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

IN THE MATTER OF THE WAGE CLAIM OF ELIZABETH M. MAYS,	)	Case No. 2148-2016
Claimant,	)	
vs.	)	**FINAL AGENCY DECISION**
SAM'S, INC., a Montana corporation d/b/a SAGEBRUSH SAM'S,	)	
Respondent.	)	

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I. INTRODUCTION

On June 7, 2016, Claimant Elizabeth Mays (Mays) filed a claim with the Wage and Hour Unit of the Department of Labor and Industry, alleging Respondent Sam's, Inc., d/b/a Sagebrush Sam's (Sam's), misclassified her as an independent contractor and owed her $3,059.00 in minimum wages at $8.05 per hour and that she was owed $2,028.00 in improper withholdings from 2013 through 2016. On March 13, 2017, Mays amended her complaint to cover only periods of work from 2015 through 2016, and claimed $5,636.74, including $1,626.16 in minimum wage and overtime and $1,058.00 for improper withholdings, as well as penalties and possible attorneys' fees.

Based on the alleged misclassification regarding independent contractor status, the case was sent to the Independent Contractor Central Unit (ICCU) for a determination regarding the employment relationship between the parties. On February 27, 2017, the ICCU issued a decision that Mays was an employee of Sam's. Sam's did not appeal the decision.

On April 7, 2017, the Wage and Hour Unit determined that Mays had multiple periods of employment with Sam's, and that, prior to 2016, she had quit working at Sam's on August 22, 2015. Thus, her claim filed on June 7, 2016, only covered the employment period from March 8, 2016, through March 14, 2016, as it

was the only period of employment within 180 days of the claim filing as required by Mont. Code Ann. § 39-3-207. The Wage and Hour Unit ultimately determined that Sam's owed Mays $33.43 ($68.43 wages ($8.05 x 8.5 hours) - $60.00 private dance earnings + $25.00 improper withholdings). Because Sam's had previously submitted a payment of $175.81 to satisfy Mays' wage and hour claim, the Wage and Hour Unit declined to assess a penalty pursuant to Admin. R. Mont. 24.16.7551(1). Mays timely appealed the determination.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings (OAH) on July 11, 2017. Hearing Officer Chad Vanisko conducted a telephonic hearing on November 2, 2017. Mays was present and represented by her counsel, Joe Siefert. Virginia Clark, Sam's owner, was present on Sam's behalf, which was represented by its counsel, Robert J. Whelan. Mays and Clark testified under oath.

The administrative record compiled at the Wage and Hour Unit (Documents 1 through 78) was admitted into the record upon the agreement of the parties as Admin. Exhibit 1. Claimant's Exhibits 2 and 2A, which contained Mays' discovery responses and her written dialog of text messages, were admitted without objection. Respondent's Exhibit 3, which contained a copy of Sam's discovery responses, was also admitted without objection. The case was deemed submitted at the end of the briefing following the administrative hearing.

II. ISSUE

Whether Sam's owes Mays wages for work performed, as alleged in the complaint filed by Mays, and owes penalties, as provided by law.

III. FINDINGS OF FACT

1. Claimant Mays is a resident of Wisconsin, and was not living in Montana other than during the relevant periods herein.

2. Respondent Sam's does business in the Butte, Montana, area as Sagebrush Sam's.

3. Mays is an exotic dancer who, during the relevant times herein, worked in Montana and a number of other states.

4. In 2013, while in Montana, Mays contacted Sam's to ask if they were seeking dancers. Mays subsequently auditioned with Sam's owner, Virginia Clark, and received an offer to work as a dancer for the business.

5. Mays and Sam's executed an "Independent Contractor Agreement" (ICA) on July 25, 2013. The ICA was the only written agreement executed between Sam's and Mays.

6. Pursuant to the terms of the ICA, Mays received no wages from Sam's. Mays' income was obtained directly from Sam's patrons. Specifically, the ICA provided: Contractor [Mays] shall receive no payment from Sam's. Contractor will be able to keep payments/tips which are received directly from Sam's clientele.

7. Pursuant to the ICA, Mays was required to pay "fines" for arriving late, canceling a booking, or leaving the bar before 2:00 a.m. In reality, Sam's did not charge these "fines," and Mays presented no evidence that she had paid fines in the spreadsheets she compiled showing her income and fees.

