

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

-----	X
In the Matter of the Petition of:	:
	:
GAMEEL M. OMAR AND WISE ENTERPRISES,	:
INC. (T/A DAIRY KING),	:
	:
Petitioners,	:
	:
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 19, and an Order under	:
Article 19 of the Labor Law, both dated May 23, 2016,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
-----	X

APPEARANCES

Gameel Omar, petitioner pro se, and for Wise Enterprises, Inc. (T/A Dairy King).

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Benjamin T. Garry* of counsel), for respondent.

WITNESSES

Gameel Omar, for petitioners.

Senior Labor Standards Investigator James Donohue, for respondent.

WHEREAS:

On July 22, 2016, petitioner Gameel Omar filed a petition with the Industrial Board of Appeals pursuant to Labor Law § 101 seeking review of two orders issued against him, Wise Enterprises, Inc. (T/A Dairy King), and Kya Jacobs a/k/a Sylvia Robinson by respondent, Commissioner of Labor, on May 23, 2016. Kya Jacobs did not appeal the orders or otherwise appear in this proceeding. Respondent filed her answer on August 26, 2016.

Upon notice to the parties, a hearing was held on December 6, 2016, in Buffalo, New York, before J. Christopher Meagher, Esq., Board member and designated Hearing Officer in the proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first order (minimum wage order) demands that petitioners comply with Article 19 of the Labor Law and pay the Commissioner \$931.25 in unpaid wages due and owing to claimant Camron Jordan for the period from May 31, 2015, through June 21, 2015, interest at the rate of 16% calculated to the date of the order in the amount of \$137.57, liquidated damages in the amount of \$931.25, and a civil penalty in the amount of \$931.25. The total amount due is \$2,931.32.

The second order (penalty order) under Article 19 of the Labor Law assesses petitioners a civil penalty of \$1,000.00 for violation of Labor Law § 661 and 12 NYCRR 146-2.1 for failure to keep and/or furnish true and accurate payroll records for the period from May 21, 2015 through June 21, 2015.

The petition alleges that petitioners were not Jordan's employers. We agree. As discussed below, we find that the orders are unreasonable and dismissed as they relate to Gameel Omar and Wise Enterprises, Inc. (T/A Dairy King).

SUMMARY OF EVIDENCE

Petitioners' Evidence

Testimony of petitioner Gameel Omar

Petitioner Gameel Omar testified that in April 2015, he owned three stores in Buffalo, NY; two "phone stores" and a Dairy King ice cream shop that he operated on a part-time basis, from approximately 4:00 p.m. to 9:00 p.m. While he had employees in the phone stores, he did not hire workers for the Dairy King because the shop did not earn enough revenue. In fact, he attempted to convert the Dairy King into a phone store, but the landlord did not allow it, so Omar closed the Dairy King because that was less costly than running it at a loss. To mitigate his economic loss, Omar posted the Dairy King for sale on Craigslist.

Kya Jacobs and her husband expressed interest in purchasing the ice cream shop, but wanted to test running the business before committing to its purchase. To avoid breaching the terms of his commercial lease, Omar entered into a 50/50 partnership with Jacobs, wherein they would equally share the start-up costs (inventory, rent, etc.) and profits during Jacobs' trial period, which was to run from May 1 to October 1, 2015. Under the name K.J. Sweets, Jacobs, who had full control of the hours of operation, worked alone at the shop. At the hearing, Omar provided pictures of the signage, which included an awning and flyers/promotional materials for K.J. Sweets. Jacobs distributed flyers inviting patrons to K.J. Sweets' grand opening and directing the public to its social media pages.

For several weeks, Jacobs opened and operated the ice cream shop alone, and by June 15, 2015, Omar approached her to finalize the agreement to purchase the business, and to request reimbursement of approximately \$500.00 for contributing more than his share of the partnership. Jacobs asked for additional time to come up with the money, and decide whether she and her husband were going to purchase the business.

Concerned that Jacobs was not operating the ice cream shop for enough hours or days, on June 21, 2015, Omar texted Jacobs to ask whether she opened the ice cream shop that day, to which

Jacobs responded that she did not because she had worked six days by herself and needed a day off. By the end of June 2015, Omar called Jacobs and her husband indicating that if they did not want to purchase the store, this was the time to make that clear, but in either event, referencing an incident wherein Jacobs unplugged the ice cream freezer and all the product melted by the next morning, they needed to stop engaging in behavior that caused him to lose money.

