COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

3 DOGS LLC, JOHN CATALDI RESTAURANT INC. & JOHN CATALDI, INDIVIDUALLY Petitioners	:	Docket No. LB-24-0210 & 0211 Date: March 18, 2025
v.	:	
OFFICE OF THE ATTORNEY GENERAL, FAIR LABOR DIVISON Respondent	:	

Appearances

For Petitioners: Allan Levin, Esq.
For Respondent: Justin Polk, Esq.

Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

The Petitioners owed their delivery drivers a separate and additional mileage reimbursement. They could not simply avoid this reimbursement by raising the employees' wages to cover what they owed. Also, the Petitioners did employ minors in a prohibited position—delivery driver—and the fines for those violations were not arbitrary and capricious. Additionally, the Petitioners allowed minors to work during prohibited times: more than 8 hours in one day and past 7:00 p.m. on other days. These citations are all affirmed.

The Petitioners were not wrong to include their employee, Karen Graziano, in a tip sharing pool. Ms. Graziano was not a manager, nor did she exercise limited managerial responsibilities. Finally, the Petitioners had a valid sick leave policy whereby they allowed employees to earn and use sick leave. These two citations are vacated.

INTRODUCTION

The Petitioners timely appeal citations for violations of the Massachusetts wage and hour law imposed by the Office of the Attorney General, Fair Labor Division ("FLD"). I held a

hearing on November 19, 2024. The FLD called three witnesses: investigator Christina Proietti, Ben Egan, a former employee, and George Egan, his father; the Petitioners also called three witnesses: John Cataldi, the owner, Hollie Cataldi, his wife, and Karen Graziano, a current employee. I admitted joint exhibits 1-7, respondent exhibits R1-R19 and petitioner exhibits P1-P3. The parties submitted closing briefs on January 31, 2025, and each submitted reply briefs on February 14, 2025, at which point I closed the administrative record.

FINDINGS OF FACT

Background

1. John Cataldi owns and operates two restaurants: John Cataldi Restaurant, Inc., more commonly known as "Solstice," and 3 Dogs LLC. Solstice is a fine dining restaurant. 3 Dogs is a casual pizza restaurant. (John Cataldi.)
2. Mr. Cataldi has operated Solstice since 2000. He opened 3 Dogs, around 2020. The restaurants are located next to one another. (John Cataldi testimony.)
3. Hollie Cataldi, Mr. Cataldi's wife, has always helped him manage both restaurants. Together they are responsible for traditional managerial duties: hiring and firing employees, scheduling, ordering supplies, banking, running payroll, etc. (John Cataldi and Hollie Cataldi.)
4. The restaurants employ the typical restaurant employees: cooks, wait staff, bussers, hosts, take out attendants, and expediters. (John Cataldi and Graziano.)
5. Expediters are extremely important, especially on busy nights. They are in charge of sorting and distributing food from the kitchen to its destination, either in the restaurant or for take-out/delivery. When necessary, they deliver food to a patron themselves or help in any other way needed. (John Cataldi and Graziano testimony.)

6. Neither restaurant has a manager. Those duties are typically covered by Mr. and Mrs. Cataldi ("the Cataldis"). However, when they first opened 3 Dogs, the Cataldis did hire a manager. The manager worked there for about three months and then was terminated for personal reasons. After that, the Cataldis did not hire a new manager because they did not think it was necessary. Instead, they managed 3 Dogs themselves. (John Cataldi and Hollie Cataldi.)

7. Employees of a restaurant may get paid in a variety of ways. At 3 Dogs, kitchen staff usually are paid a salary, but sometimes are paid by the hour. Everyone else is usually paid hourly through some combination of a minimum salary and tips. Some employees are paid the prevailing minimum wage. If they also receive tips directly, or participate in a tip pool, they receive that money on top of their minimum salary. (General.[1])

8. Other employees—typically the wait staff and expediters—are paid what is called the "tipped minimum." That is a base salary lower than the prevailing minimum wage. They also receive tips, which are added to this tipped minimum. However, if after adding their tips with the tipped minimum, they earn less than the prevailing minimum wage, the employer is responsible for paying the difference. That way, the employee receives at least the same pay as someone working solely for minimum wage. (General.)

