

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM	)	Case No. 354-2008
OF CINDY R. BERGER,	)	
	)	
Claimant,	)	FINDINGS OF FACT
	)	CONCLUSIONS OF LAW
vs.	)	AND ORDER
	)	
SOULCATCHER, INC., D/B/A MCGARRY'S )	)	
ROADHOUSE, a Montana Corporation, )	)	
	)	
Respondent.	)	

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**I. INTRODUCTION**

On August 7, 2007, Cindy R. Berger (Berger) filed a claim with the Department of Labor and Industry, contending that Soulcatcher, Inc. d/b/a McGarry's Roadhouse (McGarry's) owed her \$7,255.00 in tip wages. On June 10, 2008, the Department dismissed the claim finding that the tip-out pool was voluntary and that McGarry's had not improperly retained any of Berger's wages. On August 15, 2008 the Department issued a redetermination upholding the original dismissal. After attempts at mediation failed the case was transferred to the Hearings Bureau on September 12, 2008 for hearing.

Hearing Officer David A. Scrimm conducted a hearing in the case on December 16, 2008. Berger, appeared pro se. Clifton W. Hayden, Attorney at Law, represented McGarry's. Berger, Sara Peterson, Jessica Sanderson, R. C. Muraoka, Sandra Nogal, Natalie Soyland, Sara Erb, Kristina Rowden and Steve Nogal testified. Exhibits 5-8, 12, 13, 15, 16, 20, 29, 32-37, 42-44, 53-55, 102, 105, 119-129, 143-147, 150-152, 163-165, 168,179-192, 271-274, 278-778, 810, 822, 823, 832, 833, 1000-1089, 1108, 1111, and A were admitted into evidence. Exhibits 177 and 779-793 were partially redacted to protect privacy interests of the claimant. The evidentiary record closed on December 16, 2008. The parties filed proposed findings of fact and conclusions of law on January 16, 2009, at which point the case was deemed submitted for decision.

Prior to hearing, the claimant filed a motion to compel answers to interrogatories, for the production of certain documents and to continue the hearing. The respondent also filed a motion for protective order. At the prehearing conference the parties were able to resolve the production and protective order issues by having the respondent submit the requested documents with social security numbers redacted. The hearing officer determined that the interrogatories that the claimant sought to compel answers to were either repetitive, vague or

irrelevant and denied the motion on that basis. The hearing officer, after argument on the motion to continue, denied the motion on the basis that the claimant had sufficient time to prepare for the hearing. Of particular note was the fact that claimant had made no effort to contact her potential witnesses at the time of the pre-hearing conference even though she had identified them in her filings some weeks earlier. The claimant filed an additional motion to compel and to continue on the day before the hearing in this matter. That motion was denied as it was not supported by any brief, was duplicative of her earlier motion to compel and provided no legitimate basis for continuing the hearing.

## **II. ISSUE**

The issue in this case is whether Soulcatcher, Inc., d/b/a McGarry's Roadhouse, a Montana Corporation, owes wages for work performed and specifically whether it owes unpaid tips, as alleged in the complaint filed by Berger, and owes penalties or liquidated damages, as provided by law.

## **III. FINDINGS OF FACT**

1. Cindy R. Berger (Berger) was employed by McGarry's as a waitress from September 4, 2004 through August 8, 2007.
2. On August 27, 2007, Berger filed a wage claim with the Wage & Hour Unit of the Montana Department of Labor & Industry pursuant to §39-3-201 et seq., MCA.
3. In October 2003, McGarry's initial wait staff discussed and adopted a tip sharing arrangement whereby 15% of their IRS reported tips would be distributed to kitchen and hostess staff.
4. Participation in the tip-out agreement was voluntary.
5. At the end of each shift, McGarry's wait staff completed a "Check-Out" sheet for federal tax tip reporting purposes showing all employee sales. This is a mandatory requirement.
6. The Check-Out also contains a section for wait staff to calculate tips to be deducted from credit card tips and shared with non-wait staff according to the tip-out agreement.
7. The tip-out portion is completed in the employee's discretion in amounts selected by the employee, if any.
8. Berger was informed that the employees had adopted tip-out agreement during her initial interview.
9. Berger participated in the tip-out process throughout her entire employment at McGarry's.

