

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

|  |   |                              |
|--|---|------------------------------|
| IN THE MATTER OF THE WAGE CLAIM        | ) | Case No. 1220-2006           |
| OF JAMES W. KEPHART,                   | ) |                              |
|  | ) |                              |
| Claimant,                              | ) |                              |
|  | ) |                              |
| vs.                                    | ) | <b>FINAL AGENCY DECISION</b> |
|  | ) |                              |
| ROBIN'S ROOST, INC., a Montana         | ) |                              |
| corporation d/b/a JULIAN'S PIANO BAR ) | ) |                              |
| AND CASINO, an Assumed Business Name ) | ) |                              |
| registered in Montana, DAVID JORDAN )  | ) |                              |
| and ROBIN JORDAN,                      | ) |                              |
|  | ) |                              |
| Respondents. )                         | ) |                              |

\* \* \* \* \*

**I. INTRODUCTION**

In this matter, James Kephart appeals from a Wage and Hour Unit determination that he was not due additional wages for the time period between June 2005 to August 5, 2005. Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter in Butte, Montana. James Kephart appeared on his own behalf. Tina Morin, attorney at law, represented the respondents. Kephart, Don Stone, Harold McDonald, John Rolich, David Davenport, and Robin Jordan all testified under oath. ERD Documents 41, 50 through 55, 62 through 72, 82 through 84, 150, 151, 193, and Exhibits A through F were all admitted into evidence.

Following the hearing, the parties were permitted to file post-hearing briefs. Having carefully considered the evidence presented at hearing and the parties' arguments contained in their post-hearing briefs, it is evident that Kephart is not entitled to relief under the Montana Wage and Hour Act. For the reasons that follow, the hearing officer agrees with the Respondent that the weight of the evidence shows that Kephart was in a partnership relationship with the Jordan's prior to the opening of the bar, not an employment relationship. Because no employment relationship existed, Kephart is due no additional wages.

**II. ISSUE**

Is Kephart due wages for the time period between June 2005 and August 5, 2005?

**III. FINDINGS OF FACT**

1. Kephart and his brother Sam Kephart own the Maley Building which is located in Butte, Montana. The Maley building is a commercial property that rents space to business tenants.

2. Kephart and his brother approached David and Robin Jordan about the possibility of opening a piano bar in the Maley Building in order to attract additional tenants to the building. The parties agreed to enter into a partnership which would own the bar. Kephart's contribution to the partnership included supervising the updating of the bar, providing some recipes, assisting in obtaining a loan from the Butte Local Development Corporation (BLDC), and doing additional work in order to get the bar up and running. In exchange for this, Kephart would receive a 1/3 interest in the partnership

3. Kephart hired Don Stone to put a new tile floor in the bar. Kephart told Stone that Kephart, his brother and the Jordans were hiring Stone to complete the work. Kephart also stated that he and his brother owned the building and they were attempting to put a piano bar in the building.

4. Kephart supervised and directed the construction work at the bar, including the installation of Stone's tile work. Kephart also controlled painters who were working in the upstairs part of the building.

5. Kephart recruited David Davenport, a person experienced in starting up bars and food establishments, to help get the bar up and running. Kephart told Davenport that Kephart was opening a piano bar in a joint venture with the Jordans.

6. Kephart prepared the business plan for the bar that was used to obtain the loan for getting the bar started. Kephart and the Jordans also researched issues regarding "pourage," that is, the correct amount of alcohol to be poured into individual drinks in order to ensure an adequate profit margin on each drink. Kephart also obtained recipes that were to be used when the kitchen opened. The kitchen never opened prior to August 5, 2005.

7. Kephart also told the Butte-Silver Bow County Health Inspector that he was a part owner of the piano bar.

8. Kephart kept no time cards between June and August 5, 2005. In contrast, during this time period employees of the bar were asked to keep time cards and did so. For example, Davenport and bartender Tim Gallagher turned in time cards each week in order to receive their pay.

9. On September 4, 2005, Robin Jordan sent Kephart an e-mail indicating that "I certainly do not want this buyout issue to be stressful to you or to Sam." This e-mail confirms that Kephart, his brother Sam and the Jordans had embarked on a partnership. It does not demonstrate that an employment relationship existed.

10. At the hearing in this matter, Kephart frankly admitted that he expected to receive a partnership percentage for his work. Kephart never claimed to have been an employee of the bar during the June to August 5, 2005 period until after it became clear that his partnership with the Jordans was dissolving.

