

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

DON BIRCH

CLAIMANT

vs.

CASE NO. WC2008050020

SCHUMACHER HOMES OF ARKANSAS, INC.

RESPONDENT

ORDER

This matter came before the Arkansas Department of Labor on Friday, September 12, 2008 at 10:00 a.m. The claimant appeared in person and the employer appeared by telephone and was represented by Brenda Renicker, Human Resource Manager.

FINDINGS OF FACT

Don Birch was employed by Schumacher Homes of Arkansas, Inc. as a New Home Consultant. He began work on December 17, 2007 and his last day of employment was Monday, April 14, 2008. On April 22, 2008, the claimant filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor. He claimed that he was owed \$940.01 in net wages for work performed March 29, 2008 through April 14, 2008. The Labor Standards Division investigated the claim and issued a Preliminary Wage Determination Order on June 2, 2008 finding that Mr. Birch was owed wages in the amount of \$230.84.

The Labor Standards investigator determined that Mr. Birch had not been paid minimum wage and overtime for 86 hours of work from March 29 through April 14, 2008 in the amount of \$556.28. The investigator deducted from this amount the gross amount of \$325.44 which was paid by Schumacher Homes to Mr. Birch on April 25, 2008 as payment of accrued vacation.

The respondent tendered to the Department of Labor and to the order of Mr. Birch a paycheck in the gross amount of \$230.84. Mr. Birch timely appealed the Preliminary Wage Determination.

Mr. Birch signed a contract at the time of hire which set out the terms of his employment, including his compensation. Specifically, the contract provided that he was to be paid a base or guaranteed salary of \$577 per week for 13 weeks, or a total of \$7500.00. The salary was to be paid on a bi-weekly basis. The salary was to cease “[b]eginning on Day 91” and Mr. Birch was to be compensated solely on commissions.

The respondent paid the claimant gross wages of \$577 per week for 13 weeks. Mr. Birch continued to work for 4 weeks and one day, March 16, 2008 through April 14, 2008. While there was some discussion between the parties about whether Mr. Birch would continue to receive a salary for some additional time, his written contract was never formally revised. On April 14, 2008 Mr. Birch was advised that he would not receive any additional compensation. He terminated his employment after 2 hours of work that day. He received no compensation for the period of work from March 16, 2008 through April 14, 2008.

After filing his wage claim, Mr. Birch was paid on April 25, 2008, the sum of \$325.44 for accrued vacation.

The evidence from the parties conflicts with respect to the exact number of hours Mr. Birch worked from March 16, 2008 through April 14, 2008. The evidence is clear, however, that Mr. Birch’s regular schedule of work was 8 hours per day, 5 days per week, for a total of 40 hours per week. Sunday and Wednesday were his days off. Mr. Birch worked 162 hours from March 16, 2008 through April 14, 2008 for which he has not been compensated.

CONCLUSIONS OF LAW

1. Upon application of either an employer or employee, the Director of the Department of Labor, or any person authorized by the director, shall have authority to inquire

into, hear, and decide disputes arising from wages earned and shall allow or reject any deduction from wages. Ark. Code Ann. § 11-4-303(a).

2. The wage claimant carries the burden of proof for any claim of unpaid wages.

3. The employer carries the burden of proof for any set-off or affirmative defense.

4. In the present case, the employer paid the claimant all wages due under the written employment contract. The only issue is whether the employer is obligated to pay Mr. Birch minimum wage.

5. The Arkansas Minimum Wage Act, Ark. Code Ann. §§ 11-4-20 *et seq.*, requires most employers to pay nonexempt employees a minimum wage of not less than \$6.25 per hour and overtime at 1 ½ times the employee's regular rate of pay for hours worked in excess of 40 hours per workweek. Ark. Code Ann. §§ 11-4-210 and -211.

6. In the present case, the respondent has not claimed any exemption, but merely relies on the signed contract. The right to payment of minimum wage is a statutory right that can not be waived or released or contracted away. *Brooklyn Sav. Bank v. O'Neil*, 324 U. S. 697, 707 (1945)(applying the federal minimum wage law). *See also* ADL Labor Standards Regulation 010.14-112 which provides "The department may rely on the interpretations of the U. S. Department of Labor and federal precedent established under the Fair Labor Standards Act in interpreting and applying the provisions of the [state] Act."