8. Aside from the rental fees, Mays received all tips paid while dancing on stage and all fees charged for private dances she performed.

9. The Wage and Hour Unit referred the matter to the Independent Contractor Central Unit (ICCU) for a determination of Mays' employment relationship with Sam's. On February 27, 2017, the ICCU determined that Mays was an employee of Sam's and not an independent contractor. Sam's did not appeal the ICCU determination.

10. The time period at issue in the present claim pertains to dates Mays worked at Sam's in 2015 and 2016. Mays kept a detailed, contemporaneous log of all amounts she earned and the amounts she paid and remitted to Sam's. The log included, among other things, the days she worked at Sam's, the hours worked, the money received from patrons, and the sums paid by her to Sam's for fees and fines. It is apparent from their scope and detail that the records were kept in anticipation of bringing the present claims.

11. Mays' work at Sam's included dancing on a stage located in a public area in the bar, and performing dances in private areas. While dancing on the stage, Mays received money directly from patrons who, while she was performing, placed cash on the perimeter of the stage. Private dances were performed in segregated, private areas. Patrons again paid her directly for the dances.

12. Sam's did not determine the amount Mays charged for her private dances, and Sam's had no contact with patrons before private dances were arranged.

13. The nature of Mays' work is itinerant. Mays typically signs a contract with a club, performs there for a period of time, leaves to perform elsewhere and/or engage in other activities, and then returns as her schedule permits and depending on the needs of the club.

14. Mays chose her dates of work at Sam's.

15. Sam's had other workers it treated as employees, such as bartenders, waitresses, and DJs, which it did not let come-and-go at will in terms of work hours as it did dancers during this period.

16. Mays worked at Sam's for the following dates in 2015 and 2016:

- June 8-13, 2015
- June 15-16, 2015
- June 22-27, 2015
- June 29, 2015 - July 1, 2015
- August 8, 2015
- August 10-11, 2015
- August 14, 2015
- August 19, 2015 - August 22, 2015
- March 8, 2016
- March 14, 2016

17. Mays learned of available work dates by either contacting Sam's when she wished to work or, in the alternative, via Sam's booking agent, Erin Joseph (Joseph), who would regularly text individuals who had provided their contact information when additional dancers were needed.

18. On October 15, 2015, Joseph texted Mays asking when she planned on coming back to Butte. Mays responded that she had "things to take care of" in Wisconsin which were time consuming, including going to school, that did not "allow for . . . [Mays] to get out much." Mays told Joseph she did not anticipate returning before the spring of 2016.

19. Joseph sent Mays other texts offering her work during the periods of January 11-16; January 18-23; and January 29-30, 2016. Mays did not accept any of these employment opportunities with Sam's.

20. From approximately late-August, 2015, through March 7, 2016, Mays attended school and worked almost exclusively at Outskirts, an exotic dance club in Wisconsin, with brief periods of employment at Divas, Midnight Express, Jimmy's Lounge, and Pony, all of which are also located in Wisconsin.

21. Mays was not available to work for Sam's while living in Wisconsin and attending school. Based on the foregoing, Mays ended her employment with Sam's on August 22, 2015, and was re-employed on March 8, 2016.

22. Mays worked at Sam's two days in March, 2016, for a total of 8.5 hours. She earned $118.00 from Sam's patrons, and paid Sam's fees in the amount of $25.00.

23. Mays received a total of $60.00 in private dance compensation in March, 2016.

24. On March 15, 2017, prior to the issuance of any administrative determination on the claim, Sam's deposited $175.81 with the Wage and Hour Unit to cover any wages awarded to Mays. The underlying determination herein was issued by the Wage and Hour Unit on April 7, 2017.

IV. DISCUSSION

The ICCU determined that Mays was an employee of Sam's and that decision was not appealed. The decision is therefore binding on this tribunal. Mont. Code Ann. § 39-71-415(2)(b)(i). As such, the only remaining issues are: (1) the dates of employment covered by Mays' claim; and (2) the amount due Mays as a result of her claim.

The imposition of an employer-employee relationship on the parties at this point requires the creation of some legal fictions which do not perfectly match with the situation as it actually existed. Indeed, as Clark testified, Sam's entire relationship with Mays–ranging from the hours she worked to the monies she retained–would have been different had it been under the impression Mays was an employee. All that can be done now is to impose a remedy that roughly

approximates wages that would have been paid Mays pursuant to an employer-employee relationship.

