

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

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| IN THE MATTER OF THE WAGE CLAIM |) | Case No. 1673-2008 |
| OF BENJAMIN A. FERREN, |) | |
| |) | |
| Claimant, |) | |
| |) | FINDINGS OF FACT; |
| vs. |) | CONCLUSIONS OF LAW; |
| |) | AND ORDER |
| KEN AULT CONSTRUCTION INC., |) | |
| a Montana corporation, |) | |
| |) | |
| Respondent. |) | |

* * * * *

I. INTRODUCTION

Respondent Ken Ault Construction, Inc., (Ault), appeals from a determination of the Wage and Hour Unit of the Department of Labor and Industry upholding the claim of Benjamin A. Ferren (Ferren). Hearing Officer David A. Scrimm held a contested case hearing in this matter on March 26, 2009. At the hearing, Ferren represented himself and Ault was represented by Katie Olson, attorney at law, Jasper, Smith, Olson, P.C. The parties stipulated to Ferren appearing via telephone and Ault appearing in person.

Ferren, Peter Demaras, Jeff Poucher, Ault, Jodi England and Jake England testified. Documents 1-48 submitted to the parties with the Notice of Hearing were admitted into the hearing record along with Ault's Exhibits A and D. Based on the evidence and argument presented at the hearing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Is the claimant due additional wages and penalty as provided by law?

III. FINDINGS OF FACT

1. Ken Ault employed Benjamin Ferren from the beginning of 2004 until March 2008.
2. Ault was not only Ferren's boss; they became friends who socialized outside of work and enjoyed hunting together.
3. Ferren worked primarily as an excavator; he eventually worked his way up to job foreman. Ferren became the Project Manager for three projects: Briggs Court; Platinum and Avalon Meadows. The Briggs Court project was 75 percent complete when Ferren took over the project.
4. In 2007, Ferren approached Ault and expressed an interest in purchasing a home of his own. Due to his poor credit history, Ferren was concerned about his ability to obtain a loan.
5. Ault agreed to help Ferren with the loan process; this included clearing up his credit.
6. Ferren provided Ault with a copy of his credit report. Ault observed that there were many unsatisfied/unpaid bills for relatively small amounts. Ault advised Ferren that he should begin paying off the smaller amounts.
7. There was one large judgment on Ferren's credit report that had been levied against Ferren by his former employer. The amount of the judgment was approximately \$16,000.00. Ault contacted Kelly J. Vernes, the attorney that represented Ferren's former employer in obtaining the judgment. On or about August 2, 2006, Ault negotiated a settlement of the judgment for twelve thousand dollars(\$12,000.00). Ault's payment of the judgment was solely for Ferren's benefit and was not a gift.
8. Ault and Ferren agreed that if Ault was to pay the \$12,000.00 dollars to satisfy the judgment, this amount would be repaid to Ault out of the construction loan that Ferren would ultimately obtain to build his own home through Ken Ault Construction.
9. There was never any bonus agreement for any of the houses built on Briggs Court.
10. Ault did not pay off the judgment against Ferren as part of any bonus agreement for the Briggs Court construction. This payment was not a bonus in any form. He did it in order to assist his friend, Ferren, in clearing his credit history and obtaining a home of his own.

11. Ferren performed no special role in the Briggs Court project that would have warranted any form of a bonus. Ault never had any bonus structure in place for his employees or for his foreman.

12. On or about September 15, 2006, Ault co-signed on a loan so Ferren could purchase a pickup truck.

13. The initial plan was for Ferren to build and move into one of the Avalon Meadows houses. Ferren would be able to obtain sweat equity in one of the properties for work that he performed on the project. Ault was prepared to let Ferren use Ken Ault Construction's equipment to perform work on his home. This equity could be used to pay off the \$12,000.00 that Ault loaned Ferren.

14. It would have taken approximately one year for Ferren to get into one of the Avalon properties.

15. Subsequently, Ferren broke his hand in an altercation with his brother. This incident resulted in Ferren incurring approximately \$10,000.00 in medical bills.

16. Ault advised Ferren that he would not be able to assist him in paying off the medical bill.

17. Ault and Ferren discussed an alternate plan for Ferren. Ault offered to allow Ferren to live on twenty acres that Ault had in Frenchtown. This property was equipped with a double wide trailer. Ault and Ferren agreed that Ferren could live at the property for free and, in exchange, he would begin fixing up the trailer home with materials that Ault would provide.

18. The money that Ferren would save in rent was to be applied to his outstanding medical bills as well as to the other unsatisfied smaller amounts that were reflected in his credit report.

19. Prior to moving into the Frenchtown trailer, Ferren lived in Ault's home.

20. Ferren did do work on the trailer. He and his friend, Peter Dumars, installed new carpet and vinyl that Ault purchased.

21. Ferren had a deal with Peter Dumars to trade Peter's labor for the flooring installation in exchange for Ferren helping install a patio at Peter's home.

