

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

WFK

2012 CA 1735

DONNA WATSON

VERSUS

JEW

JUBAN EXPRESS I, L.L.C.

Judgment Rendered: JUN 11 2013

On Appeal from the
21st Judicial District Court,
In and for the Parish of Livingston,
State of Louisiana
Civil Docket No. 136,444, Division "D"

The Honorable M. Douglas Hughes, Judge Presiding

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Juban Express I, L.L.C.

BEFORE: PARRO, WELCH, AND KLINE,¹ JJ.

Parro, J., concurs.

¹ Hon. William F. Kline, Jr., retired, is serving as judge *ad hoc* by special appointment of the Louisiana Supreme Court.

KLINE, J.

An employee appeals a final judgment that dismissed her petition for unpaid wages, statutory penalty wages, and attorney fees. For the following reasons, we reverse and render.

FACTS AND PROCEDURAL HISTORY

Plaintiff/Appellant, Donna Watson, was hired on November 1, 2010, by Defendant/Appellee, Juban Express I, L.L.C. (“Juban Express”), to work as a clerk and cashier at its convenience store in Livingston Parish, earning \$9.00 per hour. Ms. Watson worked there continuously until Sunday, November 27, 2011, when she resigned at the end of her shift. On the next scheduled payday, December 2, 2011, Ms. Watson appeared at the store to collect her final paycheck. The owner of Juban Express told Ms. Watson that because she quit, Juban Express had an additional fourteen days to issue her final paycheck. Ms. Watson left the premises without her final paycheck.

Ms. Watson sent a demand letter to Juban Express on December 13, 2011, detailing the amount of unpaid wages she was owed and outlining her employer’s duties under the Louisiana Wage Payment Act (“Act”).² Ms. Watson received no response. After she retained legal counsel, Ms. Watson’s attorney sent a second demand letter to Juban Express on February 28, 2012, detailing her unpaid wages, an employer’s obligations under the Act, and the consequences for noncompliance. Ms. Watson again received no response, and subsequently filed a petition for unpaid wages, penalties, and attorney’s fees. Ms. Watson alleged she was due \$444.38 from Juban Express in unpaid wages,³ was entitled to statutory penalty

² Louisiana Revised Statutes 23:631 *et seq.*

³ In the pay period immediately preceding her resignation, Ms. Watson worked a total of 46.25 hours. At the hourly rate of \$9.00, Ms. Watson earned \$360 for 40 hours. At the statutory overtime rate of time and a half (or \$13.50 per overtime hour), Ms. Watson earned \$84.38 for the remaining 6.25 hours she worked.

wages totaling \$4,628.70, and was entitled to attorney fees. In its answer to Ms. Watson's petition, Juban Express asserted the affirmative defense of setoff and argued that no wages were owed to Ms. Watson due to the fact that she owed Juban Express more money than she was owed in unpaid wages.

The minutes reflect that the district court heard Ms. Watson's case against Juban Express at a bench trial on July 26, 2012.⁴ At the conclusion of the trial, the district court dismissed Ms. Watson's petition and subsequently signed a judgment to that effect on August 15, 2012. Ms. Watson now appeals the dismissal of her petition.

DISCUSSION

Payment of Wages upon Termination of Employment

Louisiana Revised Statutes 23:631 provides, in pertinent part:

A.(1)(b) Upon the resignation of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, on or before the next regular payday for the pay cycle during which the employee was working at the time of separation or no later than fifteen days following the date of resignation, whichever occurs first.

B. In the event of a dispute as to the amount due under this Section, the employer shall pay the undisputed portion of the amount due as provided for in Subsection A of this Section. The employee shall have the right to file an action to enforce such a wage claim and proceed pursuant to Code of Civil Procedure Article 2592.

It is uncontroverted that Ms. Watson worked 46.25 hours during the week before she quit.⁵ Juban Express, however, claimed that Ms. Watson was paid in cash for the first three days of her last week of work. Juban Express's co-owner,

⁴ See Louisiana Revised Statutes 23:631(B) and Louisiana Code of Civil Procedure article 2592(12).

⁵ Ms. Watson worked Monday, November 21, Tuesday, November 22, Wednesday, November 23, Saturday, November 26, and Sunday, November 27, 2011, prior to quitting her job at Juban Express.

Imteyaz Sheikha, testified before the district court that Ms. Watson was paid in cash on Thursday, November 24, 2011, but that Ms. Watson was never paid for the final Saturday and Sunday she worked prior to resigning. The district court believed Ms. Sheikha's testimony, finding that Juban Express was in "good faith" regarding the cash payment of Ms. Watson's wages for the first three days of her last week of work. The trial court's determination of a witness's credibility is entitled to great weight and should not be disturbed on appeal. *See Stobart v. State through Dept. of Transp. & Dev.*, 617 So. 2d 880, 882 (La. 1993). Thus, Ms. Watson is entitled to recover unpaid wages, at the rate of \$9.00 per hour, for the 7.5 hours she worked on Saturday, November 26, 2011, and the 7.5 hours she worked on Sunday, November 27, 2011, which totals \$135.

Penalty Wages

Ms. Watson also claimed she is entitled to recover statutory penalty wages equal to ninety days of her pay, pursuant to Louisiana Revised Statutes 23:632, in the amount of \$4,628.70, for the failure and refusal of Juban Express to pay the amount due her within fifteen days of the termination of her employment. Section 632 provides:

Any employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the employee either for **ninety days wages** at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages. **Reasonable attorney fees shall be allowed** the laborer or employee by the court which shall be taxed as costs to be paid by the employer, in the event a **well-founded suit for any unpaid wages** whatsoever be filed by the laborer or employee after three days shall have elapsed from time of making the first demand following discharge or resignation. (Emphasis added.)

