

In the Matter of
GOODMAN OIL COMPANY, INC.,

Case No. 69-00

July 25, 2000

SYNOPSIS

Respondent violated ORS 652.610(3) by withholding \$105.00 from its employee's wages pursuant to an agreement the employee had signed, which provided that if he accepted a check from a customer without a check guarantee card, and that resulted in "return of an unpaid check," the amount of the check would be deducted from his wages. ORS 652.610(3) does not allow such deductions. The commissioner found that Respondent acted willfully in withholding the wages and ordered Respondent to pay \$1560.00 in penalty wages in addition to the \$105.00 in unpaid wages, plus interest. ORS 652.140, ORS 652.150, ORS 652.610(3).

The above-entitled case was scheduled for hearing on May 31, 2000, before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia Domas, an employee of the Agency. Respondent was represented by its president, Charles D. Conley. Before the date scheduled for hearing, the ALJ granted the Agency's motion for summary judgment and canceled the hearing.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about December 1, 1999, the Agency issued an Order of Determination in which it alleged that employer "Michael J. McConville and Charles D.

1 Conley, dba Goodman Oil Company," had employed Claimant and failed to pay him
2 \$105.00 in earned wages. The Agency further alleged that the failure to pay wages was
3 willful and the employer, therefore, owed Claimant \$1560.00 in penalty wages. The
4 Order of Determination required the employer, within 20 days, either to pay these sums,
5 plus interest, in trust to the Agency, request an administrative hearing and submit an
6 answer to the charges, or demand a trial in a court of law.

7 2) On or about December 30, 1999, Respondent filed an Answer and
8 Request for Hearing through its president and authorized representative, Charles D.
9 Conley. In that Answer, Respondent denied it had committed the alleged violations and
10 asserted:

11 "In response to paragraph II of the Order of Determination, Goodman Oil
12 Company admits that it employed the Wage Claimant from on or about
13 November 19, 1998, to on or about October 23, 1999. Goodman Oil
14 Company admits that during the Wage Claimant's employment, Wage
15 Claimant was paid \$6.50 per hour. Goodman Oil Company admits that at
16 the time of Wage Claimant's employment, Goodman Oil Company paid
17 Wage Claimant all compensation due and owing to Wage Claimant.
18 Goodman Oil Company admits that during Wage Claimant's employment,
19 Goodman Oil Company deducted from Wage Claimant's wages the
20 amount of \$105.00 for shortages of assets caused by Wage Claimant's
21 violation of an employment contract voluntary [sic] signed by Wage
22 Claimant. Goodman Oil Company denies that deduction of the amount of
23 \$105.00 from Wage Claimant's wages was in violation of ORS 652.610(3),
24 and denies all other allegations set forth in paragraph II not specifically
25 admitted in this Answer."

3) On March 6, 2000, the Hearings Unit received the Agency's request for
hearing and the Agency's motion to amend the caption.

4) The Hearings Unit issued a Notice of Hearing on March 9, 2000, setting
forth the time and place of hearing. The Notice was served on Respondent together
with: a) a copy of the Order of Determination; b) Summary of Contested Case Rights
and Procedures containing the information required by ORS 183.413; and c) a copy of
the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

1 5) The same day, the forum issued an order granting the Agency's motion to
2 amend the caption of the Order of Determination to name Goodman Oil Company, Inc.,
3 as the sole Respondent.

4 6) The Agency filed a motion for summary judgment on May 15, 2000. The
5 forum issued an interim order notifying Respondent that its response to the summary
6 judgment motion was due on May 22, 2000. Respondent did not file a response to the
7 motion.

