

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE WAGE CLAIM)	Case No. 7-2019
OF SYLVIA ROSE LEARY,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
FRANK ROBBINS, KAREN ROBBINS,)	
individually and d/b/a ALPINE MOTEL,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On July 2, 2018, Sylvia Rose Leary filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit) alleging Frank Robbins, Karen Robbins, individually and d/b/a Alpine Motel (Robbins) owed her a total of \$6,088.78 in wages for work performed during the period of July 16, 2016, through May 31, 2018.

On July 5, 2019, the Wage and Hour Unit issued a determination finding Robbins owed Leary \$930.00 in unpaid regular wages and \$2,703.95 in overtime wages. The determination also found liquidated damages in the amount \$2,703.95 was appropriate, as well as a penalty of 15% on the unpaid regular wages, for a total of \$6,477.40. On July 17, 2019, Robbins timely appealed the determination.

Following mediation efforts, the Wage and Hour Unit transferred the matter to the Office of Administrative Hearings (OAH) on September 26, 2019.

Hearing Officer Caroline A. Holien conducted a telephone hearing in this matter on January 17, 2020. Sylvia Rose Leary failed to appear due to a family emergency. The hearing proceeded with only the participation of the Respondent and its witnesses: Chad Meador, General Manager, and Deana Fry, Payroll Administrator, who testified under oath. The record was reopened upon a showing of good cause by Leary, and a second day of hearing was held on April 23, 2020. Leary, Meador, and Fry testified under oath. *See* Order Reopening Record (03/26/2020)

and Post-Hearing Order (04/24/2020). Karl Knuchel, Attorney at Law, represented the Respondent at both hearings.

The parties stipulated to the admission of Documents 1 through 331, which included the entirety of the administrative record compiled by the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit).

The parties agreed to provide post-hearing briefing on the issue of the admissibility of the documents submitted by the Respondent. Upon the timely filing of the final brief, the record was closed and the case deemed submitted.

Based upon the evidence and argument adduced at hearing, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Whether Frank Robbins, Karen Robbins, individually and d/b/a Alpine Motel, owe wages for work performed, as alleged in the complaint filed by Sylvia Rose Leary, and owe penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. In April 2016, Leary began working as a front desk attendant at the Alpine Motel, when the General Manager was Mona Abelseth.

2. In late May 2016, Leary began a planned leave of absence. Leary returned to work in July 2016.

3. Leary was allowed to live in a hotel suite when the motel was empty in April 2016. Abelseth decided to not place Leary in a cabin across the street as she had originally stated she would. Abelseth ultimately placed Leary in the manager's apartment.

4. Leary has never signed a written agreement allowing for the employer to withhold wages to cover rent or costs associated with her housing. Leary never had wages withheld to cover housing costs.

5. Employees who lived in the employer-owned cabins were required to pay \$150.00 per month. These employees typically included foreign students working for the summer in the United States.

6. Leary's daughter, Alecia, worked for Alpine Motel during the summers of 2016 and 2017. Alecia lived with two other women in a house not owned by the employer. The two women worked for the Alpine Motel on an as-needed basis.

7. In July 2016, Abelseth left her employment with Alpine Motel, and Leary began working as the General Manager. As a result of Leary assuming the duties of General Manager, her rate of pay was increased from \$10.00 to \$15.00.

8. During this period, Owner Frank Robbins engaged the services of Integral Hospitality Solutions (IHS). IHS assists hotel and motel owners in making decisions related to increasing business and ensuring the business' profitability. Leary worked closely with IHS personnel in her role as General Manager.

9. Leary's duties included taking reservations using an online system; checking in/out guests and processing guest payments; and assisting with housekeeping and laundry. Leary was also responsible for purchasing supplies for the motel.

10. Leary had some supervisory authority over Alpine Motel employees. For example, Leary scheduled employees for work and posted the employee work schedule on a weekly or bi-weekly basis. Leary implemented the use of a time sheet. The time sheet listed all employees, who were responsible for noting the start and end time of their shifts, as well as their breaks. Leary also recorded her work hours on this time sheet, which was for the entire payroll period that typically ran from the first of the month to the 15th and the 16th through the end of the month.

11. At the end of each payroll period, Leary would total the hours for the employees and send it to IHS, Robbins, and Deana Fry, Payroll Administrator with Hillman & Associates. *See* Exs. 162-233; 236-237. Fry would process the payroll and send Leary a payroll summary. Leary would then attach that summary to the time sheet and keep a copy in a payroll file she kept at the motel's office. *See* Exs. 99-104.

12. Leary was never advised her time keeping system was wrong or should be changed. Leary understood she was tracking time as she had been taught by Abelseth and as required by IHS, Robbins, and Fry. There was no other method of tracking employees' time during Leary's employment.

13. Leary was required to work overtime several times per week. As an onsite manager, Leary was subject to being called in during her off hours. Leary always responded when called upon and performed her job duties to the best of her ability.

14. Despite working more than 40 hours in a week, Alpine Motel paid her straight time for all hours worked except for the pay period of July 1, 2016 through July 15, 2016, when she received time and a half. Ex. 116; *See also* Exs. 117-160.

15. On or about May 16, 2017, Leary's hourly wage was increased from \$15.00 to \$20.00. IHS authorized Leary's raise. Leary was paid at this hourly rate until the payroll period ending November 15, 2017. Ex. 149. Leary's hourly rate was \$15.00 throughout the remainder of her employment.

16. Leary was paid her regular hourly rate for all hours she worked, including those hours in excess of 40.

17. In May 2018, a new General Manager was hired for the motel. On or about May 23, 2018, Leary quit due to dissatisfaction with the employment and the behavior of Frank Robbins.

