

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 869-2004 & 1237-2004
OF BRIAN S. KENNEDY AND TASHA L.)	
KENNEDY,)	
Claimant,)	
)	FINDINGS OF FACT;
vs.)	CONCLUSIONS OF LAW;
)	AND ORDER
JANE WALDIE, d/b/a THE OLD HOTEL,)	
)	
Respondent.)	

I. INTRODUCTION

Brian and Tasha Kennedy brought separate actions alleging that Jane Waldie, d.b.a. the Old Hotel owed them both unpaid wages and owed Tasha unpaid tips. The Wage and Hour Unit dismissed the claims, finding that neither Brian nor Tasha had proven that they were due additional wages. Brian and Tasha appealed each determination.

Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on July 8, July 20, and July 21, 2004. By stipulation of the parties, the parties and witnesses were permitted to appear telephonically. The parties also agreed to consolidate Brian's and Tasha's claims into one hearing, as each case arose out of the same facts and involved identical issues. Brian and Tasha represented themselves. Stephanie Kruer, attorney at law, represented Jane Waldie. Claimant's exhibits 15, 16, 17, 18, 19, 27, 33, 56, 87, 88, 89, 90, and 91 and Respondent's exhibits A, B, C, D, L, M, N, O, P, Q, R, S, U, V, W, X, Y, Z, AA, BB, CC, DD, EE, and FF were admitted. The originals of Exhibits N, O, and W were, with the concurrence of the parties, photocopied and the photocopies were substituted for the originals. The originals were then returned to the respondent as these are business records the respondent must keep with her records. Brian and Tasha, Jane Waldie, Greg Smith, Caroline Miatke, Rebecca Ramsey, Julie Ward, Deputy Dan Birdsall and Kalli Elford testified under oath in this matter. Based on the evidence adduced at the hearing and the oral and written arguments of the parties, the hearing examiner makes the following findings of fact, conclusions of law, and final order.

II. ISSUE

Does Jane Waldie d.b.a Old Hotel owe Brian and Tasha additional wages as alleged in their complaints and penalty as provided by law?

III. FINDINGS OF FACT

1. Brian Kennedy has been a chef for some time, having obtained a culinary arts certificate in August, 1998. Brian is married to Tasha Kennedy.

2. In January, 2003, Brian and Tasha were living in Colorado. Brian began searching for employment elsewhere.

3. Jane Waldie owns and manages the Old Hotel in Twin Bridges, Montana. In January 2003, Waldie began looking for a chef to prepare meals in the dining room at the Old Hotel for the summer season of 2003. Waldie's acquaintance advised her that Brian might be available for the position. On January 24, 2003, Waldie e-mailed Kennedy to ask for his resume. In her e-mail, Waldie informed Kennedy that "accommodation is included, salary is negotiable." January 24, 2003 e-mail, Exhibit L. The accommodation Waldie referred to was a cottage some nine miles from the Old Hotel, which would not be ready for the Kennedys' use until on or after June 1, 2003.

4. On March 17, 2003, Waldie e-mailed the Kennedys to indicate that Waldie would be leaving for Scotland "in one week." Waldie also indicated that she would "try and have the upstairs [of the Old Hotel] clean and reasonably comfortable before we leave." March 17, 2003 e-mail, Exhibit L.

5. On March 23, 2003, Waldie e-mailed the Kennedys and informed them the Old Hotel opened on Friday, May 9th and that the "usual schedule is to be open for dinners only until the 1st week in June, when you would be employed *full* time." March 23, 2003 e-mail, Exhibit L (emphasis added).

6. The Kennedys decided to go to Montana early, and arrived by bus in Twin Bridges on April 16, 2003. At the time, Waldie was in Scotland. A friend of Waldie's, Caroline Miatke, let the Kennedys into the Old Hotel so that they would have a place to stay.

7. Tasha Kennedy took a part time job working at a local day care center during a part of the month of April and a part of the month of May, 2003. Tasha worked the following hours on the following days during May, 2003 at that day care:

May 1, 2003 10:00 a.m. to 3:00 p.m.

May 2, 2003 11:00 a.m. to 5:00 p.m.

May 5, 2003 11:30 a.m. to 5:30 p.m.

May 6, 2003 11:00 a.m. to 5:00 p.m.

May 8, 2003 11:30 a.m. to 5:45 p.m.

May 9, 2003 11:00 a.m. to 3:30 p.m.

