

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

STEPHEN B. SACHER, TRAVCO INC., and :
SACHER & CO., CPA, P.C., :

Petitioners, :

DOCKET NO. PR 11-151

To Review Under Section 101 of the Labor Law: An :
Order to Comply with Article 6 dated March 25, 2011, :

RESOLUTION OF DECISION

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :
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APPEARANCES

Stephen B. Sacher, petitioner *pro se*.

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

WITNESSES

Stephen B. Sacher and Charles Vigliotti, for petitioners.

Heidi Norwick, and Enrique Anico-Taveras, Labor Standards Investigator, for respondent.

WHEREAS:

On May 20, 2011, petitioners Stephen B. Sacher (Sacher), Travco Inc. (Travco), and Sacher & Co., CPA, P.C. (Sacher & Co.) (together, petitioners) filed a petition with the Industrial Board of Appeals (Board) seeking to annul an order issued by the Commissioner of Labor (Commissioner, Respondent or DOL) on March 25, 2011.

The order requires compliance with Labor Law Article 6 and demands payment of \$2,870.00 in unpaid wages due and owing claimant Heidi Norwick, together with interest continuing thereon at the rate of 16% to the date of the order in the amount of \$441.90, liquidated damages in the amount of \$717.50 and a civil penalty of \$2,870.00, for a total amount due of \$6,899.40 for the period April 1 to June 17, 2010. The petition claims that the order is invalid and unreasonable because Norwick was never employed by Sacher or Travco,

was terminated as a Sacher & Co. employee before the relevant period, was paid all wages due and chose to come to the workplace after her termination in the hope that business would be restored and she would be compensated for her time. The petition also challenged the liquidated damages and civil penalty.

Upon notice to the parties, a hearing was held on December 17, 2013 in White Plains, New York before Jean Grumet, Esq., Member of the Board and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

SUMMARY OF EVIDENCE

Testimony of Petitioner Stephen B. Sacher

Sacher was the president and sole shareholder of both Sacher & Co., a certified accounting firm, and Travco, Inc. a business brokerage which assists clients in selling businesses and procuring financing. Sacher & Co. and Travco are separate entities. The two companies shared office space but had separate workforces, clientele, bank accounts, telephone numbers, insurance policies, and corporate identification numbers, and filed separate tax returns. Travco is still in business but “does not have employees, and never did,” instead operating with independent contractors. As a result of Sacher’s health problems Sacher & Co. ceased operations on March 31, 2010 and that was the date of its final payroll.

The only payroll record the petitioners provided, an ADP “worksheet” for Sacher & Co. for the period March 1 – March 16, 2010, listed only the names and hourly rates of six employees, including Norwick, Lori Braun and Charles Vigliotti. Sacher testified that Norwick was a part-time Sacher & Co. employee sharing a work station with Braun, who also worked part-time but had more responsibility than Norwick and was trusted with sensitive information. Sacher testified that Vigliotti was the only person who worked for both Sacher & Co. and Travco, in the case of Travco as an independent contractor (both before and after Sacher & Co. closed). Vigliotti, who had bookkeeping and other responsibilities at Sacher & Co., did editorial, marketing, client relations, letter writing and typing work for Travco.

Norwick, who “was simply there because Miss Braun could not work full-time,” worked from 1 p.m. to 5 p.m. fewer than five days per week and had “the most menial position in the firm,” with her primary responsibility being to answer the phone. In addition she may “have done some typing. Or put some envelopes in the mailbox, stamps on envelopes, that kind of thing.” Prior to March 31, 2010 Norwick took direction “from me and me alone.” After that date, Sacher testified that he was dealing with health issues and did not go to work and could not, therefore, have directed Norwick’s work. Sacher did not recall a request by Norwick for unpaid wages.

On March 31, 2010 Sacher met with each Sacher & Co. employee individually and explained that due to its financial situation, “we were unable to continue.” As further evidence that Sacher & Co. ceased doing business in March 2010, Sacher entered into evidence unsigned, undated Sacher & Co. tax returns for 2010 through 2012, stated to have been prepared by Travco, indicating that Sacher & Co. paid \$25,886.00 in wages in 2010 but paid no wages in

2011 or 2012; and Sacher & Co.'s July 2, 2010 response to a Workers' Compensations Board inquiry, stating that Sacher & Co. was no longer paying workers' compensation insurance because it went out of business as of March 31, 2010. Travco's 2010 tax return was also entered into the record to demonstrate that Travco had no employees.

