

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1244-2008
OF GLORIA J. WALTON,)	
)	
Claimant,)	
)	FINDINGS OF FACT;
vs.)	CONCLUSIONS OF LAW;
)	AND ORDER
FIVE STAR COLLECTIONS, INC.,)	
A Montana Corporation,)	
aka FIVE STAR COLLECTIONS,)	
A Montana Sole Proprietorship,)	
)	
Respondent.)	

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I. INTRODUCTION

Five Star Collections, Inc. (appellant) appealed a Wage and Hour Unit determination that found it owed Gloria Walton additional wages and penalty. Walton sought additional relief, disagreeing with the Wage and Hour Unit Determination that found she was not due reimbursement for insurance premiums her employer withheld from Walton's paycheck and that she could not recover the \$15.00 insufficient check fee she paid as a result of the employer issuing her an insufficient funds check.¹

The scheduling conference in this matter was held on November 12, 2008. Walton appeared but no one appeared on behalf of the Respondent. As a result, the hearing officer issued a scheduling order on November 12, 2008 setting the hearing for December 12, 2008 and directing the respondent to appear in the matter by filing a written notice of appearance no later than November 26, 2008. The scheduling order also specifically apprised the parties that the appellant's failure to appear at the hearing would result in the hearing officer affirming the determination of the Wage and Hour Unit and taking up the issue of any further relief sought by the claimant.

Both parties received the November 12, 2008 scheduling order. Despite this, the respondent never filed its notice of appearance. At the time and on the date set for the hearing, the hearing officer contacted the appellant at the only telephone number provided to the Hearings Bureau. The phone had been disconnected. In accordance with the scheduling order,

¹Recovery of NSF fees is not allowable under the laws governing wage and hour claims.

the hearing officer affirmed the finding that the respondent owed the claimant additional wages. The hearing officer then held a hearing on the issue of the additional monies sought by the claimant. To this end, the hearing officer admitted Documents 1 through 230 into the record and took sworn testimony from the claimant. The hearing officer then closed the record in this matter.

II. ISSUES

Is Walton due unpaid wages as alleged in her complaint, penalty as provided by law on those unpaid wages, reimbursement for insurance premiums as improper wage withholdings, and reimbursement of a \$15.00 insufficient funds fee?

III. FINDINGS OF FACT

1. The appellant was properly notified of the time and date of the hearing in this matter.

2. Without good cause, the appellant failed to appear at the hearing in this matter.

3. Because the appellant did not appear, it failed to present a prima facie case showing that it was entitled to any relief. Moreover, there is nothing in the record or the Wage and Hour Determination that shows any error of fact or law that would call into question the propriety of the determination of the Wage and Hour Unit with respect to unpaid wages due to the claimant.

4. The Wage and Hour Unit determined that the respondent owed the claimant \$2,029.63 in unpaid wages (which included unpaid vacation). Document 60, Determination of July 22, 2008. The wage compliance specialist deducted \$1,316.25 as the employer provided a check to the Wage and Hour Unit with its February 21, 2008 response for that amount of unpaid wages. This check, however, was dishonored as it was stale by the time that the Determination issued on July 22, 2008. Thus, the claimant is still due the total amount of \$2,029.63.

5. Of the total amount owed, one check that the employer provided to Walton, the December 21, 2007 check in the amount of \$500.00, was returned to Walton as unpaid as there were not sufficient funds in the bank to cover it.

6. In conformity with the determination of the Wage and Hour Unit, Walton is found to be due \$2,029.63 in unpaid wages. Of this amount, \$500.00 of the remaining unpaid wages is due to the employer paying with an insufficient funds check. A 110% penalty, totaling \$550.00 ($\$500.00 \times 1.10 = \550.00), is due on that amount. Admin. R. Mont. 24.16.7556(d). A 55% penalty must be assessed against the remaining amount of unpaid wages, \$1,529.63 ($\$2,029.63 - \$500.00 = \$1,529.63$), for a total penalty on that amount of \$841.30 ($\$1,529.63 \times .55 = \841.30). Admin. R. Mont. 24.16.7566. Total penalty on the entire amount of these unpaid wages is \$1,391.30 ($\$550.00 + \$841.30 = \$1,391.30$).

