

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM )	Case No. 1932-2010
OF BETTY ROUTZAHN, )	
)	
Claimant, )	
)	
vs. )	<b>FINDINGS OF FACT;</b>
)	<b>CONCLUSIONS OF LAW;</b>
)	<b>AND ORDER</b>
CENTER FOR MENTAL HEALTH, )	
a Montana corporation, )	
)	
Respondent. )	

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**I. INTRODUCTION**

Claimant Betty Routzahn appeals from a dismissal of her claim for \$4,278.93 in unpaid wages by the Wage and Hour Unit of the Department of Labor and Industry. Hearing Officer David A. Scrimm held a contested case hearing in this matter on December 21, 2010. Ronald Waterman, attorney at law, represented the claimant. Richard Larson, attorney at law, represented the respondent, Center for Mental Health (CMH).

Routzahn and Rhonda Champagne testified under oath. Respondent's Exhibits A, B, C, D, E, F and Claimant's Exhibits 1 and 2 were admitted into the hearing record. At the close of the hearing, the hearing officer asked the parties to clarify the date Rhonda Champagne became Director of CMH and Routzahn's supervisor. On December 27, 2010, Larson submitted a letter, now included in the record as Exhibit G, which indicates that Champagne was offered the position effective September 22, 2008. With Exhibit G, Larson also submitted additional time sheets for Routzahn that had not been introduced into evidence at hearing. Counsel for Routzahn objected to the additional exhibits. These proposed exhibits exceeded the scope of what the hearing officer requested at the close of the hearing and they therefore were excluded from the record. Further, on December 21, 2010, counsel for the parties filed a stipulation describing CMH's payroll process. Based on the evidence and argument presented at the hearing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

## II. ISSUE

The issue in this case is whether the Center for Mental Health owes wages for work performed, specifically overtime premium pay, as alleged in the complaint filed by Betty Routzahn, and owes penalties or liquidated damages, as provided by law.

## III. FINDINGS OF FACT

1. CMH provides medical and psychological services, case management, day treatment, payee services, and other services to people with chemical dependency, schizophrenia, bi-polar disorders, brain injuries, and other severe mental illness. It also maintains individual, foster, and group homes for its clients. The main office is in Great Falls and serves 13 counties in central Montana. CMH maintains an office in Helena from which it serves 600 Helena-area clients.

2. Betty Routzahn began working part-time for CMH's predecessor Golden Triangle in July 2000 running a housing program for its mentally disabled clients in the Helena office. At the time CMH hired Routzahn, Jeff Sturm was the director of the Helena office and Routzahn's supervisor. Sturm was replaced by Darren Nealis who served as Routzahn's supervisor until October 2008, when Rhonda Champagne was hired as the Tri County Director of Services.

3. A few months after Routzahn commenced employment, Nealis offered her a full-time position as office supervisor and Nealis' secretary. The duties of this position included managing three secretarial staff, making deposits, processing new client applications, and dealing with issues with the Montana State Hospital. Making deposits was Routzahn's first priority and had to be done one or two times per month. Processing applications required her to ensure that the insurance was correct, forms were properly completed, and meeting with team leaders and staff to determine where the applicant would be placed or treated. Persons released from Montana State Hospital had to have housing arranged, therapists assigned, and insurance arrangements reviewed.

4. In the first few years of her employment, Routzahn also had responsibilities as representative payee. These responsibilities related to social security and veterans' benefits that CMH received on behalf of clients who were not competent to manage their own funds. Routzahn's payee responsibilities required her to work with case managers to develop budgets for clients and to write checks on behalf of clients to pay for rent, food, and other needs. The payee responsibilities also required her to pass out cash and other items to the clients every morning. The payee also had to account for funds and report to the Social Security Administration and other

agencies. Routzahn also reconciled clients' bank accounts when statements arrived. Sometime in 2002, CMH ceased to provide representative payee services.

5. After CMH ceased to provide representative payee services, Routzahn continued to perform her other duties, managing the office, processing applications, working with housing, managing grants, and other activities, including a People's Law grant. This grant provided resources for clients who did not have insurance and was a last resort for medical, dental, and other services. Managing the grant included negotiating with medical providers and reporting.

