

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

ALYSA D. STUKES AND HARRIET'S
ALTER EGO, INC.,

Petitioners,

DOCKET NO. PR 09-061

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 12-A of the Labor
Law, dated January 28, 2009,

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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APPEARANCES

Alysa D. Stukes, *pro se*, for Petitioners.

Maria L. Colavito, Counsel to the NYS Department of Labor, Benjamin T. Garry of
Counsel, for Respondent.

WITNESSES

Alysa D. Stukes and Ngozi Odita, for Petitioners; Paul Kalka, Senior Labor Standards
Investigator, for Respondent.

WHEREAS:

A Petition for review in the above case was filed with the Industrial Board of
Appeals (Board) on March 27, 2009. Petitioners Alysa D. Stukes and Harriet's Alter Ego,
Inc. (together, Petitioners) seek to vacate an Order to Comply with Article 12-A of the Labor
Law (Order) that the Commissioner of Labor (Commissioner) issued against Petitioners.
The Order is dated January 28, 2009.

The Order found Petitioners in violation of Article 12-A for failing to: (1) register
with the Commissioner as a "manufacturer" in the apparel industry, as required by Labor

Law §§ 341 and 345.1; and (2) comply with an “order to register” issued to Petitioners on June 13, 2008, as required by Labor Law §§ 341 and 345.2. The Order assessed civil penalties against Petitioners of \$800 for the first violation (Count 1), and \$1,200 for the second (Count 2), for a total penalty of \$2,000.

The Petition asserts that the majority of merchandise that Petitioner Stukes and her business partner sold at their shop was on consignment from local designers and produced off premises. Two sewing machines were the only equipment on site. One of the machines was inoperable, and the one functioning machine was used mostly for alterations. Petitioners assert that they did not employ production employees and argue that the Commissioner’s Order is invalid and unreasonable because Petitioners were not a “manufacturer” in the apparel industry subject to registration. The Petition asserts that the penalties are also unreasonable because Petitioner and her partner have closed their shop and are without a source of income. Petitioners argue that “it would be unfair and cause undue hardship for us to bear such a financial burden for an unwarranted order.”

Respondent Commissioner filed an Answer to the Petition, denying the material allegation, and interposing as an affirmative defense that the Order and penalties were assessed in accordance with the provisions of the Labor Law and were in all respects valid and reasonable.

Upon notice to the parties, a hearing was held on December 9, 2009 before J. Christopher Meagher, Esq., Member of the Board and the Board’s designated hearing officer in this case. Each party was afforded full opportunity at the hearing to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

SUMMARY OF EVIDENCE

Petitioner Alysa D. Stukes (Stukes) is the President of Petitioner Harriet’s Alter Ego (the Boutique), a clothing store that sold women’s fashions and accessories in Brooklyn, New York.

Testimony of Ngozi Odita and Alysa D. Stukes

Ngozi Odita (Odita) testified that she and Stukes operated the Boutique together as business partners from 2004 to January 15, 2009 and were the only employees. The business operated in a two-floor commercial space of approximately 2500 square feet. On the top floor of the shop was a showroom where garments were sold at retail. The basement contained a storage space and small work area with two sewing machines, one of which was inoperable.

Odita testified that most of the items sold in the Boutique – “probably ... 87% of what was sold in the store” – were finished garments dropped off by designers which the Boutique sold on consignment. The remainder were: (1) “blank[s]” or “complete garments

... like rap shirts, t-shirts [and] dresses” purchased from other apparel makers that Petitioners embroidered or had a contractor embroider with Petitioners’ printed designs, tie-dying, or other details to make into the Boutique’s “creation[s] and part of our line”; (2) garments that Petitioners made for fashion shows and sold on the showroom floor; (3) garments Petitioners made to order to customers’ specifications; and (4) vintage apparel purchased from thrift stores that Petitioners reconstructed or remade for sale in the showroom. On cross examination, Odita identified advertisements in a local newspaper and from the Boutique’s website in 2008 and acknowledged they accurately described the Boutique’s business. The ads contained descriptions of the Boutique’s “one-of-a-kind pieces” and “colorful creations.”