18. On July 2, 2018, Leary filed her claim for unpaid wages. Robbins made several allegations regarding Leary's honesty and performance as General Manager that were not substantiated at hearing in response to Leary's wage claim.

19. Leary worked a total of 4,164.51 hours during the period of July 16, 2016, through May 31, 2018. Leary worked a total of 453.58 hours in overtime during that same period. *See* Add. A.

20. Leary earned \$72,206.64 in wages during the period of July 16, 2016, through May 31, 2018. Leary was paid \$70,294.00 in wages during that same period.

21. Leary is owed \$1,912.64 in unpaid overtime wages for the period of her wage claim.

22. Liquidated damages in the amount of \$1,912.64 are appropriate in this matter to compensate Leary for the overtime wages she did not receive for work performed during the period of her wage claim, as well as recognizing the failure of the Alpine Motel to ensure its practice of unilaterally reducing employees' pay was in compliance with state and federal law.

23. Alpine Motel improperly withheld Leary's final wages of \$930.50 that were earned during the period of May 16, 2018 through May 31, 2018. A 55% penalty on the amount of unpaid regular wages owed to Leary amounts to \$511.78 and is appropriate in this matter.

IV. DISCUSSION¹

A. Montana Wage Protection Act.

Montana law provides, “. . . every employer of labor in the state of Montana shall pay to each employee the wages earned by the employee in lawful money of the United States or checks on banks convertible into cash on demand at the full face value of the checks, and a person for whom labor has been performed may not withhold from any employee any wages earned or unpaid for a longer period than 10 business days after the wages are due and payable, except as provided in § 39-3-205.” Mont. Code Ann. § 39-3-204.

The requirement to pay minimum wage and overtime does not apply to “resident managers employed in lodging establishments or assisted living facilities who, under the terms of their employment, live in the establishment or facility.” Mont. Code Ann. § 39-3-406(1). The burden of proving that an employee is excluded from overtime requirements falls upon the employer who asserts it. *Kemp v. Board of Personnel Appeals*, 1999 MT 255, 296 Mont. 319, 989 P.2d 317. To meet this burden, an employer must present evidence to show that the employee falls “plainly and unmistakably within the exemption’s terms.” *Id. at* ¶ 16, *citing Public Employees Ass’n v. Dept. of Transportation*, 1998 MT 17, 287 Mont. 229, 954 P.2d 21.

The evidence, including the testimony of both Leary and Meador, who currently holds the job, shows Leary was a resident manager as contemplated by Mont. Code Ann. § 39-3-406(1)(1). Leary was clearly required to live on the premises given Frank Robbins’ decision to withhold her final paycheck to cover her lodging costs. Leary performed front desk tasks, as well as other tasks related to the management of the motel’s daily operations. Therefore, Leary was a “resident manager” within the meaning of Mont. Code Ann. § 39-3-406(1)(1). *See, e.g., Moore v. Imperial Hotels Corp.*, 1998 MT 248, ¶¶ 7, 24, 291 Mont. 164, 967 P.2d 382. Therefore, Leary is excluded from the minimum wage and overtime provisions of Mont. Code Ann. §§ 39-3-404, -405. *See* Mont. Code Ann. § 39-3-406(1)(1).

Exclusion from Montana’s Wage Protection Act does not, on its own, exclude Leary from coverage under the FLSA. The issues then become whether Leary was covered under the FLSA, and, if so, whether she was compensated at a rate not less than the applicable minimum wage rate for every hour worked, and what amount of overtime she is due.

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.

B. Fair Labor Standards Act (FLSA).

The FLSA “protect[s] all covered workers from substandard wages and oppressive working hours, labor conditions that are detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency and general well-being of workers.” *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728, 739, 101 S. Ct. 1437, 1444, 67 L. Ed. 2d 641 (1981). In furtherance of this end, the Supreme Court “has consistently construed the Act liberally to apply to the furthest reaches [of the economy] consistent with congressional direction.” *Irizarry v. Catsimatidis*, 722 F.3d 99, 103 (2d Cir. 2013) (quoting *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 296, 105 S. Ct. 1953, 1959, 85 L. Ed. 2d 278 (1985) (internal quotation marks omitted)). The FLSA provides labor protections to employees who are either (1) “employed by an enterprise engaged in commerce or in the production of goods for commerce,” or (2) “engaged in commerce or in the production of goods for commerce.” See 29 U.S.C. §§ 206(a), 207(a)(1). Either individual or enterprise coverage is enough to invoke FLSA protection. *Martin v. Bedell*, 955 F.2d 1029, 1032 (5th Cir. 1992).

A claimant has the burden of proving three elements in a FLSA claim:

- (1) The existence of an employer-employee relationship;
- (2) Coverage under the Act; and
- (3) A violation of one or more of the statutory standards.

See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–87 (1946). There is no dispute Leary was an employee of Alpine Motel. Therefore, the next issue is whether the FLSA provides coverage under the facts of this case.

1. Leary is not subject to an exemption under the FLSA.

Alpine Motel did not specifically argue Leary was subject to any exemption from the requirement she be paid overtime pay at not less than time and one-half the regular rate for any hours worked in excess of 40 hours per week. The only exemption that may apply under the facts of this case is that allowed for bona fide administrative employees.

The Code of Federal Regulations provides that the term “employee employed in a bona fide administrative capacity” means any employee:

- (1) Compensated on a salary or fee basis pursuant to § 541.600 at a rate per week of not less than the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region (or 84

percent of that amount per week, if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities. Beginning January 1, 2020, and every three years thereafter, the Secretary shall update the required salary amount pursuant to § 541.607;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; *and*

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. 541.200(a)(1)-(3) (emphasis added).

