

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIMS) Case Nos. 1050-2004, 1061-2004,
OF RENEE L SMITH, JESSICA R LABERDEE,) 1062-2004, 1480-2004,
LORI L NIENDORF, SARAH L SARFIELD,) 1561-2004, 2784-2004 and
TAMMY R MAUSETH, TOMA D CAMPBELL,) 2772-2004
AND MONICA G HAMILTON,)

Claimants,)

vs.)

FINAL AGENCY DECISION

TYAD, INC., a Montana corporation d/b/a)
THE PLAYGROUND LOUNGE AND)
CASINO,)

Respondent.)

* * * * *

I. INTRODUCTION

Respondent TYAD, Inc., (TYAD) challenges a determination of the Employment Relations Division that found additional wages and penalty were owed to 7 former dancers, Renee Smith, Jessica Laberdee, Monica Hamilton, Toma Campbell, Tammy Mauseh, Sara Sarsfield, and Lori Niendorf.

Hearing Examiner Gregory L. Hanchett convened a contested case hearing in these matters on July 13 and 14, 2005 in Great Falls, Montana. Immediately prior to the beginning of the hearing on July 13, 2005, Renee Smith entered into a settlement agreement with TYAD resolving her case. As part of the agreement, Smith moved to withdraw her complaint. Her motion was granted and her case was dismissed. Despite several written notices of the time and date for hearing, the need to appear for hearing, and the indication that a failure to appear would likely result in a decision adverse to the party failing to appear, claimants Sara Sarsfield and Lori Niendorf did not appear at the hearing. Consequently, they did not present a prima facie case as to the number of hours they worked and the amount of wages they were owed.

The parties stipulated to admission of the documents contained in the Wage and Hour unit files. In addition, the parties stipulated to the admission of Campbell Exhibit #1 and Laberdee Exhibits 1 through 48. The parties also stipulated to the admission of TYAD Exhibits A through PP. At the July 13, 2005 hearing, Hamilton, Campbell and Mauseth testified under oath. Respondent's witnesses Rich Pavalonnis, David Blackwell, Dustin Moore, Robert Suiste and Sally Vani also appeared and testified under oath. At the July 14, 2005 hearing, Laberdee appeared and testified under oath by video conference from Spokane, Washington. Respondent's witnesses Pavalonnis, Blackwell, Moore, Suiste and Vani also appeared and testified under oath during that hearing.

The parties requested an opportunity to submit post-hearing briefs and they were permitted to do so. The matter was deemed submitted for decision on September 9, 2005, the date that the respondent's reply brief was due. Based on the evidence and arguments adduced at the hearing, as well as the arguments contained in the post-hearing briefs of the parties, the hearing examiner makes the following findings of fact, conclusions of law, and final orders.

II. ISSUE

Does TYAD owe Jessica Laberdee, Monica Hamilton, Toma Campbell and Tammy Mauseth additional wages and a penalty as provided by law?

III. FINDINGS OF FACT

1. TYAD owns and operates an exotic dance club/bar in Great Falls, Montana known as the Playground. David Blackwell serves as TYAD's corporate president. Rich Pavalonnis is the vice-president. Dustin Moore and Robert Suiste are employed as security personnel at the club.

2. TYAD employed Hamilton as a dancer from January 2003 to June 2004. Campbell worked as a dancer for TYAD from January 4, 2003 until June 28, 2004. Mauseth worked as a dancer for TYAD from August 1, 2003 through October 31, 2003. Laberdee worked as a dancer for TYAD from January 2003 through November 9, 2003.

3. Each of the dancers used a stage name. Campbell's stage name was "Destiny." Hamilton's stage name was "Dakota." Mauseth's stage name was "Chilo." Laberdee's stage name was "Venus."

4. TYAD paid no wages to the claimants during the time periods in question in these cases, believing that the claimants were independent contractors. The claimants were permitted to keep all of their tips. In addition, the claimants received fees for “lap” and “hostage” dances. The amounts of the fees varied, but generally each claimant received approximately \$20 dollars for each “lap” or “hostage” dance that she preformed.

