STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

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| **IN THE MATTER OF THE WAGE CLAIM OF JANET L. RODGERS**, Claimant, vs. **GM, INC.**, a Montana corporation d/b/a Really Windy's, an Assumed Business Name registered in Montana, Respondent. | ) | Case No. 307-2005<br><br>*Final Agency Decision* |

## I. Introduction

Hearing Examiner Terry Spear convened a contested case hearing on January 24, 2005, in Great Falls, Cascade County, Montana, at the Great Falls Job Service Workforce Center, 1018 7th Street South. Claimant Janet L. Rodgers appeared and testified. Gayle Morris appeared on behalf of the respondent corporation, GM, Inc., and testified. Melody Ross and Lauren Long (formerly Lauren Gabriel), testified. The parties agreed to admit Exhibits 1-75 into evidence.

## II. Issue

The issue in this case is whether GM, Inc., a Montana Corporation, doing business as Really Windy's, an assumed business name registered in Montana, owes wages to Janet L. Rodgers for work she performed, as alleged by her complaint, and for either a penalty or liquidated damages, as provided by law.

## III. Findings of Fact

1. In the spring of 2004, GM, Inc., a Montana corporation for which Gayle Morris was President and managing agent, operated a bar named "Really Windy's" (a Montana registered assumed business name) on its premises in Great Falls. The corporation had previously leased a portion of the premises to a third party, who operated a restaurant on the premises. That arrangement terminated, and the corporation was unable to find anyone willing to enter into a new lease arrangement to operate a restaurant on the premises. The absence of a restaurant on the premises reduced the profitability of the bar. The corporation decided to open its own restaurant operation on the premises.

2. In April 2004, the corporation hired Janet L. Rodgers to work in the effort to open a restaurant on the premises and to "run" the restaurant. Rodgers and the corporation agreed that she would be paid $9.00 per hour. She kept track of her working hours, and submitted a time card or sheet documenting the hours she had worked. The corporation paid her based upon the time information she submitted.

3. Rodgers frequently worked more than 40 hours a week, in the restaurant and in the bar, for the corporation. Her work initially involved renovation and preparation of the restaurant for opening, which ranged from procuring needed equipment (tables and chairs, etc.) to doing manual labor redecorating the restaurant. Once the restaurant opened, she supervised other employees (Morris made the hiring and wage decisions for those employees), prepared food, waited tables, did clean up and generally performed all necessary tasks. She submitted all the working hours for which she expected to be paid. The corporation paid her $9.00 for each hour that she reported, whether working in the bar or the restaurant.

4. The corporation never obtained a completed W-4 or other withholding documentation from Rodgers and took no deductions of any kind from her wages. She was paid the full $9.00 per hour for each two week pay period until the pay period ending July 25, 2004. Rodgers knew that the restaurant was just beginning, and believed that the corporation might have difficulty paying overtime wages. When the corporation hired her, she and Morris discussed eventually negotiating a percentage of the restaurant's net profit that she would receive for her work, but agreed she would receive $9.00 per hour until the restaurant was a going concern. Until July 25, 2004, Rodgers had not expected nor had she demanded overtime pay, because the restaurant was not yet a going concern, and she did not know how the negotiations regarding her pay would commence or what they might entail.

5. For the pay period ending July 25, 2004, the corporation took deductions from Rodgers' gross pay of $1,174.50 for Social Security, Medicare and federal and state income taxes ($269.31, in total). An additional deduction of $446.77 was taken for food the corporation provided to Rodgers, in accord with an agreement reached between Rodgers and Morris. The corporation did not put her actual Social Security number on the deduction statement, because it did not yet have it. As of the date of hearing, the corporation had not provided Rodgers with either a W-2 or a 1099 documenting her wages paid during 2004.

6. Rodgers decided that if the corporation was going to begin following the law by taking deductions, it could and should also pay her for the overtime hours she had worked. She requested overtime pay for her overtime hours to date. Gayle Morris, on behalf of the corporation, refused. He told her that he did not pay overtime and she would have to "file a claim" if she expected any such pay. As a result, Rodgers left her employment with the corporation at the end of July 2004 and filed her wage claim. This contested hearing ultimately resulted.

7. Over her entire employment with the corporation, beginning April 27, 2004, and ending July 29, 2004, at a wage of $9.00 per hour, Rodgers worked 601 hours, of which 150 hours were in excess of 40 hours worked in particular weeks, for which she earned $13.50 per hour. The corporation paid her $4,076.42 in total wages. She earned $6,084.00 in regular and overtime wages. Therefore, the corporation owes her $2,007.58 in unpaid wages.

8. On August 13, 2004, Rodgers filed her wage and hour claim with the Department of Labor and Industry, alleging that she was entitled to overtime wages for the hours in excess of 40

per week that she had worked for the corporation. The department determined that the corporation owed Rodgers overtime premium pay. On redetermination, the department determined that the corporation owed Rodgers $2,007.58 in unpaid wages, and gave notice that unless the corporation paid Rodgers the wages due and the 55% penalty assessed by November 29, 2004, a statutory penalty of 110% would apply. That maximum penalty does apply, at $2,208.34.

