

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM) Case No. 800-2013
OF KARI MURPHY,)

Claimant,)

vs.)

FINAL AGENCY DECISION

SAMUELS JEWELERS, INC., GITANJALI,)
USA, a Delaware corporation registered)
with the Montana Secretary of State)
d/b/a SAMUELS JEWELERS, INC.,)

Respondent.)

* * * * *

I. INTRODUCTION

On November 21, 2012, the claimant, Kari Murphy, filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry contending the employer, Samuels Jewelers, Inc., Gitanjali, USA, a Delaware corporation registered with the Montana Secretary of State d/b/a Samuels Jewelers, Inc. (Samuels Jewelers, Inc.) owed her \$12,000.00 in unpaid bonus payments.

On January 7, 2013, the Wage and Hour Unit issued a determination finding that Samuels Jewelers, Inc. owed Murphy \$9,523.00 in unpaid bonus payments and imposed a 15% penalty for a total of \$10,951.45.

On March 14, 2013, the Wage and Hour Unit issued a redetermination affirming its earlier determination in its entirety. On April 3, 2013, the Wage and Hour Unit referred the matter for mediation after receiving the employer's timely appeal. On May 13, 2013, the matter was transferred to the Hearings Bureau after attempts at mediation were unsuccessful.

On May 31, 2013, the Hearing Officer issued a scheduling order. On June 10, 2013, the claimant's attorney requested an all in-person hearing to be held in

Billings, Montana. On June 13, 2013, the employer's attorney responded and argued an in-person hearing was unnecessary and unduly burdensome. On June 17, 2013, the claimant's attorney replied and suggested the parties proceed informally under Mont. Code Ann. § 2-4-603(2).

On June 26, 2013, the Hearing Officer conducted a telephone conference in which the parties both appeared and agreed to proceed informally. A briefing schedule was set and an order outlining the schedule agreed upon by the parties was issued the next day. On July 2, 2013, the Hearing Officer received the parties' written agreement to proceed informally under Mont. Code Ann. § 2-4-603(2).

On July 26, 2013, the claimant's final brief was received. The employer's attorney did not submit a second response brief by August 2, 2013 or have any further contact with the Hearings Bureau. As such, the matter was deemed submitted upon the passing of August 2, 2013.

Based on the briefs submitted, the following findings of fact, conclusions of law, and final agency decision are made.

II. ISSUE

The issue in this case is whether Samuels Jewelers, Inc. owes wages for work performed, as alleged in the complaint filed by Kari Murphy, and owes penalties or liquidated damages, as provided by law.

III. STIPULATED FACTS

1. Samuels Jewelers, Inc. employed Kari Murphy as a sales associate at its store in Billings, Montana, beginning August 22, 2006. Murphy was subsequently named the Store Manager. Murphy's ending hourly wage was \$21.63.

2. Samuels Jewelers, Inc. offers eligible Store Managers a Year-End Store Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA) bonus. The EBITDA bonus is paid annually to eligible store managers based upon their individual store's sales. Samuels Jewelers, Inc.'s EBITDA bonus policy states:

The Year End Store EBITDA bonus is paid at the Annual National Conference held during the fourth quarter of the calendar year following the fiscal year in which they accrue. Store Manager/Assistant Manager

must be employed with [Samuels] at the time the Bonus is paid to be eligible for payout.

Note: Gitanjali reserves the rights to modify or terminate this incentive plan at any time. Any modification to or termination of this plan must be made in writing.

3. The fiscal year for Samuels Jewelers, Inc. ends March 31. The annual audit, which determines EBITDA bonus amounts for eligible managers, begins at the end of the fiscal year and is typically completed in June or July.

4. Samuels Jewelers, Inc. began paying the EBITDA bonus prior to the Annual National Convention after protests by members of management regarding the length of time they had to wait for their bonus payments during the 2010-2011 fiscal year. On or about June 24, 2011, Murphy received an EBITDA bonus of \$3,631.06. Murphy received the EBITDA bonus prior to the annual convention.

