COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. Division of Administrative Law Appeals

Siri Karm Singh Khalsa and
The Boston Language Institute, Inc.
Petitioner

v. Docket No. LB-19-0288

Office of the Attorney General –
Fair Labor Division,
Respondent

Appearance for Petitioner:

Laurence S. Richmond, Esq.
Richmonds & Co., LLC
44 Washington Street, Suite 150
Wellesley Hills, MA 02481

Appearance for Respondent:

Amy L. Goyer, Esq.
Assistant Attorney General
700 Pleasant St., Suite 310
New Bedford, MA 02740

Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

The Attorney General's civil citation against Petitioners for violation of G.L. c. 149, § 148 is affirmed. Petitioners Siri Karm Singh Khalsa and The Boston Language Institute failed to pay the wages of seven employees. Petitioners failed to keep payroll records; the employer, rather than the employees, bears the consequence of that failure. Accusing employees of theft does not constitute a valid set-off of the wages owed. Finally, I conclude that the Petitioners' bankruptcies should not affect the Fair Labor Division's ability to enforce its citation.

DECISION

The Office of the Attorney General, Fair Labor Division (FLD) issued a civil citation against Petitioners Siri Karm Singh Khalsa and The Boston Language Institute, Inc. for unintentional failure to make timely payment of $9,759.44 in wages to seven employees from July 10, 2018 to January 22, 2019. The FLD also assessed a civil penalty of $2,000 against the Petitioners. Petitioners appealed the citation under G.L. c. 149, § 27C(b)(4).

After an extensive series of pre-hearing and status conferences and status reports conducted by Magistrate Mark Silverstein, this appeal was transferred to me on January 4, 2024. I conducted a status conference the next day, during which the parties agreed to resolve the matter on cross-motions for summary decision. I issued a scheduling order.

On March 8, 2024, Petitioners filed a "Motion to Dismiss and Request for Hearing,"[1] along with an affidavit of Siri Karm Singh Khalsa. On April 5, 2024, the FLD filed its opposition to the Petitioners' motion and a cross-motion for summary judgment, along with an affidavit of FLD Investigator Christina Proietti. On April 17, 2024, Petitioners filed their reply to the FLD's cross-motion for summary judgment. Neither party submitted additional exhibits.

FINDINGS OF FACT

The following facts are not in dispute:

1. Petitioner The Boston Language Institute, Inc. was a corporation organized under the laws of Massachusetts, with its principal office in Millis, MA. The

[1] I treat this as a motion for summary decision, as the Petitioners have supplemented their motion and argument with an affidavit.

Institute provided instruction in over 140 foreign languages, English as a second language, teacher training, translation and interpreting services, corporate programs, and more. Petitioner Siri Karm Singh Khalsa served as president and treasurer of BLI. According to Mr. Khalsa, he owned and operated the business for approximately 38 years. (Proietti Aff. ¶ 3.)

2. The Institute was involuntarily dissolved by the Secretary of the Commonwealth on or about December 31, 2021. (Khalsa Aff. ¶ 3.)

3. Christina Proietti is a Senior Investigator with the FLD. She is responsible for investigating violations of Massachusetts Wage Laws. She was assigned to investigate Petitioners' wage and hour practices in this case. (Proietti Aff. ¶2, 3.)

4. On February 8, 2019, the FLD, through Inspector Proietti, requested that Petitioners produce "wage related records, including payroll, timekeeping, and certified payroll reports . . . of 11/1/18 through 1/31/19." (Proietti Aff. ¶ 5.)

5. In April 2019, Petitioners responded to FLD's request, but failed to provide many of the items requested in the demand letter, including some time and payroll records. (Proietti Aff. ¶¶ 16, 17.)

6. Investigator Proietti was unable to determine what, if any, wages were owed to employees of the Institute utilizing the company's documentation. Consequently, she contacted the complainants for interviews regarding their hours worked, rates of pay, and wages received to determine the wages owed. (Proietti Aff. ¶ 8.)

7. Investigator Proietti was able to interview seven of the nine complainants. She determined the seven complainants were owed at least $9,759.44 in past due wages.

