



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

PO Box 44000 • Olympia Washington 98504-4400

September 17, 2024

Via E-mail and U.S. Mail

Julie Larson, AAG
Office of the Attorney General
1116 W Riverside Ave Ste 100
Spokane, WA 99201
Julie.Larson@atg.wa.gov
sidnie.bernhardt@atg.wa.gov
lnispofax@atg.wa.gov

Maas Construction, Inc.
Dena Maas
P.O. Box 216
Liberty Lake, WA 99019

Jonathan O'Day
14323 W Pinebluff Rd
Nine Mile Falls, WA 99026
odjono@protonmail.com

**RE: Jonathan O'Day
OAH Docket No. 09-2023-LI-01949
Director No. 2024-010-WPA**

Dear Parties:

Please find the enclosed Director's Order, which is served on the date of mailing. A copy of the Initial Order is enclosed for your convenience.

Sincerely,

Joel Sacks
Director

Enclosure

cc: Judge Lisa Dublin
Haley Bobbitt, Tacoma OAH
Anastasia Sandstrom, AAG



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

In re:

JONATHAN O'DAY,

Appellant,

Determination of Compliance No.
DOC-160-23

OAH Docket No. 09-2023-LI-01949

No. 2024-010-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 Jonathan O'Day (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 March 4, 2024.
2. The Director received a timely filed petition for review from the Appellant.
3. The Director adopts and incorporates by reference Findings of Fact No. 4.1 to 4.54 by a preponderance of the evidence.

NO. 2024-010-WPA

DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

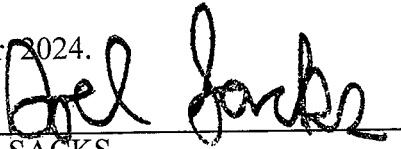
II. CONCLUSIONS OF LAW

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. The Director adopts and incorporates by reference Conclusions of Law No. 5.1 to 5.19 and Initial Order No. 6.1 and 6.2.

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 March 4, 2024, is adopted and incorporated by reference.

DATED at Tumwater this 17 day of September 2024.



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 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, hereby declare under penalty of perjury under the laws of the State of Washington, that the **DIRECTOR'S ORDER** was mailed on the 17 day of September 2024, to the following via regular, postage prepaid:

Julie Larson, AAG
Office of the Attorney General
1116 W Riverside Ave Ste 100
Spokane, WA 99201
Julie.Larson@atg.wa.gov
sidnie.bernhardt@atg.wa.gov
lnispofax@atg.wa.gov

Maas Construction, Inc.
Dena Maas
P.O. Box 216
Liberty Lake, WA 99019

Jonathan O'Day
14323 W Pinebluff Rd
Nine Mile Falls, WA 99026
odjono@protonmail.com

DATED this 17 day of September, 2024, at Tumwater, Washington.


LISA DECK

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Jonathan O'Day,

Appellant/Wage Claimant.

Docket No. 09-2023-LI-01949

INITIAL ORDER

Agency: Department of Labor and
Industries

Program: Wage Payments

Agency No. DOC-160-23

1. ISSUES:

- 1.1. Can the Appellant/Wage Claimant, Jonathan O'Day, prove, by a 'preponderance of the evidence', his former employer, Maas Construction, retaliated against him for taking sick leave, a protected right under Chapter 49.46 RCW, known as the Washington State Minimum Wage Act?
- 1.2. If the Appellant establishes retaliation occurred, should the Department of Labor and Industries' 'Determination of Compliance No. 160-23' be set aside?

2. INITIAL ORDER SUMMARY:

- 2.1. The Appellant/Wage Claimant, Jonathan O'Day, failed to prove, by a 'preponderance of the evidence', his former employer, Maas Construction, retaliated against him for taking sick leave, a protected right under Chapter 49.46 RCW, known as the Washington State Minimum Wage Act.
- 2.2. Since the Appellant did not establish retaliation occurred, the Department's 'Determination of Compliance No. 160-23' is **affirmed**.

