

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

FILED
1st JUDICIAL DISTRICT COURT
Santa Fe County
8/27/2019 4:40 PM
STEPHEN T. PACHECO
CLERK OF THE COURT
Leticia Cunningham

No. D-101-CV-2016-01218

**JUAN TORRES GARCIA, VERONICA VELAZQUEZ and
IVAN HERNANDEZ,**

Plaintiffs,

vs.

**HY INVESTMENT INC., MAKI YAKI 29
and HWIDONG PARK and MI YOUNG LEE in their individual capacities,**

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the Court for trial on the merits with Plaintiffs Juan Torres Garcia, Veronica Velasquez and Ivan Hernandez (hereinafter collectively referred to as “Plaintiffs” but otherwise individually) represented through their attorneys, the United Workers’ Center of New Mexico (Gabriela C. Ibañez Guzmán, Esq.) and Quiñones Law Firm (Carlos Quiñones, Esq.), and Defendants HY Investment Inc., Maki Yaki 29, Hwidong Park and Mi Young Lee (hereinafter collectively referred to as “Maki Yaki Defendants) represented by their attorney Eunjin Choi, Esq., the Court having considered the evidence presented during such trial, and being otherwise well-advised, hereby issues Findings of Fact and Conclusions of Law, as follows:

FINDINGS OF FACT

1. Plaintiffs seek relief against all of the Maki Yaki Defendants under the New Mexico Minimum Wage Act for damages in the amount of unpaid or underpaid minimum wages, and overtime wages, plus interest, and an additional amount

- equal to twice the unpaid or underpaid wages per NMSA § 50-4-26(C), as part of a continuing course per NMSA§ 50-4-32, pre- and post-judgment interest; and an award of attorneys' fees and costs under NMSA § 50-4-26(E). (Complaint at p. 1).
2. Plaintiffs were and are residents of New Mexico at all relevant times. (Complaint at ¶ 3, Testimony of Plaintiffs).
 3. Defendant Maki Yaki is or was a Santa Fe based restaurant at all relevant times. (Testimony of Plaintiffs; Testimony of Defendant Hwidong Park).
 4. Its office is or was located at 3003 S. St. Francis St. in Santa Fe, New Mexico 87505. (Complaint at ¶ 9, Testimony of Plaintiffs, Testimony of Defendant Hwidong Park).
 5. Defendant Hwidong Park is or was the owner and operator of Maki Yaki, a New Mexico based company, at all relevant times. (Complaint at ¶ 4, Testimony of Plaintiffs, Testimony of Defendant Hwidong Park).
 6. Defendant Mi Young Lee is or was an officer with HY Investment Inc., Maki Yaki 29, a New Mexico based company, at all relevant times. (Complaint at ¶5, Testimony of Defendant Hwidong Park; Plaintiffs' Trial Exhibit 19).
 7. Plaintiffs bring suit against Defendants Park and Mi Young Lee in their official and individual capacities. (Complaint at ¶ 8).
 8. All three (3) Plaintiffs were hired and worked for the Maki Yaki Defendants in job positions that were not supervisory, managerial or professional positions. (Testimony of Plaintiffs Velazquez, Torres Garcia and Hernandez; Testimony of Defendant Hwidong Park).
 9. In 2006, the Maki Yaki Defendants hired Plaintiffs Juan Torres Garcia and Veronica

- Velazquez to work as kitchen staff at the Maki Yaki restaurant. (Complaint at ¶ 9; Testimony of Plaintiffs; Plaintiffs' Trial Exhibit 24 [Deposition Transcript of *Hwidong Park*, at P87; L14 -15]; Testimony of Defendant Hwidong Park).
10. As a business license holder within the City of Santa Fe, Defendants acknowledged they were required to be in compliance with the City of Santa Fe Living Wage Ordinance. (Testimony of Defendant Hwidong Park).
11. Plaintiffs' minimal regular hourly rate of pay for their various years of employment with Defendant is defined by the provisions of the City of Santa Fe Living Wage Ordinance. *See New Mexicans for Free Enterprise v. City of Santa Fe*, 2006-NMCA-007, ¶ 72, 126 P.3d 1149, 1173 (“[t]he City has the power to set a minimum wage for private employers that is higher than that mandated by the state.”); Santa Fe Living Wage Ordinance, Ord. § 28-1 SFCC 1987; Santa Fe Living Wage Ordinance pursuant to Rule 1-044(A) NMRA and Rule 11-201 NMRA, Plaintiffs' Trial Exhibit 20.
12. Both Plaintiff Juan Torres Garcia and Plaintiff Velazquez were driven to New Mexico from California by Defendant Park in 2006 to work at the Maki Yaki Defendants' restaurant. (Plaintiffs' Trial Exhibit 24 at P67; L 22- 25; P68; L1-4; Testimony of Defendant Hwidong Park).
13. During her entire employment with the Maki Yaki Defendants, Plaintiff Velazquez, whose testimony the Court finds to be credible with regard to this and other Findings of Fact and Conclusions of Law, was prohibited from clocking-in and clocking-out for each of her shifts. (Plaintiffs' Trial Exhibit 24 at P42; L19-24; P43; L22-25; P44; L1-3, 9 -12, 15-17, 23-25; P45; L5-9, 13-15, 24-25; P46; L1-2; Testimony of

