

1 DIVISION OF LABOR STANDARDS ENFORCEMENT  
2 Department of Industrial Relations  
3 State of California  
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9  
10 BEFORE THE LABOR COMMISSIONER  
11 OF THE STATE OF CALIFORNIA  
12

13 DEBORAH TINSLEY, ) Case No. TAC 04-99  
14 Petitioner, )  
15 vs. ) DETERMINATION OF  
16 ) CONTROVERSY  
17 )  
18 )  
19 MITCHELL AGENCY, INC., )  
20 Respondent. )  
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28 INTRODUCTION

29 The above-captioned petition was filed on January 27,  
30 1999 by DEBORAH TINSLEY as guardian ad litem for ANGELA TINSLEY  
31 (hereinafter "Petitioner"), alleging that MITCHELL AGENCY, INC.  
32 (hereinafter "Respondent"), promised to represent petitioner as her  
33 exclusive agent in the fields of modeling and acting. Petitioner  
34 alleges that based on a signed contract for representation she was  
35 induced to spend in excess of \$500.00 for pictures, make-up, and  
36 hairstyling. Petitioner contends that after the photographs were  
37 developed the respondent refused to represent petitioner. By this  
38 petition, petitioner seeks reimbursement for the cost of the  
39 photographs, hairstyling, and processing of the film in the amount

1 of \$500.00.

2 Respondent filed an answer on February 18, 1999, stating  
3 in short, there was no promise of representation, no signed  
4 contract, no money collected on behalf of respondent and thus no  
5 benefit attained. A hearing was held on May 19, 1999 before the  
6 undersigned attorney for the Labor Commissioner. Both parties  
7 appeared in propria persona. Based upon the testimony and evidence  
8 presented at this hearing, the Labor Commissioner adopts the  
9 following Determination of Controversy.

10  
11 FINDINGS OF FACT

12 1. On January 27, 1998, Petitioner attended an open  
13 call for aspiring models. Respondent expressed a strong interest  
14 in representing petitioner but requested petitioner's hair be taken  
15 out of braids and photographs be taken prior to representation.  
16 During the initial January 27<sup>th</sup> meeting, respondent handed  
17 petitioner a copy of a television commercial agency contract for  
18 her perusal. This contract was not signed by either party. During  
19 the next several weeks, petitioner contacted respondent in an  
20 effort to ascertain whether respondent was still interested in  
21 representing petitioner.

22 2. On February 26, 1998, at the request of respondent,  
23 petitioner visited respondent's office. Another contract for  
24 representation was handed to the petitioner and signed by then, 14  
25 year old Angela. The signature of respondent is in issue.

26 3. On March 20, 1998, at the direction of respondent,  
27 petitioner had her hair styled by Fritz of Hair Play, for \$80.00,

1 and on March 28, 1999, petitioner completed a photo shoot conducted  
2 by Todd Hartnett for a cost of \$250.00. In addition, Mr.  
3 Hartnett's make-up assistant was paid \$100.00. The shoot was  
4 completed and petitioner paid an additional \$80.82 for processing  
5 of the film.

6 4. Upon receipt and appraisal of the photographs,  
7 respondent decided that representation of petitioner was no longer  
8 desirable, as the width of petitioner's nose did not photograph as  
9 anticipated. On April 14, 1998, petitioner was informed by  
10 respondent's employee that she would not be represented by the  
11 respondent.

12 5. Petitioner requested the photos be returned, and that  
13 she be reimbursed for costs associated with the photo shoot in the  
14 amount of \$500.00. Petitioner alleges that respondent's promise of  
15 representation, via a signed contract, induced petitioner to  
16 purchase the photographs. Petitioner alleges on numerous occasions  
17 she inquired whether representation was conditional upon  
18 respondents approval of the photo shoot and respondent assured her  
19 it was not. Petitioner claims, had she known the contract would be  
20 declared invalid if respondent was dissatisfied with the photos,  
21 she would not have signed a contract or had the photos completed.

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25 CONCLUSIONS OF LAW

26 1. Labor Code §1700.4(b) includes "models" in the  
27 definition of "artist". Petitioner's is an "artist" within the

1 meaning of Labor Code §1700.4(b).

2           2. It is undisputed that Respondent is a licensed  
3 California talent agent and is therefore a "talent agency" within  
4 the meaning of Labor Code §1700.4(a).

5           3. The Labor Commissioner has jurisdiction relating to  
6 "any controversy between the artist and the talent agency relating  
7 to the terms of the contract." Labor Code §1700.23

8           4. The critical issues are as follows:

9           a) Was a valid contract executed between the parties?

