

In the Matter of
Allen Belcher dba Gutters Etc.
Case No. 63-08

Final Order of Commissioner Brad Avakian

Issued October 28, 2009

SYNOPSIS

Claimant worked 54 hours as an employee of Respondent from May 29 through June 18, 2007. She was entitled to be paid the minimum wage of \$7.80 per hour and was only paid \$75.00. Respondent was ordered to pay Claimant \$346.20 in unpaid, due and owing wages. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay \$1,872.00 in penalty wages. Based on Respondent's failure to pay the minimum wage to Claimant, Respondent was also ordered to pay a civil penalty of \$1,872.00. ORS 652.140(1), ORS 652.150, ORS 653.025, ORS 653.055.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 29, 2009, at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, in the State Office Building located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Chet Nakada, a case presenter employed by the Agency. Wage claimant Terra Elias ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent Allen Belcher did not appear at hearing and was held in default.

The Agency called as witnesses: Claimant, Stormie Mathews (telephonic), and Bernadette Yap-Sam (telephonic), Wage and Hour Division compliance specialist.

The forum received into evidence:

a) Administrative exhibits X-1 through X-8 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-11 (submitted prior to hearing) and A-12 (submitted at hearing).

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On July 19, 2007, Claimant filed a wage claim with the Agency alleging that Respondent had employed her from May 29 through June 18, 2007, and failed to pay her \$397.85 in earned and due wages. At the time she filed her wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

2) Claimant brought her wage claim within the statute of limitations.

3) On November 29, 2007, the Agency issued Order of Determination No. 07-2360 based upon the wage claim filed by Claimant. The Order of Determination alleged that claimant had been employed in Oregon by Respondent from May 29 through June 18, 2007; that Respondent was required to pay claimant at least \$7.80 per hour; and that claimant was only paid \$75.00, leaving a balance due and owing of \$346.20. The Order also alleged that Respondent willfully failed to pay those wages; that more than 30 days had elapsed since the wages became due and owing; that a written notice was sent to Respondent; that Claimant's daily rate of pay was \$62.40 per day; and that Respondent owed Claimant \$1,872.00 in penalty wages. Finally, the Agency alleged that Respondent paid Claimant less than the wages to which she was entitled under ORS 653.010 to 653.261 and was therefore liable to Claimant for ORS

653.055(1)(b) civil penalties in the amount of \$1,872.00. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On January 18, 2008, Respondent filed a written request for hearing. On January 22, 2008, the Agency sent Respondent a notice stating that his answer was insufficient because it did not include an admission or denial of each fact alleged in the Order of Determination and a statement of each relevant defense to the allegations. On January 30, 2008, Respondent filed an answer in which he stated:

“I deny that the wage claimant work [sic] for me for that long a period of time. The dates of the first and last checks do not support that claim.

“Although I do admit that the wage claimant is owed money. The sum of \$346.20 is incorrect based on the time period she worked & the day’s [sic] she was not available to work.”

5) On July 14, 2009, the Agency filed a “BOLI Request for Hearing.”

6) On July 15, 2009, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant stating the time and place of the hearing as Sept 29, 2009, at 10 a.m., at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, in the State Office Building located at 800 NE Oregon Street, Portland, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled “Summary of Contested Case Rights and Procedures” containing the information required by ORS 183.413, a document entitled “Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum’s contested case hearings rules, OAR 839-050-000 to 839-050-0445.

7) On August 6, 2009, the Agency filed a motion for a discovery order seeking answers or documents in five categories, stating that it sought relevant and admissible evidence, that it had previously requested this information on an informal

basis, and that Respondent had not responded. On August 18, 2009, the ALJ issued a discovery order that required Respondent to provide the following documents and information:

“1. Any and all documentation on the method of payment for claimant Terra Elias between May 29, 2007 and June 18, 2007. This sort of documentation would include commission agreements, payroll checks, canceled checks, W-2's. If there is no documentation, please provide a written explanation for what wage you were to pay Terra Elias.

“2. Any and all documentation on the method of timekeeping for Terra Elias between May 29, 2007 and June 18, 2007. This sort of documentation would include time cards or electronic methods of recordkeeping or calendars etc. If there is no documentation, please provide a written explanation “on how you kept her track of your Terra Elias' hours worked.”

“3. A complete copy of Terra Elias' personnel files.

“4. Identification by name, address and telephone number all employees from the second and third quarter of 2007. State of Oregon Employment Department tax records will suffice for this request.

