

In the Matter of

LISA SANCHEZ,

Case No. 50-04

Final Order of Commissioner Dan Gardner

Issued October 11, 2005

SYNOPSIS

The Agency paid out \$253.33 in unpaid wages to a wage claimant in a Wage Security Fund payout and sought reimbursement of that amount from Respondent, plus a \$200 penalty. The forum ordered Respondent to repay the amounts sought to the Wage Security Fund. ORS 652.414; OAR 839-001-0510, OAR 839-001-0515.

The above-entitled case came on regularly for hearing before Alan McCullough, 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 January 19, 2005, at the Bureau’s Salem office located at 3865 Wolverine NE, E-1, Salem, Oregon.

The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by Cynthia L. Domas, case presenter, an employee of the Agency. Respondent Lisa Sanchez did not appear at the hearing and was held in default.

The Agency called the following witnesses: Donna Stutzman (“Claimant”)(telephonic); Jenelle Neuffer, Wage & Hour Division compliance specialist; and Michael Mortland, Wage & Hour Division compliance manager.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-12 (submitted or generated prior to hearing); and
- b) Agency exhibits A-1 through A-31 (submitted prior to hearing).

Having fully considered the entire record and the Agency's exceptions 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 January 30, 2003, Claimant filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay her all earned, due, and owing wages.

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 August 4, 2003, the Agency issued Order of Determination No. 03-0368 in which it alleged that Claimant was employed by Respondents Lisa and David Sanchez, dba Morgan's at the Mountain, from November 1 through December 20, 2002; that Respondent unlawfully deducted \$201.33 from Claimant's wages; and that Respondent owed Claimant another \$52 in earned, due, and owing wages, plus \$1,560 in penalty wages and \$1,560 in civil penalties based on violations of ORS 653.055(1)(b).

4) On August 25, 2003, Respondent Lisa Sanchez filed an answer and request for hearing.

5) On March 19, 2004, Claimant signed a "Wage Security Fund Assignment of Wages" in which she assigned to the Commissioner of the Bureau of Labor and Industries all wages due from Respondent.

6) On June 1, 2004, the Agency issued a Final Order of Determination on Default as to David Sanchez.

7) On April 12, 2005, the Agency filed a motion to amend the Order of Determination in the following particulars:

- a) Delete David Sanchez as a Respondent;
- b) Delete the Agency's plea for penalty wages and civil penalties;
- c) Allege that "[p]ursuant to ORS 652.414 and OAR 839-001-0500 to 839-001-0560, the Bureau determined that the wage claimant in this matter was entitled to and received payment from the Wage Security Fund, hereinafter Fund, in the sum of \$253.33. The Commissioner of the Bureau of Labor and Industries is entitled by ORS 652.414(3) and OAR 839-001-0560 to recover from the employer the amount paid from the Fund, together with a penalty of 25 percent of the sum paid from the Fund or \$200, whichever is greater. In this case \$200 is the greater amount and that is the penalty amount the Agency is seeking along with interest at the legal rate per annum from June 1, 2004 until paid."

8) On April 13, 2005, the Hearings Unit issued a Notice of Hearing to Respondent Lisa Sanchez and the Agency stating the time and place of the hearing as June 14, 2005, at 10 a.m., at the State Office Building, 800 NE Oregon St., 10th Floor, 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 Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

9) On April 27, 2005, the ALJ granted the Agency's motion to amend the Order of Determination.

10) On April 27, 2005, the ALJ issued an Interim Order changing the location of the hearing to BOLI's Salem office, located at 3865 Wolverine St. NE, Bldg. E-1, Salem, Oregon.

11) When the ALJ commenced the hearing at 10 a.m. on June 14, 2005, Respondent had not yet appeared at the hearing and had not contacted the Agency case presenter, the ALJ, or the Hearings Unit to state that she would not be making an

appearance. The ALJ waited until 10:30 a.m. to commence the hearing, then declared Respondent in default and commenced the hearing.

