

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re: Savanna Garcia,

Appellant/Wage Claimant.

Determination of Compliance Nos. 214-20
& 264-20

OAH Docket Nos. 07-2020-LI-01467 &
08-2020-LI-01485

No. 2022-002-WPA

DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the Amended Initial Order served on June 3, 2021, having considered the petition for review filed by Off the Hook @ 1069, Inc. (the Appellant), briefing submitted to the Director's Office, and having reviewed the record created at hearing and the records and files herein, issues this Director's Order.

The Director makes the following Findings of Fact, Conclusions of Law, and Final Decision and Order.

DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

I. FINDINGS OF FACT

1. On March 27, 2020, the Department of Labor and Industries issued Determination of Compliance No. 214-20 finding the Appellant did not retaliate against Savanna Garcia for filing a workers' rights complaint.
2. After the Appellant appealed, the Office of Administrative Hearings issued and served the Initial Order on June 3, 2021, and the Appellant timely filed a petition for administrative review with the Director.
3. The findings of fact of the Amended Initial Order are adopted and incorporated by reference

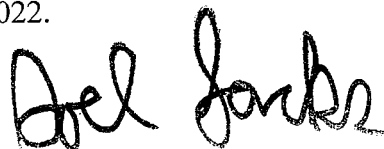
II. CONCLUSIONS OF LAW

1. Based on the Appellant's timely filed petition for administrative review, there is authority to review and decide this matter under RCW 49.48.084 and RCW 34.05.
2. I have considered the findings and conclusions of the Amended Initial Order, which correctly analyzed the legal issues in this appeal, and I adopt and incorporate all the Amended Initial Order's conclusions of law.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusion of Law, the Decision and Order is affirmed and the Determination of Compliance reversed. The "Amended Initial Order" section 6.1 to 6.8 is adopted and incorporated by reference. The Amended Initial Order of June 3, 2021 is incorporated by reference herein.

DATED at Tumwater this 18 day of January 2022.



JOEL SACKS
Director

SERVICE

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

APPEAL RIGHTS

Reconsideration. Any party may file a petition for reconsideration. RCW 34.05.470. Any petition for reconsideration must be filed within 10 days of service of this Order and must state the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order **or** (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing, or by emailing to DirectorAppeal@LNI.WA.GOV, or delivering it directly to Joel Sacks, Director of the Department of Labor and Industries, P. O. Box 44001 Olympia, Washington 98504-4001, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Director's Office. RCW 34.05.010(6).

NOTE: A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. A timely filed petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the Director does not (a) dispose of the petition **or** (b) serve the parties with a written notice specifying the date by which it will act on the petition. RCW 34.05.470(3).

Judicial Review. Any petition for judicial review must be filed with the appropriate court and served within 30 days after service of this Order. RCW 34.05.542. RCW 49.48.084(5) provides, "Orders that are not appealed within the time period specified in this section and Chapter 34.05 RCW are final and binding, and not subject to further appeal." Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.

DECLARATION OF MAILING

I, Lisa Deck, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 18 day of January 2022, via U.S. Mail, postage prepaid, and by email to the following:

Ian McCurdy
Adelstein Sharpe & Serka LLP
PO Box 5158
Bellingham, WA 98227
immcurdy@adelstein.com

Off the Hook @ 1069, Inc.
dba Off the Hook
c/o Claude Johnston
19 W Troxell Rd
Oak Harbor, WA 98277
offthehook@comcast.net

Lisa Roth, AAG
Office of the Attorney General
800 Fifth Ave., Suite 2000
Seattle, WA 98104-3188
lisam.roth@atg.wa.gov
lniseaeservice@atg.wa.gov

Savanna Garcia
145 W Glenarm Rd.
Glenarm, IL 62536
savannag4@gmail.com

DATED this 18 day of January 2022, at Tumwater, Washington.


LISA DECK

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Savanna Garcia,

Appellant/Wage Claimant.

Docket Nos. 07-2020-LI-01467
08-2020-LI-01485

AMENDED INITIAL ORDER

Agency: Labor and Industries

Program: Wage Payments

Agency Nos. 214-20 & 264-20

AMENDED INITIAL ORDER: This 'Amended Initial Order' seeks to clarify the retaliation finding and penalty, as pronounced in Paragraphs 2.2, 2.3, 5.16, 5.17, 6.2 and 6.3. All amendments are underlined. This 'Amended Initial Order' does not change or alter the original decision issued in the previous 'Initial Order'.