“5. Identification by name, address and telephone number of all witnesses you intend on calling.”

8) At the time set for hearing, Respondent did not appear and had not previously notified the forum that it would not appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondent did not appear or contact the hearings unit by telephone during that time, the ALJ declared Respondent in default and commenced the hearing.

9) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Allen Belcher (“Respondent”) conducted business in Oregon under the assumed business name of Gutters Etc. Respondent's

business offered the services of gutter cleaning, gutter screening, pest control, and moss control.

2) Respondent obtained work through telemarketing. At the time Claimant was hired, Respondent employed 13 telemarketers and three technicians.

3) In late May 2007, Claimant's friend told her that Respondent had an opening for a telemarketer. Claimant expressed interest, and Respondent contacted her for an interview. Claimant and Respondent met at a Red Robin restaurant and Respondent hired Claimant to work as a telemarketer.

4) Respondent agreed to pay Claimant \$25 for each "lead" that resulted in a client requesting "a quote" from Respondent, plus five percent of the income from any work Respondent performed as a result of one of Claimant's "leads." At the conclusion of the interview, Respondent suggested specific language that Claimant should use when calling prospective clients. Respondent also gave Claimant 20 pages that were copied from the "COLE" directory and included names, addresses, and phone numbers of prospective clients in the Portland area.

5) On May 29, 2007, Claimant began working for Respondent. On Respondent's behalf, she telephoned prospective clients from her home, using her cell phone. Claimant maintained a written record of all of her calls and wrote down all the "leads" she developed in a notebook. In the same notebook, she also wrote down the number of hours she worked each day.

6) Claimant was supervised by a woman named Wendy. Wendy called Claimant for status reports each day that Claimant worked. During their conversations, Claimant told Wendy about all new leads.

7) Claimant worked the following dates and hours while employed by Respondent:

May 29:	4 hours
May 30:	4.5 hours
May 31:	4 hours
June 3:	2.5 hours
June 5:	4 hours
June 5:	4 hours
June 7:	4.5 hours
June 10:	2 hours
June 11:	1.5 hours
June 12:	4.5 hours
June 13:	4.5 hours
June 16:	4 hours
June 18:	6 hours

In total, she worked 54 hours.

8) Claimant received two paychecks from Respondent during her employment. The first, written on June 2, 2007, was in the amount of \$75.00. The second, written on June 11, 2007, was in the amount of \$197.85. The second check bounced and Claimant never received any of the \$197.85.

9) On June 19, 2007, Respondent fired Claimant. The next day, Wendy told Claimant that she would send Claimant's final paycheck to her by mail. When no check arrived, Claimant telephoned Respondent on June 25, 26, and 27. Despite Claimant's calls, Respondent never paid Claimant any more money. In total, Respondent only paid Claimant \$75.00 for her work.

10) In 2007, Oregon's minimum wage rate was \$7.80 per hour.

11) Calculated at \$7.80 per hour, Claimant earned a total of \$421.20 in gross wages while employed by Respondent.

12) On August 2, 2007, the Agency mailed a "NOTICE OF WAGE CLAIM" to Respondent that was addressed to: "Gutters Etc., 15516 NE Alton St., Portland, OR 97230." The notice read:

"NOTICE OF WAGE CLAIM"

"You are hereby notified that TERRA L. ELIAS has filed a wage claim with the Bureau of Labor and Industries alleging:

“Unpaid statutory minimum wages of \$385.20 at the rate of \$7.80 per hour from May 29, 2007 to June 18, 2007.

“IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send the payments to the Bureau of Labor and Industries at the above address.

“IF YOU DISPUTE THE CLAIM, complete the enclosed “Employer Response” form and return it together with the documentation which supports your position, as well as payment of any amount which you concede are owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

“If your response to the claim is not received on or before August 16, 2007, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees.”

13) On August 16, 2007, Respondent visited BOLI’s Portland office and spoke with Kim Penwell, a BOLI employee. Among other things, he told Penwell that he owed Claimant money, but not as much as she claimed.

14) Yap-Sam, an Agency compliance specialist, was assigned to investigate Claimant’s wage claim. On October 9, 2007, she wrote a letter to Respondent in which she stated, among other things:

“Enclosed is a copy of the Notice of Wage Claim mailed on/about August 2, 2007 together with an Employer Response form. * * *

“This letter is to notify you that you are required to respond to me * * * as set out in the Notice of Wage Claim by no later than **October 22, 2007**. Payment of any wages that you do not dispute should be remitted to my attention by check or money order payable solely to Terra Elias together with an itemized statement of all **lawful** deductions, if applicable.

