City and County of Denver

Denver Labor

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Glenarm Dining Services d/b/a Diamond Cabaret
c/o

November 25, 2024

Denver Labor, Denver Auditor's Office
Liability and Penalty Determination
Re: Worker and Glenarm Dining Services d/b/a Diamond Cabaret

I. Introduction

On September 13th, 2024, the Denver Labor division of the Denver Auditor's Office ("Denver Labor") received credible information alleging that Glenarm Dining Services d/b/a Diamond Cabaret ("Diamond Cabaret" or the "Employer") had stolen Worker's wages and had taken adverse action against her for exercising her rights under the Denver Minimum Wage and Civil Wage Theft Ordinances ("MWO," "DCWTO," and together, the "Ordinances"). Upon receipt of this information, Denver Labor contacted Worker and, after carefully reviewing her allegations, opened an investigation.

On September 24th, 2024, Denver Labor sent to Diamond Cabaret a Notice of Investigation regarding these issues. Diamond Cabaret responded to the allegations on October 8th, 2024. Denver Labor requested additional information on October 25, 2024, and Diamond Cabaret provided a partial response on November 20, 2024.

Denver Labor considered all available evidence, provided Diamond Cabaret with a full opportunity to address the allegations, and now issues this Liability and Penalty Determination. If the Employer and Worker resolve this matter amicably within **14 days of the date of this Determination**, Denver Labor will waive applicable penalties.

II. Summary of Determination

Denver Labor concludes the following:

1. Diamond Cabaret illegally stole wages from Worker on December 9, 2023, when a manager required her to share $525 in tips with him and other managers.

2. The Employer illegally applied the tip credit to Worker's wages, paying her $14.27 per hour of work rather than $17.29, the minimum wage in effect at the time. Because the Employer required Worker to share tips with management in violation of Denver and Colorado law, its application of the tip credit is nullified for this pay period. However, because Diamond Cabaret's overall wage practices are the subject of a larger investigation, this Determination only addresses the narrow question of Worker's wage rights during the 11/30/23 – 12/13/23 pay period. The rights of the Employer's other workers, and of Worker in other pay periods, will be addressed at later dates.

3. Diamond Cabaret unlawfully retaliated against Worker by removing her from the schedule as a server and telling her that she could only work as a "TLC." This was a quantitatively and qualitatively worse position that Worker could not fill because of her schedule. These actions effectively amounted to termination—a decision Manager 1 made final on February 12, 2024. And,

4. Diamond Cabaret unlawfully retaliated against Worker by challenging her claim for unemployment benefits. The Employer falsely asserted "job abandonment" as the cause of termination, when it in fact terminated her.

To rectify these violations of law, Diamond Cabaret is **ORDERED** to:

1. Pay Worker $593.77 in unpaid wages, plus damages of $1,781.30, and interest of $67.93, for a total of **$2,443.00**, and provide proof of payment to Denver Labor.

2. Pay to the City and County of Denver a penalty for wage theft equal to **$2,500** based on its acts of wage theft. *See* D.R.M.C. § 58-26(e)(1).

3. Pay to the City and County of Denver penalties for retaliation equal to **$10,000**, based on $5,000 fines for each retaliatory act. D.R.M.C. § 58-4(d)(3).

4. Reinstate Worker and place her in the position she would have been in had the Employer never retaliated against her. *See* D.R.M.C. § 58-26(d); Civil Wage Theft Rule 15.9. At a minimum, Diamond Cabaret must present Worker in writing with a plan to return her to work in her previous position, at a rate of pay at or above Denver's minimum wage, and without being required to share her tips with Manager 1 or any other managers. Worker shall be entitled to the wages, benefits, and seniority that she would have earned had Diamond Cabaret not unlawfully terminated her employment. Such wages and benefits shall continue to accrue until Worker returns to work but be reduced by any mitigation of damages obtained by Worker since the date of this determination.

   Once the Employer and Worker have reached an agreement for her to return to work,

and no later than 30 days from the date of this Determination, they shall share that agreement with Denver Labor, which will calculate her back pay entitlement.

