

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1156-2013
OF JOHN A. DROGITIS,)	
)	
Claimant,)	
)	FINAL AGENCY DECISION
vs.)	
)	
BONNIE TUSS d/b/a J&D HOLDINGS,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On February 6, 2013, John A. Drogitis filed a claim with the Department of Labor and Industry contending J and D Holdings owed him \$4,600.00 for two bred heifers and one yearling as a bonus for work performed during 2012 and the beginning of 2013. On February 27, 2013, James W. Thompson, Attorney for J and D Holdings, filed a response to the claim contending Drogitis was not owed any type of bonus for work performed during the period in question.

On March 22, 2013, the Wage and Hour Unit issued a determination finding Drogitis was owed \$1,405.00 for the value of the bred heifer he did not receive from J and D Holdings. The respondent requested a timely redetermination. On June 10, 2013, the Department issued a redetermination affirming the previous determination. The respondent filed a timely appeal to a contested case hearing.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Department's Hearings Bureau on September 12, 2013. On September 19, 2013, the Hearings Bureau issued a Notice of Hearing and Telephone Conference. Following a scheduling conference on October 8, 2013, the matter was set for hearing on November 13, 2013. The parties declined the opportunity for additional time for discovery and pre-hearing preparation.

Hearing Officer Caroline A. Holien conducted a hearing in this matter on November 13, 2013 at the Job Service office in Lewistown, Montana. The claimant was present and appeared without counsel. James W. Thompson, Attorney at Law, represented the respondent. Drogitis, Bonnie Tuss, Owner of J and D Holdings,

J.R. Tuss, Owner of 3 Butte Ranch, and Russell Thomas, Ranch Hand for 3 Butte Ranch, presented sworn testimony. The claimant's wife, Pam Drogitis, appeared but did not testify.

The administrative record compiled at the Wage and Hour Unit (Documents 1 through 115) was admitted into the record.

The parties were given until 4:30 p.m. on Thursday, November 14, 2013, to request an opportunity to submit post-hearing briefs. Neither party contacted the Hearings Bureau. The case was then deemed submitted at that time. Based on the evidence and argument adduced at hearing, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Whether Bonnie Tuss d/b/a J and D Holdings owes wages for work performed, as alleged in the complaint filed by John A. Drogitis, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. J and D Holdings (J and D) is owned and operated by Bonnie Tuss. Tuss's son, J.R. Tuss, manages 3 Butte Ranch, LLC (3 Butte). Bonnie Tuss is the registered agent for both J and D and 3 Butte. Both ranches are part of the Lewis family ranch operations located in Grass Range, Montana. John Drogitis performed work for both J and D and 3 Butte beginning on or about November 11, 2010. Drogitis' last day of work for both employers was December 15, 2012. Drogitis was paid for all work performed for both J and D and 3 Butte.

2. There was no written employment agreement governing the terms and conditions of Drogitis' employment with either J and D or 3 Butte. Drogitis intended to work only a few months for J and D and 3 Butte until he was able to secure employment in Alaska. Drogitis lived with J.R. Tuss during the first few months of his employment.

3. Bonnie Tuss completed payroll for both J and D and 3 Butte. Bonnie Tuss determined from which business account Drogitis would be paid. Drogitis was not required to submit a formal time card but a running record of the number of hours Drogitis worked each day was kept by the employer. Documents 36 through 46.

4. In October 2011, Drogitis began receiving a monthly salary of \$2,500.00 rather than his previous hourly wage of \$12.00 after he expressed an interest in becoming a permanent, full-time employee for J and D and 3 Butte.

5. In January 2012, Drogitis began living in a trailer provided to him by J and D and 3 Butte. Drogitis also received a side of beef from J and D and 3 Butte during this period. There was no formal written agreement governing Drogitis' residence at the trailer that provided for monies to be withheld from Drogitis' paycheck to cover his housing costs. Drogitis was allowed to keep cattle at the employer's ranches in exchange for his performing feeding duties on the weekends.

6. In February 2012, Drogitis received one bred heifer from J and D and one bred heifer from 3 Butte in anticipation that he would work the entire calving season, which typically runs from February through May. The standard practice of both J and D and 3 Butte is to provide employees with one bred heifer at the beginning of calving season as a type of inducement to keep employees working throughout the calving season, which requires long hours and constant monitoring of the cattle. Neither J and D nor 3 Butte guarantees any employee will receive a bred heifer or that the heifer will produce for the employee.

7. On or about December 15, 2012, Drogitis stopped performing work for both J and D or 3 Butte. Drogitis had accepted a job offer from another ranch in the area during this period. Drogitis continued living in the trailer and keeping his cattle at the ranch. Drogitis was not paid for any time worked after December 15, 2012, because both Bonnie Tuss and J.R. Tuss understood Drogitis was no longer an employee of either J and D or 3 Butte.