8 7) On May 23, 2000, the ALJ issued an order granting the Agency's motion
9 for summary judgment and canceling the contested case hearing. That order stated:

10 "The Agency alleged in the amended Order of Determination that
11 Respondent employed Claimant in Oregon from October 17, 1998,
12 through August 15, 1999, and unlawfully failed to pay Claimant \$105.00 of
13 his wages. The Agency further alleged that 30 days had elapsed since
14 the wages became due and owing, that Respondent's failure to pay the
15 wages was willful, and that Respondent, therefore, owed Claimant
16 \$1560.00 in penalty wages. In response to the Order of Determination,
17 Respondent's secretary-treasurer requested a contested case hearing and
18 made the following assertion:

19 'While employed with Goodman, the claimant voluntarily signed a
20 legally binding contract with his employer in which he agreed to be
21 responsible for shortages of assets caused by his failure to adhere
22 to company policy. This contract is necessary to ensure that
23 employees of Goodman do not collude with third parties to defraud
24 Goodman of company property entrusted to their care. Goodman
25 does not believe your agency has authority to deny Goodman the
right to contract as guaranteed by the United States Constitution.'

“(Summary Judgment Motion, Exhibit A-4).

“Respondent later filed a formal Answer and Request for Hearing, in which
it admitted: that it employed Claimant from about November 19, 1998, to
about October 23, [1999]; that it paid Claimant \$6.50 per hour during his
employment; and that it 'deducted from Wage Claimant's wages the
amount of \$105.00 for shortages of assets caused by Wage Claimant's
violation of an employment contract voluntary [*sic*] signed by Wage
Claimant.' Respondent denied the Agency's allegation that the deduction
from wages was unlawful and denied that it willfully failed to pay any
wages due. Respondent also asserted the following defenses:¹

1 “1. ‘ORS 652.610(3) and the Order of Determination * * *
2 unconstitutionally deprive [Respondent] of its right to contract with
3 its employees, in violation of Art. I, Section 10, cl. 1 of the
4 Constitution of the United States.’

5 “2. ‘The imposition of a civil penalty in the amount of \$1560
6 pursuant to ORS 652.150 is excessive and unconstitutional under
7 the Eighth Amendment to the Constitution of the United States.’

8 “(Summary Judgment Motion, Exhibit A-3 at 2).

9 “On May 15, 2000, the Agency filed a motion for summary judgment,
10 claiming that no genuine issues of material fact remained in dispute. The
11 forum issued an order stating that Respondent’s response to the summary
12 judgment motion was due on Monday, May 22, 2000. By the afternoon of
13 May 23, the forum had received no response from Respondent.²

14 “A participant in a BOLI contested case hearing is entitled to summary
15 judgment only if the participant demonstrates that ‘[n]o genuine issue as to
16 any material fact exists and the participant is entitled to a judgment as a
17 matter of law * * *.’ OAR 839-050-0150(4)(B). In reviewing a motion for
18 summary judgment, this forum ‘draw[s] all inferences of fact from the
19 record against the participant filing the motion for summary judgment * * *
20 and in favor of the participant opposing the motion * * *.’ *In the Matter of*
21 *Efrain Corona*, 11 BOLI 44, 54 (1992), *aff’d without opinion, Corona v.*
22 *Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993). In
23 considering summary judgment motions, this forum gives some
24 evidentiary weight to unsworn assertions contained in the participants’
25 pleadings and other filings. *Cf. In the Matter of Tina Davidson*, 16 BOLI
 141, 148 (1997) (considering contents of the Respondent’s answer in
 making factual findings in a default hearing).

 “In a typical wage claim case, the Agency has the burden of proving:

 “1. that the respondent employed the claimant;

 “2. any pay rate upon which the respondent and the claimant
 agreed, if other than minimum wage;

 “3. that the claimant performed work for the respondent for
 which he or she was not properly compensated; and

 “4. the amount and extent of work claimant performed for the
 respondent.

 “*In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000). In this
 case, only the third element is disputed: Respondent admits that it
 employed Claimant,³ that it paid Claimant \$6.50 per hour,⁴ and that it
 deducted \$105.00 from the wages Claimant had earned.⁵ Consequently,
 the only issue in dispute is whether Respondent properly compensated
 Claimant for the work he performed – *i.e.*, whether Respondent’s

1 deduction of \$105.00 from Claimant's wages was lawful. That is a legal
2 question that properly may be resolved by summary judgment.

3 "ORS 652.610(3) provides:

4 'No employer may withhold, deduct or divert any portion of an
5 employee's wages unless:

6 '(a) The employer is required to do so by law.

