

In the Matter of
TINA DAVIDSON,
dba Magic Care, Respondent.

Case Number 44-97
Final Order of the Commissioner
Jack Roberts
Issued August 7, 1997.

SYNOPSIS

Where respondent employer failed to pay wage claimant all wages due after she quit, the Commissioner found the failure to pay to be willful and assessed penalty wages in addition to the unpaid earnings. ORS 652.140, 652.150.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon and sitting in Portland, Oregon. The hearing was held by telephone on July 10, 1997. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency, by telephone from Eugene, Oregon. Tina Davidson, formerly doing business as Magic Care (Respondent), was not present either in person or by telephone after due notice and was in default. Danielle Felton (Claimant) was present by telephone throughout the hearing and was not represented by counsel.

The Agency called as witnesses Claimant by telephone from Milton-Freewater, Oregon, and Agency Compliance Specialist Rhoda Briggs, by telephone from Bend, Oregon. No witnesses were presented by Respondent.

Having fully considered the entire record in this matter, I, Jack Roberts,

Commissioner of the Bureau of Labor and Industries, 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 or about June 25, 1996, Claimant filed a wage claim with the Agency in which she alleged that she had been employed by Respondent, who had failed to pay all wages earned and due to her.

2) At the same time she filed her 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 19, 1996, through the Marion County Sheriff, the Agency personally served on Respondent at 4296 Amherst NE, Salem, Oregon, Order of Determination No. 96-113 (Determination Order) based upon the wage claim filed by Claimant and the Agency's investigation. The Determination Order found that Respondent owed Claimant \$2,329.05 straight time and overtime wages computed at \$4.75 per hour on a total of 455.75 hours worked, 69.5 of which were worked over 40 hours in a workweek, less the sum of \$1,861.13, leaving a total of \$467.92 unpaid. The Determination Order found further that the failure to pay was willful and that there was due and owing the sum of \$1,140 in civil penalty wages.

4) The Determination Order required that, within 20 days, Respondent either pay these sums in trust to the Agency or request an administrative hearing and submit a written answer to the charge.

5) On January 10, 1997, the Agency received from Respondent a written answer to the Determination Order and a request for hearing. The answer admitted that Claimant had been employed by Respondent at the times alleged and alleged that

Claimant had been overpaid, thus alleging that there was nothing owed. Respondent's answer stated in part,

"I have served to the Labor and Industries copys [sic] of Miss Feltons file and have found to be she was over paid, I have servied [sic] all documents to the labor board time sheets and stubs for taxes taken out."

6) The Agency requested a hearing date and on March 27, 1997, the Hearings Unit issued a Notice of Hearing setting forth the time and place of the hearing as July 10, 1997, in Pendleton, Oregon, which was served on Respondent together with the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; and b) a complete copy of Oregon Administrative Rules (OAR) 839-050- 0000 to 839-050-0420, regarding the contested case process. The Notice of Hearing was placed in the regular US mail, postage prepaid, addressed to Respondent at 4296 Amherst NE, Salem, Oregon 97305 and was not returned undelivered.

7) On June 13, 1997, the Agency filed a motion for the hearing to be conducted by telephone, setting forth that Respondent, Claimant, and Agency witness Briggs were located at the time in Salem, Hermiston, and Bend, that the evidence was largely documentary, and that travel by all concerned, including the forum, to Pendleton from various portions of the state was uneconomical and unnecessary. Respondent did not file any opposition to the motion, which was served on Respondent by regular US mail, postage prepaid, addressed to her at 4296 Amherst NE, Salem, Oregon 97305 and was not returned undelivered.

8) Also on June 13, 1997, the Agency filed a motion for summary judgment, with supporting documentation, alleging that there was no genuine issue of material fact existing and that the Agency was entitled to prevail on its claims for wages and civil penalty wages as a matter of law. Respondent did not file any opposition to the motion,

which was placed in the regular US mail, with postage prepaid, addressed to her at 4296 Amherst NE, Salem, Oregon 97305 and was not returned undelivered. On June 19, 1997, the Agency filed an addendum to its motion for summary judgment, alleging a mathematical error in its original motion. Respondent again did not file any opposition to the addendum, which was placed in the regular US mail, postage prepaid, addressed to her at 4296 Amherst NE, Salem, Oregon 97305 and was not returned undelivered.

