

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



V

**Mary Ann's Diner LLC**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages  
RSA 275:48 I/II withholding of wages

**Employer:** Mary Ann's Diner LLC, 3 Veterans Memorial Hwy, Salem NH 03079

**Date of Hearing:** January 4, 2018

**Case No.:** 56361

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant asserts she is owed \$3,800 in tips which the employer required her to tip out to bussers. She estimates she worked between four and five shifts for each of thirty-eight weeks and tipped out approximately \$20 each shift.

The employer argues that she was not involved in any of the tipping arrangements between the servers and the bussers as she was informed by Labor Inspector Olson it was illegal during a compliance audit with this Department.

**FINDINGS OF FACT**

The claimant worked for the employer from August 28, 2016 through May 18, 2017, when she quit her position as a server.

The claimant argues she is owed \$3,800 in tips which the employer required her to tip out to bussers. She estimates she worked between four and five shifts for each of thirty-eight weeks and tipped out approximately \$20 each shift. She alleges the employer regularly told her she was not tipping enough to the staff. On May 15, 2017, the employer emailed the staff stating there would be ramifications for many infractions, the first of which was "Do I tip out the bussers properly [?]" and that some wait staff had the "audacity to tip out less than \$5".

The employer maintained management had no input nor involvement with the tipping program between the wait staff and the bussers.

Upon direct questioning by the Hearing Officer, the employer maintained that the May 15, 2017, email was not any involvement in the tip sharing program, though she continued to state that the wait staff should "properly" tip the bussers.

The Hearing Officer finds Ms. Latham's testimony to not simply be less than credible, but completely untruthful.

First, it must be determined if the employer violated RSA 279:26-b, which allows an employee to share their wages, their property, voluntarily and without coercion from the employer, in a tip sharing arrangement.

RSA 279:26-b Tip Pooling and Sharing I states that tips are wages and shall be the property of the employee receiving the tip and shall be retained by the employee, unless the employee voluntarily and without coercion from his or her employer agrees to participate in a tip pooling or tip sharing arrangement.

II. No employer is precluded from administering a valid tip pooling or tip sharing arrangement at the request of the employee, including suggesting reasonable and customary practices, and mediating disputes between employees regarding a valid tip pooling or tip sharing arrangement.

RSA 279:1 Definitions reads, in relevant part, XII. "Tip" means money given to an employee by a customer, in cash or its equivalent, or transferred to the employee by the employer pursuant to directions from a credit card customer who designates a sum to be added to the bill as a tip, or added as a gratuity or service charge to a customer's bill, in recognition of service performed.

XIII. "Tip pooling" means the voluntary practice by which the tip earnings of directly tipped employees within the same job category are intermingled in a common pool and then redistributed among participating employees.

XIV. "Tip sharing" means the practice by which a directly tipped employee gives a portion of his or her tips to another worker who participated in providing service to customers.

XV. "Coercion" means the threat of or a direct action which results in an adverse effect on an employee's economic or employment status.

RSA 275:48 Withholding of Wages I (b) allows an employer to make certain deductions from an employee's wages if they have first secured a written authorization by the employee for deductions, for a lawful purpose accruing to the benefit of the employee as provided in regulations issued by the commissioner.

The claimant did not present persuasive evidence or testimony that the employer violated RSA 279:26-b by coercing participation in a tip pooling or sharing arrangement between August 28, 2016 and May 14, 2017. She agreed that the employer did not provide a specific amount to tip out, only that it should be more. She suffered no threat or direct action which resulted in an adverse effect on her economic or employment status.

The employer's email of May 15, 2017, stating there would be ramifications for many infractions, the first of which was "Do I tip out the bussers properly [?]" and that some wait staff had the "audacity to tip out less than \$5", does prove by a preponderance of the evidence that the employer was coercing participation in the share arrangement as stated "If you have answered incorrectly to any of these questions, you'll know why your section is smaller or your shifts have changed."

Therefore, the Hearing Officer finds the claimant proved by a preponderance of the evidence that she was coerced into participating in a tip sharing arrangement as of May 15, 2017. The claimant worked two shifts, May 15 and May 18, 2017, after the May 15, 2017, email, in which the employer coerced participation in a tip sharing arrangement.

The claimant argues she is due approximately \$20 per shift which she tipped out to bussers. She agrees she does not know the exact amount tipped per shift and did not maintain any contemporaneous notes.

The Hearing Officer finds the claimant's testimony that she used an estimate of the amount of the tips she was coerced to share, to most accurately reflect the tip out amounts, persuasive, because it most closely reflects tip out amount, in the absence of true and accurate records. The employer's failure to maintain payroll records to show the tips shared with other employees does not mitigate their responsibility of or shield them from responsibility for wages owed to the claimant. The employer was required by statute and administrative rule, RSA 279:27 and Lab 803.03, to maintain true and accurate payroll records including all wages paid to each employee. They had the ability and the opportunity to maintain these records, but chose not to do so.

Therefore, it is found that the claimant proved by a preponderance of the evidence she is due \$20 for each shift worked on May 15 and May 18, 2017.

### **DECISION AND ORDER**

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant proved by a preponderance of the evidence that she was not paid all wages due because the employer illegally deducted \$40 from her wages, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$40 (\$20 +\$20).

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$40 (\$20 +\$20), less any applicable taxes, within 20 days of the date of this Order.

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Melissa J. Delorey  
Hearing Officer

Date of Decision: January 9, 2018

Original: Claimant  
cc: Employer  
Employer's Attorney

MJD/nm