

1 §1700.25(e)(1) and (2).

2 Respondent filed her answer and cross petition on April
3 25, 1999, alleging that an employer/employee relationship existed
4 between the parties, and in her cross-petition respondent seeks
5 payment for back-wages and penalties pursuant to §203. After
6 numerous continuations, the hearing commenced on July 13, 2000,
7 at the Los Angeles Office of the Labor Commissioner. Petitioner
8 was represented by Ronald A. DiNicola of Mitchell Silberberg &
9 Knupp LLP; respondent appeared *in propria persona*. Due
10 consideration having been given to the testimony, documentary
11 evidence, and briefs submitted, the Labor Commissioner adopts the
12 following determination of controversy.

13
14 FINDINGS OF FACT

15 1. The petitioner is the daughter of boxing great
16 Muhammad Ali. In January 1999, Ali, owner of a Marina Del Rey
17 nail salon, publicized her decision to enter the world of women's
18 professional boxing. The public response to petitioner's
19 decision was immediate and overwhelming. Requests for
20 interviews, photo shoots and public appearances came fast and
21 furious.

22 2. The respondent had public relations, advertisement
23 and promotional experience in the entertainment industry for over
24 twenty-six years. Ali, unsophisticated in these matters, turned
25 to her salon client for guidance. And on January 23, 1999,
26 Cutler agreed to handle all of the incoming calls and requests,
27 in exchange for free nail services and the opportunity to design
28 new business cards for Ali.

1 3. Respondent was eager to expand her role with Ali
2 and on February 2, 1999, she met with Magic Johnson Entertainment
3 to discuss a possible relationship between Johnson's company and
4 Ali. Discussions included a documentary film project designed to
5 chronicle Ali's blossoming boxing career. As the requests for
6 Ali continued to build, it became apparent that free nail service
7 would not adequately compensate the respondent for her efforts.
8 On February 8, 1999, respondent approached Ali with a one-year
9 written contract providing, *inter alia*, that respondent would
10 "employ 'Agency' to provide promotional, motion picture and
11 public relations services for Laila Ali." In return for those
12 services, Cutler would receive \$6,000.00 per month. The nail
13 salon's earnings netted far less than \$6,000.00 a month. Ali
14 unable to afford respondent's request, scoffed at the monthly
15 amount and refused to sign the contract. On the other hand,
16 Cutler's cross petition and unconvincing testimony claimed that
17 Ali had orally agreed to the terms, though respondent later
18 recanted her testimony by testifying that the \$6,000.00 was never
19 agreed upon.

20 4. Despite the parties inability to reach an
21 agreement, the respondent continued to provide services and seek
22 opportunities for Ali. Cutler approached both Everlast and Nike,
23 ostensibly to assess interest in endorsement deals. On February
24 12, 2000, respondent scheduled a photo shoot with Vogue Magazine
25 and a London tabloid in which respondent negotiated Ali's
26 compensation from the \$750.00 offer to a \$5,000.00 payment on
27 behalf of Ali. Notably, the \$5,000.00 was wired to respondent's
28 account, where it remains today.

1 5. As interest in an Ali documentary increased,
2 additional discussions with the Magic Johnson Entertainment group
3 were necessary. Respondent was eager to organize a deal for the
4 documentary and expressed to Ali that a \$150,000.00 to
5 \$200,000.00 payment for a documentary was plausible. On January
6 24, 1999, respondent approached Ali with a second contract. This
7 contract purported to allow Cutler to "represent [Ali] in the
8 attempt to secure a documentary film commitment", for 10 percent
9 of any funds paid to the petitioner. Ali again refused to sign
10 the contract. Ali was unhappy with respondent's attempt to
11 expand her role and verbally terminated their existing
12 relationship.

13 6. Despite Ali's verbal termination, on February 26,
14 1999, Cutler attended a second meeting with the Magic Johnson
15 Entertainment group to further discuss the documentary. On the
16 same day, Ali served written notice of termination and demanded
17 Cutler remit the \$5,000.00 Ali earned in connection with the
18 London tabloid photo shoot and interview. Cutler refused to
19 tender payment and demanded \$12,000.00 from Ali pursuant to the
20 alleged oral contract for \$6,000.00 per month. Cutler stated
21 that she would hold petitioner's \$5,000.00 in trust against the
22 \$12,000.00 owed to Cutler for the two months of rendered
23 services. Cutler's cross petition seeks \$12,000.00 in back wages
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1 and penalties pursuant to Labor Code §203².
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3 CONCLUSIONS OF LAW

4 1. Petitioner is a celebrity/athlete who has done
5 countless photo shoots. As a model and subject of a film
6 documentary, petitioner is an "artist" within the meaning of
7 Labor Code §1700.4(b).

