

In the Matter of
DAVID CREAGER and
Judith Creager, dba
Visual Changes Salon,
Respondents.

Case Number 50-98
Final Order of the Commissioner
Jack Roberts
Issued August 25, 1998.

SYNOPSIS

Respondents, who operated a hair salon, employed Claimant as a stylist. Respondents failed to pay Claimant all wages due upon termination, in violation of ORS 652.140(2) and OAR 839-020-0030 (overtime wages). Respondents' failure to pay the wages was willful, and the Commissioner ordered Respondents to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140(2), 652.150, 653.261; and OAR 839-020-0030.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 14, 1998, in Bureau of Labor and Industries offices, Suite 105, 700 E Main Street, Suite 105, Medford, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by David Gerstenfeld, an employee of the Agency. Amy M. Smith (formerly Beyer-Percy)

(Claimant) was present throughout the hearing. David Creager (Respondent D. Creager) and Judith Creager (Respondent J. Creager) were present throughout the hearing and were not represented by counsel.

The Agency called as witnesses Lesley Laing, a compliance specialist with the Wage and Hour Division of the Agency; and Amy M. Smith, Claimant. Respondents called themselves as witnesses.

Administrative exhibits X-1 to X-9, Agency exhibits A-1 to A-12 (A-7, page 7 only), and Respondent exhibits R-1 to R-3 were offered and received into evidence. The Agency withdrew all of exhibit A-7 except page 7. The record closed on May 12, 1998.

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

FINDINGS OF FACT -- PROCEDURAL

- 1) On October 10, 1996, Claimant filed a wage claim with the Agency. She alleged that Respondents employed her and failed to pay wages earned and due to her.
- 2) At the same time that she filed the wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondent.
- 3) On September 19, 1997, the Agency served on Respondents an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondents owed a total of \$213.75 in wages and \$1,200 in civil penalty wages. The Order of Determination required that, within 20 days, Respondents either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges.

4) On October 9, 1997, Respondents filed an answer to the Order of Determination. Respondents' answer contained a request for a contested case hearing. They denied they owed Claimant any unpaid wages.

5) On April 16, 1998, the Hearings Unit issued a Notice of Hearing to the Respondents, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

6) On April 20, 1998, the Administrative Law Judge issued a discovery order directing each participant to submit a summary of the case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-050-0210(1). The summaries were due by May 4, 1998. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200 (8), for failure to submit the summary.¹ The Agency submitted a timely summary. Respondents did not submit one.

7) On May 4, 1998, the Hearings Unit received Respondent D. Creager's request for a postponement of the hearing scheduled for May 14, 1998. The reason for the request was that Mr. Creager had court dates set on May 5 and 19 and a brief due at the state Supreme Court on May 13. He claimed that these matters were already scheduled when he received the Notice of Hearing, and that they were "extremely time consuming to prepare for and obviously extremely important." The Agency objected to a postponement because there was no conflict between the hearing date (May 14) and any of Mr. Creager's other commitments. The Agency stressed that Mr. Creager did not

claim he had inadequate time or was unable to prepare for the hearing. The ALJ denied Respondent D. Creager's request, pursuant to OAR 839-050-0150(5), because workload was the cause for the requested postponement. This forum has consistently ruled that, in the absence of an actual conflict between a hearing date and a respondent's schedule, workload alone is not sufficient to justify a postponement. Respondent D. Creager did not show good cause for a postponement.

8) During a pre-hearing conference, Respondents and the Agency stipulated to certain facts, which were admitted by Respondents in their answer.

9) At the start of the hearing, Respondents said they had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

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

11) The proposed order, containing an exceptions notice, was issued June 16, 1998. Exceptions were due June 26, 1998. On June 17, 1998, this proceeding was transferred from ALJ McKean to ALJ Warner W. Gregg.

12) On June 26, 1998, the forum received by fax a request from Respondent David Creager for an extension of time in which to file exceptions to the Proposed Order herein, reciting that delivery of the Proposed Order to Respondent was delayed because of a changed address and the time consumed in forwarding mail to a mailing address of 2047 Amy St., Medford, Oregon, 97504. Finding that Respondents had failed to timely notify the forum of a change of address, the ALJ found that Respondent had failed to show good cause for extending time for exceptions. Nonetheless, the ALJ

extended time for exceptions to July 24, 1998. Respondent's exceptions were received by the forum on July 24, 1998, and are dealt with in the opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) Respondents operated a beauty and barber shop under the assumed business name of Visual Changes Salon. Respondents were coregistrants of the assumed business name. Respondents are husband and wife. The salon was in Medford, Oregon. Respondents shared the profits from the business and were each liable for any losses. They each participated in the management of the salon.

