DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re: GIORDANOUS GROUP, LLC dba INTERACT; DAVID J. KELLEY, individually; and DAVID J. KELLEY and SPOUSE, and the marital community thereof, Appellants. Citation and Notice of Assessment No. W-437-16 OAH Docket No. 09-2016-LI-00241	NO. 2018-021-WPA DIRECTOR'S ORDER RCW 49.48.084(4); RCW 34.05

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the record, the briefing submitted to the Director's office by the parties, and the superior court's order remanding this matter to the Director to apply the economic realities test, issues this Director's Order.

The parties are the Department; Kim Schmidt; Giordanous Group LLC; Interact; David J. Kelley, individually; and David J. Kelley and spouse and the marital community thereof. "The Company" refers to Giordanous Group LLC; Interact; David J. Kelley, individually; and David J. Kelley and spouse and the marital community thereof.

This Order intends to resolve the contested issue of whether the Company failed to pay all the wages due to Kim Schmidt in violation of the wage payment laws. **The Company is ordered to pay wages to Kim Schmidt in the amount of $36,150.70. The Company is also ordered to pay interest of one percent per month under RCW 49.48.083(2) for these wages (except for the period of April 25, 2017, to the date this order is served). The Company is ordered to pay the Department a penalty in the amount of $3,615.07.**

The Director makes these Findings of Fact, Conclusions of Law, and Final Decision and Order.

I. FINDINGS OF FACT

1. On June 3, 2016, the Department issued a citation and notice of assessment to the Giordanous Group LLC dba Interact; David J. Kelley, individually; and David J. Kelley and spouse and the marital community thereof ("the Company"). The citation number was W-437-16. The citation alleged that the Company failed to pay Schmidt wages in the amount of $36,150.70 for the period of January 5, 2015, to April 30, 2015. The Company appealed.

2. After a hearing, the Office of Administrative Hearings served the Initial Order on the parties on April 25, 2017. The Initial Order reversed the June 3, 2016 citation.

3. The Department timely appealed to the Director on May 25, 2017.

4. On November 17, 2017, the Director issued an order reversing the Initial Order and affirming the citation. The Director determined that the Company owed Schmidt wages in the amount of $36,150.70. The order also affirmed a penalty of $3,615.07.

5. The Company timely appealed the Director's order in superior court. On July 27, 2018, the superior court remanded to the Director to apply the economic realities test to determine if Schmidt was an employee of the Company.

6. David Kelley formed Interact to develop augmented reality and virtual reality applications. Interact Agency is another name for Interact.

7. Kelley and Kim Schmidt were professional colleagues and friends who had collaborated professionally in the past. Schmidt respected Kelley for his technological acumen and

believed that he could create a successful business in Interact. Six months before the Interact opportunity, Schmidt had declined to work for free on a project with Kelley.

8. In November 2014 and earlier, Kelley had conversations with Schmidt for her to work for Interact. In December 2014, Schmidt applied to work with Kelley at Interact and emailed saying, "Kim is Applying Officially" and "Tell me a move date, I'm on it." Ex. 25 at 4. On January 5, 2015, Kelley told her to "Pack up and move" to come work with Interact and him. Tr. 444. Schmidt would not work for free for Kelley on this project, and Kelley told her it was a paying job. She asked for a written agreement because she would not move to Seattle without one.

9. In January 2015, Kelley provided Schmidt with a document titled "Letter of Intent to Offer Employment" on Interact letterhead. It stated:

> It is a pleasure to issue this letter of intent to hire you as the Community Engagement Manager for Interact—a design agency organized by ParameterIO. In this role you will be specifically responsible for all aspects of the user group, community social media and community outreach at the agency. We are confident your exceptional skills and experience will enable us to capitalize on this significant opportunity to build a strong agency.
>
> As the Interact Community Engagement Manager we are pleased to offer you the following Terms of Compensation:
>
> Compensation
>
> - Starting Annual Salary: $80,000
> - Bonus structure based on Personal and Team Objectives to be defined within 6 months by the leadership team;
> - In an effort to support your move to the Seattle area if you decide to relocate we are offering 7000.00 to help offset that expense.
>
> . . . .
>
> Location
>
> You will be based in the greater Seattle area but may work on occasion at other locations as determined by the needs of the business.
>
> Start Date

1 February 2015

Please let me know if you have any questions regarding this offer and let me be the first to welcome you to the Interact Team that I look forward to building with you.

