City and County of Denver
Denver Labor
201 West Colfax Avenue, #705 • Denver, Colorado 80202
(720) 913-5039 • www.denverauditor.org/DenverLabor

NOTE: Denver Labor has made minor edits to and removed all personally identifying information from this Determination to protect the privacy of the persons affected by the outcome.

Denver Labor, Denver Auditor's Office

Liability Determination

Re: Worker & Employer

October 3rd, 2023

I. Introduction

On July 3rd, 2023, "Worker" filed a credible wage complaint with the Denver Labor division of the Denver Auditor's Office ("Denver Labor"). Worker alleged his former employer (the "Employer") failed to pay him minimum wage in violation of Denver's Civil Wage Theft Ordinance ("the Ordinance").[1] On August 9th, 2023, Worker filed a credible retaliation complaint against Employer.

Denver Labor opened investigations into these matters and provided notice to the Employer via first-class mail sent to its owner, (the "Owner"). Employer responded to the allegations, is represented by competent counsel, and had a full opportunity to present its evidence and defenses.

Denver Labor has considered all available evidence and now issues this Liability Determination. If this matter is not resolved within **14 days** of the date of this Liability Determination, either through compliance or settlement, Denver Labor will conduct further investigation and issue a Penalty Determination.

II. Summary of Determination

Denver Labor concludes that Employer illegally failed to pay Worker Denver minimum wage and illegally retaliated against him.

[1] D.R.M.C. § 58-1 *et seq*. Denver's Civil Wage Theft Ordinance, as used in this determination, incorporates Denver's Minimum Wage Ordinance.

Within **14 days** of the date of this Liability Determination, Employer is ORDERED to:

- As detailed in the attached spreadsheet, Ex. 1, pay Worker $22,247.17 in unpaid wages, plus damages of $33,370.76, and interest of $2,412.31, for a total of **$58,030.24**.

- Cease and desist from making further unlawful threats against Worker.

Furthermore, Denver Labor finds it appropriate to sanction Employer for its wage violations. Employer is further ordered to pay to the Denver Auditor's Office a penalty of **$29,015.12**.

Alternatively: The Employer and Worker may settle this matter and provide the terms of such settlement to the Executive Director of Denver Labor, who shall close this case, defer to the terms of the parties' settlement, and waive the $29,015.12 penalty.

If this matter has not been resolved through compliance or settlement within **14 days**, Denver Labor will issue a Penalty Determination, which will:

- Impose upon Employer an additional penalty of $5,000 for its unlawful retaliation;[2]
- Impose upon Employer further damages, payable to Worker, of **$22,247.17**; and
- Impose additional civil wage theft penalties of up to $25,000 per pay period in which the Employer underpaid Worker.[3]

III. Jurisdiction

Denver Labor has the authority to investigate, remedy, and deter wage theft against workers who work in the City and County of Denver.[4] A "worker" is a human being who performs work on behalf of or for the benefit of an employer. An "employer" is any entity that employs a worker. Worker and Employer meet these statutory definitions.

For the time period in question, Worker worked at his home or at the Employer's offices. Both are physically located in the City and County of Denver.

IV. Background

In December 2021, Worker began working for the Employer providing IT support. At this time, the Employer asserts he was an independent contractor. On January 24th, 2022, Worker accepted a job offer to join Employer as its IT assistant, and started this role on or about February 1, 2022.

Worker worked for Employer through June 30th, 2023. From February 1st through December 31st, 2022, Employer paid him $1500 per month regardless of the number of hours he worked. In January 2023, the Employer increased Worker's salary to $1700 per month, and

[2] D.R.M.C. § 58-4(c)(3).

[3] D.R.M.C. § 58-26(e).

[4] D.R.M.C. §§ 58-1 *et seq*.

in February 2023 increased it again to $1708.[5] For June, Worker negotiated a wage rate of $30/hour, retroactive to June 1st. Employer also provided Worker with two bonuses in 2023.

During his tenure with Employer, the Employer did not itself track Worker's hours. It instead required him to do so. He did, in detailed Excel spreadsheets. These spreadsheets provided dates, days of the week, and a description of work performed. Worker broke out his time tracking by "Internal" hours billable to Employer, and "Client" or "On-site/remote" hours billable to clients. Worker worked at Employer's physical office 2-3 days per week, and states he was typically there between the hours of around 9 AM and 6 PM. He claims he worked full-time for Employer, and his records reflect that he typically worked between approximately 130 and 190 hours per month.

