

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

MARIELLEN CUPINI,

Petitioner,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 6, dated January 26,
2018,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 18-014

RESOLUTION OF DECISION

APPEARANCES

Law Offices of Pullano & Farrow, Rochester (André L. Lindsay of counsel), for petitioner.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (Steven J. Pepe of counsel), for respondent.

WITNESSES

Mariellen Cupini and Anne Wendl, for petitioner.

Senior Labor Standards Investigator Lori Quackenbush, for respondent.

WHEREAS:

On March 19, 2018, petitioner Mariellen Cupini (hereinafter “Cupini”) filed a petition with the Industrial Board of Appeals (hereinafter “Board”) pursuant to Labor Law § 101 seeking review of an order issued against her and Gregory A. George aka Gregory A. George, Sr. (hereinafter “George”) T/A Stepping Stones also T/A Stepping Stones Learning Center by respondent Commissioner of Labor, on January 26, 2018.¹ Respondent filed her answer on April 27, 2018. Upon notice to the parties, a hearing was held in Rochester, New York, on December 11, 2018, before Matthew Robinson-Loffler, Associate Counsel to the Board 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.

¹ George filed a separate petition before the Board appealing the January 26, 2018 orders on February 22, 2018. On November 9, 2018, respondent moved to withdraw the order to comply as to George. The Board granted respondent’s motion through resolution of decision dated December 12, 2018.

The order to comply with Article 6 (unpaid wages order) directs Cupini to pay wages in the amount of \$173,607.08 due and owing to 90 individuals for the period from June 4, 2017 through July 1, 2017. The unpaid wages order also directs Cupini to pay \$15,925.58 in interest at the rate of 16% calculated to the date of the order, 100% in liquidated damages in the amount of \$173,607.08, and a 200% civil penalty in the amount of \$347, 214.16, for a total amount due of \$710,353.90.

The petition alleges that Cupini was not the claimants' employer during the relevant time period. We find that petitioner met her burden of proof to establish that respondent's determination that Cupini was claimants' employer during the relevant period was unreasonable.

SUMMARY OF EVIDENCE

Petitioner's Evidence

Testimony of petitioner Mariellen Cupini

Cupini was the cofounder and C.E.O. of Stepping Stones Learning Center (hereinafter "Stepping Stones"), a not-for-profit learning center, for 24 years. Stepping Stones had a board of directors that was responsible for making decisions for the organization, overseeing the day to day operation of Stepping Stones, and providing approvals. Cupini was a member of the board of directors and sat on each of the board of director's subcommittees except the audit committee. Cupini directly supervised the organization's leadership team, which included a C.F.O., site director, H.R. director, coordinator of office management, director of special education services, director of O.P.W.D.D., director of clinical services, and the director of child care.

Cupini testified that her tenure as C.E.O. ended on the evening of May 2, 2017, when she was personally served with a letter of suspension by the acting chair of Stepping Stones's board of directors. The letter stated that Cupini was placed on unpaid suspension, effective May 2, 2017, for misappropriation of funds, allegations of altered financial statements, and harassment and abuse to staff. The letter further said that an investigation would commence which would take several weeks and that Cupini is neither permitted on Stepping Stones's premises nor permitted to speak with Stepping Stones's staff until the investigation is concluded. After delivering the letter, the acting chair escorted Cupini from the building. After leaving Stepping Stones that day, Cupini had no contact with and never returned to Stepping Stones. Some Stepping Stones's staff members reached out to her, but she advised them that she could not speak with them. Until her departure on May 2, 2017, Stepping Stones had always made payroll on time despite the finances frequently being stressed. On May 18, 2018, Cupini received a letter from Stepping Stones's then board chair, George, informing her that she was terminated. The letter states, "[y]ou are directed to refrain from entering the premises of [Stepping Stones's] offices or any other [Stepping Stones] location."

Testimony of Anne Wendl

Anne Wendl (hereinafter "Wendl") was a member of Stepping Stones's board of directors for six and ½ years, until April 2017. She learned that Cupini was terminated from the news. Wendl was not aware of any complaints about Cupini during her tenure on the Stepping Stones's board.

Respondent's Evidence

Testimony of Senior Labor Standards Investigator Lori Quackenbush

Lori Quackenbush (hereinafter "Quackenbush") has been a Senior Labor Standards Investigator for three years and has been with respondent's division of Labor Standards since 2011. Quackenbush testified that respondent's investigation was initiated at the end of June 2017, when the interim director of Stepping Stones, telephoned respondent because Stepping Stones did not have sufficient funds to cover payroll. Quackenbush then made a field visit to Stepping Stones along with another investigator. During the field visit, the investigators met with the interim director, human resources director and the finance director and spoke to George by telephone. The investigators also interviewed two employees.

After the field visit, respondent continued to receive claims for unpaid wages. At hearing, respondent entered eight, a "sample," of these claim forms. Quackenbush testified that the sample of claim forms entered by respondent identified Cupini as the person who hired or supervised the claimants, but she could not recall if Cupini was named on all of the claim forms. Quackenbush sent a letter to Cupini, outlining respondent's findings and informing Cupini of the amount determined to be due. Quackenbush sent this letter to Cupini because respondent was informed during the investigation that Cupini was the C.E.O., was identified by a large number of the claimants as the employer and was in charge of the finances until Cupini left Stepping Stones.

Quackenbush testified that she was informed during respondent's investigation that Cupini had been terminated prior to the relevant time period covered by the order under review and that respondent did not have any evidence that Cupini was present at Stepping Stones during the relevant time period. Respondent determined Cupini was an employer "because the financial situation upon her leaving had a large effect on what happened directly after." Quackenbush recommended a 200% civil penalty be assessed due to the size of the business and the overall size of the underpayment.

