

COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE APPEALS

Middlesex, ss.

Fashioning Diffusion, LLC and
Ivan Herjavec

Petitioners,

v.

Docket No. LB-22-0105 - 0108

Office of the Attorney General,
Fair Labor Division
Respondent

Appearance for Petitioner:

Ivan Herjavec, pro se

Appearance for Respondent:

Kate Watkins, Esq.

Administrative Magistrate:

James P. Rooney

Summary of Decision

The Office of the Attorney General's Fair Labor Division issued four citations to Petitioner. He appealed only the unpaid wage citation. Although the Petitioner maintained that he was an officer only of a parent company, the evidence established that he played a sufficient role in the management of the company that failed to pay wages that the Fair Labor Division could hold him responsible for the unpaid wages. The amended citation is affirmed as the evidence establishes the accuracy of the Fair Labor Division's calculation of unpaid wages and the Petitioner failed to contest the penalty.

DECISION

On March 1, 2022, the Fair Labor Division (Division) issued Fashioning Diffusion, LLC and Ivan Herjavec four citations for failing to pay wages timely, failure to keep true and accurate payroll records, failure to provide employees a suitable pay slip, and failure to track accrual or use of sick time. On March 10, 2022, the Division amended the citations to charge Lisa Carnevale as well.

Mr. Herjavec, who lives in Spain, filed a timely appeal. Fashioning Diffusion, LLC and Ms. Carnevale did not appeal. Mr. Herjavec denied being an officer of Fashioning Diffusion LLC. He stated that he worked for its parent company, Fashioning Diffusion Limited (an Ireland-based company), and that his role with Fashioning Diffusion LLC was simply to assist with sales and marketing. (Pet. Ex. 3.) He also asserted that the LLC's employees were paid in full and attached a Bank of America statement showing payments in November and December 2020 to the three employees listed in the citation for failure to pay wages.

On March 10, 2024, after Mr. Herjavec produced proof of an additional payment to the three employees, the Fair Labor Division amended the citation for failure to pay wages by reducing the amount of restitution sought for the three employees. It no longer asserted that the violation was with specific intent, but it continued to seek the same penalty amount. (AG Ex. 16.)

I held a hearing on March 18, 2024 at the Division of Administrative Law Appeals. Mr. Herjavec appeared at the hearing via Webex. I admitted sixteen exhibits proposed

by the Fair Labor Division. (AG Es. 1-16.) I admitted two exhibits proposed by Mr. Herjavec, to which I have added his appeal as a third exhibit. (Pet. Exs. 1-3.) Mr. Herjavec testified for himself. The Fair Labor Division presented testimony from its investigator, Daniel Guerino, and one of Fashioning Diffusion, LLC's employees, Kendra Wellman.¹ Only the Fair Labor Division filed a closing brief. It did so on April 12, 2024, thereby closing the record.

Findings of Fact

Based on the testimony and exhibits presented at the hearing and reasonable inferences from them, I make the following findings of fact:

1. Fashioning Diffusion, LLC is owned by a company based in Ireland known as Fashioning Diffusion Limited. (Pet. Ex. 3.) In the autumn of 2020, Fashioning Diffusion, LLC opened stores in seven American cities under the name Fashioning Space. (AG Ex. 13.)
2. One of the stores was at Copley Place in Boston. (AG Ex. 13.) Ivan Herjavec hired Lisa Carnevale to work in New York as the vice president of retail for Fashioning Diffusion, LLC. He exchanged a series of emails with her about the mechanics of opening the Copley Place store. In each of these emails, he listed himself as the Executive Chairman of the Fashioning Group.² (AG Ex. 13; Herjavec testimony.) He also

¹ My effort to record the hearing failed.

² The record does not disclose what the Fashioning Group is, but I assume Fashioning Diffusion is one of the companies within the Fashioning Group.

opened a bank account with Bank of America for Fashioning Diffusion, LLC in Manhattan, where the headquarters of Fashioning Diffusion was located. In this document, which Mr. Herjavec signed, he was described as the manager of the company. (AG Ex. 10.)

3. The Copley store was managed by Scarlett de Lemeny, who was hired by Mr. Herjavec. The three company employees whose wage payments are at issue were Lillian O’Riordan, Kendrah Wellman, and Eleanor Fischer-Mueller. The company agreed to pay Ms. Fisher-Mueller \$18/hour. It promised to pay the other two \$15/hour. (Pet. Ex. 1; AG Ex. 2; Herjavec testimony.)

4. Mr. Herjavec was intimately involved in the details of opening the Copley Place store. He sent or received emails concerning the contractor who was to paint the store; the date on which store fixtures would be installed; the receipt (or the lack of receipt) of clothes hangers, a printer, and labels to tag goods; and the prospective opening date of the store. (AG Ex. 14.).

