

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE WAGE CLAIM )	Case No. 499-2016
OF AMY GRAHAM, )	
	)
Claimant, )	
	)
vs. )	<b>FINAL AGENCY DECISION</b>
	)
SHADOW'S KEEP OF MISSOULA, INC., )	
a Montana corporation, d/b/a THE KEEP )	
RESTAURANT, )	
	)
Respondent. )	

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**I. INTRODUCTION**

On September 17, 2015, Amy Graham filed a claim for unpaid wages in the amount of \$13,728.00 with the Wage & Hour Unit of the Department of Labor & Industry. After investigating the claim, the Wage & Hour Unit issued a Determination on April 15, 2016 that Graham was owed \$12,367.12 in unpaid tips. On April 27, 2016, The Keep Restaurant filed its appeal of the Determination.

After mediation attempts were not fruitful, the case was transferred to the Office of Administrative Hearings on September 7, 2016. On September 27, 2016, the hearing officer conferred with the parties and set a January 11, 2017 hearing date.

On December 9, 2016, The Keep filed its Motion for Summary Judgment, arguing that under *Cumbe v. Woody Woo, Inc.*, 596 F. 3d 577 (9th Cir. 2010), The Keep's tip pooling arrangement was not in violation of Montana's Wage Payment Act (WPA) or the Fair Labor Standards Act (FLSA). On January 4, 2017, OAH received Graham's response to the motion.

On January 5, 2017, the parties conferred with the hearing officer and it was agreed that the hearing officer could grant summary judgment to either party. The parties further agreed that the amount of tips not paid was \$12,429.18. Accordingly, the hearing was vacated.

The parties further agreed that if the hearing officer drafted a decision not favorable to The Keep, he would consider allowing it to put on testimony of several witnesses. After further discussions with the parties, The Keep was allowed to submit two sworn affidavits.

The affidavits did not affect the hearing officer's decision. The affidavit of one customer, Steven Curtis, stated that he usually tipped 40% when the food and service is excellent and never less than 20%. He further stated that he expects his tips to be equitably distributed to other staff who assisted in his overall experience.

The affidavit of Heidi Kelly, a part-time lounge server, stated that she had no problem with The Keep's tip pooling policy. The affidavit then offered a lot of hearsay information about the purported beliefs of other staff and customers.

## II. UNDISPUTED FACTS

1. The Keep is a locally owned, fine dining restaurant located in Missoula. Affidavit of Melissa Mooney, December 9, 2016. The Keep is owned by Reed and Melissa Mooney. *Aff. Mooney*.

2. Reed Mooney ("Reed") went to work for Mr. Hoffmaster in 1986, as a dishwasher at the Mansion. *Id.* at 4. Reed worked his way up from the dishwasher position to the positions of head chef and kitchen manager at Shadows Keep before purchasing the restaurant in 2007. *Id.* Reed has been continuously employed at the Mansion, Shadows Keep, and The Keep for over 30 years, and he continues to prepare food for The Keep's patrons to this day. *Id.*

3. Melissa Mooney ("Melissa") began working for Mr. Hoffmaster in 1996, as a busser at Shadows Keep. *Id.* at 5. Melissa eventually worked her way up to the positions of host, server, dessert chef, and banquet manager at Shadows Keep. *Id.* From 1996 to the present day, Melissa has been employed at either Shadows Keep or The Keep, off and on, for 14 years. *Id.* She continues to plan and coordinate weddings and holiday parties at The Keep, and occasionally hosts and assists with food service on busy evenings. *Id.* Reed and Melissa share The Keep's managerial duties. An assistant manager assists with the restaurant's various operations. *Id.*

4. The Keep employs nearly 30 staff, including 13 restaurant servers, two hosts/bussers, three bartenders, six cooks, a dessert chef, and four dishwashers. It pays each of its restaurant employees no less than the minimum wage required under Montana law. *Id.* at 6.

