1 DAMAGE TO OR LOSS OF PROPERTY

LOSSES CAUSED BY EMPLOYEES

79-48 Taylor v United Drilling Co (1979)

Upon termination of employment, ER withheld EE's earned wages to offset losses EE allegedly caused. EE did not give written consent for the deduction.

ER violated Sections 5 and 7. Once wages are found earned and due, there is no authority in the Act to allow a withholding to offset alleged or actual losses EE caused.

RELATED CASES: 2, 3, 4, 74

CONTRARY CASES: See "THEFT - Proven"

COMMENTS: PW case law is clear that mistakes or negligence by EEs that result in losses to ERs are not recoverable through deductions without specific written consent by EE. One area that is an exception is where EEs have been convicted of stealing cash from the ER or where ER has a money judgment against EE. See contrary cases above.

2 EMPLOYEE ERRORS

79-103 Millikin v Lavender 'N Lace Style Shop (1980)

ER deducted an amount from EE's wages to cover a monetary loss caused by EE's error. ER had warned EE verbally several times that errors would result in deducting the amounts from wages. EE did not give written consent for the deduction.

ER violated Section 7. No authority in the Act for ER to make a deduction without EE's written consent, even where EE errors cause a loss to ER.

RELATED CASES: 1, 3, 4, 74

CONTRARY CASES: See "THEFT - Proven"

COMMENT: PW case law is clear that an EE's mistakes or negligence cannot be recovered by deductions without the EE's specific written consent.

3 EMPLOYEE ERRORS

79-1 Turner v Fenkell Family Clinic (1979)

ER took deductions from EE's final paycheck for missing office money, claiming the money

was lost due to EE's negligence. No written consent for the deduction.

ER violated Section 7. No authority in the Act to deduct wages due to any alleged or actual loss EEs caused without EE's express written consent. (This decision was thoroughly discussed in Molin v Pour House, Eaton County District Court, C-511-77 (1978), wherein even written consent for the deduction did not justify it.)

RELATED CASES: 1, 2, 4, 74

CONTRARY RULINGS: See "THEFT - Proven"

COMMENT: PW case law is clear that EE mistakes or negligence cannot be recovered by deductions or nonpayment of earned wages without express written consent of EE.

4 DAMAGE TO OR LOSS OF PROPERTY

LOSSES CAUSED BY EMPLOYEES

WRITTEN CONSENT
Promissory Note

79-166 Rol v Novi Towing Co (1980)

EE acknowledged damaging ER property. EE signed a promissory note and another separate written consent for wages to be deducted to cover the amount of the damage. Part of the amount deducted resulted in EE being paid less than minimum wage.

That part of the deduction which resulted in EE being paid less than minimum wage violated Section 7. The promissory note by itself would not have allowed ER to make the deduction. That part of the deduction above the minimum wage was found to be allowable because EE had given a specific written consent for the deduction.

RELATED CASES: 1, 2, 3 (losses caused by employees), 16 (deductions below minimum wage), 21 (written consent for deduction), 135 (written consent adequate)

CONTRARY RULINGS: 23 (written consent inadequate to allow deduction), 134 (written contract inadequate to allow deduction), 3 (discussion of a district court case where written consent was found to be inadequate to allow deduction)

COMMENT: Written consent must be specific to the point where the total amount and time span of the deductions are discernible.

5 SICK PAY

Unearned

79-26 Gutierrez v ESAA Project dba LA SED (1979)

EE used more sick time than she had earned. ER's written policy governing fringe benefits stated that EEs would only be compensated for sick time earned. However, ER paid EE during the times she used the sick time and then deducted the amounts when EE terminated employment.

ER did not violate the Act. EE had been compensated for wages that she did not earn earlier in her employment (when she took sick leave she had not earned, ER had paid her anyway). As the Act defines wages as earnings for labor and services and EE did not perform any labor or services on the days in question, it was concluded she did not earn any wages. The Judge thus applied the prior unearned wages that were paid against the amount that would be due on EE's final paycheck and concluded that she had already been compensated for all labor and services rendered. Thus, if there are no wages due, there can be no deduction.

RELATED CASES: 14, 104

CONTRARY RULINGS: 7, 19, 20, 22, 27, 107

COMMENT: In a few cases it has been found that employees did not earn wages they were paid earlier in their employment and deductions have been allowed. However, the majority of rulings have not allowed deductions of this nature because wages must be paid for the pay period in which they are earned. Thus, a deduction "now" cannot be made to recoup a prior overpayment "then" because it would result in EE not being paid all wages earned in the "now" period. Entry 107 discusses both sides of this issue.

6 FAIR LABOR STANDARDS ACT (FLSA)

RETROACTIVE DEDUCTIONS

TIP CREDITS

79-33 Roelofs v Sambo's Restaurant (1979)

Through ER's bookkeeping error, tip credits which are authorized to be deducted from an EE's wages under certain conditions were not deducted through the course of EE's employment. ER attempted to deduct the tip credits retroactively to when EE started working and thus withheld EE's final two paychecks. No written consent for the deduction.

ER violated Sections 5 and 7. Although 1964 PA 154, the minimum wage law, allows deductions of tip credits, such deductions are permissible, not mandatory. If, through error,

ER neglects to make the deductions, it may not make itself whole retroactively. Further, when deductions were made, they resulted in EE being paid less than minimum wage and violated Section 7.

CONTRARY RULINGS: 18 (tip credit deduction allowed because wages were viewed as unearned)

COMMENT: This decision cites the 1974 amendments to the FLSA of 1938 and Senate Report 93-690, which describe conditions under which tip credits may be deducted.

7 OVERPAYMENTS

Gratuitous

WAGE ASSIGNMENTS

79-36 Tyrrell v Sails by Watts (1980)

ER withheld final paycheck because it had paid EE gratuitous payments while she was sick. EE verbally agreed to repay the gratuitous payments as they were viewed as a loan from ER. ER had also deducted monies on a regular basis to pay for an individual retirement account for EE. At some point, however, ER ceased paying for the account but continued to make the deductions from EE's check. The original deduction authorizing the retirement account deduction had the EE's written consent.

ER violated Sections 5 and 7. No authority to recover overpayments without written consent. Retirement deduction also became a violation at the point in time when ER stopped depositing the funds in EE's account. EE's written consent was for a specific purpose, and when ER subverted that purpose it had no right to continue to make the deductions.

RELATED CASES: 12, 133 (wage assignments), 11 (recovery of gratuitous overpayments), 125 (verbal consent for deductions), 10 (deductions to recoup loans)

CONTRARY RULINGS: 5 (recovery of unearned sick time allowed), 14 (recovery of gratuitous overpayment allowed), 104 (recovery allowed due to EE misrepresentation)

COMMENT: Entry 107 discusses both sides of allowing recovery of prior overpayments.

8 THEFT

Alleged

79-121 Ascenzo v Brittany Park Apartments (1980)

An amount was deducted from EE's final paycheck to cover the cost of a ladder last seen in

EE's possession. No written consent for the deduction.

ER violated Section 7. No authority in the Act to allow deductions for alleged theft without specific written consent. ER's recovery attempt would be proper as a civil action.

RELATED CASES: 24 (alleged theft), 144 (even where a conviction was obtained, the deduction was not allowed)

CONTRARY RULINGS: 105 (conviction obtained, deduction allowed), 119 (conviction obtained, deduction allowed)

COMMENT: An allegation of theft does not allow withholding of wages. Where thefts of other than cash have been proven in court, the deduction has not been allowed. When thefts of cash have been proven in court and where the cash is equal or more than the amount of wages due the EE, the withholding has been allowed because EE is deemed to have been compensated by the monies he/she took. The reasoning behind the distinction in proven thefts is that wages must be paid in U.S. currency. As such, EE's conviction of a theft of other than cash would not satisfy the requirements of Section 6 for payment in currency.

9 COLLECTIVE BARGAINING AGREEMENT (CBA)

Deductions

79-110 Gill v Ground Services, Inc (1980)

ER deducted an amount from EE's final paycheck. A CBA expressly permitted the deduction.

ER did not violate the Act. The Act makes specific allowances for deductions properly made pursuant to CBA (Section 7).

RELATED CASES: 15

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

10 LOANS

79-61 Tyler v Dexter Waverly Market (1979)

ER loaned EE money that had not been totally paid back at EE's termination. EE had been paying back the loan, although not in the form of deductions from her paycheck. ER withheld the final paycheck to use as a setoff toward the amount EE still owed. No written consent for the deduction.

ER violated Section 5. Deductions for ER's benefit can only be made with EE's full, free written consent.

RELATED CASES: 7

11 OVERPAYMENTS
Gratuitous

VACATION
Unearned

79-65 Yatzeck v Flair Floors (1980)

EE had taken sick and vacation time off during her employment for which ER had paid her. There was no written policy providing for payment of sick or vacation time. At termination ER deducted those prior paid amounts from EE's final paycheck and claimed EE had already been compensated for all earned wages via the prior payments when she hadn't worked. No written consent for the deduction.

ER violated Section 5. No authority in the Act to recover prior overpayments without specific written consent. Further, no written policy stating ER would recoup unearned sick or vacation time.

RELATED CASES: 7, 19 (recovery of overpayments not allowed), 20 (even where ER's policies provided for recovery, the deduction was not allowed)

CONTRARY RULINGS: 5 (recovery of unearned sick time allowed), 14 (recovery of gratuitous overpayment allowed, wages found unearned), 104 (recovery allowed, employee misrepresentation)

12 WAGE ASSIGNMENTS

79-28 Wilson v Acorn Builders (1979)

ER deducted an amount EE authorized as a wage assignment; however, ER did not deliver the monies to the assignee but kept them.

ER violated Section 7. Although EE authorized the deduction, it was the express purpose of the deduction to be delivered to the assignee. ER subverted the authorization by not delivering the monies in accordance with the authorization.

RELATED CASES: 7, 133 (wage assignments)

COMMENT: Where EE authorizes a deduction for a specific purpose, ER must fulfill that purpose or the deduction is a violation.

13 CONDITIONAL EMPLOYMENT

DEDUCTIONS
Written Consent
For Each Deduction

LOSSES CAUSED BY EMPLOYEES

SECURITY DEPOSITS

WRITTEN CONSENT
For Each Deduction

80-480 Beam v Spartan Oil Co (1981)

EE signed an agreement allowing ER to deduct an amount from his paychecks to build up a security deposit. The deposit was required as a condition of employment. The agreement stated that losses EE caused would be deducted from monies owed him by ER. At some point ER did begin taking monies from EE's wages to cover losses.

LEGAL ARGUMENT: The Department of Labor contended that requiring an EE to provide a security deposit as a condition of employment violated Section 8 which prohibits "job selling."

The ALJ found that ER violated Section 7 but not Section 8. The original agreement providing for a deduction to build a security deposit did not require EE to pay for getting the job, since a security deposit, although held by ER, would still presumably belong to EE and be refundable. The agreement itself was specific enough to allow the deductions without a separate written consent for each pay period involved, because the starting and ending dates and total amount of the deduction were discernible by simple interpretation

of the agreement. However, the agreement did not specifically provide for deductions from wages to cover losses, only to build a security deposit. Any deduction for losses would need a separate, specific written consent. Thus, at the point the deductions began being made to cover losses instead of building the deposit, they became violations of Section 7.

RELATED CASES: 23 (deductions to cover losses), 143 (security deposits). Even where ER did not refund the deposit, it was not a violation because the deposit was not "wages."

14 OVERPAYMENTS

Gratuitous

80-586 Verstraete v Fred Voetberg, CPA (1980)

EE did not work three days in the pay period prior to his termination but requested that ER pay him anyway and he would make up the time later. ER agreed. A week and a half later, EE quit and refused to work the three days for which he had already been paid. ER deducted the amount from the final paycheck. ER actually deducted an amount slightly greater than three days' pay. No written consent for the deduction.

The deduction up to three days' compensation was allowed. EE had been compensated in the form of prior unearned wages paid.

RELATED CASES: 5 (recovery of unearned sick time allowed), 104 (recovery of unearned wages allowed, EE misrepresentation), 110 (recovery allowed, wages unearned)

CONTRARY CASES: 7, 11, 19, 20, 22, 107

15 COLLECTIVE BARGAINING AGREEMENT (CBA)

Deductions

80-523 Thill v Big Bay De Noc School (1980)

A CBA was entered into between ER and EE's union. The net effect of the agreement reduced EE's pay. EE contended that the agreement was not enforceable because he had not agreed to it or signed it. ER deducted an amount from EE's pay in accordance with the agreement. No written consent.

ER did not violate the Act. A CBA need not be signed by each member of a union to be valid. Since the agreement was properly agreed to and executed, the members of the union are bound by its provisions. See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

16 MINIMUM WAGE

Deductions

80-505, et al Dean, et al v Lawson Co (1980)

EE was confronted with eye witness evidence that she had stolen merchandise. ER offered EE the option of signing a written consent for amounts of the alleged thefts to be deducted in lieu of being prosecuted. EE signed the written consent. Deduction resulted in EE being paid less than minimum wage.

ER violated Sections 5 and 7. A deduction that results in EE being paid less than minimum wage is a violation in spite of written consent. The amount deducted above minimum wage rate was not a violation, because the written consent was determined to be freely given.

RELATED CASES: 21 (written consent); 4, 135 (minimum wage)

COMMENT: The decision discusses to some extent what constitutes "full and free" written consent.

17 DEDUCTIONS

Indirect

79-373 Shaw v Schafer Bakeries (1981)

ER informed EE that he must pay for the goods he had delivered to stores which were "over code," a violation of state health policies. EE was told if he didn't pay for the goods, the amounts would be deducted from his wages. EE paid the amounts under protest.

ER violated Section 7. The requirement on EE to pay for goods or have them deducted from wages put him in the same position he would be in if in fact the deductions did come from wages and constituted an indirect deduction under the Act. Both the net amount and the net effect of requiring EE to pay were the same as if the deduction had been made directly from wages.

RELATED CASES: 18 (indirect deductions), 134 (charges against EE for shortages constituted illegal deductions even when provided for in employment contract)

CONTRARY RULINGS: 137 (no indirect deduction found, voluntary payment by employee)

COMMENT: The issue in indirect deduction cases is usually whether payment by EE was voluntary or not. A large part of deciding these issues is the nature of the employment relationship. Where ER informs EE to repay an amount "or else," the violations have generally been found. Where EE terminates and then repays the amount, no violation has been found because ER exercised no further control over EE and payment was deemed to be voluntary.

18 DEDUCTIONS
Indirect

TIP CREDITS

79-296 Erickson v Elias Brothers Restaurants (1980)

ER informed EE that she must reimburse it for shortages occurring during her shift. It was stated that she would pay for the shortages after she cashed her paycheck. EE did so. ER further neglected to deduct a tip credit from EE's first paycheck (a deduction ER could legally have made). EE was instructed again to pay ER the amount of the tip credit after she cashed her check and she did so.

ER violated Section 7. Requiring EE to pay back portions of her wages to ER was deemed to be an indirect deduction. Although repayment may have been voluntary, the net effect of repayment is the same as if the deduction had been made directly from wages. The net effect also reduced EE's wages below minimum wage. The repayment of the tip credit was found not to be a violation because the amount was not earned.

RELATED CASES: 17 (indirect deductions), 23 (shortages)

CONTRARY RULINGS: 6 (tip credits), 137 (indirect deductions)

19 DEDUCTIONS
Overpayment

OVERPAYMENTS
Gratuitous

PREEMPTION
CBA
Federal Preemption

79-219 Ureel v General Cinema Corp (1980)

The parties stipulated at hearing that ER had deducted an amount from EE's wages to recover past overpayments.

ER contended PA 390 is preempted from jurisdiction because the CBA was negotiated under the federal LMRA and EE had not exhausted his administrative remedies under that contract.

The Act and the Department have jurisdiction. Where there may be jurisdiction of the NLRB in some cases, that jurisdiction is not exclusive. The Act does not exempt cases involving

CBAs.

ER violated Section 7. Even though ER may have paid EE for periods when EE did not work and thus earned no wages, it may not make itself whole at some later time by deducting those amounts from later wages without written consent of EE.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

RELATED CASES: 7, 11, 22, 56, 57, 63, 107

CONTRARY RULINGS: 5, 14, 104, 110

OAKLAND COUNTY CIRCUIT COURT: Affirmed 9/22/81

20 COMMISSIONS
In Lieu of Salary

VACATION
Unearned

WRITTEN POLICY
Deductions

79-214 Jackson v National Bank of Detroit (1980)

EE used more vacation time than he had earned. The written policy of ER stated that such excess used vacation would be recovered from EE at termination. ER proceeded to withhold EE's final paycheck to cover two unearned vacation days EE had taken. No written consent.

ER violated Sections 5 and 7. Even though a written policy specifically covered this situation, the Act does not permit recovery by deduction without EE's written consent. Further, the deduction resulted in EE receiving less than minimum wage.

RELATED CASES: 7, 11, 27 (recovery not allowed), 107

CONTRARY RULINGS: 5, 14, 82, 104 (recovery allowed)

21 MINIMUM WAGE
Deductions

79-216 Kirschner v J L Hudson Co (1980)

EE applied for a credit account and signed a document allowing ER to apply any monies due

at termination toward her account balance. At termination EE owed more on her account than she had coming in wages and fringe benefits, so ER withheld these monies and applied them to the account as provided for in EE's signed consent. At a later date ER did return an amount to EE equal to the minimum wage for the hours worked just prior to termination. The written consent had been freely given. The written consent was signed several years before the deduction was made.

ER did not violate the Act. EE's written consent was specifically made to cover this fact situation. Had ER not returned the minimum wage rate to EE, that portion of the deduction would have been found in violation.

RELATED CASES: 4, 16 (written consent), 135

CONTRARY CASES: 23 (written consent inadequate to allow deduction), 134 (written contract inadequate to allow deduction), 3 (discussion of a district court case where written consent was found to be inadequate to allow a deduction)

COMMENT: Apparently as long as the written consent is specific, understandable and applied correctly, there is no need for it to closely predate the deductions made pursuant to it.

22 OVERPAYMENTS

Mistakes

80-833 Pennington v County of Muskegon (1981)

ER mistakenly overpaid EE and deducted the overpayment amount in a subsequent pay period. No written consent for the deduction.

ER violated Sections 2 and 7. Absent written consent, ER may not recover overpayments by deducting them in subsequent pay periods.

RELATED CASES: 7, 11, 19, 22, 29, 107, 142

CONTRARY RULINGS: 4, 14, 82, 104

23 LOSSES CAUSED BY EMPLOYEES

WRITTEN CONSENT

Inadequate

80-666 Dekeil v Sands Motel (1981)

EE signed an agreement providing that shortages he caused could be deducted from wages.

At termination, ER withheld EE's wages to cover shortages he allegedly caused. There was only one signed agreement, and it was meant to cover the entire duration of employment. ER provided no evidence that EE caused the shortages.

ER violated Sections 5 and 7. That portion of the deduction that resulted in less than minimum wage was found to be a violation on its face. The portion above minimum wage became governable by the written agreement. The agreement would be sufficient to allow the deductions if in fact ER could prove EE caused the shortages. Lacking that essential element, the written agreement was found to be unenforceable and the deduction was a violation.

RELATED CASES: 3 (discussion of a district court ruling that found written consent inadequate), 134 (written contract inadequate to allow deduction), 13 (written consent)

CONTRARY RULINGS: 4, 16, 21, 135 (written consent adequate)

24 THEFT

Alleged

81-2186 Wynn v Burger King (1981)

ER withheld EE's final paycheck because it alleged EE had stolen promotional merchandise. No written consent for the deduction.

ER violated Section 7. No authority in the Act to make deductions without written consent of EE.

RELATED CASES: 8, 144 (even where a conviction was obtained the deduction was not allowed)

CONTRARY RULINGS: 105, 109 (conviction of theft of cash that EE doesn't pay back may allow deduction)

COMMENT: Alleged thefts are not recoverable without written consent. Theft proven by conviction is treated differently depending on whether the theft is of currency or cash, materials, supplies or merchandise. See the related and contrary cases above for the distinctions.

25 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

79-308 Gross v Sessions Building and Remodeling (1980)

Complainant performed a sales function for Respondent. Throughout the course of employment, Respondent provided Complainant with a company car, leads for sales, office space, and deducted taxes and social security amounts from Complainant's pay. Respondent further directed and controlled Respondent's activities. Respondent deducted an amount from Complainant's pay without written consent and claimed Complainant was not an EE and therefore not subject to the Act.

ER violated Section 7. Complainant was found to be an EE of Respondent. The test of EE v independent contractor is that where a contract relationship exists, the rights of the employer extend only to the results to be accomplished and not to the methods to be used. Also, it was clear from the evidence that Respondent controlled and directed Complainant, paid wages, and acted in every manner as Complainant's ER.

RELATED CASES: 33, 69, 81

CONTRARY RULINGS: 32, 132

26 LOSSES CAUSED BY EMPLOYEES

80-1248 Harris v Mr Tile Co (1981)

ER took a deduction from EE's wages to cover a bank deposit EE allegedly lost. EE paid ER for part of the loss with a personal check. ER contended that since EE paid for the part of the loss, the signature on EE's personal check acknowledged the debt and authorized ER to deduct the remainder from wages. No specific written consent for the deduction.

ER violated Section 7. Losses caused by EEs are not recoverable by deductions without EE's specific written consent. The written consent must expressly provide for a deduction from wages.

RELATED CASES: 1, 2, 3, 74 (written consent required), 134 (even a written contract was not sufficient to allow deductions)

CONTRARY CASES: See "THEFT - Proven"

27 WRITTEN POLICY

Deductions

80-1220 Knowlson v Ottawa Silica Co (1981)

EE used more vacation time than earned. ER deducted the excess amount from final wages in accordance with a company policy specifically providing for such deduction. No written consent for the deduction.

ER violated Section 7. The Act does not allow an ER to make deductions pursuant to its own policies. EE written consent is required.

RELATED CASES: 20, 74 (written policies inadequate to allow deduction), 134 (even written contract insufficient to allow deduction)

CONTRARY RULINGS: 5 (recovery of unearned sick time allowed), 14 (deduction to offset unearned wages), 82

28 COMMISSIONS

Deductions

80-1102 Sorter v Leo E Morris Co (1981)

ER withheld payment of EE's earned commissions because two of EE's prior sales for which he was paid commissions were uncollectible accounts for the business. No written consent for the deduction.

ER violated Section 7. No provision in the Act to deduct wages without written consent.
RELATED CASES: 77, 108 (deductions from commissions not allowed), 134 (written contract not sufficient to allow deductions)

COMMENT: Generally PW case law has viewed commissions as being wages paid for making a sale, and absent some specific provision in the employment agreement or company policies, ERs have not been allowed to condition payment of an earned commission on the performance of a third party. Par. 134 cites a case where even a written contract of employment providing for deductions from commissions based on EE conduct was not sufficient to allow withholding of an earned commission.

29 OVERPAYMENTS
Mistakes

80-1094 Yon v Walker Buick-Opel-Datsun, Inc (1981)

ER mistakenly paid EE twice for the same sale and subsequently deducted the overpayment in a later pay period. No written consent for the deduction.

ER violated Section 7. No authority in the Act to deduct monies without EE's written consent.

RELATED CASES: 7, 11, 19, 22, 142

CONTRARY RULINGS: 5, 14, 104, 110

30 EMPLOYMENT RELATIONSHIP
Partnerships

79-293 Hammond v LeDisco, Inc (1980)

ER and EE had an arrangement whereby EE would be compensated by sharing the profits of the business. EE acted as manager and worked without supervision most of the time. EE did not pay bills nor incur liabilities. EE offered to purchase the business from ER but was turned down. When the business closed, ER did not pay EE and claimed he was not an EE, but a partner, and therefore not subject to the Act.

ER violated Section 5. Profit sharing was viewed as a wage agreement and did not constitute partnership. The business was solely in ER's name and the fact that EE was turned down in his offer to purchase indicates he had no ownership rights or liabilities previous to the offer. Therefore, he could not be considered a partner. The relationship must be considered EE/ER and be subject to the Act.

CONTRARY CASES: 31

31 EMPLOYMENT RELATIONSHIP
Partnerships

79-149 Habashi v Foto Art Marketing Service, Ltd (1980)

Complainant, who worked for a different company, made a service call on Respondent. A discussion was had concerning Complainant and Respondent becoming partners in Respondent's already established business. However, Complainant was not able to fulfill his capital contribution to the arrangement and the arrangement thus ended. During the period

when Complainant was attempting to secure his capital, he did perform services at Respondent's business, including directing Respondent's EEs. Respondent did not pay Complainant for these services.

Respondent did not violate the Act. Complainant was a potential investor in the business and not an EE. Although he did perform services for Respondent, they were performed in connection with the parties' intention that Complainant would become a partner in the business.

CONTRARY CASES: 30

32 EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

80-978 Ciullo v Swiger, CPA (1981)

Respondent permitted Complainant to work as a favor so Complainant could gain the required one-year experience to get a license in his field. Respondent agreed to pay Complainant $15 per hour for the time Complainant spent working on accounts Respondent gave him. Complainant also performed work on accounts not connected with Respondent. Complainant reported to and left Respondent's place of business whenever he wanted to and Respondent exercised no control over Complainant, nor did it deduct taxes or fill out W-4 or W-2 forms for monies paid Complainant. Further, it did not direct his work activities. Complainant assumed that he was an EE. Respondent did pay Complainant some monies.

Respondent did not violate the Act. The evidence failed to show that Respondent controlled or directed Complainant in a manner that would indicate an EE/ER relationship.

RELATED CASES: 35, 132

CONTRARY CASES: 25, 33, 69, 81

33 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

80-960 Otto v Detroit Hypertension Control Program (1981)

Complainant performed work at Respondent's place of business, utilized Respondent's equipment and was supervised by Respondent's employee. Respondent made legal tax deductions from Complainant's wages and provided benefits to Complainant. Complainant's supervisor informed her she would receive a retroactive pay raise under a new employment contract but the contract was never executed. Complainant filed a claim for the difference between her pay rate and the raise. Respondent claimed no employment relationship.

ER did not violate the Act. Complainant was an EE based on the economic reality test. EE had no right to the raise since the new contract was never executed.

RELATED CASES: 25, 69, 81 (employment relationships)

CONTRARY RULINGS: 32, 35, 132 (employment relationships)

COMMENT: This decision cites several cases that set forth the principle of the economic reality test for employment relationships.

34 EMPLOYMENT RELATIONSHIP
President as EE

80-929 Hemstock v Peninsula Supply

Complainant was president of Respondent corporation and was terminated at the time he was to start his vacation. A written policy provided for payment of vacation benefits for EEs. Complainant claimed unpaid vacation benefits and expenses. The written policy did not provide for expenses.

LEGAL ARGUMENT: The Department of Labor contended that a president is not an EE.

ER violated Sections 2 and 5. There is nothing in the Act that distinguishes the president of a company as being anything other than an EE. No violation concerning expenses, since there was no written policy providing for them.

CONTRARY CASES: 96 (expenses)

(Decision Not Available for Review)

35 EMPLOYMENT RELATIONSHIP
Independent Contractor Relationship Found

80-793 Robinson v Williams & Richardson Co (1981)

Complainant entered into an agreement to construct three pumps at Respondent for $600 each. Complainant constructed two pumps and was paid $1,200. The contract to construct the third pump was terminated. Complainant contended he worked some hours on the third pump and should be compensated. There was no discussion between the parties of a wage.

Respondent did not violate the Act. Complainant failed to provide any evidence that he was an EE of Respondent.

RELATED CASES: 32, 132

CONTRARY CASES: 25, 33, 69, 81

36 EMPLOYER IDENTITY

EMPLOYMENT RELATIONSHIP
Interlocking Corporate Entities

SEVERANCE PAY
Parent Company Policy

VACATION
Payment at Termination
Written Contract/Policy

80-906 Schultz v Precision Cold Forge (1981, 1983)

EE claimed severance pay from ER. ER did not have a policy that provided for severance pay, but ER's parent company did. EE claimed that ER must be bound by parent company's policies.

EE was also not paid for two weeks' vacation pursuant to a written policy providing for two weeks' vacation after completion of one year of service.

No violation as to severance pay. ER was not bound by its parent company's policies when in fact it had its own policies and there was no showing that ER was only an agent of the parent company. ER ordered to pay EE two weeks' vacation due in the amount of $961.54 pursuant to the written policy.

RELATED CASES: 79, 138 (employer identity), 114, 75 (severance pay)

37 BURDEN OF PROOF
Recordkeeping

80-675 Minter v Michigan Maintenance (1981)

The CBA provided for partial payment of accumulated sick time at termination. EE testified she had X number of hours accumulated. ER disagreed with the amount of hours but offered no evidence to substantiate the number of hours it claimed were due.

ER violated Section 4. It was ER's duty to keep track of hours. When it produced no

evidence as to the amount, the Court is bound to accept the credible testimony of EE, even if it is only a reasonable approximation.

RELATED CASES: 40

CONTRARY RULINGS: 109, 112 (where ER produces records, they adequately rebut EE's approximations)

38 BURDEN OF PROOF
Appellant

80-661 Gordon v Boron Oil Co

Department issued a determination finding no violation, from which EE appealed. EE did not appear at the hearing.

Appeal dismissed. The Appellant had a duty to appear and present competent evidence concerning his disagreement with the DO.

RELATED CASES: 41, 70

CONTRARY RULINGS: 39

COMMENT: There is an administrative rule pending that would place the burden of proof on the Appellant in all cases.

(Decision Not Available for Review)

39 BURDEN OF PROOF
Appellant

80-566 Ortiz v Clark Oil Services

Complainant and Respondent failed to appear at the hearing. The Department offered no testimony.

The case was dismissed because the Department could offer no evidence to substantiate that ER violated the Act.

CONTRARY CASES: 38, 41

COMMENT: There is an administrative rule pending that would place the burden of proof on the Appellant in all PW cases.

40 BURDEN OF PROOF

Recordkeeping

Inconsistently Kept

WAGES PAID

Recordkeeping

Time Worked

79-160 Bastien v Rosebud's Restaurant (1980)

ER did not keep records of EE's time worked. EE quit working because he was not getting paid for all hours worked. EE testified as to hours worked, and ER testified as to monies paid, but could only produce verification for a portion of his testimony.

ER violated Section 5. It is EE's burden to prove time worked. In this case, since EE testified to time worked and ER had no records, ER had no basis on which to dispute EE's accounting. Therefore, EE's evidence was controlling.

RELATED CASES: 37, 40

CONTRARY RULINGS: 109, 112 (Where ER does produce records, they adequately rebut EE's approximations)

41 APPEALS

Dismissed

Failure to Attend Hearing

BURDEN OF PROOF

Appellant

81-1449 Morgan v Village of Caseville

Complainant appealed the Department's DO and did not appear at the hearing.

Appeal dismissed. The Appellant has a duty to appear and present competent evidence on why the DO was in error.

RELATED CASES: 38, 70

CONTRARY CASES: 39

COMMENT: There is an administrative rule pending that would place the burden of proof

on the Appellant in all PW cases.

42 EVIDENCE

Hearsay

80-744 Stepp v Spartan Oil Corp (1981)

EE did not attend the hearing but sent a document in supporting his claim. There was no corroborative testimony on the document offered at hearing.

ER did not violate the Act. The hearsay document was insufficient to support a finding of a violation without any supporting testimony.

43 RETROACTIVITY OF ACT 390

79-368 Ott v Shepard

EE's work gave rise to the filing of a claim occurring prior to the effective date of the Act. The Department has no jurisdiction to proceed in matters predating the Act.

RELATED CASES: 46
(Decision Not Available for Review)

44 APPEALS

Telephone
Untimely
Good Cause Not Found
Moves After Receiving DO

79-243 Zimbelman v Center for Foreign Study (1980)

EE filed an appeal of the DO one day late and offered that she had moved after having received the DO. She stated that someone from MESC authorized her over the telephone to file a late appeal.

Appeal dismissed. Good cause must be shown for filing a late appeal. In the instant case the fact that EE moved after having received the DO was not good cause. As MESC has nothing to do with the Payment of Wages Act, that agency does not have the authority to grant an extension of time.

RELATED CASES: 49, 51 through 55, 65

CONTRARY RULINGS: 131 (DO so unclear that a reasonable person would not know he should appeal); 140 (DO was not sent to attorney of record. ER testified it did not receive DO either.)

45 WRITTEN CONSENT

Damages

88-6855 Daniels v George Kirk dba Specialty Cleaners (1988)

EE worked as a seamstress at ER's business. EE's sewing machine needed repairs which ER deducted from EE's paycheck. EE was not informed that she was responsible for any damage to machines.

ER violated Section 7 by deducting wages absent a written consent.

See General Entry III.

46 RETROACTIVITY OF ACT 390

79-123, et al Placilla, et al v Billie Jean King Tennis Center (1980)

EE filed a claim for fringe benefits that were not paid. The alleged violation occurred before the effective date of Act 390.

No jurisdiction. The Act does not apply retroactively.

RELATED CASES: 43

OAKLAND COUNTY CIRCUIT COURT: Affirmed 8/24/81

47 BANKRUPTCY

79-92 Kitchen v Pioneer Foam Insulation Co

ER was discharged in bankruptcy prior to hearing date.

The Hearings Judge elected not to take jurisdiction because a claim for wages is also properly dischargeable under the Bankruptcy Act.

RELATED CASES: 61

(Decision Not Available for Review)

48 CLAIMS

Timeliness Of

80-874 Suber v Michigan Department of Social Services (1981)

EE filed his claim more than 12 months after the alleged violation.

No jurisdiction. The statute is clear that claims must be filed within 12 months of the alleged violation.

RELATED CASES: 64, 141

49 APPEALS

Good Cause Not Found

Lack of Information to Defend

80-761 Roseberry v Jiffy Car Wash

ER filed a late appeal and claimed that the Department had not provided it with enough information to prepare an adequate defense.

Appeal dismissed. Good cause was not shown for filing the late appeal.

RELATED CASES: 44, 51 through 55, 65

CONTRARY CASES: 131, 140

(Decision Not Available for Review)

50 ADJOURNMENT OF HEARING

Good Cause

80-428 Jakubiec v Family Heating (1980)

ER telephoned the Hearings Judge on the date of the hearing and stated he had mislaid the Notice of Hearing and made another commitment for that date. He requested an adjournment of the hearing.

Request for adjournment denied. A party must show good cause for an adjournment to be granted at such a late time.

COMMENT: Generally when requests for adjournment are received well in advance of a hearing and there is a good reason for the request, or if the other party does not object, adjournments have been granted.

51 APPEALS

Telephone
Untimely
Appeal Must Be in Writing or in Person

80-630 Osgood v Fleming International Airways

ER filed a late appeal to the DO. It claimed that since it was in Florida, 14 days is insufficient time to get an appeal in on time through the US Postal Service. It also claimed that it had made an appeal by telephone to the Wage Hour Division within the 14 days, and the Act does not require an appeal be in writing.

Appeal dismissed, good cause not shown. Fourteen days is sufficient time to file an appeal through the postal service. The DO states on its face that appeals must be in writing or in person.

RELATED CASES: 44, 49, 52 through 55, 65

CONTRARY RULINGS: 131, 140

COMMENT: Wage Hour Rule 30(4) now requires appeals to be in writing.

52 APPEALS

Untimely
Good Cause Not Found
Delay in Processing

80-896 Mangold v Gallery Stores, Inc (1981)

ER filed a late appeal and claimed that either the postal service or Wage Hour Administration delayed its processing.

Appeal dismissed, good cause not shown. ER's allegations as to the postal service or Wage Hour Administration causing the delay were unsubstantiated.

RELATED CASES: 44, 49, 51, 53 through 55, 65

CONTRARY RULINGS: 131, 140

53 APPEALS

Untimely

Good Cause Not Found

Delay in Processing

80-880 Ricks v Bilalian Child Development Center

ER filed a late appeal and claimed it would have been on time were it not for a postal service delay. The appeal was dated prior to the due date, but the postmark was only one day prior to the due date. The appeal arrived at the Department one day late. ER claimed that it had deposited the appeal with the postal service five days prior to the postmark.

Appeal dismissed, good cause not shown. There was no evidence to support the argument that the postal service delayed the processing of this piece of mail.

RELATED CASES: 44, 49, 51, 52, 54, 55, 65

CONTRARY RULINGS: 131, 140

54 APPEALS

Untimely

Good Cause Not Found

Extension of Statutory Time Limits

Vacation, Extended Trip, Out of State

80-848 Logan v Greg's Clark Service

ER filed a late appeal and stated he was on vacation during the time the DO arrived at his business. He prepared the appeal and mailed it immediately upon his return from vacation, but it arrived at the Department two days late. He claimed he should be given credit for the two days it was on route through the postal system. The appeal was postmarked on the date it was due in the Department.

Appeal dismissed, good cause not shown. The fact that ER was on vacation did not negate the requirement for a timely filing. ER should have made arrangements for someone else to handle important matters during his absence. There is no provision in the Act for the Hearings Judge to extend statutory time limits to accommodate handling by the postal service.

RELATED CASES: 44, 49, 51 through 53, 55, 65

CONTRARY RULINGS: 131, 140

55 APPEALS

Untimely

Good Cause Not Found

Vacation, Extended Trip, Out of State

80-830 Meeker v Micro Platers Sales

ER filed a late appeal and testified he had been visiting a sick relative out of state and did not realize the importance of filing his appeal in a timely manner.

Appeal dismissed, good cause not shown. ER should have had a responsible person assigned to handle matters of importance during his absence.

RELATED CASES: 44, 49, 51 through 54, 65

CONTRARY RULINGS: 131, 140

56 COLLECTIVE BARGAINING AGREEMENT (CBA)

Authority to Interpret

PREEMPTION

Federal Preemption

80-1038 Oldis v Northville Public Schools (1981)

ER claimed that EE's claim had been dealt with under the CBA and the Department of Labor had no authority to interpret the agreement.

The Department does have jurisdiction to determine whether ER properly applied the terms of the CBA. In the instant case it was found that ER did apply the terms of the agreement properly and there was no violation.

RELATED CASES: 45, 57, 63

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

57 PREEMPTION

CBA

Federal Preemption

80-982 Diener v Crown Furniture Co (1981)

ER claimed that the Department was preempted from applying the Act to EE's claim, since

there was a CBA in effect with provisions for binding arbitration. EE testified that he had unsuccessfully tried to invoke the grievance procedure.

A CBA does not preempt the Act. An EE's rights under the Act are not affected by any rights he may have under a CBA.

RELATED CASES: 45, 56, 63

COMMENT: The decision in this case discusses Ballentine v Arkansas Best Freight Systems, a federal case holding that CBAs do not preempt EEs' rights provided for by law.

58 BANKRUPTCY

JUDICIAL PROCEEDINGS

80-961 Matras v Architectural Research **(1981)**

EE filed an appeal with the Wage Hour Division and a suit in circuit court on the same subject matter.

Appeal dismissed without prejudice. The relief available via circuit court is more complete than that available under the Act, and it would not serve the interests of judicial economy to have the case heard in both forums. Should the circuit court refuse to hear the case, it may be reopened and redocketed under the PW Act.

RELATED CASES: 47, 61

COMMENT: Jurisdiction over appeals generally has been relinquished by PW Hearings Judges when the case has also been filed in a court of general jurisdiction.

59 TERMINATION

Propriety Of

80-914 Baldwin v Delta College **(1981)**

ER involuntarily terminated EE. EE claimed that the termination was improper and made a claim for wages retroactive to the time of the termination.

No jurisdiction. There is no authority under Act 390 that would allow the Department to make a determination as to whether a termination was proper or not.

COMMENT: Even if a termination was improper, there is no authority in the Act to order payment of wages for work that was not performed.

60 DETERMINATION ORDER - Issuance Within 90 Days
Amendment of DO

80-891 Turco v Meade Oil (1981)

DO became final when neither party appealed within 14 days. Two years later the Wage Hour Division decided its original determination had been in error and issued an amended determination. EE appealed this amended determination.

The Wage Hour Administration had no authority to amend or reopen a determination that had become final by operation of law. Accordingly, the original determination stands as final.

RELATED CASES: 62, 129

61 BANKRUPTCY

81-1356 VanEpps v B & B Landscaping

An involuntary bankruptcy had been filed against ER and the US District Court had jurisdiction in that case.

ER appeal was dismissed since the federal District Court had jurisdiction in the bankruptcy proceeding and a claim for wages may be adjudicated in that forum. The case could be heard under Act 390 if the Hearings Judge chose to hear it because Section 362(b)(4) of Title II permits proceedings under regulatory acts.

RELATED CASES: 47, 58

62 DETERMINATION ORDER - Issuance Within 90 Days
Amendment of DO

81-1840 Bailey v JWR Brokers (1981)

DO became final when neither party appealed within the 14-day limit. At some later time the Wage Hour Division sought to amend the DO. ER appealed from the amended order.

Amended DO and appeal dismissed. The Wage Hour Administration does not have the authority to amend or reopen a DO that has become final by operation of law.

RELATED CASES: 60, 129

KENT COUNTY CIRCUIT COURT: Dismissed 8/29/83

63 PREEMPTION

CBA

Federal Preemption

80-868, et al **Wrubel and Kalt v The Detroit News** **(1981)**

ER claimed that since EE's claim had been previously handled via the grievance procedure in the CBA, the claim could not be adjudicated under Act 390.

A CBA does not preempt the Act, and any rights an EE has under such an agreement do not affect his rights under Act 390.

RELATED CASES: 45, 56, 57

64 CLAIMS

Timeliness Of

81-1593 **Kamysiak v Concrete Systems, Inc** **(1981)**

Under the terms of a union contract, ER was supposed to pay monies into a vacation fund for the benefit of EE. The monies would be payable to EE at a future date. When EE attempted to use the funds, it was determined that ER had failed to deposit them in the account. EE filed a claim approximately 11 months after he attempted to use the funds and thereby discovered that ER had failed to deposit them.

EE's claim was dismissed. The alleged violations took place at the time ER failed to make the deposits, not at the time when EE discovered this fact. Therefore, any claim must have been filed within 12 months of the time of the alleged violation, not 12 months from EE's discovery of the violation.

RELATED CASES: 48, 141

65 APPEALS

Untimely

Good Cause Not Found

Extension of Statutory Time Limits

Parties Negotiating

81-1329 **Budd v Horticultural Creations**

Upon receipt of the DO, ER made an offer for settlement to EE. ER waited until EE responded to its offer before it filed an appeal of the DO. The appeal was filed late.

Appeal dismissed, good cause not shown. The Act does not provide for an extension of the appeal period because the parties are in negotiations. ER had a duty to file the appeal within the statutory time limits.

RELATED CASES: 44, 49, 51 through 55

CONTRARY RULINGS: 131, 140

(Decision Not Available for Review)

66 BONUSES

EVIDENCE
Parol Evidence

PAROL EVIDENCE

WRITTEN CONTRACT
Parol Evidence

80-692, et al **<u>Farr, et al</u> v <u>Diecast Corp</u>** **(1981)**

A CBA provided that EEs would be paid bonuses in December of each year and that the bonus would be calculated based on the earnings of the EE from January 1 to December 1 of the year in which the bonus would be paid. EE retired in September and was not paid a bonus. The CBA did not specifically say that EEs must be employed at the time bonuses are paid, but ER had always administered the bonus program in that fashion. ER did not pay EEs a bonus because EEs were no longer employed when the bonuses were given in December.

The CBA was so vague that it required examination of parol evidence to determine the intent of the parties. The fact that other EEs who were no longer employed at the time bonuses were paid ever got one, combined with the fact that bonuses were calculated on January to December earnings, convinced the Judge that it was the intent of the parties that bonuses would only be paid to persons employed at the time the bonuses were due to be distributed (December). Since EEs were not employed at that time, they were not entitled to a bonus. ER did not violate the Act.

RELATED CASES: 68 (bonus, parol evidence), 89 (written policy unenforceable)

CONTRARY RULINGS: 77 (parol evidence not considered)

COMMENT: Generally parol evidence is only considered where some essential part of the policy or contract is silent or ambiguous. Some policies do not spell out what an EE must do

to become eligible for a benefit.

67 EVIDENCE
Silence as an Admission

REHEARING

WRITTEN POLICY
Fringe Benefits

81-1358 Probelski v Consolidated Dairies of Michigan (1981)

ER did not appear at the hearing. EE testified that ER had adopted a written fringe benefit policy from another company (both companies owned by the same person) and that the policy was to apply to the instant ER also. A decision was issued in EE's favor and ER requested a rehearing.

Rehearing denied, good cause not shown. When ER failed to appear at the original hearing to rebut EE's testimony, it could reasonably be inferred that any evidence ER possessed may have been construed against its own interests. Thus, the testimony of EE was accepted as controlling. ER requested a rehearing but offered no reasons why the rehearing should be granted other than the fact that the decision in the original hearing had been against it. The record of the first hearing was adequate for review.

68 BONUSES

EVIDENCE
Parol Evidence

PAROL EVIDENCE

VACATION
Payment at Termination

WRITTEN CONTRACT
Parol Evidence

80-686, et al Bostwick, et al v Diecast Corp (1981)

ER's written fringe benefits policy provided that a Christmas bonus would be paid to EEs during the first three weeks of December each year. The policy itself did not state what EEs must do to earn the bonus. The policy did state that the bonus would be computed based on earnings between January 1 and December 1 of each year. EE, who was terminated in

midyear, made a claim for a prorated bonus. ER claimed that although not written, it was the policy only to pay the bonus to EEs on the payroll at the time the bonuses were due (first three weeks of December).

ER did not violate the Act. The wording of the policy was so vague as to require parol evidence to explain how the policy had been interpreted and followed by the parties in the past. The Hearings Judge made a determination that it was the intent of the policy only to pay the bonus to those EEs on the payroll at the time the bonus was paid.

Vacation pay was also payable under a CBA and was earned by EE. ER did not pay the benefit because it claimed since EE terminated and no longer was an EE that he was also no longer subject to the CBA. The agreement itself was silent as to any requirement that EE must be employed on any certain date to receive the benefit. ER violated Section 3. The benefit was earned by EE and absent any provision in the agreement disqualifying EEs who don't work a full year or who terminate, the previously earned benefit must be paid.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

RELATED CASES: 66, 71, 89, 91, 126

CONTRARY RULINGS: 77, 82, 127

69 EMPLOYER IDENTITY

EMPLOYMENT RELATIONSHIP
EE/ER Relationship Found

81-1439 Poindexter v Smithers (1982)

A third party contracted Respondent to erect a pole barn. Under the contract, Respondent was permitted to hire additional people as necessary to complete the work. Respondent contracted Complainant for certain services after receiving permission from the third party to do so. Respondent supervised Complainant, permitted him to work, purchased materials for use by Complainant in the work, kept time records on Complainant. Respondent was paid for the pole barn by the third party. Complainant was not paid and filed a claim against Respondent. Respondent claimed that Complainant was not his EE, but the EE of the third party.

ER violated the Act. Complainant was Respondent's EE. All negotiations and agreements made by Complainant were with Respondent. It was Respondent who permitted Complainant to work, supervised him and kept track of his time.

RELATED CASES: 25, 33, 81

CONTRARY CASES: 32, 35, 132

70 BURDEN OF PROOF
Appellant

81-1441 Cronk v Birmingham Motors, Ltd

EE claimed ER did not pay him commissions in accordance with the wage agreement but offered no evidence or testimony other than his allegations.

ER did not violate the Act. The moving party in any case must establish its case by a preponderance of the evidence, and unsubstantiated allegations are insufficient.

RELATED CASES: 38, 41

(Decision Not Available for Review)

71 VACATION
Payment at Termination

WRITTEN POLICY
Fringe Benefits

80-962 Petteys v Riverside Pontiac-Buick-GMC (1982)

ER's written policy provided for certain vacation benefits to be earned in one year and taken the next year. At some point ER posted a new policy which stated that all benefits under the old policy were canceled. At termination EE made a claim for those benefits he had earned up until the cancellation. ER did not pay the benefits.

ER violated Section 3. ER may not cancel benefits already earned.

RELATED CASES: 68, 126

SHIAWASSEE COUNTY CIRCUIT COURT: Affirmed 12/20/82

72 VACATION

Gratuitous Payment in Lieu of Payment at Termination
Payment at Termination

WRITTEN POLICY

Amendment
Subsequent Agreements

81-1388 Baert v Michigan Abrasive Co, Inc (1982)

ER's vacation policy stated that EEs would be paid all earned vacation at termination. ER issued a check to EE and sent it along with a letter that stated the check was for vacation and severance pay. ER had no written policy providing for severance pay. The check total was greater than EE's earned vacation. EE made a claim for earned but unpaid vacation.

ER did not violate the Act. Under the written policy ER was obligated only to pay vacation pay, not severance. Since the amount EE received was greater than his earned vacation, it was concluded that he had received everything he was entitled to under the policy and more.

RELATED CASES: 36 (severance pay), 94, 145 (gratuitous payment applied to earned fringe benefits)

CONTRARY CASES: 90

COMMENT: Generally where an ER owes EE an amount under a written policy and does pay EE an amount equal to or greater than the obligation, regardless of what the payment is called, it discharges ER's obligation. The contrary case at par. 90 is in direct opposition to this view.

73 OVERTIME

SICK PAY

Offset by Vacation
Proration

80-1024 Green v Legal Aid Defender Association (1982)

ER's policy stated that overtime would only be paid with prior approval from supervisor. Sick pay policy stated EEs would receive 15 sick days per year, but did not specify how those days were earned or put any other qualifications on them. Policy also provided vacation days without qualifications. When EE terminated, ER did not pay balance of

vacation days, arguing that sick days were prorated and EE had used sick days he had not yet earned, so ER claimed the right to offset this excess sick time taken by withholding vacation

pay. ER further paid no overtime and offered testimony that it had never approved overtime for EE.

Violation as to withholding vacation pay. No violation as to overtime. ER's policy did not provide that it could deduct excess sick time taken from any vacation that was owing. Further, as the policy on sick pay had no stipulations as to how it is earned, EE had the right to the full 15 days at the beginning of his employment. Therefore, the sick time taken was not excess, and there was no basis for ER to offset it by withholding vacation benefits. Any overtime EE worked was without the approval required by ER's written policy, and, therefore, no overtime is due to EE.

CONTRARY CASES: 93

74 EMPLOYEE ERRORS

LOSSES CAUSED BY EMPLOYEES

WRITTEN POLICY
Deductions

81-1950 Johnson v On The Rocks Carry Out (1982)

ER had a written policy forbidding EEs from cashing checks for customers and stating that if EE did cash a check, they would be responsible for the amount. EE cashed a check for a customer and the check was NSF. ER withheld the amount of the check from EE's wages.

ER violated Section 7. A unilateral written policy by ER does not allow deductions without specific EE written consent, even where there is EE misconduct.

RELATED CASES: 26, 134

75 SEVERANCE PAY

WRITTEN POLICY
Fringe Benefits

81-1770 Gesmundo v Vlachos/Jerkins & Hurley, PC (1982)

At termination ER provided EE with a letter stating she would receive one-week severance pay. ER did not pay the severance pay and claimed the letter was not a policy as it applied only to one EE. EE performed no work after receiving the letter.

ER did not violate the Act. Due to the fact that EE performed no further services for ER

after receipt of the letter, there was no consideration given by EE and thus the letter did not constitute a binding contract.

RELATED CASES: 36, 114

CONTRARY CASES: 88, 95, 123

76 EQUITABLE CLAIMS

WAGE AGREEMENTS
Verbal

81-1359 Royston v Eaton County Juvenile Court (1981)

EE's supervisor was discharged, and EE was told she would now be in charge of the office temporarily until a new supervisor was found. EE performed the supervisory duties for a period and applied for the position but was not chosen for it. There was never any discussion between ER and EE about any additional compensation for the additional duties. EE made claim for compensation at the supervisory rate for that period she had performed those duties, but ER only paid her normal salary.

ER did not violate the Act. In the absence of any specific wage agreement between the parties, the Act has no authority to provide equity. As ER never promised any additional compensation, it was not required to pay it.

RELATED CASES: 106

77 COMMISSIONS
Earned

EVIDENCE
Parol Evidence

PAROL EVIDENCE

WRITTEN CONTRACT
Parol Evidence

81-1508 Fowler v Cornerstone Publishing/Lansing Magazine (1982)

ER did not pay EE a commission on an account EE had sold. ER claimed it was industry standard and well known by EEs that commissions would not be paid if the account sold by EE turned out to be a bad debt. However, the contract of employment stated that

commissions were due to EEs on the accounts receivable billing date.

ER violated the Act. Where a contract of employment specifically states the terms under which a commission will be paid, one may not go outside of that contract to parol evidence or industry standards. ER must be bound by its own written contract.

RELATED CASES: 28, 108 (commissions)

CONTRARY RULINGS: 66, 68 (parol evidence), 89 (written policy unenforceable)

78 WRITTEN POLICY

Fringe Benefits
Notice to Terminate Requirements

81-1429, et al Nickless, Raeburn & Heft v Aquinata Hall (1982)

ER had a written policy governing the payment of sick and vacation pay at termination. The policy stated that in order to receive these benefits, EEs "are asked" to give 30-day notices of intent to leave employment. EE did not give a 30-day notice and ER did not pay the benefits. A prior written policy had stated EEs are "required" to give notice to receive the benefit.

ER violated Section 3. When ER changed the wording of the written policy from "required" to "are asked," the provision for the 30-day notice became permissive rather than mandatory. As the policy was unilaterally prepared and executed by ER, ER must be required to adhere to the strict literal meaning of the words contained in the policy. Therefore, failing to provide notice did not release ER from its responsibility to pay earned benefits.

RELATED CASES: 84

79 EMPLOYMENT RELATIONSHIP

Interlocking Corporate Entities

81-1620, et al Raica, et al v FM 101, Inc (1982)

Complainants were not paid and made a claim against a person they thought to be their ER. Evidence at the hearing showed conclusively that Respondent was merely a manager and although he had tried to buy the business, the sale was never consummated.

Respondent did not violate the Act. The person named as Respondent in the case was not in fact the ER. An EE's belief is not enough to establish an employment relationship. Complainants may have a claim against the actual owner of the business.
RELATED CASES: 36, 69, 138

80 SICK PAY

Payment at Termination

81-1379 Saffell v Community Hospital (1982)

EE worked under a CBA that provided for payment of sick pay at termination. At some time during her employment, she was promoted to management and therefore was no longer under the provisions of the agreement. Management personnel were not permitted payment of sick pay at termination. EE made a claim for payment of that sick pay she had accrued while under the CBA. ER did not pay the benefit.

ER did not violate the Act. When EE accepted the promotion to management, her employment became controlled by management policies for fringe benefits and the management policy did not provide for payment of sick pay at termination.

RELATED CASES: 88, 95

CONTRARY RULINGS: 68

81 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

80-618 Wirbel v Triangle Electronics (1982)

Complainant started working for Respondent under an arrangement whereby he would receive 50 percent of the profits as compensation. Respondent claimed that this made Complainant an independent contractor, not an EE. Respondent directed Complainant's work, set his hours, and eventually did change the compensation from profits to a wage agreement.

ER violated the Act. The facts clearly showed that Respondent fit all the definitions of an ER. (Decision analyzes the definitions of an EE/ER relationship.)

RELATED CASES: 25, 33, 69

CONTRARY RULINGS: 32, 35, 132

82 VACATION
Earned

WRITTEN POLICY
Deductions

80-599 Richardson v Book Couzens Tours (1980)

Fringe benefit policy provided unearned but already used vacation time would be deducted from EE's final pay. The policy did not speak to paying for earned but unused vacation time at termination.

ER did not violate the Act. In the absence of any specific provision in the policy providing for payment of vacation time at termination, ER was not required to make such payment.

RELATED CASES: 5, 127

CONTRARY RULINGS: 20, 27, 68, 91, 126

83 VACATION
Proration

80-559 Mullen v Sault News Printing Co (1980)

ER written policy provided that vacation would be credited to an EE each year in amounts that depended upon EE's length of service. Vacation was earned all at once at the beginning of the year and not accrued throughout the year. EE terminated in midyear and claimed he should be paid half the vacation he would have received at the start of the next year, since he had worked half the year required to earn it.

ER did not violate the Act. Written policy was clear that vacation time was credited at the beginning of each year. An EE had to work a full year before he earned any vacation at all.

RELATED CASES: 124, 127

CONTRARY RULINGS: 68, 126

84 VACATION

Resignation

Adequate Notice

WRITTEN POLICY

EE Knowledge

Notice to Terminate Requirements

80-414 Wilensky v Bank of Lansing (1981)

ER's fringe benefit policy stated EEs must give notice of termination in an amount at least equal to their accrued vacation time in order to be compensated for that time at termination. EE did not know of this policy since it was never communicated by ER to any EEs. Further, EE did verbally notify ER of her termination one week prior to leaving. She had one week of earned vacation pay.

ER violated Section 3. EE's lack of knowledge of the notice requirement, added to the fact that she did give verbal notice that satisfied the notice requirement, were enough to find that EE had complied with the policy.

RELATED CASES: 78

CONTRARY RULINGS: 92 (no requirement that EE know of ER policies)

85 VACATION

Payment at Termination

WRITTEN POLICY

Temporary

79-274 Roeder v David Carrigan & Associates, Inc (1980)

ER had in effect a temporary policy that governed fringe benefits. ER refused to pay EE's earned and unused vacation time at termination. ER claimed that since the written policy was temporary and contained no provision allowing vacation time to be carried over from year to year, it did not have to pay the benefit.

ER violated Section 3. The temporary nature of the policy did not affect the case, since it was in full force and effect during the time for which the claim was made. Had ER intended that vacation time already earned could not be carried year to year, it could have easily included that in the written policy. Since it did not, a benefit once earned must be paid.

RELATED CASES: 68, 71, 126
CONTRARY RULINGS: 62, 127

86 DEDUCTIONS

Damages
Purchases
Uniforms

VACATION

Discharged EE

87-6586, et al Kuznicki and Norden v TLC/Freight Services, Inc (1988)

EEs worked as interstate freight truck drivers and were discharged. They claimed vacation pay and wages were due that had been deducted for alleged damages, personal purchases or uniforms.

ER violated Sections 3 and 7. See General Entry III.

87 WAGES

Withheld
Theft

88-6854 Trahan v Trendell's Truck & Auto Center (1988)

EE worked as a clerk in the parts department. His duties involved ordering parts and taking calls for service. ER withheld EE's last paycheck. ER did not pay EE the monies earned because their records showed that EE owed them $2,300 for parts that were ordered and taken by EE. ER filed a complaint with the Detroit Police Department.

ER violated Section 5 by withholding wages without written consent. Section 7 prohibits ERs from withholding wages as a means of resolving monetary disputes with EEs. Instead, ERs must utilize the judicial remedies available to creditors. ERs are protected by the opportunity to become judgment creditors and collect debts by whatever process is available against EEs' assets.

See General Entries III and XIV.

88 WRITTEN CONTRACT

Amendment

80-574 Porter v A B Bhansali, MD (1981)

ER and EE entered into an employment agreement that provided vacation would be discussed between the two at the end of one year. Slightly prior to the one-year period being up, the two did discuss vacations and ER made a notation on the contract that EE would

receive one week of vacation after one year of employment. When EE terminated, ER did not pay the vacation and claimed the original terms of the contract (discussion after one year) must control the contract.

ER violated Section 3. Even though the contract had a provision providing for a discussion after one year, both parties did discuss and amended the contract prior to that time. The amended contract is enforceable.

RELATED CASES: 95, 123

CONTRARY RULINGS: 75

89 BONUSES

WRITTEN POLICY

Unenforceable

80-746, et al **Trombly, et al v Sarge Harvey Ford** **(1981)**

ER had a written policy that provided for a bonus payment to EEs. The policy stated that the bonus program would depend on several factors but did not state with specificity how those factors were determined. There was no evidence presented at hearing to clarify how the bonus program worked.

ER did not violate the Act. The written policy was so vague as to be unenforceable.

RELATED CASES: 66, 68

90 VACATION

Gratuitous Payment in Lieu of Payment at Termination

80-713 Novick v Michigan State University **(1981)**

ER agreed to keep EE on salary for a period of time even though EE was not performing services. ER assumed that part of the monies paid to EE during this period were his accumulated vacation. EE testified that he had specifically requested that he be kept on salary so that he would still have his vacation pay available at a later time to assist in moving to a new job. When EE finally terminated from the payroll, ER did not pay any accrued vacation, arguing that that amount had already been more than paid to EE by keeping him on salary after he had ceased performing services.

ER violated Section 3. Hearings Judge found that a document from ER authorizing EE to be kept on salary must be read literally, and "on salary" meant continuing to receive his regular

paycheck and did not include vacation benefits. If it was ER's intent to have vacation benefits included in these payments, the document should have so stated.

CONTRARY RULINGS: 72, 94

91 VACATION

Payment at Termination

80-1000 Walker v Livonia Chrysler-Plymouth (1981)

ER's written policy stated that EEs would receive a one-week paid vacation upon completion of one year's employment. EE worked one year, terminated and requested payment for his vacation. ER refused to pay, stating that the policy did not provide for payment in lieu of actually taking the time off.

ER violated Section 3. EE fulfilled the only qualification in the policy, that of working one year. The policy did not specifically prohibit payment in lieu of time off and once a benefit is earned it may not be taken away.

RELATED CASES: 68, 126

CONTRARY RULINGS: 82

92 WRITTEN POLICY

EE Knowledge

80-1233 Gunsberg v Mid-West Paper Products (1981)

ER took over the business from a prior owner and issued a policy that stated it would continue the same benefits as the former owner. Those prior benefits had been strictly verbal, no written policy. The instant ER subsequently made out a new written policy which superseded all former policies. This new policy was enacted the very same day that EE went on sick leave, and, therefore, EE did not know of the new policy. EE was off work longer than allowed by the new sick leave policy, and, therefore, ER applied his vacation time toward the excess sick time taken which was provided for in the new policy. EE made a claim for his vacation pay.

ER did not violate the Act. There is no requirement in the Act that EEs be aware of the written policy of the ER concerning fringe benefits, only that ER pay benefits in accordance with that policy. As ER did follow the policy - no violation.

RELATED CASES: 93
CONTRARY RULINGS: 73 (offset not allowed); 84 (EE knowledge of policy)

93 VACATION

Earned

WRITTEN POLICY

Fringe Benefits

80-1179 Schuster v TWI International

ER's written policy provided that EEs would not be paid sick pay unless ER approved their absence from work. ER further had a clause that stated payment of earned vacation pay at termination was at the discretion of ER. ER did not authorize EE's absence for three sick days and chose not to pay EE for earned vacation at termination.

ER did not violate the Act. In both instances, the written contract specifically provided for the discretion ER made use of.

CONTRARY RULINGS: 73

(Decision Not Available for Review)

94 VACATION

Gratuitous Payment in Lieu of Payment at Termination

80-1033 Gauss v Union Steel Products (1981)

EE had four weeks accumulated vacation when ER terminated him. Although not required by any written policy or contract, ER kept EE on payroll and continued to pay him a salary for several months after EE had ceased performing work. EE made a claim for vacation pay and ER did not pay it.

ER did not violate the Act. EE had received monies from ER that amounted to much more than his vacation pay. Since ER had no obligation to pay these monies, the amount more than satisfied any vacation due EE.

RELATED CASES: 72, 145

CONTRARY RULINGS: 90

95 WRITTEN POLICY

Amendment

Subsequent Agreements

80-890 Kennedy v Midwest Advanced Computer (1981)

ER's written policy provided four weeks' vacation to certain EEs. This EE entered into an agreement with ER to assist ER in transferring accounts to a new firm. EE made claim for vacation benefits, and ER claimed that the subsequent agreement which did not provide for vacation pay was controlling.

ER did not violate the Act. Where a subsequent agreement that changes the terms of employment is entered into knowingly by both parties, that agreement will control the relationship.

RELATED CASES: 88, 123

CONTRARY RULINGS: 75

96 EXPENSES

80-840 Gumpp v American Way Service Co (1981)

A document written by ER showing that it owed reimbursement to EE for telephone calls was sufficient to require ER to pay the benefit.

CONTRARY RULINGS: 34

97 RETIREMENT

80-817 Gilpin v City of Hillsdale

EE terminated employment to accept another position. ER's written policy provided for payment of one half of all earned sick leave to EEs who "retired." ER did not pay the benefit because EE did not retire, but merely quit to accept another job. EE was not eligible for retirement benefits under the company's retirement program.

ER did not violate the Act. The written policy was clear that in order to receive the benefit EE must retire. EE did not retire and therefore was eligible for the benefit.

(Decision Not Available for Review)

98 COMMISSIONS

Conflicting Payment Plans

79-244, et al Tegge and Freeman v Michigan Food and Beverage (1980)

EEs made claim for unpaid commissions and presented a commission schedule through a

witness. Respondent witness presented a different commission schedule and EEs stated they had never seen nor heard of it. ER's schedule, due to its makeup, would have resulted in EEs owing money to ER. EEs' supervisor also testified that he had never seen the commission schedule offered by ER.

ER violated Section 5. Evidence presented about ER's commission schedule was highly improbable based on the fact that it would have resulted in EEs owing the company money. Testimony of EEs' supervisor was given more weight and ER must pay the commissions based on that schedule.

99 COMMISSIONS

Payment

After Separation

79-231 Lamb v Mid-States Mortgage Corp (1981)

EE was to be paid commissions on sales. When EE terminated, he had made some sales that had not yet been closed by the business. ER withheld payment of these commissions, arguing that it does not have to pay the commission until the sale is finalized and that when the sales in question were finalized, EE was no longer working for the company.

ER violated Section 5. Evidence established that as a salesman, EE's duties only included making a sale and not closing it. Therefore, EE earned the commission at the time he made the sale.

RELATED CASES: 102, 117, 122

100 MISREPRESENTATION BY EMPLOYEE

UNAUTHORIZED WORK

79-187 Moore v Olsonite Corp (1980)

EE came to work at a time when he was neither scheduled nor authorized to work. ER withheld wages.

ER violated Section 7. Even where EE performed work at a time when he should not be working, ER is obligated to compensate EE since it did obtain benefits from EE's work.

RELATED CASES: 103, 107

CONTRARY RULINGS: 104

101 FRINGE BENEFITS

Must Be in Writing to Be Enforced

VACATION

No Written Contract/Policy
Past Practice

WRITTEN CONTRACT

Fringe Benefits

WRITTEN POLICY

Fringe Benefits

87-6763 Garvison v St Joseph Autobody (1988)

EE was employed as a body repairman. EE received two weeks' paid vacation per year during his employment. EE claimed one week vacation pay. ER did not have a written vacation policy or a written contract providing vacation benefits.

Since there was no written contract or policy, ER did not violate the Act by failing to pay vacation benefits.

See General Entry I.

102 COMMISSIONS

Payment

After Separation

79-120 Prew v Global Mobile Homes, Inc (1980)

EE was a commissioned salesman. Prior to separation, EE had made a sale of a mobile home. EE was told by his supervisor that he would be paid a commission on the sale when it closed. ER paid the commission to a different salesman and refused to pay EE the commission because he had failed to follow company policy.

ER violated Section 5. EE had earned the commission at the time the parties entered into a binding contract of sale.

RELATED CASES: 108, 117, 122

103 MISREPRESENTATION BY EMPLOYEE

79-101 Warren v Ingham County Remonumentation Society (1980)

EE obtained a position with ER by misrepresenting a fact that would have shown him to be ineligible for the position. EE did perform work. Upon discovering the misrepresentation, ER immediately terminated EE and did not pay him.

ER violated Section 5. Even where an EE misrepresents himself to obtain employment, ER is not allowed to benefit from the work performed without any compensation.

RELATED CASES: 100, 107

CONTRARY RULINGS: 104

COMMENT: Where an EE misrepresents himself to show a special qualification in order to earn a higher rate of pay, PW case law has held that he is not entitled to that higher rate but is entitled to some compensation.

104 MISREPRESENTATION BY EMPLOYEE

79-24 Oller v J A Fredman, Inc (1979)

EE misrepresented himself as a journeyman carpenter when in fact he was an apprentice. ER paid him as a journeyman until it discovered this fact and EE then resigned. ER withheld EE's last paycheck to make up for the overpayments it had paid him prior (the difference between journeyman and apprentice rates).

ER did not violate the Act. As the wages must be paid when they are earned, EE had only earned the apprentice rate. As such, EE had already been overpaid by ER, and therefore no wages were due.

RELATED CASES: 5

CONTRARY RULINGS: 100, 103, 107

105 THEFT

Proven

80-551 Corlley v Dawn Donuts (1980)

EE was convicted of stealing cash from ER in an amount greater than the wages he had coming. EE did not pay the stolen money back to ER. ER withheld final wages.

ER did not violate the Act. EE had received (via theft) more monies from ER than he was due in wages.

RELATED CASES: 16, 119

CONTRARY CASES: 8, 24

106 VALUE OF SERVICES

80-511 Simmons v Milford Auto Services (1980)

EE claimed ER had agreed to pay him a specified wage. ER claims no wage was agreed upon and EE had agreed to work and be paid as monies became available. ER did pay some monies to EE.

ER did not violate the Act. EE's evidence concerning the wage agreement was not credible, but EE did have the right to be paid for the reasonable worth of his services. Absent evidence to determine what that rate might be for the particular services performed, EE is entitled to minimum wage. ER had already paid an amount greater than the minimum wage rate for the hours worked.

RELATED CASES: 76

CONTRARY RULINGS: 116 (minimum wage not required)

107 MISREPRESENTATION BY EMPLOYEE

80-502 Mouch v Riske Mason Contractors (1980)

EE misrepresented himself as a journeyman when in fact he was an apprentice. As such, he was paid a higher rate of pay than he was entitled to. Upon discovery, ER reduced the rate of pay to the apprentice level and deducted the amount it had previously overpaid EE.

Originally the Hearings Judge found no violation based on precedent set in the Oller case (entry 104). Upon motion for rehearing by the Department of Labor, the case was reheard and the decision was reversed, finding a violation. It was found that even though the overpaid wages may not have been earned, ER cannot deduct them at a subsequent time without written consent, a CBA, or express permission of law.

RELATED CASES: 100, 103, 142

CONTRARY RULINGS: 104

108 COMMISSIONS
Deductions
Earned

80-413 Hermanson v Dow Associates/CM, Inc (1980)

EE earned a commission for selling a management service for construction and was paid a full commission. The construction project, for which the service was sold, was canceled after it was 26 percent complete. ER deducted 75 percent of the previously paid commission from a subsequent paycheck. The employment contract provided that EE's commission was earned and due when either a contract was signed consummating the sale or when ER received the first payment from the client. The contract did not specifically address the treatment of commission in the event ER did not collect the total amount of the sale from the client.

ER violated Section 7. This case was viewed as a simple deduction from wages without written consent. However, this decision does discuss the merits of the evidence concerning the employment contract and when commissions are earned and due.

RELATED CASES: 28, 77, 99, 102, 117, 122

109 WAGES PAID
Time Worked

79-376 Boris v David Nelson Contractors (1980)

EE claimed he had worked more hours than he was paid. He offered testimony and other hearsay affidavits, plus the unreliable testimony of a co-worker. ER offered time records.

ER did not violate the Act. It's EE's burden to prove time worked. EE's proofs were vague, and combined with ER's evidence of time records, the Hearings Judge concluded that EE had not met his burden.

RELATED CASES: 112
CONTRARY CASES: 37, 40

110 COMMISSIONS
Deductions
In Lieu of Salary

79-378 Moyer v Tall-Eez Shoe Co (1980)

EE worked under a draw against commission arrangement. ER withheld an amount because

in the prior month EE's commissions did not meet the amount drawn and thus he did not earn the commissions already paid.

ER did not violate the Act. EE did not earn the amount in question.

RELATED CASES: 121

CONTRARY RULINGS: 118, 120

111 LUNCH HOUR AS TIME WORKED

TIME
Lunch Hour

79-382 Theeck v Garm Protection Services (1980)

EE was required to remain in a certain area during his lunch break and be on call to ER. EE was a uniformed security guard. ER did not pay EE for lunch periods.

ER violated Section 5. Since EE was not free to pursue his own interests during lunch periods and his presence at a particular place benefitted ER, it is considered time worked.

RELATED CASES: 139

112 WAGES PAID
Time Worked

79-319 Karkau v Twin Pines Nursery (1980)

EE testified he had worked more time than ER had paid him. He testified from memory. ER presented time records, check stubs, and canceled checks to show EE had been paid for all hours worked.

ER did not violate the Act. EE did not carry his burden of proving that he worked the hours claimed.

RELATED CASES: 109

CONTRARY RULINGS: 37, 40

113 COLLECTIVE BARGAINING AGREEMENT (CBA)

Wages

SUBSISTENCE PAY

80-1035 Petter v Gregory Construction (1981)

EE worked under a CBA that provided subsistence pay when an EE had to travel to cities located more than 50 miles from designated shipping points. EE actually lived closer to some of the work sites than the shipping point, and, therefore, did not always have to travel 50 miles to work. In these instances, ER did not pay the subsistence pay since it claimed that EE did not actually do the amount of traveling that subsistence pay was intended to compensate for. EE claims the work site was literally more than 50 miles from the shipping point and actual travel was not contemplated in the agreement.

ER did not violate the Act. The Hearings Judge found that the CBA was intended to compensate EEs when they were required to travel certain distances. Although the agreement itself was somewhat unclear, it was found to be the parties' intent that subsistence pay would be required when actual travel exceeded 50 miles.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

114 SEVERANCE PAY

81-1458(b) Hardt v Jackson Co-Op Federal Credit Union (1982)

ER's written policy provided two weeks' severance pay for terminating EEs unless the termination was for misconduct or where EE was on probation at termination. EE was terminated while on probation. ER did not pay the severance pay.

ER did not violate the Act. ER's policy was clear that EEs on probation were not entitled to severance pay.

RELATED CASES: 36, 75

115 TIME

Workweek Different From Pay Period

81-1424 Prohuska v City of Menominee

EEs worked 48 hours one week, 40 hours the next, and 32 hours the third week. EEs were paid for 40 hours each pay period. The work week ran from Friday to Friday, but the pay

period ran from Saturday to Saturday. EEs made claim that they should be paid for 48 hours in the week in which it was worked.

ER did not violate the Act. The Act does not specify that work weeks must coincide with pay periods, only that all wages earned must be paid each pay period. EEs did receive all wages they had earned.

(Decision Not Available for Review)

116 FAIR LABOR STANDARDS ACT (FLSA)

MINIMUM WAGE

Companionship EE Exception

81-1406 Smith v Universal Home Health (1981)

EE went to work as a companionship EE without discussing wages with ER. ER paid a rate less than minimum wage, and EE made a claim for minimum wages.

ER did not violate the Act. Title 29, Part 552 of the Code of Federal Regulations concerning applications of the FLSA to domestic service, exempts companionship EEs from minimum wage provisions. In the absence of any evidence of a wage agreement, the Judge found all wages earned had been paid.

See General Entry VII.

117 COMMISSIONS

Payment

After Separation

81-1335 Cooper v Gumpert Co (1981)

EE worked as a commission salesperson. EE did not get commissions on sales shipped after her separation.

ER violated Section 5. EE's duties were to make sales, and she did so expecting to be paid a commission. Once the sale was made, EE had completed her job and earned the commission. RELATED CASES: 99, 102, 117, 122

118 COMMISSIONS

In Lieu of Salary

MINIMUM WAGE

Commissions

81-1332 Russman v ABC Sign Manufacturing Co (1981)

EE was hired to sell signs and went to work under an arrangement whereby initially she would work for a commission and a salary would be discussed later. EE was required to place soliciting telephone calls from ER's place of business. After repeated attempts to discuss a salary with supervision failed, EE voluntarily terminated employment and made a claim for minimum wages for the time she spent making calls at ER's place of business. ER did not pay EE.

ER violated Section 5. Even where an EE agrees to work for commissions only, that EE is at least entitled to minimum wages when she is required to be at ER's place of business to perform work.

RELATED CASES: 120

CONTRARY CASES: 110, 121, 116 (minimum wage exception)

119 THEFT

Proven

80-1087 Weinberger v Tulsa Oil Corp

EE was convicted of larceny from ER of an amount greater than the wages ER owed him. EE did not pay back any of the amount he had stolen. ER withheld the wages.

ER did not violate the Act. EE was more than compensated by taking an amount greater than wages due.

RELATED CASES: 16, 105

CONTRARY RULINGS: 8, 24

COMMENT: Theft of "other than cash" has been treated differently by PW case law, even where convictions are obtained.

(Decision Not Available for Review)

120 MINIMUM WAGE

Commissions

80-806 Tungate v Gardner AMC/Jeep, Inc (1982)

EE worked as a commission salesperson and was only paid commissions. His commissions did not amount to a minimum wage rate for the number of hours worked. EE claimed minimum wages.

ER violated Sections 2 and 5. Even where an EE agrees to work for commissions only, ER has a duty to pay at least minimum wage for the hours spent working on ER's premises (when his commissions do not amount to minimum wage).

RELATED CASES: 118

CONTRARY RULINGS: 110, 121, 116 (minimum wage exception)

121 COMMISSIONS

In Lieu of Salary

FINANCIAL SUCCESS AS CONDITION OF PAYMENT

80-724 Sherman v Widmer Roofing Co (1980)

EE agreed to work for a commission plan that provided 50 percent payment of the business's profit. There was no discussion between the parties concerning a salary or other wage agreement. EE made a claim for unpaid salary.

ER did not violate the Act. The evidence indicated that the only agreement between the parties was for 50 percent of the profits of the business.

RELATED CASES: 110

CONTRARY RULINGS: 118, 120

122 COMMISSIONS

Payment

After Separation

80-1218 Coup v Service Sales Co (1982)

Wage agreement provided that EE would be paid commissions on sales made. EE made sales for which the business did not collect from the clients until after EE left employment.

EE made a claim for the commissions on his sales, and ER stated it was policy not to pay commissions to salesmen after separation.

ER violated Section 5. Where a wage agreement provides commissions to be paid for sales made, EE had earned the commission at the time he consummated the sale. The time or nature of collecting the sales price from clients will not affect an earned commission unless specifically spelled out in the wage agreement.

RELATED CASES: 99, 102, 117

123 VERBAL AGREEMENTS

WAGE AGREEMENTS
Verbal

81-1844 Diekema v Jartran, Inc (1982)

EE was offered a promotion which involved additional duties and responsibilities and a raise. EE accepted the promotion, but ER only gave EE a portion of the promised raise. EE made a claim for the difference. No written wage agreement.

ER violated Section 2. In this case the promised raise was part of an employment offer and EE did perform the additional duties. Since there was consideration from both parties, this became not merely an offer of a raise but an enforceable employment contract.

RELATED CASES: 88, 95

CONTRARY RULINGS: 75

124 VACATION
Proration

WRITTEN CONSENT
Inadequate

81-1733, et al Bailey, et al v Associated Newspapers, Inc (1982)

CBA provided that EEs earned vacations in one year that could be taken in the next year. It also provided that there could be no pay in lieu of actually taking time off. At the time ER laid off EEs, they all had vacation time previously earned that they had not yet taken. ER did not pay EEs for that time. EEs also claimed prorated vacation pay for the year in which they were laid off. The agreement provided that EEs must be employed on December 31 of each year in order to earn the vacation time they would take the next year.

ER violated Section 3 as to vacation time already earned but not taken. No violation as to the claim for prorated vacation pay. Even though the CBA had a provision banning pay in lieu of time off, ER cannot take away a benefit that EE has already earned. As ER laid off EEs, they had no opportunity to use their already earned vacation time, and they must be compensated for it. The bargaining agreement was clear that vacation is not earned until December 31 of each year. Since the EEs were not employed on December 31 of the year they claimed prorated benefits, they were not entitled to those benefits.

RELATED CASES: 83, 126, 127

125 VERBAL AGREEMENTS

81-1391 Westcomb v Beckner's Standard Service (1982)

EE owed ER money and gave ER verbal consent to deduct the amount from his check. EE later made a claim for the amount.

ER violated Section 7. The Act provides that deductions may be made only pursuant to law, CBAs, or with the express written consent of EE.

RELATED CASES: 7

126 VACATION

Earned
Proration

80-499 Freers v Koory

Written policy provided that vacation benefits were earned each pay period and accrued to EE. When EE terminated he had earned but unused vacation time and requested payment. ER did not pay the benefit. The written policy did not contain a clause specifically providing for payment in lieu of taking the time off, and, therefore, ER claimed he did not have to pay the benefit.

ER violated Section 3. The argument that there is no clause providing for payment does not negate the fact that once earned, the benefit must be paid.

RELATED CASES: 68, 91, 124

CONTRARY RULINGS: 82, 127

(Decision Not Available for Review)

127 VACATION

Proration

80-1251, et al 16 Complainants v The Wessels Co (1982)

CBA controlled fringe benefits and did not provide for prorated vacation. EEs made a claim for vacation time to be prorated and provided in the year in which they were laid off. The closing of the business prevented EEs from working the full year, which is what they would have needed to do to earn the vacation benefit. ER did not pay the benefit.

ER did not violate the Act. Read clearly and literally, the CBA provided that EEs must work the entire year before any vacation benefit accrued to them. This case examines both federal and Michigan law concerning fringe benefits.

RELATED CASES: 83, 124

128 LOANS

Written Consent to Deduct

81-1436 Coburn v Pantaleo Enterprises, Inc (1982)

EE was compensated while attending class with the stipulation that a passing grade be received. When ER found out EE was not attending class, the amounts previously paid were deducted from EE's wages. No written consent for the deduction.

ER violated Section 7. The Act does not permit deductions for the benefit of ER without EE's express written consent.

RELATED CASES: 7, 10, 28

129 DETERMINATION ORDER - Issuance Within 90 Days

Amendment of DO

80-987 Lamb v Conkright (1982)

The Wage Hour Division issued a DO that was not appealed, and it therefore became a final order. Several months later the Division issued an amended DO from which EE appealed.

Amended DO and appeal dismissed. The Department of Labor has no authority to amend an order that has already become final by operation of law.

RELATED CASES: 60, 62

130 WRITTEN POLICY

Fringe Benefits

80-877 Morgan v All City Vendors, Inc (1982)

EE made a claim for fringe benefits at termination. EE had been paid fringe benefits pursuant to an unwritten policy.

ER did not violate the Act. Even where an EE can show a clear intent and policy through the past actions of ER, Act 390 can only enforce fringe benefits provided through a written policy.

131 APPEALS

Untimely

Good Cause Found

DO Did Not Decide All Issues

81-1343 Boothman v G L Robinson Auto Body Shop (1982)

EE made several claims against ER. When EE received the Department's DO, the order had not dealt with all of the EE's claims and had found in his favor on one of them. A Department EE had told him another of his claims would be handled separately. EE testified that upon reading the DO, it did not appear to him that he had been ruled against on any issue and therefore he did not think he needed to appeal. He later called the Department, and based upon information told to him by a Department supervisor, he realized he needed to appeal and did so. The appeal was beyond the 14-day limit.

Good cause for late appeal. Upon examination of the DO, the Hearings Judge found that a reasonable person would not understand that he had been ruled against on several of his claims.

RELATED CASES: 140

CONTRARY RULINGS: 44, 49, 51 through 55, 65

132 EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

80-619 Fields v Rev Fletcher McAfee (1982)

Respondent and Complainant entered into an agreement whereby Complainant would repair Respondent's house for a set fee. Complainant was not required to keep particular hours. Respondent did not supervise Complainant but occasionally helped him and showed him

how to make repairs. Complainant hired two helpers. Respondent paid Complainant a portion of the original fee, which Complainant used to pay his helpers.

Respondent refused to pay the remainder of the fee because the work was never completed.

Respondent did not violate the Act. The relationship between the parties was that of independent contractor. Respondent did not control the duties, keep time records, pay wages, have the right to discipline Complainant or even control Complainant's two assistants.

RELATED CASES: 32, 35

CONTRARY RULINGS: 25, 33, 69, 81

133 WAGE ASSIGNMENTS

81-1632 Perry v Lane Punch Corp (1982)

EE gave written authorization for ER to deduct $100 from his check each payday and send the money to EE's father. Shortly before EE terminated, ER advanced him $100 as an incentive "to be a company man." When EE terminated he did not pay back the $100 advance. ER made the $100 deduction from the final paycheck just as he always had, but he did not send the money to EE's father in accordance with the written authorization.

ER violated Section 7. When deductions are made pursuant to a written authorization for a specific purpose, that purpose must be fulfilled by ER or the deduction is a violation.

RELATED CASES: 7, 12

134 COMMISSIONS
Deductions

DEDUCTIONS
Written Consent

WRITTEN CONSENT
Deductions

80-1188, et al Vellenga, et al v Schwan's Sales Enterprises, Inc (1982)

EE signed a contract of employment that provided he would be paid commission on sales. The contract also had numerous provisions for charges against EE if EE did not account for the stock or turn in receipts in a timely fashion. ER proceeded to deduct amounts from earned commissions pursuant to those contract provisions.

ER violated Section 7. Even though the contract provided for charges against EEs for certain items, those charges were in the nature of penalty rather than an included part of determining the amount of commissions due. The section of the contract involving commissions was separate from the section dealing with the charges. Moreover, even if the contract permitted these charges against commissions, the Act requires a separate written consent for each deduction made.

RELATED CASES: 3 (discussion of a district court ruling finding written consent inadequate), 18 (charges against employees), 23 (written consent inadequate)

CONTRARY RULINGS: 4, 16, 21, 135

135 DEDUCTIONS
Overpayment

OVERPAYMENTS
Mistakes

WRITTEN CONSENT
Deductions

79-371 Reinks v Clark Equipment Co (1982)

EE was overpaid. EE signed a written consent allowing ER to deduct a certain amount from each paycheck until ER recouped the overpayment.

ER did not violate the Act. One written consent was adequate to allow the deductions because the amount to be deducted was a specific amount, the starting and ending dates, and total amount of the deductions were easily discernible.

RELATED CASES: 4, 16, 21

CONTRARY RULINGS: 23, 134

136 FRINGE BENEFITS
Notice to Terminate Requirements

VACATION
Resignation
Adequate Notice
Eligibility for Based on Two-Weeks' Notice

81-1476 Keigley v K-Mart #4036 (1982)

ER's written policy provided EEs who resigned prior to February 1 would not earn vacation benefits for the upcoming year. It also stated two weeks' notice of intent to resign was necessary to maintain work schedules. On January 14, EE said he would resign effective February 1. ER did not allow EE to work after giving resignation notice. ER did not pay the vacation benefit, claiming that EE resigned prior to February 1 and therefore did not earn the benefit.

ER violated Section 3. The written policy, although requiring two weeks' notice of intent to resign, did not state that EEs will lose the benefit if they don't give two weeks' notice. Therefore, had EE waited until February 1 to give notice, he would have earned his vacation. It would be manifestly unfair to penalize EE for attempting to follow ER's notice policy, when in fact by not following it, EE would have been entitled to the benefit. Further, as the policy relates to resignations, a resignation is a voluntary act. As such, the evidence pointed out that it was the intent of EE to voluntarily resign as of February 1, which would qualify him for the benefit. For the purposes of interpreting the vacation policy, EE's resignation was effective February 1.

RELATED CASES: 78, 84

137 DEDUCTIONS

Indirect

81-1828 Wallace v Progressive Oil Co (1982)

EE voluntarily endorsed his final paycheck over to ER to cover shortages. EE signed over the check, terminated employment, and was no longer under the control of ER.
ER did not violate the Act. Since the endorsement of the check was voluntary and occurred on the last day of employment, the action was not viewed by the Hearings Judge as a deduction. ER no longer exercised any control over EE, and there can be no assumption that the return of the check was anything other than voluntary in the absence of any evidence to the contrary.

CONTRARY RULINGS: 17, 18

138 EMPLOYER IDENTITY

EMPLOYMENT RELATIONSHIP

Interlocking Corporate Entities

80-1234, et al Etter, et al v Associated Charities of Metro Detroit (1982)

One business financed the operation of another and issued paychecks to its EEs. The second business was the one that hired EEs, permitted them to work and directed their activities. EEs made claim against the business that had been issuing the paychecks.

ER did not violate the Act. Evidence indicated Complainants were EEs of the business that hired, directed, and controlled their activities.

RELATED CASES: 36, 79

139 LUNCH HOUR AS TIME WORKED

TIME
Lunch Hour

80-1247 Clinton v Olympic Coney Island (1982)

Wage agreement provided that EE would receive an unpaid half hour for lunch. In fact, during the times of her lunch period, she performed services for ER and was not free from her duties the entire half hour.

ER violated Section 5. When an EE is required to perform services of benefit to ER during a period designated as unpaid lunch break, the time is considered time worked and must be compensated for.

RELATED CASES: 111

140 APPEALS

Untimely
Good Cause Found
DO Not Received by Party or Attorney

WRITTEN CONSENT
Deductions

80-1021 Vlodyka v Bill Rowan Olds (1982)

ER filed an untimely appeal. Affidavits were filed by ER and his attorney setting forth that neither of them had received the DO. The Department testified that it did not send a copy of the DO to the attorney, although it was aware that ER was represented by the attorney.

Good cause was established for the late appeal.

During the hearing it was determined that ER deducted the sum of $1,213.87 from EE's last

paycheck without written authorization to offset an earlier loan made by ER to EE.

ER violated Section 7 by deducting any amount from EE's wages without the full, free, written consent of EE.

WAYNE COUNTY CIRCUIT COURT: 10/1/82
ALJ's decision affirmed as to the violation but modified to delete the requirement of repayment under Section 18(1)(a) of the Payment of Wages Act and also the 10 percent penalty, Section 18(1)(c). The Court expressed a desire that ER not have to engage in further litigation to recover the amount lent to Complainant and owed to Respondent. It was further ordered that ER pay the attorney fees of the Wage Hour Division, the cost of the administrative hearing, and the transcript costs.

141 CLAIMS

Timeliness Of

81-1456 Olsen v Teledyne Continental Motors (1982)

ER failed to pay EE vacation benefits. EE filed a claim more than 12 months after the alleged violation.

EE's claim is dismissed. The Act is clear that claims must be filed within 12 months of the alleged violation.

RELATED CASES: 48, 64

142 OVERPAYMENTS

Mistakes

81-1302 & 81-1328 Wood-Goode & Allen-Anderson v Detroit Central City Community Mental Health, Inc

ER overpaid EE and deducted the amount from EE's final paycheck. ER claimed that EE had not earned the amount and ER's recovery of it did not constitute a deduction under the Act. No written consent.

ER violated Section 7. EE earned all wages in the pay period when the deduction was made. The Act provides for payment of wages after work is performed, not prior. The amount of pay an EE receives must represent the amount of work performed in that period. An employer may not engage in "balancing" to recover from past mistakes without EE's express written consent.

RELATED CASES: 22, 29, 100, 103, 107

CONTRARY RULINGS: 4, 104, 110

(Decision Not Available for Review)

143 CONDITIONAL EMPLOYMENT

SECURITY DEPOSITS

80-1081 Nauss v Spartan Oil Corp (1982)

As a condition of employment, EE was required to pay a $200 security deposit to cover losses that might occur while EE managed a service station. Through the course of employment, losses exceeded $200 and ER did not return the security deposit to EE at termination.

ER did not violate the Act. Requiring EE to provide a security deposit does not violate Section 8 since it is not "selling a job."

RELATED CASES: 13

144 THEFT

Alleged
Deduction Taken From Wages
Proven

80-665 Powser v Grady Roofing Co (1981)

EE was convicted of stealing ER's equipment. ER withheld earned wages. No written consent.

ER violated Sections 5 and 7. No authority in the Act to allow withholding of wages without written consent.

RELATED CASES: 8, 16, 24

CONTRARY RULINGS: 105, 119

145 FRINGE BENEFITS

Gratuitous Payment in Lieu of Vacation

OVERPAYMENTS

Gratuitous

VACATION

Gratuitous Payment in Lieu of Payment at Termination

80-1036 Hopper v West Shore Community College (1982)

ER and EE had an employment contract. Midway through the contract, EE's performance became unsatisfactory and ER ceased having EE perform work. However, ER continued EE on salary for the remaining term of the contract. Shortly after EE ceased performing work, ER sent him a letter stating that although he would continue to receive a salary and certain other benefits, he would no longer receive vacation benefits and his accrued vacation up to that point would constitute part of the gratuitous payments ER was making.

ER did not violate the Act. The payments ER made to EE (while EE was no longer working) amounted to far more than his accrued vacation.

RELATED CASES: 72, 94

CONTRARY RULINGS: 90

146 COMMISSIONS

Deductions

79-300 Egan v Cutler-Williams, Inc (1980)

EE worked under a draw against commissions agreement in addition to salary. During one period, EE's commission did not meet the amount of his draw, and ER deducted the difference from his salary. The employment contract provided for deductions "when commissions exceed monthly draw," i.e., the amount previously drawn would be deducted from commissions when they exceed the draw. The contract did not speak to deducting amounts from the salary.

ER violated Section 7. The contract provided that deductions could be made only from commission earnings, not from salary. Deduction from salary would have required a specific written consent.

RELATED CASES: 110 (draw against commissions)

147 EMPLOYER IDENTITY

81-1862, et al Middlebrook, et al v Tom Harris, Donald Ashley, Jr, Herman Martin and HMH Fiberglass, Inc (1982)

When ER went bankrupt EEs filed claims for unpaid wages against one of the stockholders who had also participated somewhat in the management of the business.

ER did not violate the Act. This particular stockholder was only minimally involved in the business and the Business Corporation Act of 1972 repealed the prior provision in the Revised Judicature Act that had allowed stockholders to be liable for labor costs.

RELATED CASES: 36, 69, 79, 138

148 BONUSES

80-721, et al Kerr, et al v Metalloy Corp (1982)

ER's policy on bonuses provided that they were earned in a fiscal year ending on July 31. It was company policy not to pay the bonus until December and then only to EEs who were still on the payroll in December. EEs terminated after the end of the fiscal year but prior to December and were not paid bonuses.

ER violated Section 3. Although it was ER policy not to pay the bonuses until December, it was clear from the written policy that they were earned at the end of the fiscal year. As EEs worked through that period, they were entitled to the bonus.

RELATED CASES: 66, 68, 89

149 COLLECTIVE BARGAINING AGREEMENT (CBA)
Deductions

79-104 Kulesza v Troy School District (1982)

ER made deductions from EE's pay. The CBA made specific provisions for these deductions to be made.

ER did not violate the Act. When expressly permitted by a CBA, a deduction made pursuant thereto does not violate the Act.

RELATED CASES: See "COLLECTIVE BARGAINING AGREEMENT - Deductions" See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

150 COLLECTIVE BARGAINING AGREEMENT (CBA)
Authority to Interpret

OVERTIME

80-533 Hoffman v General Telephone Co (1982)

EE made a claim for daily overtime based on the CBA. ER paid EE based on the agreement's provisions for weekly overtime. The agreement provided that overtime could be paid for one or the other.

ER did not violate the Act. As the agreement provided for payment of either daily or weekly overtime and ER did pay the weekly rate, ER did not violate the agreement.

RELATED CASES: See "COLLECTIVE BARGAINING AGREEMENT"

151 EMPLOYMENT RELATIONSHIP
EE/ER Relationship Found

80-1060 Lerette v Gull Road Big Boy (1982)

Shortly after beginning work, ER assigned EE to another business as a favor to a stockholder there. EE was informed he would return at the end of that assignment. ER's written policy provided for one week vacation after one year. ER did not pay vacation because it claimed the period worked for the other business did not count towards employment with ER. EE had not been informed at any time that his employment with ER had been terminated.

ER violated Section 3. EE performed work at the other business because of the direction of ER, and therefore there was no interruption of his employment relationship with ER during the year in question.

RELATED CASES: 25, 33, 69, 81

152 EMPLOYMENT RELATIONSHIP
Independent Contractor Relationship Found

81-1589, et al Roon, et al v Carroll's Trucking, Inc (1982)

Complainants filed claims for wages. Respondent claimed they were not his EEs but independent contractors.

Respondent did not violate the Act. This decision discusses the law concerning employment relationships.

RELATED CASES: 32, 35, 132

CONTRARY CASES: 25, 33, 69, 81, 151

153 EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

80-1185, et al <u>Belmont</u> v <u>Hall Ionia Car Wash</u> (1982)

Complainant testified Respondent hired him to manage a car wash. Respondent testified that he rented the car wash to Complainant who was an independent contractor. Respondent did not control Complainant's activities, pay his wages, or engage in the actual running of the car wash in any way. Complainant had sought out Respondent and requested that he be allowed to operate the business.

Respondent did not violate the Act. The facts establish that Respondent permitted Complainant to operate the car wash as an independent contractor. There was no agreement to pay wages, no control over the running of the business, and the profitability of the car wash was strictly up to Complainant. The washing of cars was as much an integral part of Complainant's business as it was Respondent's.

RELATED CASES: 32, 35, 132, 152

CONTRARY CASES: 25, 33, 69, 81, 151

154 DEDUCTIONS

Indirect

81-1936 <u>Knight</u> v <u>Colonial Oil Co, Inc</u> (1982)

ER required EE to pay him an amount of money to cover shortages before ER would give EE his paycheck.

ER violated Sections 7 and 8. By requiring EE to pay ER an amount before he could receive his check, this amounts to an indirect deduction from wages because it has the same effect as a direct deduction would have.

RELATED CASES: 17, 18, 134, 137

155 WAGE AGREEMENTS

Dispute

Verbal

81-2045, et al <u>Byerly, et al</u> v <u>Grand Pointe Marina</u> (1982)

EEs were paid salary plus commission. At some point ER told them he was changing their commission rates. ER testified that this change meant EEs would work strictly on commission and not receive a salary. EEs testified that no mention was made of changing the salary. When EEs received their first paycheck under this arrangement, they questioned ER about their salary and were told they were not receiving a salary. EE terminated within a few days.

The Hearings Judge found that EEs were not aware that their salary was being changed and that their first constructive notice of this was when they received their paychecks. EEs were entitled to salary up until that point.

RELATED CASES: 76, 123

156 REHEARING

Denied

Department Request

THEFT

Alleged

81-1641 <u>Snapp</u> v <u>Uniflow</u> (1982)

EE was convicted of embezzling an amount greater than the amount of wages owed to her. ER did not pay the wages.

ER did not violate the Act. EE had been more than compensated by her theft from ER.

The Department requested rehearing based on its disagreement with ALJ's decision. The request was denied. The record was found adequate for judicial review.

RELATED CASES: 105, 119, 144

CONTRARY RULINGS: 8, 16, 24

157 EMPLOYER IDENTITY

81-1473 Lambrecht v Thomas Truck & Trailer Repair (1982)

Complainant claimed Respondent hired him for office management, billing and estimations, labor relations, and other functions for a wage agreement of $500 weekly. Respondent paid premiums on a hospitalization insurance policy and life insurance policies on Complainant and himself with Respondent as beneficiary. Respondent stated he hired Complainant and wife as "management team"; that they were not EEs and no specific rate of pay was agreed to. Also, he did not authorize purchase of life insurance policies. Payroll records indicated total of $31,186.58 was paid to Complainant and wife on checks written by wife and signed by Complainant.

Respondent did not violate the Act in that the Administrative Law Judge determined no EE/ER relationship. Additionally, no taxes were withheld from monies paid to Complainant and wife, where, as a rule, taxes and social security payments are deducted from wages where there exists an EE/ER relationship.

RELATED CASES: 32, 132

COMMENT: This case also contains discussion of court cases on distinction between ER and independent contractor.

158 LOANS

81-1745 Kopp v Ciamillo Heating & Cooling (1982)

EE worked 43 hours, earned $311.75. ER withheld wages as offset for debt EE owed for insurance payment. No written consent or provision in CBA to make deduction.

ER violated Section 7. Act does not permit deductions without EE's consent. Also, ER violated Section 5 for not paying EE at termination all wages earned as soon as amount could be determined with due diligence.

RELATED CASES: 7, 10, 28, 128

159 COMMISSIONS

Deductions

81-1963 Howse v Quality Systems Co (1982)

EE worked as commissioned salesperson from 7/21/80 to 2/17/81. The wage agreement provided EE be paid a draw against commissions. In July and December of each year, EE

would be paid the difference between draw received and commission earned. In December 1980 and January 1981, EE made sales to various customers and earned commission of $2,079.80. ER refused to pay commission because goods were paid after EE terminated employment, or goods were not shipped until after employment was terminated.

ER violated Section 5 of Act.

RELATED CASES: 28, 77, 99, 102, 108, 117, 122

COMMENT: This decision cites cases where commissions are earned by the salesperson when the parties enter into a binding contract of sale. Additionally, the time of ER collecting on sales from clients will not affect an earned commission unless specifically spelled out in the wage agreement.

160 WAGE AGREEMENTS

Verbal

82-2335 Durinski v Gaspare's (1982)

On or about 8/21/81, parties tentatively agreed that EE would start work one week prior to opening of the restaurant on or about 9/2/81, but starting date was not certain. Opening delayed approximately one week due to death in family. ER was to call EE when he was to begin work. ER instructed EE to begin work after 9/4/81. ER testimony rebutted by hearsay only. EE did not attend hearing to testify in support of position.

EE was not employed by ER when beginning work on 8/25, because he was not engaged to work until sometime after 9/4. Inasmuch as EE was not employed, he did not earn wages during the week beginning 8/25/81. Therefore, ER did not violate the Act by refusing to pay EE for work performed that week.

RELATED CASES: 76, 106

161 COMMISSIONS

Earned

81-1911 VandeGiessen v Avnet, Inc, Mechanics Choice Division (1982)

Parties stipulated total amount of commissions owed by ER is $213.30. EE was told he would receive $150 per week draw during 8-week training period. However, EE was expected to begin selling ER's products after three days of formal training. EE stated he was unaware until after 1 1/2 months of employment he was not eligible for draw because his sales were less than the $750 amount set forth in ER's policy manual. EE should have been given to understand draw was advance payment of commissions to be earned later and

charged against such commissions. EE also claimed reimbursement for travel expenses of $125 per week, indicating that he was informed ER would pay the maximum of $125 for travel expenses. ER stated EE was not reimbursed because of (1) incomplete expense form statements, and (2), because he did not meet sales quota. ER submitted documents to substantiate argument.

DO modified to the extent EE was to be paid $213.30 as stipulated by parties. Based on evidence presented, ER was not required by written contract or policy to pay EE claimed travel expenses. Therefore, payment of claimed fringe benefit cannot be enforced under the Act.

RELATED CASES: 77, 102, 108

162 WRITTEN POLICY

Notice to Terminate Requirements

81-2006 Fiel v Dispatch Lounge (1982)

EE worked as a management trainee for 23 weeks. EE claimed hours worked in excess of 45 1/2 hours per week during employment, hourly rate based on salary of $10,500 annually. No time records of hours worked were kept by either EE or ER. However, work schedules show hours scheduled, but not worked.

EE stated she received paychecks of $140 plus cash payments of $80 for total wages of $220, and computed hourly salary of $5.50 per hour. Also, she stated she worked as an hourly EE 75 percent of time. Consequently, she claimed overtime pay of $8.25 per hour for 132.5 hours worked in excess of 40 hours per week. ER stated EE's rate of pay for first six months of employment to be $3.35 per hour and during next six months, salary to be $250 per week or total compensation $10,500 per year.

ER deducted $22.07 from EE's base pay of $162.07 to repay EE's loan for job employment service fee, and to repay EE's down payment on loan. Based on 23 weeks of employment, total amount deducted was $507.61. EE did not give written consent for deduction.

ER violated Section 7.

163 COLA - WAGE, NOT FRINGE BENEFIT

81-1742 Dault v Conrad Klooster, Inc (1982)

EE worked from 6/5/78 to 2/27/79. Prior to 4/1/80, ER provided cost-of-living allowance to its EEs. In February and March 1980, EE was informed COLA terminated as of 4/1/80. EE attended meetings and received notification of termination. ER did not give EE written

notification of termination. EE claimed he worked 1,873 regular hours and 124 1/2 overtime hours. He did not receive the COLA which he claims is at the rate of $.45 per regular hour and $.68 per overtime hour.

COLA in this matter is not a fringe benefit but a wage. Act does not require termination to be in writing, as in fringe benefit. ER did not violate the Act. ER not required to pay claimed COLA amount.

164 FAIR LABOR STANDARDS ACT (FLSA)

WAGE ASSIGNMENTS

81-1970 Verlin v Federal Armored Service, Inc (1982)

EE employed as truck driver at $3.35 per hour. EE was on a messenger run from Grand Rapids to Ludington with stops at banks along the way and a layover of approximately six hours in Ludington, with a return trip to Grand Rapids and more stops en route. EE was required to wait in Ludington until banks closed but did not perform any services for ER and was not on call. No express agreement between parties that EE would be paid or not paid for layover time. EE actually worked 7 1/2 hours out of 13 1/2 run, and ER paid for 9 1/2 hours each day.

Administrative Law Judge concluded EE earned wages for layover excluding time spent for meals. ER had already paid EE for two hours of each six-hour layover. EE did not earn wages for a reasonable lunch period of one hour per layover, therefore EE entitled to unpaid wages for three hours of each of four layovers at rate of $3.35 per hour for 12 hours totaling of $40.20.

COMMENT: This case also contains discussion of court cases on distinction of time spent predominately for EE's benefit constituting working time compensable under provisions of the FLSA.

165 OVERTIME

VACATION

Resignation

Eligibility for Fringe Benefits

82-2438 Goodrow v PLRS, Inc (1982)

EE did secretarial work from 1/3/79 until 1/22/81. ER contended EE eligible for two weeks' vacation pay at $210 per week, totaling $420. EE also contended she was eligible for two days sick pay at $42 per day, stating she earned five sick days during next calendar year. She

used three days in January 1981 prior to resignation, with two days remaining. EE policy manual (Department Exhibit 1) indicated EEs not using paid sick days during calendar year will be paid for unused sick days around first week of December. ER contended only EEs on payroll in December would receive payment for unused sick leave. ER contended he was only responsible for one-third of any fringe benefit, inasmuch as two other individuals were officers of corporation during time of EE's employment and they had agreed to share all expenses, including EE's salary and fringe benefits on one-third basis.

ER violated Section 3 of Act and owes EE $420 vacation pay earned prior to resignation from employment. ER did not violate Section 3, and ER's interpretation of policy manual is reasonable. Since EE terminated employment in January, 1981, EE could not take the two remaining sick days during the remainder of the year.

RELATED CASES: 68, 71, 91, 126

166 WAGES

Full Amount Not Paid

82-2171 Mathews v Sterling Sales & Service (1982)

EE hired under WIN program at $4.50 per hour. Terms of agreement between ER and MESC called for reimbursement of $2.25 per hour. Record shows amounts were owed by ER based on prior placement; therefore, ER was not sent any reimbursement for EE in instant case.

ER violated Sections 2 and 5 of Act. Agreement clearly provided that ER pay the full $4.50 per hour.

167 LOSSES CAUSED BY EMPLOYEES

82-2509 Phillips v Merchants Beer & Wine Imports, Ltd (1982)

ER acknowledges owing $116 during 10/26/81 through 10/31/81, but claimed EE incurred $348 in repair and towing charges which ER paid to Bobson Leasing Company for a tow truck to remove a loaded trailer that sunk in an asphalt parking lot. ER claiming EE to be independent broker was not substantiated due to fact ER assumed responsibility for damage to the leased trailer. Also, no contract in existence signed by EE acknowledging that EE was an independent contractor.

ER violated Section 7 of Act permitting deductions from wages only when EE authorized in writing, by law, or by a CBA.

RELATED CASES: 26, 74, 134

168 WRITTEN POLICY

Fringe Benefits

82-2334 Foster v William Mueller & Son, Inc (1982)

EE was in plant maintenance from 9/11/79 to 8/17/81, and contends he is entitled to sick leave and vacation benefits earned during that period. ER has EE handbook regarding provision for sick and vacation benefits. ER stated EEs earn no benefits during first year of employment and once first year anniversary has been reached, EEs are given sick and vacation benefits based upon formula outlined in handbook. ER witness stated provisions were designed to supply an EE with sick and vacation benefits from end of first year anniversary to end of calendar year. On January 1 of the calendar year, each EE receives 28 hours of sick leave and 40 hours of vacation time to be used during the year. When EE terminates during the year, balance of amounts will be given EE regardless of when employment is terminated.

ER stated there was no official written policy for sick and accident benefits, although there may have been some memo setting forth basis parameters, however, ALJ Exhibit No. 3, a memo from ER witness, contradicts testimony but indicates this is due to the fact that no written policy was in existence at the time he wrote the document.

ER violated Section 3 which provides an ER shall pay fringe benefits to or on behalf of an EE in accordance with the terms set forth in the written contract or written policy.

169 LOSSES CAUSED BY EMPLOYEES

WAGES

Show-Up Time

81-1998 Pillar v Greater Detroit Heating & Cooling (1982)

Before leaving on vacation, EE was instructed to deliver work truck emptied of tools to ER's home. EE did so on the first day of his vacation. Under union contract EE is entitled to show-up time of one-half day of pay. The wages due were not paid EE upon termination of employment. A deduction was made from EE's wages due to loss of one of ER's tools. Union contract does not authorize wage deductions.

ER violated Sections 5 and 7 of Act. Section 5 requires payment of due wages upon termination of employment. Section 7 requires EE written consent before deducting wages.

RELATED CASES: 8, 24, 173

170 FRINGE BENEFITS

Must Be in Writing to Be Enforced

WAGES

Show-Up time

WRITTEN POLICY

Fringe Benefits

81-1999 Pielack v Greater Detroit Heating & Cooling (1982)

ER mistakenly overpaid EE and deducted the overpayment in a subsequent pay period. No written consent for the deduction. EE asked for a reimbursement for expenses. The fringe benefit was not in writing. EE informed ER he was quitting and performed no further service after that day except to return a work truck two days later. EE claims wages for the return of the truck.

Section 7 does not allow deductions to repay ER for prior overpayment of wages. Under Section 3, fringe benefits are enforceable only if written. There was no written contract, so ER is not in violation for nonpayment of reimbursement. Since EE was no longer employed when he returned the truck, he is not entitled to "show-up" time under union contract.

RELATED CASES: 22, 142

171 ADVANCES

COLLECTIVE BARGAINING AGREEMENT (CBA)

Deductions

81-2008 Coan v Frito-Lay, Inc (1982)

EE worked as a route salesman. In a letter marked Respondent's Exhibit 1, ER explained that under the CBA the salesmen's routes could be cut, but they would receive compensation for this reduction for a period of 12 weeks equal to the average weekly earnings of his route during the previous 12 weeks. EE was paid this compensation in one lump sum, but only worked 4 of the 12 weeks. ER believed EE was not entitled to an additional eight weeks' pay and deducted this from EE's final paycheck. EE also took a cash advance which he signed for at the beginning of his employment. ER deducted this from EE's final pay.

ER violated Section 7 by deducting wages without written consent. Both the union contract and EE's letter indicate the compensation was not a payment of earnings for labor or services. ER did not violate the Act for withholding the cash advance from EE's final pay because it was a payment of wages to be earned by EE, so there was no deduction from wages.

RELATED CASES: See "COLLECTIVE BARGAINING AGREEMENT - Deductions"

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

172 WAGES

Full Amount Not Paid

81-1824 Enos v The Ross Company (1982)

EE accepted employment as a truck driver knowing in advance the mileage rate for single and double drivers. After driving the truck as a double driver, EE claimed pay as a single driver. ER paid wages of a double driver.

ER did not violate the Act. EE was paid wages due.

173 EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

WAGE AGREEMENTS

Verbal

81-2075 Hamlin v Valley Inn (1982)

Complainant was employed as a maintenance supervisor to work 40 hours per week. Complainant claimed he worked in excess of 40 hours a week. Respondent did not agree to pay Complainant for overtime. No records were kept of hours worked.

Complainant claimed Respondent agreed to pay him contractor fees for remodeling the business while it was closed. This work was outside the 40-hour week. Complainant never received any wages in addition to his weekly salary. Respondent denies agreement, saying any remodeling was part of Complainant's job as maintenance supervisor. No records were kept on remodeling work.

Complainant's initial salary was reduced at closing of the business. Although Complainant claimed his salary was to be increased when the business reopened, he continued to work at the same rate of pay after the reopening.

The burden is upon Complainant as the appellant to prove time worked. Neither Complainant nor Respondent kept any records, so there is no basis for a specific number of unpaid overtime hours. Complainant's continuation of work for an extended length of time without additional wages negates his argument of employment as a remodeler, distinct from maintenance supervisor. Also, if he were to have received one lump sum for his remodeling, he would be an independent contractor, not an EE. The Act only regulates payment of wages

to EEs. The evidence does not support Complainant's claim to a raise upon reopening of the business.

RELATED CASES: 32, 35, 132, 152, 153

174 WRITTEN POLICY
Fringe Benefits
Payment Into Funds

81-1783 Appel v Interior Design (1982)

ER failed to pay fringe benefits due under union contract. ER also failed to put monies deducted from EE's wages into a vacation fund.

ER violated Section 3. ER must pay fringe benefits in accordance with the written contract.

175 WAGE AGREEMENTS
Verbal

81-1619 Prince v Prince's on The Lake, Inc (1982)

Complainant and Respondent were to be equal partners in a business venture with Complainant setting up and running the business and Respondent financing. Some work was completed and then a corporation was formed, owned solely by Respondent. Their planned joint venture was never consummated. Although Complainant worked for nearly a year at a much lower rate, he believes there was an agreement to a larger amount of compensation.

Complainant's claim for wages is unenforceable. The conduct of the parties indicates no agreement to higher wages for Complainant. Even if they were joint venturers, the Act affords remedy only to EEs. The statute of frauds bars payment of claim. RELATED CASES: 76, 106

176 COLLECTIVE BARGAINING AGREEMENT (CBA)
Deductions

WRITTEN POLICY
Fringe Benefits

81-2067 Eddy v Model Coverall Service, Inc (1982)

EE was a commissioned salesman paid on the gross invoiced amounts presented to customers. Due to discrepancies in the amount invoiced and the amount actually paid, EE

was paid commissions greater than the amount actually paid by the customer. These discrepancies occurred because the customer would notify ER that certain EEs were not on the payroll for the period charged. Because of this, fewer uniforms were used than invoiced. This process went on for several years before ER realized that the amounts not paid should have been written off. ER deducted the overpayment from EE's vacation and sick leave benefits.

Section 4 prohibits the withholding of compensation due an EE as a fringe benefit to be paid at a termination date unless the withholding is agreed upon by written contract or a signed statement from EE. The record does not establish that the contract of employment permitted this deduction. In addition, EE did not authorize this deduction in writing.

RELATED CASES: 71

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

177 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

WAGES

Full Amount Not Paid

81-1896, et al <u>Nelson, et al</u> v <u>Regional Services</u> (1982)

ER made the decision to close the business on 11/19/79. It was concluded, contrary to the assertion of ER, that EEs did not agree to work as volunteers without pay.

One EE said he would assume responsibility for the business and that he had a buyer for the company. ER claims the business name was changed on April 10, 1980, pursuant to EE's direction. It was concluded that EE never assumed responsibility for the finances of the company. He offered to find a buyer for the company and did so on May 12, 1980. The sale amount was received by the owner.

Section 5 requires ER to pay a separating EE all amounts earned and due as soon as the amount can be determined.

RELATED CASES: 25, 33, 69, 81, 151, 166, 169

178 MISREPRESENTATION BY EMPLOYER

TIME CARD

Destruction by ER

82-2570 **Rinehart v PJS Commercial Corp** **(1982)**

EE was required to fill out a time card. His supervisor destroyed his time card because of errors in punching and filled out and signed a new one himself. EE claimed he properly punched his own card and that the new card left out several hours of employment.

EE's testimony is more believable. The act of destroying a time card is highly suspect.

179 COMMISSIONS
Payment
After Separation

OVERPAYMENTS
Mistakes

79-106 Moraru v "C" US 1st Real Estate **(1982)**

EE worked under a "draw against commissions" arrangement. A contract was drawn up but never consummated. EE was given verbal notice of termination two weeks prior to a written notice of termination which he received the day of separation. At this time he had a draw of $4,500 more than earned. EE claims wages for the two-week period after his written notice of termination.

EE was entitled to no further draw against commissions, and there was no agreement to pay EE a further wage for the two weeks after separation.

RELATED CASES: 110, 121

180 COMMISSIONS
Earned

82-2517 **Seifert v Modern Roofing, Inc** **(1982)**

EE was employed as a salesman from June to December 1980. Commissions were pursuant to a written contract which paid 65 percent of net profit from jobs sold. In the fall of 1980, EE sold a siding job and a customer was billed. Final payment plus interest was not made until July 1981. While the balance of the customer's bill was uncollected, ER borrowed money (exceeding the amount owed by the customer) and was charged interest. In determining net profit, ER added the interest on the unpaid balance of the customer's account at the rate he was required to pay for his loan and then paid EE 65 percent of this.

EE is due 65 percent of the interest of ER's loan because this bore no relationship to the customer's account and was for a different amount.

RELATED CASES: 77, 108

181 COMMISSIONS
Deductions

WRITTEN POLICY
Advances

81-2015 Juliano v Cadillac Plastic (1982)

EE was employed as a telephone sales representative from April 1980 to 7/6/81, with agreement for payment of 1 to 5 percent commission depending on sales. The wage agreement was changed in January 1981, to provide for payment of a percent of gross profit margin. EE was unable to make sufficient sales to earn commission on two occasions and the draw against commission was eliminated, the last time being late June. ER offered to pay EE 1 percent of total sales. EE stated 2 percent would be more equitable. ER terminated employment.

ER did not violate the Act. EE's contention she should be paid $365.97 for total sales after 7/1/81, is not supported by the record.

RELATED CASES: 110, 121, 179

182 COMMISSIONS
Deductions
Coin Machines

DEDUCTIONS
Coin Machines

82-2363 Stivers v Capital Coffee Co (1982)

EE delivered snack boxes and was paid a commission based on percentage of sales. EE claims deduction from gross wages prior to figuring commission was made for each coin-operated machine en route. An adjustment was made for coin-operated machines ranging from $3 to $1.50 per machine. In determining commissions, gross sales were totaled minus cost of goods and then adjusted for cost of coin-operated machines. The figure was then used to compute commission earned. ER claims these were not deductions from wages. There was no written authorization for this adjustment or deduction.

ER violated Section 7, prohibiting deductions either directly or indirectly from EE's wages unless deduction is permitted by law, CBA, or with written EE consent.

RELATED CASES: 77, 108, 179, 181

183 COLLECTIVE BARGAINING AGREEMENT
Fringe Benefits
Tuition Costs

FRINGE BENEFITS
Tuition Costs

WRITTEN POLICY
Fringe Benefits
In Lieu of CBA

82-2366 Smith v Livingston County Sheriff (1982)

EE contends he was entitled to reimbursement of college tuition costs pursuant to the personnel manual for authorized courses needed to achieve a BA in criminal justice. The courses were determined not to be job related, but would facilitate a job-related promotion. EE was covered by a CBA which was silent as to reimbursement of tuition costs, but the personnel manual spoke to the 50 percent reimbursement. EE produced sworn affidavits from two other county EEs, each covered by the CBA, who received tuition reimbursement pursuant to the personnel manual because the CBA was silent .

ER violated Section 3. EE's expenses were those as set forth in the personnel manual. It cannot be held that the CBA does not recognize the personnel manual in light of the affidavits submitted. Department DO reversed.

See Sands Appliance Services v Wilson, 231 Mich App 405 (1998), where the Court of Appeals found there was no public policy against allowing a prematurely departing EE from agreeing to reimburse an ER for specialized training, without which an EE could not have performed the job. This decision was supported by:

(1) Plaintiff discussed the tuition contract with defendant before hire;

(2) Defendant was employed by another appliance store at the time he applied with plaintiff, and defendant could have refused to leave his prior job to work for plaintiff if he had objected to the tuition contract; and

(3) Defendant had options available to him when presented with the tuition contract.

Also, any inequality of options or bargaining power between plaintiff and defendant was insufficient to declare the tuition contract adhesive. Because the contract was substantively reasonable, it was found to be enforceable.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA. RELATED CASES: 123, 96

184 FRINGE BENEFITS

Proration of Vacation Benefits

VACATION

Proration

82-2348 Jackson v Bruce Cartage, Inc (1982)

EE was employed from March 1964 until date of retirement in March 1981. EE was covered by a union contract providing vacation for EEs having worked 60 percent or more of total working days during any 12-month period. EE was entitled to five weeks' vacation. EE contended he only received two of the five weeks' vacation pay earned. From an exhibit submitted, EE earned and was entitled to 66 weeks of vacation pay and received such pay prior to retirement, but EE stated two checks received on 3/7/81, constituted the vacation pay for the last year worked. ER stated Complainant in many instances received vacation pay prior to the beginning of the next working year. EE received two checks for vacation pay early, and the contract authorized early payment of vacation pay.

The contract states EE must have worked 60 percent of total working days of the year. Calculated on a weekly basis, 60 percent of 52 weeks is 31.2 weeks that would have to be worked. Therefore, EE would have had to work until 4/16/81, to meet 60 percent required under the contract. Consequently, EE received five weeks' vacation pay for last year even though he did not work the 60 percent, thus he had been more than compensated.

ER did not violate Section 3.

185 VACATION

Proration

82-2401 Price v Southern Clinton County Sanitary Sewer (1982)

EE began employment as a utility operator on 9/2/80. On 9/1/81, EE received approval for sick leave. Also, approval was granted for a personal leave day for 9/2/81. EE's time report shows eight hours of sick leave on 9/1/81 and eight hours of personal leave on 9/2/81. Stated on time report was "Resigned as of 9/8/81." CBA states vacation allowance is determined by length of service, as does ER's policy manual. ER stated EE did not complete one year of service to be entitled to vacation pay; that EE's last day of service was 8/30/81. ER also stated EE did not follow requirements of written policy to become entitled to vacation pay, nor did he submit a written letter of resignation.

ER did not violate Section 3.

RELATED CASES: 83, 124

186 APPEALS

Dismissed

DISCRIMINATION

No Complainant Right to an Appeal

82-2715 Konschuh v Dama Corp (1982)

EE filed a discrimination complaint on 7/14/81, and the Department issued DO on 1/11/82, finding that ER did not discharge or otherwise discriminate against EE for filing a complaint of illegal deductions. EE was advised case could only be reviewed in circuit court after review hearing with the Department. EE referred to Section 11(4) as permitting both EE and ER to seek review of determination within 14 days. Section 13(2) permits an EE who believes he or she has been discharged or discriminated against by an ER to file a complaint with the Department within 30 days after violation occurs. Section 13(3) provides that an ER may seek review of the Department's determination by following procedure provided in Section 11(4) to (9). The appeal provisions set forth for a Section 13 action are limited to ER.

EE's 8/2/82 appeal dismissed. There is no authority in the Act to permit an EE's appeal of an adverse Department DO dealing with discrimination.

187 DEDUCTIONS

Tarps

Written Consent

88-6848 Colburn v Trucking Services, Inc (1988)

EE was fired when he refused to sign an authorization to allow deductions for tarps stolen from his truck. The EE handbook stated that drivers were accountable for tarps. ER made a deduction for the stolen tarps.

The EE handbook stated that EEs were responsible for the equipment but this was not an authorization for deductions. EE did not give written consent for deductions. ER violated Section 7 by withholding EE's wages without written consent.

See General Entry III.

188 MISREPRESENTATION BY EMPLOYER

82-2571 Brown v PJS Commercial Corp (1982)

ER contends EE worked 6 3/4 hours at $3.50 per hour, totaling $23.65, with Respondent Exhibit 1 being a time card showing hours worked. However, ER said he destroyed the original time card because of errors in punching, and Respondent Exhibit 1 was completed and signed by the supervisor, using EE's name. EE testified he punched the time card correctly and Respondent Exhibit 1 leaves out several hours of work. He stated he worked a total of 17 hours on days in question at $3.50, totaling $59.50.

ALJ determined EE's testimony more credible, and the act of destroying time cards is suspect. DO 5031 to be amended to show amount due of $59.50 less proper deductions and Department to compute new 10 percent per annum penalty amount to reflect modified amount. ER violated Sections 2(3) and 5(2).

RELATED CASES: 178

189 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

81-1935 Galvan v The George McClain Corp (1982)

EE contended he was foreman for a construction project in April and May 1981, with a salary to be $600 per week. EE was paid $500; one week with no salary, and three days with no wages totaling $120 per day or $360, or total claimed of $1,200. EE used his own equipment on the project which ER was to rent, but a written agreement for rental was not prepared, only a verbal agreement at a price to be agreed upon after commencement of project. After not receiving wages, EE removed the equipment from the job site and billed ER $1,403 for equipment rental. ER contended that Complainant's business joined Respondent in joint venture for three projects with the agreement that each party would split expenses 50 percent and share equally all profits, with Respondent performing administrative functions and Complainant doing physical labor. Based on ER's argument of a joint venture, he was directed to send copies of joint venture agreements to court. However, the document submitted applied only to one project, not the one in question.

ER violated Sections 2 and 7 in that parties did not have a joint venture agreement, and facts establish an EE/ER relationship existed.

RELATED CASES: 25, 69, 81

190 COMMISSIONS

Payment

After Separation

82-2349 Powers v Grand Traverse Auto Co (1982)

EE was employed as a car salesman. ER terminated EE after he was hospitalized as a result of an automobile accident. Prior to his accident, EE had almost completed the sale of three vehicles. All three purchasers had signed purchase agreements and given down payments. When the vehicles became ready for delivery, all EE needed to do was a small amount of paperwork and exchange license plates. Although EE offered to make the deliveries after his termination, ER refused and deliveries were made by other EEs. Commissions were usually paid after delivery of a vehicle, but there was no evidence of an express agreement between EE and ER.

ER violated Section 5 for failure to pay commissions due upon termination of employment. EE performed just about all the work involved in the three sales and there was no specific contract of employment that required forfeiture of commissions after a sale was completed and purchasers were waiting for delivery.

191 WAGES

During Two-Week Notice Period

Pursuant to Written Contract

81-1922 Elkins v Michigan Claim Service, Inc (1982)

EE was employed pursuant to a written contract which provided that either EE or ER may terminate the contract by giving two weeks' notice. A similar provision in Respondent's EE handbook stated that they expect at least two weeks' written notice of EE's intention to leave. EE gave two weeks prior notice of his plans to terminate. The general manager then terminated EE on the same day EE's notice was received. ER told EE not to perform any more service. ER did not pay EE wages or allow him to work for the two-week notice of termination period.

ER did not violate Section 5 because, during the period in question, EE did not perform labor or services, and therefore did not earn wages. The Department does not have authority under Section 18 to order payment for the two weeks not worked. ER may have breached the requirement of two weeks' notice set forth in the employment contract, and, if so, EE can seek a judicial remedy for breach of contract in another forum.

RELATED CASES: 58, 61, 163, 169, 172, 177

192 OVERTIME

82-2525 Herring v City of Reed City (1982)

EE was employed as a Department head pursuant to conditions set forth in Respondent's EE manual, which said that Department heads would, in most circumstances, receive overtime for excess of the normal work week. EE worked 64 hours overtime and did not receive payment.

ER did not violate Section 3. It is clear in EEs' handbook that Department heads are not necessarily entitled to additional compensation for hours worked in excess of 40.

RELATED CASES: 73, 150

193 CLAIMS
Timeliness Of

82-2591 Zielinski v Loyal Order of Moose No 782 (1982)

EE was entitled to three weeks' vacation per year pursuant to a written policy. He terminated with ER in March of 1981 and filed a complaint for three weeks' vacation pay in May of 1982.

Filing of complaint was not in compliance with the 12-month requirement of Section 11(1); therefore, Department has no authority under the Act. The claim is barred even though Complainant was not aware of this requirement. Ignorance of rights are referenced in Carpenter v Mumby, 86 Mich App 739 (1979).

RELATED CASES: 48, 64, 141

194 WAGE AGREEMENTS
Verbal

81-1506 Stevens v Richard Lee (1982)

EE was hired in July 1980 as an agent to supervise the demolition of a burned out house and obtain bids for labor required for construction. EE contends his rate of pay was $16 per hour. ER contends EE was to be paid 10 percent of the cost of the work and $16 per hour as an advance. ER gave EE an advance payment of wages when he began work. Three different times EE gave ER a job report itemizing his hours worked times $16 per hour plus mileage. ER never objected to the claim for wages, but testified he did not read them. After each job report, ER paid EE a much smaller amount than what was claimed. EE submitted a final report claiming a balance of $3,100.25 wages due plus mileage.

ER never paid EE wages at the rate of $16 per hour, so it is concluded that there was no such agreement. It is also unlikely ER would agree to pay such a large amount for such services, noting that his bids were worthless to ER.

RELATED CASES: 175

195 EXPENSES

HEARING
Costs

82-2402 Reingardt v Francis Bolda Trucking (1982)

It was stipulated in the prehearing conference that EE was owed wages. EE seeks an order of $78.54, payment for gasoline expenses incurred traveling from his residence in Georgia to the hearing in Michigan. Section 18(3) provides that the Department may order an ER who violates Sections 2, 3, 4, 5, 6, 7, or 8 to pay attorney costs, hearing costs, and transcript costs.

The hearing was conducted because of EE's appeal from the Department's determination. Since EE stipulated that the amount due was only $9.99 more than the DO, it appears that the appeal was without substantial merit, and so it would be improper to order ER to bear the costs of EE's appeal. EE's request for costs is denied.

196 WRITTEN POLICY
Fringe Benefits

81-2098 Gillaspie v The Upjohn Co (1982)

EE was discharged for gross misconduct after trouble with labeler machines in her area on six different occasions. EE's supervisor watched EE's area and established that she was tearing the labels. The company fringe benefit policy provided for severance policy except where gross misconduct exists. The burden of proof is on the Appellant, i.e., the party requesting review of the Department's DO. EE contends this proof is satisfied by (1) her employment of over 11 years; and (2) the existence of EE's severance pay policy. EE contends that now the burden shifts to ER to prove gross misconduct as an exception to the policy. EE relies on situations in which the burden of proving EE misconduct shifts to ER in unemployment compensation cases and in arbitration of CBAs. However, procedures in these proceedings are not binding as precedents in administrative hearings conducted pursuant to the Act. EE must prove absence of gross misconduct.

ER did not violate Section 3 (payment of fringe benefits as set forth in the written policy). The preponderance of the evidence shows that EE tore the labels on the machine on the day

the supervisor watched the area. It is unlikely the supervisor would lie to his superiors and again under oath about what he saw. It is even more unlikely ER's management would falsely accuse EE of gross misconduct as a means of termination. It is believed that EE would be reluctant to admit intentionally destroying ER's property.

RELATED CASES: 7, 183, see "WRITTEN POLICY"

197 VACATION

Proration

81-1882 Culbert v ENT Surgical Associates (1982)

EE contends her vacation time at termination should have been prorated based on her anniversary date rather than on a calendar-year basis. ER's policy is somewhat ambiguous and confusing. Considered as a whole, it seems clear that the intent of the policy is that vacations are to be taken on a calendar-year basis.

EE received the full amount due for unused vacation time at termination.

198 LOANS

82-2593 McKinstry v ABC Sign Manufacturing Co (1982)

ER had a practice of providing EEs with advances, and based upon a verbal agreement, deducted part of all of these advances from weekly paychecks. ER made three different deductions from EE's paychecks without signed authorization.

ER violated Section 7 of the Payment of Wages Act which says no deductions are allowed without EE written consent.

RELATED CASES: 7, 10, 158

199 EMPLOYEE ERRORS

81-1831 McGrath v Askin Carpet Co (1982)

EE was employed as a carpet salesperson. ER withheld wages due EE because she misfigured a job which cost them more money and also failed to return a $30 carpet sample. ER did not have written consent or a CBA.

ER violated Section 5(2) by failing to pay EE wages due as soon after her discharge as the amount could be determined. Also Section 7 was violated which prohibits ERs from making

deductions without written consent or unless permitted by a CBA

RELATED CASES: 1, 3, 4, 74

200 WAGES

Full Amount Not Paid

82-2519 Rikkers v Bixby Office Supply Co (1982)

EE gave two weeks' termination notice and was not paid wages for his final two weeks' employment.

ER violated Section 5(1) by refusing to pay EE wages earned and due as soon as the amount could be determined with due diligence.

RELATED CASES: 166, 169, 172, 177, 191

201 THEFT

Proven

82-2486 Reichard v Hudson Oil Co (1982)

EE was convicted of theft for which ER withheld wages to offset the shortage. EE's restitution was reduced by the amount of unpaid wages EE earned.

ER violated Sections 5 and 7. No authority in the act to allow withholding of wages without written consent. However, the Kent County Circuit Court's order of restitution (82-29458-FY) for EE was based on the merits of the same matter at issue in this proceeding, and therefore the Department of Labor should not proceed with the enforcement of EE's claim for wages.

RELATED CASES: 105, 119

CONTRARY RULINGS: 8, 24, 144

202 WRITTEN POLICY

Fringe Benefits

81-2089 Hornbrook v Associated Truck Lines (1982)

EE was employed pursuant to a written agreement which stated he must work at least 151 days out of the year for X amount of vacation. EE actually performed work only 145 days of

the year in question, but reported and did not receive assignment to haul a load on the other days. EE believes the days he reported but did not drive should be counted as work days for purposes of the agreement.

ER did not violate the Act. The Act requires payment of fringe benefits in accordance with the written contract or policy. It is clear that normal usage of the word "worked" means actually perform services.

RELATED CASES: See "WRITTEN POLICY - Fringe Benefits"

203 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

WAGES

Full Amount Not Paid

81-1394 Sherman v Dr Adele Zieman (1982)

EE and ER's son went out of state to do some work for ER with the belief they would be paid from the time they left until they returned. They performed no work upon arrival due to the time of day. The next day was 10/13/80, and ER's son informed EE they would not work nor receive wages due to ER's superstition. EE returned to Michigan by bus since he was not going to be paid. ER contends EE was working for her son, not her, but the fact that she controlled the actions of both her son and EE by not allowing them to work due to her superstition indicates she was the ER. EE claims wages of 51 hours plus reimbursement of his fare back to Michigan.

ER violated Section 5 for failure to pay EE wages due upon termination. EE's claim for reimbursement is not enforceable under the Act because "expenses" are fringe benefits -- Section 3 requires payment of fringe benefits only under terms of a written contract or policy. No evidence of that here.

RELATED CASES: 33, 69, 81, 151, 166, 169, 172, 177, 189

204 COMMISSIONS

Payment

After Separation

WAGES

Commissions

Payable After Separation

81-2087 & 82-2450 Hays & Trinder v Barrett's Contemporary & Scandinavian Interiors (1982)

Complainant Hays

EE was a commissioned salesman pursuant to a written contract which called for a 6 percent commission to be paid to EE upon delivery of merchandise in the customer's home. There was no agreement that the 6 percent would only be paid while EE was employed by ER. On the back of EE's last check, ER typed a statement stating, "Upon endorsement of this check is payment in full of all outstanding wages and commissions due payee." After seeing that the amount was only for 3 percent, EE printed on the back of the check, "PAYMENT NOT ACCEPTED" and then cashed the check. ER argues that the typed statement on the back and EE's cashing of the check constitutes accord and satisfaction. ER violated Section 5 for the balance of the 6 percent commission due EE. There was never any accord and satisfaction because there was never a meeting of the minds. No new contract for the lesser amount was created.

Complainant Trinder

The issue was whether ER violated the Act by reducing Complainant's commission from 6 percent to 3 percent for the merchandise delivered after she left employment but sold during the course of her employment. It was concluded the contract of employment called for 6 percent to Complainant upon delivery of merchandise in the customer's home. ER attempted to unilaterally change the employment contract at the time Complainant separated from employment.

INGHAM COUNTY CIRCUIT COURT: 7/3/84

Remanded the cases to the ALJ on the grounds that the burden of proof was improperly thrust upon ER.

ALJ DECISION UPON REMAND FROM CIRCUIT COURT: 4/19/85

The contract of employment between the parties at the time of hire was for payment of 6 percent on all delivered sales, and it was not understood that this 6 percent would not continue on delivered sales after the Complainants left employment. Any change in wages without agreement of Complainants would be a unilateral change in the contract.

Although follow-up duties for sales made by Complainants before their departure had to be handled by others, it was concluded these duties did not involve extraordinary work.

ER violated Section 5 for the balance of the 6 percent commission due.

ER APPEAL TO CIRCUIT COURT: 6/10/85
To reverse ALJ decision and to have civil penalty set aside. ER claims the civil penalty is being applied to a violation occurring before the civil penalty rule.

INGHAM COUNTY CIRCUIT COURT: 2/1/88
Dismissed ER Procedural Challenges that ALJ was biased, that Complainant Trinder's claim should have been dismissed for her failing to attend the hearing; ALJ decision was not supported by law; and the hearing was unduly delayed. Reversed BES/ALJ determination that wages were due based on accord and satisfaction. The circuit court held where disputed payment was issued with language identifying an endorsement as acceptance of the check as final and full payment, language added by EE rejecting the condition while endorsing the check was not effective. The payment was determined to be the resolution of the claim.

RELATED CASES: 102, 117, 122

205 BURDEN OF PROOF

Appellant

81-1853 Hoxie v Glasco Corporation (1982)

EE was a sales representative paid commission at the end of each month on sales completed. He claims commission on 11 accounts sold prior to his termination, but for which work did not begin on seven of the jobs until after his termination. He could not present proof commissions were not paid on the work completed prior to his departure.
ER did not violate the Act. EE failed to show he had not been paid all wages earned and due.

206 ATTORNEY FEES

WRITTEN POLICY

Fringe Benefits

81-1842 Tauren v S & H Stores, Inc (1982)

EE began working for ER in January 1979 as an auditor under a bonus policy. At the end of the Fiscal Year 1979 (1/31/80), an appraisal was made on EE's work performance during the prior fiscal year. He scored 65 out of 100. In October 1980, EE was asked to resign. A letter of recommendation was furnished and no appraisal was done prior to his resignation.

EE filed a claim for benefits with MESC. The commission determined EE resigned at ER request. The bonus policy required bonus to be computed based on last appraisal and paid to

an EE who resigns at company request. There was no written notice canceling the bonus program and EE was never given any indication his work performance was poor until time of hearing.

ER argues that since the company did not meet its 1980 financial goals, 55 percent of EE's 1980 bonus should be excluded. In 1979 the financial goals were not met either, but EE was paid a bonus based on the 65-point appraisal figure.

EE's Attorney submitted attorney fees and EE requests exemplary damages.

ER contends amounts paid EE after separation for severance, long-term disability and hospitalization should be offset from any bonus found due to EE.

ER violated Section 3 for failure to pay fringe benefits in accordance with the written policy. There is no provision in the policy to change computation of bonus due at separation.

ER is also ordered to pay attorney fees and expenses. It is believed ER had no defense in refusing to pay EE fringe benefits claimed. ER is not ordered to pay exemplary damages - the violation was not found to be flagrant or repeated.

A reduction in the bonus amount should not be made based on the gratuitous severance pay and payment of insurance policies because of the continuous attempt by ER to thwart efforts of EE to secure payment of fringe benefits.

207 DETERMINATION ORDER - Issuance Within 90 Days
Amendment of DO

PENALTY AMOUNT

81-1883 Baker v Herculite Products (1982)

EE did not appear at the hearing. The WH Administration moved to amend the DO to find ER violated Section 5 only, instead of Sections 3 and 5. Thereafter, ER admitted owing EE wages for services performed. ER believes he should not be liable for penalty, since EE was not paid because of his own fault.

ER violated Section 5 for failure to pay EE wages due. ER is liable for penalty because there is no provision in the Act to waive permitting nonpayment of wages by ERs.

208 SICK PAY

Payment at Termination

82-2454, et al Num, et al v Wilco US, Inc (1982)

EEs were laid off due to ER's closing of the plant after one year's employment. A sick plan provided for 70 percent reimbursement of unused sick days after one year of service. ER claimed EEs were not entitled to reimbursement unless employment continued to end of plan year.

ER did not violate Section 4.

RELATED CASES: 93, 165

CONTRARY RULINGS: 21, 73, 168

209 EMPLOYER IDENTITY

82-2524 Surato v T-Bolt Machine Shop, Inc (1982)

ER's foreman hired and kept track of the hours EEs worked under his supervision. EE worked almost three months without pay but realized there was a problem with cash flow. Although EE's name appeared on the time sheets and purchase orders which ER saw, ER maintains that EE only hung around the shop as a friend of the foreman. ER never instructed the foreman to have EE leave the premises.

Based on the believable evidence presented, EE worked on the jobs with ER's knowledge. ER violated Section 5 for failure to pay all wages earned and due.

RELATED CASES: 69

210 COMMISSIONS

Payment

After Separation

OVERPAYMENTS

Mistakes

WAGES

Commissions

Payable After Separation

82-2543 Morton v Parker Hannifin Corp (1982)

EE was employed as a janitor pursuant to a written policy for holiday pay which states that

EEs must work scheduled day before and after holiday in order to be paid for the holiday. EE was involved in an accident the day before the holiday. EE's foreman told EE to bring in the car tow slip and he would probably receive his holiday pay. ER deducted the holiday pay because it was paid in advance. The deduction was made without EE's written consent.

No authority in the Act to deduct prior overpayments without EE's written consent. EE earned all wages in the pay period when the deduction was made.

211 EMPLOYER IDENTITY

WRITTEN POLICY
Fringe Benefits

82-2667 Burkhart v R J Cogswell, Inc (1982)

ER provided drivers for Sears, Roebuck & Company pursuant to a Standard Trucking Agreement. EE did not receive his vacation or vacation pay as provided for in the agreement. ER asserts Sears has the responsibility to pay EE vacation pay.

ER violated Section 3 by failing to pay fringe benefits in accordance with the contract. ER hired EE and made all legal deductions and controlled his activities.

212 DETERMINATION ORDER - Issuance Within 90 Days
Amendment of DO

81-1905 Welch v E W Mulder, Inc and Flash Interstate Leasing, Inc (1983)

It is undisputed that wages and fringe benefits are owed EE. The issue is who were EE's ERs -- Edward Mulder, Kris Mulder, Mark Mulder, and Mulder, Inc. or Flash Interstate Leasing. During EE's employment, the businesses of Mulder, Inc. and Flash were intertwined. Based on evidence presented, it is concluded EE was employed by Mulder, Inc. However, the Respondents: Edward Mulder, Kris Mulder, and Mark Mulder are officers of the corporation and not personally liable for the corporation's debts.

DO modified to delete Edward Mulder, Kris Mulder, and Mark Mulder as ERs.

213 COMMISSIONS
Contract Interpretation

82-2703 Bowler v Car-Bee, Inc (1982)

EE was a salesperson whose commission was provided for in a written contract and

determined by subtracting all costs pertaining to each job from the selling price of that job. The balance remaining after this will be split 50-50 between EE and ER. The contract also states no other form of remuneration is included. EE claims that the advances paid him for three jobs were really wages for additional services he rendered and he has not been paid his 50 percent commission. ER argues there was no agreement to pay EE wages other than 50 percent of selling price after the subtraction.

DO affirmed. No wages due EE. Although EE may feel he performed more work than originally intended, there was no contract for the payment of additional wages where none was negotiated by the contract. A similar case was discussed in Eaton County Juvenile Court WH 81-1359 (1981).

214 WAGES PAID

Recordkeeping

82-2736 Tomes v Kelley Awning Co (1982)

ER contends Complainant was not an EE but came in two to three hours on two separate days to hear lectures from him on the awning business. EE contends ER told her she would be paid for the training period in addition to work performed afterwards. EE kept a record of hours worked and what jobs she performed. ER kept no record. The burden of proof is upon the Appellant, who in this case is the ER. Section 9 states that an ER shall maintain a record of total hours worked.

ER has not met his burden of proof to set aside the DO and violated Section 5 which requires ER to pay EE all wages due upon separation from employment.

RELATED CASES: 37, 40

CONTRARY RULINGS: 109, 112

215 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

82-2563 Schlaack v American Citizens Stables (1982)

ER claims EE signed a document stating he was entering into an independent contractor relationship with ER. EE denies signing the document and states the wage agreement was $250 net pay a week. ER claims EE was to pay his own taxes as an independent contractor.

There must be more than ER intent to form an independent contractor relationship. The signed document stated this relationship was never produced; therefore, ER violated Section 5 and must pay EE wages due as an EE.

216 COMMISSIONS

Deductions
Earned

82-2730 DeLatorre v Congoleum Corp dba Curtis Industries (1982)

ER withheld commissions because EE had not returned catalogs and other selling equipment. EE contends he withheld these items because ER improperly deducted from his commissions. ER claimed these reductions were agreed to by EE and were in the sales contract and ER's administrative manual. Both documents permitted ER to charge EE for commissions already paid when a customer returns merchandise or fails to pay for that delivered. EE contends these deductions are prohibited by Section 7 of the Payment of Wages Act.

ER violated Section 7 for deductions from EE's commissions without written consent. Commissions are a form of wage as defined in Section 1(f). It is concluded that EE's compensation was reduced by events which happened prior to the pay periods at issue. A similar issue is dealt with in Schwan's Sales Enterprises, Inc., WH 80-1188, 81-1434, 81-1435. In that case it was concluded that unpaid charges, bad checks, and returns by the customers did not have a reasonable relationship to the value of the EE's labor or service for the pay period in question. Also violation of Section 5(2) for failure to pay commissions due because of EE's failure to return catalogs and equipment.

217 WRITTEN POLICY

Fringe Benefits

82-2529 Hines v Cambridge Business Schools (1982)

EE was employed as an instructor for a little over a year pursuant to a written policy which provided for vacations after one year of service to be taken between May 1st and August 31st each year. ER produced a revised copy of the written policy which provides for vacations after one year minimum service up to and including April 30th of any year. The vacation must be taken between May 1st and August 31st. The policy was dated for January 1982, which was after EE's termination. ER claims the year is a typographical error and should read for the previous year. EE denies ever seeing the revised policy.
ER violated Section 4 for refusing to pay EE vacation earned upon termination. Neither of the written policies state that earned vacations must be forfeited if not taken, nor does it state that an earned vacation is lost if an EE is not employed during the vacation period. Any ambiguity in a written instrument is generally construed against the drafter.

RELATED CASES: See "WRITTEN POLICY - Fringe Benefits"

218 COMMISSIONS

Payment

After Separation

82-2562 Spriggs v Leo E Morris Co (1982)

EE was a commissioned salesman. ER refused to pay commissions at termination on monies uncollected from the customer. Although the wage agreement provided that a commission would only be paid when monies were collected, prior commissions were always based on sales and delivery. After EE's separation, the ER claimed commission payments were dependent on monies being first collected.

ER violated Section 5. ER's assertion that it is normal in sales-type jobs to pay commission only when money is collected is irrelevant to the consideration of the wage agreement.

219 APPEALS

Untimely

Good Cause Not Found

Department's 90-Day Notification Procedural, Not Jurisdictional

DETERMINATION ORDER

Department's 90-Day Issuance Period Procedural, Not Jurisdictional

80-762, et al Bellhorn, et al v Jiffy Car Wash (1981)

The ALJ issued orders to show cause why determinations should not be made final upon ER's untimely request for review. ER stated that he was unable to properly respond or defend himself because the Department failed to comply with the provisions of Section 11(3) by failing to notify him of the determinations within 90 days. The ALJ ordered the Department to show cause why the determinations should not be dismissed and is summarized in the Order Denying Request for Rehearing.

The ALJ finds that ER has not shown good cause for late request for review. The Department's 90-day notification requirement is procedural and not jurisdictional. Dismissal of the DOs will not provide for settlement of disputes regarding wages and fringe benefits and will deprive Complainants of rights expressly provided for within the Act.

CONTRARY RULINGS: 131, 140

220 ACT 62

Fringe Benefits or Wages Due

82-2583 Patterson v Margaret Rice, Inc (1982)

EE was a buyer pursuant to a letter of 1966 stating facts agreed upon at several meetings prior to EE's employment. The letter stated it was not a contract, but provided for an annual bonus at the rate of 2 percent of total sales. ER failed to pay commission due and contends the amount claimed is a bonus which was paid voluntarily. The WH Administration concluded that the Department of Labor has no jurisdiction because there was no written contract/policy as specified in Section 3.

ALJ finds monies claimed by EE represent commissions. When the letter of agreement was written in 1966, Act 62 of the Public Acts of 1925 was in effect. It defined wages to include fringe benefits. Even under Act 390 the disputed monies would be considered a wage. ER violated Section 5 by failing to pay EE earned wages due as soon after termination as possible.

221 ADVANCES

82-2738 **Fludd v Associated Health Care Center** **(1982)**

ER contends he advanced EE wages. EE asserts ER made personal loans to her and the monies did not constitute wages. A letter from ER admitted to owing EE the claimed amount of money and that ER had made personal loans to EE.

ER violated Section 5 by failing to pay wages due.

222 WAGE AGREEMENTS
Verbal

82-2611 **Moore v World Entertainment, Inc** **(1982)**

EE auditioned for a role in a play, and although she had no theater experience, was selected for a principal role. EE states ER agreed to pay her $75 per week while rehearsing and $75 for each show performed. EE says she rehearsed 18 weeks and appeared in six performances and was not paid except $50 after one performance. EE also claims monies for hosting a cast party and making signs to advertise. ER states he never promised to pay EE for rehearsals or performances -- she would gain exposure and possibly someone who could afford to pay her may discover her. He acknowledged paying EE some money after one performance.

ALJ finds agreement of $75 for 30 to 35 hours work a week incredible since it is well below minimum wage. However, ER probably did degree to pay EE $75 for each show because he did pay her after one performance. Expenses incurred during employment are fringe benefits and there must be a written contract for that. ER violated Section 5 by failing to pay wages due.

RELATED CASES: 194

223 WRITTEN CONSENT

Inadequate

82-2343 Kemp v Boron Oil Co (1982)

ER deducted wages to cover two cash shortages; one alleged by EE's friend, and another by EE. EE repaid half of the first shortage and verbally agreed to a deduction from wages for the remainder. The second shortage was replaced with a credit card voucher initialed by EE for the amount. ER claimed verbal acceptance of responsibility and the initialed voucher was an authorized deduction from wages.

ER violated Section 7. Written consent must be more than initials and verbal promise. Deduction below minimum wage is also in violation.

RELATED CASES: 3, 4, 16, 21, 23, 125, 134

224 WAGES

Full Amount Not Paid

82-2464 Brown v Silvers Corp (1982)

ER agreed to pay EE a set wage with the provision EE would devote 90 percent of the time to ER's business and 10 percent of the time to winding down EE's own business. EE was discharged after one month's work, having spent two days' work at the EE's own business. ER paid EE less than half of claimed earnings. ER presented no evidence.

ER violated Section 5 by failing to pay wages due after discharge.

RELATED CASES: 37, 40, 161, 164, 169

CONTRARY CASES: 109, 112

225 VACATION

Gratuitous Payment in Lieu of Payment at Termination

82-2477 Zduniak v Mechanics Laundry Co (1982)

EE appealed for earned but unpaid two weeks' vacation pay when discharged. ER was paid a regular salary for six months following termination. EE failed to present proof that severance pay was required by contract or policy.

ER did not violate the Act. EE was more than compensated by gratuitous severance pay.

RELATED CASES: 94

CONTRARY RULINGS: 90

226 OVERPAYMENTS

Withheld at Termination

82-2479 Taylor v United Community Services of Metropolitan Detroit (1982)

EE accepted offer of employment at a different job for lower wages when the current job was eliminated. ER continued to pay EE for eight pay periods at former rate. Following termination, ER withheld EE's wages, claiming overpayment. EE claimed she was not overpaid because she was performing duties of both the old and new job.

ER violated Section 7 by deducting wages without written consent or a provision in the CBA. ER violated Section 5 by failing to pay earned wages to an EE as soon as the amount can be determined with due diligence. ER violated Section 4 by failing to pay vacation pay as provided in the written policy.

RELATED CASES: 19, 22, 29, 107, 142, 176

CONTRARY RULINGS: 14, 104, 110

227 BURDEN OF PROOF

Appellant

82-2586 Goldasich v Invironmental Control Technology (1983)

EE was employed pursuant to a written policy providing for sick leave. However, the policy did not define the term "sick leave." EE was given two weeks' notice of termination. Neither party kept records of the EE's hours worked for the final two weeks. EE did not work regular hours, and used working hours to look for another job. EE believes he is entitled to accrued sick time in excess of one pay period.

EE, as the Appellant, has the burden of proofing all matters upon which the appeal is based. EE has not presented proof as to the number of hours worked for the period for which he claims wages. Section 85 of the APA requires that an order be supported by competent, material and substantial evidence, and, therefore, EE is not entitled to sick pay for the period in question.

RELATED CASES: 38, 41, 70, 183, 205

228 APPEALS

Good Cause Not Found

Appeal Must Be in Writing or in Person

Appeal Requires Only Expression of Disagreement With DO

82-2819 Lee v Voice of the Inner Mind (1983)

EE filed an untimely appeal and offered as good cause that (1) EE got a job during 14-day appeal period; (2) EE needed to get copies of records from an attorney who was not in the office when EE got out of work; (3) EE had to get special permission to get off work early to get records from the attorney; (4) two weekends were in the 14-day period and EE had only 8 days left to get the papers.

ALJ found no good cause for late appeal. All EE needed to do in order to perfect an appeal was to write a note indicating disagreement with Department's DO and desire to appeal.

See General Entry II.

WAYNE COUNTY CIRCUIT COURT ORDER: 3/3/83
Affirmed the DO finding no EE/ER relationship or jurisdiction.

229 VACATION

Forfeited

82-2540 Culberson v American Way Service Corp (1982)

EE was employed eight years under the wage agreement which provided one-half time for overtime, which EE did work. ER's written policy provided for vacation time with no forfeiture upon termination. EE signed a statement authorizing ER to deduct for Incentive Plan Account. During the year debits were charged the account for medical and sick time. ER claimed EE was not entitled to repayment of the remainder in the account because it was a discretionary plan and EE had received "balance or other compensation" as stated in the policy. ER also claimed EE had forfeited vacation pay at termination.

ER violated Section 5, failure to pay earned wages of overtime, and Section 4, failure to pay earned vacation. ER did not violate the Act regarding incentive plan since ER had chosen to repay with other compensation.

RELATED CASES: 93, 124

CONTRARY RULINGS: 73

230 COMMISSIONS

Payment

After Separation

82-2521 Averill v Gregware Equipment Co (1982)

EE worked as a salesman on reduced salary but was to receive 4 percent commission of any sale in his territory even if he did not directly procure the sale, but had called on the customer within 30 days. Unlike other salesmen, EE's itinerary was checked by ER and at that time ER intended to stop paying EE commission on sale EE was unaware of. EE claimed he was not notified of ER's intent. ER, however, did pay commission on some sales EE did not know about. EE claimed commission on sale he was unaware of but discovered later. ER claimed final sale was after EE's termination, so ER owed no commission.

EE's appeal dismissed, no commission due EE.

RELATED CASES: 99, 102, 117, 122, 179

CONTRARY RULINGS: 204

231 VERBAL AGREEMENTS

82-2594 Lewis v Gibelyou Trucking (1982)

EE began employment as a truck driver accompanying ER on a trip. Both parties stipulated EE earned wages during the trip. ER alleged EE was paid for the trip, but offered no proof of payment. EE claimed he was not compensated.

ER violated Section 5(1). No proper receipt of payment. ER ordered to pay wages.

RELATED CASES: 123

CONTRARY RULINGS: 76, 173, 194

232 VACATION

Payment at Termination

82-2317 Lambie v EMT Laboratories, Inc (1982)

EE was employed a year, during which ER deducted amounts from EE's wages without written consent or a provision in the CBA. EE was not paid for one day's earned vacation. Written sick pay policy regarding payment at termination was specific as being at ER's discretion.

