

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1389-2009
OF JENNIFER K. WOODCOCK,)	
)
Claimant,)	FINDINGS OF FACT
)
vs.)	CONCLUSIONS OF LAW
)
	AND ORDER
)
MONTANA STATE UNIVERSITY-)	
BOZEMAN,)	
)
Respondent.)	

* * * * *

I. INTRODUCTION

Claimant Jennifer Woodcock (Woodcock) appeals from a dismissal of her claim for \$8,019.99 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 November 24, 2009. At the hearing, the claimant represented herself, and the respondent Montana State University (MSU) was represented by Leslie Taylor, university counsel.

Woodcock, John Watts, Susan Alt, Adelle Westrick, Cali Morrison and, Marjorie Old Horn testified under oath. Documents 1-170; Claimant's Exhibits 200-282, 284-402; and Respondents Exhibits A, D and F were admitted into the hearing record. The hearing officer now determines that Claimant's Exhibit 283 is not admitted as it is hearsay. 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

Is the claimant due additional wages and penalty as provided by law?

III. FINDINGS OF FACT

1. Jennifer Woodcock worked at the American Indian Research Opportunity (AIRO) office of Montana State University from September, 26, 2005 until November 14, 2008. Her job title was Administrative Associate III

2. Woodcock filed her wage claim with the Wage and Hour Unit of the Montana Department of Labor and Industry on February 19, 2009. Her claim is subject to the Fair Labor Standards Act because MSU is an employer pursuant to 29 U.S.C. § 205(e).

3. Woodcock originally sought unpaid overtime wages in the amount of \$8,019.99 for the time period of February 11, 2008 to August 29, 2008.

4. MSU later paid Woodcock for 136 overtime hours that it believed were corroborated by other employees or documented in other ways. The total amount paid by MSU was \$2,547.14. MSU paid these additional wages despite the fact that Woodcock did not report or seek approval to work these hours as required by MSU policy. The remaining unpaid wages after MSU's payment is \$5,472.85.

5. Woodcock was being considered for a promotion to a program coordinator position.

6. In 2007, a half-time administrative position in the AIRO office was eliminated. In March 2008, Nora Bird, Assistant Director and Woodcock's immediate supervisor took a medical leave of absence from which she did not return. In June 2008, Watts retired. In July, Shane Doyle was hired as interim director and in August Marjorie Old Horn was hired as the new executive director. Watts, and Doyle were frequently out of the office and regularly left the office at 5:00 p.m.

7. Woodcock's regular job duties included responding to email, responding to requests for information, checking Pcard transactions in Banner, making travel arrangements, preparing travel reimbursements, BPAs, making housing payments, checking lab expenses, answering phones, filing grants, bookkeeping for 10 or more grants, ordering office supplies, preparing W-9s, grant reconciliations, preparing time & effort reports, Pcard expense accounting, updating databases, office projects, fixing problems, closing out grants, planning for AIRO board meetings, graduate dinner preparations, organizing functions for job candidates and preparing grants for submission to various agencies.

8. When Woodcock left AIRO, her work on the NSF grant was incomplete and required input from other employees to put them into order. Woodcock offered to assist with this effort, but Old Horn declined her offer.

9. Woodcock frequently worked through her one hour lunch period and frequently stayed one-half to three-quarters of an hour late to accommodate her transportation needs.

10. The following table shows the overtime hours Woodcock claimed to have worked, the hours MSU paid her, the hours disallowed by the hearing officer and the number of hours for which she is owed unpaid wages, as well as totals for those categories.

Date		Claimed OT Hours	Hours Paid By MSU	Disallowed hours	Overtime Hours owed
2-1-2008	Fri	1.45	0.00	1.45	0.00
2-11-2008	Mon	1.50	0.00		1.50
2-12-2008	Tue	1.50	0.00		1.50
2-13-2008	Wed	1.50	0.00		1.50
2-14-2008	Thu	3.50	0.00		3.50
2-17-2008	Sun	6.00	0.00		6.00
2-18-2008	Mon	3.50	0.00		3.50
2-19-2008	Tue	4.50	0.00		4.50
2-20-2008	Wed	3.50	0.00		3.50
2-21-2008	Thu	1.00	0.00	0.50	0.50
2-22-2008	Fri	1.50	0.00	0.50	1.00
2-24-2008	Sun	5.00	5.00		0.00
2-25-2008	Mon	3.00	3.00		0.00
2-26-2008	Tue	6.00	6.00		0.00
2-27-2008	Wed	0.50	0.00	0.50	0.00
2-28-2008	Thu	0.50	0.00	0.50	0.00
3-2-2008	Sun	6.50	0.00		6.50
3-3-2008	Mon	0.50	0.00	0.50	0.00
3-4-2008	Tue	0.50	0.00	0.50	0.00
3-6-2008	Thu	0.50	0.00	0.50	0.00
3-7-2008	Fri	0.50	0.00	0.50	0.00
3-9-2008	Sun	5.00	0.00		5.00

