

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 NICK MALEGIANNAKIS AND NZM :
 RESTAURANT CORP. (T/A MICHAEL'S DINER), :
 :
 Petitioners, :
 :
 To Review Under Section 101 of the Labor Law: :
 An Order to Comply with Article 7 of the Labor Law, :
 dated January 29, 2009, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 09-035
RESOLUTION OF DECISION

APPEARANCES

Towne, Ryan & Partners P.C. (John J. Hoke of counsel), for petitioners.
Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for respondent.

WITNESSES

John Moss, Pauline Koument, Donna Brequelt, Nick Malegiannakis, Michael Malegiannakis, and Ramiro Marin for the petitioners; Senior Labor Standards Investigator Constance Higgins-Bee and Darlene Shamus for the respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on February 20, 2009, and seeks review of an order issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Nick Malegiannakis and NZM Restaurant Corp. (T/A Michael's Diner) on January 29, 2009. Upon notice to the parties a consolidated hearing was held in this matter and another case involving the same petitioners on March 9 and 10, 2010, in Albany, New York, before Sandra M. Nathan, then the Board's Deputy Counsel, 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 file post-hearing briefs.

The order under review is an order to comply with Article 7 of the Labor Law, dated January 29, 2009, which imposes a \$2,000.00 civil penalty against the petitioners for violating Labor Law § 215 by “discharging employees after being apprised that complaints had been lodged against him/her. Said employer discharged employee Darlene Shamus on or about February 24, 2008 after complaints were lodged with the Commissioner of Labor.”

SUMMARY OF EVIDENCE

Senior Labor Standards Investigator Constance Higgins-Beer testified that claimant Darlene Shamus filed a claim for unpaid wages, dated March 21, 2008, with the Department of Labor (DOL), alleging that petitioners Nick Malegiannakis and NZM Restaurant Corp. (T/A Michael’s Diner) failed to pay their waitresses minimum wage. Higgins-Beer initiated contact with the petitioners in September 2008.

Higgins-Beer testified that on or about October 8, 2008, she received a complaint from the claimant that the petitioners had terminated her in retaliation for filing a wage claim. Higgins-Beer spoke to Nick Malegianakis by phone to discuss Shamus’ complaint of retaliation. Nick Malegiannakis told Higgins-Beer that the petitioners had terminated Shamus for various job performance related reasons and also because she had been “bad-mouthing” him to all the employees and asking them to file complaints with DOL and Unemployment. Higgins-Beer noted that there was no discussion at that time of an incident that had taken place in February 2008. Higgins-Beer further testified that she had been at the diner in September to examine records, and had discussed Shamus’ wage claim with the petitioners and advised them that retaliation was illegal.

Petitioner Nick Malegiannakis testified that he has been the owner of Michael’s Diner since 2002, which he operates along with his son, Michael Malegiannakis. Nick Malegiannakis testified that in 2008, Darlene Shamus “left” two times. The first time she left after an argument with Malegiannakis over her late arrival to work. Michael Malegiannakis subsequently rehired Shamus, although Nick Malegiannakis could not recall when she was rehired. The second and final termination was in October 2008. Michael Malegiannakis also testified that Darlene Shamus was terminated twice in 2008. He testified that the first time was after she came to work 2 ½ hours late, that he eventually rehired her, and she came back to work for a couple of months before she was terminated.

Claimant Darlene Shamus testified that she stopped working for the petitioners in February 2008 because of a disagreement with Nick Malegiannakis over arriving late to work. She was rehired by Michael Malegiannakis in July 2008, and terminated by him on October 5, 2008.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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 (Labor Law § 101, 103; 12 NYCRR 65.30). For the reasons set forth below, we find that the petitioners have met their burden of proof, and the order is revoked in its entirety.

Labor Law § 215 (1), as in effect in 2009¹, provided in relevant part that:

“No employer or his agent, or the officer or agent of any corporation, shall discharge . . . any employee because such employee has made a complaint to his employer, or to the commissioner or his authorized representative, that the employer has violated any provision of [the Labor Law]; or because such employee has caused to be instituted a proceeding under or related to [the Labor Law], or because such employee has testified or is about to testify in an investigation or proceeding under [the Labor Law]. If after investigation the commissioner finds that an employer has violated any provision of this section, the commissioner may, by an order which shall describe particularly the nature of the violation, assess the employer a civil penalty of not less than two hundred or more than two thousand dollars”

A violation of Labor Law § 215 is established where the evidence demonstrates that (1) the claimant engaged in activity protected by Labor Law § 215; (2) that the employer was aware of the protected activity; (3) that the claimant suffered an adverse employment action; and that (4) there is a nexus between the protected activity and the adverse employment action. (*See McDonnell Douglas Corp. v Green*, 411 US 792 [1972]; *accord Lai v Eastpoint Int'l, Inc.*, 141 Lab. Cas (cch) P34, 120 [SDNY 2000] [analogous anti-retaliation provision of federal Fair Labor Standards Act applied to Labor Law § 215]; *Landwehr v Gray Advertising*, 211 A.D.2d 583 [1st Dept 1995] [federal standards followed in state human rights law case]; *Dept of Correctional Services v. Division of Human Rights*, 238 AD2d 704 [3d Dept 1997] [federal standards followed in state human rights law case].)

The order finds that the petitioners terminated claimant Darlene Shamus on or about February 28, 2008 after she had filed a complaint with the Commissioner. However, the evidence clearly indicates that the claimant did not file her claim for unpaid wages until March 28, 2008, which was after she had stopped working for the petitioners in February 2008, but before she was rehired and subsequently terminated for the final time. We find that the order must be revoked, because as of February 28, 2008, the claimant had not yet engaged in a protected activity.

At hearing, the Commissioner presented evidence that a clerical mistake led to the issuance of an incorrect draft of the order, and argued that the petitioners were not prejudiced by the mistake, because the answer to the petition apprised the petitioners of the Commissioner's actual theory of liability. Furthermore, the Commissioner argued that Investigator Higgins-Beer's testimony concerning conversations she had had with Nick Malegiannakis in October 2008 established that the petitioners were aware that the October

¹ Labor Law § 215 has subsequently been amended.

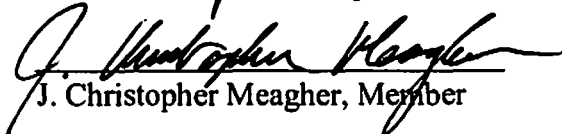
termination, not the February termination, was the subject of the order. The petitioners, for their part, argued that order did not provide proper notice of the basis for the violation, where the claimant was terminated twice, and the order referred only to the earlier termination date. The Commissioner, upon discovering the order contained incorrect information, could have moved to amend the order, but did not. Short of that, absent direct evidence that the petitioners were not misled or confused by the plain language of the order, we find the order invalid and unreasonable.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order to comply with Article 7 of the Labor Law is revoked; and
2. The petition for review be, and the same hereby is, granted.



Anne P. Stevason, Chairperson

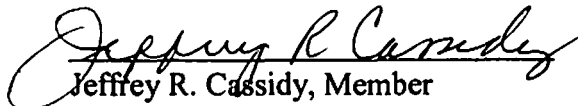


J. Christopher Meagher, Member



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
March 29, 2012.