STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE WAGE CLAIM OF DAWN M. AUGUSTINE, Claimant, vs. JEWELS JEM, INC., a Montana corporation d/b/a THE CATTLEMEN'S CUT SUPPER CLUB, Respondent.	)	Case No. 1545-2017 **FINAL AGENCY DECISION**

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I. INTRODUCTION

On March 29, 2017, Dawn M. Augustine filed a wage and hour claim with the Wage & Hour Unit of the Montana Department of Labor & Industry (Wage & Hour Unit) alleging Jewels Jem, Inc., a Montana corporation d/b/a The Cattlemen's Cut Supper Club (Supper Club) owed her $10,133.00 in unpaid wages for tips the Supper Club improperly withheld and added to a mandatory tip pool for the period beginning February 19, 2015 through February 19, 2017.

On September 14, 2017, the Wage & Hour Unit issued a determination dismissing Augustine's claim on the grounds that Augustine's participation in the tip pool was not mandatory. Augustine timely appealed the dismissal of her claim.

Following mediation efforts, the Wage & Hour Unit transferred the case to the Office of Administrative Hearings (OAH) on November 29, 2017. On December 6, 2017, OAH issued a Notice of Hearing and Telephone Conference.

On December 14, 2017, Hearing Officer Caroline A. Holien conducted a telephone scheduling conference in this matter. Augustine appeared, as did Julie Meyer, owner of the Supper Club. Hearing Officer Holien advised Meyer that the Supper Club must be represented by an attorney licensed to practice law in Montana. A schedule of proceedings was also set in this matter including the date and time for

the telephone hearing. On December 20, 2017, the Hearing Officer issued a Scheduling Order outlining the schedule of proceedings in this matter.

On March 12, 2018, the Hearing Officer conducted a final pre-hearing conference. Augustine and Meyer both participated. Steven Potts, Attorney at Law, appeared on behalf of the Supper Club. Potts had not yet filed a Notice of Appearance at the time of the telephone conference.

On March 19, 2018, the Hearing Officer conducted a telephone hearing in this matter. Augustine, Meyer, Tyrel Thurston, and Jennifer Jones testified under oath. Potts represented the Supper Club.

The administrative record compiled at the Wage and Hour Unit (Documents 1 through 204) was admitted into the record upon the agreement of the parties. The parties requested the opportunity for post-hearing briefing. Upon the filing of the final brief on May 4, 2018, the record was closed and the case was deemed submitted. Based upon the evidence and argument adduced at hearing, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. FINDINGS OF FACT

1. Jewels Jem, Inc., a Montana corporation d/b/a The Cattlemen's Cut Supper Club (Supper Club) employed Dawn M. Augustine as a server beginning in May 2008 through February 19, 2017.

2. Julie Meyer opened the Supper Club in March 1998 and subsequently opened at an expanded location in April 2004. At all times relevant to this matter, the Supper Club has been located in Great Falls, Montana.

3. The Supper Club pays each of its restaurant employees no less than the minimum wage required under Montana law.

4. In April 2004, the Supper Club implemented a "tip sharing" or "tip pooling" policy that requires servers to share 2.5% of their food sales with the Supper Club's cooks, dishwashers, bus persons, hostesses, salad prep people, and salad bar fillers on a nightly basis. The policy also requires servers to share 4% of their bar sales to the Supper Club's bartenders and 8% to the Supper Club's cocktail servers if there are any working that particular shift. Ex. 121.

5. The servers are allowed to keep whatever tips are remaining after they "tip out" at the end of the night. The owners of the Supper Club do not retain any portion of the tips to be used for any purpose other than to compensate its employees for their work in providing the restaurant's patrons an enjoyable dining experience.

6. Augustine was aware of and worked under the Supper Club's tip pooling policy throughout her employment. At times, Augustine left more or less than the percentages required by the employer based upon the number of customers she had that evening or by rounding up or down the dollar amount she left. Augustine understood she was required to comply with the Supper Club's tip pooling policy in order to remain in her employment.