ER violated Section 7 by deducting from EE's wages without written consent. ER violated Section 4 by failing to pay earned vacation pay. ER did not violate the Act concerning sick pay because it was at ER's discretion.

RELATED CASES: 93, 124, 210

CONTRARY RULINGS: 73

233 COLLECTIVE BARGAINING AGREEMENT (CBA)

Deductions

82-2478 Anderson v Grosse Pointe Motor Sales (1982)

EE was an auto repairman. The wage agreement provided commission on 50/50 percent basis at the end of each job. ER made a deduction from EE's earnings for advanced payment without written consent or a CBA.

ER violated Section 7, deduction without written consent or CBA.

RELATED CASES: 23, 171

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

234 COMMISSIONS

Payment

After Separation

82-2495 Turnbull v Pyramid Broadcasting, Inc, WPBK (1982)

EE worked as an announcer for minimum wage plus as a salesperson on a 15 percent commission on collections to cease at EE's separation. EE claimed commissions owing for auto expenses.

ER did not violate the Act. ER had paid according to agreement and owed no auto expense, since there was no written contract or policy providing for such.

RELATED CASES: 93, 130, 202

CONTRARY CASES: 71, 117, 122, 204

235 VERBAL AGREEMENTS

WORK

As Acceptance of Wage Agreement

82-2419 **Moralez v Action Tire Co** **(1983)**

EE received hourly wages and contends ER told him he would be paid 10 percent of 75 percent of the charges for all labor performed at the store, regardless of who performed the labor and regardless of the type of labor. EE believed the 75 percent figure was used because ER did not want to keep records of who performed the work. ER's witnesses testified the 10 percent of 75 percent of charges was for mechanical work only, not for tire work. ER said he told EE he would receive 10 percent of 75 percent only for the work EE performed, not all tire work at the store. This is how EE was paid for over a year and continued to work under this arrangement. EE also contends he was not paid proper amounts for percentages on his mechanical work but presented no evidence.

Based on the conduct of the parties, the contract of employment did not require ER to pay EE a percentage of tire work performed by other EEs. No wages due.

RELATED CASES: 123

236 SICK PAY

Payment at Termination

VACATION

Deferred Payment

82-2564 **Lederle v Apollo Expediting, Inc** **(1983)**

EE was employed as a driver pursuant to a written agreement which provided that when an EE is receiving unemployment compensation, his right to and payment for vacation shall be deferred until after termination of the unemployment benefit period. At the time of termination, EE had accrued 90 hours of vacation pay and is presently not entitled to unemployment compensation.

EE also accrued 24 hours' sick pay at termination, but absent language to the contrary in a written contract, accrued sick time is provided to allow an EE to receive wages when absent from work due to illness.

The agreement should be interpreted as providing for payment rather than forfeiture of earned vacation benefits. ER violated Section 3 for failure to pay vacation benefits due.
RELATED CASES: 126, 127

237 EMPLOYER IDENTITY

Truck Driver

EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

Truck Driver

88-6862 Gambel v Rutherford (1988)

Respondent owned a semi tractor and leased it to Equity Transportation to haul loaded trailers from one destination to another. Complainant drove Respondent's semi tractor for Equity Transportation. Complainant was paid a percentage from the gross on what the load paid after subtracting out administrative expenses. Complainant was reimbursed for legitimate expenses incurred as reflected by receipts. Complainant was responsible for paying his own taxes and received a 1099 form from Respondent. Equity Transportation charged Respondent for any advances a driver would take from a load on a contractor settlement sheet.

Respondent received two contractor settlement sheets showing two advances that Complainant took for the same load. Complainant did not have receipts to account for the two sums and would not settle up with Respondent.

Respondent did not violate the Act. Complainant received his loads, trip arrangements and advances from Equity Transportation. Respondent had no control over Complainant's day-to-day duties, exercised no control over Complainant's hours or payment of monies. The ALJ determined Complainant received more than what was earned when he took two advances for the same trip.

See General Entry VII.

238 ADVANCES

DEDUCTIONS

Written Consent

WRITTEN CONSENT

Inadequate

82-2569 Jakey v Pranger Service (1983)

EE was a truck driver hauling freight and was paid $.15 per mile traveled. EE was given an advance for expenses incurred while on the road. EE was furnished with ER's rules (Respondent Exhibit) when hired and he signed them. The exhibit contained 56 rules, 52 of

which were typed and the last four handwritten, some in different handwriting and not dated. ER asserts EE has already received wages in the form of advances according to Rule 55, which says, "50 percent of advance money given to driver is considered part of the wages."

ER violated Sections 5(1) and 7. Respondent's exhibit is not a written authorization given fully and freely by Complainant to deduct from wages due and owing, an "advance payment of wages."

RELATED CASES: 23, 171

OCEANA COUNTY CIRCUIT COURT: Reversed 11/15/83
Court held that part of the advance by ER constituted advance on wages which EE initiated or controlled. No evidence that EE signed a written authorization for advance as a result of intimidation or fear of discharge for refusal to permit the deduction.

239 WAGES
Withheld
Theft

87-6709 Boertmann v Tires Plus (1988)

EE was not paid for 25 1/2 hours worked. ER withheld wages alleging EE had stolen tires. There was no written consent for withholding wages.

ER violated Sections 5 and 7. See General Entries III and XIV.

240 WRITTEN POLICY
Deductions

82-2809 Likowski v Kent Upholstering, Inc (1983)

It is undisputed that ER deducted monies from EE's wages to recover insurance premiums paid on EE's behalf while he was off from work two months due to illness. EE gave no written consent and was not a member of a union.

ER violated Section 7 by deducting monies without written consent or a provision in a CBA.

241 EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

82-2406 Colter v Owen Transport Service (1983)

Complainant worked as a tractor-trailer driver and was paid full wages earned for driving Respondent's tractor-trailers. When he was not driving, Complainant and several other individuals worked at Complainant's home installing trailer modifications on two of Respondent's trailers. Respondent had no control over the details of the work. Complainant was not supervised or told how or when to perform his work. Complainant asserted he could repair the trailers at a fair price. Respondent sent money for parts, oil and fuel, and wages for driving, but Complainant received no wages for hours worked repairing the trailers. Complainant said he did not get paid because the company was new and no money was available. Respondent claimed Complainant performed work on trailers as an independent contractor and therefore DOL has no jurisdiction in this case.

The Department has no authority to enforce contracts entered into by independent contractors. Complainant's repair work was his own part-time business and not Respondent's. Complainant may have cause for action in another forum.

RELATED CASES: 153

242 BURDEN OF PROOF

Appellant

Presentation of Proofs

82-2530 Stupakis v McNary Agency, Inc (1983)

EE worked pursuant to a commission agreement which provided that commissions would be paid only if ER received monies for goods. EE was unable to show ER had received payment for parts he had shipped. EE argues that since ER was the Appellant, he had the burden of proof of whether commissions were earned.

Payment of wage rule does provide that Appellant shall have the burden of proof, but it does not mean that the Appellant/ER must present proofs first. The order in which proofs are received is within the discretion of the ALJ. EE made an admission that ER was not liable for the commissions claimed. Therefore, the necessity of established nonliability by ER is rendered moot and ER did not violate the Act.

RELATED CASES: 70, 125

WAYNE COUNTY CIRCUIT COURT: 4/25/85

Case remanded for further proceedings because ER had the burden of proof. Before the case could be set for rehearing at the administrative level, the parties settled.

243 VACATION

Proration

WRITTEN POLICY

Interpretation

82-2541 VanDokkumburg v WHTC Radio (1983)

Before termination, EE earned but did not use vacation time. The written contract provided that vacation time must be taken and that no EE can receive his vacation pay and not take time off. ER believes the language of the policy to mean that an EE forfeits earned but unused vacation benefits upon termination of employment. The written vacation policy also provided that upon termination, an EE who has vacation time due him will receive prorated vacation equal to number of months worked since last vacation. WH Administration argues that last vacation means last vacation earned, not last vacation taken. ER contends "vacation time due him" refers to unused vacation time. It is clear that the "number of months worked since his last vacation" does not mean the number of months an EE has worked during the calendar year, and "vacation time due him" means vacation time remaining unused in the calendar year.

ER violated Section 4 by failing to pay vacation pay upon termination.

OTTAWA COUNTY CIRCUIT COURT: 2/10/84

Modified the ALJ's award, increasing the amount due Complainant from $271.91 to $890.90.

APPEALS COURT: 3/21/84

The Appeals Court reversed the circuit court decision and endorsed a literal interpretation of the vacation policy. The policy stated an EE must take time off to receive vacation pay. Complainant did not take time off and forfeited vacation pay.

244 EMPLOYMENT RELATIONSHIP

ER/EE Relationship Found

81-2057 Rust v Dr E S E Hafez (1983)

EE performed her duties at the Wayne State University School of Medicine but was paid by check from Hutzel Hospital out of funds from research grants and royalties received by Respondent. No taxes were deducted from EE's paycheck. EE was informed that fringe benefits would be allowed according to WSU standards. ER argues Complainant was not an EE within the meaning of the Act, although he authorized her work, set hours of work, required time sheets be kept, and established her rate of pay. The fact that EE worked in a building and used phones owned by Wayne State does not change the nature of the relationship. EE is claiming unpaid wages for the month prior to her termination.

ER violated Section 5 for failure to pay wages earned upon termination.

245 OVERTIME

VACATION
Payment at Termination

WAGES
Full Amount Not Paid

82-2718 Scofield v Advanced Interiors, Inc (1983)

EE, a foreman, accumulated 50 hours of overtime. EE intended to use the accumulated 50 hours of overtime for a vacation, which ER approved. EE did not take a vacation and requested payment of accumulated overtime. EE was paid for the 50 hours of overtime at the regular rate of pay and not at 1 1/2 times the regular rate. EE also claims nonpayment of time spent at meetings totaling 8 1/2 hours at the overtime rate. ER did not rebut the accumulated overtime. ER did not rebut EE's claim for attending the meetings.

EE entitled to 1/2 the regular rate of accumulated overtime. EE was in the employment of ER while attending the meetings and has not been paid for this time. ER's failure to pay the overtime rate for accumulated overtime and for time at the meetings violated Section 2(3).

246 EMBEZZLEMENT
Alleged But Not Prosecuted

WAGES
Full Amount Not Paid

82-2855 Powers v The J J Dill Company (1983)

EE did not receive pay for six dates worked prior to discharge. ER maintains that wages due were withheld because of EE's failure to submit expense justifications. ER also alleges EE is suspected of embezzlement; however, EE was not prosecuted. The Act requires ER to pay all wages earned and due and prohibits unauthorized deductions without EE's consent.

ER violated the Act in its failure to pay EE wages due and owing.

247 COLLECTIVE BARGAINING AGREEMENT (CBA)

Overtime

82-2804 Henderson v American Hoist (1983)

EE was injured on the job. EE was limited to light work for four days after being injured, with no heavy lifting. For three of the four days, EE performed light work. On the fourth day, a Saturday, ER informed EE that there was no light work on that day. ER had not told EE not to report that day for work, so ER did not pay overtime wages for that day that EE would have received it if not injured and had come to work. ER submitted a claim to the insurance carrier for benefits for EE's absence that day. The claim was denied because EE was not totally disabled. The CBA provides that the failure of a carrier to provide benefits shall not result in liability to fall on ER.

ER did not violate the Act by failing to pay the claimed fringe benefits.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

248 DEATH

Payment of Fringe Benefits

FRINGE BENEFITS

Proration of Vacation Benefits

82-2630 Easterday v Quality Spring Products, Inc (1983)

EE was employed from 1968 through 10/23/81 and employment terminated due to EE's death. CBA stated that the vacation period for each year shall be from January 1 to December 31 of the same year, and EE's eligibility will be computed on gross earnings during the preceding calendar year. Complainant argues that the calendar year is completed on the anniversary date of employment.

ER did not violate the Act. EE, due to untimely death, had not qualified for vacation pay for the period claimed, since a complete calendar year had not been worked.

RELATED CASES: 83, 124, 127

249 RESIGNATION

No Notice

82-2672 St Aubin v Home Energy Savers (1983)

EE worked from 10/17/81 through 3/13/82. EE claims wages for first three days of

employment plus five additional days. EE attempted to obtain wages on 3/15/82. When not paid, EE resigned from his employment.

ER violated Section 2. EE is owed all withheld wages.

250 BONUSES

WRITTEN CONTRACT
Amendment

82-2647 Baareman v Wise Personnel Services, Inc (1983)

EE began employment on 8/7/79. EE was paid a salary on a calendar month-end bonus. ER's 1974 memorandum provides when EE's employment terminates during any calendar month, then EE shall not be entitled to receive the calendar month-end bonus for that month, nor any part thereof, nor for any succeeding month. EE had signed acknowledgment of memorandum receipt but neither read nor received a copy of the 1974 memorandum.

The 1974 memorandum does not affect EE's right to the claimed commissions, since the 1974 memorandum was rescinded by a 1979 memorandum. ER violated Section 5(2) and ordered to pay EE a month-end bonus. The 1979 memo changed the 1974 policy by not including a provision that counselors would not receive certain payments in the event of employment termination. Case appealed to circuit court and ultimately settled by the parties.

251 WAGES
Full Amount Not Paid

82-2458 Fulton v Miller Brothers Oil Corporation (1983)

EE was terminated from employment. ER refused to pay wages for the two weeks prior to EE's termination. Section 5(2) provides "An employer shall immediately pay to an employee who has been discharged from employment all wages earned and due, as soon as the amount can with due diligence be determined." EE earned wages for one week and one-half day of the two weeks prior to his termination.

ER violated Section 5(2) by its failure to pay wages due.

252 DAMAGE TO OR LOSS OF PROPERTY

RETURNS
Work Not Completed Properly

WRITTEN CONSENT
Inadequate

82-2514 Templeman v Allen District Sales, Inc (1983)

ER reduced EE's wages for one month in the amount of $30 for a damaged tool and $525 for returned repair work. ER contends that EE's work was performed improperly and ER redid the work with no charge to the customer. EE did not sign a written consent for any wage deductions.

ER violated Sections 5(2) and 7. ER ordered to pay wages due.

253 BUSINESS PURCHASE
Deduction From Wages

WRITTEN CONSENT
Inadequate

82-2811 Stelma v Bera, Inc, dba Assured Maintenance, Inc (1983)

EE had an agreement whereby ER was to purchase his business. ER paid a down payment pursuant to the agreement. The sale never occurred. EE did not return the down payment to ER. ER then withheld some of EE's earned wages. EE did not consent in writing to the wage deductions.

ER required to pay all wages earned and due. Any amount EE may owe to ER has no bearing, since EE did not give written consent to deductions.

254 BURDEN OF PROOF
Appellant

WAGES PAID
Recordkeeping

82-2512 Rapai v Garden City Auto Parts, Inc (1983)

EE claims unpaid commissions in the approximate amount of $3,000 for the period from November 1980 through November 1981. EE has no record of his sales during that period.

EE has not met his burden of proving those matters upon which his appeal is based. EE's appeal is based on the speculation rather than evidence that he was not paid earned commissions. The evidence presented does not establish a specific amount of unpaid commissions.

255 LOANS

WRITTEN CONSENT
Inadequate

82-2695 Monthei v Knight Enterprises, Inc (1983)

EE was employed as a driver from 3/15/82 through 4/23/82, when he quit. On about 3/17/82, ER loaned EE $2,000. EE signed a letter authorizing deductions from his salary payments over a 52-week period, plus interest at an annual rate of 15 percent.

During EE's employment $45.13 per week was deducted from his wages to repay the loan pursuant to the letter of 3/17/82.

ER did not pay any wages for EE's last two weeks of employment. Instead, ER withheld EE's checks as repayment of the loan. EE did not consent in writing to deductions from his wages except as set forth in the letter of 3/17/82. Section 7 prohibits ERs from withholding wages, without written consent, as a means of resolving monetary disputes with EEs.

ER violated Sections 5 and 7 by withholding amounts in excess of $45.13 per week from EE's wages. ER is ordered to pay $678.96 plus a penalty in accordance with Section 18(1)(c).

256 VACATION
Forfeited
Unearned

82-2628 Tyksinski v Block Steel Corporation (1983)

EE's employment began in June 1949 and ended on 2/26/82, when ER went out of business. ER's written policy provided for paid vacations of one week for three to five years of service; three weeks for five to ten years of service; and after ten years, four weeks of vacation. The written policy requires that EEs must be employed to their anniversary date to be eligible for vacation pay. It will require a minimum of 1,000 hours worked during the preceding 12 months. EE did not have the right to use the claimed vacation benefits until his anniversary. EE, at the time of his termination, did not have the right to receive vacation pay because he had not met the requirement of completing employment to his anniversary.

ER did not violate the Act by not paying the claimed vacation pay.

257 FOSTER CARE HOME
Wages

WAGE AGREEMENTS
Foster Care Home
Verbal

82-3006 Smith v Hillside Foster Care (1983)

EE lived in ER's foster care home. EE did not receive a salary during the first six months. There were no foster care residents during this period living at the home.

After the first foster care residents arrived at the home, EE was paid a salary for caring for the residents and maintaining the home.

EE contends that ER agreed to pay her a salary beginning with EE living in the home. ER contends that she did not agree to pay a salary until residents moved in, since she did not receive payments for foster care until residents moved in.

There was no clear agreement that the salary would be paid commencing with EE living at the foster care home. ER did not violate the Act by refusing to pay the wages claimed for this period.

258 THEFT
Proven

VACATION
Forfeited

82-2720 Kammers v Clark Oil and Refining Corp (1983)

EE was employed from March 1974 to January 1982. EE was a manager of the gasoline station. During EE's last four months of employment the station had money shortages as well as losses of gasoline. An EE accused Complainant and another manager of taking gasoline from the station. When confronted about the stolen gasoline, EE admitted taking $10 worth of gasoline without paying on one occasion, and was then fired for stealing gasoline. ER's written fringe benefit policy provided, in part, that station managers were entitled to three weeks' vacation after five years of continuous service. EE signed the employment agreement, which provided, in part, that "If Manager is terminated under circumstances detrimental to Clark (e.g. unreasonably short notice, loss of money, et cetera), any unused

vacation shall be forfeited to Clark." ER did not pay EE for vacation time after his discharge.

Any unused vacation benefit was forfeited under the terms of the employment agreement. ER did not violate the Act by its refusal to pay EE for unused vacation time after his termination.

259 COLLECTIVE BARGAINING AGREEMENT (CBA)
Interpretation

JURISDICTION
Severance Pay
Statute of Limitations

SEVERANCE PAY
Fringe Benefit or Wage

83-3107 Wendzik v The Kroger Co (1984)

Complainant was laid off approximately 12/26/81 from his employ with Respondent. By letter dated 1/25/82, EE requested severance pay but did not receive payment from Respondent. EE did not file a grievance concerning the failure to pay severance pay. Instead, a complaint was filed pursuant to Section 11 claiming $2,500 in severance pay. Severance pay is covered under the CBA entered into between Respondent and the Complainant's union.

Severance pay is not listed in the definitions of fringe benefit or wages in Section 1. Looking at prior cases, the only fringe benefit that can arguably include severance pay is a "bonus." It was concluded that severance pay is not a bonus because a bonus, as defined in the Act, is made based on good work performance. Severance pay is made on length of service. Therefore, the concepts are not the same. The ALJ has no authority to add severance pay to the list of fringe benefits covered by the Act.

ER did not violate the Act.

Department Request for Rehearing Denied: 6/11/84

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

260 SEVERANCE PAY

83-3055 Robinson v R B & W Fabricated Metal Products (1983)

ER employed EE on 4/19/65. EE worked until 10/15/82, at which time she was let go as the

plant was totally shut down.

On 6/18/82, EE was informed by the plant manager that a planned shutdown was being put into effect. On that same day EE was given a copy of ER's policies which provides that EE would be entitled to 17 weeks of severance pay. ER did not dispute the length of service or the amount of severance pay involved.

EE was granted 8.5 weeks of severance pay. ER claimed that the compensation package that EE received did not apply and that a different severance package was to be drawn up where there was a complete shutdown.

ER violated Section 3 for failure to pay the severance pay in accordance with its written policy upon termination of employment.

261 VACATION

Payment at Termination

Probationary Period

82-2929 Mallia v Hilco Plastics Products Co (1983)

From 10/23/79 through 6/15/82, EE worked a total of 99 weeks. EE was laid off, but then rehired by ER. EE then worked from 1/82 to 8/4/82 and then quit. EE was paid one week's vacation pay. EE claims one more week of unused vacation time. ER had in effect a written policy that if EE had seniority of at least one year but less than two years, EE received one week of vacation; and seniority of at least two years but less than seven years, a two-week vacation.

Also, the written policy specified an EE's seniority would not begin to accumulate until having been employed for a period of (90) calendar days as of the last date of hire. Therefore, of the two periods worked, a total of 26 weeks were probationary and not counted as part of seniority. EE's amount of seniority was less than two years.

ER did not violate the Act by not paying the second week of vacation pay claimed.

262 JURISDICTION

Severance Pay

Statute of Limitations

SEVERANCE PAY

83-3020 Case v Atlantic & Pacific Tea Company (1983)

EE was a meat wrapper starting 11/26/76. EE was a "floater" who worked at different stores.

EE was laid off due to lack of work on 8/21/81.

ER had a written policy which provided for severance pay. Within one month after her layoff, EE sent a letter to ER requesting severance pay. ER refused to pay severance pay because EE was not laid off as a result of a store closing.

On 12/13/82, EE filed a complaint with the Department pursuant to the Act. Under the terms of Section 20.4 of ER's policy, any severance pay was due not later than two weeks after EE's separation on 8/21/81. Therefore, any violation of the Act by denying severance pay occurred no later than 9/4/81.

EE did not comply with the requirement of Section 11 that a complaint be filed within 12 months after the alleged violation. Therefore, EE's claim is not within the Department's authority under the Act.

263 BONUSES

82-2787 **Pogats v R B Richardson Company** **(1983)**

EE commenced work on 11/9/76. When hired, EE was given a copy of a document indicating that one of the EE benefits would be a Christmas bonus consisting of one week's base pay or draw for each full year of employment, to a maximum of three weeks' bonus for three years or more of employment. That sheet also stated at the bottom that: Above benefits subject to change without notice and do not start until end of 90-120 days' trial period, if employee is converted to regular employment at that time.
In January 1981, the president at Respondent company gave written notices to persons in the sales department that as of 1/1/81, a Christmas bonus would no longer be an EE benefit. The elimination of the Christmas bonus was also discussed with EE shortly following the notice.

At the time of EE's termination, he was given a final check which contained a written release acknowledging receipt of all monies due from ER. EE endorsed and cashed the check, apparently without objection to the release. ER contends that EE is not entitled to a Christmas bonus because EE was notified that a Christmas bonus was being discontinued as a fringe benefit in January 1981.

EE had been advised at the beginning of 1981, that a Christmas bonus was no longer included as an employee benefit for the sales department. ER did not violate the Payment of Wages Act and no monies for fringe benefits are due EE.

264 SICK PAY

Emotional Illness

83-3079 **McMahon v Michigan Humane Society** **(1983)**

EE was examined by a doctor and determined to be suffering from nervous exhaustion. A certificate of disability stated that EE was totally incapacitated from 7/9/82 through 7/15/82.

EE presented the doctor's certificate to ER's manager who advised her that she would use paid sick time due to her condition. EE missed a total of 16 hours work on 7/12 and 7/14/82. She was at home in bed on those days.

When EE returned to work, ER's management informed her that she would not be paid sick pay for the two days she was absent from work. The reason given for disallowing the sick pay was that EE's illness was emotional rather than physical. ER did not pay sick pay for the two days of work missed.

During EE's illness, ER's written policy provided for sick leave after 90 days of employment and stated: "Paid sick time is not intended to allow an employee additional time off, it is only granted to cover the real illnesses which are unexpected."

ER's policy does not state that sick time may not be taken for emotional illness, only that the illness be real.

ER violated Section 3 by refusing to allow paid sick leave for EE's illness.

265 COLLECTIVE BARGAINING AGREEMENT (CBA)
Deductions
Grievances
REDUCTION OF WAGES/BENEFITS
RES JUDICATA

82-2196, et al 14 Complainants v Admiral Merchants Motor Freight, Inc (1983)

Twelve of the fourteen EEs gave written consent to reduce their wages and certain fringe benefits. ER reduced the wages and fringe benefits of all fourteen EEs. EEs then filed grievances under the terms of the CBA contending that their written consent granting wage and fringe benefit concessions violated the terms of the agreement and were of no legal effect. EEs requested full payment due under the terms of the agreement. Two arbitration panels upheld EEs' grievances and directed ER to comply with the contract.

ER did not comply with the panel's finding. The teamster locals brought legal action to enforce the grievance awards. The Court granted the union's motion for summary judgment for the amounts due under the contract.

Before the institution of the lawsuit, EEs filed claims with the Michigan Department of Labor alleging violation of the Payment of Wages and Fringe Benefits Act by ER. The WH Administration issued determinations finding that in all but two of EEs' claims, ER did not

violate the Act.

The ALJ rescinded the DOs. EEs were not barred in bringing these claims based on **Ballentine** v **Arkansas-Best Freight System**, 450 US 728, 67 L ED 2d 641, 101 5th Ct 1437 (1981). The PW Act provides minimum substantive guarantees to EEs that cannot be barred by grievance procedure. Res Judicata did not apply since there had been no judicial decision on the merits of the claims. The written agreement to reduce EE's wages and benefits violated the terms of the CBA. Section 7 only covers deductions, not reductions of wages and benefits. Therefore a written consent would not make any difference. EE's reduction of wages and benefits was improper.

WAYNE COUNTY CIRCUIT COURT: 12/5/84
Affirmed the ALJ's decision rejecting the arguments of res judicata and accord and satisfaction.

COURT OF APPEALS: 2/18/86
Affirmed the statutory right to file PA 390 claim was not preempted. Also held that arbitration was not an adequate substitute for judicial proceedings and the "settlement" was not binding.

APPLICATION FOR LEAVE TO APPEAL TO THE SUPREME COURT FILED.
See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

266 COLLECTIVE BARGAINING AGREEMENT (CBA)
Deductions

WRITTEN CONSENT
Deductions

82-2676, et al 20 Complainants v Township of Clinton (1983)

In March 1977, the township entered into a CBA with all of its union groups except certain units of the police department. Pertinent parts of the CBAs provided for the payment of a $.01 per hour cost of living allowance (COLA) for each 3/10 (.3) rise in the Bureau of Labor Statistics Consumer Price Index (CPI) per quarter. The agreement also provides for a deduction from wages during those quarters when the CPI declined between quarters.

Because of declines in the CPI, payroll deductions were made by ER from the EE's base wages for three pay periods worked. ER did not have written authorization from EEs to deduct monies from their wages, nor were the deductions permitted by a CBA between the township and the affected EEs since they were not members of a union.

Section 7 prohibits ER deductions unless expressly permitted by law or by a CBA.

ER violated of Section 7. EEs were not parties to a CBA and none of them gave written consent.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

267 DISCRIMINATION

Discharge Due To

82-2465 Traynham v Mr Tee's (1983)

EE was employed part time by ER to work as a dishwasher in a cafeteria. EE had a disagreement with his supervisor. EE was transferred, where soon after he was fired. EE then filed a wage claim with the WH Administration.

EE was rehired by ER and began work under the supervision of Mr. Berishay. A wage hour investigator telephoned ER's business manager and advised him that EE had filed a claim for wages. ER was informed that $82.91 was owed EE.

EE had work and attitude problems while employed. ER's witness testified that Mr. Berishay told him that he caught EE smoking marijuana in an alley during working hours and that EE had problems with work habits and attitude. EE denied using marijuana on company property during working hours. Mr. Berishay followed EE around all day on 6/23/81, and at the end of the day fired him. EE testified that he did not believe Mr. Berishay was aware of the fact that he had filed a wage claim against ER. EE then filed a discrimination complaint.

MCLA 408.483(2) expressly prohibits an ER from terminating an EE for filing a wage claim pursuant to the Payment of Wages Act. The EE and the WH Administration contend that the wage claim EE filed was a substantial reason for his termination since he was discharged shortly after ER received notification of the claim. An inference arises that EE's filing was a substantial reason for his discharge.
EE's discharge was not the result of his engagement in protected activity and would have occurred even if he had not filed a wage claim. EE was terminated for reasons other than his having filed a complaint.

ER did not violate Section 13(1). DO was rescinded.

WAYNE COUNTY CIRCUIT COURT: Affirmed

268 ADVANCES

WRITTEN CONSENT
Deductions

82-2735 Simpson v Interstate Alarm Systems, Inc (1983)

EE began work on 1/25/82 at $50,000 per year. During the period of 3/13/82 through 3/26/82, EE earned $1,923.07 which ER withheld to recover $4,000 advanced to EE on 2/11/82 and 2/26/82. EE did not give written consent for ER to withhold his wages, nor was he a member of a union where a CBA permitted such a deduction.

Section 7 prohibits deductions by ER unless expressly permitted by law or by a CBA. Since EE did not give written consent and was not a member of a union, ER violated Section 7.

269 SICK PAY
Payment at Termination

82-2755 Holliman v Community Development Corp (1983)

EE telephoned his place of employment and requested that he be granted leave due to sickness in accordance with ER's written policy. Later during the same morning, ER sent EE two telegrams. They first advised EE that because of his inability to carry out his responsibilities, he was suspended without pay with the possibility of termination. The second telegram informed EE that he was to immediately turn over all keys and property and not to enter the premise during his suspension period. EE filed a claim for six days' sick pay.

There was no merit to EE's contention that he is entitled to sick pay for six days. First, during the period in question, EE had been suspended without pay. Second, ER's written policy provides that EEs will not be paid for accrued sick time at termination. EE's suspension was in fact a termination, since by the date of hearing, EE had not returned to work. ER did not violate the Act.

270 EVIDENCE
Insufficient to Establish Claim
Preponderance

82-2643 Rhoniy v Board and Berry (1983)

EE was a semi-truck driver during the period of 12/28/81 to 3/20/82. His wage agreement provided for 30 percent of gross revenues generated per load, to be paid weekly. He was

paid a total of $104.04 weekly. EE testified that he does not know how much each load grossed, but estimates that he is owed $3,500 in back wages. EE testified that ER's accountant thinks he is owed $736.99 and ER believes the amount to be $2,550. EE presented no other evidence.

EE failed to present sufficient evidence to support his claim for wages. A claim for wages based on speculation and conjecture does not amount to a preponderance of the evidence necessary to establish a violation of the Act.

271 WAGES

Full Amount Not Paid

At Separation

82-2538 Green v Complete Moving, Inc (1983)

EE was employed from the summer of 1982 until 12/27/82 at $5 per hour. His duties consisted of driving, loading and unloading trucks. EE worked 5 1/2 hours between 12/18/82 and 12/24/82 and 7 1/2 hours on 12/27/82 for which he was not paid.

ER violated Section 5 by failing to pay wages to an EE as soon after the termination of the EE's employment.

272 BURDEN OF PROOF

Receipt Signed by EE

VACATION

Eligibility Includes Time Off for Sickness

83-3104 Harrison v Pfeiffer Lincoln-Mercury, Inc (1983)

EE was an automobile body repairman. October 1, 1982, was the last day EE worked for ER. During the week of 10/4/82 through 10/8/82, EE missed work due to illness. On 10/14/82, EE notified ER that he was terminating his employment. Prior to that date EE had neither quit nor been discharged by ER. During EE's employment, ER had a written vacation policy which provided that after one full year of employment as a full-time EE, an EE would be given one week of vacation with pay. Also, the vacation pay which each EE received was to be an average weekly pay based on the prior year's earnings. EE did not receive a paid vacation during his employment with ER, nor was EE paid vacation pay after he terminated his employment.

EE worked from 10/7/81 to 10/14/82. Therefore, he was employed for over a year and was entitled to one week of vacation with pay under the terms of ER's policy. ER violated Section 3 by failing to pay EE the vacation benefit.

273 BURDEN OF PROOF
Receipt Signed by EE

EVIDENCE
Receipt Signed by EE

82-2865 Dalen v Midwest Broadcasting Company (1983)

From 5/2/82 through 5/23/82, EE worked 31 hours for ER and earned wages in the amount of $103.85. EE was out of Michigan for three weeks during 6/82. Upon his return, EE went to ER's place of business and discussed payment of his wages. ER testified that EE was paid for the hours worked. EE testified that ER told him that he did not have the money to pay the wages and that he would not be paid. EE testified further that he has not been paid the wages claimed in the gross amount of $103.85. ER offered a copy of a payment receipt EE purportedly signed.

Rule 408.22969 provides that: "An Appellant shall have the burden of proving those matters upon which the appeal is based." EE's testimony is no more persuasive than ER's testimony which was supported by the receipt showing payment.
EE has not met his burden of proving those matters upon which his appeal is based as required by the above rule. ER didn't violate the Act.

274 VACATION
Discharged EE
Eligibility
Payment at Termination
Discharged

WRITTEN POLICY
Interpretation
Vacation Forfeiture

82-2996 Jacobs v Guardsmark, Inc (1983)

EE began employment as a guard on 7/23/81. She was discharged on 8/20/82 for failure to carry out orders, an attendance problem, and excessive tardiness.

ER had a written vacation policy which provided that an EE must have at least one year of full-time employment to be eligible for a vacation with pay. Also, EEs receiving vacation pay shall be paid their hourly rate of pay, multiplied by 40, no premium (i.e. time and one-half) shall be computed.

EE worked more than 2,080 hours during the calendar year commencing 7/23/81.

ER's vacation policy provided further that if a full-time EE in good standing is terminated,

he/she shall be paid for any vacation time to which he/she is entitled.

EE did not receive a paid vacation during her employment with ER, nor was she paid vacation pay after her discharge.

Under the terms of ER's policy, an EE in good standing who is terminated, such as an EE who is laid off due to lack of work, is entitled to pay for accrued vacation time. The policy does not state that an EE who is discharged for cause forfeits accrued vacation time.

Since documents which are ambiguous should be construed against the party drafting them, it is concluded that EE's accrued vacation benefit was not forfeited under paragraph 5 of ER's policy. ER violated Section 3 by failing to pay EE this vacation benefit.

275 COMMISSIONS

Payment

After Separation

Late Customer Payment

82-2802 Bonjernoor-Pierson v Ad Infinitum, Inc (1983)

EE earned commissions on accounts she obtained for ER in addition to a weekly salary. EE's commission was 30 percent of the calculated agency profit and the commission was earned when the client paid.

EE submitted a letter of resignation. EE had not been paid commissions for some of the business she had obtained for ER. EE seeks payment of these commissions.

ER contends that EE did not earn commissions on amounts that were not paid within 90 days after the client was billed. However, there was no clear understanding that EE would not be paid commissions on amounts that were paid late.

ER violated Section 5(1) by refusing to pay EE earned commissions upon employment termination.

276 EVIDENCE

Entire Record

WAGES

Full Amount Not Paid

At Separation

82-2922 Ridings v Cimmarron Lounge (1983)

EE was employed from 12/5/82 to 8/18/82, when she was discharged. EE alleged that she was not paid the wages earned from 8/8/82 to 8/18/82.

ER offered evidence that EE was paid the wages claimed. But based on the evidence presented as a whole, ER did not pay EE wages earned from 8/8/82 to 8/18/82.
ER violated Section 5(2) by refusing to pay EE's wages.

277 COMMISSIONS

Contract Interpretation
Payment
After Customer Payment
After EE Performed Contract

82-2900 Rosema v McDonald Nursery (1983)

ER employed EE beginning 3/15/82 through 6/5/82, as a lawn fertilizer applicator and lawn fertilization salesman. EE was paid a weekly salary for his labor plus a 9 percent commission for completed sales.

EE alleges that it was his understanding that he was to receive the commission for each sale completed. He claims that even if the sales agreements were subsequently canceled or ER was not paid by a customer for any treatment or application, he is entitled to the commission for four applications. EE maintains that there were over 450 sales made for which he is entitled to commissions.

EE's method of payment was to issue a weekly check to EE for labor for fertilizer applications. In addition, when EE made a sale and after application, EE was issued a commission after ER received payment from the customer.

EE based his claim on possible future applications that may or may not be performed and payments either received or not received. The contract required EE to oversee or participate in application. Commission payment would be made only after customer paid. ER didn't violate the Act.

278 COERCION BY EMPLOYER

CONDITIONAL EMPLOYMENT
Payment of Wages to Part-Time EEs

WAGES
Deductions to Pay Other EEs

83-3090 Swager v A Book and Video Shack (1983)

EE was employed from 4/14/82 to 10/23/82 as cashier and manager. Her wage agreement during the period in question provided for $200 a week gross. Upon her hiring, she was told she would be working long hours alone until part-time EEs could be found.

During the period in question, EE found three persons at various times who agreed to work part time. Each of them were paid $60 a week and were paid from EE's net income. At various times ER would add $30 as half or part-time EE's pay.

ER admits that EE was not responsible for paying wages; it was the ER's sole responsibility. ER's position, though, was that if EE did not like the arrangement for their wages to be paid out of her wages, that she was free to quit any time.

ER's continual insistence that EE pay part-time EEs out of her own wages or quit was a violation of Section 8. This section prohibits an ER from demanding an EE to pay a fee, gift, tip, gratuity or other remuneration or consideration as a condition of employment or continuation of employment.

279 VERBAL AGREEMENTS
Vacation

WRITTEN POLICY
Bonus
Vacation

82-2921 Peters v R A Dematttia Company (1984)

EE was employed by ER for one year and two months. ER's written policy for vacation pay provided that EEs with one year of service would be entitled to two weeks' vacation.

During the course of EE's employment, he took one week vacation shortly after joining the company and six and one-half days during the remainder of his employment.

EE contends that he is entitled to an additional five days' vacation because the week he used upon starting his employment was verbally promised to him as a bonus for being assigned to a work station out of town immediately after starting.

ER's written policy provided for two weeks' vacation after one year. During the course of his employment, EE used two weeks and one day. There is no proof of a written policy that EE was entitled to a bonus of an additional week.

280 COMMISSIONS

Draw Against Commission

EVIDENCE

Draw Against Commission

82-2850 O'Hara v Monroe-Dodge-Chrysler, Inc (1983)

EE claims that ER failed to pay him $150 for one of the weeks of his employment as a commissioned salesperson. EE was to receive $150 per week as a draw against his commissions. EE received 28 payments of $150 each for the 28 paydays in 1982. EE's last day of employment was 7/10/82. EE received 52 payments at $150 each for 1981.

While it is clear that EE is dissatisfied with the findings of the Department in its DO, the presentation at the time of hearing shows that EE had received all of the draws against commission for each of the weeks that he was employed by ER.

281 WAGES

Firemen and Civil Service Act (1935 PA 78)

82-2938 Tewel v City of Southfield (1983)

EE based his claim for fringe benefits and wages allegedly earned between 2/9/82 and 9/3/82 on Section 14 of the Firemen and Civil Service Act, 1935 PA 78, MCL 38.514. This section provides that during the period between the making of the charges as a basis for removal and the decision by the commission, the member shall remain in office.

The Payment of Wages Act contains no authority to enforce Act 78. There is no requirement within the CBA for the member to remain employed during an appeal of disciplinary action by the appointing authority.

Since the record establishes that EE was paid all wages and fringe benefits earned and due through 2/7/82, no violation of the Act.

282 COMMISSIONS

Deductions

Sales Not Equivalent to Draw

DEDUCTIONS

Purchases

EXPENSES

Charged to ER

82-2820 McClain v Metro Passbook International (1983)

Complainant worked less than a year. ER withheld her last check because she charged a briefcase and she also did not generate sales equivalent to her draw.

ER violated Section 7 by deducting wages without EE's signed authorization.

283 RESIGNATION
Retroactive Policy Change

VACATION
Earned
Freeze On
Retroactive Policy Change

WRITTEN POLICY
Verbal Change

82-2869 Watters v Fabricating Engineers, Inc (1983)

EE was employed pursuant to a written policy covering vacations which made EE eligible for two weeks' vacation as of 5/31/82. In April of 1982 Complainant and the other EEs were told vacations for 1982 would be frozen due to adverse economic conditions.

ER has a right to prospectively amend its vacation policy, but in this case this was done verbally and after the EE had already worked for almost a year in expectation of receiving the vacation benefit.

Section 1(e) includes vacation as a fringe benefit, and Section 3 requires the ER to pay fringe benefits on behalf of an EE in accordance with the terms set forth in a written policy. Department's DO affirmed finding ER violated the Act.

284 AGENCY
EE Reliance on ER Agent

82-2936 Buckfire v Metro Passbook International (1983)

Complainant was interviewed and hired as an ad salesperson on straight commission. After a couple of weeks, EE was approached by the person who hired her and offered a job in the Art Department and she accepted. EE was told to punch a time clock, but after a few days her card was missing. When she reported her card was missing, the bookkeeper advised her to simply punch another card. Complainant estimated her hours but did not keep a separate

record.

ER argues that the person who hired EE had no authority to offer a task different from that which EE was hired to perform and EE did not receive authorization to do anything else from the president of the company.

It is concluded EE reasonably relied on a person who had apparent authority to direct her employment when she accepted the job offer from that person.

ER violated Section 5 of the Payment of Wages Act which requires payment to an EE voluntarily resigning employment of all wages due and owing.

285 COURT ACTIONS
To Collect Expenses Charged to ER

DEDUCTIONS
Health Club
Purchases

EXPENSES
Charged to ER

82-2822 <u>Gildenberg</u> v <u>Metro Passbook International</u> (1983)

Respondent Corporation employed Complainant as financial vice president. His task was to hire EEs, discipline, issue checks and keep bookkeeping records. EE went to Hawaii and stayed in a condominium owned by the corporation for approximately one month. He was directed to perform bookkeeping work while there which could have been completed in one or two days. Instead he took a month. EE was given $300 prior to departure to help with financial arrangements. While in Hawaii he ran up a bill of $88 at a restaurant and presented it to ER. Upon his return he also secured a $400 membership in a local health club which ER paid for and EE kept when he left the corporation.

ER withheld $462.50 in wages due EE at his termination because of the health club membership and the restaurant bill.

It was concluded that EE was paid for his labor while in Hawaii by the $300 check he was given prior to departure.

ER violated Section 7 which prohibits deductions without the written consent of EE. ER directed to pay EE $462.50 plus penalty amount. ER may file a suit in another forum against EE for the health club membership and restaurant bill.

286 AGENCY

Apparent Authority of ER Agent
EE Reliance on ER Agent

WAGES

Shift Premium

82-2797 Orr v Sumby Hospital (1983)

Complainant interviewed for employment with ER's agent. He was told he would receive $9.50 per hour plus an additional $1 per hour shift differential for the afternoon and midnight shifts. EE worked the first week on days and received $9.50 per hour.

The following week EE worked the midnight shift but did not receive the $1 per hour shift differential, at which time he wrote a brief note to the ER's agent about the wage rate agreed upon when hired. The agent replied that the differential had been put in the computer wrong and would be included in his next check. EE received several more checks without the additional amount being included. EE received document from agent
indicating shift differential was $1 per day, not $1 per hour. EE was discharged approximately one month later.

ER's agent had a specific duty to correct the misunderstanding, and based on her failure, EE continued working with the supposition he would get an additional $1 per hour shift differential payment. The error was not corrected until the agent sent EE the message from the administrator. The principal, ER, gave one of its agents the apparent authority to make decisions regarding hiring and pay levels.

ER violated Section 2 which requires the regular and periodic payments of agreed upon remuneration. Section 5 also has been violated since ER was not paid all wages due when discharged from employment.

287 VACATION

Forfeited
Resignation
Adequate Notice
Eligibility for Based on Two-Weeks' Notice

82-2964 Cooper v Flint Rotary Press, Inc (1983)

EE notified ER verbally on 8/24/82 that she had accepted another job and would start the new employment on 8/31/82. ER reminded EE of the company's written policy which provides any EE who quits without two weeks' prior notice to the company shall not be entitled to any vacation pay. EE contacted her new ER and the next day advised that she would work the two weeks specified in the policy. After consultation with counsel, ER

advised Complainant on 8/27/82 that her verbal resignation on 8/24/82 had been accepted and she was then terminated. She was paid, however, for the rest of Thursday and Friday, 8/28/82, and the following Monday, 8/30/82. In addition, Complainant was paid for 7 1/2 days of vacation pay. EE contends she was entitled to 16 days of vacation pay since she gave the required two weeks' notice.

ER had the option of retaining EE's services for the full two-week period but chose not to accept this.

ER violated Sections 3 and 4. EE is entitled to vacation benefits which are a fringe benefit under Section 1(e). It is concluded that Complainant is entitled to six more days of vacation. Sixteen days of vacation minus the two-and-a-half days paid minus the seven-and-a-half days of vacation paid equals the six days.

288 DEDUCTIONS

Purchases

Written Consent

Inadequate

Interpretation

Vague

WRITTEN CONSENT

Interpretation

Vague

82-2897 Hilyard v Ben Hodges Chevrolet-Olds (1983)

EE was employed as body shop manager. Facts were clear that he owed ER money for parts purchased from the parts department. EE signed a written authorization for ER to deduct the sum of $20 "or more" from EE's checks for repayment of these parts. The written authorization says, "I understand and agree that I cannot stop a wage deduction for

payment of purchases from the company." ER's representatives testified the phrase "or more" meant ER could deduct any sum in excess of $20 from EE's check.

Complainant testified he understood it to mean that he could pay any additional amount to ER out of his checks if he desired.

If ER's interpretation of the phrase "or more" were applied to this case, the provisions of Section 7 would be nullified because ER would be free to make whatever deduction was desired without specific authorization once EE had signed the form.

It was concluded that ER only had the right to deduct the sum of $20 from the wages of

Complainant. ER violated Section 7.

ARENAC COUNTY CIRCUIT COURT: 6/10/83
EE's appeal was dismissed because he sought review of an issue not adjudicated in the administrative decision.

289 DEDUCTIONS
Loans

EMPLOYMENT RELATIONSHIP
EE/ER Relationship Found
Carpenter/Painter

LOANS

82-2794 Wheeler v Michellinda Construction (1983)

Complainant worked about a month for Respondent's customers performing carpentry and painting at the rate of $6 per hour. He was paid weekly. At first, Respondent directly supervised Complainant's activities closely and did not regulate his work schedule. Complainant used some of his own tools and was provided other tools by Respondent. Respondent discharged Complainant and withheld wages as repayment for money Respondent lent to Complainant. Complainant did not consent in writing to the deduction from wages.

Respondent contends Complainant was an independent contractor and not an EE. The current test used in Michigan for distinguishing an EE from an independent contractor is the "economic reality" test which includes: (1) control of worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the ER's business towards the accomplishment of a common goal. Employing that test to the present case, it is concluded that Complainant was employed by Respondent.

ER violated Sections 5(2) and (7) by deducting $106 from EE's wages without written consent.

290 CLAIMS
Twelve-Month Statute of Limitations

JURISDICTION
Statute of Limitations

83-3113 Mebert v Ward Libler Buick, Inc (1983)

EE was employed as body shop manager. ER compensated Complainant with a 60 percent commission on body work performed. EE claimed unpaid commissions.

In February 1982, as a sale of ER's business was pending, EE requested payment of back commissions from ER. Payment of these claimed commissions was refused. EE filed a claim on 1/31/83 for $5,713 in commissions earned from 4/10/81 through 12/10/81.

Department had no jurisdiction over EE's claim because the complaint was not filed within 12 months after the alleged violation as required by Section 11(1).

291 DEDUCTIONS

Wages Below Minimum Wage

WAGES

Deductions Below Minimum Wage

WRITTEN CONSENT

EE Consent Ineffective if Below Minimum Wage

82-2934 ***Shelters v Dr. Doodles*** **(1983)**

EE was employed as a waitress at a pay rate of $2.52, the minimum wage for waitresses under provisions of the Minimum Wage Act.

EE entered into a written agreement with ER to assume responsibility for and to permit ER to deduct monies from her wages for guest checks, house and commercial charges. EE also agreed to guarantee payment for all errors in computation on these checks and to reimburse ER for all losses.

EE worked 31 ½ hours and earned net wages of $15.89. ER withheld this amount for losses resulting from an error on a guest check and for accepting a bad credit card.

Under the provisions of the Payment of Wages Act, ER is required to pay EE all wages earned and due. Since EE was being paid minimum wage, her written consent was ineffective for ER to deduct any amount from her wages. ER was ordered to pay EE $15.89 plus a penalty in accordance with the Act.

292 EMPLOYER IDENTITY

Corporation

INDIVIDUAL v CORPORATE LIABILITY

82-2880 ***Tanner v Bangor Advance*** **(1983)**

EE worked as an advertising salesman for a newspaper. During EE's employment, he was directed by and dealt with Nancy F. Sloan, John Sloan, and John LaFata.

EE believed that he was employed by John and Nancy Sloan. EE was never told that he was working for a corporation. His paychecks were drawn on the account of Bangor Advance Incorporated. The checks bore the name "Bangor Advance" and were signed by Nancy F. Sloan.

EE was employed by Bangor Advance Incorporated, not Nancy F. Sloan, based on the fact that EE worked for the newspaper known as the Bangor Advance, which was owned and operated by Bangor Advance Incorporated. Persons dealing with such businesses should assume that they are dealing with a corporation and not individuals. Respondent Nancy F. Sloan was not liable as ER for wages earned by EE during his employment by Bangor Advance Incorporated.

293 WAGES

Full Amount Not Paid

WRITTEN AGREEMENT

Work Study Program

82-2832 ***McClinchey v Out Wayne County Coalition, Inc.*** **(1983)**

EE worked as an intern and received credits from Michigan State University for this work. Initially EE was not to be paid for her services. However, during the early part of her internship she and her supervisor discussed the possibility of receiving compensation under MSU's work-study program. MSU approved EE's work-study program effective 8/24/81. Under the terms of the approval, EE was to be paid $3.32 per hour for a maximum of 29 hours per week. ER was to pay EE and then obtain 70 percent reimbursement form MSU.

EE worked 40 hours per week for three weeks after 8/24/81. In April 1982 ER paid EE wages in the gross amount of $130. This was the only wage payment EE received for her services. During the three-week period, ER engaged EE to work for pay in accordance with the work-study program. EE performed services during this period in reliance on ER's agreement to pay her pursuant to the work-study program.

ER violated Section 5 by failing to pay wages upon termination of employment.

294 EVIDENCE
Conflict

TESTIMONY
Conflict

82-2803 ***Dittrich v Frigid Foods Product, Inc.*** **(1983)**

EE worked as an apple picker form 9/21/81 through 10/29/81. EE contends that between 9/23/81 and 10/3/81 she picked 26 boxes of apples for ER but was issued only 24 of the tickets used to record the quantity picked. EE's mother also was an apple picker for ER. According to EE, she and her mother each turned in 24 tickets between 9/25/81 and 10/3/81. EE's mother was issued a check for 24 boxes on 10/3/81. EE suggested that ER erroneously failed to issue her a check on 10/3/81 due to confusion caused by the similarity in names and the fact that each turned in tickets for 24 boxes. However, this suggestion is merely speculation. It was more likely that EE's mother turned in tickets for 24 boxes earlier than EE. This would explain why checks for 24 boxes each were issued to EE's mother on 10/3/81 and to EE on 10/10/81. This explanation is consistent with ER's Records, which are the only records available. Also, the 24 boxes EE alleges she picked in approximately one week are considerably more than her weekly average.

ER did not violate the Act by failing to pay the wages claimed by EE.

295 **DAMAGE TO OR LOSS OF PROPERTY**
Company Vehicle

DEDUCTIONS
Company Vehicle
Written Consent
In Employment Agreement

STATUTORY CONSTRUCTION
Section 7

83-3076 **Dmuchowski v American Way Service Corp** **(1983)**

EE quit on 4/27/82, giving two week's notice. EE's last check was reduced by the sum of $218.90 to cover the cost of replacing the front windshield of a company car. It was later discovered by ER that the amount of the repair was $199.09. The balance of $19.81 was sent to the Department for forwarding to EE.

An employment agreement EE signed on 8/26/81 gave ER the authorization to withhold the sum for repair of the car.

The Department and EE took the position that the signed agreement does not authorize ER to withhold the payment for the automobile repair from EE's wages. EE claimed that there was nothing wrong with the automobile's windshield when the car was returned and nothing was called to his attention by his supervisor at that time.

Section 7 requires ER to obtain written consent from EE for each deduction from wages. Section 7 changed the procedure permitted by prior legislation on this subject. The passage of Act 390 repealed Act 62 of the Public Acts of 1925, MCL 408.521 - 408.425(a), which provided, in part, as follows: . . . nothing in this Act shall be construed as to prohibit a deduction from the wages or compensation of any EE, any indebtedness or obligation owed by such EE to the ER . . . .

This provision is not found in Act 390. Where provisions of a statute differ from those of a previous statute on the same subject, they are presumed to have a different construction or meaning and denote an intention to change the law. The document signed by EE does not give ER the authority to deduct from wages. The amount of $199.09 is owed to EE.

296 EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

Economic Reality Test

Truck Driver

88-7077 **Dick v Roadway Package Systems, Inc** **(1989)**

Complainant signed an operating agreement and equipment lease with Respondent that could be terminated without cause or reason at any time upon written notice to the other party.

After reviewing the facts, the ALJ concluded that Complainant was an independent contractor. Even though Respondent had some control over Complainant's duties, the testimony was that Complainant picked his own routes and hours and that no FICA or federal incomes taxes were withheld.

See General Entry VII.

297 WAGES

Payment Made Before Work Performed

82-2753 **Harmon v Kathy's Construction** **(1983)**

EE was employed as a secretary commencing 4/22/82 and claimed wages of $346.86. EE received a check for $137.86 in wages earned during the week beginning 5/3/82. However, there were insufficient funds in ER's account to cover the check. ER contended that EE was paid these wages by other checks that were issued payable to EE or "cash." ER's contention was rejected because these other checks did not total $137.86, were not intended as paychecks, and were issued before wages were due for the week of 5/3/83. Therefore, it was concluded that wages were due as claimed for the week of 5/3/83.

297 (Continued)

EE also claims wages for weeks beginning 5/17 and 5/24/82. There was conflicting testimony as to whether EE was employed by ER during these two weeks.

Based on EE's testimony, it was concluded that wages were due as claimed for the weeks beginning 5/17 and 5/24/82. ER was ordered to pay EE the wages due plus penalty.

298 EMPLOYEE DEBT TO EMPLOYER

UNCOLLECTED ACCOUNTS

WAGES
Withheld
EE Debt to ER
Uncollected Accounts

82-2531 **Genz v Nicholas Flowers** **(1983)**

Rule 19 of the Administrative Rules promulgated pursuant to the Act, being R408.22969 reads: An Appellant shall have the burden of proving those matters upon which the appeal is based.

ER is the Appellant in this case. ER's witness admitted that EE was employed during the period ending 1/8/82 and earned $288.72. These monies were withheld as an offset for monies allegedly owed to ER by EE and for accounts sold by EE which were not collected.

There was no proof that EE gave written consent for the deduction or that he was a member of a union which had a CBA authorizing ER to withhold wages for the reasons advanced by ER.

ER violated Section 7 by failing to pay the amount due.

299 WAGES

Payment Ordered Based on ER Records Over EE Speculation

83-3165 Tezak v West Bloomfield School of Dance, Inc (1983)

Complainant testified that she worked 80 1/2 hours and she submitted a time sheet which she kept at home to keep track of her hours. Respondent presented time sheets indicating EE worked 62 1/2 hours, which Complainant acknowledged she signed and turned in after working the period in question. EE claims one of the time sheets is missing, and therefore the records are not complete. An examination of the records led to the opposite conclusion.

Respondent violated Section 5 for failure to pay Complainant for 62 1/2 hours worked.

300 BURDEN OF PROOF

Appellant

EMPLOYMENT RELATIONSHIP

Reemployment After Separation

82-2704 Hajji v Universal Refrigeration Equipment, Inc (1983)

The parties stipulated that Complainant was employed as a sales representative from 11/9/81 through 11/27/81. During this period Complainant was paid all wages earned.

Complainant claims he was rehired by Respondent in February 1982 and was to be paid commissions only. He testified to making repeated sales calls which resulted in purchases for three weeks in February but did not close the sale. Respondent presented evidence that Complainant was not employed after 11/27/81. The major account Complainant testified he contacted in February 1982 had purchased supplies in November 1981 from a sales representative other than Complainant. Complainant presented no competent evidence he was employed by Respondent after November 1981, or that he made sales for which a commission was earned.

No wages due and owing from Respondent.

301 COMMISSIONS
In Lieu of Salary

CONTRACT
Amendment
Acceptance

MINIMUM WAGE
Commissions

83-3097 Hunter v Academy Electronics Corporation (1983)

EE was employed as a VCR television technician at $8 per hour. He was paid in this fashion for the first two weeks of his employment. At the end of EE's second week of employment, Respondent gave Complainant the option of continuing to work for commissions only or be terminated. Complainant did not respond to Respondent's offer but continued to work for another three weeks under the assumption he would be paid $8 an hour. Although Complainant did not verbally respond to ER's offer to work for commission only or discontinue his employment, the act of continuing to work constitutes acceptance of the terms. A wage agreement which provides for payment of commission is effective only when an EE is paid minimum wages. EE was paid all wages earned and due for the additional three weeks.

ER did not violate the Act.

302 VALUE OF SERVICES

WRITTEN CONTRACT
Failure to Pay According To

83-3193 Hartrick v Kalamazoo Blueprint and Supply Co, Inc (1983)

EE began working for ER on 5/10/82 as a bookkeeper until 1/14/83 when she was discharged. ER contended the written wage agreement is only a guideline and because EE's work was not satisfactory, she was not entitled to the agreed hourly rate. Furthermore, since EE would not pay the payment fee, she should not receive the agreed hourly rate. This does not meet the required burden of persuasion.

EE asserts she never received the scheduled raises per the written agreement; she was informed her work was satisfactory after three months of employment; and that her request for an evaluation by ER was repeatedly ignored.

ER violated Section 2 for failure to pay EE the scheduled hourly rate set forth in the written agreement, and also Section 5(2) by failing to pay Complainant all wages earned and due upon EE's discharge.

303 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

Economic Reality Test

Partner as EE

83-3108 **Keller v Enuresis Family Center, Ltd** **(1983)**

Respondent claimed Complainant was simply an owner of the corporation who invested in the business and hoped it would prosper.

Complainant argues that although he was an owner of the corporation, he was also an EE. The "economic reality test" adopted by the Michigan Supreme Court in determining whether an EE/ER relationship exists includes: 1. Control of worker's duties 2. The payment of wages 3. The right to hire and fire and the right to discipline 4. The performance of duties as an integral part of ER's business towards the accomplishment of a common goal. Reviewing the facts in total, it was found that Complainant was an EE of Respondent and not simply a stockholder.

ER violated Section 5 which requires an ER to pay discharged EEs all wages due.

OAKLAND COUNTY CIRCUIT COURT: Dismissed 5/16/84
Respondent/Appellant failed to file a timely brief pursuant to GCR 701.9.

304 BURDEN OF PROOF

Wages Paid

ER Burden to Show

EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

WAGES PAID

Recordkeeping

83-3140 **Murray & Reese v Wushu-Desiree of Paris** **(1983)**

In the case of Louise Murray, the WH Administration found there was no EE/ER relationship. EE worked 11 weeks for $150 per week plus a 50 percent finder's fee. She voluntarily terminated her employment. Her duties consisted of interviewing loan applicants who responded to advertisements in the classified section of the newspaper. ER directed EE's activities and supervised her work. After a few weeks she was assigned general office work.

304 (Continued)

Section 1(b) defines the term "employ" to mean "to engage or permit to work." EE was permitted to work by ER.

A "to whom it may concern" letter written by EE on the letterhead of another company during the 11-week period is insufficient proof that EE was not permitted to work by ER.

The claim of Nina Reese is based on work allegedly performed by her for ER from 10/18/82 through 11/29/82 when she voluntarily terminated her employment. EE testified she was employed as an executive secretary for $160 a week and during the period of her employment she was only paid $150.

ER testified that the original pay records were destroyed but EE was paid all wages earned and due. He presented photocopies that appeared to be signed payroll records for the period in question. EE signed a payroll record for one week but asserts the additional records are duplicates with different pay periods written in the space provided.
Section 9 requires ERs to maintain for three years a record for each EE, which includes, among other things, total wages paid each pay period.

In both cases ER violated Section 5 by failing to pay all wages due and owing.

305 **WAGES**
Withheld
Door Locks

WRITTEN CONSENT
EE Consent Ineffective if Below Minimum Wage
Inadequate

82-2566 **Potter v Lawrence Stockler PC** **(1983)**

ER withheld $125 from EE's check as an offset for replacing locks on the law office doors. EE signed an authorization to permit deductions or risk losing her job.

ER violated Section 5(2) by failing to pay EE all wages earned and due; and Section 7 by deducting wages without the full, free, and written consent of EE. Even if EE had freely given her written consent, ER still violated Section 7 because the amount withheld reduced EE's wages below the minimum wage for 1981.

WAYNE COUNTY CIRCUIT COURT: Affirmed 4/22/85

306 **SICK PAY**
Payment at Termination

WRITTEN CONTRACT
Interpretation

82-2370 **Marshall v Total Building Services, Inc** **(1983)**

EE was employed as a janitor from 9/26/79 through 7/30/81 pursuant to a contract of employment and was assigned to work at the University of Detroit. The contract provides that an EE who has been at a job site ten months will be entitled to five days paid vacation, and an EE employed at the job site for two years will be entitled to ten days paid vacation per year.

EE did receive vacation pay for 20.61 hours; however, she is entitled to five days paid vacation because she was at the job site for more than ten months.

EE's argument that she is entitled to ten days vacation since she was employed at the job site 22 months was rejected. the intent of the contract is to give EEs five days vacation after the first ten months of employment. After that period had expired, however, EE would not receive any further vacation benefits until he or she had passed the second year anniversary.

With respect to sick benefits, the contract provides that an EE with one-year seniority at the job site shall be entitled to five days after serving one year at the job site, but EE was not paid the sick benefits required by the contract.

ER violated Section 3 for not paying EE the full amount of vacation benefits and for not paying sick days as set forth in the contract.

307 **EMPLOYMENT RELATIONSHIP**
Independent Contractor Relationship Found
Economic Reality Test

82-2835 **Watkins v Assad Company** **(1983)**

The issue in this case is whether there was an EE/ER relationship during the period of 6/1/81 through 8/15/81 and 1/1/82 through 3/13/82.

Complainant contended there was a verbal EE/ER relationship because of the actions he performed such as reporting to the job site, the inability to work for anyone else, and his reporting responsibilities. Complainant asserted that he became an independent contractor only after he signed the employment sales account. Witnesses testified that he performed tasks other than those of a salesperson selling Respondent's product.

307 (Continued)

Respondent contended that Complainant desired to work as a salesperson out of his house. Complainant had no employment agreement. He was given a 1099 form to compute federal and state taxes because he received commissions under a verbal agreement with Respondent.

The Michigan Supreme Court has adopted an "economic reality test" to determine whether an EE/ER or independent contractor relationship exists, which is explained in the ALJ's decision. Applying that test to this case, it was found that Complainant was an independent contractor during the two periods in question, and, therefore, Respondent did not violate the Act.

308 **PREEMPTION**
CBA

RES JUDICATA

82-2412 **Zurowick v Wayne County Sheriff's Department** **(1983)**

Complainant filed a claim for wages and fringe benefits in the amount of $166.40. The DO stated that the Department has no jurisdiction in the matter because the case was subject to a previous court decision; that decision being based on two prior court decisions, re: Michigan Council 25, et al v Board Of Commissions of Wayne County and National Union of Police Officers, Local 502 SEIU, AFL-CIO, et al v County of Wayne, et al.

ER argues that principles of res judicata, merger by judgment, and collateral estoppel demand dismissal of EE's claim. EE argues that she was not a member of Local 502 and that the decision involving Council 25 was on behalf of union members. It has been consistently held that there are no procedural barriers or exhaustion requirements which prevent an EE from bringing an action under Act 390; the ALJ's decision cites several cases. Therefore, EE is not foreclosed from bringing this action.

The facts are undisputed. EE worked on 3/23/81 and 3/24/81 and earned wages and fringe benefits pursuant to the terms of the CBA in the amount of $166.40 for which she was not paid.

ER violated Sections 2 and 3 for failure to pay EE wages on or before the 15th day following the end of the work period and fringe benefits in accordance with the terms of the written contract.

309 COMMISSIONS

Payment

After Separation

Incomplete Sales

82-2885 **McKinley v Jacobson's** **(1983)**

EE was employed by ER pursuant to a wage agreement which provided a 6 to 7 percent commission on sales made in ER's designer department. One month prior to EE's termination, she solicited orders from customers. The orders came in a couple of months later; clothes were fitted and altered and the customers made decisions on whether to purchase the ordered merchandise.

EE argues she is entitled to the 7 percent commission on the sales made because ER paid commissions to salespeople for final sales even if they were absent. There is no merit to this argument. A salesperson absent because of sickness or vacation still retains status as an EE.

ER didn't violate the Act. Complainant merely solicited orders. Sales were not complete until the customers were called two or three months after EE left.

310 WRITTEN CONTRACT

Termination Prior to Contract Date

81-1582 **Tinskey v Precision Cold Forged Products, Inc** **(1983)**

Complainant was employed pursuant to a contract dated 7/18/75. He was discharged by ER on 2/1/80. According to the contract, EE's base compensation was to be continued through 7/31/80 unless terminated for certain specific reasons, one being negligence or insubordination upon 30 day's notice by the Board of Directors. After EE was terminated, certain alleged irregularities were found in the books of ER. Complainant was not given written notice that such irregularities would be the basis for his termination.

The contract provides that EE will be entitled to four weeks' vacation in each year. Complainant used one week of vacation prior to his termination.

ER violated Section 5(2) for failure to pay Complainant wages from 3/1/80 through 7/31/80. Since ER is liable to EE for additional monies due for the duration of the contract, no additional payment is required for vacation pay.

311 **COMMISSIONS**
Deductions
Draw Against Commission

82-2980 **Cohn v Leeds Furniture, Inc, #2** **(1983)**

EE began employment with ER on 3/8/82 pursuant to a wage agreement providing for a draw of $300 per week against commission. EE testified he was told when hired that if he did not make his draw for the first two months, it would not be held against him and the "slate would be clean."

During his first two months, EE's draw exceeded his commissions. The following two months, commissions exceeded draw and EE was paid the difference in commission. The next month EE was terminated and ER withheld commissions earned that month to recover payments made the first two months. ER testified that "wiping the slate clean for the first two months" applies only if an EE remains with the company.

ER violated Sections 5 and 7. Section 5 requires ERs to pay EEs leaving employment all wages earned and due, as soon as the amount can be determined with due diligence. Section 7 requires the written consent of EE for deductions to be made from their paychecks.

OAKLAND COUNTY CIRCUIT COURT: Affirmed 8/8/84
EE is owed earned commissions because there is no written authorization for deductions.

312 **BURDEN OF PROOF**
Recordkeeping

WAGES PAID
Recordkeeping

82-2849 **Kain v Executive House Apts** **(1983)**

EE was employed to do maintenance work. EE contends he worked 24 hours per day from 5/7/82 through 5/12/82, and 7/19/82 through 7/25/82. EE testified that during the periods in question he was required to remain on ER's premises on call and could leave for two 30-minute periods each day. ER produced time records EE signed indicating EE worked 40 3/4 hours each period and was paid all wages earned. EE claimed he signed the cards under duress.

ER didn't violate the Act. It is highly unlikely that EE worked 24 hours per day, 7 days a week during the period in question.

313 **BURDEN OF PROOF**
Appellant

83-3201 **Bigger v Town and Country Carpets, Inc** **(1983)**

Respondent withdrew his appeal of the DO. Accordingly, the hearing was limited to EE's contention that monies were due and owing in an amount larger than that found by the Department.

EE worked as a carpet salesman earning $200 a week draw against commissions. He received 33 1/3 percent of the net profits when orders were paid. Complainant could not prove more was due than the amount found by the investigator.

It is an established principle that the party who has the burden of persuasion must establish a fact by a preponderance of the evidence. It was found that EE failed to do so. More than assertions and estimates are necessary.

DO affirmed. Respondent violated Section 5.

SHIAWASSEE COUNTY CIRCUIT COURT: Affirmed 8/28/84

314 **GENERAL ASSISTANCE RECIPIENT**
Wages Earned

MANDATORY WORK PROGRAM
Wages Earned

83-3080 **Pettway v Maranatha Christian** **(1983)**

Complainant, a general assistance recipient, was referred to Respondent to take part in a mandatory work program. He was required to work three days per week, a total of 65 hours per month as a condition of receiving general assistance.

After being hired by ER, he was told to stay on general assistance until the center was able to pay him and he received his first check. From 9/13/82 to 10/8/82, EE worked 40 hours per week for a total of 160 hours. He was paid $10 at the end of the second week and was informed the balance would be paid when and if the day-care center got started, which it did not. EE discontinued working 40 hours per week and resumed working 65 hours per month through mid-December 1982.

The record establishes EE worked 95 hours more than was required for him to continue to receive general assistance. ER's witnesses admitted that the time records submitted to the funding agency did not accurately reflect the times and days actually worked by Complainant.

314 **(Continued)**

ER violated Section 5 by failing to pay EE all wages earned and due, as soon as the amount could be determined. ER ordered to pay EE 95 hours of wages less $10.

315 **COLLECTIVE BARGAINING AGREEMENT (CBA)**
Deductions
Telephone Calls

DEDUCTIONS
Expressly Permitted by CBA
Telephone Calls

TELEPHONE
Long Distance Calls, Deductions

UNAUTHORIZED ABSENCE
Deductions From Wages

82-2915 **Ulmer v R & W Service System, Inc** **(1983)**

Respondent employed Complainant as a truck driver. An unratified agreement dated 4/1/82 provides, in part, that: "Health, welfare and pension will be prorated and charged back to the EE at one-fifth (1/5) the weekly cost for each day of unauthorized absence."

During the contract negotiations, ER and EE's union executed a written agreement listing past practices which included "charging for personal calls made collect or on our telephone service." This list was not made part of the CBA that eventually was ratified.

From 1/1 through 7/20/82 ER deducted $34.42 for collect telephone calls pursuant to past practice and deducted $20.10 on 5/1/82 to reimburse Respondent for health, welfare and pension payment for EE's absence on 4/23/82. Complainant did not give written consent for these deductions.

ER contends that collect telephone charges can be deducted legally from EE's wages pursuant to the CBA.

Section 7 allows wage deductions that are expressly permitted by a CBA. Even if the agreement incorporated Respondent's past practice regarding collect calls, any authorization of deductions is implicit and, therefore, not expressly permitted by the CBA.

315 (Continued)

The agreement does not use the specific term "deduction" in allowing ER to recover health, welfare and pension payments for days of unauthorized absence. But in stating that these amounts will be "charged back" to EE, the parties apparently intended that these amounts would be deducted from wages. Therefore, it is concluded this was expressly permitted by the CBA.

ER violated Section 7 by deducting telephone charges in the amount of $34.42 from EE's wages. No violation of Section 7 by deducting the health, welfare and pension payment in the amount of $20.10.

COMMENT: There is mention that a driver, in 1980, filed a grievance challenging ER's practice of deducting telephone charges. This grievance was resolved in favor of ER at the state level of the grievance procedure set forth in the CBA.

WAYNE COUNTY CIRCUIT COURT: 5/2/86 (See entry 368)

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

316 **DEDUCTIONS**
Written Consent

THEFT
Alleged
Deduction Taken From Wages

WAGES
Deductions Below Minimum Wage

WRITTEN CONSENT
Advances

87-6590 **Zeoli v Tri-County Petroleum dba Qwik Stop Food Store** **(1988)**

The facts were undisputed as to EE's earnings when his employment terminated. ER testified that EE admitted to the theft of at least $500. EE signed a statement indicating he had received a cash advance of $184.37. Rather than EE receiving net wages of $184.37 and giving it back to ER, EE was instructed to sign the cash advance receipt.

ER violated Section 7 by withholding EE's wages without written consent. The receipt which EE signed did not authorize ER to withhold wages.

Even if the signed receipt was construed as written consent, ER still violated Section 7 by withholding all of EE's wages reducing his earnings to below minimum wage.

316 (Continued)

ER also violated Section 5 for failing to pay EE's wages as soon as the amount could be determined with due diligence. See General Entries III, VIII, XIV.

317 **EMPLOYER IDENTITY**
Partnership Agreement Not Completed

EMPLOYMENT RELATIONSHIP
Partnerships
Not Finalized

83-3123 **Locke v Paul A Johnson/Robert M Urka** **(1983)**

Paul Johnson and Robert Urka signed a document which provided that all payments were to be made out to Robert Urka and after expenses were paid a profit would be split 50-50. The back of the document stated that: Received from Paul A. Johnson $5,500 as down payment on full partnership. Balance $2,500.

The parties agreed that after 30 days Mr. Johnson would pay the balance of $2,500. At that time he would be considered a partner. However, Mr. Johnson did not pay the $2,500 so there was no legal partnership.

Mr. Johnson had hired Terry Locke, Complainant, to drive a truck that was owned by Mr. Urka. Mr. Urka had no knowledge of this. Since Mr. Johnson and Mr. Urka cannot be viewed as partners, Mr. Urka was not liable as a principle to pay EE's wages. Respondent Robert Urka did not violate the Act.

318 **EXPENSES**
Per Diem

IMPLIED CONTRACTUAL RIGHT

WRITTEN CONTRACT
Board Minutes

82-2394 **Roberts v Teamsters and Chauffeurs Local #580** **(1983)**

Local 580 hired EE as a business agent. He received per diem pay if he was out of town for panel meetings. He is claiming expenses incurred on a business trip to Arizona. There was no written contract. Any policy that allegedly existed was contained in the Board Minutes. When requests for payment or reimbursement for travel expenses were submitted, they were either approved or disapproved by the Board. The Board itself did not have a written policy for expenses.

EE cites Toussaint v Blue Cross and Blue Shield of Michigan in support of position that the Board minutes create an implied contractual right. It was concluded that unlike Toussaint, supra, there was no evidence of a board policy or contract that would give rise to enforceable rights. EEs were unaware of any personnel policy and practice which was applied consistently and uniformly to each EE. ER did not violate the Act.

319 **EMPLOYMENT RELATIONSHIP**
EE/ER Relationship Found
Attorney

SUBPOENAS

83-3124 Capello v Eyde Brothers Development Co, Centaur Management (1983)

Complainant agreed to become a staff attorney for Respondent and moved in with Respondent in April of 1982 for an annual salary of $20,000. After two and a half months of work, he accepted a check for $2,300 as all or nothing. Shortly thereafter Complainant terminated his employment with Respondent who contended Complainant was an independent contractor.

In determining whether an EE/ER or independent contractor relationship exists, the economic reality test advanced by the Michigan Supreme Court must be followed. Respondent had the authority to control Complainant to the extent required by law to qualify him as an EE. Respondent provided Complainant with an office, regulated his hours, offered Complainant an insurance policy, approved his time and called Complainant if he did not show up by a particular time. Respondent established a yearly salary to be paid in monthly amounts, exercised the right to hire and fire Complainant, and regularly discussed with Complainant the handling of cases, when to file complaints and the desired outcome, which is an integral part of Respondent's business in accomplishing a common goal.

The ALJ concluded that Complainant was Respondent's EE. ER violated Section 5 by failing to pay EE all wages earned upon termination. Remanded to WH to compute wages due.

INGHAM COUNTY CIRCUIT COURT: 3/14/84
ER's appeal was dismissed because MDOL was not named as a defendant. Both parties appealed the WH determination of the amount due.

319 (Continued)

INGHAM COUNTY CIRCUIT COURT: 5/23/84
EE was directed to comply with ALJ subpoena on behalf of ER.

ALJ DISMISSAL OF DETERMINATION: For EE's failure to comply with the subpoena and failure to file a timely response to ALJ "show cause" order of dismissal.

320 **ADVANCES**
Deducted From Final Pay

BARTER AND EXCHANGE AGREEMENTS

EMPLOYEE DEBT TO EMPLOYER
Bicycle Parts

83-3161 **Delpozzo v Pine Lake Bicycle** **(1983)**

Complainant worked 82.5 hours at $3.25 per hour performing various tasks in exchange for bicycle parts which had to be special ordered.

Respondent offered to pay $17.38, which Complainant refused and filed a WH claim. Respondent claimed that Complainant received $240.75 in parts and a $10 cash advance. Respondent said Complainant was an independent contractor and the claim for remuneration was satisfied pursuant to the barter and exchange agreement.

The facts clearly establish that Respondent permitted Complainant to work as defined in Section 1(b) in exchange for special bicycle parts. However, the agreement to exchange labor for bicycle parts violates Section 6(1), which says the payment of wages shall be paid in U.S. currency or negotiable check or draft. Respondent is prohibited from offsetting the $240.75 in parts from the wages which Complainant earned.

ER violated Section 6(1) and also Section 7 by deducting $10 that EE allegedly received as an advance payment of wages without his written consent. ER violated Section 5 by failing to pay a former EE all wages earned and due.

321 BURDEN OF PROOF

Fire Destroyed Records

83-3023 **Downey v Sabatino Enterprises, Inc dba Can Can Nite Club** **(1984)**

Respondent, as Appellant, has the burden of proof. Respondent's witness testified that because of a fire at his place of business, there was no evidence that Complainant worked during the period in question. No other evidence was offered.

ER violated Section 5 by failing to pay EE wages due.

322 VACATION

Forfeited

Payment in Lieu of Taking

83-3283 **Hall v Slenderform Universal Health Spa, Inc** **(1983)**

EE was employed as a fitness instructor pursuant to a written policy until discharged. EE received all wages earned. He did not take a vacation during the course of his employment. EE and the Department claimed he was entitled to one week's vacation pay as an earned benefit. The written policy states that after 12 months of continuous employment, EEs receive one week's paid vacation and there will be no payments in lieu of vacation either while employed or after termination.

ER did not violate the Act. EE did not exercise his right to take time off with pay and the written policy is clear that there will be no payments in lieu of vacation either while employed or after termination.

323 **COLLECTIVE BARGAINING AGREEMENT (CBA)**
Deductions
Police Badge

DAMAGE TO OR LOSS OF PROPERTY
Police Badge

DEDUCTIONS
Indirect

83-3261 **Woods v Lansing City Police Department** **(1984)**

EE, employed as a patrolman, lost his uniform badge and was issued an order to pay the replacement cost ($38.65). Failure to comply with the order would be grounds for insubordination and disciplinary action. EE could have appealed this order to the Chief of Police, Police Board or filed a grievance.

ER contended the CBA authorized the right to deduct reimbursement costs from EE's wages because the CBA states that reimbursement charges for the damage to or loss of department property due to carelessness is at the discretion of the Chief of Police.

Section 7 permits deductions if "required" or "expressly permitted" by the CBA. ER is not required by the CBA to recover reimbursement costs for the loss of equipment. A deduction from EE's wages for reimbursement costs is not required by a CBA. The deduction was not expressly permitted by the CBA because the language is permissive and not mandatory.

It was concluded that EE's tender of a personal check to pay for the badge constituted an indirect deduction made without the full, free, and written consent of EE, obtained without intimidation or fear of discharge as described in Section 7. EE was subject to disciplinary action if he did not pay for the badge.

ER violated Section 7.

INGHAM COUNTY CIRCUIT COURT: 12/18/85
Dismissed ER appeal for lack of prosecution.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

324 VACATION

Earned

Ambiguous Policy

WRITTEN POLICY

Interpretation

Against Drafter

83-3291 **Hammack v Wheeler-Blaney Company, Inc** **(1983)**

Respondent employed Complainant from 10/31/65 until he was laid off 12/30/82. ER's vacation policy provided for three weeks' vacation after seven years of employment. From January through October 1982, EE received 16 paid vacation days.

Complainant contended that in 1982 he earned vacation benefits to be used in 1983. The written policy says "the first year of employment - one week. . . " which clearly indicates EEs were entitled to vacation benefits during the first year of employment.

ER's policy is ambiguous with regard to whether vacations were based on a calendar year or anniversary year. This ambiguity should be resolved against Respondent as the party that drafted the policy. Therefore, it was concluded that Complainant earned but did not receive vacation benefits for the first two months of his anniversary year which began 11/1/82.

Respondent violated Section 3.

325 MINIMUM WAGE

Commissions

VACATION

No Written Contract/Policy

83-3084 **Vieaux v Sales Executives, Inc** **(1983)**

On 9/15/82 Complainant was reassigned to a job as an account executive. Complainant was to be paid $1,500 as a draw against commissions on the 15th and the last day of each month.

Complainant was terminated on 10/28/82. During the period 10/16/82 through 10/28/82, he worked 60 hours and made no sales. He filed a claim for $1,500 for wages allegedly earned during the last two weeks of his employment and for $1,500 for two weeks' vacation pay.

325 **(Continued)**

No vacation pay due because neither party presented evidence that Respondent had a written policy or contract providing for vacation pay.

Respondent violated Section 5 by failing to pay a terminating EE all wages earned as soon as the amount could be determined. Complainant did not make any sales during the period in question and, therefore, no commission is owed. ERs are required by Act 154 of the Public Acts of 1964, the Michigan Minimum Wage Act, to pay EE a minimum wage. The minimum wage in 1982 was $3.35 per hour. Complainant worked 60 hours and earned $101 from 10/16/82 through 10/28/82.

326 **EVIDENCE**
Post-Hearing Submission

VACATION
Written Contract/Policy

83-3018 **Fassett v Multi-Vision Cable Systems** **(1983)**

The parties were given an opportunity to file post-hearing summaries. Respondent's summary raised matters not covered at hearing and presented two documents which were not offered at hearing. Complainant's response was that ER had this information at the hearing and should not be permitted to offer further evidence after the hearing. ER's post-hearing submission was rejected to the extent that it raised arguments and documents not offered at hearing.

In June 1981 Complainant and three other men formed this company, with Complainant designated as president in July 1981. In August 1981 two others joined the corporation. A contract between the corporation and Complainant dated 12/1/81 was approved by the Board of Directors providing a salary of $3,400 per month, expenses, a company car, and four weeks' vacation. EE contended he was eligible for $1,118.63 in expenses from January 1982 through September 1982 and $3,400 for four weeks' vacation based on the contract. Other claims for payment, which were part of the contract, were a $187 wage shortage from June 15 through September 15, 1982; a $366 deduction from the 7/1/82 check; and $2,550 as wages for the last 1 1/2 weeks.

In January 1982 a new group of investors joined the corporation. One of the investors had a discussion with Complainant about the need to draft a contract. Complainant did not mention anything about his prior contract until April 1982. It was concluded, however, that January '81 contract was in the existence before the new owners took over in January 1982.

326 **(Continued)**

Based on the valid contract, Complainant is entitled to payment of the claimed amounts for expenses and vacation based on Section 3. The deductions were made without Complainant's written consent. The record supports the claim that Complainant worked the last 1 1/2 weeks before his discharge which establishes a violation of Section 5. This requires payment of all wages due an EE at separation.

OAKLAND COUNTY CIRCUIT COURT: 2/25/85
Dismissed the case with prejudice. ALJ's decision final. ER paid EE amount of his claim plus interest.

327 FINANCIAL SUCCESS AS CONDITION OF PAYMENT

83-3221 **Brown v Sutton's Candy Manufacturing Co** **(1983)**

Respondent appealed the DO finding ER violated Section 5 and owed Complainant $236.34 earned from 10/18/82 through 11/22/82.

Respondent testified Complainant agreed to work for the company as a volunteer until the business became solvent, but there was never an agreement to pay her wages. Complainant testified in a credible fashion that she agreed to enter into a training program with Respondent from 9/16 until 10/18. Thereafter she entered into an agreement to work for $3.50 per hour.

During the period 11/18 through 11/20/82, when she was discharged, she worked 130 hours and earned $455. She was paid $300.

DO was modified finding ER violated Section 5 by failing to pay Complainant $155 in wages earned and due upon termination.

328 **WRITTEN POLICY**

EE Knowledge

83-3381, et al **Leffler, et al v Burns International Security, Inc** **(1983)**

EEs were employed as assistant shift supervisors by ER at $9.60 per hour pursuant to a written policy providing Easter as a holiday. In January 1983 a meeting was held with supervisors and assistant supervisors to discuss a shift from hourly wages to salaried. Although holidays may have been discussed, EEs were not specifically informed that Easter would no longer be a holiday.. They each worked 8 hours on Easter, 4/3/83, and were paid regular wages rather than holiday wages. ER contended that prior to Easter 1983, EEs were notified by memorandum dated 3/11/83 that Easter would no longer be a holiday. According to ER, the memorandum was misfiled and was not considered by the Department when they did their investigation. The memorandum was not posted on the bulletin board in accordance with ER's policy.

ER violated Section 6(2) for not notifying EEs of the policy change, and Section 3 for not paying fringe benefits in accordance with the written policy.

329 **VACATION**

Gratuitous Payment in Lieu of Payment at Termination
Payment at Termination

83-3323 **Fish v Elks Lodge #48** **(1983)**

EE was employed as a club manager for ER pursuant to a written contract. The contract commenced 2/8/82 and would continue for a period of one year unless terminated by either party upon a 30-day written notice. The contract also provided for two weeks' vacation with advance approval by the Board of Trustees.

EE was given written notice of termination on 12/3/82 effective 1/3/83. He was also given a check for salary 12/3/82 through 1/3/83. ER did not require EE to perform services after 12/3/82. EE contended he did not receive two weeks' vacation in accordance with the terms of the employment contract.

Respondent did not violate Section 3. He provided EE the fringe benefit and more. The term "salary" on the check stub is not inconsistent with Respondent's position that it provided EE a paid vacation subsequent to 12/3/82.

330 VACATION

Resignation

Eligibility for Based on Two-Weeks' Notice

WRITTEN POLICY

EE Knowledge

82-2995 **Benedict v Michigan Judicial Alternative Agency, Inc** **(1983)**

EE commenced employment with ER on 10/1/81. She alleges she was fired on 9/30/82 although she received a mailgram the following day, 10/1/82, suspending her for October 1, 4, and 5. She then wrote ER a letter stating she would not report back to work on 10/6/82 or thereafter.

Complainant attached a written policy dated 6/22/81 to her claim that she contended was in effect at the time of her termination. The policy provided for 12 days' vacation and 12 sick days each year. This attached copy was altered from 12 days' sick leave to 24 days' sick leave. The parties stipulated that EE used 6 vacation days and 3 sick days during the year in question. Her claim was for payment of 6 vacation days and 21 sick days pursuant to this policy.

EE denied having knowledge of a new policy, effective 10/1/81, but ER had a signed statement showing EE's receipt. The policy provided that if EEs resigned without two weeks' written notice, they would not be entitled to payment of unused sick and vacation days.

ER did not violate the Act. Since Complainant chose not to return to work, it was concluded that she resigned, and, therefore, under the terms of the written policy, payment of fringe benefits was not required because she did not give two weeks' written notice.

331 VACATION

When to Take

WRITTEN POLICY

ER Ignorant of Verbal Policy Put in Writing

83-3297 **VanDyke v Bander, DDS** **(1983)**

EE was office manager for Respondent when she quit after being employed from 8/80 to 1/21/83. Respondent's office manual included "After two years - two weeks vacation, preferable at same time Doctor is away." Complainant did not type the vacation policy or place it in the manual, but she was aware of the policy when she commenced employment and when she quit.

Respondent did not authorize the written statement of the policy or placing the policy in the manual, although it conformed approximately to the oral policy that was in effect. With due diligence, ER could have known the written policy was placed in the manual by the EE he supervised.

Respondent's contention that the policy required taking two consecutive weeks of vacation in November was rejected. By the terms of the policy, it was not mandatory to use vacation benefits at the same time the doctor was away.

Respondent violated Section 3 by failing to pay Complainant the fringe benefits in accordance with the written policy.

332 **BUSINESS PURCHASE**
Incomplete

EMPLOYER
Identity

EMPLOYMENT RELATIONSHIP
Reemployment After Separation

82-2397 **Petrie v Toddy Time Bar** **(1983)**

Complainant was employed as a bartender commencing 11/15/79. In April 1981 Respondent terminated Complainant and all his other EEs because he planned to sell the bar to Jim Harrington.

From 7/6/81 through 9/2/81, the bar was run by Mr. Harrington. Respondent was not involved in the operation of the business during that period. The sale of the business was never completed.

Section 1(b) provides that: "Employ" means to engage or permit to work. Section 1(c) provides that: "Employee" means an individual employed by an employer.

It was concluded that Respondent was not Complainant's ER from 7/6/81 through 9/2/81 because he did not engage or permit her to work during that period.

Respondent did not violate the Act by failing to pay Complainant wages.

333 **EMPLOYER**
Identity

EMPLOYMENT RELATIONSHIP
Independent Contractor Relationship Found
Self-Employment

82-2999 **Nichols v Hobart Mailing Service, Inc** **(1983)**

Complainant was employed on 1/8/81 as a commissioned salesperson and earned and was paid 10 percent commission on sales made between January and November 1982. In December 1981 Complainant ceased being an EE of Respondent and started his own business. He subcontracted mailing jobs to Respondent Company and coordinated the printing and mailing of orders which he received from clients. For this period, Complainant claims $6,731.81 in commissions. Section 1(b) reads: "Employ" means to engage or permit to work. Section 1(c) provides: "Employee" means an individual employed by an employer.

Respondent didn't violate the Act. Complainant had become self-employed from December 1981 through July 1982, and Respondent did not engage in or permit him to work during this period.

334 **EMPLOYEE**
One Who Is Permitted to Work

EMPLOYMENT RELATIONSHIP
Economic Reality Test

REHEARING

83-3321 **Jensen v Insurance Stop** **(1983)**

The Department found no EE/ER relationship. Since 1978 Complainant worked as an insurance solicitor at a pay rate of 50 percent commission on premiums from sales of fire and casualty insurance. The test of whether an EE/ER relationship exists rests upon whether a person is engaged or permitted to work.

The ALJ found that the record established that Complainant was engaged by and permitted to work for Respondent. Respondent violated Section 5 by failing to pay Complainant $569.55 in commissions earned.

334 (Continued)

FINDING UPON REHEARING: The Department requested a rehearing, and after reconsidering the record established, the ALJ found the decision issued on 11/18/83 was in error. The ALJ applied the economic reality test, as established by the Supreme Court decision in the case of Askew v Macomber 398 Mich 212 (1978), and found that the work performed by Complainant and his hours of work were not subject to Respondent's control or direction; no taxes or social security were withheld; and in past years he had been issued IRS Form 1099 rather than a W-2 form received by regular EEs. Therefore, Respondent didn't violate the Act. An independent contractor relationship was found.

335 **JURISDICTION**
Statute of Limitations

83-3385 **Holt v Murco, Inc** **(1983)**

EE's employment with ER commenced 11/12/73. On 10/5/81, Complainant's union went on strike after giving two weeks' notice. Complainant never returned to work after that date. Complainant claims three weeks' vacation pay under the CBA. It is Complainant's position he voluntarily terminated his employment with two weeks' notice in accordance with the CBA. He contended the claimed vacation pay was due on 11/12/81. He filed his complaint on 6/7/83.

Complainant's claim is barred because he did not file a complaint within 12 months of the alleged violation as required by Section 11(1).

336 **BURDEN OF PROOF**
Wages Paid
ER Burden to Show

83-3303 **McLeod v Century Mortgage Group, Inc** **(1983)**

Complainant worked 9/6/82 through 9/9/82 and earned wages in the amount of $250. Respondent testified that he did not know whether Complainant worked during this period or if she was paid. The ALJ found that Respondent failed to present sufficient evidence to support his claim that the Department's determination should be modified or rescinded.

Respondent violated Section 5 by failing to pay Complainant all wages earned and due.

337 **UNIFORMS**
Deductions For

WRITTEN CONSENT
None

83-3042 **Cordell v Wayne Road and I-94 Shell** **(1983)**

During the course of EE's employment, ER deducted $231.80 from wages due EE to cover the cost of cleaning required uniforms. Complainant did not give written consent for the deduction and was not a member of the union. Respondent produced two witnesses whose testimony was contradictory, stating EE signed a written statement authorizing the deductions. Respondent failed to produce the statement allegedly signed by Complainant.

Respondent violated Section 7 by deducting wages without full, free, written consent of Complainant.

338 **MINIMUM WAGE**
Overtime

OVERTIME
Minimum Wage Law

VIOLATIONS
No Statutory Penalty

WAGES
Deposited Into EE's Account

83-3485 **Adrian v Vitamin & Nutrition Center aka Vitamin & Nutrition Connection aka Whole Earth Natural Foods** **(1983)**

EE was employed from 2/28/83 through 7/12/83. She raised several objections to the manner in which ER paid her during her employment.

Complainant asserts she is entitled to time and a half for working one hour beyond ten hours on four different days pursuant to Act 137 of the Public Acts of 1885. The Michigan Minimum Wage Law is Act 154 of the Public Acts of 1964 and supersedes Act 137. The Act requires time and a half for any EE who works in excess of 40 hours per week. Complainant did not work more than 40 hours for each week involved, so she is not eligible for time and a half.

338 **(Continued)**

Complainant contended she was underpaid by $.57 on a check, and ER agrees. She also stated that on four different occasions ER issued a check that bounced, but ER later paid her. ER violated Section 2 which requires an ER to make regular and periodic payments to an EE; however, the amounts have been paid to EE, and there is no amount or penalty which can be ordered paid to Complainant as a result of this violation.

ER deposited directly into EE's credit union account a check with insufficient funds. Section 6(2) prevents an ER from doing this without the written consent of EE, but the Act did not provide a penalty for this violation.

ER violated Section 2 for the underpayment of $.57. Section 2 requires the regular and periodic payments of EE's earned wages.

339 **COURT ACTIONS**
Permitting Holdback of Wages During Pendency

WAGES
Held During Civil/Criminal Proceedings

83-3318 **Lloyd v Livonia Chrysler-Plymouth** **(1983)**

Respondent withheld Complainant's wages and stated this should be upheld pending the outcome of civil and criminal proceedings. Nothing in the Act permits ER to withhold payment of earned wages pending the resolution of civil or criminal proceedings.

Respondent violated Section 5 for withholding wages without EE's written consent.

340 **WAGES**
Withheld
Losses

WRITTEN CONSENT
None

83-3302 **Lucas v Weathers Insurance Agency** **(1983)**

EE was employed from 1/80 until 1/19/83 as an office manager. Respondent withheld Complainant's last week of earned wages to cover its loss resulting from Complainant's alleged conversion of company funds to her own use.

340 **(Continued)**

Respondent violated Section 7 for withholding wages without written consent. Respondent may make use of remedies for monetary disputes in a court of general jurisdiction.

341 **ADVANCES**

WAGES
Withheld
Advances

83-3399 **Murray v O'Grady Tool Company, Inc** **(1983)**

ER employed EE as a surface grinder from 8/22/79 to 4/29/83. EE worked 4/25/83 through 4/28/83 and earned $311.43. ER withheld EE's wages to recover $338.40 paid to Complainant on 4/19/83 which ER contended was an advance wage payment.

Respondent violated Section 7 by withholding EE's wages to recover an advance payment. ER also violated Section 5(2) by failing to pay EE all wages earned and due as soon after his discharge as the amount could be determined.

342 **VACATION**
Forfeited
Proration

83-3393 **Thompson v Ron Besteman Transport, Inc** **(1983)**

Complainant was employed from 12/26/78 to 3/8/83. At the time of his termination, his average weekly wage was $577.50 gross. A written policy provided for two weeks' vacation payable after four years' service. EE was paid $228 vacation pay at termination. This was a prorated amount based on the portion of the year EE worked after his anniversary date of 12/26/82, which was in accordance with ER's regular practice. ER contended that since the written policy did not state when vacation pay was to be prorated, its established practice should be considered in construing the policy.

ER violated Section 3 by failing to pay EE vacation pay in the amount of $927 in accordance with the written policy. The written policy does not provide that an earned vacation benefit is partially forfeited by termination of employment.

343 **OVERPAYMENTS**
Gratuitous
Withheld at Termination

VACATION
Earned
Forfeited
Overpayment
Recovery at Termination
Payment at Termination

83-3352 **Matsen v Pediatric Associates of Farmington, PC** **(1984)**

On 2/29/80 EE was a medical billing clerk for ER. She received one week's paid vacation between 2/29/80 through 2/29/81. A written policy was issued in June 1981 which provided: six months through one year - one week paid vacation; two years through five years - two weeks' paid vacation.

By December 1982, EE had received five weeks of vacation. She terminated 3/17/83 and was eligible, according to the written policy, to three weeks' vacation.

ER is not permitted to refuse to pay EE vacation pay which she earned between 2/29/82 and 2/29/83 to recover for vacation he gratuitously paid to EE in 1980 and 1981. Further, the written policy does not provide for forfeiting earned vacation.

ER violated Section 4 for withholding compensation due EE as a fringe benefit to be paid at termination, without written consent or a written contract.

OAKLAND COUNTY CIRCUIT COURT: 10/15/84
Appellee Matsen's Motion to Dismiss Appellant's appeal was granted because Appellant filed a claim of appeal rather than a petition for review. The court ordered costs to Appellee in the amount of $300.

344 **COMMISSIONS**
Draw Against Commission
No Sales

83-3473 **Wierengo v Post Energy & Supply Co** **(1984)**

EE worked as a salesman from 11/15/82 through 12/31/82. Complainant did not sell any of ER's products but said ER promised to pay him a draw against commissions. The draw was never paid. EE understood the draw to be an advance payment of commissions. Since no commissions were earned, the ALJ concluded no wages were owed to EE.

344 **(Continued)**

EE also claimed expenses for miles traveled; however, they were not due based on the written policy.

345 **MINIMUM WAGE**
Tipped Employee

WAGES PAID
Recordkeeping
ER Obligation

83-3542 **Rogers v Michael's Bar, Inc** **(1984)**

EE worked as a barmaid and waitress at $3.35 per hour for 8 1/2 hours per day. She claims pay for 1/2 hour per day worked for which she was not paid and $.10 per hour for each hour she was not paid minimum wage.

ER did not keep a record of hours worked but contended EE was not required to work the extra half hour. Since she was a tipped EE, he was not required to pay minimum wage.

ER violated Section 5 by failing to pay EE the extra 1/2 hour per day. The ALJ concluded that since Complainant was a tipped EE, ER was not obligated to pay her minimum wage.

346 **WRITTEN CONSENT**
None

83-3249 **Davis v J J Zayti Trucking, Inc** **(1983)**

EE was employed as a truck driver. ER withheld EE's wages to recover the cost of an airline ticket for his return to Detroit, Michigan, after his truck broke down en route to New York. EE did not give written consent for the deduction and was not covered by a CBA.

ER violated Section 7 by deducting from wages without the full, free and written consent of EE, obtained without intimidation or fear of discharge for refusal to permit the deduction. ER also violated Section 5 by failing to pay all wages earned and due.

See General Entry III.

347 **ADVANCES**
Deductions

WRITTEN CONSENT
None

83-3277 **Halberg v Tri-State Sausage Products Co, Inc** **(1983)**

EE agreed upon a wage of $200 to attend a training program the first week of his employment with ER to observe other drivers and see if he wanted to perform this work. Complainant asked and received a cash advance of $50, was given $110 for a three-wheeled motorbike, and advanced another $30 to obtain a physical examination necessary to drive trucks.

After the training EE decided he did not wish to continue working for ER. ER gave EE the agreed upon sum as wages but deducted the $50 cash advance and $110 for the bike, which was returned because it did not work. There was no written authorization from EE to make these deductions.

Section 7 clearly prevents an ER from making deductions from wages without written consent from EE even if the money is acknowledged to be owed to ER. ER has the right to sue EE for monies owed in a court of general jurisdiction.

ER violated Section 7 by deducting wages without written consent from EE.

See General Entry III and XIII.

348 **JURISDICTION**
Severance Pay

WRITTEN CONTRACT
Termination Prior to Contract Date

83-3342 **Rancel v Munsing Wear, Inc** **(1983)**

EE worked for ER at its Ironwood location from 10/31/73 through 4/16/82 when the plant closed. EE contended she is due $480 pursuant to the Memorandum of Understanding entered into between the union and Respondent shortly after EE's layoff.
EE was called back and worked at the Ashland, WI plant, located 58 miles away, from 9/14/82 through 9/17/82 when she resigned because of the distance and lower pay. All EEs laid off were placed on a preferential hiring list to be offered jobs as needed in order of seniority. Most laid off EEs were hired at ER's other locations; however, four EEs were not recalled and were given severance payments.

348 **(Continued)**

On 1/19/83 the union and company entered into a supplemental severance agreement which provided that EEs still on the layoff list or called back and still working or called back and laid off would be eligible for severance pay. EE did not fall within any of these categories since she was called, accepted employment and then resigned prior to the preparation of the supplemental agreement.

ER did not violate the Act. Since EE resigned her employment prior to the creation of the agreement, she does not qualify for payment of the severance pay benefit. However, since severance pay is not covered as a fringe benefit or wage, the Payment of Wages Act may not be used to enforce a collective bargaining contract requiring severance payments.

349 **INDIVIDUAL RETIREMENT ACCOUNT (IRA)**
Eligibility

JURISDICTION
Statute of Limitations

83-3360 **Thomas v Smith-Morris Corporation** **(1983)**

EE was employed from December 1978 to 9/8/82. Respondent's written policy provided that it would establish an "Individual Retirement Account Plan" and contribute 2 percent of gross earnings each fiscal year, October 1 through September 30. To become vested for the plan, EEs must work the full fiscal year.

Complainant filed his wage claim with the Department of Labor on 4/4/83, stating the company violated its policy by failing to pay into the IRA plan for the fiscal years 9/30/81 and 9/30/82.

ER did not violate the Act. The Department has no jurisdiction to consider Complainant's claim for wages for the fiscal year ending 9/30/81 since the complaint was filed more than 12 months after payment was due. It was further found that EE was not entitled to payment into the IRA plan because he, contrary to the language of the written policy, was not employed the full Fiscal Year 1981 through 1982. He terminated 9/8/82, and the fiscal year did not end until 9/30/82.

350 WORK

As Acceptance of Wage Agreement

83-3115 Bonner v Peter Rabbit Day Care Center (1983)

Complainant was employed in August 1982. Her wage agreement was $5 per hour; Respondent failed to pay for 17 1/2 hours.

Prior to the 8/2/82 pay period, Respondent held a staff meeting and announced that the company could not continue to remain open without reducing EE's pay by 25 percent. Complainant requested to be placed on part time rather than take a pay cut, but she continued to work on a full-time basis.

ER did not violate the Act. Since Complainant continued to work full time, she agreed to work at the reduced rate of pay.

351 SICK PAY

Unearned

83-3299 Heinze v Warren Sash and Screen Co (1983)

Respondent's written policy provided for 2 1/2 sick days during the third calendar year of employment. Sick days not taken by December 31 of that year would be paid on the first pay period of January.

EE terminated her employment with ER on 2/8/83 and claims 2 1/2 sick days for the calendar year 1983.

ER did not violate the Act. According to the written policy, sick pay earned in 1983 is payable January 1984. Complainant did not earn 2 1/2 days sick pay in 1983 since she terminated her employment on 2/8/83.

352 **COMMISSIONS**
Liquidation of Assets

CREDIBILITY
Reduced Commission

82-2994 **Carpenter v Wright's Kitchen Distributors, Inc** **(1983)**

Complainant was paid a salary and commission for her services until 8/31/82. Respondent went out of business and the Citizens Bank took over operation in order to liquidate its assets on 8/17/82.

A meeting was held on 8/19/82 between the Respondent's owner and EEs. Complainant was present. It was agreed that the normal hourly rate would be continued plus a flat 2 percent commission rate. Complainant testified that it was discussed but that she was not told that the 2 percent commission rate would go into effect.

ER did not violate the Act. It was not reasonable to believe that Complainant did not understand that the 2 percent figure would be the maximum rate for commissions during the month of August 1982 based upon the liquidation of Respondent's assets.

353 **WAGES**
Change in Pay Periods

83-3121 **Barnett v First Federal Savings & Loan** **(1983)**

Effective 12/21/81, EE's salary was increased from $17,000 to $18,000 per year, payable biweekly. On 5/1/82 ER changed the pay period from biweekly to bimonthly. On the 15th and last day of each month, commencing 5/15/82 until EE voluntarily terminated her employment on 9/15/82, she was paid $713.94 which was $36.06 less than she earned at $18,000 per year ($18,000 divided by 24 bimonthly periods in one year equals $750 bimonthly.) For the 9 bimonthly periods beginning 5/15/82 and ending 9/15/82, EE was paid $325.54 less than she earned.

Respondent violated Section 5 by failing to pay EE wages due as soon after separation that amount could be determined.

354 **DAMAGE TO OR LOSS OF PROPERTY**
Security Deposit

EMPLOYEE DEBT TO EMPLOYER
Security Deposit

WRITTEN CONSENT
None

83-3056 **Pattenaude v Intercoastal Airways, Inc** **(1983)**

During the period 6/7/82 to 6/11/82, EE was employed by Respondent and earned $350. ER withheld EE's wages to recover a $350 security deposit that Respondent forfeited for damages allegedly caused by Complainant to an apartment that Respondent provided for him. Respondent did not have written consent for the deduction, nor was Complainant a member of a union.

Respondent violated Section 5 by failing to pay EE $350 as soon after he terminated employment as the amount could be determined. There is also a violation of Section 7 for withholding Complainant's wages without written consent or a provision in a CBA.

355 **WAGES**
Department of Social Services
Training Period

83-3288 **Lentine v Patti's New Image, Inc** **(1983)**

ER sells Merle Norman cosmetics at retail. Prospective salespeople go through a training period and take a test but are not paid until completion of this program.

ER provided Complainant with a statement for the Department of Social Services saying Complainant would not be paid during her training program, which she was not. ER asserted its concern that paying Complainant now would be a violation of this statement.

It was clear from the record that ER violated Section 5 by failing to pay the wages owed to EE. ALJ found that this payment would not be a violation of the letter previously sent to the Department of Social Services since this amount was not paid during the course of Complainant's training program.

356 **COMMISSIONS**
Records
ER Responsibility

HEARING
Costs

WAGES PAID
Recordkeeping
ER Obligation

83-3301 **Mercer v Lakeland Energy Systems, Ltd** **(1983)**

EE was employed as an estimator from 3/12/82 through 11/30/82. He produced 30 contracts for which he had not been paid and asserted he was to be paid commissions at the rate of 18 to 22 percent, with an average of 22 percent.

ER claimed that the amount for commission was actually close to 10 percent for each job. ER's records and check stubs did not specifically designate which jobs were covered with the paychecks issued to Complainant. ER agreed he owed EE for several of the jobs listed and came up with a figure based on 15 percent commission.

Section 9 requires ERs to maintain a record for each EE, setting forth the total basic rate of pay, total hours worked and total wages paid in each pay period. Since there was no way to determine which jobs listed were in fact paid by ER, it was concluded ER should bear the burden for this failure of his records. The 15 percent commission figure was then multiplied by the total jobs listed by Complainant as due and owing.

Respondent violated Sections 5 and 9; Section 5 by failing to pay a terminating EE all wages earned and due, and Section 9 as set forth above. In addition, Section 18(3) permits the Department to order an ER who violates Section 5 to pay hearing costs. Complainant subpoenaed two witnesses which is a hearing cost to be paid by ER.

357 **MINIMUM WAGE**
EEs Excluded

OVERTIME

83-3170 **Scoppa v Wee Wisdom Montessori School** **(1983)**

EE worked as a teacher and assistant director from 8/30/82 until 11/4/82 when she was discharged with a salary of $185 per week. For five weeks she worked a total of 18 1/4 hours in excess of 40 hours per week and was paid $185 per week. Her final week of employment she worked 23.7 hours and received no wages.

357 **(Continued)**

Complainant appealed the DO finding $109.73 due. She contended for her final week she should have been paid $185 since she was hired on a salary basis. Alternatively, she claimed she should have been paid the overtime rate of 1 1/2 times her hourly salary for the 18 1/4 hours.

WH determination affirmed. EE worked 23.7 hours and should be paid at an hourly rate.

There is no merit to her overtime rate claim for the 18 1/4 hours worked in excess of 40 hours. Section 4 of Act 154 of the Public Acts of 1964, as amended, the Michigan Minimum Wage Act, excludes EEs employed in an executive, administrative, or professional capacity including the capacity of academic administrative personnel or teacher in an elementary or secondary school. Therefore, the overtime provisions of the Minimum Wage Act do not apply to EE.

358 **REDUCTION OF WAGES/BENEFITS**
Notice After EE Works

TESTIMONY
Conflict

83-3246 **Sieh v Kelley Tab, Inc** **(1983)**

EE's salary as a plant manager was reduced or increased depending on the financial condition of the business. ER reimbursed EE for a pay reduction in 1977. Respondent testified he informed Complainant he would not be reimbursed for a reduction made commencing 1/25/82.

Complainant testified he worked for 4 1/4 months with the understanding he would be reimbursed, but in late May or early June 1982, ER informed him otherwise. ER terminated EE's employment on 11/5/82.

Respondent violated Section 5 by failing to reimburse Complainant for 4 1/4 months' reduced wages. ER did not inform EE until the end of May 1982 that he would not be paid.

359 THEFT

Proven

WRITTEN CONSENT

None

83-3335 **McGee v Hudson Oil Co** **(1983)**

Complainant was employed as a service station supervisor from 11/5/81 through 3/13/83. EE was discharged because he was suspected of stealing or defrauding $7,000 to $10,000 from Respondent. Criminal proceedings were instituted against Complainant. He plead guilty to unauthorized use of property under $300 and received a suspended sentence. From 2/28 through 3/13/83, Complainant earned wages in the amount of $692.31 from ER and was also entitled to $675.12 for reimbursable expenses in accordance with ER's written policy. Respondent withheld both of these amounts due to the missing money without Complainant's written consent.

Respondent violated Sections 4 and 7 by deducting amounts from Complainant's wages and fringe benefits without written consent. There are other judicial remedies ERs may use to resolve monetary disputes with EEs.

360 EMPLOYEE DEBT TO EMPLOYER

Telephone Calls

WRITTEN CONSENT

None

83-3292 **Crook v Dornace Bellville** **(1983)**

ER withheld $316.75 from EE's wages without consent. The deduction was made, according to ER, because EE was responsible for certain unpaid bills and for the death of a calf.

ER violated Section 5(1) by failing to pay an EE voluntarily leaving employment all wages earned and due; and Section 7, which prohibits ERs from withholding wages, without written consent, as a means of resolving monetary disputes.

361 FINANCIAL SUCCESS AS CONDITION OF PAYMENT

NONPROFIT ORGANIZATIONS

83-3387, et al Richardson & Clark v Your Grocery Delivery Service, Inc (1984)

Respondent was a nonprofit organization formed in 1983 to deliver groceries to senior citizens and handicapped persons. Complainant Richardson worked from 9/15/82 through 4/2/83 delivering groceries and coordinating route schedules at $250 per week. He was paid $535. Complainant Clark was employed from 12/13/82 through 2/22/83 at $150 per week to deliver groceries and pick up orders. Respondent asserted that both Complainants had been unemployed and frequented his brother's party store, so they agreed to work for Respondent with the expectation that the delivery service would be successful and they would be paid. ER said he was merely testing the market and no money was available to pay wages.

Respondent violated Section 5 by failing to pay EEs who terminate their employment all wages earned and due as soon as the amount can be determined. The Act does not excuse ER from paying wages for the reasons advanced by Respondent. Respondent also violated Section 2 which requires payment of wages on a regular basis. Nonprofit organizations are not exempt from the Act.

362 BUSINESS PURCHASE
Never Consummated

EMPLOYMENT RELATIONSHIP
Independent Contractor Relationship Found
Economic Reality Test

83-3280 Smith v Chickhaven II (1984)

Complainant and Respondents executed an agreement on 9/8/82 wherein Complainant paid $3,000 to purchase the restaurant/bar known as Chickhaven II. He was to pay an additional $6,000 when the liquor license was transferred from Respondents to Complainant; however, Respondents recovered possession of the business in February 1983 because Complainant did not have the money to close the sale.

Complainant contended he was to manage the operation for Respondents with a salary of $400 per week. Respondents contended Complainant was to operate as an independent contractor who was entitled to any profits. Complainant received three checks for $400 drawn on an account opened for the operation and signed by Respondent. After mid-October 1982, Complainant did not receive or demand a $400 weekly salary from Respondents because there were insufficient funds in the account to pay his salary. He was not concerned because the salary could be offset against the $6,000 he was to pay at closing.

362 (Continued)

*The economic reality test is used in Michigan to distinguish an EE from an independent contractor. Applying the test to this case, it was concluded Complainant was not an EE. No wages were paid for most of the period Complainant managed Chickhaven II. Respondents did not understand the three $400 checks to be wage payments. Complainant's activities were not controlled, nor was he disciplined. His activities were an integral part of Complainant's goal as the purchaser. Respondents' involvement was more like that of joint venturer with Complainant. The Act affords a remedy only to EEs, not joint venturers.

Respondent did not violate the Act.

*See Case No. WH 84-3108, entry 303, for a list of factors considered in the economic reality test.

363 **DAMAGE TO OR LOSS OF PROPERTY**
Customer Car

WRITTEN CONSENT
Deductions

83-3522 **Cummings v Royal Oak Tire Co** **(1984)**

ER deducted $40 from EE's payroll check to recover cost of a customer's car grill which EE allegedly broke. EE did not give written consent for the deduction.

ER violated Section 7 by deducting from earnings without EE's written consent; also Section 5 for not paying a terminating EE all wages due and owing.

364 **BRIEFING PERIOD**

COLLECTIVE BARGAINING AGREEMENT (CBA)
Overtime

PAROL EVIDENCE

WRITTEN CONTRACT
Parol Evidence

81-2102, et al **18 Complainants v Clinton County Sheriff's Department** **(1983)**

EEs were employed subject to a CBA which provided that a 15-minute briefing period prior to the start of a shift "shall be excluded from all overtime." The agreement did not state whether EEs were entitled to regular wages for the briefing period.

364 **(Continued)**

It was concluded that the agreement involved in this matter was complete and unambiguous. The DO was affirmed finding ER violated Section 2, requiring timely payment of straight time for the 15-minute period.

CLINTON COUNTY CIRCUIT COURT DECISION: 6/21/84
ALJ's decision affirmed. Court held that ALJ had not erred in excluding parol evidence.

COURT OF APPEALS DECISION: 9/24/85
Reversed and remanded matter to ALJ to consider parol evidence - evidence of the intent of the parties regarding overtime provisions of the CBA.

DECISION UPON REMAND FROM COURT OF APPEALS: 12/23/86
Parol evidence showed the parties did not intend that wages as either straight time or overtime would be paid for the briefing periods. Therefore, ER did not violate the Act by refusing to pay EEs for those periods.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

365 **EMPLOYER IDENTITY**
County/Court

82-2595 **Glaza v Bay County** **(1984)**

EE's employment began on 7/5/43 as an alimony clerk in the County Clerk's office. She then began working as a court clerk in January 1973 and retired in January 1983. EE contended she was eligible for sick leave benefits from Bay County based upon its personnel policy or upon the union contract between the County Board of Commissioners and the United Steelworkers of America. Both policies provided for payment of a portion of accumulated sick leave to an EE who leaves the employment of the County.
EE claimed that when the court entered into a contract with the United Steelworkers of America in December 1981, she became an EE of the court and left employment with the County. However, for prior periods she was a county EE and therefore eligible for the sick leave benefit. ER claimed that EE has never been a county EE.

365 **(Continued)**

The county policy statement covers only county positions and the county contract covers only EEs of Bay County. Therefore, neither of the documents include Complainant. Respondent cited Judges of the 74 Judicial District v County of Bay, 385 Mich 710, 190 NW 2d 219 (1971) for the proposition that a CBA between the county and its EEs cannot bind the court and its EEs. The job duties of Complainant are included in the order of the Circuit Court as affirmed by the Supreme Court.

ER did not violate the Act. Complainant was an EE of the court at least from the decision in Judges.

366 PRORATION OF WAGES

83-3384 Rathbun v Watertown Charter Township (1984)

EE served as Township Clerk from 2/14/83 through 3/24/83 with a salary of $10,000 per year. She was not required to work according to a regular schedule. In the past the clerks had been paid 1/12 of their annual salary each month. The new clerk paid EE wages in the total amount of $1,068.60 for 39 days worked at $27.40 per day from 2/14/83 through 3/24/83. EE contended that since clerks were paid 1/12 of their annual salary monthly, proration of wages for part of the month also should be on a monthly basis.

ER's choice of a monthly pay period does not negate the fact that the clerk's salary was understood to be an annual salary. Since EE worked for an annual salary, it was appropriate to determine her daily rate on an annual, rather than monthly basis. Therefore, it was proper to prorate EE's wages at the rate of $27.40 per day.

367 OVERPAYMENTS
Mistakes

SICK PAY
Overpayments

WRITTEN CONSENT
Deductions

83-3395 **Ruth Brooks v GMC, Fisher Body** **(1984)**

Complainant was a salaried nonunion EE. After an extended sick leave ending in September 1982, ER made deductions from EE's bimonthly checks in September and October 1982 without written consent to recover overpayments in sickness and accident benefits during her sick leave.

In November 1982 she gave ER written consent to make monthly deductions until 2/28/83, when the balance of any outstanding debt could be withheld.

ER violated Section 7 by deducting wages without EE's written consent for September and October 1982.

368 COLLECTIVE BARGAINING AGREEMENT (CBA)
Deductions
Rate/Tariff Errors
Telephone Calls

DEDUCTIONS
Rate/Tariff Errors
Telephone Calls

TELEPHONE
Long Distance Calls, Deductions

83-3398 **Monhollen v R & W Service System, Inc** **(1984)**

ER deducted monies from EE's wages to make adjustments for amounts allegedly overpaid due to rate errors and long distance phone calls. ER claimed that the adjustments were made pursuant to the express language in the CBA which says that all rate errors must be corrected. Since wages are based upon a percentage of tariffs for shipments charged to customers, any rate or tariff adjustments necessarily affect the wages which drivers earn.

ER violated Section 7 by deducting wages that were not required or expressly authorized by law or a CBA. An express provision would authorize deductions to be made from EE's wages.

368 (Continued)

WAYNE COUNTY CIRCUIT COURT: 8/15/86
Ruled that deductions to adjust for rate errors were expressly authorized by CBA which read: "All rate errors must be corrected within 30 days . . ." and reversed the decision of the Department of Labor. The Court held that deductions made for personal telephone calls were permissible and expressly authorized by virtue of Item 6 of the Past Practices Agreement incorporated into the CBA.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

369 LOSSES CAUSED BY EMPLOYEES

THEFT
Alleged

WAGES
Withheld
Losses
Theft

83-3402 **Fields v Szarka Enterprises, Inc** **(1984)**

ER refused to pay EE wages due upon termination because of back charges for an automobile which EE allegedly never paid for, tool item allegedly stolen, unused insurance premiums which were not refunded after EE terminated, authorized long distance phone calls, and damaged merchandise.

ER violated Section 7 by deducting or withholding EE's wages without written consent or a provision in a CBA.

370 VACATION
Offset by Severance Pay

WRITTEN POLICY
Vacation

83-3495 **Corl v Steketee's Audio Shop, Inc** **(1984)**

ER discharged EE pursuant to a written policy. He received two severance checks in lieu of notice. Prior to discharge EE became eligible for payment of two weeks' vacation. Complainant did not give ER written authorization to apply one of the prior vacation payments to this entitlement. The severance pay amounts can be used to offset this obligation since ER was not required to pay severance.

370 **(Continued)**

ER violated Section 4 for withholding a fringe benefit without EE's written consent. Complainant was entitled to $566.80 for the two weeks' vacation. Subtracting $268 paid in severance pay leaves $298.88 owed to EE.

371 **EXPENSES**
Written Contract/Policy

WAGES PAID
Recordkeeping
ER Obligation

83-3467 **Startwell v Poly-Gard of Wayne** **(1984)**

EE was employed as the manager of ER's rust-proofing operation. The wage agreement provided for $200 per week plus 5 percent commission on sales up to $5,000 and 7 percent above $5,000. ER also made an oral promise to pay $50 a week for expenses.
At termination Complainant contended he was owed $900 in commissions. A pay stub indicated he was paid $200 in commissions. EE's testimony was contradicted by ER who said that because business was bad, the agreement to pay commissions ended in December and EE's January payment was compensation for commissions earned in December.

ER was unable to provide records indicating EE had been paid gross wages in the amount of $500. EE also claims expenses of $400.

ER violated Section 5 by failing to pay EE $500 due at termination. Section 1(e) defines expenses as a fringe benefit. Section 3 provides that fringe benefits are only payable in accordance with a written contract. There was no written contract, therefore, no violation of Section 3.

372 **WRITTEN CONSENT**
Deductions

WRITTEN CONTRACT
Amendment
Meeting of the Minds

83-3613 **Robinson v Harcor Window and Glass Sales, Ltd** **(1984)**

EE was a window and door salesman pursuant to a wage agreement providing for payment of a commission of 10 percent of cost for sale and installation of windows and doors, and 10 percent profit for sales of windows and doors only.

EE claims commission for the sale of windows; monies deducted to recover losses; and monies deducted for "administrative costs."

ER violated Section 7 by deducting without EE's written consent to recover losses on two contracts and also deducting 4 percent of EE's commissions for "administrative costs" to offset the 4 percent sales tax which ER was required to pay. This would alter the wage agreement from 10 percent to 6 percent. The 10 percent commission is based on the total cost of the contract which already includes sales tax. There was no meeting of the minds, which is needed for ER to effectively change the employment contract. There was no merit to EE's claim for commissions.

373 **BANKRUPTCY**

DETERMINATION ORDER - Issuance Within 90 Days
Amendment of DO

EMPLOYER IDENTITY
Corporation Officers

REHEARING

81-1311, et al **Robinson, et al v M-N Metal Products Corporation** **(1982)**

The Department dismissed the claims of EEs for wages and/or fringe benefits because ER had filed for bankruptcy in federal court. The Department recommended that EEs file as creditors with the bankruptcy court. The Complainants appealed.

EEs asserted their claims should not be dismissed because they were not against M-N Metal but against Donald Nick and Charles Harrison, Jr., who were acting in the interests of M-N Metal. The ALJ found that contrary to EEs' assertions, the wage claims were filed against M-N Products Corporation, aka Summa-Harrison Metal Products, Inc.

373 (Continued)

Disputes are now under the jurisdiction of a United States Bankruptcy Court and are stayed in accordance with Section 362(a) of the Bankruptcy Act, 11 USC 362(a).

OAKLAND COUNTY CIRCUIT COURT ORDER: 6/3/83
ALJ decision modified to stay proceedings until the automatic stay provisions of 11 USC 362(a) are dissolved or are no longer effective.

It was determined that the Petitioners' original complaints were effectively amended to include their claims against the corporate officers, Charles Harrison, Jr., and Donald Nick.

It was further determined that persons who act "directly or indirectly in the interest of an ER" are, in addition to the corporation for whom they acted, ERs of EEs within the meaning of Section 1(d) of the Payment of Wages Act, and, as such, are liable to the EE for wages and fringe benefits due and owing.

The case was remanded to the Department of Labor for a hearing to determine whether Charles Harrison, Jr., and Donald Nick acted directly or indirectly in the interest of the ER and as a result became indebted to the EEs.

AFTER REMAND: The parties settled their dispute and the ALJ approved Complainants' request to withdraw their appeals.

374 **DEDUCTIONS**
Insurance Premiums

EVIDENCE
Insufficient to Establish Claim

EXPENSES
Written Contract/Policy

JURISDICTION
Over Business Expenses Without a Written Contract or Written Policy

83-3401 **Drean v McKonough Engineering** **(1983)**

EE was paid $260 per week plus expenses. There was no written contract or written policy providing for the payment of expenses. ER deducted $230.49 from EE's wages for insurance coverage without his written consent or a provision in a CBA, which is a violation of Section 7.

374 **(Continued)**

EE filed a claim for $200 plus expenses and a 10 percent commission of $11,880. ERs are required by Section 3 to pay fringe benefits (expenses) in accordance with the written contract or written policy. Since there were none governing the employment relationship, the Department has no jurisdiction to enforce EE's claim for expenses.

EE testified that for several months prior to being employed by ER he had discussions with ER in which it was agreed that his salary would be $260 plus 10 percent commission. ER denied any agreement and no commissions were ever paid.

The ALJ found that EE failed to show by a preponderance of competent, material and substantial evidence that his wage agreement included a 10 percent commission. ER violated Section 7 for the wage deduction without EE's written consent.

375 **REHEARING**
Denied
Subpoena Enforcement

VACATION
Proration

WRITTEN POLICY
Interpretation
Against Drafter

83-3456 **Boucher v Bronson Methodist Hospital** **(1984)**

Complainant and Respondent both appealed the DO.

Stipulations included wages owed. EE was employed from 3/1/64 through 3/28/83 when she was discharged for unsatisfactory work performance. ER's personnel policy covered a merit bonus program which called for EE's satisfactory work performance over the previous 12-month period. EE's employment did not continue to her review date, so she did not receive an evaluation in 1983 nor a bonus. EE contended she was entitled to a merit bonus based on performance during 12 months prior to 12/31/82. Since she was discharged for unsatisfactory performance, and she did not complete the 12-month review period, she is not eligible for the claimed merit bonus under the terms of the written policy.

The policy was ambiguous as to proration of vacation pay. ER claimed that it is necessary to consider its past practice of not allowing proration of vacation pay for part of a pay period. Since EE was not employed for a full pay period, she was not entitled to vacation pay for this period.

375 **(Continued)**

Since an ambiguous instrument should be construed against the drafter, it was concluded that EE was entitled to prorated vacation pay a portion of the last pay period.

ER violated Sections 2(3), 3, and 5(2). Section 2 deals with payment of wages on a regularly scheduled payday; Section 3 states that an ER shall pay fringe benefits in accordance with the written policy; Section 5 requires an ER to pay a discharged EE all wages earned and due.

EE requested a rehearing due to ER's refusal to produce certain documents listed in a subpoena duces tecum. Complainant elected to proceed with the hearing without the documents rather than requesting a continuance so she could petition circuit court for enforcement of the subpoenas. Therefore, Complainant's request for rehearing was denied.

376 **JURISDICTION**

Severance Pay

SEVERANCE PAY

83-3422 **Fleming v Texstar Automotive Group, Inc** **(1984)**

Department Request For Rehearing Denied: 6/11/84

EE was employed pursuant to a contract providing for severance pay on 6/1/76 and was first laid off on 10/15/82. He was called back for one week in November. The parties disagreed as to when severance pay was required to be paid. While severance pay has been considered as a fringe benefit in prior cases, it has never been clear that the Department had any authority under Act 390 to handle such claims. Since severance pay is not covered as a fringe benefit or a wage, the Payment of Wages Act may not be used to enforce the CBA and order its payment. With this conclusion it was unnecessary to determine the applicability of ERISA, federal labor law, or the grievance procedure in the contract.

No authority in the Act over severance pay. EE left to possible action in the state or federal court under EE's Retirement Income Security Act of 1974, 29 USC 1001, et seq, (ERISA) to pursue his claim.

377 **RESIGNATION**
Eligibility for Fringe Benefits

VACATION
Resignation
Eligibility for Fringe Benefits

WRITTEN CONSENT
Deductions

WRITTEN POLICY
Amendment
Notice to EEs

83-3300 **Rich v Apex Engineering Co** **(1983)**

EE was employed on 2/7/77 and voluntarily terminated on 3/12/83. He was governed by several different vacation policies, the two most current of which expressly stated vacation would be forfeited upon voluntary termination.

Complainant filed a claim for two weeks' unpaid vacation and monies deducted from his wages for Blue Cross-Blue Shield insurance benefits without written consent or a provision in a CBA.

EE appealed the DO that ER's written policy was not violated concerning vacation pay. ER appealed the DO finding that it violated Section 7 for making improper wage deductions. Complainant relies on Rule 6 to support his appeal, which says:

> A written policy concerning fringe benefits shall not be issued or changed unless the EEs are notified of the policy or policy change before it takes effect.

EE claimed that the most recent policies issued were not discussed with any EEs nor were any EEs notified of changes in the policies prior to being issued.

The ALJ found no requirement that ERs discuss policy changes prior to being issued. The intent of Rule 6 is to prohibit ERs from retroactively changing policies without notice to EEs. In this case the vacation forfeiture policy was in effect for more than three years prior to EE's termination. Also, to follow EE's reasoning, increased vacation allowances provided for in two of the policies would violate the cited rules because the increase was not discussed with any EEs nor were EEs notified of the increase prior to the policy taking effect.

377 **(Continued)**

Respondent's argument that EE indirectly gave written consent for the deductions for insurance coverage by voluntarily paying to have his insurance continued after his termination is not in accord with the language of the statute which requires written consent or an express provision in a CBA. (Section 7)

ER violated Section 7.

378 **WAGES**
Withheld
Moving Expenses

WRITTEN CONSENT
Moving Expenses

88-7031 **Reiben v The Phoenix of Southfield, Inc** **(1989)**

EE was hired as a telephone solicitor at a pay rate of $400 per week. When EE reported to work on 7/22/87, he was discharged. ER refused to pay EE his prior week's wages of $400, plus wages earned on 7/21/87 of $80, because EE refused to sign a form indicating that he owed ER $500 for moving expenses. ER paid EE's moving expenses four years before.

ER violated Section 7 by withholding EE's wages without written consent.

See General Entry III.

379 BARTER AND EXCHANGE AGREEMENTS

VERBAL AGREEMENTS

WAGES

EE Entitled to as Long as Available to ER

83-3455 **Zimmerman v Shepherd's Tree and Landscaping Service** **(1984)**

EE was an equipment operator for ER. His claim is for $390 at the rate of $7.50 per hour for 48 hours worked from 9/13/82 through 9/18/82.

EE and ER had a verbal trade agreement whereby ER would trim trees on EE's property in full accord and satisfaction for the amount of wages EE would earn from 9/13/82 through 9/18/82. When the parties' relationship severed, ER had not fulfilled his part of the agreement. ER asserted EE should only be compensated for the cost of trimming trees. This overlooks the agreement or trade entered into by each of the parties. EE was not compensated for wages earned and due.

ER also contended that EE would only be entitled to $4.50 an hour as an unskilled laborer (even though he held a journeyman's license for six years) because ER was unfamiliar with EE's work experience at the time he was employed. This was unsupported by the record which established that EE was sought out for employment by ER. ER's employment policy had a set rate for EEs based upon experience. Another contention of ER was that the equipment broke down for half the time in dispute. As long as EE was available and had hours recorded on the daily work sheet, he was employed by ER and due wages for that period. ER controlled the time and daily work sheet for EE.

ER violated Section 5 by failing to pay all wages earned and due at termination.

380 COMPENSATORY TIME
Different From Vacation Pay

VACATION
No Written Contract/Policy

WRITTEN POLICY
Interpretation

83-3454 **Crane v Wagner-Stark-Moore Memorial Chapel, Inc** **(1984)**

EE began working on 9/26/79 and was discharged 2/24/83. ER had a verbal vacation policy whereby EE was due two weeks' vacation.

Complainant also took time off for hunting and fishing trips. These days off were generally accumulated from compensatory days. When EE worked on a day that he was scheduled to be off, a compensatory day would be earned as set forth in a written policy for earning and use of compensatory time.

EE claimed that the written policy on compensatory time should be considered ER's written policy on vacations as well. The Department and ER contended there was no written policy for vacations. The ALJ concluded that the concepts of vacation and compensatory time are separate and distinct. EEs earn vacation based on length of service. Compensatory time has nothing to do with length of service but is based only on time off when EE works on a scheduled day off.

The facts establish ER owed EE for two weeks' vacation; however, this sum cannot be ordered based on the Payment of Wages Act because the compensatory time policy statement cannot be broadened to cover vacations because the concepts are different. Rules governing interpretation of contracts require one not to go beyond the document unless there is an ambiguity to resolve. The document on compensatory time is not ambiguous. It does not apply to vacations. EE may seek relief in a court of general jurisdiction.

ER did not violate the Act.

381 COMMISSIONS

Change Without Notice to EE

WRITTEN CONTRACT

Amendment

Meeting of the Minds

88-3648 Wilking v Hydromation Company (1984)

ER refused to pay EE commissions because Complainant had terminated his employment to work for a competitor. Respondent also introduced a policy dated which stated that commission payments to terminated EEs would be at the discretion of management. However, EE was not aware of the policy and Respondent was unable to state that a policy had ever been communicated to Complainant.

ER violated Section 5 by failing to pay earned commissions to Complainant upon termination. There is no evidence there was a meeting of the minds or that EE was ever advised that final earned commissions would be payable at the discretion of management.

382 VACATION

Resignation

After Taking

WRITTEN POLICY

Interpretation

Against Drafter

83-3514 Donovon v Addison Products, Inc (1984)

Complainant was employed in the industrial relations department starting 10/18/80. Part of his responsibilities were to change a policies and procedures manual. Respondent's vice president of finance had another policy manual updated to January 1959 which EE had never seen. Each of the manuals contained a vacation policy which provided for vacations to be taken during the period of June 1 through November 30. Respondent's EEs had been allowed to take vacations between May 1 and November 30 for at least three years despite the vacation period stated in the policy manuals.

On 4/4/83 a memorandum was issued to salaried EEs stating their earned vacation days and requesting EEs to submit vacation dates for the period of May 1 through November 30. EE had earned ten days' vacation, and his choice of vacation dates was verbally approved by the supervisor.

382 **(Continued)**

Complainant submitted a notice of resignation on 4/26/83 stating his last day would be 5/13/83 after exhausting his vacation time. Respondent did not pay Complainant for his two weeks' vacation pursuant to its vacation policy in the 1959 manual.

Respondent's Memorandum of 4/4/83 amended any previous written policies by changing the vacation period for 1983 to May 1 through November 30th. Moreover, both of the previous policies were ambiguous concerning vacation pay, and, therefore, should be construed against the drafter. ER violated Section 4 by failing to pay EE fringe benefits in accordance with its written policy.

HILLSDALE CIRCUIT COURT ORDER: 5/17/85
Affirmed the ALJ decision that the policy regarding vacation eligibility was established by a subsequent memorandum that modified the policy manual.

383 **BURDEN OF PROOF**
Appellant

EVIDENCE
Post-Hearing Submission

83-3440, et al **7 Complainants v McCoy Restaurant** **(1984)**

Respondent's post-hearing brief offered facts relating to the alleged incompetence of Carson McCoy and a narrative of facts not presented on the record during the hearing. These assertions were disregarded for purposes of the decision.

Respondent claimed that Carson McCoy was not mentally competent to operate a business or hire EEs and that Beulah Jackson was the operating force in the restaurant. However, each of the EEs testified that they were hired by Respondent and that Jackson managed the business.

Respondent violated Section 5 by failing to pay wages due and owing upon termination.

384 **BURDEN OF PROOF**
Unrebutted Testimony

HEARINGS
Proceeding in Absence of Party

OVERTIME

83-3464 **Sanders v Oakland Humane Society** **(1984)**

Complainant appealed the DO finding ER did not violate the Act. Respondent failed to appear. The hearing proceeded in accordance with Section 72(1) of the APA in Respondent's absence.

Complainant testified in a believable manner that he was employed by Respondent from May 1982 to May 1983. Complainant was not paid from November 1982 to May 1983. He worked 70 hours a week at $3.60 per hour plus an overtime rate of $5.40 per hour. EE also testified he was to be paid $120 extra per week for staying on ER's premises. The ALJ found no basis for concluding EE was entitled to the $120 per week absent a showing that he was working during that period.

ER violated Section 5 by failing to pay EE $7,284 (24 weeks, 70 hours per week) upon termination.

385 **VACATION**
Earned

WRITTEN CONTRACT
Provisions Not Altered Based on Past Practice

83-3430, et al **Keil and Keil v Roumell Catering Co, Inc** **(1984)**

Complainants were cooks governed by the terms of a CBA. The CBA said that a regular or steady EE was one who worked four days or more per week. A steady EE was entitled to two weeks' paid vacation after 24 months' employment with ER. Extra EEs received no vacation.

EEs contended they were steady EEs entitled to two weeks' vacation. The records for 1982 and 1983 indicated Complainant Harvey Keil worked four or more days per week for 46 of 70 weeks. Complainant David Keil worked four or more days per week for 59 of 71 weeks.

ER claimed Complainants have never been paid two weeks' vacation because an extra EE has always been an extra EE regardless of the hours and were hired on a day-to-day basis.

385 **(Continued)**

The ALJ found that ER elected not to follow the clear language of the agreement, and its past practice in failing to pay EEs in accordance with the agreement does not mean it is ambiguous as asserted by Respondent.

ER violated Section 3 by failing to pay EEs fringe benefits in accordance with a written contract or policy. When a contract is clear on its face, parol evidence or a party's past practice is ineffective to vary its terms.

386 **BURDEN OF PROOF**
Commissions

DAMAGE TO OR LOSS OF PROPERTY

EVIDENCE
Insufficient to Establish Claim

WAGES PAID
Commissions

83-3476 **Ward v Janush Brothers Moving and Storage** **(1984)**

EE was employed from June 1982 until May 1982. Her wage agreement provided for $200 per week salary, $30 car allowance, plus commissions based upon percent of line haul, packing, military and third party moves. She claimed she was owed $2,000 for commissions; however, she was unable to state with specificity the basis of her claim. She also claimed $150 for damage to her car.

ALJ found EE's testimony to be vague and inconsistent. She had no idea how she arrived at the $2,000 claimed in commissions, and this was also at odds with the $175.50 salary she claimed on her claim form. Further, the WH Administration has no jurisdiction to consider her claims for damage to her car.

Respondent's witness testified in a believable manner that Complainant was paid all wages earned during the period of her employment.

ER did not violate the Act.

387 VACATION
Unearned

WRITTEN POLICY
Interpretation

83-3647 Zadigian v Select Tool and Gage Co (1984)

EE was hired in June 1979. After one year he was paid one week's vacation. After his second year, July 1981, he was paid two weeks' vacation. ER's written policy dated 1/1/82 provided that EEs with more than two years' service and less than five years would be entitled to two weeks' vacation. Further, it provided that vacation pay was based upon a percentage of gross earnings between December 1 of one year to November 30 of the next year, provided the EE had worked a minimum of 1,000 hours in the vacation year. The vacation year began on December 1.

EE received vacation payments as follows: July 1982, two weeks' vacation based upon 1981 earnings; July 1983, two weeks' vacation based upon earnings from 12/1/81 to 11/30/82. EE terminated on 7/15/83 and claimed two weeks' vacation from 12/1/82 to 7/15/83.

The ALJ found no merit to EE's claim since he was not employed on 12/1/83, the beginning of the vacation. Had EE been employed on 12/1/83 and also have worked more than 1,000 hours in the vacation year, he would have been eligible for vacation pay.

Complainant's claim dismissed.

388 WAGE PAYMENT
Lack of Funds

83-3620 Beyeler v McCorp, Inc (1984)

EE was employed from 11/15/82 through 12/15/82 and earned $3,400 for which he was not paid because no money was available. ER is not relieved of his obligation to pay wages because of lack of money.

EE violated Section 5 by failing to pay all wages earned and due upon termination.

389 **MINIMUM WAGE**
Deductions

VALUE OF SERVICES

WRITTEN CONSENT
EE Consent Ineffective if Below Minimum Wage

83-3639 **King v Amulet, Inc** **(1984)**

EE was employed as a waiter from 4/17/82 through 7/9/83 at minimum wage. ER deducted $143.81 from EE's wages to recover monies lost due to errors made by EE on customers' checks. EE did not give written consent for the deductions and was not a member of a union.

Respondent violated Section 7 for deductions made from EE's wages without written consent. Since EE was only being paid minimum wage, ER would be prohibited from deducting any amount from EE's wages even if he had given written consent for the deductions.

See General Entry IV.

390 **APPEALS**
Dismissed

JURISDICTION
Statute of Limitations

REHEARING

83-3227 **Briggs v WCHB Bell Broadcasting** **(1984)**

On 11/8/83 an order was issued dismissing Complainant's appeal because of his failure to appear at the 10/12/83 hearing as the appellant. On 2/2/84 the ALJ granted Complainant's request for rehearing filed pursuant to Section 87 of the APA. The issue is whether the period for which money is claimed exceeds the 12-month statute of limitations specified in Section 11(1) of Act 390. Complainant filed his claim for wages allegedly deducted from his salary during the period January 1981 through January 1982 on 2/7/83. Complainant did not comply with the requirement of Section 11(1), that a complaint be filed within 12 months after the alleged violation. Section 11(1) does not give the Department authority to excuse compliance with its requirement by a showing of good cause.

Complainant's appeal dismissed.

391 EMPLOYEE DEBT TO EMPLOYER

WRITTEN CONSENT
Deductions

83-3478 **Hogan v Smith & Douglas Janitorial Service** **(1984)**

EE was employed from 7/27/81 through 7/27/83. During the period June 21 through 27, 1983, Complainant worked 16 hours and earned $56. ER refused to pay the earned wages because EE allegedly owed him $140 for bailing him out of jail. EE did not give written consent nor was he a member of a union.

ER violated Section 7 by deducting $56 from EE's wages. There are no provisions in the Act for ERs to withhold earned wages to offset debts owed by EEs. ER may file an action in civil court. ER also violated Section 5 by failing to pay a terminating EE all wages due and owing.

392 EMPLOYER IDENTITY

83-3507 **Lamb v City Case Co** **(1984)**

EE was hired by Paul Monney who agreed to pay EE $130 to $180 per week, and later $3 per hour. EE admitted he was not employed by John Fresard, the principal of City Case Company.

ER did not violate the Act. No proof that Complainant was employed by Respondent.

393 ADVANCES

LOANS
Written Consent to Deduct

WRITTEN CONSENT
Deductions

83-3350 **Kahkola v Superior Machine & Engineering Co** **(1984)**

EE was employed from 2/2/82 until 2/21/83 when he quit. ER lent EE $500 on 10/22/82 as a down payment on a piece of land and shortly thereafter an additional $1,200 to purchase a mobile home. EE verbally agreed to have $25 per week deducted from his check in repayment of the loans. When Complainant terminated his employment, several $25 wage deductions had been made towards the loans.

393 **(Continued)**

ER withheld the last two paychecks due EE and applied these sums to the loan balance. ER claimed that the payments made to EE were advances on wages, not loans. He also provided a card dated 5/12/83 wherein EE acknowledged owing money to ER and promised to pay the amounts owed.

Section 7 prohibits deductions from an EE's wages without written consent or a provision in a CBA. It makes no difference whether the deduction was for an advance wage payment or a loan not repaid. In the card of 5/12/83, EE admitted owing ER money, but this cannot be considered to be written authorization. ER may file an action in a court of general jurisdiction to recover the monies owed by EE.

ER violated Section 7 by deducting monies from EE's last two checks in the amount of $370.31 without written authorization.

See General Entry IV.

394 **CLAIMS**
Timeliness Of

JURISDICTION
Statute of Limitations

83-3550 **Zbosnik v Michigan College of Beauty** **(1984)**

On 8/11/83 Complainant filed a claim for wages earned during the period April 1977 through 1/17/80. She claims she did not file her claim within the 12-month period provided for in Section 11(1) because she was working during January and September 1980, and after September 1980, she had a heart attack and could not have any worry or stress.

DO affirmed concluding that the Department does not have jurisdiction to consider Complainant's claim since it was filed more than 12 months after the period for which she has a wage claim. EE had ample time to file her claim between January 1980 and January 1981.

395 VACATION

Written Contract/Policy

WRITTEN POLICY

Interpretation

83-3553 **Knaffle v Livonia Chrysler-Plymouth** **(1984)**

EE was employed from April 1981 until August 1983. Pursuant to a written policy, hourly EEs would be granted paid vacations upon approval. EE requested and received approval to take a vacation from June 20 to 24, 1983. The written policy also provided for paid time off for holidays, including Memorial Day and July 4th. Respondent refused to pay EE $183.75 for vacation and holiday pay because Complainant worked less than 40 hours per week.

ER violated Section 3 by failing to pay EE fringe benefits in accordance with its written policy. The written policy makes no reference to the number of hours worked to be qualified for fringe benefits.

396 WRITTEN CONSENT

Deductions

Insurance

Uniforms

83-3383 **Griffin v More Shelter, Inc** **(1984)**

ER deducted EE's wages to cover optional medical insurance coverage and optional uniforms that were provided to EE. Complainant did not consent in writing to these deductions, nor were they permitted by a CBA.

ER violated Section 7 by deducting wages of EE without written consent. Section 7 does not allow an exception under these circumstances.

See General Entry IV.

397 WAGE AGREEMENTS
Verbal

WAGES
Retroactive Change in Rate

83-3484 **Rogers v K-Mart Corporation** **(1984)**

Complainant began her employment on 9/12/81 at $3.40 per hour and was informed at the time she would receive a $.10 per hour raise after 60 days. She did not receive the raise until June 1982. On 4/20/83 EE was told she would be given a raise of $.40 per hour. Five cents of this amount was to compensate her for having missed raises at eight-month intervals of $.20 and $.15 per hour. She was also told she would receive retroactive wages for the period from the start of the fiscal year until her raise.

Complainant was fired on 5/15/83. She was paid $3.90 per hour for all hours worked and not paid the retroactive wages of $35.

Complainant asked to pay back the compensatory $.05 raise and the $35 retroactive pay and have her wages figured with the raises at the regular intervals she was supposed to receive.

ER did not violate the Act. Even if Complainant should have received raises under ER's normal procedure, she continued to work with the understanding she would be paid at the rates she received.

398 **ADMINISTRATIVE LAW JUDGE**
Constitutionality of Act

CONSTITUTIONALITY OF ACT
ALJ Determination

PREEMPTION
CBA

VACATION
Payment at Termination
Eligibility Based on Compensable Leave

WORKERS' DISABILITY COMPENSATION
Determination of Disability

84-3716 **Prajzner v Tecumseh Products, Inc** **(1984)**

EE worked from 3/23/53 through 1/11/83. He was off work on sick leave from 1/12/83 through 8/4/83 and received a total of $7,296.54 in sickness and accident benefits for a nonwork-related disability. A workers' disability claim filed by EE on 8/4/83 found his disability to be work related or compensable. This was appealed by ER.

EE claims vacation benefits for 7/1/82 through 6/30/83. The CBA, in entry 188, says if an EE is on sick leave for more than 50 percent of 900 hours worked during a year, he does not qualify for vacation benefits. It also says in entry 194 that an EE on compensable leave will be given credit up to 40 hours per week for all time off for vacation purposes during the first year of such leave. Complainant and the Department contended this applies to EE because time off was due to a work-related disability, compensable time, and therefore qualifies EE for the vacation benefit in entry 188.

The ALJ agreed with Respondent's argument that because there has not been a final agency decision as to whether EE's time off was compensable, a final determination cannot be made on the issue until there is a decision by the Workers' Compensation Appeal Board. Respondent's argument that EE is preempted from filing a claim with the Department based on the Interstate Commerce clause of the U.S. Constitution and the National Labor Relations Act was rejected. The ALJ does not have the authority to determine the constitutionality of the law being enforced. There are no provisions in the Act which would exclude ERs and EEs subject to a collective bargaining contract from the requirements and benefits of the Act.

398 (Continued)

Complainant's claim for vacation benefits must wait for a decision by the Workers' Compensation Appeal Board. If the Board concludes that EE's time off was compensable, then he is due the amount agreed on by the parties. If the Board does not find a work-related disability, no vacation benefits will be due.

399 **COMMISSIONS**
Contract Interpretation

EMPLOYER IDENTITY
Corporation Officers

EMPLOYMENT RELATIONSHIP
EE/ER Relationship Found

FAIR LABOR STANDARDS ACT (FLSA)

83-3419 **Hooker v National Personnel Consultant** **(1984)**

Complainant seeks payment of commissions on fees received for placements he made from 1/17 through 4/11/83 when he was discharged for refusing to invest in the company or sign a contract defining the relationship between the parties.

Respondent contended Complainant was an independent contractor, not an EE. Applying the "economic reality" test to this case (see entry 303), the ALJ found that Complainant was an EE. The company exercised substantial control over EE's activities, and these activities were performed in furtherance of the business goal for which the company had been established.

EE contended he was to receive 50 percent of all fees generated by his placements. ER contended that the counselors received either 30 percent of fees plus a draw or 50 percent of fees without a draw. Since EE received a draw he was only entitled to 30 percent commissions. The figures established EE was not receiving a draw against commissions.

There was no evidence presented of a fee-splitting arrangement referred to by ER whereby the company was to receive one-half the normal commission from "house accounts" or resume placements. Therefore, the ALJ concluded that EE was entitled to full commissions.

The officers of ER requested dismissal of the complaint as pertaining to them. Ordinarily officers are not personally liable for the debts of a corporation; however, it has been held in federal FLSA cases that officers may be liable for the wages of a corporation's EEs if they exercised pervasive control over the corporation's business and financial affairs and acted in the interest of the corporation in relation to its EEs. The ALJ found the officers of the corporation to be liable as ERs for wages earned by EE. ER and officers of the corporation violated Section 5 by failing to pay EE all wages earned and due upon termination.

See General Entry VII.

KENT COUNTY CIRCUIT COURT ORDER: 8/25/85
Affirmed determination amount and finding of simultaneous liability for ERs.

400 EXEMPLARY DAMAGES

TEACHERS
Unemployment Compensation

WRITTEN CONSENT
Inadequate

83-3111 **Folk v Owendale-Gagetown Area Schools** **(1984)**

During the summer of 1982, Complainant, a tenured teacher for Respondent, collected unemployment benefits in the amount of $1,618. She resumed her teaching job in September 1982. ER deducted $1,292 from EE's wages from September 1982 through November 1982.

EE was presented with a contract to sign for the 1982-1983 school year while teaching a class. She did not read the document carefully and did not notice a line stating "unemployment compensation to be deducted as per Board resolution." A deduction of $326 was taken from her 1/10/84 paycheck after signing the contract. She contended she did not give written consent for the deductions from September through November 1982, and further, her signature on the contract did not satisfy the requirement for written consent contained within Section 7. She also demanded a 10 percent penalty, exemplary damages, and attorney fees.

ER claimed EE's signature on the contract provided retroactive and prospective consent for all deductions taken from EE's checks.

ER violated Section 7 by deducting $1,618 from EE's wages without full, free, and written consent obtained without intimidation or fear of discharge. When deductions are taken for the benefit of ER, EE must give written consent for each wage payment subject to the deduction. There was no prior written consent for the deductions taken from September through November 1982. Once deductions are taken that violate the Act, subsequent consent by EE cannot change the fact that the prior deductions were illegal.
EE did not know the deduction provision was in the contract, and without this knowledge there would be no consent as required by Section 7. ER may file a suit in a court of general jurisdiction as a remedy to obtain the sums considered due.

The ALJ found no exemplary damages due because there was no evidence of previous violations and no evidence ER's management acted deliberately and knowingly as set forth in Rule R 408.9034, the Department's rule on exemplary damages. ER's case presented in opposition was plausible and not made in bad faith. Therefore, EE's request for attorney fees was denied. The 10 percent penalty is assessed in every wage case and serves to prevent ER's profiting by delaying EE's wage payments found due.

HURON COUNTY CIRCUIT COURT: Affirmed 10/24/84
The Court of Appeals also affirmed on 7/25/85.

401 BURDEN OF PROOF
Wages Paid

83-3496 **Kovach v Benton Feichtenbiner** **(1984)**

EE was hired on 4/25/83. EE requested to be paid a salary instead of an hourly rate as all other EEs were paid, so ER calculated a salary of $180 per week minus FICA and federal tax which were deducted weekly.

EE alleged wages owed from 6/6/83 through 6/11/83; however, the EE/ER relationship ended 6/9/83. ER computed the hours worked for the three days, 6/6 through 6/9, based upon what would have been the hourly rate of pay and made payment to EE.

ER did not violate the Act. EE received all wages earned and due upon termination in compliance with Section 5.

402 BURDEN OF PROOF
Appellant

EMPLOYER IDENTITY

84-3694, et al **Rensberry & Goodwin v Busy Bee Ceramics** **(1984)**

Complainants testified that in February 1983 they were engaged by Maxine Taylor to work at Busy Bee Ceramics for $3.50 per hour, and they worked under her direction until August 1983. They also testified that during the period of their employment, they did not understand that Elizabeth Nellis and Robert Taylor had any connection with the business.

The WH Administration alleged that Nellis and Taylor were owners and licensees of the business; however, no competent evidence was offered to support these allegations. Moreover, the facts did not establish the existence of an EE/ER relationship between Complainants and Nellis and Taylor.

Complainants, as Appellants, did not meet the burden of proving the existence of an EE/ER relationship with Nellis and Taylor. The matter was remanded to the WH Administration for investigation and determination of the complaints as to Maxine Taylor.

403 TIP SHARING

84-3670 **Casey v Asahi Japanese Steakhouse** **(1984)**

EE was a cook. Based on the testimony, it is customary for cooks to share 50 percent of the tips. ER contended that the cooks chose to receive a guaranteed salary in lieu of tips, which EE denied. The ALJ found that customary tips were due for the first pay period since the parties had no clear agreement to the contrary. However, no tips were due after the first paycheck because EE should have understood by that time that the claimed tips would not be paid.

ER violated Section 2(1), the regular payment of wages, and Section 5(1), failure to pay a terminating EE all wages earned and due.

404 EMPLOYMENT RELATIONSHIP

Economic Reality Test
Independent Contractor Relationship Found
Teacher

83-3503 **Peace v Heritage Baptist Academy/Jordon College** **(1984)**

Complainant and Respondent's president met to discuss the establishment of a weekend student program at Heritage. Complainant proposed to teach five classes from 8:30 to 4:30 every Saturday for two 6-week periods between January and May 1983 at a contract price of $1,000 for each course and an additional $105 for each of two independent study courses.

At the end of the term, Complainant failed to post grades and filed a wage claim for $6,210. Applying the "economic reality" test (discussed in entry 303) it was concluded that Complainant was an independent contractor. Respondent did not control his activities, supervise his work, or discipline Complainant, although it was apparent that Complainant did not adhere to posted hours. Further, there was no agreement to pay wages to Complainant on a periodic basis. Complainant was responsible for paying his own taxes.

Respondent did not violate the Act. Complainant was an independent contractor, which is not covered by the provisions of Act 390.

405 EMPLOYMENT RELATIONSHIP

Economic Reality Test
EE/ER Relationship Found

84-3404, et al **7 Complainants v Industrial Rubber Lining, Inc and/or Lambert David Elliot and/or William Piasecki and/or Glen Harrison (1984)**

Respondent is in receivership in Wayne County Circuit Court and Glen Harrison is the court-appointed receiver. Complainants claimed wages for working on a project installing anti-corrosive rubber linings. Respondent contended Complainants were independent contractors.

Applying the "economic reality" test (discussed in entry 303) the ALJ concluded that Complainants were EEs and earned the wages found due by the WH Administration. Each of the EEs were hired by Respondent's manager, who agreed to pay them between $6 and $7 per hour after the jobs were completed. He kept a record of hours worked, directed the activities of the EEs, and provided the material and equipment for performance of their work.

ER violated Section 5 by failing to pay terminating EEs all wages due and owing.