Delivery drivers and employing minors

9. Neither restaurant used to offer delivery service. That changed during the Covid-19 pandemic because 3 Dogs needed to generate more revenue. (John Cataldi.)

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[1] There are some facts about which many witnesses testified and are not in dispute. I simply note the testimony as "General."

10. To do so, the Petitioners had to hire delivery drivers. They began by hiring a few college students who were living at home because of the pandemic. (John Cataldi.)

11. As the delivery business improved, they needed more drivers, so they hired younger siblings or friends of other employees. This resulted in hiring several minors, i.e., people under 18 years old. They also hired some minors for other positions, such as bussers. (John Cataldi.)

12. Because neither restaurant ever employed minors before, the Petitioners were not aware of various restrictions. (John Cataldi.) For example, minors need work permits, which the Petitioners did not ask for and minors are not generally allowed to work as delivery drivers. (Proietti.)

13. Minors are also limited as to when they are allowed to work. Minors aged 14 and 15 may work until only 7:00 p.m. during the school year and 9:00 p.m. in the summer. Minors aged 16 and 17 may work only until 10:00 p.m. on school nights and midnight on other nights. No minor may work more than 8 hours a day, regardless of the day. (Proietti.)

14. The Petitioners concede they improperly hired minors as delivery drivers. In case there is any doubt, the records confirm that there were minors hired as delivery drivers. (Ex. 7.)

15. The Petitioners dispute that minors under 16 worked later or longer than permitted. However, I find that in fact happened based on the following facts.

16. The FLD fined Solstice for having one minor under the age of 16 work more than eight hours in one day. The payroll records confirm that occurred on January 7, 2023. (Ex. 7, tab B.)

17. The FLD also fined 3 Dogs for having *at least* two minors under the age of 16 work later than the latest permissible hour: 7:00 p.m. Again, records confirm this happened

repeatedly—by my count, 23 times—with five different minors for various lengths of time. The violations were as short as 17 minutes and as long as over two hours. In fact, there were 7 different violations of over two hours. (Ex. 7, tab B.)

Mileage reimbursement

18. Employees who use their vehicles for work purposes are entitled to mileage reimbursement. They receive a set amount of money per mile driven. For example, during the period in question, the mileage reimbursement was between $0.585 and $0.625 per mile. (Exs. R7 & P1; general.)

19. This kind of mileage reimbursement applies to delivery drivers who use their own vehicles to make deliveries. (Proietti.)

20. Employees are supposed to keep track of their miles and report them to their employers. (Proietti.)

21. When delivery service began, Mr. Cataldi was aware of this and had his drivers keep track of their miles. However, many were not good record keepers for a variety of reasons: their odometers were broken, they forgot, they might make personal trips in between deliveries, or they might use multiple vehicles. (John Cataldi.)

22. Thus, Mr. Cataldi came up with an alternative payment method that would obviate the need to keep mileage records but still make sure the drivers were paid enough to cover their mileage expenses. The delivery drivers were originally paid the tipped minimum, plus tips and mileage. Under the new system, however, they were paid the prevailing minimum wage plus tips (but no mileage). (John Cataldi.)

23. The new system resulted in the drivers being paid more overall.[2] (John Cataldi; ex. P1.)

24. Although this new system resulted in Mr. Cataldi having to pay his drivers more, he preferred this method. For one, he felt these drivers should be making more money anyway. But also, it eliminated the mileage record keeping requirements that were difficult to keep track of. (John Cataldi.)

Tip pool and Karen Graziano's duties

25. Employees in restaurants typically share tips in some way. (John Cataldi; ex. R18.)

26. However, managers are ineligible to participate in a tip pool. (Proietti.)

27. Karen Graziano participated in the tip pool. (General.)

28. The FLD alleges that Ms. Graziano was a general manager and thus ineligible to participate in the tip pool. However, I find that Ms. Graziano was not a general manager based on the following facts.

29. Ms. Graziano has worked for the Cataldis for years. She began as a hostess and waitress at Solstice. Shortly after 3 Dogs opened, she transferred there as a waitress and expediter. She was brought on after the manager was terminated. (John Cataldi, Hollie Cataldi, & Graziano.)

30. Her role on any given night depended on what was needed. (John Cataldi, Hollie Cataldi, & Graziano.)

31. The restaurant has a computer system that serves multiple purposes. One purpose is for employees to punch in and out. To do so, they must first be entered into the system.

