DA 19-0007

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 219

IN THE MATTER OF THE WAGE CLAIM OF:

ELIZABETH M. MAYS,

Claimant and Appellant,

and

SAM'S INC., a Montana corporation d/b/a SAGEBRUSH SAM'S,

Respondent and Appellee.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. BDV-18-356
Honorable Elizabeth A. Best, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Steven T. Potts, Steven T. Potts, PLLC, Great Falls, Montana

For Appellee:

Frank J. Joseph, Frank J. Joseph, P.C., Attorney at Law, Butte, Montana

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Submitted on Briefs: August 7, 2019

Decided: September 17, 2019

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Elizabeth Mays (Mays) appeals an order entered by the Montana Eighth Judicial District Court, Cascade County, on judicial review, which affirmed in part, reversed in part, and remanded a decision by the Department of Labor and Industry's Office of Administrative Hearings (Agency) on Mays' wage claim against Sam's Inc., d/b/a Sagebrush Sam's (Sam's). We affirm, and restate the issues as follows:

1. Is the District Court's order, which included a remand to the Agency, a final judgment for purposes of appeal?

2. Did the District Court err by affirming the Agency's determination of the terms of Mays' employment?

3. Did the District Court err by affirming the Agency's determination that Sam's was not obligated to reimburse Mays for fees?

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Sam's engaged Mays to work as an exotic dancer pursuant to an Independent Contractor Agreement (ICA) the parties executed on July 25, 2013. Under the ICA, Mays was designated an independent contractor, and she paid Sam's $15 per night for stage rental fees and $4 or $5 for private dance room fees. Mays was paid nothing by Sam's, but was permitted under the ICA "to keep payments/tips which are received directly from Sam's clientele." In a paragraph entitled, "Term," the ICA provided: "Because the Stage is rented by the shift, this Agreement contemplates that the parties may agree to which day(s) the Stage and Contractor will be available. Thus, the specific days for which this contract will apply will be orally agreed to later by the parties."

¶3 Mays was engaged at Sam's intermittently, working for brief periods and then leaving to work elsewhere or pursue other activities. The time period at issue pertained to

dates Mays worked at Sam's in 2015 and 2016. After working a number of stints in the summer of 2015, Mays went to Wisconsin and resided there from August 23, 2015 through March 7, 2016, attending school and working at a local exotic dance club. While Mays was in Wisconsin, Sam's contacted her several times regarding work, but Mays declined each time. Mays returned to work at Sam's for a brief period starting March 8, 2016, but Sam's terminated the relationship on March 14, 2016, due to a dispute between the parties.

¶4 On June 7, 2016, Mays filed a wage claim with the Montana Department of Labor and Industry, alleging she was misclassified as an independent contractor and was owed employment wages for hours she worked, claiming minimum wage. The matter was referred to the Independent Contractor Central Unit (ICCU) to determine the employment relationship between Mays and Sam's. Finding Mays did not satisfy the criteria to be an independent contractor, the ICCU determined Mays was an employee and transferred the matter to the Wage and Hour Unit to determine whether Mays was owed wages. In turn, the Wage and Hour Unit determined that Mays was initially employed by Sam's for several finite periods, which ended on August 22, 2015, and that she was separately employed for another time period between March 8, 2016 and March 14, 2016. Due to the 180-day limitation for filing wage claims under § 39-3-207, MCA, Mays was eligible to claim only wages for the work performed during this final period, as the time for filing had lapsed for the earlier, separate, periods of employment. Accordingly, the Wage and Hour Unit determined that Sam's owed Mays $33.43, computed as $8.05 per hour, times 8.5 hours, minus $60 private dance fees Mays had received, plus $25 in improper withholdings. Mays pursued a contested case hearing before the Agency, after which the Hearing Examiner

likewise determined Mays was owed $33.43 in wages, reasoning with regard to her claim for earlier time periods that she "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."

¶5 Mays sought judicial review, and the District Court determined that the Agency's findings regarding Mays' employment periods were not clearly erroneous; that the ICA did require a different determination about Mays' periods of employment; and that Sam's was not obligated to reimburse Mays' fees beyond the statutory limitation period. However, the District Court reversed the Agency's determination that Sam's was entitled to an offset for Mays' tips, concluding the exclusion for tips under § 39-3-402(7)(b), MCA, applied because Sam's sold food and beverages. The District Court also reversed the Agency's determination that Sam's was not required to pay a penalty under § 39-3-206(1), MCA, finding that Sam's attempt to "circumvent applicable wage law" was unlawful under *Smith v. TYAD, Inc.*, 2009 MT 180, ¶ 28, 351 Mont. 12, 209 P.3d 233, and that the language imposing a penalty under § 39-3-206(1), MCA, was mandatory. Sam's does not cross-appeal these issues, and therefore we do not address them. The District Court remanded the matter to the Agency for recalculation of the amount owed to Mays. Neither party challenges the ICCU's determination that Mays did not satisfy the criteria to be classified as an independent contractor, and was therefore an employee of Sam's.

¶6 Mays appeals.

STANDARD OF REVIEW

¶7 "Section 2-4-704(2), MCA, establishes the applicable standard of review of an administrative decision. It provides that when a district court reviews an agency decision,

it may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Rather, the district court reviews the agency's decision to determine if the agency's findings of fact were clearly erroneous and whether its conclusions of law were correct. We apply this same standard to our review of a district court's decision to affirm an agency decision. In reviewing conclusions of law under § 2-4-704, MCA, we determine whether the agency's interpretation of the law is correct." *Smith*, ¶ 23.

