

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

GIOVANI LAKE A/KA GEMINI LAKE (T/A :
DVEIC/PR CONSULTANTS), :

Petitioner, :

DOCKET NO. PR 09-140

To Review Under Section 101 of the Labor Law: :
Two Orders to Comply With Article 6 and an Order :
under Article 19 of the Labor Law, all dated April 14, :
2009, :

RESOLUTION OF DECISION

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :
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APPEARANCES

Giovani Lake, *pro se* Petitioner.

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

WITNESSES

Giovani Lake, Mia Hiraoka, for Petitioners.

Mia Hiraoka, Lety Escobar, Senior Labor Standards Investigator, for the Respondent.

WHEREAS:

On June 16, 2009, Petitioner filed a petition with the New York State Industrial Board of Appeals (Board), pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules (12 NYCRR part 66), seeking review of three Orders that the Commissioner of Labor (Commissioner or Respondent) issued on April 14, 2009.

The first Order is an Order to Comply with Article 6 of the Labor Law (Wage Order), which finds that Petitioner failed to pay wages to Mia Hiraoka (Claimant) in the amount of \$2,384.45, interest at the rate of 16% calculated to the date of the Order in the amount of \$602.06, and a civil penalty in the amount of \$2,384.00 for a total amount due and owing of \$5,370.51.

The second Order is an Order to Comply with Article 6 of the Labor Law (Supplemental Wage Order), which finds that Petitioner failed to pay supplemental wages, and demands payment in the amount of \$383.99, interest at the rate of 16% calculated to the date of the Order in the amount of \$89.21 and a civil penalty in the amount of \$384.00 for a total amount due and owing of \$857.20. The Supplemental Wage Order does not identify the supplemental wage due, but Claimant's claim for unpaid wage supplements identifies the supplemental wage as an unreimbursed plane ticket (\$199.99) and payment for business flyers (\$184.00).

The Order under Article 19 (Penalty Order) finds that Petitioner failed to keep and/or furnish true and accurate payroll records and demands payment of \$500.00.

The petition challenges the Wage and Supplemental Wage Orders on the grounds that Petitioner did not employ Claimant, and that the Department of Labor (DOL) dropped its initial investigation because Claimant filed a civil action in small claims court and a complaint with the New State Division of Human Rights. Respondent states that Claimant was Petitioner's employee (executive assistant to Giovanni Lake), and that DOL initiated a new investigation, and issued new orders, when it became aware that Claimant's wages were not at issue in either the small claims or the Human Rights proceedings.

SUMMARY OF THE EVIDENCE

Lake testified that he met Claimant in Manhattan and that she told him that a modeling agency scammed her out of money. Lake added that he offered to help her get her money back and that he would help her earn money by selling merchandise on eBay. He taught her the optimal way to list items on eBay in order to maximize profits, and he believed that he and Claimant would build a successful business. However, Lake insisted that when Claimant sold items, she kept the money and that he "never had a dime of it," though he expected a 20 percent return on items Claimant sold. Lake also testified that Claimant was never his assistant.

Lake denied that DVEIC was a company, but rather was an acronym for "display, view, engage, inform, and connect," which he described as eBay terms. According to Lake, DVEIC was not incorporated, was not filed as a business, has never been licensed, and has never held a bank account. He described his occupation during the claim period as helping a company called "I Sold It," where he strategized the obtaining, marketing, and selling of inventory on eBay. He stated that he was essentially a consultant, that he never sold on eBay, but that he bought merchandise for others to sell there.

Lake explained that Claimant had two eBay accounts and once he helped her get started she sold his inventory through those accounts. He testified that a web designer (Qianna) worked with Claimant to set up her own website.

Claimant had a markedly different recollection of their relationship. She testified that in the summer of 2007, right after graduation from college, she responded to a Craigslist advertisement for a position for an unidentified Fortune 500 company, and that Lake responded when she answered the ad. According to Claimant, Lake told her that

she would be working for DVEIC, and described the advertised position as his assistant. He also characterized DVEIC as a marketing consultancy.

