

VIDAL SOBERON and JODY SOBERON

dba The Prime House

Case No. 45-02

Final Order of the Commissioner Jack Roberts

Issued December 20, 2002

SYNOPSIS

Where the forum's calculations showed Claimant was overpaid by \$349 for the period between January 16 and March 10, 2001, based on original time cards and Claimant's acknowledgement of certain wages paid, the forum found that Claimant was paid all wages due to him when he quit his employment without notice. The forum also found no evidence that Respondent Jody Soberon conducted business jointly with Respondent Vidal Soberon and the forum dismissed the Order of Determination. ORS 652.140(2); ORS 652.150

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 October 16, 2002, in the Hanscam Center conference room, located at 16399 Lower Harbor Road, Harbor, Oregon.

Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Kirt A. McQueen ("Claimant") was present throughout the hearing and was not represented by counsel. Vidal Soberon ("Respondent V. Soberon") was present throughout the hearing and was not represented by counsel. Jody Soberon ("Respondent J. Soberon") was not present for any part of the hearing and no one appeared on her behalf.

The Agency called Claimant as its only witness.

Respondent V. Soberon called no witnesses, but testified on his own behalf.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-8 (generated prior to hearing) and X-9 through X-12 (generated after the hearing);
- b) Agency exhibits A-1 through A-6 (filed with the Agency's case summary) and A-7 through A-11 (submitted at hearing);
- c) Respondent exhibits R-10, R-24, R-25, and R-33 (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 14, 2001, Claimant filed a wage claim form stating Respondents had employed him from October 11, 2000, until March 10, 2001, and failed to pay him the agreed upon rate of \$9.00 per hour 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 Respondents.

3) On September 14, 2001, the Agency issued an Order of Determination, numbered 01-2140. The Agency alleged Respondents had employed Claimant during the period January 16 through March 10, 2001, and failed to pay Claimant at least \$9.00 per hour for each hour worked in that period, and was liable to Claimant for \$1,057.60 in unpaid wages. The Agency also alleged Respondents' failure to pay all of Claimant's wages when due was willful and Respondents, therefore, were liable to Claimant for \$2,160 as penalty wages, plus interest. The Order of Determination gave Respondents 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) On September 25, 2001, Respondent V. Soberon filed an answer and request for hearing that stated, in pertinent part:

“We admit that ‘the wages were earned by the wage claimant in Oregon during the period January 16, 2001, through March 10, 2001, at the rate of \$9.00 per hour for \$1,633.50.’

“We deny that ‘during said period of time, no part of which has been paid except the sum of \$575.90.’ We therefore deny all other allegations included in paragraphs II and III.”

In his answer, Respondent V. Soberon listed draws taken by Claimant between January 12 and March 10, 2001, totaling \$1,228.

5) On April 29, 2002, the Agency requested a hearing. On May 13, 2002, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on September 4, 2002. 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 hearing rules, OAR 839-050-0000 to 839-050-0440.

6) On July 8, 2002, the forum ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of any agreed or stipulated facts; and (for the Agency only) any wage and penalty calculations. The forum ordered the participants to submit their case summaries by August 23, 2002, and advised them of the possible sanctions for failure to comply with the case summary order. On August 16, 2002, the Agency filed its case summary.

7) On August 16, 2002, the ALJ, on her own motion, rescheduled the hearing to commence on Wednesday, October 16, 2002, at the time and place previously scheduled, due to an unexpected scheduling conflict. The ALJ also extended the case summary due date to October 4, 2002.

8) On October 1, 2002, Respondent V. Soberon filed a timely case summary.

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

10) At the start of hearing, Respondent V. Soberon stated off the record that Respondent J. Soberon could not attend the hearing due to the press of work.

11) The ALJ issued a proposed order on November 26, 2002 that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On December 2, 2002, the Hearings Unit received a letter from Claimant requesting an extension of time to file exceptions to the proposed order. On the same date, the forum issued an order that stated in pertinent part:

“Under the applicable rules, Claimant is not a party to this proceeding and therefore is not a participant for the purposes of filing exceptions to the Proposed Order that issued in this matter. On that basis, Claimant’s request for an extension of time is **DENIED**.

“However, Claimant is not precluded from contacting the Agency to discuss possible exceptions and the forum will consider the Agency’s, or Respondent’s, exceptions if they are filed no later than 10 days from the date the Proposed Order issued. The forum will consider granting an extension of time to file exceptions as long as the Agency makes its request no later than **December 6, 2002**, which is the time limit for filing exceptions in this matter.”

12) On December 6, 2002, the Agency timely requested an extension of time to file exceptions. By interim order issued the same date, the forum extended the deadline for filing extensions to no later than December 13, 2002. Neither the Agency nor Respondents filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent V. Soberon owned and operated a restaurant located in Brookings, Oregon under the assumed business name of The Prime House and employed one or more individuals in Oregon. The registrants of the

assumed business name are listed with the Corporations Division as Vidal Soberon and Jody Soberon.

2) Respondent V. Soberon employed Claimant as a cook from on or about October 12, 2001, until March 10, 2002.