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[2] The Petitioners submitted a spreadsheet they prepared for each delivery driver, including Ben Egan, to show that they all earned more money under the new system than the old one. I am not sure the final calculations as to how much more the drivers earned under the new system are correct. But assuming the underlying data is accurate, there is no dispute the drivers did earn more under the new system, if not always then almost always. (Ex. P1.)

When that occurs, they are given a title. Although Ms. Graziano was not hired as a manager, when the Cataldis entered her into the system, they substituted her for the old manager. Mr. Cataldi explained this was easier than creating a new position. Thus, her title in the computer system is "general manager." (John Cataldi, Hollie Cataldi, & Graziano.)

32. Also, depending on one's title in the system, one may have different permissions to access different data. Making Ms. Graziano the "general manager" meant at least someone other than the Cataldis could access functions in the system when they were not there. Indeed, they sometimes asked Ms. Graziano to do things in the system that only a person with "general manager" permission could do. (John Cataldi and Hollie Cataldi.)

33. Ms. Graziano never had authority to do these things on her own. She only did what the Cataldis asked her to do. For example, they might ask her to change the price of a menu item if they were not in the restaurant to do it themselves. Or they might ask her to run a financial report at the end of the night. (John Cataldi, Hollie Cataldi, & Graziano.)

34. Being called a "general manager" in the computer system did not give Ms. Graziano any additional authority. She was not allowed to hire or fire anyone, change their pay, do anything related to budgeting, exercise any supervisory control, maintain sales records, appraise employees, discipline other employees, plan work techniques, order supplies, monitor legal compliance, etc. (John Cataldi, Hollie Cataldi, & Graziano.)

35. Those were all things the Cataldis did. Sometimes the head chef at 3 Dogs would take care of some of these responsibilities too. When the Cataldis took a vacation, the bookkeeper or Mrs. Cataldi's mother would take over management responsibilities. (John Cataldi.)

36. Therefore, Ms. Graziano's title was a misnomer. She was not a manager. (John Cataldi, Hollie Cataldi, & Graziano.)

37. That said, sometimes Ms. Graziano did things that made it seem as if she had some limited managerial responsibility. Ms. Graziano is the most experienced waitress at 3 Dogs, if not both restaurants. The Cataldis trust her. She is thus able to help the Cataldis in a variety of ways when they need it. (John Cataldi, Hollie Cataldi, & Graziano.)

38. As noted above, she might change the price of a menu item as requested by the Cataldis. Or she might print out the employee schedules for the Cataldis. (John Cataldi.)

39. If someone new was starting, there was no formal training or trainers. If the Cataldis were not around, they would call over and tell whoever was there to help show the new person around. This could be Ms. Graziano, and if she was working, she would gladly do it; but it could be any other wait staff. The "training" consisted of the more experienced staff having the new hires follow them around to learn what to do. (Hollie Cataldi and Graziano.)

40. After this investigation began, the Cataldis realized they needed to ask minors for work permits. They asked Ms. Graziano to ask the minors for that on their behalf. She did by sending the minors a text message. (Ex. R3; John Cataldi.)

41. Ms. Graziano was present at one meeting between the Cataldis and Ben Egan. This was on a night she was working. This was to address some of Ben's complaints about how he was being paid. The Cataldis asked her to be there because she was familiar with everything the "group" had been talking about. Also, Ben had been texting Ms. Graziano directly about his complaints, so the Cataldis thought she could help with the conversation. (John Cataldi.)

42. Ms. Graziano was also present for another meeting when Mrs. Cataldi told all the minors they could no longer work as delivery drivers. Instead, they were given the option of staying on as bussers. The Cataldis asked Ms. Graziano to be present at that meeting because she knew all the minors well and they thought she might be able to help answer questions. Mrs. Cataldi also wanted someone to sit with her. (John Cataldi, Hollie Cataldi.)

43. When she helps the Cataldis do some of these things, Ms. Graziano gets paid a small bonus of $250. The Cataldis decide when she should receive it. This does not happen often, though. In 2022, for example, she was paid this bonus only three times for an annual total of $750. The bonus is called "salary" on her paycheck, but it is not part of her regular salary. (Ex. R17; John Cataldi, Hollie Cataldi, & Graziano.)

