

In the Matter of

ARTHUR LEE dba Safe Dry Cleaner

Case No. 50-01

Final Order of the Commissioner Jack Roberts

Issued August 8, 2001

SYNOPSIS

Respondent failed to pay Claimant all wages earned and due upon termination, in violation of ORS 652.140(1). Respondent withheld Claimant's wages upon termination for the repayment of a loan and did not meet the conditions for making the deduction, in violation of ORS 652.610(3)(e). Respondent's failure to pay the wages was willful and Respondent was ordered to pay civil penalty wages, pursuant to ORS 652.150. ORS 653.010; ORS 652.140; ORS 652.150; ORS 652.610.

The above-entitled case came on regularly for hearing before Linda A. Lohr, 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 July 3, 2001, in the hearing room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

David K. Gerstenfeld, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Fenny Pearson ("Claimant") was present throughout the hearing and was not represented by counsel. Arthur Lee ("Respondent") failed to appear for hearing in person or through counsel.

The Agency called Claimant as its only witness.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-23;
- b) Agency exhibits A-1 through A-8 (filed with the Agency's case summary).

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 June 30, 2000, Claimant filed a wage claim form stating Respondent had employed him from December 1999 until May 8, 2000, and failed to pay him the agreed upon rate of \$10.00 for all hours worked.

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

3) On October 3, 2000, the Agency issued an Order of Determination, numbered 00-2828. The Agency alleged Respondent had employed Claimant during the period December 1, 1999, through May 8, 2000, at the rate of \$10.00 per hour and had unlawfully deducted a portion of Claimant's wages in the amount of \$712.50. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent, therefore, was liable to Claimant for \$2,400 as penalty wages, plus interest. The Order of Determination gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) The Agency issued a Notice of Intent to Issue Final Order by Default on October 24, 2000. On November 2, 2000, Matthew C. Daily, attorney at law, filed an appearance on behalf of Respondent and requested a hearing alleging "the Employer has paid all compensation due the Wage Claimant." The Agency thereafter issued a Notice of Insufficient Answer to Order of Determination requesting that Respondent specifically admit or deny the allegations and provide a statement of any relevant defenses. Respondent, through counsel, filed an answer and second request for hearing. In its answer, Respondent generally denied all of the allegations.

5) On December 19, 2000, the Agency requested a hearing. On January 9, 2001, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on July 3, 2001. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440. The Notice of Hearing and accompanying documents were mailed to Arthur Lee dba Safe Dry Cleaner at 747 SW 12th Avenue, Portland, Oregon 97205 and to Respondent's counsel.

6) On February 27, 2001, the Agency moved for a discovery order that required Respondent to produce seven categories of documents. The Agency provided a statement indicating the relevance of the documents requested. Respondent filed no response to the Agency's motion. On March 19, 2001, the forum issued an interim order that granted the Agency's motion and required Respondent to produce all of the requested documents to the Agency no later than Monday, April 2, 2001.

7) On May 1, 2001, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: 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); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by June 22, 2001, and advised them of the possible sanctions for failure to comply with the case summary order. The Agency filed a timely case summary. Respondent did not file a case summary.

8) On June 12, 2001, the Agency moved for a second discovery order deeming certain facts as admitted or, in the alternative, prohibiting Respondent from introducing evidence contrary those facts. The Agency based its motion on Respondent's failure to respond to the Agency's previous informal request for admissions or denial of certain facts at issue. Respondent did not respond to the Agency's motion.

9) On June 18, 2001, the Agency delivered to the Hearings Unit a letter to the ALJ stating:

"Today when I came to my office I had a telephone message from Matthew Daily, Respondent's counsel. In that message, he indicated that "Safe Dry Cleaner" had filed for bankruptcy a little less than a month ago and that, accordingly, this action was barred by the automatic bankruptcy stay. He did not, however, leave a case number. I attempted to confirm that a bankruptcy was filed by using both the Bankruptcy Court's automated telephone information system and also using the public records search engine available to the Agency. I do not know how current the records were, but I was unable to find, using either system, a bankruptcy proceeding that seemed to be filed by Respondent. I left a telephone message with Mr. Daily early this morning asking that he provide me with proof of the filing, such as a copy of the Bankruptcy Petition.

"I have not yet received any response, but wanted to inform you of the information Mr. Daily provided to me. If I receive confirmation of a stay being in effect, I will so notify the forum. Thank you for your assistance in this matter.

"Sincerely, David K. Gerstenfeld, Case Presenter"

10) On June 29, 2001, the forum issued a discovery order on behalf of the Agency requiring Respondent to admit or deny the following facts no later than July 2, 2001:

- 1) Respondent employed Fenny Pearson ('Claimant') in Oregon for the period of approximately December 1, 1999, through May 8, 2000.
- 2) At the time Claimant's employment with Respondent terminated, on May 8, 2000, he was earning \$10 per hour.
- 3) Claimant's final paycheck from Respondent should have been for a gross amount of \$712.50.

