

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

IN THE MATTER OF THE WAGE CLAIM) Case No. 1827-2002
OF SCOTT A. BERUBE,)
) Claimant,)
) vs.) FINAL AGENCY DECISION
BECKY TITUS, d/b/a BADLANDS WIRELESS)
) Respondent.)

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I. INTRODUCTION AND EVIDENTIARY RULINGS

On April 22, 2002, Scott A. Berube filed a claim with the Department of Labor and Industry seeking wages for work performed for Becky Titus, doing business as Badlands Wireless. The Wage and Hour Unit determined that he was in fact owed wages, and Titus appealed. The case was then transferred to the Department's Hearings Bureau for hearing.

Hearing officer Anne L. MacIntyre held a contested case hearing in this matter on September 20, 2002. The claimant and respondent were present and testified. Sue Burleson also presented testimony.

Exhibits numbered 8 through 18, 23 through 27, 31 through 37, 44, claimant-1, and claimant-2 were admitted without objection. The respondent objected to the admission of exhibits 19 through 22 on the grounds that it was obtained in violation of § 45-8-213(1)(c), MCA. The hearing officer reserved ruling on the objection until completion of the decision in this matter.

Exhibits 19 through 22 are a transcript of a recording made by Berube of a conversation he had with Titus. He taped the conversation without telling her he was doing so. Montana law provides that "a person commits the offense of violating privacy in communications if the person knowingly or purposely: . . . records or causes to be recorded a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation. . . ." § 45-8-213(1)(c), MCA. There are certain exceptions to the statute, mostly involving public officials. Allowing a party to use evidence obtained in violation of law is against public policy. There may be some circumstances in which such evidence would be admissible, such as for impeachment purposes, but in this case, Exhibits 19 through 22, the transcript of the conversation, are excluded.

Based upon the testimony and exhibits in the case, the hearing officer makes the following:

II. FINDINGS OF FACT

1. Becky Titus owned Badlands Wireless, a company that sold cellular phones and phone products in Glendive, Montana. In the fall of 2001, she was planning to open a new store in Miles City. She was looking for an employee to work in the Glendive store.

2. At the beginning of October 2001, Titus spoke to Scott Berube about working in the Glendive store. At the time, he was working at Hedahls in Glendive, earning \$7.25 per hour. Titus agreed to pay him \$1,300.00 per month. Berube agreed to take the job beginning November 1, 2002. He was to work Monday through Friday, 9:30 a.m. to 5:30 p.m. with a one hour lunch. In December 2001, he asked if Titus could adjust his hours of work to 9:00 a.m. to 5:00 p.m. with a one hour lunch. He made the request to allow him to work as a coach on a part-time basis. He also told her he would need several afternoons off to attend games. Titus agreed to the request. She did not indicate that taking the afternoons off would result in any reduction to his salary.

3. Titus was experiencing financial difficulties and never paid Berube in accordance with the agreement. She did not pay him on any regular basis, and did not withhold taxes because she erroneously believed him to be "contract labor." She paid him as follows:

November 30, 2001 \$ 200.00
December 6, 2001 \$ 450.00
December 24, 2001 \$ 500.00
January 3, 2002 \$ 600.00
January 8, 2002 \$ 200.00
January 30, 2002 \$ 500.00
February 28, 2002 \$ 500.00
March 27, 2002 \$ 500.00

Total \$3,450.00

Titus made these payments by personal check to Berube only when he asked for his wages and told her he needed to be paid.

4. Titus kept no record of the hours or days worked by Berube.

5. Frustrated with not being paid, Berube found a part-time job. He worked February 13, 20, 21, 27, and 28, 2002, at his new job, and thus did not work for Titus. In addition, he had part days off on January 15, February 5, and February 12, 2002, in connection with coaching. He did not work full days on January 30, January 31, and February 1, 2002. He quit his job at the end of February, 2002. At that time, he had earned \$5,200.00 (4 months x \$1,300.00 per month), less \$480.00 for the 8 days that Berube took off for personal reasons or to work at another job. Thus, Titus owed Berube \$4,720.00 in wages. Subtracting the \$3,450.00 paid by Titus from this amount, Titus still owes Berube \$1,270.00 in wages.