406 BANKRUPTCY

DETERMINATION ORDER - Issuance Within 90 Days

Amendment of DO

WAGE ASSIGNMENTS

Lease/Rental Agreement

83-3343, et al **Meinke, McCormick & Wilcox v The Morrison Company (1984)**

A motion was granted to amend the DO by deleting all reference to WCC Inc., who had filed for relief under Chapter 11 of the U.S. Bankruptcy Act. During the bankruptcy proceedings Complainants Meinke and McCormick were working under a lease/rental agreement for T. J. Company, a subcontractor of Respondent. EEs were issued checks on 9/17/82 which were returned unpaid as "uncollected funds" from T. J. Construction Company, Inc.'s account because of, according to Complainants, failure by Respondent to advance the money to T. J. Construction Company, Inc. for disbursement.

406 (Continued)

At the same time Complainants were contacted by Respondent about working on another contract entered into with the Department of Transportation, Respondent was behind on the scheduled completion and was accumulating penalties in the amount of $300 per day. Complainants agreed that as individuals, but not as WCC Inc., they would enter into a lease/rental agreement with Morrison Company. The lease/rental agreement required Respondent to keep certified payrolls for inspection.

Complainants initially received pay for one week and decided to stop work half way through the job as they had not received any further wages. They returned to work after the comptroller paid them $200 each but did not receive any further wages.

Department Exhibit 1 is an invoice which lists an account number and states: "Wages advanced on behalf of WCC Inc. for work performed on MDOT 1275 project." The WH investigator attempted to obtain payroll records and time sheets from Respondent but was told Morrison Company was not the ER and therefore there were no records for review. The State Department of Transportation was withholding payment to Morrison Company until all liens and wage obligations were paid.

Respondent violated Sections 2 and 5. Section 2 deals with the timeliness and regularity of wage payments, and Section 5 addresses the payment of wages due and owing upon termination.

407 **VACATION**
Payment in Lieu of Taking

WRITTEN CONTRACT
Payment in Lieu of Vacation

83-3497 **Kinaschuk v Chrysler Corporation** **(1984)**

EE was employed from 10/10/50 through 7/30/82 pursuant to an agreement dated 10/25/79. On 3/1/82 EE requested two weeks' unpaid vacation starting 7/7 which was approved on 3/2/82. On 6/1/82, a doctor recommended she take time off work due to work-related medical problems. EE was off from 6/2 to 6/13/82. She seeks payment in lieu of vacation for 13 weeks worked from 5/1/82 through 7/30/82 as provided in the agreement.

Respondent contended EE would not be eligible for payment in lieu of vacation because she worked only 12 weeks during this period.

407 (Continued)

Generally the agreement requires that an EE must actually work 13 pay periods to be eligible for payment in lieu of vacation. The exception in the agreement that an EE must actually work to accrue credit toward pay periods worked is a "compensable injury." Complainant was not injured, so she does not come within this exception. Also, the terms in this section "legal occupational disease" and "compensable disability" refer to something more than an ordinary temporary illness. Therefore, EE did not accrue credit during the period 6/2 through 6/13/82.

ER did not violate the Act. Complainant was not eligible for payment in lieu of vacation under the terms of the agreement.

408 EMPLOYMENT RELATIONSHIP

Economic Reality Test
Interlocking Corporate Entities

83-3506 Miles v Target Manufacturing (1984)

In 1980 Complainant's husband and Arthur Spitzke established a business called Target Manufacturing. At about the same time her husband started a business called Target Sales. Both businesses operated out of the same office. Complainant assisted in establishing both businesses and performed functions for both. She testified she was promised that when Target Manufacturing became established and monies were available, unpaid wages would be made up. In January 1983 Complainant started paying herself $275 per week. After a lawsuit was commenced between her husband and Arthur Spitzke, Complainant, on 7/5/83, filed a claim for $23,000 in back wages between May 1981 and May 1983.

Respondent contended there was no EE/ER relationship because there was no wage rate, no requirement to perform services, no fixed hours or service required, no responsibility to any corporate officers or supervisor, and no definite tasks to be performed.

Applying the economic reality test (see entry 303), it was concluded that Complainant was a corporate officer in both businesses whose functions overlapped. Her conduct indicated she was not an EE but worked toward the common objective of sharing in the profits of both businesses had they been successful.

Respondent did not violate the Act. No EE/ER relationship found.

409 VACATION

Earned

Reduced to Recover Overpayment

WRITTEN POLICY

Amendment

Notice to EEs

Vacation

83-3502 Zygner v Blue Cross/Blue Shield of Michigan (1984)

EE was employed by ER from 3/6/77 until 2/16/83 when she went on maternity leave which lasted eight weeks due to pregnancy complications. After that time she was an inactive EE and all company benefits ceased. As of 4/22/83, EE had 162.75 vacation hours. She had been paid 57 hours of personal time since 1/1/83. Respondent paid her for 121.25 vacation hours. The difference, 41.5 hours, or $569.50, was deducted to recover an overpayment of personal time.

Complainant contended nowhere in Respondent's policies does it state that in the event of termination, the eight days of personal time earned each January are to be prorated throughout the year, and any time used over what was prorated to termination date will be recouped from EE's vacation pay.

A memo was distributed to management personnel which provided that if a terminating EE has used more than their prorated allowance of personal time, as did Complainant, the overuse balance could be recouped from the final check. There was no evidence that EE received this memo.

Respondent contended that the overpayment and eventual recouping of monies from the Complainant's final paycheck were not earnings within the meaning of the Act and therefore did not constitute a wage withheld or deducted violated Section 7.

Respondent was not at liberty to incorporate other terms into the policy without EE's knowledge. ER had a duty to inform EEs of the contents of the memorandum distributed to its managers. Respondent violated Section 3 by failing to pay Complainant accrued vacation pay in accordance with its written policy.

WAYNE COUNTY CIRCUIT COURT: Affirmed 3/13/85

410 EMPLOYMENT RELATIONSHIP
Joint Venture
Partnerships

83-3636 **Vella v Zavis Enterprises** **(1984)**

Complainant and Respondent opened a music shop. Both parties were involved in the business planning, expansion, and exploring ways to secure financing. Complainant was to receive 12 percent of the gross profits which he agreed to reinvest in the store. During Complainant's 16-week association with Respondent, he worked approximately 50 hours per week. No wages were paid. Complainant claims wages based on 50 hours per week for 16 weeks at minimum wage.

To be covered by the Act, Complainant must establish the existence of an EE/ER relationship. The record established that the parties were involved in a joint venture as partners. There was no proof that Complainant was an EE. There was no agreement to pay wages, no supervision of Complainant's work, no work hours specified, and no time records kept.

Respondent did not violate the Act. A person acting in a joint venture is not covered by the Act.

WAYNE COUNTY CIRCUIT COURT: 10/1/84, decision pending

411 CLAIMS
Timeliness Of

JURISDICTION
Statute of Limitations

83-3516 **Garber v Balimony Manufacturing Co** **(1984)**

EE filed a claim for wages and vacation pay beyond the 12-month period allowed by Section 11(1).

Since the Act does not permit a consideration of any explanation for a late filing, there is no violation. EE may still have civil remedies that may be pursued to recover the wages claimed.

See General Entry V.

412 **BURDEN OF PROOF**
Commissions

WAGES PAID
Commissions

84-3677 **Day v Mt Clemens Dodge, Inc** **(1984)**

EE failed to establish that he earned commissions during the period in question. He presented no sales figures or invoice to support his claim. A claim for wages based on approximation and speculation is insufficient to establish a violation of Act 390.

ER did not violate the Act.

413 **TESTIMONY**
Conflict

TIP CREDITS

84-3764 **McGraw v Merryland Restaurant** **(1984)**

Complainant was hired as a waitress for $50 a week. During the period in question she was paid two $50 payments. Respondent claimed he did not hire Complainant nor did she work for him. He also claimed he gave Complainant money as a favor to her boyfriend. Two of Respondent's witnesses testified they did not know whether Complainant was employed by Respondent. A third witness recalled seeing Complainant working as a waitress. Complainant testified in a believable manner that she worked 130 straight-time hours and 70 overtime hours.

Respondent violated Section 5 by failing to pay $489.50 upon termination. This amount was determined by giving EE the benefit of a 25 percent tip credit which applies to waiters and waitresses ($3.35 less 25 percent).

414 **EMPLOYMENT RELATIONSHIP**
Contract of Employment
Multiple ERs at Same Time

84-3867 **Massey v Gussie Faison** **(1984)**

Complainant was employed as a housekeeper for Ida Beasley pursuant to a payment arrangement of the Department of Social Services. She earned and was paid $271.20. Complainant filed a wage claim for $271.20 against Respondent Gussie Faison of the same address as Ida Beasley. She testified she worked the same time and same hours for Respondent as she did for Ms. Beasley.

Respondent did not violate the Act. Absent proof that Complainant worked for Respondent at different hours than she did for Ms. Beasley during the period in question, she is not entitled to additional wages. Complainant cannot work for two ERs at the same time. The evidence indicates Complainant never received authorization from the Department of Social Services to work for Respondent.

415 **BURDEN OF PROOF**
Unrebutted Testimony

EMPLOYMENT RELATIONSHIP
Contract of Employment

83-3690 **Smith v Midland National Life** **(1984)**

A representative of Respondent called Complainant and discussed the job (telephone work) with her. There was no agreement as to the amount she would be paid. A check was prepared for Complainant after she communicated she had set up 15 to 18 appointments for the agent. The check was canceled when it was discovered there were in fact no names and no appointments. Complainant did not appear at the hearing. The agent's unrebutted testimony established that there never was an employment relationship with Complainant.

Respondent did not violate the Act.

416 REDUCTION OF WAGES/BENEFITS

WRITTEN POLICY
EE Knowledge
Unenforceable

84-3828 **Rogers v Jerry Keeder dba Keeder's Show Bar** **(1984)**

ER's employment contract consisted of ten rules written on the front and back of a piece of paper and was allegedly posted in the girls' dressing room. EE never saw the contract nor was she told to read it. Rule 5 stated that if you are fired or quit, the bar reserves the right to pay minimum wage. EE was told when ER's wife hired her that she would receive $9 an hour. She worked ten hours and was paid $3.35 an hour as a dancer.

ER's contract cannot be given any credibility. There is no date indicating when it was allegedly drafted, no signature of who authored it, no instructions that a dancer had to read it or sign it indicating she understood it.

ER violated Section 5 by failing to pay an EE all wages due upon termination.

417 BONUSES
Resignation Before Payment Date

WRITTEN POLICY
Forfeiture of Benefits
Interpretation
Against Drafter

84-3816 **Overway v Henry House, Inc** **(1984)**

ER's written policy provided for a profit-sharing bonus plan generated by efficient production and paid out to the EEs at the end of the company's fiscal year which ended 10/31/83. The bonus reserve was to be paid in December 1983. EE terminated his employment with ER on 11/4/83. ER refused to pay EE a bonus from the reserve because its past practice was that EEs who terminate prior to payment date did not receive a bonus. ER also relied on a provision in its written vacation policy which stated that if an EE was discharged for just cause, or quits, all benefits accumulated as of dismissal are forfeited.

417 **(Continued)**

Section 3 requires an ER to pay fringe benefits, such as a bonus, in accordance with the terms of a written policy. This applies regardless of ER's past practice of paying fringe benefits. Since the forfeiture provision was in the vacation portion of the policy, it was reasonable to interpret this as a forfeiture of vacation benefits only. Moreover, any ambiguity in the written policy should be construed against its drafter.

ER violated Section 3 by failing to pay EE the annual bonus in accordance with the terms of its written policy.

418 **WRITTEN CONSENT**

Expressly Permitted by CBA
Inadequate

83-3472 **Hoard v Anderson & Son, Inc** **(1984)**

EE was a driver/route salesman, selling and delivering beer for ER. Pursuant to an agreement between Teamsters Local No. 17 and Respondent, the driver/salesman bears the loss from stale beer which must be removed from the customer's stock and dumped. EE was told he must sign a letter dated 7/26/82 authorizing deductions in accordance with the contract.

There was a problem with stale beer toward the end of EE's employment. It was decided that the loss for the stale beer would be charged 1/2 to ER, 1/4 to supervision, and 1/4 to driver/route salesmen. ER deducted $347.49 from EE's paycheck of 5/27/83. The pay stub showed this deduction as "Old Beer." The deduction category, meaning cash or product shortages, was blank.

ER contended the agreement permitted deductions for stale beer and that the term "product shortage" includes stale beer which is returned. This contention was inconsistent with ER's own conduct in making a distinction between product shortages and stale beer on the paycheck stub.

ER violated Section 7 which requires deductions be "expressly permitted" by a CBA. The agreement did not expressly permit deductions for stale beer. Section 7 also requires written consent for each wage payment. The 7/26/82 letter does not satisfy this requirement since it did not apply to a specific wage payment but instead was intended to be a one-time consent to all future deductions.

419 CLAIMS

Timeliness Of

JURISDICTION

Statute of Limitations

Limitation Period Renewed

Promise to Pay

83-3676 Potocka v ISS Prudential Maintenance Services (1984)

The issue in this case is whether the complaint should be dismissed for untimely filing. EE was laid off by ER on 4/26/82 and was not paid all the vacation and sick pay claimed due under the terms of the employment agreement. She met with a representative of Respondent between May and July 1982 and was promised she would be paid. A payment of $339.30 for 58 1/2 hours' vacation was made to her in July 1982, but this payment did not include all fringe benefits due.

She discussed this matter by telephone with Respondent's representatives prior to moving from Detroit to Ann Arbor around the end of July 1982, and again in September 1982 and January 1983, and was told she would be paid if Respondent owed her anything. She received no further fringe benefit payments from Respondent and filed a wage claim on 10/18/83.

Section 11(1) requires an EE to file a written complaint with the Department within 12 months after the alleged violation. The Complainant did not follow this requirement. Respondent's unwritten promise to pay on 1/24/83 did not put off the effect of the statute of limitations. A new promise must be absolute and in writing to renew the limitations period. Complainant's appeal and complaint were dismissed.

See General Entry V.

420 LOANS

OVERPAYMENTS

Withheld at Termination

84-3783 Hall v Croton Excavating and Building (1984)

EE was a construction worker. ER paid EE gross wages in the amount of $220 per week for the week ending 6/25 and 10/8/83. This represents $5.50 per hour times 40 hours, although EE did not always work 40 hours per week. EE contended the $220 per week he received was a salary. ER contended that EE earned an hourly rate, not a salary, and any overpayments were loans which were to be deducted from future wages. EE did not give written consent for any deduction.

420 (Continued)

For the week ending 10/15/83, EE was paid gross wages at $5.50 per hour. The parties discontinued the regular $220 per week wage payments and instituted a pay rate of $5.50 per actual hours worked. EE worked a total of 32 1/2 hours during the weeks ending 10/22 and 10/29/83. EE was fired on 10/27/83 and Respondent withheld his last two weeks of pay to offset the overpayments when EE received $220 weekly.

Section 7 prohibits ERs from withholding wages and fringe benefits as a means of resolving monetary disputes with EEs.

Respondent violated Section 5(2) by failing to pay EE, at the time of his discharge, wages earned during his last two weeks of employment even if EE owed Respondent for previous overpayments.

421 EMPLOYMENT RELATIONSHIP

Severing Employment Relationship

Notice to EE

83-3644 **Lemster v North Star Transportation** **(1984)**

EE worked for Respondent as a truck driver. Respondent later became an EE of another company but continued to pay Complainant with the North Star Transportation checks and never informed Complainant that he no longer worked for Respondent.

Section 1(c) defines an EE as an individual employed by an ER. Section 1(d) defines an EE as an individual acting directly or indirectly in the interest of an ER who employs one or more individuals. Section 1(b) defines the term "employ" as engaging or permitting to work.

Respondent did permit Complainant to work. Respondent's relationship with Complainant never changed. He continued to pay Complainant on checks from North Star Corporation. Complainant, therefore, was acting directly in the interest of Respondent.

Respondent violated Section 5 by failing to pay a terminating EE all wages earned and due.

422 **JURISDICTION**
Termination Pay

SEVERANCE PAY
Fringe Benefit or Wage

TERMINATION PAY

WRITTEN CONTRACT
Fringe Benefits

83-3537 **Perz v King Communications, Inc** **(1984)**

ER closed its Bay City office where EE worked. She was offered a position in ER's Saginaw office which she refused because of the greater distance from her home. Based on the written contract, EE felt she was entitled to termination pay. The agreement provided that regular EEs whose service was terminated by permanent layoff would receive termination pay. The facts presented establish that EE was not given permanent layoff.

ER agreed not to challenge the rights to unemployment compensation of those EEs who chose not to transfer to the Saginaw office. Therefore, EE was able to draw unemployment benefits, even though she had been offered work.

Based on the agreement and facts, the only persons who would be entitled to termination pay would be those who were not offered jobs at the Saginaw location. Moreover, severance pay is not covered as a fringe benefit or a wage under the Payment of Wages Act. The ALJ found no difference between the concept of severance pay and termination pay; therefore, the Act itself does not permit the Department to order an ER to pay termination pay.

423 **FRINGE BENEFITS**
Must Be in Writing to Be Enforced

VERBAL AGREEMENTS

80-1078 **Mason v Allyn Anthony** **(1981)**

EE claimed fringe benefits. Section 3 requires that fringe benefits be paid pursuant to a written contract or written policy. There was no written contract or policy to provide for the claimed fringe benefits. ER did not violate the Act.

See General Entry I.

423 (Continued)

CIRCUIT COURT: Affirmed

COURT OF APPEALS: 11/25/79
Denied Complainant's application for rehearing and affirmed ALJ and circuit court decision that the $.10 per bushel bonus arrangement, payable if the farm worker completed the season, had to be in writing in order to fall within the jurisdiction of Act 390.

SUPREME COURT: 4/5/85
Denied Appellant's application for leave to appeal.

424 COMPUTATION OF DAILY HOURS WORKED

DEDUCTIONS
Written Consent

DETERMINATION ORDER
Department's 90-Day Issuance Period Procedural, Not Jurisdictional

PENALTY AMOUNT

WRITTEN CONSENT
Deductions

84-3824, 84-3834 Myers and Cox v Top Line Enterprises **(1984)**

ER deducted $2.00 per pay period from each EE's check for coffee. ER followed the federal rules which permitted computation of daily hours worked to the nearest tenth of an hour or six minutes. The state rule requires ER to compute daily hours worked to the nearest unit of 15 minutes. One of the owners did not know why he added hours onto the back of each of the EEs' time cards. EEs testified that these were added for hours in a prior pay period for which they had not received wages.

ER violated Section 7 for coffee deductions without written consent from the EEs. Based upon the evidence presented, the company did not meet all the requirements for use of the federal rule. Therefore, the state rule for computation of hours applied.

424 **(Continued)**

With respect to ER's argument concerning the imposition of the 10 percent per annum penalty amount required by Section 1(c), it was concluded this penalty is to be computed from the time ER is notified that a complaint has been filed. If ER chooses to file an appeal and continue to delay payment to EEs, the penalty amount continues to run. ER also referenced the fact that the DOs were issued beyond the 90-day time period set forth in Section 11(3). In a prior decision (WH 80-763, entry 219) it was concluded the 90-day time period is procedural and not jurisdictional. A dismissal of the DO due to its late issuance would effectively dismiss EEs' claims and deprive them of Act 390 rights.

425 **EMPLOYMENT RELATIONSHIP**
EE/ER Relationship Found
Family Business

FINANCIAL SUCCESS AS CONDITION OF PAYMENT

MINIMUM WAGE
When No Specific Wage Agreed Upon

83-3645 **Haywood v Famco Supermarket** **(1984)**

Respondent was purchased with contributions made by several family members. It was not set up as a family corporation but specifically formed under the names of Charles Parham and Joseph McKnight. It was concluded that they were the owners of the business. Family members allegedly were told that they would receive wages for their work if the market succeeded.

The facts established that the Complainant was designated the manager of the supermarket by one of the owners and she performed managerial duties during the course of her association with Respondent. Complainant was an EE and was entitled to wages for her period of employment.

Since no specific amount for wages was agreed to by the parties, the law requires that EE receive at least minimum wage as set forth in the Minimum Wage Law of 1964, Act 154 of the Public Acts of 1964, as amended.

ER violated Section 2 by failing to pay EE wages on a regular basis, and Section 5 by failing to pay all wages due upon termination.

SAGINAW COUNTY CIRCUIT COURT: Affirmed 2/15/85

BURDEN OF PROOF
Recordkeeping
Section 9

WAGES PAID
Recordkeeping

84-3817 **Perior v Photo Parlour** **(1984)**

ER acknowledged not having paid EE wages in full. He claimed that EE agreed to receive some of her wage in the form of labor performed by himself for her. Section 6(1) requires that wages be paid in U.S. currency or by negotiable check or draft. An ER is not permitted to satisfy a wage claim in any other fashion.

The parties could not agree to the specific number of hours for which EE had not been paid. EE kept a record of her own hours in a notebook. In addition, EEs were to write their hours on a schedule form for ER. For the period in question, a person's name other than EE's appeared on the form. EE contended she did sign the form but ER failed to bring it to the hearing. EE's testimony, together with her having kept her own record of hours worked, convinced the ALJ that she did work the period in question. ER's records are questionable because of all the corrections on the form, and the sheet EE testified she signed could be missing. ER's records do not meet the requirements of Section 9, which requires an ER to maintain a record for each EE, including total hours worked and total wages paid for each pay period.

Since ER's business was a one-person operation, it was unlikely EE worked at the same time as another EE. A fair resolution of this issue was to subtract the number of hours ER paid the second EE from the total hours claimed by the Complainant for the dates in question.

ER violated Section 5 by failing to pay a terminating EE all wages due.

427 **EMPLOYMENT RELATIONSHIP**
Independent Contractor Relationship Found
Tax Withholding Statements

83-3623 **Wells v Eagle Security Systems** **(1984)**

The WH Administration concluded that there was no EE/ER relationship. Respondent provided Complainant with office space and business cards, a telephone, and secretary. The Complainant hired an EE to assist in prospecting for customers and to set up appointments. The Complainant advertised in various newspapers for customers, established his own working hours, and paid wages to his EE. At no time did Respondent supervise Complainant's work, provide fringe benefits, or place him on the regular payroll.

Complainant was hired as an independent contractor. The fact that he was provided business cards and support services is not sufficient to establish an EE/ER relationship. Complainant was free to market Respondent's products by any method he selected. Complainant was not part of the regular staff and was not required to maintain regular hours. He was not required to sign withholding forms for taxes and social security payments. The WH Administration's conclusion was affirmed.

428 **EVIDENCE**
Time Worked

WAGES PAID
Time Worked

83-3169 **Cutler v Dodge Investment Co, Inc** **(1984)**

EE and his wife were employed as a management team at a pay rate of $1,200 a month. EE claimed that he was owed $150 for work performed during the period 9/30/82 through 10/8/82. ER's witness testified that EE did not work during the period in question.

ER did not violate the Act.

429 DEDUCTIONS
Uniforms

UNIFORMS
Deductions For

82-2751 **Goodrich v Happy Italian Roma Cafe, Inc** **(1983)**

EE worked as a waitress for ER from October 1981 through 6/6/82. EE was told that all waitresses would have to purchase navy-colored uniforms with white trim. Prior to that EE wore a white and light blue uniform at work.

ER's representative and two waitresses testified that ER did not direct the EEs to purchase uniforms. The waitresses felt that the darker color would be easier to keep clean than the light blue uniforms. ER had no objection to new uniforms and directed the EEs to work it out among themselves.

The cost for each EE was $28.33. Respondent Exhibit 1 is a receipt showing that the uniforms were purchased by ER on behalf of EEs. Section 7 prohibits an ER from taking an indirect deduction from an EE unless permission is given in writing. This was not done in this case.

ER violated Section 7. ER did not violate Section 8. There was no evidence that EE's job was threatened if she did not pay for the uniform.

430 COMMISSIONS
Payment
After Separation
Customer Payment After Separation
Incomplete Sales

84-3890 **Griffin v Southeastern Michigan Consumer Alliance** **(1984)**

EE earned a 35 percent commission on fees. She performed other duties for a 10 percent commission on fees. At the time of EE's termination, there were unpaid accounts. EE claims commissions on these balances.

Commissioned salespeople often perform services for which they receive no wage because their efforts do not result in a completed sale. ER's sales representatives were not eligible for commissions until the fees were paid. EE did not meet the burden of proving that she was entitled to commissions when the fees were paid even after her separation. EE's appeal dismissed.

431 BONUSES
Retroactive Change

WRITTEN POLICY
Retroactive Change

83-3083 **Moorhead v Capitol Northwest Management Co** **(1983)**

EE managed and kept records for ER's operation from September 1981 until 10/9/82. EE contended that she was entitled to a $500 bonus for the month of August 1982; that ER's bonus policy was in effect during the month of August 1982; and that the policy was changed in a communication dated 8/23/82, effective 8/1/82. EE claimed that she did not receive the letter dated 8/23/82 until 8/30/82.

EE was to receive a $500 bonus for any month in which the square footage of occupancy was at 75 percent or greater. During August 1982, the occupancy of the facility managed by EE was at 76 percent.

Section 3 directs ERs to pay fringe benefits to EEs in accordance with the terms set forth in a written policy statement. EE was working during August 1982.

Since EE met the terms of the bonus policy statement, EE is entitled to a $500 bonus for August. ER's revised policy statement was not effective for August since EE worked during the month in reliance upon the prior policy.

ER violated Section 3.

432 WRITTEN CONSENT
Deductions

83-3500 **Festerman v Walt Lazar Chevrolet, Inc** **(1985)**

EE was employed as a car salesman. His wage agreement provided for a 40 percent commission for new car sales and 30 percent for used car sales. ER withheld some wages due to EE. EE was discharged. Section 5 requires ERs who discharge EEs to pay all wages earned and due as soon as the amount can be determined. ER also made deductions from EE's paychecks without written consent. Section 7 prohibits ERs from deducting monies from wages without written consent.

ER violated Sections 5 and 7. At a rehearing ER was found to have violated only Section 7. Since EE had been paid all wages, ER did not violate Section 5.

See General Entry III.

433 **DEDUCTIONS**
Insurance Premiums
Verbal Consent

VERBAL CONSENT

WRITTEN CONSENT
Deductions

84-3732 **Coryell v Mark Tool & Die Co, Inc** **(1984)**

In February 1977 EE started employment with ER. In January 1981 ER's secretary informed EE that he had the option of enrolling in a group health insurance policy. She explained to him that this would require wage deductions for premiums. With this understanding EE told the secretary that he wanted insurance.

On 1/28/81 ER's secretary signed EE's name on a group enrollment card for the health insurance. On the card the box was checked for the following statement above the signature:

> I hereby apply for the group coverage and authorize deductions from my earnings for the amount required, if any, to cover any contribution for group coverage for which I am or may become eligible.

EE did not authorize the secretary to sign his name nor did he give written consent to deductions from his wages for health insurance premiums.

ER deducted amounts for health insurance premiums from EE's paychecks. EE quit his job. When he returned to pick up his final paycheck, he was told that he had to turn in his health insurance card before receiving his check. EE turned in to ER both his and his wife's health insurance card.

After receiving his final paycheck, EE discovered that there had been an amount deducted from his wages for health insurance. ER had deducted the amount to recover the premium which had already been paid for health insurance coverage. Although EE no longer had a card, he and his family were covered under the health policy and he could have used forms to submit claims. EE then filed a complaint for $193.77 with the Department.

Section 7 prohibits deductions from wages without the EE's written consent. Written consent is necessary even when the EE has consented verbally to the deduction of an amount which is due the employer. ER violated Section 7.

434 **VACATION**
Forfeited

83-3674 **Gardner v Hurley Medical Center** **(1984)**

EE contended that he was entitled to 56 hours of vacation pay. ER believed that this amount was forfeited. EE claimed that forfeiture was a violation of the contract agreed to by ER and the union. EE received a job reallocation. The reallocation resulted in a change of agreements. Under the old agreement EE would not have forfeited his vacation days. EE had requested that four of his mandatory days off be credited from his vacation bank. ER denied the request. EE also requested vacation time for normal days off. The requests were denied because EE would have been paid for more than 40 hours per week.

The ALJ held that the ER's new and old labor contracts were not different with regard to vacation benefits forfeiture. It was EE's obligation to request vacation in order to avoid the forfeiture.

However, ER violated Section 3 since EE was not paid vacation benefits for the mandatory days off.

435 **JURISDICTION**
Severance Pay

SEVERANCE PAY

84-3826, et al **Eovaldi, et al v Allied Supermarkets, Inc** **(1984)**

EEs claimed the employer refused to pay severance pay in accordance with their employment contract after layoff.

Severance pay is not included within the definition of wages or fringe benefits. The Payment of Wages and Fringe Benefits Act may not be used to enforce the terms of a contract regarding payment of severance pay.

436 **PROFIT SHARING**
Written Contract

VACATION
Unearned

83-3110 **Parent v Chandler Haven** **(1983)**

The written agreement provided for a two-week vacation period with pay after the first year of employment. Also, it was agreed that EE would receive a percentage of any profits made by ER. EE claimed monies due for vacation pay and profit sharing.

EE was employed less than one year, so the claim for vacation pay was invalid. ER's records showed a loss during EE's tenure.

No profit sharing bonus owed to EE.

437 **BURDEN Of PROOF**
Recordkeeping
Not Maintained

CETA EMPLOYEE

WAGES PAID
Recordkeeping

83-3271 **Passalacqua v Chalmers-Charlevoix Auto Service** **(1983)**

EE was employed from 8/24/82 to 12/4/82 as a mechanic at a pay rate of $6 per hour. Because EE was a CETA employee, ER would be reimbursed $3 by CETA for each hour that EE worked. During the pay period 11/13/82 to 12/6/82, ER failed to pay EE $360. ER was unable to verify his claim that EE had been paid because no records were maintained.

ER violated Section 5.

438 **BANKRUPTCY**

83-3279 **Mathis v L & W Trucking Co** **(1983)**

ER filed a petition pursuant to Chapter 13 of the Bankruptcy Act in the U.S. District Court to stay claim of EE.

The dispute fell under the jurisdiction of the U.S. District Court and the matter was stayed in accordance with the Bankruptcy Act.

439 **EXPENSES**
Advances

WAGES PAID
Recordkeeping

WRITTEN CONSENT
Deductions
Inadequate

84-3794 **Matlock v Eagles, Inc** **(1984)**

EE was employed as a truck driver from 8/23/83 to 10/6/83. During his employment, EE drove a truck which ER had leased to another company. During the trips the lessee sent money to EE by means of Comcheks. These amounts were advanced to EE to cover operating expenses. After the trips were completed, the lessee reduced its payments to ER by the amount advanced to EE.

When EE returned from the trips, he turned in receipts for operating expenses to ER. According to ER, the advances to EE exceeded his allowable expenses. To offset these amounts, ER made a deduction from EE's wages. EE did not consent in writing to the deductions.

ER violated Section 7 by deducting amounts from EE's wages without written consent. Section 7 prohibits ERs from withholding wages as a means of resolving monetary disputes with EEs.

440 BURDEN OF PROOF

Overtime

OVERTIME

Not Claimed

84-3713 **Wade v First Housing Corporation** **(1984)**

EE was first hired as a janitor. Later his position changed and he worked as a security guard at the housing complex. EE was to make rounds of the housing complex Monday through Friday beginning at 5:00 p.m. and concluding at 1:00 a.m. EE was to submit time sheets for the hours worked.

The time sheets submitted listed 80 hours worked for each two-week period. EE claimed he wasn't paid for overtime. If EE worked overtime, he was to submit an additional time sheet. In this case none were submitted. ER did not violate the Act. ER honored the wage agreement by paying EE for all hours submitted.

441 BONUSES

WRITTEN CONTRACT

Failure to Pay According To

84-3736 **Aernie v John Keyser Agency, Inc** **(1984)**

On 2/1/70 EE started working as an insurance salesman. EE's employment was pursuant to a written contract which provided an annual bonus of 35 percent on gross commissions produced on General Line Insurance Premium (except Life, Health and Accident Insurance Premiums). If the contract was terminated on or before April 1 of any year, EE was not entitled to any bonus for that period. If the contract was terminated after April 1 of any year, EE would be entitled to a bonus.

In addition to EE's activities as an insurance salesman, he also sold diamonds and diet products part-time for at least three years prior to his termination. He worked 40 to 50 hours per week selling insurance for ER despite these other activities. He not sell insurance for any other company.

441 (Continued)

ER considered EE's other activities a breach in the employment contract that he "devote his full time to said employment." However, ER did not terminate EE's employment and continued to pay him an annual bonus.

In April 1983 EE was involved in a telephone confrontation with an EE of one of ER's insurance carriers. On 4/25/83 ER's president sent a letter to the carrier apologizing for EE's behavior.

EE was discharged on 4/21/83. At that time EE's annual bonus for the 1982 calendar year had not been paid. ER refused to pay the bonus. EE filed a complaint for the annual bonus.

ER contended that, under the terms of the contract, the 10/26/83 complaint was either premature or late. ER's contention was rejected because the termination portion of the bonus section clearly refers to the bonus based on the calendar year of termination, 1983. EE was claiming a bonus for the 1982 calendar year, not the 1983 calendar year. The complaint was timely under Section 11(1) since it was filed within 12 months of that date. ER's motion to dismiss the complaint was denied.

ER contended that EE was not entitled to the 1982 annual bonus because he violated the employment contract by not devoting full time to his employment. Also, ER alleged that EE was not entitled to a bonus because of his misconduct with the insurance carrier.

The contract does not provide that payment of the annual bonus was contingent on EE's compliance with its terms or satisfactory performance. Payment of the bonus was mandatory.

ER violated Section 3.

442 DEPARTMENT
Dismissal of Claims
ER Location Unknown

EMPLOYER
Location Unknown

TERMINATION PAY

83-3340, et al Vaughn and Craig v Echo Hill Furniture (1983)

ER's forwarding address was found to be unknown after the complaints were filed. Section 11(2) provides that within a reasonable time after a complaint is filed the Department shall notify the ER and investigate the claim and shall attempt to informally resolve the dispute.

The Department complied with the Act by refusing to investigate the complaint without notification to ER. Complaints were dismissed.

443 EMPLOYEE
One Who Is Permitted to Work

82-2904 Matthews-Pennanen v WSG Install, Inc (1983)

ER employed EE as an independent contractor from 10/30/81 to February 1982 when he terminated his employment. ER reemployed EE on 3/15/82 as a salaried EE. His wage agreement was $400 per week. From 3/15/82 to 5/28/82, EE was paid sporadically. He worked a total of 11 weeks and was paid $2,050. ER failed to pay EE $2,350.

ER had not paid EE all wages earned. ER violated Section 5.

444 BURDEN OF PROOF
Recordkeeping

JURISDICTION
Statute of Limitations

REDUCTION OF WAGES/BENEFITS
Agreement to Pay in Future

WAGE AGREEMENTS
Wage Reduction
Agreement to Pay in Future

84-3993 Johnson v Carpet by Charles Leaf & Associates (1984)

EE worked as a salesman/store manager from June 1981 through November 1983 at $4.50

per hour. EE kept track of his own hours and reported them weekly or biweekly to ER. Sometime in March 1982 EE agreed to take home less than $4.50 per hour in an attempt to keep the business going and kept track of the difference between wages earned and actually paid and contended this difference was due from ER.

ER contended there would be no running balance kept for eventual payment of the full $4.50 per hour. EE filed a claim for benefits on 2/29/84 and terminated his employment approximately 11/14/83. The Act's statute of limitations only permits a review of amounts claimed for 2/29/83 through 2/29/84.

ER violated Section 2 for failure to pay the agreed wage rate on a regular and periodic basis. ER violated Section 5 for failure to pay all amounts due at EE's termination, and Section 9 for failure to maintain a record for each EE showing total basic rate of pay, total hours worked, total wages paid in each pay period, and a separate itemization for all deductions taken from EE's wages.

445 BURDEN OF PROOF
Time Worked

EMPLOYEE
One Who Is Permitted to Work

EVIDENCE
Insufficient to Establish Claim

WAGES PAID
Time Worked

84-3796 Carter v Adelman-Bryant Dental Laboratory (1984)

Complainant applied for a position which Respondent advertised in anticipation of an EE resigning. Complainant did not qualify because he had no prior work experience. Complainant was allowed to observe, and if he could do the work, his employment chances would be increased when the other worker left. Complainant agreed to observe and work without any pay for two weeks. The other worker had not left after the two weeks, but Complainant continued to report at his convenience. He had no regular hours. He was never told by Respondent he would be paid; however, the other worker told him if he produced he would be paid. After about a month he was paid for one day per week when the other EE was absent.

Complainant's testimony was inconsistent and contradictory about hours worked and wages owed, and the time sheets did not correspond with his testimony. Complainant failed to present a preponderance of evidence that Respondent either expressly or impliedly promised to pay him.

Complainant presented insufficient evidence to meet his burden of proof. Respondent did not violate the Act.

446 EMPLOYMENT RELATIONSHIP
Economic Reality Test
EE/ER Relationship Found

WRITTEN CONSENT
Deductions

84-3854, et al VanHaitsma, et al v Tower Ridge Farm, Inc (1984)

Complainants worked and lived on Respondent's dairy farm from 10/83 through 2/15/84. Respondent did not supervise Complainants on a daily basis because they were trained and experienced. Major decisions were made by Respondent and supplies were charged its account. Respondent furnished the tools and equipment for the work. Respondent paid Complainants semimonthly and filed a 1983 W-2 wage and tax statement.

Respondent deducted amounts from Complainants' final checks without their written consent. Respondent contended Complainants were independent contractors. Applying the "economic reality" test, as discussed in entry 303, for distinguishing an EE from an independent contractor, it was concluded that Complainants were Respondent's EEs.

ER violated Section 7 by making wage deductions without written consent.

447 BURDEN OF PROOF
Time Worked

WAGES
Time v Job

WAGES PAID
Time Worked

84-4166 Talano v Shelby Diesel & Injection, Inc (1984)

EE was employed as a mechanic from 2/6/84 through 2/27/84 at $6 per hour. ER paid EE for time worked on specific jobs. EE was directed to enter jobs on time cards. EE punched in and out at the beginning and end of each day, and for lunch.

ER claimed he should not have to pay an EE for not working on a job. EE understood he would be paid based on the time punched in and that the listing of jobs was for billing purposes. The Department contended EE was under the direction and control of ER the entire period punched in each day.

ER must pay EE for all hours punched in whether or not a specific job was assigned. ER violated Sections 2 and 5 by failing to pay EE wages on a regular basis and failure to pay all wages due and owing upon termination.

448 BURDEN OF PROOF
CETA Employee
Recordkeeping

CETA EMPLOYEE

EVIDENCE
Insufficient to Establish Claim

MINIMUM WAGE
Overtime

WAGES PAID
Recordkeeping

84-3712 Forrest v Flowers by Jackie (1984)

EE was employed first under a CETA contract and later through the Vocational Rehabilitation Department. ER claimed that several amounts were paid to EE in cash which Complainant denied receiving. If ER had followed the requirements of Section 9, which requires an ER to maintain employment records for each EE of total hours worked and paid in each pay period, and a separate itemization of deductions, she would have support for the alleged cash payments. ER also claimed she had no knowledge of the overtime requirements as contained in the Minimum Wage Act. This, however, does not excuse ER's failure to pay these amounts. It was concluded that Appellant ER had not met its burden of proving that the DO was incorrect.

EE contended that the DO should have been higher, arguing that she was required to cash the personal checks given to her and return half of each check in order for EE to continue her job. ER denied these allegations. EE's testimony was corroborated by her husband. It was concluded that the record did not establish sufficient proof for this assertion.

DO affirmed finding ER violated Sections 2 and 5 by failing to pay EE wages on a regular basis and all wages earned and due at termination.

449 EMPLOYMENT RELATIONSHIP
Economic Reality Test
Independent Contractor Relationship Found

83-3538 Wall v Kennedy Trucking, Inc (1984)

From approximately 11/1/82 through 5/31/83, Complainant worked as a driver of a semi-truck owned by Respondent. The truck was leased to various freight carriers. Respondent contended Complainant was not an EE. Using the economic reality test to distinguish an EE from an independent contractor, as discussed in entry 303, it was

concluded that Complainant was not an EE.

It appeared that Complainant was engaged in a joint venture with Respondent whereby Respondent's truck was leased to freight carriers and driven by Complainant, and certain proceeds divided.

Respondent did not violate the Act.

450 ADVANCES

DEDUCTIONS
Advances

EMPLOYEE DEBT TO EMPLOYER

84-3865 Casteel v Bowerman (1984)

EE was employed as a truck driver pursuant to a wage agreement which provided that EE would receive 25 percent of the gross truck revenue for a trip he made to and from Atlanta, Georgia. ERs contended they advanced and wired EE money at his request so the trip could be completed. EE was issued a traffic ticket which ERs contended was to be paid equally, but EE failed to pay his share. EE was not paid his 25 percent share of the gross truck revenue. EE did not give any written authorization for a deduction.

Section 5(2) requires an ER to immediately pay an EE who has been discharged all wages earned and due as soon as the amount can be determined.

ERs violated Section 5(2).

451 BONUSES

84-4017 Cox v Associated Truck Lines, Inc, ANR Freight System, Inc (1984)

EE began his employment in Grand Rapids in 1976. In 1982 ER planned to centralize certain administrative functions in Denver, Colorado. Some EEs would be transferred and some would be terminated without the opportunity to transfer. ER issued a written Employment Retention Bonus policy for those who remained through the transition period but whose employment would end when the functions were centralized in Denver. EE's position in Grand Rapids was not eliminated and he continued to work in the fall 1983. His employment was terminated when he refused the option of accepting a double occupancy room for a two-week assignment in Detroit or paying the difference between single and double occupancy rates. EE claimed that he was entitled to payment pursuant to the retention bonus policy.

EE's position was not transferred to Denver; therefore, the bonus policy is not applicable to him. It was not the purpose of the policy to provide a bonus to EEs whose termination was

unrelated to the administrative centralization. ER did not violate the Act.

452 COLLECTIVE BARGAINING AGREEMENT (CBA)

Fringe Benefits
Layoff
Grievances
Vacation
Earned During Layoff

84-3864 Spence v Perfection Automotive Products Corp (1984)

EE was employed pursuant to a CBA from 8/3/82 through 6/4/83 when she was laid off due to lack of work. Under the CBA the period EE was laid off, 6/4 to 8/3/83, should be considered as time worked for the purposes of computing vacation pay. Therefore, EE was entitled to one week's vacation pay as of 8/3/83.

ER contended that because EE did not utilize the grievance procedure available under the CBA, the Department of Labor should not order payment of the claimed vacation pay. Section 11(1) authorized and required the Department to proceed with the matter.

ER violated Section 3 by failing to pay fringe benefits in accordance with the terms set forth in the written contract.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

453 EQUITABLE DEFENSES

REDUCTION OF WAGES/BENEFITS

VERBAL AGREEMENTS
Statute of Frauds

84-3710 Schmidt v Sears Precision Drilling (1985)

EE was employed as a salesman on 6/1/81 pursuant to a written contract. At a Board of Directors' meeting on 2/11/82, EE voluntarily agreed to reduce his salary to $200 per week in order to help the company hold down expenses. He was paid $200 per week from 2/11/82 through 3/11/83 when he was discharged. EE filed a claim for the reduction of his wages. He contended that ER had no written consent for withholding his wages earned and due as required in Section 7. The ALJ found no evidence that ER deducted any amount from EE's wages. The agreement to reduce EE's wages did not violate the prohibition against wage deductions without written consent.

EE also claimed that an employment contract for a term in excess of one year comes within the statute of frauds and cannot be modified except in writing. EE claimed that a totally new oral agreement would not be enforceable or replace the former agreement unless it were

reduced to writing and signed by the parties. ER contended that because EE did not utilize the grievance procedure available under the CBA, the Department of

Labor should not order payment of the claimed vacation pay. Section 11(1) authorized and required the Department to proceed with the matter.

454 EVIDENCE

Insufficient to Establish Claim

84-3916 Jaye v Macomb-St Clair Private Industry Council (1985)

EE was employed as an administrative assistant to the Macomb-St. Clair Private Industry Council on 9/19/83. On 12/15/83, at a council meeting, a motion was made to continue to fund EE's staff position. The motion failed. A vote taken to fund a staff person's position, without reference to EE, passed. The minutes of the 12/15 meeting indicated that EE's status as staff person was terminated effective 12/31/83. EE also received a letter dated 12/29/83 from the Macomb County Personnel Director informing him of his termination effective 12/31/83.

EE testified that after January 1st he worked at City Hall and the Chamber of Commerce in Warren, at the direction of certain members of the Private Industry Council. On 1/31/84 EE filed a claim for wages and fringe benefits earned during the period 1/1/84 to the date of his claim. At the hearing he modified his claim to include wages and fringe benefits through 3/2/84.

EE contended the only issue to be decided was whether the failed motion at the council meeting of 12/15/83 constituted a discharge of EE's employment, arguing that failure of a motion means that no action was taken.

EE's appeal dismissed. The substantial evidence presented established that EE's employment was terminated effective 12/31/83.

455 VACATION

Payment at Termination
When to Take

WRITTEN POLICY

Vacation

84-4195 Sams v Midwestern Institute, Inc (1985)

EE was employed from 4/18/83 through 5/18/84 pursuant to a written policy. ER claimed that all EEs accrue 10 vacation days a year which must be used within the year. No carry-over is allowed. ER stated that EE requested 5 days of vacation in August 1983, which was granted, and EE used paid vacation time during the holidays. No records were produced to support these claims.

The written policy clearly stated that each permanent EE was entitled to 10 vacation days per year on the anniversary date of employment at the rate of 3.34 hours per pay period. This means that once that precondition has been met, the EE may then exercise the right or claim to the 10 vacation days. The written policy also stated that accrued vacation days may be taken at any time during the year. The investigation report indicated that EE requested vacation time in August; however, he did not utilize this time because his plans were canceled and EEs were instructed not to use vacation time over Christmas.
ER violated Section 3 by failing to pay fringe benefits in accordance with the terms of the written policy, and also Section 4, which prohibits ERs from withholding a payment of compensation due an EE as a fringe benefit to be paid at a termination date unless agreed to by the EE with a signed statement.

456 FRINGE BENEFITS
After Separation

WRITTEN POLICY
Amendment
Subsequent Agreements
Supervisor Promise

84-3857 VanDyken v Keeler Brass Co (1985)

EE began employment in October 1978 and gave two weeks' notice of resignation on 5/25/83. A written policy dated 1/18/83 stated that if $2.6 million in profit was achieved in 1983, there would be a 7 percent wage increase retroactive to 1/1/83 paid in December 1983 and built into the 1984 base rate. EE's supervisor told her she would receive the lump sum payment despite her resignation. By letter dated 8/12/83, EE's former supervisor stated that he was incorrect when he stated she would receive the lump sum payment because the Board of Directors decided any EE who voluntarily terminated employment before 7/3/83 would not be eligible.

EE claimed the lump sum payment of 7 percent of her earnings accrued during the first half of 1983. Under the terms of the written policy, EE was not entitled to the claimed payment at the time of her resignation in June 1983. The statement by EE's supervisor was not enforceable under the Act because it was not written.

Section 3 only requires an ER to pay fringe benefits to an EE. Complainant did not have a right to the claimed payment because at the time of payment she was no longer an EE.
ER did not violate the Act.

457 WRITTEN CONTRACT
Fringe Benefits
Incentive Compensation
ER Discretion to Pay

84-4076 **Blaine v Merrill Lynch, Pierce, Fenner and Smith, Inc** **(1984)**

EE was employed as an account executive from 5/77 through 9/24/83 pursuant to a signed agreement. He was terminated for cause on 9/24/83 when he was caught copying records. Complainant alleged he was entitled to 36 percent of the gross production from accounts of $8,090.20 for the month of September 1983 in the form of incentive compensation based on a booklet which stated that incentive compensation would be paid three times a year and all other production would be paid according to the step-up grid. This same booklet said that "Should you leave Merrill Lynch's employ, you will have no claim for any incentive compensation distributed after the date you leave." He also based his claim on the fact that the other account executives who left employment received incentive compensation after termination. They were not terminated for cause, however. He further relied on a document dated December 1978 which said if you were eligible for incentive compensation, it would be paid to you at the next payment cycle, regardless of what your normal payment cycle was. Complainant contended this superseded the signed contract.

It was concluded that the payment of incentive compensation in this case was wholly discretionary on the part of Respondent. As the 1982 corporate policy stated, an account executive's fixed salary may be supplemented by incentive compensation payments, which is a reward or bonus based on many factors. According to the written contract and the numerous revisions, once the employment relationship is terminated, the former EE has no claim to any compensation beyond the salary.

ER did not violate the Act.

458 WAGES

Complainant Paid Full Amount Earned but Not Amount Claimed

84-3838 **Sylo v LeCom** **(1985)**

EE was employed as a line foreman from 10/24/83 through 11/10/83. His wage agreement provided for payment of $.11 per foot of cable installation plus an extra amount for accessories. EE submitted a work order requesting payment of $477.25. A check was issued for this amount. However, upon investigating the work allegedly completed by Complainant, ER discovered that Complainant had not satisfactorily completed all of the work. ER then stopped payment on the $477.25 check and reissued Complainant a check for $331.88 as payment for work actually performed. The Wage Hour Administration found ER violated Section 7 by deducting $145.37 from Complainant's wages.

No evidence on the record to support the conclusion that any amount was deducted from EE's wages. Complainant was paid for all work he performed. ER did not violate the Act.

459 BURDEN OF PROOF

Unrebutted Testimony

FINANCIAL SUCCESS AS CONDITION OF PAYMENT

WAGES PAID
Recordkeeping
Time Worked

84-4105 **Hallas v Old Time Market** **(1984)**

Complainant alleged he was due $905.50 in wages for the period 1/15/84 through 2/24/84 for 330 hours worked. Respondents contended Complainant received all wages due ($50 a week for four weeks worked from 2/1/84 through 2/24/84.) The Department contended there was no wage agreement and therefore nothing on which to base a claim for wages.
The record reflected four discussions between a family and two others (Complainant and his father) regarding what was to be done in setting up a meat store. Within each version there was one undisputed fact: Complainant's father and Respondent's father worked out a wage agreement for Complainant. Respondents ratified the actions of their father by hiring Complainant and his father. Complainant ratified his father's actions by working. Complainant's father's unrebutted account of the wage agreement was payment of $3.35 an hour after the store was making money; therefore, Complainant met the requisite burden of proof in establishing the existence of a wage agreement. However, there was no wage agreement for the period 1/15/84 through 2/1/84 because Complainant's father and Respondents all agreed that any labor rendered during this period was voluntary.

The Department's argument that there was no agreement because the terms of a profit were not understood would not prevent the enforcement of a wage agreement. One of the Respondents defined it as "what is left after the bills have been paid."

The other point in dispute was the number of hours Complainant worked from 2/1/84 through 2/24/84. Complainant alleged 330 hours; however, the time cards kept by one of the Respondents, which Complainant acknowledged he previously saw and that they corresponded quite closely to his recollection except for one week, showed a total of 173-3/4 hours. It was concluded Complainant was owed wages for 173 3/4 hours minus the $200 he had already been paid.

Respondent violated Section 5 by failing to pay Complainant all wages due and owing at termination.

460 BURDEN OF PROOF
Time Worked

RESIGNATION
Acceptance

84-3932 **Servitto v City of Warren** **(1985)**

On 1/5/83 Complainant was appointed City Attorney by the Mayor. The City Council confirmed the appointment on 2/5/83. On 7/12/83 Complainant informed City Council that as soon as a replacement was appointed and confirmed, he would resign as City Attorney.

On 7/13/83 Complainant delivered a memo to the Mayor of his intent to resign and said he would be taking a leave of absence from 7/18 until 7/28. The Mayor informed Complainant his letter of resignation was accepted effective 7/12/83 and he was removed from the payroll as of 7/13/83. On 8/9/83 Complainant notified City Council that he no longer accepted the position as City Attorney effective 8/9/83.

Complainant's claim is for wages for 7/29 through 8/9/83. He claimed that the City Council did not accept his resignation until tendered to them on 8/9/83. The undisputed facts established that on 7/13/83 Complainant was informed by the Mayor that his resignation had been accepted. Any claim for wages after the date of discharge falls outside the jurisdiction of the Act, since Complainant failed to show he was employed after 7/13/83. All other questions would be more appropriately litigated in a court of general jurisdiction.

ER did not violate the Act.

461 APPEALS

Untimely

Good Cause Found

DO Number Left Off Appeal

EXEMPLARY DAMAGES

MIGRANT WORKERS

REDUCTION OF WAGES/BENEFITS

VALUE OF SERVICES

84-3991 Florez v Cass River Farms (1984)

Appeal letters were sent out on six other claims similar to EE's, but EE's name was inadvertently left off the typed copy of appeal. The error in checking the typed copy more carefully should not act as a bar to considering Respondent's appeal. Therefore, good cause was found for the late appeal.

EEs claimed they worked from 9/19 through about 9/29/83 believing they would receive piece-rate wages for picking green peppers. Prior to 9/19 they had received piece-rate and were not told at any time that the wage rate would change from piece-rate to minimum wage. Respondent claimed the EEs were told the piece-rate for picking peppers would not be in effect after the week ending 9/17/83 because of the poor quality of the peppers being picked.

The burden of proof is upon ER in this case as the party appealing the DO. There were no written records produced to support the contention that EEs were told prior to 9/19/83 of the discontinuance of the piece-rate wage. Moreover, the testimony of Respondent's witness was contrary to what she told the Department investigator three months after the complaints were filed. ER's dissatisfaction with the quality picked cannot alter an agreed wage rate after EEs worked in reliance on that rate.

Respondent's argument concerning the fact that the WH investigator had never before investigated a migrant worker claim was of no merit. The investigator testified she had been doing this work four or five years. Her testimony as to discussions with ER while investigating the claims was unrebutted and persuasive.

EEs are free to proceed under the Migrant and Seasonal Agricultural Protection Act for their claim of violation. EE's argument for assessing exemplary damages was rejected. Section 18(2) requires evidence that ER's violation be flagrant or repeated. There was no evidence that ER deliberately and knowingly violated the Act.

ER violated Section 5 by failing to pay EEs all wages earned and due at termination.

462 BONUSES

After Separation

84-3935, et al Evans, et al v Bob Zankl Buick, Inc (1985)

EEs were employed pursuant to a written contract providing for "year-end" bonus payments. The dealership was sold on 8/12/83 and EEs were discharged on 8/15/83. ER's 7/31/83 Operations Report reflected a profit of $151,275. ER's accountant said if a report had been prepared for 12/31/83, it would have reflected a loss of $20,635.19. EEs filed claims for year-end bonuses.

According to ER's written policy, it was not required to pay EEs' bonuses for 1983. There were no profits for 1983. Even if there were profits, EEs would not be entitled to bonus payments since they were not employed on 12/31/83.

ER did not violate the Act.

463 EMPLOYMENT RELATIONSHIP

Joint Venture

84-4030 Basile v Paul's Family Inn, Inc (1985)

In November 1982 Complainant discussed establishing a cheese factory with Respondent. Respondent invested $200,000 to start the business and Complainant agreed to quit his job as a salesman and investigate techniques for making cheese and to keep track of the expenses. He worked 50 to 60 hours per week. Respondent did not supervise Complainant's work or direct that specific duties be performed. No time records were maintained and Complainant had no set work hours. When the business was established, Complainant was to receive 10 percent of the business, some stock and $500-$600 per month. Complainant ended his association with Respondent on 7/1/83. In June 1983 he received $300 for three weeks. Complainant filed a claim for $5,000 of his savings which he spent to support himself during his five-month association with the factory. He supplemented his claim four months later and requested $5,100.

There was no evidence in the record that Complainant was an EE. He provided all the necessary labor with the idea that if the business proved successful, he would share in the profits and obtain stock in the company. There was no evidence that Complainant was promised a salary.

Respondent did not violate the Act. Complainant was a joint venturer in a business that failed, not an EE.

464 BARTER AND EXCHANGE AGREEMENTS

BONUSES

EMPLOYMENT RELATIONSHIP
Reemployment After Separation

83-3688 Carlton v Bairdwill Farms (1984)

Complainant worked as a farm hand from 8/20/81 through 10/21/83 at the direction and supervision of Respondent. Complainant worked an average of 60 hours a week, was paid $165 a week and was provided housing, among other things. There was no written agreement for this period. Around 9/5/83, Complainant was told to begin looking for another job as his services were no longer needed. On 10/21/83 a new arrangement was made between Complainant and Respondent. Complainant was to milk the dairy cattle once a day and haul manure. There was no arrangement as to wages. Respondent contended Complainant was to receive housing and electricity in exchange for labor. He also contended he did not employ Complainant after 10/21/83 although he continued to direct and supervise Complainant's work. From 10/21/83 through 11/4/83 Complainant performed these duties.

Respondent was Complainant's ER from 10/21/83 through 11/4/83 because he engaged or permitted the Complainant to milk the dairy cattle and haul manure. Complainant is due wages for his labor services in United States' currency, negotiable check or draft according to Section 6(1). Complainant testified the wages he was due should be deducted by 25 percent to account for the value of the housing and electricity that was furnished by Respondent.

Respondent violated Section 5 by failing to pay an EE voluntarily leaving employment or discharged all wages earned and due.

465 COMMISSIONS
Deductions

EMPLOYMENT RELATIONSHIP
Economic Reality Test

84-3943 Mortimore v Sipla dba Pri-Mar Products, Inc (1985)

Complainant delivered oil to Respondent's customers. Respondent received the oil on consignment from Pri-Mar Petroleum, Inc. Complainant received a commission on the number of gallons delivered. Respondent withheld 10 percent of Complainant's commission to offset bad debts without Complainant's written consent. Respondent also withheld, without Complainant's written consent, commissions earned by Complainant when he voluntarily quit. These commissions were used to offset Complainant's bad debts.

Respondent contended Complainant was an independent contractor, not an EE. Employing the "economic reality" test as discussed in entry 303, it was concluded Complainant was Respondent's EE. Respondent controlled performance of Complainant's duties as much as was necessary considering the nature of the work. Respondent paid Complainant his commissions. Since Complainant was allowed to deliver only Pri-Mar product to Respondent's customers, it was clear that Complainant's performance of his duties was an integral part of Respondent's business.

Respondent violated Section 5(1) by failing to pay all wages due and owing upon termination and withholding commissions without Complainant's written consent.

466 REDUCTION OF WAGES/BENEFITS
Agreement to Pay in Future

WAGE AGREEMENTS
Verbal

83-3540 Baker v Charles M Schoonover Trucking (1985)

EE was employed as a truck driver from 2/22 to approximately 3/29/83. ER's truck was leased to other companies to transport freight. When hauling loads by himself, EE received 22 percent of the gross revenue as wages after the lessee retained his share. When two drivers went together they received 15 percent of the adjusted gross revenue. EE testified that at a meeting with ER and another driver, Mr. Corwin, it was agreed that EE and Mr. Corwin would take Mr. Shay, who was inexperienced in refrigerated trailers, along with them for training. The drivers were to be paid as if they were hauling alone (22 percent). Mr. Corwin recalled the meeting and testified that he said he would not take a pay cut; however, he did not recall a discussion about Complainant's wages and did not know what Complainant was to receive. Complainant shared driving responsibilities on three trips during the period 2/22 through 3/24/83. Complainant was paid 15 percent of the adjusted gross revenue for these trips but contended 22 percent of the gross revenue was due him.

EE did not meet the burden of proving ER agreed to pay him 22 percent of the gross revenue for the trips with Mr. Shay. ER did not violate the Act.

467 COLLECTIVE BARGAINING AGREEMENT (CBA)
Authority to Interpret
Fringe Benefits
Subsequent Contracts/Policies

EE Knowledge
Subsequent Agreements

JURISDICTION
Severance Pay

PREEMPTION
CBA

SEVERANCE PAY

84-4009 Childs v Clark Equipment Co (1985)

EE was employed pursuant to a CBA from 12/11/72 to 11/11/83 when he was laid off due to closing of ER's Jackson plant.

A plant closing agreement (PCA) was executed 5/12/83 which provided that the CBA would continue in effect until 11/15/83, the closing date of the Jackson plant.

On 3/28/84 EE signed a waiver and release of claims against ER in order to receive severance pay and vacation pay. According to a memo dated 10/20/83, which EE testified he did not receive, the deadline for signing the waiver and release was 2/1/84.
ER refused to pay the 1984 vacation pay because EE failed to sign by 2/1/84. ER contended that the 1984 vacation pay was a type of severance because it was payable only under the PCA and not under the CBA.

ER claimed correctly that claims for severance pay are not enforceable under the Act. However, it was concluded that EE's claim for 1984 vacation pay was not a claim for benefits under the PCA, and, therefore, it was not necessary for EE to sign the waiver and release to be entitled to the benefit.

ER violated Section 3 by failing to pay 1984 vacation pay in accordance with the CBA.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

BERRIEN COUNTY CIRCUIT COURT: 1/3/86
ER disputed the ALJ's interpretation of the CBA and whether right to file wage claim under PA 390 was preempted by Employees Retirement Income Security Act and Labor Management Relations Act. Circuit Court found that federal provisions, ERISA and LMRA, do not preempt application of Michigan law. ALJ correctly interpreted the CBA.

468 COLLECTIVE BARGAINING AGREEMENT (CBA)
Conflict With Law

OVERTIME
Minimum Wage Law

WRITTEN POLICY
Interpretation
Past Practice

84-4007 **Fisk v Imtec, Inc** **(1985)**

EE was employed as an office manager from 1/28/80 through 1/25/84 pursuant to a written policy. EE contended she was entitled to take her vacation prior to her 1984 anniversary date because ER's vacation policy was on a calendar year basis. ER claimed if this were the proper interpretation, an EE hired December 31 would be eligible for a paid two-week vacation on January 1 of the next year. The normal interpretation of the term "5th year of employment" means the year beginning on the fourth anniversary of employment. Under the terms of the written policy, EE was not entitled to the claimed vacation pay because she had not started her 5th year of employment at the time of her termination.

Complainant also contended that another EE was paid vacation during the month prior to the first anniversary; however, the Act requires Respondent to pay vacation benefits only in accordance with the terms of the written policy, not in accordance with past practice.

No violation in reference to the vacation benefits claimed. The ALJ found that the definition of overtime in the CBAs did not supersede the requirement to pay overtime in accordance with Act 154 (the Minimum Wage Act). Therefore, ER violated Section 2 by failing to pay EEs all wages earned at least once every 15 days. As to those EEs whose employment had terminated, ER also violated Section 5 by failing to pay all wages earned and due as soon as the amount could be determined with due diligence.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

469 **ACT 390**
Independent Statutory Rights

COLLECTIVE BARGAINING AGREEMENT (CBA)
Authority to Interpret
Overtime

MINIMUM WAGE
Overtime

OVERTIME

PREEMPTION
CBA

84-3771, et al **37 Complainants v City of Hazel Park,**
Hazel Park Police Department **(1985)**

The normal workday for both command and patrol officers is 8 hours and 15 minutes. A

General Order incorporated into the labor agreement in 1967 required EEs to be in the squad room ready for briefing and roll call at least 15 minutes prior to the start of each shift. Following this 15-minute period, EEs worked eight-hour shifts. If an officer was absent from roll call, a deduction was made from his or her salary. EEs filed claims on 11/1/83 alleging they were entitled to additional compensation for the required attendance at roll call, arguing that ER is required by the Minimum Wage Act of 1964, MCLA 408.38 et seq. to pay overtime for all hours worked in excess of 40 hours weekly.

ER claimed that EEs attendance at roll calls was merely the "normal workday" for which they are paid annual salaries. It relied on the definition of overtime in the labor agreements which specified that overtime would be paid when EEs were called in earlier than "normal," before roll call, required to work beyond the normal end of the shift, or required to work on a scheduled day off.

ER also claimed the proper forum for considering EEs' claims would be arbitration, as provided in the labor agreements, and since the grievance procedures were negotiated pursuant to the Public Employment Relations Act, they take precedence over Act 390.
The ALJ found no merit to ER's argument that the Department lacks jurisdiction to adjudicate the claims. It has been consistently held that there are no procedural barriers or exhaustion requirements which prevent an EE from bringing an action under the Act. The decision contains many cites to uphold this finding.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

470 CLAIMS
Twelve-Month Statute of Limitations

COMMISSIONS
Payment
After Separation

JURISDICTION
Statute of Limitations

WAGES
Commissions
Payable After Separation

88-6840 <u>Davis</u> v <u>Pen Fab Equipment Corporation</u> (1988)

EE worked as a salesman until 11/12/86 when he terminated employment. EE and ER executed a written agreement concerning the payment of commissions. EE claimed commissions due after separation.

EE filed his claim on 12/7/87. This was not within 12 months after the violation, as required by Section 11(1).

Under the agreement, the commissions were not due and payable until ER was paid. Even if it were concluded that the agreement, rather than Act 390, determined the due date for payment of commissions, there was no evidence that ER was ever paid for the sales claimed by EE.

ER did not violate the Act.

See General Entry V.

471 COMMISSIONS

Reduction
Reliance

84-3903 Anthony v WDMJ Radio (1984)

After resigning on 2/1/84, EE received a commission check for $97.95 for his January 1984 work. This amount was based on a commission computation different from that used for EE's commissions since October 1981. ER's position was that EE had, in the past, been paid excess commissions based upon an earlier error, and the change in the commission computation simply corrected the error.

EE testified that in October 1981 when a new bookkeeper took over, his commission payments doubled without explanation. He spoke with the bookkeeper about the error and she checked her figures and spoke with the manager who told her she was computing the commission properly.

The owner changed the method of paying commissions on 2/1/84 after EE had already worked in January 1984 with the understanding commissions would be paid as they had been since October 1981.

ER violated the terms of the employment contract, and Sections 2 and 5 by failing to pay wages in a timely manner and payment of all wages due at termination.

472 LUNCH HOUR AS TIME WORKED

84-3823 Cherney v West Michigan Cleaners (1984)

EE worked through her lunch periods from the week ending 10/30/82 through 10/4/83. ER contended EE was to punch in and out for lunch each day and not to work during her lunch period. A lunch period was required for any days worked over five hours, and lunch time should have been staggered with another EE.

EE asserted that sometimes she was the only person working and could not stagger her lunch periods with any other EE. On other occasions EEs were too busy waiting on customers and performing the work of the ER to punch out and take an uninterrupted lunch.

It was concluded that ER's failure to do something about EE not punching in and out for lunch after examination of the time cards was the same as agreeing to pay EE for these periods. In order for this time not to be considered time worked, an EE must be free to pursue his or her own interests.

ER violated Sections 2 and 5 by failing to pay wages due at regular intervals and failure to pay a terminating EE all wages due.

473 DISCHARGED
For Cause

VACATION
Termination for Cause

WRITTEN POLICY
Vacation

84-3501 Upleger v Multi-Care Medical Services and Supply, Inc (1984)

EE had accumulated eight vacation days at the time of her discharge. An addendum to ER's written policy provided that vacation time would be forfeited for an EE discharged for cause. EE was terminated for unsatisfactory work performance after she refused to resign. ER maintained that EE's failure to submit bills to medicaid and other insurance carriers in a timely manner caused it to become responsible for outstanding accounts in excess of $26,000.

The ALJ found EE's explanation of alleged outstanding balances just as plausible and credible as those provided by ER. EE's witness testified that many of the entries for outstanding balances were in error. There is no evidence that EE's conduct was willful or in substantial disregard of ER's interests.

No evidence in the record to support a finding that EE was discharged for cause. ER violated Section 3 by failing to pay fringe benefits in accordance with the written policy.

474 VACATION
Proration

83-3400 Piotrowski v Northwestern Dodge, Inc (1984)

EE was a car salesman from 7/8/80 through 3/23/83 pursuant to a written agreement. He is claiming pro rata vacation pay. Section 3 provides that ERs are only required to pay fringe benefits according to terms set forth in a written contract or written policy. EE did not work until his anniversary date in 1983 because he was discharged. There is no provision in the contract for prorating pay for periods worked less than an entire year.

ER did not violate the Act.

475 TRUCK DRIVERS

Deductions

Fuel

Tires

WRITTEN CONSENT

Deductions

WRITTEN POLICY

Deductions

83-3498 Royal v Hetherington (1984)

EE was a long distance truck driver. ER deducted monies from EE's wages without his written consent to recover the cost of burned tires, out-of-route fuel, missing placards, and similar items. ER claimed it was justified in making the deductions because EE was given a set of rules when first employed which put him on notice that money would be deducted if he failed to comply with the rules.

ER violated Section 5 by failing to pay a terminating EE all wages due, and Section 7 which prohibits ERs from making deductions without written consent or a provision in a CBA.

476 EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

Tax Withholding Statements

84-4002 Terry v Fisher Wrecking (1984)

Complainant asserted that Respondent agreed to pay him $10 an hour for work he performed during the period November 21 through December 5, 1983. Respondent denied agreeing to pay Complainant $10 an hour and asserted the work Complainant did could have been done by others for $4 per hour.

No records were prepared by Respondent for Complainant's work and Complainant did not insist on submitting tax withholding statements prior to his beginning work. The record did not establish any agreement as to hourly rate of pay or payment schedule. Therefore, it was concluded that Complainant entered into an independent contractor relationship with Respondent. The Act does not have any jurisdiction over this relationship. Complainant may have rights to file an action against Respondent in a court of general jurisdiction.

477 APPEALS

Dismissed

Inadequate Request for Review

83-3147, 83-3148 Shafer and Shafer v PJS Commercial Corporation (1983)

The DOs issued by the Wage Hour Administration stated that any request for review must contain the name of the EEs and the signature of the Applicant. ER's request for review did not contain this information. The ALJ directed ER to show cause why the Department's DOs should not be made final in accordance with Section 12 since the request for review did not contain the required information. No response was received from ER.

The DOs were remanded to the Wage Hour Administration as final.

478 EMPLOYEE DEBT TO EMPLOYER

WRITTEN CONSENT
Deductions
EE Admission of Debt

84-3840 McMillon v Tulsa Oil, R I Marketing, Inc (1984)

ER withheld EE's wages as an offset for a $1,356 shortage at EE's assigned station. Complainant signed a statement saying he was fully aware of the shortage and that he did take the money out and use it.

ER violated Section 7 by deducting EE's wages without written consent or a provision in a CBA. The ER's remedy to recover funds allegedly taken is to file an action in a court of general jurisdiction.

479 ACT 390
Independent Statutory Rights

COLLECTIVE BARGAINING AGREEMENT (CBA)
Grievances
Overtime

LUNCH HOUR AS TIME WORKED

PREEMPTION
CBA

84-3841, et al 21 Complainants v Schoolcraft Memorial Hospital (1984)

DOs found straight time wages due for a 15-minute period before the beginning of the regular shift. EEs appealed the DOs, arguing they were entitled to overtime pay for the 15-minute period and not straight time. ER appealed also.

ER claimed the EEs must exhaust remedies under the CBA prior to filing any claims. The ALJ found that EEs were not barred by the grievance procedure contained in the CBA from

filing claims with the Department of Labor and cited a number of cases in support of this finding. The statutory rights in the Act are independent of those set forth in the CBA. EEs were entitled to earnings for the time in question because they were performing a service for ER and the payments should have been included in their regularly scheduled paychecks.

It was concluded that EEs were not entitled to overtime payment for the 15-minute period because they did not work over eight hours per day as required in the overtime provision. They were not required to work their lunch period, which meant they worked 7 1/2 hours per day plus the 15 minutes, totaling 7 3/4 hours.

EEs' appeals concerning the DOs were rejected. EEs' appeals concerning overtime payments were rejected also.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

480 DISCRIMINATION

Discharge Due To

84-3904 Lowes v Cardinal's Red Bird Inn (1984)

EE filed a wage claim on 2/2/84 and was laid off on 2/14/84. The wage claim was settled on 4/4/84. EE was rehired by ER on 3/10/84. The Department concluded the layoff was prompted by the wage claim.

ER contended the layoff was due to a downturn in business and that she was rehired when business picked up. ER's argument that lack of work caused the layoff was not supported by the business receipts.

ER filed a help wanted ad on 2/15/84 because the list of prospective employment candidates was low. EE kept a notebook of conversations with ER which supported her contention that she was laid off in February because she had filed a wage claim. Her length of seniority was second among the four EEs working; however, her number of hours worked per week was smaller. ER said it was less expensive to lay off one person than to keep all four EEs on at reduced hours. ER could have given EE the choice of either being laid off or working more hours.

ER violated Section 13. EE was laid off based upon her having filed a wage claim with the Department.

481 DEFERRED COMPENSATION

Fringe Benefit or Wage

EMPLOYMENT CONTRACT

Deferred Compensation Payments

SEVERANCE PAY

Fringe Benefit or Wage

82-2658 **Hendricks v City of Sterling Heights** **(1983)**

EE's employment was terminated effective 1/31/82. Pursuant to the employment contract, ER paid EE severance pay and a lump sum for accumulated but unused vacation hours and sick time. The contract required the payment of 16 percent of the annual base salary to a deferred compensation requirement plan. ER made the 16 percent payment for January 1982 but refused to make a contribution based on the severance pay. EE claimed that ER's failure to pay 16 percent for all payments made in 1982, including severance pay, violated the Act.

Deferred compensation and severance pay are fringe benefits required by the contract. Since there were no pay periods following EE's termination, he was not entitled to any deferred comp payments after that date. Severance pay is not a salary or wage and therefore does not trigger the 16 percent payment requirement.

ER did not violate the Act.

MACOMB COUNTY CIRCUIT COURT: Affirmed 12/11/84

482 VACATION

Due at Separation
Payment at Termination
Eligibility Based on Sick Leave
Proration
Unearned

84-4016 **Willard v Tri-County Electric Cooperative** **(1984)**

EE's position terminated 5/14/84. He had seven years, five months' seniority which he alleged made him eligible for 15 days' vacation according to ER's vacation policy. The control calendar and record of vacation earned and taken for 1977 shows that EE took 10 days or 80 hours of paid vacation in July 1977, even though he had not earned any vacation time. EE said this vacation time was advanced as an incentive and could be used if EE did not miss any days after he was hired and had sufficient sick leave to back it up.

EE's last check was payment for hours worked, sick leave, vacation hours carried over from the previous year, plus prorated vacation advanced during the first four months of 1984, minus any vacation hours used.

EE's contention was that he should have been paid for 15 days based on his seniority. This position conflicted with his previous argument concerning the hours that were advanced beginning in 1977. In effect he would now treat vacation hours advanced the same as vacation hours earned. Vacation hours were not earned until the completion of one year's service.

ER did not violate the Act. ER paid EE for all fringe benefits due and owing. EE also

received vacation hours on a pro rata basis for the period worked in 1984, even though the written vacation policy did not require ER to pay for these hours.

483 REHEARING

VACATION
Due at Separation
Forfeited

WRITTEN CONTRACT
Fringe Benefits

79-670 Slebodnik v Wayne County Board of Commissioners (1980)

ER withheld $274.34 from EE's final check for vacation pay. EE requested annual leave, but it was denied by ER. The written agreement provided that if a request for annual leave was denied, EE would be compensated in cash for all accumulation in excess of the two-year limitation.

ER violated Section 4 by failing to pay EE a fringe benefit agreed upon in a written contract.

Rehearing Decision: 6/26/81

ER submitted a written agreement which was different from that submitted in the initial hearing. EE did not comply with a section which stated EE must inform appointing authority in writing by May 1st of each year of desire for annual leave. Prior ALJ decision reaffirmed.

ALJ Decision Upon Remand From Circuit Court: 9/9/83
Although EE was denied an opportunity to use his excess annual leave on 10/28 through 30 and 11/1/78, he had ample opportunity to use his excess leave prior to his retirement on 11/2/78 and did not request leave on any of the available days.

ALJ reaffirmed his prior decision based on the clear and unambiguous meaning of the CBA. The agreement simply stated that an EE will not be compensated "unless denied a request for annual leave." The facts are clear that EE's request for leave was denied.

WAYNE COUNTY CIRCUIT COURT: Reversed 1/24/84
EE was not entitled to the excess accumulated compensation time since he was given ample opportunity to liquidate that excess before retirement.

484 COLLECTIVE BARGAINING AGREEMENT (CBA)
Overtime

OVERTIME

Third Shift/Saturday A.M. Hours

82-2367, et al Hansen, et al v Johnson Mold & Manufacturing (1982)

EEs were employed pursuant to a CBA dated 7/13/80 which provided that the established work week would consist of 5 days, 8 hours per day, 40 hours per week, and Saturday work would be at the 1 1/2 times rate through 8 hours, and 2 times the rate for anything beyond 8 hours or work on Sunday. In the early to mid-1970s, Respondent added a second and third shift. For several years the third shift commenced its 40-hour week at 11:00 p.m. on Sunday and ended at 7:00 a.m. on Friday. Third shift EEs were paid the straight time rate for the hour worked on Sunday and no grievances were filed based on the language of the CBA.

On 9/7/81 ER changed the third shift hours to begin 11:00 p.m. on Monday and end at 7:00 a.m. on Saturday. Third shift EEs were not paid at the "1 1/2 time rate" for Saturday work and claimed those wages. ER contended that the provision in the agreement for 1 1/2 times for Saturday work was never intended to apply to work within a regularly scheduled work week, but premium pay was intended to be provided on the 6th or 7th day of the work week.

ER's position ignored the possibility that the agreement provided for premium pay on Saturday and Sunday because the union membership preferred to have those days off, rather than other days of the week.

ER violated Section 2 by its failure to pay EEs 1 1/2 times for work performed on Saturdays during the regularly scheduled work week.

CIRCUIT COURT: 4/8/83
On 4/8/83 the Circuit Court reversed the ALJ finding:

1) The premium pay provision for Saturday and Sunday work is not applicable here because Saturday work is part of the regularly scheduled forty (40) hour workweek which is the established workweek per Art. XIII Sec.1 of the 2/13/80 CBA.

2) Pursuant to all the proofs in this case, the union officials present at the 9/3/81 meeting were authorized to make any changes to the existing contract; subsequent changes being authorized by union members.

APPEALS COURT: Affirmed 1/25/84
Affirmed the Circuit Court decision which reversed the ALJ's decision and held that the premium pay provision for Saturday and Sunday work was applicable because the seven Saturday hours are part of the regularly scheduled 40-hour work week, which is the established work week under the CBA.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

485 ATTORNEY FEES

COMMISSIONS

Contract Interpretation
Payment
After Separation
Incomplete Sales

CONTRACT
Implied
Unilateral Change In

DECISIONS
Discretion

EXEMPLARY DAMAGES

REDUCTION OF WAGES/BENEFITS

REHEARING
Denied

SETTLEMENT
Court Action Prior to Payment of Wages Claim

WAGES
Unilateral Change In

82-2599, et al Cecchini, et al v Automobile Club of Michigan (1984)

EEs were commissioned sales representatives who worked based on the Sales Rules Manual. One EE testified that renewal commissions accounted for 90 percent of his earnings. From at least '65 through 1/18/82, ER had a practice of paying EE commissions on policies renewed within 90 days after separation of the EE.

Throughout 1982 ER terminated sales representatives and did not inform them until the date of termination that the 17-year practice of paying commissions for 90 days after termination had changed, and that they would only be paid commissions on renewals for a two-week period after their termination. EEs claim the commissions on renewal payments made within 90 days after termination.

ER asserted that it never contractually agreed to pay commissions on renewals received by sales representatives subsequent to their termination. It stated the Sales Rules Manual unambiguously provided that the final commission check due the terminating salesman was not handed out at termination but held for 90 days to cover estimated future cancellations and gadget balances (items purchased with the salesperson's name imprinted.)

The ALJ found that the Sales Rules Manual, coupled with the 17-year practice of paying the commission on payments for 90 days after termination, were sufficient to establish an implied contract. Since at the time each EE was terminated, wages had already been earned under the implied contract, ER's announcement to unilaterally change the terms of the

contract was ineffective to deprive EEs of commissions which had already been earned.

ER violated Section 5 by failing to pay the wages earned and due. The ALJ found no basis for an award of exemplary damages or attorney fees pursuant to Section 18(2). EEs presented no evidence ER had previously violated the Act or that it deliberately and knowingly violated it. Although ER's defense of the claims was rejected, there was no proof that it was frivolous.

SUPPLEMENTAL DECISION: 1/25/85
Issue No. 1 - EEs contended they were owed commissions on policies renewed within 90 days after the effective dates of their terminations. ER contended commissions were only owed for policies renewed within 90 days after their last day of work. The ALJ supported EEs' contention. Since ER ordered EEs not to work during the ten days between their notice of termination and effective dates of termination, they are owed renewal commissions on policies delivered to their branches prior to their effective termination dates.

Issue No. 2 - ER claimed credit for payments made for new business, memberships, rewrites, and vacation. EEs contended no authority for such offsets and that ER could not reverse its own prior decision to make payments. The ALJ found no merit to EEs' assertions.

Issue No. 3 - ER asserted a general release signed by EEs Conrad, Coolman, Loree, and Plamondon was a complete bar to their wage claims. EEs claimed Michigan courts for 25 years have refused to enforce unfair and oppressive releases. The ALJ found no proof that the release was obtained by fraudulent or overreaching conduct. The four EEs were barred from reasserting their claims before the Department when they had already been settled in a court of general jurisdiction.

FILED WITH WAYNE COUNTY CIRCUIT COURT: 4/1/86
Request for exemplary damages, recision of ER credit for gratuitous payments.

WAYNE CIRCUIT COURT: 2/6/87
Affirmed the ALJ award of commissions due EE pursuant to contract established by practice for 90 days after termination. Affirmed ALJ offset for gratuitous payments made against commissions actually due. Ruled that exemplary damages are discretionary and should be awarded only if the violation is flagrant or repeated. Exemplary damages denied. Affirmed ALJ dismissal of four EEs' claims, who, prior to filing, signed a settlement and agreed to waive further claims for wages or fringe benefits.

486 DEDUCTIONS
Advances

WRITTEN CONSENT
Deductions

84-3819 Gehrke v Bloom and Bloom PC 1985

EE was employed from 12/12/83 through 1/3/84. EE did not report to work on 12/26/83 and

requested she be paid for it and offered to make the day up on 1/2/84, which ER agreed. EE worked eight hours on 1/2/84 and 1/2 day on 1/3/84, but wages were withheld for 1/2/84 to offset monies paid to her on 12/26/83. EE did not give written consent for the withholding of wages.

ER violated Section 7 by deducting wages without written consent or a provision in a CBA. ER's remedy to recover funds advanced to EE would be to file an action in a court of general jurisdiction.

487 VACATION

Resignation

Retirement

84-3879 Hibbs v The J L Hudson Co (1985)

EE was employed from 10/8/69 through 10/27/83. Her employment was governed by a written vacation policy providing for four weeks' vacation for an EE paid 800 hours or more during the preceding payroll year based on length of service as of January 1. EE and the WH Administration claimed EE was entitled to the vacation on 1/1/84 because she had been paid for 1,231 hours of service between 1/1/83 and her retirement on 10/27/83.

The ALJ found that since EE was not employed on 1/1/84 she was not entitled to time off for vacation or vacation pay during 1984. ER did not violate the Act.

488 REDUCTION OF WAGES/BENEFITS

Notice After EE Works

84-4071 Holdren v Michigan Residential Aftercare Services, Inc (1985)

EE was employed from 3/27/82 through 3/30/84. On 3/16/84 EE received a memo stating she would be transferred from her position in one group home to another and there would be a salary adjustment to be discussed and detailed within five working days. EE's salary at this time was $15,500 annually. In response to the transfer, EE submitted two weeks' written notice of her resignation. She reported to work at the new home on 3/18/84. On 3/23/84 the main office confirmed EE's salary to be $12,000 annually. EE was never notified for various reasons that her salary would be reduced to $12,000 annually. When her employment ended on 3/30/84, her final paycheck was based on a $12,000 annual salary.

Since EE never received notice of the new rate, her salary continued at the rate of $15,500 annually.

ER violated Section 5.

489 BURDEN OF PROOF

Recordkeeping

VACATION
Deferred Payment

WAGES
Held Back for Vacation Payment

WAGES PAID

84-4162 Robinson v Lenawee County UAW Building Association, Inc (1985)

EE was a part-time janitor from 4/1 through 7/27/83. EE's supervisor was ER's building manager. EE and the building manager agreed on an arrangement whereby portions of EE's wages were held back to be paid later when EE took a vacation. EE was not entitled to a paid vacation under the terms of his employment with ER. The building manager recorded hours and wages held back on ER's wage voucher forms which EE signed. Although ER's financial secretary disputed the number of hours claimed, both EE and the building manager's testimony were more persuasive that wages were held back. The preponderance of the evidence established that the claimed unpaid wages were due EE.

ER violated Section 5(1) by failing to pay EE all wages due upon termination.

490 EMPLOYMENT RELATIONSHIP
Economic Reality Test

84-4021 Pitts v Motuelle Trucking (1985)

From 11/26/83 through 2/19/84 Complainant drove a truck owned by Respondent. Respondent contended that Complainant was not an EE. Applying the "economic reality" test as described in entry 303, it was concluded that Complainant was not an EE of Respondent. Complainant was allowed to accept loads of his choice and controlled his own activities on trips. Any payments from Respondent were in reality a splitting of proceeds, not a payment of wages.

Respondent did not violate the Act. The conclusion that Complainant was not Respondent's EE was consistent with previous administrative decisions in which it has been held that the driver of a truck leased to a carrier was not an EE of the truck owner.

491 COLLECTIVE BARGAINING AGREEMENT (CBA)
Authority to Interpret
Deductions

83-3213, et al Fox, et al v Oceana County Sheriff's Department (1984)

EEs were employed during the period January 1 through 12/31/82 pursuant to a written agreement. The last payday for 1982 wages was 1/7/83 for the two-week pay period ending

12/31/82. Section 11 of the Agreement provided for payment of wages for regular hours at an hourly rate, which conflicted with the Agreement's provision for specified annual salaries for 1982. There being 2,088 hours in ER's regular work schedule for 1982, if ER had paid EEs for 2,088 hours at the hourly rate used in 1982, they would have received wages for regular work hours in excess of the annual salaries provided in the Agreement. ER informed EEs they were being paid in advance for the last 8 hours of the 1982 regular work schedule. For the pay period ending 12/31/82, ER paid each EE regular wages equal to annual salary minus regular wages previously paid for 1982. EEs did not consent in writing to these deductions from their wages.

Section 11 should be interpreted to apply to overtime only since the section follows the heading "overtime" and is necessary for purposes of calculating an hourly rate for overtime. EEs were entitled to hourly rates equal to annual salary divided by 2,088.

ER violated Section 7 by deducting wages for approximately 8 hours from each EE's paycheck for the period ending 12/31/82.

OCEANA COUNTY CIRCUIT COURT: 6/17/85
Reversed the ALJ decision and ruled there was no deduction, illegal or otherwise, nor were any wages due.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

492 ADVANCES
Set Off Against Vacation Pay

DEDUCTIONS
Written Consent

OVERPAYMENTS
Gratuitous

84-3945 <u>Rodriguez</u> v <u>Commonwealth Associates dba Gilbert Commonwealth</u> (1985)

EE was advanced $1,001 for relocation and moving expenses when he started with Respondent Company along with several other advances for expenses incurred in the conduct of company business. EE was placed on permanent layoff on 4/13/84. He had vacation pay earned and due in the amount of $600 and wages earned and due for 39 hours worked in the amount of $487.50. EE owed a balance of $991 from prior advances that had not been returned as required by the language on each advance request.
The question was whether ER was entitled to set off the $991 from prior advances against the vacation pay and wages earned for the last 13 hours worked.

EE's repeated signed authorizations allowing ER to deduct amounts from any wages or other sums due was fully and freely given, so ER was free to set off the $991 advanced from the $1,087.50 due. EE received $500 in severance pay which was not required as a fringe

benefit. It was therefore concluded that EE received everything he was entitled to and more. ER did not violate the Act.

493 VACATION

Earned

83-3013 Mardigian v Lowell Perry Industries, Inc (1983)

EE was employed by ER from 8/21/72 to September 1982 as a press operator earning $350 per week.

Section 1 of the CBA provided that EEs with 7 years of service would receive 3 weeks' vacation, and EEs with 10 to 15 years' service would receive 3 1/2 weeks.

EE had been employed ten years and earned 3 1/2 weeks.

ER violated Section 3.

494 DEPOSITIONS

Service

DISCOVERY

Depositions

SUBPOENAS

84-4043 Jeffreys v Packaging Corporation of America (1985)

Order Regarding Respondent's Motion to Quash: 12/19/84

ER filed a motion for a protective order and/or to quash subpoenas. The parties responded to the motion.

The Administrative Law Judge found that Section 74(1) and 80(c) of the APA gives the ALJ discretion to allow depositions as a discovery tool or for use at hearing.

Another issue was whether a nonresident witness could be ordered to appear at a deposition hearing in Michigan without a showing that the deposition cannot be taken in the state of the witness's residence. GCR 305.2 requires a showing as to why the deposition cannot be taken in the state of the witness's residence.

A third issue questioned whether the subpoenas were properly served. The subpoenas were sent by mail to Respondent's attorney along with the notices of the taking of the depositions. Although GCR 305.1 does not require subpoenas to be issued when filing a notice of deposition, since they were issued, they should have been served pursuant to GCR 506.5 and 105.4 and not mailed to ER's attorney.

The fourth issue addressed the validity of the subpoenas because they were not served in accordance with R 408.22962, which covers subpoenas directing witnesses to appear at a hearing. The General Court Rules control the deposition process unless the agency has promulgated its own rules. Since the Department has no rules on depositions, the GCR should be used.

EE must take the deposition of ER's employees in their state of residence unless a showing is made that these depositions cannot be taken in that state. If subpoenas are served, they must be served in compliance with GCR 506.5 and 105.4. Department of Labor Rule R 408.22962 does not apply to depositions.

495 EMPLOYEE

One Who Is Permitted to Work

UNAUTHORIZED WORK

84-3888 Cheshire v Dual Nursery (1984)

On 4/5/83 EE commenced employment with ER. At that time it was agreed that EE's employment could be terminated at the end of six months.

EE was paid a salary of $22,000 annually. At the end of October 1983, ER's manager met with EE and informed him that his employment was not working out and that ER could not afford to pay him. EE continued to be present at ER's place of business daily from 11/1 through 12/15/83, although he did not earn wages after 11/15/83. He was put on notice of his employment termination when he did not receive his usual paycheck on or about that date.

ER permitted EE to perform services after 10/31/83. This was inconsistent with the alleged notification of termination effective on that date. EE continued to work for ER after 10/31/83, with the reasonable expectation that he would continue to receive a salary. ER violated Section 5(2) by failing to pay EE wages earned from 11/1 through 11/15/83.

496 WAGES PAID

Recordkeeping
Time Worked

83-3114 McLellan v Yeager & Company, Inc (1983)

EE was employed as an account executive at a salary of $15,000 plus commissions. ER claimed that EE did not work and no wages were due for the pay period claimed. ER didn't maintain any record of hours worked. ER believed that EE did not work because he did not present sales or expense reports. EE did not submit a sales report because no sales were made.

Absence of sales or expense reports was not proof of whether an EE had performed work. If

no sales were made and no expenses were incurred, it would be reasonable to infer that no reports would be available. EE testified that he worked the week claimed, and that he was prevented from working longer because ER repossessed his car. Wages were ordered paid to EE.

OAKLAND COUNTY CIRCUIT COURT: 10/24/83
Factual dispute regarding whether work was performed. There was no documentation of work performed. Paid and closed 12/14/83.

497 COMMISSIONS
When Earned

83-3668 Beuthin v Cadillac Overall Supply Co (1984)

EE was employed as a salesman starting 2/7/83. EE's employment terminated on 6/4/83 when the business was sold. EE was then employed by a new owner until 7/22/83.

EE claimed additional commissions for rental orders he wrote for which he was not paid. ER's policy stated that a minimum weekly average for sales personnel would be $40 in rental volume. EE's average was $33.54 per week. Also ER's policy stated that direct sales would not be used to compute the individual's average for additional commissions over a $50 rental volume. EE's average was less than $50 weekly even including direct sales.

ER did not violate the Act by not paying the commissions.

498 APPEALS
Untimely
Good Cause Found
Busy Workload

RETIREMENT
Retroactive Pay Increases

WRITTEN CONTRACT
Separation Prior to Consummation

82-2843 McCall v Shiawassee County Probate Court (1984)

SHIAWASSEE COUNTY CIRCUIT COURT: 12/6/83
Good cause found for late appeal of DO. Case remanded to Department of Labor for full determination of merits after being dismissed because of late appeal. Pressures of a busy work load often result in missed deadlines.

EE informed ER by letter that he intended to retire on 2/28/82. EE then participated in collective bargaining negotiations with ER. EE asked during negotiations whether the negotiations would be completed before he retired so that he would receive benefits. EE was

told "yes." EE believed this to be an assurance that he would receive the wages and fringe benefits claimed.

EE then retired on 2/28/82, believing that he would receive benefits under the CBA still being negotiated.

On 4/13/82, a CBA was executed by ER and the Probate Court Employees Association. ER's personnel policy stated that EEs who terminate employment prior to the date that any increase in salary or fringe benefits were granted would not be entitled to benefits, retroactive or otherwise, unless they were on the payroll on the date that the benefits were granted by the Board of Commissioners.

The agreement, upon which EE based his claims, was not in existence at the time of his retirement. ER did not violate Section 5. Since EE was no longer an EE when the agreement was executed, ER was not required by the Act to pay him.

SHIAWASSEE COUNTY CIRCUIT COURT: Reversed 3/12/85
The parties' new contractual arrangement became effective retroactively and followed naturally that increased benefits should be afforded to all EEs who worked after the operative date of the new contract, 1/1/81.

499 EMPLOYMENT RELATIONSHIP
Economic Reality Test

84-3756, et al Kenyon, et al v Balloon Saloon, Inc, dba Stagecoach Inn (1984)

Complainants claimed wages due from 8/28 to 9/17/83. During that period neither Harold or Olga Schuster, the general manager of the Scalehouse Restaurant and Motel were involved in the operation of the Balloon Saloon, nor did they hire Complainants, direct their activities, or have any business dealing with Complainants during that period.
Harold and Olga Schuster did not violate Section 5(2) because they were not Complainants' ERs.

500 CLAIMS
Timeliness Of

EQUITABLE ESTOPPEL

JURISDICTION
Statute of Limitations

SUBPOENAS

83-3378, et al 54 Complainants v George Simon, Sr, George Simon, II, and Joseph Simon (1984)

EEs alleged that they were owed vacation, holiday, severance pay, and monies for insurance premiums and medical bills. The Wage Hour Administration found against the EEs because the period for which monies were claimed exceeded the 12-month statute of limitation specified in Section 11(1). EEs appealed.

Counsel for EEs filed a written request for subpoenas duces tecum to compel production of selected documents. The request was denied because of immateriality and irrelevance.

EEs contended that the refusal of their requests prevented them from presenting evidence necessary to prove their claim.

EEs who believe their ERs have violated the Act must file claims with the Department within 12 months of the alleged violation. The Department was prohibited from granting equitable relief because it would exceed the scope of its delegated authority.

501 RESIGNATION

Payment During Notice Period

83-3389 Yee v Paradise Travel Service, Inc (1984)

EE's employment as a travel agent began on 9/28/80. In March 1983 EE formed her own travel agency and gave notice on 3/31/83 that she would terminate her employment in two weeks. ER failed to pay EE what she earned between 4/1 and 4/14/83.

ER claimed wages were not earned during this period because EE was not working for him but was working for herself by using ER's computers to divert customers to her company. ER further asserted that EE was stealing business records and files. EE denied these allegations.

EE performed her assigned duties as required during the two-week period after she gave notice of her resignation. ER violated Section 5 which requires wages be paid to EEs who terminate their employment as soon as the amount can be determined.

502 TIME

Lunch Hour

82-2894 Loew v Buskirk Lumber Company (1984)

EE was a truck driver beginning 11/29/71 and ending about 10/29/82. A CBA was entered into between ER and the union which provided, in part, that all EEs were to be paid for all time spent in service to ER. Actual time worked was to be computed from the time that EE was to report to work until time released from duty. Time lost due to delays at no fault of EE driver was to be paid at an hourly rate.

During EE's employment he turned in time slips showing work starting and completion

times. For days when EE did not take his 1/2 hour lunch period, he specified "no lunch" on the time slip.

The EE/ER agreement specified certain categories of "time lost" for which a driver received wages. Time lost for lunch was not included. EE was released from duty and was not in the service of ER during his lunch breaks. ER did not violate the Act.

503 WAGES

Pursuant to Written Contract

83-3665 Phillips v Van Epoch, Inc (1984)

EE was employed from August 1981 until April 1983. His wage agreement provided the payment of $200 for each conversion van sold to dealers.

When EE's employment was terminated, he had been responsible for securing orders for 19 conversion vans and was not paid.

ER violated Section 5.

504 FAIR LABOR STANDARDS ACT (FLSA)

PREEMPTION

Federal Preemption

STATUTORY CONSTRUCTION

WAGES

Pursuant to Written Contract

83-3366, et al Strow, et al v Hastings Aluminum Products (1984)

EEs claimed wages pursuant to the terms of a CBA. ER moved for dismissal of the complaints on the grounds that the Payment of Wages Act was preempted by federal labor laws. The ALJ denied the motion because an agency cannot determine the validity of a statute, which in this case clearly required the Department to proceed with the complaints.

ER paid wages based on a seven-day week which was in accord with the FLSA. These payments did not violate Act 390.

BARRY COUNTY CIRCUIT COURT: Received 8/28/84

Court held the question was one of contract interpretation and not statutory interpretation and was therefore not properly before the Department of Labor and the appeal was dismissed.

So long as ER sets forth a work week and pays wages accordingly, there is no statutory conflict.

Neither the FLSA or the Michigan wage payment statute provides for the interpretation of contract language or mandates what kind of work week an ER must establish.

See General Entries VII regarding the FLSA and XV regarding Act 390 authority to interpret a CBA.

505 COMMISSIONS

Contract Interpretation

83-3418 Jackson v Group Underwriters, Inc (1984)

EE began employment on 8/5/80 for a yearly salary of $18,000, plus 10 percent of the fees she earned. EE's duties consisted of sales, service representative on selected cases, and computer work.

In March 1981 ER raised EE's salary to $23,000 annually. ER contended that the arrangement whereby EE received the larger raise also included a change in her bonus compensation. EE denied that there was any such agreement to modify the bonus provisions of the 8/5/80 letter.

ER failed to pay EE the 10 percent commission as well as bonuses due. ER's nonpayment violated Section 3.

506 EMPLOYMENT RELATIONSHIP

Economic Reality Test
Independent Contractor Relationship Found

83-3763 Smallwood v Nationwide Bartering Company (1984)

Complainant entered into a written contract to sell memberships for Respondent. The agreement provided that during a four-week period Complainant agreed to make 160 sales presentations to business owners, attend daily sales meetings, and make two sales. At the end of the period, Complainant was to be paid $1,200.

At the end the contract period, Complainant had made less than the required number of presentations. During the period of Complainant's association with Respondent, he set his own hours of work, selected the customers he contacted, and had no direct supervision. No record of hours worked was maintained by Respondent nor did Complainant sign tax withholding forms.

Complainant filed a claim for $536 based on working approximately 160 hours at the minimum wage of $3.35 per hour. Respondent believed that Complainant was an independent contractor.

Respondent did not direct or control Complainant's activities, supervise his work, or agree to

pay Complainant on a periodic basis. The agreement provided that Complainant would be paid $1,200 in exchange for performing specified tasks which Complainant did not complete. Complainant was an independent contractor.

507 COMMISSIONS

Incomplete Sales
Payment
After Separation

84-3737 Coon v Management Recruiters of St Joseph, Inc (1984)

EE was employed as an account executive from 11/10/82 through 1/26/83 when he was terminated. EE's compensation was to consist of commissions on job placements; however, he made no placements during his employment.

Shortly before EE's termination, he was informed of ER's termination policy, which provided that if there were any placements made within 30 days after termination, and Management Recruiters took further action to place the individual, then the terminated EE was entitled to split 1/2 of what he normally would have received as commission. If no action at all was taken by Management Recruiters to place an individual within the first 30 days, then the terminated EE was entitled to 100 percent of his normal commission. If a placement occurred after 30 days, then the terminated EE was entitled to no commission.

EEs working on a commission basis often perform services for which they receive no wages because their efforts do not result in a sale or a placement. EE not entitled to further commissions because the placement occurred more than 30 days after his termination.

508 VALUE OF SERVICES

WAGES

Poor Economic Situation

84-3743, et al Robinette & Haworth v Innovative Marketing Consultants Corporation (1984)

ER did not pay EEs their wages because of the company's bad economic situation and because it believed EEs had discredited and deceived the company.

ER violated Section 5.

509 BURDEN OF PROOF

Appellant

FRINGE BENEFITS

Must Be in Writing to Be Enforced

84-3781, et al McGinnis, et al v Contractors 1, Inc (1984)

Complainant Paul McGinnis filed a claim for fringe benefits. He did not know how much money he was claiming and he did not have a copy of a written contract or policy which provided for payment of fringe benefits. Since Section 3 requires ERs to pay fringe benefits in accordance with the terms of a written policy or contract and Complainant Paul McGinnis failed to present proof of either, his claim was dismissed.

Complainant Marcella McGinnis filed a claim for vacation pay and wages. Since she too did not present proof of a written contract or written policy providing for payment of vacation pay, her claim regarding fringe benefits was also dismissed. It was concluded EE had been paid all wages earned and due.

See General Entries I and XI.

510 WRITTEN CONTRACT
Failure to Pay According To

WRITTEN POLICY
Interpretation

83-3531, et al Cochran, et al v St Joseph Public Schools (1984)

EEs Hill, Knowles, Hoover, and Cochran were employed as school bus drivers by Respondent for the full 1982-83 school year. Hill was assigned a regular secondary and elementary run throughout the full 1982-83 school year. Her run required driving both secondary and elementary students to school in the morning.

EEs Knowles and Cochran were assigned regular secondary runs for part of the 1982-83 school year. They also worked less than a full-time schedule or as swing bus drivers during part of the school year.

EE Hoover was a swing bus driver during the entire 1982-83 year.

EEs' employment was pursuant to an agreement between the school system and the nonteaching EEs' association. EEs claimed amounts were due pursuant to the minimum annual earning provision of Section 2(e)(1) of the Agreement. EEs Knowles, Hoover and Cochran contended that it was discriminatory to exclude them from the benefits of the minimum annual earnings provision of Section 2(e)(1). Drivers assigned regular runs do have different rights under Section 2(e) than drivers working less than full time and swing bus drivers. Under the terms of the agreement, only drivers assigned regular runs for the full school year were eligible for the benefit of the minimum annual earnings provision.

The driver does not have to drive both secondary and elementary students to be eligible for the minimum annual earnings benefits. ER was ordered to pay EE Hill. The appeals of the other three EEs were dismissed.

See General Entry XV.

511 LUNCH HOUR AS TIME WORKED

WAGES
Lunch Hour as Time Worked

80-1283 Knowlton v Olympic Coney Island (1982)

EE was a dishwasher from 9/12/79 through 9/7/80 at minimum wage. ER deducted one hour's pay for a lunch hour, although EE was allowed only 1/2 hour at most.

ER violated Section 5(2) by not paying wages for periods which were actually work time.
GENESEE COUNTY CIRCUIT COURT: Affirmed 5/23/84

512 COMMISSIONS

Commission v Bonus
When Earned

INCENTIVE PAYMENTS
Commissions

85-4560 Hammond v Jobbers Warehouse Service, Inc (1986)

EE was paid a weekly salary as a salesperson along with monthly incentive payments. There was no written contract or written policy providing for the incentive pay. EE received incentive payments for sales even if he was on vacation when the order was taken and even if the sales were uncollected. Sales were credited for incentive pay purposes when the merchandise was shipped and the customer billed.

EE took a paid vacation his last week of employment in June 1984. ER refused to pay EE incentive payments for June 1984 on sales made while he was on vacation because the amount of uncollected sales on EE's accounts exceeded the amount of June 1984 sales.

The ALJ held that incentive pay was not an unenforceable bonus paid pursuant to an unwritten policy. The amounts paid were not premiums or extra or irregular remuneration as the term "bonus" is defined in the Act. EE received incentive payments each month as part of his regular remuneration. ER contended that even if incentive payments were wages, they were not earned until payment for the sales was collected. The ALJ concluded that ERs do not ordinarily pay wages which have not been earned, and yet prior to June 1984, ER consistently paid EE incentive payments for uncollected sales.

In the absence of notice, EE was entitled to be paid under the prior arrangement whereby EEs on vacation earned incentive payments.

ER violated Section 5(1) by failing to pay EE earned wages for June 1984 sales.

KENT COUNTY CIRCUIT COURT: 7/14/86
The issues in this appeal were whether incentive payments are a bonus or a wage, and whether payments were earned when sales were paid or when orders were shipped. ER's practice was to pay on shipments.

10/17/86 - ER withdrew its appeal and agreed to place all monies due in an interest-bearing escrow account. It was agreed that ER's counterclaims would be stayed so that EE could appeal the court's grant of ER's Motion for Summary Disposition. If EE failed to overturn the court's grant of Summary Disposition, the escrowed funds would be paid to ER as a settlement. If EE succeeded to overturn the court's grant of Summary Disposition, the escrowed funds would remain in escrow until final judgment had been rendered in both EE's claim and ER's counterclaims.

7/30/87 - Court of Appeals reversed and remanded for rehearing. The court addressed EE's overtime claim and whether EE was an exempt "administrative employee."

9/19/88 - Michigan Supreme Court vacated judgment of the Court of Appeals and remanded to the Court of Appeals for consideration of issues raised on appeal. The Supreme Court found that the Court of Appeals erred in holding that the "short test" for determining whether a person is employed in a "bona fide administrative capacity" and thus, excepted from the overtime provisions of the FLSA, is limited to academic administrative personnel. The test applies to all EEs "compensated on a salary or fee basis at a rate of not less than $250 per week."

11/29/88 - Court of Appeals found that the trial court properly concluded there was no genuine issue of disputed fact in granting ER's summary disposition. The case was remanded to the circuit court for further proceedings.

513 EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

81-2072, et al <u>Merlington and Scott</u> v <u>Carroll's Trucking, Inc</u> (1982)

Order was issued denying Respondent's Motion for Accelerated or Summary Judgment.

OTTAWA COUNTY CIRCUIT COURT: 6/6/83
Respondent filed accelerated judgment with the circuit court before an administrative hearing could be held to determine whether the Complainants should be considered as EEs or independent contractors.

APPEALS COURT: 9/1/83
Affirmed the circuit court which held that the orders were not final, therefore, could not be appealed to a higher court. (Remanded to hearing)

ALJ'S DECISION: 12/10/84

Complainants were drivers of semi-tractors owned by Respondent and leased to ICC, a commercial freight carrier. Respondent was not a commercial freight carrier. All licenses and permits for the semi-tractors were issued in the name of ICC. Respondent and ICC signed a written agreement for some but not all of the semi-tractors.

ER contended Complainants were independent contractors, not EEs. ICC exercised extensive control, limiting Respondent's control and Complainants' duties. This factor indicates no ER/EE relationship.

Part of Complainants' compensation was an advance from ICC. The remainder was by check from Respondent, but this was not paid until Respondent received a check from ICC. The payment of Complainants' wages was not indicative of an EE/ER relationship.
Applicants became drivers through ICC's certification process. ICC also maintained a surveillance system and disciplinary policy for the drivers.

ICC's control over most aspects of Complainants' performance indicated such performance was an integral part of ICC's business.

No EE/ER relationship.

514 FRINGE BENEFITS

Must be in Writing to be Enforced

VACATION

No Written Contract/Policy
Past Practice

WRITTEN CONTRACT

Fringe Benefits

WRITTEN POLICY

Fringe Benefits

87-6727 Hurst v Nehi-Royal Crown Beverage Co, Inc (1988)

EE was employed as a general manager from 1980 through 1986. ER's union employees received vacation benefits pursuant to a CBA. There was no written contract or policy providing vacation benefits or other fringe benefits to management personnel. ER did not violate the Act since there was no written contract or policy.

515 DEDUCTIONS

Common Law
Written Consent

OVERPAYMENTS

Mistakes

SICK PAY

Not Covered by CBA

85-4823 **Clark v Consumers Power Co** **(1986)**

EE was employed during 1983 and 1984 pursuant to a CBA. ER erroneously paid EE sick leave for two days' absence due to nonjob-associated illness. ER deducted amounts from EE's paychecks to recover the amount paid in error. EE did not consent in writing to these deductions.

ER contended that the words in Act 7, "expressly permitted by law," regarding deductions include common law, which allows an ER to recover excessive compensation by means of offsets against subsequent entitlements.

Section 7, considered as a whole, clearly intends to abolish both Act 62 rights (ER's right to deduct debts owed by EE) and any common law right to make deductions from wages.

ER violated Section 7 by deducting monies from EE's paycheck without written consent. ER may utilize other judicial remedies to recover the erroneous payments to EE. See General Entry III.

JACKSON COUNTY CIRCUIT COURT: 8/27/86
Voluntary dismissal by Consumers Power Company.

516 PAROL EVIDENCE

WRITTEN CONTRACT

Failure to Pay According To
Parol Evidence

85-4550 **Woolridge v Bath Charter Township** **(1985)**

EE began work as a police officer on 9/1/83. After completing one full year of employment he expected a wage increase, as noted in the contract, which said an EE having less than one year of employment will earn the sum of $14,352; however, after completion of one year that EE will earn $16,847.12. EE did not receive the expected wage increase.

A supervisor stated that the past practice of ER was to pay wage increases starting on January 1 of the year following the date that EE completed an additional year of service.
ER and the Department claimed that the contract was ambiguous, and, therefore, parol evidence as to practice was needed to interpret the contract.

The contract is clear and unambiguous on its face; therefore, parol evidence as to past practice cannot be considered. ER violated Section 2 by failing to pay EE the agreed upon wage.

CIRCUIT COURT: Reversed 1/23/86

517 BONUSES

Written Contract/Policy/Agreement

DEDUCTIONS

Written Consent

THEFT

Alleged

Deduction Taken From Wages

WRITTEN CONSENT

None

85-5090 Lanckton v Executive Art Studios (1986)

EE was to be paid $3.35 an hour plus a bonus of $.65 an hour if she did a good job. The bonus cannot be enforced absent a written policy according to Section 1(e).

EE had not received a paycheck for wages earned during the time of her employment. ER alleged theft of monies by EE which entitled him to withhold wages due and owing. This argument was rejected. ER must utilize other judicial remedies to recover the alleged theft by EE.

ER violated Section 5 which requires payment of all wages earned and due upon termination, and Section 7 for withholding EE's wages without written consent.

INGHAM COUNTY CIRCUIT COURT: 3/26/86
To determine if ALJ should have decided ER counterclaim. ER alleges theft of monies.

(No Circuit Court decision available.)

518 WRITTEN POLICY

Interpretation

Against Drafter

81-1579 Winter v Michigan Television Network, Inc (1982)

EE claimed that ER owed him 10 weeks and 1/2 day of unused vacation time. He further claimed that four weeks' pay was due him pursuant to ER's letter of intent which stated that both EE and the company have the option of termination at any time with 30 days' notice to the other. EE was given two hours' notice to vacate the premises.

ALJ found EE entitled to vacation time and entitled to carry over the unused earned vacation. Pursuant to the letter of intent, EE entitled to an additional four weeks' severance pay.

ER violated Section 3 which requires fringe benefits to be paid in accordance with the written policy or contract.

GRAND TRAVERSE CIRCUIT COURT ORDER: Affirmed 9/29/83

APPEALS COURT DECISION: Affirmed 7/27/84
Vacation pay was due. Ambiguity of the policy was to be held against the policy drafter.

519 CLAIMS
Timeliness Of

WRITTEN POLICY
Amendment
Subsequent Agreements

82-2614, et al <u>Frankhouser, et al</u> v <u>Woodhaven School District</u> (1983)

Dean, Frankhouser, Perskey and Herman filed complaints in 1982, claiming pay for the 1979-80 school year. The claims were not in compliance with the 12-month requirement of Section 11(1).

EEs contend they were covered by interim operating conditions adopted by ER on 8/31/81, or by a retroactive salary increase granted by ER on 12/23/81 for present EEs, laid off EEs, EEs on leaves of absence, and retired EEs. Each of the EEs either voluntarily terminated their employment or were discharged and therefore would not be eligible for the salary increase even if their claims were timely.

EE Monteleon was laid off 6/30/80. Her claim for wages accrued 12/23/81 and was timely filed on 7/7/82. The school district authorized a retroactive salary increase for the 1979-80 school year and payment was to be made to laid-off EEs, et al. ER violated Section 5 by failing to pay EE Monteleon back wages authorized on 12/23/81.

WAYNE COUNTY CIRCUIT COURT: 8/2/83 EEs Dean, et al.
To determine whether EEs filed their claims within 12 months of the alleged violation.

WAYNE COUNTY CIRCUIT COURT: 8/25/83 EE Monteleon.
To determine whether EE is qualified for retroactive pay.

Circuit Court decision not received. File has been destroyed.

520 APPEALS
Dismissed
Failure to Attend Hearing

82-2467 <u>Brooks Equipment Co</u> v <u>Robert F Yustick</u> (1983)

The DO of 4/16/82 found ER did not violate the Act. EE filed a timely appeal but failed to appear at the hearing.

Appeal dismissed. Good cause had not been shown for EE's failure to appear at the hearing.

APPEAL TO OAKLAND COUNTY CIRCUIT: 7/11/83
To determine whether the Hearings Officer properly dismissed the appeal because of EE's failure to appear at the hearing.

SEPARATE ACTION
APPEAL TO OAKLAND COUNTY CIRCUIT COURT: 7/15/83
To determine whether EE qualified for bonus; whether EE forfeited the bonus.

521 COLLECTIVE BARGAINING AGREEMENT (CBA)

Overtime

PREEMPTION

CBA

83-3088 Brush v General Telephone Company of Michigan (1984)

Towards the end of his shift, EE was told to go to the personnel manager's office where a discussion concerning management and the union took place lasting 1/2 hour beyond his regular workday. EE was a union steward. He was denied overtime wages for the 1/2 hour under the terms of the CBA and subsequently filed a claim with the Department.

ER filed a motion, which was denied, for dismissal and accelerated judgment alleging the Department lacked jurisdiction since the Act is preempted by federal law and conflicts with the U.S. Constitution.

The ALJ found that the Department does have jurisdiction over the complaint because the statutory right afforded by the Act may not be waived in negotiating a CBA. A holding that the Department is preempted would result in substantive statutory rights being unavailable to every EE who is a union member.

EE was asserting an independent statutory right, and the Department has jurisdiction to award relief. ER violated Section 2 by failing to pay EE overtime wages earned and due. The meeting was controlled or required by ER, and EE's participating was pursued necessarily and primarily for the benefit of ER.

MUSKEGON COUNTY CIRCUIT COURT: Reversed 9/9/86
Federal law preempted a state wage and fringe benefit act involving a question of overtime pay when the dispute may arise over an interpretation of a contract provision.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

522 DEDUCTIONS
Fines

EMPLOYEE DEBT TO EMPLOYER

WRITTEN CONSENT
Deductions

83-3264 Whitfield v Eagles, Inc (1983)

EE was a truck driver from 5/19/82 through 1/28/83. EE's compensation was a commission on gross charges. ER made a deduction from EE's wages without his consent to repay a fine.

ER contended he should be reimbursed for a trailer allegedly damaged by EE and wages paid EE for which ER was never paid because a carrier went bankrupt. ER also paid EE advances that were not offset by earned wages.

ER violated Section 7 by deducting EE's wages to repay the fine without written consent. ER is further prohibited by Section 7 from deducting amounts as reimbursement for the trailer damage and bankrupt carrier.

ER violated Section 5(1) by failing to pay EE earned wages minus the advance upon termination.

BERRIEN COUNTY CIRCUIT COURT: 9/23/83
To determine whether deductions for fines paid on behalf of EE were properly deducted from wages without signed authorization.

On 1/6/86 the circuit court affirmed the ALJ finding of a violation of Section 7. The court stated the ALJ properly offset wages by the advances received and rejected further deductions in the absence of a written consent. The ALJ noted the purpose of the hearing was to determine wages due EE. ER's claim for damages amounted to a tort and may be a cause for a separate civil action but cannot offset the wage liability. The decision also defines the nature of judicial review.

523 EMPLOYER IDENTITY
Corporation Officers

83-3695, et al 12 Complainants v Schmidt & Martin (Tri-Kraft, Inc) (1984)

One issue in this case is whether stockholders, directors or officers are ERs under the definition of Section 1(d) (Employer). It has been held in FLSA cases that they may be held liable for the wages of a corporation if they acted in the interest of a corporate ER.

Another issue is whether one individual may be held liable and indebted for wages and/or fringe benefits due and owing. According to FLSA cases, the individual in whom ultimate control was vested and under whose direction management EEs acted may be considered as

the ER.

Schmidt was responsible for nothing more than the day-to-day affairs as president and resident agent. His position was more of a first line manager and supervisor. His only area of sale authority was limited to the daily operation of the printing business. In all other respects he had to seek approval from Clifton Martin, including contract negotiations, grievance settlements, and signing checks and other documents for the company. Martin decided to discontinue the payroll and file for bankruptcy.

Schmidt is not an ER within the meaning of Section 1(d). Case remanded to Wage Hour to determine the possible liability of Clifton Martin as an ER under the definition of Section 1(d) because he did not appear at the hearing and all correspondence was returned as undeliverable.

INGHAM COUNTY CIRCUIT COURT: 11/30/84
To determine whether Bureau of Employment Standards is required to enforce provisions of Act 390 that require individuals who act in the interest of an ER corporation to be liable for wages earned.

Circuit Court decision not available.

524 SICK PAY
Unearned

WRITTEN CONSENT
Deductions
Sick Pay from Wages

81-2001 Jurban v Kemp, Klein, Endelman & Beer, PC (1982)

EE was advanced sick time with the understanding that this time would be accumulated, and deducted from her last pay. ER deducted 2 1/2 days' advanced sick leave from EE's pay upon termination without her written consent. ER violated Section 7 by deducting wages to recover a prior overpayment.

OAKLAND COUNTY CIRCUIT COURT: 6/7/84
Reversed the ALJ and denied payment to EE even though there was no signed authorization for deduction from final paycheck.

525 APPEALS
Dismissed
Untimely
Good Cause Not Found
Appeal Unlikely to Be Received Same Day Mailed

CLAIMS

Twelve-Month Statute of Limitations
Begins After Alleged Violation

COLLECTIVE BARGAINING AGREEMENT (CBA)
Fringe Benefits
Past Practice
Statute of Limitations
Twelve-Month Time Period Begins After Alleged Violation
Subsequent Agreements

FRINGE BENEFITS
Retroactive Change

HEARING
Appellant
Did Not Appear at Hearing

84-3825, et al Japenga, et al v Tekmold, Inc (1985)

Two EEs filed late appeals. The ALJ found their explanation did not establish good cause. EEs' conduct, in placing their appeals in their own mailboxes on the last day of the appeal period, was not reasonable since it was highly unlikely the appeals would also be received by the Department on the same day.

EEs claimed they were entitled to 2 percent of their 1983 W-2 gross income amount as a vacation benefit as set forth in the company union agreement effective 3/10/80 through 3/10/83.

ER's arguments were that EEs had already been paid all vacation benefits due pursuant to a settlement entered into between the union and the ER after the contract expired on 3/10/83, and, therefore, there was no contract for the EEs to rely on in filing requests for fringe benefits under Section 3. The claims of several EEs were filed more than 12 months from the date that the vacation benefits were due violated Section 11(1).

The Department claimed that the expiration of the CBA on 3/10/83 affected only the EEs' accrual of vacation after that date.

The ALJ found that the 12-month time period of Section 11(1) only begins to run after an alleged violation by ER. The determination of vacation entitlement could not be made until ER issued the W-2 forms for 1983 in early 1984. The violation could not have occurred until after ER failed to pay EEs the amounts they claimed were due.

It was concluded EEs did earn vacation benefits until 3/10/83. The fact that the contract ended on that date did not affect this benefit since the benefit had been earned.

The settlement agreement, negotiated with the union but never ratified, required payment of accrued vacation pay; however, it did not state the amounts to be paid. Administrative Rule R 408.9006 prohibits a retroactive change in fringe benefits unless the change is to the

benefit of EEs. EEs had the right to file claims for vacation benefits pursuant to the Payment of Wages Act since this Act gives EEs independent statutory rights that cannot be bargained away.

For those EEs filing timely appeals, the amounts found in the DOs should have been based on 2 percent of 1983 gross income times the number of weeks of vacation each EE was entitled to.

For those EEs who did not appeal or who filed untimely appeals, the DOs were affirmed. One EE was not present at the hearing. Administrative Rule R 408.22966 requires an order be issued dismissing the appeal of an Appellant who fails to appear in a contested case after proper notice.

ORDER DENYING MOTION FOR CORRECTION: 4/26/85

ER filed a motion on 3/26/85 contending an incorrect formula was used in calculating amounts found due for EEs Miller, Young, and Rawdon; and that the Department's DO for EE Martin based on an incorrect calculation was denied on 4/26/85. ER presented no argument at hearing or in post-hearing submissions alleging improper calculation of EEs' DOs.

MUSKEGON COUNTY CIRCUIT COURT: 12/16/85

Respondent/ER's appeal to circuit court was limited to the issue of computation of vacation benefits involving EEs Miller, Young, Rawdon, and Martin.

The ALJ's decision was affirmed in regards to computing vacation pay benefits on the basis of annual earnings from 1/1/83 to 3/10/83 for all EEs, rather than to prorate the gross earnings from each EE's anniversary date to 3/10/83. A trier of fact in Michigan is precluded from relying on past practice of a company in construing a wages and fringe benefits section of a CBA due to the effects of MCL 408.473, MSA 17.277(3), which provides that an ER shall pay fringe benefits to or on behalf of an EE in accordance with the terms set forth in the written contract or written policy.

However, the decision was remanded for the purpose of recomputing the vacation pay of EE Martin, using her 1983 W-2 form as a wage base. It was concluded that since Respondent appealed the DO, the entire case, including EE's claim for recomputation, could be addressed.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

(Further information not available. File destroyed.)

526 WRITTEN POLICY
Interpretation

84-3990 White v Wohl Shoe Company dba Regal Shoes (1985)

EE began employment 1/1/83 with ER and quit 2/29/84. He contended he was entitled to one week's vacation pay after 7/1/83 under paragraph 1 of the vacation Handbook and two additional weeks' vacation pay after 1/1/84 under paragraph 2 of the policy. Thus, according to EE, one week's vacation pay was due as two weeks' vacation had already been paid.

ER contended that an EE may receive the benefits of paragraph 1 or paragraph 2 but not both paragraphs of the vacation policy.

The ALJ found that EE earned one week's vacation pay at the end of six months of service and two weeks' additional vacation pay after one year of service, because the policy did not state or even imply that an EE was entitled to the vacation benefits of one paragraph but not both. EE earned three week's vacation pay after one year of service but would not be entitled to further vacation pay until 1/1/85 if employment had continued.

EE is due vacation pay for one week in accordance with Section 3 of Act 390 which states that an ER shall pay fringe benefits to or on behalf of an EE in accordance with the terms set forth in the written contract or written policy.

527 EMPLOYMENT RELATIONSHIP

Economic Reality Test
Partnerships

84-4066, et al Oge, Ploff & Schuler v Judy's Restaurant (1985)

EEs worked at Respondent restaurant and were due unpaid wages as shown in the DO. Respondent appealed the DO. Respondents Campbell and Merriam began operation of the business on 11/1/83, but had their names removed from the sales tax license in late November or December 1983 and January 1984, respectively. At the end of March 1984, Respondent Merriam ceased to participate in the business. Respondent Campbell operated the business with a new partner starting April 1984. Respondent Merriam contended she stopped participating in the business and was no longer the ER when she had her name removed from the sales tax license.

It is noted that Respondent Merriam continued to act both directly and indirectly as Complainants' ER. She opened and closed the restaurant, cooked, purchased supplies, directed EE activities, paid EE wages in cash, participated in the hiring of some EEs. ER violated Sections 2 and 5(1) by failing to pay wages earned.

528 REDUCTION OF WAGES/BENEFITS

84-4163 Kling v Universal Energy Products (1985)

EE was employed from 8/15/83 through 4/28/84, for the most part as a dealer rep at a salary of $461.54 per week. Due to unsatisfactory performance, EE was informed on 4/10/84 he would have to work as a commissioned salesman for 60 to 90 days and his salary would

continue to the middle of the month. EE continued to work for ER from 4/15/84 through 4/28/84 as a salesman; however, he earned no commissions. EE's last paycheck was salary for the week ending 4/14/84. He claims two weeks' salary for the period from 4/15/84 through 4/28/84.

ER did not violate the Act. The only evidence presented was Respondent's unequivocal testimony that EE's salary was to continue only to the middle of the month.

529 EVIDENCE
Insufficient to Establish Claim

VALUE OF SERVICES

83-3464 Sanders v Oakland Humane Society (1985)

EE was a night watchman from November 1982 to early May 1983 from 7:00 p.m. to 7:00 a.m. He was provided a place to reside as part of his employment on ER's premises. EE filed a claim for $10,000 in unpaid wages which he allegedly earned by working 24 hours each day for six months.

The ALJ found there was no credible evidence presented at the hearing to establish a contract of employment between EE and ER beyond that of night watchman. There was no agreement between EE and ER regarding any work that EE may have performed during the day, and therefore, no basis for payment. ER did not violate the Act.

530 FRINGE BENEFITS
Must Be in Writing to Be Enforced

VACATION
Resignation
Eligibility for Fringe Benefits

WRITTEN CONTRACT
Fringe Benefits

84-4000 Olson v S-G Imports Car Parts (1985)

EE was employed on 2/20/79 pursuant to a written policy which provided that vacations are earned after 12 months' employment. Vacation pay was issued in advance of time off.

On about 1/20/84, EE obtained verbal permission to take a vacation earlier than his February 20 anniversary. On 2/3/84, EE received a regular payroll check for work performed 1/22/84 through 1/29/84 and a check for 40 hours of work which EE contended was for the vacation pay.

On 2/6/84, EE was advised he would not be returning to work after his vacation ended. ER

sent a letter on 2/13/84 informing EE that the extra check he had received was his final check for work performed the week of 1/29/84 through 2/4/84.

ER did not violate the Act. Section 3 requires ERs to pay fringe benefits in accordance with the terms of the written contract or policy. EE was not eligible for vacation until 2/20/84. ER is not legally bound by his verbal agreement with EE to deviate from the written policy and permit EE to take an early vacation.

531 BONUSES

EQUITABLE CLAIMS

VERBAL AGREEMENTS

83-3364 Graveley v Pfizer, Inc (1985)

EE was employed pursuant to an annual bonus incentive plan. The Department found no ER violation in regards to its written policy concerning bonuses. EE contended her claim was really for commissions and not bonuses. She claimed that on 10/1/79 she entered into a verbal contract with ER to receive open-ended commissions and that the 1979 Integrated Management Systems Manual existed separate and apart from her verbal contract of employment. Since commissions on sales are earned and due at the time sales are made, ER's attempt to limit the amount of commissions which could be paid out violates this principle. She stated that no valid modification of her verbal contract for open-ended commissions took place, since she did not "sign" the change or otherwise agree to it.

The ALJ found EE's position to be without merit. There was no proof on the record that EE's employment was governed by terms and conditions different from the 650 other sales representatives. Even if the monies claimed were wages, none would be due because EE did not fulfill the required condition precedent of attaining 100 percent of the 1983 quota.

EE also claimed that she was entitled to recover under theories of fair dealing and quantum merit. Since these are equitable remedies and the ALJ lacks equitable powers, there exists no basis to grant relief.

ER did not violate the Act.

OAKLAND COUNTY CIRCUIT COURT: 6/4/85
To determine whether compensation based on sales goal achievement was a commission (wage) or bonus. ALJ decision was affirmed that compensation claimed was a bonus.
COURT OF APPEALS: 10/20/87
Incentive payments, in addition to regular salary, based on the formula set forth in a written policy and a plan providing for an increased rate of payment as sales quotas were met or exceeded, were fringe benefits and not wages. Payments were not due because EE failed to meet requirement of the policy.

532 COMMISSIONS
Earned

OVERPAYMENTS
Mistakes

84-4015 Lewis v Tri-Cities Yellow Pages, Inc (1985)

EE was employed as an advertising sales rep pursuant to a written agreement that he receive a 20 percent commission. EE terminated employment because ER implemented new company policies which EE rejected.

The question is whether EE is entitled to be paid for an order which was placed before his termination but delivered after he left. ER contended EE was not entitled because another sales rep spent considerable time finalizing the arrangement.

ER also contended EE was paid an erroneous $20 overpayment. Since EE did not give written consent for a deduction, ER is prohibited by Section 7 of the Act from deducting this alleged overpayment.

The DO also included $10 which was ordered paid pursuant to the new company policies. Because EE's employment was not pursuant to those policies, EE was not entitled this payment.

The ALJ ordered ER to pay the 20 percent commission earned and the $20 overpayment deducted from EE's wages.

533 BURDEN OF PROOF
Wages Paid

COMMISSIONS
Draw Against Commission

84-4180 Rix v Nulty Agency, Inc (1985)

EE was an insurance salesperson from 8/1/83 through 5/21/84 when she was discharged. EE contended she was to be paid a salary of $1,500 per month. ER paid $500 at the middle of each month and $1,000 at the end of each month during her employment but contended those payments were draws against EE's commission of 10 percent of premiums on her sales.

EE kept records of her sales. ER contended if EE was not working on a commission basis, there would be no reason to maintain such records. EE said she was merely keeping track of her progress in meeting sales goals ER had set for her.

ER violated Section 5 by failing to pay all wages earned and due at termination. EE was employed at a $1,500 monthly salary because ER paid $1,500 a month for almost ten months without any accounting for the excess of alleged advances over commissions. ER paid $500

for EE's services in May 1984. EE worked 2 3/10 weeks in May and earned $802.33 minus the $500 paid, leaving $302.33 due and owing.

534 BURDEN OF PROOF
Presentation of Proofs

EMPLOYEE DEBT TO EMPLOYER

THEFT
Alleged

84-3860, et al <u>Crouse, et al</u> v <u>Tom's Auto Service</u> (1985)

EE Kevin Lee High was employed from 10/18 through 11/26/83 as a mechanic, night watchman and truck driver.

EE Robert Crouse was employed as a night watchman from 9/12/83 to 10/14/83.

EE Joan Crouse was employed to answer the phone and complete work orders for ER from 9/12/83 to 10/14/83.

ER testified that each of EEs had been paid through October, although he could not produce proof of payment. Thereafter, he claims each of EEs paid themselves by stealing merchandise, creating large bills for parts at an auto parts store and reselling the parts and by removing monies from the shop.

ER violated Section 5 by failing to pay EEs all wages earned and due upon termination. ER's assertion, without documentation, that EEs have been paid all wages earned is insufficient to meet ER's burden of proof.

535 RESIGNATION
Written Policy
Two-Week Notice Required

VACATION
Payment at Termination

WRITTEN POLICY
Resignation
Two-Week Notice Required

84-4466 <u>Brandenburg</u> v <u>NuVision, Inc</u> (1985)

EE had earned three weeks' vacation separation pay on 8/27/84. The vacation provision of the written policy provided in pertinent part:

EEs who are separated from the company in good standing, (for reasons other than theft) will be paid for earned vacation on a pro rata basis. EEs must give proper notice (a minimum of (2) weeks) when separating from the company or they will forfeit accumulated vacation pay.

By letter delivered 8/24/84, EE submitted a written resignation which gave ER two weeks' notice of her resignation beginning 8/27/84. On 8/27/84 EE had a verbal dispute with the vice president of sales, who directed EE to leave his office and the building. EE interpreted this as a discharge and proceeded to pack her belongings and leave the company. She did not return to work thereafter.

ER's attorney testified he assisted EE in carrying her things from the office to the car and told her she had not been terminated. He also stated that the vice president did not have the authority to unilaterally discharge an EE without going through the attorney for the company.

The Department contended that there is no requirement in ER's vacation policy provision that an EE actually work the last two weeks of employment as long as a two-week notice is provided to the company.

ER claimed that the policy requires not only a two-week notice but employment for two weeks in order to provide the company an opportunity to replace the departing EE.

ER did not violate the Act. Without the working requirement, the two-week notice would be of little value to ER.

536 DEDUCTIONS

Customer's Check Returned for Insufficient Funds
Errors on Customer's Check

LOSSES CAUSED BY EMPLOYEES

WRITTEN CONSENT

None

84-4210 <u>Gardner</u> v <u>Marion J Soldano and Mary A Soldano dba Marion Studio and Camera Shop</u> (1985)

EE was employed from 5/21 through 6/29/84 as a sales clerk. On 6/2/84 EE accepted an out-of-state $170 check from a customer. The check was returned uncashed due to insufficient funds. ER incurred postage expenses of $11.10, attempting to obtain payment of the amount of the check.

ER withheld EE's wages of $178.23 as a means of reimbursement for the check and expenses without EE's written consent. ER contended that this withholding was justified was justified because the check was accepted in violation of written rules.

ER violated Section 7. An ER's rules cannot take precedence over Section 7, which provides that no wage deductions may be taken from without EE's full, free and written consent.

537 WAGES

Work Before/After Shift End

84-3850 Hicks v Bob Ruby, Inc dba Evart Lounge (1985)

EE was employed as a bartender/waitress from 7/30 through 10/1/83. She was frequently required to work without pay, cleaning up from 5 to 20 minutes after her scheduled shift. She recorded unpaid time worked on a calendar.

ER violated Sections 2 and 5 which concern the time and regularity of wage payments and the payment of all wages earned and due as soon as possible after termination.

538 EMPLOYER IDENTITY

Corporation Officers

EMPLOYMENT RELATIONSHIP

Economic Reality Test

84-3892, et al Childers, et al v Paul Bowman and Lawrence Weemaes (1985)

The issue in this case is whether Respondents may be considered ERs of the 11 Complainants who were terminated in April 1983 when the corporation filed for bankruptcy. As a result of the bankruptcy action, EEs did not receive wages and fringe benefits required by their contract. Respondents Bowman and Weemaes were vice president and secretary of the corporation, respectively, and they were also members of the Board of Directors.

Ordinarily stockholders, directors and officers are not considered personally liable for the debts of a corporation. However, Section 1(d) defines an ER in pertinent part as ". . . an individual acting directly or indirectly in the interest of an ER who employs 1 or more individuals."

Applying the "economic reality test" (entry 303) to this case, Respondents owned small amounts of stock. Although they had responsibility for the day-to-day control of the corporation, they acted within the guidelines established by an active Board of Directors. Respondents did not exercise independence of control apart from directions given them by the Board of Directors.

ER did not violate the Act.

539 EMPLOYMENT RELATIONSHIP

Contract of Employment

84-4327 **Dickerson v Goldie McKinley** **(1985)**

Complainant accepted an offer from one Neona to live with Respondent. Neona asked Complainant to help Respondent by taking care of the house, preparing the meals, and lifting Respondent from bed to chair and back, and other related activities. According to Complainant, there was a contract for payment of $10 per day for her services between herself and Respondent.

No evidence of a contract between Respondent and Complainant. Neona's communication with Complainant could not bind Respondent to a wage obligation to Complainant.

540 EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

Tax Withholding Statements

84-4386 **DeGrouche v Engineering Technology** **(1985)**

Complainant agreed to drive a truck for Respondent to various race sites around the country for an agreed-upon compensation of $100 per day less expenses. He was paid for one trip to New York, but similar bills covering trips to California and Oregon were never paid.

Complainant asserted that he was under the supervision of Respondent at all times during the trips and that he used Respondent's truck, hauled Respondent's trailer and worked with Respondent's tools.

Respondent claimed that there was never an EE/ER relationship.

Respondent did not violate the Act. A contract for Complainant to work was never consummated because there was never a "meeting of the minds" between the parties. Respondent considered Complainant at all times to be an independent contractor. No tax withholding forms were signed by Complainant to permit tax deductions, and Complainant submitted invoices for services rendered. Complainant may bring an action in another tribunal to recover the monies due him.

541 DEDUCTIONS

Written Consent

MINIMUM WAGES

Deductions

85-4519 **Matthaei v Executive Art Studio, Inc** **(1985)**

ER deducted $1 from EE's check due to an alleged shortage in a pay envelope sent to the main office for counting. EE signed an agreement that all shortages incurred during his shift were to be paid at the time it was discovered or it would be deducted from the next paycheck.

EE disputed that the envelope was $1 short and said that any small shortages were made up out of his pocket; larger shortages were noted on a shortage slip attached to the envelope.

The believable testimony of ER was that each envelope is checked and double-checked when the count does not come up the same as that noted by EE. It was concluded there was probably an error made in counting, which EE did not realize, resulting in the discrepancy.

Although there was a shortage of $1, Section 7 prohibits deductions without the full, free and written consent of EE. A deduction for the benefit of ER requires written consent for each wage payment subject to the deduction; however, the total amount of the deduction cannot reduce the gross wage of EE to an amount less than the minimum wage. EE was only making minimum wage, so any deduction from his wages would have reduced the amount below minimum wage.

ER violated Section 7.

542 EMPLOYMENT RELATIONSHIP

Economic Reality Test

WRITTEN CONSENT

None

84-4311 Krzyzaniak v Shear Paradise Hair Designs (1985)

Complainant was a hair stylist. Deductions were taken from Complainant's checks in the amount of $428.72 without her written consent. Respondent claimed that since Complainant was not an EE, Section 7, which prevents an ER from deducting wages without the full, free and written consent of EE, would not apply.

Applying the "economic reality test" (entry 303) to this case to determine whether there was an EE/ER relationship, it was clear that Complainant was an EE of Respondent for the following reasons: Respondent frequently exercised control over Complainant's activities; directed Complainant's work; supervised her time at the salon; required her attendance at monthly meetings; paid her wages on a regular basis; and the performance of Complainant's duties were an integral part of Respondent's business toward the accomplishment of a common goal.

ER violated Section 7 by making deductions without written consent.

543 ADVANCES

MINIMUM WAGE

Deductions

85-4520 **Houser v Executive Art Studios** **(1985)**

EE claimed wages withheld and deducted for $1,241.24. The deductions taken were to recover advances made and sums lost due to EE's negligence in the training of a new clerk. EE received minimum wage.

Section 7 requires that the total amount of a deduction may not reduce the gross wage paid to an amount less than the minimum wage rate.

ER violated Section 7 because any deduction would have reduced EE's pay to an amount below the minimum wage rate. Section 5 is also in violation because ER withheld wages which should have been paid as soon as possible after discharge.

KALAMAZOO COUNTY CIRCUIT COURT: 7/15/85
To determine whether an ER may withhold wages from an EE receiving minimum rate for cash shortages and advances.

544 VACATION
Earned
Offset by Sick Leave

WRITTEN POLICY
Vacation

84-4260 **Kalajian v Grosse Pointe Farms Municipal Court** **(1985)**

EE was employed from June 1976 until January 1984 pursuant to a written policy. EE was required to work 24 hours per week. On 1/1/84, EE earned 120 hours of vacation for which she had not been paid. ER deducted 68 hours to offset excess sick time used without her written consent.

ER violated Section 4 by deducting the earned vacation without EE's written consent. Section 3 was also violated because ER failed to pay EE earned vacation in accordance with its written policy.

545 WAGE AGREEMENTS
Verbal

WITNESS
Credibility

84-4263 **Compton v Variegate, Inc** **(1985)**

EE was employed as a telephone solicitor from 10/10/83 until 5/24/84 when she was discharged. EE contended her wage agreement provided for payment of 10 percent of the yearly contract price each month, or if contract was month-to-month, 10 percent of the

contract price for the first three months.

EE's testimony was contradictory and inconsistent. ER's witness testified in a believable manner that EE was paid 5 percent commission on each contract she solicited. ER did not violate the Act.

546 EMPLOYMENT RELATIONSHIP

Economic Reality Test
Joint Venture

85-4619 Phillips v Gard Industries, Inc (1985)

Complainant claimed she was hired to work in the office answering phones, typing, coordinating shipments, and to establish a bookkeeping system. She was to be paid $400 per week, but a week after she started she agreed to accept $350 per week, since her husband was supposed to get a share of the company.

Respondent contended that Complainant and her husband were independent contractors. Complainant had special training as a traffic manager and would not be hired simply to perform clerical office type work. Complainant and her husband rented various items of equipment to assist them in their work as outside contractors.

The ALJ applied the "economic reality test" (see entry 303) to distinguish an EE from an independent contractor and found that Complainant, her husband and Respondent's president were part of a joint venture. This was supported by Complainant's statement attached to the wage claim.

An appeal to the Circuit Court was filed but the decision is not available.

547 VACATION

Payment at Termination
Discharged
Termination for Cause

84-3931 Meyers v Rexell Industries, Inc (1985)

EE was employed on 3/1/82 pursuant to a written policy which said that any EE who is separated from the employ of the company voluntarily or by acts of misconduct shall not receive vacation pay. EE was terminated 5/3/83.

ER claimed EE's employment was terminated for misconduct, relying upon his attendance record which showed that EE was late five times in March 1983 and absent twice. In April he was late three times and absent four times. EE was hired by a former plant manager who was his supervisor and neighbor and depended on EE for transportation to work. The plant manager was also discharged for tardiness and poor attendance.

EE claimed that he was laid off for lack of work and that his absence and tardiness were excused by the plant manager. The termination notice he received indicated the reason for termination was "layoff."

The ALJ found there was insufficient evidence to support EE's claims. The termination notice indicated that although Complainant was laid off, ER would not rehire him. ER did not violate the Act.

548 VACATION

Forfeited
Payment at Termination
Discharged

84-4349 **Polson v Friendship Village of Kalamazoo** **(1985)**

EE commenced employment as a maintenance worker in 1977. In 1984 he was terminated for allegedly not following job instructions. EE had accrued, and ER approved, two weeks' vacation at the time of his termination. EE claims payment for this vacation time and five personal days. ER's written policy provided that "Involuntary termination by the Employer forfeits all Employee benefits except those required by law."

EE contended he was entitled to the claimed benefits because he had completed the service required for the claimed vacation benefit, which was approved, and he should not have been terminated.

Section 3 requires ER to pay EE for vacation time and personal days only in accordance with the written policy. The forfeiture clause of the policy applies to vacation time accrued or approved. ER did not violate the Act.

549 COMPUTATION OF DAILY HOURS WORKED

EMPLOYEE
One Who Is Permitted to Work

84-4314 **Russey v Family Affair Restaurant** **(1985)**

EE was a restaurant manager for ER commencing 6/18/84. After the restaurant closed at 3:00 p.m., EE washed walls. On 6/19/84, EE worked from 6:00 a.m. to 4:00 p.m. On 6/20/84, she started work at 6:00 a.m. and at 8:45 a.m. ER called and told her to close the restaurant by 10:00 a.m. She continued to work until 1:00 p.m.

ER contended EE should have closed the restaurant and quit working by 10:00 a.m. in accordance with his instructions. It was undisputed that ER owed EE $100 for work performed.

It was concluded ER owed EE $122 for 16 1/2 hours worked on 6/18/84, ten hours on

6/19/84, and four hours on 6/20/84.

550 JURISDICTION

Statute of Limitations

84-4136 Hultgren v Kent Physical Therapy Associates, Inc (1985)

EE was employed from 9/27/82 through 4/15/83 when he quit. On 6/11/84 EE filed a complaint with the Department of Labor for $2,692.15. Section 11(1) provides that an EE must file his complaint with the Department within 12 months of the alleged violation.

EE testified he did not know of his right to file a complaint under the Act until the MESC informed him. He believed he could not file his complaint until proceedings before the MESC were resolved; and he did not know that a wage complaint must be filed within 12 months after the alleged violation.

The Department was without authority to proceed in this matter because the complaint was not filed within 12 months of the alleged violation. As a general rule, ignorance of a right to sue does not postpone the commencement of the limitation period.

551 BURDEN OF PROOF

Wages Paid

EVIDENCE

Insufficient to Establish Claim

84-4177 Iceberg v G A Design (1985)

EE was employed as a part-time printer from October 1983 through March 22 or 23, 1984, for $7 per hour. ER paid EE's wages in cash. Sometimes EE signed a receipt for wage payments and sometimes he did not.

Although he did not obtain a receipt from EE, ER testified that on 3/24/84 he paid EE $327 in cash for wages earned from 3/6 through 3/22/84. ER's bookkeeper entered a $327 payment in the payroll records on that date.

It was undisputed that EE was paid $21.25 of the $327 allegedly owed. EE claims the balance of $311.25 and relies on the fact that there is no receipt.

ER did not violate the Act. EE did not meet his burden of proving he was entitled to the claimed wages. The parties' past practice of payments in cash, often without a receipt, established that the absence of a receipt did not prove that any amount was still due.

552 EMPLOYMENT RELATIONSHIP

Economic Reality Test

Independent Contractor Relationship Found
Tax Withholding Statements

JURISDICTION
Out-Of-State Employment

84-3987 Michael v Master Transport Services, Inc (1985)

Complainant drove trucks leased by Respondent from October 1982 through February 1984 for which he received 17 cents per mile. Complainant claimed $279.48 for two trips made during the period of 1/20/84 through 2/15/84, driving trucks owned by two individuals.

Respondent did not control Complainant's duties. Complainant was not required to accept loads and Respondent did not direct his activities on trips. Complainant was not paid until Respondent was paid by its customer, which shows that Respondent's payments to Complainant were, in reality, a splitting of fees. The payments were reported to the IRS on Form 1099 as nonemployee compensation. As a driver of trucks leased by Respondent, Complainant spent less than 10 percent of his time in Michigan.

Although Complainant's performance as a driver was an integral part of Respondent's business of hauling freight, it was concluded that he did not work as an EE. (See entry 303 - "economic reality test".) Complainant performed less than 10 percent of his duties in Michigan and he did not have a permanent work station. Therefore, under Rule 21(2) the complaint was dismissed for lack of jurisdiction.

553 FRINGE BENEFITS
Must Be in Writing to Be Enforced

VACATION
Anniversary Date
No Written Contract/Policy

84-3944 Looyengoed v The Camera Shop, Inc (1985)

EE was employed from May 1970 to February 1984 at a salary of $183.72 per week. After May 1971 EE began receiving paid vacations with no written policy. He received two weeks' paid vacation in September 1983. In November 1983 ER established a written fringe benefit policy which provided for two weeks' vacation and three weeks' pay after five years of continuous employment.

EE received unwritten approval from his supervisor to take a vacation beginning in March 1984. He was laid off effective 2/24/84 and claims three weeks vacation.

ER did not violate the Act. Section 3 requires ER to pay fringe benefits in accordance with the terms of its written policy. The written policy clearly provided for paid vacations only after an EE's anniversary date. Therefore, EE was not eligible for further paid vacations until his anniversary date in May 1984. The supervisor's unwritten approval for vacation did not

affect the written policy.

554 COLLECTIVE BARGAINING AGREEMENT (CBA)

Discharge for Cause
Fringe Benefits
    Discharge
Grievances

84-3734 **Lamoreaux v Lear Sieglar, Inc** **(1985)**

EE was employed from 1958 to 1983 when he was discharged for just cause according to ER. EE is seeking vacation benefits which were denied by ER. The CBA states that seniority will be lost if an EE is discharged for cause and provides for a grievance procedure which was not utilized by EE. EE believed the "just cause" issue should be litigated at the hearing to determine if he is entitled to the vacation benefits.

ER's position was that it would be improper to determine at the hearing that the discharge was not for cause.

There are no provisions in Act 390 that exclude from its coverage EEs and ERs whose relationship is pursuant to a CBA which provides a grievance procedure culminating in arbitration.

ER did not violate the Act. Vacation benefits are not due under the terms of the CBA because EE was discharged for "just cause."

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

555 VACATION

Earned
Payment at Termination
    Discharged

84-4239 **Osgood v Whitmore Lake Convalescent Center, Inc** **(1985)**

EE was employed from 1978 to 1984 when she was discharged. A written policy was issued in 1983 for "salaried personnel policies" which provided for 20 days' vacation after five years, and one-half day per month for personal business. EE used nine vacation days and no business days during the period in question and ER paid her for four vacation days after her termination.

ER contended the policy did not apply to EE because she was an administrator and not required to work any particular number of hours as long as her assignment was performed properly. The ALJ found that the written policy clearly applied to EE as she was salaried personnel.

ER also contended that EE was overpaid in 1982 and 1983, and so in effect had been paid the claimed vacation benefits. ER stated EE received more than the 26 paychecks per year she was supposed to receive. The evidence showed that EE received checks in irregular amounts on dates which were not paydays. These were found to be a vacation payoff, Christmas bonus, and five days paid as a bonus, thus establishing that EE was not overpaid.

ER violated Section 4 by failing to pay EE vacation benefits owed.

556 MISREPRESENTATION BY EMPLOYEE

VALUE OF SERVICES

84-4328 DelRosario v Salerno Tool Works, Inc (1985)

EE was hired to operate a Bridgeport mill machine pursuant to ER's ad in the newspaper for an experienced millhand. At the time of the interview, ER agreed to pay EE $8.50 an hour based on EE's resume and the fact that he claimed to know how to run the mill machine and the digital readout. One of EE's references also stated that EE knew how to run the machine. The first day on the job, EE had trouble operating the machine and another EE was assigned to help him. EE stated he had trouble because of the digital readout system. The foreman testified that the Bridgeport machine and the digital readout are standard in the industry and EE did not know how to operate it.

EE resigned at the end of the shift contending that ER's president was watching him during the day. ER offered him $50 at that time, but EE refused the offer. ER later paid EE $4.50 per hour for eight hours, through the Department of Labor, which was the normal rate paid to a starting EE with no experience.

The question in this case is what amount of wages were earned by EE on the day he worked? The Department claimed the full $8.50 per hour was due because ER purchased EE's time, which EE gave. The ALJ found that the $8.50 per hour figure was based on the good quality of EE's resume and his stated prior machine operating experience. Based on the small amount of work produced by EE, it was concluded that payment of $4.50 per hour was proper.

ER did not violate the Act.

557 BONUSES

WRITTEN CONTRACT

Fringe Benefits

Bonuses

84-4216 Elarton v Lenawee Hills Memorial Park Association, Inc (1985)

EE started his employment on 5/5/83 as a groundkeeper for ER at $3.50 per hour. After a

month EE was told that he would receive a "bonus" of $.50 per hour if he remained employed until 6/1/84 and would only be paid if he remained employed to that date. There was no written contract or written policy providing for the bonus.

ER's payroll records starting 6/9/83 indicate that EE earned wages at the rate of $4 per hour and withholding taxes were deducted based on that rate. However, he was paid gross wages of $3.50 per hour. EE quit on 5/31/84 and claims payment of the additional $.50 per hour for the period from 6/1/83 through 5/31/84 which ER refused to pay.

ER did not violate the Act. Wages must be paid at least monthly according to Act 390. They cannot be withheld for almost a year. The intent of the parties was that EE would receive gross wages of $3.50 per hour rather than $4 per hour. The additional $.50 an hour comes under the definition of a "bonus" in Rule 2(2). The Act does not require payment of this additional amount as a bonus. Section 3 provides that fringe benefits must be paid in accordance with the terms set forth in a written contract or written policy. Therefore, the bonus, which is a fringe benefit, is not enforceable because there was no written contract or policy.

558 EMPLOYMENT RELATIONSHIP

Partnerships

Not Finalized

84-4473 **Salsini v C & J Landscape & Lawncare** **(1985)**

Complainant worked cutting lawns with his brother-in-law, Dennis James. James hired Complainant and said that he and Christopher Brown were partners. Brown and his brother Jack were, in actuality, partners. Discussion had taken place for James to take Jack's place but this never materialized. Brown denied ever seeing Complainant work or that he had agreed to hire him. James paid Complainant cash after he turned in his hours worked. Complainant claims wages at $3 an hour for 19 hours.

No EE/ER relationship between Complainant and the above-named ER. Any promises made by James to Complainant were made in his private capacity and not as a principal in the company because the partnership arrangement was never finalized.

559 ADVANCES

WRITTEN CONSENT

None

84-4029 **Morgan v Bright Futures, Inc** **(1985)**

Subsequent to EE's discharge, ER withheld wages due without her written consent. She was a nonunion EE. ER contended the deductions were made to take care of monies EE advanced herself by writing checks on ER's account. Some of these monies were repaid, but the unpaid amount exceeded her earnings.

ER violated Section 7 by deducting or withholding EE's wages without written consent. ER also violated Section 5 which requires payment of all wages earned and due as soon as the amount can be determined with due diligence.

560 FRINGE BENEFITS

Proration of Vacation Benefits

VACATION

Proration

WRITTEN POLICY

Fringe Benefits

Interpretation

85-4512 Moggie v Thompson Sales & Service, Inc (1985)

EE began working on 9/2/75 and resigned on 9/14/84. The company's written policy for vacations provided for two weeks' paid vacation for EEs with five to ten years with the company. EE and the Department claimed that because EE started another year of employment on 9/2/84, he was eligible for two weeks' paid vacation even though he resigned on 9/14/84. EE received two weeks' paid vacation for the period from 9/2/83 through 9/1/84.

ER claimed an EE is not automatically eligible for the full period of vacation unless EE works the entire year for which the vacation benefit is paid. So EE would be eligible for two weeks' paid vacation during the year 9/2/84 through 9/1/85 if EE continued on the payroll throughout the entire year. The policy had never been interpreted or applied in the manner advanced by EE and the Department. EE was paid a pro rata vacation benefit up to his separation of 9/14/84.

After reviewing the policy handbook and testimony presented, the ALJ found that ER's policy permitted payment of vacation benefits to a departing EE based upon the portion of the year that EE actually worked, and this amount had already been paid to him. ER did not violate the Act.

561 HEARING

Appellant

Did Not Appear at Hearing

Presumption of Notice of Hearing Receipt

REHEARING

Denied

Presumption of Notice of Hearing Receipt

84-4298 Tait v Metro Money Savers (1985)

ORDER DENYING REQUEST FOR REHEARING

ER filed a request for rehearing on 4/15/85 and asserted that they never received any service and/or any notice by mail concerning the hearing date.

EE and the Department representative appeared at the hearing. ER did not appear and there was no request for an adjournment, nor was the Notice of Hearing returned by the postal authorities as undeliverable.

There was no evidence presented to overcome the presumption of proper mailing and receipt. ER's denial of receipt was insufficient by itself to rebut the presumption.

ER's request for rehearing was denied.

562 BURDEN OF PROOF
Wages Paid

WITNESS
Credibility

84-4092 Yassine v Nine Mile Service, Inc (1985)

EE was employed as a service station attendant and is claiming wages for the periods ending 4/8/84 and 4/15/84. ER offered copies of payroll records with entries showing wage payments for 7/7/83 through 4/15/84 and copies of 25 unendorsed canceled checks for the period 7/14/84 through and including checks for 4/8/84 and 4/15/84. ER asserted it was a common practice for EEs to cash checks at the station without endorsing the payroll checks. ER also presented a witness who saw another EE cash the checks for EE.

The Department maintained that the canceled checks offered did not establish that EE received the wages due and that ER's consistent records of hours worked and wages due is uncharacteristic for service stations.

ER did not violate the Act. The Department's assertion that ER's witnesses were not credible or that the records maintained are uncharacteristic is insufficient to prove that EE was not paid all wages earned and due.

563 COLLECTIVE BARGAINING AGREEMENT (CBA)
Fringe Benefits
Discharge

84-4118 Filburn v Chrysler Corporation (1985)

EE was a salaried bookkeeper pursuant to a CBA from 4/11/66 through 9/12/83 when she was discharged. EE believes she is entitled to vacation pay for the period 1/1 through

8/19/83.