2) Claimant was employed by Respondents from approximately April 12 to June 15, 1996, and was paid at the straight time rate of \$5.00 per hour.

3) Claimant worked for Respondents as a hair dresser and nail technician. She also answered the business phone, helped customers, was a cashier, and cleaned the salon.

4) Respondents paid a total of \$1,670 in wages to Claimant for all of the time she worked for Respondents.

5) Respondents always paid Claimant at the straight time rate of \$5.00 per hour.

6) Respondents paid each employee for a minimum of four hours each day. They told employees there would be no overtime work, that is, no work time over 40 hours in a week.

7) Respondents' work week ran from Monday through Saturday.

8) Claimant maintained a log book in which she recorded her appointments and hours worked. At Respondent D. Creager's direction, Claimant normally started at 8 a.m. on weekdays, and at 9 a.m. on Saturdays. If she came in later, she marked it in her

book. She normally took a one-hour lunch break. Sometimes she did not leave the shop during her lunch hour. On those occasions, she was not always relieved of all duties because she was expected to answer the phone, and sometimes she watched hair-care videos. She usually stayed until 6 p.m., Monday through Friday, unless she had an earlier engagement. Respondents never told her to leave early. If she had time without customers, she cleaned the shop, washed and folded towels, and answered the phone. On Saturdays Claimant usually worked 9 a.m. to 5 p.m.

9) Respondent D. Creager told Claimant that the time she spent performing services for her family members was not work time. Respondents did not charge the family members for these services, but did charge them for any products used. When staff members styled each other's hair or did each other's nails, this was not part of any training. It was for their own benefit. Staff members asked each other for these services. Normally, all training was done after the salon's business hours.

10) Respondent J. Creager was a hair dresser and the salon's bookkeeper. She kept track of when employees came and went from the salon. From the salon's appointment book, she kept a daily diary of hours employees worked. This daily diary was not accurate.

11) For the period April 12 to 30, 1996, Respondents paid Claimant gross wage of \$370, for 74 hours worked. For the period May 1 to 31, 1996, Respondents paid Claimant gross wage of \$902.50, for 180.5 hours worked. For the period June 1 to 15, 1996, Respondents paid Claimant gross wage of \$397.50, for 79.5 hours worked. Total gross wages equaled \$1,670, for 334 hours worked.

12) For reasons explained in the opinion, Respondents' records were not reliable. Accordingly, from the Claimant's appointment book and other credible evidence, the forum finds that she worked the hours shown below. The forum made

adjustments for lunch hours, time Claimant provided services to her family members, and times when she was giving or receiving services to or from other salon staff. Claimant's compensable work hours in 1996 were: April 12, 3.75; April 13, 7.0; April 15, 9.0; April 16, 9.0; April 17, 7.0; April 23, 8.5; April 24, 8.0; April 25, 9.0; April 26, 6.0; April 27, 7.0; April 30, 8.0; May 1, 8.0; May 2, 8.5; May 3, 8.5; May 4, 8.0; May 6, 8.0; May 7, 7.0; May 8, 5.0; May 9, 7.0; May 10, 9.0; May 11, 6.0; May 13, 9.0; May 14, 7.0; May 15, 8.0; May 17, 7.0; May 18, 3.0; May 20, 9.0; May 21, 8.0; May 22, 8.0; May 23, 6.0; May 28, 9.0; May 29, 7.0; May 30, 8.0; May 31, 8.0; June 1, 6.0; June 3, 5.0; June 4, 9.0; June 5, 9.0; June 6, 7.0; June 7, 6.0; June 8, 7.0; June 10, 4.0; June 11, 9.0; June 12, 9.0; June 13, 9.0; June 14, 9.0; and June 15, 8.0. Claimant worked a total of 351.25 hours; of the total hours, 14 were hours worked in excess of forty hours per week. Claimant earned \$1,791.25 in wages (337.25 hours x \$5.00 = \$1,686.25; plus 14 OT hours x \$7.50 = \$105). Respondents paid Claimant \$1,670. The balance of earned, unpaid, due and owing wages equals \$121.25.