3. EVIDENTIARY HEARING:

- 3.1. Hearing Date: Wednesday, January 3, 2024
- 3.2. Admin. Law Judge: TJ Martin
- 3.3. Appellant: Jonathan O'Day
 - 3.3.1. Representative: The Appellant/Wage represented himself
 - 3.3.2. Witnesses: Jonathan O'Day, Appellant/Wage Claimant
- 3.4. Agency: Department of Labor and Industries
 - 3.4.1. Representative: Julie Larson, Assistant Attorney General
 - 3.4.2. Witnesses: Michael Davis, Department Industrial Relations Agent
Dena Maas, Mass Construction, Inc. Co-Owner

3.5. Exhibits: Department Exhibits 1 to 20 were admitted.
Appellant Exhibits C, X, Y and Z were admitted.
Appellant Exhibit Aa-Av, B, and D-W were taken
'under advisement' at hearing and later admitted.

3.6. Court Reporter: Tamara Nasser, Capitol Court Reporting

4. FINDINGS OF FACT:

The following facts are established found by a 'preponderance of the evidence':

Jurisdiction-

4.1. On May 18, 2023, the Department of Labor and Industries (Department) issued 'Determination of Compliance No. 160-23' (Determination), finding Maas Construction Inc., (Maas Construction/Employer) did not retaliate Jonathan O'Day (Appellant/O'Day/Wage Claimant) for exercising his rights under Chapter 49.46 Revised Code of Washington (RCW), the Minimum Wage Act. *Department Exhibit (Dept. Ex.) 1.*

4.2. On June 18, 2023, O'Day appealed the Department's Determination. *Dept. Ex. 2.*

4.3. On July 13, 2023, the Department forwarded O'Day's appeal to the Office of the Attorney General (AGO) to transfer to the Office of Administrative Hearings (OAH) for an administrative, adjudicative proceeding. *Dept. Ex. 3.*

Credibility Finding-

4.4. A genuine dispute of material fact exists in the present case. Based on this dispute of fact, a credibility finding is warranted. Based on the testimony and documentation provided, the undersigned administrative law judge finds the Department's version of the events more convincing than the Appellant's, for the following reasons:

- a. During the course of the Department's investigation, Department Industrial Relation Agent Michael Davis (Agent Davis) gathered documentation and interviewed people with relevant information regarding the Appellant's job separation. The Department's investigation established the Employer, Maas Construction, terminated O'Day for 'job performance', not for taking sick leave;
- b. At the evidentiary hearing, Maas Construction Owner, Dena Maas' testimony confirmed O'Day's termination arose from his problematic job performance, not for taking sick leave. Her testimony was consistent with the documentation provided to Agent Davis during the Department's Wage Complaint investigation;
- c. While O'Day argued his termination was retaliatory, he failed to establish such truth with concrete evidence. This administrative tribunal was not convinced by his conjecture regarding his termination.

O'Day Employment with Maas Construction-

- 4.5. Maas Construction, Inc. (Maas Construction), was a licensed General Commercial & Residential Construction Contractor and Electrical Contractor, located in Spokane, Washington and owned by Dena Maas and Jason Maas. *Dept. Ex. 19.*
- 4.6. As of the evidentiary hearing, on January 3, 2024, Maas Construction no longer does construction, only electrical contracting, with five to ten employees. *Testimony of Dena Maas (Testimony of Maas) at Evidentiary Hearing Audio at 3:43:30.*
- 4.7. On August 20, 2020, O'Day filled out the necessary form required for employment with Maas Construction and obtained an 'Employee Safety Manual'. *Testimony of Davis at 2:08:30-2:08:40, Dept. Ex. 14 and Appellant Exhibit (App. Ex.) T.*
- 4.8. From August 21, 2020 to December 1, 2020, O'Day worked for Maas Construction, at a rate of pay of \$22.00 per hour. *Testimony of Michael Davis (Testimony of Davis) at 29:20-30:50 & 2:07:20 and Dept. Ex. 6; page (pg.) 1 & Dept. Ex. 7.*
- 4.9. Maas Construction paid Industrial Insurance premiums in the event a worker became injured on the job. O'Day filed a claim for injury, but the Department denied it. *Testimony of Dena Maas (Testimony of Maas) at 3:54:20-3:56:15.*
- 4.10. O'Day worked for Maas Construction, as a construction employee, for about three months in 2020. *Testimony of Maas at 3:45:00-3:45:30.*
- 4.11. Travis Rice (Rice) served as O'Day direct supervisor while he worked for Maas Construction. Rice oversaw three, other employees. *Testimony of Mass at 3:49:00-3:49:30.*
- 4.12. O'Day found Rice to be 'abrasive', 'easily offended' and 'quite particular'. *Testimony of Jonathan O'Day (Testimony of O'Day) at 4:18:00-4:18:45.*
- 4.13. O'Day claims Rice and other employees wanted to skip lunch and breaks to get off early each day. *Testimony of O'Day at 4:19:00-4:20:00.*
- 4.14. O'Day accrued 'sick leave' during his time at Maas Construction. *Testimony of Davis at 34:00-34:20.*

