

In the Matter of

THE ALPHABET HOUSE and Children's Center, LLC

Case Nos. 08-03 and 58-03

Final Order of Commissioner Dan Gardner

Issued July 24, 2003

SYNOPSIS

Respondent Alphabet House employed Claimant from June 1999 until September 9, 2001, at the agreed salary of \$3,000 per month and paid her nothing for her work in October, November, and December 2000. Alphabet House also failed to make and keep available records of her actual hours worked in October 2000 and September 2001, in violation of ORS 653.045(1) & (2). Alphabet House was ordered to pay \$9,000 in unpaid wages to Claimant. Children's Center, LLC, was not Claimant's joint employer and was not liable for the unpaid wages. The forum found that Alphabet House's failure to pay the wages was willful and awarded \$4,061 in penalty wages. Alphabet House was also ordered to pay \$1,200 in civil penalties for its four violations of ORS 653.045, ORS 652.140(2), ORS 652.150, ORS 653.045, ORS 653.256; OAR 839-020-0080; OAR 839-020-1020.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 6 and 7, 2003, at the Bureau's Salem office located at 3865 Wolverine NE, E-1, Salem, Oregon. The hearing was reconvened briefly on May 27, 2003, by teleconference.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Wage claimant Mildred Anne Parker ("Claimant") was present throughout the hearing and was not represented by counsel. Respondents were represented by William C. Williams ("Williams"), their designated authorized representative.

The Agency called as witnesses: Claimant; Harley Roth, former member of Alphabet House's board of directors; and Stan Wojtyla, BOLI Wage and Hour Division Compliance Specialist. Respondents' only witness was William C. Williams, Respondents' authorized representative.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-31 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 through A-4, A-6 through A-14, A-19 through A-29, A-31, A-40, and A-52 (submitted prior to hearing). A-53 was offered, but not received;
- c) Respondent exhibits R-1 and R-3 (submitted at hearing). R-2 was offered at hearing, but not received.

Having fully considered the entire record in this matter, I, Dan Gardner, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

- 1) On January 9, 2002, Claimant filed a wage claim with the Agency alleging Respondents had employed her and failed to pay wages earned and due to her.
- 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 Respondents.
- 3) Claimant brought her wage claim within the statute of limitations.
- 4) On April 11, 2002, the Agency issued Order of Determination No. 02-0046 based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent "The Alphabet House" ("Alphabet House") owed a total of \$12,000 in unpaid wages and \$4,152 in civil penalty wages,

plus interest, and required that, within 20 days, Alphabet House either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On April 30, 2002, Alphabet House filed an answer and request for hearing through Williams, its authorized representative. Alphabet House denied all the allegations in the Order of Determination.

6) On October 29, 2002, the Agency filed a motion to amend its Order of Determination to include "Children's Center, LLC" as an additional respondent based on the Agency's belief that the evidence would show that Claimant was an employee of both Alphabet House and Children's Center, LLC, and that Alphabet House was the sole member of Children's Center, LLC.

7) Respondent objected to the Agency's motion and denied that the Agency's assertions supporting its motion to amend were true. On November 21, 2002, the ALJ granted the Agency's motion on the ground that OAR 839-050-0170 "merely requires that the Agency assert a right to relief arising out of the same transaction(s) or occurrence(s) and that questions of law or fact common to both respondents will arise."

8) On December 12, 2002, Respondents, through their authorized representative Williams, filed an answer to the Agency's amended Order of Determination.

9) On January 3, 2003, Respondents filed a motion for an order requiring the Agency to make more definite and certain allegations contained "in the Agency's Notice of Intent to Assess Civil Penalties dated December 16, 2002." Respondents alleged that the Agency's Notice of Intent "neglects to allege what specific acts or omissions constitute the violations." Among other things, Respondents alleged that the Notice of

Intent failed to provide adequate notice under “the Due Process Clause of the US Constitution, Amend XIV, and Oregon Constitution Art I, §10.”

10) On January 10, 2003, the Agency objected to Respondents’ motion and provided the forum with a copy of its Notice of Intent, which alleged that Respondents had committed 12 payroll record violations under ORS 653.045 and sought to impose \$12,000 in civil penalties. The Notice of Intent alleged the following specific violations:

“(4) During the period of July 4, 1999 through October 17, 2001, Respondents employed Millie Anne Parker (‘Claimant’) as a non-exempt employee. Respondents are obligated by law to pay their employees wages they earn. Respondents have failed and refused to pay Claimant wages she has earned and to which she is entitled.”

“(5) With regard to these lawful obligations Respondents willfully

“(a) failed to make required payroll and other records in violation of ORS 653.045 and OAR 839-020-0080 (four violations);

“(b) failed to keep available required payroll and other records in violation of ORS 653.045 and OAR 839-020-0080 (four violations); and

“(c) failed to supply Claimant with itemized statements of amounts and purposes of deductions in the manner provided in ORS 652.610 in violation of ORS 653.045 and OAR 839-020-0012 and 839-020-0080 (four violations).”

11) On January 13, 2003, the Agency moved to consolidate the cases involving its amended Order of Determination and its Notice of Intent.

12) On January 13, 2003, the ALJ granted Respondents’ motion to make more definite and certain, noting that the Agency’s Notice of Intent referred to 13 monthly payroll periods but the allegations encompassed only four of those periods. The ALJ required that the Agency specify which months or payroll periods in which the alleged violations occurred and ruled that Respondents need not file an answer and request for hearing until 20 days after Respondents received an Amended Notice of Intent containing this information.

13) On January 15, 2003, the ALJ denied the Agency's motion to consolidate on the basis that no answer and request for hearing had yet been filed in response to the Agency's Notice of Intent.

14) On January 21, 2003, Respondents filed an answer and request for hearing to the Agency's Notice of Intent. In pertinent part, Respondents' answer stated the following:

"I.

