

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

LABOR STANDARDS DIVISION

AGENCY

VS.

CASE NO. 2012-0009

MIKE ROBERTSON d/b/a CITY CAFÉ AND DELLA DINER

RESPONDENT

**ORDER**

This matter came before the Arkansas Department of Labor on July 25, 2012. Mike Robertson d/b/a City Café and Della's Diner appealed the findings of the Labor Standards Division of the Arkansas Department of Labor<sup>1</sup> that Mike Robertson d/b/a City Café and Della's Diner violated Arkansas Code Annotated §§ 11-4-210 (Supp. 2007), 11-4-211(a)(Supp. 2007) and 11-4-217 by failing to pay some of its employees the State minimum wage, failing or refusing to pay some of its employees for work in excess of forty hours in a work week at the statutorily required rate, and failing to keep wage and hour records as required by administrative regulations and applicable statutory law.

The Agency was represented by the Honorable Daniel Faulkner. No one appeared on behalf of Mr. Mike Robertson d/b/a City Café and Della's Diner.<sup>2</sup> The Agency presented two witnesses. Both witnesses, Heidi Massey, the Agency Investigator in this case, and Lindsay M. Moore, the Agency Labor Standards

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<sup>1</sup> Hereafter referred to as the "Agency"

<sup>2</sup> As part of the case file, certified delivery of the hearing date notice was signed by Mike Robertson on 5/25/2012 at 9:28 a.m.

Administrator, testified. The Agency also introduced eight written exhibits that were accepted into the record.

The parties were afforded full opportunity to appear, to introduce relevant evidence, and to examine and cross-examine witnesses. Upon the entire record and from my observations of the demeanor of the witnesses, I make the following Findings of Fact, Conclusions of Law, and Order.

### **Findings of Fact**

Mike Robertson d/b/a City Café and Della's Diner is a sole proprietorship with its restaurant locations in the towns of Lincoln and Prairie Grove, Arkansas.<sup>3</sup> City Café is open seven days a week and Della's Diner is open five days a week. Employees may work in either location, work assignment depends on the need of the location(s), and no distinction is made between the two locations on payroll records or through management and supervisory control over the day to day operations of the business or its employees. For the last three calendar years, the annual gross dollar volume of sales ranged from \$45,500 to \$54,000 and employees were paid on a weekly basis.<sup>4</sup>

On January 17, 2012, the Agency received two complaints alleging that Mike Robertson d/b/a City Café and Della's Diner failed to pay overtime wages when employees worked more than forty hours during a work week. Each complaint involved employees who worked as both cooks and tipped employees. In response to these complaints, Heidi Massey, an agency investigator, reviewed payroll records as provided

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<sup>3</sup> Agency Exhibit 4 B completed Business Profile Report for City Café and Della's Diner.

<sup>4</sup> Agency Exhibit 4 B completed Business Profile Report for City Café and Della's Diner.

by the Respondent for the period of January 2010 through December 2011. Although the Agency's initial request for records was not complied with, it did receive this information after a hand delivered records request was issued.

For this 104 week timespan, payroll records indicated only 33 weeks where at least 4 employees worked.<sup>5</sup> In her review of these records, Ms. Massey noticed payroll stubs always indicated employees' reported tips sufficient to bring the employee up to the federal and state minimum wage.<sup>6</sup> Upon questioning by Ms. Massey, both Mike and Della Robertson stated that employees were not required to write down or report their tips and neither knew how much each employee made in tips. Employees completed weekly time cards indicating only their work start and stop times. Based on these time cards, Mr. Robertson would add up the employees' hours worked, report these numbers to his accountant for payroll purposes, and then destroy the time cards.