ANALYSIS

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

Burden of Proof

Petitioner's burden of proof in this matter is 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; Board Rules [12 NYCRR] § 65.30; *Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dep't 2003]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24 [October 11, 2011]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (Labor Law § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]). Petitioner argues that the order under review is invalid or unreasonable because she did not possess the

requisite authority over the claimants' employment to be deemed an employer under the Labor Law. For the reasons stated below, we find that Cupini met her burden of proof to show that the order issued by respondent is invalid or unreasonable.

Petitioner Is Not Individually Liable as An Employer

Article 6 of the Labor Law defines "employee" as any person employed for hire by an employer in any employment (Labor Law § 190 [2]). "Employer" as used in Article 6 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]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act (FLSA), 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 used for analyzing employer status under the FLSA (*Crawford v Coram Fire Dist.*, 2015 U.S. Dist. LEXIS 57997, *24 [ED NY, May 4, 2015, No. 12-3850] citing *Chu Chung v The New Silver Palace Restaurant*, 272 F Supp 2d 314, 319 n 6 [SDNY 2003] ["Section 190 of N.Y. Labor Law defines 'employer' as 'any person, corporation or association employing any individual in any occupation, industry, trade, business or service.' Most courts agree that the test for determining whether an entity or person is an 'employer' under New York Labor Law is the same as the test set forth in *Herman* for analyzing employer status under the Fair Labor Standards Act."]).

In *Herman v RSR Sec. Servs. Ltd.*, (172 F3d 132, 139 [2d Cir 1999]), the Second Circuit Court of Appeals explained the "economic reality 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 as the purpose of examining them is to determine the economic reality based on a "totality of circumstances" (*id.*). Applying the *Herman* test to the present matter, we find Cupini did not possess the requisite authority over the claimants' employment during the relevant period to be deemed an employer under the Labor Law (*id.*; see also *Salinas v Starjem Restaurant Corp.*, 123 F Supp 3d 442, 463-465 [SDNY 2015]).

It is uncontested that Cupini played a central role in operations of Stepping Stones as C.E.O., a board member and the direct supervisor of the organization's leadership team until and including May 2, 2017. Cupini credibly testified, however, that after May 2, 2017, she had no operational control at Stepping Stones to be considered an employer under the Labor Law because she was placed on unpaid suspension, prohibited from entering the Stepping Stones premises and prohibited from contacting any employee of Stepping Stones. This testimony was corroborated by a letter regarding her unpaid suspension from Stepping Stones. Cupini was then terminated on

May 18, 2017. The relevant period as set forth in the order to comply is June 4, 2017 to July 1, 2017, when Cupini was no longer the C.E.O. or a board member of Stepping Stones. Respondent does not dispute these facts. Petitioner met her burden of proof that she was not liable as an employer during the claim period.

The burden thereby shifted to respondent to submit sufficient evidence to establish that Cupini met the *Herman* test and possessed the requisite authority during the claim period contained in the order under review. Respondent failed to meet her burden. Respondent offered only a "sample" of the claim forms it received as documentary evidence and did not call any claimants as witnesses in the proceeding. Quackenbush did testify that she and another investigator interviewed two employees, but her testimony did not identify the claimants or provide any detail as to the nature of the interview. Quackenbush also admitted that respondent did not have any evidence that Cupini was present at Stepping Stones during the relevant time period. Respondent's argument that Cupini should be liable for the unpaid wages as an employer "because the financial situation upon her leaving had a large effect on what happened directly after," is unsupported by any case law and, thus, unpersuasive. Petitioner proved that, from June 4, 2017 to July 1, 2017, she did not hire or fire Stepping Stones employees; supervise and control Stepping Stones employees's schedules or conditions of work; determine Stepping Stones's employees's rate and method of pay; or maintain Stepping Stones's employment records. Respondent had no evidence indicating otherwise. Where there is no evidence of a single factor in the *Herman* test, petitioner cannot be held liable as an employer (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d at 139).

The fact that some claimants identified Cupini as the "responsible person" in their claim forms is an insufficient basis, alone, to refute Cupini's evidence that she was not an employer during the claim period (see *Matter of Ibrahim Issa A/K/A Anthony Isaa and Bronxdale Auto Care, Inc.*, Docket No. PR 16-020, pp. 4-6 [July 26, 2017]; *Matter of Woronoff and Katz's Furniture Corp. [T/A La-Z-Boy]*, Docket No. PR 09-208, at p. 4 [December 14, 2012] citing *Matter of Franbilt, Inc. and/or Thomas J. Barnes and/or Michael J. Burns*, Docket No. PR 07-019, at p. 5 [July 20, 2008] [finding a claim's listing of Burns as a "responsible person" even coupled with certain hearsay evidence, insufficient]). Respondent offered no additional evidence to prove that Cupini should be held liable for the unpaid wages in this matter.

We find, therefore, based on the totality of the circumstances of the record before us, that respondent's determination that petitioner is individually liable as an employer in the unpaid wages order was unreasonable. Because we find petitioner was not an employer, the order is revoked.

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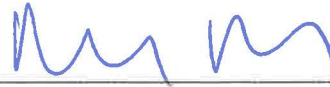
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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

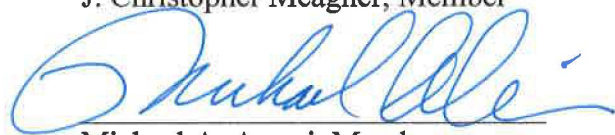
1. The order is revoked; and
2. The petition be, and the same hereby is, granted.



Molly Doherty, Chairperson

RECUSED

J. Christopher Meagher, Member



Michael A. Arcuri, Member



Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York,
on May 29, 2019.