7 '(b) The deductions are authorized in writing by the employee,
8 are for the employee's benefit, and are recorded in the employer's
9 books;

10 '(c) The employee has voluntarily signed an authorization for a
11 deduction for any other item, provided that the ultimate recipient of
12 the money withheld is not the employer, and that such deduction is
13 recorded in the employer's books;

14 '(d) The deduction is authorized by a collective bargaining
15 agreement to which the employer is a party; or

16 '(e) The deduction is made from the payment of wages upon the
17 termination of employment and is authorized pursuant to a written
18 agreement between the employee and employer for the repayment
19 of a loan made to the employee by the employer if [certain
20 conditions are met].'

21 "Here, Respondent and the Agency agree that Respondent withheld the
22 \$105.00 from Claimant's wages pursuant to a company policy signed by
23 Claimant, which provided, in pertinent part:

24 '8. [Respondent] has no alternative but to assume that if an
25 employee accepts a check without a check guarantee card, the
employee is working as an accomplice with the person passing the
check to defraud the company.

'9. If an employee fails to follow company policy and it results in
the 'return of an unpaid check', the amount will be withheld from the
employee's pay check.'⁶

"The undisputed nature of the \$105.00 deduction from Claimant's wages
establishes that Respondent violated ORS 652.610(3) by making that
deduction. Respondent was not legally required to withhold the wages;
the deduction was not for Claimant's benefit; Respondent was the ultimate
recipient of the money withheld; there has been no suggestion that the
deduction was authorized by a collective bargaining agreement; and the
deduction was not made to repay a loan from Respondent to Claimant.
Because the deduction did not fall within any of the categories of
deductions authorized by ORS 652.610(3), it was impermissible as a
matter of law. Consequently, there is no genuine dispute of fact regarding
Respondent's obligation to pay the \$105.00 in unpaid wages, plus interest.
See ORS 652.320(9); 652.330(1).

1 "The Agency also seeks \$1560.00 in penalty wages. A respondent must
2 pay penalty wages when it has 'willfully fail[ed] to pay any wages or
3 compensation of any employee whose employment ceases * * *.' ORS
4 652.150. An employer acts 'willfully' when it 'knows what [it] is doing,
5 intends to do what [it] is doing, and is a free agent.' *Vento v. Versatile
6 Logic Systems Corp.*, ___ Or App ___ (May 17, 2000); see *Wyatt v. Body
7 Imaging*, 163 Or App 526, 531-32, 989 P2d 36 (1999), *rev den* 320 Or 252
8 (2000).

9 "In this case, Respondent denies that it willfully failed to pay wages.
10 However, the undisputed evidence establishes that Respondent
11 intentionally withheld \$105.00 from Claimant's paycheck pursuant to
12 Respondent's company policy. That evidence proves that Respondent
13 acted knowingly, intentionally, and as a free agent in making the deduction
14 and, therefore, acted willfully. It makes no difference that Respondent
15 may have acted with a good faith belief that it was entitled to make the
16 deduction. See *Wyatt*, 163 Or App at 531. The undisputed evidence also
17 establishes that more than 30 days have passed since Respondent made
18 the unlawful deduction from Claimant's wages. Under these
19 circumstances, 'as a penalty for such nonpayment,' Claimant's wages
20 'shall continue' as a matter of law. ORS 652.150. The amount of penalty
21 wages owing is calculated pursuant to statute and Agency rule as follows:
22 30 days x 8 hours/day x \$6.50/hour = \$1560.00. See ORS 652.150; OAR
23 839-001-0470(1).

24 "Respondent raised two arguments in its Answer that must be addressed
25 at this time. First, Respondent claims that ORS 652.610(3) and the Order
of Determination alleging a violation of that statute unconstitutionally
deprive Respondent of its right to contract with its employees, in violation
of Article I, section 10 of the United States Constitution. This argument
has no merit. The Contract Clause provides:

'No State shall * * * pass any * * * Law impairing the Obligation of
Contracts[.]'

