

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 274-2002
OF JERRY C. KITCHIN,)	
Claimant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
NCI TECH COMPANY, LLC, d/b/a EXXON)	
GLACIER GATEWAY,)	
Respondent.)	

I. INTRODUCTION

NCI Tech Company, LLC, (NCI) appeals a determination of the Wage and Hour Unit that found it owed claimant Jerry Kitchin (Kitchin) \$11,080.68 in unpaid wages and additional penalty. Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on July 13, 2004. Steven Hudspeth, attorney at law, represented Kitchin. Gregory Smith, attorney at law, represented NCI. Kitchin testified on her own behalf. Joe Murphy testified on behalf of NCI. Claimant's documents 28, 29, 82 through 126, 144, 145, 146 and Respondent's exhibits A, B, and C were admitted by stipulation of the parties. The parties were permitted to submit post hearing memoranda and this office received the last memorandum on August 13, 2004.

During the pendency of this proceeding, Kitchin engaged in repeated and unwarranted refusals to respond to discovery requests related to her prosecution for theft from NCI's Glacier Gateway Exxon Store (Glacier Gateway) at the time she was managing the store. As a sanction for the discovery violation, the hearing examiner imposed a discovery sanction that precluded claimant from contesting that she had committed that crime. Based upon the evidence adduced at hearing and the arguments contained in the parties post-hearing briefs, the following findings of fact, conclusions of law, and final order are made.

II. ISSUE

Does NCI owe wages to Jerry Kitchin as alleged in her complaint and penalty as provided by law?

III. FINDINGS OF FACT

1. Kitchin began working as a cashier at NCI's store, Glacier Gateway, in 1998. In February, 1999, NCI promoted Kitchin to store manager at Glacier Gateway.

2. Glacier Gateway is both a convenience store and a casino. As store manager, Kitchin took over complete management of all facets of the facility, including ultimate responsibility for handling the cash for the casino. She had responsibility for hiring and discharging staff, preparing weekly work schedules, maintaining the Glacier Gateway store checkbook, preparing weekly sales reports, keeping store expenses within budget, paying bills to vendors on a monthly basis, ordering and monitoring store inventory, ensuring cleanliness of the store, and reducing bad check and overdraft expenses (expenses incurred as a result of customers paying with insufficient funds checks). NCI also required Kitchin to implement a monthly inventory loss reduction program.

3. NCI agreed to compensate Kitchin in accordance with a "Management Employment Agreement" prepared by NCI and signed by Kitchin. The agreement provided that Kitchin would work 40 to 50 hours each week, be eligible for two weeks "vacation/sick leave," and be paid "\$1,800.00 per month for work performed, every 2 weeks." Exhibit 000145 and 000146. Kitchin would also receive an incentive bonus tied to Kitchin's performance related to keeping bad checks to under \$500.00 per quarter, insuring the store incurred no overdrafts or penalties, putting into place an inventory shrinkage control program, and ensuring the cleanliness of the store. Meeting each of these expectations would result in Kitchin receiving the following amount each month: (1) bad checks under \$500.00 per quarter, \$50.00 per month, (2) no overdrafts or penalties, \$100.00 per month, (3) inventory shrinkage reduction program that resulted in inventory shrinkage of less than 1½ %, \$100.00 per month, for shrinkage reduction program that resulted in shrinkage of less than 1%, \$200.00 per month, (4) cleanliness of store, depending on condition being either fair or good, \$50.00 or \$100.00 respectively per month. Exhibit 000145 and 000146.

4. Kitchin's compensation agreement also included a year end bonus. The original agreement provided that Kitchin would receive a year end bonus comprised of "10% of the store's profits (except gaming machines)." Exhibit 000029. At the request of the Montana Department of Revenue, NCI and Kitchin modified the agreement to read that Kitchin would receive a year end bonus of "10% of the store's gross profits (except gaming machines)." Exhibit 000145 and 000146.

5. The management employment agreement also called for Kitchin to be compensated for her use of her personal vehicle for company travel at a rate of \$.30 per mile. In order to be compensated, however, the agreement required Kitchin to retain "supporting records and original receipts on all travel, phone, and out of pocket expenses."

6. During her tenure as store manager, Kitchin was able to reduce bounced checks to below \$500.00 per quarter. She did not implement an effective program to reduce inventory shrinkage. Loss of inventory continued to be a problem for Glacier Gateway throughout Kitchin's tenure as manager.

