

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

IN THE MATTER OF THE WAGE CLAIM ) Case No. 1258-2014  
OF PAMELA J. POLEJEWSKI, )  
                                       )  
                                       )  
Claimant, )  
                                       )  
                                       )  
vs. )  
                                       )  
                                       )      **FINAL AGENCY DECISION**  
KINDRED SYSTEMS, INC., a Delaware )  
corporation registered with the Montana )  
Secretary of State, d/b/a PARK PLACE )  
HEALTH CARE CENTER, )  
                                       )  
                                       )  
Respondent. )

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## I. INTRODUCTION

On January 28, 2014, Pamela J. Polejewski filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry alleging the respondent, Kindred Nursing Centers West, LLC, d/b/a Kindred Transitional Care and Rehabilitation - Park Place (Park Place) owed her \$29,560.00 in wages for unpaid overtime and unpaid breaks during the period beginning September 1, 2013 through November 7, 2013. Park Place responded after an extension of time was granted and denied owing Polejewski any additional wages for work performed during that period.

On May 9, 2014, the Wage and Hour Unit dismissed the claim finding Park Place had submitted records showing Polejewski had been “paid all wages for hours reported through [Park Place’s] payroll reporting process.” Polejewski timely appealed the dismissal.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings (Hearings ) on July 8, 2014. Following a scheduling conference on July 29, 2014, the matter was set for hearing before Hearing Officer Leanora O. Coles on October 30, 2014 in Great Falls, Montana.

On October 7, 2014, the case was transferred to Hearing Officer Caroline A. Holien.

Hearing Officer Holien conducted a hearing in this matter on October 30, 2013. Pamela J. Polejewski; Loretta Giffords, Charge Nurse and previous Director of Nursing; Donna Shandley, Unit Manager; Tiffany Nitz, current Director of Nursing; Jill White, Staff Development Coordinator; and Sally McQuire, Payroll Benefits Coordinator, appeared personally and presented sworn testimony. Dwayne Fairbanks and his wife, Bernadine Fairbanks, and Warren Harding, all of whom were former patients of Polejewski, appeared telephonically and presented sworn testimony. Attorney Gregory Black represented Park Place.

The parties stipulated to the admission of Documents 6 through 8; 70 through 72; 79; 80; 91; 97 through 99; and 116 through 119, which were included in the administrative record compiled at the Wage and Hour Unit. The parties also stipulated to respondent's Exhibits 82A and 500 through 518.

The respondent made a Motion for Judgment as a Matter of Law at the close of the claimant's case and renewed its motion prior to the end of the hearing. The respondent's motion was taken under advisement. The respondent's motion will be addressed below.

The parties requested the opportunity for post-hearing briefing. Upon the filing of the final brief on December 1, 2014, 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**

Whether Kindred Nursing Centers West, LLC, d/b/a Kindred Transitional Care and Rehabilitation - Park Place (Park Place) owes wages for work performed, as alleged in the complaint filed by Pamela J. Polejewski and owes penalties or liquidated damages, as provided by law.

## **III. FINDINGS OF FACT**

1. Kindred Nursing Centers West, LLC, d/b/a Kindred Transitional Care and Rehabilitation - Park Place (Park Place) employed Pamela J. Polejewski as a Registered Nurse (RN) beginning March 26, 2013. Polejewski was typically

scheduled to work 2:00 p.m. to 10:30 p.m. or 2:00 p.m. to 2:00 a.m. Polejewski's last day worked was November 7, 2013.

2. Park Place considered Polejewski a non-exempt employee under the Fair Labor Standards Act (FLSA). Park Place's employee handbook specifically states that all non-exempt employees must be paid for all hours worked, including overtime. Exhibit 503, PP010. There has been no allegation that Park Place improperly treated Polejewski as a non-exempt employee.

3. Park Place has detailed time keeping policies and procedures. Employees are required to punch in or out at the beginning and end of their shifts and at the beginning and end of their 30-minute meal break if they work a shift longer than six hours. Employees are required to use a centrally located time clock that requires them to enter their employee identification number and scan their fingerprint.