1. ISSUES:

OAH Dkt. No. 07-2020-LI-01467 (Retaliation)- Based on the Department of Labor and Industries' 'Determination of Compliance No. 214-20':

1.1. Whether the Employer, Off The Hook @ 1069 Inc. doing business as (dba) Off the Hook, retaliated against the Appellant/Wage Claimant, Savanna Garcia, for her exercise of rights under Chapter 49.46 Revised Code of Washington (RCW), in violation of RCW 49.46.210(4) and Washington Administrative Code (WAC) 296-128-770?

1.2. If so, what is the appropriate penalty?

1.3. Whether the Department's 'Determination of Compliance No. 214-20' should be affirmed, modified or set aside?

OAH Dkt. No. 08-2020-LI-01485 (Wage Complaint)- Based on the Department of Labor and Industries' 'Determination of Compliance No. 264-20':

1.4. Whether the Employer, Off The Hook @ 1069 Inc. dba Off the Hook, failed to pay the Appellant/Wage Claimant, Savanna Garcia, for all tips earned from August 17, 2019 to October 31, 2019, in violation of RCW 49.46.020 and Chapter 296-128 WAC?

1.5. If so, what wages and interest are due, based on RCW 49.48.083?

1.6. If so, what is the appropriate penalty, based on RCW 49.48.083?

1.7. Whether the Department's 'Determination of Compliance No. 264-20' should be affirmed, modified or set aside?

2. AMENDED INITIAL ORDER SUMMARY:

OAH Dkt. No. 07-2020-LI-01467 (Retaliation Complaint)- Based on the Department of Labor & Industries' 'Determination of Compliance No. 214-20':

2.1. The Employer, Off The Hook @ 1069 Inc. dba Off the Hook, retaliated against the Appellant/Wage Claimant, Savanna Garcia, for her exercise of rights under Chapter 49.46 RCW, in violation of RCW 49.46.210(4) and WAC 296-128-770.

2.2. Based on a finding of retaliation, the case is **REMANDED** to the Department to determine the appropriate penalty to the Employer, whether one thousand dollars or an amount equal to ten percent of the total amount of unpaid earnings attributable to the retaliatory action, whichever is greater, based on WAC 296-128-790.

2.3. The Employer is ordered to make payable to the employee earnings that the employee did not receive due to the employer's retaliatory action, including interest of one percent per month on all earnings owed, based on WAC 296-128-780(5)(a).

2.4. The Department's 'Determination of Compliance No. 214-20' is **SET ASIDE**.

OAH Dkt. No. 08-2020-LI-01485 (Wage Complaint)- Based on the Department of Labor & Industries' 'Determination of Compliance No. 264-20':

2.5. Whether the Employer, Off The Hook @ 1069 Inc. dba Off The Hook, failed to pay the Appellant/Wage Claimant, Savanna Garcia, for all tips she earned from August 17, 2019 to October 31, 2019, in violation of RCW 49.46.020 and Chapter 296-128 WAC.

2.6. Based on a finding tips are owed, the case is **REMANDED** back to the Department to determine the appropriate wages, and interest, due by the Employer, based on RCW 49.48.083.

2.7. Based on a finding tips are owed, the case is **REMANDED** back to the Department to determine the appropriate penalty to the Employer, based on RCW 49.48.083.

2.8. The Department's 'Determination of Compliance No. 264-20' is **SET ASIDE**.

3. EVIDENTIARY HEARING:

3.1. Hearing Date: Thursday, March 4, 2021- Tuesday, March 9, 2021

3.2. Admin. Law Judge: TJ Martin

3.3. Appellant: Savanna Garcia (Appellant/Wage Claimant).

3.3.1. Representative: The Appellant represented herself.

3.3.2. Witnesses: Savanna Garcia, Appellant

Claude Johnston, Off The Hook Owner

Wayne Lucia, Attorney and Appellant's friend.

- 3.4. Agency: Department of Labor and Industries (Department)
- 3.4.1. Representative: Lisa Roth, Assistant Attorney General
- 3.4.2. Witnesses: Savanna Garcia, Appellant
Claude Johnston, Off The Hook Owner
Ruth Castro, Department Industrial Relations Agent
Carl Backen, Department Wage & Hour Specialist
- 3.5. Exhibits: Department Exhibits 1 through 16 were admitted.
Appellant's Exhibit A excluded since witness testified.
Appellant's Exhibits B through D were admitted.
- 3.6. Court Reporter: Devine Rugh and Rachel Hall, Central Court Reporting

4. FINDINGS OF FACT:

The following facts are established, by a 'preponderance of the evidence':

Jurisdiction-

OAH Dkt. No. 07-2020-LI-01467 (Retaliation Complaint)-

4.1. On March 27, 2020, the Department of Labor and Industries (Department) issued 'Determination of Compliance No. 214-20' finding Off The Hook (Employer), did not retaliate against Savanna Garcia (Wage Claimant) for filing an 'worker rights complaint'. *Ex. 9; Pg. 1-2.*