"With regard to the factual allegations * * * Respondents * * * DENY, each and every allegations therein delineated, severally and jointly, with the following exception: Respondent, the Alphabet House, ADMITS that * * * [Claimant] was its employee during certain times relevant to the above proceeding, however, it DENIES that it employed Claimant prior to January 1, 2001 and subsequent to October 1, 2001.

"II.

"In the alternative, with regard to the factual allegations contained in Notice, Respondents, The Alphabet House and the Children's Center, LLC, ADMITS [sic], each and every allegation therein delineated, severally and jointly. Respondent [sic] further contend, as has been previously admitted, * * * that Claimant was responsible for the acts and omissions in this paragraph herein acknowledged. Specifically, Respondents contend that it is admitted that Claimant was responsible for the 'disbursement of funds and the payment of accounts,' * * * such responsibility being at the core of the allegations contained in Notice. It follows that, if Responsibility [sic] have any liability for that [sic] acts and omissions described in Notice, such liability is predicated upon the acts and omissions of Claimant, being their agent and officer, who performed or omitted to perform the aforesaid while in the employ of Respondents. Accordingly, Respondents maintain that the aforementioned admission permits assertion of the following[.]

"* * * * *

"IV.

"As the allegations as recited above are due primarily to the acts or omissions of Claimant, her liability therefore is at least equal to, if not greater than, that if [sic] Respondents, to the extent that BOLI's claims contained in Notice are based upon an assignment of rights from Claimant, such claims are barred by the legal doctrine of *in pari delicto*, i.e., of equal guilt.

"* * * * *

"VI.

“Because Claimant was employed contractually by Respondents to perform the duties that form the basis of BOLI’s claims and, to the extent that BOLI’s claim as contained in Notice are based upon assignment of rights from Claimant, such claims constitute a breach of Claimant’s and through Claimant, BOLI’s contractual obligation of good faith performance.

“* * * * *

“VIII.

“As Claimant was an agent of Respondents, an officer of Respondent, The Alphabet House, and a manager of Respondent, the Children’s Center, her conduct violates the standard of conduct delineated in ORS 65.577 and ORS 60.377, with respect to the Alphabet House, and the standard of conduct delineated in ORS 63.155(9), with respect to the Children’s Center.

“* * * * *

“X.

“Because Claimant is liable, at least to the extent that Respondents are, if not to a greater extent, Respondents are entitled to seek an equal contribution from Claimant to any judgment rendered herein against them, pursuant to ORS 18.440.

“* * * * *

“XII.

“Because Claimant is liable, at least to the extent that Respondents are, if not to a greater extent, Respondents are entitled to seek indemnification with respect [to] any judgment rendered herein against them.”

15) On January 23, 2003, the Agency renewed its motion to consolidate and filed a motion to dismiss Respondents’ five counterclaims. In the same motion, the Agency clarified that it was alleging Claimant was not paid for her work during the months of October, November, and December of 2000 and September of 2001.

16) On January 29, 2003, the Agency filed a “BOLI Request for Hearing” with the forum.

17) On February 7, 2003, the ALJ granted the Agency’s motion to consolidate, finding that the Agency’s amended Order of Determination and Notice of Intent involved the same Respondents and common questions of fact.

18) On February 7, 2003, the ALJ issued an Interim Order granting the Agency's motion to dismiss Respondents' counterclaims on the basis that the Commissioner "lacks the authority to grant relief on the basis of any of the counterclaims stated by Respondents in their answer." The ALJ also required the Agency to file a statement listing the specific times in which the recordkeeping and itemized statement violations alleged in its Notice of Intent occurred.

19) On February 7, 2003, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and Claimant stating the time and place of the hearing as May 6, 2003, at 3865 Wolverine Street NE, Bldg. #E-1, Salem, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

20) On February 12, 2003, the Agency filed a statement indicating that the four alleged ORS 653.045 violations related to making records and the four alleged itemized statement of deductions violations contained in the Notice of Intent occurred "on or about Respondents' regular paydays following October, 2000, November, 2000, December, 2000 and September, 2001." The Agency further stated that the four ORS 653.045 payroll and record availability violations alleged in the Notice of Intent "occurred and/or continue to occur for two years following October, 2000, November, 2000, December, 2000 and September, 2001, respectively."

21) On February 12, 2003, the forum ordered the Agency and Respondents 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; 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 file case summaries no later than April 25, 2003, and notified the Agency and Respondents of the possible sanctions for failure to comply with the case summary order. The forum also enclosed a form designed to assist *pro se* respondents in filing a case summary. Williams, Respondents' authorized representative, received this Interim Order.

22) On March 26, 2003, the Agency filed a motion for a discovery order seeking payroll documents pertaining to Claimant for the months of October through December 2000 and September 2001. The motion included a statement that an informal request had previously been made for these documents and that Respondents had not provided them and also included a statement of relevancy.

23) On April 3, 2003, Respondents filed a motion to dismiss the allegations contained in the Notice of Intent relating to failure to provide itemized statements of deductions on the basis that the Agency had failed to comply with the ALJ's order requiring the Agency to state the specific time periods in which those violations occurred.

24) On April 9, 2003, the ALJ granted the Agency's motion for discovery order over Respondents' objection that the Agency's request was overly broad, finding that the Agency had requested documents that were directly related to its allegations and had clearly defined the scope of its request.

25) On April 9, 2003, the ALJ denied Respondents' motion to dismiss, finding that "the Agency's statement that the violations alleged in the Notice of Intent occurred on Respondents' paydays corresponding to the months of October, November, and December 2000, and September 2001" conformed to the ALJ's interim order requiring the Agency to clarify its pleadings.

26) On April 25, 2003, the Agency filed a case summary, accompanied by 52 exhibits.

27) Respondents did not file a case summary.

28) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the Agency and Williams, Respondent's authorized representative, of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

29) During the hearing, Respondents sought to call four witnesses besides William C. Williams – Bill Hoard, Kathe Williams, John Hawkins, and an unnamed individual from Larry Tokarski's office. The Agency objected on the grounds that Respondents had not filed a case summary listing these witnesses, that this was the first notice the Agency had of Respondents' intent to call these witnesses, and that the Agency would be prejudiced based on its lack of ability to prepare to meet the witnesses' testimony. Williams stated that he had not filed a case summary because Jonathan Nelson, the individual he was relying on to prepare the case summary, had been taken ill on the Friday (May 2) before the hearing and was unable to prepare the case summary. The ALJ found that this did not constitute a satisfactory reason for not filing a case summary, in that the case summary was due on April 25, 2003, and Williams, as Respondents' authorized representative, was the person responsible for filing it. The ALJ further found that the Agency would not receive a fair hearing if Respondents were allowed to call the four witnesses, and that a continuance would not cure the problem. For these reasons, the ALJ ruled that Respondents would only be allowed to call William C. Williams, its authorized representative, as a witness. The ALJ allowed Williams to make an offer of proof stating the substance of the testimony each of the four witnesses would give, if allowed to testify.

30) When the hearing resumed on May 7, Williams requested to have three unnamed “rebuttal” witnesses testify. The ALJ denied the request, ruling that Respondent was entitled to present “rebuttal” evidence during the presentation of its case after the Agency presented its case in chief, but was not entitled to call rebuttal witnesses to counter testimony by the Agency’s rebuttal witnesses.

31) On June 20, 2003, the ALJ issued a proposed order 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) The Alphabet House was founded in 1994 by William and Kathe Williams as a facility for fragile and developmentally delayed children aged birth to six where children could come with their families and receive care.

2) The Oregon Corporation Division’s records show that The Alphabet House (“Alphabet House”) was registered on September 20, 1994, as a nonprofit organization for “public benefit.” At all material times herein, Alphabet House was a “501(c)(3)” company.

3) William and Kathe Williams envisioned a birth-infant-toddler-kindergarten school that would include “regular” children and fragile and developmentally delayed children.

4) At all material times herein, Alphabet House’s office was located in the back of a large warehouse in Salem, Oregon.

5) In June 1999, Claimant signed an employment contract with Alphabet House to work as an independent contractor/consultant for Alphabet House at a salary of \$3,000 per month. Kathe Williams told Claimant she would receive a signing bonus and become an employee at the salary of \$3,000 per month when Alphabet House received expected funding from a grant through HHECF, a state bonding agency.

About the same time, Alphabet House also entered into similar independent contractor employment contracts with Leslie Harrison, Trudy Campbell, and Karla Ridling.

6) Shortly after signing the employment contract, Claimant began working from 8 a.m. to 5 p.m., Monday through Friday, for Alphabet House. She sometimes worked evening hours if there was a meeting related to Alphabet House business.

7) Between June 1999 and the summer of 2000, Claimant's primary job duties included, among other things, setting up and maintaining all of Alphabet House's records, bookkeeping, scheduling meetings, attending meetings related to Alphabet House, and paying bills. Claimant learned how to do bookkeeping while working at Alphabet House. Williams asked Claimant to keep copies of Alphabet House's records in her fireproof safe at home because Alphabet House did not have a fireproof safe.

8) Alphabet House's plans for growth hinged on getting the grant from HHECFA. Sometime in the summer of 2000, Alphabet House learned that HHECFA had denied its grant application. In response, Alphabet House opened a retail store called the "Attic" in the same warehouse as Alphabet House's office. The retail store was opened to show that Alphabet House could successfully operate a small business, giving Alphabet House greater credibility for gaining funding.

9) Claimant helped set up the Attic and worked part-time in it after it opened, along with other persons on Alphabet House's staff.

10) In or around August 2000, Alphabet House rented a separate building space that was already licensed as a daycare center for the purpose of starting the school originally envisioned by the Williams.

11) Alphabet House hired a contractor and architect to remodel the new building space so it would be accessible to disabled children, and construction began.

12) By November 2000, Alphabet House had exhausted its funds and construction on the school was only half finished. Williams sought money from an individual named Larry Tokarski, who agreed to provide additional funding under certain conditions. First, the school would become an LLC, with Tokarski and Alphabet House as its two members, each having a 50% ownership interest. Second, that Alphabet House would manage the LLC, with the LLC reimbursing Alphabet House for half the salary of Alphabet House staff who managed the LLC. On November 9, 2000, the “Children's Center, LLC,” registered with the Oregon Corporations Division as an LLC with “The Alphabet House” listed as its member of record.

13) Sometime between the HHECFAs grant denial and November 9, 2000, Williams asked Claimant, Harrison, Campbell, and Ridling to tear up their independent contractor employment contracts. Harrison, Campbell, and Ridling tore up their contracts. Claimant did not. All four continued working for Alphabet House.

14) In October, November, and December 2000, Claimant believed she was an employee of Alphabet House. Claimant worked 532 hours in total in these three months.

15) During the months of October, November, and December 2000, Claimant completed a single “Time Billing” form on which she itemized dates and times worked in those months that involved work on weekends or after 5 p.m. The words “The Alphabet House, 3896 Beverly Ave. NE J-20, Salem, OR 97305” are printed on top of this form and the two forms described in Finding of Fact 16 – The Merits.

16) In November and December 2000, Claimant completed two additional Alphabet House “Time Billing” forms on which she wrote down each date she worked, the work she did that day, and the total number of hours she worked each day.

Beginning on November 13, 2000, Claimant also wrote down the number of hours she worked each day for the Children's Center.

17) Neither Alphabet House nor the Children's Center maintained copies of these time sheets. Neither Alphabet House nor the Children's Center created or maintained any other record of the hours worked each day by Claimant in October, November, and December 2000, or in September 2001.

18) In November 2000, Claimant worked 88 hours for Alphabet House and 72 hours for the Children's Center. In December 2000, Claimant worked 106 hours for Alphabet House and 88 hours for the Children's Center.

19) By January 1, 2001, the Children's Center had exhausted its funds and the school was not yet ready to operate. Tokarski agreed to provide more funds on the conditions that Bill Frey, chairman of Alphabet House's board of directors, would contribute an equal amount. Tokarski and Frey contributed an equal amount of funds. In exchange, Frey acquired Alphabet House's 50% ownership interest and membership in the Children's Center. The agreement that Alphabet House would manage the Children's Center for a fee continued in effect.

