

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 524-2001
OF RUDOLPH J. GIECEK,)	
Claimant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
ISWFACE (International Sex Worker,)	
Foundation for Art, Culture, and Education),)	
a California corporation not currently)	
registered)	
in Montana, d/b/a Dumas Brothel Museum,)	
Respondent.)	

I. INTRODUCTION

On September 26, 2000, Rudolph J. Giecek filed a claim with the Montana Department of Labor and Industry, alleging he was owed \$52,000.00 in wages for work performed during the period of May 1998 through July 1, 2000. The Wage and Hour unit conducted an investigation and found that the respondent owes Giecek \$52,000.00 for work performed during the period of his employment, pursuant to §39-3-205, MCA. The determination also found Giecek entitled to penalty pursuant to §39-3-206, MCA.

Michael T. Furlong conducted a hearing in this matter in Butte, Montana, on October 9 and 10, 2001. Rudolph J. Giecek appeared and testified (pro se). Lori Armstrong, Attorney at Law, represented Respondent. Norma Jean Almodovar appeared as a witness on behalf of the respondent. Bob Bristol, certified public accountant, appeared on behalf of the respondent and testified as an expert witness.

Claimant's Exhibits 1-11 and Respondent's A through U were admitted into evidence.

II. ISSUES

1. Whether the respondent owes wages to Rudolph J. Giecek pursuant to §39-3-205, MCA.
2. Whether the respondent owes penalty to Rudolph J. Giecek pursuant to §39-3-206, MCA.

III. FINDINGS OF FACT

1. Giecek purchased the Dumas Brothel in 1990. Thereafter, he operated the Dumas Brothel Museum (Dumas) and attempted to restore the building because he considered it of historic value. During that period he also operated a photo studio and furniture restoration and antiques mall in the building.
2. In 1998, Giecek experienced financial difficulties and began looking for someone to purchase the business. He advertised nationwide.
3. In 1998, Norma Jean Almodovar, president of the International Sex Worker Foundation for Art, Culture, and Education (ISWFACE) expressed interest in purchasing the Dumas from Giecek. Almodovar traveled from the ISWFACE headquarters in California to Montana to examine the historic building and determine whether a purchase of the business by ISWFACE would be feasible. She was very interested in the Dumas and said she would contact Giecek once she had proposed the matter of the purchase to the ISWFACE Board of Directors.
4. In April 1998, Almodovar informed Giecek that the Board of Directors had authorized the purchase of the Dumas by ISWFACE. The same month, ISWFACE entered into an agreement with Giecek to purchase the Dumas from Giecek and his wife. Communication continued between Giecek and ISWFACE regarding the sale.
5. On May 1, 1998, Giecek and ISWFACE entered into an earnest money contract for the sale and purchase of the Dumas. (Respondent's Exhibit L).
6. ISWFACE commenced operating the Dumas on May 1, 1998, immediately upon entering into the purchase contract. ISWFACE also entered into an agreement with Giecek to work at the Dumas under the job title of caretaker/curator. In that capacity, he was to oversee the general operation of the museum and to manage the tour guide operation.
7. Giecek remained at the Dumas by himself in his capacity as manager/curator from May 1, 1998 to June 15, 1999. On June 15, 1999, Almodovar arrived in Butte to operate the Dumas and establish offices there. From June 15, 1999, until October 15, 1999, ISWFACE took over the responsibilities and duties of running the museum. Almodovar began setting rates for tour guides and collected and controlled the tour fees for ISWFACE.
8. One of the main goals of ISWFACE at that time was to promote a biker rally. Based on projections of the proceeds from sponsoring the biker rally, ISWFACE initially expected to make enough money to pay off the purchase agreement and compensate Giecek for the actual time he was working.

9. Almodovar designed and created a letterhead for ISWFACE and a business card that listed Giecek as curator/manager of the Dumas. She also listed Giecek as curator/manager in newspaper advertisements soliciting business for the Dumas after May 1, 1998.

10. ISWFACE and Giecek signed and executed an Addendum to the agreement on May 1, 1999. (Claimant's Exhibit 1). That contract addendum stated as follows:

- [1] Commencing from this date, May 1, 1999, ISWFACE agrees to pay the interest with the principle [sic] on the outstanding mortgage for the Dumas Brothel at the rate of \$553.09 per month until such time as the mortgage has been paid in full, and;
- [2] ISWFACE agrees to pay above and beyond the outstanding mortgage principle with interest, the balance of the sale price of \$95,000 in the sum of \$30,000. If this sum remains outstanding for longer than 6 months commencing from this date, ISWFACE agrees to add interest to the outstanding balance owed Rudy Giecek, and;
- [3] ISWFACE further agrees to continue to pay the taxes, utilities, telephone and any other expenses accrued on behalf of the Brothel and ISWFACE, and;
- [4] ISWFACE further agrees that it owes and will pay to Rudy Giecek, as caretaker and curator of the Dumas, the sum of \$500 per week in wages retroactively to the date of the initial contract signed May 1, 1998. This sum will be paid as it is available to our organization and is an acknowledged debt of our organization to be paid to Mr. Giecek whether or not the contract continues in force. At the time he is paid, Mr. Giecek will be responsible for any outstanding tax liability on his wages.

