

**STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU**

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1629-2004
OF DEEDEE P. LINVILLE,)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
THOMAS E. RODGERS,)	
)	
Respondent.)	

I. INTRODUCTION

On January 27, 2004, DeeDee P. Linville filed a claim with the Department of Labor and Industry contending that Thomas E. Rodgers had failed to pay her \$471.00 in wages due to her for work performed between November 26, 2003 and December 26, 2003, and that Rodgers had issued her a non-sufficient funds check for the wages. On the same date, the Department's Wage and Hour Unit sent notice of the claim to Rodgers, indicating that he owed Linville \$516.00 in wages, plus a statutory penalty of 110% because of the non-sufficient funds check. On February 18, 2004, the Wage and Hour Unit received a money order from Rodgers, payable to Linville in the amount of \$471.00, the net amount of the wages owed after taxes and other deductions. On February 18, 2004, the Wage and Hour Unit determined that Rodgers still owed Linville the 110% statutory penalty. On February 23, 2004, Linville filed an additional claim that Rodgers had failed to pay her \$148.50 for work performed between December 26, 2003 and January 1, 2004. Rodgers appealed the February 18 determination on March 1, 2004. The Wage and Hour Unit did not make a determination on the second claim. On March 23, 2004, the combined cases were transferred to the Department's Hearings Bureau for hearing.

The hearing was conducted by telephone on April 28, 2004. Linville and Rodgers were both present and testified. They stipulated to proceeding by telephone. Lois Blankenship, Eric Martell, Mindy Mitchell, Gina Huber, and Pam McDaniel also testified in the case. Documents from the investigative file compiled by the Wage and Hour Unit numbered 1, 3-5, 7-9, 12-14, 15, 16-18, 23, and 24-26 were admitted into evidence without objection. Claimant's exhibit L6 was also admitted without objection.

II. ISSUES

The issues in this case are whether Rodgers owes Linville a penalty in connection with the payment of wages by a non-sufficient funds check, and whether Rodgers owes Linville wages and penalties for additional hours worked.

Based upon the testimony and exhibits in the case, the Hearing Officer makes the following:

III. FINDINGS OF FACT

1. In November 2003, Lois Blankenship and Rodgers agreed that Blankenship would perform the necessary work to reopen Arlo's, a bar in Wolf Point, Montana, owned by Rodgers and his son. Rodgers authorized Blankenship to hire Linville to assist in cleaning the premises to get it open by the end of the year. Blankenship hired Linville and agreed to pay her \$6.00 per hour.

2. Between November 26 and December 26, 2003, Linville earned \$516.00 assisting with the cleaning and preparations to open the bar.

3. Between December 27, 2003 and January 1, 2004, Linville worked 24.75 hours as a cocktail waitress, earning \$148.50. Linville did not work after January 1, 2004.

4. On December 31, 2003, Rodgers issued Linville a paycheck drawn on Western Bank in the amount of \$471.00 representing her earnings of \$516.00 prior to December 27, 2003, less deductions. Linville attempted to cash this check at Western Bank several times but the bank refused to honor it because of insufficient funds.

5. On January 27, 2004, Linville filed her wage claim with the department.

6. On February 18, 2004, the department received a money order from Rodgers, payable to Linville in the amount of \$471.00.

7. On February 23, 2004, Linville filed an additional claim that Rodgers had failed to pay her \$148.50 for work performed between December 26, 2003 and January 1, 2004.

8. Rodgers has never paid Linville for the wages she earned between December 27, 2003 and January 1, 2004.

IV. DISCUSSION AND ANALYSIS⁽¹⁾

Montana law requires that employers pay employees wages when due in accordance with the employment agreement, and in any event not more than 15 days following the separation from employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205. Montana law also provides for a penalty to be assessed against an employer and paid to the employee in an amount not to exceed 110% of the wages due and unpaid when the employer violates the wage payment laws. Mont. Code Ann. § 39-3-206(1). The rules of the department provide that the penalty should be the full 110% for minimum wage or overtime violations, and when certain special circumstances are present. Admin. R. Mont. 24.16.7556 and 24.16.7561. One of the special circumstances is payment of wages by non-sufficient funds check.

