

IN THE YMCA MODEL SUPREME COURT OF THE STATE OF MONTANA

No. 2010-002

JOEY MOWER,

Petitioner and Appellant

v.

RICHARD "DICK" DOLLERMAN,

Respondent and Appellee

BRIEF OF RESPONDENT

Responding from the District Court of
Cascade County in the State of Montana

ORAL ARGUMENT REQUESTED

APPEARANCES:

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STATEMENT OF THE ISSUES

1. Was Joey Mower entitled to at least minimum wage plus overtime compensation, or was his employment exempt from minimum wage and overtime laws?
 - a. Did the District Court correctly conclude that Joey Mower was an agricultural worker “primarily engaged in” cultivating the soil or producing a horticultural commodity?
 - b. Did the District Court correctly conclude that Joey Mower was performing only menial labor?
2. Did the district court correctly conclude that no employment contract or agreement existed between Joey Mower and Dick Dollerman wherein Dollerman was to pay Joey \$8.00 per hour?

STATEMENT OF THE FACTS

The summer before his freshman year of college Joey Mower began working for Dick Dollerman. Dollerman originally asked Joey to do work around his house including mowing the lawn, trimming the trees and shrubs, spraying the weeds, working in the garden, and anything else Mr. Dollerman needed. When Joey asked about pay, Dollerman responded that he would pay Joey once a month. When Joey asked him how much per hour, Dollerman replied he would have to work from 7:00 a.m.- 4:00 p.m. with a half an hour lunch break. Joey asked again about hourly pay and Dollerman said, “Oh, whatever you kids are worth these days.” Joey suggested eight dollars, and Dollerman shook his hand, without ever verbally agreeing to the deal. He just told Joey to be on time the next day.

The next day Joey arrived 7:00 a.m. at Dollerman's residence, and no one was awake. When he knocked on the door, Dollerman told him to feed the horses. Joey gave each horse a flake of hay and then went to the shed, but it was locked. To pass the time Joey took pictures of birds on the property. At 8:30 a.m. Dollerman found Joey and told him he did not feed the horses enough and that Joey had to start mowing the lawn. He also added that Joey would be docked an hour's pay for sitting around. Joey worked through lunch until 6:00 p.m.

Joey continued to work each day, and he also began tracking his hours. He also had to start cleaning the barn, shoveling manure, and spreading manure. A little over two weeks after Joey turned in his payroll, Dollerman paid Joey \$635. Joey said it did not add up correctly, and Dollerman said he had taken out the taxes. Joey asked about overtime, and Dollerman said he had not seen Joey working overtime. Joey then took the money. Joey checked the amount later and realized he had not even been paid for a forty hour work week. The next time Joey was paid he got \$1200. Joey again pressed for overtime hours, but Dollerman said, "Take it or leave it."

Dollerman later won the "Parade of Homes" best landscaping award. He said that working on his lawn had been a "labor of love." A few weeks later Joey had to leave for school, and on the first of October he was received \$635 for his final months pay from Dollerman. Joey filed a Wage and Hour complaint with the Department of Labor. Dollerman claimed Joey sat around a lot and did mostly farm labor, which meant Joey was only owed \$635 a month without overtime. He also said he never received any of the time records that Joey had kept. Joey produced the time records and brought up the oral agreement. Joey also said the \$1200 was more than he should

have gotten if he was just a farm worker. Dollerman said it was a bonus. The investigator sided with Joey's arguments, but Dollerman made an appeal. The hearing examiner again supported Joey and charged Dollerman with the overtime fees, full back pay and a 110% penalty.

However, The District Court of Judicial Review "reversed the hearing examiner." The Judge decided that Joey was an agricultural worker, and that the work Joey did was either agricultural labor or menial chores. He also said that Joey accepted his low wage when he accepted his first check. He said the time records did not matter, and that there was no a contract between Dollerman and Joey. This appeal followed.

ARGUMENT

I. THE DISTRICT COURT RULED CORRECTLY IN THAT JOEY MOWER WAS AN AGRICULTURAL WORKER PRIMARILY ENAGED IN CULTIVATING THE SOIL OR PRODUCING A HORTICULTURAL COMMODITY AND THAT JOEY MOWER WAS PERFORMING ONLY MENIAL LABOR.

