

**In the Matter of**

**NOVA GARBUSH dba NOVA GARBUSH ADULT FOSTER CARE**

**Case No. 60-00**

**April 14, 2000**

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**SYNOPSIS**

Where Respondent submitted an answer to the Order of Determination and requested a hearing, but failed to appear at the hearing, the commissioner found Respondent in default of the charges set forth in the charging document. Where the Agency made a prima facie case supporting the Agency's Order of Determination on the record, the commissioner found that Respondent willfully failed to pay Claimant all wages due after Claimant quit her employment, in violation of ORS 652.140(2). The commissioner ordered that Respondent pay \$441.00 in unpaid wages and \$1,680.00 in civil penalty wages. ORS 652.140(2); ORS 652.150.

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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 March 8, 2000, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia Domas, an employee of the Agency. Krystyna Drozd ("Claimant") was present throughout the hearing. Also present throughout the hearing was Regina Popiel, an interpreter in Polish, who translated the proceedings in their entirety. Nova Garbush ("Respondent"), after being duly notified of the time and place of this hearing, failed to appear and no representative appeared on behalf of Respondent.

The Agency called the following witnesses: Claimant; Michael Wells, Wage & Hour Division Compliance Specialist; and Eugiezia Kaptur, Claimant's friend.

The forum received into evidence:

a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-7, and A-9 (submitted or generated prior to 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 August 24, 1999, Claimant filed a wage claim with the Agency. She alleged that Respondent employed her and failed to pay wages earned and due to her.

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

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

4) On November 17, 1999, the Agency served Order of Determination No. 99-3303 on Respondent based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$441.00 in unpaid wages and \$1,680.00 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 December 7, 1999, the Agency issued a Notice of Intent to Issue Final Order by Default to Respondent, notifying Respondent that a Final order by Default would be issued unless the Agency received an Answer and Request for Hearing or Court Trial from Respondent by December 17, 1999.

6) On December 16, 1999, the Agency received a written request for hearing from Respondent.

7) On December 16, 1999, the Agency issued a Notice of Insufficient Answer to Order of Determination to Respondent stating that Respondent's Answer received on December 16, 1999 was insufficient because it did not include "an admission or denial of each fact alleged in the Order and a statement of each relevant defense to the allegations." The Agency stated that a Final Order on Default would be executed unless this information was received by "the extended date" of December 27, 1999.

8) On December 27, 1999, the Agency received an Answer from Respondent responsive to the Agency's Notice of Insufficient Answer. In the answer, Respondent admitted that Claimant had worked for her for almost five years, including the dates of February 7, 14, 21, and 28, 1999; admitted that Claimant had worked a total of 36 hours on February 7, 14, 21, and 28, 1999; alleged that Respondent paid Claimant in full for those hours in cash; denied that Claimant worked for Respondent in March 1999; and denied that she owed Claimant any money for unpaid wages.

9) On January 26, 2000, the Agency served a "BOLI Request for Hearing" on the forum.

10) On January 28, 2000, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as March 8, 2000, and successive days thereafter, at 9:00 a.m., at the Hearings Room, 10<sup>th</sup> Floor, State Office Building, 800 NE Oregon Street, Portland, 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.

11) On February 3, 2000, BOLI mailed a copy of the forum's amended contested case hearings rules, effective January 27, 2000, to Respondent.

12) On February 7, 2000, 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 February 29, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

13) The Agency timely filed its case summary, with attached exhibits, on February 29, 2000. Respondent did not file a case summary.

14) On March 2, 2000, the Agency filed a motion for a discovery order requiring Respondent to provide documents relevant to the Claimant's wage claim.

15) On March 2, 2000, the forum granted the Agency's motion, finding that the relevance of the documents sought was apparent. Given the uncertainty of whether Respondent would even receive the forum's interim order prior to March 6, 2000, the date by which the Agency sought to obtain the documents, the forum ordered Respondent to hand deliver the requested documents to the Agency no later than the time and date that the hearing was scheduled to begin.

16) On March 6, 2000, the Agency submitted an addendum to its case summary enclosing one additional exhibit.

17) At the time set for hearing, Respondent had not appeared and had not previously announced that she would not appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondent did not

appear or contact the hearings unit by telephone during that time, the ALJ declared Respondent in default at 9:30 a.m. and commenced the hearing.

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

19) On March 22, 2000, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. The forum received no exceptions.

### **FINDINGS OF FACT – THE MERITS**

1) During all times material herein, Nova Garbush, an individual person, did business under the assumed business name of Nova Garbush Adult Foster Care.