8. On or about January 13, 2013, J.R. Tuss approached Drogitis while he was completing feeding. J.R. Tuss told Drogitis that he had to vacate the trailer, because J and D was planning on hiring another ranch hand.

9. On or about January 19, 2013, Drogitis met with Bonnie Tuss and demanded he be given one particular bred heifer as a bonus for the work he performed in 2012. Bonnie Tuss told him that particular bred heifer had already been promised to her grandchildren. Drogitis then demanded another particular bred heifer. Bonnie Tuss told Drogitis to pick a number out of a hat to keep it fair. Drogitis got angry and told her to forget it before leaving the shop.

10. On or about January 26, 2013, Drogitis received a check from 3 Butte for \$1,400.00. J.R. Tuss decided to pay Drogitis what he believed to be the cash value of a bred heifer in order to avoid any further conflict with Drogitis. Drogitis accepted and cashed the check.

11. Drogitis stated at the time of hearing that he is not seeking any additional wages for work performed from either J and D or 3 Butte. Drogitis indicated he is only seeking the value of one bred heifer, which he contends is owed to him by J and D. Drogitis denied seeking any additional compensation from 3 Butte.

IV. DISCUSSION¹

Montana law requires that employers pay wages when due, in conformity with the employer's written personnel policies. 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. That determination is left to the agreement between the parties. "Wages" are money the employer owes an employee including bonuses. Mont. Code Ann. § 39-3-201(6); *Delaware v. K-Decorators, Inc.*, 1999 MT 13, 293 Mont. 97, 104-105, 973 P.2d 818.

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. 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. 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 (holding that lower court properly concluded 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).

Once an employee has shown as a matter of just and reasonable inference that he or she 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 approximation.' * * *." *Garsjo*, 172 Mont. at 189, 562 P.2d at 477, quoting *Purcell, supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

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

Drogitis must show by a preponderance of the evidence that he is actually owed the additional compensation claimed 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, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that lower court properly concluded 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, Drogitis must show that in fact an actual or implied employment agreement for the compensation sought existed between him and J and D.

Drogitis argued J and D owes him one bred heifer based upon his having performed work for the ranch throughout 2012. Drogitis testified he had received one bred heifer from J and D and one bred heifer from 3 Butte in February 2012 for work performed in 2011. Drogitis testified J.R. Tuss promised him that he would receive two bred heifers for every full year he worked.

Bonnie Tuss argued J and D did not owe Drogitis one bred heifer for three reasons. First, Bonnie Tuss contended Drogitis did not actually work for J and D through the end of December 2012 but had actually stopped working on or about December 15, 2012. The respondent submitted payroll records which show Drogitis was only paid a net amount of \$1,009.87 on December 30, 2012, which amounts to one-half of his net monthly salary of \$2,090.75. Second, Bonnie Tuss argued J and D gives employees one bred heifer at the beginning of the calving season on the premise that the employee will work throughout the calving season. Both Bonnie Tuss and J.R. Tuss testified Drogitis received one bred heifer from each ranch in February 2012 on that condition. Both Bonnie Tuss and J.R. Tuss denied Drogitis received those two bred heifers for work he performed in 2011. Third, Bonnie Tuss argued no ranch would offer an employee a bred heifer as a bonus if that employee was not expected to work throughout the calving season.

J.R. Tuss denied promising Drogitis that he would receive two bred heifers upon working an entire year. Three Butte Ranch Hand Russell Thomas confirmed he only received a bred heifer as a bonus at the beginning of a calving season. Thomas denied that any of the bred heifers he had previously received as bonuses were ever given to him on the basis of his having worked one full year of work for 3 Butte.

The evidence presented by Drogitis does not persuade the Hearing Officer that there was any agreement in place, actual or implied, that he would receive a bred heifer from both 3 Butte and J and D upon working an entire year. Given the timing of his receipt of the bred heifer in February 2012, it seems more likely Drogitis would only receive a bred heifer from J and D at the beginning of a calving season on the promise that he would work the entire calving season. If Drogitis became eligible to

receive the bred heifer only upon the completing of one full year of work, it would have made greater sense for him to have been given the heifer at or near the end of the year rather than at the beginning of calving season. Drogitis has not shown there was an agreement between the parties that he would receive a bred heifer from J and D for work performed in 2012. Therefore, Drogitis' claim must be dismissed.

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. Drogitis has failed to demonstrate by a preponderance of the evidence that he had any agreement with J and D for compensation that would include a bonus of one bred heifer. Drogitis' claim must, therefore, be dismissed.

VI. ORDER

Based upon the foregoing, the claim of John Drogitis for additional wages is dismissed.

DATED this 11th day of December, 2013.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
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.