DISCUSSION

¶8 *1. Is the District Court's order, which included a remand to the Agency, a final judgment for purposes of appeal?*

¶9 On a threshold matter, Sam's argues that Mays' appeal is premature because the District Court remanded the case to the Agency for recalculation of her award, and thus, the judgment is not yet final. We faced a similar issue in *Whitehall Wind, LLC v. Mont. PSC*, 2010 MT 2, 355 Mont. 15, 223 P.3d 907, where the District Court, upon judicial review of a rate determination by the Public Service Commission (PSC), reversed and remanded the case with instructions for the PSC to determine a new rate. *Whitehall Wind*, ¶ 18. We held that, despite the remand for a rate recalculation by the agency, the District Court's order "constitutes a final order from which the PSC as a right of appeal" under the Rules of Appellate Procedure, and, "to force the PSC to recalculate the rate in accordance with the District Court's specific instructions before allowing it to appeal would undermine the PSC's right to appeal under § 2-4-711, MCA." *Whitehall Wind*, ¶ 18. Similarly, Mays has standing to appeal the District Court's order despite the remand for recalculation of the award because the order constitutes a final order in a contested case for which judicial

review is available. *See Whitehall Wind*, ¶ 18 (citing § 2-4-702, MCA and M. R. App. P. 4(1)(a)). Further, as a matter of judicial economy, a reversal by this Court could well revise the instructions upon remand that were entered by the District Court.

¶10 *2. Did the District Court err by affirming the Agency's determination of the terms of Mays' employment?*

¶11 The primary thrust of Mays' appeal is that the times she worked for Sam's in 2015 and 2016 constituted one employment period that ended in a singular separation on March 14, 2016, allowing her to seek unpaid wages for this entire period under the 180-day claim limitation in § 39-3-207, MCA. *See also* § 39-3-205(2), MCA ("when an employee is separated . . . all the unpaid wages of the employee are due and payable immediately upon separation . . ."). Mays challenges as clearly erroneous the Hearing Officer's Finding of Fact #21, which stated, "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." Mays cites the Term provision of the ICA, which stated that times of work would be "agreed to" by the parties, and provided the ICA could be terminated "by either party," which she argues did not occur until March 14, 2016. Mays relies upon the statement in the independent contractor determination by the ICCU that she "worked as an exotic dancer and sold drinks for Sagebrush Sam's from July 5, 2013 to March 14, 2016" to support her claim of a singular employment period.

¶12 However, as noted by the ICCU, its independent contractor determination was directed to "a party's liability with respect to *employment status*" (emphasis added), and

its factual rendition of the case was for that purpose, not for determining wages Mays was eligible to claim as an employee, which was the duty of the Wage and Hour Unit, and thereafter the Hearings Examiner. Thus, ICCU's factual statement does not control here. Regarding Mays' reliance upon the ICA, the Hearing Examiner noted the difficulty in applying the Agreement to an employment relationship, because "Mays' on-and-off schedule was representative of an independent contractor relationship." The Hearing Officer found that, in accordance with the ICA, "Mays chose her dates of work at Sam's," but that, "[i]n practice, Mays worked on-and-off for limited durations, but never continuously." Mays does not challenge the many factual findings delineating her actual work times, addressing the sporadic nature of her work, and, importantly, discussing the seven-month gap that began in August 2015. During that time, Sam's booking agent contacted Mays multiple times about work, but Mays declined, as she was attending school and working at clubs in Wisconsin until March 2016. The Hearing Officer thus concluded 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."

¶13 This conclusion is consistent with our holding in *Dundas v. Winter Sports, Inc.*, 2017 MT 269, ¶¶ 12-13, 389 Mont. 223, 410 P.3d 177, that a seasonal employee was not continuously employed for purposes of claiming wrongful termination under the Montana Wrongful Discharge of Employment Act. Similarly here, Mays' employment lapsed in August 2015 when she left for an extended period of time, secured employment elsewhere,

and declined offers of work from Sam's. The Agency's findings of fact are not "clearly erroneous in view of the reliable, probative, and substantial evidence on the record." Section 2-4-704(2)(a)(v), MCA. The District Court correctly affirmed the Agency's determination regarding the duration and periods of Mays' employment.

¶14 *3. Did the District Court err by affirming the Agency's finding that Sam's was not obligated to reimburse Mays for fees?*

¶15 Mays briefly argues the Agency failed to address fees that she paid to Sam's during her employment "over the years," which should be reimbursed to her. However, as Sam's correctly notes, the Agency decision did require Sam's to repay the stage and room rental fees it charged Mays during the employment period in March 2016, the only period for which a claim was timely filed. Mays' claim for reimbursement of fees for work periods in earlier years is mooted by our holding under Issue 2.

¶16 Sam's did not appeal the District Court's reversal of the Agency's decision on the tip offset and wage penalty, both of which accrue in Mays' favor. We affirm the issues raised on appeal by Mays, and thus, the District Court's decision is affirmed in its entirety. Thus, this matter is remanded to the Agency for re-calculation of Mays' award.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ LAURIE McKINNON