Wage Claimant O'Day's Termination-

- 4.15. On November 25, 2020, Travis Rice met with Owner, Dena Maas, regarding concerns with O'Day, including a November 16, 2020, in which O'Day had become disruptive at the job site and resulted in work stopping. The outcome of the meeting was that O'Day employment would be terminated, in person, on Monday, November 30, 2020. *Testimony of Davis at 1:01:40-1:03:00 & 2:32:20 & 3:33:00-3:33:10, Testimony of Maas at 3:52:20-3:54:00 & 3:57:00-4:00:00 & 4:06:30-4:08:10, Dept. Ex. 13; pg. 4 and App. Ex. V; pg. 3.*

- 4.16. Prior to the November 25, 2020 meeting with Rice to discuss O'Day, Maas had not personally observed any employment issues with O'Day, other than being absent and disruptive on the jobsite. *Testimony of Maas at 3:51:10-3:52:20.*
- 4.17. Twice previously, Rice met with Maas about O'Day. He had been unable to resolve his issues with O'Day's work performance. *Testimony of Maas at 3:57:45.*
- 4.18. The outcome of the November 25, 2020 meeting between Rice and Mass was they were going to meet with O'Day, on Monday, November 30, 2020, to terminate him and discuss reimbursement of his tool advance from the company. *Testimony of Davis at 1:02:50 and Testimony of Maas at 3:57:00-4:00:00.*
- 4.19. Jason Maas, Co-Owner, was not involved in the November 25, 2020 meeting between Dena Maas and Rice. *Testimony of Maas at 4:01:00-4:01:30.*
- 4.20. Later, Maas Construction Co-Owner, Jason Maas, who was responsible for setting up work assignments, sent a text to O'Day about upcoming assignments, unaware O'Day was going to be terminated on Monday, November 30, 2024. *Testimony of Davis at 1:08:00-1:09:00, Testimony of Maas at 4:00:40-4:01:00 and Dept. Ex. 10; pg. 11.*
- 4.21. Jason Maas learned later on November 30, 2020 of the decision to terminate O'Day. *Testimony of Maas at 4:02:00-4:02:30.*
- 4.22. Early on the morning of Monday, November 30, 2020, O'Day called sick into work, complaining of back problems. Rice texted back 'Get well'. As a result, the termination meeting involving O'Day did not go forward. *Testimony of Davis at 56:30 & 1:03:00-1:05:00, Testimony of Maas at 4:00:00-4:00:30, Dept. Ex. 10; pg. 7 and App. Exs. A & B.*
- 4.23. As a result of O'Day's back problems, the meeting involving Maas, Rice and O'Day was moved to the following day, Tuesday, December 1, 2020. *Testimony of Davis at 1:05:00-1:05:20.*
- 4.24. On Tuesday, December 1, 2020, Co-Owner Dena Maas terminated O'Day, due to his work performance and attendance issues, unrelated to his paid, sick leave. *Testimony of Davis at 56:45 & 1:05:30-1:06:40.*
- 4.25. O'Day had accrued 13.16 hours of available sick leave at the time of his discharge. *Testimony of Davis at 58:20 & 2:23:50 and Dept. Ex. 9.*
- 4.26. O'Day admits he missed one or two days of work due to his pickup being broken down. Maas Construction knew about it and it was 'fine'. *Testimony of O'Day at 4:29:00-4:29:10.*
- 4.27. O'Day admits he was terminated for a 'number of factors' which is 'what happens when a business is not run correctly'. *Testimony of O'Day at 4:22:30-4:22:45.*

