

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 2027-2014
OF MARK E. LAUBURG,)	
)	
Claimant,)	FINAL AGENCY DECISION
)	GRANTING SUMMARY
vs.)	JUDGMENT AND
)	DISMISSING CASE
MARY HOLYOAK AND ROBERT EKBALD,)	
individually,)	
)	
Respondents.)	

* * * * *

Respondents, Mary Holyoak and Robert Ekbald, seek summary judgment in this matter, alleging that the claimant, Mark Lauburg, is statutorily excluded from overtime wages under the companionship services exemption of Montana and Federal law. Respondents also request Lauburg’s claim be dismissed for his failure to cooperate in these proceedings.

Lauburg did not submit a response to the summary judgment motion. The Hearing Officer finds that summary judgment in favor of the Respondents is appropriate. The rationale for this decision follows.

I. PROCEDURAL BACKGROUND & FINDINGS

1. On October 13, 2014, Lauburg, through his counsel, Hollie Lund, timely appealed the dismissal of his wage claim against Holyoak and Ekbald by the Wage and Hour Unit of the Department of Labor and Industry and requested a contested case hearing before the Office of Administrative Hearings (OAH). Lauburg’s claim alleged he was owed \$3,094.00 in wages at a rate of \$14.00 per hour; overtime wages in the amount of \$4,505.25; and “Other” wages in the amount of \$86.00.

2. On October 29, 2014, the Wage and Hour Unit transferred the matter to mediation.

3. Between November 2014 and August 2015, Lauburg provided no substantive communication to Respondents or the Wage and Hour Unit with respect to his claim.

4. On September 2, 2015, Lund and Tara Harris, who had also entered an appearance on behalf of Lauburg, filed Notice of Withdrawals as counsel for Lauburg.

5. After mediation efforts were unsuccessful, the Wage and Hour Unit transferred the case to the OAH on November 12, 2015.

6. On November 18, 2015, Chief Administrative Law Judge David Scrimm issued a Notice of Hearing and Telephone Conference for December 2, 2015.

7. On December 2, 2015, Hearing Officer Scrimm initiated the telephone conference with the parties. Lauburg informed Hearing Officer Scrimm that he could not participate because he had a dentist appointment. Hearing Officer Scrimm then postponed the conference to December 3, 2015.

8. On December 3, 2015, Hearing Officer Scrimm, on behalf of Hearing Officer David Evans, convened a telephone conference. Both Lauburg and Malin Stearns Johnson, attorney for Holyoak and Ekbal, participated. At the conference, Lauburg gave consent to the withdrawal of Lund and Harris. The parties also agreed to a hearing date and a schedule of pre-hearing deadlines.

9. On December 7, 2015, Hearing Officer Evans issued a Scheduling Order setting a discovery deadline of January 22, 2016 and a hearing date of March 2, 2016. The Scheduling Order states, in part:

“A party’s failure to appear for any conference, and/or failure to obey orders issued by the Hearing Officer, may result in sanctions against that party that can include entry of default, dismissal of an appeal, dismissal of the complaint, imposition of liability or other appropriate sanctions.”

10. On December 15, 2015, Stearns Johnson served upon Lauburg a set of discovery requests to be returned within thirty (30) days. Lauburg did not timely respond to Stearns Johnson’s discovery requests; nor did he respond to the discovery requests by the discovery deadline set in the Scheduling Order.

11. On January 22, 2016, OAH staff contacted the parties to inquire about resetting the hearing date due to a scheduling conflict on Hearing Officer Evans’ calendar. Lauburg spoke to OAH Legal Secretary Sandy Duncan and represented to her that he had new counsel and he was awaiting his new counsel’s availability with respect to filing his discovery responses. As of the date of the final pre-hearing conference, no attorney has filed an appearance in this matter.

12. On January 28, 2016, Hearing Officer Evans issued an Order resetting the hearing date to March 7, 2016.

13. On January 29, 2016, Respondents filed a Motion for Summary Judgment requesting judgment on and dismissal of Lauburg's wage claim. Lauburg was to respond to the motion no later than February 11, 2016. To date, Lauburg has filed no response to the Motion for Summary Judgment.

14. On February 19, 2016, Respondents timely filed their Requests for Relief, Final Contentions, Lists of Exhibits and Witnesses, Requests for the Issuance of Subpoenas, and Stipulated Facts. Lauburg did not file with the OAH or exchange with Respondents any Requests for Relief, Final Contentions, Lists of Exhibits and Witnesses, Requests for the Issuance of Subpoenas, and Stipulated Facts on or before February 19, 2016 as required in the December 7, 2015 Scheduling Order.

15. On February 23, 2016, the Hearing Officer initiated the scheduled final pre-hearing telephone conference with the parties. Both Lauburg and Stearns Johnson participated in the conference.

