

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM	)	Case No. 1552-2001
OF BETH SAUER,	)	
Claimant,	)	
	)	FINDINGS OF FACT;
vs.	)	CONCLUSIONS OF LAW;
	)	AND ORDER
ZIMMERMAN RESTAURANT, INC.,	)	
d/b/a COUNTRY HARVEST	)	
Petitioner/Respondent.	)	

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I. INTRODUCTION

Beth Sauer filed a wage claim on February 27, 2001, alleging that Zimmerman Restaurant, Inc., d/b/a Country Harvest, owed her unpaid wages. On April 12, 2001, the Wage and Hour Unit of the Department of Labor and Industry issued a redetermination finding that Country Harvest owed Sauer wages and penalties in the amount of \$909.05. Country Harvest appealed the redetermination. Bernadine Warren, Hearing Officer for the Department of Labor and Industry, conducted a hearing in this matter on October 5, 2001. Beth Sauer and her representative, David DeMars, who is under the guidance of James Hunt, attorney, appeared by telephone. Jamie Mitchell appeared by telephone as a witness for the claimant. Amy Christensen, attorney, represented Country Harvest by telephone. Mike Zimmerman and Jackie Ross appeared by telephone as witnesses for the Respondent.

Exhibits 9 through 11, 21 through 25, and 28 through 34 were admitted into the record without objection. Exhibit F-2, proposed by the employer, was admitted into the record over Sauer's objection that the employer failed to timely exchange exhibits, and that the document was unreliable. The Hearing Officer admitted the document into the record after determining that Sauer was aware of the document's existence, admitted to signing two of the advance payment notes, and thus, was not unduly prejudiced by its admission. Exhibit 13 was not admitted as irrelevant.

II. ISSUES

1. Whether Zimmerman Restaurant, Inc., d/b/a Country Harvest, filed a timely appeal to the Department's Wage and Hour determination.

2. Whether Zimmerman Restaurant, Inc., d/b/a Country Harvest, owes wages for work performed, as alleged in the complaint filed by Beth Sauer.
3. Whether Zimmerman Restaurant, Inc., d/b/a Country Harvest, owes penalties for unpaid wages, as provided by law.

### III. FINDINGS OF FACT

1. Country Harvest hired Sauer as a waitress in 1995.
2. Mike Zimmerman is the president of Zimmerman, Inc., which owns Country Harvest. Zimmerman is involved in the management and operation of Country Harvest.
3. Zimmerman allows employees to receive advances on their wages. He charges employees a \$25.00 fee for each wage advance. Zimmerman allows employees to pay back the advance either from the next pay check, or over time. Sauer was aware of Zimmerman's advance policy, and had requested such advances from time to time. On March 30, 1999, Sauer requested, and received, a \$325.00 advance from Zimmerman. She repaid \$350.00. On May 3, 1999, Sauer requested, and received, a \$200.00 advance from Zimmerman. She repaid \$225.00.
4. In March 1999, Zimmerman purchased a new computer system for Country Harvest. The system included a "touch screen" monitor. Employees touched the screen to access or enter company data. The touch screen locked up from time to time, and prevented employees from entering the required data. Employees learned that if they tapped the screen several times, the screen sometimes unlocked. If it still did not unlock, employees reentered the data after wiping the screen off with a damp cloth and then allowing the screen to dry.
5. On October 13, 1999, Sauer was working her shift. She went to the monitor to enter her data. When she touched the screen, it locked up. Sauer lifted her left hand and touched the flat of her palm to the screen to unlock it. Her diamond ring clicked against the screen. A cobweb of cracks spread across the screen. Sauer reported the accident to her manager, Jim Vickers. Zimmerman was away from the office.
6. On October 14, 2001, Data Northwest, the company that sold the monitor to Country Harvest, sent another monitor to the company, and invoiced the company \$707.00 for the replacement monitor.
7. On October 17, 1999, Zimmerman returned to the office. Sauer immediately reported the broken monitor to Zimmerman, and explained what had happened.
8. On October 18, 1999, Zimmerman asked Sauer if she carried homeowners insurance. She replied that she did. He next asked her if she had a home computer. She confirmed that she did. Zimmerman then asked if she could get a receipt or invoice for the home computer. Sauer stated she would look. She believed that Zimmerman was going to ask her to submit a claim to her homeowner's insurance.
9. Over the following day or two, Zimmerman and Sauer talked about submitting a claim to her insurance, or submitting a claim to his insurance. She feared that her premiums would increase or her insurance would be cancelled should she submit a claim to her insurance. Zimmerman did not want to submit a claim to his company's insurance. They talked about Sauer reimbursing the company for the cost of the computer monitor.
10. Sauer received her pay check on October 21, 1999. She discovered that Zimmerman had deducted \$107.00 from the check, including that amount in the "advances" column of the

