

In the Matter of
ROBERT N. BROWN dba Café Rosemary,,

Case No. 62-00

June 8, 2000

SYNOPSIS

Respondent employed Claimant as a food server and failed to pay Claimant all wages due upon termination, in violation of ORS 652.140(2). Respondent's failure to pay the wages was willful, and Respondent was ordered to pay civil penalty wages. ORS 652.140(2), 652.150.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 19, 2000, in the Bureau of Labor and Industries office at 1250 N.E. 3rd, Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Jaymie L. Turner, the wage claimant ("Claimant"), was present throughout the hearing and was not represented by counsel. Respondent Robert N. Brown was present throughout the hearing and was not represented by counsel.

The Agency called the following witnesses: Claimant and Rhoda Briggs, Wage & Hour Division Compliance Specialist. Respondent called himself as a witness.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-7 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 through A-11 (submitted or generated prior to hearing) and A-12 (submitted at hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, 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 or about April 1, 1999, Claimant filed a wage claim with the Agency. She alleged that Respondent employed her and failed to pay wages she earned between January 18, 1999 and February 4, 1999.

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

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

4) On August 13, 1999, the Agency served Order of Determination No. 99-1116 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 \$442.50 in unpaid wages and \$1,560.00 in civil 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 August 31, 1999, the Agency received a written request for hearing and answer from Respondent. In his answer, Respondent acknowledged that Claimant had worked for him for "59.5" hours "according to time records" from January 18, 1999 through February 4, 1999. Respondent alleged that penalty wages were inappropriate because of missing funds associated with Claimant's employment.

6) On January 28, 2000, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as

April 11, 2000, and successive days thereafter, at 9:00 a.m., at the Bend office of the Bureau of Labor and Industries. Together with the Notice of Hearing, the forum sent 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 3, 2000, BOLI mailed a copy of the forum's amended contested case hearings rules, effective January 27, 2000, to Respondent.

8) On February 7, 2000, the ALJ issued a case summary order requiring the Agency and Respondent each to submit a list of witnesses to be called, copies of documents or other physical evidence to be introduced, and a statement of any agreed or stipulated facts. The Agency was additionally ordered to submit wage and penalty calculations and a brief statement of the elements of the claim. Respondent was additionally ordered to submit a brief statement of any defenses to the claim. The ALJ ordered the participants to submit case summaries by April 3, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On March 13, 2000, the ALJ, on his own motion, reset the hearing for April 19, 2000 at the same location, at the same time extending the due date for case summaries to April 10, 2000.

10) The Agency timely filed its case summary, with attached exhibits, on April 10, 2000. Respondent did not file a case summary.

11) On April 13, Respondent left a voice mail message with the ALJ requesting a postponement. On April 14, after notifying the Agency case presenter of this message, the ALJ contacted Respondent and advised that he needed to file his request in writing and that it could be filed by facsimile transmission directly to the ALJ and served in the same manner on the Agency. At 11:47 a.m. on April 14, Respondent

filed a motion for postponement via facsimile and served a copy on the Agency. The stated basis for Respondent's motion was that he had been in California dealing with unforeseen urgent family business – his brother's serious illness - the prior two weeks and it appeared he would be again called away the date of the hearing. In response, the ALJ conducted a pre-hearing conference at 2:35 p.m. on April 14. At that time, the Agency objected to Respondent's motion on the basis that it was untimely and did not show good cause. During the conference, Respondent stated that the circumstance that would require his absence was a prospective, presently unscheduled meeting with his brother's estranged wife's attorneys in California. The ALJ denied Respondent's motion on the basis that it was untimely and that Respondent had failed to show good cause. At the hearing, the ALJ confirmed that ruling.

12) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) At the hearing, the Agency moved to amend the Order of Determination to conform to the evidence to seek \$385 in unpaid wages instead of \$422.50. Respondent did not object and the motion was granted.

14) At the hearing, Respondent sought to testify concerning the contents of documents labeled R-2 and R-3 and further sought to have those documents admitted as exhibits. Both documents consisted of handwritten statements by two of Respondent's employees, created in November 1999, that discussed Respondent's policy for retaining guest checks. The Agency objected to Respondent's testimony and admission of the documents on the bases of lack of relevancy, that they had not been provided as required by the ALJ's case summary order, that Respondent had not disclosed the authors as potential witnesses pursuant to the same order, and that

Respondent did not have a satisfactory reason for failing to previously provide the documents. Respondent did not articulate a satisfactory reason for not providing them as part of a case summary. The ALJ further concluded that excluding the evidence would not violate the duty to conduct a full and fair inquiry under ORS 183.415(10), based on their lack of relevance to the issue of whether Claimant was owed wages,¹ and refused to admit them or to allow Respondent to testify concerning their contents. However, Respondent was allowed to submit the exhibits and describe their contents as an offer of proof.

15) The ALJ issued a proposed order on May 4, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The forum received no exceptions.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Robert N. Brown, an individual person, did business under the assumed business name of Café Rosemary.

2) Respondent hired Claimant in December 1998 as a food server. Claimant's usual hours were 10:30 a.m. to 3:30 p.m., Monday through Friday. Claimant was paid minimum wage, which was \$6.00 per hour in 1998 and \$6.50 per hour in 1999.

3) Claimant was employed by Respondent through February 4, 1999.