EE worked approximately eight months in 1983, and therefore did not have "continuous service" on 12/31/83 to qualify for vacation in 1984. The CBA also provided that if an EE is separated for reasons other than those set forth in the agreement, he or she will not be eligible to payment in lieu of vacation, and discharge is not one of the reasons set forth in the CBA.

ER did not violate the Act.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

564 EMPLOYEE
Work Location

JURISDICTION
Out-of-State Employment

84-4313 Mattens v A-1 Supply Co (1985)

EE was employed by Respondent Advance Irrigation Supply Company from June 1980 to 7/17/84. EE was hired in Mattawan, Michigan, by Donald Vos, who conducted business under that name. The main office of the business was located in Portage, Michigan.

EE was manager of a warehouse of Advance Irrigation Supply Company located in Indiana. He performed most of his duties at the warehouse and normally worked 40 hours per week. Occasionally, EE made deliveries in Indiana and Michigan, which were a minor part of his responsibilities and performed after his regular hours.

EE's appeal dismissed due to lack of jurisdiction. Rule 21(2) of the Administrative Rules states in pertinent part that a complaint filed by an EE whose permanent work station was outside the state of Michigan and who performed a substantial portion of his or her duties outside Michigan shall be dismissed due to lack of jurisdiction.

565 ADVANCES
Deducted From Final Pay

EXPENSES

WRITTEN CONSENT
Inadequate

84-4320 Donaldson v Sully-Van Lines, Inc (1985)

EE was a truck driver from 5/11/84 through 6/2/84. At the beginning of his employment, EE signed Department Exhibit 1, a petty cash receipt form allowing $500 for expenses which was to be returned upon leaving employment or the company would deduct it from EE's

wages. Since the payment of the fund was for the benefit of ER, Section 7 requires a separate consent for each wage payment subject to a deduction. Department Exhibit 1 had no specificity for application to a specific wage payment. EE was allowed cash advances for which he still owed ER $611.88. In addition, EE incurred two $50 penalties due to failure to follow the procedure on lease agreements, bringing the total to $711.88. ER deducted $581.39 from EE's paycheck leaving a balance owed ER of $130.49.

The parties agreed that the correct amount of wages earned by EE and offset against monies owed to ER minus taxes and FICA already paid by ER totaled $611.84.

ER violated Section 7 by deducting wages from EE's final check without written consent.

WAYNE COUNTY CIRCUIT COURT: 8/23/85

To determine whether a signed statement acknowledging a $500 expense fund authorizing any undocumented amount to be recovered at termination complied with Section 7.

Circuit Court decision not available.

566 COMMISSIONS

Payment

After Separation

Incomplete Sales

SUBPOENAS

83-3637 Kall v Dobson The Mover Corp

SAGINAW COUNTY CIRCUIT COURT ORDER: 10/29/84

Ordered compliance with an Office of Hearings' subpoena by 11/2/84. Also ordered judgment for costs incurred for failing to comply with subpoena, including attorney fees.

Decision after hearing: 6/25/85

EE worked from April 1982 until June 1983. Each month there was a revenue quota, and EE would be paid a 6 percent commission on sales in excess of the quota.

EE claims commissions for June and July 1983. The record was clear that EE did not make his quotas for either month. EE's argument that he would have made the quota for June, if he had remained employed for the entire month, may be true, but based upon the contract of employment, EE had to make the monthly quota before being eligible for a commission. ER testified no one received payments for moves EE arranged prior to separation.

ER did not violate the Act.

567 COMMISSIONS

Payment

After Separation
Customer Payment After Separation

84-4294 Lizotte v Lawrence A Wright, Inc (1985)

EE worked as a field man and accountant from 5/8/79 through 2/1/84 and earned a 40 percent commission at the time of his separation. In January 1984 a staff meeting was held and the president discussed the sale by the field staff of televideo computer systems for clients. EE contended the president made an offer of $1,000 to anyone who could sell a televideo computer system to a client. The parties and witnesses differed as to the exact meaning of the discussion. EE sold a computer system in January 1984 and was told by the president he would get the commission. When EE announced his resignation, a bitter argument ensued and the president said EE was going to get the commission before the resignation announcement.

The ALJ concluded there was sufficient communication of intent to pay a $1,000 commission for the sale of a computer system to a client. EE relied on this communication. ER's argument that the computer system was not paid for until after EE's resignation was not sufficient reason to deny EE the $1,000 commission.

ER violated Section 5(1) which requires payment to an EE voluntarily leaving employment all wages earned and due as soon as the amount can with due diligence be determined.

568 EMPLOYMENT RELATIONSHIP
Severing Employment Relationship
Notice to EE

EXPENSES

WRITTEN CONSENT
Fringe Benefits

84-4306 Austgen v Vogel International Ltd (1985)

EE began employment on 6/6/83 earning a salary of $325 per week. EE was responsible for finding jobs for physical therapists. He was paid through 10/15/83 and is claiming wages and unreimbursed expenses for the period 11/1/83 through 1/4/84.

ER claimed EE was hired on 6/6/83 for a six-month trial period to be paid $1,300 per month as a draw against commission. Also, EE was advised at a meeting on 9/29/83 that his employment was terminated, which EE denies. ER's payment on 10/15/83 was inconsistent with his testimony that EE was discharged on 9/29/83. The ALJ was unpersuaded that the payment on 10/15/83 was a gratuitous payment. The believable evidence showed that EE worked from 6/6/83 through 1/4/84, and that ER did not pay wages after 10/15/83.

ER violated Section 5(2) by failing to pay a discharged EE all wages earned as soon as the amount could be determined. No violation for failure to pay expenses, since there was no

written policy or contract providing for such payment.

569 COLLECTIVE BARGAINING AGREEMENT (CBA)
Deductions

FAIR LABOR STANDARDS ACT (FLSA)

PREEMPTION
CBA
Federal Preemption

84-3946 Beecher v Complete Auto Transport (1985)

Under Georgia's law, trailers registered in Georgia before 1983 were allowed to exceed a newly-adopted weight restriction which provided that units lower their dead axle to lessen the weight on the drive axle. This required a state permit displayed on the unit for inspection purposes.

ER's 7900 trailers exceeded the new weight limit; however, they had previously been registered in Georgia and were allowed the exception as long as the driver possessed the state permit authorizing the lowering of the dead axle. A notice concerning the permit was posted in the driver room and check-in center and also included in the newsletter.

On 1/16/84 EE drove one of ER's 7900 trailers and proceeded through Georgia without a weight permit. A citation resulted against ER in the amount of $154. ER deducted this amount from EE's check due to his negligence in not obtaining a permit. EE claimed that because the unit he drove through Georgia was not his assigned unit, he was unfamiliar with whether the proper permit had been obtained. He filed a grievance for reimbursement of the $154 deducted from his pay, which was denied because EE failed to follow company instructions before leaving on his trip to Georgia. EE filed a claim with the Wage Hour Administration.

ER argues that the Department, like state and federal courts, is barred by federal labor policy from enforcing a CBA which provides for resolution of disputes by arbitration.

There are no provisions in Act 390 which exclude EEs and ERs whose relationship is governed by a CBA; therefore the Department does have jurisdiction.

ER's arguments are premised on the doctrine of preemption, which is a constitutional question. Administrative agencies do not have the authority to rule on the constitutionality of statutes enacted by the legislature. A determination by the ALJ that Act 390 is preempted would nullify the statute's coverage for all union EEs in the state, thus ignoring the legislature's mandate to enforce Act 390 according to its terms.

ER violated Section 7 by deducting $154 from EE's wages without written consent.

See General Entries VII regarding the FLSA and XV regarding Act 390 authority to interpret

a CBA.

570 COMMISSIONS
Contract Interpretation

DEDUCTIONS
Part of Wage Determination

84-4049 Kozara v Southway Tire Company (1985)

EE was a salesperson. As explained during her interview, commissions were split on an 80/20 basis between EE and her sales manager, respectively. The vice president of ER testified this was the standard method for compensating salespersons and managers since the company formed in 1977.

EE claimed $1,406.61 illegally withheld from her check violated Section 7, which forbids deductions without the full, true, and written consent of EE, obtained without intimidation or fear of discharge for refusal to permit the deduction, except those deductions required or expressly permitted by law or a CBA.

ER did not violate the Act. There were no deductions from EE's wages. The 80/20 commission split was the method of compensation by which EE's wages were determined, and by her own testimony she agreed to this arrangement.

571 EMPLOYMENT RELATIONSHIP
Economic Reality Test
EE/ER Relationship Found

MINIMUM WAGE
When Wage Agreement Is in Dispute

WAGE AGREEMENTS
Dispute
Minimum Wage
Verbal

84-4317 Groce v Logistical Trans Continental (1985)

Complainant alleged he was employed by Respondent as Director of Marketing. EE's wage agreement was in dispute. Complainant believed he was to be paid $100,000 per year, increasing to $150,000 per year. Complainant worked regular hours for Respondent. Respondent claimed that Complainant was hired as an independent contractor even though Complainant had no experience or education to perform his duties. Respondent denied that Complainant was to be paid $100,000 per year.

The ALJ found Complainant to be an EE not an independent contractor and considered the

following factors: (1) the control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of ER's business toward the accomplishment of a common goal. Respondent controlled the performance of Complainant's duties by providing a place of employment, regulating hours of work, and preparing proposals for Complainant to send to prospective customers. The activities performed by Complainant were an integral part in advancing Respondent's quest to increase its contracts with minority business. Complainant's testimony that his salary was $100,000 per year was found to be incredible. In the absence of a wage agreement, Complainant was entitled to the minimum hourly wage of $3.35 per hour for all hours worked.

ER violated Section 2, which requires payment of all wages earned and due at least every 15 days, and 5(2), requiring payment of wages to terminated EEs as soon after discharge as the amount can be determined with due diligence.

572 WAGES

Shift Premium

WRITTEN CONTRACT

Provisions Explained Based on Past Practice

85-4533 Lowe v Kith Haven, Inc (1985)

Whether EE is entitled to a shift premium amount of $.10 per hour in addition to the regular straight time hourly rate.

The written contract provides that second shift EEs will receive the premium amount but does not state a time for the start of the second shift. There were three general shifts and EEs came at various times. EE's shift began at 11:30 a.m. For at least ten years ER had considered that 12:00 noon marked the distinction between first and second shift.

The contract at issue was ambiguous and incomplete by itself; therefore, additional evidence needed to be considered as to the meaning of the term "second shift." Considering the testimony presented, it was clear that for at least ten years ER never paid shift premium amounts to anyone starting work prior to 12:00 noon.

ER did not violate the Act. EE's claim for a shift premium amount contradicted the prior practice of ER, and therefore, the terms of the contract.

573 COLLECTIVE BARGAINING AGREEMENT (CBA)

Deductions

For Negligence

DEDUCTIONS

Written Consent

Signed as Condition of Employment

84-4321 **Antes v R & W Service System** **(1985)**

EE was a truck driver from 2/14 to 6/5/84. On 2/9/84, EE signed a document which stated that he would accept full monetary responsibility for damage to company equipment either owned or operated by the company. The document also authorized the company to retain all or any portion of monies owed for a loss. ER's dispatcher advanced EE $350 to pay for a wrecker to tow a trailer out of mud. The amount was deducted from EE's wages in the amount of $25 per week without EE's written consent except the 2/9/84 document.

The CBA set forth a mandatory arbitration and grievance procedure for settlement of disputes and interpretation of provisions. The agreement provided that EEs should not be charged for loss or damage unless clear proof of negligence was shown.

EE lost his claim before the grievance committee.

ER violated Section 7 by deducting wages without full, free and written consent of EE. The document dated 2/9/84 was signed as a condition of employment and only authorized retention of monies owed for losses incurred through damage to equipment. There was no damage to the equipment.

WAYNE COUNTY CIRCUIT COURT ORDER: 8/15/86
Affirmed decision of ALJ.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

574 DEDUCTIONS
Common Law

OVERPAYMENTS
Mistakes

SICK PAY
Not Covered by CBA

84-4236 **Landa v Consumers Power Co** **(1985)**

EE was hired in 1975. In 1984 his employment was governed by an agreement executed in 1983. EE was absent for two days due to illness. EE was paid because of a clerical error.

ER reduced EE's gross wages on two occasions to recover the error without his written consent. ER contended that the words in Act 7, "expressly permitted by law" regarding deduction included common law, which allows an ER to recover excessive compensation by means of offsets against subsequent entitlements.

ER violated Section 7 by deducting from EE's paycheck without written consent. ER may utilize other judicial remedies to recover the erroneous payments to EE.

JACKSON COUNTY CIRCUIT COURT: 10/3/85
To determine whether a deduction pursuant to a "common law" right complies with Section 7.

Circuit Court decision not available.

575 ATTORNEY FEES

EMPLOYMENT RELATIONSHIP
Economic Reality Test

REHEARING
Denied

85-4611 Price v Ward's RV Sales (1985)

Complainant worked on his own car using Respondent's facility and equipment in exchange for labor on Respondent's customers' automobiles. Complainant worked additional hours on customers' cars for which he was paid cash. An agreement was reached by the parties that the money due to Complainant would be paid by providing parts for Complainant's personal vehicle. Complainant would be paid for any work in excess of the value of the parts.

According to the economic reality test (see entry 303), Complainant met the requirements of an EE rather than an independent contractor. The record clearly showed that Complainant's duties were under the control of Respondent. Respondent never disputed wages due. Complainant performed his duties as an integral part of Respondent's business.

ER violated Section 2 which requires ERs to pay EEs on a regular basis, and Section 5 which directs payment of all wages due upon termination as soon as the amount can be determined. ER also ordered to pay attorney fees pursuant to Section 18(3).

ORDER DENYING REQUEST FOR REHEARING: 4/4/86
ER filed a request for rehearing arguing that he did not believe his presence was required nor necessary at the hearing and did not seek advice of counsel, and therefore was not properly advised of his rights. ER's request for rehearing was untimely.

ER was put on notice of his obligations to appear at the hearing to present evidence on all disputed issues. ER did not show good cause for his failure to appear at the hearing. The request for a rehearing was denied.

INGHAM COUNTY CIRCUIT COURT: 6/4/86
EE filed a motion to dismiss ER's petition for review 4/23/86. The Court dismissed the appeal without comment.

576 COLLECTIVE BARGAINING AGREEMENT (CBA)

Authority to Interpret
Grievances

PREEMPTION
CBA

84-4070 **Spain v Grand Valley State College** **(1985)**

EE had worked as a custodian for ER since June 1982. Her supervisor approved use of sick leave for February 20, 23, and 24, 1984, on the condition that she submit doctor's slips. She was paid for the sick days on 3/6/84 in the amount of $181.68, which was subsequently deducted from her 4/3/84 paycheck when no doctor's slips were submitted. EE did not consent in writing to this deduction.

EE filed grievances pursuant to the CBA for the deduction. Both grievances were denied.

ER claimed that the Department of Labor was without jurisdiction over the matter because the CBA provided a grievance procedure, including arbitration, for resolving disputes about its interpretation. Section 11, however, clearly authorizes and requires the Department to proceed with this matter.

It was ER's position that EE was paid for three days worked during the period from 3/18 through 24, 1984, by the previous payment for three days' sick leave for which she was ineligible. This contention is not in accord with the facts. Neither EE or ER understood or intended the payment of $181.68 to be an advance payment of wages, but for sick leave, which is a fringe benefit, not a wage.

ER violated Section 7 by deducting $181.68 from EE's wages without her written consent. The CBA also expressly prohibited unauthorized deductions.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

577 **BURDEN OF PROOF**
Appellant
Burden Not Sustained
EE Termination

EMPLOYMENT
Termination
Failure to Receive Paycheck

EMPLOYMENT RELATIONSHIP
Severing Employment Relationship
Notice to EE

85-4509 **Poris v Richard H Rassler Associates, Inc** **(1988)**

EE was a leasing agent and consultant. The question presented was the termination date of EE/ER relationship. ER had the burden of proving EE was given notice of his termination.

EE claimed he was not given notice of his termination until 8/24/84. This contention was supported by the fact that he continued to work. EE's last check was on 6/15/84. His failure to receive a paycheck on 6/29/84 did not give EE constructive notice of his termination because ER promised to pay him when funds became available. This promise was negated, however, on 7/13/84 when ER responded "that's tough" to a complaint about not receiving a paycheck. EE could not have reasonably relied on a promise to continue his salary after that statement.

ER violated Section 5 by failing to pay EE wages earned from 6/16/84 through 7/13/84.

OAKLAND COUNTY CIRCUIT COURT: 2/26/86
To determine when EE/ER relationship ended. Complainant continued to provide services as directed by ER. Circuit Court decision not available.

578 APPEALS
Dismissed

WAGES PAID
Checks Returned Unpaid by Bank

85-4613 Mills v Cragmar Security Specialist

Order Dismissing Appeal: 7/19/85

Complainant failed to appear at the hearing and good cause was not shown for his absence.

Wayne County Circuit Court Appeal:

Determined EE's illness was good cause for not attending hearing as scheduled. Claim was remanded for hearing which was held 1/16/86.

Hearing Decision: 2/14/86

The DO showed that ER owed EE wages for 152 hours of work. In addition to that, Complainant was paid wages in two checks which were cashed by EE at a neighborhood market and were returned, unpaid by ER's bank. Another check was given to EE as a debt statement until a good check could be issued to Complainant. A proper check was never issued to Complainant.

ER violated Section 5 for failure to pay EE all wages due upon separation from employment.

579 OVERPAYMENTS
Mistakes

TESTIMONY
Conflict

81-1887 Rivait v Flowers Plus (1982)

EE and the Department alleged that ER overpaid EE on 2/4/81 and deducted the overpayments from wages earned during the period 2/4/81 through 2/14/81. ER contended it did not overpay EE on 2/4/81 but paid her on 2/6/81 for working 80 hours during a three-week period from 1/19/81 through 2/6/81.

ER violated Section 5 by failing to pay EE all wages earned and due, and also Section 7 for withholding wages without written consent or a provision in a CBA. ALJ found that ER overpaid EE on 2/4/81 and deducted the overpayment from wages earned from 2/4/81 through 2/14/81. The testimony from ER's witness was inconsistent.

WAYNE COUNTY CIRCUIT COURT ORDER: 3/16/84
Dismissed for lack of prosecution.

580 APPEALS
Dismissed
Good Cause Not Found
Advice from Others

86-5369, et al Youngs, et al v Dennis F Payne and Earth Station Satellite,Inc, jointly and severally (1986)

ER's appeal of the Department's DO was received 26 days after the due date. The ALJ issued an order to show cause why the DOs should not be made final for ER's failure to request a timely appeal.

ER filed a response one day after the due date. His reasons for the late appeal were that he was originally told by the labor people that he should not be concerned because EEs were contract laborers; he was never contacted after that conversation until he received the DOs; and he was never given a chance to show that EEs were paid and that they were not EEs.

ER did not act reasonably by filing his appeal 26 days after the due date, and failed to establish "good cause" for his late appeal as provided in Section 11(4). ER's appeal was dismissed. The finding was made without consideration of ER's defense to the DOs. A good case on the merits by itself does not establish good cause.

FILED WITH INGHAM COUNTY CIRCUIT COURT: 8/18/86
To establish if there was (1) "good cause" for the late appeal; (2) whether an EE/ER relationship existed; and (3) whether EEs had been paid for all services.

ORDER: 10/19/87
Dismissed the appeal and affirmed determination without specific comment.

581 ADVANCES
Deducted From Final Pay

COURT ACTIONS
Remand

EXPENSES
Advances

WAGE ASSIGNMENTS
Lease/Rental Agreement

84-4371 Koning v RRR Enterprises (1985)

EE drove a truck or semi-tractor owned by ER. The truck and trailer were leased by ER to commercial freight carriers. ER and/or the carrier advanced money to EE at the beginning of trips for expenses. The amount of $1,170.93 was deducted from EE's wages without written consent because he did not turn in receipts to account for all truck advances.

On two occasions ER paid EE amounts totaling $495 prior to receiving payments from the carrier. Normally EE wasn't paid until after the carrier paid ER. EE claimed the $495 as being an advance deducted from his wages.

EE was supposed to drive a truck to Texas on his final trip. Instead, he drove from Detroit to Kalamazoo and returned the truck. ER refused to pay for the trip.

ER violated Section 7 by deducting $1,170.93 from EE's wages without written consent. The payments totaling $495 were clearly wage payments, not advances for truck expenses, because these trips were completed and EE had performed all services. EE did not earn wages on his final trip because he did not perform services for ER.

KALAMAZOO COUNTY CIRCUIT COURT ORDER: 12/17/85
Remanded to allow additional evidence by way of testimony relating to the amount of EE's wages withheld by ER; relating to any admissions by EE that expense monies advanced to EE were used to pay personal debts of EE.

ALJ DECISION UPON REMAND: 2/2/87
Wages in the net amount of $1,423.67 were earned and due EE. The amount of $3,600 paid to EE was intended and understood by the parties to be advances for truck expenses, not wage payments. Therefore, ER withheld or deducted $928.67 from EE's wages.

EE admitted that during trips for ER he used some of the money advanced for truck expenses to buy meals for himself and his wife. He admitted that he used part of his last advance to buy food after quitting his employment with ER, but did not use the money advanced for personal debts.

ER violated Section 7 by withholding $928.67 from EE's wages without written consent.

ER may utilize judicial remedies available to nonjudgmental creditors generally to recover this amount.

582 APPEALS

Dismissed

85-5039 Sears v Arthur Martin Order Dismissing Appeal: 4/4/86

An order dismissing ER's appeal of the Department's DO was issued on 4/4/86 because ER failed to appear at the hearing after proper notice.

OAKLAND COUNTY CIRCUIT COURT:

ER filed with circuit court August 1986 alleging Notice of Hearing was not received and advances not covered by receipts in excess of wages should be considered wage payments.

Circuit Court decision not available.

583 COLLECTIVE BARGAINING AGREEMENT (CBA)

Fringe Benefits

Statute of Limitations

EXEMPLARY DAMAGES

Discretionary

JURISDICTION

Lack Of

Statute of Limitations

Claim Date

SICK PAY

Payment at Termination

WORKERS' DISABILITY COMPENSATION

Determination of Disability

85-5055 SooHoo v City of Detroit (1986)

EE was an electrical inspector. His last day of work was 4/11/79. EE claimed he was unable to work because of job-related stress. ER requested EE to take a thorough medical examination, which indicated he was fit for normal duties and able to return to work without restrictions. EE continued to maintain, however, that he was ill and unable to work.

ER informed EE that he had been absent without official leave and was no longer entitled to

paid sick or vacation leave. In addition, ER discontinued deductions for insurance coverages. EE filed a workers' compensation claim and after appeal was awarded compensation. More than five years after he was removed from payroll, EE filed a claim against ER for wage supplement. The Department through its DO concluded that it did not have jurisdiction to consider EE's claim since it was filed more than 12 months after the violation occurred.

The ALJ found that EE's claim was not filed within the 12-month statute of limitation period set forth in Section 11(1). Therefore, ER did not violate the Act. Any violation occurred when ER removed EE from the payroll instead of allowing him to exhaust his sick leave reserve as required by Article 37 of the CBA. This event was more than one year before the claim was filed.

FILED WITH WAYNE COUNTY CIRCUIT COURT: 10/10/86
At issue was an application of the statute of limitations. The case was remanded for hearing, ruling that the claim accrued from the date of the first workers' comp check issued, not the date of the "injury."

ALJ DECISION ON REMAND
The ALJ, on rehearing, determined a supplemental wage payment was due, but denied a request for exemplary damages.

WAYNE COUNTY CIRCUIT COURT: Filed on 5/20/88
A Petition for Review was filed to reverse the ALJ ruling on exemplary damages. The circuit court found no abuse of discretion in ALJ refusal to award exemplary damages. The Court ruled the award of exemplary damages is discretionary and an ALJ could reasonably deny damages even in a case of a flagrant or repeated violation.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

584 VACATION

No Written Contract/Policy
Policy Changed

85-4532 Asbell v The Smoke House (1985)

EE began working on 6/23/82 and ceased employment in August 1984. The Department concluded that EE was entitled to $560 for 80 hours of vacation time.

It was clear from the testimony that ER did have a paid vacation policy in 1981. Since a policy statement was posted in early 1982 with no mention of paid vacations, the policy was changed, effective 1982. Section 3 requires an ER to pay fringe benefits in accordance with the written policy or contract.

ER did not violate the Act. EE was not entitled to paid vacation during 1983 and 1984 because there was no written contract or policy to provide paid vacations during this time.

585 EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

JURISDICTION

Independent Contractor Relationship

84-4457 Morgan v Brides To Be, Inc (1985)

Complainant was a WOMC radio announcer from August 1981 through August 1984. Respondent asked Complainant to commentate at a show to be held December 1983 for $75. After the December show, Respondent asked Complainant to commentate at ten shows during 1984. Prior to the start of the first 1984 show, Complainant was told she would have to commentate with another person. She refused and asked for the $75 for her previous work. She was given an IOU.

The facts indicated Complainant was not an EE of Respondent but an independent contractor. Respondent exercised very little control over the actual commentating but simply contracted for the performance of the task. There was no agreement for Respondent to take out taxes.

Department has no jurisdiction over the claim because no EE/ER relationship. Complainant may pursue her claim in a court of general jurisdiction.

586 DEDUCTIONS

Shortages

EE Errors

VALUE OF SERVICES

WAGES

Training Period

84-4464 Griffen v Maier and Werner (1985)

EE began work on 6/8/84 as a receptionist. She was not a member of a union. She worked one-half day on 6/8 and from 8:00 to 6:00 on 6/9. ER claimed one-half day on these two dates was a training period for EE. Wages were withheld from EE without her written consent to offset cash shortages and nonpayment for hairstylings.

ER violated Section 7 by withholding wages without EE's written consent. The ALJ found no merit to the claim that EE was a trainee for the first two days she worked. EE did not agree to work without pay and it would be rare for a new EE to be familiar with an ER's operating procedure.

587 VACATION

Resignation

Eligibility for Fringe Benefits

WRITTEN POLICY
Fringe Benefits
Interpretation

85-4482 **Selesko v Goldstein, Serlin, Eserow & Steinway** **(1985)**

EE was a legal secretary from 1/2/84 through 7/13/84 when she voluntarily terminated her employment. ER's written policy provided for five vacation days during the first year of employment, to be scheduled at the mutual convenience of EE and ER. The vacation could not be taken during the first six months of the year.

ER claimed EE was not entitled to vacation because she gave notice and quit prior to completion of her first six months.

ER violated Section 4 by failing to pay EE fringe benefits in accordance with its written policy. EE completed six months of employment on 7/2/84 and was thereafter entitled to five days' vacation pay upon her termination.

588 BURDEN OF PROOF
Unrebutted Testimony

WAGES
Training Period

85-4531 **Lent v Morry's Triangle Grill** **(1985)**

The Department's DO of $67 was based on 20 hours of work at $3.35 per hour earned when EE was training at ER's restaurant.

Based on the unrebutted, believable testimony of ER, it was concluded that EE agreed to observe the functions of EE in the kitchen on her own time without pay. EE did some work for which she was paid after this training period was over.

ER did not violate the Act.

589 DAMAGE TO OR LOSS OF PROPERTY

DEDUCTIONS
Damages
Written Consent

84-4378 **Johnson v Itah P Ndon** **(1985)**

ER withheld money due EE at the time of separation for a typewriter purposely broken by EE

and supplies thrown out. ER sent EE a check for the balance after deduction for these damages. EE sent the check back to ER. Written consent was not given for the deductions.

ER violated Section 7 which requires a written authorization signed by EE for any deductions other than those required by law. ER may sue EE for damages in court of general jurisdiction.

590 EMPLOYEE DEBT TO EMPLOYER

THEFT
Alleged
Deduction Taken From Wages

85-4510 Leib v Detroit Business Journal (1985)

ER withheld EE's wages without her written consent to recover the value of a briefcase she took from ER's premises. She traded the briefcase with an attorney for legal services. She was not a member of a union.

ER violated Section 7, which prohibits deductions from wages unless expressly permitted by law, a provision in a CBA, or written consent.

591 EMPLOYEE DEBT TO EMPLOYER

WRITTEN CONSENT
None

84-4373 Hogan v Losinski Mold Tool & Die (1985)

ER deducted $614.46 from EE's wages to offset bills and fines incurred by EE. EE did not consent to the deductions in writing. ER also did not pay EE $71.05 in wages earned.

ER violated Section 7 for deductions without EE's written consent.

592 BUSINESS PURCHASE
Deduction From Wages

DEDUCTIONS
Written Consent

MINIMUM WAGE
Deductions

REDUCTION OF WAGES/BENEFITS

84-4023 **Nouhan v Kozak Chevrolet, Inc** **(1985)**

Nouhan Chevrolet, Inc., became Kozak Chevrolet, Inc., after Respondent purchased it from Complainant. At this time an Agreement of Sale and Employment Agreement were executed. The agreement of sale provided that the buyer could reduce amounts payable to Complainant under any other agreement upon which buyer was obligated to him.

Respondent believed $27,411.95 earned by Complainant from April through December 1983 was offset by $57,304.94 in charges that were paid by Kozak Chevrolet for Complainant's benefit. Because the parties agreed to settle the matter in arbitration, Respondent considered these proceedings premature. Respondent believed Complainant's written consent was contained in the Agreement of Sale.

There are no provisions in the Act which exclude Complainants and Respondents who agree to have an arbitrator decide disputes. The language of the agreement of sale was ineffective for Respondent to withhold all wages earned by Complainant between April and December 1983. Since the agreement and authorized wage reduction were for the benefit of Respondent, written consent from Complainant was required for each wage payment subject to the deduction.

Respondent violated Section 7 by failing to pay Complainant $27,411.95 less amounts earned in April 1983 in excess of the minimum wage.

593 COLLECTIVE BARGAINING AGREEMENT (CBA)
- Deductions
- Fringe Benefits
  - Appellant Not Sick

OVERPAYMENTS
- Gratuitous
- Withheld at Termination

UNAUTHORIZED WORK

84-4072 **Ashley v Michigan Institutional Supervisors Union OPEIU Local No 512** **(1985)**

EE was employed pursuant to a CBA providing for vacation, holiday, sick and overtime pay (by mutual consent.) EE claimed overtime pay, sick pay, personal days and holiday. EE's claims for overtime and sick pay were unfounded because there was no authorization for the overtime work, and she admitted at the hearing she was not sick on the days she claimed as sick days.

As far as EE's claim for a personal paid holiday, she presented no proof that the request, left on an answering machine, was ever approved. The ALJ's interpretation of the contract was that EEs earned vacation at the rate of 1 1/4 days per month. EE's anniversary was 2/4, so she earned 1 1/4 days or 11 hours vacation.

ER's claim to be credited with monies EE overpaid herself for a bonus was denied. Act 390 prohibits wage and fringe benefit deductions unless there is an express provision in the CBA or written consent.

ER violated Section 5(2) by failing to pay a terminating EE all wages due and owing, and Section 7 by deducting wages or fringe benefits without EE's written consent.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

594 DEDUCTIONS
Written Consent

WAGES
In Kind

84-3942 Michnal v Western Michigan University (1985)

EE was employed as a residence hall director and was paid a salary. EE was required to live in the residence hall. EE's compensation for the 1982-83 year was to be $14,920. EE was to be paid $13,222 in cash annually with the balance of $1,698 in kind (room and board).

A wage structure study was done for EEs in 1983. As a result, ER's administration decided to increase the residence hall director's compensation. It was also decided the amount for in kind compensation should reflect market value.

During 1983-84 EE received biweekly paychecks for $17,693 ($21,770 less $4,077) per year. ER continued to provide EE with room and board in the residence hall without charge.

EE's paycheck stubs showed the amounts for room and board as "in kind" earnings, which were included in "gross earnings." This amount was not included in withholdings or deductions but was one of the amounts subtracted from gross earnings to arrive at net pay. EE did not give written consent to deductions from his wages of the amounts assigned to in kind compensation.

EE claimed $1,866 which equals the retroactive increase in the amount assigned to in kind compensation for the period from January 3 to July 3, 1983.

The Act regulates the payment of fringe benefits and wages. Wages are all earnings, whether determined to be on the basis of time, task, piece, commission, or other method of calculation for labor or services except those defined as fringe benefits. The term "wages" as used in the Act refers to monetary compensation rather than compensation in the form of goods or services. ER did not violate the Act. Therefore, the Department's determination that ER violated the Act was rescinded.

595 VACATION

No Written Contract/Policy
Past Practice

84-4020 Hartman v Shellcast (1986)

EE worked from 10/80 to 3/11/83. In 10/81 ER paid EE five days of vacation pay. In 10/82 EE was paid six days' vacation pay. EE claimed he was entitled to additional vacation pay. EE contended the EEs were entitled to an additional day of vacation pay for each year of service, although there was no written policy to that effect. The written policy provided for 1 week paid vacation after 1 year of service; 2 weeks after 5 years of service; 3 weeks after 15 years of service; 4 weeks after 25 years of service.

The Act requires ER to pay fringe benefits, such as vacation pay, only in accordance with a written contract or policy. EE was entitled to the vacation pay only as set forth in the written policy. ER's past practice in paying vacation benefits did not establish EE's claimed right to an additional day of vacation pay for each year of service. Under ER's written policy, EE was entitled to no more than three days' vacation pay as of 5/31/81; five additional days 5/31/82. He was not entitled to vacation pay from 6/1/82 to 3/11/83, because the policy prorated those EEs not having one year of service. EE earned eight days' vacation pay during his employment and was paid eleven. ER did not violate Section 3.

596 DEDUCTIONS
Minimum Wage
Written Consent

84-4262 Ross v Hamilton-Glendale Service (1985)

EE's rate of pay was at the minimum wage. ER had deducted $62 from EE's last paycheck, leaving 61 cents as payment after deductions.

Section 7 requires a written consent to be signed by EE before ER can deduct money from wages. The Act also prohibits an ER from making any deduction from an EE's wage even with written consent when the deduction reduces the wage to an amount less than minimum wage. The Act does not provide for an ER to recover monies due from an EE.

597 VACATION
Verbal Agreements

VERBAL AGREEMENTS
Unenforceable

WRITTEN CONTRACT
Not Altered Because of Verbal Agreement

84-4201 Waldorf v CATS Co, Inc (1985)

EE's claim was for seven days of vacation pay based on a conversation with ER. The employment contract did not contain any provision for paid vacation until after the first year of employment. EE worked about ten months for ER.

Since EE did not complete the first year of employment, the contract does not permit any payment for vacation. The contract cannot be altered based upon a conversation with ER.

598 EMPLOYMENT RELATIONSHIP
Independent Contractor Relationship Found

WAGES
Forfeiture by Termination

84-4255 Neuman v IDA, Impact Display Advertising (1985)

Complainant entered into an Independent Contractor's Agreement with Respondent. The Agreement provided that the independent contractor would not be required to follow a daily or weekly routine, work regular hours, report in person, by telephone, or in writing, or attend business meetings. The agreement also provided that no sale would be viewed as completed until payment was received, and any commissions due to the independent contractor would be forfeited upon termination.

Complainant was paid a $200 commission on each sale where one-half down payment was paid. After Complainant's termination, the balance of one sale was paid to Respondent. Complainant claimed an additional commission payment in the amount of $100.

Complainant was not an EE, since the only contacts he had with Respondent were daily phone calls and a meeting at the end of each week. The written agreement indicated the parties' intent that Complainant would be an independent contractor. Complainant forfeited any commissions after termination of his services pursuant to the agreement.

599 WAGES
Work Not Completed

84-4347 Pardee v J & S Forest Products (1985)

EE was a piece maker cutting and piling wood for ER. The job required EE to cut cedar and balsa and stack it for removal. To make up for being late one day, EE cut the tops of birch trees, which were larger, instead of the cedar and balsa, hoping to make more money faster. This left the tops of the birch trees on top of wood previously cut and stacked by EE for which he claimed $16.45. ER had to pay other EEs to clean out the birch tops so the stacked wood could be removed.

ER did not violate the Act. EE was not entitled to the $16.45 because he did not complete the job assignment given to him by ER.

600 EMPLOYMENT RELATIONSHIP

Severing Employment Relationship

Notice to EE

EVIDENCE

Insufficient to Establish Claim

85-4857 Jankowski v ETC JBM ETC, Inc (1985)

EE asserted he was hired at the rate of $1,000 per week as a national sales manager. The record established, however, he was never paid more than $500 a week. EE went on vacation 12/19/84 and returned on 1/8/85. ER testified EE was discharged when he did not return to work as scheduled on 1/7/85 and that no work was performed by EE on 1/8/85. EE contended he continued working for the company from 1/8 through 1/24/85 making several phone calls and visiting some contacts during this time. ER asserted EE came to the business once or twice more but did no work.

There was insufficient evidence presented to support EE's position. A reasonable person would not have worked three weeks without pay.

ER did not violate the Act. No EE/ER relationship after 12/17/84.

601 UNAUTHORIZED WORK

86-5336 Holt v Fred Weier dba Clarence's Std Service (1986)

Complainant's brother-in-law permitted Complainant to work without authorization while the owner was absent. Complainant was dismissed upon the owner's return.

Respondent did not violate the Act. Complainant was not hired by Respondent and therefore would not be entitled to wages.

602 EMPLOYMENT RELATIONSHIP

Control

Economic Reality Test

Truck Driver

85-5180 Brown v Coleman (1986)

Complainant worked as a driver of trucks owned by Respondent. The trucks were leased to Stoops Express, a commercial freight carrier located in Anderson, Indiana. Respondent contended Complainant was not an EE. Applying the economic reality test (see entry 303), it was concluded that Complainant was not an EE of Respondent. Complainant arranged for his loads and controlled his own activities on trips. Any payments from Respondent were a splitting of proceeds from Stoops Express, not a payment of wages. Complainant's primary

duty was driving trucks to haul freight. Stoops Express, not Respondent, was in the business of hauling freight. Therefore, performance of Complainant's duties was not an integral part of Respondent's business.

Respondent did not violate the Act.

603 VACATION

Resignation

Eligibility for Fringe Benefits

Written Policy

Written Contract/Policy

84-4292 Piechowski v Lakeside Shop-Rite (1985)

EE's employment lasted for a period of 36 months and EE was paid two weeks' vacation. EE claimed an additional one week's vacation. ER's original policy was to pay two weeks' vacation for 24 months of employment as of January 1st. This was later changed to 36 months. However, the policy also denied vacation pay to any EE resigning before the first of the year. Although EE had completed 36 months of employment, she had terminated her employment before January 1st. Therefore, she was not entitled to any additional vacation. ER did not violate the Act.

604 DEATH

Bereavement Pay

85-4541 Bynum v Aeroquip Corporation (1985)

EE was paid three days' bereavement pay upon the death of his adoptive parent. The natural parent then passed away and EE requested three more days' bereavement pay. The employment contract provided for bereavement pay for a stepparent or parent. An adoptive parent stands in place for a natural parent for all purposes.

ER did not violate Section 3. Since ER paid the bereavement pay upon the death of the adoptive parent, EE was not entitled to it upon the death of the natural parent.

605 COLLECTIVE BARGAINING AGREEMENT (CBA)

Fringe Benefits

Termination of CBA

VACATION

Termination of CBA

84-4346 Makee v North Star Lines, Inc (1985)

ER notified the union of its intention to terminate the CBA on its expiration date. There was

no written extension of the agreement. EE's claim was for vacation benefits and a driver's safety award.

Payment of fringe benefits is not enforceable when there is no written contract or policy. ER did not violate the Act.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

606 CLAIMS
Timeliness Of

JURISDICTION
Statute of Limitations

OVERTIME

WAGES
Lunch Hour as Time Worked

84-4266 Dunlop v The Weaver House of Flowers, Inc (1985)

EE was to take a 1/2 hour lunch per day, but she frequently worked during part of her lunch break. EE claimed 1 1/2 hours per week of overtime wages were due for time that she worked during her lunch period.

ER did not direct EE to work any part of her lunch periods. Also, a portion of EE's wage claim was for a period before the 12-month statute of limitations and, therefore, untimely. ER did not violate the Act.

607 PAROL EVIDENCE

WRITTEN CONTRACT
Parol Evidence

84-4137 Emerson v Peninsula Health Care, Inc (1985)

When the contract language is clear in meaning, no verbal evidence is permitted to interpret the contract. However, when the terms of the contract are not clear, discussion between the parties at the signing of the contract may be considered to clarify the meaning of the ambiguous terms.

The term "placed with a client" contained in the employment contract was unclear and had been discussed between the parties. At the time of the signing of the agreement, commissions would not be paid to Complainant if the contact or placement of the equipment was made by another person. Also, commissions would not be paid to the Complainant unless the first month equipment rental was paid by the customer. ER had paid EE for the

commissions on the pieces of equipment placed by him.

EE was not entitled to the commissions on equipment he didn't place. ER did not violate the Act.

608 COLLECTIVE BARGAINING AGREEMENT (CBA)
Deductions

85-4546 Dart v C J Rogers Transportation Co (1985)

ER made deductions from EE's wages to pay for a missing tarp for which EE was responsible for. The CBA stated that "employees shall not be charged for loss or damage unless clear proof of gross negligence is shown. This Article is not to be construed as permitting charges for loss or damage to equipment under any circumstances."

Since the tarp was equipment as opposed to the material being transported, the CBA did not permit a deduction from wages. ER violated Section 7.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

609 DEDUCTIONS
Written Consent

TRUCK DRIVERS
Deductions
Bail Bond

85-4815 Dimock v Hallmark Leasing, Inc (1985)

ER provided drivers to various carriers. ER had a contractual agreement in which its drivers, including EE, had to comply with the laws governing truckload commodities. The agreement authorized deductions for expenses or charges when the driver did not make a complete pickup or delivery. However, the agreement did not authorize deductions for an excess axle weight fine. EE picked up a load in Ohio and was to deliver it to Missouri. When EE drove over the scales in Illinois, he was issued a ticket and complaint for having an excess axle weight. EE violated the law because the load was not properly scaled. EE had to post bond in Illinois and scale the load so it would be legal. ER made a deduction from EE's paycheck as an advance against wages for the bail bond.

ER did not have the written consent of EE to make a deduction. ER violated Section 7.

610 REHEARING
Denied

85-4831 Ashley v Metro Moving & Storage, Inc (1986)

ER failed to appear for the prehearing conference and hearing. An Order Dismissing Appeal was issued. ER asserted it sent a letter requesting adjournment of the hearing, but the letter was not received by the ALJ.

The record was adequate for judicial review of the order dismissing ER's appeal. A rehearing is required only where, for justifiable reasons, the record is inadequate for judicial review. In all other situations rehearings are discretionary. ER had not established a justifiable reason for an inadequate record.

Since the record was adequate for a review, a rehearing was not required and was denied.

611 EMPLOYMENT RELATIONSHIP
Economic Reality Test

JURISDICTION
Lack Of
Statute of Limitations

84-4469 Jones v Russ Brown and Associates (1985)

A portion of Complainant's claim for commissions earned but withheld was dismissed due to lack of jurisdiction because it was not filed within 12 months of the alleged violation.

A more recent portion of the complaint was timely. The issue was whether or not there was an EE/ER relationship.

There was no proof that the commissions represented completed sales as of 7/31/83 (Complainant's last working day). Applying the "economic reality test" (see entry 303) to this case, it was concluded that Complainant was not an EE of Respondent. Respondent exercised no control; Complainant was not supervised in the performance of his duties or the hours he had to be available; Complainant's compensation was a monthly advance to be used as a draw against commissions from sales Complainant secured and completed and not in the form of a wage; the relationship was not one where Respondent might exercise a right to fire or discipline Complainant; and Complainant's sales were not an integral part of Respondent's business towards the accomplishment of a common goal.

Respondent did not violate the Act.

612 EMPLOYMENT RELATIONSHIP
Control
Self-Employment

85-4975 Kasham v Allison Salisbury (1986)

Complainant baby-sat Respondent's son and was not paid. An agreement was made to allow

Respondent to work at Complainant's husband's business, and Respondent's wages would be deducted to satisfy the debt owed to Complainant. After the wages were deducted, Respondent filed a claim with the Department. The Department ordered the deducted wages to be paid to Respondent.

A WH investigator said a complaint could be filed to recover amounts owed Complainant. The DO found Complainant was not an EE.

Applying the economic reality test (see entry 303), it was concluded Complainant was not an EE because there was no evidence that Respondent controlled Complainant's baby-sitting duties. Statements of an investigator do not affect the Department's authority under the Act to order payment of money.

613 EMPLOYER IDENTITY
Partnership Agreement Not Completed

EMPLOYMENT RELATIONSHIP
Joint Venture

TESTIMONY
Conflict

83-3251 6 Complainants v Dennis White and Joseph Mathis (1985)

Joseph Mathis leased property as a bar and restaurant known as Carson's Supper Club until he became ill. His son continued to operate the bar on weekends and for scheduled parties. The kitchen and restaurant facilities were subleased for holiday parties to Respondent White. White claimed he agreed to buy a 60 percent interest in Carson's and that he spent $20,000 making repairs to the kitchen.

White engaged all Complainants to work for him directly or through his agent. The wages owed Complainants were undisputed. The issue was whether Complainants were hired by either or both Respondents.

White and Mathis were never able to agree upon the terms of any kind of joint venture. They did sign a document where White agreed to lease the kitchen and restaurant from Mathis for $1,500 from 11/15/83 to about 1/1/83. As the lessee, White directly or through his agents engaged and permitted Complainants to work, directed their activities and promised them payment.

White violated Section 2 by failing to pay EEs at least every 15 days and Section 5 by failing to pay all wages earned and due as soon after termination as possible. No evidence Mathis engaged the services of or permitted Complainants to work on his behalf.

614 DEDUCTIONS
Written Consent

LOANS

WRITTEN CONSENT

EE Consent Ineffective if Below Minimum Wage

84-4310 **Karish v Sintel, Inc** **(1985)**

EE signed an authorization for payroll deductions of $25 per week to repay a loan from ER.

ER declined to deduct the $25 during the summer because EE needed the money due to a disability making him unable to work full time. ER also continued to pay insurance premiums on EE's behalf.

In September, ER withheld EE's paycheck to offset loan repayments and insurance premiums.

ER violated Section 7. Written consent required for each $25 deduction, since repayment of the loan was for ER's benefit. Written consent was also required for the deduction for past due loan payments and insurance. The deductions violated Section 7 by reducing EE's wages to less than the minimum rate.

615 BURDEN OF PROOF

Presentation of Proofs

Recordkeeping

WAGES PAID

Time Worked

84-4221 **Hayes v Nicks Transportations Specialist, Inc dba TSI** **(1985)**

EE claimed wages for "detention time," which was time waiting for a truck to be loaded at a steel mill. In order to be paid for this time, paperwork and mill passes were required to be turned in. ER's contention was EE must not have turned in the paperwork for the disputed detention time or he would have been paid. ER did not have records to indicate whether EE turned in the required paperwork and mill passes.

ER violated Section 5(2) by failing to pay EE all wages earned and due. EE's testimony established he turned in the paperwork, including mill passes, for part of the detention time. EE spent the rest of the time engaged in services for ER and should have been paid even though the paperwork was not turned in.

616 WRITTEN CONTRACT

Fringe Benefits

Incentive Compensation

ER Discretion to Pay

85-4687 Chmurynski v Pendell Printing, Inc (1985)

EE claims monies for personal days after his voluntary termination. The written policy provided that if an EE did not leave in "good standing," personal days would not be paid. ER contended EE did not leave in "good standing" because prior to his separation he arranged with a client to perform a portion of the work previously handled by ER which would cause a loss of work to ER.

ER did not violate the Act. ER did comply with the provisions of the written contract.

617 RESIGNATION

Work Partially Completed

VALUE OF SERVICES

85-4868 Benko v Dag's Collision Service, Inc (1985)

When EE terminated his employment he had performed partial work on four vehicles for which he had not been paid. ER refused to pay EE on these jobs because he had to pay another person to finish up the work of EE. Contrary to ER, past practice showed ER had paid EEs for partial work on large jobs.

ER violated Section 5 by failing to pay all amounts earned and due. ER did not have a clear policy of not paying for partial work to resigning EEs. EE was therefore entitled to payment for the work performed.

618 SICK PAY

Payment at Termination

WRITTEN POLICY

Interpretation

Against Drafter

Leave of Absence

84-4139 Zagumny v Knape & Vogt Manufacturing (1985)

While EE was off work due to illness (doctor excused) he was seen operating a crane by ER's management at a gravel pit. EE operated an excavating business out of his home and went to the gravel pit to meet the rep of a gravel company. While there, a part-time EE got a crane stuck and Complainant got in to show him how to extricate the crane.

After the doctor's approval, Complainant returned to work but was terminated pursuant to EE Handbook because he accepted gainful employment while on leave of absence.

According to ER's written policy, EE was eligible for sick pay for all but the first week

during the time he was off under the care of a physician.

EE was not on "leave of absence" as that term is commonly understood. ER violated Section 3 by failing to pay EE sick pay due.

619 COLLECTIVE BARGAINING AGREEMENT (CBA)
Subsequent Agreements

REDUCTION OF WAGES/BENEFITS

85-4641, et al Payne, et al v A & C Carriers (1985)

The membership of the local union voted to approve a per hour pay cut which took effect immediately. Five months later the Joint State Committee considered and approved the pay cut. Complainants claimed the pay cut should not have taken effect until the Joint State Committee approved it and therefore they were eligible for the reduction in their hourly wage from the time it took effect to the time of approval by the Joint State Committee.

The concession addendum was submitted to the Joint Committee within 90 days as required by the CBA. The CBA permitted an ER to put an addendum into effect once approved by the parties but before approval by the Joint Committee. If the Joint Committee did not approve the addendum, then backpay would be required.

ER did not violate the Act.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

620 VALUE OF SERVICES

WAGES
Work Not Completed

85-4535 Mashon v Klaassen Enterprises (1985)

EE cleaned apartments for ER and was paid per unit. After cleaning two town houses and one apartment unsatisfactorily in half the time it should have taken, EE was contacted to redo the work, which she refused. ER had to hire two other people to redo the work.

ER did not violate the Act. Although given an opportunity to correct the problem to receive the agreed upon payment, EE refused the offer.

621 JURISDICTION
Lack Of

VACATION

No Written Contract/Policy

85-4683 **Lee v Property Specialists Corp** **(1985)**

EE claims fringe benefits pursuant to ER's past practice of vacation pay and authorized expenses.

EE's claim for fringe benefits was unenforceable because there was no written contract or policy. ER did not violate the Act.

622 WRITTEN CONSENT

EE Consent Ineffective if Below Minimum Wage

85-4884 **Grzelka v Ross & Relyea, CPA, PC** **(1986)**

EE used more time off for sickness and vacation than she was entitled. ER refused to pay her wages earned at termination. EE had signed a statement directing ER to pay her for 3.25 hours as the hours worked in excess of hours she owed.

ER violated Section 7 for withholding EE's wages. Although there was written consent, ERs may not deduct wages below the minimum wage.

623 EMPLOYEE

Full-Time

SICK PAY

Full-Time EE

85-4548 **Pickett v Cranbrook Nursing Home** **(1985)**

Complainant contended she was eligible for sick pay benefits as a full-time EE. The written agreement provided that full-time EEs were those who worked 73 or more hours in a two-week period and part-time EEs were those who worked less than 73 hours but at least 37 1/2 hours in a two-week period.

Two exhibits referenced Complainant as a full-time EE by Respondent. These do not determine Complainant's status. The fact that Complainant may have been scheduled for 37 1/2 hours per week does not mean that she worked the required minimum 73 hours for each two-week period.

ER did not violate the Act.

624 BURDEN OF PROOF

Presentation of Proofs

MINIMUM WAGE
Deductions

TESTIMONY
Conflict

85-4538 **Lile v Seven Mile Ferguson Shell** **(1985)**

The Department found $402 owed to EE based on a letter signed by the owner saying wages for two pay periods were withheld because of missing cash. But at the hearing the owner testified they withheld one check. EE contended he was not paid for the last three weeks of his employment.

The dates and amounts shown on the W-2 and W-4 forms submitted by ER did not match the payroll record cards. One card was signed by someone other than EE, and it appeared there was an error in reporting EE's wages. It also appeared a second card showing gross earnings and taxes taken out was prepared after EE signed the original one.

ER did not meet his burden of proof because of the discrepancies and problems with the proofs presented. ER violated Section 7 by withholding wages without written authorization for each deduction. Even if there were written authorizations, Section 7 prohibits deductions if the net amount after deduction would reduce wages below the minimum wage. This was the case, since EE earned minimum wage.

625 ADVANCES
Deducted From Final Pay

TRUCK DRIVERS
Deductions
Food/Clothes

WAGES
Cash Payments

85-4612 **Meldrum v Peeples** **(1985)**

Monies were withheld from EE's wages as a truck driver to offset advances used for food and clothing.

EE's wages cannot be paid with food and clothing. Section 6 requires wages to be paid in U.S. currency or check.

ER violated Section 7 for withholding wages to offset advances.

626 SICK PAY
Maternity Leave

WRITTEN CONTRACT
Fringe Benefits
Maternity Leave

85-4617 Robbins v Financial Data Systems Security, Inc (1985)

ER had a written contract which provided for sick leave but did not mention time off for pregnancy. The sick leave policy required EE to file a "Request for Leave" form.

After EE was notified her yearly raise would be smaller than expected, she notified ER she would begin her maternity leave immediately (November) rather than waiting until the first of the year. EE was sent a letter directing her to return to work immediately or be considered as a voluntary quit.

ER did not violate the Act based on ER's sick leave policy. EE did not present a doctor's statement indicating it was medically necessary for her to leave in November, nor did she fill out the required Request for Leave form.

627 EMPLOYEE
One Who Is Permitted to Work

UNAUTHORIZED WORK

85-4557 Williams v Virginia Park Citizens District Council (1985)

EE was suspended in August for reporting to work late. She was advised by telegram on 10/12, signed by the chair of the personnel committee, that her suspension was continuing. Based on the verbal statements of 2 council members and the alleged agreement of the assistant director, she returned and worked October 6, 17, and 19.

ER did not engage or permit EE to work on October 16, 17, and 19. The telegram of October 12 advising of continued suspension and the final termination of October 13 were signed by the chair of the personnel committee.

628 SICK PAY
Unearned

VACATION
Offset by Sick Leave

85-4580 Nichols v Sims-Varner and Associates (1985)

The Department found 12 hours' vacation due EE. The record established that EE was owed 12 hours' vacation pay, but she was also overpaid 24 hours of sick leave. The Department claimed that EE did not sign a statement permitting ER to apply excess sick leave to the

vacation pay owed.

The contract of employment did not require ER to pay EE the $114 overpaid for sick leave. The overpayment for sick leave was a gratuitous payment and may therefore be applied to a vacation benefit owed to EE.

ER did not violate the Act.

629 BONA FIDE EXECUTIVE CAPACITY

FAIR LABOR STANDARDS ACT (FLSA)

MINIMUM WAGE
EEs Excluded

85-4606 Morton v Arrigo's Little Italy, Inc (1985)

ER agreed to pay EE a salary for 60 to 70 hours of work a week. EE understood he was to be paid 1 1/2 times his regular rate for any work in excess of 40 hours per week. EE presented a written contract to ER which was never signed.

The parties raised the issue whether ER would be regulated by the Minimum Wage Law (Act 154 of the PA of 1964) or the federal FLSA (29 USC 201). Both Acts require compensation at not less than 1 1/2 times the regular rate in excess of 40 hours. An exception to this requirement is an EE employed in a "bona fide executive capacity."

EE was employed in a bona fide executive capacity because he was compensated on a salary basis at a rate greater than $250 per week; his primary duty was kitchen manager at ER's restaurant, and he regularly directed the work of more than two EEs. ER did not violate the Act.

See General Entry VII.

630 OVERPAYMENTS
Mistakes

85-4620 Harwood v The Wilsons (1985)

EE submitted time cards for hours worked. Some time cards had duplicates. EE asserted this was because some days he did not always get paid on time. The Department concluded there were two days when EE was not paid and cited a violation of Section 5, requiring all wages to be paid at termination as soon as possible.

ER did not violate the Act. After reviewing EE's work for the entire season, the ALJ concluded EE had received pay for all wages earned, since he was overpaid some pay periods.

631 BURDEN OF PROOF
Recordkeeping

EVIDENCE
Insufficient to Establish Claim

85-4558 Rosenbloom v Tamiko's Japanese Restaurant and Sushi Bar (1985)

The parties' dispute was whether EE worked 41 1/2 hours from 7/9/85 through 7/22/85. ER did not retain EE's time cards for that period but relied on records of receipts and tips which indicated EE did not work that week. EE relied on an incomplete personal calendar showing starting times and some quitting times. There were discrepancies between the hours shown on the calendar and EE's paycheck statements. EE did not object to the amounts of her paychecks at the time she received them, although her calendar showed she worked almost twice the amount of hours for which she was paid.

The calendar was not a reliable record of EE's hours worked. She did not meet the burden of proving she worked 41 1/2 hours during the period in question.

632 DEDUCTIONS
Damages

WAGES
Training Period

84-4050 Cichocki v Farah Medical Clinic (1985)

The written contract provided EE would be paid $9 an hour until ultrasound equipment was installed and then her wage would increase to $9.50 for a six-week probationary period. ER refused to pay EE for 19 1/4 hours worked because he claimed she quit her job abruptly, did not keep her agreement to work as an ultrasound tech, spent most of the three days in training, and caused damage to the x-ray machine.

ER violated Section 5 by failing to pay a terminating EE all wages earned and due. Written consent would be required to offset EE's wages for damage to an x-ray machine.

633 COLLECTIVE BARGAINING AGREEMENT (CBA)
Fringe Benefits
Payment Denied to Overpayment Offset

VACATION
Anniversary Date
Payment in Advance

84-4477 **Vandenburg v McLean Trucking Company** **(1985)**

EE was entitled to four weeks' vacation pay after completion of 15 years' employment under the CBA. Vacation is received in the year after it is earned. EE was given four weeks' vacation in the year prior to his 15 years' employment when he was only entitled to three weeks. The fourth week was taken because ER's general manager told EE to take a week of vacation or lose it. Complainant understood this was because ER was changing from a calendar year to an anniversary system.

After EE's layoff and completion of his 15th year of employment, ER refused to pay him the full four weeks' vacation earned to offset the overpayment made the previous year.

ER violated Section 3 by failing to pay four weeks' vacation earned.

634 SALARIED EMPLOYEE

WAGE AGREEMENTS
Salary
Verbal

85-4974 **Dean v Black River Land Co** **(1985)**

Complainant worked under a salary agreement. The Department claimed that although EE did not put in a full week's work his last week, he should be paid based on the salary agreement. As far as one other day EE worked and was not paid, the Department came up with an average hourly wage and multiplied that by the number of hours worked for the day as due and owing.

Department affirmed. ER violated Section 5(2) by not paying EE all wages earned and due.

635 BUSINESS PURCHASE
Incomplete

EMPLOYMENT RELATIONSHIP
Control

84-4238 **Woody v Dor-Don, Inc dba The Benchwarmer** **(1985)**

Three individuals purchased Respondent corporation on 6/15/83 and were to start proceedings for transfer of the liquor license. At the direction of the Liquor Control Commission, Respondent president took back possession of the business on 3/29/84 because the liquor license had never been transferred. During the period 6/15/83 through 3/29/84, Respondent president had no control over the activities of the business. Complainant was hired by the three purchasers of the business and was owed wages for checks the bank returned for insufficient funds.

Respondent president did not violate the Act. His company, Dor-Don, Inc., remained titleholder of the liquor license only. He had nothing to do with the business during the time at issue. Wages are due from the people who hired and supervised Complainant's activities.

636 BURDEN OF PROOF

Presentation of Proofs

VACATION

No Written Contract/Policy
Policy Different for Management EEs
Verbal Agreements

85-4835 Karr v Concord-Wrigley Drugs, Inc (1985)

EE was employed as part of a management team for ER. He asserted he was covered under EE Handbook regarding the earning and receipt of vacation pay, which would entitle him to another 1 1/2 weeks' vacation. ER asserted EE Handbook did not apply to management EEs. There was a verbal agreement by the management team that they would take vacation as needed. EE agreed to this in a letter which was submitted into evidence.

The Department claimed EE was entitled to the 1 1/2 weeks' vacation because ER sent a letter to the Department stating EE already received 3 weeks' vacation pursuant to EE manual. However, a computer printout showed EE had taken 60 hours. The Department also claimed EE Handbook covered all EEs without any exceptions noted in the document.

ER claimed it did not realize until after submitting the letter to the Department that EE was not covered by the vacation policy in effect for nonmanagement EEs.

Based on EE's letter agreeing to the verbal agreement for vacation benefits, there was no written agreement covering vacation for EE. The Handbook was never given to EE and there were many provisions in the Handbook which EE acknowledged did not apply to him.

ER did not violate the Act. ER met its burden of proof through EE's letter of verbal agreement on vacation and the testimony of two witnesses.

637 VACATION

Anniversary Date

WRITTEN POLICY

Interpretation
Against Drafter

85-4818 Schumann v Northern Screw Products (1985)

ER's policy was ambiguous with regard to whether vacations were based on a calendar year or anniversary year. The policy did not state one year is the anniversary date from hire. EE

worked 365 days, so he met one definition of a year and is entitled to the vacation pay claimed.

The ambiguity in the policy was resolved against ER as the one who drafted the policy. ER violated Section 4 by failing to pay fringe benefits earned upon termination.

638 EMPLOYEE DEBT TO EMPLOYER

THEFT
Proven

WAGES
Cash Payments

85-4537 LeJeune v Wilmark Enterprises, Inc (1985)

ER claimed it was entitled to set off the value of computer equipment which EE had been convicted of stealing and that the stolen computer equipment more than compensated EE for monies owed.

EE cited two Office of Hearings' cases in support of its claim. The cases cited were distinguishable from this case, since they both involved embezzlement of money in excess of their earned wages. Act 390 requires wages to be paid in U.S. funds, so it could be concluded EEs in the cited cases were adequately compensated. However, EE in this case was convicted of larceny from a building and there was no indication money was involved.

Section 7 is clear in rejecting any concept of set-off. It requires written consent or a provision in a CBA for wage deductions.

ER violated Section 5 by failing to pay all wages earned and due.

639 COMMISSIONS
Draw Against Commission
In Lieu of Salary

WAGES
Pursuant to Written Contract

85-4676 Larson v ARS Inc, dba MicroAge Computer Stores (1985)

EE was paid a salary during a probationary period as a sales consultant. ER contended that wage agreement was then changed to a draw against commission in early November. Nothing in the written employment agreement supported this. EE claimed the company president assured him he would continue to receive his salary for November due to delays in remodeling the store during the change in franchises.

EE was terminated in November and not given his last paycheck because he made no sales during the last two-week period. He therefore did not earn any commissions. It was unlikely EE would have worked two weeks with the knowledge he would not receive any wages if he did not have any sales. It was concluded the amount paid EE biweekly was a salary and not a draw.

ER violated Section 5 by failing to pay all wages earned and due.

640 ACT 390

Remedial Legislation

VACATION

Earned

Payment at Termination

80-531 Andes v Michigan Economics for Human Development (1980)

The written policy was clear that an EE's earned vacation pay could be received after completion of a probationary period. The Department's contention, found to be without merit, was that earned vacation was not due an EE at termination unless clearly spelled out in the policy. There was nothing in the contract saying EE had to continue employment in order to receive past earned benefits. Act 390 as a remedial statute must be construed broadly to effectuate its intent.

ER violated Section 3 by failing to pay fringe benefits in accordance with the written policy.

641 WAGE AGREEMENTS

Verbal

WAGES

Poor Economic Situation

85-4854 Fiske v ETC JBM ETC, Inc (1985)

EE was given the service manager's job at $650 per week in October. ER asserted the receipt of $650 a week tied to EE's ability to perform the work and to the financial health of the company. The ALJ concluded there was a wage agreement for $650 from October to January as evidenced by ER's assurances that salary amounts not paid then would be made up after the first of the year. Also, at least initially, ER tried to catch up to the $650 a week payment schedule. Finally, a contract was prepared after the first of the year officially changing EE's salary to $250 per week.

ER violated Section 5 by failing to pay all amounts earned and due.

642 ADVANCES

Deducted From Final Pay

THEFT
Proven

85-5009 **Keesler v Executive Art Studio, Inc** **(1986)**

ER paid for dental services needed by EE. ER believed this "benefit" to be an advance of wages to be repaid by EE. EE took a camera and briefcase and was discharged. Since EE had been discharged, he was not able to repay ER for the dental services. ER withheld wages for the last two pay periods worked by EE. EE did not give a written authorization for these deductions.

Fringe benefits are compensation due an EE pursuant to a written contract or policy. Since there was no written contract, ER's payment was not a "benefit" as defined by the Act. ER violated Sections 5 and 7 for unauthorized deductions and wages withheld.

643 COMMISSIONS
Draw Against Commission

WAGE AGREEMENTS
Unclear
Verbal

85-4561 **DesVoignes v Doug Fairchild dba Tire Systems** **(1985)**

EE had a verbal agreement with ER for weekly pay. EE believed he was to be paid a salary and receive a commission on sales. ER believed the weekly payment to be a draw against commissions. No commission rate had been agreed upon.

When EE terminated his employment, ER stopped payment on the last paycheck. EE did not earn any commissions during his employment. There was no clear verbal agreement about the terms of EE's employment.

The weekly payment was a salary, not a draw against commissions. ER violated Section 5(1).

644 EMBEZZLEMENT
Alleged But Not Prosecuted

WRITTEN CONSENT
None

86-5265 **Shorter v Dr James V Barone** **(1986)**

EE was employed as a receptionist. ER refused to pay EE because of its belief that she

embezzled $230 and caused it to incur expenses for a CPA to audit its records. ER filed a police report but did not prosecute. EE did not give written consent to withhold wages.

ER violated Sections 5 and 7.

645 COMMISSIONS

Earned

WRITTEN CONTRACT

Employer Is Bound by Terms

85-4916 Elzinga v National File Co, Inc (1986)

EE's claim was for commissions on sales as a sales manager. EE believed his employment contract entitled him to commissions on sales made up to the date of discharge. ER believed that EE was not entitled to commissions because no sales were made. EE received an annual salary plus a commission percentage based on sales by his sales representatives. The Department believed that EE was entitled to commissions, because sales were made and duties performed by EE to the date of discharge.

EE was entitled to commissions on sales. ER violated Section 5. The terms of the employment contract covered payment of commissions and required commissions based on the sales made by EEs working for the Complainant.

646 COLLECTIVE BARGAINING AGREEMENT (CBA)

Fringe Benefits

Substitute Teacher

Grievances

JURISDICTION

Exhaustion of CBA Remedies

85-4861 Denman v City of Detroit Board of Education (1986)

EE was a teacher governed by a CBA beginning 9/17/71. Between 1968 and 1971 he had worked as a substitute teacher. EE claimed a longevity bonus in 1984 for 15 years of full-time service, stating he was credited with the three years he worked as a substitute when he received his contract in 1971. ER claimed that the Department did not have jurisdiction because EE had not exhausted his remedies contained in the CBA, and the term "full-time employees" referred to those with contract status.

Act 390 covers all ERs that engage or permit EEs to work. A CBA cannot deprive EE of a right granted by state law. ER violated Section 3 by failing to pay fringe benefits in accordance with the written contract. EE was entitled to a bonus payment because he had worked more than 15 years by December 1984 according to MSA 105.41236, which entitled substitute teachers the same privileges and salary as regular teachers after 60 days' service.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

647 MINIMUM WAGE

When No Specific Wage Agreed Upon

85-4486 Logue v Crown and Bray dba Crown Arabian Stables (1986)

EE contacted ER in response to a magazine advertisement for an experienced on-farm horse trainer. EE contended she was to receive $375 per month plus room and free board for her two horses.

ER contended EE's only function was to exercise five horses in return for free room and board plus free boarding of her horses. ER stated EE worked two hours per day for 26 days exercising the horses.

Sections 3 and 4 (Minimum Wage Law) require payment of minimum wage, although ER did not agree to pay EE wages. ER violated Section 5 by failing to pay wages earned at termination. EE due wages for two hours a day for 26 days at the minimum wage rate.

648 VACATION

Anniversary Date

WRITTEN POLICY

Interpretation

Against Drafter

85-4491 Owens v Apex Drug Stores, Inc (1986)

Initially, EE was classified as a Regular Part-Time (II) EE. She was later reclassified to a Regular Part-Time (I) EE.

ER contended EE's anniversary date for purposes of vacation was the date she was reclassified from a II to a I, stating II EEs were not eligible for vacation benefits.

The literal terms of the vacation policy provide for vacation benefits when an EE completes one full year of employment, and a vacation year begins on the date of EE's first anniversary with the company.

The policy said nothing about a requirement that EE's year(s) of service be in a classification which is eligible for vacation.

The written policy is ambiguous and should be construed against the drafter. ER violated Section 3 by failing to pay EE vacation earned.

649 VACATION

EE on Payroll on Payment Date

WRITTEN CONTRACT

Fringe Benefits

Provisions Explained Based on Past Practice

85-5149 Zwiers v Modern Molds, Inc (1986)

Vacation benefits were given to each EE the first day in July of each year. EE claimed he was entitled to vacation benefits on 7/1/85 based upon the period of his employment from 7/1/84 through 4/17/85 (his last day of work).

ER claimed the vacation policy stated each "employee" would be paid vacation benefits July 1 of each year and because Complainant was not an EE on 7/1/85, he was not eligible for vacation benefits. This had always been the interpretation of the policy. EE claimed there was nothing in the policy to limit the payment of vacation benefits to persons actually on the payroll on 7/1 of each year.

ER did not violate the Act. ER's interpretation of the word "employee" in the vacation policy was correct. Vacation policy applies only to those persons on the payroll on 7/1 of each year.

650 PROMOTION

Not Approved by Proper Party

WAGES

Unauthorized Pay Increase

85-5154 Bishop v Sunshine Food Stores, Inc (1986)

EE was employed as a clerk at the minimum hourly wage and then promoted to assistant manager with a 15 cent per hour raise. ER claimed that EE was not entitled to additional pay because her manager had no authority to grant an EE a raise, that it must be approved by the company president. The president did not approve a raise for EE.

ER did not violate the Act.

651 CLAIM

After Exhaustion of CBA Remedies

WAGES

Determined by CBA

85-4849 Fogg v Commercial Carriers (1986)

EE's claim was for excess loading time pay for three instances. Two of the three days were

not filed within the statutory required time limit and were dismissed. The claim for the one remaining day involved 75 minutes of excess loading time and loading seven vehicles. EE had been paid for excess loading time for three cars. He was not paid extra for the other four cars as they were not compensable per the union/company agreement.

The CBA stated that excess loading time pay claims must first be heard by a negotiating committee. In this case, EE's claim had been reviewed and it was determined that he was entitled to pay for 3/10 of an hour. If EE disagreed with this finding, he was required to exercise his rights as set forth in the CBA. ER had paid the amount the committee had found to be due and did not violate the Act. Had ER failed to pay the amount, a claim with the Wage Hour Administration would then have been proper.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

652 OVERPAYMENTS

Withheld at Termination

VACATION

No Written Contract/Policy

WRITTEN CONTRACT

Expiration Before Benefits Claimed

85-4834 Parsell v Police Officers' Association of Michigan (1986)

ER implemented a written employment agreement contract for three years, 1974 through 1977. Although the agreement expired in 1977, an addendum to the agreement was approved and was to expire 9/30/83. EE's employment was terminated in February 1984.

EE was to receive a salary with a 10 percent increase each October. In addition to salary, the agreement provided for the lease of a car, reasonable expenses, vacation pay, holiday pay, sick time, and medical insurance. When EE's employment was terminated, ER withheld one week's wages to offset advances, insurance payments, overpayment, and unauthorized removal of property. EE did not give written consent for ER to withhold wages. EE also claims vacation pay because the employment agreement provided 20 days of vacation pay per year. However, the addendum to the agreement expired before EE's employment was terminated.

ER did not violate Section 3 which deals with payment of fringe benefits in accordance with the terms set forth in the written contract, since the agreement had expired. ER violated Section 5 for not paying an EE all wages earned when employment is terminated. ER violated Section 7, since it had deducted wages without the written consent of EE.

653 BURDEN OF PROOF

Appellant

Presentation of Proofs

VACATION

Written Contract/Policy

85-5015 **Sokol v Tradin' Times, Inc** **(1986)**

EE was employed as an account representative for ER under a written agreement. This agreement did not provide for payment of vacation benefits. Testimony was brought forth that vacation benefits were provided in ER's Employee Handbook which was not offered into evidence.

ER violated Section 4 by failing to pay vacation benefits. ER did not meet its burden of proving vacation benefits were not due.

654 AGENCY

Apparent Authority of ER Agent

APPEALS

Untimely

Good Cause Found

DO Not Received by Party or Attorney

COLLECTIVE BARGAINING AGREEMENT (CBA)

Interpretation

85-4652 **Hayes v Riverside Place, Inc** **(1985)**

ER was directed to show cause why its appeal should not be dismissed, since it was not filed within 14 days of the Department's determination. The ALJ found good cause for the late appeal because the Department failed to send a copy of the DO to ER.

ER hired a contractor to manage apartments it was negotiating to purchase. The contractor was authorized to hire EEs and perform other functions related to the maintenance and upkeep of the property. EE was hired as a maintenance person by the contractor. EE worked 522.5 hours for which he had not been paid. Respondent claimed that EE had not been paid because the contractor had no authority to hire EE at $7 an hour.

ER violated Section 5 by failing to pay an EE all wages earned and due. ER's dissatisfaction with EE's rate of pay after the work was performed did not relieve its obligation to pay the pay rate set by their agent, who was acting with apparent authority.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

655 PENALTY AMOUNT

85-5615 **Bujold v M & G Convoy, Inc** **(1986)**

EE claimed a penalty amount allegedly due for delay times or breakdowns as provided in the CBA. The ALJ held that the penalty amount claimed was not a fringe benefits or a wage payment for labor as defined by the Act. ER did not violate the Act.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

656 TESTIMONY
Conflict

WAGE AGREEMENTS
Verbal

85-5077 Anderson v National Ag Products Development, Inc (1986)

On or about 6/1/85 a meeting was held concerning sales quota amounts for Complainant and EE Polson. Complainant was paid his regular salary for the period ending 6/7/85. He was out of town on personal business from 6/10 to 6/14. He claimed further wages under the quota system, arguing he worked six days and sold in excess of $11,000 to customers from 6/1/85 to his discharge date of 6/17/85. EE Polson testified the new system was not put into effect immediately because of questions concerning applicability.

ER did not violate the Act. The quota system was not clearly set up on 6/1/85.

657 ACT 390
Independent Statutory Rights

COLLECTIVE BARGAINING AGREEMENT (CBA)
Deductions

PREEMPTION
CBA
Federal Preemption

84-4025, et al 15 Complainants v M & G Convoy, Inc (1986)

EEs were dispatched to haul loads. On the first leg of the trip they were paid in advance the full contract rate. When the second leg of the trip was found to be longer than the first leg, ER deducted amounts overpaid for the first leg of the trip from EEs' wages without written consent or an express provision in the CBA. The CBA allowed a joint review committee to grant relief from pay rates specified in the CBA to increase the competitiveness of ER. The committee's decision was subject to the grievance and arbitration provisions of the agreement.

ER claimed since resolution of the claim was dependent upon analysis of the CBA, their claims must be treated under the NLRA or be dismissed because of preemption by federal

labor contract law. Also, the method of adjusting EE's pay was in conformity with the contract under the competitive agreement.

The Department found that ER violated Section 7 for the deductions, since the CBA did not expressly provide for the adjustment of driver's wages to conform with the competitive agreement.

ER violated Section 7 for deductions made without written consent or an express provision in the CBA. There are no procedural barriers or exhaustion requirements that prevent EEs from exercising their statutory rights under the Act.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

658 COMMISSIONS

Obligation of Successor Business

JURISDICTION

Over Contract Provisions Between Respondent and Successor Business

84-4287, et al **Kornfield, Hoeft, Alescio, Ovington & Hench v The Hearthside, Inc** **(1986)**

All EEs were discharged by ER when it went out of business on 6/21/84. All assets were transferred to Ethan Allen (EAI). EAI hired several of the EEs beginning 6/22/84 to perform the same jobs and receive the same commissions previously received. EEs were specifically told EAI would not be paying commissions for furniture ordered prior to 6/21/84 but delivered after that date. Hearthside would be legally responsible for any commissions due for work performed prior to 6/21/84. However, Hearthside went out of business and presumably had no funds to pay the claims. EEs claimed the commissions for merchandise delivered after 6/21/84 were owed by EAI.

Based on its status as a successor corporation, EAI may be liable because it was unjustly enriched or based on its contract with Hearthside to assume and perform all outstanding contracts relating to undelivered furniture, but these issues are beyond the scope of the Act. EEs may pursue their claims in district or circuit court where EAI's responsibility for payment could be considered without regard to whether EAI is an ER.

Hearthside violated Sections 2 and 5 for failure to pay wages (commissions) earned and due upon delivery of furniture and payment by customers after 6/21/84.

659 WRITTEN CONTRACT

Failure to Pay According To

85-5064 **Alling v Potter Moving and Storage Co** **(1986)**

EE was employed as a commissioned sales representative. There was a written commission

rate agreement. Within this agreement was the notation that EE would receive a $50 per week car allowance that would not be charged against the drawing account. EE claimed $1,000 for the car allowance. ER claimed that it agreed to pay EE only reasonable car expenses and not the $50 per week car allowance. It was an oversight to place EE's name on the portion of the agreement providing for a car allowance. ER violated Section 4.

660 BONUSES

Written Contract/Policy/Agreement

COMMISSIONS

Earned

85-5020 Lemich v Ford & Mackey (1986)

EE was employed as a commissioned salesperson. He was responsible for selling insulation to homeowners who would finance the sale through interest-free loans from local utility companies. In addition to the commissions earned, EE also claimed a $300 bonus. There was no written policy. ER did not appear at the hearing. The Department submitted a document to show that some of the commissions claimed by EE were canceled or pending at the time of investigation.

ER violated Section 5. ER did not violate Section 3 by failing to pay EE a $300 bonus, since there was no written policy.

661 EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

Economic Reality Test

87-6737 Sutton v NBR, Inc (1988)

Complainant entered into a written agreement with Respondent regarding wages to be paid. Complainant was responsible for purchasing supplies, setting up jobs and supervising contractors. He was not supervised by Respondent, set his own work schedule, received no benefits, directed his own activities, no deductions were made from his earnings, and when hired he did not complete an income tax withholding form (W-2). Complainant claimed he was entitled to wages and fees from October, 1986, through January, 1987. Respondent contends Complainant was an independent contractor and not an employee.

The ALJ concluded that Complainant was an independent contractor because of the standards set forth in General Entry VII.

662 DEDUCTIONS

Written Consent

Beginning of Employment

SICK PAY
Unearned

VACATION
Payment in Advance

WRITTEN CONSENT
Inadequate

85-5049 Haworth v George Rennix, Joyce Collins and Praise the Lord Corporation dba Medical Personnel Pool (1986)

ER made a deduction from EE's last check for one day sick leave used but unearned and four days' vacation taken but not earned. EE signed a document 12/12/83 stating she received, read, and agreed to abide by the policies of the Medical Personnel Pool which said that a deduction would be made for unearned vacation time advanced prior to termination and termination prior to the year-end would negate any sick leave time bonus.

EE's signature on the 12/12/83 document at the beginning of EE's employment does not constitute sufficient written consent by EE as required by Section 7. This section requires that consent for a deduction be given close to the time of the intended deduction with full knowledge on the part of both parties as to the amount of the deduction.

663 CONTRACT
Amendment
Meeting of the Minds

85-4981 McClure v The Rotor Tool Co (1986)

EE was paid on a salary basis as a salesman. In late 1984 EE proposed changing from salary to commission and was informed if this was implemented it would be retroactive to 1/1/85. After EE resigned on 3/8/85 because he wasn't placed on commission, he received a statement from ER for February 1985 indicating commissions earned.

EE believed he was entitled to commissions because he received the February 1985 commission statement entitling him to commissions.

ER did not violate the Act. The essential terms of a contract must be agreed upon by the parties. There must be a meeting of the minds. EE acknowledged that ER never agreed to pay him on a commission basis.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

664 COLLECTIVE BARGAINING AGREEMENT (CBA)
Fringe Benefits
Medical Exam Required by ER

Interpretation
Sick Benefits-Payment For

85-4808 Januszewski v Detroit Edison Company (1986)

EE was sent home by ER's medical department to have a psychiatric examination. She was off for 18 days and paid straight time for absence due to illness. EE claimed she should not have had to exhaust her sick bank for her time off and ER should bear her medical expenses because ER had sent her home for the medical examination.

The CBA provides for payment for medical exams required by ER. It did not mention whether EEs are required to use sick leave, but provided that EEs would be paid for time off due to sickness. Complainant was paid for her sick days.

ER did not violate the Act.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

665 COLLECTIVE BARGAINING AGREEMENT (CBA)

Full or Part-Time EE
Interpretation

EMPLOYEE

Full-Time

85-4521 Luteyn v Oakbrook Consolidated, Inc dba Szabo Food Service (1986)

EE claimed two weeks' vacation pay. ER alleged EE was not entitled to any vacation benefits. Although the benefits had been paid to her in previous years, ER said these were gratuitous payments and not required by the CBA, which provided vacation benefits for full-time EEs.

EE was a call-in EE (did not work a regular schedule) and worked more than 20 hours a week. ER contended "full time" did not include call-in EEs. The agreement did not define "full-time EE" or state whether "call-in EEs" were entitled to vacation benefits.

ER violated Section 3 for fringe benefits due. EE was not a part-time EE so she must be considered a full-time EE, since she worked more than 20 hours per week.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

666 APPEALS

Only Issues Raised by Appellant May Be Considered

HEARING

Costs

84-4232 **Davis v Financial Counselors of America, Inc** **(1986)**

Respondent did not appeal the DO finding a violation of Section 5, so the review by the ALJ concerned only the amount found due by the Department.

After examining the documents submitted at the hearing, the DO was modified finding a revised total amount due. Payment of hearing costs were ordered because ER acknowledged owing Complainant commissions and yet had continued to refuse payment of any amount.

667 ADVANCES

WRITTEN CONSENT
Advances
None

85-5024 **Woodworth v Dennis A Fellows, Fellows Electric, Inc** **(1986)**

ER gave EE advances to bring his wife from Florida to Michigan and deducted the advances from two of EE's checks without written consent. In addition, EE did not pick up one check issued to him, and another check was not honored by the bank.

The Department's DO found wages owed EE based on the check not picked up and the check not honored by the bank. EE testified he still owed $110 for advances received.

ER violated Section 7 by withholding wages to repay amounts owed without written consent. Upon receipt of the amount on the DO, EE should repay the $100 still owed for advances he received from ER.

668 FRINGE BENEFITS
Must be in Writing to be Enforced

VACATION
No Written Contract/Policy
Past Practice

WRITTEN CONTRACT
Fringe Benefits

WRITTEN POLICY
Fringe Benefits

86-5892 **Moll v Modern Cutting Service** **(1988)**

EE was employed full-time as a truck driver and operated screw machines and saws until 1986. ER issued a written employee handbook in 1995 which was distributed to EEs. The

handbook contained no provision for paid vacations, although there was an unwritten policy of providing at least five paid vacation days per year. EE received four paid vacation days in 1986 and claimed he was entitled to a fifth day.

ER did not violate the Act by failing to pay EE a fifth vacation day because that benefit was not set forth in a written contract or policy. The Department has no authority to order payment of the amount claimed by EE.

See General Entry I.

669 COLLECTIVE BARGAINING AGREEMENT (CBA)
Deductions
Grievances

UNION MEMBERSHIP
Seasonal EE

WRITTEN CONSENT
Expressly Permitted by CBA

85-5094 Karbowski v Coca Cola Bottling Company of Michigan (1986)

Deductions were taken from EE's checks without written consent. The parties disputed EE's membership in the union. The CBA prohibited deductions from a route person's check unless authorized by EE except for "bona fide" cash or product shortages. Complainant was a seasonal route EE. He was never given a copy of the CBA; he did not fill out an application to join the union; union dues were never taken from his checks, and when Complainant talked to a union rep and steward about membership, he was told seasonal EEs were not eligible to join the union.

The business agent for the union said the CBA provided that all EEs become members of the union after the 31st day following the beginning of their employment, and even though Complainant did not fill out a dues check-off slip, he was considered a part of the bargaining unit.

The personnel director of ER testified seasonal EEs are not included in most of the provisions of the CBA including filing grievances.

The CBA does not specifically include seasonal EEs as members of the union and does not specifically permit deductions from their wages. It was clear EE was not a member of the union. ER may not rely on the exemption in Section 7 for deductions "expressly permitted by . . . a collective bargaining agreement" to justify deductions taken from EE's pay. The inability of Complainant as a seasonal EE to file a grievance was especially critical, since Complainant claimed the deductions taken from his pay were not "bona fide" as required by the CBA.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

670 ARBITRATION

Expressly Permitted by CBA

COLLECTIVE BARGAINING AGREEMENT (CBA)

Deductions
Grievances

PREEMPTION

CBA

85-4845, et al Gogola, et al v Commercial Carriers, Inc (1986)

EEs were employed as truck drivers governed by a CBA containing a mandatory grievance and arbitration procedure. Deductions were made from EEs' pay in accordance with the competitive adjustment clause. The issue in these cases was whether an arbitration decision interpreting a provision of a CBA which is final and binding on the parties is also binding on the Department for purposes of determining whether the deductions made were either "required or expressly permitted by the CBA." (Section 7)

Nothing in Act 390 excludes EEs covered by a CBA having provisions for a final and binding arbitration. A finding by an arbitration panel dismissing a claim does not rise to the level of being "required or expressly permitted by a CBA." ER violated Section 7 for making deductions without written consent or expressly permitted by the CBA.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

671 JURISDICTION

Severance Pay

SEVERANCE PAY

Fringe Benefit or Wage

85-5063 Schlaps v Centronics Data Computer Corp (1986)

EE submitted a request for "voluntary termination" pursuant to a memorandum posted for all EEs. The request was not approved. EE separated himself from employment and filed a claim with DOL for severance pay as covered in the personnel policy manual.

Severance pay is not specifically listed as either a fringe benefit or a wage under Act 390. The only kind of fringe benefit that could include severance pay is a "bonus." The term "bonus" is defined in Rule 408.9002(2) as a "premium number or extra or irregular remuneration awarded to an EE at the discretion of ER pursuant to a written contract or written policy."

The personnel manual covered payment of a severance pay to EEs based on specific

conditions. ER had no discretion on the payment of severance pay if the conditions set forth in the manual were met. The ALJ concluded severance pay was not a bonus because there was no discretion to make the severance payment and also the purpose behind paying a bonus was not present (reward for work performance in the hope a good job will continue in the future).

ER did not violate the Act. The ALJ has no authority to add severance pay to the list of fringe benefits covered by the Act.

672 DETERMINATION ORDER - Issuance Within 90 Days
Amendment of DO

FRINGE BENEFITS
Must Be in Writing to Be Enforced

85-5060 Higham v Clark's Store Fixtures, Inc (1986)

The Department could not order ER to pay sick leave or holiday pay because there was no written policy for these fringe benefits.

There was a written policy statement for vacation pay. ER used a "Code 7" to designate both vacation and holiday payment, making it unclear how much was actually paid for vacation benefits. The ALJ concluded the hours taken on or next to a holiday were holiday hours and would not be owed to EE without a written policy. Any other time was considered vacation. EE was still owed for the balance of vacation benefits earned but unused.

ER violated Section 4 for failure to pay unused vacation benefits earned. Section 3 requires payment of fringe benefits contained in a written contract or policy. EE may bring a lawsuit in district court for payment of sick and holiday pay not included in a written policy.

673 COMPUTATION OF DAILY HOURS WORKED

REMAND

WAGES
Work Before/After Shift End

WAGES PAID
Time Worked

85-4633 Carley v In and Out Food Stores, Inc (1986)

EEs were required to report to work prior to the start of their shift and to remain to complete closing activities after their shifts ended. ER claimed all EEs understood they would not be compensated for this time. EE claimed wages for 15 minutes prior to her shift and 15 minutes after.

ER violated Section 2 by failing to pay EE for the time worked before and after her shift. DO remanded to the Department to review EE's time records for the exact time worked before and after shifts because EE admitted she did not always work 15 minutes before and after her shift.

674 DAMAGE TO OR LOSS OF PROPERTY

EXPENSES

FRINGE BENEFITS
Must Be in Writing to Be Enforced

WAGES PAID
Checks Returned Unpaid by Bank

85-5206 Temple v Gregory LaFrance aka Maranatha Construction Co, Jointly and Severally (1986)

EE was employed in construction work. Initially he was paid by the hour, kept track of his own hours, and received a check each Friday. Later he was paid by the job. EE performed specific jobs for ER and was provided tools for the work. EE claims wages for this work, two checks he received returned unpaid by the bank, payment for ER's damage to his truck, and reimbursement for materials he purchased during the course of his employment.

ER violated Section 5 for not paying EE wages earned. Because there was no written contract or policy for fringe benefits, the Act cannot be used to order reimbursement for truck damage and materials purchased.

675 BURDEN OF PROOF
Recordkeeping

84-4364 Perry v Jowa Security Services, Inc (1985)

EE's claim was for work performed on 6/11/84. He presented a work schedule indicating he was scheduled to work 6/11. ER presented a dispatcher's sheet and a "short sheet" EE was required to sign to verify the accuracy of number of hours worked. The dispatcher's sheet showed that EE did not work on 6/11/84.

EEs were required to sign time records at the job site. Those records were destroyed after the information was transferred to time control sheets.

ER did not violate the Act. EE's name did not appear on the dispatch sheet and he signed the "short sheet" indicating he did not work on 6/11.

676 BURDEN OF PROOF

Unrebutted Testimony

85-4628 Gjonaj v United States Maintenance Corp (1985)

ER paid all members of a work crew for the same number of hours on a job. The supervisor turned in the hours for people under his control at the end of each day. EE testified she turned in double the number of hours paid to anyone in her crew because she put in additional hours picking up lumber and debris from construction work going on during her last week of employment. ER had no knowledge of any additional work performed by EE.

ER violated Section 5 by failing to pay all wages earned and due upon termination. The Appellant has the burden of proof. ER, as the Appellant, did not establish the DO was incorrect or contradict EE's sworn, believable testimony.

677 VACATION

Anniversary Date

WRITTEN POLICY

Fringe Benefits

Interpretation

85-5068 Avila v R A Victor Martin Service Envelope Mfg Co, Inc (1986)

EE submitted her resignation on 5/10/85. She filed a claim for four weeks' vacation she would have earned between 6/1/85 and 5/31/86. ER's vacation policy provided that "June 1 of each year is the `cut off' or control date to calculate your vacation time . . ."

ER did not violate the Act. Vacation policy is clear that the vacation year begins June 1 and ends May 31. EE was not employed during the vacation year.

678 BONUSES

FRINGE BENEFITS

Must Be in Writing to Be Enforced

JURISDICTION

Lack Of

85-5117 Mustazza v John P Clark, John P Clark and Associates, Inc (1986)

EE earned commissions and had not been paid for recruiting people for employment. She also claimed payment for one recruitment for whom there was an understanding she would be paid a bonus for a job well done.

ER violated Section 5 by failing to pay EE commissions earned. EE's claim for a bonus

(fringe benefit) is outside the jurisdiction of the Department because there was no written policy.

679 VACATION

Anniversary Date
Payment at Termination
Discharged
Written Contract/Policy

86-5756 Barber v Retool Machine Co (1987)

ER claimed that since EE was discharged for failure to come to work, all rights to vacation benefits ended. The vacation policy must be strictly construed against ER as the creator. According to the vacation policy, ER has discretion to allow an EE to take time off with pay or to keep EE working for the entire year and pay the vacation benefit in lieu of time off at the end of the year. It does not state that a vacation benefit is lost when an EE separates from employment for whatever reason.

Since EE was no longer employed, ER cannot give her time off with pay. The ALJ found it reasonable to require payment of the vacation benefit at the time of separation.

680 TESTIMONY

Conflict

UNAUTHORIZED WORK

WITNESS

Credibility

87-6021 McCray v Phone Tech North, Inc (1987)

EE presented contradictory and evasive testimony at hearing. Based on EE's lack of credibility, her position that she was entitled to an extra hour of wages each day was rejected.

EE worked as a telephone solicitor from 9:00 to 5:00. She was paid for six hours each day with an hour for lunch and an hour for breaks. It was her claim that she did not take the break hour each day but worked instead. This claim was not accepted based on EE's demeanor at hearing.

681 EVIDENCE

Insufficient to Establish Claim

REDUCTION OF WAGES/BENEFITS

Agreement to Pay in Future
EE Continues Working

WAGE AGREEMENTS
Wage Reduction
Agreement to Pay in Future

85-4829 **Matthews-Pennanen v Cable Services, Inc** **(1986)**

ER's president informed EE his salary would be reduced. Contrary to the evidence, EE contended the salary reduction would be made at a later time. EE continued to work after being informed of the reduction in salary.

After comparing EE's wages earned and the gross wages paid, ER violated Section 5(1) by failing to pay all wages due.

682 COLLECTIVE BARGAINING AGREEMENT (CBA)
Fringe Benefits
Proration

VACATION
Anniversary Date
Proration

85-4865 **Brennan v Eugene Welding Co** **(1986)**

EE contended he was eligible for a portion of the vacation benefit earned from 6/10/84 (his anniversary) to his separation on 1/26/85. The CBA provided vacation benefits to be paid on the anniversary date of employment.

EE relied on a provision in the CBA which said an EE may schedule a vacation in advance of the anniversary date after the first year of employment if EE had worked a minimum of 1,500 hours between the last anniversary date and the date proposed for the vacation.

ER did not violate the Act. The CBA permits an EE to schedule a vacation in advance of the anniversary date but does not require or permit ER to pay for this vacation.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

683 APPEALS
Untimely
Good Cause Not Found
Vacation, Extended Trip, Out of State

85-5220 **Ellis v Sure Coat Enameling Co, Inc** **(1986)**

ER's letter of appeal was received seven days after the due date. ER said the appeal was filed late because ER's president was on an extended hunting trip.

ER failed to establish "good cause" and the appeal was dismissed. The appeal period set forth in the Act cannot be set aside to allow for a vacation. A prudent person would have arranged for the handling of important mail.

684 BONUSES

Written Contract/Policy/Agreement

JURISDICTION

Over Bonus Without Written Contract

85-5128 Kalisz v Richard J Tapper and Physicians Bookkeeper, Inc (1986)

EE processed unmatched payments of medical billings and received an hourly salary for 32 or fewer unmatched payments per hour. Under an unwritten bonus incentive program she would receive extra or irregular payment for processing over 32 per hour. EE claimed pay for additional bonus hours. ER said she was not entitled to this bonus because the work performed was not typical, nor work that was used to establish unmatched hourly pay.

ER did not violate the Act. The Department is without jurisdiction because the incentive bonus program was not under a written policy or contract. EE's claim dismissed.

685 COMMISSIONS

Payment

After Separation

Incomplete Sales

WAGES

Commissions

Payable After Separation

85-5136 Lockwood v Nixdorf Computer Corp (1986)

EE claimed a commission for converting the lease of a computer to a purchase. The sales compensation plan provided no commissions would be paid when a transaction was completed after employment was terminated.

The second part of EE's claim was for a sales commission computed on the basis of a product factor. EE had been paid a product factor of 1.3. During the time of the sale the product factor was 1.5.

Since employment was terminated prior to the completion of the transaction, ER did not violate the Act. However, ER violated Section 5 regarding the second part of EE's claim, since the commission paid should have been calculated at the higher product factor amount.

686 CLAIMS

Twelve-Month Statute of Limitations

JURISDICTION

Statute of Limitations

88-6961 Williams v Mid-America Research Institute, Inc (1988)

EE's appeal was dismissed after the ALJ determined that the claim was not filed within 12 months after the alleged violation as required by Section 11(1).

See General Entry V.

687 EMPLOYMENT RELATIONSHIP

Subcontractor

JURISDICTION

Independent Contractor Relationship
Lack Of

86-5341, et al 5 Complainants v C J Mack Improvement Company (1986)

Complainant Greenwood and four others claimed that they were hired by Respondent to do construction work. Complainant Greenwood claimed he was supervisor and responsible for keeping a record of the time worked by the other Complainants. Respondent claimed he subcontracted Complainant Greenwood. Respondent agreed to pay for paving work but never hired or promised to pay the four other Complainants.

Complainants were not hired by Respondent but were working for Complainant Greenwood who had entered into a contractual relationship with Respondent. Claims for wages should have been made against Complainant Greenwood by the other Complainants. The Department lacked jurisdiction to pursue the claims of Complainants against Respondent. Respondent did not violate the Act.

688 COLLECTIVE BARGAINING AGREEMENT (CBA)

Fringe Benefits
Rate Paid

FRINGE BENEFITS

Rate Paid
Wage Rate When Earned or When Paid

85-5182 Hyde v Wolverine Power Supply Cooperative, Inc (1986)

EE had a back injury while working. After a period off work, EE returned and was placed on light duty. His hourly rate was reduced. After separation, EE began receiving accumulated

holiday pay, vacation pay, personal days, and sick leave. These accumulated hours were paid at the reduced hourly rate EE was earning at the time of separation. EE's claim was for the difference between the two hourly rates.

ER had complied with the terms of the CBA in paying fringe benefits at the rate of pay earned at the time of separation. ER did not violate the Act.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

689 SEMINARS

Voluntary Attendance

WAGES

Gratuitous Payments
Payment for Voluntary Seminar Attendance

86-5368 Hayward v Robert W Cady, DDS, PC (1986)

EE was a dental assistant from April 1984 through October 1985. During the month of October EE attended a seminar with ER and co-workers. EE stated she was not given a choice concerning attendance at the seminar. Based on this, the Department concluded that the hours spent participating in the seminar and traveling to and from the seminar should be considered work time. She understood that her job would be in jeopardy if she did not attend.

ER testified attendance at the seminar was not required. Of the eight EEs invited to attend, four did not. ER paid for all food, lodging and travel for EEs who decided to go and paid their normal paychecks for the weeks involved.

EE was not required to attend the seminar, since the other EEs who did not go were not disciplined. Since attendance was not mandatory, ER's offer to pay the normal wage rate during the time of the seminar was gratuitous. No additional wage payments were due. The Department's DO was rescinded.

690 VACATION

Anniversary Date
Forfeited
Policy Changed
Written Contract/Policy

WRITTEN POLICY

Notice to EE of Change
Resignation
Two-Week Notice Required

85-5074 MacDonald v Frontier Exploration, Inc (1986)

EE was employed under the terms of a written policy stating that an EE who terminated employment prior to the anniversary date would forfeit accumulated vacation, and an EE with a year or more of service, resignation with less than two weeks' written notice, would also forfeit accumulated vacation. Vacation was earned at the rate of one day per month beginning with the third month of employment.

EE claimed nine months of employment excluding the first two months. EE had signed the prior policy statement; however, he hadn't received or signed a revised policy statement. The revised statement change was to the effect that even with a written notice of resignation or if terminated, EE would receive no accrued vacation pay.

Since EE had not received the revised policy statement, ER was bound by the prior document which did not contain forfeiture of vacation pay for laid off EEs. The language only applied to EEs who were laid off. Since EE did not terminate his employment, his accrued vacation pay was not forfeited. EE was entitled to nine days of vacation pay. ER violated Sections 3 and 4.

691 DAMAGE TO OR LOSS OF PROPERTY

LOSSES CAUSED BY EMPLOYEES

WAGES

Poor Job by EE

86-5391 Rieker v Lefkovits (1986)

EE was hired as a carpenter's apprentice and worked 72 hours. The wage agreement provided EE would not be paid for the first two weeks of his employment during training. ER believed payment was not required because ER lost $3,000 in business, in addition to damaged tools, because of EE. Also, ER claimed he could not afford to pay minimum wage, since EE's work was worth only $.50 an hour.

ER is prohibited from paying less than the minimum wage even if EE agreed to work for less. ER violated Section 5.

692 COLLECTIVE BARGAINING AGREEMENT (CBA)

Authority to Interpret
Conflict With Law

MISREPRESENTATION BY EMPLOYEE

85-5246 Brown v New Center Community Medical Health Services (1986)

ER refused to pay wages to EE who was discharged for falsifying his employment application. ER claimed that EE fraudulently obtained employment in a job classification,

which had an entry level requirement of a master's degree when he had only a high school diploma. ER and EE had entered into a CBA. EE did not comply with the exit procedures contained in the CBA, which provided that prior to receipt of final monies, EEs must report to their supervisor.

Requiring EEs to comply with exiting procedures of the CBA, prior to being paid wages or fringe benefits, does not outweigh the requirement of the Act. ER violated Sections 4 and 5.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

693 RENT

Deductions From Wages to Pay

WAGES

Deduction From to Pay Rent

WRITTEN CONSENT

None

86-5313 Haynes v Lawrence and Janice Wheeler dba Wheeler Farms (1986)

EE was injured and ER hired another person during EE's absence. During the period of this absence, ER reduced the amount of EE's paychecks. EE did not provide written consent for the reduction.

EE began working part time for ER in order to spend time at his own business. EE lived in a house owned by ER, but he could not live there rent free since he was no longer a full-time EE. EE agreed to pay $250 a month as rent but fell behind on his payments. At EE's request, he worked additional hours to be applied towards the rent. EE quit his employment and ER withheld pay to be applied towards past-due rent. ER violated Sections 5, 6, and 7.

694 FRINGE BENEFITS

Lost When Company Goes out of Business

SICK PAY

Contract or Policy Statement

86-5330, et al Edwards, et al v Agra Land, Inc (1986)

EEs claimed accumulated sick leave prior to their discharge. The policy manual provided sick pay at the rate of eight hours per month of employment. Sick pay credits could accumulate to a maximum of 480 hours. EEs were paid any amount over the 480 hour bank on the payday closest to December 15 of each year, with the balance to be paid at the time of retirement. Employment terminated September 30 when the company closed. EEs claimed that they did not receive the amount of their sick pay bank over 480 hours.

The 480 hour bank was to be paid only at retirement. Also, EEs were not employed after September 30. They were not eligible to receive sick pay over the 480 hour bank, since payment was to be made around December 15 of each year. ER did not violate the Act.

695 BURDEN OF PROOF

Recordkeeping
Wages Paid

REHEARING

TESTIMONY

Conflict

WAGE AGREEMENTS

Salary
Unclear

85-4819 Hanner v Robert Stroher dba Fruit Belt TV (1986)

EE contended he earned $4 an hour as a handyman for ER. ER's contention that EE made a salary of $125 a week was accepted by the ALJ because of the irregular hours worked and the absence of time records. It was undisputed that EE was paid $2,870. ER contended EE also paid himself wages out of the cash drawer. EE kept records of these transactions and paid back all amounts taken.

The Department found ER paid EE wages in the amount of $5,462 in 1984, relying on a profit and loss statement. It was not clear whether the entry for "CONT LABORER" on the statement represented wages paid to EE, and there was no evidence regarding the method of determining the amount.

ER violated Section 5(1) by failing to pay EE wages for 48 weeks worked at $125 per week minus the $2,870 already paid.

At the rehearing ER presented evidence that EE's wage claim had been settled by a $1,000 payment in October 1984. The ALJ found this evidence insufficient to establish an accord and satisfaction, since EE's contrary testimony was equally persuasive. ER's contention was inconsistent with the fact EE received payments subsequent to the $1,000.
ALJ's previous decision affirmed.

BERRIEN COUNTY CIRCUIT COURT - Filed 10/12/27
ER requested review based on evidence of payment conspiracy between EE and bookkeeper.

4/27/89 - ALJ decision affirmed.

696 ACT 62

Deductions

DEDUCTIONS
Purchases

WRITTEN CONSENT
Inadequate

87-6597 Torres v Sophie's Drugs, Inc dba Southwestern Drugs, Inc (1988)

The facts were undisputed that the application for employment which EE signed said: "If hired, do you understand that any and all purchases made will be deducted from your paycheck on a weekly basis. This includes food items consumed in the store and merchandise taken home." EE answered "yes."

During EE's employment, ER made deductions for items received. For each purchase made by EE, she signed a receipt which acknowledged that goods had been received, but did not give written consent for deductions from wages.

ER violated Section 7 which prohibits employers from deducting any amount from an employee's wages without written consent. Act 390 repealed Act 62 which permitted employers to deduct monies which EEs owed to ERs.

See General Entry III.

697 DEDUCTIONS
Minimum Wage
Written Consent

WRITTEN CONSENT
EE Consent Ineffective if Below Minimum Wage

85-5181 Bonnett v Turf-Pro Industries, Inc (1986)

EE worked as a sales rep. EE voluntarily submitted a letter asking to have restitution taken from his 6/21/85 check to pay back for lawns he undermeasured, and pay $1 for each lead wasted that could have been sold if measured accurately.

ER contended the letter authorized withholding $338.25 from EE's wages to offset the loss caused by the mismeasured lawns and $400 for 400 leads that EE should have contacted during the last three days of employment.

EE did not consent to the deduction of $400 for leads that should have been contacted. EE did consent to deductions from his 6/21/85 paycheck to compensate ER for mismeasured lawns. However, Section 7 prohibits deducting amounts that would reduce EE's gross wages to less than the minimum wage rate.

ER violated Section 7 by failing to pay EE minimum wage for the pay period covered by the

6/21/85 paycheck.

698 BUSINESS PURCHASE

Incomplete

EMPLOYMENT RELATIONSHIP

President as EE

FAIR LABOR STANDARDS ACT (FLSA)

85-4856, et al Gargin, Park & Bitonti v Electronic Office Center, Inc, and John Speck and Electronic Office Center of Michigan, Inc, and William Flattery, jointly and severally (1986)

Respondent Flattery was hired by Respondent Speck as president of Electronic Office Center, Inc (EOC). Complainant Park was responsible for EOC's financial affairs including payroll. After negotiations, Flattery made a down payment toward the purchase of EOC. He planned to operate as a new corporation and incorporated EOC of Michigan on 8/29/84.

By mid-September, 1984, Speck indicated to Flattery he did not want to put any more money into EOC. Flattery was told sales reps would not be paid draws for September, so Flattery had checks from the EOC of Michigan account issued for September draws because he wanted the sales reps to remain as EEs of the business after he bought it. After a check was returned unpaid by a bank because of insufficient funds, Flattery deposited funds from EOC accounts receivable into the EOC of Michigan account, and the account was then used to pay debts of EOC. Flattery did not purchase the business and did not work after 10/10/84. Complainants were not paid from 10/1 to 10/10/84.

EOC of Michigan and Flattery were not Complainant's ER because there was no evidence Flattery told Complainants they were employed by EOC of Michigan. Payment of checks by EOC of Michigan in mid-September was not sufficient to establish that EOC of Michigan engaged or permitted Complainants to work.

In FLSA cases, stockholders, directors and officers may be held liable for wages of a corporation's EEs if they had control over the corporation's business and financial affairs. Complainant Park claims wages for September 1984. Although Flattery was president of EOC at the time, Park controlled and was responsible for payment of wages. The other alleged violations were for nonpayment of prorated draws and salary for 10/1 through 10/10/84. These payments were not due until after Flattery's employment as president had terminated. The evidence suggests these violations were the result of Speck's decision not to put any more money into EOC. Speck and EOC violated Section 5(2).

See General Entry VII.

699 COURT ACTIONS

Default Judgment to Offset Amount Due Complainant

DEDUCTIONS
Written Consent
None

LOSSES CAUSED BY EMPLOYEES

THEFT
Proven

UNAUTHORIZED WORK

WRITTEN CONSENT
None

85-5134 Hatmaker v Northland Collision, Inc (1986)

ER deducted EE's wages without written consent to recover the cost of tapes and for unauthorized repairs EE made on his vehicle using ER's materials, equipment and personnel. ER obtained a default judgment against EE for the conversion of goods and services.

ER violated Section 7 by deducting EE's wages without written consent. However, the amount of the default judgment obtained in district court offsets more than the amount of wages due EE.

700 EMPLOYMENT RELATIONSHIP
Joint Operation of Business

INDIVIDUAL v CORPORATE LIABILITY

85-4556 Thornsberry v Pantele Enterprises, Inc and Baron Co dba Bootleggers Again (1986)

Angelo Pantele sold all stock in Pantele Enterprises and was freed of all obligations, debts, liabilities. The purchasers operated Pantele Enterprises under an assumed name registered by Baron Company, a corporation they owned. After a time, Angelo Pantele recovered control and possession of the property. Complainant was a waitress for Bootleggers Again and had not been paid all wages due.

Respondent Pantele Enterprises, Inc., claimed it was not liable for the wages due Complainant, because Angelo Pantele was not involved in the operation of Bootleggers Again during the period wages were claimed. However, the claim was not against Mr. Pantele individually, but against two corporations involved in the operation of Bootleggers Again during the period in question. The corporations were found to owe the wages claimed.

Respondents violated Section 5.

701 COLLECTIVE BARGAINING AGREEMENT (CBA)

Fringe Benefits

Past Practice

VACATION

Anniversary Date

Past Practice

Written Contract/Policy

85-5082 Towers v Mettaloy Corporation (1986)

EE was employed under a CBA which clearly established the hire date as the eligibility date for vacation pay. EE's anniversary was September. EE's last vacation was inexplicably paid to him in July 1984, although he wasn't eligible until September 1984. EE quit in May 1985 and claimed vacation pay was due on 1/1/85.

ER did not violate the Act. Under the terms of the agreement, EE was not eligible for the claimed vacation until September 1985. Regardless of ER's actual practice in paying vacation pay, the DOL is authorized to order payment of fringe benefits only in accordance with the agreement.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

702 BURDEN OF PROOF

Recordkeeping

EVIDENCE

Insufficient to Establish Claim

85-5250 Baird v Taliwaldis and Adela Strautkalns dba Sir James Auto Cleaners, jointly and severally (1986)

EE washed cars. EE kept track of his time because he reported to work at 8:00 a.m. but could not punch in until the first customer arrived.

Although EE contended when business was slow he had to punch out on the time clock but remain at ER's place of business, the evidence established that sometimes EE punched out voluntarily and was not required to remain on premises.

ER violated Section 2 by failing to pay EE the difference between EE's time records and ER's time cards for the time EE reported to work.

703 EMPLOYER IDENTITY

Corporation Officers

EMPLOYMENT RELATIONSHIP
Control

FAIR LABOR STANDARDS ACT (FLSA)

85-4924 Hetrick v James A Gardner and Western Michigan Business Assoc dba Tri State Truck Repair, jointly and severally **(1986)**

Respondent Gardner was sole stockholder of Western Michigan Business Association (WMBA), a corporation. He hired Complainant as general manager of Tri State Truck Repair. Complainant worked seven days per week and controlled the day-to-day operation of Tri State Truck Repair. Gardner's only involvement was preparation of the payroll, for which he received no compensation. Complainant or his secretary-bookkeeper prepared Complainant's paychecks.

Respondent Gardner did not violate the Act. Gardner's preparation of the payroll was not an exercise of control of the corporation's affairs, but merely a way to monitor the operation of the corporation. Gardner did not control preparation of Complainant's paychecks.

See General Entry VII.

704 ACT 390
Independent Statutory Rights

BONUSES
Written Contract/Policy/Agreement

COLLECTIVE BARGAINING AGREEMENT (CBA)
Deductions
Grievances
Subsequent Agreements

WRITTEN CONSENT
Fringe Benefits

85-5076 Seedorff v City of Marshall (Fire Department) **(1986)**

EE, a member of Local 1929, was employed as a firefighter under a 1983 CBA that expired on 6/30/84. EE received an educational bonus from ER for the period ending 10/6/84.

In January 1985 a new agreement was negotiated retroactive to 7/1/84. EEs were given a lump sum payment for the difference in amounts owed under the new agreement and amounts paid since 6/30/84. The educational bonus EE had received was deducted from his lump sum, because the bonus had been discontinued under the new agreement. ER did not pay the bonus in January 1985. Local 1929 filed a grievance on behalf of EE for the deduction which was denied at the third step.

ER did not violate the Act by refusing to pay the bonus in January 1985 because the new agreement did not require it. ER violated Section 7 by deducting the educational bonus without EE's written consent. Contrary to ER's contention, the grievance proceeding did not preclude EE from exercising an independent statutory right of filing a wage claim under the Act.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

705 BONUSES

JURISDICTION
Over Bonus Without Written Contract

86-5340 Reason v Can Am Travel, Inc (1986)

EE filed a claim for a bonus. The Department found a violation of Section 5 for failure to pay unpaid wages. The parties stipulated the amount in dispute was not a wage. The issue was whether the payment of the bonus was pursuant to a written contract or policy as required by Sections 3 and 4.

The only evidence of a written policy or contract was a quota sheet which did not show terms of payment or explanation of accounts. EE received the details of the bonus plan verbally one week after she received the quota sheet.

ER did not violate the Act. Absent a written policy or contract, the Department of Labor lacks jurisdiction to enforce payment of a bonus.

706 BURDEN OF PROOF
Appellant

TESTIMONY
Conflict

VERBAL AGREEMENTS

WAGE AGREEMENTS
Unclear
Verbal

84-3882 Mahoney v David Johnston Trucking, Inc (1986)

The issue was whether wages were due EE. The parties had a verbal agreement. The only fact agreed upon by the parties was that EE drove ER's tractor rig from September until January. The ALJ stated he had never before been presented with such conflicting testimony, evidence, and a morass of contentions. EE had the burden of proof which only amounted to

approximations. Conflicting evidence in determining whether or not a party has met its burden of persuasion is treated by the following test:

> Where two parties, equal in interest, in character and in opportunity to know the facts, have made irreconcilable and contradictory statements, and neither is corroborated, there is no preponderance, and the party whose burden is to go forward, has failed to sustain his burden.

Since the record consisted of uncorroborated approximations, EE failed to sustain his burden of proof that ER owed more than the amount found due in the DO.

DO affirmed. ER violated Section 5 by failing to pay wages earned.

707 ACT 390

Independent Statutory Rights

PAROL EVIDENCE

RES JUDICATA

WRITTEN CONTRACT

Fringe Benefits
Parol Evidence
Provisions Explained Based on Past Practice

85-4873 Becker v Harrisville Tool Company (1986)

EE worked from 6/17/81 through 5/31/85. The written contracts defined the vacation year as June 1 through May 31. EEs were provided vacation benefits based upon their seniority, with an exception for new EEs that allowed one week's vacation benefits for less than one year of employment prior to June 1 of a calendar year.

The contract said new EEs earning a vacation prior to June 1 would have that year counted in determining seniority for future vacations. EE requested and was denied a second week of vacation during the vacation year expiring 5/31/85. ER claimed this provision only applied to new EEs for the first year of vacation and that the company had been interpreting the contract to require three full years' seniority prior to June 1 before an EE is eligible for two weeks' vacation. EE went through the grievance procedure until the third step when the union advised the matter would not be pursued.

There was no need to turn to parol evidence to determine the intent of the drafters of the contract because the contract was clear. The contract clearly stated that the vacation benefit EE received prior to June 1st of his first year could be carried over to future vacation periods.

With respect to ER's argument concerning the res judicata effect of the grievance procedure, McDonald v City of West Branch, 466 US 284; 104 SCt 1799; 80 LEd 302 (1984) concluded

this doctrine does not apply to arbitral decisions.

Although EE made use of the grievance procedure, the Act provides an independent statutory right which may be exercised by an EE independent of any rights set forth in the CBA.

ER violated Section 3 by failing to pay vacation benefits.

708 SICK PAY

Doctor's Statement

WRITTEN POLICY

Sick Leave

Not Supported by Doctor's Statement

85-5110 Dillon v Ford Motor Co (1986)

Although EE was denied a leave of absence to study for a law school final exam for the period 4/29 through 5/3/85, he did not report to work after 4/26. EE telephoned ER on 4/29 saying he was ill. EE was advised 5/3/85 he would be terminated if he did not report to work or supply documentation to justify his time off.

EE's doctor saw EE on 5/10 and notified ER that he had just finished law school exams and had been experiencing headaches from stress, only getting two hours of sleep nightly over the past few weeks. On 6/19/85 EE was advised of his termination as of 4/26/85 for an unsatisfactory reason for his absence.

ER did not violate the Act. The doctor's letter was insufficient proof to show total and continuous disability as set forth in ER's written policy for payment of benefits.

709 SICK PAY

Maternity Leave

WRITTEN CONTRACT

Conflicts Between Two Documents

85-5067 Brooks-Hornich v Cardinal Mooney Central High School (1986)

EE was a teacher and took a maternity leave during the 1984-1985 school year. She continued to receive her yearly salary during that time. When she returned to work, the balance of her yearly salary was computed after subtracting the amount she had been paid and the ten sick days permitted. These sick days were provided in a "Supplement to Teacher's Contract" signed by both parties. EE claimed this document applied to the 1983-84 teacher contract only and that she was told she would receive pay for the full maternity leave.

ER claimed the supplement applied to all subsequent contracts besides the 1983-84 contract.

The ALJ accepted ER's position. The teacher's contract contained a beginning and ending date. The supplement contained only a beginning date. Therefore the supplement applied to the 1983-84 contract as well as subsequent years.

ER did not violate the Act. The only written policy presented provided for ten sick days that EE had received.

710 BUSINESS PURCHASE
Not Crucial to ER Status

EMPLOYMENT RELATIONSHIP
Permit EEs to Work

85-4969, et al <u>Moran, Patterson & Veal</u> v <u>Bruce Ford and Rick Stem dba Bruno's Pizza</u> (1986)

Respondents worked for Saline Graphics and did printing for the Round Haus Restaurant. The Round Haus was failing and owed $2,000 to Saline Graphics. Control of the Round Haus was delegated to Ken Kirch, who allowed Respondents to take over restaurant management for a chance to recover their $2,000 and possibly become owners. There was no written agreement.

Respondents assumed control and operated as Bruno's Pizza and Sub Shop. Respondent Ford hired Complainant Patterson as manager. Respondent Ford was present at Bruno's ten hours a week and invested $500 in the business. Respondent Stem was also present some of the time. Ford applied for a license from the Michigan Department of Public Health under Bruno's Corporation, Bruce Ford, president. Bruno's fell behind in its wage payments and ceased operation.

Respondent Ford contended he did not employ Complainants because he did not own Bruno's or direct its operation on a daily basis. Ford had made statements that he did not want to be involved with Bruno's and was not responsible for its debt.

Respondents violated Section 5 by failing to pay wages due. Respondent Ford engaged Patterson to work as manager. Patterson supervised the other Complainants in the presence of Ford, who permitted them to work with the understanding he was their ER.

711 EMPLOYMENT RELATIONSHIP
Bank as Entity Making Decision Not to Pay
Control
Severing Employment Relationship
Notice to EE

FAIR LABOR STANDARDS ACT (FLSA)

85-4890, et al 24 Complainants v Leonard D Klok and Ralph E Gilbert

(1986)

In May 1982 Respondents purchased and became stockholders of Miller Companies. They made all the important business decisions and supervised some EEs. In a letter of 9/5/84, the creditor bank deemed itself to be insecure and accelerated the indebtedness due under the promissory note from Respondents. Respondents had no control over the business and financial affairs of Miller Companies after 9/6/84. Complainants were fired 9/7/84 and were not paid for Labor Day and unused vacation benefits.

Fringe benefits were due at Complainants' terminations on 9/7/84. By that time Respondents had lost control of Miller Companies and were not acting in its interest. Therefore, they were not ERs and did not violate the Act on 9/7/84. DOs modified to delete Respondents as ERs.

See General Entry VII.

712 CLAIMS

Timeliness Of

JURISDICTION

Statute of Limitations

86-5321 Pearce v Oldsmobile **(1986)**

EE was suspended without pay on 7/13/84 for a series of unexcused absences. He checked in at a treatment center at ER's suggestion. ER sent a certified letter to EE's home address stating EE chose to voluntarily terminate employment. Termination was to be effective 8/3/84, and benefits would cease or be liquidated as specified on an attached summary sheet.

EE did not receive the letter because he was in a treatment center and did not know who signed for it. EE did not see the letter until December 1984 when he reviewed the personnel file. ER's written policy required an EE to have been receiving wages up to the time of the sickness in order to receive benefits. EE was not receiving wages due to his suspension.

EE's claim of 1/21/86 was more than 12 months after the alleged violation by ER (Section 11(1). EE had 12 months from the time he discovered his termination letter in his personnel file in which to file a complaint.

713 BURDEN OF PROOF

Recordkeeping

DEDUCTIONS

Minimum Wage

Written Consent

Signed as Condition of Employment

MINIMUM WAGE
Deductions

WRITTEN CONSENT
EE Consent Ineffective if Below Minimum Wage
Inadequate

85-5041 Curtis v Executive Art Studios, Inc (1986)

The records EE completed for purposes of having eight checks prepared did not support EE's allegation of additional wages due.

EE signed an authorization to have monies deducted from his paycheck after the deductions were already taken. The sum listed on the authorization did not appear to be EE's handwriting. EE testified he signed the authorization to keep his job.

ER violated Section 7 for making deductions before written consent was obtained; the written consent was obtained with fear of discharge; there was only one written authorization for two deductions; and the second deduction reduced EE's gross wages below the minimum wage rate.

714 BURDEN OF PROOF
Unrebutted Testimony

85-5096 and 85-5097 Burton and Walker v James and Andrea Beckman dba Royal Motel (1986)

The number of hours worked given to the Department by EEs were disputed based on the records in ER's possession. EEs did not come to the hearing. The owner did appear and gave testimony in opposition to the Department's records. It was concluded the sworn, unrebutted testimony of the owner was more credible than the hours claimed in the Department's files.

ER did not violate the Act.

715 CONDITIONAL EMPLOYMENT
Doctor's Statement

85-5150 Walker v Care Manor, Inc dba Northwoods Manor (1986)

EE claimed compensation for a physical exam. ER required a statement from a physician that EE was in good health and free from disease (Public Health Code), not a physical exam.

The requirement of ER for the physician's statement was not a violation of Section 8, which forbids an ER from demanding "a fee, gift, tip, gratuity, or other remuneration or consideration as a condition of employment or continuation of employment." The

physician's statement is similar to employment criteria which requires that an EE have a driver's license.

716 BURDEN OF PROOF

Presentation of Proofs

EVIDENCE

Hearsay
Insufficient to Establish Claim

85-5084 Tallman v Allan J Kaufman and Donald L Payton dba Kaufman and Payton, jointly and severally (1986)

EE alleged he was due one-half day vacation, relying on his written note of a telephone conversation with the office manager who verified his vacation earned. The Department submitted records showing EE was paid an additional two days' vacation he was not entitled to.

ER did not violate the Act. EE's note was hearsay. The office manager was not present to verify the vacation earned. EE failed to satisfy burden of proof.

KENT COUNTY CIRCUIT COURT: Filed 11/13/86
Issue: Rules of evidence regarding ALJ admission of a statement by a party opponent. Factual dispute on vacation days due. The circuit court dismissed EE's appeal.

717 SICK PAY

Contract or Policy Statement
Payment at Termination

WRITTEN POLICY

Fringe Benefits
Interpretation

85-5163 Hulack v Wayne Westland Community Schools (1986)

ER's written policy provided for sick leave of one day per month accumulative to 120 days. When EE terminated she had accumulated sick days, which she claimed payment was due. ER's policy does not state whether an EE is entitled to payment of accumulated sick leave upon termination.

ER did not violate the Act. Unlike vacation benefits, sick leave does not give an EE the absolute right to take time off with pay, but is provided to allow absence from work due to illness. Therefore, EE was not entitled to payment of the accumulated sick leave at termination.

718 HEARING

Adjournment

Good Cause

WAGE PAYMENT

Lack of Funds

86-5299 Warren v Paul Stafford and P S and Associates, Diversified Management Company, Inc (1986)

The afternoon a day before the hearing, ER's secretary called requesting a continuance. No reason was given for the request, and it was not within the ten-day period set forth in the Notice of Hearing. Therefore, the request was denied.

ER's secretary appeared towards the end of the hearing with an affidavit of Respondent, which said the Notice of Hearing was opened after ER returned to his office the day before the hearing and that ER would be leaving for Europe the day of the hearing. ER did not act reasonably opening his mail 77 days after the date of mailing, and therefore did not establish good cause for the late request.

EE never received the weekly salary due according to the employment contract. ER claimed cash flow problems and repeatedly promised to pay EE the amount due retroactively. EE did not submit a written authorization allowing ER to withhold or deduct the unpaid amount.

ER violated Section 5 by failing to pay EE all wages earned and due in accordance with the contract.

719 BURDEN OF PROOF

Presentation of Proofs

85-4866 Mills v Static Controls Corp (1986)

EE was an outside salesperson for ER. On 10/16/84 EE telephoned ER and advised that his father died and he would return to work the following day. EE never reported to work and could not be reached. On 11/1/84 EE resigned. EE claimed wages, car allowance, expenses and sales calls made from 10/17 through 10/25. A receipt showed the purchase of gasoline some distance outside EE's sales territory.

ER did not violate the Act. The believable and undisputed testimony established EE did not perform work for ER after 10/15/84.

720 EMPLOYMENT RELATIONSHIP

Truck Driver

HEARING

Party Arrives After Record Closed

Proceeding in Absence of Party

87-6049 **Burns v Wing** **(1987)**

Complainant arrived more than one hour after the record was closed and Respondent had left. The ALJ would not take any more testimony. Complainant believed the hearing time to be that of a previous scheduled hearing for which an adjournment was requested.

The parties' verbal agreement was for Complainant to drive one of Respondent's semi-tractors as an independent contractor. Complainant was found to be an independent contractor according to the economic reality test (see entry 303) and therefore no violation.

721 COURT ACTIONS

Default Judgment to Offset Amount Due Complainant

DEDUCTIONS

Required or Permitted by Law

EMBEZZLEMENT

Alleged But Not Prosecuted

87-6179 **Sheppard v Jerome W Sheppard and Comprehensive Data Processing, Inc** **(1987)**

EE pleaded guilty in circuit court to embezzling money from ER. The Court ordered restitution and a civil default judgment.

ER did not violate Sections 4 and 5 by withholding EE's salary and vacation pay. By ordering restitution as part of the criminal sentence, the Court created a deduction required or expressly permitted by law.

722 FINANCIAL SUCCESS AS CONDITION OF PAYMENT

WAGE PAYMENT

Lack of Funds

WAGES

Poor Economic Situation
Volunteer

87-6029 **Wilson v Diane Smith and Artists Production/Celebrity Development** **(1987)**

EE answered an ad seeking volunteers to assist in developing a performing arts school. Volunteers would be paid only when stable funds became available. EE may be entitled to compensation for working three weeks if and when the school is established.

723 SICK PAY

Contract or Policy Statement
Payment at Termination

VACATION

Proration
Resignation
Adequate Notice
Eligibility for Based on Two-Weeks' Notice
Written Policy

WRITTEN POLICY

Fringe Benefits
Interpretation
Interpretation
Against Drafter
Notice to Terminate Requirements
Resignation
Two-Week Notice Required

87-6077 Batchelor v Autumn Woods Facility Care (1987)

The fact that EE quit without notice did not justify withholding vacation and sick benefits earned pursuant to ER's benefit policy. The policy provided that one week of vacation benefits was earned after one year of work. Pro rata benefits were not to be paid in the event of a quit without notice. However, this provision did not refer to sick pay. The term, pro rata, was interpreted to mean the benefits earned since the last anniversary date.

The policy did not terminate sick pay to an EE who quit without notice. A policy statement ending benefits for an EE absent three days without notice to supervisor was held not to refer to a quit without notice.

The terms of the policy were strictly construed against the drafter.

724 SETTLEMENT

Default
Unenforceable Without a Final Agency Order

87-6096 Ure-Hodges v John L Challender, Dick Westfall, and Judy McCrimmin and Wildwood Floral & Gift, Inc (1987)

The Department concluded ERs were in default on a settlement agreement when EE did not receive all monies due for nonpayment of wages.

According to the AG, the settlement agreement was unenforceable because a final agency

order had not been issued. Canceled checks issued to EE and personal money orders submitted at the hearing showed that EE had been paid all wages due.

725 DEDUCTIONS

Common Law
Damages

87-6017 Kampmeier and Bloomquist v American Financial Consulting Co (1987)

EEs were not compensated for expenses provided for in the written contract. ER relied on Hudson v Fiejie 24 NW 863, 58 Michigan 148 (1885) for the view that it had suffered damages in excess of any funds due EEs and was therefore entitled by common law to an offset.

ER violated Section 3 by failing to pay fringe benefits due and Section 4 for withholding fringe benefits without written consent. The payment of wages and fringe benefits in Michigan are governed by statute, and parties therefore have no common law rights.

726 COMMISSIONS

Split

87-6033 Conti v Dynatech Laboratories, Inc and Dynatech Data Systems (1987)

A commission for the sale of a computer matrix switch to EDS was properly split by Respondent between Complainant and another EE. The contract was approved by EDS in mid-May 1986. Complainant was off on disability leave from 4/23/86 through 8/11/86 and the other EE ensured approval of the deal.

727 DEDUCTIONS

Medical Benefits

87-6309 Oglesby v Wedtech of Michigan, Inc (1987)

ER called a meeting of laid-off EEs to find out if medical insurance should be extended. EE did not attend and a portion of his owed fringe benefits were used for this purpose.

This was a violation of Section 4, since EE did not give written consent for the deduction. ER's good motive does not change the Act's requirements.

728 DEDUCTIONS

Insurance Premiums
Written Consent

INSURANCE PREMIUMS
ER Benefit

LOANS
Written Consent to Deduct

86-5718 **Mason v Decker's Flowers & Gifts** **(1987)**

ER deducted wages from EE without written consent to recover a loan and floral purchases she made. ER asserted that authorized insurance premium deductions should be allowed and credited against the erroneous wage deduction. The Department claimed any deduction for insurance premiums was for the benefit of ER because the premiums were paid on EE's behalf, and written consent would be required for each wage payment subject to the deduction.

EE's written consent did not specify a stated period for insurance coverage deductions. Although ER paid the premium prior to the wage deduction, it does not mean the deduction was for the benefit of ER.

ER violated Section 7 by deducting, without written consent, the difference between the wage deduction and the authorized insurance premium.

729 VACATION
Past Practice
Payment at Termination

86-5531 **Scott v National Janitors Supply Co** **(1987)**

EE used one of two weeks' vacation earned prior to his termination. ER's 65-year policy requiring EEs to lose unused vacation at termination was not in the written policy.
ER violated Section 3 by failing to pay vacation according to written policy, and Section 4 for withholding EE's vacation pay without written consent. The requirement that EEs must use vacation time in the year it is earned does not preclude them from being paid for unused vacation earned during the year of termination.

730 BURDEN OF PROOF
Recordkeeping

FINANCIAL SUCCESS AS CONDITION OF PAYMENT

WAGE PAYMENT
Lack of Funds

WAGES
Poor Economic Situation

86-5764, et al **Evelhock and Batch v David Dalrymple and Cedar Creek Inn** **(1987)**

EEs were told to keep track of their hours each day and forgo wages until the business improved. Messrs. Warner and Dalrymple bought out the stock of the owner in August 1985. EE Evelhock was discharged on 8/25/85. EE Batch resigned her employment in July 1985.

David Dalrymple was deleted as Respondent because he did not have sufficient control over EEs' work. ER violated Section 2 by not paying EEs on a regular basis, Section 5 by failing to pay all wages due at termination, and Section 9 because records were not maintained as required.

Muskegon County Circuit Court: (12/7/87)
Dismissed for failure to file briefs within 21 days after record received.

731 COMMISSIONS
Deductions

DEDUCTIONS
Damages

WRITTEN CONSENT
None

86-5889 **Panayotou v Robert Samper, an Individual** **(1987)**

EE was paid a salary and commission each month on sales. ER discussed discounts, damaged items, and errors being deducted from commissions with EEs. After EE left, ER deducted commissions owed because of money spent replacing items, correcting errors, and giving credits to EE's dissatisfied customers. There was no agreement authorizing adjustments or deductions from the commissions.

ER violated Sections 5 and 7 by failing to pay commissions earned at termination and for making deductions without written authorization.

732 COMMISSIONS
Payment
After Separation
Customer Payment After Separation
Not Addressed in Written Employment Agreement

86-5812 **Zettell v Lombardi Food Service dba Lombardi Food Co** **(1987)**

EE claimed commissions for sales made prior to his termination but collected after his employment ended. The written policy did not address this issue. Two former EEs and the

supervisor were unaware of a "long-standing policy" to not pay commissions after payment ended.

Unless addressed in the employment agreement, commissions are unaffected by delivery or customer payment, since salespeople are generally not involved in delivery or collection. ER violated Section 5 by failing to pay commissions due.

OAKLAND COUNTY CIRCUIT COURT: Filed 9/15/87
ER claims commissions are forfeited by EE at termination.

(Decision not available.)

733 BONUSES
Written Contract/Policy/Agreement

BURDEN OF PROOF
Recordkeeping

87-5960 Creighton-Caraway v The Rivertown Warehouse, Inc (1987)

Both parties appealed the DO finding wages due for one-day bartending. Neither party sustained the burden of proof to show the determination was in error.

EE was not entitled to a bonus for promoting a jazz series because there was no written contract or policy. EE performed some remodeling work on the premises, but there was a question as to whether this was done on a volunteer basis or as an EE. No time records were kept. DO affirmed.

734 DEDUCTIONS
Changing Locks

EXEMPLARY DAMAGES

EXPENSES
Changing Locks

86-5881 Cavanaugh v Michael A Roth, MC, PC (1987)

ER incurred expenses to have a lock changed when EE failed to return keys so he stopped payment on EE's wage check. EE would not agree to share one-half the cost.

ER violated of Section 5 for withholding wages without written consent or a provision in a CBA. ER's failure to pay the wages was flagrant and unjustified and, therefore, ER ordered to pay EE $100 in exemplary damages.

735 JURISDICTION

ERs with CBAs and Grievance Procedure

PREEMPTION

CBA
Jurisdiction

86-5691, et al 23 Complainants v Canteen Corp (1987)

ER claimed any proceeding under Act 390 is preempted by the Labor Management Relations Act and the issues involved (holiday pay) had been submitted for resolution pursuant to the grievance procedure contained in the CBA. The CBA provided EEs must work the last scheduled workday before the holiday and the first day after to be paid. EEs were informed the food service contract with GM would be canceled and their last scheduled workday would be 12/18/85 with high seniority EEs permitted to work 12/19 and 12/20/85. EEs claimed holiday pay for 12/23/85 through 1/1/86.

ER did not violate the Act. EEs were no longer employed after 12/20/85. However, since the contract was terminated prior to its 3/31/87 expiration date, EEs and/or the union may have a course of action in a court of general jurisdiction against Respondent for breach of contract and severance pay.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

736 BANKRUPTCY

COMMISSIONS

Payment
After Separation
Profit on Sale

WAGE AGREEMENTS

Dispute
Verbal
Working Constitutes Agreement

83-3284 and 83-3285 Garza v Jack Dykstra Ford, Inc (1987)

EE appealed a DO finding an improper deduction (Section 7) but no commissions due. The issues were whether EE was barred from pursuing his claims because of his Chapter 13 bankruptcy proceeding; whether EE was due any commission for a new car sale; and whether EE was due any additional commission for an in-house used car sale after his termination.

Bankruptcy filing: EE's trustee authorized him to pursue these claims as long as an order permitting this was signed by the Bankruptcy Judge.

New car sale: ER's sales agreement for new car sales was not written, but it was discussed at

sales meetings held three times a week. The salesmen received a 30 percent commission on the actual profit of a sale. EE did not protest the method used to calculate his commission on new car sales while employed. He is not due additional amounts for these sales. EE's working constitutes agreement with the wage agreement.

Used car sales: ER had what was referred to as "in-house" used car sales. Customers made a down payment and ER would finance the balance to be paid in monthly installments. The salesmen received a 20 percent commission on these monthly installments in addition to a commission from the sale. When EE terminated, three transactions were outstanding, requiring future monthly installments. The established policy and practice for payment of commissions on future installment payments included the requirement of continued employment. The subsequent commissions were not considered earned when the sales agreements were completed. EE had to earn future commissions by performing other activities. Although EE maintained he was never called upon to perform any work on these accounts, this did not relieve him of the responsibility of being able and available to work.

DO affirmed but EE not due any further commissions.

737 WRITTEN CONSENT

Deductions

Expenses

Materials Used

87-6052 Patton v Sam Ciamillo and Ciamillo Heating and Cooling, Inc (1987)

The authorization for deductions signed by EE only permitted deductions for tools and items from stock. ER deducted the value of two acetylene tanks and a container of R-22 refrigerant. ER violated Section 7.

738 CIVIL PENALTY

EXEMPLARY DAMAGES

86-5844 and 86-5845 Churchill and Stephen M Dorr v Paul Stafford, Sr dba P S Associates, Diversified Management Co, Inc, jointly and severally (1987)

Paul Stafford was the principal owner and operator, made all decisions, hired, fired, supervised, and was the only one authorized to sign payroll checks. Both EEs were owed wages, monies for health insurance premiums, and commuting costs.

Paul Stafford was found individually liable because of his total control over both EEs. ER violated the Act on a prior case and was ordered to pay unpaid wages. Paul Stafford repeatedly and flagrantly violated Sections 3, 5 and 9, and therefore exemplary damages were ordered for twice the amount of wages and fringe benefits due. A civil penalty for each violation was assessed against ER for credit to the state general fund.

739 COLLECTIVE BARGAINING AGREEMENT (CBA)
Cost of Living Adjustment (COLA)
Wages

JURISDICTION
Statute of Limitations

87-6045, et al Harrington, Harmon & Harris v Lakewood Public Schools (1987)

The CBA provided for semiannual cost of living adjustments to the hourly rate of pay. EE's claims were filed in August and October 1986 for the period beginning 7/1/85 through the end of the year. The complaints do not exceed the 12-month jurisdictional period as set forth in Section 11(1).

EEs alleged nonpayment of the cost of living adjustments for the period of June 1985 through December 1985. The COLA calculation was a percentage of any point increase in the CPI for wage earners and clerical. The CPI dropped due to sharp decreases in energy costs for June 1984. As a result, the previous high of June 1983 was used to calculate the rate.

ER did not violate the Act. EEs were paid all wages due based on a fair and reasonable manner of calculating the COLA.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

740 COMMISSIONS
Deductions
Earned

DEDUCTIONS
Shortages
EE Errors
Written Consent
Beginning of Employment

EMPLOYEE
Location Unknown

EMPLOYEE ERRORS

HEARING
Proceeding in Absence of Party

LOSSES CAUSED BY EMPLOYEES

87-6034 **Sutton v New York Carpet World, Inc dba Clyde's Carpet** **(1987)**

The Notice of Docketing and Hearing were returned because EE moved and left no forwarding address. EE was not paid commissions for all sales completed and closed after he quit. ER could not prosecute EE for taking money received on accounts because his location was unknown. When hired, EE signed an authorization for deductions from wages for losses caused by his own errors. When EE quit, he owed for carpet he ordered for himself.

ER did not violate the Act. The total taxes, orders not paid, personal orders, and debit from EE's error exceeded the amount of the DO.

741 EMPLOYER IDENTITY

Corporation
Corporation Officers

EMPLOYMENT RELATIONSHIP

Control
Partnerships
Not Finalized

86-5683 **Byers v Jack Johnson, Jim Melson and Tanglewood Realty, Inc, jointly and severally** **(1987)**

Complainant earned wages which were not paid. Respondent Johnson exercised pervasive control over the business and financial affairs of Tanglewood Realty and acted in the interest of the corporation in relation to Complainant. Respondent Johnson was liable as an ER. Respondent Melson was to purchase stock of Tanglewood Realty; however, no shares of stock were transferred to Melson. Melson was not liable as an ER because he did not have control over Complainant's work.

742 EMPLOYEE

On Call

FAIR LABOR STANDARDS ACT (FLSA)

WAGES

Complainant Paid Full Amount Earned but Not Amount Claimed

WAGES PAID

Time Worked

86-5849 **LeVasseur v National Broach and Machine Co** **(1987)**

EEs were told to evacuate the building because of a bomb threat and were directed to the parking lot. Some EEs left for the day without being disciplined and others remained in the

lot. They were told they might be able to return to work. Two hours and forty-five minutes later EEs returned to work. EE claimed wages for the time spent waiting in the parking lot.

The Department claimed EE was under the direction and control of ER by reporting to work and relied on 29 CFR 785.17 promulgated pursuant to the FLSA, which provides that an EE who is required to remain on call on ER's premises, or so close thereto, that he cannot use the time effectively for his own purposes is working while on call.

No evidence ER maintained control over EE for the time he chose to remain in the lot.

See General Entry VII.

743 VACATION

Written Contract/Policy

WRITTEN POLICY

Fringe Benefits

Interpretation

86-5671, et al 6 Complainants v International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America dba Truck Drivers Local 299 (1987)

The written policy provided that EEs would not be paid for accrued vacation. EEs claimed the July 30 minutes amended the July 23 policy, but this was not found to be true.

The Act authorizes pay for time off for vacation only on the basis of a written contract or written policy. The written policy provides that EEs will not be paid for accrued vacation.

744 BURDEN OF PROOF

Credibility

Wages Paid

87-6252 Cannon v Bravince Technology, Ltd (1987)

According to EE a check issued to him for wages was dishonored by the bank for insufficient funds. ER's witness testified EE signed the check and was given cash for the check. On the front of the check was the notation "paid cash" and the date. ER also relied on a letter from EE stating he had been paid in full and waived all liability arising out of his employment. EE denied signing this letter.

ER violated Section 5 by failing to pay a terminating EE all wages earned and due as soon as possible. The evidence offered by ER was not credible.

745 BANKRUPTCY

EMPLOYER DEFENSE
Lack of Money

87-6478 Peterson v Wedtech of Michigan (1987)

EE was owed fringe benefits. The corporation was in Chapter 11 bankruptcy proceedings. The current lessee had made an offer to purchase, and if accepted, money would be available to pay EE the outstanding fringe benefits. The fact no money was available was not a defense to the obligation to pay EE.

746 DAMAGE TO OR LOSS OF PROPERTY

DEDUCTIONS
Escrow Account
Written Consent
Beginning of Employment

TRUCK DRIVERS
Deductions
Escrow Account

87-6148 Bodine v Churchill Transportation (1987)

EE was hired to drive a trailer. On the date of hire EE voluntarily signed a document agreeing to have money taken from his wages and placed in an escrow account. ER deducted for a broken tractor window from the escrow account. EE could have provided his own insurance to cover tractor damages.

ER did not violate Section 8 and Rule 11. The escrow agreement was not a security deposit required as a condition of employment because EE had the option of obtaining his own insurance.

The deductions from the escrow account for the window damage was proper, but ER violated Section 7 by not refunding the escrow account balance.

747 DISCHARGED
Competing Business

DISCRIMINATION
Discharge Due To

86-5400 Miga v Great Lakes Recreation Co and Cloverlanes Bowl, Inc (1987)

EE filed a wage claim after ER failed to pay her an alleged bonus. She then established her own competing business and spent time away from her job without ER knowledge.

EE contended she was fired for claiming fringe benefits with DOL. ER claimed the termination was due to EE's lack of attendance.

ER did not violate the Act. ER had a legitimate nondiscriminatory reason for terminating EE.

748 ADJOURNMENT OF HEARING
Good Cause

EMPLOYER
Counterclaim

OVERPAYMENTS
Gratuitous

86-5752 Anderson v Micro-Time Management Systems, Inc (1987)

Good cause for adjournment was found the day of hearing due to death in immediate family of ER. A copy of the funeral program was provided to justify adjournment.

ER violated Section 7 for deductions taken from EE's wages without written consent; however, overpayments given EE more than offset the amount of the deductions. The Act does not provide a forum for ER to advance counterclaims to recover amounts allegedly due from EE.

749 BONUSES

FRINGE BENEFITS
Must Be in Writing to Be Enforced

WRITTEN CONTRACT
Never Executed

87-6315 Content v Lo-Mack Company, Inc dba Marywood Golf Course (1987)

A contract was drafted but never executed providing for a bonus. The contract formally offered to EE was rejected because of a bonus reduction from 10 percent to 7 percent. No bonus due because there was no meeting of the minds.

750 BURDEN OF PROOF
Recordkeeping
Unrebutted Testimony

87-6055 Whitaker v Hilltop Construction Company, Inc (1987)

EE kept a calendar of hours worked and testified in a believable manner he was not paid for all hours worked. ER's witness failed to appear at the hearing with records.

ER violated Section 5 by failing to pay a terminated EE all wages due. EE's testimony was unrebutted.

751 FRINGE BENEFITS
Earned at a Higher Value Than Paid

VACATION
Past Practice

87-6412 Harper v Industrial Welding, Inc (1987)

When EE's employment was changed from salary to hourly his accrued vacation days carried over. EE claimed the difference in value of vacation days earned as a salaried EE but paid hourly. ER gave an additional hour of vacation to those EEs switching from salary to hourly. The written policy for salaried and hourly EEs did not specify the dollar value for vacation payments.

ER did not violate the Act. It had been ER's policy to pay vacation benefits based on the amount an EE was earning per hour at the time the vacation was taken.

752 BURDEN OF PROOF
Recordkeeping

EMPLOYER IDENTITY
Corporation Officers

86-5632 Vasicek v Leonard G Schnieder, Masonette Construction, Inc (1987)

ER violated Section 9(1) by failing to maintain EE's employment records; also, Section 5 by failing to pay a separating EE all wages due as soon as possible. Respondent Schnieder was president of the company and acted directly or indirectly in the interests of Masonette Construction and, therefore, was liable for the wages owed along with company.

753 BURDEN OF PROOF
Recordkeeping
Unrebutted Testimony

87-5959 Adado v Joe Asicone and Harry Keif (1987)

The testimony of EE and her witnesses, plus a calendar kept by EE each day during her employment, was sufficient evidence to find EE worked during the period claimed. ER did not appear at the hearing.

ER violated Section 2 by failing to pay wages in a regular manner and Section 5 by failing to pay a separating EE all wages due as soon as possible.

754 DEDUCTIONS
Consent at Hearing

WAGES
Cash Payments

WRITTEN CONSENT
Testimony at Hearing

87-6102 Miracle v D & H Services (1987)

EE claimed wages for a 12-week period prior to being placed on payroll. ER's argument there was no wage agreement for this period was rejected. ER made substantial cash payments, more than necessary, to tide EE over, and these continued after EE was placed on payroll.

EE's testimony that he owed ER for truck repairs was sufficient authorization to make the deduction from the wages due.

755 EMPLOYMENT RELATIONSHIP
Bus Driver
Control
Driving Test

87-6314 Cogswell v Bath Community Schools (1987)

EE was hired to drive school bus and claimed pay for time spent taking a driver's test. The bus driver's agreement said ER would pay the full cost of bus certification tests.

ER did not violate the Act. The driving test was for renewing the license, not an initial certification test. EE was not working under the direction and control of ER while taking her driving test.

756 SICK PAY
Disability
Doctor's Statement
Medical Leave

WRITTEN POLICY
Fringe Benefits
Medical Leave

87-6219 Crouch v Clinton Memorial Hospital (1987)

EE was on medical leave for substance abuse. His medical leave status was changed to a suspension when a doctor found that EE was not physically or mentally disabled to work.

It was undisputed EE accumulated eight days of paid time off. This constituted a violation of Section 3, because this fringe benefit was contained in a written policy. No violation for nonpayment of 75 percent of EE's gross weekly wage, because he was not eligible for short-term disability under the written policy.

757 BURDEN OF PROOF

Credibility
Presentation of Proofs

WAGES

Poor Economic Situation

86-5814 Sawinski v General Cycle, Inc (1987)

EE's wage agreement provided 50 percent payment for labor charges on each job completed. EE's manager allegedly told him to withhold his pink slips for payment, collect unemployment compensation, and he would be paid commissions when business improved.

EE failed to prove he was owed wages by ER and changed his testimony about not receiving any wages when payroll cards were presented showing he had received some compensation.

WAYNE COUNTY CIRCUIT COURT: 4/22/88
Remanded the case to the ALJ for further testimony as either party shall wish or want to present and reconsideration.

ALJ DECISION AFTER REMAND: 11/88
EE's witness corroborated his testimony. ER, as the Appellant, failed to prove that the determination was incorrect. ER violated Section 5 by failing to pay EE all wages earned and due after termination.

758 THEFT

Alleged
Deduction Taken From Wages
Proven

85-5023 Kleinhardt v Beatrice Burnham dba Tee Family Restaurant (1987)

ER operated two restaurants under assumed names, Tee Family Restaurant and Centennial Haus. EE worked at both restaurants at different rates of pay. ER withheld EE's wages without written consent because he allegedly stole money from both restaurants. EE pleaded

guilty to larceny from Centennial Haus and was not prosecuted for the alleged theft from Tee Family Restaurant as a result of a plea bargain.

ER violated Section 7 for withholding wages without written consent.

MUSKEGON COUNTY CIRCUIT COURT: 4/8/88
EE withdrew his claim; ER withdrew judicial review request.

759 COLLECTIVE BARGAINING AGREEMENT (CBA)
Discharge for Cause

DISCRIMINATION
Discharge Due To
No Complainant Right to an Appeal
Reinstatement Refusal

PREEMPTION
CBA

86-5390 Malenfant v Dick Genthe Chevrolet, Inc (1987)

The issue was whether ER discharged EE for filing a wage claim and rejecting an offer of settlement. ER contended EE was fired for poor sales performance, although several other salesmen were not terminated for continued poor sales performance.

The ALJ rejected EE's refusal of reinstatement because his income would be decreased due to the increased sales staff.

There was no merit to ER's assertion the matter should be dismissed because it is preempted by the National Labor Relations Act and the CBA. The issue is not whether ER violated the CBA but whether EE was discharged for having engaged in an activity protected by MCLA 408.308.

ER was ordered to pay EE wages up to the offer of reinstatement and ordered to purge EE's records of any reference to his illegal discharge.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

WAYNE COUNTY CIRCUIT COURT - Filed 11/20/87
The issue is whether EE was discharged for filing a wage complaint.

On or about 1/3/89 the circuit court affirmed the ALJ that a discriminatory discharge did occur.

Leave to appeal was denied by the Court of Appeals.

Leave to appeal was filed with the Michigan Supreme Court.

On 7/27/89 the DO was satisfied.

760 COLLECTIVE BARGAINING AGREEMENT (CBA)
Double Time

DOUBLE TIME

85-5124 Russell v Gulf and Western Manufacturing Co, Bohn Aluminum and Brass Division (1987)

The claim was for double time for working regular shift on Monday (Sunday 11 p.m. - Monday, 7 a.m.) EE was paid double time for Sunday shift and straight time for Monday. The CBA permits double time only for hours worked prior to or after an EE's regular shift. Also, double time was specifically excluded for the shift beginning at 11 p.m. on Sunday. The claim was denied.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

761 CLAIMS
Twelve-Month Statute of Limitations

EMPLOYMENT RELATIONSHIP
EE/ER Relationship
Appointment

87-6019 Delbridge v Grantee Policy Council Child Development Program Non-Profit Corporation and City of Detroit (1988)

Complainant was appointed chairman of a mayoral subcommittee in 1972. In July 1974 she was hired by the city of Detroit's Recreation Department. She was laid off August 1974. Complainant testified she was assaulted in 1983 and has been on sick leave ever since.

Respondent did not violate the Act. No proof of written contract and no evidence Complainant was employed by Respondent other than 7/74 to 8/74. There was no EE/ER relationship established by her subcommittee appointment.

762 EXEMPLARY DAMAGES

RETIREMENT
Retroactive Pay Raises

87-6087 Jackson v City of Mt Clemens (1987)

EE retired 2/3/86. Retroactive pay raises to 7/1/85 were granted 6/2/86. EE claimed 31

weeks of backpay at the increased salary and an additional 25 percent exemplary damages. Respondent claimed the raise was to compensate the new assessor for his "greater qualifications" and did not apply to EE.

ER violated Section 5 for failing to pay EE monies earned between 7/1/85 and 2/3/86. Retroactive means the parties are to act as if the changed conditions were in effect as of the effective date, 7/1/85. Since Complainant was an EE from that date to 2/3/86, he should receive the increase.

No merit to EE's claim for exemplary damages.

763 DEDUCTIONS

Uniforms
Written Consent

UNIFORMS

Deductions For

88-6813 McNamara v McRae-Simmons Building Supply, Inc (1988)

ER agreed to owing EE for 45 1/4 hours worked. ER withheld this amount when EE was discharged. ER also deducted $4.50 for uniform rental. There was no written authorization to withhold any sums.

ER in violation of Section 7 for withholding EE's wages.

See General Entry III.

764 VACATION

Forfeited

WRITTEN POLICY

Silent on Forfeiture
Vacation v Sick Leave

85-5129 Parish v Harry Pall and Pall, Heppe, Nelson and Co, PC (1987)

EE was found entitled to earned but unused vacation benefits at termination. The policy was silent as to forfeiture. The case of Carpenter v Flint School District, 115 Mich App 683 (1982) was distinguished. The policy also provided that vacation benefits accrue on a vacation year basis and not by pay period.

765 SICK PAY

EE Not Sick

86-5883 Jones v Rand Systems Corporation (1987)

The claim was for vacation or sick leave. EE testified he was not ill on the days in question but just didn't feel like coming to work. He called in at 8:30 a.m. The written fringe benefit policy required a 30-day notice before vacation could be used.

The claim was denied, since EE was not sick and did not give the 30 day notice to be eligible for vacation.

766 JURISDICTION
Lack Of

SICK PAY
Due to Separating EE

WRITTEN POLICY
Accrued Sick Leave
Sick Leave

86-5805 Joy v Wesley R Benzing and Datamatic Processing, Inc (1987)

The written policy did not have language requiring payment of accrued sick leave to separating EE.

The Payment of Wages Act does not cover all monetary issues arising from an employment relationship. Verbal agreements can be pursued in the appropriate district court.

767 DEDUCTIONS
Failure to Collect From Customer

OVERTIME
Compensatory Time

WORK
EE Ready to Work but Door Locked

85-5118 Donn v Neill S Hirst MD, PC (1987)

ER violated Section 7 by reducing EE's earnings to minimum wage to pay for a $115 patient bill EE failed to collect.

EE worked overtime and was not instructed to reduce her weekly hours to avoid going over 40. ER had an office policy to pay overtime only if agreed in advance. Since ER knew of the overtime and did not adjust hours, it was concluded that ER agreed to the overtime.

EE reported to work on schedule at 9:00 a.m. and found the door locked. It was 10:00 before

a key could be obtained from another EE. This was found to be an hour of work, since EE arrived as scheduled, ready to work.

768 EMPLOYER

Principal Exercising Extensive Control

86-5291 Naturale v M Scott Fisher and Aptek, Ltd (1987)

Respondent Fisher was president of Aptek and, due to the small size of the corporation, exercised extensive control over Aptek. Section 1(d) permits individual liability if one acts directly in the interest of an ER. Personal liability for Fisher was not found because there was nothing in the record to suggest the corporate operation was a sham.

769 TWO-WEEKS' NOTICE

Failure to Work

Vacation Pay

VACATION

Discharge

Two-Weeks' Notice

85-5137 Reef v Ann Arbor Inn (1987)

EE was demoted in title and responsibilities but kept at former salary and benefits. EE quit rather than accept the change. The vacation policy required a two-week notice and work before vacation pay would be paid at termination. EE's argument that he could not give notice and work was rejected, since he could have worked at the offered position at the same pay.