5. The claimants were employees at all times while they worked for TYAD.¹

6. Each of the claimants paid a “stage fee” to TYAD for each shift that the dancer worked at the Playground. TYAD provided receipts to each of the dancers for each stage fee that the dancer paid. Prior to October 2003, each dancer paid a stage of \$20.00. Beginning after October 2003, management changed the stage fee structure as follows: a dancer who began work at 4:00 p.m. in the afternoon paid a stage fee of \$10.00. Dancers beginning work after that time paid a stage fee of \$20.00. Dancers who arrived late for their dances paid a stage fee of \$35.00.

7. TYAD maintained copies of many of the stage fee receipts that each of the claimants paid in during their respective tenures of employment at the Playground. The stage receipts show both the stage name of the dancer, the amount that each dancer paid to TYAD, and the date that each dancer paid the fee. Those stage receipts do not reflect the hours that each dancer worked, however.

8. During her employment, Campbell worked 6 to 8 hour shifts 4 nights each week. Campbell was off work on December 24 and December 27, 2003 and also was off work for 2 weeks during April 2004. During her tenure, she worked approximately 191 shifts. There is no evidence to suggest that Campbell’s hours exceeded 40 hours during any 1 week. At 6 hours per night, Campbell is owed

¹ As a primary defense to the wage claims in these cases, TYAD asserted that the claimants were independent contractors. The Independent Contractors Central Unit determined the claimants were employees, not independent contractors. Pursuant to Mont. Code Ann. §39-71-415, TYAD appealed that determination to the Montana Worker’s Compensation Court. After a *de novo* evidentiary hearing, the worker’s compensation court ruled that the claimants were employees. *TYAD, Inc., v. I.C.C.U.*, (April 8, 2005) 2005 MTWCC 16, WCC No. 2004-1186. The Worker’s Compensation Court denied TYAD’S request for reconsideration in that matter on August 10, 2005. The hearing examiner in this case stayed these wage claims at TYAD’s request while the independent contractor status issue was litigated in the worker’s compensation court. Based on the Worker’s Compensation Court decision and TYAD’s ability fully and fairly to litigate the issue of the claimant’s employee status in that forum, TYAD was collaterally estopped in this proceeding from asserting that the claimants were not employees. Accordingly, the only issue in this matter is the amount of wages due to the claimants.

\$5,901.90 (191 shifts x 6 hours x \$5.15=\$5,901.90). Between the time of her hire and October 2003, she paid a \$20.00 stage fee each night she worked. She worked 110 shifts during that time and paid \$2,200.00 in stage fees (110 shifts x \$20.00=\$2,200.00). Between November 2003 and the time she left her employment, Campbell paid a \$10.00 stage fee 10 occasions for a total of \$100.00 (10 shifts x \$10.00= \$100.00) and a \$25.00 stage fee for 71 shifts totaling \$1,775.00 (71 shifts x \$25.00= \$1,775.00). She thus paid a total of \$4,075.00 in stage fees while employed at the Playground. During her tenure, Campbell received compensation for “lap” and/or “hostage” dances amounting to \$1,200.00. Deducting the remuneration Campbell received for the “lap” and/or “hostage” dances from the total amounts due her, TYAD owes Campbell a net amount of \$8,776.90 (\$5,901.90+\$4,075.00-\$1,200.00=\$8,776.90). 55% of this amount is \$4,827.29.

9. Hamilton, during her employment, worked 6 to 8 hour shifts approximately 3 nights each week for a total of 200 shifts during her tenure. There is no evidence to suggest that Hamilton’s hours exceeded 40 hours during any 1 week. At \$5.15 per hour, this amounts to a total due of \$6,180.00 (200 shifts x 6 hours x \$5.15=\$6,180.00) that has not been paid to Hamilton. Between the time of her hire and October 2003, Hamilton payed a \$20.00 stage fee each of the 123 shifts she completed during that time frame, amounting to a total of \$2,460.00. Between November 2003 and June 2004, she paid a \$10.00 stage fee for 61 shifts, a total of \$610.00 (61 shifts x \$10.00=\$610.00), and a \$25.00 stage fee for 35 shifts, a total of \$875.00 (35 shifts x \$25.00= \$875.00). She thus paid a total of \$3,945.00 in stage fees during her employment. Also during her employment, Hamilton received compensation for completing approximately 1 “lap” and/or “hostage” dance per week during her tenure for a total of approximately \$1,000.00. Deducting the remuneration Hamilton received for the “lap” and/or “hostage” dances from the total amounts due her, TYAD owes Hamilton a net amount of \$9,125.00 (\$6180.00+\$3,945.00-\$1,000.00=\$9,125.00). 55% of this amount is \$5,018.75.

