

1. Sundance Lodge, Inc., is a guest ranch that provides fishing, hunting, horseback riding, and hiking. Inside the main lodge there are nine guest rooms in addition to an eating and drinking establishment. There are also four separate cabin units for guests. David E. Wendler has owned the guest lodge since 1990.
2. Terry L. Spaethe and Michael Kidd have lived together as a couple for 14 years. Both have known Wendler for a number of years. In 2000, Spaethe and Kidd moved from California to Montana and made an arrangement with Wendler to live in a tent on the lodge premises. Kidd also resumed working as a general hand and attendant at the lodge.
3. Wendler hired Spaethe on June 16, 2000 as a housekeeper to replace Libby Green after her termination in May 2000. Under the verbal agreement, Spaethe would receive \$600.00 per month. Spaethe would also receive tips over and above her monthly salary and room and board along with Kidd.
4. Within a week following Spaethe's hiring, the full time cook at the lodge, who received \$800.00 per month, left employment unexpectedly. In the past, full time cooks at the lodge started at \$700.00 per month and received a raise to \$800.00 after 30 days of satisfactory performance.
5. Wendler decided not to hire a replacement cook. He left Spaethe in charge of cooking details. Spaethe was responsible for preparing meals from the menu including short order meals, dinner meals and salad preparations. In addition to her cooking responsibilities, Spaethe continued to do her housekeeping chores which included cleaning, bookkeeping, ordering supplies, waiting tables and guest registration.
6. In November 2000, Spaethe prepared and helped serve a Thanksgiving meal for a party of 50 customers in November 2000. Spaethe continued to be responsible to prepare meals for customers who ate at the lodge.
7. Wendler continued to pay Spaethe at a monthly rate of \$600.00 through November 2000.
8. Conflicting testimony was given regarding Spaethe's pay she was to receive under the employment agreement upon being assigned the full range of cooking responsibilities at the lodge.
9. Spaethe expected Wendler to pay her the same wages customarily received by the cooks in the past (\$800.00). Wendler agreed to pay her \$800.00 per month. Wendler would have continued to pay the cook \$800.00 per month had he not left work unexpectedly. Under the work agreement, Spaethe was to receive \$800.00 per month while performing the primary cooking details at the lodge. She began that work effective July 1, 2000.
10. Spaethe and Wendler did not discuss her wages beginning in December 2000 when the lodge begins its winter business season. During that season, overnight guest reservations were nearly non-existent and eating and drinking establishment activities were substantially reduced. Spaethe did understand that her wages would be significantly reduced during the slow seasonal period

beginning in December 2000. She terminated her employment effective May 1, 2001. She received \$300.00 per month beginning December 1, 2000 to May 1, 2001. Wendler depended on Spaethe to cook for customers at the lodge from December 2000 through April 2001. He did not agree to pay her more than \$300.00 per month for December 2000 through May 2001.

11. Wendler did not keep any records or keep track of the tips paid to dining room and kitchen staff employees. The general policy was for the cash tips received at the lodge by the employees to be placed in a tip bag and shared evenly at the end of each week or pay period. If tips went on credit cards and there was not enough cash on hand, at the end of each month Wendler would write out a check in the amount of the tips from the credit cards. The employee who cashed the check while making the lodge monthly bank deposit then distributed the tips.

12. Receipts from the Sundance Lodge (Claimant's Exhibit 6) show that Spaethe served customers who paid for their service by credit card that included the following gratuity amounts:

Date	Customer Name	Balanced Owed	Gratuity Amount	Grand Total
9/23 - 9/24/00	Ken Snodgre	\$85.66	\$20.00	\$105.69
7/9 - 7/11/00	Bume	\$211.82	\$12.00	\$223.82
7/14 - 7/16/00	Connie Mechan	\$248.84	\$25.00	\$273.84
7/2 - 7/5/00	Peder Hildre	\$276.35	\$30.00	\$306.35
6/29 - 7/4/00	Clay and Sherrie Bryant	\$1,533.15	<u>\$200.00</u>	\$1,733.15
			\$287.00	

13. Spaethe did not receive the gratuity amounts from these receipts (\$287.00). Wendler had no records to show that Spaethe ever received the gratuities, nor did he have any personal knowledge that they were paid.

IV. DISCUSSION/RATIONALE

Montana law requires employers to pay employees wages when due and in no event more than 15 days following termination of employment. § 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.

Spaethe claims that she is entitled to unpaid wages for services performed under the terms and conditions of employment as follows:

1. \$200.00 per month for seven months (June through December) upon assuming primary cooking responsibilities

2. \$100.00 per month from December through April while she was performing cooking duties during the winter or off-season

3. \$287.00 for unpaid gratuities she earned

1. SALARY ENTITLEMENT WHILE COOKING

Spaethe assumed the full range of food preparation and cooking details after the full time cook left work at the end of June 2000. Wendler assigned all the cooking details to Spaethe. Spaethe accepted the cooking responsibilities in addition to her housekeeping duties with the understanding that she would receive a \$200.00 per month increase to \$800.00, the customary salary for the cook's position. Spaethe repeatedly confronted Wendler after she continued to be paid \$600.00 per month and he reassured her that he would pay her the appropriate salary differential when he could. Spaethe is entitled to the wage differential of \$200.00 per month once she inherited the cooking/food preparation details when the full time cook terminated.

