

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

IN THE MATTER OF THE WAGE CLAIM ) Case No. 871-2022  
OF TINA M. PEDERSON, )  
)  
Claimant, )  
) **FINAL AGENCY DECISION**  
vs. )  
)  
LA CASA TOSCANA, LLC, )  
)  
Respondent. )  
\* \* \* \* \*

**I. INTRODUCTION**

Claimant Tina M. Pederson (Pederson) filed a wage claim on April 10, 2019, alleging La Casa Toscana, LLC (LCT) owed a total of \$10,000.00 in tips during the period of November 1, 2018 through January 26, 2019.

On September 2, 2021, the Wage and Hour Unit issued a determination finding Pederson’s claim held merit, and as such, she was due wages and penalties. Specifically, Pederson was due tips in the amount of \$344.49 and penalties (15%) in the amount of \$51.67. As a result, LCT was required to make a total payment to Pederson in the amount of \$396.16. LCT made the requisite payment, however Pederson appealed the matter on September 17, 2021. As required, the appeal initially went to mediation, which was unsuccessful. As a result, on December 13, 2021, the Wage and Hour Unit transferred the matter to the Office of Administrative Hearings (OAH).

On July 10, 2023, the Hearing Officer conducted a hearing in this matter, at the Office of Administrative Hearings (OAH) located at 715 Front Street, Helena, Montana. Pederson was represented at hearing by Attorney Anne Sherwood (Sherwood). LCT was represented at hearing by Attorney Lawrence Henke (Henke). Pederson testified on her own behalf and did not call any other witnesses. LCT did not offer any other witnesses.

The admitted Exhibits are as follows:

Claimant’s Exhibits: 302, 303, 305 (p. 3-15), 306, and 311.

Respondent’s Exhibits: A and C/C-Sub 1.

Claimant's Exhibit 312 (later identified as Exhibit 312/A and B) was objected to by Henke. Sherwood opposed the objection. The Hearing Officer hereby sustains the objection, and as such, Exhibit 312/A and B shall not be admitted.

Any proposed exhibits not included in the above enumerated lists were not admitted into evidence. The exhibits not admitted were due to the parties' failure to motion for admission. The parties also did not move for the admission of the administrative record (1-252), and therefore the administrative record was not admitted into evidence.

The parties waived post-hearing briefing, and as such, the case was deemed submitted at the close of the hearing. 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. ISSUE**

Whether LCT owes Pederson wages for work performed, in regard to unpaid tips, and owes penalties or liquidated damages, as provided by law.

## **III. FINDINGS OF FACT**

1. Pederson is a career Server in the food service industry, and she has worked in the industry over the course of the past 34 years.
2. LCT is a fine dining restaurant located in Butte, Montana. The restaurant is locally owned and operated.
3. Pederson began her term of employment as a Server with LCT beginning October 2018.
4. When Pederson was hired, she participated in the tip pooling arrangement. The tip pooling required all servers to pool their individual tips (credit card, service charge, and cash), and equally redistribute the total tips with all employees of LCT, excluding management, who worked on a given day.
5. LCT uses a Point-of-Sale (POS) system called "CAKE," which is a computerized system used to record daily sales revenue for the business. As part of the CAKE system, LCT's total daily gross sales, total tips received (other than cash), and number of employees on duty for the day were recorded within the system. The total tips included credit card tips and automatic service charges (which equated to a tip for parties of six or more).

6. Each week LCT would issue Pederson, and her co-workers, a check with the amount of tips earned as an equal share of the tip pool for each shift worked. LCT's servers also received cash tips, which the employees would pool at the end of each night, and redistribute as equal shares amongst themselves. Pederson participated in the nightly distribution of cash tips, and properly received her share.

7. Pederson received paystubs as records of her share of the credit card tips and service charges. Pederson did not receive a receipt for the cash tips the servers pooled and dispersed at the end of each night.