Sick leave policy

44. Prior to this investigation, the Petitioners did not have a *written* sick leave policy. However, I find that they had an *unwritten* sick leave policy based on the following facts.

45. Mr. Cataldi explained their sick leave policy at the hearing. He did not use the word "unlimited" but essentially that is what he described. Employees could take sick leave whenever they needed. They just needed to notify him they would be out.[3] (John Cataldi.)

46. From his perspective, it was easy to provide unlimited leave because, in reality, restaurant workers rarely took sick leave. Since employees could easily switch shifts, they hardly ever had to call out. Switching shifts was better than calling out sick because the

[3] After the investigation, the Petitioners adopted a new sick leave policy and put it in writing. The policy is different and more traditional, i.e. not unlimited. (Ex 19.) The FLD points to the difference between the written policy and Mr. Cataldi's testimony to imply his testimony was not truthful. But the Petitioners could easily have had one policy before this investigation, and a different one after.

employee would make more money working (by earning tips) than being paid for sick leave (which was just minimum wage without tips). (John Cataldi.)

47. For example, during the time reviewed by the citations, Mr. Cataldi estimated employees called out sick about 10 times, and it was usually the salaried employees, not wait staff. Each time he paid them even though they did not come to work. (John Cataldi.)

48. This was the policy and everyone was aware of it. He explained it to his workers. (John Cataldi.)

49. He also put up notices of the earned sick leave general laws on the walls. (John Cataldi.)

Citations

50. After concluding its investigation, the FLD issued various citations, some of which the Petitioners did not appeal. The Petitioners appealed only the following:

- Citation #1: failure to reimburse its delivery drivers for mileage: $5,201.45 in restitution and a penalty of $550.00. (Ex. 1.)
- Citation #2: wrongly including Ms. Graziano in the tip pool: $8,557.86 in restitution and a penalty of $2,150.00. (Ex. 2.)
- Citation #4: employing a minor past the latest permissible hour: $2,300.00 penalty. (Ex. 3.)
- Citation #6: employing minors in a prohibited occupation, i.e. delivery drivers): $43,750.00 penalty. (Ex. 4.)
- Citations #7 and #12: failure to permit employees to earn and use sick time at both Solstice and 3 Dogs: $3,000.00 penalty for each citation. (Exs. 5 & 7.)
- Citations #11: employing a minor more than eight hours a day: $250.00 penalty (Ex. 6.)

DISCUSSION

A person aggrieved by a citation from the Attorney General may appeal it. *See* G.L. c. 149, § 27C(b)(4). If the Petitioner "demonstrates by a preponderance of evidence that the

citation . . . was erroneously issued," DALA may vacate or modify the citation as appropriate. *Id*. Otherwise, DALA must affirm the citation. *Id.*

Citation # 1 (mileage reimbursement)

There is no dispute the Petitioners had to reimburse delivery drivers for their mileage. Accordingly, when they began delivery service, they had delivery drivers keep track of their mileage. There is also no dispute that when this became difficult, the Petitioners looked for an alternative way to reimburse them for the mileage. The Petitioner's intent was benign—find a way to pay the drivers for mileage while not having to deal with faulty recordkeeping. That intent, however, is irrelevant to the disputed issue: whether they could avoid reimbursing their drivers for mileage through an alternative system. The short answer is no, they could not.

Employers must reimburse employees for all transportation expenses when the employees are "required or directed to travel from one place to another after the beginning of or before the close of the work day." 454 Code of Mass. Regs. § 27.04(d). There is no exception. Thus, an employer must pay an employee these reimbursements just as, for example, it must pay its employees overtime. These are separate and additional payments in addition to an employee's wages.

Seeking efficiency, the Petitioners sought to fold mileage reimbursements into their employees' salaries. This method did not result in a separate and additional payment of mileage. Rather, the Petitioners increased the employees' hourly wages to cover what they were supposed to pay separately. While it is understandable why they did that, and this alternative scheme may even have resulted in netting employees more money overall, it was still prohibited.

