STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE WAGE CLAIM OF JAMES D. HAWKINS, Claimant, vs. MERGENTHALER TRANSFER & STORAGE CO., a Montana corporation, Respondent.	)	Case No. 1677-2018 **FINAL AGENCY DECISION**

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I. INTRODUCTION

On April 5, 2018, James D. Hawkins filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit) alleging Mergenthaler Transfer and Storage Co., a Montana corporation (MTS), owed him a total of $13,550.00 in unpaid wages based upon an alleged promise that he would receive a bonus of 5% of $271,000.00 savings experienced by MTS's Claims Department.

On July 30, 2018, the Wage and Hour Unit issued a determination dismissing Hawkins' claim on the grounds that Hawkins had failed to meet his burden in showing that he was owed a bonus.

Following mediation efforts, the Wage & Hour Unit transferred the case to the Office of Administrative Hearings (OAH) on December 5, 2018. On December 10, 2018, OAH issued a Notice of Hearing and Telephone Conference.

On February 19, 2019, the Hearing Officer conducted an in-person hearing in this matter in Helena, Montana. Hawkins, Arthur Villa, MTS's Chief Administrative Officer (CAO), and Aaron McPherson, MTS's Director of Household Goods, testified under oath. Documents 4, 7 through 9, 13 through 16, 18 through 20, 26 through 29, 59, 60, 62, 63, 65 through 67, and 104 were admitted into the record.

At hearing, an issue was raised as to the admissibility of the testimony of Cindy Raymond. Raymond, who was dating Hawkins at the time they both worked

for MTS, proposed to offer testimony regarding a conversation she overheard in the offices of MTS between Villa and his wife, Heidi Leithead-Villa, MTS's Corporate Counsel. The parties were asked to submit briefing on the admissibility of Raymond's testimony. On March 12, 2019, the Hearing Officer issued an order excluding Raymond's testimony on the grounds that MTS had not waived attorney-client privilege and that any testimony regarding what Leithead-Villa allegedly said would constitute inadmissible hearsay. *See Order Granting Respondent's Motion to Exclude the Testimony of Cindy Raymond* (03/12/19).

The parties were invited to submit post-hearing briefing. Upon the filing of the final brief on April 29, 2019, the record was closed and the case was deemed submitted. Based upon 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

The issue in this case is whether Mergenthaler Transfer and Storage Co., a Montana corporation, owes wages for work performed, as alleged in the complaint filed by James D. Hawkins, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Mergenthaler Transfer and Storage Co., a Montana corporation (MTS), employed James D. Hawkins in its Claims Department beginning on October 13, 2016. Hawkins' last day of work was April 23, 2018.

2. Aaron McPherson, Director of Household Goods, was Hawkins' supervisor.

3. MTS previously used a third party to process claims-related damages incurred during moving. MTS moved the claims processing in-house at or near the time of Hawkins' hire to increase the level of customer service to its clients.

4. Hawkins performed his job duties in a satisfactory manner.

5. On March 18, 2017, McPherson conducted Hawkins' performance review. McPherson promoted Hawkins to Claims Supervisor and gave him a raise of $3.00 per hour due to Hawkins' performance level.

6. During the performance review, McPherson discussed with Hawkins the potential of a bonus. McPherson and Hawkins "kicked around" ideas about what a

bonus could look like and discussed how it could be structured. McPherson considered the conversation to be one where they were "spitballing ideas."

7. Hawkins suggested to McPherson that the bonus should be based on the percentage of savings made in claims. Hawkins offered 5% as a figure for the proposed bonus. Hawkins deferred to McPherson's decision on the bonus structure because he wished to focus on customer service rather than percentages. Hawkins and McPherson shook hands at the end of the conversation, and Hawkins assumed he would be receiving a bonus of some type based upon this conversation.

8. The only bonus program in place at MTS is in its Freight Department. The bonus program has clear written guidelines as to who is eligible for the bonus and how the bonus is calculated. MTS does not have a bonus program in place for its Claims Department.

9. McPherson ultimately decided not to establish a bonus program for the Claims Department. McPherson found it too difficult to determine how the bonus should be calculated given the intangible nature of customer service.

10. The Claims Department utilizes the MoversSuite software program. MoversSuite tracks the amount a customer claims for goods damaged during transit and the amount the claim is ultimately settled for. Some claims are not borne by MTS because the claim is charged back to a third party. The difference between the claimed amount and the amount the claim is actually settled for is not an accurate measurement of individual employee performance.

11. On December 21, 2017, Hawkins approached McPherson about the proposed bonus after receiving a $50.00 Christmas bonus. Hawkins asked if that was the bonus they had discussed earlier that year. McPherson indicated the $50.00 bonus was a bonus given to all employees.

12. Hawkins sent McPherson an email about the proposed bonus again approximately two months later. McPherson did not respond to Hawkins' email.

13. On March 22, 2018, Hawkins sent another email to McPherson questioning if he would be receiving the bonus they had discussed the previous year. McPherson responded to Hawkins' email several days later with an email explaining that there would be no bonuses being paid out for 2017 based upon the division not having performed at an acceptable level. Hawkins responded by pointing out the proposed bonus was to be based upon his performance and not the performance of the division. Hawkins copied Art Villa, CAO, in his email.

