

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

IN THE MATTER OF THE WAGE CLAIM) Case No. 1573-2003
OF FRANKLIN FRITH, II,)
Claimant,)
) FINAL AGENCY DECISION
vs.) AND NOTICE OF RIGHT TO
) SEEK JUDICIAL REVIEW
WILDLAND FIREFIGHTERS COMPANY)
LLC, d/b/a OBADIAH'S WILD FIRE)
FIGHTERS,)
Respondent.)

I. Introduction

The Hearing Officer convened a telephone hearing⁽¹⁾ on the claimant's wage claim on January 30, 2004. The claimant, Franklin Delano Frith II, participated and represented himself. The respondent, Wildland Firefighters Company LLC, d/b/a Obadiah's Wild Fire Fighters ("Obadiah's"), participated through Annette Chain, designated representative, and was represented by counsel, William A. Douglas, Douglas Law Firm, P.C. Franklin Delano Frith II, James Massey, Larry Chain and Annette Chain testified. The hearing officer admitted Exhibits AE through AH, 1000 and 1001 (for signatures only) and the documents bearing the Bates stamp numbers 00012-15 (to show Frith's requested relief), 00033-36, 00056, 00095-96, 00121-23, 00128-29, 0013, 00140-41, and 00143-48. The hearing officer refused documents bearing the Bates stamp numbers 00065 and 00105-07. On March 8, 2004, Obadiah's filed its proposed decision; no replies were filed thereafter, and therefore this matter has been submitted for decision.

II. Issue

The issue in this case is whether Obadiah's owes wages to Frith for work performed, as provided by law and alleged by his complaint, and if so, whether Obadiah's is additionally liable to Frith for either a statutory penalty or liquidated damages.

III. Findings of Fact

1. Obadiah's employed Frith during the summer of 2002. As well as working for Obadiah's as an employee, Frith entered into a separate agreement to provide certain business services to Obadiah's, for which he did receive payments. The parties attempted to reach a written contract regarding both the employment and the business services. They did not agree upon all of the

applicable terms to the written contract. As a result, the binding employment agreement was the oral agreement for \$1,000.00 per week for Frith. The multiple signings of the modified agreement were done in haste, under the pressure of time because of fire fighting needs to be met, and the signatures did not manifest a mutual assent to the terms of the agreement, some of which were still in dispute.

2. During his employment with Obadiah's, Frith and the owners of Obadiah's, Larry and Annette Chain, were increasingly in conflict about what Frith was to do, and where, and when.

3. Frith worked for Obadiah's from June 5, 2002, through July 9, 2002. On July 3, 2002, Frith and some other employees, with a substantial amount of Obadiah's equipment, obtained the permission of Obadiah's to leave the Durango Fire, in Colorado, where Larry Chain was working for Obadiah's, and began work at the Reese Fire, in Wyoming. Frith agreed to return to the Durango Fire upon completion of the work in Wyoming. On July 9, 2002, having completed the work at the Reese Fire, Frith elected to disregard the directions of the employer and travel with the equipment and other employees to a location of their selection rather than the location upon which the employer had agreed. As of July 9, 2002, Frith abandoned his employment with Obadiah's. On July 10, 2002, he left the equipment in Dillon, Montana.

4. Frith demanded pay for his work. Obadiah's refused to pay him, asserting that he had made excessive wage demands and had held Obadiah's equipment in an effort to force Obadiah's to meet those demands. Obadiah's also claimed that Frith had cost the company more than three times the wages he claimed, in lost daily income from the work of Larry Chain, who had to delay work at another fire (for which Obadiah's billed \$3,400.00 a day) for five days to travel from the Durango Fire to Montana to recover the equipment. But for the trip to Montana, Larry Chain could have immediately begun work at the other fire in Steamboat Springs, Colorado.

5. As a result of the dispute over his pay, Frith filed a federal wage claim in August 2002, which only related to the time he had worked on the Reese Fire. Relying upon his understanding of what Glen Peter, another claimant against Obadiah's, told him a Department of Labor and Industry employee had told Peter, what the investigator responsible for the federal claim told him and what a Department of Labor and Industry employee told him, Frith did not file a state law claim for his wages from Obadiah's with the Montana Department of Labor and Industry until March 3, 2003, after his federal claim was finally determined. In resolution of the federal claim, Frith received payment (on or about February 20, 2003) from Obadiah's of \$860.96 in wages for his work on the Reese Fire. He has received no other payment from Obadiah's for his due and unpaid wages.

6. Frith acted in good faith in pursuing his federal claim before filing his state claim. He was negotiating with Obadiah's to settle his wage claim, and he believed the entire claim would be resolved through the federal complaint.

7. Frith earned \$5,000.00 in wages working for Obadiah's. The wages still due and unpaid for those five weeks are for the amount of \$4,139.04. 55% of that amount is \$2,276.47.

