

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1063-2010
OF PATRICK HUNTER,)	
)	
Claimant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
MINING CITY HARDWARE AND)	
LUMBER, LLC, a Montana Limited)	
Liability Company,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

In this matter, the respondent, Mining City Hardware, LLC (MCH), has appealed a portion of the determination of the Wage and Hour Unit which found that Hunter was due \$473.21 in overtime wages and \$57.00 in improper withholding.¹ Hearing Officer Gregory L. Hanchett held a telephone hearing in this matter on July 26, 2010. Hunter appeared on his own behalf and testified under oath. Wade DaHood, attorney at law, appeared on behalf of MCH. Owner Margaret Therriault testified under oath on behalf of the respondent. The parties stipulated to the admission of Wage and Hour Documents 1 through 58. In addition, the parties stipulated to the admission of Hunter's Exhibit 59 and MCH's Document 60.

¹ In addition to finding that MCH owed Hunter an additional \$473.21 for the time period between May 15, 2009 and October 6, 2009, the Wage and Hour Unit Determination found that MCH owed Hunter unpaid overtime wages in the amount of \$338.87 for the time period between March 15, 2009 and May 15, 2009. Prior to the issuance of the determination, MCH paid in \$76.75 to the Wage and Hour Unit. After the determination, MCH paid in the \$338.87 amount found to be due for the March 15 to May 15, 2009 time period. MCH appealed only that portion of the determination finding that Hunter was due an additional \$473.21 in overtime wages and \$57.00 in improper withholdings.

II. ISSUE

Is Hunter due additional overtime wages of \$473.21 and \$57.00 for improperly withheld wages?

III. FINDINGS OF FACT

1. MCH employed Hunter as a salesperson. He began his employment on March 1, 2009. He resigned on October 6, 2009.

2. At all times material to this claim, MCH was engaged in interstate commerce. Therefore, the Fair Labor Standards Act (FLSA) applies to this case.

3. Therriault is the owner of MCH. She employed managers to help run the store. Ed Herlson was Hunter's manager. Herlson approved Hunter's overtime work. Therriault was unaware of Hunter's overtime but does not dispute that Herlson authorized the overtime.

4. As a salesperson, Hunter started out at a pay rate of \$14.40 per hour. His pay rate was increased when he was switched to salary in May 2009. His equivalent hourly rate after he became salaried was \$15.38 per hour beginning May 15, 2009.

5. At the rate of \$15.38 per hour, his hourly premium for overtime would be an additional \$7.69 (\$23.07 total compensation for each hour of overtime).

6. During the time period that he was paid \$15.38 per hour, Hunter (as demonstrated by his testimony and Documents 37 through 58) worked on average at least 6.10 hours per day seven days per week. For each work week,² he was due the following amounts and paid the following amounts:

² The table denotes the regular and overtime amounts due for each work week as well as the date the single work week ended. As an example, the first row indicates that the work week ended May 24, 2009, Hunter worked each day an average of 6.1 hours, he earned regular wages of \$615.20, overtime wages of \$20.76, and earned a total of \$635.96. He received no wages that week (because he was paid on a bi-monthly basis). He was paid \$1,333.33 after the week ending May 31, 2009.

Week Mon. Tues. Wed. Th. Fri. Sat. Sun. Reg. OT Earned Paid

5/24/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	
5/31/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	1333.33
6/07/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	
6/14/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	
6/21/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	1333.33
6/28/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	
7/05/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	1333.33
7/12/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	
7/19/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	1333.33
7/26/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	
8/02/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	1333.33
8/09/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	
8/16/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	1333.33
8/23/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	
8/30/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	
9/06/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	1333.33
9/13/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	
9/20/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	1333.33
9/27/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	
10/4/09	6.10	6.10	6.10	6.10	6.10	6.10	6.10	615.20	20.76	635.96	1333.33
10/11/09	8.00	8.00							0.00	246.08	246.08

Total Earned: \$12,965.34

Total Paid: \$12,492.13

Amount of Overtime Hunter Has Earned But Not Been Paid: \$473.21

7. At the time he was employed by MCH, Hunter had a child support lien that had been levied against him through the State of Montana. Document 60. The garnishment required his employer to withhold \$354.21 twice per month. MCH withheld \$354.21 as required from Hunter's September 5, 2009 paycheck. The substantial evidence in this case corroborates MCH's contention that it withheld \$354.21 as required and did not withhold more child support than mandated by the garnishment.

