

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

IN THE MATTER OF THE WAGE CLAIM )	Case No. 783-2014
OF MARK R. DULANEY, )	
)	
Claimant, )	
)	
vs. )	<b>FINAL AGENCY DECISION</b>
)	
FAISON OFFICE PRODUCTS, INC., )	
a Colorado corporation not registered with )	
the Montana Secretary of State, )	
)	
Respondent. )	

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**I. INTRODUCTION**

Claimant Mark Dulaney appealed from a Wage and Hour Unit determination that found he had failed to show that he was due additional commissions from respondent Faison Office Products, Inc.

Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on July 23, 2014 in Glasgow, Montana. Matt Knierim, attorney at law, appeared on behalf of Dulaney. Cory Gangle, attorney at law, appeared on behalf of Faison. Dulaney, Karen Ingstrom, and Shannon Wakefield-Olhauser testified under oath. Due to the unpredictable closure of the Williston, North Dakota, airport on July 22, 2014 because of a fire, Wakefield-Olhauser was unable to complete her travel to the hearing site in Glasgow. As a result, the parties agreed that Wakefield-Olhauser could appear and testify by telephone as provided in Mont. Code Ann. § 39-3-206(3).

The parties stipulated to the admission of Claimant’s Exhibits 1, 2, 4, 6<sup>1</sup>, 7, 8, and 10 (which was offered as a demonstrative exhibit only) and Respondent’s

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<sup>1</sup>The respondent was only willing to stipulate to paychecks for pay periods relative to commission earned from January through August 2013. The exhibit provided to the hearing officer only contains pay stubs falling within those date parameters and the claimant did not move for the admission of any additional pay stubs falling outside those parameters.

Exhibits A through V.<sup>2</sup> At the close of the hearing, the parties provided the hearing officer with oral closing statements and the matter was deemed submitted for decision. Based on the evidence and argument presented at the hearing, the following findings of fact, conclusions of law, and final order are made.

## II. ISSUE

Is Dulaney due additional commissions and penalty as prescribed by law?

## III. FINDINGS OF FACT

1. Gaffaney's Office Products employed Dulaney as a commission only salesman in 2002. In late 2012, Faison purchased all of Gaffaney's assets but assumed none of its liabilities. This included the purchase of Gaffaney's retail stores in Plentywood and Glasgow, Montana, and Williston, North Dakota. As part of this purchase, Faison extended offers of employment to Dulaney and other Gaffaney's employees, including the owners of Gaffaney's.

2. Dulaney's initial employment agreement, entered into on January 9, 2013, called for him to be paid 27.5% of Faison's gross margin on invoiced sales of products. Respondent's Exhibit C. On April 1, 2013, Faison and Dulaney agreed to change Dulaney's commission structure. Exhibit E. Under the new commission structure, his position was denominated as an account developer, a salesman who engaged in outside sales (that is, sales not made through one of Faison's retail stores) to customers. Under this agreement, Faison would pay to account developers between 25% and 27.5% of gross margin on invoiced sales. *Id.* at page 2. The agreement stated that "Sales reps that assist with the bulk of their own deliveries and installations will be paid at a rate of 27.5% of Gross Margin. Employees that do not assist with the bulk of their deliveries will be paid at a rate of 25% of Gross Margin. Customer sales generated from a store location will be commissioned within the Retail Sales program described below." *Id.* The agreement goes on to discuss retail sales, stating:

Retail Sales resulting from purchases inside the retail store locations that are supported by the retail sales associates will be commissionable however the commission will be calculated as follows:

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<sup>2</sup>Certain exhibits which were introduced into evidence at hearing were subject to a protective order entered by this tribunal on June 11, 2014. The exhibits have been removed from the parties' respective binders and placed in an envelope marked as sealed. Those exhibits shall remain sealed, available for review only by an appellate tribunal exercising appellate or other statutory or regulatory authority over this tribunal, unless otherwise ordered by this tribunal or other authority exercising appellate jurisdiction over this tribunal.

Retail sales: Customers that purchase from a retail location. These sales will be tracked to the retail store location however combined sales over \$3,000.00 will be commissionable. The commission rate on these sales will be payable to the retail sales associates. The commission will be calculated at 2.5% of Gross Margin. Commission will be earned on all store sales including protected accounts.

