

**In the Matter of**  
**SUSAN C. STEVES**  
**Case No. 75-11**

**Final Order of Commissioner Brad Avakian**

**Issued April 30, 2012**

**SYNOPSIS**

Respondent employed Claimant as her assistant from March 5, 2009, through May 26, 2010, during which time Claimant worked 1,143 hours. In the absence of an agreed wage rate, Claimant was entitled to be paid Oregon's statutory minimum wage of \$8.40 per hour for all hours worked. Claimant earned \$9,601.20 and was only paid \$2,000, leaving \$7,601.20 in unpaid due and owing wages. Respondent's failure to pay Claimant was willful and Respondent was ordered to pay \$2,016.00 in penalty wages. Respondent was ordered to pay an additional \$2,016.00 as a civil penalty based on her failure to pay the minimum wage for all hours worked. ORS 652.140(2), ORS 652.150; ORS 653.055.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 23-24, 2012, at the DeArmond Room of Deschutes County's offices, located at 1300 N.W. Wall Street, Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Chet Nakada, an employee of the Agency. Wage claimant Kristene Crawford ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent Susan C. Steves represented herself and was present throughout the hearing.

The Agency called the following witnesses: Claimant; BOLI Wage and Hour Division compliance specialist Bernadette Yap-Sam (telephonic); and Cheryl Bruns (telephonic), a former client of Respondent.

Respondent called herself as a witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing); and X-11 through X-13 (ALJ interim orders issued after the hearing). Exhibit X-10, consisting of Respondent's case summary submitted at the time set for hearing, was not received into evidence.

b) Agency exhibits A-1 through A-11 (submitted prior to hearing), A-12, A-13, and A-15 (submitted at hearing);

c) Respondents' exhibits R-1 and R-2 (submitted at hearing); and

d) Exhibits ALJ-1 and ALJ-2, consisting of documents requested by the ALJ after the hearing.

Having fully considered the entire record in this matter, I, Brad Avakian, 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 October 13, 2000, Claimant filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned and due to her. At the same time, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. Earlier, Claimant filed a wage claim form with the Agency that she signed on August 25, 2010.

2) On February 15, 2011, the Agency issued Order of Determination No. 10-2591 based on the wage claim filed by Claimant and the Agency's investigation. In pertinent part, the Order alleged that:

- Respondents employed Claimant from March 5, 2009, through May 26, 2010 (the “wage claim period”), and was required to pay Claimant no less than \$8.40 per hour for each hour worked;
- Claimant worked 1,114.49 hours;
- Respondent only paid Claimant \$2,000.00, leaving a balance due and owing of \$7,361.72 in unpaid wages, plus interest thereon at the legal rate per annum from July 1, 2010, until paid;
- Respondent willfully failed to pay these wages and owes Claimant \$2,016.00 in penalty wages, with interest thereon at the legal rate per annum from August 1, 2010, until paid.
- Respondent owes Claimant \$2,016.00 in civil penalties based on Respondent’s failure to pay Claimant at the minimum wage for all hours worked.

3) On May 31, 2010, Respondent filed an answer and request for hearing in which she denied employing Claimant for 1,114.49 hours during the wage claim period, further denied that Claimant was ever her employee, and alleged that Claimant volunteered in her office because Respondent represented Claimant's boyfriend in a contested custody modification proceeding without charging him.

4) On August 12, 2011, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant setting the time and place of hearing for 9:00 a.m. on February 23, 2012, at the Offices of Deschutes County, located in Bend, Oregon. The Notice of Hearing included a copy of the Notice of Intent to Assess Civil Penalties, a document entitled “Summary of Contested Case Rights and Procedures” containing the information required by ORS 183.413, a document entitled “Servicemembers Civil Relief Act (SCRA) Notification, a multi-language notice explaining the significance of the Notice of Hearing, and a copy of the forum’s contested case hearings rules, OAR 839-050-000 to 839-050-0445.