Leary's monthly salary of approximately \$2,400.00 (\$15.00/hour x 40 hours x 4 weeks) meets the salary criteria of (a)(1), which was set at a minimum of \$455.00 per week during the period in question.² Leary was clearly responsible for overseeing the daily operations of the motel. However, Leary's primary duties were not in non-manual work related to management or other business operations. Leary was primarily tasked with ensuring manual work such as laundry, housekeeping, routine room maintenance, and guest services was completed. IHS was engaged to perform the high level management duties intended to increase the motel's business and to ensure its profitability. Leary was not in a position to exercise discretion and judgment independent of IHS and Frank Robbins. Therefore, the bona fide administrative exemption does not apply to Leary's position.

2. Alpine Motel is subject to the FLSA as a covered enterprise.

An "[e]nterprise engaged in commerce or in the production of goods for commerce" means an enterprise with two or more employees that, in relevant part:

(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

² The rate is currently \$684.00 per week. 29 C.F.R. 541.200(a)(1).

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated). . . .

29 U.S.C. § 203(s)(A)(i)-(ii).

Frank Robbins completed Respondent's Answer to Wage Claim on behalf of Alpine Motel. Robbins answered yes to the question, "Did the Claimant deal in Interstate Commerce? (such as individuals involved in interstate trucking, credit card transactions, Mail and/or Telephone Transaction with Other States)." Exs. 293-94. Robbins also confirmed in this response that Alpine Motel had sales in excess of \$500,000.00 in 2019, as did Meador in his sworn testimony. It is therefore determined that Alpine Motel is subject to the FLSA as a covered enterprise.

3. Leary is subject to the FLSA protections on an individual basis.

Employees of non-covered enterprises may still be subject to the FLSA's protections on an individual basis if they were individually engaged in interstate commerce or in the production of goods for interstate commerce, or in any closely-related process or occupation directly essential to such production. *See* 29 U.S.C. §§ 206-207; *See also Zorich v. Long Beach Fire Dep't & Ambulance Serv.*, 118 F.3d 682, 685-86 (9th Cir. 1997).

No *de minimis* rule applies to coverage under the FLSA, and any regular contact with commerce, no matter how small, will result in coverage. *See Mabee v. White Plains Publishing Co., Inc.*, 327 U.S. 178, 181-84 (1946). A determination is made based on whether the employee's work is actually in commerce or is so closely related to the movement of commerce that it is for practical purposes a part of it, rather than an isolated, local activity. *See Mitchell v. C. W. Vollmer & Co.*, 349 U.S. 427, 429 (1955). "Employees are 'engaged in commerce' within the meaning of the Act when they are performing work involving or related to the movement of persons or things (whether tangibles or intangibles, and including information and intelligence) among the several States or between any State and any place outside thereof." 29 C.F.R. 779.103; *but see Sobrinio v. Med. Ctr. Visitor's Lodge, Inc.*, 474 F.3d 828, 829-30 (5th Cir. 2007) (noting that employees engage in commerce when their work is entwined with a continuous stream of interstate travel, and that providing local transportation for out-of-state motel guests could not be viewed as part of a constant stream of interstate travel). "Typically, but not exclusively, employees engaged in interstate or foreign commerce include . . . clerical and other workers who regularly use the mails, telephone or telegraph for interstate communication; and employees who regularly travel across State lines while working." 29 C.F.R. 779.103.

Leary routinely handled reservations for out-of-state guests and guests from other countries. Leary regularly used the internet, telephone, and U.S. mail in the performance of her duties as the General Manager. Leary frequently traveled to Wyoming in her role as Alpine Motel's General Manager. It is therefore determined Leary was individually engaged in interstate commerce based upon her job duties as General Manager. *See* 29 U.S.C. §§ 206-207; *See also Zorich v. Long Beach Fire Dep't & Ambulance Serv.*, 118 F.3d 682, 685-86 (9th Cir. 1997).

C. Leary's Hours.

With coverage under the FLSA established and no applicable exemptions argued by the Respondent, the question becomes the amount of work, if any, which Leary performed without proper compensation.

An employee seeking unpaid wages under the FLSA has the initial burden of proving work performed without proper compensation. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946). 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. *Anderson*, 328 U.S. at 687. To ensure employees are paid overtime when it is owed, the law requires employers to keep records of employee's hours. 29 U.S.C. § 211(c). In *Anderson, supra*, the U.S. Supreme Court held that when the employer fails to record the employee's hours, the employee's records may be used to determine the amount of time worked. *Anderson*, 328 U.S. at 687. As the Supreme Court stated in *Anderson*:

[W]here the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. . . . 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. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Anderson, 328 U.S. at 687-88.

The Montana Supreme Court adopted the U.S. Supreme Court's approach to determining an employee's claims for unpaid overtime when the employer's records

are inadequate in *Garsjo*, 172 Mont. at 189. The court held, “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 an 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” *Id.*

The Montana Supreme Court confirmed this to be the proper approach in *Arlington v. Miller’s Trucking, Inc.*, 2015 MT 68, 378 Mont. 324, 343 P.3d 1222. In *Arlington*, the court was tasked with determining whether an employee was owed unpaid wages when both the employee and the employer failed to maintain adequate records regarding the number of hours worked. The court noted the FLSA imposes the ultimate responsibility of ensuring the maintenance of accurate records of hours worked upon the employer. *Arlington*, ¶ 17. An employee’s failure to track his or her hours does not absolve the employer of this duty. *Arlington*, ¶ 18. “If plaintiff’s evidence of hours worked is inaccurate or imprecise because the employer’s time-keeping practices made it difficult to ascertain the truth, the employer rather than the employee must suffer the consequences.” *Id.* “[I]f 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.” *Mitchell v. Caldwell*, 249 F.2d 10, 11 (10th Cir. 1957) (emphasis added) (citing *Anderson, supra*; *Porter v. Poindexter*, 158 F.2d 759 (10th Cir. 1947); *Handler v. Thrasher*, 191 F.2d 120 (10th Cir. 1951)).

