they wanted to and up to an hour. The only instruction to the jury on this matter was 9A (Tr. 21) which took no cognizance of the fact that if the plaintiff were allowed to recover the value of a meal not furnished, she could not at the same time be paid for the time of the meal, some of which were taken and some were not. Defendant objected to the failure to give an instruction which would cure this defect and do equity. (Tr. 352, L. 19-24)

Such a provision is presumably a common one as it appears to be reasonable. There must be decided cases which would be precedents or of interest to the Court but

we have been unable to find them. A comparable issue arose on arbitration where culinary workers were eating food for which the hospital sought to charge them. Under a rule similar to the one here, it was held that the meals should be furnished to the culinary workers by the employer at no additional cost and an allowance made where a meal was not available with no determination of what remedy the employees might have had for the past meals not furnished or furnished and deducted from pay. *In re San Francisco Hospital Conference and Hospital Conference and Hospital Workers Local No. 250 (A.F.L.)* 5 Labor Arbitration Reports p. 137, (1946).

The employee wishing to obtain compensation for meals purchased by her undoubtedly would and should be required to keep a record of such meals so that reimbursement would be completed and accurate. And if such an employee brought her own food from home, a record should be kept and proven on that and with testimony as to the value of it for purposes of reimbursement.

On the other hand, girls are not compelled to eat heavy meals and if the plaintiff preferred to have a beverage or a snack from the kitchen either with or without taking time off for the eating of it, she has made an election which she has a right to make and cannot now hold the employer for the cost of food in addition to the food which she ate or the cost of food which she intentionally turned down for the sake of her figure or weight control or for any other reason. There was no complaint in the record that the plaintiff worked too hard and did not

have opportunity to rest and under the instructions given and the testimony of the parties and the form of the special verdict, the plaintiff has already been compensated for all of her mealtime regardless of who supplied or paid for the food.

The amount of money involved in this portion of the Judgment (110 x 75c (Tr. 45) or a total of \$82.50) represents only part of the mischief. The trial of the case and the instructions to the jury were favorable to the plaintiff and unfair to the defendant. For this reason the Court should remand the case for a new trial. And in any event, the verdict should be reduced by \$82.50.

### POINT III. EXCLUSION OF EVIDENCE OF PLAINTIFF'S DRINKING WAS ERRONEOUS AND PREJUDICIAL.

Whether or not plaintiff drank beer and liquor were given significance in the eyes of the jury by reason of emphasis of the subject. Defendant testified that the drinking of beer by the girls was without charge and also that this "was highly abused." (Tr. 226) The plaintiff was then called for cross-examination (Tr. 283) and on re-examination by the plaintiff was allowed to testify that she did not drink beer or intoxicating beverages to which defendant objected as not proper re-direct but which objection was overruled. (Tr. 294, L. 21-17). Plaintiff again testified on direct examination that she drinks one cup of coffee in the morning "not as a habit" and "I don't drink beer" and does not drink alcoholic beverages. (Tr. 319).

Jim Pappas had testified that the last day the plaintiff worked was one of the few days he saw her take a drink on the job. (Tr. 137) Plaintiff further testified that she did not drink in 1961 and does not now drink alcoholic beverages and did not drink with customers while at The Shah, denied drinking alcoholic beverages on the day she quit and finally testified "I don't drink — I don't drink." (Tr. 336 and 337)

Defendant made plain that his purpose in going into the matter of drinking was to discredit the testimony of the plaintiff. (Tr. 346, L. 9-21) And he was refused his right.

This was contrary to the earlier ruling of the Court where plaintiff objected to evidence of the amount of tips made by the plaintiff and the Court ruled "it has a bearing on the veracity; I cannot admit part without all, even though we have no issue on the amount of tips." (Tr. 104) The Court made a similar ruling again at Tr. 118.

The Court gave Instruction No. 13 on impeachment Tr. 24) but had refused opportunity to the defendant to contradict the plaintiff on a subject of considerable and repeated testimony.