If the Employer fails to make a good faith effort to locate and pay Worker as required by D.R.M.C. § 58-26(c)(3), an additional $5,000 fine shall apply, and wage theft penalties shall increase to $10,000 total. Each instance in which the Employer fails to comply with the reinstatement order by refusing to place Worker on the weekly schedule will result in a $1,000 fine, accruing on a weekly basis and beginning to accrue the week starting on December 29, 2024. D.R.M.C. § 58-4(d)(4) (up to $1,000 fine for any violation of Chapter 58 without a specific penalty attached); D.R.M.C. § 58-26(d) (authorizing the Auditor to order reinstatement); D.R.M.C. § 1-13(c) ("Unless distinct and separate violations can be otherwise established, each day an offense and violation continues shall constitute a separate offense and violation.").

Alternatively: The Employer and Worker may lawfully settle this matter and provide the terms of such lawful settlement to the investigator of this matter, who shall close this case and waive all potential penalties outlined above.

III. Jurisdiction

Denver Labor has the authority to investigate, remedy, and deter wage theft against workers who work in the City and County of Denver. D.R.M.C. §§ 58-1 *et seq.* A "worker" is a human being who performs work on behalf of or for the benefit of an employer for compensation. An "employer" is any entity that employs a worker. Worker and Diamond Cabaret meet these statutory definitions. In addition to being a worker, Worker was also an employee under Colorado law. *See* C.R.S. § 8-4-101(5).

For the time period in question, Worker worked at Diamond Cabaret, which is physically located at 1222 Glenarm Place in the City and County of Denver.

IV. Background

Diamond Cabaret is a strip club operating in Denver. It is owned and operated by Glenarm Dining Services, a registered trademark of RCI Hospitality Holdings, Inc.

In May of 2023, Worker was hired as a "TLC".[1] By August, she had been promoted to a cocktail waitress, a position that offered her the opportunity to make more money. During her employment, Worker received one written and one verbal warning. Both were regarding "lack of service." These warnings were both recorded on October 30th, 2023. Worker's written response was that she was doing the best she could given the number of liquor suites that opened at the same time. Diamond Cabaret did not report any other issues with Worker's performance during her employment, nor did it take any serious disciplinary action against her.

During her shift on December 9th, 2023, Worker received a large tip. She reports it was for approximately $2,000 from a patron. The patron tipped her using Dance Dollars (sometimes

[1] Diamond Cabaret provided a general overview of this position which states that it "assists servers and hosts as needed and provides neck and back rubs to guests."

called Diamond Dollars), the Employer's internal currency. For context, when a patron tips using Dance Dollars, managers take a share of those tips of at least 25%. When a patron tips in another way, the workers are not always required to share those tips with managers.

In this instance, while speaking to Manager 1 in an office at Diamond Cabaret, Worker resisted giving 25% of her tip to management. Manager 1, however, insisted that she turn over $500. She reported that this meeting was uncomfortable, and Manager 1 was hostile and insistent. She eventually gave in and gave $500.

Immediately after, when Worker was sitting in the bar area waiting for security to walk her to her car, Manager 1 approached her again and asked her to clarify how much money she earned in tips that evening. He then walked toward Worker with his hand out and demanded she give another $25. One of the bartenders ("Bartender") working that evening, witnessed and corroborated this interaction.

On Sunday, December 10, Worker went to Diamond Cabaret and met with Manager 1 and Diamond Cabaret's General Manager. She generally expressed her confusion and discomfort about her interaction with Manager 1. Although General Manager denies this meeting occurred, contemporaneous text messages between Worker and Bartender confirm that on December 10 she spoke with management about these events.

In mid-January, Diamond Cabaret removed Worker from the work schedule entirely as a cocktail waitress. The Employer did so without any notice. Instead, Worker learned about this from another waitress. She then contacted General Manager. General Manager told Worker that the Employer was changing her position back to TLC, and that she should reach out to Manager 2 to schedule TLC hours. She attempted to contact Manager 2 at least twice, on January 25 and January 29 of 2024. When she first messaged him, Manager 2 never confirmed any hours so she could not begin working. When she followed up again, Manager 2 did not respond.

On February 12, 2024, Manager 1 formally terminated her employment, citing "voluntary job abandonment."

At some point after the Employer removed her from the schedule, Worker applied for unemployment insurance benefits. In March 2024, Diamond Cabaret denied Worker's unemployment claim, stating that she "stopped showing up for work" and "quit and did not give notice."