“If you fail to cooperate as requested above * * * not only will the Division pursue the wages that it determines are due and owing, but also, penalty wages of \$1,872 for failure to remit final wages in a timely manner, civil penalties of \$1,872 for failure to pay minimum wage, and, reimbursement of costs and attorney fees incurred by the Division during the administrative process.”

(emphasis bolded in original)

15) On November 9, 2007, Yap-Sam sent another letter to Respondent in which she stated, among other things, that Claimant was claiming 54 unpaid work hours and that Respondent owed Claimant a total of \$346.20 in gross, unpaid wages.

16) Respondent failed to pay Claimant all earned, due, and payable wages not later than the end of the first business day after Claimant's discharge, and more than 30 days have elapsed from the date her wages were due.

17) Penalty wages are computed in accordance with ORS 652.150 by multiplying Claimant's hourly wage x 8 hours x 30 days ($\$7.80 \times 8 \times 30 = \$1,872.00$).

18) Civil penalties are computed in accordance with ORS 653.055 by multiplying Claimant's hourly wage x 8 hours x 30 days ($\$7.80 \times 8 \times 30 = \$1,872.00$).

19) The Agency's witnesses were all credible.

ULTIMATE FINDINGS OF FACT

1) Beginning on August 25, 2005, and continuing throughout Claimant's employment, Respondent Allen Belcher did business under the assumed business name of Gutters Etc. in Oregon and suffered or permitted one or more persons to work for him.

2) Respondent suffered or permitted Claimant to work for him from May 29 through June 18, 2007, and fired Claimant on June 19, 2007.

3) Claimant was entitled to be paid at least \$7.80 per hour, Oregon's minimum wage in 2007, for all her work.

4) Claimant worked a total of 54 straight time hours for Respondent, earning \$421.20 in gross wages. Respondent only paid Claimant \$75.00 for her work, leaving a total of \$346.20 in unpaid wages due and owing to her, calculated at the wage rate of \$7.80.

5) Respondent was aware that he owed wages to Claimant but failed to pay Claimant those earned, due, and payable wages not later than the end of the first

business day after Claimant was discharged and more than 30 days have elapsed since her wages were due. The Agency sent a written notice of Claimant's wage claim to Respondent in August 2007 and made subsequent written demands for Claimant's unpaid wages in October and November 2007.

6) Penalty wages, computed in accordance with ORS 652.150, equal \$1,872.00.

7) Respondent failed to pay Claimant the minimum wage for all hours worked. Civil penalties, computed in accordance with ORS 653.055(1)(b), equal \$1,872.00.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Allen Belcher was an employer subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010 to 653.261. Respondent employed Claimant Terra Elias from May 29 through June 18, 2007.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414, ORS 653.040, ORS 653.256.

3) Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than the end of the first business day after Claimant's discharge and owes Claimant \$346.20 in unpaid, due and owing wages.

4) Respondent's failure to pay Claimant's wages was willful and Respondent is liable for \$1,872.00 in penalty wages to Claimant. ORS 652.150.

5) Respondent did not pay Claimant the minimum wage for all hours worked and Respondent is liable for a \$1,872.00 civil penalty to Claimant. ORS 653.055.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has

the authority to order Respondent to pay Claimant her earned, unpaid, due and payable wages, penalty wages, and a civil penalty, plus interest on all sums until paid. ORS 652.332.

OPINION

INTRODUCTION

Respondent defaulted when he did not make an appearance at the hearing. When a respondent defaults, the Agency must present a prima facie case on the record to support the allegations of its charging document in order to prevail. *In the Matter of Okechi Village & Health Center*, 27 BOLI 156, 161 (2006). This consists of credible evidence of the following: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which she was not properly compensated; and 4) The amount and extent of work Claimant performed for Respondent. *In the Matter of MAM Properties, LLC*, 28 BOLI 172, 188 (2007).

CLAIMANT WAS EMPLOYED BY RESPONDENT

Respondent does not dispute that he employed Claimant.