11. Kephart filed an action in Montana District Court alleging that he was due monies from his partnership with the Jordans. In his complaint, he alleged that the partnership agreement between him and the Jordans required him to provide all the work he did prior to the opening in exchange for his partnership interest.

12. Prior to August 5, 2005, Kephart was not an employee of either Robin's Roost or the Jordans.

#### IV. OPINION<sup>1</sup>

In his appeal, Kephart asserts that he is due additional wages for the time preceding August 5, 2005. Robin's Roost contends that Kephart was simply a partner, not an employee. The hearing officer agrees that the overwhelming evidence in this matter shows that Kephart was a partner with the Jordans. There is no credible evidence that Kephart was an employee of Robin's Roost prior to August 5, 2007.

Kephart bears the burden of persuasion in this matter to show by a preponderance of the evidence that he was entitled to the additional wages he claims. *Berry v. KRTV Communications* (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112. *See also, Marias Health Care Services 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). As part of this burden of proof he must show that in fact an actual or implied employment agreement existed between him and Robin's Roost.

Montana Law provides that "every employer of labor in the state of Montana to pay each employee the wages earned by the employee . . ." 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. Montana Code Annotated § 39-3-201(3) defines the term "employ" to mean "to permit or suffer to work." Montana Code Annotated § 39-3-201(4) defines an "employee" to be "any person who works for another for hire."

The existence of a partnership, without more, does not create an employment relationship. In the absence of some type of employment agreement between the parties, the

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<sup>1</sup>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.

employment relationship and the partner relationship are inconsistent. *See, e.g., Cook v. Lauten*, 335 Ill. App. 92, 97, 80 N.E. 2d 280, 282 (1948) (A party cannot be an employee and a copartner at the same time in the same business since a partner is a co-owner.) On the other hand, where a partnership enters into an agreement which creates an employment relationship between a partner and the partnership, unpaid wages may be recoverable. *See, e.g., Hovine, Verick, & Amrine, P.C., v. Comm'r of Labor* (1989), 237 M. 525, 774 P.2d 995 (Fact that claimant was a stockholder did not prevent him from seeking wages under the Montana Wage and Hour Act where the entity in which he was a stockholder was an “employer” for purposes of the Act and a written employment agreement designating the stockholder as an employee of the entity existed between the entity and the stockholder). Thus, in order to prevail in this case, Kephart must show that aside from the partnership, some form of employment agreement existed between him and Robin’s Roost and/or the Jordans.

As the evidence plainly reveals, no such agreement existed. Kephart and his brother entered into a partnership with the Jordans. Kephart admitted his ownership in the bar at hearing. He reinforced the existence of his ownership in the bar by telling not only casual acquaintances but also employees (Davenport) and even the Butte health inspector that he owned the bar. He solicited the Jordan’s to open the bar in his building as a means of attracting additional tenants to the building he and his brother owned. He agreed to do all work prior to the opening of the bar in exchange for a 1/3 ownership interest in the bar. He was not supervised by anyone during that time period. He personally directed the reconditioning of the bar (e.g., placing tile) and other repairs to other parts of the building not in the bar (i.e., the upstairs). He did not keep time cards during the period in question even though employees like Davenport and Gallagher did. There is no evidence of any employment agreement between Kephart and any of the respondents at anytime between June and August 5, 2005. All that existed during that time was the partnership agreement.

Kephart suggests that Robin Jordan’s e-mail of September 4, 2005, shows that Jordan herself believed that Kephart was an employee. The hearing officer does not agree. The import of the e-mail is that Kephart was entitled to a payout because of his partnership interest in the business. It does not support Kephart’s proposition that he was an employee prior to the opening of the bar. Because Kephart was in a partnership agreement, and there is no evidence of any employment agreement, he cannot be considered to have been an employee under the Wage and Hour Act. Accordingly, he does not meet the requisites for recovering wages under the act.

## 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. Kephart has failed to prove by a preponderance of the evidence that any employment relationship existed between him and the respondents between June 2005 and August 5, 2005. Because he has not shown that he was employed by the respondents, his claim under the Montana Wage and Hour Act must fail.

## VI. ORDER

Based on the foregoing, James Kephart's complaint is dismissed.

DATED this 14th day of September, 2007.

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.

Kephart FOF ghp