May 12, 2003 11:30 a.m. to 5:30 p.m.

May 13, 2003 11:30 a.m. to 5:30 p.m.

8. During the 2003 season, the dining room at the Old Hotel was open beginning May 9, 2003 for dinner only on Friday, Saturday and Sunday, May 9 through 11, Thursday, Friday, and

Saturday, May 15 through 17, Thursday, Friday, and Saturday, May 22 through 24, and Thursday, Friday, and Saturday, May 29 through 31. Beginning on June 1, 2003, the dining room was open Tuesday through Saturdays from 7:00 a.m. to 11:00 a.m. for breakfast and from 5:30 p.m. to 9:30 p.m. for dinner. The dining room was open on Sundays from 7:00 p.m. to 3:00 p.m. and then closed.

9. Waldie employed Tasha as part of the wait staff beginning May 9, 2003. Waldie agreed to pay Tasha \$5.15 per hour plus tips. Waldie also utilized Brian to assist in the kitchen prior to his taking on full time responsibilities on June 1, 2003. Brian prepared meals and undertook other responsibilities in the kitchen beginning May 9, 2003. With the opening of the full time season on June 1, 2003, Brian took over as full time chef. He was to be compensated at a rate of \$1,500.00 per month plus he and Tasha would have the use of the cottage beginning on June 1, 2003.

10. Waldie maintained time cards for her wait staff employees in a slipshod fashion. She kept the time cards in a drawer next to the cash register near. The employees were expected to keep track of their own hours by writing down the number of hours they worked each day. Waldie would then pay her employees from the time cards. Waldie maintained such time cards for Tasha. She did not maintain any such time cards for Brian because Brian agreed to work on a salaried basis and Waldie believed she did not have to keep time cards for salaried employees.

11. Waldie maintained three time cards for Tasha. The first of those time cards shows that Tasha worked five hours on May 16 and five hours on May 18, 2003. The second time card shows that Tasha worked 36.5 hours between May 19, 2003 and May 25, 2003. The third time card shows that Tasha worked 12 hours during a third week that ended on May 29, 2003.

12. Tasha worked Mother's day weekend (May 9, 10, and 11), a fact corroborated by Waldie but not shown by Waldie's time cards. Tasha worked while the kitchen was open on each of those three days (5:30 p.m. to 9:30 p.m.).

13. Brian worked a total of 48 hours in the kitchen between May 9, 2003 and May 31, 2003. He worked no more than 12 hours during any one week and no more than four hours during any one day. After June 1, 2003, Brian became a salaried employee.

14. On June 11, 2003, Waldie and Brian got into a heated argument. As a result of the argument, Waldie fired Brian and Tasha.

15. Waldie paid Tasha twice. Waldie first paid Tasha on May 24, 2003 in the gross amount of \$108.15 for her regular hourly wage and \$181.25 for her tips. The pay for the hourly wage represented payment for 21 hours at \$5.15 per hour ($21 \times \$5.15 = \108.15). On June 12, 2003, Waldie paid Tasha for work completed between June 1 and June 12, 2003 in the gross amount of \$208.58 for her hourly wage and \$212.50 for tips. The pay for the hourly wage represented payment for 40.5 hours of work ($\$5.15 \times 40.5 = \208.58).

16. Waldie deducted 3% from Tasha's gross credit card tips in order to cover the costs of completing the credit card transaction. Waldie then deducted 15% from Tasha's net tips and

distributed that 15% between the dishwashers and other kitchen help, none of whom were management.

17. Waldie paid Brian \$100.00 on May 27, 2003. This payment has no deductions, and apparently represented a tip for the Kennedys given to them by an Old Hotel customer. Waldie also paid Brian on June 12, 2003 in the gross amount \$692.31. This amount reflected one half of the \$1,500.00 monthly salary earned between June 1 and June 15, 2003. Waldie deducted \$57.69 from this amount for groceries that the Kennedys purchased for their own use using Old Hotel funds.

IV. DISCUSSION⁽¹⁾

A. Additional Wages Are Owed To The Kennedys.

Montana law requires that employers pay wages when due, in accordance with the employment agreement, pursuant to Mont. Code Ann. § 39-3-204. Except to set a minimum wage, the law does not set the amount of wages to be paid. That determination is left to the agreement between the parties. "Wages" are any money due an employee by the employer. Mont. Code Ann. § 39-3-201(6).

