IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

RITTA OWENS, LESIA G. JOHNSON, CHERYL L. MITCHELL, CLARA M. SHARP, WILLIAM A. SMITH and JOBE L. TAYLOR, Plaintiffs/Appellees, v. THE UNIVERSITY CLUB OF MEMPHIS, a not-for-profit Tennessee corporation, Defendant/Appellant.	)	Appeal No. 02A01-9705-CV-00103 Shelby Circuit No. 77038
ANNE R. GALLOWAY, Plaintiff/Appellee, v. THE UNIVERSITY CLUB OF MEMPHIS, a not-for-profit Tennessee corporation, Defendant/Appellant.	)	Shelby Circuit No. 56228

FILED

October 15, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE

THE HONORABLE D'ARMY BAILEY, JUDGE

For the Plaintiffs/Appellees:

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For the Defendant/Appellant:

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**AFFIRMED IN PART,
REVERSED IN PART
AND REMANDED**

HOLLY KIRBY LILLARD, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

ALAN E. HIGHERS, J.

OPINION

This case involves consolidated actions against the University Club of Memphis ("the Club"). Both lawsuits allege that portions of tips paid to the Club for banquet and private parties were withheld from banquet service employees and were appropriated by the Club. The first lawsuit, filed by former and current food and beverage workers at the Club, sought damages for breach of contract, fraud, misrepresentation, and conversion. The second suit, filed by the former Assistant Manager of the Club, alleged wrongful discharge for her refusal to continue withholding tips, as well as whistleblower claims. After a jury trial, each of the plaintiffs was awarded compensatory damages, and the jury awarded collective punitive damages. The defendant appeals, arguing ***inter alia*** that the plaintiffs' claims are barred by the statute of limitations, that there is no private right of action under the Tennessee Tip Statute, and various evidentiary issues. After reviewing the record, we affirm in part, reverse in part, and remand.

The plaintiffs in the first lawsuit are all current or former food and beverage employees of the Club who worked banquets and private parties during some or all of their tenure. These plaintiffs are Ritta Owens, Lesia G. Johnson, Cheryl L. Mitchell, Clara M. Sharp, William A. Smith, and Jobe L. Taylor (hereinafter collectively the "Owens plaintiffs"). Some were employed over thirty years, others less than a year. The plaintiff in the second lawsuit, Anne Galloway ("Galloway"), worked as the Club's Assistant Manager from 1991 until her termination in 1992.

The University Club offers food and beverage service to its members, including food and drink from a menu (á la carte service), buffet service, and banquet or party service. The banquet or party employees were hired as waiters and waitresses and were paid an hourly wage plus tips. When a private party was held at the Club, a surcharge of 15% was added to the total bill. The plaintiffs allege that the surcharge was a tip, and that the entire amount of the surcharge should have been distributed to the service employees who worked the party.

Through the years, after some private functions, the Club's General Manager withheld from the service employees a portion of the 15% surcharge. Part of the retained amount was recorded as income on the Club books, part was paid to management employees, part was used to defray expenses and for other purposes. In their lawsuit, the Owens plaintiffs alleged that the Club's practice of withholding portions of tips violated the Tennessee Tip Statute, Tennessee Code Annotated § 50-2-107, and also amounted to breach of contract, misrepresentation, fraud and conversion. The Owens plaintiffs also alleged that the Club was guilty of making false and

deceptive representations in their hiring and payroll practices, contrary to Tennessee Code Annotated § 50-1-102. Galloway, the plaintiff in the second lawsuit, alleged that she told the Club's management that the entire amount of the surcharge should be distributed to the banquet service employees, and refused to continue withholding a portion of it. She alleged that she was terminated for her refusal to continue the practice.

On August 4, 1992, the Owens plaintiffs filed the original complaint in this action in United States District Court. The complaint alleged racial discrimination in hiring, transfer, and compensation in violation of 42 U.S.C. § 1983; it did not include claims for breach of contract, fraud, or conversion. The plaintiffs' attempt to amend the complaint and assert such claims was denied in September 1994. The Owens plaintiffs' federal complaint was dismissed in January 1996, and the lawsuit was refiled in state court in March 1996, alleging breach of contract, fraud and conversion.

Shortly after her termination in April 1992, Galloway filed a charge of employment discrimination with the Tennessee Human Rights Commission, asserting that she was terminated because of "sex discrimination." She did not mark the block on the charge styled "retaliation." Galloway began working for Jim Clayton Homes, Inc. in Knoxville, Tennessee. Galloway was later fired after Mr. Clayton, her new employer, spoke with a University Club Assistant Manager about Galloway.

Galloway initially filed suit against the Club in United States District Court, alleging a claim under 28 U.S.C.A. § 1981 and a pendent state claim under Tennessee's Whistleblower Statute, Tennessee Code Annotated § 50-1-304. This suit was ultimately dismissed for lack of jurisdiction. Galloway then refiled her complaint in state court, alleging that she had been wrongfully discharged from the Club for refusing to participate in "an illegal scheme" of tip distribution. She sued the Club for violating the Tennessee Whistleblower Statute and for intimidating her exercise of civil rights, contrary to Tennessee Code Annotated § 39-17-309(b). Galloway later amended her complaint to include a claim that the Club had tortiously interfered with her subsequent employment by informing Mr. Clayton of her lawsuit against the Club.

Both lawsuits were later consolidated and tried to a jury in Shelby County Circuit Court, before the Honorable D'Army Bailey. A variety of witnesses testified about the Club's practices.

At trial, Norbert Barruel testified that he was the Club's General Manager from 1959 until 1989. He hired the plaintiffs Clara Sharp, Lesia Johnson, Ritta Owens, Jobe Taylor, and Cheryl Mitchell. They were to be paid "wages, plus tips." In approximately 1964, he implemented the system of distributing the surcharge on banquets and parties that continued until the filing of this suit. Barruel testified that he determined how the surcharge on banquets would be distributed. He admitted that sometimes a portion of the surcharge on a party was not distributed to the employees who worked it:

> The money was kept in reserve for other party [sic] where they didn't make as much money. Sometime[s] the money will go for expenses which the club had to incur like parking, breaking, so on. But they usually got a fair tip all the time. I never had any complaint.[sic]

Before leaving his employment at the Club, Barruel trained his replacement, Jason Macauley, to use a similar system of tip distribution. Macauley testified that he divided up the banquet surcharge among such employees as waiters and waitresses, bussers, porters, captain, the maitre d', banquet manager, dining room manager, food and beverage manager, and bartender. Macauley testified that, "[o]n a medium to large party, usually the banquet manager received a small portion of [the surcharge]." He added that some of the money was withheld or held back "to compensate for parties when very little or no money was taken in or paid out."

Scarlett Pearsall testified that she had been the Club's Business Manager since 1981. She testified about what became of the surcharge that was "held back" by the General Manager:

> Q. Don't you know or isn't it a fact that funds that were accumulated from the tip pool or the amount of the surcharge that was not distributed would be placed into the general operating funds of the club?
>
> A. That is correct.

Pearsall testified that she prepared Trial Exhibit 57, a chart indicating the gross banquet sales, the total amount of the surcharge collected, and the amount paid to all employees from the first pay period of 1991 through August 1992. In compiling the chart, she testified that she spent approximately six hundred hours reviewing and cross-checking several different sources and types of documents, including the tip book, sales tickets, tip sheets, payroll journal, and monthly sales summaries. Nevertheless, Pearsall could not state the cumulative amount of surcharge retained

during this period. She was unable to estimate as to the years prior to 1991, because the member tickets had been destroyed by the Club.

The Owens plaintiffs testified about what they were told when they were hired, the amount of time they spent working banquets and parties, their efforts to determine whether they were paid all of their tips, their questions to the Club's management, and management's response.

Plaintiff Clara Sharp testified that she began working at the Club thirty years ago. When she was hired by Barruel, he informed her that her pay would consist of "wages, plus tips." Sharp worked in the dining room as well as banquets. She testified that she asked Barruel and others about the amount of her check, but was always put off. She stated that, during Macauley's tenure as General Manager, the Club stopped posting the total price of the parties. In addition, the tip book was no longer available to employees. The tip book contained lists of the parties and the total checks. Before Barruel retired, it had been open and available to all employees; after Macauley became the General Manager, the book was stored in a locked office.

Plaintiff Cheryl Mitchell testified that she began working as a waitress at the Club in 1977. She was also hired by Barruel, and believed her pay would consist of hourly wages plus tips. Mitchell began working banquets at the Club during high school, and eventually worked in the men's grill as well as banquets. Mitchell testified that she questioned Barruel about her check when it was less than the amount she expected:

> When you went to talk to Mr. Barruel, Mr. Barruel would get on the calculator, he would do this mumbo jumbo. You didn't know what he was doing. When you come [sic] out there, you thought you owed him money.

Plaintiff Lesia Johnson testified that she had worked for the Club since 1980. She initially worked banquets part-time, and eventually worked full-time in the dining room. Johnson testified that she talked to Macauley and Pearsall about her check, but that she never quite understood how her check accounted for the tips she received. Before Macauley became General Manager, the parties were posted for the employees, with money amounts on the sheets. From this, the servers could approximate the tips they would receive from each party. After Macauley took over the day-to-day operations of the Club, this information was no longer available.

Plaintiff Jobe Taylor testified that he began working for the Club in 1984. He worked full-time as maitre d', as a waiter in the dining room, and also worked one or two parties. Taylor testified that he never asked a Club manager about his check, or about his share of the tips from a party. He

stated that he believed the tips were split among the waiters and waitresses who worked the party.

Plaintiff William Arthur Smith testified that he worked at the Club from September 1991 until 1992. He began bussing tables, and was later promoted to waiter. He worked in the men's grill and at parties and banquets. He testified that he kept track of his tips, and that his check was not as much as he calculated it should be, even when he considered tax and other deductions. The Club later terminated Smith.