14. Villa ultimately responded to Hawkins' concerns via a letter in which he advised Hawkins that he had determined that McPherson had not made a specific promise of a bonus to him during their March 2017 conversation.

15. Hawkins makes no claim that he is owed additional wages for work performed or that he is seeking any compensation other than the bonus proposed in March 2017.

IV. DISCUSSION[1]

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 if the payment of such bonuses are required by the employment agreement. Mont. Code Ann. § 39-3-201(6). 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; s*ee 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).

Where a bonus is only payable in the sole discretion of the employer, it is in the nature of a gratuity, not recoverable in a wage claim under the Montana Wage and Hour Act. *Talon Plumbing and Heating v. Bears,* ¶31, 2008 MT 376, 346 Mont. 499, 198 P.3d 213. To be recoverable under wage payment laws, a bonus must have the character of compensation for work performed. *See, e.g., Pyle v. National Wine and Spirits Corp.*, 637 N.E. 2d 1298, 1300 (Ind. App, 1994) (a bonus

[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.

can be considered a wage under the wage and hour laws if "it is compensation for time worked and is not linked to a contingency such as the financial success of the company"); *State ex rel. Nilsen v. the Oregon State Motor Association* (1967), 248 Ore. 133, 432 P.2d 512. Moreover, the conditions for earning the bonus must be fulfilled or such bonus will not be recoverable under the wage and hour act. *See, e.g., Berry v. KRTV* (1993), 262 Mont. 415, 426-27, 865 P.2d 1105, 1101-02 (finding that while the employment agreement required the employer to pay the claimant a bonus if the employer's television ratings were higher than those of its competitors, the claimant failed to prove that the employer's ratings were in fact higher than those of its competitors and therefore the bonus was not due to the claimant).

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.

Hawkins 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). To discharge this burden, Hawkins must show that, in fact, an actual or implied agreement for the compensation sought existed between him and MTS.

The issue in this case is not whether the proposed bonus must be included in determining Hawkins' regular rate of pay. The issue is whether any such agreement existed that would require MTS to pay Hawkins the bonus he argues he is owed. It is helpful to look at the Montana Wage and Hour rules, while not directly applicable in this case, for consideration as to the types of bonuses considered to be wages under the Montana Wage and Hour Act.

Promised bonuses are not excluded from determining the regular rate of pay. As the rules indicate, "Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay." Admin. R. Mont. 24.16.2517(4)(c).

Indeed, under the Montana rules, in order to be considered as a discretionary bonus, and therefore not includable in determining the regular rate of pay, the employer must retain discretion "both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid." Admin. R. Mont. 24.16.2517(4)(b).

Hawkins conceded at hearing that McPherson never promised him a bonus during their conversation on March 18, 2017 when McPherson first approached him about how he thought a bonus should be structured. Hawkins testified he understood or assumed an agreement had been reached when he suggested the bonus be 5% of the difference between a claim amount and the ultimate settlement amount. Hawkins argued McPherson shook his hand before leaving his office and said something to the effect, "Then that's what we'll do." Their discussion was never put in writing or otherwise put into a formal, written agreement.

McPherson denied entering into any agreement that day or having any intention of finalizing the structure of a bonus for Hawkins. McPherson testified he approached Hawkins about how he thought a bonus could possibly be structured for the Claims Department. McPherson testified he considered what he thought were suggestions made by Hawkins and ultimately determined it would be too complicated to calculate a bonus given the intangible nature of customer service, which was his primary concern for the Claims Department.

The evidence is clear that there was no real meeting of the minds on March 18, 2017 that would form the necessary basis for an enforceable agreement. Hawkins points to the handshake and McPherson's departing comments as evidence of an agreement. However, Hawkins conceded at hearing McPherson made no promises and he was unclear at the end of the meeting exactly how the proposed bonus would be calculated or when it would be paid. It makes little sense that a bonus would be promised when the specifics were nebulous at best at the end of the conversation. Further, given McPherson's testimony regarding the difficulty of factoring in customer service in calculating a bonus, it seems unlikely that he would promise or enter into an agreement regarding a bonus at that point.

Even assuming that an agreement can be found in this matter, the evidence shows MTS retained discretion "both as to the fact of payment and as to the amount . . . ." See Admin. R. Mont. 24.16.2517(4)(b). There was no evidence offered showing that there was any specific mention as to when Hawkins could expect payment of the bonus; what amount that bonus would be; and how the bonus would be calculated. The fact the bonus was completely within the employer's conduct negates Hawkins' argument that he was promised a bonus and had a reasonable expectation that it would be paid by MTS.

Hawkins has not shown there was an agreement between the parties that he would receive a bonus based upon claim savings. Therefore, Hawkins has failed to show by a preponderance of the evidence that he is owed the additional compensation claimed in this case. Hawkins' 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. James D. Hawkins has failed to demonstrate by a preponderance of the evidence that he had any agreement with Mergenthaler Transfer and Storage Co., a Montana corporation, for compensation that would include a bonus payment. Hawkins' claim is, therefore, dismissed.

VI. ORDER

Based upon the foregoing, the claim of James D. Hawkins for additional wages is DISMISSED.

DATED this 7th day of May, 2019.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

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. Please send a copy of your filing with the district court to:

Department of Labor & Industry
Wage & Hour Unit
P.O. Box 201503
Helena, MT 59620-1503