Rodgers authorized Blankenship to hire Linville, and was thus her employer. He was responsible to pay her in accordance with the law. Rodgers paid the wages for the initial period of Linville's employment with a non-sufficient funds check. This resulted in a failure to pay her within 15 days of her separation from employment, and is therefore a violation of the wage payment laws. Rodgers ultimately conceded that he owed the wages, by tendering payment of them to the department. However, because of his payment by non-sufficient funds check, he remains liable to Linville for a penalty of 110% of the wages due and payable, or \$567.60.

Rodgers attempted to establish at hearing that he should not be liable for the penalty because representatives of the department told him that he would not have to pay the penalty. Pam McDaniel, compliance specialist for the department's wage and hour unit, testified that she granted an extension of time to respond to the claim and told Rodgers she would not assess a penalty for his untimely response. However, she also stated that she did not have the file in front of her when she told him this, and did not realize that the department had already assessed the penalty for the non-sufficient funds check.

Rodgers clearly believed the department had the ability to waive the penalty in this case. However, under the law, if the claimant has established facts which entitle her to a penalty for violation of the wage payment laws, the department is not able to waive the penalty on her behalf. In particular, the rules of the department provide that when an employer has issued a non-sufficient funds payroll check, the application of the full penalty is mandatory and to be waived only "upon written mutual agreement of the parties and the department." Admin. R. Mont. 24.16.7556(3). Thus, even if McDaniel did tell Rodgers she could waive the penalty for payment of wages with a non-sufficient funds check, Linville would still be entitled to the penalty unless she herself agreed to waive it. There is no evidence that Linville agreed to waive the penalty or would be willing to do so. Therefore, Rodgers is liable to Linville for the full amount of the penalty, or \$567.60.⁽²⁾

Regarding Linville's claim for additional wages for the period December 27, 2003 to January 1, 2004, Rodgers attempted to establish through the testimony of Eric Martell that Linville did not work all of the hours she claimed. He also attempted to impeach Linville's credibility by claiming that Linville had tried to induce Martell to support her position by bribing him.

Rodgers lives in Glasgow, Montana, and was not directly involved in running the business. He has no direct knowledge of the hours Linville worked and apparently maintained no records of the hours worked. Blankenship, who was coordinating the cleanup on Rodgers' behalf, maintained a calendar which showed that Linville worked the hours claimed. The testimony of Martell was equivocal at best. Martell worked assisting with the cleanup and as a bartender after the bar opened. He was there most of the nights that Linville claimed to have worked. He did not consider Linville's claim for 24.75 hours to be unreasonable. The testimony established that on most of the days between December 27 and January 1 that Linville worked, there was not sufficient business to require her presence. But saying she was not needed is not the same thing as saying that she did not report to work and remain there as an employee. The responsibility to control the hours worked and to ensure efficiency and productivity is that of the employer. If Linville reported to work for those hours, the law requires she be paid for them.

In a wage claim case, the employer has the responsibility of keeping records to establish the number of hours worked. See *Roan v. Rosebud County* (1980), 192 Mont. 252, 627 P.2d 1222. When an employer fails to keep time records on employees subject to the law, the employee need only prove the extent of overtime worked as a matter of just and reasonable inference. *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 189, 562 P.2d 473, 476. In *Garsjo*, the court also set out the procedure for determining how to address no records or inadequate records.

When the employee shows, as he did here, that he did in fact perform overtime work for which he was not properly compensated and produces sufficient evidence to show the extent and amount of such work as a matter of just and reasonable inference, the burden shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee. And if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation.

Garsjo, supra, 172 Mont. at 189, 562 P.2d at 477 (quoting *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W.2d 494, 497).

Linville's testimony, which is bolstered by that of Blankenship and Martell, establishes that she worked the 24.75 hours claimed. Based on the employment agreement to pay her \$6.00 per hour, Rodgers owes Linville \$148.50.

Regarding Rodgers' claim of bribery, the testimony of Martell is completely inconclusive. He testified that a woman gave him a note offering him \$50.00 to support Linville's position in this matter. He did not know the woman and did not know whether she had any relationship to Linville. The note was not in Linville's handwriting, which he said he would have recognized. He did not accept the money, and stated that he would not allow his testimony to be influenced in such a way. Linville emphatically denied doing any such thing. On the record of this case, the allegation of bribery is completely unsupported. Even if it could be used to impeach Linville's credibility, however, the only significant factual question in Linville's claim is the number of hours she worked during the week of December 27, 2003 to January 1, 2004. But in the absence of other evidence, such as employer records, to support a contrary conclusion as to the number of hours worked, impeaching the credibility of the claimant is of limited utility. As to the other issues in the case, the facts are not in serious dispute, and the issues are issues of law, which do not depend on Linville's credibility.