Department Investigation of O'Day's Wage Complaint-

- 4.28. On December 20, 2020, Appellant/Wage Complainant, Jonathan O'Day, filed a 'Worker Rights Complaint' with the Department, alleging retaliation by his former employer, Maas Construction, for using paid sick leave. He included timesheets and text messages with the Employer. *Testimony of Davis at 26:00 to 29:05 & 31:00-31:30, Dept. Exs. 6 & 7 and App. Exs. F, G, W-Z.*
- 4.29. From December 16, 2020 to May 10, 2023, Department Industrial Relations Agent, Retaliation Division Supervisor, and trained lawyer, Michael Lewis (Agent Lewis) investigated O'Day's Wage Complaint. During his investigation, he compiled an 'Investigation Log, which included notes, text messages, and correspondence from the Wage Complaint, O'Day, and the Employer, Maas Construction. *Testimony of Davis at 37:20-40:00 & 1:13:20-1:18:00 and Dept. Exs. 4, 11, & 18.*
- 4.30. On June 7, 2022, Agent Lewis contacted Dena Maas, of Maas Construction, regarding O'Day's Wage Complaint, requesting information from the Employer. *Testimony of Davis at 40:15-43:30 & 2:16:00, Testimony of Maas at 3:46:30-3:46:45 and Dept. Ex. 12.*
- 4.31. On June 20, 2022, Dena Maas provided a letter to the Department, refuting O'Day's Wage Complaint alleging retaliation for using sick leave and provided paystubs and timesheets. *Testimony of Davis at 43:30-46:00 & 1:10:00-1:13:10, Testimony of Maas at 3:47:00-3:48:00, Dept. Exs. 13-16 and App. Exs. E & K.*
- 4.32. Based on the Employer's provided information, Agent Davis determined he wanted to speak to Travis Rice (Rice), O'Day's supervisor, who might have information regarding O'Day's employment and discharge. The Employer willingly provided Rice's contact information so he could be interviewed. *Testimony of Davis at 46:00-48:30 and Dept. Ex. 13; pg. 2.*
- 4.33. On July 13, 2022, Agent Davis contacted Rice, who said O'Day argued a lot on the job, questioned directions, researched stuff on his phone during work time, and had trouble getting to work on time. Agent Davis found Rice to be credible and an 'incredible witness'. *Testimony of Davis at 48:30-53:40 and Dept. Ex. 4; pg. 9 & Ex. 13; pg. 4-5.*
- 4.34. Rice told Agent Davis that Maas Construction had performance issues with O'Day going back to mid-November, including a documented November 16, 2020 incident, due to O'Day arguing with his supervisor in front of a customer. Due to the situation, which involved some anger, the work stopped. *Testimony of Davis at 58:45-1:01:30 & 2:32:20, Testimony of Maas at 3:58:45-3:59:00, and Dept. Ex. 13; pg. 5 and Ex. 8; pg. 1.*