IV. Opinion

Employment Status

Montana law requires employers to compensate employees for all hours worked. Mont. Code Ann. § 39-2-204(1). The law applies when there is an employer-employee relationship. In this case, Frith came to Montana for the express purpose of working for Obadiah's, both at its business premises in Libby, Montana, and around the country at fire sites. The parties disagreed about the scope and effectiveness of the written contract, but there was no substantial dispute that they agreed Frith would receive a salary of \$1,000.00 per week for work as an employee. The parties never effectively modified that agreement.

Statute of Limitations

Pursuant to Mont. Code Ann. (1999) § 39-3-207, a claim for wages due and unpaid must be filed within 180 days of default of delay in the payment of wages. Montana does apply the doctrine of equitable tolling to the question of the timeliness of wage claims. *Intermount. Deac. Home for Children v. Dept. of Labor and Ind.* (1981), 191 Mont. 309, 623 P.2d 1384.

The doctrine of equitable tolling arrests the running of statutes of limitation while the claimant reasonably and in good faith pursues one of several possible legal remedies. The claimant must meet three criteria: (1) timely notice to the defendant within the applicable statute of limitation in filing the first claim; (2) lack of prejudice to the defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by the claimant in filing the second claim. *Sorenson v. Massey-Ferguson, Inc.* (1996), 279 Mont. 527, 927 P.2d 1030, 1032; **citing** *Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200, 208, **subsequent appeal at** *Chance v. Harrison*, 272 Mont. 52, 899 P.2d 537(1995).

This case satisfies the three elements of the equitable tolling doctrine. Obadiah's had notice of Frith's claims, and had notice of the federal complaint. There is no evidence that Obadiah's has been prejudiced in gathering evidence by the delay in filing the state wage claim. Frith filed the claim promptly after the final resolution of the federal claim, and he did pursue his federal claim first in good faith. Frith is entitled to recover his due and unpaid wages.

Offset for Claimed Damages

Obadiah's cannot offset any amount it lost as a result of Frith's conduct after he abandoned his employment. Mont. Code Ann. § 39-3-204(1) provides:

[E]very employer of labor in the state of Montana shall pay to each employee the wages earned by the employee in lawful money of the United States or checks on banks convertible into cash on demand at the full face value of the checks, and a person for whom labor has been performed may not withhold from any employee any wages earned or unpaid for a longer period than 10 business days after the wages are due and payable. However, reasonable deductions may be made for board, room, and other incidentals supplied by the employer, whenever the deductions are a part of the conditions of employment, or other deductions provided for by law.

This statute prohibits withholding Frith's wages to apply them toward damages caused by his negligence. 36 Mont. A.G. Op. 17 (1975); *see also Christiansen v. Taylor Brothers, Inc.* (1987), 225 Mont. 318, 732 P.2d 841. ⁽²⁾

Since Frith did not agree in writing to any withholding based on alleged theft of the equipment and there is no evidence of filing of charges within fifteen days of any report of the alleged theft, Obadiah's also cannot withhold his wages due on that basis. *See*, Mont. Code Ann. § 39-3-205(3).

Penalty

Mont. Code Ann. § 39-3-206(1) provides for employee recovery of wages due plus a penalty in an amount not to exceed 110% of the wages due and unpaid. The rules of the department provide for a 55% penalty, except under circumstances which are not applicable in this case. Admin. R. Mont. 24.16.7566(1)(a).

V. Conclusions of Law

1. The State and the Commissioner of the Montana Department of Labor and Industry have jurisdiction over this complaint. Mont. Code Ann. § 39-3-201 *et seq.*; *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Wildland Firefighters Company LLC, d/b/a Obadiah's Wild Fire Fighters, owes its former employee, Franklin Delano Frith II, \$4,139.04 in due and unpaid wages for work during the week of July 3-9, 2002. Mont. Code Ann. § 39-3-204(1). Obadiah's owes Frith a penalty of 55% of the unpaid wages, in the amount of \$2,276.47. Mont. Code Ann. § 39-3-206(1); Admin. R. Mont. 24.16.7556(3).

VI. Order

Wildland Firefighters Company LLC, d/b/a Obadiah's Wild Fire Fighters, is ORDERED to tender a cashier's check or money order for \$6,415.51 (\$4,139.04 in wages and \$2,276.47 in penalty), payable to FRANKLIN DELANO FRITH II, mailed to the department's Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision.

DATED this 27th day of May, 2004.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR

Terry Spear
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.

If no appeal is filed and the payment ordered is not made, the Montana Commissioner of Labor and Industry will apply to the District Court for a judgment enforcing this Order. Mont. Code Ann. § 39-3-212. Such an application is not a request for review of the validity of this Order.

1. The hearing officer's January 13, 2004, order permitting telephonic hearing over the objection of the respondent is part of the record, and will not be recapitulated within this final agency decision.
2. An agreement which violates Mont. Code Ann. § 39-3-204(1) is void as a matter of law. Mont. Code Ann. § 39-3-208.