8. During the time period at issue for her employment with LCT, Pederson earned the following share of credit card tips, including service charges, from the tip pool:

Date	LCT Gross Sales (\$)	Total Tips (\$)	Employees on Duty (#)	Pederson's Earned Share (\$)
11/9/18	1,975.15	389.57	4	97.39
11/9/18-11/10/18	4,896.52	396.04	4	99.01
11/10/18-11/13/18	6,472.42	1,576.62	5	315.32
11/13/18-11/14/18	1,753.74	303.31	3	101.10
11/14/18-11/15/18	1,700.99	266.01	3	88.67
11/15/18-11/16/18	4,695.33	849.63	4	212.41
11/16/18-11/17/18	3,206.18	495.57	4	123.89
11/17/18-11/20/18	2,873.79	517.58	3	172.53
11/20/18-11/21/18	2,595.58	386.36	3	128.79
11/21/18-11/24/18	3,082.03	642.32	4	160.58
11/24/18	5,341.39	957.66	6	159.61
11/24/18-11/26/18	210.25	14.00	1	0
11/26/18-11/27/18	2,501.57	505.65	3	168.55
11/27/18-11/28/18	1,676.70	290.32	3	96.77

11/28/18- 11/29/18	1,690.71	265.59	3	88.53
11/29/18- 11/30/18	4,098.11	761.83	4	190.46
11/30/18- 12/01/18	3,925.20	654.29	4	163.57
12/01/18- 12/03/18	474.75	1	0	0
12/03/18- 12/04/18	2,119.90	433.28	3	144.43
12/04/18- 12/05/18	679.67	44.00	3	14.67
12/05/18- 12/06/18	2,024.88	314.02	4	78.50
12/06/18- 12/07/18	3,776.97	648.95	5	129.79
12/07/18- 12/08/18	5,608.89	1,037.37	5	207.47
12/08/18- 12/09/18	873.25	1	0	0
12/09/18- 12/10/18	1,018.25	26.00	1	0
12/10/18- 12/11/18	2,032.59	135.52	3	45.17
12/11/18- 12/12/18	2,463.28	376.63	3	125.54
12/12/18- 12/14/18	2,860.42	353.00	3	117.67
12/14/18	5,870.82	1,173.37	4	293.34
12/14/18- 12/15/18	4,672.74	632.43	4	158.11
12/15/18- 12/17/18	358.50	33.00	2	0
12/17/18- 12/18/18	1,724.33	180.02	3	60.00
12/18/18- 12/19/18	4,093.67	363.00	3	121.00
12/19/18- 12/20/18	4,105.18	701.23	5	140.25
12/20/18- 12/21/18	4,003.13	420.07	4	105.02
12/21/18- 12/22/18	2,313.72	221.71	4	55.43

12/22/18- 12/24/18	1,273.00	0	0	0
12/24/18- 12/28/18	3,588.25	729.59	3	243.20
12/28/18	4,193.35	417.39	3	139.13
12/28/18- 12/29/18	2,028.21	386.52	4	96.63
12/29/18- 01/01/19	8,602.51	1,663.02	5	332.60
01/01/19- 01/04/19	2,070.58	147.03	5	29.41
01/04/19- 01/05/19	3,221.18	384.02	3	128.00
01/05/19- 01/08/19	1,036.12	183.71	3	0
01/08/19- 01/09/19	260.70	57.52	3	19.17
01/09/19- 01/10/19	2,835.53	420.28	4	105.07
01/10/19- 01/11/19	4,370.97	845.72	4	0
01/11/19- 01/12/19	15,011.55	0	2	0
01/12/19- 01/16/19	2,093.21	301.33	3	0
01/16/19- 01/17/19	628.62	107.98	2	53.99
01/17/19- 01/18/19	5,364.60	641.54	5	128.31
01/18/19- 01/19/19	3,231.72	674.17	4	168.54
01/19/19- 01/22/19	1,036.85	178.73	3	59.58
01/22/19- 01/23/19	2,378.06	312.49	4	78.12
01/23/19- 01/24/19	1,480.26	295.38	3	98.46
01/24/19- 01/25/19	3,794.65	746.19	5	149.24
01/25/19- 01/26/19	3,380.97	778.07	4	194.52

TOTAL: Pederson's Tip Pooling Earned Share \$6,187.54

9. During the same time period of her employment with LCT, Pederson received the following share of credit card tips, including service charges, from the tip pool:

Beginning and Ending Payment Periods	Pederson's Tip Payments Gross Amount (\$)
11/01/18-12/01/18	342.00
12/04/18-12/09/18	780.78
12/11/18-12/15/18	947.14
12/18/18-12/22/18	740.19
12/23/18-01/04/19	933.00
01/05/19-01/12/19	905.35
01/13/19-01/19/19	368.96
01/20/19-01/26/19	498.64

TOTAL: Pederson's Tip Payments Received \$5,516.06

10. At times Sonia Z., LCT's owner, was improperly included in the tip pool calculations as an employee. Sonia Z. was not always included as an employee, but as a member of management she could not receive a share of the tip pool.

