

In the Matter of
GRACIELA VARGAS,
aka Graciela Vargas Cardenas, dba Restaurant Vargas, Respondent.

Case Number 45-97
Final Order of the Commissioner
Jack Roberts
Issued February 4, 1998.

SYNOPSIS

Respondent, who operated a restaurant and lunch truck, employed two claimants and failed to pay them all wages due upon termination, in violation of ORS 652.140(2). Respondent's failure to pay the wages was willful, and the Commissioner ordered Respondent to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140(2), 652.150.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, 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 June 3, 1997, in Conference Room 251A of the Public Service Building, 255 Capitol Street NE, Salem, Oregon. The record was reopened and the forum received additional testimony on November 13, 1997, at the Bureau's office in Salem.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Alicia Terrero (Claimant Terrero) and Raul Cano (Claimant Cano) were present throughout the hearing on June 3, 1997. Claimant Cano was present during the hearing on November 13, 1997. Graciela Vargas, aka

Graciela Vargas Cardenas (Respondent), was present throughout the hearing on both dates. She was represented by attorney Matthew U'Ren during the hearing on November 13, 1997.

The Agency called the following witnesses: Raul Cano, Claimant; Manuel Hernandez and Enrique Hidalgo, compliance specialists with the Wage and Hour Division of the Agency; Cynthia Powers, insurance agent; and Alicia Terrero, Claimant.

Respondent called the following witnesses: Rafael Alejos; Carlos Cardenas, Respondent's son and former employee; Lorena Cardenas, Respondent's daughter and former employee; Jose Monteblanco, Respondent's bookkeeper; Uriel Quiroz, business owner; Graciela Vargas, Respondent; and Pastor Vargas, Respondent's brother and former employee.

Maria Morrison, appointed by the forum and under proper affirmation, acted as an interpreter for Spanish speaking witnesses on June 3, 1997. Jose Monteblanco, under proper affirmation, assisted and acted as an interpreter for Respondent on June 3, 1997. Christine Chabre, appointed by the forum and under proper affirmation, acted as an interpreter for Spanish speaking witnesses on November 13, 1997.

Administrative exhibits X-1 to X-31, Agency exhibits A-1 to A-22, and Respondent exhibits R-4 to R-6 were received into evidence. Respondent withdrew exhibits R-1 and R-2. The ALJ did not receive R-3. The record closed on November 13, 1997.

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 July 31, 1996, Claimant Terrero filed a wage claim with the Agency. She alleged that Respondent employed her and failed to pay wages earned and due to her.

2) On July 31, 1996, Claimant Cano filed a wage claim with the Agency. He alleged that Respondent employed him and failed to pay wages earned and due to him.

3) At the same time that they filed their wage claims, Claimants assigned to the Commissioner of Labor, in trust for Claimants, all wages due from Respondent.

4) On November 20, 1996, the Agency served on Respondent an Order of Determination based upon the wage claim filed by Claimant Terrero and the Agency's investigation. The Order of Determination alleged that Respondent owed her a total of \$9,050 in wages and \$1,200 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges. At hearing, the ALJ granted the Agency's motion to amend the wages alleged due from \$9,050 to \$8,259.

5) On November 20, 1996, the Agency served on Respondent an Order of Determination based upon the wage claim filed by Claimant Cano and the Agency's investigation. The Order of Determination alleged that Respondent owed him a total of \$7,338 in wages and \$1,440 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

6) On December 6, 1996, Respondent filed an answer to each Order of Determination and requested a contested case hearing. On December 20, 1996, Respondent filed an amended answer in each case. Respondent denied that she was

Claimants' employer and denied that she owed either Claimant wages or civil penalty wages.

7) On April 18, 1997, the Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimants indicating the time and place of the hearing. Together with the Notice of Hearing, the forum sent a document entitled "Notice 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 839-050-0000 to 839-050-0440.

8) On May 6, 1997, the ALJ issued a discovery order directing each participant to submit a summary of the case, including a list of the witnesses to be called and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-050-0210(1). The summaries were due by May 23, 1997. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary. The Agency submitted a timely summary and a supplement. Respondent submitted a summary on May 29, 1997.

9) At the start of the hearing on June 3, 1997, Respondent reviewed the "Notice of Contested Case Rights and Procedures" with the assistance of Mr. Montebianco and the ALJ explained these rights and procedures to her.

