

**In the Matter of**

**SUE DANA**

**Case No. 42-06**

**Final Order of Commissioner Dan Gardner**

**Issued September 26, 2006**

**SYNOPSIS**

Respondent employed Claimant to clean houses at the agreed rate of \$100 per house. Claimant cleaned four houses over a nine day period and worked 73 hours. At the minimum wage rate of \$7.25 per hour, Claimant earned \$529.25 and was paid \$100. Respondent was ordered to pay the balance due of \$429.25 in unpaid, due and owing wages. Respondent's failure to pay was willful and Respondent was ordered to pay \$1,740 in penalty wages. Respondent was also ordered to pay a civil penalty of \$1,740 based on Respondent's failure to pay Claimant at least the minimum wage rate for the hours Claimant worked. ORS 652.140; ORS 652.150; ORS 653.055; ORS 653.025.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 29, 2006, in the W.W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Patrick Plaza, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Maria Luisa Cayetano ("Claimant") was present throughout the hearing and was not represented by counsel. Sue Dana ("Respondent") failed to appear for hearing in person or through counsel. Terry Rogers, a certified Spanish interpreter, was present throughout the hearing and interpreted the entire proceeding for the benefit of Claimant and interpreted her testimony during the hearing.

The Agency called Maria Luisa Cayetano, Claimant; Adriana Julian, Claimant's friend; and Stan Wojtyla, BOLI Wage and Hour Division compliance specialist as witnesses.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-8;
- b) Agency exhibits A-1 through A-13 (filed with the Agency's case summary).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 August 1, 2005, Claimant filed a wage claim with the Agency alleging Respondent had employed her from April 28 to May 10, 2005, and failed to pay her wages for hours she worked during that period.

2) 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.

3) On December 8, 2005, the Agency issued Order of Determination No. 05-2316. In the Order, the Agency alleged Respondent had employed Claimant during the period April 28 through May 10, 2005, failed to pay her for all hours worked in that period, and was liable to her for \$429.25 in unpaid wages, plus interest. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent was liable to her for \$1,740 as penalty wages, plus interest. In addition to the penalty wages, the Agency alleged Respondent paid Claimant less than the wages to which she was entitled under ORS 653.010 to 653.261 and was therefore liable to her for \$1,740 as civil penalties pursuant to ORS 653.055(1)(b), plus interest. The Order gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On December 28, 2005, Respondent filed an answer that stated, in pertinent part:

“I deny that Maria Luisa Cayetano earned \$520.25 at the rate of \$7.25 per hour during period of April 28-05 through May 10, 2005.

“The truth is she shared some residential cleaning with Sue Dana at 4 locations for a total of \$360.00 (her share), which \$100 has been paid.

“I (S.D.) would like Maria to receive her portion, but Maria was not paid because Sue Dana was not able to collect the remaining money from the person who offered us this cleaning job and is not to be found.

“Also, Sue Dana had an injury which has delayed her ability to pay out of her own resources.

“Maria was not an employee, but did share the job with Sue.

“I am requesting a hearing unless we can settle this in accordance with my figures. I do not believe I should be fined penalties or interest on any of the money Maria earned (Sue Dana’s figures.)”

5) On July 18, 2006, the Agency submitted a request for hearing. On July 19, 2006, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 1 p.m. on August 29, 2006. With the Notice of Hearing, the forum included copies of the Orders of Determination, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

6) On August 4, 2006, the Agency filed a motion to amend the Order of Determination and a motion for summary judgment based on the proposed amendment. Both motions were later withdrawn on August 11, 2006.

7) On August 16, 2006, the ALJ ordered the Agency and Respondent each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by

August 23, 2006, and notified them of the possible sanctions for failure to comply with the case summary order.

8) On August 23, 2006, the Agency timely filed a case summary. Respondent did not file a case summary.

9) Respondent did not appear at the time and place set for hearing and no one appeared on her behalf. The ALJ found Respondent to be in default, and commenced the hearing.

10) At the start of hearing, the Agency waived the ALJ's recitation of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) The ALJ issued a proposed order on September 13, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither Respondent nor the Agency filed exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) At times material, Respondent was an individual conducting a housecleaning business. (Testimony of Claimant, Julian, Wojtyla; Entire Record)

2) On or about April 13, 2005, Claimant was a passenger in a car that was involved in a car accident. Following the accident, Respondent, a passerby, stopped her car and offered Claimant assistance. Claimant spoke little English and Respondent spoke little Spanish, but they exchanged telephone numbers. Very soon thereafter Respondent called Claimant and asked if she was currently employed. When Claimant told Respondent she was not employed, Respondent offered her a job cleaning houses. Respondent wanted Claimant to start work immediately, but Claimant could not start until she arranged for child care. Respondent called or stopped by Claimant's home daily until Claimant finally found a babysitter she could afford and started working for Respondent.