13) In mid June 1996, Claimant's fiancé was injured, and Claimant asked for time off work to care for him. At the end of June 1996, Claimant notified Respondents that she had accepted a new job.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondents were persons who, as partners, engaged the personal services of one or more employees in the state of Oregon.

2) Respondents employed Claimant from April 12 to June 15, 1996.

3) Respondents and Claimant had an oral agreement whereby Claimant's rate of pay was \$5.00 per hour.

4) Claimant quit without notice around June 30, 1996.

5) Claimant worked 351.25 hours, 14 of which were hour worked in excess of 40 hours in a work week. Claimant earned \$1,791.25 in wages. Respondents paid Claimant \$1,670, and owe her \$121.25 in earned and unpaid compensation.

6) Respondents willfully failed to pay Claimant all wages within five days, excluding Saturdays, Sundays, and holidays, after she quit without notice, and more than 30 days have elapsed from the date her wages were due.

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

CONCLUSIONS OF LAW

1) During all times material herein, Respondents were employers and Claimant was an employee subject to ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

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

3) ORS 653.261(1) provides:

"The commissioner may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-020-0030(1) provides in part:

"[A]ll work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefit of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Oregon law required Respondents to pay Claimant one and one-half times her regular hourly rate for all hours worked in excess of 40 hours in a week. Respondents failed to pay Claimant her overtime rate, in violation of OAR 839-020-0030(1).

4) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Respondents violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after she quit employment without notice.

5) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for civil penalties under ORS 652.150 for willfully failing to pay all wages to Claimant when due as provided in ORS 652.140.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondents to pay Claimant her earned, unpaid, due, and

payable wages and the civil penalty wages, plus interest on those sums until paid. ORS 652.332.

OPINION

Hours Worked

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

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

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

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

Here, ORS 653.045 requires an employer to maintain payroll records. Respondent kept records of Claimant's work. However, those records were inaccurate and unreliable. Pursuant to the analysis then, the employee, or in this case the Agency, has the burden of first proving that the employee "performed work for which [she] was improperly compensated." The burden of proving the amount and extent of that work can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. This forum has previously accepted, and will accept, the testimony of a claimant as sufficient evidence to prove such work was performed and from which to draw an inference of the extent of that work -- where that testimony is credible. See *In the Matter of Sheila Wood*, 5 BOLI 240, 254 (1986); *Dan's Ukiah Service*, 8 BOLI 96, 106 (1989). From Claimant's log book and credible testimony, as well as other evidence in the record, the forum has concluded that Respondents employed and improperly compensated Claimant. The forum may rely on the evidence produced by the Agency regarding the number of hours worked and rate of pay for Claimant.

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

Respondents submitted three documents regarding the hours worked by Claimant: their appointment books; a daily diary of hours worked; and a summary of

hours, in which they compared the information in their appointment books with that in their daily diary. In addition, they testified about Claimant's hours worked and made allegations about her hours in their answer. For the following reasons, the forum found Respondents' records and testimony about Claimant's hours worked inconsistent and unreliable.

In their answer, Respondents contended that Claimant worked only 269.75 hours. They also asserted this in their summary of hours. In the answer, they also claimed they paid her for 332.5 hours. This number of hours times Claimant's rate of pay (\$5.00 per hour) equals \$1,662.50. They also asserted this in their summary of hours. At the same time, however, they admit in the answer that they paid Claimant \$1,670, which corresponds to 334 hours at \$5.00 per hour. Respondents' pay checks and transaction reports support \$1,670 and 334 hours.

Respondents daily diary does not agree with their appointment book. Their summary of hours and their testimony demonstrate the complete unreliability of their daily diary. Likewise, the summary doesn't accurately track with the information in their appointment book. For example, for April 23, their diary shows Claimant worked 8 hours. However, Respondents claim in their summary that she only worked 6 hours. In contrast, they testified from the appointment book that Claimant came in at 8: a.m. and left at 4:30 p.m. (8.5 hours), less one hour for lunch and one hour for styling her mother's hair, which equals 6.5 hours.

