

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
PETULA GIANOPOULOS SIKIOTIS A/K/A	:
YIOTA P. SIKIOTIS,	:
	:
Petitioner,	:
	:
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 6 of the New York	:
State Labor Law and an Order to Comply with	:
Article 19 of the New York State Labor Law, both	:
dated May 20, 2011,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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DOCKET NO. PR 11-186

RESOLUTION OF DECISION

APPEARANCES

Petula Gianopoulos Sikiotis, petitioner *pro se*.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Benjamin A. Shaw and Matthew D. Robinson-Loffler of counsel), for respondent.

WITNESSES

Petula Gianopoulos Sikiotis, for petitioner.
Emilie Scarpelli, Roberto Ramos, Eusebio Arce, and Labor Standards Investigator Neil Benjamin, for respondent.

WHEREAS:

On June 20, 2011, Petitioner Petula Gianopoulos Sikiotis (petitioner or Sikiotis) filed a petition with the Industrial Board of Appeals (Board) to review orders to comply with Articles 6 and 19 of the New York State Labor Law issued against her on May 20, 2011 by respondent Commissioner of Labor (Commissioner, respondent, or DOL). The first order (wage order) directs payment of \$7,077.01 in wages due and owing to seven claimants: Eusobio Arce, Reginald Coaxum, Edvin Cruz, Francisco Molina-Velez, Carlos Monroy, Roberto Ramos and Emilie Scarpelli, for various periods from August 17, 2009 to January 10, 2010, together with \$1,769.27 in liquidated damages, \$1,923.58 in interest calculated to the date of the order, and a \$7,077.01 civil penalty, for a total amount due of \$17,846.87. The second order (minimum wage

order) directs payment of \$2,151.00 in minimum wages due and owing to three claimants: Abraham Cruz, Victor Flores, and Alberto Ortega, for various periods from December 27, 2009 to January 10, 2010, together with \$537.76 in liquidated damages, \$583.42 in interest calculated to the date of the order, and a \$2,151.00 civil penalty for a total amount due of \$5,423.18.¹

The petition alleges that Milton Rainford was the owner of Metro Grille, Yonkers, LLC (Metro Grille),² and that petitioner was an employee whose duties included faxing or calling in the payroll to the payroll company each week. Sikiotis filed an amended petition on September 19, 2011, alleging that petitioner was never a principal, owner, or officer of Metro Grille; that Milton Rainford and Metro Grille were the claimants' employers; that she was an employee who performed clerical duties and bookkeeping and maintained payroll and time records and had no authority to sign pay checks or disburse money. The respondent filed an answer on October 31, 2011. Upon notice to the parties, hearings were held in White Plains, New York on March 18, March 25, and April 1, 2014, before Jean Grumet, Esq., then Member of the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues.

SUMMARY OF EVIDENCE

Petitioner's evidence

Petitioner (Sikiotis) testified that Metro Grille was open for three or four years and that she was an employee for the last six or seven months before the business closed in January 2010. She was hired by Milton Rainford (Rainford) as "front of the house type manager" with duties that included ordering and purchasing food and liquor for the restaurant, as well as helping out "on the floor." Sikiotis testified that she did not have a job title, that she was not a manager and only worked part-time. According to Sikiotis, her hours varied, but she worked approximately from noon until 5:00 p.m. three or four days per week and earned \$10.00 per hour. Rainford signed employee paychecks. Sikiotis "probably" hired employees but she did not make any final decisions on hiring, and another manager named Vinny would interview the job candidate. Vinny or Rainford would make the final decision to hire. Sikiotis stated some employee paychecks were cashed in house at the employees' request because they did not have bank accounts and check cashing agencies charged a fee.

Respondent's evidence

Claimant Emilie Scarpelli testified that when she applied for a job at Metro Grille, Sikiotis interviewed her and "hired me on the spot." According to Scarpelli, "I even remember we sat down at the bar, [Sikiotis] said, 'Okay. Looks good. You just have to take out your earrings.'" Scarpelli came for training either later that day or the next day and was put on the schedule as a server. Vinny or Rainford never interviewed her. According to Scarpelli, there were three managers during the eight months that she was employed, and Sikiotis was the head

¹ Petitioner, however, did not attach a copy of the penalty order to her petition or to the amended petition, nor did she move to amend the petition to challenge the penalty order during the hearing, and therefore waived any challenge to the penalty order.

