

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM	)	Case No. 2104-2001
OF LINDA L. ROGERS,	)	
Claimant,	)	
	)	FINDINGS OF FACT;
vs.	)	CONCLUSIONS OF LAW;
CLIFFORD W. KIMERLY,	)	AND ORDER
d/b/a BAD BUBBAS BBQ AND	)	
ROADHOUSE SALOON	)	
Respondent.	)	

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**I. INTRODUCTION**

Michael T. Furlong conducted a telephone hearing in this matter on October 16, 2001. The claimant was present (pro se). The respondent was represented by Edward Murphy, attorney at law. Respondent's exhibit A was entered into evidence without objection. Prior to the hearing, the parties stipulated to the admission of department case file documents marked 000001 through 000022.

The claimant filed her claim on May 8, 2001, alleging she was owed \$4,926.00 in regular and overtime wages for work performed for the period from January 2, 2001, until March 1, 2001.

**II. ISSUE**

Whether the claimant is owed wages, pursuant to §§ 39-3-204, 39-3-205, and 39-3-405, MCA, and penalty pursuant to §39-3-206. MCA.

**III. FINDINGS OF FACT**

1. Bad Bubbas BBQ and Roadhouse Saloon is a bar and restaurant located in Lolo, Montana. During the period from January 2, to March 1, 2001, the business was owned by Clifford Kimerly. Adjacent to the establishment is a five unit motel, also owned by Kimerly.
2. Between January 2, and March 1, 2001, Kimerly was in the process of selling the business to Farhad Kharmenan, who resides in Missoula. The business had been closed for some time prior to January 2001. Kharmenan wanted to buy the business and get it operating again. Kimerly was employed out of state at the time. As a result, he left Kharmenan in charge of the day to day operations beginning January 2001, while the sale was pending.
3. The claimant had work experience as a bartender and bar manager. She had been an acquaintance of Kharmenan for some time. In December of 2000, Kharmenan approached

Rogers about managing Bad Bubbas and the adjacent motel. Rogers indicated that she was interested in the position.

4. Sometime prior to January 2, 2001, Kharmenan introduced Rogers to Kimerly to discuss the prospects of her managing the establishment. Kimerly offered Rogers employment as bar manager to begin immediately.
5. Rogers accepted the offer of employment from Kimerly. Under the terms and conditions of employment, she was to manage the bar, restaurant, and motel by herself. Kimerly and Rogers did not initially agree as to the wages she would receive and decided to discuss her pay at a later time. At some point, Kimerly offered her \$1,200.00 per month and Rogers continued to work for that salary.
6. From January 2, through March 1, 2001, Rogers reported for duty and worked as manager of Bad Bubbas. She made a personal record of the hours she worked on a daily basis. (Exhibits 12 and 13). She kept the time records on the counter next to the cash register in the establishment.
7. Roger's time records show she worked the following hours:

WORK WEEK	REGULAR HOURS	OVERTIME HOURS	TOTAL HOURS
1 Rogers began recording her time cards on Tuesday, January 2, 2001, her first day of employment. Since no work week was established under the hiring agreement, her work week is established as beginning Tuesday through Monday during the course of her employment.			
1/2/01 - 1/8/01	40	37.5	77.5
1/9/01 - 1/15/01	40	49.5	89.5
1/16/01 - 1/22/01	40	45.5	85.5
1/23/01 - 1/29/01	40	36.5	76.5
1/30/01 - 2/5/01	40	26.0	66.0
2/6/01 - 2/12/01	40	22.0	62.0
2/13/01 - 2/19/01	40	30.0	70.0
2/20/01 - 2/26/01	40	27.5	67.5
2/27/01 - 3/1/01	26	00.0	26.0
TOTAL	346	274.5	620.5

8. Neither Kimerly nor Kharmenan kept a record of the time Rogers worked. Because Kimerly was working out of state, he returned to Montana to inspect the establishment only about once every three weeks. Kimerly had seen Rogers working during his visits. He does not dispute the fact that she was working at the establishment from January 2 to March 1, 2001, at which time the business closed.