10. Mauseth worked at the Playground between August 1, 2003 and October 31, 2003. During her employment, she worked 6 to 8 hour shifts approximately 3 nights each week during her work, for a total of 39 shifts. There is no evidence to suggest that Mauseth’s hours exceeded 40 hours during any 1 week. At \$5.15 per hour, Mauseth should have been paid a total of \$1,205.10 (39 shifts x 6 hours x \$5.15 = \$1,205.10). Between the time of her hire and October 2003, Mauseth payed a \$20.00 stage fee each night she worked, totaling \$780.00 (39 x \$20.00=\$780.00). During her tenure, Mauseth received compensation for 3 “lap” and/or “hostage” dances for a total of \$60.00. Deducting the remuneration she received for the “lap” and/or “hostage” dances from the total amounts due her, TYAD

owes Mauseth a net amount of \$1,925.10 ($\$1,205.10 + \$780.00 - \$60.00 = \$1,925.10$). 55% of this amount is \$1,058.80.

11. Laberdee, during her employment, worked 6 to 8 hour shifts a total of 216 times. There is not sufficient evidence to show that Laberdee's hours exceeded 40 hours during any 1 week. At \$5.15 per hour, this amounts to a total of \$6,674.40 ($216 \text{ shifts} \times 6 \text{ hours} \times \$5.15 = \$6,674.40$) that Laberdee was due. During her employment at the Playground, Laberdee payed a \$20.00 stage fee each night she worked, amounting to \$4,320.00 ($\$20.00 \times 216 \text{ nights}$). Also, during that time, Laberdee received compensation for between 25 and 50 "lap" and/or "hostage." Her compensation for those dances ranged between \$10.00 and \$40.00 for each dance; the exact amount she was paid for each dance and the exact number of dances she completed is uncertain, but her compensation could not be less than \$250.00. Deducting the remuneration Laberdee received for the "lap" and/or "hostage" dances from the total amounts due her, TYAD owes Laberdee a net amount of \$10,744.40 ($\$6,674.40 + \$4,320.00 - \$250.00 = \$10,744.40$). 55% of this amount is \$5,909.42.

12. The security personnel, Moore and Suiste, were not in physical proximity to each of the claimants while the claimants completed their respective "lap" and/or "hostage" dances. They were not, therefore, in a position to observe how much each claimant was paid for completing a "lap" or "hostage" dance. In addition, these security personnel were not always present at the Playground while the claimants were completing these "lap" and/or "hostage" dances. They were not, therefore, capable of giving reliable estimates of the number of "lap" and/or "hostage" dances each claimant completed.

IV. OPINION²

TYAD disputes the number of hours of work claimed in the complaints and further contends that the claimants' remuneration for completing "lap" or "hostage" dances should be deducted from the amounts due the claimants. TYAD does not dispute that the stage fees were impermissible (as found by the Wage and Hour Unit) nor does it dispute that the stage fees should be refunded in addition to the amounts of minimum wage due to the claimants. TYAD'S closing brief, page 5-6 ("Such total prepaid wages should then be subtracted form the net sum of rental payments . . . added to the minimum wage multiplied by the work hours established . . .").

² 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.

Montana law requires that employers pay employees wages when due, in accord 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.” Thus, as the Wage and Hour Unit correctly noted, the stage fees were not properly collected and must be returned to the claimants because those fees amounted to an impermissible kick back under the regulations.

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. *See also, 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). 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.” *Garsjo* 172 Mont. *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.

Once an employee shows 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, op. cit., quoting Purcell, op. cit.* To require the employee to show with exacting precision the number of hours worked 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 the courts will not do.

The credible evidence in this matter establishes that the 4 claimants worked the number of hours and are due the wages noted in the findings of fact. TYAD contends that the most credible evidence on the issue is the stage fees receipts. The hearing examiner does not agree. In some cases, there are gaps in those stage fees receipts (*e.g.*, there are no receipts for July 3 to July 13, 2003, nor are there receipts for February 2 to February 5, 2003). Even where there are stage fee receipts, they shed no light on the number of hours worked each day by the claimants. In some cases the receipts do not coincide with the schedule that was provided as evidence by TYAD (Exhibit A).