Sincerely

David J. Kelley
CEO
interact.agency

Ex. 11.

10. Schmidt understood this to be an employment offer and accepted it. Kelley claims the offer was contingent on funding, but the document does not make it contingent on funding. Kelley claims it was only an intent to hire and not an actual offer of employment, but the document says "we are pleased to offer you the following Terms of Compensation" in the present tense with a start date of February 1, 2015, showing it was a job offer. It was reasonable for Schmidt to believe that it was an employment offer based on the document and conversations with Kelley, including his holding her out to be an employee to the public in social media and in Interact documents, including the Interact organization chart.

11. Schmidt quit her 20-hour a week job at Dun and Bradstreet where she was making $120,000 a year to work for the Company. Schmidt moved to Seattle to work for the Company.

12. Kelley employed Schmidt at Interact as a community engagement marketing manager. Schmidt was a respected technology evangelist, which involves promotion and marketing. She has a reputation for performance and, as a result, she has gained the respect of top technology developers and visionaries. When Schmidt worked for Interact, her reputation and contacts benefited Interact. Her job description, which Kelley helped draft, provided that she would work on customer and community-at-large engagement; organize events, user group meetings, and other meetings; and post on social media. She performed work to accomplish these tasks. She did several tasks while working for the Company from January to April 2015: marketing Interact, working with user groups, interacting with social media, networking with technology leaders, and planning events. Schmidt had an Interact email address and attended weekly Interact meetings.

13. In January 2015, Kelley told Schmidt she would be reporting to Tyler Marchand "to get the user group up and running as well as other community related evangelism tasks and social media for the agency." Ex. 25 at 9. During January 2015, Kelley sent emails directing her to do tasks. For example, he directed her to join the Seattle Augmented Reality user group and revive it. And he told her direct supervisor Marchand tasks that would have her compile a conference list for Kelley to attend, work on the Interact user group, get a list of other user groups, and market and raise awareness for Interact.

14. One of Schmidt's main projects was to organize an Interact business-networking event with well-known technology experts as speakers. It took place in April 2015. Kelley supported the event and provided input into its organization, including approving the sponsorship packet, giving ideas about venues, and paying for the food. Witnesses reported that this event was a success and reflected well on Interact. Kelley later characterized this as a party that Schmidt and Marchand managed on their own. But at the time of the event, he said, "Looks like this will be the real launch for the agency." Ex. 29 at 8.

15. Kelley disclaims responsibility for the event, saying that Schmidt was doing it as a friend. The facts do not support this characterization. Kelley does not dispute that Schmidt worked hours on this project. The project benefited Interact. In doing this project and others, Kelley permitted Schmidt to work on the behalf of the Company. Schmidt provided her labor to benefit Interact, and Kelley did not tell her not to do the work on the business event and other projects even after notice she was doing work for the Company.

16. Schmidt also worked in March and April on planning a June 2015 business event for Interact at an industry convention.

17. The Company did not pay Schmidt her salary. She asked for payment and Kelley told her that funding was coming and that she would be paid. At times, he represented there were deals in place and funding. Kelley said there would be back pay. The Company received some funds and paid others, but not Schmidt. Schmidt kept working because she trusted Kelley and thought he would make Interact a success. Schmidt did not agree to receive no wages or knowingly submit to not receiving wages. She continued to ask for her wages throughout the time she worked for Interact, and she reasonably anticipated that she would be paid.