While meeting with Claimant at a coffee shop, Lake gave her a confidentiality agreement and told her that she would be in training for two weeks. Claimant also testified that after her first week she asked Lake about her pay; that he asked her what was the "minimum for [her] to get by monthly . . .;" and, that she responded, \$1,500. Claimant added that Lake agreed to the \$1,500, but that he also told her that in addition to her pay she would receive bonuses.

Claimant stated that within the first week of being employed, Lake gave her a document outlining DVEIC's mission. That document described DVEIC as a "full service communications consultancy" which specialized in "targeting supplier diversity, multicultural audiences, business-to-business development, corporate communications and lifestyle marketing." The document also lists a number of clients and various projects it conducted on their behalf, and according to Claimant, Lake gave her the document because he wanted her to learn more about his company. In response, Lake testified that the document was the profile of Kevin Dericott, who Lake described as the "top New York PR person," and that he had Dericott's profile on his computer but without being labeled DVEIC. Lake also inferred that someone altered Dericott's profile to show that DVEIC was his company.

According to Claimant, during her first two weeks, Lake trained her in basic marketing techniques. After that she posted ads online for Lake's companies and went with him to various events. She explained that Lake gave her "homework assignments" involving eBay so that she would better understand his business; that she ran errands for him, took notes at meetings and events, attended a couple of client meetings, and did whatever was needed. She also stated that she often went with Lake to a store where he selected merchandise to be sold on eBay.

Claimant conceded that most of her eBay activity was done at work, and that she spent just a few hours on it after work. However, she maintained that eBay was a small part of what she did and that her DOL wage claim form reflected only the hours she worked for DVEIC.

Claimant testified that she approached Lake about her salary sometime in September 2007, and again in October 2007, and that he rejected the idea she was owed any wages. According to Claimant, Lake told her that he did not owe her any money because of the time and energy he spent training her.

Claimant gave DOL investigator Steve Konsistorum a transcript from a tape of a conversation she had with Lake, an email she believed was from another assistant, and a DVEIC project chart. Claimant contended that she recorded the conversation with Lake for evidence of her employment relationship with Lake and DVEIC; that the email showed that she had a company email address (mai@dveic.info); and, that the project chart showed DVEIC's involvement with clients.

Claimant maintained that she filed a complaint in small claims court in order to be reimbursed for the merchandise that she bought and for a \$1,400 cash advance she made to Lake, and that her DOL complaint did not cover the issues in the small claims

court proceeding. She also testified that Lake did not reimburse her for flyers she bought for DVEIC (\$184.00) and for an airline ticket (\$199.99) he instructed her to buy for Terina Taylor, who Claimant identified as another Lake assistant. However, Claimant conceded that the reimbursement for the flyers and airline ticket were expenses that were also included in the DOL claim.

Senior Labor Standards Investigator Lety Escobar testified that Konsistorum investigated Claimant's claim, but that DOL no longer employed him. Escobar explained that Claimant's claim of \$4,191.10 in wages was based on Claimant's asserted hours and number of days worked multiplied by the \$7.15 minimum hourly wage rate in effect during the claim period. As the \$1,500 monthly salary Claimant alleged Lake promised her was less than the minimum wage for the hours she claimed to have worked, the higher amount was used for the Wage Order. However, Konsistorum requested that Claimant provide only the hours that she worked as Lake's assistant, and not the hours she worked on eBay, either at home or while working for Lake. Once that information was received the wage claim was reduced to \$2,384.45. The original order for \$4,191.10 was rescinded and replaced with the Wage Order for \$2,384.45. Escobar also testified that Konsistorum recommended the 100% civil penalty of \$2,384.45 (though he incorrectly identified it as a 200% penalty) which was based on Lake's general uncooperativeness.

