STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF MELODY D. ROSS, Claimant, vs. **GM, INC.**, a Montana corporation d/b/a Really Windy's, an Assumed Business Name registered in Montana, Respondent.	)	Case No. 308-2005 *Final Agency Decision*

Hearing Examiner Terry Spear convened a contested case hearing on January 31, 2005, in Great Falls, Cascade County, Montana, at the Great Falls Job Service Workforce Center, 1018 7th Street South. Claimant Melody D. Ross appeared and testified. Gayle Morris appeared on behalf of the respondent corporation, GM, Inc., and testified. Janet Rodgers and Lauren Long (formerly Lauren Gabriel), testified. The parties agreed to admit Exhibits 1-56 into evidence.

During her testimony at hearing, Ross objected to the hearing because the corporation failed to file any request for relief, and objected to the testimony of Long because the corporation failed to file a timely list of its witnesses. The hearing examiner overruled the former objection because the previous filings gave Ross clear notice that the corporation objected to paying her any additional wages (which was the relief it requested). The hearing examiner overruled the latter objection because the corporation did send a timely list of its witnesses to Ross, albeit bearing the wrong claim number (307-2005, the case number of Janet Rodgers' wage claim against GM, Inc., heard on January 24, 2005), and Long testified during the Rodgers hearing, in the presence of Ross (a witness during that hearing), so no unfair surprise resulted to Ross from Long testifying in this hearing.

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 Melody D. Ross 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, the corporation operated a bar 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 Melody D. Ross, to work in the effort to open a restaurant on the premises and work as a bartender in the bar. Ross 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. After the restaurant opened, Ross volunteered to work in the restaurant as well as in the bar. The corporation agreed, and she began to work in the restaurant as well as in the bar. She frequently worked more than 40 hours a week, in the restaurant and in the bar, for the corporation. She submitted all the working hours for which she expected to be paid. Those working hours included regular shifts as a bartender as well as time spent working in the bar and the restaurant at times when she was not working her bartending shifts. The corporation paid her $9.00 for each hour that she reported.

4. The corporation did not distinguish between hours Ross worked in the restaurant and hours she worked in the bar. There was no separate legal entity operating the restaurant. There were no separate time keeping documents regarding employment in either operation. There were no separate checks paying wages earned in either operation. The corporation employed all of the workers in both operations.

5. The corporation never obtained a completed W-4 or other withholding documentation from Ross. She was paid the full $9.00 per hour for each two week pay period until the pay period ending July 25, 2004. 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 paying her at $9.00 per hour until the restaurant was a going concern. Ross did not know how the corporation might report the expense of her wages, for its tax purposes. She had not thought about it. She also had not thought about whether she was entitled to any overtime pay, and had not expected nor demanded overtime pay.

6. Before the corporation paid Ross for the pay period ending July 25, 2004, Morris and Long had talked with Ross about filling out a W-4. She responded that she was currently in the process of getting a divorce and did not want to fill out a W-4 until after that process was finished. For the pay period ending July 25, 2004, the corporation took deductions from Ross' gross pay of $1,120.50 for Social Security, Medicare and federal and state income taxes ($253.79, in total). It did not put her Social Security number on the deduction statement, because it did not yet have it.

7. Ross 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. As a result, Ross left her employment with the corporation at the end of July 2004 and filed her wage claim. This contested hearing ultimately resulted.

8. Over her entire employment with the corporation, beginning April 27, 2004, and ending July 29, 2004, at a rate of $9.00 per hour, Ross worked 589.3 hours, of which 135 hours were in excess of 40 hours worked in particular weeks. The corporation paid her $3,354.13 in total wages. She earned $4,088.70 in wages for her regular hours (at $9.00 per hour) and $1,822.50 in overtime premium wages (at $13.50 per hour), for a total of $5,911.20. Therefore, the corporation owes her $2,557.07 in unpaid wages, $734.57 in regular wages and $1,822.50 in overtime premium wages.

9. On August 13, 2004, Ross 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 Ross overtime premium pay. On redetermination, the department determined that the corporation owed Ross $2,557.07 in unpaid wages (both regular wages and overtime wages), and gave notice that unless the corporation paid Ross the wages due and the 15% and 55% penalties assessed on the unpaid regular and overtime wages by November 29, 2004, statutory penalties of 55% (on unpaid regular wages) and of 110% (on unpaid overtime wages) would apply. Those maximum penalties do apply, at a total of $2,408.76, $404.01 in a 55% penalty on unpaid regular wages and $2,004.75 in a 110% penalty on unpaid overtime premium wages.