## IV. Opinion

Montana law requires employers to compensate employees for all hours worked. Mont. Code Ann. § 39-2-204(1). An employer may not employ any employee for a workweek longer than 40 hours unless the employee receives compensation for employment in excess of 40 hours in a workweek at a rate of not less than 1½ times the hourly wage rate at which the employee is employed. Mont. Code Ann. § 39-4-405(1). Rodgers proved that she was an employee who did work more than 40 hours in many weeks, and did not receive full pay (including overtime premium) for the hours she worked.

Rodgers testified that the spread sheet from the department's redetermination accurately stated her hours worked. The corporation did not rebut this testimony. She proved the numbers of hours she worked during her employment.

The department must assess a penalty against an employer who fails to pay an employee wages due as specified under Montana law, of up to 110% of the wages due and unpaid. Mont. Code Ann. § 39-3-206(1). For unpaid overtime premium wages, the maximum 110% penalty applies unless both no special circumstances under Admin. R. Mont. 24.16.7556(1) apply (none do here) and the employer pays the wages and 55% penalty determined to be due by the department,[1] by the date set in the (in this case) redetermination. Admin. R. Mont. 24.16.7561(1). The corporation did not make that payment, so the maximum penalty applies to the overtime premium wages unpaid.

*Defenses Interposed by the Corporation: Self-Employment During Start-Up*

The corporation argued that Rodgers was self-employed during the start-up period until the restaurant opened.[2] The argument was unpersuasive. Although the explanation for tardy commencement of withholding (belatedly to get Rodgers on the payroll for workers' compensation insurance coverage purposes) was credible, its extension (that somehow Rodgers was not an employee until some date after the restaurant opened) was inconsistent with the corporation's payment to her of an hourly wage from the beginning. Morris explained that the

[1] The statute refers, by "determination," to administrative determinations or redeterminations issued before the case proceeds to contested case hearing, as the regulations make plain.

[2] In the companion case, *Ross v. GM, Inc.*, Case No. 308-2005, Morris testified clearly and specifically that he did not intend for the corporation to hire Ross until the restaurant actually opened. That testimony was unpersuasive in that case, and to the extent that same defense was interposed in this case by testimony as well as argument, equally unpersuasive here. Rodgers was an hourly wage employee of the corporation for the entire time that the corporation paid her $9.00 per hour for her work.

corporation paid the hourly wage before (according to his argument) Rodgers was an employee because it had too much invested in trying to open the restaurant to risk Rodgers' immediate departure. This explanation was inadequate to negate the finding, drawn from the clear evidence that the corporation and Rodgers acted as if they were employer and employee from the very beginning, that the corporation and Rodgers were employer and employee from the very beginning.

*Defenses Interposed by the Corporation: Exempt Employee*

The corporation contended it hired Rodgers to manage the restaurant, and she was therefore exempt from the overtime pay law. The overtime pay requirement does not apply to an individual employed in a *bona fide* executive (i.e., managerial) capacity, as defined by department regulations. Mont. Code Ann. § 39-4-406(1)(j). There is a five-part test to determine whether an employee works in a *bona fide* executive capacity, Admin. R. Mont. 24.16.201, which was not met here.

The first part of the test requires that Rodgers' primary duty consisted of the performance of office or non-manual work directly related to the employer's general business operations. To the extent that she was "running" the restaurant, this was performance of office or non-manual work related to the business operations. Giving the corporation the benefit of the doubt, Rodgers met this part of the test.

The second part of the test required that Rodgers customarily and regularly exercised discretion and independent judgment. Morris hired her for her experience in the restaurant business and relied upon her to address the details, even though he retained control over decisions. Rodgers may have met this part of the test.

The third part of the test is that Rodgers regularly and directly assisted a proprietor or performed, under only general supervision, specialized or technical work requiring special training, experience, or knowledge. With regard to the restaurant operation, she met this part of the test.

The fourth part of the test is that Rodgers devoted less than 40 percent of her weekly working hours to activities not directly and closely related to the performance of her primary duty (running the restaurant). The evidence did not prove that she spent less than 40 percent of her time as a regular employee (rather than manager) in the restaurant and the bar.

The fifth part of the test is that Rodgers receive a salary (of at least a minimum amount) rather than hourly wages. She clearly did not meet this part of the test.

Admin. R. Mont. 24.16.201 goes on to state that "an employee who is compensated on a salary basis at a rate of not less than $200 per week, exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which he is employed or a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all of the requirements of this section." Again, since Rodgers received an hourly

wage rather than a salary, this provision does not apply to her. Although most weeks she earned more than $200.00 a week, it was based on an hourly wage, not a salary. Even if the evidence satisfied all of the first four parts of the test, which it did not, the payment of hourly wages instead of salary to Rodgers was fatal to the exempt employee defense.