770 BURDEN OF PROOF

Recordkeeping

EMPLOYMENT RELATIONSHIP

Changing From EE to Independent Contractor

WAGES

Records to Show Time

85-5211 Johnson v Piontek Painting (1987)

Complainant kept track of hours worked; Respondent did not. Complainant worked as an EE painting houses and later worked to repair a boat. Respondent claimed the boat labor was not as an EE but only to learn the work. Complainant would have been paid only if the boat were sold.

Respondent did not meet the burden of proof. In view of previous EE/ER relationship, Complainant reasonably believed he would be paid for work on the boat.

771 DISCRIMINATION

Demeanor of Witnesses
Discharge Due To

WITNESS

Demeanor

86-5293 Pettit v United Steel & Wire Co (1987)

EE and plant superintendent claimed over use of phone. EE was discharged. Previously EE had filed a wage complaint over unauthorized deductions. The supervisor told Department investigator that EE was fired for filing the prior complaint. The supervisor was later laid off and then called back to work at a lower paying nonsupervisory position. His testimony at hearing was considered agitated, reluctant, cautious, frightened, and red-faced.

A discriminatory discharge was found even though EE started the argument with the plant superintendent. EE would not have been discharged for this incident if he had not filed the prior claim.

772 VACATION

Conflict in Written Policies
Employment on Certain Day Required

WRITTEN POLICY

Conflict in Policies
EE Notice

86-5508 Ribikowski v Cross Company (1987)

Three claims were based on a vacation policy statement covering EE's place of employment. ER claimed another policy applied. The second statement required employment on a date after EE's separation. It was also titled with the name of a different plant location. EE had never been told the second notice covered their employment.

The first policy was found applicable to EE and vacation pay was ordered.

773 CONSTITUTIONALITY OF ACT

ALJ Determination

JURISDICTION

ERs With CBAs and Grievance Procedure

PREEMPTION
Jurisdiction

86-5385 Cruse v Anchor Motor Freight (1987)

ER took a deduction from EE's wage without consent. Based on a CBA, EE was not entitled to the money.

Respondent claimed that the Labor Management Relations Act provided exclusive remedy for breach of a CBA-binding grievance arbitration. McNeil v National Metalcrafters Division of Keystone, 784 F2d 817 (7th Cir 1986) was cited in support.

An ALJ does not have authority to rule on constitutionality of the statute. Barrantine v Arkansas Best 450 U.S. 728 (1981) was cited for the proposition that EE is not limited to a CBA but can pursue statutory rights.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

774 WAGES
Increase
Meeting of the Minds

86-5535 Boughton v IMC Plastics, Inc (1987)

EE started working in 6/82 with a written statement he would be increased $2,000 per year after 90 or 120 days if work was satisfactory. He did not receive the increase because of financial problems at the company. EE worked until 7/85 and claims backpay. It was held there was no meeting of the minds to establish a contract for a higher wage.

775 EMPLOYER
Counterclaim

RESIGNATION
No Notice

86-5485 Trawick v Linda S Okun dba All Drivers Insurance Agency (1987)

EE resigned without notice and left her keys in the office. The owners went on vacation the same day. No one could get into the office to answer the phone. ER withheld EE's last pay.

This was a violation of Sections 5 and 7. ER may not use self-help methods to pay itself for losses caused by EE. A suit in district court is the option. The Act does not permit an ER counterclaim to be heard by an ALJ.

776 COMMISSIONS

Reserve Account

WAGES
Reserve Account

85-5037 **Walden v Continental Marketing Corp** **(1986)**

EE was paid a wage consisting of 90 percent commissions. The remaining 10 percent was placed in a reserve account from which uncollected accounts and returns were deducted. EE claimed this 10 percent amount is due as unpaid wages.

Based on the history of employment, EE never received 100 percent of commissions. The actual wage was the 90 percent figure. All wages were paid.

777 HEARING
Split

VACATION
Policy Statement Not Ambiguous

WRITTEN POLICY
Not Ambiguous

85-5130 **Smykowski v Sealed Power Corporation** **(1986)**

Split hearings were held because of location of parties.

Employee Handbook denied vacation benefits to an EE "terminated before or between anniversary dates." Respondent claimed this language applied to all EEs separating for whatever reason. Since EE voluntarily quit, no vacation pay is due.

It was held that use of the word "terminated" limited the language to EEs discharged and did not include those voluntarily leaving. Since this language is unambiguous, it was not necessary to consider Respondent's prior interpretation and application of the policy.
CASS COUNTY CIRCUIT COURT: Filed 2/4/87
ER claimed parol evidence should have been considered to interpret vacation pay provisions of CBA.

(Decision not available.)

778 DEDUCTIONS
Written Consent
Signed as Condition of Employment

86-5333 **Heeringa v McCarthy & Sons** **(1986)**

At the commencement of employment EE signed forms agreeing to deductions from his wages for lost equipment and tools. It was held that EE would not have been hired if he did not sign the forms. Authorization obtained with intimidation or fear of discharge violated Section 7.

(Decision not available.)

779 DAMAGE TO OR LOSS OF PROPERTY

DEDUCTIONS
Verbal Consent

86-5486 Lynch v R S Hoffman Management, Inc (1986)

ER withheld last two weeks of wages to repay for damage to his truck. EE verbally admitted to damage and willingness to pay for damage.

Section 5 requires all wages to be paid to separating EEs. Section 7 prohibits a deduction without written authorization. ER must pursue its claim in district court.

780 CONSTITUTIONALITY OF ACT
ALJ Determination

JURISDICTION
ERs With CBAs and Grievance Procedure

PREEMPTION
Jurisdiction

85-5144, et al 5 Complainants v Muskegon Tool (1987)

Five Complainants claimed the CBA entitled them to vacation pay. Respondent claimed preemption of Article VI, Section 2 of the U.S. Constitution, the supremacy clause, failure to exhaust grievance procedures and lack of a contract.

Citing Barrantine v Arkansas-Best, 450 US 728 (1981) and Abbott v Beatty Lumber, 90 Mich App 500 (1979), the claims were affirmed. An ALJ does not have authority to find the Act unconstitutional.

781 BURDEN OF PROOF
Credibility

WAGE AGREEMENTS
Dispute
Verbal

Working Constitutes Agreement

WITNESS
Credibility

85-5151 Kerby v Gordon Bonney dba Bonney's Auto Parts and Supply (1987)

EE claimed a wage agreement of $300 per week. EE worked for nine weeks without receiving this amount. Under these circumstances EE could not have reasonably believed he would receive the amount claimed.

782 APPOINTMENTS
Qualification of Successor

CONTRACT
Employment

86-5258 Miller v Michigan Department of Labor (1987)

Complainant was not reappointed to the Workers' Compensation Appeal Board after his term expired on 2/1/85. He continued his duties after that date as a holdover. Complainant was informed to vacate his office on 10/14/85. A successor was appointed to a term effective 10/15/85. There was no meeting of the minds to continue Complainant's employment after 10/14/85. Also, Attorney General Opinion No. 6120 of 1983 states that an appointee may assume office immediately unless the senate acts to reject the appointment. Complainant's successor could assume the position on 10/15/85.

LIVINGSTON COUNTY CIRCUIT COURT - Filed 8/19/87
Complainant, of the Workers' Compensation Appeal Board, claimed wages due until 60 days after a successor was appointed and qualified. **12/30/88** - Affirmed the ALJ, stating successor was qualified to serve, and Miller's employment ended upon successor filing the oath of office.

783 COMMISSIONS
Deductions
To Offset Draw Deficit

COURT ACTIONS
Remand

DEDUCTIONS
Written Consent
For Each Deduction

WRITTEN CONSENT
For Each Deduction

88-7081 Kihnke v Grand Rapids Material Handling Co, Inc (1989)

Monthly commission payments were withheld to offset an accumulated draw deficit. Amounts earned greater than $2,100 per month were credited to a $7,000 balance pursuant to a written statement signed by EE. ER violated Section 7, which requires written consent for each deduction.

KENT COUNTY CIRCUIT COURT:
10/15/90 - Circuit Court remanded for hearing. Affirmed ALJ decision on miscellaneous deductions and required repayment of any amount which reduced the gross wages below $2,100. The court concluded that a separate signing was not required for each pay period. The one-time signing was effective for as many pay periods as were required to reach a $7,000 payback. The miscellaneous deductions were made without any written consent. This portion of the ALJ decision was affirmed. The court stated the ALJ should have limited his consideration of the consent to whether the parties considered it to be binding and whether amounts to be deducted could be specifically determined by a matter of calculation known to the parties. A consent form need not expressly identify a date and amount to be deducted.

2/25/91 - Amended ALJ decision. The DO was modified to order payment of $2,545.59 plus penalty in accordance with the court's order.

784 APPEALS
Only Issues Raised by Appellant May Be Considered

LOANS

WAGES
Training Period

87-5969 Ballance v Faud Hadi and Community Network Systems (1987)

EE alleged she was to be paid $300 a week for a training period during her first month. ER claimed the $300 EE received after her first week was a loan, although EE never signed a note. After notification, EE accepted a new wage rate of $125 for the last week of training.

Monies paid an EE after a week of employment can be presumed to be payment for work performed and not a loan. The Department's finding is the maximum amount that could be ordered paid, although a greater amount would have been found due if EE had appealed.

785 EMPLOYMENT RELATIONSHIP
Contract of Employment
Control
Economic Reality Test

86-5735 Del Valle v Robert G Borchak and Emergency Care, PC (1987)

Complainant had a written agreement with Respondent to provide emergency room coverage at a hospital where Respondent provided physician staffing. According to the economic reality test (see entry 303) an EE/ER relationship did not exist. Respondent exercised no control over Complainant's hours of work, did not supervise his performance or provide the tools or equipment necessary to perform the duties. Social security and taxes were the responsibility of Complainant. Complainant was a shareholder of Respondent corporation, which only had the authority to terminate its contractual agreement with him.

Complainant's work was an integral part of Respondent's business, but this fact alone was insufficient to establish an EE/ER relationship. MDOL without jurisdiction to consider Complainant's claim for wages.

786 BONUSES
Written Contract/Policy/Agreement

LUNCH HOUR AS TIME WORKED

WAGES
Gratuitous Payments

86-5750 Hall v Kay Willis Home, Inc (1987)

EE was not paid for her lunch period. She was not allowed to leave the premises or do as she pleased at lunch. EE was paid a Christmas bonus under no written policy.

ER violated Section 5 by failing to pay all wages earned upon termination. ER benefited from EE's presence during the lunch periods and the time should be considered time worked. EE due wages for lunch periods minus the Christmas bonus she received that ER was not obligated to pay.

787 EMPLOYMENT RELATIONSHIP
Severing Employment Relationship

WAGES
Due Despite ER Dissatisfaction

86-5739, et al Ridal, et al v General Properties Corp dba Merriman Park Apartments (1987)

EEs' employment agreement as apartment managers included an apartment on the premises along with their salary. After being discharged, EEs needed ten days to vacate their apartment. They contended they worked during that ten days prior to leaving their apartment.

Any work performed after the discharge was insignificant. EEs left the apartment on

numerous occasions to seek other employment. EEs are due wages prior to the discharge even though ER was dissatisfied with their work.

788 VACATION

Payment At Termination
Discharged
Policy Statement Not Ambiguous
Written Contract/Policy

WRITTEN POLICY

Fringe Benefits
Interpretation
Not Ambiguous

86-5846 DiMaggio v Manufacturers National Banks of Detroit and Bank of Lansing (1987)

Complainant was an officer for Bank of Lansing and was transferred to Manufacturers National Bank of Detroit as a staff EE. While a staff EE, Complainant was terminated. He would have been eligible for vacation benefits if he had completed ten months of employment. Complainant claimed vacation benefits under "Officer Vacation Time" in the written policy.

ER did not violate the Act. Complainant was not an officer after being transferred. Even if he were an officer, fringe benefits would not be due because the policy authorized payment of vacation to officers who terminate their employment, not officers who are terminated.

789 BURDEN OF PROOF

Presentation of Proofs

86-5742 Anderson v K & M Coachworks (1987)

EE was awarded one week's pay. ER and Department did not appear at the hearing. EE presented convincing evidence that ER held back a week of pay.

790 CLAIMS

After Exhaustion of CBA Remedies

COLLECTIVE BARGAINING AGREEMENT (CBA)

Deductions
Grievances

DEDUCTIONS

Fines
Written Consent

JURISDICTION

ERs With CBAs and Grievance Procedure
Exhaustion of CBA Remedies

PREEMPTION

CBA
Jurisdiction

85-4817, et al Partridge, Garczynski & Smith v R-W Service System, Inc (1987)

ER deducted money from EEs' checks to cover fines. Complainant Smith signed an authorization allowing deductions for money paid for fines. Complainant Garczynski filed a grievance. The union concluded the deductions were authorized by the CBA. ER claimed the Department lacked jurisdiction because of preemption by the National Labor Management Relations Act, and Complainants' failure to exhaust remedies under the CBA precluded bringing an action under Act 390.

Respondent needs written consent for each deduction from wages under Section 7. The CBA did not expressly permit deductions from wages to pay fines but stated negligent drivers were to pay fines. There are no procedural barriers or exhaustion requirements that prevent an EE from bringing an action under Act 390.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

WAYNE COUNTY CIRCUIT COURT - Filed 12/23/87
ER alleged preemption of Act 390 by LMRA and Court requirement that EEs exhaust grievance procedure. Also alleges a work rule specifying drivers are to pay fines constitutes a CBA authorization of a deduction.

The circuit court concluded that to resolve EE claims it was necessary to refer to CBA; thus making claims preempted under Luecke, et al. Because Section 7 specifically excludes deductions required or expressly permitted by law or by a CBA and the claim involves interpretation regarding its inclusion/exclusion in the CBA, the claim is preempted.

U.S. DISTRICT COURT: Filed 5/31/88
ER requests declaratory judgment that LMRA preempts Act 390 and injunctive relief prohibiting the Department from pursuing any present or future investigation, adjudication or enforcement of Section 7 of Act 390 against R-W service system for past, present or future deductions from wages.

By consent of Attorney General's Office, an order was issued. The MDOL is permanently enjoined from any current or prospective prosecution against R-W service or any claim brought by an EE pursuant to Section 7 where R/W Service establishes that the employment relationship was governed by a CBA at the time of alleged violation.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

791 COLLECTIVE BARGAINING AGREEMENT (CBA)

Deductions

Forwarded to the Union

HEARING

Address

Duty to Keep Department Advised

Unprepared

87-6323 Wilson v Oakland Paving Co and Thomas McDermott (1988)

The CBA provided for vacation pay and other benefits to be deducted from EE's pay each week and forwarded to the union. ER violated Section 7 by failing to forward EE's deductions to the union because of unaccounted expense money and refusal to return a pickup truck.

ERs' claimed they were not prepared for the hearing because the Notice of Hearing was not sent to the correct address was rejected because it was not returned as undeliverable by the postal authorities and was sent to the same address as the DO. Respondents have a duty to keep the Department advised as to a current address.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

792 FRINGE BENEFITS

Proration of Vacation Benefits

VACATION

Employment on Certain Day Required

Layoff

Proration

Written Contract/Policy

87-6138 Jones v Towlift of Michigan (1988)

After being laid off EE claimed three weeks' pay based on a written policy. The Department's position was no vacation was owed because of the policy provision that EEs would not receive vacation pay in lieu of time off. This was rejected because the policy did not address the question of vacation pay to laid-off EEs. ER's argument that EE must be employed as of January 1 was inconsistent with the language of the policy that laid-off EEs are eligible for a prorated vacation payment. Any ambiguity in the policy is construed against the drafter. EE was found eligible for a vacation benefit.

793 TEMPORARY EMPLOYMENT

WORK

As Acceptance of Wage Agreement

86-5669 Purdy v Polly Ann Pastry Kitchens, Inc (1987)

Complainant worked for Kelly Services, received minimum wage, and was assigned to Respondent. Respondent subsequently hired Complainant at $5.40 an hour and Complainant quit Kelly Services. Complainant worked three days before being informed he had not been hired. Respondent paid Kelly Services for three days at minimum wage. Complainant worked the three days in reliance that he had been hired at $5.40 an hour and is entitled to wages at $5.40 an hour.

794 BURDEN OF PROOF

Credibility
Wages Paid

COMMISSIONS

Draw Against Commission

87-6605 Kaul v Securities Press, Inc (1988)

EE's wage agreement provided for $20,000 a year plus a 4 percent commission on sales less freight and delivery. EE claimed a modified wage agreement provided $32,500 as a draw against a 5 1/2 percent commission on sales. According to ER, the modified wage agreement provided $32,000 a year plus a bonus at the end of the year if sales during the year exceeded a predetermined figure.

The ALJ found it unlikely ER would agree to increase EE's compensation so substantially that she would earn $9,800 in commissions in two months when the previous full year she earned only $12,000 in commissions. EE failed to sustain her burden of proof.

795 EMPLOYER

Principal Exercising Extensive Control

EMPLOYMENT RELATIONSHIP

Control

87-6287 Lanctot v Robert H Riccardi and Display and Exhibit Company (1988)

There was no evidence that existing policies were altered after Respondent Riccardi bought the business; therefore, vacation pay was due Complainant from Respondent. However, Respondent Riccardi was not liable for vacation pay owed, since there was no evidence he directed or controlled Complainant's activities.

796 COMMISSIONS

Draw Against Commission

Draw While On Vacation
Incomplete Sales

86-5395, et al **Strobridge, et al v Mol and Manufacturers Supply Co** **(1987)**

ER deducted wages without written consent due to sales not consummated. The commissions were less than the draws EE was paid so no further amount was due. Vacation payment was due based on a written policy that said vacations were to be paid vacations. EE, as a salesperson working on a draw against commission basis, is entitled to a continuation of the draw while on vacation.

797 FRINGE BENEFITS
Holiday Pay

WAGES
Forfeiture by Termination

87-6319, et al **O'Neil, Cortez and Germain v White Star Trucking** **(1988)**

It was held EEs were not entitled to be paid for a personal holiday because they had not used it by the time they were laid off. The union and company agreed the holiday would not be used until the end of the year, but EEs were not employed then.

798 APPEALS
Only Issues Raised by Appellant May Be Considered

CLAIMS
Twelve-Month Statute of Limitations

EMPLOYMENT RELATIONSHIP
Joint Operation of Business

JURISDICTION
Notification of Investigation
Statute of Limitations

SETTLEMENT AGREEMENT
Default

VACATION
Earned

85-5660 **Aiello v Tom Hasler, Milton Bauer and George Elkin and Admiral Optical Co, Inc** **(1987)**

A determination ordering payment of $3,000 in vacation benefits was issued after

Respondent failed to comply with a settlement agreement for the same amount.

Issue No. 1: The 1983 vacation benefit was outside the jurisdiction of the Department because it was prior to one year before Complainant filed his claim.

Issue No. 2: Respondent Elkin objected to being named as Complainant's ER, because he was not notified during the investigation stage of the claim. It was held there was no jurisdictional requirement to have contacted Respondent Elkin during the investigation before a DO could be issued. The company had been notified. Respondent Elkin was able to file an appeal and present testimony at the hearing. It was held to be proper to consider Respondent Elkin as Complainant's ER for purposes of liability under the Act because he acted jointly in exercising control over the business and financial affairs and acted in the interest of the corporation concerning its EEs.

Issue No. 3: Vacation benefits were due for 1984 based upon the written contract. A greater amount of vacation pay would have been found due if Complainant had appealed the DO.

799 THEFT

Alleged

Deduction Taken From Wages

87-6280, et al Manasterski and Jenkins v Jam Sound Specialists, Inc (1987)

ER withheld wages from EEs. Complainant Jenkins was caught stealing merchandise and he implicated Complainant Manasterski.

An allegation of theft does not allow the withholding of wages. Thefts of cash, proven in Court, where the cash is equal to or more than the amount of wages due an EE have been allowed because EE is deemed to have been compensated by the monies taken.

800 COMMISSIONS

Payment

After Separation

Customer Payment After Separation

When Earned

JURISDICTION

Trading Credits

87-6249 Farkas v Tradin' Times, Inc (1988)

EE continued to work after separation while aware of ER's policy that no commissions are earned on payments received subsequent to EE's last day of work. EE did not sign the employment agreement to this effect and felt he was due commissions paid after separation because of a verbal agreement. EE also claimed trading credits.

ER did not violate the Act. Although no written contract, company policy was clear. No evidence ER ever agreed to a verbal contract to pay EE after his separation. The Department has no jurisdiction to enforce the collection of trading credits because they are not U.S. currency or remuneration under the Act.

801 EMPLOYEE
Economic Reality Test

EMPLOYMENT RELATIONSHIP
Truck Driver

87-6177, et al Andrzejewski and Johns v Roadway Package Systems, Inc (1987)

Complainants were found to be EEs of Respondent as truck drivers. Respondent picked the routes, set the work standards, including dress and uniforms, and determined the hours worked. EEs' payroll was prepared at ER's direction. ER had the right to hire, fire, and discipline EEs.

WAYNE COUNTY CIRCUIT COURT - Filed 3/31/88
ER alleges Notice of Hearing was not received, good cause existed for absence at the hearing.

(Decision not available.)

802 BURDEN OF PROOF
Credibility

FRINGE BENEFITS
Must Be in Writing to Be Enforced

TESTIMONY
Inconsistent

WITNESS
Credibility
Demeanor

86-5631 Yaroch v Service Employees International Union Local 79, AFL-CIO (1987)

ER did not violate the Act. Complainant claimed fringe benefits as an EE of Local 79 but was found to be an EE of Council 35. Council 35 did not have a written contract or policy covering fringe benefits. Council 35 was subsidized by a parent organization in order to pay staff. Local 79 was the paymaster because Council 35 did not have a bookkeeper. Local 79 received the subsidized money from Council 35 to pay Complainant. Complainant's testimony was vague, inconsistent, contradictory and unbelievable.

INGHAM COUNTY CIRCUIT COURT: Filed 2/19/88
Issue: Whether there is an EE/ER relationship between EE and a local union or its statewide council. W-2s were issued by Local. Activity reports were written for state council.

(Decision not available.)

803 EMPLOYMENT RELATIONSHIP
Contract of Employment

TRAINING PERIOD
Payment For

86-5758 Finn v Tamara Institute de Beaute, Inc (1988)

Complainant was to be an unpaid observer for her first three days of employment. She claimed wages for these days plus a commission on products sold after this initial period. Under the parties' agreement Complainant's employment commenced after the initial three-day period. Complainant is owed the commission from products sold.

804 COLLECTIVE BARGAINING AGREEMENT (CBA)
Deductions
Grievances
Interpretation

JURISDICTION
ERs With CBAs and Grievance Procedure

PREEMPTION
CBA
Jurisdiction

87-6035 Murphy v Complete Auto Transit, Inc (1987)

EE's wages were deducted without written consent for a bridge violation fine. ER claimed the deduction was taken following the provisions of the CBA and also raised the argument of preemption by federal law.

The deduction was not taken within 30 days as specified in the agreement. EE is not barred use because he used the CBA grievance procedure. In Barrantine v Arkansas Best Freight Systems, 450 US 728 (1981), the Supreme Court concluded a wage claim could be filed despite a prior unsuccessful grievance.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

U.S. DISTRICT COURT: Filed 3/4/88

ER requested a declaratory judgment that Act 390 is preempted by LMRA and jurisdiction of the Department void.

9/5/89 - Granted ER summary judgment vacating ALJ's ruling (for EE) and declared that MDOL lacked jurisdiction because Act 390 was preempted by Section 301 of LMRA.

805 COMMISSIONS
Unsatisfactory Work

RETURNS
Work Not Completed Properly

VALUE OF SERVICES

87-6432 Parrinello v Trendy Auto (1988)

EE was a car painter who received commissions for completed work. He claimed wages on six vehicles he painted. ER claimed EE's work was not satisfactory and some vehicles had to be redone.

EE due wages on two vehicles satisfactorily completed. Wages are not due on those that were unsatisfactory. Additional expense would be incurred by ER in paying another person to redo EE's work.

806 CORPORATION
Shareholders Bound by President

EMPLOYMENT RELATIONSHIP
Contract of Employment

WAGES
Pursuant to Written Contract

WRITTEN CONTRACT
Failure to Pay According To

87-6433 Frazzitta v Makowski, Wishaw, Keller & Macomb Home Health Care, Inc (1988)

EE claimed wages and fringe benefits under an employment agreement. ER Wishaw was president of Macomb Home Health Care, Inc., and hired EE. ER shareholders claimed they never received a copy of the wage agreement or voted on it at a shareholders' meeting and, therefore, the terms of the employment were not valid.

ER violated Section 5. The president was elected and entered into the employment contract on behalf of the other shareholders. The president was EE's supervisor and had control over

her daily duties.

807 COMMISSIONS

Payment

After Separation

WAGES

Poor Economic Situation

Retroactive Change in Rate

87-6152 VanderWoude v Proto-Cam, Inc (1987)

EE's wage rate changed several times due to ER's financial difficulties. These changes always affected future months. During the month of June, following EE's discharge, it was determined there was insufficient money available to pay commissions for May.

EE had worked during May in reliance on an agreed commission. The company cannot change the amount of EE's wage rate after the fact even if there are financial difficulties.

808 COLLECTIVE BARGAINING AGREEMENT (CBA)

Fringe Benefits

Past Practice

Grievances

CONSTITUTIONALITY OF ACT

ALJ Determination

JURISDICTION

Lack Of

PREEMPTION

CBA

Federal Preemption

Jurisdiction

87-6163 Chandler v Michigan Bell Telephone Co (1987)

EE claimed fringe benefits for accrued vacation pursuant to the CBA. A local representative told EE they agreed with ER's interpretation of the CBA so EE did not file a grievance.

ER claimed federal law required the contract be interpreted through the grievance/arbitration procedure and/or the federal courts and therefore the Department lacked jurisdiction.

An ALJ does not have authority to rule on constitutionality of the statute. The CBA did not contain an accrued vacation benefit forfeiture clause for failure to use vacation time within the calendar year. A violation of Sections 3 and 4 was found.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

WAYNE COUNTY CIRCUIT COURT - Filed 2/12/88.
ER claimed preemption by LMRA, Arbitration Act. Also argues erroneous interpretation of CBA and conflict with past practice.

11/21/88 - ALJ decision affirmed. Act 390 was not preempted, since the determination was based on clear and unambiguous CPA language.

809 EMPLOYMENT RELATIONSHIP
Contract of Employment
Partnerships
Permit EEs to Work

87-6425 Ryan v America Personnel Services, Inc and Tom Van Scyoc (1988)

Respondent Van Scyoc bought out a former partner and merged the company with another. Complainant wanted to work for the partner, but the terms of the buyout agreement prevented this until Complainant's earnings exceeded her draw. The issue was whether Complainant and Respondent agreed to her continued employment.

The ALJ found no wages due. There was no written contract. There must be an agreement by both parties to continue employment, and it was evident Respondent did not intend to keep Complainant employed.

810 BURDEN OF PROOF
Recordkeeping

DEDUCTIONS
Minimum Wage

MINIMUM WAGE
Deductions

WAGES
Deductions Below Minimum Wage

87-6283 Lamar v NGRBB, Inc dba Nate's Car Wash Corp (1988)

EE claimed he was paid less than the minimum wage and that ER made deductions from his wages pursuant to a written consent to recover damages caused by EE.

ER's time and pay records showed EE did not work as many hours as claimed. The deductions made with written consent are not allowed because they reduced EE's wages below the minimum wage.

811 WRITTEN CONTRACT

Amendment

Meeting of the Minds

85-5857, et al Fletcher, et al v Cambridge Business Schools, Inc (1988)

EEs refused to sign the employment contract for a new pay schedule. They claimed wages due under this new pay schedule.

Monies owed to EEs must be calculated at the old rate. In order for a contract to be accepted, both parties must agree.

812 COMMISSIONS

When Earned

TESTIMONY

Conflict

UNCOLLECTED ACCOUNTS

WAGES

Commissions

Payable After Separation

87-6085 LoDuca v Thomas J Hammond and Oak Hills Mortgage Corp (1988)

EE claimed commissions on accounts he obtained as a loan representative. The vice president of the corporation testified EE did not perform all duties necessary concerning the contracts, left out necessary information on the forms, and a company policy prevented commissions if the mortgage was finalized more than 30 days after EE's termination.

The ALJ found commissions due. The manager's testimony contradicted the vice president's testimony concerning a 30-day cutoff policy and EE was not advised of this policy. Even though the applications submitted by EE were imperfect, the corporation made a profit. Mr. Hammond was removed as ER because he did not hire or direct EE.

OAKLAND COUNTY CIRCUIT COURT - Filed 3/24/88
The claim concerns commissions to a loan originator and whether performance beyond obtaining a loan application is required.

2/21/89 - ALJ decision affirmed. Wage agreement did not require service beyond taking of a loan application. Circuit court also deferred to ALJ's determination of credibility of witnesses.

813 DEDUCTIONS

Required or Permitted by Law
Verbal Request

87-6262 **Richmond v Britton-Devlin Corp dba Duffy's On The Lake** **(1988)**

EE requested that deductions be taken from his pay and sent to the Friend of the Court. No evidence of a court-ordered wage assignment was presented. Therefore, this deduction was not required or permitted by law.

Although ER acted in good faith to EE's request, violation of Section 7 for withholding wages without written consent. ER may file a claim in a Court of appropriate jurisdiction to recover monies owed.

814 DAMAGE TO OR LOSS OF PROPERTY

UNAUTHORIZED WORK

WAGES
Withheld
Property Damage

WRITTEN CONSENT
Damages

87-6426 **Sweeny v Ajax Industries, Inc and Jay-Cobb Corp** **(1988)**

EE took ER's truck full of asphalt without permission. The truck was severally damaged while in EE's possession. EE knew he was not working for ER when he took the truck. He offered to pay for the damages, although he did not have sufficient funds. EE signed an authorization to forfeit what monies ER owed him and resigned. He contended he had not signed voluntarily and was threatened with going to jail.

ER did not violate the Act. EE knowingly and willingly waived any claim for wages due him to help cover the serious property damage. No criminal charges were filed and EE never filed a grievance with the union as to the nature of his separation from employment.

815 SICK PAY
Contract or Policy Statement

WRITTEN POLICY
Accrued Sick Leave
Fringe Benefits
Interpretation

86-5724 **Pilger v National Office Products, Inc** **(1987)**

The written policy provided if sick leave was not used it would be paid at the end of EE's eligibility year. EE's employment ended in May and his eligibility date was in October, so he was not entitled to sick pay.

816 DEDUCTIONS

Minimum Wage
Shortages
EE Responsibility
Written Consent
Beginning of Employment

LOSSES CAUSED BY EMPLOYEES

WRITTEN CONSENT

Inadequate

87-6220 Smith v Showtime TV Sales, Inc (1988)

ER withheld wages from EE based upon the value of a missing video camera. EE was responsible for guarding the merchandise. EE signed an authorization for such a deduction in his job application. A job description form signed by EE also held him responsible.

Section 7 requires written consent for each wage deduction. Even if the consents were valid, EE would still be owed minimum wage.

817 BURDEN OF PROOF

Unrebutted Testimony

EMPLOYEE

One Who Is Permitted to Work

HEARING

Rescheduling

VALUE OF SERVICES

87-6110 Peters v Comstock (1988)

EE did not attend the hearing. EE's request to reschedule the hearing, postmarked eight days after the hearing, was denied. The request was not filed prior to the hearing as directed in the Notice of Hearing and good cause was not presented.

Based on the unrebutted and believable testimony of ER, no wages were found due. EE accompanied ER on several occasions to observe the work in progress and was paid for helping to install a desk.

818 VACATION

Anniversary Date
Break in Service
Workers= Compensation Benefits
Past Practice
Work Requirement

87-6212 VanGoethem v Freeway Sport Center, Inc (1988)

EE was to receive two weeks' paid vacation after service of one year. EE contended he earned the two weeks' vacation by association with ER, but EE had a break in service from 2/4 through 4/16/86 when he was injured on the job and received workers' compensation benefits. In prior cases EEs were required to make up for time off to satisfy the one-year service requirement. It was concluded the word "service" required EE to work for ER throughout the year except for normal vacation and minimal sick leave absences.

819 COMMISSIONS

Payment
After Separation
Customer Payment After Separation

WRITTEN POLICY

EE Knowledge
Notice to EE of Change

84-4142, et al Skladzien, et al v Automobile Club of Michigan (1987)

Four of the five Complainants were notified of the revised payout policy prior to their termination, and therefore were not entitled to be paid for renewal commissions for 90 days after separation. No evidence Complainant O'Hara was made aware of the revised policy of no payment of commissions after last day worked, and he was therefore entitled to be paid for renewal commissions for 90 days after separation, provided customer payment was made within that period.

820 COMMISSIONS

When Earned

87-5902 Timmerman v Share Advertising, Inc (1987)

EE's job included signing up customers and servicing them for 30 days. She claimed commissions for customers signed up but not serviced. No commissions due for the sales claimed, because she did not satisfy the commission standard of servicing the customer for 30 days. She was paid in the same manner throughout her 17 months of employment, and to pay a full commission when the customer was signed up without servicing for 30 days would be like paying an advance.

821 BURDEN OF PROOF

Presentation of Proofs
Recordkeeping

87-6290 Jones v Myles Cleaners, Inc dba Tigers Cleaners (1988)

EE claimed she was paid with a personal check for the first two weeks of employment, was not paid the next week, and produced pay stubs for the remainder of her employment. She also claimed she worked beyond the date of the last pay stub.

ER violated Section 5 for failing to pay EE her third week of employment based on the lack of pay records. EE failed to present evidence she worked after the date of her last pay stub.

822 RESIGNATION

Written Policy
Two-Week Notice Required

TWO-WEEKS' NOTICE

Failure to Work
Vacation Pay

VACATION

Conflict in Written Policies
Resignation
Adequate Notice
Written Policy

WRITTEN POLICY

Conflict in Policies

86-5747 Miller v Beier, et al (1987)

EE was paid wages for her last three days of employment at her previous rate of pay. She claimed the difference from the old pay rate to the new and also two weeks of accrued vacation under a written policy. She gave two weeks' notice of her resignation but only continued working three days for lack of work assignments.

ER's vacation policy and resignation/severance policy conflicted and therefore must be construed against the drafter. The vacation policy provided vacations not taken are forfeited. The resignation/severance policy provided if EEs resign or terminate, they will be paid for accrued vacation. The vacation policy indicated EEs were expected to give two weeks' notice if they resign, but did not say that accrued vacation would be forfeited if the notice was not given.

823 ATTORNEY FEES

BURDEN OF PROOF
Recordkeeping

EXEMPLARY DAMAGES

WAGES
Records to Show Time

86-5819 Gomez v Sharon Schaening, Brenda Schaening dba Lansing Lumper Service (1987)

EE worked unloading trailers and was not paid which violated Section 5. There were no payroll records kept as required by Section 9. Eleven other claims were investigated

against ER for nonpayment of wages. Therefore, exemplary damages were ordered for twice the amount of wages due, plus attorney fees and costs.

824 APPELLANT
Unrebutted Testimony

DISCRIMINATION
Discharge Due To
Poor Productivity

WITNESS
Failure to Appear

86-5831 VanHyfte v Denno's Furniture, Inc (1987)

The Department sent a letter to ER on 5/1 advising of EE's wage claim (later withdrawn). EE was discharged on 5/5 due to alleged poor productivity and losses incurred by the company. Other employees were also discharged. ER's witness stated the company was not aware of the 5/1 letter before making the decision to terminate EE. The Department investigator interviewed an employee who confirmed someone was hired the same day EE was discharged and worked the same hours and did the same work as EE. Neither EE nor the witness appeared at the hearing.

EE's claim was not substantiated. It was uncertain as to when ER received the notification of the wage claim and unrebutted that all EEs were discharged due to poor productivity.

825 FRINGE BENEFITS
Must Be in Writing to Be Enforced
Notice to Terminate Requirements

RESIGNATION
No Notice

WRITTEN POLICY
Resignation
Two-Week Notice Required

86-5753 **Bond v Kendor Steel Rule Die** **(1987)**

EE claimed he worked the day before and after the holiday (Memorial Day) as required by a note posted on the bulletin board. He quit two days later without notice. A note attached to his pay stub said holiday pay forfeited due to quitting without notice.

ER claimed the notice was posted more than a month after EE terminated and there was no written policy for holiday pay at the time of EE's employment.

It was concluded that ER also posted the notice before Memorial Day and holiday pay was due. EE was not informed he needed to give notice of quitting.

826 THEFT
Alleged
Deduction Taken From Wages

86-5778 **Auletta v Terry Whitman and Executive Art Studio, Inc aka Velvet Touch** **(1987)**

ER violated Section 5 by withholding EE's last two weeks' wages for 18 videotapes allegedly taken by EE. An allegation of theft by itself does not permit ER to withhold wages. A court order permitting the withholding of wages as restitution would satisfy Section 7.

INGHAM COUNTY CIRCUIT COURT - Filed 6/29/87
The issue was whether ER's due process rights were deprived because EE failed to attend the hearing and could not be cross-examined.

12/19/88 - ALJ decision affirmed.

827 EMPLOYMENT
Termination
Failure to Receive Paycheck

87-6436 **Immonen v Lucaj Painting Contractors, Inc** **(1988)**

When EE resigned his employment he had not received wages for ten weeks. EE produced checks for three weeks but ER testified he never signed those checks because EE was not doing his job.

Since EE was not paid for three weeks and ER refused to sign the paychecks, it was evident the employment relationship ended. It was found that ER violated the Act and EE was entitled to four weeks' pay for the services performed. No payment was due after this time because of the lack of evidence to show what work EE performed.

828 COMMISSIONS

Draw Against Commission

87-6456 Masopust v Curtin Matheson Scientific, Inc (1988)

EE was paid a salary twice monthly plus bonuses. This method of payment ceased when he signed a contract to become a full-commissioned sales representative. He received his draw at midmonth and his commission at the end of the month minus the draw. The commission was based on the prior month's sales.

EE received two salary checks in January. EE's claim was for one additional check which was treated by ER as a draw. He was entitled to only one salary check because his contract agreement for commissions was retroactive to January 1. It was found that ER did not violate the Act.

829 EMPLOYER IDENTITY

EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

86-5690 Parks v Frank Vaydik and Valley Management Services and Northfield Center, Limited Dividend Housing Association (1987)

Complainant worked for a property management corporation which managed several entities. Complainant was terminated from one entity and began employment for another managed by the corporation. Respondent believed Complainant had broken his employment seniority for vacation purposes when he changed jobs and withheld vacation pay.

Based on the economic reality test, (see entry 303), it was found there was an EE/ER relationship. All entities of the corporation were Complainant's ER.

SAGINAW COUNTY CIRCUIT COURT DECISION: 3/9/88

Affirmed the ALJ decision that Respondents were all ERs of Complainant.

830 DEDUCTIONS

Overpayment

Telephone Calls

TELEPHONE

Long Distance Calls, Deductions

WRITTEN CONSENT
Deductions

86-5537 **Tryan v Herbert and Wood** **(1986)**

ER sought to make a deduction without consent for vacation pay overpayment and telephone expenses.

ER violated Section 7 by not having written consent.

SCHOOLCRAFT COUNTY CIRCUIT COURT: 7/2/87
Affirmed the ALJ decision requiring written consent.

831 COMMISSIONS
Earned

EMPLOYMENT RELATIONSHIP
Control
Economic Reality Test
EE/ER Relationship Found
Economic Reality Test

86-5645 **Hodge v John R Titus, Jr and Dignitary Protection, Inc** **(1987)**

Complainant was told she would receive commissions on telephone contacts and interviews for two weeks and then receive $4 per hour. Complainant kept track of her time during the period of employment. Complainant never received $4 per hour but received only $40 from the company. Mr. Titus, Jr., believed that Complainant was not an EE but an independent contractor.

According to the economic reality test used to determine whether an EE/ER or independent contractor relationship existed, it was found Complainant was an EE of the company because she performed a variety of clerical duties including interviewing others while at company offices and was not an independent contractor. John R. Titus, Jr., stopped handling operations of the company and was found not to be an ER of Complainant. Respondent Dignitary Protection violated Section 5(1).

832 COMMISSIONS
Earned

EMPLOYMENT RELATIONSHIP
Contract of Employment
Economic Reality Test
EE/ER Relationship Found

MINIMUM WAGE
Overtime

86-5646 **Thomas v John R Titus, Jr and Dignitary Protection, Inc** **(1987)**

Complainant was hired by Respondent, a company providing bodyguard services, to screen applicants and determine qualifications. Complainant had a background in the martial arts. He was told he would receive an hourly wage plus a commission for each person that signed up for instruction. He did not receive any wages and was told that he would have to wait for a client to guard before the wage agreement would take effect.

John R. Titus, Jr., claimed Complainant was not an EE but an independent contractor. In applying the economic reality test, it was found that Complainant was an EE of Respondent Dignitary Protection, Inc., because (1) Respondent controlled Complainant's duties; (2) the payment of wages; (3) the right to hire and fire and the right to discipline; and (4) the performance of the duties as an integral part of ER's business toward the accomplishment of a common goal.

It was also found that Mr. Titus's association with the company as supervisor for Complainant was irregular and infrequent and, therefore, he was not an ER of Complainant.

Respondent Dignitary Protection, Inc., violated the Act and owed Complainant minimum wage for the hours worked, plus overtime pay and commissions.

833 JURISDICTION
Over State EEs

84-3768 **Creighton v Department of Social Services** **(1984)**

The Department was directed to show cause why it should not be directed to investigate EE's claim, since the Act defines an ER to include "this state or an agency of this state." The Department asserted it was without jurisdiction to investigate the claim.

The Payment of Wages Act covers state EEs even though they are Civil Service EEs. The Department was directed to investigate EE's wage claim.

WAYNE COUNTY CIRCUIT COURT ORDER:
Affirmed decision of the ALJ.

COURT OF APPEALS: 5/29/87
The case was dismissed because of a settlement.

834 APPEALS
Untimely
Good Cause Not Found

86-5893 **Rhines v Dominion Systems, Inc** **(1987)**

EE filed an appeal one year and twenty-nine days late. EE's appeal was based on newly discovered evidence and relied on a decision of the employment security board of review finding an EE/ER relationship between EE and ER.

It was found that the decision EE was relying on was neither newly discovered evidence, nor good cause for a late appeal. Over three months had elapsed from the time the decision was issued and EE appealed. EE's appeal was dismissed.

MUSKEGON COUNTY CIRCUIT COURT: 9/30/87
Order of dismissal granted after the Department of Labor filed a Motion to Dismiss without objection from the parties.

835 WAGE AGREEMENTS

Unclear

87-6078 **Bartley v Carl L Graves dba TEC Appliance Center** **(1987)**

EE was hired to repair refrigerators in the shop and at customers' homes. EE's last wage was withheld for one month to cover costs of any repairs to appliances repaired by EE before his separation. An employment agreement signed by EE agreed to this procedure. ER violated Sections 5 and 7.

The agreement violated Section 7 since it did not specify any particular pay period or amount to be deducted. EE did work during the last week of employment and is legally entitled to the wages earned.

836 COLLECTIVE BARGAINING AGREEMENT (CBA)

Wages

EMPLOYMENT RELATIONSHIP

Bus Driver

WRITTEN CONTRACT

School Bus Mileage Computation

87-6162 **Papiernik v Board of Education Arenac County, Arenac Eastern School District No 4** **(1987)**

Additional wages for school bus driver were denied. CBA required wage to be paid based on miles driven on bus route. EE claimed distance from bus parking position at rear of school to front of school starting position should have been included in mileage computation.

It was concluded the additional distance claimed was not part of historical computation of distance. The wage agreement could not be changed unilaterally. Moreover, drivers received a bus start-up fee each day to prepare the buses for travel.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

837 DEDUCTIONS

Haircut

EMPLOYMENT RELATIONSHIP

Contract of Employment

Observer

TRAINING PERIOD

Payment For

WRITTEN CONSENT

Deductions

87-6424 Mate v Timm's Place, Ltd, a corporation, and Timothy M Murphy, an individual, jointly and severally (1988)

EE was not hired at the time of the initial interview. Instead, it was agreed that EE would observe ER's operations so it could be determined whether she would be able to perform the job. EE claimed she worked during this initial observation period. However, it was concluded that EE was not employed and did not earn wages during that period. EE was subsequently hired by ER. ER deducted $25 from EE's wages without written consent for a haircut.

ER violated Section 7 by making a deduction without written consent. See General Entry III.

838 VACATION

Anniversary Date

Break in Service

Eligibility Affected by Illness

Written Contract/Policy

87-6313 Gorey v Scott Chevrolet-Oldsmobile-Pontiac, Inc (1988)

EE was ill and was off work for 2 2 months. The vacation policy specified two weeks' vacation after two years' employment. EE took a two-week vacation, but ER withheld the vacation payment because it believed EE had not completed two years' employment.

It was found that EE's illness was not a break in seniority. EE did not resign during the illness. The two-year requirement was satisfied and EE qualified for two weeks' vacation pay.

ER violated Section 3, which requires payment of fringe benefits in accordance with the written policy.

839 TRUCK DRIVERS

Paperwork Required Before Wages Due

WAGES

Paperwork Required Before Payment

87-6463 Eckel v Charles Bruce aka Bruce Trucking (1988)

EE was a commissioned truck driver. He was to receive 25 percent of the amount of the gross amount after ER received payment for the trip. EE did not receive payment for six accounts. EE withheld paperwork because he did not receive his wages. The employment agreement stated that paperwork was needed before payment could be made. No wages due to EE because he did not submit the required paperwork.

840 BURDEN OF PROOF

Handwriting Expert
Recordkeeping
Inconsistently Kept

EMPLOYMENT RELATIONSHIP

Ends Without Wages

WAGES

Records to Show Time
Volunteer

WITNESS

Credibility

86-5442 Gennara v Hermansville Housing Commission (1988)

ER received monies from Housing and Urban Development (HUD) to pay wages for project administration. After the money for wages ran out, EE continued to work without compensation but then resigned. According to Section A 1.04-3(3) of the Department's operations manual, Complainant was considered an EE and not a volunteer. Upon inspection by a lieutenant of the Michigan State Police Forensic Science Division, the document submitted as the employment record maintained by ER was found altered and not uniformly written. It was found that ER did not keep a daily or weekly time record.

ER violated Section 2 by not paying EE in a regular manner, Section 5 by not paying all wages due when EE resigned, and Section 9 by not keeping employment records as required.

841 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Not Found

87-6421 Martin v Marcelino Gonzales and Judy Gonzales dba Country Cooking (1988)

The Department found no EE/ER relationship. Complainant appealed.

Respondents were opening a new restaurant. Complainant filled out an application for employment. Respondents did not know what happened to Complainant's application. Complainant was frequently at the restaurant. Complainant made suggestions to Respondents about who they could interview to work at the restaurant. He was seen occasionally wiping off a counter. This led some to believe that he was the manager.

It was found that Complainant was never hired, never told he would receive a wage, and never told to supervise, hire or fire EEs. His name was not on the time schedule and there was no W-2 form filled out.

Complainant was found not to be a manager, therefore no EE/ER relationship.

842 WAGES

Full Amount Not Paid

87-6726 Marion v Professional Services of Michigan (1988)

In accordance with the terms of the employment contract, EE agreed to continue to work a reasonable period of time after giving ER notice of resignation to train a replacement. ER did not pay EE for time worked during that period, nor for authorized expenses. EE did not give written consent for withholding wages and fringe benefits.

ER violated Sections 4 and 5 by withholding EE's wages and authorized expenses without authorization.

843 SUCCESSOR LIABILITY

Written Policy Adopted by New Owner

VACATION

Anniversary Date

87-6656 Zaggy v Garnaat Travel, Inc dba AMF/Red Carpet Travel of Jackson (1988)

EE had a leave of absence for three months. During her leave, the business changed owners. No new EEs were hired and the written policy continued in effect. EE earned five days' vacation after six months. On the first anniversary date EE was entitled to two weeks' paid

vacation. When EE returned to work, seniority began to accumulate. According to the written policy, EE was entitled to two weeks' paid vacation in August '86. EE terminated employment February '87 and was half way through her second anniversary year. EE did not take any vacation prior to termination and was not paid for any vacation days.

ER believed he was not liable for the vacation days because he was a new owner. However, ER had adopted the previous owner's written policy when he told EEs it would continue in force.

ER violated Section 3 by not paying fringe benefits in accordance with the written policy and violated Section 4 because it withheld compensation without written consent.

844 OVERTIME

Salaried EE

87-6596 Kipke v Ashland Oil, Inc dba Instant Oil Change (1988)

ER had a written policy regarding overtime pay where hours worked beyond 40 hours per week were to be paid at 1 2 times the hourly wage. EE was never paid for overtime. He worked about 50 hours per week. According to the written policy, EE was not entitled to overtime pay because he was a manager and salaried; only hourly EEs were eligible for vacation. EE was paid all wages earned and due. ER did not violate the Act.

845 COURT ACTIONS

Restitution

DEDUCTIONS

Written Consent

EMBEZZLEMENT

Convicted But Not Sentenced

THEFT

Proven

Restitution

Sentencing

WRITTEN CONSENT

Shortages

Theft

87-6477 Miroslaw v C A Muer Corp (1988)

ER violated Section 5 and was ordered to pay $262.50 plus penalty. ER appealed. EE did not appear at the hearing.

EE signed an agreement to allow ER to deduct from wages any amount of shortages for which he was responsible. EE was convicted of theft of $3,920 from ER. ER submitted a request for restitution to circuit court. The court did not order restitution because EE failed to appear for sentencing.

ER did not violate the Act because EE had signed an agreement authorizing deductions to be made for shortages.

846 COMMISSIONS

Payment

After Separation

Follow-up Work

Incomplete Sales

87-6567 Zdan v Aro Systems, Inc dba Great Lakes, Inc (1988)

EE received a commission on computer sales and consultations. He received consultation pay after the customer paid. EE's claim was for a sale that was paid on a consultation that occurred after he severed employment. EE did not perform the consultation or follow-up to assure customer satisfaction. He did not perform or offer additional services for later orders and purchases.

It was found that EE was not entitled to consultation commissions due after he had severed employment. ER did not violate Section 5.

847 DEDUCTIONS

Workers' Compensation

WAGES

Commissions

Payable After Separation

WITNESS

Credibility

87-6506 Miller v Chemlube, Inc (1988)

Complainant worked as a sales representative. There was no written employment agreement. Complainant was paid a commission on sales, payable the 15th of the following month after the product was shipped. Complainant and Respondent did not agree on the date of separation. Complainant continued to work and was not paid commissions earned. Complainant's position was accepted as being more credible as to the separation date.

After separation, Complainant sent Respondent a request to operate as an independent manufacturer's agent. Complainant would pay his own expenses, taxes, social security, and workers' compensation. However, Respondent deducted workers' compensation from

Complainant's last paycheck.

Respondent violated Section 2 by delaying payment of earned commissions, violated Section 5(2) for not paying all wages earned as soon as the amount could be determined, and violated Section 7 for a deduction without written consent for workers' compensation.

848 COURT ACTIONS

Default Judgment to Offset Amount Due Complainant

87-6659 Connor v Burlingame Company (1988)

Prior to hearing, ER received an Order of Judgment from small claims court awarding damages and costs against EE. The judgment exceeded the amount set forth in the Department's DO, which was not appealed by EE. The determination was amended to find no wages or fringe benefits due EE. The judgment was an authorized offset of the amount stated in the DO.

849 COLLECTIVE BARGAINING AGREEMENT (CBA)

Interpretation

Retroactive Application

JURISDICTION

Statute of Limitations

Contract Ratification

RESIGNATION

Retroactive Pay

Interest

RETROACTIVE PAY

Interest

WRITTEN CONTRACT

Termination Prior to Contract Date

87-6330 Devlin v Redford Township (1988)

EE resigned 9/13/85. A new CBA was ratified in June 1986 providing for 7 percent retroactive pay from 4/1/85 to 3/31/86. EE claimed retroactive pay from 4/1/85 until 9/13/85.

Section 11 (Statute of Limitations) did not apply because the claim for retroactive pay could not be made until it was agreed upon and EE was aware of it. Therefore EE's filing was timely.

The agreement showed there was no intention to retroactively pay people who were not EEs

when the contract was ratified. EE's claim was denied.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

850 BURDEN OF PROOF

Credibility
Recordkeeping
Wages Paid

87-6333 Krista v Michael Koury dba Command Performance (1988)

EE did not appear at the hearing. ER testified the record submitted as Department Exhibit 1 was in error which showed EE worked ten hours. She was only paid for five hours. ER testified in a believable manner that there was a discrepancy in the records. No wages due.

851 FRINGE BENEFITS

Must Be in Writing to Be Enforced

VACATION

No Written Contract/Policy
Past Practice

87-6331 White v Gibraltar National Corp (1988)

The former comptroller of ER testified it was company policy to pay salaried EEs the same benefits as union EEs. There was no written policy regarding vacation pay for salaried EEs. EE claimed vacation pay. She was a salaried EE and not a member of the union.

No authority under the Act to order vacation pay without a written policy.

852 WRITTEN POLICY

EE Knowledge
Unsigned

87-6571 LeGree v Phoenix-Ivory Moving & Storage Co, Inc (1988)

ER allowed EE to change from an hourly EE to a commissioned driver or broker. EE did not explain why he asked for commissions except that he was playing it by ear. EE said he was never informed deductions would be taken from the 45 percent commissions. Although the written agreement was never signed by the parties, it was a standard contract and its provisions applied to EE employment. ER did not violate the Act.

853 BURDEN OF PROOF

Presentation of Proofs

WRITTEN POLICY
Never Executed
What Constitutes

87-6508 **Croxall v Michael J Penn dba Titcomb and Penn** **(1988)**

The Department found no fringe benefits due because there was no written policy. EE testified all EEs were given a written policy at a meeting. ER's witness testified EEs received a written memorandum when ER was considering a policy manual and wanted to get EEs' views, but this policy was never executed.

ER did not violate the Act. A written policy under the Act must be more than a piece of paper containing some provisions regarding employment.

854 BURDEN OF PROOF
Credibility
Recordkeeping

87-6541 **Lietaert v Larry Moore and All Purpose Cleaning of Monroe, Inc** **(1988)**

Based on EE's personal problems and doubt as to the accuracy of time cards, the evidence was considered insufficient to establish a wage claim.

855 EMPLOYMENT RELATIONSHIP
Truck Driver

JURISDICTION
Lack Of

VACATION
Lack Of

87-6547 **Alexander v Peltier Companies International, Inc** **(1988)**

Ligon Company of Kentucky leased trucks from ER. Ligon controlled the drivers by hiring and dispatching them. A contract was signed between EE and Ligon company, but there was no signed employment contract between EE and ER. Payment was not made on a load EE delivered because work papers were lost. Ligon Company forwarded 75 percent of monies received for delivery of loads and then 25 percent of that went to the driver, minus advances. Monies were owed EE for the delivery, but there is no jurisdiction to order payment because there is no employment relationship between EE and ER. The parties may pursue their claims in a court of competent jurisdiction.

856 APPEALS

Untimely

Good Cause Not Found

Appeal Must Be in Writing or in Person

FRINGE BENEFITS

Must Be in Writing to Be Enforced

JURISDICTION

Lack Of

Over Bonus Without Written Contract

VACATION

No Written Contract/Policy

WAGES

Deposited Into EE's Account

86-5542 Hale v LeRoy Nichols, an individual, and N-P Construction, Inc, jointly and severally (1987)

EE did not file an appeal of the DO, but informed the investigator of his disagreement and understood the matter would be forwarded for hearing. EE filed an answer to the Department's response to ER's Motion to Quash Subpoenas but appeal was found to be late without good cause. ER filed a timely appeal. EE's claim for a bonus was outside the Act's jurisdiction because there was no written policy.

EE worked for his father-in-law. When EE terminated employment, his vacation and wage checks were given to his estranged wife who deposited them in their joint bank account and then immediately withdrew them.

ER did not violate the Act with regard to vacation pay because there was no written contract. ER violated Section 5, which requires ERs to pay EEs who leave employment all wages earned and due; and Section 6(2) prohibits ERs or agents of ERs from depositing an EE's wages in a bank without their written consent. EE's wages were given to his estranged wife for her use and enjoyment.

LeRoy Nichols was dismissed as a Respondent because he did not have the ultimate or pervasive control over the daily operations of the company.

KALAMAZOO COUNTY CIRCUIT COURT DECISION: 2/29/88

EE contended subpoenas were improperly quashed and paychecks constituted a written policy for vacation pay; bonus was a regular part of compensation and was due irrespective absence of a written policy.

The Petition for Review was dismissed without comment.

857 APPEALS

Dismissed

REHEARING

Denied

86-5332 Moore v Terry Whitman, Executive Art Studios, Inc (1986)

On the date scheduled for hearing, ER requested an adjournment by telephone which was denied. ER's appeal was dismissed because good cause had not been shown for his absence from the hearing.

ORDER DENYING ER'S REQUEST FOR REHEARING: 1/15/87

ER's request for an adjournment the day of the hearing did not constitute a justifiable reason for a rehearing or reconsideration.

INGHAM COUNTY CIRCUIT COURT ORDER: 8/25/87

Dismissed the appeal based on settlement by the parties.

858 DEDUCTIONS

Written Consent

Beginning of Employment

TELEPHONE

Time Spent, Personal Calls

WRITTEN CONSENT

Deductions

84-3762 Budde v Law Office of Lawrence Stockler (1984)

ER deducted EE's personal phone call charges. Her written authorization three months before the deduction for "set off of any kind" does not comply with Section 7 because ER is required to obtain written consent for each wage payment subject to the deduction.

MACOMB COUNTY CIRCUIT COURT: Filed 11/13/84

The 1/27/86 AG memo indicated file was closed because both parties were represented by counsel.

859 COMMISSIONS

Incomplete Sales

Mortgage Originators

Payment

After Separation

WAGES

Commissions
Payable After Separation

87-6281 Becker v Thomas J Hammond and Oak Hills Mortgage Corp (1988)

Notice of a policy that loan originators were not entitled to a commission on mortgage loans that were closed more than 30 days after separation was not communicated to EE until after she was discharged. ER also asserted EE would not be entitled to commissions because she did not perform final sign-up or other duties after separation. It was found the follow-up was not part of EE's duties.

ER violated Sections 5 and 7 by failing to pay EE all wages earned and for making a deduction from EE's earnings without written consent.

OAKLAND COUNTY CIRCUIT COURT: Filed 6/30/88
No further information is available concerning this appeal.

860 DEDUCTIONS
Written Consent
Beginning of Employment

WRITTEN CONSENT
Deductions

87-6602 Zick v Industrial Insurance Service, Inc (1988)

ER's argument that EE's blanket authorization at the time of hire to withhold final wages was ineffective according to Section 7, which requires written consent for each wage payment subject to a deduction.

WAYNE COUNTY CIRCUIT COURT: Filed 7/22/88
10/19/89: Settled by stipulation.

861 HEARING
Proceeding in Absence of Party

87-6297 Raper v Don Warsaw and J H M, Inc (1988)

ER was not present at the hearing because he misread the Notice of Hearing. EE's claim was for 30 percent commissions on four sales he made while employed. By examining the company's books prior to his separation, EE learned he had not received the 5 percent override fee for sales made by other salespeople. EE also claimed expenses for a car, meals, hotel, parking and miscellaneous items. ER had a written policy which required payment of the 30 percent commission and fringe benefits.

ER violated Section 5 by not paying 30 percent of the four sales. ER violated Section 3 by

not paying the fringe benefits.

KENT COUNTY CIRCUIT COURT: Filed 1/29/88.
ER asserted that the decision was not supported by competent evidence. ER claimed right had been prejudiced since the Notice of Hearing was misread, resulting in coming to the hearing one day after hearing was held.

4/27/89 - ALJ decision affirmed.

862 ADJOURNMENT OF HEARING
Good Cause

COLLECTIVE BARGAINING AGREEMENT (CBA)
Grievances
Sick Benefits-Payment For

CONSTITUTIONALITY OF ACT
ALJ Determination

JURISDICTION
ERs With CBAs and Grievance Procedure

PREEMPTION
CBA
Jurisdiction

87-5964 Maslar v Detroit Free Press, Inc (1988)

EE filed a grievance requesting sick leave under the CBA. EE's doctor sent a medical log indicating EE suffered work-related stress. EE refused to provide a medical report. The medical log was insufficient to determine whether sick pay benefits or workers' compensation benefits should be paid.

The ALJ found that ER did not violate the Act by not paying sick leave. ER was unable to process the sick pay claim because EE did not provide sufficient information to make a decision.

Other issues the ALJ addressed:

1. Good cause was not found for granting an adjournment request because ER erroneously contacted a workers' compensation magistrate instead of the ALJ from the Office of Hearings listed on the Notice of Hearing. This case was remanded from the Wayne County Circuit Court by stipulation of the party.

2. The Department has jurisdiction to issue the determination even though they did not comply with the statutory notice requirement.

3. The Department is not preempted by the Labor Management Relations Act. The Payment of Wages Act gave Michigan EEs certain rights that cannot be taken away because the CBA grievance procedure was used.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

863 BONUSES

Written Contract/Policy/Agreement

DEDUCTIONS

Bonus
Written Consent

THEFT

Christmas Bonuses

87-6310 LaFleur v Americar Rental Systems (1988)

EE took monies from ER's safe as a Christmas bonus. He left a receipt in the cash box. ER made a deduction to recover the money EE had taken. EE gave no written consent for the deduction.

ERs are only required to pay bonuses in accordance with terms set forth in a written contract or policy. There was nothing in writing to authorize a bonus for EE. ER did not violate Section 7 by withholding the amount to recover the money EE had removed from the safe.

OAKLAND COUNTY CIRCUIT COURT: Filed on 6/20/88.
The issue was whether there was a "deduction" from EE's wages. EE took a bonus verbally promised. The final check was reduced by the amount of the bonus.

2/6/89 - Remanded for rehearing to determine if a bonus was paid, to introduce into evidence ER's "cash budget."

5/8/89 - The supplemental ALJ decision found that a written bonus policy did not exist. When EE took $750 from the safe on 12/31/86, he had earned wages for work on 12/29 through 12/31. EE was merely paying himself for a part of the wages that he had earned. The prior ALJ decision was affirmed and the DO was modified for ER to pay an additional $37 plus penalty.

864 APPEALS

Untimely
Good Cause Not Found
Believed Appeal Period Same as MESC

87-6181 Albrecht v Executive Art Studios, Inc (1987)

ER's appeal of the Department's DO was untimely. The appeal was received 13 days after the due date. ER believed the proper procedure time for filing such a request was 30 days after the notification was issued as followed by the Michigan Employment Security Commission. Also, ER's attorney began dissolution of a law partnership and as a result was forced to prepare for a trial so he could meet the obligations of the firm to its clients. ER's explanation did not establish good cause for the late appeal.

INGHAM COUNTY CIRCUIT COURT: 12/19/88
Affirmed the ALJ, concluding a late appeal filed by a busy and mistaken attorney did not have good cause.

865 APPEALS

Untimely

Good Cause Not Found

Accident, Illness, or Major Obstacle Did Not Prevent Filing of Timely Appeal

88-6835 Honkala v Bresnan Communications Company (1988)

EE's appeal of the Department's DO was untimely. The appeal was received over ten months after the due date. EE's explanation of his late appeal was that ER prevented EEs from discussing the matter with him and he was unable to secure information necessary to file a timely appeal. A statement filed by the Department claimed that EE's explanation for the late filing did not "indicate that an accident, illness, or other major obstacle prevented him from filing an appeal." EE's explanation did not establish good cause for the late appeal. An Order Dismissing Appeal was issued 4/29/88.

On 5/4/88 EE filed a request for rehearing. The Department opposed granting a rehearing. Section 87(2) of the Michigan Administrative Procedures Act, 1978 PA 306, requires a rehearing where the record is inadequate for purposes of judicial review. In all other cases, granting a rehearing is discretionary. It was found that the record pertaining to dismissal of EE's appeal was adequate for purposes of judicial review. An Order Denying Request for Rehearing was issued on 6/20/88.

MARQUETTE COUNTY CIRCUIT COURT: Filed on 7/8/88
The issue was whether there was good cause for the late appeal.

6/20/89 - Circuit court dismissed; no brief filed by petitioner.

866 WAGES

Commissions

Payable After Separation

86-5276 Johnson v Computers and Concepts (1987)

A wage agreement provided that EE would be compensated for transactions completed

during employment. At the time EE terminated employment, ER withheld commissions on EE's sales, some of which were paid to ER after EE's separation. The wage agreement did not allow payment of commissions for sales completed after separation.
ER owed wages to EE for work performed. ER violated Section 5.

WAYNE COUNTY CIRCUIT COURT: Filed on 6/13/88
ER appeal withdrawn.

867 APPEALS
Untimely
Detrimental Reliance

CLAIMS
Twelve-Month Statute of Limitations

JURISDICTION
Statute of Limitations

WORKERS' DISABILITY COMPENSATION
Determination of Disability

87-6543 Prajzner v Tecumseh Products, Inc (1988)

EE's claim for 1983-84 vacation pay exceeded the 12-month statute of limitations in Section 11(1). In a previous hearing (WH 84-3716), summarized in entry 398, it was found that if the time EE was off work was held to be compensable time by the Workers' Compensation Appeal Board, Court of Appeals, and Supreme Court, EE would be entitled to 1982-83 vacation pay. The finding on the 1982-83 claim for vacation pay was in favor of EE.

EE asserted he did not file his claim for 1983-84 vacation pay within the 12-month period because the investigator allegedly advised him to wait until after the decision in WH 84-3716 became final.

There is no authority in the Act for the ALJ to award 1983-84 vacation benefits because of Section 11(1). However, the ALJ believed a good case had been made for detrimental reliance and advised EE to appeal to circuit court.

LENAWEE COUNTY CIRCUIT COURT: Filed 4/7/88
9/2/88 - The circuit court affirmed the ALJ decision that a claim must be filed within 12 months of alleged violations, that "good cause" reasons for failure to timely file do not mitigate late filing; and that circuit court in review capacity does not have equitable powers.

868 CHECKS
Cashed by ER

WRITTEN CONSENT

None

87-5945 **Rasnick v Jack Paulus dba Saranay Motel** **(1987)**

ER made deductions from EE's pay without written consent which violated Section 7.

OAKLAND COUNTY CIRCUIT COURT: Filed 8/31/87
ER claimed a right to make a wage deduction for advances.

OPINION AND ORDER: 9/20/88
The Court agreed with ER's argument that there were no deductions from EE's wages. EE sometimes took an advance, but she always received a paycheck for the total weekly wages earned. If she had taken an advance, she would endorse the check and ER would remit the difference between total wages earned and wages already advanced. This method of repaying the advances was established and mutually agreed to by the parties. EE received exactly what she was entitled to. The ALJ's decision was reversed.

869 DEDUCTIONS
Promissory Note

WRITTEN CONSENT
None
Promissory Note

87-6282 **Moore v Dennis Rizor, an individual, dba Rizors Tree Transplants** **(1988)**

ER cosigned two promissory notes executed to finance automobiles purchased by EE. EE failed to make timely payments on the notes several times. ER refused to pay EE wages for his last four days of work unless he obtained another cosigner or made arrangements to eliminate ER's liability on one of the notes.

No provision in the Act allowing withheld wages to offset ER's claim against EE or for any other reason unless EE gives written consent.

870 WAGE AGREEMENTS
Dispute
Automobile Manufacturer Rate v Hourly Rate

87-6482 **Carter v The Meade Group, Inc dba Pointe Isuzu, Inc and Pointe Jeep/Perrault, Inc** **(1988)**

EE was a service mechanic and claimed he should have been paid 1.3 hours for every car he prepped based upon the service manual's listing. He was paid at the 1.3 rate per car for a two-week period and then informed he was only entitled to an hourly rate.

No evidence of any contract or agreement that EE was entitled to receive 1.3 hours for prepping cars. What the manufacturer pays a dealer is not necessarily the amount the dealer pays its EEs.

871 BURDEN OF PROOF
Credibility

COMPUTATION OF DAILY HOURS WORKED

WAGES
Records to Show Time

87-6449 Foster v Christy Newsreel Services, Inc (1988)

EE's testimony differed dramatically from his written complaint. He could not show with any credibility the number of hours worked. EE submitted two exhibits showing hours worked which did not match, and testified Exhibit 1 was more accurate than Exhibit 2, later recanting this, saying Exhibit 2 was more credible. ER submitted payroll records kept in the ordinary course of business.

The ALJ found that EE was paid all wages due. ER did not violate the Act.

872 EXPENSES
Substantiation

WRITTEN CONTRACT
Failure to Pay According To

87-6556 Kaschyk v Michigan Licensed Practical Nurses Association (1988)

EE was to be reimbursed for authorized expenses under a written contract. It was undisputed he was owed expenses. EE had not turned in expense vouchers, and, according to ER, abused the privilege.

EE's written contract gave him considerable discretion in carrying out his responsibilities and did not reference any guidelines or frequency of submitting expense vouchers. EE was entitled to those job-related expenses that could be substantiated.

873 COMMISSIONS
Earned
House Account

87-6671 Sack v Wright and Filippis, Inc (1988)

EE's wage agreement was a commission on 50 percent of the net profit from each sale, half

paid upon receipt of the purchase order and half when the sale was paid by the purchaser. EE claimed commission for equipment he sold which another sale representative set up and demonstrated.

There was no credible evidence to support ER's position that EE was not entitled to the commission because it was a house account. This was never communicated to EE during his employment. ER violated Section 5(2) by not paying Complainant earned wages.

874 APPEALS

Dismissed

BURDEN OF PROOF

Unrebutted Testimony

COURT ACTIONS

Remand

EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

HEARING

Proceeding in Absence of Party

85-4646 Denton v Pig Time, Inc (1989)

The appeal was dismissed due to Respondent's failure to appear at the hearing. The district court then ordered a remand of the matter for a hearing. Complainant did not appear at the rescheduled hearing.

Complainant was found to be an independent contractor because he had his own place of business, owned his own equipment, and performed work for persons and companies other than Respondent. It was not believable that Complainant was employed at a weekly salary because he was only paid one initial payment.

875 VACATION

Anniversary Date
Resignation
Eligibility for Fringe Benefits
Written Contract/Policy

87-6440 Yager v Mitchell Corporation of Owosso (1988)

ER told EE on Friday, 9/19/86, it was not necessary for him to work the following Monday in order for his personnel record to show he had quit with notice. There was no discussion of EE's anniversary date at the time and ER was not aware of the date. ER did not violate the Act by failing to pay vacation pay because EE did not continue his employment to his accrual

anniversary date of 9/20/86 in accordance with the written policy.

876 VACATION

Resignation

Eligibility for Fringe Benefits

Written Policy

Written Contract/Policy

87-6570 Czapski v Tobin and Tobin, PC (1988)

EE claimed two weeks' vacation pursuant to a written memo after giving two weeks' notice of termination. EE was not eligible for vacation because she did not satisfy the requirement of giving 30 days' advance notice. ER did not violate the Act.

877 ACT 62

Deductions

THEFT

Alleged

Deduction Taken from Wages

87-6654 Zorkot v Hijazi and Younes (1988)

EE was employed for three days at ER's gas station. ER deducted wages for cash register shortages.

ER violated Sections 5 and 7.

See General Entry XIV.

878 UNAUTHORIZED WORK

87-6214 Triestran v W S Smith Co dba Skyrise Apartments (1988)

EE worked for ER as an office manager 40 hours per week, Monday through Friday. EE claimed wages for 8 hours worked during a weekend. Payment was refused because ER did not direct or authorize EE to work overtime.

Under these circumstances there was no violation of the Act.

879 WAGES

Withheld

Moving Expenses

Training Expenses

WRITTEN CONSENT

None

87-6591 **Wiley v Attainment Enterprises, Inc** **(1988)**

EE was hired as a systems manager in 8/86. On 10/86, a written employment agreement was entered into between EE and ER as follows:

> The undersigned agrees to refund to AEI, or its assignee, any moving, interview, and/or living expenses paid to/or for them if the undersigned fails to complete one full year of employment with AEI.
>
> AEI is authorized by the undersigned, if such a premature termination does occur; to withhold any unpaid salaries, or monies due them; such sums to be applied to the amount owed if any.

On 11/86 EE voluntarily terminated employment. From 11/1 to 11/21 EE worked two weeks and three days. ER refused payment stating he had been compensated previously for moving and training, relying on the 10/86 contract.

The ALJ found no merit to ER's argument, finding the withholding was for ER's benefit. The employment contract was ineffective and EE's written consent was required during the period 11/1 though 11/21.

ER violated Section 7 by withholding wages without written consent; and also Section 5 by failing to pay EE all wages earned and due as soon as the amount could be determined with due diligence.

See General Entry III.

880 BONUSES

Written Contract/Policy/Agreement

CLAIMS

Twelve-Month Statute of Limitations

JURISDICTION

Statute of Limitations

87-6471 **Warner v Anderson Honda Car Sales, Inc** **(1988)**

EE was employed as a controller or account supervisor for ER's six corporations until 9/15/85. EE claimed she was to receive $500 weekly, a 1 percent monthly commission from each company, plus 1 percent of the combined business profit annually as part of her salary.

ER and Department claimed that the 1 percent annual profit was a bonus and that EE did not

comply with the one year statute of limitations required by Section 11(1). There as no written employment contract or policy regarding fringe benefits. EE failed to file her claim until 5/13/87. The question presented was whether the annual profit was considered a bonus.

Because EE did not file timely pursuant to Section 11(1), the claim was found to be unenforceable and no decision was needed on the bonus question.

See General Entry V.

881 CLAIMS
Twelve-Month Statute of Limitations

JURISDICTION
Statute of Limitations

87-6182 Gamble v Clark Equipment Co (1988)

EE filed a claim with the WH department two years after ER's plant closing and denial of requested vacation pay. EE claimed he was on unemployment compensation and did not know the time requirement within which to file a vacation pay claim with ER.

It was found that EE was required to file his complaint within 12 months after the alleged violation despite the ignorance of his rights under the Act as required by Section 11(1).

See General Entry V.

882 DAMAGE TO OR LOSS OF PROPERTY
Personal Use

DEDUCTIONS
Damages

88-6858 Jacobs v General Provision, Inc (1988)

ER deducted $200 from EE's last paycheck to pay for truck damage during an accident when EE was driving. EE disputed the amount of damage.

ER violated Sections 5 and 7.

See General Entry III.

883 ACT 390
Remedial Legislation

BURDEN OF PROOF

Appellant
Burden Not Sustained

EMPLOYMENT RELATIONSHIP
Economic Reality Test
Carpenter

88-7023 **Naccashian v Bill Kinney, dba Chateau Construction & Development** **(1988)**

EE alleged that he was hired as a carpenter at $10 per hour. ER claimed EE was an independent contractor. There was no written contract or agreement between the parties. The Department concluded the EE was employed by ER and was not an independent contractor.

See General Entry VII.

884 COMMISSIONS
Unsatisfactory Work

WAGES
Withheld
Poor Work

88-6880 **Luckow v Wind, Surf & Sail Pools, Inc** **(1988)**

EE installed pool liners and filter systems. EE's claim was for unpaid wages. ER disputed owing any money to EE because customers withheld payment due to unsatisfactory work. There was no written authorization allowing ER to deduct any money from EE's checks.

ER violated Section 7 by withholding EE's wages without written consent.

885 CLAIMS
Timeliness Of
Twelve-Month Statute of Limitations

86-5806 **Winters v White Lake Trucking** **(1988)**

At the hearing the parties agreed that Complainant was an EE who was paid weekly. EE terminated employment because of a dispute regarding hours worked and wages not paid. ER continued to pay a weekly sum for two months after EE quit, which approximated EE's former weekly wage. In addition to weekly payments, ER agreed to make payments on a student loan. When payments stopped, EE filed a claim on 8/22/86. This was more than one year from 7/31/95, the date when ER allegedly violated Act 390.

EE's claim was not filed within 12 months after the alleged violation as required by Section

11(1). The Department has no authority to proceed with a claim which was not filed in accordance with the Act. DO was affirmed and EE's appeal was dismissed.

886 DEDUCTIONS
Uniforms
Written Consent
Beginning of Employment

UNIFORMS
Deductions For

WRITTEN CONSENT
EE Consent Ineffective if Below Minimum Wage

87-6701 Patricia Reed v Jarco, Inc (1988)

EE was employed on 4/27/87 as a security guard at $3.40 per hour. EE signed a "uniform agreement" in which she agreed to a payroll deduction of $25 bi-weekly until the balance was paid in full. She also agreed to pay the balance in the event she left employment voluntarily or involuntarily.

EE terminated employment in May 1987. ER deducted $25 bi-weekly from EE's pay until her last pay period, where he deducted the remaining balance due for the uniform.

ER's time records were unclear as to the hours EE worked each week and were not dated.

ER violated Section 7.

See General Entry VIII.

887 ACT 62
Deductions

DEDUCTIONS
Written Consent

THEFT
Alleged
Deduction Taken From Wages

88-6945 Martel v General Towing, Inc (1988)

EE worked as a wrecker driver for two months before he was terminated. ER withheld last paycheck because he alleged EE accepted money which was not turned in and therefore ER did not receive insurance money. EE did not admit that he took this money but indicated that he did not remember. There was no signed authorization for the deduction of these monies.

A criminal warrant was issued against EE. The charges were dismissed at the preliminary examination.

ER violated Sections 5 and 7.

See General Entries III and XIV.

888 APPEALS

Only Issues Raised by Appellant May Be Considered

BURDEN OF PROOF

Appellant

Burden Not Sustained

EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

Housekeeper

87-6742 Letendre v Deal (1988)

Complainant worked as a housekeeper and stayed four evenings one week and three on the alternating week at Respondent's mother's home. Respondent asserted that EE was hired by his mother. There was no written employment contract or policy. Respondent wrote a check on his mother's account. Respondent stopped payment on the check. Respondent claimed Complainant owed for phone calls and three hours off work for a personal matter.

Respondent was ER and violated Section 5.

Although Complainant claimed at hearing that she was due more than the DO found, she didn't appeal and is limited to the DO findings.

See General Entries VII, XI and XII.

889 ADVANCES

Deducted From Final Pay

DEDUCTIONS

Insurance Premiums

Written Consent

None

THEFT

Alleged

Deduction Taken From Wages

88-6987 Vanderlinden v Alan Ford, Inc (1988)

EE was employed as an office manager supervising the cashier department at ER's car dealership. ER deducted monies from EE's wages because of bounced checks, cash advances that were not approved, and hospitalization insurance without written authorization.

ER violated Sections 5 and 7.

See General Entries III, XIII and XIV.

890 ADVANCES

Deductions

86-5782 Williams v Byron Georgeson, dba The Cone Zone (1988)

EE worked from 4/17/86 to 5/30/86 at $3.50 per hour. ER advanced EE money during the work week and the sums advanced were settled when EE's checks were issued. On the back of two April time cards, EE acknowledged the receipt of $80 and $50 to be paid back. ER did not settle the matter until the last check two months later.

ER violated of Section 5 for failing to pay a separating employee all wages that have been earned; and Section 2 for failing to pay an employee in a regular manner. The fact that ER advanced EE money does not permit ER to withhold wages earned months later. Also, the record did not contain an adequate explanation for ER's deviation from the normal policy of collecting the advances when checks were issued.

See General Entry XIII.

891 ACT 62

Deductions

DEDUCTIONS

Written Consent

None

THEFT

Alleged

Deduction Taken From Wages

88-6885 Marshall v Corrado Bartoli and Co-Ordinated Systems, Inc (1988)

ER did not dispute the fact the EE was employed and earned wages in the amount of $420 for which he was not paid. ER did not pay wages because EE had taken equipment worth approximately $1,400.

ER violated Sections 5 and 7.

See General Entry XIV.

892 ACT 62

Deductions

ADVANCES

Deducted From Final Pay

DEDUCTIONS

Purchases
Verbal Consent
Written Consent
None

WRITTEN CONSENT

None

87-6751 Findley v Fergan Auto Parts (1988)

EE was employed and worked as a counter person, dispatcher and order clerk for 14 months. ER had a 15-year policy of allowing EEs to make purchases which were then subtracted from wages. There was no written authorization or written policy. At termination EE owed ER $398.20 for a previous purchase and $200 for an advance. After taxes ER owed EE $513.09 for his last check. ER claimed no money was due EE.
ER violated Section 7 by withholding EE's wages without written consent.

ALJ permitted the $200 deduction because it was considered an advance of future salary.

See General Entry III and XIII.

893 APPEALS

Dismissed
No Response to Untimeliness
Untimely
Good Cause Not Found
No Response From Appellant

89-1785/91-38 Walker v Pousho Plumbing and Heating (1989/1991)

Order to Show Cause Why Determination Should Not be Made Final

This matter was dismissed because ER did not respond to a show cause order to justify its late appeal.

OAKLAND COUNTY CIRCUIT COURT: 10/8/90

ER alleged uniforms were not mandatory and were a benefit to EE. ER claimed ALJ decision was not supported by evidence and testimony. Remanded for hearing.

After a further hearing, the ALJ found violations of Sections 5 and 7. See General Entries III, VIII and IX.

894 APPEALS

Dismissed

Failure to Attend Hearing

REHEARING

Denied

Presumption of Notice of Hearing Receipt

89-006 Weidman v Lightcrete Floors, Inc (1989)

Order Dismissing Appeal

An order dismissing ER's appeal was issued when ER, as the Appellant, did not attend the scheduled hearing. His request for a rehearing was denied because merely asserting the Notice of Hearing was not received without further explanation was found to be insufficient showing of good cause for a rehearing.

WASHTENAW COUNTY CIRCUIT COURT: 11/22/89
The AG advised that a stipulation was entered reversing ALJ decision.

895 EMPLOYMENT RELATIONSHIP

Economic Reality Test

Reemployment After Separation

Temporary Assignment

WAGE AGREEMENTS

Dispute

88-334 McElrath v Ingram Court Reporting (1988)

Complainant worked as a Court Reporter. After she terminated her employment with Respondent, a transcript was ordered and excerpts previously prepared and paid for were returned for incorporation. Complainant prepared the transcript. Respondent computed

the rate per page for the excerpts incorporated into the transcript. Complainant accepted his rate, although distressed.

The ALJ found no EE/ER relationship -- no control present and no ability to hire and fire. Even if there was an EE/ER relationship, the amount to be billed was the responsibility of Respondent.

See General Entry VII.

896 WRITTEN POLICY

Accrued Sick Leave
Amendment
Inquiries Prior to Change
Subsequent Agreements

88-072 Grassa v Sinai Hospital of Detroit (1989)

Prior to termination EE inquired about payment of fringe benefits and was advised they would be paid. This inquiry was made prior to a change in policy. ER did not violate the Act.

897 DEDUCTIONS

Written Consent
Authorization Precedes Incident

WRITTEN CONSENT

Advances

88-309 Killian v Transcontinental Leasing, Inc (1989)

A payroll deduction authorization for an advance signed preceding the deduction was found to satisfy the requirements of Section 7 because the authorization and deduction were in such close proximity.

898 DEDUCTIONS

Telephone Calls

TELEPHONE

Long Distance Calls, Deductions

WRITTEN CONSENT

None

88-245 Witt v Leaders Products, Inc (1988)

ER violated Section 7 by making deductions for EE's personal phone calls and use of ER's automobile. EE signed a handbook stating long distance phone calls were the responsibility of EE; however, EE did not consent in writing to those deductions.

See General Entry III.

899 DETERMINATION ORDER - Issuance Within 90 Days

Remand

REMAND

Determination Order

88-313 Johnson v Pepsi Cola Co (1989)

The DO was remanded to the Department for reevaluation after reviewing an Arbitrator's decision in a pending grievance proceeding.

900 DEDUCTIONS

Written Consent

Recollection Vague

WRITTEN CONSENT

Deductions

Recollection Vague

88-6846 Shapiro v Zee Medical Inc (1988)

EE's recollection of signing deduction authorizations was limited, so greater weight was given to ER's testimony. ER did not violate Section 5 (requiring payment of all wages earned to a separating EE) and Section 7 (prohibiting deductions without written consent) except for two deductions made prior to EE's authorization.

901 COURT ACTIONS

Default Judgment to Offset Amount Due Complainant

THEFT

Proven

Sentencing

88-7004 James v Lois Gross Cleaners, Inc (1988)

ER received a judgment in district court against EE for stolen clothing and unpaid bills. The judgment was in excess of the wages claimed, therefore no further wages due.

See General Entry VI.

902 APPEALS

Only Issues Raised by Appellant May Be Considered

WRITTEN CONTRACT

ER Is Bound by Terms

WRITTEN POLICY
Interpretation
Against Drafter

88-6937 **Fedrizzi v Van Clark, Inc dba Clark's Landing** **(1988)**

EE's appeal was late and good cause was not shown; therefore the only issue was ER's appeal. There is nothing in the contract that required a one-year period of employment, as ER alleged, before vacation would be paid. Any ambiguities in the contract must be construed against the drafter.

See General Entries II and XII.

903 WRITTEN POLICY
Notice to EE of Change

88-6819 **Saurez v Pat Milliken Ford, Inc** **(1988)**

EE claimed he was out of the room when a change in policy was discussed. The policy change was not handed to him personally but placed on his desk where it was not discovered until sometime later. ER violated Section 5, which requires payment of all wages earned.

904 ACCORD AND SATISFACTION

CHECKS
Restrictive Endorsement

88-6823 **Berk v Sterling Savings and Loan** **(1988)**

The issue was whether a payment designated as payment in full and accepted under protest by EE constituted a settlement of the disputed claim.

ER did not violate the Act. To permit EE to unilaterally modify ER's offer of accord would violate the general principles of contract law.

MACOMB COUNTY CIRCUIT COURT: 6/19/89
Petition for Review was voluntarily dismissed based on a settlement payment.

905 WRITTEN POLICY
Unsigned
What Constitutes

88-6871 **Garavaglia v Central Cartage Co** **(1988)**

The bonus EE claimed must be supported by a written contract or policy. There was not a valid document submitted that a written contract or policy existed, because it did not identify the parties or contain their signatures. There were no written terms, agreement, consideration given, or acceptance by the parties.

906 COMMISSIONS

Incomplete Sales

Mortgage Originators

Payment

After Separation

Follow-Up Work

88-563 Kitzmiller v Anchor Federated (1990)

The ALJ found that commissions on mortgages initiated prior to separation were due based on closings occurring after EE's termination.

KENT COUNTY CIRCUIT COURT: 3/9/90. Affirmed ALJ decision. The court acknowledged a post-termination agreement that commissions would be paid if EE did the follow-up work on loans -- even though not a full-time EE. Since the follow-up work was performed the commissions were due.

907 EMPLOYEE

One Who Is Permitted to Work

EMPLOYMENT RELATIONSHIP

EE/ER Relationship Not Found

87-6056 Earhart v International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America dba Truck Drivers Local No 299 (1988)

Complainant claimed he was a business agent and was not paid because of "lack of money." The record showed Complainant was not employed by Respondent during the period in question. Neither Complainant nor any of his witnesses were able to state what work Complainant performed.

908 RESIGNATION

Eligibility for Fringe Benefits

Retroactive Pay

WAGES

Due Despite ER Dissatisfaction

Forfeiture by Termination

Retroactive Change in Rate

WRITTEN CONSENT
None

88-6936 Gravenor v Story Incorporated dba Story Olds (1988)

EE terminated his employment with ER on 8/1/87 and returned to work on 8/6/87 after being given a raise in his annual salary retroactive to 1/1/87. He terminated his employment again on 9/1/87. ER would not give EE his bonus for August sales unless he returned the retroactive base salary increase.

The policy did not provide for forfeiture of a bonus if EE terminated at the end of the month, and EE gave no written authorization for a deduction. ER violated Section 3, which requires payment of fringe benefits in accordance with the written contract or policy.

See General Entry III.

909 COLLECTIVE BARGAINING AGREEMENT (CBA)
Interpretation

DEATH
Payment of Fringe Benefits

VACATION
Death of EE

88-7069 Bernath v ITT Hancock, Inc (1988)

The CBA called for vacation and payment of vacation pay to EEs on July 1 of each year. The husband of Complainant passed away in April. It was found that Complainant's husband was not eligible for vacation pay because he was not an EE on July 1. The exceptions in the CBA to the payment of vacation pay did not include payment to a beneficiary in the event of death.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

910 COMMISSIONS
Payment
After Separation
Profit on Sale

87-6481 Buirkle v American District Telegraph Co (1988)

EE sold security systems. His wage agreement included commissions. Commissions were earned after bids were accepted, purchase orders were issued and equipment was delivered.

EE did not earn a commission for the sale of a security system because the bid was not accepted and the purchase order was not issued until three months after he was discharged.

The wage agreement also provided for a commission payment at the time of sale based on the company's standard gross margin of profit. Improper deductions were not taken from EE's wages. The commission paid was more than the standard gross margin. ER did not violate the Act.

911 WAGES PAID

Payroll Conversion
Time and Manner of Payment

88-6828 Vocino v Wayne State University (1988)

ER changed its payroll system. The issue was whether EE's wages were paid within the time and manner requirements of Section 2. The Department contended ER must pay accrued wages before the first day of the pay period affected by the new pay schedule, and that ER violated Section 2 because payment did not occur within 14 days of the end of the pay period, but rather 17 days after the close of the pay period.

The Section 2 interpretation depended on whether the conversion date was part of the old or new payrolls. The pay date occurred during the conversion period, and because it was not part of either the original or new system, it was required to comply with Section 2(1), which it did. All EEs were paid all wages earned. ER did not violate the Act.

912 ATTORNEY FEES

DEDUCTIONS

Written Consent
Signed as Condition of Employment

88-6962, et al Ruthruff and Rugg v Maag and Son, Inc (1988)

ER deducted for shortages, damages, fines and other charges from EE's earnings. EEs signed payroll work sheets authorizing the deductions under protest in order to secure their paychecks.

ER violated Section 7, which prohibits deductions directly or indirectly from EE's wages without their full, free, written consent. ER was also ordered to pay attorney costs.

913 EMPLOYMENT RELATIONSHIP

Nonprofit Corporation
Permit EEs to Work

NONPROFIT ORGANIZATIONS

88-6951 Nelson v Superior Shore Systems, Inc (1988)

Respondent was a nonprofit corporation established to perform community service work. Respondent managed a summer program for the city of Negaunee. The individuals working for the city were paid with a grant handled by Respondent corporation. The grant expired on September 30. The city continued paying Complainant through October 10. On October 24 the city manager informed Complainant he would not be paid for working from October 12 through October 23.

Even though Complainant filled out a W-4 form and was given a W-2 form by the city, Respondent corporation presented itself to the city as a manager of the proposed summer program. Complainant was an EE of Respondent corporation throughout the summer and was permitted to work for the period in question. [See the definition of "employ" in Section 1(b)]. ER violated Section 2, which requires EEs to be paid wages in a regular manner, and Section 5, which requires an EE separating from employment to be paid all wages due.

914 JURISDICTION

Out-Of-State Employment

88-6934 O'Halloran v Stryker Corp (1988)

EE's work station and work duties were performed outside Michigan; therefore, under Administrative Rule 21(2), R 408.9021(2), the Department has no jurisdiction.

915 WRITTEN POLICY

EE Knowledge
Notice to EE of Change

88-6916 Gorton v ANR Freight Systems, Inc (1988)

ER provided EEs reasonable notification of a policy change by posting it on the bulletin board and placing it in the policy manual which was accessible to EEs.

ER did not violate the Act.

916 EMPLOYEE

One Who Is Permitted to Work

EMPLOYMENT RELATIONSHIP

Permit EEs to Work

WAGES

Volunteer

87-6674 **Oberst v Micromet Corp** **(1988)**

ER rejected EE's offer to work free. EE was told to report to work after discussion of a salary and possible bonus. Although the understanding may not have been clear, EE was not a volunteer and reasonably expected to be compensated for his services. ER violated Section 5(2) by failing to pay EE wages earned.

917 CONTRACT

Amendment

Meeting of the Minds

WORK

As Acceptance of Wage Agreement

88-6955 **Fryer v Solid Waste Control, Inc and Saginaw Welding & Fabricating, Inc** **(1988)**

EE disputed the contract of employment had been changed from a salary arrangement to commissions. The ALJ found that ER did not violate the Act. It is unreasonable to believe EE would continue to report to work for 19 weeks without remuneration if the salary arrangement had not ceased.

918 COMMISSIONS

Incomplete Sales

Bulk of Work Performed

Payment

After Separation

Bulk of Work Performed

88-277 **Heise v Audio Central Alarm** **(1988)**

The ALJ found that a commission was earned on a sale where the bulk of the work had been performed before EE's separation. A mistake made on a form (due to the short period of time EE was on the job) prepared a second time should not cancel EE's commission.

919 LUNCH HOUR AS TIME WORKED

OVERTIME

Compensatory Time

SUBSTANTIAL PERFORMANCE

WAGES

Lunch Hour as Time Worked

87-6335, et al **61 Complainants v Royal Oak Police Officers' Association** **(1988)**

EEs claimed payment of overtime for the final 10 minutes of a 30-minute lunch period. The CBA provided for payment of the first 20 minutes of lunch. The final 10 minutes was for working 10 minutes prior to the start of the regular tour of duty. ER did not violate the Act. EEs failed to show they performed substantial duties during their lunch period. Being on call was not sufficient.

See General Entry XV.

920 COLLECTIVE BARGAINING AGREEMENT (CBA)
Lunch Hour as Time Worked

LUNCH HOUR AS TIME WORKED

OVERTIME
Compensatory Time

WAGES
Lunch Hour as Time Worked

87-6370, et al **12 Complainants, Royal Oak Command Officers' Association v City of Royal Oak** **(1989)**

Command officers were on call during their 30-minute lunch period. They were required to remain in Royal Oak and leave a telephone number with the dispatcher or maintain radio contact but were rarely interrupted for emergencies. If they were interpreted, they were permitted to finish lunch after the emergency. ER refused to pay overtime and did not consider the lunch period as part of the 40-hour week.

ER did not violate the Act. EEs were free to go where they chose and do what they wanted during lunch.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

921 CONTRACT
Amendment
Meeting of the Minds

WRITTEN CONTRACT
Not Altered Because of Verbal Agreement

87-6468 **Terbeck v Grand Rapids Metaltek, Inc** **(1988)**

A statement allegedly made by Respondent's president did not modify the employment

agreement. The statement was not written and there was no consideration to support the alleged modification.

922 COMMISSIONS

Contract Interpretation

HEARING

Witness Fails to Attend

REHEARING

To Take Testimony of Witness Failing to Attend Hearing

87-6637 Lappenga v Dayton Walther Corp dba Wolverine Brass Works (1988)

EE was not informed prior to or during his employment that commissions were to be paid only after $22 million sales in each calendar year. The ALJ found EE earned commissions after the first $22 million in sales to the end of his employment. Failing to pay commissions to an EE voluntarily leaving employment violated Section 5(1).

KENT COUNTY CIRCUIT COURT: 10/7/88

The issue was an interpretation of the written wage agreement. ER claimed a rehearing should be granted because a witness who agreed to testify, without force of a subpoena, did not attend the hearing.

The circuit court remanded the case for rehearing and testimony of the witness who did not attend the hearing.

ALJ DECISION AFTER REMAND: 5/8/89

The ALJ affirmed his original order.

KENT COUNTY CIRCUIT COURT: 10/23/89

Dismissed by stipulation of the parties.

923 EMPLOYEE

Mandatory Attendance at Meeting

WAGES

Work Before/After Shift End

87-6646 Ruczynski v Edna Rhines dba Cafe Pastels (1988)

ER violated Section 5 for failing to pay EE for mandatory attendance at a meeting held after EE's regular work time. The meeting was for the benefit of ER and involved EE's job duties.

924 BURDEN OF PROOF

DISCOVERY
Enforcement of Wage Payments Delayed

EMPLOYER DEFENSE
Lack of Money

SUBPOENAS

UNEMPLOYMENT COMPENSATION
Unjust Enrichment

87-6231, et al 4 Complainants v The Lycee International School (1988)

ER failed to meet its payroll obligations when it did not receive money expected from the French Government (U.S. District Court lawsuit). EEs' salaries were paid over a 12-month period. The ALJ is bound by the MESC decision granting unemployment compensation for July and August. ER violated Section 5. Unemployment compensation is not unjust enrichment because services were completed by the close of the school year in June.

The ALJ ordered the Department to wait one year before enforcing the payment of wages to allow ER time to complete the federal lawsuit and time for discovery to show whether EEs received payment from the French Government.

925 COMMISSIONS
Earned
Minimum Quota

VERBAL AGREEMENTS
Minimum Quota

WORKING
Continued Working for Amount Less Than Claimed

87-6741 Pinto v Neptune's Nest dba Waterbed World (1988)

The unwritten employment contract was for commissions of 1 percent only if the store grossed monthly sales in excess of $100,000. EE was paid a 1 percent commission if a month's sales were close to $100,000 and therefore claimed a commission for three more months' sales below $100,000.

ER did not violate the Act. EE kept on working even though he claimed he was entitled to a commission for the months in dispute.

926 BURDEN OF PROOF
Recordkeeping

Falsified Records

COLLECTIVE BARGAINING AGREEMENT (CBA)
Fringe Benefits
Termination of CBA
Vacation Amount Paid Into Fund
Wage Deductions Permitted

MISREPRESENTATION BY EMPLOYEE

WAGES
Records to Show Time

87-6750 Tomlinson v Artt Elevator Co (1988)

EE was not paid vacation pay earned and vested before the CBA expired. ER discovered he paid EE when no work was performed. The general contractor refused to pay ER as the subcontractor because EE falsified time reports.

The CBA authorized ER to make a deduction from EE's check. The ALJ found that the requirements of Sections 3 and 4 had been met. ER did not violate the Act.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

927 BURDEN OF PROOF
Appellant
Burden Not Sustained

PRORATION OF WAGES

87-6739 Manninen v Willard Spencer dba Willard Spencer Co (1988)

EE, a sales representative, was paid based on 360 work days a year. EE requested wages for his last work week and claimed one quarter of the amount he would receive had he worked the whole month.

ER did not violate the Act. There is no written contract regarding prorated weekly wages. EE did not sustain a burden of proof for entitlement to the prorated amount.

See General Entry X.

928 EMPLOYMENT RELATIONSHIP
Economic Reality Test

WAGES
Full Amount Not Paid

Poor Job by EE

87-6535 **Holloway v Perkins** **(1988)**

After applying the economic reality test, Complainant was considered an EE because Respondent controlled the hours of work, provided tools, paid Complainant's wages except for his last week, and the work was an integral part of Respondent's construction business.

ER alleged EE did not perform the required work or did not perform it properly. As an EE, Complainant is entitled to receive wages [Section 1(b)]. ER could have discharged EE for unsatisfactory work or provided better supervision.

ER violated Section 5 by failing to pay wages for work performed.

See General Entries VII and IX.

929 ADVANCES

VERBAL AGREEMENTS

87-6617 **Fujishige v Greater Detroit Montessori Centers, Inc** **(1988)**

The verbal employment agreement was for approximately 20 payments at $575, $11,000 for the year. EE received 19 checks and claimed an additional check for $575. ER did not pay EE for May 1 because advances were stopped and all EEs had to wait two weeks for checks.

ER gave the Department of Labor $58.59 to be paid to EE. ER owed EE $16.41 to total $11,000. ER violated Section 5(1).

930 CHECKS

Cashed by ER

87-6644 **Graves v Renaissance Office Machines, Inc** **(1988)**

After cashing EE's check, the service manager reminded EE that he owed for tools. EE gave the service manager the money owed. No violation. ER did not withhold money from EE.

931 EMPLOYEE

Economic Reality Test

EMPLOYMENT

Termination

Failure to Receive Paycheck

EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found
Economic Reality Test
Reemployment After Separation

88-6882 **Noel v Engineering Systems, Inc** **(1988)**

Respondent provided engineering services. Complainant and Respondent signed a written employment contract whereby Complainant would provide consultant services and be given the title of vice president but with no authority to run the business. His wages were covered in the contract's compensation clause.

Approximately one year later, Complainant received a letter stating the position of vice president no longer existed and also outlined Complainant's job responsibilities and corporation policies.

Two months later Complainant was terminated, reinstated one week later under a verbal contract, and again terminated. The IRS determined that Complainant was an employee for tax purposes. Respondent refused to pay Complainant his last paycheck because he was considered an independent contractor and because of incurred costs caused by Complainant.

Complainant found to be an EE. ER violated Act 390.

932 COLLECTIVE BARGAINING AGREEMENT (CBA)
Fringe Benefits
Termination of CBA

PREEMPTION
CBA
Federal Preemption

87-6678 **Johnson v Precision Spring Corporation** **(1988)**

EE signed a resignation and waiver of seniority rights along with an Agreement to Redeem Liability settling his Workers' Compensation case with ER. The agreement was a settlement for any and all money and claims against the company.

The ALJ found that EE was not barred use of the Payment of Wages Act because he used the CBA as an EE. Preemption by federal law is discussed.

The termination agreement called for vacation pay to be paid from proceeds of the sale of equipment. The sale failed to generate sufficient funds to meet the alleged vacation pay obligation. When EE signed the release, he gave the union authority to terminate the CBA, extinguishing EE's right to vacation pay under the CBA. Therefore, although EE could file a payment of wage claim (even though ER had a CBA with a grievance procedure), nothing is due.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

933 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

MINIMUM WAGE

When No Specific Wage Agreed Upon

87-6572 Baten v Bootlegger's and Driftwood, Inc dba Bootlegger's and Baron Co dba Bootlegger's Again, jointly and severally (1988)

Complainant was an EE of Respondent with a bona fide EE/ER relationship because of their day-to-day involvement. The parties did not have a meeting of the minds regarding a wage agreement, therefore EE was entitled to minimum wage for unpaid wages.

ER violated Section 2 by failing to pay wages on the 1st and 15th day of each month, and Section 5, which requires payment of all wages earned to an EE as soon as the amount can be determined.

See General Entry VII.

The 54-A District Court refused to enforce based on ER's presentation that the Notice of Hearing and ALJ decisions were not received. The Bureau will reissue the DO. No further information is available.

934 JURISDICTION

Payment of Taxes

86-5468 Gadwell v Aloysius Hoffman, Mildred Hoffman, Marilyn Hoffman, Donald Hoffman and Head West Hair Salon aka Genesis Health and Beauty Center (1988)

EE's claim for taxes ER allegedly agreed to pay is not wages or fringe benefits within the coverage of Act 390 and therefore not within the jurisdiction of the Department. ER did not violate the Act.

935 ADVANCES

Deducted From Final Pay

EXPENSES

Advances

WRITTEN CONSENT

None

87-6450 Buzzitta v Nationwide Truck Brokers, Inc (1988)

ER violated Section 7 by withholding EE's wages to offset a shortage on goods and advance money used by EE for personal expenses. EE is not entitled to reimbursement for truck expenses from advance money because there was no written contract or policy requiring reimbursement for expenses. See Section 3.

See General Entry III.

936 PUBLIC EMPLOYMENT RELATIONS ACT

WAGES
Payment When Earned
Pursuant to Written Contract

85-4871, et al Harris and Schrier v Kenowa Hills Public Schools (1988)

EEs were teachers. Their salaries were paid in 26 biweekly payments, violating Section 2(1). Wages are earnings for labor and services. EEs earned wages when they performed services, requiring 21 biweekly payments.

937 BONUSES
Payment for Past Performance, Future Action or Wages

87-6768 Davis v Leo J Chouinard dba Pebble Creek Mobile Home Community (1988)

EE, co-manager of ER's mobile home park, received a bonus allegedly as a condition of staying until the following spring when ER would build an addition on her home. After receiving the bonus, EE's husband accepted a job offer. EE was not paid for 22 days worked.

The ALJ found that the bonus check was not intended as consideration for the promise of staying, nor as a wage payment. ER violated Section 5.

938 BONUSES
Written Policy
Interpretation

88-6804 Hallett v Cockrell-Kroll, Inc dba New Cadillac Power Center (1988)

EE showed good cause in filing a late appeal after returning to Michigan from out of state.

ER had a written policy for payment of a bonus if sales quotas were met in each bracket (listing eight categories of products with two to six model numbers in each category). ER was not required to pay a bonus until the sales quota was met for every one of the models.

See General Entry II.

939 COMMISSIONS

Payment

After Separation

Customer Payment After Separation

SUBSTANTIAL PERFORMANCE

86-5375 Fuller v Pioneer Microfilming, Inc (1988)

EE was responsible for sales and service before commissions were earned. The agreement between the parties was one of substantial performance. EE is entitled to commissions on accounts substantially completed up to his discharge even though invoices were paid after discharge.

ER violated Section 5, which requires ERs to pay discharged EEs all wages earned as soon as the amount can be computed.

940 FRINGE BENEFITS

Must be in Writing to be Enforced

WRITTEN POLICY

Amendment

Subsequent Agreements

Unenforceable

87-6531 Bailey v Robert M Johnson, DDS (1988)

ER purchased a dental practice where EE was employed. EE typed in her hourly rate on a wage agreement from her former employment, and ER signed it. ER did not sign the office policy providing payment for unused sick time. ER did not violate the Act by refusing to pay EE for unused sick days. It was clear ER did not intend to adopt a policy of providing sick pay.

941 DEDUCTIONS

Shortages

EE Responsibility

VACATION

Termination for Cause

THEFT

Acknowledged

WRITTEN CONSENT
Deductions
Shortages

87-6300 **Caruso v C A Muer Corporation** **(1988)**

The Department claimed EE's authorized wage deduction was taken from fringes benefits rather than wages. This did not need to be addressed because there was insufficient evidence to show vacation pay was due. The vacation policy stated vacation time must be taken. Ordinarily, if an EE is prevented from taking his vacation, he is entitled to receive payment for the time. EE was responsible for his own termination when he acknowledged taking money from ER and therefore was not entitled to vacation pay.

942 DEDUCTIONS
ER Benefit

SEMINARS
Payment For

WAGES
Seminar Attendance

WRITTEN CONSENT
None

87-6600 **Clemens v The Golden Mushroom, Inc** **(1988)**

EE terminated her employment with ER after taking a two-day computer class. ER deducted the cost of the class from EE's wages without written consent and violated Section 7. EE's claim for wages for attending the class was denied, since ER did not benefit from EE attending the class.

943 DEDUCTIONS
Escrow Account

87-6647 **Kubacki v Churchill Transportation** **(1988)**

EE signed an "Authorization To Withhold Escrow Account Monies From Wages" but claimed the amount deducted. The escrow account was not a fee, gift, tip, gratuity, or other remuneration as a condition of employment and violated Section 8. ER's escrow account requirement to reimburse ER for damages due to EE's negligence did not violate the Act.

944 EMPLOYMENT RELATIONSHIP
Economic Reality Test

EE/ER Relationship Found

87-6620 Bryant v Avant (1988)

After applying the economic reality test, Complainant was found to be Respondent's EE because:

1. Respondent had the authority to fire Complainant and did on several occasions.
2. Respondent hired him.
3. Respondent paid him wages.

See General Entry VII.

945 COLLECTIVE BARGAINING AGREEMENT (CBA)

Grievances
Wages

WAGE AGREEMENTS

Covered by CBA
Dispute

87-6514 Bender v Koenig Fuel & Supply Co (1988)

A grievance board found that EE had been discharged four days before his probationary period ended and rehired to avoid paying an increased wage rate and fringe benefits required for seniority EEs. EE was granted seniority back to his hire date with payment of fringe benefits for each week worked after his rehire date.

EE asserted his wages should have been paid at a higher rate after his rehire because of his new seniority date.

Act 390 regulates the time and manner of wage payments. The rate of pay is governed by the agreement between the parties. Since the grievance board did not resolve the pay rate issue, EE did not have a cause of action before the Department of Labor and is left to the dispute resolution process in the CBA.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

946 BURDEN OF PROOF

Credibility

COMMISSIONS

Payment
After Separation
Follow-up Work

87-6593 **Goodman v Garden City Envelope Co of Michigan, Inc** **(1988)**

EE was to be paid a commission on lottery cards shipped. The agreement was not in writing. ER claimed the agreement provided for a commission for cards shipped prior to 12/31/86, two months after EE's contract expired, and asserted other salespersons were paid to service the account after EE's contract expired. The Department found commissions due for cards shipped between January and July 1987, which ER paid. ER asserted it paid this amount because of its lack of knowledge that an appeal could be filed. EE claims commissions on the additional cards shipped after July 1987.

EE's testimony was more credible than that of ER. The DO clearly stated the order could be appealed within 14 days. ER violated Section 5 by failing to pay commissions for cards shipped after July 1987.

947 COURT ACTIONS

Default Judgment to Offset Amount Due Complainant

DEDUCTIONS

Required or Permitted by Law

87-6589 **Neff v Steven R Gentry dba Transit Express and Rye Gentry Trucking, Inc** **(1988)**

ER failed to pay wages because of damages caused by EE and failure to comply with ER's directions. ER secured a judgment against EE in district court.

Although ER violated Sections 5 and 7 for failing to pay EE wages due, the amount of the judgment more than offset wages earned. EE's claim was dismissed.

948 CREDIBILITY

Claim Filed After Discharge

DEDUCTIONS

Escrow Account

Written Consent

Claim Filed After Discharge

87-6598 **Kelsey v Royal Oak Ford, Inc** **(1988)**

EE signed an authorization to have monies placed in escrow to guarantee payment of a loan after his error on a deal. EE was told to sign the authorization or lose his job. Seven months later EE was terminated. He testified he would not have filed a claim if he hadn't been terminated.

The ALJ concluded EE gave written consent freely without force or coercion. No violation.

949 BURDEN OF PROOF

Recordkeeping

Unable to Find Records

VACATION

Written Contract/Policy

87-6458 LeVasseur v Midwest Home Care, Inc (1988)

It was undisputed EE's written employment contract provided for vacation pay. ER's argument that no records could be found to verify EE's claim was rejected.

950 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

WAGES

Full Amount Not Paid

At Separation

87-6692 Heemstra v Andy's TV Service (1988)

EE worked out of his home and worked part-time for ER. No tax deductions were taken from EE's pay. EE's work was controlled by ER. ER violated Section 5 by not paying all wages earned when employment was terminated.

951 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Not Found

JURISDICTION

Independent Contractor Relationship

87-6640 James v Nu-Vision, Inc (1988)

At a preemployment meeting between Complainant and Respondent, Complainant was asked to prepare a marketing plan. There was no employment application filled out nor a discussion of wages at the meeting. There was no EE/ER relationship found. Since Complainant was an independent contractor, the Department had no jurisdiction over the claim.

952 WRITTEN CONTRACT

Fringe Benefits

87-6601 Gaymon v Credit Counseling Centers, Inc (1988)

EE was paid full wages for 26 weeks over 14 months while hospitalized, working restricted hours while convalescing. EE became totally disabled and unable to return to work. EE claimed 26 weeks' pay in addition to what was already received, arguing that the 26-week period must run consecutively or commence when EE becomes totally disabled. EE was paid in accordance with the written policy which allowed for 26 weeks' benefit. ER did not violate Section 3.

953 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

87-6568 Gill v Jerry L Zolton and Nancy Salas dba Hotel Hemlock (1988)

Mr. Zolton and Ms. Salas entered into an agreement with the owner for a three-year option to purchase the hotel once it was brought up to building codes. The owner later withdrew the offer to sell and closed the business. Neither Mr. Zolton or Ms. Salas received any wages during their management of the hotel.

Complainant was hired as a bartender/waitress by Mr. Zolton, the hotel manager. Mr. Salas did not direct Complainant's activity and signed only one of Complainant's paychecks.

Section 1(d) defines an employer as "an individual acting directly or indirectly in the interest of an ER who employs one or more individuals." Mr. Zolton was the person who acted directly in the interest of the owner of the hotel. He signed all but one of Complainant's paychecks. It was found that Ms. Salas had no control over Complainant's activities and was not an individual acting directly or indirectly in the interest of ER. The actions of the hotel owner prevented Mr. Zolton from paying Complainant out of the hotel proceeds, since all proceeds were used to modernize the building.

Respondent Zolton violated Sections 5 and 6.

954 BURDEN OF PROOF

Recordkeeping

87-6411 Lennert v Ronald Eichenberg aka R K E Forest Products (1988)

The Department found that ER violated Section 7. EE appealed for additional wages. EE relied on records his mother kept on a calendar and nonexistent time cards for an additional period of employment.

It was found that both ER and EE kept poor records. However, EE had the burden of proof to show the Department's determination was incorrect. The Department's determination was affirmed.

955 DEDUCTIONS

Written Consent

None

EXEMPLARY DAMAGES

FRINGE BENEFITS
Holiday Pay

OVERPAYMENTS
Mistakes

WAGE AGREEMENTS
Unclear

87-6749 Goeschel v City of Detroit, Board of Education (1988)

EE was a member of a non-represented group but her wages reflected the rate established for represented EEs. A CBA was negotiated for the represented group, and as a result EE received a retroactive wage increase. There was confusion regarding EE's status as a represented/non-represented employee. EE was erroneously paid and doubly compensated for vacation time. ER claimed they were entitled to deduct for the overpayment, but there was no written authorization.

ER violated Section 7 by withholding wages without written consent.

ER violated Section 4 by not paying holiday pay.

ER violated Section 2 by not paying wages in a regular, periodic manner.

EE also claimed exemplary damages and attorney fees due to harassment by ER. The ALJ found the violation was not flagrant or repeated as required by Section 18(2); no attorneys fees or damages were ordered.

See General Entries III and IX.

956 BURDEN OF PROOF
Years of Service

VACATION
Policy Statement Not Ambiguous

WRITTEN CONTRACT
Fringe Benefits

87-6621 Ibbetson v Margaret Muddes dba Heads Together Hair Salon (1988)

EE worked from April 1984 to April 1987. She claimed vacation pay according to an Employee Handbook of July 1984 listing vacations according to number of years' service.

ER did not sustain its burden of proof that EE's anniversary date was the same as the Employee Handbook. EE's raise was closer to the April anniversary date than the July date of the Employee Handbook. ER violated Sections 3 and 4.

957 BURDEN OF PROOF
Unrebutted Testimony

EMPLOYEE ERRORS

HEARING
Proceeding in Absence of Party

87-6448 Johnson v Aadcoms, Inc (1988)

ER assigned EE, a programmer analyst, to the Strohs Brewery Company. ER lost its yearly account with Strohs when the hours submitted by EE and billed by ER to Strohs Brewery Company were in error and the program submitted by EE was ineffective. Based upon the unrebutted, sworn and believable testimony of ER, EE was paid for more hours than he worked. ER did not violate the Act. EE did not appear at the hearing.

958 BURDEN OF PROOF
Wages Paid
ER Burden to Show

THEFT
Alleged

87-6628 Richardson v U S Maintenance Corp (1988)

ER owed EE three checks. EE received one check in the mail. EE was told another one was sent in the mail but later picked it up from ER. EE alleged never receiving the third check. The signature on the third check was markedly different from that of the other two and was cashed at a different place than the other two. ER employed another person with the same name as EE, but said that it was up to EE to find out if this person received the check.

ER had a duty to investigate and prove that EE received the check. ER violated Section 5.

959 BURDEN OF PROOF
Recordkeeping

87-6682, et al 7 Complainants v Plush Pony Restaurant (1988)

EEs filed claims for unpaid wages. ER claimed the wages were not paid because employment records were stolen by the prior owner and the exact amounts due were not known. A hearing was pending in district court between ER and the prior owner. ER hoped

to receive compensation from the prior owner to pay EEs.

The amounts found due on the DOs were computed based upon estimates of time worked provided by each EE.

ER cannot refuse to pay EEs because amount due is unknown. ER violated Sections 5 and 9 by not paying wages and not keeping employment records as required.

960 EMPLOYEE

Full-Time
Job Training Partnership Act

87-6729 Skinner v Furniture City Truck Stop Inc (1988)

ER's vacation policy provided for one week of paid vacation for full-time EEs. EE was hired under a Job Training Partnership Act contract. After the contract ended, ER rehired EE. ER did not pay EE for one week's vacation, claiming he was a part-time EE. EE worked 35 or more hours each week and was entitled to vacation pay. ER violated Section 3.

961 COLLECTIVE BARGAINING AGREEMENT (CBA)

EE Dishonesty
Interpretation

PERSONAL DAY PAYMENTS

87-6716-D Sheard v Meadowbrook Country Club (1988)

A CBA provided for payment of vacation pay and personal absence days. EE was discharged for leaving work without permission, which ER claimed was dishonest. The CBA did not provide for payment of benefits if EE was discharged for dishonesty. EE's claim was for vacation pay and personal absence days.

It was found EE was not eligible for vacation because he did not work the required number of days as stated in the CBA. However, EE was eligible to be paid for personal absence days because EE's discharge was not based on dishonesty. ER violated Section 3.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

WAYNE COUNTY CIRCUIT COURT: Filed 9/12/88
The issue was whether the CBA required payment of accrued personal days to a discharged/voluntary-quit EE. No further information is available concerning this appeal.

962 VACATION

Discharge
Two-Weeks' Notice

87-6522, et al **5 Complainants v Thornapple Valley, Inc** **(1988)**

EEs qualified for vacation pay under ER's written policy if they were terminated or quit with at least two-weeks' notice.

Since EEs were not given at least two-weeks' notice of termination, they did not qualify for vacation pay under the terms of ER's written policy. ER did not violate Section 3.

963 CLAIMS

Twelve-Month Statute of Limitations

JURISDICTION

Statute of Limitations

Corporate Legal Obligation

WAGES

Poor Economic Situation

88-7042 **Hass v Law Office of Timothy L Hass** **(1988)**

EE claimed that wages were not due as a corporate legal obligation until the claim was filed. It was concluded that wages earned must be paid as directed by Section 2.

Additional wage payments became due only if corporate assets were available to make additional payments. Since this did not happen, no further payment was due.

See General Entry V.

964 WAGES

Cash Payments

WRITTEN CONSENT

Deductions

88-199 **Grusell v Downtown Food & Beverage Inc** **(1989)**

EE received merchandise and lottery tickets charged on her account at ER's store. EE also cashed a check that ER did not receive payment for due to insufficient funds in EE's account. ER made a deduction from EE's last paycheck due to the unpaid balance of EE's charge account and the check that was not paid by the bank. There was no written consent for the deduction.

Section 6(1) does not allow payment of wages in the form of merchandise or lottery tickets but states that payment of wages shall be paid in currency or by check. ER violated Section 7.

See General Entry III.

965 BONUSES

Written Contract/Policy/Agreement

JURISDICTION

Over Bonus Without Written Contract

WRITTEN POLICY

What Constitutes

88-7008 Brasch v The Raubar Granite Co (1988)

The DOL has no jurisdiction to enforce the claim for a bonus because there was no written policy or contract. The exhibit offered was not a written policy. It did not identify the parties, contain their signatures or terms of agreement; it also did not contain an exchange of consideration.

ER did not violate the Act.

966 DEDUCTIONS

Written Consent

In Employment Agreement

88-075 Keelin v Clinical Resources, Inc (1989)

The words in the employment agreement -- "reduction in compensation" and "shall have the right to withhold amounts from future compensation" -- constituted written consent. The purpose of Section 7 is to prevent surprise deductions. EE knew exactly the amount to be reduced from compensation based on the employment agreement.

967 BURDEN OF PROOF

Appellant

Burden Not Sustained

Credibility

Refusal to Testify

EMPLOYMENT RELATIONSHIP

Economic Reality Test

REFUSAL TO TESTIFY

88-216 DeGregory v A-1 Top Soil (1989)

EE's and ER's credibility was questionable. EE's testimony was in conflict with his father's. ER refused to testify and insisted on taking the Fifth Amendment, basing it on the fact he spoke very poor English and could not read or write English. EE did not meet the Appellant's burden to prove that Act 390 was violated.

See General Entries VII and XI.

968 JURISDICTION

Breach of Employment Contract for Future Employment

REDUCTION OF WAGES/BENEFITS

Agreement to Pay in Future

WAGE AGREEMENTS

Wage Reduction

Agreement to Pay in Future

87-6246, et al <u>Gluckman and Usitalo v AP Electronics, Inc</u> (1989)

The employment agreement set Complainants' salaries for five years. When Respondent experienced financial problems and attempts were made to sell company stock, layoffs occurred. Complainants proposed a salary reduction and agreed to accept a wage reduction. They claimed that the wage reduction was only until the stock was sold. After the sale all withheld wages were to be paid in full. Complainants received reduced wage payments until their layoff. Complainants also made a wage claim for the time after layoff up to the end of their employment agreements.

It was found there was no agreement to pay withheld wages. As for the employment agreement, Complainants may have a breach of contract action for the salary they would have received to the end of the five-year agreement period; however, the Act only covers a working EE/ER relationship, not a breach of contract claim.

969 ATTORNEY FEES

WAGES

Commissions

Payable After Separation

87-6791 <u>Hermann</u> v <u>Vanden Bosch and Associates, Inc</u> (1989)

EE performed work which led to ER's receipt of payment. ER withheld commissions, maintaining that no commissions were due after EE left the job. The employment contract did not require EE's employment before commissions were paid. ER violated Section 5.

The second part of EE's claim was for attorney fees due to ER's frivolous defense in order to delay the time when payment would be required. Attorney fees were found due pursuant to

Section 18(c)(3).

970 COLLECTIVE BARGAINING AGREEMENT (CBA)
Arbitrator's Decision

CONSTITUTIONALITY OF ACT
ALJ Determination

JURISDICTION
ERs With CBAs and Grievance Procedure

PREEMPTION
CBA
Federal Preemption
Jurisdiction

88-373 Tutor v Anchor Motor Freight, Inc (1989)

The ALJ dismissed EE's appeal because the arbitration committee's decision, pursuant to the CBA, interpreted the contract and found that EE was properly paid all wages.

ER claimed that the Department was preempted from enforcing the Act by Section 301 of the Federal Labor Management Relations Act (LMRA), 29 USC, Section 185. Because the resolution of EE's claim depends upon an interpretation of the terms of the CBA, the Department is bound by the decision of the arbitration committee.

The ALJ found that the issue of preemption cannot be decided by the administrative agency because it lacked the authority to determine the constitutionality of a statute. EE asserted a statutory claim, not a contract claim. Arbitration is not an adequate substitute for judicial proceedings.

Application of state law is preempted by Section 301 of the LMRA only if it requires an interpretation of the CBA. If the CBA is only used to ascertain the rate of pay or other economic benefits, then the separate state law analysis is not preempted.

See General Entries V and XV. There is no longer any Act 390 authority to interpret a CBA.

971 BONUSES
Payment During Illness

FRINGE BENEFITS
Bonuses/Incentive Pay
Payment During Illness

88-437 Cain v BWS Automotive Corp (1989)

ER withheld payment of bonus during a period EE was recuperating from illness. There was a written bonus policy requiring payment. During EE's illness he continued to work by making telephone sales calls from his home. The plan awards EEs who helped make a profit. It would not be fair to pay EE for periods he was unable to help.

ER violated Section 3 for bonus payments earned after EE returned to work.

972 MEDICAL LEAVE

Drug Treatment Program

VACATION

Computing Time

Drug Treatment Program

88-440 Wilber v Kalamazoo Lumber Mfg (1989)

EE was arrested during his lunch hour, off ER's premises, by narcotics officers. After being released from jail, EE was offered his job back if he completed a 28-day drug rehabilitation program. ER also told EE that they could discuss vacation pay when he returned to work. Vacation pay was to be paid to all full-time EEs who worked 52 weeks during their current anniversary year. EE entered a drug rehabilitation program but quit before its completion, and ER informed him that he was no longer employed. ER withheld vacation pay.

EE was on medical leave during drug rehabilitation treatment. Therefore, EE's time in the rehabilitation center counts as time worked and he completed 52 weeks worked in his anniversary year. The ALJ found that EE was entitled to vacation pay.

973 WRITTEN POLICY

Interpretation

Against Drafter

Layoff v Termination

89-101 Martin v Kenneth Hoadley, Summit Products Co (1989)

ER issued a notice to EEs which set forth how benefits were to be paid. Accrued vacation benefits were to be prorated and issued after EE had been on layoff status for two consecutive months. ER did not pay prorated accrued vacation benefits to EE because he was terminated, not laid off. According to ER, the term "layoff" meant there was a chance that EE would be recalled to work. ER's notice did not define "layoff." To the extent that the term is unclear, it should be construed against ER as drafter of the notice. It was concluded that the term "layoff" in the notice included the permanent cessation of employment due to the closing of ER's business.

Subject to layoff for other than disciplinary reasons, EE was entitled to the accrued vacation benefits set forth in ER's notice. ER violated Section 3 by failing to pay EE vacation benefits.

974 EVIDENCE

Time Card

WAGES

Withheld

Unsigned Time Card

88-696 Merriman v Western Temporary Services, Inc (1989)

ER required its EEs to turn in time cards signed by EE and the supervisor. After EE's employment with ER ended, he turned in a time card which was signed by him but was not signed by a supervisor. ER refused to pay EE wages because he did not turn in a signed time card.

Despite the Section 9(1) requirement that an ER maintain a record of an EE's hours worked, the time cards signed by EE are the only available evidence of the hours he worked. EE earned the wages for which he had turned in a time card.

ER violated Section 5(2) by failing to pay EE at the time of his discharge.

975 COLLECTIVE BARGAINING AGREEMENT (CBA)

Jury Duty

PREEMPTION

CBA

88-6852 Morse v Oakland Community College (1989)

EE requested that the college pay him for two days of jury duty and witness pay pursuant to the CBA. Because EE had not submitted the required documentation, which would have entitled him to this pay, his request was initially denied. After the denial, EE's union representatives requested that the college pay the witness fee before EE submitted the required documentation. The union promised that the required evidence would be promptly furnished to the college. When evidence of jury duty service was not provided as the union had promised for the day which EE claimed, the amount was deducted from his paycheck.

ER claimed that the Department was preempted by the arbitration provisions contained in the CBA. EE did not use the CBA grievance procedures. However, the Department did not decide whether or not EE was entitled to the jury duty and witness pay provision contained in the labor agreement but found that EE earned wages during a week which wages were deducted without proper authorization. ER violated Section 7.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

976 EMPLOYMENT RELATIONSHIP

Economic Reality Test

Severing Employment Relationship

88-338 Zick v Whirlpool Corporation (1989)

Complainant worked for Whirlpool Corporation and was considered an independent contractor until a January 1984 meeting when he became an EE of Beacon Services. Beacon's EEs were provided to Whirlpool Corporation. Beacon Services paid Complainant and withheld taxes. Applying the economic reality test, Complainant was an EE of Beacon Services rather than Whirlpool Corporation.

See General Entry VII.

977 BURDEN OF PROOF

Appellant

Burden Sustained

DEDUCTIONS

Authorization Form Missing

Uniforms

Written Consent

None

REFUSAL TO TESTIFY

UNIFORMS

Deductions For

88-692 Gilbert v Pousho Plumbing and Heating, Inc (1989)

A signed authorization permitting a wage deduction for uniforms was missing. Evidence was insufficient to show the document had been signed. EE's failure to answer questions from ER would not change the fact that there must be an authorization for each wage payment. If EE refused to answer questions in any future hearing, a determination would be made against EE. It is EE's burden as the party filing the claim to cooperate with the Department and take part in procedures necessary to adjudicate his claim.

See General Entries III and X.

OAKLAND COUNTY CIRCUIT COURT: 7/24/89

No further information is available concerning this appeal.

978 COLLECTIVE BARGAINING AGREEMENT (CBA)

Fringe Benefits

Layoff

VACATION
Eligibility Affected by Illness
Layoff

WORKERS' DISABILITY COMPENSATION
Considered as Days Worked

88-7059 **Leonard v Bejin Trucking** **(1988)**

According to the CBA, EE was not entitled to vacation pay. Days off while on workers' compensation could not be counted in computing vacation time because EE could not have been scheduled to work. All EEs were laid off.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

979 WAGES
Withheld
Overpayment

WRITTEN CONSENT
None

WRITTEN POLICY
Vacation

87-6630 **Gazouleas v Comspec, Inc** **(1988)**

EE worked as a salaried computer consultant/contract programmer based on 40 hours per week. EE earned overtime pay for hours worked in excess of 8 hours per day.

ER erroneously paid EE an unearned $300 bonus, which ER deducted from wages due. ER violated Section 7 by withholding wages without written consent.

At the time of EE's termination he had accrued 37.86 hours of vacation pay pursuant to ER's written policy.

The ALJ found EE was due wages and unpaid vacation. ER violated Section 5.

See General Entry III.

980 EMPLOYER
Principal Exercising Extensive Control

EMPLOYER IDENTITY
Corporation Officers

FAIR LABOR STANDARDS ACT (FLSA)

87-6713 Vanover v Gallatin Building Co and Jeffrey R Gallatin (1988)

Mr. Gallatin, who was president, manager, and a member of the Board of Directors of Respondent, was found liable as ER for the unpaid wages earned by Complainant. Mr. Gallatin exercised pervasive control over the business and financial affairs of Gallatin Building Company and acted in its interest in relation to Complainant. Several cases are cited under the FLSA that stockholders, directors and officers may be liable for the wages of a corporation's EEs.

See General Entry VII. It has been held in federal Fair Labor Standards Act cases that stockholders, directors, and officers may be liable for the wages of a corporation's EEs where the individuals exercised persuasive control over the corporation's business and financial affairs and acted in the interest of the corporation in relation to its EEs.

981 APPEALS
Dismissed

COURT ACTIONS
Remand

88-6884 Cogan v Vince Grainger dba Eagle Security (1988)

Respondent filed a timely appeal of the DO but did not appear for hearing. Good cause was not shown for Respondent's failure to appear. The appeal was dismissed.

MACOMB COUNTY CIRCUIT COURT: 4/26/90

Respondent contended Notice of Hearing was not received and claimed determination erred because ER was a corporation, not an individual, and because no EE/ER relationship existed. Circuit Court remanded to the Office of Hearings for a hearing. No further information is available.

982 COLLECTIVE BARGAINING AGREEMENT (CBA)
Unemployment Benefits

CONSIDERATION FOR EMPLOYMENT

DEDUCTIONS
Required or Permitted by Law

UNEMPLOYMENT BENEFITS

87-6167, et al Schuiling, Ross & Meyers v Kenowa Hills Public Schools (1988)

Each of the Complainants were employed by Respondent as teachers for the 1985-86 school year. Complainants were laid off at the end of the school year. During the summer the Complainants drew unemployment compensation benefits. On 8/25/86 Complainants were recalled for the 1986-87 school year but on condition that they repay the unemployment benefits received during the summer.

In 9/86 Complainants entered into a CBA where they agreed "under protest" to biweekly deductions from their paychecks to repay the unemployment benefits.

The ALJ found no violation of Section 7 because the deductions were permitted by the CBA. The ALJ found a violation of Section 8(1) because the Complainants' promise to repay the unemployment benefits induced Respondent to recall the Complainants.

Both parties appealed to the Kent County Circuit Court. On 2/28/89 the Court issued an order affirming the ALJ's finding of no Section 7 violation but reversing on the Section 8(1) violation. The Court found the requirement to repay the unemployment benefits was not a consideration for Respondent to recall the Complainants.

Complainants filed an appeal with the Court of Appeals. On 9/4/90 the Court rejected the appeals finding no violation of Sections 7 or 8(1). The CBA permits the deductions. Section 7 allows deductions without specific EE consent when authorized in a CBA. Also, the deduction provision is not a quid pro quo payment to resume employment. "Instead, it is an agreed upon method to ensure that all the teachers who have not experienced a summer layoff, but who work a full school year, be paid according to their seniority and education and no less than those teachers who are similarly situated except for their summer layoff status."

The Supreme Court denied Complainants' application for leave to appeal on 5/31/91.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

983 EVIDENCE

Calendar
Time Card

WAGES

Records to Show Time
Work Before/After Shift End

88-701 Keith v Gold & Son Automotive, Inc (1989)

EE contended she was entitled to additional wages for time spent after punching out. EE's calendar by itself did not establish she worked for periods claimed. The time clock is the best evidence. Many of the times on EE's calendar had been changed, causing doubt as to their validity. ER did not violate the Act.

984 DEDUCTIONS

Court Judgment
DO Offset
Written Consent
Beginning of Employment
Truck Driver
For Each Deduction
Signed as Condition of Employment

TRUCK DRIVERS

Deductions
Driver Negligence

WRITTEN CONSENT

Beginning of Employment
Truck Driver
Damages
For Each Deduction
Signed as Condition of Employment

89-346 Duffy v Gainey Transportation Services Inc (1989)

EE was hired as a truck driver and discharged because he had too many accidents. When hired, EE was required to sign a form permitting ER to deduct for damages to freight and equipment caused by driver negligence. After discharge, EE filed a claim for the deductions taken from his wages. The ALJ found ER violated Section 7 except for the first deduction. There was no evidence that EE did not consent fully and freely to the authorization signed on 3/17/88. Since Section 7 requires a written authorization for each deduction, the 3/17/88 signing did not give ER authorization to take future deductions.

ER obtained a Court Judgment against EE and presented this at the hearing. The ALJ found this judgment to be an authorization permitted by law as stated in Section 7. Applying the judgment toward the amount found due by the Department reduced the amount owed by ER to $163.52.

ER appealed. The Kent County Circuit Court affirmed on 11/20/90. The Court of Appeals also affirmed on 3/3/92. As pointed out by Assistant Attorney General Gregory Taylor, the Court affirmed the "long held agency interpretation of ' 7 that the statute requires a separate written consent by the employee for each paycheck from which a deduction is made." The Court of Appeals= decision is binding on all circuit courts.

985 ATTORNEY GENERAL OPINION

Deductions From Teacher's Salary

DEDUCTIONS

Overpayment

Workers' Compensation

WORKERS' DISABILITY COMPENSATION
Wage Deduction for Overpayment

89-1538 Ramos v Battle Creek Public Schools (1990)

ER violated Section 7 for wage deductions made as adjustments for workers' comp overpayment. ER claimed AG Opinion 5836 permitting deductions from a teacher's annual salary for days not worked constituted an authorization by law for deductions, and the adjustment was permitted by MCLA 418.354 relative to the coordination of benefits under the Workers' Compensation Act.

INGHAM COUNTY CIRCUIT COURT: 10/15/90
The case was dismissed for Department's failure to file its brief in a timely manner. The Department did not appeal the Court's decision.

986 WRITTEN CONSENT
None

89-1877 McNeely v Metro Publications, Inc (1990)

ER withheld EE's wages and violated Section 7 without written consent because of the alleged loss of Metro Passbooks.

See General Entry III.

OAKLAND COUNTY CIRCUIT COURT: 5/16/89 Decision pending.

ER disputed that EE/ER relationship existed and ALJ nonallowance of withholding wages without written consent because of missing Metro Passbooks.

No further information is available concerning this appeal.

987 COLLECTIVE BARGAINING AGREEMENT (CBA)
Wage Deductions Permitted

WAGE AGREEMENTS
Covered by CBA

88-345 Dushane v Wayne By Products Co (1989)

The CBA contained a pay-back clause allowing a deduction of any sum due ER as an overpayment to be taken from EE=s last check or accrued vacation pay due or both. EE was subsequently discharged and ER withheld EE=s last two paychecks to pay back the period not covered by employment.

ER did not violate the Act.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

988 VACATION

Carryover Not Allowed
Payment at Separation

88-446, et al **Wilson, et al v Prein & Newhof, PC** **(1989)**

EEs claimed vacation pay due at termination. ER claimed that the policy did not require payment of unused vacation time. EEs pointed out that the term Acredited@ was used in the policy with respect to unused vacation. ACredited@ refers to an amount in a person=s favor. ER pointed out that the term referred to sick leave payment and that other benefits were not specifically listed.

ER did not violate the Act. Vacation benefits were for EEs= use during the course of employment. Denying vacation pay at termination did not violate the terms of the contract. If ER were required to pay vacation at termination, it would create a provision that is not in the policy. Since the Act does not require the creation of a policy but only the enforcement of those already in place, no vacation benefit payment is necessary.

989 ATTORNEY FEES

EXEMPLARY DAMAGES

Discretionary

SUBPOENAS

88-6860 **Kelley v Blain GMC Trucks, Inc** **(1989)**

The ALJ rejected ER=s argument opposing a subpoena duces tecum and concluded that EE=s counsel could file a cost statement responding to ER=s motion. Section 18(3) permits the department to order an ER who violates Section 5 and 7 Ato pay attorney costs, hearing costs, and transcript costs.@ Section 18(2) permits the department to order an ER who has violated Sections 2 through 8 to pay the EE exemplary damages of not more than twice the amount of the wages and fringe benefits which were due, if the violation is flagrant or repeated. EE=s counsel filed a motion for attorney fees and exemplary damages and the Department and ER were invited to comment on the request. Since ER did not respond to the motion for attorney fees, the ALJ found the motion for attorney fees reasonable and ordered payment.

The petition for exemplary damages was rejected since ER had not flagrantly or repeatedly violated the Act.

990 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

Actors

WAGE AGREEMENTS

Unclear

88-6971, et al 10 Complainants v Matthews dba Prodigal Son Production (1989)

ER=s argument that EEs were independent contractors was rejected. Activities and schedules of the EEs as actors for a play were established by ER; he told them what time to report for rehearsals, required they sign in, and were subject to being dismissed if they missed two to three rehearsals.

Since the agreement on how much to pay EEs was unclear, the ALJ found that EEs were to be paid the amount consistent with payments made to other cast members for rehearsals after the first performance.

ER violated Section 5.

991 COMMISSIONS

Payment

After Separation

Bulk of Work Performed

88-7020 Halas v Hoffman Associates, Inc (1989)

The wage agreement provided that EE would be paid 35 percent of fees paid by clients recruited for certain health care facilities. Payment was due after payment was made to ER.

Although most of the recruitment work was done by EE before terminating employment, the client did not accept the offer for over a month. ER did not violate the Act.

992 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

After Resignation - Work Completion

Salesman

97-311 Wiersma v Kitchen & Bath Gallery, Inc (1997)

Complainant was a salesman for Respondent and received commission plus medical insurance and a gas allowance. On 5/10/95, Complainant advised Respondent=s president that he was going to resign. The president prepared a Memorandum of Understanding to address those customer contacts Complainant had made. Respondent agreed in this document to pay Complainant his regular commission to complete any deals started but

completed after Complainant left, except medical insurance or gas allowance. Throughout the summer Complainant continued to work on these sales and contacts. Customers paid Respondent for contracts sold by Complainant. As a result, Complainant claimed commissions for those sales made until October 1995.

The Department found commissions due and Respondent appealed. Respondent argued that after his resignation, Complainant ceased to be an EE covered by Act 390. The ALJ applied the tests set forth in Askew v Macomber, 398 Mich 212 (1978), and concluded that Complainant was an EE for the period until October 1995. Respondent had no further evidence to dispute Complainant=s commission claim, therefore, the DO was affirmed.

See General Entry VII.

993 BONUSES

Written Contract/Policy/Agreement
Discretionary
Working Constitutes Agreement

89-001 Shourd v Sbarro, Inc (1989)

EE=s signing a document making a bonus discretionary and working under its terms changed any claim he may have had to a different payment.

ER did not violate the Act.

994 DEDUCTIONS

Damages
ER Benefit
Minimum Wage
Written Consent
Beginning of Employment

MINIMUM WAGE

Deductions

WRITTEN CONSENT

Damages
EE Consent Ineffective if Below Minimum Wage

89-1556 Franklin v Gainey Transportation Services, Inc (1990)

EE signed a written consent form allowing deductions as a condition of employment. ER violated Section 7 by making deductions from EE=s final paycheck for equipment damages during the year. The deductions were for the benefit of ER and EE had to sign the consent form in order to get the job. This is not free consent but a form of intimidation. ER also violated the Section 7 requirement that wages not be reduced below the minimum wage, and

Section 5 which requires payment of all wages due at separation.

See also General Entries III and VIII.

KENT COUNTY CIRCUIT COURT: Filed 8/13/90
No further information is available concerning this appeal.

995 BONUSES
Written Contract/Policy/Agreement

WAGES
Written Contract/Policy Not Needed

89-1911 Morrison v Best Western Restaurant of Munising (1990)

EE=s claim was for unpaid bonuses. The first employment agreement provided for bonus payments on net sales and had been signed by the EE.

A second agreement changed EE=s bonus eligibility. EE refused to sign the second agreement. As a part of the second agreement, and based on EE=s need for family medical insurance, ER increased EE=s weekly wage in lieu of providing medical insurance.

ER claimed that there cannot be two contracts in effect. If the first agreement was in effect, EE was due a bonus but was overpaid wages for family medical needs. If the second agreement was in effect, no bonus was due and EE could keep the higher wage payments.

ER violated Section 3, which requires payment of fringe benefits in accordance with the terms set forth in a written policy. Section 1(e) includes bonuses within the definition of fringe benefits. Since only the first agreement was signed, bonuses are due.

The Act does not require a written wage agreement before Sections 2 and 5 apply. No written agreement was necessary to increase wages. EE was entitled to keep the wage increase.

996 DEDUCTIONS
Minimum Wage

MINIMUM WAGE
Wage Reduced To

WAGES
Reduced to Minimum Wage

89-1112 Nancy Wiggins v Concord Enterprises dba Long John Silvers (1990)

After receiving a paycheck for two weeks worked, EE quit without giving the required two-

weeks= notice. ER stopped payment and reissued the paycheck at $3.25 per hour minimum wage. In addition, ER issued a check at minimum wage for the time that EE worked prior to quitting.

EE had signed an employment agreement which stated that an EE failing to give two-weeks= advance notice before quitting Ashall be compensated at the then existing minimum wage for all hours worked, but not paid.@

ER violated Section 5 by making deductions from the first check since EE had not resigned during that period. ER did not violate Sections 5 or 7 by paying the last check at minimum wage since EE agreed to minimum wage if she resigned without notice.

KENT COUNTY CIRCUIT COURT: 6/10/91
Affirmed the ALJ decision.

See General Entry VIII.

997 EMPLOYMENT RELATIONSHIP
Partnerships

EVIDENCE
Wages Not Paid

89-007 Salem v Hungry Dutchman, Inc (1989)

The ALJ found Complainant was a partner not an EE. The tests set forth in Askew v Macomber, 398 Mich 212; 217-218 (1978) were applied. Complainant hired EEs and paid them in cash. No records were maintained. Complainant decided when the business would be open. No wages were paid to Complainant. Complainant and Respondent attempted to breathe new life into a business Respondent started. Complainant continued to operate this business for 26 weeks. This length of time without a wage points to a partnership agreement.

Also see General Entry VII.

998 BURDEN OF PROOF
Burden Not Sustained
Must Overcome DO
Recordkeeping
Not Maintained

EVIDENCE
Insufficient to Establish Claim

89-582 Michael v Bills Refrigeration & Air Conditioning (1989)

ER appealed DO's conclusion that wages were due. ER claimed it paid EE. EE claimed payment was never received. ALJ upheld DO and found ER's records insufficient to show a payment. See General Entries IX and XI.

OAKLAND COUNTY CIRCUIT COURT: Filed 2/27/91
No further information is available concerning this appeal.

999 COMMISSIONS
Payment
After Separation
90-day Cut-off Policy

TESTIMONY
Unrebutted

WAGE AGREEMENTS
Verbal
Notice of Change

90-324 Olin v Griffin Pest Control, Inc (1990)

At the advice of a Department investigator, ER implemented a 90-day commission cut-off policy. ER=s claim that all sales staff were informed of the policy was sufficient to show that the Act was not violated. Since EE was not present to refute ER=s claim, commissions for an account paid more than 90 days after EE=s separation were not due.

1000 SETTLEMENT AGREEMENT
Order Enforcing
Verbal Agreement

90-682 Griffon v Sink Power Equipment, Inc (1990)

The ALJ ordered the enforcement of a settlement agreement which ER wished to rescind. A verbal settlement agreement is enforceable against a party who voluntarily and knowingly authorizes the agreement. EE did not receive the agreed payment from ER.

1001 ADVANCES
Deductions

COMMISSIONS
Prepayment

DEDUCTIONS
Wage/Commission Prepayment

WAGES
Prepayment

90-190 Walton v Concurrent Computer Corporation (1990)

EE's claim for commissions rejected because prepayment of wages (advances) in the form of draws was received.

1002 FRINGE BENEFITS
Show-up Pay

WAGES
Show-up Time

WRITTEN POLICY
Never Executed

90-191 Arakelian v Pizza Hut of America, Inc (1990)

EE was sent home after she arrived to work. EE claimed six hours' pay for showing up even though no work was performed. There was no written fringe benefits policy.

ER did not violate the Act.

See General Entry I.

1003 DEDUCTIONS
Training Expenses

WAGES
Withheld
Training Expenses

90-4 Schenk v Asbestos Management (1990)

EE signed a reimbursement of training expenses agreement. ER initiated the agreement to help keep EEs on the job for at least one year after receiving training.

The reimbursement of training expenses depended on EE's length of employment. If EE stayed for one year there would be no reimbursement. If EE left between one day and 90 days, 100 percent would be due.

EE quit one month after training. ER made deductions for training expenses.

The ALJ found that deductions were permitted pursuant to Section 7. ER did not violate the Act.

1004 DEDUCTIONS

Telephone Calls

90-7 White v Whilley (1990)

ER withheld wages for phone calls made by EE. EE did not provide written authorization permitting a deduction from wages.

ER violated Sections 5 and 7.

1005 EMPLOYEE

One Who Is Permitted to Work

No Direction to Work

90-9 Puzella v Custom Trucking and Asphalt (1990)

Complainant claimed wages for time he worked on a house for Respondent's sister. Respondent hired Complainant to perform work as a general laborer. Respondent paid Complainant for all work performed. Respondent never agreed to hire or pay Complainant for any work done on his sister's house. Respondent submitted a detailed account of how many hours Complainant worked for him and how many hours he worked for his sister.

ER did not violate the Act.

1006 DEDUCTIONS

Draw Deficit

90-11 Nearhoof v Bob Maxey Lincoln Mercury, Inc (1990)

EE worked on a commission basis and was paid a draw subtracted from commissions. EE voluntarily signed a deduction agreement for the overpaid amount.

The ALJ found that the deduction complied with Section 7. EE voluntarily signed the agreement approving the deduction. ER did not violate the Act.

1007 DEDUCTIONS

Advances

WAGES

Withheld

Advances

90-13 Kerner v Lincoln Center Bread Basket Deli, Inc (1990)

ER made deductions for advances and an insurance premium. The time cards which had the advances documented were approved and signed by EE. ER continued to pay the insurance premium for the remainder of the month even though EE had been earlier discharged.

ER did not violate Section 7.

1008 EMPLOYEE
On Call

JURISDICTION
ERs With CBAs and Grievance Procedure

PREEMPTION
CBA
Federal Preemption
Jurisdiction

90-47 Dillard v Metz Baking Company (1990)

EE was initially hired "on call" and later became a full-time EE and requested a wage differential. EE claimed he had experience which would entitle him to 100 percent pay. The parties stipulated that the wage differential amount would cover the period of 5/16/87 through 10/16/88. EE submitted his claim on 2/28/89. The one-year statute of limitations provision, Section 11, permitted consideration only of time after 2/28/88.

The terms of employment were covered by a CBA. EE filed a grievance pursuant to the CBA but the grievance was not pursued to arbitration.

The issue was whether or not the proceeding was preempted by federal labor law. Section 301 of the Labor Management Relations Act (LMRA) provides that "Suits for violation of contracts . . . may be brought in any District Court of the United States . . . ." EE claimed that ER breached the wage provisions of the CBA. As such, the Department is preempted by Section 301 of the LMRA.

The ALJ found that the Department lacked jurisdiction.

See General Entries V and XV. There is no longer any Act 390 authority to interpret a CBA.

1009 EXPENSES
Mileage

90-48 Brown v Midwest Quality Construction, Inc (1990)

EE claimed unpaid wages and fringe benefits. EE did not receive pay for 80 hours of work. EE earned 40 hours vacation after one year of employment. ER=s vacation policy allowed

vacation pay for a terminating EE after eligibility.

The policy manual contained a provision for travel reimbursement. EE had a record of miles traveled on a mileage card. ER claimed he did not know of a travel expense policy. ER violated Sections 4 and 5 by failing to pay wages and fringe benefits. ER's claim of not knowing of the fringe benefits travel policy does not allow withholding wages.

1010 EMPLOYMENT RELATIONSHIP

Truck Driver

90-49 Schifler v C-Lines, Inc & A & R Barkhaulers, Inc (1991)

Complainant was hired by C-Lines, Inc., as a truck driver. His duties consisted of picking up trailers from A & R Barkhaulers, Inc. After being fired, Complainant filed a claim for truck loads he hauled.

The DO found both A & R Barkhaulers, and C-Lines, Inc., to be ERs. The ALJ found that Complainant was an EE of C-Lines, Inc. EE was paid, hired and fired by C-Lines, Inc. A & R Barkhaulers, Inc., was not an ER.

C-lines, Inc. violated Section 5(2) by failing to pay EE wages and violated Sections 9 by failing to produce records.

See General Entry VII.

1011 WAGES

Payment to Taxing Authorities and Not EE Withheld

EE Debt to ER

90-51 Cideko v Trayne Investment Corporation (1990)

EE was a part-time salesman and recordkeeper at the time of his separation. ER deducted wages from EE's paycheck to cover an account balance debt.

Since ER did pay a portion of EE's last check to the taxing authorities, the Department made a motion to amend the section of the Act alleged to have been violated from Section 5(2) to Section 7. Section 7 refers to wage deductions.

The Act permits deductions if permitted by a CBA or in accordance with law. The Department has interpreted this to include situations where ER obtains a judgment against EE for a debt and where the Court orders an offset for wages that EE owes.

ER obtained a judgment against EE for the difference between EE's debt and wages due. The judgment did not include the net amount due for the last period of employment and did not order EE's wages to be offset against the debt to ER.

ER violated Section 7.

1012 BONUSES

Written Contract/Policy/Agreement

Discretionary

90-66 Saxon v Chicago Diversified Foods Corp dba Taco Bell Corp (1990)

EE was employed by Taco Bell Corp., which later was purchased by Chicago Diversified Foods Corp. After change in owners, EE was promoted to district manager. When Taco Bell was the owner, there was a District Manager Incentive Plan. The new owner, Chicago Diversified Foods Corp., never adopted the District Manager Incentive Plan. EE claimed that the policy was continued by Chicago Diversified and stated that managers under her supervision received bonuses during the time she was the district manager. It was not shown that these bonuses were paid based on a written contract or policy as opposed to discretionary bonuses.

The ALJ found that verbal commitments to pay fringe benefits were insufficient. Section 3 requires fringe benefits to be paid based upon a written contract or policy. Existence of a written contract or policy was not established. EE could pursue a claim in District Court where a written contract or policy is not required to establish ER's contractual obligation.

1013 EMPLOYER

Identity

EMPLOYER IDENTITY

Management Company

90-80 Pidgeon v Dr. R. Rourke (1990)

Respondent hired a management company to handle all employment issues for nurses. This company hired EE, supervised her work and paid her wages. Respondent was not EE's employer for purposes of Act 390.

See General Entry VII.

1014 BURDEN OF PROOF

Appellant

90-102 Quick v Peerless International, Inc (1990)

Complainant filed a claim for payment of wages. The claim was denied because there was no written contract or policy.

Complainant did not meet the burden of proof by a preponderance of the evidence. Respondent did not violate the Act.

See General Entry XI.

1015 COMMISSIONS

Payment

After Separation

90-104 O'Meara v Bull HN Information Systems, Inc (1990)

EE filed a claim for a computer installation commission. ER advised EE that her request for commission was denied since the computer installation was after her termination. The written policy allowed for commission payment if a reservation was allowed. Under a reservation, an EE continued to be eligible for credit for transactions that took place after EE had been relieved of account responsibility. After resigning, EE requested a reservation on the account until installation.

The ALJ found that equipment was installed subsequent to EE's employment. According to ER's written policy, EE would only be entitled to commissions if a reservation was allowed. The reservation must be approved by ER's vice president. EE never received reservation approval and was not entitled to a commission. ER did not violate the Act.

1016 DEDUCTIONS

Written Consent

Signed as Condition of Employment

90-153 Yoeman v Gainey Transportation Services, Inc (1990)

As a condition of employment, EE signed documents to allow for deductions covering advances in pay, company and statutory fines, and damage to freight, company equipment, and other vehicles or property caused by driver negligence.

The signed documents did not comply with Section 7's requirements to permit the deductions taken from EE's check. EE's signatures did not constitute free consent since he was required to sign the documents as a condition of employment.

ER violated Section 7. See General Entry III.

KENT COUNTY CIRCUIT COURT: Filed 7/30/90
No further information is available concerning this appeal.

1017 DAMAGE TO OR LOSS OF PROPERTY

Truck/Van

EMPLOYMENT RELATIONSHIP
Independent Contractor Relationship Found
Truck Driver

JURISDICTION
Independent Contractor Relationship

90-218 Thomas v Twin Oaks Landscaping (1990)

Respondent refused to pay Complainant because of $900 in truck damages. Complainant was found to be an independent contractor and not an EE. Respondent did not supervise Complainant. Complainant did not have set work hours. The Department had no jurisdiction to consider EE's claim.

See General Entry VII.

1018 DAMAGE TO OR LOSS OF PROPERTY
Fines
Truck/Van

JURISDICTION
Out-of-State Employment

90-219 Petrie v Petrie Trucking (1990)

EE claimed one week's wages as a truck driver for his brothers' business. ER paid fines and damages that EE incurred. EE lived in Fort Wayne, Indiana. The majority of EE's work time and truck routes were outside of Michigan. The ALJ dismissed the claim, for lack of jurisdiction, pursuant to Rule 21(2).

1019 EMPLOYMENT RELATIONSHIP
Economic Reality Test
Carpenter
Independent Contractor Relationship Found
Carpenter
Economic Reality Test

90-223, et al McGorman, et al v Shawn Habedank d/b/a Plain & Fancy (1990)

Complainants worked for Respondent as carpenters. They were found not to be Respondent's EEs after application of the economic reality test. Complainants set their own hours and schedules, worked unsupervised, and supplied their own tools. Respondent told Complainants what had to be done, not how it was to be done. Complainants were paid draws on each job. There were no established wage schedules or pay frequency.

Respondent did not violate the Act.

See General Entry VII.

1020 EMPLOYEE

Economic Reality Test

EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

Economic Reality Test

90-276 Germon v Davidson Laird & Assoc (1990)

Complainant managed Respondent's office for a 50 percent commission on personnel placements. Complainant claimed unpaid commissions were due. Respondent claimed Complainant was not an EE but hired as part of a joint venture to build revenue to open a new office. Complainant never signed a written employment agreement.

The ALJ found that Complainant was an EE. Respondent controlled EE's duties. EE worked out of Respondent's office and used their equipment. ER violated Section 5.

See General Entry VII.

OAKLAND COUNTY CIRCUIT COURT: 4/22/91

10/23/91 - Circuit Court dismissed Respondent's Petition for Review and affirmed the 2/22/91 ALJ decision.

1021 VACATION

Check Not Cashed

Amount Still Due

90-280 Fish v JCK and Associates (1990)

ER mailed a check to EE for one hour's vacation pay which EE never cashed. After 90 days the check was void. EE entitled to one hour's vacation pay. ER violated the Act.

1022 COMMISSIONS

Unsatisfactory Work

Misrepresentation

90-285 Syria v Howard J. Rosner, OD, PC d/b/a DOC (1990)

ER's written commission policy stated that any EE falsifying or misrepresenting commissions would void payment. EE submitted approximately 15 commission duplications. EE also submitted approximately 3 or 4 commission requests that were earned by someone else. The ALJ found that commission duplications voided payment.