Plaintiff Veronica Velazquez).

14. From 2009 until July 2013, Plaintiff Velazquez was paid for a set number of hours for each workweek instead of her actual hours worked. (Plaintiffs' Trial Exhibit 24 at P96; L20– 25, P97; L1 -21; Testimony of Plaintiff Veronica Velazquez; Plaintiffs' Trial Exhibit 8).
15. Defendant Park testified he paid Plaintiff Velazquez in cash in 2009 through 2011. (Plaintiffs' Trial Exhibit 24 at P91; L13- 25; Testimony of Plaintiff Veronica Velazquez; Testimony of Defendant Hwidong Park).
16. Defendant Park testified he did not keep a record of Plaintiff Velazquez's hours from 2009 to 2013. (Plaintiffs' Trial Exhibit 24 at P92; L5 – 25; P93; L21-25; P94; L6- 15; P99; L21- 23).
17. Defendant Park testified he did not issue a W-2 to Plaintiff Velazquez from 2006 to 2011. (Plaintiffs' Trial Exhibit 24 at P101; L21 – 25; P102; L1 – 10; Testimony of Veronica Velazquez; Testimony of Defendant Hwidong Park).
18. Defendant Park issued a W-4 to Plaintiff Velazquez for the first time in June 2012, more than six years after she commenced working at Defendant Maki Yaki. (Testimony of Plaintiff Veronica Velazquez; Plaintiffs' Trial Exhibit 7).
19. Plaintiff Velazquez was required to sign off on a document where her set hours were listed, and if she did not sign it she would not receive her paycheck. (Testimony of Plaintiff Veronica Velazquez; Plaintiffs' Trial Exhibit 2).
20. In 2009, Plaintiff Velazquez worked approximately 30 hours a week and was paid \$400 per pay period. (Testimony of Plaintiff Veronica Velazquez).
21. From 2010 to 2011, Plaintiff Velazquez worked approximately from 10 a.m. to 6

- p.m. six (6) days during the week and was paid \$550 per pay period. (Testimony of Plaintiff Veronica Velazquez).
22. Beginning in 2011, Plaintiff Velazquez worked approximately from 10 a.m. to 6 p.m. six (6) days during the week and was paid \$600 per pay period. (Testimony of Plaintiff Veronica Velazquez).
23. In September 2011, Plaintiff Velazquez worked approximately from 10:15 a.m. to 4 p.m. six (6) days during the week and was paid \$350 per pay period. (Testimony of Plaintiff Veronica Velazquez).
24. From 2009 to June 2012, Plaintiff Velazquez was paid every 15th and 30th of the month. (Testimony of Plaintiff Veronica Velazquez).
25. Beginning in June 2012, Defendant Park began to pay Plaintiff Velazquez with a paycheck, provided her with a pay stub and paid on a bi-monthly basis. (Testimony of Plaintiff Veronica Velazquez; Plaintiffs' Trial Exhibit 2; Plaintiffs' Trial Exhibit 8).
26. Plaintiff Velazquez was not paid the Santa Fe Living Wage during her employment with the Maki Yaki Defendants. (Complaint at ¶¶ 55-56; Testimony of Plaintiff Veronica Velazquez; Plaintiffs' Trial Exhibit 20; Plaintiffs' Trial Exhibit 23).
27. Plaintiff Velazquez worked overtime hours during her employment at Maki Yaki, but was not paid at the time and a half premium rate. (Testimony of Plaintiff Veronica Velazquez; Plaintiffs' Trial Exhibit 23).
28. Plaintiff Velazquez suffered unpaid and/or underpayment of wages from the Defendants. (Testimony of Plaintiff Veronica Velazquez; Plaintiffs' Trial Exhibit 23).