5) On November 28, 2011, the ALJ ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and a brief statement of the elements of the claim, a statement of any agreed or stipulated facts,

and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by February 10, 2012, and notified them of the possible sanctions for failure to comply with the case summary order.

6) The Agency filed a case summary on February 10, 2012.

7) On February 16, 2012, Dirk D. Sharp, attorney at law, faxed a notice of representation to the forum stating that Respondent had retained him to represent her. At the same time, Sharp filed a motion for postponement based on the following grounds:

1. "Additional investigation is necessary on behalf of Respondent.
2. "Witnesses need to be informed of the hearing.
3. "Witnesses need to be interviewed.
4. "MS. Steves has undergone emergency oral surgery in the last week and is scheduled for additional treatment next week.
5. "Due to the above medical treatments MS. Steves experiences severe pain upon speaking.
6. The foregoing would impede and prevent adequate representation of MS. Steves."

On Friday, February 17, the ALJ telephoned Sharp and told him that he would need to provide a letter from Respondent's dentist confirming Respondent's medical status before the ALJ would rule on Respondent's motion for postponement. The ALJ also informed Sharp that, once Sharp provided a note from the dentist, he would call the Agency case presenter to see if the Agency had any objection to a postponement. Later that day, Sharp telephoned the ALJ, said that the dentist's office was not open, and asked that the ALJ grant the postponement without a note from Respondent's dentist. About 10 minutes later, the ALJ conducted a prehearing conference with Sharp and the Agency case presenter to discuss Respondent's motion for postponement. The Agency case presenter objected to a postponement on the grounds that the Agency was prepared for hearing. Sharp reiterated that Respondent might not be unable to

participate in the hearing, depending on her medical condition the following week. The ALJ denied Respondent's motion for postponement based on the absence of any medical evidence other than Sharp's statement to support it, but said that he would reconsider Respondent's motion if Respondent filed a statement from her dentist that established Respondent was medically unable to participate in the hearing. At 9:25 a.m. on February 21, the ALJ telephoned Sharp to inform him that the Hearings Unit had received nothing from the dentist's office. In response, Sharp said he would no longer be representing Respondent at the hearing and was withdrawing as her counsel. Sharp added that Respondent would attend the hearing. Sharp faxed a letter of withdrawal of representation to the ALJ later that day.

8) At the start of hearing, the ALJ verbally informed the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

9) Respondent did not file a case summary prior to the time set for hearing, but brought her case summary to the hearing. The Agency objected to Respondent's case summary on the grounds that it was untimely filed. In response to the ALJ's query, Respondent stated that she did not file a case summary earlier because the ALJ's interim order requiring case summaries had been misfiled at her office. The ALJ sustained the Agency's objection on the grounds that Respondent failed to offer a satisfactory reason for having failed to timely file her case summary and that excluding it would not violate that ALJ's duty to conduct a full and fair inquiry under ORS 183.415(10).

10) On her case summary, Respondent listed Dirk Sharp as a witness. Based on the Agency's objection and Respondent's failure to timely file a case summary, the ALJ did not allow Sharp to testify but did allow Respondent to make an oral offer of

proof regarding what Sharp's testimony would have been, had he been allowed to testify.

11) On February 28, 2012, the ALJ re-opened the record on his own motion to obtain a copy of Claimant's original 2009-2010 nail salon appointment books for inspection. Claimant sent her original books directly to the ALJ, who received it on March 5, 2012. After inspecting the books, the ALJ copied two pages that appeared to contain inconsistencies with the Claimant's 2009-2010 calendars received at hearing as Exhibits A-8 and A-9, and marked and received them into the record as Exhibits ALJ-1 and ALJ-2. Copies were provided to both participants and the original books mailed back to the Claimant, with instructions to Claimant to retain them until such time as this case is completely resolved and all appeal rights have expired. The record closed on March 29, 2012.

