

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM) Case No. 471-2010
OF SHARON HESER,)

Claimant,)

vs.)

HELP FOR HOMELESS PETS, INC.,)
a Montana Corporation,)

Respondent.)

**FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND ORDER**

* * * * *

I. INTRODUCTION

Sharon Heser appealed a determination of the Wage and Hour Unit that dismissed her claim for additional wages against Help For Homeless Pets, Inc. (Help) after finding Heser was not an employee of Help. Hearing Officer Gregory L. Hanchett held a telephonic hearing in this matter on June 11, 2010. Heser appeared on her own behalf and testified under oath. Brandon Hartford, attorney at law, appeared on behalf of Help. The parties stipulated to the admission of Documents 1 through 138. The parties also stipulated to the admission of Respondent's Exhibit 139. Based upon the evidence and arguments adduced at hearing, the hearing officer makes the following findings of fact, conclusions of law and final order.

II. ISSUES

Is Heser due the additional wages she seeks in her complaint and penalty as prescribed by law?

III. FINDINGS OF FACT

1. At all times material to this proceeding, Help has been a Montana non-profit corporation. Help promotes the welfare of animals, including pet adoption and spaying and neutering. Angie Cook is Help's director.

2. As a non-profit, income tax exempt corporation, Help relies on volunteers to carry out its various duties. To encourage volunteers to participate in its activities, Help pays its volunteers \$25.00 per event the volunteer engages in. Help does not withhold taxes or undertake any type of payroll deduction. Help does not provide W-2s to its employees. It does, however, provide Internal Revenue Service form 1099s to its volunteers.

3. Help maintains an adoption center at the Petsmart in Billings. Volunteers clean the animal cages at the adoption center each day. They are not controlled in when they must arrive, how long they must stay there and clean, nor are they instructed on how to clean. That is left up to the volunteer. On average, it takes a volunteer one to two hours per day to clean the cages at Petsmart.

4. On March 1, 2008, Hesel volunteered to work at Help. Like the other volunteers, she would be compensated at a rate of \$25.00 per event that she worked. At the time she volunteered, she adopted a pet. In lieu of paying the \$175.00 adoption fee, she assisted at seven events for seven days in a row.

5. Hesel worked cleaning cages at Petsmart as part of her volunteer activities. She also did some bookkeeping. In June 2008, Hesel quit volunteering at Help because she was upset. Documents 93 and 94.

6. In September 2008, Hesel again began volunteering at Help. Help paid her for any event she undertook (such as cleaning cages at Petsmart) in the same amount she had previously made, \$25.00 per event. Cleaning cages routinely took one and usually no more than three hours.

7. Angie would call Hesel to let her know what event Hesel needed to cover on any given day that Hesel volunteered. Cook did not tell Hesel how to do her work nor did she direct Hesel in how much time she could spend doing the work. Other than to request Hesel to go to any particular event, Cook did not control Hesel's work in any way.

8. Hesper did not regularly get called out to do events. As Hesper testified at hearing, and the hearing officer finds, she had no set regular work schedule.

9. Hesper did not receive any W-2 statement while she worked at Help. She received only a 1099 form for reporting income. Hesper conceded at hearing that she expected to get a 1099 form from Help. In addition, no taxes were withheld from any check that Hesper received. She did not report any income taxes to the Internal Revenue Service from her Help income.

10. It is clear that Hesper and Help's only agreement was that Hesper was a volunteer and that she would be paid \$25.00 for each volunteer event she attended. The evidence fails to demonstrate that Hesper had an employment agreement with Help.

11. Other volunteers such as Kathy Byrd, Kirsten Graham, Lilita Klein, and Sandra Wulff (Exhibits 50, 51, 52, and 53, respectively) performed the same tasks as Hesper (such as cleaning cages at Petsmart) and were volunteers. These volunteers were also reimbursed at the same rate as Hesper (\$25.00 per event).

IV. DISCUSSION¹

As the Wage and Hour Unit correctly noted, this case initially turns on the question of whether or not an employment agreement existed between Hesper and Help. Hesper contends that such an agreement did exist while Help argues that Hesper was a volunteer exempted from the requirements of the Montana Wage and Hour Act.

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).

Hesper bears the burden of persuasion to show by a preponderance of the evidence that she actually earned the additional wages that she claimed she was due in this case. *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,

¹Statements 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.

¶¶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). As part of this burden of proof, Hesper must make at least a prima facie showing that in fact she was an "employee" under the Montana Wage and Hour Act.

The Montana Wage and Hour Act provides that the minimum wage and overtime protections of the Act do not apply to persons who are not regular employees of a nonprofit organization on a fully or partially reimbursed basis. Mont. Code Ann. § 39-3-406(e). The burden of proving this exemption rests on the employer who must show that the employee falls plainly and unmistakably within the exemption. *Holbeck v. Stevi-West, Inc.* (1989), 240 Mont. 121, 125, 783 P.2d 391, 393; *Rosebud County v. Roan* (1981), 192 Mont. 252, 627 P.2d 1222. Questions involving exemption from the minimum wage and overtime requirements are to be narrowly construed in order to carry out the purposes of the wage and hour act. *Kemp v. Board of Personnel Appeals*, 1999 MT 255, 296 Mont. 319, 989 P.2d 317.

It is evident from Hesper's cross-examination testimony, as well as the supporting documents admitted into evidence at the hearing (e.g., the statements of fellow volunteers), that Hesper was a volunteer at all times that she was with Help. Help was an all volunteer, non-profit entity. Hesper performed the same tasks as other volunteers. She worked as needed and was reimbursed at the same rate as other volunteers. She was not controlled in any meaningful way by the director (other than she was told what event she would be needed at) and she had no supervisor. She was never provided a W-2. Instead, she received and expected to receive a 1099 form, further corroborating that she was reimbursed as a volunteer. She did not file any tax returns and no income tax was taken out of any of her reimbursements which further convinces the hearing officer that she was a volunteer.

Hesper has testified that she entered into an employment agreement with Cook in March 2008. In light of the factors identified in the above paragraph, that testimony is not credible. However, even if her testimony were taken at face value, it is apparent that any such agreement ended in June 2008 when she quit her job at Help which effectively ended any such employment agreement. Hesper acknowledged at hearing that she quit in June 2008 but Hesper has not offered any evidence to show that when she came back in September 2008, that anyone at Help had any type of employment agreement with her. The evidence shows only that she was a volunteer and was reimbursed as other volunteers at the rate of \$25.00 per event.

Without evidence of an employment agreement, Hesper can in no event prove a violation of the Montana Wage and Hour Act.

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. Hesper has failed to demonstrate by a preponderance of the evidence that she had an employment agreement with Help.

3. Help has demonstrated plainly and unmistakably that Hesper was a volunteer within the meaning of Mont. Code Ann. § 39-3-406(1)(e). She is, therefore, exempt from the protections of the Montana Wage and Overtime provisions of the Montana Wage and Hour Act.

4. Because Hesper has not proven the existence of an employment relationship and, because in any event, Help has proven that Hesper was a volunteer exempted from the protections of the Wage and Hour Act, Hesper has failed to prove that she is due additional wages as alleged in her complaint.

VI. ORDER

As Hesper has failed to demonstrate that she is due additional wages, her claim has failed and is hereby dismissed.

DATED this 21st day of July, 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.