

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	CASE NO. 1885-2006
OF KYLE G. RIEKENA)	
)	
Claimant,)	
)	FINDINGS OF FACT;
vs.)	CONCLUSIONS OF LAW;
)	AND ORDER
ROBIN'S ROOST INC., d/b/a JULIAN'S)	
PIANO BAR AND CASINO,)	
)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION:

On March 20, 2006, Kyle Riekena (Riekena) filed a wage and hour claim maintaining that the respondent owes him unpaid wages in the amount of \$767.00 for work performed beginning July 22, 2005, and ending August 6, 2005.

By letter dated April 7, 2006, the Wage and Hour Unit dismissed Riekena's claim on the basis that it was not filed within 180 days.

On April 26, 2006, Riekena filed an appeal, accompanied by an affidavit filed on behalf of Riekena by James W. Kephart, appealing the dismissal of Riekena's claim, maintaining that Riekena is an innocent, unsophisticated and unrepresented victim of the employer who was unaware of the requirement that he file his claim within a certain time period.

On May 16, 2006, the Wage and Hour Unit issued a redetermination dismissing Riekena's claim on the basis that it was not filed within 180 days. The determination advised Riekena that it would become final unless he filed an appeal by June 5, 2006.

On June 5, 2006, Riekena filed an appeal.

On September 7, 2006, the Hearing Officer held an in-person hearing in that matter in room 106 at the Butte-Silver Bow County Courthouse. Riekena was present. Tina Morin, Attorney at Law, represented the respondent. Dale Gamble, compliance specialist for the Wage and Hour Unit, appeared as a witness for the respondent. David and Robin Jordan were present and observed for the respondent.

On September 25, 2006, the Hearing Officer issued a decision which concluded that Riekena had filed a timely claim.

This matter came to hearing on the merits of Riekena's wage claim on January 10, 2007, in room 106 of the Butte-Silver Bow County Courthouse. All parties appeared in person. Riekena was present. James W. Kephart appeared as a witness for Riekena. Tina Morin, Attorney at Law, represented the respondent. David and Robin Jordan, co-owners, appeared as witnesses for the respondent.

Exhibits 1 through 45 were provided to the parties prior to the pre-hearing conference held on August 1, 2006. At the hearing, exhibits 1 through 19, 23, 24, and 27 through 41 were admitted into the record without objection. Exhibits 20 through 22 were admitted into the record over the respondent's objection that they are hearsay. The respondent objected to the admission of exhibits 25, 26 and 45 on the basis that they are hearsay. They were admitted into the record. The respondent objected to the admission of exhibits 41 through 44 on the basis that there is no foundation for them and that they are not relevant. They were admitted into the record.

Exhibits 46 through 277 were offered by Riekena and then withdrawn.

Exhibits 278 and 279 were proposed for admission by Riekena and admitted into the record without objection. Exhibits marked A and B, offered by the respondent, were admitted into the record without objection.

II. ISSUE:

The issue in this case is whether Robin's Roost Inc., d/b/a JULIAN'S PIANO BAR AND CASINO owes wages for work performed, as alleged in the complaint filed by Riekena, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT:

1. During the hearing in this matter, the parties stipulated to the fact that the Respondent and Riekena have known each other for approximately four years. They met in Missoula at social functions. The Jordans then moved to Butte. Riekena moved to Butte on July 20, 2005.

2. Riekena stipulated to being referred to in the masculine gender.

3. On July 22, 2005, the Jordans were working on the establishment at 113 N. Hamilton St., in Butte, which was to open soon as Julian's Piano Bar and Casino. Riekena came in and asked for employment. The Jordans told him they did not have any work available and Riekena

asked for money because he had left his money in an account in Missoula. Robin Jordan gave him \$5.00.

4. Over the next several days, Riekena went into the establishment, asking for money. Robin usually gave him some. She also gave him beer and cigarettes and allowed him to sit around and talk. She finally decided that giving Riekena money was not the right answer and talked to David Jordan about giving Riekena some things to do around there. David agreed to do so.

5. The next time Riekena entered the establishment and asked for money, the Jordans asked him to help clean up by sweeping the floors and taking the construction trash out. They gave him a beer and cigarettes and paid him \$5.00 or \$10.00.

6. Thereafter, when Riekena went in, the Jordans gave him some things to do like sweeping the floor or washing windows and paid him \$5.00 or \$10.00, in addition to beer and cigarettes while he hung around.

7. On one occasion, during the week ending August 6, 2005, Riekena went in while Robin Jordan was staining a piece of trim. She asked Riekena to finish staining all the trim while she painted the restroom. Two or three hours later, Robin was finished painting and went to where Riekena was working. She found that he was still working on the same piece of trim and asked him to leave.

8. The business was to open on Friday, August 5, 2005. During that last week before opening, the Jordans were very busy. Every time Riekena came in, they gave him something to do and paid him \$10.00 or \$20.00, in addition to beer and cigarettes, while he hung around. On one occasion, Riekena asked for a job as a swamper. The Jordans told him they could not afford to hire a swamper and offered to take him to the local Job Service.

9. On August 5, 2005, the business opened. When Riekena went in, David Jordan asked him to buff the bar. When the bar got busy, Jordan told Riekena to buff the dance floor. Later, David Jordan asked to talk to Riekena alone. Jordan discharged him for cadging in the bar, and told him not to come back.

10. Riekena concedes that the Jordans paid him a total of \$115.00 during the period between July 22, 2005, and August 5, 2005, and that he never completed a W-4 form for the employer. The employer maintains that the payment of \$115.00 was more than sufficient for the amount of work Riekena did.