- 4.35. In addition to providing a letter refuting O'Day's retaliation allegation, Maas Construction also provided O'Day's employment application and paystubs, from August 28, 2020 to December 1, 2020.
- 4.36. Maas Construction also provided the Department with a copy of its 'Time Off/Leaves of Absence' Policy. *Dept. Ex. 17 and App. Ex. N.*
- 4.37. On June 21, 2022, Rice wrote a statement regarding the November 25, 2020 meeting with Dena Maas and basis for O'Day's termination. *App. Ex. V.*
- 4.38. On June 22, 2022, O'Day provided his timesheet for the weeks of November 16, 2020 and November 23, 2020. *Testimony of Davis at 32:00-32:40 and Dept. Ex. 8.*
- 4.39. O'Day also provided his paystubs from September 25, 2020 to December 4, 2020. *Testimony of Davis at 32:40-35:10 and Dept. Ex. 9.*
- 4.40. On September 14, 2022, Agent Lewis gave O'Day until Monday, September 19, 2022, to provide additional evidence, since the Department, at the time, did not have enough evidence to substantiate O'Day claim of retaliation. *Dept. Ex. 11; pg. 24.*
- 4.41. On the same day, O'Day provided 12 images, including text messages of his text message communications with his employer. *Testimony of Davis at 36:00-37:00 and Dept. Ex. 10.*
- 4.42. Agent Davis did not review any medical documentation regarding any medical condition, such as A.D.H.D., which O'Day suffers from, since such information is outside Agent Davis's jurisdiction. *Testimony of Davis at 1:36:00-1:37:10 and App. Ex. D.*
- 4.43. Agent Davis only investigated O'Day's Wage Complaint alleging retaliation. He did not investigate Mass Construction's tax filings, withholdings in employee paychecks, prevailing wage, tool reimbursement, asbestos, permits, or industrial injury since those matters were never raised by the Appellant in his complaint, were outside of his Minimum Wage Act investigatory jurisdiction raised and raised for the first time at the hearing, and. *Testimony of Davis at 2:41:00-2:48:15 and App. Exs. H, M, P & Q.*
- 4.44. Agent Davis did not investigate any other issues, including possible rest break violations, as a part of his investigation. Agent Davis only investigated O'Day's allegation of retaliation for taking sick leave, as alleged in his Worker Right Complaint. *Testimony of Davis at 1:32:00-1:34:40.*

[Continued]

- 4.45. To find a violation of the Minimum Wage Act, four elements are required: (1) An employee exercises a protected right under the Minimum Wage Act, such a use of sick leave; (2) The Employer is aware of the exercised right; (3) An alleged adverse action occurs, such as termination; and (4) A connection exists between the protected right and the adverse action. Agent Davis found the first three elements were met, but evidence supporting the forth element was missing. *Testimony of Davis at hearing audio 23:30 to 25:20 & 1:19:15-1:21:00.*
- 4.46. After conducting his investigation, Agent Davis could not substantiate O'Day's claim Maas Construction retaliated against him for using paid sick leave. *Testimony of Davis at 1:06:30-1:06:50.*
- 4.47. Further, Agent Davis could not find any retaliatory motive by the Employer, Maas Construction, or any evidence suggesting retaliation by the Employer. *Testimony of Davis at 1:09:30-1:10:00.*
- 4.48. 'Retaliation' must be 'the substantial motivating factor' which leads to the adverse action, such as discharge. *Testimony of Davis at 2:28:20-2:30:30.*
- 4.49. Agent Davis determined no retaliation occurred due to O'Day taking sick leave. *Testimony of Davis at 3:36:00-3:37:00.*
- 4.50. On February 23, 2023, Agent Lewis notified O'Day the Department would be issuing a Determination of Compliance regarding his Wage Complaint, since no retaliation was found. *Dept. Ex. 11; pg. 26.*
- 4.51. On May 10, 2023, Agent Lewis issued an 'Agent Summary', outlining his investigation and recommending a 'Determination of Compliance' be issued since no retaliation by Maas Construction against O'Day occurred. *Testimony of Davis at 1:22:00-1:23:50, Dept. Ex. 5, and App. Ex. Av.*
- 4.52. On May 18, 2023, the Department issued 'Determination of Compliance No. 160-23' finding Maas Construction did not retaliate against O'Day for exercising his rights under the Minimum Wage Act. *Testimony of Davis at 1:18:00-1:19:15 & 1:21:30-1:23:20 and Dept. Ex. 1.*
- 4.53. On June 18, 2023, O'Day appealed the Department's Determination. *Testimony of O'Day at 4:32:00-4:33:20 and Dept. Ex. 2.*
- 4.54. During the evidentiary hearing, no new information was disclosed which would have changed Agent Davis's decision to issue the Determination of Compliance in the present case. *Testimony of Davis at 3:37:45-3:38:00.*

[Continued]

5. CONCLUSIONS OF LAW:

Based upon the above 'Findings of Fact', the following 'Conclusions of Law' are made:

Jurisdiction-

5.1. The Office of Administrative Hearings has jurisdiction over the persons and subject matter of the present case based on Revised Code of Washington (RCW) 49.48.084(3) and Chapters 34.05 RCW.