8 2. The issues to be determined are:

9 a) Whether a contract was formed between the parties
10 and if so, what were the terms and rights of the parties to the
11 contract?

12 b) Based on the evidence produced at this hearing,
13 did the respondent operate as a "talent agency" within the
14 meaning of Labor Code §1700.40(a), or an employee? If so, what is
15 the significance?

16 3. Respondent was unable to demonstrate that an oral
17 contract for \$6,000.00, a month (or any other amount) was
18 created. The testimony and evidence reflected that all
19 subsequent offers were refuted by Ali. There was never a meeting
20 of the minds and therefore never an acceptance. Cutler's second
21 meeting with Magic Johnson Entertainment was unbeknownst to Ali,
22 and the termination was clear, thus the elements of an implied
23 contract were also not met. In fact, the only contract created

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25 ² A cross petition for wages is procedurally inappropriate in this forum.
26 Labor Code §1700.44 vests the Labor Commissioner with jurisdiction to hear and
27 determine controversies between artists and talent agents that arise under the
28 Talent Agencies Act. Other sections of the Labor Code provide the Labor
Commissioner with jurisdiction and authority to investigate, hear disputes and
award penalties involving unpaid wages between employees and employers. See
Labor Code §98 and §203.

1 between the parties was the agreement for Cutler to handle media
2 requests in exchange for free nail service. However, the
3 terminations both orally and in writing on February 24th and 26th
4 by the petitioner were clear.

5 4. Labor Code §1700.40(a) defines "talent agency" as,
6 "a person or corporation who engages in the occupation of
7 procuring, offering, promising, or attempting to procure
8 employment or engagements for an artist or artists." Cutler met
9 with the Magic Johnson Entertainment group which lead to
10 discussions about the documentary. Cutler relayed this news to
11 Ali, set up additional meetings in an effort to solidify a deal,
12 while attempting to have Ali sign a representation agreement.
13 Moreover, Cutler took a photo shoot offer of \$750.00 and used her
14 negotiating skill to increase Ali's compensation to \$5,000.00.
15 Cutler's attempts to sell a documentary chronicling Ali to Magic
16 Johnson Entertainment and her efforts in raising compensation
17 with respect to the London tabloid photo shoot are both attempts
18 to procure and actual procurement of employment or engagements
19 for Ali.

20 5. In Waisbren v. Peppercorn Production, Inc (1995)
21 41 Cal.App.4th 246, the court held that any single act of
22 procuring employment subjects the agent to the Talent Agencies
23 Act's licensing requirement, thereby upholding the Labor
24 Commissioner's long standing interpretation that a license is
25 required for any procurement activities, no matter how incidental
26 such activities are to the agent's business as a whole.

27 6. Applying Waisbren, it is clear respondent acted in
28 the capacity of a talent agency within the meaning of Labor Code

1 §1700.4(a). Labor Code §1700.5 provides that "no person shall
2 engage in or carry on the occupation of a talent agency without
3 first procuring a license therefor from the Labor Commissioner."
4 It was stipulated the respondent had never obtained a talent
5 agency license.

6 7. Respondent contends that she was hired as
7 petitioner's public relations **employee** for a salary of \$6,000.00
8 per month. Consequently, respondent argues she is entitled to
9 wages and that an agency relationship simply does not exist. The
10 courts and the legislature do not agree. An "employee" is one
11 who is subject to the absolute control and direction of his
12 employer in regard to any act, labor or work to be done in the
13 course and scope of his employment. Crooks v. Glens Falls Indem.
14 Co., 124 Cal.App.2d 113, 121. An "agent" is defined by section
15 2295 of the Civil Code as follows: "An agent is one who
16 represents another, called the principal, in dealings with third
17 persons." Although both relate to voluntary action under
18 employment and express the idea of service, the service performed
19 by an [employee] may be inferior in degree to work done by an
20 agent for his principal. Accordingly, while both a[n] [employee]
21 and an agent are workers for another under an express or implied
22 employment, an agent works not only for, but in the place of his
23 principal. People v. Treadwell, 69 Cal.226, 236. Furthermore, as
24 stated in Wallace v. Sinclair, 114 Cal.App.2d 220 [250 P.2d 154]:
25 "Agency is the relation that results from the act of one person
26 ... to conduct one or more transactions with one or more third
27 persons and to exercise a degree of discretion in effecting the
28 purpose of the principal. Gipson v. Davis Realty Co. 215