On July 7th and July 13th, 2023, Worker sent two e-mails to two of the Employer's clients with whom he worked: Client 1 and Client 2. These e-mails were essentially identical. The e-mail to Client 1, for example, stated:

> Good afternoon,
>
> Making the decision to move away from working as an employee of Employer's has been very difficult because of the connections I have made with the two of you and the Client 1 team. The team has treated me so well since I began serving your business and also the personal connection of meeting the two of you and your family is what has made the relationship special for me.
>
> Unfortunately, I have no choice but to step away from working with Employer at this time to support myself. Being paid well below the legal minimum wage while living in Denver simply is not sustainable, particularly with the unfulfilled promises that Employer has made. I realize my sudden departure may affect you negatively and I am sorry.
>
> It has been a pleasure working with the two of you and the rest of the Client 1 team as everyone has treated me with respect and kindness. Thank you for letting me support and improve the IT environment of your business.
>
> I wish the two of you and your team the best in your future business endeavors.
>
> Worker

The Employer received copies of these e-mails on July 8th and July 20th.

On August 8th, the Employer sent Worker a letter through its counsel. Generally, the letter ordered Worker to "cease and desist your actions interfering with Employer's business relationships with its customers and your defamation of Employer." Ex. G, p. 1. Specifically, counsel explained:

> It has come to Employer's attention that you are directly contacting Employer's customers and making false and disparaging statements about Employer, including that Employer paid you "well below the legal minimum wage" and

[5] The Employer asserts it paid Worker $1708 in January 2023. He provided bank records establishing otherwise.

> subjected you to "unfulfilled promises." I have reviewed the business records of Employer and these claims are patently false. To the contrary, the records show that you were paid far above minimum wage for the hours that you worked.

Employer also asserted it had uncovered information establishing that Worker breached his fiduciary duty, and accused him of tortiously interfering with the Employer's business relationships.[6] The Employer threatened a lawsuit against Worker, and asserted it could claw back wages already paid. Worker shared this letter with Denver Labor.

In conducting its investigations, Denver Labor demanded payroll data from Employer for its employees, as well as any information justifying the August 8th letter from Employer's attorney and establishing that it was not illegally retaliatory. Employer produced some information, including an Excel sheet purporting to establish hours worked and wages paid for all employees; a response letter from its attorney; an affidavit from Employer; and 11 exhibits attached to Employer's affidavit.

V. Analysis

A. Employer violated the Ordinance by failing to pay Worker minimum wage.

i. Denver Labor accepts Worker's records of hours worked as reliable. The Employer produced multiple, conflicting sets of records and appears to have substantively edited its production.

Worker alleges that he worked full time for Employer, but the Employer paid him less than Denver's minimum wage in 2022 and 2023 by paying him a flat salary of $1,500 per month in 2022 and approximately $1700 per month in 2023. In support of this claim, Worker provided Denver Labor with records of his text message and e-mail communications; weekly to-do lists; an explanation of his experiences; and copies of Excel sheets reflecting his hours worked each day from January 1st, 2022 through June 30th, 2023. The spreadsheets follow a uniform structure.

After leaving his employment with Employer, but prior to filing his claim with Denver Labor, Worker amended his timesheets to reflect "wait time," which typically consisted of several hours each day. Worker informed Denver Labor that he filled in this wait time based on his normal work habits and schedule, his recollection of projects and tasks, and reviews of his text messages and e-mails.

The Employer disputes Worker's claim. It asserts that "Worker was never hired as a full time employee," and worked only part-time and as-needed. He allegedly "averaged around 45 hours per month" of work, "was not required to work at Employer's physical offices, and he typically only worked from Employer's physical offices approximately 2-3 times per week and worked remotely the remainder of the time." Employer Response Letter, p.2. According to the Employer, Worker always earned above minimum wage, and his actual hourly rate – depending on the month – varied between $17.65 and $95.24 per hour. *Id*.

[6] Re-stating these allegations is not an acknowledgment by Denver Labor that Worker committed any of these acts, or that he owed Employer a fiduciary duty under Colorado law.

