

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 269-2009
OF LEO RONALD DEWOLF,)	
)	
Claimant,)	FINDINGS OF FACT
)	CONCLUSIONS OF LAW
vs.)	AND ORDER
)	
MICHAEL P. O'BRIEN, D/B/A MICK)	
O'BRIEN USED CAR AND TRUCK)	
CENTER,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On August 13, 2008, Leo R. DeWolf (DeWolf) filed a wage and hour claim with the Wage & Hour Unit of the Department of Labor and Industry, contending that Michael O'Brien d/b/a Mick O'Brien Used Car and Truck Center (O'Brien) owed him \$785.85 in unpaid future commissions (commissions which were not due and payable to him until after he left his employment).

On September 8, 2008, DeWolf amended his claim amount to \$822.99. On November 7, 2008, DeWolf amended his claim amount to \$1,425.09. On December 2, 2008, DeWolf amended his claim amount to \$4,400.00

On December 26, 2008, the Wage & Hour Unit dismissed DeWolf's claim on the basis that he had failed to provide sufficient evidence to support his claim that he met the requirements of the employment contract and commission policy.

DeWolf obtained counsel and on January 13, 2009, filed an appeal and request for hearing. The matter was referred for mediation. Attempts at mediation failed and the case was transferred to the Hearings Bureau on January 30, 2009.

Hearing Officer David H. Frazier conducted an in-person hearing in this matter on March 23, 2009. DeWolf was represented by J. Cort Harrington, Jr., Attorney at Law. Leonard J. Haxby, Attorney at Law, represented O'Brien. Theresa Holman, former administrative assistant, Leonard Cislo, lot man, William Justin Lawrence, self employed loud sound engineer,

Mary Lou Clark, administrative assistant and title clerk, Michael O'Brien, owner, and Sharon O'Brien, sales office manager, appeared as witnesses for O'Brien.

Exhibits 1 through 500, provided to the parties prior to the hearing, were admitted into evidence without objection. Exhibits 501 and 502, offered by the employer were admitted into the record without objection. Exhibit 503, offered by the claimant was admitted into the record without objection. Exhibit 504, offered by the claimant, was admitted into the record over the respondent's objection that it was not timely offered and is not relevant. The evidentiary record closed on March 23, 2009, at the close of the hearing.

II. ISSUE

The issue addressed during the hearing was to determine whether O'Brien, owes commission wages to DeWolf as defined by the employment contract, and owes penalties or liquidated damages as provided by law.

III. FINDINGS OF FACT

1. O'Brien employed DeWolf as a used car and truck salesman from October 17, 2007, through July 28, 2008.
2. When O'Brien hired DeWolf, he went over the employment contract (Exhibit 377) and commission payment policy with him and explained them. DeWolf signed the employment contract, indicating that he agreed with it.
3. O'Brien offers financing to customers under a "Buy here, Pay here" (BH/PH) policy:
 - a. If a customer goes to a bank and gets an auto loan which provides O'Brien with the total payment for the vehicle upon delivery, the salesman receives his full commission at that time.
 - b. Most of O'Brien's customers do not have sufficient credit to obtain an auto loan from a bank, so O'Brien offers them a monthly payment plan, with the goal of paying for the vehicle in full within twelve months.
 - c. Under the in-house financing policy, the salesman receives his commission out of the customer's monthly payment when the payment is made.
 - d. O'Brien has found that customers will generally not make their monthly payments unless they are reminded to do so. Consequently, the salesmen are motivated to get their monthly commission wages by calling the customers once a month to remind them to make their payment. O'Brien advises all salesmen to do a certain amount of phone work every day.

