

**STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU**

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1246-2004
OF MARIANA L. COOK,)	
Claimant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
SIRIUS BUSINESS COMPANY, INC., d/b/a)	
PLANET LOCKWOOD,)	
a Montana Corporation,)	
Respondent.)	

I. INTRODUCTION

Sirius Business Company, Inc. d/b/a Planet Lockwood (Lockwood), appeals from a Wage and Hour Unit determination that found Lockwood owed Mariana Cook additional wages and statutory penalty. On August 10, 2004, Hearing Examiner Gregory L. Hanchett convened a telephonic contested case hearing in this matter. Terry L. Seiffert, attorney at law, represented Cook. Vicki Dunaway, attorney at law and James Healow, attorney at law, represented Lockwood. Cook, Spencer Bradley, and James Healow testified under oath. The parties stipulated to the admission of Documents 1 through 26, 29 through 89, and 95 through 208. Documents 27 and 28 and Documents Number 90 through 94 were not offered into evidence. After presenting evidence and argument, the parties submitted the matter to the hearing examiner for decision. Based on the evidence and argument presented at hearing, and having considered applicable statutes, regulations, and case law, the hearing examiner makes the following findings of fact, conclusions of law, and order.

II. ISSUE

Does Lockwood owe wages to Cook as alleged in her complaint and penalty as provided by law?

III. FINDINGS OF FACT

1. Cook began working as a dancer at Lockwood in September, 2002. She resigned in October, 2003.

2. Lockwood paid Cook \$6.50 per hour plus tips. Cook received all hourly wages she was due.

3. Lockwood has a center stage for dancers where patrons may sit stage side to watch the dancers. There are also tables spread throughout the building which are not stage side. Lockwood serves alcohol while the performances are going on and also has a disc jockey (DJ) playing music and talking to the patrons.

4. Lockwood collected a cover charge from each patron as the patron entered the establishment. The DJ playing music regularly encouraged patrons to sit stage side and tip dancers by placing tips on the stage which the dancers collected. For example, the DJ reminded the patrons "C'mon guys, these girls don't work for free."

5. Lockwood did not require patrons to tip the dancers in order to remain at a stage side seat. Indeed, Spencer Bradley, who visited Lockwood at least once per month while Cook worked there, never saw a stage side patron removed from a stage side seat for failure to tip a dancer. There were no posted notices telling patrons that they were required to pay stage tips to the dancers for the privilege of sitting at a stage side seat. In addition, patrons were not being notified (either orally or through signage) that the money they were leaving on the stage was some sort of seating fee being charged by Lockwood for the privilege of sitting stage side.

6. When paying tips to dancers while stage side, Bradley intended that his tip go to the dancer for her performance.

7. Lockwood required its dancers to pay a "stage fee" to Lockwood management. The amount of the stage fee varied and was based on the number of patrons entering the establishment on a given night. A dancer paid these stage fees out of the tips left on stage by patrons for the dancer while she performed. If there were insufficient tips paid to the dancer on any given evening, the dancer would have to pay the stage fee out of her own pocket.

8. Cook paid \$3,265.00 in stage fees to Lockwood between December, 2002 and October 9, 2003. On only one occasion, January 1, 2003, did her tips not cover her stage fee. That day, Cook worked 5 hours but received no tips. She left her job that day owing her employer \$15.00 in unpaid stage fees.

IV. OPINION⁽¹⁾

A. Lockwood Owes Wages to Cook.

Cook contends that Lockwood cannot keep any portion of her tips and that the stage fee was a "kick-back" paid to the employer in violation of Admin. R. Mont. 24-16-1507. From this she argues that she is owed the \$3,265.00 which she paid to Lockwood as a stage fee plus 110% penalty as provided by statute. Lockwood argues that the stage fees collected by the dancers were not tips at all but rather were a charge by Lockwood to the patrons which the dancers merely collected on behalf of Lockwood. In the alternative, Lockwood argues that even if the

money collected by the dancers were tips, Lockwood and the dancers were free to contract for the stage fee.

The facts of this case demonstrate that the money left by the Lockwood patrons on the stage was tips. Whether a tip is to be given, and its amount, are matters determined solely by the customer, and generally the customer has the right to determine who shall be the recipient of his gratuity. 48A Am. Jur. 2d, *Labor and Labor Relations*, § 4233 (whether a tip is to be given and its amount are matters determined solely by the customer, and, generally, he has the right to determine the recipient of this gratuity). Cook's and Spencer Bradley's testimony convince the hearing examiner that the decision to leave money on the stage and the amount to be left was completely discretionary with the customer. Patrons intended that the money left on the stage be given to the dancer in recognition of her performance. This money was clearly a tip.