Respondent J. Creager testified that Respondents maintained the daily diary for just this kind of situation, that is, a wage claim. Yet she admitted that the diary did not accurately reflect the hours worked. She said it reflected the amounts paid to the employee. Respondents claimed they were trying to be kind, and rounded the hours up. For example, regarding May 8, Respondents contend they paid Claimant for 8 hours

(per their daily diary), when she only worked 4 hours (per the summary). In contrast, Respondent J. Creager testified from the appointment book that Claimant worked only 3 hours -- she performed services for her mother until noon, then took a one-hour lunch break, and then worked from 1:00 to 4 p.m.

Respondent J. Creager testified that Respondents filled out the daily diary at end of each day. However, Respondents testified inconsistently about the accuracy of the diary. Respondent D. Creager said he wanted the diary for "tight record keeping." He said it was "very accurate," to avoid problems like this wage claim. But then he testified that the appointment book was more accurate. The diary was not accurate. For example, regarding June 7, Respondents testified that Claimant was out all day, but (per the daily diary) they paid her for 6.5 hours.

Respondent's appointment book was not accurate or reliable as a record of Claimant's hours. It was kept in pencil. Others besides Respondents wrote in it and erased entries from it. It was inconsistent with the diary and Respondents testimony. The forum concludes that Respondents' evidence about Claimant's hours worked did not sufficiently undermine the credible evidence produced by the Agency.

Wages Due

Claimant's credible testimony and log book established the number of hours she worked as a matter of just and reasonable inference. Although Respondents had no agreement with Claimant regarding overtime, Oregon law required them to pay her at time and one-half her regular hourly rate for all hours worked over 40 in a work week. Accordingly, the forum calculated Claimant's overtime wages at the rate of \$7.50 per hour (time and one-half her regular hourly rate of \$5.00). From the credible evidence and the applicable law, the forum concluded that Respondents owe Claimant \$121.25 in earned and unpaid wages.

Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondents, as employers, had a duty to know the amount of wages due to their employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, evidence established that Respondents knew they were not paying the Claimant overtime wages and intentionally failed to pay those wages. Evidence showed that Respondents acted voluntarily and were free agents. Under this test, the forum finds that Respondents acted willfully and thus they are liable for penalty wages under ORS 652.150.

Respondents' Exceptions

Respondents' exceptions included disagreement with the findings of the Proposed Order as to Claimant's 8:00 a.m. starting time, as to the expectation that Claimant would answer the phone during lunch, and that Claimant's work day extended to 6:00 p.m. weekdays and 5:00 p.m. Saturdays during which she cleaned and washed and folded towels when not with a customer. Respondents' exceptions further disputed that overtime was authorized or worked and stated that Claimant knew none could be expected and that she was free to leave after four hours each day. Respondents denied that Claimant's final pay was late, that their appointment book was inaccurate or that they had any knowledge of unpaid overtime until receiving the wage claim, and argued that they should not be liable for penalty wages when Claimant gave them no notice of or claim of underpayment for nine or more months after employment ended. In

support of these exceptions, Respondents pointed to their own testimony and to the documents they submitted at hearing.

The forum previously considered all of the arguments listed in Respondents' exceptions. The facts as found establish that the testimony of Respondents and their documents were inconsistent and unreliable. Claimant's log and testimony were considered credible. Respondents had a duty to know the amount of wages due, knew they were not paying overtime worked, and failed to pay all that was due. That is all ORS 652.150 requires for penalty wages to be assessed.

Respondents' exceptions are without merit and are overruled.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as a result of Respondents' violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders David Creager and Judith Creager to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries IN TRUST FOR Amy M. Smith in the amount of ONE THOUSAND THREE HUNDRED AND TWENTY ONE DOLLARS AND TWENTY FIVE CENTS (\$1,321.25), less appropriate lawful deductions, representing \$121.25 in gross earned, unpaid, due, and payable wages; and \$1,200 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$121.25 from July 15, 1996, until paid and nine percent interest per year on the sum of \$1,200 from August 15, 1996, until paid.

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¹This discovery order was inadvertently not listed with the administrative exhibits that were received at hearing. The order, marked exhibit X-5A, is hereby received.