STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
GARY HSIN LIANG A/K/A GARY LIANG AND HAPPY LEMON INC.,	:	
Petitioners,	:	DOCKET NO. PR 14-061
To Review Under Section 101 of the Labor Law: An Order Under Article 7 of the Labor Law, dated February 14, 2014;	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent,	:	

APPEARANCES

Wang Law Office, PLLC (William R. Stoltz of counsel), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for respondent.

WITNESSES

Senior Labor Standards Investigator Guangming Liu for petitioners.

Assistant Director of Labor Standards Maritza Lamboy for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on March 25, 2014 and seeks review of an order issued under Article 7 of the Labor Law against Gary Hsin Liang and Happy Lemon Inc. on February 14, 2014. Respondent Commissioner of Labor filed an answer to the petition on May 20, 2014.

Upon notice to the parties a hearing was held in this matter on May 26, 2015, in New York, New York, before J. Christopher Meagher, 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, make statements relevant to the issues raised in the proceeding, and to file post-hearing legal briefs.

The order under Article 7 assesses petitioners "Civil Penalties" of $10,000.00 because "said employer violated" Labor Law § 215 (1) (a) by retaliating against claimant Xiang Dong Guo by instituting a civil suit against him just prior to a Board proceeding in which he was to testify in a wage claim case against his employer (Count 1), and $10,000.00 because "said employer violated" Labor Law § 215 (1) (b) by retaliating against claimant by instituting a civil suit against him just prior to the same Board proceeding (Count 2).[1] The total amount due is $20,000.00.

The petition alleged that the order is invalid or unreasonable because: (1) respondent failed to cite valid statutory violations and correct civil penalty amounts in the initial order, therefore failing to afford petitioners proper notice; (2) the order imposes the same civil penalty twice for identical counts, therefore exceeding the $10,000.00 maximum civil penalty for violating Labor Law § 215; (3) claimant was not an employee of petitioners; and (4) respondent did not conduct a proper investigation of the alleged retaliation by petitioners against claimant.

We find, as discussed below, that respondent's determination finding that petitioners retaliated against claimant by filing a lawsuit against him is reasonable, but modify the order to reduce the civil penalties from $20,000.00 to $10,000.00.

PROCEDURAL HISTORY

On June 17, 2011, petitioners filed a petition with the Board seeking review of two orders issued against them by respondent on May 11, 2011. The orders were the result of respondent's investigation of a minimum wage claim filed against petitioners by claimant Xiang Dong Guo. A hearing was held on August 20, 2013, and on August 7, 2014, we issued a decision affirming the orders (*Matter of Gary Hsin Liang*, PR 11-184 [August 7, 2014]).

On August 19, 2013, one day before the hearing on the petition for review of the orders stemming from claimant's minimum wage claim, petitioners filed a lawsuit in Supreme Court, Queens County, alleging as a cause of action that claimant breached a fiduciary duty to petitioners by filing a claim against petitioners with respondent. The lawsuit was dismissed on December 17, 2014 for failure to properly serve the summons and complaint on claimant (*Happy Lemon Inc. v Guo*, Sup Ct, Queens County, December 17, 2014, Livote, J., index No. 703451/13).

SUMMARY OF EVIDENCE

Senior Labor Standards Investigator Guangming Liu, called by petitioners as their only witness, testified that respondent issued the order under review against petitioners because petitioners did not respond to correspondence sent to them by the Department of Labor (DOL) concerning allegations of retaliation against claimant by filing a lawsuit against him. The referral to issue an order against petitioners was based on what DOL knew about petitioners' actions in filing the suit at the time and what had been discussed by DOL investigators and Assistant Director of Labor Standards Maritza Lamboy. Liu testified that he recommended the penalties in the order based on conversations with Lamboy, and that he believed petitioners' actions were egregious,

[1] On consent of petitioners, respondent amended the order at hearing to correct typographical errors that had named the sections of law violated as Labor Law § 215 (a) (Count 1) and Labor Law § 215 (b) (Count 2), which should have read Labor Law § 215 (1) (a) and Labor Law § 215 (1) (b) respectively.

explaining that "all retaliation cases . . . are severe cases, so that's why we normally [impose a] $10,000.00 penalty."