Having determined that the money customers placed on the stage during dances was a tip, the question remains whether Lockwood's stage fee is permissible under the statutory and regulatory scheme controlling tips. The hearing examiner concludes that under the circumstances presented in this case that the fee is not permissible.

Mont. Code Ann. § 39-3-201 (6) defines wages to include any money to be paid to an employee including "all tips and gratuities covered by section 3402 (k) . . . of the Internal Revenue Code of 1954." Montana law requires that employers pay employees wages when due, in accordance with the employment agreement, pursuant to Mont. Code Ann. § 39-3-204, and in no event more than 10 days following the separation from employment. Mont. Code Ann. § 39-3-205. The language of this statute is "all inclusive" and contains no exception for deductions except for "reasonable deductions made for board, room, and other incidentals supplied by the employer." 36 Op. Att'y Gen. 17 (1975). The deduction provision of this statute is strictly construed because the law does not favor forfeiture of wages. 25 Op. Att'y Gen. Op. 11 (1953). Recognizing the narrowness of the statutory provision for deduction, the Attorney General of Montana has opined that employer deductions against wages to settle an account between the employer and employee and to offset losses incurred as a result of negligent conduct of the employee are not permissible. 25 Op. Att'y Gen. 11 (1953); 36 Op. Att'y Gen. 17 (1975).

Wages are not considered to be paid unless they are paid "finally and unconditionally or 'free and clear.'" Admin. R. Mont. 24.16.1507. This same statutory regulation specifically indicates that the "wage requirements of the law will not be met where the employee "kicks back" directly or indirectly to the employer . . . the whole or part of the wage delivered to the employee." Admin. R. Mont. 24.16.1508 provides that tips belong to the employee. While, strictly speaking, these two administrative provisions are applicable only to minimum wage and hour claims, they nonetheless provide insight into the breadth of the wage and hour statutes, and help to show that the wage and hour statutes do not permit and should not be interpreted to permit kick backs that would undermine the policies behind wage protection.

The language of the applicable statutory and regulatory sections demonstrates that Lockwood's practice of charging a stage fee is impermissible. Tips are considered to be wages and all wages due an employee must be paid to that employee unless one of the narrow statutory deductions come into play. The regulations specifically prohibit kick backs to the employer

which would circumvent the requirement that employees be paid the wages they are due. Nothing in the facts of this case brings the stage fee into the statutorily permitted deduction. Lockwood's stage fee is the very type of kick back that the regulation prohibits. Accordingly, the hearing examiner concludes that the \$3,265.00 paid out by Cook as stage fees are wages that she is due.

B. Lockwood Owes 55% penalty to Cook.

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. For cases involving minimum wage claims, a penalty of 110% must be imposed in the absence of certain circumstances, none of which are applicable to this case. Admin. R. Mont. 24.16.7561. For claims involving compensation other than minimum wage and overtime compensation, a penalty of 55% must be imposed in the absence of certain circumstances, none of which apply to this case. Admin. R. Mont. 24.16.7566.

Cook asserts that she is entitled to 110% penalty with respect to Lockwood's retention of the stage fee. She did not allege in her complaint nor did she demonstrate at hearing that her wage claim was a minimum wage case. Rather, the failure to pay wages in this case stemmed Lockwood's retention of the stage fee which came from wages paid to Cook which were over and above minimum wage. Accordingly, as the Wage and Hour Unit properly concluded, Lockwood owes 55% penalty in this case, or \$1,795.57 ($\$3,265.00 \times .55 = \$1,795.57$).

V. CONCLUSIONS OF LAW

1. The State of Montana and the Department of Labor and Industry have jurisdiction over this complaint. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.
2. Money left on the stage by customers during dances was tips.
3. Lockwood's practice of charging a stage fee to dancers was an impermissible kick back.
4. Lockwood owes Cook additional wages in the amount of \$3,265.00, representing the amount of the impermissible kick back paid to Lockwood as stage fees. In addition, Lockwood owes 55% penalty in the amount of \$1,795.57.

VI. ORDER

Sirius Business Company, Inc., d/b/a Planet Lockwood, is hereby ORDERED to tender a cashier's check or money order in the amount of \$5,060.57, representing \$ 3,265.00 in wages and \$1,795.57 in penalty, made payable to Mariana Cook, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision. Sirius Business Company, Inc., may deduct applicable withholdings from the wage portion but not the penalty portion.

DATED this 15th day of November, 2004.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT

GREGORY L. HANCHETT
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 service of the decision. See also Mont. Code Ann. § 2-4-702.

1. Statements of fact in this opinion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.