7. The Supper Club required Augustine to complete a Tip Out Sheet for Food and Bar Sales each shift and to turn it into payroll on the last Sunday of the payroll period in order to be paid. See Exs. 9-39 & 144-174.

8. In February 2016, Augustine became aware of a decision by the 9th U.S. Circuit Court of Appeals upholding a 2011 U.S. Labor Department rule prohibiting tip pooling schemes such as the one used by the Supper Club. Exs. 84, 183.

9. The Supper Club improperly required Augustine to contribute to a tip pool as a condition of her continued employment. As a result, the Supper Club owes Augustine $11,818.00 in unpaid wages for the amount of tips improperly withheld during the period of February 2015 through February 2017.

III. DISCUSSION

Augustine's claim is for unpaid regular wages. She has made no claim for minimum wage or overtime pay. As such, her claim is determined under the provisions of the Montana Wage Payment Act (WPA) and not the federal Fair Labor Standards Act (FLSA).

The FLSA is designed to ensure that employees are paid a minimum wage and that they receive 1½ times their regular rate for hours worked beyond 40 in a workweek. 29 U.S.C. §§ 206-07; *Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106, 116 (2d Cir. N.Y. 2013); *Parker v. City of New York*, 2008 U.S. Dist. LEXIS 38769, 12-13 (S.D.N.Y. May 13, 2008) (2d cir); *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 490 (2d Cir. 1960); *Monahan v. County of Chesterfield, Va.*, 95 F.3d 1263, 1266-67 (4th Cir. 1996); *Cole v. City of Port Arthur*, 2014 U.S. Dist. LEXIS 96754, 13-14 (E.D. Tex. July 16, 2014) (5th cir); *Espenscheid v. DirectSat*

USA, LLC, 2011 U.S. Dist. LEXIS 154706, 29-30 (W.D. Wis. Apr. 11, 2011) (7th cir.); *Hensley v. MacMillan Bloedel Containers, Inc.*, 786 F.2d 353, 357 (8th Cir. 1986); *Davis v. City of Loganville*, 2006 U.S. Dist. LEXIS 20795 (M.D. Ga. Mar. 27, 2006) (11th cir); *Arnold v. Arkansas*, 910 F. Supp. 1385, 1393 (E.D. Ark. 1995); *Brown v. Lululemon Athletica, Inc.*, 2011 U.S. Dist. LEXIS 18217, 2011 WL 741254, *4 (N.D. Ill. Feb. 24, 2011); *Valcho v. Dallas County Hospital District*, 658 F. Supp. 2d 802, 811 (N.D. Tex. 2009). *But see Lamon v. City of Shawnee*, 972 F.2d 1145, 1155 (10th Cir. 1992) (recognizing pure gap time claim); *Schmitt v. Kansas*, 844 F. Supp. 1449, 1458 (D. Kan. 1994) (same).

The FLSA is a minimum wage, maximum hour law; its purpose is to set limits on the minimum wages and maximum hours an employee is permitted to work before the employer is required to pay overtime. 29 U.S.C. §§ 206-07; *Monahan v. County of Chesterfield*, Va., 95 F.3d 1263, 1266-67 (4th Cir. 1996).

> So long as an employee is being paid the minimum wage or more, FLSA does not provide recourse for unpaid hours below the 40-hour threshold, even if the employee also works overtime hours the same week. See id. In this way federal law supplements the hourly employment arrangement with features that may not be guaranteed by state laws, without creating a federal remedy for all wage disputes--of which the garden variety would be for payment of hours worked in a 40-hour work week. For such claims there seems to be no lack of a state remedy, including a basic contract action. See, e.g., Point IV (discussing the New York Labor Law).

Lundy v. Catholic Health Sys. of Long Island, Inc., 711 F.3d 106, 116 (2d Cir. N.Y. 2013).

