

In the Matter of

MERMAC, INC.

Case No. 26-05

Final Order of Commissioner Dan Gardner

Issued April 28, 2005

SYNOPSIS

Where Respondent corporation acquired a restaurant business from its president's friend, Ali Aazad, who had employed Claimant and would not or could not pay wages earned and owed to Claimant, and where Respondent continued the same business with the same employees, including Claimant, without any interruption or change of operations, the forum determined that Respondent was liable for Claimant's wages in the amount of \$1,728.67 as a successor employer. ORS 652.310(1); ORS 652.140.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 8, 2005, in the W. W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Cortney Barber ("Claimant") was present throughout the hearing and was not represented by counsel. Mohammad Sharifi-Tehrani, Respondent Mermac, Inc.'s corporate president, appeared as Respondent's authorized representative.

The Agency called as witnesses: Katy Bayless, BOLI Wage and Hour compliance specialist; Eric Hartman, Claimant's friend; and Claimant.

Respondent called its corporate president and authorized representative, Mohammad Sharifi-Tehrani, as its only witness.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-13; and
- b) Agency exhibits A-1 through A-29 (filed with the Agency's case summary).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 February 5, 2004, Claimant filed a wage claim form stating that Ali Azad had employed her during the wage claim period of November 15, 2002, to May 22, 2003, and failed to pay her all wages that were due at the time he sold his business. She further stated that the business continued under new ownership and that she was still owed wages for the wage claim period when she quit her employment on June 9, 2003.

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

3) On May 20, 2004, the Agency issued an Order of Determination numbered 03-3747. In the Order of Determination, the Agency alleged Mohammad Sharifi-Tehrani ("Sharifi") and Respondent had employed Claimant during the period November 15, 2002, through May 22, 2003, failed to pay Claimant for all hours worked in that period, and were liable to Claimant for \$1,692.52 in unpaid wages, plus interest. The Agency also alleged Sharifi and Respondent's failure to pay all of Claimant's wages when due was willful and both were liable to Claimant for \$1,656 as penalty wages, plus interest. The Order of Determination gave Sharifi and 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. Sharifi and Respondent timely filed answers and a

request for hearing. Both alleged that they acquired the business on May 23, 2003, did not employ Claimant during the wage claim period, and were not responsible for Claimant's unpaid wages.

4) On November 10, 2004, the Agency requested a hearing. On November 16, 2004, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:30 a.m. on February 8, 2005. With the Notice of Hearing, the forum included copies of the Order of Determination, "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES," and the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

5) On November 17, 2004, the ALJ issued a notice of administrative rule amendments that included a complete copy of the amended contested case hearing rules and a revised copy of the "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES." Due to an error in the mailing address, the documents were mailed a second time to Respondent Mermac, Inc., at the correct address, on November 29, 2004.

6) On November 29, 2004, the ALJ ordered the Agency and Respondents each to submit a case summary that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim, and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by January 28, 2005, and notified them of the possible sanctions for failure to comply with the case summary order. Additionally, the ALJ provided Respondents with a Case Summary Form designed to assist authorized representatives and unrepresented respondents with filing a case summary.

7) On December 1, 2004, the Agency moved to extend the due date for case summaries to February 1, 2005. Respondents raised no objections to the Agency's motion within the time allowed and, by interim order dated December 15, 2004, the ALJ granted the Agency's motion.

8) The Agency timely filed a case summary. Respondents did not file a case summary.

9) On January 28, 2005, the Agency moved to amend the Order of Determination to remove Sharifi as an individual respondent because "the business is an active Oregon corporation and there is no legal basis that the Agency is currently aware of under which [Sharifi] would be individually liable." The Agency further moved to delete its request for penalty wages based on its position that the corporate respondent is a successor in interest to a previous employer and "it is the Agency's policy not to pursue penalty wages in such circumstances." Respondents did not file a response to the motion by the due date set forth in the ALJ's interim order dated January 28, 2005, and the ALJ granted the Agency's motion at the start of hearing on February 8, 2005.