Commissions are earned only when submitted with appropriate paperwork.

ER did not violate the Act.

1023 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

Fund Raising

90-299 Vaughn v Open Arms Shelters, Inc (1990)

Complainant was hired to develop programs and solicit funds for Respondent. No wages were to be paid unless funds were raised. Since no funds were raised, no wages were due.

Complainant was found to be an EE despite her testimony that she was a contract EE. There was also little control over Complainant's activities. She did not have to report to the office and worked according to her own schedule. Respondent did not violate the Act.

See General Entry VII.

1024 EMPLOYMENT RELATIONSHIP

Economic Reality Test

ER Definition

ER/ER Relationship Not Found

ER Definition

INDIVIDUAL LIABILITY

90-313, et al 42 Complainants v Ray McCarroll, an individual, and Allied Automation Systems, Inc, jointly and severally (1990)

The Department found Ray McCarroll and Allied Automation Systems, Inc., jointly and severally, to have violated Section 4. Respondent Ray McCarroll appealed DO. An appeal was not filed on behalf of the corporation; DO final against corporation assets. Respondent McCarroll did not meet the Section 1 definition of "employer." The ALJ found that Respondent McCarroll was not individually liable and did not violate the Act.
See General Entry VII.

1025 EMPLOYEE

On Call

WORK

On Call

91-24 Adams v J L L Trucking, Inc (1991)

The issue was whether "on call" represented time worked. When hired, EE was given a 4-hour orientation where on call status was explained.

The ALJ held the "on call" provisions were not considered hours worked. There are no state regulations or provisions in the Act requiring payment.

1026 RESIGNATION

Written Policy

Two-Week Notice Required

WRITTEN POLICY

Resignation

Two-Week Notice Required

91-25 Jeffrey v Loranger Chiropractic Clinic, P C and Dr Lisa Loranger, P C (1991)

Both EE and ER agreed that the terms of employment were covered by a written contract and that EE did not give notice when she left employment.

ER denies that payments are due and owing because EE did not comply with the notice requirements of the written policy.

The ALJ found no wages due pursuant to the written policy.

1027 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Not Found

Foreman

91-37 Hillis v Loren Jackson (1992)

Complainant Hillis was employed by Haskins Builders, along with his brother-in-law and Respondent Jackson, to build a horse barn for customer Fisher. The work contract was between Fisher and Haskins. Respondent Jackson was foreman and submitted crew hours to Haskins. Payment was then given by Haskins to Respondent Jackson for distribution.

The ALJ found Respondent Jackson was not Complainant=s ER. Respondent Jackson was the foreman and responsible for turning in hours and distributing pay.

See General Entry VII.

1028 EMPLOYER IDENTITY

Corporation Officers

EMPLOYMENT RELATIONSHIP
Company President As ER

INDIVIDUAL v CORPORATE LIABILITY

90-1494 thru 990-1499 & 90-1814 **10 Complainants v Kraig Malstrom and Sweetwater Crafts, Inc (1991)**

Respondent was president of company, but did not issue or sign payroll checks, hire or layoff workers, or perform any other bookkeeping duties. The only issue was whether Respondent was personally liable for the payment of wages and fringe benefits of workers after the business had financial troubles.

The ALJ found that Respondent could only be personally liable if it was found that he acted Adirectly or indirectly in the interest of an employer.@ See Section 1(d). The ALJ found that Respondent was not the Complainants= ER and modified the DOs to find Respondent Sweetwater Crafts, Inc. was solely responsible for Complainants' wages.

Also see General Entry VII.

1029 COMMISSIONS
Payment
After Separation
Incomplete Sales

WAGES
Commissions
Payable After Separation

WRITTEN POLICY
Commissions
After Separation

91-68 **Kruse v Hayes Enterprises, Inc dba Hayes R V Holiday Plaza (1991)**

The ALJ found no wages due pursuant to a wage agreement which stated EE had to be present at delivery of merchandise to perform specified tasks. EE resigned before delivery.

1030 COMMISSIONS
Computation
Bad Debts

91-70 **Mellen v Mid-Michigan Trading Post Ltd dba Wheeler Deeler (1991)**

EE was employed on a commission basis for 10 months before he resigned. The parties agreed to subtract bad debt amounts from commissions. Once the bad debt deduction was made, ER paid the balance of EE's gross wages, less appropriate taxes.

EE claimed commissions due of $1,490.20. ER did not pay this amount because bad debts totaled more than commissions. EE did not give written consent to withhold this amount.

The ALJ examined the parties' wage agreement and found ER did not violate the Act. The adjustments made were not unexpected deductions from wages but part of the commission determination. The adjustments were in accord with the parties= agreement.

1031 VACATION

Terminated Involuntarily
Written Contract/Policy

WRITTEN POLICY

Fringe Benefits
Terminated Involuntarily

91-72 Shuster v Montrose Nursing Home, Inc (1991)

EE claimed compensation for (1) direct care, (2) vacation pay and (3) incentive bonus.

(1) The ALJ found that the amount paid was proper and therefore nothing more was due.

(2 & 3) After a phone conversation, ER believed EE had quit and EE believed she had been told not to report to work. EE claimed $200.25 vacation pay. The ALJ found the outcome did not depend on EE resigning or being discharged because the ER handbook stated: AEEs terminated involuntarily are not eligible for full or accrued benefits.@

EE did not voluntarily resign. She either quit involuntarily or was discharged. Therefore no vacation pay or incentive bonus was due.

1032 COMMISSIONS

Deductions
Bad Debts

DEDUCTIONS

Bad Debts

91-92 Lamson v New York Carpet World dba Clyde's Carpet, Inc (1991)

EE was a commissioned salesperson and sold merchandise which was paid by personal check. The check was later returned because the customer's account had been closed. ER refused to pay EE $38.48.

The ALJ found that EE was not responsible for unpaid debts. Therefore, ER in violation of Section 5 for failing to pay EE.

1033 BURDEN OF PROOF

Recordkeeping

Not Maintained

TESTIMONY

Inconsistent

91-99 Brandon v Independent Construction, Inc dba Timchuk Construction (1991)

The ALJ found no wages due for EE's work as a drywaller. EE's testimony was unreliable and contradictory as to the number of hours worked. ER did not keep records.

See General Entry X.

1034 DEDUCTIONS

Wages Below Minimum Wage

EXEMPLARY DAMAGES

Deliberate, Conscious and Knowing Violation

91-160 Bunce v Michael George, Inc dba Paul's Auto Wash II (1991)

EE's supervisor endorsed his check to take out a deduction for ER's benefit. EE got the balance in cash which was less than minimum wage.

The ALJ found a violation of Section 7 because there was no written authorization to take the deduction, plus the balance was less than minimum wage.

The ALJ ordered exemplary damages because the deduction was made deliberately and knowingly.

See General Entries III and VIII.

1035 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

Truck Driver

HEARING

Costs

Lost Wages

91-161 French v Haskins & Sons, Inc (1991)

Applying the case of Askew v Macomber, 398 Mich 212, 217-218 (1978), Complainant was found to be an EE because he did not sign an owner/operator agreement. Respondent told Complainant the route to follow, the time to leave and arrive, where to gas up and he used Respondent=s vehicle.

Complainant=s claim for reimbursement of hearing costs for lost wages was denied.

See General Entry VII.

1036 APPEALS

Untimely

Good Cause Found

DO Not Timely Received

DEDUCTIONS

Personal Use

Workers= Compensation Premiums

EXPENSES

Charged to ER

WRITTEN CONSENT

Deductions

Personal Use

Workers= Compensation Premiums

91-163 Westrick v Thomas D Carr dba CDT Investment Group (1991)

After finding good cause for late appeal, the parties agreed to EE=s earnings. ER refused to pay amount due because of EE=s personal use of ER=s truck and worker=s compensation premiums.

After numerous attempts to receive ER=s records with no response, a DO was issued finding a violation of Section 9(3).

The ALJ affirmed the Department=s DO finding violations of Sections 5, 7 and 9, and also hearing costs for ER=s failure to supply records.

See General Entry IX.

1037 COURT ACTIONS

Circuit Court Appeal

DETERMINATION ORDER
Amendment of DO
At Hearing
In Absence of Party

91-220 Kruszka v William Bennett dba Bennett Construction (1991)

ER failed to appear for hearing. The ALJ determined there was an EE/ER relationship and found wages due plus interest.

ER filed an appeal in circuit court alleging the decision was not supported by competent, material and substantial evidence based on the whole record. The circuit court judge upheld the ALJ=s decision.

1038 DEDUCTIONS
Consent at Hearing

WRITTEN CONSENT
Damages
Deductions
EE Admission of Debt

91-221 Wehring v ETV, Inc (1991)

EE signed an agreement accepting responsibility for low overpass accidents. After EE=s discharge, ER deducted damages from EE=s wages. EE agreed he was responsible for the accident. The ALJ concluded that EE=s testimony satisfied the consent requirement. DO modified to reflect ER=s violation of Section 7, but no payment due.

See General Entry III.

1039 VACATION
Recordkeeping
Payment
Written Contract/Policy
Discharged or Quit

91-245 Roberts v Spartan Tire Stores of Washtenaw, Inc dba Spartan Tire (1991)

ER withdrew its appeal concerning wages due. The issue remaining, based on EE=s appeal, was whether there was a violation of the written policy or contract regarding EE=s claimed vacation pay.

Violation of Section 3 found. The ALJ ordered payment vacation paid because ER=s records did not show vacation payments required by the vacation policy.

See General Entry I.

1040 DEDUCTIONS
Advances

WRITTEN CONSENT
Advances

91-271 Martin v North Star Ranch, Inc (1991)

EE signed an agreement allowing ER to deduct from his wages personal advances not related to truck expenses.

The ALJ found that ER made personal advances to EE which exceeded his wages and found no further monies due.

See General Entry III.

1041 ATTORNEY GENERAL OPINION
Preemption
CBA
Public ER

COLLECTIVE BARGAINING AGREEMENT (CBA)
Authority to Interpret
Public ER
Work Not Fully Performed

PREEMPTION
CBA
Interpretation
Public ER

WAGES
Full Amount Not Paid
Withheld
Work Not Fully Performed

91-284 Whitman v Wayne State University (1991)

EE was a professor, teaching two courses per semester in mechanical engineering. EE refused to teach three courses when directed by ER. ER took the position that EE was entitled to two-thirds of his salary since he was fulfilling only two-thirds of his assignment. The ALJ agreed and found no further wages due.

The ALJ also found that Attorney General Opinion 6647, 7/11/90, does not apply to public ERs. (This AG opinion preempts the Department from determining Act 390 claims where a CBA interpretation is required in nonpublic employment.)

See General Entry XV.

1042 WAGES

Work After Discharge

91-290 Dempz v Davidson Associates and Company (1991)

ER alleged that any future work performed would be paid on a commission basis after EE=s discharge, although no specific terms were discussed. EE continued to work for two weeks after being discharged. The ALJ concluded that EE performed services after discharge and awarded wages due.

1043 BONUSES

Written Policy

Fulfilled

91-291 Gauthier v Synchronized Design & Development Co, Inc (1991)

EE alleged a bonus due pursuant to a bonus policy. The ALJ determined that EE was eligible since he fulfilled the terms of the bonus policy.

1044 VACATION

Eligibility After Business Purchase

Verbal Promises

90-332 Kik v Nicholas Plastics, Inc (1990)

EE and ER reached a verbal agreement whereby, ER would honor the EE=s seniority for vacation time for time worked before the ER purchased the business. There was no written agreement crediting EE with nine years before the acquisition or a separate written vacation policy covering EE. The ER=s written fringe benefit policy was the only policy enforceable under Act 390.

ER did not violate Section 3 and was not required to pay for fringe benefits earned before he purchased the business.

Also see General Entry I.

1045 BURDEN OF PROOF

Burden Sustained

Records
Testimony

WAGE AGREEMENTS
Wage Reduction
Starting Date

91-425 Moulton v Zorn Industries (1992)

EE=s weekly salary was $600. Because of ER=s cash flow problems, both parties agreed to a weekly salary of $400. The issue is when did the reduced salary agreement begin.

The ALJ found that EE=s testimony and exhibits presented corroborated EE=s claim for wages and expenses and found ER in violation of Sections 2(2) and 5(3).

(1995) The Circuit Court upheld the ALJ=s decision regarding wages.

1046 COURT ACTIONS
Default Judgment to Offset Amount Due Complainant

91-429 Hull v Dakota Leasing, Inc (1991)

A small claims judgment constitutes legal authorization to withhold wages, but there was no judgment when EE=s wages were withheld.

An offset was made to the DO by the award of a court judgment. ER violated Section 5 since wages were withheld before the district court judgment.

See General Entry VI.

1047 FRINGE BENEFITS
Must be in Writing to be Enforced

WAGE AGREEMENTS
Claim For Cash Overages

91-431 Bent v Phillip Meisterheim dba Captain Oil Change Polyguard (1992)

EE alleged that he was entitled to a cash overage since he had to pay one third of any shortage. Wages are based on the parties= agreement. If there is no agreement, there is no obligation to pay. There was no agreement for payment of a cash overage. Therefore, no additional wages were due.

EE also claimed vacation pay. Section 3 requires vacation pay only if the payment is required in a written contract or policy. There was no such document.

The ALJ found no violation of the Act.

1048 COMMISSIONS

Payment

After Separation

Follow-up Work

91-527 Rolston v Astro-Sales Corp dba Rain Soft Water Treatment (1992)

The ALJ found no commission due EE after separation because the sales agreement signed by EE required follow-up and paperwork to be completed during employment. Since EE resigned before this work was finished, no commission was due.

1049 APPEALS

Dismissed

Failure to Attend Hearing

VACATION

Sale of Business

91-565 thru 91-571 Cooper, Graft, Martin, Savitski, McCormick, Dara & Trierweiler v Auto Mart Inc of Portland dba Davis Ford Mercury (1992)

Due to non-appearance, the appeals of Complainants Cooper, Martin and McCormick were dismissed.

Complainants Graft, Savitski, Dara and Trierweiler claimed vacation pay. The dealership was purchased by Respondent on or about 9/1/86. Control over Complainants' employment by Respondent ceased on 8/25/90 due to a change in ownership. The EE manual pertaining to vacation said:

> In the event of termination of employment for any reason, you will not be entitled to receive any pay for unused vacation time.

The ALJ found the sale of the business was a termination of employment and ended any obligation under Act 390 to pay vacation benefits.

1050 VACATION

Payment at Termination

Discharged

After Notice of Resignation

Retroactive Policy Change

91-576 Drozdowsi v Market Opinion Research Company (1991)

ER failed to appear. EE appeared and testified in a credible manner. EE testified when she gave two weeks' notice of termination, ER told her to leave immediately. EE requested her vacation pay. ER advised that the company would be changing the policy and she would not be entitled to vacation pay. At the time of her resignation she had accrued 10 days vacation.

The ALJ found ER violated Section 3 because the policy required payment. A plan to change future entitlement can not retroactively change the benefit.

1051 DEDUCTIONS

Court Judgment

DO Offset

JUDICIAL PROCEEDINGS

District Court Judgment

DO Offset

91-648 Wilterdink v Nationwide Truck Brokers, Inc (1991)

The DO found ER violated Sections 7 and 8. ER filed a timely appeal. Prior to the hearing, ER presented a District Court small claims judgment finding money due ER from EE.

A small claims judgment constitutes legal authorization to withhold wages. However, ER violated the Act since the deduction was taken before the District Court judgment. The District Court judgment must be reduced by crediting the DO amount plus penalty up to the court judgment date.

Also see GE VI.

1052 EMPLOYMENT CONTRACT

Commissions

Changed by ER

91-666 Brown v Dean G. Warner Building Co (1992)

EE's employment was governed by a written employment agreement. The agreement provided for an annual salary plus 2 percent commission. EE was to receive 1 percent of the commission when the job was half complete and the remainder upon completion. ER decided to enlist third-party help to generate sales. ER paid EE 1 percent of the sales claiming this represented a bonus. EE claimed there was never a written or verbal agreement to alter her written contract, and the 1 percent payment represented half her commissions.

The ALJ found the wage agreement stated that EE would be responsible for sales. Since a third party was hired to generate sales, EE's commissions ended. No violation found.

1053 DEDUCTIONS

Court Judgment

DO Offset

JUDICIAL PROCEEDINGS

District Court Judgment

DO Offset

91-708 Rouse v American Mobile Living, Inc (1991)

Prior to hearing, the WH representative presented a copy of a District Court small claims judgment finding $478.84 due ER from EE.

ER violated the Act since there was no small claims judgment at the time EE's wages were withheld. However, the District Court judgment must be reduced by crediting the DO amount plus penalty up to the court judgment date.

See General Entry VI.

1054 EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

Subcontractor

Supervision

91-724 Hill v Gyll Stanford dba Stanford Enterprises (1991)

The ALJ found an independent contractor relationship. EE was not supervised by ER and used his own tools and methods to accomplish the job.

1055 VACATION

Offset by Sick Leave

91-727 Heikkila v The CATS Co (1991)

EE was absent from work for 7 days due to a family illness. ER's written contract provided for 10 days' paid vacation and did not include any provision for sick time. The ALJ found that since the written policy did not provide for sick time, the 7 days EE used was considered vacation time. EE used 60 hours of vacation and is entitled to 20 additional hours of vacation.

1056 APPEALS

Untimely

Good Cause Found

Business Closed

DO Not Timely Received

91-809 Fennell v Bradford Teeple dba Bradfords **(1991)**

Good cause for a late appeal was found where Respondent's business closed and while in the midst of divorce proceedings mail was forwarded to Respondent's parents' house which delayed his receipt.

A violation of Section 7 was found because Respondent took a meal deduction without written authorization.

See General Entry III and IX.

1057 WAGES

Deferral
Payment When Business Profitable

91-868 VanEvery v Puddles Away, Inc **(1992)**

It was agreed that EE would get a weekly wage, but the wage would not be due until the business became profitable. There was a dispute as to whether the agreement included a minimum of 8 hours' work per week to earn this wage.

The ALJ found that EE did put in the 8 hours' required work but determined that ER did not violate the Act because business was not profitable. No wages were due.

1058 DISABILITY INCOME

91-874 Densmore v Keyes-Davis Company, Inc **(1993)**

On 8/10/90 EE was granted a voluntary unpaid leave of absence to 9/3/90 due to the injury and later death of her son.

EE returned to work on 9/4/90, having been prescribed medication for nerves, stress and pain. On 9/17/90 EE's doctor changed medications and instructed EE not to work around machinery until 10/9/90. EE informed ER's supervisor that she was not able to work because of her medical condition. While off work, EE attempted to collect disability income. ER contacted EE's doctor who informed him that EE was capable of light-duty work. ER claimed EE's absence from work was an unauthorized extension of her bereavement leave. ER presented no proofs to show EE refused light-duty work to disqualify her for disability income.

The ALJ found that EE was entitled to disability income. This was a fringe benefit covered by a written policy. Section 3 requires an ER to pay fringe benefit in accordance with the terms of a written policy.

1059 EMPLOYMENT RELATIONSHIP
Partnerships
Grocery Store

EVIDENCE
Payroll Records

WAGES
Full Amount Not Paid
Store Remodeling

WRITTEN CONTRACT
Partnership
Wages

91-359 Cole v Kilp dba Betsie Valley Market (1992)

The parties entered into a written agreement to operate a grocery store as a partnership. The parties agreed that wages were to be derived from the sale of goods. Prior to opening the store, the building needed remodeling. EE helped with the remodeling and repairs for approximately a month before the store opened. EE received $500 from ER prior to the store's opening. EE claimed wages for work performed prior to opening the store and the last week worked.

ER admitted he paid EE $500 before the store opening, but produced no payroll records or proof that EE was paid all monies due. ER failed to sustain the burden of proof. The ALJ found wages due.

See General Entry XIX.

1060 ADVANCES
Deductions

DEDUCTIONS
Advances
Written Consent
Advances

WRITTEN CONSENT
Advances

91-496 Banister v Jim Winter Buick-GMC-Nissan, Inc (1992)

EE was employed as a body shop technician. EE was granted a leave of absence from 6/25 through 7/1/90. EE declined an advance of monies prior to the leave, but requested and received an advance of one week's pay upon his return. EE signed a voluntary agreement authorizing the deduction from payroll or pension funds due.

The ALJ found deduction was made in accordance with the written consent of EE.

See General Entries III and X.

1061 WAGES
Withheld
Training Expenses

91-499 Sharma v Bquad Engineering, Inc (1992)

ER stopped payment on EE's last pay check, contending EE was not entitled to his salary because he falsified work performed.

The ALJ found that ER anticipated a long-term relationship with EE as evidenced by the hiring agreement. During the hearing, it became evident that ER was displeased with losing EE's services after having trained EE. ER claimed financial detriment.

ER did not sustain his appeal by a preponderance of the evidence. The DO was affirmed by the ALJ.

See General Entry XI.

1062 BURDEN OF PROOF
Burden Not Sustained
Records

COMMISSIONS
Deductions
Minimum Wage

JURISDICTION
Statute of Limitations
Minimum Wage

MINIMUM WAGE
Statute of Limitations

91-702 Patino v University Olds, Inc (1992)

EE was employed as a rental manager and salesman for ER's used car department. EE was paid, pursuant to a written contract, a 35 percent commission after various deductions were made for reconditioning costs. EE claimed commissions for two sales and payment of minimum wage. EE claimed he worked 80 hours and received $100. ER produced records which indicated sale one resulted in a loss. The second sale presented deductions authorized by EE's signature. Since EE had the burden of proof, the ALJ denied EE's claim due to

insufficient evidence.

EE's claim for payment of minimum wages was not proper because EE did not allege claim in wage complaint. The statute of limitations also barred this claim. EE only made this allegation after his separation from employment.

1063 FRINGE BENEFITS

After Separation
Holiday Pay
Written Policy
Must be Employed

91-749 Franco v Motor Wheel Corp (1992)

The ALJ examined the fringe benefit policy and found EE was not entitled to vacation and holiday pay. The policy provided eligibility through 12/31 of each year. EE was employed through 12/15/89. EE claimed if allowed to take vacation time and given holiday pay, he would have been employed until 1/2/90. EE was not employed after he received his layoff notice on 12/15/89. Therefore, no violation found.

1064 ADVANCES

Deductions

DEDUCTIONS

Advances
Shortages
EE Responsibility
Written Consent
Beginning of Employment

WRITTEN CONSENT

Beginning of Employment

91-780 Schmidt v Dave's Blue Bird Motel, Inc (1992)

EE was hired as a desk clerk and signed an authorization permitting ER to deduct shortages from his pay. ER deducted shortages and advances from EE's check. The ALJ found no violation. No authorization was necessary to deduct the advances.

See General Entries III and X.

1065 ADVANCES

Deducted From Final Pay

CHECKS

Stop Payment

FRINGE BENEFITS
Resignation
Eligibility
Written Policy
Eligibility

RESIGNATION
Eligibility for Fringe Benefits

WAGES
Resignation
Stop Payment

91-918 Boik v National Business Centers (1992)

The written fringe benefit policy allowed one week vacation after one year of employment. EE was allowed one week vacation even though employed less than 6 months. ER advised EE if she left employment before earning vacation, the amount would be deducted from her last check. After six months' employment, EE received a pay check and advised ER she was leaving. ER stopped payment on the check.

EE made a claim for last week's pay. No authorization was signed for the deduction of vacation pay. ER argued no vacation time was due EE and that she was aware of the deduction prior to one year's service.

The ALJ found the parties were bound by the written policy which provided one week of vacation after one year of employment. The ALJ concluded that EE was aware of the policy in light of accepting her last check and immediately resigning, indicating EE's knowledge regarding repayment of vacation pay.

The issue decided was whether ER withheld EE's last check in violation of the Act. The ALJ held that since EE was not entitled to vacation time, the pay EE received previously was payment for her last week of work.

1066 ADVANCES

BURDEN OF PROOF
Appellant
Burden Sustained
Testimony
Unrebutted Testimony

EMPLOYMENT RELATIONSHIP
EE/ER Relationship Not Found
Photographer

91-765 Lutes v George Shaw Agency (1992)

Respondent operated a talent agency and rented space to photographers. In August 1989 Complainant and Respondent agreed to split photographer fees. Respondent paid Complainant fees for the period 8/1/89 through 11/4/89. Respondent also paid Complainant in advance for work performed 10/27/89 through 11/4/89. Respondent denied any employment relationship with Complainant.

The ALJ found there was no employment relationship between Complainant and Respondent. Respondent appeared and testified in a credible manner that he did not hire Complainant and any money earned for split photographer fees was paid. Complainant failed to appear.

1067 DETERMINATION ORDER
Amendment of DO

96-49 Burgett v Richard Rafalko and D & R Photographics, Inc dba Soft Impressions (1996)

The parties appearing at the hearing agreed to amend the DO by dismissing individual Richard Rafalko as one of the Respondents.

1068 ADMINISTRATIVE LAW JUDGE
Unable to Write Decision

EMPLOYEE
Township Deputy Supervisor

TOWNSHIP DEPUTY SUPERVISOR

WAGES
Township Deputy Supervisor

96-14 Behrens v Hamburg Township (1996)

The ALJ who presided at the hearing became ill and unable to write a decision. With consent of the parties, another ALJ read the transcript and issued a decision.

Based on MCL 41.61(2), the township supervisor appointed Complainant as deputy township supervisor. Complainant was told he would be paid $9.55 per hour, but the township board refused to establish compensation for the deputy. Complainant testified to the hours he worked.

The ALJ found that Complainant was an EE because he was permitted to work by the township supervisor, Section 1(b). Wages were found due for those times Complainant

performed the supervisor's duties during the supervisor's absence until the township board's vote denying compensation.

1069 PERSONAL PAY PAYMENTS

VACATION
Written Contract/Policy

96-47 Spielman v Ann Arbor Cat Clinic (1996)

EE was found ineligible for personal and vacation pay where policy did not provide for payment at separation. The fact that ER paid another EE does not require ignoring the policy that allowed payment only when time off was taken.

1070 ADMINISTRATIVE LAW JUDGE
Equitable Powers

COMMISSIONS
Payment
After Separation
Must Be Employed

EQUITABLE CLAIMS

FRINGE BENEFITS
Bonuses/Incentive Pay
Must be Employed
Working Constitutes Agreement
Written Policy
Must Be Employed
Working Constitutes Agreement

WRITTEN POLICY
Must Be Employed
Working Constitutes Agreement

96-51 Todd v Nemic Machinery Company (1996)

EE worked through 3/31/95. On 1/12/95, ER changed the employee handbook to require an employee be employed when incentive payments were made. EE worked the entire quarter through 3/31/95, but was not paid the bonus on 4/14/95, because she was no longer employed. EE argued that the claim was a commission or wage and not a fringe benefit. The ALJ found that ER could condition a commission to employment as long as EE received at least the minimum wage. Since EE received an hourly wage of $8.75 plus the commission, the restriction was proper. If the payment is considered a fringe benefit, EE accepted the policy change by working after the change. Section 3 requires a fringe benefit payment in

accordance with a written policy. ER did not violate Act 390. While the ALJ considered ER=s decision to be unfair, since EE did the work and ER benefited from her effort, an ALJ has no equitable powers to create a solution at odds with Act 390.

1071 HEARING

Costs

96-54/96-109 Murphy v Tallahasee Care, Inc (1996)

EE appealed DOs finding no violation of Act 390. ER paid the amount claimed plus the 10 percent interest amount [Section 18(1)(c)]. EE objected to dismissal of his appeals claiming costs. Section 18(3) permits costs to be assessed against an ER found in violation of Act 390. Here the Department did not find a violation. Costs are not appropriate in this case.

1072 BURDEN OF PROOF

Recordkeeping

Cash Payments

WAGES

Cash Payments

Risk to ER

Payment to Taxing Authorities and Not EE

96-1011 Chon v Rebecca Jeon dba Golden Chop Stix Fried Rice (1996)

EE was paid in cash for work as a cook. She claimed wages for a period that ER claimed she was paid, but ER had no records showing this payment. Another entire wage payment was sent to taxing authorities for Social Security and tax obligations. EE did not consent to this payment.

ER violated Sections 2 and 5 by not paying wages as required, and Section 9 for not maintaining records.

1073 VACATION

Payment at Termination

Discharged

96-1058 Shumaker v Electronic Data Systems Corp (1996)

ER's written policy ended vacation eligibility at separation. EE was discharged and was ineligible to collect accrued vacation. EE was denied a vacation request made prior to her discharge because another EE had requested the same period. EE could have requested another vacation, but did not do so before her discharge.

1074 EXEMPLARY DAMAGES

Deliberate, Conscious and Knowing Violation

INDIVIDUAL v CORPORATE LIABILITY

Pervasive Control

96-1060 Magnone v Michi-Mug, Inc (1996)

Respondent corporation appealed an adverse DO, but did not appear for hearing. Based on EE's testimony, the ALJ amended the DO to find individual liability for the president and CEO because he exercised pervasive control over the business.

Also, since the president wrote that he wanted EE to suffer, the ALJ found a violation of Section 5 was deliberate, conscious and knowing. Exemplary damages were awarded to EE.

1075 BURDEN OF PROOF

Recordkeeping

Not Provided to Department

EMPLOYER

Duty to Pay Wages

Delegation of Authority

WAGES

Cash Payments

96-1064 Williams v Cuisine, Inc (1996)

ER violated Section 6 by withholding wages to pay for EE's apartment. Section 6 requires wages to be paid in cash or check. ER violated Section 2 by not paying EE as manager in a regular, periodic manner. ER has responsibility to be sure all EEs including the manager are paid wages.

ER may sue EE for damages and theft from the apartment, but may not withhold wages. ER violated Section 9 by not providing records to the Department on request.

1076 DEDUCTIONS

Poor EE

Written Consent

Beginning of Employment

96-1126 Dorman v Dan Helm and Helm Trucking, Inc (1996)

ER withheld wages due at separation because EE signed a form when hired agreeing to forfeit ending wages if he did not give a two-week notice of resignation.

The ALJ found that EE's employment was conditional on signing the form. This was not an authorization obtained with EE's full and free consent as required by Section 7. Also, ER's evidence showing EE was a poor employee did not permit the deduction.

1077 BURDEN OF PROOF

Recordkeeping

Section 9

EXEMPLARY DAMAGES

Negotiable Check

Payment Stopped

96-105 Mask v Robert Miller dba Robert Miller Drywall Hanging Service (1996)

ER appealed a DO which found wages due for the last employment period. ER also canceled another wage check. The Department presented evidence of efforts to obtain ER records. The DO was issued based on EE=s claim because ER didn=t present any employment records. The ALJ found a violation of Section 5 because ER failed to pay all wages due at separation, and a violation of Section 9 because ER failed to present EE=s employment records on request. Section 6 requires wages to be paid with a negotiable check or cash. ER violated this section by issuing a check and then stopping payment. The Department=s motion to find exemplary damages due as a violation of Section 18(2) was approved. By first issuing a wage check and then stopping payment, a flagrant violation was established.

1078 CONSIDERATION FOR EMPLOYMENT

UNIFORMS

Required

90-361 Pfeifer v Joy Beth Green d/b/a Fife Lake Inn (1991)

ER decided to have the waitresses at her business wear uniforms at the suggestions of the previous owner. The previous owner collected the money for the uniforms before the ER took over the business. EE feared she would lose her job if she questioned the policy of requiring her to buy the uniform.

ER violated Section 8, even though she did not collect the money for the uniforms herself.

1079 CLAIMS

Twelve-Month Statute of Limitations

EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

Signed Agreement

JURISDICTION

Statute of Limitations

96-75 **Duncan v R & D Distributing Corporation** **(1996)**

Complainant signed an agreement and worked for Respondent as an independent contractor. He filed a claim on 11/22/94. Section 11(1) imposes a 12-month statute of limitations period. Therefore, the claim can address 11/22/93 until 11/21/94. During this time Complainant was not an EE. The ALJ found no violation of the Act. Complainant was referred to the District Court.

See General Entry V.

1080 BURDEN OF PROOF

Appellant

Burden Not Sustained

Recordkeeping

Not Maintained

EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

Control

96-87 **Wheeler v Dana Cassiday** **(1996)**

An employment relationship was found where ER decided when to work and transported EE to the job site, a pole barn. ER also supplied the tools and supervised. The property owner paid ER and expected him to pay the workers. ER controlled the project. EE kept track of his hours and presented documentary evidence and testimony. ER presented no records of EE=s hours. ER did not meet the burden simply by presenting testimony opposing EE.

See General Entry XI.

1081 EMPLOYER IDENTITY

Individuals

INDIVIDUAL LIABILITY

96-92 **La Croix v Dr Henry Kallet, Conley, and Amalfitano** **(1996)**

Respondent Amalfitano, one of three Respondents, appealed and attended the hearing. He made a motion to be dismissed as a Respondent. He agreed with the wages found due to EE. The ALJ found that Respondent failed to produce documentation/papers showing that he had disposed of his business interest prior to the time EE=s wages were earned and due. Accordingly, the motion to be excluded was denied.

1082 ACT 62

Deductions

DEDUCTIONS

Insurance Premiums
Tickets
Written Consent
Subscriber Application Form

96-107 Kelsey v Gallatin Realty Company (1996)

Violations of Sections 2, 5, and 7 were upheld. ER took three wage deductions from EE for insurance premiums and tickets. The group subscriber application form was not considered a written authorization as required by Section 7 because nowhere on the form did EE give permission for wage deductions. Act 62 was repealed by Act 390. While Act 62 permitted deductions from wages for amounts due the employer, this is not permitted by Section 7 unless EE gives written authorization.

See General Entry III.

1083 JURISDICTION

Out-of-State Employment

96-981 Djurovic v Perry Johnson, Inc (1996)

The Department found no jurisdiction over EE=s claim where EE was the Regional Manager for ER during the last year of his employment. Relying on Department Rule R 408.9021, the ALJ concluded that EE did not show that his permanent work station was in Michigan or that a substantial portion of his work was performed in Michigan.

1084 BURDEN OF PROOF

Burden Not Sustained
Opposing Testimony Insufficient

TIMECARD

Presumption of Work

WAGES

Full Amount Not Paid
Less Than Timecard

96-126 Heise v Michigan=s Adventure, Inc (1996)

ER appealed a DO finding a violation of Section 5. The amount found due was based on a

timecard. ER did not pay EE for the time shown because it contended EE was not working during this period. EE testified that he was working. EE was discharged because he was observed playing an arcade game. This was a dischargeable offense listed in the information given new employees. The ALJ found that the time shown on the timecard is a rebuttable presumption that EE worked. ER had the obligation to supervise EE and take appropriate action when poor performance was observed. But until discharge, EE must be paid for all hours shown on the timecard. ER=s allegations as to EE=s activities were insufficient to overcome the presumption that EE worked.

See General Entry XI.

1085 EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

Truck Driver

Equipment Lease

96-191 Harding v El Toro Motor Freight, Inc (1996)

Complainant claimed payment for a run from Detroit to Missouri. The ALJ found that Complainant was not an EE, a condition required to be covered by Act 390. The Complainant had an equipment lease with Respondent. This lease agreement specified that Complainant was an independent contractor. Complainant received 1099 forms at the end of each year from 1993 through 1995 and not W-2 forms.

1086 PREEMPTION

Federal Preemption

Verbal Contract

WAGE AGREEMENTS

Covered By CBA

Verbal

96-192 Lynn v City of Muskegon (1996)

The ALJ found a violation of Section 5 because EE entered into a contract for the city to pay him $5.25 per hour for work as a laborer. This was the amount ER placed in an ad which was answered by EE. Also, EE was told during his interview by ER=s representative that he would receive this amount. However, EE was paid only $4.25 per hour during his summer employment. He was told that union negotiations were in progress and it was expected the higher amount would be concluded. In this event EE would receive the retroactive $1.00 per hour for all hours worked. As it turned out, however, the union contract kept the $4.25 per hour amount for laborers.

This finding was affirmed by the Circuit Court on 8/6/96. However, this ruling was reversed by the same Court on 1/17/97. In the second ruling the Court held that while EE and ER entered into a verbal contract for $5.25 per hour, his verbal contract was unenforceable in the

face of an existing CBA that governed the same benefits. The Court cited Section 301(A) of the Labor/Management Relations Act, 29 USC 184(A), as providing federal jurisdiction over Asuits for violation of contracts between the employer and a labor organization.@ Since the federal law preempts state enforcement, EE cannot claim additional monies under his verbal contract when that claim is inconsistent with the CBA.

See General Entry XV.

1087 WAGES

Full Amount Not Paid

Salesperson or Manager Rate

96-194 Holly v Sterling, Inc (1996)

EE worked as a manager and gave ER two weeks= notice of her resignation. ER accepted the resignation but had EE leave before the two weeks were up and paid EE her last wages and earned vacation at the rate for a salesperson, not a manager. EE continued to perform managerial duties during the period after her notice. She continued to have the store key and controlled the cash. The new manager also worked with EE the last week of the EE=s employment.

The ALJ found a violation of Sections 3 and 5. EE performed all duties as a manager until her separation. Her final pay and earned vacation benefits should have been paid at the manager rate.

1088 JURISDICTION

Severance Pay

SEVERANCE PAY

Substitute for Vacation Pay

VACATION

Written Contact/Policy

Board Minutes

96-197 Sanchez v Thumb Outreach/Minority Services (1996)

Minutes of Respondent=s Board of Directors approved vacation benefits for EE but then Acorrected@ the minutes to state EE was to receive severance pay and not vacation pay. While minutes of a board may satisfy the Section 3 requirement for a written contract or policy, the minutes in this case approved severance pay and not vacation pay. There is no jurisdiction under Act 390 over severance pay.

1089 VACATION

Written Contract/Policy

Interpretation
Giving Meaning to All Provisions
Prior Payments

96-199 Goff v H & H Tube Manufacturing Co (1996)

EE claimed vacation pay after his separation based on a policy which granted vacation benefits to an EE who worked in excess of 1,000 hours during the year. But another provision stated that service time ends at separation, and paid time off is earned on December 31 and paid the next year. Since EE was not employed on December 31, he was found ineligible for vacation.

The ALJ considered all provisions in a manner to give meaning to all. The clause relied on by EE was held to apply only to those instances where the EE is ill or on workers= compensation but still employed. The fact that other EEs received vacation pay under similar circumstances does not change the result. Section 3 of Act 390 requires vacation benefits to be paid in accordance with a written policy. The fact that mistakes were made does not change the policy=s language.

1090 APPEALS
Presumption of Receipt

PRESUMPTION OF RECEIPT
Appeal

WRITTEN POLICY
Interpretation
Effect to All Language

96-232 Mallory v State Farm Insurance Company (1996)

ER=s appeal was received after the 14-day appeal period. ER testified that he sent an earlier document within the appeal period. The Department denied receipt of this earlier appeal. ER testified that the first document was sent by regular mail to the Department=s address and the document was not returned by the postal authorities. The ALJ found that there is a presumption of receipt for mail which is properly addressed, stamped, and placed in the U.S. mail system. ER=s first appeal document was found to have been timely filed.

EE worked as a customer service representative. ER=s written vacation policy was prepared in December 1994 to take effect on 1/1/95, after EE had worked for one year. The policy provided that EEs with one year service would receive 10 vacation days. EE resigned on 3/24/95. The ALJ found that EE was due 10 days less time taken. EE was due the full 10 days because she had already worked more than one year when the policy was created. This interpretation gives effect to all policy language. The interpretation advanced by the Department and ER gave no effect to the clause giving 10 days per year to an EE with more than one year service.

1091 APPEALS

Good Cause Not Found

DO Not Received

Presumption of Receipt

DETERMINATION ORDER

Presumption of Receipt

96-242 Sargent v Robert Lee Hardison, Jr (1996)

ER filed a late appeal contending that he didn=t receive the Department=s DO. The ALJ found that there is a presumption of receipt for a document mailed to the correct address with proper postage. The DO was not returned by the postal authorities as undeliverable. The Department presented a certification of mailing form. These show a regular, proper mailing which satisfies the presumption of receipt. ER presented no evidence to rebut this presumption.

1092 BURDEN OF PROOF

Burden Not Sustained

Appellant Refused to Testify

96-243 Ordiway v Northwest Plumbing & Heating Supply, Inc (1996)

Complainant=s appeal was dismissed because he refused to testify at the hearing claiming his Fifth Amendment right against incrimination.

1093 EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

Salesperson

96-276 Stallings v Heritage Greeting, Inc (1996)

Complainant sold greeting cards by placing the cards at businesses. Complainant was free to set his work hours and schedule. He used forms supplied by Respondent but was free to find customers anywhere. Respondent didn=t exert control over Complainant=s work. Respondent didn=t deduct taxes from Complainant=s compensation and Complainant was free to hire and pay for helpers.

See General Entry VII.

1094 OVERTIME

Driving To Work Site

PORTAL TO PORTAL ACT

96-277 Smith v Area Corporation dba Area Painting Company (1996)

EE claimed overtime for time spent driving a company truck to and from the job site. ER argued that the Portal to Portal Act, 29 USC 251-262, eliminates the need to pay for this time. The ALJ found that EE was required to drive the company truck from the company office to the work site. Since this was required as part of EE=s employment contract, he must be paid for the time. The Act cited by ER also requires this payment when there is an express provision in the employment contract for this work. In this case there was a verbal contract for EE to drive the truck. Since ER directed EE to do this work, payment for the time is required by not only Act 390 but the Portal to Portal Act.

1095 WAGES
Time v Job
Work Not Completed
Reports

WORK
Not Completed
Reports

96-453 Walk v CMD Investigations, Inc (1996)

EE claimed work as an investigator. ER didn=t pay for three assignments because EE failed to file any written report or dictation. The Department argued that EE should be paid for his time whether or not the task is completed. EE was given an opportunity after his termination to submit either a report or taped dictation. EE did not attend the hearing to establish that he worked during the time at issue. The ALJ concluded that EE was required to file either a written report or dictation to show he performed the assignment. The ALJ found that EE didn=t work and therefore should not receive payment. The report or tape were part of his job.

1096 WAGES
Time v Job
Work Not Complete
Time Sheets

WORK
Not Completed
Time Sheets

96-458 Mooney v Computer Management Technologies, Inc (1996)

ER refused to pay EE for 30 hours during his last week because EE failed to submit time sheets showing his activity. Testimony from witnesses established that EE reported to work during the week and worked for ER. Failure to complete time sheets was considered to be a

matter of job performance not related to whether EE should be paid for his time. An ER must pay for time spent by an EE. Work quality must be monitored by ER. Here there was evidence that EE put in the time claimed. EE must be paid even though he didn=t do all ER demanded.

1097 DETERMINATION ORDER

Amendment of DO

At Hearing

In Absence of Party

HEARING

Amendment of DO

Proceeding in Absence of Party

96-459 Hernandez v Patrick Hartford dba Metal Man SCAT (1996)

Complainant appealed a DO which found no ER/ER relationship. The ER did not attend the Prehearing Conference and Hearing. As a result of prehearing discussions between the Complainant and the Department=s representative, the Department made a motion on the record to amend the DO to find an ER violation of Section 5(1) and $2,250 due to the Complainant plus interest. The Motion was granted. Section 72(1) of the APA allows a hearing to proceed in the absence of a party. The Notice of Hearing clearly listed issues including whether the DO should be affirmed, modified, or reversed, whether Respondent violated Sections 2 through 10 of Act 390, and whether wages and penalties should be ordered paid to Complainant.

1098 BURDEN OF PROOF

Appellant

Burden Sustained

Testimony

Unrebutted Testimony

CREDIBILITY

Unrebutted Testimony

HEARING

Proceeding in Absence of Party

96-462 Carmean v SHIV, Inc dba Livonia Ramada (1996)

The DO found for EE who did not attend the hearing. After hearing the unrebutted testimony of ER, the ALJ reversed the DO to find no violation of Act 390. ER=s wage records for EE were stolen by EE. ER was on the premises during the time period claimed and testified in a believable manner that EE did not work during this time.

1099 APPEALS

Good Cause Not Found

DO Not Received

Presumption of Receipt

DETERMINATION ORDER

Presumption of Receipt

96-464 Ingles v I & H Engineered Systems (1996)

ER filed a late appeal and argued that the DO was not received. The Order was mailed to the same address as noted on ER=s appeal. The DO was not returned by the postal authorities as undeliverable. The Department provided a certification asserting that the Order was properly mailed. All of these aspects pointed to a regular, proper mailing. There is a rebuttable presumption in the law that assumes receipt of mail which is properly stamped, addressed, and deposited in the U.S. mail system. ER did not present any information to rebut this presumption. Accordingly, the late appeal was dismissed.

1100 DISCRIMINATION

Discharge Due To

Disclosing Wage Rate

PENALTIES

Unauthorized by Act

REINSTATEMENT

WAGES

Unauthorized by Act

96-497 Reo v Lane Bryant, Inc (1996)

EE was discharged for disclosing her wage rate to another EE. The Department found a violation of Section 13a(1)(c) but found no wages, damages, or other penalties due to EE. The ALJ found that where a clear violation of the Act occurs, it is reasonable to conclude some penalty is due. The ALJ used the penalty provisions of Section 13 for this purpose and ordered EE=s reinstatement with back pay of $21,610.

The Circuit Court reversed finding that the ALJ exceeded his authority by rejecting the prior opinion of the Court of Appeals in Reo v Lane Bryant, 211 Mich App 364 (1995) and using the penalty provisions of Section 13 to address the prohibitions contained in Section 13a.

1101 APPEALS

Good Cause Found

Presumption of Receipt Rebutted

96-577 Fauser v Peter Klamka and General Display Devices, Inc (1996)

Good cause for a late appeal was found where it was Department policy to place all DOs for the same employer in the same mailing envelope. Three EEs filed claims against the same employer. The Department issued three DOs but apparently only placed two in the same envelope. ER filed timely appeals for the two DOs and a late appeal for Complainant Fauser. The ALJ found it likely that if all three DOs had been mailed together, ER would have filed timely appeals for all three. The presumption of normal receipt of Complainant Fauser=s DO was rebutted by the Department=s practice. The parties settled at the prehearing conference.

1102 TESTIMONY
Inconsistent

WAGES
Discount Coupons
Records to Show Time

95-1345/96-1149 Easterday v Sports Guide, Inc dba SGI Publications (1996)

EE claimed wages for distributing discount coupons. The ALJ found no wages due based on ER=s records showing no coupons distributed in Ann Arbor during August. Coupons for Ann Arbor were received in September. EE only worked two days in Ypsilanti. There were many inconsistencies in EE=s testimony.

1103 TESTIMONY
Unrebutted

WAGES
Travel Time

96-1238 Morgan v New Way Asphalt Co, Inc (1996)

The ALJ found wages due for one hour in the morning and another hour at the end of each day. ER directed EE to come to the office each morning and drive a truck to the work site. At the end of the day he had to return the truck to the office. EE=s testimony was unrebutted.

1104 COMMISSIONS
Employment Contract
Customer Payment

96-1269 Rice v DBC Enterprises, Inc (1996)

EE claims commission for the period April 23 through May 28, 1995. ER objected to paying

the claimed commission because ER was unable to collect approximately $300,000 from customers. The ALJ found commission due because the wage agreement required payment based on total brokerage revenue not on collections. EE=s claim was supported by ER since the exhibit was prepared by ER based on ER=s figures.

1105 ACT 62

Fringe Benefits or Wages Due

DEDUCTIONS

EE Fraud

Written Consent

Theft

96-1286 Whittaker v Meyer Jewelry Company (1997)

ER withheld wages and fringe benefits from EE because ER alleged that EE and an accomplice perpetrated a fraud which resulted in great loss to ER. This fraud consisted in a series of fictitious credit card entries. ER argued that Section 7 was only a cumulative right for common law rights available to ER citing Murphy v Sears & Roebuck Co, 190 Mich App 384; 476 NW2d 639 (1991). The ALJ found to the contrary, that Act 390 was intended to change the prior law -- 1925 PA 62 -- which permitted ERs to deduct from wages any amount owed by EE to ER. Accordingly, the withheld wages and fringe benefits were ordered paid to EE.

See General Entry III.

1106 DEDUCTIONS

Advances

Resignation

96-1292 Zyla v Directions Early Learning Center, Ltd (1997)

EE received an advance at the beginning of the school year but resigned before the end of the school year. ER withheld that portion of the advance unearned. The parties signed an agreement when the advance was given stating that no repayment is expected. The ALJ found a violation of Section 7 because a deduction from wages was made without EE=s written consent.

See General Entry III.

1107 HEARING

Appellant

Did Not Appear at Hearing

REHEARING

Denied

96-1294 **Gniewek v Sedgwick James of Michigan, Inc** **(1997)**

ER appealed a Department DO finding violation of Section 4 and ordered payment of $55.86. ER didn=t come to the Prehearing Conference and Hearing. The EE and Department representative appeared. Based on the unrebutted and believable testimony of EE, the ALJ found $6,453.75 due as a violation of Section 4. ER requested a rehearing but this request was denied. The Notice of Prehearing Conference and Hearing stated in bold black print A**ALL PARTIES ARE DIRECTED TO APPEAR.**@

See General Entry IV.

1108 APPEALS

Untimely

Good Cause Found

Confusion Over District Court Jurisdiction

TESTIMONY

Unrebutted

96-652/96-1322 **Davenport v Golden Body/Doll Lee Gifts, Inc** **(1997)**

EE filed a wage claim with the Department and a commission claim in the District Court. The Department found no commission due because there was no commission agreement. EE didn=t appeal this finding because of her pending District Court action. The Court later found that the commission issue had been decided by the Department and dismissed EE=s claim. Good cause for a late appeal was found because the ALJ held it reasonable for a layperson to be confused over which entity had jurisdiction to act on the commission claim.

The ALJ considered the unrebutted, believable testimony of EE and found commission due. As the appellant, EE had the burden to establish by a preponderance of the evidence that her claim for commission was proper. EE=s testimony was unrebutted and credible. See Administrative Rule R 408.22969.

See General Entry X.

1109 HEARING

Proceeding in Absence of Party

Incarceration

96-1383 **Eshenroder v Forever Green Landscaping Co** **(1997)**

ER appealed the DO finding a violation of Section 5. Based on the unrebutted testimony of ER=s witnesses, the ALJ reversed the DO. EE didn=t work on the days claimed. EE was incarcerated, but the case had been adjourned twice before for the same reason. The third

request for adjournment was denied.

1110 BUSINESS PURCHASE
By EEs

EMPLOYMENT RELATIONSHIP
Business Purchase

96-1403 thru 96-1406 4 Complainants v Blake Gymnastics Centre, Inc (1996)

The Department found Respondent in violation of Section 5 and ordered wages paid to each Complainant. The ALJ found that Complainants agreed to purchase 100 percent of Respondent=s stock for $25,000. A promissory note was issued to Respondent for this amount. Based on the tests established in Askew v Macomber, 398 Mich 212 (1978), Respondent did not control the worker=s duties or pay wages to Complainants. Respondent did not have the right to hire or fire or discipline the Complainants because they were operating their own family business.

See General Entry VII.

1111 DEDUCTIONS
Waitpersons
Breakage
Customer Walkoffs

EXEMPLARY DAMAGES
Deliberate, Conscientious, and Knowing Violation

WAGES
Minimum Wage

96-1407 Hall v We Three, Ltd dba Rhinoceros Restaurant (1996)

The ALJ found violations of Sections 2, 5 , 7 and 9, as well as exemplary damages. ER failed to pay EE=s last week of wages at $2.52 per hour. This was the minimum wage for the period. ER stated he paid EE $2.50 per hour in cash but produced no records. ER also took $300 in deductions for breakage at $3 per shift and $46 because of a customer who walked off without paying. These deductions were a violation of Section 7 because they were taken without written authorization from EE. Exemplary damages were ordered because of the number of violations, because ER required EEs to pay the bills for customers who left without paying, and because EE went to the business three times to request his wages before filing a complaint.

1112 BURDEN OF PROOF
Credibility

WITNESS
Credibility

96-1414 Coster v Village Realtors, Inc dba Prudential Village Realtors (1997)

The Department found EE was due wages based on a wage agreement for $2,000 per month plus commission. EE received the wage for the first month and continued working for 62 months without pay based on ER=s promise to make up the payments once ER=s financial situation improved. ER contended the wage rate was only due if EE recruited sales agents for ER=s second office. After hearing from four ER witnesses, the ALJ found that ER had not presented a preponderance of evidence to overturn the Department=s DO. Administrative Rule R 408.22969 places the burden of proof on the appellant, who in this case was ER.

1113 BURDEN OF PROOF
Burden Not Sustained
Conflicting Investigation Reports
WITNESS
Credibility
Demeanor

96-724 Marshall v Commercial Investment Corporation dba Blue Dolphin Restaurant (1996)

EE supported his claim with credible testimony that he worked for 27.75 hours. He presented personal notes he kept in a notebook. EE did not punch a time clock until directed by ER. Accordingly, there were periods when he used the time clock and times that he didn=t. ER presented conflicting investigative reports from the Department=s investigator to support reversal of the DO. The ALJ observed that these interviews were not taken under oath while EE gave credible testimony that he worked. The DO was affirmed.

1114 ATTORNEY FEES
Flagrant Violation

BURDEN OF PROOF
Burden Sustained
Show-Up Time

EXEMPLARY DAMAGES
Flagrant Violation

WAGES
Show-Up Time
Time Sheet Changes

96-544 Whitehead v R & E Trucking, Inc (1997)

EE worked for ER as a truck driver. The ALJ found that ER had reduced EE=s time sheets to match the amount agreed to between ER and the customer. These changes were made without EE=s permission. EE was required to be in the yard 10 to 15 minutes before leaving but was not paid for this time. EE was also not paid for time in the yard after a trip if this time exceeded the predetermined time allocated between the ER and customer. EE was found due wages for these periods in the amount of $1,568.49. Exemplary damages and attorney fees were not ordered because ER=s failure to pay was not found to have been a flagrant violation of Act 390.

1115 COMMISSIONS

Conflicting Payment Plans

EXEMPLARY DAMAGES

Knowing and Repeated Violation

96-1478 Elsesser v Michigan Data Supply, Inc (1997)

EE worked as a salesperson and was paid a 50 percent commission on gross profit minus 2 percent for shipping costs. In January 1995, ER changed this plan to a commission of double the profit margin. EE made a sale to Wayne State University in January 1995 and claimed commission under the new plan. ER wanted to average the commission with prior profit margins under the prior commission plan. The ALJ found that EE was due the commission claimed since the sale was made after ER changed the commission policy. Exemplary damages were found because ER knowingly and repeatedly violated Section 5.

1116 BURDEN OF PROOF

Appellant

Burden Not Sustained

Company President as ER

EMPLOYMENT RELATIONSHIP

Company President as ER

EE/ER Relationship Found

Company President

INDIVIDUAL LIABILITY

96-1461 Grisdale v Dillard Daniels and Pontiac Plastics and Supply Company, Inc (1997)

The ALJ found individual liability for the corporate president because he exercised pervasive control over the corporation=s business and financial affairs and acted in the corporation=s interests in relation to its employees. Section 1(d) defines an employer as in individual who acts directly in the interest of an employer. Here, the president wrote company checks to

himself and treated the company as his own Aplay thing.@ The DO was affirmed because the Respondent did not present sufficient evidence to meet the burden of Administrative Rule R 408.22969.

1117 WAGES

Deferral
Retroactive Payment

96-1428 Orlowsky v Dillard Daniels and Pontiac Plastics and Supply Company, Inc (1997)

EE worked as ER=s controller. EE received a pay increase but deferred the increase, with the company president=s permission, because the company was experiencing financial difficulties. A later request for the retroactive amount was denied. ER agreed the pay increase had been approved but could not dispute EE=s claim about a salary deferral agreement. The ALJ found the retroactive amount due. No written agreement was needed to enforce the claim because EE claimed wages under Sections 1(f) and 5(2). EE met his burden of proof under Administrative Rule R 408.22969.

1118 VACATION

Policy Modified by Discharge Notice

96-1479 Kovach v Cato Management, Ltd dba Cato Companies (1996)

EE worked as resident manager from 11/28/94 through 10/31/95 when she was discharged. The vacation policy stated that EE would earn 10 days vacation after one year employment. The policy also provided that no payment would be made for vacation not taken. The discharge notice provided that EE would be paid the vacation benefit as if she worked the entire year if she met certain conditions. These conditions were met. The ALJ found the vacation policy to have been modified by the discharge notice. EE was due the balance of the vacation benefit not previously taken.

1119 BURDEN OF PROOF

Checks Not Presented

EVIDENCE

Failure to Present Creates Presumption

TESTIMONY

Believable

96-1536 Furlo v Commercial Investment Corp, dba Blue Dolphin Restaurant & Nite Club (1997)

EE claimed a salary for 2/10/96 through 2/23/96 at $350 per week. She testified in a

believable manner that she often opened the restaurant at 10 a.m. and was called to close at 12:00 midnight, or later, depending on business. This testimony was supported by that of EE=s fiancé and a letter from ER=s president. In the letter to EE, the president states the discharge date as 2/23/96. ER argued that EE was paid her final paycheck on 2/15/96, but the check and stub referenced the period 2/3/96 through 2/9/96.

Section 9 requires ERs to provide a statement to employees with their paycheck which identifies the pay period for which the payment is being made. Since this was the only statement provided, it was concluded that EE was unpaid for the period 2/10/96 through 2/23/96. ER could have presented all paychecks to clearly show whether EE had wages still due. The failure to produce evidence creates a presumption that such evidence, if presented, would have been against the party. See Barringer v Arnold, 358 Mich 594 (1960).

1120 ACT 390

Fairness Not Required

COMMISSIONS

After Discharge
At Will EE

TERRITORY CHANGE

Costs Improperly Included

96-1546 Erway v Heritage Broadcasting Company of Michigan (1996)

EE sold television advertising on commission. She was discharged and claimed commissions and a 1995 bonus for the period after her discharge. An exhibit stated EE was due a bonus if she sold more than 110 percent of the quarterly budget. The ALJ found that two accounts were included in EE=s budget after she had been assigned a different territory. ER=s refusal to remove these two accounts was found to be an abuse of discretion. EE was found due a bonus of $2,424.52.

No additional commission for a period after her discharge was found due. EE argued she should have been paid commission at 11 percent and not 8.5 percent because she would have met her monthly goal if ER had not discharged her. But ER always has the option of discharging an Aat will@ EE. Since she was discharged, EE did not meet her monthly goal and therefore was not eligible for the 11 percent payment.

Act 390 doesn=t require an ER to be Afair.@ The fact that ER gave an EE who had resigned commissions equal to a month and a half of sales does not require ER to do so for an EE, especially since EE was discharged and did not resign. Also, the wage agreement did not require payment for sales made after an EE's separation.

1121 COMMISSIONS

Expenses to Reduce Profit

95-930 Farkas v Advantage Housing, Inc (1996)

EE was employed as a salesman for modular and manufactured housing with a commission of 18 percent of profit. After investigation, the DO found violations of Sections 2 and 5 and ordered $2,672.26 paid to EE. Both EE and ER appealed. EE alleged that several of the expenses listed by ER to reduce profit should not have been included because the work was done by companies owned by or in some way connected with ER. Each sales sheet was examined on the record. EE presented his explanation of why certain costs should not have been included and ER presented an explanation as to why they were included. The result was to reduce the DO amount by $344.52.

1122 EMPLOYMENT CONTRACT
Full Salary Due
Sick Leave/Vacation

SALARIED EMPLOYEE
Full Amount Due
Sick Leave/Vacation

95-1048/96-845 Joslin v Administrative Technologies Corp (1996)

ER withheld EE=s last check because of excess vacation and sick time taken by EE before her resignation. EE did not give ER written authorization to withhold her check. The withholding was a violation of Section 7. Also, the ALJ found the Complainant to be a salaried EE. She was due the full amount of her biweekly salary even though she did not work 40 hours per week. The employment agreement only stated EE would be paid $22,000 per year payable every two weeks. The agreement had no requirement that EE would work 40 hours per week. ER was ordered to pay an additional amount to cover the entire pay period.

1123 BURDEN OF PROOF
Appellant
Burden Not Sustained
Must Overcome DO

EMPLOYMENT RELATIONSHIP
Gutters/Downspout Installation

96-579 Livingston v David Ruhmo dba Advanced Eavestroughs (1996)

Complainant worked installing gutters and downspout and repairing drainage systems. Respondent left Complainant=s work orders in the warehouse or at Respondent=s home. Respondent supplied the jobs and material. Complainant turned in his figures for material installed. Complainant was paid based on the amount of material installed.

Complainant was Respondent=s EE. ER controlled EE's activities by providing the jobs and

supplying material. As noted in Section 1(b), Respondent permitted Complainant to work. Respondent did not meet the burden of proof set forth in Administrative Rule R 408.22969. ER brought no records to the hearing. Simply voicing a different amount due at hearing does not meet ER's burden to overturn the DO.

1124 EMPLOYEE

Time Spent vs Quality

EMPLOYMENT RELATIONSHIP

Company President As ER

EE/ER Relationship Found

Company President

INDIVIDUAL LIABILITY

WAGES

Poor Job by EE

96-895 Hunkins v Stewart Marketing, Inc (1996)

Individual liability was found for the corporate president because he exercised pervasive control over the corporation=s business and the day-to-day control over EEs. The president had authority to hire, fire, and supervise EE's work. He provided customers for EE to contact and controlled EE's hours. He reviewed EE's paperwork and decided when to pay his commissions. The president also provided the forms and directions for pricing. The president was sole owner of the corporation. ER argued that EE made so many errors on his sales that he should not be paid. But an EE is paid based on time spent. An ER must discipline for poor performance or discharge of EE.

1125 PERSONAL DAY PAYMENTS

After Resignation

RESIGNATION

Personal Leave Due

96-968 Winegar v RSI Wholesale of Grand Rapids, Inc (1996)

ER=s policy provided three personal leave days after an EE completed one year. EE satisfied the one-year requirement and received permission to take three personal leave days. After the first day, he resigned. ER contends that no wages are due because EE ceased to be at work. The policy stated that any EE who ceases to be employed for any reason forfeits any unused personal time. The ALJ found EE due one day of personal leave. The policy does not require an EE to return to work after taking personal leave. EE did not resign until after having taken one day. Therefore, one day is due.

1126 COMMISSIONS

Fire Repair Contracts

INDIVIDUAL LIABILITY

96-591/96-737 Lemeshko and Kerrigan v Dimitry Brodsky and Entech Builders (1996)

EEs were hired to obtain fire repair contracts for ER. They were to be paid a 10 percent commission within one week of obtaining a signed contract. Contracts were paid by a fire insurance company on the structure burned.

The ALJ found individual liability for Dimitry Brodsky because he exercised control over EEs' work activities. EEs were required to come to the office each morning and given leads. They used ER's office, phone, and copy machine. They were also given keys to the office.

ER did not present evidence to overturn the Department=s DO. The agreement between the parties was for commission payment once contacts were obtained, not when ER received payment from the insurance company.

1127 BONUSES

Truck Driver

Discretion

EMPLOYMENT RELATIONSHIP

Truck Driver

96-619 Roland v Charles Spurlock Leasing, Inc (1996)

Complainant claimed a bonus promised by Respondent for safe driving. The ALJ found no employment relationship between the Complainant and Respondent. Complainant was employed by American Motor Lines, Inc., a subsidiary of Alco Truck Lines (Alco). Complainant was to receive 23 percent of the gross receipts from his truck driving. Spurlock leased some of his trucks to Alco with the understanding that he could object to drivers. Spurlock offered Complainant a 3 percent bonus if he drove safely. There was no written agreement. After Complainant damaged the truck, Respondent refused to pay the bonus and directed Alco to assign a new driver for Respondent=s trucks. Respondent did not exercise control over Complainant=s duties. Complainant reported to Alco for driving assignments and was paid by Alco. Even if Complainant had been Respondent=s EE, the ALJ concluded that no money would be due because Spurlock had discretion as to whether he would pay the bonus.

1128 COMPENSATORY TIME

SALARIED EMPLOYEE

Compensatory Time

96-1355 Dusek v Taylor Inn Enterprises, Inc (1997)

EE was first employed as a banquet supervisor at $7 per hour. The company was then purchased by ER. EE worked considerably more than 40 hours per week during the transition, which also occurred during the busy holiday season. EE was made a salaried employee and accumulated overtime and was either paid or placed in a compensatory time bank. EE continued to work many additional hours, often double daily shifts. EE resigned when ER refused to pay time off from his compensatory leave bank as well as New Year=s Day. The ALJ found a violation of Section 4 for failing to pay holiday pay. Violations of Section 5 and 7 were also found. Since EE was salaried, he was entitled to full payment for the period prior to the resignation even though he took two days off during the pay period.

See General Entry X.

1129 BURDEN OF PROOF
Appellant
Burden Not Sustained

WAGES
Full Amount Not Paid
At Business Closure

97-23 Kardes v Gym Bums II, Inc dba Gold's Gym II (1997)

The ALJ found wages due for EE's work as a bookkeeper. ER did not meet appellant's burden of proof required by Rule R 408.22969. EE testified that she performed bookkeeping work at nine hours per day during the period at issue.

See General Entry XI.

1130 BURDEN OF PROOF
Recordkeeping
Section 9

97-29 Curtis v Pruczinsky, Inc dba AJ's Food & Spirits (1997)

The ALJ dismissed a violation of Section 9. Record summaries were being performed for a circuit court receiver and therefore not available to send to the Department. After a review of these records, the Department Supervisor determined that no additional wages were due to EE.

1131 COMMISSIONS
Change Without Notice to EE
Contract Interpretation

EMPLOYMENT
At Will

97-31 **Warnke v Max Larsen, Inc** **(1997)**

EE was a commission truck salesperson. He earned 35 percent of ER's profit and claimed additional commissions on sales.

The ALJ examined the wage argument and found EE was not due commissions on a 2 percent hold back amount kept by the dealer for overhead costs. In an "at will" employment relationship, ER can change the contract at any time. If EE continues working under the changed condition, EE has agreed to the contract change. Other EE commission claims were found due.

1132 VACATION
Payment at Termination
EE Handbook
Employment Contract

97-40 **Keller v Clark Brothers Instrument Company** **(1997)**

The ALJ found no vacation benefits due at separation. Neither EE's personal employment contract nor handbook required this payment.

See General Entry I.

1133 APPEALS
Good Cause Not Found
Vacation, Extended Trip, Out of State

97-56 **Williams v Wellington Mortgage Co** **(1997)**

Good cause for a late appeal was not found where the company president was out of town. It is not reasonable for a company president to leave town without having someone to respond to important mail or to check back and direct responses.

See General Entry II.

1134 BURDEN OF PROOF
Appellant
Burden Sustained
Records
Testimony

97-97 Ernest v Energy & Sons, Inc (1997)

The ALJ found no wages due to EE for the period claimed. ER testified that EE did not work during the week at issue. This was supported by the employment records. EE did not provide specific testimony as to when he turned in time card and where he worked.

1135 HEARING

Appellant

Did Not Appear at Hearing

REHEARING

Denied

Good Cause

Presumption of Notice of Hearing Receipt

97-121 Vance v Foot Health Centers, PC (1997)

ER failed to attend the scheduled hearing and the appeal was dismissed. A request for rehearing was denied because both Complainant and Department attended the hearing. ER's hearing notice was sent to the address of record and not returned by the postal authorities.

See General Entry IV.

1136 COMMISSIONS

After Separation

Bulk of Work Performed

Verbal Agreement

97-127 Jorday-Murray v The Livingston Radio Company dba WHMI (1997)

EE claimed commission on sales made before separation. There was an old agreement that commission would cease at separation. EE argued she had performed all the work before separation.

The ALJ found no commission due because commission was paid only in excess of the monthly draw. Since she earned no draw after separation, the commission would not exceed the draw. Also, the verbal agreement ended commission at separation.

1137 APPEALS

Dismissed

Good Cause Not Found

Son Failed to Mail

97-146 Tapin v Preferred Telecommunications Corporation (1997)

Good cause for a late appeal was not found where Complainant's son did not mail the appeal as instructed.

1138 WAGE AGREEMENTS

Working Constitutes Agreement

97-200 Smith v T D M, Inc dba Property Management (1997)

EE claimed wages for a 2 hour period each day. When he inquired as to payment, he was told that the work day began at 9:00. EE was allowed to come in the office at 8:30 each day where he smoked and drank coffee before beginning work. When EE continued working after receiving ER's decision not to pay for the 8:30 - 9:00 period, he accepted this as part of the wage agreement. Since the wage agreement did not include this 2 hour period, EE is not due any wages.

1139 APPELLANT

Unrebutted Testimony

BURDEN OF PROOF

Unrebutted Testimony

TESTIMONY

Unrebutted

97-210 Thompson v Imagemasters Printing, Inc (1997)

The Department found no wages due. EE appealed and provided unrebutted testimony that he was not paid all wages due at separation. ER did not attend the hearing.

Based on EE's unrebutted testimony, ER was held in violation of Act 390 and ordered to pay wages and the 10 percent per year penalty, Section 18(1)(c).

1140 COMMISSIONS

Draw Against Commission

90-365 McCardel v Delta Manufactured Home Sales, Inc (1990)

Commission that EE could have earned was well under his total weekly draws. EE was therefore not entitled to commission. Therefore, ER did not violate Section 5.

Also see General Entry XI.

1141 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

Dog Groomer

EXPENSES
Travel to Hearing

97-302 Clark-DeSmet v Dana Corso dba Dana's Pooch Caboose (1997)

Applying the case of Askew v Macomber, 398 Mich 212, 217-218 (1978), Complainant was found to be an EE despite her having signed an independent contractor agreement. Respondent set the prices for grooming, supplied a customized van, and supervised the work.

Complainant's claim for reimbursement of travel expenses to attend the hearing was denied.

1142 TERMINATION
Vacation
Written Contract/Policy
None Due at Termination
Vacation Pay
Resignation or Discharge

WRITTEN POLICY
Vacation
None Due at Termination

97-308 Burden v Lakeland Underwriters, Inc (1997)

EE claimed one week vacation at her resignation. The policy denied vacation after notice of employment termination. The ALJ found this covered situations where EE quits or are discharged.

1143 DEDUCTIONS
Uniforms

97-309 Appling v Paragon Trucking, Inc (1997)

The ALJ found a violation of Section 7 where ER deducted $208.60 from EE's wages without written authorization.

See General Entry III.

1144 BURDEN OF PROOF
Burden Sustained
Testimony

EMPLOYMENT RELATIONSHIP
EE/ER Relationship Found
Caulker

TESTIMONY
Unrebutted

97-312 Payne v Paul Corrado (1997)

The ALJ found Complainant was an EE because Respondent assigned the work, provided caulking material and ladders, and supervised work. However, no wages were found due because Respondent provided unrebutted testimony that the jobs claimed were not Respondent's. Also, the wage agreement required payment only for jobs completed satisfactorily. Several of the claimed jobs had to be recaulked because Complainant did not do the job satisfactorily.

1145 DEDUCTIONS
Moving Expenses

97-324 Kay v Clark Lake Golf Club, Inc (1997)

EE answered an ad for a cook that promised moving expenses would be paid. ER advanced EE $475 for a home deposit. ER claimed the amount was a wage advance and deducted it from EE's final wage.

The ALJ found the amount was paid to help EE move. EE could not have moved without the house deposit. The deduction from wages was a violation of Section 7. EE did not give ER written authorization.

See General Entry III.

1146 EMPLOYER
Counterclaim

97-299 Twitchell v Econo Travel Corporation (1997)

ER agreed that EE worked 30.75 hours at $7 per hour and earned $215.25. This amount was withheld because EE had agreed to work for approximately one year, but instead quit after only four days. ER expended training costs of $600 - 30 hours at $20 per hour.

The Act does not provide for an employer counterclaim. ER may pursue this claim in court.

1147 BURDEN OF PROOF
Appellant
Burden Not Sustained

Recordkeeping
Not Presented

WAGES
Full Amount Not Paid
Less Than Timecard

97-404 thru 407 **Sibert, Albert Grant, Georgetta Grant & Timberlake v Emmanuel Child Care & Development Center** **(1997)**

Four EEs claimed wages based on timecards. ER's witness testified EEs were not paid in accord with timecards, but based on instructions from the director. No payment records were produced. The ALJ affirmed the Department's determination order finding violations of Sections 5 and 9.

1148 EMPLOYMENT RELATIONSHIP
Independent Contractor Relationship Found
Truck Driver

97-408 Berger v Truckcorp, Inc **(1997)**

Complainant signed an independent contractor agreement form. His job was to drive a truck and he received a percentage of what the truck earned. Although Respondent kept track of the truck with computer and satellite equipment, the ALJ did not find supervision sufficient to make Complainant an EE.

1149 EMPLOYMENT RELATIONSHIP
Independent Contractor Relationship Found
Truck Driver

97-409 Berger v Autumn Express, Inc **(1997)**

Complainant signed an independent contractor agreement form. His job was to drive a truck and he received a percentage of what the truck earned. Although Respondent kept track of the truck with computer and satellite equipment, the ALJ did not find supervision sufficient to make Complainant an EE.

Although Complainant made a claim for deductions taken from his pay, he was not able to produce evidence or testify as to the amount deducted from his commissions.

1150 ACT 62
Deductions

DEDUCTIONS
Loans

LOANS
Final Check Held

WAGES
Deductions Below Minimum Wage
Withheld
Loans

97-612 Flynn v Van Buren County and Cass County Community Action Agency (1997)

EE received loans from ER and signed agreements permitting deductions each payday. When he was fired, all final wages were withheld.

ER violated Section 5 by not paying wages due at separation. ER could not hold all wages because EE only authorized a lesser deduction. Section 7 prevents a deduction leaving an amount below the minimum wage. Act 390 changed the practice permitted by Act 62 which allowed an ER to deduct from EE's wages amounts due employers.

See General Entries VIII and IX.

1151 APPELLANT
Appeared But Left Before Hearing

HEARING
Appellant
Did Not Remain at Hearing

97-559 Vierling v S-G Publications, Inc (1997)

ER/Appellant appeared for the prehearing conference but left during the prehearing conference. ER didn=t request adjournment of the proceedings. ER=s appeal was dismissed based on Administrative Rule R 408.22966.

See General Entry XVI.

1152 DETERMINATION ORDER
Amendment of DO
At Hearing

97-472 Kaplan-Glaser v Rainbow USA, Inc dba Rainbow Apparel Distribution Center Corp (1997)

The DO was amended as a result of discussions between EE and the Department during the prehearing conference. ER did not attend. The agreements were placed on the record and an Order issued amending the DO.

1153 APPELLANT

Unrebutted Testimony

BURDEN OF PROOF

Burden Sustained

Testimony

97-483 Miller v Bodytechniques Fitness Center (1997)

EE appealed an adverse DO. ER did not attend the prehearing conference and hearing. Unrebutted testimony was provided by EE that he did not receive earned wages for the last week of employment. The DO was reversed to find an ER violation of Section 5.

1154 BANKRUPTCY

INDIVIDUAL LIABILITY

97-877/97-878/97-1003 Nykanen, Ingalls, Traynoff v Michael Adorjan and AJ=s Services, Inc (1997)

The parties entered into a settlement agreement during the prehearing conference. The ALJ found the settled amount due from Michael Adorjan, an individual. Since the Respondent corporation filed bankruptcy, the settled amount due was stayed against the corporation.

1155 VACATION

Discharged EE

ER Failed to Approve

97-902 Sreepathi v Wayne State University (1997)

ER=s vacation policy required EE to take all vacation before separation. EE attempted to take vacation during his employment but was denied. He was told that if he took vacation, he would be discharged. He was then discharged before he could take vacation. The ALJ found the vacation due.

1156 APPEALS

Untimely

Good Cause Found

Address Error

Language Difficulty

97-906 Zubiate v Murch, Inc (1997)

Good cause for a late appeal was found where the DO was mailed to EE at the wrong address and also that EE needed assistance to read and understand the DO. The appeal was denied because EE failed to present evidence that he earned wages at a higher rate than he was paid.

See General Entry XI.

1157 BURDEN OF PROOF
Recordkeeping
Section 9

PREEMPTION
CBA
Interpretation

97-942 Kelley v Flint Special Services, Inc (1997)

ER violated Section 9 because EE was not furnished a statement of hours worked. ER argued that the Department is preempted because the CBA specifically addresses hours worked. Also, EE is required to record hours daily in triplicate. But the ALJ held that an EE wage statement is clearly required by Section 9. The CBA did not satisfy these requirements. Also, no interpretation of the CBA was required to enforce Section 9. Respondent appealed the ALJ=s decision to the Circuit Court arguing preemption, but then voluntarily dismissed the Petition for Review.

See General Entry XV.

1158 PREEMPTION
Jurisdiction
Tribal Territory

98-989 thru 98-991 Beeler, Swetich, Thomas v Guardian Angel Private Security Services, Inc (1997)

The Department issued DOs finding a violation of Act 390. ER appealed arguing that the claims were preempted by federal law and treaty. EEs worked on tribal territory for an Indian-owned business. Based on advise from the Attorney General, the Department decided not to defend the DOs. ER's Motion to Dismiss was granted.

1159 APPEALS
Untimely
Good Cause Found
DO Not Received by Party or Attorney
Change in Ownership/Management

DETERMINATION ORDER
Amendment of DO
At Hearing
In Absence of Party

97-945 Caing v Alcove Network Corp dba Pioneer Home Health Care of MI (1997)

ER filed a late appeal. At the show cause hearing only ER/Appellant appeared. The ALJ found good cause for the late appeal because ER is a successor owner and did not receive the DO. This document was not turned over during the transition in time to file a timely appeal. ER agreed to an amended DO amount and paid this amount within the time provided. EE didn=t appeal the amended DO.

1160 BURDEN OF PROOF
Burden Not Sustained
Must Overcome DO

COMMISSIONS
Reduction
EE Continues Working

REDUCTION OF WAGES/BENEFITS
EE Continues Working

97-987 Socha v Central-Quality Services Corp dba Amertex Service Group (1997)

EE claimed commission based on a long-term agreement. ER argued that the agreement had been changed and no commission was due. EE continued working for a year after the change while receiving a substantially reduced commission. The ALJ found that EE did not meet the burden of proof. While EE=s testimony was believable, that of ER was also. Also, EE=s continued working is evidence that EE accepted the commission change.

1161 BURDEN OF PROOF
Appellant
Burden Not Sustained
Must Overcome DO

97-848 DeAgostino v Supreme Carpet Sales, Inc (1997)

The DO found wages due for the last three days of EE=s employment. ER paid the first day and appealed the others. The testimony was equally believable on the question of whether EE worked the second day. Therefore, the Administrative Law Judge found the ER did not satisfy the burden of proof which requires evidence to overcome the DO. It was also found that the EE only worked less than one hour on the third day. The DO was reduced accordingly.

See General Entry XI.

1162 EMPLOYMENT RELATIONSHIP

Independent Contractor Relationship Found

Truck Driver

Written Agreement

97-868 Hall v Creative Merchandising Systems (1997)

Based on the Respondent=s unrebutted testimony (Complainant did not appear), the ALJ found an independent contractor relationship. Complainant signed an agreement stating that he was an independent contractor. He also submitted invoices for his work. No taxes were taken from his payments.

See General Entry VII.

1163 COMMISSIONS

Payment

After Separation

30-Day Limit

97-664 Rouleau v First Federal of Michigan (1997)

EE claims commissions for loans which he originated before his discharge. The Department found no violation of Act 390. ER=s written policy provided that a discharged employee would receive commissions on loans closed and fully disbursed within 30 days of the discharge. The ALJ found no further commissions due. ER complied with the policy statement signed by EE. EE did not meet his burden of proof.

See General Entry XI.

1164 VACATION

Resignation

Advance Payment

WAGES

Direct Deposit

Overpayment

Applied to Fringe Benefits

97-810 Worth v Ford Motor Company (1997)

EE quit during a disciplinary hearing and only worked 6 days, 48 hours, during the pay period. ER paid his last check for 80 hours directly into EE=s bank account. EE was due

160 hours vacation at separation. ER paid EE 128 hours vacation after he left and applied 32 hours of the last check toward the vacation balance. The Department found a violation of Section 4 finding that ER took a deduction from EE=s vacation entitlement.

The ALJ found no violation of the Act. The last wage check was prepared before EE=s unexpected departure. It is reasonable to apply part of this last wage payment toward the vacation amount due. EE did not earn 80 hours during his last pay period. It is not the intent of Act 390 to give a windfall to an EE who has been paid in full. ER didn=t take an unauthorized deduction from a prior pay period. EE received all wages due for his last pay period and an advance on the vacation amount due. The balance was paid in a later check.

1165 BURDEN OF PROOF

Appellant

Burden Sustained

Testimony

Unrebutted Testimony

TESTIMONY

Unrebutted

97-1022 Sanders v Mar-Que General Contractors, Inc (1997)

EE was employed to search for new customers, prepare construction estimates and supervise subcontractors hired to do repair work for water, fire and wind damage to commercial and residential buildings. ER contended that EE did not work the period claimed. When ER could not contact her during this period, he assumed she had quit. During the period claimed, no work was performed by EE to benefit ER. Company policy required EE to report to the office every day. EE did not come to the hearing. Therefore, no proof was presented that EE worked for ER during the claimed period.

1166 BURDEN OF PROOF

Appellant

Burden Sustained

Testimony

Unrebutted Testimony

COMMISSIONS

Deductions

Part of Computation

Reduction

EE Continues Working

DEDUCTIONS

Part of Wage Determination

TESTIMONY

Believable
Unrebutted

97-689 Dukes v Westinghouse Security Systems, Inc (1997)

EE appealed an adverse DO and presented unrebutted, believable testimony at the hearing. ER did not appear. ER was found in violation of Section 5 for failure to pay EE commissions. EE was to receive commissions when security systems were installed. The ALJ found $2,695 due. Subtractions from commissions were not found to be violations of Section 7 because these had been taken throughout EE=s employment. They were part of the wage agreement.

1167 BURDEN OF PROOF
Unrebutted Testimony

EMPLOYMENT RELATIONSHIP
EE/ER Relationship Found
Control
Independent Contractor to EE

97-394 Butler v Blue Dolphin One Piece Fiber Glass Pools (1997)

Complainant appealed a DO which found no ER/EE relationship. ER did not attend the hearing. Accordingly, Complainant presented unrebutted testimony. Complainant began an association with Respondent as an independent contractor installing pools. This relationship changed and Complainant became an EE. ALJ found that ER controlled EE=s work activities. While an independent contractor, Complainant kept the equipment at his home. When he became an EE, equipment and trailer were turned over to Respondent. As an EE, Complainant was required to report to ER=s business. He supervised workers who were also paid by ER. ER gave EE the jobs and directed EE where to install the pools. On occasion, ER came to the site and supervised. The ALJ found an ER violation of Section 5(1).

1168 COMMISSIONS
When Earned

97-473 Albert v Keller Brass Company (1997)

EE was employed as a sales engineer until his resignation. He was paid a base salary, bonus, incentive and commission on new business. EE=s claim related to a new project for GMC. EE and the Department argued that EE did all that he could to secure this project, but that it failed because ER was unable to provide an optic change desired by GMC. ER argued that no purchase order or commitment had ever been issued by GMC. Had EE not resigned, he still would not have been entitled to the incentive commission. The ALJ found no violation of the Act. ER met its burden to show that no commission was due.

See General Entry X.

1169 BURDEN OF PROOF

Burden Not Sustained

Must Overcome DO

Recordkeeping

Falsified Records

97-555 Clasgens v Transportation Management Systems, Inc dba Dependable Transportation (1997)

ER appealed a DO ordering commissions paid to EE. EE was employed in outside sales with a salary plus commission. At the hearing ER=s representative argued the records presented to the Department and on which the DO was based were incorrect. The representative offered new records not previously seen by the Department which were not found to be Aoriginal@ records generated in the normal course of business. EE testified from records given to her during her employment that further commissions were due.

The ALJ found that ER did not meet the burden of proof established by Administrative Rule R 408.22969. The DO was affirmed.

1170 WAGES

Due Despite ER Dissatisfaction

97-426 Podrasky v A & L Insurance Agency, Inc (1997)

EE was due wages for her last day. ER refused to pay, believing EE had not trained well during the prior two weeks and was unhappy with her job. These reasons do not present a lawful basis to withhold wages.

1171 BONUSES

Deductions

Valid Authorization

DEDUCTIONS

Valid Authorization

JURISDICTION

Damage to EE Property

SHIFT PREMIUM

VACATION

Two-Week Notice

WAGE AGREEMENTS
Working Constitutes Agreement

97-468 Campbell v Hop-In Michigan, Inc **(1997)**

The ALJ found EE was due bonus and shift premiums based on testimony and exhibits. EE was not due vacation pay because this was due under the policy only if EE was discharged or gave two weeks' notice. EE attempted to use vacation time as part of his notice. ER did not take deductions in violation of Section 7. ER took a deduction of $22.50 for three weeks based on a valid written authorization allowing $7.50 per week. EE's claim for damage to his leather coat was not within the jurisdiction of Act 390. EE's claim for wages was denied because he continued to work at the reduced rate.

1172 FRINGE BENEFITS
Exempt Employees

HOLIDAY PAY
Working On

VACATION
Eligibility

97-561 Parisi v VDO North America, LLC **(1997)**

EE appealed a DO which denied claims for vacation, attendance bonus and holiday pay. The ALJ found that EE sustained the burden of proof for the holiday pay but not for the vacation or bonus claims. EE was not eligible for vacation because the vacation policy granted this benefit only after EE worked one year. Since EE did not work one complete year, no vacation was due. No attendance bonus was due because the policy only applied to hourly employees and not to non-exempt employees such as EE. Since EE worked on the floating holiday AApple Blossom@ day and did not have a chance to take off a day before his discharge, ER was required to pay EE one day=s pay.

1173 VACATION
Written Contract/Policy
Discharged or Quit

WITNESS
Selective Memory

97-447 Cranson v PM Environment, Inc **(1997)**

ER's vacation policy required a two-week notice of resignation. EEs who provided this notice and those who were discharged were to be paid accumulated but unused vacation. EE interpreted a letter from the company president to be a discharge. The ALJ found this letter to be one of counseling not discharge. Accordingly, no vacation benefit was due.

1174 BURDEN OF PROOF

Recordkeeping

Falsified Records

COMMISSIONS

Deductions

Work Not Performed

Reduction

Split

97-804 Miller v Chris Miller, Inc dba Tuffy Auto Service Center (1997)

EE worked as a mechanic trainee earning $7.125 per hour or a commission, and received the greater of these each week. During the week at issue, EE worked 62 hours and earned $441.75 or a commission rate of $1,201.63. Since the commission rate was higher, EE claimed that amount was due him.

Because the commission was substantial higher than any prior week, ER asserted that the shop's manager performed EE's work and changed the invoices to credit EE. ER testified that the manager would not gain any financial advantage from this practice, since he was paid a base salary plus a commission on the total shop sales.

Because of ER's suspicion that EE did not do the work, he took the manager's and EE's commissions, added them together and divided it in half, therefore paying EE $694.27, leaving a balance due of $507.36.

ER violated Section 2(3) by not paying EE on a regular recurring basis, and Section 5(2) by not paying a separating employee all wages earned and due at the time of separation.

See General Entries III, IX, and XI.

1175 CORPORATION

Bound by Shareholder

DISCHARGED

Effective Date

WAGES

Discharge Date

97-321 thru 97-323 King, Olmstead, Holsclaw-Smith v Way-Mar, Inc (1998)

Respondent's company was owned equally by two individuals, Slutter and Kenyon. Slutter hired the Complainant nurses to care for a patient needing round-the-clock nursing care. When the insurance company stopped paying for nursing services, Slutter told EEs they were

discharged. However, the date of this notice was at issue. EEs all stated the notice came one pay period later than Slutter claimed. Also, the patient was owner Kenyon=s daughter. The nurses stated that Kenyon told them to stay on after Slutter discharged them. Since Kenyon was a 50 percent shareholder and an officer with hiring responsibilities, she could bind the corporation to pay EEs' wages.

The ALJ found that EEs were due their last paycheck plus fringe benefits and mileage in the absence of clear and convincing evidence that they were told of their discharge before the period claimed. Administrative Rule R408.22969 places the burden of proof on the appellant, which in this case is Respondent. Respondent did not carry this burden.

Each EE filed on a different day and shortly after the period at issue. The ALJ found it likely that their memories were clearer at that time regarding when Slutter discharged them than Slutter=s memory at hearing that he believed he gave them notice before the last pay period.

1176 APPEALS

Untimely

Good Cause Found

Federal Express Returned Mailing

DISCRIMINATION

Burden of Proof

Discharge Due To

Verbal Abuse

Evidence

Other EEs Not Discharged

97-719 Pelkie v Pellestar, Ltd **(1998)**

Good cause for a late appeal was found where the Federal Express mailing was returned to ER because of a missing air bill. ER acted reasonably by relying on an overnight delivery service previously used successfully. ER presented two witnesses who gave unrebutted testimony that the original mailing was properly prepared and sent.

The Department found a violation of Section 13(1) because the suspension and discharge came after EE filed a wage claim. The ALJ found that EE presented a prima facia case but ER presented an appropriate nondiscriminatory reason for the discharge. EE was discharged for swearing at the president, calling him a liar, leaving work without permission, and swearing at the president=s parents. EE did not demonstrate that the proffered reason was pretextual. See Reich v Hoy Shoe Co, Inc 32 F3d 361, 365 (CA 8, 1994). The ALJ found that EE could be terminated for these reasons. The record also showed that three other EEs who filed wage claims against ER were not disciplined.

1177 APPEALS

Dismissed

Appellant Did Not Remain For Hearing

COURT ACTIONS
Judgment to Offset Amount Due Complainant

DEDUCTIONS
Advances
Resignation
Court Judgment
DO Offset

HEARING
Appellant
Did Not Remain at Hearing

WAGES
Withheld
Advances

97-1102/98-728 **Isham v Professional Auditing Services of America** **(1998)**

The ER/appellant appeared for the Prehearing Conference and Hearing, but left before his case could be heard. The ALJ was delayed attending to a prior case. ER=s appeal was dismissed based on Section 11(7) of the Act and Administrative Rule R 408.22966.

The ALJ granted ER=s request for rehearing. ER gave EE an advance on a Friday and EE quit on the following Monday. ER withheld EE=s last check. ER obtained a judgment against EE for the same amount as the DO from the District Court, Small Claims Division. At the hearing ER testified that EE was present at the District Court proceeding. The Court judgment was not appealed. The ALJ found a violation of Section 5 because ER did not pay EE all wages that were due at the time of separation. The ALJ found the District Court judgment could be considered as Apermitted by law@ as that phrase is used in Section 7.

The DO violation of Section 5 was affirmed without a requirement to pay any amount to EE.

See General Entries VI and IX.

1178 APPEALS
Dismissed
Failure to Attend Hearing

EXEMPLARY DAMAGES
Deliberate, Conscious, and Knowing Violation

HEARING
Appellant
Did Not Appear at Hearing
Costs

97-973 Frase v Thompson Cabinet Company (1998)

ER=s appeal was dismissed based on his failure to attend the hearing. In addition, based on the evidence offered by the Department and EE, twice the amount of wages due was ordered as exemplary damages. Also, $100 was ordered as hearing costs. ER attempted to deceive the Department to have it believe EE's check had been issued and cashed. ER=s bank denied that the check had been presented for payment.

1179 SALARIED EMPLOYEE

Pay For Missed Time

94-965 Sieler v Harding Tube Corp (1994)

Complainant was a salaried EE and paid $620 per week, $124 per day. EE claimed pay for November 22 and 23, 1993. EE was not required to punch a time clock or keep a record of his hours, but was expected to work a normal 8:00 to 5:00, Monday through Friday work week. Although he had worked an occasional Saturday and had taken a week's vacation and may have taken a day off, the same salary was paid from March 1993 when he was hired until he was asked to leave on 11/23/93. On 11/17/93, EE gave his notice of leaving effective 12/6/93. ER disputed that EE was due any additional wages because he missed time on November 19, 22, and 23, 1993. He also did not work at all on 11/15/93.

The ALJ found that EE was a salaried employee due a salary each week. This is the case even if EE missed some time during the pay period.

See General Entry X.

1180 ADMINISTRATIVE LAW JUDGE
Unable to Write Decision

VACATION
Break in Service

90-366, 90-368 **Ebert v Claire's Boutiques, Inc.** **(1992)**

Original ALJ was unable to write decision due to his loss of employment. Another ALJ wrote decision, based on hearing transcripts, exhibits, and post-hearing submissions. EE was rehired after she was discharged. She claims that her length of service should be bridged for fringe benefit purposes because she was rehired within the period provided in ER's written policy. However, policy required EE to work at least one year before the bridging provisions apply. Therefore, ER did not violate Section 3.

Also see General Entry I.

1181 INCENTIVE PAYMENTS
Employment on Certain Day Required

VACATION
Conflict in Written Policies
Advice of Supervisor

90-800 **Sander v Hegira Programs,Inc.** **(1990)**

The EE claimed vacation and incentive pay. Prior to her separation on 12/2/88, she asked the administrator of administrative resources what notice was required to receive vacation pay. EE was told a 10-day notice was required, and also that she was eligible to receive 20 hours accrued vacation. Complainant sent a memo to the administrator confirming this advice. The administrator also advised EE of her eligibility for incentive pay. ER's written vacation policy required 20 days' notice, although another provision stated that employees are expected to provide 10 days' notice when voluntarily separating. It was because of this inconsistency that EE contacted the administrator for advice.

The ALJ found it unreasonable to deny EE's vacation benefit based on erroneous advice from the ER. But, the ER's incentive plan required a distribution to employees as of the end of the calendar year. Since Complainant was not an employee at that time, she was not due incentive pay. The ALJ concluded that the two plans were different. Even though the administrator gave incorrect information regarding both benefits, EEs were paid incentive pay to encourage them to remain employed. Since EE had already left, there was no reason to give her incentive pay. The vacation pay, on the other hand, had already been earned.

1182 DETERMINATION ORDER

Amendment of DO

At Hearing

In Absence of Party

90-809 and 90-810 Dock and Dock v Quaker Management Corporation (1990)

Complainants appealed DO's finding ER violated Section 5. ER didn't come to the hearing. The Notice of Hearing sent to ER was returned by the postal authorities. The ALJ continued with the hearing concluding that the ER had an affirmative duty to notify the Department of a change in address. The Department made a motion to amend the DOs to find violations of Section 3, fringe benefits, as well as Section 5, wages.

1183 COURT ACTIONS

Litigation as Bar to Act 390 Claim

JURISDICTION

Statute of Limitations

Real Estate Closing

90-845 Busuito v Sal Mar Homes, Inc. (1991)

The ALJ found the EE's Act 390 claim barred because the District Court dismissed his claim. Also, EE was barred by Section 11(1), which requires a claim to be filed within one year of the alleged ER violation. The real estate closing for which EE claimed commission was sold on 4/10/88. His claim was filed on 4/27/89.

See General Entry V.

1184 VACATION

Written Contract/Policy

Payment at Separation

WAGES

Full Amount Not Paid

Offset for Overpayment

90-864 Fertig v Electronics Boutique, Inc. (1991)

The EE claimed vacation and wages. The ER had a vacation policy that provided payment for overtime during the Christmas season had to be taken during February, March or April. EE did not take vacation during these months and resigned on 4/1/89. The ALJ found no vacation due because the policy did not have a provision for a cash payment of accrued vacation. Section 3 requires an ER to pay fringe benefits, in this case

vacation, in accord with a written policy. Since the policy had no provision covering Complainant's claim for payment at separation, no vacation payment is required.

The ALJ found a violation of Section 5 because the ER didn't pay the Complainant's last two week's wages. The ER attempted to offset a $1,000 bonus given the Complainant in error. The ALJ found that Act 390 prohibits ERs from withholding wages as a means of resolving monetary disputes with EEs. Also see General Entries III and XIII.

1185 DISCHARGED
For Cause

VACATION
Discharged EE
For Cause

WRITTEN POLICY
Discharged
For Cause

90-868 Cloud v Machus Sly Fox, Inc. (1990)

EE worked as a waitress and was discharged because her hair was too short. The vacation policy stated that this benefit was forfeited when the EE is dismissed for cause. The policy required hair to be "neatly groomed, worn above collar line, side curls not below bottom of the ear. No headbands or hair ornaments." The ALJ found a violation of Section 4. EE's hair did not violate the policy and the discharge was therefore not for cause.

1186 FRINGE BENEFITS
School Bus Driver
Based on Run

90-870 Marx v Holly Area Schools (1991)

EE drove a route designated as 4 3/4 hours. Five-hour routes made the EE eligible for fringe benefits including health insurance. The ALJ found that EE deliberately filled out her log to add 15 minutes to her route. The ER computed the route length by observation and route audits. ER did not violate the Act.

1187 WAGES
Full Amount Not Paid
Offset for Overpayment
Union Scale

90-874 **Wittman v J Horvath Company** **(1990)**

EE worked as a ceramic tile installer and was paid union scale. ER later found out that EE was not a member of the union and reduced last check to a non-union rate. ER also recalculated prior checks to recoup the overpayments. The ALJ found that reducing the last check to the proper rate was proper but ER couldn't reduce all prior overpayments.

1188 BURDEN OF PROOF
Recordkeeping
No Proof of Hours Worked

90-900 **Orzel v Knollwood Memorial Park Association** **(1990)**

ER appealed an adverse DO but had no records to show the hours worked by EE. The Department's investigation showed EE worked 166 hours. Subtracting the amount paid by ER, the amount found due by the Department remained due.

1189 BURDEN OF PROOF
Appellant
Burden Not Sustained
Sales Not Accepted by ER

EVIDENCE
Supervisor's Salary Based on EE's Sales

90-901 **Steiber v Centel Communications Company** **(1991)**

EE was a sales representative paid a salary plus commission. A written contract called for a commission of 1 percent for sales up to $1 million when accepted by the company. The sales claimed by EE were not accepted by the ER and were therefore not sales for which commission was due. The ER's evidence was considered more reliable because EE's supervisor's salary was computed based on commission earned by his employees. It would be in the supervisor's interest to be sure EE was paid the highest amount possible. Also, the Department reviewed the ER's files and determined that no additional commission was due.

1190 BURDEN OF PROOF
Appellant
Burden Not Sustained
Must Overcome DO
Testimony Contradicted

90-909 Foster v LaClare's, Inc. **(1990)**

EE worked as a mechanic paid on commission. He was to be paid 45 percent of the labor bill for all work properly performed. He claimed commission for work on several vehicles. EE had no records showing what was paid to him or what was paid to ER by customers. He had no proof of what labor charges were billed by the ER. The ER's owner on the other hand testified in a credible manner that EE was paid all wages due. Payments were denied EE because work was not performed in a satisfactory manner.

Also see General Entry XI.

1191 BUSINESS PURCHASE
Assumption of Debts

PREEMPTION
National Labor Relations Board Decision

90-911 & 90-912 Milobar and Kreuzer v Plastech Engineered Products, Inc (1991)

EEs worked for Dynaplast which was purchased by Plastech, the ER. Plastech didn't assume the debts of Dynaplast. Therefore ER was not required to pay the EEs vacation benefits earned while at Dynaplast. Also, the UAW filed a complaint with the NLRB against ER which included denial of accrued vacation pay. The parties settled and an ALJ approved the settlement. The State Department of Labor had no jurisdiction to revisit the issue of vacation pay since it had already been decided. The EEs didn't work at ER long enough to qualify for vacation benefits from ER.

1192 COMMISSIONS
Payment
After Separation
Follow-Up Work

90-919 Allen v Symcon **(1991)**

EE operated under an employment letter which provided a salary and commission structure. Commissions were to be paid after receipt of client payment. EE claimed commissions for sales made before her voluntary separation. Also, customers paid for these sales before EE's separation. The ALJ found that all sales and customer payments were complete before EE's separation. That was all that was required before commissions were due. The employment letter did not permit ER to deduct costs of servicing contracts.

1193 ACT 390

Fairness Not Required

COMMISSIONS

Recruiters

Sole Effort

90-967 Collins v Management Recruiters of Kalamazoo, Inc (1990)

EE claimed a commission for placement of an employee. The contract of employment required payment if the EE's "sole effort" caused the placement. In this case the EE sent three people to the prospective employer for interview. One was hired but chose not to accept the position. After EE's separation, ER's president contacted the employer and convinced the customer to hire another of the three interviewed. Since this hiring was not due to the sole effort of EE, no commission was due. The ALJ observed that morally and ethically the Complainant was due a portion of the commission but that Act 390 does not order people to behave ethically.

1194 FRINGE BENEFITS

Holiday Pay

Written Policy

Required Before Payment

HOLIDAY PAY

Written Policy

Required Before Payment

VACATION

Sale of Business

90-968 Young v Polynesian Spa Ltd (1991)

EE worked for Respondent's predecessor company for 31 ½ years and for ER for another 6 months before being laid off. He claims vacation pay earned at the first company and holiday pay for Labor Day. EE was paid all vacation earned while working with Respondent. Also, Respondent had no written policy requiring payment for holidays. The ALJ found that any unwritten promise of fringe benefits made by the new owners is not enforceable under Act 390. Also, Respondent is not required to pay EE for Labor Day because EE was not employed on that holiday and there is no evidence of a written holiday policy. See General Entry I.

1195 COLLATERAL ESTOPPEL

COURT ACTIONS

Litigation as Bar to Act 390 Claim

LICENSE

MOTIONS
To Dismiss

WAGES
Withheld
License

90-971 Ritsema v Rivendell of Michigan (1991)

EE claimed wages while working for ER as a psychologist. ER presented evidence that EE was practicing a limited licensed psychologist without a license. The ALJ granted Respondent's Motion to Dismiss Complainant's claim. Since he did not have a license, EE could not earn the wages claimed. Also, the Circuit Court already addressed the issue of EE representing himself as a limited licensed psychologist. In order to determine if EE is due wages, it was necessary to determine if EE satisfied the license requirements. Since this fact had already been determined by the Court, it could not be relitigated in an Act 390 action.

1196 ACT 390
Fairness Not Required

90-977 Gorey v Charter Township of Flint (1990)

From August 1985 through 10/18/88, EE was Respondent's confidential secretary. In October 1988 EE's position was terminated and she became a clerical EE subject to the CBA. EE claimed wages, vacation pay, and personal time based on her prior position. The ALJ found that EE didn't have to accept the new job paying less than she had previously earned both in wages and in fringe benefits. While it would have been fair for the Respondent to recognize EE's experience and place her at a higher position, this was not required by the CBA. See General Entry XV.

1197 FRINGE BENEFITS
Holiday Pay
Working Before and After
Written Policy
Required Before Payment

HOLIDAY PAY
Working Before and After

Written Policy
Required Before Payment

90-978 Leiby v Four Winns, Inc (1990)

The EE worked Wednesday and Saturday before and after Thanksgiving. She claimed pay for Thursday and Friday. She was not scheduled to work on the Monday following Thanksgiving. The written policy listed Thanksgiving as a paid holiday but not Friday, the day after. The policy also required the EE to work his last scheduled work day before and after a holiday in order to receive holiday pay. The ALJ found the EE due pay for Thanksgiving but not the Friday. The EE did work the day before and after the holiday and is due pay for Thanksgiving. The policy does not require payment for Friday and therefore cannot be ordered pursuant to Act 390. Even if all EEs received Friday pay, Act 390 cannot be used to order this payment if there is no written policy to require payment. Also see General Entry I.

1198 FRINGE BENEFITS
Forfeiture
Gross Infraction

90-1005 Papajohn v William Beaumont Hospital (1990)

EE was terminated after she had accumulated vacation pay. Prior to her discharge she had received two written warnings, a one-day suspension, and a two-day suspension for absenteeism. She was discharged because she did not report to work or call. The written contract provided for forfeiture of fringe benefits when the EE is discharged for gross infraction of policy. The ALJ found the EE's discharge was based on a gross infraction of hospital policy and that the vacation pay forfeiture was proper.

1199 WAGES
Business Closure
Discharge Date

90-1006 Long v Finance Accounting & Computer Service, Inc. dba F A C S, Inc (1990)

ER told EEs they would not be paid after 4/30/89, but they could use the Respondent's facilities to explore formation of a new company. EE filed a wage claim for the period 5/1 through 5/19/89. The ALJ found no violation of Act 390. EEs were on notice that they would not be paid after 4/30/89. EE was discharged 4/30/89.

1200 DEDUCTIONS

Insurance Premiums
Written Consent
Insurance Premiums

90-1022 Fletcher v Elm Animal Hospital, PC (1991)

The ALJ found deductions for medical insurance proper. EE authorized these deductions in a written statement. ER didn't violate Section 3.

1201 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found
Marriage/Divorce

WAGES

Divorce Decree

90-1046 Beaumont v Belboko Publishing Corporation (1991)

Complainant and his wife formed a corporation and published a newspaper. Complainant was employed by his wife as a writer and editor at the rate of $200 per week. They were divorced in 1989. EE claims wages for 9 days in September 1989. The former wife and owner argued that the divorce decree settled any money due to EE. The Department found $450 due at the rate of $50 per day. The ALJ found that EE worked 9 days in September and earned $450. See General Entry IX.

1202 BURDEN OF PROOF

Appellant
Burden Sustained
Testimony

WAGES

Written Contract/Policy Not Needed

90-1048 Beaupre v The Metro Times, Inc (1991)

EE claims commissions paid more than 30 days after her separation. The written policy permitted commissions up to and including 30 days from separation provided EE gives two weeks' notice. The sales manager told EE that if she stayed over the Memorial Day

weekend, an additional four days beyond the two-week notice period, the company would pay her for two additional accounts even though they were not paid within the 30-day period. The ALJ found that the parties could alter the written policy for wages. Act 390 does not require a written policy for wages as it does for fringe benefits. See Section 3. EE testified in a credible manner and no one testified on ER's behalf. The additional wages were ordered paid to EE.

1203 FRINGE BENEFITS

Sale of Business
Sick Pay
Written Contract/Policy
Required Before Payment

SICK PAY

Contract or Policy Statement
Required Before Payment

90-1066 Johnson v Jones Intercable (1991)

EE worked for Respondent's predecessor company for eight years and for ER for another two to three months before quitting. He claimed 32 days of sick pay earned during his employment with the first company. EE was paid all sick pay earned while working with ER. The ALJ found that any unwritten promise of fringe benefits made by the new owners is not enforceable under Act 390. See General Entry I.

1204 VACATION

Fiscal Year Change
Verbal Promises
Written Contract/Policy

90-1074 Lefere v Airco Gases (1991)

ER's written policy provided that vacations are earned and must be taken in the same year. Time could not be carried over to the next year. EE was discharged in September 1990. On 10/1/90, ER changed its fiscal year from a calendar year to October 1 through September 30. Since EE didn't work in the fiscal year that began 10/1/90, he didn't earn any vacation time. The three weeks he earned starting 1/1/90 had to be taken before he separated. What ER actually did or told EEs contrary to the written policy does not control. Section 3 requires fringe benefits to be paid in accordance with the terms of a written contract or policy.

1205 DEDUCTIONS

Company Vehicle

EXEMPLARY DAMAGES

Salary Reduction Without Notice

JURISDICTION

Statute of Limitations

Deductions

90-1082 Feeney v Michigan Glove Co (1991)

The ER took a deduction from EE's wages for excessive use of a company car. There was no written authorization to permit this deduction but it could not be ordered because it was made more than 12 months before the claim date contrary to Section 11(1). The commission due the EE was not paid as required. This claim was within the Department's jurisdiction. Exemplary damages were ordered because Respondent illegally deducted car expenses without written authorization, withheld wages by reducing salary without notice, and did not pay commission due.

1206 EMPLOYMENT RELATIONSHIP

Control

Truck Driver

Truck Driver

90-1119 Hasselbach v Peltier Companies International (1991)

Complainant claimed wages and deductions from Respondent. The ALJ found that Respondent leased a truck to Triton who controlled Complainant's activities. The DO was dismissed. Respondent was not an employer under Act 390.

1207 BONUSES

Management Prerogative

Subjective Performance Evaluation

90-1120 Voyles v US Manufacturing Corp (1991)

Complainant claimed a 25 percent bonus for 1998. The policy stated EE was "eligible" for this bonus, but it would be determined based on earnings and management's subjective evaluation. The ALJ found that the bonus was not guaranteed. The policy permitted the Respondent not to pay a bonus. This decision was not arbitrary.

1208 VACATION

Forfeited
Proper Resignation Notice

WRITTEN POLICY
EE Knowledge

90-1141 Eling v J Kaltz & Company (1991)

Complainant resigned without giving two weeks notice. The written policy provides for vacation benefits at separation but only if the EE gives two weeks' notice. Since EE did not give the required notice, earned vacation was forfeited. This conclusion was reached even though EE disputed ever seeing the written policy. Without the policy Complainant cannot claim a vacation benefit under Section 3, but with the policy, the benefit is forfeited due to lack of proper notice.

1209 CLAIMS
Employer
District Court

COMMISSIONS
Cabinet Sales

EMPLOYER
Counterclaim

90-1148 Starick v Bosker Manufacturing (1991)

Complainant sold cabinets, countertops and related items for Respondent. She earned a 15 percent commission for cabinet sales and 7 percent for countertops. These amounts were due when the items were delivered to the customer if the Complainant were still employed. Several customer sales were examined at hearing and the ALJ found $2,167.63 due to EE. Respondent's claims against Complainant were not considered because Act 390 does not permit this consideration. Respondent was referred to the District Court.

1210 BURDEN OF PROOF
Appellant
Burden Not Sustained
Records
Testimony Contradicted

90-1216 Wilson v Jack Dragmiler dba Central Welding (1991)

EE claimed he worked until 4/19/89 and only received one check in January 1989. ER presented testimony from two witnesses that EE did not work after 3/1/89. ER also brought canceled checks showing seven checks in addition to the one EE brought. The ALJ affirmed the DO finding no violation. EE did not meet his burden of proof to show time worked without pay.

1211 BURDEN OF PROOF

Appellant

Burden Sustained

Testimony

90-1218 Cookson v Airport Management Services, Inc (1991)

The ALJ ordered commissions paid to EE but gave ER credit for a $1,000 promissory note and $2,000 salary paid to EE during his notice period. EE didn't perform his manager duties during this 30-day notice period. EE earned commissions selling two airplanes. Only two people had personal knowledge as to the agreement between the parties. Only EE appeared and gave credible testimony that the agreement required commission when the offer was accepted by ER. ER's representative at the hearing had no personal knowledge of the employment agreement.

1212 COMMISSIONS

Draw Against Commission

Payment

After Exceeding Draw

WORK

As Acceptance of Wage Agreement

90-1238 Dragisic v Sundance Chevrolet, Inc.
dba Sundance Family Home Center (1990)

The ALJ found EE only entitled to commissions when he exceeded draws. EE argued that draws were to be eliminated each month. EE discussed this matter with the General Manager who told him commissions would be paid only when they exceeded draws. EE continued working after this conversation. Continuing to work after confirmation of ER's position meant EE's agreement to ER's payment plan.

1213 ADMINISTRATIVE LAW JUDGE

Equitable Powers

EXHAUSTION OF ADMINISTRATIVE REMEDIES

JURISDICTION
Statute of Limitations
Tolling by Court Action

90-1239 Tracy v Morbark Industries, Inc (1991)

Complainant filed a claim in the Circuit Court for bonuses and commissions. The Court dismissed the claim finding that the Department of Labor (now Consumer and Industry Services) has exclusive jurisdiction pursuant to Act 390. The Court followed the decision in Cockles v International Business Expositions Inc, 159 Mich App 30 (1987), lv den. 428 Mich 914 (1987) where the Oakland County Circuit Court dismissed Complainant's claim that she had been discharged in retaliation for asserting her right to compensation contrary to Section 13(1) of Act 390. The Court found that the Complainant was required to exhaust her administrative remedies by filing a claim first with the Department of Labor. Also in Duncan v Rolm Mil-Spec Computers and Loral Corporation, the United States Eastern District Court in an opinion issued 12/18/89, relied on Cockles and found that the Complainant's claims for commissions had to be filed first with the Department of Labor using Act 390. That case was appealed to the Sixth Circuit Court of Appeals which affirmed, 917 F2d 261 (CA 6, 1990).

Complainant Tracy appealed to the Michigan Court of Appeals but at the same time filed for the first time a claim with the Department of Labor pursuant to Section 11(1) of Act 390. The ALJ dismissed this claim and affirmed the DO because the claim was not filed within 12 months of when the employer allegedly violated the Act as required by Section 11(1). The ALJ observed that he had no equitable powers to correct the unfair result. Complainant had no way to know he would be required to file an Act 390 claim before going to court. This requirement found by the Court conflicts with the plain language of Section 11(1) and the Department's advice to the public. When asked, Department staff advise that a claim for wages, commissions, or fringe benefits can be filed with either the courts or the Department. There is concurrent jurisdiction for common law contract claims. Since there was no common law claim for discrimination under Section 13(1), these claims alone are required to be started with the Department.

The ALJ also found that the court proceedings did not toll the statute of limitation period.

1214 WAGES
Withheld
Losses

WORK
As Acceptance of Wage Agreement

WORKING
Continued Working for Amount Less Than Claimed

90-1240 Schwind v Digitrace, Inc (1991)

EE claimed the difference in wages received and wages he should have received. ER had cash problems and had to reduce EE's salary as well as other management salaries. EE was never told that he would be paid the reduced wages in the future. EE continued to work at the reduced rate. ER never kept track of the amount reduced. Evidence presented by EE was not enough to create an ER obligation.

ER did not violate Sections 2 and 5.

1215 EMPLOYMENT RELATIONSHIP
EE/ER Relationship Not Found

90-367 Schemke v D & S Leasing (1990)

The Department found no EE/ER relationship. Complainant appealed.

Complainant signed an agreement that referred to mileage rates and frequency of pay for a job as a truck driver. Complainant received one payment from which no deductions were taken out and he never received a W-2 form. Respondent leased the trucks that Complainant drove to another company. Complainant took driving lessons from the other company, could purchase insurance from the other company, and received expense checks from the other company.

At most, Respondent was more of a middleman and had negligible control over Complainant. The evidence was not sufficient to show that an EE/ER relationship existed.

Also see General Entry VII.

1216 EMPLOYMENT RELATIONSHIP
EE/ER Relationship Not Found
Salesperson
Independent Contractor Relationship Found
Salesperson

90-424 Burcroff v Safety Plus, Inc (1990)

Complainant was required to sign an independent contractor agreement and he was free to work whenever, wherever and however desired. This was the case, even though Respondent controlled the price and when the sales representatives got paid.

Act 390 was not violated because an EE/ER relationship did not exist. Also see General Entry VII.

1217 DETERMINATION ORDER
Amendment of DO
At Hearing
By Department

In Absence of Party

EMPLOYER
Identity

90-425, 90-427 Furman and Myers v Safety Plus, Inc (1990)

Department representative filed motion to dismiss Determination Orders at the hearing. Respondents submitted evidence showing that complainants were employed by someone else.

1218 COLLECTIVE BARGAINING AGREEMENT (CBA)
Fringe Benefits
Subsequent Contracts/Policies
Vacation

VACATION
Resignation
Eligibility for Fringe Benefits
Signed Waiver

90-428 Kopp v Nelson Metal Products (1990)

EE resigned by signing an agreement waiving all rights arising out of employment relationship. CBA also stated that an EE who quits or is discharged prior to their eligibility date would not be eligible to receive paid vacation. The CBA also states there is no exception for those who resign. Even if CBA had provided for vacation benefits, signing the waiver canceled EE's eligibility. Therefore, there is no violation of Act 390.

See General Entry XV. There is no longer any Act 390 authority to interpret a CBA.

1219 DETERMINATION ORDER
Amendment of DO
At Hearing
By Department

WAGES
Commissions
Payable After Separation

90-431 Johnson v Ten Harmsel Furniture (1990)

EE was employed from November 1981 until February 1989. She was to receive a 6 percent commission on delivered sales. EE claimed she was owed $1456.48 for commissions due after her separation from ER. However, evidence submitted by ER showed that no commissions were due to EE.

ER did not violate the Act. Also see General Entry X.

1220 CONTRACT
Meeting of the Minds

EMPLOYMENT RELATIONSHIP
EE/ER Relationship Not Found

VERBAL AGREEMENTS
Meeting of the Minds

WAGES
Full Amount Not Paid
At Business Closure

90-556 Burns v Strenger (1990)

Complainant and Respondent made a verbal agreement, whereby Complainant was to be paid for performing certain duties in order to start a gas company. However, there was no meeting of the minds, and thus, no contract between Complainant and Respondent. Complainant believed his duties to be something other than that intended by the Respondent. Complainant claimed that he was due wages for duties performed under the alleged contract after the business arrangement was terminated by Respondent.

Act 390 covers only those employment relationships where there is an agreement or contract. The evidence shows no contract or agreement between the two parties. Therefore, there is no violation of the Act.

1221 COMMISSIONS
Draws Against Commission
Month to Month Carryover

90-558 Hahn v Maple Island Estates, Inc (1991)

EE began working for ER in reliance on promise that he could receive commissions even if they did not exceed total draws. ER introduced evidence that draws are carried over from month to month. However, EE neither received nor signed any documents discussing such an arrangement. EE claimed that he was due commission payments after he separated from ER.

The ALJ found that draws would be erased at the end of each month. Therefore, ER violated Section 2 and Section 5.

1222 WRITTEN POLICY
Interpretation
Against Drafter

90-563 Tucker v Top O'Michigan Insurance Agency, Inc (1990)

EE did not have any input in the drafting of ER's written policy, and therefore its contents should be strictly enforced against the ER. If ER had intended for part-time employees to not receive vacation benefits, it could have been stated. Thus, EE is eligible to receive vacation pay from the time she began working part-time.

ER violated Section 3.

Also see General Entry XVIII.

1223 RES JUDICATA

90-565 Navarro v T&M Navarro (1991)

EE brought wage claim against ER. The ER appealed an adverse DO. ER then brought a suit against EE in small claims court. The small claims court held that EE did not have a wage claim against ER. The decision could not be appealed because both parties agreed to be bound by the small claims court opinion. Since the opinion could not be appealed, it is a final binding judgment. Therefore, EE is precluded from re-litigating the same claim under the principle of res judicata.

1224 COMMISSIONS
After Separation
Written Contract/Policy

WAGES
Commissions
Payable After Separation
Written Contract

WRITTEN CONTRACT
Amendment
Meeting of the Minds
Commissions

90-572 Martin v Securitec, Inc (1990)

EE was paid on salary plus commissions and recurring monthly revenues, as provided in a written agreement. Shortly before her termination, EE was informed that ER was considering retaining all monthly commissions and recurring monthly revenues. This was never reduced to writing and given to EE. EE did not consent to the proposed change and took immediate steps to reject any notion of acceptance. The ALJ found that commissions were earned by EE at the rate claimed, because the written agreement required payment of commissions and recurring monthly revenues.

ER failed to abide by the written agreement and violated Section 5.

1225 COURT ACTIONS
Judgment to Offset Amount Due Complainant

WAGES
Full Amount Not Paid
Held During Civil/Criminal Proceedings

90-595 Stratton v Pressure Washing Specialist, Inc (1990)

EE did not receive wages earned for two pay periods as a result of EE stealing ER's van. The Circuit Court held that EE was to pay restitution for costs incurred in retrieving the van as a condition of parole. Therefore, the wages due EE from working for ER, were offset by the circuit court judgment.

Also see General Entry VI.

1226 EMPLOYMENT RELATIONSHIP
EE/ER Relationship Found
Babysitter

WAGES
Full Amount Not Paid
Divorce

90-638 Soave v Nauseda **(1990)**

An EE/ER relationship was found between babysitter and father of kids. She was hired to perform duties for a weekly salary. After parents divorced, EE claims that she was not paid for services performed for wife, that wife claimed husband would pay for. EE was only entitled to wages for services performed at father's home because EE was hired by the father.

1227 JURISDICTION
ERs With CBAs and Grievance Procedure

90-640 Bashaw v Complete Auto Transit, Inc **(1990)**

In accordance with Complete Auto Transit, Inc.v Elizabeth Howe, et al, Civil Action No. 88-CV-70863-DT, decided in the United States District Court for the Eastern District of Michigan, Southern Division, the Department of Labor lacks jurisdiction over the EE's claim since its resolution was dependent upon the meaning of the CBA.

Also see General Entry XV.

1228 FRINGE BENEFITS
Vacation
Written Contract/Policy

VACATION
Written Contract/Policy

90-641 Schultz v Wendt Grinding Corporation **(1990)**

EE claimed he was due vacation in accordance with ER's written policy. ER contended that his vacation was not earned because the vacation accrued upon the anniversary date. The ALJ held that ER's contention was without merit and was inconsistent with past practice. It was probable that EE would have received his two-week vacation pay before his anniversary date, but he was not paid because he left his employment. The only reasonable interpretation of the policy was that vacation accrued at the beginning of the year, and not at his anniversary date.

ER violated Section 4.

1229 COURT ACTIONS
Judgment to Offset Amount Due Complainant

90-654 Pineau v Mark A Vettraino dba Vettraino Chiropractic Clinic (1990)

Respondent obtained a District Court judgment regarding money owed to Complainant. The parties stipulated that the small claims judgment should be used as an offset against the DO. Respondent violated Section 5. However, no money was owed to Complainant since the judgment was allowed as a credit.

Also see General Entry VI.

1230 WAGES PAID
Check Cashed by EE

90-658, 90-744 Hill v William Friske dba Wayne Janitorial (1990)

EE was due wages from ER for work performed. ER sent check to EE, but EE claimed that she never received it. A canceled check issued by ER showed that EE cashed the check, as her correct signature and driver's license number were on reverse of check. Therefore, ER did not violate the Act.

1231 ADVANCES
Wages

WAGES PAID
Recordkeeping

90-668 Johnston v David Wharton dba Bloomfield Lawn Sprinklers (1990)

EE in charge of bookkeeping wrote, signed, and cashed petty cash fund checks, from which she paid herself, without ER authorization. EE was not entitled to wages since she paid herself for one week that she did not work. She was also not entitled to wages because any checks cashed for the petty cash fund would be an advance on payment of any possible wage that would be due to her. No vacation was due because ER did not have a written fringe benefit policy.

ER did not violate Sections 3 or 5.

Also see General Entry I.

1232 COLLECTIVE BARGAINING AGREEMENT (CBA)
Interpretation
Public Employees

DEDUCTIONS
Workers' Compensation Premiums

JURISDICTION
Public Employees

90-669 Lawrence v City of Detroit (1992)

Unionized public EE claimed that ER was making improper deductions from his paycheck for reimbursement of workers' compensation benefits. When EE was injured, EE used sick pay for income continuation. When it was determined that EE was entitled to workers' compensation benefits, ER deducted the excess money received from EE's wages and paid him back his sick leave time, without written authorization.

There was no language in CBA that allowed for deductions of wages for workers' compensation benefits. The ALJ found these deductions violated Section 7.

ALJ found jurisdiction over case because there is no specific case preempting the Department from interpreting CBAs in public employment. There is an Attorney General opinion addressing preemption of the Department in cases where there is a CBA covering private employment. See General Entry XV. Therefore, the Department has jurisdiction over public sector claims.

Also see General Entry III.

1233 COMMISSIONS
Payment
After Separation
Procuring Cause
Procuring Cause

91-1111 Canell v Mighty-Mac Broadcasting Co, Inc. (1991)

EE claimed he was due commissions for sales made. The ALJ held that EE was the procuring cause of the sales for which he claimed he was due commissions. In Reed v Kurdziel, 352 Mich 287; 89 NW2d 479 (1958), Short v Centri-Spray Corp, 369 Mich 303; 119 NW2d 528 (1963), and Widman v Ronnoco Associates, Inc.dba Management Recruiters of Lansing, an unpublished decision, Michigan Court of Appeals No. 158691, it was held that a party is considered a procuring cause if the commissioned agent was the primary reason for a transaction being successful. If a party is found to be the procuring cause, they are entitled to a fair share of the principal's realized profits in accordance with their contractual agreement. Since EE was the procuring cause of the sales claimed, he was entitled to the commissions.

1234 COMMISSIONS
No Agreement
Payment
After Separation
Not Addressed in Written Employment Agreement

90-687 Bennett v Mead-O-Acres, Inc. (1990)

ER and EE discussed changing from salary to commission, but no agreement was reached. EE was only paid a weekly salary. Therefore, no commissions were due to EE.

1235 WAGE AGREEMENTS
Dispute
Verbal

90-690 Tujaka v Michigan Democratic Party (1991)

EE made a demand for a raise in salary, which was conditional on ER still being her supervisor the following year, and if ER was not, he would recommend to her next supervisor that she receive the raise. When her supervisor left the job, ER elected not to give her the raise. EE claimed that she was due the amount of the raise per her agreement with her former supervisor. However, the new wage agreement was verbal and not binding on supervisor's successors. Thus, EE's claim for unpaid wages cannot be sustained.

1236 WAGES
Full Amount Not Paid
At Separation

WRITTEN POLICY
Fringe Benefits
Holiday Work

90-746 Van Tassel v Robert Stein dba 7-11 dba The Southland Corp (1990)

EE claimed that she was due payment for wages earned her last day of work, as well as overtime payment for work on Easter. Evidence given by EE which showed that she was not paid for her final day, was unrebutted by ER. Therefore, she was entitled to those wages. However, she was not due any overtime pay, because there was no written policy regarding overtime pay for working on Easter.

ER violated Section 5, but did not violate Section 3.

1237 DEDUCTIONS
Required or Permitted by Law
FICA

90-753 Syzmanski v Keystone Midwest Corporation (1990)

Money was deducted from EE's check that went to reimburse ER for FICA payments which were not taken from the settlement of a circuit court action. The parties agree that the money earned by EE was taxable income. ER knew that this payment was subject to FICA, and paid the FICA payment to the IRS. The evidence showed that the W-2 received for the taxable year showed the payment was reported in the FICA account of EE. Therefore, EE received credit with the federal FICA account. The law imposes a duty on an employer to withdraw FICA deductions.

ER did not violate Section 7.

1238 EMPLOYMENT RELATIONSHIP
EE/ER Relationship Not Found

Receiver Discharged

90-756 Peterson v Metro Harper Apartments (1990)

Respondent was found not to be liable for fringe benefits because he was no longer the ER. Respondent was discharged of his duties as ER by a circuit court judgment. Thus, Respondent was not liable under the Act for vacation pay.

1239 WAGES
Full Amount Not Paid
At Separation

WRITTEN POLICY
Fringe Benefits
Vacation

90-773 Slemer v Gwizdala & Company (1990)

In accordance with EE's time report summary, he was awarded wages due for services already performed. However, EE could not recover for unpaid vacation time because there was no written policy regarding vacation policy agreed to by EE and ER.

ER violated Section 5, but did not violate Section 3.

1240 WAGE AGREEMENTS
Dispute
Job Classification

90-778 Snider v Smalley Construction Co, Inc (1991)

EE claimed he was due unpaid wages from ER. EE did not appear for the hearing. ER testified that EE's claim that he was to be paid for the hours worked as a machine operator was incorrect, and that his correct job classification was as a laborer, which paid less. ER had already paid EE for the worked performed at the hourly rate for a laborer. Therefore, no wages were owed to EE.

1241 EMPLOYMENT RELATIONSHIP
Independent Contractor Relationship Found
Salesperson

90-779 Dillman v United Phone Book Advertisers (1990)

Complainant arranged his own hours, made his own schedule, decided how many customer calls he would make, determined how much income he would make, and also signed an "independent contractor agreement." Complainant was thus deemed to be an independent contractor and not an EE. The Department of Labor has no jurisdiction over those claims where there is no EE/ER relationship.

1242 FOSTER CARE HOME
Wages

WAGE AGREEMENTS
Foster Care Home
Salary v Hourly

90-781 Wilson v Judith Gore dba Gorte's Adult Foster Care Home (1991)

There was no written agreement as to how the EE's salary would be paid. EE was paid at a monthly salary instead of an hourly wage. EE believed that she would be paid at an hourly rate because that was how she was paid at a similar job. However, ER stated she was to be hired on a monthly salary. The ALJ determined that no wages were due EE since she was already paid more than she would have received at the monthly rate.

ER did not violate Section 5.

1243 WAGES
Advances
Overpayment
Payment Made Before Work Performed

90-796 Shabander v Westenfelder, P C (1990)

EE received an advance on wages for college from ER. EE later quit his job and claimed wages due for his last week of employment. However, evidence submitted by ER showed that EE never worked the final week. Thus, ER actually overpaid EE. EE did not earn any wages for which he was not paid.

ER did not violate Section 5.

1244 BONUSES
Written Policy
Interpretation

WRITTEN POLICY
Bonus
Commissions

90-798 Johnson v Plouffe & Stuff, Inc (1991)

After separation, EE claimed she was due commissions for sales based on overcharge of draw. However, this was offset by an earlier overpayment to EE. EE also claimed to be due a bonus for meeting certain requirements in ER's written policy. However, it was shown that EE did not meet the necessary requirements set in the written policy for acquiring the bonus.

ER did not violate the Act.

1245 WAGES
Paid in Full

90-799 Parker v Lawrence Mozham dba Air Flo Cleaning System (1990)

EE claimed he was not paid for work performed by ER. However, evidence submitted by ER showed that he was in fact paid in full.

1246 EMPLOYER IDENTITY
Corporation Officers

INDIVIDUAL LIABILITY

90-1251 Cody v Frank Vaydik, and Ammar Land Company (1991)
90-1252 Kincaid v Frank Vaydik, and Ammar Land Company
90-1253 Kreiner v Frank Vaydik, and Ammar Land Company
90-1254 Dittenber v Frank Vaydik, and Ammar Land Company
90-1255 Belden v Frank Vaydik, and Ammar Land Company
90-1302 Mayfield v Frank Vaydik, and Ammar Land Company

Respondent did not hire or fire EEs, control their work activities, or issue payroll checks. Also, he did not sign any employment contracts. For these reasons, Respondent could not be personally liable for Complainants' wages, even though the corporation was liable.

Also see General Entries VII, IX.

1247 THEFT
Wage Advance

WAGES
Theft

90-1282 Griggs v McDonald's of Hamtramck, Inc (1991)

ER provided EE with a loan which he never paid back. ER also gave EE the keys to the safe from which money was missing. EE was given money to deposit at the bank which was never deposited.

ALJ found that the loan and the money missing from the safe did not satisfy the written authorization provision of Section 7. However, he also held that the money never deposited was either a payment of wages or an advance on his wages for which ER had a right to credit the last paycheck. Thus, if ER could show that EE's net pay was less than the money not deposited, no money was due from ER and there would be no violation.

1248 WAGES
Paid in Full

90-1283 McKay v Joseph Pontiac, Inc (1991)

EE claimed that she was not paid wages due from ER. However, evidence showed that he was actually paid in excess of salary requirements.

1249 MINIMUM WAGE

Wage Reduced To

WAGES
Reduced to Minimum Wage

90-1295 Gifford v Long John Silvers dba Concord Enterprises (1991)

EE gave ER written two-week notice of her resignation. ER's written policy was to reduce salary to minimum wage if the proper notice was not given. Because EE gave ER a two-week notice, it was improper to reduce EE's salary to minimum wage.

ER violated Section 5.

1250 WAGE AGREEMENTS
Unclear
Working Constitutes Agreement

WORKING
Continued Working for Amount Less Than Claimed

90-1367 G Castle, R Castle, D Smith, and G Barkman (1991)
90-1473 v Auto Brite Collision, Inc
90-1474

Complainants claimed that ER changed method of paying wages without their approval. However, the Complainants continued working for ER knowing that ER did not agree with their claims. When faced with a change in wages, an EE has several choices. He can discuss the issue with his employer, quit, or continue working. By continuing to work, knowing ER did not agree with their position, the complainants in effect agreed to ER's wage offer and a new contract was formed.

There was no violation of the Act.

1251 WAGES
Withheld
Competition With ER
Losses

90-1376 Brennan v Capletters Ltd (1991)

ER refused to pay EE for last week of work because EE worked on starting her own company that week. ER introduced evidence of a decline in sales volume, work performed, correspondence mailed and talking with former clients. Also EE had taken one of the largest accounts with her.

ALJ found that EE did not work on ER's accounts during her last days and found no violation of the Act.

1252 CONSIDERATION FOR EMPLOYMENT

DEDUCTIONS
Written Consent

Signed as Condition of Employment

90-1377 Williams v E & E Fasteners Company, Inc (1991)

EE signed written agreement authorizing ER to deduct amounts from last paycheck for physical and drug testing. EE left her employment within the probationary period, and pursuant with company policy, ER deducted money from EE's last paycheck for the physical and drug test.

Since EE voluntarily signed the written agreement, ER did not violate Section 8.

1253 WAGE AGREEMENTS
Verbal
Working Constitutes Agreement

WORKING
Continued Working for Less Than Amount Claimed

90-1381 Dail v Bob Borst Lincoln Mercury, Inc (1991)

EE claimed improper deductions were taken from his wages. Although EE believed his wage was 50 percent of labor charged for body shop repairs, he was never paid this amount. ER always reduced the labor charge by at least $1.00 to cover insurance costs. EE was then paid 50 percent of this reduced amount.

The ALJ found no violation of the Act. By continuing to work for the lower amount, EE agreed to this wage computation.

1254 COURT ACTIONS
Judgment to Offset Amount Due Complainant

DEDUCTIONS
Required or Permitted by Law

90-1428 Berry v New York Carpet World, Inc (1991)

ER withheld money from EE's wages due to a probation order directing EE to pay restitution to the ER as a result of criminal proceeding. Later, the restitution amount was lowered, and EE claimed that the extra money withheld was an improper deduction, because he had paid the full amount due. ER submitted evidence that deductions were permitted by law. Because EE consistently informed his attorney that he intended the restitution to be paid by withholding his check, the deduction is an authorization expressly permitted by law.

Therefore, ER did not violate Act 390. The probation order was an authorization of law permitting the deductions. See Section 7.

1255 SALARIED EMPLOYEE
Punctuality

WAGES
Poor Job by EE

90-1430 Bondy v Comfort Systems, Inc (1991)

EE's salary depended on his punctuality. During his last week of work, EE showed up late for work on three days and left for an extra long lunch hour with another EE, without permission. EE had been previously reminded that his salary was based on his showing up for work on time. EE was not paid for his final week of work since he did not comply with the terms of the salary.

EE did not fulfill the terms of the salary requirement, and was not entitled to his last week of salary. ER did not violate the Act.

1256 DETERMINATION ORDER
Amendment of DO
At Hearing

90-1442 Marx v Zee Medical Services, Inc (1991)

ER was granted motion to amend DO to a lesser amount owed for unpaid wages, since EE had actually worked two less days than originally determined.

1257 COMMISSIONS
Change From Salary
Deductions
Last Week of Salary

90-1448 Schwager v Social Security Disability Consultants (1991)

EE elected to change method of payment of his wages from salary to commission, as allowed in employment agreement. ER deducted money from commission check as a draw against EE's monthly commission. However, the deduction was improper because it represented salary due for the prior week's work.

Therefore, ER violated Section 5.

ER appealed to Oakland County Circuit Court which affirmed the ALJ concluding his decision was authorized by law and supported by competent, material, and substantial evidence in the record.

1258 CHECKS
Restrictive Endorsement

COMMISSIONS
Forfeiture by Termination

WAGES
Forfeiture by Termination

WAGES PAID
Commissions

WRITTEN POLICY

Commissions
After Separation

90-1451 Nicolay v Joseph Pontiac, Inc (1991)

EE claimed he was owed salary and commissions for his last month. ER argued no money was owed because the company's written policy stated that all overrides would be waived, and only salary or guaranteed draw would be paid to any EE who left the company voluntarily or by discharge. However, ER paid the money alleged to be due by check with a restrictive endorsement on the back which stated: "in consideration of a full and final release of all claims against [ER]." EE crossed out the restrictive clause and cashed the check.

The ALJ held that the money due EE was paid by ER when the check was cashed and ER did not violate Section 5. EE did not obviate the restrictive language simply by crossing it out. But even without considering the restriction, EE was paid all wages due.

1259 FRINGE BENEFITS

Forfeiture
Specific Notice Required

VACATION
Resignation
Eligibility for Based on Two-Weeks' Notice
Two-Week Notice

90-1461 Mercer v Mutual of Detroit Insurance Company (1991)

EE signed written contract which provided that vacation pay would be forfeited if he failed to give his two weeks' notice. He provided ER with his two weeks' notice, but failed to work his last day.

EE did not comply with the written terms of his contract with ER. Therefore, no vacation pay was due EE, and there was no violation of Section 3.

1260 COMMISSIONS

Payment
After Separation
90-Day Cut-Off Policy

90-1478 Oginsky v Don Fox Mobile Home Sales, Inc. (1991)

EE was to be paid commission, provided that the sale is completed within 90 days of separation. EE was not told of this rule, because the sale should have been completed within the period allowed. Although EE secured the initial contract, she did not perform the bulk of the work, and the sale was not completed within 90 days of her separation.

ER did not violate Section 5.

1261 BONUSES

After Separation

FRINGE BENEFITS
Bonuses/Incentive Pay
Vacation
Written Contract/Policy

90-1481 Janz v Auto Mart, Inc., dba Davis Chevrolet-Buick (1991)

EE was terminated and claimed he was due certain monthly bonuses, as well as vacation pay. Evidence submitted by EE showed he was due his bonus for the month before his termination, but not for the other week claimed. EE was also not entitled to vacation pay based upon a written agreement calling for the forfeiture of such benefits.

ER violated Section 4, but not Section 3.

Also see General Entries I, XI.

1262 FRINGE BENEFITS
Written Policy
Eligibility

VACATION
Written Contract/Policy
Two-Week Notice

90-1484 Vaughan v Ardis Nursing Homes, Inc. (1991)

EE was discharged or quit without two weeks' notice, and claimed she was due vacation pay. ER had written policy that EE would not be eligible to receive any unused vacation pay if she was discharged or quit without two weeks' notice. EE's claim was in direct conflict with the terms of the written policy.

ER did not violate Section 3.

1263 COMPENSATORY TIME
Written Policy

FRINGE BENEFITS
Compensatory Time
Written Policy

91-1148 Merrill v G & K Management Services, Inc.dba Regency Park Convalescent Center (1993)

EE claimed she was due pay for compensatory time earned for hours worked in excess of her normal 40 hour work week. ER claimed that she was considered part of the management and was expected to work in excess of 40 hours per week. ER also testified that EE was only told that if she missed any time, her pay would not be docked because of the additional hours she was working as part of management, but never mentioned anything about compensatory time. No credible written evidence was introduced by EE showing that she was due pay for compensatory time. Also, no written contract or policy was produced covering this benefit.

ER did not violate Section 3.

Also see General Entry XI.

1264 FRINGE BENEFITS
Sick Pay
Written Contract/Policy

VACATION
Written Contract/Policy
Interpretation
Giving Meaning to All Provisions

90-1529 Hall v Foreign Adoption Consultants (1991)

EE claimed vacation and sick pay after separation from ER. However, written policy provided that sick and vacation days were cumulative, but had no cash surrender value at termination. EE argued that he was entitled to fringe benefits because he asked for them before separation. ALJ held that basic rules of construction require one to give meaning to all provisions in a policy, and that if EE's claim were allowed, the no cash surrender at termination clause would have no significance. However, because the policy did not require any specific steps before one claimed vacation pay, EE's request should have been enough. EE was awarded vacation pay for the time period between when he requested vacation pay and when the separation took place.

1265 FRINGE BENEFITS
Written Policy
Anniversary Date

VACATION
Written Contract/Policy
Anniversary Date

90-1530 Cline v Harco Graphics Products, Inc. (1991)

EE claimed he was due vacation pay from ER after separation. However, ER's written policy provided that EE must have worked past his anniversary date. Since EE was terminated prior to his anniversary date, he was not entitled to vacation pay.

ER did not violate Section 3.

1266 COMMISSIONS
Payment
After Separation
Not Addressed in Written Employment Agreement
Procuring Cause

WAGES
Commissions
Payable After Separation
Procuring Cause

90-1537 Widman v Ronnoco Associates, Inc. (1991)

EE claimed she was due commissions from ER for job placement. ER's written policy did not address how commissions would be paid when an EE leaves. But since commissions are a wage and not a fringe benefit, there does not need to be a written agreement for it to be enforced. See Section 1(f) and 3. Evidence from ER showing that commissions were only paid after the placement was permanent, was consistent with previous commission payments. EE presented no evidence to indicate otherwise.

ALJ held that since the placement was not permanent when EE left job, there was no violation of Section 5, and EE was not entitled to commission.

EE appealed decision to Ingham County Circuit Court, File No. 91-70061-AA, where the ALJ was reversed on the grounds that EE was the procuring cause of the placement and therefore, entitled to commission. Circuit court was affirmed by the Michigan Court of Appeals in Widman v Ronnoco Associates, Inc.dba Management Recruiters of Lansing, an unpublished decision, No. 158691. The Court of Appeals relied on Reed v Kurdziel, 352 Mich 287; 89 NW2d 479 (1958), and Shortt v Centri-Spray Corp, 369 Mich 303; 119 NW2d 528 (1963). These cases hold that a party is considered a procuring cause if the commissioned agent was the primary reason for a transaction being successful. If a party is found to be the procuring cause they are entitled to a fair share of the principle's realized profits in accordance with their contractual agreement. The court found that EE successfully plead all of the elements necessary to fulfill the procuring cause test, and awarded her commission for the placement.

1267 WAGES
Paid in Full

90-1605 Turley v Direct Services, Inc. (1992)

EE claimed he was not paid for a week of work. A one week period was provided for EE to review his log books and submit evidence for a week he believed he made two trips, but was only paid for one. It was evident that EE was paid in full.

1268 COMMISSIONS
Payment
After Separation
Incomplete Sales
Profit on Sale

WAGES
Commissions
Payable After Separation

90-1610 Alferink v Colwell Equipment Company, Inc. (1991)

EE claimed he was due commissions for 5 different sales or rental agreements. The first sale was made before he was paid on a commission basis, thus he was denied commissions. EE was also paid commissions for two rental agreements he had secured and was therefore, not due any commissions. Another sale was considered incomplete because delivery had taken place after EE no longer worked for ER. EE was denied commission on the final sale on the basis that there was no profit. In each of these sales, no commission was due.

ER did not violate Section 5.

Also see General Entry XI.

1269 COMMISSIONS
Payment
After Separation
30-Day Policy
Verbal Agreement

WAGES
Commissions
Payable After Separation

90-1611 Rogers v Ability Search Group (1992)
90-1447

Two cases were consolidated for trial and decision. In the first case, EE claimed he was due commissions for employment placement services performed. EE was to be paid a straight commission of 50 percent if he was responsible for finding the client as well as placing the client. If a client was found or placed by someone else, the commission was to be 25 percent. EE claimed 50 percent for a particular placement, of which he only received 25 percent. However, it was shown that a different EE placed the client and EE was only due 25 percent.

ER did not violate Section 5.

In the second case, EE had no written agreement for the payment of commissions for placement of workers. The practice of ER was to pay for placements within 30 days of one leaving employment. The placement in question took place more than 30 days after EE ended his employment. EE claims he is due commissions anyway, while ER argued that there was no waiver of the 30-day policy and no commission is due.

ALJ held that ER did not violate Section 5 because the placement took place more than 30 days after EE left his job.

But see Widman v Ronnoco Associates, Inc., WH 90-1537 (1991), where circuit court and Michigan Court of Appeals discussed "procuring cause."

1270 RES JUDICATA

90-1614 Downs v Michigan Door & Installation, Inc. (1991)

There was a district court judgment in favor of ER for a wage claim. EE then brought wage claim before ALJ. This claim was barred because of res judicata, a legal principle which prevents the same parties from re-litigating the same claim already determined by a different court or judicial body.

1271 ADVANCES
Deductions

WAGES

Withheld
Advances

90-1631 Hampton v Donald Loew dba D & L Leasing (1991)

EE claimed to be due wages that were withheld because ER considered them as advances on wages. EE claimed he was due reimbursement for certain expenses incurred during his employment. However, he did not have receipts to prove his expenditures. Because of the lack of proof that the expenses were incurred, they were held to be advances on wages, and ER was not required to pay EE for any expenses.

ER did not violate Section 5.

Also see General Entry XIII.

1272 FRINGE BENEFITS
Written Policy
Vacation
At Separation

WRITTEN POLICY
Fringe Benefits
Vacation
At Separation

90-1673 Hempel v Rite Aid Corporation (1991)

EE claimed to be due vacation pay from ER. The written policy of ER stated that he could obtain the vacation pay, provided he was not terminated for willful misconduct and his resignation was accompanied by at least one full week's notice. EE did not provide a one week notice and it was determined that he left voluntarily because ER requested that EE attend a meeting, which EE refused to attend.

Therefore, ER did not violate Section 3, and EE was not entitled to any vacation pay.

1273 COMMISSIONS
Customer Contact

WAGE AGREEMENTS
Working Constitutes Agreement

WORKING
Continued Working for Amount Less Than Claimed

90-1681 Szafranski v Warners Supply, Inc. (1991)

EE claimed he was due commissions for all sales in his territory whether or not he made a call on the customer. However, EE was already informed that this prior procedure would not continue and he would not receive future commissions on accounts not contacted. EE knew in advance that the wage agreement had changed. While he was paid for accounts not contacted when he started, ER told him this would change. By continuing to work after this change, EE agreed to the change.

ER did not violate Section 2 or 5.

1274 COMMISSIONS
Payment
After Separation
Based on Profit

WAGE AGREEMENTS
Commissions
Based on Profit

90-1708 Rzewnicki v G T Einstein Electric, Inc. (1991)

EE had an agreement with ER for payment of wages and commissions, whereby EE would receive commissions for securing construction jobs. His commission check was dependent on the net profit received from securing the jobs. EE was unable to show that certain jobs resulted in profits. Therefore, no commission was due EE.

Also see General Entry XI.

1275 DETERMINATION ORDER
Amendment of DO
After DO Final

90-1709 through 90-1730 22 Complainants v Android Corporation (1991)

The Department issued a DO in favor of Complainants for unpaid vacation benefits. Neither party filed a request for review within the 14-day period allowed. The Bureau then sua sponte amended the DO to include three other Employers. All three filed motions to dismiss the amended DO on the basis that the original DO was final, conclusive and not subject to sua sponte amendment. The ALJ held that the original DO was final, conclusive, and that the Department did not have authority to amend the DO because neither original party filed a timely request for review.

1276 BURDEN OF PROOF
Unrebutted Testimony

EMPLOYER IDENTITY
Management Company

EMPLOYMENT RELATIONSHIP
EE/ER Relationship Not Found
Management Company

90-1731 Baten v Baron Company dba Bootleggers Uptown (1991)

Complainant claimed wages due from Respondent. According to unrebutted testimony of Respondent, Baron Company was a management company which had never used the name "Bootleggers Uptown" to designate any business, and complainant never worked for respondent. "Bootleggers Uptown" was not used to run any specific business, it was simply a name owned by Baron Company.

Respondent was not Complainant's ER and did not violate Section 5.

1277 COMMISSIONS
Draw Against Commission
Month to Month Carryover

90-1760 Trendell v Cobane & Associates dba Cobane Corporation (1991)

EE claimed commissions due for sales and vacation benefits. EE was paid on a draw versus commission, where he received a weekly draw whether he worked or not. Draws were carried over from month to month to year to year. EE submitted no evidence of commissions being credited to his account or that he was covered by any written policy. ER testified that EE had a deficit draw and that salespersons were not covered by any written policy.

The ALJ found that the ER did not violate Sections 3 or 5.

Also see General Entry I.

1278 COMMISSIONS
Draw Against Commission
Month to Month Carryover

WAGE AGREEMENTS
Commissions
Verbal

90-1796 Champagne v Material Technology Corporation (1991)

EE claimed commissions due for sales. EE was paid on a commission/draw basis, but he claimed he was employed at a salary plus commission. The terms of the wage agreement were not reduced to writing, but ER's business records showed that EE received a weekly draw and exceeded his draw with eared commissions.

ER did not violate Section 5.

Also see General Entry XI.

1279 FRINGE BENEFITS
Written Policy
Employment on Certain Day Required

VACATION
Employment on Certain Day Required

90-1812 Miller v Benteler Industries, Inc. (1991)

EE claimed he was due vacation pay because he was employed on January 1 when two weeks' vacation pay was to be awarded. ER's policy required that EE give 10 days' notice before resignation. EE gave the ten days' notice on December 18, making EE's last day of work December 29. EE argued that he was entitled to the vacation pay

because New Year's Eve was on a Sunday, and the work day before New Year's Day, Friday, December 29, was a paid holiday. Therefore, his employment relationship should be extended until January 1. However, it was determined that EE was not eligible to receive the vacation pay because the holiday payment he would have received on December 29 was really for December 31. Thus, his employment was effectively ended on December 29. He was not eligible to receive any fringe benefits because he was not employed on 1/1.

1280 COLLECTIVE BARGAINING AGREEMENT (CBA)
Arbitrator's Decision

JURISDICTION
Arbitrator's Decision

89-1795, 90-1896 **Richards v Peninsula Asphalt Corporation** **(1991)**

DO was issued by the Department finding Respondent not liable for unpaid wages. The Department claimed there was no jurisdiction over the claim because it is based on an arbitrator's judgment, and Act 390 does not cover enforcement of an arbitrator's decision. Complainant contended that his readiness to work for Respondent satisfies the Act's requirement for labor or services. Complainant also argued that no interpretation of the CBA was necessary since no appeal was taken from the arbitrator's decision. The ALJ held that Act 390 does not cover back pay ordered by an arbitrator. Thus, there was no jurisdiction to hear the claim.

Also see General Entry XV.

1281 WAGE AGREEMENTS
Dispute
Appraiser v Office Work

90-1872 **Town v Robert Christian dba Michigan Construction Co** **(1991)**

EE claimed he was hired at $8 per hour to be an appraiser. ER claimed EE was only paid $4 per hour because he did not perform the duties of an appraiser. The ALJ determined that EE was to be paid $8 per hour when he performed the appraiser's duties, and $4 per hour when he worked in the office. Since EE worked basically in the office, he was properly paid $4 per hour.

ER did not violate Section 2 or 5.

1282 ADMINISTRATIVE LAW JUDGE
Unable to Write Decision

FRINGE BENEFITS
Vacation
Written Contract/Policy

VACATION
Work Requirement

90-1876 Cederquist v Great Lakes Catering dba Pier III (1991)

The ALJ who conducted the hearing could not write the decision due to Department personnel changes. Another ALJ reviewed the transcript and issued a decision.

EE claimed she was due two weeks' vacation pay for meeting the length of service requirements in ER's written policy. The policy provided one week's vacation pay after one year of service and two weeks' for three years of service. EE did not work three years and was only due one week's vacation pay.

Also see General Entry XVIII.

1283 COMPENSATORY TIME
Written Policy

FRINGE BENEFITS
Compensatory Time
Written Policy

91-1150 Guzyulak v Children's Aid Society (1993)

EE claimed he was due pay for compensatory time that was earned but not taken. ER's written policy provided that EE would lose any time unused during the designated time frames, and if EE were to voluntarily terminate his employment, he would forfeit any unused compensatory time. EE voluntarily terminated his employment before he was able to use compensatory time. Therefore, he forfeited compensatory time in accordance with ER's written policy.

Also see General Entry XI.

1284 EMPLOYMENT RELATIONSHIP
EE/ER Relationship Not Found
Truck Driver

91-1369 Cass v Gertrude Kamer dba H-K Distribution (1993)

Complainant was a truck driver who claimed he was not paid for certain deliveries. Respondent claimed they were not Complainant's ER and owed any wages. The ALJ determined that even though Complainant filled out a W-4 and an application for Respondent, he was not Respondent's EE. Complainant's written employment contract was unclear as to whether his relationship as an EE was to the truck owner or to Respondent. Therefore, it was held that Complainant was not Respondent's EE.

Also see General Entry XI.

1285 FRINGE BENEFITS

Verbal Promise to Pay

VACATION

Verbal Agreements

91-1819 Sweeney v LBG Corp dba Lou's IGA & Family Center (1993)

The only written statement regarding vacation stated Complainant would receive two weeks' vacation after one year of employment. EE claims two weeks' vacation after finishing two years. Section 3 requires an ER to pay fringe benefits, including vacation, in accordance with a written policy. Neither the Department nor ALJ may fill in or add language to a written policy. This is true even if the ER verbally told EE she would receive a vacation payment after two years and even if a payment makes sense from the available written policy.

Also See General Entry I.

1286 EMPLOYMENT RELATIONSHIP

Company President As ER

INDIVIDUAL v CORPORATE LIABILITY

91-1393, et al Jones, et al v Roger W Higgins and R Higgins Associates, Inc (1993)

The Department had found that Respondent was in violation of Act 390, but Respondent Higgins claimed that he was not personally liable for the violations because he was not the ER. The ALJ found that stockholders and corporate officers could be held liable for the wage responsibilities of the corporation itself, because persons who acted directly or indirectly in the interest of an employer were, in addition to the corporation for whom they acted, employers within the meaning of Section 1(d) of Act 390. A preponderance of the evidence confirmed that Respondent Higgins exercised ultimate control over the course of corporate Respondent's activity and that he acted in the interest of the corporate Respondent in relation to its employees.

Therefore, Respondent was the ER, and violated Sections 3, 5, 7, and 9.

See also General Entry VII and XIX.

The Wayne County Circuit Court affirmed the ALJ. The court noted:

Numerous federal cases have held an officer or shareholder of a corporation personally liable to pay the wages of corporate employees where the officer or shareholder exerts significant managerial control over corporate affairs. As an exception to the general

shield from liability provided by the corporate form, "Congress has in effect provided that for the purposes of the Act any person who acts directly or indirectly in the interest of an employer in relation to an employee shall be subject to the same liability as the employer." Schulz v Chalk-Fitzgerald Construction Co, 309 F Supp 1255, 1257 (DC Mass, 1970).

> A managing agent such as a corporate officer who actively participates in the management of a business regarding the employment practices prevailing in the business is an employer within the meaning of section 3(d) of the Act, and he is liable along with the corporation or other business entity to be restrained from further violations and to be jointly and severally restrained from failing to make restitution of back wages due under the Act.
>
> Usery v Godwin Hardware, Inc, 426 F Supp 1243, 1266 (DC Mich, 1976).

Although there exists no Michigan Court of Appeals of Michigan Supreme Court cases construing the statute, the federal cases cited above are persuasive authority in that Michigan Payment of Wages and Benefits Act and the federal Fair Labor Standards Act are similar in purpose, and in that the federal cases involve facts nearly identical to the case at bar. Further, review of the statutory definition of "employer" under the Michigan Act leads to the conclusion that Higgins was an employer, along with RHAI. A court cannot contort unambiguous words of a statute to be beyond their plain and ordinary meaning. People v Love, 425 Mich 691 (1986). Contrary to Higgins' assertion, individual liability is not an alternative under the literal language of the statute, but a companion to corporate liability. Further, a statute must be construed to avoid unreasonable consequences or an absurd interpretation. Acco Industries, Inc.v Dept of Treasury, 134 Mich App 320 (1984), *lv den* 421 Mich 857 (1985). In the case at bar, it is reasonable to conclude that the president of a corporation, owning a majority of the voting stock, having the power to hire, and having informed complaints of the corporation's close of business is an employer within the meaning of the statute.