Leary is in the peculiar position of having developed and implemented the employer’s time keeping system. Leary testified she recorded the hours she worked each day, totaled her hours, and sent that information to the employer’s payroll administrator, as well as IHS every two weeks. Leary testified in great detail about attaching the time sheet to the payroll summary she received from Fry once payroll had been issued. However, Alpine Motel was apparently unable to locate that documentation despite it being requested by Leary during the course of discovery. Alpine Motel offered no credible evidence as to the time keeping practices during Leary’s tenure as General Manager.

The parties submitted Leary’s pay stubs for the period in question. Leary did not offer any evidence showing she was owed for hours worked beyond those listed on her paystub. The evidence shows Leary worked a total of 4,164.51 hours during the period of July 16, 2016, through May 31, 2018. Of those hours worked, 453.58 were overtime. All but one of the paystubs show that, when overtime hours are listed, Leary was paid her regular hourly rate for all hours worked.

Alpine Motel argues Leary never claimed overtime during her employment. However, she clearly submitted time sheets showing she worked in excess of 40 hours

for several weeks. It's difficult to understand how that was not sufficient to put the employer on notice that Leary was working overtime during her employment. Leary has met her burden in showing she performed work for which she was not compensated. Alpine Motel now has the burden of producing evidence to negate Leary's showing she is owed unpaid overtime wages.

Alpine Motel failed to maintain any records independent of those offered by the parties. The witnesses Alpine Motel called at hearing - Meador and Fry - had no independent, first-hand knowledge as to the work performed by Leary during the period of her wage claim. Therefore, Alpine Motel failed to offer evidence sufficient to rebut the evidence offered by Leary showing the extent and amount of work she performed as Alpine Motel's General Manager.

There are no time cards or time sheets showing the precise number of hours Leary worked each day and/or week, and the work week is not defined. Therefore, the daily hours were calculated by taking the hours reported for each pay period and divided by the number of days in the pay period. The amount owed to Leary for regular wages was determined by multiplying all hours worked up to 40 hours per week by her regular rate. The overtime wages found to be owed in Addendum A were determined by taking the number of hours Leary worked in excess of 40 hours per week, multiplied by her overtime rate that is equal to one and a half of her regular rate. *See Add. A.*

The preponderance of evidence shows Leary worked a total of 4,164.51 hours during the period of July 16, 2016, through May 31, 2018, with 453.58 of those hours constituting overtime. The evidence further shows Leary earned a total of \$72,206.64 in wages during the period of July 16, 2016, through May 31, 2018, and was paid \$70,294.00 in wages for that period. Leary is owed \$1,912.64 in unpaid overtime wages for the period of her wage claim.

1. Unauthorized Overtime.

Alpine Motel argued at various points of the administrative process that Leary had not received prior authorization to work the overtime listed in her claim for unpaid wages. Again, the employer knew or should have known that Leary was working overtime, given many of her pay stubs show she was paid her regular rate for more than 40 hours in several of the weeks in her wage claim. Clearly, the employer was aware Leary was working overtime on a regular and consistent basis and did nothing to stop her. There is no evidence showing that any effort was made to stop Leary from working overtime. The CFR addresses such cases:

Work not requested but suffered or permitted is work time. [. . .] The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

* * *

In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

29 C.F.R. 785.11, 785.13; *See also Handler v. Thrasher*, 191 F.2d 120, 123 (10th Cir. 1951). Thus, any argument that Leary was not permitted or authorized to work overtime fails.

2. Leary's Housing Costs.

Alpine Motel argues Leary was required to have rents withheld from her paycheck to cover the cost of her lodging. No rental agreement was produced; nor is there any evidence showing Leary ever agreed to or actually had her lodging costs withheld from her pay.

Employers may make a reasonable deduction for "board, room, and other incidentals supplied by the employer. . . " under certain conditions. Mont. Code Ann. § 39-3-204(1).

Except as provided in subsections (2) and (3), every employer of labor in the State of Montana shall pay to each employee the wages earned by the employee in lawful money of the United States or checks on banks convertible into cash on demand at the full face value of the checks and a person for whom labor has been performed may not withhold from any employee any wages, earned or unpaid for longer than 10 business days after the wages are due and payable except as provided in § 39-3-204. However, a reasonable deduction may be made for board, room, and other incidentals supplied by the employer, whenever the deductions are part of the conditions of employment, or as otherwise provided for by law.

“Other incidentals” have been defined to

“. . . include items the employer furnishes to the employee that are not required for the performance of the employee’s duties. These would include items such as furnished transportation that is not required for work purposes, electricity, water or gas furnished for the non-commercial use of the employee, or fuel, such as kerosene, coal, firewood, for the employee’s non-work use. These types of incidentals may properly be deducted from the employee’s wages, provided the employee agrees to the deductions, and the agreement is voluntary and uncoerced.”

In re Wage Claim of Beth Sauer, Case No. 1552-2011 (Mont. DOLI 2001).

However, an employer may not simply withhold wages. There must be an agreement between the parties that such a deduction is a condition of the employment.