Burden and Standard of Proof Challenging a 'Determination of Compliance'-

5.2. In contesting a 'Determination of Compliance', the appealing party has the burden of proof, to establish by a 'preponderance of the evidence', a 'more likely than not' standard of proof, the Department's 'Determination of Compliance' is in error. *MacSuga v. County of Spokane*, 97 Wn. App. 435, 445-446, 983 P.2d 1167 (1999).

5.3. In the present case, the Appellant/Wage Claimant, Jonathan O'Day, has the burden to prove, by a 'preponderance of the evidence', the Department's 'Determination of Compliance No. 160-23' is in error.

Department Legal Requirements-

5.4. The Department of Labor & Industries is responsible for implementing and enforcing the provisions of Chapters 49.46, 49.48 and 49.52 of the RCW and Title 296 Washington Administrative Code (WAC), pertaining to wages, for the purpose of protecting the immediate and future health, safety, and welfare of the people of the State of Washington.

5.5. The Department's authority includes enforcing wage payments such as:
(a) Payment of minimum wages (RCW 49.46.020 and Chapter 296-128 WAC);
(b) Payment of overtime wages in excess of more than 40 hours of work in a week (RCW 49.46.13); (c) Payment of final wages (RCW 49.48.010); and (d) Withholding of lawful deductions from wages (RCW 49.52.060); and (e) Enforcement of any wages as authorized by statute, ordinance, and/or contract (RCW 49.52.050).

5.6. If an employee files a wage complaint, the Department is required to investigate. RCW 49.48.083(1) and WAC 296-128-820.

5.7. In the present case, on December 20, 2020, Jonathan O'Day filed a 'Worker Rights Complaint' with the Department, alleging his former employer, Maas Construction retaliated against him for taking sick leave, a protected right under Chapter 49.46 RCW. As a result, the Department investigated O'Day's complaint.

[Continued]

Minimum Wage Protected Rights and Retaliation-

- 5.8. In 1961, the State of Washington Legislature adopted the 'Minimum Wage Act', codified under Chapter 49.46 Revised Code of Washington. The purpose of the Act was to establish a minimum wage for employees as well as establish minimum standards of employment...for the purpose of protecting the immediate and future health, safety and welfare of the people of this state.
- 5.9. As a part of the State of Washington's Minimum Wage Act, RCW 49.46.210 mandates employers to provide sick leave to their employees. The employer cannot discriminate against or retaliate against an employee for using such sick leave, if accrued. RCW 49.46.210(4).
- 5.10. RCW 49.46.210(4) prohibits an employer from discriminating or retaliating against an employee for his or her exercise of any rights under Chapter 49.46 RCW.
- 5.11. Washington Administrative Code (WAC) 296-128-770 'Retaliation' establishes:
- (1) It is unlawful for an employer to interfere with, restrain, or deny the exercise of any employee right provided under or in connection with chapter 49.46 RCW. This means an employer may not use an employee's exercise of any of the rights provided under chapter 49.46 RCW as a negative factor in any employment action such as evaluation, promotion, or termination, or otherwise subject an employee to discipline for the exercise of any rights provided under chapter 49.46 RCW.
 -
 - (3) It is unlawful for an employer to take any adverse action against an employee because the employee has exercised their rights provided under chapter 49.46 RCW. Such rights include, but are not limited to: Filing an action, or instituting or causing to be instituted any proceeding under or related to chapter 49.46 RCW; exercising their right to paid sick leave, minimum wage, overtime, tips and gratuities; or testifying or intending to testify in any such proceeding related to any rights provided under chapter 49.46 RCW.
 - (4) Adverse action means any action taken or threatened by an employer against an employee for their exercise of chapter 49.46 RCW rights, which may include, but is not limited to:...(b) Termination.
- WAC 296-128-770(1), (3) & (4).
- 5.12. WAC 296-128-780 'Enforcement-Retaliation' requires the Department to investigate any retaliation complaint. If the Department finds the allegation is substantiated, it will issue a citation and notice of assessment to the employer. If the Department finds the allegation is not substantiated, it will issue a determination of compliance.

