

In the Matter of
LINDA MARIE MORGAN
Case No. 80-08
Final Order of Commissioner Brad Avakian
Issued March 30, 2009

SYNOPSIS

Respondent employed Claimant as a food server at the agreed rate of \$9 per hour. Claimant worked 489 hours, including 9.25 overtime hours. Claimant earned \$4,442.63, including \$124.88 in overtime wages, and was paid \$2,397.00. Respondent was ordered to pay the balance due of \$2,045.63 in unpaid, due and owing wages. Respondent's failure to pay was willful and Respondent was ordered to pay \$2,160.00 in penalty wages. Respondent also was ordered to pay a civil penalty of \$2,160.00 based on Respondent's failure to pay Claimant the appropriate rate for the overtime hours Claimant worked. ORS 652.140; ORS 652.150; ORS 653.055; ORS 653.261.

The above-entitled case came on regularly for hearing before Linda A. Lohr, 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 January 27, 2009, in the Oregon Employment Department conference room, located at 450 Marine Drive, Astoria, Oregon.

Patrick Plaza, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Danielle J. McConnell ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent Linda Marie Morgan ("Respondent") was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses: Mary Garrett, Respondent's former landlord; Bernadette Yap-Sam, BOLI Wage and Hour Division Compliance Specialist; Katherine Johnson, Claimant's acquaintance; and Claimant.

Respondent did not call any witnesses.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-7; and
- b) Agency exhibits A-1 through A-17 (filed with the Agency's case summary).

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 October 12, 2007, Claimant filed a wage claim with the Agency alleging Respondent had employed her and failed to pay her wages for the hours she worked between April 28 and September 13, 2007. Claimant alleged she earned \$4,443.50 and was paid only \$2,352 during that period, and that Respondent owed her \$2,091.50 in unpaid wages.

2) When 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 March 31, 2008, the Agency issued Order of Determination No. 07-3310. In the Order, the Agency alleged Respondent had employed Claimant during the period claimed, failed to pay her for hours worked during those periods, and was liable to her for \$2,045.63 in unpaid wages, plus interest. The Agency also alleged Respondent's failure to pay all of the wages when due was willful and she was liable to Claimant for \$2,160 as penalty wages, plus interest. The Agency further alleged Respondent paid Claimant less than the wages required by law and was liable for an additional \$2,160 as civil penalties, 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) Respondent was served with the Order of Determination and thereafter filed an answer and requested a hearing. In her answer, Respondent claimed Claimant took Respondent's work sheets and failed to credit Respondent with an additional \$80 that Respondent gave to Claimant on her last work day.

5) On September 9, 2008, the Agency submitted a request for hearing. On September 10, 2008, the Hearings Unit issued a Notice of Hearing stating the hearing would begin at 9:00 a.m. on December 16, 2008. The Notice of Hearing included copies of the Order of Determination, a language notice, a Servicemembers Civil Relief Act notification, and a Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

6) On September 11, 2008, 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 December 5, 2008, and notified them of the possible sanctions for failure to comply with the case summary order. On the same date, the ALJ issued an order pertaining to fax filings and timelines for responses to motions and service of documents.

7) On November 25, 2008, the Hearings Unit Coordinator re-mailed to Respondent's new address, 2264 Jennifer Place, Longview, WA 98632, copies of all documents in the hearing file that had been returned by the U.S. Postal Service as undeliverable at Respondent's last known address. In the cover letter, Respondent was reminded that she must notify the Hearings Unit when she has a change of address.

8) On December 5, 2008, the Agency timely submitted a case summary.

9) On the morning of December 15, 2008, the participants were notified by telephone that the hearing scheduled for the next day was cancelled due to inclement weather. On December 17, 2008, the ALJ issued an order rescheduling the hearing to begin on January 27, 2009. The case summary deadline was extended to January 16, 2009. Respondent did not file a case summary.

10) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) At the start of hearing, the ALJ, on her own motion, amended the caption in the Notice of Hearing to include Respondent's full name as it appears in the Agency's Order of Determination.

12) The ALJ issued a proposed order on March 6, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material, Respondent was an individual operating a restaurant known as the Hidden Flower in Clatskanie, Oregon.