Odita asserted that because the items the Boutique sold were on consignment and unique one-of-a-kind pieces, “we [didn’t] mass-produce anything” and “there was never any manufacturing that occurred.” She testified that the Boutique was forced to close in January, 2009 because it was six months in rent arrears and owed over \$16,000 to creditors. The store made less than \$1,500 in net revenues during its last few months of operation, owed rent and other bills of more than \$3,500 per month, and could no longer stay in business.

Stukes testified that an investigator from the Department of Labor (DOL) visited the Boutique in 2008 and advised Petitioners that the business needed to be registered. Petitioners attempted to comply but were unable to complete registration and pay any fines that might be imposed because of the escalating costs the business faced which ultimately forced it to close. Stukes asserted that she and Odita were not presently employed and it would be a hardship to pay the penalties assessed by the Commissioner. Stukes corroborated Odita’s testimony concerning their non-manufacturing status and stated that most of the apparel work performed was tailoring of garments that were already produced.

Testimony of Investigator Paul Kalka

Paul Kalka (Kalka) is a Senior Labor Standards Investigator (SLSI) employed by the Department of Labor. His responsibilities include: (1) review of investigations conducted by DOL’s Apparel Investigations Task Force (AITF); (2) holding compliance conferences with apparel operators to resolve registration violations issued by AITF; and (3) processing of cases that are not resolved for an Order to Comply.

Kalka testified concerning the investigation that led to the Order under review. AITF’s investigation was triggered by newspaper and internet advertisements that Odita testified to that described the Boutique’s apparel operations. On June 13, 2008, DOL investigator Rashid Allen (Allen) did a site inspection of Petitioners’ operations, spoke with Petitioners, and concluded that the Boutique was an apparel manufacturer and had failed to register for the 2008 year. Based on the inspection, Allen issued the Boutique a Notice of Violation for failure to register and an Order to Register (OTR) within 20 days.

Kalka testified that all garments produced or enhanced in value for sale by the Boutique are considered apparel production subject to registration. While the majority of Petitioners' business may have been a retail outlet for finished clothing,

“...if a retailer is having goods produced for itself or maybe if it's not complete production, but enhances the value of that merchandise, such as embroidery or silk-screening, that ... makes that party subject to Article 12-A of the New York State Labor Law.”

Tailoring and alteration are exempt from registration because they are work on previously made garments that do not involve “production of anything new.” In contrast, if the operator “adds anything of value” to the garment, such as printing or embroidery on blank garments done on premises or by an outside contractor for sale by the operator, the operator is part of the production process and must be registered.

At Petitioners' request, Kalka held a compliance conference on September 4, 2008 where Petitioners could be heard why an Order to Comply should not be issued and penalties not imposed for their failure to register. Stukes and Odita appeared at the conference and stated they had been unaware that the registration requirement applied to their business. Kalka explained the law's requirement that the business register if there was “any amount of production” being done within the state regardless of the business' size.

On cross examination, Kalka was asked whether the hardships of the business were discussed at the compliance conference and responded that there was some discussion of Petitioners' business difficulties, “but at the time we weren't discussing a number on the fine because ... I was giving a window of opportunity for the party to come into compliance with the law in order to, perhaps, do a stipulated settlement thereafter.” Since Petitioners did not complete the registration process in a timely fashion, however, he was compelled to process the case for an Order to Comply.

A DOL report was admitted into evidence, summarizing the conference and DOL's investigation. Kalka stated in the report that: (1) the investigation revealed two people were employed and Petitioners' establishment occupied 500 square feet; (2) Petitioners' registration application was received on September 22, 2008 but was found incomplete; (3) DOL sent Petitioners follow up letters requesting FEIN and insurance coverage information but received no response; (4) Petitioners failed to complete the apparel registration process in a timely fashion; and (5) Petitioners failed to register for the years 2004 to 2007, operated their business without the proper apparel registration certificate from 1/15/08 to 10/10/08, and failed to comply with an OTR within 20 days. Citing the penalty criteria of Labor Law § 345.4(a), Kalka recommended that an \$800 penalty be imposed for Petitioners' failure to register and \$1,200 for their failure to comply with an OTR.