6. The performance of these duties often required Routzahn to work more than 40 hours per week. CMH's overtime policy provided for the payment of overtime pay for non-exempt employees of 1½ times the employee's hourly rate for hours worked in excess of 40 per week. It also required employees to record all hours worked, even if overtime hours had not been previously authorized. It further stated:

The Director of Service or his designee will assign work shifts within the workweek according to program responsibility. Employees may be required to work in excess of eight hours in a day when necessary for program needs. An employee who works or approaches forty (40) hours of work prior to the end of the employee's regularly scheduled weekly work shift may be required to forego completion of the regularly scheduled weekly work shift, to avoid overtime.

7. Prior to 2009, Routzahn complied with the policy and recorded the overtime she worked. CMH paid her overtime pay in accordance with its policy.

8. In August 2009, CMH resumed its agreement to provide representative payee services. It assigned the payee responsibilities to Routzahn. Routzahn retained all her other duties. At first there were only a few payees and CMH told Routzahn she would receive assistance when the number of payees reached 20, which it did in only a few weeks.

9. In the fall of 2009, due to cash flow problems, CMH announced that no overtime would be authorized. Champagne announced this decision to "freeze" overtime to the Helena staff, including Routzahn. Routzahn told Champagne that she could not perform the duties expected of her within a 40 hour week or without assistance. In December 2009, CMH transferred Routzahn's bank deposit duties to a new office manager after Routzahn trained her to do them, but Routzahn continued to perform all others.

10. The number of payees grew steadily throughout the remainder of Routzahn's employment. By the time CMH discharged Routzahn, she was providing representative payee services for 107 clients whose money would come into their accounts on the first or third of the month. Ensuring that clients' money was received and clients' bills were paid in a timely fashion was critical to the clients' well-being and to the agency's operation and funding sources.

11. The representative payee duties required about three hours of work per month, per payee, in addition to Routzahn's other responsibilities. Routzahn was overwhelmed. She had several discussions with Champagne, telling her that she was falling behind and needed help. The only additional staff CMH provided was a temporary on-call employee who worked about 10 hours per week in a variety of other duties for other staff. CMH attempted to address the problems with Routzahn's workload by providing different software applications and by allowing Routzahn to perform some of her work from home to avoid the frequent interruptions she was subject to in the office. Champagne also made multiple requests of CMH upper management to hire additional staff to help Routzahn complete her duties. CMH denied each of these requests.

12. Beginning in October 2009, Routzahn regularly worked more than 40 hours per week. She kept track of the overtime hours but did not include them on the time sheets she submitted to CMH because of the overtime freeze. Routzahn knew that Champagne could and would not approve them. The hours she worked were:

Work week ending 10/8/09	56 hours
Work week ending 10/15/09	56 hours
Work week ending 10/22/09	65 hours
Work week ending 10/29/09	73 hours
Work week ending 11/5/09	58 hours
Work week ending 11/12/09	55 hours
Work week ending 11/19/09	67 hours
Work week ending 11/26/09	58 hours
Work week ending 12/3/09	60 hours
Work week ending 12/10/09	61 hours
Work week ending 1/7/10	44 hours

Routzahn worked a total of 213 overtime hours during the period of her claim.<sup>1</sup>

13. Champagne knew Routzahn was working and not reporting overtime hours during the period of Routzahn's claim. Routzahn's work was essential to CMH's function. Champagne also knew that Routzahn could not do her duties without working additional hours. Routzahn could not perform all the duties required of her within a 40 hour week. Neither Champagne nor anyone else in CMH management told Routzahn to scale back her duties. When Champagne saw Routzahn working in the late evening, she would tell her to go home.

14. Routzahn's hourly rate was \$13.33. Routzahn is therefore owed \$4,258.94 in unpaid overtime wages (\$13.33 x 1.5 x 213)

#### IV. DISCUSSION<sup>2</sup>

##### A. Wages Owed

Routzahn claims that CMH owes her unpaid overtime wages and liquidated damages pursuant to the FLSA and the Montana minimum wage and overtime laws. Both Montana law and the federal Fair Labor Standards Act (FLSA) prohibit employers from employing their employees in excess of 40 hours in a single work week unless the employee is compensated at a rate not less than one and one-half times the regular rate at which the employee is employed. Mont. Code Ann. § 39-3-405 and 29 U.S.C. § 207(a)(1). Montana law allows employees owed wages, including wages due under the FLSA, to file a claim with the Department of Labor and Industry to recover wages due. Mont. Code Ann. § 39-3-207; *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232.

