

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 377-2005
OF MARK BORCHERS,)	
)	
Claimant,)	
)	FINAL AGENCY DECISION
vs.)	
)	
MARLER INC. d/b/a ALL BRIGHT)	
WINDOW CLEANING,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Marler, Inc., (Marler) d/b/a All Bright Window Cleaning, appeals a determination of the Wage and Hour Unit of the Department of Labor and Industry that found it owed Mark Borchers \$1,408.00 in unpaid wages and additional penalty. Prior to commencement of the contested case hearing in this matter, Marler paid Borchers \$330.15 in unpaid hourly wages and penalty. Marler appealed only those portions of the determination that found it had improperly required Borchers to pay tool rental and for payments Borchers made to Marler for property damage created by Borchers while he was on the job.

Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on April 5, 2005. Borchers appeared and represented himself. Borchers, Norma Goss, a former manager of All Bright, and Mike Payne, a former All Bright employee, appeared and testified under oath on behalf of Borchers. Richard Marler, president of Marler, appeared on behalf of Marler and testified under oath. The parties stipulated to the admission of Documents 1 through 105 contained in the Wage and Hour Unit file. In addition, the parties stipulated to the admission of Borchers exhibits 1 through 40 and Marler's exhibits A, B, E, F, G, and H. Borchers objected to the admission of Marler's exhibits C and D on the basis that those exhibits were hearsay. The hearing examiner sustained the objection to those two documents and they were not admitted into evidence. Based on the evidence

presented in this matter, the hearing examiner makes the following findings of fact, conclusions of law and final order in this matter.

II. ISSUES

A. Did Marler improperly withhold tool belt rental from Borchers' pay check and improperly require Borchers to pay for a broken window?

B. Was Borchers's payment for damage to an All Bright vehicle an impermissible kickback of wages?

C. Does Marler owe penalty as prescribed by law?

III. FINDINGS OF FACT

1. Marler employed Borchers as a window washer beginning on June 25, 2002. Borchers resigned from the position on July 10, 2004.

2. Marler incorrectly assumed that all its window washers were "independent contractors." In fact, as determined by the Independent Contractor Central Unit (ICCU) of the Department of Labor and Industry, all of the window washers, including Borchers, were employees. At hearing, Marler agreed that Borchers was an employee, not an independent contractor.

3. Marler deducted from its employees' pay checks rent for tool belts they used in order to complete their jobs as window washers. Marler did this because of its mistaken belief that its employees were independent contractors. Once the ICCU made its determination that the employees were not independent contractors, Marler stopped charging rent for the tool belts. Over the course of Borchers' employment, Marler deducted \$495.00 dollars in tool belt rent from Borchers' pay check.

4. At the end of the work day Borchers left his tool belt at the All Bright office. On occasion, he took the tool belt home in order to arrive on time at an All Bright job site the next day. During the course of his employment, there was only one time when Borchers used any of the tools from his tool belt to complete work not assigned by Marler. Otherwise, Borchers used the tool belt only to complete work for Marler.

5. Marler had a standing policy with respect to damages caused to a customer's property: an employee causing damage to a customer's property had to pay for it. For example, on one occasion Richard Marler insisted that one of the employees that Norma Goss supervised pay for damages done to a customer's home. Only Goss' refusal to permit this prevented the employee from paying for the damage to the customer's home.

6. Borchers broke a customer's window while washing windows at the customer's home. He took the broken window pane to a glass shop where he paid \$25.00 to have the glass pane replaced. Borchers's paid to repair the window because of Marler's policy that employees pay for damage to customers' property.

7. Sometime during 2002, Borchers caused a car accident while driving an All Bright van from a job site to the All Bright Office. Upon returning to the office, Borchers advised Richard Marler that he had rear ended another car and apologized for causing the accident.

8. Borchers's offered to pay for the damage to the All Bright van and agreed to make payments when he could. Marler did not withhold any money from Borchers' pay checks for the payments for the damage to the van. Instead, Borchers occasionally wrote a check to All Bright to pay a portion of the costs of the repairs.

9. Marler did not threaten to withhold money from Borchers's paycheck nor did he threaten to otherwise garnish Borchers's pay check in order to recover the costs of the damage to repair the van. Furthermore, although Marler had a policy that employees must pay for damage to customer's property, there was no similar requirement with respect to damage an employee caused to All Bright property.

IV. DISCUSSION¹

A. *Borchers' Payment of Tool Belt Rental and Payment for Damage to the Broken Window Was an Improper Kick Back*

Mont. Code Ann. § 39-3-201(6) defines wages to include any money to be paid to an employee. Montana law requires that employers pay employees wages when due, in accordance with the employment agreement, pursuant to Mont. Code Ann.

¹Statements 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.

§ 39-3-204, and in no event more than 10 days following the separation from employment. Mont. Code Ann. § 39-3-205.

