

In the Matter of

MILLENNIUM INTERNET, INC.

Case No. 95-03

Final Order of Commissioner Dan Gardner

Issued March 22, 2004

SYNOPSIS

Respondent employed Claimant as a technical writer and failed to pay Claimant his earned wages for all straight time hours worked and did not pay Claimant overtime for hours worked over 40 in a given workweek. The forum awarded Claimant \$1,831.50 in unpaid, due and owing wages. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay \$5,280 in penalty wages. ORS 652.140(2), *former* 652.150, *former* OAR 839-001-0470.

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 February 24, 2004, at the Oregon State Employment Department, located at 545 SW 2nd Street, Corvallis, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Frederick B. Marsico, the wage claimant ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent did not appear at the hearing and was found in default.

The Agency called Claimant and Jenelle Neuffer, Wage and Hour Division compliance specialist, as its only witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-12 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-16, A-18, and A-19 (submitted prior to hearing).

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 6, 2001, Claimant filed a wage claim with the Agency. He alleged that Respondent had employed him and failed to pay wages earned and due to him.

2) At the time he filed his wage claim, Claimant assigned to the Commissioner of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) Claimant brought his wage claim within the statute of limitations.

4) On January 24, 2003, the Agency served Order of Determination No. 01-3568 on Respondent based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$1,831.50 in unpaid straight time and overtime wages and \$5,280 in penalty wages, plus interest, and 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.

5) On February 24, 2003, Respondent filed an answer and request for hearing. Respondent's answer admitted that Respondent had been Claimant's

employer from May 15, 2001 through July 12, 2001, and alleged that Claimant had been paid all earned wages.

6) On January 16, 2004, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as February 24, 2004 at 9:00 a.m. at the Oregon Employment Department, 5545 SW 2nd Street, Corvallis, 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, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

7) On February 24, 2004, at 9 a.m., Respondent did not appear for the hearing and had not earlier notified the Hearings Unit that it would not be present at the hearing. The ALJ went on the record and announced that he would wait until 9:30 a.m., pursuant to OAR 839-050-0330, to commence the hearing and that Respondent would be in default if it did not make an appearance by that time. Respondent did not appear by 9:30 a.m. and the ALJ declared Respondent to be in default and commenced the hearing.

8) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the Agency of the issues to be addressed, 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, Respondent Millennium Internet, Inc. was a Washington corporation that engaged or utilized the personal services of one or more employees in the state of Oregon.

2) In late May 2001, Benter Oriko, Respondent's corporate president, hired Claimant to work as a technical writer on a contract Respondent was performing for the Oregon Department of Education at the Department's office in Salem, Oregon.

3) Oriko and Claimant originally agreed that Claimant would be paid \$25 per hour. Subsequently, Oriko and Claimant agreed that Claimant would be paid \$22 per hour, with statutory deductions taken from his wages.

4) Claimant began work for Respondent on May 30, 2001. Throughout his employment with Respondent, his workweek was Monday through Friday.

5) Claimant's last day of work with Respondent was July 13, 2001. During his employment with Respondent, he worked for the following number of hours by workweek:

- a) May 30-31: 16 hours
- b) June 4-8: 43.5 hours
- c) June 11-15: 44.5 hours
- d) June 18-22: 41.5 hours
- e) June 25-29: 41.5 hours
- f) July 2-6: 34 hours
- g) July 9-13: 42.5 hours

6) In all, Claimant worked 250 straight time hours and 13.5 overtime hours while employed by Respondent.

7) Oriko was aware of all the hours that Claimant worked.

8) Claimant was entitled to be paid \$33 per hour ($\22×1.5) for his overtime hours.

9) Claimant earned a total of \$5,945.50 while employed by Respondent ($250 \text{ hours} \times \$22 = \$5,500$; $13.5 \text{ hours} \times \$33 = \$445.50$; $\$5,500 + \$445.50 = \$5,945.50$).

10) Respondent paid Claimant a total of \$4,114 in wages in three paychecks issued on June 5, June 20, and July 5, 2001. These checks were intended to pay

Claimant for work he performed during the respective pay periods of May 16-31, June 1-15, and June 16-30, 2001.

11) Respondent paid Claimant nothing for the work he performed after June 30, 2001.

12) There is no evidence in the record as to whether Claimant's separation from Respondent's employment was voluntary or involuntary.

13) Claimant asked Oriko to pay him all wages due and owing on several occasions after he left Respondent's employment, but Respondent did not and has not paid Claimant any more wages.

