

STATE OF MICHIGAN  
DEPARTMENT OF LABOR  
OFFICE OF HEARINGS  
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RECEIVED  
ACT HOUR DIVISION  
OCT 23 2006

In the Matter of:

Beverly Cherney,

Complainant,

Appeal Docket No. WH 84-3823

West Michigan Cleaners,

Respondent,

Determination No. 7093

Bureau of Employment Standards,  
Wage Hour Administration,

Department.

**DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Procedural Findings

This is a proceeding held pursuant to the authority of Section 11 of Act 390 of the Public Acts of 1978, as amended, being MCLA 408.481 et seq., the Payment of Wages Act (hereinafter referred to as the Act), and in accordance with Act 306 of the Public Acts of 1969, as amended, being MCLA 24.201 et seq., the Administrative Procedures Act (hereinafter referred to as the APA).

The purpose of this review is to examine Determination Order No. 7093 issued by the Wage Hour Administration, Michigan Department of Labor, on February 21, 1984. The department found Respondent in violation of Section(s) 2 and 5 of the Act and ordered Respondent to pay Complainant \$412.83 in accordance with Section 18(1)(a) of the Act. Additionally, Respondent was ordered to pay a ten percent per annum penalty of \$.1131 per day beginning November 15, 1983, until the determined amount is paid, in accordance with Section 18(1)(c) of the Act. Respondent filed a timely appeal.

Notice of Prehearing and Hearing was transmitted to the parties by the Office of Hearings of the Michigan Department

of Labor on July 17, 1984. Hearing in the above captioned matter was held as scheduled on August 16, 1984, at the State Office Building, Grand Rapids, Michigan. Present at the hearing were Beverly Cherney, Complainant; Irene Cherney and Shirley Hannah, witnesses; Norma Smentkowski, owner of Respondent business; and Cindy Braun, representing the Wage Hour Administration.

Statement of the Issues

Whether monies in the form of wages are due and owing to the Complainant from Respondent.

Findings of Fact and Conclusions of Law

At the outset of the hearing the parties stipulated their agreement to Department Exhibit 1 which is a breakdown of the hours paid, hours worked, and balance of hours due from October 30, 1982 through October 4, 1983 on condition that it is concluded that the Complainant worked through her lunch periods from the week ending October 30, 1982 through October 4, 1983.

The employer contends that the Complainant was to punch out and in for lunch each day and not to work during her lunch period. The employer asserts that on times when she visited the location where the Complainant was assigned, she observed the Complainant and other employees eating lunch. It was also asserted that there were two employees working and that the Complainant and the other employee should have staggered their lunch periods.

The Complainant asserted that some of the time that she worked for the Respondent she was the only person working at the establishment and therefore could not stagger her lunch periods with any other employee. On other occasions it was acknowledged that there were two employees, including the Complainant, working at the same time so that a staggered lunch hour could have been taken; however, this did not occur because both employees were too busy waiting on customers and performing the work of the employer to punch out and take an uninterrupted lunch.

The facts establish that the Complainant began working for the Jiffy Cleaners on or about October 17, 1980. This location closed in June 1983. At that time the Complainant was transferred to the One Hour Martinizing Cleaners which also closed at the end of September 1983. At that time the Respondent closed the entire business.

From October 1982 through June 1983 while the Complainant worked at the Jiffy Cleaners, she was the only person on duty at that location. It was her job to take in all clothes dropped off at that location and to take them to the One Hour Martinizing location located nearby for pressing. After the clothes were cleaned, it was her duty to take them back to the Jiffy Cleaner location for return to the customers. The Complainant began working each day at 7:30 a.m. and worked until 2:30 p.m. At that time someone relieved her and worked until 6:00 p.m. For the seven hours of her employment each day, the Complainant had no one to relieve her during lunch and accordingly, it is concluded that the Complainant should be paid for her lunch period during the time that she worked at the Jiffy Cleaners.

The employer testified that she checked all payrolls each pay period. This examination should have pointed out to the employer that the Complainant was not punching out and in each day for lunch. The employer points to the personnel disposition card filled out for the Complainant at the time that she began work and at the time that she was transferred to One Hour Martinizing (Employer Exhibits 1 and 2). Reference is made on these documents to the requirement that the employee take a lunch period each day that she worked more than five hours. Reference was also made to the notice placed above the time clock at the One Hour Martinizing which requires all personnel to clock out and in at lunch periods.

It is concluded that an examination of the Complainant's time cards for the period covered in this case would have shown the employer that the Complainant was not punching out and in for lunch as required and appropriate corrective action could

have been taken. The employer's failure to do something about the Complainant's failure to punch out and in for lunch is tantamount to an agreement to pay the Complainant for these periods.

When the Complainant began working at One Hour Martinizing, she worked from 2:30 p.m. to 6:00 p.m. Monday through Thursday and therefore did not take a lunch period. On Friday and Saturday she worked a longer period of time and therefore was eligible to take a lunch period. In addition, a presser was working during this time period. Accordingly, the Complainant and the presser could have taken turns with their lunch periods. However, both the Complainant and the presser, Irene Cherney, testified that it was too busy at that time for one person to handle all of the work. The employer rebuts this testimony by pointing out that the number of pounds of clothing coming in for cleaning each week was very low and it was for this reason that the business was ultimately closed. The Complainant also presented Shirley Hannah as a witness. Ms. Hannah testified that she would often bring food to the Complainant and Irene Cherney because they were not allowed to leave the establishment for lunch.

Based upon the evidence presented, it is concluded that the Complainant worked through her lunch periods as asserted by the department and the Complainant. While it is true that the Complainant did have a person with whom lunch periods could have been traded when she worked at the One Hour Martinizing, this did not occur due to busy conditions at the establishment. While the employer had a work rule requiring punching out and in for lunch periods, this work rule was not enforced since the Complainant was never directed to specifically follow this requirement. Since the employer checked each payroll, the failure to order the Complainant to follow the work rule is concluded to be employer acceptance of the Complainant's practice of not punching out and in for lunch.

Previous decisions have been issued regarding the issue of whether an employee is entitled to payment for a lunch period. In the case of Garm Protection Services, WH 79-382-D

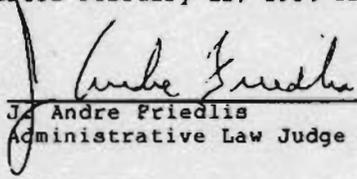
(1980) and Olympic Coney Island, WH 80-1247-D (1982) it was concluded that the employers violated Section 5 of the Act when requiring an employee to perform services of benefit to the employer during a period designated as a lunch break. In order for this time not to be considered time worked, an employee must be free to pursue his or her own interests. The facts of the instant case are clear that the Complainant was not able to do this during her lunch periods for the time period covered by the Determination Order.

Decision

Based upon the evidence presented and upon the stipulation of the parties with respect to the hours contained on Department Exhibit 1, it is concluded that the Complainant did work through her lunch periods from October 30, 1982 through October 4, 1983. Determination Order No. 7093 dated February 21, 1984 is affirmed.

DATED: \_\_\_\_\_

9/25/84

  
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J. Andre Friedlis  
Administrative Law Judge