

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

IN THE MATTER OF THE WAGE CLAIM )	Case No. 87-2019
OF JULIE V. MILES, )	
)	
Claimant, )	
)	
vs. )	<b>FINAL AGENCY DECISION</b>
)	<b>DISMISSING RESPONDENT'S</b>
)	<b>APPEAL</b>
JENNIFER L. MCVICKER individually )	
and d/b/a KIYA'S KIDS, LLC, )	
)	
Respondent. )	

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**I. PROCEDURAL BACKGROUND**

1. On July 13, 2018, Julie V. Miles filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry alleging Jennifer L. McVicker individually and d/b/a Kiya's Kids, LLC (McVicker) owed her \$610.50 in unpaid wages and an undetermined amount of banked overtime hours for work performed during the period of September 2, 2017 through July 5, 2018. See Docs. 16-23.<sup>1</sup>

2. On July 2, 2018, the Wage and Hour Unit Investigator assigned to Miles' claim contacted McVicker by telephone seeking a response to Miles' claim. Upon verification of the address, a request was sent to McVicker asking for either payment of the claim or a response to the allegations. McVicker failed to respond to the request for information. *Id.*

3. On August 15, 2018, a determination was issued finding wages and penalty due. On August 16, 2018, McVicker responded to the claim, which the Wage and Hour Unit treated as a timely request for redetermination. On August 30, 2018, Miles also filed a request for redetermination. *Id.*

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<sup>1</sup> The documents referred to in this order are part of the administrative record compiled by the Wage and Hour Unit and included with the Notice of Hearing and Telephone Conference mailed to the parties on March 14, 2019.

4. On January 23, 2019, the Wage and Hour Unit issued a redetermination finding McVicker owed Miles \$491.86 in unpaid wages and imposed a penalty of 15% amounting to \$14.73 of the amount of unpaid wages found owing if the amount was paid within the time provided for by the redetermination. A penalty of 55% amounting to \$54.03 was imposed if the unpaid wages were not timely paid. Liquidated damages in the amount of \$393.61 were also awarded based upon a finding the claim was subject to coverage by the Fair Labor Standards Act (FLSA). See Doc. 22.

5. On February 8, 2019, McVicker filed an appeal via email. The appeal was sent from the email address: jlmcvicker@hotmail.com. Doc. 6.

6. On February 26, 2019, the mediator assigned to the matter sent a letter to McVicker advising her that mediation would be attempted pursuant to Montana law. The letter was mailed to McVicker at Kiya's Kids, LLC, Jennifer McVicker, 8169 Avocet Drive, Helena, MT 59602.

7. On March 5, 2019, the mediator spoke with both McVicker and Miles by telephone. On March 7, 2019, the mediator left a message for McVicker advising her that Miles had declined to make an initial offer as demanded by McVicker and the matter would be transferred to the Office of Administrative Hearings (OAH). Doc. 3.

8. On March 8, 2019, notice that the matter would be transferred to OAH was mailed to McVicker at 8169 Avocet Drive, Helena, MT 59602. Doc. 1.

9. On March 14, 2019, OAH issued a Notice of Hearing and Telephone Conference setting a scheduling conference in this matter for March 26, 2019. The notice was mailed to McVicker at 8169 Avocet Drive, Helena, MT 59602. The mailing was not returned as undeliverable.

10. The Hearing Officer was unexpectedly unavailable at the time of the scheduling conference on March 26, 2019, and OAH staff attempted to contact the parties. OAH staff was able to speak with Miles but was unable to reach McVicker, whose telephone number was disconnected. There were no other telephone numbers on record for McVicker.

11. On March 27, 2019, the hearing officer issued an Order Resetting Telephone Conference scheduling the conference for April 1, 2019 at 10:00 a.m., MDT. The order was mailed to McVicker at 8169 Avocet Drive, Helena, MT 59602. The order was not returned as undeliverable.

12. On April 1, 2019, the hearing officer attempted to convene a telephone conference in this matter. The hearing officer was unable to reach McVicker at the telephone number of record.

13. On April 1, 2019, the hearing officer issued a Notice of Intent to Dismiss based upon McVicker's failure to attend the scheduling conference and failing to have any contact with OAH. The Notice of Intent to Dismiss advised McVicker that she was required to "file and serve a written argument as to why her appeal should not be dismissed no later than April 16, 2019." The order was mailed to McVicker at 8169 Avocet Drive, Helena, MT 59602. The notice was not returned as undeliverable.

14. On April 3, 2019, McVicker called OAH and spoke with Sandy Duncan, Legal Secretary. McVicker informed Duncan that she had just received the paperwork for this matter and her address and phone number had changed.

15. On April 3, 2019, Duncan emailed the Notice of Intent to Dismiss to McVicker at kiyaskids@hotmail.com. Duncan advised McVicker to respond to the Notice of Intent to Dismiss no later than April 16, 2019 as set out in the Notice of Intent to Dismiss. There was no indication that the email was not properly transmitted. McVicker has had no contact with OAH, and she has failed to file a written argument stating good cause as to why she failed to appear for the scheduling conference.