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. To meet this burden, the employee must produce evidence to "show the extent and amount of work as a matter of just and reasonable inference." *Id.* at 189, 562 P.2d at 476-77, *citing Anderson*, 328 U.S. at 687, *and Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; *see Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that lower court properly concluded that the plaintiff's wage claim failed because the plaintiff failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, "the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee. And if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation." * * *." *Garsjo*, 172 Mont. at 189, 562 P.2d at 477, *quoting Purcell v. Keegan, supra*, 359 Mich. at 576, 103 N.W. 2d at 497. It is of no consequence that the employee cannot show with exacting precision the number of hours worked. To require such evidence from an employee would "place a premium on an employer's failure to keep proper records in conformity with statutory duty," seriously undermining the strength of the wage protection statutes. *Garsjo* at 189, 562 P.2d at 476, *citing Anderson*, 328 U. S. at 687. This courts will not do.

Waldie agrees that Brian worked in the kitchen prior to June 1, 2003, but contends that Brian worked in exchange for room and board. Waldie also acknowledges that Tasha worked in the

kitchen during that time and was to be compensated at a rate of \$5.15 per hour plus tips. Waldie contends that Tasha has been paid all money that she is due.

In contrast, Brian contends that he was to be paid \$10.00 per hour prior to June 1, 2003 and afterwards at a rate of \$2,000.00 per month. Tasha contends that she worked far more hours than those for which she was paid. Brian relies on his alleged employment contract and photo copies of his self-maintained time sheets, which he contends Waldie signed. Tasha relies on her alleged employment contracts and her self-maintained time sheets, which she also contends Waldie signed.

The hearing examiner accords no weight to the alleged employment contracts. Based on Waldie's testimony, the hearing examiner finds that the contracts are fabricated and were not signed by Waldie.

The hearing examiner also concludes that the time sheets created by the Kennedys are fabrications. As Waldie consistently testified, she had no reason to keep time cards for Brian, much less sign such time cards, because she did not believe she needed to keep time cards for salaried employees. Moreover, Waldie in fact kept pre-printed form time cards for Tasha (Exhibit W) which she most certainly would have kept for Brian had she believed it necessary to do so. Because she utilized pre-printed form time cards for Tasha, she would have had no reason to sign Tasha's time sheets as Tasha claims Waldie did. Furthermore, with respect to Tasha's time sheets, she claims on several days to have been working at the Old Hotel during the same time that she was working at the day care center. Obviously, Tasha could not be in two different places at the same time. Since the day care time records were produced by an independent source (Tasha's day care employer), they are found to be credible. Because Tasha's time records for work at the Old Hotel conflict with the time shown by the day care time records, her time records are not credible.

Waldie's testimony, however, does establish that Brian worked in the kitchen starting on May 9, 2003 and running through May 31, 2003 for at least four hours each day on Thursday, Friday, and Saturday of each week. Admin. R. Mont. 24.16.1005 ARM specifically provides that "work not requested but suffered or permitted is work time." Waldie made plain in her testimony that Brian was eager to help out in the kitchen during the time between May 9, 2003 and the opening of the kitchen on June 1, 2003 and Waldie permitted Brian to do so.

Waldie's e-mails prove that the parties agreed that Brian's compensation would be wages in addition to room and board. Waldie's March 23, 2003 e-mail supports the claim that Brian and Tasha were to work part time until the restaurant opened for full time business on June 1, 2004. This arrangement is also corroborated by Brian's comment to the deputy sheriff at the time of Waldie's and Brian's altercation to the effect that he became upset because Waldie "owed him money." Testimony of Deputy Dan Birdsall. Waldie permitted Brian to work in the kitchen prior to June 1, 2003. The evidence adduced at the hearing shows that at a minimum Brian worked between May 9 and May 31, 2003 during the hours that the kitchen was open on Thursdays, Fridays, and Saturdays, a total of 48 hours (4 hours each day x 12 days = 48 hours).

Having found that Brian's contract is a fabrication, there is nothing in the record to suggest what the parties' agreement was with respect to hourly compensation for Brian during the time period between May 9 and May 31, 2003. The hearing examiner strongly suspects that there was no agreement with respect to the amount of an hourly wage. In the absence of such an agreement, Waldie is only required to pay the minimum legal wage. Mont. Code Ann. §§ 39-3-404 (1) and 39-3-408. The minimum wage presently prescribed by regulation is \$5.15 per hour. Admin. R. Mont. 24.16.1510(8). Given the agreement for wages in addition to accommodations, the parties intended that accommodation be in addition to wages, therefore no credit against minimum wage is appropriate for the accommodations. Multiplying the minimum wage by the number of hours Brian worked (48 x \$5.15) results in Brian being owed \$247.20 in unpaid wages.