10. Berger completed Check-Out sheets throughout her entire employment. Those sheets indicate numerous times when Berger tipped less than 15% and others where she did not tip out at all.
11. By mutual agreement among the employees, wait staff did not participate in the tip-out agreement when they made less than \$35 in tips.
12. Berger's tip-outs, when she participated, do not reflect an employer predetermined percentage.
13. No employee, including Berger, was ever disciplined, threatened or coerced in any manner for participation or nonparticipation in the employee tip-out agreement.
14. McGarry's administered the collection and distribution of the tip-out funds at the request of the employees.
15. McGarry's distributed the tip-out amounts designated by wait staff to kitchen and hostess/busser staff on their paychecks.
16. No tips were retained by McGarry's or received by Sandy or Steven Nogal.
17. All modifications to the tip-out policy were made at the discretion of McGarry's employees.
18. Berger's varying degree of participation in the tip-out pool demonstrated that she viewed the tip-out process and percentages as voluntary.
19. Berger kept a receipt book upon which she based her tip summary.
20. Berger destroyed her actual tip records after the Wage & Hour Unit's request to produce them.
21. McGarry's does not owe unpaid wages or penalty to Berger.

#### IV. DISCUSSION AND ANALYSIS<sup>1</sup>

Wages include "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) . . ." Mont. Code Ann. § 39-3-

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<sup>1</sup>Statements of fact in this discussion and analysis are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

201(6). The regulations regarding tips state that “tips are the employees to keep and may not be used by the employer to make up any part of the employees wage. Admin R. Mont. 24.16.1508(1). While the department has no specific rule on tip-sharing agreements, it has developed a policy based on the statute and rules cited above. Under that policy a tip-sharing agreement must be voluntary, the employer is not allowed to create or control the terms of the policy and the employer cannot receive any portion of the tips.

The claimant bears the burden of persuading the trier of fact by a preponderance of the evidence that she was not properly compensated under her employment agreement. *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).

Berger bears the burden of proof in this matter to show by a preponderance of the evidence that she is entitled to the additional wages she claims to be due. *Id.* In this matter, Berger failed to carry her burden to show that the tip-sharing agreement was involuntary, that the employer created it or controlled the terms of the policy, and that the employer received any portion of the tips. Berger thus failed to prove the employer improperly withheld wages from her. The overwhelming testimony showed that the tip-sharing agreement was voluntary and that the employer did not receive any portion of those shared tips.

Here, the claimant contends that the tip-sharing agreement was not voluntary and that as a result the employer improperly retained her wages. The preponderance of the evidence showed, however, that the tip-sharing arrangement was voluntary. The testimony of employees who initiated the policy indicated that it was their decision to participate and that they developed the terms. Moreover, Berger’s own testimony showed that she didn’t always tip out according to the policy. Evidence introduced at hearing also showed that there were may times that she did not tip out at all.<sup>2</sup>

While it is clear that McGarry’s played a role in collecting and distributing the shared tips, that role was limited to an administrative function. The claimant provided no testimony that any manager or owner received any portion of the shared tips. McGarry’s un rebutted testimony showed that neither Sandy nor Steve Nogal received any tips even though they often worked in positions that, when held by other employees, were eligible to receive a portion of the shared tips.

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<sup>2</sup>Claimant created a tip summary from a receipt book that she destroyed during the investigation of her claim which showed multiple dates when she failed to tip out at all and other times when she tipped less than 15 or 20 percent. Exhibits 179-192.

**V. 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. Berger is not owed unpaid wages. Mont. Code Ann. § 39-3-204.

3. Berger is not entitled to any penalties Admin. R. Mont. § 24.16.7566.

**VI. ORDER**

Berger's claim for unpaid wages is dismissed.

DATED this 27th day of February, 2009.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ DAVID A. SCRIMM  
David A. Scrimm, Hearing Officer  
Hearings Bureau

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.

Berger FOF dsp