22. Around this same time, Ault and Ferren realized that the property at Avalon would not be a good fit for Ferren due to the covenants that were in place and the lack of room for his large dogs.

23. At this same time, Ault realized that Ferren was not taking any steps to clear up his credit, nor did Ault foresee Ferren having the ability to repay him any of the \$12,000.00 that Ault had paid to satisfy the judgment.

24. Ault and Ferren sat down in the winter of 2007 to discuss where they stood. Ault had loaned Ferren \$1,700.00 to go on a vacation. Ault had also purchased a \$1,700.00 mule for Ferren to on hunting trips that he took with Ault.

25. In sum, Ferren owed Ault \$15,400.00.

26. Ault proposed a plan that would allow Ferren to begin paying off his debt. Ault and Ferren agreed that for every house that Ferren closed in Avalon project on time, Ferren would receive a \$1,000.00 “bonus.” This was not intended as additional wages, but as a mechanism for Ferren to repay his debt to Ault. Although both Ferren and Ault incorrectly referred to this amount as a “bonus” it would have more properly been termed a “payment plan.” The “bonus” was to be applied as a credit to the significant outstanding balance that Ferren had incurred with Ault.

27. Had Ferren not owed Ault a significant amount of money, this repayment plan would have never been instituted. Ault never had initiated any sort of plan like this in the past.

28. Under this repayment structure, Ferren’s outstanding balance to Ault was lowered by approximately \$10,000.00 for the houses that he timely closed in the Avalon project (Lots 29, 40, 42, 43, 47, 48, 49, 50, 51 and 52).

29. Ferren moved out of Ault’s trailer in Frenchtown on April 1, 2008.

30. Ferren never made any offer or arrangement with Ault to attempt to repay the outstanding money that he owed.

31. On March 20, 2008, Ault received a bill from Peter Demaras for the flooring installation, despite the arrangement that Ferren had made with Peter.

32. Ferren still owes Ault approximately \$5,400.00.

IV. DISCUSSION¹

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

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

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 she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

Ferren argues that the \$12,000.00 Ault paid to satisfy the judgment against him by a previous employer was a gift and not a loan. He also argues that the \$1,000.00 per closed house was a bonus. Montana law defines wages to include bonuses. Mont Code Ann. 39-3-210(6)(a).

However, it is clear from the testimony at hearing that the \$12,000.00 payment and other amounts given to or expended on behalf of Ferren were not gifts. Ferren’s tax returns do not indicate any large gifts were received. Testimony also made clear that the original plan was to have Ferren repay the loan when he received the proceeds of his financing of the home that he and Ault were trying to get him into.

The Department of Labor & Industry’s rules contemplate that employers may loan money to their employees and that the loans would not be part of the employees regular rate. Admin R. Mont. 24.16.2525(2)(b).

Ault’s payment of the judgment was a loan. When Ferren subsequently broke his hand and incurred additional liabilities, it became unlikely that he would be able to repay Ault through the home financing as originally planned. A home in Avalon Meadows also became less likely due to covenants restricting use and due to Ferren’s large dogs. At this point another arrangement was developed to repay the debt. Under the agreement Ault would credit Ferren \$1,000.00 for every home he closed in Avalon Meadows and in Platinum Court. Ault did not require Ferren to perform any additional duties to earn the credit, merely complete the homes so they could be sold. This was already part of Ferren’s duties.

While both Ault and Ferren referred to this plan as a “bonus,” it was in fact, merely a debt repayment plan. No other employees of Ault Construction ever received any bonuses. If Ault had not loaned Ferren the \$12,000.00 no “bonus” plan would have ever been conceived. This repayment plan was mistakenly referred to as a bonus because neither party understood the legal significance of referring to it as such. While Ferren argues that it was a gift, his uncorroborated testimony in this area is less credible than Ault’s.

Montana law also declares that an agreement made between an employer and an employee “the provisions of which violate, evade, or circumvent this part is unlawful and void.” Mont. Code Ann. 39-3-208. The agreement between Ferren and Ault was not made to evade or circumvent the wage payment laws of the State of Montana. The so-called “bonus” was again, merely a debt repayment plan and was not intended to be any sort of special remuneration for Ferren. Ault, who had extended a very generous helping hand to Ferren to

help him restore his credit and to become a homeowner, was merely attempting to recoup some of the funds he had loaned Ferren.

Ferren bears the burden of proof in this matter to show by a preponderance of the evidence that he is entitled to the additional wages he claims to be due. In this matter, Ferren failed to carry his burden to show that he was owed the so-called “bonus.”

V. CONCLUSIONS OF LAW

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

2. Ken Ault Construction does not owe unpaid wages to Benjamin A. Ferren.

VI. ORDER

1. The wage claim of Benjamin A. Ferren against Ken Ault Construction, Inc., having not been proved by a preponderance of the evidence, is dismissed.

DATED this 5th day of June, 2009

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ DAVID A. SCRIMM
David A. Scrimm, Hearing Officer
Hearings Bureau

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.