On September 10, 2024, Bartender notified Denver Labor that she believed Diamond Cabaret committed wage theft and retaliated against Worker. Denver Labor thereafter spoke directly with Worker. Worker's statements, Bartender' statements, and accompanying documentation indicated a likelihood that Diamond Cabaret had stolen Worker's wages and had illegally retaliated against her for resisting tipping out managers. After carefully reviewing the documentation and allegations, Denver Labor opened an investigation into Diamond Cabaret on September 24th. Diamond Cabaret responded and provided documentation on October 8th, 2024. On October 24th, Denver Labor requested follow up information from Diamond Cabaret. Diamond Cabaret provided an incomplete response on November 20, 2024.

V. Analysis

The goal of the Ordinances is to ensure payment of earned wages to as many workers as possible. D.R.M.C. §§ 58-14, 58-22. Wages are all amounts for labor or service performed by workers, so long as such amount is earned, vested, and determinable. D.R.M.C. § 58-23; *see also* Colo. Rev. Stat § 8-4-101(14). "Tips are earned and vested as soon as paid by customers, and must be given to employees timely without forfeiture, like any wages or compensation." Interpretive Notice & Formal Opinion (INFO) #3C, p. 1. In 2023, Denver's minimum wage was $17.29 per hour.

As discussed in more detail below, the Ordinances also prohibit retaliation against persons who in good faith exercise their rights. D.R.M.C. § 58-2(b).

A. Diamond Cabaret violated the ordinance by failing to pay Worker earned wages.

Worker alleges that the Employer violated the law by stealing her earned tips. Denver Labor finds merit to this allegation, in part because the Employer has not denied the essential facts. The September 24, 2024 Notice of Investigation outlined in detail Worker's allegations. Although the Employer responded, including by providing an affidavit from General Manager, it never contested her core claim that she was forced to share her tips with Manager 1, among others, on December 9. As explained below, Worker was entitled to keep the $525 that she was forced to give to managers. Additionally, the fact that Worker was required to share her tips invalidates the tip credit for, at a minimum, the relevant pay period. 7 CCR 1103-1, Rule 1.10(B); Civil Wage Theft Rule 7.2E. Once the Employer forced Worker to tip out managers in violation of the law, it also was required to pay her the full minimum wage. Worker is entitled to an additional $3.02 per hour for each hour worked in this pay period, which would bring Worker up to the regular minimum wage.

During the pay period in question, Worker worked 22.77 hours and was paid at a rate of $14.27 an hour for a grand total of $324.93. Because the tip credit is invalid in this pay period, Worker should have been paid at a rate of $17.29 per hour for a total of $393.69.

Employers may not let an employer, manager, or supervisor take tips earned by line employees—and if they do, they cannot apply a tip credit and must pay full minimum wage **as well as return any shared tips**. C.R.S. § 8-4-103(6) ("unlawful for an employer ... to assert a claim to, or right of ownership in, or control over gratuities"); C.R.S. § 8-4-105; COMPS Order, 7 CCR 1103-1, Rule 1.10; 29 U.S.C. § 203(m)(2)(B) ("An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion... , regardless of whether or not the employer takes a tip credit."); 29 C.F.R. § 531.54(b)(1) (elaborating same rule). Diamond Cabaret is required to return the tips stolen from Worker.

Denver Labor finds that treble damages and a fine of $2,500 for Diamond Cabaret's tip stealing and minimum wage violations is appropriate. Denver Labor is empowered to order an employer to pay treble damages for wage theft, and to impose fines of up to $25,000 per incident of civil wage theft. D.R.M.C. §§ 58-26(b)(2), (e)(1); Civil Wage Theft Rule 10.2(B). In determining appropriate fines and damages, Denver Labor considers all aggravating and mitigating factors. In this case, there are significant aggravating factors and no mitigating factors. The Employer committed two kinds of violations of Worker's wage rights—stealing her tips, and failing to pay her the full minimum wage to which she was entitled. These were not inadvertent mistakes. Managers made a conscious decision to commit wage theft, and

did so over her protestations. As described below, Diamond Cabaret later punished her further for asserting her basic rights. Over the course of nearly a year, the Employer has made no effort to return any of Worker's missing wages to her. Finally, Worker reports that she resisted giving money to managers because she was financially insecure at the time; worse, losing her job at Diamond Cabaret has caused an ongoing shortfall in her earnings.

These facts justify treble damages to compensate Worker for the harm she suffered from Diamond Cabaret's wage theft, and a significant fine to recognize and redress the Employer's illegal acts. To induce compliance, however, Denver Labor will limit the fine to only 10% of the maximum. As further inducement and recognition of Diamond Cabaret's unlawful behavior, wage theft fines will increase to $10,000 should Diamond Cabaret refuse to make her whole as ordered in this Determination.

