

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1860-2005
OF MINNIE BORSUM,)	
)	
Claimant,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND ORDER
)	
BILLINGS ATHLETIC CLUB,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Respondent Billings Athletic Club appealed a determination of the Wage and Hour Unit which found that it owed claimant Minnie Borsum additional regular wages of \$695.11 plus applicable penalties for work completed in 2005.

Hearing Officer Terry Spear convened a telephonic contested case hearing in this matter on August 17, 2005. Borsum appeared and represented herself. Ron Muri, registered agent, appeared as an advocate for Billings Athletic Club. Wage and Hour Unit Documents 8-10, 17, 21-24, 66-68 and 77-78 were admitted into evidence without objection. Wage and hour Unit Document 35 was refused as hearsay. Additional Documents 96-97 were refused as hearsay (with the additional objection of failure timely to disclose being moot as a result).

Borsum, Kori Leppart (Butts), Angela (Angie) Seifred, Brooke Neibauer and Terry Doerfler testified. Kent Fellingham was unavailable. Lisa Johnson refused to testify. The hearing officer refused the testimony of Joel Christianson as irrelevant.

The parties gave closing arguments and submitted the case for decision. Based on the evidence adduced at the hearing and the arguments presented in closings, the hearing officer makes the following findings of fact, conclusions of law and final order in this matter.

II. ISSUE

Are additional wages due Borsum for her work for BAC in 2005, and is a penalty due as required by law?

III. FINDINGS OF FACT

1. The Billings Athletic Club (BAC) is an organization providing various facilities and services related to fitness and sports activities in Billings, Montana. It is not regularly engaged in interstate commerce.

2. Minnie Borsum worked as a personal trainer for clients of BAC. Beginning in late 2004, she became a member of the “sales team” for BAC, and went through training for that position, with a salary of \$12,000.00 per year and various commissions and personal trainer packages to augment her salary. Her work for the sales team began in January 2005.

3. BAC presented Borsum with a “contract” regarding payment of her salary, and she signed the document. The document consisted of 2 pages (Wage and Hour Unit Documents 66 and 67–Borsum signed the first page). Both pages consisted of captions and phrases, with no complete sentences or paragraphs. The first page included a section captioned “compensation,” which stated, in its entirety:

\$12,000/year salary
14 pay periods/year=\$857.14

No salary paid in the month of February
Additional \$285.71 paid in May, August, and December
** see attached pay schedule **

4. The entire second page had the caption “2005 Pay Schedule,” followed by a series of pay day dates, beginning with January 14 and followed by successive dates each 2 weeks later (January 28, February 11, etc.), ending with December 30. The pay day dates within each calendar month were single spaced, and double spacing separated the calendar month pay day dates. After each date, the payment for that pay day was listed. For most pay day dates, the payment identified was either “salary: \$857.14” or “commission from [previous calendar month].” For all months except February, May, August and December, the first pay day date for each calendar month had the “salary: \$857.14” entry. For all months except February, the second pay day date in each month had the “commission from [previous calendar month]” entry. For February, the first pay day date had the entry “no salary; ½ of commission from January,” and the second pay day date had the entry “other ½ of commission

from January.” For May, August and December, the first pay day date had the entry “salary: \$857.14 + \$285.71 = \$1142.85.” July and December had 3 pay day dates, and the third pay day date in each month had the “salary: \$857.14” entry.

5. BAC employees explained to Borsum that the variable pay system was based upon experience with employees. According to the explanation, January commissions were usually large, and summer commissions were usually small. Spreading the February salary over May, August and December (the holiday season) made the employees’ compensation more even, and avoided loss of employees in summer, when they made less money on commissions after very profitable months at the beginning of the year.

6. Neither BAC’s “contract” nor its explanations made it clear to Borsum that BAC expected her to work in February for no salary earned, and to earn higher salaries in 3 later months. She signed the “contract” because she was given no choice if she wished to continue her employment, without a clear understanding of the terms and conditions that BAC thought the contract contained. Borsum did not agree, by her signature, to work in February for no salary earned, and did not understand that her signature manifested such an agreement on her part.

7. Borsum found that the hours she worked far exceeded what she had expected when she joined the “sales team.” She concluded that her salary and her commissions were not sufficient to compensate her for the time she spent working, although she was at all times receiving more than minimum wage. She quit on February 19, 2005. Her last day of work was February 22, 2005.

8. When Borsum left her employment, she owed charge backs to BAC (as a result of services which other employees had to provide for her clients, for which she had already been paid, see Wage and Hour Unit Document 68) in the sum of \$809.30. She paid back \$410.30 by personal checks, leaving a balance of \$399.00 owing. In February, Borsum earned commissions of \$399.00, which BAC retained (with Borsum’s agreement) for the balance of her charge backs.

9. BAC and Borsum agreed she would earn a salary of \$12,000.00 per year as a member of the “sales team.” This amounted to \$230.14 per week (\$12,000 divided by 52.143). Borsum worked 7.57 weeks (January 1 through February 22, 2005), earning \$1,742.16 in salary. She was paid \$857.14 for that work, leaving a salary balance due of \$885.02.