12) On July 19, 2005, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On July 20, 2005, the Agency filed a request for an extension of time to file exceptions. The ALJ granted the Agency's motion. The Agency timely filed exceptions on August 9, 2005. As a result of those exceptions, the ALJ issued an amended proposed order that included a notice that the Agency and Respondent were entitled to file exceptions to the amended proposed order.

13) On August 8, 2005, the Agency filed an exception to the amended proposed order arguing that Respondent should not have been granted the opportunity to file exceptions because of Respondent's default. The forum notes that, had Respondent filed any exceptions, it would have included them in the record and hearings file but would not have considered them for the reasons stated in the Agency's exception.

FINDINGS OF FACT – THE MERITS

1) In 2002, Respondent was a person who operated a restaurant in Welches, Oregon and engaged the personal services of one or more persons.

2) Lisa and David Sanchez took over the operation of a restaurant named Morgan's at the Mountain ("Morgan's") on or about November 1, 2002. Claimant had worked at that same restaurant for its previous owner. On November 1, 2002, Lisa and David Sanchez hired Claimant to continue work for them as a food server and at the bakery counter. Claimant was paid \$6.50 per hour plus tips.

3) Claimant worked for Lisa and David Sanchez until December 20, 2002, when she voluntarily quit.

4) Claimant was paid all wages that she earned between November 1 and November 30, 2002.

5) Claimant worked 84.5 hours at Morgan's in December 2002.

6) On January 5, 2003, Respondent issued a final paycheck to Claimant to compensate Claimant for the work she performed in December 2002. Respondent calculated Claimant's wages based on 76.5 hours of work. In addition to statutory deductions, Respondent deducted the sum of \$201.33 from Claimant's check "in Bakery tips Taken by Donna Stutzman as wages, without permission 11-1 – 12-18."

7) Claimant never signed an authorization for Respondent to take any deductions from her paycheck.

8) Jenelle Neuffer, an Agency compliance specialist, investigated Claimant's wage claim. Based on Claimant's contemporaneous time records, Respondent's failure to provide any time records, and Respondent's written acknowledgement of the \$201.33 deduction from Claimant's final paycheck, Neuffer made a determination that Claimant had a valid wage claim in the amount of \$253.33 in earned, due, and owing wages.

9) Neuffer also determined that Respondent had filed a Chapter 7 bankruptcy claim on January 29, 2003, that was dismissed on April 29, 2003; that Respondent filed a subsequent Chapter 7 bankruptcy claim on October 29, 2003; and that Respondent was no longer doing business as of January 12, 2004.

10) On or about April 8, 2004, Neuffer completed a document entitled "Wage Security Fund Report," a standard Agency form used by Agency compliance specialists when they recommend that a wage claimant be paid wages from the Wage Security Fund ("WSF"). The form asks 12 questions, and the answers noted by Neuffer included the following:

a) Morgan's had ceased doing business and was closed, or substantially closed, as of 1/12/04;

- b) Morgan's no longer employed anyone;
- c) It was unknown whether there was successor in interest;
- d) Lisa and David Sanchez had filed Chapter 7 bankruptcy;
- e) Recovery was recommended against "Lisa & David Sanchez, et al."

Question 6 on the form asks "Are employer's assets sufficient to fully and promptly pay Claimant?" Neuffer did not answer that question. At the bottom of the form, Neuffer added the following additional comment: "Recovery is recommended because bankruptcy filing is set for dismissal pending outcome of bankruptcy fraud charges. Appears that employers have retained assets."

11) On May 3, 2004, BOLI caused the WSF to issue a check in the amount of \$230.55 to Claimant, representing net wages. Claimant was actually paid gross wages of \$253.33, but statutory deductions were taken from the gross wages before BOLI issued the check to Claimant.

12) Twenty-five percent of \$253.33 is \$63.33.

13) Claimant, Neuffer, and Mortland were credible witnesses.

ULTIMATE FINDINGS OF FACT

1) In 2002, Respondent was a person who operated a restaurant in Welches, Oregon and engaged the personal services of one or more persons, including Claimant.

2) Claimant worked for Respondent from November 1 through December 20, 2002, when she voluntarily quit. She earned \$6.50 per hour plus tips.