18. Kelley was the chief executive officer and owner of Interact. He acted directly in the interest of the Company in relation to Schmidt. He had the power to make hiring decisions for Interact, to authorize payments on behalf of Interact, to determine when employees would be paid, and to control the work performed on behalf of Interact. His

actions bind the Company. Decisions regarding payment of wages of the Company's employees, including Schmidt, were within the control of Kelley, and he is responsible for those decisions. Kelley owned and was a member of Giordanous Group, LLC, which also owned Interact. Interact was not in any form of a corporation.

19. Kelley and Schmidt conflict on the material facts on whether Kelley offered her employment and whether it was contingent on funding. Giving due regard to the credibility findings of the administrative law judge, the Director finds Schmidt more credible as confirmed by other witness testimony, the exhibits, and the context of the case. Schmidt is a well-regarded marketing expert who moved from California to Seattle, leaving a well-paying job. Witnesses testified that Schmidt was a highly respected marketing expert. It is very unlikely that a well-established marketing expert would move to Seattle solely to help out a friend without expectation of pay. The Company did not produce documentary evidence that Schmidt was not hired or that she was hired contingent on funding. In contrast, the Department produced documentary evidence that showed that she was hired. Witnesses observed Schmidt working on behalf of the Company. Kelley admitted to the Department's investigator that her "work had benefited . . . Interact . . . ." Ex. 4 at 3.

20. Kelley is not credible in his representations, including that Schmidt would work contingent on funding. Kelley is not credible in his statements that an employment relationship was not created and is not credible that the letter of intent created no employment relationship. Kelley knew Schmidt was working full time and talked with her daily. Although he testified that he did not hire Schmidt, at the time Schmidt was working, he told people he hired her, including telling Schmidt and posting on social media. The company organization chart listed her as an employee. In promoting Interact and generating interest in the company, Kelley told others he had hired Schmidt and used her reputation to generate support for Interact. Kelley's testimony had several unbelievable statements, such as Schmidt was just doing the April 2015 business event as a friend and he had no control to stop her from doing it.

21. **Employee under RCW 49.46.010, .130:** Schmidt was an employee of the Company and not a volunteer. Interact was a for-profit entity and was not an educational, charitable, religious, non-profit, or governmental entity. The Company permitted Schmidt to work on its behalf. Schmidt did not provide office work directly related to management policies or general business operations of her employer or her employer's customers, nor did her work require the exercise of discretion and independent judgment. The evidence showed that her work involved marketing and promoting, not management policies or business operations. Numerous emails and Schmidt's testimony show that she presented marketing opportunities to Kelley for his approval but that she did not have authority to make decisions independently on behalf of the Company.

22. **Employee as a matter of economic reality:** Schmidt was an employee of the Company based the economic realities of the relationship. She moved from California to Seattle for the sole purpose of working for the Company. The Company's letter of intent to offer employment designated Schmidt's position as the Company's "Community Engagement Manager" with an annual salary of $80,000. The offer included full participation in the Company's employee benefits program for health insurance, life insurance, 401K plan, health club allowance, vacation time, and sick leave. Schmidt did not sign a written independent contractor agreement. She did not receive a 1099 tax form for the wages that the Company ultimately paid her. No witness testified that either Schmidt or the Company contemplated an independent contractor relationship.

22.1 **Control:** The Company exercised significant control over Schmidt. While the Company did not monitor Schmidt's daily schedule, Kelley directed and approved Schmidt's work for the Company over the phone, through in person meetings, and by email. Kelley directed Schmidt to join online user groups, put together presentations, and come up with promotional ideas for the Company's augmented reality business. The Company designated Tyler Marchand as Schmidt's supervisor. It directed Schmidt to work with Marchand to arrange participation at conferences, present non-disclosure agreements, develop sponsorship packages, edit briefs for presentation to investors, and arrange promotional events. This factor suggests that Schmidt was an employee.