- 4) Respondent withheld Claimant's final paycheck claiming Claimant owed money to Respondent.
- 5) Respondent has not yet paid Claimant his final paycheck.

11) At approximately 8:25 a.m., on July 3, 2001, the date set for hearing, Respondent's counsel telephoned the Hearings Unit Coordinator and informed her that neither Respondent nor counsel would be appearing at the hearing because they were appearing in bankruptcy court at 9:00 a.m. Counsel indicated that "Safe Dry Cleaner Corporation" had filed for bankruptcy on May 26, 2001, case number 301-35057TMB7, and all of its assets were being liquidated. Counsel further stated he no longer represented Respondent in this matter because Respondent owed him money and had "scrounged up" only enough money for the bankruptcy action. Counsel left a cell phone number where he could be reached if the ALJ had questions.

12) At approximately 8:45 a.m., on July 3, 2001, the ALJ spoke with Respondent's counsel by telephone and he confirmed that neither he nor Respondent would be appearing at the scheduled hearing. The ALJ advised counsel that if neither he nor Respondent appeared at the hearing and the Hearings Unit did not receive a facsimile transmission showing the Agency's action was subject to an automatic bankruptcy stay by 9:30 a.m., the forum would find Respondent in default and commence the hearing. Counsel stated Respondent had not yet filed for bankruptcy. He also stated he no longer represented Respondent and that he represented Safe Dry Cleaner Corporation only in the bankruptcy proceeding. Counsel indicated he was "late" for a "treasurer's meeting" that was to convene at 9:00 a.m. to discuss the corporation's bankruptcy. The ALJ reiterated that Respondent risked defaulting if he or his counsel failed to appear. Counsel stated he would stipulate that there were wages owed and again stated that neither he nor Respondent intended to appear at the scheduled hearing.

13) Respondent did not appear at the time and place set for hearing and no one appeared on his behalf. The ALJ placed the substance of the prehearing contact with Respondent's counsel on the record, found Respondent to be in default, and commenced the hearing.

14) At the start of hearing, the Agency represented that Respondent did not reply to the ALJ's discovery order requiring Respondent to respond to the Agency's request for admissions. The ALJ, relying on ORCP 45 for guidance, deemed as admitted the facts set forth in Findings of Fact – Procedural 10.

15) The Agency waived the ALJ's recitation of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

16) The ALJ issued a proposed order on July 11, 2001, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Arthur Lee operated a laundry, cleaning and garment service under the assumed business name, Safe Dry Cleaner, and employed one or more individuals in Oregon.

2) Respondent employed Claimant as a presser from approximately December 1999 until he was terminated from employment on May 8, 2000.

3) Claimant's rate of pay at the time he was terminated was \$10.00 per hour.

4) Between April 24 and May 8, 2000, Claimant worked 71.25 hours and earned \$712.50.

5) Respondent withheld Claimant's final paycheck for the hours worked between April 24 and May 8, 2000, claiming Claimant owed him money. Claimant did not sign an authorization for a deduction from his wages.

6) Claimant's wages remain unpaid.

ULTIMATE FINDINGS OF FACT

- 1) Respondent at all times material herein conducted a business in the state of Oregon and engaged the personal services of one or more employees in the operation of that business.
- 2) Respondent employed Claimant between April 24 and May 8, 2000.
- 3) Respondent and Claimant agreed Claimant would be paid \$10.00 per hour.
- 4) Claimant did not sign an authorization for a deduction from his wages.
- 5) Respondent terminated Claimant's employment on May 8, 2000.
- 6) Claimant worked 71.25 hours between April 24 and May 8, 2000. At the agreed upon rate of \$10.00 per hour, Claimant earned \$712.50 in wages.
- 7) Respondent owes Claimant \$712.50 for wages earned.
- 8) Respondent willfully failed to pay Claimant the \$712.50 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.
- 9) Civil penalty wages, computed pursuant to ORS 652.150, equal \$2,400.

CONCLUSIONS OF LAW

- 1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.
- 2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.
- 3) ORS 652.140(1) provides in part:

"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 the end of the first business day after Claimant was terminated on May 8, 2000.

4) 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 \$2,400 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(1).

5) ORS 652.610 provides in part:

“(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; or

“(e) The deduction is made from the payment of wages upon termination of employment and is authorized pursuant to a written agreement between the employee and employer for the repayment of a loan made to the employee by the employer, if all of the following conditions are met:

“(A) The employee has voluntarily signed the agreement;

“(B) The loan was paid to the employee in cash or other medium permitted by ORS 652.110;

“(C) The loan was made solely for the employee’s benefit and was not used, either directly or indirectly, for any purpose required by the employer or connected with the employee’s employment with the employer;

“(D) The amount of the deduction at termination of employment does not exceed the amount permitted to be garnished under ORS 23.185(1)(a) or (d); and

“(E) The deduction is recorded in the employer’s books.”