29. Before February 2015, Plaintiff Torres Garcia, whose testimony the Court finds to be credible as regards this and other Findings of Fact and Conclusions of Law, was prohibited from clocking-in and clocking-out for each of his shifts. (Plaintiffs' Trial Exhibit 24 at P42; L19-24; P43; L22-25; P44; L1-3, 9 -12, 15-17, 23-25; P45; L5-9, 13-15, 24-25; P46; L1-2; P48; L11-14.; Testimony of Plaintiff Juan Torres Garcia).
30. Before February 2015, Plaintiff Torres Garcia was paid for a set number of hours for each workweek, instead of actual hours worked. (Plaintiffs' Trial Exhibit 24 at P75; L4-25; P76-P78; Plaintiffs' Trial Exhibit 5 Testimony of Plaintiff Juan Torres Garcia).
31. Defendant Park paid Plaintiff Torres Garcia in cash from 2009 through 2011. (Plaintiffs' Trial Exhibit 24 at P73; L19-25; Testimony of Defendant Hwidong Park; Testimony of Plaintiff Juan Torres Garcia).
32. Defendant Park issued a W-4 to Plaintiff Torres Garcia for the first time in June 2012, more than six years after he commenced working at Defendant Maki Yaki. (Testimony of Plaintiff Juan Torres Garcia; Plaintiffs' Trial Exhibit 4).
33. Before February 2015, Plaintiff Torres Garcia was required to sign off on a spreadsheet where his set work hours were listed, and if he did not sign he would not receive his paycheck. (Testimony of Plaintiff Juan Torres Garcia; Plaintiffs' Trial Exhibit 3).
34. Before February 2015, Plaintiff Torres Garcia was not paid for all his time worked and was not paid the Santa Fe Living Wage during his employment with the Maki Yaki Defendants. (Testimony of Plaintiff Juan Torres Garcia; Plaintiffs' Trial Exhibit 20; Plaintiffs' Trial Exhibit 21).

35. Before February 2015, Plaintiff Torres Garcia worked overtime hours during his employment at Maki Yaki, but was not paid at the time and a half premium rate. (Testimony of Plaintiff Juan Torres Garcia; Plaintiffs' Trial Exhibit 21).
36. Defendant Park did not keep time records for Plaintiff Torres Garcia from 2009 to 2013 and is unable to state whether Plaintiff Torres Garcia worked overtime hours. (Plaintiffs' Trial Exhibit 24 at P85; L23 – 25; P86; L1 -25; P87; L1 -6; Testimony of Defendant Hwidong Park).
37. From 2009 to 2012, Plaintiff Torres Garcia worked approximately 66 hours a week, six days a week and was paid \$900 per pay period. (Testimony of Plaintiff Juan Torres Garcia; Plaintiffs' Trial Exhibit 21).
38. Beginning in June 2012, Defendant Park began to pay Plaintiff Torres Garcia with a paycheck, provided him with a pay stub and paid on a bi-monthly basis. (Testimony of Plaintiff Juan Torres Garcia; Testimony of Defendant Hwidong Park; Plaintiffs' Trial Exhibit 3; Plaintiffs' Trial Exhibit 5).
39. Plaintiff Torres Garcia was not paid the Santa Fe Living Wage during his employment with the Maki Yaki Defendants. (Testimony of Plaintiff Juan Torres Garcia; Plaintiffs' Trial Exhibit 20; Plaintiffs' Trial Exhibit 21).
40. Plaintiff Torres Garcia worked overtime hours during his employment at Maki Yaki, but was not paid at the time and a half premium rate. (Testimony of Plaintiff Juan Torres Garcia; Plaintiffs' Trial Exhibit 21).
41. Plaintiff Torres Garcia suffered unpaid and/or underpayment of wages from the Defendants. (Testimony of Plaintiff Juan Torres Garcia; Plaintiffs' Trial Exhibit 21).
42. In 2011, Defendants hired Plaintiff Ivan Hernandez, whose testimony the Court finds