4.2. On April 17, 2020, Garcia appealed the Department's Determination.

OAH Dkt. No. 08-2020-LI-01485 (Wage Complaint)-

4.3. On June 12, 2020, the Department issued 'Determination of Compliance No. 264-20', finding Off The Hook did not violate wage and hour laws, by failing to pay Savanna Garcia all wages and tips owed. *Exhibit (Ex.) 1.*

4.4. On July 7, 2020, Garcia appealed the Department's determination.

Credibility Finding-

4.5. The Employer, Off The Hook, and the Wage Claimant, Savanna Garcia, differed on material points. Therefore, a credibility finding is warranted. Based on this credibility finding, the undersigned administrative law judge finds the Wage Claimant's evidence more credible and convincing than the Employer's, by a 'preponderance of the evidence', for the following reasons:

[Continued]

4.6. On Thursday, November 21, 2019, Off The Hook Owner, Claude Johnston (Johnston), terminated Garcia's employment. At the hearing, Garcia alleged her termination occurred in retaliation to her filing a wage complaint. Yet, Johnston denied any knowledge of Garcia's wage complaint prior to her termination, citing numerous performance issues as the basis for Garcia's termination. However, the evidence establishes otherwise. In particular, Department Industrial Relations Agent Ruth Castro testified and documented that she notified Johnston of Garcia's wage complaint the day before he terminated her, so he did have notice of her wage complaint.

4.7. Based on this credibility finding, the undersigned administrative law judge finds the Wage Claimant's version of the events more convincing than the Employer's. As such, the following events occurred:

Off the Hook and Savanna Garcia-

4.8. Off The Hook Restaurant and Lounge, owned by Off the Hook @ 1069 Inc., is located at 880 Southeast Pioneer Way, Oak Harbor, Washington. Claude Johnston serves as the business' owner, registered agent and manager. The business serves alcohol and food. *Testimony of Claude Johnston (Testimony of Johnston), Testimony of Ruth Castro (Testimony of Castro) and Ex. 4.*

4.9. Johnston, as owner and manager, was responsible for scheduling, training and paying employees. In addition, he also bar tended, as needed. *Testimony of Johnston and Testimony of Savanna Garcia (Testimony of Garcia).*

4.10. On August 17, 2019, Johnston hired Garcia as a bartender, at a rate of pay of Minimum Wage and tips. *Testimony of Garcia, Ex. 8; Pgs. 2 & 4 and Ex. 15; Pg. 7-9.*

4.11. Garcia, as a bartender, typically worked 5:00 p.m. to close, sometime between 1:00 a.m. to 3:00 a.m., Thursday through Sundays. She typically worked Sunday brunch, from 8:00 a.m. to 2:00 p.m. *Testimony of Garcia and Ex. 15; Pg. 9.*

Off the Hook's Tip Policy-

4.12. Off The Hook did not have a written or official policy or formula regarding tips. Rather, after closing, tips were gathered from the bar's tip jar, credit card receipts and table cash tips then 'split fairly' among staff. There was no formal calculation, only that tips were divided 'fairly' among employees. *Testimony of Johnston, Ex. 8; Pg. 4 and Ex. B & C.*

4.13. Typically, security staff received 10% of the tips and weekend cook staff received 5%. The rest of the tips were then divided among the employees, based on how many were working and the length of their shifts. *Testimony of Johnston.*

- 4.14. Johnston, if he worked any shifts, took his share of the tips, along with his employees. *Testimony of Johnston.*
- 4.15. At the start of Garcia's employment, on August 17, 2019, Johnston told her of the Employer's unwritten, unofficial tip policy. *Testimony of Garcia and Testimony of Johnston.*

