

**DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES  
STATE OF WASHINGTON**

In re:

ERIC ALLEN,

Appellant,

Determination of Compliance No.  
DOC-119-23

OAH Docket No. 08-2023-LI-01925

No. 2024-009-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 appeal filed by Eric Allen, (Appellant), briefing submitted to the Director's Office, and having reviewed the record, issues this Director's Order.

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

**I. FINDINGS OF FACT**

1. The Office of Administrative Hearings issued and served the Initial Order on April 4, 2024.
2. The Director received a timely filed petition for review from the Appellant.
3. This order adopts and incorporates by reference Findings of Fact 4.1 to 4.25 of the Initial Order.

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DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

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OFFICE OF THE DIRECTOR  
DEPARTMENT OF LABOR & INDUSTRIES  
P.O. BOX 44001  
OLYMPIA, WA 98504-4001

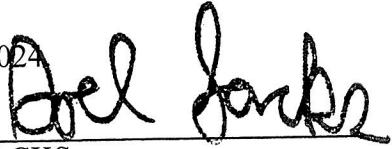
## II. CONCLUSIONS OF LAW

1. Based on the Appellant's timely filed petition for review, there is authority to review and decide this matter under RCW 49.48.084 and RCW 34.05.
2. This order adopts and incorporates by reference Conclusions of Law No. 5.1 to 5.8 and Initial Order No. 6.1 and 6.2 of the Initial Order.

## III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusion of Law, and the Determination of Compliance is **AFFIRMED** and the Initial Order of April 4, 2024, is incorporated by reference herein.

DATED at Tumwater this 3 day of September, 2024

  
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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 it to [directorappeal@lni.wa.gov](mailto: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

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DIRECTOR'S ORDER

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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, hereby declare under penalty of perjury under the laws of the State of Washington, that the **DIRECTOR’S ORDER** was mailed on the 3 day of September 2024, to the following via regular, postage prepaid:

Heather Klein Leibowitz, AAG  
Office of the Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
[heather.leibowitz@atg.wa.gov](mailto:heather.leibowitz@atg.wa.gov)  
[eileen.west@atg.wa.gov](mailto:eileen.west@atg.wa.gov)  
[lniseaeservice@atg.wa.gov](mailto:lniseaeservice@atg.wa.gov)

Eric Allen  
30928 17th Ave SW, Unit #110-D  
Federal Way, WA 98023

Adam Pankratz  
Ogletree Deakins  
1201 Third Avenue, Suite 5150  
Seattle, WA 98101  
[adam.pankratz@ogletree.com](mailto:adam.pankratz@ogletree.com)

DATED this 3 day of September 2024, at Tumwater, Washington.

  
\_\_\_\_\_  
LISA DECK

**WASHINGTON STATE  
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Eric Allen,

Appellant/Wage Claimant.

Docket No. 08-2023-LI-01925

**INITIAL ORDER**

Agency: Dept. Labor and Industries  
Program: Wage Payments  
Agency No. DOC -119-23

1. **ISSUE:** Whether to affirm or to set aside Determination of Compliance No. 119-23, dated April 20, 2023, in which the Department of Labor and Industries determined that the evidence submitted by the parties does not support Eric Allen's allegation that he was retaliated against for exercising his rights under the Minimum Wage Act when he used accrued paid sick leave on or about May 18, 2022.
2. **ORDER SUMMARY:** Determination of Compliance No. 119-23 is affirmed.
3. **HEARING**
  - 3.1. Hearing Date: February 12, 2024
  - 3.2. Administrative Law Judge: Terry A. Schuh
  - 3.3. Appellant: Eric Allen, *pro se*
  - 3.4. Agency: Department of Labor and Industries
    - 3.4.1. Representative: Heather Klein Leibowitz, Assistant Attorney General
    - 3.4.2. Witnesses:
      - 3.4.2.1. Philip Zurcher, former supervisor of Eric Allen
      - 3.4.2.2. Michelle Darin, Industrial Relations Agent, Department of Labor and Industries
      - 3.4.2.3. Theresa Bigelow, former HR specialist
  - 3.5. Exhibits: Exhibits 1 through 23, filed by the Department of Labor and Industries, were admitted into the record as evidence.
  - 3.6. Observer: Adam Pankratiz, Attorney, Deakins, Nash, Smoak & Stewart, PC, appearing on behalf of Taylor Farms Northwest, LLC dba Real Foods of Seattle, LLC.