² Metro Grille Yonkers, LLC and Milton Rainford were also named in the orders to comply, but they did not file an appeal.

were three managers during the eight months that she was employed, and Sikiotis was the head manager. If Vinny could not resolve a problem, he would "tell us to go ask for Petula." Scarpelli stated that employees were paid by check but they were only allowed to cash the check in-house.

Scarpelli testified that she clocked in and received a time sheet which was supposed to correspond to her pay stub. However, when she received her pay stub, the hours listed on the stub did not correspond with her time sheets; there would be a different amount of hours on the pay stub than she actually worked. Scarpelli's claim form included copies of the time sheets and her pay stubs which showed the discrepancy. When she complained about the discrepancy in her wage stub to any of the managers, she was told "Talk to Petula... anytime there was a problem they couldn't handle, it was always, 'Talk to Petula.'" Scarpelli testified that other managers did not have authority to resolve issues regarding paychecks, and Scarpelli was told that she had to speak to Petula about "anything that had to do with time and money." Scarpelli testified that she worked afternoons and evenings, and Sikiotis would "hang around" and would sometimes leave at 6:00 or 7:00 p.m. and would also work in the restaurant on the weekends. Sikiotis worked until the beginning or middle of Scarpelli's shift. Scarpelli testified that Sikiotis worked at least 4 or 5 days per week, and she would see her at least part of the day on most days.

According to Scarpelli, Rainford did not appear to have any authority over the employees, and the word of mouth in the restaurant was that Rainford was just a financial backer. Rainford "would come and visit" but anytime workers complained to him, it did not appear that he had the authority to resolve their complaints. "He just came in, said hello, looked around, that's all. He never ordered anyone to do anything; we never got orders from him; he never set up the schedule; he never even gave us our checks." Rainford never gave out paychecks, and never set up employee schedules. If liquor or food was running out, either Sikiotis would go out to buy it, or she would send Vinny.

Claimant Roberto Ramos testified that when he applied for a job at Metro Grille, he was told that he had to speak to Petula. He returned the following day, and Sikiotis hired him immediately, told him he would be paid \$10.00 per hour, and gave him his schedule. Ramos testified that Sikiotis represented herself as the boss to other employees. When asked to whom Sikiotis reported, Ramos replied "She was the boss." After not being paid for three weeks, Ramos complained to Sikiotis, who assured him that she was going to pay him on Wednesday. When he went to get his pay, the restaurant had closed.

Claimant Eusebio Arce testified that he has worked with Sikiotis' family since 2001, when he was hired by Bennigan's, which was owned by members of Sikiotis' family. During his employment at Bennigan's he was a floor manager who gave servers and bartenders their sections for the night. According to Arce, Bennigan's closed down and employees were told that the company was going to reopen in a month, and Bennigan's reopened as Metro Grille and the Bennigan's employees were hired back. Sikiotis became involved in Bennigan's towards the very end and until they closed because two of her brothers went to jail and Sikiotis "stepped in" because they had no one else to run the business. Bennigan's was a franchise, and the whole corporation was going under. Sikiotis and her family decided to continue with the name until one day they came to work and the doors were bolted by marshals. This resulted in a lapse of one to two months when the restaurant was closed. The employees remained in contact with Sikiotis' brother, Tom, who told them to wait around because the restaurant was going to reopen

as Metro Grille. One to two months later, the restaurant reopened as Metro Grille.

At Metro Grille, Arce worked evenings six to seven nights a week as a bartender and server, and occasionally did hosting. Sikiotis moved him from position to position. Sikiotis was the general manager of Metro Grille throughout the time that it operated. Arce answered to her, and she was "like our general boss, general manager." She was the only person in overall charge of the restaurant on a day-to-day basis during the relevant period. Sikiotis was at the restaurant throughout the day, and on some occasions, she closed the restaurant. She hired and fired employees, set their schedules, gave instructions, and told employees what stations they would be working at and who would be bartending that night. Arce called Sikiotis if he was late, sick, or needed a day off. He gave his timecards to Sikiotis. She gave him his check and cashed it for him. Sikiotis fired an employee named Jose Bonilla, and disciplined employees including Patricia Porcetti and an employee named Joy. Sikiotis took away employee privileges. If Patty or Arce were working at the bar, she would make them work on the floor as waiters instead. This would occur for a shift or for a week. According to Arce, Rainford visited the restaurant "maybe once a week, maybe, if that" but he never supervised or paid employees, although his signature was on the paychecks.