The language of this statute is “all inclusive” and contains no exception for deductions except for “reasonable deductions made for board, room, and other incidentals supplied by the employer.” 36 Op. Att’y Gen. 17 (1975). The deduction provision of this statute is strictly construed because the law does not favor forfeiture of wages. 25 Op. Att’y Gen. Op. 11 (1953). Recognizing the narrowness of the statutory provision for deduction, the Attorney General of Montana has determined that employer deductions against wages to settle an account between the employer and employee and to offset losses incurred as a result of negligent conduct of the employee are not permissible. 25 Op. Att’y Gen. 11 (1953); 36 Op. Att’y Gen. 17 (1975).

Wages are not considered to be paid unless they are paid “finally and unconditionally or ‘free and clear.’” Admin. R. Mont. 24.16.1507. This same rule specifically indicates that the “wage requirements of the law will not be met where the employee ‘kicks back’ directly or indirectly to the employer . . . the whole or part of the wage delivered to the employee.” The administrative rules prohibit an employer from deducting from wages the cost of providing “tools of the trade and other materials and services incidental to carrying on the employer’s business.” Admin. R. Mont. 24.16.1502(3).

Marler’s deduction of the tool belt rental from Borchers’s paycheck was plainly impermissible. Marler required his employees to pay rental for the tools they needed in order to carry out the employer’s work and in order to continue employment with All Bright. This contravenes the very spirit and letter of the rules. Accordingly, the employer owes Borchers \$495.00 for the tool rental paid to Marler during the course of his employment.

Moreover, while not a deduction, Borchers’s payment for the broken window, undertaken as a result of Marler’s edict that employees pay for damages to customer’s property, amounts to an indirect kick back prohibited by the statute. Under these circumstances, Borchers is entitled to recoup the amounts paid out for tool belt rental and to repair the broken window.

B. *Borchers's Payments for Damage to the Vehicle Are Not Recoverable in this Proceeding*

Borchers also seeks recovery of the payments he made to Marler for the damage to the van. Borchers concedes that he wanted to make payments for the damage to the van. The evidence establishes that Marler did not deduct or threaten to deduct from Borchers' paychecks the money needed to fix the van. Furthermore, the evidence does not show that Marler had any policy in place that required an employee to pay for damage to All Bright property. Rather, Borchers entered into a voluntary agreement with Marler outside the employment relationship to pay for the damage. Accordingly, the payments are not recoverable in this forum.

Although the wage and hour protection statutes prohibit improper withholding or impermissible kick backs designed to circumvent the wage and hour statutes, they do not prohibit employees and employers from entering into agreements that are unrelated to the employment relationship. As the Montana Supreme Court has noted, the wage protection statute "is designed to prevent an employer from depriving an employee of wages at the employer's instigation, or for the benefit of the employer. . . . Deductions voluntarily requested by the employee in his own behalf do not violate statutes such as Section 39-3-204(1)." *Christiansen v. Taylor Brothers, Inc.*, (1987), 225 Mont. 318, 320, 732 P.2d 841, 843.

Here, Marler never deducted or withheld any wages for payments related to damage to the van. Marler never threatened to withhold wages from Borchers if he did not agree to pay for the damages to the van. Instead, Borchers, out of a feeling of remorse, voluntarily entered into an agreement with Marler to pay for the damage of the van. Under these circumstances, the payments to Marler for damages to the van did not constitute either a withholding of wages or an impermissible kick back of wages that violated the wage protection statute.

C. *Marler Owes Penalty with Respect to the Tool Belt Rental and the Broken Window*

Mont. Code Ann. § 39-3-206(1) provides that, "A penalty must also be assessed against [an employer who fails to pay an employee as provided for in this part] and paid by the employer to the employee in an amount not to exceed 110% of the wages due and unpaid." Admin. R. Mont. 24.16.7566 provides that a maximum penalty equal to 55% of the wages determined to be due must be imposed unless any of the special circumstances of Admin. R. Mont. 24.16.7556 apply. Since there is no evidence showing any of the special circumstances apply, a penalty of 55%, amounting

to \$272.25 ($\$495.00 \times .55 = \272.25) for the improper tool belt rental, and \$13.75 ($\$25.00 \times .55 = \13.75) for the improper payment for the broken window, is due to Borchers.

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. Borchers has demonstrated by a preponderance of the evidence that the tool belt rental was an improper withholding and payment for the broken window was an impermissible kick back.

3. Borchers has failed to show by a preponderance of the evidence that his voluntary agreement to reimburse Marler for the damage to the van constituted either impermissible withholding or an improper kick back under either the rules or statutes.

4. Marler owes penalty to Borchers under Admin. R. Mont. 24.16.7566 on the amounts Borchers paid for the tool belt rental and for the window repair.

VI. ORDER

Richard Marler, d/b/a All Bright Window Cleaning is hereby ORDERED to tender a cashier's check or money order in the amount of \$806.00, representing \$520.00 in wages ($\$495.00$ tool belt rental + $\$25.00$ window repair = $\$520.00$) and \$286.00 in penalty ($\$272.25$ penalty on tool belt withholding + $\$13.75$ penalty for window repair kick back = $\$286.00$), payable to Mark Borchers, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision. Marler may withhold appropriate deductions for income taxes and social security on the wage portion but not the penalty portion.

DATED this 18th day of May, 2005.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ GREGORY HANCHETT

Gregory Hanchett
Hearings Officer