Id at page 3.

3. The April 2013 commission agreement also provided that salesmen could earn quarterly bonuses based upon total profit achieved by the sales representative. The bonus was paid as follows:

<u>profit amount</u>	<u>bonus rate</u>
\$22,500-\$27,500	.5% of gross margin
\$27,501-\$33,500	1% of gross margin
\$33,501-\$38,500	1.5% of gross margin
\$38,501-\$43,500	2.5% of gross margin
\$43,501-\$50,000	3.5% of gross margin

4. As of January 2013, Dulaney's territory covered accounts to outside customers located between Malta, Montana, on the west to Frazier, Montana, on the east. Faison salesman Charlie Archer covered accounts to outside customers in the northern tier of the sales region. Faison salesman Kip Hentges covered accounts to outside customers from Wolf Point to Poplar and other points further east.

5. Hentges left employment with Faison in March 2013. Faison then had Dulaney and Archer cover Hentges' former territory. In early June 2013, Archer also left Faison's employment, leaving Dulaney to service all three sales territories.

6. Faison employed two computer programs that are of pertinence to this case. The first was a program called EVMS by which salespersons inputted orders and from which sales were invoiced. Each salesman had a unique identifying sales number in that program by which sales were identified. In addition, Faison employed a program by which salesmen could monitor their sales, the gross margins on those sales, and their commissions. This was known as the Sales I program. It is a "real time" system of tracking which means that it immediately updates and makes available to salesmen the above information. Dulaney was given some training on the system but apparently could not (or did not) access Sales I to keep track of his sales, the gross margin on those sales, and his commissions. There is no evidence that Dulaney

complained to anyone at Faison that lack of training on the Sales I program precluded him from keeping current on his sales, gross margin, and commission information through the Sales I program.

7. Dulaney began to have concerns that his sales were not being properly recorded and, therefore, his commissions were not being properly calculated. In late March, he complained about this to his sales manager, Jim Lester.

8. Claimant's Exhibit 1, pages 45 through 97 (replicated in Respondent's Exhibits F through M), show all of Dulaney's individual and split sales from January through August 2013, as well as the cost of the items sold, the gross margin, Dulaney's commission, and whether the commission was 27.5% or 25% the gross margin. None of these records show that Dulaney was improperly paid on his commissions. These records do show that Dulaney received approximately \$640.00 in draws which were not covered by commissions earned.

9. Dulaney received first, second, and third quarter bonuses during 2013 in accordance with his employment agreement. For the first quarter, he received a bonus of \$1,004.92. Exhibit V. For the second quarter 2013, he received a bonus of \$254.12. *Id.* His third quarter bonus, which was paid two days late, amounted to \$1,047.45. *Id.* The bonus is separate from commissions and it is possible to get a bonus even though sales commissions are declining. Testimony of Wakefield-Olhauser.

10. In February 2013, Dulaney sold a calculator to the Glasgow law office of Christofferson & Knierim. The amount of the sale was \$178.00. Exhibit 8. When Faison invoiced the sale, it showed salesman number 300, an indicator that the Glasgow store was the salesman, not Dulaney. *Id.* Dulaney was not given credit for the sale and did not receive commission on the sale. The amount of commission he should have received if he had been properly credited the sale was a little more than \$16.00. Testimony of Wakefield-Olhauser.

11. In August 2013, shortly before he left employment with Faison, Dulaney worked with Deaconess Hospital on a furniture sale consisting of chairs. Testimony of Dulaney. The order for the chairs was a special order that took approximately three weeks to be delivered from the manufacturer. Dulaney was not working for Faison when the chairs were received and invoiced. The sales order (Exhibit 8) shows that the order was taken on September 11, 2013, some two or more weeks after Dulaney had left Faison's employ. *Id.* The sales order indicates that the salesperson who took the order was the salesperson who took Dulaney's position after he resigned. *Id.* The sales order also indicates that Alice Hopstad of Deaconess Hospital called in the order. *Id.*

#### IV. OPINION<sup>3</sup>

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.

Dulaney bears the burden of persuasion in this matter to show by a preponderance of the evidence that he was entitled to the commissions he claims he is due. *Berry v. KRTV Communications* (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112. See also, *Marias Health Care Services v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that lower court properly concluded that the plaintiff’s wage claim failed because the plaintiff failed to meet her burden of persuasion to show that she was not compensated in accordance with her employment contract).