B. Diamond Cabaret illegally retaliated against Worker

The Ordinance strictly prohibits retaliation against workers who exercise in good faith any rights protected under the Ordinance. D.R.M.C. § 58-2(b)(1). The purposes of the Ordinance's broad anti-retaliation provision are to encourage workers to speak up about wage violations; create a safe environment in which they may ask about or assert their rights; and grant them the freedom to advocate for themselves and their coworkers without fear of reprisal.

To establish unlawful retaliation, a complainant must show, by a preponderance of the evidence, that 1) they engaged in protected activity, 2) the employer took adverse action, and 3) the adverse action was motivated by their protected activity. D.R.M.C. § 58-2(b)(3). Where adverse action occurs within 90 days of protected activity, however, Denver Labor presumes unlawful retaliation. D.R.M.C. § 58-2(b)(3). This presumption may only be overcome if the employer shows, by clear and convincing evidence, that it took the adverse action for a lawful purpose.

Diamond Cabaret failed to meet its burden here. The evidence establishes that Worker engaged in protected activity, suffered (at least) two adverse actions, and that these adverse acts were motivated by Worker's protected activity.

i. Worker engaged in protected activity and suffered an adverse action

The Ordinance protects the right of workers to engage in a wide range of actions, so long as they do so in good faith. Among other things, the law empowers workers to "refus[e] to participate in or oppos[e] an activity that would result in a violation of city, state, or federal law." D.R.M.C. § 58-2(b)(1). In resisting illegally tipping out managers, Worker engaged in a protected activity. C.R.S. § 8-4-103(6); 29 U.S.C. § 203(m)(2)(B) ("An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit.").

The Ordinance likewise takes an expansive view of what constitutes an adverse action. Adverse actions include "denying a job or promotion, demoting, terminating, failure to rehire after a seasonal interruption in work, threatening, penalizing, retaliating . . . and any other negative change to an aspect of employment, including modification of pay, work

hours, responsibilities, or other material change in the terms and conditions of a person's employment." D.R.M.C. § 58-1(1). Put more generally, an adverse action is any action that would discourage a reasonable worker from engaging in protected activity. Civil Wage Theft Rule 15.4.

Diamond Cabaret took an adverse action against Worker when it effectively terminated her employment. This consisted of removing her from the schedule, changing her position to a less desirable one that she could not work because of her schedule, failing to schedule her again, and ultimately terminating her and wrongly asserting she had abandoned her job. *See* D.R.M.C. § 58-1(1).

It also committed an adverse act when it contested her unemployment claim by falsely claiming she had abandoned her job without notice. The purpose of unemployment insurance is to provide stability and support to employees who lose their employment. *See* C.R.S. § 8-70-102. Contesting a former employee's unemployment claim threatens to exacerbate the "[e]conomic insecurity due to unemployment," which the legislature has deemed to be "a serious menace to the health, morals, and welfare of the people of" Colorado. *Id.* It has the effect of worsening the "crushing force" of "[i]nvoluntary unemployment," which "so often falls . . . upon the unemployed worker and [her] family." *Id.*

Not all contestations of unemployment claims are retaliatory; but in this case, Diamond Cabaret's behavior crossed the line of legality. Worker was unemployed because of decisions the Employer and its managers made. She did not remove herself from the schedule or seek a job change, and the evidence she has presented—which Diamond Cabaret largely does not contest—proves that she was not at fault for the termination of her employment. Diamond Cabaret, as an entity, was aware of these facts and still claimed, falsely, that she abandoned her job and was at fault. This disingenuous claim supported a cruel act, and Denver Labor concludes that it would discourage a reasonable worker from engaging in protected activity. *See* Civil Wage Theft Rule 15.4.

ii. <u>Worker's protected activity motivated Diamond Cabaret. In addition, its alternative explanation is not persuasive, but pretextual.</u>

The evidence also establishes that Worker's protected activity motivated Diamond Cabaret. A complainant may establish unlawful retaliation by presenting direct or circumstantial evidence. Circumstantial evidence may include close temporal proximity and any evidence showing that the employer's stated justification is pretextual. *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 274 (2001); *Troupe*, 20 F.3d at 736. Because of the timing in this case, Denver Labor presumes retaliation, and it is the Employer's burden to prove by clear and convincing evidence that it retaliated against Worker for a lawful purpose.

