

In the Matter of

TONI KUCHAR

dba

South Beach Gallery & Studio

Case No. 34-02

Final Order of the Commissioner Jack Roberts

Issued August 2, 2002

SYNOPSIS

Where Claimant performed odd jobs for Respondent, was paid less than minimum wage for hours worked, was not paid for all hours worked, and Respondent claimed she was not an employee, the forum found that Claimant was an employee covered by state minimum wage provisions. The forum also found Claimant was underpaid wages for hours worked and not paid for all hours worked. Respondent kept no record of Claimant's work hours and the forum awarded Claimant \$203.50 in unpaid wages based on Claimant's credible testimony and contemporaneous records. Respondent's failure to pay was willful and the forum ordered Respondent to pay \$1,560 in civil penalty wages in addition to the unpaid wages. ORS 653.010; ORS 652.310; ORS 652.140(2); *former* ORS 652.150.

The above-entitled case came on regularly for hearing before Linda A. Lohr, 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 July 9, 2002, in the Abby Room of the Oregon Employment Department, located at 120 NE Avery Street, Newport, Oregon.

Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Nicole J. Reed ("Claimant") was present throughout the hearing and was not represented by counsel. Toni Kuchar ("Respondent") was present throughout the hearing and was not represented by counsel.

In addition to Claimant, the Agency called as witnesses: Sam Reed, Claimant's grandfather, and Newell Enos, BOLI Wage and Hour Division Compliance Specialist.

In addition to herself, Respondent called as witnesses: Carrie Gartz, Respondent's friend, and Jack Parks, Respondent's husband.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-7;
- b) Agency exhibits A-1 through A-8 (filed with the Agency's case summary) and A-9 through A-11 (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 October 16, 2001, Claimant filed a wage claim form stating Respondent had employed her from July 26 through September 28, 2001, and failed to pay her at least the minimum wage rate for all hours worked.

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 January 10, 2002, the Agency issued an Order of Determination, numbered 01-4798. The Agency alleged Respondent had employed Claimant during the period July 26 through September 28, 2001, at the rate of \$6.50 per hour for 249 hours of work, no part of which had been paid except \$625, leaving a balance due and owing of \$993.50. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent was liable to Claimant for \$1,560 as penalty wages, plus interest. The Order of Determination was personally

served on Toni Kuchar at 3607 South Coast Highway, South Beach, Oregon, and 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) On February 5, 2002, Respondent filed an answer and requested a hearing. Respondent's answer stated, in pertinent part:

"Nicole J. Reed was not hired as an employee. She did a couple of odd jobs for pay. Each job payed [sic] on that day (example) like yard work and washing paint off windows. She was never hired as a [sic] employee. During period she says she was employed the shop wasn't open. I sent statements 3 times to Bureau. One I faxed[,] 2 sent by mail. 36 pages, also statement from the woman who had sublet my shop in August thru Sept. There was a craft bazarre [sic]. She was not here or hired by anyone.

"Nicole Reed owes Toni Kuchar \$50 on payment of loan to her. Nicole Reed was paid in full. She called and made threats to try & get money. The woman who had bazaarre [sic] here took a phone call from Nicole Reed to me. Nicole didn't realize that she wasn't speaking to me. I sent statements of persons next door to me and never have they been reviewed."

5) On February 25, 2002, the Agency requested a hearing. On February 26, 2002, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 10 a.m. on July 9, 2002. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440. The Notice of Hearing and accompanying documents were mailed to Toni Kuchar, South Beach Gallery & Studio, 3607 South Coast Highway 101, South Beach, Oregon 97366-9635. The U.S. Post Office did not return the Notice of Hearing documents to the Hearings Unit.

6) On February 28, 2002, the forum sent Respondent a copy of the amended contested case hearing rules and a revised Summary of Contested Case Rights and Procedures, effective February 15, 2002. The amended rules and revised summary

were mailed to Toni Kuchar, South Beach Gallery & Studio, 3607 South Coast Highway 101, South Beach, Oregon 97366-9635, and were not returned by the U.S. Post Office.

7) On April 30, 2002, the Agency moved for a discovery order requiring Respondent to produce five categories of documents. The Agency included a copy of its informal discovery request, marked as "Agency Exhibit A," which was mailed to Respondent at PO Box 93, South Beach, Oregon 97366, on April 10, 2002. The relevance of the documents sought in four of the five categories was readily apparent. Respondent filed no response to the Agency's motion. On May 14, 2002, the forum issued an interim order that granted the Agency's motion and required Respondent to produce all of the requested documents in four of the five categories to the Agency no later than May 17, 2002. The forum's discovery order was mailed to Respondent at PO Box 93, South Beach, Oregon 97366, and was not returned by the U.S. Post Office.