Savanna Garcia's Employment-

- 4.16. Between August 17, 2019 and October 31, 2019, Garcia did not raise any dispute regarding her wages and tips. *Ex. 6; Pg. 51 and Ex. 8; Pg. 8-10.*
- 4.17. However, between August 17, 2019 and October 31, 2019, Johnston several times voiced his concerns with Garcia 'over-pouring' and 'over-serving' customers, which lost money for the business and sometimes lead to patrons becoming intoxicated, and engaging in aggressive behavior, including fights. Johnston and employees often documented incidents and shifts in a journal kept at the bar. *Testimony of Johnston and Exs. 13-15.*
- 4.18. Off The Hook has 15 cameras located around the restaurant and bar so Johnston could watch from home or from his cellphone the activities going on in the restaurant and bar. If there were any problems, Johnston would call or text the employee about the issue or else discuss the matter, in person, later. *Testimony of Johnston.*
- 4.19. On October 12, 2019, Garcia served a patron wearing a long coat, but no pants. He had been admitted by door security staff. However, based on her vantage point behind the bar, Garcia was unable to see the patron was not dressed below the waist. *Testimony of Garcia.*
- 4.20. On October 31, 2019, Halloween night, Garcia disputed the splitting up of tips with the door security employee, since she believed the owner should pay for such security. On that night, Johnston, briefly tended bar, while Garcia put on her Halloween costume. *Testimony of Johnston.*
- 4.21. On October 31, 2019 and November 1, 2019, Garcia and Johnston had a continuing disagreement regarding the splitting of tips. Johnston believed door security, the cook, janitor as well as himself should be tipped. Garcia thought tips should only be split among bartenders and servers and not including Johnston, the owner. Based on this disagreement, Johnston decided to never work with Garcia again. *Testimony of Johnston.*
- 4.22. On November 1, 2019, Johnston asked Garcia to work front door security, to get better at assessing customer intoxication and checking identifications. Garcia refused, claiming it was 'too rowdy' due to over-service. *Testimony of Johnston and Ex. 13; Pg. 4-5.*

- 4.23. On November 1, 2019, Johnston contacted the Employer's C.P.A., who told Johnston that he, as the owner, could not share tips with employees. Johnston ceased taking part in tip sharing after that day. *Testimony of Johnston.*
- 4.24. After November 1, 2019, Johnston repeatedly contacted Garcia, while working, via cellphone or text message, about his concern for Garcia over-pouring customers. *Testimony of Garcia.*
- 4.25. On November 3, 2019, Garcia served an off-duty Island County Sheriff Deputy then kept the tip without asking him. Johnston had concerns about Garcia over-pouring as well as keeping the tip. *Testimony of Johnston.*
- 4.26. On November 3, 2019, Garcia filed a 'Worker Right Complaint' with the Department of Labor and Industries, alleging she was owed tips for the period of October 3, 2019 to November 3, 2019. *Testimony of Garcia, Testimony of Ruth Castro (Testimony of Castro) and Ex. 2.*
- 4.27. From November 3, 2019 to January 27, 2020, Agent Castro investigated Garcia's wage complaint, gathering information and documentation from both the Wage Claimant and the Employer. *Ex. 3-8, 10-14.*
- 4.28. On November 5, 2019, Johnston suggested Garcia work in the kitchen, rather than bartend. In the kitchen, Garcia would earn significantly less in tips. Garcia declined. Garcia believed Johnston's request for her to work in the kitchen was in retaliation for their on-going tip dispute. *Testimony of Garcia and Ex. 3; Pg. 1.*
- 4.29. On November 5, 2019, Garcia's complaint was assigned to Department Industrial Relations Agent Ruth Castro (Agent Castro). *Testimony of Castro and Ex. 3.*
- 4.30. On November 6, 2019, Wayne Lucia, Garcia's friend and an attorney, wrote a letter to Johnston regarding him improperly taking tips. *Testimony of Wayne Lucia (Testimony of Lucia) and Ex. 6; Pg. 21.*
- 4.31. On the evening of November 16, 2019/early morning of November 17, 2019, a fight broke out in the bar area, due to 'over service'. Garcia, but not Johnston, was tending bar. Oak Harbor Police were required to respond to the incident. *Testimony of Johnston.*
- 4.32. Prior to the November 16-17, 2019 incident, Off The Hook had one previous over-service incident in 2014, in which the bartender and bar were both fined \$1,000 and the LCB closed the bar for one week. *Testimony of Johnston.*
- 4.33. Based on the November 16-17, 2019, incident, Johnston drafted a 'Performance Improvement Plan' (P.I.P.) for Garcia. Johnston planned to give Garcia the P.I.P. and suspend her for two weeks. *Testimony of Johnston and Ex. 6; Pg. 1-2 (same as Ex. 11; Pg. 4-5 and Ex. 13; Pg. 19-20).*