Date		Claimed OT Hours	Hours Paid By MSU	Disallowed hours	Overtime Hours owed
3-11-2008	Tue	5.00	0.00		5.00
3-12-2008	Wed	0.50	0.00	0.50	0.00
3-13-2008	Thu	0.50	0.00	0.50	0.00
3-14-2008	Fri	0.50	0.00	0.50	0.00
3-17-2008	Mon	1.50	0.00		1.50
3-18-2008	Tue	2.50	0.00		2.50
3-19-2008	Wed	1.50	0.00		1.50
3-20-2008	Thu	1.50	0.00		1.50
3-21-2008	Fri	0.50	0.00	0.50	0.00
3-23-2008	Sun	2.00	0.00		2.00
3-24-2008	Mon	2.00	0.00		2.00
3-26-2008	Wed	1.50	0.00		1.50
3-27-2008	Thu	0.50	0.00	0.50	0.00
3-30-2008	Sun	5.00	0.00		5.00
3-31-2008	Mon	0.50	0.00	0.50	0.00
4-1-2008	Tue	0.50	0.00	0.50	0.00
4-2-2008	Wed	5.50	0.00		5.50
4-3-2008	Thu	4.50	4.50		0.00
4-4-2008	Fri	4.50	0.00		4.00
4-7-2008	Mon	3.00	2.00		1.00
4-9-2008	Wed	0.50	0.00	0.50	0.00
4-10-2008	Thu	4.00	0.00		4.00
4-11-2008	Fri	0.50	0.00	0.50	0.00
4-13-2008	Sun	5.25	0.00		5.25
4-14-2008	Mon	0.50	0.00	0.50	0.00
4-16-2008	Wed	3.00	0.00		3.00
4-17-2008	Thu	5.00	0.00		5.00
4-18-2008	Fri	-8.00	0.00		-8.00
4-20-2008	Sun	2.75	0.00		2.75
4-21-2008	Mon	2.25	0.00		2.25
4-22-2008	Tue	6.00	0.00		6.00
4-23-2008	Wed	1.00	0.00		1.00
4-24-2008	Thu	1.00	0.00		1.00
4-25-2008	Fri	0.50	0.00	0.50	0.00
4-27-2008	Sun	6.75	0.00		6.75

Date		Claimed OT Hours	Hours Paid By MSU	Disallowed hours	Overtime Hours owed
4-28-2008	Mon	0.50	0.00	0.50	0.00
4-29-2008	Tue	1.50	0.00		1.50
4-30-2008	Wed	1.00	0.00		1.00
5-1-2008	Thu	0.50	0.00	0.50	0.00
5-4-2008	Sun	9.00	9.00		0.00
5-5-2008	Mon	3.00	0.00		2.00
5-6-2008	Tue	8.00	8.00		0.00
5-7-2008	Wed	8.00	8.00		0.00
5-8-2008	Thu	6.00	6.00		0.00
5-9-2008	Fri	4.00	4.00		0.00
5-11-2008	Sun	5.25	0.00		5.25
5-12-2008	Mon	4.00	4.00		0.00
5-13-2008	Tue	6.00	6.00		0.00
5-15-2008	Thu	0.50	0.00	0.50	0.00
5-16-2008	Fri	0.50	0.00	0.50	0.00
5-18-2008	Sun	4.25	0.00		4.25
5-20-2008	Tue	6.00	6.00		6.00
5-21-2008	Wed	2.50	0.00		2.50
5-22-2008	Thu	0.50	0.00	0.50	0.00
5-23-2008	Fri	0.50	0.00	0.50	0.00
5-25-2008	Sun	8.25	0.00		8.25
5-26-2008	Mon	7.00	0.00		7.00
5-27-2008	Tue	5.00	5.00		0.00
5-28-2008	Wed	5.00	5.00		0.00
5-29-2008	Thu	8.00	0.00		8.00
5-30-2008	Fri	4.00	0.00		4.00
5-31-2008	Sat	4.00	0.00		4.00
6-1-2008	Sun	9.50	9.50		0.00
6-2-2008	Mon	4.00	0.00		4.00
6-3-2008	Tue	4.50	0.00		4.50
6-4-2008	Wed	6.50	0.00		6.50
6-5-2008	Thu	5.00	0.00		5.00
6-6-2008	Fri	0.50	0.00	0.50	0.00
6-8-2008	Sun	6.75	0.00		6.75
6-9-2008	Mon	4.00	0.00		4.00