16. At the pre-hearing conference, Hearing Officer Evans asked Lauburg why he failed to comply with the initial Scheduling Order discovery deadlines; why he failed to timely respond to Respondents' Motion for Summary Judgment; and why he failed to file the requisite documents necessary to prepare a final pre-hearing order. Lauburg responded that he was just going through the administrative process to get to District Court. Lauburg told the Hearing Officer that he had consulted with counsel but it was not the right time in the process for counsel to appear on his behalf. The Hearing Officer asked Lauburg if he intended to participate in the hearing scheduled for March 7, 2016. Lauburg said he would like to just sit in on the hearing and would not be presenting any testimony, offering exhibits, or calling witnesses.

17. Stearns Johnson responded that Lauburg's failure to cooperate and respond to her discovery requests prevented her from preparing a meaningful defense to Lauburg's claim.

18. In response as to why he did not file a response to Respondents' Summary Judgment Motion, Lauburg stated that he had consulted with counsel and that he understood that summary judgment would not be granted if there were factual issues in dispute.

19. Due to Lauburg's failure to comply with the deadlines set forth in the Scheduling Order, which prevented Stearns Johnson from preparing a defense on

behalf of her clients, the Hearing Officer vacated the March 7, 2016 hearing and informed the parties that he would be issuing a decision on the Motion for Summary Judgment based upon the information he had received from the parties. The parties were informed that if Respondents' motion was denied, OAH staff would contact the parties to set a new hearing date.

II. FACTS BASED ON THE PLEADINGS THAT ARE NOT IN DISPUTE

20. Holyoak is a retired records clerk living in Missoula, Montana. In 2012, Holyoak left her job at Sentinel High School and relocated to Kalispell to care for her aunt, Phyllis Ekbald. When Phyllis died, it became apparent that Phyllis' 85-year-old husband (Holyoak's step-uncle), Robert Ekbald, was suffering from Alzheimer's disease and could not live alone.

21. Holyoak became Ekbald's durable power of attorney on July 23, 2012, and later that summer moved Ekbald to Grizzly Peak, a senior living facility in Missoula. Ekbald was unhappy at Grizzly Peak and at his insistence, Holyoak agreed to rent an apartment for Ekbald and hire caregivers to look after him in her absence.

22. In November 2013, Holyoak posted an advertisement with the University of Montana School of Social Work seeking caregivers to provide basic personal care and companionship to Ekbald in exchange for an hourly wage of \$12.00.

23. Lauburg apparently learned of the position through his girlfriend, Ann Truesdell, who was a social work student at the time.

24. Professionally, Lauburg described himself as a bouncer, personal trainer, and certified nursing assistant.

25. In December of 2013, Holyoak hired Lauburg and Truesdell to work evening shifts - typically from 7:00 p.m. to 7:00 a.m. - and agreed to pay them each \$12.00 per hour.

26. Lauburg and Truesdell shared a bedroom at Ekbald's apartment where they slept.

27. Lauburg and Truesdell's primary duties were being available to Ekbald during the night if he required assistance. This entailed checking on Ekbald intermittently throughout the night, responding to his occasional nighttime requests, and meeting his incontinence needs. Specifically, Lauburg and Truesdell's collective job duties included: watching television with Ekbald; helping Ekbald to bed; emptying Ekbald's catheter bag when it reached capacity during the nighttime hours;

laundering Ekbald's bedding and clothing due to incontinence; bringing Ekbald water during the night; advising Ekbald to stay in bed during the nighttime hours; preparing Ekbald's breakfast; and helping Ekbald get the morning newspaper.

28. At the end of each shift, Lauburg or Truesdell wrote a description of Ekbald's night, e.g., how well he slept, whether he wet the bed, his general mood, etc., in a notebook provided by Holyoak.

29. Holyoak requested that all of Ekbald's caregivers, including Lauburg, record their hours on a pre-printed timesheet and submit it to her at the end of each week. The pre-printed timesheets used by Holyoak had a column titled "Overtime."

30. Lauburg never recorded hours in the "Overtime" column, never inquired about overtime compensation, and never expressed entitlement to overtime wages until he filed a wage claim with the Montana Department of Labor and Industry.

31. Holyoak multiplied the number of hours the caregivers reported by \$12.00 and wrote personal checks for that amount. Initially, Holyoak did not withhold taxes. However, after meeting with an accountant, Holyoak began withholding taxes from caregivers' paychecks in March 2014. To compensate for the decrease in take-home pay as a result of instituting proper withholding practices, Holyoak raised all caregivers' pay from \$12.00 per hour to \$14.00 per hour.

32. Holyoak terminated Lauburg's employment in April 2014 due to repeated complaints from other caregivers regarding Lauburg's behavior in Ekbald's home.

33. During the approximately four months Lauburg worked for Holyoak, he recorded and submitted to Holyoak four time sheets claiming a total of 887.5 hours worked. For that same period, Holyoak paid Lauburg a total of \$10,761.00 in wages.

III. DISCUSSION

A. Lauberg is in default for failing to respond to deadlines set forth in the Scheduling Order and for failing to respond to Respondents' Motion for Summary Judgment.

Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment are met. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment is appropriate where "the pleadings . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Mont. R. Civ. P. Additionally, M. R. Civ.