1287 ADVANCES
Deductions
Embezzlement

DEDUCTIONS
Required or Permitted by Law

EMBEZZLEMENT
Restitution Ordered

91-1427 Miller v Tower Motel (1993)

EE was embezzling money from her ER. EE was sentenced and ordered to pay $500 restitution to ER, and then claimed she should be paid her wages. However, she embezzled substantially more than $500. The ALJ found that Act 390 and public policy mandated an interpretation that civil and criminal proceedings are constructive authorization allowing the ER to credit the wages, and that the ordering of restitution is certainly a deduction required or permitted by law as contained in Section 7. Also, the monies embezzled were found to be at least an advancement of her wages. ER did not violate Section 5.

1288 ADVANCES

Deducted From Final Pay
Work Not Performed

WAGES

Withheld
Work Not Fully Performed
Work Not Completed

91-1460 Sutphen v Bradley Bird (1993)

EE was a truck driver who was to deliver goods and receive a certain percent of the gross receipts for the load. ER advanced EE $1,000 for expenses. EE then refused to take the trip because he thought there would be a five-day lay-over. It cost ER an additional $500 to pay someone else to make the trip. EE contends he is due the gross receipts for the trip, while ER claims he is not because he did not perform the work, and he was advanced $1,000. The ALJ found EE should not have been paid for work he did not perform.

ER did not violate Section 5.

1289 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

91-1492 & 93-1112 Miller v The Data Factory, Ltd (1995)

Complainant claimed that she was due commissions from Respondent. Whether commissions were due depended on whether Respondent was Complainant's ER. Respondent arranged for loans for the company, the company's headquarters moved to a building owned by Respondent's husband, Respondent suggested personnel changes which were implemented, and Respondent was making changes in company goals. The ALJ found that these actions showed ER acting directly or indirectly in the interest of an ER. Therefore, Respondent was ordered to pay commissions due to Complainant.

The ALJ's decision was affirmed by the Wayne County Circuit Court. The court held that Respondent's claim that the "economic reality test" should be used to determine liability was incorrect because that test was not helpful in analyzing the statute. The only real question was whether Respondent was acting directly or indirectly in the interest of an employer. The court held that the ALJ was correct in finding that a steadily increasing exercise of ownership prerogatives was evidenced, and Respondent was liable for the commissions due complainant.

1290 EXEMPLARY DAMAGES

Discretionary

91-1495 Kania v A Child's Garden, Inc (1993)

EE claimed she was due unpaid wages. During the prehearing conference, ER agreed to pay the amount ordered in the DO. However, EE desired to pursue her claim at the hearing for purposes of claiming exemplary damages, which may be awarded if ER violated Sections 2, 3, 4, 5, 6, 7, or 8 flagrantly or repeatedly. Ordering ER to pay exemplary damages is based upon the discretion of the ALJ. No evidence was presented that ER flagrantly or repeatedly violated Section 5 as EE claimed.

1291 CLAIMS

Twelve-Month Statute of Limitations

Begins After Alleged Violation

COMMISSIONS

Payment

After Separation

Procuring Cause

JURISDICTION

Statute of Limitations

Commissions

91-1493 Ahonen v R P Collection Corporation (1993)

EE claimed he was due commissions for sales made. The Department held that his claim was unenforceable because the period of the alleged violation exceeded the 12-month jurisdiction it was granted by Section 11(1). However, the ALJ found that the statute of limitations did not begin to run until the day following the scheduled payment date for the monies claimed by EE. After jurisdiction was found by the ALJ, it was also determined that EE was the procuring cause of the sales for which he claimed he was due commissions. In Reed v Kurdziel, 352 Mich 287; 89 NW2d 479 (1958), Short v Centri-Spray Corp, 369 Mich 303; 119 NW2d 528 (1963), and Widman v Ronnoco Associates, Inc.dba Management Recruiters of Lansing, an unpublished decision, Michigan Court of

Appeals No. 158691, it was held that a party is considered a procuring cause if the commissioned agent was the primary reason for a transaction being successful. If a party is found to be the procuring cause, they are entitled to a fair share of the principle's realized profits in accordance with their contractual agreement. Since he was the procuring cause of the sales claimed, he was entitled to the commissions.

1292 FRINGE BENEFITS
Written Policy
Vacation
Employment on Certain Day Required

VACATION
Written Contract/Policy
Employment on Certain Day Required

WRITTEN POLICY
Fringe Benefits
Vacation
Employment on Certain Day Required

91-1494 Martin v Milford Fabricating Company (1993)

EE claimed he was due vacation pay from ER. ER's written policy for vacation pay provided that an EE must be employed for one full year on their anniversary date to be eligible for vacation pay. EE was looking for another job while on his vacation, but never notified anyone that he had accepted another job nor had he sought prior approval to work elsewhere during his vacation. ER's written policy also provided that if EE worked in any occupation without prior management approval, he would be terminated. EE did not tell anyone of his intent to work elsewhere until two days after his anniversary date, which coincidentally was the essential element of his receiving vacation pay. ER's written policy also provided that an EE who quits or is discharged prior to his anniversary date forfeits his vacation pay. EE began working with another ER four days prior to his anniversary date, thus severing his employment with ER, and forfeiting any vacation pay.

Also see General Entry XI.

1293 FRINGE BENEFITS
Vacation
Written Contract/Policy

VACATION
Written Contract/Policy
Payment at Separation

91-1501 Kinsey v Skillman, Boyle & Pollack (1993)

EE claimed he was due vacation pay in accordance with ER's written policy. EE had earned vacation, but ER's policy did not address the issue of what happens to earned vacation time of an EE when the EE quits or is terminated before taking earned vacation time. The ALJ held that EE terminated his employment before taking the remaining vacation time, and because he was no longer an EE he lost his remaining unused vacation time.

1294 EMPLOYMENT RELATIONSHIP
ER/EE Relationship Found
Tanning Salon

WAGES
Full Amount Not Paid
At Separation
Theft

91-1517 <u>Koenig</u> v <u>Leisa Krieger dba Sun Tan Hut</u> (1993)

EE claimed she was due wages from ER. EE was paid an hourly wage, from which taxes were not taken out. EE was expected to keep track of her hours, but ER claimed that she never informed her as to how many hours she actually worked. ER then stopped paying EE when she believed her to be stealing certain products, and then ultimately fired her. Uncontroverted and credible testimony provided by EE indicated that an ER/ER relationship was present. But ER failed to keep employment records. The EE's claim of hours was accepted.

ER violated Sections 5 and 9.

Also see General Entries XI and XVII.

1295 COMPENSATORY TIME
Written Policy

WRITTEN POLICY
Compensatory Time

91-1527 <u>Spoolstra</u> v <u>Alcohol Outpatient Services, Inc.</u> (1993)

EE claimed unpaid wages from ER. He claimed that since he was entitled to five days of compensatory time, ten days of vacation, two days of holiday pay, plus two and one-half more days of vacation for his quarterly anniversary, he should have been paid for this time after his last day of work. ER had no written policy as to how compensatory time was calculated, and there was no evidence submitted to support EE's contention that he

was due any compensatory time. Also, it was determined that EE started his employment three days later than claimed, because his employment began when his first pay period began, not when he had attended a company orientation session three days earlier. No evidence was presented to indicate that whatever accumulated time which may have existed, be it vacation, compensatory time, or whatever, was required to be used to extend the period of employment beyond the last actual day worked, and thus no wages were due EE.

See also General Entry XI.

1296 DISABILITY INCOME

FRINGE BENEFITS
Disability Income

91-1540 Hershock v Hudson & Muma, Inc. (1993)

EE claimed she was due disability pay from ER while she was on medical leave. EE informed ER that she would be moving out-state, at which ER told her to just give her two weeks' notice. In the meantime, EE went on medical leave, which qualified her for nine and one-half weeks of full wage pay. EE sold her house and moved, left no forwarding address, and failed to give ER two weeks' notice. The ALJ held that even though EE was entitled to the full nine and one half weeks of pay, the ER was within his rights to terminate EE's disability pay early when he was not provided with EE's disability status or whereabouts. EE violated Section 3 by reducing EE's disability pay for two pay periods.

1297 FRINGE BENEFITS
Forfeiture
Written Policy
Vacation

VACATION
Forfeited
Written Contract/Policy

91-1541 Hawkins v Fred Silber Co, Inc. (1993)

EE claimed vacation pay from ER. ER's written policy stated that any unused vacation time at time of separation is forfeited. Compensation will not be given for unused vacation time. EE was discharged before he used any earned vacation time. Therefore, in accordance with ER's written policy, no vacation pay was due.

ER did not violate Section 4.

1298 WAGES PAID

Time and Manner of Payment

91-1542 & 91-1608 **Kaczynski & Blake v Macomb County** **(1993)**

EEs claimed they were due wages as a result of ER incorrectly calculating their wages for a whole year. ER contended that no wages or fringe benefits were due and to either EE pursuant to its established payment policy. The ALJ held that no wages or fringe benefits were due, because a divisor of 26.09 for a biweekly pay period is fair, when one considers that dividing an annual wage by 26 biweekly pay periods would result in a wage overpayment.

ER did not violate Section 2.

Also see General Entry XI.

1299 WAGES

Full Amount Not Paid

Canceled Checks

91-1600 **Williams v Theio's Restaurant II, Inc.** **(1993)**

EE claimed he was due wages for work performed before he was incarcerated. ER claimed that the checks were issued and EE's mother picked them up. However, ER was unable to produce any canceled checks or any other evidence that indicated EE was paid. The ALJ held that ER violated Sections 2 and 5.

Also see General Entry XI.

1300 FRINGE BENEFITS

Written Agreement

Waiver

VACATION

Waiver

Consideration

WRITTEN POLICY

Vacation
Waiver
Consideration

91-1655 Hinnegan v The Columbus Auto Parts Company (1993)

EE claimed he was due unpaid vacation pay. ER contended that EE was entitled to vacation pay based upon an undated "Release and Agreement Regarding Severance Payment," which was signed by both parties. According to that waiver, ER was released from any and all claims to which EE may have been entitled in consideration for the payment of $46,739.79, part of which was acknowledged to have been received and the balance to be paid shortly thereafter. Therefore, the consideration for EE's waiver was bifurcated into a condition precedent, the initial payment, and a conditio subsequent, the payment of the balance. Unless both of the conditions were met, there would be failure of consideration for EE's waiver. According to EE, the payment was never made, which meant a lack of consideration for the waiver, leaving it unenforceable.

ER violated Sections 3 and 5.

See also General Entry XI.

1301 WAGES PAID
Time Worked
Absenteeism

91-1656 Parker v Richard Joseph Collins (1993)

EE claimed she was due unpaid wages. ER contended that EE was not entitled to wages because she was not at work for the days claimed. ER submitted evidence showing EE was fired for poor attendance and that she had previously missed work for long periods of time. ER also submitted canceled checks showing that EE had been paid for the hours that she had worked.

The ALJ held that ER did not violate Sections 5 or 9.

1302 ARBITRATION
Arbitration v Statutory Rights of Act 390

VACATION
Conflict in Written Policies
Written Contract/Policy
Interpretation

91-1659 & Ehresman and Nickol v Bultynck & Co, PC (1994)

91-1660

EE claimed he was due vacation pay based upon ER's written policy. ER contended that the principal employment agreement contained the entire agreement of the parties, and that its explicit language provided that it was not binding upon either the shareholders/owners or the ER. The agreement also contained no references to vacation time usage or payment. The ALJ found that the provisions of ER's principal employment guide superseded the personnel manual. When looking at the words which gave meaning to the provisions of the personnel manual and the principal employment guide, it was evident that the provisions in each were similar enough to be used interchangeably.

ER also contended that according to the principal employment agreement, any disputes arising from the contract of employment were to be resolved by arbitration. The ALJ held that the arbitrator's ruling was of no consequence in this case because an EE's statutory rights might not be adequately protected in arbitration where an arbitrator's specialized competence pertains primarily to the law of the subject document and not to the statutory law which was the issue. Because an arbitrator effectuates the intent of the parties rather than the statute, the ruling may be inimical to the public policies underlying Act 390. As a result, an arbitrator may not be competent to interpret and apply statutory law.

The ER failed to establish that its written vacation policy was not applicable to EE, and is in violation of Section 3.

Also see General Entry XI.

1303 DEDUCTIONS

Gratuitous Payment

DETERMINATION ORDER

Amendment of DO

At Hearing

By Department

91-709 & 91-1694 <u>Bowers</u> v <u>Camp Leelanau/Camp Kohanna</u> (1992)

As a result of a prehearing conference between Department and Respondent, the Department was granted a motion to amend their DO to find no violation of Section 7, and no monies due to Complainant. This was based on a further review of records which showed the alleged deduction from EE was not made from a wage payment, but rather a gratuitous payment given to Complainant after she left Respondent's employ. It was a payment made in the hope that the separation from employment could be amicable.

1304 WAGE AGREEMENTS

Dual Classification

WAGES
Full Amount Not Paid
Dual Classification

91-1699 Johnson v City of Detroit (1993)

EE claimed he was due unpaid wages. EE provided unrebutted testimony that he was supposed to make $.70 more an hour when working under a different classification. The ALJ held that his rate of pay was the higher amount claimed by EE. Thus, he was due unpaid wages for times when he worked under the different classification. ER violated Section 2.

1305 EMBEZZLEMENT
Convicted But Not Sentenced
Restitution Ordered

WAGES
Withheld
Embezzlement

91-1704 & 91-1705 Rogers v Lochmoore Mechanical, Inc., and Brentwood Plumbing & Mechanical, Inc. (1993)

EE claimed unpaid wages from ER. EE was ER's office manager and was in charge of preparing the payroll. ER stopped payment on checks issued to EE when it was discovered that she had been stealing from the company by giving herself excess pay. While EE was stealing, she destroyed the payroll records. The ALJ held that wages were not due because they were not ascertainable without payroll records.

ER did not violate Section 5.

1306 BONUSES
Written Contract/Policy/Agreement

COMMISSIONS
Payment
After Separation
Procuring Cause
Procuring Cause

FRINGE BENEFITS
Bonuses/Incentive Pay
After Separation

91-1708 Scholle v Pony Express Courier Corp (1993)

EE claimed she was due commissions for sales made before she left ER. The ALJ held that EE was the procuring cause of the sales for which she claimed she was due commissions. In Reed v Kurdziel, 352 Mich 287; 89 NW 2d 479 (1958), Short v Centri-Spray Corp, 369 Mich 303; 119 NW2d 528 (1963), and Widman v Ronnoco Associates, Inc.dba Management Recruiters of Lansing, an unpublished decision, Michigan Court of Appeals No. 158691, it was held that a party is considered a procuring cause if the commissioned agent was the primary reason for a transaction being successful. If a party is found to be the procuring cause, they are entitled to a fair share of the principle's realized profits in accordance with their contractual agreement. Since EE was the procuring cause of the sales claimed, she was entitled to the commissions.

The ALJ also held that the subject matter of the hearing was truly an issue of a bonus and not of a commission, because the term bonus was often used interchangeably with commission. ER contended that the commissions/bonuses were not due because they had a policy of not paying an EE once they left their employment. However, the policy of not paying someone the bonus because they left their employment was not in writing. ER's written policy did provide for the payment of the bonus if the EE was eligible to receive it. In this case, EE was eligible to receive the bonus and payment was not received. Since a bonus is a fringe benefit, it must be paid in accordance with the written policy. In this case, ER's alleged policy of not paying an EE who left their employment was not reduced to writing. According to ER's present written policy, EE was entitled to the commission/bonus, and ER violated Section 3.

Also see General Entry XI.

1307 FRINGE BENEFITS
Written Policy
Vacation

VACATION
Written Contract/Policy
Paid in Advance

91-1709 Smith v Joe Randazzo's Fruit Markets, Inc (1993)

EE claimed he was due vacation pay in accordance with ER's written policy. According to written policy, EE was eligible for vacation pay. However, the vacation pay was paid early upon EE's request. ER presented evidence that checks for payment of vacation pay were issued and cashed for the periods EE claimed. Therefore, no vacation pay was due EE.

Also see General Entry X.

1308 BURDEN OF PROOF

Burden Not Sustained

Hearsay

WAGES

Full Amount Not Paid

At Separation

No Records Presented at Hearing

91-1778 Gresser v Great Lakes Office Systems, Inc (1993)

EE claimed he was due unpaid wages. ER's witness provided an unsigned letter which stated that EE was to be paid by straight commission. The witness also stated that no check was provided for a week's pay for EE, and that EE owed a telephone bill. ER did not produce any payroll records. ER's witness was not the record keeper, had no knowledge of the employment agreement between EE and ER, and was employed six months after EE left his job. The mere hearsay of the witness stating that no check was prepared for EE is insufficient proof that EE was not entitled to a salary for the week claimed.

ER violated Section 5.

1309 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Not Found

Personal Service Contracts

91-1786 Lloyd v Ingram Sales, Inc (1993)

Complainant claimed he was due wages from Respondent based on the fact that he was hired by his father, one of the company's corporate officers. Respondent contended that the only employees working for the company were the corporate officers and everyone else involved with the company were individuals on personal service contracts. Respondent also claimed that none of the corporate officers ever hired Complainant. Complainant contended that his father gave him the authority to determine the amount to be charged for his services. Complainant's claim that he was hired by his father was completely unsupported. He never provided any records or his father's testimony to support his claim. All other aspects of his claim were rebutted by Respondent. The ALJ held that Respondent was not an ER and no wages were due Complainant.

Also see General Entry X.

1310 FRINGE BENEFITS

Written Policy

Sick Pay
Vacation

VACATION
Written Contract/Policy
Ambiguous
Forfeiture

WRITTEN POLICY
Sick Pay
Vacation
Ambiguous
Forfeiture

91-1787 **Roe v Barton Malow Rigging Co** **(1993)**

EE claimed he was due vacation pay and sick pay from ER. According to ER's written policy, the calendar year is from January 1 through December 31, and any vacation time unused by December 31 is forfeited. It also indicates that an EE with two to six years of employment earns ten vacation days per year. EE testified that the secretary would tell him exactly what his vacation time balance was and that she indicated that vacation was earned for the prior year and if not used by the next year would be lost. ER contends that vacation which is earned but not used during the calendar year is forfeited. EE's interpretation is slightly different. His contention that vacation benefits, earned in one year, are to be taken in a subsequent year is reasonable. EE was denied sick pay because it was not a payable benefit at separation. The ALJ held that EE was entitled to vacation pay because of the credible testimony of EE and the ambiguity of ER's written policy.

Also see General Entry XI.

1311 DEDUCTIONS
Court Judgment
DO Offset

91-1807 **Stout v Land's End Marina, Inc** **(1992)**

ER admitted that he deducted $1,000 from EE's check without written authorization. The ALJ found him to be in violation of Section 7. However, the DO was offset by a court judgment in favor of EE for the same deduction already claimed, meaning ER did not have to pay for the wrongful deductions again.

1312 BURDEN OF PROOF
Unrebutted Testimony

WAGES
Full Amount Not Paid
At Separation

91-1872 thru 91-1874 & 91-1876 **Carey, et al v Cameron Technical Design Corp** **(1993)**

Complainants claimed they were due unpaid wages from ER. ER did not show up at hearing and Complainants' unrebutted testimony that each worked for ER and received part payment for work performed until discharged, as well the calculations for wages due, was accepted by the ALJ.

ER violated Section 5.

1313 BURDEN OF PROOF
Unrebutted Testimony

WAGES
EE Entitled to as Long as Available to ER
Full Amount Not Paid
After EE Death

91-1879 **D'Aloisio v D'Aloisio's, Inc** **(1993)**

Complainant-decedent claimed unpaid wages due from ER. Decedent was hospitalized during his term of employment. During his absence from employment, he was still performing generally all of the matters pertaining to the restaurant's operation from his hospital bed. ER did not pay him for this period of absence from work. ER did however, accept his services and the restaurant continued to operate even though decedent was not physically present at the premises.

The ALJ accepted this unrebutted testimony of decedent's daughter and held that ER violated Sections 2 and 5.

1314 BURDEN OF PROOF
Appellant
Burden Sustained
Testimony
Unrebutted Testimony

EMPLOYEE
Evidence

97-1089 Saquet v Product Sol, L L C (1998)

The Department's DO found a violation of Sections 2(3) and 5(2) and ordered payment of $19,944.13, wages due. The ALJ found a violation of Section 5(2) but not 2(3) and reduced the wages due to $2,500, the EE's last semimonthly salary. This finding was made based on the credible, unrebutted testimony of Respondent's General Manager that EE was paid on a regular, semimonthly pay period as required by Section 2(3). The wages found due covered Complainant's last check withheld until he returned files allegedly kept by Complainant.

The Complainant claimed wages at the rate of $5,000 per month from January 1996 through May 1996 and during October 1996, but the ER contended Complainant was an EE only from May through October 1996. The ALJ found employment only from May 1996, when he was hired by Respondent's Chief Operating Officer. It was at that time that Complainant filled out tax withholding forms, a direct deposit form, a group insurance enrollment card and a medical insurance application. This evidence plus portions of Complainant's testimony belied the existence of an EE/ER relationship before May 1996. The ALJ found the Respondent's presentation to have met its burden of proof as stated in Administrative Rule R 408.22969 except for the withholding of Complainant's last check which was a violation of Section 5(2).

1315 DEDUCTIONS

Advances

Resignation

Personal Use

REHEARING

Denied

97-1059 Garcia v Oraymart, Inc (1998)

ER appealed a DO which found a violation of Section 7. EE and the Department did not appear at the hearing.

EE worked for one month as a truck driver. On his second run, EE left the truck and contents in Michigan on a run from the west to the east coast. ER had to find and pay a second driver to complete the trip. During this last run, EE took a $2,100 in cash advances. If he had completed the trip, he would have earned $1,692.

The ALJ found, based on ER's unrebutted testimony, that the wages withheld were an offset or repayment for cash advances taken by EE and not deductions prohibited by Section 7. The DO was modified to find no violation of Section 7 and no money due to EE.

EE's request for rehearing was denied. The ALJ found the record adequate for judicial review as required by Section 87(2) of the APA. EE's assertion of a misunderstanding in a telephone conversation with the ALJ was rejected. "Even if, in fact, there had been a bad connection at Complainant's end of the conversation, nothing in our conversation even remotely suggested an adjournment or cancellation of the hearing."

See General Entry IV.

1316 COMMISSIONS

After Discharge
Change Without Notice to EE

97-2003 Pratt v Glassman Oldsmobile-Saab-Hyundai, Inc (1998)

EE appealed an adverse DO and claimed August 1996 commissions of $2,500 from his job as a used car sales manager and Hyundai new car manager. EE earned a monthly draw of $3,000 against commissions which were 5 percent on used cars and 1/2 percent on new cars. EE also earned a bonus on the sale of 40, 50, and 60 used cars in a month. EE was terminated 8/22/96.

The ALJ rejected ER's position that ER managers are only paid on a monthly basis and not for a partial month. The ALJ noted that it is not reasonable to expect one to work knowing that at any time they could be discharged and receive nothing for the month of the discharge. Moreover, this condition was never mentioned by ER until after the discharge. ER was found in violation of Section 5 and ordered to pay EE $2,500 plus the 10 percent per annum interest amount provided in Section 18(1)(c).

1317 COURT ACTIONS

Circuit Court Appeal
Costs

DEPARTMENT

Appearance at Hearing

DETERMINATION ORDER - ISSUANCE WITHIN 90 DAYS

EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found
Truck Driver

HEARING

Department Appearance

98-34/99-225 Ripepe v American Way Transport, Inc (1999)

The Department found no employment relationship during the claimed period. The Complainant appealed and was the only party present at the hearing. The ALJ applied the tests set forth in Askew v Macomber, 398 Mich 212 (1978) and concluded that Complainant was an EE for the period 11/6/96 through 1/31/97. EE was hired by ER at the rate of 28 cents per mile. ER's dispatcher told EE where and when to drive and provided the tractor EE drove. The tractor had ER's name on the side. EE reported daily to ER. EE was never paid so there was no history of payment to show an employment relationship. EE was not employed by any other company during his relationship with ER. Based on EE's unrebutted testimony, the ALJ found EE due $4,000.

Respondent's rehearing request was denied based on a presumption that the Notice of Hearing was received.

Respondent appealed and the Wayne County Circuit Court reversed the ALJ and remanded for further hearing. The court awarded costs to Respondent.

After a further hearing attended by both the Respondent and Complainant but not the Department, the ALJ denied Respondent's Motion to Dismiss because the Determination Order was issued more than 90 days after the complaint was filed. See Section 11(3). As noted in ¶219 and ¶424 of this Digest, the 90-day requirement is procedural not jurisdictional. Dismissal of DO's under these circumstances will not provide for settlement of wage and fringe benefit disputes and will deprive all parties of rights expressly provided in the Act. Respondent's Motion to Dismiss because the Department was not present at the hearing was also denied.

The ALJ reversed his prior decision and affirmed the original DO finding Complainant was not an employee of Respondent, American Way. Sanjay Transport signed an independent contractor agreement with Respondent. Sanjay was to deliver cargo for the carrier, American Way. Complainant was to drive the truck owned by Sanjay. Sanjay had the ability to hire, fire, or terminate Complainant and ultimately did so when Sanjay went out of business. Also, Complainant's driver's pay sheet showed Ashook as the owner. Ashook was the owner of Sanjay. Respondent only issued Comchecks after authorized by Sanjay. All fuel charges, permits, or fees were deducted from amounts paid by Respondent to Sanjay.

Also see General Entries VII and XXI.

1318 EMPLOYMENT RELATIONSHIP
EE/ER Relationship Found

REHEARING
Denied
Request for Adjournment

98-33 Parish v Innovative Media Services, Inc (1998)

The Department found no employment relationship during the claimed period. The Complainant appealed and presented unrebutted, believable testimony. The ALJ applied the tests set forth in Askew v Macomber, 398 Mich 212 (1978) and concluded that Complainant was an EE. EE answered an ad at a local community college and was interviewed by ER's manager. The president later sent a letter hiring EE at a specific wage plus benefits. EE was trained at ER's place of business and told by the president that he had no money to pay him. The ALJ found wages due for the period 2/13 through 2/18/97, and a violation of Sections 2 and 5 of Act 390.

Respondent filed a request for rehearing, claiming he requested an adjournment of the hearing. The request was denied. It was unreasonable for Respondent to assume the hearing had been adjourned without notice from the ALJ. Respondent's request had not been received by the ALJ.

See General Entry VII.

1319 EVIDENCE
Parol Evidence

SALARIED EMPLOYEE

TEACHERS
Daily Rate
Salaried
Written Contract
Parol Evidence

WRITTEN CONTRACT
Teachers

98-177 Fulks v Williamston Community Schools (1998)

EE entered into a written contract with ER for the period 7/1/97 through 6/30/98 at a specific salary over 26 pay periods. The contract included 20 vacation days for the year provided these were not taken when school is in session. He began receiving salary payments on 7/3/97 and every two weeks thereafter. His last actual day of work was 8/8/97. But he took one week's vacation from 8/11 through 8/15/97, the day of his resignation. ER refused to pay EE his last two weeks, arguing that he had been paid more than his "daily rate." This was computed by dividing his salary by 225, the number of days the contract required him to work during the year.

The ALJ found that Complainant was a salaried EE and must be paid for each week employed. This included his last two weeks. The contract was clear and did not include a

"daily rate" computation. Parol evidence cannot be used to add to, vary or contradict a clear contract.

The case was appealed to the Ingham County Circuit Court. Judge Glazer found EE due $67,044 for 225 days or a $297.97 daily rate. EE is due only for days actually worked. EE was found due 2 ½ vacation days, 15 work days, and 1 paid holiday. At the daily rate, EE was due $5,512.45. Since he had been paid $7,735.86, no further amount was due.

1320 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

Economic Reality Test

98-11 Berrington v E Pieter Stammis dba Stammis Construction, Inc. (1998)

The DO found violations of Sections 5(1) and 9(3) and found wages due of $1,110. Respondent disputed this finding by presenting testimony that Complainant was an independent contractor hired to work as a laborer at $7.50 per hour. Respondent presented a statement of hours given to him by Complainant. This statement covered 3/19 through 3/28/97 for 58.40 hours. It also contained Complainant's social security number, driver license number and number of claimed dependents. Complainant began working for Respondent immediately after resigning from a job paying $12 per hour and for which Complainant had worked for 15 years.

The ALJ found that the Complainant was an EE, not an independent contractor, after applying the tests established by Askew v Macomber, 398 Mich 212 (1978), because Stammis told EE to provide his number of dependents so that proper deductions could be taken. Also, Stammis directed EE's activities, including training, and he also provided tools for EE. Although no wages were paid, EE was promised wages. ER had the authority to discipline or discharge. Finally, EE's activities were an integral part of ER's business.

The number of hours found due was reduced because EE could not produce more than the one hour's statement given to ER. Also, EE's testimony of time worked conflicted with the claim form. Although EE argued he gave more than one statement to ER, it seems likely that Stammis would have produced it as he did the first statement. The ALJ found EE due a pay rate of $10 per hour since he just left a job paying $12. Also, Stammis testified that he was considering EE for a possible partnership. This was not the typical new EE starting out as a laborer. The amount due was found to be $580.40. Section 2 was added as having been violated because ER didn't pay EE in a regular periodic manner.

1321 VACATION

ER Failed to Approve

98-114 **Calka v Delivery Systems of America** **(1998)**

The ALJ found vacation due EE based on ER's written policy. EE was prevented from taking a vacation due to understaffing. See General Entry XVIII.

1322 VACATION

Break in Service
On Certain Day Required
Policy Changed
Sale of Business

98-132 **Kotsull v Tenneco Automotive, Inc** **(1998)**

ER's vacation policy required accrued time be taken by June 30 of each year. EE had to be employed on June 30. EE resigned on 5/30/97 and claimed vacation earned from 2/1/97 to 5/30/97. ER purchased Clevite where EE worked before 2/1/96, but ER's vacation policy didn't start until 7/1/97. The ALJ found no vacation due because EE was not covered by ER's policy. There was no policy that stated Clevite employees would fall under ER's policy at the time of purchase.

1323 BANKRUPTCY

Agreement to Pay

98-142 **Mahoney v Bevilacqua Construction, Inc. dba Valley Home Improvement** **(1998)**

The Department's DO found nothing due based on ER's agreement to send EE a check for $550.87. This check was issued but not accepted by the bank. ER stopped payment because the company filed a Chapter 11 bankruptcy. The Department filed a Motion to Amend the DO to find this amount due. Complainant did not appear at the hearing scheduled for his appeal. ER's representative agreed $550.87 was owed to EE. ER agreed to file a request with the Bankruptcy Court to pay EE with post-petition funds. The DO was amended to find an ER violation of Section 5 with $550.87 due plus the 10 percent per annum penalty.

1324 REDUCTION OF WAGES/BENEFITS

EE Continues Working

98-205 **Benardo v Edgar J Dietrich, an individual, and E & J Maplewood Lumber Company, E J Dietrich Corporation, Kitchen and Bath Gallery, Inc., jointly and severally** **(1998)**

EE appealed a DO which found no wages due. He claimed additional wages for 3/28 through 5/29/97. He began with Maplewood Lumber in November 1996 as a shop worker and installer earning $10 per hour. During this time he also worked for Wayne Todd Cabinet Maker, Inc. Todd was also employed at Maplewood Lumber as a manager. In March 1997 EE's employment changed to that of a part-time truck driver working 15 hours per week. Any additional hours were to be paid by Todd. ER argued that the company was not responsible for more than 15 hours per week after the March change. The ALJ found that EE knew or should have known of the change to part time. He was advised of the new terms and acquiesced in them by working while receiving only a part-time rate.

1325 WAGES

School EE

26 Payments

98-207 Hickey v Lakewood Public Schools (1998)

EE worked as Food Service Director from April 1989 through 8/18/97. She claimed wages for her last pay period for 1996-1997 in the amount of $1,162.80. The contract year ended on 8/18/97. ER presented a printout showing 26 separate checks issued to EE for the period 8/26/96 through 8/8/97. These checks were in the amount due EE for the year 1996-1997. A separate exhibit showed 26 payments in a lower amount for the prior year. ER's witness testified that EE was in a group of school EEs who received wages from the last pay period in August to the first pay period the following August. The ALJ found no violation of Section 5(1) and reversed the DO. No wages were due EE.

1326 COMMISSIONS

Contract Interpretation

DEDUCTIONS

Part of Wage Determination

WORK

As Acceptance of Wage Agreement

98-482 Anderson v Airtouch Paging (1998)

EE sought recovery for disconnects taken from his commissions. EE worked from August 1997 to January 1998 and always had disconnects taken from commissions. He also had add-ons added. EE argued that disconnects should only be applied within 90 days of when the customer signed up. The branch manager testified that the plan given to EE had no limit on these deductions. A disconnect occurs when a customer discontinues a contract. An add-on is when a customer decides to add on additional pagers after having first started a contract. The ALJ found that the disconnect policy was part of the

commission computation. Also, EE's continued employment constituted an agreement to receive the amount due based on ER's computations which included deductions for disconnects and additions for add-ons.

1327 AGENCY

Apparent Authority of ER Agent
EE Reliance on ER Agent

98-498 Madejcheck v Diversified Mortgage Finance, Inc (1998)

EE claimed two weeks' pay at $600. She was hired by a person who told her she was the office manager. EE filled out a W-4 and I-9 forms and gave the "manager" a copy of her social security card as well. She spent the two-week period being directed by the "manager" and once drove the staff to Lansing for a meeting. At the end of the two-week period, the owner refused to pay EE because she had not signed an employment and compensation agreement. The ALJ found that ER had not met the burden of proof. ER cannot prevail simply by presenting testimony contradicting EE. Since ER had the burden of proof, a preponderance of evidence was necessary to overcome the Department's DO. EE reasonably relied on a person that ER placed in a position to bind ER. The "manager" held herself out as office manager with the apparent authority to hire, train and supervise employees. EE reasonably believed she was hired and worked during the two-week period. It is ER's job to properly supervise EEs to avoid "improper" activities by its agents.

1328 COURT ACTIONS

Judgment to Offset Amount Due Complainant

DEDUCTIONS

EE Credibility
ER Benefit
Written Consent
Beginning of Employment
Truck Driver
For Each Deduction
Signed As Condition of Employment

89-1555 Mannes v Gainey Transportation Services, Inc (1990)

EE claimed deductions made by ER based on "approvals" provided when EE began working. The ALJ found that EE's consent under Section 7 must be full and free, without intimidation for refusal to permit the deduction. A deduction for ER's benefit must have written consent for each wage payment subject to the deduction. The deductions taken in this case were for ER's benefit since they were to pay for equipment damages. The written "approval" given when EE signed documents at hire was not free and without

intimidation. EE would not have been hired without signing. EE's credibility is not relevant to determining whether ER violated Section 7. ER argued that EE failed to tell the ER about speeding tickets and failed to tell the Department's investigator about an ER wage payment. A small claims' court judgment was applied to the amount owed to EE. A court judgment is a deduction permitted by law and permitted by Section 7.

The Kent County Circuit Court affirmed on 3/9/92. The oral arguments and bench opinion are available for review.

1329 DEDUCTIONS
Exemplary Damages

EXEMPLARY DAMAGES
Flagrant Violation

92-1383 Willis v Gainey Transportation Services, Inc. (1992)

After the decision in Duffy v Gainey Transportation Services, Inc, 193 Mich App 221 (1992) application for leave denied, ER agreed that the deductions taken from EE violated Section 7. The Department filed a Motion to assess exemplary damages based on the many decisions issued by the Department and the ALJ's finding that ER violated Section 7. ER argued that continuing to take deductions from EE's wages was not meant to flagrantly violate Section 7 but only to test the meaning of this section. The ALJ found that Duffy was the first decision having statewide applicability and that under these circumstances it was inappropriate to use the exemplary damages provision of the Act.

1330 DEDUCTIONS
ER Benefit
Written Consent
Beginning of Employment
Truck Driver
For Each Deduction
Signed as Condition of Employment

94-1057 Bunker v Gainey Transportation Services, Inc (1994)

EE was hired as a truck driver on 12/19/91; he separated on 8/15/93. During his training period he signed two documents. One authorized deductions for advances in pay, fines, freight and equipment damages caused by driver negligence. The second agreed to have his pay reduced by 2 cents per mile following a chargeable accident until the deductible or cost was recovered. The Department's DO found $897.33 due as deductions not permitted by Section 7. The ALJ found that EE did not sign a written authorization as required by Section 7. ER must file the appropriate lawsuit in a court of appropriate jurisdiction to collect the amounts claimed. Unlike in Duffy v Gainey Transportation

Services, Inc, 193 Mich App 221; 484 NW2d 07 (1992), where the ALJ found that the form signed when Duffy began work satisfied the requirements of Section 7 for the first deduction, the ALJ in Bunker did not. He concluded that the form signed when EE started work was dated 11/18/91. EE could not have known when he signed this form that ER would deduct $101.71 on 10/29/92, more than a year later. This "authorization" was not based on knowledge and therefore there was not informed consent. The ALJ also found that the 2 cents per mile reduction was an "indirect deduction" also forbidden by Section 7.

See General Entry *III.*

1331 BURDEN OF PROOF
Records Not Presented

COMMISSIONS
Assigned Accounts
House Account
Written Contract/Policy

98-671 Hemry v Penn Imagewear, Inc **(1998)**

EE and ER signed a contract for payment of 10 percent commission on sales of assigned accounts. Because of confusion over the meaning of this term, the parties signed a later contract stating that walk-ins or reorders obtained by others are considered house accounts and the 10 percent commission would not be paid. EE's claim related to five sales. ER presented unrebutted testimony and documentary evidence showing that two sales were for accounts in existence before EE became employed. Therefore, the 10 percent commission did not apply to these sales. The remaining three were found to be due the 10 percent commission.

1332 DETERMINATION ORDER
Amendment of DO
At Hearing
By Department
Remand

JURISDICTION
Remand for Investigation

MOTIONS
To Amend DO

98-659 Anderson v M-Care **(1998)**

The Department's DO found no jurisdiction based on Section 11(1) because EE's complaint was filed more than 12 months from the alleged violation. As a result of the prehearing conference, the Department made a Motion to Amend the DO to find jurisdiction over the complaint. The matter was remanded to the Department for an investigation pursuant to Section 11(2). Following the investigation the Department was directed to issue a new DO which can be appealed based on Section 11(4).

1333 COURT ACTIONS
Circuit Court Appeal
ALJ Decision Affirmed
Fringe Benefits
Paid Time Off
EMPLOYMENT
Termination
Transfer to Purchaser Company

FRINGE BENEFITS
Paid Time Off
Termination
Business Purchase
Written Contract/Policy
Change Before Business Purchase

98-140 & 98-141 **<u>Begeman & Kilp</u> v <u>John V Carr & Son, Inc.</u>** **(1998)**

Complainants were long-term EEs. ER offered EEs paid time off (PTO) as a reward for not taking time off. The policy was changed on 12/19/95 to reduce the bank to 78 days and the payout at termination to 20 days. In mid-May 1996, the business was sold to AEI.

EEs were hired by AEI and began working for AEI immediately after the sale performing the jobs they previously performed with ER at the same pay. EEs were not given the 20 PTO days when they ceased working for ER. ER argued that money for this payment was given to AEI as part of the purchase price. AEI gave the EEs 20 days' pay when they were laid off from AEI.

The ALJ found that EEs were due payments for 20 PTO days when their jobs with ER ceased. The fact that EEs went in a seamless transfer to AEI did not change this result. Articles published in Respondent's internal newspaper describing the purchase and transfer of EEs to AEI did not constitute a change to the PTO policy.

The Complainant's jobs with ER ended when the business was purchased by AEI and they began working for AEI. This was a job termination which activated the PTO payoff provisions of the policy.

WAYNE COUNTY CIRCUIT COURT: 2/24/99

The Court affirmed the decision of the ALJ upholding the Department's DOs.

1334 COMMISSIONS

After Separation
30-Day Policy
Payment
After Separation
30-Day Limit
Procuring Cause

WAGES

Commissions
Payable After Separation
Procuring Cause

98-377 Hamady v JD, Inc., dba Executrain of Grand Rapids (1998)

EE sold a training software package on 7/30/97. He was discharged on 7/31/97. When he began employment, EE signed a document agreeing to be paid commissions for a 30-day period after termination. The purchaser of the software package customarily delayed payments for 30 days. The ALJ found EE to be the procuring cause for the sale citing MacMillan v C & G Cooper Co, 249 Mich 594 (1930), Berger v Gerber Products Co, 75 FSupp 792 (1948), and Reed v Kurdziel, 352 Mich 287; 89 NW2d 479 (1958). Moreover, EE would not have been hired if he hadn't signed the 30-day agreement when he began employment. Also, at the time of the discharge, ER agreed that EE would be paid all commissions earned in July 1997. ER's 30-day policy had the effect of denying commissions earned in a separating EE's last month. The ER's policy was made worse when coupled with a 30-day customer payment holdback policy over which EE had no control.

1335 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found
Manager

MAILING

Presumption of Receipt

PRESUMPTION OF RECEIPT

Notice of Docketing

98-303 Turnbull v Chi Kanu, an individual, and Phat Like That, Inc. (1998)

Complainant was employed as store manager. It was his job to open Respondent's store at 10:00 a.m. and close it at 9:00 p.m., Monday through Saturdays, and 5:00 p.m. on Sunday. He started at $200 per week and was later raised to $250 per week. He claimed Respondent withheld his first and last week's pay. Respondent disputed that Complainant was an EE, claiming that he was only helping out and that he was a member of management. The ALJ found Complainant to be an EE because ER sent a letter to EE's probation officer stating that he was an EE. ER also paid EE a weekly salary.

ER wanted an adjournment of the hearing to bring a witness. ER said that he didn't receive a Notice of Docketing which stated that a subpoena could be obtained on request to the Office of Hearings. The ALJ found that there is a rebuttable presumption in the law that mail properly addressed and stamped is received by the addressee. As the appellant, ER had the burden of proof based on Administrative Rule R 408.22969.

The ALJ found that ER didn't establish by a preponderance of evidence that wages were not owed to EE.

See General Entries VII, IX, XI, and XIX.

1336 BURDEN OF PROOF
Burden Not Sustained
Timecards

EMPLOYEE
One Who Is Permitted to Work

EMPLOYER
Duty to Pay Wages
Despite Deal With Another Contractor

98-747 Marquez v J C Masonry & Construction, Inc. (1998)

EE was placed on ER's payroll because of an agreement between ER and another contractor. ER argued that Complainant was not his employee. The record showed that EE was paid with ER's checks, signed by ER's president. EE was given a W-2 for his work during the year. EE's hours were given to ER's accountant with those of other EEs. ER's president also kept track of EE's hours. Based on these factors, the ALJ found that Complainant was properly an EE. ER cannot avoid employment responsibilities by referring to a deal with another contractor.

With regard to the wages claimed, the ALJ relied on the timecards presented by EE because they were found more reliable than those presented by ER. EE was paid for 40 hours work each week despite the fact that ER's cards showed less than 40 hours worked.

The cards presented by EE showed overtime work for which he had not been paid. ER violated section 5(2).

1337 COMMISSIONS

Work

As Acceptance of Wage Agreement

WORK

As Acceptance of Wage Agreement

89-985 Jacob v Pre-Fit Door, Inc. (1989)

In November 1987, EE began working for a base salary of $225 per week plus a 2 percent commission. In December, the weekly payment was increased to $550 per week. EE claimed this was a salary increase; but ER claimed the extra $325 was to be a draw against commissions. Reports provided to EE for the period January through May 1988 show that the extra amount was treated as a draw against commission. By the end of May, EE had a deficit balance of $6,084.58. From June through September, EE earned more commissions and the deficit was reduced to $1,707.16. The ALJ held that the wage agreement was a contract. If ER did not pay according to the contract EE believed was negotiated in December, EE could quit, discuss the matter with ER, or continue working. By continuing to work, knowing that ER was treating the extra compensation as a draw against commission, EE in effect agreed to a wage agreement different from what he believed he had negotiated in December.

1338 DEDUCTIONS

Part of Wage Determination

WAGES

Deductions as Part of Computation

89-992 Knauss v Seyferts Foods (1990)

EE worked for ER as a snack food route salesman. He was paid 9 1/2 percent of sales minus adjustments. Adjustments included inventory shortages, returns, and unearned vacation pay. The amount remaining after adjustments was considered gross wages from which taxes and social security were deducted. This process was set forth in ER's Accounting Manual. The ALJ found amounts taken from the 9 1/2 percent computation were not deductions but adjustments. This process was a factor in calculating EE's wages. These adjustments were distinguished from deductions for shortages taken from convenience store clerks or gas station attendants. The latter are compensated with an hourly wage, not a percentage of sales. Moreover, the frequency of adjustments in the instant case pointed to the conclusion that these adjustments were a factor in the wage

calculation, not an unexpected deduction for a reason unrelated to the earning of the wages.

1339 DEDUCTIONS

Part of Wage Determination

WAGES

Deductions as Part of Computation

87-6765 Hampton v Modern Cable Techniques, Inc (1988)

EE was employed as a cable construction crew foreman. During his employment, EE executed a written agreement which established a retainage fund to pay for defective work performed by EE's crew. The agreement also provided forfeiture of the fund if EE quit in the middle of a phase or without a 30-day notice. The ALJ found no violation of the Act for deductions taken for the retainage fund. The fund was found to be a method of wage calculation and not a prohibited wage deduction.

1340 EMPLOYMENT RELATIONSHIP

Company President as ER

INDIVIDUAL LIABILITY

98-222-29 8 Complainants v Cherokee Express, Inc. (1998)

EEs worked as dispatchers for ER, a freight carrier. ER went out of business causing the unemployment of EEs. The ALJ found wages due from Cherokee Express but not Respondent President Bobbie Johnson. Because of similarities in language to Act 390, the ALJ examined the federal Fair Labor Standards Act and concluded that with this Act, Congress permitted an exception to the general shield from liability provided by a corporation. When a person acts directly or indirectly in the interest of an ER in relation to an EE, that person can be subject to the same liability as the ER. See Schultz v Chalk-Fitzgerald Construction Co, 309 F Supp 1255, 1257 (DC Mass, 1970). The ALJ found Johnson not individually liable for the wages due EEs because he did not control the duties of EEs and he did not hire, fire, or discipline any of the EEs. Respondent Johnson lost any ability to pay wages because the National Bank of Detroit demanded payment of their loan and took the Respondent's accounts receivable.

See General Entry VII.

1341 ATTORNEY FEES

DEDUCTIONS

Tips

EXEMPLARY DAMAGES
EE Discharged

TIPS
Deductions From

WAGES
Deductions From

98-260 Sayyae v Sweet Lorraine's (1998)

EE worked as a server/waiter at an hourly wage of $2.51 plus tips. After his employment began, EE was told that he would have to participate in a "tip out" arrangement where he had to make cash payments of 2.25 percent of gross sales to bus persons and bartenders.

Management tallied EE's gross sales including taxes and calculated tips at 15 percent. He
was required to pay in cash the 2.25 percent amount under the supervision of management. The amount paid was unrelated to actual tips received by EE. EE was discharged for refusing to give a "tip out" amount on a sale for which EE received no tip. The ALJ found this practice violated Section 7 which prohibits "indirect" deductions without the written consent of the EE. Although ER did not actually withhold the amount from the EE's tips, it was a mandatory requirement and a condition of employment for EE to pay the "tip out" amount. The ALJ also found ER's discharge of EE to be egregious and found exemplary damages due. ER was also ordered to pay attorney fees to EE's Attorney.

The ALJ granted Respondent's request for rehearing but Respondent did not appear. Respondent's appeal was dismissed. The exemplary damages and attorney fees previously ordered were doubled.

1342 CHECKS
Stop Payment
Violation of Section 6

SALARIED EMPLOYEE
Unclear Duties

WAGE PAYMENT
Stop Payment
Violation of Section 6

98-370 Was v PK Partners, Inc., dba Auto Ameristar (1998)

The ALJ found violations of Sections 5(1) and 6 where ER stopped payment on a wage check because ER felt EE didn't put in the proper amount of time. ER is required to provide clear job duties. Salaried EEs are required to put in the amount of time necessary to accomplish the job. Here EE performed necessary duties during her employment. ER didn't give EE a list of specific duties and cannot after the fact withhold wages claiming the job wasn't performed. Stopping payment on a wage check is a violation of Section 6.

1343 CHECKS

Stop Payment

EXEMPLARY DAMAGES

Flagrant Violation
Negotiable Check
Payment Stopped

98-230 thru 241 **12 Complainants v E & M Castings** **(1998)**

ER held back two weeks' wages by only paying EEs one week in two separate pay periods. ER also stopped payment on the second one-week payment after checks had been issued. The ALJ found violations of Sections 2, 5, and 7. ER was also found to have flagrantly violated the Act because of the stop payment order and ER's prior violation history. Exemplary damages were ordered as provided in Section 18(2) and Administrative Rule 34(1)(b). The ALJ also found a portion of the Employee Manual to be against public policy. This section assessed monetary damages against an EE who files an Act 390 claim in the event the company president is required to assist or testify to defend the company.

1344 BURDEN OF PROOF

Recordkeeping
Cash Payments
Wages Paid
ER Burden to Show

WAGES

Cash Payments
Risk to ER

98-626 & 98-627 **Bialy and Johnson v Jack's Glen Lake Inn, Inc.** **(1998)**

EEs claimed wages over four pay periods, eight weeks. ER claimed EEs were paid in cash. ER offered exhibits showing that the gross wages and taxes had been paid to the IRS and MESC for the period claimed. ER also sent two checks to the Friend of the

Court on behalf of EE Bialy from the amount earned during the period. Both EEs drew unemployment compensation after their separation relying on the claimed period as credit weeks. Also, EEs used the W-2 forms provided by ER to pay their 1997 taxes. Neither demanded new forms to reflect the actual amount paid. The ALJ found the claimed amount due. ER had the burden of proof to show payment of wages. Section 9 requires an ER to keep records to show compliance with the Act. Tax payments to governments do not establish that EEs were also paid. The ALJ referred to Entries 304, 336, and 958 of the Digest for prior cases finding it to be the ER's burden to show wages were paid.

ER filed an appeal to the Leelanau County Circuit Court. The appeal was dismissed pursuant to settlement reached between the parties.

1345 BURDEN OF PROOF

Appellant
Burden Sustained
Records
Testimony
Unrebutted Testimony

WAGES

Paid in Full

98-657 Rossetti v Robert Brian Alban dba Trebor Associates (1998)

The Department's DO found violations of Sections 2, 5, and 9 and ordered payment of wages. EE failed to appear at the hearing. Respondent appeared and presented unrebutted testimony and exhibits that EE did not work the days in question. Also, the DO found wages due for New Year's Day and the day after, but ER was closed on these days. The ALJ reversed the DO and found no violation of Act 390.

1346 BURDEN OF PROOF

Burden Not Sustained
Conflicting Testimony Insufficient
Testimony Contradicted

COMMISSIONS

Deductions
To Offset Draw Deficit
Draw Against Commission
Deducted at Separation
Handbook/Manual
EE Receipt

DEDUCTIONS

Draw Deficit
Telephone Calls

EXEMPLARY DAMAGES
Flagrant Violation

98-794 Monterusso v Lanser Broadcasting Corp (1998)

EE was hired to sell radio advertising. EEs were hired with a salary for two months. The third month is a draw to be paid back out of the EE's last check. This policy was set forth in an employment manual. EE denied ever receiving this manual and ER was unable to provide a signed form showing EE's receipt of the manual. ER agreed that EE was due a specific wage amount even considering ER's claim for payment of the third month draw. ER testified that the entire amount claimed was withheld when EE filed an Act 390 claim. The ALJ found this decision to withhold EE's entire claim to be a flagrant violation of Act 390 and assessed exemplary damages in accordance with Section 18(2) and Administrative Rule R 408.9034.

The ALJ also found that ER violated Sections 5(1) and 7. As noted by Administrative Rule R 408.22969, the burden of proof is on the ER. ER presented evidence that EE was told of the requirement for repayment of the third month draw from the last check, but EE denied this. Simply presenting testimony that is rebutted by equally believable testimony did not meet ER's burden. The withholding of the draw from EE's final wage was not established to be part of the employment contract because there was no proof that EE knew of this requirement.

Finally, the ALJ found that deducting telephone call charges from EE's last check without written authorization violated Section 7.

See Entry 898 of this Digest.

1347 WORK
As Acceptance of Wage Agreement

WORKING
Continued Working for Amount Less Than Claimed

98-1010 Thierry v Occupational Consulting Services, Inc (1998)

EE claimed pay for time spent on clerical tasks. The original employment contract provided payment only when billable hours were submitted. These did not include time spent on typing duties. When EE began working in February 1997, EE only had to submit draft reports for final typing. This process was changed in January 1998 requiring EE to submit final reports. The ALJ found that when EE began, he agreed to a certain wage agreement. ER changed certain aspects of this agreement, but EE continued to

work under the changed contract. He did not seek to negotiate a new contract for additional wages. By continuing to work after ER's change in contract, EE is considered to have agreed to the change without additional wages.

See Entries 917 and 925 of this Digest.

1348 TEMPORARY EMPLOYMENT

WAGES
Temporary Employment

98-563 Felder v Tandem, Inc, and Labor World of Grand Rapids (1998)

Complainant was registered with Respondent, a temporary employee agency. Complainant received employment through the agency and was paid by the agency for work performed for a second company, Sassy. Sassy hired Complainant and paid him directly instead of paying Respondent for a referral. When Complainant was laid off by Sassy, he claimed wages from the Respondent for five weeks worked at Sassy.

The ALJ found that Complainant was not employed by Respondent while working for Sassy and no additional wages were due.

1349 EMPLOYMENT RELATIONSHIP
EE/ER Relationship Found
Mortgage Sales

PRESUMPTION OF RECEIPT
Notice of Hearing

REHEARING
Denied
Presumption of Notice of Hearing Receipt

98-32 Mayer v DMR Financial Services, Inc (1998)

The Department's DO found no EE/ER relationship and therefore no violation of Act 390. EE appealed and attended the hearing. ER did not appear. Based on the EE's unrebutted testimony, the ALJ found that EE's work was controlled by ER approving or rejecting mortgages and funding secured by EE. EE was paid on a commission basis and had statutory deductions taken from his pay. He was also provided with fringe benefits. EE was hired pursuant to a "Compensation Agreement" which refers to ER and EE relationships and responsibilities. The tests set forth in the case of Askew v Macomber, 398 Mich 212 (1978) were followed to conclude that Complainant was an EE covered by Act 390 and due wages in the amount of $10,937.83 plus a 10 percent interest penalty. ER filed a request for rehearing claiming the Notice of Hearing was not received. The

ALJ found that there is a presumption that mail which is properly sent and not returned by the postal authorities is received and denied the request for rehearing.

Also see General Entries VII, X, and XIX.

1350 BONUSES

After One Year
Retroactive Change

98-1180 Burgess v Diamond Rope Company (1998)

EE began working in April 1997 with a written promise that she would receive a 7 percent of base salary bonus at the end of one year. In March 1998 ER decided to close but kept EE employed through 6/5/98. In March, ER told EE there would be no bonus because this payment was "predicated on the business being financially successful, not just simply lasting the full twelve (12) months." This decision was put in writing. The ALJ found that the bonus was "guaranteed" if EE stayed employed for one year. The contract containing this promise was not predicated on the business being financially successful. Moreover, the attempt to cancel this bonus was made after EE had already worked 11 months in reliance on the first contract and did not consent to this proposed change.

1351 FRINGE BENEFITS

Paid Time Off

99-3 Lautner v Heartland Home Health Care Services, Inc d/b/a Heartland Home Health Care (1998)

EE claimed paid days off (PDO) at her separation. The written policy required two weeks' notice for EEs voluntarily terminating employment. However, the same document states all PDO is forfeited if the EE quits to go to work for a competitor. EE testified that she went to work for a competitor and therefore the ALJ found no PDO eligibility. Moreover, despite initially giving six weeks' notice, after two weeks had passed, EE changed her notice to an immediate resignation. The ALJ found that these facts did not give ER two weeks' notice of her resignation on a specific day as required by the policy.

1352 FRINGE BENEFITS

At Separation
Specific Notice Required

VACATION

Forfeited
Specific Notice Required

Two-Week Notice

WITNESS
Credibility
Prior Statement

99-13 **Waitman v Custom Personalized Lawn Care Corp** **(1998)**

EE claimed vacation benefits, asserting that he had provided a two-week notice of his resignation as required by the policy. ER disputed this claim. The Department relied on a notarized statement provided by a coworker, but this witness contradicted the statement at trial. The ALJ found the ER and witnesses more believable than EE. Another coworker had received vacation because ER agreed this EE had provided two weeks' notice of his resignation.

1353 BURDEN OF PROOF
Appellant
Burden Sustained
Records
Testimony
Unrebutted Testimony

WAGES
Resignation
Stop Payment
Withheld
Competition with ER
Embezzlement

99-40 **White v In-Line Foundations, Inc** **(1999)**

The ALJ found no wages due because during the last week of "employment," EE set up his own business in competition with ER. EE also took a credit card advance and wrote 13 checks to himself, signing ER's name.

ER's testimony was unrebutted because EE didn't attend the hearing. ER met the burden of proof established in Administrative Rule R 400.22969 based on records produced plus testimony.

1354 BURDEN OF PROOF
Unrebutted Testimony

SICK PAY
Excessive Use

92-637 Sielaff v Charter Township of Redford (1993)

EE was a firefighter/paramedic who worked three (24-hour) days in a nine-day cycle. The union contract allowed one day (24 hours) of sick leave for every month on condition that one had to be sick to receive sick pay. That determination was made by management.

EE was counseled on his weekend use of sick leave. During EE's first 35 months, he took 30 sick days, 22 on weekends. EE claimed 96 hours sick pay, but did not appear at the hearing.

The ALJ found no violation, because under the management's rights clause in the contract, ER had the right to make the final determination**.**

1355 ACT 390

Claim Not Covered

Retroactive Wage Claim

JURISDICTION

Retroactive Wage Increase

RETROACTIVE PAY

WAGES

Retroactive Payment

After Termination

92-682 Martin v Flint N I P P (1993)

EE worked from 7/1/90 through 6/30/91, or 2080 hours, at $14 per hour. A 6 percent raise was approved 7/1/90, but placed in escrow until a collective bargaining issue was resolved. The authorization for the retroactive wage increase came on 10/7/91 for those "currently employed." EE claimed 6 percent of $14 for 2080 hours.

The ALJ ruled that retroactive wage payments are not covered by Act 390. EE was paid for all work performed at the agreed upon wage. The ALJ found that the raise was not communicated in an official manner as to change EE's wage during his employment. Therefore, EE was properly paid his wage contract amount for the period in question. The parties were referred to the district court where the limitations of Act 390 would not apply.

1356 THEFT

Alleged

WAGES
Exit Interview Required
Full Amount Not Paid
Exit Interview Required

WRITTEN POLICY
Exit Interview Required

92-640 **Simmons v President Tuxedo, Inc** **(1993)**

ER did not dispute the number of hours worked nor the amount of pay due EE at termination. Even though ER believed EE was responsible for missing monies, ER's insurance company reimbursed ER for the loss minus the amount of EE's wages.

ER refused to pay EE's final wage because of company policy requiring an exit interview. ER's appeal stated: ". . . we will not release any check to Mr. Simmons unless he makes arrangements with us to personally pick up the check and sign off on the termination papers. We will not conduct this transaction through the mail or through a third person . . . ."

A review of the evidence did not satisfy the preponderance of evidence that ER needed to establish. ER admitted not having paid EE for hours worked. Final wages cannot be withheld because EE did not attend an exit interview.

Also see General Entry XI.

1357 WAGE AGREEMENTS
Work Length Requirement

WAGES
Work Length Requirement

93-542 **Baran v Diane Fisher, Inc.dba Trendz Hair Studio** **(1994)**

The terms of the employment relationship required EE to work four weeks before monies were earned. EE left after one week. ER did not violate the Act.

Also see General Entry X.

1358 REMAND
Determination Order
Inadequate Investigation

92-688 **Gniech v Joe Ricci Jeep Eagle, Inc** **(1993)**

The ALJ remanded this matter back to the Wage & Hour Division for further investigation after the WH representative indicated that Complainant's specific claim was not investigated.

The ALJ found that it is the duty of the trier of fact to ferret out the truth and not foreclose rights which may have been abridged by what may have been an inadequate investigation.

1359 DEDUCTIONS

Written Consent

Policy Book Receipt

WRITTEN CONSENT

Policy Book Receipt

WRITTEN POLICY

Policy Book Receipt

92-763 Harvey v Freedman, Krochmal & Goldin, P C (1993)

EE worked as a legal secretary earning $475 per week. EE earned ½ sick or personal days a month pursuant to the Company Policy Book. ER deducted three days pay claiming EE was overdrawn by three personal days. ER argued that EE's signature acknowledging receipt of the policy booklet constituted written authorization under the Act.

ER violated Section 5 by failing to pay all amounts earned and due; and Section 7, which requires the full, free, written consent of EE. EE's acceptance of the Company Policy Book did not constitute written authorization. The ALJ found the three days to be vacation days and not personal or sick days.

1360 DETERMINATION ORDER

Amendment of DO

At Hearing

TESTIMONY

Unrebutted

WRITTEN POLICY

Vacation

None Due at Termination

92-806 Kauffman v Rafalka, Inc.dba Motophoto (1993)

EE performed duties of marketing and sales. EE claimed he was due payment for eight work days and five vacation days. ER's written policy only allowed vacation after one year of employment. EE quit his employment before the one year anniversary date. The ALJ found no violation of Section 3 pursuant to the written policy.

The ALJ found that EE was entitled to three days' pay. EE testified that he worked these days and his testimony was supported by another EE. ER did not appear and offered no testimony to rebut EE's claim. The DO was so modified.

1361 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Not Found

Management Company

Payroll/Insurance

93-511 51 Complainants v R-W Service Systems, Inc, and Transportation Accounting Services, Inc, and TTC Illinois, Inc (1994)

TTC was a human resource company which provided services to other ERs. TTC entered into a service agreement with RWSS for which they received a fee for their services. TTC didn't own, either directly or indirectly, any assets, had no control over EEs, and had no ER relationship with RWSS. TTC provided similar services to approximately 300 other customers. TTC was a servicing agent, not an employer. The service agreement provided for payroll services and insurance benefits, including workers' compensation. TTC received the payroll information from RWSS and provided checks to EEs. TTC was not Complainants' ER.

Also see General Entry VII.

1362 TERMINATION

Vacation Pay

Resignation or Discharge

WRITTEN POLICY

Interpretation

Effect to All Language

92-842 Suzor v Calder Electronics, Inc (1992)

ER's vacation policy required payment of two weeks' vacation after EE worked for two years. EE satisfied this requirement. EE took five days' vacation before her discharge. Her claim is for the additional vacation days.

The Department and ER took the position that the policy does not allow vacation payments to an EE who separates either voluntarily or by discharge.

Section 3 requires vacation to be paid based on the terms of the written policy. The Department cannot substitute terms or conditions that are not part of the written policy. According to the policy, it is clear that payment is not allowed for someone discharged. The DO was affirmed.

1363 TESTIMONY
Unrebutted

WAGES
Full Amount Not Paid

93-151 Grimes v Speck Carpentry, Inc (1994)

EE was hired as a carpenter at the rate of $13 per hour. EE was injured on the job, and approximately one month after his injury he received a check in the mail for $336 based upon 42 hours' work at the pay rate of $8.00 per hour. EE is claiming the difference of the agreed amount ($13) and the rate he was paid ($8), plus four hours worked on the day he was injured. When questioned, ER informed EE that "that was all he was worth and that he injured himself deliberately."

The ALJ concluded that EE is entitled to wages in the amount of $13 per hour plus the additional four hours on the date of injury. ER did not appear at the hearing to rebut EE's testimony.

1364 VACATION
Written Contract/Policy
Interpretation

WRITTEN POLICY
Fringe Benefits
Vacation
At Separation

93-113 Bell v National Standard Company (1993)

EE was employed over 25 years and earned five weeks' vacation as an engineer. EE worked until 7/31/92. ER's policy states as follows: "When you leave the company for any reason, you will be paid the unused vacation to which you are entitled to during that vacation year. If you are an active employee on April 1, you will be eligible for a full year's vacation payment for the following year computed on your base salary in effect at the time you leave the company."

EE testified that he took five weeks' vacation prior to 4/1/92. He is claiming an additional five weeks for his employment from 4/1/92 to 7/31/92.

The ALJ found EE's claim unreasonable because had EE remained employed after 7/31/92, he would not have been able to take the claimed vacation until after 4/1/93.

1365 CIVIL PENALTY

98-453 Witte v Kevin Malarney dba Cut Only (1998)

ER failed to appear at the hearing. A motion was made by the Wage Hour supervisor to assess a civil penalty in accordance with Rule R 408.9033. This rule permits a civil penalty to be assessed an ER who violates Sections 2 through 8 or Section 10 of Act 390.

ER was assessed a civil penalty of 50 percent of the amount of wages and fringe benefits found due EE. The penalty will be collected only if the Department is required to initiate a civil action to enforce the Order.

1366 ATTORNEY FEES

JURISDICTION
Overtime

OVERTIME
Jurisdiction

93-114 Warren v Grayling Motor Mall (1993)

EE was employed at the rate of $4 per hour and $6 for overtime hours. EE's records indicated he worked 789 regular hours and 250 overtime hours during the period in question. EE is entitled to $3,156 for the regular hours, but the Department has no jurisdiction to enforce the overtime hours.

EE appeared at the hearing with his attorney and requested attorney fees. The ALJ awarded attorney fees of $600 since the matter could have been avoided had ER indicated he would not appear or that he was willing to settle this matter.

1367 CHECKS
Signature Forged

93-334 Golembiewski v The New 145 Auto/Truck Plaza, Inc (1993)

ER's manager received a call requesting that EE's check be given to a friend, Carol Moon. EE was employed as a waitress and Ms. Moon was listed as the person to contact in the event of an emergency. The caller was told that a letter was needed from EE giving permission for Ms. Moon to pick up the check. Ms. Moon appeared, presented a letter with EE's signature spelled incorrectly, and was given the check. The check was cashed using EE's voter's registration card for identification. EE filed a claim alleging that she did not give Ms. Moon permission to pick up her check and that her signature was forged.

The question presented was whether ER paid EE's earnings. ER acted reasonably in relying on the phone call, letter and appearance of Ms. Moon to release the check; however, the facts show that EE was not paid her last week's wages. The ALJ based his findings on the misspelled signature and also because the signature appeared different from the signature on the check. ER's recourse was to report this to the bank and police. The bank could credit ER's account because the correct person was not paid as directed on the check.

1368 BONUSES

Management Prerogative
Written Policy/Contract/Agreement
Discretionary

FRINGE BENEFITS

Bonuses/Incentive Pay
Discretionary

93-345 Leachman v Paul's Auto Wash (1993)

ER refused to pay EE's bonus because of a report that EE did not perform all required tasks. Section 3 of Act 390 requires an ER to pay fringe benefits in accordance with the terms set forth in a written policy. ER's policy provided that "Incentive Bonus Programs are set up only after the work meets or exceeds average sales or requirements, discretion of management will be used to hold or discontinue bonus pay. . . ."

The ALJ determined that the policy gave ER the right to review EE's performance before the bonus was paid. Act 390 cannot be used to second-guess ER's review of EE's work. No violation was found.

1369 EMPLOYER DEFENSE

Individual v Corporate Liability

INDIVIDUAL v CORPORATE LIABILITY

INDIVIDUAL LIABILITY

93-411/93-1101 **Bowden & Teubert v Daher B Rahi and M D Diet Control, Inc** **(1993)**

Dr. Rahi was initially a 1/3 owner of the corporation. Later on he became sole owner. At the time of purchase he was under the impression that the company had outstanding debts of $200,000, when in fact it was more like $500,000. After soliciting help from financial experts and lawyers, he was unable to salvage the company. Dr. Rahi claimed that although he was the major shareholder and president, any liability should be corporate and not individual.

EEs Bowden and Teubert testified that Dr. Rahi assured them that their wages would be paid. ER did not contest the amounts due.

The ALJ concluded that even though Dr. Rahi suffered a great injustice in his business dealings and investments, he undertook those responsibilities voluntarily. His statements to EEs, his control of the company, his signing of payroll checks, and the fact that he was president and major shareholder placed the responsibility of paying EEs on him individually. The DOs were upheld.

Also see General Entry XI.

1370 BONUSES

Written Contract/Policy/Agreement

Eligibility

TRAINING PERIOD

Payment For

93-4 **Smith v P N M of Taylor, Inc** **(1993)**

EE entered into a two-week training program with ER who trained nurses aides. There was no charge for the classes. A Class Training Agreement, signed by EE, stated "I will be eligible for a bonus after 89 days if I am a full time employee or 119 days if I am a part-time employee." ER's employment records showed that EE was part-time and needed 120 hours to be eligible for the bonus.

After the two-week training period, EE was hired to complete clinical training by working with live patients. EE was supervised by ER. After completing 90 days full time or 120 days part-time, and passing her clinical training, she would be allowed to take a written test for state certification. EE never completed the necessary hours to be eligible for the bonus, no payment was due.

See General Entry X.

1371 COMMISSIONS
False Claim

FRINGE BENEFITS
Health Insurance

95-545 Armour v Bob Thibodeau Ford, Inc (1994)

EE's job was to write up repair orders. He earned $5 per hour plus commissions on labor hours performed. EE also received health insurance benefits which were deducted from his check. The commission in question was based on a false claim. There was no evidence that EE was aware of the invalid claim. ER claimed that because the labor hours were never performed, no commission was due and owing. The ALJ agreed.

With respect to the claimed health insurance of $103, the ALJ determined no monies were owed for insurance coverage because EE signed an authorization when hired to allow for deduction of premiums. EE received coverage and was responsible for premiums.

ER agreed a clerical error was made and $41 was owed to EE for wages.

1372 ADVANCES
Bail Money

EMPLOYEE DEBT TO EMPLOYER
Bail Money

WRITTEN CONSENT
Deductions
EE Admission of Debt

93-711/94-569 Nathaniel v S & S Enameling, Inc (1994)

ER paid $500 for EE's release from jail. EE signed an agreement acknowledging this sum was owed and that ER was authorized to withhold $100 from his check.

ER received a district court judgment against EE for $212.03. This amount was based on the agreement to pay back the $500 bail money.

The ALJ concluded that the bail money was an advance on EE's wages for which no specific authorization pursuant to Section 7 is needed. No violation of the Act.

See General Entries VI and X.

1373 COMMISSIONS

After Separation

Not Addressed in Written Employment Agreement

CONTRACT

Unilateral Change In

92-866 DeBerry v Measurement Instruments East, Inc (1993)

When EE was initially hired on 4/1/89, he had an annual salary of $40,000 plus commission, bonuses and medical coverage. In August 1990, EE's compensation was changed to a straight 40 percent commission. Later, his commission was changed to 30 percent. EE was told by ER that this was a temporary arrangement. EE received commissions on the revenue received from sales. There was no written agreement regarding commission payments after termination. ER testified that EE understood that no commissions would be paid after termination. EE argued he is entitled to 30 percent of the commissions earned before termination.

Throughout EE's employment, ER unilaterally changed his compensation. ER had the right to direct and control EE's activity and establish the method of compensation. By continued employment, EE agreed to the changes. The ALJ determined that EE was aware of the terms of the oral contract and found no further wages or commissions due.

See General Entry I.

1374 FRINGE BENEFITS

Vacation

Written Contract/Policy

Interpretation

VACATION

Written Contract/Policy

Interpretation

Giving Meaning to All Provisions

93-150 Camarda v Friendly Jeep Eagle, Inc (1994)

EE was a finance and building manager from 1985 to 1992. As of 1/1/90, EE's pay agreement was $350 per week, plus an 8 percent commission paid monthly on department earnings. EE is claiming vacation pay based on his weekly earnings and commissions or 1/52 of his yearly wage for two weeks. The DO found two weeks' vacation pay due or $700.

The vacation policy stated: 1 year - 1 week
2 years - 2 weeks

Salaried employees - regular weeks pay
Hourly employees - 40 hour week
Commissioned or flat rate - 1/52 of previous years earnings.

There was no provision for a cash pay-out if the vacation was not taken or a provision for an EE who is both salaried and commissioned.

The ALJ found no violation of the written fringe benefit policy. The policy did not have a provision for payment of vacation after termination. The ALJ stated it was not unreasonable to interpret the policy as only paying vacation pay at the $350 rate since this was the amount EE received every week. Another interpretation could be that no vacation pay is required since the policy does not state that a cash payment is required when vacation is not taken. Section 3 requires the vacation pay policy to be specific. The DO was affirmed for $700.

See General Entry I.

1375 CIVIL PENALTY

DEDUCTIONS
Security Deposit

DETERMINATION ORDER
Amendment of DO
At Hearing
In Absence of Party

EMPLOYEE
Economic Reality Test

EMPLOYER
Individual Liability

EMPLOYMENT RELATIONSHIP
EE/ER Relationship Found
Lawn Maintenance

INDIVIDUAL LIABILITY

98-503 Tebbenkamp v Kevin Malarney dba Cut Only (1998)

The DO was amended after the hearing to reflect the following:

(1) Complainant was found to be an EE during the period claimed.

EE testified in a believable fashion that he worked for ER cutting grass. He also submitted as evidence, letters from customers certifying that he was employed by ER. The ALJ found that ER provided the necessary equipment and paid EE wages in cash. EE testified that he was hired, directed, trained and paid by ER.

(2) ER violated Section 5 by not paying EE's last week of wages.

ER refused to pay EE's wages because he wanted EE to work an additional period of time. When EE first began working, he advised ER as to when he would be leaving. EE also provided a three-week notice of leaving.

(3) ER violated Section 7 for deducting money from EE's check without written authorization.

ER deducted $50 from EE's wages on four separate occasions to form a $200 security deposit in the event EE damaged any equipment. EE testified that he did not damage any of ER's equipment, but ER refused to refund the $20 when EE terminated his employment.

(4) ER violated Section 9 for not maintaining employment records and providing them to the Department representative on request.

(5) The Department's motion was granted to assess a civil penalty in accordance with Rule R 408.9033. This rule permits a civil penalty to be assessed an ER who violates Sections 2 through 8 or Section 10 of Act 390.

ER was assessed a civil penalty of 50 percent of the amount of wages and fringe benefits found due EE. The penalty will be collected only if the Department is required to initiate a civil action to enforce the Order.

(6) Kevin Malarney was found individually liable.

The testimony established that Kevin Malarney hired, trained, paid and directed the employment of EE. Kevin Malarney responded to all communications sent by the Department regarding EE's claim. Accordingly, the liable employer was changed to Kevin Malarney dba Cut Only.

Also see General Entries III, VII, IX and XIX.

1376 OVERTIME

VACATION

Carryover Not Allowed
Written Policy/Contract

Carryover Not Allowed

92-926 Blanchard v Medical Transcription Services, Inc (1993)

EE claimed 12.3 hours' overtime having worked more than 8 hours per day and 80 hours' vacation pay earned in 1990. The DO found no vacation pay, holiday pay, nor wages due EE.

EE stated that vacation days accrued in 1990 could be carried over to 1991. ER's vacation policy did not allow the carryover of vacation to the following year; vacation usage was limited to the year EE accrued it. The ALJ found that EE had been paid or used 80 hours' vacation during 1990.

EE's claim for overtime was based on hours worked more than 8 hours per day. ER's written policy stated that an EE earned overtime pay for hours worked greater than 40 hours per week, not greater than 8 hours per day. EE's interpretation of the policy was incorrect.

ER did not violate the Act. The ALJ affirmed the DO.

1377 COMMISSIONS

Payment

After Exceeding Wage

EVIDENCE

Insufficient to Establish Claim

No Records Presented at Hearing

92-927 Gaekle v Mike Building Company (1993)

EE's $6 per hour and commissions were based upon a lease's duration. If commissions did not exceed hourly wages, ER did not pay commissions.

EE claimed that in June 1990 she obtained leases/rentals from applicants which earned her commissions greater than $1,600. EE did not submit any records of leases, rentals, or tenants' names at the hearing.

After review of ER's payroll records, EE's claim was unsupported. The DO determined no wages were due for June 1990. The ALJ affirmed the DO.

1378 BURDEN OF PROOF

Unrebutted Testimony

DETERMINATION ORDER

Amendment of DO
At Hearing
In Absence of Party

92-935 Lopez v Dimoski and RJL Enterprises, Inc.dba South Lyon Bar-B-Que House (1993)

Only ER appeared and testified at the hearing. Since no other evidence was presented, the ALJ accepted the testimony. ER's records showed that EE was only entitled to $45 based upon hours worked. The ALJ modified the DO in the amount only. ER violated Sections 5 and 9.

1379 VACATION
Carryover Not Allowed
Written Policy/Contract
Carryover Not Allowed

92-941 & 92-942Legus and Balos v Vander Werf Energy, Inc (1993)

EEs separated from employment and made a claim for vacation pay. ER's vacation pay policy did not allow vacation carryover from one year to the next. The DO was reversed. ER did not violate the Act.

1380 DETERMINATION ORDER
Amendment of DO
At Hearing

EVIDENCE
Insufficient to Establish Claim
EE Not Present at Hearing

92-950 Smith v Michael Jacob dba KG-3 Distributing (1993)

Department's representative made a motion to amend the DO to show ER did not violate the Act. Without EE's presence at the hearing, the Department did not have sufficient evidence to show a violation.

DO reversed. ER did not violate the Act.

1381 BURDEN OF PROOF
Time Ticket Error

EVIDENCE

Insufficient to Establish Claim

WAGES
Computation Error

92-1056 Louchart v Anton Elyateem dba Tony's Foreign Auto Repair (1992)

EE worked three weeks as an auto mechanic for ER. ER testified that the wage agreement for the first two weeks was $15 per hour for the period EE worked on a customer's car. EE believed the agreement was $15 for all hours worked. Based on the wage disagreements for the first two weeks of employment, the parties agreed to a flat $300 salary for the third week. EE claimed that an agreement existed for an additional 25 percent commission on labor above the $300 payment.

The Department found EE was underpaid for the third week. The time ticket for the third week showed 25 percent of $761 labor as $30.44 when the correct amount is $190.25. ER refused to pay the difference and EE quit.

The ALJ found that ER presented insufficient evidence to overturn the DO. ER violated Section 5.

1382 ACT 390
Claim Not Covered
Retroactive Wage Claim

RETROACTIVE PAY

92-1062 Degenhardt v James Savage, Bald Eagle Enterprises, Inc (1993)

The evidence did not support any wages due for April through June 1991 since no employment contract existed. In July 1991, Respondent agreed to pay Complainant $10 an hour for future work and $1,000 for April through June.

The ALJ found wages due for July 1991. Complainant could file a claim in small claims court for work done before 7/1/91. Act 390 does not cover retroactive wage claims. ER violated the Act by not paying wages for work in July 1991 after the wage agreement took effect.

1383 DETERMINATION ORDER
Amendment of DO
After DO Final

JURISDICTION
After DO Final

92-1070 Vandebrake v FEI International (1993)

The DO found violations of Sections 2(1) and 5(1) and no one appealed. The Assistant Attorney in charge of enforcement questioned the DO, and the Department issued a "Corrected Determination Order."

The ALJ found that the Department had no authority to issue a corrected DO, when the prior DO had become a final agency order.

1384 WAGES

Complainant Paid Full Amount Earned but Not Amount Claimed

WORK

As Acceptance of Wage Agreement

92-1072 Cathey v DeFlores Chiropractic Clinic, PC (1993)

From August through November 1991, EE received a $300 salary while only working three days per week. In early December 1991, ER changed EE's pay from salary to hourly. EE claimed additional pay for the period 12/2 through 12/6 contending that notice of the change came after she had already worked the week.

The ALJ found ER owed no additional wages. EE turned in 24 hours for the week instead of the 40 she had previously submitted. This showed that EE had been told she would be paid an hourly wage not salary.

1385 EVIDENCE

Sign-in Log
Time Worked

92-1113 Whitman v National Window Cleaning & Maintenance Company (1993)

ER denied any wages due EE and submitted the sign-in and out log kept by ER's client. This record showed EE did not work the hours claimed. The hours on the log did not match the excessive hours claimed. ER paid EE for all hours worked. ER did not violate the Act.

1386 BURDEN OF PROOF

Appellant

Burden Not Sustained

Testimony Contradicted

EVIDENCE
Preponderance

TESTIMONY
Inconsistent

92-1115 Robinson v The Fairlane Club (1994)

EE filed a claim for two hours on his last day worked. EE's testimony was inconsistent when he stated that on his last day he had worked with two others but later testified he worked by himself. EE claimed he punched in when he came in to work but did not remember whether he punched out or not.

EE must establish by a preponderance of the evidence that he had worked the number of hours claimed and that ER didn't pay for the period claimed. The ALJ reviewed the evidence and found that EE did not satisfy his burden of proof.

1387 THEFT
Proven
Restitution

WAGES
Full Amount Not Paid
Theft
Theft

WORK
Not Completed
Car Phone/Pages

92-1129 LaFave v Edward J Law dba National Machine Engine & Parts Co (1993)

ER could not contact EE during EE's last two weeks of employment. EE would not answer his company car phone or beeper. ER's office manager discovered that 15 invoices did not match up with parts that should have been in the warehouse and notified ER. ER called the police who conducted surveillance of EE and arrested him at the location where he stored the stolen parts. EE was found guilty of grand larceny and given a suspended sentence with an order of restitution for $4,200.

EE was not entitled to wages because he didn't work for ER during his last weeks of employment; he was not available and didn't answer his pages or car phone. EE's conduct was illegal. It is not the intent of the Act to reward EEs who are not working in ER's interests.

The DO was rescinded. ER did not violate the Act.

1388 BURDEN OF PROOF

Appellant

Burden Sustained

Threat to Prosecute

DAMAGE TO OR LOSS OF PROPERTY

Truck/Van

EVIDENCE

Preponderance

WAGES

Threat to Prosecute

92-1192 Wilson v Salvation Army ARC, Inc (1993)

ER discharged EE for stealing a van. Estimated damage to the van was between $300 to $500. When EE returned to ER to pick up his check, he was told he could take the check but that ER would prosecute him for auto theft. ER did not prosecute when EE did not take the check.

The DO found ER violated Section 5(2) of the Act. The evidence presented showed that ER never denied that EE was entitled to pay, nor did ER refuse to pay what was due. All tax amounts were sent to the taxing authorities.

The ALJ found that a review of the evidence satisfied the preponderance of the evidence requirement. The DO was reversed.

ER did not violate Section 5(2).

See General Entry X.

1389 THEFT

Proven

Restitution

WAGES

Full Amount Not Paid

Theft

Theft

92-1355 Smith v Hayley's, Inc, dba Coats & Suits Unlimited, Inc (1993)

EE worked for ER as a bookkeeper. During EE's employment she embezzled monies from ER. She pleaded guilty to uttering, publishing, and embezzlement in Oakland County Circuit Court. The Court placed EE on probation and ordered restitution.

EE did not appear for the hearing. ER's representative did not have any records to show what hours EE worked and what wages were due. The ALJ found that ER did not owe wages to EE. There was no testimony to prove hours worked.

EE was guilty of taking ER's monies. It is not the intent of the Act to reward EEs who are not working in the ER's interests.

ER did not violate the Act.

See General Entry XI.

1390 FRINGE BENEFITS

Sick Pay

Part-Time EEs

Written Contract/Policy

Required Before Payment

92-1452 Hyman v Country Home Bakery of Michigan, Inc. dba Saunders (1993)

EE claimed entitlement to sick pay but worked part time. According to ER's employment contract, part-time EEs were not entitled to sick and accident benefits. The contract allowed sick pay for full-time EEs with one-year's seniority.

ER did not violate Section 3.

1391 DETERMINATION ORDER

Amendment of DO

At Hearing

By Department

Additional ER

EMPLOYER

Added at Hearing

MOTIONS

To Amend DO

VACATION

Company Closure

92-1468 Woodcox v Nish-Nah-Bee Plastics, Inc (1993)

EE worked for Nish-Nah-Bee Industries in March 1983. Nish-Nah-Bee Plastics, Inc., began in April 1990. Both companies used the same policy manual. EE earned vacation under this policy and claimed 168.75 hours of vacation benefits were due.

ER company ceased operation shortly after EE's separation. ER claimed that no vacation was due EE because the policy had no provision to pay vacation when the company goes out of business. The ALJ disagreed. The policy does not have a forfeiture clause if the company goes out of business. EE earned the vacation as part of a wage/fringe benefit package.

The Department made a Motion to add Nish-Nah-Bee Industries, Inc., as another Respondent. The ALJ granted the Motion based on the proofs that showed the two Respondents shared a payroll account and policy manual. EE's last pay stub had the name of Nish-Nah-Bee Industries, Inc. The evidence showed a close relationship between the two companies.

The DO was modified to add Nish-Nah-Bee Industries, Inc., as a second employer responsible for payment of vacation pay. ERs violated Sections 3 and 4.

1392 EMPLOYMENT RELATIONSHIP
Control

INDIVIDUAL v CORPORATE LIABILITY
Pervasive Control

92-1510 Rizk v Waymaker Products, Inc, and Brian Engel (1993)

Respondent Brian Engel hired Complainant to do secretarial work. Steven Lowell, president of Waymaker Products, told Engel not to hire a secretary. Engel stated that Complainant had been preparing forms and files for Waymaker. Although Engel knew Lowell opposed employing a secretary, he wanted to surprise Lowell by presenting work done by the Complainant for Waymaker.

The evidence showed that Engel was an independent contractor who lacked authority to hire Complainant for Waymaker. Complainant was hired by Engel for $12 an hour and worked under Engel's direction and control. Respondent Engel was the employer of Complainant; Respondent Waymaker Products did not hire Complainant. The ALJ dismissed Respondent Waymaker Products as a party.

Respondent Engel violated Sections 5(2) and 9(3) of the Act.

See General Entry IX.

1393 PROMOTION

Not Approved by Proper Party

92-1516 Clark v Total Building Services, Inc (1993)

EE testified he worked with a building cleaning crew. EE stated he worked as a supervisor during his last week, trained a new employee, and that ER should have paid him supervisor's pay.

ER had a policy that they carried out when an EE's status changed. ER stated that they did not receive papers to show EE had been promoted to supervisor. Although EE may have trained an EE during his last week worked, he failed to sustain the burden of proof by a preponderance of the evidence that he was a supervisor and entitled to supervisor's pay.

The ALJ found Respondent lax in recordkeeping. ER had no record of EE working for two days, at two job sites. ER agreed to pay EE's wages for the dates worked after receiving EE's job completion forms at the hearing.

The ALJ affirmed the DO. ER did not violate the Act.

See General Entry XI.

1394 VERBAL

Notice of Change

WAGE AGREEMENTS

Dispute

Payment by Load v Time Card

92-1525 thru 92-1527 Buchanan, McMillan, Paler v Organic Lawns, Inc (1993)

ER employed EEs during the summer 1991 to spray chemicals for $6 per hour on customer lawns. ER changed the manner of payment to a nine-hour day and expected that EEs spray two tankfuls each day within nine hours. ER expected eleven loads each week, two each day and one Saturday, and limited EEs' work schedule to 50 hours per week -- 40 regular hours and 10 overtime -- at $6 per hour for regular time and $9 per hour for overtime. A management representative advised EEs of this change without a written contract/policy setting forth the new payment procedure. Payment was to be based on loads, not the total hours worked.

The Department investigator compared total hours worked and paid and concluded that ER did not compensate for all hours. EEs kept track of hours worked on time cards. The ALJ found that ER did not state the "payment by load" procedure to EEs and that ER should pay them based on time cards.

ER violated Section 5.

1395 CHECKS

Signed Under Pressure From Grandmother

WAGES

Paid in Full

92-1633 Wells v The Japhet School Corporation (1993)

EE claimed she cashed three checks received from ER under pressure from her grandmother to use them for school tuition. EE stated that she signed two of the checks at the school. Her grandmother was also there when EE signed the checks. EE was in class and the school's office called her in to sign the checks. The grandmother brought the checks from home for this purpose. EE signed the third check at her grandmother's home, and the grandmother deposited it in her account from which they wrote a check for school tuition.

ER has paid EE all earned wages. The facts of this case are different from those where an ER directs an EE immediately to sign over a paycheck from which ER makes deductions for purchases. Section 7 prohibits a deduction from wages with a threat of discharge or refusal to pay. These facts are not present here. EE received her checks. The school did not demand her signature; ER made no threats to expel or discharge EE if she did not use her checks to pay tuition. The pressure to sign came from her grandmother.

ER did not violate the Act.

1396 BURDEN OF PROOF

Burden Not Sustained

Appellant Refused to Testify

Credibility

Refusal to Testify

92-1521 Brocklehurst v The Art Show Gallery, Inc (1993)

Appellant ER decided not to present any evidence opposing the DO. Administrative Rule R 408.22969 places the burden of proof on the appellant. Without any evidence to show the DO was in error, the ALJ affirmed the DO.

1397 BURDEN OF PROOF

Credibility

Hours Not Submitted

Wages Not Paid

EMPLOYMENT RELATIONSHIP

EE/ER Relationship Not Found

Partnership Expected

EVIDENCE

Hours Not Submitted

Wages Not Paid

92-1531 O'Neal v Mincio Travel Agency, Inc (1993)

On 7/31/91 ER told EE that they could pay no more wages because the business was losing money. EE kept working with no wages from 7/31/91 until 11/9/91 because of the possibility that she might enter into a partnership relationship. During this time she did not turn in her hours as she had before 7/31/91, because she knew ER would not pay her wages.

The ALJ found that Complainant was not an EE after 7/31/91. Work done after that date was based on the belief that they would form a partnership. The record of hours worked from August through November 1991 were not turned in weekly but was compiled after the fact to file the claim. The average hours worked before 7/31/91 were less than 20 hours per week. It was doubtful that the hours between August and November 1991 were more than 40 per week. ER stipulated that records were not kept as required by Section 9.

ER did not violate Section 5. ER violated Section 9.

1398 REHEARING

Denied

Presumption of Notice of Hearing Receipt

92-1634 Garner v Victor E Premen, DDS (1993)

ORDER DENYING REQUEST FOR REHEARING

EE and the Department representative appeared at the 7/7/93 hearing. On 7/15/93 an Order Dismissing Appeal was issued due to ER's failure to attend the hearing scheduled for 7/7/93.

ER filed a request for rehearing on 9/11/93 and asserted that they never received any notice by mail concerning the hearing date.

There was no evidence presented to overcome the presumption of proper mailing and receipt. ER's denial of receipt was insufficient by itself to rebut the presumption.

The ALJ denied ER's request for rehearing.

1399 COMMISSIONS

Draw Against Commission
Trailing Commissions

EVIDENCE

Draw Against Commission
ER Records
Insufficient to Establish Claim

92-425, 92-1804 thru 92-1806 Sposaro, Presczewski, Moore, and Rosiewicz v Reginald J Psciuk dba A-1 Medical & Insurance Brokers (1994)

EEs began their employment based on a draw applied against commission. At the time of their termination, Rosiewicz owed ER $752.86 for excess draws over commission earned, Moore owed $4,186.39, and Presczewski owed $1,755.79.

EEs' claims were based on the fact that they sold insurance policies and did not receive their appropriate commissions. They demanded payment on trailing commissions (commissions received by ER after EEs were terminated). EEs stated they could not prove their claim because ER had not turned over all information needed to show what sales and commissions earned. ER contended that no trailing commissions were due because EEs were not present to service clients. ER paid new employees any commissions that terminated EEs earned. ER denied any written or verbal agreements that allowed for the payment of trailing commissions.

The ALJ found no monies due EEs. No written agreement existed. ER's records showed that EEs were not entitled to any further commissions and that all of the EEs, except Sposaro, were overdrawn on their draws versus commissions earned.

EEs did not meet the burden of proof by a preponderance of the evidence. ER did not violate the Act.

9/6/94 - Macomb County Circuit Court affirmed ALJ's decision.

1400 WRITTEN POLICY

Discharged
For Cause
EE Dishonesty
Vacation
None Due at Termination
EE Dishonesty

92-1857 Pike v Meijer, Inc (1993)

Following a nonwork-related automobile accident, EE altered her doctor's disability certificate by adding words to the disability certificate, "5 days in a row," following words of restriction of "8 hrs day max." EE added the words because she did not want to work ten consecutive days that her supervisor had promised. ER discharged EE for violating the company's written "honesty" policy, and ER did not pay unused vacation pay.

ER did not violate Section 3.

1401 FRINGE BENEFITS
Sick Pay
Written Contract/Policy
Forfeited at Termination
Vacation
Carryover

WAGES
Retroactive Payment
After Termination
Unauthorized Pay Increase

92-1895 Collier v General Electronic Data Systems, Inc (1993)

ER laid off EE. EE made a claim for a pay raise she did not receive plus accrued vacation and sick pay.

EE was not entitled to a pay raise. The authority to grant a pay raise rested with the company's CEO. He reviewed EE's request and did not grant a pay raise.

EE was entitled to four hours of vacation that she was unable to use in 1990. The policy showed that vacation days were not carried over to the next year unless approved by the company. The company president asked EE not to take vacation and work because the company was so busy. The president authorized and used EE's services for four hours. EE was due four hours of vacation pay. EE had completed three years of service and was also entitled to two weeks' vacation.

EE was not entitled to 96 hours of sick pay. The policy stated that ER would not pay sick leave during leaves of absence or layoffs and that sick leave credit was forfeited upon termination of employment.

EE was entitled to 84 hours of vacation pay. ER violated Section 4.

1402 BURDEN OF PROOF

Appellant
Burden Sustained
Unrebutted Testimony

DEDUCTIONS

Purchases
Written Consent
Acceleration of Payment

WRITTEN CONSENT

Acceleration of Payment
Deductions
Personal Use

98-342 Curtis v Roush Management, Inc (1999)

ER was a distributor of various equipment and tools such as Snap-On and Craftsman. EEs purchased various types of tools at a discounted price from ER. For purchases made, EE consented to payroll deductions of $19.65 per week for 156 payments. At separation, ER deducted the $19.65 payment from EE's last pay and then also kept the amount remaining after taxes. The Department found that EE only gave written consent for the $19.65. By keeping EE's net check amount, $119.62, ER violated Section 7.

The ALJ found that EE signed and consented to all of the terms in the purchase agreement including acceleration of payment. The purchase agreement stated that all money was due when an EE separated from employment or if an EE did not make a payment when due.
Courts or administrative adjudicatory bodies must rely upon evidence (testimony or exhibit) which is presented at a hearing. ER established by a preponderance of the evidence that it did not violate Section 7.

See General Entry X.

1403 EMPLOYEE

Incorporator

EMPLOYMENT RELATIONSHIP

Nonprofit Corporation
Lack of Funds

NONPROFIT ORGANIZATIONS

WAGE AGREEMENTS
Dispute
Quantum Meruit

98-435 Schroeder v The Home of New Vision (1999)

Complainant worked for Respondent from 1/1/97 to 9/10/97. Respondent was a nonprofit corporation. Respondent did not have paid employees until 1/1/98; prior to that date, they were volunteers. After 1/1/98, the individuals were paid with a grant. EE was an incorporator of EE.

Applying the economic reality test, an employment relationship existed between Complainant and Respondent. Nonprofit corporations are not exempt from Act 390. Respondent cannot be excused from complying with the Act even in the absence of having funds to pay employees. Also, even though EE was an incorporator of ER, Complainant was still an EE covered by Act 390.

Complainant satisfied the preponderance of the evidence to support the existence of an EE/ER relationship and entitlement to compensation. ER violated Section 5.

WASHTENAW COUNTY CIRCUIT COURT

Respondent filed a Petition for Review - 2/25/99. On 12/22/99 the Court reversed the ALJ's decision and ordered Complainant to pay $13,695.52 as restitution to Respondent.

1404 BURDEN OF PROOF
Unrebutted Testimony
Selective Termination Policy

COMMISSIONS
Selective Termination Policy

TESTIMONY
Believable

98-679 Brown v Rock Financial Corporation (1999)

ER's verbal wage agreement provided EE a $25,000 annual salary, a 2- to 3 percent monthly commission on loans made, and a $100 bonus on each file referred to other

companies. EE claimed $800 commissions and $300 for referred files. EE's claim was based on records he kept.

ER's Employee Handbook did not prohibit the payment of commissions, bonuses, or referrals upon EE termination, but ER claimed EE signed a termination/compensation plan that denied all accrued compensation at EE termination. EE did not recall signing this agreement. EE stated that even if he did sign the agreement, ER engaged in a selective termination policy by paying others accrued commissions after separation.

The ALJ found that EE's testimony and written evidence were credible. ER violated Section 5(2).

1405 BONUSES
After Separation
Written Contract/Policy/Agreement
Interpretation
Disparate and Selective Treatment

FRINGE BENEFITS
Bonuses/Incentive Pay
After Separation
Must Be Employed

WRITTEN POLICY
Interpretation
Past Practice
Disparate and Selective Treatment

97-975 Marroso v Robert Half International, Inc. (1999)

EE's witness testified that EE was paid a base salary plus a 10 percent commission based on EE's gross margin per the employment agreement. Past practice established that typically the bonus payment was made a month after the end of the quarter and EE had to be employed on the day checks were distributed.

An Employee Handbook provided that bonuses were the sole discretion of management. However, several policy documents in effect during EE's employment were presented.

EE's witness testified that after his termination, he was eventually paid the withheld earnings. The witness's gross margin calculations were similar to EE's.

The question presented was whether ER engaged in a selective bonus payment policy when EE was terminated.

Testimony established that another EE was terminated 15 days before bonus eligibility and was paid two weeks' severance pay and was continued on the payroll to the end of the quarter entitling him to a bonus.

Additionally, EE's witness testified that his last paycheck included a bonus, even though bonus payments were normally paid a month after the end of the quarter.

The ALJ found:

a) That the bonus policy was confusing and replete with inconsistencies.
b) That ER engaged in disparate and selective treatment of EEs in applying its bonus payment at termination.
c) ER presented no proofs to rebut testimony that bonus payments were made a month after the quarter ended.
d) That ER violated Section 5(2).

See General Entry IX, XI.

1406 OVERTIME

Salaried EE

SALARIED EMPLOYEE

Overtime

WAGES

Hourly v Salary

98-868 Fallon v Innisfree, Inc. (1999)

EE was hired at $480 per week in a new business. His duties included running the kitchen, setting up the menu, supervising two EEs, cooking, supplies, and clean-up. Later, EE's duties were changed and a head chef was hired. EE's remuneration was changed from salary to hourly pay, $8 per hour. EE did not complain but gave a month's notice.

EE claimed wages over 40 hours a week at $12 per hour for a total of $9,900 due. ER maintained EE was paid a salary, not hourly, and did not work the hours claimed. There was no written employment contract. ER did not keep track of EE's hours.

The DO found that EE was underpaid at the $8 per hour rate because ER failed to advise EE that his compensation was being changed. ER paid the ordered amount in the DO. EE appealed requesting overtime pay.

The ALJ found no further wages due. EE was on salary, not hourly payment, until the change was made. No overtime is due for the period EE was paid a salary.

1407 EMPLOYER

Duty to Pay Wages

Delegation of Authority

Identity

INDIVIDUAL v CORPORATE LIABILITY

99-39 Hardy v VandenBerg and TJV Construction, Inc. (1999)

EE and ER VandenBerg stipulated that $7,250 was due EE. The question presented was whether VandenBerg was individually liable for payment.

The Department Supervisor testified that VandenBerg was individually responsible for EE's wages because he exercised pervasive control over EE's work. VandenBerg was the president and sole shareholder of Cosy Warm Fireplace Company, Inc., later named TJV Construction, Inc.

VandenBerg hired a general manager who controlled most of the day-to-day business operations of Cosy Warm. The general manager trained, supervised and disciplined EEs, along with approving vacations, paying bills, reviewing work performance and approving payroll checks prepared by the office manager. The commission checks were issued by the corporation and not VandenBerg individually.

ER VandenBerg can only be held personally liable for EE's wages if it is found that he acted directly or indirectly in the interest of the ER. To determine whether an ER/EE relationship existed, the following factors must be considered:

1) Control of worker's duties;
2) Payment of Wages;
3) The right to hire and fire and the right to discipline; and
4) The performance of the duties as an integral part of the ER's business toward accomplishment of a common goal.

The ALJ found regarding the above points:

1) That the day-to-day duties were controlled by the general manager. ER VandenBerg did not control EE's work.
2) Payroll checks were issued by the office manager and approved by the general manager.
3) Although ER VandenBerg hired EE, he did not fire or discipline.
4) ER performed duties integral to the business, but these activities did not make him personally liable for EE's wages.

Also see ¶s 980 and 1028 in this Digest, as well as General Entry VII. The DO was amended to find ER VandenBerg not liable for EE's wages.

1408 APPEALS

Dismissed
Untimely
Good Cause Not Found

93-886 Winters v Arde Company, Inc (1993)

EE's appeal was not received within 14 days as required by Section 11(4). The ALJ found EE's explanation did not establish good cause and the appeal was dismissed. EE did not act reasonably by having important mail delivered to an address checked infrequently.

Also see General Entry II.

1409 DETERMINATION ORDER

Amendment of DO
At Hearing
In Absence of Party

SETTLEMENT AGREEMENT

93-1254 Farneth v Hilal & Myrna Ismail dba Superior Floor & Cleaning (1993)

A settlement agreement was entered into during the prehearing conference between the Department and ER for less than the amount ordered. EE did not attend; EE has a duty to keep the Department notified of his current address.

1410 RES JUDICATA

93-1692 Kuzmik v Sevenski dba Boyne City Glass Co. (1994)

This claim was dismissed based on principles of res judicata. Act 390 issues decided in court may not be addressed again by the ALJ. The District Court's order effectively stopped any further litigation of EE's claim.

1411 DEDUCTIONS

Written Consent
For Each Deduction

EXEMPLARY DAMAGES
Discretionary

LOANS
Written Consent to Deduct

WRITTEN CONSENT
For Each Deduction

93-847 Weller v Dakota Leasing, Inc. (1993)

The facts established that EE was not given his last two checks. The amounts were used to repay ER for a $100 loan and penalties because EE did not work six months or give a two-week notice. Exhibits introduced indicated that EE signed several documents at the time of hire permitting deductions from wages, a $200 deduction if employed less than six months, the deduction of advances, and a $300 deduction from the last paycheck upon failure to give a two-week resignation notice.

Even though Section 7 allows wage deductions with written consent, a deduction cannot reduce wages to an amount below the minimum wage, and the authorization must be without intimidation or fear of discharge. EE did not give ER written authorization to withhold his last paychecks. ER testified that EE would not have been hired if he did not sign the statements.

ER violated Section 7 by withholding all of EE's wages at resignation. Since EE did not sign a written authorization, ER could not legally deduct EE's wages. ER can recover amounts due in a court judgment.

The Department also requested exemplary damages. Since ER filed the appeal, he was required to present evidence to rebut the charge. Since none was presented, exemplary damages were affirmed.

1412 BUSINESS PURCHASE
By EEs
Incomplete

EMPLOYMENT RELATIONSHIP
EE/ER Relationship Not Found
Business Purchase

93-1114/93-1115 Rossi & Shemwell v Monroe Street Pizza, Inc. (1994)

Respondent Morales testified he purchased this pizza business as an investment. EEs Rossi and Shemwell were to make monthly payments to Morales to repay him for the

initial investment plus interest. When the business was paid for, it would be equally divided among them.

EEs paid Morales for eight months and then discontinued payments. Morales eventually sold the business. Morales testified that he did not operate the business, pay wages, hire other EEs, pay expenses or have tax returns prepared.

The unrebutted testimony supported Morales' claim that he was not an ER. No violation found.

See General Entries X, XXI.

1413 BONUSES

After Separation
Management Prerogative
Written Contract/Policy/Agreement
Interpretation

FRINGE BENEFITS

Bonuses/Incentive Pay
After Separation

93-1462 <u>Utberg</u> v <u>Miller, Canfield, Paddock and Stone</u> (1994)

The ALJ determined no bonus was due EE because she was terminated for poor job performance. ER had discretion to award a bonus pursuant to an office memo which stated "Bonuses . . . . are generally given for outstanding performance . . . ." It was reasonable for ER not to give a bonus to an EE who would not be employed by the firm in the following year.

1414 FRINGE BENEFITS

Written Contract/Policy/Agreement
Vacation
At Separation

VACATION

Eligibility
ER Failed to Approve
Payment In Lieu of Taking

WRITTEN POLICY

Forfeiture of Benefits
Interpretation
Past Practice

93-1174 Cihak v Great Lakes Ford, Inc. (1994)

EE worked as a used car manager from March 1989 through May 1992. The written vacation policy in effect provided two weeks' vacation after two years' service. The policy did not allow for vacation pay in lieu of taking time off. Also, all vacation was to be approved by management and vacations not taken were forfeited.

EE provided two copies of check stubs showing vacation payments in lieu of taking time off. ER refused EE's requested vacation pay in April '92. EE then asked for time off and that was denied. EE acknowledged that spring was a busy time.

Section 3 requires an ER to pay fringe benefits in accordance to the terms of a written contract or policy. The issue was whether vacation benefits should be ordered since EE attempted to take the benefit before his separation. Since the policy required vacation approval by management, the ALJ found no vacation benefit due. The testimony did not indicate that management unreasonably denied the vacation request.

In addition, the policy prohibited payment in lieu of actually taking vacation time. The fact that this was done does not require it be done again. "An ER can always choose to go beyond the policy."

See General Entry I.

1415 BURDEN OF PROOF
Records Not Presented

EVIDENCE
Failure to Present Creates Presumption

VACATION
Conflict in Written Policies
Policy Different for Management EEs

WRITTEN POLICY
Fringe Benefits
Vacation

93-1177/93-1178 Brandel & Brandel v Uptown Cleaners & Hatters, Inc (1993)

EEs were plant managers for ER's dry cleaning operation. Their written employment agreement was signed by EEs. That contract was not presented at the hearing. A portion of ER's handbook was marked as evidence. The DO found that EEs were not due vacation benefits under the handbook. EEs argued that they were not covered by the handbook but had their own employment contract which gave them two weeks' vacation

per year. The ALJ found no vacation benefits due based on the handbook, which was the only written policy presented.

Section 3 of the Act requires a written contract or policy before fringe benefits can be found due. A claim filed in district court action does not require a written contract or policy.

1416 COMMISSIONS

Payment

After Separation

WRITTEN POLICY

Commissions

After Separation

93-1436 Przystas v CFSB Bancorp, Inc. (1994)

EE claimed $22,696.57 on mortgage commissions closed after his separation. EE was paid a salary plus commissions of ½ of 1 percent. Commissions were paid only when a loan closed. ER presented an employment contract signed by EE. EE testified that this was not his contract but only a proposal for loan originators and trainees. The document did not refer to EE's management duties; therefore, the ALJ determined there was no written contract covering EE's employment.

The Department presented a document titled "Loan Originator Compensation Agreement" which was given to EE in 1992 to read and approve. The document was not signed by EE. ER argued this agreement did not provide for commissions after separation. The ALJ agreed and found no commissions due, stating that an employment agreement or contract does not have to be in writing.

1417 BURDEN OF PROOF

Appellant

Burden Sustained

Records

Commissions

Recordkeeping

Not Presented

Unrebutted Testimony

COMMISSIONS

Payment

After Separation

Records

ER Responsibility

EXEMPLARY DAMAGES
Flagrant Violation

93-1204 Clair v Bachman Information Systems, Inc. (1994)

EE was employed as a sales representative selling high-tech computer equipment. ER terminated her employment after EE had submitted a business plan detailing potential clients and expected sales. The Department was unable to prove what commissions were due because ER refused to turn over records during the investigation stage as ordered by the ALJ. ER did not appear for the hearing.

The ALJ found ER in violation of the Act and ordered commissions of $7,280 based on EE's testimony and records submitted. Also, because of ER's flagrant refusal to provide records, exemplary damages were awarded in the amount of $14,560.

See General Entry XX.

1418 ADMINISTRATIVE LAW JUDGE
Authority to Interpret Policy

FRINGE BENEFITS
Paid Time Off

WRITTEN POLICY
Interpretation
Against Drafter
Use of "or"

93-1642 thru 93-1646 & 94-203 Bradley, Dolson, Ebig, Lyvere, Suchodolski, Frenze v A & D Health Care Professionals, Inc. (1994)

The parties agreed prior to hearing that all EEs worked more than six months and resigned from employment. The remaining issue was whether the written policy required payment of a fringe benefit, paid time off, to EEs who resigned but worked more than six months. The key language in contest was ". . . An employee who resigns or is released prior to completion of the six-month eligibility period will forfeit their paid time off benefits."

ER's representative argued that the word "or" was used as an alternative between two different alternatives. The first alternative was the EE who resigned. The second was the EE who was released prior to completion of the six-month eligibility period. Both categories would forfeit the benefit.

The Department representative interpreted the language to mean forfeiture only to EEs who resigned or were released before working six months. He agreed that "or" designated an alternative, the EE who resigned and the EE released, but the phrase "prior to completion of the six-month eligibility period," applied to both alternatives. ER applied this language only to the second category, those who were "released."

When policy terms are in doubt, language ambiguities must be construed against the drafter of the document, the ER. The ALJ did not believe only EEs who were discharged would receive the benefit. The ALJ concluded that the phrase "prior to completion of the six-month eligibility period" applied to both sides of the "or," that is, to EEs who resigned as well as those who were released.

ER's representative argued that Act 390 provides only regulatory authority and not contract interpretation. The ALJ rejected that argument and concluded that Section 3 requires an ER to pay fringe benefits as set forth in a written policy. Since this case presented a conflict as to what the written policy requires, the ALJ has the authority to decide that question and granted EEs the benefit, paid time off.

CIRCUIT COURT: Affirmed 1/27/95.

1419 REMAND

Determination Order

Inadequate Investigation

93-849 Kling v Earl O Russell dba Russell's Country Store (1993)

The case was remanded for further investigation when it was learned that EE's records had not been compared with ER's records during the investigation.

1420 COMMISSIONS

Incomplete Sales

Mortgage Originators

Payment

After Separation

Rule of Reason

93-1137 Ryan v Grand Oak Mortgage Co, Inc (1993)

EE was a loan originator for ER. Her duties included processing mortgage applications, verifying information, and securing the necessary documents for loan approval. EE's wage/commission was ½ percent of the mortgage amount due at closing. Both parties agreed that no payment was due unless there was a closing.

The issue centered on pending applications taken by EE before she left. There was no written employment contract and the verbal contract did not specify what would happen to these accounts. ER voluntarily paid seven accounts because little work was needed to bring the mortgage to closing. The remaining seven needed substantial work before the mortgage could close. The ALJ applied a rule of reason. Where other EEs had to call and secure documents, the commission was not owed to EE. Where little additional work was required, EE was properly paid the commission.

1421 BURDEN OF PROOF

Appellant
Burden Sustained
Records
Testimony

WAGES

Paid in Full

94-202 Pawlowski v Express File, Inc. (1994)

The DO found wages due based on EE's complaint and because ER did not submit records, even after four written requests. ER terminated EE because of missing cash. ER brought records to the hearing and testified that EE received all wages due and that EE owed money to ER for cash taken. ER filed a complaint with the Sheriff's Department, but no warrant was ever issued.

The ALJ found no wages due to EE. The Department was unable to show that EE worked any hours for which ER did not compensate. EE did not appear for the hearing. ER violated Section 9 by not submitting its records to the Department until the hearing date.

See General Entry XVII.

1422 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Not Found
No Commissions (Wages) Paid
Independent Contractor Relationship Found
Salesperson

94-291 Koerber v Birmingham Consulting Group, Inc, a Corporation dba Birmingham Computer Group, Inc (1994)

Respondent markets and sells computer programs for manufacturing companies. Respondent allowed Complainant to use their office, phone, supplies, and attend staff meetings. Complainant claimed Respondent hired him at a salary of $36,000 per year

with a 30 percent commission on sales. Respondent denied any employment contract existed but admitted that Complainant was an outside salesperson to whom they would pay a 30 percent gross margin commission. There was no written contract.

The ALJ found no EE/ER relationship. Respondent's failure to pay any salary during a 15-month interval was proof there was no meeting of the minds to pay a salary to Complainant. Respondent did not violate the Act.

See General Entry XXI.

OAKLAND COUNTY CIRCUIT COURT - 5/28/96: The Court upheld the ALJ's decision and denied Complainant's appeal. The Court found Complainant was an independent contractor. Respondent did not give Complainant assignments or supervise his work. Complainant could set his own hours and decide how to pursue sales leads. Complainant was not listed as an EE on Respondent's MESC or workers' compensation records.

1423 RES JUDICATA

94-363 LaTorella v Summit Travel Service, Inc (1994)

A District Court decision extinguished EE's claim. Act 390 issues decided in court may not be addressed again by the ALJ. The District Court's order effectively stopped any further litigation of EE's claim.

1424 BURDEN OF PROOF
Appellant
EE & ER Appeals

CONTRACT
Falsified Acceptance

FRINGE BENEFITS
Written Contract/Policy
Falsified Acceptance

WITNESS
Credibility
Contract Approval

94-391 Downey v Packer & Assoc, Inc, a Corp dba John M Packer & Assoc (1995)

The DO found ER violated Sections 5 and 7. The DO also held that because there was no written policy, the payment of fringe benefits could not be required. Both EE and ER filed timely appeals.

ER's witness credibly testified that ER's purported initials on the compensation proposal were not that of ER. The ALJ found that the compensation proposal was not a written employment contract. ER showed by a preponderance of the evidence the lack of a written contract/policy for fringe benefits. EE failed to show the existence of a written contract/policy but showed by a preponderance of the evidence entitlement to payment of ER's illegal deductions.

See General Entries I and III.

1425 FRINGE BENEFITS

At Separation

Specific Notice Required

VACATION

Resignation

Adequate Notice

After Taking

94-234 Rogers v Monsanto Employees Federal Credit Union (1995)

EE quit and claimed two weeks' vacation pay. ER's written vacation policy stated if employment ended without notice, ER would not pay EE any unused vacation pay. The written policy also stated that ER would pay vacation benefits after an EE returned to work. EE did not give ER notice until four days after leaving on 7/8/93. In EE's 7/12/93 written resignation, she stated that the two weeks of July 12-16 and July 19-23 were her two weeks' notice and vacation.

The ALJ found EE had not given ER the required two weeks' notice until after EE's last day of work. ER did not violate the Act.

See General Entry XI.

1426 WAGES

Unauthorized Pay Increase

92-392 Good v Argosy Tool & Manufacturing, Inc (1994)

ER paid EE $6 per hour for typing, telephone work, writing checks, and sending bills. EE prepared a memo at ER's direction that advised EEs they would receive a 25 cent per hour wage increase after working 90 days. EE testified that the memo was directed to all

EEs. Based on the memo, EE increased her wage to $6.25 per hour after working 90 days.

ER testified that the 25-cent wage increase applied only to shop EEs. EE's last check was for $6 per hour and ER reduced the net amount an additional $8 to recover the 25-cent amount added for prior hours.

The ALJ found no agreement for EE to receive a 25 cent per hour wage increase. ER did not violate the Act by writing EE's last check for $6 per hour. ER violated Section 7 by deducting $8 to recover overpayment.

See General Entry III.

1427 APPEALS

Untimely

Good Cause Not Found

Only Referenced One of Several DOs

94-999 thru 94-1006 & 94-1064
9 Complainants v Annette E O'Rourke and Mar-Tek Engineering, Inc. (1994)

ER filed a timely appeal for one DO but neglected to include the others. ER's failure to reference all ten cases in the appeal was careless, negligent and lacked reasonable diligence. The ALJ dismissed the appeals pursuant to Section 11(4).

1428 FRINGE BENEFITS

Extended Disability Benefits

Written Contract/Policy/Agreement

Eligibility

94-1027 Lauderdale v City of Detroit - DOT (1994)

ER appealed the DO which found a violation of Section 4. EE retired from ER's employment on 4/19/90. As to the issue of whether sick and accident benefits are due, the policy stated "once having 'retired,' a City EE cannot begin drawing his retirement pension benefits until all vacation, sick, or casual leave has been exhausted by payment over normal working week periods; no lump sum payments are allowed."

EE received sick and accident benefits from April until September, at which time he liquidated his vacation and extended disability benefits (EDB). EE's retirement pension benefits began
in December 1990. Pursuant to the labor agreement, EEs are to accumulate seniority and other benefits while on non-retiree payroll.

The ALJ determined EE was entitled to have his EDB supplemented from any existing vacation pay. The supplementation would make up the difference between whatever the EDB weekly rate may have been and his full weekly wage. The ALJ modified the Department's DO to reflect the correct hourly rate upon which EE's vacation was actually calculated and paid. ER did not satisfy the burden of proof.

1429 FRINGE BENEFITS

Written Contract/Policy/Agreement

ER Did Not Follow, Payment Ordered

VACATION

Written Contract/Policy

ER Did Not Follow, Payment Ordered

94-1073	**Bertin v R W J Corp dba Robins Printing Co**	**(1994)**
94-1074	**Fann v R W J Corp dba Robins Printing Co**	**(1994)**
94-1075	**Verkennis v R W J Corp dba Robins Printing Co**	**(1994)**
94-1077	**Duminske v R W J Corp dba Robins Printing Co**	**(1994)**

Per ER's handbook, EEs were entitled to 20 vacation days per year if employed more than five years. The vacation policy stated "Annual Vacation Days will not be allowed until June 1, and must be used up by May 31 of the following year, or be forfeited." However, testimony was presented that carry-over vacation time from one year to the next was permitted if EE's requested vacation was not approved because of ER's needs.

EEs claimed vacation days denied by ER. The Department's position was that ER's written policy made no provision for payment of unused vacation days.

The ALJ disagreed, finding that the written policy was a sham to shield against an actual practice in violation of the written policy.

See General Entry X.

1430 FRINGE BENEFITS

Travel Expenses

Vacation

Written Contract/Policy

Silent as to Payment at Separation

OVERTIME

Jurisdiction

94-1109	**Headley v Bio-Medical Services, Inc.**	**(1994)**

EE serviced hospital medical equipment and earned $11 per hour. His benefit package allowed mileage reimbursement and overnight expenses, but was silent as to a vacation benefit upon separation. ER's records showed underpayment of mileage for $236.81. EE claimed trip expenses of $1,387.70; vacation of $440; overtime pay for 120 hours; and medical insurance reimbursement of $79.02. Since ER's main office was in Ohio, overtime was considered a federal claim and not covered by Michigan's minimum wage law.

The ALJ found a violation of Section 3 and ordered payment due for mileage and meal expenses. No violation was found requiring vacation pay, medical insurance deductions, or overtime pay.

1431 CONTRACT

Amendment

Acceptance

94-1125 Jackson v Parents Together (1994)

The parties negotiated an employment contract which called for 20 hours work each week for $519.23. However, ER changed the contract when it "asked" EE to work additional hours without paying her an additional wage. EE accepted this new contract by continuing to work the additional hours for the same pay. When EE tried to leave after four hours, her requests were denied, but EE did not press the issue for fear of losing her job.

While EE asserted that she "had no choice," it is clear she had the choice of quitting, complaining about the additional hours, or leaving at the scheduled quitting time. By working the additional hours, she agreed to change the employment contract. The DO was affirmed.

1432 BURDEN OF PROOF

Appellant

Burden Not Sustained

Records

Recordkeeping

Lack of Clarity

WAGES

Deposited into EE's Account

98-1002 Frazier v Packard Group Incorporated (1999)

The issue was whether wages were due EE from ER. EE failed to appear at the hearing; however, ER was unable to substantiate that he sent EE's wages to AFLAC. ER's records

lacked clarity; the ALJ found ER in violation of Section 7. No interest was assessed if ER paid amount found due at the hearing.

1433 DETERMINATION ORDER

Department's 90-Day Issuance Period Procedural, Not Jurisdictional
Finality
Issuance of New DO
Appearance of Impropriety

JURISDICTION

After DO Final

94-1170 Graham v Syschk, Inc (1995)

EE's complaint dated 11/28/90 alleged $1,118 due, consisting of $1,020 in wages and $98 in a 401K retirement fringe benefit. The Department made an in-house determination that EE was due wages but not entitled to the claimed fringe benefit. However, the 9/16/91 DO did not address the wage claim, only that the 401K deduction was not within the jurisdiction of the Act. Neither party was notified of the in-house determination concerning the wages. EE did not appeal the DO until 6/15/94, almost three years after its issuance. A second DO was issued on 6/29/94. The Act's provision for a 90-day period for issuance of DOs is procedural, not jurisdictional. ER filed a timely appeal.

Because the Department erred in the 1991 DO by not addressing the wage issue, EE was denied his right to have a determination made on the merits of his wage claim. However, the ALJ found EE's appeal of 6/14/94 not timely and good cause not shown for the lateness. ER had a right to rely upon the finality of the 1991 Order. The Department's issuance of a subsequent Order three years later, without any notice to or contact with ER, raised an appearance of impropriety. Therefore, the DO was set aside.

1434 ATTORNEY FEES

WAGE AGREEMENTS

Dispute
Minimum Wage

WRITTEN CONTRACT

ER Is Bound by Terms

94-1023 Hoyt v Service & Design Group - Architects, Inc (1994)

EE salary per a wage agreement was $15,000 per year with the caveat that as ER's company became prosperous her salary would increase. Evidence showed that at times they paid her a double salary and other times nothing.

ER argued the weeks EE received no salary that she can only claim minimum wage. The ALJ stated minimum wage would be proper in a situation where the parties had no agreement. However, the parties' agreement specifically set forth what EE's salary was each week despite time off for vacation, sick leave, or personal leave. ER's obligation for wage payments must be viewed as a whole, not on a week to week basis. Therefore, ER violated Sections 2 and 5 by not paying EE every pay period and not paying wages due.

Because ER violated Sections 2 and 5, the ALJ ordered attorney fees for $1,000 in accordance with Section 18(3) of Act 390.

1435 ACT 62

Deductions

ADVANCES

Deducted From Final Pay

DEDUCTIONS

Advances

FRINGE BENEFITS

Holiday Pay

94-1172 Ross v New Kent Homes, Inc. (1994)

EE was a supervisor for a group home earning $8.22 per hour. The Department found 46 unpaid hours or $378.12 pursuant to a signed time sheet. ER testified that the time sheet was signed in advance and EE did not work the alleged hours before being discharged. ER claimed EE was advanced monies and still owed 17.19 hours. ER also objects to EE being paid 8 hours for New Year's Day since holiday pay was only paid to an EE who worked full-time during the pay period.

The ALJ found $234.27 due according to the signed time sheet less holiday pay. Act 390 does not allow an ER to deduct from EE's wages the amount owed by EE to ER. Section 7 changed the procedure permitted by Section 1 of Act 62, MCL 408.521, where it provided in part as follows: ". . . nothing in this Act shall be construed as to prohibit a deduction from the wages or compensation of any employee, any indebtedness or obligation owed by such an employee to the employer. . . ."

This provision allowing an ER to deduct from the wages of an EE amounts owed by EE to ER is not found in Act 390. It is a generally accepted proposition of law that where statutory language differs from a prior statute on the same subject, the new language is presumably intended to have a different construction or meaning and denote an intention to change the law.

See General Entries III and XIII.

1436 BURDEN OF PROOF

Recordkeeping

Cash Payments

Not Maintained

Section 9

WAGES

Cash Payments

No Records

WAGES PAID

Checks Returned Unpaid By Bank

94-1025 Haines v John T Robinson dba Grand Ledge Auto Clinic (1994)

EE worked as a mechanic for ER at the rate of $200 per week. The Department's investigator was unable to corroborate whether EE was paid for the period claimed due to insufficient ER records. ER testified he paid EE cash but did not request that EE sign a receipt showing payment.

ER did not use reasonable, accepted methods to protect himself against an Act 390 claim. These methods include paying EEs with checks and keeping and providing stubs or obtaining a receipt for a cash payment.

See General Entry XVII.

1437 WAGES

Paid in Full

Payment for Last 10 Days

95-34 Link v Fetzer Broadcasting Services, Inc. dba Muzi-Tronic Services (1995)

EE's annual salary was $18,000. EE received biweekly paychecks totaling $1,500 per month. EE claimed unpaid wages for the 10-day period between the date of her last paycheck and her separation date. EE admitted that she did receive full wages during her last month of employment. Therefore, no additional wages were due.

ER did not violate Section 5(1) of the Act. The fact that EE received checks on a biweekly basis did not change the wage agreement.

Also see General Entry IX.

1438 FRINGE BENEFITS

After Separation
Holiday Pay
Must Be Employed
Vacation
At Separation
Written Contract/Policy/Agreement
Must Be Employed

VACATION

Written Contract/Policy
Carryover Not Allowed
Paid in Advance

95-180 Brandt v Morley M Biesman, DDS, PC (1995)

EE retired from ER on 5/13/94 giving one month's oral notice and written notice one day after separation. At the time of separation, EE claimed vacation and holiday pay. ER's written policy provided that EEs must be employed in order to be paid for holidays. EE was not entitled to holiday pay after her last day of employment.

EE claimed vacation pay due from 1993. Written policy of ER stated there shall be no vacation carryover from year to year. Therefore, EE was not entitled to pay for 1993 unused vacation time. EE also claimed vacation for 1994, the year of her separation from ER. ER's written policy provided that there must be two weeks' written notice in order to receive pay for unused vacation. ALJ found EE's oral notice to be adequate. Records showed that EE had accrued 7.5 days of vacation but had taken 8.5 days. Accordingly, no additional vacation time was owed.

1439 BURDEN OF PROOF

Burden Sustained
Testimony
Unrebutted Testimony

TESTIMONY

Believable
Unrebutted

TIME CARD

Double Entries

WAGES

Paid in Full

95-82 **Leachman v Paul George, Inc., dba Paul's Auto Wash I** **(1995)**

EE claimed she was due unpaid wages after separation pursuant to time card entries. The time card had two sets of entries, one being 6:59 p.m. to 12:05 a.m. EE did not appear at the hearing and ER offered testimony that normal work hours on a Friday ended at 5:30 p.m., with clean-up duties completed no later than 7:00 p.m. ER met the burden of proof that EE did not work the hours on the time card and his testimony was unrebutted. Consequently, the ALJ found that the EE did not work the hours and was not entitled to pay for those hours.

1440 ATTORNEYS FEES

Appellant Non-Appearance at Hearing

95-85 **Peters v American Gas & Oil, Inc.** **(1995)**

ER filed a timely appeal. A representative of ER requested an adjournment which was denied. Appellant failed to appear at the hearing. EE and his attorney appeared at the hearing. EE's attorney subsequently filed a motion for payment of attorney fees citing Section 18(3) which provides the ALJ may grant such payment. ER objected to this motion, noting that the Notice of Pretrial Conference and Hearing did not state an attorney was necessary. The Notice of Hearing, however, notifies parties that they may be represented by an attorney. The ALJ found ER had a duty to appear at the hearing requested by ER. EE was granted attorney fees.

See General Entry XVI.

1441 BURDEN OF PROOF

Appellant

Burden Not Sustained

Must Overcome DO

95-88-D **Hall v JB Holden Company** **(1995)**

ER appealed DO finding EE was owed unpaid wages. ER presented no testimony or documentation showing that he did not owe EE the wages. Therefore, ER's burden of proof was not met. Administrative Rule R 408.22969 places the burden of proof on the Appellant. The DO was modified based on one check produced which showed wages paid during the time period claimed.

See General Entry XI.

1442 EMPLOYER

Individual Liability

EMPLOYER IDENTITY
Individual Liability

EMPLOYMENT RELATIONSHIP
Control
Economic Reality Test
EE/ER Relationship Found
Manager

95-120 through 95-124 **5 Complainants v Bear Cleaning Services, Inc.** **(1995)**

ER appealed the DO finding he owed wages to the EEs. ER was the Michigan representative of AIOM Corporation and claimed AIOM owed the wages to the EEs. Applying the ER/EE relationship test in Askew, 398 Mich 212 (1978), the ALJ found an employment relationship existed because the evidence showed that ER placed the job order with the MESC, interviewed the EEs, directed the EEs in their duties, and informed the EEs that the job had terminated. While ER may have been acting on the behalf of AIOM, because he held himself out to be the ER of the EEs, he incurred individual liability.

See General Entry VII.

1443 MINIMUM WAGE
Wage Reduced To

WAGES
Reduced to Minimum Wage

95-270 **Olman v Concord Enterprises, Inc.** **(1995)**

EE gave ER less than two weeks' notice of her resignation. ER's written policy was to reduce salary to minimum wage if the proper notice was not given. At commencement of employment, EE signed a form agreeing to give two weeks' notice of resignation or receive minimum wage for wages due at separation. Because EE did not give two weeks' notice, it was proper to reduce EE's salary to minimum wage.

1444 FRINGE BENEFITS
Written Contract/Policy/Agreement
Vacation
Signed Waiver

VACATION
Eligibility
Signed Waiver
Written Contract/Policy
Signed Waiver

95-272 **Zenker v Pinkerton's, Inc. dba Pinkerton's Security** **(1995)**

In July 1993, EE chose Option A payment of wages which included a waiver of fringe benefits. Subsequently, ER posted a vacation policy for all EEs hired as of 8/1/93. EE claimed vacation pay was due since the written policy did not address EEs who chose Option A. The ALJ found no vacation pay due EE since he previously waived his rights to all fringe benefits.

1445 BONUSES
Date of Payment v Act 390 Claim Date

CLAIMS
Twelve-Month Statute of Limitations
Date of Bonus Payment v Act 390 Claim Date

FRINGE BENEFITS
Bonuses/Incentive Pay
Date of Payment v Act 390 Claim Date

95-288 **Murphy v Ply Curves, Inc** **(1995)**

EE claimed a bonus due for the period 10/1/92 through 9/30/93. EE filed an Act 390 claim on 12/5/94, more than 12 months after the alleged violation. EE delayed filing the claim because the 1993 bonus was not paid until one year after the bonus period ended. The date bonuses are actually paid, however, does not affect the Act 390 claim date. Therefore, EE did not file a timely claim.

1446 COMMISSIONS
Payment
After Separation
Customer Payment
Customer Satisfaction

WAGES
Commissions
After Customer Satisfaction and Payment
Earned After Customer's Satisfaction and Payment

95-297 Healey v Classic Kitchens & Baths, Inc (1995)

EE claimed unpaid commissions. EE left prior to completing delivery to customers, assuring the customer's satisfaction, and the customer's payment of the invoice. EE claimed commissions were due even though she had not overseen the installation, invoice submission and collection of money on each job. ER testified that he had to complete these phases of each job, including assuring the customers' satisfaction with the job and correcting any mistakes. The ALJ found no wages due EE because of the personal nature of the work and the fact that customers had not paid.

1447 EVIDENCE
Affidavit

TESTIMONY
Unrebutted

VACATION
Dissolution of Law Firm
Verbal Promises
Written Contract/Policy
Affidavit

95-333-D Tisdale v Gibson & Frederick, PC (1995)

EE had earned 15 days' vacation under the written policy at the law firm's dissolution date. ER did not appear at the hearing. EE testified that ER made an oral promise to pay EE for accrued vacation days as of the dissolution. EE presented an affidavit from another member of the firm in support of his position. In light of the unrebutted testimony and evidence presented, the ALJ found the ER violated Section 3.

1448 DEDUCTIONS
ER Counterclaims
Wages Below Minimum Wage

JURISDICTION
Statute of Limitations
Claim Filed at Hearing

95-345-D Counsman v Thomas J Trenta and Law Offices of Thomas J Trenta, PC, jointly and severally (1995)

EE claimed unpaid wages and unreimbursed expenses. ER withheld EE's final paycheck after his separation from the firm. ER did not have written authorization from EE to make any deductions to his paycheck. In addition, an ER may not make deductions that

would reduce the EE's pay below minimum wage. EE could not claim unreimbursed expenses since the 12-month statute of limitations period has passed. The ER did not sustain its burden of proof and the ALJ awarded unpaid wages to EE.

See General Entries III, V and XI.

1449 WAGES
Not Earned
Timesheet Not Signed

95-358-D **Balok v Syschk, Inc.** **(1995)**

EE worked from 2/1/94 to 2/4/94 when he tendered his resignation. ER required time sheets to be signed by the ER's client representative. EE was at Chrysler Tech Center on the dates in question, familiarizing himself with the company's operations and systems. EE's job title was systems analyst. EE's time sheet was not signed by a representative of Chrysler, since they questioned whether he had in fact performed any work. The ALJ found that since EE had only become familiar with operations and did not do any analysis, he was not entitled to wages.

1450 EMPLOYER
Duty to Maintain Records

EMPLOYMENT RELATIONSHIP
Independent Contractor Relationship Found
Economic Reality Test

JURISDICTION
Independent Contractor Relationship

95-36 and 95-402-D **Smith v D E R Entertainment, Inc. dba Upper Deck Sports Cafe** **(1995)**

Complainant claimed unpaid wages. Complainant was hired for four weeks at $200 per week to ready the kitchen of ER's cafe prior to opening for business. The ALJ applied the economic reality test and found Complainant was an independent contractor because he had no duties once the restaurant opened for business. He was not supervised; his hours were not set; and he did not fill out any W-2s. Because the Complainant was not an employee, the ALJ found the Department had no jurisdiction over this matter. The ER did not violate Section 9 since there was no EE/ER relationship. Therefore, ER was not required to maintain records.

See General Entries XVII and XXI.

1451 COURT ACTIONS

Judgment to Offset Amount Due Complainant

JUDICIAL PROCEEDINGS

District Court Judgment

DO Offset

95-595 Hindman v David Rudd dba Downtown Auto Body & Collision Center(1995)

EE and ER failed to appear at the hearing. EE sent a District Court Judgment showing wages due ER in the amount of $790.66. Administrative Rule R408.22966 requires dismissal if Appellant does not appear at the hearing. However, the ALJ set off the DO against the District Court Judgment. The amount of the DO plus penalty totaled $544.27 which reduced the amount owed to ER to $246.39. The ALJ found ER had violated Sections 2(3) and 5(2) since the ER withheld wages before the District Court Judgment was entered.

See General Entries VI and XVI.

1452 DETERMINATION ORDER

Amendment of DO

At Hearing

By Department

In Absence of Party

95-446 Comstock, Jr v G W D Express, Inc (1995)

EE claimed wages due. EE did not attend the hearing. The Department made a motion to amend the DO to find no violation of Act 390 and no wages due because EE's mileage was to be computed based on the Household Carrier Guide and not truck mileage. There being no objection, the motion was granted.

1453 DEDUCTIONS

Uniforms

95-363 Snyder, II v Gene's Hardware (1995)

ER deducted $10.40 each pay period for uniforms. EE did not give written consent to these deductions. Therefore, ER violated Section 7.

See General Entry III.

1454 COMMISSIONS

After Separation

Bad Debts

Deductions

Bad Debts

Insurance

DEDUCTIONS

Bad Debts

WAGES

Deductions From

Withheld

Losses

95-434 Schoen (Bradley) v Upper Peninsula Insurance Specialists, Inc. (1995)

EE claimed unpaid wages. EE was paid commissions on new insurance policies sold. EE took a deposit from the customer, processed the paperwork and received the commission when the policy term was up (6 months for an auto insurance policy). ER incurred losses in connection with several of the policies EE sold and ER withheld her check. The ALJ found ER violated Section 7 because EE did not give written authorization for withholding her pay. The ALJ also found that ER violated Section 5 when he did not pay EE her commission when due. Even if ER sustained losses on these accounts, EE had followed ER's instructions for processing new policies and did nothing wrong to incur these losses. The ER may proceed against the EE with a district court action but may not withhold wages.

1455 APPEALS

Dismissed

Mail Not Forwarded

Untimely

Good Cause Not Found

Mail Not Forwarded

95-406 Bradsher v Contech Services & Engineering Co (1995)

ER did not file a timely appeal because ER's daughter forwarded the DO to him in Arkansas. The ALJ found it was unreasonable for the ER not to notify the Department of his current address. The appeal was dismissed.

See General Entry II.

1456 BURDEN OF PROOF

Appellant
Burden Not Sustained
Records
Timecards
Recordkeeping
Cash Payments
Not Maintained

WAGES

Cash Payments
No Records
Risk to ER
Full Amount Not Paid
At Separation
No Records Presented at Hearing

95-365 & 95-366 Bentley, Rickey E Bentley v Patrick J Durm, an individual dba Millers Camp/Sunset Motel (1995)

EEs claimed unpaid wages for work in October, November, and December 1993. EEs made time card entries and left time cards in a pouch on the refrigerator. ER generated paychecks from these time cards. In 3/94, after being unpaid since December 1994, the EEs took the time cards for their last pay period. EEs also filed for unemployment compensation. ER had a duty to maintain employment records but did not. The ER could have written checks based on the time cards at any time before March 1994. In addition, ER claimed that he had paid EEs in cash for their final days of work. Again, ER did not have records of these payments. The ALJ found that ER owed EEs unpaid wages and directed that the wage checks be made out to each EE and the Commission for proper credit. (The EEs had received unemployment compensation based on the period covered by the wages.)

See General Entry IX.

1457 COMMISSIONS

After Separation
Written Contract/Policy
Forfeiture by Termination

FRINGE BENEFITS

Vacation
Written Contract/Policy
Forfeiture by Termination

WAGES
Commissions
Forfeiture by Termination
Written Contract/Policy
Forfeiture by Termination

95-450-D **Jenkins v Federated Financial Reserve Corp** **(1995)**

EE claimed unpaid commissions on six sales she handled. Once the sales were booked, commissions were earned if sales exceeded $75,000 that month. ER had a written policy which stated that EEs shall not be entitled to any commissions following employment termination. Only two of the commissions EE claimed were booked at the time of her termination and sales did not total $75,000 for the month. Accordingly, EE did not meet the threshold amount for payment of commission. In addition, EE claimed vacation pay due because other EEs had been paid for vacation time not taken. ER's written policy stated that unused vacation time would not be paid upon termination. The ALJ found no commissions or vacation pay due EE.

1458 CONTRACT
Employment
Nullification

EMPLOYMENT CONTRACT
Nullification
Contract With Another ER

JURISDICTION
Severance Pay

95-641-D **Nowalski v G B Tee's Golf World, Inc** **(1995)**

EE claimed unpaid wages. EE signed a written employment contract with ER which did not provide for a start date. ER was to inform EE of a start date as soon as it was known. Two days after signing the employment contract, EE signed another employment contract with a different ER and informed ER. EE traveled to Florida for one month of training with his new ER. EE returned to Michigan and asked ER for a job, to which ER replied that there was none. EE then claimed unpaid wages from the date he signed the employment contract to the date ER had no position available to him and one week's severance pay. The employment contract provided for nullification by either party at any time. The contract also provided EE could not work for any other employer in the golf industry and that violation of this clause would result in immediate discharge. The ALJ found that when EE signed the subsequent employment agreement with another ER, he nullified his existing contract. EE also claimed severance pay, and the ALJ found that the Department had no jurisdiction over severance pay.

1459 DISCHARGED
Board Action

EMPLOYER
Duty to Maintain Records

EVIDENCE
Post-Hearing Submission

RESIGNATION
Letter Interpreted As

WAGES
Deductions as Part of Computation
Full Amount Not Paid
At Separation
No Records Presented at Hearing
Poor Economic Situation
Promised in Future

95-642 Stanley v CMR Industries (1995)

The ALJ ruled that exhibits attached post hearing could not be considered in his decision. EE claimed unpaid wages for various pay periods in 1993 and 1994. On 4/1/93 EE began receiving bi-weekly pay checks per his employment contract. These payments ceased in August 1993. EE inquired as to his wages and was told that cash was low and he would be paid eventually. EE wrote a letter to ER in December 1993, requesting payment of monies owe and citing problems the company was having. ER read this to be EE's resignation from the company. ER claimed that EE wrote checks to himself out of the company funds that were intended as wages. ER deducted these amounts from wages owed to EE. The ALJ found that EE was owed unpaid wages up until the date of his letter to the company. The ER was not allowed to make deductions from EE's wages without EE's written authorization. The ALJ also found ER violated Section 9 because it did not provide the Department with payroll records.

1460 FRINGE BENEFITS
Vacation
Written Contract/Policy
Anniversary Date

VACATION
Written Contract/Policy
Anniversary Date

95-643 Whitley v Kenco, Inc (1995)

EE claimed unpaid vacation time as of separation. ER's written vacation policy stated that vacation was earned as of the EE's anniversary date. EE terminated her employment prior to her anniversary date and was not entitled to any vacation time.

1461 APPEALS

Untimely

Good Cause Not Found

DO Not Received

Presumption of Receipt

95-722-D Kirshner v Dr and Mrs Robert Chadwick (1995)

ER filed an untimely appeal because he did not receive the DO at his home. Although a copy was sent to his work, ER did not check that mail on a regular basis because of his irregular work schedule. There is a presumption of mail receipt which the ER did not rebut. The appeal was dismissed.

See General Entry II.

1462 APPEALS

Dismissed

Failure to Attend Hearing

Presumption of Receipt

95-731-D Dunson v Hink's Corporation dba United Consumers Club (1995)

The hearing was rescheduled and ER failed to appear. ER claimed that he did not receive notification of the new hearing date. ER received notification that the original date would be rescheduled and the Order Dismissing Appeal as a result of his failure to appear. There is a presumption of receipt which ER did not rebut. ER's request for a rehearing was denied.

1463 CIVIL PENALTY

DETERMINATION ORDER

Amendment of DO

At Hearing

By Department

95-998 Wentworth v Friske Building Maintenance Co (1995)

EE did not appear at the hearing. The Department made a motion to amend the DO to show zero due. ER violated Section 7 and agreed to pay a civil penalty of $100.

1464 EXEMPLARY DAMAGES

Deliberate, Conscious and Knowing Violation

WAGES

Full Amount Not Paid

At Separation

Verbal Agreement v Written Contract/Policy

Verbal Agreement v Written Contract/Policy

95-725 Lake v Roger Steig dba Steig Trucking (1995)

EE claimed unpaid wages due to an oral agreement with ER. ER's written policy provided that EE was to receive either 25% of truck pay or $100 per dispatch day, whichever was more. ER gave EE oral instructions to leave the truck in another state and return to Michigan for a wage of $350. ER instead paid EE $87.50 which was 25% of the truck pay. ER said the $100 per day dispatch was reduced by a $50 penalty for not calling in. Therefore, $87.50 was the higher pay. The ALJ found that the oral agreement superseded the written policy. EE gave written authorization to deduct $20 from his pay and this amount was deducted from the $350 award. EE asked for exemplary damages but the ALJ found the ER did not have another violation in the previous 12 months and did not knowingly violate the Act. See Administrative Rule R408.9034 in Volume I of this Digest under the tab "Wage Hour Division Rules."

1465 DEDUCTIONS

Training Expenses

Wages Below Minimum Wage

Written Consent

Inadequate

No Date for Payment

WAGES

Deductions From

95-801 Griggs v Clean Sweeps of Michigan & Air Duct Cleaners of Michigan, Inc (1995)

EE received training for his position just prior to quitting his job. EE offered in writing to pay back any costs of the trip associated with the training. ER deducted the costs from EE's final paycheck. EE claimed he was going to pay the costs back over the holidays, not from his final paycheck. The written authorization did not state when EE would pay

back the costs. The ALJ found the deduction to be authorized but the ER violated Section 7 because the deduction brought EE's wages below minimum wage. ER was ordered to pay EE the difference between his final paycheck and what minimum wage would have been.

See General Entry III and VIII.

1466 DEDUCTIONS

Lunch
Travel Time

WAGES

Cash Payments
No Records
Deductions From
Full Amount Not Paid
At Separation
No Records Presented at Hearing

95-912 Scott v Ted Vronko dba Great Services Co (1995)

EE was on a work release program from prison and ER agreed to transport EE to and from the job site. EE claimed unpaid wages. ER deducted travel time and lunch hours from EE's hours. The ALJ allowed these deductions. ER claimed he paid EE $812 in cash and that his son witnessed this. The ALJ did not allow this deduction since the ER had no records to verify the cash payment. The DO was modified to show the correct amount of wages due.

1467 EVIDENCE

Calendar
ER Records

TESTIMONY

Believable

95-1062 Aguilu v Jabbour & Associates (1995)

EE claimed unpaid wages over and above the amount of the DO. EE had a calendar showing the hours she worked which indicated 28.0 hours worked and not paid by ER. ER presented a computer printout of hours worked by EEs. EE's believable testimony contradicted this printout. The ALJ found EE had not been paid for the 28 hours worked.

1468 BURDEN OF PROOF

Appellant
Burden Sustained
EE Journal

WAGES
Full Amount Not Paid
At Separation
EE Journal

WITNESS
Credibility
Failure to Appear

95-511 **Alvarez v Leo Winner dba Western Michigan Decorators** **(1995)**

EE had a dispute with ER regarding his hourly wage and quit his job. EE claimed unpaid wages because he did not receive his last paycheck. ER did not appear at the hearing and the EE testified in a credible manner. EE had a personal journal where he kept entries of the hours he worked each day. The ALJ found he was not paid his last paycheck but ordered it paid at a lower hourly rate since there was no evidence regarding EE's claim that he was entitled to a higher rate.

1469 BURDEN OF PROOF
Appellant
Burden Not Sustained
No Written Contract/Policy

EMPLOYER IDENTITY
Individual Liability

EXPENSES
Written Contract/Policy

INDIVIDUAL LIABILITY

VACATION
Written Contract/Policy
Offer of Employment

WAGES
Paid in Full
EE Testimony

95-895-D **Burny v Gary D Campbell, an individual,**

and Amendt Milling Company, jointly and severally **(1995)**

EE claimed unpaid wages, vacation pay and unreimbursed expenses. The ALJ found there were no unpaid wages since EE testified that he received all of his wages. ER had no written vacation policy, but EE presented his offer of employment which described "paid vacations as indicated in Employee Manual (two weeks after first year)." The ALJ found this to be evidence of the existence of a written policy, but also found that vacation time must be taken in order for payment to be mandated by the Act. There was no written policy regarding reimbursement of expenses so the ALJ found none due to EE. EE said Mr. Campbell personally guaranteed reimbursement of expenses. The ALJ found Mr. Campbell was not personally liable for expenses since there was no evidence supporting this allegation. The EE did not meet the burden of proof on his appeal and it was, therefore, denied.

1470 COMMISSIONS

House Account
Payment
After Separation
Customer Payment

EVIDENCE

Records

WAGES

Commissions
Payable After Separation

95-933 Wykoff v ABD Limited dba East Side Auto Repair (1995)

EE received commissions amounting to 50% of all customer payments except house accounts which were paid at the time the service was performed. EE claimed unpaid wages. ER produced records which showed only one customer payment. ER paid a $67.50 commission for this payment as ordered by the DO, but EE didn't cash this check. The ALJ ordered ER to reissue this check.

1471 APPEALS

Good Cause Not Found
DO Not Received
Presumption of Receipt

99-217 Boverhof-Poggi v Larry Ray Swanson dba Sienna (1999)

ER filed a late appeal from a Department DO. In response to an Order to Show Cause, the ER asserted that he did not receive the DO. The ALJ found the ER did not present

good cause for the late appeal. The Department sent the DO to the same address used by the Office of Hearings. The ER responded to Office of Hearings' mailings suggesting receipt. The post office did not return the DO as undeliverable. The Department provided a certification that the DO was properly mailed. The ALJ found a rebuttable presumption that mail properly stamped, addressed, and deposited in the US mail system is delivered to the addressee. Also, see ¶s 1091 and 1099 and General Entry II. The ER's late appeal was dismissed.

1472 BURDEN OF PROOF
Unrebutted Testimony

VACATION
Written Contract/Policy
Ambiguous
Payment at Termination

96-884 Wallace v D & B Engineering, Inc. (1999)

The EE appealed an adverse Department DO finding no vacation benefits after EE's discharge. The ER's written policy stated benefits would be paid at termination. This term was not defined to mean only those situations where the EE voluntarily quits. The ALJ held, based on EE's unrebutted testimony, that vacation benefits were due at EE's termination.

1473 PUBLIC POLICY, AGAINST
Work Without Compensation

WAGES
Against Public Policy
Work Without Compensation

WRITTEN POLICY
Interpretation
Against Drafter

98-1178 Billenstein v Centennial Michigan RSA 7 Cellular Corporation (1999)

EE worked as an outside sales representative from 3/16/98 through 4/8/98. The ER's compensation plan stated that EEs are paid $1,250 per month with two pay dates each month. EE received $625 at the end of March 1998 but nothing for the time in April 1998. The plan guaranteed EEs to receive at least this salary amount for the first three months regardless of how much they made in commissions. But another provision of the plan stated that no wages are due to an employee who separates before the 15th of the month.

The ALJ determined that the plan provisions were in conflict and construed the conflict against the ER who drafted the plan. Earlier decisions in the Wage Hour Digest reached the same conclusion. See ¶518 and ¶1222. The ALJ also observed that it is against public policy for employees to work without compensation.

1474 ACT 390
Discharge

DISCHARGED
Grooming Policy

FRINGE BENEFITS
Written Contract/Policy/Agreement
Employment On Certain Day Required

JURISDICTION
Discharge

WRITTEN POLICY
Must Be Employed

91-1197 Brodeur v D & W Food Centers Inc. (1992)

EE had been employed for 8 years and had worn a beard for most of this time. ER changed its grooming policy and required EEs to be clean shaven. EE was discharged with a last day of work 12/26/89 when he refused to shave. EE claimed vacation pay, sick pay, and personal holidays credited to each EE's bank on January 1st. The ALJ found that these were properly denied because EE was not employed on 1/1/90. EE's argument that he should receive these benefits because he received wages in 1990 for work performed in 1989 was found to be unpersuasive. Since his last day was 12/26/89, he was ineligible for these fringe benefits.

1475 ACT 390
Claim Not Covered
Severance Pay Deduction

BURDEN OF PROOF
Burden Not Sustained
Claim Not Covered by Act 390

FRINGE BENEFITS
Bonuses/Incentive Pay
Severance Pay

Resignation
Eligibility

SEVERANCE PAY
Deductions From

WAGES
Gratuitous Payments

94-1456 **Sokolik v Conner Peripherals, Inc** **(1995)**

ER offered Complainant and other EEs a "Retention Bonus Plan" to encourage EE retention where 35 percent of their three-month salary would vest after one year and payment in full would be made after two years. Conner Peripherals, Inc., purchased this ER, and they moved the company to California. They gave EEs a choice of moving or taking a severance package. ER then instituted a second "Retention Bonus Plan" which provided one half the three-month salary to be paid on 12/9/92 with the remaining half to be paid 12/9/93. Both EE and ER signed the second plan. EE elected to leave the company for 50 percent of his three-month bonus on 12/9/92. ER paid the remaining 50 percent of the bonus plus the EE's regular paycheck for 15 weeks of severance pay.

EE claimed he was entitled to a "Retention" bonus equivalent to three months' salary of $24,250 plus $1,865.16 which had been deducted from his last check. In addition, EE claimed he was entitled to the provisions of both the bonus plans.

ER did not violate the Act because EE's last check was a severance benefit and not wages under the Act. Section 7 only prohibits deductions from wages. EE failed to meet the burden of proof with a preponderance of the evidence showing that the Act covered his claim. ER's "Retention Bonus Plan" was a written agreement signed by both parties. ER paid out all that was due to EE.

See General Entries I, III, XI.

1476 EMPLOYMENT RELATIONSHIP
EE/ER Relationship Not Found
Unemployment Compensation Fraud

FRAUD
Unemployment Compensation

94-848 **Schaf v Jungle Jerry's Inc** **(1994)**

The Complainant assisted a friend to operate a pizza and ice cream summer business. The owner gave Complainant a check which the Complainant used to apply for Unemployment Compensation. Both the Complainant and the owner knew there was no

money to cover the check. The Complainant drew compensation during the summer and worked for the owner. The ALJ found no ER/EE relationship and no wage agreement. The Complainant and the owner operated the business planning on the Complainant drawing compensation. The matter was referred to the MESC for possible violation of the MESC Act.

1477 BURDEN OF PROOF

Appellant

Burden Not Sustained

Witness

No Personal Knowledge

Credibility

Failure to Pay Undisputed Amount

WAGES

Commissions

Payable After Separation

Unrebutted Testimony

Full Amount Not Paid

Less Than Timecard

94-1205 <u>Faunce II</u> v <u>J-G Mold & Engineering Inc</u> (1994)

EE claimed wages based on timecard plus commissions. ER representative at hearing was hired after EE's discharge and had no personal knowledge of the claim. EE presented unrebutted testimony that he worked the afternoon of his last day. He presented a timecard with afternoon hours. ER's representative presented the same card but with the afternoon hours erased. EE also claimed commissions earned before his discharge. He presented unrebutted testimony that he designed the molds which were made according to his design. ER's representative agreed that the EE was due some commissions but this undisputed amount had not been paid to EE despite the Act 390 claim, the ER being advised of the claim, and the Department's DO. The ALJ found wages due for the afternoon of EE's last day as well as the commissions claimed. ER's representative did not have personal knowledge of EE's employment. ER did not satisfy the burden of proof necessary to overcome the Department's DO.

1478 APPEALS

Only Issues Raised by Appellant May Be Considered

FULL AMOUNT NOT PAID

At Separation

Witness Credibility

WAGES

Cash Payments
Risk to ER

WAGES PAID
Time and Manner of Payment

93-1351 Elbast v Charlie's Party Store dba Charlie's Enterprise Inc. (1994)

The Department issued a DO finding violations of Sections 2 and 5 and ordered payment of $800 in wages based on 11 weeks' work at $500 per week. The EE appealed; the ER did not. The ALJ found the EE went to work in order to check out the business for possible purchase. There was an agreement to pay EE wages during this period at $500 per week. ER made several case payments ranging from $20 to $850 totaling $4710. This amount was reported to the Internal Revenue Service and the Michigan Employment Security Commission. These payments were made at different intervals, some as little as two days apart. The ALJ found a violation of Section 2 because the cash wages were not paid in a regular, periodic manner. Also, Section 5 was violated because all wages due were not paid to EE at separation. (11 x $500 =$5500 - $4710 = $790 which is very close to the $800 found due.) Although cash wage payments are permitted by Section 6, an ER paying wages in cash has no protection from claims of nonpayment. While the EE did not work a full 11 weeks, ER didn't appeal the DO. The $800 found due in the DO therefore became final. No further wages were found due to EE. See General Entry XII.

1479 ADMINISTRATIVE LAW JUDGE
Authority to Direct Document Filing

APPEALS
Dismissed
For English Translation
Must Be In English

FRINGE BENEFITS
Must Be in Writing to Be Enforced

REHEARING
Granted
English Translation of Appeal Provided

94-709/94-1076 Alcantara v Applewood Orchards Inc. (1994)

Complainant filed an appeal in a language other than English. Complainant was provided 60 days to submit an English translation. Complainant's "appeal" was dismissed based on Complainant's failure to provide an English translation. Section 11(4) of Act 390 permits an appeal from a Department DO, but without an English translation, it was unclear whether an appeal had been filed. MCL 600.1427 requires court records to be in

English. Section 80(d) of the Administrative Procedures Act gives the presiding officer the authority to direct the filing of documents. Complainant's failure to file an English translation of the appeal is a violation of Section 80(d).

An Order Granting Request for Rehearing was issued because the Department provided an English translation of Complainant's appeal.

After hearing, the ALJ found no bonus due because there was no written contract or policy requiring this payment as required by Section 3.

See General Entry I.

1480 COMMISSIONS

Computation
    Bad Debts
Deductions
    Part of Computation
Employment Contract
    Change After Sale
    Customer Bankruptcy
Payment
    After Invoice

93-1184 Jones v London Packaging Corporation (1994)

EE claimed a commission for a sale where the customer went bankrupt. EE's commission agreement was 50 percent of gross profit. The commission was due 30 days after invoice. After this sale, ER changed its policy to cancel commissions for overdue accounts. EE claimed the amount due because the invoice billed the customer the full amount. The Department found that gross profit meant actual profit, not the sale price. Since the customer went bankrupt, there was no profit and therefore no commission is due. The ALJ found the commission due to EE because before the ER changed its policy, there was no policy permitting ER to charge back commissions where the customer didn't pay.