Plaintiff Ritta Owens testified that she worked for the Club from 1984 until 1991. Barruel hired her as a waitress and told her that she would be paid wages plus tips. Owens also worked private parties. She testified that she believed the tips were split among the waiters and waitresses who worked the parties, and not with other service personnel.

Sandra Terrell, an auditor for the Tennessee Department of Revenue, testified that in April 1991, she completed a routine audit of the University Club regarding their payment of sales taxes. A printout of Terrell's findings established the amount of the mandatory surcharge the Club collected from October 1988 through March 1991 as $127,848.57.

The plaintiff in the second lawsuit, Anne Galloway, testified that she began working at the Club as Assistant Manager in 1991. She stated that Macauley taught her how to collect the mandatory surcharges, divide them up, post the tips, and hold some money back, usually twenty to thirty percent of the total surcharge. Initially, Macauley told her that the money that was held back was used to supplement the servers' incomes during slower periods. Later, however, she learned that part of this money was paid to banquet and food and beverage managers and part was deposited into the Club's operating fund. During 1992, Macauley was out on vacation and Galloway took over the tip distribution duties. She did not withhold tips from the servers, but rather paid out all the surcharge to the employees who worked each party, and also gave the servers written confirmation of their tips. Galloway testified that she told Macauley that she did not think the tip distribution scheme was right, and that she would no longer hold back any tips. Galloway asserted that, shortly after this conversation, Macauley talked with her about changing her position at the Club, a change which would result in Galloway no longer being responsible for distributing tips. Galloway perceived this proposed change as a demotion.

Galloway continued to pay out all of the tips to the banquet and party employees, without holding back a portion as she had been instructed. Subsequently, Macauley told Galloway that he

planned to change her job title from "Assistant Manager" to "Administrative Assistant." Galloway's duties would include sales, marketing, and special events. The record is not clear whether she would remain responsible for tip distribution. Galloway accepted the new position, and worked that weekend. A few days later, Macauley terminated her employment.

At trial, the Owens plaintiffs argued that the Club's practices constituted conversion, fraud, misrepresentation, and breach of contract. The Owens plaintiffs also argued that the Club's practices violated the Tennessee Tip Statute, which generally provides that a service charge, tip or gratuity added to a customer's bill must be paid to the employees for whom it is intended. They argued that they had a private right of action under the statute.

Galloway argued at trial that she was wrongfully discharged for refusing to participate in an illegal practice (withholding the tips), and that her termination violated Tennessee's Whistleblower Statute.

The jury found in favor of all of the plaintiffs and awarded compensatory damages to each: Owens was awarded $30,000, Johnson was awarded $50,000, Mitchell was awarded $45,000, Sharp was awarded $50,000, Smith was awarded $3,500 and Taylor was awarded $35,000. Galloway was awarded compensatory damages of $35,000. The Owens plaintiffs were awarded collective punitive damages of $500,000. Galloway was awarded no punitive damages.

The Club now appeals the jury verdict, citing numerous issues on appeal. The Club asserts that the trial judge erred in declining to recuse himself, and that he erred in admitting three letters from the Club's auditing firm. The Club also contends that the Owens plaintiffs' claims were barred by the statute of limitations. The Club argues that the Owens plaintiffs had no private cause of action under the Tennessee Tip Statute. The Club alleges that the evidence was insufficient to establish breach of contract, conversion or fraud. The Club raises several issues concerning the sufficiency of the jury instructions. The Club also argues that the Owens plaintiffs failed to prove the amount of their damages with a reasonable degree of certainty. Finally, the Club contends that the proof at trial was insufficient to establish conduct which warranted an award of punitive damages.

On the Galloway lawsuit, the Club asserts that Galloway failed to establish that the Club violated the Tennessee Tip Statute, and that, consequently, the evidence was insufficient to establish a violation of the Tennessee Whistleblower Statute. The Club also argues that Galloway was

judicially estopped from asserting under the Whistleblower Statute that she was terminated "solely" for refusing to participate in illegal activities, because she asserted in her Charge with the Tennessee Human Rights Commission that she was terminated because of sex discrimination. Finally, the Club asserts that the evidence was insufficient to establish Galloway's claim for tortious interference with her employment after she left the Club.

RECUSAL

The Club argues that the trial judge, the Honorable D'Army Bailey, erred by refusing to disqualify himself from hearing this case. The Club cites a 1993 article from ***Memphis*** magazine in which Judge Bailey criticizes private Memphis clubs in general and the University Club in particular for racially restrictive membership policies. The Club contends that the quote in this article establishes that Judge Bailey held a personal bias against the Club which required his recusal. The plaintiffs note that the article was published over three years before the trial in this action, and argue that the trial judge's comments were made so long before the trial that they could not be considered related to the Club's policies at the time of trial. The plaintiffs maintain that the Club failed to carry its burden of showing actual bias.

In Tennessee, the decision of recusal is a matter within the judge's discretion. ***See Wiseman v. Spaulding***, 573 S.W.2d 490, 493 (Tenn. App. 1978). The Code of Judicial Conduct provides that a judge should recuse himself when his impartiality may be questioned, including situations where "he has a personal bias or prejudice concerning a party." ***Code of Judicial Conduct***, Canon 3(C)(1) (1996); ***see State v. Cash***, 867 S.W.2d 741 (Tenn. Crim. App. 1993) (independent fact-finding trip and interrogation of the defendant from the bench eliminated court's status as a neutral and detached arbiter); ***Lackey v. State***, 578 S.W.2d 101, 104 (Tenn. Crim. App. 1978). Extra-judicial comments which indicate "a judge's personal moral conviction or which reflect prevailing societal attitudes" do not mandate recusal. ***Alley v. State***, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). The record does not establish in this case that the trial judge abused his discretion by declining to recuse himself. The decision of the trial judge is affirmed on this issue.

EVIDENTIARY ISSUES

The Club next asserts that the trial court erred by admitting three letters that contained expert opinions of an unidentified out-of-court declarant. These letters, dated November 30, 1983, November 30, 1984, and November 29, 1985, were prepared by Ernst & Whinney, the Club's

auditing firm, and were not signed by an individual. In the letters, the firm recommended that the Club change its policies and practices regarding the 15% service fee charged for special events such as banquets and private parties. The firm recommended that "[i]n order to avoid any employee misunderstandings as to the fairness of such distributions," the Club should "clearly distinguish the special events service fee from normal gratuities," and "develop a formal policy for the manner" in which the service fee was distributed, rather than simply relying on the individual judgment of the Club manager.

At trial, the Club objected to the introduction of these letters, arguing that they were inadmissible hearsay and were not subject to the business records exception under Tennessee Rule of Evidence 803(6). The Club argues on appeal that Tennessee courts have generally rejected the admission of writings by unknown persons, even when contained in what might otherwise be regarded as a "business record." It cites ***Butler v. Ballard***, 696 S.W.2d 533 (Tenn. App. 1985), as support for its argument. ***Ballard*** addressed the admissibility of statements contained in hospital records: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." ***Id.*** at 537.

The admissibility of evidence is within the sound discretion of the trial court and will be overturned on appeal only when there is a clear showing of abuse of discretion. ***See Otis v. Cambridge Mut. Fire Ins. Co.***, 850 S.W.2d 439 (Tenn. 1992); ***Steele v. Ft. Sanders Anesthesia Group, P.C.***, 897 S.W.2d 270, 275 (Tenn. App. 1994). The documents are admissible under the business records exception if they were

> made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Tenn. R. Evid. 803(6) (1996). The Club's Business Manager, Scarlett Pearsall, testified that the Club hired Ernst & Whinney to perform annual audits in the years 1983 to 1985. Pearsall testified that she provided the auditors with the necessary financial records to perform the audits. The Club's former General Manager, Barruel, also testified that he assisted Ernst & Whinney employees in preparing the audits of Club finances in 1983 and 1984. These letters, which related Ernst &

Whinney's findings from the audits, were kept under Pearsall's control and custody in the Club's files.

In ***Alexander v. Inman***, 903 S.W.2d 686 (Tenn. App. 1995), time records from a law firm were admitted based on one attomey's testimony as to the firm's method for recording and keeping such records, even though the individual attorneys who prepared the records were unknown.

In ***Rayder v. Grunow***, No. 91-3570-I, 1993 WL 95561 (Tenn. App. April 2, 1993), the appellant, Rayder, challenged the Department of Human Services' denial of food stamp benefits because she intentionally failed to report wages earned while enrolled in the program. Rayder asserted that the trial court erred in admitting into evidence a wage match report generated by the Tennessee Department of Employment Security. Rayder argued that the wage match report did not qualify under the business records exception because the person who generated the record did not testify as to its authenticity. This Court noted that, even though the identity of each person who provided information for the record was not known, there was testimony that every person who contributed to the creation of the record had a business duty to do so. Therefore, the decision to admit the document into evidence was affirmed:

> [T]he person originally reporting the information about Ms. Rayder to the Department of Employment Security, had firsthand knowledge of Ms. Rayder's employment and salary information because he was her employer. He had a business duty to keep accurate records concerning Ms. Rayder's earnings and to report this information to the Department of Employment Security. The Department of Employment Security, in turn, has a duty to use Mr. Webb's salary information in administering the unemployment compensation program. It also has a duty to provide this information to the Department of Human Services. The Department of Human Services has a corresponding duty to receive and use the Department of Employment Security's information to administer the food stamp program. Finally, the investigator who introduced the wage match report was a qualified witness because she could identify the record and could testify concerning its preparation and that it was made in the regular course of business at or near the time of the recorded event.

Rayder, 1993 WL 95561, at *4 (citations omitted). In this case, Pearsall and Barruel, employees of the Club, had a business duty to provide Ernst & Whinney with the necessary audit information. Ernst & Whinney employees had a duty to compile and analyze that information, and to report relevant findings to the Club. These findings were contained in the letters, dated at approximately the time of the audits. Pearsall, the Business Manager, was under a duty to maintain the letters and all other records concerning the audits, and could authenticate the letters as records of the Club. We find that the trial court did not abuse its discretion in admitting the records, and its decision on this

issue is affirmed.