check stub. Sauer went to speak with Zimmerman about the deduction. Zimmerman told her that he would deduct \$107.00 per paycheck until she had paid for the cost of the replacement monitor.

11. Sauer called her mother and related what Zimmerman had done. She asked her mother to call her at work and pretend that there was an emergency so that Sauer could leave work. Her mother did so, and Sauer left. She went to her mother's place of business and showed her the paycheck with the deduction. Sauer was very upset.
12. Zimmerman deducted \$107.00 from each of Sauer's paychecks on October 21 and November 4, 1999, \$100.00 from each of her paychecks on November 18, December 2, December 16 and December 30, 1999, and \$113.00 from her January 13, 2000 paycheck, for a total of \$727.00.
13. Zimmerman requires employees to wear T-shirts that have the company logo printed on them. He charges employees \$17.50 for each T-shirt. In 1999, Zimmerman withheld \$45.98 from Sauer's pay for uniforms. In 2000, Zimmerman withheld \$17.50 from Sauer's pay for a uniform shirt.
14. On February 25, 2001, Zimmerman placed Sauer on a 100 day unpaid suspension.
15. On February 27, 2001, Sauer filed a claim with the Wage and Hour Unit, contending that Zimmerman improperly withheld \$798.39 from her wages. Zimmerman answered the claim on March 12, 2001, contending that Sauer broke the monitor, and agreed to repay the cost of replacement rather than submit a claim to her insurance. Zimmerman protested her submitting a claim now, considering it to be in retaliation for his placing her on suspension, rather than submitting a claim when the withholdings occurred.
16. On March 21, 2001, the Wage and Hour Unit issued a determination finding that Country Harvest owed Sauer wages. Zimmerman filed a timely appeal of the determination, contending that Sauer had not filed her claim within the statutory 180 days, and that she had agreed to repay the cost of the broken monitor.
17. On April 12, 2001, Tom Brodowy, compliance specialist with the Wage and Hour Unit, issued a redetermination finding that Country Harvest owed Sauer \$790.48 in unpaid wages, plus appropriate penalties, and that Sauer had filed her claim within 180 days of the end of her employment, and thus met the statutory requirement. The redetermination noted that it would become final unless the employer or employee filed a written appeal postmarked on or before April 30, 2001.
18. On April 30, 2001, at about 4:00 p.m., Zimmerman placed a written appeal of the April 12 redetermination in the mail box at the Post Office. In the letter, dated April 30, 2001, Zimmerman contended that Sauer broke the computer monitor and agreed to pay for the replacement, and that she had failed to file her wage and hour claim within 180 days of the incident, and thus, the claim was invalid.
19. The postmark on the envelope containing the appeal has a date of May 1, 2001, and a "PM" indicating that it was postmarked on the afternoon of May 1. Zimmerman has no idea why the envelope was not postmarked until the afternoon of May 1 when he placed it in the mail on the afternoon of April 30, 2001.
20. In July 2000, the Department of Labor and Industry, Hearings Bureau, issued a decision, Case No. 732-1999, finding that Zimmerman Restaurants, Inc. violated wage and hour law by withholding wages from Trish Hart for uniforms.

#### IV. DISCUSSION

The provisions of the Fair Labor Standards Act do not apply to this claim because it is not a minimum wage or overtime claim. Instead, the claim is governed by the provisions of the Montana Wages and Wage Protection Act.

**ISSUE 1:** Whether Zimmerman Restaurant, Inc., d/b/a Country Harvest, filed a timely appeal to the Department's Wage and Hour determination.