4. The employment contract (Exhibit 377), provides for a 25% commission on gross sales totaling up to \$4,000.00 in a month and a 30% commission on gross sales totaling \$4,001.00 or more in a month.
 - a. O'Brien charges the customers a \$25.00 delivery fee on in-house financing. The salesman's commission is adjusted if the gross amount of the sale is increased to cover, or include, the delivery fee.
 - b. The balance of the salesman's unpaid commissions after the customer's down payment is divided by the number of months for which the vehicle is financed and is paid when the customer makes their payment. If the customer pays less than the amount due, the salesman's commission payment is reduced accordingly. If the payment is for more than the amount due, the salesman's commission payment is increased accordingly.
 - c. If a salesman quits his job, his future commissions are forfeited as of his last day of work, and stay with the company because the salesman will no longer be available to call the customers and the employer will have to do so in order to get the payments for the vehicle. If the salesman cannot work because of health problems or injury, O'Brien will continue to pay his commissions from the customer payments until his account is paid in full. If the business closes, or the salesman is laid off, O'Brien will pay his commissions from the future customer payments.
 - d. O'Brien provides all salesmen with a weekly draw, or advance, of \$230.77, which equals an advance of \$923.08 per month during four-week months and \$1,153.85 per month in five-week months. At the end of each month, the salesman's commissions and draws are totaled. If the commissions total more than the advances, the remainder is the salesman's. If the advances total more than the commissions, the balance is due when future monthly commissions exceed \$923.08, or \$1,153.85, until the advance amount is repaid in full.
5. Several months after DeWolf started work, he went to O'Brien and asked if O'Brien had any place for him to live. During their discussion, they talked about the possibility of buying a small mobile home for DeWolf. O'Brien agreed to buy one, if DeWolf would buy it from him. DeWolf agreed to buy it from him and agreed to make payments on it.
6. O'Brien bought a small mobile home and moved it in behind the office on the car lot. DeWolf moved into it but never had a water supply hooked up. He used the restroom in the office. DeWolf never made a payment to O'Brien for the mobile home. On several occasions, O'Brien asked him to move it off the lot, but he didn't. When DeWolf left work, he left the mobile home behind.

7. Throughout his employment, DeWolf occasionally showed up for work with a hangover. On those occasions, he would go back to the mobile home and lie down for a while and asked Cislo to tell him when Mick showed up. O'Brien was aware that DeWolf occasionally showed up for work with a hangover and occasionally took naps. O'Brien didn't care because DeWolf was a good producer and sold a lot of vehicles.
8. On Saturday, December 1, 2007, DeWolf bought a 1995 Chevy Lumina from O'Brien for \$3,591.00, and financed it on O'Brien's in-house plan. On every Friday between December 14, 2007 and June 13, 2008, O'Brien deducted a \$75.00 payment from DeWolf's advances or commission wages for the car. By June 13, 2008, DeWolf owed a balance of \$1,566.90 on the car. There were no payments made for the remainder of June (Exhibit 382).
9. On July 2, 2008, DeWolf had new tires put on the car. He had the tires balanced and a new windshield installed. He charged the expenses, totaling \$281.28, to O'Brien's account,(Exhibit 383). O'Brien added these charges to the balance due on the car.
10. On July 3, 11, and 18, 2008, O'Brien took three more \$75.00 payments toward the car from DeWolf's advances or commission wages. Two more payments were taken from his advances or commissions on July 25 and August 1, 2008. Those payments brought the balance due to \$1,191.90. After the additional charges of \$281.28 were added, the balance due on the car totaled \$1,473.18. DeWolf has made no more payments on the vehicle, although he still maintains possession of it.
11. DeWolf and Holman were dating while they worked for O'Brien. Holman got to know DeWolf very well and knew he had a back problem for which he took pain medication. He never told her he had any other problems or that there was any reason he was unable to work. DeWolf occasionally took a day off to go to Fort Harrison but he never explained why to O'Brien.
12. During the week beginning July 20, 2008, DeWolf called Holman and asked her to go to the "Testicle Festival" at the Rock Creek Lodge with him. She declined.
13. DeWolf last worked for O'Brien on Monday, July 28, 2008. He sold a car that day. He was next scheduled to work on July 29, and 31 and on August 1 and 2, 2008. He had a scheduled day off on July 30, 2008.
14. After work on Monday, July, 28, 2008, DeWolf drove from Butte to Fort Harrison in Helena but did not go in because he thought they would just give him medication to calm him down and tell him to come back the next day. He called his psychiatrist and made an appointment. He then drove to Rock Creek to attend the festival.
15. Around 10:00 a.m. on Tuesday, July 29, 2008, DeWolf called Cislo's cell phone while Cislo was at work. He told Cislo he was sick and unable to work (Claimant's testimony,

which was contradicted by Cislo). Cislo told DeWolf not to be calling him but to call Mick. DeWolf did not call Mick.