20) Neither Alphabet House nor the Children's Center paid Claimant anything for the work she performed from June 1999 through December 31, 2000.

21) From June 1999 until September 7, 2001, Claimant worked under the direct supervision of either William or Kathe Williams. She worked from 8 a.m. until 5 p.m., Monday through Friday, and used equipment provided by Alphabet House or the Children's Center to perform her job duties. There was no expectation that her employment would end at any particular time. There was no evidence that she was employed elsewhere or had any investment in Alphabet House or the Children's Center.

22) The Children's Center opened its school in late February or early March 2001. Campbell, Harrison, Ridling, and Kathe Williams all began working exclusively for the Children's Center. Claimant continued working for Alphabet House and began performing additional administrative services for the Children's Center. Additional services she performed included setting up ADP payroll for Children's Center's employees, notifying ADP each month of the Children's Center's payroll, producing employee handbooks for Alphabet House and the Children's Center, setting up CPR and First Aid classes for Children's Center employees, and setting up and monitoring Children's Center employee personnel files.

23) In late August 2001, Alphabet House and the Children's Center again ran out of funds and the Children's Center was unable to pay its employees on August 31, 2001, its regularly scheduled payday.

24) Frey and Tokarski agreed to contribute equal amounts of money so the Children's Center could meet its payroll. At the same time, they terminated Alphabet House's management of the Children's Center. At that time, Claimant and Williams were Alphabet House's only employees.

25) Early in the week beginning September 3, 2001, Williams met with Claimant, told her that there was no money to pay her salary, and said she should talk with Kathe Williams about working at the Children's Center. Williams told Claimant that her computer would be moved over to the Children's Center. Claimant met with Kathe Williams, who told her that she could do aide work with children at the Children's Center.

26) On September 9, 2001, Claimant delivered a letter to Williams that read as follows:

“Dear Bill:

"In the three years I have worked for The Alphabet House I have never taken a leave of absence. I need to take this next week due to illness.

"Since you and Kathe have always told me to take my vacation whenever I liked this is to inform you that I will take a month's paid vacation starting September 17, 2001.

"I am also removing my personal belongings from The Alphabet House since you are moving to a smaller location and liquidating the Attic. I do not want to cause you any concern on what is my personal property or can be sold."

"Millie Parker, Director of Administrative Services, The Alphabet House"

27) On October 10, 2001, Williams telephoned Claimant and left a message in which he stated, among other things, that Claimant "was never fired from The Alphabet House," that "she was laid off from The Alphabet House because I was ordered to cut down to one person to save money," and that she "was going to be picked up at the other building as an employee and then we were going to work out something so she could be doing the things she liked to do."

28) Claimant never returned to work at Alphabet House or the Children's Center. Her last date of work was September 7, 2001.

29) In 2001, Claimant received nine paychecks drawn on Alphabet House's general account. Except for one check, Claimant made out and signed each check, with Williams's authorization. The eight checks Claimant made out and signed were each for one month's pay and were in the gross amount of \$3,000, less statutory deductions that Claimant made and deposited in appropriate accounts. The ninth was issued by Alphabet House on 9/28/01 in the amount of \$207.72. The notation "for 12 hours pay" was written on it.

30) There was no evidence presented that any deductions were taken from the \$207.72 check issued to Claimant on 9/28/01.

31) Respondents did not provide Claimant with a statement of itemized deductions for the \$207.72 check issued to her on 9/28/01.

32) Claimant was paid in full for all the hours she actually worked in 2001.

33) Pursuant to the agreement between Alphabet House and the Children's Center whereby Alphabet House would manage the Children's Center in exchange for a fee, the Children's Center reimbursed Alphabet House in the amount of \$1,782.60 for each of Claimant's eight \$3,000 paychecks.

34) Neither Alphabet House nor the Children's Center had a written vacation policy for employees. However, the board of directors for Alphabet House decided that certain persons, including Claimant, would get paid vacations. No reliable evidence was presented as to the specific amount of time authorized for vacations.

35) In the summer of 2001, William and Kathe Williams, Karla Ridling, and Camille Self all took paid vacations ranging from about one week to about one month.

36) On August 16, 2001, Kathe Williams, as vice president of Alphabet House, signed an agreement with the Internal Revenue Service in which Alphabet House agreed that "[b]eginning October 1, 2000, and for all periods thereafter, officer workers and persons performing equivalent duties regardless of taxpayer's job titles will be treated as employees for all federal tax purposes."

37) On January 16, 2002, BOLI's Wage & Hour Division sent a "Notice of Wage Claim" to Alphabet House stating that Claimant had filed a wage claim in which she claimed "unpaid wages of \$10,000 at the rate of \$3,000.00 per month from October 1, 2000 to October 17, 2001 and claims unpaid vacation compensation of \$3,000.00 for period October 1, 2000 to October 17, 2001 for a total claim of \$13,000.00."

38) As of the date of hearing, neither Alphabet House nor the Children's Center had paid any wages to Claimant since Claimant received the 9/28/01 check for \$207.72.

39) Penalty wages are computed in accordance with ORS 652.150 and OAR 839-001-0470(1)(d) as follows. \$9,000 in unpaid wages ÷ 532 hours = \$16.92 per hour x 8 hours = \$135.36 x 30 days = \$4,061 penalty wages.

40) Harley Roth was a disgruntled former member of Alphabet House's board of directors who testified as to the relationship between Alphabet House and the Children's Center and the vacation policy of both entities. His memory was admittedly hazy and he did not recall how much vacation was approved for Alphabet House and the Children's Center's staff. Consequently, the forum has only relied on his undisputed testimony that the board approved paid vacation for staff persons, including Claimant.

41) Stan Wojtyla testified as to his investigation of Claimant's wage claim. His memory was also unclear, as shown by hazy recollection of whom he spoke to and when those conversations took place. His testimony was largely irrelevant to the ultimate issues of the case and the forum has not relied on it.