Rogers did not receive regular wage payments for the work she performed during her employment. However, Kimerly and Kharmenan allowed her to take draws from the cash register since she was not being paid on a regular basis. She was left to her own discretion to take the draws and kept no records of the money she withdrew. Rogers took \$1,000.00 in authorized draws.

#### IV. DISCUSSION/RATIONALE

The record shows that Linda L. Rogers was an employee, under §39-3-301, MCA, of Clifford W. Kimerly, d/b/a Bad Bubbas BBQ and Roadhouse Saloon.

Montana law requires that employers pay employee wages when due in accordance with the employment agreement. §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.

When Rogers filed her wage claim, she calculated her straight time and overtime wages based on a regular hourly rate of \$8.00. She had received \$8.00 per hour during her previous employment as a bar manager and believed she was entitled to the same wage while working at Bad Bubbas. The only evidence of an agreement between the parties as to Rogers' salary is Kimerly's statement that he offered her \$1,200.00 per month. Although Rogers believed she should be paid more, she continued to work after Kimerly offered that amount. Under the terms and conditions of employment, Rogers' salary was \$1,200.00 per month. This equals a regular hourly rate of \$6.92 per hour (173.3 work hours per month). Rogers is also entitled to time and a half for all hours worked in excess of 40 hours per week. §39-3-405, MCA.

The burden of proof regarding hours worked is on the employer, not the employee. See Garsjo v. Department of Labor & Industry, 172 Mont. 182, 562 P.2d 473 (Mont. 1977); and ARM 24.16.1012. If the employer fails to record the employee's hours, reference is then made to the employee's records. However, the employee is not to be penalized for failing to keep precise time records.

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

Garsjo, 172 Mont. 182, 562 P.2d 476, citing Anderson v. Mt. Clemens Pottery, 328 U.S. 680, 687 (1946).

The Hearing Officer has an obligation to determine, if possible from the evidence presented, the number of hours Rogers worked. Respondent did not keep any pay records during the time she performed services. Therefore, Respondent failed in its burden to provide an accurate and adequate accounting of Rogers' work time, as required by law. The time records presented by Rogers from January 2 through March 1, 2001, are sufficient to establish a just, reasonable and reliable inference that she had worked the hours as shown. Rogers time records show she worked 346 regular time hours and 274.5 overtime hours. Therefore, she earned \$2,394.32 in straight time wages (346 hours x \$6.92), and \$2,849.31 in overtime wages (274.5 overtime hours x \$6.92 x 1.5). This amount is offset by \$1,000.00 for the draws Rogers received. Linda L. Rogers is entitled to \$4,243.63 (\$2,394.32 + \$2,849.31 - \$1,000.00) in wages and overtime wages.

Rogers is also entitled to statutory penalty pursuant to §39-3-206, MCA, and ARM 24.16.7561. In accordance with ARM 24.16.7561, a penalty of 110% of the wages determined is due and owing. Kimerly owes Rogers penalty in the amount of \$4,667.99 (\$4,243.63 x 110%).

## 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. Clifford W. Kimerly violated §§ 39-3-204 and 39-3-205, MCA, by failing to pay Linda L. Rogers wages when due, and §39-3-405, MCA, for failing to pay overtime. Clifford W. Kimerly owes Linda L. Rogers \$4,243.63 in wages.
3. Clifford W. Kimerly is liable for a 110% penalty for failure to pay wages when due. Clifford W. Kimerly owes Linda L. Rogers a penalty of \$4,667.99.

## VI. ORDER

Clifford W. Kimerly is hereby ORDERED to tender a cashier's check or money order in the amount of \$8,911.62, representing \$4,243.63 in wages and \$4,667.99 in penalty, made payable to Linda L. Rogers, 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 31st day of October, 2001.  
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.

DATED this 31 day of October, 2001.  
/s/Carol A. Larkin