Assistant Director of Labor Standards Maritza Lamboy, called by respondent as her only witness, testified that she became involved in this matter when a DOL attorney handling a case before the Board involving petitioners informed her that DOL needed to "do a retaliation case" because petitioners were trying to stop witnesses from coming forward. Lamboy testified that she decided to issue the order because petitioners were trying to deter witnesses from testifying against them at the Board hearing by filing a lawsuit against claimant so close to the time of the Board hearing on claimant's wage claim. Lamboy explained that "the Department feels that retaliation is an egregious matter and we always, usually unless the employer shows good faith, we usually give the maximum [civil penalty] of $10,000.00." In this case, Lamboy believed the violation was egregious "because it was stopping a witness [claimant] from coming forward . . . we felt that because of the timing, that the employer was acting in a retaliatory manner."

Lamboy further testified that a DOL attorney told her claimant received the lawsuit the day before the Board hearing on his wage claim, but does not recall whether the witness, who did not appear at the hearing, ever said he did not appear because of the lawsuit. The decision dismissing the lawsuit, however, indicates that the summons and complaint was never served on claimant and that service was attempted after the date of the Board hearing. Petitioners' counsel stipulated at hearing that the lawsuit was filed with the court by electronic filing on August 19, 2013.

LEGAL AUTHORITY

Labor Law § 215 (1) (a) in relevant part provides:

> "No employer . . . shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee (i) because such employee has made a complaint . . . to the commissioner or his or her authorized representative . . . that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of [the Labor Law]."

Labor Law § 215 (1) (b) in relevant part provides:

> "If after investigation the commissioner finds that an employer or person has violated any provision of this section, the commissioner may, by an order which shall describe particularly the nature of the violation, asses the employer or person a civil penalty of not less than one thousand nor more than ten thousand dollars provided, however, that if the commissioner finds that the employer has violated the provisions of this section in the preceding six years, he or she may assess a civil penalty of not less than one thousand nor more than twenty thousand dollars. The commissioner may also order all appropriate relief including . . . ordering payment of liquidated damages to the employee by the person or entity in

> violation . . . . Liquidated damages shall be calculated as an amount not more than twenty thousand dollars."

The federal Fair Labor Standards Act (FLSA) at 29 USC § 215 (a) (3) provides that it shall be unlawful for any person "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [FLSA] or has testified or is about to testify in any such proceeding."

Because the language of the Labor Law's anti-retaliation provisions are nearly identical to the anti-retaliation provisions of FLSA, the elements of a retaliation claim are the same under federal and New York law (*Torres v Gristedes Operating Corp.*, 628 FSupp2d 447, 477 n18 [SDNY 2008]; *Ozawa v Orsini Design Associates*, 2015 U.S. Dist. LEXIS 29933 *24 n10 [SDNY 2015]). Retaliation claims under the Labor Law are, therefore, subject to the three-step burden shifting framework established by *McDonnell Douglas Corp. v Green*, 411 US 792 (1973) (*Copantitla v Friskado Estiatorio Inc.*, 788 FSupp2d 253, 302 [SDNY 2011]).

A prima facie case of retaliation requires that claimant made a complaint about an employer's violation of the Labor Law and, as a result was terminated or otherwise penalized, discriminated against, or subjected to an adverse action (*Higueros v New York State Catholic Health Plan, Inc.*, 630 FSupp2s 265, 269 [EDNY 2009]). Once a prima facie case has been established, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the adverse action (*Id.* at 271). Respondent may still prevail upon a showing that the legitimate, nondiscriminatory reason offered by the employer is a pretext for discrimination against claimant (*Id.* at 272).

ANALYSIS

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):

Burden of Proof

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the order issued by the Commissioner is invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30). Petitioners failed to meet their burden of proof that the order is unreasonable or invalid and we affirm it for the reasons discussed below, except that the civil penalties are modified from $20,000.00 to $10,000.00.