10) Pursuant to ORS 183.415(7), the ALJ explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

11) On July 31, 1997, the ALJ issued a proposed order. On August 10, 1997, Respondent, through attorney Jose Mata, requested an extension of time to file exceptions to the proposed order. The ALJ granted that request and on September 2,

1997, Respondent filed timely exceptions. In addition, Respondent moved to reopen the record. The Agency responded to the motion and on September 19, 1997, the ALJ granted it in part. The ALJ agreed to reopen the record to take evidence on Respondent's allegation that Claimant Cano attempted to bribe a potential witness.

12) The ALJ set an additional hearing date. At Respondent's request, that date was reset to November 13, 1997.

13) At the start of the hearing on November 13, 1997, Respondent's attorney, Matthew U'Ren, stated that he understood the contested case rights and procedures and had no question about them.

14) On November 25, 1997, the ALJ issued an amended proposed order. Included in the amended proposed order was an Exceptions Notice that allowed ten days for filing exceptions to the amended proposed order. The Hearings Unit received no exceptions. The forum has addressed Respondent's original exceptions in the Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) During all times material herein, Respondent, a person, did business as Restaurant Vargas in Cornelius, Oregon. She employed one or more persons in the State of Oregon. She employed members of her family.

2) From November 18, 1995, to May 29, 1996, Respondent employed Claimant Terrero as a cook and waitress.¹ The agreed rate of pay was \$5.00 per hour.

3) From April 1 to June 10, 1996, Respondent employed Claimant Cano. The agreed rate of pay was \$6.00 per hour. Respondent and Claimant Cano were not partners.

4) Respondent bought two lunch trucks, upon which she had painted "Taqueria Vargas." Respondent obtained automobile insurance, naming Claimant Cano

as one of the drivers who would frequently use a truck. Claimants worked in one of the lunch trucks, driving it to various business locations, farmers' fields, and apartments to sell food and drinks.

5) Respondent kept no time or payroll records for either Claimant.

6) Claimant Terrero's records and testimony reveal the following information, which the forum has accepted as fact: she worked 1537 total hours; of the total hours, 546 were hours worked in excess of forty hours per week. Claimant Terrero and Respondent had no agreement about overtime hours. Claimant Terrero earned \$9,050 in wages ((991 hours x \$5.00) + (546 hours x \$7.50) = \$9,050). Respondent paid her \$820. The balance of earned, unpaid, due, and owing wages equals \$8,230.

7) Claimant Cano's records and testimony reveal the following information, which the forum has accepted as fact: he worked 950 total hours; of the total hours, 546 were hours worked in excess of forty hours per week. Claimant Cano and Respondent had no agreement about overtime hours. Claimant Cano earned \$7,338 in wages ((404 hours x \$6.00) + (546 hours x \$9.00) = \$7,338). Respondent paid him nothing. The balance of earned, unpaid, due, and owing wages equals \$7,338.

8) Claimant Terrero quit without notice on May 28, 1996, because Respondent was not paying her.

9) Claimant Cano quit without notice on June 10, 1996, because Respondent was not paying him and because he was having trouble with Respondent's son, Carlos.

10) Respondent did not pay Claimant Terrero more than \$820 in wages because Respondent considered the restaurant to be a family business, and she was treating Claimant Terrero as a member of the family. During some of the time relevant herein, Claimant Terrero lived in Respondent's house. Respondent knowingly paid Claimant Terrero only \$820 in wages, she paid her this amount intentionally, and she

was a free agent.

11) Respondent knowingly and intentionally paid Claimant Cano nothing, although she suffered or permitted him to work for her and knew he was not her partner. During some of the time relevant herein, Claimant Cano lived in Respondent's house, and Respondent apparently believed this was sufficient compensation for his services. Respondent was a free agent.

12) The forum computed civil penalty wages for Claimant Terrero, in accordance with ORS 652.150 and Agency policy, as follows: \$5.00 (Claimant Terrero's hourly rate) multiplied by 8 (hours per day) equals \$40.00. This figure of \$40.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) for a total of \$1,200. The Agency set forth this figure in the Order of Determination.

13) The forum computed civil penalty wages for Claimant Cano, in accordance with ORS 652.150 and Agency policy, as follows: \$6.00 (Claimant Cano's hourly rate) multiplied by 8 (hours per day) equals \$48.00. This figure of \$48.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) for a total of \$1,440. The Agency set forth this figure in the Order of Determination.