"U.S. Const. art I, sec. 10. The Contract Clause relates only to statutes
that limit obligations under contracts that already exist. It has no
application to statutory provisions enacted before formation of the contract
in question. See *General Motors Corp. v. Romein*, 503 U.S. 181, 186-87,
112 S Ct 1105, 117 L Ed 2d 328 (1992); *Thoren v. Builder's Board*, 21 Or
App 148, 153, 533 P2d 1388 (1975).

"ORS 652.610(3), which prohibits the type of deduction Respondent made
here, was first enacted in 1977 and has existed in its present form since
1995. See 1995 Or Laws ch 594, sec 5; 1977 Or Laws ch 618, sec 1.
The undisputed evidence shows that Respondent first employed Claimant
in 1998 and that Claimant signed the contract authorizing the deductions
when he was employed.⁷ Because the relevant provisions of ORS
652.610(3) existed before Respondent and Claimant entered the contract,

1 the statute could not impermissibly impair any obligations of that contract
2 in violation of the Contract Clause.

3 “Moreover, even if the statute did substantially impair an existing contract,
4 its operation would not violate the Contract Clause because it ‘imposed a
5 generally applicable rule of conduct designed to advance a broad societal
6 interest[.]’ *Exxon Corp. v. Eagerton*, 462 US 176, 190 (1983) (citation
7 omitted); see *In re Seltzer*, 104 F3d 234, 236 (9th Cir 1996).

8 ‘The Contract Clause does not deprive the States of their ‘broad
9 power to adopt general regulatory measures without being
10 concerned that private contracts will be impaired, or even
11 destroyed, as a result.’ As Justice Holmes put it: ‘One whose
12 rights, such as they are, are subject to state restriction, cannot
13 remove them from the power of the State by making a contract
14 about them.’”

15 “*Exxon*, 462 US at 190. As an example of a permissible exercise of police
16 power that would not violate the Contract Clause, the Supreme Court has
17 identified: ‘a workmen’s compensation law * * * applied to employers and
18 employees operating under pre-existing contracts of employment that
19 made no provision for work-related injuries[.]’ *Id.* at 191 (citation omitted).

20 “ORS 652.610(3), like the workers’ compensation laws, serves the state’s
21 broad interest in protecting workers – in this case, from unscrupulous
22 employers who wish to shift the risks of doing business from themselves
23 to their employees. The statute is a reasonable exercise of the state’s
24 police power and its operation – even as applied to pre-existing contracts
25 – does not violate the Contract Clause.

“Respondent also argues that the imposition of \$1560.00 in penalty wages
‘is excessive and unconstitutional under the Eighth Amendment to the
Constitution of the United States.’ This claim lacks merit for several
reasons. First, the United States Supreme Court has not yet decided
whether corporations are protected by the Eighth Amendment to the
United States Constitution. *Browning-Ferris Industries v. Kelco Disposal,
Inc.*, 482 US 257, 109 S Ct 2909, 2920 n. 22, 106 L Ed 2d 219 (1989).
Second, it is not clear that the Excessive Fines Clause of the Eighth
Amendment has any application in cases where, as here, the government
seeks to collect a fine only on behalf of a private party, and will not retain
any of the money itself. See *id.* at 2914 (Excessive Fines Clause does not
apply to damages in civil suits ‘when the government neither has
prosecuted the action nor has any right to receive a share of the damages
awarded’). Third, the Excessive Fines Clause applies to civil penalties,
fines and forfeitures only where those measures are punitive, at least in
part. See *U.S. v. Bajakajian*, 524 US 321, 118 S Ct 2028, 2033, 141 L Ed
2d 314 (1998). An argument can be made that penalty wages imposed
pursuant to ORS 652.150 are remedial, not punitive, in nature.

1 “However, assuming *arguendo* that the penalty wages in this case are
2 subject to scrutiny under the Excessive Fines Clause, the forum finds that
3 the penalty is constitutionally permissible. The United States Supreme
4 Court recently decided the first case in which it determined whether a ‘fine’
(in this case, a forfeiture) was unconstitutionally excessive. In *U.S. v.*
Bajakajian, the Court stated:

5 ‘The touchstone of the constitutional inquiry under the Excessive
6 Fines Clause is the principal of proportionality: The amount of the
7 forfeiture must bear some relationship to the gravity of the offense
8 that it is designed to punish * * *. [A] punitive forfeiture violates the
9 Excessive Fines Clause if it is grossly disproportional to the gravity
10 of a defendant’s offense.’