An employer cannot withhold the wages or any portion thereof due and owing to an employee as wages earned, and apply such wages to an account which the employee has with the employer unless the account existing between the employer and employee is for board, room or other incidentals which the employer has agreed may be deducted as a condition of the employment.

Att’y Gen’l Op. No. 25, Vol. 11 (March 25, 1953).

Alpine Motel has failed to produce sufficient evidence that Leary ever agreed to having her housing costs deducted from her wages. Therefore, Alpine is not entitled to an offset based upon Leary’s housing costs.

3. Leary’s Final Wages.

Mont. Code Ann. § 39-3-205(1) provides:

Except as provided in subsection (2) or (3), when an employee separates from the employ of any employer, all the unpaid wages of the employee are due and payable on the next regular payday for the pay period during which the employee was separated from employment or 15 days from the date of separation from employment, whichever occurs first, either through the regular pay channels or by mail if requested by the employee.

The evidence shows Alpine Motel improperly withheld Leary's final paycheck. Therefore, Alpine Motel owes Leary \$930.50 in unpaid regular wages for the period of May 16, 2018, through May 31, 2018.

D. Penalties.

A claimant is allowed to pursue claims under both state law and the FLSA. However, a claimant may not recover damages under both. *See Roman v. Maietta Constr.*, 147 F.3d 71, 76 (1st Cir. 1998) (finding plaintiff who recovered under the FLSA for his claim cannot recover again under state law). *See also Reich v. Tiller Helicopter Services, Inc.*, 8 F.3d 1018, 1033 (5th Cir. 1993) (Secretary of Labor permitted to sue employer under both §§ 216(c) [providing for legal relief] and 217 [providing for equitable relief] "subject to the principle of unjust enrichment that precludes the Secretary from obtaining more than one recovery for back wage liability.")

While the Montana Supreme Court has not addressed the issue of whether recovery can be had exclusively under the FLSA or the MWPA or both, other courts within the 9th Circuit have held that, while the plaintiff is to be made whole and not enjoy a windfall at the defendant's expense, the plaintiff is entitled to whatever remedy is greater. *See Allen v. WTD Indus.*, 2000 U.S. Dist. LEXIS 22382, **14, 15 (Ore. D. Ct. 2000).

Montana law also assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. In this case, the potential penalties include 55% required under Montana law or liquidated damages equal to the amount of wages found to be due owing under the FLSA. *See* 29 U.S.C. § 216(b). Clearly, liquidated damages provides for greater recovery for the claimant, who suffered the loss of wages earned by him and owed by the employer. Therefore, liquidated damages are appropriate and will be imposed.

Alpine Motel may only avoid the imposition of liquidated damages if it can show it acted in good faith and on reasonable belief that it was complying with the law. *See* 29 U.S.C. § 216(b). The onerous burden to demonstrate good faith rests with the employer: "[D]ouble damages are the norm, single damages the exception. . . ." *Brock v. Wilamowsky*, 833 F.2d 11, 19 (2d Cir. 1987) (quoting *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986)). Even if an employer carries the burden, liquidated damages may still be awarded. *See Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1416 n. 8 (5th Cir. 1990); *See also Tacke v. Energy W., Inc.*, 2010 MT 39, ¶¶ 25-30, 355 Mont. 243, 249, 227 P.3d 601, 607. Although liquidated damage awards are discretionary, there is a strong presumption in favor of

liquidated damages. *See* 29 U.S.C. § 260; *Shea v. Galaxie Lumber & Constr. Co.*, 152 F.3d 729, 733 (7th Cir. 1998).

The sheer fact Leary regularly worked more than 40 hours in a week being paid only her regular hourly rate is sufficient to find liquidated damages are appropriate in this case. The employer had the opportunity to rectify the situation each pay period when Leary submitted hours in excess of 40 in a week. It failed to do so.

Given the obvious lack of consideration of both its legal duties and its duties of fairness to its employees, Alpine Motel has failed to establish it acted in good faith and reasonable belief in its practice of paying Leary her regular hourly rate for hours worked in excess of 40 each week. As noted above, Leary has shown she is owed \$1,912.64 in unpaid overtime wages for the period of her wage claim. Therefore, liquidated damages in the amount of \$1,912.64 are proper in this case. *See* 29 U.S.C. §§ 216, 260.

1. Leary's Final Wages.

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. Imposition of the penalty is mandatory. *Id.* For cases involving minimum wage and overtime claims, a penalty of 110% will be imposed where a determination has been made that overtime wages are owed and the employer fails to pay the amounts due within the time frame prescribed by the determination. Admin. R. Mont. 24.16.7561. The sole exception to this rule is where none of the special circumstances described in Admin. R. Mont. 24.16.7556 apply. In those cases, a reduced penalty in the amount of 55% may be imposed.

Leary has shown she is owed \$930.50 in unpaid regular wages for the pay period of May 16, 2018, through May 31, 2018. Leary is owed a penalty in the amount of \$511.78 (\$930.50 x 55%). *See* Admin R. 24.16.7566(1)(a).

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.*; *See also State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978).

2. Sylvia Leary was an employee of Frank Robbins, Karen Robbins, individually and d/b/a Alpine Motel and not excluded from the minimum wage and overtime provisions of Mont. Code Ann. §§ 39-3-404, -405.

3. Frank Robbins, Karen Robbins, individually and d/b/a Alpine Motel is engaged in interstate commerce and is subject to the FLSA.

4. Sylvia Leary was engaged in interstate commerce on an individual basis in her role as General Manager of Alpine Motel.