2) Respondent hired Claimant to work as a food server on April 28, 2007. The restaurant had 10-15 tables and 2-3 employees. There was no set schedule and each day Claimant was told when to report to work for her next shift. Respondent gave each food server, including Claimant, a separate calendar that remained at the work site to record hours worked. Claimant recorded her daily work hours on that calendar. Every time she was paid, she wrote the amount on the calendar.

3) Respondent agreed to pay Claimant \$9 per hour.

4) Respondent had no established pay period. Food servers were paid sporadically based on each day's earnings. Respondent paid Claimant varying

amounts ranging from \$5 to \$30 in cash. Additionally, between April and September 2007, Respondent gave Claimant three checks totaling \$820.00. Claimant and the other food servers put their daily tips in a cup for distribution amongst the employees at a later date. Respondent never distributed the tips and Claimant does not know what happened to the tips after they were placed in the cup.

5) Claimant quit working for Respondent on September 13, 2007. When she quit, she asked Respondent for all of her wages. Respondent promised she would pay Claimant when she had the money. When she left, Claimant took with her the calendar documenting her work hours. Claimant later returned the calendar to Respondent, along with a "personal spreadsheet" that was prepared using the information she had recorded on the calendar during her employment. Claimant gave Respondent one week to pay the wages owed. Claimant never heard from Respondent and has not received any wages from Respondent since she quit her employment.

6) On October 19, 2007, the Agency mailed a "Notice of Wage Claim" to "Hidden Flower" stating that Claimant had filed a wage claim alleging she was owed \$2,091.50 in unpaid wages. Respondent submitted no response to the notice.

7) On December 27, 2007, the Agency mailed a letter to Respondent requesting a response to the notice of wage claim or full payment of unpaid wages. Respondent submitted a response on January 14, 2008, that included a completed "Employer Response" form and copies of the calendar Claimant used to record her work hours, Claimant's "personal spreadsheet," and an itemized statement of Claimant's "2007 - YTD Wages." In her response, Respondent admitted she employed Claimant during the wage claim period and that she had agreed to pay Claimant \$9 per hour. The itemized statement of Claimant's "2007 - YTD Wages" included a breakdown of Claimant's gross earnings totaling \$4,443.50, showing "Draws" totaling \$2,352 and a

“net” amount due of \$2,091.50. The statement also documented “net wages” of \$1,058.00 after deductions, which included “Draws,” FICA, Medicare, and other lawful withholdings.

8) Based on the records Claimant and Respondent provided, the Agency determined that Claimant worked 489 hours between April 28 and September 13, 2007, including 8.75 overtime hours for the week ending May 19, 2007, and .5 overtime hours for the week ending June 23, 2007. For all of those hours, Claimant earned gross wages of \$4,442.63. During that period, she was paid \$2,397, leaving \$2,045.63 in unpaid, due, and owing wages.

9) All of the witnesses testified credibly.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent was an individual operating a restaurant as a sole proprietor and employing one or more persons to perform work in Oregon.

2) Respondent employed Claimant as a food server between April 28 and September 13, 2007, and agreed to pay her \$9 per hour.

3) Between April 28 and September 13, 2007, Claimant worked 489 hours for Respondent, including 9.25 hours in excess of 40 hours per work week.

4) Respondent did not pay Claimant one and one half times her pay rate for any of the overtime hours she worked during that period.

5) Claimant quit her employment with Respondent on September 13, 2007.

6) From April 28 and September 13, 2007, Claimant earned \$4,442.63 and Respondent paid her only \$2,397 for the work she performed.

7) Respondent owes Claimant \$2,045.63 in due and unpaid wages.

8) Respondent willfully failed to pay Claimant the wages due and owing and more than 30 days have elapsed since the wages were due.

9) BOLI sent Respondent written notices of nonpayment of wages to Claimant on October 19 and December 27, 2007, and on February 26, 2008, before issuing an Order of Determination on March 31, 2008.

10) Penalty wages for Claimant, computed pursuant to ORS 652.150, equal \$2,160.

11) Respondent did not pay Claimant 9.25 hours of overtime and civil penalties, computed pursuant to ORS 652.150, equal \$2,160.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer utilizing Claimant's services and was 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 Respondent. ORS 652.310 to 652.405.