Agency Rules 010.14.107 E.6. and 010.14.102(B)(3) set out that an employer who claims a tip credit must maintain tip records. Employers that do not maintain such records are not entitled to the tip credit against the minimum wage. Employers can rebut lack of records by otherwise proving that the employee(s) against who a tip credit is sought actually received and retained each work week tips in an amount equal to or greater than the tip credit claimed.<sup>7</sup> In a letter dated April 20, 2012 from Lindsay M. Moore, Labor Standards Administrator, to Mr. Robertson, the Agency specifically

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<sup>5</sup> Because of jurisdictional authority, this case only deals with violations found by the Agency during these 33 weeks and referred to time period. Agency Exhibit 3 contains copies of payroll records where violations are contended.

<sup>6</sup> This portion of the case only deals with violations of the state minimum wage laws and regulations.

<sup>7</sup> Agency Exhibit 8 Administrative Regulations Pertaining to the Arkansas Minimum Wage Act, July 2010.

reiterated that it would entertain any type of documentation such as credit card receipts showing tips paid to wait staff.<sup>8</sup> No further documentation from Mr. Robertson was received by the Agency prior to the hearing nor did he attend the hearing and present any.

The Agency interviewed or attempted to interview all employees who worked during the 33 week time period. Based upon the information from employees relating to the amount of tips consistently or inconsistently received or documented during the 33 weeks, and the lack of employer records in regard to actual tips reported, the Agency found Mike Robertson d/b/a City Café and Della's Diner not eligible for the tip credit<sup>9</sup> he had used to bring ten employees'<sup>10</sup> rate of pay up to the state minimum wage of \$6.25 per hour.

Elimination or adjustment of the tip credit resulted in 10 employees failing to be paid at the state minimum wage on about 50 occasions during the 33 week time period.<sup>11</sup> Specifically, the Agency found that Mike Robertson d/b/a as City Café and Della's Diner still owes the following employees back wages for not paying the State

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<sup>8</sup> Agency Exhibit 7 April 20, 2012 letter.

<sup>9</sup> Employers of employees who engage in occupations where gratuities are customarily and usually constituted as part of remuneration may be entitled to an allowance for gratuities as part of the hourly wage rate not to exceed 58% of the minimum wage rate. The employee must actually receive the amount of gratuities. With the State minimum wage of \$6.25, the minimum cash wage would be \$2.63 per hour and the maximum tip credit wage allowance would be \$3.62 per hour.

<sup>10</sup> Originally, the Agency found violations for 11 employees. At the hearing on July 25, 2012, the Agency amended its findings to exclude Ms. Amy Galloway who, since the initial investigation, provided information that she routinely and customarily received tips in an amount during the 33 week period sufficient to meet the tip credit. Based on her representations, the Agency amended its findings to show minimum wage violations due to inappropriate employer tip credit violations for only ten employees.

<sup>11</sup> Agency Exhibit 2 contains Agency spreadsheets, by employee, summarizing and outlining payroll data, minimum wage at the time, total hours worked by employee, regular hours paid per hour, any tip credit per hour documented, additional cash wage needed per hour to bring employee up to the State minimum wage and amount owed by the employer.

minimum wage for time worked: Kathryn Allen \$501.37; Dawn Bowers \$18.00; Debra Brock \$109.51; Kimberly Cantrell \$118.56; Miram Dewitt \$470.60; Terrah Hart \$92.31; Jenna Reeves \$273.31; Jennifer Spies \$488.70; Trisha Spivey \$138.47 and Gail Whitehead \$670.95.<sup>12</sup> A total of \$2881.78 is owed to these employees.<sup>13</sup>

In addition to finding violations of the State minimum wage and recordkeeping requirements during the relevant 33 weeks, the Agency found that Mike Robertson d/b/a City Café and Della's Diner failed to pay overtime to three employees in violation of A.C.A. § 11-4-211(a) (Supp. 2007). A.C.A. § 11-4-211 requires that an employee who works in excess of 40 hours in a work week must receive overtime pay for the hours worked over 40 hours at a rate not less than one and one half times the employee's regular rate of pay.