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**4. FINDINGS OF FACT**

I find the following facts by a preponderance of the evidence:

*Jurisdiction*

- 4.1. The Department of Labor and Industries (“the Department”) issued Determination of Compliance No. 119-23 on April 20, 2023, finding that Taylor Farms Northwest, LLC dba Real Foods of Seattle, LLC (“Real Foods”) did not violate the Washington State Minimum wage Act retaliation protections concerning Eric Allen (“Mr. Allen” or “Allen”) when Real Foods terminated Mr. Allen on May 21, 2022. Ex. 1.
- 4.2. On May 14, 2023, Mr. Allen appealed the Determination of Compliance. Ex. 2.

*Real Foods reasonable notice policy*

- 4.3. Mr. Allen worked for Real Foods as a mechanic, repairing and maintaining the equipment Real Foods used to package food for sale. Philip Zurcher (“Mr. Zurcher” or “Zurcher”) Testimony.
- 4.4. Mr. Zurcher supervised Mr. Allen and the other mechanics. Zurcher Testimony. Mr. Allen reported directly to Mr. Zurcher. Michelle Darin (“Ms. Darin” or “Darin”) Testimony. Mr. Zurcher communicated with Mr. Allen and other mechanics in-person or by radio when they worked the same shift, and otherwise by email and text messages. Zurcher Testimony.
- 4.5. Real Foods had a policy regarding paid time off that required reasonable notice. Darin Testimony; Ex. 5, pp. 1-2. Mr. Allen was advised of this at his orientation. Darin Testimony; Ex. 5, p. 1.
- 4.6. Real Foods policy required employees who left work early, before completing their shift, to notify their supervisor or another manager prior to leaving the employer’s premises, and to submit paperwork to Human Resources. Zurcher Testimony; Theresa Bigelow (“Ms. Bigelow” or “Bigelow”) Testimony.
- 4.7. Notifying a non-supervisory employee was not sufficient. Zurcher Testimony; Bigelow Testimony.
- 4.8. If an employee left work early without approval from a member of management, that absence was considered to constitute job abandonment. Darin Testimony; Ex. 3, p. 15. Mr. Allen signed an acknowledgement of the policy that included this provision. Bigelow Testimony; Ex. 3, p. 15. This policy was still in effect when Real Foods discharged Mr. Allen. Bigelow Testimony; Darin Testimony.

*Mr. Allen’s history of failing to properly exercise his rights to paid time off*

- 4.9. Mr. Allen left work early without permission several times. Zurcher Testimony. Specifically, Mr. Allen left work without notifying a supervisor on April 2, May 1, May 11, and May 12, 2022. Ex. 21, p. 106. He also failed to provide proper

notice when he was absent for the entire shift on February 25, 2022, and when he was late for work on March 25 and May 11, 2022: Ex. 21, p. 106.

- 4.10. Mr. Zurcher provided Mr. Allen with at least one, perhaps two, verbal warnings about his failure to follow policy when leaving work early. Zurcher Testimony; Darin Testimony.
- 4.11. Mr. Zurcher delivered at least one such warning to Mr. Allen in his office, with two witnesses present. Zurcher Testimony.
- 4.12. Mr. Zurcher warned Mr. Allen that the next time he violated this policy, there would be serious discipline. Zurcher Testimony.
- 4.13. On May 18, 2022, Mr. Allen left work early, apparently ill. Zurcher Testimony. He told a fellow worker that he was leaving, but he did not tell a member of management. Zurcher Testimony; Darin Testimony; Bigelow Testimony.
- 4.14. Later that evening, Mr. Zucher sent a text message to Mr. Allen asking where he was and asking if he was okay. Bigelow Testimony; Darin Testimony; Ex. 13, p. 2.
- 4.15. Mr. Allen did not respond to that text and, instead, blocked Mr. Zucher from further texting to him. Darin Testimony; Bigelow Testimony.