2) Respondent hired Claimant in 1995 to care for disabled patients in Respondent's home, located at 11721 S.E. Powell Blvd., Portland, Oregon. Respondent offered Claimant the wage of \$7.00 per hour and Claimant accepted Respondent's offer. Respondent paid Claimant \$7.00 per hour throughout her employment with Respondent.

3) Claimant worked continuously for Respondent until March 1999. She worked one shift a week, beginning at 11 p.m. each Saturday night and ending at 8 a.m. each Sunday morning.

4) Respondent's normal practice was to pay Claimant twice a month, at the middle and end of each month.

5) Claimant maintained a contemporaneous record of the dates and hours she worked during her employment with Respondent, including the months of January, February, and March 1999.

6) In February and March 1999, Claimant worked the following shifts for Respondent, working nine hours each shift: February 6-7, 13-14, 20-21, 27-28; March

6-7, 13-14, 20-21. During that time, Claimant cared for a paralyzed adult in Respondent's home.

7) Claimant stopped working for Respondent after her March 20-21, 1999 shift because Respondent had not paid her for any of the work Claimant had performed in February and March 1999 and avoided Claimant whenever Claimant made one of numerous attempts to ask Respondent for her wages.

8) Calculated at the wage rate of \$7.00/hr., Claimant earned a total of \$441.00 between February 6, 1999 and March 21, 1999.

9) At the time of Claimant's termination, Respondent owed Claimant \$441.00 in unpaid wages.

10) Prior to Claimant's termination, Respondent had not paid her anything for her work between February 6, 1999 and March 21, 1999. Since Claimant's termination, Respondent has not paid Claimant any wages.

11) Civil penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: \$7.00/hr. multiplied by 8 hours per day equals \$56.00; \$56.00 multiplied by 30 days equals \$1,680.00.

12) Wells, a Compliance Specialist employed by the Agency for the previous ten months before the hearing, investigated Claimant's wage claim. During his investigation, he wrote to Respondent and asked Respondent to provide copies of payroll and time records regarding Claimant. Respondent did not respond to his request. Wells also attempted unsuccessfully to contact Respondent by phone.

13) Claimant testified in Polish through Popiel, the forum's interpreter. She responded to questions in a straightforward manner. Her testimony was consistent with statements on her wage claim, the calendar submitted with her wage claim, the

calendar of hours worked that she contemporaneously maintained while working for Respondent, and with Kaptur's testimony. The forum finds her testimony credible.

14) The testimony of Wells was credible.

15) Eugiezia Kaptur also testified in Polish through Popiel, the forum's interpreter. Her testimony was direct, to the point, and consistent with Claimant's testimony. The forum has found her testimony credible.

#### **ULTIMATE FINDINGS OF FACT**

1) During all times material herein, Respondent was an individual person who engaged the personal services of one or more employees in the State of Oregon.

2) Respondent employed Claimant in Oregon from 1995 through March 21, 1999.

3) Claimant earned \$441.00 in wages during her employment with Respondent in February and March, 1999.

4) Respondent has not paid Claimant any wages for the work she performed in February and March 1999.

5) Claimant voluntarily terminated her employment with Respondent on March 21, 1999 because Respondent had not paid her any wages for the work she performed in February and March 1999. Claimant did not give Respondent prior notice of her intent to quit.

6) Respondent willfully failed to pay Claimant \$441.00 in earned, due, and payable wages no later than March 26, 1999, five days after Claimant quit, and more than 30 days have elapsed from the date Claimant's wages were due.

#### **CONCLUSIONS OF LAW**

1) During all times material herein, Respondent Nova Garbush 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. During all times material herein, Respondent employed Claimant.

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) At times material, ORS 652.140(2) provided:

“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 schedule payday after the employee has quit, whichever event first occurs.”

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid not later than March 26, 1999, five business days after Claimant quit. Those wages amount to \$441.00.

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 \$1,680.00 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).

5) OAR 839-050-0330(1) and (2) provide, in pertinent part:

“(1) Default can occur in four ways:

“ \* \* \* \*

“(d) Where a party fails to appear at the scheduled hearing.

“(2) When a party notifies the agency that it will not appear at the specified time and place for the contested case hearing or, without such notification, fails to appear at the specified time and place for the contested case hearing, the administrative law judge shall take evidence to establish a prima facie case in support of the charging document and shall then issue a proposed order to the commissioner and all participants pursuant to OAR 839-050-0370. Unless notified by the party, the administrative law judge shall wait no longer than thirty (30) minutes from the time set for the hearing in the notice of hearing to commence the hearing.”