) The ALJ issued a proposed order on April 11, 2012, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times during the wage claim period, Respondent was an Oregon attorney with an office in Bend, Oregon, that she shared with Dirk Sharp, another attorney, and operated a for-profit business. As part of her general practice, she did pro bono<sup>i</sup> work for military veterans.

2) At all times during the wage claim period, Claimant worked as a nail technician at Image Salon in Bend, Oregon, where she leased her own work station and worked as an independent contractor. Claimant did not work at the nail salon on Mondays and Wednesdays.

3) Respondent and Claimant met at Images Salon, where Respondent went every couple of weeks to have her nails done, and they became friends. Claimant

learned that Respondent was an attorney and did pro bono work for military veterans. Claimant's live-in boyfriend, David Sutterfield, is a military veteran who needed legal assistance in his child custody case. Claimant told Respondent about Sutterfield's situation and Respondent agreed to take Sutterfield's case on a pro bono basis.

4) In 2009, Respondent performed a substantial amount of pro bono legal work on Sutterfield's behalf, including several all day court appearances. Her first consultation with Sutterfield was on February 20, 2009. Claimant assisted Respondent in some of her work on Sutterfield's behalf.

5) On one of Respondent's visits to Claimant's nail salon, Respondent told Claimant that she had been having trouble collecting debts from some of her clients. Claimant told Respondent that she had a background in collections and could assist Respondent.

6) On March 5, 2009, Claimant began performing work for Respondent at Respondent's office. Claimant continued to perform work for Respondent until May 26, 2010, working primarily on Mondays and Wednesdays, but also working some other days, including weekends and evenings. During this time, Claimant acted as Respondent's personal assistant. Besides collections, Claimant also performed reception work, filed documents for Respondent in her office, and delivered documents to the court and to other attorneys.

7) Respondent told Claimant to keep track of all the hours she worked on a calendar so that Respondent would be able to pay her for the time Claimant had worked, plus a bonus for her collections. Respondent and Claimant did not agree on a specific wage rate.

8) During her employment with Respondent, Claimant maintained a contemporaneous record of the hours she worked each day on a calendar, noting that times she started and stopped work each day.

9) Respondent did not keep a record of the hours that Claimant worked.

10) In 2009, Respondent had not filed tax returns for the prior four years. When Claimant learned this, she told Respondent that she had done her own taxes and could do Respondent's. With Respondent's acquiescence, Claimant organized Respondent's financial records for the previous four years and prepared tax returns for those years, a job she started doing on September 29, 2009. On March 1, 2010, Respondent signed a "POWER OF ATTORNEY FOR REPRESENTATION" form that authorized Claimant to "receive [Respondent's] confidential tax information and/or represent [Respondent] before the Oregon Department Revenue for all tax matters." Claimant subsequently spoke with Department of Revenue representatives a number of times on Respondent's behalf.

11) Between March 5, 2009, and May 26, 2010, Respondent and Claimant exchanged approximately 604 phone calls that Claimant made or received on her cell phone. A number of those calls were made on days that Claimant did not claim to have worked on her calendar of hours submitted to the Agency.

12) Claimant worked a total of 1,143 hours for Respondent, broken down as follows:

<u>Month &amp; Year</u>	<u>Hours Worked</u>
March 2009	66.5
April 2009	56.75 <sup>ii</sup>
May 2009	53.75
June 2009	76.75
July 2009	60.00
August 2009	76.00

September 2009	103.5
October 2009	54.5
November 2009	85.5
December 2009	75.25
January 2010	86.5
February 2010	87.5
March 2010	106.5
April 2010	100.75
May 2010	53.25