Arce testified that he received checks for some wages during the relevant period, but the checks bounced. None of the local banks would accept Metro Grille's checks, so employees would sign their checks over to the restaurant and receive cash. Sikiotis was the only one who handed Arce his paycheck, and the manager on duty would cash the check. Arce never received payment for three checks listed on his claim.

Arce testified that in 2012, he called Sikiotis to ask for a job reference, and she responded that she would give him the reference on the condition that he not testify at the hearing.

Labor Standards Investigator Neil Benjamin testified regarding DOL's investigation of this matter. He identified ten sworn claims for unpaid wages and failure to pay minimum wage that were part of the investigative file. Benjamin interviewed two claimants, Scarpelli and Reginald Coaxum, who stated that Sikiotis was the manager they dealt with on a daily basis, that she gave them their work instructions and paid them. Both Scarpelli and Coaxum were very specific about Sikiotis' authority, and Benjamin concluded that Sikiotis was an employer based on these interviews and the fact that all ten claimants named Sikiotis as the responsible person.

Rebuttal

On rebuttal, petitioner stated that she was never employed by or worked at Bennigan's; that she did not know who owned Bennigan's; and that her brothers' involvement with Bennigan's was irrelevant. She denied that she ever stayed until closing time at Metro Grille where, she variously testified, she worked from 10 to 2, 11 to 4, or until "like 7, 8:00 at night, and then I would have to be home if my mother had picked up my daughter or something." Sikiotis testified that, as a single mother of three young children living in Stamford, Connecticut, she needed to be and always was home when the school bus brought them home; as a result, she worked very few hours at the restaurant.

According to Sikiotis, Rainford hired job applicants when he was there; he came in about four days a week because he also had another business in the Bronx. George, who was a floor

manager and in charge of most restaurant closings, also hired workers, and there were “managers that ran the store, supervisors. I was not there.” Petitioner testified that she did not have access to payroll records or the office safe. The payroll company delivered paychecks and “all the managers...like six of us” could hand workers their checks. Most employees deposited their check in the bank. The restaurant would not have had enough cash on hand to pay all employees. Petitioner testified that “I was never authorized to pay unless they said that their pay – ,” and did not complete the sentence.

Sikiotis testified that employees reported to Rainford or when he was not there to a general manager, Tom. Petitioner did scheduling and ordering of supplies but was not a manager. She only worked part-time during the last seven or eight months of Metro Grille’s operation; most claimants were hired two years or more before she even worked there. Nor did petitioner even know in advance of the restaurant’s closing; she, too, did not receive her two last paychecks.

STANDARD OF REVIEW

In general, when a petition is filed, the Board reviews whether the Commissioner’s order is valid and reasonable. The petition must specify the order “proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections ... not raised in [the petition] shall be deemed waived” (Labor Law § 101). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103).

Pursuant to the Board Rules of Procedure and Practice (Rules) 65.30 (12 NYCRR 65.30): “The burden of proof of every allegation in a proceeding shall be upon the person asserting it.” Therefore, the burden is on the petitioner to prove by a preponderance of the evidence that the orders are not valid or reasonable (*see also* State Administrative Procedures Act § 306).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.39 (NYCRR 65.39).

Employer Status

The threshold issue to be determined is whether petitioner was an employer of the claimants within the meaning of the New York Labor Law.

Labor Law § 190 defines the term “employer” as including “any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service” (Labor Law § 190 [3]). An “employee” is described in the statute as “any person employed for hire by an employer in any employment” (Labor Law § 190 [2]). Furthermore, to be “employed” means that a person is “permitted or suffered to work” (Labor Law § 2 [7]).

Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines “employ” to include “suffer or permit to work” (29 U.S.C. § 230 [g]), and it is well settled that “the test for determining whether an entity or person is an ‘employer’ under the New York Labor

Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act” (*Chung v The New Silver Palace Rest., Inc.*, 272 FSupp2d 314, 319 n6 [SDNY 2003]). In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999], the Second Circuit Court of Appeals explained the test used for determining employer status:

“[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the ‘economic reality’ presented by the facts of each case. Under the ‘economic reality’ test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records” (internal quotations and citations omitted).