Respondent violated ORS 652.610(3) by withholding Claimant’s final paycheck without Claimant’s written authorization.

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

DEFAULT

Before the hearing, Respondent’s counsel of record notified the forum by telephone that he no longer represented Respondent and that neither he nor his former client would be appearing at the hearing for reasons that remain unclear. When Respondent failed to appear and no one appeared on his behalf at hearing, the forum found Respondent in default pursuant to OAR 839-050-0330. The Agency, therefore, needed only to establish a prima facie case on the record to support the allegations in its charging document. *In the Matter of Sealing Technology, Inc.*, 11 BOLI 241 (1993). Other than a general denial in his answer, Respondent contributed nothing to the record for the forum to consider. Having considered all of the evidence in the record, the forum concludes the Agency presented a prima facie case in support of its claim that Respondent unlawfully withheld Claimant’s final paycheck. The forum further concludes

Respondent's failure to pay Claimant his wages earned and owed upon Claimant's termination was willful.

AGENCY'S PRIMA FACIE CASE

The Agency was required to prove: 1) that Respondent employed Claimant; 2) Respondent agreed to pay Claimant \$10.00 per hour; 3) that Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230 (2000). In this case, those elements are not in dispute. Pursuant to OAR 839-050-0200(2)(e), the Agency requested admissions from Respondent as to those facts relevant to each element. Respondent, despite an informal and formal request for admissions, failed to respond. The rules governing this forum do not provide a sanction where a participant fails to respond to a request for admissions. The forum draws guidance from the Oregon Rules of Civil Procedure (ORCP) where a matter is not addressed in the administrative rules. *In the Matter of United Grocers, Inc.*, 7 BOLI 1 (1987). Here, the forum relied on ORCP 45 to determine an appropriate sanction, deeming the factsⁱ set forth by the Agency as admitted by Respondent. The forum notes that those facts deemed admitted are also supported by credible evidence in the record. The remaining issue is whether Respondent was permitted by law to withhold Claimant's final paycheck as repayment for a loan Respondent claimed to have made to Claimant.

UNAUTHORIZED DEDUCTIONS

Undisputed evidence establishes Respondent withheld Claimant's final paycheck claiming Claimant owed him an amount of money that exceeded the amount Claimant earned during the time period at issue. ORS 652.610(3) permits an employer to deduct

from the payment of wages amounts owed as a result of a loan by the employer to the employee only as follows:

“(e) The deduction is made from the payment of wages upon termination of employment and is authorized pursuant to a written agreement between the employee and employer for the repayment of a loan made to the employee by the employer, if all of the following conditions are met:

“(A) The employee has voluntarily signed the agreement;

“(B) The loan was paid to the employee in cash or other medium permitted by ORS 652.110;

“(C) The loan was made solely for the employee’s benefit and was not used, either directly or indirectly, for any purpose required by the employer or connected with the employee’s employment with the employer;

“(D) The amount of the deduction at termination of employment does not exceed the amount permitted to be garnished under ORS 23.185(1)(a) or (d); and

“(E) The deduction is recorded in the employer’s books.”

In this case, Claimant credibly testified that he never entered into a written agreement with Respondent or signed an authorization for deductions from his wages. Respondent did not appear or proffer evidence to dispute or contradict the Agency’s credible evidence. In the absence of a written agreement between Respondent and Claimant, meeting the requirements set forth in ORS 652.610(3)(e) and voluntarily signed by Claimant, the forum finds Respondent unlawfully withheld Claimant’s wages.

CIVIL PENALTIES

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. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983). Credible evidence

establishes Respondent intentionally withheld Claimant's final paycheck to cover amounts Respondent claimed was owed on a loan he made to Claimant. From that fact, the forum infers Respondent voluntarily and as a free agent failed to pay Claimant all of the wages he earned between April 24 through May 8, 2000. Respondent acted willfully and is liable for penalty wages under ORS 652.150.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondent **Arthur Lee** is hereby ordered 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 Fenny Pearson, in the amount of THREE THOUSAND ONE HUNDRED TWELVE DOLLARS AND FIFTY CENTS (\$3,112.50), less appropriate lawful deductions, representing \$712.50 in gross earned, unpaid, due and payable wages and \$2,400 in penalty wages, plus interest at the legal rate on the sum of \$712.50 from May 8, 2000, until paid and interest at the legal rate on the sum of \$2,400 from June 8, 2000, until paid.

ⁱ See Findings of Fact – Procedural 10.