8. MCH withheld \$57.00 in wages on an account maintained by Hunter to purchase store goods. The employer had no agreement with Hunter to do so and acted unilaterally in doing so.

9. The employer did not act in bad faith in failing to pay the additional overtime due to Hunter. Herlson, who had apparent authority to authorize overtime, permitted Hunter to work overtime hours. Therriault did not schedule employees and therefore had no knowledge that Hunter was working overtime. Moreover, it is clear that Therriault's intent was to pay workers their overtime (see, e.g., Document 34 wherein Therriault instructed the accountant to make sure and pay employees overtime). However, because of a payment convention employed by her accountant (paying bi-monthly), MCH inadvertently failed to pay Hunter his overtime. Therriault did not become aware that Hunter was due overtime until after Hunter brought this proceeding.

IV. DISCUSSION³

A. *Mining City Hardware Owes Hunter Overtime Wages.*

Montana law requires employers to pay wages when due in conformity with the employment agreement but no later than 15 days following termination of employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205. Except to set a minimum wage, the law does not set the amount of wages to be paid.

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.

Once an employee has shown as a matter of just and reasonable inference that he 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

³Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

approximation.’” *Garsjo*, 172 Mont. at 189, 562 P.2d at 477, quoting *Purcell*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

Having carefully considered the testimony of the witnesses, the hearing officer finds that Hunter’s testimony is credible in this matter. Hunter’s testimony about the number of overtime hours he worked is credible. Therriault’s manager, Ed Herlson, asked Hunter to work the extra hours. Hunter has met his burden of proof in this case. In addition, the time cards and pay check stubs that Hunter submitted (Documents 38 through 58) substantiate that he worked the overtime hours he claims and is due an additional \$473.21 in unpaid overtime wages.

As Hunter has met his burden of proof, the burden shifts to the employer to demonstrate the precise amount of work that Hunter did. Therriault was not in a position to contradict Hunter’s testimony. Her manager, Ed Herlson, requested Hunter to work the overtime. Herlson, as Therriault’s manager, had apparent authority to require Hunter to work overtime. As such, the employer suffered Hunter to work overtime even though Therriault was unaware of it and may not have otherwise authorized it. Therriault failed to produce any evidence by way of time cards or other documentation to rebut Hunter’s testimony. Because MCH has failed to meet its burden of proof, the hearing officer must find that Hunter is entitled to the additional amount he seeks in overtime wages, \$473.21.

Hunter has failed to prove, however, MCH withheld an improper amount of child support. MCH’s evidence showing that the amount MCH withheld and the amount garnished for Hunter’s child support obligation were the same (Document 60) convinces the hearing officer of this point. Therefore, Hunter has failed to prove that MCH withheld more child support than it was supposed to under the garnishment.

B. The \$57.00 Was Improperly Withheld.

MCH withheld \$57.00 from Hunter’s pay without any agreement to do so from Hunter. Under Montana Law, in the absence of an agreement from the employee, the employer has no authority to do so. *See, e.g., Mont. Atty. Gen. Op. No. 25*, Vol. 11 (March 25, 1953) (holding that the Montana Wage and Hour statutes do not permit an employer to withhold wages earned and apply such wages to an account which the employee has with the employer in the absence of an agreement between the employer and employee to that effect). As such, this withholding was improper and Hunter is due this amount.

