

IN THE YMCA SUPREME COURT OF THE STATE OF MONTANA

No.2010-002

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JOEY MOWER

Plaintiff and Appellant,

v.

RICHARD "DICK" DOLLARMAN

Defendant and Respondent,

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BRIEF OF APPELLANT

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On appeal from the District Court

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ORAL ARGUMENT REQUESTED

APPEARANCES:

Laura M. Bueter  
PO Box 88  
Yellowstone National Park, WY 82190

Paul Krish  
PO Box 606  
Yellowstone National Park, WY 82190

ATTORNEYS FOR PLAINTIFF AND APPELLANT

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## **TABLE OF AUTHORITIES**

### **Statutes**

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### **Case Law**

*Garsjo v. Department of Labor and Industry*, 172 Mont. 182, 562 P.2d 473 (1977)  
*Holbeck v. Stevi-West, Inc.*, 240 Mont. 121, 783 P.2d 391 (1989)  
*Adkins v. Mid-America Growers, Inc.* 167 F.3d 355 (7 Cir. 1998)  
*Beltinck v. Matasich*, Department of Labor and Industry Hearings Bureau Case no. 1076-2007  
*Rogers v. Kimerly, d/b/a Bad Bubba's BBQ and Roadhouse Saloon*, Department of Labor and Industry Hearings Bureau Case no. 2104-2001  
*McNulty v. Bweley Corp.*, 182 Mont. 260 (1979)  
*Bishop v. Hendrickson* 215 Mont. 158 (1985)

## **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? The following two sub-issues are legally relevant:
  - a) Was Joey Mower an agricultural worker “primarily engaged in” cultivating the soil or in producing a horticultural commodity?
  - b) Was Joey Mower performing only menial labor?
2. Did an employment contract or agreement exist between Joey Mower and Dick Dollarman wherein Dollarman was to pay Joey \$8.00 per hour?

### **Statement of the Facts**

Unfortunate 18-year old Joey Mower had a job with Lookgreat Landscaping. They trained him to do yard work like trimming trees and spraying chemicals. Lookgreat Landscaping was forced to lay off Mower, but they gave him a reference and Dick Dollarman's number. Dollarman hired Mower. Mower was supposed to mow the lawn, trim the trees, spray the weeds, help with the gardens, and feed the horses. They talked about pay and Dollarman tried to avoid mentioning a specific amount, but finally gave in and agreed to eight dollars an hour. They shook on the deal.

When Mower started work the property was a mess. He worked long, hard hours making the property presentable. He trimmed, weeded, sprayed, and pruned the property. Additionally he was required to use a chainsaw to remove a tree (a job he could not have accomplished without the help of his former employers) and build several items for the garden. In an effort that was far above and beyond his original duties he arranged the flowerbeds in an elaborate decorative pattern. He kept logs of all his hours and submitted them to his employer. When Dollarman gave Mower a check for the minimum wage of a farm worker, Mower objected. Dollarman did not say the real reason for the lower wage and instead blamed the lower paycheck on taxes, although Mower had not filled out any forms.

The next month Mower saw an article in the "lifestyles" section which showed that Dollarman's estate had won the "Parade of Homes" Best Landscaping Award. In the article Dollarman lied again, saying he had done all the work himself.

Mower received another \$635 check at the end of the summer. Mower filed a complaint with the Department of Labor.

**I. JOEY MOWER WAS ENTITLED TO AT LEAST MINIMUM WAGE PLUS OVERTIME COMPENSATION. HIS EMPLOYMENT WAS NOT EXEMPT FROM MINIMUM WAGE AND OVERTIME LAWS.**

**A. Joey Mower is not an agricultural worker.**

a. Dollarman's home is not a farm or a ranch. As defined by MCA 39-3-402, a property is a farm or ranch if it is "an endeavor primarily engaged in cultivating the soil or in connection with raising or harvesting an agricultural or horticultural commodity..." Dollarman's property is primarily a home and is therefore not a farm or ranch. Furthermore, the definition of agricultural work, as defined by *Adkins v. Mid-America Growers, Inc.* 167 F.3d355 (7 Cir. 1998), is when a crop is grown, cultivated, or sold. The grass Mower cuts is not sold, the branches he trims are not sold, and the horses he cares for are not used for commercial purposes. Mower is therefore not an agricultural worker and subject to minimum wage laws.

b. Due to multiple responsibilities, Mower's job was not agricultural. MCA 39-3-405 denies overtime work for farm workers. MCA 39-3-402 defines farm workers as a person employed to do a service performed on a farm or ranch. Since Dollarman's house is not a farm or ranch, Mower is not an agricultural worker. Mower's agricultural work only consisted of feeding the horses. His non-agricultural work consisted of mowing all the lawns, trimming the trees and shrubs, spraying the weeds, trimming around the planters, and helping with the gardens and flowerbeds.

According to *Adkins v. Mid-America Growers* “a worker who does any nonexempt work in a week is entitled to the statutory time and a half for all his overtime that week...” Mower spent about a half hour taking care of the horses every day. He is therefore entitled to at least minimum wage plus overtime compensation for the majority of the time he spent working. Since Mower was not exclusively a farm worker as defined by the above codes, he is due both minimum wage and overtime compensation.