14) Rafael Alejos worked for Glenn Walters Nursery for about 10 months in 1996 and for 1000 Farms for two months that year. At different times, Alejos had arranged with Claimant Cano's sister, Maria Refugio Gutierrez, to provide food for workers. Gutierrez had earlier owned Las Conchas Restaurant, which she sold to Respondent (and which became Restaurant Vargas), and she operated a couple of lunch trucks. Claimant Cano had operated one of these trucks for Gutierrez. In February, March, or April 1997, Claimant Cano met with Rafael Alejos. Claimant Cano

asked Alejos if he would be a witness for him at the Bureau's hearing. Claimant Cano wanted Alejos to testify that Cano had been Respondent's employee. Alejos refused because he had only known Cano as Gutierrez's employee, not Respondent's. Claimant Cano then said he would give Alejos "good money," that is, a bribe, if Alejos would testify for him. Alejos refused.

15) The forum carefully observed Claimant Terrero's demeanor and found her testimony to be credible. Her testimony was consistent and corroborated by other credible evidence. There is no reason to determine Claimant Terrero's testimony to be anything except reliable and credible.

16) The forum carefully observed Claimant Cano's demeanor and found his testimony regarding his employment with Respondent to be credible. His testimony denying his meeting in 1997 with Rafael Alejos was not credible.

17) Respondent's testimony was unreliable, inconsistent, and contradicted by other evidence, including the testimony of her own witnesses. Accordingly, the forum gave little weight to Respondent's testimony, except that which was corroborated by credible evidence.

ULTIMATE FINDINGS OF FACT

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

2) Respondent employed Claimant Terrero from November 18, 1995, to May 29, 1996. Respondent suffered or permitted Claimant Terrero to render personal services to Respondent. Respondent and Claimant Terrero had an oral agreement whereby Claimant's rate of pay was \$5.00 per hour.

3) Claimant Terrero earned \$9,050 in wages. Respondent paid her a total of \$820. Respondent owes Claimant Terrero \$8,230 in earned and unpaid compensation.

4) Respondent willfully failed to pay Claimant Terrero all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimant quit employment without notice on May 29, 1996. More than 30 days have elapsed from the due date of those wages.

5) Civil penalty wages for Claimant Terrero, computed in accordance with ORS 652.150 and Agency policy, equal \$1,200.

6) Respondent employed Claimant Cano from April 1 to June 10, 1996. Respondent suffered or permitted Claimant Cano to render personal services to Respondent. Respondent and Claimant Cano had an oral agreement whereby Claimant's rate of pay was \$6.00 per hour.

7) Claimant Cano earned \$7,338 in wages. Respondent paid him nothing. Respondent owes Claimant Cano \$7,338 in earned and unpaid compensation.

8) Respondent willfully failed to pay Claimant Cano all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimant quit employment without notice on June 10, 1997. More than 30 days have elapsed from the due date of those wages.

9) Civil penalty wages for Claimant Cano, computed in accordance with ORS 652.150 and Agency policy, equal \$1,440.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimants were employees subject to 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. ORS 652.310 to 652.414.

3) ORS 653.261(1) provides:

"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 rest 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 times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-20-030(1) provides in part:

"[A]ll work performed in excess of 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 653.261(1)."

Oregon law required Respondent to pay each Claimant one and one-half times his or her regular hourly rate for all hours worked in excess of 40 hours in a week. Respondent failed to pay Claimants this overtime rate, in violation of OAR 839-20-030(1).

4) ORS 652.140(2) provides:

"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 Claimants all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimants quit employment without notice.

5) 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 civil penalties under ORS 652.150 for willfully failing to pay all wages to each Claimant when due as provided in ORS 652.140.

6) 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 Claimants their earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on those sums until paid. ORS 652.332.

OPINION

CLAIMANTS WORKED AS EMPLOYEES

Respondent contends that Claimants were not her employees, but were living with her and just helping around the restaurant. Although she acknowledged that Claimant Cano was never her partner in the ownership and operation of one lunch truck, she nevertheless denied that he was her employee when he operated the truck. The Agency contends that both Claimants worked as employees.

"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 * * *." ORS 652.310(2); *Lamy v. Jack Jarvis & Co., Inc.*, 281 Or 307, 574 P2d 1107, 1111 (1978); *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 40-41 (1993). "Employ" includes to suffer or permit to work. ORS 653.010(3).