10) On February 2, 2005, the Agency filed a second motion to amend the Order of Determination to increase the amount sought in back wages to \$1,728.67, based on the Agency case presenter's determination that an error made in the original calculations warranted a correction to the amount sought. The Agency attached the "recalculations" to its motion as "Exhibit A." Respondents did not respond to the Agency's motion within the requisite time period and, at the start of hearing on February 8, 2005, the ALJ granted the Agency's motion to amend and deemed the amended allegation denied for hearing purposes.

11) On February 2, 2005, the Agency filed an addendum to its case summary.

12) On February 7, 2005, the ALJ contacted the participants to schedule a brief prehearing conference on the same date to discuss the Agency's motions. Respondent's authorized representative stated he was unavailable for a prehearing conference, but requested that the ALJ permit him to bring an "assistant" to the hearing because he was not familiar with "legal matters" and needed guidance. After establishing that the proposed assistant was not a member of the Oregon State Bar in accordance with the contested case hearing rules, the ALJ denied Respondent's request.

13) At the start of hearing, the ALJ disclosed Respondent's authorized representative's ex parte request to appear with an "assistant" and affirmed her denial of that request, noting that Respondent had ample opportunity to retain legal counsel but, instead, chose to authorize a corporate officer to appear on its behalf.

14) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) During the hearing, the Agency case presenter offered a revised back wage calculation document referred to as "Exhibit A-29," which was admitted without objection. During a brief recess, the ALJ discovered that her copy of the exhibit was incorrectly marked as "Exhibit A-A" and directed the case presenter to properly mark the document as "Exhibit A-29."ⁱ On the record, the ALJ advised Respondent's authorized representative of the correction and affirmed that the correctly marked exhibit was admitted as "Exhibit A-29." Respondent made no objection to the correction or to the admission of the exhibit.

16) On February 16, 2005, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of

its issuance. The Agency did not file exceptions. Respondent timely filed exceptions, which are addressed in the opinion section of this final order.

FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent Mermac, Inc. was an Oregon corporation engaged in the restaurant business and operating under the assumed business name of Hawthorne Street Café.

2) At times material herein, Mohammad Sharifi-Tehrani (“Sharifi”) was Respondent’s president.

3) Claimant began working at the Hawthorne Street Café, a Portland restaurant, on August 1, 2002. At that time, Ali Aazad owned the restaurant and employed nine workers, including Claimant. Aazad had previously conducted business as president of Nadia, Inc., an Oregon corporation that was involuntarily dissolved in June 1999. During Claimant’s employment, Aazad continued to use the name Nadia, Inc. on the paychecks he issued through a payroll service named PayChex.

4) Aazad hired Claimant as a “server.” Her duties included opening and closing the restaurant, performing “prep” work, bussing tables, and serving food to customers.

5) Claimant earned \$6.50 per hour, plus tips, until the minimum wage law changed January 1, 2003. Her hourly rate at that time increased to \$6.90 per hour.

6) The restaurant opened at 7:30 a.m. and closed around 2:30 or 3 p.m. Claimant worked at the restaurant Friday through Monday, from approximately 7:30 a.m. until 2:30 or 3 p.m. On some days, she worked from 11 a.m. until the restaurant closed.

7) In or around mid-November 2002, Aazad stopped paying Claimant regularly. Although she was paid for her work in December, Claimant’s paychecks regularly bounced after January 2003 because Aazad’s account lacked sufficient funds

to cover them. When Claimant repeatedly asked for her unpaid wages, Aazad assured her she would be paid the wages she was owed, along with the other employees who were not being paid during that time.

8) Sharifi, Respondent's corporate president, was Aazad's friend and when he heard Aazad was selling the café, he researched its history and determined that its longtime reputation as a high quality and popular restaurant was a good investment for Respondent. On or about May 23, 2003, the café's ownership shifted to Respondent. Sharifi "shadowed" Aazad during the month preceding Respondent's takeover and was told by several employees, including Claimant, that Aazad had not paid their wages and owed them for the work they had performed during the preceding months. Sharifi felt "compassion" for the employees, and, although he retained all of Aazad's employees after the takeover, he did not believe that Respondent had an obligation to compensate them for their unpaid wages. Sharifi paid one employee her unpaid wages totaling \$80 out of his own pocket after she pleaded with him for money to put food on the table for her children. He did not compensate any other employees for the wages Aazad failed to pay.