1 Cal.App.2d 190, 205.

2 8. Representation seems to be the chief
3 characteristic of agency while control by the employer is the
4 primary element of employment. Intent of the parties also plays
5 an important role in establishing the true nature of the
6 relationship. Utilizing those standards, it becomes abundantly
7 clear that Cutler acted as an agent and not as respondent
8 contends, an employee. Cutler approached companies, used her
9 independent judgment and discretion in seeking to advance the
10 public persona of Ali and negotiated finances with third parties
11 on Ali's behalf. Moreover, Cutler was the industry expert and
12 was never subject to any control and direction of Ali.
13 Conversely, Cutler used her vast experience in the entertainment
14 industry to do whatever was necessary to increase benefits for
15 Ali.

16 9. Finally, the express terms of the contracts that
17 Cutler herself prepared, manifested her intent. Cutler coined
18 her role as the "agency" and sought to "represent" Ali. The
19 terms of the contract speak for themselves and Cutler's intent to
20 represent Ali as an agent was equally apparent.

21 10. Cutler's responsibilities for Ali were never
22 clearly articulated. But, it was Cutler who sought to expand her
23 role and in doing so Cutler engaged with impunity in the
24 activities of an agent as defined in both the Civil Code and the
25 Labor Code. Respondent acted in the capacity of a talent agent
26 within the meaning of the Talent Agencies Act, and her
27 unconvincing argument that she is an employee fails.

28 11. Petitioner seeks attorney's fees and interest

1 pursuant to Labor Code §1700.25(e)³. The respondent's
2 withholding of petitioner's earnings are the subject of a
3 controversy within the meaning of 1700.25(a)(2) and consequently
4 are not "willful". The petitioner is not entitled to attorney's
5 fees or interest.

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7 ORDER

8 For the above-stated reasons, the respondent acted
9 illegally as petitioner's unlicensed talent agent. IT IS HEREBY
10 ORDERED that the Respondent, NORMALYNN CUTLER dba CUTLER
11 ENTERPRISES has no enforceable rights under any agreement with
12 the petitioner and shall immediately remit \$5,000.00 to
13 petitioner for earnings in connection with the London tabloid.
14 Respondent's cross petition is dismissed.

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³ §1700.25 providing in pertinent part:

19 (a) A licensee who receives any payment of funds on behalf of an artist shall ...
20 be disbursed to the artist within 30 days after receipt. However, notwithstanding
21 the preceding sentence, the licensee may retain the funds beyond 30 days of
22 receipt in either of the following circumstances:

23 (2) When the funds are the subject of a controversy pending before the Labor
24 Commissioner under Section 1700.44 concerning a fee alleged to be owed by the
25 artist to the licensee.

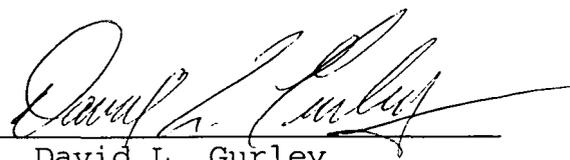
26 (c) If disputed by the artist and the dispute is referred to the Labor
27 Commissioner, the failure of a licensee to disburse funds to an artist within 30
28 days of receipt shall constitute a "controversy" within the meaning of Section
1700.44.

(e) If the Labor Commissioner finds, in proceedings under Section 1700.44, that
the licensee's failure to disburse funds to an artist within the time required
by subdivision (a) was a willful violation, the Labor Commissioner may, in
addition to other relief under Section 1700.44, order the following:

- (1) Award reasonable attorney's fees to the prevailing artist.
- (2) Award interest to the prevailing artist on the funds wrongfully withheld
at the rate of 10 percent per annum during the period of the violation.

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Dated: 3-20-01



David L. Gurley
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: 3/20/01



THOMAS GROGAN
Deputy Chief