But that is not **all** the Employer has asserted, because during this process Employer produced three different sets of time records. On July 27th, 2023, Employer submitted an Excel file "containing a record of our wages paid from July 1, 2020 until June 30, 2023," which included total hours worked each month. On August 22nd, 2023, Employer informed Denver Labor that "there were a few inaccuracies in the reported hours . . . for the employee Worker." She provided new numbers for April 2022, May 2022, and January 2023. Then when the Employer filed its response to Denver Labor's retaliation investigation on August 30th, 2023, it asserted yet another set of hours worked. It also provided an affidavit from Employer and two exhibits purporting to be "true and correct copies of all of Worker's timesheets from February of 2022 through June 2023 as he submitted them to Employer."[7] Employer Aff., ¶7; Employer Exs. A-1 & A-2.

Here is a sample of the various claims of hours worked that Denver Labor is left with:

Month	**Employer (July 27th)**	**Employer (Aug. 22nd)**	**Employer (Aug. 30th)**	**Worker (July 3rd)**
April 2022	31	18.5	20	153.75
May 2022	9	69.75	58.75	168
Jan 2023	34.54	35.45	35.45	125.75

After reviewing the evidence and arguments presented by the parties, Denver Labor accepts Worker's allegations. Although Worker's records contain "wait time" that he included after the fact, Denver Labor nevertheless finds his assertion that he worked full time to be credible. There are a variety of reasons for this.

First, it is an employer's responsibility to track employee hours, but Employer did not keep its own contemporaneous records of hours worked. Instead, it relied on Worker. Worker, in turn, primarily tracked the time he spent working for clients, which Employer used for billing purposes.

Second, his evidence supports his claim that he worked full-time for Employer. He produced more than 160 pages of weekly to-do lists, which reflect specific tasks for Employer. He also shared a year's worth of e-mails, and multiple years of his text messages. Worker frequently communicated with Employer about work, sometimes exchanging dozens of messages in a single day. He also explained to Denver Labor the range of tasks he performed on a daily basis and the various projects he worked on during "internal" time. The evidence supports that Worker worked full-time for the Employer.

[7] Even without the timekeeping issues detailed in this Liability Determination, this is not an accurate statement. Employer's affidavit describes Exhibits A-1 and A-2 as being edited to have "Enterprise Hours Removed." Employer does not explain what Enterprise is or why it saw fit to remove these hours. Worker explained that "Enterprise" is another enterprise owned by Employer, and he would sometimes perform work related to Enterprise at Employer's direction.

Finally, the Employer's records are not reliable. As stated, Employer produced three different assertions as to hours worked. Beyond that problem, the Employer's records do not reflect Worker's **actual** hours worked. Worker's spreadsheets divide his time into "Internal" hours and "Client" or "On-site/Remote" hours. But often, "Internal" hours – billed to Employer – are missing from the Employer's records. Sometimes, this is the case even when it is clear from Worker's notes that he performed compensable work. For example, the Employer's Exhibit A-1 asserts that Worker performed no work on July 1st, 2022.

His record of July, however, **does** reflect hours worked—and based on the "Notes" in the excerpt above, he did perform work for Employer on July 1st.

In the end, Denver Labor has four assertions of Worker's time worked. All disagree. But Worker is the only party to have presented a consistent narrative, supported by significant documentary evidence. He is the only party that has not contradicted itself. For these reasons, Denver Labor accepts his records as reliable.

ii. Worker's "wait time," which he billed to Employer, was compensable.

Under Colorado and Denver law, workers must be paid for any time that counts as "time worked."[8] Generally, this means that a worker must be compensated for all time spent performing labor or services for an employer's benefit.

Employer asserts that any time Worker billed as "wait time" was not compensable. It argues that

> The Ordinance does not apply to workers required to be on-call or on standby off-site. *See* Denver Wage Theft Rules, Section 5.1.C. "On Call, Stanbdby and Sleep Time." Here, Worker was an IT assistant who primarily worked remotely and whose job was to respond to client IT requests on an as needed basis. He was not required to be physically present anywhere unless he was performing work. At most, he was occasionally on standby offsite and available to respond to client needs as they arose, and to Employer's knowledge he included that time in the work hours he recorded on his time sheets.

Employer Response Letter, p. 4.

Employer misunderstands Rule 5.1.C, which states that off-site on-call time is not compensable **unless** such time would be payable under state or federal law. It also misrepresents what Worker did during his "wait time." In this case, Worker's "wait time" was compensable because he spent it performing work for the benefit of Employer.[9] There were frequent "internal" tasks and projects that Worker worked on during his time with Employer. This is supported by his time records; text message history; weekly to-do list; and the

[8] *See* Interpretive Notice & Formal Opinion (INFO) #20, p. 1. Because the Ordinance protects "workers" rather than merely "employees," workers in Denver are entitled to be paid for all time worked.