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. To meet this burden, the employee must produce evidence to "show the extent and amount of work as a matter of just and reasonable inference." *Id. at*

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<sup>1</sup> Routzahn's time sheets show an additional eight hours of overtime for the work week ending November 26, 2009, 19 hours for the work week ending December 17, 2009, and an additional eight hours of overtime for the week ending January 7, 2011. However, these were weeks in which Routzahn received holiday or vacation pay, and she did not actually work those additional hours in those weeks.

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

189, 562 P.2d at 476-77, *citing* *Anderson*, 328 U.S. at 687, *and Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; *see also*, *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that the lower court properly concluded that the plaintiff's wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, “the burden shifts to the employer to come forward with evidence of the precise amount of the 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*, 172 Mont. at 189, 562 P.2d at 477, *quoting Purcell v. Keegan*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

Routzahn provided substantial evidence of the additional hours she worked. CMH defended against Routzahn's claim by challenging the credibility of her testimony of the hours worked, but it produced no evidence that would establish a different number of hours worked or that would negate the reasonableness of the inference established by Routzahn's evidence. Routzahn's testimony regarding her hours was essentially un rebutted, and was largely supported by Champagne, her supervisor.

As defined in 29 U.S.C. § 203(g), “employ’ includes to suffer or permit to work.” “[T]he words ‘suffer’ and ‘permit’ as used in the statute mean ‘with the knowledge of the employer.’” *Fox v. Summit King Mines*, 143 F.2d 926 (9th Cir. 1944).

[A]n employer who knows or should have known that an employee is or was working overtime must comply with the provisions of § 207. An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation. However, where an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of § 207.

*Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414-415 (9th Cir. Or. 1981).

See also *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 288 (2nd Cir. N.Y. 2008), in which the court stated:

We regard Gotham's knowledge as sufficient to afford it the opportunity to comply with the Act. See *Forrester*, 646 F.2d at 414. An employer who has knowledge that an employee is working, and who does not desire the work be done, has a duty to make every effort to prevent its performance. *Reich v. Stewart*, 121 F.3d 400, 407 (8th Cir. 1997); *Forrester*, 646 F.2d at 414 ("An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation . . ."); *Mumbower v. Callicott*, 526 F.2d 1183, 1188 (8th Cir. 1975) ("The employer who wishes no such work to be done has a duty to see it is not performed."); 29 C.F.R. § 785.13. This duty arises even where the employer has not requested the overtime be performed or does not desire the employee to work, or where the employee fails to report his overtime hours. See *Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 718 (2d Cir. 2001); *Holzapfel*, 145 F.3d at 524; 29 C.F.R. §§ 785.11-.12.

Like the employers in *Forrester* and *Chao*, CMH should have known that Routzahn was working additional hours. CMH substantially increased Routzahn's responsibilities at a time that she had already been working overtime hours. Routzahn told her supervisor she could not possibly complete her assignments in a 40 hour work week. Champagne also attempted unsuccessfully to obtain additional staff to help Routzahn. In addition, Champagne had actual knowledge that Routzahn was working overtime to complete some assignments and surmised that she was working additional overtime on the weekends. Further, because of the decision to allow Routzahn to work from home, CMH put itself in a position of not knowing when Routzahn was or was not working. Such ignorance is less an indicator that Routzahn deliberately hid her overtime work from CMH and more an indication that due to staffing shortages, turnover, and leadership transition, senior management of the office had other priorities. Additionally, regardless of CMH policy, Routzahn reasonably interpreted the directive to freeze overtime as a tacit directive to work overtime without reporting it.

Routzahn bears the burden of proof in this matter to show by a preponderance of the evidence that she is entitled to the wages she claims to be due. *Berry v. KRTV Communications* (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112. In this matter, Betty Routzahn carried her burden to show that she is owed for 213 hours of unpaid overtime premium pay.