The 9th U.S. Circuit Court of Appeals addressed a USDOL rule disallowing a tip pooling policy but allowing tip splitting agreements made between the employees in *Oregon Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080 (9th Cir. 2015), rehearing denied by, rehearing, en banc, denied by *Or. Rest. & Lodging Ass'n v. Perez*, 843 F.3d 355, 2016 U.S. App. LEXIS 16361 (9th Cir., Sept. 6, 2016).[1] The court held:

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[1] A tip pooling policy would be a situation where all the wait staff put all their tips into a pot and receive some percentage back from the employer. Tip splitting would be a voluntary agreement between the wait staff to contribute a set percentage of their tips into a pool for other employees to receive.

> A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, who has the right to determine who shall be the recipient of the gratuity. Tips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool. Only tips actually received by an employee as money belonging to the employee may be counted in determining whether the person is a "tipped employee" within the meaning of the Act and in applying the provisions of section 3(m) which govern wage credits for tips.

29 CFR 531.52.

> Where employees practice tip splitting, as where waiters give a portion of their tips to the busboys, both the amounts retained by the waiters and those given the busboys are considered tips of the individuals who retain them, in applying the provisions of section 3(m) and 3(t). Similarly, where an accounting is made to an employer for his information only or in furtherance of a pooling arrangement whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed among themselves, the amounts received and retained by each individual as his own are counted as his tips for purposes of the Act. Section 3(m) does not impose a maximum contribution percentage on valid mandatory tip pools, which can only include those employees who customarily and regularly receive tips. However, an employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

29 CFR 531.54.

Meyer argued the Supper Club's tip pooling policy was created by three employees in the early days of the business and has been agreed to by every employee since by virtue of their continuing to work for the business. It seems unlikely that any employee would voluntary give up a portion of the tips he or she earned by virtue

of his or her skills as a server without there being at least an implied threat their employment would not continue as contended by Augustine. Further, given the litany of policies and rules submitted by the employer during the course of the Wage and Hour Unit's investigation, it seems highly unlikely Meyer would allow any employee to act contrary to any policy she created and implemented on behalf of the business. As the court found in *Perez*, the Supper Club's tip policy violates the FLSA. However, in this case, the WPA, and not the FLSA, governs this case.

The WPA defines wages as follows:

> "Wages" includes 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)[2] and service charges that are covered by section 3401 of the Internal Revenue Code of 1954, as amended and applicable on January 1, 1983, received by employees for services rendered by them to patrons of premises or businesses licensed to provide food, beverage, or lodging.

Mont. Code Ann. 39-3-201(6)(a)(emphasis added).

The plain meaning of the statute makes it clear that under the WPA, Augustine's tips were her wages to do with what she wished. *See MM&I, LLC v. Bd. of County Comm'rs of Gallatin County, 2010 MT 274, P44; 246 P.3d 1029, 1036* (In discerning the plain meaning, the words used shall be reasonably and logically interpreted, so as to give them their usual and ordinary meaning). The administrative rules echo this result: "tips are the employees to keep and may not be used to make up any part of the employee's wage." Admin R. Mont. 24.16.1508.[3]

As the district court found in *Shadow's Keep of Missoula, Inc., a Montana corporation d/b/a The Keep Restaurant v. Amy Graham,* Cause No. DV-17-504 (filed Sept. 14, 2017), Montana law governs in a case such as this. In that case, the district court held that The Keep's mandatory "tip-pooling" policy violated the WPA. The court reasoned that tips left by customers are wages under Mont. Code Ann.

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[2] Section 3402(k) requires a certain percentage of a server's tips be reported as wages for tax purposes.

[3] The Hearing Officer notes that this rule was promulgated under the authority of Mont. Code Ann. § 39-3-403 which is the Minimum Wage and Overtime Act.