- to be credible regarding this and other Findings of Fact and Conclusions of Law, to work as kitchen staff at the Maki Yaki restaurant. (Complaint at ¶39; Testimony of Plaintiff Ivan Hernandez; Testimony of Defendant Hwidong Park).
43. Plaintiff Hernandez was hired by Hwidong Park. (Plaintiffs' Trial Exhibit 24 at P103; L4 – 6; Testimony of Plaintiff Ivan Hernandez; Testimony of Defendant Hwidong Park).
44. Except for a few days at the end of Plaintiff Hernandez's employment, he was not allowed to clock-in and clock-out for each of his shifts. (Plaintiffs' Trial Exhibit 24 at P45; L5 -9, 13-15, 24 -25; P46; L 1-2; P48; L11-14; P107; L 9– 25; Testimony of Plaintiff Ivan Hernandez; Plaintiffs' Trial Exhibit 11).
45. When questioned by Plaintiff Hernandez why he was not allowed to clock-in and clock-out like other workers, Defendant Park stated he “was different” from the other workers. (Testimony of Plaintiff Ivan Hernandez).
46. All other Maki Yaki restaurant employees, other than the Plaintiffs, clocked in and clocked out regularly on the restaurant time clock, which was in operation throughout the entire time the restaurant was operating. (Testimony of Plaintiffs' Velazquez, Torres Garcia and Hernandez; Testimony of Defendant Hwidong Park).
47. Plaintiff Hernandez was paid for a set number of hours for each workweek, instead of actual hours worked. (Plaintiffs' Trial Exhibit 24 at P106; L5–18; Testimony of Plaintiff Ivan Hernandez).
48. Plaintiff Hernandez was required to sign off on a document where his hours were left blank, and if he did not sign the document he would not receive his paycheck. (Testimony of Plaintiff Ivan Hernandez, Plaintiffs' Trial Exhibit 1).

49. Plaintiff Hernandez worked overtime hours during his employment at Maki Yaki, but was not paid at the time and a half premium rate. (Testimony of Plaintiff Ivan Hernandez; Plaintiffs' Trial Exhibit 20).
50. Plaintiff Hernandez was not paid the City of Santa Fe Living Wage from his employment start date of March 2011 until June 30, 2012. (Testimony of Plaintiff Ivan Hernandez).
51. Plaintiff Hernandez was always paid every two weeks by the Maki Yaki Defendants, with 26 pay periods annually. (Testimony of Plaintiff Ivan Hernandez).
52. Plaintiff Hernandez was paid a flat rate of \$720 every two week pay period from the outset of his employment through June 2012. (Testimony of Ivan Hernandez).
53. Plaintiff Hernandez worked a total of 48 hours per week (96 hours per pay period) from the outset of his employment through June 2012. (Testimony of Ivan Hernandez).
54. From July 1, 2012 to September 2014, Plaintiff Hernandez was paid a flat rate of \$840 every two weeks. (Testimony of Plaintiff Hernandez).
55. From July 1, 2012 to March 2015, Plaintiff Hernandez was working 83 hours in a two-week pay period. (Testimony of Plaintiff Hernandez).
56. From September 2014 to February 2015, Plaintiff Hernandez was paid a flat rate of \$860.00 every two weeks. (Testimony of Plaintiff Hernandez).
57. Plaintiff Hernandez suffered unpaid and/or underpayment of wages from the Defendants. (Testimony of Plaintiff Ivan Hernandez).
58. Plaintiff Veronica Velazquez, was continuously employed by the Maki Yaki Defendants from 2009 to July 2013. (Testimony of Plaintiff Veronica Velazquez;

Testimony of Defendant Hwidong Park).

59. Plaintiff Juan Garcia Torres was employed by the Maki Yaki Defendants from November 2006 until the restaurant's closure around October 2017. (Testimony of Plaintiff Juan Garcia Torres; Testimony of Defendant Hwidong Park).
60. Plaintiff Ivan Hernandez was employed by the Maki Yaki Defendants from March 2011 through February 2015. (Testimony of Plaintiff Ivan Hernandez; Testimony of Defendant Hwidong Park; Plaintiffs' Trial Exhibits 11 and 12).
61. The Maki Yaki Defendants exercised day-to-day operational control over their restaurant, having direct responsibility for the supervision of its employees, controlling the payment of wages to employees and controlling all aspects of the operation of the business. (Testimony of Plaintiffs Ivan Hernandez, Juan Torres Garcia and Veronica Velazquez; Testimony of Defendant Hwidong Park).
62. The Maki Yaki Defendants did not pay Plaintiffs what is legally mandated by the State of New Mexico and the City of Santa Fe for payment of wages. (Testimony of Plaintiffs Ivan Hernandez, Juan Torres Garcia and Veronica Velazquez; Plaintiffs' Trial Exhibit 20; Plaintiffs' Trial Exhibit 21; Plaintiffs' Trial Exhibit 22).
63. The Maki Yaki Defendants failed to maintain accurate employee time and pay records, as required under the New Mexico Minimum Wage Act. (Testimony of Plaintiffs Ivan Hernandez, Juan Torres Garcia and Veronica Velazquez. Testimony of Defendant Hwidong Park).
64. All three (3) Plaintiffs suffered underpayment of wages from the Maki Yaki Defendant, thus meeting their initial burden of proving they all performed work for which they were not properly compensated. (Testimony of Plaintiffs Ivan

