

In the Matter of

JO-EL, INC.,

Case No. 15-01

Final Order of the Commissioner Jack Roberts

Issued May 20, 2001

SYNOPSIS

Respondent suffered or permitted Claimant to work 198 hours between June 3 and August 13, 1999, and did not pay him for 166.25 hours worked. Respondent was ordered to pay Claimant \$1,082.25 in due and unpaid wages, calculated at the state minimum wage rate of \$6.50 per hour. Respondent's failure to pay the wages was willful and Respondent was ordered to pay \$1,560.00 in civil penalty wages. ORS 652.140(1), 652.150; OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Alan McCullough, 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 April 3, 2001, at the Salem office of the Bureau of Labor and Industries, located at 3865 Wolverine NE, Building E, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Peter McSwain, an employee of the Agency. Claimant Billy Parker was present throughout the hearing and was not represented by counsel. Respondent was represented by Ken L. Yee, its corporate president and authorized representative

The Agency called the following witnesses: Billy Parker, the wage claimant, and Rose Brundage, claimant's former supervisor. Respondent called Ken Yee as its only witness.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-5 (submitted or generated prior to hearing) and X-6 (generated at hearing);
- b) Agency exhibits A-1 through A-4 (submitted prior to hearing);
- c) Respondent exhibits R-1 and R-2 (submitted at 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 May 9, 2000, Claimant filed a wage claim with the Agency. He alleged that Respondent had employed him and failed to pay wages earned between June 3 and August 13, 1999, and due to him.

2) At the time he filed his wage claim, Claimant assigned to the Commissioner of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) Claimant brought his wage claim within the statute of limitations.

4) On July 17, 2000, the Agency served Order of Determination No. 00-1854 on Ken Yee, Respondent's registered agent, based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$1,082.25 in unpaid wages and \$1,560.00 in civil penalty wages, plus interest, and required that, within 20 days, Respondent 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 August 1, 2000, the Agency received an answer and written request for hearing from Respondent. It was written and signed by "Ken L. Yee, The Pier Restaurant & Lounge."

6) On January 25, 2001, the Agency served a "BOLI Request for Hearing" on the forum.

7) On February 7, 2001, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as April 3, 2001, and successive days thereafter, at 9:00 a.m., at BOLI's Salem office, 3865 Wolverine NE, Building E, Salem, Oregon. Together with the Notice of Hearing, the forum sent 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.

8) On February 12, 2001, the ALJ issued a case summary order requiring the Agency and Respondent each to submit a list of witnesses to be called, copies of documents or other physical evidence to be introduced, and a statement of any agreed or stipulated facts. The Agency was additionally ordered to submit wage and penalty calculations and a brief statement of the elements of the claim. Respondent was additionally ordered to submit a brief statement of any defenses to the claim. The ALJ ordered the participants to submit case summaries by March 22, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On February 13, 2001, the forum issued an interim order informing Respondent that, as a corporation, it must be represented at all stages of the proceeding either by counsel or an authorized representative.

10) The Agency timely filed its case summary, with attached exhibits, on March 7, 2001. Respondent did not file a case summary.

11) Because of a family emergency, the ALJ did not arrive at the hearing until 9:45 a.m. on April 3, 2001. The hearing commenced at 10 a.m.

12) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) Before opening statements, the ALJ asked Yee if he intended to act as Respondent's authorized representative. Yee identified himself as Respondent's corporate president, and stated it was his intent to act as Respondent's authorized representative. Because Respondent had not previously submitted a written statement authorizing Yee to be Respondent's authorized representative, the ALJ required Yee to write and submit a brief statement authorizing himself to be Respondent's authorized representative before proceeding with the hearing.

14) On April 24, 2001, the ALJ issued a proposed order that included an Exceptions Notice that allowed ten days for filing exceptions to the proposed order. The forum received no exceptions.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent Jo-EI, Inc., an Oregon corporation, did business in Woodburn, Oregon as a restaurant and lounge under the assumed business name of The Pier. Ken Yee is Respondent's president.

2) Sometime prior to June 1999, Yee and Claimant went to Mexico together. During their trip, Yee and Claimant discussed Claimant's interest in the restaurant business. Respondent and Claimant agreed that Claimant would "train" at The Pier until September 1, 1999, to learn the business, and would then go on Respondent's payroll.

