

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1221-2010
OF ALISA M. HERODES,)	
)	
Claimant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
A BETTER CABINET DEAL, INC.,)	
a Montana Corporation,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Alisa Herodes appeals from a Wage and Hour Unit determination and redetermination that dismissed her claims for additional wages and commission from A Better Cabinet Deal, LLC (ABCD). The Wage and Hour Unit found that Herodes had failed to show she was due additional wages or commission and dismissed her claim.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on November 5, 2010. Paul Haffeman, attorney at law, represented Herodes. Robert Pfennings, attorney at law, represented ABCD. Herodes, Daryl Christensen, Larry Christensen, and Kimberly Miller appeared and testified under oath. The parties stipulated to the admission of ERD Documents 1 through 151 as well as respondent's Exhibits A through D.

The parties requested the opportunity to file post-hearing briefs, the last of which was timely received on February 4, 2011. Based on the testimony, exhibits admitted at the hearing, and the oral and written arguments of the parties, the hearing officer makes the following findings of fact, conclusions of law, and final order.

II. ISSUES

Is Herodes due additional wages and commission as alleged in her complaint?

III. FINDINGS OF FACT

1. At all times material to this case, ABCD has been a Montana Corporation owned by Daryl Christensen.

2. Herodes began working for ABCD on May 17, 2007. She left her employment with ABCD on September 25, 2009.

3. Herodes' interest in working for ABCD was not just employment. Her ultimate goal was to purchase ABCD from Christensen after five years. Christensen shared Herodes' objective and wanted to ensure Herodes stayed on at ABCD so that she could buy the business. Christiansen and Herodes agreed that Christiansen would be teaching Herodes the trade and then, after the passage of five years, Herodes would buy the business from Christiansen for \$700,000.00 to \$800,000.00.

4. At the outset of the employment relationship, Christiansen and Herodes entered into an oral agreement regarding Herodes' compensation. Under that agreement, for her first year of employment, Herodes was to be paid \$400.00 per week, net, a commission of 25% on the profit from sales of cabinets to existing customers, and a commission of 50% on the profit of sales of cabinets to new customers. After the first year of employment, Herodes was to be paid \$400.00 gross per week and a straight 25% commission on the profit of all sales, regardless of whether the customer was a new customer or an existing customer.

5. During her first year of work, Herodes did well. On June 4, 2008, Christensen told Herodes that, consistent with the agreement they had made when she started, effective May 25, 2008, Herodes would be paid \$400.00 per week gross and a straight 25% commission on all sales. Herodes told Christensen that she did not think she could live on \$400.00 per week. In response, Christensen agreed to extend her \$400.00 net per week out through November 2008, after which she would go to \$400.00 gross per week.

6. During her employment (with one exception discussed below), Herodes was not paid commission on sales until all work was complete (including installation) and final payment had been received. By way of example, the Grabiell sale had been ordered in August 2008. As Herodes' own testimony demonstrates, and the hearing officer finds, Herodes did not turn in her request for commission on that job until February 2009 because at that point all cabinets had been installed. She was paid the commission owing on that job on February 6, 2009. Exh. 116. Thus, the custom and practice of the parties was to pay Herodes her commissions when all work was complete and final payment had been received. The employment agreement

contained no condition subsequent to payment that Herodes must be employed at the time the sale became final in order to be paid on that job.

7. The one exception to the above arrangement came during the Grabiell sale which Herodes made. That sale was made at the April Home Show in Great Falls and purchasers would not be taking delivery until the fall or later. Because of this, and because Herodes asked, Christensen decided to go ahead and pay Herodes her commission up front. As it turned out, a cabinet had to be reordered on the Grabiell sale which resulted in a reduction in ABCD's profit of \$232.00.

8. Herodes was the procuring cause of those commissions for which she was not paid. In a typical scenario, a customer would come in or phone in and describe the project to her. Herodes would ask questions of the customer in order to make certain calculations and to determine the aesthetic qualities (materials out of which the cabinets would be made, the stain to be used on the cabinets, etc.) that the customer desired. Herodes would then meet with the customer at the job site to take measurements and get a sense of the project. She would then use computer software at her office to lay out the project. At that point, the customer would pay 50% of the price of the cabinets as a down payment. Once the cabinets were produced and installed on site, and assuming no customer complaints, the balance of the money due would be paid by the customer.