Dulaney believes he is owed as much as \$8,000.00 in unpaid commissions. The essence of his case is to argue that he has met his initial burden of proof by showing by just and reasonable inference that he is entitled to at least that amount. To meet this initial burden of proof, he relies heavily on his demonstrative Exhibit 10 as well as his contentions that Faison failed to properly credit him for the sale of a calculator (the calculator sale to Christofferson and Knierim) and the sale of furniture to Deaconess Hospital.

Faison counters that, as demonstrated through their Exhibits F through M, there are no unpaid commissions due to Dulaney. Faison further contends that the calculator sale could not have belonged to Dulaney because the computer records do not show that it was his sale. Faison also argues that the furniture sale was not invoiced until after Dulaney resigned and, under the terms of his employment agreement, under no circumstance can he be entitled to commission on that sale.

Assuming that Dulaney has met his burden of proof to show by just and reasonable inference that he is due the amount he claims, it is clear that Faison has presented adequate records to rebut any conceivable inference that Dulaney was not paid the amounts of commission he is due. Faison’s records (contained in Exhibits F through M) show plainly and unmistakably the sales price of the product sold, Faison’s cost, and the gross margin of the product upon which Dulaney’s

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<sup>3</sup>Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

commission was based pursuant to the employment agreement. Nothing in those records shows that Dulaney is due additional commissions. The fact that they are stored on and retrieved from a computer data base is of no consequence and the claimant has not cited to any rule or statute which shows that the employer's methodology of keeping those records does not conform to the law. See, e.g., Admin. R. Mont. 24.16.6101 (no particular order or forms of records is prescribed by the regulations). The records effectively rebut any inference that might be drawn from Dulaney's argument that the increase of sales of product necessarily means that his commission must have gone up.

Dulaney's assertion (made both at hearing and in writing in his demonstrative Exhibit 10) that there is no profit information upon which to ascertain the amounts of commission due to Dulaney is wrong. Exhibits F through M plainly show the gross margin, which under the terms of Dulaney's employment agreement is the "profit" upon which his commission was based.<sup>4</sup>

Dulaney's efforts to meet his burden of persuasion by showing the two instances of perceived failure to pay commission are not sufficient to carry the day in this case. The hearing officer agrees that it does appear that Faison did not properly credit him for the calculator sale. On the other hand, by the terms of his employment agreement, he is not entitled to the commission on the sale of the furniture to Deaconess Hospital since there is no convincing evidence that the sale was or could have been invoiced any earlier than September 2013 even if Dulaney had worked to get the sale. It is also very telling that under cross-examination, Dulaney could not, except for the calculator sale, recall any other specific customer to whom he had made a sale and for which he was not properly paid commission. Given the nature of his work, it would seem that he should be able to recall other customers to whom he had made sales for which he not been paid. This is especially true given the relatively speaking large amount of commission he was seeking. In the end analysis, the finder of fact remains unconvinced that Dulaney is due any additional commissions.

Finally, Dulaney's suggestion that payment of quarterly bonus helps to prove that he was not paid commissions is unavailing. Wakefield-Olhauser testified credibly and reasonably that the paying of bonus and the paying of the commissions are not tied together and Dulaney did not rebut that point nor did he suggest how the paying of the bonus implicated improper paying of commissions. Without more, the payment of bonus to Dulaney does not persuade the fact finder that Dulaney has not been paid all commissions he is due.

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<sup>4</sup>Indeed, Dulaney conceded in his testimony at hearing that "profit" and "gross margin" were, for purposes of his compensation agreement, the same thing.

As to the \$16.00 commission on the calculator, Faison's exhibits, as well as the testimony of Wakefield-Olhauser, demonstrate that Dulaney was effectively compensated that amount because his draws exceeded his commissions by more than that amount. Thus, Faison does not owe additional wages as claimed in Dulaney's complaint.

**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. Dulaney has failed to prove by a preponderance of the evidence that Faison failed to pay him the commissions he was due as alleged in his complaint.

**VI. ORDER**

Based on the foregoing, Dulaney's complaint is dismissed.

DATED this 30th day of July, 2014.

DEPARTMENT OF LABOR & INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

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 the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702.