**A. Joey Mower was performing skilled labor.**

a. Mower's duties exceeded the definition of menial labor. MCA 39-3-406 excludes "persons employed in private homes whose duties consist of menial chores, such as babysitting, mowing lawns, and cleaning sidewalks" from minimum wage and overtime compensation. However, Mower was doing much more than simply mowing the lawn. He was landscaping. Mower's landscaping training lasted for two months. He learned skills like trimming trees, safely spraying chemicals, and driving tractors. Most importantly, Dewey required that he build and arrange flower beds and planters. Building the beds took skill and training that transcends the definition of menial. Furthermore, arranging them artfully is also beyond the definition of menial labor.

b. People usually hire professionals to do the kind of work Dollarman asked Mower to do. It takes special training to safely trim trees, use chemicals, operate chainsaws, help with gardens, and build flower planters. Homeowners would generally have to hire professionals to do the work. These professionals are paid at least minimum wage because their job no longer falls under the definition of menial

labor as defined by MCA 39-3-406. Therefore Mower's work is more than menial labor and Joey should be paid minimum wage with overtime compensation.

**C. Joey Mower is entitled to at least minimum wage plus overtime compensation.**

a. Case law supports Mower. *Holbeck v. Stevi-West, Inc.*, 240 Mont. 121, 783 P.2d 391 (1989) was ruling on the definition of an executive employee, not the definition of an agricultural worker. *Garsjo v. Department of Labor and Industry*, 172 Mont. 182, 562 P.2d 473 (1977) is also ruling on the definition of and executive employee, as well as a live-in agreement. Neither of these issues arise in today's case.

b. Dollerman is unable to refute Mower's evidence of work performed.

According to *Beltnick v. Matosich*, Department of Labor and Industry Hearings Bureau Case no. 1076-2007 "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 to negate the reasonableness of the inference..." Because Dollerman is unable to prove the number of hours worked, we have to use Mower's records. We also have to use Mower's records for the amount of work done on the property.

**II. THERE WAS A CONTRACT BETWEEN JOEY MOWER AND DICK DOLLARMAN WHEREIN DOLLARMAN WAS TO PAY MOWER \$8.00 PER HOUR.**

**A. An express contract was established between Dick Dollarman and Joey Mower and it must be honored.**

The fact pattern states "...Mower pressed Dollarman for a specific hourly wage, and Dollarman replied he would pay \$8.00 an hour. Mower agreed with this amount

and shook hands with Dollarman, who told Mower to arrive the next day at 7 a.m. . . .” MCA § 28-2-103 states "An express contract is one in which the terms are stated in words," therefore both parties in this case established a contract for \$8.00 an hour. Mower's first check of \$635 was paid six weeks after he began working. Mower realized that this was not enough for all the hours he had worked, and questioned Dollarman. He replied, “I took out taxes, stupid, of course it’s less than eight bucks and hour.” In this statement, made 6 weeks after the express contract was formed, Dollarman *affirmed* the wage of \$8.00 an hour. Therefore, he very clearly understood the expectations of the earlier contract, even if he did not abide by them.

In *Keith v. Kottas* (1946), 119 Mont. 98, 101, 172 p.2d 306, the Court stated: "...No agreement can be implied where there is an express one existing." Under Keith, if an express contract has been entered into by both parties, the District Court cannot alter the terms of that express agreement. Since an express contract clearly existed between Mower and Dollarman, Mower should have received \$8.00 an hour.

**B. Dollarman did not abide by the expressed contract and deceived Mower as to when he would get full satisfaction to their agreement.**

Dick Dollarman stated that the full \$8.00 an hour was not paid for tax reasons, even though Mower had never filled out a W-4.

Mower checked his old pay stubs from his previous job in order to find out a rough idea of what taxes he owed, and discovered that Dollarman hadn’t even paid him for 40 hours a week. The next month, Mower turned his hours in early along with a W-4 he had printed off the IRS website. Dollarman did not reject the

W-4 or the hours that Mower presented. Three weeks later Dollarman gave Mower a check for \$1200, leading Mower to believe that because he filled out a W-4, Dollarman could no longer take advantage of him and \$1200 was the correct wage amount (not including overtime). Dollarman only later claimed that the \$1200 was a “bonus”; at the time he said only “Take it or leave it”. MCA § 28-2-301 states that “consent must be free, mutual, and communicated”; Mower never gave consent to any changes in the contract.

**C. The agreement between Dollerman and Mower was never extinguished.**

MCA § 28-2-503 states “A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all obligations arising from it, as long as the facts are known or ought to be known to the person accepting.” Since Mower was deceived by Dollarman, Mower never truly gave consent to any changes in the contract. All changes must be made known to participants of the contract. Dollarman owes Mower all back wages because Mower’s decision to cash the checks did not imply consent.

**Conclusion**

In light of the preceding facts, the decision of the District Court should be reversed.

Respectfully submitted this 24<sup>th</sup> day of March 2010

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Paul Krish  
Attorney at Law  
Yellowstone National Park

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Laura Bueter  
Attorney at Law  
Yellowstone National Park