9) In addition to retaining all of Aazad's employees, Respondent kept the café's same name and location because it had garnered a positive reputation in the community over the years and was a local landmark. Respondent did not change the menu or the basic décor and retained all of the preexisting kitchen equipment and dining room furniture and hardware.ⁱⁱ The café did not close for any period after Respondent took over ownership. Sharifi believed that under good fiscal management the café could be profitable and as of the hearing date he believed the business was an "excellent, fine-tuned operation," stating: "I am famous now."

10) After the café's ownership transferred to Respondent, Claimant prepared a personal calendar of her previous work hours using the information retained on the café's business computer. Not all of the hours she worked for Aazad were still on the computer and she estimated some of the hours based on her "fairly consistent schedule."

11) On February 5, 2004, Claimant filed a wage claim against Aazad and prepared a calendar for the BOLI Wage and Hour Division using the information recorded on her personal calendar.

12) Claimant's records show that between November 15 and December 31, 2002, she worked 110.5 hours at minimum wage (\$6.50 per hour) earning a total of \$718.25. Aazad paid Claimant \$549.25 of the amount owed, leaving a balance due of \$169.

13) On January 1, 2003, the minimum wage rate increased to \$6.90 per hour.

14) Claimant's records show that between January 1 and May 23, 2003, she worked 326.6 hours at the minimum wage rate, earning a total of \$2,253.54. Aazad paid Claimant \$693.87 of the amount owed, leaving a balance due of \$1,559.67.

15) Between November 15, 2002, and May 23, 2003, Claimant worked 437.1 hours. She earned a total of \$2,971.79 but was paid only \$1,243.12 for those hours as of the hearing date. Aazad had not paid Claimant for all of the hours she worked at the time he transferred the café's ownership to Respondent, leaving an amount due and owing of \$1,728.67.

16) Claimant's last work day for Respondent was June 9, 2003. Between May 23 and June 9, 2003, Claimant was paid for all of the work she performed for Respondent. At the time she left her employment on June 9, until the hearing date, Claimant had not been paid for all of the hours she worked for Aazad.

17) When BOLI's Wage and Hour Division pursued Respondent as a successor to Ali Aazad's restaurant business, Respondent provided information to BOLI that included paperwork showing it purchased the business from Aazad effective May 23, 2003, along with information regarding Aazad's whereabouts. BOLI attempted to collect Claimant's unpaid wages through Aazad to no avail. Although Aazad agreed to enter into a stipulated agreement to pay the wages, he later left the state and BOLI was unable to collect any of Claimant's wages from Aazad.

18) Claimant's demeanor was sincere and her testimony was straightforward and responsive. She had a clear recollection of pertinent facts and did not embellish her testimony in any way. Her testimony that she estimated some of her hours based on her "fairly consistent schedule" was reasonable and entirely believable. The forum credits Claimant's testimony in its entirety.

19) Sharifi's testimony was believable. He did not dispute the key facts, but rather expressed a strong interest in justice being served. His strident belief that Respondent should not be held liable for "someone else's responsibility" was tempered by his understanding and concern for Claimant's plight. The forum credited his testimony in its entirety.

20) All of the other witnesses testified credibly.

ULTIMATE FINDINGS OF FACT

1) At times material herein before May 23, 2003, Ali Aazad was a person doing business as the Hawthorne Street Café in Portland, Oregon, and employed one or more persons in the operation of that business.

2) At times material herein, Respondent was and is an Oregon corporation. From May 23, 2003, to the present, Respondent has been engaged in the restaurant business, operating under the assumed business name of Hawthorne Street Café, and has continuously employed one or more persons in Oregon.

3) From August 1, 2002, until May 23, 2003, Claimant was Ali Aazad's employee.