11. Pederson was separated from her employment with LCT on January 26, 2019.

12. On April 10, 2019, Pederson filed a wage claim for the period beginning November 1, 2018 through January 26, 2019.

## **IV. DISCUSSION**

### **A. Pederson's Right to Wages**

As an initial matter, at hearing Pederson stated she was not contesting the tip pooling agreement she worked under while employed with LCT. Instead, Pederson was appealing the amount of wages, in the form of tips, she is due. Therefore, the first question to be addressed concerns whether Pederson has a right to wages from LCT.

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).

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. 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.

#### **i. Credit Card and Service Charge Tips**

At hearing Pederson argued she did not receive the total wages she earned while employed with LCT. Specifically, Pederson identified she earned more tips than she received. Pederson referenced the Point-of-Sale (POS) system (CAKE), which is a computerized system used to record daily sales revenue for LCT. As part of the CAKE system, LCT's total daily gross sales, total tips received, including service charges (other than cash), and number of employees on duty for the day were recorded within the system. Pederson

provided copies of all of the end of day printouts from the POS system, which contain the above referenced information. Pederson argued she earned \$2,640.91 more in tips than she was paid.

Upon review, Pederson's earned equal share of the tip pool (other than cash), during the period under review, totaled \$6,187.54. Pederson also provided paystubs as records of the amount of tips (other than cash) she actually received. Pederson's received share of the tip pool (other than cash), during the period under review, totaled \$5,516.06. The difference between what Pederson earned and what she received from LCT shows a deficit of \$671.48. Based on the evidence provided by Pederson, she established by a preponderance of the evidence she has a right to wages from LCT for the period under review.

As Pederson met her burden of proof, the burden then shifts to LCT to provide “. . . evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee. . . .” *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. LCT, just as Pederson, produced copies of all of the end of day printouts from the POS system. The production of LCT's business records comport with the findings concerning what credit card tips, including service charges (other than cash), Pederson earned. However, LCT did not produce Pederson's paystubs for the period under review, in order to substantiate any argument on behalf of the employer that Pederson was paid wages beyond what the paystubs show she was paid.

Without evidence to negate Pederson's substantiated evidence, LCT failed to meet its burden of proof, and as such, Pederson has a right to wages from LCT. Pederson has shown LCT owes her unpaid wages of \$671.48 as a result of its failure to fully pay Pederson the credit card tips, including service charges (other than cash), she earned.

## **ii. Cash Tips**

However, Pederson also argued she did not receive the total cash tips she earned while employed with LCT. Specifically, regarding cash tips, Pederson stated at hearing she and her co-workers would pool their cash tips at the end of each night. The employees would then redistribute the cash tips as equal shares amongst themselves. Pederson identified she participated in the nightly distribution of cash tips, and took the cash tips home with her nightly rather than receiving the amount as part of her tip check. Pederson did not provide any evidence to show how much she received in cash tips over the course of her employment with LCT. Instead, Pederson argued she should have received approximately 19% of the nightly cash sales.



Pederson bears the initial burden to show she performed work without proper compensation. Pederson's testimony at hearing regarding her receipt of the nightly equal share of cash tips negates her argument she did not receive all of the cash tips she earned. Pederson did not keep a personal record of the amount of cash tips she received each night. Further, Pederson did not provide substantiating documentation, such as her tax records, which if properly claimed, would have a record of the tips she received from LCT. Pederson's own statements show her argument, concerning not receiving the amount of cash tips she earned, lacks credibility. Pederson referenced a "black book" where the cash tips were recorded each night. Pederson argued LCT failed to produce the black book for hearing. However, Pederson did not present evidence to show the existence of the black book. Further, if the black book does exist, Pederson did not show she requested the black book as part of discovery. Nor was a motion to compel filed in order to reach said black book if LCT did in fact fail to respond to a proper request for production.

Pederson's burden of proof requires she must produce evidence to "show the extent and amount of work as a matter of just and reasonable inference." *Garsjo* at 189. Specifically in regard to her receipt of the cash tips, Pederson failed to produce any evidence to create a just and reasonable inference that she did not receive the share of cash tips she earned. Further, Pederson's own testimony contradicts her claim. Therefore, Pederson failed to meet her burden of proof, and as such, her wage claim fails in regard to the proper compensation of cash tips.

