STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF STEVE PENWELL,	)	**Case No. 1462-1999**
Claimant,	)	
	)	**FINDINGS OF FACT;**
vs.	)	**CONCLUSIONS OF LAW;**
	)	**AND ORDER**
AUTOGON, INC.,	)	
Respondent.	)	

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I. INTRODUCTION

Steve Penwell filed a wage claim on May 18, 1999 alleging that Autogon Inc. owed him $12.00 in unpaid wages, $800.00 in improper withholdings, and $330.00 in unpaid vacation, for a total of $1,142.00. On October 26, 1999, the Wage and Hour Unit of the Department of Labor and Industry issued a determination finding that Autogon, Inc. owed Penwell wages and penalties in the amount of $2,398.20. Autogon, Inc. appealed, and the matter was scheduled for hearing. However, on August 31, 2000, Autogon, Inc. settled with Penwell in the amount of $1,100.00. Upon receiving the settlement documents, the Hearing Officer dismissed the case, without prejudice.

On July 7, 2001, Penwell, through his attorney, filed a Motion to Reopen based upon Autogon's failure to pay all amounts provided by the settlement agreement. Since the case had been dismissed without prejudice, the Hearing Officer reopened the case and scheduled the matter for hearing. Bernadine Warren, Hearing Officer for the Department of Labor and Industry, conducted a hearing in this matter on October 26, 2001. Autogon provided no telephone number or representative name for the Hearing Officer to contact. As a result, Penwell requested that the Hearing Officer decide the case based upon documentary evidence in the record rather than proceed to a full evidentiary hearing. The Hearing Officer granted the request.

Petitioner exhibits I, II and III were admitted into the record without objection.

II. ISSUES

Whether Autogon, Inc. withheld wages, made improper withholdings and failed to pay accrued vacation as alleged in the complaint filed by Steve Penwell.

III. FINDINGS OF FACT

1. In December 1997, Diane Robideau with Express Personnel Services (Express) contacted Autogon and inquired whether Autogon might want to hire employees through Express. She spoke with Mary Foroszowsky. Robideau explained that Express would refer employees to the client. If the client decided to hire the referred employee, it would pay Express an agreed upon amount for the referral. The client could also choose to use the evaluation hire program, where the worker remained an employee of Express for up to 720 hours. Under that program, the client paid Express an hourly rate for the employee during the evaluation time period. Robideau told Mary that any hiring fees were paid by the client, not the worker. Mary told Robideau that the company was seeking a mechanic.
2. On December 15, 1997, Steve Penwell signed on with Express as an entry level mechanic. Robideau referred Penwell to Autogon.
3. On December 16, 1997, Mary Foroszowsky interviewed Penwell. Robideau contacted Mary and asked about Penwell's interview. Mary indicated that she was interested in hiring Penwell.
4. Approximately three weeks went by without Robideau hearing anything. Finally in January 1998, Penwell came to Robideau's office and stated that Autogon had hired him. Robideau contacted Mary Foroszowsky and discussed fees. Mary chose to pay the direct hire fee. Robideau sent Autogon a bill for $1000.00, to be paid in two payments of $333.34 and one payment of $333.32. The payments were to be made in February, March and April 1998. Robideau did not receive payment from Autogon.
5. On May 14, 1999, Steve Penwell filed a claim with the Wage and Hour Unit alleging that Autogon owed him $12.00 in unpaid wages, $800.00 in improper withholdings and $330.00 in accrued vacation. Penwell provided documentation to the Wage and Hour Unit showing that Autogon withheld $800.00 for the employment hiring fee charged by Express. He also provided a pay stub that showed he had 40 hours of vacation accrued, in the amount of $330.00.
6. Autogon responded to the claim and stated that Penwell had not worked long enough to accrue vacation, and that Penwell had agreed to have the employment fee withheld from his pay. As proof, Autogon sent the Wage and Hour Unit a copy of a document dated April 9, 1998, allegedly signed by Penwell, authorizing Autogon to withhold $20.00 per week from his pay until the $1,000.00 employment fee was paid in full. The Penwell signature is obviously forged. Therefore, I find that Penwell did not sign an agreement to withhold the employment fee from his paychecks.
7. On October 26, 1999, the Wage and Hour Unit issued a determination finding Autogon owed Penwell $1,142.00 for unpaid vacation and improper withholdings, and $1,256.20 in penalties for failure to pay wages.
8. On August 31, 2000, Autogon agreed to pay Penwell $1,100.00 to settle the claim. Penwell accepted the settlement. Autogon agreed to pay Penwell $250.00 on or before September 25, 2000, $75.00 per month from October 2000 through July 2001, and $100.00 in August 2001.
9. Autogon paid Penwell $250.00 on September 25, 2000, $50.00 on October 27, 2000, $75.00 on December 12, 2000, $100.00 on January 2, 2001, $75.00 on January 31, 2001, and $75.00 on March 7, 2001, for a total of $625.00. Following March 7, 2001, Autogon failed to send any other payments to Penwell in accordance with the settlement agreement.

10. Penwell requests that Autogon pay him the remainder of the unpaid wages, penalties, and interest, if applicable.

IV. DISCUSSION

Montana law requires that employers pay employees wages when due, in accordance with the employment agreement, pursuant to §39-3-204, MCA. 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 any money due an employee by an employer, including commissions. § 39-3-201(6), MCA. Penwell's claim alleges that Autogon wrongfully withheld wages from his pay for an employment fee. Autogon contends that Penwell agreed to repay the cost of employment fee by having amounts withheld from his pay, and thus, the transaction was legal. It cites no authority supporting this contention. To the contrary, the court has repeatedly held that "Parties cannot privately waive statutes enacted to protect the public in general. " Phoenix Physical Therapy v. Unemployment Insurance Division, 284 Mont. 95, 104, 943 P.2d 523, 528 (1997). The court cautioned in Garsjo v. Department of Labor and Industry, 172 Mont. 182, 188, 562 (1977), that "an employee may not enter into an agreement which operates to waive compensation for overtime actually worked." The court recognized that the laws of Montana that ensure an employee's right to receive minimum wage and overtime pay are expressions of public policy created to protect workers, and restraining those from withholding overtime pay is vindication of a public right rather than a private right. Withholding wages is considered a continuing public offense. Although this case does not involve overtime or minimum wage violations, the same theories apply.