7. Commission salespersons are exempt from payment of minimum wage only if they are involved in outside sales. Ark. Code Ann. § 11-4-203(1)(A) excludes from the definition of "Employee" for purposes of the Arkansas Minimum Wage Act, any individual employed as "an outside commission-paid salesperson who customarily performs his or her services away from his or her employer's premises taking orders for goods or services."

8. In the present case, the claimant was employed by Schumacher Homes as a New Home Consultant working in the employer's "design center". In fact, part of his job responsibility was to ensure that the design center was neat and clean. There is no evidence that he was an outside sales employee. "The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home." 29 C.F.R. 541.502, adopted by ADL Labor Standards Regulation 010.14-106(B)(1)(a).

9. The respondent owes the claimant for 162 hours of work from March 16, 2008 through April 14, 2008 at minimum wage, or a total of \$1012.50 in gross wages.

IT IS THEREFORE CONSIDERED AND ORDERED that Schumacher Homes of Arkansas, Inc. shall pay Don Birch wages in the gross amount of \$1012.50.

JAMES L. SALKELD
DIRECTOR OF LABOR

By: _____
C. J. Acklin, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE: _____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

VIRGINIA SCOTT

CLAIMANT

vs.

CASE NO. 2008-020024

A TASTE OF ITALY

RESPONDENT

ORDER

The record in this case indicates that the case was originally set for hearing on October 13, 2008 and subsequently continued due a medical emergency on the part of the Respondent. This matter was reset for final hearing on this Friday, November 21, 2008 at the offices of the Arkansas Department of Labor. Both parties were duly notified of the resetting via certified mail with return receipt requested, along via regular mail, to the permanent addresses listed in the file. The hearing was set for 1:00 p.m. The hearing convened at approximately 1:15 p.m. Neither party has appeared for the hearing. The Claimant in this matter carries the burden of proof and her appearance is necessary to prevail. Extensive efforts have been made to contact the Claimant. All telephone calls have gone unanswered and unreturned, and all Certified Mailings have been returned as unclaimed.

THEREFORE, this matter is hereby dismissed with prejudice.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY: _____
Don Cash
Appointed Hearing Officer

DATE: _____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR
CASE NO. WH2008-005

ARKANSAS DEPARTMENT OF LABOR

AGENCY

vs.

Case No. WH2008-006

McDONALDS OF HARRISON

RESPONDENT

ORDER

This matter came before the Arkansas Department of Labor on September 18, 2008. McDonalds of Harrison (hereafter referred to as “McDonald’s”) has appealed the finding of the Labor Standards Division of the Arkansas Department of Labor (hereafter referred to as the “LS Division”) that they are in violation of Ark. Code Ann. § 11-4-210 (Minimum Wage). The Agency was represented by the Honorable Daniel Faulkner. McDonalds was represented by the Honorable James D. Sprott. Kathy Dilbeck, Labor Standards Investigator, and Tom Hudson, Labor Standards Administrator, testified on behalf of the LS Division. Jay Herrin testified on behalf of McDonald’s. Agency Exhibit number one (Administrative Regulations Pertaining to the Arkansas Minimum Wage Act, June 2007), Agency Exhibit number two (inspection report completed by Kathy Dilbeck), Respondent Exhibit number one (list of employee charges), Respondent Exhibit number two (proposed revision of amounts owed) and Respondent Exhibit number three (copy of McDonald’s policies) were offered and accepted into the record.

FINDINGS OF FACT

McDonald’s of Harrison is a fast food chain restaurant, owned by Herrin Land Company, which operates at 1314 North Main Street in Harrison, Arkansas. On or about May 12, 2008, Labor Standards Investigator Kathy Dilbeck performed a routine inspection of McDonald’s by inspecting payroll and time records. Ms. Dilbeck testified that her inspection included records from October 1, 2006 through May 2, 2008 and that her determination was that McDonald’s was in violation of Ark. Code Ann.

§ 11-4-210. Ms. Dilbeck testified that it was her finding that employee meal charges were being deducted from wages and, as a result of those deductions, the final paycheck after those deductions reflected a wage rate that, averaged over the number of hours worked, calculated to be less than five dollars and ninety-five cents (\$5.95) per hour. The record reflects that the investigator allowed credit of thirty cents (\$0.30) per hour according to the allowance set forth in Ark. Code Ann. § 11-4-213. The total calculation by the investigator for these violations is four thousand, two hundred fifty-nine dollars and four cents (\$4,259.04) for fifty seven employees. Labor Standards Administrator Tom Hudson offered testimony consistent and comparable to that of Ms. Dilbeck.