4. Park Place's Timekeeping for Non-Exempt Employees policy states, "You should not perform work prior to the beginning of, or after the end of, your shift." The policy further states:

"This policy prohibits 'off-the-clock' work under all circumstances. You must record all hours that you work, including any time worked before or after the completion of your shift, while at home, while on call, during an interrupted meal break or for a missed meal break whether or not the time has been approved, using the Timeclock Feedback form. If you perform any work during your 30-minute meal break, then you will be paid for the entire meal break. [Emphasis in the original]

The policy also states:

"Your supervisor must approve overtime work in advance. While you will be paid for all hours worked, including overtime, whether or not the time was approved in advance, the failure to obtain appropriate approval may result in discipline, up to and including separation from employment."

Exhibit 501.

5. Employees who forget to punch in or out or experience difficulties using the time clock are required to complete a Time Clock Feedback Form noting the date and time of the issue and the nature of the time clock issue. The Time Clock Feedback

Form is then sent to the employee's supervisor or to another member of management for approval. These forms are also used if an employee is required to work through a meal break due to patient needs or other issues. Employees are generally required to sign the Time Clock Feedback Form to certify they are aware of the issue and it has been corrected appropriately.

6. On March 26, 2013, Polejewski completed Park Place's orientation. Exhibit 500. Jill White, Staff Development Coordinator, reviewed Park Place's policies and procedures with Polejewski, as she does with all new employees. White reviewed Park Place's Timekeeping For Non-Exempt Employees Policy with Polejewski. Exhibit 501. Polejewski was also provided a copy of the employee manual, which included the employer's timekeeping policies. Exhibit 502.

7. Sally McQuire, Payroll Benefits Coordinator, is responsible for collecting timekeeping and payroll data at the facility and submitting that information to the corporate office for payroll to be completed. McQuire must correct all missed time clock punches before she can submit the data to the corporate office. McQuire reviews the Time Clock Feedback Forms on a daily basis and ensures that the employees and their supervisors complete the forms in a timely and accurate manner. McQuire also publishes a schedule of all time clock punches before payroll is submitted to the corporate office that is made available to all employees. The schedule is published twice during every payroll period. Employees are encouraged to review the schedule and to report any inaccuracies to McQuire.

8. Between March 26, 2013 and November 1, 2013, McQuire processed more than 75 Time Clock Feedback Forms for punches missed; meal breaks worked through; or other time keeping errors made by Polejewski. Polejewksi signed the majority of those forms. Other forms were prepared and signed by members of management to correct Polejewski's time keeping errors. Exhibits 506 through 514.

9. On September 17, 2013, Director of Nursing Tiffany Nitz presented Polejewski with a written warning and Performance Improvement Plan (PIP). Documents 79 through 80. The PIP noted Polejewski had been late for eight of her last 27 shifts and she had been punching out well beyond the scheduled end of her shift. The PIP directed Polejewski to clock out before 11:00 p.m. for an 8-hour shift or 2:30 a.m. for a 12-hour shift. Polejewski was granted 30 minutes of overtime for each shift under this PIP. Nitz did not directly or indirectly suggest to Polejewski that she should work "off-the-clock" in violation of Park Place's timekeeping policies and procedures.

10. During the following pay periods, Polejewski worked and was paid for the following overtime hours:

09/20/2013 - 10/03/2013	9 hours
10/04/2013 - 10/17/2013	8.25 hours
10/18/2013 - 10/31/2013	16.25 hours
11/01/2013 - 11/14/2013	0 hours

Exhibits 515 and 517.

11. On November 11, 2013, Park Place discharged Polejewski for issues unrelated to timekeeping issues. Polejewski's last shift was November 7, 2013.