§ 39-3-201(6)(a) and Admin. R. Mont. 24.16.1508. *Id.* at p. 6. "Montana law is clear: an employer does not have any legitimate right to control the tips an employee receives from a customer. Once a tip is left behind by the customer, that tip is the property of the employee who receives it." *Id.*

Augustine has shown the Supper Club owes her unpaid wages as a result of its policy of requiring employees to contribute a portion of their tips to an improper tip pool. Therefore, the next issue is the amount of unpaid wages owed to Augustine.

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 also, *Marias Health Care Srv. v. Turenne,* 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding the lower court properly concluded the plaintiff's wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract). As the Montana Supreme Court has long recognized, it is the employer's duty to maintain accurate records of hours worked, not the employee's. *Smith v. TYAD, Inc.*, 2009 MT 180, ¶46, n.3, 351 Mont. 12, 209 P.3d 228.

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.

In this case, neither party provided adequate records documenting the amount of tips Augustine contributed to the Supper Club's tip pool in 2015. In an analogous case, the Montana Supreme Court provided guidance as to the analysis required when neither party has maintained adequate records of an employee's hours. In *Arlington v. Miller's Trucking, Inc.*, 2015 MT 68, 378 Mont. 324, 343 P.3d 1222 (2015), the court held overtime hours claimed by an employee may be reduced to the

extent supported by credible evidence offered by the employer but not reduced below the amount established by the employee. The court reasoned:

> In short, when an employer has failed to maintain adequate records of an employee's hours, it is expected that the employee will not be able to offer convincing substitutes for the employer's records. Moreover, whatever evidence the employee does produce can be expected to be 'untrustworthy'. The solution in such situations, however, is not to penalize the employee for his inability to accurately prove his hours by denying his claims in their entirety.

Arlington, 378 Mont. 324, 331, 343 P.3d 1222, 1229.

As in this case, the employer failed to provide any documentation of the tips Augustine contributed to its tip pool in 2015. Augustine prepared a worksheet showing her estimates as to what she tipped out in 2015. When comparing her estimates to the amounts included on the tip out sheets, her estimates appear reasonable and likely close to what she actually tipped out during that period. The employer offered no substantial and credible evidence negating the reasonableness of the information provided by Augustine. Therefore, Augustine has shown by a preponderance of the evidence that the Supper Club owes her $11,818.00 in unpaid wages and a penalty of $6,499.90 (55% of the wages owed).[4]

IV. 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. Jewels Jem, Inc., a Montana corporation d/b/a The Cattlemen's Cut Supper Club owes Dawn M. Augustine $11,818.00 in unpaid wages. Mont. Code Ann. § 39-3-204.

3. Jewels Jem, Inc., a Montana corporation d/b/a The Cattlemen's Cut Supper Club owes a penalty of $6,499.90. Admin. R. Mont. 24.16.7566.

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[4] If the wait staff at a restaurant were to make their own agreement to share their tips with other front-of-the-house employees, such an agreement would appear to satisfy both the WPA and the FLSA. See e.g. *McConkey v. Flathead Elec. Coop.*, 2005 MT 334, 125 P. 3d 1121.

V. ORDER

IT IS HEREBY ORDERED that Jewels Jem, Inc., a Montana corporation d/b/a The Cattlemen's Cut Supper Club shall tender a cashier's check or money order in the amount of $18,317.90, representing $11,818.00 in wages and $6,499.90 in penalty, made payable to Dawn M. Augustine, and mailed to the **Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503**, no later than 30 days after service of this decision. Jewels Jem, Inc., a Montana corporation d/b/a The Cattlemen's Cut Supper Club may deduct applicable withholding from the wage portion, but not the penalty portion, of the amount due.

DATED this 1st day of June, 2018.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
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 the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702. Please send a copy of your filing with the district court to:

Department of Labor & Industry
Wage & Hour Unit
P.O. Box 201503
Helena, MT 59624-1503

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.