A. Mays Can Only Recover for Work Performed in March of 2016 Due to Mays' Prior Separation From Employment and the Date of Her Claim Filing

The period for making wage and hour claims is controlled by statute. The Montana Code[1] provides in relevant part that an employee may recover all wages and penalties for the violation of Mont. Code Ann. § 39-3-206 by filing a complaint within 180 days of default or delay in the payment of wages. Mont. Code Ann. § 39-3-207(1). The Code further provides that:

> Except as provided in subsection (2) [(regarding separation for cause or lay off)] or (3) [(regarding discharge for theft)], when an employee separates from the employ of any employer, all the unpaid wages of the employee are due and payable on the next regular payday for the pay period during which the employee was separated from employment or 15 days from the date of separation from employment, whichever occurs first, either through the regular pay channels or by mail if requested by the employee.

Mont. Code Ann. § 39-3-205(1); *see also* Admin R. Mont. 24.16.7511(1).

Mays' last day of work for Sam's was March 14, 2016. Mays timely filed her claim for wages on June 7, 2016. However, in order to avoid the 180-day filing requirement for dates of employment prior to March of 2016, Mays must also show that she never separated from employment with Sam's prior to her 2016 work. It is Mays' position that, because she operated under the same ICA since 2013 and was occasionally employed through 2016, her employment was continuous. This is not the case.

[1]The parties have not alleged that the Fair Labor Standards Act (FLSA) applies to this case, nor have they put into evidence anything indicating that Sam's is an enterprise engaged in interstate commerce with gross sales in excess of $500,000.00. *See* 29 U.S.C. 201, *et seq*.

The difficulty in determining the proper period of employment[2] for Mays' present claim stems from the fact that Sam's was operating under the assumption that it had an independent contractor relationship with Mays. For example, as shown by her work history, Mays' on-and-off schedule was representative of an independent contractor relationship. Furthermore, an independent contractor relationship does not require formal "hiring" and "firing," which is what Mays argues had to have occurred in order to limit the accrual period. While it is true that nothing in the Wage Payment Act specifies that employment is characterized by performing work on a continuous or uninterrupted basis, the assertion that an uninterrupted employment relationship could be as spotty and sporadic as Mays' was with Sam's stretches the notion of ongoing employment to its limits. Although Mays' contract was not necessarily for a limited duration on its face, it was also written as an independent contractor agreement. In practice, Mays worked on-and-off for limited durations, but never continuously.

In the case of seasonal workers, the Montana Supreme Court has endorsed the argument that, absent circumstances indicating otherwise, a seasonal employee is hired as a new employee–with a new probationary period–each time he or she returns to work. *See Dundas v. Winter Sports, Inc.*, 2017 MT 269, ¶¶ 12-13, 389 Mont. 223, 410 P.3d 177 (Court rejected argument that a seasonal employee should be found in "'continuous employment'" from 2003 until his termination in 2015 in a wrongful discharge claim). As the *Dundas* Court noted, employment is terminated by the expiration of its appointed term. *Dundas*, ¶ 12 (quoting Mont. Code. Ann. § 39-2-501(1)). Application of this principle makes sense in Mays' case, which could not even be characterized as regular enough to be seasonal. Indeed, Mays' employment with Sam's could generally be characterized as sporadic at best and certainly not continuous. Mays' testimony and the evidence establish that Sam's was but one of many different establishments for which Mays intermittently danced. Prior to 2016, Mays most recently worked at Sam's from August 8, 2015, through August 22, 2015. Thereafter, Mays left Sam's to live, work, and attended college in Wisconsin. While going to school and living in Wisconsin, Mays worked almost exclusively for Outskirts, an exotic dance establishment in Wisconsin. Through a

[2]At the outset of the analysis that follows, it should be noted that the ultimate conclusion regarding the period of employment is largely moot because, as discussed in the section below regarding offsets, Mays' wage award must be offset by her private dance fees. Were the Hearing Officer to conclude Mays was in continuous employment from 2015 through 2016, the 8.5 hours she worked in 2016 at a net of less-than-minimum wage would be averaged into her earnings in 2015, resulting in an hourly rate above minimum wage for the period as a whole (based on her earnings solely from private dances after deducting withholdings, albeit not specifically taking into account the 1.0 hour of overtime Mays claims for 2015).