3) Until January 2001, Respondent V. Soberon paid Claimant every two weeks by check. Pay periods usually ran from the 1st to the 15th and from the 16th to the end of each month.

4) In early January 2001, Respondent V. Soberon quit giving Claimant regular paychecks because his business suffered a financial setback around November or December 2000. To help out the business, Claimant volunteered to accept some of his pay in the form of cash draws and payments toward Claimant's bar bill, credit card balance, and court fines. Claimant recorded his cash draws on his time cards and Respondent V. Soberon or his agent initialed Claimant's entries. All of Claimant's handwritten entries were dated and initialed except for his bar tab entry.

5) The work hours recorded on Claimant's time cards, in his own handwriting, show that Claimant worked 159.5 hours between January 16 and March 10, 2001.

6) Respondent V. Soberon and Claimant agree that Claimant's rate of pay during that time period was \$9.00 per hour.

7) Claimant recorded the following cash draws on his time cards between January 16 and March 10, 2001:

- (1) January 18 - \$10
- (2) January 18 - \$10.50 (recorded as "10 ½")
- (3) January 18 - \$1.00
- (4) January 18 - \$5.00
- (5) January 26 - \$50
- (6) January 26 - \$52

- (7) January 28 - \$460
- (8) February 2 - \$10
- (9) February 6 - \$10
- (10) February 7 - \$10
- (11) March 1 - \$32
- (12) March 2 - \$150
- (13) March 3 - \$60
- (14) March 3 - \$50
- (15) March 10 - \$160
- (16) March 10 - \$50
- (17) Undated and not initialed by Respondent V. Soberon - \$60
(recorded as "- 60 Tab")

Additionally, at Claimant's request, Respondent paid Claimant's court fines totaling \$50 by check (numbered 1154) dated January 16, 2000. Also at Claimant's request, Respondent paid Claimant's January credit card payment totaling \$100 by check (numbered 1161) dated January 18, 2000.ⁱ Additionally, Claimant accepted \$44 in "gift certificates" to use at Respondent V. Soberon's restaurant that he acknowledged were in lieu of some wages owed. Claimant considered the gift certificates and Respondent V. Soberon's payments toward Claimant's credit card and court fines as an offset for some of the wages earned at that time.

8) Claimant's time cards, kept and maintained by Respondent, show the dates and hours Claimant worked each work day and the total hours worked each week between January 16 and March 10, 2001.ⁱⁱ The time cards also show the cash amounts Respondent paid Claimant for wages earned and, except for the \$60 bar tab Claimant noted on his March time card, the dates the cash amounts were paid. The time cards do not show the amounts Respondent paid directly to Claimant's creditors or the \$44 gift certificates Claimant accepted in lieu of cash.

9) Except for Claimant's final paycheck, Respondent V. Soberon did not provide Claimant with itemized statements showing lawful deductions during the claim period between January 16 and March 10, 2002.

10) Claimant quit his employment with Respondent on March 10, 2001, without prior notice to Respondent V. Soberon. He received a final paycheck dated March 10, 2001, signed by Respondent V. Soberon, in the amount of \$29.90, shortly after he quit his employment.

11) Respondent included an itemized statement with Claimant's final paycheck that shows deductions for Medicare and state, federal, and social security taxes totaling \$380.10. It also designates an "Hourly Rate (182.00 @ \$9.00) \$1,638" and "Draws -\$1,228." The statement is dated March 10, 2001, and shows "year to date" earnings as \$1,638 and "year to date" draws as \$1,228.

12) Between January 16 and March 10, 2001, Claimant worked 159.5 hours and earned gross wages of \$1,435.50 (159.5 hours x \$9.00 per hour).

13) Claimant's cash draws and other compensation from January 16 to March 10, 2001, total \$1,374.50.ⁱⁱⁱ

14) When Claimant quit his employment, Respondent V. Soberon owed Claimant gross wages of \$61 (\$1,435.50 - \$1,374.50).

15) From Claimant's final paycheck, Respondent made deductions for Medicare and state, federal, and social security taxes from a gross amount of \$1,638^{iv} that exceeded the gross wages owed when Claimant quit his employment, resulting in a \$349 overpayment to Claimant (\$1,435.50 gross wages - \$1,374.50 in draws - \$380.10 in withholdings - \$29.90 net pay).

16) During the hearing, Claimant exhibited unwarranted hostility toward Respondent V. Soberon by responding to Respondent's direct examination with

sarcastic remarks and impatience. Additionally, Claimant repeatedly disrupted the hearing with inappropriate comments and the ALJ was frequently compelled to admonish him about his lack of decorum during the hearing. Moreover, Claimant's testimony that Respondent altered Claimant's time cards to increase the amount of Claimant's draws was not credible. First, the ALJ thoroughly inspected the original time cards and found no evidence of tampering on the part of Respondent. Second, Claimant's testimony about his handwritten draws was inconsistent and evasive. For instance, he could not identify one of the entries at all, then later in his testimony claimed that only one of the numbers in the entry was a cash draw and denied he had written the second number. Later still, he claimed the entry was "probably" the name of an album cover that he had written down on the back of his time card. Throughout his testimony regarding the draws, Claimant claimed he could not remember receiving some of the larger cash draws, but had no problem recalling specific smaller amounts. Based on Claimant's general demeanor and unreliable testimony, the forum believed Claimant's testimony only when it was consistent with other credible evidence in the record, was logically credible or constituted a statement against interest.