- 13) Respondent paid Claimant approximately \$2,000.00 in cash for her work.
- 14) On one occasion between August 2009 and May 26, 2010, Respondent introduced Claimant to Cheryl Bruns, one of her clients, with the following words: "This is my assistant Kristy." When Bruns called Respondent's office, Claimant usually answered the phone. One day Respondent called Bruns and told Bruns that Claimant "was no longer working for her and that [Respondent] was going to have a new assistant."
- 15) Claimant quit on May 26, 2010, because Respondent would not pay her.
- 16) In July 2010, Respondent contacted the Bend Police Department and reported that Claimant had a \$250 check in her possession made out Respondent's name. Respondent told an officer from the Bend Police Department that she "used to have an assistant in her legal office named Kristene Crawford. \* \* \* Crawford began asking for advances of pay, and it got to the point that Steves told Crawford she could no longer giver [sic] advances."
- 17) Oregon's statutory minimum wage in 2009 and 2010 was \$8.40 per hour.
- 18) Claimant filed two wage claim forms with BOLI's Wage and Hour Division, in response to Yap-Sam's request to Claimant to provide additional information that was not provided on her first wage claim form.

19) On November 22, 2010, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent that stated:

"You are hereby notified that KRISTENE MARIE CRAWFORD has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid wages of \$9,391.90 at the rate of \$8.40 per hour from March 4, 2009 to May 26, 2010.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before December 7, 2010, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

20) Respondent has not paid any money to Claimant since Claimant's last day of work and owes Claimant \$7,601.20 in unpaid, due and owing wages (Entire Record)

21) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: \$8.40 per hour x 8 hours x 30 days = \$2,016.00.

22) ORS 653.055 civil penalties are computed as follows for Claimant: in accordance with ORS 652.150 and ORS 653.055: \$8.40 per hour x 8 hours x 30 days = \$2,016.00.

### **CREDIBILITY FINDINGS**

23) Bernadette Yap-Sam and Cheryl Bruns were credible witnesses and the forum has credited their testimony in its entirety.

24) Claimant was a credible witness as to the number of hours she worked and the duties she performed. The forum has believed her testimony on those issues whenever it conflicted with Respondent's testimony.

25) Respondent's testimony concerning the number of hours worked by Claimant and as to Claimant's "volunteer" status was not credible.

### **ULTIMATE FINDINGS OF FACT**

1) At all times during the wage claim period, Respondent was an Oregon attorney who maintained an office in Bend, Oregon, and employed Claimant.

2) Claimant worked as Respondent's assistant between March 5, 2009, and May 26, 2010. She filed documents, did collections and reception work, delivered documents to the court and to other attorneys, and prepared and filed Respondent's back returns. She quit on May 26, 2010.

3) Claimant worked a total of 1,143 hours for Respondent, earning \$9,601.20, and has only been paid \$2,000.00. Respondent owes Claimant \$7,601.20 in unpaid, due and owing wages.

4) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150:  $\$8.40 \text{ per hour} \times 8 \text{ hours} \times 30 \text{ days} = \$2,016.00$ .

5) ORS 653.055 civil penalties are computed as follows for Claimant: in accordance with ORS 652.150 and ORS 653.055:  $\$8.40 \text{ per hour} \times 8 \text{ hours} \times 30 \text{ days} = \$2,016.00$ .

### **CONCLUSIONS OF LAW**

1) At all times material herein, Respondent was an Oregon employer who suffered or permitted Claimant to work in Oregon and Claimant was Respondent's employee, subject to the provisions of ORS 652.110 to 652.200, ORS 652.310 to 652.405, and ORS 653.010 to 653.055.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.405.

3) Respondent violated ORS 652.140(2) by failing to pay to Claimant all wages earned and unpaid not later than five days after May 26, 2010, excluding

Saturdays, Sundays and holidays. Respondent owes Claimant \$7,601.20 in unpaid, due, and owing wages.

4) Respondent willfully failed to pay Claimant all wages due and owing and owes \$2,016.00 in penalty wages to Claimant. ORS 652.150.

5) Respondent paid Claimant less than the wages to which he was entitled under ORS 653.010 to 653.261 by failing to pay her Oregon's statutory minimum wage for all hours worked and is liable to pay \$2,016.00 in civil penalties to Claimant. ORS 653.055(1)(b).

