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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

LAURIE ZABAWA,

Plaintiff,

v.

**GATEWAY HOSPITALITY GROUP,
INC., an Ohio Corporation; HOLLY
FERRELL, an individual, BOZEMAN
LODGING INVESTORS, LLC, d/b/a
HILTON GARDEN INN - BOZEMAN,
and DOES 1 - 5,**

Defendants.

Cause No. 13-691B

**MOTION TO AMEND COMPLAINT
AND DEMAND FOR JURY TRIAL
and BRIEF IN SUPPORT**

COMES NOW the Plaintiff, Laurie Zabawa, and files this Motion to Amend Complaint and Demand for Jury Trial. This Motion is brought pursuant to Rule 15, M.R.Civ.P., and supporting case law. Defendants oppose this Motion.

BRIEF IN SUPPORT

Plaintiff is Moving to Amend the Complaint to include a claim for Declaratory Relief. The relief sought is a judicial declaration that the Defendants' policy of withholding tips generated from an arbitrary service charge of 20% attached to all Banquet Event Orders ("BEO") is in violation of public policy and illegal. The Defendants' policy of taking the tip income from employees instead of distributing it to hardworking nonmanagement Montana employees deprives them of vital tip income

that they are entitled to under the law. In some cases those employees are single parents. Allowing the Amendment is appropriate in that Laurie Zabawa's rights and interests as a former employee of Defendants were directly impacted by Defendants' institution of the unlawful policy as described in the accompanying Amended Complaint and Demand for Jury Trial. Laurie has already plead that the policy was one of the reasons for her to leave her employment. Succinctly, Defendant Holly Ferrell, on behalf of Defendants Gateway and Bozeman Lodging Investors, instructed Laurie Zabawa to deprive her banquet staff of tip income and in one instance instructed Laurie to essentially fire an employee who was complaining about the policy. Moreover, the Amendment is appropriate because a declaration of rights under the statute will clarify for necessary but as yet unknown parties their rights and status under Montana law as employees of the Defendants and as customers who pay the 20% arbitrary fee.

Montana law provides the following with regard to payment of tips to nonmanagement employees:

(6) (a) "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) 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.

(b) For the purposes of this subsection (6), "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.

Section 39-3-201(6), MCA.

Before Defendant Gateway Hospitality Group took over management of the Hilton Garden Inn the Hilton paid the arbitrary fee associated with the BEOs to the

nonmanagement employees. After GHG took over the management of HGI and Defendant Holly Ferrell took over as the General Manager, GHG determined that the 20% fee would be retained for HGI's benefit and not paid to the employees. GHG had employees then working at the time sign a document, or they would lose their position in banquets, advising the employee that they would no longer be getting the tip as required by the law. GHG then changed the name of the arbitrary fee from "gratuity" to either "service charge" or "set up fee." Granting the Motion is appropriate at this time as it is still early in the case and a determination of this very serious issue is properly and squarely before the Court.

According to Rule 15(2), M.R.Civ.P., "The court should freely give leave when justice so requires." See, *Lien v. Murphy Corp.* 201 Mont. 488, 492, 656 P.2d 804, 806 (1982)(*Holding*, "Rule 15(a), M.R.Civ.P., provides that even after a responsive pleading has been served, the trial court shall freely grant plaintiff leave to amend the original complaint 'when justice so requires.' This rule has been construed broadly. In *Union Interchange, Inc. v. Parker* (1960), 138 Mont. 348, 354, 357 P.2d 339, 342, we stated, '... it is the rule to allow amendments and the exception to deny them.'") Though a responsive pleading has been served the Parties only recently exchanged lay witness and exhibit lists. Additionally, the issue presented by the Amended Complaint is almost exclusively a question of law. Defendants admit that they do not provide the 20% arbitrary fee to the nonmanagement staff members. The question then becomes one of law; is the policy legal or not under the law?