9) On June 19, 1997, the Agency advised the ALJ, Claimant, and Respondent of a change in Case Presenter from Judith Bracanovich to Alan McCullough. Respondent's copy of the Agency's letter was placed in the regular US mail, postage prepaid, addressed to her at 4296 Amherst NE, Salem, Oregon 97305 and was not returned undelivered.

10) On June 23, 1997, Case Presenter McCullough forwarded to Respondent at 2185 Bridgett Avenue, Hermiston, Oregon, with a letter, the following:

- (1) Notice of Hearing;
- (2) Summary of Contested Case Rights and Procedures;
- (3) Administrative Hearings Rules for the Bureau of Labor and Industries;
- (4) Agency Motion for Summary Judgment, with 11 exhibits;
- (5) Agency Motion for Telephone Hearing;
- (6) Addendum to Agency Motion for Summary Judgment;
- (7) June 19, 1997, letter from Case Presenter Bracanovich to Judge Gregg.

Case Presenter McCullough's letter with enclosures of June 23, 1997, was sent by certified and regular US mail, postage prepaid, addressed to Respondent at the Hermiston address and was not returned undelivered. Certified mail receipt no. P 066 192 982 shows delivery at 2185 Bridgett Avenue, Hermiston, Oregon, on June 25, 1997, and bears the apparent signature of Respondent.

11) On June 30, 1997, the ALJ denied the Agency's motion for summary

judgment, finding that the hours claimed by the Agency on Claimant's behalf and those submitted by Respondent were not wholly in agreement and that summary judgment was therefore inappropriate. Also on June 30, the ALJ granted the Agency's motion for telephone hearing and directed that Respondent, who by that time was located in Hermiston, and Claimant, located in Milton-Freewater, advise the ALJ and the Case Presenter in writing by July 7, 1997, of their respective telephone numbers for July 10, 1997, at 9 a.m. Thereafter, Claimant advised the forum of her telephone number. Respondent's copy of the ALJ's June 30 order was placed in the regular U.S. mail, postage prepaid, addressed to her at 2185 Bridgett Avenue, Hermiston, and was not returned undelivered.

12) At the commencement of the hearing at 9 a.m. on July 10, 1997, Respondent had not appeared in the hearing room in accordance with the Notice of Hearing, had not advised the ALJ of a telephone number in accordance with the June 30, 1997, order, and had not advised the ALJ of any reason for a failure to respond, for tardiness, or for non-attendance. Because the Notice of Hearing and the attachments thereto together with copies of all documents were received by Respondent by certified mail at the Hermiston address and the ALJ's order of June 30 was sent to the same address with postage prepaid and not returned undelivered, the ALJ found that Respondent received the Notice of Contested Case Rights and Procedures and had notice of the date, time, and manner of hearing.

13) The hearing of July 10, 1997, commenced at 9 a.m. Pursuant to ORS 183.415(7), Claimant and the Agency were orally advised by the ALJ of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. At 9:35 a.m., pursuant to OAR 839-050-0330(2), Respondent was found in default for failure to appear at hearing.

14) The proposed order, which contained an exceptions notice, was issued July 15, 1997. Exceptions were due July 25, 1997. No exceptions were received.

FINDINGS OF FACT -- THE MERITS

1) During times material herein, Respondent, an individual, operated an adult foster care home under the assumed name "Magic Care" at 2185 Bridgett Avenue, Hermiston, Oregon, engaging or utilizing the personal service of one or more employees.

2) Claimant worked for Respondent from March 19 through June 8, 1996. Claimant was referred to the job by the Oregon State Employment Department, Hermiston. The job order received by the Employment Department was for a care giver for elderly residents at \$950 per month, involving five to six shifts of eight to ten hours each per week. Claimant actually worked from one to seven shifts per week, varying in length from six to 16 hours. She was paid at or near the 15th of the month (not always on time) at the rate of \$4.75 per hour for straight time and \$7.125 per hour for hours over 40 hours in one week.

