

**STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU**

IN THE MATTER OF THE WAGE CLAIM)	Case No. 697-2004
OF GREGORY GUSTAFSON,)	
Claimant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
WIRELESS COMMUNICATIONS INC.,)	
d/b/a CELLULAR PLUS,)	
Respondent.)	

I. INTRODUCTION

Respondent Wireless Communications (Wireless) appeals a determination and redetermination by the Wage and Hour Unit that found it owed unpaid wages and commission to Greg Gustafson (Gustafson). Wireless Communications contends that it has paid all commissions due to Gustafson and owes him no unpaid wages. Gustafson contends he is owed \$676.24 in unpaid commissions.

Hearing Examiner Gregory L. Hanchett convened a telephonic contested case hearing in this matter on April 8, 2004. Gustafson appeared on his own behalf and testified under oath. Adam Kimmet and Leif Welhaven testified under oath on behalf of the respondent. The parties stipulated to the admission of Documents 1 through 250. The parties also stipulated to the admission of documents A through Z and AA through AN proffered by the respondent at the time of the hearing.

Gustafson's original claim included an assertion that he was owed \$500.00 in unpaid salary as well as unpaid commissions. In reviewing discovery provided by Wireless, Gustafson discovered that he had been paid the \$500.00 salary that he thought was unpaid. On March 30, 2004, Gustafson sent a letter to the Hearings Bureau indicating that he was not seeking any amount of the unpaid back wages since he had in fact been paid those wages. He reiterated this position at the time of the hearing. Thus, the hearing proceeded forward only on Gustafson's claim for unpaid commissions. Based on the evidence and arguments presented at the hearing, the following findings of fact, conclusions of law, and final order are made.

II. ISSUE

Is Gustafson entitled to additional commissions as alleged in his complaint and penalty as provided by law?

III. FINDINGS OF FACT

1. Wireless hired Gustafson as an outside salesperson in May, 2002. Gustafson resigned his position on September 8, 2003.

2. As an outside salesperson, Gustafson had responsibility for selling various Wireless equipment and service plans to outside customers. In addition to a salary, Gustafson's agreement with Wireless called for him to be paid commission on sales of products. Pertinent to the issues in this case are the portions of the agreement that provide that Gustafson would be paid 10% commission on the sale of accessories and phones and specified dollar amounts on the sales of monthly access plans (Exhibit 000163).

3. Gustafson's employment agreement carefully delineates how and under what conditions outside sales associates will be paid commissions (Exhibit 000072). The agreement indicates that Gustafson was not entitled to a commission on an accessory if he sold the product at more than \$5.00 below the retail price of the product. In order to get commission on phone sales, Gustafson was required to sell the phone for the list price. If the phone was sold for less than that price, then no commission was due.

4. After completing sales, Gustafson turned in his sales reports in order to receive his commissions. Each month, during the middle of the month, the employer made available to Gustafson his commission reports for the previous month so that the employee could note any discrepancies.

5. Gustafson contends that Wireless shorted him on commissions during the months of July, August, September, October, and December, 2002 and January, February, March, April, May, June, and August, 2003. Most of the commissions which Gustafson claims to be owed involved Wireless' failure to pay the 10% commission on phones and accessories which Gustafson sold (see, e.g., Exhibit 000056, Gustafson's claim for unpaid commissions). With few exceptions (those exceptions are noted below), these accessories and phones were sold either at \$5.00 or more below retail or, in the case of the phones, were sold far below the retail price. The evidence shows that Wireless properly credited Gustafson for sales of access plans, with the exception of the "Snow Crest" access plan sale (also discussed below).

6. Wireless failed to pay Gustafson proper commission on sales to Lennick Brothers (a fact acknowledged by Wireless at hearing). Commissions for these three sales totaled \$15.00. In addition, Wireless docked Gustafson's pay \$40.00 because Wireless believed that one of the phone activations for Snow Crest Chemical was not an activation. The more credible evidence on that issue, Gustafson's testimony, demonstrates that this was an activation and Gustafson's commission pay should not have been docked.