- 4.34. Prior to that date, Johnston had never provided any formal coaching to Garcia regarding her work performance. *Testimony of Garcia*.
- 4.35. On Monday, November 18, 2019, Johnston met with Garcia to discuss the November 16-17, 2019, incident. He planned to give her with the P.I.P. and suspend her for two week. However, after the meeting, Johnston 'felt good' about their discussion and decided not to suspend Garcia. *Testimony of Johnston and Ex. 11; Pg. 39*.
- 4.36. On the following day, Tuesday, November 19, 2019, Department Agent Castro left an initial voicemail message for Johnston regarding the Worker Rights Complaint, regarding tips, filed by Garcia. *Testimony of Castro and Ex. 7*.
- 4.37. On Wednesday, November 20, 2019, the Department Agent Castro sent an email to Johnston, along with a copy of Garcia's wage complaint. *Testimony of Castro and Ex. 3; Pg. 2 and Ex. 11; Pg. 1-3*.
- 4.38. The following day, on Thursday, November 21, 2019, the next day Garcia was scheduled to work, Garcia, upon arriving to work, was fired by Johnston for the 'over service' incident, on November 16-17, 2019. Johnson told Garcia 'You're a liability for my business', due to over-serving, over-pouring and not taking responsibility or accountability. *Testimony of Garcia, Testimony of Johnston, Ex. 6; Pg. 13 and Ex. 15; Pg. 8*.
- 4.39. On December 11, 2019, Garcia filed a 'Worker's Right Complaint', alleging Off The Hook Owner Claude Johnston retaliated against her for filing her 'Worker's Rights Complaint' asserting unpaid tips. *Testimony of Garcia, Testimony of Carl Backen (Testimony of Backen), Ex. 16; Pg. 1*.
- 4.40. On December 11, 2019, Johnston filed 'Employer's Answer to Claim for Wages', regarding Garcia's wage complaint. Johnston, in the 'Employer's Answer', included payroll record, timecards and customer receipts. *Ex. 8*.
- 4.41. From December 11, 2019 to February 12, 2020, Department Investigator Jay Scovell conducted an investigation regarding Garcia's Retaliation Complaint. Scovell gathered information from both the Wage Claimant and the Employer regarding Garcia's complaint. *Testimony of Carl Backen, Ex. 9-14 and Ex. 16*.
- 4.42. On December 27, 2019, Castro called Johnston to inform him that it was unlawful for the Employer to be a part of the tip pool. As a result, \$2,100.00 was owed to Garcia, based on Garcia's calculation. *Testimony of Castro and Ex. 3; Pg. 3*.
- 4.43. On December 30, 2019, Agent Castro sent notice to Claude Johnston, that based on her investigation, the Employer owed Garcia \$2,100.00 in tips. *Ex. 7; Pg. 4-5*.

- 4.44. On February 12, 2020, Scovell, based on a review of the 'totality of facts', issued an 'Agent Summary', recommending a 'Determination of Compliance' be issued since the Department found no retaliation. *Testimony of Backen and Ex. 9; Pg. 3-5.*
- 4.45. On March 6, 2020, Department Industrial Relations Agent Ruth Castro issued an 'Agent Summary', recommending a 'Determination of Compliance' be issued in Garcia's wage/tip complaint case since the Department was unable to determine the amount of tips owed to Garcia, for the period of August 30, 2019 to October 26, 2019. *Ex. 1; Pg. 4-6.*
- 4.46. On March 27, 2020, the Department issued 'Determination of Compliance No. 214-20', finding Off The Hook did not retaliate against Savanna Garcia when she was discharged. *Testimony of Backen and Ex. 9; Pg. 1-2.*
- 4.47. The Department determined tips were owed by the Employer, due to Johnston improperly taking out tips. However, the Department was unable to determine the amount of tips owed to the employees. Therefore, the Department did not order Johnston to return the tips improperly taken from employees. *Testimony of Castro.*
- 4.48. On June 12, 2019, the Department issued 'Determination of Compliance No. 264-20', finding no wages or tips were owed to Garcia since the Department could not calculate the amount owed. *Testimony of Castro and Ex. 1.*
- 4.49. As a part of the Department's investigation, Johnston did not provide the Department with any written tip policy. *Testimony of Castro.*
- 4.50. The Employer provided a partial record of all tips during the course of Garcia's employment. *Ex. 6; Pg. 75-121 and Ex. 8; Pg. 5-7 and Pg. 13-22.*
- 4.51. The Department gathered some of Garcia's timesheets as a part of its investigation. The Department did not request other employee timecards from the Employer. *Testimony of Castro and Ex. 8; Pg. 5-7.*
- 4.52. Department Castro did collect many of the credit card receipts in the possession of the Employer, to determine how much tips were paid. *Testimony of Castro.*
- 4.53. The Department determined the Employer did not provide complete information in order to the calculation of tips going to each employee. *Testimony of Castro.*
- 4.54. From August 17, 2019 to November 21, 2019, Garcia worked for Off The Hook. *Testimony of Garcia and Ex. 8; Pg. 1-2.*

[Continued]

5. CONCLUSIONS OF LAW:

Based upon the above 'Findings of Fact', the following 'Conclusions of Law' are made:

Jurisdiction-

5.1. The undersigned administrative law judge has jurisdiction over the persons and subject matter under Revised Code of Washington (RCW) 49.48.084(3) and Chapters 34.05 and 34.12 RCW.