3) Claimant started work for Respondent sometime before June 3, 1999, working as a kitchen helper. Prior to June 3, 1999, Respondent paid Claimant's wages in full in the form of meals and drinks.

4) Between June 3 and August 13, 1999, Claimant's hours of work were scheduled by Rose Brundage, Respondent's kitchen manager, who wrote out

Claimant's work schedule on Respondent's calendar. Claimant worked the hours scheduled by Brundage on the calendar.

5) Claimant made a written record of the hours he worked during his employment by copying his work schedule from Respondent's calendar.

6) Between June 3 and August 13, 1999, Claimant worked 198 hours for Respondent.

7) Respondent did not maintain any written record of the hours worked by Claimant between June 3 and August 13, 1999. There was no testimonial or documentary evidence offered concerning the value of meals and drinks consumed by Claimant during that time period, other than Yee's unsupported assertion that Claimant's meals and drinks more than offset the wages he earned during that time period.

8) Claimant was paid a total of \$204.75 in cash for 31.5 of his 198 hours of work between June 3 and August 13, 1999. He was paid at the rate of \$6.50 per hour. Claimant received \$100 of this total on August 16, 1999, and the remaining \$104.75 on August 17, 1999.

9) Calculated at the wage rate of \$6.50 per hour, Claimant earned a total of \$1,287.00 between June 3, 1999 and August 13, 1999.

10) Claimant became Respondent's general manager on September 1, 1999, and went on salary. Claimant continued working for Respondent until January 3, 2000, when Yee terminated him

11) Claimant was paid in full for all his work as Respondent's general manager, but has not been paid any additional wages for the hours he worked between June 3 and August 13, 1999.

12) At the time of Claimant's termination, Respondent owed Claimant \$1,082.25 in unpaid wages.

13) Civil penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: \$6.50 per hour multiplied by 8 hours per day equals \$52.00; \$52.00 multiplied by 30 days equals \$1,560.00.

14) Between June 23 and July 7, 2000, Claimant wrote \$100.00 in NSF checks to Respondent.

15) Claimant's testimony and record concerning the number of hours he worked between June 3 and August 13, 1999, and the sum he was paid for working those hours was credible and the forum has credited this testimony and supporting documentation in its entirety.

16) Brundage's testimony that she wrote Claimant's work schedule on Respondent's calendar, and that Claimant worked the hours she wrote down as his schedule on the calendar was credible and the forum has credited this testimony in its entirety.

17) Yee's testimony that the value of meals and drinks consumed by Claimant between June 3 and August 13, 1999, exceeded any wages earned by Claimant was not credible and the forum has not given it any weight.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was an Oregon corporation that operated The Pier restaurant and lounge in Woodburn, Oregon.

2) Prior to June 1999, Claimant began training to work in the restaurant business by performing work in The Pier's kitchen. Respondent and Claimant did not agree on a specific rate of pay.

3) Prior to June 3, 1999, Claimant was fully paid for his work with meals and drinks at The Pier.

4) Between June 3 and August 13, 1999, Claimant worked 198 hours for Respondent. Claimant was paid \$204.75 in cash for 31.5 hours of those hours, calculated at the rate of \$6.50 per hour. Claimant has not been paid anything for the remaining 166.5 hours.

5) Calculated at \$6.50 per hour, Claimant earned \$1,287.00 in wages during his employment with Respondent between June 3 and August 13, 1999.

6) Respondent terminated Claimant's employment on or about January 3, 2000.

7) Respondent willfully failed to pay Claimant \$1,082.25 in earned, due, and payable wages on or about January 3, 2000, the date Claimant was terminated, and more than 30 days have elapsed from the date Claimant's wages were due.

CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

“(3) ‘Employ’ includes to suffer or permit to work * * *.

“(4) ‘Employer’ means any person who employs another person * * *.”

Respondent employed Claimant by suffering or permitting him to work at The Pier.

2) ORS 653.025 provides, in pertinent part:

“Except as provided by ORS 652.020 and the rules of the Commissioner of the Bureau of Labor and Industries issued under ORS 653.030 and 653.261, for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

“* * * * *

“(3) For calendar years after December 31, 1998, \$6.50. * * *”

Respondent was required to pay Claimant at least \$6.50 for each hour he rendered personal services to Respondent between June 3 and August 13, 1999.