Testimony of Charles Vigliotti

Vigliotti was the bookkeeper at Sacher & Co., where Sacher was responsible for hiring and firing, until around the beginning of April 2010 when Vigliotti and, he believes, all other Sacher & Co. employees were informed there was no funding to support payroll and all employees would be notified of termination. Vigliotti continued to work as a consultant for Travco after Sacher & Co. closed; he still worked for Travco at the time of the hearing. Vigliotti was the only one working for Travco in April through June 2010. When Sacher told Vigliotti there was no money to fund Sacher & Co., Vigliotti told him "You need to tell everyone." Sacher said he would. Vigliotti "wasn't there when it happened, but [Sacher] told me, subsequently, that he had told everyone." Vigliotti did not know when Sacher did this.

Vigliotti testified that Braun was Sacher & Co.'s receptionist, did some of the billing, and collected information about their hours from Vigliotti and other Sacher & Co. employees. After the beginning of April 2010, Vigliotti "occasionally" spoke with Braun, who asked where Sacher was.

Norwick "generally answered the phones" for Sacher & Co., was also a receptionist, and was supervised by Sacher. Since phone lines for both Sacher & Co. and Travco were on the same system, the Sacher & Co. receptionist answered the phone for both companies. Vigliotti did not remember how often he saw Norwick in the office after April 1, 2010; it was probably more than one day a week, and Vigliotti did not recall whether it was more than three days a week. Vigliotti saw Sacher at the building "very rarely, if at all" during that time, and to Vigliotti's knowledge, no one was directing Norwick's employment. Since the "phone didn't ring much," she simply sat at the front desk; Vigliotti did not ask her to leave because "That's not my authority." He does not believe he told Sacher that Norwick was coming in. Vigliotti did recall asking Norwick: "Why are you here?" And she responded, "I have nowhere else to go." Vigliotti did not remember what was said beyond that. When asked by the Hearing Officer, during petitioners' rebuttal, whether Norwick ever had any involvement with Travco's "Constant Contact" email marketing program, Vigliotti testified that she did, that "I failed to mention that," and that Norwick worked with Sacher to develop email messages. Sacher, who "was very particular on what he wanted to go out," closely supervised Norwick's writing and also had Vigliotti check the messages.

Testimony of Claimant Heidi Norwick

Norwick was hired by Sacher in September or October 2006 to work for Travco as a marketing assistant, principally through email marketing. She continued in that job through June 17, 2010. In addition to her marketing work, Norwick sat at the reception desk and answered phones for Travco, Sacher & Co. and another company then owned by Sacher, but her main duty was email marketing for Travco. Norwick worked 20 hours a week when she was first hired, alternating with Braun. Her final wage was \$20 per hour. Norwick filled out a time sheet for each biweekly period and gave it to Braun, who presented it to Sacher for approval. Braun

served as office manager and, except for answering the phone, had duties completely different from Norwick's. Although Norwick was paid by Sacher & Co., her main function was always for Travco, "to prepare weekly email blasts that would go out to contacts... to let people know that this type of business was for sale," maintain client records, file and do occasional direct mail. Norwick sent the weekly emails through a company called Constant Contact. She testified that Vigliotti, Sacher's "right hand," supplied her with information about Travco clients throughout her employment. Norwick's responsibilities never changed, but in March 2010, because of financial problems, her and other employees' work hours were reduced.

Norwick was last paid for the period March 16, 2010 – March 31, 2010, and her final pay stub from Sacher and Co. for gross pay of \$750.00 for 37.5 hours worked was entered into the record. After March 2010 the phones and lights were sometimes not working, and Norwick sometimes could not access Constant Contact to perform her job because Travco had not paid its bill. On June 17, 2010 Norwick, who had not been paid since March 31, again found herself unable "to do the work that I customarily do and I remember speaking to Mr. Sacher, standing outside his door just, you know, saying at this juncture, you know, what's the plan? How are we moving forward?" Sacher had no answer. As of that time not only Norwick but also Braun and two or three others were still working at Sacher & Co. or Travco. Norwick had continued working "because there was work to do," Sacher never said he could no longer pay, and paychecks had come "very erratically even prior to April 1st.... So, you know, not getting a paycheck exactly when I was supposed to, at that point in time, was not new." Norwick provided a list of four paychecks, beginning with one for the pay period ending February 15, 2010, which she was unable to cash until up to eight weeks after they should have been issued.