7. Walton also has sought recovery of the September and December, 2007 premiums that her employer withheld from her paycheck during those months. Walton's uncontradicted testimony at hearing and her consistent argument in all the documents submitted to the Wage and Hour Unit is that her employment agreement with Five Star provided that the employer would pay for her health insurance premiums whether she worked full time or part time. It is also clear that at the end of September, 2007, Five Star unilaterally changed the employment agreement and withdrew from Walton's paycheck the September, 2007 premium that Five Star should have paid because Five Star decided that it would not pay health insurance for an employee who was working only part time. By doing this, Five Star, breached its employment agreement with Walton and therefore improperly withheld the September, 2007 premium from Walton's wages for that month. Walton is thus due the value of that premium, \$844.51 (see Document 76). A 55% penalty is due on this amount and totals \$464.48 ($\$844.51 \times .55 = \464.48).

8. Walton also seeks the value of the December premium that she paid out. Her argument on this is moot. Walton was not paid during December and that has resulted in the employer being ordered to pay unpaid wages. As the compliance specialist correctly noted in his July 22, 2008 determination, the employer never deducted those premiums from Walton's wages because it never paid her those wages. The order in this matter requiring payment for unpaid wages requires the employer to pay the full amount of wages due and contains no offset for December's health insurance premium. Therefore, Walton's request for the December premium is moot.

9. Walton paid a \$15.00 fee on her bank account when her December 27, 2007 check from her employer was returned unpaid. This amount is not recoverable in an administrative wage and hour case. *Johnson v. K & T Manufacturing, Inc.* (1981), 191 Mont. 458, 652 P.2d 66.

10. In addition to seeking an order against Five Star Collections, Inc., Walton has requested that the order in this matter be entered against Five Star Collections since it is essentially the same entity, has the same owners, Steve and Barbara Beatty and Dorothy Milledge, and is the alter ego of Five Star Collections, Inc. The evidence adduced by Walton at the hearing supports her position and shows that Five Star Collections, Inc, is now doing business as Five Star Collections, a sole proprietorship, with the same individuals who ran the corporation now acting as a sole proprietorship. Walton's evidence further shows that Five Star Collections is the alter ego of Five Star Collections, Inc. Accordingly, the facts demonstrate that this order should also include the sole proprietorship Five Star Collections as a proper respondent.

IV. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under § 39-3-201 et seq. MCA. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. A review of the Wage and Hour Unit's determination shows no legal cause why the determination should not be affirmed.

3. By failing to appear at the hearing, the appellant has shown no basis for setting aside the determination of the Wage and Hour Unit. Walton is due an \$2,029.63 in unpaid wages and \$1,391.30 in penalty.

4. Walton has demonstrated that she is also due \$844.51 for her employer's improper withholding of September wages to pay for a health insurance premium that the employer, per the wage agreement, was obligated to pay. Penalty on this amount is \$464.48.

5. Walton cannot be reimbursed for the \$15.00 insufficient funds fee she suffered as a result of her employer giving her an insufficient funds check. Such expense reimbursements are not recoverable in an administrative wage and hour case. *Johnson v. K & T Manufacturing, Inc.* (1981), 191 Mont. 458, 652 P.2d 66.

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V. ORDER

Based upon the foregoing, the determination of the Wage and Hour Unit is affirmed. Five Star Collections, Inc., a/k/a Five Star Collections, is hereby ORDERED to tender a cashier's check or money order in the amount of \$4,729.92, representing \$2,029.63 in unpaid wages and \$1,391.30 in penalty on those wages and \$844.51 in improper withholdings and \$464.48 in penalty on those improper withholdings ($\$2,029.63 + \$1,391.30 + \$844.51 + \$464.48 = \$4,729.92$), made payable to Gloria Walton and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision. Five Star Collections, Inc, a/k/a Five Star Collections may deduct applicable tax withholdings from the wage portion but not the penalty portion.

DATED this 19th day of December, 2008.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearing Officer
Hearings Bureau

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 service of the decision. See also Mont. Code Ann. § 2-4-702.

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.

Walton FOF ghp