

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 388-2005
OF LAREE JESSOP,)	
)	
Claimant,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND ORDER
)	
JAMES W. OLSON, DDS, PC,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

In this matter, Laree Jessop (Laree) appeals from a wage and hour unit determination that dismissed her wage claim.

Hearing Examiner Gregory L. Hanchett conducted a telephonic hearing on February 11, 2005. Laree represented herself. Dr. James Olsen represented himself. Laree, Johanna Jessop (no relation to Laree), Dr. Olsen, and Carole Olsen testified under oath. The parties stipulated to the admission of Documents 1 through 35 contained in the Wage and Hour Unit file. In addition, the parties stipulated to the admission of Laree's Exhibits 1 and 2 and Dr. Olsen's Exhibit A. Having considered the evidence and arguments of the parties, the hearing examiner makes the following findings of fact, conclusions of law, and final order.

II. ISSUE

Is Laree Jessop due additional wages as claimed in her complaint and a penalty imposed by law?

III. FINDINGS OF FACT

1. Laree worked as a dental assistant for Dr. Olsen beginning in 2000. Laree worked for an agreed upon hourly wage. Dr. Olsen's wife, Carole, managed Dr. Olsen's dental office and negotiated compensation agreements with the office employees, including Laree.

2. By 2003, Laree's hourly wage had increased to \$14.00 per hour. She was paid only for hours that she actually worked.

3. Dr. Olsen's office is not open more than four days each week. During some weeks, the office is closed because the Olsens are out of town.

4. Sometime in the summer of 2003, Laree asked to be paid on a monthly salary basis so that she would have a steady monthly flow income even during those times when the dental office was not open. Carole Olsen agreed to compensate Laree in that manner. The parties agreed that Laree would be paid \$896.00 dollars per month for the hours she worked. At the time, Laree was working approximately 2 days per week and eight hours on each of those days.

5. Dr. Olsen's employees are paid on the 15th (or thereabouts) of each month for hours completed during the previous month.

6. In May, 2004, Laree's co-worker, Johanna Jessop, decided she needed to take additional time off work in order to pursue training for providing daycare for children. Because Johanna would be missing work, she and Laree decided that Laree would cover Johanna's hours during the period between July 15 and August 15, 2004.

7. Laree and Johanna informed Carole Olsen that Laree would be working "full time" during Johanna's absence. There was no discussion between the parties regarding any extra compensation for Laree. The discussion focused solely on the fact that Laree would work Johanna's hours. Carole Olsen agreed that Laree could work Johanna's hours.

8. During the time period between July 15 and August 15, Laree worked 7.75 hours during the workweek ending Friday, July 16, 2004. She worked 30.5 hours during the workweek ending July 23, 2004. Laree worked 19.75 hours during the week ending August 6, 2004. She also worked 30.75 hours during the week ending August 13, 2004. Between July 15, 2004 and August 13, 2004, Laree worked a total 88.75 hours. On August 16, 2004, Laree worked a total of 4 hours.

9. Laree decided to leave employment with Dr. Olsen to move to another job. Her last day of work was August 16, 2004, which she intended to work as a full day.

10. At approximately noon on August 16, 2004, Laree received her paycheck, reflecting \$896.00 for the period worked between July 15, 2004 and August 15, 2004, and an additional \$112.00 for the time she would be working during the next pay period of August 16, 2004 and September 15, 2004.

11. Upon receiving her check, Laree became upset because she thought she would be paid an additional amount for the hours she had covered for Johanna at a rate of \$14.00 per hour for the additional work. Dr. Olsen's office refused to

pay her any additional amounts because Carole believed that Laree's agreement called for her to be compensated \$896.00 for all hours worked. Because Dr. Olsen's office refused to pay Laree any more money, she left the office at noon and did not return.

IV. OPINION¹

Montana law requires that employers pay wages when due, in conformity with the employment agreement. Mont. Code Ann. § 39-3-204. Except for the minimum wage, the law allows the parties to agree upon the wage rate for work to be done. Mont. Code Ann. § 39-3-201(6); *Delaware v. K-Decorators, Inc.*, 1999 MT 13, 293 Mont. 97, 104-105, 973 P.2d 818.

Laree bears the burden to prove by a preponderance of the evidence that she is entitled to additional wages. *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 proof to show that she was not compensated in accord with her employment contract).

In this case, resolution of the dispute turns on the parties' original agreement regarding wages. If, as contended by Laree, the parties original agreement contemplated that Laree would be paid \$896.00 monthly salary for working 16 hours per week each week during the month, then arguably Laree would be due additional amounts for hours she worked in excess of her part time work. If, on the other hand, Dr. Olsen's contention is correct that the employment agreement contemplated by the parties called for Laree to be paid no more than \$896.00 for all work completed during the month, then Laree is due no additional wages.

The facts of this case demonstrate that the parties' agreement called for Laree to be compensated \$896.00 for all of her work each month. Laree asked for this salary arrangement to ensure a steady stream of income. Prior to the agreement to pay salary, there were times when Dr. Olsen's office would be closed and Laree would not be working and thus would receive no income. To alleviate this problem, the parties agreed that Laree would receive a monthly salary of \$896.00 for all of her work.

The evidence does not show that the employment agreement contemplated that Laree would be compensated on an hourly basis for any additional hours over and above her usual 16 hours per week of work. Certainly nothing that occurred during Laree's conversation with Carole about covering Johanna's hours shows that the parties intended to modify Laree's compensation. During that conversation, for example, there was no discussion about an additional amount that would be paid to Laree nor was there any conversation or discussion to suggest that the parties intended to modify the extant agreement to provide additional compensation for the hours Laree covered for Johanna. Laree failed to meet her burden to show that the employer did not comply with the parties' compensation agreement.²

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.

²Even if the hearing examiner found that the salary agreement covered only 16 hours of work each week during a one month period, Laree would be due only de minimus additional compensation. The parties never agreed nor even discussed a specific hourly amount that Laree would earn while working. Laree herself acknowledged that she and Carole never discussed a specific amount nor was there any suggestion that the parties implicitly or explicitly settled on an hourly amount that Laree would be paid for covering Johanna's hours. Admin. R. Mont. 24.16.1005 ARM specifically provides that "work not requested but suffered or permitted is work time." However, in the absence of any implicit or explicit agreement as to an

amount Laree would be paid for additional hours of work, the employer is only required to pay the minimum legal wage. Mont. Code Ann. §§ 39-3-404 (1) and 39-3-408. The minimum wage presently prescribed by regulation is \$5.15 per hour. Admin. R. Mont. 24.16.1510(8). In this case, Laree worked an additional 28.75 hours (over the 64 hours she would have worked and for which she would have been paid her monthly salary of \$896.00). She would thus be entitled only to an additional \$148.06 ($\5.15×28.75 hours). She was in fact paid an additional \$112.00, leaving only an additional \$36.06 that would have been due to her ($\$148.06 - \$112.00 = \$36.06$).

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. Laree has failed to prove by a preponderance of the evidence that Dr. Olsen's office owes her additional compensation as alleged in her complaint.

VI. ORDER

Based on the foregoing, Laree Jessop's complaint in case number 388-2005 is dismissed.

DATED this 22nd day of February, 2005.

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.

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

LAREE JESSOP
898 HWY 93 N
HAMILTON MT 59840

DR JAMES OLSON DDS PC
215 N 10TH ST
HAMILTON MT 59840

DATED this 22nd day of February, 2005.

/s/ SANDRA K. PAGE