Here, "justice so requires" granting leave to amend because Laurie Zabawa's claim under the WDEA includes a claim that she was required to deprive employees of tip income Ms. Zabawa believed they were entitled to. In one case, Defendant Holly Ferrell even instructed Ms. Zabawa to "write-up" one employee who was complaining about the policy for purposes of then firing that employee. Requiring Ms. Zabawa to deprive hard

working Montanans of money they earned is a violation of public policy and may entitle Ms. Zabawa to punitive damages as against the Defendants. Additionally, this policy of depriving tips to nonmanagement employees effects dozens, if not hundreds, of people around the state.

CONCLUSION

For all of the foregoing reasons Ms. Zabawa asks the Court to GRANT this Motion to Amend her complaint and demand for jury trial, to instruct the Clerk of the Court to file the Amended Complaint that accompanies this Motion, and require the Defendants to thereafter Answer the Amended Complaint.

Dated this 13th day of October, 2014.


Jason Armstrong
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I, Jason Armstrong, hereby certify that on October, ¹³2014, I served the foregoing document on counsel of record by depositing it in the ^UUnited States mail, first class postage pre-paid, addressed as follows:

Jean Faure
Faure Holden Attorneys at Law, P.C.
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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

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HILTON GARDEN INN - BOZEMAN,
and DOES 1 - 5,**

Defendants.

Cause No. 13-691B

**AMENDED COMPLAINT AND
DEMAND FOR JURY TRIAL**

COMES NOW the Plaintiff, Laurie Zabawa, and for her Amended Complaint against Defendants GATEWAY HOSPITALITY PARTNERS, INC., HOLLY FERRELL, BOZEMAN LODGING INVESTORS, LLC, doing business as HILTON GARDEN INN - BOZEMAN, and DOES 1-5, alleges as follows:

PARTIES

1. Plaintiff Laurie Zabawa is an individual who at all times material hereto resided in Gallatin County, Montana.

2. Defendant GATEWAY HOSPITALITY PARTNERS, INC., is an Ohio corporation doing business in Bozeman, Montana with its principal place of business in Twinsburg, Ohio.

3. Defendant HOLLY FERRELL is an individual whose principal place of business is within Gallatin County, Montana and who also resides in Gallatin County, Montana.

4. Defendant BOZEMAN LODGING INVESTORS, LLC, is a Montana limited liability company which is doing business under the assumed business name, HILTON GARDEN INN – BOZEMAN, and which maintains its principal place of business in Bozeman, Montana.

5. Defendants DOES 1 through 5 are persons or entities whose names are presently unknown, and Plaintiff will amend this Complaint to identify those persons or entities once their names are identified.

JURISDICTION AND VENUE

6. Jurisdiction is proper in that all of the persons herein named are found within the State of Montana as defined and described in Rule 4A and 4B(1), M.R.Civ.P. Jurisdiction is also proper as to Defendants pursuant to Rule 4B(1)(b), (e) and (f), M.R.Civ.P.

7. Gallatin County is the proper place for trial as this is the location where Plaintiff Zabawa was employed by the Defendants, performed employment related services for Defendants and was wrongfully discharged from employment by the Defendants.

GENERAL ALLEGATIONS

8. Plaintiff reasserts the foregoing allegations.

9. Plaintiff Laurie Zabawa became employed in the banquet department of the Hilton Garden Inn - Bozeman when it opened in 2005. In 2007 Plaintiff Zabawa was promoted to banquet manager and maintained that position until her termination from employment in May 2013.

10. In fall 2012, Plaintiff Zabawa reported a violation of public policy to Defendant Ferrell in that when Defendant GATEWAY HOSPITALITY GROUP began managing the Hilton Garden Inn - Bozeman it refused to distribute the service charge or otherwise arbitrary fixed charge for banquets to nonmanagement employees as required by §§ 39-3-201(6)(b) and -

402(7)(c), MCA. Defendant HOLLY FERRELL also insisted that Plaintiff Zabawa conduct offensive, repugnant and objectionable hiring practices.