C. Imposition of Liquidated Damages Is Not Appropriate.

Under Montana law, the liquidated damages provision of the FLSA, not the statutory penalty provisions of the Minimum Wage and Overtime Act, apply to cases subject to FLSA. Mont. Code Ann. § 39-3-408. The FLSA has a liquidated damages provision which states:

Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid . . . wages . . . and in an additional equal amount as liquidated damages.

29 U.S.C. § 216. Liquidated damages under FLSA are compensatory, not punitive in nature. The damages are imposed to compensate employees for losses they might have suffered because they did not receive their wages at the time they were due. *Marshall v. Brunner*, 688 F. 2 748, 753 (3rd Cir. 1982).

However, 29 U.S.C. § 260 modifies the requirement of section 216, stating:

In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act.

A tribunal may refuse to award liquidated damages if the employer demonstrates it acted reasonably and in good faith. The employer has the plain and substantial burden of persuading the court by proof that [its] failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon [it] more than a compensatory verdict.” *Brock v. Shirk*, 833 F.2d 1326, 1330 (9th Cir.,1987), *vac’d on other grounds*, *Shirk v. Brock*, 488 U.S.____ (1988).

To demonstrate “good faith” under this exception, an employer must show “the act or omission giving rise to [the violation] was in good faith and that [it] had reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA].” *Id.* Good faith requires an honest intention and no knowledge of circumstances which might have put the employer on notice of FLSA problems. *Id.*

In this case, the employer has presented evidence that it gave its employees strict orders not to work overtime because of the company's financial condition. Herlson, not Therriault, authorized Hunter's overtime and Therriault had no reason to know or suspect that Hunter was working overtime. Moreover, as demonstrated by Document 34 (Therriault's response to Hunter's wage claim), it is clear that Therriault instructed her accountant to pay overtime not realizing that her accountant's methodology of paying bi-monthly might be problematic in terms of the overtime requirements of the law. The respondent's conduct in this case was not an attempt to circumvent the FLSA requirements. In addition, there is no evidence that MCH has ever engaged in or even been accused of failing to comport with FLSA requirements outside of this case. Considering all of the circumstances in this case, MCH has convinced the hearing officer by substantial proof that it acted in good faith and had no reason to believe its error in paying overtime was in violation of FLSA. Therefore, liquidated damages are not required under 29 U.S.C. § 260.

D. Imposition of Penalty on the Improperly Withheld \$57.00 is Required.

While imposition of liquidated damages on the improperly withheld overtime is not appropriate, the hearing officer is required to assess penalty on the improperly withheld \$57.00. That portion of Hunter's claim is not controlled by FLSA but is instead controlled by the Montana Wage and Hour Act. Mont. Code Ann. § 39-3-408. For claims not involving minimum wage or overtime, a 55% penalty must be imposed. Admin. R. Mont. 24.16.7566. On the \$57.00 claim, that amounts to \$31.35 ($\$57.00 \times .55 = \31.35).

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. MCH owes Hunter \$473.21 in unpaid overtime wages and \$57.00 for improperly withheld wages. MCH also owes penalty on the improperly withheld \$57.00 in the amount of \$31.35.

3. Imposition of liquidated damages on the unpaid overtime wages is not appropriate in this case.

4. MCH properly withheld the \$354.21 in child support garnishment and sent that to the State of Montana. MCH did not withhold more than it was required to and there is no basis to find that MCH improperly withheld child support from Hunter's wages.

VI. ORDER

Mining City Hardware, LLC, is hereby ORDERED to tender a cashier's check or money order in the amount of \$561.56, representing \$530.21 in unpaid wages and \$31.35 in penalty, made payable to Patrick Hunter, and mailed to the Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503, no later than 30 days after service of this decision. Mining City Hardware, LLC may deduct applicable withholding from the wage portion, but not the penalty portion, of the amount due.

DATED this 31st day of August, 2010.

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.