11 “*Bajakajian*, 118 S Ct at 2036; see *U.S. v. \$273,969.04 U.S. Currency*,
12 164 F3d 462, 466 (9th Cir 1999). In determining whether a forfeiture or
13 fine is grossly disproportionate, a forum should consider that ‘judgments
14 about the appropriate punishment for an offense belong in the first
15 instance to the legislature.’ *Bajakajian*, 118 S Ct at 2037. The forum also
16 should consider whether the magnitude of the forfeiture or fine bears
17 some correlation to the harm suffered. *Id.* at 2038-39.

18 “In this case, the penalty wages of \$1560.00 are not ‘grossly
19 disproportional’ to Respondent’s offense of unlawfully withholding \$105.00
20 from Claimant’s wages. In drafting ORS 652.150, the legislature defined
21 what it considered to be a reasonable penalty for failure to pay wages
22 when due – continuation of the wages, on a full-time basis, for a maximum
23 period of 30 days. The legislature’s decision to cut off the penalty wages
24 at 30 days placed a reasonable limitation on the size of penalty that could
25 be imposed, avoiding imposition of a penalty ‘grossly disproportional’ to
the offense committed.⁸ This forum sees no reason to reject the
legislature’s determination regarding the appropriate limits on penalty
wages. In addition, the magnitude of the \$1560.00 in penalty wages does
correlate to the offense Respondent committed – failure to pay wages due
-- because it is based on the hourly wage that Claimant earned but
Respondent failed to pay. Consequently, the penalty wages assessed in
this case do not constitute an unconstitutionally excessive fine.

“The Agency's motion for partial summary judgment is **GRANTED**. The
hearing scheduled to commence on May 31, 2000, is **canceled**. Within
the next few weeks, the undersigned ALJ will issue a proposed order
based on this interim order granting the Agency’s summary judgment
motion.”

⁸ The Order of Determination originally was issued against the ‘Employer,’ identified as
‘Michael J. McConville and Charles D. Conley, dba Goodman Oil Company.’ In answer
to the Order of Determination, Conley asserted another defense – that the Order of
Determination was not issued against an ‘employer’ because Goodman Oil Company
was the employer, not Michael McConville or Charles Conley. To correct this defect, the

1 Agency later filed a motion to correct the caption to name Goodman Oil Company, Inc.,
2 as the Respondent. The forum granted that motion.

3 “² If the forum later receives any response from Respondent, the forum will consider it to
4 be a motion for reconsideration of this order if Respondent timely filed the response by
5 mailing it on or before May 22, 2000. If the forum were to decide, upon reconsideration,
6 not to grant summary judgment to the Agency, it would reschedule the hearing for a later
7 date.

8 “³ Summary Judgment Motion, Exhibits A-3 at 1, A-4.

9 “⁴ Summary Judgment Motion, Exhibit A-3 at 1.

10 “⁵ Summary Judgment Motion, Exhibit A-3 at 1.

11 “⁶ Summary Judgment Motion, Exhibit A-1 at 2 (original in all upper case); *see id.*, Exhibit
12 A-1 at 1 (fax cover sheet from Respondent to BOLI identifying the above-quoted policy as
13 “signed company policy agreement for the above identified claimant”); *id.*, Exhibit A-3 at 1
14 (Respondent’s admission that it deducted the \$105.00 “for shortages of assets caused by
15 Wage Claimant’s violation of an employment contract voluntary [*sic*] signed by Wage
16 Claimant”); Exhibit A-4 at 1 (Respondent’s admission that “claimant voluntarily signed a
17 legally binding contract with his employer in which he agreed to be responsible for
18 shortages of assets caused by his failure to adhere to company policy”).

19 “⁷ Summary Judgment Motion, Exhibits A-3 at 1, A-4 at 1, A-1 at 4.