[9] In this sense, Worker's "wait time" was not "waiting time" as that phrase has meaning under Colorado law. Worker labeled it as such, but these were productive hours during which he performed a variety of activities for the benefit of his employer.

statements he made to Denver Labor during this process. Although this internal time was not billable to Employer's clients, it was still time worked.

Denver Labor concludes that the Employer failed to pay Worker minimum wage, and he is entitled to restitution as detailed on page 1 of this Liability Determination.

B. Employer illegally retaliated against Worker.

The Ordinance strictly prohibits retaliation against workers who exercise in good faith any right protected under the Ordinance.[10] The purposes of the Ordinance's broad anti-retaliation provision are to encourage workers to speak up about wage violations; create a safe environment in which they may ask about or assert their rights; and grant them the freedom to advocate for themselves and their coworkers without fear of reprisal.

To establish unlawful retaliation, a complainant must show, by a preponderance of the evidence, that 1) they engaged in protected activity, 2) the employer took adverse action, and 3) the adverse action was motivated by their protected activity.[11] Where adverse action occurs within 90 days of protected activity, however, Denver Labor presumes unlawful retaliation. This presumption may only be overcome if the employer shows, by clear and convincing evidence, that it took the adverse action for a lawful purpose.

The Employer has failed to meet its burden here. The evidence establishes that that Worker engaged in protected activity, suffered adverse action when Employer and its counsel threatened legal action, and that this act was motivated by Worker's protected activity.

i. <u>Worker engaged in protected activity and suffered adverse action.</u>

The Ordinance protects the right of workers to engage in a wide range of actions, so long as they do so in good faith. Among other things, the law empowers workers to inform "any . . . person about an alleged violation" of their rights.[12] Worker engaged in protected activity by filing a complaint with Denver Labor and by informing two former clients of his belief that the Employer paid him less than minimum wage.

The Ordinance likewise takes an expansive view of what constitutes an adverse action. An adverse action is any action that would discourage a reasonable worker from engaging in protected activity. The Ordinance explicitly defines threats as adverse actions.[13] Employer, therefore, took adverse action when it sent Worker a letter threatening legal action.

ii. <u>Worker's protected activity motivated Employer.</u>

The evidence also establishes that Worker's protected activity motivated Employer. A complainant may establish unlawful retaliation by presenting direct or circumstantial evidence. Circumstantial evidence may include close temporal proximity[14] and any evidence

[10] D.R.M.C. § 58-2(b)(1).

[11] D.R.M.C. § 58-2(b)(3).

[12] D.R.M.C. § 58-2(b)(1)(c).

[13] D.R.M.C. § 58-1(1).

[14] *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 274 (2001).

showing that the employer's stated justification is pretextual.[15] Because of the timing in this case, Denver Labor presumes retaliation, and it is the Employer's burden to prove by clear and convincing evidence that it sent Worker the cease-and-desist letter for a lawful purpose.[16]

Employer has not met its burden. This is a rare situation where there is documented direct evidence of retaliatory motive. The second paragraph of the letter from Employer's attorney explains the reasoning behind it: The Employer wrote Worker the letter because he told others about his wage theft. Clearly the Employer did not appreciate that action. But the Ordinance expressly protects that right and prohibits threats of reprisal. Furthermore, protected activity requires only that a worker have a **good faith belief** that their employer violated their rights. There is every indication here that Worker honestly believed Employer paid him less than minimum wage—as it, in fact, did.

The Employer responds, in part, by asserting that its letter does not suggest or imply that its grievance lay with Worker filing a wage complaint with Denver Labor. There are two problems with this defense. First, Employer attempts to parse the facts beyond reason. In the midst of an ongoing wage investigation, it instructed a worker not to tell third-parties about his perceived rights violations. This action cannot be disentangled from Denver Labor's investigation. An adverse act is one that would discourage a reasonable worker from engaging in protected activity, and a reasonable worker would be discouraged from cooperating with the government in response to the Employer's letter.

Second, the Employer misunderstands the Ordinance, which protects the right of workers to tell "any person" about an alleged violation, so long as they do so in good faith.

iii. The Employer's alternative explanations are not persuasive, but pretextual.