7. Kitchin maintained the Glacier Gateway checkbook out of which expenses, including payments to vendors, were made. In order to determine Kitchin's eligibility for quarterly incentive bonuses with respect to overdrafts/penalties, NCI needed to have access to the checkbook. Kitchin failed to turn over the checkbook as required in order to permit the calculation of the incentive bonuses due to her.

8. Kitchin worked in her management position until resigning on August 18, 2000. During the time she was employed as manager, Kitchin received one incentive bonus check of \$1,200.00, covering the months of her management through July, 1999. She also received her monthly salary. She did not receive any other compensation in the form of a bonus. In addition, she received no mileage reimbursement expenses.

9. Kitchin's final paycheck, issued August 23, 2000, paid her a gross amount of \$791.21 for the two week pay period ending August 20, 2000. Kitchin worked 40 to 50 hours each of these last two weeks, fulfilling her hourly work requirement for those last two weeks.

10. During Kitchin's tenure as store manager, Glacier Gateway had no "gross profits."

11. Kitchin kept no records of any of her mileage expenses as required by her agreement with NCI.

12. Kitchin did not take any vacation during 2000, nor did she receive any compensation for her vacation at the time of her resignation.

13. After Kitchin resigned, NCI learned of several discrepancies in the casino accounts. Later investigation by law enforcement disclosed that Kitchin stole \$87,000.00 from the gaming machines located in the casino. The State of Montana subsequently indicted Kitchin for the theft. On August 6, 2003, Kitchin entered a "no contest" plea to the indictment. The Montana Eighth Judicial Court of Cascade County conducted a sentencing hearing during which time the court found that Kitchin "developed and implemented a plan to not only steal money from the casino, but to also receive additional bonuses by manipulating the gaming machines." Exhibit B, page 2. The court ordered Kitchin to pay restitution to NCI in excess of \$87,000.00.

14. In August, 2001, Kitchin filed a wage claim against NCI, alleging that she was owed \$13,945.48, comprised of \$10,025.73 in year end bonus, \$131.87 in unpaid salary, \$923.08 in unpaid vacation time, \$364.80 for mileage reimbursement, and \$2,500.00 as incentive bonus.

IV. OPINION⁽¹⁾

Montana law requires that employers pay wages when due, in conformity with the employment agreement. 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" include any money due from an employer to an employee, including bonuses. Mont. Code Ann. § 39-3-201(6).

Kitchin bears the burden of proof in this matter to show by a preponderance of the evidence that she was entitled to the bonus under the terms of her employment agreement. *Berry v. KRTV Communications* (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112. *See also, Marias Health Care Services v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that lower court properly concluded that the plaintiff's wage claim failed because the plaintiff failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

NCI contends that principles of common law preclude Kitchin's recovery of any amount in this matter because she stole over \$87,000.00 from NCI. This tribunal, however, has power to consider only those claims arising under Title 39, chapter 2. In light of the facts adduced at hearing, there is no authority in this proceeding to order any offset against Kitchin's claim. Mont. Code Ann. § 39-3-205(3). Under this statute, it is only if the claimant has agreed to offset or a district court exercising appropriate jurisdiction has ordered offset that an offset can be taken against wages owed. Here, none of the requisites of Mont. Code Ann. § 39-3-205(3) have been met. Accordingly, Kitchin's theft from her employer does not preclude her recovery in this matter.

Year End Bonus

Kitchin's recovery with respect to her "year end bonus" turns on the definition of "gross profits" as used in her employment agreement. Kitchin admitted at hearing that she did not discuss with her employers any special meaning of the term "gross profits." Nor did her interactions with her employer give her any reason to believe that the term "gross profits" meant that her year end bonus would be based on anything but gross profit. Kitchin nonetheless contends that the term "gross profits" is ambiguous. She then argues that this provision of the contract entitles her to 10% of all sales from the store without consideration for the cost of the goods sold (i.e., 10% of the gross receipts of the store).

As NCI correctly points out, discernment of the parties' intention in a contract is gleaned "first and foremost from the writing alone, and resort to extrinsic evidence in aid of discovering the parties' intent should be utilized only when the contract is ambiguous on its face." *Bank of Montana v. Potts*, 2002 MT 178, ¶21, 311 Mont. 12, 17, 52 P.3d 920, 923. Determining whether a contract is ambiguous in its terms is a question of law. *Id.* A contract is ambiguous only where the contract taken as a whole in its wording is reasonably subject to two different interpretations. *Wray v. State Compensation Insurance Fund* (1993), 226 Mont. 219, 223, 879 P.2d 725, 727.