8) On June 4, 2002, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); and a statement of any agreed or stipulated facts and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by June 28, 2002, and advised them of the possible sanctions for failure to comply with the case summary order. The case summary order was mailed to Respondent at PO Box 93, South Beach, Oregon 97366, and was not returned by the U.S. Post Office.

9) The Agency filed its case summary, with attached exhibits, on June 11, 2002. Respondent did not file a case summary.

10) At the start of hearing, Respondent stated she had received the Notice of Contested Case Rights and Procedures and had no questions.

11) 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.

12) During the hearing, Respondent stated that she did not receive the forum's discovery order or the interim order requiring case summaries that were mailed to her on May 14 and June 4, 2002, respectively, to PO Box 93, South Beach, Oregon 97366. Respondent further stated that she has received mail at that address since January 2002.

13) On July 10, 2002, at the participants' request, the forum mailed copies of administrative exhibits X-1 through X-7 to Respondent at PO Box 93, South Beach, Oregon 97366, and 3607 South Coast Highway 101, South Beach, Oregon 97366-9635.

14) The ALJ issued a proposed order on July 19, 2001, 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 herein, Respondent Toni Kuchar operated a blown glass retail business under the assumed business name of South Beach Gallery & Studio and employed one or more individuals in Oregon.

2) Mutual friends introduced Claimant and Respondent during the summer of 2001. When they met, Respondent was preparing to open a shop in South Beach, Oregon, which displayed and sold hand blown glass. Claimant was looking for work at that time and Respondent agreed to pay her \$5.00 per hour to help Respondent ready the shop for business. Respondent told Claimant her hourly rate would increase to \$6.50 per hour after the shop's "grand opening" sometime in August.

3) Claimant's first day of work was July 26, 2001.

4) Between July 26 and September 28, 2001, Claimant performed odd jobs such as cleaning glass, answering the telephone, dusting shelves, sweeping floors, and painting walls. Claimant occasionally sold glass floats and tended the shop when Respondent was elsewhere.

5) In July and August 2001, Claimant worked irregular hours and usually called Respondent to determine what day and time Respondent needed her in the shop. Claimant's grandfather, with whom she lived, drove her to and from work each workday because Claimant did not have a driver's license.

6) In July and August 2001, Claimant kept a daily record of her hours in a small loose leaf "Portable Student Planner"ⁱ because she believed Respondent was not recording her work hours. Claimant stopped recording her hours in September 2001 because Respondent began tracking Claimant's hours on a calendar, which hung on a wall, after the shop opened for business.

7) In September 2001, Claimant began attending an alternative high school two hours per day and received credit for any hours she worked for Respondent. Claimant believed the special program was designed "for kids who can't cope with regular high school." Claimant arranged to have her school hours switched from late afternoon to morning hours so that she was free to work for Respondent in the afternoons for five or six hours.

8) At all times material herein, Oregon's minimum wage was \$6.50 per hour. The difference between the amount Respondent was required to pay Claimant for every hour worked and the amount Respondent paid Claimant for every hour she worked is \$1.50.

9) For the week ending July 28, 2001, Claimant worked 18 hours and was paid \$5.00 per hour for a total of \$90.00. Respondent underpaid Claimant \$27.00 (18 hours x \$1.50 per hour).

10) For the week ending August 4, 2001, Claimant worked 14.5 hours and was paid \$5.00 per hour for a total of \$72.50. Respondent underpaid Claimant \$21.75 (14.5 hours x \$1.50).

11) Claimant's planner does not show any hours worked during the week ending August 11, 2001.

12) For the week ending August 18, 2001, Claimant worked 17.5 hours and was paid \$5.00 per hour for a total of \$87.50. Respondent underpaid Claimant \$26.25 (17.5 hours x \$1.50).

13) For the week ending August 25, 2001, Claimant worked 22 hours and was paid \$5.00 per hour for a total of \$110. Respondent underpaid Claimant \$33.00 (22 hours x \$1.50).

14) For the week ending September 1, 2001, Claimant worked 16 hours and was paid \$5.00 per hour for a total of \$80. Respondent underpaid Claimant \$24.00 (16 hours x \$1.50).

15) Claimant worked 11 hours in September for which she received no compensation. For those 11 hours, Claimant earned \$71.50 (11 hours x \$6.50 per hour).

16) Between July 26 and September 28, 2001, Claimant worked 99 hours, earning a total of \$643.50 in gross wages.

17) Respondent paid Claimant gross wages of \$440.

18) Respondent owes Claimant \$203.50 for 99 hours of work (88 hours x \$1.50 and 11 x \$6.50).

19) Claimant quit her employment without notice on September 28, 2001, after Respondent became angry when Claimant asked for the \$55.00 that Respondent owed her for hours worked in September. Claimant based her demand for payment on the \$5.00 per hour rate agreed upon when Respondent hired Claimant.