The preponderance of the credible evidence on the whole record establishes that Respondent suffered or permitted both Claimants to render personal services to her

wholly in this state. That evidence also shows she agreed to pay each of them at a fixed rate. No evidence suggests that they were either Respondent's partners or independent contractors. The forum concludes that Claimants were Respondent's employees.

HOURS WORKED

In wage claim cases such as this, the forum has long followed policies derived from *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946). The US Supreme Court stated therein that the employee has the "burden of proving that he performed work for which he was not properly compensated." In setting forth the proper standard for the employee to meet in carrying this burden of proof, the court analyzed the situation as follows:

"An employee who brings suit under 16(b) of the [Fair Labor Standards] Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

"When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he

produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." 328 US at 686-88.

Here, ORS 653.045 requires an employer to maintain payroll records. Respondent kept no such records of Claimants' work. Pursuant to the analysis then, the employee, or in this case the Agency, has the burden of first proving that each employee "performed work for which he [or she] was improperly compensated." The burden of proving the amount and extent of that work can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. This forum has previously accepted, and will accept, the testimony of a claimant as sufficient evidence to prove such work was performed and from which to draw an inference of the extent of that work -- where that testimony is credible. See *In the Matter of Sheila Wood*, 5 BOLI 240, 254 (1986); *Dan's Ukiah Service*, 8 BOLI 96, 106 (1989). As part of their claims for wages, Claimants filled out calendar forms for the Agency to show the number of hours they worked. On the basis of these calendars and Claimants' credible testimony, the forum has concluded that Respondent employed and improperly compensated Claimants. The forum may rely on the evidence produced by the Agency regarding the number of hours worked and rate of pay for Claimants.

Where the forum concludes that an employee was employed and improperly compensated, it becomes the burden of the employer "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Anderson v. Mt. Clemens Pottery Co.*, 328 US at 687-88; *In the Matter of Dan's Ukiah Service*, 8 BOLI at 106.

Respondent did not maintain any record of hours or dates worked by Claimants.

Respondent and her witnesses produced no credible evidence to contradict Claimants' evidence. Several of Respondent's witnesses testified that they saw Claimant Terrero work around the restaurant a few times, but contended that she was just hanging around waiting for a ride home with Respondent. Likewise, these witnesses testified either that they never saw Claimant Cano drive the lunch truck or work for Respondent, or that he only drove the truck a few times. This testimony was exceedingly vague, inconsistent, unreliable, and biased. Many of Respondent's witnesses acknowledged that they were not present during much of the time Claimants worked; they were either in school, out of state, or rarely present at the restaurant. Therefore, the forum gave their testimony little or no weight. The forum concludes that Respondent's evidence did not sufficiently undermine the credible evidence produced by the Agency.

To the extent that the credibility of Claimant Cano's testimony was undermined, the forum has found that the basic elements of his claim -- namely, that he was Respondent's employee, that he worked many hours over a period of time, and that Respondent paid him nothing for this work -- were supported by other credible evidence in the record, which corroborated his testimony on these points. Thus, Respondent did not produce persuasive "evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens Pottery Co.*, 328 US at 687-88.

WAGES DUE

Claimants' credible testimony and calendar forms established both their regular hourly rates of pay and the number of hours each worked. Although Respondent had no agreement with Claimants regarding overtime, Oregon law required her to pay them at time and one-half their regular hourly rate for all hours worked over 40 in a work week.

Accordingly, the forum calculated Claimant Terrero's overtime wages at the rate of \$7.50 per hour (time and one-half her regular hourly rate of \$5.00) and Claimant Cano's overtime wages at the rate of \$9.00 per hour (time and one-half his regular hourly rate of \$6.00). From the credible evidence and the applicable law, the forum concluded that Respondent owes Claimant Terrero \$8,230 and Claimant Cano \$7,338 in unpaid wages.

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 employees. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, evidence established that Respondent knew she was not paying the Claimants wages and intentionally failed to pay those wages. Evidence showed that Respondent acted voluntarily and was a free agent. Under this test, the forum finds that Respondent acted willfully and thus she is liable for penalty wages under ORS 652.150.

Financial Inability

ORS 652.150 provides in part that an "employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

In the proposed order the ALJ held that Respondent did not plead or prove that she was financially unable to pay Claimants' wages at the time they accrued, and thus she could not escape penalty wage liability.