22.2 **Risk of Profit and Loss:** Schmidt had little opportunity for profit or loss based on her managerial skill. The Company agreed to pay Schmidt a fixed yearly salary of $80,000, along with stock options in "recognition of [Schmidt's] pivotal role as a founding member of Interact.agency." Neither the salary nor the stock options were tied to Schmidt's job performance. Nor was Schmidt able to negotiate the rate the Company paid her for discrete tasks. This factor suggests that Schmidt was an employee.

22.3 **Investment:** Schmidt invested minimal equipment and materials. She purchased an iPhone, paid a fee to open an Interact user account, used her own computer, and purchased some food for an April 2015 promotional event. She sought reimbursement for expenses she incurred on the Company's behalf. The Company, by contrast, made significant investment in a Microsoft business operating system, website development, cloud storage, and expenses for the April 2015 promotional event—investments that outweighed Schmidt's contributions. This factor suggests that Schmidt was an employee.

22.4 **Skills:** Schmidt's position with the Company required a specialized skill. As a technology evangelist with a strong reputation in the high-tech community, Schmidt was skilled in technology promotion and marketing. On the other hand, as described below, this skill set was integral to the Company's business of selling high-tech design work and augmented reality applications. This factor weakly suggests that Schmidt was an independent contractor.

22.5 **Permanency:** The Company and Schmidt intended a permanent employment relationship. Schmidt moved from California to Seattle in order to work for the Company. The annual salary offer, the employee benefits package, and the Company's organizational charts show that the parties contemplated a permanent relationship. During the time she worked for the Company, Schmidt performed no work for other employers except for some knowledge transfers for her former employer, Dun and Bradstreet. This transition work took place before Schmidt's move to Seattle. Schmidt had a domain name of Communivate, but she did not have a business license or perform work under that name during the time she worked for the Company. She added the domain name to a promotional event's flyer only after she determined she would be seeking a new job. This factor strongly suggests that Schmidt was an employee.

22.6 **Integral to Business:** The services Schmidt rendered were an integral part of the Company's business of creating and selling high-tech design work and augmented reality applications. Schmidt's work in technology brand management, community engagement, and event coordination was a key aspect of the Company's business. This factor suggests that Schmidt was an employee.

22.7 Based on the totality of the circumstances, Schmidt was economically dependent on the Company. She was not in business for herself. Schmidt was an employee under the economic realities test.

23. **Employee under RCW 49.52.050:** The Company willfully and intentionally deprived Schmidt of her wages when she performed labor for the Company and it did not compensate her. Kelley, a free agent, acted willfully because he knew what he was doing and intended to not pay her for her labor. He knew that he was allowing Schmidt to work without payment. Schmidt performed labor for the Company from which it benefited and the Company provided no testimony that an independent contractor relationship was established. Schmidt was an employee, not a volunteer. This was shown by the offer of work and acceptance of that offer. It was independently demonstrated by the work performed by Schmidt and the failure of Kelley to tell her to stop working.

24. There was no bona fide dispute. The Company, through Kelley, knew that Schmidt was performing work on its behalf and had hired her to work for it. One party's non-credible statements do not create a bona fide dispute. There is no indication that any party believed Schmidt to be an independent contractor or that wages were withheld on this basis. Nor was the Company merely careless in failing to pay the wages; it acted intentionally.

25. The Company kept no payroll records documenting Schmidt's work hours.

26. Schmidt's salary was $80,000 per year at $38.46 per hour at the regular rate.

27. Schmidt provided a reasonable reconstruction of her hours, using her day planner, emails, and other sources of information. The Company did not rebut Schmidt's claims with documentary evidence or otherwise produce evidence showing the hours worked by Schmidt.

28. The Company owes Schmidt $36,150.70 in wages. This amount represents 68 regular hours at the rate of $9.47 per hour from the period of January 5, 2015, to January 30, 2015. Starting February 2, 2015, to April 30, 2015, Schmidt worked 450 hours at the rate of $38.46 per hour and 326 overtime hours at one and one half times the regular rate equaling $57.69. Schmidt received one payment of $607.20.

