

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM) Case No. 379-2013
OF KIM S. FIFE,)

Claimant,)

vs.)

FINAL AGENCY DECISION

PEGASUS EMERGENCY MANAGEMENT)
SERVICES, LLC, a Delaware Limited)
Liability Company registered with the)
Montana Secretary of State,)

Respondent.)

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I. INTRODUCTION

In this matter, claimant Kim Fife appeals from a Wage and Hour Unit determination that found her employment agreement with Respondent Pegasus Emergency Management Services (Pegasus) did not provide for accrual of a vacation benefit between February 4, 2010, the beginning of her employment, and November 22, 2010, the date she entered into a written employment agreement with her employer and began to receive a vacation benefit. On appeal, Fife sought only what she claimed as vacation pay for accrued vacation time between February 2010 and November 22, 2010, liquidated damages on that amount, and a penalty for the final paycheck which the employer agreed it did not pay her immediately upon her discharge but that it did pay her within 10 days after her discharge.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on March 19, 2013 in Bozeman, Montana. Fife appeared on her own behalf. Martin Trpis appeared on behalf of the corporation. Fife, Trpis, Shauna Burns, Sarah McCauley, and Brian Sweeney testified under oath. Documents 1 through 142 were admitted into evidence by stipulation of the parties. Documents 143 through 166 were admitted as noted in this tribunal's March 7, 2013 Order Admitting Exhibits and Denying Claimant's Request for Continuance. The claimant initially indicated that she would attempt to enter additional documents numbered 167 through 183 but she then decided immediately prior to the hearing not to do so.

After evidence was taken, the parties presented closing arguments. Based on the testimony and exhibits admitted as well as the parties' closing arguments, the following findings of fact, conclusions of law and final agency decision are made.

II. ISSUES

1. Did Fife's employment agreement between February 4, 2010 and November 22, 2010 provide for vacation?

2. Is Fife due penalty on wages that were not paid to her immediately upon her discharge but were paid to her within 15 days after her discharge?

III. FINDINGS OF FACT

1. Pegasus hired Fife as an hourly assistant to the chief financial officer in February 2010. She began work on February 4, 2010.

2. When Fife joined Pegasus, it was a "start-up" company. The company provided personnel with flexible working hours. However, the company did not provide vacation to employees. In fact, the testimony of the employees (aside from Fife's testimony) showed that no employee received a vacation benefit. Testimony of Trpis and Sarah McCauley.

3. Fife worked without a written employment agreement until November 22, 2010. On that date, Fife and Pegasus entered into a written employment agreement that provided for Fife to take over the position of controller of Pegasus. The terms of that agreement called for Fife to be paid an annual base salary of \$65,000.00. It also provided for her to receive for the first time a vacation benefit in addition to her salary.

4. On June 1, 2012, Fife and Pegasus entered into a second employment agreement. This agreement raised Fife's annual base salary to \$88,500.00 per year and continued to provide her the benefits she had received from her November 22, 2010 written employment agreement.

5. Pegasus discharged Fife from her employment on August 24, 2012. At the time of her discharge, Fife's remaining wages, \$1,766.84, were not paid to her. However, on August 29, 2012, Fife received a check from the employer in the amount of the remaining wages due, \$1,766.84.

IV. DISCUSSION

A. *Fife Has Failed To Demonstrate That She Is Owed Vacation Pay.*

The primary thrust of Fife's claim is her contention that she had an employment agreement with her employer between the date of her hire and November 22, 2010 that called for her to receive a vacation benefit. The employer strenuously disagrees with Fife on this issue, arguing that the employment agreement did not provide Fife a vacation benefit until the first written employment agreement between the parties on November 22, 2010.

Montana law requires that employers pay wages when due, in accordance with the employment agreement, pursuant to Mont. Code Ann. § 39-3-204. Wages includes unpaid vacation pay. *Langager v. Crazy Creek Products*, 1998 MT 44, 287 Mont. 445, 954 P.2d 1169.

An employee seeking unpaid wages has the burden of proving by a preponderance of the evidence that she was not compensated in compliance with her employment agreement. *Berry v. KRTV Comm.* (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112; *see also Marias Health Care Serv. v. Turenne*, 2001 MT 127, ¶¶13-14, 305 Mont. 419, 28 P.3d 494 (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, the claimant must prove that in fact an employment agreement for the compensation sought existed between her and the employer.

The preponderant evidence in this matter fails to demonstrate that a vacation benefit was in fact part of Fife's employment agreement between her hiring date and November 22, 2010. While Fife contended she had a vacation benefit during this time period, the respondent's witnesses testified unequivocally that there was no vacation benefit accorded to any employee of the corporation during this period as the employer felt it was better to just give the employee flexible hours for working. The testimony presented by Fife and by the respondent has equal force, making it impossible to say that the preponderance of the evidence shows that Fife indeed had a vacation benefit. Accordingly, under *Turenne*, Fife has failed to carry her burden of proof and that portion of her wage claim fails.

B. *No Penalty Is Due On The Wages That Were Not Paid Upon Fife's Separation.*

Fife also seeks penalty on the \$1,766.84 in final wages that, while paid to her within four days after her separation, was not paid to her immediately upon separation. It is true that Mont. Code Ann. § 39-3-205(2) provides that when an employee is discharged for cause, the employee must be paid all wages due and owing “immediately unless the employer has a written personnel policy that extends the time for payment to the employee’s next regular payday or within 15 days, whichever occurs first.” Admin. R. Mont. 24.16.7551 states, however, that where wages claimed by the employee are paid before receipt of the initial letter commencing the wage claim and prior to the issuance of the determination, no penalty shall be imposed upon the employer.

Here, there is no dispute that the final wages due were paid to Fife four days after her date of separation and long before the determination in this matter issued. This tribunal, being an administrative tribunal and having only those powers specifically provided by statute or rule, is constrained to apply the plain language of Admin. R. Mont. 24.16.7551. *Auto Parts of Bozeman v. Employment Relations Div., Uninsured Employer’s Fund*, 2001 MT 72 ¶38, 305 Mont. 40, 23 P.3d 193. The rule in Admin. R. Mont. 24.16.7551 is clear and prohibits imposition of any penalty on the \$1,766.84 in wages paid to Fife four days after her separation.

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. Fife has failed to demonstrate by a preponderance of the evidence that she is due additional wages as she has failed to prove by a preponderance of the evidence that her employment agreement called for her to receive a vacation benefit between the date of her hire and November 22, 2010.

3. Fife is not entitled to 10% penalty on the \$1,766.84 in unpaid wages which was provided to her four days after her separation from her employment.

VI. ORDER

Having failed to prove that she is due any additional wages or penalty, Fife's claim is hereby dismissed.

DATED this 2nd day of April, 2013.

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 the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702.