3) Claimant was hired on March 19, the day she applied. She kept her hours on time cards supplied by Respondent, entering her arrival time and quitting time in the "In" and "Out" columns respectively in the "regular time" section of the card. She worked from 2 p.m. to 8 p.m. (six hours) that day and from 8:30 a.m. to 6:30 p.m. (10 hours) on March 20. She was not paid for those hours, which Respondent claimed was "training."

4) Claimant's duties as a caregiver employed by Respondent included cooking and housecleaning, and changing, bathing, and feeding the residents. There were approximately five other caregivers, including Respondent, when Claimant began work.

5) When payday arrived on the 15th of the month, Respondent made excuses and delayed paying Claimant. Claimant found she could not plan her time off because Respondent would ask her to work on scheduled time off. Because of the uncertain hours and pay, Claimant did not return to work after June 8. At least two or three co-workers had similar difficulties with Respondent and quit.

6) Respondent acknowledged to Claimant that she owed Claimant wages when Claimant quit, and promised to pay her, but did not.

7) Rhoda Briggs was a Compliance Specialist with the Agency at times material. As part of her job duties, she accepted and investigated Claimant's wage claim. On July 17, 1996, she sent Respondent a notice of wage claim letter for \$462.55 in unpaid wages. Following receipt of records from Respondent, Briggs revised the figure to \$466.14, based on 386.75 straight time hours and 68.75 overtime hours. Briggs spoke by telephone with Respondent, who did not question the amount and assured Briggs that she would send a check for Claimant. No check was received.

8) From Tuesday, March 19, through Saturday, March 23, 1996, Claimant worked a total of 48 hours for Respondent. In subsequent weeks, Claimant worked the following hours: 58 from March 24 to March 30; 42.25 from March 31 to April 6; 57.75 April 7 to April 13; 45 from April 14 to April 20; 9 from April 21 to April 27; 9 from April 28 to May 4; 23.5 from May 5 to May 11; 56.5 from May 12 to May 18; 41.5 from May 19 to May 25; 36.5 from May 26 to June 1; and 28.75 from June 2 to June 8, when she quit. She thus worked a total of 455.75 hours, 69 of which were hours worked over 40 hours in a work week, and earned \$1,837.06 straight time and \$491.63 in overtime wages.

9) Records submitted to the Agency by Respondent show a gross total of \$1,861.13 paid to Claimant, leaving a balance of \$467.56 owed to Claimant at the time Claimant ceased working for Respondent.

10) Briggs calculated the penalty wages due in accordance with Agency policy. The daily rate from which penalty wages are calculated is the result of multiplying the agreed rate of \$4.75 an hour by eight hours. This daily rate is then multiplied by the number of days, up to 30, that wages remain unpaid.

ULTIMATE FINDINGS OF FACT

- 1) During times material herein, Respondent was an employer in this state.
- 2) Claimant was employed by Respondent from March 19 through June 8, 1996, at \$4.75 an hour straight time and \$7.125 an hour overtime.
- 3) From March 19 through June 8, 1996, Claimant worked a total of 386.75 straight time hours and 69 overtime hours, earning a total of \$2,328.69.
- 4) When Claimant ceased employment, Respondent owed her \$2,328.69 less \$1,861.13 paid, or \$467.56.
- 5) When Claimant quit employment, Respondent failed to pay her at the next scheduled payday for all wages earned, and for 30 days thereafter.
- 6) The daily rate for Claimant was \$38. Penalty wages equal \$1,140.

CONCLUSIONS OF LAW

- 1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.
- 2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.405.
- 3) At times material, ORS 652.140(2) provided:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has

quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs.

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid at the next scheduled payday after Claimant terminated employment.

4) At times material, ORS 652.150 provided:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

5) At times material herein, ORS 653.025 provided, in part:

"[F]or each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

" * * * * *

"(3) For calendar years after December 31, 1990, \$4.75."

Respondent failed to pay Claimant minimum wage for the hours in Respondent's employ.

6) At times material herein, ORS 653.261 provided, in part:

"The commissioner may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half time the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

At times material herein, OAR 839-20-030 provided, in part:

"(1) Except as provided in OAR 839-20-100 to 839-20-135 all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefit of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 253.261(1). * * *

"(2) Definitions:

"(a) 'Work week' means any seven (7) consecutive twenty four (24) hour period as determined by the employer. * * * For purposes of overtime computation, each work week stands alone;

"(b) 'Regular rate', for purposes of overtime computation means a regular hourly rate, but in no case less than the applicable statutory minimum wage rate. * * * "

Respondent failed to pay Claimant one and one-half times the minimum wage for the hours worked for Respondent in excess of 40 hours in any one week.