11. In December 2012, to favor of another management staffer, Defendant Ferrell insisted that Plaintiff Zabawa's job would be performed by the other manager and that Plaintiff Zabawa would have a banquet and sales job. Plaintiff Zabawa informed Defendant Ferrell that she was unable to perform the sales job due to a physical limitation. While the other management staffer received a raise for supposedly taking over Plaintiff Zabawa's banquet manager duties, in fact, Plaintiff Zabawa continued to perform as the banquet manager as well as taking on the sales position. Defendant Ferrell, therefore, on behalf of herself and the other Defendants, imposed unreasonable working conditions, unjustified personnel actions, the repeated and continual making of hostile, derogatory, demeaning and humiliating remarks, and conditions of employment that were not imposed on others and that were unreasonable and unjustified.

12. Plaintiff Zabawa ultimately voluntarily terminated her employment at Hilton Garden Inn - Bozeman because of the situation described above which was created by acts of the Defendants as her employer which an objective, reasonable person would find so intolerable that voluntary termination was the only reasonable alternative.

13. The employment relationship between Plaintiff Zabawa and GATEWAY HOSPITALITY GROUP, HOLLY FERRELL, and BOZEMAN LODGING INVESTORS, LLC, is subject to the Wrongful Discharge from Employment Act ("WDEA"), § 39-2-901, *et seq*, MCA.

14. During her tenure at the HILTON GARDEN INN Plaintiff Zabawa managed and oversaw dozens if not hundreds of banquets that took place either on HILTON GARDEN INN property or elsewhere. A document called a Banquet Event Order ("BEO") is generated that shows the break down of costs associated with the Banquet and includes in the total cost to the client a 20% fee that has been variously called a gratuity, a service charge, or a set up fee.

15. On information and belief, dozens of clients have paid HILTON GARDEN INN to provide banquet services at events.

16. On information and belief, some of those clients include well-known members of this community such as the Museum of the Rockies, Simms, Billion Auto Group, and the Montana State Bar.

17. On information and belief, over the years HILTON GARDEN INN and GATEWAY HOSPITALITY GROUP have grossed hundreds of thousands, if not millions of dollars, on banquet services they have provided to their clients.

18. A member of the team at HILTON GARDEN INN, Christina Adams, became concerned about the fact that after GATEWAY HOSPITALITY GROUP took over management of the HILTON GARDEN INN the HILTON GARDEN INN was collecting what used to be her tip money.

19. On information and belief, Defendants GATEWAY HOSPITALITY GROUP and HILTON GARDEN INN, by and through the General Manager Defendant HOLLY FERRELL had Christina Adams - and all other nonmanagerial banquet servers - sign a document stating that they would no longer be getting their tips.

20. On information and belief, the non-managerial banquet employees were told that if they did not sign the document that they would no longer be allowed to work banquets.

21. Christina Adams brought her concerns to Plaintiff Zabawa, Defendant HOLLY FERRELL, and the person then in charge of human resources at Hilton Garden Inn, Delina Ekberg. Ms. Adams advised Plaintiff Zabawa of the Montana Code section that requires tips to be paid to nonmanagerial staff when there is an arbitrary fee attached to banquet charges.

22. Section 39-3-201(6)(b), MCA, states, "For the purposes of this subsection (6), '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."

23. In response to Christina Adams concerns Defendant HOLLY FERRELL advised Plaintiff Zabawa that Ms. Adams was a problem employee and instructed Plaintiff Zabawa to "write-up" Ms. Adams three times and then to fire her. Plaintiff Zabawa refused.

24. Defendant HOLLY FERRELL also instructed Plaintiff Zabawa, and another person on the management team Cal Hultman, to fabricate training logs to satisfy the requirements of the parent company Hilton World Wide.