Burden and Standard of Proof Contesting a 'Determination of Compliance'

5.2. In contesting a Determination of Compliance, the appealing party challenging the Department's decision has the burden of proof, to establish by a 'preponderance of the evidence', the Determination of Compliance is in error.

5.3. In the present case, the Appellant/Wage Claimant, Savanna Garcia, has the burden of proof to establish, by a 'preponderance of the evidence', the Department's 'Determination of Compliance No. 214-20' and 'Determination of Compliance No. 264-20' are in error.

Savanna Garcia's Worker's Rights Complaints-

5.4. The Department of Labor & Industries (Department) is responsible for implementing and enforcing the provisions of Chapters 49.46, 49.48 and 49.52 of the RCW and Title 296 WAC, pertaining to wages, for the purpose of protecting the immediate and future health, safety, and welfare of the people of the State of Washington.

5.5. The Department's authority includes enforcing wage payments such as:
(a) Payment of minimum wages (RCW 49.46.020 and Chapter 296-128 WAC);
(b) Payment of overtime wages in excess of more than 40 hours of work in a week (RCW 49.46.13); (c) Payment of final wages (RCW 49.48.010); and (d) Withholding of lawful deductions from wages (RCW 49.52.060); and (e) Enforcement of any wages as authorized by statute, ordinance, and/or contract (RCW 49.52.050).

5.6. If an employee files a wage complaint, including for tips and gratuities and/or retaliation, the Department is required to investigate. RCW 49.48.083(1), WAC 296-128-820 and WAC 286-128-780.

[Continued]

OAH Dkt. No. 07-2020-LI-01467 (Retaliation Claim)-

5.7. On December 10, 2019, Garcia also filed a 'Worker's Right Complaint', alleging retaliation, by Off The Hook for her termination, occurring on November 21, 2019. Therefore, the Department was required to investigate, based on WAC 286-128-780.

5.8. RCW 49.46.210(4) prohibits an employer from discriminating or retaliating against an employee for his or her exercise of any rights under Chapter 49.46 RCW.

5.9. Further, WAC 296-128-770 'Retaliation' also establishes:

(1) It is unlawful for an employer to interfere with, restrain, or deny the exercise of any employee right provided under or in connection with chapter 49.46 RCW. This means an employer may not use an employee's exercise of any of the rights provided under chapter 49.46 RCW as a negative factor in any employment action such as evaluation, promotion, or termination, or otherwise subject an employee to discipline for the exercise of any rights provided under chapter 49.46 RCW.

.....

(3) It is unlawful for an employer to take any adverse action against an employee because the employee has exercised their rights provided under chapter 49.46 RCW. Such rights include, but are not limited to: Filing an action, or instituting or causing to be instituted any proceeding under or related to chapter 49.46 RCW; exercising their right to paid sick leave, minimum wage, overtime, tips and gratuities; or testifying or intending to testify in any such proceeding related to any rights provided under chapter 49.46 RCW.

(4) Adverse action means any action taken or threatened by an employer against an employee for their exercise of chapter 49.46 RCW rights, which may include, but is not limited to:...(b) Termination.

WAC 296-128-770(1), (3) & (4).

5.10. WAC 296-128-780 'Enforcement-Retaliation' requires the Department to investigate any retaliation complaint. If the Department finds the allegation is substantiated, it will issue a citation and notice of assessment to the employer. If the Department finds the allegation is not substantiated, it will issue a determination of compliance.

5.11. WAC 296-128-790 'Enforcement-Retaliation-Civil Penalties' authorizes the employer to pay a civil penalty if the Department finds the employer retaliated against an employee.

5.12. In order to prove 'retaliation', an employee must show she engaged in protected activity, then suffered an adverse employment action. The employee must establish a casual link between the protected activity and the adverse action. *Cornwell v. Microsoft*, 192 Wn. 2d 403 (2018).