3) Respondent violated ORS 652.140(2) by failing to pay Claimant all wages or compensation earned and unpaid when her employment terminated.

4) Respondent is liable for penalty wages under ORS 652.150 based on her willful failure to pay all wages or compensation earned and due to Claimant when Claimant's employment terminated as provided in ORS 652.140(2).

5) Respondent violated ORS 653.261 by failing to pay Claimant one and one half times her wage rate for each hour she worked in excess of 40 per week and is liable for civil penalties as provided in ORS 653.055.

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 all sums until paid. ORS 652.332.

OPINION

The Agency was required to prove: 1) Respondent employed Claimant; 2) any 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 Forestry Action Committee of the Illinois Basin*, 30 BOLI _ (2008).

Respondent admitted she employed Claimant at the agreed upon rate of \$9 per hour and acknowledged Claimant was improperly compensated. Respondent did not dispute the number of hours Claimant claimed, but contended she paid Claimant \$80 that was not reflected on the calendar Claimant contemporaneously maintained at Respondent's behest. Respondent's contention was negated by evidence demonstrating the Agency credited Respondent with the \$80 payment when computing the wages owed and Respondent produced no evidence showing she paid Claimant more wages than claimed.ⁱ In fact, Respondent provided the Agency with Claimant's 2007 itemized wage statement that corroborates Claimant's testimonial and documentary evidence. For those reasons, Respondent owes Claimant the amount alleged in the Order of Determination - \$2,045.63.

PENALTY WAGES

Penalty wages may be awarded when a respondent's failure to pay wages is deemed 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. *In the Matter of Forestry Action Committee of the Illinois Basin*, 30 BOLI 1, (2008).

Respondent does not dispute she owed Claimant wages when Claimant quit her employment. Moreover, Respondent did not refute credible evidence establishing that

Claimant recorded her hours on a calendar provided and maintained by Respondent or that Respondent was well aware of the amount and extent of Claimant's work hours when Claimant quit her employment. The itemized statement that Respondent produced showing Claimant's 2007 earnings reflects the identical amount Claimant claimed she earned and was owed during the wage claim period. Respondent did not refute Claimant's credible testimony that Respondent promised to pay Claimant when she "had the money," or that after Claimant quit, she continued to rebuff Claimant's attempts to collect her wages. Evidence demonstrates Respondent voluntarily and as a free agent failed to pay Claimant all of the wages she earned between April 28 and September 13, 2007, when Claimant terminated her employment without notice. Respondent acted willfully and is liable for penalty wages pursuant to ORS 652.150.

Accordingly, penalty wages are assessed and calculated in accordance with ORS 652.150 in the amount of \$2,160. This figure is computed by multiplying \$9 per hour by 8 hours per day multiplied by 30 days. See ORS 652.150 and OAR 839-001-0470(1)(c).

CIVIL PENALTIES

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 compensate Claimant at one and one half times her regular rate of pay for each hour she worked that exceeded 40 hours in a given work week between April 28 and September 13, 2007. The Commissioner's rules governing overtime requirements were promulgated pursuant to ORS 653.261 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 overtime for the hours she worked in excess of 40 per week, as

required under OAR 839-020-0030(1). Accordingly, Respondent is liable to Claimant for \$2,160 in civil penalties as provided in ORS 652.150 (\$9 x 8 hours per day x 30 days). ORS 653.055(1)(b).

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondent **Linda Marie Morgan** hereby is ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Danielle J. McConnell, in the amount of SIX THOUSAND THREE HUNDRED SIXTY FIVE DOLLARS AND SIXTY THREE CENTS (\$6,365.63), less appropriate, lawful deductions, representing \$2,045.63 in gross earned, unpaid, due and payable wages, less appropriate lawful deductions, \$2,160 in penalty wages, and \$2,160 in civil penalties, plus interest at the legal rate on the sum of \$2,045.63 from October 1, 2007, until paid, and interest at the legal rate on the sum of \$4,320 from November 1, 2007, until paid.

ⁱ Although she was not testifying under oath at the time, Respondent made a statement against interest during the hearing when she admitted she never distributed the tips that accrued each day in the tip jar during the wage claim period. She also appeared to concede that she owed the amounts claimed and profusely apologized to Claimant for failing to pay the amounts owed.