*Real Foods terminated Mr. Allen*

- 4.16. Mr. Allen was not scheduled to work on May 19 and 20, 2022. Darin Testimony; Ex. 3, p. 8.
- 4.17. When Mr. Allen returned to work on May 21, 2022, Mr. Zurcher met Mr. Allen in the hallway, told him he was discharged, and asked for his employee badge. Zurcher Testimony. Mr. Zurcher told Mr. Allen that he left work without permission and that Real Foods could not support that conduct. Zurcher Testimony.
- 4.18. The parties dispute whether Mr. Zurcher told Mr. Allen he was discharged for using too much sick leave.

Mr. Zurcher told Mr. Allen that he was discharged for leaving work early and he never said that Mr. Allen was discharged for using too much sick leave. Zucher Testimony. Mr. Zurcher discharged Mr. Allen after first talking matters over with Human Resources. Zucher Testimony.

On the other hand, Mr. Allen told Ms. Darin that Mr. Zucher told him on May 21, 2022, that he was discharged for using excessive amounts of paid leave. Darin Testimony; Ex. 3, p.2. Mr. Allen also told Ms. Darin that Real Foods Human Resources emailed him later and asked if he had quit. Darin Testimony; Ex. 3, p.3.

Mr. Allen told Ms. Darin that he responded to Human Resources and said he had been discharged. Darin Testimony; Ex. 3, p. 2.

Michelle Melendez and Cris Hernandez – from Real Foods Human Resources – told Ms. Darin by telephone conference on September 20, 2022, that Real Foods discharged Mr. Allen for job abandonment and not for supposed excess use of paid time off. Darin Testimony; Ex. 3, p. 6.

Mr. Allen was discharged for job abandonment. Bigelow Testimony.

I find by a preponderance of the evidence that Real Foods discharged Mr. Allen for violating its reasonable notice policy and not for alleged abuse of paid time off. Of particular significance in reaching this finding was Mr. Allen's history of that violation shortly before what proved to be the final violation on May 18, 2022.

4.19. Mr. Allen gathered his personal property and left. Zurcher Testimony.

4.20. Real Foods paid Mr. Allen for the paid sick leave he took on May 18, 2022. Bigelow Testimony; Darin Testimony.

*Mr. Allen filed a Retaliation Complaint Form*

4.21. Mr. Allen filed a Retaliation Complaint on September 1, 2022. Darin Testimony; Ex. 4. Mr. Allen reported that he was discharged for “excessive sick leave use”. Ex. 4, p. 2; Darin Testimony.

4.22. Ms. Darin was assigned to investigate Mr. Allen's complaint. Darin Testimony; Ex. 3, p. 2.

4.23. Ms. Darin gathered information from both Mr. Allen and Real Foods. Darin Testimony; Exs. 7-19.

4.24. Ms. Darin was unable to substantiate Mr. Allen's claim that he was discharged in retaliation for taking protected leave. Darin Testimony.

4.25. Rather, Ms. Darin concluded that Real Foods discharged Mr. Allen for failing to follow Real Foods' reasonable notice requirements and for not cooperating with Mr. Zurcher's attempt to contact him by text message. Darin Testimony.

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## 5. CONCLUSIONS OF LAW

Based upon the facts above, I make the following conclusions:

### *Jurisdiction*

5.1. I have jurisdiction to hear and decide this matter under Washington Administrative Code (“WAC”) 296-128-800(4), (6); Chapter 34.05 Revised Code of Washington (“RCW”); and Chapter 10-08 WAC.

*Real Foods' discharge of Mr. Allen was not retaliatory*

- 5.2. It is unlawful for an employer to discharge an employee in retaliation for exercising their right to paid sick leave. WAC 296-128-770.
- 5.3. An employee who believes their employer retaliated against them for exercising their right to paid sick leave, may file a complaint with the Department. WAC 296-128-780(1).
- 5.4. If an employee files a timely complaint, the Department will investigate that complaint. WAC 296-128-780(2).
- 5.5. To establish a claim of retaliation, the employee must show that they exercised a protected right, that they were discharged for doing so, and that a "causal connection" existed between the employee's exercise of the protected right and the employer's decision to discharge. See, *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46, 68, 821 P.2d 18 (1991) (considering workers' compensation law rather than the law at issue here).
- 5.6. If the employee satisfies the foregoing, the employer must "articulate a legitimate nonpretextual nonretaliatory reason for the discharge. The employer must produce relevant admissible evidence of another motivation, but need not do so by the preponderance of the evidence standard necessary to sustain the burden of persuasion, because the employer does not have that burden." *Wilmot* at 70 (citations omitted).
- 5.7. Here, Real Foods discharged Mr. Allen on his next scheduled day of work after he exercised his right to paid time off. However, the basis for Real Foods' action was Mr. Allen's violation of its reasonable notice policy. Mr. Allen was advised in writing of this policy at hire. More specifically, he was advised that failing to notify management before he left work early would be considered job abandonment. He was reminded of this policy verbally when he violated it more than once shortly before he did so again on May 18. Finally, he refused to respond to his supervisor's inquiry on May 18 about his status after he left. Accordingly, Real Foods has met its burden to produce a legitimate non-pretextual non-retaliatory reason for its decision to discharge. Therefore, Mr. Allen is unable to meet his burden to prove retaliation.