On or around June 25, 2015, with the business relationship strained, Jacobs and her husband told Omar that they were going to leave the premises. The Jacobs took most of their things out of the ice cream shop, and once again, Omar listed the business for sale, this time with real estate agent Realty USA, for \$20,000.00. Jacobs contacted Realty USA and, on July 1, 2015, made an offer to purchase the business for \$12,000.00, which Omar rejected for being too low. Jacobs subsequently called Omar and advised him that if he did not accept her offer, she was going to make sure he suffered economic loss. Omar refused to accept the offer, and on July 3, 2015, Jacobs and her husband filed a claim against Omar with the Department of Labor (DOL), then on July 6, 2015, Jacobs' son, Camron Jordan, filed a claim against Omar with DOL, followed by a July 7, 2015 suit against Omar for \$5,000.00 in Small Claims Court by Jacobs, wherein she described herself as his ice cream shop business partner. The wage claims filed by Jacobs and her husband were dismissed by the DOL. The wage claim filed by Jordan, Jacobs' son, resulted in the orders appealed by Omar in this proceeding.

Omar testified that in one of his meetings with Jacobs, she introduced Jordan to him as her son, but never described him as also an employee of the ice cream shop. Omar never saw Jordan working at the ice cream shop, nor did Jordan ever ask him for money. Omar testified that Jordan never worked for him, and he doubts he ever worked for Jacobs either. Omar was to approve the hiring of employees, if any, as they considered hiring someone to sell baked goods, but never did. Adding that Jacobs made her son file a false claim, Omar testified that Jacobs wanted to hurt him because he rejected her offer to buy the business. Omar testified that the ice cream shop was not big enough, or profitable enough to require a full-time employee, much less more than one.

During respondent's investigation of the claims by the three claimants, Omar attended a compliance conference in which the three claimants were present. At this meeting, when a DOL employee asked Jordan whether he filed a claim against Omar, he said he did not. Jacobs interjected that Jordan did file said claim.

Respondent's Evidence

Senior Labor Standards Investigator James E. Donohue

Senior Labor Standards Investigator James E. Donohue testified that this matter was investigated by Labor Standards Investigator Nathan L. Lazelle, who made an initial visit to Dairy King on August 24, 2015. While relying on the contact log maintained by respondent, Donohue testified that Lazelle interviewed Omar's son during his visit, and left a Notice of Revisit requesting payroll records. Donohue testified that there is no record of a follow-up visit to the ice cream shop.

It was at a 2016 compliance conference with Omar, his counsel at the time, and the (at the time) three claimants, that Donohue dismissed the claims by Jacobs and her husband because, as evidenced by the contract between Jacobs and Omar, and the fact that both parties invested money

and goods into the business, respondent determined that Jacobs was a partner during the claim period. As such, Jacobs' claim was essentially against herself. As a spouse to a partner of the business, Michael Jacobs' claim was similarly dismissed. Donohue testified that Jacobs indicated that Jordan was not her son. Jordan's claim remained, and proceeded to the issuance of an order to comply.

The orders were issued against Omar and Jacobs as business partners, and Wise Enterprises, Inc. d/b/a Dairy King. Donohue determined Dairy King to be the appropriate corporate employer because it is the entity Jordan identified in his claim form. In addition, while K.J. Sweets was going to be the name of the business once purchased by Jacobs, the K.J. Sweets sign had not yet been installed.

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 Rules (12 NYCRR) § 65.39.

Petitioners met their Burden to Establish that they were not Employers

Petitioners have the burden to show by a preponderance of evidence that the orders are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Matter of RAM Hotels, Inc.*, PR 08-078 at 24 [2011]). Petitioners allege the orders are unreasonable because they were not claimant's employer. We find based on the record before us that petitioners met their burden of proof.

"Employer," as used in Article 19 of the Labor Law, means "any individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]). An "employee" is "any individual employed or permitted to work" by an employer (*id.* § 651 [5]). "Employed" means "permitted or suffered to work" (*id.* § 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 described 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 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).

