

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1403-2003
OF JANICE L. WISEMAN,)	
)	
Claimant,)	
)	FINDINGS OF FACT;
vs.)	CONCLUSIONS OF LAW;
)	AND ORDER
FENTON'S CLEANING, INC.,)	
a Montana corporation,)	
Respondent.)	

I. INTRODUCTION

In this matter, Janice Wiseman appeals from a redetermination by the Wage and Hour Unit dismissing her claim for additional wages. Wiseman argues in this appeal that she is due payment from her former part-time employer, Fenton's Cleaning (Fenton's), for additional hours that she worked. Fenton's contends that it has paid Wiseman for all work she completed.

Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter in Livingston, Montana on October 3, 2003. Wiseman appeared and represented herself. Dan Yardley, Attorney at Law, represented Fenton's. The parties stipulated to the admission of Documents 1 through 110 (comprised of the exhibits presented to the Wage and Hour Unit). Janice Wiseman, Gary Wiseman, Tina Bergdoll, and Andrew Kitts testified under oath on behalf of Wiseman. Gary Fenton, Jim Fenton, and Vicky Shipley testified under oath on behalf of Fenton's. Based on the evidence, exhibits and arguments presented at the hearing, the hearing examiner makes the following findings of fact, conclusions of law, and final order.

II. ISSUE

Does Fenton's owe wages for work performed as alleged in Wiseman's complaint and owe penalty as provided by law?

III. FINDINGS OF FACT

1. Fenton's hired Wiseman part-time to clean the Community Health Partners' Building (CHP) in Livingston, Montana. Wiseman began working in this position on March 27, 2002 and worked on Mondays, Wednesdays, and Fridays.

2. Wiseman and Fenton's agreed that Fenton's would pay Wiseman \$300.00 every month to complete her work at CHP. She was paid semi-monthly on the 5th and 20th of each month. On April 25, 2002, Wiseman began working Monday, Tuesday, Wednesday, Thursday and Friday at CHP.

3. Wiseman and Fenton's subsequently agreed that Wiseman would take on additional responsibility cleaning the Park Clinic Building (Park). She would work at that site on Tuesdays and Thursdays. Fenton's increased Wiseman's monthly pay to \$420.00 every month in order to compensate her for her work at CHP and the additional cleaning duties at Park. Wiseman began her additional duties at Park on May 14, 2002.

4. Wiseman last worked for Fenton's on August 23, 2002. Between March 27, 2002 and August 25, 2002, she missed some days of work both at CHP and at Park. Wiseman missed work at CHP on eight occasions: May 31, July 1, July 2, August 5, August 6, August 12, August 13, and August 14, 2002. Wiseman was also absent on three occasions from her duties at Park: July 2, August 6, and August 13, 2002.

5. During her time of employment with Fenton's, Wiseman worked the following hours and was paid the following amounts:

Week (M-F)	Mon	Tues	Wed.	Thurs	Fri.	Regular Hrs	Reg. Rate	Wages Due	Wages Paid (DATE PAID)
3/25- 3/29/02	0	0	2.25	0	2	4.25	\$5.15	\$21.89	
4/1- 4/5/02	3	0	3	0	4.5	10.5	\$5.15	\$54.08	\$109.90 (4/5/02)
4/8- 4/12/02	3	0	3	0	4.5	10.5	\$5.15	\$54.08	
4/15- 4/19/02	3	0	3	0	4.5	10.5	\$5.15	\$54.08	\$109.37 (4/20/02)
4/22- 4/26/02	0	0	3	3	4.5	10.5	\$5.15	\$54.08	
4/29- 5/3/02	3	3	3	3	4.5	16.5	\$5.15	\$84.98	