In her exceptions, Respondent argued that this was "a very strict interpretation of OAR 839-50-130(2) and [was] not required." (Respondent's exceptions, at 16.) She argued that good cause for consideration of her defense should be found from her inability to fully understand the proceedings or the English language or the nature of her potential defenses. *Id.* She alleged that she was financially unable to pay Claimants' wages, and claimed there was credible evidence on the record to show it.

The defense of financial inability to pay wages at the time they accrued is an affirmative defense subject to proof. *In the Matter of Ashlanders Senior Foster Care, Inc.*, 14 BOLI 54, 81 (1995). This forum has repeatedly held that it is a respondent's burden to show the respondent's financial inability to pay a claimant's wages. See ORS 652.150, 183.450(2), and OAR 839-050-0260(3). See also *In the Matter of Jorrion Belinsky*, 5 BOLI 1, 9-10 (1985); *In the Matter of Mega Marketing*, 9 BOLI 133, 138 (1990). The two Orders of Determination in this case each stated in part:

VIII.

" * * * [The] written 'Answer' must include an admission or denial of each factual allegation contained in those paragraphs and shall affirmatively allege a short and plain statement of each affirmative defense which the employer will assert at the contested case hearing. For example, the affirmative defense of financial inability to pay the wages or compensation at the time they accrued must be included in the written 'Answer.'

IX.

" * * * [F]ailure to raise an affirmative defense in the 'Answer' shall be deemed a waiver of such affirmative defense; * * * evidence shall not be taken on any factual or legal issue not raised in this Order of Determination or the employer's 'Answer.'" (Emphasis added.)

OAR 839-050-0130(2) states in part:

"The failure of the party to raise an affirmative defense in the answer shall be deemed a waiver of such defense. * * * Evidence shall not be taken at the contested case hearing on any factual or legal issue not raised in the charging document or the answer, except for good cause shown to the administrative law judge, or pursuant to amendment under OAR 839-050-0140."

Neither Respondent's original answers nor her two amended answers raised the affirmative defense of financial inability to pay the wages at the time they accrued. Therefore, she waived this defense. OAR 839-050-0130(2).

Nevertheless, some evidence came in at hearing concerning respondent's financial difficulties. If Respondent wanted to amend her answers to conform to this evidence and raise this defense, she needed to make a motion to do so at hearing. OAR 839-050-0140(2)(a). She did not do this. As a result, the Agency had no opportunity to object, to seek discovery, or to present evidence to meet this new issue.

Further, the forum finds that Respondent has not shown good cause for taking evidence on this issue. In her motion to reopen the record she raised similar contentions regarding her alleged inability to understand the process or the English language. For the reasons given in the ALJ's ruling on her motion and given below regarding her claim that she didn't get a full and fair hearing, the forum is not persuaded by these arguments. Concerning her claim that she was unable to fully understand her potential defenses, the forum is likewise not persuaded. The charging documents, quoted above, each stated explicitly in paragraph 8 that "the affirmative defense of financial inability to pay the wages or compensation at the time they accrued must be included in the written 'Answer.'" Thus, Respondent was put on notice that this was a defense available to her. She had the assistance of Mr. Montebianco before and at hearing, and the ALJ assisted her at hearing. It was not until after the proposed order was issued that she raised the defense.

As mentioned above, some evidence concerning Respondent's financial difficulties came in at hearing. Most of that evidence was Respondent's testimony. Testimony of an employer, even where such testimony is credible, is not ordinarily sufficient in and of itself to constitute an inability to pay, and does not therefore, serve to

meet the employer's burden of proof. *In the Matter of Sheila Wood*, 5 BOLI 240, 255 (1986). A showing of financial inability requires specific information as to the financial resources and requirements of both the employer's business and the employer personally (where the business is not a corporation) during the wage claim period, as well as submission of the records from which that information came. *In the Matter of Country Auction*, 5 BOLI 256, 263-64 (1986). Respondent's evidence failed to show she was financially unable to pay Claimants' wages at the time they accrued.

"The meaning of ORS 652.150 is obvious: the only way an employer who has willfully failed to pay termination wages when due can avoid paying a penalty for that failure is to show that the employer could not have paid the employee the wages when they were due. There are no exceptions or qualifications to the phrase 'financially unable.' It is a very strict standard designed to impress upon employers the absoluteness of the duty to pay wages which ORS 652.140 imposes upon them. If an employer has chosen to apply his or her resources elsewhere than to an employee's wages, [then] the employer cannot escape penalty wage liability. Herein, the Employer chose to make payments on other debts and to retain all his business assets rather than to pay the Claimant. This choosing, or setting of priorities, falls within the [ambit] of unwillingness, not inability, to pay." *In the Matter of Kenneth Cline*, 4 BOLI 68, 81 (1983).