STATUTE OF LIMITATIONS

The Club also asserts that the trial court erred by denying the Club's motions for directed verdict and for judgment notwithstanding the verdict against the Owens plaintiffs, based on the statute of limitations. The Club contends that the Owens plaintiffs' claims are barred by Tennessee Code Annotated § 28-3-105, which provides a three-year limitation on actions for injuries to personal or real property and actions for the detention or conversion of personal property. The Club contends that the plaintiffs should have been aware that they were not getting all of their tips by 1989, the year that the General Manager who instituted the tip distribution system retired. In the alternative, the Club maintains that the contract claims are barred by the six-year statute of limitations provided by Tennessee Code Annotated § 28-3-105.

As noted above, the Owens plaintiffs filed the original complaint in federal court on August 4, 1992, alleging racial discrimination. They later sought to amend the complaint to allege breach of contract, fraud and conversion; this motion was denied. After the federal complaint was dismissed in January 1996, the Owens plaintiffs refiled in state court, alleging breach of contract, fraud and conversion. The Club argues that the state law claims were not saved by the filing of the federal action, because the applicable savings statute[1] "saves" a refiled action only to the extent that it asserts "substantially the same cause of action as set out in the original suit." ***Worthams v. Atlanta Life Ins. Co.***, 533 F.2d 994, 997 (6th Cir. 1976). Because the state law claims were different from the federal claims, the Club argues that this action should be barred.

[1] The Club alleges that one of either Tennessee Code Annotated § 28-1-105(a) (Supp. 1997), the general savings statute, or Tennessee Code Annotated § 28-1-115 (Supp. 1997), the savings statute which allows refiling of actions dismissed by federal courts for lack of jurisdiction, applies to this situation. According to the Club, the outcome should be the same under either statute.

The plaintiffs agree that the statute of limitations for conversion, fraud, and violation of the tip statute is three years. Nevertheless, they respond that the Club erroneously argues that the plaintiffs discovered their cause of action upon the General Manager's retirement. The plaintiffs argue that, under Tennessee's discovery rule, the statute of limitations did not begin to run until the plaintiffs learned of their injuries and also learned of the causal connection between their injuries and the defendant's actions. ***Wansley v. Refined Metals Corp.***, No. 02A01-9503-CV-00065, 1996 WL 502497, at *3 (Tenn. Ct. App. Sept. 6, 1996). The employees did not have access to the documents necessary to determine the amount of tips charged, collected, and paid. The employees also testified that the Club employed "deliberately Byzantine record keeping" and refused to truthfully or completely disclose to the plaintiffs that substantial portions of their tips were not paid to them. Consequently, the plaintiffs maintain that they could not have known about the tip practices until they were informed of them by Anne Galloway in April of 1992. Therefore, the original filing of the complaint in the District Court was timely. Although the District Court dismissed the state law actions in 1996, the plaintiffs refiled in state court soon thereafter. They assert that, under Tennessee Code Annotated § 28-1-115,[2] these claims were timely filed.

Finally, the Owens plaintiffs contend that the doctrine of equitable estoppel applies to bar the Club from asserting that the plaintiffs either knew or should have known of their potential cause of action long before the complaint was filed. The Owens plaintiffs allege that the Club took affirmative steps to mislead them and to prevent the discovery of their injuries, and that they are therefore entitled to invoke the doctrine of equitable estoppel.

The elements of equitable estoppel are set out in ***Consumer Credit Union v. Hite***, 801 S.W.2d 822, 825 (Tenn. App. 1990):

> The essential elements of an equitable estoppel as related to the party estopped are said to be (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) Intention, or at least expectation that such conduct shall be acted upon by the other party; (3) Knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel they are (1) Lack of knowledge

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[2] The Tennessee Savings Statute, Tennessee Code Annotated § 28-1-115, provides:

> Notwithstanding any applicable statute of limitation to the contrary, any party filing an action in a federal court that is subsequently dismissed for lack of jurisdiction shall have one (1) year from the date of such dismissal to timely file such action in an appropriate state court.

> and of the means of knowledge of the truth as to the facts in question; (2) Reliance upon the conduct of the party estopped; and (3) Action based thereon of such a character as to change his position prejudicially . . . .

Consumer Credit Union v. Hite, 801 S.W.2d 822, 825 (Tenn. App. 1990) (quoting ***Callahan v. Town of Middleton***, 41 Tenn. App. 21, 36, 292 S.W.2d 501, 508 (1954)); ***see also Stewart Title Guar. Co. v. FDIC***, 936 S.W.2d 266, 270 (Tenn. App. 1996); ***Robinson v. Tennessee Farmers Mut. Ins. Co.***, 857 S.W.2d 559, 563 (Tenn. App. 1993); ***Chattem, Inc. v. Provident Life & Acc. Ins. Co.***, 676 S.W.2d 953, 955 (Tenn. 1984).

In this case, there is testimony from which the jury could conclude that Norbert Barruel, the former General Manager, and Jason Macauley, the General Manager at the time this suit was filed, took deliberate steps to conceal the nature of the tip distribution practices from the employees. Although the Owens plaintiffs testified that they "knew" that the tips were not fairly distributed long before 1992, they also testified that their efforts to find out how the tips were apportioned were rebuffed by the Club management. Therefore, the record contains evidence sufficient for the jury to find that the Club took affirmative steps to conceal from the plaintiffs their potential claims. The jury could infer from the proof that this was done with the intent to cause the Owens plaintiffs to refrain from acting on any suspicion that they were not receiving all of their tips. The jury could also conclude that the Owens plaintiffs were in fact prevented from learning that they were not receiving all their tips and consequently refrained from taking further action. Under these circumstances, the doctrine of equitable estoppel could apply to toll any applicable statutes of limitations until the alleged fraud and conversion were revealed to the plaintiffs by Anne Galloway in 1992.

Moreover, because the state claims were based on the same set of facts that were alleged in the federal lawsuit, the savings statute applies to this cause of action. ***See Energy Sav. Prod., Inc. v. Carney***, 737 S.W.2d 783 (Tenn. App. 1987). An amended complaint can avoid the statute of limitation where the allegations arise from the "conduct, transaction or occurrence set forth in the original pleading." ***Carney***, 737 S.W.2d at 784 (citing ***Karash v. Pigott***, 530 S.W.2d 775 (Tenn. 1975); ***Gamble v. Hospital Corp. of Am.***, 676 S.W.2d 340 (Tenn. App. 1984); ***Osborne Enter. v. City of Chattanooga***, 561 S.W.2d 160 (Tenn. App. 1977)); ***see also Campbell Co. Bd. of Educ. v. Brownlee-Kesterson, Inc.***, 677 S.W.2d 457, 464 (Tenn. App. 1984). In the instant case, the plaintiffs' original cause of action alleged a claim based on the Club's wrongful withholding of a portion of the plaintiffs' tips in violation of the Tennessee Tip Statute. The claims brought in the

second suit were based on the same facts alleged in the first suit. Accordingly, the savings statute applies, and we affirm the trial court's holding on this issue.

TENNESSEE TIP STATUTE

The Club next asserts that the trial court erred in denying the Club's motions for directed verdict and for judgment notwithstanding the verdict, based on the Owens plaintiffs' failure to establish a violation of the Tennessee Tip Statute,[3] breach of contract, fraud or conversion. The Club notes that the Tip Statute is a criminal statute and argues that the plaintiffs do not have a private right of action under it.

This Court has considered the implication of a private cause of action from the violation of a criminal statute. ***See Buckner v. Carlton***, 623 S.W.2d 102 (Tenn. App. 1981). To determine whether a private right of action exists in this case, certain factors must be considered:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted. Second, is there any indication of legislative intent, explicit or implicit, either to create or deny a private cause of action. Third, is the private cause of action consistent with the underlying purposes of the legislation.

Buckner, 623 S.W.2d at 105 (quoting ***Cort v. Ash***, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L. Ed. 2d 26 (1975)) (internal citations omitted). These factors are pertinent to determine whether the legislature intended for there to be a private right of action under the statute. ***See Touche Ross & Co. v. Redington***, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979). In ***Buckner***, the plaintiff

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[3] The Tennessee Tip Statute, Tennessee Code Annotated § 50-2-107 (1991), provides:

> (a)(1) If a business, including private clubs, lounges, bars or restaurants, includes on the bill presented to and paid by a customer, member or patron an automatic percentage or specific dollar amount denominated as a "service charge," "tip," "gratuity," or otherwise, which amount is customarily assumed to be intended for the employee or employees who have served the customer, member or patron, that amount shall be paid over to or distributed among the employee or employees who have rendered that service. Such payment shall be made at the close of business on the day the amount is received or at the time the employee is regularly paid, or, in the case of a bill for which credit is extended to a customer, member or patron, payment shall be made at the close of business on the day the amount is collected or on the first day the employee is regularly paid occurring after the amount is collected.
>
> (2) Such payment shall not be reduced, docked or otherwise diminished to penalize an employee for any actions in connection with the employee's employment, if it is derived from a mandatory service charge or tip collected from customers, members or patrons.
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> (3) This section shall not apply to bills for food or beverage served in a banquet, convention or meeting facility segregated from the public-at-large, except such facilities which are on the premises of a private club.
>
> (b) A violation of this section is a Class C misdemeanor. Each failure to pay an employee constitutes a separate offense.

alleged a violation of Tennessee Code Annotated § 39-3203, which prohibited "any person, by color of his office," from "willfully and corruptly oppress[ing] any person, under pretense of acting in his official capacity." ***Id.*** at 105. A violator could be punished by fine not exceeding one thousand dollars or imprisonment in the county jail for up to one year. ***Id.*** The Court discussed the statute's application in a civil suit:

> There is no indication of a legislative intent to create or deny a private right of action for oppression. A private right of action would probably not interfere with the underlying purpose of the oppression statute, although it could be argued the private enforcement of the statute through a civil cause of action with its lesser standard of proof would hamper the activities of government officials to an extent not intended by the Legislature. But the factor weighing most heavily against an implied right of action is that the oppression statute as well as the criminal statutes concerning conspiracy and solicitation are intended for the protection of the general public. When courts have implied a private right of action from a criminal statute, the statute invariably is intended to protect a particular class of people.