25. Since Defendants GATEWAY HOSPITALITY GROUP and HOLLY FERRELL instituted the new tip policy the money generated from the 20% service charge attached to all BEOs that was previously paid to non-managerial employees who prepared or served food or beverages now goes directly to the Defendant HILTON GARDEN INN.

26. Defendant GATEWAY HOSPITALITY GROUP states on their web page that, "Gateway Hospitality Group has proven that effective food & beverage operation is not only possible, but it can also be highly profitable."

27. Since Defendant GATEWAY HOSPITALITY GROUP took over management of the HILTON GARDEN INN and instituted a policy of retaining the 20% service charge instead of distributing that fee to hard working nonmanagement employees it is absolutely true that Defendant HILTON GARDEN INN has seen an increase in their banquet profitability.

28. According to Defendant GATEWAY HOSPITALITY GROUP's web page it either owns or manages seven hotels throughout the state of Montana.

29. The number of persons affected by GATEWAY HOSPITALITY GROUP's policy of depriving nonmanagerial employees of their tips is unknown.

30. On information and belief, Defendants have informed clients when they inquire that the 20% fee is distributed to nonmanagement employees as tips though it is not.

COUNT I – WRONGFUL DISCHARGE

31. Plaintiff realleges the foregoing allegations.

32. Defendants' termination of Plaintiff Zabawa's employment constituted a wrongful discharge pursuant to the WDEA because it was in retaliation for Plaintiff Zabawa's reporting of a violation of public policy, and because she had long completed her probationary period of employment and her discharge was not for good cause.

COUNT II - PUNITIVE DAMAGES

33. Plaintiff realleges the foregoing allegations.

34. Defendant FERRELL, acting at all times as an agent of Defendants GATEWAY HOSPITALITY GROUP and BOZEMAN LODGING INVESTORS, engaged in actual malice in the discharge of Laurie Zabawa in violation of § 39-2-904(1)(a), MCA, in that Ferrell acted with knowledge of facts or intentionally disregarded facts that created a high probability of injury to Plaintiff Zabawa and deliberately proceeded to act in conscious or intentional disregard of the high probability of injury to Plaintiff Zabawa, or deliberately proceeded to act with indifference to the high probability of injury to Plaintiff Zabawa.

COUNT III - DECLARATORY RELIEF

35. Plaintiff realleges the foregoing allegations.

36. According to Montana law any person interested under a writing or whose rights, status, or other legal relations are affected by statute, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, or franchise and obtain a declaration of rights, status, or other legal relationships thereunder.

37. Plaintiff Zabawa's rights, status, or other legal relations as a former employee of Defendants are affected by the aforementioned statute in that Defendant HOLLY FERRELL and GATEWAY HOSPITALITY GROUP's requirement that she withhold from her banquet staff tip money that should have been paid to those employees was a violation of the law found at § 39-3-201(6), MCA

38. Pursuant to § 27-8-301, MCA, parties currently unknown but otherwise affected by a declaration under this Count III are necessary parties and should be joined as plaintiffs.

WHEREFORE, Plaintiff Laurie Zabawa prays that the Court:

1. Enter judgment in favor of Plaintiff and against the Defendants for Defendants' wrongful discharge of Plaintiff Laurie Zabawa;
2. Enter judgment in favor of Plaintiff and against the Defendants for punitive damages;
3. Enter judgment in favor of Plaintiff and against the Defendants for all damages recoverable under Montana law, together with costs of suit and for all such other form of relief to which Plaintiff may be justly entitled;
4. Declare as a matter of law that the Defendants' policy of withholding the arbitrary fee of 20% that is attached to banquet fees and costs violates Montana law, specifically §§ 39-3-201 and 402, MCA.
5. For all other relief which the Court deems just and proper.

PLAINTIFF LAURIE ZABAWA DEMANDS A JURY TRIAL.

Dated this 13th day of October, 2014.


JASON ARMSTRONG
Attorney for Plaintiff