

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Order to Comply  
Labor Law Violation, Penalty  
Assessment Failure to Make and Keep  
Records, and Penalty Assessment  
failure to Provide Copy of Personnel  
Record of Budget Towing, Inc.

**PREHEARING ORDER  
ON MOTION FOR SUMMARY  
DISPOSITION**

This matter came before Administrative Law Judge M. Kevin Snell on the Department Labor and Industry's motion for summary disposition. Oral argument on the motion was heard on March 28, 2007, and the record closed on that day.

Tricia L. Matzek, Assistant Attorney General, 445 Minnesota Street, Suite 900, Saint Paul, MN 55101-2127, appeared on behalf of the Department of Labor and Industry (Department). Patrick M. Connor, Esq., Dudley and Smith, P.A., Suite 2602, 101 East Fifth Street, St. Paul, MN 55101-1896, appeared on behalf of Budget Towing, Inc. (Budget Towing).

Based on the memoranda and file herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

**RECOMMENDATION**

IT IS HEREBY RESPECTFULLY RECOMMENDED that the Commissioner of Labor and Industry order that the Departments Motion for Summary Disposition be GRANTED in part and Denied in part, in accordance with the following

**ORDER**

IT IS HERBY ORDERED that:

1. This recommendation to grant Partial Summary Disposition will be made to the Commissioner as part of the Administrative Law Judge's final report. It will not be certified to the Commissioner at this time.
2. The Department's Motion for Summary Disposition be GRANTED as to the following claims:

a. That Budget Towing violated Minn. Stat. § 177.30 and Minn. R. 5200.0100 by failing to make and keep records for all hours worked each day and each work-week for all employees, for which Budget Towing is subject to enforcement under Minn. Stat. §§ 177.30 and 177.32.

2. That Budget Towing violated Minn. Stat. § 177.24, subd. 4, which limits deductions from employees' wages for the cost of uniforms and equipment to their full cost or \$50.00, whichever is less.

3. That Budget Towing violated Minn. Stat. § 181.961 by failing to provide a full and complete copy of the personnel record for Robert Rasmussen.

3. This matter will proceed to hearing as scheduled on the issues of what remedial and enforcement actions the Commissioner should take in response to violations of applicable provisions of Minnesota Statutes and rules of the Department.

Dated: July 9, 2007

s/M. Kevin Snell  
M. KEVIN SNELL  
Administrative Law Judge

## MEMORANDUM

### Background

The issues in this case are whether Budget Towing has violated Minnesota statutes and rules in its practices of deducting amounts from employees' wages for uniforms and equipment, relying on employees to make time records required to be kept by employers, and failing to provide a personnel record to a terminated employee, and, if it has, what remedial action the Commissioner of the Department should take.

### Standard for Summary Disposition

An Administrative Law Judge may recommend or grant summary disposition of a case where there is no genuine issue as to any material fact.<sup>1</sup> Summary disposition is the administrative equivalent of summary judgment in district court because summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>2</sup> The Office of Administrative Hearings has generally followed the summary judgment standards developed in the courts when considering motions for summary disposition in contested cases.<sup>3</sup>

When considering a motion for summary judgment, the facts must be reviewed in the light most favorable to the non-moving party.<sup>4</sup> All doubts and factual inferences must be resolved against the moving party.<sup>5</sup> If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.<sup>6</sup> To defeat a motion for summary judgment successfully, the nonmoving party must show that specific facts are in dispute that have a bearing on the outcome of the case.<sup>7</sup> The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden.<sup>8</sup> Summary judgment may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery.<sup>9</sup> To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some

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<sup>1</sup> Minn. R. 1400.5500 K.

<sup>2</sup> Sauter v. Sauter, 70 N.W. 2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ.P. 56.03.

<sup>3</sup> See Minn. R. 1400.6600

<sup>4</sup> Ostendorf v. Kenyon, 347 N.W.2d 834 (Minn. Ct. App. 1984).

<sup>5</sup> See, e.g., Celotex, 477 U.S. at 325; Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971); Thompson v. Campbell, 845 F. Supp. 665, 672 (D. Minn. 1994).