Wendler testified that he had never promised Spaethe an increase in pay to \$800.00 even though she assumed the responsibility to prepare and cook the full menu after the full time cook had terminated. Wendler said he did not adjust Spaethe's wages after she assumed the cooking tasks because he considered her primary duties to be that of a housekeeper. He testified that any added cooking tasks assigned to Spaethe were not significant enough to warrant a pay increase due to the expected slow volume of business at the lodge during the summer/fall fire season and the winter season. Spaethe testified that Wendler did promise her a raise to \$800.00 a month for assuming the cooking details. When she continued to receive \$600.00 a month, she confronted him on several occasions, and he assured her that he would pay the differential (\$200.00) at a later date when he had the resources to cover the additional wages. Kidd testified he had heard Wendler promise to pay Spaethe \$800.00 per month. Spaethe's testimony was corroborated by Kidd, who also observed the events in question. Spaethe's testimony was more credible.

Wendler did not present employer records to show the date the full time cook left work or the date Spaethe assumed his tasks. Wendler could only vaguely estimate from memory that he thought that the cook quit in either August or September 2000. Spaethe testified that she had to begin her role as cook at or near the end of June 2000, just shortly after being hired on as a housekeeper (June 16, 2000). Spaethe's testimony that she could specifically recall starting her duties as a cook at the lodge was the most reliable.

Spaethe alleged she was entitled to an additional wage differential of \$200.00 per month for performing the cooking details from June through December for a total of \$1,400.00 (\$200.00 x 7 months). The record shows that she did not begin her full time cooking duties until the end of June 2000. The record further shows that she ceased working in the full time capacity at the end of November with the beginning of the lodge's designated winter season. Spaethe is owed the \$200.00 wage differential for July through November 2000 (five months). Spaethe is entitled to wages under the work agreement in the amount of \$1,000.00 (\$200.00 x 5 months).

2. SALARY ENTITLEMENT DURING THE WINTER SEASON

Spaethe amended her claim for wages to include an additional \$100.00 per month during the lodge's winter season beginning in December 2000 through April 2001 because she had prepared food orders during that period. There were never any discussions or agreements between Spaethe and Wendler concerning wages other than free room and board and an additional \$300.00 monthly salary beginning in December 2000 when the business activity at the lodge decreased significantly. Wendler never promised Spaethe a wage differential for any food preparation she may have performed during the winter season. She received \$300.00 per month and room and board accommodations during the months of December 2000 through April 2001. There was no breach in the terms and conditions of employment concerning Spaethe's pay during the winter season. She is not entitled to additional wages for that period.

3. ENTITLEMENT TO GRATUITIES

Wendler did not keep records of gratuities received by employees at the Sundance Lodge. He could not provide records at the hearing to show whether Spaethe had already received the tip amounts she claimed.

In Montana, the employer not only has the burden of proving that an individual is exempt and not subject to overtime coverage, but also the record-keeping responsibility under state and federal law. See Roan v. Rosebud County, 627 P.2d 1222 (Mont. 1980). 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. In Garsjo v. Department of Labor and Industry, 172 Mont. 182, 562 P.2d 473 (Mont. 1977), the Montana court adopted the standard set forth first in Anderson v. Mt. Clemens Pottery, 328 U.S. 680 wherein the U.S. Supreme Court held:

". . . [W]here the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on the employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and the extent of the work as a matter of just and reasonable inference . . ."

The Montana court then went on to set a procedure for determining how to address no records, or inadequate records, adopting the reasoning of the Michigan Supreme Court in Purcell v. Keegan, 103 N.W.2d 494:

"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."

Under the terms of the work agreement, Spaethe is entitled to receive tips designated by the customer on their dining room expense receipts. The record supports a finding as a matter of just and reasonable inference that Spaethe did not receive gratuities in the amount \$287.00 left by customers she served who paid for their service by credit card. Spaethe's testimony that she did not receive the appropriate gratuities was credible. Wendler primarily disputed her claim for the gratuities because customer tips had never created problems at the lodge in the past, and Green testified she received her tips. However, Wendler had no supporting records and no personal knowledge that Spaethe ever received the credit card tip amounts.

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 § 39-3-201 et seq. MCA. State v. Holman Aviation, 176 Mont. 31, 575 P.2d 925 (1978).

2. David E. Wendler individually and/or d/b/a Sundance Lodge Montana, Inc., an inactive corporation since December 3, 1990, violated §§ 39-3-204 and 39-3-205, MCA, by failing to pay Terry L. Spaethe wages when due. David E. Wendler individually and/or d/b/a Sundance Lodge Montana, Inc., an inactive corporation since December 3, 1990, owes Spaethe \$1,287.00 in wages.

3. David E. Wendler individually and/or d/b/a Sundance Lodge Montana, Inc., an inactive corporation since December 3, 1990, is liable for 55% penalty for failure to pay wages when due. Under § 39-3-206, MCA, David E. Wendler individually and/or d/b/a Sundance Lodge Montana, Inc., an inactive corporation since December 3, 1990, owes Terry L. Spaethe a penalty of \$707.85.

VI. ORDER

David E. Wendler individually and/or d/b/a Sundance Lodge Montana, Inc., an inactive corporation since December 3, 1990, is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,994.85, representing \$1,287.00 in wages and \$707.85 in penalty, made payable to Terry L. Spaethe, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision.

DATED this 24th day of September, 2002.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ MICHAEL T. FURLONG

MICHAEL T. FURLONG
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.

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 § 39-3-212, MCA. Such an application is not a review of the validity of this Order.