10. Resolving the ambiguities in the contract in favor of Borsum, since BAC drafted the contract, Borsum should have received an additional \$885.02 for work she performed in 2005. 55% of \$885.02 is \$486.76.

IV. DISCUSSION¹

A. BAC Owes Borsum Unpaid Wages of \$885.02.

Employers must pay wages when due and may not withhold from any employee wages earned or unpaid for a longer period than 10 business days (with some exceptions irrelevant to this case). Mont. Code Ann. § 39-3-204. “Wages” are any money due an employee from the employer, whether paid by the hour, day, week, semimonthly, monthly or yearly. Mont. Code Ann. § 39-3-201(6). Borsum had the burden of proving that she performed work without proper compensation. *Marias Health Care Service v. Turenne*, 2001 MT 127, ¶¶13-14, 305 Mont. 419, 28 P.3d 494 (the 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).

A written contract establishes the agreement between the parties and as between the parties, no evidence of the terms of the agreement other than the contract itself is proper, unless there is a mistake or imperfection in the written contract which is at issue. Mont. Code Ann. § 28-2-905(1)(a).

The imperfections of the BAC contract are patent. The contract indicated that there were 14 “pay periods” in 2005. BAC paid Borsum every 2 weeks. There were 13 pay day dates upon which BAC, according to the “contract,” would make salary payments to Borsum in 2005—the first pay day date in each month except February and the third pay day date in the 2 months (July and December) with 3 such dates. The first pay day date in February had the “no salary” notation. Thus, the first pay day date in February appears to represent the commencement of the 14th “pay period.” This application of “pay period” results in some pay periods having 28 days and others having 14 days.

It was unclear from the evidence as well as the “contract” whether salary pay days were advance salary payments for the 28 or 14 day pay period following each of them, salary payments for the previous pay period, salary payments for the prior month or salary payments for the current month. BAC appeared to treat salary as earned on a pay period basis—dividing the year into 14 pay periods—because the annual salary was divided by 14 to derive the basic amount (\$857.14) paid during each “pay period” except February.

¹Statements 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.

BAC's evidence of the explanations provided to Borsum did not resolve these imperfections. Borsum clearly understood that she would not be paid \$857.14 on February 11, unlike the first pay day date in every other month. Borsum credibly testified, given the imperfections in the contract, that she believed she earned her salary in February, but that payment of it would be deferred to 3 later pay periods during the year.

Since there remained an uncertainty in the interpretation of the terms of the agreement, even after receiving evidence of the conduct, understanding and intent of the parties, the language of the "contract" is interpreted most strongly against the party who caused the uncertainty to exist, the BAC. Mont. Code Ann. § 28-3-206.

It remains highly questionable whether BAC can employ its sales team members for a yearly salary, plus commissions, calculate the "pay period" salary amount based upon the entire year, and then either defer payment of that salary for February or declare February a "no salary" month and increase the salary in 3 other months by 1/3 of the amount otherwise due in February. With a clear agreement with the employees, BAC perhaps could argue that the February salary was not "due" under the "contract" until and unless the individual continued to work for BAC through the rest of the calendar year.² That dubious legal argument did not apply in this case, since the ambiguities of the "contract" are resolved in favor of Borsum. She earned her salary for January and for February 1-22, 2005. The amount she earned is the weekly salary (annual salary divided by 52.143) for the number of weeks (January 1 through February 22, 53 days, divided by 7) she worked in 2005.

When Borsum quit, her unpaid wages were due and payable either 15 days later or on the next regular payday for the pay period during which she quit, whichever came first. Mont. Code Ann. § 39-3-205(1). BAC failed to pay those wages, and owes her the unpaid salary earned in 2005, based on a weekly salary amount and the number of weeks worked. That calculation appears in finding 10.

B. BAC Owes the Statutory Penalty.

Borsum has no minimum wage or overtime claims. For claims other than minimum wage and overtime claims, BAC also owes a penalty of 55% of the wages due. Admin. R. Mont. 24.16.7566. That penalty appears in finding 11.

² *But see, Langer v. Crazy Creek Products*, 1998 MT 44, ¶¶ 30-31, 287 Mont. 445, 954 P.2d 1169 (vacation pay, like any other form of wage, is earned by the employee's labor and once accrued, it has been earned and cannot be divested by a requirement that the employee return to work after the end of the vacation or lose it as paid vacation).

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. BAC owes Borsum additional wages of \$885.02.

3. BAC owes Borsum a 55% penalty amounting to \$486.76.

VI. ORDER

The Billings Athletic Club is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,371.78, representing \$885.02 in unpaid wages and \$486.76 in penalty, made payable to Minnie Borsum, 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. The Billings Athletic Club may withhold appropriate deductions for income taxes and social security on the wage portion but not the penalty portion.

DATED this 29th day of September, 2005.

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 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.