Respondents entered into evidence: (1) time sheets which Norwick submitted to Braun for work from April through June 2010; (2) Norwick's bank statement for the period March 18 – April 17, 2010, indicating deposits and a returned check in April which Norwick testified were for late payment and a bounced check from Sacher & Co.; (3) a 2010 calendar on which Norwick recorded work performed by her for Travco; (4) a "Travco Marketing Plan," including a page for "Heidi," for the first quarter of 2007; and (5) a June 7, 2010 email from heidi@sacherco.com to steve@travcoinc.com in which she gave Sacher two telephone messages, including that Braun "will be in around 11:30 tomorrow," and that "Constant Contact is not active. I will be going home early."

Norwick denied that Vigliotti ever asked her why she was in the office. She testified that she had a key to the office, which she used if Vigliotti was not already there when she arrived. Sacher "likely" asked her to return the key on her last day of work, June 17, 2010. On cross-examination by Sacher, Norwick again denied that he told her at the end of March or beginning of April that he was closing his business. In response to the Hearing Officer's questions, she testified that Sacher was out of the office for medical reasons for most of April 2010, with "more communication with the office" after a recuperation period.

Testimony of Labor Standards Investigator Enrique Anico-Taveras

Labor Standards Investigator Enrique Anico-Taveras was called as a witness to authenticate the DOL's investigative file.

FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to Board Rule 65.39 (12 NYCRR § 65.39). We find that the Petitioners failed to meet their burden of proving that Claimant was paid all wages due for the period April 1 through June 17, 2010, and we affirm the order.

Standard of Review and Burden of Proof

The petitioners have the burden to show that the orders are invalid or unreasonable by a preponderance of the evidence (State Administrative Procedure Act § 306[1]; Labor Law § 101, 103; 12 NYCRR § 65.30).

The Petitioners were the Claimant's Employers

The petition asserts that only Sacher & Co., not Travco or Sacher as an individual, employed Norwick. "Employer" as used in Article 6 of the Labor Law means "any person, corporation or association employing any individual in any occupation, trade, business or service" (Labor Law § 190[3]). "'Employed' includes permitted or suffered 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... [used] for analyzing employer status under the Fair Labor Standards Act." *Chu Chung v. New Silver Palace Rest., Inc.*, 272 FSupp 2d 314, 319 n6 [SDNY 2003]. Under both laws, more than one entity or individual can be an employee's employer. See, e.g., *Zheng v. Liberty Apparel Co.*, 355 F3d 61, 66, 78 [2d Cir 2003]; *Moon v. Kwon*, 248 FSupp 2d 210, 237-8 [SDNY 2002]; *Matter of Robert Lovinger and Miriam Lovinger and Edge Solutions, Inc.*, PR 08-059 [Mar. 24, 2010]. In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132 [2d Cir 1999], the U.S. Court of Appeals for the Second Circuit 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). 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.* at 139 (internal citations omitted).

In the present case, it was reasonable and valid to find that while Norwick was paid by Sacher & Co., Travco also employed her. Norwick's testimony that she was hired to work for Travco and did so throughout the time she was employed, marketing for Travco through Constant Contact emails, was both credible, and supported by other credible proof. After initially failing to mention it, Vigliotti confirmed her work for Travco. The "Constant Contact

2010 Calendar” and “Travco Marketing Plan” Norwick provided further confirmed her testimony. On June 7, 2010, shortly before her employment ended (and more than two months after the petitioners claimed it ended), Norwick emailed Sacher that she was going home early since Constant Contact was not active. Norwick answered the phone (which Sacher incredibly testified was her main duty) for Travco as well as for Sacher & Co.: Vigliotti testified the same person answered calls to both. Despite the petitioners’ claim that the companies were separate, they appear to have been interchangeable. Norwick was hired and mainly worked for Travco, yet was paid by Sacher & Co. Sacher, president and owner of both firms, worked from a single desk for both. Although Sacher & Co. was an accounting firm and Travco supposedly a business broker, the latter prepared the former’s tax returns. Even if the businesses were indeed separate, both employed Norwick. Accordingly, we find both are liable for her wages.