#### **IV. DISCUSSION<sup>1</sup>**

A. The respondent's Motion for Judgment as a Matter of Law is denied.

Rule 50, Mont. R. Civ. Proc., provides that a court may grant a party's Motion for Judgment as a Matter of Law if a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue. Judgment as a matter of law is properly granted only when there is a complete absence of any evidence which would justify submitting an issue to a jury and all such evidence and any legitimate inferences that might be drawn from the evidence must be considered in the light most favorable to the party opposing the motion. *Johnson v. Costco Wholesale*, 2007 MT 43 at ¶ 13; 336 Mont. 105, 152 P.3d 727 (citing *Williams v. Union Fid. Life Ins. Co.*, 2005 MT 273, 329 Mont. 158, 123 P.3d 213). Judgment as a matter of law is not proper if reasonable persons could differ regarding conclusions that could be drawn from the evidence. *Id.* (citing *Kearney v. KXLF Communications, Inc.*, 263 Mont. 407, 417, 869 P.2d 772, 777-78 (1994)).

Park Place argued in support of its motion that Polejewski had failed to submit any documentary evidence that would show by a reasonable and just inference that she was owed additional wages for work performed during the period beginning September 1, 2013 through November 7, 2013. Polejewski contended she had produced sufficient evidence in support of her claim.

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<sup>1</sup> 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.

Polejewski's contention is well taken. Polejewski produced sufficient evidence that would, at the very least, lead reasonable persons to differ regarding what conclusions could be drawn from the evidence she had presented. Therefore, the respondent's Motion for Judgment as a Matter of Law is hereby denied.

B. Polejewski is not owed additional wages.

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. 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 the lower court properly concluded that 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 v. Keegan*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

Polejewski testified the employer knew that she was working through her meal breaks and longer after the scheduled end of her shift. Polejewski pointed to one incident when Donna Shandley, Unit Manager, observed Polejewski sitting with a resident. Shandley asked if Polejewski was on or off the clock. Polejewski told Shandley she was off the clock. Polejewski argued there was a portable computer on wheels used at the facility that was near her, which should have caused Shandley to conclude she was still performing work for the employer while off the clock. Shandley testified she did not see anything in Polejewski's demeanor or in the area to suggest Polejewski was working off the clock. Shandley also denied seeing anything on the computer screen to suggest Polejewski was charting or performing other work for the employer. Shandley testified she understood Polejewski was merely visiting with a resident and not performing work.

Polejewski presented a handwritten list of dates beginning September 1, 2013 through November 7, 2013 which showed she missed meals on those dates and spent two additional hours charting. Documents 71 and 72. Polejewski conceded she prepared the list in response to a request by the Wage and Hour Unit and that she had not maintained a calendar or diary during the period in question. Polejewski offered no direct and credible evidence substantiating her claim that she worked through every meal break and spent two additional hours after each shift charting during the period in question. Polejewski conceded she did not tell the Administrator, her supervisor, or anyone else in management that she was working through her meal breaks and working “off the clock.”

Polejewski has not shown by a reasonable and just inference that Park Place owes her additional wages for missed meal breaks and overtime hours. Even if Polejewski was found to have met her burden, Park Place presented evidence that negated the reasonableness of the inference to be drawn from the evidence presented by Polejewski. Park Place presented Polejewski’s time keeping records; payroll records; and Time Clock Feedback Forms that showed when Polejewski punched in and out and the efforts the employer made to ensure Polejewski was paid for all time worked throughout her employment. It appears the employer was willing to pay her for all time worked by virtue of the fact that it continued to pay her for overtime hours beyond the 30 minutes allowed under the PIP. Given the level of effort Park Place made to ensure its employees, including Polejewski, were punching in and out appropriately and all time worked was accounted for, it makes little sense that Park Place would knowingly and intentionally allow Polejewski to work “off the clock,” particularly given its stated policy specifically prohibiting employees from working “off the clock.”

The evidence shows Polejewski was paid for all time worked and is not owed any additional wages.

## 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. Polejewski has not shown she is owed additional wages for work performed during the period beginning September 1, 2013 through November 7, 2013.

## VI. ORDER

Based on the foregoing, the claim of Pamela Polejewski is hereby dismissed.

DATED this 6th day of January, 2015.

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.