Id. (citing ***Texas & Pacific Ry. Co. v. Rigsby***, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed.2d 874 (1916) (Act for the Protection of Railroad Employees and Travelers); ***J. I. Case Company v. Borak***, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964) (Act for the Protection of Investors)).

Unlike ***Buckner***, the statute at issue in this case is intended to protect the rights of a certain class of people -- service employees who receive tips as part of their compensation. The Owens plaintiffs are persons within this class. On its face, the Tennessee Tip Statute is clearly intended to protect such employees by forbidding employers from keeping their tips. While the statute contains no express indication of legislative intent to create or deny a private right of action, a private action is consistent with the purpose of the legislation, and indeed complements the remedy in the statute by providing a mechanism to make employees whole. Consequently, we affirm the trial court's determination that the plaintiffs could pursue a private cause of action under the Tennessee Tip Statute.

The Club further argues that, assuming a private civil cause of action exists under the Tennessee Tip Statute, the plaintiffs did not produce evidence sufficient to submit the issue of a violation of the statute to the jury. The statute provides that if a private club includes on a member's bill an amount "customarily assumed to be intended for the employee or employees who have served the customer," then the amount "shall be paid over to or distributed among the employees who have rendered that service." Tenn. Code Ann. § 50-2-107 (1991). The Club does not dispute that an automatic service charge was added to the members' bills for private parties. Rather, the Club

asserts that the plaintiffs did not prove the remaining elements of the statute. Pointing to testimony by several club members, the Club argues that the surcharge was not "customarily assumed" to be intended entirely for the employee or employees who served as waiters or waitresses. Some Club members testified that they assumed that the banquet surcharge would be used in part as a gratuity, and also to defray the costs of the banquet. However, another Club member, Mrs. Dudley Deaton, whose husband has been a member of the University Club for many years, testified that she had hosted a few private parties at the Club, and that she believed that the set amount added to her bill was a tip intended to go to the waiters and waitresses who worked the party. This evidence, coupled with the employees' testimony, was sufficient for the jury to weigh the credibility of the witnesses' testimony and conclude that the service charge was "assumed to be intended" only for employees such as the Owens plaintiffs.

The Club also asserts that it paid all of the surcharge to "employees who served," within the meaning of the statute. It argues that banquet supervisors, maitre d's, and porters should be deemed "employees who served" and that consequently the Club was not in violation of the statute. The plaintiffs respond that the term "employees who served" does not include employees who draw a higher hourly rate, and certainly does not include management. The Plaintiffs cite to the Federal Labor Standards Act[4] (FLSA) to support this contention. Under the FLSA, an employer may not divert or withhold tips from customarily tipped employees to create a tip pool unless the tips are pooled "among employees who customarily and regularly receive tips." 29 U.S.C. § 203(m)(2) (1993).

In this case, the Owens plaintiffs produced enough evidence to support the trial court's decision to deny the defendant's motion for directed verdict. We find that the trial court did not err in determining that the term "employees who served" included only the food service staff who actually served the meals to the members, and excluded other hourly employees such as porters and kitchen workers, as well as banquet supervisors. The trial court is affirmed on this issue.

[4] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1993).

BREACH OF CONTRACT

The Club also claims that the Owens plaintiffs failed to establish a cause of action for breach of contract. The Club argues that, although hired for an hourly wage "plus tips," the Owens plaintiffs could not prove that there was an enforceable oral contract obligating the Club to pay **all** tips.

The Owens plaintiffs respond that, even though they were at-will employees and had no contract of employment, an oral contract for terms such as wages and hours of employment is enforceable. ***See Williams v. Maremont Corp.***, 776 S.W.2d 78 (Tenn. App. 1988). They point to the testimony of Norbert Barruel, the former General Manager of the Club. He stated that when he hired Clara Sharp, Ritta Owens, Lesia Johnson, Cheryl Mitchell, and Jobe Taylor, he told each of them that they would be paid an hourly wage, "plus tips." Although all of the tips earned in the á la carte service were given to the service employees, a portion of the banquet tips was "held back." The employees were not told that there was a difference between á la carte and banquet tips. Scarlett Pearsall testified that, until at least 1993, there was no written policy that distinguished between banquet and dining room servers and their tips. The Owens plaintiffs stress that they understood "tips" to mean all tips, not a portion of the tips at some times and all of the tips at other times.

The evidence presented at trial was sufficient to allow the trial court to submit the issue of the existence of an oral contract to the jury. The trial court is affirmed on this issue.

FRAUD AND MISREPRESENTATION

The Club also asserts that the Owens plaintiffs failed to establish a claim for fraud or misrepresentation. In order to establish a cause of action for fraud or misrepresentation, a plaintiff must prove that the representation was made in regard to an existing or past material fact, that the representation was false, that the defendant knew it was false, and that the plaintiff acted upon the representation and suffered damages as a result. ***See Hiller v. Hailey***, 915 S.W.2d 800, 803 (Tenn. App. 1995) (citing ***Williams v. Spinks***, 7 Tenn.App. 488 (1928); ***Bevins v. Livesay***, 32 Tenn.App. 1, 221 S.W.2d 106 (1949), ***Long v. Range***, 31 Tenn.App. 176, 213 S.W.2d 52, (1948)). "The party alleging fraud takes upon himself the burden of proving every necessary and material element of fraud and fraud will not be presumed from a showing merely that a motive or intent to perpetrate the

same existed." ***Hiller v. Hailey***, 915 S.W.2d 800, 803 (Tenn. App. 1995) (quoting ***Williams v. Spinks***, 7 Tenn.App. 488, 494 (1928)).

The basis of the Owens plaintiffs' fraud claim is that the General Manager who hired them, Norbert Barruel, made a knowing misrepresentation to the banquet employees. He knew at the time he hired plaintiffs Sharp, Mitchell, Owens, Johnson, and Taylor that the Club differentiated between á la carte and banquet service when distributing tips, but failed to inform these plaintiffs of the Club's practices. The Owens plaintiffs asserted that they were injured in their reliance upon Barruel's statements because they accepted employment and continued to work there. Had the plaintiffs been informed of the tip distribution practice, they could have sought work elsewhere or refused to work banquets or private parties. The evidence was sufficient to submit this claim to the jury, and the trial court is affirmed on this issue.

CONVERSION

The Club also asserts that the Owens plaintiffs failed to establish a cause of action for conversion. In an action for conversion, the plaintiff must establish that the defendant appropriated the plaintiff's eamings in defiance of the plaintiff's rights to those earnings. ***Mammoth Cave Prod. Credit Assoc. v. Oldham***, 569 S.W.2d 833 (Tenn. App. 1977). The Club claims that the Owens plaintiffs failed to establish that they had a property right to **all** of the banquet surcharge, so that the Club's use of such funds constituted conversion. The Owens plaintiffs respond that they produced sufficient evidence that the Club failed to pay them all of the tips to which they were entitled under both the Tip Statute and the terms of their oral agreement. Barruel testified that the withheld tips were used to pay for equipment repair, rental and replacement, breakage and damage done to the Club, expenses related to other private parties and parking expenses, and to supplement the wages of dining room servers. Macauley testified that the tips were used to supplement the wages of banquet supervisors and other non-service employees. Scarlett Pearsall testified that some of the tips withheld were deposited in the Club's general operating account and used for operating expenses. This evidence, when combined with Barruel's admission that he did not distinguish between banquet tips and á la carte tips when he told the Owens plaintiffs that they would be paid "wages, plus tips," is sufficient to establish the conversion claim. The trial court is affirmed on this issue.

JURY INSTRUCTIONS

The Club raises several allegations of error relating to the jury charge. First, the Club argues that the trial court erred in failing to issue the Club's requested charge regarding the Tennessee Tip Statute, Tennessee Code Annotated § 50-2-107, or to otherwise specify in its charge to the jury the legal elements necessary to establish a violation of the Tennessee Tip Statute. The Club complains that the trial court merely read the text of the Tip Statute to the jury, and did not clearly indicate the elements of proof necessary to establish a civil claim under that statute. According to the Club, the trial court's failure to provide the jury with guidance on the elements of the claim constitutes an error which warrants a new trial.

The plaintiffs respond that the Tip Statute clearly set forth the elements necessary to establish a claim, and that the statute is written in plain words that the average juror will understand. ***Grissom v. Metropolitan Gov't of Nashville***, 817 S.W.2d 679 (Tenn.App. 1981). The instruction given was as follows:

> Now, if a business, including private clubs, lounges, bars or restaurants includes in the bill presented to and paid by a customer, member or patron an automatic percentage or specific dollar amount denominated as a "service charge," "tip," gratuity or otherwise, which amount is customarily assumed to be intended for the employee or employees who have served the customer, member or patron, that amount shall be paid over to or distributed among the employee or employees who have rendered that service. Such payment shall be made at the close of business on the day the amount is received or at the time the employee is regularly paid. Or in the case of a bill for which credit is extended to a customer, member or patron, payment shall be made at the close of business on the day the amount is collected or on the first day the employee is regularly paid occurring after the amount is collected.