5. The Keep also has a “tip-sharing” or “tip pool” policy which it adopted from the Mansion and Shadows Keep. *Id.* That policy has now been in effect at the restaurant for over 30 years. Under that policy, tips that are left by patrons, in addition to their food and beverage bill, are shared among the restaurant staff. *Id.* This policy is intended to recognize the collective effort of each of The Keep’s staff members in contributing to the patrons’ overall dining experience. *Id.* Under this tip pool policy, The Keep’s servers retain 67% of all tips they collect from the patrons, while 17% of the tips go to the cooks and dishwashers (back of the house staff), and 16% go to the bartender, host, and bussers (front of the house staff). *Id.* All tips are received by The Keep’s employees, and no tips are retained by The Keep for any use other than to compensate its employees for their work in providing the restaurant’s patrons an enjoyable dining experience. *Id.* Because they receive a significantly smaller percentage of tips, The Keep’s cooks are paid a slightly higher hourly wage than its servers. *Id.*

6. Amy Graham (“Graham”) was employed as a dining room server with The Keep from approximately July 1, 2013 through July 26, 2015. *Id.* at 8. As a server, Graham was paid Montana’s minimum wage of \$8.05 an hour, and retained 67% of tips left by the patrons she served each night. *Id.* She “tipped-out” the remaining 33% of those tips according to The Keep’s tip pool policy. *Id.* From July 1, 2013 through July 26, 2015, Graham earned \$15,444.37 in wages paid by The Keep, and retained an additional \$25,235.00 in tips. *Id.* She “tipped-out” \$12,429.18 to her co-workers, with \$6,402.91 of those tips going to the back of the house staff, and \$6,026.27 going to the front of the house staff. *Id.*

### III. DISCUSSION

Graham’s claim is for unpaid regular wages. She made no claim for minimum wage or overtime pay. As such, her claim is determined under the provisions of the Montana Wage Payment Act (WPA) and not the federal Fair Labor Standards Act (FLSA). The FLSA is designed to ensure that employees are paid a minimum wage and that they receive 1½ times their regular rate for hours worked beyond 40 in a workweek. 29 U.S.C. §§ 206-07; *Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106, 116 (2d Cir. N.Y. 2013); *Parker v. City of New York*, 2008 U.S. Dist. LEXIS 38769, 12-13 (S.D.N.Y. May 13, 2008) (2d cir); *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 490 (2d Cir. 1960); *Monahan v. County of Chesterfield, Va.*, 95 F.3d 1263, 1266-67 (4th Cir. 1996); *Cole v. City of Port Arthur*, 2014 U.S. Dist. LEXIS 96754, 13-14 (E.D. Tex. July 16, 2014) (5<sup>th</sup> cir); *Espenscheid v. DirectSat USA, LLC*, 2011 U.S. Dist. LEXIS 154706, 29-30 (W.D. Wis. Apr. 11, 2011) (7<sup>th</sup> cir.); *Hensley v. MacMillan Bloedel Containers, Inc.*, 786 F.2d 353, 357 (8<sup>th</sup> Cir. 1986); *Davis v. City of Loganville*, 2006 U.S. Dist. LEXIS 20795 (M.D. Ga. Mar. 27, 2006) (11<sup>th</sup> cir); *Arnold v. Arkansas*, 910 F. Supp.

1385, 1393 (E.D. Ark. 1995); *Brown v. Lululemon Athletica, Inc.*, 2011 U.S. Dist. LEXIS 18217, 2011 WL 741254, \*4 (N.D. Ill. Feb. 24, 2011); *Valcho v. Dallas County Hospital District*, 658 F. Supp. 2d 802, 811 (N.D. Tex. 2009). But see *Lamon v. City of Shawnee*, 972 F.2d 1145, 1155 (10th Cir. 1992) (recognizing pure gap time claim); *Schmitt v. Kansas*, 844 F. Supp. 1449, 1458 (D. Kan. 1994) (same).

The FLSA is a minimum wage, maximum hour law; its purpose is to set limits on the minimum wages and maximum hours an employee is permitted to work before the employer is required to pay overtime. 29 U.S.C. §§ 206-07; *Monahan v. County of Chesterfield, Va.*, 95 F.3d 1263, 1266-67 (4th Cir. 1996).

So long as an employee is being paid the minimum wage or more, FLSA does not provide recourse for unpaid hours below the 40-hour threshold, even if the employee also works overtime hours the same week. See *id.* In this way federal law supplements the hourly employment arrangement with features that may not be guaranteed by state laws, without creating a federal remedy for all wage disputes--of which the garden variety would be for payment of hours worked in a 40-hour work week. For such claims there seems to be no lack of a state remedy, including a basic contract action. See, e.g., Point IV (discussing the New York Labor Law).

*Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106, 116 (2d Cir. N.Y. 2013).