Respondent did not appear at the hearing at all and did not notify the forum that it would not appear at the hearing. Respondent was properly found in default when 30 minutes had elapsed after the specified time for the contested case hearing.

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 her 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 63 hours of work she performed for Respondent in February and March 1999. The Agency further alleged that Claimant was entitled to the agreed-upon rate of \$7.00 per hour and is owed a total of \$441.00 in unpaid wages and \$1680.00 in civil penalty wages.

### **DEFAULT**

Respondent filed an answer and request for hearing, but failed to appear at hearing and was held in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Leslie and Roxanne DeHart*, 18 BOLI 199, 206

(1999). The task of this forum, therefore, is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. *DeHart*, at 206.

### **PRIMA FACIE CASE**

In this wage claim case, the elements of a prima facie case consist of proof of the following: (1) Respondent employed Claimant; (2) Claimant's agreed upon rate of pay, if it was other than minimum wage; (3) Claimant performed work for which she was not properly compensated; and (4) the amount and extent of work performed by Claimant. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999).

In her answer and request for hearing, Respondent alleged, in relevant part, that she paid Claimant in full for the 36 hours Claimant worked in February 1999, and denied that Claimant worked for Respondent in March 1999 or that she owed Claimant any money for unpaid wages. Respondent provided no supporting documentation. Where a respondent has submitted an answer but defaults by not appearing at hearing, the forum may consider its contents when making factual findings. However, unsworn and unsubstantiated assertions in the answer are overcome wherever they are controverted by other credible evidence on the record. *DeHart*, 18 BOLI at 206.

In this case, it is undisputed that Respondent employed Claimant in February 1999. The credible testimony of Claimant and Kaptur overcome Respondent's unsworn denial that Claimant did not work for Respondent.

The forum concludes that Claimant's agreed upon rate of pay was \$7.00 per hour based on Claimant's credible testimony and Respondent's failure to deny that allegation, contained in the Order of Determination, in the answer. See *OAR 839-050-0130(2)*.

Respondent alleges in its answer that Claimant was paid for her work in February 1999, did not work in March 1999, and was paid in full for her work. However, those unsworn and unsubstantiated assertions are overcome by Claimant's and Kaptur's credible testimony that Claimant worked for Respondent in February and March 1999 and was not paid for any of that work.

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 Graciela Vargas*, 16 BOLI 246, 254 (1998). A claimant's credible testimony may be sufficient evidence. *In the Matter of David Creager*, 17 BOLI 102, 109 (1998). Claimant credibly testified that she worked from 11 p.m. until 8 a.m. on seven occasions in February and March 1999, for a total of 63 hours, and produced a contemporaneous written record supporting her testimony.<sup>1</sup> That testimony was bolstered by Kaptur's credible testimony regarding her awareness of Claimant's work schedule. Respondent's unsworn and unsubstantiated assertions to the contrary are insufficient to overcome this evidence. The forum concludes that Claimant worked 63 hours for Respondent for which she has not been compensated, earning a total of \$441.00 gross wages.

## **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. *In the Matter of Norma Amezola*, 18 BOLI 209, 219 (1999). Respondent, as an employer, had a duty to know the amount of wages due her employees. *In the Matter of R.L. Chapman Ent. Ltd.*, 17

BOLI 277, 285 (1999). The forum infers that Respondent knew the hours Claimant was working from the fact that Claimant was caring for a paralytic patient in Respondent's house. The forum also infers that Respondent knew she owed Claimant wages based on her intentional avoidance of Claimant whenever Claimant tried to collect her wages. There is no evidence that Respondent acted other than voluntarily or as a free agent. The forum concludes that Respondent acted willfully and assesses penalty wages in the amount of \$1,680.00, the amount sought in the Order of Determination. This figure is computed by multiplying \$7.00 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 she owes as a result of her violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **NOVA GARBUSH** 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 Krystyna Drozd in the amount of TWO THOUSAND TWENTY-ONE DOLLARS (\$2,021.00), less appropriate lawful deductions, representing \$441.00 in gross earned, unpaid, due, and payable wages and \$1,680.00 in penalty wages, plus interest at the legal rate on the sum of \$441.00 from April 1, 1999, until paid and interest at the legal rate on the sum of \$1,680.00 from May 1, 1999, until paid.

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<sup>1</sup> See Finding of Fact – The Merits #11 for the exact dates.