The same can be said of the facts here. Evidence showed that Respondent continued to operate the restaurant and the lunch truck while Claimants' wages accrued and for months thereafter. During this period, she had income from other employment. The forum infers that she was paying other debts and expenses, but not Claimants' wages. The important time frame here is when claimants' wages were accruing, not months later when she sold the restaurant. In short, Respondent's vague and unsubstantiated evidence of financial inability to pay Claimants' wages was insufficient to prove this defense.

Accordingly, the forum concludes that Respondent did not plead or prove that she was financially unable to pay Claimants' wages at the time they accrued, and thus she cannot escape penalty wage liability.

ATTEMPTED TAMPERING WITH A POTENTIAL WITNESS

Respondent contends that Claimant Cano attempted to bribe a potential witness (Rafael Alejos) and that this should be the death knell of these wage claims, because nothing they say can be believed. The Agency argues that this never occurred.

The ALJ heard the testimony of Alejos and Claimant Cano on this issue. He carefully observed the demeanor of each witness, assessed the consistency of the testimony and its inherent probability, assessed whether the testimony was corroborated or contradicted by other evidence, assessed whether human experience demonstrated the testimony was logically incredible, and considered any bias the witness might have. *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245, 602 P2d 1161 (1979) (Richardson, J., concurring in part and dissenting in part). On the basis of his demeanor, his lack of bias or motive to fabricate his testimony, and the consistency of his testimony, the forum finds that Alejos's testimony was credible. Accordingly, the forum finds Claimant Cano's flat denial unreliable and not credible.

The issue, then, is what effect this finding should have on these wage claims. To begin with, Claimant Cano's credibility is damaged. This lowers the forum's opinion of all of his testimony. Despite this, the forum remains convinced that Respondent suffered and permitted Cano to work for her, that Cano was not Respondent's partner, that he worked with Claimant Terrero in Respondent's lunch truck, and that Respondent paid him nothing. Claimant Cano's testimony regarding his employment with Respondent was corroborated by other credible evidence, including Claimant Terrero's and Carlos Cardenas's testimony. Thus, the forum finds that the preponderance of credible evidence still supports Claimant Cano's wage claim.

It's important to note that the record supporting this wage claim was not tainted by the testimony of a bribed witness. Mr. Alejos did not testify at the hearing on June 3,

1997. The forum would strike the testimony of a bribed witness. Further, no evidence in the record suggests that Claimant Cano tried to or did bribe other witnesses, and no evidence shows that other witnesses for Cano gave false testimony. Accordingly, Claimant Cano's attempt to get Alejos to testify for him does not undermine the other evidence on the record that supports his wage claim.

What the attempted bribe did was damage Claimant Cano's credibility. In some circumstances, this could undermine a wage claim and cause it to fail for lack of proof. As noted above, however, the forum finds that the preponderance of credible evidence supports Claimant Cano's wage claim, even with the diminished credibility of Cano's testimony.

The forum wants to make it clear, however, that it views tampering with witnesses (or even attempting to do so) very seriously. We do not expect or require the claimants who assign their wage claims to the Agency to be perfect citizens. But actions that undermine the fairness of the contested case hearing process require us to take whatever measures are required to maintain that fairness. This may include striking or disregarding any evidence that may be tainted. Under the particular facts of this case, Claimant Cano's attempted bribe of a potential witness did not affect the forum's conclusions about the validity of his wage claim or Respondent's liability to him for wages earned and due.

RESPONDENT'S EXCEPTIONS TO THE PROPOSED ORDER

Respondent filed timely exceptions to the original proposed order. The record was then reopened and additional evidence taken on November 13, 1997. The ALJ instructed Respondent's counsel during that hearing that Respondent could file additional exceptions to the amended proposed order concerning only issues arising from reopening the record. Respondent filed no additional exceptions.

Respondent raises a number of objections to the facts and conclusions in the proposed order. First, Respondent contends that Claimants were not her employees. She argues that Claimant Cano, while never her partner, provided services to her to entice her into a partnership. (Respondent's exceptions, at 2, 15.) As the ALJ found in his ruling on reopening the record,

"[t]here can be little doubt that Cano performed services for Respondent driving and maintaining her truck, buying food for the restaurant and the truck, cooking food, taking money, and serving lunch truck customers. Several persons, including Respondent's witnesses, made statements corroborating this. Respondent acknowledges that she and Cano never formed a partnership, and she never alleged that Cano was an independent contractor. Thus, [the ALJ] found that Respondent employed Cano."