5. Sylvia Leary is not subject to exclusion from the minimum wage and overtime requirements of the FLSA or the MWPA. 29 C.F.R. 213(b)(1); Mont. Code. Ann. § 39-3-406(2)(d).

6. Sylvia Leary has shown she performed work for the employer during the period of her wage claim for which she was not properly compensated.

7. Frank Robbins, Karen Robbins, individually and d/b/a Alpine Motel failed to negate the reasonableness of the inference raised from Leary's evidence that she performed work for which she was not compensated. *See Anderson*, 328 U.S. at 686-88.

8. Frank Robbins, Karen Robbins, individually and d/b/a Alpine Motel owes Leary \$1,912.64 in unpaid overtime wages for the period of her wage claim. *See* 29 U.S.C. §§ 216, 260.

9. Frank Robbins, Karen Robbins, individually and d/b/a Alpine Motel has failed to meet its burden of showing it acted in good faith and on reasonable belief that it was complying with the law when it failed to pay Leary properly for her overtime hours throughout the majority of her employment. 29 CFR § 785.19.

10. Liquidated damages on the amount of the overtime wages found to be owed, which amounts to \$1,912.64, are mandatory based upon the facts of this case. *See* 29 U.S.C. §§ 216, 260.

11. Leary is owed a penalty of 55% on the \$930.50 in regular wages earned during the pay period of May 16, 2018 through May 31, 2018 that Frank Robbins, Karen Robbins, individually and d/b/a Alpine Motel improperly withheld. The penalty amount is \$511.78 ($\$930.50 \times 55\%$). Admin R. 24.16.7566(1)(a).

12. Frank Robbins, Karen Robbins, individually and d/b/a Alpine Motel owes Leary a total of \$5,267.56, including unpaid wages and liquidated damages and penalty.

VI. ORDER

Frank Robbins, Karen Robbins, individually and d/b/a Alpine Motel is hereby ORDERED to tender a cashier's check or money order in the amount of \$5,267.56, representing \$1,912.64 in unpaid overtime wages and \$930.50 in unpaid regular wages, as well as \$1,912.64 in liquidated damages and \$511.78 in penalty on the unpaid regular wages, made payable to Sylvia Leary, and mailed to the **Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503**, no later than 30 days after service of this decision. The Respondents may deduct applicable withholding taxes from the portion representing wages, but not from the portion representing liquidated damages or penalties.

DATED this 9th day of September, 2020.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
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 the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702. Please send a copy of your filing with the district court to:

Department of Labor & Industry
Wage & Hour Unit
P.O. Box 201503
Helena, MT 59620-1503

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.

Workweek Ending	Sun.	Mon.	Tues.	Wed.	Thur.	Fri.	Sat.	Total Hours	Regular Hours	Regular ¹ Wages	Overtime Hours	Overtime Wages	Wages Paid
07/16/2016							5.64	5.64	5.64	84.60	0	0	
07/23/2016	5.64	5.64	5.64	5.64	5.64	5.64	5.64	39.48	39.48	592.20	0	0	
07/30/2016	5.64	5	5	5	5	5	5	40.64	40	600	.64	14.40	
08/06/2016	5	5	5	5	5	5	5	35	35	525	0	0	1357.50
08/13/2016	5	5	7	7	7	7	7	45	40	600	5	112.50	
08/20/2016	7	7	7	7	7	7	7	49	40	600	9	202.50	1200.00
08/27/2016	7	7	7	7	6.63	6.63	6.63	47.89	40	600	7.89	177.53	
09/03/2016	6.63	6.63	6.63	6.63	6.63	6.63	6.63	46.41	40	600	6.41	144.23	
09/10/2016	6.63	6.63	6.63	6.63	6.63	7.82	7.82	48.79	40	600	8.79	197.78	1680.00
09/17/2016	7.82	7.82	7.82	7.82	7.82	7.82	7.82	54.74	40	600	14.74	331.65	
09/24/2016	7.82	7.82	7.82	7.82	7.82	7.82	7.49	54.41	40	600	14.41	324.23	1497.75
10/01/2016	7.49	7.49	7.49	7.49	7.49	7.49	7.49	52.43	40	600	12.43	279.68	
10/08/2016	7.49	7.49	7.49	7.49	7.49	7.49	7.49	52.43	40	600	12.43	279.68	1762.50
10/15/2016	5.93	5.93	5.93	5.93	5.93	5.93	5.93	41.51	40	600	1.51	33.98	
10/22/2016	5.93	5.93	5.93	5.93	5.93	5.93	5.93	41.51	40	600	1.51	33.98	1687.50
10/29/2016	5.93	5.93	7.27	7.27	7.27	7.27	7.27	48.21	40	600	8.21	184.73	
11/05/2016	7.27	7.27	7.27	7.27	7.27	7.27	7.27	50.89	40	600	10.89	0	1425.00

¹Leary's regular hourly rate was \$15.00. Leary's overtime hourly rate was \$22.50.