5. On June 11, 2012, Murphy received a letter of termination from Samuels Jewelers, Inc. On June 16, 2012, Murphy received payment for her regular earnings and vacation through her final day of employment.

IV. ADDITIONAL FINDINGS OF FACT

1. During the 2011-2012 fiscal year, Murphy's store had total sales of \$2,121,983.00, which resulted in the store achieving an EBITDA of \$317,428.00. That amount constituted a 15% EBITDA, thereby making the store eligible for an EBITDA bonus of 3% of the EBITDA, which amounted to an EBITDA bonus of \$9,523.00. (Documents 46 through 48).

2. Samuels Jewelers, Inc. offers a Monthly Store Manager/Assistant Manager bonus that is paid the month after the bonus is earned by the employee. The Monthly Store Manager/Assistant Manager bonus policy states, "Store Manager/Assistant Manager must be employed with Gitanjali at the time the bonus is paid to be eligible for payout." (Document 54).

3. The termination letter Murphy received on June 11, 2012 states, "all commissions/incentives earned will be paid through regular payroll process at month end on check date July 20, 2012." (Document 127).

4. On June 22, 2012, Murphy received a commission payment of \$2,071.23 and the Monthly Store Manager/Assistant bonus of \$1,000.00. On July 20, 2012, Murphy received a commission payment of \$116.02. (Documents 49, 70).

5. Murphy earned the EBITDA bonus of \$9,523.00 prior to her separation from employment and is thereby owed that amount by Samuels Jewelers, Inc.

6. Penalty on the unpaid amount is \$5,237.65 ($\$9,523.00 \times .55 = \$5,237.65$).

V. DISCUSSION¹

A. *Murphy has proven she is owed the 2011-2012 fiscal year EBITDA bonus.*

Montana law requires that employers pay wages when due, in conformity with the employer's written personnel policies. 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" are money the employer owes an employee including bonuses. Mont. Code Ann. § 39-3-201(6); *Delaware v. K-Decorators, Inc.*, 1999 MT 13, 293 Mont. 97, 104-105, 973 P.2d 818.

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. As part of this burden of proof, the claimant must prove that in fact an employment agreement for the compensation sought existed between her and the employer. To meet this burden, the employee must produce evidence to "show the extent and amount of work as a matter of just and reasonable inference." *Id.* at 189, 562 P.2d at 476-77, *citing Anderson*, 328 U.S. at 687, and *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; *see also, Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that lower court properly concluded the plaintiff's wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, "the burden shifts to the employer to come forward with

¹ Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee. And if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation.’ * * *.” *Garsjo*, 172 Mont. at 189, 562 P.2d at 477, quoting *Purcell*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

Murphy argues she earned the EBITDA bonus by virtue of the work she performed for Samuels Jewelers, Inc. throughout the entirety of the 2011-2012 fiscal year. Samuels Jewelers, Inc. argues Murphy is not entitled to receive the EBITDA bonus because she did not fulfill the condition precedent of continued employment at the time the bonus was paid out. Both parties offer zealous arguments regarding the Montana Supreme Court’s decision in *Langager v. Crazy Creek Products*, 287 Mont. 445, 954 P.2d 1169 (Mont. 1998), which examined a former employee’s wage claim for two weeks of unpaid vacation.

In *Langager*, a former employee filed a wage claim seeking payment for two weeks of vacation. *Langager*, 287 Mont. at 447. The employer’s vacation policy required the employee to work the shift prior to and after the requested time in order to be qualified to receive paid vacation time. *Langager*, 287 Mont. at 447 and 448. The court found this to be a condition subsequent that imposed an unreasonable restriction on the employee’s accrual of paid vacation. The court found:

Langager earned her vacation pay when she completed the second year of her employment. The condition subsequent that she work the shift following her vacation does not pertain to whether she “earned” the vacation, rather it pertains to whether she will be paid for the vacation she earned. Conditions which purport to divest an employee that which the employee has earned are not reasonable and should not be upheld.