6) 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 Susan C. Steves to pay Claimant her earned, unpaid, due and payable wages, ORS 652.150 penalty wages, and ORS 653.055 civil penalties, plus interest, on all sums until paid. ORS 652.332.

## **OPINION**

### **CLAIMANT'S WAGE CLAIM**

To establish Claimant's wage claim, the Agency must prove the following elements by a preponderance of the evidence: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if other than the minimum wage; 3) The amount and extent of work Claimant performed for Respondent; and 4) Claimant performed work for which she was not properly compensated. *In the Matter of Letty Lee Seshier*, 31 BOLI 255, 261 (2011).

### **RESPONDENT EMPLOYED CLAIMANT**

Respondent claims she that never employed Claimant and Claimant volunteered all her work for Respondent to repay Respondent for pro bono work that Respondent performed for Claimant's boyfriend, a military veteran. Respondent testified that she

valued this work at \$35,000+, based on Respondent's standard fee of \$195 an hour. Respondent also alleges that Claimant cannot, as a matter of law, be her employee because there was no agreed rate of pay. The forum rejects both defenses for reasons stated below.

First, as Respondent testified, pro bono work means work performed without the expectation of compensation. Respondent's claim that she performed \$35,000+ of pro bono work for Claimant's boyfriend and accepted 15 months of volunteer work by Claimant based on Claimant's gratitude for that work is a non-sequitur.

Second, there is credible evidence in the record that Respondent told two persons – Cheryl Bruns and a Bend police officer -- that Claimant was her assistant.

Third, Oregon law imposes specific conditions on the circumstances in an employment setting in which a person can be considered a volunteer. ORS 653.010(2) provides:

“‘Employ’ includes to suffer or permit to work but 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 referred to in subsection (3) of this section, 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.”

Respondent is a private attorney operating a for-profit business who fits in none of these categories. Consequently, Claimant could not work for her as a volunteer as a matter of law.<sup>iii</sup>

Fourth, Claimant credibly testified that Respondent paid her approximately \$2,000.00 in cash during the wage claim period. Respondent's claim that she gave this amount of money to Claimant whenever she needed money because they were “friends” requires a stretch of the imagination the forum is unwilling to make.

Fifth, although Respondent and Claimant may have been friends before the wage claim was filed, the approximate 604 phone calls between Respondent and Claimant during the wage claim period support an inference that the relationship between Respondent and Claimant was something other than just a friendship.

Finally, although ORS 653.010 does not include an express definition of "employee," by contextual implication and for purposes of chapter 653, a person is an "employee" of another if that other "employs," *i.e.*, "suffer[s] or permit[s]" the person to work. *In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 38 (2003), affirmed without opinion, Ochoa v. Bureau of Labor and Industries, 196 Or App 639, 103 P3d 1212 (2004).* When an employer suffers or permits a person to work, as in this case, the fact that the person is not paid or there is no agreement to pay the worker a fixed rate does not take her out of the definition of "employee" when a minimum wage law requires she be paid the minimum wage. *In the Matter of LaVerne Springer, 15 BOLI 47, 67 (1996).*

Based on all of the above, the forum concludes that the Agency has met its burden of proving that Respondent employed Claimant.

### **CLAIMANT WAS ENTITLED TO BE PAID OREGON'S MINIMUM WAGE**

Testimony by both Respondent and Claimant concerning the specific circumstances under which Claimant began working for Respondent and their pay arrangement was sparse and murky. However, it is undisputed that there was no agreement that Claimant would be paid a specific wage. Claimant testified she expected to be paid a commission on the collections she successfully performed for Respondent, and Respondent points to this as evidence that Claimant was not entitled to an hourly rate. This argument fails. When there is no agreed upon rate of pay, an employer is required to pay at least the statutory minimum wage. *In the Matter of Jo-El,*

*Inc.*, 22 BOLI 1, 7 (2001). Since Respondent and Claimant did not agree to a specific rate of pay, Claimant was entitled to be paid \$8.40 per hour, Oregon's statutory minimum wage in 2009 and 2010.