ARM 24.16.7537 requires that a request for formal hearing must be made by the appealing party within 15 days of the date the determination or redetermination was served on the party. ARM 24.16.7514 provides guidance on how to compute time for wage and hour purposes. The rule instructs that the day of mailing is not counted, but that the last day of the period is counted. If the last day of the period falls on a Saturday, Sunday or holiday, the period then ends on the next business day. ARM 24.16.7506(4) defines "day" as a calendar day. Thus, Saturdays, Sundays and holidays are counted when determining the end of a period. In this case, the Wage and Hour Unit mailed the redetermination to Zimmerman on April 12, 2001. Using the method of counting described above, the appeal time expired on Friday, April 27, 2001. Section 25-20-6(e) requires that three days be added to the period if a document is served by mail. Thus, the Wage and Hour Unit correctly noted on the redetermination that an appeal had to be postmarked by April 30, 2001.

Country Harvest contends that Zimmerman placed the appeal in the mail box on April 30, 2001. The facts show that Country Harvest has repeatedly responded promptly to all requests for information and appealed the initial determination promptly. Zimmerman's letter appealing the redetermination is dated April 30, 2001. Zimmerman credibly testified that he mailed the appeal on April 30, 2001. Further, the Postal Service receives huge volumes of income tax returns each April. It is certainly possible that Zimmerman mailed his letter on one day, and that the Postal Service did not postmark it until the following day due to the high volume of mail, or for other reasons. It is preferable to dispose of cases on their merits than to maintain too strict a regard for technical rules of procedure. *Brothers v. Brothers*, 71 Mont. 378, 383-84, 230 P. 60, 61 (1924). The court upheld this preference in *Little Horn State Bank v. Real Bird*, 183 Mont. 208, 210, 598 P.2d 1109, 1110 (1979), where it stated "Generally, cases are to be tried on the merits and judgments by default are not favored." Under these conditions, then, I find that Country Harvest filed its appeal in a timely fashion, and that this decision may address the merits of the claim.

**ISSUE 2:** Whether Zimmerman Restaurant, Inc., d/b/a Country Harvest, owes wages for work performed, as alleged in the complaint filed by Beth Sauer.

Montana law requires that employers pay employee wages when due, in accordance with the employment agreement, pursuant to §39-3-204, MCA. Except to set a minimum wage, the law does not set the amount of wages to be paid. That determination is left to the agreement between the parties. "Wages" are any money due an employee by an employer, including commissions. § 39-3-201(6), MCA. Sauer's claim alleges that Country Harvest wrongfully withheld wages from her pay for required uniforms and to reimburse the company for a broken computer monitor.

Country Harvest first contends that Sauer failed to file her claim within 180 days of the repayment for the broken monitor, as outlined in § 39-3-207(1), MCA. That statute refers to § 39-3-206, which provides that when an employee separates from employment, all unpaid wages of the

employee are due and payable on the next regular payday or within 15 days of the separation, whichever comes first. Thus, the alleged default or delay of payment of wages occurred when Country Harvest failed to pay Sauer the claimed unpaid wages on the next regular payday following her separation from employment or within 15 days of the separation from her employment. Additionally, under § 39-3-207(2), an employee may recover wages and penalties for a period of 2 years prior to the date of an employee's last day of employment or the filing of her wage claim. In this case, Sauer's employment with Country Harvest ended on February 25, 2001. Under the law, her claim could cover the two years preceding that date, which would take her back to February 25, 1999. The alleged unpaid wages occurred subsequent to February 25, 1999. Thus, Sauer filed her claim within the time allowed by law.

Country Harvest next contends that Sauer agreed to repay the cost of the broken monitor by having amounts withheld from her pay, and thus, the transaction was legal. It cites no authority supporting this contention. To the contrary, the court has repeatedly held that "Parties cannot privately waive statutes enacted to protect the public in general." Phoenix Physical Therapy v Unemployment Insurance Division, 284 Mont. 95, 104, 943 P.2d 523, 528 (1997). The court cautioned in Garsjo v. Department of Labor and Industry, 172 Mont. 182, 188, 562 (1977), that "an employee may not enter into an agreement which operates to waive compensation for overtime actually worked." The court recognized that the laws of Montana that ensure an employee's right to receive minimum wage and overtime pay are expressions of public policy created to protect workers, and restraining those from withholding overtime pay is vindication of a public right rather than a private right. Withholding wages is considered a continuing public offense. Although this case does not involve overtime or minimum wage violations, the same theories apply.