The facts support Worker. Furthermore, Diamond Cabaret has not met its burden. It claims that it fired Worker for "job abandonment." The problem here is that nothing indicates that Worker abandoned her job. The opposite, in fact.

Where temporal proximity is close, it deserves meaningful weight. That Diamond Cabaret removed Worker from her normal schedule and changed her job duties approximately one month after she engaged in protected activity is persuasive evidence of unlawful retaliation, especially when paired with the other facts of this case.

There are some contested facts here. But there is also a credibility gap between Worker and Bartender on the one hand, and the Employer on the other. On material disagreements Denver Labor credits Worker's explanations. She has consistently made the same essential claims, both to Denver Labor and to the Colorado Department of Labor Division of Unemployment Insurance (which also ultimately credited her version of events). Her allegations about how tips operate at Diamond Cabaret have been supported by other current and former workers. She has provided contemporaneous documentary evidence that supports her version of events. And again, in this case the Employer does not deny the core facts alleged by Worker—some of which were witnessed by Bartender.

In his affidavit, however, General Manager makes material statements that are, at the very least, incorrect. He asserts, for instance, that "[t]he Company is not aware of any efforts made by Worker requesting her return to work." This is untrue, as Worker produced her messages to Manager 2—a manager—in which she requested just that. Although Diamond Cabaret appears to deny that General Manager instructed Worker that she could only work as a TLC and to contact Manager 2 for scheduling, the facts support Worker's version of events. There is no dispute she was removed from the schedule as a waitress after January 14, and no reason why she would have reached out to Manager 2 on January 25 and January 29 to get scheduled as a TLC unless she had been told that was her option.

Diamond Cabaret alleges that it fired Worker for job abandonment. Diamond Cabaret's general assertion does nothing to substantiate the details here. Without documentation showing that Worker was scheduled and did not show up to work, Diamond Cabaret's claim of "job abandonment" falls short of meeting its burden.

In fact, the Employer does not even allege that Worker was scheduled and did not show up. They simply state "Worker did not show up for any other shifts." This phrasing suggests Worker was at fault. To test this suggestion, Denver Labor requested "Diamond Cabaret work schedules for the months of January and February 2024." The Employer ignored this request. If those work schedules supported the idea that Worker was scheduled and simply did not come to work, thereby abandoning her job, Diamond Cabaret would have produced them.

In retaliation cases, employers "must articulate in some detail a more specific reason than its own vague and conclusional feeling about the employee." *Patrick v. Ridge*, 394 F.3d 311, 317 (5th Cir. 2004). Here, Diamond Cabaret has provided nothing supporting its version of events.

When employers retaliate, it impacts more than just the individual worker. While retaliation has an immediate effect on the worker who experiences it, its harm also spreads to the workplace. Firing a worker who has engaged in protected activity without a legitimate justification sends a message to other coworkers that doing the same could cost them their jobs. For many individuals, especially in low-wage, hourly positions, the risk of termination is a powerful inducement to remain silent. Retaliation frequently has a chilling effect, and in recognition of how harmful retaliatory acts can be, Denver law imposes significant penalties. In this case, Bartender made it clear that other employees believed—and even understood—that Worker was fired for raising these issues, underscoring the harms of unlawful retaliation.

VI. Conclusion

After considering all available evidence and applicable law, Denver Labor finds that Diamond Cabaret is liable for violating the Ordinance.

The Employer shall fully comply with the requirements detailed in **Part II**. Alternatively, Worker and Diamond Cabaret may settle this dispute **within 14 days** and present the investigator of this matter with proof of such settlement, at which time Denver Labor will close this case.

Unless Diamond Cabaret appeals this Determination pursuant to D.R.M.C. § 58-5 and Denver Labor's Rules of Procedure for Hearings and Appeals, it shall be final.[2]

November 25, 2024

Denver Labor

Denver Auditor's Office

Sent via first-class mail to the parties and via e-mail to their representatives this same date.

[2] This Determination does not resolve any other ongoing investigations Denver Labor is or might be conducting into Diamond Cabaret regarding other allegations of retaliation or wage theft. Additionally, this Determination does not conclude that Worker did not experience minimum wage or other violations in any other pay period. This Determination narrowly addresses only the pay period in which Manager 1 stole Worker's tip and leaves broader questions of other workers and Worker's other experiences to be addressed at a later date.