The forum is convinced that Respondent suffered or permitted Claimant Cano to work for her. Accordingly, she employed him, and he was her employee. ORS 653.010(3), 652.310(2). Respondent's exception on this issue is overruled.

Regarding Claimant Terrero, the evidence is persuasive that Respondent employed her. Respondent admits that Terrero did some work for her. (Respondent's exceptions, at 2.) However, Respondent argues that Terrero worked as a volunteer.

ORS 653.010(3) provides, in part:

"Employ" * * * does not include voluntary or donated services performed for no compensation or without expectation or contemplation of compensation as the adequate consideration for the services performed for a public employer * * *, or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service, religious or humanitarian reasons or for services performed by general or public assistance recipients as part of any work training program administered under the state or federal assistance laws."

No credible evidence suggests that Claimant Terrero was providing Respondent with voluntary or donated services performed for no compensation or without expectation or contemplation of compensation. Respondent acknowledges paying Terrero for some work. Furthermore, Respondent was not operating as a public employer or a religious,

charitable, educational, public service or similar nonprofit corporation, organization or institution for community service. She was running a for-profit restaurant. Therefore, Claimant Terrero did not perform work for Respondent as a volunteer, under ORS 653.010(3). Accordingly, Respondent's exception on this issue is overruled.

Respondent next takes exception to the number of hours worked by Claimants. Respondent "contends that any work performed by claimants was minor and did not even approach many hundreds of hours they are claiming." (Respondent's exceptions, at 2.) This exception has been addressed above in the section of the opinion entitled "Hours Worked" and below in the discussion regarding Claimants' credibility. The exception is overruled.

Respondent next claims that she did not obtain a full and fair hearing and that a continuance should have been granted. (Respondent's exceptions, at 2, 3-5.) She claims the ALJ abused his discretion by not postponing the hearing to allow her to get an attorney. She contends she was unsophisticated and did not understand the process. Respondent raised these issues in her motion to reopen the record. In his ruling on the motion, the ALJ said:

"The forum disagrees with Respondent's argument that she lacked the ability to represent herself. Before hearing she used the services of Mr. Montebancho to prepare herself. On Respondent's behalf, Mr. Montebancho called [the ALJ] on at least two occasions before hearing and obtained instructions and clarifications concerning the contested case process. At no time did he assert that Respondent needed legal assistance or did he request a postponement for Respondent to obtain a lawyer.

"It is all-too-common that citizens who represent themselves at hearings are unsophisticated about the contested case process and in the skill of questioning witnesses. That alone does not mean they are denied due process. The ALJ has a duty to ensure that each respondent gets a full and fair hearing. In this case, the forum believes Respondent received a full and fair hearing. [The ALJ] permitted Mr. Montebancho to stay with Respondent throughout the hearing to assist her with translations and with her exhibits. [The ALJ] explained the contested case process at hearing, both on and off the record. Respondent was free to ask [the ALJ]

questions at any time and did so. She asked questions of the Agency's witnesses and her own. In addition, the Agency's case presenter and [the ALJ] asked questions of witnesses to assist in the fact finding process. Respondent never complained about any translations at hearing, despite an instruction from [the ALJ] to do so if either participant questioned the accuracy of an interpretation. There were several bilingual persons at the hearing, and translations were rarely if ever questioned. The time to challenge any interpretation was at the hearing, not now, in a posthearing motion or in the exceptions.

"To the extent that Respondent should have done a better job preparing and representing herself or should have gotten legal representation, these arguments do not persuade me to reopen the record and allow Respondent to present additional evidence. If it were otherwise, every *pro se* litigant who did a less-than-perfect job representing him or herself would have the right to have the record reopened to offer more evidence after the proposed order was issued. Respondent, like other *pro se* litigants, has made choices about how to defend herself. Although she now believes she did an inadequate job of it, this is not a sufficient reason to reopen the record and give her another chance to offer additional evidence."