4) During Claimant's employment, Respondent had bi-monthly payroll periods, from the first to the fifteenth day, and the sixteenth to the last day of each month. Respondent paid employees on the fifth and twentieth days of each month.

5) Claimant worked 59.25 hours for Respondent between January 18, 1999 and February 4, 1999. Respondent has not paid Claimant for any of these hours.

6) Respondent has not paid Claimant for these hours based on an unspecified amount of "missing funds" and his perception that Claimant was stealing

from him by not putting all the cash she received from customers in payment of their guest checks in Respondent's cash register.

7) Respondent reported Claimant's suspected theft to the police in the week prior to the hearing, but had initiated no legal action against her prior to that time.

8) On February 2, 1999, Claimant gave Respondent notice that February 4 would be her last day of work. Claimant worked February 3 and 4, 1999.

9) Calculated at the wage rate of \$6.50/hr., Claimant earned a total of \$385.13 between January 18, 1999 and February 4, 1999.

10) At the time of Claimant's termination, Respondent owed Claimant \$385.13 in unpaid wages.

11) Civil penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: \$6.50/hr. multiplied by 8 hours per day equals \$52.00; \$52.00 multiplied by 30 days equals \$1,560.00.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was an individual person who engaged the personal services of one or more employees in the State of Oregon.

2) Respondent employed Claimant in Oregon from December 1998 through February 4, 1999.

3) Claimant earned \$385.13 in wages during her employment with Respondent between January 18, 1999 and February 4, 1999.

4) Respondent has not paid Claimant any wages for the work she performed between January 18, 1999 and February 4, 1999.

5) Claimant voluntarily terminated her employment with Respondent effective February 5, 1999, giving Respondent prior notice on February 2, 1999.

6) Respondent willfully failed to pay Claimant \$385.13 in earned, due, and payable wages no later than February 4, 1999, Claimant's last day of employment, and more than 30 days have elapsed since that date.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Robert N. Brown 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. During all times material herein, 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.

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 by February 11, within five days, excluding Saturdays, Sundays and holidays, after Claimant quit.. Those wages amount to \$385.13.

4) ORS 652.150 provides:

“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 hourly 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 \$1,560.00 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

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 her earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

INTRODUCTION

The Agency alleged in its Order of Determination that Claimant was not paid for 65 hours of work she performed for Respondent between January 18 and February 4, 1999. The Agency alleged that Claimant was entitled to \$6.50 per hour, the statutory minimum wage, and was owed a total of \$442.50 in unpaid wages and \$1560.00 in civil penalty wages. At hearing, the forum granted the Agency's unopposed motion to amend the Order of Determination downward to seek \$385.00 in unpaid wages instead of \$442.50.

PRIMA FACIE CASE

To establish a prima facie case for wage claims, the Agency must establish the following elements: (1) Respondent employed Claimant; (2) Claimant's agreed upon rate of pay, if it was other than minimum wage; (3) Claimant performed work for which she was not properly compensated; and (4) the amount and extent of work performed by Claimant. *In the Matter of Majestic Construction, Inc.*, 19 BOLI 59, 67 (1999).

All of these elements are undisputed, with Respondent and the Agency stipulating that Claimant worked 59.25 hours for which she was entitled to be paid \$6.50 per hour, the statutory minimum wage, and for which she was not compensated. The

only issue is whether Respondent's perception that Claimant was responsible for "missing funds" entitled Respondent to deduct any or all of the wages Claimant earned for working those 59.25 hours.

Oregon law in this matter is set forth in ORS 652.610. This statute severely limits the circumstances under which an employer may take deductions from an employee's wages. None of those circumstances applies here. The forum has previously held that an employer may not withhold an employee's wages based on allegations, even if confirmed, that the employee stole money from the employer. *In the Matter of Ken Taylor*, 11 BOLI 139, 144 (1992). Consequently, Respondent owes Claimant the \$385.00 in unpaid wages sought in the Order of Determination, as amended at hearing.

PENALTY WAGES

An award of 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. *In the Matter of Barbara Coleman*, 19 BOLI 230, 265 (2000). Respondent, as an employer, had a duty to know the amount of wages due his employees. *Id.* Respondent testified that he knew the specific number of hours worked by Claimant and that he voluntarily chose not to pay Claimant, based on his perception that she was stealing from him. There is no evidence that Respondent acted other than voluntarily or as a free agent. The forum concludes that Respondent acted willfully and assesses penalty wages in the amount of \$1,560.00, the amount sought in the Order of Determination. This figure is computed by multiplying \$6.50 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages he owes as a result of his violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Robert N. Brown** 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 Jaymie L. Turner in the amount of ONE THOUSAND NINE HUNDRED FORTY-FIVE DOLLARS (\$1,945.00), less appropriate lawful deductions, representing \$385.00 in gross earned, unpaid, due, and payable wages and \$1,560.00 in penalty wages, plus interest at the legal rate on the sum of \$385.00 from March 1, 1999, until paid and interest at the legal rate on the sum of \$1,560.00 from April 1, 1999, until paid.

¹ The issue of guest checks was relevant only to Respondent's defense that Claimant had stolen money from Respondent and that Respondent was therefore entitled to offset Claimant's wages by the amount purportedly stolen. As discussed in the Opinion, *infra*, this is not an available defense under Oregon law.