Date		Claimed OT Hours	Hours Paid By MSU	Disallowed hours	Overtime Hours owed
6-10-2008	Tue	4.50	0.00		4.50
6-11-2008	Wed	2.75	0.00		2.75
6-12-2008	Thu	3.50	0.00		3.50
6-13-2008	Fri	0.50	0.00	0.50	0.00
6-14-2008	Sat	13.50	13.50		0.00
6-15-2008	Sun	7.75	0.00		7.75
6-16-2008	Mon	6.00	0.00		6.00
6-17-2008	Tue	4.00	0.00		4.00
6-18-2008	Wed	6.00	0.00		6.00
6-19-2008	Thu	5.00	0.00		5.00
6-20-2008	Fri	0.75	0.00	0.75	0.00
6-21-2008	Sat	12.50	12.50		1.00
6-22-2008	Sun	5.25	0.00		5.25
6-23-2008	Mon	6.50	0.00		6.50
6-24-2008	Tue	8.00	7.00		1.00
6-25-2008	Wed	8.50	0.00		8.50
6-26-2008	Thu	2.00	0.00		2.00
7-1-2008	Tue	1.25	0.00		1.25
7-6-2008	Sun	5.75	0.00		5.75
7-7-2008	Mon	0.50	0.00	0.50	0.00
7-7-2008	Tue	-8.00			-8.00
7-9-2008	Wed	2.00	0.00		2.00
7-10-2008	Thu	1.50	0.00	0.50	1.00
7-12-2008	Sat	17.00	0.00		17.00
7-13-2008	Sun	12.00	12.00		12.00
7-14-2008	Mon	1.50	0.00	0.50	1.00
7-16-2008	Wed	3.75	0.00		3.75
7-17-2008	Thu	3.00	0.00		3.00
7-18-2008	Fri	1.00	0.00	0.50	0.50
7-20-2008	Sun	6.75	0.00		6.75
7-21-2008	Mon	3.50	0.00		3.50
7-23-2008	Wed	3.50	0.00		3.50
7-24-2008	Thu	0.50	0.00	0.50	0.00
7-25-2008	Fri	1.50	0.00	0.50	1.00
7-27-2008	Sun	2.00	0.00		2.00

Date		Claimed OT Hours	Hours Paid By MSU	Disallowed hours	Overtime Hours owed
7-28-2008	Mon	1.50	0.00	0.50	1.00
7-29-2008	Tue	4.00	0.00		4.00
7-30-2008	Wed	2.00	0.00		2.00
7-31-2008	Thu	2.50	0.00		2.50
8-1-2008	Fri	1.50	0.00	0.50	1.00
8-3-2008	Mon	1.50	0.00	0.50	1.00
8-4-2008	Tue	1.50	0.00	0.50	1.00
8-5-2008	Wed	1.50	0.00	0.50	1.00
8-6-2008	Thu	1.50	0.00	0.50	1.00
8-7-2008	Fri	1.50	0.00	0.50	1.00
8-10-2008	Mon	-8.00			-8.00
8-11-2008	Tue	-8.00			-8.00
8-12-2008	Wed	-8.00			-8.00
8-13-2008	Thu	-1.50			-1.50
Totals		435.45	136.00	22.20	277.25

11. Woodcock claimed 435.45 hours of unpaid overtime. She was paid for 136 of those hours by MSU. The hearing officer finds that 22.20 hours are not compensable, leaving a balance of 277.25 hours of unpaid overtime. Woodcock's hourly rate was \$12.486365. Woodcock is therefore owed \$5,192.77 in unpaid overtime wages ($12.486365 \times 1.5 \times 277.25$).

12. Woodcock would submit a timesheet on an Outlook Calendar that showed her regular hours worked, sick leave taken, holiday hours, compensatory time earned and compensatory time taken. Exhibits 136, 141, 146, 151, 156 and 161. Some time after the timesheet was submitted Woodcock reviewed her desk calendar and reconciled it with her already submitted timesheet to show additional hours worked. MSU paid Woodcock for some of the hours added to her timesheets after they were submitted. Watts signed Woodcock's unreconciled April timesheet which showed Woodcock had accumulated 6.5 hours of compensatory time.

13. MSU acted reasonably and in good faith when it learned of Woodcock's claim and subsequently paid her for 136 hours of overtime. It reasonably concluded at that time that her documentation was insufficient to support other hours worked and that because it had a policy of reporting all hours worked it was not in violation

of the Fair Labor Standards Act. Accordingly, MSU does not owe liquidated damages associated with Woodcock's unpaid wages.

IV. DISCUSSION¹

A. Wages Owed

Woodcock claims that MSU owes her unpaid overtime wages and liquidated damages pursuant to the FLSA and the Montana Wage Payment Act. Both Montana law and the 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 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

¹ 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.

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.