Specifically, employer payroll records indicated that Miriam Dewitt worked 50.75 hours and 42.50 hours during the work weeks of 11/10/10 and 11/17/10 respectively; Amy Galloway worked 44.50 hours during the work week of 1/19/11; and Trisha Spivey worked 46.00 hours during the work week of 10/28/10. At times, all three employees worked two different jobs, one where they were paid \$2.63 per hour when

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<sup>12</sup> Agency Exhibit 1 contains an Inspection Summary outlining these amounts. Agency Exhibit I was amended by the Agency to eliminate an initial finding that \$2,255.27 in minimum wages was owed to Amy Galloway. This amount was revised to \$0.0 when Ms. Galloway provided the Agency with convincing information that she received sufficient tips during the weeks in question to meet the full tip credit allowance. Agency Exhibit 2 contains the actual worksheet calculations for computing the minimum wage amounts owed to these ten employees. This exhibit was also amended by the Agency to indicate full tip credit resulting in Ms. Galloway having been paid the State minimum wage during the 33 week period reviewed.

<sup>13</sup> In Agency Exhibit 5, on March 16, 2012, the Agency initially notified Mr. Robertson that it found \$5,137.05 in minimum wage back wages owed to 11 employees. Subsequently, the Agency's found that Mike Robertson d/b/a City Café and Della's Diner could take advantage of the tip credit on Ms. Amy Galloway. With the elimination of Ms. Galloway from its overall minimum wage back pay assessment, the amount now found and sought by the Agency was amended to \$2881.78.

working as a tipped employee and \$7.25 per hour when performing the duties of a non-tipped employee. During the weeks in question for overtime violations, only two of the three employees performed different job duties and were paid at two different rates. Since the computation of the overtime rate of pay involved two different hourly rates of pay for these two employees, the Agency computed their overtime hourly rate of pay by taking the dollar amount earned from both types of job duties for each employee and then dividing that total by the number of hours the employee worked for that week. The average hourly rate was multiplied by one and one half to establish the overtime hourly rate of pay. This new overtime hourly wage rate was then multiplied by the number of hours the employee worked over 40 hours for that work week to derive the amount of overtime payment due the employee. During the week of her overtime eligibility, one employee, Debra Spivey, only performed duties as a non-tipped cook and she was paid at only one rate of pay. For that week, the Agency used Ms. Spivey's actual hourly rate, times one and one-half, to find the overtime hourly rate for that week.

The Agency found that Miriam Dewitt is owed \$58.32 in overtime for 10.75 overtime hours at an overtime hourly rate of pay of \$9.38 for the week of 11/10/10 and \$11.85 in overtime for 2.50 overtime hours at a rate of pay of \$9.48 for the week of 11/17/10; Amy Galloway is owed \$30.35 for 4.50 overtime hours at an overtime hourly rate of pay of \$9.38 per hour for the week of 11/19/11; and Trisha Spivey is owed \$57.37 for 6 overtime hours at an overtime hourly rate of pay of \$10.74 for the week of

10/28/10. Mike Robertson d/b/a City Café and Della's Diner owes a total of \$158.25 in overtime back wages.

The Agency pointed out that no distinction was indicated on the pay stub to denote whether an employee worked at City Café or Della's Diner or the number of hours worked at either location. The pay stub did, however, indicate for each work week how many hours an employee worked performing the duties of a cook (non-tipped) or a waitress (tipped).

Under Rule 010.14-111, the Labor Standards Administrator may issue a civil money penalty for the paying of wages at a rate less than required by the Arkansas Minimum Wage Act. The amount of any civil money penalty may be between \$50 and \$1000 per violation with each violation constituting a separate offense. When determining the amount of penalty, the Labor Standards Administrator shall consider the appropriateness of the penalty to the size of the business and the gravity of the violation.