combination of out-of-state work, school, and residence, Mays placed herself in a position such that she could not have worked at Sam's had she wanted to (which she did not). Stated succinctly, Mays voluntarily left Sam's in 2015 for reasons other than lack of work (or any other reason related to her work), and later turned down work when offered it. Indeed, Mays' own text messages indicate that her schedule did not allow her to get out much, and further show that she also rejected employment offers from Sam's during the time frame of August, 2015, through March, 2016. For example, in January of 2016, Joseph reached out to Mays with the hopes of employing her. Mays refused.

The facts establish that Mays could not still be working for Sam's if she turned down work when offered, and it is reasonable to conclude that each time Mays either left employment with Sam's when continued work was available or refused work that was offered, she voluntarily separated from her employment with Sam's. *See, e.g., Sheila Callahan & Friends, Inc. v. Dep't of Labor & Indus.*, 2012 MT 133, ¶ 18, 365 Mont. 283, 280 P.3d 895 (a refusal of work is not merely a lapse of a contract, but a voluntarily termination of work). This fact alone is enough to establish that Mays separated from her employment with Sam's after working there in 2015 and prior to returning to work in 2016. In addition, the facts also show that, as described hereinabove, Mays had gone to school, lived out-of-state in Wisconsin, was employed elsewhere in Wisconsin, and was completely unavailable for work at Sam's for a period after leaving work there in August of 2015. Again, these facts all show that she had left her employment with Sam's in 2015, and her return in 2016 cannot be used to tie the present claim with her previous work in 2015.

Based on the foregoing, Mays may only recover wages for the discrete period of employment from March 8, 2016, through March 14, 2016. Mont. Code Ann. § 39-3-207.

B. Sam's is Entitled to Take an Offset for the Monies Mays Received from Private Dances

Mays makes several arguments to the effect that any recovery she receives should not be offset by any of her earnings from work at Sam's. In part, she argues that private dance fees should be excluded from wages as a "service charge" pursuant to Mont. Code Ann. § 39-3-402(7)(b). A "'service charge' means an arbitrary fixed charge added to the customer's bill by an employer in lieu of a tip. It is collected by the employer and must be distributed directly to the nonmanagement employee preparing or serving the food or beverage or to any other employee involved in related

services, pursuant to a tip pool agreement." Mont. Code Ann. § 39-3-402(7)(c). For the reasons set forth below, private dance fees were not service charges.

The definition of "service charge" makes it clear that the service charge is an amount the employer adds to a consumer's bill in lieu of a voluntary, negotiable tip. Furthermore, the "service charge" is collected by the employer and is distributed directly to the "employee preparing or serving the food or beverage or to any other employee involved in related services, pursuant to a tip pool agreement." Mont. Code Ann. § 39-3-402(7)(c). Private dance fees do not fit within the definition of a "service charge" as that term is defined. Most obviously, although Sam's does serve beverages, private dances have nothing to do with either preparing or serving food or beverages, and it is hard to see how dancers would qualify as other employees involved in related services. Furthermore, private dance fees are not added to a consumer's bill in lieu of a tip. Rather, such fees are a charge the customer pays prior to receiving a private dance. If the customer wishes to tip the dancer after the private dance, the customer is free to do so. Because private dance fees are not added to customer's bills in lieu of tips and because the dancers are not preparing or serving food or beverages to obtain the dance fee, dance fees are not a "service charge" and therefore should be included as wages paid to the dancer. *See* Mont. Code Ann. § 39-3-402(7)(c).

Mays' interpretation of *Smith v. TYAD* (*TYAD*) as not supporting an offset of private dance fees against a wage award is not borne out by a reading of the case. Although *TYAD* is unfortunately scant on analysis of offsets, it does offer some guidance. Unlike here, the dancers in *TYAD* were paid an hourly wage, but that fact did not affect the Montana Supreme Court's analysis of whether or not private dance earnings should offset a wage award. To quote the Court, because the dancers received both wages and private dance fees, "the dancers therefore arguably received double payment during private dances." *Smith v. TYAD, Inc.*, 2009 MT 180, ¶ 15, 351 Mont. 12, 209 P.3d 228. Thus, regardless of whether some wages were paid (as in *TYAD*) or no wages were paid (as here), it is clear that the Court viewed private dance fees as a form of wage-like remuneration when it affirmed the credit of private dance fees toward wages. *TYAD*, ¶¶ 15, 48-54. This logic stands to reason, as had Sam's paid Mays as a traditional employee, it would have likely retained all the private dance fees and only paid out the portion necessary to make up Mays' wages.