II. CONCLUSIONS OF LAW

1. Based on superior court's order remanding this matter for application of the economic realities test, there is authority to review and decide this matter under RCW 49.48.084 and RCW 34.05.

2. Under the Wage Payment Act, if the Department determines that an employer violated a wage payment requirement, it may issue a citation and notice of assessment for unpaid wages and penalties. RCW 49.48.083(2), (3). The wage payment requirements violated here are RCW 49.46.020, .130, and RCW 49.52.050. *See* RCW 49.48.082(12).

3. The evidence shows that Interact was a start-up business, but this status does not shield the Company from complying with wage payment requirements.

4. RCW 49.46.020 requires an employer to pay an employee the minimum wage. RCW 49.46.130 requires an employer to pay its employee overtime wages for hours over 40 hours a week. "Employee" includes any individual employed by an employer. RCW 49.46.010(3). "Employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee. RCW 49.46.010(4). "'Employ'

includes to permit to work." RCW 49.46.010(2). An employer must pay an employee for time it has permitted the employee to work.

5. The definition of "employee" in the Minimum Wage Act incorporates the economic realities test developed by the federal courts. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 871, 281 P.3d 289 (2012). The relevant inquiry is "whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself." *Id.* (citations omitted). The test includes the following nonexclusive factors:

    1. The degree of control that the business has over the worker;
    2. The worker's opportunity for profit or loss depending on the worker's managerial skill;
    3. The worker's investment in equipment or material;
    4. The degree of skill required for the job;
    5. The degree of permanence of the working relationship;
    6. The degree to which the services rendered by the worker are an integral part of the business.

    Anfinson v. FedEx Ground Package Sys., Inc., 159 Wn. App. 35, 54-55, 244 P.3d 32, (2010), *aff'd*, 174 Wn.2d 851 (2012).[1] The six factors are not exclusive, and neither the presence nor absence of any single factor is determinative. *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981). The facts relevant to each factor must be viewed through the lens of "economic dependence." *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1312 (11th Cir. 2013).

6. Employment status is a mixed question of fact and law. *Anfinson*, 159 Wn. App. at 50. The existence and degree of each factor is a question of fact while the legal conclusion to

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[1] The economic realities test "depends on the totality of the circumstances of each case." *Becerra v. Expert Janitorial, LLC*, 176 Wn. App. 694, 708, 309 P.3d 711 (2013), *aff'd*, 181 Wn.2d 186, 332 P.3d 415 (2014). The test requires examination of "all factors relevant to the particular employment situation to determine the economic reality of the relationship." *Becerra*, 176 Wn. App. at 699. In *Anfinson*, the court identified factors for distinguishing employees from independent contractors—the matter before it in that case. 159 Wn. App. at 54-55. In other employment situations, a different set of factors may be relevant. *See Becerra*, 181 Wn.2d at 196-97. Here, both the Department and the Company limit their arguments to the six factors identified in *Anfinson*. Neither party identifies any additional factor for consideration.

be drawn from those facts—whether workers are employees or independent contractors—is a question of law. *Id.* at 37 n.19. But where the facts are disputed, the ultimate determination of employment status is properly a question for the trier of fact. *Id.* at 50.

7. Schmidt was an employee under the economic realities test. Based on the totality of the circumstances, Schmidt was economically dependent on the Company. She moved to Seattle to work for the Company on a permanent, exclusive basis; she was not in business for herself. The Company's degree of control, Schmidt's opportunity for profit or loss, her minimal investment in equipment and materials, the permanence of the relationship, and the nature of Schmidt's work as an integral part of the Company's business all suggest that Schmidt was an employee. The degree of skill required for Schmidt's job only weakly suggests an independent contractor relationship. Under the economic realities test, Schmidt was an employee of the Company.

8. Schmidt could not volunteer her labor as the Company argues. The Minimum Wage Act only permits volunteers for educational, charitable, religious, non-profit, or governmental bodies. RCW 49.46.010(3)(d). Washington law does not permit volunteers for for-profit entities such as Interact. Even if Kelley's testimony that Schmidt was helping out as a "friend" were credible, this is not an exception to the Minimum Wage Act.