7) Under the facts and circumstances of this record, and in accordance with ORS 652.332, 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 and the civil penalty wages, plus interest on both sums until paid.

OPINION

1. DEFAULT

Respondent failed to appear at the hearing and thus defaulted to the charges set forth in the Order of Determination. OAR 839-050-0330(2). It is the charged party's responsibility to keep the Agency and this forum advised of the party's address once the party has been served with the charging document. OAR 839-050-0030(4). In a default situation, pursuant to ORS 183.415(5) and (6), the task of this forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. See *In the Matter of John Cowdrey*, 5 BOLI 291, 298 (1986); *In the Matter of Art Farbee*, 5 BOLI 268, 276 (1986); *In the Matter of Judith Wilson*, 5 BOLI 219, 226 (1986); see also OAR 839-050-0330(2).

Where a respondent submits an answer to a charging document, the forum may

admit the answer into evidence during a hearing and may consider the answer's contents when making findings of fact. Where a respondent fails to appear at hearing, the forum may review the answer to determine whether the respondent has set forth any evidence or defense to the charges. *In the Matter of Jack Mongeon*, 6 BOLI 194 (1987); *In the Matter of Richard Niquette*, 5 BOLI 53 (1986). In a default situation where a respondent's total contribution to the record is a request for a hearing and an answer that contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by other credible evidence on the record. *Mongeon, supra*.

The Agency has established a prima facie case. A preponderance of credible evidence on the whole record showed that Respondent employed Claimant during the period of the wage claim and willfully failed to pay her all wages, earned and payable, when due. That evidence, which established that Respondent owed Claimant the amount in the Order below, was credible, persuasive, and the best evidence available, given the failure of Respondent to appear at the hearing. Having considered all the evidence on the record, the forum finds that the prima facie case has not been contradicted or overcome.

2. HOURS WORKED

It is the employer's duty to maintain an accurate record of an employee's time worked. ORS 653.045; *In the Matter of Godfather's Pizzeria, Inc.*, 2 BOLI 279, 296 (1982) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946)). Respondent's records did not reflect any dispute as to hours worked. The order below enforces the duty of the employer to pay what was really due, since that duty is absolute. *In the Matter of Handy Andy Towing, Inc.*, 12 BOLI 284, 294-95 (1994); *Garvin v. Timber Cutters, Inc.*, 61 Or App 497, 658 P2d 1164 (1983).

3. PENALTY WAGES

Awarding penalty wages turns on the issue of willfulness. 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. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to her employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Evidence established that Respondent intentionally failed to pay wages. Evidence showed that she acted voluntarily and as a free agent. She must be deemed to have acted willfully under this test and thus is liable for penalty wages under ORS 652.150.

The record established that Respondent violated ORS 652.140 as alleged and owed Claimant the amount found as civil penalty wages pursuant to ORS 652.150. Earlier cases computed penalty wages based on the claimant's average daily rate for the period worked. *In the Matter of Flavors Northwest*, 11 BOLI 215, 224 (1993). By statute, the daily rate in this case was determined by multiplying the agreed upon hourly rate by eight hours. As before, the penalty period is limited to 30 calendar days from the date wages became due, *i.e.*, the next scheduled payday when a quit without notice was within five days of the next scheduled payday. ORS 652.150 (1995).

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders TINA DAVIDSON, dba Magic Care, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

- (1) A certified check payable to the Bureau of Labor and Industries IN TRUST

FOR DANIELLE FELTON in the amount of ONE THOUSAND SIX HUNDRED SEVEN DOLLARS AND FIFTY-SIX CENTS (\$1,607.56), less lawful deductions, representing \$467.56 in gross earned, unpaid, due, and payable wages, and \$1,140 in penalty wages, plus

(2) Interest at the rate of nine percent per year on the sum of \$467.56 from June 15, 1996, until paid, plus

(3) Interest at the rate of nine percent per year on the sum of \$1,140 from July 15, 1996, until paid.

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