While there are no cases directly analyzing this statutory provision, the issue is entirely analogous to other payment schemes recently addressed by the Supreme Judicial Court. The

Court clarified that overtime wages and Sunday pay must be paid separately and apart from an employee's salary. *Sullivan v. Sleepy's LLC*, 482 Mass. 227, 233 (2019); *Sutton v. Jordan's Furniture, Inc.*, 493 Mass. 728 (2024). In those cases, employees were paid through commissions. But the employees also regularly worked more than 40 hours a week (overtime) and also worked on Sundays. Although their commissions paid them more than if they were simply paid a regular overtime rate, the employers nevertheless owed the employees that separate overtime payment in addition to their commissions.

> [D]raws and commissions cannot be retroactively allocated as hourly and overtime wages and Sunday pay even if these draws and commissions equaled or exceeded the minimum wage for the employees' first forty hours of work and one and one-half times the minimum wage for all hours worked over forty hours or Sunday. Rather, the employees are entitled to *separate and additional* payments of one and one-half times the minimum wage for every hour the employees worked over forty hours or on Sunday.

Sleepy's, at 228 (emphasis added).

This is exactly what the Petitioners attempted to do here. They intended to increase the employees' base salary (from the tipped minimum to the standard minimum) to allocate the extra money as a replacement for the mileage reimbursement. Again, while this made sense and may even have resulted in higher wages in some instances,[4] the practice was prohibited. The Petitioners had to reimburse the drivers for their mileage separately.

The Petitioners argue that an employer is allowed to pay an employee in this way as long as the parties agree to this reimbursement scheme ahead of time. I disagree. Just like an employer

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[4] Indeed, without calculating how much mileage was owed, the Petitioners cannot really be sure the new scheme always netted the employees higher wages. It is possible a driver drove so many miles in a shift that the new scheme would not cover what he would have received had they been reimbursed for their mileage. While this seems unlikely or at least infrequent, it cannot be ruled out. A scheme that always requires a separate and additional payment avoids this ever becoming a problem.

may not contract around paying an employee minimum wage, or agree to use commissions to cover overtime, an employer may not eliminate mileage reimbursements by allocating a higher wage to cover what the employee was separately owed.[5] *Cf.* G.L. c. 149, § 148 (employees may not contract away their right to wages).

The Petitioners also cite cases that explain when an employer may use a set-off. The problem with this argument is that an employer may only set-off wages when there is a "clear and established debt owed to the employer by the employee." *Somers v. Converged Access, Inc.*, 454 Mass. 582, 593 (2009). Here the employees owed the employers nothing. It was the other way around—the employers owed the employees the mileage reimbursement.

Citations # 4 and 11 (employing minors during prohibited times)

The Petitioners dispute that they employed some minors during prohibited times, i.e. more than eight hours in one day and after 7:00 p.m. on many occasions. The Petitioners' argument is that some of these minors were not working during those hours. Rather, they were waiting for their parents, who also worked at 3 Dogs, to finish their shifts. While waiting, they forgot to "clock out." At the hearing, Mr. Cataldi explained this without naming the parents/employees. In their closing briefs, for the first time, the Petitioners provide more detail, including naming the parent/employees. But these new arguments are not supported by any credible evidence in the record.

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[5] The Petitioners' reliance on *Salerno v. Baystate Ford Inc*., 33 Mass. L. Rptr. 215, 2016 WL 513747 (Mass. Super. Ct. Feb. 5, 2016) is unavailing. The issue there was whether the employers agreed to pay the employees for certain tasks or whether the parties agreed those tasks would be uncompensated. In that context, the Court held that "an employer and employee who agree at the outset of their contract that the employee will be paid at an hourly rate for selected tasks, but not for *all* work, are plainly not violating the Wage Act when the employee is paid in accordance with this agreed understanding." *Id*. But there, the issue revolved around what work should be compensated. In contrast, mileage reimbursement is in addition to base compensation. Thus, an employer cannot contract around it.

In any event, the Petitioners' argument does not address the one minor who worked for more than eight hours in one day at Solstice. *See* Ex. J6. Also, there were five minors who worked past the latest permissible hour, but the Petitioners' argument references only three of them. That leaves two minors for which the Petitioners offer no explanation. Those two worked well past the allowed time. To the extent Mr. Cataldi's testimony was directed at them, I do not credit it. There is no plausible explanation for why two minors who did not have parents working would stay several hours after their shift and simply forget to "clock out." Moreover, it seems unlikely 3 Dogs would have let this happen 23 times; I would expect that after a few times, it would have corrected the practice and directed them to "clock out" so the restaurant would not have to pay them for not working. Therefore, the evidence supports the FLD's citations for these violations.