P. 56 (e) 2 provides, “If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.”

Lauburg was properly served Respondents’ Motion for Summary Judgment at the address OAH has used throughout these proceedings. Lauburg acknowledged receiving the Motion for Summary Judgment at the February 23, 2016 final pre-hearing conference. Lauburg offered no credible argument as to why he failed to file a timely response to the motion or have any contact with OAH if he had questions about what response was required. Lauburg’s failure to respond to the motion leaves the employer’s asserted facts as undisputed.

Lauburg’s failure to timely respond to the Motion for Summary Judgment is part of a continuing pattern of his failure to abide by the pre-hearing deadlines set forth in the December 7, 2015 Scheduling Order. Lauburg’s contention that he was merely waiting for the administrative process to be completed so he can take his case to District Court ignores the fact that the administrative process is an opportunity for the parties to make a full and complete record that can be taken to District Court.

Therefore, the Hearing Officer finds Lauburg in default.

B. The Motion for Summary Judgment is granted because Lauburg has failed to establish that a genuine issue of material fact exists.

Even if Lauburg’s failure to respond to Respondents’ Motion for Summary Judgment was an insufficient basis to dismiss his appeal, the undisputed facts demonstrate Respondents are entitled to summary judgment as a matter of law.

Montana law allows employees owed wages, including wages due under the FLSA, to file a claim with the Department of Labor and Industry to recover wages due. Mont. Code Ann. § 39-3-207; *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232.

Both Montana law and the Fair Labor Standards Act (FLSA) prohibit employers from employing their employees in excess of 40 hours in a single work week unless the employee is compensated at a rate not less than one and one-half times the regular rate at which the employee is employed. Mont. Code Ann. § 39-3-405 and 29 U.S.C. § 207(a)(1). However, both laws exclude certain employees from the requirement for overtime premium pay. Mont. Code Ann. § 39-3-406(1)(p) and 29 U.S.C. § 213(a)(15).

The employer must prove each of the elements of an overtime exclusion. *Wage Claim of Holbeck v. Stevi-West*, 240 Mont. 121, 125 (Mont. 1989). The

Montana courts have not held that the exclusions are inapplicable except to persons ‘plainly and unmistakably within their terms and spirit,’ but a fair reading of Mont. Code Ann. § 39-3-408 requires a similar standard of proof for the exemptions under both the FLSA and Montana law. See *Auer v. Robbins*, 519 U.S. 452, 462, 137 L.Ed. 2d 79, 91, 117 S. Ct. 905, 912 (1997) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 4 L. Ed. 2d 393, 80 S. Ct. 453 (1960)); see also *Donovan v. Nekton, Inc.*, 703 F.2d 1148, 1151 (9th Cir. 1983); *Klem v. County of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000).

Both the FLSA and Montana law provide overtime exclusions for workers who provide care to the elderly when employed directly by a family member. 29 U.S.C. § 213(a)(15) excludes from overtime:

“any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).”

Mont. Code Ann. § 39-3-406(1)(p) provides that overtime exclusions do not apply to:

“an employee employed in domestic service employment to provide companionship services, as defined in 29 C.F.R. 552.6, or respite care for individuals who, because of age or infirmity, are unable to care for themselves as provided under section 213(a)(15) of the Fair Labor Standards Act, 29 U.S.C. 213, when the person providing the service is employed directly by a family member or an individual who is a legal guardian.”

Federal Regulations define “Companionship Services” as:

(a) As used in section 13(a)(15) of the Act, the term companionship services means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. The provision of fellowship means to engage the person in social, physical, and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social events. The provision of protection means to be present with the person in his or her home or to accompany the person when outside of the home to monitor the person’s safety and well-being.

(b) The term companionship services also includes the provision of care if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek. The provision of care means to assist the person with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).

29 C.F.R. § 552.6 (Emphasis added).

It is clear that Holyoak hired Lauburg to provide companionship services for her uncle because her uncle was unable to care for himself. Lauburg's duties were to care for and spend time with Ekbald in the evening, which included staying overnight in Ekbald's home. These duties included watching television, changing his catheter bag, changing Ekbald's pajamas and bedding, and just being available to meet Ekbald's needs.

Because of his failure to respond, Lauburg has provided no evidence controverting the fact that his care for Ekbald fell within the definition of companionship services. Further, Lauburg has presented no factual issues to refute the conclusion that he is an excluded employee and therefore not subject to overtime pay.

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

2. Mark Lauberg is in default for failure to comply with the terms of the Scheduling Order and failing to respond to Mary Holyoak's and Robert Ekbald's Motion for Summary Judgment.

3. The Respondents proved that Lauburg was a companionship services provider and thus his services were excluded by law from the overtime provisions of Montana law and the FLSA. Therefore, summary judgment is granted.

4. No overtime wages are due the claimant because he was excluded from the requirement for overtime premium pay as an employee engaged in companionship services pursuant to 29 U.S.C. § 213(a)(15) and Mont. Code Ann. § 39-3-406(1)(p).

V. ORDER

Because Mark Lauberg is in default and because Mary Holyoak and Robert Ekbald have proven they were not required to pay overtime, this matter is DISMISSED.

DATED this 1st day of March, 2016.

DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DAVID W. EVANS
DAVID W. EVANS
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.