Because the instructions are the jury's sole source for guidance in their deliberations, ***see State ex rel. Myers v. Brown***, 209 Tenn. 141, 148-49, 351 S.W.2d 385, 388 (1961), the trial court must give accurate instructions with respect to the parties' respective theories. ***Grissom***, 817 S.W.2d at 685 (citing ***Street v. Calvert***, 541 S.W.2d 576, 584 (Tenn. 1976); ***Gross v. Nashville Gas Co.***, 608 S.W.2d 860, 872 (Tenn. App. 1980); ***Martin v. Castner Knott Dry Goods Co.***, 27 Tenn.App. 421, 431, 181 S.W.2d 638, 642 (1944)). On appeal, jury instructions are not required to be perfect. ***Grissom***, 817 S.W.2d at 685 (citing ***Davis v. Wilson***, 522 S.W.2d 872, 884 (Tenn. App. 1974)). An appellate court will not invalidate the instruction so long as it "fairly defines the legal issues involved in the case and does not mislead the jury." ***Id.*** (citing ***Smith v. Parker***, 213 Tenn. 147, 156, 373 S.W.2d 205, 209 (1963); ***Railroad Co. v. Spence***, 93 Tenn. 173, 187, 23 S.W. 211, 215 (1893)). We find that the trial court's instruction on the tip statute was adequate and fairly presented the issue

to the jury. The trial court is affirmed on this issue.

The Club's remaining challenges to the jury charge involve instructions on compensatory damages and the statute of limitations. The Club contends that the trial court erred by not including an instruction on the relevant statute of limitations, which explains which facts may be considered in determining when the Owens plaintiffs knew, or should have known, of the existence of the cause of action. The plaintiffs respond that the trial court properly charged the jury that the statute of limitations began to run when the plaintiffs "knew or should have known" about the Club's misconduct. This language is sufficiently clear, and the trial court is affirmed on this issue.

The Club also alleges that the trial court erred by failing to give a limiting charge which prevented the Owens plaintiffs from recovering damages, under the Tip Statute or for fraud or conversion, for conduct that occurred more than three years prior to the date the original complaint was filed in federal court. In 1996, Tennessee adopted the continuing violation doctrine. ***Spicer v. Beaman Bottling Co.***, 937 S.W.2d 884, 889 (Tenn. 1996). Federal courts originally developed this doctrine in response to employment discrimination cases arising under Title VII of the Civil Rights Act. ***Id.*** The continuing violation doctrine operates as an exception to the strict requirements of a statute of limitations. ***Id.*** When discriminatory acts are viewed as individual violations, a cause of action accrues for each violation and the cause of action is lost under the statute of limitations if the party fails to sue within the limitations period. However, if the violations are viewed as a continuing wrong, the statute of limitations is tolled and will not begin to run until the final violation occurs, so long as at least one violation occurs within the limitations period. ***Id.*** ***Spicer*** listed several reasons for a more lenient interpretation of statutes of limitation in employment discrimination cases:

> First, they emphasize that Title VII is a remedial statute designed to eliminate discrimination and make parties whole. Second, they stress that employees are generally lay people and are unaware that they must act quickly or risk losing their cause of action. Often employees fear reprisal or turn to others for help, and in so doing, delay action on their cause until the statute has expired. Finally, and perhaps most importantly, those courts recognize that many discriminatory acts cannot be viewed as discrete incidents, and often unfold rather than occur, making it difficult to precisely pinpoint the time when they take place.

Id. Tennessee has not applied the continuing violation doctrine outside discrimination cases. However, the same factors are applicable to an employment case involving a continuous policy of wrongfully withholding an employee's tips in violation of the Tennessee Tip Statute. As in employment discrimination cases, the employees protected by the Tennessee Tip Statute are

customarily lay people who are unaware that by delaying they risk losing any claim against the employer. Likewise, the employees covered by the Tip Statute may fear reprisal if they "make waves" over the method or amount of payment. As in many employment discrimination cases, the acts complained of in this case "unfolded" over time; as various employees came to suspect that tips were being withheld, their inquiries were rebuffed and diverted. In ***Frazier v. Heritage Fed. Bank for Sav.***, 955 S.W.2d 633, 637 (Tenn. App. 1997), the Court stressed that the basis for finding continuing violation is "that it would have been unreasonable to require the plaintiff to sue separately on each one." ***Id.*** In this case, the acts involved the same conduct by the employer on a recurring basis. Every week in which one of the Owens plaintiffs worked banquets, the Club withheld a percentage of their tips. Evidence in the record showed that the Club turned away the plaintiffs' questions about the tips, and may have deliberately hidden the fact that the plaintiffs were not paid all of their tips. Most importantly, it would not be reasonable to require that each plaintiff file suit after each paycheck in which the Club withheld tips. This would have required a lawsuit every pay period. Surely this is not the result intended by the legislature in enacting the Tennessee Tip Statute. Thus, although the Tennessee Tip Statute states that "[e]ach failure to pay an employee constitutes a separate offense," the circumstances of this case warrant application of the continuing violation doctrine.

For the continuing violation doctrine to apply in a particular case, the plaintiff must "link[] a series of related acts, one or more of which falls within the limitations period." ***Frazier v. Heritage Fed. Bank for Sav.***, 955 S.W.2d 633, 637 (Tenn. App. 1997). In this case, instances of tip withholding occurring outside the limitations period must be adequately linked to tip withholdings occurring within the limitations period. To determine whether the acts are linked, ***Frazier*** listed several factors: (1) whether the acts involved are of the same type, (2) whether the acts are recurring, such as a bi-weekly paycheck, or are isolated, and (3) whether the act has the "degree of permanence" that would alert an employee to his duty to assert his rights. ***See id.*** at 638. In this case, the acts involved the same conduct by the Club. These acts recurred each time the employee worked a banquet or private party. These acts did not have a degree of permanence, such as a termination or demotion. Under these circumstances, there is adequate evidence in this case to link the series of acts and toll the statute of limitations. Consequently, the Owens plaintiffs were not limited to damages incurred within the three years prior to the filing of the original complaint. The

trial court is affirmed on this issue.

The Club also argues that the order of the charges led the jury to mistakenly believe that mental or emotional injury was a proper element of compensatory damages under the Owens plaintiffs' claims. Immediately after reading the instruction on Galloway's claims for tortious interference and retaliatory discharge, the trial court gave the following instruction:

> Now, the plaintiffs might also be entitled depending upon your finding for recovery for mental or emotional injury. Reasonable compensation for mental or emotional injury suffered by the plaintiff and proximately caused by the defendant's conduct, these injuries may include suffering such as anguish, distress, fear, anxiety, humiliation, grief, shame and worry. No definite method or standard of calculation is prescribed by law by which to fix reasonable compensation for mental or emotional suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for mental or emotional suffering, you shall exercise your authority with calm and reasonable judgment. And the damages you fix shall be just and reasonable in the light of the evidence.

The trial court then read the instruction on Galloway's whistleblower claim. The Club argues that this sequence implies that mental and emotional damages were available for the Owens plaintiffs' claims, and was therefore confusing and misleading. The plaintiffs respond that a fair reading of the instructions ***in toto*** and in context make it clear that the trial court's instruction as to mental or emotional injury was referring only to Galloway's claims.

The Club in this case bears the burden of showing that an alleged error in the instructions likely resulted in prejudice to its position. ***DeRossett v. Malone***, 239 S.W.2d 366 (Tenn. App. 1951). "A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." **Tenn. R. App. P. 36**; ***see Otis v. Cambridge Mut. Fire Ins. Co.***, 850 S.W.2d 439, 446 (Tenn. 1992); ***Cook v. Blytheville Canning Co***., 210 Tenn. 414, 359 S.W.2d 828 (1961). "Therefore, regardless of alleged error, the verdict will not be set aside if 'ample convincing evidence exists to sustain the verdict of [the] jury.'" ***Scott v. Jones Bros. Const., Inc.***, 960 S.W.2d 589, 593 (Tenn. App. 1997) (quoting ***Blackburn v. Murphy***, 737 S.W.2d 529, 533-34 (Tenn. 1987)). From our review of the instructions as a whole, the Club has not borne its burden of proving an error in the instructions that likely resulted in prejudice to its position. The trial court is affirmed on this issue.

DAMAGES

Much of the Club's argument on appeal relates to the damages awarded in the Owens

lawsuit. At the close of the plaintiffs' proof, the Club moved for directed verdict on the ground that the Owens plaintiffs had failed to establish their respective compensatory damages with any degree of specificity. The Club reasserted these grounds in its post-trial motions for judgment notwithstanding the verdict or new trial. On appeal, the Club argues that the trial court's denial of these motions was error.

Tennessee law requires a plaintiff to prove damages with a "reasonable degree of certainty." ***Airline Constr., Inc. v. Barr***, 807 S.W.2d 247, 274 (Tenn. App. 1990). This evidence must "lay a foundation enabling the trier of fact to make a fair and reasonable assessment of damages." ***Pinson & Assoc. Ins. Agency, Inc. v. Kreal***, 800 S.W.2d 486 (Tenn. App. 1990). When the plaintiff claims loss of wages, the measure of damages is the difference between what the employee was actually paid and what the employee should have been paid. ***Frye v. Memphis State Univ.***, 806 S.W.2d 170 (Tenn. 1991) (applying loss of wages formula to wrongful termination case).

The Club maintains that the plaintiffs offered no proof of what they should have been paid under their theory of the case. Also, the Club claims that the plaintiffs furnished no data from which the jury could reasonably infer the amount of each plaintiff's respective damages, given the variables in their respective years of employment, work schedules, and in the number of private parties worked by each.

In response, the plaintiffs point to the testimony of Sandra Terrell, which established the total amount of surcharge the Club charged from 1988 to 1991. Also, Barruel's testimony established that the servers involved in the current lawsuit were part of a staff of twenty-five waiters and waitresses on staff at any given time. Galloway testified that the practice was to withhold between twenty and thirty percent of the surcharge for every banquet. The plaintiffs assert that each plaintiff testified as to the period of time he or she worked at the Club, the approximate number of hours worked, and that each performed some banquet or private party work. The plaintiffs also introduced a wage analysis for each plaintiff during the years 1989 to 1993. The Owens plaintiffs contend that this evidence was sufficient to allow the jury to calculate the amount of surcharge collected each year, the amount of surcharge withheld each year, each plaintiff's share of the surcharge, and which years each plaintiff worked. Exact computation or mathematical certainty as to the amount of damages is not required; a reasonable degree of certainty is all that is needed. ***Pinson & Assoc. Ins. Agency, Inc.,*** 800 S.W.2d at 488-89; ***Moore Constr. Co. v. Clarksville Dep't of Elec.***, 707 S.W.2d 1, 15 (Tenn.

