

Upon notice to the parties, hearings were held in this matter on July 16, October 23, and December 11, 2014, and on May 19, 2015, in New York, New York, before Devin A. Rice, Deputy Counsel to 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, make statements relevant to the issues, and to file legal briefs.

The order to comply with Article 19 of the Labor Law (minimum wage order) under review directs compliance with Article 19 and payment to the Commissioner for unpaid minimum wages due and owing to six named claimants for the time period from March 18, 2009 to March 5, 2010 in the amount of \$41,863.84, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$23,686.30, 25% liquidated damages in the amount of \$10,465.95, and assesses a 100% civil penalty in the amount of \$41,863.84, for a total amount due of \$117,879.93.

The order to comply with Article 6 of the Labor Law (unpaid wages order) under review directs compliance with Article 6 and payment to the Commissioner for unpaid wages due and owing to two named claimants for the time period from March 18, 2009 to March 5, 2010 in the amount of \$3,155.60, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$1,807.17, 25% liquidated damages in the amount of \$788.90, and assesses a 100% civil penalty in the amount of \$3,155.60, for a total amount due of \$8,907.27.

The order under Articles 5 and 19 of the Labor Law (penalty order) assesses a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about January 3, 2008 through March 6, 2010; a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.2 by failing to give each employee a complete wage statement with each payment of wages from on or about January 3, 2008 through March 6, 2010; and a \$1,000.00 civil penalty for violating Labor Law § 162 by failing to provide employees with at least thirty minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period from eleven o'clock in the morning to two o'clock in the afternoon from on or about March 18, 2009 through March 5, 2010, for a total amount due of \$3,000.00.

The individual petitioner, Dimitrios Gatanas, alleges that he was a member of 303 FD 149, LLC, which operated a pizzeria in New York, New York doing business as Tito's Pizzeria, and that as a member of the LLC that employed the claimants he is not individually liable as an employer under Articles 5, 6, and 19 of the Labor Law for the wages, interest, and penalties found due and owing by the orders under review, because he did not have responsibility within the LLC for employment matters.

SUMMARY OF EVIDENCE

Testimony of Dimitrios Gatanas

Petitioner Gatanas testified that he was an owner and member of 303 FD 149, LLC along with Aspasia Gatanas and Alexander Gatanas. 303 FD 149, LLC purchased and operated a pizzeria in New York, New York trading as Tito's Pizzeria. Gatanas testified that his primary role in the LLC's operation of the pizzeria was to handle corporate and administrative matters

such as marketing and licensing. Gatanas testified that he did not supervise, pay, or interact with the employees of Tito's Pizzeria except to inspect the business from time to time. Gatanas testified that the LLC hired managers to run the pizzeria's daily operations and that Gatanas' father dealt with any day to day concerns the managers may have had relating to employees.

Gatanas testified that his duties included hiring a certified public accountant to apply for a DBA certificate for the LLC, preparing the Department of Health application, working with a State Liquor Authority expediter to obtain an alcoholic beverage permit, communicating with the accountant about sales and quarterly tax filings, hiring insurers, negotiating the lease, dealing with the landlord, handling City code violations, and creating the pizzeria's name and designing its logo.

Testimony of Andres Larrazabal-Ramirez

Andres Larrazabal-Ramirez a/k/a Rodolfo A. Ramirez filed claims with DOL against Tito's Pizzeria on August 3, 2009 and March 22, 2010.¹ The minimum wage/overtime claim of August 3, 2009, which he filed as Rodolfo A. Ramirez, alleges he worked as a pizzaiolo at Tito's Pizzeria from January 3, 2008 to August 5, 2009 when he was discharged for lack of work. The claim alleges that for the entire claim period Ramirez worked seven days a week from 10:00 a.m. to 9:00 p.m. with no time for meals, and that his weekly salary was \$450.00. The claim lists "Pedro" as the manager and supervisor, and names "Dimitrius" as the owner. On March 22, 2010 Ramirez filed two claims under the name Andres R. Larrazabal-Ramirez. The first claim is for minimum wage/overtime, the second claim is for unpaid wages. Both claims allege that Ramirez worked at Tito's Pizzeria from November 2, 2009 to March 5, 2010, when he was discharged because the business relocated, that he worked 10:00 a.m. to 8:00 p.m. on Sunday and 9:00 a.m. to 7:00 p.m. Monday through Saturday with a 15 minute meal period per day. Both claims name Manny Manuel Rosario as "owner" and supervisor. The claim for unpaid wages alleges that Ramirez was not paid wages from February 14, 2010 to March 6, 2010 and that when he requested his wages from Manny Manuel Rosario, Rosario promised to pay him.