42) Claimant was a credible witness. With one exception, her testimony was consistent with her other testimony at hearing and statements made prior to hearing. That exception was her initial testimony that she only received \$24,000 pay from Alphabet House in 2001, by way of eight checks for \$3,000 in gross wages. She later acknowledged receiving a ninth check for \$207.72. This inconsistency was more than balanced out by her voluntary acknowledgment that she received eight checks for \$3,000 in gross wages, whereas Alphabet House's record showed she was only paid seven checks in this amount.¹ Her testimony on the most important issue – Respondents' failure to pay for her work in October, November, and December 2000, was undisputed. As a result, the forum has credited her testimony as to facts in its entirety. The forum has disregarded the legal conclusions she testified to based on

those facts. For example, her testimony that she was an independent contractor and that the Children's Center was her joint employer.

43) William Williams, Respondents' authorized representative and only witness, was an emotional witness who expressed considerable anger and disgust at BOLI's investigation and hearings process. He repeatedly sought to evoke the ALJ's sympathy by complaining about how little money he and his wife took home from their work at Alphabet House and how much money Alphabet House owed them. He repeatedly claimed ignorance of legal procedure and complained of his inability to adequately represent Respondents at the hearing, yet in his pre-hearing motions cited case law, constitutional law, the Oregon Rules of Civil Procedure, and legal doctrines by using their Latin name. Finally, his sincerity was diluted by his extravagant expressions of affection for Claimant.ⁱⁱ His requirement that his four so-called independent contractors tear up their contracts and irritation at Claimant for not tearing up hers cast considerable doubt on the content of the contracts, as well as his willingness to pay employees as required by law. His claim that Claimant worked as a volunteer in October, November, and December 2000 because she was afraid of tax consequences, in the context of his assertion that Claimant had been an independent contractor up to that point earning \$3,000 per month, was unbelievable, as was his testimony that Claimant stole documents from Alphabet House. As a result, the forum has only credited his testimony where it was undisputed or corroborated by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Alphabet House was a nonprofit organization that engaged the personal services of one or more employees in Oregon.

2) Between November 9, 2000, and October 2001, Children's Center, LLC, was a limited liability company doing business in Oregon.

3) The Alphabet House was a member of the Children's Center, LLC, from November 9 through December 31, 2000, with a 50% ownership interest.

4) Claimant was employed by Alphabet House between June 1999 and September 9, 2001, as director of administrative services. When she was hired, Alphabet House agreed to pay her a \$3,000 per month salary. During her employment with Alphabet House, Claimant's regular work schedule was 8 a.m. to 5 p.m., Monday through Friday.

5) Between November 13 and December 31, 2001, Claimant spent 45% of her time performing administrative work for the Children's Center, pursuant to an agreement between Alphabet House and the Children's Center whereby Alphabet House agreed to manage the Children's Center, and the Children's Center agreed to reimburse Alphabet House for staff time.

6) Alphabet House and the Children's Center paid Claimant nothing for her work in October, November, and December 2000 and Claimant is owed \$9,000 in unpaid, due and owing wages.

7) Alphabet House and the Children's Center did not maintain records showing Claimant's actual hours worked each week and each pay period in October, November, and December 2000.

8) Alphabet House and the Children's Center did not create or maintain records showing the actual hours worked by Claimant in October 2000 and September 2001.

9) Alphabet House willfully failed to pay the wages due and owing to Claimant and more than 30 days has elapsed since they were due.

10) Penalty wages are computed in accordance with ORS 652.150 and OAR 839-001-0470(1)(d) as follows. \$9,000 in unpaid wages ÷ 532 hours = \$16.92 per hour x 8 hours = \$135.36 x 30 days = \$4,061 penalty wages.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Alphabet House was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010 to 653.261. During all times material, Alphabet House employed Claimant.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.414, ORS 653.040, ORS 653.256, ORS 653.261.

3) Respondent Alphabet House violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid by September 14, 2001, five days after she voluntarily left her employment, excluding Saturdays, Sundays and holidays. Alphabet House owes Claimant \$9,000 in unpaid, due and owing wages.

4) Respondent Alphabet House is liable for \$4,061 in penalty wages to Claimant. *Former* ORS 652.150; *former* OAR 839-001-0470(1).

5) Respondent Alphabet House committed two violations of ORS 653.045(1)(b) by failing to make records of the actual hours worked each week by Claimant during the months of October 2000 and September 2001.

6) Respondent Alphabet House committed two violations of ORS 653.045(1)(b) by failing to keep available records of the actual hours worked each week by Claimant during the months of October 2000, and September 2001.

7) 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 Alphabet House to pay Claimant her earned, unpaid,

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

8) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner's imposition of penalties for Respondent Alphabet House's violations of ORS 653.045(1)(b) is an appropriate exercise of his discretion. ORS 653.256.

OPINION

CLAIMANT'S WAGE CLAIM

To prevail, the Agency must prove: 1) that Respondent or Respondents employed Claimant; 2) any pay rate upon which Respondent(s) 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(s). *In the Matter of Toni Kuchar*, 23 BOLI 265, 273 (2002).

A. Alphabet House was Claimant's employer.

Respondents contended that Claimant was an independent contractor between June 1999 and September 2000, and worked as a volunteer from October 1 to December 31, 2000. Respondent also argued that the Children's Center was never Claimant's employer. Claimant acknowledged signing a purported independent contractor agreement when she started work for Alphabet House, but denied working as a volunteer for the last three months of 2000. The Agency alleged that she was an employee of Alphabet House and the Children's Center in October, November, and December 2000 and in September 2001. For reasons stated below, the forum concludes that she was an employee of Alphabet House between June 1999 and September 7, 2001, the last day she worked for Alphabet House, and that the Children's Center was never Claimant's employer.