In arguing against any form of offset, Mays seeks to have her proverbial cake and eat it too. She wants all of the benefits of being both an employee and an independent contractor, but none of the potential downside, such as earning "only" minimum wage. If Mays wishes for this tribunal to treat her relationship with Sam's

as that of an employee, however, then she must also accept all that goes along with such a relationship. Based on the foregoing, Sam's is entitled to offset Mays' private dance fees, less any withholdings.

C. Sam's is Not Subject to Penalties

The Montana Code provides in relevant part that, "[a]n employer who fails to pay an employee as provided in this part or who violates any other provision of this part is guilty of a misdemeanor. A penalty must also be assessed against and paid by the employer to the employee in an amount not to exceed 110% of the wages due and unpaid." Mont. Code Ann. § 39-3-206(1). However, the Administrative Rules also provide that, "[i]n cases where the wages claimed are paid by the employer either before or after receipt of the initial letter commencing the claim . . . and prior to the issuance of a determination, no penalty will be imposed unless any of the special circumstances described in ARM 24.16.7556 apply." Admin. R. Mont. 24.16.7551(1). Mays did not introduce evidence of any prior violations that resulted in adverse determinations of record. *See* Admin. R. Mont. 24.16.7556(1)(c).

On March 15, 2017, prior to the issuance of any administrative determination on the claim, Sam's deposited $175.81 with the Wage and Hour Unit to cover any wages awarded to Mays. The underlying determination herein was issued by the Wage and Hour Unit on April 7, 2017. Pursuant to Admin. R. Mont. 24.16.7551(1) and given the amount of the award herein, Sam's is therefore not liable for penalties pursuant to Mont. Code Ann. § 39-3-206.

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. The ICCU's determination that Mays was an employee of Sam's is both final and binding on this tribunal. Mont. Code Ann. § 39-71-415(2)(b)(i).

3. Mays separated from employment with Sam's on August 22, 2015, which triggered the 180-day filing requirement set forth in Mont. Code Ann. § 39-3-207(1).

4. Mays' subsequent re-hiring on March 8, 2016, and separation from employment with Sam's after March 14, 2016, again triggered the 180-day filing requirement set forth in Mont. Code Ann. § 39-3-207(1).

5. Mays' June 7, 2016, wage claim filing only permits her to recover wages from March 8, 2016, through March 14, 2016.

6. Mays' income while working at Sam's must be deducted from any wages owed to Mays in order to prevent double recovery. *See Smith v. Tyad*, Inc., 2009 MT 180, ¶¶ 15, 48-54, 351 Mont. 12, 209 P.3d 228.

7. Pursuant to Admin. R. Mont. 24.16.7551(1) and given the amount of the award herein, Sam's is not liable for penalties under Mont. Code Ann. § 39-3-206. No special circumstances described in Admin. R. Mont. 24.16.7556 apply.

8. As a result of the ICCU determination that Mays was an employee, the $25.00 in fees she paid Sam's must be repaid to Mays.

9. Mays is entitled to receive $33.43[3] for her claim.

VI. ORDER

Of the $175.81 already deposited with the Wage and Hour Unit by Sam's, the Wage and Hour Unit is hereby ORDERED to tender funds in the amount of $33.43, representing wages, made payable to Elizabeth M. Mays, and to mail said funds to Mays no later than 30 days after service of this decision. The remaining $142.38 shall be returned to Sam's, Inc.

DATED this 4th day of June, 2018.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CHAD R. VANISKO
CHAD R. VANISKO
Hearing Officer

[3]This amount results from the following calculation: $8.05 (Montana's minimum wage in March of 2016) x 8.5 (the number of hours worked by Mays at Sam's within 180 days of filing her wage and hour claim) + $25.00 (the fees paid to Sam's by Mays) - $60.00 (the amount earned by Mays from private dances, but excluding tip income).

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