

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM )	Case No. 575-2010
OF KATY L. NEWBREAST, )	
)	
Claimant, )	
)	
vs. )	<b>FINAL AGENCY DECISION</b>
)	
JENNIFER LUBKE d/b/a MONKEY TREE )	
CHILDCARE, )	
)	
Respondent. )	

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**I. INTRODUCTION**

Jennifer Lubke (Lubke), d/b/a Monkey Tree Childcare, appeals a determination of the Wage and Hour Unit of the Department of Labor and Industry that found it owed Katy Newbreast \$767.08 in unpaid wages and additional penalty.

Hearing Officer David A. Scrimm convened a telephonic contested case hearing in this matter on June 29, 2010. Newbreast did not answer her telephone for the hearing or return a message from the hearing officer until well after the hearing concluded. Newbreast informed Hearings Bureau staff that she had moved to Hawaii, but had not provided this information to the Bureau prior to the hearing. Newbreast also failed to appear at the pre-hearing conference or to submit any required pre-hearing filings. Orders issued by the hearing officer were not returned. Lubke appeared with her counsel, Josh Van De Wetering. Lubke testified under oath. Documents 1 through 160 contained in the Wage and Hour Unit file were admitted into the evidentiary record. Based on the evidence presented in this matter, the hearing officer makes the following findings of fact, conclusions of law and final order.

**II. ISSUES**

A. Does Lubke owe unpaid wages to Newbreast?

B. Did Lubke improperly withhold wages to offset the cost of CPR training undertaken by Newbreast?

C. Did Lubke improperly withhold wages to pay for Newbreast's daughter's daycare?

D. Does Lubke owe penalty as prescribed by law?

### III. FINDINGS OF FACT

1. Lubke employed Newbreast as a cleaner on November 4, 2008. Newbreast resigned from the position on or about August 1, 2009.

2. Newbreast, as a condition of employment, was required to complete CPR/First Aid training. Newbreast completed the training in May 2009 and the \$65.00 cost was deducted from her paycheck.

3. Newbreast enrolled her daughter at Monkey Tree Childcare. At some point she became eligible for childcare benefits and all she was required to pay was a \$10.00 co-payment which was, per her agreement with Lubke, deducted from her paycheck. The childcare agreement required Newbreast to give 30 days notice of termination. Newbreast did not provide 30 days notice when she left employment and her daughter did attend childcare at Monkey Tree on at least one occasion in August. Accordingly, Lubke deducted the \$541.00 from her final paycheck.<sup>1</sup>

4. Newbreast signed three documents authorizing Lubke to deduct childcare costs, including co-payments, the cost of CPR/First Aid training, any advances, and any other money owed to Monkey Tree Childcare from her paycheck. Exhibits 36, 37 and 39.

5. Lubke does not dispute the \$61.03 that the Wage and Hour Unit determined she owes Newbreast in unpaid wages.

### IV. DISCUSSION<sup>2</sup>

A. *Newbreast failed to meet her burden of proving she was owed unpaid 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,

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<sup>1</sup> It appears that by leaving her employment Newbreast was no longer eligible for childcare benefits from DPHHS.

<sup>2</sup>Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

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 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).

Newbreast failed to appear at the hearing in this matter. Accordingly, she provided no evidence to prove she is owed unpaid wages. On this basis alone her claim can be dismissed. Nonetheless, the evidence produced by Lubke proves that she did not make improper deductions from Newbreast’s wages and that she is only owed wages that the employer does not dispute, as explained below.

B. *Lubke properly deducted the cost of CPR training and childcare costs from Newbreast’s wages.*

Mont. Code Ann. § 39-3-201(6) defines wages to include any money to be paid to an employee. Montana law requires that employers pay employees wages when due. Mont. Code Ann. § 39-3-204. Employers may make “reasonable deductions for board, room and other incidentals supplied by the employer, whenever the deductions are a part of the conditions of employment, or as otherwise provided by law.” *Id.*

Although the wage and hour protection statutes prohibit improper withholding or impermissible agreements designed to circumvent the wage and hour statutes, they do not prohibit employees and employers from entering into agreements that are unrelated to the employment relationship. As the Montana Supreme Court has noted, the wage protection statute “is designed to prevent an employer from depriving an employee of wages at the employer’s instigation, or for the benefit of the employer. . . . Deductions voluntarily requested by the employee in his own behalf do not violate statutes such as Section 39-3-204(1).” *Christiansen v. Taylor Brothers, Inc.*, (1987), 225 Mont. 318, 320, 732 P.2d 841, 843.

Newbreast agreed to reimburse the employer for its provision of the CPR/First Aid training that was a condition of her employment. This is an incidental supplied by the employer and part of the conditions of employment, thus in conformity with Mont. Code Ann. § 39-3-204. While Montana law requires childcare providers to maintain such training for its employees, there is nothing in the law that requires the employer to pay for that training. Lubke was within her rights to require Newbreast to obtain and pay for the training.

With regard to the deduction from her paycheck for the cost of daycare for her child for the month of August, Newbreast agreed to this deduction and signed an agreement requiring 30 days notice of termination. She did not provide such notice, thus the employer was within its rights to charge her for this cost and pursuant to Newbreast's agreement to have such cost deducted from her wage, was within her rights to do just that. As the court held in *Christiansen*, such agreements unrelated to the employment relationship do not violate Mont. Code Ann. § 39-3-204.

C. *Newbreast's unpaid wages.*

Lubke testified that she did not dispute the \$61.03 in unpaid wages that the Wage and Hour Unit determined she owed Newbreast. Therefore, Newbreast is owed that amount in unpaid wages.

D. *Lubke owes penalty with respect to the unpaid wages.*

Mont. Code Ann. § 39-3-206(1) provides that, "A penalty must also be assessed against [an employer who fails to pay an employee as provided for in this part] and paid by the employer to the employee in an amount not to exceed 110% of the wages due and unpaid." Admin. R. Mont. 24.16.7566 provides that a maximum penalty equal to 55% of the wages determined to be due must be imposed unless any of the special circumstances of Admin. R. Mont. 24.16.7556 apply. Since there is no evidence showing any of the special circumstances apply, a penalty of 55%, amounting to \$33.57 ( $\$61.03 \times .55 = \$33.57$ ) for the unpaid wages, is due to Newbreast.

## V. CONCLUSIONS OF LAW

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

2. Newbreast failed to prove she is owed unpaid wages.

3. Lubke owes Newbreast \$61.03 in unpaid wages that she does not dispute.

4. Lubke owes penalty to Newbreast under Admin. R. Mont. 24.16.7566 on the unpaid wages.

**VI. ORDER**

Jennifer Lubke, d/b/a Monkey Tree Childcare is hereby ORDERED to tender a cashier's check or money order in the amount of \$94.60, representing \$61.03 in wages and \$33.57 in penalty, payable to Katy Newbreast, and mailed to the Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503, no later than 30 days after service of this decision. Lubke may withhold appropriate deductions for income taxes and social security on the wage portion but not the penalty portion.

DATED this 2nd day of July, 2010.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM  
DAVID A. SCRIMM  
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 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.