I hereby agree and accept the terms of continuing the contract for the sale of the Dumas Brothel to ISWFACE.

11. Giecek continued as manager/curator at the Dumas until July 2000 when his work relationship with ISWFACE was severed.

12. Giecek's duties as manager and curator included maintaining records of all income received, including tour fees, sales of merchandise from the Dumas gift store, and cash donations. He performed maintenance on the building. ISWFACE directed Giecek to hire part time temporary tour guides, and he instructed them in their duties. He obtained their social security numbers and signed their time sheets. In his position as curator/manager, Giecek could observe traffic and was authorized to schedule the tour guides' work hours. In December 1999, he was assigned to take charge of banking tasks, including the issuing of checks from the Dumas business checking account, while Almodovar was in California.

13. Neither Giecek nor ISWFACE kept a record of the hours he worked. Giecek reported for duty at the Dumas on a regular full time basis without taking time off from May 1, 1998 until July 1, 2000.

14. Almodovar was in Butte to oversee Dumas operations from June 15, 1999, until mid-October 1999. She returned to California during the periods she was not in Butte. She observed Giecek at the Dumas on a regular basis while she was working in Butte.

15. During her stays in Butte, Almodovar's primary focus was on the promotion of a motorcycle rally and other promotional events to benefit the Dumas. During those periods, she directed Giecek's activities at the Dumas.

16. Sometime in June, 1999, Giecek closed his antiques business, but continued to operate his photo shop as a separate entity.

17. During the months of October through April, the off-season for tourist traffic, business at the Dumas slows substantially, to a practically non-existent operation. During those slow seasonal periods, Giecek continued to report to the Dumas and work an average of eight 8 hours each day. The claimant continued to perform maintenance and repair work on the building. While he spent time working on his own enterprises, it was necessary for him to perform services for ISWFACE, such as answering the telephone and addressing people who came to the Dumas. It was necessary for him to do so since no other ISWFACE representative was available at the site.

18. ISWFACE paid the claimant's bills, including back taxes, in excess of the \$10,000.00 earnest money, and the monthly mortgage required of the organization in the amount of \$17,954.39. The amount paid for these non-contractually required and non-ISWFACE related Dumas expenses in 1998 was \$4,964.86.

19. In October 1999, ISWFACE agreed to pay the monthly mortgage on Giecek's home at a rate of \$220.70 per month, even though the contract of May 1999 obligated ISWFACE to pay only the outstanding mortgage for the Dumas at the rate of \$503.09 per month. ISWFACE paid a total of \$2,096.69 towards the home mortgage during the period of the agreement.

20. ISWFACE estimated the value of estimated rental fees for Giecek's use of Dumas facilities for his photography business and to store personal property, such as furniture that he intended to repair as part of his antiques restoration business, at \$7,800.00. The parties never had any agreement that addressed storage or any rental fees connected with storage of Giecek's property at the Dumas.

21. ISWFACE paid Giecek \$2,000.00 in wages for work he performed at the Dumas during the course of his contract.

22. When Almodovar returned to California, she left office equipment owned by ISWFACE at the Dumas to conduct ISWFACE business. The equipment included a computer, printer, scanner, copy machine and fax machine. Giecek continued to use the equipment after Almodovar left.

IV. DISCUSSION/RATIONALE

Montana law requires that employers pay employees wages when due in accordance with the employment agreement. § 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. It is the claimant's position in this case that he was, in fact, an employee, and served as curator/manager of the Dumas Museum from May 1, 1998, to July 1, 2000.

A. Independent Contractor Issue

ISWFACE argues that Giecek was not an employee, as defined under § 39-3-201, MCA, where employee, employer, and wages are defined as:

(4) "Employee" includes any person who works for another for hire.

(5) "Employer" includes any individual, partnership, association, corporation, business trust, legal representative, or organized group of persons acting directly or indirectly in the interest of an employer in relation to an employee but does not include the United States.