GOVERNING LAW

Standard of Review and Burden of Proof

The Labor Law provides that "any person . . . may Petition the board for a review of the validity or reasonableness of any . . . order made by the [C]ommissioner under the provisions of this chapter" (Labor Law 101 § [1]). It also provides that a Commissioner's order shall be presumed "valid" (Labor Law § 103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is a petitioner's burden at the hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; *Angelo v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]; see also State Administrative Procedure Act § 306 [1]). It is therefore Petitioner's burden to prove, by a preponderance of the evidence, that Claimant's wages and miscellaneous expenses are not due and owing, and that the Civil Penalty is invalid or unreasonable.

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 Rule 65.39 (12 NYCRR § 65.39).

Petitioner was Claimant's Employer

The Orders were issued against Giovanni Lake. Under the Labor Law, an individual may be found personally liable for unpaid wages if he or she is deemed an "employer." Article 6 of the Labor Law defines "employer" as "any person, corporation or association employing any individual in any occupation, trade, business or service" (Labor Law § 190 [3]). "Employed" means "permitted or suffered to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 USC § 203[g]). Because the statutory language is nearly identical, the same test is used to determine whether a person is an employer under both the Labor Law and the FLSA (*See, e.g. Chu Chung v The New Silver Palce Rest Inc.*, 272 F Supp 2d 314, 319 n 6 [SDNY 2007]). The Board has found individual corporate owners and officers to be employers if they possess the requisite authority over employees (*See, e.g., 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]).

The central inquiry in determining employer status and responsibility of an individual under these expansive definitions 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" (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999]). Factors to consider when examining the "economic reality" of a particular situation 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 employee records," though no single factor is dispositive. Instead, the "economic reality" test encompasses the totality of the circumstances, no one of which is exclusive. "[E]conomic reality is determined based upon *all* the circumstances, [and] any relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition" (*id.*)

Petitioner contends that Lake merely attempted to help Claimant start her own eBay business and that DVEIC was not a company but merely an acronym for eBay terms. Applying the indicia of the "economic reality test" we find that while Lake may have helped Claimant navigate her own eBay sales, and that a substantial amount of her time may have been spent in pursuit of that venture, he was her employer for all the other work she did for Lake. We credit Claimant's testimony that her relationship with Lake began when she answered a Craigslist listing that advertised a position with an unidentified Fortune 500 company. Lake's recollection of how he met Claimant was not as clear nor as convincing as Claimant's.

Further, in evidence is a DVEIC project chart that Claimant testified Lake gave her for the purpose of "brainstorming for [Lake's] company." Included on the chart was Nephria, which Claimant identified as a company that Lake was trying to establish as a client. This document supports Claimant's testimony that she acted as an assistant for Lake and that she did other work besides posting on eBay.

Lake also supervised and controlled Claimant's work schedule and conditions of employment. She credibly testified that he required her to sign a confidentiality

agreement, an assertion that Lake did not deny. Though her hours were flexible, it was Lake who told her there were no specific hours.

We also find that Lake set Claimant's rate of pay at \$1,500 a month plus bonuses. It is improbable that Claimant would have worked for Lake for two months without any expectation of pay other than what sales eBay might produce.

Petitioner also argues that the New York State Division of Human Rights, in dismissing a complaint filed by Claimant, held that Petitioner was not Claimant's employer and that collateral estoppel should bar Claimant's wage claim. The Division of Human Rights determined that under Human Rights Law § 297 (2) it did not have jurisdiction to investigate Claimant's complaint because Petitioner Lake did not employ at least four employees (Executive Law § 292 [5] states "The term 'employer' does not include any employer with fewer than four persons in his or her employ . . .").

The Wage Order is Affirmed

An employer's failure to keep adequate records does not bar employees from filing wage claims. Rather, where claims demonstrate a violation of the Labor Law, the DOL must calculate wages due based upon the best available information, and Labor Law § 196-a provides that employers who keep inadequate records "shall bear the burden of proving that the complaining employee was paid wages, benefits, and wage supplements" (*Angello v Natl. Fin. Corp.*, 1 AD3d 818 [3d Dept 1989]) As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 (3d Dept 1989), "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer." Such decisions are rooted in the U.S. Supreme Court's discussion and decision in *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-688 (1946), *superseded by statute on other grounds*:

"The solution [where the employer's records are inadequate] ... is not to penalize the employee by denying him any recover on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper record In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate."