20) When Claimant filed her wage claim in October 2001, she returned to Respondent's business to make a copy of the September calendar showing her hours worked for that month. The calendar had disappeared and Respondent denied knowing its whereabouts.

21) At the time of hearing, Claimant was 16 years old.

22) Claimant's testimony about the numbers of hours she worked between July 26 and September 28, 2001, and the sum she was paid for working those hours was credible and bolstered by her contemporaneous planner. Although her interaction with Respondent during the hearing was acrimonious, the forum attributed Claimant's emotional behavior during some of her testimony to her youth and Respondent's confrontational manner when questioning Claimant. The forum has credited Claimant's testimony and the notes on her contemporaneous planner in their entirety.

23) Gartz credibly testified that she knew Respondent needed help setting up her business and observed Claimant working at South Beach Gallery, which Respondent owned. She did not know specific dates or hours Claimant worked, but credibly testified that she observed Claimant working in the shop on several occasions and that Claimant told her, in September 2001, that Respondent still owed Claimant \$55.00. The forum has credited Gartz' testimony in its entirety.

24) Reed's testimony that he drove Claimant to and from work each day she worked was credible and the forum has credited his testimony in its entirety.

25) Respondent's testimony suggesting that Claimant was either "working off" money Respondent loaned to her or "working off the cost of blown glass [Claimant] had taken from the shop" was not credible. However, her contrary testimony that she needed someone to help ready her shop for business and that Claimant "desperately" needed a job and asked Respondent for a job, performed work at Respondent's shop, and was paid cash for the work performed, was consistent with other credible testimony. The forum, therefore, credits the latter testimony as an admission. Additionally, the forum believes Respondent's testimony that she maintained a wall calendar in September 2001 to note hours worked, but does not believe her claim that she noted her niece's hours on the calendar rather than Claimant's or that her "niece" had the same name as Claimant. There was no evidence to support that claim and the forum only credits Respondent's statement that a wall calendar hung on the wall of her shop with notes pertaining to "Nicole's work hours" as an admission.

26) Parks' testimony was influenced by his marital relationship with Respondent and the forum gave it no weight.

27) Enos' testimony that Respondent provided no records to the Agency during the wage claim investigation was credible.

ULTIMATE FINDINGS OF FACT

1) Respondent, at all times material herein, conducted a business that engaged the personal services of one or more employees in Oregon.

2) Respondent engaged Claimant's personal services and suffered or permitted Claimant to work from July 26 through September 28, 2001.

3) Oregon's minimum wage at times material was \$6.50 per hour.

4) Claimant quit her employment without notice to Respondent on September 28, 2001.

5) Claimant worked 99 hours between July 26 and September 28, 2001, earning a total of \$643.50. Respondent paid Claimant \$440 and owed Claimant \$203.50 in earned and unpaid compensation on the day her employment terminated.

6) Respondent willfully failed to pay Claimant the \$203.50 in earned, due and payable wages no later than October 8, 2001, the fifth business day after Claimant quit her employment without notice to Respondent. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

7) Civil penalty wages, computed pursuant to *former* ORS 652.150 and OAR 839-001-0470, equal \$1,560 (\$6.50 per hour x 8 hours per day x 30 days).

CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

“(3) ‘Employ’ includes to suffer or permit to work; * * * .

“(4) ‘Employer’ means any person who employs another person * * * .”

ORS 652.310 provides, in pertinent part:

“(1) ‘Employer’ means any person who in this state, directly or through an agent, engages personal services of one or more employees * * * .

“(2) ‘Employee’ means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled.”

During all times material herein, Respondent was an employer and Claimant was Respondent’s employee, subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein.

3) At times material herein, 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 within five days, excluding Saturdays, Sundays and holidays, after Claimant quit her employment without notice.

4) At times material herein, *former* ORS 652.150ⁱⁱ 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 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 in civil penalties under *former* 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 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 and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

The Agency was required to prove: 1) that Respondent employed Claimant; 2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) that 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 Barbara Coleman*, 19 BOLI 230 (2000). Respondent does not dispute that Claimant performed odd jobs in Respondent's shop for compensation, but denies Claimant was an employee. The evidence proves otherwise.

RESPONDENT EMPLOYED CLAIMANT

Respondent's bare assertion that Claimant was not an employee contrasts with evidence, including Respondent's own testimony, that corroborates Claimant's statements that she was paid, albeit underpaid, for work performed in Respondent's shop at Respondent's behest. ORS chapter 653 governs minimum wage claims. For purposes of chapter 653, a person is an "employee" of another if that other "suffers or permits" the person to work. *Id.* at 264. Respondent suffered or permitted Claimant to render services for her at Respondent's business, and the forum concludes that Claimant was Respondent's employee under ORS chapter 653.