## **II. ISSUE**

Whether Jennifer L. McVicker individually and d/b/a Kiya's Kids, LLC owes regular and overtime wages for work performed, as alleged in the complaint filed by Julie V. Miles, and owes penalties or liquidated damages, as provided by law.

## **III. FINDINGS OF FACT**

1. Jennifer McVicker received proper notice regarding the scheduling conference originally scheduled for March 26, 2019 and subsequently rescheduled to April 1, 2019.

2. McVicker has been personally aware that a contested case proceeding was pending with OAH.

3. McVicker has failed without good cause to participate in the proceedings initiated as a result of her appeal.

4. McVicker owes Miles \$98.25 in unpaid regular wages and \$393.61 in overtime wages for a total of \$491.86.<sup>2</sup>

5. McVicker owes Miles \$393.61 in liquidated damages, which represents 100% of the overtime wages determined to be owed.

6. McVicker has paid no portion of the monies determined by the Wage and Hour Unit to be owed to Miles.

7. McVicker owes a penalty of \$54.03 representing 55% of the unpaid wages found to be owed to Miles.

#### IV. DISCUSSION

This is a contested case proceeding subject to the Montana Administrative Procedures Act (MAPA) pursuant to Mont. Code Ann. § 2-4-601 et. seq and § 39-3-302. MAPA specifically provides that informal disposition may be made of any contested case by, among other things, a default unless such disposition is precluded by law. Mont. Code Ann. § 2-4-603(1)(a). Nothing in Title 39 or Title 2 prohibits imposition of a default where a party fails to comport with any facet of a scheduling order, fails to respond to a tribunal's direct order, or fails to appear for a scheduled hearing.

The Department has adopted the Attorney General's model rules, which provide in pertinent part, "[I]n a contested case, if a party does not appear to contest an intended agency action, the agency may enter a default order. If a default is entered, pursuant to Mont. Code. Ann. § 2-4-623, the order must be in writing and include findings of fact and conclusions of law" (emphasis added). Admin. R. Mont. 1-3-213(1) and 24-2-101(1).

McVicker is the appellant in this matter. McVicker received notice of this tribunal's intent to dismiss the matter if she failed to state good cause for her failure to appear at the scheduling conference. McVicker has chosen to ignore the order of this tribunal and has failed to file and serve a written argument stating good cause for her failure to appear at the scheduling conference. This appears to be a continuing pattern for McVicker based upon a review of the administrative record compiled by the Wage and Hour Unit and sent to the parties with the Notice of Hearing and Telephone Conference on March 14, 2019. McVicker's apparent indifference suggests to the hearing officer that she does not intend to pursue her appeal in this

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<sup>2</sup> Miles indicated at the April 1, 2019 telephone conference that she was not seeking additional wages beyond that which was found to be owed in the redetermination of the Wage and Hour Unit.

matter. It is therefore determined that McVicker is in default and her appeal is hereby 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. Jennifer L. McVicker individually and d/b/a Kiya's Kids, LLC, has failed to follow the orders of this tribunal as set forth in the Notice of Intent to Dismiss, which she received no later than April 3, 2019. McVicker has failed to state good cause as to why her appeal should not be dismissed.

3. There has been no showing that the Wage and Hour Unit's redetermination finding McVicker owes Julie V. Miles \$491.86 in unpaid wages (\$98.25 in regular wages and \$393.61 in overtime wages) should be set aside.

4. There has been no showing that the order of liquidated damages in the amount of \$393.61, representing 100% of the overtime wages determined to be due, should be set aside. See 29 USC § 216.

5. There has been no showing that McVicker paid any portion of the wages found to be owed to Miles in the time provided for in the Wage and Hour Unit's redetermination. Therefore, a 55% penalty in the amount of \$54.03 shall be imposed pursuant to Admin. R. Mont. 24.16.756(1)(a), (b).

## VI. ORDER

Based on the foregoing, the Respondent's appeal is DISMISSED. The department's redetermination is final.

The redetermination of the Wage and Hour Unit finding Jennifer L. McVicker individually and d/b/a Kiya's Kids, LLC owes Julie V. Miles \$491.86 in unpaid regular wages and overtime wages is affirmed.

The redetermination of the Wage and Hour Unit finding a penalty of \$393.61, representing liquidated damages amounting to 100% of the overtime wages found to be owed, is affirmed.

The redetermination of the Wage and Hour Unit imposing a penalty in the amount of \$54.03, representing a penalty of 55% of the wages found to be owed to

Miles, is proper given McVicker's failure to timely pay Miles the monies determined to be owed her by the Wage and Hour Unit.

Jennifer L. McVicker individually and d/b/a Kiya's Kids, LLC owes Julie V. Miles \$939.50 in unpaid wages, liquidated damages and penalty of \$54.03. Jennifer L. McVicker individually and d/b/a Kiya's Kids, LLC is ORDERED to tender a cashier's check or money order in the amount of \$939.50 made payable to Julie V. Miles and mailed to the Employment Relations Division, P.O. Box 201503, Helena, MT 59620-1503, no later than 30 days after service of this decision. Jennifer L. McVicker individually and d/b/a Kiya's Kids, LLC may deduct applicable withholding from the wage portion, but not the penalty portion.

DATED this 23rd day of April, 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 59624-1503

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.