4) On May 23, 2003, Respondent acquired the business known as the Hawthorne Street Café from Aazad and, up to and through the date of hearing, continued to operate the business, without interruption, under the same name, at the same location, using the same employees, including Claimant, the same restaurant equipment and furniture, and providing the same services as Aazad.

5) From November 15, 2002, to May 23, 2003, Claimant worked 437.1 hours, earning total wages of \$2,971.79 for these hours and, to date, has been paid only \$1,243.12, leaving unpaid wages of \$1,728.67.

6) Respondent is a "successor" within the meaning of ORS 652.310(1), and therefore is subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

7) As a successor employer, Respondent is liable for Ali Aazad's failure to pay Claimant all wages earned and unpaid immediately upon her termination from employment. ORS 652.140(1).

CONCLUSIONS OF LAW

1) At 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 actions, inaction, statements, and motivations of Mohammad Sharifi-Tehrani, Respondent's president, are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.405.

4) Respondent continued to conduct essentially the same business as its predecessor, Ali Aazad, and is a successor employer under ORS 652.310(1) and liable for Aazad's failure to pay Claimant all wages earned and unpaid after Respondent assumed ownership of the business and at the time Claimant's employment terminated. ORS 652.140(1).

5) 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 her earned, unpaid, due and payable wages, plus interest on that sum until paid. ORS 652.332.

OPINION

The primary issue in this case is whether Respondent was a successor to Claimant's previous employer, Ali Aazad, and thus liable for Claimant's unpaid wages.

ORS 652.310(1), in pertinent part, defines "Employer" as:

"any person who, in this state, directly or through an agent, engages the personal services of one or more employees and includes any successor to the business of any employer * * * so far as such employer has not paid employees in full."

This forum has long held that the test to determine whether an employer is a successor is whether it conducts essentially the same business as conducted by the predecessor. The elements to consider include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; whether the same or substantially the same work force is employed; whether the same product is manufactured or the same service is offered; and, whether the same machinery, equipment, or methods of production are used. Not every element needs to be present to find a successor employer. The forum considers all of the facts together to reach a decision. *In the Matter of Fjord, Inc.*, 21 BOLI 260, 286 (2001), *citing In the*

Matter of Catalogfinder, Inc., 18 BOLI 242, 256 (1999). See also *In the Matter of Tire Liquidators*, 10 BOLI 84, 93 (1991).

In this case, credible evidence shows and Respondent does not dispute that Respondent's acquisition of its predecessor's business, the Hawthorne Street Café, did not result in a name change, location change, or a change in type of services offered by the business. Moreover, the café continued to operate without interruption after Respondent acquired the business on May 23, 2003, using the same employees, the same menu, and the same restaurant equipment and furniture its predecessor, Aazad, used to conduct business. Respondent did not dispute that Sharifi, Respondent's president, was Aazad's friend and readily acknowledged that it took over the failing business to restore the landmark café to its former status. Other than alluding to some minor changes in décor and Sharifi's desire to better manage the café, Respondent offered no evidence that remotely suggested any notable change in the business operation. Based on the facts as a whole, the forum concludes, as a matter of law, that Respondent was a successor employer to Ali Aazad and is liable for Claimant's unpaid wages.

Respondent argues that its predecessor bears sole responsibility for Claimant's wages and that to impose liability on Respondent, who did not employ Claimant during the wage claim period, is manifestly unjust. However, the foremost purpose for the application of the successor doctrine in the wage claim context is the protection of employees. *In the Matter of Gerald Brown*, 14 BOLI 154, 167 (1995). The forum in *Brown* explained it this way:

"The buyer and seller, lessor and lessee, etc., of a business can protect their respective interests when negotiating a sale agreement, lease, or other business arrangement, by an indemnification clause in the acquisition agreement or by a lower purchase price. The employees are not parties to these negotiations and are in the least advantageous position to protect themselves when a change occurs in the employer's

business. In importing and codifying the successor doctrine into the definition of 'employer' in ORS 652.310, the legislature has made a determination that the objectives of the wage collection laws require that the prerogative of owners independently to rearrange their businesses, and even eliminate themselves as employers, be balanced by some protection to the employees from a sudden change in the employment relationship. The ultimate issue is one of balancing the interests of the bona fide successor, the affected employee(s), and the public. By its adoption of the successor doctrine, the legislature has introduced into the balancing process an emphasis upon protection for victimized employees. In the balancing process attendant to the application of the successor doctrine, the legislative goal of protection of employees is subverted by leaving the employee without a remedy or with an incomplete remedy." (citation omitted)

Id. at 167.