5. Fashioning Space had an employee handbook. In the handbook, Mr. Herjavec was listed as the Executive Chairman, Ms. Carnevale as the VP of Retail, and Ms. de Lemeny as the Regional Director of Retail. (AG Ex. 13.)

6. The handbook informed its employees that the company had a semi-monthly payroll period. The first hours scheduled for any of the three employees was on October 27, 2020. The company made wage payments by electronic transfers to employee bank accounts. (AG Exs. 2, 12, and 13.)

7. The first wage payment was on November 18, 2020. The gross wages paid these employees on that date were: \$576.00 to Ms. Fischer-Muller, \$150 to Ms. Wellman, and \$256 to Ms. O’Riordan. (AG Exs. 2 and 7.)

8. A comparison of the gross payments and the scheduled hours of the three employees shows that the November 18 wage payments were for the payroll period ending on October 31, 2020. For example, Ms. Wellman had worked 10 hours by then. At \$15/hour, her gross pay of \$150 was correct. The pay for Ms. Fischer-Muller is similarly correct. The pay for Ms. O’Riordan was slightly off. She was scheduled to work 16 hours in this period but was paid for 17 hours. (AG Ex. 2.)

9. Fashioning Space’s employees at Copley Place were not paid in November 2020. On November 17, 2020, Ms. de Lemeny, the store manager, emailed Mr. Herjavec asking “[w]hen should my team expect to receive the bank transfer that was scheduled for yesterday?” Mr. Herjavec responded, “[w]e are expecting minimum sales. Currently there is nothing. We are working to change our business model which will start December 1 and we have to finish November sales. We will pay your team by the end of the week.” (AG Ex. 15.)

10. When employees had still not been paid by the end of November, Mr. Herjavec sent a number of emails to Ms. de Lemeny. He told her on November 20, 2020 that the employees would be paid “in a day or two for the period from late September until the end of November.” He asked the company accountant to include wages earned from “October 26 to November 30.” He added that the staff “will be paid regularly once we

set up [a] profitable model which should start from tomorrow.” (AG Ex. 15.) Ms. de Lemeny responded, “[p]lease process the Boston team on Monday as well - they are not comfortable coming to work until they are paid.” (Pet. Ex. 2.)

11. Fashioning Space employees did not receive wage payments until December 7, 2020. The gross wages paid that date were \$1,512.80 to Ms. Fischer-Muller, \$517.50 to Ms. Wellman, and \$679.18 to Ms. O’Riordan. The wages received in these payments roughly correspond to the wages earned between November 1 and November 15, 2020. Ms. Fischer-Muller was scheduled to work 83 hours during this period and was paid wages corresponding to 84 hours of work. Ms. Wellman was scheduled to work 34 hours and was paid for 34.5 hours. Ms. Riordan was scheduled to work 46 hours and was paid for 45.27 hours. (AG Ex. 2.)

12. The Copley Square store closed on December 7, 2020.³ Ms. de Lemeny resigned that day. In an email to Mr. Herjavec, she objected to him “terminating all previous employment agreements for our retail team.” The only other person scheduled to work that day was Ms. Fischer-Muller. (AG Ex. 2 and 15; Pet. Ex. 2; Guerino testimony.)

13. Ms. Wellman filed a wage claim with the Fair Labor Division in December 2020. The Fair Labor Division assigned Daniel Guerino to investigate. Mr. Guerino filed a payroll demand with Fashioning Diffusion, LLC’s Manhattan office. Ms. Carnevale

³ Mr. Herjavec initially argued at the hearing that the employees of the store did not work there after November. The parties stipulated during the hearing that the store closed on December 7, 2020.

produced records of the November 18, 2020 and December 7, 2020 payments and a work schedule for the three employees. Ms. Carnevale told Investigator Guerino that the schedule was the only record the company had of the hours each employee worked. (Guerino testimony; AG Exs. 3 and 4.)

14. On March 1, 2022, the Fair Labor Division issued four citations to Fashioning Diffusion, LLC and Ivan Herjavec, both of whom it listed at an address in Manhattan, alleging wage and hour violations between October 1, 2020 and April 1, 2021.

Citation 20-12-59794-001 (Docket No. LB-22-0105) sought \$4,475.32 in restitution for unpaid wages for the three company employees at Copley Place – Lillian O’Riordan (\$894.82), Kendrah Wellman (\$862.50), and Eleanor Fischer-Mueller (\$2,718.00) – for violation of M.G.L. c. 149, § 148. It also imposed a \$1,350 penalty for a specific intent violation.