Woodcock provided substantial evidence of the additional hours she worked. Her testimony regarding those hours was essentially un rebutted. MSU's evidence that the quality of Woodcock's work was poor and left unfinished when she departed was presumably offered to show that could not have worked the number of hours claimed. However, at best, MSU's evidence showed that Woodcock may not have been particularly good at the accounting aspects of her job or that she did not make the best use of her time spent in the office. MSU's partial payment of Woodcock's unpaid overtime claim lends credibility to the claim. If Woodcock was not fabricating the hours claimed and paid for by MSU, it is reasonable to conclude that Woodcock worked the remaining unpaid overtime hours.

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)

MSU argues, like the employer in *Forrester*, that because it had no knowledge of Woodcock's overtime work and because Woodcock failed to notify her superiors of the overtime work that it is not liable for paying the additional overtime hours she claims. MSU's argument fails for several reasons. First, unless Woodcock was hiding the fact of her overtime work, MSU should have known that she was working additional hours. While Woodcock was not reporting overtime hours on her timesheet she was showing comp time she was earning and using on the Outlook

calendars that were turned in to Watts and others. Second, Watts did have knowledge that Woodcock was working overtime to complete some projects and surmised that she was working additional overtime on the weekends. Third, because of the absence of Nora Bird and given the frequent traveling of Watts and Doyle, MSU put itself in a position of not knowing what Woodcock was or was not doing in the AIRO office. Such ignorance is less an indicator that Woodcock deliberately hid her overtime work from MSU and more an indication that due to staffing shortages, turnover and leadership transition, senior management of the office had other priorities.

Additionally, regardless of MSU policy, Woodcock reasonably interpreted Watts' advice not to show overtime on her timesheet, but instead to work additional hours and try to use that time within the same month as a tacit approval of her overtime work. While it is likely that Watts would have advised Woodcock not to work so many overtime hours had he possessed knowledge of the extent of the hours she was putting in, he simply wasn't there to observe what was going on. Third, Watts signed Woodcock's April timesheet that showed compensatory time on it. Finally, as stated above MSU's payment of some of the time Woodcock claimed undermines its argument that she should not be paid for hours she did not seek approval for and that the employer asserts it did not know about.

The fact that Woodcock tried to use the overtime hours she worked as justification for her promised promotion does not mean she did not work the hours she claims. It is, however, likely that at least some of her motivation for putting in the extra time was her hope that doing so would indicate her dedication to the program and her willingness to put in the necessary work and would thus increase her chances of getting the promotion she sought. When Woodcock was denied the promotion and decided to seek employment elsewhere on campus she was then unable to use the comp time she had built up before she departed AIRO and therefore reasonably demanded payment of it as overtime wages.

With regard to Woodcock's time spent between 5:00 p.m. and the time her transportation arrived to take her home, these hours were regulated less by the employer's need for work to be performed and more by Woodcock for her convenience. As such they are not compensable. *See Admin. R. Mont. 24.16.1002(3).*

Woodcock also included 1.45 hours of overtime that predate her claim and are therefore not allowable.

Woodcock bears the burden of proof in this matter to show by a preponderance of the evidence that he is entitled to the wages he claims to be due. *Berry v. KRTV Communications*, (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112. In this matter, Jennifer Woodcock carried her burden to show that she is owed for 277.25 hours of unpaid overtime wages as shown in the table above. Woodcock did not prove that she is owed wages for the time period prior to February 11, 2008 or for the time she stayed late after work to accommodate her travel arrangements.

B. Penalty

The FLSA entitles employees owed wages to liquidated damages for an employer's failure to pay overtime premium. Under Montana law, the liquidated damages provision of the FLSA, not the statutory penalty provisions of the state Minimum Wage and Overtime Act, apply to cases subject to FLSA. Mont. Code Ann. § 39-3-408. The FLSA has a liquidated damages provision, 29 U.S.C. § 216, which states:

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.

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.

The hearing officer may refuse to award liquidated damages if 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 ground 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.

In this matter, MSU had no indication that it had any FLSA compliance issues until confronted with Woodcock’s claim for unpaid wages. It reviewed the hours claimed and in good faith paid Woodcock for the hours it reasonably believed she had worked. MSU also believed that under its time reporting policy it was in compliance with the FLSA. The fact that the hearing officer subsequently found Woodcock is owed additional unpaid wages does not diminish MSU’s good faith response in paying Woodcock the hours it determined she worked.

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. Montana State University owes Jennifer Woodcock unpaid overtime wages in the amount of \$5,192.77.

VI. ORDER

Montana State University is hereby ORDERED to tender a cashier's check or money order in the amount of \$5,192.77, made payable to Jennifer Woodcock. MSU may deduct applicable withholding taxes.

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 10th day of February, 2010.

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.