No one of these factors is dispositive; the purpose of examining them is to determine economic reality based on a “totality of circumstances” (*Id.*). Under the broad New York and FLSA definitions of “employer,” more than one entity can be found to be an employee’s employer. (*Zheng v. Liberty Apparel Co.*, 355 F3d 61 [2d Cir 2003]; *Matter of Robert Lovinger and Miriam Lovinger and Edge Solutions, Inc.*, PR 08-059 [Mar. 24, 2010] *Matter of Muna Gowandan*, PR 12-016 [Aug. 7, 2014]). An individual who “hired and fired employees, supervised and controlled employees’ work schedules, determined the method and rate of pay, kept employment records, and approved any vacations” can be personally liable as an employer under Article 6 of the Labor Law. (*Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 626 [1st Dept 2013]). Under Labor Law §2(6), the term “employer” is not limited to the owners or proprietors of a business, but also includes any agents, managers, supervisors and subordinates, as well as any other person or entity acting in such capacity. *Matter of Ira Holm and RSI Inc. and Midland Ave. Corp.*, PR 08-025, [December 17, 2008]. The Board has found individuals to be employers if they possess the requisite authority over employees (*see e.g. Matter of Robert H. Minkel and Millwork Distributors, Inc.*, PR 08-158 [January 27, 2010]; *Matter of Ira Holm, supra*, PR 08-025, [December 17, 2008]; *Matter of Michael Caruso*, PR 11-040 [Aug. 7, 2014]).

We find that the credible record evidence amply demonstrates that Sikiotis was the claimants’ employer. Sikiotis hired and fired employees, supervised and controlled their schedules, disciplined employees and controlled their conditions of employment, determined their rate and method of payment, docked their salary, and maintained employee records. Sikiotis’ testimony that she was not an employer was shifting and evasive and replete with contradictions, while the testimony of claimants Arce, Scarpelli and Ramos was consistent and credible and was corroborated by seven additional sworn claims.

Sikiotis testified that she worked on a part-time basis and portrayed her main duties as ordering food, liquor and supplies, and admitted that she also “did schedules, things like that, ran the floor, helped out on the floor.” Petitioner claimed that Rainford, was in overall charge of the restaurant, hired employees, and was on the premises four days per week. We credit the testimony of Arce that Rainford was present at most, once a week, never supervised employees, and was understood to be a “silent partner” as well as the testimony of Scarpelli that Rainford did not appear to have authority over the employees and was understood to be merely a financial

backer. "He came in to say hello" but never gave orders, never set schedules, and never gave out checks.

Petitioner's claim to be a short-term, part-time employee with limited responsibility was also undermined by other credible evidence. For example, Arce testified that he began working at the restaurant in 2001 when it operated as Bennigan's; that he continued working for Metro Grille when the restaurant reopened under that name because "[y]ou guys [from Bennigan's]... told us that you were going to reopen in a month and just gave us our jobs back;" and that while Sikiotis became involved in Bennigan's only towards the end, when her brothers went to jail and there was no one else to run the business, she was the manager at Metro Grille throughout its existence, and no one else was in overall control on a day-to-day basis. Sikiotis "acted like a manager, like an owner. [She] was running that place." While Bennigan's had several managers with distinct duties, Arce credibly testified that at Metro Grille "just Petula" ran the store with duties including "scheduling, hiring, firing;" she was the person Arce spoke to if he needed to take a day off, and he called her if he was late or out sick. Sikiotis fired one employee and disciplined at least two others, took away employee privileges, and moved employees from job to job, for example from bartender or server to host and bartender to server, which affected the amount of tips they would receive. Scarpelli credibly testified that while there were three managers during her eight months of work, petitioner "was the head one. Like if, say, Vinny... couldn't help us, he'd tell us to go ask for Petula." Sikiotis incredibly testified that she did not know who owned Bennigan's, and refused to answer any questions about Bennigan's or her family's involvement that led to hers.

Sikiotis testified that she "probably" hired employees, but claimed that Vinny or Rainford, who made the final decision on hiring, subsequently interviewed all applicants. Scarpelli, however, credibly testified that Sikiotis interviewed her and "hired me on the spot" and told her to remove her earrings. Likewise, Ramos credibly testified that when he sought work at the restaurant, he was told to speak to Sikiotis, who inquired about his social security card and immediately hired him and informed him of his schedule and his rate of pay. Five sworn claims listed petitioner as the person who hired them, and all ten claims listed petitioner as "superintendent, manager or foreman," one of the firm's "responsible persons," or both.