3) Claimant's first work day was April 28, 2003. Respondent drove Claimant to and from work each day that Claimant worked because Claimant did not have a car or driver's license. Respondent drove a pick-up truck with a canopy that was filled with cleaning supplies.

4) Respondent told Claimant she would pay her \$100 for each house Claimant cleaned. Between April 28 and May 10, 2005, Claimant cleaned three houses in Molalla and one house in Canby, Oregon. Claimant kept a written record of the hours she worked on each house on a personal calendar at home so she would later know how much she owed her babysitter. Claimant recorded that she worked the following hours for Respondent in 2005: April 28 - 8 hours; April 29 - 8 hours; May 2 - 9 hours; May 3 - 8 hours; May 4 - 10 hours; May 5 - 5 hours; May 6 - 8 hours; May 9 - 9 hours; May 10 - 8 hours. Claimant did not keep her personal calendar after she replaced it at the end of 2005.

5) All of the houses Claimant cleaned were unoccupied when she cleaned them. The first house she cleaned was already rented, but the renters had not moved in yet. All of the houses were very dirty and required heavy duty cleaning. On one occasion, painters were on site painting the interior walls while Claimant cleaned. Claimant cleaned the houses according to Respondent's instructions and with the cleaning supplies and equipment that Respondent provided. Claimant washed walls, windows, and floors. When Respondent observed Claimant "mopping" the floors, she told Claimant the kitchen and bathroom floors were to be cleaned by hand only, which required that Claimant clean while on her knees, using her hands and a rag. Claimant also cleaned the kitchen cupboards, kitchen and bathroom sinks, toilets, bathtub, stove, refrigerator, and oven in each house. Respondent provided a step ladder for Claimant to use while she cleaned the light fixtures and changed the light bulbs in each house.

Claimant "deep cleaned" each house according to Respondent's specifications. Respondent periodically checked on Claimant's work. Sometimes Respondent praised her work and other times asked her to re-do a particular room or task.

6) After she cleaned four houses, Claimant asked Respondent for her wages so she could pay her babysitter. Respondent promised to pay her and asked Claimant if she would be interested in cleaning offices and restaurants for Respondent. Claimant told her that she could not continue working for Respondent unless she received her wages for the houses she had already cleaned, because she could not afford child care unless she was paid and she could not work "for free." Respondent made excuses for not paying Claimant and Claimant did not work for Respondent again after May 10, 2005.

7) After she quit working for Respondent, Claimant called Respondent several times and asked for her wages. At first, Respondent told her the "company" was going to pay Respondent "on Friday" and promised that Claimant would receive her wages when the company paid Respondent. In or around June 2005, Respondent went to Claimant's home and gave her \$100 in cash. She claimed she could not pay more because she was still waiting to be paid. Claimant's friend, Adriana Julian, who is fluent in Spanish and English, intervened at Claimant's request. Julian spoke to Respondent several times on the telephone and Respondent acknowledged that she hired Claimant to clean houses, that Claimant cleaned four houses, and that she owed Claimant money for cleaning those houses. Each time Julian called her, Respondent apologized and said she would pay Claimant, even if it was "out of her own pocket," but she failed to follow through with her promises to pay. After several calls, Julian told Claimant that it was "obvious" Respondent did not intend to pay her wages.

8) Respondent left Claimant several telephone messages in response to Claimant's inquiries about her wages. Claimant usually deleted the messages after she listened to them, but decided to tape record the last message with Julian's assistance. Using a "micro" cassette recorder, Julian recorded the telephone message that said in pertinent part:

"Hi Maria, this is Sue. I got your messages. I told you that I was trying to get the money from the property management company they haven't really paid anybody. When they pay me I will pay you as soon as I get the money. I'm sorry that you don't believe me but there's nothing I can do about that. I haven't got my money either and I've called them and said even if you just paid for Maria that's fine I won't even take my money if they're not going to pay me, but if they do not pay me before you have to go on your trip I will make sure somehow you get your money okay. So just hang in there I'm working on it. In the meantime, I'm just trying to survive myself, so ummm there's nothing I can do about it until then. Ummm, I'm sorry you misunderstood me but I've told you over and over that she just hasn't paid me. So, I hope this is, obviously isn't gonna come between our friendship because I'm sorry this has happened, but there's nothing I can do about it. My number again is 503-761-0745. Take care. You will get your money. One way or another I will get your money to you. I'm working on that end if they don't pay me then I will pay you. I'll find a way to pay you. Anyway, take care. Bye Bye."