Ramirez testified that the information on his claim forms is correct, and explained that he was already working at Tito's Pizzeria when petitioner purchased the business from the prior owner. When the ownership changed in 2008, the prior management notified the employees that there would be new bosses – petitioner, Nick Gatanas, and Jimmy Gatanas. Ramirez testified that his work was supervised by petitioner's uncle, Jimmy Gatanas, and that petitioner was present no more than two to three hours a week to "supervise, to see what things were in supply, which things were out of supply, to check on things – only to check on things." Ramirez testified that when petitioner was present they would greet each other and petitioner would "explain how to do different jobs." However, he also testified that all of his job duties had been shown to him by the prior management before the change in ownership, so he already knew how to do the job when petitioner became an owner and received no additional directions. Ramirez later testified that petitioner was present two to three days a week, "not long, one hour, two hours," and that when petitioner was at the pizzeria he was "supervising, making sure everything was going well, the customers were being attended to properly" and telling the employees to "give good customer service."

¹ Ramirez explained that he used the name on his identification, which was incorrect, and when he eventually corrected his identification, he filed the second claim form under his correct name. He also explained that he filed two claims because the pizzeria closed and then reopened.

Ramirez testified that he worked for three different managers at Tito's Pizzeria – Jimmy Gatanas, Pedro, and Manny Manuel. Ramirez testified that his pay rate was originally negotiated by Jimmy Gatanas, and that he was paid by Jimmy Gatanas, and after Jimmy left, by Manny. If Ramirez wanted to take time off, he needed to ask Jimmy for approval. According to Ramirez, his weekly salary was raised in 2009 by Manny to \$550.00. Ramirez testified that Manny told him petitioner was “in agreement.”

Testimony of Alejandro Antemate-Cocuyo

Alejandro Antemate-Cocuyo filed claims for unpaid wages and minimum wages and overtime with DOL on August 3, 2009. The claims allege he worked at Tito's Pizzeria as a cook from March 18, 2009² and was still employed by Tito's at the time of his claims. Cocuyo's claims list Pedro as manager and supervisor and “Dimitrius” as owner. The claims allege Cocuyo worked 56 hours a week for \$9.00 an hour with no overtime pay, and that Tito's paid him no wages for the period from June 28, 2009 to July 25, 2009. According to the claims, Cocuyo demanded his wages from Hardath Singh a/k/a Pedro, who told him “there was no money.”

Cocuyo testified that prior to working at Tito's he knew Singh and petitioner because he was working at another restaurant owned by petitioner. Singh “took” Cocuyo to work at Tito's in June 2009. Cocuyo testified that petitioner told him what work to do at the pizzeria [on the first day], and said nothing further; however, Cocuyo also testified that he was hired by Singh, his rate of pay was set by Singh, his work was supervised by Singh and Manny, and he was “directed” by petitioner and sometimes Manny.

Cocuyo said that petitioner was present at Tito's three to four times a week for two to three hours at a time. While at Tito's, petitioner supervised that everything was under control and running well, checked to make sure the pizza was good quality, made sure the money in the cash register was correct, and “acted like the boss.”

Testimony of Labor Standards Investigator Julio Rodriguez

Labor Standards Investigator Julio Rodriguez testified that he was the lead investigator in this matter after DOL received claims of wage violations from employees of Tito's Pizzeria. Rodriguez testified that after receiving the claims, he made a field visit to the location of the pizzeria on October 14, 2011, and discovered the pizzeria was no longer in business. Rodriguez testified that his contact with the employer in this matter was with petitioner, who was identified by some of the claimants as the owner of Tito's Pizzeria. Rodriguez also found other individuals responsible for the alleged unpaid wages and issued letters to them as well as petitioner for the production of payroll records. No payroll records were ever produced to DOL during the course of its investigation of Tito's, although petitioner represented that he had access to the records.

Rodriguez testified that based on the claims and the failure of the employers to produce payroll records, DOL issued a notice of violation to petitioner and the other individuals and entities named in the orders under review. Petitioner responded that the records were not available to him because of a dispute with the accountant who had possession of them.

² Cocuyo testified that the claim form is incorrect. He did not start working at Tito's until June 2009.

Rodriguez testified that eventually some records were submitted to a Senior Labor Standards Investigator. The records provided did not contain all the information required by law. Because no satisfactory records were ever produced, DOL used the information from the claim forms to determine the amount of wages owed to the claimants.

Rodriguez testified that during the investigation, he never spoke to any of the claimants except one phone call to one claimant to verify his period of employment. He also testified the claims were not signed in his presence.

Rodriguez testified that DOL determined based on information provided by the claimants and from state and city records that petitioner, Manuel Rosario, Hardath Singh, and 303 FD 149, LLC were the responsible parties for the unpaid wages. With respect to petitioner, Rodriguez testified that he had a conversation with one claimant who told him petitioner supervised his work and was involved in operating the company, and that the claimants mentioned petitioner as an owner. Rodriguez further testified that his investigation had identified petitioner as an officer of the company.

