



**In the Matter of William K's
Findings and Recommendations
December 15, 2016**

Introduction

The City of Buffalo Living Wage Commission (LWC) held a hearing on December 5, 2016 to determine whether Mollyworld LLC has violated the City's law by paying workers less than a living wage. The LWC had not received any grievances from current or past employees; rather, the hearing was prompted by quarterly reports from Mollyworld indicating wages less than a living wage. Present at the hearing were

- Living Wage Commissioners Kelly Dodd, Erin Hatton, Sharon Ivey, Penny Selmonsky, and Merle Showers;
- LWC attorney Sam Magavern;
- City of Buffalo attorney Anna Falicov;
- Mollyworld owner Molly Koessler;
- Mollyworld attorney Justin White;
- Former William K's employees Rebecca Allen, Rachel Herman-Gross, and Chris Keroack.

These findings were adopted unanimously by the five commissioners present at the hearing.

Findings of Facts

1. Mollyworld LLC leases property from the City of Buffalo for the operation of two restaurants, the Hatch and William K's. Mollyworld's agreement with the City, dated April 2014, specifies that it will comply with the City's living wage law.
2. On May 22, 2014, the LWC wrote to Molly Koessler, president of Mollyworld, noting that the contract was covered by the living wage law and including the forms used for reporting compliance.

3. On September 14, 2015, the LWC received a letter from Ms. Koessler, noting that the second restaurant on the site, William K's, would open in October and asking that "you give consideration to reducing this wage in the new restaurant for tipped employees to \$8.75 per hour + tips".
4. On October 6, 2015, the LWC responded with a letter to Ms. Koessler indicating that "Under our interpretation of the law, tips could not be counted as wages, and there is no exception or exemption that would allow for the wage to be reduced for tipped employees."
5. Ms. Koessler stated at the hearing that after receiving the letter from the LWC she wrote to the Mayor asking for assistance and spoke several times with the director of City Parks, Andrew Raab, but never heard back from the Mayor.
6. The Buffalo living wage rate for 2016 is \$11.63 per hour if the employer provides health insurance to the employee and \$13.06 if the employer does not.
7. An quarterly report submitted by Mollyworld for January 31 through April 30, 2016 indicated:
 - a. 7 servers receiving \$7.50 per hour
 - b. 7 bartenders receiving \$7.50 per hour
 - c. 2 bussers receiving \$7.50 per hour
 - d. 1 server receiving \$13.01 per hour
 - e. 2 hosts receiving \$13.01 per hour
 - f. 1 busser receiving \$13.01 per hour
 - g. 4 dishwashers receiving \$13.01 per hour
 - h. 2 cooks receiving \$13.01 per hour
 - i. 1 cook receiving \$500 per week
 - j. 1 bar manager receiving \$400 per week
 - k. 1 untitled employee receiving \$13.01 per hour
8. On June 1, 2016, the Commission wrote to Ms. Koessler with a list of the 29 employees who, based on the quarterly report mentioned above, did not appear to be making a living wage and stating, "Please submit any information that will provide clarification on this issue, and, if it is true that these employees have not been earning a living wage, please let us know of what steps you are taking to come into compliance with the law."
9. A quarterly report submitted by Mollyworld for May 1 through July 31, 2016 for William K's showed:
 - a. 4 dishwashers receiving \$13.01 per hour
 - b. 2 bussers receiving \$13.01 per hour
 - c. 8 bartenders receiving \$13.01 per hour
 - d. 25 servers receiving \$13.01 per hour
 - e. 4 cooks receiving \$13.01 per hour
 - f. 1 host receiving \$13.01 per hour

g. 1 bartender receiving \$360 per week

10. A quarterly report submitted by Mollyworld for August 1 through October 31, 2016 for William K's showed:

- a. 1 dishwasher receiving \$13.01 per hour
- b. 2 bussers receiving \$7.50 per hour
- c. 1 busser receiving \$10 per hour
- d. 7 bartenders receiving \$7.50 per hour
- e. 1 bartender receiving \$10 per hour
- f. 14 servers receiving \$7.50 per hour
- g. 1 server receiving \$10 per hour
- h. 4 servers receiving \$13.01 per hour
- i. 2 cooks receiving \$13.01 per hour

11. A quarterly report submitted by Mollyworld for August 1 through October 31, 2016 for the Hatch showed:

- a. 1 dishwasher receiving \$13.01 per hour
- b. 2 cashiers receiving \$13.01 per hour
- c. 1 bartender receiving \$7.50 per hour
- d. 2 bartenders receiving \$13.01 per hour
- e. 1 server receiving \$7.50 per hour
- f. 2 servers receiving \$13.01 per hour
- g. 10 cooks receiving \$13.01 per hour
- h. 1 building maintenance worker receiving \$12.50 per hour
- i. 1 building maintenance worker receiving \$13.01 per hour
- j. 17 concessions workers receiving \$13.01 per hour
- k. 2 security workers receiving \$13.01 per hour

12. A notice to all employees from Mollyworld dated November 9, 2016 indicates that "Our records indicate you were underpaid for all pay periods in the year 2016. Our calculations were based on \$13.01 as opposed to \$13.06. Enclosed is a check to make up the difference of your underpayment."