Citation #6 (employing minors in prohibited positions)

The Petitioners do not, and cannot, dispute that they employed minors in a prohibited position: delivery driver. However, they challenge the amount of the fine for this violation. Here, the FLD fined the Petitioners the maximum allowed: $250 per incident. Since there were 175 instances, the total fine was $43,750.

The FLD "may impose, for each instance in which a minor is required or permitted to work in violation of sections 56 to 105, inclusive, a separate civil penalty of not more than $250 for the first violation." G.L. c. 149, § 78A. "Section 78A, unlike certain other penalty provisions of G.L. c. 149, does not require the FLD to consider whether the employer acted with specific intent, or any other particular factors or circumstances, in making its penalty assessments. [And] because § 78A does not identify the factors that the FLD must consider in assessing the penalties, I must review its penalty decisions under the 'arbitrary and capricious' standard."

Qdoba v. Fair Labor Div., LB-19-0404, at *10 (Div. Admin. Law Apps. Oct. 7, 2020), (contrasting G.L. c. 149, § 27C which sets separate penalty scales for violations with and without "specific intent" and a list of factors to consider in assessing a penalty).

The FLD justifies the penalty here by noting it is within the statutory range—which it is. Absent more, the penalty appears unduly harsh. But DALA "should be slow to decide that [an agency] has acted unreasonably or arbitrarily. The court should cast about to discover, if possible, some ground which reasonable men might deem proper on which the action can rest." *Id.* at *4, *quoting Dubuque v. Conservation Comm'n of Barnstable*, 58 Mass. App. Ct. 824, 829 n.9 (2003), *in turn quoting Cotter v. Chelsea*, 329 Mass. 314, 318 (1952). Such reasons exist here.

First, the penalty is consistent with prior practice. *Qdoba*, *supra,* (imposing the maximum penalty for 1,632 instances violating § 78A despite no prior violation). Additionally, looking at other factors, while I appreciate that the Petitioners did not intend to violate the statute, and quickly rectified their conduct once put on notice, it would have been better if they had made some attempt to research the requirements of employing minors before they employed minors. They did not know the rules about employing minors, not because they misread the law, but because they did not read the law at all. Their ignorance of the law resulted in failing to procure work permits for minors and probably contributed to some minors working past the latest permissible time. While I may not agree with the FLD's imposition of a maximum penalty in this case, given these facts, I cannot say it was unreasonable.

Citation #2 (tip pool)

The parties agree that a restaurant can have a tip pool, and they also agree a manager may not participate in the tip pool. G.L. c. 149, § 152A. The disagreement is whether Ms. Graziano was a manager or ever exercised managerial responsibilities.

Section 152A defines some positions and not others. A wait staff employee is:

> a person, including a waiter, waitress, bus person, person in a quick service restaurant who prepares or serves food or beverages as part of a team of counter staff or any other counter employee who: (i) serves beverages or prepared food directly to patrons or who clears patrons' tables; (ii) works in a restaurant, banquet facility or other place where prepared food or beverages are served; and (iii) has no managerial responsibility during a day in which the person serves beverages or prepared food or clears patrons' tables.

It does not define a "manager." Accordingly, the Attorney General looks to 29 Code of Fed. Regs. § 541.1 "and relevant law for interpretive guidance to define the term 'managerial responsibility.'" Massachusetts Attorney General Advisory 2004/2 (2021) ("A.G. Advisory"). That, in turn, defines management to include:

> activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

29 Code of Fed. Regs. § 541.102.

Even if someone is not a manager, § 152A does acknowledge that some wait staff employees may have some managerial responsibilities on certain days. On those days, those employees may not share tips; but on days in which they have "no managerial responsibilities,"

they may share tips. *Id*. *See* A.G. Advisory ("Workers with limited managerial responsibility, such as shift supervisors, assistant managers, banquet captains and many *maître d's*, do not qualify as wait staff employees during days in which they perform managerial responsibilities.").