9) Once she determined that collecting her wages from Respondent was futile, Claimant went to "El Programa Hispano" on East Burnside to seek assistance. Claimant told the staff about the problem she had collecting her wages from Respondent and was given a wage claim form to fill out and send to BOLI.

10) During BOLI's wage claim investigation, Respondent acknowledged she met Claimant after witnessing a car accident involving Claimant. Although she denied "employing" Claimant, she admitted she offered her a job "helping" Respondent clean houses and offered to pay her "half" of what Respondent made on each house. When she made a written request for hearing after BOLI issued an Order of Determination, Respondent stated, in pertinent part, in her answer:

"[Claimant] shared some residential cleaning with Sue Dana at 4 locations for a total of \$360.00 (her share), which \$100 has been paid.

"I (S.D.) would like Maria to receive her portion, but Maria was not paid because Sue Dana was not able to collect the remaining money from the person who offered us this cleaning job and is not to be found.

"Also, Sue Dana had an injury which has delayed her ability to pay out of her own resources. Maria was not an employee, but did share the job with Sue."

11) Claimant worked 73 hours between April 28 and May 10, 2005. Calculated at \$7.25 per hour, Claimant earned \$529.25. Respondent paid Claimant \$100, leaving a total of \$429.25 still owing in unpaid wages.

12) On August 18, 2006, BOLI's Wage and Hour Division sent a letter to Respondent notifying her that Claimant had filed a wage claim against her and demanding payment of \$429.25 in unpaid wages at the minimum wage rate of \$7.25 per hour from April 28 to May 10, 2005.

13) All of the witnesses testified credibly.

#### **ULTIMATE FINDINGS OF FACT**

1) At times material, Respondent conducted business in Oregon and employed one or more persons in the operation of that business.

2) Respondent employed Claimant from April 28 through May 10, 2005.

3) At times material, the state minimum wage was \$7.25 per hour.

4) Between April 28 and May 10, 2005, Claimant worked 73 hours for Respondent.

5) Claimant quit her employment with Respondent on May 10, 2005.

6) From April 28 through May 10, 2005, Claimant earned \$529.25 and Respondent paid her only \$100 for the work she performed.

7) On August 18, 2006, BOLI's Wage and Hour Division sent Respondent a written notice of nonpayment of wages on Claimant's behalf. Respondent did not pay Claimant any additional wages in response to BOLI's notice.

- 8) Respondent owes Claimant \$429.25 in due and unpaid wages.
- 9) Respondent willfully failed to pay Claimant the \$429.25 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.
- 10) Penalty wages for Claimant, computed pursuant to ORS 652.150, equal \$1,740.
- 11) Respondent paid Claimant less than the minimum wage to which she was entitled and civil penalties, computed pursuant to ORS 652.150, equal \$1,740.

### **CONCLUSIONS OF LAW**

- 1) At all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and ORS 653.010 to 261.
- 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.
- 3) Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid after she quit Respondent's employment.
- 4) Respondent is liable for penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation earned and due to Claimant when her employment terminated, as provided in ORS 652.140(2).
- 5) Respondent is liable for civil penalties under ORS 653.055 for failing to pay Claimant the minimum wage to which she was entitled pursuant to ORS 653.025.
- 6) Under the facts and circumstances of this record, and according to the applicable law, 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 civil penalties, plus interest on those sums until paid. ORS 652.332.