This forum uses an “economic reality” test to determine whether a wage claimant is an employee or independent contractor under Oregon’s wage collection laws. *In the Matter of Heiko Thanheiser*, 23 BOLI 68, 75-76 (2002). The focal point of the test is “whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which [she] renders [her] services.” *Id.* The forum considers five factors to gauge the degree of the worker’s economic dependency, with no single factor being determinative: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and alleged employer; (3) the degree to which the worker’s opportunity for profit and loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. *Id.*

Respondent rests its claim that Claimant was an independent contractor on the agreement that she signed.ⁱⁱⁱ Although Claimant may have signed an “independent contractor” agreement, this fact does not control the outcome of this case, as the forum looks at the totality of the circumstances in determining whether a wage claimant was an employee or an independent contractor. *In the Matter of Triple A Construction, LLC*, 23 BOLI 79, 93 (2002). In this case, the relevant facts show that William or Kathe Williams directed Claimant’s work; Alphabet House or Children's Center supplied all the equipment necessary to perform her work; Claimant had no investment in Alphabet House or Children's Center; Claimant had no opportunity to earn a profit or suffer a loss, as she was paid a set salary of \$3,000 per month; Claimant learned how to do bookkeeping while working for Respondents; Claimant was hired for an indefinite period of time; and no one else employed Claimant between June 1999 and September 7, 2001. Williams testified that Claimant said she would work as a volunteer during the months of October, November, and December 2000, but the forum did not find this

testimony credible. There was no evidence that any significant changes occurred in Claimant's conditions of employment at Alphabet House between June 1999 and December 31, 2000, further indicating that her employment status was the same throughout her tenure at Alphabet House. Additionally, Alphabet House began paying Claimant as an employee retroactive to January 1, 2001, and did not provide a credible explanation for Claimant's alleged employment status change on that date. All these factors point the forum to the conclusion that Claimant was an employee, not an independent contractor, throughout her tenure at Alphabet House. However, the forum may only award back wages for the period of time in which back wages were sought.^{iv}

Prior to hearing, the Agency amended its Order of Determination to allege that the Children's Center was also Claimant's employer during the wage claim period. At hearing, the Agency rested its allegation on credible evidence that Claimant performed at least half of her work for the Children's Center beginning in November 2000, that the Children's Center paid for 60% of her salary, that the Children's Center did not write Claimant a separate check as a money saving convenience for Claimant, and that Alphabet House also paid the salary of Kathe Williams, a fulltime employee of the Children's Center. Claimant also testified to her belief that she was employed by both entities. On the other hand, Respondents presented credible evidence that the Children's Center had an agreement with Alphabet House to the effect that Alphabet House would manage the Children's Center and the Children's Center would reimburse Alphabet House for the proportion of salaries paid out to its staff that was attributable to management of the Children's Center.^v Credible evidence also established that Claimant's worksite was in Alphabet House's office and that her paychecks, which she wrote herself, were drawn on Alphabet House's general account. Williams testified that Claimant was always an employee of Alphabet House. Williams, who was an employee

of Alphabet House, was Claimant's immediate supervisor after the Children's Center began operations. Claimant and Williams both agreed that Williams asked Claimant to interview with Kathe Williams about employment with the Children's Center in early September 2001, an unlikely scenario if Claimant was already employed by the Children's Center. In addition, the evidence was undisputed that Claimant never completed any paperwork for the Children's Center, such as an I-9 or W-4, that a new employee would be asked to complete, even though Claimant was in charge of the records for Alphabet House and the Children's Center. Claimant kept track of her time in November and December 2000 on Alphabet House "Time Billing" sheets. Finally, Claimant signed her September 9, 2001, letter as "Director of Administrative Services, The Alphabet House." Based on the above, the forum concludes that the Agency failed to meet its burden of proof in establishing that the Children's Center was her employer.

The forum also notes that the Children's Center, LLC, did not exist as a business entity prior to November 9, 2000,^{vi} and therefore could not have been Claimant's employer before that date.

CLAIMANT'S RATE OF PAY

Claimant's credible testimony as to her salary agreement, together with the fact that she was actually paid \$3,000 in gross salary for eight separate months in 2001, establishes that Claimant's rate of pay was a \$3,000 per month salary based on working eight hours per day, five days a week.

CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED

Claimant's credible testimony and records established that her regular work hours during October, November, and December 2000, were 8 a.m. to 5 p.m., Monday through Friday. Respondents did not dispute her claim that she was paid nothing for her work. These facts establish the third element of the Agency's case.

THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

As stated above, Claimant credibly testified that her regular work schedule during the wage claim period was 8 a.m. to 5 p.m., Monday through Friday. She also credibly testified that she occasionally worked in the evening and on weekends. At the time she filed her wage claim, she provided the Agency with a calendar showing she worked a total of 532 hours in October, November, and December 2000. She further testified that that total was accurate, to the best of her recollection, and Respondents did not challenge this figure. The forum concludes that Claimant worked 532 hours during the wage claim period, earning \$9,000 based on her salary agreement with Alphabet House. Those wages are still unpaid, leaving \$9,000 due and owing.

VACATION PAY

The Agency additionally alleged, in its amended Order of Determination, that Claimant was due \$3,000 in unpaid wages for the month of September 2001. At hearing, the Agency clarified that the wages sought for the month of September 2001 represented one month's vacation pay. Respondents denied that any vacation pay was due Claimant. It is the Agency's burden to establish that Claimant was entitled to vacation pay. The evidence relevant to this issue is discussed below.

The Agency based its claim on four pieces of evidence. First, undisputed testimony of Harley Roth, former member of Alphabet House's board of directors, that the board decided sometime in 2001 that certain employees, including Claimant, were entitled to paid vacations. Roth testified he did not recall the length of vacation that was approved, only that "was in a chunk of weeks" and that the length was stated in the board's minutes. Second, the undisputed fact that Williams and at least three employees of the Children's Center – Kathe Williams, Karla Ridling, and Camille Self, took paid vacations of approximately a week or more in the summer of 2001. Third,

Claimant's undisputed testimony that Williams told her to take a paid vacation whenever she wanted. Fourth, Claimant's testimony that she believed she was entitled to two weeks' vacation pay each from Alphabet House and the Children's Center.