App. 1985); ***Cummins v. Brodie***, 667 S.W.2d 759 (Tenn. App. 1983).

The Owens plaintiffs also note that the Club's incomplete and confusing system of keeping track of tip distribution, allegedly designed at least in part to obscure the facts and keep accurate information from the plaintiffs, should not be a basis to deny them relief. A defendant may not complain of uncertainty as to the amount of damages when the defendant's own deliberate and wrongful conduct made it difficult to prove specific amounts. ***Fuqua v. Madewell***, 153 S.W.2d 133, 135 (Tenn. App. 1941) (citing ***Eastman Kodak Co. v. Southern Photo Materials Co.***, 273 U.S. 359 (1927)); ***see also Cummins v. Brodie***, 667 S.W.2d 759 (Tenn. App. 1983).

In ***Fuqua v. Madewell***, 153 S.W.2d 133 (Tenn. App. 1941), the parties entered into a written contract through which the defendant, Fuqua, agreed to lease a farm to Madewell for a year. Fuqua breached the contract by leasing the farm to another man. Madewell sued for damages, and received a jury verdict. Fuqua appealed, claiming that the judgment was improper because the plaintiff's damages were too speculative. ***Fuqua***, 153 S.W.2d at 134. The court affirmed the jury verdict, stating that Madewell was entitled to damages equal to the benefit of the bargain that Fuqua breached: "The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which, he alone is responsible for making, were otherwise." ***Id.*** at 135. ***See also Sholodge Franchise Sys., Inc. v. McKibbon Bros., Inc.***, 919 S.W.2d 36, 42-43 (Tenn. App. 1995); ***Jennings v. Hayes***, 787 S.W.2d 1, 3 (Tenn. App. 1989); ***Cummins v. Brodie***, 667 S.W.2d 759 (Tenn. App. 1983); ***Brandtjen & Kluge, Inc. v. Pope***, 28 Tenn. App. 679, 692, 192 S.W.2d 496, 501 (1945).

The Club asserts that the trial judge should have directed a verdict in its favor or granted its motion for judgment notwithstanding the verdict (J.N.O.V.), or granted its request for a new trial because the plaintiffs' evidence of damages was purely speculative. Courts do not re-weigh the evidence or reevaluate the witness' credibility when they rule on a motion under Rule 50 of the Tennessee Rules of Civil Procedure. ***Holmes v. Wilson***, 551 S.W.2d 682, 685 (Tenn. 1977). The court views the evidence in a light most favorable to the motion's opponent and grants the motion only when the evidence can reasonably support but one conclusion. ***Holmes***, 551 S.W.2d at 685; ***Grissom v. Metropolitan Gov't of Nashville***, 817 S.W.2d 679, 683 n.2 (Tenn. App. 1991). Viewing the evidence in the light most favorable to the plaintiffs, we find that the trial court did not err in refusing to direct a verdict or grant a new trial on the basis that the overall evidence of damages in

the Owens case was unduly speculative.

The Club argues that the amounts of compensatory damages awarded to each of the Owens plaintiffs were based on pure speculation and cannot be affirmed on appeal. ***See Pinson & Assoc. Ins. Agency, Inc. v. Kreal***, 800 S.W.2d 486, 488 (Tenn. App. 1990). Speculative damages cannot be recovered when "the fact of damage is uncertain, contingent or speculative." ***Id.*** (citing ***Maple Manor Hotel, Inc. v. Metropolitan Gov't***, 543 S.W.2d 593 (Tenn. App. 1976)). "Courts will allow damages for breach of contract even where it is impossible to prove the exact amount of damages." ***Id.*** (citing ***Provident Life & Accident Ins. Co. v. Globe Indem. Co.***, 156 Tenn. 571, 576, 3 S.W.2d 1057, 1058 (1928)). "All that is required is proof with a reasonable degree of certainty." ***Id.***

The evidence in this case is clearly sufficient to establish the fact of damages. Witnesses for the Club acknowledged that the Owens plaintiffs were not paid all of the banquet surcharge collected from private parties. Under these circumstances, the jury could conclude that the Club owed the Owens plaintiffs damages resulting from its inequitable distribution of tips.

We now must determine whether the evidence in this case "is sufficient to enable the trier of fact to make a 'fair and reasonable assessment of damages.'" ***Pinson***, 800 S.W.2d at 488. The compensatory damages awards for each of the Owens plaintiffs must be examined, in order to determine whether the judgment for each plaintiff is reasonably related to the evidence presented. Where the Club's confusing system of keeping track of tip distribution makes calculation of the damages difficult, this cannot be a basis for denying relief to a given plaintiff. ***See Fuqua***, 153 S.W.2d at 135. However, each plaintiff must provide the jury with *some* basis, however approximate, for calculating damages.

The jury awarded plaintiff Clara Sharp $50,000 in damages. Clara Sharp testified that she had worked for the Club since 1966. From 1966 until 1992, Sharp testified that she worked in the dining room most of the time, but also worked banquets and private parties from her start date. From 1992 until 1996, Sharp worked part-time, working banquets only. Plaintiffs' calculation of damages for Sharp was based on the assumption that she spent one third of her time during her tenure working banquets. Testimony indicates that the full-time food and beverage workers at the Club normally worked a split shift in which they would work from approximately 10:30 A.M. to 2:00 P.M. for lunch and then return at approximately 5:00 P.M. to work dinner or banquets. Although Sharp testified that she worked mostly in the dining room, on those days on which she did work banquets she would

necessarily have been able to work only approximately three and a half hours in the dining room. This testimony, in combination with Sharp's testimony that after 1992 she worked solely in banquets, is sufficient support for the plaintiffs' contention that Sharp spent one third of her time working banquets. Plaintiffs' show that in the sample year 1989, Sharp worked a total of 2117 hours, one third of which, or 705 hours, was banquet work. Sharp's average hourly wage was calculated by the plaintiffs as $7.25 for 1989.[5] There is some support in the record for the assumption that the employer contributed approximately $2.00 an hour with the remainder coming from tips. With $5.25 an hour in tips, the amount of tips Sharp received in 1989 for banquet work equaled $3701. If this amount reflected approximately seventy percent of the total banquet tips to which Sharp was entitled, according to Galloway's testimony, then the withheld tips for that year totaled $1586. This amount, multiplied by the thirty years Sharp worked for the Club equals $47,580. This estimate does not take into account fluctuations in the number of parties Sharp worked and the amount withheld. However, considering the undisputed testimony that she worked banquets from the start of her employment and worked on banquets only after becoming part-time in 1992, it is sufficiently related to the amount of compensatory damages awarded to Sharp. This judgment is affirmed.

The jury awarded plaintiff Jobe Taylor $35,000 in compensatory damages. Taylor worked for the Club from 1984 until the time of trial as a waiter and a maitre d' in the dining room. Taylor testified that he rarely worked banquets during his employment: "I have worked on parties, on one or two banquets, not all the time." Taylor was paid a salary during the time he worked as a maitre d'-- he did not receive tips. Taylor received tips only when he worked in the dining room and at a few private parties. Plaintiffs' estimate of Taylor's damages assumed that one-half of his compensation came from serving at private parties and banquets. This is not consistent with his testimony at trial. The record does not support an award of $35,000 in Taylor's case. When the verdict has been approved by the trial judge, the Court of Appeals must affirm the award "if there is any material evidence to support the award . . . ." ***Foster v. Amcon Int'l, Inc.***, 621 S.W.2d 142, 146 (Tenn. 1981) (quoting ***Ellis v. White Freightliner Corp.***, 603 S.W.2d 125, 129 (Tenn. 1980); ***see also Porter v. Green***, 745 S.W.2d 874, 879 (Tenn. App. 1987). Based on the record as a whole, there is not material evidence to support the amount awarded to Taylor. The award of $35,000 in

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[5] The Club's Business Manager testified that the wage for a waiter or waitress could be as high as nine dollars per hour including tips.

compensatory damages to Taylor must be reversed.

The jury awarded plaintiff Cheryl Mitchell $45,000. Mitchell began working full-time for the Club in 1977. Prior to that, Mitchell worked part-time at the Club during high school as a server at banquets and parties. Mitchell testified that after she began working full time for the Club in 1977, she served lunch in the men's grill and worked banquets at night. The plaintiffs' calculation of damages for Mitchell was based on the assumption that half her time was spent working banquets. As noted above, testimony indicates that the full time food and beverage workers at the Club normally worked a split shift in which they would work from approximately 10:30 A.M. to 2:00 P.M. for lunch and then return at approximately 5:00 P.M. to work dinner or banquets. Therefore, a full time server working lunches in the dining room and evenings in banquets, would necessarily spend half of his or her time working banquets. Therefore, Mitchell's testimony that as a full-time server she worked lunches in the men's grill and evenings in banquets supports the plaintiffs' contention that Mitchell spent half her time working banquets. Basing their figures on the sample year of 1989, plaintiffs show that Mitchell worked a total of 2162 hours, 1081 of which were in banquets. Mitchell's average hourly wage was computed to be $5.60 during 1989 but testimony indicated that for a waiter or waitress the hourly wage could be as high as nine dollars per hour. Because the jury could have concluded, based on this testimony, that Mitchell earned up to nine dollars per hour, the following calculations were done assuming a nine dollar an hour wage. The Club contributed approximately $2 of this amount and the remainder came from tips. Earning seven dollars an hour in tips, the amount of tips Mitchell received in 1989 for the 1081 hours she worked in banquets was $7567. If, as Galloway testified, 30% of the tips were withheld, the amount of withheld tips for Mitchell in 1989 was $3243. When this amount is multiplied by the nineteen years that Mitchell worked full-time, $61,617 was withheld from her over those nineteen years. In addition, the assumption that the same amount of tips was withheld during the estimated two years that Mitchell worked while in high school, adds another $6486 of withheld tips. Therefore, the evidence is sufficient to affirm the $45,000 jury award to Mitchell.