Jay Herrin testified the practice of McDonald's prior to the investigation was to allow employees to "charge" food that they chose to purchase for personal meals. As outlined in Respondent Exhibit 3 (McDonald's policy), employees' meals are discounted by fifty percent, regardless of whether or not they are purchased during a shift, and that the meal may be charged and withheld from the employee's paycheck. These charges were documented by within a handwritten spreadsheet which shows rate of pay, hours worked and total food deductions. Mr. Herrin also provided a revised calculation that he proposed, in the event that the Administrative Law Judge found that the employees in question were underpaid. This calculation, labeled Respondent Exhibit Number two, appears to be a figure arrived to by deducting employee charges made off duty, in addition to an adjustment to minimum wage for student employees. However, no student eligibility certificates were offered as evidence, and furthermore, the student rate was not being paid to those employees.

CONCLUSIONS OF LAW

The employer herein did withhold more than the allowable amount pursuant to A.C.A. § 11-4-213, although there was no willful intent to violate the code by the employer. However, in accordance with Administrative Regulations of the Labor Standards Division, Rule Number 010.14-112, "the department may rely on the interpretations of the U.S. Department of Labor and federal precedent established under the Fair labor Standards Act in interpreting and applying provisions of the Act and Rule

010-14-100 through -113.” It has long been recognized that the protection afforded by the Fair Labor Standards Act may not be waived by agreement between employer and employee. *Brooklyn Bank v. O’Neil, 1945, 324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296.*

THEREFORE, IT IS CONSIDERED AND ORDERED that the employer, McDonald’s, shall issue payment for a total sum of four thousand, two hundred fifty-nine dollars and four cents (\$4,259.04). Payment drafts shall be issued to the employees in the respective amounts as detailed on page two (2) and three (3) of Agency exhibit two (2) and mailed to the Department of Labor. Payment shall be issued within ten (10) days of the receipt of this Order.

IT IS SO ORDERED

James L. Salkeld
Director of Labor

BY: _____
C.J. Acklin, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE: _____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR
CASE NO. WH2008-005

ARKANSAS DEPARTMENT OF LABOR

PETITIONER

vs.

J.L.S. & K. INC., and LYN'S DARI-DELITE, INC.
d/b/a DARI-DELITE

RESPONDENT

ORDER

This matter came before the Arkansas Department of Labor on September 18, 2008.

J.L.S. & K. Inc. and Lyn's Dari-Delite, Inc. d/b/a Dari-Delite (hereafter referred to as "Dari Delite") has appealed the finding of the Labor Standards Division of the Arkansas Department of Labor (hereafter referred to as the "LS Division") that they are in violation of Ark. Code Ann. § 11-4-210 (Minimum Wage). The LS Division was represented by the Honorable Daniel Faulkner. Dari Delite was represented by owner Lyn Warden, appearing on her own behalf. Kathy Dilbeck, Labor Standards Investigator, and Tom Hudson, Labor Standards Administrator, testified on behalf of the LS Division. Melissa Jones and Doris Davis testified on behalf of Dari Delite. Agency Exhibit number one (Administrative Regulations Pertaining to the Arkansas Minimum Wage Act, June 2007), Agency Exhibit number two (Administrative Regulations Pertaining to the Arkansas Minimum Wage Act, September, 1979), Agency Exhibit number three (inspection report completed by Kathy Dilbeck), Agency Exhibit number four (minimum wage poster, June 2007), Respondent Exhibit number one (Statutes Regulating Wages and Hours in Arkansas, October 2006), and Respondent Exhibit number two (verification of enrollment for employed students) were offered and accepted into the record.

FINDINGS OF FACT

Lyn Warden is the owner of Dari Delite, a restaurant operating at 1315 East Walnut Street, Paris, Arkansas. Dari Delite was previously incorporated under the name of "J.L.S. & K. Inc." Following a divorce involving Ms. Warden on or about January 2006, J.L.S. & K. Inc. was dissolved, and the business was purchased and incorporated under Lyn's Dari-Delite, Inc.

Dari Delite customarily employs young adults as well as minors. On or about March 4, 2008, Labor Standards Investigator Kathy Dilbeck performed an inspection following the receipt of a complaint alleging wage and hour violations. Ms. Dilbeck testified her inspection of records included those dating from the purchase of the business in January 2006 through January 2008 and her determination was that Dari Delite was in violation of Child Labor Regulation 2.6 and Ark. Code Ann. § 11-4-210.