7. Gustafson also made substantial sales to Acorn Technologies (Acorn) during April, 2003. On April 16, 2003, Gustafson sold Acorn a car kit handset for \$120.00 (list \$149.99) and a

"Smooth Talker In Line Hands Free Kit" for \$208.00 (list \$250.00). On April 16, 2004, Gustafson sold Acorn a "Smooth Talker Boost Kit CDMA," for \$224.00 (list \$280.00). These sales were discounted from the list price in order to gain Acorn's business. Gustafson did not undertake these discounted sales on his own, however. Leif Welhaven specifically told Gustafson to discount these sales. Gustafson should have been paid a \$12.00 commission for the sale of the car kit handset ($\$120.00 \times 10\% = \12.00 commission), \$20.80 commission for the sale of the "Smooth Talker In Line Hands Free Kit" ($\$208.00 \times 10\% = \20.80 commission), and \$22.40 commission for the April 16 sale of the "Smooth Talker Boost Kit CDMA" ($\$224.00 \times 10\% = \22.40 commission). Wireless failed to pay Gustafson any commission for these three sales.

8. Altogether, Wireless failed to pay Gustafson \$110.20 in commissions due to him.

9. Wireless provided Gustafson with two company cell phones to be used for company business. Gustafson used the cell phone for the sole purpose of conducting business. Despite this, Wireless docked Gustafson's pay in the amount of \$23.80 because during one month his cell phone usage exceeded 750 minutes. Company policy (which Gustafson did not agree to be bound by) required each outside sales person to reimburse the company anytime he or she exceeded the 750 minute limit.

10. Wireless has had a previous incident of failing to pay all wages when due. In April, 2003, the Wage and Hour Unit adjudicated Wage and Hour complaint 1185-2003 and found that Wireless had failed to pay commissions to employee Charles McDonald.

IV. OPINION⁽¹⁾

A. Wireless Owes Commissions to Gustafson.

Montana law requires that employers pay employees wages when due in accordance with the employment agreement, and in any event not more than 15 days following the separation from employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205. 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" include any money due from an employer to an employee, including bonuses and 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 employment agreement in this case clearly states that Gustafson would not be paid for phones sold at less than list price or for other items sold at more than \$5.00 below list price. With the exception of the sales noted in Paragraphs 5 and 6 in the Findings of Fact, the sales for which Gustafson claims to be owed commission were not sold in conformity with this agreement. Therefore, with the exception of the sales noted in Paragraphs 5 and 6 of the Findings of Fact, Gustafson is not entitled under the terms of his employment agreement to any commission on these sales.

The substantial evidence in this matter shows that Gustafson is owed additional commission on the sales discussed in Paragraphs 6 and 7 of the findings of fact. These

commissions total \$110.20. Wireless acknowledges that it failed to pay Gustafson \$15.00 commission for the Lennick Brothers sales. Wireless should have credited Gustafson for the Snow Crest activation. With respect to the Acorn sales, Welhaven's direction to Gustafson to sell the items at a discounted amount resulted in a novation of the work agreement with respect to those particular sales. Gustafson sold the Acorn items in conformity with Welhaven's instructions and is thus entitled to commission on those three sales.

Wireless' attempt to offset the cell phone overage amount against Gustafson's pay was illegal. Mont. Code Ann. § 39-3-204(1). *See also, Christensen v. Taylor Brothers* (1987), 225 Mont. 318, 320, 732 P.2d 841, 843 (Mont. Code Ann. § 39-3-204(1) prevents employers from deducting wages to cover expenses incurred by the employer); 36 Op. Att'y. Gen. 17 (1975)(wages may not be set aside for damages caused by an employee's negligence, for unauthorized truck mileage or for other expenses incurred by the employee as a result of his employment). Wireless presented no evidence to refute Gustafson's credible testimony that he only used the cell phone for business purposes. Wireless thus improperly deducted \$23.80 from Gustafson's pay.

B. Wireless Owes Penalty of 110%.

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 will be imposed unless any of the special circumstances of Admin. R. Mont. 24.16.7556 apply. Admin. R. Mont. 24.16.7556 provides for the imposition of a 110% penalty if the employer is found to have violated similar wage and hour statutes within three years prior to the date of the filing of the wage claim. In this case, as noted in the findings of fact above, the Wage and Hour Unit adjudicated a similar violation with respect to a different employee in case #1185-2003 in August, 2003. This special circumstance justifies the imposition of a 110% penalty in the amount of \$147.40 ($\$134.00 \times 110\% = \147.40).

V. ORDER

Wireless Communications, Inc., IS HEREBY ORDERED to tender a cashier's check or money order in the amount of \$281.40, representing \$134.00 in unpaid wages and \$147.40 as a penalty, payable to the claimant, Greg Gustafson, and delivered to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than 30 days after service of this decision.

DATED this 3rd day of June, 2004.

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.

1. 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.