CLAIMANT WAS ENTITLED TO BE PAID THE MINIMUM WAGE

Claimant credibly testified that Respondent agreed to pay her on commission. Employers are free to pay employees solely by commission so long as the commission does not result in the employee earning less than the minimum wage for all hours worked. *In the Matter of William Presley*, 25 BOLI 56, 70 (2004), *aff'd Presley v. Bureau of Labor and Industries*, 200 Or App 113, 112 P3d 485 (2005). In this case, the Agency sought unpaid wages for Claimant calculated at the minimum wage, and chose to present evidence focusing on the number of hours that Claimant worked instead of trying to prove the amount of commission she earned. Since she was entitled to be

paid at least the minimum wage no matter how much commission she earned, the forum not only determines that Claimant was entitled to the minimum wage but also computes all unpaid wages at the minimum wage rate, which was \$7.80 per hour in 2007.

CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED

Claimant's credible testimony and contemporaneous time records established that she worked a total of 54 hours during the wage claim period. She was entitled to be paid at least \$7.80 per hour for every hour she worked, but was paid only \$75.00. This is far less than the amount she earned.

THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT.

The final element of the agency's prima facie case requires proof of the amount and extent of work performed by claimant. The agency's burden of proof can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. A claimant's credible testimony may be sufficient evidence. *In the Matter of Ilya Simchuk*, 22 BOLI 186, 196 (2001). When the forum concludes that an employee was employed and improperly compensated, the burden shifts to the employer to produce evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. *In the Matter of David Creager*, 17 BOLI 102, 109 (1998). In this case, Claimant provided a contemporaneous record of her work hours and credibly testified that it accurately reflected the hours that she worked. In contrast, Respondent provided no records or evidence whatsoever concerning the number of hours worked by Claimant other than the unsworn, generic statements in his answer that he owed Claimant wages, but Claimant did not work the hours that she claimed. The forum concludes that Claimant worked a total of 54 hours.

WAGES OWED TO CLAIMANT

Claimant earned a total of \$421.20 in straight time wages and was only paid \$75.00, leaving \$346.20 in unpaid, due and owing wages.

PENALTY WAGES

An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *In the Matter of Carl Odoms*, 27 BOLI 232, 240-41 (2006).

Claimant credibly testified that Wendy, her supervisor, telephoned her for status reports every day that Claimant worked. This establishes that Respondent, through his supervisor, was aware of Claimant's work schedule. Despite this awareness, and despite his admission that he owed Claimant wages, Respondent made no effort to pay Claimant the wages he knew she was entitled to.ⁱ This amounts to a willful failure to pay Claimant the wages she was owed.

ORS 652.150(2) provides that "[i]f the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages * * * unless the employer fails to pay the full amount of the employee's unpaid wages * * * within 12 days after receiving the written notice." On August 2, October 9, and November 9, 2007, the Agency sent written notices of nonpayment to Respondent. By serving the Order of Determination, the Agency also gave written notice to Respondent of Claimant's wage claim. In response, Respondent failed to pay any of the unpaid wages, despite conceding that wages were due. Therefore, penalty wages are not limited to 100% of Claimant's unpaid wages and

are calculated pursuant to ORS 652.150(1): \$7.80 per hour x 8 hours x 30 days = \$1,872.00.

ORS 653.055 CIVIL PENALTIES

ORS 653.055 provides that the forum may award civil penalties to an employee when the employer pays that employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261. Under ORS 653.055(1), an employer who pays an employee less than the minimum wage is liable to the employee for civil penalties that are computed in the same manner as penalty wages under ORS 652.150. *In the Matter of 82nd Street Mall, Inc.*, 30 BOLI 140, 150 (2009). A *per se* violation occurs when an employee's wage rate is the minimum wage, the employee is not paid all wages earned, due, and owing under ORS 652.140(1), and no statutory exception applies. *Id.* No statutory exception applies in this case, and Respondent's failure to pay the minimum wage to Claimant entitles Claimant to a civil penalty under ORS 653.055, calculated as follows: \$7.80 per hour x 8 hours x 30 days = \$1,872.00.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages, penalty wages, and civil penalties Respondent owes as a result of its violations of ORS 652.140(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Allen Belcher** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Terra Elias in the amount of FOUR THOUSAND NINETY DOLLARS AND TWENTY CENTS (\$4,090.20), less appropriate lawful deductions, representing \$346.20 in gross earned, unpaid, due, and payable wages, \$1,872.00 in penalty wages, and \$1,872.00 in civil penalties, plus interest at the legal rate on the sum of \$346.20 from July 1, 2007, until paid, and interest at the legal rate on the sum of \$3,744.00 from August 1, 2007, until paid.

ⁱ Cf. ORS 652.160, which provides “In case of dispute over wages, the employer must pay, without condition, and within the time set by ORS 652.140, all wages conceded by the employer to be due * * *.”