10           b) If so, did respondent breach the contract?

11           c) If so, are there ascertainable damages?

12           5. During the hearing, petitioner submitted into  
13 evidence a talent agency contract allegedly signed by both parties.  
14 Petitioner testified that on February 25, 1998, petitioner was  
15 independently solicited to go on an audition. Petitioner then  
16 informed respondent that alternative options existed for  
17 representation. Respondent's employee Kat, instructed petitioner  
18 to immediately come into the office and sign an exclusive  
19 contract. On February 26, 1998 petitioner came to respondent's  
20 office and signed a contract titled "Mitchell Model Management  
21 Talent Agency Contract". Petitioner alleges the contract was  
22 signed by Troy, the wife of owner Mitchell Solarek. The contract  
23 did not have the signature of Troy, but rather was signed in ink,  
24 *Mitchell Agency, Inc.*. After the contract was signed, petitioner  
25 was instructed to begin her portfolio. Respondent testified he  
26 encouraged petitioner to begin her portfolio and required she use  
27 a specific hairstylist and photographer. In direct contradiction

1 to petitioner's testimony, respondent testified he had no knowledge  
2 of a contract between the parties.

3           6. Respondent's testimony is not credible. Respondent's  
4 statement that he had no knowledge of the contract is inconsistent  
5 with a May 11, 1998 letter, admittedly written and signed by  
6 respondent. The letter states, "[F]or Angela to pursue modeling  
7 after the shots came back would have been a complete waste of time.  
8 The only other option would have been to have Angela to continue to  
9 test and build a portfolio and then send her out on castings **for**  
10 **the duration of the contract. At the end of the contract time, I**  
11 believe we would have all come to the same conclusion." This  
12 letter implies knowledge of an existing contract between the  
13 parties. Additionally, respondent testified that he has no  
14 knowledge that a contract had been signed by his wife. Respondent  
15 testified, "nothing sent by the Tinsley's mentioned that my wife  
16 signed a contract." Again, this statement is contradicted by a May  
17 5, 1999 letter from Ms. Tinsley to Mr. Solarek, stating in  
18 pertinent part:

19  
20           "On February 26, 1998, **Troy signed a contract**  
21 with Angela, confirming Mitchell's intent to  
22 represent her and said, 'I am looking forward  
23 to representing you and excited about working  
24 with you. Get those pictures done so we can  
25 begin marketing you.'"

26           Testimony and evidence presented at the hearing confirmed  
27

1 respondent not only read the letter, but was deeply offended by the  
2 contents of the May 5, 1999 letter. Respondent was put on notice  
3 that his wife had allegedly signed a contract on behalf of the  
4 agency. Further, the petition served on respondent states a  
5 contract had been signed. Mr. Solarek's response filed with this  
6 agency also reflected knowledge of a contract, he states, "We do  
7 not nor have we ever forced a model to stay with us because of a  
8 contract." The fact that respondent mentions a contract in both  
9 detailed correspondence with the petitioner and again in his  
10 response to this agency implies clear knowledge of the existence of  
11 a contract.

12           7. Conversely, Angela's testimony that she signed the  
13 contract followed by Troy's signature on behalf of the agency was  
14 entirely credible. Angela testified that upon execution of the  
15 contract by both parties, "Troy signed the contract, then got up,  
16 copied the contract and handed us one."

17           8. Respondent's inconsistencies do not end there. Early  
18 in the hearing, respondent testified that he had no prior knowledge  
19 of the May 5, 1998 letter from petitioner. Respondent then  
20 inexplicably admits to writing a May 11, 1998 letter to petitioner  
21 that upon examination is clearly written in response to the May 5,  
22 1998 letter, which he earlier testified he had no prior knowledge.  
23 Respondent's inconsistencies are further compounded by his  
24 testimony near the end of the hearing:

25           "This letter (May 5, 1998) that she sent me saying we  
26 exploited Angela was unbelievably offensive, ...did I want  
27

1 to represent her after that? Would I even consider  
2 putting her in the talent agency? No. I wanted nothing  
3 to do with her at that point. It wasn't even about  
4 business anymore!"  
5

6 Respondents concludes that had he not received the May 5,  
7 1998 letter he would have been more likely to utilize petitioner's  
8 talents. This statement, more than any other evidence or testimony  
9 introduced at the hearing, directly reflected on the lack of  
10 respondent's credibility for truthfulness in this hearing.  
11 Clearly, respondent knew of the contract, knew that his wife was  
12 being alleged to have signed the contract and knew of the  
13 allegations contained in the May 5<sup>th</sup> letter. The evidence produced  
14 at the hearing coupled with respondent's lack of credibility leads  
15 to the conclusion a contract was signed by Respondent's wife on  
16 behalf of the agency on February 26, 1998.