With respect to Brian's salaried work, the hearing examiner finds that he was properly compensated. The agreement between Waldie and Brian provided that he would be paid \$1,500.00 every month plus accommodations for him and Tasha. Brian only worked two weeks of his salaried work before he was fired. He was paid one half of his monthly salary at the time he was terminated, less the \$57.69 that the parties agreed could be deducted from Brian's final pay check. Since, with respect to Brian's salaried amount, there is no minimum wage issue, the parties were free to agree that the \$57.69 could be deducted out of Brian's salary. Accordingly, the hearing examiner finds that Brian has been appropriately compensated for all of his salaried employment.

The time cards maintained by Waldie demonstrate that Tasha worked a total of 58.5 hours between May 9, 2003 and May 31, 2003. The only evidence of payment to Tasha for her work between May 9 and May 31 is one check, dated May 24, 2003, showing gross wages paid of \$108.15 for 21 hours of work.⁽²⁾ Waldie's time cards themselves show that Tasha worked 58.5 hours during this period. It is also clear that Tasha worked a total of twelve hours on Mother's day weekend, May 9, 10, and 11, 2003. There is no record to show that she was paid for any of this time. The evidence demonstrates that Tasha remains unpaid for 49.5 hours of work, a total of \$254.92 (49.5 hours x \$5.15=\$254.92).

With respect to Tasha's tips, Tasha's evidence fails to show that she was not properly compensated pursuant to her tip arrangement with Waldie. The credit card tip receipts show that Tasha had gross credit card tip receipts in the amount of \$476.83. Pursuant to her agreement with Waldie, Waldie deducted 3% of the gross amount (\$14.30) to cover the credit card transaction cost and then deducted 15% of the net amount (\$69.42) to give to other non-management employees.⁽³⁾ Applying this arrangement to Tasha's credit card tip amount results in a net amount due to Tasha of \$393.80. Tasha was paid this exact amount as demonstrated by her two pay checks. Tasha failed to produce any evidence to show that she is owed anymore in the way of tips. Accordingly, Tasha's claim for additional tips fails.

B. Old Hotel Owes Penalty on The Unpaid Wages.

Having determined that Brian is entitled to unpaid wages of \$247.20 and Tasha is due additional wages of \$193.12, the hearing examiner must next determine appropriate penalty. Because Waldie provided room and board (the reasonable cost of which can be included as part

of an employee's compensation when determining minimum wage, Admin R. Mont. 24.16.1505 (2)), and because no party provided evidence as to the value of the room and board, the claimants have failed to show that this case merits imposition of the 110% penalty required for minimum wage violations. For claims other than minimum wage claims, a penalty equal to 55% of the wages due is mandated by regulation. Admin. R. Mont. 24.16.7566. In Brian's case, that penalty amounts to \$135.96 ($\$247.20 \times .55 = \135.96). In Tasha's case, that penalty amounts to \$140.21 ($\$254.92 \times .55 = \140.21).

V. CONCLUSIONS OF LAW

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

2. Jane Waldie d/b/a Old Hotel owes Brian Kennedy \$247.20 in additional wages and penalty in the amount of \$135.96.

3. Jane Waldie d/b/a Old Hotel owes Tasha Kennedy \$254.92 in additional wages and penalty in the amount of \$140.21.

VI. ORDER

Jane Waldie d/b/a Old Hotel is hereby ORDERED to tender a cashier's check or money order in the amount of \$778.29, less appropriate deductions for taxes and social security, representing \$247.20 in unpaid wages and \$135.96 in penalty for Brian Kennedy and \$254.92 in unpaid wages and \$ 140.21 in penalty for Tasha Kennedy, made payable to Brian and Tasha Kennedy, 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.

DATED this 17th day of August, 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.

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.

1. Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.
2. The only other check given to Tasha represents payment for work completed between June 1, 2003 and June 12, 2003.
3. A tip pooling arrangement wherein non-management employees such as dishwashers and cooks share a percentage of tips is permissible under Montana law. Mont. Code Ann. §39-3-201(6).