<sup>6</sup> Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986).

<sup>7</sup> Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986).

<sup>8</sup> Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988).

<sup>9</sup> Id.

“metaphysical doubt” as to material facts does not meet this burden.<sup>10</sup> Summary disposition is the administrative law equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.<sup>11</sup> The Office of Administrative Hearings has generally followed the summary judgment standards developed in the courts in considering motions for summary disposition of contested case matters.<sup>12</sup>

### **Undisputed Material Facts**

Budget Towing has been doing business in Minnesota and employing individuals during the applicable time period of July 25, 2003, through July 25, 2005.<sup>13</sup>

During this period, Budget Towing purchased uniforms for the employees to use, laundered them weekly, and replaced them every two to three months. Budget Towing also provides Nextel telephones, which contain Walkie-Talkie features, to its employees. During this period, Budget Towing has charged and deducted from each employee’s wages the following sums:

\$10.00 per week for use of Nextel telephones provided by Budget Towing;  
and

\$10.00 to \$12.00 per week for the purchase and laundering of uniforms.<sup>14</sup>

Certain records of hours worked by Budget Towing employees do not contain a.m. and p.m. designations relating to the beginning and ending times of work by those employees.<sup>15</sup>

On October 31, 2003, a water main burst and flooded a basement at the Budget location and destroyed or damaged many files, including employee files.<sup>16</sup>

On July 12, 2005, Robert Rasmussen was terminated from his employment with Budget Towing. Also on that date, Mr. Rasmussen requested a copy of his personnel record pursuant to Minn. Stat. § 181.961. Although there are documents in existence that would be considered portions of Mr.

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<sup>10</sup> *Id.*

<sup>11</sup> *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwgie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. 1400.5500 K; Minn.R.Civ.P. 56.03.

<sup>12</sup> See Minn. R. 1400.6600.

<sup>13</sup> Budget Towing’s Affidavit, Matzek Affidavit, Exhibit D.

<sup>14</sup> Budget Towing’s Aff. Matzek Aff., Exhibit K.

<sup>15</sup> Budget Towing’s Aff. Matzek Aff., Exhibit G.

<sup>16</sup> Budget Towing Aff. at paras 12 and 13.

Rasmussen's personnel file,<sup>17</sup> there is no evidence in the record that any of them were provided to him pursuant to his July 12, 2005, letter.

## Analysis

### **1. Whether Budget Towing Violated the Requirements of Minn. Stat. §177.30 and Minn. R. 5200.0100 by failing to make and keep records for all hours worked each day and each work-week for all employees.**

Minn. Stat. §177.30 provides in applicable part:

"Every employer subject to sections 177.21 to 177.35 must make and keep a record of . . . (3) the hours worked each day and each workweek by the employee; . . . The records must be kept for three years in or near the premises where an employee works."

Minnesota Rule 5200.0100, entitled EMPLOYER RECORDS, provides:

"By definition, "hours worked each day" includes beginning and ending time of work each day, which shall include a.m. and p.m. designations, and such designations shall be included in the employer's records."

Budget Towing argues that, because it expects employees to keep accurate records of their work hours on an honor system, and it can reconstruct time records from other records, that it is in compliance with the law.<sup>18</sup> However, Budget Towing also admits that it is not in full compliance with the requirement, as only "Most of Budgets' employees do in fact submit handwritten statements that are in compliance."<sup>19</sup> In fact, most of the time records do not have either the a.m. or p.m. designations.<sup>20</sup> Lack of these designations can make accurate overtime determinations difficult to determine and verify. Employers may not shift responsibility for complete and accurate records to employees. Budget Towing also argues, indirectly, that it should be absolved from providing records due to an October 31, 2003, water main burst that flooded a basement at the Budget location and destroyed or damaged many files, including employee files.<sup>21</sup> The Administrative Law Judge notes that the remedy for violations of this provision includes the imposition of a fine of up to \$1,000.00 for "each" violation.<sup>22</sup> It appears that the Department has given due consideration to circumstances

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<sup>17</sup> Connor Affidavit, Exs. 1, 3, 4, and 5.