III. DISCUSSION AND ANALYSIS

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. §§ 39-3-204 and 39-3-205, 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.

The central dispute in this case is what wage Berube and Titus agreed to. Berube credibly testified that Titus agreed to pay him \$1,300.00 per month. He also credibly testified that he would not have accepted a job paying less than the position he had at Hedahls. Titus testified that she agreed to pay Berube "up to" \$1,300.00 per month. When asked at hearing for specifics as to how she intended to determine what Berube's wage would be, Titus indicated that she would determine how much money she had left each month after subtracting certain expenses and ongoing costs from her sales commissions. The amount she had left would determine the amount of Berube's wage. It is extremely improbable that Berube agreed to work for Titus for such an uncertain wage. Therefore, Titus agreed to pay Berube \$1,300.00 per month to work during the store's regular business hours. These hours were initially 9:30 a.m. to 5:30 p.m., with one hour lunch, but were changed to 9:00 a.m. to 5:00 p.m. at Berube's request.

In addition to her position that she never agreed to pay Berube \$1,300.00 per month, Titus presented evidence that Berube had certain performance deficiencies as an employee. While these deficiencies might have given Titus cause to discipline Berube, they have no bearing on whether she is obliged to pay wages for the time he was employed in accordance with the employment agreement.

In agreeing to a monthly salary, Titus did not indicate that Berube's salary would be reduced for days that the store was closed for holidays, or on days when Berube left early with leave. Berube specifically requested three afternoons off to coach. Titus granted his request without indicating that his pay would be docked. In the absence of a specific discussion between the parties, however, it would not be reasonable to construe the agreement as requiring payment for days that the store was open but that Berube did not work at all for personal reasons or because he started his new job. Thus, the monthly salary Titus agreed to pay should be reduced for the 8 days he did not work at all.

There are 21.66 week days in an average month. Dividing Berube's monthly salary by 21.66 days results in a daily wage of \$60.00. He indicated in his wage claim that he did not work for Titus on January 30, January 31, and February 1, 2002. He testified at hearing that he did not work for Titus on February 13, 20, 21, 27, and 28, 2002 because of his new job. Because he did not work 8 days for personal reasons, his earnings are reduced by \$480.00 (\$60.00 x 8 days). If he had worked all days during the 4 month period, his salary would have been \$5,200.00. Reduced by the \$480.00 for the 8 days he did not work results in total earnings of \$4,720.00, of which Titus paid Berube \$3,450.00. Thus, Titus still owes Berube \$1,270.00.

Montana law provides for a penalty to be assessed against an employer who has not paid wages as required by law and paid to the employee in an amount not to exceed 110% of the wages due and unpaid. § 39-3-206(1), MCA. The rules of the department provide that, except for minimum wage and overtime violations, a 55% penalty should be imposed for any amounts not paid within the time specified in the department determination, unless certain special circumstances apply. ARM 24.16.7561. This case does not involve a minimum wage or overtime violation and none of

the special circumstances apply in this case. Therefore, Titus owes Berube a penalty of 55%, or \$698.50, on the wages she did not pay.

IV. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under § 39-3-201 et seq. MCA. State v. Holman Aviation, 176 Mont. 31, 575 P.2d 925 (1978).
2. Becky Titus, doing business as Badlands Wireless, violated §§ 39-3-204 and 39-3-205, MCA, by failing to pay Scott A. Berube wages when due and within 15 days of the termination of his employment. She owes Scott A. Berube \$1,270.00 in wages.
3. Becky Titus, doing business as Badlands Wireless, owes Scott A. Berube a penalty of \$698.50 pursuant to § 39-3-206, MCA, and ARM 24.16.7561.

V. ORDER

Becky Titus, doing business as Badlands Wireless, IS HEREBY ORDERED to tender a cashier's check or money order in the amount of \$1,968.50, representing \$1,270.00 in unpaid wages and \$698.50 in penalty, payable to the claimant, Scott A. Berube, and delivered to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than December 17, 2002.

DATED this 18th day of November, 2002.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ ANNE L. MACINTYRE

Anne L. MacIntyre, Chief
Hearings Bureau

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.

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 § 39-3-212, MCA. Such an application is not a review of the validity of this Order.