She arrived at these determinations not only from interviews with complainants, but also by reviewing documentation from former employees and employer records related to prior pay periods to determine if the reported hours and rates of pay were consistent with prior pay periods. Most of the wages turned out to be based on bounced paychecks and unpaid final week's wages. She was unable to determine wages owed to any other former employees of the company. (Proietti Aff. ¶¶ 9, 10.)

8. Investigator Proietti participated in numerous phone calls with Mr. Khalsa during the pendency of the investigation. Mr. Khalsa stated he did not know how many hours the employees worked, how many hours were taken as vacation time, and what documents would show such information from 7/10/18 to 1/22/19. (Proietti Aff. ¶12; Khalsa Aff. ¶10.)

9. In June 2018, Mr. Khalsa filed for bankruptcy. During the pendency of the investigation, Mr. Khalsa's bankruptcy automatic stay was lifted on January 14, 2019. The next day, on January 15, 2019, a creditor (Century Bank) took all of his assets, which forced him to close the business. (Ex. 6; Proietti Aff. ¶12.)

10. Mr. Khalsa failed to pay restitution to the employees, even when the FLD offered him a payment plan and a penalty reduction. (Proietti ¶¶ 14, 17.)

11. On May 31, 2019, the FLD issued citation #19-01-53398-001 to Petitioners. The citation was for failure to make timely payment of wages due and owing from 7/10/2018 to 1/22/2019, without specific intent, in violation of G.L. c. 149, § 148. It directed Petitioners to pay restitution of $9,759.44 and imposed a civil fine of $2,000. The citation states that this was Mr. Singh's first violation. (FLD Citation.)

12. By letter dated June 7, 2019, Petitioners appealed the citation. The Attorney General and DALA each received notice of this appeal on June 10, 2019. (6/10 Acknowledgement; Khalsa letter to DALA.)

ANALYSIS

I

Summary decision in administrative proceedings is the functional equivalent of summary judgment in civil proceedings. Compare 801 CMR 1.01(7)(h) with Mass. R. Civ. P. 56. *See Caitlin v. Bd. of Registration of Architects*, 414 Mass. 1, 7 (1992) (citing Mass. R. Civ. P. 56 for summary decision in administrative case); *Calnan v. Cambridge Retirement Bd.*, CR-08-589, at *4 (DALA Feb. 17, 2012). Summary decision is appropriate where there are no genuine issues of material fact and the case may be decided as a matter of law. *Caitlin*, 414 Mass. at 7. A fact is only "material" if it might affect the outcome of the case. *Lockridge v. Univ. of Maine Sys.*, 597 F. 3d 464, 469 n.3 (1st Cir. 2010) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). An issue of material fact is only "genuine" if a fact-finder could reasonably resolve the dispute in favor of either party. *Id.* (citing *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004)).

The moving party must demonstrate the absence of any genuine issue of material fact. 801 CMR 1.01(7)(h); *see also* Mass. R. Civ. P. 56; *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 808 (1991). He may do so by submitting affirmative evidence that negates an essential element of the opposing party's claim. *Kourouvacilis v. Gen. Motors Corp.*, 410 Mass. 706, 715 (1991). *See Beatty v. NP Corp.*, 31 Mass. App. Ct. 606, 607 (1991) (evidence "may be in the form of affidavits,

depositions, interrogatories, admissions, and sworn pleadings"). Inferences from these materials must be drawn in the light most favorable to the opposing party. *Beatty*, 31 Mass. App. Ct. at 607. However, a judge does not make credibility determinations at the summary decision stage. *Id.* Therefore, if the moving party's evidence establishes a material fact, the opposing party must in turn "set forth specific facts showing that there is a genuine issue for trial." Mass. R. Civ. P. 56 ("mere allegations or denials" are not sufficient). Absent such "countervailing materials" from the opposing party, summary decision may properly be granted on the basis of the moving party's undisputed evidence. *Kourouvacilis*, 410 Mass. at 716.