9. While Herodes disputes the date on which Christensen began paying her at the reduced rate of \$400.00 gross per week and 25% commission on all sales, she agreed at hearing that she was aware no later than November 4, 2008 that the employer would be paying her under those changed terms. Herodes continued to work at \$400.00 gross per week and 25% commission until her last day of work on September 25, 2009.

10. Herodes filed her wage complaint on January 25, 2010.

11. After her initial year of working at ABCD, Herodes was paid \$400.00 gross per week for every week she worked in accordance with her employment agreement. She was also paid 25% commission on all sales that had been finalized except for the sales shown in Document 144. Those commissions remain unpaid.

12. Herodes procured cabinet sales between June 25, 2009 and her last day of work. Of these sales, she was not paid any commission on sales netting a total profit for ABCD of \$12,942.25. Document 144. 25% commission on that profit is \$3,264.81.

13. After Herodes left, ABCD's profit on the Grabiell sale was reduced by \$232.00. The reduction was due to Herodes' measuring error when measuring for the new cabinets. As a result of the error, a new cabinet had to be made to replace the one that was incorrectly measured at a cost to ABCD of \$232.00.

14. In its pre-hearing contentions, the respondent specifically articulated that it intended to raise the statute of limitations. See Page 6, Respondent's timely filed final contentions dated October 29, 2010. The claimant was thus given fair notice that the respondent intended to raise a statute of limitations defense.

IV. DISCUSSION¹

A. *The Statute Of Limitations Does Not Bar Recovery Here.*

A substantial portion of Herodes' claim relates to the pay discrepancies which Herodes acknowledges occurred before June 25, 2009. The respondent contends that any such claims are time barred by the statute of limitations. The claimant contends that no such bar exists in this case because the respondent did not affirmatively plead the defense as required by the rules of civil procedure.

Practically speaking, the issue of the timeliness of the complaint is moot since the hearing officer has found that the agreement between Herodes and ABCD in fact contemplated that after her first year, Herodes' compensation would be changed to \$400.00 per week gross and 25% commission. Except with respect to the commissions which she did not receive prior to leaving, Herodes has never contended that she was not paid according to that agreement. Rather, she has argued that changing her pay to \$400.00 gross and straight 25% commission was not part of the agreement. Since, except for the commissions which became final after she left her employment, Herodes has been properly paid under her agreement with ABCD, it is of no consequence to this decision whether any part of her claim is time barred since as a matter of fact she was paid in accordance with the agreement. However, since the issue has been extensively argued by the parties, the hearing officer will rule on the question of the timeliness of the claim.

Mont. Code Ann. § 39-3-207 provides in pertinent part:

(1) An employee may recover all wages and penalties provided for the violation of 39-3-206 by filing a complaint within 180 days of default or delay in the payment of wages.

¹ Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

(2) Except as provided in subsection (3), an employee may recover wages and penalties for a period of 2 years prior to the date on which the claim is filed if the employee is still employed by the employer or for a period of 2 years prior to the date of the employee's last date of employment.

Here, Herodes last worked on September 25, 2009 and she filed her claim on January 25, 2010. She filed her complaint within 180 days of the time that she claimed her commissions were not paid. Because she filed her complaint within 180 days of the date she alleged that she was due her commissions but not paid them, her claim is timely. Because her claim is timely, she can recover unpaid wages for a period of up to two years before the date she quit, September 25, 2009.

Citing *Marias Health Care v. Turenne*, 2001 MT 127, 305 Mont. 419, 28 P.3d 491, the claimant asserts that even if her claim is untimely, ABCD has waived the affirmative defense of the statute of limitations. Assuming that the statute is an affirmative defense (and not a limitation on the jurisdiction of this tribunal to act), *Turenne* is inapposite. *Turenne* involved the pleading requirements of the rules of civil procedure in a district court case. Those rules do not apply to this administrative proceeding. *Wheelsmith Fabrication, Inc., v. Department of Labor and Industry*, 2000 MT 27, 298 187, 993 P.2d 713. Instead, the Montana Administrative Procedures Act (MAPA) and the rules relating to Wage and Hour claims (Admin. R. Mont. 24.16.7519 et seq.) apply to this proceeding. Nothing in MAPA or the administrative rules requires that a party raise an affirmative defense any earlier than has been done in this proceeding, at the time the parties file their respective contentions before the hearing. Accordingly, the hearing officer finds that ABCD has not waived its ability to question the timeliness of the filing of the complaint.