Ms. Dilbeck testified it was her finding that proper records were not being maintained, as the time cards were relinquished to the employees along with the corresponding paycheck. A record of the hours worked was not being kept as required by Arkansas Administrative Regulations Pertaining to Child Labor, Section 600, section 2.6. Although the record-keeping violation was noted in the investigation, no penalty was assessed for the infraction.

Ms. Dilbeck further testified Dari Delite was paying employees who were students at a reduced minimum wage rate as allowable by Ark. Code Ann. § 11-4-210 (b). However, she also found that while the reduced rate was being paid, the employer failed to obtain certificates of eligibility as required by Administrative Regulation 010.14-103 (A)(1)(a). The employer acknowledged that she had not obtained the certificates, but in an effort to support her position that payment of the reduced rate was proper, provided verification that the students in question were, in fact, enrolled on a full-time basis at one of two high schools in the area (Paris High

School and Scranton High School). Ms. Warden's testimony was that it was her understanding that the reduced rate was allowable on the basis that the employees in question were students, and she was unaware of a regulation requiring she obtain a certificate of eligibility prior to adjustment being made to the wage rate.

CONCLUSIONS OF LAW

The purpose of the Department of Labor shall be to foster, promote, and develop the welfare of the wage earner of Arkansas, to improve their working conditions, and to advance their opportunities for profitable employment. Ark. Code Ann. § 11-2-101. The Director shall have the power to make, modify, or repeal such rules, or changes in rules, as he may deem necessary to carry out the provisions of this subchapter. Ark. Code Ann. § 11-2-110 (b). The rules of the director shall have the force and effect of law, and shall be enforced by the director in the same manner as the provisions of this subchapter. Ark. Code Ann. § 11-2-110 (d). Further regulatory authority in minimum wage is granted the Director pursuant to Ark. Code Ann. § 11-2-209.

Ark. Code Ann. § 11-4-210, prior to October 1, 2006, mandated Arkansas minimum wage to be \$5.15 per hour. Minimum wage, beginning October 1, 2006, became \$6.25 per hour. Ark. Code Ann. § 11-4-210 subsection (b) allows an employer to pay full-time students at a rate equal to but not less than 85% of the minimum wage. The student rate would be \$4.38 per hour prior to October 1, 2006 and \$5.32 per hour thereafter. Former Administrative Regulation 11 required an employer to, "...obtain authorization from the Director to employ any full-time student at less than the applicable minimum wage...evidenced by a certificate of eligibility to be issued by the Director." Administrative Regulation 11.1 and 11.2. Current Administrative Regulation 010.14-103 requires, "The employer has, in advance of employment at less than the

applicable minimum wage rate, a full-time student certificate issued by the department.”

Administrative Regulation 010.14-103 (a.).

All parties agree the employees herein were full-time students as defined by the Code. All parties agree the employer did not procure either a “certificate of eligibility” or a “student certificate” as required by the Regulation. The employer is in compliance with Ark. Code Ann. § 11-4-210. The employer is not in compliance with Administrative Regulation 010.14-103. There were forty-eight employees paid as students. The employer is a small business in a small town with minimal employees and income. The A.L.J. finds the employer has violated the regulation forty-eight times, there being forty-eight students without certificates. The employer is required to pay the minimum fine of fifty dollars (\$50.00) per violation for a total fine of twenty-four hundred dollars (\$2,400.00).

Additionally, while reviewing the Department’s Exhibit 3 it is evident the following employees were paid below the minimum allowable rate. To wit:

Brittany Baumgartner	\$5.98	Rebecca Becker	\$4.84	Mikka Berg	\$6.85
Marcus Brown	\$0.39	Molly Bunch	\$2.89	Kelby Chambers	\$1.75
Amanda Cordell	\$6.37	Ashley Coy	\$2.29	Brandi Forst	\$1.10
Christopher Hayden	\$0.34	Tiffany Hill	\$3.65	Catlin Huber	\$2.20
Nick Hughes	\$6.80	Alaina Kaelin	\$4.76	Christin Kampmann	\$4.25
Dylan Lowe	\$2.94	Ryan Nicholas	\$1.95	Lisa Ralph	\$0.80
Danny Wilks	\$2.85				

WHEREFORE the employer is ordered to submit funds to the Department in the sum of \$62.00 to be paid to these employees. Payment shall be issued within ten (10) days of the receipt of this Order.

FURTHER the employer is ordered to make arrangements with the Department within ten (10) days for the payment of the civil penalty in the amount of \$2,400.00

The motion of the Agency to correct the style of the case is granted.