CLAIMANT'S PAY RATE

ORS 653.025 prohibits employers from paying employees less than \$6.50 for each hour of work time. Any employer who pays less than the minimum wage is liable to the affected employee for the full amount of wages owed, less any amount paid, and for civil penalties provided in *former* ORS 652.150. See ORS 653.055. An agreement between an employer and employee to work at less than the minimum wage and an employee's acceptance of less than minimum wage are not defenses to a wage claim action. See ORS 653.055. See also *In the Matter of La Estrellita, Inc.*, 12 BOLI 232, 243 (1994). Respondent paid Claimant \$5.00 per hour and owes Claimant an additional \$1.50 for each hour worked for which Claimant was paid, and \$6.50 per hour for hours worked for which Claimant was not paid. Neither the agreement nor Claimant's

acceptance of less than the minimum wage constitute a defense. Claimant is entitled to be paid \$6.50 per hour for all hours she worked for Respondent.

CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED

Claimant testified credibly that she worked for Respondent and was underpaid or not paid at all for the hours she worked. Supporting Claimant's testimony, Gartz credibly testified that she observed Claimant working for Respondent and heard Claimant say in September 2001 that Respondent owed her \$55.00. Claimant's grandfather also credibly testified that he drove Claimant to and from her job each workday until Claimant quit because Respondent had not paid her. From those facts, the forum concludes that Claimant performed work for Respondent for which she was not properly paid.

AMOUNT AND EXTENT OF HOURS WORKED

When the forum concludes, as it does here, that an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. Where an employer has produced no records, as happened in this case, the commissioner may rely on evidence produced by the agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference and then may award damages to the employee, even though the result be only approximate." *In the Matter of Ilya Simchuk*, 22 BOLI 186, 196 (2001), quoting *Anderson v. Mt. Clemens Pottery Co.*, 3289 US 680 (1946).

Respondent kept no record of the days or hours Claimant worked in July and August 2001. Claimant credibly testified that Respondent recorded her September 2001 hours on a calendar that hung on a wall in Respondent's shop and that the calendar disappeared after Claimant filed her wage claim. Respondent acknowledges

the calendar, but claims the hours noted belonged to her niece with the same name as Claimant. Respondent offered no evidence to support her claim, nor did she comply with a discovery order requiring her to produce such information. The forum draws an adverse inference from Respondent's failure to produce the calendar and has consequently relied on Claimant's testimony and her contemporaneous planner to determine the amount and extent of work she performed for Respondent. The forum concludes that Claimant performed 99 hours of work for which she was not properly compensated. For all these hours, Claimant earned a total of \$643.50. Claimant credibly testified that she was paid \$5.00 per hour for 88 hours, which totals \$440 in wages she received from Respondent. Respondent owes Claimant \$203.50 in unpaid wages.

CIVIL PENALTIES

The forum may award civil penalty wages where a respondent's failure to pay wages is 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).

Respondent acknowledged at hearing that Claimant performed work for her at Respondent's shop. Respondent denied, however, that she "employed" Claimant. The facts and law prove otherwise. Respondent's failure to apprehend the correct application of the law and Respondent's actions based on this incorrect application do not exempt Respondent from a determination that she willfully failed to pay wages earned and due. *In the Matter of Locating, Inc.*, 14 BOLI 97 (1994), *aff'd without opinion, Locating, Inc. v. Deforest*, 139 Or App 600, 911 P2d 1289 (1996); *In the Matter*

of *Mario Pedroza*, 13 BOLI 220 (1994). Respondent does not deny she did not pay Claimant the minimum wage for all hours Claimant worked and the evidence shows her failure to pay the minimum wage rate was intentional. From these facts, the forum infers Respondent voluntarily and as a free agent failed to pay Claimant all of the wages she earned between July 26 and September 28, 2001. Respondent acted willfully and is liable for penalty wages under *former* ORS 652.150.

Penalty wages, therefore, are assessed and calculated in accordance with *former* ORS 652.150 in the amount of \$1,560. This figure is computed by multiplying \$6.50 per hour by 8 hours per day multiplied by 30 days. See *former* 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 Respondent owes as a result of her violations of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Toni Kuchar** 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 Nicole J. Reed, in the amount of ONE THOUSAND SEVEN HUNDRED SIXTY THREE DOLLARS AND FIFTY CENTS (\$1,763.50), less appropriate lawful deductions, representing \$203.50 in gross earned, unpaid, due and payable wages and \$1,560 in penalty wages, plus interest at the legal rate on the sum of \$203.50 from October 8, 2001, until paid and interest at the legal rate on the sum of \$1,560 from November 8, 2001, until paid.

ⁱ Claimant's planner included a monthly calendar on which Claimant noted appointments and recorded her daily work hours in July and August 2001.

ⁱⁱ In 2001, the legislature amended ORS 652.150. The amendment is not relevant to this matter, which involves wages earned prior to its effective date of January 1, 2002.