The contract at issue in this case does not suffer from any ambiguity with respect to the term "gross profits." While the term "gross profits" is not defined in the contract, the legal definition of "gross profits" is "the difference between sales and cost of goods sold before allowance for operating expenses and income taxes." Black's Law Dictionary, 6th Edition. *See also, Veterans Rehabilitation Center v. Birrer* (1976), 170 Mont. 182, 185, 551 P.2d 1001, 1003 (the phrase gross profits refers generally to the excess of selling price over cost price without deducting the expenses of resale and other costs of doing business; the gross amount of sales made, after deducting only the cost, import duties, and carriage). Gross receipts, on the other hand, is defined as "the total amount of money or the value of other considerations received from selling property

or from performing services." Black's Law Dictionary, 6th Edition. The Montana Supreme Court has long recognized: "[I]t is a matter of common knowledge that there is a vast difference between profit and gross receipts." *State ex rel. Schultz-Lindsey v. Board of Equalization* (1965), 145 Mont. 380, 401, 403 P.2d 635, 646.

Kitchin contends that the term "profits" in the contract really meant "receipts." There is nothing in the language of the contract that would suggest such an understanding between the parties. Moreover, even if resort to extrinsic evidence were proper, the evidence in this matter is devoid of any suggestion that anyone at NCI created such an impression in Kitchin. In the absence of such evidence, there is nothing in the record to show that the term "gross profits" with respect to this contract means anything other than the difference between sales and cost of goods sold before allowance for operating expenses and income taxes.

Kitchin has presented no evidence to show that Glacier Gateway had any gross profits which would entitle her to a year end bonus. To the contrary, the evidence suggests that Glacier Gateway did not have any gross profits during the quarters in question. Accordingly, Kitchin has failed to meet her burden of proof to show that she was not paid in accordance with her contract with respect to the year end bonus.

Unpaid Salary Claim

Kitchin contends that NCI failed to pay her the total amount of wages due to her for her final two weeks of work which ended on August 20, 2000. Kitchin's uncontested evidence shows that during that two week pay period, she worked all of the hours she was required to work under her employment contract (40 to 50 hours each week). Under the terms of her employment agreement, NCI paid Kitchin \$1,800.00 salary per month, payable every two weeks. This equates to a bi-weekly payment of salary amounting to \$830.77 ($\$1,800.00 \times 12 \text{ months} \div 26 \text{ bi-weekly pay periods} = \830.77). The evidence shows that NCI did not pay her the full amount of her salary during her final two weeks, shorting her \$39.56 ($\$830.77 - \$791.21 = \39.56). NCI thus owes Kitchin an additional \$39.56 in unpaid salary. Because the employer failed to pay the wage when due, and because this wage does not involve an overtime or minimum wage claim, a 55% penalty on this amount, totaling \$21.76 ($\$39.56 \times .55 = \21.76) is also due. Mont. Code Ann. § 39-3-206 and Admin. R. Mont. 24.16.7566.

Kitchin's contention that she regularly received "gross pay" every two weeks in the amount of \$923.08 cannot be correct based on the language of the employment agreement. The evidence does not show any custom of payment that does not comport with the parties' employment agreement. Interpreting the contract most favorably for Kitchin, her bi-weekly amount could not have amounted to \$923.08.

Vacation Pay

NCI's sole contention with respect to the vacation pay to which Kitchin claims entitlement is that Kitchin had responsibility for scheduling workers and her failure to do so in an efficient manner is the cause of her inability to take vacation. NCI does not contend that it reimbursed

Kitchin for unused vacation when she resigned her position or that Kitchin took her vacation time during 2000. Neither does NCI suggest that Kitchin's contract did not entitle her to vacation time she claims to be owed or that Kitchin used the time as sick leave.

Wages include accrued vacation pay. Mont. Code Ann. § 39-3-201(6); 23 Op. Att Gen. 56 (1949). The employment agreement in this matter provided that the claimant was "eligible for 2 weeks vacation/sick leave," without regard to when that leave was considered accrued or had to be used. As there is no contractual prerequisite to accrual, and there is no evidence to contradict Kitchin's testimony that she did not use her vacation time, Kitchin is due unpaid wages for two weeks of unused vacation time. As discussed above, two weeks pay for Kitchin under her employment agreement equates to \$830.77 ($\$1,800.00 \times 12 \text{ months} \div 26 \text{ bi-weekly pay periods} = \830.77). Because the employer failed to pay the wage when due, and because this wage does not involve an overtime or minimum wage claim, a 55% penalty on this amount, totaling \$456.92 ($\$830.77 \times .55 = \456.92) is also due. Mont. Code Ann. § 39-3-206 and Admin. R. Mont. 24.16.7566.