Hernandez, Juan Torres Garcia and Veronica Velazquez; Plaintiffs' Trial Exhibit 20; Plaintiffs' Trial Exhibit 21; Plaintiffs' Trial Exhibit 22).

65. Plaintiffs presented testimony and documentary evidence at the bench trial of hours worked and wages due. (Testimony of Plaintiffs Ivan Hernandez, Juan Torres Garcia and Veronica Velazquez; Plaintiffs' Trial Exhibits 5, 8, 10, 21, 23).

66. The unpaid or underpaid wage total for Plaintiff Velasquez was \$25,085.90. (Testimony of Plaintiff Veronica Velazquez; Plaintiffs' Trial Exhibit 23). This figure differs from the amount set forth in Plaintiffs' Exhibit 23, in particular the first component figure of \$4,393 set forth therein, based in part upon Plaintiffs' trial stipulation that no unpaid or underpaid wages would be sought prior to July 2009 even though the first five lines of Exhibit 23 include wages for the period January 2009 up to December 22, 2009. Accordingly, the wages set forth in Plaintiffs' Exhibit 23 as to Plaintiff Velazquez have been reduced to \$25,085.90 herein based in part upon Plaintiffs' exclusion of claims prior to July 2009.

67. Plaintiff Torres Garcia calculated his unpaid or underpaid wage total at \$72,310.85. (Testimony of Plaintiff Juan Torres Garcia; Plaintiffs' Trial Exhibit 21).

68. Plaintiff Hernandez calculated his unpaid or underpaid wage totals at approximately \$9,000 from March 2011 through February 2012 (26 pay periods); \$3,000 from March 2012 through June 30, 2012 (8 pay periods); \$4,700.00 from July 1, 2012 through February 2013 (17 pay periods); \$7,800.00 from March 2013 through February 2014 (26 pay periods); \$4,700.00 from March 2014 through September 2014 (15 pay periods); and \$3,000 from September 2014 through February 2015 (10 pay periods), for a total claim of \$32,200.00. (Testimony of Plaintiff Hernandez).

69. The Maki Yaki Defendants did not discharge their evidentiary burden of rebutting Plaintiffs' evidence of uncompensated time worked and unpaid/underpaid wages.
70. The Maki Yaki Defendants agreed not knowing the law is no excuse for not paying Plaintiffs in accordance with the law. (Testimony of Defendant Hwidong Park).
71. At trial, Plaintiffs stipulated they are seeking all unpaid and underpaid wages due from Defendants beginning in July 2009. (Stipulation of Plaintiffs' legal counsel).
72. Defendants' proposed findings of fact not adopted herein are hereby denied.

CONCLUSIONS OF LAW

1. The actions of the Maki Yaki Defendants constitute a violation of Plaintiffs' rights under the New Mexico Minimum Wage Act by not paying Plaintiffs for all the hours Plaintiffs worked for the Maki Yaki Defendants and by not paying overtime pay as required at the time and one-half premium.
2. The New Mexico Minimum Wage Act (MWA) provides in relevant part that:

An employee shall not be required to work more than forty hours in any week of seven days, unless the employee is paid one and one-half times the employee's regular hourly rate of pay for all hours worked in excess of forty hours. For an employee who is paid a fixed salary for fluctuating hours and who is employed by an employer a majority of whose business in New Mexico consists of providing investigative services to the federal government, the hourly rate may be calculated in accordance with the provisions of the federal Fair Labor Standards Act of 1938 [FLSA] and the regulations pursuant to that act; provided that in no case shall the hourly rate be less than the federal minimum wage.

NMSA § 50-4-22(D).