## OPINION

Respondent failed to appear at hearing and the forum found Respondent in default pursuant to OAR 839-050-0330. Consequently, the Agency was required to establish a prima facie case on the record to support the allegations in its charging documents. *In the Matter of Barbara Blair*, 24 BOLI 89, 96 (2002). When making factual findings, the forum may consider unsworn assertions contained in a defaulting respondent's answer, but those assertions are overcome whenever controverted by other credible evidence. *Id.*

### WAGE CLAIM

The Agency's prima facie case must include credible evidence of the following elements: 1) Respondent employed Claimant during the wage claim period claimed; 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. *Id.*

#### A. Respondent employed Claimant.

Respondent's unsworn assertion in her answer that Claimant was not an employee, but rather "shared some residential cleaning" jobs with Respondent was controverted by credible evidence in the record. First, Claimant's credible testimony that Respondent, a stranger to Claimant, approached her following a car accident and almost immediately thereafter offered her a job cleaning houses at the rate of \$100 per house was substantiated by Respondent's admissions to the Agency investigator. Second, Claimant credibly testified that Respondent told her what hours to work and provided transportation to and from the job sites which consisted of four unoccupied houses. Third, Claimant credibly testified that Respondent told her how to perform the tasks she was assigned and provided Claimant all of the cleaning equipment she needed to perform those tasks. There is no evidence that Respondent "shared" the

tasks with Claimant or even that she was present on the job sites except to direct and control Claimant's work. Based on Claimant's credible testimony and Respondent's admissions, in the answer and to the Agency investigator, the forum concludes Respondent employed Claimant.

**B. Claimant was entitled to at least the minimum wage rate for any work she performed for Respondent.**

Credible evidence shows Respondent and Claimant agreed on a pay rate - \$100 per house – a rate which, when calculated based on Claimant's actual work hours, is less than the 2005 minimum wage rate of \$7.25 per hour. Respondent was required to pay Claimant at least \$7.25 per hour for the hours she worked between April 28 and May 10, 2005.

**C. Claimant performed work for which she was not properly compensated.**

Respondent admitted and evidence shows Claimant did not receive all of the wages she earned for the work she performed between April 28 and May 10, 2005.

**D. Claimant maintained an independent record of her work hours that established the amount and extent of the work she performed.**

When, as in this default case, a respondent produces no record of dates or hours worked, the forum may rely on a wage claimant's credible testimony to show the amount and extent of the work performed. *Barbara Blair*, 24 BOLI at 97. Here, Claimant credibly testified that she kept a written record of her work hours in order to track the amount she owed for childcare while she worked. When she filed her wage claim, she relied on her record to show the dates and hours she worked for Respondent. The forum accepts Claimant's record that established she worked 73 hours, earning a total of \$529.25 when computed at \$7.25 per hour. Respondent paid Claimant \$100 and has paid nothing further to date. Respondent owes Claimant \$429.25.

## **PENALTY WAGES - ORS 652.150**

The forum may award penalty wages when it determines that a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. A respondent commits an act or omission "willfully" if the respondent acts or fails to act intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Respondent's telephone message to Claimant and her subsequent admissions to the Agency investigator and in her answer demonstrate that Respondent knew Claimant was owed wages for the house cleaning work she performed at Respondent's behest. Respondent's claim that Claimant could not be paid until Respondent was paid by a third party was not credible and, in any event, is not a defense. There is no evidence that Respondent was acting other than intentionally and as a free agent. Consequently, Respondent is liable to Claimant for penalty wages in the amount of \$1,740.

## **CIVIL PENALTIES - ORS 653.055**

If an employer pays an employee "less than the wages to which an employee is entitled under ORS 653.010 to 653.161," the forum may award civil penalties to the employee. ORS 653.055. The Agency alleged Respondent failed to pay Claimant a rate equal to at least the 2005 minimum wage rate for the hours Claimant worked between April 28 and May 10, 2005. Oregon's minimum wage requirements are included under ORS 653.025 and are within the range of wage entitlements encompassed by ORS 653.055. The Agency presented sufficient evidence to show Respondent failed to pay Claimant the minimum wage rate required under ORS 653.025 for each hour that Claimant worked for Respondent. Respondent is therefore

liable to Claimant for \$1,740 in civil penalties as provided in ORS 652.150 (\$7.25 x 8 hours per day x 30 days). See ORS 653.055(1)(b).

### **ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, Respondent **Sue Dana** is hereby ordered 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:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Maria Luisa Cayetano, in the amount of THREE THOUSAND NINE HUNDRED NINE DOLLARS AND TWENTY FIVE CENTS (\$3,909.25), less appropriate lawful deductions, representing \$429.25 in gross earned, unpaid, due and payable wages, \$1,740 in penalty wages, and \$1,740 in civil penalties, plus interest at the legal rate on the sum of \$429.25 from June 1, 2005, until paid, and interest at the legal rate on the sum of \$3,480 from July 1, 2005, until paid.