<sup>18</sup> Budget Towing Affidavit at paragraphs 12 and 13.

<sup>19</sup> Budget Towing's Memorandum of Law Regarding Summary Disposition, at 18.

<sup>20</sup> Aff. of Tricia L. Matzek, Exhibit G.

<sup>21</sup> Budget Towing Aff. at paras 12 and 13.

<sup>22</sup> "The commissioner may fine an employer up to \$1,000 for each failure to maintain records as required by this section. This penalty is in addition to any penalties provided under section 177.32, subdivision 1. In determining the amount of a civil penalty under this subdivision, the appropriateness of such penalty to the size of the employer's business and the gravity of the violation shall be considered. Minn. Stat. § 177.30.

presented by Budget Towing in assessing only one \$1,000.00 fine for the violations of this provision.<sup>23</sup>

The Administrative Law Judge recommends that the Department's motion for summary disposition with respect to the existence of undisputed facts sufficient to establish violation of Minn. Stat. §177.30 and Minn. R. 5200.0100, regarding records of hours worked by employees be GRANTED.

**2. Whether Budget Towing Violated the Requirements of Minn. Stat. § 177.24, Subds. 4 and 5, by making improper un-reimbursed deductions from employee wages for uniforms and pagers.**

The applicable portions of Minn. Stat. § 177.24 provide:

“Subd. 4. **Unreimbursed expenses deducted.** Deductions, direct or indirect, from wages or gratuities not authorized by this subdivision may only be taken as authorized by sections 177.28, subdivision 3, 181.06, and 181.79. Deductions, direct or indirect, for up to the full cost of the uniform or equipment as listed below, may not exceed \$50. No deductions, direct or indirect, may be made for the items listed below which when subtracted from wages would reduce the wages below the minimum wage:

- (a) purchased or rented uniforms or specially designed clothing required by the employer, by the nature of the employment, or by statute as a condition of employment, which is not generally appropriate for use except in that employment;
- (b) purchased or rented equipment used in employment, except tools of a trade, a motor vehicle, or any other equipment which may be used outside the employment;
- (c) consumable supplies required in the course of that employment;
- (d) travel expenses in the course of employment except those incurred in traveling to and from the employee's residence and place of employment.

Subd. 5. **Expense reimbursement.** An employer, at the termination of an employee's employment, must reimburse the full amount deducted, directly or indirectly, for any of the items listed in subdivision 4. When reimbursement is made, the employer may require the employee to surrender any existing items for which the employer provided reimbursement.”

There is no ambiguity in the language of this section and the referenced provisions. When the language is clear, no further inquiry or construction is required.<sup>24</sup> This subdivision permits deductions within its framework and that of the other three statutory sections. Sections 177.28, subdivision 3, 181.06, and 181.79 do not apply because the permissible deductions under those sections

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<sup>23</sup> Complainant's Memorandum of Law in Support of Motion for Summary Disposition, at 11.

<sup>24</sup> Minn. Stat. § 645.16 (2006), *Owens v. Water Gremlin Co.*, 605 NW.2d 733,737 (Minn.2000).

are specific, and costs for uniforms and telephones are not encompassed in any of the enumerated items permissible for deductions under those sections.<sup>25</sup>

The first requirement is unambiguous. Deductions for the listed items cannot exceed \$50.00. This is an absolute amount and covers the entire period of an employee's employment. The actual cost of a uniform, or fifty dollars, whichever is less, is the absolute amount that may be deducted. The actual cost of a telephone, or fifty dollars, whichever is less, is the absolute amount that may be deducted for a telephone that can only be used in the employment.

Budget Towing states that, because the Nextel telephones may be used outside of employment,<sup>26</sup> and argues that the limitations of subd. 1 do not apply. This may be true and Budget Towing is entitled to that inference at this stage, however it does not negate the effect of the second requirement, subdivision 5, which requires complete reimbursement of all deductions upon return of the subject item at termination of employment. The permitted deductions are in the nature of a security deposit, to be repaid upon termination of employment.