Attorney General Opinion No. 25, Volume 11 (March 25, 1953), still in effect, held that an employer cannot withhold wages from an employee to pay a debt to the employer, unless the debt is for room, board or other incidentals which the employee has agreed may be deducted as a condition of employment. "Other incidentals" include items the employer furnishes to the employee that are not required for the performance of the employee's duties. These would include items such as furnished transportation that is not required for work purposes, electricity, water or gas furnished for the non-commercial use of the employee, or fuel, such as kerosene, coal or firewood, for the employee's non-work use. These types of incidentals may properly be deducted from the employee's wages, provided the employee agrees to the deductions, and the agreement is voluntary and uncoerced. (See 29 CFR § 531.30, 29 CFR § 531.3(a), and 29 CFR § 531.3(b), FLSA interpretive regulations regarding items that may legally be deducted from an employee's wages without disturbing minimum wage requirements.)

Items that are primarily for the benefit of the employer are not considered incidentals, and may not be deducted from an employee's pay. An employee may properly authorize an employer to make deductions and to turn the deducted amount over to a third party, such as union dues, child support payments, or charitable contributions. However, any deduction that either directly or indirectly produces a profit to the employer is not allowed.

Similarly, Attorney General Opinion No. 17, Volume 36 (August 27, 1975) held that an employer may not make deductions from an employee's pay for damages caused by the employee during the course of his employment, losses caused by the employee's poor judgment, or liability insurance deductible charges attributable to employee negligence. The opinion held that an employer may not withhold wages, even pursuant to a union contract, unless the deductions were made for board, room, and other incidentals supplied by the employer as part of the conditions of employment.

In this case, Autogon deducted $800.00 from Penwell's pay for an employment fee owed by Autogon to Express. These deductions were for the benefit and profit of the employer, not the employee. They do not meet the definition of "other incidentals" as contemplated by both Attorney General opinions referenced above and FLSA interpretive regulations. Thus, whether or not Penwell agreed to the deductions, they were improper withholdings from his wages. Autogon owes Penwell $800.00 in improper withholdings. Penwell submitted no information, however, in support of the alleged $12.00 unpaid wages. Accordingly, his claim for that amount is denied.

In a 1949 opinion, which remains valid authority for the resolution of vacation pay disputes, the Attorney General concluded that "vacation pay which has been earned and is due and owing must be considered in the same category as wages and is collectable in the same manner and under the same statutes as are wages." 23 Op. Att'y Gen. 151, 153 (1949). In Langager v. Crazy Creek Products, Inc., 287 Mont. 445, 954 P.2d 1169, (1998), the Supreme Court held that "[o]nce an employee has accrued paid vacation pursuant to the terms of his or her employment contract, an employer may not then impose conditions subsequent which would, if unmet, effectively divest an employee of that accrued vacation."

Penwell submitted evidence that he had 40 hours of vacation accrued for which Autogon did not pay him. Other than to deny the claim, Autogon provided no evidence to the contrary. Thus, the $330.00 claimed by Penwell is due and payable.

An employer who fails to pay an employee as provided by law or who violates any other provision of the law is guilty of a misdemeanor and must pay a penalty of up to 110% of the unpaid wages. § 39-3-206, MCA. ARM 24.16.7566 provides that a penalty equal to 55% of the wages due the employee will be imposed if none of the special circumstances of ARM 24.16.7556 apply. That rule requires that 110% penalty be applied to those cases where the employer fails to cooperate or provide requested information, the employer's records are falsified or intentionally misleading, or the employer has violated similar wage and hour statutes within the three years previous to the wage claim. Autogon failed to cooperate. It refused to participate in the hearing and refused to abide by its settlement agreement. Thus, the full 110% penalty of $1,243.00 is properly assessed.

Autogon owes Penwell $800.00 in improper withholdings, $330.00 in unpaid vacation, and $1,243.00 in penalties, for a total of $2,373.00. However, it already repaid Penwell $625.00 in accordance with the settlement agreement. Therefore, Autogon still owes Penwell $1,748.00. There is no provision in the law that requires employers to pay interest on unpaid wages.

VI. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over Penwell's claim for unpaid wages under § 39-3-201 et seq. MCA. State v. Holman Aviation, 176 Mont. 31, 575 P.2d 925 (1978).
2. Autogon improperly withheld $800.00 from Penwell's pay and failed to pay Penwell $330.00 in accrued vacation pay. Penwell is entitled to a penalty of $1,243.00 pursuant to §39-3-206, MCA and ARM 24.16.7566(1)(a). Autogon repaid $625.00 per the settlement agreement. Thus, Autogon still owes Penwell $1,748.00.

VI. ORDER

Respondent Autogon, Inc. is hereby ORDERED to tender a cashier's check or money order in

the amount of $1,748.00, representing the remainder of the unpaid wages and penalties, made payable to Steve Penwell, and mailed to the Employment Relations Division, PO Box 6518, Helena, Montana, 59624-6518, no later than 30 days from the date of this Order.

DATED this 5th day of November, 2001

HEARINGS BUREAU

By: /s/ Bernadine E. Warren Bernadine E. Warren
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with § 39?3?216(4), MCA, by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also § 2?4?702, MCA.