ANALYSIS

Petitioner was not an employer

The Board makes the following findings of fact and conclusions of law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39).

Petitioner alleges that he is not individually liable as an employer. We find that petitioner met his burden of proof to establish that he was not the claimants' employer during the time period relevant to the orders (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30 [petitioners must prove by a preponderance of the evidence that the order is invalid or unreasonable]).

"Employer" as used in Articles 6 and 19 of the Labor Law means "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]; *see also* Labor Law § 651 [6]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and "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" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 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 stated that the test used for determining employer status by explaining that:

"Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the 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 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).

When applying this test, “no one of the four factors standing alone is dispositive. Instead the ‘economic reality’ test encompasses the totality of the circumstances, no one of which is exclusive.” (*Id.* [internal citations omitted]). A corporate officer who does not have direct control over employees may be individually liable as an employer for unpaid wages if he actually exercises operational control over the daily operation of the business (*Copantila v Fiskardo Estiatorio, Inc.*, 788 FSupp2d 253, 310-11 [SDNY 2011]; *cf. Coley v Vanguard Urban Improvement Assn, Inc.*, 2014 U.S. Dist. LEXIS 135608 * 9 [EDNY 2014] [individual must possess control over a company’s actual operations in a way that relates to employment to be found liable as an employer]). We find that petitioner did not exercise sufficient operational control over the business to satisfy this test.

Petitioner credibly testified that he did not supervise, pay, or interact with the employees of Tito’s Pizzeria except to inspect the business from time to time, and that his role in the LLC was limited to handling corporate and marketing matters. Respondent’s evidence, which consisted mainly of Ramirez and Cocuyo’s subjective belief about petitioner’s role and status at the pizzeria was not sufficient to rebut petitioner’s testimony. Ramirez and Cocuyo each testified that petitioner spent little time at the pizzeria. Ramirez explained that petitioner was only present a few hours a week to check on things, including surveying the supplies and making sure customers were being taken care of, and provided vague testimony that petitioner showed him at some time how to do different tasks, which he contradicted by also testifying that he already knew how to do the work when petitioner became an owner and received no further instructions. Cocuyo’s testimony was similar. He offered vague testimony that petitioner “acted like the boss” and “directed” his work, which he contradicted by also testifying that petitioner did not speak to him further after his first day working at Tito’s. Cocuyo described petitioner’s role at the pizzeria as making sure things were running well, and checking the cash register and quality of the pizza.

Respondent’s evidence that petitioner may have directed employees to carry out tasks related to customer service, was sometimes present at the pizzeria, and that employees believed he was the owner or boss, does not rise to the level of operational control necessary to hold petitioner individually liable as an employer (*Salinas v Starjem Restaurant Corp.*, 2015 U.S. Dist. LEXIS 106154 *52-53 [SDNY 2015]) in the absence of any evidence that petitioner hired or fired employees, or had the authority to do so whether exercised or not, supervised and controlled employees’ work schedules, determined rates and methods of employees’ wages, paid employees, or maintained employment records. Petitioner’s status as a member of the LLC absent evidence of control over employment matters is not sufficient to render him liable as an employer (*Copantila*, 788 FSupp2d at 311; *Sexton v American Golf Corp.*, 25 Wage & Hour Cas. 2d [BNA] 1199 [EDNY 2015]; *Salinas*, 2015 U.S. Dist. LEXIS at *52). Significantly, Ramirez and Cocuyo each testified that they were hired, supervised, had their pay rates set by and were paid by individuals other than petitioner, and they had no direct knowledge that he was involved in these decisions. The record shows petitioner had a limited personal role in the business, and did not “run the show” and, therefore, the facts of this case do not amount to operational control (*Kim v 511 E. 5th Street LLC*, 2014 U.S. Dist. LEXIS 135337 *27-28 [SDNY

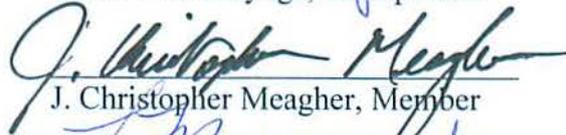
2015)). Because we find petitioner was not an employer under the Labor Law, the orders are unreasonable and must be revoked with respect to petitioner.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

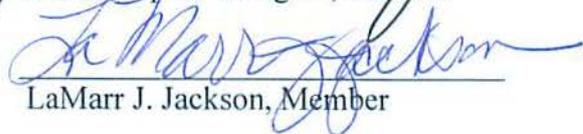
1. The minimum wage order is revoked with respect to Dimitrios Gatanas only; and
2. The unpaid wages order is revoked with respect to Dimitrios Gatanas only; and
3. The penalty order is revoked with respect to Dimitrios Gatanas only; and
4. The petition for review be, and the same hereby is, granted.



Vilda Vera Mayuga, Chairperson



J. Christopher Meagher, Member



LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
March 2, 2016.

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