Finally, Employer argues it was justified in sending the cease-and-desist letter. Essentially, Employer claims that it cannot be held liable for retaliation because its allegations were correct. It asserts Worker defamed Employer, which always paid him above minimum wage; breached his duty of loyalty; and tortiously interfered with its business relationships.

The evidence does not support these claims. Worker did not defame Employer, which did not pay him above minimum wage.

Nor is the Employer's claim that Worker attempted to poach clients and "[stole] company time and resources for his own personal benefit and to the detriment of Employer" availing. Employer has provided no evidence that Worker attempted to steal clients, or that his actions caused the company financial harm. Instead, the Employer's arguments overstate the facts. For example, Employer claims Worker's e-mails to Client 1 and Client 2 are a smoking gun of his bad faith, reflecting his "effort to cause those clients to stop doing business with Employer and switch their business accounts to him." Employer also states that Worker at some point—it does not say when—"unilaterally . . . made himself the primary

[15] *Troupe*, 20 F.3d at 736.

[16] Even absent this presumption, Denver Labor would find that Employer retaliated against Worker in violation of the Ordinance. The totality of the circumstances present a strong argument that it sought to threaten Worker because he exercised his rights in good faith.

administrator" on certain accounts for Client 2 "in what seems to have been an attempt to unilaterally take over that client's account." *Id*.

But there is not support for the idea that Worker attempted a hostile takeover of the Employer's major clients. His e-mails do not say what Employer claims; Employer has not provided evidence for many of its basic factual claims; and there are self-apparent explanations for Worker's actions. For example: Worker's job was to provide IT support; it makes sense that an IT specialist would make themselves the primary administrator on a client's software accounts. Nor was he attempting to "unilaterally take over" the client when, after he quit, Employer was able to remove his access.

Finally, the Employer's allegation that Worker breached his fiduciary duty is unpersuasive. As an initial matter, Denver Labor notes that Employer does not provide any evidence of damages, a necessary element for a breach of fiduciary duty claim in Colorado.[17] It tries to assert that Worker "stole time" by "work[ing] on his own personal projects," but this is pure speculation.

Its evidence for this is two inconclusive documents that Worker created outside of normal work hours, and a series of communications he had with a company. Employer argues that Worker had Client as a personal client, e-mailed them from his Employer e-mail account, and took calls from Client while at Employer's office. It claims that this is proof he was "pursu[ing] his own personal business in competition with Employer."

But Employer and Worker agree on at least one point here: Employer knew about Worker's side business, and approved of him working to build that business. In its response, Employer leaps immediately from admitting this fact to insisting that Worker's work with Client was unlawful competitive behavior—even though it does not assert that it was even attempting to have Client as a client.

Employer cannot have it both ways. It cannot argue it blessed Worker's business and demanded only occasional part-time work from him while also restricting him from doing outside IT work, even for businesses that were not clients of Employer. Furthermore, Worker, provides a reasonable explanation for this situation: Client was his client; Employer knew he sometimes performed work for it; but around April of 2023, Client's needs had grown to the point where Worker felt he should bring them on as a client for Employer, at which point he began to communicate with them from his work e-mail. In other words, he was not engaged in unfair competition with Employer, but the opposite.

Denver Labor therefore concludes that Employer unlawfully retaliated against Worker because he informed other persons of his good faith belief that the Employer paid him less than minimum wage.

VI. Conclusion

After considering all available evidence and applicable law, Denver Labor finds that Employer violated the Ordinance.

[17] *SGS Acquisition Co. Ltd. v. Linsley*, 2018 WL 4698614, at *6 (D. Colo. Sept. 30, 208).

Within 14 days of the date of this Liability Determination, the Employer shall fully comply with the requirements detailed in Part II. Alternatively, Worker and Employer may settle this dispute and present the Executive Director of Denver Labor with proof of such settlement, at which time Denver Labor will close this case. Absent proof of either compliance or settlement, Denver Labor initiate collections and issue a Penalty Determination as described in Part II.

Unless either party appeals this Liability Determination pursuant to D.R.M.C. § 58-5 and Denver Labor's Rules of Procedure for Hearings and Appeals, it shall be final.

Dated October 3rd, 2023

Denver Labor

Denver Auditor's Office

Sent via first-class mail to the parties this same date, and via e-mail to their representatives on October 2nd, 2023.