3. The actions of the Maki Yaki Defendants constitute violations of Plaintiffs' rights under the MWA by not paying and underpaying them for all the hours worked for the Maki Yaki Defendants.
4. The Maki Yaki Defendants are found liable, jointly and severally, under the MWA and Plaintiffs are entitled to damages.

5. The Maki Yaki Defendants' violations of Plaintiffs' rights under the MWA were part of a continuing course of conduct as provided at NMSA § 50-4-32.
6. Therefore, Plaintiffs are entitled to all unpaid and underpaid wages caused by the Maki Yaki Defendants' violations that occurred as part of a continuing course of conduct regardless of the date on which they occurred.
7. NMSA § 50-4-32 was promulgated in June 2009.
8. In construing a statute, New Mexico courts seek to determine and give effect to the intent of the Legislature. *N.M. Indus. Energy Consumers*, 2007-NMSC-053, ¶ 20, 142 N.M. 533, 168 P.3d 105. In discerning the Legislature's intent, New Mexico courts have adopted certain rules of statutory construction, first looking at "the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Id.* "When statutory language is clear and unambiguous, [a court] must give effect to that language and refrain from further statutory interpretation." *Anadarko Petroleum Corp. v. Baca*, 117 N.M. 167, 169, 870 P.2d 129, 131 (1994) (internal quotation marks and citation omitted). "A statute should be interpreted to mean what the Legislature intended it to mean, and to accomplish the ends sought to be accomplished by it." *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 794, 568 P.2d 1236, 1240 (1977).
9. Pursuant to NMSA § 50-4-21(B) of the MWA, "employer" includes "any individual, partnership, association, corporation, business trust, legal representative or any organized group of persons employing one or more employees at any one time, acting directly or indirectly in the interest of an employer in relation to an employee."

10. All of the Maki Yaki Defendants meet the definition of an “employer” of Plaintiffs, jointly and severally, under the MWA.
11. As a private business located within the City of Santa Fe, New Mexico, the Maki Yaki Defendants were required to abide by the provisions of the City of Santa Fe Living Wage Ordinance including, but not limited to, the minimum hourly living wage amounts over the years of Plaintiffs’ employment.
12. Plaintiffs’ minimal regular hourly rate of pay for their various years of employment with Defendant is defined by the provisions of the City of Santa Fe Living Wage Ordinance. *See New Mexicans for Free Enterprise v. City of Santa Fe*, 2006-NMCA-007, ¶ 72, 126 P.3d 1149, 1173 (“[t]he City has the power to set a minimum wage for private employers that is higher than that mandated by the state.”); Santa Fe Living Wage Ordinance, Ord. § 28-1 SFCC 1987; judicial notice of *New Mexicans for Free Enterprise* and Santa Fe Living Wage Ordinance pursuant to Rule 1-044(A) NMRA and Rule 11-201 NMRA, Plaintiffs’ Exhibit # 20.
13. “Wages” shall mean all amounts at which the labor or service rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, commission basis or other method of calculating such amount. NMSA § 50-4- 1(B).
14. Wages shall be paid in lawful money. NMSA § 50-4-2(B).
15. “The regular hourly rate of pay of an employee is determined by dividing the total remuneration for employment in any [work period] by the total number of hours actually worked by him in that [40 hour work period] for which such compensation was paid.” (citation omitted). *Kohlheim v. Glynn County*, 915 F.2d 1473, 1480 (11th Cir. 1990). *See also* NMSA § 50-4-22(D) (New Mexico Minimum Wage Act

provides “hourly rate may be calculated in accordance with the provisions of the federal Fair Labor Standards Act of 1938 [FLSA] and the regulations pursuant to that act).

16. Per federal regulations pertaining to the FLSA:

The general overtime pay standard in section 7(a) requires that overtime must be compensated at a rate not less than one and one-half times the regular rate at which the employee is actually employed. The regular rate of pay at which the employee is employed may in no event be less than the statutory minimum. (The statutory minimum is the specified minimum wage applicable under section 6 of the Act, except in the case of workers specially provided for in section 14 and workers in Puerto Rico, the Virgin Islands, and American Samoa who are covered by wage orders issued pursuant to section 8 of the Act.) ***If the employee’s regular rate of pay is higher than the statutory minimum, his overtime compensation must be computed at a rate not less than one and one-half times such higher rate.*** Under certain conditions prescribed in section 7 (f), (g), and (j), the Act provides limited exceptions to the application of the general standard of section 7(a) for computing overtime pay based on the regular rate. With respect to these, see §§778.400 through 778.421 and 778.601 and part 548 of this chapter. The Act also provides, in section 7(b), (i), (k) and (m) and in section 13, certain partial and total exemptions from the application of section 7(a) to certain employees and under certain conditions. Regulations and interpretations concerning these exemptions are outside the scope of this part 778 and reference should be made to other applicable parts of this chapter. 29 CFR § 778.107 (emphasis added).