(6) (a) "Wages" includes any money due an employee from the employer or employers, whether to be paid by the hour, day, week, semimonthly, monthly, or yearly, and includes bonus, piecework, and all tips and gratuities

ISWFACE maintains that, while Giecek may have some contractual claims, they were consideration for the purchase, rather than employee compensation. It also contends that Giecek's relationship was that of an independent contractor, rather than an employee, pursuant to § 39-71-120, MCA:

(1) An "independent contractor" is one who renders service in the course of an occupation and:

(a) has been and will continue to be free from control or direction over the performance of the services, both under the contract and in fact; and

(b) is engaged in an independently established trade, occupation, profession, or business.

(2) An individual performing services for remuneration is considered to be an employee under this chapter unless the requirements of subsection (1) are met.

Essential to this case is the question of whether there existed an employee/employer relationship or an independent contractor relationship between Giecek and ISWFACE from May 1, 1998 until July 1, 2000. In reviewing the record, it is apparent that ISWFACE was, in fact, Giecek's employer. The test to determine whether or not an employer/employee relationship exists within the meaning of the Montana Wage Protection Act is the so-called "control test." State ex rel. Ferguson v. District Court, 164 Mont. 84 88 519 P.2d 151, 153 (1974). Employer/employee and independent contractor are statutorily defined. §39-71-118 (1), MCA, states:

(1) The term "employee" or "worker" means:

(a) each person in this state, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written.

Section 39-71-120, MCA, states:

(1) An "independent contractor" is one who renders service in the course of an occupation and:

(a) has been and will continue to be free from control or direction over the performance of the services, both under the contract and in fact; and

(b) is engaged in an independently established trade, occupation, profession, or business.

(2) An individual performing services for remuneration is considered to be an employee under this chapter unless the requirements of subsection (1) are met.

In Foster v. Commissioner of Labor and Industry, 225 Mont. 246, 731 P.2d 1313 (1987), the Supreme Court chose the definition of "independent contractor" found in §39-71-120, MCA, as the proper definition in a wage claim matter. Further, the Department has adopted administrative rules to define the term "independent contractor" which are substantially identical to § 39-71-120, MCA, and ARM 24.35.301.

The record does not support a finding that from May 1, 1998, to July 1, 2000, Giecek performed services for ISWFACE as an independent contractor as that term is defined in § 39-71-120, MCA, and ARM 24.35.301. Nothing was expressed or implied in the work agreement that Giecek was to provide services as an independent contractor. Under the terms of the contract, Giecek was to receive the sum of \$500.00 per week in wages beginning May 1, 1998. The contract entered into on May 1, 1998, and renewed on May 1, 1999, is clear in its declaration that Giecek would perform services as a curator/manager of the Dumas for \$500.00 per week, effective May 1, 1998. Under the contract, he was to provide services as caretaker and curator of the Dumas. ISWFACE represented Giecek to the public as its assigned curator/manager of the Dumas by providing him business cards with that title. It also advertised events in the local news media representing Giecek as the curator/manager of the facility. Giecek performed at the instructions of the ISWFACE representative assigned to Butte, doing the hiring and supervision of tour guides and other such functions, as directed by ISWFACE. ISWFACE furnished office equipment and supplies for Giecek to perform those duties. Such terms and conditions are indicative of parties engaged in an employee/employer relationship.

B. Offsets Claimed by ISWFACE

ISWFACE further argues that if Giecek is found to be an employee, the benefits received by Giecek from ISWFACE during the period in question should be considered wages to offset his claim. ISWFACE also questions the amount of time Giecek alleges he was on duty.

The record does not reveal that Giecek ever agreed to accept benefits in lieu of wages for being allowed to operate a side business or store personal property at the Dumas. ISWFACE was aware of those matters and did not mention in the contract that benefits received would be exchanged

for wages. Although Bob Bristol testified that such benefits could be characterized as wages for IRS purposes, such a characterization is not consistent with Montana wage and hour law. State law requires wages to be paid in cash or checks convertible to cash. § 39-3-204, MCA.

ISWFACE contends that Giecek did not have to work during the off-season, October through May of each year, that Giecek did not work full time hours during those months, and that the hours he says he worked during those periods are exaggerated. Giecek's credible sworn testimony established that he reported to work and worked 8 hours each day at the Dumas during the period from May 1, 1998, to July 1, 2000. Under the work agreement, Giecek understood that he was to be at the place of business full time as a caretaker in the absence of any other ISWFACE representative.

ISWFACE contends that any claim that Giecek has should be offset by payments that ISWFACE made on Giecek's behalf. In 1998, ISWFACE paid \$4,964.86 of bills owed by the claimant. In 1999, ISWFACE paid \$2,096.69 toward Giecek's home mortgage. None of these payments were contractually required by the purchase agreement. Therefore, these cash payments advanced on behalf of Giecek should be considered wages and offset from the wage claim on this case. The total offset is \$7,061.55.