The Wage Order states that Claimant is owed \$2,384.45 for unpaid wages for the claim period August 17, 2007 to October 17, 2007. Senior Labor Standards Investigator

Escobar explained that the unpaid wage calculation was based on Claimant's assertion of the hours that she worked for Petitioner, excluding the time she spent selling items on her eBay accounts, multiplied by the minimum hourly wage rate. In the absence of any employer wage and hour records, we find that the hours and pay calculated by the DOL are reasonable and valid.

Additionally, the Wage Order assesses a 100% civil penalty that was not objected to in the petition, and is therefore affirmed (*see* Labor Law § 101 [2] [objections not raised by petition are waived]). The nondiscretionary interest included in the Wage Order at 16% per year is also affirmed (*see* Labor Law § 219 [1]; Banking Law § 14-A).

The Supplemental Wage Order is Revoked

Section 198-c of the Labor Law requires an employer who is party to an agreement to pay or provide benefits or wage supplements to employees to pay such benefits within thirty days after they are required to be paid. Claimant testified that she was not reimbursed for flyers in the amount of \$184.00 for Petitioner's campaign to obtain Nephria as a client and for a \$199.99 airline ticket, both of which Lake instructed her to buy.

However, Claimant testified that these expenses for these specific amounts were part of a claim that she made in the Civil Court of New York City, Small Claims/Commercial Claims Part on October 31, 2007. On May 8, 2008, a Notice of Judgment was entered by the Court dismissing Claimant's complaint. Although a small claims court judgment has limited preclusive effect on subsequent litigation,¹ an unsuccessful small claims plaintiff may not pursue the same claim again for the same amount (*See, e.g. Omara v Polise*, 163 Misc2d 989, 625 NYS2d 403 [1995, Sup App T]; *See also* Weinstein, Korn, Miller, CPLR Manual [Matthew Bender] §§ 1.04 [1], 25.04 [h2]).

Therefore, Claimant's claim for Supplemental Wages is precluded as she conceded that the reimbursement of the cost of those items were the subject of her unsuccessful Small Claims proceeding against Lake. Accordingly the Supplements Order is revoked.

The Penalty Order is affirmed

Under Labor Law § 101 [2] any objection not raised in the petition is waived. The petition does not object to the Penalty Order, which is therefore affirmed.

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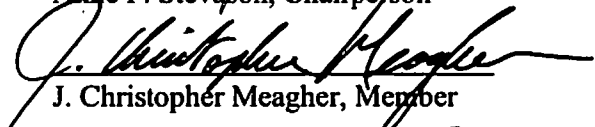
¹ Although DOL is the party in this case and not the claimant, for purposes of reimbursement of expenses where the Labor Law requires a private agreement, there is a unity of interest between the claimant and DOL. We reserve decision on whether the same would apply for other types of claims where DOL has a separate public policy interest in enforcement.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is affirmed; and
2. The Supplemental Wage Order is revoked; and
3. The Penalty Order is affirmed; and
4. The Petition for review be, and the same hereby is, otherwise denied.



Anne P. Stevason, Chairperson

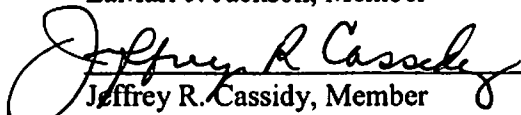


J. Christopher Meagher, Member



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
October 17, 2012.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is affirmed; and
2. The Supplemental Wage Order is revoked; and
3. The Penalty Order is affirmed; and
4. The Petition for review be, and the same hereby is, otherwise denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member



LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
October 17, 2012.