- 5.13. In the present case, on November 3, 2019, Savannah Garcia filed a wage complaint, regarding tips the Employer's owner, Claude Johnston, took improperly. While Off The Hook Owner, Claude Johnston had numerous verbal coachings regarding over-service and over-pouring, Garcia was never written up. On Monday, November 18, 2019, Johnston, with a prepared 'Performance Improvement Plan' (P.I.P.), met with Garcia to discuss a fight due to over-service at the bar on November 16-17, 2019. Johnston planned to give Garcia the P.I.P., as well as, at the least, suspend her for two weeks. However, after a 'good meeting', he decided not to suspend her. Instead, he allowed her to continue to work. However, on the next day, Tuesday, November 19, 2019, Department Industrial Agent Ruth Castro left an initial voicemail message for Johnston to return her call regarding the wage complaint filed by Garcia. The following day, Wednesday, November 20, 2019, Johnston contacted Castro and was informed of Garcia's November 3, 2019, wage complaint and provided with a copy of the complaint. The following day, Thursday, November 21, 2019, upon arriving to work, Garcia was fired by Johnston, citing 'liability concerns'. At the hearing, Johnston denied any knowledge of Garcia's November 3, 2019, wage complaint or that it influenced his decision to terminate her. However, between Johnston and Garcia's 'good meeting', on Monday, November 1, 2019 and Garcia's immediate discharge on Thursday, November 21, 2019, was the Department notifying Johnston of Garcia's wage complaint. However, as shown in the 'Findings of Fact', Johnston knew of Garcia's wage complaint the day before he decided to fire her. *Testimony of Castro, Ex. 3; Pg. 2 and Ex. 11; Pg. 1-3.*
- 5.14. As established by the evidence and testimony, on Wednesday, November 20, 2019, Johnston learned of Garcia's wage complaint leading him to discharge her the very next day, on Thursday, November 21, 2019.
- 5.15. Therefore, the undersigned administrative law judge finds, by a 'preponderance of the evidence', Johnston terminated Garcia in retaliation to her filing a wage complaint, in violation of WAC 296-128-770.
- 5.16. Based on a finding of retaliation, the case is **REMANDED** to the Department to determine the appropriate penalty to the Employer, whether one thousand dollars or an amount equal to ten percent of the total amount of unpaid earnings attributable to the retaliatory action, whichever is greater, based on WAC 296-128-790(1).
- 5.17. The Employer is ordered to make payable to the employee earnings that the employee did not receive due to the employer's retaliatory action, including interest of one percent per month on all earnings owed, based on WAC 296-128-780(5)(a).
- 5.18. The Department's 'Determination of Compliance No. 214-20' is **SET ASIDE**.

OAH Dkt. No. 08-2020-LI-01485 (Wage Complaint)-

- 5.19. In the present case, on November 3, 2019, Savanna Garcia filed a 'Worker's Rights Complaint', alleging unpaid tips and gratuities from Off The Hook. Therefore, the Department was required to investigate, based on RCW 49.48.083(1) and WAC 296-128-820.
- 5.20. Any employer who pays an employee less than wages to which such employee is entitled shall be liable to such employee for the full amount of such wages. RCW 49.46.090(1).
- 5.21. RCW 49.46.010(3)(c) establishes an 'employee' as anyone not exempt by the statute, including executive, administrative or professional staff.
- 5.22. RCW 49.46.020(3) requires:
An employer must pay to its employees: (a) All tips and gratuities;... Tips and service charges paid to an employee are in addition to, and may not count towards, the employee's hourly minimum wage.
RCW 49.46.020(3).
- 5.23. In the present case, Off the Hook Owner, Claude Johnston, does not dispute tip sharing with employees on any day he worked.
- 5.24. However, on November 1, 2019, Johnston spoke with the Employer's C.P.A. and informed he could not tip-share with employees. He ceased tip sharing at that point.
- 5.25. Further, on December 27, 2019, Department Industrial Agent Ruth Castro informed Johnston that it was improper for an owner to tip share with employees.
- 5.26. At the hearing, the Department agreed Johnston violated RCW 49.46.020(3), by tip sharing with his employees. However, the Department issued a 'Determination of Compliance' since it was unable to reasonably calculate the tips owed to Garcia, based on the Employer's lack of records, consistent with WAC 296-128-010.
- 5.27. As result, the Employer, Off The Hook, by tip sharing with employees, failed to pay the Wage Claimant, Savanna Garcia, all tips she earned between August 17, 2019 and October 31, 2019, in violation of RCW 49.46.020(3) and Chapter 296-128 WAC.
- 5.28. Therefore, the present case is **REMANDED** back to the Department to calculate the appropriate amount of tips, and interest, owed to Garcia, from August 17, 2019 to November 1, 2019, when Johnston ceased tip sharing with his employees.
- 5.29. Further, based on a finding tips are owed, the case is **REMANDED** back to the Department to determine the appropriate penalty by the Employer, based on RCW 49.48.083.
- 5.30. The Department's 'Determination of Compliance No. 264-20' is **SET ASIDE**.