9. The Company's argument that payment was contingent on funding is also unavailing. Even were Kelley correct that Schmidt was working contingent on funding—an assertion that is not credible—this does not matter because Schmidt could not volunteer for a for-profit entity without payment under the Minimum Wage Act. RCW 49.46.090 does not allow for waiver of rights under the Minimum Wage Act.

10. No exemption under RCW 49.46.010(3)(c), WAC 296-128-510, WAC 296-128-520, or WAC 296-128-530 applies. This is because the Company did not pay her salary so it did not actually compensate her on a salary basis as required by these provisions, and because it meets no other part of the respective tests.

11. An employer must pay its employees for hours worked. The Department's Administrative Policy ES.C.2 states in part:

> "Hours worked," means all hours during which the employee is authorized or required, known or reasonably believed by the employer to be on duty on the employer's premises or at a prescribed work place. An analysis of "hours worked" must be determined on a case-by-case basis, depending on the facts. See WAC 296-126-002(8). See Administrative Policy ES.C.1. The department's interpretation of "hours worked" means all work requested, suffered, permitted or allowed and includes travel time, training and meeting time, wait time, on-call time, preparatory and concluding

> time, and may include meal periods. "Hours worked" includes all time worked regardless of whether it is a full hour or less. "Hours worked" includes, for example, a situation where an employee may voluntarily continue to work at the end of the shift. The employee may desire to finish an assigned task or may wish to correct errors, prepare time reports or other records. The reason or pay basis is immaterial. If the employer knows or has reason to believe that the employee is continuing to work, such time is working time.

(Emphasis omitted.)

12. The Company did not keep records on Schmidt's hours. Special rules apply to evaluating the evidence and the burden of proof when an employer has failed to keep adequate records. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946), is the seminal case addressing the effect of an employer's failure to keep adequate records and is followed in Washington. *MacSuga v. Cty. of Spokane*, 97 Wn. App. 435, 445, 983 P.2d 1167 (1999); *see Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 583, 397 P.3d 20 (2017); *see generally Drinkwitz v. Techsys, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000) (Washington often looks to the Fair Labor Standards Act as persuasive authority in interpreting the Minimum Wage Act). Washington law, like federal law, requires employers to keep records about the hours worked by its employees. RCW 49.46.040, .070; WAC 296-128-010; *Anderson*, 328 U.S. at 687. Under *Anderson*, employees should not be punished for the inability to prove with precision the hours worked by the employees because the employer failed to keep adequate records:

> Due regard must be given to the fact that it is the employer who has the duty under [FLSA] to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

328 U.S. 687; *see also Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986) ("an award of back wages will not be barred for imprecision where it arises from the employer's failure to keep records . . . .").

13. The *Anderson* Court provided for a shifting burden of proof if the employer does not keep adequate records:

> [W]e hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

328 U.S. at 687-88. The *Anderson* Court developed the burden-shifting standard because of FLSA's remedial nature and the "great public policy which it embodies" and because lack of evidence is within the control of the employer. 328 U.S. at 687. Placing responsibilities on the employer when it fails to keep adequate records is "a result consistent with Washington's long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz*, 140 Wn.2d at 300.

14. Under *Anderson*, although the preponderance of the evidence standard applies, the burden of proof is relaxed when an employer does not keep adequate records. *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1315 (11th Cir. 2013) (FLSA places upon the employee "the burden of proving that he performed work for which he was not properly compensated. . . . However, if the employer failed to keep time records, as in this case, that burden is relaxed.") (citation omitted); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994) ("The Secretary's burden in these cases, however, is merely to present a prima facie case. Indeed, it is settled that the burden (with respect to a given employee) is met if it is proved that the employee has in fact performed work for which he was improperly compensated and if the employee produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."); *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991) (the "initial burden in these cases is minimal."); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) ("burden is not on the employees to prove the precise extent of uncompensated work.").