13. A memo from Mollyworld dated November 11, 2016 indicates that "any individual listed at \$7.50 per hour on our Buffalo City Living Wage Commission report is a server who receives \$7.50 plus tips totaling an hourly wage of \$13.06 per hour. If that individual does not make enough tips to cover the City Wage, Mollyworld, LLC adjusts the pay rate to accommodate the \$13.01 rate."

14. In addition to those erroneously paid at the \$13.01 rate and to those servers paid at the \$7.50 rate, Mollyworld's quarterly reports show the following individuals being paid less than \$13.06 per hour:

- a. January 1 through April 30, 2016 for William K's:

- i. 7 bartenders receiving \$7.50 per hour
- ii. 2 bussers receiving \$7.50 per hour
- iii. 1 bar manager receiving \$400 per week
- iv. 1 cook receiving \$500 per week
- b. May 1 through July 31, 2016
 - i. 1 bartender receiving \$360 per week
- c. August 1 through October 31, 2016 for William K's
 - i. 2 bussers receiving \$7.50 per hour
 - ii. 1 busser receiving \$10 per hour
 - iii. 7 bartenders receiving \$7.50 per hour
 - iv. 1 bartender receiving \$10 per hour
- d. August 1 through October 31, 2016 for the Hatch
 - i. 1 bartender receiving \$7.50 per hour
 - ii. 1 building maintenance worker receiving \$12.50 per hour

Findings of Law

1. The City's living wage law requires that "Covered employers shall pay no less than a living wage to their covered employees." City of Buffalo Code, Section 96-19(D)(1).
2. Because it holds a contract with the City in which it pays the City more than \$50,000 per year and because it has more than 10 employees, Mollyworld is a covered employer, and its workers at William K's and the Hatch are covered employees. City of Buffalo Code, Section 96-19(C).
3. Tips are not wages. Wages are paid by the employer to the employee. Tips are given as gratuities by patrons directly to employees. They are purely discretionary on the part of the patron and become the sole property of the employee. Federal and state labor and tax laws clearly distinguish tips from wages. See, for example, the Fair Labor Standards Act, 29 US Code, Section 203 (Definitions), or New York State Labor Law Section 196(d), which specifies that an employer may not accept or retain any part of a gratuity.
4. There are no provisions in the City's living wage law that distinguish tipped employees from other employees or allow for a lower wage rate for tipped employees.
5. Hence, Mollyworld must pay all its employees a living wage, which, for employees who do not receive health insurance from Mollyworld, is \$13.06 per hour in 2016.

Discussion

Mollyworld violated the law in several ways – apparently for several reasons.

- In some cases, it was apparently a numerical error – paying \$13.01 per hour instead of \$13.06. Mollyworld states that it has rectified these discrepancies.
- In the case of the building maintenance worker being paid \$12.50 per hour, it is not clear why Mollyworld violated the law or that full restitution has been made.
- In the case of the cook receiving \$500 per week and the bar manager receiving \$400 per week, it is not clear why Mollyworld violated the law, and it does not appear that those workers have received restitution.
- In the case of the tipped workers (bartenders, servers, and bussers), Ms. Koessler stated at the hearing that she met with the staff when opening William K's and reached a mutual decision to pay \$7.50 per hour rather than a living wage, but to make sure that the tips received made up the difference each pay period, and, if they did not, to supplement the wages accordingly. It is striking to the Commissioners that Ms. Koessler took this course of action after being told in writing by the LWC that it would be illegal. Neither before the hearing nor at it did Mollyworld disagree with the LWC's interpretation of the law. Ms. Koessler apparently hoped that the Mayor would exempt her from the law's provisions – but Mollyworld does not qualify for any of the exemptions listed in the law. While she has every right to ask the City to amend its law, the LWC would have expected that, in the meantime, she would have observed the law as it is written. Similarly, even if Mollyworld's employees agreed to wages below the legal level, there is nothing in the law that allows a worker to waive its provisions.

Recommendations

As noted above, this was not a grievance hearing, and, therefore, the LWC is not invoking Section E(3) of the living wage law, which would create a duty upon the part of the City to impose sanctions within 30 days. Nonetheless, as the City entity charged with monitoring compliance with the law, the LWC makes the following recommendations:

1. Mollyworld should provide documentation to the LWC and the City that it has made full restitution to all non-tipped employees who received less than a living wage.

2. Mollyworld should make full restitution to all tipped employees who received less than a living wage, and should provide documentation to the LWC and the City that it has done so. It was illegal to count tips as wages, and the employees are entitled to the full wages that the law provides.
3. If Mollyworld does not document full restitution to both classes of employees by February 1, 2017, the City should move to terminate the contract based on a material violation of its terms.