It was undisputed that Respondents' personnel manuals, which Claimant wrote, contained no reference to vacation leave and that Claimant did not take any vacation prior to the effective end of her employment on September 9, 2001. In addition, there was no evidence concerning Respondents' policy, if any, concerning payment for accrued vacation time upon termination of employment, and no evidence that the Children's Center had any policy whatsoever for vacation pay, other than the fact that some of its employees took paid vacations.

Assuming, *arguendo*, that Claimant was entitled to accrued vacation pay after September 9, 2001,^{vii} the forum must be able to calculate the amount due in order to award vacation pay. It is also the Agency's burden to establish the amount of vacation pay owed to her. The evidence in the record proves only that other employees took paid vacations ranging from approximately one week to approximately four weeks. There is no evidence that any other employees took paid vacation after their last day on the job. Based on the evidence in the record, the forum has no way of determining the specific extent, if any, of Claimant's entitlement to vacation pay, and declines to base an award of unpaid wages for accrued vacation leave on speculation.^{viii}

LIABILITY FOR UNPAID WAGES

Alphabet House was Claimant's employer and is liable for \$9,000 in unpaid, due and owing wages to Claimant. Since the Children's Center was not Claimant's joint employer, it is not liable for any of the unpaid wages in this proceeding.^{ix}

PENALTY WAGES

ORS 652.150 allows an award of penalty wages “[i]f an employer willfully fails to pay any wages or compensation of any employee whose employment ceases.” Since Children's Center was never Claimant’s employer, penalty wages, if appropriate, can only be assessed against Alphabet House.

An employer is liable for penalty wages when it “willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140[.]” Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Claimant’s last date of employment was September 9, 2001. Under ORS 653.140(2), her \$9,000 in unpaid wages became due on September 14, 2001. None of those wages have been paid. Alphabet House’s claim that Claimant was an independent contractor, then a volunteer, when Williams, her supervisor, was aware of Claimant’s actual conditions of employment and hours worked and the forum has determined that Claimant was an employee, is not a defense.^x There is no evidence that Alphabet House acted other than voluntarily and as a free agent in failing to pay Claimant the wages she earned and the forum concludes that Alphabet House’s failure to pay Claimant’s wages was willful.

Penalty wages amount to \$4,061 and are computed as shown in Ultimate Finding of Fact 10.

ALPHABET HOUSE VIOLATED ORS 653.045 BY FAILING TO MAKE RECORDS OF CLAIMANT'S HOURS IN OCTOBER 2000 AND SEPTEMBER 2001

The Agency alleged that Respondents violated ORS 653.045 and OAR 839-020-0080 by failing to make "required payroll and other records." Because the Agency does not specifically allege which of the many subsections of OAR 839-020-0800 was violated, the forum looks to language of the statute to determine if one or more violations occurred. The statutory language that fits the Agency's allegation requires employers to make a record of "[t]he actual hours worked each week and each pay period by each employee." ORS 653.045(1)(b).

Claimant's pay periods were on a monthly basis. The Agency itself provided evidence that Respondents met this requirement for November and December 2000 by Claimants' written record of the dates and hours she worked each day in November and December 2000.^{xi} However, no testimony was elicited from Claimant, Respondents' record keeper, as to whether or not she kept a similarly detailed record for October 2000 and September 2001, and no evidence was presented that records were made for those months. The forum finds that Alphabet House, Claimant's employer, committed two violations of ORS 653.045(1)(b) by failing to make a record of the actual hours worked each week by Claimant in October 2000 and September 2001. The Children's Center is not liable for the violation because it was not Claimant's employer.

CIVIL PENALTY

OAR 839-020-1020 sets out six mitigating and aggravating circumstances that may be considered by the commissioner in determining the amount of civil penalty to be assessed.

- “(a) The history of the employer in taking all necessary measures to prevent or correct violations of statutes or rules;
- “(b) Prior violations, if any, of statutes or rules;
- “(c) The magnitude and seriousness of the violation;

- “(d) Whether the employer knew or should have known of the violation;
- “(e) The opportunity and degree of difficulty to comply;
- “(f) Whether the employers’ action or inaction has resulted in the loss of a substantive right of an employee.”

It is the employers’ responsibility to provide mitigating evidence, and the commissioner must consider all mitigating circumstances presented by the employer. OAR 839-020-1020(2) & (3). There was no evidence presented concerning (a) and (b). The magnitude and seriousness of the violations was low, as they only involved one salaried worker. As to (d), Alphabet House claimed it was not responsible for creating records in 2000 because it was not Claimant’s employer. The forum has concluded otherwise and has previously determined that an employers’ failure to apprehend the correct application of the law and actions based on that incorrect application are not a defense. *In the Matter of Toni Kuchar*, 23 BOLI 265, 275 (2002). Likewise, Williams, as Claimant’s supervisor, should have known of the violation, in that employers are presumed to know the laws they are required to follow and Williams was acting as an agent for Alphabet House. *In the Matter of John Mathioudakis*, 12 BOLI 11, 20-21 (1993). Alphabet House, as Claimant’s employer, was ultimately responsible to insure that Claimant, its record keeper, created the records required by law and the forum concludes that Alphabet House should have known of the violation. Complying with the law would have been a simple matter of requiring Claimant to keep a written record of the hours that she worked. Finally, Claimant’s wage loss was not a result of Alphabet House’s failure to make these records.

Alphabet House’s two violations are mitigated by the fact that Claimant was the employee who was responsible for making the very records on which the Agency bases its allegations.

Considering all the aggravating and mitigating circumstances, the forum assesses a civil penalty of \$250 for each violation, for a total of \$500.