5/6-5/10/02	3	3	3	3	4.5	16.5	\$5.15	\$84.98	\$162.43 (5/05/02)
5/13-5/17/02	3	5.5	3	5.5	4.5	21.5	\$5.15	\$110.73	
5/20-5/24/02	3	5.5	3	5.5	4.5	21.5	\$5.15	\$110.73	\$214.40 (5/20/02)
5/27/02-5/31/02	0	5.5	3	5.5	0	14	\$5.15	\$72.10	
6/3-6/7/02	3	5.5	3	5.5	4.5	21.5	\$5.15	\$110.73	\$214.40 (6/05/02)
6/10-6/14/02	3	5.5	3	5.5	4.5	21.5	\$5.15	\$110.73	
6/17-6/21/02	3	5.5	3	5.5	4.5	21.5	\$5.15	\$110.73	\$216.57 (6/20/02)
6/24-6/28/02	3	5.5	3	5.5	4.5	21.5	\$5.15	\$110.73	
7/1-7/5/02	0	0	3	0	0	3	\$5.15	\$15.45	\$227.40 (7/05/02)
7/8-7/12/02	3	5.5	3	5.5	4.5	21.5	\$5.15	\$110.73	
7/15-7/19/02	3	5.5	3	5.5	4.5	21.5	\$5.15	\$110.73	\$227.39 (7/20/02)
7/22-7/26/02	3	5.5	3	5.5	4.5	21.5	\$5.15	\$110.73	
7/29-8/2/02	3	5.5	3	5.5	4.5	21.5	\$5.15	\$110.73	\$216.57 (8/05/02)
8/5-8/9/02	0	0	3	5.5	4.5	13	\$5.15	\$66.95	

8/12-8/16/02	0	0	0	5.5	4.5	10	\$5.15	\$51.50	\$124.04 (8/20/02)
8/19-8/23/02	3	5.5	3	5.5	4.5	21.5	\$5.15	\$110.73	\$95.00 (9/05/02)
TOTALS						355.75		\$1832.11	\$1917.47

6. Wiseman worked a total of 355.75 hours during her employment with Fenton's. Wiseman did not work more than 21.5 hours during any single work week.

IV. DISCUSSION

Montana law requires that employers pay wages when due, in accordance with the employment agreement, pursuant to Mont. Code Ann. § 39-3-204. 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 the employer. Mont. Code Ann. § 39-3-201(6).

An employee who brings suit for unpaid wages has the initial burden of proving that she performed work for which she was not properly compensated. *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. 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*, 359 Mich. 571, 103 N.W. 2d 494, 497 (1960).

At the hearing, Wiseman conceded that she and Fenton's agreed that she would be paid a flat rate each month for her work. Prior to beginning her duties at Park, that amount was \$300.00 per month. After she began her additional duties at Park, that amount increased to \$420.00 per month. Wiseman does not contend in her appeal that Fenton's failed to pay her the agreed upon flat monthly rate. Rather, she focuses on her contention that she was not paid for several hours of work that she claims she completed. As this is Wiseman's only argument, and because the parties were free to set the amount of wages to be paid to Wiseman (provided that the agreed upon wages did not fall below the minimum hourly wage of \$5.15), there is only one issue to be determined in this case: whether the flat monthly amount paid to Wiseman resulted in compensation to her that fell below the minimum hourly wage level. If the flat monthly rate paid to Wiseman resulted in her being paid at or above the minimum hourly wage, then Wiseman will have failed to show that Fenton's violated the Wage and Hour provisions.

The number of hours noted in the table above is reflective of Wiseman's hours as demonstrated by the testimony of Andrew Kitt, Wiseman's testimony at the hearing, the testimony of Jim and Gary Fenton, and the employer's sparse records. Multiplying these hours by

the minimum wage fails to reveal any violation of the minimum wage act. Fenton's compensated Wiseman at an hourly rate which exceeded the statutorily required minimum hourly wage.

Wiseman's contention that she worked 430.75 hours (posited in her June 24, 2003 letter to the Wage and Hour Unit, Documents 000005 through 000007) is not credible. She presented no evidence to substantiate these hours. Wiseman herself contradicted the number of hours claimed in the June 24, 2002 letter in her earlier letters to the Wage and Hour Unit (see, e.g., Wiseman's March 4, 2003 letter, Documents 000073 through 000075). In addition, Wiseman never once complained about the pay she received or the number of hours she was working during her entire tenure with Fenton's. Under these circumstances, the hearing examiner cannot find Wiseman's contention that she worked 430.75 hours to be credible.

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 Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Wiseman has failed to demonstrate by a preponderance of the evidence that she is due additional wages or that she was not paid at the minimum hourly wage.

VI. ORDER

Wiseman's claim is hereby dismissed.

DATED this 13th day of November, 2003.

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.