*Defenses Interposed by the Corporation: Separate Employment in the Restaurant*

The corporation presented this defense more fully in the companion Ross case. To the extent the corporation also interposed the defense, though with even less strength, that Rodgers had two separate jobs, in two separate businesses, and therefore neither business owed overtime, the legal merits of such a defense are irrelevant, because the corporation was the sole employer for both operations. There was no separate entity operating the restaurant. Rodgers worked for the corporation, in both operations. If there had been two corporations, or if Morris individually owned and operated the restaurant, leasing the premises from the corporation, then this defense would require a legal analysis. As it stands, the corporation was Rodgers' employer for all of her hours of work.

*Defenses Interposed by the Corporation: Untimely Overtime Claim or Waiver*

The corporation also contended that it should not, after the fact, be liable for overtime wages that Rodgers never claimed. Morris argued that had he known she would later claim overtime, he would not have allowed Rodgers to work more than 40 hours in a week. Rodgers acknowledged that she did not ask for or expect overtime wages during the weeks she worked more than 40 hours.

Although the corporation and Rodgers had an understanding that when the restaurant was a going concern, there would be further negotiations about an increased wage, there were no binding promises regarding what would happen. Indeed, there was no evidence that the corporation had any legal obligation to increase Rodgers' wages or augment them (with, for example a percentage of net profits from the restaurant operation) under any future circumstances. Thus, in analyzing the legal merit of the defense that Rodgers made an after-the-fact overtime claim which was either too late or which she had already waived, the status of Rodgers was that of an hourly wage employee of the corporation.

Rodgers, by law, may recover all wages and penalties due her from the corporation for a period of 2 years prior to her last date of employment by the corporation. Mont. Code Ann. § 39-3-207(2). Rodgers could not waive her right, established as a matter of public policy, to higher wages for her overtime work. *In re Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232, 234-35. Her failure to ask for pay for her overtime until she left her employment does not estop her from asserting her wage claim now. *Lewis v. B&B Pawnbrokers, Inc.*, ¶¶24-25, 1998 MT 302, 292 Mont. 82, 968 P.2d 1145.

*Defenses Interposed by the Corporation: No Penalty on Overtime Wages*

The corporation argued that the statutory penalty applies to wages unpaid under Part 2, Title 39. Mont. Code Ann. § 39-3-206(1). Overtime wages are mandated by Part 4, Title 39.

Mont. Code Ann. § 39-4-405(1). However, the definitions of "wages" include, under both parts, money or compensation due an employee from the employer. ***Compare*** Mont. Code Ann. § 39-3-201(6)(a) ***to*** § 39-3-402(7)(a). The penalty provision thus applies to overtime wages.

The corporation also argued that the statutory penalty only arises when the employer has been found guilty of a misdemeanor. However, the penalty provision is in a separate sentence, which is properly read in the disjunctive:

> An employer who fails to pay an employee as provided in this part or who violates any other provision of this part is guilty of a misdemeanor. A penalty must also be assessed against and paid by the employer . . . .

Mont. Code Ann. § 39-3-206(1).

Neither party said or thought anything about the applicable overtime laws when Morris and Rodgers agreed upon her employment for the corporation. If they had, perhaps Morris would have offered a lower base wage, with overtime. Perhaps Rodgers would have accepted such an offer. That is not what transpired, and the impact of the mutual silence of the parties regarding overtime cannot now be ameliorated. They agreed upon $9.00 per hour. Since Rodgers was an employee, the result inevitably follows from application of Montana law that she is entitled to overtime hourly pay of 1.5 times her normal hourly wage for all hours more than 40 she worked each week. The corporation presented numerous ingenious arguments and interpretations of the law, but the applicable law is clear. The corporation may have acted entirely in good faith, but its liability arises despite that fact. Good faith is not a valid defense to imposition of the statutory penalty. *Rosebud County v. Roan* (1981), 192 Mont. 252, 627 P.2d 1222, 1228.

## V. Conclusions of Law

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

2. GM, Inc., owes Janet L. Rodgers the sum of $2,007.58 in overtime wages earned and unpaid. Mont. Code Ann. §§ 39-3-204(1) and 39-3-405(1).

3. GM, Inc., failed to pay Rodgers the overtime wages earned and unpaid within the time specified within the redetermination, and therefore owes Rodgers an additional $2,208.34 as a statutory penalty of 110% of the unpaid wages it owes. Mont. Code Ann. § 39-3-206(1); Admin. R. Mont. 24.16.7556(3).

## VI. Order

GM, Inc., is ORDERED to tender a cashier's check or money order for $4,215.92 ($2,007.58 in overtime wages and $2,208.34 in penalty), payable to JANET L. RODGERS, 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: February 4, 2005.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR
Terry Spear
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 this decision. See also Mont. Code Ann. § 2-4-702.**

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

JANET L. RODGERS
319 MCIVER RD
GREAT FALLS MT 59401

GM INC
ATTN: GAYLE MORRIS
PO BOX 6933
GREAT FALLS MT 59406

DATED this 4th day of February, 2005.

/s/ SANDY DUNCAN
Legal Secretary, Hearings Bureau