March 16, 2012, Lindsay M. Moore notified Mike Robertson of a \$1,100 penalty assessment for the aforementioned multiple State minimum wage and record keeping violations and failure to pay appropriate overtime wages.<sup>14</sup> Mr. Moore testified that he took into consideration various factors when establishing the penalty assessment. These factors included the size of the businesses, the number of violations, and the number of employees affected. He also stated that his initial assessment was based on

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<sup>14</sup> Agency Exhibit 5 Letter dated March 16, 2012 from Lindsay M. Moore to Mike Robertson.

violations found on eleven employees, and since the Agency amended its findings to only reflect violations on ten employees, Mr. Moore amended his penalty by reducing it from \$1,100 to \$1000. Mr. Moore stated that the Rule allowed him discretion to charge the employer with a penalty of \$50 to \$1000 per violation<sup>15</sup> and that the \$1,000 total penalty was far below the amount he is allowed to assess the employer.

## **Conclusions of Law**

### **Jurisdiction**

Mike Robertson d/b/a City Café and Della's Diner is located in the towns of Lincoln and Prairie Grove, Arkansas. It has an annual volume of sales or business done for at least the past 3 calendar years is less than \$500,000.<sup>16</sup>

The term "employer" within the meaning of the Arkansas Minimum Wage Act specifically does not include any entity or person "for any work week in which fewer than four (4) employees are employed." A.C.A. § 11-4-203(4)(A). During the period of January 1, 2010 through December 31, 2011, Respondent's payroll records indicated 33 weeks where 4 or more employees were employed. For those 33 weeks, Mike Robertson d/b/a City Café and Della's Diner fall under the Arkansas Minimum Wage (A.C.A. §11-4-210), Arkansas Overtime (A.C.A §11-4-211), Arkansas Recordkeeping (A.C.A. §11-4-217) laws and the Agency Administrative Regulations pertaining to the

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<sup>15</sup> Agency Exhibits 2 and 3 bear out that over a 33 week time period there were about 50 occasions where an employee(s) was underpaid.

<sup>16</sup> Employees who work for "enterprises" that have an annual dollar volume of sales or business done of at least \$500,000 may be covered under the Federal Fair Labor Standards Act of 1930, as amended. 29 C.F.R. Parts 510 to 794 and 29 U.S.C. § 201 *et. seq.*

Arkansas Minimum Wage Act (2007). Accordingly, the Arkansas Department of Labor has proper jurisdiction over these matters during the 33 weeks.<sup>17</sup>

### **General Conclusions of Law**

The Agency established a *prima facie* case on behalf of the employees as to the Arkansas Minimum Wage Claim, the failure to pay for worked time in excess of 40 hours in a work week at the statutorily required rate and failure to maintain wage and hour records as required by the Administrative Regulations of the Labor Standards Division – Arkansas Department of Labor and Arkansas state law. Once the *prima facie* case is established, the burden shifts to the employer to produce evidence indicating that the appropriate wage was paid to the employees. Mike Robertson d/b/a City Café and Della's Diner failed to produce any evidence to indicate that the required minimum wages were paid and that appropriate adjustments in pay rates were made to reflect work in excess of a 40 hour work week. Agency's evidence and testimony credibly established that 10 employees were not paid a total of \$2,881.78 for minimum wage violations, 3 employees were not paid a total of \$144.24 for overtime violations, and the employer failed to maintain appropriate records as required by the Agency's regulations. Based upon the same evidence and testimony, it was appropriate, reasonable and within the discretion of the Agency to assess a \$1000.00 penalty to the employer.

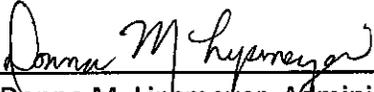
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<sup>17</sup>Agency Exhibits 2 and 3.

**THEREFORE, IT IS CONSIDERED AND ORDERED** that the employer, Mike Robertson, d/b/a City Café and Della's Dinner shall be liable for a total sum of four thousand and twenty six dollars and two cents (\$4,026.02). A payment draft in the total amount of \$4,026.02 should be forwarded to the Arkansas Department of Labor, Labor Standards Division, within ten (10) days of receipt of this Order.

**IT IS SO ORDERED.**

James E. Salkeld  
Director of Labor

BY:   
Donna M. Lipsmeyer, Administrative Law Judge  
Arkansas Department of Labor  
10421 West Markham Street  
Little Rock, AR 72205

DATE: July 30, 2012