6. AMENDED INITIAL ORDER:

THIS ADMINISTRATIVE TRIBUNAL ORDERS:

OAH Dkt. No. 07-2020-LI-01467 (Retaliation Complaint)- Based on the Department of Labor & Industries' 'Determination of Compliance No. 214-20':

- 6.1. The Employer, Off the Hook @ 1069 Inc. dba Off the Hook, retaliated against the Wage Claimant, Savanna Garcia, for her exercise of right under Chapter 49.46 RCW, in violation of RCW 49.46.210(4) and WAC 296-128-770.
- 6.2. Based on a finding of retaliation, the case is **REMANDED** to the Department to determine the appropriate penalty to the Employer, whether one thousand dollars or an amount equal to ten percent of the total amount of unpaid earnings attributable to the retaliatory action, whichever is greater, based on WAC 296-128-790(1).
- 6.3. The Employer is ordered to make payable to the employee earnings that the employee did not receive due to the employer's retaliatory action, including interest of one percent per month on all earnings owed, based on WAC 296-128-780(5)(a).
- 6.4. The Department's 'Determination of Compliance No. 214-20' is **SET ASIDE**.

OAH Dkt. No. 08-2020-LI-01485 (Wage Complaint)- Based on the Department of Labor & Industries' 'Determination of Compliance No. 264-20':

- 6.5. The Employer, Off the Hook @ 1069 Inc. dba Off The Hook, by failing to pay the Wage Claimant, Savanna Garcia, all tips she earned between August 17, 2019 and October 31, 2019, violated RCW 49.46.020 and Chapter 296-128 WAC.
- 6.6. Based on a finding tips are owed, the case is **REMANDED** back to the Department to determine the appropriate wages and interest due by the Employer, based on RCW 49.48.083.
- 6.7. Based on a finding tips are owed, the case is **REMANDED** back to the Department to determine the appropriate penalty by the Employer, based on RCW 49.48.083.
- 6.8. The Department's 'Determination of Compliance No. 264-20' is **SET ASIDE**.

Issued from Tacoma, Washington on the date of mailing.



TJ Martin
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE ATTACHED

PETITION FOR REVIEW

Any party that disputes this Initial Order may file a Petition for Administrative Review with the Director of the Department of Labor and Industries.¹ You may e-mail your Petition for Administrative Review to the Director at directorappeal@lni.wa.gov. You may also mail or deliver your Petition for Administrative Review to the Director at the Department's physical address listed below.

Mailing Address:

Director
Department of Labor and Industries
PO Box 44001
Olympia, WA 98504-4001

Physical Address:

7273 Linderson Way SW
Tumwater, WA 98501

If you e-mail your Petition for Administrative Review, please do not mail or deliver a paper copy to the Director.

Whether you e-mail, mail or deliver the Petition for Administrative Review, the Director *must actually receive* the Petition for Administrative Review during office hours at the Director's office within 30 days of the date this Initial Order was mailed to the parties. You must also provide a copy of your Petition for Administrative Review to the other parties at the same time.

If the Director does not receive a Petition for Administrative Review within 30 days from the date of the Initial Order, the Initial Order shall become final with no further right to appeal.²

If you timely file a Petition for Administrative Review, the Director will conduct an administrative review under chapter 34.05 RCW.

¹ RCW 49.48.084 and RCW 34.05.464.

² RCW 49.48.084 and Chapter 34.05 RCW.

**CERTIFICATE OF SERVICE FOR OAH DOCKET NOS. 07-2020-LI-01467
AND 08-2020-LI-01485**

I certify that true copies of this document were served from Tacoma, Washington via Consolidated Mail Services upon the following as indicated:

<p>Savannah Garcia 1332 Penn Cove Rd Unit B Oak Harbor, WA 98277 <i>Appellant – Wage Claimant</i></p>	<p><input checked="" type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> E-mail: savannag4@gmail.com 9489 0090 0027 6102 1670 29</p>
<p>Lisa Roth, AAG Office of the Attorney General MS: TB-14 800 5th Ave Ste 2000 Seattle, WA 98104 <i>Respondent Representative</i></p>	<p><input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail: lisam.roth@atg.wa.gov rachel.thornton@atg.wa.gov lniseaeservice@atg.wa.gov</p>
<p>Ian McCurdy Adelstein, Sharpe & Serka, LLP PO Box 5158 Bellingham, WA 98227 <i>Intervenor Representative</i></p>	<p><input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> E-mail: imccurdy@adelstein.com</p>
<p>Off the Hook @ 1069, Inc. dba Off the Hook c/o Claude Johnston 19 W Troxell Rd Oak Harbor, WA 98277 <i>Intervenor/Employer</i></p>	<p><input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> E-mail: offthehook@comcast.net</p>

Date: Thursday, June 3, 2021

OFFICE OF ADMINISTRATIVE HEARINGS


Shawntá Williams
Legal Assistant 2