

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM )	Case No. 384-2005
OF MICHAEL A. MALIKIE, )	
)	
Claimant, )	<b>FINDINGS OF FACT;</b>
)	<b>CONCLUSIONS OF LAW;</b>
vs. )	<b>AND ORDER</b>
)	
FRANKLIN COMMUNICATIONS, INC., )	
a Montana Corporation, )	
)	
Respondent. )	

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**I. INTRODUCTION**

Claimant Mike Malikie appealed a determination of the Wage and Hour Unit which found that Respondent Franklin Communications owed him additional regular wages of \$4,898.43 plus applicable penalties for work completed between April 1, 2004 and August 19, 2004. Malikie claimed he was due in excess of \$13,374.97 in regular wages for that time period. In addition, during this appeal and hearing process, Malikie expanded his claim, seeking additional overtime wages which he had not previously sought. Franklin Communications also appealed the determination, arguing that the Wage and Hour Unit determination erroneously concluded that additional wages were due.

Hearing Examiner Gregory L. Hanchett convened a telephonic contested case hearing in this matter on June 28, 2005. Malikie appeared and represented himself. Mike Franklin, owner of Franklin Communications, appeared on behalf of the respondent. The parties stipulated to the admission of Wage and hour Unit Documents 1 through 258, Malikie's exhibits 1-181, and Franklin Communication's exhibits A through U11. Malikie, Franklin, Larry Ashwell of Washington Communications, John Malikie, the claimant's father, Beverly White, Franklin Communications bookkeeper, and Leroy Wolf, a former employee of Franklin Communications, all testified under oath. The parties were permitted to submit posthearing briefs. Malikie filed an opening brief and Franklin Communications submitted a responsive brief. Though permitted to do so, Malikie did not file a reply

brief. The record was deemed closed on August 5, 2005. Based on the evidence adduced at the hearing and the arguments presented in the posthearing briefs, the hearing examiner makes the following findings of fact, conclusions of law, and final order in this matter.

## **II. ISSUE**

Are additional wages due Malikie as alleged in his complaint and is a penalty due as required by law?

## **III. FINDINGS OF FACT**

1. The hearing examiner finds and the parties conceded at hearing that this matter is not subject to the Fair Labor Standards Act but is only subject to the Montana Wage and Hour Act.

2. Malikie worked as a telecommunications technician (installing phones and phone systems) for Franklin Communications. He started this job January 1, 2004 and resigned from the position on August 19, 2004.

3. Prior to April 1, 2004, Franklin Communications paid Malikie as a salaried employee at the rate of \$65,000.00 per year. Beginning in April 2004, Franklin Communications began to pay Malikie on a retainer basis. Under this pay scheme, Franklin was to pay Malikie \$3,000.00 per month as a retainer and utilize Malikie to service Franklin Communications' Mitel accounts (for which Malikie had specialized training) and to complete jobs that Franklin could not himself complete. Malikie was to be paid this amount regardless of the number of hours he worked and Malikie was to be available throughout the month as needed.

4. The pay change came about because Franklin Communications could no longer pay Malikie as a salaried employee due to financial difficulties. Franklin and Malikie considered various plans to keep Malikie on board. These options included (1) keeping Malikie as a salaried employee, (2) trying to get Malikie hired back at his previous employer, Washington Communications, or (3) keeping Malikie around on the retainer basis as described above in Paragraph 3. The first option was not feasible in light of Franklin's then existing financial condition. The second option did not pan out as Washington Communications could not hire Malikie back.

5. Because the first two options were not viable, the parties settled on the third option. By doing so, the parties intended to give Malikie a source of income

while permitting him to build his own accounts and, eventually, undertake his own business. Under this plan, Franklin Communications erroneously believed that Malikie was an independent contractor. Malikie, however, continued to be an employee.<sup>1</sup>

6. Between April 1, 2004 and August 19, 2004, Malikie completed certain jobs for Franklin Communications and informed Franklin Communications of the number of hours he had worked. Invoices 4021 (dated April 12, 2004 ) through 4067 (dated August 6, 2004) show the total number of hours Malikie worked during that time. He worked 156.75 hours and he did not work more than 40 hours during any single week. See Documents 21 and 22 and Franklin Communications Exhibits P6 through D9. During that time, Malikie was paid a total of \$11,000.00. Those payments were made as follows:

April 1 to April 30, 2004 -----	\$0.00
May 1 to May 31, 2004 -----	\$2,000.00
June 1 to June 30, 2005 -----	\$3,000.00
July 1 to July 31, 2004 -----	\$3,000.00
August 1 to August 15, 2004 -----	\$3,000.00

7. At no time during his employment did Malikie complain about the compensation that he received. He cashed each of the checks provided by Franklin. It was not until after his resignation from Franklin Communications that Malikie filed this wage complaint.

8. During the time period April 1, 2004 through April 30, 2004, Malikie should have been paid \$3,000.00 but was not paid at all. Between May 1 and May 31, 2004, Malikie should have been paid \$3,000.00. Franklin, however, paid him only \$2,000.00. Malikie was fully compensated for June and July 2004. Malikie was also compensated \$3,000.00 for the month of August. However, he was available to work for only 19 of the 31 days of the month of August.