*The Determination of Compliance should be affirmed*

- 5.8. For the reasons recited above, Determination of Compliance 119-23 should be affirmed.

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6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

- 6.1. The Department of Labor and Industries action is **AFFIRMED**.
- 6.2. Determination of Compliance No. 119-23 is **AFFIRMED**.

Issued from Olympia, Washington on the date of mailing.



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Terry A. Schuh  
Administrative Law Judge  
Office of Administrative Hearings

**CERTIFICATE OF SERVICE ATTACHED**

## APPEAL RIGHTS

### PETITION FOR REVIEW

Any party that disputes this Initial Order may file a Petition for Review with the Director of the Department of Labor and Industries.<sup>1</sup> You may e-mail your Petition for Review to the Director at [directorappeal@lni.wa.gov](mailto:directorappeal@lni.wa.gov). You may also mail or deliver your Petition for Review to the Director at the Department's physical address listed below.

Mailing Address:

Director  
Department of Labor and Industries  
PO Box 44001  
Olympia, WA 98504-4001

Physical Address:

7273 Linderson Way SW  
Tumwater, WA 98501

If you e-mail your Petition for Review, please do not mail or deliver a paper copy to the Director.

Whether you e-mail, mail or deliver the Petition for Review, the Director *must actually receive* the Petition for Review during office hours at the Director's office within 30 days of the date this Initial Order was mailed to the parties. You must also provide a copy of your Petition for Review to the other parties at the same time.

If the Director does not receive a Petition for Review within 30 days from the date of the Initial Order, the Initial Order shall become final with no further right to appeal.<sup>2</sup>

If you timely file a Petition for Review, the Director will conduct an administrative review under chapter 34.05 RCW.

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<sup>1</sup> RCW 49.48.084 and RCW 34.05.464.

<sup>2</sup> RCW 49.48.084 and Chapter 34.05 RCW.

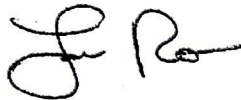
**CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 08-2023-LI-01925**

I certify that true copies of this document were served on those listed below, from Olympia, Washington via Consolidated Mail Services by one of the following: First Class Mail, Certified Mail, Hand Delivery via Messenger, Campus Mail, Facsimile, or by Email.

<p>Eric Allen 30928 17th Ave SW #110-D Federal Way, WA 98023 <b><i>Appellant Wage Claimant</i></b></p>	<p><input checked="" type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> E-mail</p>
<p>Heather Klein Leibowitz, AAG Department of Labor &amp; Industries 800 Fifth Avenue Suite 2000 Seattle, WA 98104 <b><i>Agency Representative</i></b></p>	<p><input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail <a href="mailto:Heather.L Leibowitz@atg.wa.gov">Heather.L Leibowitz@atg.wa.gov</a> <a href="mailto:Eileen.West@atg.wa.gov">Eileen.West@atg.wa.gov</a> <a href="mailto:Iniseaeservice@atg.wa.gov">Iniseaeservice@atg.wa.gov</a></p>
<p>Taylor Farms Northwest, LLC dba Real Foods of Seattle, LLC 8030 S 228th Street Kent, WA 98032 <b><i>Intervenor Employer</i></b></p>	<p><input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> E-mail</p>
<p>Adam Pankratz Ogletree Deakins 1201 Third Avenue Suite 5150 Seattle, WA 98101 <b><i>Intervenor Representative</i></b></p>	<p><input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> E-mail</p>

Date: Thursday, April 04, 2024

OFFICE OF ADMINISTRATIVE HEARINGS



Tamara Roberson  
Legal Assistant 2