Because Rodgers failed to pay Linville the \$148.50 for her work during the period of December 27, 2003 to January 1, 2004, she is entitled to her wages, plus a penalty pursuant to Mont. Code Ann. § 39-3-206(1). The rules of the department provide that, for minimum wage violations, for cases involving payment of wages by non-sufficient funds check, and in cases when the employer has previously violated the wage payment laws, the full 110% penalty should be imposed. Admin. R. Mont. 24.16.7556 and 24.16.7561. The employer's failure to pay Linville her wages at all is a minimum wage violation and Rodgers previously violated the statute by

paying wages with a non-sufficient funds check. Therefore, Linville is entitled to the full 110% penalty on these wages or \$163.35.

During the hearing, Rodgers expressed concern that Linville had retained the original non-sufficient funds check in this case, despite his remission of the replacement money order to the department. Without determining whether Linville would still be able to negotiate the check, the hearing examiner finds that this matter can easily be resolved by having Linville send the check to the department's Wage and Hour Unit, which can hold it until full payment of the other wages and penalties from Rodgers have been received. It can then return the check to Rodgers and disburse the wages and penalties to Linville. If Linville, for any reason, is unable to send the check to the Wage and Hour Unit, she can comply with this requirement by providing the Wage and Hour Unit with an agreement, in writing, to indemnify Rodgers for the amount of the check, should it be cashed.

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Thomas E. Rodgers violated Mont. Code Ann. § 39-3-204 by failing to pay DeeDee P. Linville wages due her in a check convertible to cash on demand at full face value, and violated Mont. Code Ann. § 39-3-205 by failing to pay Linville the remainder of the wages due to her within 15 days of her separation from employment. Although Rodgers paid the wages represented by the non-sufficient funds check to Linville through the department after she filed her claim, he remains liable to her in the amount of \$148.50 for the balance of her wages, plus penalties as provided by law.

3. Rodgers is liable to Linville for a penalty of 110% of the wages he owes Linville, or \$730.95. Mont. Code Ann. § 39-3-206.

VI. ORDER

1. Thomas E. Rodgers IS HEREBY ORDERED to tender a cashier's check or money order in the amount of \$879.45, representing \$148.50 in unpaid wages and \$730.95 in penalty, payable to the claimant, DeeDee P. Linville, and delivered to the Wage and Hour Unit, Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than June 21, 2004. Rodgers may deduct applicable withholding from the wage portion but not the penalty portion.

2. DeeDee P. Linville IS HEREBY ORDERED to tender check no. 1015, drawn on the account of Arlos Bar and Thomas E. Rodgers at Western Bank in Wolf Point, Montana, dated December 31, 2003 and payable to Linville, to the Wage and Hour Unit, Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than June 21, 2004. If Linville is unable to tender the check to the agency for any reason, she may, in the alternative, tender a written agreement to indemnify Rodgers for the amount of the check if it is cashed.

3. Upon receipt of the cashier's check or money order from Rodgers and check no. 1015 or indemnity agreement from Linville, the Wage and Hour Unit shall promptly disburse the sums tendered to the department by Rodgers to Linville. The Wage and Hour Unit shall also promptly forward check no. 1015 or the indemnity agreement to Rodgers.

DATED this 20th day of May, 2004.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ ANNE L. MACINTYRE

Anne L. MacIntyre, Chief

Hearings Bureau

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

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212, MCA. Such an application is not a review of the validity of this Order.

1. Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

2. Rodgers also attempted to establish through Martell's testimony that Linville's claimed hours during the cleanup were not reasonable, citing as an example that the workers claimed wages for removal of linoleum by hand rather than obtaining a floor stripper for this task. However, the fact that the workers may have used inefficient means to perform the work does not prove that they failed to work the hours they claimed. Furthermore, Linville's claim at this point is for the penalty only, not for the wages. Rodgers conceded the amount of the wages when he wrote the non-sufficient funds check.