To recover penalties under Section 632, the employee must prove that (1) wages were due and owing; (2) demand for payment was made at the place where the employee was usually paid; and (3) the employer failed to pay upon demand.

Because Section 632 is penal in nature, it must be strictly construed. *Berard v. L-3 Communications Vertex Aerospace, LLC*, 09-1202, pp. 13-14 (La. App. 1 Cir. 2/12/10), 35 So. 3d 334, 344-45, *writ denied*, 10-0715 (La. 6/4/10), 38 So. 3d 302.

Equitable defenses are available, however, and penalty wages are not to be absolutely imposed. A claim for penalty wages under Section 632 may be defeated by an equitable defense, that is, a good-faith, non-arbitrary defense to liability for unpaid wages. *Richard v. Vidrine Auto. Services, Inc.*, 98-1020 (La. App. 1 Cir. 4/1/99), 729 So. 2d 1174, 1177-78. However, when the employer is arbitrary, sets out procedural pitfalls for the employee, or is merely negligent in failing to pay past due wages, penalty wages will be assessed. Whether there exists a valid equitable defense to a claim of penalty wages depends on the particular facts of each case. *Berard*, 35 So. 3d at 345.

Louisiana courts have recognized that an employer's claim of setoff, or compensation, constitutes an equitable defense to a penalty wage claim. *Richard*, 729 So. 2d at 1178. The defense of setoff requires mutual obligations, whereby each obligor owes an equally liquidated and demandable debt to the other. *Winkle v. Advance Products & Sys., Inc.*, 98-694 (La. App. 3 Cir. 10/28/98), 721 So. 2d 983, 989; *see also* La. Civ. Code art. 1893.

In the present case, Juban Express averred it is not liable for penalty wages, because it had a reasonable belief that it was entitled to a setoff against the amount owed Ms. Watson in final wages. Juban Express claimed that Ms. Watson's conduct during her employment with the store – allegations of theft, improperly processing customer refunds, ordering merchandise from vendors without permission, shortage in lottery ticket sales, and selling cigarettes at unauthorized discounts – resulted in losses to the store that exceeded her unpaid wages. Following the trial, the district court determined that Juban Express did not owe Ms. Watson any penalty wages, based on its setoff.

A party claiming setoff, or compensation, as an affirmative defense has the burden of proving his claim. *Winkle*, 721 So. 2d at 989. Here, Juban Express carried its burden of proving its entitlement to set off Ms. Watson's "debts" against the payment of her wages, such that the store is not subject to penalty wages. While there is no indication from the record of the exact amount of the setoff claimed by Juban Express, and whether or not this amount was liquidated at the time Ms. Watson demanded her unpaid wages, the district court was convinced that Juban Express made a good-faith, non-arbitrary defense to its liability for penalty wages.

We agree with the district court. Ms. Watson's pattern of unauthorized acts during the year of her employment with Juban Express was financially detrimental to the store. The covert nature of Ms. Watson's actions does not lend itself to the determination of an exact dollar amount. It is evident from the record that Juban Express is a victim of Ms. Watson's employment. To reiterate, the district court, in determining credibility, found Juban Express had a valid equitable defense in the form of a setoff, such that it was not subject to **penalty wages**.

Attorney Fees

Unlike the award of penalty wages, the award of reasonable attorney fees under Section 632 is mandatory when an employee brings a "well-founded" suit for unpaid wages, **irrespective of any equitable defenses** that may have been raised. Suits in which the recovery of unpaid wages is granted are considered "well-founded." *Berard*, 35 So. 3d at 345. Reasonable attorney fees are to be awarded even if penalty wages are not due. *Cochran v. American Advantage Mortgage Company, Inc.*, 93-1480 (La. App. 1 Cir. 6/24/94), 638 So. 2d 1235, 1240.

Ms. Watson's suit for unpaid wages is "well-founded," because she prevailed on the issue of unpaid wages on appeal. Accordingly, she is entitled to

attorney fees. Here, the record does not disclose any evidence as to the value of attorney fees; however, this court may examine the record and determine a reasonable value. *See Wilson v. Inessa Stewart's Antiques, Inc.*, 96-2767 (La. App. 1 Cir. 2/20/98), 708 So. 2d 1132, 1135, *writ denied*, 98-0777 (La. 5/8/98), 718 So. 2d 435. We conclude that \$1,500 is a reasonable amount and will award these attorney fees to Ms. Watson. *See Richard*, 729 So. 2d at 1179-80.

In conclusion, the recognition of Juban Express's equitable defense, the setoff, does not relieve the store of its obligation to pay Ms. Watson the wages due her; however, the equitable defense does relieve Juban Express of liability for any penalty wages. In fairness, there are other remedies which Juban Express may explore to seek recovery of its losses.

DECREE

For the foregoing reasons, the district court's judgment, dismissing Ms. Watson's claim, is reversed. Judgment is rendered, awarding Plaintiff/Appellant, Donna Watson, \$135 in unpaid wages and \$1,500 in attorney fees, to be taxed as costs. Costs of this appeal are assessed to Defendant/Appellee, Juban Express I, L.L.C.

REVERSED AND RENDERED.