3) ORS 653.055(1) provides, in pertinent part:

“(1) Any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected:

“(a) For the full amount of the wages, less any amount actually paid to the employee by the employer; and

“(b) For civil penalties provided in ORS 652.140.

“* * * * *

“(3) The Commissioner of the Bureau of Labor and Industries has the same powers and duties in connection with a wage claim based on ORS 653.010 to 653.261 as the commissioner has under ORS 652.310 to 652.445 * * *.”

Respondent is liable to Claimant for \$1,082.25 in unpaid wages (166.5 hours x \$6.50 per hour) plus penalty wages.

4) At times material, ORS 652.140(1) provided:

“Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination.”

Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than January 3, 2000, the day Claimant was terminated.

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 \$1,560.00 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has

the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

INTRODUCTION

The Agency alleged in its Order of Determination that Claimant was not paid for 166.5 hours of work he performed for Respondent between June 3 and August 13, 1999. The Agency further alleged that Claimant was entitled to the minimum wage of \$6.50 per hour and is owed a total of \$1,082.25 in unpaid wages and \$1,560.00 in penalty wages.

PRIMA FACIE CASE

In this wage claim case, the Agency's prima facie case consists of proof of the following elements: (1) Respondent employed Claimant; (2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; (3) Claimant performed work for which he was not properly compensated; and (4) the amount and extent of work performed by Claimant. *In the Matter of Contractor's Plumbing Service, Inc.*, 20 BOLI 257, 270 (2000).

A. Respondent Employed Claimant

For purposes of chapter 653, a person is an "employee" of another if that other "suffer[s] or permit[s]" the person to work. *In the Matter of Bubbajohn Howard Washington*, 21 BOLI ___ (2000); *In the Matter of Barbara Coleman*, 19 BOLI 230, 234 (2000). It is undisputed that Claimant performed work at The Pier, related to the business of The Pier, between June 3 and August 13, 1999 with Yee's knowledge and acquiescence. This makes Claimant Respondent's employee under ORS Chapter 653.

B. Claimant's Rate of Pay

There was no agreement between Claimant and Yee as to Claimant's rate of pay during Claimant's "training" period prior to September 1, 1999. However, the forum notes that Claimant was paid \$6.50 per hour for 31.5 hours work between June 3 and August 13, 1999. Where there is no agreed upon rate of pay, an employer is required to pay at least the minimum wage, which was \$6.50 per hour in 1999. *Coleman*, 19 BOLI at 262-63. Claimant was entitled to be paid \$6.50 per hour for his work for Respondent between June 3 and August 13, 1999.

C. Claimant Performed Work for Which He was not Properly Compensated

Claimant testified credibly that he worked 198 hours for Respondent between June 3 and August 13, 1999, and was only paid for 31.5 hours. His testimony as to his work hours was supported by the credible testimony of Brundage, who scheduled his hours and observed Claimant working those scheduled hours. Respondent concedes that Claimant was paid in cash for only 31.5 hours, but argues that Claimant was fully paid for those hours by the meals and drinks he consumed, based on an alleged agreement between Yee and Claimant that Claimant's wages would consist solely of meals and drinks. Assuming such an agreement existed, the forum would consider the value of the meals and drinks as a deduction from Claimant's wages for the purpose of determining if they could be considered as a legitimate offset against Claimant's earned wages.

ORS 653.035 permits the "fair market value" of meals furnished by the employer for the private benefit of the employee to be deducted from the minimum wage. OAR 839-020-0025 defines "fair market value" as "[t]he amount actually and customarily charged for comparable meals, lodging, facilities or services to consumers who are not employees of the employer; or [t]he actual cost to the employer in purchasing, preparing

or providing the meals, lodging or other facilities or services.” The employer has the burden of establishing the fair market value. OAR 839-020-0025(1) & (2). In addition, the deduction of these costs from the employee's wages must have been authorized by the employee in writing, the deduction must have been for the private benefit of the employee, and the deduction must be recorded in the employer's books, or the deduction of these costs must be authorized by a collective bargaining agreement, in accordance with the provisions of ORS 652.610. Finally, “[f]ull settlement of sums owed to the employer by the employee because of meals * * *” must be made on each regular payday. Respondent, who has the burden of proof, did not establish the “fair market value” of any meals or drinks consumed by Claimant or any other of the conditions that must be met before meals and drinks can be deducted from the minimum wage.