### **B. Amount of Tips Earned but not Received**

With the establishment of unpaid wages, only in regard to credit card tips, including service charges, the next question to be addressed concerns the amount of unpaid wages owed to Pederson. As cited above, the burden of proof is on the employee in an action to recover compensation to establish, by a preponderance of the evidence, the elements of a case entitling him to recovery, including that the employee has performed work for which he has received inadequate compensation. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

As addressed above, Pederson argued she did not receive the total wages she earned, and identified \$2,640.91 as the total difference between what she received and what she earned. As proof of the tip discrepancy, Pederson provided copies of all of the end of day printouts from the POS system. Pederson also provided paystubs as records of the amount of tips she actually received. Pederson's earned share of the tip pool, during the period under review, totaled \$6,187.54. Pederson's received share of the tip pool, during the period under review, totaled \$5,516.06. Pederson agreed she was paid the amounts shown on the paystubs, so she only proved she is owed the difference

between what she earned and what she received from LCT, a deficit of \$671.48. Based on the evidence provided by Pederson, she established she earned, but did not receive, wages in the amount of \$671.48. Pederson failed to prove by a preponderance of the evidence that she was due any further wages to support a finding of \$2,640.91, as the amount of wages she did not receive.

With the establishment of a total amount of wages Pederson did not receive from LCT, the burden then shifts to LCT to provide “. . . 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. . . .” *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. Although LCT produced the same POS end of day printouts, the employer did not produce any business records to show Pederson actually received the tip amount she showed she was not paid.

Mont. Code Ann. § 39-3-201(6)(a) defines wages as “. . . 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) 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.”

Pederson has shown LCT owes her unpaid wages as a result of its failure to fully compensate her for the tips Pederson earned as an equal share of the tip pool. Utilizing the POS end of day printouts and paystubs, when Pederson’s earned share of the total tips (\$6,187.54) is compared with Pederson’s received share (\$5,516.06), shows a deficit of \$671.48.

Regarding the calculation of the tips Pederson earned, the LCT employees working during a shift would equally share the tips they earned. The POS end of day printouts identifies the employees by name for each day worked. However, the discrepancy of how Pederson’s equal share was calculated lies primarily with the inclusion of one of LCT’s owners, Sonia Z., as an employee. Sonia Z. was not always included as an employee, but as a member of management she could not receive a share of the tip pool. This led to some confusion as to the correct calculation of the tip pool. Another individual identified as Christopher Z., was sometimes included in the tip pool calculations, and at other times he was excluded. This also led to some confusion as to the calculation of the tip pool. With the proper exclusion of Sonia Z., the discrepancy between the amount of tips Pederson earned and what she received totals \$671.48.

### **C. Penalty**

The final question to be addressed concerns whether a penalty applies. Admin. R. Mont. 24.16.7566 provides direction regarding the calculation of penalties, when wages are determined to be due an employee. Specifically:

(1) For determinations involving claims filed on or after October 1, 1993, if none of the special circumstances of ARM 24.16.7556 apply, penalties are calculated as follows:

(a) a penalty equal to 55% of the wages determined to be due to the employee will be imposed in all determinations issued by the department; but

(b) the department will reduce the penalty to 15% of the wages determined to be due if the employer pays the wages found due in the time period specified in the determination as well as a penalty equal to 15% of that amount.

(2) If a claim involves any of the special circumstances of ARM 24.16.7556, the department will impose the maximum penalty allowed by law.

(3) The penalty calculated according to this rule may be reduced only upon the mutual agreement of the parties and the department.

The parties did not present an argument or evidence to show the existence of circumstances which require the maximum penalty. Instead, the discrepancy which led to LCT's failure to pay Pederson's wages in full was based on a miscalculation. The record of the case shows LCT timely paid the initial amount of wages and penalty due. Therefore, under Admin. R. Mont. 24.16.7566(1)(b), LCT owes a penalty of 15% of the total wages determined by this decision, to be owed to Pederson, which totals \$100.72.

### **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. La Casa Toscana, LLC owes Tina M. Pederson \$671.48 in unpaid wages. Mont. Code Ann. § 39-3-204.

3. La Casa Toscana, LLC owes a penalty of \$100.72. Admin. R. Mont. 24.16.7566.

**VI. ORDER**

IT IS HEREBY ORDERED that La Casa Toscana, LLC shall tender a cashier's check or money order in the amount of \$772.20, representing \$671.48 in wages and \$100.72 in penalty, made payable to Tina M. Pederson, 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. La Casa Toscana, LLC may deduct applicable withholding from the wage portion, but not the penalty portion, of the amount due.

DATED this 21st day of July, 2023.

DEPARTMENT OF LABOR & INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ COLLEEN C. TANNER  
COLLEEN C. TANNER  
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 59620-1503

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.