B. With The Exception Of The Commissions On Which She Was Not Paid Any Money, Herodes Was Paid In Conformity With Her Wage Agreement.

Montana law requires that employers pay wages when due, in conformity with the employment agreement. Mont. Code Ann. § 39-3-204. Except to set a minimum wage, the law does not set the amount of wages to be paid. That determination is left to the agreement between the parties. "Wages" are money the employer owes an employee, including commissions. Mont. Code Ann. § 39-3-201(6); *Delaware v. K-Decorators, Inc.*, 1999 MT 13, 293 Mont. 97, 104-105, 973 P.2d 818.

The credible evidence in this case shows that the parties contemplated that during her first year of employment, Herodes would be paid \$400.00 net per week plus commissions of 25% on profit from sales to existing customers and 50% commission on profit from sales to new customers. After that first year, her

compensation would be changed to \$400.00 gross per week and 25% on profits from commissions of all sales. Except for the commissions appearing on Document 144 (which were never paid to Herodes but should have been as discussed below), Herodes was paid in conformity with her wage agreement throughout her employment and she has failed to prove she is due additional wages or commission as a result of an illegal unilateral change in the employment agreement.

Herodes does not dispute that at least by November 4, 2008, she was aware that she would be paid only \$400.00 gross and 25% commission. She nonetheless contends that she entered into a five year contract at the beginning of her tenure which required that she be paid \$400.00 net per week, 50% commission on profit for new customers, and 25% commission on profit on existing customers. Based on this, she contends that she is due additional regular wages and commissions. She also argues that theories of equitable estoppel prevent ABCD from arguing that Herodes is due only \$400.00 per week gross and 25% commission on profits. None of these arguments is persuasive.

In the first place, the hearing officer does not agree with Herodes' factual contention. There is no basis in fact to find that the parties ever entered into a five year agreement. Herodes knew from the outset that after one year of employment, she would be switched over to \$400.00 gross per week and a straight 25% commission on all sales. Second, as the respondent correctly points out, the employment agreement was oral, not written. A five year oral agreement cannot be enforced under Montana's statute of frauds. Mont. Code Ann. § 28-2-903(1)(a) (which requires that a contract which cannot be performed within one year of the making of the agreement is invalid in the absence of a writing which has been subscribed by the party against whom enforcement is sought).

As to the assertion that equitable estoppel applies, the hearing officer is at a loss as to how that could be so in this case. Application of equitable estoppel requires a finding of six essential elements, one of which is conduct amounting to a representation or concealment of facts. See, e.g., *Matter of Shaw*, 189 Mont. 310, 316, 615 P.2d 910, 914 (1980). ABCD never hid anything from Herodes. She knew from the start that the employment agreement contemplated that she would switch over to \$400.00 per week gross and a straight 25% commission after one year of employment. Equitable estoppel simply has no application in the facts before this hearing officer. Thus, other than as noted above, Herodes has failed to prove that she is due any additional wages.

C. *Herodes Is Entitled To Commissions For Which She Was the Procuring Cause.*

An employee is due all wages that have been “earned” by that employee. Mont. Code Ann. § 39-3-204(1). An employee may be considered to have “earned” commissions on sales made after the employee leaves employment if the employee is the procuring cause of the sale. This rule applies unless the employment agreement between the parties specifically provides when commissions will be paid. In that event, the terms of the employment agreement will control. *See, e.g., Schackleton v. Federal Signal Corp.*, 196 Ill. App. 3d. 437, 554 N.E. 2d. 244 (1989) (holding that employee was due commissions on sales for which he was the procuring cause because the rule applies in the absence of a specific provision to the contrary in the employment agreement). *See also, Tech. Rep., Inc., v. Richardson-Merrell, Inc.*, 107 Ill. App. 3d. 830, 438 N.E. 2d 744 (1982), citing *Richard v. Koury Brothers*, 341 F. 2d 34 (7th Cir. 1965).

Here, the parties’ employment agreement with respect to commissions contemplated that Herodes would be paid commissions on sales that had been finalized. Nothing in the agreement prevented Herodes from being paid commissions if she was not employed at the time the sales became final.