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<sup>1</sup> While the case was at the Wage and Hour Unit, Franklin Communications defended against Malikie's claim by arguing that Malikie was an independent contractor between April 1, and August 19, 2004. The case was transferred to the Independent Contractor's Central Unit (ICCU) for resolution of that issue. The ICCU determined that Malikie was in fact an employee between April 1, 2004 and August 19, 2004. In this proceeding, Franklin Communications does not contest Malikie's status as a Franklin Communications' employee during that time period.

9. Based on his employment agreement between April 1, 2004 and August 19, 2004, Malikie should have been compensated a total of \$13,838.71. He was paid \$11,000.00. He was thus underpaid by \$2,838.71.

#### IV. DISCUSSION<sup>2</sup>

##### A. *Franklin Owes Malikie Additional Unpaid Wages of \$2,838.71.*

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 seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Marias Health Care Service v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (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). An employee who produced evidence to “show the extent and amount of work as a matter of just and reasonable inference” meets this burden. *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 189, 562 P.2d 473, 476-77, citing *Anderson v. Mt. Clemens Pottery* (1944), 328 U.S. 680, 687, and *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497.

Malikie contends that between April 1, 2004 and August 19, 2004, he was to be compensated on the basis of an annual salary of \$65,000.00 per year. In addition, as the case progressed, Malikie sought more money than originally stated in his complaint, alleging that not only was he shorted in hourly wages, he was not paid for overtime which he was due. Franklin Communications contends that the Wage and Hour Unit’s determination that Malikie worked 156.75 hours was correct and that based on this number of hours of work, Malikie has been more than properly compensated because he was paid \$11,000.00, an amount which far exceeds the hourly rate of compensation for the 156.75 hours worked based on a \$65,000.00 annual salary.

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<sup>2</sup>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.

In his posthearing brief, Malikie correctly noted that if the employment agreement had been for an annual salary of \$65,000.00 per year, his overtime premium would have been \$46.87 per hour (Malikie's Exhibit 4). However, the hearing examiner does not find Malikie credible with respect to either his allegations of overtime work or his claim that he was to be paid on an annualized basis of \$65,000.00 per year between April 1 and August 19, 2004. Malikie's documentation of those overtime hours (Malikie's Exhibit 5), produced approximately one month before the hearing and only after he had for months contended that he had no record of the number of overtime hours he had worked, deserves no credence.

Instead, the invoices (Documents 21 and 22), made at a point in time close to the completion of the work, are far more credible and establish that Malikie worked a total of 156.75 hours during from April 1 to August 19, 2004 (testimony of Franklin and Leroy Wolf), with no single work week exceeding 40 hours. The credible evidence also establishes that the true employment agreement between the two parties during this time period was that Franklin would keep Malikie on a retainer, paying him \$3,000.00 per month to complete some of Franklin's work and to allow Malikie to build his own business. The fact of Franklin's cash flow problems, coupled with Malikie's willingness to cash the checks he received and Malikie's utter failure to protest the amount he was being paid during his employment demonstrates preponderantly that Malikie agreed to a wage of \$3,000.00 per month to stay on retainer and help out.

Franklin's version of the employment agreement was in fact the employment agreement during this time. It does not follow, however, that Franklin is correct in his contention that he paid all money due to Malikie. The employment agreement, as demonstrated by Franklin's own testimony, called for Franklin to pay Malikie \$3,000.00 per month to be on retainer regardless of the actual number of hours he worked. Between April 1 and August 19, 2004, Franklin paid Malikie only \$11,000.00. Under the parties' agreement, Malikie should have been paid \$13,838.71. This amount is comprised of the \$3,000.00 per month for the four full months that Malikie was available to work (April 1 through July 31, 2004 for a total of \$12,000.00) plus a proration ( $19/31 \times \$3,000.00 = \$1,838.71$ ) for the 19 days of August 2004 that Malikie was available to work. Franklin thus owes Malikie \$2,838.71 ( $\$13,838.71 - \$11,000.00 = \$2,838.71$ ) in unpaid wages.

#### *B. Franklin Owes Penalty.*

Malikie asserts that Franklin should be ordered to pay the 110% penalty mandated by Admin. R. Mont. 24.16.7561. Here, however, based on the number of

hours that Malikie was found to have worked, there is no minimum wage or overtime violation. Thus, Admin. R. Mont. 24.16.7561 is inapplicable to this case.

For claims other than minimum wage and overtime claims, a penalty equal to 55% of the wages due is mandated by regulation. Admin. R. Mont. 24.16.7566. In this case, that penalty amounts to \$1,561.29 ( $\$2838.71 \times .55 = \$1,561.29$ ).

## 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. Franklin owes Malikie additional wages of \$2,838.71.

3. Franklin owes Malikie a 55% penalty amounting to \$1,561.29.

## VI. ORDER

Franklin Communications is hereby ORDERED to tender a cashier's check or money order in the amount of \$4,400.00, representing \$2,838.71 in unpaid wages and \$1,561.29 in penalty, made payable to Mike Malikie, 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. Franklin Communications may withhold appropriate deductions for income taxes and social security on the wage portion but not the penalty portion.

DATED this 12th day of September, 2005.

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.