Claimant filed a claim with respondent on August 19, 2009 alleging petitioners had failed to pay minimum wages for work performed. Respondent issued orders finding petitioners had violated certain provisions of the Labor Law and owed unpaid minimum wages to claimant. Petitioners appealed the order to the Board, and upon notice to the parties, a hearing was scheduled for August 20, 2013. On August 19, 2013, one day before the scheduled hearing, petitioners filed a civil suit against claimant in Supreme Court, Queens County, alleging among other things that claimant breached his fiduciary duty to petitioners by filing a claim against petitioners with respondent. The Board hearing was held and concluded on August 20, 2013, and the Board, by

resolution of decision dated August 7, 2014, affirmed respondent's determination that petitioners were claimant's employer and that petitioners failed to pay minimum wages to claimant (*Matter of Liang*, PR 11-184). Respondent subsequently issued the order under review finding petitioners had violated Labor Law § 215 by filing a lawsuit against claimant in retaliation for his filing a claim against them with respondent.

Labor Law § 215 (1) (a) (i) prohibits an employer from retaliating against an employee for filing a claim with respondent. Filing a lawsuit against an employee who has exercised his rights under the Labor Law may be unlawful retaliation where the lawsuit is baseless or designed to deter a claimant from pursuing a claim against an employer (*Torres*, 628 FSupp2d at 472-73). Respondent established that claimant filed a complaint against petitioners for violation of the protections of the Labor Law and his complaint was followed by a lawsuit filed against him by petitioners based on that *very* complaint, indeed one day before the Board's hearing on the merits of the case. We find respondent thereby established a prima facie case of retaliation. Petitioners, who had the burden of proof in this proceeding, failed to submit any evidence of a legitimate, non-retaliatory reason for the lawsuit they filed against claimant. In the absence of such evidence, respondent's determination that petitioners violated Labor Law § 215 by filing a lawsuit against claimant is therefore reasonable.

The civil penalties imposed by respondent, however, must be modified due to errors on the face of the order. The order contains two counts. Count 1 finds a violation of Labor Law § 215 (1) (a) and Count 2 finds a violation of Labor Law § 215 (1) (b). Both counts are identical in that they find petitioners unlawfully retaliated against claimant by instituting a civil suit against him just prior to a Board proceeding in which claimant was to testify in a wage claim against petitioners. The order assesses a $10,000.00 civil penalty for both counts. There is no amount assessed as liquidated damages and the space on the order where liquidated damages is to be specified is blank. At hearing, respondent amended the orders to correct a typographical error in that Count 1 originally read Labor Law § 215 (a) and Count 2 read Labor Law § 215 (b). No other amendments were made to the order. Moreover, the second count of the order may not be read as assessing liquidated damages since that count alleges that "said employer violated" Labor Law § 215 (1) (b) by instituting a lawsuit. That provision does not proscribe conduct which may constitute a violation, but lists remedies that respondent may issue to vindicate the violation.

Labor Law § 215 (1) (a) and (b), when read together, allow for respondent to assess a maximum civil penalty of $10,000.00 for unlawful retaliation, unless the employer had illegally retaliated against an employee in the preceding six years. In such case, the maximum civil penalty is $20,000.00 and liquidated damages may be assessed in an amount up to $20,000.00 on behalf of every "aggrieved" employee. The statute does not allow respondent to assess two civil penalties in the same amount for one violation of the statute.

We therefore modify the order to reduce the total due from $20,000.00 to $10,000.00 because there is no showing that petitioners had violated the statute within the preceding six years of the order. The maximum civil penalty of $10,000.00 is supported by the record where respondent showed that she considers retaliation severe and egregious and exercises her discretion to punish retaliation against claimants by imposing a maximum civil penalty. Because liquidated damages are not included on the face of the order and the order was never amended to include them, we find no liquidated damages have been assessed against petitioners.

Petitioners remaining allegations that the order is unreasonable because claimant was not petitioners' employee and respondent did not conduct a proper investigation are without merit. We found in the decision on the underlying minimum wage claim that petitioners were claimant's employer (*Matter of Liang*, PR 11-184]). The record before us amply supports respondent's determination that petitioners retaliated against claimant by filing a lawsuit against him following his complaint against them for violation of the Labor Law.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order is modified to reduce the total civil penalties due and owing to $10,000.00, but is otherwise affirmed; and

2. The petition for review be, and the same hereby is, denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York on
December 14, 2016.