[Continued]

- 5.13. WAC 296-128-790 'Enforcement-Retaliation-Civil Penalties' authorizes the employer to pay a civil penalty if the Department finds the employer retaliated against an employee.
- 5.14. In order to prove 'retaliation', an employee must show he engaged in protected activity, the employer was on notice of such a right, then the employee suffered an adverse employment action, as a result. The employee must establish a causal link between the protected activity and the adverse action. *Cornwell v. Microsoft*, 192 Wn. 2d 403 (2018).
- 5.15. In the present case, Jonathan O'Day failed to establish, by a 'preponderance of the evidence' (more likely than not), his termination was the direct result of taking Minimum Wage Act protected sick leave. Rather, as established at the evidentiary hearing, through documented evidence and testimony in support of such evidence, the Employer, Maas Construction, planned to terminate him prior to him taking sick leave on Monday, November 30, 2020.
- 5.16. At the evidentiary hearing, Dena Maas, Owner of Maas Construction, credibility testified she met with O'Day's supervisor, Travis Rice, on at least two occasions to discuss O'Day unsatisfactory work performance. On November 25, 2020, Maas and Rice met yet again to discuss O'Day just 'not working out' for the Employer. At that time, the Employer decided to terminate O'Day, who would be notified on Monday, November 30, 2020, upon returning from the Thanksgiving holiday. However, he was sick. They terminated him upon his return the following day.
- 5.17. The Appellant failed to establish Maas Construction terminated him for taking sick leave on Monday, November 30, 2020. The evidence in the record and testimony of the Department Industrial Agent and the Employer Owner supported the decision to terminate O'Day arose from his unsatisfactory work performance, not due to taking sick leave. O'Day taking sick leave on Monday, November 30, 2020, just delayed, by one day, his job performance-related termination.
- 5.18. As a result, the Appellant/Wage Claimant, Jonathan O'Day, failed to prove, by a 'preponderance of the evidence, his former employer, Maas Construction, retaliated against him for taking sick leave, a protected right under Chapter 49.46 RCW, known as the Washington State Minimum Wage Act.
- 5.19. Since the Appellant did not establish retaliation occurred, the Department's 'Determination of Compliance No. 160-23', is **affirmed**.

[Continued]

6. INITIAL ORDER:

THIS ADMINISTRATIVE TRIBUNAL ORDERS;

- 6.1. The Appellant/Wage Claimant, Jonathan O'Day, failed to prove, by a 'preponderance of the evidence', his former employer, Maas Construction, retaliated against him for taking sick leave, a protected right under Chapter 49.46 RCW, known as the Washington State Minimum Wage Act.
- 6.2. Since the Appellant did not establish retaliation occurred, the Department's 'Determination of Compliance No. 160-23' is **affirmed**.

Issued from Olympia, Washington on the date of mailing.



TJ Martin
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE ATTACHED

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.¹ You may e-mail your Petition for Review to the Director at 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.²

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

¹ RCW 49.48.084 and RCW 34.05.464.

² RCW 49.48.084 and Chapter 34.05 RCW.

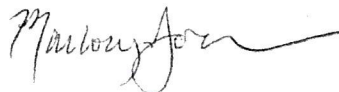
CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 09-2023-LI-01949

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.

Jonathan O'Day 14323 W Pinebluff Rd Nine Mile Falls, WA 99026 <i>Appellant/Wage Claimant</i>	<input type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail: odjono@protonmail.com
Julie Larson, AAG Office of the Attorney General 1116 W Riverside Ave Ste 100 Spokane, WA 99201 <i>Agency Representative</i>	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail: julie.larson@atg.wa.gov sidnie.bernhardt@atg.wa.gov lnispofax@atg.wa.gov shaun.reeser@atg.wa.gov
Maas Construction, Inc. Dena Maas PO Box 216 Liberty Lake, WA 99019 <i>Intervenor/Employer</i>	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail: dena@maasconstructionspokane.com

Date: Monday, March 04, 2024

OFFICE OF ADMINISTRATIVE HEARINGS



Mallory Jordan
Legal Assistant 2