Respondent also asserts the defense that it was exempt from the minimum wage requirement because Claimant was in “training” during the wage claim period. OAR 839-020-0044 exempts employers from the minimum wage requirement during a training program if four criteria are met:

- “(a) Attendance is outside of the employee’s regular working hours;
- “(b) Attendance is voluntary;
- “(c) The course, lecture, or meeting is not directly related to the employee’s job;
- “(d) The employee does not perform any productive work during such attendance.”

In this case, none of those criteria are met.

Finally, Respondent argues that Claimant’s NSF checks should act as an offset against any unpaid wages. As with meals and drinks, the forum analyzes this potential offset as a deduction. ORS 652.610 regulates this type of deduction. In pertinent part, that statute reads as follows:

- “(3) No employer may withhold, deduct or divert any portion of an employee’s wages unless:

“(a) The employer is required to do so by law;

“(b) The deductions are authorized in writing by the employee, are for the employee’s benefit, and are recorded in the employer’s books;

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

“(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party[.]”

None of these circumstances apply here. Even if they did, ORS 652.610, together with ORS 652.360, require that an employer pay an employee the wages that are due and seek to resolve any claims the employer may have against the employee by other means. *In the Matter of Ken Taylor*, 11 BOLI 139, 144 (1992) (citing *Garvin v. Timber Cutters, Inc.*, 61 Or App 497 (1983)).

Based on the above, the forum concludes that Claimant performed work for Respondent for which he was not paid.

D. The Amount and Extent of Work Performed by Claimant

The final element of the Agency’s prima facie case requires proof of the amount and extent of work performed by Claimant. The Agency’s burden of proof can be met by producing sufficient evidence from which “a just and reasonable inference may be drawn.” *In the Matter of Majestic Construction, Inc.*, 19 BOLI 59, 58 (1999). A claimant’s credible testimony may be sufficient evidence. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 56 (1999).

Claimant testified credibly that he worked 198 hours for Respondent and the dates he worked those hours during the wage claim period. The credibility of his testimony was enhanced by the record he kept of his hours, taken directly from his work schedule, and the testimony of his supervisor, Brundage, that Claimant worked the hours on the work schedule she posted for him. Respondent provided no credible

evidence that Claimant did not work those hours. This is sufficient evidence to establish the amount and extent of Claimant's work.

PENALTY WAGES

An award of 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. *Contractor's Plumbing Service*, 20 BOLI at 274. Respondent, as an employer, had a duty to know the amount of wages due its employees. *In the Matter of Robert N. Brown*, 20 BOLI 157, 163 (2000). Based on Claimant's credible testimony that Claimant's work schedule was written on Respondent's calendar and Claimant worked those hours, the forum infers that Yee, Respondent's president, knew Claimant's hours of work. There is no evidence that Yee, as Respondent's agent, acted other than voluntarily or as a free agent in not paying Claimant for all hours worked between June 3 and August 13, 1999. Respondent's alleged agreement to pay Claimant meals and drinks for work during his "training" period, even if true, is not a defense to penalty wages. *See, e.g., In the Matter of Anna Pache*, 13 BOLI 249, 269 (1994). Accordingly, the forum concludes that Respondent acted willfully and assesses penalty wages in the amount of \$1,560.00, the amount sought in the Order of Determination. This figure is computed by multiplying \$6.50 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages it owes as a result of its violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Jo-EI**,

Inc. to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in trust for Billy Parker in the amount of TWO THOUSAND SIX HUNDRED FORTY-TWO DOLLARS AND TWENTY-FIVE CENTS (\$2,625.25), less appropriate lawful deductions, representing \$1,082.25 in gross earned, unpaid, due, and payable wages and \$1,560.00 in penalty wages, plus interest at the legal rate on the sum of \$1,082.25 from September 1, 1999, until paid and interest at the legal rate on the sum of \$1,560.00 from October 1, 1999, until paid.