II

FLD issued Citation #19-01-53398-001 to Mr. Khalsa and the Institute for unintentional failure to make timely payment of wages of $9,759.44 to various employees of the Institute in violation of G.L. c. 149, § 148. FLD assessed a civil penalty of $2,000. The Attorney General may issue civil citations to any employer who violates the Wage Act, G.L. c. 149, § 148. G.L. c. 149, § 27C(b). In the case of a corporation employer, this liability extends beyond the corporation itself to include "[t]he president and treasurer of a corporation and any officers or agents having the management of such corporation." G.L. c. 149, § 148. *See Wiedmann v. Bradford Group, Inc.*, 444 Mass. 698, 710-11 (2005). In determining the amount of any civil penalty to be assessed, the Office of the Attorney General must take into consideration at least the previous violations of chapter 149 or chapter 151 by the employer, the intent by such employer to violate the provisions of chapters 149 or 151, the number of employees affected by the

present violation(s), the monetary extent of the violation(s), and the total amount of the public contract or payroll involved. G.L. c. 149, § 27C(b)(2).

The same standard applies to challenging a penalty as applies to challenging the underlying substance of the citation. G.L. c. 149, § 27C(b)(4). DALA may vacate or modify a citation only "if the aggrieved person demonstrates by a preponderance of evidence that the citation . . . was erroneously issued." *Id.* Otherwise, DALA must affirm the citation as issued. *Id.* If the citation is not vacated, the Petitioner must comply with DALA's decision within 30 days. *Id.* § 27C(b)(6).

III

A

The most remarkable aspect of this appeal is that Mr. Khalsa does not deny that he and the Institute failed to pay the seven employees their wages. This is not surprising given the state of BLI's business records: Mr. Khalsa does not know the starting dates of some of the employees in question and he does not know how many hours they worked. (Khalsa Aff. ¶¶ 5, 7, 10.) Instead, Mr. Khalsa accuses a former employee of converting confidential information for her own purposes. He also accuses several employees of stealing company furniture and fixtures. (Khalsa Aff. ¶ 8.) If Mr. Khalsa wants to bring an action against these employees to recover anything he believes was wrongly taken from him, he is free to do so. But those accusations are not relevant to this matter.

An employer cannot take a deduction against wages owed unless there is a "valid set-off against the [employee's wages]." *Somers v. Converged Access, Inc.*, 454 Mass. 582, 593 (2009); G.L. c. 149, § 150. A "valid set-off" in this context refers to

"circumstances where there exists a clear and established debt owed to the employer by the employee." *Id.*

> An arrangement whereby [the employer] serves as the sole arbiter, making a unilateral assessment of liability as well as amount of damages with no role for an independent decision maker, much less a court, and, apparently, not even an opportunity for an employee to challenge the result within the company, does not amount to a "clear and established debt" owed to the employer by the employee.

Camara v. Attorney General, 458 Mass. 756, 757 (2011); *Somers*, 454 Mass. at 593. Mr. Khalsa's bald accusations that his employees were stealing from him do not qualify as valid set-offs. Mr. Khalsa has failed to demonstrate that he does not owe the wages listed in the citation.

B

Petitioners protest that paragraphs eight to eleven of Investigator Proietti's affidavit, which address the wages owed, are inadmissible because they are hearsay, and by extension that the citations themselves were based on hearsay statements and are therefore erroneously issued. (Petitioner's Reply to Attorney General's Cross-Motion for Summary Decision.) This is incorrect. Hearsay is admissible in administrative hearings as long as "it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." *See* G.L. c. 32, § 11(2).

Because Petitioners failed to keep appropriate timekeeping and payroll records, Investigator Proietti could not determine what wages were owed to BLI's employees using the company's records alone. She was forced to turn to interviewing the employees and checking their assertions against their own and the extant company records. (Most of the wages turned out to be based on bounced paychecks and unpaid final week's wages.) Investigator Proietti was able to interview only seven of the nine employees; she

therefore did not include any wages in the citation for the two employees she did not interview.