11. The Hearing Officer takes administrative notice of the following: Appearing in the *Montana Standard*, November 18, 2005: At 1:00 a.m. on Thursday, November 17, 2005, Riekena was involved in an altercation with a group of people near the 100 block of North Main in Butte, during which he produced a knife and threatened them. Later that night, he was charged with assault. In a separate incident that night, Riekena was charged with trespassing and

criminal mischief after he broke into an apartment, entered through a window and knocked over a TV. The Hearing Officer also takes administrative notice of the public record which reveals that the State of Pennsylvania suspended Kephart from practice because he was convicted of a crime and that his voluntary disbarment was accepted.

IV. DISCUSSION¹

Montana law requires employers to pay wages when due, and in no event later than 15 days following termination of employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205. An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *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* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; **see also**, *Marias Health Care Srv. 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).

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, “the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee. And if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation.” *Garsjo*, 172 Mont. at 189, 562 P.2d at 477, **quoting** *Purcell*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

In this matter, the respondent came forward with evidence and credible testimony which demonstrated that the precise amount of work performed by Riekena was other than he claims to have performed. The evidence and testimony presented by the respondent undermined the reasonableness of the inference to be drawn from Riekena’s evidence.

Riekena’s testimony

At the hearing in this matter, the respondent produced evidence to show that Riekena’s testimony was not credible. Although Riekena consistently denied being involved in any of the altercations described by the respondent, the respondent produced evidence that he was. The respondent also described an altercation in its establishment involving Riekena in November of 2005, which Riekena denied while leaving the hearing uttering profane curses. The incident of

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

November 17, 2005, is not of any consideration in regard to Riekena's actions on that date, and was not submitted for the purpose of describing his actions on that date. It is of consideration and was submitted for the purpose of bringing into question the underlying truthfulness of his testimony and claim.

Following the presentation of the testimony of Robin and David Jordan, counsel for the respondent called Riekena as a witness. During direct examination, counsel asked the same question of Riekena, about his documentation, many times because he was evasive, did not answer the question, repeatedly answered the previous question, yelling that counsel was badgering him. His evasiveness and hostile reaction did not lend credibility to the document in question.

The claimant's lack of credibility in matters of public record and his evasiveness when asked about his documentation bring into question the basis for his claim and his total testimony. Although he maintains that his record of hours worked for the employer are contemporaneous, he did not keep track of the payments made to him at the same time he allegedly kept those records. And, in the end, he agreed to deduct the \$115.00 paid to him from the wages he is claiming on Exhibit 44. Further, it became clear during direct-examination by counsel for the respondent, that the figures he created on Exhibit 44 are not accurate in other ways. Overall, Riekena's testimony and documentation cannot be considered credible. Riekena has not met the burden of showing the extent and amount of work as a matter of just and reasonable inference.

Kephart's testimony:

Further, the credibility of the testimony of Kephart was brought into question during cross-examination. When counsel for the respondent attempted to impeach Kephart, Kephart became hostile and lectured counsel and the Hearing Officer on counsel's lack of standing under the law to impeach him. He produced the Montana Supreme Court's analysis of Rule 608, M. R. Ev. in *Unmack v. Deaconess Medical Center* 1998 MT 967 P2d 783. The copy which he produced is included in this record.

In *Unmack*, the admission of character evidence regarding a physician witness who was also a licensed attorney, concerning disciplinary action taken against the witness as an attorney, was considered improper and prejudicial because attorney character evidence was not probative or relevant as to the credibility of an expert medical witness. This decision is not at all relevant to Kephart's position as a witness in this matter. He was not called as an expert witness. The questions put before him by counsel for the respondent were not related to anything but his qualifications to tell the truth.

Rule 608 M. R. Evid. states in part, (b) specific instances of conduct of a witness, for the purpose of attacking or supporting the witness' credibility, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or

untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Kephart's position was untenable. Based upon Rule 608 M. R. Evid., respondent's questions about his past conduct were probative of his truthfulness or untruthfulness. His use of *Unmack* was not on point. The Hearing Officer permitted counsel for the respondent to treat Kephart as a hostile witness. Kephart continued to refuse to answer counsel's questions which were directed at impeachment. His refusal to answer leading questions about his past conduct and current unlicensed and disbarred condition as an attorney significantly affected his credibility as a witness. He did not deny counsel's allegations that he was disbarred for commission of a crime, but defied and lectured her, proposing that his disbarment was due to letting his license lapse and closing his Philadelphia office, while the public record in this matter reveals that the State of Pennsylvania suspended Kephart from practice because he was convicted of a crime and that his voluntary disbarment was accepted.

Montana law recognizes that character evidence is admissible for the purpose of impeachment. There have been no Montana cases holding that a specific instance of conduct was improperly inquired into where the conduct was probative of truthfulness or untruthfulness of a witness.

Kephart's demeanor and conduct totally undermined the credibility of his testimony. Riekena has provided no credible evidence to show that he is owed additional wages.

Jordan's testimony:

The Hearing Officer found the testimony of David and Robin Jordan to be highly persuasive. Their testimony was not inappropriately dramatic, emotionally charged or vitriolic, as was Riekena's and Kephart's. Their responses were reasonable and presented without exaggeration. David Jordan testified credibly, admitting against his interest, that he employed Riekena on a casual basis, with no intent to offer permanent employment. Robin Jordan testified credibly that she believed Riekena needed help and was willing to offer what help she could. The Jordan's testimony revealed that the respondent paid Riekena all the wages to which he was entitled, at the time he was entitled to them. As a result, the respondent has met its burden of negating the reasonableness of the inference to be drawn from Riekena's evidence.

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. Robin's Roost, Inc. does not owe Riekena additional wages.

VI. ORDER

Riekena's claim for unpaid wages is dismissed.

DATED this 21st day of February, 2007.

**DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU**

By: /s/ DAVID H. FRAZIER
DAVID H. FRAZIER
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.