### **AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT**

When the employer produces no records of the hours that a wage claimant worked, the forum may rely on evidence produced by the agency from which “a just and reasonable inference may be drawn.” *In the Matter of Letty Lee Sesher*, 31 BOLI 255, 262 (2011). See also *In the Matter of Mark A. Frizzell*, 31 BOLI 178, 204 (2011). A claimant’s credible testimony may be sufficient evidence to show the amount of hours worked by the claimant. *Id.* In this case, Claimant's testimony, supported by her contemporaneously maintained calendar and cell phone records, is the only evidence of the hours that Claimant worked, as Respondent testified that she did not keep records of Claimant’s hours.<sup>iv</sup> OAR 839-020-0040 sets out general parameters for how work hours are to be calculated. In pertinent part, it states:

“(2) Work requested or required is considered work time. Work not requested, but suffered or permitted is considered work time.

“(3) Work performed for the employer but away from the employer's premises or job site is considered work time. If the employer knows or has reason to believe that work is being performed, the time spent must be counted as hours worked.

“(4) It is the duty of the employer to exercise control and see that the work is not performed if it does not want the work to be performed. The mere promulgation of a policy against such work is not enough.”

Claimant credibly testified as to the hours she recorded in her 2009 and 2010 calendars as having worked for Respondent and testified as to her specific recollection of the duties she performed on a number of different days. Her testimony supports a conclusion that her recorded hours reflect work performed at Respondent’s request of acquiescence. Although Respondent testified generally that Claimant did not work the hours she claimed, the only significant dispute over what Claimant did on a particular

day concerned July 20, 2009, a date Claimant said she drove Respondent to Salem to the Supreme Court, and Respondent testified that Claimant drove Respondent to the Court of Appeals, then went on a shopping trip to Portland while Respondent presented her case to the Court. As Claimant only claimed one hour of work on that day, from 6-7 p.m., this disagreement is immaterial to the forum's determination concerning the number of hours Claimant worked.

In conclusion, the forum relies on Claimant's credible testimony and contemporaneous record of hours worked establish the number of hours she worked for Respondent. That total is 1,143 hours, as detailed in Finding of Fact # 12 -- The Merits.

### **CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED**

Claimant credibly testified that she was paid approximately \$2,000.00 in cash. Respondent kept no receipts or other record of the payments she made to Claimant, but acknowledged she gave Claimant cash upon request. Lacking any other evidence of the amount paid by Respondent to Claimant, the forum relies on Claimant's credible testimony to conclude that she was paid \$2,000.00 for her work. In contrast, she earned \$9,601.20, leaving a balance due and owing of \$7,601.20. Although this amount exceeds the amount of unpaid wages sought in the Order of Determination, the commissioner has the authority to award monetary damages, including penalty wages that exceed those sought in the Order of Determination when they are awarded as compensation for statutory wage violations alleged in the charging document. See, e.g., *In the Matter of Letty Lee Seshier*, 31 BOLI 255, 263 (2011); *In the Matter of Petworks LLC*, 30 BOLI 35, 44 (2008). The commissioner exercises that authority in this case.

## **CLAIMANT IS OWED PENALTY WAGES**

An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply or require blame, malice, 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. See, e.g., *In the Matter of Computer Products Unlimited, Inc.*, 31 BOLI 209, 225 (2011).

In this case, Respondent knew that Claimant was performing work on Respondent's behalf and chose not to pay her all wages due and owing on the basis of her belief that Claimant was a volunteer and not entitled to any wages. An employer acts "willfully" when it knows what it is doing, intends to do what it is doing, and is a free agent. *In the Matter of Pavel Bulubenchki*, 29 BOLI 222, 227 (2007). There is no evidence that Respondent intended to pay Claimant an amount other than the amount Claimant was actually paid or that Respondent was not acting as a free agent in choosing not to pay Claimant the rest of her wages. The forum further notes that Respondent's failure to apprehend the correct application of the law and her actions based on this incorrect application do not exempt her from a determination that she willfully failed to pay wages earned and due. See *In the Matter of Scott Miller*, 23 BOLI 243, 262 (2002).