Citation 20-12-59794-002 (Docket No. LB-22-0106) levied a \$1,000 penalty, without specific intent, for failing to keep true and accurate payroll records in violation of M.G.L. c 151, §§ 15 and 19(3).

Citation 20-12-59794-003 (Docket No. LB-2-0107) levied another \$1,000 fine, without specific intent, for failure to furnish a suitable pay slip to company employees in violation of M.G.L. c. 149, § 148.

Citation 20-12-59794-004 (Docket No. LB-22-0108) levied a penalty of \$750 for failure to track the accrual or use of sick time in violation of M.G.L. c. 149, § 148C.⁴

(AG Ex. 1.)

15. Mr. Herjavec appealed on March 10, 2022. He stated that he “was not an officer of Fashioning Diffusion LLC, but . . . had a special contract with the company to assist in

⁴ On March 10, 2022, the Fair Labor Division amended the citations to charge Lisa Carnevale, Fashioning Diffusion’s vice president for retail, with the alleged violations. Ms. Carnevale did not appeal, and she has not been included in this matter.

sales and marketing.” He added that the company was wholly owned by Fashioning Diffusion Limited, a company based in Ireland. He asserted that the three employees who the Fair Labor Division asserted were owed wages had been paid in full. He did not mention the other three citations in his appeal. (Pet. Ex. 3.)

16. Sometime later, Mr. Herjavec sent Investigator Guerino a bank statement from September 2021 -- ten months after they last worked -- showing a final payment to each of the three employees. The gross wages paid on September 7, 2021 were \$1,359.00 to Ms. Fischer-Muller, \$322.50 to Ms. Wellman, and \$487.50 to Ms. O’Riordan. These wages correspond approximately with the company’s bi-monthly payroll period for the last half of November 2020 but hardly account for the total work performed by December 7, 2020. Ms. Fisher-Muller was scheduled for 70 hours between November 16, 2020 and November 30, 2020. She was paid for 75.5 hours. Ms. Wellman was scheduled for 20 hours in the latter half of November. She was paid for 21.5 hours. Ms. Riordan, on the other hand, appears not to have been paid in full for the latter half of November. She was scheduled for 40 hours but was paid for only 32.5 hours. Ms. Fisher-Muller and Ms. Wellman both worked in December. Ms. Fisher-Muller was not paid wages for the 46 hours she worked in December 2020. Ms. Wellman was not paid wages for the 14 hours she worked in December. (AG Exs. 2 and 9.)

17. Mr. Guerino took the September 2021 payments into account when calculating the amount of restitution owed to the three employees. He totaled each employee’s scheduled hours, calculated what she should have been paid based on her wage rate,

and deducted the three payments she received to come up with a revised calculations of the restitution owed. He concluded that Ms. Fisher-Muller was still owed \$710.20, Ms. Wellman \$330.00, and Ms. Riordan \$107.32. Those are the restitution figures used in the amended wage citation issued on March 10, 2024. The amended citation dropped the charge that the violation was with specific intent. It kept the \$1,350 penalty. (AG Exs. 2 and 16.)

Discussion

The Fair Labor Division issued four citations to Fashioning Diffusion, LLC, Ivan Herjavec, and Lisa Carnevale. Only Mr. Herjavec appealed. Thus, the four citations became final as to Fashioning Diffusion LLC and Ms. Carnevale when the 10-day window for them to appeal ran out. As for Mr. Herjavec, his appeal letter mentioned only the citation asserting that wages were not paid timely and not the other three citations. His testimony at the hearing addressed only that citation. Thus, the other three citations are already final as to him.⁵

Mr. Herjavec made two arguments in his defense against the unpaid wage citation wage. He claimed he was not a proper party and he asserted that the three employees for whom the Fair Labor Division sought restitution of unpaid wages had been paid in full.

⁵ The four docket numbers correspond with the four citations. Although Mr. Herjavec appealed only one citation, he attached all four citations to his appeal, thus there are four docket numbers.

Mr. Herjavec's claim that he is not a proper party is based on his assertion that he was not employed by Fashioning Diffusion, LLC, and thus is not responsible to pay unpaid wages to that company's employees.

Two provisions of the Wage Act apply here. The first provides that "[e]very person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned." M.G.L. c. 149, § 148. The second states that "[t]he president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section." *Id.* This latter section does not mention limited liability corporations like Fashioning Diffusion, LLC.