A. Joey was an agricultural worker

1. Joey was producing a horticultural commodity

According to 29 U.S.C. section 203(f) the definition of "agriculuture", as in the meaning of the Fair Labor and Standards Act, "includes farming in all its branches and among other things includes...the production, cultivation, growing and harvesting of any... horticultural commodities." And according to *The American Heritage Dictionary* horticulture is the science or art of cultivating fruits, vegetables,

flowers and plants. One of Joey's main responsibilities was to work in Mrs. Dollerman's garden cultivating flowers. Joey had to move topsoil, plant more flowers, construct flower planters, expand the garden, remove weeds to protect the flowers, and ensure that it was always watered. Clearly Joey was actively engaged in producing a horticultural commodity. Because Joey was working primarily in agriculture, Dollerman did not have to pay him overtime, as according to section 213(b)(12), an agricultural exemption, of the Fair Labor Standards Act, 29 U.S.C. Section 201 et seq.

2. Joey tended to the livestock

According to the record, another of Joey's main duties was to tend to livestock, which is also an agricultural duty. Joey tended to the Dollerman's horses, which are considered livestock. He shoveled manure, cleaned the barn, fed the horses, and spread manure on their pasture. Because working with horses is an agricultural job, Dollerman again did not have to pay Joey overtime, as according to section 213(b)(12) of the Fair Labor Standards Act, 29 U.S.C. Section 201 et seq.

B. The rest of Joey's job was either related to the agricultural work or menial chores

The rest of Joey's work included mowing the lawn, pruning the trees, spraying the lawn, and removing a tree. Obviously each one of these is not something that would have to be done each day, unlike tending to the garden or the horses. This means that Joey's duties were primarily agricultural. Furthermore, the duties that were not were just menial chores, as the district judge stated. According to *The American Heritage Dictionary* menial means of, pertaining to, or appropriate for a servant. Mowing the

lawn, spraying the lawn, and removing a tree are not important tasks, so they fit the definition of menial. Spraying the lawn for weeds could even be considered agricultural, because removing the weeds will prevent them from expanding into the garden. Because Joey's other duties were menial chores, Dollerman did not have to pay him minimum wage or overtime. And because his primary duties were agricultural, Dollerman did not owe him minimum wage or overtime. Thus, Dollerman only had to pay him \$635 per month.

II. NO EMPLOYEE CONTRACT OR AGREEMENT EXISTED BETWEEN JOEY MOWER AND RICHARD DOLLARMAN WHEREIN DOLLARMAN WAS TO PAY MOEWEVER \$8.00 AN HOUR

A. There was no concrete oral agreement

When Joey Mower and Richard Dollarman were forming an agreement, Dollarman's response to Joey's inquiry about his pay was "Oh, whatever, eight bucks an hour. I'll pay you something, don't worry about it." According to Restatement (Second) of Contracts Section 33(1) (1978) "even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain." Clearly, the terms of Mower and Dollarman's agreement were not certain; Dollarman stated "whatever . . . I'll pay you something, don't worry about." Dollarman avoided the point and stressed that he'd pay Joey "whatever," and Joey offered no objection. Thus, because Dollarman was incredibly vague about the terms of the agreement that were shaken upon and no clear

agreement was formed, no contract or agreement existed wherein Joey was to receive \$8.00 an hour, as affirmed by the district court.

B. Joey knowingly accepted a lesser contract

When Joey was paid less than eight dollars an hour, he still cashed the checks and accepted the payment. According to MCA Section 28-2-503 (2) “a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known or ought to be known to the person accepting.” Joey accepted the check and therefore consented “to all the obligations arising from it,” which were his duties on the farm. Also, Joey knew that the payment was less than he wanted and he still accepted it, so the facts were “known to the person accepting.” Thus, Joey consented to an agricultural wage and no contract for \$8.00 an hour existed.

CONCLUSION

Because Joey was primarily an agricultural worker performing some menial chores and because Joey accepted payment for his work, the decision of the District Court should be upheld.

Respectfully submitted this 15th day of March, 2010.

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