Workweek Ending	Sun.	Mon.	Tues.	Wed.	Thur.	Fri.	Sat.	Total Hours	Regular Hours	Regular Wages	Overtime Hours	Overtime Wages	Wages Paid
11/12/2016	7.27	7.27	7.27	7.27	7.27	7.27	7.27	50.89	40	600	10.89	245.03	
11/19/2016	7.27	7.27	7.27	7.27	7.27	7.27	7.27	50.89	40	600	10.89	245.03	1635.00
11/26/2016	7.27	7.27	7.27	7.27	7.27	7.27	7.27	50.89	40	600	10.89	245.03	
12/03/2016	7.27	7.27	7.27	7.27	5.93	5.93	5.93	46.87	40	600	6.87	154.57	1425.00
12/10/2016	5.93	5.93	5.93	5.93	5.93	5.93	5.93	41.51	40	600	1.51	33.98	
12/17/2016	5.93	5.93	5.93	5.93	5.93	8.56	8.56	46.77	40	600	6.77	152.33	2055.00
12/24/2016	8.56	8.56	8.56	8.56	8.56	8.56	8.56	59.92	40	600	19.92	448.20	
12/31/2016	8.56	8.56	8.56	8.56	8.56	8.56	8.56	59.92	40	600	19.92	448.20	1545.00
01/07/2017	6.86	6.86	6.86	6.86	6.86	6.86	6.86	48.02	40	600	8.02	180.45	
01/14/2017	6.86	6.86	6.86	6.86	6.86	6.86	6.86	48.02	40	600	8.02	180.45	2055.00
01/21/2017	6.86	6.81	6.81	6.81	6.81	6.81	6.81	47.67	40	600	7.67	172.58	
01/28/2017	6.81	6.81	6.81	6.81	6.81	6.81	6.81	47.67	40	600	7.67	172.58	1635.00
02/04/2017	6.81	6.81	6.81	7.6	7.6	7.6	7.6	50.83	40	600	10.83	243.68	
02/11/2017	7.6	7.6	7.6	7.6	7.6	7.6	7.6	53.2	40	600	13.2	297.00	1710.00
02/18/2017	7.6	7.6	7.6	7.6	7	7	7	51.4	40	600	11.4	256.50	
02/25/2017	7	7	7	7	7	7	7	49	40	600	9	202.50	1260.00
03/04/2017	7	7	7	6.6	6.6	6.6	6.6	47.4	40	600	7.4	166.50	
03/11/2017	6.6	6.6	6.6	6.6	6.6	6.6	6.6	46.2	40	600	6.2	139.50	1485.00
03/18/2017	6.6	6.6	6.6	6.6	6.81	6.81	6.81	46.83	40	600	6.83	153.68	

Workweek Ending	Sun.	Mon.	Tues.	Wed.	Thur.	Fri.	Sat.	Total Hours	Regular Hours	Regular Wages	Overtime Hours	Overtime Wages	Wages Paid
03/25/2017	6.81	6.81	6.81	6.81	6.81	6.81	6.81	47.67	40	600	7.67	172.58	1635.00
04/01/2017	6.81	6.81	6.81	6.81	6.81	6.81	5.81	46.67	40	600	6.67	150.08	
04/08/2017	5.81	5.81	5.81	5.81	5.81	5.81	5.81	40.67	40	600	.6	13.50	1309.50
04/15/2017	5.81	5.81	5.81	5.81	5.81	5.81	5.81	40.67	40	600	.67	15.08	
04/22/2017	5.33	5.33	5.33	5.33	5.33	5.33	5.33	37.31	37.31	559.65	0	0	1200.00
04/29/2017	5.33	5.33	5.33	5.33	5.33	5.33	5.33	37.31	37.31	559.65	0	0	
05/06/2017	5.33	5.33	5.33	5.33	5.33	5.33	5.33	37.31	37.31	559.65	0	0	1200.00
05/13/2017	5.33	5.33	5.33	5.33	5.33	5.33	5.33	37.31	37.31	559.65	0	0	
05/20/2017	5.33	5.33	7.41 ²	7.41	7.41	7.41	7.41	47.71	40	800	7.71	231.30	
05/27/2017	7.41	7.41	7.41	7.41	7.41	7.41	7.41	51.87	40	800	11.87	356.10	
06/03/2017	7.41	7.41	7.41	7.41	7.07	7.07	7.07	50.85	40	800	10.85	325.50	
06/10/2017	7.07	7.07	7.07	7.07	7.07	7.07	7.07	49.49	40	800	9.49	284.70	2371.00
06/17/2017	7.07	7.07	7.07	7.07	7.07	7.69	7.69	50.73	40	800	10.73	321.90	
6/24/2017	7.69	7.69	7.69	7.69	7.69	7.69	7.69	53.83	40	800	13.83	414.90	2126.00
07/01/2017	7.69	7.69	7.69	7.69	7.69	7.69	4.87	51.01	40	800	11.0	330	
07/08/2017	4.87	4.87	4.87	4.87	4.87	4.87	4.87	34.09	34.09	681.80	0	0	2310
07/15/2017	4.87	4.87	4.87	4.87	4.87	4.87	4.87	34.09	34.09	681.08	0	0	

²Leary's hourly wage increased from \$15.00 to \$20.00. Leary's overtime rate was \$30.00.