17. Therefore, Plaintiffs’ respective overtime rates must be computed using the actual regular rate of pay for each Plaintiff, even if that higher rate of pay is in accordance with hourly rates set by the City of Santa Fe Living Wage Ordinance.

18. The regular rate of pay for Plaintiffs may in no event be less than that mandated by the City of Santa Fe Living Wage Ordinance for a private business, like the Maki Yaki Defendants, who operated in the City of Santa Fe, New Mexico.

19. The New Mexico Court of Appeals upheld the constitutionality and lawfulness of

the Santa Fe Living Wage, holding “[t]he City has the power to set a minimum wage for private employers that is higher than that mandated by the state.” *New Mexicans for Free Enterprise v. City of Santa Fe*, 2006-NMCA-007, ¶ 72, 126 P.3d 1149, 1173.

20. The Tenth Circuit recognized the employers’ duty to maintain accurate employee time and pay records, under the Fair Labor Standards Act (FLSA) (after which the New Mexico Minimum Wage Act is modeled). *See Donovan v. Simmons Petrol. Corp.*, 725 F.2d 83 (10th Cir. 1983).

21. In *Donovan*, the shifting of the burden to prove damages between the employee and the employer is explained as such:

The employee bears the burden of proving he performed work for which he was not properly compensated. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). However, employers have a duty to keep accurate records. If employers do not keep accurate records the employee’s burden is extremely difficult. In order to prevent the employee from being penalized by the employer’s failure to keep adequate records, the Supreme Court held in *Anderson* that an employee carries his burden by proving that he has “in fact performed work for which he was improperly compensated and . . . [producing] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.” *Id.* Upon such a showing, the burden shifts to the employer to produce evidence of the precise amount of work performed or to negate the reasonableness of the inference drawn from the employee’s evidence. If the employer does not rebut the employee’s evidence, then damages may be awarded even though the result is only approximate. The employer cannot complain that the damages lack the precision that would have been possible if the employer had kept the records required by law. *Id.* at 687-88.

Donovan, 725 F.2d at 85-86. *See also Dole v. Alamo Foundation*, 915 F.2d 349, 351 (8th Cir. 1990) (where employer has not kept adequate records of wages and hours, employees generally may not be denied recovery of back wages on the ground that the precise extent of their uncompensated work cannot be proved).

22. The employees “are to be awarded compensation on the most accurate basis possible.” *Id.* (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)).
23. The Maki Yaki Defendants failed to maintain accurate employee time and pay records, as required under the New Mexico Minimum Wage Act. (Testimony of Plaintiffs Ivan Hernandez, Juan Torres Garcia and Veronica Velazquez; Testimony of Defendant Hwidong Park).
24. Plaintiffs presented testimony and documentary evidence at the bench trial of hours worked and wages due. (Testimony of Plaintiffs Ivan Hernandez, Juan Torres Garcia & Veronica Velazquez; Plaintiffs’ Trial Exhibits 5, 8, 10, 21, 23).
25. The Maki Yaki Defendants presented no evidence on the amount(s) of Plaintiffs’ unpaid or underpaid wage totals.
26. The Maki Yaki Defendants did not discharge their evidentiary burden of rebutting Plaintiffs’ evidence of uncompensated time worked at Defendants’ restaurant.
27. Pursuant to NMSA § 50-4-26(C), “an employer who violates any provision of [the New Mexico Minimum Wage Act] shall be liable to the employees affected in the amount of their unpaid or underpaid minimum wages plus interest, and in an additional amount equal to twice the unpaid or underpaid wages.”
28. Plaintiffs are entitled under the New Mexico Minimum Wage Act to damages for their unpaid wages, interest on the their unpaid wages, and an additional amount equal to twice the unpaid or underpaid wages.
29. There is no “intent” requirement contained in NMSA § 50-4-26(C) of the state MWA for awarding successful plaintiffs the “additional amount equal to twice the unpaid

or underpaid wages.”