When the Supreme Judicial Court addressed the question of whether managers of limited liability corporations are liable for unpaid wages under the Wage Act, it noted at the outset that "[w]hen the provision of G.L. c. 149, § 148, making corporate officers individually liable for payment of wages was added in 1932, see St. 1932, c. 101, § 1, the LLC did not exist as a form of business association." *Cook v. Patient Edu, LLC*, 465 Mass 548, 553 (2013). The Court concluded:

We do not read these provisions of G.L. c. 149, § 148, as a legislative effort to single out for individual liability only the officers or managers of the specific types of entities mentioned in the statute. Rather, the inclusion of the provisions on corporate officer liability and public officer liability serves to illustrate the circumstances in which an individual may be deemed a "person having employees in his service" under G.L. c. 149, § 148. *Cf. Massachusetts Bay Transp. Auth. v. Massachusetts Comm'n Against Discrimination*, 450 Mass. 327, 337, 879 N.E.2d 36 (2008) (list may "illustrate[] the types" of actions proscribed by a statute, but is not

exhaustive). We therefore reject the defendants' argument that the corporate officer provision, by identifying only corporations, implicitly excludes managers of LLCs and other limited liability entities from the more general category of "person[s] having employees in [their] service." See *Harborview Residents' Comm., Inc. v. Quincy Hous. Auth.*, 368 Mass. 425, 432, 332 N.E.2d 891 (1975) (while it is "maxim of statutory construction ... that a statutory expression of one thing is an implied exclusion of other things ... we have also recognized that the maxim is not to be followed where to do so would frustrate the general beneficial purposes of the legislation"). We discern from the inclusion of the provisions regarding corporate and public officer liability a clear legislative intent to ensure that individuals with the authority to shape the employment and financial policies of an entity be liable for the obligations of that entity to its employees.

Id. at 553-554.

The evidence showed that Mr. Herjavec functioned as a manager of Fashioning Diffusion, LLC, operating as Fashioning Space. He was listed in the Fashioning Space Handbook as the Executives Director. He identified himself as the manager of Fashioning Diffusion, LLC when opening a bank account for the company with Bank of America. He was intimately involved in the effort to open the Copley Place store. He hired the manager of the Copley Place Store and her manager, Ms. Carnevale. He was in frequent communication with the Copley Place store manager, Ms. De Lemeny, about paying the three store employees. His communications about the lack of sales at the store and his statement that the employees "will be paid regularly once we set up [a] profitable model" show that he made decisions about the circumstances in which store employees would be paid. All of this adds up to a finding that Mr. Herjavec was a person having Fashioning Diffusion, LLC employees in his service and thus a person who could be cited by the Fair Labor Division for unpaid wages owed the company's employees.

Turning to the question of whether the three employees of the Copley store are still owed wages, Mr. Herjavec has asserted throughout that they were paid in full. His evidence for this is the two payments they received in 2020 and the one payment in 2021.

The payments alone do not show that the employees were paid in full. The payments must be compared with the hours they each worked and their pay rates. Only the Fair Labor Division offered any evidence on this. The company did not produce payroll records in response to Mr. Guerino's request for them. It produced only a work schedule that Ms. Carnevale told Mr. Guerino was the only record the company had of the hours the employees worked. A comparison of the hours scheduled with the pay the employees received in their first two paychecks shows that the schedule is a valid approximation of the hours each employee worked. The last payment the employees received is for less than what each of them should have been paid for the hours they worked before the store closed. This is not altogether surprising given the apparent lack of sales that ultimately led the store to close on December 7, 2020.

Mr. Guerino, by figuring out what each employee should have been paid for the total hours they worked and then deducting the total pay actually received, used a valid method to determine the amount of unpaid wages. Mr. Herjavec did not challenge Mr. Guerino's calculation.⁶

⁶ Although not discussed at the hearing, the payments to the three Copley Place employees violated the payment provision of the Wage Act in two other ways. The Wage Act allows employers to pay wages weekly or bi-weekly, not bi-monthly as

The person appealing a citation issued by the Fair Labor Division has the burden to prove “by a preponderance of evidence that the citation . . . was erroneously issued.” M.G.L. c. 149, § 27C(b)(4). Mr. Herjavec has failed to show that the Fair Labor Division erred in its calculation of the wages still owed. Mr. Herjavec also did not introduce any evidence concerning the penalty amount and hence has not shown any error in this aspect of the citation either.

Conclusion

For the reasons stated above, I affirm the amended wage citation at to Mr. Herjavec, including the restitution amounts owed to Ms. Fisher-Mullen (\$710.20), Ms. Wellman (\$330.00), and Ms. O’Riordan (\$107.32) and the \$1,350 penalty. As previously noted, the other three citations are already final as to him because he did not appeal them.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney

James P. Rooney
First Administrative Magistrate

Dated: October 23, 2025

Fashioning Diffusion, LLC did. M.G.L. c. 149, § 148. It also requires employers to pay wages within five to seven days of the end of the pay period depending on how many days the employee worked per week. *Id.* None of the payments made were timely.