15. In its prima facie case for wages, the party seeking wages must (1) prove that the employee has performed work that the employer did not properly compensate the employee for and (2) provide evidence to show such work by reasonable inference. *Anderson*, 328 U.S. at 687. If the initial burden is met, "The employer must then rebut the inference that the employee worked the number of hours required to accomplish this amount of work." *MacSuga*, 97 Wn. App. at 446.

16. *Anderson* applies here. The Company did not keep adequate records that showed the hours worked. Schmidt was subject to the Minimum Wage Act under RCW 49.46.010,

.020, and .130, and the recordkeeping statutes and rule apply to her. RCW 49.46.040, .070; WAC 296-128-010.

17. The Department met its burden of proof. First, it proved that Schmidt performed work for which the Company did not properly compensate her. For example, Schmidt organized the April business event that benefited Interact. Second, she reconstructed her records using her day planner, emails, and other electronic sources. These are reasonable sources to infer hours from and this evidence satisfies the burden to show her hours by a "just and reasonable inference." *See Anderson*, 328 U.S. at 687.

18. The Company did not rebut the inference that Schmidt worked the number of hours required to accomplish this amount of work. The Company did not negate the Department's claims with specific evidence about dates and times of the hours worked.

19. For all her hours worked, the Company owes Schmidt's wages for regular and overtime work under the Minimum Wage Act for work performed from January 5, 2015, to April 30, 2015. The Department calculated only $643.96 for time worked in January at the minimum wage because it concluded that as of February 1, 2015, there was an agreed wage under RCW 49.52.050 of $80,000 a year. This conclusion was correct.

20. RCW 49.52.050, the agreed wage statute, makes it unlawful for an employer to willfully withhold wages it must pay an employee. If there is a willful withholding of wages, the employee may receive the agreed wage. RCW 49.52.050(2). The Director also determines the appropriateness of penalties under RCW 49.48.083(3) using the willfulness standard in RCW 49.52.050. RCW 49.48.082(13). Our Supreme Court has noted that the test for "willful" failure to pay is not stringent—the employer's failure to pay must simply be volitional. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998). The question of willfulness is a question of fact. *Schilling*, 136 Wn.2d at 160. Here the facts of failing to keep adequate records and volitional behavior, show willfulness.

21. An employer acts willfully in depriving an employee of wages when it "makes no genuine effort to keep a proper record of their payroll account with the [employee] or to determine by audit the correct amount of the wages owing." *Brandt v. Impero*, 1 Wn. App. 678, 680, 463 P.2d 197 (1969). The Company did not keep records of Schmidt's time despite being required to under RCW 49.46.040 and .070, showing willfulness.

22. Willfulness is also found where the employer's refusal to pay is volitional: "Willful means merely that the person knows what he is doing, intends to do what he is doing, and is a free agent." *Morgan v. Kingen*, 166 Wn.2d 526, 534, 210 P.3d 995 (2009) (internal quotations omitted). Kelley knew Schmidt was performing work on behalf of the Company and did not tell her to stop working. He knew she was an employee because he

told her to move to Seattle to work for him and gave her the offer of intent that established an employment relationship. He knew the Company was not paying her and that was intentional. Kelley and the Company acted willfully.

23. Purported financial inability to pay is not a defense to a finding of willfulness. *Schilling*, 136 Wn.2d at 164.

24. An employer's failure to pay wages is not willful where a bona fide dispute existed between the employer and employee regarding the payment of wages. *Schilling*, 136 Wn.2d at 160. The Company claims bona fide disputes over whether the parties created an employment contract, what Schmidt's pay rate was, and what hours she worked. The inquiry for willfulness is whether a person knows what he or she is doing—no bona fide dispute is created when an employer knows an employee is providing labor for the company and does not pay. Schmidt was an employee of the Company under RCW 49.46.020 and RCW 49.52.050. The parties established the pay rate by the letter of intent. Kelley said he did not think she was an employee and that the letter of intent created no employment relationship, but as found above, these beliefs are not credible and non-credible statements do not create a bona fide dispute. With regard to the Company's suggestion that Schmidt was an independent contractor, no witness testified that any party believed this to be true or that the Company withheld wages on this basis. Indeed, this argument is inconsistent with Kelley's contention that Schmidt should not have expected payment—independent contractors do not work for free. Finally, regarding Schmidt's hours, the Company did not meet its burden to show them incorrect, so there is no bona fide dispute over them.