16. Lawrence, loud sound engineer, arrived at Rock Creek to set up his sound system that Tuesday, July 29. DeWolf asked Lawrence if he could help him. Lawrence declined the offer because DeWolf was drunk. He saw DeWolf at the festival every day and noted that he was always as drunk as everyone else there. He also noted that DeWolf was there until August 4, 2008, the day after the festival was over, still intoxicated, when Lawrence took down his equipment.
17. On Wednesday, July 30, 2008, DeWolf's day off, he called Cislo again and told him he would not be in to work. Cislo told him to call Mick. DeWolf did not call Mick.
18. On Thursday, July 31, 2008, DeWolf called Cislo again and asked him to tell Mick and Sharon that he would not be in that day, or Friday or Saturday. Cislo was standing in front of Sharon's desk and told DeWolf to call Mick. DeWolf told Cislo he was going to give Mick his two-week notice and that he had an interview for another job that afternoon. Cislo asked DeWolf where he was. DeWolf laughed and told Cislo he knew where he was. Cislo handed the phone to Sharon who told DeWolf to call Mick and not to be calling employees when he was not coming in to work.
19. After he talked to Sharon, DeWolf called Mick and gave Mick his two-week notice. He told Mick he would not be in the next day but would be in after that and would work for the next two weeks straight. Mick told him not to bother to come in again.
20. During the week beginning August 3, 2008, DeWolf filed a claim for unemployment benefits.
21. Judy Ulberg, nurse practitioner, has been treating DeWolf at Fort Harrison since December 27, 2007, for a mood and anxiety disorder. On August 20, 2008, Ulberg completed a Request for Medical Information form related to DeWolf's unemployment claim and submitted it (Document 372) to the Unemployment Insurance Division. Ulberg indicates on the form that DeWolf was unable to work from July 29, 2008, through August 7, 2008, that he was released to return to work without restrictions on August 7, 2008, and, without explanation, that he should not change occupations but should change his place of employment.

IV. DISCUSSION AND ANALYSIS¹

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.

DeWolf's sole claim in this case is that he was sick and unable to return to work and, therefore, under the terms of his employment agreement, he is due commissions which were not due and payable to him until after he left his employment. His claim does not include any unpaid commissions that were due and payable to him prior to leaving his employment.

Resolution of De Wolf's claim turns on whether he quit his job or whether, due to health problems, he was unable to work through no fault of his own. Under the employment contract, if a salesman quits his job, his future commissions are forfeited as of his last day of work, and stay with the company because the salesman will no longer be available to call the customers and the employer will have to do so in order to get the payments for the vehicle. However, if the salesman cannot work because of health problems or injury, the employer will continue to pay the salesman's commissions from the customer payments until the account is paid in full. The evidence adduced at hearing plainly establishes that the claimant quit his employment and is not entitled to any additional commissions under the terms of his employment agreement.

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).

The claimant bears the burden of persuading the trier of fact by a preponderance of the evidence that he was not properly compensated under his 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 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).

In this matter, the claimant was intoxicated from July 29, 2008, through August 4, 2008, a seven-day period. Although he maintains he called in sick on July 29, 2008, and should, therefore, be qualified for additional or continued payment of commissions after his termination of employment, his testimony was contradicted by Cislo, who maintains that DeWolf did not indicate he was unable to work because he was sick. If DeWolf did call in sick on July 29, he has no credibility, because he was not telling the truth. He was not sick, he was intoxicated. Moreover, he had been intoxicated for three days when he gave the employer his two-week notice.

Further, if he saw Ulberg on August 7 (and there is no record that he did) he presumably would have been sober for three days and she released him to return to work at that time without restrictions. She did not advise him to change occupations but did recommend he change employers. In this regard, the claimant has not shown that his work for O'Brien was toxic or bad for his health or that he had to leave that work because of poor health or injury.

As a result, there is no substantial evidence that the claimant left work because he was sick, or was unable to work because of poor health or injury. The medical information which he has provided is insufficient to show that he was unable to work at the time he quit because of poor health, or that he was unable to work thereafter, as contemplated by the employment agreement. He was unable to work because he was intoxicated rather than sick. The employer's contract does not provide for the continued payment of commission wages after termination of the employment under these conditions.

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. O'Brien does not owe DeWolf any unpaid wages. Mont. Code Ann. § 39-3-204.
3. O'Brien does not owe DeWolf any penalties Admin. R. Mont. § 24.16.7566.

VI. ORDER

DeWolf's claim for unpaid wages is dismissed.

DATED this 16th day of April, 2009.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ DAVID H. FRAZIER
David H. Frazier, 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.

DeWolf FOF dfp