It was also reasonable and valid to find Sacher her employer and personally liable. It is well settled that an individual can be liable along with a corporate employer if he or she, individually, meets the test for employer status. See *Herman, supra*; *Bonito v. Avalon Partners, Inc.*, 106 AD3d 625 [1st Dept 2013]; *Martinez v. Alubon, Ltd.*, 111 AD3d 500 [1st Dept 2013]. The Board has repeatedly found individual corporate owners and officers who possess the requisite authority to be employers. See, e.g., *Matter of Marc Chiffert*, PR 10-348 [Mar. 20, 2013]; *Matter of David Fenske T/A AMP Tech and Design, Inc.*, PR 07-031 [Dec. 14, 2011]; *Matter of Robert H. Minkel and Millwork Distributors, Inc.*, PR 08-158 [Jan. 27, 2010]; *Matter of Franbilt, Inc.*, PR-07-109 [July 30, 2008]. In the present case it is undisputed that Sacher, both companies’ president and owner, hired, had power to terminate and supervised Norwick. Sacher testified he hired her, “instructed her in her daily work routine,” and terminated her, and that she “took direction from me and me alone.” Petitioners did not claim anyone but Sacher set pay rates. While Braun collected records kept by employees of their work hours, Norwick credibly testified that Braun submitted these records to Sacher for approval before sending them to ADP for preparation of payroll. These facts more than suffice to establish Sacher’s employer status.

Petitioners Violated Article 6 of the Labor Law by Failing to Pay Norwick Wages Due

Petitioners failed to meet their burden to prove by a preponderance of the evidence that Norwick was terminated on March 31, 2010 and was not entitled to wages for the period of her claim. Contrary to the petitioners’ claims that Sacher told Norwick and all other employees that Sacher & Co. was closing, there was nothing for her to do after March, and she at most occasionally came in on her own and sat idle, we credit Norwick’s testimony that she was never told the business was closing, that she and others worked through June 17, and that she continued doing marketing and other work throughout that time.

Norwick’s testimony was supported by documentary evidence. For example, her June 7, 2010 email to Sacher gave him two phone messages, including that Braun will be in around 11:30 tomorrow, and stated that since Constant Contact was inactive Norwick was leaving early. Sacher speculated in his closing statement that Norwick might have come in on June 7 and sent this email to build a record. Petitioners provided no evidence to support that speculation. When cross-examining Norwick about the email, Sacher’s main question was why she used a Sacher & Co. email address if she worked for Travco; she replied, “Whatever was assigned to me, I used.” While the email did not expressly state that Braun was still working, Norwick so testified and the email tends to support that. The same is true of Vigliotti’s testimony that after all employees’

supposed termination, Braun occasionally asked him why Sacher didn't come in much. Without ever quite saying so, Vigliotti implied in his testimony that only he and Norwick were at the Sacher & Co./Travco office after March 2010, but unless Braun and others continued working, it is hard to see how Braun even knew that Sacher was not coming in, or to understand Vigliotti's testimony that "everyone" was concerned about him since "it wasn't like him not to be there."

Sacher's failure and Vigliotti's initial failure even to mention Norwick's work for Travco (confirmed by documents, and belatedly acknowledged by Vigliotti) undermines Sacher's credibility and calls in question Vigliotti's candor. We find the latter's claim that he believed Norwick was terminated inconsistent with his testimony that he continued to see her in the office "probably" more than once a week and possibly more than three times a week, but neither told her to stop coming nor told Sacher she was doing so. Vigliotti remained dependent on Travco as of the hearing date; Norwick described him as Sacher's "right hand." It is noteworthy that he did not actually confirm Sacher's claim to have told Norwick she was terminated, testifying only that when Sacher told *him* there was no money for Sacher & Co., Vigliotti said "You need to tell everyone" and Sacher later claimed to have done so. Vigliotti did not explain how Norwick entered the office after she was no longer an employee; the petitioners did not dispute her testimony that she had a key, which is unlikely for a terminated former worker absent some explanation as to why she still had a key.