ORS 652.150(1) and (2) provide, in pertinent part:

"(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 \* \* \*, then, as a penalty for the nonpayment, the wages or compensation of the 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.

"(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the

full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. \* \* \*

The Agency provided documentary and testimonial evidence that its investigative staff made the written demand for Claimant's wages contemplated in ORS 652.150(2) after Claimant filed her wage claim. The Agency's Order of Determination, issued on February 15, 2011, repeated the demand.<sup>v</sup> Respondent failed to pay the full amount of Claimant's unpaid wages within 12 days after receiving the written notice and has still not paid them. Consequently, the forum assesses penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Using this formula, penalty wages for Claimant equal \$2,016.00.

### **CLAIMANT IS OWED CIVIL PENALTIES UNDER ORS 653.055**

The Agency also seeks civil penalties of \$2,016.00 under ORS 653.055(1)(b). That statute provides that an employer who pays an employee less than the applicable minimum wage is liable to the employee for civil penalties that are computed in the same manner as penalty wages under ORS 652.150. *Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001). A *per se* violation occurs when an employee's wage rate is the minimum wage, the employee is not paid all wages earned, due, and owing under ORS 652.140(1) or 652.140(2), and no statutory exception applies. *In the Matter of Allen Belcher*, 31 BOLI 1, 10 (2009). Claimant's wage rate was the minimum wage. She was not paid all wages earned, due, and owing after she quit, and there is no applicable statutory exception. Consequently, Claimant is entitled to an ORS 653.055 civil penalty in the amount of \$2,016.00.

### **ORDER**

NOW, THEREFORE, as authorized by ORS 652.140(1), ORS 652.150, ORS 653.055, and ORS 652.332, and as payment of the unpaid wages, penalty wages, and

civil penalties, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Susan C. Steves** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant in the amount of ELEVEN THOUSAND SIX HUNDRED AND THIRTY THREE DOLLARS AND TWENTY CENTS (\$11,633.20), less appropriate lawful deductions, representing \$7,601.20 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from July 1, 2010, until paid; \$2,016.00 in penalty wages, plus interest at the legal rate on that sum from August 1, 2010, until paid; and a civil penalty of \$2,016.00, plus interest at the legal rate on that sum from August 1, 2010, until paid.

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<sup>i</sup> Respondent testified that "pro bono" means "providing legal services for free -- no charge."

<sup>ii</sup> The forum has not included hours Claimant noted on her calendar for April 8 and April 17 because her notes indicated she performed work related to "Jeff," an individual whom Respondent credibly testified was never her client.

<sup>iii</sup> See also *In the Matter of Graciela Vargas*, 16 BOLI 246, 259 (1998)(the forum held that claimant did not perform work for respondent as a volunteer when claimant did not provide respondent with voluntary or donated services performed for no compensation or without expectation or contemplation of compensation and respondent ran a for-profit restaurant; was not a public employer or religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service; and acknowledged actually paying claimant for some work); *In the Matter of Arabian Riding and Recreation Corp.*, 16 BOI 79, 92 (1997)(minors were employees, not volunteers, when there was no evidence or attempt to show that respondent was a public employer or a religious, charitable, or educational institution as described or was involved in a federal or state public assistance program).

<sup>iv</sup> Specifically, Respondent testified that she did not keep records because she did not believe that Claimant was an employee.

<sup>v</sup> See *In the Matter of Captain Hooks, LLC*, 27 BOLI 211, 224 (2006)(the Agency's Order of Determination constitutes a written notice of nonpayment of wages).