IT IS SO ORDERED

James L. Salkeld
Director of Labor

BY: _____
C.J. Acklin, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE: _____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

SARAH CAPLE

CLAIMANT

vs.

CASE NO. 2008-018

RK COLLECTIONS

RESPONDENT

ORDER

The record in this case indicates that the case was originally set for hearing on November 21, 2008 and subsequently continued at the request of the respondent due to a medical emergency. This matter was reset for final hearing on this Monday, December 15, 2008 at the offices of the Arkansas Department of Labor. Both parties were duly notified of the resetting. The claimant was notified via certified mail with return receipt requested to the permanent addresses listed in the file and the respondent was notified via confirmed facsimile and US Mail. The hearing was set for 9:00 a.m. The hearing convened at approximately 9:30 a.m. Neither party has appeared for the hearing. The Claimant in this matter carries the burden of proof and her appearance is necessary to prevail.

THEREFORE, this matter is hereby dismissed without prejudice.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY: _____
MARK MARTIN
APPOINTED HEARING OFFICER
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE: _____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

JOHN WINEMILLER

CLAIMANT

vs.

CASE NO. 2008-0046

STEPHEN'S JEWELERS

RESPONDENT

ORDER

This matter came before the Arkansas Department of Labor on Monday, January 5, 2009. Stephen's Jewelers has appealed an agency finding that unpaid wages are due to Mr. John Winemiller. Mr. Winemiller appeared in person on his own behalf. Stephen's Jewelers was represented by Stephen Kirsch, who appeared by telephone. No exhibits were offered at the time of the hearing. The claim file was accepted into the record with no objections.

FINDINGS OF FACT

John Winemiller, employee, filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on July 9, 2008. He claimed four hundred dollars (\$400.00) in unpaid vacation time earned during his employment spanning from May 8, 2006 through May 31, 2008. The Labor Standards Division, after an investigation, issued a Preliminary Wage Determination Order on September 19, 2008 finding that Winemiller was owed four hundred dollars (\$400.00). Stephen's Jewelers filed an appeal of this finding on September 22, 2008.

Mr. Winemiller's testimony was that he was claiming one week of unused vacation time that was earned after completion of his second year of employment at Stephen's Jewelers. He indicated that he had earned two weeks of vacation time and had taken one week off prior to his termination. He stated that his contention was that he was entitled to the second week of vacation time.

Stephen's Jewelers representative, Stephen Kirsch, offered testimony congruous to the employer response in the claim file, stating that the position of the employer is that vacation is prorated after termination and that Stephen's Jewelers did not owe any unpaid time to Mr. Winemiller.

CONCLUSIONS OF LAW

1. Upon application of either an employer or employee, the Director of the Department of Labor or any person authorized by the director shall have authority to inquire into, hear, and decide disputes arising from wages earned and shall allow or reject any deduction from wages. Ark. Code Ann. 11-4-303(a).
2. After final hearing by the director or person appointed by him, a copy of findings and facts and any award shall be filed in the office of the Department of Labor. Ark. Code Ann. 11-4-303(b).
3. The amount of the award of the director shall be presumed to be the amount of wages, if any, due and unpaid to the employee. Ark. Code Ann. 1-4-303(c).
4. The wage claimant carries the burden of proof for any claim of unpaid wages.
5. The employer carries the burden of proof for any set-off or affirmative defense.
6. In the present case, the documents in the record indicate Stephen's Jewelers had a policy in effect regarding vacation time. The policy states "After two years of service, the employee is granted two weeks of paid vacation. If an employee resigns or is terminated vacation pay will be prorated." After review of the handbook language, the policy in effect clearly states that two weeks of paid time is awarded upon completion of two years of service. It is the opinion of the Hearing Officer that the language regarding proration of vacation time applies solely to years of service that had not been fully completed. The Hearing Officer further concludes that Mr.

Winemiller had completed two years of service and should have been granted two weeks of paid vacation in accordance with the handbook.

THEREFORE, IT IS CONSIDERED AND ORDERD that judgment is entered for the claimant for 40 hours of vacation time at ten dollars (\$10.00) per hour. The Respondent is directed to issue a check payable to Mr. Winemiller in the amount of four hundred dollars (\$400.00) within ten (10) days of the receipt of this Order and mailed to the Department of Labor.

James L. Salkeld
Director of Labor

BY: _____
Mark Martin, Appointed Hearing Officer
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE: _____