17) Respondent J. Soberon did not respond to the Agency's charging document and did not appear at the hearing. The Agency did not move for a default order and presented no evidence at the hearing regarding J. Soberon.

ULTIMATE FINDINGS OF FACT

1) Respondent V. Soberon 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 V. Soberon engaged Claimant's personal services between October 12, 2000, and March 10, 2001.

3) Respondent and Claimant agreed Claimant would be paid \$9.00 per hour.

4) Claimant quit his employment without notice to Respondent on March 10, 2001.

5) Between January 16 and March 10, 2001, Claimant worked 159.5 hours and earned gross wages of \$1,435.50. Respondent V. Soberon paid Claimant \$1,784.50, less lawful deductions.

6) Respondent did not owe Claimant any wages when Claimant quit his employment on March 10, 2001.

7) There is insufficient evidence in the record to find Respondent J. Soberon conducted business jointly with Respondent V. Soberon.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent V. Soberon 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(2) provides in part:

“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.”

Including a final paycheck issued March 10, 2001, Claimant was paid all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after he quit his employment with Respondent V. Soberon without notice.

4) 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 dismiss the Claimant's wage claim and Agency's Order of Determination filed against Respondents V. Soberon and J. Soberon.

OPINION

There is no dispute that Respondent V. Soberon ("Respondent") employed Claimant as a cook between January 16 and March 10, 2001. Respondent and Claimant also agree that the original time cards reflect the total number of hours Claimant worked during that time and that Claimant's wage rate was \$9.00 per hour. The only disputed matters in this case are (1) whether Respondent paid Claimant all wages earned and unpaid within five days after Claimant quit without notice on March 10, 2001, and, if not, (2) whether Respondent's failure to pay any sums owed was willful.

RESPONDENT PAID CLAIMANT ALL WAGES EARNED AND OWED

Claimant and Respondent agree that between January 16 and March 10, 2001, Claimant was not paid regularly by check as was customary prior to January 2001. To assist Respondent's declining business, Claimant agreed to a more flexible pay arrangement of accepting sporadic cash draws which were noted on the original time cards in Claimant's own handwriting and were dated by either Claimant or Respondent. Respondent or his agent initialed each draw as it occurred. At hearing, Claimant further acknowledged an additional \$60 bar tab that he entered on his March time card as a draw that was not dated or initialed by Respondent. Claimant also acknowledged two checks to Claimant's creditors written by Respondent on Claimant's behalf and receipt of \$44 in gift certificates as offsets to the wages owed. Finally, Claimant acknowledged receiving a final paycheck for \$29.90 that included an itemized statement of his earnings over the wage claim period and deductions for draws and payroll taxes. For reasons stated elsewhere herein,^v the forum finds Claimant's assertion that Respondent altered the time cards to increase the number and amount of draws shown on the time

cards not credible. The forum finds, therefore, that Respondent not only paid Claimant all wages earned and owed when Claimant quit his employment, but the forum's calculation shows that Respondent overpaid Claimant by at least \$349.

The Agency argues that Respondent should not be credited with legal deductions that accrued over the wage claim period and were not taken until Claimant decided to quit his employment. Respondent is permitted to make lawful payroll deductions, including those required by law. ORS 652.610(3)(a). The Agency does not articulate any legal theory that would negate Respondent's legal obligation to withhold certain amounts if they are not withheld timely. If the Agency had alleged and proven that Respondent did not actually pay the amounts withheld to the proper authorities, the forum may have found the deductions unlawful. However, that is not the case here. Claimant acknowledged receiving what appears to be a customary itemized statement that included standard payroll deductions that the forum is obliged to consider. Although evidence shows Respondent failed to provide itemized statements with each payment he made to Claimant between January 16 and March 10, 2001, as he was required to do by law, the Agency did not allege a violation of ORS 652.610. The forum, therefore, concludes that Respondent's deductions were lawful and Claimant was not owed any wages when he quit his employment with Respondent.

ORDER

NOW, THEREFORE, as Respondents have been found not to owe Claimant wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Order of Determination 01-2140 against **Vidal Soberon** and **Jody Soberon** be and is hereby dismissed.

ⁱ The participants stipulated that the checks were misdated and were actually written and issued on January 16 and 18, 2001.

ⁱⁱ The January time card also shows that Claimant worked 22.5 hours prior to January 16, but those hours were not included in Claimant's wage claim and are not considered in this order.

ⁱⁱⁱ See Finding of Fact – The Merits 7.

^{iv} Respondent's calculations included the 22.5 hours that Claimant worked in January prior to the wage claim period.

^v See Finding of Fact – The Merits 16