Here, Respondent acquired the Hawthorne Street Café with full knowledge of the wages owed to Claimant and other employees and continued the business without any interruption or change in operations. Moreover, Respondent revealed that as of the hearing date it was still in possession of the café's property and business assets and has continued to operate the business, which is apparently thriving under Respondent's management. In contrast, credible evidence shows Respondent's predecessor is not available and has no apparent ability to pay any part of the wage obligation he incurred. The forum finds that, under all the circumstances present in this case, the burden of imposing liability for Claimant's wages on Respondent is slight when compared to the overriding legislative purpose of protecting Claimant from nonpayment of the wages she earned while employed by Respondent's predecessor. Consequently, the forum concludes that this is an appropriate case to impose full liability upon Respondent for wages owed to Claimant.

In this case, the Agency provided credible evidence of Claimant's work hours and Respondent did not contradict that evidence. The forum, therefore, has accepted Claimant's credible statement and the record she prepared of the number of hours she

worked and concludes that, as a successor employer, Respondent is liable to Claimant for unpaid wages in the amount of \$1,728.67.

RESPONDENT'S EXCEPTIONS

Respondent objects to three factual findings in the order,ⁱⁱⁱ stating that they are "incorrect" or "erroneous." Based on the whole record herein, the forum concludes that the findings are supported by a preponderance of the evidence and Respondent's exceptions on those grounds are DENIED.

Additionally, Respondent asserts that its authorized representative is "Iranian by birth and English is not [his] first language," and that its case was damaged because the ALJ did not allow "an assistant present to aid [Respondent's authorized representative] with the proceedings." The forum notes that Respondent did not request an interpreter in accordance with the contested case hearing rules which state that "[a] participant wishing to obtain the services of an interpreter * * * must notify the administrative law judge no later than 20 days before the hearing." OAR 839-050-0300(1) Moreover, the record shows that Respondent's authorized representative made no assertion at any time prior to or during the hearing or otherwise demonstrate that he was "unable to speak or understand the English language." *Id.* Consequently, Respondent's exception is DENIED.

Finally, Respondent asserts that: "the ALJ and the Case Presenter met without me being present and changed the exhibit numbers on several previously presented exhibits." There is no evidence that supports that contention. Instead, the record shows the ALJ received an exhibit that was not marked pursuant to instructions in the case summary order. During a break in the proceeding, the ALJ asked the Agency

case presenter to mark copies of the exhibit with the correct exhibit number to avoid later confusion. Immediately following the break, the ALJ's request and the corrected exhibit number was made part of the record and Respondent did not at any time object to the correction or the exhibit. Respondent's exception is DENIED.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, **Mermac, Inc.** 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 Claimant Cortney Barber, in the amount of ONE THOUSAND SEVEN HUNDRED TWENTY EIGHT DOLLARS AND SIXTY SEVEN CENTS (\$1,728.67), representing gross earned, unpaid, due and payable wages, less appropriate lawful deductions, plus interest at the legal rate on that sum from June 1, 2003, until paid.

ⁱ The ALJ's case summary order directed the Agency to mark its exhibits as "A-1, A-2, etc." and Respondent to mark its exhibits as "R-1, R-2, etc." (Exhibit X-6)

ⁱⁱ The forum also notes that although there was no testimony on the issue, Sharifi stated in the "Employer Response" to the wage claim that Respondent continued to use the same payroll service, "PayChex," as its predecessor. See Exhibit A-8.

ⁱⁱⁱ See Findings of Fact – Procedural 13 and Findings of Fact – The Merits 8.