3) Respondent has not paid Claimant for 8 hours of work she performed in December 2002 and owes Claimant \$52 for this unpaid work. Respondent also deducted \$201.33 from Claimant's final paycheck without Claimant's written authorization and has not reimbursed Claimant for this deduction.

4) An Agency compliance specialist investigated Claimant's wage claim and made a determination that Claimant had a valid wage claim in the amount of \$253.33,

that Respondent had ceased doing business, and that Respondent was without sufficient assets to fully and promptly pay the wage claim at the cessation of business.

5) On May 3, 2004, BOLI caused the WSF to issue a check in the amount of \$230.55 to Claimant, representing net wages. Claimant was actually paid gross wages of \$253.33, but statutory deductions were taken from the gross wages before BOLI issued the check to Claimant.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer subject to the provisions of ORS 653.010 to 653.025 and 652.110 to 652.414 and Claimant was Respondent's employee.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and 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 not later than five days, excluding Saturdays, Sundays and holidays, after termination of her employment.

4) The Agency paid out \$253.33 from the WSF to the Claimant and is entitled to recoup those funds, plus a penalty of \$200 from Respondent. ORS 652.414(1), ORS 652.414(3).

OPINION

Pursuant to ORS 652.414(3), the Agency is entitled "to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid from the Wage Security Fund ("WSF") under subsection (1) of [the statute]."ⁱ The Agency is also entitled to recover a penalty of 25 per cent of the wages paid from the WSF or \$200, whichever is greater. *Id.* Respondent did not appear at the hearing to contest the Agency's recovery action and the forum held Respondent in default.

When a respondent defaults, the Agency is required to present a prima facie case on the record to support the allegations in its charging document. ORS 183.415(6). In this case, the Agency was required to establish that (1) Respondent was an employer at material times; (2) an amount was paid to Claimant from the WSF as unpaid wages; and (3) Respondent is liable for the amounts paid from the WSF.

In this case, the Agency established that Respondent operated a restaurant in Oregon and engaged Claimant's services as a food server between November and December 2002, and, thus, was Claimant's employer at times material. The Agency also presented evidence that Claimant was paid \$253.33, less statutory deductions, from the WSF, following an investigation of Claimant's wage claim. Agency Compliance Specialist Neuffer credibly testified that she made a determination that Claimant's claim was valid and she established the means by which she made that determination. She also confirmed that the \$253.33 paid to Claimant from the WSF was based on her determination that the wage claim was valid. *See In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999) (in cases involving payouts from the Wage Security Fund, when (1) there is credible evidence that a determination on the validity of the claim was made; (2) there is credible evidence as to the means by which that determination was made; and (3) BOLI has paid out money from the Fund and seeks to recover that money, a rebuttable presumption exists that the Agency's determination is valid for the sums actually paid out).

Based on the evidence presented, the forum concludes that Respondent was "the employer" for the purpose of ORS 652.414(3) and is liable for the amount paid to Claimant from the WSF. Additionally, under the statute, the Commissioner is entitled to recover a 25 percent penalty on the amount paid or \$200, whichever is greater. In this case, \$200 is greater and Respondent is liable to the Commissioner for that amount.

ORDER

NOW, THEREFORE, as authorized by ORS 652.414, and as payment of the amounts paid from the Wage Security Fund as a result of her violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Lisa Sanchez** 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 the amount of FOUR HUNDRED FIFTY-THREE DOLLARS AND THIRTY THREE CENTS (\$453.33), representing \$253.33 paid to Donna Stutzman from the Wage Security Fund and a \$200 penalty, plus interest at the legal rate on the sum of \$453.33 from June 1, 2004, until paid.

ⁱ ORS 652.414(1) requires the Commissioner to pay a wage claimant out of the WSF when he has determined that the wage claim is valid, the employer against whom the claim was filed has ceased doing business, the employer is without sufficient assets to pay the wage claim, and the wage claim cannot otherwise be fully and promptly paid. Respondent did not appear at the hearing to contest the recovery action and, in the absence of contrary evidence, the forum applies the presumption that an “[o]fficial duty has been regularly performed” and the requisite determinations made. ORS 40.135(1)(j). See also *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999),