At the hearing, Kalka was asked by the Hearing Officer how the penalty criteria were applied to arrive at the specific fines in this case. Kalka said the recommended fines were

less than the maximum which could be imposed and generally took into account the business size, time in operation, and good faith efforts to come into compliance.

Based on DOL's investigation and the compliance conference report, the Commissioner issued the Order under review.

GOVERNING LAW

A. Standard of Review and Burden of Proof

The Labor Law provides that "any person ... may petition the board for a review of the validity or reasonableness of any ... order made by the [C]ommissioner under the provisions of this chapter" (Labor Law 101 § [1]). It also provides that an order of the Commissioner shall be presumed "valid" (Labor Law §103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an Order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101 [2]). It is a petitioner's burden at hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board's Rules of Procedure and Practice § 65.30; 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; *Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

It is therefore Petitioners' burden to prove by a preponderance of the evidence the allegations in the Petition that they were not an apparel "manufacturer" subject to registration and that the penalties imposed by the Commissioner for the violations are unreasonable (*Matter of Aldeen and Island Farm Meat Corp.*, PR 07-093 [May 20, 2009] [appeal pending]).

B. Article 12-A of the Labor Law

Article 12-A of the Labor Law requires all manufacturers and contractors engaged in the apparel industry to register with the Commissioner by January 15 every year (Labor Law § 341). Those who fail to register or who fail to comply with an order of the Commissioner to register are in violation of the statute (Labor Law §§ 345 [1] and [2]). The Commissioner, in her discretion, may assess a "civil penalty" for registration violations of up to \$1,500 for an initial violation, and up to \$3,000 for a second or subsequent violation (Labor Law § 345 [4] [a]). In applying such discretion the Commissioner must balance the following factors to determine the amount of the penalty.

Section 345.4 (a) provides:

"In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the manufacturer's or contractor's business, its good faith, the gravity of the violation, the history of previous violations of this article and the manufacturer's or

contractor's compliance with the recordkeeping or other provisions of this chapter."

A special task force is established within the DOL to concentrate enforcement of the Labor Law affecting production employees in the apparel industry (Labor Law § 342). On behalf of such employees, the task force is assigned duties to inspect manufacturers and contractors to insure compliance with registration requirements, the Labor Law, and orders of the Commissioner (Labor Law § 343), and is given powers to inspect books, records, and premises for compliance with payroll tax, building, health, and safety laws, and to refer violations to proper authorities (Labor Law § 344).

Labor Law § 340 (c) provides that the "apparel industry":

"shall mean the making, cutting, sewing, finishing, assembling, pressing or otherwise producing, by any of the foregoing industry services, any men's, women's, children's or infants' apparel, or a section or component of apparel, designed or intended to be worn by any individual which is to be sold or offered for sale, provided, however, that the apparel industry shall not include cleaning or tailoring after the apparel has been sold at retail."

Labor Law §§ 340 (d) and (f) define the "manufacturers" and "production employees" in the apparel industry:

"(d) 'Manufacturer' shall mean any person who (i) in fulfillment or anticipation of a wholesale purchase contract, contracts with a contractor to perform in New York state the cutting, sewing, finishing, assembling, pressing or otherwise producing any men's, women's, children's or infants' apparel, or a section or component of apparel, designed or intended to be worn by any individual which, pursuant to such contract, is to be sold or offered for sale to a retailer or other entity, or (ii) cuts, sews, finishes, assembles, presses or otherwise produces in New York state any men's, women's, children's or infants' apparel, or a section or a component, designed or intended to be worn by any individual which is to be sold or offered for sale; provided, however, that 'manufacturer' shall not mean a production employee employed for wages who does not employ others;

"(f) 'Production employees' shall mean persons who are employed by a contractor or manufacturer directly to perform the cutting, sewing, finishing, assembling, pressing or otherwise producing of any men's, women's, children's or infant's apparel, or a section or component of apparel, designed or intended to be worn by any individual which is to be sold or offered for sale ..."