30. Pursuant to the continuing violations statutory language, NMSA § 50-4-32, and the “double damages” provision, NMSA § 50-4-26(C), Plaintiffs’ damages will encompass multiple years and large amounts, thereby placing Plaintiffs (who have never made more or much more than the Living Wage when working for the Maki Yaki Defendants) into much higher tax brackets.
31. Plaintiffs would be unable to allot their respective lump sum damages award over a multiple year period for tax purposes. This would result in Plaintiffs being placed into a higher tax bracket.
32. This heightened tax burden imposed on Plaintiffs is a direct result of the Maki Yaki Defendants’ illegal conduct should be borne by the Maki Yaki Defendants and not by Plaintiffs.
33. The Maki Yaki Defendants should not be rewarded for their illegal conduct by passing the tax burden liability onto Plaintiffs.
34. Under New Mexico law, a plaintiff wronged by an employer can recover damages arising in the future so that a plaintiff will be reasonably and fairly compensated. *See, e.g.*, UJI 13-1821 (future damages jury instruction for employment cases).
35. Therefore, the Maki Yaki Defendants are ordered to pay Plaintiffs’ tax liabilities at the rate of 20% for all lost wages amounts.
36. The Maki Yaki Defendants are liable to Plaintiff Juan Garcia Torres for damages under the MWA as follows:

- A. \$72,310.85 in unpaid and underpaid wages;
- B. Pre-judgment and post-judgment interest;

C. An additional statutory amount under the MWA of \$144,621.70; and

D. For a total award to Plaintiff Juan Garcia Torres of \$216,932.55 plus pre-judgment and post-judgment interest as further set forth herein.

37. The Maki Yaki Defendants are liable to Plaintiff Veronica Velazquez for damages under the MWA as follows:

A. \$25,085.90 in unpaid and underpaid wages;

B. Pre-judgment and post-judgment interest;

C. An additional statutory amount under the MWA of \$50,171.80; and

D. For a total award to Plaintiff Veronica Velazquez of \$75,257.70 plus pre-judgment and post-judgment interest as further set forth herein.

35. The Maki Yaki Defendants are liable to Plaintiff Ivan Hernandez for damages under the MWA as follows:

A. \$32,200.00 in unpaid and underpaid wages;

B. Pre-judgment and post-judgment interest;

C. An additional statutory amount under the MWA of \$64,400.00; and

D. For a total award to Plaintiff Ivan Hernandez of \$96,600.00 plus pre-judgment and post-judgment interest as further set forth herein.

36. Pre-judgment interest is awarded at the rate of 8.75% per year until the judgment is paid in full.

37. Post-judgment interest is awarded at the rate of 8.75% per year from the time that judgment is entered in this matter against the Maki Yaki Defendants.

38. Pursuant to NMSA § 50-4-26(E), “the court in any action brought under [the New

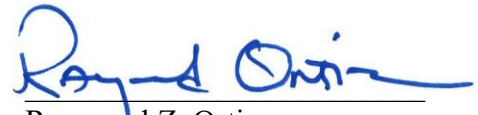
Mexico Minimum Wage Act] shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow costs of the action and reasonable attorney fees to be paid by the defendant.”

39. Pursuant to NMSA § 50-4-26(E) of the MWA, the Court shall award reasonable attorney’s fees to Plaintiffs and against Defendants in an amount to be determined after review of Plaintiffs’ attorneys’ affidavits and billing statements to be submitted within fifteen (15) days after entry of Judgment against Defendants, in accordance with Rule 1-054(E) NMRA.

40. Defendants’ proposed conclusions of law not adopted herein are hereby denied.

41. Judgment against the Maki Yaki Defendants shall be filed herewith in accordance with Rule 1-058 NMRA.

Dated this 27TH day of August, 2019.



Raymond Z. Ortiz
District Court Judge
Division III


CERTIFICATE OF SERVICE

I hereby certify that this pleading was served on the below listed attorneys on the date filed.

Gabriela Ibañez Guzmán, Esq.
United Workers Center of New Mexico
1804 Espinacitas St.
Santa Fe, NM 87505
(505) 983-6247

Carlos M. Quiñones, Esq.
Quiñones Law Firm
1532 B Paseo de Peralta
Santa Fe, NM 87501
(505) 992-1515

Eunjin Choi, Esq.
351 Monroe St. NE
Albuquerque, NM 87108
Attorney for Defendants


Ramona Lara
TCAA to Judge Raymond Ortiz
Division III