## B. Other Remedies

Montana law provides for the payment of a penalty by an employer who has failed to pay overtime compensation in accordance with the Montana's minimum wage and overtime laws. Mont. Code Ann. § 39-3-206. However, Mont. Code Ann. § 39-2-408 also provides:

The provisions of this part are in addition to other provisions provided by law for the payment and collection of wages and salaries and are applicable to employees of the state of Montana, except that the penalty provisions of 39-3-206 do not apply to minimum wage and overtime claims that are subject to the Fair Labor Standards Act of 1938, in which case liquidated damages as determined under the Fair Labor Standards Act of 1938 apply.

Thus, a determination of whether Routzahn's claim is subject to the FLSA is required.

The overtime provisions of the FLSA apply to enterprises engaged in commerce or the production of goods for commerce with a gross sales volume of \$500,000.00 or more, or is engaged in the operation of certain hospitals or institutions or is an activity of a public agency. 29 U.S.C. § 203(s)(1). They also apply to employers with individual employees engaged in commerce. 29 U.S.C. § 207(a)(1). The record does not address whether CMH as an entity is subject to the FLSA. Nevertheless, many of the duties performed by Routzahn as payee are duties in interstate commerce, particularly her duties working with the bank accounts of CMH clients and paying bills by writing checks on those accounts.

The FLSA entitles employees owed wages to liquidated damages for an employer's failure to pay overtime premium.

Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid . . . wages . . . and in an additional equal amount as liquidated damages.

29 U.S.C. § 216.

For a number of years, the Portal to Portal Act has altered the liquidated damages provision of the FLSA, pursuant to 29 U.S.C. § 260:

In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act.

Therefore, Routzahn is entitled to liquidated damages unless the employer demonstrates it acted reasonably and in good faith. To demonstrate “good faith” under this exception, an employer must show “the act or omission giving rise to [the violation] was in good faith and that [it] had reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA].” *Brock v. Shirk* (9th Cir. 1987), 833 F.2d 1326, 1330. This test has both subjective and objective components. *Id.* Good faith requires an honest intention and no knowledge of circumstances which might have put the employer on notice of FLSA problems. *Id.* See also *Key West, Inc. v. Winkler*, 2004 MT 186, ¶¶ 29-32, 322 Mont. 184, 191, 95 P.3d 666, 671.

For the same reasons discussed regarding whether Routzahn in fact worked the hours she claims, it is clear that CMH was on notice of these FLSA problems. Champagne, manager of the CMH operations in Helena, was clearly aware that Routzahn was working more than 40 hours per week but failing to report it on her time sheet. Champagne’s knowledge is attributable to CMH. Routzahn is entitled to liquidated damages in an amount equal to the amount of her unpaid overtime pay.

## 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. Betty Routzahn was engaged in interstate commerce in the performance of her work at the Center for Mental Health and her employment was therefore subject to the provisions of the Fair Labor Standards Act. 29 U.S.C. § 207(1).

3. Between October 2009 and December 2010, Betty Routzahn worked 213 hours in excess of 40 hours per week for the Center for Mental Health. The Center for Mental Health therefore owes Betty Routzahn unpaid overtime premium in the amount of \$4,258.94.

4. The failure of the Center for Mental Health to pay overtime premium to Betty Routzahn was not in good faith or based on reasonable grounds. The Center for Mental Health therefore owes Betty Routzahn liquidated damages in the amount of \$4,258.94.

## VI. ORDER

The Center for Mental Health is hereby ORDERED to tender a cashier's check or money order in the amount of \$8,517.88, representing \$4,258.94 in unpaid overtime premium pay and \$4,258.94 in liquidated damages, made payable to Betty Routzahn. CMH may deduct applicable withholding taxes from the portion representing wages, but not from the portion representing liquidated damages.

All payments required above shall be mailed to the Employment Relations Division, P.O. Box 201503, Helena, MT 59620-1503, no later than 30 days after service of this decision.

DATED this 4th day of April, 2011.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM  
DAVID A. SCRIMM  
Hearing Officer

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. Such an application is not a review of the validity of this Order.