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). Ross 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.

Ross 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.

For unpaid regular wages above minimum wage, the 55% 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 15% penalty determined to be due by the department,[1] by the date set in the (in this case) redetermination. Admin. R. Mont. 24.16.7566(1). The corporation did not make that payment, so the 55% penalty applies to the regular wages unpaid.

[1] The reference to "determined by" is to administrative determinations or redeterminations issued before the case proceeded to contested case hearing. The department includes in each determination and redetermination a notice of the date by which the payment must be made, and the increased penalty thereafter.

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

The corporation argued that Ross was self-employed during the start-up period until the restaurant opened. Morris' testimony did not establish this fact,[2] and therefore the argument was unpersuasive. Although the explanation for tardy commencement of withholding (belatedly to get Ross on the payroll for workers' compensation insurance coverage purposes) was credible, its extension (that somehow Ross 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 corporation paid the hourly wage before (according to his argument) Ross was an employee because it had too much invested in trying to open the restaurant to risk Ross' immediate departure.[3] This explanation was inadequate to negate the finding, drawn from the clear evidence that the corporation and Ross acted as employer and employee from the very beginning, that the corporation and Ross were employer and employee from the very beginning.

Defenses Interposed by the Corporation: Separate Employment in the Restaurant

The corporation also contended that Ross 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. Ross 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 Ross' employer, and whether it directed her to work in both operations or agreed to "let" her do so after she volunteered, she worked all of her hours as an employee of the corporation.

Defenses Interposed by the Corporation: Untimely Overtime Claim or Waiver

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

---

[2] Morris testified that he did not intend to employ Ross until the restaurant opened, nevertheless, Ross submitted time before the restaurant opened and the corporation paid her at $9.00 per hour. The conduct of the parties established the terms of their employment agreement, whatever Morris' intent. Ross was an employee of the corporation throughout the pertinent time.

[3] In this case, the corporation presented evidence it contended proved that Rodgers and Ross were a "package deal" so that if Ross left Rodgers would also leave. The only evidence is of a comment Ross made during an early controversy between Rodgers and the corporation, to the effect that if Rodgers left, she (Ross) would also leave. Rodgers was the employee Morris hired to "run" the restaurant. There is no evidence that Rodgers ever threatened to leave if Ross did. The explanation that the corporation paid Ross $9.00 per hour wages before the restaurant opened because of a fear that if Ross left then Rodgers would have left, too, and not in performance of an employment agreement was insufficiently supported by the evidence and speculative, amounting at best to an attempt at "spin control" to explain prior self-explanatory conduct.

Although the corporation and Ross 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 Ross' 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 Ross made an after-the-fact overtime claim which was either too late or which she had already waived, the status of Ross was that of an hourly wage employee of the corporation.

Ross, 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). She could not waive her right, 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. Cod 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 Ross agreed upon her employment for the corporation. If they had, perhaps Morris would have offered a lower base wage, with overtime. Perhaps Ross 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 Ross 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 well 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 Melody D. Ross the sum of $1,822.50 in overtime wages earned and unpaid and the sum of $734.57 in regular wages earned and unpaid. Mont. Code Ann. §§ 39-3-204(1) and 39-3-405(1).

3. GM, Inc., did not pay Ross overtime wages and regular wages due within the time specified by the redetermination, and owes Ross an additional $2,004.75 as a statutory penalty of 110% of the unpaid overtime wages and an additional $404.01 as a statutory penalty of 55% of the unpaid regular wages. Mont. Code Ann. § 39-3-206(1); Admin. R. Mont. 24.16.7556(1) and 24.16.7561(1).

VI. Order

GM, Inc., is ORDERED to tender a cashier's check or money order for $4,965.83 ($1,822.50 in overtime wages and $2,004.75 in penalty, $734.57 in regular wages and $404.01 in penalty), payable to MELODY D. ROSS, 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:

MELODY D ROSS
420 DEER DR
GREAT FALLS MT 59404

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

DATED this 4th day of February, 2005.

/s/ SANDY DUNCAN