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]). There is no evidence petitioners satisfied any of these factors.

Omar credibly testified that Jacobs wanted to try running the business before deciding whether to purchase it, so in an effort to not breach the terms of his commercial lease, he entered into a short-term contract with her wherein they were to split revenue equally while she operated the business. Omar credibly testified that Jacobs operated the ice cream shop under the name K.J. Sweets, rather than Dairy King, as supported by pictures submitted into evidence of the signage, which included an awning and flyers/promotional materials. Jacobs distributed flyers inviting patrons to K.J. Sweets’ grand opening and directing the public to its social media pages.

As supported by text messages between Omar and Jacobs, Omar was to approve the hiring of employees, if any. Omar credibly testified that he was not asked to approve, nor did he authorize the hiring of Jordan. Omar also testified credibly that Jacobs was the only person who worked at the ice cream shop.

Omar credibly testified that he never hired, paid, supervised, or set a work schedule for Jordan. Omar did not tell Jordan that he would be paid for working at the ice cream shop, nor was Omar aware whether Jordan worked at the ice cream shop, but doubted it, given the level of customer traffic. Therefore, there was no employer-employee relationship because Omar neither hired Jordan, controlled the conditions of his employment, nor suffered or permitted him to work (*see* Labor Law § 2 [7]).

Omar’s description of the business arrangement and subsequent dispute is supported by the record, including the series of text messages between Omar and Jacobs wherein Jacobs indicates that she was working alone at the ice cream shop (during a week that fell within Jordan’s claim period), the July 1, 2015 offer (in the form of a signed contract and financing rider) made by Jacobs to purchase the business for 40% less than the asking price, the subsequently filed Small Claims Court matter against Omar wherein Jacobs describes herself as Omar’s business partner, and finally the timing of the filing of the claim with respondent by Jacobs, her husband and Jordan.

Petitioners met their burden of proof to establish that they did not employ Jordan. The burden having shifted, respondent failed to rebut petitioners’ evidence with credible or reliable evidence establishing that claimant worked for petitioners during the period of his claim. Jordan did not testify, nor did Jacobs, and the claim form and statements Jordan made to investigators during the investigation are not sufficient to rebut petitioners’ credible evidence (*Matter of Amlani*, PR 14-265 [July 13, 2016 at 6] [citing prior cases, claim form and hearsay statements from claimant during investigation concerning employment relationship with petitioner are insufficient to rebut petitioner’s testimony to the contrary]).


Having found that there was no valid and reasonable basis to find that petitioners were Jordan's employers, we necessarily also revoke the penalty order finding that he violated Labor Law § 661 as supplemented by 12 NYCRR 146-2.1. Because we find petitioners were not an employer under the minimum wage order, and Omar testified without rebuttal that petitioners did not employ anyone in the ice cream shop, the penalty order against them is revoked.

Since petitioners met their burden of proof to show they were not Jordan's employers, and respondent did not provide sufficient and reliable evidence to rebut petitioner Omar's testimony, we find the orders unreasonable and revoke them as to Gameel Omar and Wise Enterprises, Inc. (T/A Dairy King).

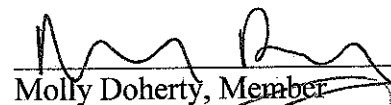
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The orders are revoked as to petitioners; and
2. The petition be, and the same hereby is, granted.


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 June 14, 2017.

Having found that there was no valid and reasonable basis to find that petitioners were Jordan's employers, we necessarily also revoke the penalty order finding that he violated Labor Law § 661 as supplemented by 12 NYCRR 146-2.1. Because we find petitioners were not an employer under the minimum wage order, and Omar testified without rebuttal that petitioners did not employ anyone in the ice cream shop, the penalty order against them is revoked.

Since petitioners met their burden of proof to show they were not Jordan's employers, and respondent did not provide sufficient and reliable evidence to rebut petitioner Omar's testimony, we find the orders unreasonable and revoke them as to Ernest Omar and Wise Enterprises, Inc. (TIA Dairy King).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The orders are revoked as to petitioners; and
2. The petition be, and the same hereby is, granted.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member


Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York,
on June 14, 2017.