17 9. The inquiry does not end here. At issue is whether  
18 representation is conditioned on respondent's approval of the  
19 photographs. An examination of the contract does not contain any  
20 provisions that would condition future representation on the  
21 outcome of Angela's test photos. In direct contradiction, the  
22 contract states at paragraph 7:

23  
24 "This instrument constitutes the entire  
25 agreement between us and no statement,  
26 promises or inducement made by any party  
27 hereto which is not contained herein shall be

1 binding or valid and this contract may not be  
2 enlarged, modified, or altered, except in  
3 writing by both parties hereto[.]”  
4

5 10. Respondent testified that, “he does not recall ever  
6 being asked if representation is conditioned on the outcome of the  
7 photos.” Again, respondent’s statement is not believable.  
8 Respondent’s previous inconsistent statements, buttressed by a  
9 contract containing all of the essential terms, creates the  
10 presumption of a valid contract. In both respondent’s testimony  
11 and detailed correspondence, respondent makes reference that Angela  
12 is both beautiful, cute, full of “energy and sparkle”, and impressed  
13 with her personality. Though respondent testified he had some  
14 concern with the width of petitioner’s nose, he also states, “he  
15 had no idea the photos would turn out this way.” Indeed,  
16 respondent testified that in 8 ½ years, he is only wrong on a face  
17 once a year. In short, the evidence demonstrates respondent’s  
18 intent to represent Angela prior to looking at the test photos; a  
19 contract was signed for representation by the parties; it was not  
20 until respondent inspected the photos that he changed his mind for  
21 representation; and thus petitioner has demonstrated a prima facie  
22 breach of contract case. The respondent promised representation  
23 and failed to fulfill his promise. The *wrongful, i.e.,*  
24 unjustified or unexcused, failure to perform a contract is a  
25 breach. (Rest.2d, Contracts §235(2))

26 11. The final issue for consideration is whether damages  
27 may be awarded. California Civil Code §3301 states that “No

1 damages can be recovered for a breach of contract which are not  
2 clearly ascertainable on both their nature and origin." The  
3 question becomes could the breaching party have reasonably  
4 anticipated the damages as a result of his breach. The allegations  
5 of the complaint included damages for hairstyling(\$80.00); make-  
6 up(\$100.00); photographs(\$250.00); and photograph  
7 processing(\$70.00). . The respondent directed the petitioner to  
8 utilize the services of both the hairstylist, and the photographer.  
9 The photographer employed his make-up artist as a necessary  
10 component of the photo session and of course, processing the film  
11 was also required for delivery of the finished product. The  
12 respondent having directed petitioner to use these services and who  
13 has undoubtedly referred many artists in the past, knew or should  
14 have known the nature and origin of petitioner's damages.

15           12. It is well established in contract law that expenses  
16 incurred in anticipation of, or preparation for, performance,  
17 ordinarily are a recoverable element of damage for breach of  
18 contract. *Buxbom v. Smith*, 23 Cal.2d 535 at 541. Petitioner's  
19 expenses of hairstyling, make-up and photography costs are a direct  
20 result of petitioner preparing to perform her contractual duties.  
21 To conclude, Respondent, excited by petitioner's look, and  
22 pressured to sign petitioner to a contract because of an  
23 alternative offer, signed the contract without examining the test  
24 shots. A valid contract obligated the respondent to represent  
25 petitioner. Respondent refusing representation breached the  
26 contract. The expenses claimed by petitioner were directly  
27 attributable to respondent's promise of representation and clearly

1 foreseeable by the respondent as the one who directed the  
2 petitioner to those services.

3 13. It is important to note the evidence did not sustain  
4 a finding that respondent profited from referring petitioner to the  
5 hairstylist or the photographer. Conversely, the evidence showed  
6 that respondent's only profits are derived from legally obtained  
7 commissions from artists under contract. Respondent did not intend  
8 to exploit petitioner as alleged in the petition but only breached  
9 the contract as a result of making a premature determination on  
10 petitioner's marketability.

11  
12 ORDER

13 For the above-stated reasons, IT IS HEREBY ORDERED that  
14 the petitioner is awarded \$500.00 in damages as a result of  
15 respondent's breach of contract.

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18 Dated: 7-9-99

  
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DAVID L. GURLEY  
Attorney for the Labor Commissioner

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21 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

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24 Dated: 7/9/99

  
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MARCY SAUNDERS  
State Labor Commissioner