With respect to Campbell’s and Hamilton’s claims, based on a detailed review of the stage fee receipts and the schedules provided and considering Campbell’s and Hamilton’s testimony, the receipts provide credible evidence of the number of hours. However, with respect to Mauseth’s and Laberdee’s claims, the receipts are not the most credible evidence. Rather, Mauseth’s and Laberdee’s testimony is more credible with respect to the number of hours those claimants worked.

Deductions must be made against the amounts owed for the amount of money each claimant made in completing “lap” or “hostage” dances. TYAD’s witnesses, could not credibly testify about the exact number of “lap” or “hostage” dances that each claimant completed. Nor were TYAD’s witnesses in the best position to have first hand knowledge about the amounts each claimant received for completing these dances. Rather, the testimony of the claimants themselves with respect to the amount of remuneration received for these dances is the most credible testimony on this issue.

B. *TYAD owes a 55% penalty to the claimants.*

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. Neither the claimants nor TYAD dispute the Wage and Hour Unit determination that a 55% penalty should be applied in this case

as provided by Admin. R. Mont. 24.16.7566. Accordingly, TYAD owes 55% penalty in this case in the amounts as shown above in the findings of fact.

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. TYAD owes Campbell \$8,776.90 in wages and an additional 55% penalty in the amount of \$4,827.29. Thus, including penalty, TYAD owes Campbell a total of \$13,604.19.

3. TYAD owes Hamilton \$9,125.00 in wages and an additional 55% penalty in the amount of \$5,018.75. Thus, including penalty, TYAD owes Hamilton a total of \$14,143.75.

3. TYAD owes Mauseth \$1,925.10 in wages and an additional 55% penalty in the amount of \$1,058.80. Thus, including penalty, TYAD owes Mauseth a total of \$2,983.90.

4. TYAD owes Laberdee \$10,744.40 in wages and an additional 55% penalty in the amount of \$5,909.42. Thus, including penalty, TYAD owes Laberdee a total of \$16,683.82.

5. Sarsfield failed to appear at the hearing in this matter despite repeated and adequate notice of the need to appear. Her failure to appear resulted in her failure to present a prima facie case that she was not properly compensated. Her claim, therefore, is dismissed.

6. Niendorf failed to appear at the hearing in this matter despite repeated and adequate notice of the need to appear. Her failure to appear resulted in her failure to present a prima facie case that she was not properly compensated. Her claim, therefore, is dismissed.

VI. ORDER

1. TYAD, Inc., IS HEREBY ORDERED to tender cashier's checks or money orders payable to each of the claimants identified in paragraphs 1 through 4 of the

conclusions of law, *supra*, in the amount specified as owing to each claimant, and delivered to the Wage and Hour Unit, Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than 30 days from the receipt of this decision. TYAD, Inc., may deduct applicable withholding from the wage portions, but not the liquidated damages or penalty portions, of the payments.

2. The claims of Sara Sarsfield and Lori Niendorf ARE HEREBY DISMISSED.

DATED this 12th day of October, 2005.

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.

* * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

JESSICA LABERDEE
13517 GEORGE RD
SAN ANTONIO TX 78230

TAMMY MAUSETH
5130 40th AVENUE NE
SEATTLE WA 98105

RENEE SMITH
1232 8TH AVE NW
GREAT FALLS MT 59404-2234

TOMA CAMPBELL
100 MCGILLIVRAY CIRCLE
WARNER ROBBINS, GA 31089

LORI NIENDORF
1201 9TH ST NW APT 6
GREAT FALLS MT 59404-1875

MONICA HAMILTON
105 EDGEWOOD DR
WINCHESTER VA 22602-5713

SARAH SARFIELD
1024 4TH AVE N #2
GREAT FALLS MT 59401-1516

K.DALE SCHWANKE
ATTORNEY AT LAW
PO BOX 2269
GREAT FALLS MT 59403-2269

DATED this 12th day of October, 2005.

/s/ Trudy Phippen
Trudy Phippen