C. Agreement to Pay Only When Funds Available

ISWFACE argues that under the terms of the work agreement, payment of wages to Giecek in his capacity as curator/manager, was contingent on ISWFACE being able to afford to pay for his services. However, Montana law requires payment of wages when due in cash or checks convertible to cash, and makes all unpaid wages due and payable at the termination of employment. §§ 39-3-204 and 39-3-205, MCA.

Regardless of the conditional language of the agreement, such an agreement is against public policy. Courts (and likewise state agencies) can refuse to enforce contracts which are against public policy. Phoenix Physical Therapy v. Unemployment Insurance Division, 284 Mont. 95, 943 P.2d 523 (1997). Section 1-3-204, MCA, provides:

Waiver of benefit of a law. Anyone may waive the advantage of a law intended solely for his benefit. **But a law established for a public reason cannot be contravened by a private agreement.** [Emphasis added.]

The Montana legislature specifically incorporated this concept into the Wage Protection Act under § 39-3-208, MCA, which states, in pertinent part,

Any contract or agreement made between an employer and an employee the provisions of which violate, evade, or circumvent this part is unlawful and void . . .

Wage payment laws exist for the benefit and protection of the public. Thus, public policy, through the Wage Protection Act, demands that wages be paid to individuals if suffered and permitted to work. ISWFACE suffered and permitted Giecek to work. When services are requested or permitted, a presumption arises that the beneficiary promises to pay their reasonable value. Day v. West Coast Holdings, Inc., 699 P.2d 1067, 101 Nev. 260 (1985). Therefore, Giecek is entitled to wages for all work he was suffered and permitted to perform.

D. Amount of Wages Due

The record shows that the contract did not call for a specific number of hours to be worked, only that Giecek was to be paid at a rate of \$500.00 per week. Further, ISWFACE did not keep records of the hours he worked. Based on Giecek's undisputed testimony, he reported to work on a daily basis at the Dumas Museum and provided services under the employment contract. He is entitled to wages pursuant to the contract, at a sum of \$500.00 per week during the period from May 1, 1998 to July 1, 2000. Therefore, ISWFACE owes Giecek \$44,938.45 in wages (108 weeks times \$500.00/week minus \$2,000.00 wages received and \$7,061.55 in cash advanced on behalf of Giecek = \$44,938.45) pursuant to §§ 39-3-204 and 39-3-205.

E. Penalty

Further, pursuant to § 39-3-206, MCA, Giecek is entitled to statutory penalty of 55%. In accordance with ARM 24.16.7566, ISWFACE owes a penalty of 55% of the wages determined as due and owing. ISWFACE owes Giecek penalty in the amount of \$ 24,716.15 (55% times \$44,938.45= \$ 24,716.15).

F. Applicable procedures and appeal rights

Giecek's claim is based on §39-3-216, MCA. In 1999, the legislature amended §39-3-216, MCA, to provide that appeals of Department decisions would be to the district court rather than to the Board of Personnel Appeals. The amendment was applicable to claims "accruing on or after April 23, 1999."

Giecek's claim was for wages for work performed during the period May 1998 through July 1, 2000. Therefore, a portion of the claim accrued before April 23, 1999, and a portion accrued after. The law is not clear as to the appropriate avenue of appeal in such a case. It is improbable that the legislature intended that same case to be appealed to two forums.

In this case, the claim began to accrue in May 1998. Therefore, Giecek's appeal is to the Board of Labor Appeals.

V. 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. ISWFACE violated §§ 39-3-204, and 39-3-205, MCA, by failing to pay Rudolph J. Giecek wages when due. ISWFACE owes Giecek \$44,938.45 in wages.
3. ISWFACE is liable for 55% penalty for failure to pay wages when due. Under § 39-3-206, MCA, ISWFACE owes Rudolph J. Giecek a penalty of \$24,716.15.
4. This decision is appealable to the Board of Personnel Appeals.

VI. ORDER

ISWFACE is hereby ORDERED to tender a cashier's check or money order in the amount of \$69,654.60, representing \$44,938.45 in wages and \$24,716.15 in penalty, made payable to Rudolph J. Giecek, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision.

DATED this 25th day of April, 2002.
DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/Michael T. Furlong
Michael T. Furlong
Hearing Officer

NOTICE: You are entitled to review of this Order pursuant to §§ 39-3-216 and -217, MCA. Review may be obtained by filing a written notice of appeal postmarked no later than May 13, 2002 . This appeal time includes the 15 days provided for in § 39-3-216(3), MCA, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer. It must set forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

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.