Plaintiff William Arthur Smith was awarded $3,500 in damages. In 1991, Smith began working for the Club as a busser. He later became a waiter and worked until 1992, when he was fired for reasons unrelated to this lawsuit. At trial, Smith could not remember when he stopped bussing tables and began working as a waiter, although one exhibit indicates he was promoted "mid year."

Smith testified that, as a waiter, he "worked in the men's grill mostly and the dining room and in banquets . . . ." Smith gave no estimate of how often he worked banquets and private parties as a waiter. Smith's vague testimony is insufficient to support the jury's award of $3,500 in damages. The award of compensatory damages to Smith is reversed.

Plaintiff Lesia Johnson was awarded damages of $50,000. Johnson was hired in 1980 in a part-time position working banquets only. At some point she began working full-time, and worked in both the dining room and banquets. At the time of trial, she was still employed in this position. Johnson could not remember the approximate date on which she went from part-time to full-time, and gave no estimate of the percentage of her time working banquets after she began working full-time. From Trial Exhibit 58, it appears that Johnson's total wages in 1989 were $9,172.48, while her total wages in subsequent years ranged from $12,000 to $17,000. From this it could be inferred that she worked part-time in banquets only until sometime in 1989, and thereafter worked full-time, with an undetermined percentage of her time worked in banquets. The plaintiffs calculate that Johnson's tips withheld by the Club for the years 1980-1988 totaled $22,947. The amount of her tips withheld thereafter cannot be determined without an estimate, however rough, of the percentage of time she spent working banquets. The record contains no such information. Under the circumstances, the jury's award of $50,000 is not supported by the record. Material evidence in the record supports an award of compensatory damages to Johnson of no more than $25,000. Consequently, a remittitur of $25,000 is suggested, for a total award to Johnson of $25,000. Tennessee Code Annotated § 20-10-103(a) and (b) implicitly recognizes that an appellate court has the authority to suggest a remittitur for the first time when the case was tried by a jury with no remittitur by the trial judge. T.C.A. § 20-10-103(a) and (b) (1994); ***Coffey v. Fayette Tubular Prod.***, 929 S.W.2d 326, 331 (Tenn. 1996); ***GRW Enter., Inc. v. Davis***, 797 S.W.2d 606, 615 (Tenn. App. 1990). "But when the trial judge has approved the verdict, the review in the Court of Appeals is subject to the rule that if there is any material evidence to support the award, it should not be disturbed." ***Ellis v. White Freightliner Corp.***, 603 S.W.2d 125, 129 (Tenn. 1980). As stated above, however, there is no material evidence supporting an award as high as $50,000.

The jury awarded plaintiff Ritta Owens damages in the amount of $30,000. Owens worked as a waitress at the Club from 1984 until 1991. She was originally hired to work banquets only; later she began working in the dining room as well as private parties; after Macaulay began in 1989, she

worked more in the dining room than private parties. The record does not reflect the length of time Owens worked at banquets only. Owens' damages are supported by a compilation of tip and payroll records prepared by Scarlet Pearsall, the Club's Business Manager. Based on the sample year 1989, Owens' average hourly wage, including tips, amounted to $7.29. Deducting the employer's portion of the wage leaves $5.29 in tips per hour. This amount multiplied by the total hours worked amounts to $12,485.72. Plaintiffs estimated that half of Owens' tips came from banquets, or $6,243. From this number, plaintiffs estimated that the tips withheld from Owens amount to approximately $2,675 per year during the time in which Owens worked in the dining room and at banquets.

Plaintiffs' calculation of Owens' damages is based on the assumption that she worked banquets only from 1984 to 1987, and thereafter worked banquets half the time. There is no basis in the record for either of these assumptions. The record does contain Owens' testimony that she originally worked banquets only, but does not indicate the length of this time period. Furthermore, Owens testified that after Macaulay started, in 1989, she worked mostly in the dining room.

If Owens had spent her entire seven and a half years at the Club working half the time in the dining room and half the time working banquets, her compensatory damages would total approximately $20,000. It is undisputed that a significant portion of her tenure was spent working banquets only, and that starting in 1989 she came to work more in the dining room than in banquets. We find that Owens' vague testimony is insufficient to support an award of more than $20,000 in compensatory damages. Consequently, a remittitur of $10,000 is suggested, for a total award to Owens of $20,000.

For plaintiffs Taylor and Smith, the record contained sufficient evidence to establish the fact of damages but was insufficient to establish the amount of compensatory damages without resort to speculation and conjecture. Under these circumstances, these plaintiffs are entitled to compensatory damages in at least a nominal amount. ***See Womack v. Ward***, 186 S.W.2d 619 (Tenn. App. 1944); ***Cumberland Tel. & Tel. Co. v. Stoneking***, 1 Tenn. Civ. App. (Higgins) 241 (1910). This Court has previously held that:

> [w]here plaintiff establishes a wrong and actual loss therefrom he is entitled to nominal damages at least, although the actual damages are not susceptible of being exactly ascertained, as where the evidence fails to show the extent of the resulting damages, or fails to furnish the facts as a basis for computing the damages under the rule applicable thereto.

Williams v. Southern Ry. Co., 396 S.W.2d 98, 101 (Tenn. App. 1965) (quoting 25 C.J.S. ***Damages*** § 12 (1966). In Tennessee, those plaintiffs who receive compensatory damages, even of a nominal amount, have proven a legal injury and are entitled to receive punitive damages. ***See Pinckney v. McCormick***, No. 24, 323, 1992 WL 14132 (Tenn. App. Jan. 31, 1992); ***Oakley v. Simmons***, 799 S.W.2d 669 (Tenn. App. 1990). Both Taylor and Smith, therefore, are entitled to share in the award of punitive damages received by the Owens plaintiffs. Although the jury could have been required to assess punitive damages against each of the Owens' plaintiffs individually under T.C.A. § 25-1-104, the parties stipulated to have the jury assess a lump sum amount, therefore, the parties waived their rights under this Statute. See ***Pridemark Custom Plating, Inc. v. Upjohn Co.***, 702 S.W.2d 566, 574 (Tenn. App. 1985).

PUNITIVE DAMAGES

The Club asserts that the trial court erred by failing to direct a verdict or enter a judgment notwithstanding the verdict on the issue of punitive damages. Tennessee law requires clear and convincing proof of egregious misconduct for an award of punitive damages to be justified. The Tennessee Supreme Court set out factors to be considered with regard to punitive damages in ***Hodges v. S. C. Toof & Co.***, 833 S.W.2d 896 (Tenn. 1992):

> In Tennessee, . . . a court may henceforth award punitive damages only if it finds a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly.
>
> A person acts intentionally when it is the person's conscious objective or desire to engage in the conduct or cause the result. A person acts fraudulently when (1) the person intentionally misrepresents an existing, material fact or produces a false impression, in order to mislead another or to obtain an undue advantage, and (2) another is injured because of reasonable reliance upon that representation. A person acts maliciously when the person is motivated by ill will, hatred, or personal spite.

> A person acts recklessly when the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances.

Hodges, 833 S.W.2d at 901 (citations omitted).

The Club contends that there is no "clear and convincing evidence" of reprehensible misconduct in its treatment of its employees. However, the record in this case contains evidence clearly sufficient for the jury to find conduct warranting punitive damages. Sandra Pearsall, the Club's Business Manager, testified that part of the money held back by the manager ended up in the Club's general operating account, and other portions were used to supplement the incomes of salaried employees. The letters from Ernst & Whinney, the Club's auditors, informed the Club that its tip distribution system caused confusion and should be clarified. The Club did nothing to change this system until after the lawsuit was filed. The individual plaintiffs testified about their attempts to find out how the tips were distributed, and the Club's confusing and unresponsive reply. From this evidence, the jury could find that the employer intentionally withheld a portion of its employees' compensation over a period of decades, and took affirmative steps to prevent the employees from realizing the practice. This conduct warrants an award of punitive damages.

The amount of the punitive damages, however, presents another question. The trial court in this case did not suggest remittitur. However, as discussed above, Tennessee Code Annotated § 20-10-103(a) and (b) implicitly authorizes an appellate court to suggest remittitur for the first time on appeal, even where the trial judge did not do so. Tenn. Code Ann. § 20-10-103(a) and (b) (1994). In addition, the Club argues that punitive damages are not warranted by the evidence, but does not specifically request remittitur. Nevertheless, this does not preclude a suggestion of remittitur by the appellate court. In ***Caccamisi v. Thurmond***, 282 S.W.2d 633, 645 (Tenn. App. 1954), the defendant objected that there was no evidence supporting the $5000 punitive damages award. The defendant did not argue for remittitur. In reducing that award to $2500, the Court explained, "In spite of the fact, however, that the trial judge as thirteenth juror, approved the verdict in this cause . . . we think the amount is excessive." ***Id.*** (citing Tenn. Code § 8988 (Supp. 1950), the provisions of which are now found in Tenn. Code Ann. § 20-10-103(1994)). There is ample authority to suggest remittitur as to the punitive damages award in this case. Because the trial court approved the verdict, we must affirm the award if there is any material evidence to support it. ***Ellis v. White Freightliner Corp.***,

603 S.W.2d 125, 129 (Tenn. 1980).

The amount of punitive damages in this case equals approximately thirteen percent of the Club's net worth of 3.9 million dollars. The $500,000 punitive damages award is approximately three and one-half times the amount of compensatory damages affirmed on appeal. For the last two years that the Club provided figures, 1995 and 1994, the Club's net revenues averaged out to $304,000. The $500,000 award is higher than the Club's average net revenues. This amount is excessive. A punitive damages award of $250,000 would constitute slightly more than six percent of the Club's net worth and approximately 1.8 times the amount of compensatory damages. Under the circumstances, given the nature of the misconduct involved and the relevant financial evidence, this amount of punitive damages is appropriate. Therefore, we suggest a remittitur of $250,000, to make a total remaining punitive damages award of $250,000.