ALPHABET HOUSE VIOLATED ORS 653.045 BY FAILING TO KEEP AVAILABLE RECORDS OF CLAIMANT'S HOURS IN OCTOBER 2000 AND SEPTEMBER 2001

As applied to this case, ORS 653.045(1)(b) required Alphabet House to “keep available” to BOLI “for not less than two years” its record of Claimant’s hours worked each week and month. Williams, Alphabet House’s authorized representative, acknowledged at the hearing that Alphabet House did not have any records of Claimant’s hours, and that Claimant’s time records for November and December 2000 were provided to the Agency by Claimant, not Alphabet House. However, there was no evidence presented as to whether or not these records were in the possession of Alphabet House at the end of November and December 2002, respectively, two years after those records were created. Accordingly, the Agency’s claim must fail as to the November and December 2000 records. Since the October 2000 and September 2001 records were never created, it would have been impossible for Alphabet House to keep them “available” for any period of time. The forum concludes that that Alphabet House committed two violations of ORS 653.045(1)(b) by failing to keep available Claimant’s October 2000 and September 2001 time records “for not less than two years.”

CIVIL PENALTY

The criteria set out in OAR 839-020-1020 also apply here. Again, there is no evidence concerning the employer’s history in record keeping or prior violations, and magnitude and seriousness of the violations was low, as they only involved one salaried worker. Williams, as Claimant’s supervisor, should have known of the violation, in that employers are presumed to know the laws they are required to follow and Williams was acting as an agent for Alphabet House and should have known whether the required records were being kept and where they were kept. *Id.* Complying with the law would have been a simple matter of requiring Claimant to keep a written record of the hours that she worked and filing those records in a place accessible to Williams or another

agent of Alphabet House. Claimant's wage loss was not a result of Alphabet House's failure to make these records.

These two violations are not mitigated by the fact that Claimant was the employee who was responsible for Alphabet House's records, particularly with regard to the September 2001 record violation, as Claimant was no longer working for Alphabet House.

Considering all the aggravating and mitigating circumstances, the forum assesses a civil penalty of \$350 for each violation, for a total of \$700.

ALPHABET HOUSE DID NOT VIOLATE ORS 653.045(3), OAR 839-020-0012, OR OAR 839-020-0080 BY FAILING TO SUPPLY CLAIMANT WITH ITEMIZED STATEMENTS OF AMOUNTS AND PURPOSES OF DEDUCTIONS

The Agency alleged that Respondents violated ORS 653.045(3), OAR 839-020-0012, and OAR 839-020-0080 on four occasions by failing to provide Claimant with itemized statements of deductions in October, November, and December 2000, and September 2001. ORS 653.045(3) requires employers to "supply each of the employer's employees with itemized statements of amounts and purposes of deductions in the manner provided in ORS 652.610." ORS 652.610 requires that "the itemized statement shall be furnished to the employee at the time payment of wages, salary or commission is made[.]" OAR 839-020-0012, which interprets these statutes, states that "employers must furnish each employee, each time the employee receives a compensation payment from the employer, a written itemized statement of earnings." OAR 839-020-0080(1)(j) requires employers to preserve records showing the deductions taken "from wages paid each pay period[.]"

In order to prevail, the Agency must prove that (1) Respondents made wage payments to Claimant; (2) Respondents made deductions from Claimant's wage

payments; and (3) Respondents did not provide the itemized statement required by ORS 652.610 at the time Respondents made the wage payments.

The Agency did not meet its burden of proof for any of its four allegations. The allegations regarding October, November, and December 2000 fail because Claimant did not receive a wage payment in any of those months. Respondents' alleged September 2001 violation also must fail because the Agency produced no evidence to show that Alphabet House made deductions from the \$207.72 check that was issued to Claimant.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2) and ORS 652.332 and as payment of the unpaid wages and the penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **The Alphabet House** 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 Claimant Mildred Anne Parker in the amount of THIRTEEN THOUSAND SIXTY ONE DOLLARS (\$13,061), less appropriate lawful deductions, representing \$9,000 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from December 1, 2001, until paid, and \$4,061 in penalty wages, plus interest at the legal rate on that sum from January 1, 2002, until paid..

NOW, THEREFORE, as authorized by ORS 653.256, and as payment of the civil penalties assessed as a result of its violations of ORS 653.045(1) and (2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **The Alphabet House** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

- (2) A certified check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND TWO HUNDRED DOLLARS (\$1,200), plus any interest that accrues at the legal rate on that amount from a date

ten days after issuance of the Final Order and the date Respondent **The Alphabet House** complies with the Final Order.

ⁱ Alphabet House's record, which is Exhibit A-22, shows eight \$3,000 checks, but check #120 is listed twice.

ⁱⁱ The most pronounced example of this was his testimony "I love her and her husband."

ⁱⁱⁱ This agreement is not in evidence, as Respondent objected to its admission when the Agency offered it into evidence and the ALJ sustained the objection.

^{iv} Compare *In the Matter of Francisco Cisneros*, 21 BOLI 190, 213 (2001) and *In the Matter of Contractor's Plumbing*, 20 BOLI 257, 273 (2000) (in both cases, the Commissioner awarded wage claimants unpaid wages earned in excess of those sought in the Agency's Order of Determination; however, the excess wages were earned during the specific wage claim period alleged in the Order of Determination).

^v During 2001, Claimant and Williams were Alphabet House's only employees.

^{vi} See Finding of Fact 12 – The Merits, *supra*.

^{vii} The forum does not decide the question of whether or not Claimant was actually entitled to vacation pay because the Agency's claim fails on other grounds.

^{viii} Cf. *In the Matter of Rubin Honeycutt*, 23 BOLI 224, 233 (2002) (this forum has repeatedly declined to speculate or draw inferences about wages owed based on insufficient, unreliable evidence).

^{ix} The Commissioner only has the authority to collect unpaid wages from a claimant's employer, which does not include another member of an LLC to which the employer belongs where the claimant is not an employee of the other member. ORS 652.310 through ORS 652.332.

^x See, e.g., *In the Matter of Scott Miller*, 23 BOLI 243, 262 (2002) (respondent's failure to apprehend the correct application of the law and actions based on this incorrect application did not exempt respondent from a determination that he willfully failed to pay wages earned and due).

^{xi} See Finding of Fact 16 – The Merits, *supra*.