Attorney General Opinion No. 25, Volume 11 (March 25, 1953), still in effect, held that an employer cannot withhold wages from an employee to pay a debt to the employer, unless the debt is for room, board or other incidentals which the employee has agreed may be deducted as a condition of employment. "Other incidentals" include items the employer furnishes to the employee that are not required for the performance of the employee's duties. These would include items such as furnished transportation that is not required for work purposes, electricity, water or gas furnished for the non-commercial use of the employee, or fuel, such as kerosene, coal or firewood, for the employee's non-work use. These types of incidentals may properly be deducted from the employee's wages, provided the employee agrees to the deductions, and the agreement is voluntary and uncoerced. (See 29 CFR § 531.30, 29 CFR § 531.3(a), and 29 CFR § 531.3(b), FLSA interpretive regulations regarding items that may legally be deducted from an employee's wages without disturbing minimum wage requirements.)

To the contrary, items that are primarily for the benefit of the employer are not considered incidentals, and may not be deducted from an employee's pay. These items include, in part, the cost of uniforms, the cost of maintaining uniforms (if the employer maintains the uniforms), or the use of automobiles by sales employees where the use of the automobile is necessary to the employer's business. An employee may properly authorize an employer to make deductions and to turn the deducted amount over to a third party, such as union dues, child support payments, or charitable contributions. However, any deduction that either directly or indirectly produces a profit to the employer is not allowed.

Similarly, Attorney General Opinion No. 17, Volume 36 (August 27, 1975) held that an employer may not make deductions from an employee's pay for damages caused by the employee

during the course of his employment, losses caused by the employee's poor judgment, or liability insurance deductible charges attributable to employee negligence. The opinion held that an employer may not withhold wages, even pursuant to a union contract, unless the deductions were made for board, room, and other incidentals supplied by the employer as part of the conditions of employment.

In this case, Country Harvest deducted \$840.48 from Sauer's pay for a broken monitor, advance fees and required uniforms. These deductions were for the benefit and profit of the employer, not the employee. They do not meet the definition of "other incidentals" as contemplated by both Attorney General opinions referenced above and FLSA interpretive regulations. Thus, whether or not Sauer agreed to the deductions, they were improper withholdings from her wages. Country Harvest owes Sauer \$840.48 in unpaid wages.

**ISSUE 3:** Whether Zimmerman Restaurant, Inc., d/b/a Country Harvest, owes penalties for unpaid wages as provided by law.

An employer who fails to pay an employee as provided by law or who violates any other provision of the law is guilty of a misdemeanor and must pay a penalty of up to 110% of the unpaid wages. § 39-3-206, MCA. ARM 24.16.7566 provides that a penalty equal to 55% of the wages due the employee will be imposed if none of the special circumstances of ARM 24.16.7556 apply. That rule requires that 110% penalty be applied to those cases where the employer fails to cooperate or provide requested information, the employer's records are falsified or intentionally misleading, or the employer has violated similar wage and hour statutes within the three years previous to Sauer's claim. Zimmerman Restaurants Inc. committed a similar violation, withholding wages for uniforms, within the three years previous to Sauer's claim. Therefore, a 110% penalty of \$924.52 is assessed.

## **VI. CONCLUSIONS OF LAW**

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over Sauer's claim for unpaid wages under § 39-3-201 et seq. MCA. *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978).
2. Zimmerman Restaurant Inc., d/b/a Country Harvest, wrongfully withheld \$840.48 from Sauer's pay.
3. Sauer is entitled to a penalty of \$924.52 pursuant to §39-3-206, MCA and ARM 24.16.7566(1)(a).

## **VII. ORDER**

Respondent Zimmerman Restaurant Inc., d/b/a Country Harvest, is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,765.00, representing unpaid wages and penalties, made payable to Beth Sauer, and mailed to the Employment Relations Division, PO Box 6518, Helena, Montana, 59624-6518, no later than 30 days from the date of this Order.

DATED this 18th day of October, 2001

HEARINGS BUREAU

By: /s/BERNADINE E. WARREN  
Bernadine E. Warren  
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with § 39-3-216(4), MCA, by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also § 2-4-702, MCA