The respondent’s primary argument against finding that commissions are owed is its contention that the parties’ agreement did not contemplate payment of a commission until the cabinet sales were finalized and all money received. The employer has not advanced any other understanding of the employment agreement. Conspicuously absent from this agreement is any condition subsequent that Herodes be *employed* on the date the cabinet sale became finalized in order to be entitled to the commission on a sale. Rather, as Christensen himself testified, the only condition subsequent to paying Herodes was that she “would not be paid a commission on pending sales until the deal was final and all customer complaints resolved.” Respondent’s post-hearing reply brief, page 10. Since the only condition subsequent in the agreement to Herodes being paid a commission on a sale was that the sale be finalized and all customer complaints resolved, and since Herodes was the procuring cause on the cabinet sales, she is entitled by operation of law to the commissions on those sales once any sale which she procured became final and customer complaints resolved. Nothing in the employment agreement defeats the application of the procuring source rule, hence Herodes is entitled to the commission on those sales which she procured before leaving, which have been completed and for which she has not been paid.

In arguing that Herodes is not entitled to any commissions, ABCD points to this tribunal’s decision in *Olson v. Love*, No. 1677-2007 (2008). That case is inapposite. In *Olson*, the parties’ agreement specifically stated that Olson “would not

be entitled to commission on accounts she landed for ads on those accounts that ran after she left her employment.” *Id.*, Finding of Fact #5, page 2. In explaining the rationale for the ruling, this tribunal noted “the parties’ employment agreement specifically provided that commissions did not belong to Olson unless she was employed at the time those ads were run.” *Id.* at page 5. Unlike Olson’s agreement, nothing in the agreement in the case at bar required that Herodes be employed in order to be paid on those commissions. The only condition subsequent to earning the commission here was the requirement that the sale be finalized. Thus, on those sales which Herodes procured and which are now finalized but which were not finalized before she quit, she is due a commission of 25% in accordance with the employment agreement. *Cf.*, *Delaware, supra* (holding that the Montana Wage and Hour Act protected an employee who was entitled to a commission on decorating projects when the employer completed the project and received payment for the work even though those projects had not been completed at the time the employee was fired.)

The respondent also contends, without citation to authority, that the claimant has waived any argument regarding the procuring cause rule by failing to raise it in a timely fashion. The hearing officer does not agree. The claimant has all along contended that ABCD unlawfully withheld from her the commissions that she seeks. She has consistently argued that her agreement with ABCD contained no specific term that the cabinet deals had to be complete before she was entitled to a commission on those sales. The fact that she did not articulate the exact legal theory upon which she relied does not obviate the fact that she articulated the factual basis for her argument which is sufficient to put the respondent on notice about the claim. Her argument regarding the procuring cause rule has not been waived.

As Herodes candidly testified at hearing, under the terms of her agreement, her commission on the Grabiell sale would be reduced on that sale because of the error regarding the sizing of one of the cabinets which reduced ABCD’s profit by \$232.00. Deducting that amount from the commissions she is due, Herodes is due \$3,032.81 in unpaid commissions.²

² Herodes has not sought nor even discussed statutory penalty in this matter which, under the facts as posited by the claimant, might have been applicable under Admin. R. Mont. 24.16.7566. The failure to do so, however, appears to be of no consequence in this case under the facts as found by the hearing officer. This is because under the Wage and Hour Act a failure to pay commissions which were earned but not yet due within 10 days after separation from employment apparently does not trigger the penalty provisions of the Wage and Hour Act. *Delaware*, ¶139.

D. *Attorney's Fees Are Not Recoverable In This Proceeding.*

Finally, the claimant seeks her attorney's fees in pursuing this matter. Such fees are not recoverable in this administrative forum. Mont. Code Ann. § 39-3-214; *Chagnon v. Hardy Construction Co.*, 208 Mont. 420, 680 P.2d 932 (1984) (attorney's fees are not recoverable at the administrative stage of a wage and hour claim).

V. **CONCLUSIONS OF LAW**

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint. Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Herodes was the procuring cause of the cabinet sales for which the employer refused to pay her commission even after those sales became final. Herodes is due commissions on those sales in the amount of \$3,032.81.

VI. **ORDER**

ABCD is hereby ORDERED to tender a cashier's check or money order in the amount of \$3,032.81 made payable to Alisa M. Herodes and mailed to the Employment Relations Division, P.O. Box 201503, Helena, MT 59620-1503, no later than 30 days after service of this decision.

DATED this 18th day of April, 2011.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.