Workweek Ending	Sun.	Mon.	Tues.	Wed.	Thur.	Fri.	Sat.	Total Hours	Regular Hours	Regular Wages	Overtime Hours	Overtime Wages	Wages Paid
07/22/2017	5	5	5	5	5	5	5	35	35	700	0	0	1460
07/29/2017	5	5	5	5	5	5	5	35	35	700	0	0	
08/05/2017	5	5	5.33	5.33	5.33	5.33	5.33	36.65	36.65	733	0	0	1600
08/12/2017	5.33	5.33	5.33	5.33	5.33	5.33	5.33	37.31	37.31	746.20	0	0	
08/19/2017	5.33	5.33	5.33	6.91	6.91	6.91	6.91	43.87	40	800	3.87	116.10	1600
08/26/2017	6.91	6.91	6.91	6.91	6.91	6.91	6.91	48.37	40	800	8.37	251.10	
09/02/2017	6.91	6.91	6.91	6.91	6.91	6.95	6.95	48.37	40	800	8.37	251.10	2219
09/09/2017	6.95	6.95	6.95	6.95	6.95	6.95	6.95	48.65	40	800	8.65	259.50	
09/16/2017	6.95	6.95	6.95	6.95	6.95	6.95	7.01	48.71	40	800	8.71	261.30	2087
09/23/2017	7.01	7.01	7.01	7.01	7.01	7.01	7.01	49.07	40	800	9.07	272.10	
09/30/2017	7.01	7.01	7.01	7.01	7.01	7.01	7.01	49.07	40	800	9.07	272.10	2104
10/07/2017	6.33	6.33	6.33	6.33	6.33	6.33	6.33	44.31	40	800	4.31	129.30	
10/14/2017	6.33	6.33	6.33	6.33	6.33	6.33	6.33	44.31	40	800	4.31	129.30	1900
10/21/2017	6.33	5.31	5.31	5.31	5.31	5.31	5.31	38.19	38.19	763.80	0	0	
10/28/2017	5.31	5.31	5.31	5.31	5.31	5.31	5.31	37.17	37.17	743.40	0	0	1700
11/04/2017	5.31	5.31	5.31	5.33	5.33	5.33	5.33	37.31	37.31	746.20	0	0	
11/11/2017	5.33	5.33	5.33	5.33	5.33	5.33	5.33	37.31	37.31	746.20	0	0	
11/25/2017	5.33	5.33	5.33	5.33	5.33	5.33	5.33	37.31	37.31	559.65	0	0	1600
12/02/2017	5.33	5.33	5.33	5.33	5.33	6.8	6.8	40.25	40	600	0	0	

Workweek Ending	Sun.	Mon.	Tues.	Wed.	Thur.	Fri.	Sat.	Total Hours	Regular Hours	Regular Wages	Overtime Hours	Overtime Wages	Wages Paid
12/09/2017	6.8	6.8	6.8	6.8	6.8	6.8	6.8	47.60	40	600	7.6	57	1200
12/16/2017	6.8	6.8	6.8	6.8	6.8	6.8	5.20	46	40	600	0	0	
12/23/2017	5.20	5.20	5.20	5.20	5.20	5.20	5.20	36.40	36.40	546	0	0	1695
12/30/2017	5.20	5.20	5.20	5.20	5.20	5.20	5.20	36.40	36.40	546	0	0	
01/06/2018	5.20	5.73	5.73	5.73	5.73	5.73	5.73	39.58	39.58	593.70	0	0	1274.25
01/13/2018	5.73	5.73	5.73	5.73	5.73	5.73	5.73	40.11	40	600	.11	.83	
01/20/2018	5.73	5.73	5.96	5.96	5.96	5.96	5.96	41.26	40	600	1.26	9.45	1335
01/27/2018	5.96	5.96	5.96	5.96	5.96	5.96	5.96	41.72	40	600	1.72	12.9	
02/03/2018	5.96	5.96	5.96	5.96	7.15	7.15	7.15	45.29	40	600	5.29	39.68	1548.75
02/10/2018	7.15	7.15	7.15	7.15	7.15	7.15	7.15	50.05	40	600	10.05	75.38	
02/17/2018	7.15	7.15	7.15	7.15	7.15	6.67	6.67	49.09	40	600	9.09	68.18	1814.25
02/24/2018	6.67	6.67	6.67	6.67	6.67	6.67	6.67	46.69	40	600	6.69	50.18	
03/03/2018	6.67	6.67	6.67	6.67	6.93	6.93	6.93	47.47	40	600	7.47	56.03	1200
03/10/2018	6.93	6.93	6.93	6.93	6.93	6.93	6.93	48.51	40	600	8.51	63.83	
03/17/2018	6.93	6.93	6.93	6.93	6.93	5.75	5.75	36.15	36.15	542.25	0	0	1740
03/24/2018	5.75	5.75	5.75	5.75	5.75	5.75	5.75	40.25	40	600	.25	1.88	
03/31/2018	5.75	5.75	5.75	5.75	5.75	5.75	5.75	40.25	40	600	.25	1.88	1470
04/07/2018	5.33	5.33	5.33	5.33	5.33	5.33	5.33	37.31	37.31	559.65	0	0	
04/14/2018	5.33	5.33	5.33	5.33	5.33	5.33	5.33	37.31	37.31	559.65	0	0	1200

Workweek Ending	Sun.	Mon.	Tues.	Wed.	Thur.	Fri.	Sat.	Total Hours	Regular Hours	Regular Wages	Overtime Hours	Overtime Wages	Wages Paid
04/21/2018	5.33	5.33	5.33	5.33	5.33	5.33	5.33	37.31	37.31	559.65	0	0	
04/28/2018	5.33	5.33	5.33	5.33	5.33	5.33	5.33	37.31	37.31	746.20	0	0	1200
05/05/2018	5.33	5.33	5.33	5.33	5.33	5.33	5.33	37.31	37.31	746.20	0	0	
05/12/2018	5.33	5.33	5.33	5.33	5.33	5.33	5.33	37.31	37.31	746.20	0	0	
05/19/2018 ³	5.33	5.33	5.33					15.99		239.85			
									TOTALS	\$61,029.20		\$11,177.44	\$70,294.00

Regular Wages Earned	\$61,029.20
Overtime Wages Earned	\$11,177.44
TOTAL WAGES EARNED:	\$72,206.64
Wages Paid	(\$70,294.00)
TOTAL OVERTIME WAGES OWED:	\$1,912.64

³Leary is owed \$930.50 for her final wages due for the pay period of May 16, 2018, through May 31, 2018. As such, those hours were not used in the calculations above.