The only evidence the FLD relied on to establish Ms. Graziano was a manager was her title in the computer system. But that is not how one should judge an employee's role. 29 Code of Fed. Regs. § 541.2 ("A job title alone is insufficient to establish the exempt status of an employee."). Indeed, Ms. Graziano was not given that title because it described what she did, she was placed in that slot for administrative convenience. Instead, looking at the typical duties of management described in § 541.102, Ms. Graziano was not a manager. The Cataldis exercised all those duties. Ms. Graziano did not. She was a waitress and expediter whose job was limited to making sure food got to patrons.

That does not end the inquiry because she *may* have had some limited managerial responsibilities on certain days. However, based on my findings, nothing that Ms. Graziano did in addition to her work as a waitress/expediter could be considered exercising "managerial responsibility." I can understand why, without context, it may seem as if Ms. Graziano was doing more. Ben Egan called her his "manager," yet that appears to be because she was the most senior employee there. And since he went to her with his concerns, the Cataldis asked her to participate in a meeting with Ben Egan and his father. But she had nothing substantive to add and made no decisions regarding Ben Egan or other employees.

Ms. Graziano also sat in at a meeting where minors were told they were no longer allowed to be delivery drivers. While they were not being fired, it may have appeared that way to the minors and they may have felt as if Ms. Graziano was a part of the decision. Again, that

decision was made by the Cataldis, not Ms. Graziano, and Ms. Graziano was just there for support.

Ms. Graziano never supervised anyone nor was she in charge of training. To be sure, at the hearing, Mr. Cataldi was asked who supervised the teenage employees. He responded that the "wait staff" did. He was then asked if that included Ms. Graziano. He affirmed. Then, he was asked whether that meant Ms. Graziano exercised "some managerial responsibility" on some nights, to which Mr. Cataldi implied she did because she was "wait staff" and wait staff managed the teenagers. I do not take this as evidence that Ms. Graziano supervised the teenage employees as their manager. Rather, while counsel for the FLD used the term "managerial responsibility" as a term of art, that is not how Mr. Cataldi understood it and that is not how I interpret his answer. I interpret it to mean that older, more experienced staff would help out younger, inexperienced staff. They did not do this as their managers but as co-workers looking out for one another. In fact, Mr. Cataldi's answer was that all of the more experienced wait staff "managed" the teenage employees. By that logic, none of them would have been eligible to participate in the tip pool at any time.

Mrs. Cataldi similarly explained that if someone new was starting, there was no formal training or trainers. If she was not around, she might call over and tell whoever was there to help show the new person around. This could be Ms. Graziano; it could be any other wait staff. Like the other examples, based on the FLD's arguments, that would mean none of the wait staff could share in the tip pool when they helped out new employees. Given the context, though, it is clear this was not "training" in the managerial sense but instead in the sense of collegiality. The more experienced wait staff showed new hires the ropes by having them tag along. And they did this only at the request of the Cataldis.

The other tasks Ms. Graziano did, and for which she received a bonus, were also not "managerial responsibilities." She had no say in changing menu prices, she just had the ability to edit them on behalf of the Cataldis when they asked. She was not responsible for budgeting or ordering supplies, even if she printed out financial reports when the Cataldis asked. She was not in charge of employee recordkeeping, even if she asked the minors for their work permits on behalf of the Cataldis.

In summary, anything Ms. Graziano did, she did at the request of the Cataldis. She had no power to do any of these things on her own. She had no power to make managerial decisions or take managerial actions. *See Belghiti v. Select Restaurant, Inc*., 2014 WL 5846303 (D. Mass. Nov. 12, 2014) ("A banquet captain may convey the manager's choice to a given worker, but the captain is not a decision-maker. [Rather], a banquet captain is more of a team leader than a supervisor."); *see Smith-Mendoza v. Laz Parking Lmtd.*, 2019 WL 13188883 (Mass. Super. Ct. Feb. 22, 2019) (recognizing *Belghiti's* interpretation of the Tips Act). The help she gave the Cataldis was something every employee was empowered to do, could do, and did at different times. Given that Ms. Graziano was among the most experienced employees, it makes sense she was asked to do these things more often, thus creating the appearance that she was management. But she was not. Accordingly, she was eligible to participate in the tip pool.

Citations # 7 & 12 (sick leave policy)

The FLD cited the Petitioners for failure to "permit employees to earn and use sick leave as required" for both 3 Dogs (citation #7) and Solstice (citation #12). It did not cite the Petitioners for any recordkeeping violations pursuant to the accrual of sick leave.