14) Penalty wages, computed pursuant to *former* ORS 652.150 and *former* OAR 839-001-0470, equal \$5,280 (\$22 per hour x 8 hours x 30 days = \$5,280).

15) Claimant and Neuffer were both credible witnesses and the forum has credited all of their testimony.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Millennium Internet, Inc. was a Washington corporation that engaged or utilized the personal services of one or more employees in the state of Oregon.

2) Respondent employed Claimant as a technical writer in Oregon from May 30 through July 13, 2001.

3) Respondent and Claimant agreed that Claimant would be paid \$22 per hour.

4) Claimant worked a total of 250 straight time hours and 13.5 overtime hours while employed by Respondent, earning \$5,945.50. Claimant has only been paid \$4,114 and is owed \$1,831.50 in unpaid, due and owing wages.

5) Penalty wages equal \$5,280.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Millennium Internet, Inc. 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 653.010 to 653.261. During all times material, Respondent employed Claimant.

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 653.261.

3) Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid by July 20, 2001, five days after he left Respondent's employment, excluding Saturdays, Sundays and holidays. Respondent owes Claimant \$1,831.50 in unpaid, due and owing wages. ORS 653.261, OAR 839-020-0030.

4) Respondent's failure to pay Claimant all wages due and owing was willful and Respondent is liable for \$5,280 in penalty wages to Claimant. *Former* ORS 652.150; *former* OAR 839-001-0470.

5) 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 his earned, unpaid, due and payable wages, and the penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

When a respondent defaults, the Agency must establish a prima facie case to support the allegations of its charging document. *In the Matter of Peter N. Zambetti*, 23 BOLI 234, 241 (2002). The forum may consider unsworn assertions contained in a defaulting respondent's answer when making factual findings, but those assertions are overcome whenever controverted by other credible evidence. *Id.*

The Agency's prima facie case consists of credible evidence of the following elements: 1) Respondent employed Claimant; 2) Respondent agreed to pay Claimant \$22 per hour; 3) Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Scott Miller*, 23 BOLI 243, 258 (2002).

RESPONDENT EMPLOYED CLAIMANT

The first element of the Agency's prima facie case is undisputed, as Respondent admitted in its answer that it employed Claimant.

RESPONDENT AGREED TO PAY CLAIMANT \$22 PER HOUR

Respondent admitted in its answer that it agreed to pay Claimant \$22 per hour, satisfying the second element of the Agency's prima facie case.

CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED

In its answer, Respondent asserted that Claimant had been paid all wages due and owing. Respondent did not provide copies of any records to back up that assertion. In contrast, Claimant credibly testified that he worked 66.5 hours in July 2001 and that Respondent paid him nothing for that work. Based on this credible testimony, the forum concludes that Claimant performed work for which he was not properly compensated.

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 the claimant. The Agency's burden of proof can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. *In the Matter of Sreedhar Thakkun*, 22 BOLI 108, 115 (2001). When an employer produces no records of dates or hours worked by claimant, the forum may rely on credible testimony by the claimant to show the amount and extent of the claimant's

work. *In the Matter of G & G Gutters, Inc.*, 23 BOLI 135, 145 (2002). In this case, Claimant credibly testified that he worked 250 straight time and 13.5 overtime hours for Respondent. Based on Claimant's agreed wage of \$22 per hour, he earned \$5,945.50 in straight time and overtime wages. His check stubs show that he was only paid \$4,114, leaving \$1,831.50 in unpaid, due and owing wages.

RESPONDENT MUST PAY PENALTY WAGES TO CLAIMANT

The forum may award penalty wages where a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she 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).

Claimant credibly testified to his wage agreement with Respondent and that Respondent's president, Benter Oriko, Blair was aware of the amount and extent of the work he performed. There is no evidence to show that Respondent acted other than intentionally and as a free agent in underpaying him.

Based on the foregoing, the forum concludes that Respondent acted willfully and awards \$5,280 in penalty wages to Claimant.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and penalty wages owed as a result of its violation of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Millennium Internet, Inc.** 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 Frederick B. Marsico in the amount of SEVEN THOUSAND ONE HUNDRED ELEVEN DOLLARS AND FIFTY CENTS (\$7,111.50), less appropriate lawful deductions, representing \$1,831.50 in gross, earned,

unpaid, due, and payable wages and \$5,280 in penalty wages, plus interest at the legal rate on the sum of \$1,831.50 from August 1, 2001, until paid and interest at the legal rate on the sum of \$5,280 from September 1, 2001, until paid.