Appellant recognizes that there are definite limitations on the right to impeach or contradict a witness, including a party, as to collateral matters. This is especially true where the subject matter was brought out on cross-examination by the party who then desires to introduce contradictory testimony. That was the situation

in *State v. Steadman*, 70 Utah 224, 259 P. 326 where this Court held evidence inadmissible for impeachment on a collateral matter.

The rule has been different where the immaterial testimony as to which impeachment is sought was offered by the party as part of his own case. *State v. Sprague*, 135 Me. 470, 199 A. 705; *State v. Fletcher*, 210 La. 409, 27 So. 2d 179; *Territory of Hawaii v. Izumi*, 34 Haw. 209. And that is the situation here.

Furthermore, appellant objected to testimony about drinking as not proper direct testimony, after appellant had called the plaintiff for cross-examination. (Tr. 294) Also, the prior inconsistent rulings of the Court that he would let immaterial matter in for issues of veracity (Tr. 104 and 118) should have been followed when the appellant sought to elicit contradictory testimony on the subject of plaintiff's drinking. It was this combination of circumstances which, appellant submits, made the exclusion prejudicial error.

#### POINT IV. A PURPORTED TELEPHONE STATEMENT OF SAM OAKDEN WAS ERRONEOUSLY ADMITTED.

On the second day of the trial, Sam Oakden, the bartender, was asked if he made a telephone call to Mrs. Pierce at Tooele the night before. He testified he did not. He further testified that he knew nothing about such a call. (Tr. 207)

The plaintiff was then asked about this phone call and she testified only to a message from a nine-year-old

child that she was wanted on the phone by someone named Sam, which phone call she did not accept. (Tr. 293) The plaintiff then attempted to go into the conversation between the plaintiff and her mother to which objection was made and the subject abandoned. (Tr. 294, l. 7-9)

Thereafter, the plaintiff called her mother to testify concerning this phone call to which objection was made as being immaterial and not proper rebuttal, as being hearsay and as being "not connected in any way with anybody in this action." The witness was allowed to testify that she answered the phone and said hello that "a man answered and said, 'Vicki, this is Sam Oakden. I want to talk to you about your testimony.' " (Tr. 300-301).

This testimony was prejudicial to the defendant because it accused the defendant of attempting to control the evidence and because the witness Jim Pappas had already been accused of stating to the plaintiff that he intended to lie on the witness stand (Tr. 309) which the witness Pappas had denied. (Tr. 151)

Telephone conversations may be admissible under certain circumstances but only where the identity of the person with whom the witness spoke or whom he heard speak is satisfactorily established. 20 *Am. Jur., Evidence*, Sections 365 and 366. Proof of identity may not be found alone from the statement of his identity by the party calling on the telephone. Op. Cit. Section 368. To the same effect, are the annotations at 105 ALR 326 at 335 and 71 ALR 5 at 41. The only Utah case cited in the sup-

plemental annotations is *State v. St. Clair*, 3 Utah 2d 230, 238, 240; 282 P. 2d 323, 328-330, where a telephone conversation reportedly made by a defendant to a third party was held to be hearsay and the prejudicial effect of it was considered by this Court.

## SUMMARY AND CONCLUSION

Whether plaintiff was *in pari delicto* in a minimum wage law violation and in a practice designed to conceal income from the taxing authority should have been submitted to the jury. There was prejudicial error in admitting plaintiff's testimony about drinking by plaintiff and then refusing to permit contradictory evidence on this much emphasized subject.

It was also prejudicial to permit plaintiff's mother to testify to a telephone call from an unidentified person thereby accusing defendant of attempting to control the evidence.

For these errors defendant should have a new trial.

The errors with reference to meals also require a new trial to determine the correct allowance to the plaintiff; unless her acquiescence was a waiver, in which event there should be a reduction in the verdict of \$82.50.

Respectfully submitted,

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