Credible evidence also undermined petitioner's claim that she had no role in paying workers. Scarpelli testified that only Sikiotis had authority "to fix anything time-wise or with checks" and when Scarpelli found discrepancies between hours listed in her pay stub and those reflected in her time sheet, she discussed them with Sikiotis. If Sikiotis was not in, she would speak to Vinny, Anna, George or the petitioner's father, but "was always told to go to [Sikiotis]." Ramos testified that when he wasn't paid for three weeks, he talked to Sikiotis, who assured him that she would pay him the following Wednesday. Sikiotis herself testified, without completing the sentence, that "I was never authorized to pay unless they said that their pay - ." Sikiotis also testified that she had no responsibilities with respect to payroll, directly contradicting the averments in her petition and amended petition that: "I faxed in the payroll to the payroll company or called it in on a weekly basis," and "My duties included maintaining payroll records and time."

Petitioner provided shifting testimony about her hours worked at the restaurant. She variously testified that she worked from noon to 5 p.m. three to four days a week, then claimed she worked two days, sometimes three. She testified that she never worked evenings or

weekends, and that she was always home when the school bus brought her children home; as a result, she worked very few hours at the restaurant. She later testified that she sometimes worked until “like 7, 8:00 at night, and then I would have to be home if my mother had picked up my daughter or something.” Scarpelli, who mostly worked the evening shift, but was there some afternoons, testified that petitioner often left at 6 or 7 p.m. and would be at the restaurant even on weekends.

In light of petitioner’s shifting and evasive testimony, the credible testimony of several witnesses that Sikiotis was the person in charge of the restaurant during the relevant period despite her denials, the sheer number of claimants identifying her as such, and other factors discussed above, we credit the claimants’ and not petitioner’s account of her employer status.

Based on the facts established by the record and applicable law, it was reasonable and valid to deem petitioner an employer of the claimants. Sikiotis clearly satisfied each of the specific factors listed in *Herman*: she had the power to hire and fire employees, supervised and controlled employee work schedules or conditions of employment, determined the rate and method of payment, and maintained employee records. The totality of circumstances including claimants’ understanding of petitioner’s role as well as her family’s involvement in the restaurant further indicate that in economic reality her power and responsibility were not limited as she claimed, but were that of an employer.

The Wage Order and the Minimum Wage Order are Affirmed

The petition did not contest the wages found to be due in either the wage order or the minimum wage order. We find that the calculations made by the Commissioner in both orders were valid and reasonable in all respects and we affirm both orders.

Liquidated Damages and Civil Penalty

Labor Law § 198[1-a],³ in effect during the relevant period, allowed the Commissioner to collect liquidated damages in the amount of 25% of the underpaid wages unless the petitioner could prove she had a good faith basis to believe that the underpayment was in compliance with the law. We credit Arce’s testimony that when he called Sikiotis for a job reference in 2012, Sikiotis stated that she would give him the reference if he did not testify at the hearing, and we find that Sikiotis failed to prove she had a good faith basis to believe that the underpayment was in compliance with the law. We, therefore, affirm the liquidated damages.

Labor Law § 218[1] provided that in a willful or egregious case the Commissioner must impose a civil penalty of double the total amount found due, and in other cases the appropriate civil penalty giving “due consideration to the size of the employer’s business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements.” The orders on appeal imposed 25% liquidated damages and 100% civil penalties based on the statutory factors. The Board finds that the computations the Commissioner made in imposing the liquidated damages and civil penalties are valid and reasonable in all respects.

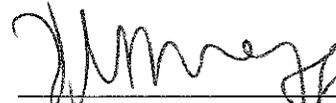
³ Effective April 9, 2011, liquidated damages are up to 100 % of the underpayment.

Interest

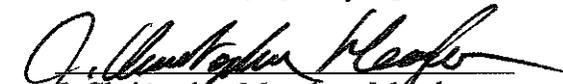
Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include “interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment. Banking Law section 14-A sets the “maximum rate of interest” at “sixteen percent per centum per annum.”

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

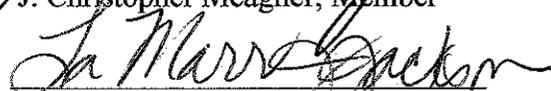
1. The wage order is affirmed; and
2. The minimum wage order is affirmed; and
3. The petition is hereby denied.



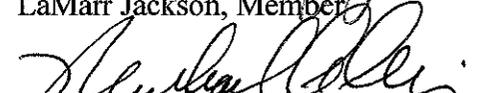
Vilda Vera Mayuga, Chairperson



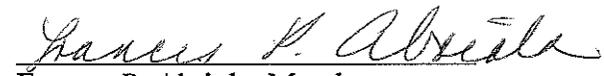
J. Christopher Meagher, Member



LaMarr Jackson, Member



Michael A. Arcuri, Member



Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
September 24, 2014.