The Keep relies on an overturned Ninth Circuit Court holding in *Cubbie v. Woody Woo*, in which the USDOL's rule prohibiting tip pooling was found ultra vires of the statute. Its argument invites the hearing officer to discount the 9th Circuit's more recent holding on a new but very similar USDOL rule that disallowed tip pooling policies but allowed tip splitting agreements made between the employees.<sup>1</sup> *Oregon Rest. & Lodging Ass'n v. Perez* case which upheld a US Department of Labor rule which provides as follows:

A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, who has the right to determine who shall be the recipient of the gratuity. Tips are the property of

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<sup>1</sup> A tip pooling policy would be a situation where all the wait staff put all their tips into a pot and receive some percentage back from the employer. Tip splitting would be a voluntary agreement between the wait staff to contribute a set percentage of their tips into a pool for other employees to receive.

the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool. Only tips actually received by an employee as money belonging to the employee may be counted in determining whether the person is a "tipped employee" within the meaning of the Act and in applying the provisions of section 3(m) which govern wage credits for tips.

#### 29 CFR 531.52

Where employees practice tip splitting, as where waiters give a portion of their tips to the busboys, both the amounts retained by the waiters and those given the busboys are considered tips of the individuals who retain them, in applying the provisions of section 3(m) and 3(t). Similarly, where an accounting is made to an employer for his information only or in furtherance of a pooling arrangement whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed among themselves, the amounts received and retained by each individual as his own are counted as his tips for purposes of the Act. Section 3(m) does not impose a maximum contribution percentage on valid mandatory tip pools, which can only include those employees who customarily and regularly receive tips. However, an employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

#### 29 CFR 531.54

Under Cubbie, an employer who does not take a tip credit would be free to negotiate with its wait staff requiring them to pool their tips. Under Perez, the wait staff would create its own agreement and the employer might collect the percentage of tips and redistribute them to other front of the house staff (bussers, hosts, and bartenders). Under Cubbie, The Keep's policy would not violate the FLSA; under Perez, The Keep's tip policy does violate the FLSA. In any case, the hearing officer has found that the WPA, not the FLSA, governs this case.

The WPA defines wages as follows:

“Wages” includes any money due an employee from the employer or employers, whether to be paid by the hour, day, week, semimonthly, monthly, or yearly, and includes bonus, piecework, and all tips and gratuities that are covered by section 3402(k)<sup>2</sup> and service charges that are covered by section 3401 of the Internal Revenue Code of 1954, as amended and applicable on January 1, 1983, received by employees for services rendered by them to patrons of premises or businesses licensed to provide food, beverage, or lodging.

Mont. Code Ann. 39-3-201(6)(a)(emphasis added).

The plain meaning of the statute makes clear that under the WPA, Graham’s tips were her wages to do with what she wished. See *MM&I, LLC v. Bd. of County Comm’rs of Gallatin County*, 2010 MT 274, P44; 246 P.3d 1029, 1036 (In discerning the plain meaning, the words used shall be reasonably and logically interpreted, so as to give them their usual and ordinary meaning). The administrative rules echo this result: “tips are the employees to keep and may not be used to make up any part of the employee’s wage.” Admin R. Mont. 24.16.1508.<sup>3</sup>

Under the WPA, The Keep owes Graham \$12,429.18 and a penalty of \$6,836.05 (55% of the wages owed).<sup>4</sup>

#### IV. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Shadow’s Keep of Missoula, Inc. owes Graham \$12,429.18 in unpaid wages and a penalty on the unpaid wages of \$6,836.05.

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<sup>2</sup> Section 3402(k) requires a certain percentage of a server’s tips be reported as wages for tax purposes.

<sup>3</sup> The hearing officer notes that this rule was promulgated under the authority of Mont. Code Ann. § 39-3-403 which is the Minimum Wage and Overtime Act.

<sup>4</sup> If the wait staff at a restaurant were to make their own agreement to share their tips with other front of the house employees, such an agreement would appear to satisfy both the WPA and the FLSA. See e.g. *McConkey v. Flathead Elec. Coop.*, 2005 MT 334, 125 P. 3d 1121.

V. ORDER

Shadow's Keep of Missoula, Inc. is hereby ORDERED to tender a cashier's check or money order in the amount of \$19,265.23, representing \$12,429.18 in wages and \$6,836.05 in penalty, made payable to Amy Graham, and mailed to the **Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503**, no later than 30 days after service of this decision. Shadow's Keep of Missoula, Inc. may deduct applicable withholding from the wage portion, but not the penalty portion, of the amount due.

DATED this 27th day of April, 2017.

DEPARTMENT OF LABOR & INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DAVID A. SCRIMM  
DAVID A. SCRIMM  
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702. Please send a copy of your filing with the district court to:

Department of Labor & Industry  
Wage & Hour Unit  
P.O. Box 201503  
Helena, MT 59624-1503

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.