GALLOWAY

In its appeal of the Galloway lawsuit, the Club contends that the trial court erred in denying the Club's motions for directed verdict and judgment notwithstanding the verdict based on Galloway's failure to establish a violation of the Whistleblower Statute.[6] The Club argues that Galloway failed to prove a violation of the Whistleblower Statute because she failed to prove an underlying violation of the Tennessee Tip Statute, Tennessee Code Annotated § 50-2-107 (1991). The Club's violation of the Tennessee Tip Statute is discussed above; the decision of the trial court is affirmed on this issue.

Next, the Club alleges that its motion for directed verdict should have been granted as to the Whistleblower claim because Galloway was judicially estopped from asserting that she was terminated by the Club "solely" for refusing to participate in or remain silent about the Club's illegal activities. Galloway's sworn complaint with the Tennessee Human Rights Commission

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[6] Tennessee Code Annotated § 50-1-304 states:

> (a) No employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities.
> (b) As used in this section, "illegal activities" means activities which are in violation of the criminal or civil code of this state or the United States or any regulation intended to protect the public health, safety or welfare.
> (c) Any employee terminated in violation of subsection (a) shall have a cause of action against the employer for retaliatory discharge and any other damages to which the employee may be entitled . . . .

("Commission") stated that she had been terminated because of sex discrimination. Galloway stated the following details in her complaint:

> III. I believe that I have been discriminated against because of my sex (female) for the following reasons:
> a. I feel I was terminated to make room for Mark Cagle (W/M) who has less responsibilities than I.
> b. I have been treated differently than Stan Gibson (W/M), the Executive Chef, who has been repeatedly reprimanded for numerous violations of company policy. He is still employed.

The Club claims that this statement should judicially estop Galloway from claiming her dismissal was attributable to something other than sex discrimination, therefore barring her claim under the Whistleblower statute.

Under the doctrine of judicial estoppel, where one states on oath in former litigation, either in a pleading or in a deposition or on oral testimony, that a given fact is true, he will not be permitted to deny that fact in subsequent litigation, although the parties may not be the same. ***Melton v. Anderson***, 32 Tenn. App. 335, 342, 222 S.W.2d 666, 669 (1948). Judicial estoppel does not apply where there is an explanation showing that the statement was inadvertent, inconsiderate, mistaken or anything short of a willfully false statement of fact. ***Monroe County Motor Co. v. Tennessee Odin Ins. Co.***, 33 Tenn.App. 223, 236, 231 S.W.2d 386 (1950) (citing cases). Anything short of a willfully false statement of fact, in the sense of conscious and deliberate perjury, is insufficient to give rise to an estoppel and the party is entitled to explain that the statement was inadvertent or inconsiderate or represents a mistake of law. ***State ex rel. Scott v. Brown***, 937 S.W.2d 934 (Tenn. App. 1996) (citing cases).

Galloway first argues that judicial estoppel applies only in judicial proceedings, and has no application with respect to administrative proceedings. In addition, Galloway argues that judicial estoppel does not apply to statements such as those at issue in this case. Galloway maintains that judicial estoppel applies only to statements of fact, and that the opinions Galloway stated in her administrative charges filed with the Tennessee Department of Employment Security and the Tennessee Human Rights Commission as the cause of her termination are not statements of fact. At the time she filed her charge of sex discrimination, Galloway apparently believed she had been fired due to sex discrimination. Galloway argues that her failure to discern the actual reason for her termination at the time in no way limits her right to assert it at trial. Statements of opinion cannot estop a party from subsequently asserting a different position. ***Schultz, Baujan & Co. v. Bell***, 23

Tenn. App. 258, 130 S.W.2d 149, 151 (1939).

In this case, the doctrine of judicial estoppel does not apply because the statement in Galloway's Charge of Discrimination filed with the Tennessee Human Rights Commission, that she believed she was discharged because of her gender, is a statement of her opinion about the reason for her discharge, not a statement of fact. Galloway's statement of her opinion does not estop her from later asserting a different position. ***See Schultz, Baujan & Co.***, 130 S.W.2d at 151.

Likewise, Galloway's assertions in her Charge with the Tennessee Human Rights Commission does not preclude her from asserting a claim under the Whistleblower Statute, Tennessee Code Annotated § 50-1-304 (1991). Under this statute, the employee must prove that the *sole* cause of her termination was her whistleblowing activities. Galloway's statement in her Charge regarding her opinion about the reason for her termination is relevant and could be taken into account by the jury in assessing her credibility. However, the statement in the Charge does not prevent the jury form concluding that the *sole* reason for Galloway's termination was her refusal to continue the practice of withholding tips. The decision of the trial court is affirmed on this issue.

The Club asserts that the trial court erred in allowing Galloway's claim for tortious interference with at-will employment to go to the jury. At trial, the evidence established that Macauley spoke with Galloway's employer, Jim Clayton of Clayton Homes, before Galloway was terminated from that job. Galloway testified that there had been no problems at her work before this conversation, and that Clayton questioned Galloway extensively about her pending lawsuit before he terminated her. This evidence was sufficient to support a finding of tortious interference with Galloway's at-will employment. The trial court is affirmed on this issue.

Lastly, the Club alleges that the trial court erred in denying the Club's motions for directed verdict and judgment notwithstanding the verdict based on Galloway's failure to prove damages for wrongful termination. The Club claims that, even assuming Galloway established a tortious interference claim, she failed to prove any damages resulting from her termination from Clayton Homes, except "depression." Indeed, Galloway admitted that her salary increased by nearly $3,500 annually following her termination at Clayton Homes, although her new benefits package was "not as good" at her subsequent job. Since it is undisputed that Galloway's compensation did not decrease following her termination at Clayton Homes, the Club claims that the trial court should have directed a verdict finding no proof of damages to Galloway.

In this case, the jury returned a general verdict in favor of Galloway in the amount of $35,000. Tennessee Code Annotated § 50-1-304(c) provides that an employee discharged under the Whistleblower Statute "shall have a cause of action against the employer for retaliatory discharge *and any other damages to which the employee may be entitled.*" Tenn. Code Ann. § 50-1-304(c) (1991) (emphasis added). This language thus allows a plaintiff to recover for the emotional distress or mental anguish associated with being fired under the Whistleblower Statute. The jury could have concluded from Galloway's testimony at trial that she suffered emotional distress upon her dismissal from the Club. Moreover, the evidence indicated Galloway suffered emotional distress as a result of the Club's alleged tortious interference with Galloway's employment with Clayton Homes. The trial court is affirmed on this issue.

In sum, we find that the trial judge did not abuse his discretion in refusing to recuse himself, or by admitting into evidence the three auditor's letters. The plaintiffs' claims are not barred by the statute of limitations because there was evidence from which the jury could conclude that the plaintiffs did not know of the practice of withholding tips until 1992, and that the Club took deliberate steps to rebuff the plaintiffs' inquiries and prevent them from knowing they had not received all of their tips. Furthermore, the continuing violation doctrine applies to link the many instances of tip withholding and toll the statute of limitations. The trial court is affirmed on its determination that a private cause of action exists under the Tennessee Tip Statute. The evidence submitted was sufficient for the jury to find a violation of the Tip Statute, breach of oral contract, fraud and misrepresentation, and conversion. The jury instructions given by the trial court were sufficient and the trial court's denial of a new trial on this basis is affirmed. The evidence supporting the jury's award of $50,000 in compensatory damages to Clara Sharp is sufficient, and this award is affirmed. The evidence supporting the award of $35,000 in compensatory damages to Jobe Taylor is insufficient, and this judgment is reversed. The evidence supporting the award of $45,000 to Cheryl

Mitchell is sufficient, and this judgment is affirmed. The evidence supporting the award of $3,500 to William Arthur Smith is insufficient, and this judgment is reversed. The evidence regarding compensatory damages suffered by plaintiff Ritta Owens supports an award of no more than $20,000. Consequently, as to her award of $30,000 in compensatory damages, a remittitur of $10,000 is suggested leaving the remaining award to Owens in the amount of $20,000. The evidence regarding compensatory damages suffered by plaintiff Lesia Johnson supports an award of no more than $25,000. Consequently, as to her award of $50,000 in compensatory damages, a remittitur of $25,000 is suggested, leaving a remaining award to Johnson in the amount of $25,000. Since the fact of damage was established by the evidence for all of the Owens plaintiffs, but the evidence was insufficient to support an award of compensatory damages to plaintiffs Taylor and Smith without resort to speculation and conjecture, these plaintiffs are entitled to an award of nominal damages. The evidence was insufficient to support the jury's award of punitive damages against the Club. A remittitur of $250,000 is suggested, leaving the remaining punitive damages in the amount of $250,000. The cause is remanded to the trial court on the above issues of remittitur of the compensatory damages for plaintiffs Owens and Johnson, and remittitur of the award of punitive damages.

On Galloway's lawsuit, the statements made in her Charge of Discrimination do not judicially estop her from asserting that she was discharged solely because of her whistleblowing activities, because the statements were assertions of her opinion, not statements of fact. The evidence was sufficient to permit Galloway's claim of tortious interference with employment to go to the jury, and the trial court is affirmed on this issue. The evidence was also sufficient to support the jury's award of compensatory damages to Galloway, to compensate for her emotional distress, despite the fact that she suffered no loss of income from her termination, and the trial court is affirmed on this issue as well.

Affirmed in part, reversed in part, and remanded. Costs are assessed against the Appellant, for which execution may issue if necessary.

HOLLY KIRBY LILLARD, J.

CONCUR:

W. FRANK CRAWFORD, P. J., W.S.

ALAN E. HIGHERS, J.