Sacher's testimony that he told Norwick on March 31, 2010 that she was terminated is further undermined by a November 10, 2010 letter he sent the DOL during its investigation. In that letter, Sacher made the quite different claim that Norwick "was notified in April of 2010 of the failing financial condition of our business" and could choose "to continue her employment" only "with the understanding that she would be compensated for her wages if and only if the company's financial condition should improve. Ms. Norwick chose to remain on with the company with this knowledge and being fully aware that she assumed the risk that no further wages would be paid." Norwick credibly denied this claim (as well as the quite different one advanced by Sacher at the hearing), and even had it been true, the Labor Law does not permit an employer to notify a worker that she can continue employment only on the understanding she will be paid "only if the company's financial condition should improve." Nor would such a supposed agreement mean "that she assumed the risk that no further wages would be paid." Labor Law Article 6 requires employers to pay clerical and other workers not less frequently than semi-monthly (Labor Law § 191 [1] [d]), and further requires that "no employee shall be required as a condition of employment to accept wages at periods other than as provided in this section." (Labor Law § 191[2]). Additionally, "it is settled law that an employee may not waive the protection of the Labor Laws." *Padilla v Manlapaz*, 643 FSupp2d 302, 322 [EDNY 2004] (internal citations omitted); *Asaro v Lilienfeld*, 36 NYS2d 802 [Civ Ct, New York City 1942] (employees may not agree to accept wage less than required by law); *Matter of Mark Barasch*, PR 10-333 [Nov. 20, 2013] [appeal pending]. And "[a]n employer who has knowledge that an employee is working and who does not desire that work to be done has a duty to prevent its performance." *Matter of Kenneth Ahrem*, PR 10-302 [Mar. 20, 2013]; cf. *Chao v. Gotham Registry, Inc.*, 514 F3d 280, 287 [2d Cir 2008].

The petition does not challenge the DOL's computation of wages due Norwick, apart from denying she was employed during the relevant period. Vigliotti testified he did not recall Norwick's hours, while the ADP "worksheet" introduced by petitioners confirmed the \$20 per hour wage to which she testified. In the absence of accurate records required by the Labor Law

the Commissioner may in any event draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements. *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989]. We find that the petitioners did not overcome the burden in Labor Law § 196-a to prove that wages were paid, and affirm the order.

Liquidated Damages and Civil Penalty

Labor Law § 198[1-a]¹ at the time the order was issued allowed the Commissioner to collect liquidated damages in the amount of 25% of the underpaid wages unless the petitioners could prove they had a good faith basis to believe that the underpayment was in compliance with the law. Here, the petitioners failed to prove they had a good faith basis to believe that the underpayment was in compliance with the law, so we affirm the liquidated damages.

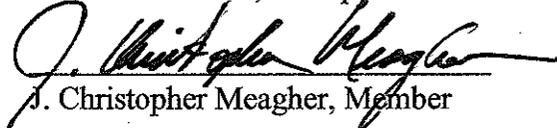
Labor Law § 218[1] provided that in a willful or egregious case the Commissioner must impose a civil penalty of double the total amount found due, and in other cases the appropriate civil penalty giving "due consideration to the size of the employer's business, the good faith of the employer, the gravity 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 order on appeal imposed 25% liquidated damages and a 100% civil penalty based on the statutory factors. The Board finds that the computations the Commissioner made in imposing the liquidated damages and civil penalty are valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order is affirmed; and
2. The petition for review is denied.



Anne P. Stevason, Chairperson



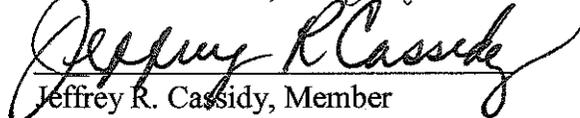
J. Christopher Meagher, Member



Jean Grumet, Member



LaMarr J. Jackson, Member



Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
April 10, 2014.

¹ Effective April 9, 2011, liquidated damages are 100 % of the underpayment.