When the employer has failed to keep payroll records, "the employer rather than the employee should bear the consequences of that failure." *Brown v. Family Dollar Stores of IN, LP*, 534 F.3d 593, 595 (7th Cir. 2008) (in similar case under Fair Labor Standards Act, 29 U.S.C. 201, *et seq.*, and Indiana wage payment statute, the 7th Circuit reasoned that "[t]o place the burden on the employee of proving damages with specificity would defeat the purpose of the FLSA where the employer's own actions in keeping inadequate or inaccurate records had made the best evidence of such damages unavailable."). "[I]n such a situation, . . . 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." *Id.* (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)). Investigator Proietti's employee interviews, in conjunction with the other corroborative evidence, was enough to draw reasonable inferences of the amounts owed. This approach satisfies the evidentiary standard at G.L. c. 32, § 11(2).

Most importantly, however, Petitioners have never disputed that they owed these employees back wages and have presented no evidence that any portion of the disputed amounts have been paid. Petitioners have therefor failed to prove that the restitution amounts in the citation were incorrect.

IV

Although Petitioners do not argue it directly, Magistrate Silverstein brought up the possibility that the citation, and this proceeding to enforce it, may be stayed under the

Bankruptcy Code. Immediately after a bankruptcy case is filed, an injunction called the "automatic stay" is generally imposed against certain creditors who want to start or continue taking action against a debtor or the debtor's property. Bankruptcy Code § 362 discusses the automatic stay. The filing of a bankruptcy proceeding does not stay the commencement or continuation of an action or proceeding by a governmental unit to enforce the governmental unit's "police and regulatory power." 11 U.S.C. § 362(b)(4). The police and regulatory power exception prevents "debtors improperly seeking refuge under the stay in an effort to frustrate necessary governmental functions." *United States v. Nicolet, Inc.*, 857 F.2d 202, 207 (3d Cir. 1988).

To determine if an action or proceeding is within a governmental unit's police and regulatory power in the service of public safety and welfare, courts have adopted two alternative tests: the "pecuniary purpose" test and the "public policy" test. *California ex rel. Brown v. Villalobos*, 453 B.R. 404, 409 (D. Nev. 2011). Satisfaction of either test will suffice to exempt the action from the reach of the automatic stay. *Id.* Under the pecuniary purpose test, "the governmental body's actions must be evaluated in order to determine whether the primary motive behind the action was to protect the public safety and welfare or to advance the governmental body's interest in the debtor's property." *Spookyworld, Inc. v. Town of Berlin (In re Spookyworld, Inc.)*, 266 B.R. 1, 10 (Bankr. D. Mass. 2001). Under the public policy test, the court must "distinguish between those proceedings that effectuate public policy and those that adjudicate private rights." *Id.*

Here, the FLD easily passes both tests. The affidavit provided by Investigator Proietti makes clear that the FLD was concerned about Mr. Khalsa's former employees not being paid. The FLD was even amenable to reducing the $2,000 penalty if it meant

the workers could be repaid. (Proietti Aff. ¶ 17.) The FLD's actions also clearly effectuate public policy. Both G.L. c. 151, § 19(3) and G.L. c. 149, § 27C(b)(2) give the FLD authority to enforce the Commonwealth's employment laws. By requiring Mr. Khalsa to pay his workers their overdue wages, the FLD is acting squarely within its statutorily granted authority to effectuate public policy. Thus, the FLD's citations and defense of them ought not be stayed, and Mr. Khalsa's bankruptcy does not affect the FLD's ability to proceed.

V

Finally, Petitioners challenge the $2,000 penalty. A maximum civil penalty of up to $7,500 may be assessed for each violation committed by a first-time violator, and, as in Mr. Khalsa's case, made without specific intent. G.L. c. 149, § 27C(b)(2). The failure to pay each person covered by the citation constitutes a separate violation. *Id.* The $2,000 civil penalty therefore was well within the FLD's authority. The Petitioners have not proven that any element of the citation was erroneous, and they have presented no additional evidence to support a reduction in the assessed civil penalty. Therefore, the $2,000 civil penalty must be affirmed.

[INTENTIONALLY BLANK.]

ORDER

For the foregoing reasons, the Petitioners' motion for summary decision is denied. The Attorney General's cross motion for summary decision is granted. The Attorney General's citation is affirmed in its entirety.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: August 2, 2024