1481 EMPLOYER IDENTITY

County/Court

WAGES

Court EEs

86-5557 thru 86-5596; 86-5599 thru 86-5628; and 87-6044 43 Complainants v Thirty-Seventh Judicial Circuit & 30 Complainants v Tenth Judicial District (1987)

Complainants filed Act 390 complaints after Calhoun County implemented an allotment system of budgetary controls. These controls did not allow the Respondent Courts to pay the Complainants' full wages and wage increases. The allotment system either froze or adjusted the Complainants' wages. The amounts claimed are the difference between what the courts attempted to secure for its employees and what the funding unit, the Calhoun County Board of Commissioners, appropriated. The Department found violations of Sections 2 and 7.

The ALJ found the Complainants had an independent statutory right to file Act 390 claims contrary to the position of Calhoun County which argued the claims circumvented the process established by the Supreme Court for disputes between the courts and the county. The ALJ also found the county had no right to file an appeal concerning the Department's DOs. The Act has no provision permitting intervention of a nonparty in a contested case. Section 11(6) designates the parties at an Act 390 hearing as the employee, employer, and the department. Nevertheless, the county was admitted with "limited party status" in order to address the issues raised in an economical manner.

The ALJ reversed the Department DOs finding that the courts were implementing budgetary controls imposed by the county. "As the courts have no control over the 'purse strings' of the funding unit, their only recourse was to commence litigation. These events are not a violation of the Act."

1482 PUBLIC POLICY, AGAINST
Work Without Compensation

WAGES
Against Public Policy
Work Without Compensation

WORK
Without Compensation, Against Public Policy

WRITTEN POLICY
Interpretation
Against Drafter

98-1178 <u>Billenstein</u> v <u>Centennial Michigan RSA 7 Cellular Corporation</u> (1999)

EE worked from March 16 through 4/8/98 as an outside sales representative. He was paid $625 at the end of March but received no pay for the time worked in April. The employment was covered by a Compensation Plan which stated he would be paid a "reconciling salary of $1,250 per month." The Plan also provided that EE was guaranteed to receive at least the salary amount while building commissions. Another portion of the Plan stated that if employment ends before the 15th of the month, EE would not receive salary for the first half of the month.

The ALJ referred to ¶s 518 and 1222 for the proposition that ambiguities in a policy should be strictly construed against the drafter. The ALJ also found it against public policy for employees to work without compensation. The Department's DO finding an amount due for the time worked in April was affirmed.

1483 BURDEN OF PROOF
Unrebutted Testimony

VACATION
Written Contract/Policy
Discharged or Quit

WRITTEN POLICY
Vacation
Discharged or Quit

98-884 Wallace v D & B Engineering Inc. (1999)

EE appealed from a DO finding no violation of the Act. Only the EE came to the administrative hearing. Based on the EE's unrebutted testimony, the ALJ found a violation of Section 3. The ER's vacation policy provided 80 hours for EEs with two years' service, but denied this benefit to those who do not give a two-week notice of resignation. The policy also stated that in the event of termination, payment would be made in lieu of actually taking a vacation. EE was discharged. The ALJ noted that the policy does not distinguish between one who discharged or quits and that it is doubtful one who is discharged could give a two-week notice.

1484 HEARING
Appellant
Did Not Appear At Hearing
Party Arrives After Record Closed
Unprepared

99-93 Briggs v Coachlite Hairstyling Salon LLC dba Possibilities Styling Centers (1999)

EE appealed from an adverse DO. After the prehearing conference, EE requested time to obtain an Attorney. The case was calendared 30 days for this purpose. The EE came to the hearing site on the 30th day, believing the hearing had been adjourned 30 days. After the 30-day period had passed with no appearance from an Attorney for EE, the hearing was rescheduled. At the new date, only the ER representative appeared for the 1:30 p.m. hearing. After waiting 15 minutes without the EE's attendance, the ER representative was allowed to leave. EE arrived at 2:15 p.m. claiming she had taken a wrong turn. EE's

appeal was dismissed. Proper notice had been sent, no adjournment had been granted, and good cause was not presented for EE's absence from the hearing. Also see General Entry XVI.

1485 ADJOURNMENT OF HEARING
Requested But Not Approved

HEARING
Address
Duty to Keep Department Advised
Adjournment
Requested But Not Approved

REHEARING
Denied
Request for Adjournment
Not Approved

98-131 <u>McPike</u> v <u>Crystal Air Inc.</u> (1998)

On 3/5/98 ER left a voice mail message for ALJ requesting an adjournment of the 6/4/98 hearing. The ALJ attempted to contact the ER but was unsuccessful at the telephone number provided. ER did not make further contact with the ALJ. ER, as the appellant, did not appear for the 6/4/98 hearing. The ALJ dismissed ER's appeal based on Administrative Rule R 408.22966. ER filed a request for rehearing contending that no one responded to ER's earlier request for adjournment. The ALJ denied the request noting that ER had a new address which was not provided to the Department. The ALJ found it to be ER's burden to secure approval for an adjournment request and not assume it to have been granted. "Being aware of the hearing date, and not having followed up on its unanswered request, did not absolve Respondent from having to appear for the hearing on its appeal."

Also see General Entry IV.

1486 BURDEN OF PROOF
Unrebutted Testimony

WAGES
Paperwork Required Before Payment

98-1048 <u>Lind</u> v <u>Hometowne Building Company, LLC</u> (1999)

The Department's DO found a violation of Section 5 and ordered wages paid to EE. At the Hearing only the ER appeared. Based on ER's unrebutted testimony, the ALJ found

no wages due. EE didn't give ER time sheets for the period claimed. The ALJ observed that all parties had the opportunity to present evidence at the Hearing. Based on the un-contradicted testimony of ER, the DO was reversed. Also, see General Entry X.

1487 WORKERS' DISABILITY COMPENSATION

Determination of Disability

98-674 Sanders v Detroit Public Schools (1999)

EE appealed the DO claiming a fringe benefit, reimbursement to the illness bank, for 24 days. EE, a teacher, was assaulted while in class. The employment contract between the ER and the Detroit Federation of Teachers produced at hearing provides that teacher absences resulting from assaults shall not be charged against sick leave. The teacher's gross earnings shall continue during the period of disability. ER compensated EE for assault pay from 12/2/97 through 1/9/98, but disputed further payments. The ALJ concluded that the proper forum to address EE's claim is the Workers' Compensation Law. Until EE is determined disabled under this process, it cannot be determined that EE's absences continue during a "period of disability" during which she is due reimbursement to the illness bank.

1488 BURDEN OF PROOF

Recordkeeping

No Proof of Hours Worked

Time Worked

COMMISSIONS

Incomplete Sales

Automobile Sales

MINIMUM WAGE

Commissions

99-220 Britten v Ramont Credit Center South, Inc. (1999)

EE was hired to sell used cars. ER had no records to show the period of EE's employment or the hours worked. EE was to receive 30 percent commission or a minimum of $200 for each sale. When EE didn't earn a commission, he was to be paid the minimum wage, $5.15 per hour. The Department found $200 due for the sale of a car, but the ALJ found that EE didn't complete all tasks necessary to earn the commission. Because of missing information, a customer had to return after taking delivery of a car and after the EE's resignation. The ER obtained the information needed by the lending institution. Accordingly, the $200 amount was not due. The ALJ ordered payment of minimum wage for all hours the business was open during the EE's employment.

1489 WAGES

Work Before/After Shift End

99-92 Ormiston v Lapeer Regional Hospital (1999)

EE claimed wages for time spent changing into hospital uniform before punching in and changing to street clothes after punching out. The evidence established that no supervisor or hospital policy ever directed EE to change clothes before and after punching out. In fact, EE was paid for all time she was punched in.

EE filed a Motion for Rehearing. The ALJ denied this motion since the record of the hearing was adequate for purposes of judicial review.

Also see General Entry IV.

1490 BURDEN OF PROOF

Appellant

Burden Not Sustained

Records

98-1002 Frazier v Packard Group Inc. (1999)

Because ER's records were unclear, the ALJ affirmed the DO.

Also see General Entry III.

1491 BURDEN OF PROOF

Appellant

Burden Not Sustained

Must Overcome DO

Deferral to Determination Summary

99-56 McPhee v T Q Construction Limited Partnership (1999)

EE claimed wages for two weeks held back at the time of hire. The Department DO found no violation of the Act. The ALJ found that all wages earned had been paid. EE's notes and records were examined but the ALJ deferred to the Department's Determination Summary which set forth in detail the period worked and the amount paid. This summary showed that EE had been paid for the two weeks held back at hire.

1492 BURDEN OF PROOF

Appellant

Burden Sustained

Testimony

EMPLOYMENT
Observation Day

WAGES
Observation Day

95-1137-D **Bishop v Point of Light Organization** **(1995)**

ER, prior to hiring an EE, would require the EE to spend a day of observation where the EE could observe typical patients and ER could observe EE. EE claimed unpaid wages when he appeared for this observation day, left early, and did not begin employment due to the rate of pay offered. ER had no employment records for EE since he was not employed. EE did not appear at the hearing and ER's testimony was credible. The ALJ found no wages due.

Also see General Entry X.

1493 HEARING
Amendment of DO
Presumption of Notice of Hearing Receipt

REHEARING
Denied
Presumption of Notice of Hearing Receipt

95-1141-D **Ohorilko v Excellare, Inc** **(1995)**

EE appealed the DO and ER did not appear at the hearing. The Department moved to amend the DO to indicate ER owed EE three days' wages. After receiving the Order Amending the DO, ER requested a rehearing claiming he did not receive the Notice of Hearing. The ALJ found that since ER received the DO and the Order Amending the DO and the Notice of Hearing was not returned as undelivered, there is a presumption of receipt. The request for rehearing was denied.

1494 APPEALS
Untimely
Good Cause Not Found
Parties Negotiating

95-1183 **Socha v Central Quality Services Corp** **(1995)**

ER filed an untimely appeal. ER was attempting to negotiate settlement of the matter and found out the day after the appeal was due that settlement was not possible. The ALJ did

not find good cause for the late appeal. The ER appealed to Circuit Court and Judge Talbot of the Wayne County Circuit Court affirmed finding the ALJ's decision was not an abuse of discretion. Even though the ER was negotiating to settle, a timely appeal needed to be filed. Good cause was not presented for the late filing.

Also see General Entry II.

1495 DEDUCTIONS

Tuition Reimbursement
Written Consent
Inadequate
Signature in Blank

WRITTEN POLICY

Tuition Reimbursement

95-1186-D Green v Brass-Craft Manufacturing Co (1996)

EE received tuition reimbursement. ER's written policy stated if EE voluntarily left employment, she would have to pay back the reimbursement. EE never saw the written policy until after her notice was given and ER's agent had EE sign authorizations for deductions in blank. The ALJ found authorizations signed in blank were not freely given and EE was entitled to pay withheld.

See Sands Appliance Services v Wilson, 231 Mich App 405 (1998), where the Court of Appeals found there was no public policy against allowing a prematurely departing EE from agreeing to reimburse an ER for specialized training, without which an EE could not have performed the job. This decision was supported by:

(1) Plaintiff discussed the tuition contract with defendant before hire;

(2) Defendant was employed by another appliance store at the time he applied with plaintiff, and defendant could have refused to leave his prior job to work for plaintiff if he had objected to the tuition contract; and

(3) Defendant had options available to him when presented with the tuition contract.

Also, any inequality of options or bargaining power between plaintiff and defendant was insufficient to declare the tuition contract adhesive. Because the contract was substantively reasonable, it was found to be enforceable.

1496 FRINGE BENEFITS

Written Contract/Policy/Agreement
Required Before Payment

95-1194-D **Schmitt v SLM Metrology, Inc.** **(1995)**

ER did not appear at the hearing. The DO was affirmed as to wages owed to EE. EE also requested unpaid lunch hours, mileage and reimbursement for office supplies. The ALJ found these amounts not owing since ER did not have a written policy regarding fringe benefits.

Also see General Entries I and IX.

1497 WAGES

Withheld

Competition With ER

Work Not Fully Performed

95-1195-D **Eberline v American Medical Personnel, Inc.** **(1995)**

EE claimed wages due. EE worked in a salaried position, was discharged mid-month and requested pay for this period of time. EE was discharged because EE was missing 30-40 percent of the work weeks. ER discovered that EE was misleading ER as to his sales efforts and was working for another ER at the same time. The ALJ found no wages due, since the EE did not perform work during this period.

1498 JURISDICTION

Circuit Court Settlement

Promissory Note

WAGES

Full Amount Not Paid

Promissory Note

95-1236-D **Hoaltin v Anodyne Corp** **(1995)**

EE was not paid his wages and brought a Circuit Court action. To settle this matter, ER signed a Promissory Note for $30,000. There was no formal settlement agreement or indication that the Promissory Note was related to the law suit. EE subsequently filed a wage claim with the Department for the balance of wages owed. At the hearing, the parties stipulated that the amount owed is $7,500 instead of the $9,000 the DO awarded.

ER argued that the Department had no jurisdiction since EE had elected his remedies in the Circuit Court. The ALJ found the Department to have jurisdiction since the Promissory Note made no mention of unpaid wages or settlement of the Circuit Court claim. Also, the Note had not been paid. EE agreed that the DO amount would be credited toward the Note amount so that there would be no double payment of wages.

1499 JURISDICTION

Out-of-State Employment

MOTIONS

To Amend DO

WAGES

Full Amount Not Paid

At Separation

Out-of-State Employment

95-1263 Miniard v Jon Dagel dba Dagel Steel (1995)

The Department made a motion to set aside the DO after discovering that 5 out of the 7 weeks EE worked were in Michigan. The ALJ found that the work was not sporadic and that the Department had jurisdiction for EE's wage claim. EE earned $4,120 and was paid $1,717. EE testified that there was no established pay day and that she was paid only after requesting money while on the job. After her last job, EE was not called back to work and ER did not pay wages due at separation. ER did not respond to requests for records from the Department and did not appear at the prehearing conference and hearing. ER violated Sections 2, 5(2) and 9(3). The DO was modified to reflect wages due to EE in the amount of $2,403.

Also see General Entry X.

1500 FRINGE BENEFITS

Vacation

At Separation

Written Contract/Policy

VACATION

Written Contract/Policy

Interpretation

Payment at Separation

95-1330 Pleimann v American Coil Spring Company (1996)

EE signed an employment contract in April 1993 and was CEO until 2/6/95 when he was discharged. EE received three weeks' vacation each for 1993 and 1994. EE claims he is owed three weeks' vacation for 1995. ER's policy statement for employees gave EEs two weeks of vacation, which is less than what EE received under his employment contract. The policy statement indicated that separating EEs receive a pro rata amount of vacation time. EE's employment contract does not address vacation pay at separation other than as

a result of death or disability. EE stated that he was given other benefits not addressed in his contract, such as health insurance. The ALJ found no vacation pay due EE since EE's employment contract did not require vacation pay at separation except as caused by death or disability.

1501 APPEALS

Dismissed

Failure to Attend Hearing

DETERMINATION ORDER

Amendment of DO

At Hearing

Partial Payment

HEARING

Appellant

Did Not Appear at Hearing

95-1325 McGaugh v Bristle Cone, Inc. dba The Varsity (1995)

ER appealed the DO. EE and ER did not appear at the hearing. The appeal was dismissed and the DO was modified to show that $15.91 was still due since ER had made a partial payment.

See also General Entry XVI.

1502 DEDUCTIONS

Sick Pay

Written Consent

None

SALARIED EMPLOYEE

Sick Pay

WAGES

Withheld

Sick Pay

95-1343-D Poore v Surburban Campus Properties, Inc. (1996)

EE was salaried and was paid bi-weekly. EE requested a policy manual and was told there was none and that she was a salaried EE. During her employment, EE missed 10 days due to illness. EE was in contact with ER during this time and ER advised her that her time off was approved and would not be subtracted from her salary. EE subsequently

left her employ and ER withheld the paycheck that covered the last two weeks she worked. ER said he deducted the sick days from this paycheck. ER had no written authorization to make this deduction. ER violated Sections 5(1) and 7.

Also see General Entry III.

1503 FRINGE BENEFITS

Vacation
At Separation
Written Contract/Policy
Two-Week Notice Required

VACATION

Written Contract/Policy
Two-Week Notice

95-1344-D <u>Knight</u> v <u>Neighborhood Service Organization</u> (1996)

The parties stipulated that there were no wages due in this matter. The only issue concerned vacation pay. ER's policy manual provided for payment of accrued annual leave upon termination with a 14 day written notice. EE testified that on 1/17/95 she gave written notice to her supervisor that she was taking her vacation 2/8/95 through 2/17/95 and that she was resigning. Her supervisor subsequently became terminally ill and died.

Neither EE nor ER have copies of these written notices. EE submitted another request on 2/1/95 for the same vacation dates. EE submitted a notice of resignation on 2/6/95 effective 2/17/95. ER's Human Resources Director advised EE on 2/7/95 that her notice did not meet the 14 day written notice requirement and she would not receive pay for the vacation time. She asked EE if she would like to work longer in order to meet this requirement and EE declined. EE never mentioned her January vacation and resignation notices. The ALJ found no vacation pay due EE because she did not meet the two week notice requirement in the personnel manual.

Also see General Entry I.

1504 COMMISSIONS

After Separation
Withheld
Start Up Costs

DEDUCTIONS

Start Up Costs

EMPLOYMENT RELATIONSHIP
Part Owner Becomes EE

WAGES
Withheld
Start Up Costs

95-1372-D **Healy v Mortgage Masters, Inc.** **(1996)**

Complainant claimed unpaid commissions. Respondent claimed that Complainant was a part owner of the business and was not a Complainant. Respondent initially was a partner in the business but that status changed in October 1994. Complainant owed Respondent money for the initial startup costs and prior to becoming a Complainant allowed 15 percent of his commissions to be applied to this debt. This 15 percent deduction ceased after he became a Complainant. There was no writing produced to show the extent of the agreement between the initial partners. Complainant did not give Respondent a written authorization to take deductions from his pay. Therefore, Respondent could not withhold Complainant's commissions as payment for Complainant's initial partnership debt. The Respondent violated Sections 5(1) and 7 and was directed to pay Complainant commissions owed.

1505 EMPLOYMENT RELATIONSHIP
Economic Reality Test
Partner as EE
EE/ER Relationship Found
Partner as EE

EVIDENCE
Failure to Present Creates Presumption

95-1382-D **Arbulu v Alternative Business Solutions, Inc.** **(1997)**

Complainant claimed unpaid wages. Complainant and Respondent formed a company called ABS International, Inc. This company was used to expand and extend the services already being provided by Respondent. The other three partners in International were also officers and shareholders of Respondent. Respondent paid expenses and utilized its resources for International's benefit. Complainant was paid a monthly salary from Respondent's payroll, was issued a W-2, was provided with health care and other employee-like fringe benefits and did not have authority to hire or fire. Respondent claimed Complainant was not Respondent's EE but was a shareholder of International; but Respondent produced no records to substantiate this claim. Applying the Askew test, the ALJ found Complainant was employed by Respondent. Respondent violated Section 5(1) and was ordered to pay Complainant his unpaid wages.

Also see General Entries VII, X, and XIX.

1506 FRINGE BENEFITS

Vacation

At Separation

Written Contract/Policy

Discretionary

VACATION

Written Contract/Policy

Discretionary

95-1391-D **Barker v K-Mart Corporation dba Builders Square** **(1996)**

EE claimed vacation pay. EE became eligible to take his vacation on his anniversary date. EE requested his vacation but was denied. EE was discharged eight days after his anniversary date. ER's vacation policy indicated that vacation pay "will not be given in lieu of time off or for vacation time that is not granted." Since the ER's written policy stated that vacation would not be paid if not granted, EE was not entitled to payment.

1507 COURT ACTIONS

EE Appeal From Adverse Discrimination DO

Remand

DISCRIMINATION

No Complainant Right to an Appeal

95-1376 **Oakes v R & L Transfer, Inc.** **(1996)**

EE filed a complaint alleging discrimination when he was fired after filing a claim for improper deductions. The Department found no violation. EE filed an appeal and the ALJ found that only ERs may appeal discrimination matters under Section 13(3) and dismissed EE's appeal.

EE appealed to the Kalamazoo Circuit Court and the Court determined that it was appropriate for EE's appeal to be heard by the Department. The judge held that reading the statute as a whole; EEs are allowed to appeal all adverse decisions. Upon remand to the Department, the parties entered into an Order Dismissing the Complaint and Appeal with Prejudice.

1508 FRINGE BENEFITS

Sick Pay

Written Contract/Policy

EEs Notified of Changes

SICK PAY

Payment at Termination

95-1412 **Thomas v McLaren Health Care Corp** **(1995)**

EE claimed 217.5 sick hours due at separation. ER's Supervisor's Manual stated at termination sick time would be paid in accordance with EE's length of service and appropriate percentage. On 3/5/95 the Manual's sick pay provision was modified so that EE's involuntarily terminated would not be paid sick time. An Administrative Rule required EEs be notified of policy changes before the changes take effect. EE testified that she was never notified of this change and ER presented no evidence to rebut this. The ALJ found EE was not notified and was, therefore, entitled to sick pay for the sick hours she had accumulated at termination. However, please note -- Administrative Rule R 408.9006 relied on for this conclusion was rescinded in the rules issued 1/27/98.

1509 WAGES

Paid in Full

EE Did Not Work

WITNESS

Credibility

Contradictions in Testimony

95-1456 **Kaastra v Consumer Network of America, Inc.** **(1996)**

EE claimed unpaid wages. EE gave his notice of resignation and ER asked if he would stay on one more week to finish work on Akron, Ohio accounts. EE testified from his Franklin day planner that he attended a sales meeting the following Monday and saw several clients in Akron on Wednesday and Thursday that week. On Friday, he again resigned effective that day. On cross examination EE testified that he was at a hospital Wednesday evening and did not see any clients on Thursday. EE's testimony was not believable; he testified to two different sets of facts and had no receipts from the hospital or hotel he claimed he visited during his stay in Ohio. ER testified that none of the clients confirmed EE had seen them that week. The ALJ found EE had not worked the week claimed and was not entitled to any wages.

1510 COMMISSIONS

After Separation

Withheld

Advances

EE Loss on Sale

WAGES

Commissions
Payable After Separation

95-1493-D **Hussar v V S Food Systems, Inc.** **(1996)**

EE claimed unpaid wages (commissions). ER claimed he did not pay the commissions because EE had backed out of a carload buy of coffee that cost ER approximately $60,000. EE testified that he was not the salesperson on this sale and ER presented no records showing that EE was the salesperson. ER requested an offset of $2,000 because he gave EE an advance on his commissions on his last day of employment. The ALJ found the claimed wages were due EE minus the $2,000 advance.

1511 DEDUCTIONS
Wages Below Minimum Wage
Written Consent
Insurance Premiums

95-1484-D **Bockmiller v B I S, Inc., of Ohio and HML Freight Systems, Inc.** **(1996)**

EE claimed improper deductions. EE signed two authorizations allowing ER to deduct the full amount of his medical insurance. The deductions brought EE's net pay to $1.44. The ER violated Section 7 but the ALJ found no amount due because the EE knew about the deduction and it was for the EE's benefit not the ER's.

1512 CLAIMS
Twelve-Month Statute of Limitations

FRINGE BENEFITS
Vacation
Break in Service

VACATION
Break in Service

94-419-D **Belcher v R T Driscoll & Associates, Inc.** **(1995)**

EE claimed unpaid vacation time. EE did not appear at the hearing. EE's wage claim form showed employment with ER through February 1992. ER stated that EE left her job in September 1991, was not an EE as of October 1991, when all EEs were transferred to a new company due to a merger, and that EE subsequently joined the new company in December 1991. The ALJ found there was a break in service on 11/25/91 and that EE's wage claim was due by 11/25/92, causing her claim filed 12/7/92 to be outside the 12-month claim period. The ALJ found no violation of the Act and set aside the DO.

Also see General Entries V and X.

1513 FRINGE BENEFITS

Vacation

Carryover

VACATION

Written Contract/Policy

Carryover Not Allowed

94-526-D **Chuckran v Keyboard Studios, Inc.** **(1995)**

EE claimed unpaid vacation time. EE accumulated 88 hours of unused vacation time in 1991. EE was laid off in July 1992. ER's written policy stated vacation time could not be carried over to the following year. The ALJ found no vacation pay due.

1514 BURDEN OF PROOF

Appellant

Burden Not Sustained

Court Judgment Not Provided to ALJ

COURT ACTIONS

Judgment to Offset Amount Due Complainant

Not Provided to ALJ

94-528 **Newcomer v Daniel Dudley dba Discount Tree** **(1994)**

EE claimed unpaid wages and improper deductions. EE did not appear at the hearing. ER's attorney advised the ALJ that ER had a Circuit Court judgment against EE and would provide a copy. At the hearing, the ALJ agreed to modify the DO (upon presentation of the Court judgment) to find nothing due EE and to affirm the violations since ER withheld wages prior to the Circuit Court judgment. Since ER did not provide the judgment, the ALJ found that the ER did not present evidence to support its appeal; the DO was affirmed as originally issued.

Also see General Entry XI.

1515 COMMISSIONS

Computation

Deduction of Costs

Deductions

Part of Computation

Draw Against Commission

Month to Month Carryover
Expenses to Reduce Profit

WAGES
Commissions
Payable After Separation

94-539-D **Hillard v Affordable Homes of Michigan, Inc.** **(1994)**

EE claimed unpaid wages (commissions). EE presented a list of commissions owed. ER presented a list which showed commissions calculated on sales after expenses were deducted resulting in less due EE. EE received $200 per week and claimed this was a salary in addition to his commission. ER produced records showing the $200 was a draw against commissions and that each month the amount of commissions received would be credited against the balance. ER continued to credit commission checks after EE's separation to this draw balance. The ALJ found no wages due EE.

1516 BURDEN OF PROOF
Appellant
Burden Not Sustained
Testimony Contradicted

EVIDENCE
Insufficient to Establish Claim
Testimony Contradicted

94-595-D **Swanson v Henze Stamping & Mfg Co** **(1995)**

Complainant's son worked for Respondent. With the son's help, Complainant attempted to secure work with Respondent. The employment agreement was not finalized, but Complainant allegedly worked three weeks for Respondent. Complainant asked his son about his pay and his son said it was probably being held back. Respondent's representative testified that Respondent did not hire Complainant and Complainant was not observed working. Complainant did not bring his son to testify and had no further evidence that he was employed by Respondent. The ALJ found Complainant was not an EE and not entitled to wages.

Also see General Entry XI.

1517 COURT ACTIONS
Circuit Court Appeal
ALJ Decision Affirmed
EE Becomes Partner

EMPLOYMENT RELATIONSHIP
EE Becomes Partner

WAGES
Full Amount Not Paid
After EE Becomes Partner

94-596-D **Brenner v Energy Resource Mgmt Corp** **(1995)**

EE claimed unpaid wages. EE went to work for ER for $300 per week in June 1992. EE did not receive her pay but continued working because the company was new and she believed it was growing and she eventually would be paid. In July 1992 EE became a part owner of ER with a 1/3 interest and no longer accumulated a weekly salary. ER argued that EE was never an EE. The ER's board minutes specifically addressed EE's part ownership, that she would no longer be accumulating a salary of $300 per week, and that she had accumulated 7 weeks' pay up to that point. The ALJ found EE was due wages.

ER appealed this decision to the Wayne County Circuit Court arguing that the ALJ decision was not supported by the record. The court noted that under MCL 24.306 decisions which are supported by competent, material, substantial evidence on the whole record must be affirmed. The court indicated that the board minutes and credible testimony of the witnesses reflected on the record were sufficient to support the ALJ decision. The court affirmed the decision.

1518 APPEALS
Untimely
Good Cause Found
Mail Delivery

99-201 Gomez v Frontier Food & Cocktails Inc. **(1999)**

Good cause for a late ER appeal was found where mail delivery problems caused delay in delivery of the DO. ER's business closed and the mail was not delivered to the proper address. At the hearing, ER agreed with the amount found due. The alleged violations of Sections 2 and 5 were upheld. Also see General Entry IX.

1519 FRINGE BENEFITS
Written Contract/Policy/Agreement
Vacation
At Separation
Twelve Months' Continuous Service Required

VACATION

Written Contract/Policy
Twelve Months' Continuous Service Required

94-868 Bartus v United Companies Lending Corporation (1994)

ER's vacation policy generally stated that EEs earned vacation benefits as soon as they were hired. The policy also had specific language regarding vacation time when an EE separated. That language stated a requirement that the EE work 12 months of continuous service in order to be reimbursed for any unpaid vacation time. EE did not work 12 months continuously and was not eligible for the vacation pay.

1520 WAGES
Full Amount Not Paid
Hourly Rate Dispute

94-883-D Edwards v Harry Zalesin dba C & L Trans 2 (1994)

EE worked as a truck driver for $10 per hour. EE's first check for 39 hours totaled $390. ER gave EE a second check in the amount of $28 with the notation 73 hours at $6.00 per hour for training. The only written documentation is the MESC work order which listed the job at $10 per hour. Since the total amount paid by ER during the two-week period did not equal 73 hours at $6 per hour, the ALJ found it more reasonable to believe that EE was to be paid at $10 per hour as claimed. The DO was affirmed.

Also see General Entries IX, X.

1521 CLAIMS
Twelve-Month Statute of Limitations
District Court Action Does Not Toll

94-951-D Heitsch v Pioneer Engineering & Mfg Co (1995)

EE filed a claim which he subsequently withdrew when he obtained a judgment in the District Court regarding the same matter. ER appealed the District Court judgment to the Circuit Court and the judgment was overturned. The 12-month statute of limitations period for these claims expired on 8/9/93. EE filed a request for resumption of his claim on 1/24/94. EE's misunderstanding of the effect of the District Court action on his claim does not toll the statute of limitations.

1522 DETERMINATION ORDER
Affirmed
Interest Waived if Paid By Certain Date

94-996 **Jensen, Jr v Randy Maynard dba Capstone Construction** **(1994)**

Respondent appeared at the hearing and agreed to pay the DO amount without paying the interest penalty amount. The DO was affirmed providing that if the ER paid the amount by a certain date there would be no interest penalty.

1523 FRINGE BENEFITS

Vacation

Deduction For Personal Leave

VACATION

Deduction From Personal Leave

99-513-D **Smith v Cass Community United Methodist Church** **(1999)**

EE did not attend the hearing. ER presented evidence of the hours of vacation due EE which conflicted with the pay stubs EE attached to her Complaint. ER showed that EE was due 16 hours of vacation time at her termination and that she had taken 12 hours of personal time in excess of that allowed. The ALJ found ER owed 4 hours of vacation pay.

1524 CONTRACT

Amendment

Meeting of the Minds

WAGES

Unilateral Change In

94-619-D **Ratledge v Wyandotte Yacht Club** **(1994)**

EE worked 5-day weeks as a housekeeper during the winter months and 6-day weeks during the summer months. EE received a daily rate of $42. EE asked the Club Manager if she could work only 5 days during the summer months with an increase in pay to correspond with the extra hour of work she would perform each day. When EE did not receive this additional pay, she gave her two week notice. ER stated that EE knew that any changes in work schedule or pay were to be approved by the House Chairman and Board of Directors. The ALJ found no wages due since EE had not sought or secured the appropriate approval for the change in hours and pay.

1525 ATTORNEY FEES

DO Amendment

DETERMINATION ORDER

Amendment of DO

At Hearing
ER Name

94-655 thru 94-659 **Alaniz, Alaniz, Puente, Vela and Vela v Hugh Bowling dba Fruitful Acres Farms (formerly Bowling's Fruit & Vegetable Farm, Inc.)** **(1994)**

ER appealed the DO. At the hearing, ER made a motion to correct the name of the ER. When the motion was granted, ER withdrew his appeal and the DO was affirmed. EEs requested attorney fees, citing a frivolous ER appeal. The ALJ denied this motion since the ER was simply protecting the officers of the incorrect corporate entity from monetary claims.

1526 FRINGE BENEFITS
Vacation
At Separation
Written Contract/Policy
Forfeiture by Termination

VACATION
Forfeited
Termination

94-690 **Moshier v Flint Leasing Inc. dba Best Western of Fenton** **(1994)**

ER's manual stated that in order to receive vacation pay, EEs must take vacation time. EE was employed slightly more than one year when she was terminated. EE claimed she was due vacation pay since she did not have an opportunity to take her vacation between the one-year anniversary date and her termination date. EE also stated that another EE had vacation time scheduled during this time period and that she could not attempt to schedule her vacation. ER testified that all EEs were advised to take their vacation after the busy season ended and that even if one EE was already on vacation, another could request the same time off. The ALJ found no vacation pay due since EE was aware of the written policy and had not taken her vacation during her employment.

1527 CIVIL PENALTY

EXEMPLARY DAMAGES
Deliberate, Conscious and Knowing Violation
Flagrant Violation

WAGES
Hours Changed by ER

94-700-D **Klein v Chef Karl's Creative Catering, Inc.** **(1994)**

ER withheld part of EE's wages. EE presented records showing hours worked had been altered to reduce the hours worked. The ALJ found ER owed unpaid wages in the amount claimed. EE also claimed exemplary damages. The ALJ found that since the ER had been found to have previously violated Sections 2 and 5 of Act 390, there was deliberate, conscious and knowing violation of the Act. Therefore, the ALJ found exemplary damages due. The Department may also assess civil penalties when an ER has violated the same section in the prior 12 months. ER was found to have twice violated the same sections in the prior 12 months. The ALJ assessed a civil penalty of $500.

1528 DETERMINATION ORDER
Amendment of DO
At Hearing
By Department
Bonus Not Due

MOTIONS
To Amend DO

94-764 **Vandenboss v May & Scofield, Inc.** **(1994)**

EE did not attend the hearing. After the prehearing, the Department made a motion to amend the DO to find no bonus due EE since ER presented evidence that bonuses were not paid to EEs no longer working for ER. The ALJ granted the motion and the DO was amended to show nothing due.

1529 WAGES
Computation Error
Full Amount Not Paid
At Separation
Salary

94-603 **Tumbarello v Little Caesar Enterprises, Inc.** **(1994)**

EE received a biweekly salary of $880. During EE's last two weeks of employment he worked 5 days the first week and 4 days the second. ER paid a percentage of EE’s salary based on his employment during 11 of the 14 days for the biweekly period ($691.42). EE asserted that he received a full bi-weekly salary during his employment as long as he worked at least 5 days each week. EE claimed that he was owed one full week's pay ($440) plus 4/5 of the second week ($352). The ALJ found wages due in the amount claimed by EE.

1530 EMPLOYER IDENTITY
Individual Liability

94-1208-D Stokes v Carol Wilson Berman and Mobile Health Services, Inc.(1995)

EE claimed that Carol Berman was individually liable for wages owed. Evidence and testimony showed that Carol Berman was an EE even though the corporate record showed the company incorporated by Carol Berman. Ms. Berman's husband, Michael, performed all of the corporate duties including hiring, firing, disciplining and distribution of paychecks. Ms. Berman also worked at the direction of Michael, as did other EEs. The ALJ found Ms. Berman not liable individually.

1531 BURDEN OF PROOF
Appellant
Burden Not Sustained
Conflicting Testimony Insufficient

COMMISSIONS
After Separation
Verbal Agreement

EVIDENCE
Preponderance

94-1252 Barlow v Apollo Satellite Systems, Inc. (1994)

EE claimed a 1 percent commission in addition to his salary. EE kept a detailed list of all accounts he worked and quit his job when told he would not receive the commission. ER did not present any rebuttal evidence or testimony. The ALJ found that EE was owed the 1 percent commission.

1532 COMMISSIONS
Payment
After Separation
Follow-Up Work

94-1254-D Best v Sterling Improvements & Design, Inc. (1994)

EE claimed unpaid commissions. There was no written employment agreement and the oral agreement between the parties changed one month before EE quit to deduct overrun costs. The accounts EE claimed due were not completed at the time he quit and another EE had to finish the work on these accounts. EE was previously paid only when the job

was completed. The ALJ found no commissions due. EE was due pay for two days he worked at his normal salary rate.

1533 FRINGE BENEFITS

Vacation

Written Contract/Policy

At Separation

30-Day Written Notice Required

VACATION

Written Contract/Policy

30-Day Written Notice Required

94-1270-D Auger v John Carlo, Jr (1995)

EE claimed unpaid vacation pay. ER's vacation policy specifically stated that vacation requests were to be in writing and submitted 30 days prior to the requested vacation period. Since EE was no longer employed, she could not give the 30-day written notice required. The ALJ found EE was not entitled to vacation pay.

1534 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

WAGES

Full Amount Not Paid

At Separation

94-1276 Rowe v David Swallow and Swallow's Nest, Inc. (1995)

EE claimed unpaid wages. EE earned $700 per week which ER disputed. The records reflected $700 payments to EE sporadically on Fridays. ER also claimed EE was an independent contractor because he worked a part-time teaching job and had a desk-top publishing business. ER claimed that he agreed to pay EE $15 per hour when invoices were submitted. The ALJ found Complainant was an EE, not an independent contractor, because he received paychecks on Fridays and the ER paid these amounts without invoices over a substantial period of time. The ALJ found wages due EE.

Also see General Entries IX and XIX.

1535 EVIDENCE

Insufficient to Establish Claim

EE Not Present at Hearing

No Records Presented at Hearing

94-134 thru 94-136 **Del'Spina, Fratarcangeli and Wilcox v Fine Art Gallery of Rochester, Inc. dba Stevens Fine Art Gallery** **(1994)**

Two of the EEs claiming wages due did not appear at the hearing. The third EE did appear and ER agreed that he owed her the wages claimed. Since the two EEs did not appear and present evidence, the ALJ found no violation of the Act. The ER violated the Act when he didn't pay the third EE wages due.

1536 COURT ACTIONS

Permitting Holdback of Wages During Pendency

94-1343 **Isler v City Animation Company** **(1995)**

EE claimed unpaid wages. ER appeared and testified that there was a Circuit Court action pending against EE because he breached his fiduciary duty by having his own company which competed with ER. The ALJ found wages due since EE did work for ER. The Department agreed to withhold payment of these wages for 90 days in order for the Circuit Court action to resolve. If the Court found EE owed money to ER, the DO would be offset. If not, then ER would owe EE the DO amount.

1537 DEDUCTIONS

Written Consent

One Pay Period

94-1368 **Williams v Peter Russell Morin dba Guardian Angel Private Security** **(1995)**

During the pretrial hearing conference, ER presented an authorization for deductions for a loan to EE. Based on this evidence, the Department allowed the deduction for the pay period in dispute. The DO was reduced to reflect the allowable deductions. ER agreed to withdraw his appeal of this reduced amount.

1538 COMMISSIONS

Written Contract/Policy

Change Without Notice to EE

94-1374 **Hinkley v VanDyk Mortgage Corporation** **(1995)**

EE claimed unpaid commissions. EE was hired under a written agreement which provided a 50 percent commission. ER claims that when it offered EE a new position that it offered this position at a reduced commission of 25 percent. EE claims that the

new percentage was never discussed with him. EE took the job and found out from another EE that this position paid only 25 percent. EE inquired of personnel and was informed this was correct. EE disputed this amount and was subsequently terminated. The ALJ found commissions due at the 50 percent rate since EE was never informed of the change in commission.

1539 FRINGE BENEFITS
Vacation
Written Contract/Policy
Silent as to Payment at Separation

94-1379 Duffy v DeBoer, Baumann & Company, PC (1995)

EE claimed unpaid vacation pay. ER's written vacation policy was silent as to payment at separation and the ALJ found no vacation pay due.

Also see General Entry I.

1540 FRINGE BENEFITS
Sick Pay
Written Contract/Policy
Required Before Payment

JURISDICTION
Arbitrator's Decision

94-1404, et al 11 Complainants v Warren Consolidated Schools (1995)

Complainants claimed unpaid sick time. The ALJ found that without a contract, including fringe benefits, Act 390 did not apply. The Complainants' claims for unpaid wages were heard before an arbitrator who decided no wages were due. The ALJ found that all issues had been addressed in another forum and no further proceedings were necessary.

1541 FRINGE BENEFITS
Vacation
Carryover

JURISDICTION
Statute of Limitations
Vacation Pay

VACATION

Written Contract/Policy
Carryover Not Allowed

94-1455 DomPierre v Turino Chiropractic Center, PC (1995)

EE claimed unpaid vacation pay. The statute of limitations on the time period claimed expired before EE filed her claim. In addition, the ALJ noted that even if the time had not expired, ER's written policy stated that there was no vacation carryover allowed.

1542 ADMINISTRATIVE LAW JUDGE
Equitable Powers

FRINGE BENEFITS
Forfeiture
Work During Notice Period Required
Resignation
Eligibility
Vacation
Written Contract/Policy
At Separation
Work During Notice Period Required
Written Contract/Policy/Agreement
Work During Notice Period Required

VACATION
Written Contract/Policy
Work Requirement

94-1540 Anderson v Ashcraft's Market, Inc (1995)

EE worked for ER for more than eight years. On 6/9/94, EE advised ER of her resignation, to be effective 6/17/94. EE and ER stipulated that EE had accumulated 72 vacation hours and 36 bonus hours' worth $702. EE did not work 6/17/94 due to illness (diarrhea) and advised ER of this fact. ER's employee handbook addresses vacation benefits and stated to be eligible for unused vacation time and bonus hours, associates must give one week's notice and actually work the complete week. EE claimed that ER could have used one day of her vacation or bonus days to cover the sick day.

Vacation days are provided to help employees "recharge their batteries" and do a good job for the employer. ER's policy specifically excludes giving a departing EE vacation or bonus time unless she/he works the entire week of notice. If ER's written policy doesn't have the provisions necessary for payment of fringe benefits, the Act cannot create the missing language, Carpenter v Flint School District, 129 Mich App 254 (1983). The ALJ found that Act 390 could not be used to insert language allowing EE's vacation

and bonus time to cover her last day. Although ALJs have no equitable powers, the ALJ urged ER to review EE's service to the company, and the unreasonableness of requiring EE to work with food while suffering from diarrhea. The ALJ opined that a business concerned with the health of its customers and the quality of its product would support EE's decision to stay home.

See General Entry I.

1543 APPEALS

Good Cause Not Found

DO Not Received

Presumption of Receipt

99-911 Durbal v Alliant Foodservice, Inc. (1999)

EE filed a late appeal and explained the late filing by arguing that he did not receive the Department's DO. EE asserted that only after a 6/16/99 letter did he discover the DO had been issued 10/30/98.

The Department asserted EE was advised the DO was issued 10/30/98 with an appeal date of 11/16/98 and that this DO was not returned as undeliverable by postal authorities. Also, the DO was mailed to EE's last known address. The legal presumption is that a properly mailed DO is received.

The ALJ found the EE failed to show good cause for the late appeal. Claiming non receipt of the DO does not establish good cause. All of the facts point to a regular, proper mailing and EE failed to rebut the presumption of receipt. See Stacy v Sankovich, 19 Mich App 688: 173 NW2d 225 (1996). Also see Merchants National Bank v Detroit Trust Co, 258 Mich App 526; 242 NW 739 (1932); Sargent v Robert Lee Hardison, Jr (1996), ¶1091; Ingels v I & H Engineering Systems, WH 96-464 (1996), ¶1099; and Boverhof-Poggi v Sienna Models, WH 99-217 (1999), ¶1471.

EE subsequently filed a petition with Wayne County Circuit Court for judicial review.

See General Entry II.

1544 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Not Found

Truck Driver

Independent Contractor Relationship Found

Truck Driver

99-157 Roland v John Douglas Ledford, Sr, as an individual, and Karen Susan Ledford dba Ledford Transportation (1999)

Complainant listed his employment with Respondent from about 2/26/98 to 4/6/98, although Complainant testified he started work 3/15/99. Complainant sought $1,600, comprised of $100 unauthorized deductions and $1,500 wages, which was calculated from 35 percent of truck generated revenue.

Complainant's testimony was rebutted by Respondents, who were more credible. Complainant submitted records which indicated Respondent paid Complainant based on truck revenue less advances and other deductions and not reflective of any salary or wage rate. The percentage rate paid was 20 percent. The Department made a verbal request 9/8/98 and a written request for records from Complainant on 8/31/98 and 9/11/98. Complainant failed to respond.

The Payment of Wages and Fringe Benefits Act requires an ER/EE relationship before a violation of the Act can be found. Administrative Rule 408.22969 places the burden of proof on the appellant. Complainant failed to establish by a preponderance of the evidence that he was an EE, and not a contractor of Respondent. The DO was affirmed.

See General Entries VII, XI and XXI.

1545 FRINGE BENEFITS

Vacation
At Separation
Twelve Months' Continuous Service Required
Written Contract/Policy/Agreement
Vacation
At Separation
Twelve Months' Continuous Service Required

VACATION

Anniversary Date
Twelve Months' Continuous Service Required

99-647 Butchko v Manistique Manufacturing & Technology (1999)

The Department found no violation of Act 390. EE appealed. The issue was whether fringe benefits (vacation) were due.

EE Butchko worked as a machinist for ER from 2/10/97 to 1/6/99 when he was laid off. EE claimed vacation pay during 2/10/98 to 1/6/99. Section 3 requires an ER to pay fringes in accordance with the terms of a written contract or policy. ER's policy provided for one week's vacation after one year's employment and two weeks after two years. EE received one week vacation after completion of his first year in 2/10/98. He took one week vacation during the summer of 1998. EE would have been eligible for two weeks'

vacation if he had worked until his second anniversary date of 2/10/99; however, EE was laid off on 1/6/99.

ER's policy had no provision to pay EE a portion of vacation pay for part of a year worked. It was all or nothing. As noted in Carpenter v Flint School District, Mich App 683 (1982), Act 390 cannot create fringe benefits or add provisions to an existing policy. EE also claimed he was laid off out of seniority. ER's representative testified EE wasn't discharged and, if called back, would be given credit for time worked until layoff. Since ER was a non-union shop, there was no requirement EE be laid off in accordance with seniority. It did appear, however, that machinists who were not laid off had more seniority than EE.

The Department considered EE discharged in the Determination Summary because he was laid off with no date for recall. If EE were discharged, no vacation pay was due because the policy provides: no vacation pay is paid upon termination. The ALJ did not consider EE to have been terminated. However, EE was not due a further vacation payment because he did not complete his second year of employment. DO was affirmed.

See General Entry I.

1546 COMMISSIONS

- After Separation
  - Bulk of Work Performed
  - Procuring Cause
- Payment
  - After Separation
    - Bulk of Work Performed
    - Procuring Cause

WAGES

- Commissions
  - Payable After Separation
    - Procuring Cause
  - Procuring Cause

99-613 Lambers v A R T Financial Services, Inc. dba Franklin Mortgage (1999)

EE was hired as a loan originator. EE's commission was 70 percent of the profit on each sale. EE claimed $871.50 as commission due after separation.

The DO found that ER violated Sections 2(1) and 5(1) of Act 390 and ordered payment of $100 to EE. EE filed a timely appeal. The issue was whether unpaid wages (commissions) were due EE from ER. ER didn't appeal and sent a check for the amount plus interest. EE refused the check and it was returned to ER.

ER had no policy or procedure to answer the question what commission a separating loan originator receives for loans processed before separation but closed after separation. Section 5 requires an ER to pay a separating EE all wages that are due. The ALJ found EE to be the procuring cause of ER's ability to process the loan for customer Mangles. See Reed v Kurdziel, 352 Mich 287; 89 NW2d 479 (1958). Also see Shortt v Centri-Spray Corp, 369 Mich 303; 119 NW2d 528 (1963); MacMillan v C & G Cooper Co, 249 Mich 594 (1930); 229 NW 53 (1930) and Berger v Gerber Products Co, 75 F Supp 792, (D Mich, 1948). The concept of procuring cause has also been addressed in several Act 390 cases covered in the Wage Hour Digest: Canell v Mighty-Mac Broadcasting Co, Inc., WH 91-1111 (1991), ¶1233; Scholle v Pony Express Courier Corp, WH 91-1708 (1993), ¶1306, Hamady v JD, Inc. dba Executrain of Grand Rapids, WH 98-377 (1998), ¶1334, and Widman v Ronnoco Associates, Inc., WH 90-1537 (1991), ¶1266.

The ALJ modified the DO to add commission of $871.50 plus the $100 amount previously ordered, and interest.

See General Entry IX.

1547 WAGES

Paid in Full

EE Did Not Work

99-4675 Almond v Borg-Warner Protective Services Corporation dba Burns International Security Services (1999)

The DO found a violation of Section 5(1) and ordered payment of $60. ER appealed. EE and the Department failed to appear. The issue was whether wages were due EE.

EE was employed as a security guard for approximately one month. EE left after finding other employment. ER paid for 18 hours but appealed any claim for 9/10/98. ER's records showed no record of EE having worked on 9/10/98. The ALJ found no violation of the Act. DO was reversed; no money was due EE.

See General Entries IX and X.

1548 WAGES

Deferral

EE Entitled to as Long as Available to ER

Payment When Business Profitable

Promised in Future

99-4678 Jordan v Lenas Family Dining, Inc. (1999)

The DO found no violation of the Act. EE appealed. ER and the Department failed to appear for hearing. The issue was whether wages were due EE.

EE's father entered into a partnership with two individuals and invested $30,000 in Lenas Family Dining, Inc. The partners signed an agreement and thereafter met with EE. It was agreed EE would work with the managing partner to open the restaurant and would receive $500 per week. The restaurant didn't open as scheduled due to problems with contractors not being paid by one partner. The two other partners instructed EE he was to deal with the contractors, city and state departments, obtain insurance, prepare ledgers and checks, and other duties. EE accepted the offer and submitted an employment application 4/13/98. It was agreed there was no money for EE to be paid but payment for past services would be made when the restaurant was opened and made money. During EE's employment period, EE's father decided he didn't want to remain in the partnership and was bought out, receiving his $30,000 initial investment. Shortly thereafter, EE was advised he was no longer needed and there was no money to pay him. EE filed his claim approximately one week later.

The ALJ found EE was hired by the partners at the rate of $500 per week for a period of 28 weeks, 2 days, totaling $14,200. EE and his father testified in a credible manner and submitted exhibits of work performed. ER failed to appear for the hearing. The DO was reversed and ER violated Section 5(2).

See General Entries IX and X.

1549 BURDEN OF PROOF

Appellant

Burden Not Sustained

No Records Presented

No Witnesses Presented

WAGES

Deductions From

Full Amount Not Paid

At Separation

Shareholder

99-334 Palmer v Greater Detroit Restaurant & Bar Supply Co (1999)

The Department found that ER violated Section 5(1) and ordered payment of $4,550. ER appealed. The issue was whether unpaid wages were due EE.

At the hearing, ER claimed EE received funds from three of ER's clients. However, ER did not seek and did not receive written authorization to deduct or withhold money from EE's wages. The ALJ determined the issue of money received from ER's clients was not within the purview of Act 390. ER also claimed EE was a shareholder in EE's

corporation and as such, was not entitled to be paid wages. The ALJ did not accept this argument.

Administrative Rule R 408.22969 places the burden of proof on the appellant. The ER did not satisfy the preponderance of the evidence in support of its appeal. The prior DO was affirmed and the appeal closed.

See General Entries III, IX and XI.

1550 APPEALS

Untimely

Good Cause Not Found

Extension of Statutory Time Limits

99-1020 thru 99-1039 20 Complainants v Elite Technologies, Inc., (Formerly known as Concap, Inc.) dba Temporary Help Connection, Inc. (1999)

ER was directed to show why the Department's DO shouldn't be made final. ER's appeal was not received within 14 days as required. ER filed an undated response asserting the last day for filing was Sunday, 8/22/99. ER's appeal was received Monday, 8/23/99, the first business day after 8/22/99.

The 14-day statutory appeal period for a DO issued Friday, 8/6/99, expired Friday, 8/20/99, not Sunday, 8/22/99, as stated on the DO. Section 11(4) allows a request for review 14 days after the DO is issued. ER did not present good cause for the late appeal by relying on the 8/2/99 date listed on the DO. The Department has no statutory authority to extend the 14-day appeal period. See General Motors Corp v City of Detroit, 141 Mich App 630; 368 NW2d 739 (1985), Sovey v Ford Motor Co, 279 Mich 313, 316; 272 NW 689 (1937), Logan v Greg's Clark Service, WH 80-848, ¶54, and Budd v Horticultural Creations, WH 81-324, ¶65. Since good cause was not established, ER's appeals were dismissed.

Also See General Entry II.

1551 COMMISSIONS

After Separation

Procuring Cause

WAGES

Commissions

Payable After Separation

Procuring Cause

99-595 Schneider v 62nd Street Broadcasting of Saginaw, LLC (1999)

EE worked for Winward Communications as a sales representative, selling advertising. ER then purchased Winward Communications. When ER took over, EE sold for two stations, both owned by ER. EE alleged ER owed $11,722.21 in commissions.

The DO found no violation of the Act. EE appealed.

ER claimed all customers had paid but wasn't sure if they paid within 120 days from first billing. EE agreed she would only be eligible for commissions on payments made during the 120-day period. ER's information revealed two accounts not paid within the 120-day period. Subtracting these amounts left $9,788.26 due Complainant.

Section 5 requires an ER to pay a separating EE all wages due. Section 1(f) defines wages to include commissions. EE was found to be the procuring cause for advertising sales to ER. See Reed v Kurdziel, 352 Mich 287; 89 NW2d 479 (1958), Widman v Ronnoco Associates, Inc, WH 90-1537 (1991), ¶1266, Shortt v Centri-Spray Corp, 369 Mich 303; 119 NW2d 528 (1963), MacMillan v C & G Cooper Co, 249 Mich 594 (1930); 229 NW53 (1939), and Berger v Gerber Products Co, 75 F Supp 792 (1948), (D Mich, 1948). Also see Canell v Mighty-Mac Broadcasting Co, Inc, WH 91-1111 (1991), ¶1233, Scholle v Pony Express Courier Corp, WH 91-1708 (1993), ¶1306, and Hamady v JD, Inc.dba Executrain of Grand Rapids, WH 98-377 (1998), ¶1334.

The DO was modified to find an ER violation of Section 5(1). EE was due $9,788.26 in commissions.

See General Entry IX.

1552 BURDEN OF PROOF
Burden Sustained
Records
Missing

VACATION
Eligibility
One Year

99-221 Copas v Strategic Protection Group, Inc. (1999)

EE was employed by ER from January until terminated on 4/30/98 as a sales representative at $30,000 per year. EE was terminated from employment along with his father, James Copas, president of the company and Walter Jones, operations manager, for financial irregularities. The issue was whether unpaid wages and fringes (vacation) were due.

ER provided a copy of a check paid to EE in the amount of $469.94 for his earnings through 4/30/98 and testified that no other monies were due EE. ER was unable to present company records, financial or personal, of Michael Copas, James Copas, and Walter Jones. Out of 300 employees, these three were the only three records missing. Jones had access to these records because of his position as did James Copas. Michael Copas has access because of his father.

ER allowed vacation pay after one year of employment. EE was employed only four months when terminated and not entitled to vacation pay. ER did not violate the Act and no monies are due and owing to EE. ER's explanation for not submitting the wage records was accepted.

See General Entry X.

1553 COMMISSIONS

After Discharge
After Separation
Bulk of Work Performed
Procuring Cause

99-248 Fidler v Phillips Service Industries, Inc. (1999)

Robert Fidler was employed as a sales engineer from 7/1/94 until he was terminated on 8/2/97. EE was entitled to commissions and salary although there was no written commission policy. The commission policy was developed in 1984 and provided for a commission on sales over $500,000 at various percentages. Salesmen received 40 percent commission when the order was written and 60 percent commission when the order was shipped. No commission was to be paid if the salesman was not employed by ER. EE filed a claim for $4,323.70 for nonpayment of two orders shipped after his termination date. Delivery dates for the two companies were 8/27/97 and 11/14/97. ER admitted EE's commission was not paid to any other EE.

Relying on Section 5, the ALJ found EE was entitled to a fair share of the commissions earned because his efforts were the procuring cause of the sale. This was evidenced by the fact that no commissions were paid to any other EE or salesman. EE's efforts were the primary reason for the sales being successful and completed. Payment of 50 percent of $4,323.70 was found to be fair compensation to EE.

ER filed a Motion for Reconsideration Rehearing Regarding Amount of Award. The total due was reduced to $2,453.75 because of an overpayment of $583.80. The DO was modified.

See General Entry IX.

1554 DEDUCTIONS

Damages

Loans

99-267 Deneweth v Service Security Systems, Inc. (1999)

EE was employed as an alarm installer from 11/95 to 10/16/98 making $11 per hour. EE's last check was for 31 hours worked, $341.00 gross, $314.91 net. During EE's employment, EE complained of financial troubles and ER advanced EE $1,000, evidenced by a promissory note. The loan was to be repaid in seven monthly installments of $130 ending with a $90 balance to be paid the first week of July 1997. EE only made three payments on the loan. After EE gave ER a day's notice of leaving, EE advised he'd take care of the loan ($610.00) when he came to pick up his check. EE tried to convince ER's secretary that he would take care of the loan after he cashed his check. The secretary refused to release the check pursuant to ER's orders. EE filed a complaint for wages and vacation pay.

DO was issued 12/23/98 finding ER violated Section 5(1) of Act 390 and ordering ER to pay EE $341.00. ER filed a timely appeal.

On EE's appeal, ER testified EE damaged equipment on several occasions, the last incident being EE's rear-ending a vehicle with ER's company truck just before leaving ER's employ. Damage was estimated between $1,300 and $1,400 for repairs. In addition, EE "lost" a number of ER furnished pagers and a NexTel cellular phone. Another of ER's employees advised of having seen Mr. Deneweth at a local watering hole shortly after he left his job, bragging about how he would "lose" a pager or phone whenever he needed money to get some drugs.

The ER's testimony and exhibits were found credible. EE failed to appear. Administrative Rule R 408.22969 places the burden of proof on the appellant. ER satisfied the preponderance of the evidence in support of its appeal.

See General Entry X.

1555 BURDEN OF PROOF

Burden Sustained

Testimony

Believability

COMMISSIONS

After Separation

Bulk of Work Performed

WAGES

Commissions
Payable After Separation
30-Day Time Limit Exception

99-108 **Murray v 1st Premier Mortgage Co, Inc.** **(1999)**

EE was employed as an Account Executive (loan officer) with ER from 11/17/97. ER contends EE was terminated on 3/13/98 and EE contends he was terminated 4/29/98 when the Donahue loan was closed. EE alleges $892.80 due as commission and ER claims all commissions due were paid. ER had an "at will employment agreement" which stated "commissions earned will be paid only with respect to loans closed within 30 days of termination of this Agreement."

EE was informed on 3/13/98 he was terminated but if he stayed on top of the two outstanding loans, he would be paid when they closed. The ER couldn't recall if there was a time limit set for this payment. EE continued to call the office to see if anything remained to be done on his outstanding loan accounts. EE attended the closing of his last two loans of Mark Cook and Ms. Donahue.

EE satisfied the preponderance of the evidence in support of his appeal. EE's testimony as to being paid his commissions, if he stayed on top of the outstanding loans, was clear and unambiguous. ER violated Section 5(2) of the Act and was ordered to pay EE $892.80 commissions.

1556 ATTORNEY FEES
Denial

CLAIMS
Twelve-Month Statute of Limitations

EMPLOYMENT
At Will

FRINGE BENEFITS
Must be in Writing to be Enforced

WORK
As Acceptance of Wage Agreement

98-1183 **Halaby v Conceptual Designs & Engineering dba Concept Design & Engineering** **(1999)**

EE was employed by ER from July 1996 at an hourly rate of $30 per hour with time and a half overtime. Up to and including 3/12/97, EE was also paid periodic 15 percent

commissions when Gilreath Mfg., Inc., paid ER for work performed. EE brought the Gilreath work with him from a previous ER.

About 3/12/97, ER informed EE he would no longer receive an hourly wage plus commissions and would instead receive only an annual salary of $100,000. EE objected but continued to work until he was discharged in March 1998. Complainant filed for unpaid wages (commission) of $32,749.64, vacation pay of $3,846 and a car allowance of $5,005. The Department found only a car allowance due. Both EE and ER appealed.

At the outset of the hearing, ER withdrew its appeal and agreed to pay EE $5,005 for reimbursement of car expanses.

Section 3 of Act 390 requires an ER to pay fringe benefits, which includes vacation pay, pursuant to the terms of a written policy or contract. If the benefit claimed is not in writing, Act 390 cannot be used to enforce its payment. See Carpenter v School District, City of Flint, 115 Mich App 683 (1982). Also see General Entry I. EE's request for vacation pay was denied because there was no written contract or policy requiring vacation pay.

In December 1997, a document setting forth changes in compensation was dated and signed by EE and ER. This agreement set a salary of $100,000 with additional compensation for hours worked on a Texas Project, but there was no mention of commissions. Complainant was an at will employee. In an at will relationship, ER can change the employment contract anytime. If the EE continues working under the changed condition, the EE is considered to have agreed to the contract change. See Warnke v Max Larsen, Inc., WH 97-31 (1997), ¶1131.

The ALJ found that if any amount were due for commission before 3/12/97, it would be barred by Section 11(1) of Act 390. This provision requires claims to be filed within 12 months of the alleged violation. Commissions ended 3/12/97. Thus, any violation would have to be filed before 3/12/98. EE filed his claim 3/24/98. Therefore, EE's commission claim could not be enforced pursuant to Act 390. See General Entry V. EE may pursue this matter in a court action.

EE's 9/4/99 Post Hearing Brief requested $2,827.50 in attorney fees. EE's request was denied because EE did not prevail on either of the issues appealed -- vacation pay or commissions.

See General Entries I and V.

1557 ACT 390

Independent Statutory Rights

ARBITRATION

Arbitration v Statutory Rights of Act 390

PREEMPTION
CBA
Interpretation

RES JUDICATA

99-488 Bouza v Bay Medical Center (1999)

A DO was issued 3/9/99. A timely appeal was filed by EE. On 8/17/99, ER filed a Motion to Dismiss EE's 5/17/99 appeal because the question, whether EE was discharged for cause, was decided by an arbitrator on 7/21/99. The arbitrator found the EE was discharged for cause.

The ALJ referenced ¶707 of this Digest, Becker v Harrisville Tool Co, which concludes res judicata does not apply to arbitral decisions. See also McDonald v City of West Branch, 466 US 284; 104 S Ct 1799; 80 L Ed 302 (1984). But General Entry XV points to an Attorney General Opinion 6649 which excludes the Department from determining Act 390 claims where the Department would have to interpret a CBA.

With no objection from the Department or the EE, the ALJ found the EE's appeal had been decided and dismissed EE's appeal. ER's Motion was granted and the DO affirmed.

1558 APPEALS
Good Cause Found
Presumption of Receipt Rebutted

MOTIONS
Withdrawal of Claim

97-944 Driscol v Cohn dba Multi State Agency, Inc (1998)

Good cause was found for ER's one day late appeal. ER argued non receipt of the DO and claimed to have learned of the Department's findings from the EE. The ALJ found it was reasonable that the ER would have responded timely to the DO, if it had been received, since previous Department and agency mail had been responded to when received. The presumption of receipt for the DO was rebutted.

Complainant filed a motion to withdraw the claim. Motion granted and the case was dismissed with prejudice.

1559 EMPLOYEE
Economic Reality Test
Managerial Duties

EMPLOYER
Principal Exercising Extensive Control

EMPLOYER IDENTITY
Corporation
Corporation Officers

EMPLOYMENT RELATIONSHIP
Economic Reality Test
Manager
EE/ER Relationship Found
Manager

FAIR LABOR STANDARDS ACT (FLSA)

99-473 **Walsh v Linda Quint, an individual, and Linda Quint, Inc., a Michigan Corporation, jointly and severally** **(1999)**

Belinda Frazier married Tim Giancomini. Ms. Frazier's parents, Eric and Linda Quint, wanted to assist the couple by purchasing Dominic's Place for them. The corporation "Linda Quint, Inc.," was formed 6/7/96 with a corporate address at the Quints' home. No annual reports were filed and the corporation didn't have a Board of Directors or officers. The corporate status as of 7/15/99 was "Automatic Dissolution."

On 7/10/97, the Quints and Giancomini guaranteed to the seller, Tringali, the "prompt payment and performance of any and all obligations set forth in the original Management Agreement, (dated 6/4/96) and subsequent Memorandum agreement." In a Bill of Sale, dated 2/23/98, Tringali agreed to sell the business to Linda Quint, Inc. This Bill of Sale identified Belinda Frazier as the president. However, Belinda Frazier and Tim Giacomini divorced in August 1997 and stopped working in the restaurant in February 1998.

In 1996, Complainant Nancy Walsh worked for Tringali as a waitress and continued employment with the change in management. In 1997, Complainant increased her hours. In addition, at Belinda Frazier's request, Complainant began training to take over for her as manager. In February 1998, Complainant took over as manager. Upon direction from Respondent, Complainant gave the checks to EEs when there was enough money in the register to pay them. Another Manager, Kathy Clark, worked many hours Complainant didn't cover. Complainant continued to work as a manager until told by Eric Quint in September 1998 that the business was closing.

Respondent argued the business was kept going until 1998 because they relied on Complainant's positive attitude to make the operation a success. February through September contained 31 pay periods and Complainant claims she received payment for

only five pay periods. The issues were whether Respondent, Linda Quint, was individually liable for Complainant's past due wages.

Respondent failed to provide to the Department the Complainant's employment records, including records of wage payments.

The Payment of Wages Act requires an ER/EE relationship to exist before wages or fringe benefits can be ordered paid. Relying on Askew v Macomber (see General Entry VII), the ALJ found Linda Quint, as an individual, was properly considered Complainant's ER for purposes of Act 390. The ALJ distinguished between managerial control and ultimate control. Complainant was always subject to supervision by Respondent. Although Complainant was an important EE, if the business succeeded, she would not reap the profits. Complainant's only interest was the payment of her weekly wages. This issue is addressed in this Digest in Hooker v National Personnel Consultant, WH 83-3419 (1984) ¶399, where officers were found individually liable for wages because they exercised pervasive control over the business and financial affairs and acted in the interest of the ER with relation to the EE's. In the case at hand, Respondent controlled this business because she was an owner. Also see Vanover v Gallatin Building Co and Jeffrey R Gallatin, WH 87-6713 (1988) ¶980.

Also, although "Linda Quint, Inc.," was formed 6/17/96, no annual reports were ever filed. Thereafter, the corporation ceased legally on 6/17/97. The claim was filed for the period February through September 1998, after the corporation ceased to exist. Linda Quint was the resident agent and incorporator and the address of the registered office was her home. These facts establish Linda Quint was responsible for payment of Complainant's wages.

See General Entries VII and XIX.

1560 APPEALS

Untimely

Good Cause Found

Mail Delivery

99-219 Rettele v Robert M Lowe, an individual, dba Rob Lowe Construction (1999)

Good cause was found for ER's one day late appeal. The DO was mailed to ER at an old address and forwarded to ER's new address. The ER filed an appeal postmarked 12/7/98. The last day of the 14-day appeal period was 12/9/98. The ALJ found it reasonable to expect an appeal mailed on 12/7/98 from Waterford would be received in Lansing by 12/9/98.

On 5/11/99, the parties settled their dispute. Since no issues remained requiring a hearing, the case was closed and the DO set aside.

1561 APPEALS

Untimely

Good Cause Found

Death/Illness

Mail Delivery

REHEARING

Denied

Untimely Petition

98-419 Burris v New Alternatives in Community Living (1998)

Good cause was found for a late ER appeal due to a mix-up of the post office box and the out-of-state funeral of ER's father. Good cause for the late appeal was found 4/24/98. A hearing was scheduled for 9/8/98. On 9/10/98, ER's appeal was dismissed based on ER's nonappearance at the hearing. See Administrative Rule R 408.22966.

On 11/13/98, ER submitted a request for rehearing regarding the 9/10/98 decision. Section 87(3) of the Administrative Procedures Act (APA), 1969 PA 306, as amended, provides that a rehearing request must be filed within the same 60-day period established for filing a petition for judicial review. Since the decision dismissing ER's appeal was issued 9/10/98 and the letter requesting the rehearing was received 11/13/98, the rehearing request was filed late. Section 87(2) of the APA requires a rehearing where the record is inadequate for purposes of judicial review. In all other cases, granting a rehearing is discretionary. ER's request for rehearing was denied.

See General Entries IV and XVI.

1562 WORKERS' DISABILITY COMPENSATION

Determination of Disability

98-674 Sanders v Detroit Public Schools (1999)

EE appealed the DO claiming a fringe benefit, reimbursement to the illness bank, for 24 days. EE, a teacher, was assaulted while in class. The employment contract between the ER and the Detroit Federation of Teachers produced at hearing provides that teacher absences resulting from assaults will not be charged against sick leave. The teacher's gross earnings will continue during disability. ER compensated EE for assault pay from 12/2/97 through 1/9/98 but disputed further payments. The ALJ concluded that the proper forum to address EE's claim is the Workers' Compensation Law. Until EE is determined disabled under this process, it cannot be determined that EE's absences continue during a "period of disability" during which she is due reimbursement to the illness bank.

1563 BURDEN OF PROOF

Recordkeeping

No Proof of Hours Worked

Time Worked

COMMISSIONS

Incomplete Sales

Automobile Sales

MINIMUM WAGE

Commissions

99-220 Britten v Ramont Credit Center South, Inc. (1999)

EE was hired to sell used cars. ER had no records to show the period of EE's employment or the hours worked. EE was to receive 30 percent commission or a minimum of $200 for each sale. When EE didn't earn a commission, he was to be paid the minimum wage, $5.15 per hour. The Department found $200 due for the sale of a car, but the ALJ found that EE didn't complete all tasks necessary to earn the commission. Because of missing information, the ER had to have the customer return after taking delivery on a car and after the EE's resignation. The ER obtained the information needed by the lending institution. Accordingly, the $200 amount was not due. The ALJ ordered payment of minimum wage for all hours the business was open during the EE's employment.

1564 ADJOURNMENT OF HEARING

Requested But Not Approved

HEARING

Address

Duty to Keep Department Advised

REHEARING

Denied

Request for Adjournment

Not Approved

98-131 McPike v Crystal Air, Inc. (1998)

On 3/5/98 ER left a voice mail message for ALJ requesting an adjournment of the 6/4/98 hearing. The ALJ attempted to contact the ER but was unsuccessful at the telephone number provided. ER did not make further contact with the ALJ. ER, as the appellant, did not appear for the 6/4/98 hearing. The ALJ dismissed ER's appeal based on Administrative Rule R 408.22966. ER filed a request for rehearing contending that no

one responded to ER's earlier request for adjournment. The ALJ denied the request, noting that ER had a new address which was not provided to the Department. The ALJ found it to be ER's burden to secure approval for an adjournment request and not assume it to have been granted. "Being aware of the hearing date, and not having followed up on its unanswered request, did not absolve Respondent from having to appear for the hearing on its appeal."

Also, see General Entries IV and XVI.

1565 APPEALS

Untimely

Good Cause Found

DO Not Received by Party or Attorney

1999-4714 Frick v Timothy Abbey & Everneal Abbey dba T Abbey Enterprises (2000)

EE filed a late appeal. At the time the DO was sent, EE was separated from spouse and EE did not receive the DO. Good cause was found for the late request for review.

1566 APPEALS

Untimely

Good Cause Found

Mail Delivery

COURT ACTIONS

Default Judgment to Offset Amount Due Complainant

DEDUCTIONS

Written Consent

None

99-968/1999-4843 Garcia v d Diversified Services, Ltd (2000)

DO found ER in violation of Sections 5(1) and 7 and was ordered to pay EE $1,384.62 plus a penalty. ER filed a late appeal but the ALJ found good cause for the late appeal. ER acted reasonably by expecting an appeal postmarked 8/3/99 in Redford, to be received in Lansing by 8/5/99, the last day of the appeal period. ER requested the DO be offset against a District Court small claims Judgment which ordered EE to pay ER $1,421.62.

The District Court Judgment is legal authorization to withhold wages, but there was no judgment at the time EE's wages were withheld. See ¶699 and ¶848. ER violated Sections 5(1) and 7 by withholding $1,384.62 from EE's wages. DO was modified by

reducing the $1,384.62 ordered plus $45.22 penalty, by the District Court Judgment amount of $1,421.62. Balance due EE was $8.22.

See General Entry VI.

1567 DAMAGE TO OR LOSS OF PROPERTY
Public Policy

DEDUCTIONS
Company Vehicle
Written Consent
Beginning of Employment
Truck Driver
Public Policy

WRITTEN CONTRACT
Truck Driver

WRITTEN POLICY
Conflict in Policies
Truck Driver

99-4638 Boone, Jr v Now Express, Inc. (1999)

DO found that ER violated Section 5(2), 7(1)(2) and ordered payment to EE of $821.45. ER appealed. EE and the Department failed to appear for the hearing. The issue was whether unpaid wages were due EE.

EE was employed as a driver for ER. EE and ER executed a contract of employment which stated in part, "no equipment shall be used . . . for any purpose other than as directed . . . the driver assumes the risks and costs of any and all loss or damage not due to the negligence of the employer . . . the driver hereby authorizes ER to withhold any and all monies or payments due to Driver until ER is indemnified for lost or damaged equipment/goods. . . . Driver represents that as the driver or operator, he is familiar with and will obey all applicable state and federal laws and regulations . . . ."

EE was involved in an accident with ER's van, was found at fault and issued a citation for operating a motor vehicle under the influence of alcohol. ER withheld net wages from EE to offset $1,000 insurance deductible for damage to ER's leased van.

Administrative Rule 408.22969 places the burden of proof on appellant. EE failed to appear and ER was found to have satisfied the preponderance of the evidence in support of its appeal. The ALJ found that the public policy upon which Act 390 was premised, must, in this case, bow to the greater public policy which prohibits operation of a motor

vehicle while under the influence of alcohol. To do otherwise would reward EE for driving while intoxicated. The DO was reversed; ER did not violate the Act.

See General Entry X.

1568 BURDEN OF PROOF
Recordkeeping
No Proof of Hours Worked
Section 9

CIVIL PENALTY

EMPLOYER
Duty to Maintain Records
Duty to Pay Wages
Sections 2/5

MINIMUM WAGE
When Wage Agreement Is in Dispute

WAGE AGREEMENTS
Dispute
Minimum Wage

WAGES
Against Public Policy
Work Without Compensation

WAGES PAID
Recordkeeping
ER Obligation

1999-4693 Villarreal v Michael Scott Tafil dba M T Enterprises Property Maintenance Services (2000)

DO found that ER violated Sections 2, 5(1) and 9(3) and ordered ER to pay $7,166.88 plus a penalty. ER filed a timely appeal.

ER met EE at a homeless shelter and EE agreed to help ER on a part-time basis cutting lawns. EE claimed that he quit a meat cutter job at $7.10 per hour to work for ER. EE asserted he worked for ER's lawn care business from approximately May through September 1998, but neither party kept any records and neither could recall many events during EE's employment. EE also worked for ER doing janitorial work for Bravo's Restaurant.

EE claimed he worked daily, eight hours per day performing janitorial duties, then cutting lawns, sometimes working past midnight. EE also was a full-time dishwasher at Bravo's. ER agreed to provide EE with room and board and expenses in exchange for his work and denied any agreement to pay EE $7.10 per hour. ER's goal was to provide EE with free room and board plus expenses so that EE could save his dish washing wages and eventually buy his own home.

Section 2 requires an ER to pay wages to an EE in a regular, periodic manner. Section 5 requires an ER to pay a separating EE all wages due. See ¶823. EE did not receive compensation as required. Section 6 does not allow an ER to pay EEs in other than U.S. currency or negotiable check. See ¶426. ER was also required to keep payroll records. See ¶437 and General Entry XVII.

The ALJ found the evidence did not support a finding that EE worked eight hours per day, seven days per week. The fact that ER did not keep records did not mean that no wages could be ordered. See ¶571. EE was due wages for 18 weeks at the minimum rate of $5.15, 27 hours per week. Wages of $1,390.50 were ordered. A civil penalty was assessed, because the record established that ER violated Section 9. Under these circumstances, a civil penalty is required by Administrative Rule 33(5).

See General Entries IX and XVII.

1569 BURDEN OF PROOF

Appellant

Burden Not Sustained

Conflicting Testimony Insufficient

CHECKS

Stop Payment

Violation of Section 6

EMPLOYER

Duty to Pay Wages

Sections 2/5

WAGE PAYMENT

Stop Payment

Violation of Section 6

1999-4698 <u>Ahlgren</u> v <u>Winpoint Retail Consulting Services, Inc</u> (2000)

The DO found that ER violated Sections 5(1) and 6(1) and ordered ER to pay $1,898 plus a penalty. ER filed a timely appeal.

EE worked for ER as an assistant to ER's CEO, making $10 per hour. EE was required to make frequent road trips and was given $100 each day on the road as a "per diem" payment. This money was in addition to EE's wage. EE was not required to account for the per diem amount. EE was also given a business expense amount which had to be accounted for with receipts. On at least two occasions, EE was given an advance on wages, $900 and $300 respectively, and signed IOU's for repayment with authorization for ER deductions from pay.

EE argued that since English was a second language for him, he was unaware of the meaning of "Employee IOU" at the top of the agreements for repayment. EE separated before he repaid the amount lent.

Section 5 requires an ER to pay a separating EE all wages that are due. Section 7 prevents deductions from wages unless EE gives written consent. The ALJ found that even if EE didn't understand the "Employee IOU" title to the form, each document contained an EE authorization allowing ER deductions in any amount necessary to repay the loan. However, EE worked 12/6/98 and 12/23/98 and was not paid. Section 2 requires wages to be paid in a regular and periodic manner. Section 6(1) also requires payment of wages shall be made in U.S. currency or negotiable check. Although ER gave EE a check, ER stopped payment. This was a violation of Section 6(1). See ¶1342. ER failed to meet the burden of proof as found in Administrative Rule R 408.22969. DO was modified and ER was ordered to pay $998 wages plus an interest penalty.

See General Entries II, IX.

1570 BURDEN OF PROOF
Appellant
Burden Not Sustained
Out of Business

EMPLOYER DEFENSE
Lack of Money

WAGE PAYMENT
Lack of Funds

WAGES
Poor Economic Situation

1999-4692 Anderson v TI-Ros Tool & Gage, Inc. (2000)
1999-4805 Borovic v TI-Ros Tool & Gage, Inc.
1999-4806 Pashby v TI-Ros Tool & Gage, Inc.

ER did not contest the amounts due EEs but argued that it could not pay due to lack of money, defunct business, dependency on a creditor for continuing business, foreclosure, economic loss above foreclosure and money owed to other creditors.

The ALJ found ER failed to meet its burden of proof in support of its appeal. Because ER did not file in bankruptcy and was only in a poor economic condition, ER was not relieved of its obligation to pay because of lack of money. See ¶388 and ¶508. DO affirmed.

See General Entry XI.

1571 BURDEN OF PROOF
Appellant
Burden Not Sustained
Conflicting Testimony Insufficient

EXPENSES
Telephone Charges
Not Business Related

WAGES
Paid in Full
EE Did Not Work

1999-4795 *Hepberger v Veto Group Corp.* (2000)

WH found ER violated Section 4 and ordered business expenses to EE of $737.94 plus 10% per annum. EE appealed. The issue was whether unpaid wages were due EE, and whether business expenses beyond those in the DO were due EE.

EE gave notice of resignation effective 1/22/09 on 1/11/99. He asserts he was waiting to be assigned work during this period but was neither given work nor dismissed. ER states that EE was told employment ended on 1/15/99, and that EE agreed to drop off equipment to ER, which he did. EE further contends he is due unpaid business expenses in the amount of $614.68.

Section 5 of Act 390 requires a separating EE to be paid all wages due as soon as the amount can be determined. The ALJ found that the EE did no work during the period of 1/18/99-1/22/99, and is owed no wages for this period. The ALJ determined that ER could have discharged EE on 1/11/99, when EE gave notice but paid him through 1/15/99. See *Elkins v Michigan Claim Service, Inc.*, WH 81-1922 (1982), ¶191.

Testimony was taken as to the telephone expenses claimed by EE, and the ALJ found the charges not sufficiently business related to be reimbursable. Section 3 of this Act requires the payment of fringe benefits in accordance with a written contract or policy, and

Section 1(e) includes "authorized expenses incurred during the course of employment" as a fringe benefit. ER telephone reimbursement policy emphasized that calls must be business connected and necessary for that purpose. The ALJ found these calls were not business related. Administrative Rule R 408.22969 places the burden of proof on the Appellant to prove the truth of the matter asserted in the appeal. Appellant did not meet the burden of proof by a preponderance of the evidence (greater weight and believability).

See General Entries IX, XI.

1572 EMPLOYMENT RELATIONSHIP
ER/EE Relationship Found
Construction Management

WAGES
Minimum Wage

1999-4709 *Tolbert v. Kingston Construction* (2000)

DO found ER in violation of Section 5(1) of Act 390, and ordered ER to pay EE $3000.00 plus 10% per annum penalty. ER appealed. At issue was whether petitioner was EE or an independent contractor during her association with ER, and whether petitioner is due unpaid wages from ER.

EE was hired to generate business in construction management. There was no discussion of EE's work schedule, or requirement for EE to track hours. EE did not bill ER for her time or send invoices. Parties were to agree on a wage once EE brought in business, but no business was generated by EE. ER paid EE a check for $1500 in 2/09, and the corporation dissolved in 4/99.

The ALJ found that there was an ER/EE relationship, considering the four factors in *Askew v Macomber*, 398 Mich 212 (1978). See General Entry XXI. EE could not set own fees, ER intended EE to represent the business, and EE's duties were integral to that business. See *Groce v. Logistical Trans Continental*, WH 84-4317 (1985), ¶571.

The ALJ further found there was no wage agreement, with the $1500 payment not intended to cover any specific period. The Minimum Wage Act, 1964 PA 154, requires employees to be paid at least the minimum wage, with Section 5 of Act 390 requiring ER to pay EE all wages due at separation. The minimum wage in Michigan was $5.15/hr. when the EE worked. The ALJ found EE need only be paid at minimum wage rate for average hours worked, 315 hours at $5.15/hr = $1622.25. Subtracting the amount already paid, ER owed $122.25.

The ALJ modified the DO to find $122.25 due as a violation of Section 5(1).

See General Entry XIX.

1573 EMPLOYMENT RELATIONSHIP
ER/EE Relationship Not Found
Management Company
Payroll/Insurance

JURISDICTION
Lack Of
Out-of-State Employment

1999-4909 ***Kiryk v. Business Interlink Service, Inc.*** **(2000)**

DO found ER in violation of Sections 2 and 5(1) of Act 390, and ordered payment to EE of wages and interest penalty. ER appealed. At issue was whether wages and deductions are due.

ER motioned to dismiss for lack of jurisdiction, based on EE having no contact with the state of Michigan. ER entered into contract with WCTM, Inc., a company located in Kentucky, and acted as payroll agent for that company. ER employed EE and leased him to WTCM. ER did not exercise control over EE's work, assign him jobs, or supervise him in any way.

The ALJ found the employing entity was not ER under the Act. The employing entity acted as payroll agent for WCTM. There was no contact with the state of Michigan for jurisdiction. The DO was rescinded for lack of jurisdiction.

1574 EMPLOYMENT RELATIONSHIP
ER/EE Relationship Not Found
Management Company
Payroll/Insurance

JURISDICTION
Lack Of
Out-of-State Employment

1999-5103 ***McClean v. Business Interlink Svcs., Inc.*** **(2000)**

DO found ER in violation of Sections 5(1) and 7 of Act 390, and ordered payment to EE of wages and interest penalty. ER appealed. At issue was whether wages and commissions are due EE from ER.

ER motioned to dismiss for lack of jurisdiction, based on EE having no contact with the state of Michigan. ER entered into contract with WCTM, Inc., a company located in

Kentucky, and acted as payroll agent for that company. ER employed EE and leased him to WTCM. ER did not exercise control over EE's work, assign him jobs, or supervise him in any way.

The ALJ found the employing entity was not ER under the Act. The employing entity acted as payroll agent for WCTM. There was no contact with the state of Michigan for jurisdiction. The DO was rescinded for lack of jurisdiction.

1575 COMMISSIONS

Contract Interpretation

Training Period

When Earned

Written Contract/Policy

2000-25 ***Rison v Engineered Electronic Svcs., Inc.*** **(2000)**

EE signed fully integrated employment agreement specifying a wage and commission structure after training period concluded. EE alleged ER offered, prior to execution of agreement, to pay commissions on next two sales. ER did pay commission on one of the next two sales. EE seeks commission on the second sale.

The ALJ found EE had no right to commissions. The agreement did not mention commissions during the training period, EE was not the primary cause of the second sale, and ER standard practice did not support EE's claim.

1576 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Not Found

Business Purchase

2000-526 ***Landon v Silberzahn*** **(2000)**
2000-527 ***DenBraber v Silberzahn***

ER attempted to sell business, notifying EE of end of EE/ER relationship, with EE to work under purchaser of the business. Purchaser failed to make payments on business, and ER regained control, rehiring EE. EE claimed wages owed while business managed by attempted purchaser. ER appealed the DO awarding wages.

Applying the economic reality test, the ALJ found no EE/ER relationship during the period in question. EE was supervised by attempted purchaser, who paid EE out of new account and exercised control of hiring and firing for nine months. DO rescinded.

See General Entry XXI.

1577 FRINGE BENEFITS

Bonuses/Incentive Pay

Working Constitutes Agreement

Written Contract/Policy/Agreement

Working Constitutes Agreement

2000-1728 ***Knieper v Michigan Head and Neck Institute, PC*** **(2000)**

EE claimed bonus and vacation pay due following discharge. At hiring, EE and ER attempted to negotiate bonus agreement, but no agreement reached. ER written policy had forfeiture provision for fringe benefits upon EE separation, which EE claimed ER planned to change. DO found no Act 390 violation, and EE appealed.

The ALJ found for ER, noting ER did not violate written agreement and that by working, EE agreed to ER policy book requiring paid personal days if EE were discharged. DO affirmed.

See General Entry I.

1578 EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

Mortgage Sales

2000-1739 ***General Mortgage Corp. v Bachleda*** **(2000)**

EEs worked for mortgage company, which became branch office of ER. ER claimed no EE/ER relationship over EEs employed at branch office. DO ordered wages to EE, and ER appealed.

The ALJ found mortgage company acted exclusively in interest of ER, subject to ER fee schedules, and had hiring authority. EEs became employees of ER when company became affiliated with ER. DO affirmed.

1579 EMPLOYER IDENTITY

Individual Liability

EMPLOYMENT RELATIONSHIP

EE/ER Relationship Not Found

Independent Contractor Relationship

Signed Agreement

2001-312 ***Schuster dba Wavemat, Inc. v Lee*** **(2001)**

ER appealed DO finding violations of Sections 2(1) and 5(1), asserting EE's wage claim was not timely. EE notified Department that he resided overseas and asked to testify by telephone. The ALJ ordered a transcript and issued an Order for Written Responses, to which EE responded. The ALJ found the claim timely. ER mistakenly assumed the claim form date was the date filed by EE, not the date form was received by the agency.

The ALJ further found insufficient evidence of an EE/ER relationship. Schuster had no d/b/a for ER, and therefore could not be individually responsible for wages owed to EE. While EE was likely owed remuneration, the evidence was insufficient to establish the existence of the ER named in the DO or that Schuster individually was subject to Sections 2(1) and 5(1). DO reversed.

See General Entry XXI.

1580 COMMISSIONS

After Separation

30-Day Policy

Written Contract/Policy

Not Required

2001-169 ***DeWitte v Computer Associates Int'l, Inc.*** **(2001)**

EE hired as sales executive for software manufacturer acquired by ER. EE previously paid base salary and plus 9% commission and told by ER that compensation would remain the same. Unlike other salespeople, EE sold a different line of products, worked under a different commission structure, and was not given written compensation plan. Upon terminating employment, ER paid partial commissions owed EE and denied owing further commissions, claiming written policy for salespeople provided for commissions for payments received within 30 days of termination. The DO found no wages due.

The ALJ found ER written policy did not cover EE. Act 390 does not require a written wage agreement. Under Section 1(f), commissions are wages. Section 5(2) requires payment of wages due at separation. The ALJ ordered $83,827 plus 10% per annum interest to be paid to EE.

See General Entry IX.

1581 DEDUCTIONS

Written Consent

Insurance Premiums

2001-1764 ***Bray dba Employee Resource Management v Ledwidge*** **(2001)**

ER appealed DO finding unauthorized wage deduction for medical insurance. The ALJ found EE provided written authorization as required in Section 7(1). Section 7(2) does not require authorization for each wage payment subject to medical deduction. DO rescinded.

1582 FRINGE BENEFITS
Holiday Pay
Written Policy
Required Before Payment

2001-1967 ***Ritter v G & M Coaches, Inc.*** **(2001)**

EE claimed holiday wages due pursuant to ER written policy. Holiday pay is a fringe benefit under the Act, and Sections 1(e) and 3 require a writing to enforce fringe benefit payments. The ALJ found the written policy limited holiday pay to holidays EE scheduled to work. EE was paid full weekly salary for weeks in which holidays fell, and no further wages were due.

1583 EMPLOYMENT RELATIONSHIP
EE/ER Relationship Not Found
Business Purchase

2001-191 ***Tender Loving Care, Inc. v Apps*** **(2001)**

ER appealed DO ordering payment of wages for the period of April 9, 2000 to April 16, 2000. The ALJ found ER did not purchase the facility EE worked at until the following year, and was not liable under Section 5(1) for wages claimed.

1584 COMMISSIONS
After Separation
Procuring Cause
Procuring Cause

2001-314 ***McCarthy v Tri-Mount Management Co., Inc.*** **(2001)**

EE sought unpaid real estate commissions from ER. Written commission agreement provided for commission on real estate sales EE closed, but did not define when closing occurs. ER withheld commissions on several lots and home sales because ER was involved in litigation with the buyers and no final closing had been reached. ER withheld commission on one lot because of pending civil litigation between ER and EE. ER

claims EE agreed to a reduced commission of $1000 on one of the disputed lots, which EE received. EE claimed she agreed to reduced commission believing she had no choice.

In Michigan, an agent is entitled to commission if the agent's efforts were the procuring cause of the sale. *Butterfield v Metal Flow Corp.*, 185 Mich. App. 630 (1990). Where there is no specific agreement, the procuring cause doctrine makes it unnecessary for the broker to conclude the sale to receive commissions. *Reed v Kurdziel*, 352 Mich. 287 (1958). ERs may not reduce EE commissions on larger sales after EE expended effort to procure the sale unless the commission agreement so provided. *Militzer v Kal-Die Casting Corp*., 41 Mich. App. 492. Retroactively adjusting the wage agreement is prohibited by Section 2 of the Act. Withholding EE commission because of pending EE/ER litigation without a court order violates Section 5(1) of the Act.

The ALJ found commission was due under Section 5(1) when EE procured purchase agreements, and ordered ER to pay $43,840.99 plus interest to EE.

See General Entry IX.

1585 BONUSES
After Separation
Written Contract/Policy/Agreement
Discretionary
Interpretation

FRINGE BENEFITS
Bonuses/Incentive Pay
Discretionary
Written Contract/Policy/Agreement
Employment on Certain Day Required

2002-865 *Bourquin v Niles Enterprises, Inc. dba Jackson Hewitt Tax Svc.* (2002)

EE, a tax preparer, signed Employment Agreement with provision for a performance bonus. ER's Employment Handbook stipulated bonus would only be paid if EE was employed through April 15. EE was discharged on April 1 and did not receive a bonus. The DO found no fringe benefit due. The ALJ found ER acted in accordance with its written policies and affirmed the DO.

1586 BONUSES
Written Contract/Policy/Agreement

FRINGE BENEFITS
Bonuses/Incentive Pay

Written Contract/Policy/Agreement
Eligibility

2002-953 ***McKenzie v Norgren Automotive, Inc.*** **(2002)**

Employment Agreement provided $7000 bonus to EE if quarterly sales goals were met. ER paid bonus in 2000, despite EE not meeting each all quarterly sales goals, stating in a letter that EE was entitled to $7000 minimum incentive payment in 2000 for coming to work for ER. EE did not meet sales goals for 2001, but sought bonus believing the letter established a guaranteed minimum annual bonus. The ALJ found the $7000 bonus was a one-time incentive bonus, and ER written policy based annual bonuses on performance, therefore the Act was not violated.

1587 BONUSES
After Separation
Resignation Before Payment Date

COMMISSIONS
After Separation
30-Day Policy
Procuring Cause
Procuring Cause

2001-1756 ***Carozza v Greg Laurin dba Smith-Laurin Group*** **(2001)**

EE sought unpaid commissions and bonuses from ER for a sale EE obtained which was closed after EE's resignation. ER's acceptance of EE's resignation provided that EE would receive commissions on sales closed within 30 days of termination. After resignation, EE worked for ER on one sale, which was closed by a home-office EE within 30 days. ER withheld commissions on the sale, arguing EE was not an EE when the sale closed, and EE did not finalize the sale.

The ALJ found EE was not terminated at the time of resignation, as EE continued to work for several weeks, during which the sale closed. EE did the bulk of the work on the sale and the involvement of the home-office EE did not defeat EE's right to commissions. The ALJ found bonuses not due in accordance with ER's written policies, as EE was not on staff during the specified time period.

See General Entry IX.

1588 DEDUCTIONS
Insurance Premiums
Written Consent
Insurance Premiums

2001-1981 ***M.H. Consulting Svc., Inc. v McCann*** **(2002)**

ER deducted monthly insurance premiums from EE wages with written authorization. EE claimed ER had not forwarded the deductions to the insurance company. The DO required payment to EE of amount equaling two monthly premiums. At the hearing, ER submitted statement showing payments to insurance company for months in question. The ALJ found ER owed no further fringe benefits.

1589 COMMISSIONS

After Separation

Procuring Cause

Procuring Cause

2001-1726 ***Hunsaker dba The Sunrise Co., Inc. v Centofanti*** **(2002)**

EE was hired on salary/commission basis as construction manager for ER. No formalized agreement stated when commissions on sales would become due, and the parties disagreed over whether EE was permitted to continue his outside business. ER withheld commissions on construction projects procured at the time EE was terminated, arguing that EE's outside business violated their unwritten employment agreement.

In Michigan, an agent is entitled to commission if the agent's efforts were the procuring cause of the sale. *Butterfield v Metal Flow Corp.*, 185 Mich. App. 630 (1990). Where there is no specific agreement, the procuring cause doctrine makes it unnecessary for the broker to conclude the sale to receive commissions. *Reed v Kurdziel*, 352 Mich. 287 (1958). MCL 600.2961 requires that commissions due a sales agent shall be delivered within 45 days from EE's termination date.

The ALJ found commissions due EE under Section 5(1) and MCL 600.2061.

See General Entry IX.

1590 BONUSES

Written Contract/Policy/Agreement

Not Paid Pursuant To

FRINGE BENEFITS

Offset by Required Bonus

OVERPAYMENTS

Mistakes

As Offset for Fringe Benefits

2000-1902 ***Austin v Gordon*** **(2001)**

DO found ER owed EE $222.40 in sick and holiday pay. ER argued it overpaid EE wages by not withholding taxes $1000 "bonus" check to EE, and this amount should offset wages owed. The ALJ affirmed the DO. The "bonus" was not a fringe benefit under Section 1(e), as it was not due pursuant to a written contract or policy. ER's decision not to withhold taxes was a volitional act, not a miscalculation or error under Section 7(4)(a). See General Entry XVIII.

1591 BONUSES
Written Contract/Policy/Agreement
Discretionary
Good Faith Requirement

FRINGE BENEFITS
Bonuses/Incentive Pay
Discretionary
Good Faith Requirement

2001-989 ***Johnson v Dent Enterprises, Inc*.** **(2002)**

EE sought profit sharing bonus pursuant to written policy. ER asserted its written policy made bonuses payable solely at management's discretion. The ALJ found ER's arbitrary nonpayment violated the implied covenant of good faith and fair dealing, and was contrary to public policy. See *Butler v Cadbury Beverages*, an unpublished decision of the US District Court of Connecticut, June 29, 1999.

The ALJ permitted a rehearing to determine the amount due EE, instructing ER to provide the bonus formula and calculations for the periods at issue. ER failed to comply with the subpoena. On rehearing, the ALJ relied on EE's wage claim to determine the amount due EE, and ordered ER to pay EE $9880 in bonuses.

See General Entry XVIII.

1592 SALARIED EMPLOYEE
Working During Vacation

VACATION
Salaried Employee
Working During Vacation

2003-1309 ***DeCarlos Enterprises, Inc. v Jacobs*** **(2003)**

EE hired as banquet director for ER. At time of hire, ER agreed EE could take a designated week as unpaid vacation. On the week in question, EE clocked in and worked two days, and claimed 9 additional hours for work done while on vacation. ER paid EE for 3 days worked. The DO found the balance of EE's weekly salary due.

The ALJ found EE not entitled to salary for the week in question, as EE/ER agreement did not provide for EE to work that week. EE was paid for time worked. ER's payment for time worked did not require ER to pay the balance of EE's salary as if it were a normal work week. See General Entry IX.

1593 EMPLOYEE
One Who Is Permitted to Work
Wage Agreement Unclear

EMPLOYMENT RELATIONSHIP
EE/ER Relationship Found
Manager

WAGE AGREEMENT
Unclear

WAGES
Determined by ALJ

2002-543 ***Baker v Jamelia, LLC dba Ramada Inn and Suites*** **(2002)**

EE worked as management consultant for company hired by ER. EE temporarily filled in as hotel manager for ER for one month under verbal agreement with ER which left the salary term undefined. EE placed himself on ER payroll at $6000 per month. He received one paycheck for two weeks work before ER terminated his employment for putting himself on payroll at too high a salary.

At the hearing, EE testified managers are paid $3750 to $5000 per month. ER testified managers are paid $1500 to $1800 per month. The ALJ found ER permitted EE to work and owed wages for the two unpaid weeks. Absent a negotiated wage rate, the ALJ averaged the lower end of wage range quoted by EE with the upper end of wage quoted by ER and awarded EE two weeks wages at that rate, totaling $1387.50.

See General Entries VII, IX, XIV.

1594 FRINGE BENEFITS
Sale of Business
Vacation
At Separation

Sale of Business

VACATION
Payment at Separation
Sale of Business

2001-2045 ***Alfano v Premier Chrysler Jeep Daewoo*** **(2002)**

ER written fringe benefit policy required EEs to take vacation time within a year or have the unused balance paid at the end of the year. EE had two weeks' vacation remaining when ER sold the business and terminated EE. ER written policy did not have a provision concerning fringe benefit payments in the event the business was sold.

The ALJ found ER's policy allowing payment of vacation at separation if EE provided two weeks' notice showed intent to pay EEs separating under good circumstances. As EE had separated under good circumstances the ALJ found ER violated Section 3 and ordered payment to EE for unused vacation.

See General Entry XVIII.

1595 ATTORNEY FEES
Complex Litigation

BONUSES
Written Contract/Policy/Agreement
Interpretation
Profit Definition

EMPLOYER
Identity
Common Enterprise

EXEMPLARY DAMAGES
Deliberate, Conscious and Knowing Violation

FRINGE BENEFITS
Bonuses/Incentive Pay
After Separation
Profit Definition

2002-699 ***Barbara Brown & Associates Inc. II v Rushing*** **(2003-04)**

EE was hired as sales manager for ER, who operated under several corporate titles. The employment contract stated EE was to receive a salary and fringe benefits, including a bonus based on company profit at close of the business year. EE was terminated after six

months and told the company could not afford his compensation. After termination, the parties disputed the meaning of "profit" in the employment contract. EE claimed "profit" meant profit on sales; ER claimed "profit" was profit of the corporation, deducting various operating expenses from the profit on sales.

ER contended ER was not the employment entity and that EE's claim was time-barred. The ALJ found Barbara Brown, Barbara Brown and Associates II Inc, and Barbara Brown and Associates Inc.were employers while Barbara Brown and Associates Inc.II and Brown and Associates Inc.were not. Barbara Brown had operational control of her corporations, determined salaries, and made hiring decisions. See *US Dept of Labor v Cole Enterprises*, 62 F3d 775, 778-79 (6th Cir 1995). Barbara Brown and Associates II was the entity for which EE worked. The ALJ found Barbara Brown and Associates Inc.and Barbara Brown and Associates II Inc.were a common enterprise under the "integrated enterprise" test. See *Kamens v Summit Stainless*, 586 F Supp 324 (ED PA 1984). The ALJ found EE's amended claim related back to EE's initial claim to the incorrect employment entity, and was therefore not time-barred. See MCR 2.118(D); *Schiavone v Fortune*, 477 US 21, 29-30 (1986); Wells v Detroit News, 360 Mich 634, 639 (1960).

In interpreting the sales commission clause, the ALJ found ER's deduction of salaries and fringe benefits from its profit calculations would be internally inconsistent. The ALJ further found the intertwining of ER's corporate entities made deductions for loans and rent from one entity to another more properly profit transfers rather than business expenses reducing company profit.

The ALJ found ER's testimony of intent to pay EE bonuses based on net income unconvincing. During hiring negotiations, ER only provided EE with only gross sales reports, suggesting EE would receive a much higher commission. If ER intended to pay EE based on net income, failure to do so would have rendered her intent fraudulent and the contract illegal. See *Universal Underwriters v Kneeland*, 464 Mich 491 (2001); *USF&G v Black*, 412 Mich 99 (1981).

The ALJ awarded EE $160,157.40 in wages. The ALJ further awarded $160,000 in exemplary damages under Section 18(2). In light of the difficulty unraveling ER identity, EE attorney costs were awarded under Section 18(3). See General Entries XVIII, XX, XXIII. These awards were affirmed by the Michigan Court of Appeals in *Rushing v Barbara Brown & Associates II, Inc*., an unpublished decision issued September 6, 2005.

1596 COMMISSIONS
After Separation
Computation
Procuring Cause

WAGES
Commissions

Payable After Separation
Procuring Cause

2003-951 ***Dunn v Security Corporation*** **(2003)**

ER sells and installs security systems. EE's employment agreement calculated commissions on installation jobs at 3-8% of contract price. ER policy paid commission for sales of equipment only at a lower rate based on profit margin. EE had not previously sold equipment. At time of separation, EE was working with a qualified representative on a on large equipment sale. EE/ER separation agreement provided EE would receive "partial credit" for this sale. ER policy on shared commissions provided that a representative doing half the work receives 50% of the commission, while an unqualified representative who must work with a qualified representative gets 30%. ER paid EE 25% commission. EE sought commission at installation rate, shared at 50%.

As separation agreement superseded the employment agreement, the ALJ determined rate of the employment agreement an inappropriate measure. The ALJ applied the method of *Reed v Kurdziel*, 352 Mich 287 (1958), determining EE did half the work, and awarding EE 50% of commission at the rate for sales of equipment.

See General Entry IX.

1597 FRINGE BENEFITS
Must Be in Writing to Be Enforced
What Constitutes Written Policy

WAGES
Deferral

2003-661 ***PopStraw Co., LLC v Murphy*** **(2003)**

EE was president of startup manufacturing company experiencing financial difficulty. From July through September 2001, EE agreed to a 50% salary deferral. In September, the management board laid off all EEs. EE sent a letter to the board agreeing to forego remuneration until the company was profitable, and continued working during this period without compensation. From January to April 2002, EE was again paid a salary.

EE claimed 100% of his salary was deferred from October 2001 through January 2002. No such deferment appeared on the books. EE also claimed fringe benefits due pursuant to the LLC agreement which authorized the board to pay reasonable fees, expenses, and other compensation.

The ALJ found wages deferred from July through September 2001 due EE. EE testimony of a deferment from October 2001 through January 2002 did not overcome evidence that EE agreed to work without compensation during this period. The LLC language did not

amount to a written fringe benefit policy within the meaning of the Act, and the ALJ found no fringe benefits due. See General Entry I.

1598 Jurisdiction
Lack Of
Financial Manager Appointment

2004-379 ***Taylor v City of Flint*** **(2004)**
2004-380

EE was a member of the Flint City Council. The local Emergency Financial Manager, appointed pursuant to the Emergency Municipal Loan Act, MCL 131.931 *et seq*., reduced EEs compensation retroactively. EE argued this reduction was unlawful.

ALJs lack the authority to determine the constitutionality of a statute or a statutory provision. See *Dalton v Ford Motor Co.*, 314 Mich 152 (1946); *Wronski v Sun O.I. Co.*, 108 Mich App 178 (1981). The ALJ found no wages due based upon Section 21(1)(q) of the Emergence Municipal Loan Act.

1599 Jurisdiction
Lack Of
Financial Manager Appointment

2004-129 ***Porter v City of Highland Park*** **(2004)**

EE was mayor of Highland Park. The local Emergency Financial Manager ("EFM"), appointed pursuant to the Emergency Municipal Loan Act, MCL 131.931 *et seq*., suspended EE's compensation. EE argued he was not compensated for time worked, and that the EFM exceeded his authority by suspending EE's salary. EE also sought longevity bonus established by city ordinance. The ALJ found administrative tribunals lack jurisdiction to determine the statutory authority of an EFM. A longevity bonus was not found to be a fringe benefit under Act 390.

1600 CONSIDERATION FOR EMPLOYMENT

DAMAGES
Duty to Mitigate

DISCHARGED
Retaliatory Discharge

DISCRIMINATION
Retaliatory Discharge

Refusal to Repay Cash Shortage

EMPLOYMENT
Consideration for

2003-1450 ***Vecheta v After Hours Formalwear*** **(2004)**

EE, a store manager, was responsible for daily bank deposits of store receipts. EE mistakenly lost a day's receipts. ER advised EE that it considered her and two coworkers responsible for the loss, and encouraged them to sign promissory note to repay their share. EE would not do so. ER suspended EE from work, offering a choice to repay the money and return to work, or return to work and waive commissions until the amount was repaid. EE declined both. ER terminated EE for failing to accept responsibility for the missing funds. EE found alternate employment working fewer hours, and made some effort to secure full time employment.

Section 8 is violated when an ER demands consideration from EE as a condition of continued employment. An ER may discipline or terminate EE for negligence, but may not legally demand or require payment to reduce the discipline. Retaliatory discharge for exercising a right afforded by the Act is a violation of Section 13, MCL 408.483.

The ALJ found ER terminated EE for refusing to repay the loss and ordered EE reinstated with back pay. The ALJ found EE did not attempt to mitigate her damages in good faith by actively seeking other employment. EE was awarded 50% of her gross weekly compensation for the period between her discharge and reemployment, less her earnings since her termination.

1601 ACT 390
Determining violations of

COMPUTATION OF DAILY HOURS WORKED
FAIR LABOR STANDARDS ACT (FLSA)
Compliance with Act 390
Method of Determining Hours Worked

WAGES
Full Amount Not Paid
Method of Determining Hours Worked
Timekeeping

2010-393 ***Mercy Health Partners* v *Shaw*** **(2004)**

EE filed wage claim based on ER practice of applying a six minute grace period to EE's starting, ending, and meal break times. The DO calculated EE time worked to the nearest $1/10^{th}$ of an hour for a 9 month period. This is the same calculation method found in

Administrative Rule R 408.472, a rule promulgated under MCL 408.1001 *et seq.* for determining minimum wage and overtime violations. The DO found EE was owed for 11.7 hours worked. ER argued its timekeeping practice would even out over time with no detriment to EE.

In order for a rounding scheme to be valid under FLSA and Act 390, the discrepancy must actually even out over time—not just in theory. Hypothetical future evening out of over and underpayments does not comply with Michigan's statutory requirement.

The ALJ held ER's practice violated Section 2's requirement that all wages for a given period be paid on that period's scheduled payday. EE was not paid for all hours worked within each pay period.

See General Entry IX.

1602 COMMISSIONS

Change Without Notice to EE

Records

ER Responsibility

EXEMPLARY DAMAGES

Deliberate, Conscious and Knowing Violation

2003-1443 ***Ultra Grip International, Inc. & Three M Tool & Machine, Inc. v Sulenski*** **(2004)**

DO found ER owed $21,903.47 in commissions due EE at separation. The ER representative admitted owing over $16,044.77 in a letter sent to EE after separation. ER later contended the letter amount had not been checked against company records, but did not respond to requests for documentation. ER introduced a letter purporting to reduce EE's commission rate, which EE denied receiving. EE testified a reduction in commissions was discussed, but no decision made.

The ALJ found ER violated Sections 2 and 5. ER testimony that the letter had not been checked against company records was not believable. The ALJ found ER acted deliberately and knowingly in withholding payment for an extended period and proceeding to an administrative hearing. The ALJ awarded exemplary damages of twice the amount found due in the DO.

See General Entries IX and XX.

1603 COMMISSIONS

After Separation

Based on Profit

FRINGE BENEFITS

Written Contract/Policy/Agreement

Required Before Payment

WRITTEN CONTRACT

Interpretation

2003-396 *Brown v Web Elite, LLC* (2003)

EE, hired in part because of his General Motors vendor number, filed claim for matching 401(k) contributions expense reimbursement, and commissions due. Neither party produced ER's written policy on fringe benefits. Employment contract awarded EE commission contingent on ER maintaining 34% profit margin. EE argued profit margin threshold clause referred to General Motors only, which was always greater than 34%. ER argued it referred to profit margin overall, well below 34%. ER payment history showed commission payments to EE during times in which ER overall profit margin was below 34%.

The ALJ found ER's course of performance dispositive in demonstrating EE's right to commissions did not depend on overall profit margin. See Restatement Contracts 2d, § 202(4); *Detroit Greyhound v Aetna Life*, 381 Mich 683, 685-86 (1969). The ALJ found $47,840 in commissions due to EE. Without evidence of a formal written policy, no fringe benefits could be awarded.

See General Entries I and IX.

1604 BURDEN OF PROOF

Recordkeeping

Not Provided to Department

COMMISSIONS

After Separation

Withheld

Forfeiture Clause

DEDUCTIONS

Employment Agreement, Part of
Wages Below Minimum Wage

DETERMINATION ORDER

Department's 90-Day Issuance Period Procedural, Not Jurisdictional

EMPLOYMENT

Termination

Failure to Receive Paycheck

2001-1017 ***Salon Nadwa Inc. dba Salon Nadwa & Day Spa v Yono*** **(2001)**
2001-1018 ***Salon Nadwa Inc. dba Salon Nadwa & Day Spa v Daskal*** **(2001)**

ER deducted 100% of EE's last week's wages upon EE quitting without notice. EE was a straight commission EE, whose employment agreement contained a forfeiture clause stating that EE forfeits all compensation due if EE fails to provide two weeks notice prior to terminating employment. ER deposited and then three days later withdrew $527.96 from EE's bank account. This was presumably the amount EE earned in her last week. ER was asked to produce payroll records, but never did so despite requesting and receiving a 90 day extension. At hearing, ER moved to dismiss because the investigation exceeded the 90 day time limit under MCL 408.481(3). The ALJ denied the motion in light of ER's requested extension and failure to provide any payroll records.

All wages are due at separation when the amount can be determined. Wage deductions are permitted only with EE consent or as required or expressly permitted by law. No deduction may bring EE's net wage below the minimum wage. See General Entries III, VIII, and IX.

The ALJ found ER violated Section 2 in applying the forfeiture clause, and the deductions taken violated Section 7. ER's failure to produce payroll records violated Section 9. The ALJ affirmed the wage award and penalties.

1605 WAGES

Resignation

Retroactive Change in Rate

2005-62/63 ***Chojnowski & Eagan v Oakland County Michigan Constitutional Corporation*** **(2005)**

EEs made claims for retroactive wages based upon CBA #2. EEs worked for ER pursuant to CBA #1. CBA #1 expired in September 2001 and the collective bargaining unit and ER began negotiating CBA #2. During the negotiations, but before the agreement was finalized, EEs voluntary resigned from their employment. CBA #2 was formalized in September 2003 and provided for a 3% wage increase for all employees governed by CBA #2 and would be retroactive to September 2001.

The ALJ declined to interpret CBA #2. Section 2 requires regular wage payments for all employees. Section 5 requires an ER pay a separating EE all wages that are due. The Act

does not provide for retroactive wages. EEs received their appropriate wage for the time period worked. The ALJ found that EEs were not due retroactive wages.

See General Entry IX.

1606 EVIDENCE

Insufficient to Establish Claim

Conjecture

2005-216 ***Gibbard v Michigan Survey Specialists, Inc.dba Kem-Tech Land Surveyors*** **(2005)**

EE claimed unpaid wages for hours worked from ER. EE had the burden of proof and could not demonstrate by a preponderance of the evidence that he worked those hours. At the beginning and end of each work day, EE was required to "punch in" and "punch out" on a timecard. EE's wages were based upon punching in and out. EE was unable to punch out on some occasions, but was permitted to contact ER's representative and the representative would perform EE's punch out. EE argued that he had not been paid for several work days in which he contacted the representative. EE was unable to identify with specificity the number of hours he worked. Also, EE admitted that he may not have worked the hours he estimated ER should be liable for.

Despite finding that the EE was due unpaid wages, the ALJ noted a "decision to one's entitlement to wages cannot be based upon conjecture. The ALJ cited Sections 5(1) and (2), which both describe a specificity requirement ("as soon as the amount can with due diligence be determined"). Act 390 does not allow an EE wage claim based on guesses. The ALJ found the ER was not liable for unpaid wages.

See General Entries IX, XI.

1607 SALARIED EMPLOYEE

Calculation

2005-259 ***Bogel v Rader, Fishman & Grauer, P.L.L.C.*** **(2005)**

EE was a patent attorney and asserted that he was a "commission EE" and thus entitled to unpaid commission wages. Section 1(f) states "[w]ages' means all earnings of an employee whether determined on the basis of time, task, piece, commission, or other method of calculation for labor or services." EE learned orally of his compensation package, which consisted of an annual salary equal to 32% of EE's billable hours. There was no written employment agreement or policy. Periodically, EE's biweekly wage amount would be adjusted based upon the 32% calculation, billed hours, and expected billable hours to come. Upon EE's resignation, EE sought the difference between the last altered salary calculation and the billed hours up to resignation as commission wages.

The ALJ found the EE to be a salaried EE, not a commission EE and therefore was not entitled to the commission wages. The ALJ found immaterial the fact EE's wages were calculated based upon an anticipated level of billings for his services. It was merely the calculation methodology of the salary and the EE was paid pursuant to that salary.

See General Entry IX.

1608 CLAIMS

Twelve-Month Statute of Limitations

Promissory Estoppel

JURISDICTION

Statute of Limitations

Promissory Estoppel

SICK PAY

Promissory Estoppel

2005-267 ***Darrow v Potterville Public Schools*** **(2005)**

EE was laid off on June 17, 2003 and ER informed EE that she would not be getting paid for unused sick leave. EE received her last pay check on June 27, 2003. EE testified that in May and August 2004 she spoke with several of ER's school board members about the sick leave. ER's sister testified that "a school board member said he could not see any reason [EE] could not be paid for her sick time." The President of the school board testified that he stated to EE that "if she were owed money, she would be paid." The President noted however, "that he had no personal or individual authority to commit the school board to a course of action." EE filed a claim with WH for the sick leave, which pursuant to Section 1(f) is a fringe benefit. EE filed the claim on October 18, 2004. WH determined it had no authority to take action because the EE failed to timely file her claim within the one year statute of limitations of the Act. See Section 11(1). The statute began running on June 27, 2003 at the latest.

EE appealed and argued that her failure to timely file a claim should be excused under a theory of promissory estoppel in that the school board members' statements bound ER to pay EE the sick leave. The ALJ found this argument unconvincing. First, the EE produced no evidence that concluded the school board members, in an official capacity, ever promised the EE would be paid for sick leave. The EE also produced no evidence that concluded EE, herself, "had a basis upon which to believe that an individual school board member's statement could bind the board as a whole." Second, Section 3 only obligates ER to pay fringe benefits to EE according to the terms of a written contract or policy. Notwithstanding the issue of fraudulent concealment, EE's argument, if successful, would have resulted in the use of parol evidence to modify ER's written contracts and policies. Such would be contrary to Section 3's writing requirement.

See General Entries I, V.

1609 CONTRACT

Employment

Independent Contractor by Contract or Agreement

2005-578 ***Paw Paw Elks Lodge #2511 v Damaske*** **(2006)**

EE denied signing a separate contract that would have made EE an independent contractor. The ALJ found the denial credible and therefore the contract was precluded from forming the basis of an employment relationship analysis. Testimony and other exhibits were used to determine an EE/ER relationship did exist.

See General Entries VII, IX, XI, XIX, and XXIII.

1610 WAGES

Withheld

Poor Work

2005-623 ***H & M Demolition Co. dba H & M Demolition Cos. v Johnson*** **(2005)**

ER attempted to establish that EE was a poor worker to avoid paying wages. The ALJ found that the ER owed wages to EE based upon EE's submitted time because ER hired EE as a supervisor. Furthermore, wages are not extinguished or reduced based on poor quality of work performed. To do so would be contrary to Section 7. An ER may discipline or discharge an EE for poor quality of work, but may not withhold wages, which here are determined by hours worked. See Section 1(f).

See General Entries III, IX, XI, and XVII.

1611 DEDUCTIONS

Union Dues

UNION MEMBERSHIP

Union Dues

Service Fees

WAGES

Full Amount Not Paid

Union Dues

2006-486 ***Lakosky v Anchor Bay School District*** **(2006)**

EE gave written authorization to ER to deduct a service fee from EE's wages in the amount of $255.08 for the time period in question. Pursuant to the CBA, EE would become a fee paying non-union member and the service fee would be paid to the Union in exchange for Union representation for EE in a grievance against ER if that became necessary. ER deducted union dues from ER's wages in the amount of $400.39 despite written authorization to deduct only a service fee.

The ALJ found that ER violated Section 2(1) because EE was not paid all wages due in a regular, periodic manner. The issue did not require CBA interpretation. Accordingly, the ALJ held the ER liable for the difference of the union dues deductions ($400.39) and the service fee (255.08), which was $145.31.

See General Entries III, IX, X, XV.

1612 COURT ACTIONS

Court of Appeals Appeal

Circuit Court Reversal
Credible Evidence Standard
Substantial Evidence Standard

EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

Control
Doctor

WAGES

Full Amount Not Paid

Doctor
Employment Contract

2006-572 *Professional Plaza Clinic Corp v Buckley* (2006)

The ALJ found that EE was an employee and not an independent contractor. The ALJ applied the economic reality test to determine whether an EE/ER relationship existed. *Askew v Macomber*, 398 Mich 212; 247 NW2d 288 (1978). The factors of the test consider ER's control over (1) worker's duties, (2) payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an intramural part of the ER's business towards the accomplishment of a common goal. *Id.* The ALJ applied the test to an employment contract that set forth EE's work duties, work schedule, compensation, and vacation time and found EE was an employee. The ALJ further found the ER liable for wages owed to EE.

ER appealed to CCT, which reversed and held EE was an independent contractor and thus was not entitled to unpaid wages under the Act. The CCT considered the evidence *de*

novo without regard to the ALJ's interpretation or reasoning. The CCT focused on the element of control in considering the following: (1) the employment contract's use of terms that referenced EE's position as both an "employee" and an "independent contractor," which allowed the contract to be interpreted both ways; (2) ER did not dictate EE's professional duties or work hours; and (3) EE signed a W-9 tax form, which was usually supplied to independent contractors, not employees. *Buckley v Professional Plaza Clinic Corp*, 281 Mich App 224, 237-38; 761 NW2d 284 (2008).

EE and DOL appealed the CCT decision to the CA.

The CA considered the CCT's standard of review. "A circuit court's review of administrative proceedings is limited to determining whether the decision was authorized by law and supported by competent, material, and substantial evidence on the whole record." Const 1963, art 6, § 28; *In re Complaint of Rovas against SBC Michigan*, 482 Mich 90, 99-100; 754 NW2d 259 (2008); *VanZandt v State Employees Retirement Sys*, 266 Mich App 579, 588; 701 NW2d 214 (2005). "When there is sufficient evidence, the circuit court must not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result." *VanZandt, supra* at 584. "It does not matter that alternative findings also could have been supported by substantial evidence on the record." *Dep't of Community Health v Risch*, 274 Mich App 365, 373; 733 NW2d 403 (2007).

The CA reversed the CCT decision and held (1) there was substantial evidence upon which the ALJ could have issued its decision, (2) the CCT erroneously applied its own interpretation to make findings of fact, and (3) it failed to consider whether the evidence adequately supported the ALJ's findings of fact. In so doing, the CCT "applied an incorrect principle of law when it did not use the correct standard of review." *Buckley, supra* at 239. The ALJ had the opportunity to consider the evidence to which the CCT cited as evidence in support of an EE being an independent contractor. The ALJ amalgamated this evidence with other acquired evidence (exhibits and witness testimony) and considered the totality of the record. The ALJ applied the amalgamated evidence to the economic reality test to come to its decision. The CCT had no authority to apply its own interpretation to the facts because "[t]he circuit court must give deference to the agency's findings of fact." *VanZandt, supra* at 588.

See General Entries VII, IX, XIX.

1613 WAGES

Full Amount Not Paid

ER Insufficient Funds

2005-634/635 ***A.W.M. Corp***
dba National Concrete Construction Associates v Bowers & Troy **(2005)**

ER admitted owing EE $548.25 in wages, but contested WH determination that ER owed $1462.00. EE failed to appear at hearing. ALJ found that ER owed $548.25 plus interest. Despite ER's affirmation of attempting to pay EE the wages owed prior to the hearing, but inability to do so because of ER's insufficient funds, the ALJ found ER in violation of Sections 5(1) and 5(2) of the Act. It makes no difference if ER was willing to pay or had insufficient funds to pay. Section 2 requires payment on a regular, periodic schedule.

See General Entries IX and X.

1614 WAGES PAID

Lack of Funds

Bank Fee Liability

2006-697 ***Radatz v Creative Hot Rods, Inc.*** **(2006)**

ER paid EE for wages earned in two checks. These checks did not clear the bank due to insufficient funds. EE was forced to pay a $10.00 fee to the bank for each dishonored check. The ALJ ordered the ER to pay EE all wages and interest due plus reimburse the EE for the two $10.00 bank fees.

See General Entries IX, XVII.

1615 FRINGE BENEFITS

Overpayment Set Off

WAGES

Against Public Policy

Cancellation of Earned Wages
Deferral
Work without Compensation

Written Contract/Policy

Deferral

2006-802, 2007-257-59 ***Girard v Integritas Business Systems, Inc.*** **(2006)**

EE claimed unpaid wages. EE's employment contract stipulated that her salary was subject to deferment by the ER Board of Directors. The deferment would be based upon revenue forecasts and cash flow conditions. ER failed to pay EE wages throughout ER's fiscal year 2005, which ended September 30, 2005. On September 28, 2005, the Board of Directors passed a resolution that "unpaid senior management compensation shall be deferred, not accrued and not paid for fiscal year 2005" and "declared that [ER] would not pay that money after the fiscal year concluded." The ALJ found this resolution to be a retroactive deferral of wages for fiscal year 2005. EE was scheduled to receive her

normal salary for fiscal year 2006, but after EE was not paid, EE resigned. The ALJ found that there was no fiscal year 2006 deferment before EE's resignation.

The ALJ found that the ER sought to cancel its wage obligation. This is a violation of Section 2. The decision to defer was to affect future wages. The EE had already worked for and earned the claimed wages before the fiscal year 2005 fiscal year deferment resolution. ER "was entitled to defer compensation prospectively and not retroactively. Any reading to the contrary would clearly fly in the face of statutory arguments." See Sections 2 and 5(1). The ALJ found ER liable for wages owed to EE for both fiscal years 2005 and 2006.

EE also claimed fringe benefits of royalties, expenses, and vacation pay. Despite the claims, the ALJ found ER overpaid EE other fringe benefits by $3,031.68. The ALJ applied these overpayments toward the full amount claimed for royalties and expenses and part of the vacation pay due.

See General Entries IX, X, XVIII.

1616 HEARING

Costs

Travel Expense

2007-267 ***Makowski v Carson Carriers, L.L.C.*** **(2007)**

ER is a Michigan-based ER and therefore subject to the Act. After filing a claim for unpaid wages, EE moved to Indiana. EE returned to Michigan to participate in the hearing/mediation conference. EE claimed travel expenses of $123.98 incurred to attend the hearing. The ALJ found the ER liable for these travel expenses. See Section 18(3).

See General Entries IX, X.

1617 EMPLOYER

Identity

Legal Existence as Basis for Violation

EMPLOYER DEFENSE

Legal Existence

EMPLOYER IDENTITY

Legal Existence as Basis for Violation

WAGES

Due despite Question as to ER Existence

2007-703 ***Morency v Edumatics Corp*** **(2007)**

EE claimed unpaid wages and fringe benefits accrued in 2005. ER asserted a defense that ER did not have legal status and thus should not have been a party to the dispute.

The ALJ found that ER did have legal status despite the fact ER was not doing business at the time an oral employment contract was concluded between the parties. ER was founded and incorporated in Maryland in 2000 and ceased "doing business" in 2003-2004. There was no evidence submitted that the ER terminated its legal existence (e.g. dissolved itself as a corporation). The CEO and founder of the parent company of ER and the founder of ER testified ER "was still 'an existing US subsidiary of" the parent company. Terminating business operations does not necessarily extinguish ER's legal existence.

The ER violated Section 5(2). Wages were found due. Business expenses were not ordered however due to the absence of written contract or policy.

See General Entries I, VII, IX, XIX.

1618 ATTORNEY FEES
Complex Litigation

EMPLOYMENT CONTRACT
Performance as Ratification

REHEARING
Denied
Full Hearing Held

SUBSTANTIAL PERFORMANCE
Employment Contract Ratification

2007-769 ***Fowlerville Agricultural Society v Dancer*** **(2007)**

WH awarded EE unpaid wages and fringe benefits owed by ER. ER appealed and argued that the governing employment contract was invalid because one of the signatories to the document was not authorized to sign. This was the sole argument by ER. ALJ #1 noted that argument would only have been determinative on the fringe benefits if no written contract or policy existed. Section 3 requires that fringe benefits be paid to EE in accordance with the terms of a written contract or policy.

ALJ #1 found that ER followed the contract for approximately two years before terminating EE's employment. ALJ #1 found this to be ER's ratification of the employment contract. Other evidence was submitted from subsequent time periods after

the period of contracting. This evidence supported ratification of the contract by EE and ER.

ALJ #1 awarded EE reasonable attorney, hearing, and transcript costs. See Section 18(3). EE computed the attorney costs to a total of $4,374.15. ER had fourteen days to respond to this computation, but did not do so. ALJ #1 awarded this sum.

Later, ER filed for a Rehearing on the attorney costs. The ER alleged that ER's attorney "committed malfeasance, nonfeasance, or malpractice." ALJ #2 cited the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 *et seq*. The rule that can be derived from MCL 24.287 is a rehearing is required where the record is inadequate for purposes of judicial review and in all other cases, a rehearing is at the discretion of the ALJ. Here, ALJ #2 found that ALJ #1 conducted a full hearing in which all parties had the right to call witnesses, cross examine opposing witnesses, and make arguments in support of their positions. Thus, the hearing was adequate for purposes of judicial review. The fact that the employer was dissatisfied with the computation or his attorney did not establish good cause to justify a rehearing. ALJ #2 denied the employer's request for a rehearing.

See General Entries XVIII, XXIII.

1619 EVIDENCE
Michigan Rules of Evidence
Witness Impeachment

TESTIMONY
Michigan Rules of Evidence
Witness Impeachment

WITNESS
Impeachment
Michigan Rules of Evidence
Production of Evidence

2007-1161 *Young v Canton Construction Corp* (2008)

EE claimed unpaid wages and commissions. EE testified at hearing. ER submitted "Register of Actions" as evidence into the record. ER intended to impeach the EE's testimony. The Register of Actions showed that the EE was convicted of receiving and concealing stolen property. The ALJ conditionally admitted ER's evidence and reserved final judgment on it until after performing research in the Michigan Rules of Evidence on the question of admissibility.

The ALJ must follow the Michigan Rules of Evidence. See Sections 11(5) and 11(7) of Act 390; Section 75 of 1969 PA 306, as amended, the Administrative Procedures Act, MCL 24.201 *et seq.*; and MRE 101.

The ALJ found that the Register of Actions was inadmissible due to MRE 609(a). The ER failed to show that "the crime was punishable by imprisonment in excess of one year." Having failed a necessary element of MRE 609(a), the EE's testimony was not impeached. The ALJ disregarded the Register of Actions when making his decision. Wages were found due to EE.

See General Entries IX, X.

1620 FRINGE BENEFITS
Vacation
Interpretation
Silent as to Payment at Separation

VACATION
Written Contract/Policy
Ambiguous
Payment at Termination
Silent as to Payment at Separation

WRITTEN POLICY
Vacation
Ambiguous
Silent as to Payment at Separation

2007-1356 *Marshall v Samba Express, Inc.* (2007)

EE filed a claim for unpaid vacation pay, which is a fringe benefit. See Section 1(e). The ER's employee handbook was silent as to whether an EE could be paid vacation pay after termination of employment. Section 3 requires ER to pay fringe benefits in accordance with the terms of a written contract or policy.

EE submitted uncontested evidence that prior to termination: (1) EE made a request for his accrued vacation pay, but was not paid prior to termination, (2) continued to raise the issue "several times per week," and (3) ER told EE that "his request was being addressed and a check would be issued." Based on this evidence, the ALJ found ER in violation of Section 3 and ordered ER to pay the fringe benefit to EE. The ALJ also noted that while the ER policy does not require payment of the benefit at separation, the creation of the policy was entirely within ER's control. "If payment at separation was not the [ER]'s intent, [ER] had a duty to make clear that the vacation benefit would not be paid at separation."

See General Entries X, XVIII.

1621 EMPLOYMENT CONTRACT
Fringe Benefits
Interpretation

EXPENSES
Contract Interpretation
Housing

FRINGE BENEFITS
Written Contract/Policy/Agreement
Interpretation

WRITTEN POLICY
Fringe Benefits
Interpretation

2008-1261 ***Green v Yamasaki Associates, Inc.*** **(2009)**

EE sought reimbursement from ER for housing expenses. The Act defines an expense as a fringe benefit and further requires payment of a fringe benefit pursuant to a written contract or policy. See Section 4. The employment contract stipulated that ER would, on its own effort and expense, find and lease a furnished apartment for the benefit of EE. ER compiled a list of choices for the EE. EE chose an apartment, but the ER rescinded that option. When EE arrived for work, ER did not provide an apartment. EE was forced to live in a hotel room for the term of employment at his own expense.

ER argued that ER should not be liable to reimburse the housing expense. First, the employment contract "spell[ed] out what was to be paid by the company and that did not include a hotel room." Second, EE resigned before ER had "the ability to find" an apartment.

The ALJ interpreted the employment contract beyond its strict construction. ER agreed to pay for an apartment. Although the contract's terms do not stipulate the housing reimbursement, the apartment provision was equivalent to a housing allowance expense. The ER had a duty to find and lease an apartment while the EE had a duty to not unreasonably reject any apartment provided. There was evidence that the ER failed in their duty because ER did not provide an apartment for six weeks after EE began to work. There was no evidence that EE unreasonably rejected any apartment. The ALJ found ER liable for the housing expense.

See General Entry XVIII.

1622 DEDUCTIONS

Shortages

Tuition Reimbursement

EMPLOYMENT RELATIONSHIP

EE/ER Relationship Found

EE Retirement as a Relationship

Severing Employment Relationship

Retirement is not Severance of Employment Relationship

RETIREMENT

Retirement is not Termination of EE/ER Relationship

2009-186 ***Lucas v City of Sterling Heights*** **(2009)**

EE claimed unpaid wages. EE retired from ER. EE's final check was subjected to an ER deduction for a tuition reimbursement. ER argued that this deduction was authorized by (1) a tuition provision in the governing CBA and (2) an Application for Tuition Reimbursement that EE signed. The tuition provision stated that an EE would reimburse ER for tuition if "an employee terminates himself" within a stated period of time. The Application stated that EE would reimburse ER if EE "resign[ed] or [is] discharged for any reason before the time frame specified." ER argued that these terms encompassed EEs who retire.

EE argued that a retiree is different from an EE who is terminated, resigns, or is discharged. While an EE who is terminated severs his or her connection with the ER, an EE who retires maintains a relationship (e.g. pension and insurance).

The ALJ found EE's argument to be persuasive. The retirement provision explicitly defines what a retiree was and this definition was different than the termination language in the tuition provision or resignation and discharge language in the Application. The retirement provision failed to address the tuition issue entirely. The ALJ found ER in violation of Section 7(1) and ordered ER to pay the deduction back to EE.

See General Entry III.

1623 INDIVIDUAL LIABILITY

Bankruptcy

Economic Reality Test

Individual Did Not Exercise Extensive Control

2009-255 ***DEM Architects & Associates, PC, et al v Fahler*** **(2009)**

EE claimed unpaid fringe benefits pursuant to a written policy. See Section 3. WH found ER jointly and severally liable in an individual capacity. Both ERs appealed the DO. ER

#1 initiated bankruptcy proceedings and named EE as a creditor. The ALJ found that the bankruptcy court discharged ER #1's debts including debts owed to EE.

ER #2 argued that he was not EE's employer in an individual capacity and therefore ER #2 should not be liable. Section 1(d) of the Act defines employer in pertinent part as "an individual acting directly or indirectly in the interest of an employer who employs 1 or more individuals." Furthermore, the Fair Labor Standards Act, 29 USC 201, *et seq*, defines employer in pertinent part as "any person acting directly or indirectly in the interest of an employer or relation to any employee." Both statutes cogently state that an individual can be held liable for unpaid fringe benefits due to the EE/ER relationship.

The ALJ applied the economic reality test to determine whether an EE/ER relationship existed between the EE and ER #2 in an individual capacity. *Askew v Macomber*, 398 Mich 212; 247 NW2d 288 (1978). The factors of the test consider ER's control over (1) worker's duties, (2) payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an intramural part of the ER's business towards the accomplishment of a common goal. *Id.* On a review of the record, the ALJ found that ER #2 was not an employer. ER #2 was found not liable in an individual capacity.

Despite finding no individual liability in either ER #1 or ER #2, the ALJ found the ER #2 liable as a corporate entity for unpaid fringe benefits.

See General Entries VII, XVIII, XXI, XXIV.

1624 REDUCTION OF WAGES/BENEFITS
EE Continues Working

WAGE AGREEMENTS
Wage Reduction
Working Constitutes Agreement

2009-483 ***Daneff Enterprises, Inc. dba Lauralex Uniforms v Glass*** **(2009)**

EE claimed unpaid wages. ER suffered financial losses leading to erratic and reduced pay to EE despite an agreed salary of $65,000. ER and EE discussed compensation to which ER memorialized ER's position on the dispute in a letter to EE.

In the letter, the ER (1) highlighted existing financial difficulties, (2) could not provide a "guaranteed" paycheck in regular intervals, and (3) EE would be among the last to be paid due to EE's position with ER. The letter also offered the following: "If you need to be assured a weekly or bi weekly [sic] check and you need to find employment that will offer that assurance, I respect that decision. If that is not your intention, then I ask you to respect the decisions that are made with regard to our financial position."

The ALJ reviewed existing WH case law. EE's continued performance in EE's work duties for ER after receipt of the letter constituted acceptance of the salary reduction. See *Socha v Central-Quality Services Corp dba Amertex Service Group*, WH 97-987 (1997). The ALJ also noted that wage agreements contingent on the profitability of a business are not incompatible with the Act. See *VanEvery v Puddles Away Inc*, WH 91-868 (1992). The ALJ found that the EE was not owed unpaid wages.

See General Entries VII, IX, XIX.

1625 FRINGE BENEFITS

At Separation

Silent Provision

Vacation

At Separation

Silent Provision

Twelve Months Continuous Serviced Required

VACATION

Eligibility

One Year

Payment at Separation

WRITTEN POLICY

Vacation

At Separation

Silent Provision

2009-489 *Witherow v Mead & White Electrical Contractors, Inc.* (2009)

EE claimed unpaid vacation pay. EE worked for ER for more than one year before EE resigned. The Act requires payment of a fringe benefit pursuant to a written contract or policy. See Section 4. The ER employee policy handbook stated, "[a]fter one year of service (on or after your anniversary) you become eligible for one week of paid vacation." The policy was silent as to whether EE was still eligible for the vacation pay if EE resigned.

In the absence of language to the contrary, the ALJ found that EE was eligible for the vacation pay. The ALJ cited *Langager v Crazy Creek*, 287 Mont 445, 455; 954 P2d 1169 (1998) to illustrate his finding. The written vacation pay policy in *Langager* was also silent. In *Langager*, the Montana Supreme Court found vacation pay is a vested contractual benefit earned by virtue of an EE's labor and the right to the benefit vests when the labor is performed. *Id.* Here, the vacation pay vested after the one year anniversary of EE's employment.

See General Entries X, XVIII.

1626 EMPLOYER
Duty to Maintain Records
Identity

EMPLOYER DEFENSE
Wrong ER

EMPLOYER IDENTITY
Wrong ER Defense

2009-516 ***Vitello & Transport Carriers, Inc. v Robinson*** **(2009)**

In an unpaid wages dispute, WH sought EE employment records from the ER and Vitello, the ER's principal owner. ER failed to produce the records. WH issued a civil penalty. See Section 9. ER appealed this penalty and argued that the named ER did not employ EE, but rather by an alternate ER.

The ALJ found that Vitello was the principal of both the named ER and the alternate ER. The ALJ also found that Vitello had a duty to provide the records to the WH investigator including that EE was employed by the alternate ER. Vitello acted at his own peril in failing to provide the records. The EE was not at fault for improperly identifying the name of his ER. The ALJ found the ER liable for the civil penalty.

See General Entries III, IX, XVII.

1627 COMMISSIONS
After Separation
Procuring Cause

WAGES
Commissions
Procuring Cause

2009-674 ***Lorge v Forest Health Services, L.L.C.*** **(2008)**

EE worked as a sales representative that secured patients for weight reduction surgeries. ER laid off EE in the middle of July 2007. EE was paid wages monthly plus commission based on the number of patients EE secured. ER paid EE all wages owed. ER paid EE 48% of commissions owed because EE was laid off in the middle of the month. ER testified that it was company policy to do this. No written contract or policy that discussed commissions existed. EE claimed unpaid commissions for the remaining 52% of July.

Due to the absence of a written contract or policy, the ALJ found that the common law procuring cause doctrine applied. The Michigan Supreme Court summarized the doctrine in *Reed v Kurdziel*, 352 Mich 287; 89 NW2d 479 (1958). The procuring cause rule from *Reed* is the EE "is entitled to recover his commission whether or not be he has personally concluded and completed the sale, it being sufficient if his efforts were the procuring cause of the sale." *Id., supra* at 294. What is "the procuring cause?" The ALJ cited an Iowa Supreme Court case to answer this question: *Business Consulting Services v Wicks*, 703 NW2d 427 (Iowa, 2005). "Procuring cause refers to a cause originating with a series of events which without break in their continuity result in procuring a purchaser ready, willing and able to buy on the owner's terms." *Id., supra* at 429, *citing Mellos v Silverman*, 367 So2d 1369, 1372 (Ala, 1979).

The ALJ found that weight reduction surgery business requires a substantial amount of sales work before patients are scheduled for appointments. EE engaged in sales work including identifying prospective patients, convincing patients to undergo surgery, and negotiating insurance coverage. The ALJ found that the sales work was the "series of events" contemplated in *Wicks*. See *id.* EE was awarded unpaid commissions for the remaining term of July 2007.

See General Entries IX, X.

1628 FAIR LABOR STANDARDS ACT (FLSA)

WAGE AGREEMENTS
Unenforceable Agreements
EE Cannot Release the Right to Wages for Time Worked

WAGES
Full Amount Not Paid
Travel Time
Travel Time
Withheld
Agreement

WRITTEN CONSENT
Unenforceable Agreements

WRITTEN POLICY
Unenforceable

2009-734 *Professional Heating & Air Conditioning, Inc. v McLeod* (2009)

EE claimed unpaid wages due to travel time. EE was a heating and air conditioning systems service technician. EE maintained a company vehicle with tools, equipment, and

supplies at his home so that he could leave from home and go directly to the jobsite to serve customers faster. Other EEs did not maintain a vehicle at their homes and drove to the ER's shop before going out on a service call. Those EEs were paid travel time from the shop to the jobsite and back. EE claimed unpaid travel time calculated on the time to and from his home to jobsites.

ER asserted that EE was not due the travel time. EE signed a written contract that purported that EE's time began when he arrived at the jobsite and ended when he left. An EE cannot sign a contract eliminating the right to wages for time spent on the ER's business and for the ER's benefit if it is an integral and indispensable part of the business. The "integral and indispensable" test is applied to activities to determine if they are compensable.

The ALJ cited in *Chao v Akron Insulation and Supply, Inc*, 184 FedAppx 508 (CA 6, 2006) to illustrate the integral and indispensable test.

> Under the Fair Labor Standards Act, all hours worked must be compensated. 29 USC 206, 29 USC 207. While not explicitly defined in the Act, "work" has been defined by the Supreme Court as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tenn Coal, Iron and R Co v. Muscoda Local No 123,* 321 US 590, 598 (1944), *accord Chao v. Tradesmen Int'l, Inc,* 310 F3d 904, 907 (6th Cir 2002). … The Supreme Court recently reaffirmed this definition of work in *IBP, Inc.v. Alvarez,* 543 US 1144 (2005), holding that employees are to be compensated for time spent walking between changing areas and work areas after putting on or taking off specialized gear and for time spent waiting to take off specialized equipment. *Id.*

Chao, supra at 510. The ALJ found that maintaining ER's vehicle at EE's home and requiring that EE leave his home and travel directly to the jobsite (and later return to his home) (1) required physical and mental exertion, (2) was burdensome, and (3) was required by ER and pursued necessarily and primarily for the benefit of ER and ER's business. Thus EE's travel time constituted an integral and indispensable element of ER's business. EE was awarded unpaid wages for travel time less normal home-to-work commuting time.

See General Entries IX, XI.

1629 COURT ACTIONS
Unpaid Wages

WAGES
Full Amount Not Paid

At Business Closure
Receivership

2009-852-62, 2009-64 ***Consolidated Industrial Corp dba St Clair Plastics Co v Cochran; Coopwood; Delavan; Dizdarevic; Gerds; Katkus; Hadzic, F; Hadzic, S; Jerinic; Muresan; Povinelli; & Schulte*** **(2009)**

EEs claimed unpaid wages accrued for working during ER's period of receivership. ER was ceasing operations. ER's bank froze ER's bank account. Bank got a CCT order placing ER into receivership. The receivership would liquidate ER's assets in order to pay off existing bank notes. The receivership also contemplated paying EEs wages for that period, secured a payroll company to process them, and submitted EE's work hours to that company. EEs received only partial wages.

The CCT order does not bar EEs from pursuing their claim under the Act. The ALJ found that the ER owes EEs all wages earned and due at discharge. See Section 5(2). This duty extends to the receivership. The ALJ awarded EEs their unpaid wages.

See General Entries IX, XVII.

1630 REDUCTION OF WAGES/BENEFITS
Notice after EE Works

WAGES
Full Amount Not Paid
Hourly Rate Dispute

Resignation
Retroactive Change in Rate

2009-872 ***Residential Staffing Agency, Inc. v Faulcon*** **(2009)**

EE claimed unpaid wages. EE worked for $12.24 per hour for a period of years. ER reduced this rate to $8.16 per hour for the last 76 hours of EE's employment.

ER argued that it scheduled a meeting with EE to discuss the pay reduction, however EE cancelled the meeting. Later, ER submitted a letter to EE informing EE of the pay reduction.

The ALJ found that the letter was submitted after EE's last day of employment. The last 76 hours of employment were covered by the $12.24 rate. The EE did not agree to or work for the reduced rate. Thus, EE's performance could not be deemed acceptance. The ALJ found ER liable to EE for unpaid wages.

See General Entries IX, XI.

1631 BONUSES

Written Contract/Policy/Agreement

Interpretation

CBA

FMLA

FRINGE BENEFITS

Bonuses/Incentive Pay

Collective Bargaining Agreement

FMLA

2010-487 ***Jones* v *36th District Court*** **(2010)**

EE took hours off, with ER's approval, under the Family Medical Leave Act (FMLA). ER and EE's relationship was governed by a CBA, which had expired; both parties acknowledged that the terms remained in effect. Before January 2009, ER did not include FMLA time in computing attendance for consideration of a perfect attendance bonus. In March 2009, ER notified in writing EEs of a change in ER's FMLA leave policy.

ER argued that the amended FMLA required FMLA leave to be considered when calculating a perfect attendance bonus. EE argued that the terms of the most recent CBA should control the issue, because the amended FMLA says perfect attendance bonuses "may" be denied for use of leave. EE argued that the CBA language would award the perfect attendance bonus and that, despite the expiration of the CBA, ER acknowledged the terms as continuing. Therefore, the revised FMLA standard did not supersede the CBA.

The ALJ found the CBA controlled. Changing the policy when the original application complied with FMLA amounted to a unilateral amendment of the CBA. This was impermissible. The CBA controlled and the perfect attendance bonus was awarded.

1632 COLLECTIVE BARGAINING AGREEMENT (CBA)

Deductions

Employer's Benefit

DEDUCTIONS

Required or Permitted by Law

Employer's Benefit

2010-948-51 ***Conn, et al.* v *Detroit Public Schools*** **(2010)**

ER and EE's relationship was governed by a CBA. The CBA contained a provision purporting to authorize ER to remove money from EE's pay to put into a Termination

Incentive Plan (TIP). The TIP deduction was removed from 22 of 26 pay periods during the academic year, excepting the four summer pay periods. This deduction of $250 per pay period amounted to deductions of $10,000 per year for each EE.

ER contended that the deductions should be allowable under section 7(1) of Act 390 because the deduction is the result of a CBA. EE contended the CBA exception to section 7(1) was intended to permit deduction of dues and fees associated with union representation. It was not intended to benefit the ER. EE also contended that the deductions were a tax-free loan for the benefit of ER. ER disputed these assertions.

The ALJ found this deduction solely for the ER's benefit and a violation of Section 7. A deduction for the benefit of the ER cannot be granted by a CBA.

1633 DEDUCTIONS
Written Consent
Intimidation

2011-262 ***Sheko v Affiliates of Urology, P.C.*** **(2011)**

EE was required to process all cash and check payments following proscribed protocol. When EE failed to follow protocol, EE was reprimanded. In accordance with the reprimand policy, any loss to ER would be deducted from EE's pay. EE signed the reprimand as required by ER's EE handbook. ER claimed this signed reprimand was adequate written consent for a deduction, as required by Act 390, Section 7.

The ALJ found the EE's continued employment was predicated on signing the reprimand. The EE's approval of the deduction was not freely without intimidation or fear of discharge.

See General Entry III.

1634 DEDUCTIONS
Written Consent
Inadequate
Condition of Employment

2010-1292 ***Real-Trans, LLC* v *Emery*** **(2010)**

At the time of EE's hire, EE signed an authorization for ER to deduct from EE's wages for damages to equipment used while at work. ER deducted for such damage. EE filed a complaint with the Wage Hour Division.

ALJ found that the authorization was not given at the time of the deduction and found that it was not obtained in manner that made it "full and free," as required by Act 390.

Authorizations obtained at time of hire are a condition of employment. EE would not have been hired without signing the authorization

Also see, General Entry XIX.

1635 DISCHARGED
Retaliatory Discharge

DISCRIMINATION
Retaliatory Discharge
Refusal to Accept Deduction

2011-300 ***Honeycutt v Auto Employees Leasing Co LLC*** **(2011)**

EE performed service on a vehicle later returned after a collision. ER determined that EE's negligence caused the collision. ER's policy carried a $1000 deductible. EE was informed he would be responsible for the deductible based on his negligent work.

EE refused to sign "write-up" detailing the incident and refused to permit deduction of the deductible from his pay. ER informed EE that if he did not sign the "write-up" he would be fired. EE continued to refuse and was fired.

Refusing to accept a deduction for remuneration is protected activity under Section 13 of Act 390. EE is not required to file a wage claim before being fired in order to claim a retaliatory discharge.

Act 390's retaliatory discharge provision protects EEs that assert their own rights. See, *contra*, *Reo v Lane Bryant*, 211 Mich App 364 (1995).

NOTE: Section 13(3) grants only ERs the right to appeal adverse retaliatory discharge determination orders. This appeal was filed by the EE and could have been dismissed on that basis.

1636 DISCRIMINATION
Retaliatory Discharge
Notice of Complaint

2010-731 ***Robinham, Inc.*** **v** ***Flake*** **(2010)**

EE filed a complaint with the Wage & Hour Division (WH), alleging a violation of Act 390. On Friday, September 18, 2009, EE received notice of his complaint. ER received notice on Monday, September 21, 2009. Upon return from vacation on September 21, 2009, EE was fired. ER argued that he had not received notice of the complaint. He claimed to have fired EE for stealing. The ALJ found a violation of section 13 of Act

390, disallowing discrimination against or discharge of an EE for filing a complaint under Act 390.

1637 TEACHERS
Salaried

WAGES
Full Amount Not Paid
Verbal Agreement

2009-1764 ***Pinkerton* v *Midwest Management Group, Inc.*** **(2009)**

ER hired EE to teach mathematics at a technical high school. EE was hired in November of 2008—six pay periods into the start of the school year. According to EE, the school's principal and vice-principal told EE that she would be paid $35,000 for the year. EE was informed her services would no longer be needed at the end of the 2008 school year. EE was paid bi-monthly until August of 2009, based on the school district's 12-month pay scheme. EE filed a complaint with the Wage and Hour Division.

EE contended that ER agreed to pay $35,000 for EE to teach the remainder of the school year. ER contended that the bi-monthly payments were based on the $35,000 figure and that ER was only obligated to pay for services rendered.

There was no evidence, aside from EE's testimony, that ER agreed to pay $35,000 for EE to teach the remainder of the school year. Rather, the ALJ found that ER agreed to pay bi-monthly payments based on the $35,000 figure. ER only owed EE wages until August of 2009 and, therefore, did not violate Act 390.

Also see, General Entry IX.

1638 TIMECARD
Failure to Punch Out

10-274 ***Doll House Inc.* v *Swanson*** **(2010)**

Rushing to leave work, EE failed to record the end of her shift on ER's time clock. As a default, ER's computer time clock system recorded EE's time for the day at zero hours. EE sent an email to her supervisor the same night to report that she had failed to clock out and noted the time she had left.

The ALJ determined that EE worked as claimed. ER cannot refuse to pay wages. ER may discipline workers for failing to punch in or out, but ER may not refuse to pay for work performed.

See also, General Entry IX.

1639 VACATION

Payment at Termination

Sale of Business

10-362 ***MRP, Inc.* v *Reidel*** **(2010)**

EE was terminated due to ER's sale of the business. Prior to termination, EE accrued vacation time. ER's written policy provided for payment of unused accrued vacation days upon termination.

ER claims that EE was allowed to keep his seniority for the calculation of vacation time with the purchasing company and, therefore, no payment was due to EE. The ALJ found that ER did not adhere to the written policy and EE's being allowed continued seniority did not negate the obligation to abide by the written policy. Payment according to the written policy was ordered.

The ALJ's decision was AFFIRMED by the Circuit Court*. 199 other claims were settled; ER paid owed vacation benefits.

*See, *MRP, Inc. v Michigan Department of Energy, Labor & Economic Growth, Wage Hour Division*, an unpublished opinion of the 28th Circuit Court issued July 1, 2011 (Docket Number 10-22921-AA).

1640 VACATION

Written Contract/Policy

Unreasonable Denial of Vacation Time

2010-484 ***Wiechec* v *Shores Tile Company*** **(2010)**

ER's written vacation policy specified that unused vacation time had no cash value. On multiple occasions, EE asked to use accrued vacation time. ER denied EE's request for vacation time, telling EE to wait to use the time. Because ER's denial of vacation time was unreasonable, EE is entitled to compensation for the unused time despite the written policy.

1641 FRINGE BENEFITS

Vacation

Written Contract/Policy

Ambiguous

One Full Year

VACATION
Written Contract/Policy
Ambiguous
One Full Year

WRITTEN POLICY
Vacation
Ambiguous
One Full Year

2009-1235 ***Tomaszewski* v *Instaset Corporation*** **(2009)**

ER's paid vacation policy required that the EE work for "one full year" from June 1 of the given year through May 31 of the following year to receive paid vacation. All or most hourly EEs at ER's factory were routinely laid off for two weeks during both December and July. ER customarily interpreted the policy to mean one chronological year, without regard to the regular layoffs in December and July.

Due to an economic downturn, ER was forced to lay off most EEs in May of 2009. ER determined that those EEs were not eligible for paid vacation, because they had not worked for "one full year." EE challenged ER's interpretation of the policy.

While the policy does not mention layoffs in its terms, the ALJ looked to the ER's consistent interpretation. The employer consistently interpreted the words "one full year" to mean a chronological year less the regular layoffs in July and December. It was within the ER's discretion to decline to expand the "one full year" definition beyond its customary interpretation.

See General Entry XVIII.

1642 COMMISSIONS
After Separation
Procuring Cause

WAGES
Commissions
Payable After Separation
Procuring Cause

09-490 ***Borbot v Freedom Broadcasting of Michigan, Inc.*** **(2009)**

EE worked for ER as a salesman. EE's job primarily involved selling local business advertising space on the TV stations ER operates. EE was on a commission plan, whereby EE would receive commission for the sales he completed. The commission plan was silent as to when commissions are earned. EE claims he is entitled to commission

for two sales in which he did most of the work, even though he did not complete the entire transaction.

The presiding ALJ held EE was entitled to such commissions. The ALJ reached its decision by observing that in Michigan, an agent is entitled to recover commissions whether or not he has personally concluded and completed the sale, it being sufficient if his efforts were the procuring cause of the sale; this rule is called the procuring cause doctrine. *Reed v. Kurdziel*, 352 Mich. 287 (1958).

Additionally, the ALJ noted the procuring cause doctrine applies when a commission plan is silent as to when commissions are earned as in this case.

Also see General Entry IX.

1643 EMPLOYER
Identity

REMAND
Determination Order
Inadequate Investigation

09-1413 ***Bell's Greek Pizza of Michigan, Inc.*, v *Geahan*** **(2009)**

The ALJ remanded to the Wage & Hour Division for further investigation after concluding that ER had not been correctly identified in the Determination Order. (The order found ER owed $786.25 to the EE). The ALJ noted ER could not be considered an "employer" under the MCL 408.471 definition because ER neither hired nor permitted EE to work.

Also see General Entry VII.

1644 WAGES
Successor Liability

09-1487 ***Gus's Soul Food LLC v Tirado*** **(2009)**

DO awarded wages to EE against Gus's Soul Food LLC and its successor, Gus's Soul Food LLC jointly and severally. The successor corporation was formed after the dissolution of the original. ER contended the successor corporation, Gus's Soul Food LLC, should not be liable because it is an entirely different entity.

The ALJ determined that the successor corporation was liable for the unpaid wages. The corporation operated at the same address under an identical name. Dissolution and reincorporation does not automatically absolve the successor corporation of liabilities incurred prior to reincorporation.

In reaching his the decision, the ALJ considered that the successor LLC was nearly identical in title, that the resident agent/original owner continued in the enterprise, and that the business performed the same functions.

See General Entry IX.