20 “⁸ For example, assuming Claimant’s wages were due no later than October 28, 1998,
21 Respondent now would owe over \$27,000.00 in penalty wages if ORS 652.150 did not
22 include the 30-day limit.

23 _____
24 The procedural findings made in the interim order granting summary judgment are
25 incorporated in this Final Order.

8) By letter dated May 24, 2000, case presenter Domas pointed out that the
word “partial” should not have been included in the first sentence of the last paragraph
of the interim order granting the Agency’s motion for summary judgment. On May 25,
the forum issued an order amending the interim order granting the Agency’s motion for
summary judgment, so that the first sentence of the last paragraph states: “The
Agency’s motion for summary judgment is **GRANTED.**”

9) The ALJ issued a proposed order on June 2, 2000, that notified the
participants they were entitled to file exceptions to the proposed order within ten days of
its issuance. On June 12, 2000, Respondent moved for an extension of time through

1 June 23, 2000, in which to file exceptions. The forum granted that motion, which the
2 Agency did not oppose.

3 10) At approximately 4:55 p.m. on June 23, 2000, the forum received a faxed
4 second request for extension of time from Respondent's authorized representative.
5 Respondent sought an additional week in which to file its exceptions. Respondent
6 indicated that it needed "additional time for Oregon counsel to review, file, and prepare
7 legal arguments in support of the exceptions" and further asserted that its Oregon
8 counsel was "Craig D. Armstrong of Miller-Nash." The request included no indication
9 that Respondent had served the request on the Agency, so the ALJ telephoned case
10 presenter Domas to ascertain her position regarding the request. Domas stated that
11 she objected to a one-week extension but would not oppose extending the deadline
12 through June 28, 2000.

13 11) On Monday, June 26, the ALJ issued an interim order disclosing the ex
14 parte contacts described above. The ALJ found that Respondent had not shown good
15 cause for needing a one-week extension and extended the deadline for filing exceptions
16 only to June 28, 2000. The ALJ also asked Craig Armstrong to inform the Agency and
17 the Hearings Unit immediately regarding whether he represented Respondent in this
18 matter.

19 12) On June 28, 2000, the forum received a letter from Armstrong stating that,
20 except for a conversation he had with case presenter Domas on June 26, he would not
21 be representing Respondent in this matter.

22 13) Neither Respondent nor the Agency filed exceptions to the proposed
23 order.

24 **FINDINGS OF FACT – THE MERITS**
25 **AND ULTIMATE FINDINGS OF FACT**

1 The forum decides no factual issues in ruling on a summary judgment motion. The
2 following are the undisputed material facts in the record, construed favorably to
3 Respondent:

4 1) Respondent employed Claimant in Oregon from the fall of 1998 to no later
5 than about October 23, 1999.

6 2) Respondent paid Claimant \$6.50 per hour.

7 3) During his employment, Claimant signed an agreement stating that if
8 Claimant failed to follow Respondent's policy requiring customers paying by check to
9 produce a check guarantee card, and that resulted in "return of an unpaid check," the
10 amount of the check would be withheld from Claimant's wages.

11 4) Respondent withheld \$105.00 from Claimant's wages "for shortages of
12 assets caused by Wage Claimant's violation of an employment contract voluntary [sic]
13 signed by Wage Claimant," in accordance with the agreement Claimant had signed.

14 **CONCLUSIONS OF LAW**

15 1) Respondent was Claimant's employer for purposes of ORS Chapter 652.

16 2) ORS 652.610(3) prohibits employers from withholding or deducting any
17 portion of an employee's wages except in limited circumstances, none of which were
18 present in this case. Respondent violated ORS 652.610(3) by withholding \$105.00 from
19 Claimant's wages.

20 3) Respondent acted willfully in withholding the \$105.00 from Claimant's
21 wages.

22 4) Because Claimant's last day of work was no later than October 23, 1999,
23 his wages would have been due no later than October 29, 1999. ORS 652.140. More
24 than 30 days have passed since that date. Consequently, Respondent owes penalty
25 wages in the amount of \$1560.00 (30 days x 8 hours/day x \$6.50/hour). ORS 652.140,
ORS 652.150.