Furthermore, the forum officially notices that paragraph V of the Order of Determination advised Respondent of her right to be represented by counsel. The forum also sent Respondent a complete set of the Bureau's contested case hearing rules (OAR chapter 839, division 050), a Notice of Contested Case Rights and Procedures, and a Notice of Hearing. All of those documents clearly advised Respondent of her right to be represented by counsel. Through her bookkeeper and interpreter, Respondent contacted the ALJ at least twice concerning the process and her preparation, and she did not request a postponement. Before hearing, the ALJ advised Respondent through Mr. Montebianco of the wisdom of retaining counsel.

At hearing on June 3, 1997, Respondent asked for the first time for a postponement to hire an attorney. OAR 839-050-0110(2) states: "Once a contested case hearing has begun, no party will be allowed a recess to obtain the services of counsel." The Bureau adopted this rule specifically to address this situation. Where the Agency has advised a respondent many times before hearing of her right to obtain

counsel, and where she does not decide to do so until the hearing has begun, the forum will not postpone the hearing to allow her to obtain the services of counsel. In this situation, the respondent's due process rights have not been violated and the ALJ has not violated his duty to conduct a full and fair hearing. The ALJ here properly followed OAR 839-050-0110(2). Respondent's exception on this point is overruled.

Finally, Respondent argues that the weight of the evidence does not support the proposed order. She argues that Claimants were not credible, that she was credible, that the evidence did not support the hours claimed, and (with regard to civil penalties) that there was evidence of her financial inability to pay wages at the time they accrued. The forum addressed this last point above in the "Penalty Wages" section of this opinion.

Respondent's complaints about Claimants' credibility and her complaint about the alleged number of hours worked go hand in hand. The forum has reviewed the evidence in light of Respondent's complaints and declines to change the credibility findings. The forum finds credible evidence corroborates Claimants' testimony regarding their employment with Respondent. This evidence includes testimony from Respondent's own witnesses, and it showed that Claimants were employed by Respondent and were not properly compensated. They did not produce records of their work, and Respondent failed to keep proper records in conformity with her statutory duty. As the US Supreme Court said in *Mt. Clemens*, employees in this situation should not be penalized by denying them a recovery on the ground that they are unable to prove the precise extent of their uncompensated work. The forum accepts that the claimed work hours were estimates, but does not find that this imprecision makes Claimants' testimony incredible. The Court also recognized that. The forum believes Claimants produced "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable

inference." As noted in the "Hours Worked" section of this opinion above, Respondent's evidence to the contrary did not undermine the credible evidence produced by the Agency, nor do her exceptions change the forum's findings on Claimants' credibility. Respondent's exception on this point is overruled.

Respondent contends that her own testimony was credible and explains that one possible inconsistency was a mistranslation about an insignificant matter. The forum has reviewed Respondent's testimony and declines to change the finding that her testimony was unreliable, inconsistent, and contradicted by other evidence.

For example, Respondent testified that Claimant Terrero never worked in the restaurant. She later acknowledged that Terrero did work in the restaurant washing dishes, busing tables, and making food. Although Respondent tried to distinguish between letting Terrero "help" in the restaurant and employing her, the forum found such testimony disingenuous. This in turn caused the forum to treat her testimony with suspicion. Respondent's exception concerning her credibility is overruled.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders **GRACIELA VARGAS, aka GRACIELA VARGAS CARDENAS**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

1. A certified check payable to the Bureau of Labor and Industries IN TRUST FOR ALICIA TERRERO in the amount of NINE THOUSAND FOUR HUNDRED AND THIRTY DOLLARS (\$9,430), less appropriate lawful deductions, representing \$8,230 in gross earned, unpaid, due, and payable wages; and \$1,200 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$8,230 from June 1, 1996, until paid and nine percent interest per year on the

sum of \$1,200 from July 1, 1996, until paid.

2. A certified check payable to the Bureau of Labor and Industries IN TRUST FOR RAUL CANO in the amount of EIGHT THOUSAND SEVEN HUNDRED AND SEVENTY EIGHT DOLLARS (\$8,778), less appropriate lawful deductions, representing \$7,338 in gross earned, unpaid, due, and payable wages; and \$1,440 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$7,338 from July 1, 1996, until paid and nine percent interest per year on the sum of \$1,440 from August 1, 1996, until paid.

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¹Claimant Tererro did not work for Respondent from February 15 to March 11, 1996, because Respondent was not paying her and Claimant was deperate for money. During that period she worked another job. Claimant Tererro returned to work as a cook for Respondent on March 12, 1996, because Respondent told her that Respondent would soon get a liquor license and wanted her help. Claimant Tererro later worked in the lunch truck with Claimant Cano.