25. The Company relies on RCW 49.52.070, but Schmidt did not knowingly submit to a wage payment violation.

26. Because the Company failed to pay its employee her full wages, the Company must pay wages owed in the amount of $36,150.70 plus interest at one percent per month under RCW 49.48.083(2) (except for the period of April 25, 2017, to the date this order is served). The interest payment obligation is ongoing until paid in full.

27. The Company owes a penalty in the amount of $3,615.07 under RCW 49.48.083(3).

28. Kelley (individually, and Kelley and spouse and the marital community thereof) is personally liable for Schmidt's wages, interest, and the penalty because he acted directly in the interest of the Company in relation to Schmidt and because he controlled the decisions regarding whether Schmidt would be hired or paid, and because he is the owner

of Interact. Kelley and his marital community are personally liable for wages, interest, and penalties incurred by Giordanous Group, LLC.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusions of Law, the Initial Order dated April 25, 2017 is VACATED and the Citation and Notice of Assessment dated June 3, 2016 is AFFIRMED.

1. Payment of wages. *See* Citation and Notice of Assessment for payment information and the effect of failing to pay wages and interest. The Company is ordered to pay wages to Kim Schmidt in the amount of $36,150.70. The Company is also ordered to pay interest of one percent per month under RCW 49.48.083(2) for these wages (except for the period of April 25, 2017, to the date this order is served). The Company is ordered to make these payments within thirty days of service of this Director's Order.

2. Payment of Civil Penalty: The Company is ordered to pay the Department a penalty in the amount of $3,615.07. *See* Citation and Notice of Assessment for payment information.

DATED at Tumwater, Washington this 19 day of October 2018

JOEL SACKS
Director

SERVICE

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

APPEAL RIGHTS

Reconsideration. Any party may file a petition for reconsideration. RCW 34.05.470. Any petition for reconsideration must be filed within 10 days of service of this Order and must state the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order **or** (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support thereof, should be filed by emailing to DirectorAppeal@LNI.WA.GOV, or by mailing or delivering it directly to Joel Sacks, Director of the Department of Labor and Industries, P. O. Box 44001 Olympia, Washington 98504-4001, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Director's Office. RCW 34.05.010(6).

NOTE: A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. A timely filed petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the Director does not (a) dispose of the petition **or** (b) serve the parties with a written notice specifying the date by which it will act on the petition. RCW 34.05.470(3).

Judicial Review. Any petition for judicial review must be filed with the appropriate court and served within 30 days after service of this Order. RCW 34.05.542. RCW 49.48.084(5) provides, "Orders that are not appealed within the time period specified in this section and Chapter 34.05 RCW are final and binding, and not subject to further appeal." Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.

DECLARATION OF MAILING

I, Lisa Deck, declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 19 day of October 2018, via U.S. mail, postage prepaid, to:

Daniel R. Prince
Prince Legal
600 First Avenue, Suite LL20
Seattle, WA 98104

Kim Schmidt
9252 W Russell Road, #14-101
Las Vegas, NV 89148

Diana Cartwright
Assistant Attorney General
Attorney General's Office
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Seattle, WA 98104

David J. Kelley and Spouse
20208 SE 216th Court
Covington, WA 98042

Giordanous Group LLC dba Interact
20208 SE 216th Court
Covington, WA 98042

DATED this 19 day of October 2018, at Tumwater, Washington.

Lisa Deck

Lisa Deck