Finally, Budget Towing argues that a 1997 conciliation court decision between Budget Towing and Mr. Rasmussen is entitled to the application of the doctrines of res judicata and collateral estoppel. Res judicata, or claim preclusion, bars a second suit for the same claim by parties or their privies. Res judicata applies when (1) there has been a final judgment on the merits, (2) the same cause of action is involved, and (3) the parties are identical or in privity. *Sunrise Elec., Inc. v. Zachman Homes, Inc.*, 425 N.W.2d 848, 851 (Minn. App. 1988). This not the same cause of action, nor are the parties identical or in privity. Collateral estoppel "prevent[s] parties to an action from relitigating in subsequent actions issues that were determined in the prior action." *Nelson v. Am. Family Ins. Group*, 651 N.W.2d 499, 511 (Minn. 2002). The Department is enforcing wage and hour and employment laws and regulations, was not a party to the conciliation court decision, and is not bound by its determination.

The Administrative Law Judge recommends that the Department's motion for summary disposition with respect to the existence of undisputed facts sufficient to establish violations of Minn. Stat. § 177.24, subd. 4, regarding uniforms be GRANTED. The Administrative Law Judge finds that there are material facts in dispute, specifically: the actual costs for the rental and/or purchase costs associated with the uniforms and Nextel telephones; and the actual amount due employees for un-reimbursed deductions for the uniforms and telephones.

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<sup>25</sup> Minn. Stat. § 177.28, subd. 3. leads to Minn. R. 5200.0090, regarding the minimum wage floor in subp. 1, and the rule under subp. 2 preventing circumvention of Minn. Stat. 177.24 by having an employee purchase the listed items directly.

<sup>26</sup> Budget Towing Aff. at 7.

**3. Whether Budget Towing violated Minn. Stat. § 181.961 by failing to provide a full and complete copy of the personnel record for Robert Rasmussen.**

Although Mr. Rasmussen requested a copy of his personnel record on July 12, 2005, he did not receive any portion of it within seven working days of its receipt, as required by law.<sup>27</sup> Budget Towing asserts that:

“We made a good faith effort to find as much documentation for the file as we could. Several hours were spent searching for viable records.”

This infers that an effort was made soon after the July 12, 2005, letter. However, the Administrative Law Judge notes that the fact that employee records were damaged or destroyed on October 31, 2003, does not explain why the documents that would constitute the personnel record of Mr. Rasmussen for the period from November 1, 2003, to July 12, 2005, were not provided to him.<sup>28</sup>

The Administrative Law Judge recommends that the Department’s motion for summary disposition with respect to the existence of undisputed facts sufficient to establish violations of Minn. Stat. § 181.961, be GRANTED.

**Conclusion and Remaining Issues**

However, the Department’s request for summary disposition that the Administrative Law Judge make conclusions with respect to the relief sought is denied. Generally, the issue of penalty is a factual matter that cannot be decided on summary disposition. Therefore, the issues of penalty and enforcement action will proceed to hearing.

The parties should be prepared to address the following issues at the hearing:

1. Application of Minn. Stat. § 181.56, regarding the burden of proof; and
2. Calculation of un-reimbursed deductions for the uniforms and Nextel telephones for the period from July 25, 2003, through July 25, 2005, (including which employees are currently employed and the termination dates for of all employees employed during the period); and
3. Actual cost of uniform purchase and laundering for the period from July 25, 2003, through July 25, 2005; and

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<sup>27</sup> Minn. Stat § 181.961, Subd. 2. provides in applicable part: . . . (a) The employer shall comply with a written request pursuant to subdivision 1 no later than seven working days after receipt of the request if the personnel record is located in this state, or no later than 14 working days after receipt of the request if the personnel record is located outside this state.

<sup>28</sup> At some point, Budget Towing found applicable documents, see Connor Aff., Exs. 1, 3, 4, & 5.

4. Actual cost of Nextel telephones for the period from July 25, 2003, through July 25, 2005; and

5. Amount of appropriate sanctions for the records and personnel file violations.

M. K. S.