Langager, 287 Mont. at 456 and 457 (Leaphart, J., specially concurring).

The court noted in *Langager* that the critical question was whether the former employee earned the vacation time and whether the employer was “obligated to pay that which is earned and due and owing.” *Langager*, 287 Mont. at 453. A similar analysis is required in this case.

The EBITDA bonus policy sets forth the conditions a manager or assistant manager must meet to be qualified to receive the bonus. First, the manager or assistant manager’s store must have sufficient sales during the fiscal year, as

determined by the annual audit, to qualify for an EBITDA bonus. There appears to be no dispute Murphy's store had sufficient sales during the 2011-2012 fiscal year to qualify her store for an EBITDA bonus of \$9,523.00.

Second, the EBITDA policy states, "Store Manager/Assistant Manager must be employed with Gitanjali at the time the Bonus is paid to be eligible for payout." Contrary to the argument of Samuels Jewelers, Inc. that the condition of continued employment at the time of the bonus payout is a condition precedent that must be met before the manager or assistant manager may receive the EBITDA bonus, the evidence shows the requirement is actually a condition subsequent. The manager or assistant manager earned the bonus based upon his or her store having sufficient sales during the fiscal year to qualify for a bonus. The EBITDA policy merely states the employee must be employed at the time of payout "to be eligible" to receive the bonus. However, the evidence clearly shows Murphy earned the EBITDA bonus by virtue of her labors during the 2011-2012 fiscal year. Therefore, the requirement she be employed at the time of the EBITDA bonus payout is a condition that follows the condition the bonus be earned. In this case, the condition Murphy be employed at the time of payout effectively divested her of the bonus she had already earned through her labors throughout the entirety of the 2011-2012 fiscal year. Therefore, as the court found in *Langager*, the condition Murphy be employed at the time of the EBITDA bonus payout is unreasonable and unenforceable.

Even if the condition Murphy be employed at the time of the EBITDA bonus payout was not an unenforceable condition subsequent, the evidence shows Samuels Jewelers, Inc. waived its right to enforce that condition based upon its actions prior to and after Murphy's separation.

Samuels Jewelers, Inc. admits it paid out the EBITDA bonus for the 2010-2011 fiscal year prior to the annual convention, which was contrary to its written EBITDA bonus policy. Samuels Jewelers, Inc. argues that it paid out the EBITDA bonus prior to the Annual National Convention only in response to "a great deal of push back from managers because they had to wait so long after the audit was completed to receive their bonuses." Murphy appears to argue that the payment of the EBITDA bonus for the 2010-2011 fiscal year prior to the annual convention and the payment she received for the manager's incentive bonus after her termination both contradicted the employer's bonus policies and served as a waiver of the employer's right to enforce those terms of its own bonus policies.

The issue in this case is similar to the issue addressed by the Supreme Court of South Dakota in *Baldwin v. National College*, 537 N.W. 2d 14 (1994). In that case, a

former employee who voluntarily left employment argued she was owed a bonus payment that she earned prior to her separation. The contract stated, “Employee will receive no bonus payments after termination of this agreement, regardless of which party terminates the agreement.” *Baldwin*, 537 N.W. 2d at 17. The court found that the terms of the contract were clear and unambiguous but found the former employee was owed the bonus payment under the waiver theory. *Baldwin*, 537 N.W. 2d at 18. The court noted that the employer, through its employees, had made repeated representations to the former employee that she would be paid for all bonuses or commissions earned during the employment. *Baldwin* at 18 and 19. The court also noted the employer was the drafter of the contract and was presumed to know what it provided. *Baldwin*, 537 N.W. 2d at 18. Through the actions of its employees by representing to the former employee that she would receive the bonus payment, and the former employee’s reasonable reliance upon those representations, the court found the employer was bound to pay the former employee for the bonuses or commissions she earned during her employment. *Baldwin*, 537 N.W. 2d at 19.