Travel Reimbursement

Kitchin also claims to be owed a minimum of \$364.80 for travel reimbursement. This tribunal, however, lacks jurisdiction over claims for expense reimbursement as these expenses are not recoverable under the wage and hour statutes. *Johnson v. K & T Manufacturing, Inc.* (1981), 191 Mont. 458, 652 P.2d 66. Accordingly, the department cannot award Kitchin any travel reimbursement in this proceeding.

Quarterly Incentive Bonus

Under the terms of her employment contract, Kitchin would receive a monthly incentive bonus, payable quarterly, if certain facets of controlling losses and store cleanliness were maintained. Kitchin received an incentive bonus for two quarters, but received no incentive bonuses for the months of August, 1999 through the end of her employment. During that time, four quarters elapsed, namely, August, 1999 through October, 1999, November, 1999 through January, 2000, February, 2000 through April, 2000, and May, 2000 through July, 2000. In addition, a portion of a fifth quarter, August 1, 2000 through August 18, 2000, also went by.

Kitchin determined her claimed entitlement to the incentive bonus due to her with respect to the bounced checks by reviewing weekly reports prepared for NCI by the Autocheck of Montana (the entity retained by NCI to keep track of bounced checks). Based on these reports, Kitchin concluded that during the quarters for which she received no incentive bonus, she in fact kept bounced checks under \$500.00 per quarter. Joe Murphy had no documentation to dispute Kitchin's testimony and in fact testified that he did not know whether or not Kitchin had kept the bad checks to under \$500.00 per quarter as required by the agreement. Under these circumstances, Kitchin has shown that she was due an incentive bonus with respect to reduction of bounced checks for the quarters in question. At \$50.00 per month, this amounts to \$560.00 for the months of August, 1999 through July, 2000 and to \$29.03 for the 18 days of August, 2000, a total of \$589.03 for the portion of the incentive attributable to reducing bounced checks.

In addition, during these quarters, the preponderance of the evidence shows that the cleanliness of the store was at least fair. Under the terms of her employment agreement, she was entitled to \$50.00 per month for each month where the store's cleanliness was at least fair. This amounts to a total of \$560.00 for the months of August, 1999 through July, 2000 and to \$29.03 for the 18 days of August, 2000, a total of \$589.03.

Kitchin produced no credible evidence to show that the store did not incur overdrafts or penalties during the quarters in question. Kitchin had access to this information as she maintained the Glacier Gateway checkbook, not NCI. Kitchin should have known whether any overdrafts or penalties occurred, yet at hearing she conceded that she did not know whether any such overdrafts or penalties had occurred. In addition, the evidence does not show that Kitchin implemented a shrinkage program to meet any of the shrinkage goals. Accordingly, these two portions of Kitchin's claim for the incentive bonus fail.

Because the evidence shows that NCI failed to pay Kitchin the store cleanliness incentive and the bounced check incentive when due, penalty is due under Mont. Code Ann. § 39-3-206 and Admin. R. Mont. 24.16.7566. That penalty amounts to \$647.93 ($\$589.03 + \$589.03 = 1,178.06 \times .55 = 647.93$).

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the 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. Kitchin has failed to prove by a preponderance of the evidence that NCI owes her any year end bonus.

3. This tribunal has no jurisdiction over Kitchin's mileage reimbursement claim.

4. Kitchin has failed to prove by a preponderance of the evidence that NCI owes her any incentive bonus with respect to overdrafts/penalties or shrinkage program.

5. Kitchin has shown by a preponderance of the evidence that NCI owes her vacation pay in the amount of \$830.77 and penalty in the amount of \$456.92.

6. Kitchin has shown by a preponderance of the evidence that NCI owes her unpaid salary in the amount \$39.56 and penalty in the amount of \$21.76.

7. Kitchin has shown by a preponderance of the evidence that NCI owes her incentive bonus with respect to keeping bounced checks under \$500.00 per month and for store cleanliness in the amount of \$1,178.06 and penalty in the amount of \$647.93.

VI. ORDER

NCI Tech d/b/a Glacier Gateway is hereby ORDERED to tender a cashier's check or money order in the amount of \$3,175.00, representing \$2,048.39 in wages and \$1,126.61 in penalty, payable to Jerry Kitchin, 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 15th day of September, 2004.

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.

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 Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.

1. Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. Coffman v. Niece (1940), 110 Mont. 541, 105 P.2d 661.