FINDINGS

Petitioners Engaged In Apparel "Manufacturing" And Were Required To Register With The Commissioner

Based on the plain and clear meaning of Article 12-A, we find Petitioners were a "manufacturer" required to register with the Commissioner. While the majority of Petitioners' business may have been sale of finished garments on consignment for other designers, Petitioners acknowledged that a portion of their sales were of garments made on premises or by apparel contractors. The making of these garments clearly involves cutting, sewing, finishing, assembling or "otherwise producing" apparel or a "section or component of apparel" to be sold in the Boutique. That Petitioners' "creations" were not mass produced but were unique one-of-a-kind pieces does not exempt them from registration. Where Petitioners engage in any of the apparel making activities covered by the statute, either directly or by agreement with a contractor, and regardless of the scale of their operations, they must be registered.

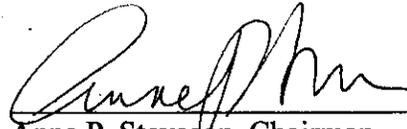
While we credit Stukes' testimony that Petitioners performed tailoring of garments, the statute provides that tailoring performed only *after* the garment is sold at retail are outside the scope of registration. Investigator Kalka credibly testified that such activities "do not produce anything new." In contrast, Petitioners' activities which "add anything of value" to the garment *before* it is sold are part of the production process and must be registered.

Based on the evidence submitted at hearing, we find the Commissioner's assessment of an \$800 penalty for Petitioners' failure to register (Count 1), and \$1,200 for their failure to comply with an order to register (Count 2), to be reasonable. Investigator Kalka testified that the penalties assessed were less than the maximum which could be imposed and took into account the size of the business, Petitioners' good faith efforts to come into compliance, and time in operation. Petitioners argue that the fines are now a hardship because the business is closed and they are not presently employed. We find, however, that the Commissioner duly considered the size of the business and Petitioners' economic circumstances at the time the investigation was concluded in setting the fines less than the maximum. Petitioners also argue they made an effort to comply but did not complete registration because they were going out of business. The registration requirement is effective on January 15 of every year, however, and Petitioners were advised in June, 2008 to register within 20 days or they may be assessed increased penalties for failure to register. While Petitioners did file their application in September, 2008 it was not complete at the time the Commissioner concluded the investigation. Petitioners remained unregistered for the entire year the business was in operation. Under the circumstances of this case, we find the penalties imposed for Petitioners' failure to register and failure to comply with an order to register reasonable.

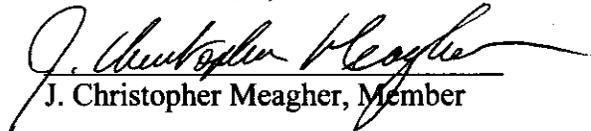
We therefore affirm the Commissioner's determination finding Petitioners to have violated Article 12-A by failing to register as an apparel "manufacturer" (Count 1), and to comply with an order to register (Count 2).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Article 12-A of the Labor Law, dated January 28, 2009, is hereby affirmed in all respects; and
2. The Petition is denied.



Anne P. Stevason, Chairman



J. Christopher Meagher, Member



Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
February 7, 2011.

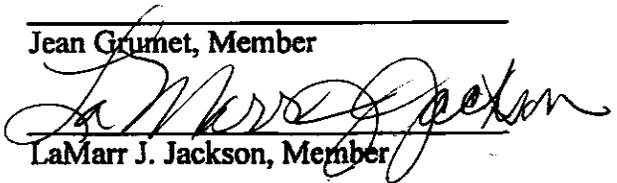
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