The Montana Supreme Court addressed a similar issue in a case involving whether the right to arbitration under an employment agreement had been waived. *Firestone v. Oasis Telecoms., Data & Records*, 307 Mont. 469, 38 P.3d 796 (Mont. 2001). The court noted that “an implied waiver follows from a ‘course of action or conduct which induces the belief that the intention and purpose was waiver.’” 307 Mont. At 474. *See also Holm-Sutherland Co., Inc. v. Town of Shelby*, 295 Mont. 65, 982 P.2d 1053.

The evidence clearly shows Samuels Jewelers, Inc. acted contrary to its own bonus policies when it paid the EBITDA bonus for the 2010-2011 fiscal year prior to the Annual National Convention and when it paid out the manager’s bonus to Murphy after her termination. Further, Murphy’s termination letter stated that “all commissions/incentives earned will be paid through regular payroll process at month end on check date July 20, 2012.” There was no language in the termination letter suggesting Murphy would not be receiving the EBITDA bonus that she had earned during the 2011-2012 fiscal year.

The course of conduct of Samuels Jewelers, Inc. prior to and after Murphy’s separation created an ambiguity and uncertainty as contemplated under Mont. Code Ann. § 28-3-206, which requires the language of a contract to be interpreted most strongly against the party who caused the uncertainty to exist.

Further, Mont. Code Ann. § 39-3-208 provides that wages may be awarded when an employer’s policy “violates, evades, or circumvents” the requirement to pay

wages that have been earned. Murphy clearly earned the EBITDA bonus by virtue of her labors during the entirety of the 2011-2012 fiscal year. Samuels Jewelers, Inc. correctly points out Murphy had no contractual right to the EBITDA bonus prior to the Annual National Convention and there was no contractual provision stating Murphy's interest vested in the EBITDA bonus upon mere completion of a term of employment. However, as noted above, the condition Murphy be employed at the time of the bonus payout is unreasonable and unenforceable. Therefore, that portion of the employer's bonus policy "violates, evades, or circumvents" the requirement an employer pay what wages have been earned by the employee.

The evidence shows Murphy earned an EBITDA bonus in the amount of \$9,523.00 for the 2011-2012 fiscal year. Murphy has shown by a reasonable and just inference that Samuels Jewelers, Inc. owes her unpaid wages in the amount of \$9,523.00. Samuels Jewelers, Inc. has failed to offer sufficient evidence to negate the reasonableness of the inference drawn from the evidence presented by Murphy.

B. Samuels Jewelers, Inc. must pay a 55% penalty on the amount found owed to Murphy.

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. Imposition of the penalty is mandatory. *Id.* For claims not involving minimum wage or overtime, a 55% penalty must be imposed. Admin. R. Mont. 24.16.7566.

The evidence shows Samuels Jewelers, Inc. failed to pay Murphy the wages owed to her when they were due. Therefore, a 55% penalty must be imposed for a penalty in the amount of \$5,237.65 (\$9,523.00 x 55%).

VI. 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. Samuels Jewelers, Inc. owes Kari Murphy the EBITDA bonus of \$9,523.00 for work performed during the 2011-2012 fiscal year.

3. A 55% penalty amounting to \$5,237.65 is due on the unpaid wages if it is paid within the time period specified in the order below. Admin. R. Mont. 24.16.7561.

VII. ORDER

Samuels Jewelers, Inc. is hereby ORDERED to tender a cashier's check or money order in the amount of \$14,760.65, representing \$9,523.00 in unpaid wages and \$5,237.65 in penalty, made payable to Kari Murphy, and mailed to the Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503, no later than 30 days after service of this decision. Samuels Jewelers, Inc. may deduct applicable withholding from the wage portion but not the penalty portion of the amount due.

DATED this 20th day of September, 2013.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
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.

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.