Broadly speaking, employees in Massachusetts are entitled to earn and use sick leave. G.L. c. 149, § 148C. The Attorney General's office promulgated regulations implementing this

statute. 940 Code of Mass. Regs. § 33.00, *et seq*. Employers have some options as to how much sick leave they allow their employees to earn. There is a minimum amount of sick leave which employers must allow. G.L. c. 149, § 148C(d)(1) ("An employer shall provide a minimum of one hour of earned sick leave for every thirty hours worked by an employee."). But employers can provide more if desired. *Id*. at § 148C(d)(2). Indeed, employers may even provide "unlimited" sick leave. 940 Code of Mass. Regs. § 33.07(6).

The statute does not explain whether or how an employer must document which scheme they have chosen. The regulations do not either. However, the regulations require that, once the employer has chosen how much earned sick leave an employee can earn, the employer keep records of an employee's accrual of that sick leave. 940 Code of Mass. Regs. § 33.06. Yet, the employer need not keep records if it provides unlimited sick leave. 940 Code of Mass. Regs. § 33.07(6). The regulations also reference an employer's sick leave "policy," 940 Code of Mass. Regs. § 33.07, but do not define what makes up a "policy." Rather, the regulations imply that a sick leave "policy" means the amount of sick leave the employer has authorized the employee to accrue. But, again, nowhere do the regulations say the policy must be in writing.

The FLD presses forward with the citation, arguing that the Petitioners had no sick leave policy to speak of. It cites their failure to document it, their failure to keep track of accrued hours, and the fact that the written policy they adopted *after* the investigation began is different from the policy Mr. Cataldi testified about. But none of these arguments necessarily mean the Petitioners did not allow employees to accrue and use sick leave.

As noted, I credit Mr. Cataldi's testimony that they had a policy that allowed unlimited sick leave. While that may seem overly generous, it makes sense in the context of the restaurant business where it is easier and more profitable for an employee to switch shifts with someone

than to call out sick. Indeed, during this investigation, he estimated employees called out sick only about 10 times. With that in mind, it is not unusual that there would be no written version of this policy since it was simple. There is also nothing wrong with the fact that the Petitioners did not keep track of accrued time since there was no limitation, and an employer need not keep written records of accrued time in this context. *See Ghanta, et al. v. Fair Labor Div*., LB-22-0554-558, 2024 WL 4254455 (Div. Admin Law Apps. Sep. 12, 2024) (recognizing an employer could have an "unwritten" policy and explaining unlimited leave does not require recordkeeping). Finally, that the Petitioners chose to implement a different policy after the investigation began, and did write it down for the employees, is irrelevant as to whether they allowed employees to accrue and use sick leave in a different manner during the period covered by the citation.

The FLD also appears to argue that whatever the Petitioners had was not a "policy." But there is nothing that defines a policy. "[T]he word 'policy' generally implies a course of action consciously chosen from among various alternatives." *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). That seems to be exactly what the Petitioners did. They chose a course of action from alternatives, explained it to their employees, and implemented it.

The FLD makes additional arguments about the Petitioners' noncompliance with other sick leave regulations. It argues the Petitioners did not post the policy in a conspicuous place.[6] It also argues the law allows an employer to require a doctor's note in certain circumstances, but the Petitioners' policy did not follow this guidance. However, neither of these arguments are

[6] To the extent it matters, I credit Mr. Cataldi that he did post the general laws regarding sick leave, which appears to be all that was required. *See* 940 Code of Mass. Regs. § 33.09(3) ("Employers shall post a notice of the G.L. c. 149, § 148C, prepared by the Attorney General, in a conspicuous place accessible to employees in every location where eligible employees work.").

relevant because that is not what the FLD cited the Petitioners for. It cited the Petitioners for failing to allow employees to accrue and use sick leave. Simply put, the Petitioners did allow employees to use sick leave[7]—and any other arguments about recordkeeping or other noncompliance are not covered by the citations issued.

CONCLUSION

The citations regarding the mileage reimbursement and minors—citations # 1, 4, 6, and 11—are all **affirmed**

The citations for tip pool sharing and the sick leave policy—citations # 2, 7, and 12—are **vacated**.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

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Eric Tennen
Administrative Magistrate

[7] Because the policy allowed unlimited sick leave, there was nothing to "accrue."